LEGAL UPDATE

Inferences and Specificity in Committee Minutes

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Courts frequently note that, while there are variations, the fiduciary principles of Title I of ERISA and federal common law under ERISA are based upon the common law of trusts. However, at common law, there were no committee meetings, nor at least to our knowledge, any reported cases dealing with same, so there are no generally applicable trust law principles that would provide guidance regarding the conduct of investment committee meetings under ERISA. Nor does ERISA require that, if a plan is administered by committees the committees memorialize the matters addressed in a meeting, so the failure to keep minutes of a committee meeting would not be a *per se* breach of the duty of prudence. If a particular investment option was actually discussed in a manner that would satisfy the process required of a prudent fiduciary, as a technical matter, that should suffice. However, as a matter of best practice, some attorneys warn clients that if you do not write it down, it did not happen. Therefore, keeping of minutes of committee meetings is, at a minimum, a widely recognized best practice under ERISA.

As to the scope of those minutes, while it is expressed broadly, some recent cases provide some additional guidance. We advise clients that, while committee minutes need not be lengthy, they should be robust and set forth the decisions made at the meeting and the analysis underlying those decisions. As the Connecticut District Court observed last month in *Kistler v. Stanley Black & Decker, Inc.*, 2024 WL 3292543 (D. Conn. July 3, 2024), "Meeting minutes should not necessarily be expected to contain a verbatim transcript of all the issues considered by the fiduciaries. At the same time, a fiduciary cannot absolutely shield itself from an accusation of imprudence by repeating in its minutes a generalized boilerplate statement that it reviewed the performance of its investments."

In a similar vein, a Colorado District Court in *Jones v. Dish Network*, 2023 WL 74583779 (D. Colo. Nov. 6, 2023) concluded that the meeting minutes "reflect very little specific analysis of any given investment option." The Court ruled against the Committee, because, as a procedural rule on a motion to dismiss under Section 12(b)(6), if committee minutes are silent on an issue, a Court must construe the minutes in a manner most favorable to plaintiffs. As the District Court for the Eastern District of Virginia concluded in *Trauernicht v. Genworth Financial Services*, 2023 WL 5961551 (E.D. Va. May 29, 2024), "it is reasonable to infer that because the minutes do not reflect that the Committee reviewed the performance of the BlackRock TDFs, the Committee failed to do so." Similarly, in *Kistler*, "because the Committee minutes contain more detailed language when other underperforming funds are assessed, construing the minutes in the plaintiffs' favor, it is reasonable to infer that the Committee minutes omitted mention of the BlackRock TDFs because the Committee did not scrutinize the performance of those funds." Defendants offered an alternative explanation of why there was no discussion of the BlackRock TDFs in the Committee meetings, which would have allowed the District Court to draw another reasonable inference. However, "given the dearth of language in the minutes discussing the Blackrock TDFs altogether," drawing an inference in favor of defendant would be impermissible at the 12(b)(6) stage of the litigation.

In contrast, in *Bracalente v. Cisco Systems, Inc.*, 2024 WL 2274523 (N.D. Cal. May 20, 2024), the District Court concluded that the Committee's minutes did not support a plaintiff's fiduciary duty claim in part because one month's meetings showed that the Committee had specifically reviewed the BlackRock TDFs. The court in Bracalente agreed with the general proposition that if a Committee's minutes do not reflect that it considered a particular investment, a court, construing the minutes in the light most favorable to plaintiffs, could conclude that the investment was not discussed. However, in one meeting, although the returns of the BlackRock TDFs were not discussed, the plan's investment advisor explained the background of the TDFs when it replaced the former QDIA; the Committee heard Department of Labor tips for reviewing TDFs; heard a review of the analysis of the key differentiators for the BlackRock TDFs and the investment advisor's belief that the BlackRock TDFs were still a prudent investment choice under the plan. The takeaway from these cases is not that discussion at one committee meeting is sufficient to establish prudent process, but rather that a failure to discuss the investment option in question at any committee meeting, if there is arguable evidence of underperformance, is likely to cause a 12(b)(6) motion to dismiss to be denied. General statements that all of a plan's investment options were reviewed will not suffice.

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