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Analyzing Excessive Fee Claims Under ERISA Following *Jones v. Harris Associates L.P.*

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In March 2010, the Supreme Court in Jones v. Harris Associates L.P.[1] *clarified the standard for determining whether a mutual fund investment adviser has breached its fiduciary duty under the 1940 Act in connection with its receipt of fees from the funds that it manages. This article examines whether the Supreme Court's ruling in* Jones *could be instructive to courts in deciding the 401(k) fee lawsuits that have been brought under ERISA. Although different terminology is used in analyzing claims under ERISA, courts apply substantially the same*

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principles and evaluate many of the same factors applicable to claims under the 1940 Act. Accordingly, even though the 1940 Act and ERISA regulate different fiduciary relationships, the Jones *decision very well may be instructive to courts in deciding ERISA-based excessive fee claims.*

In recent years, over 30 lawsuits have been brought under the Employee Retirement Income Security Act of 1974 (ERISA) against the fiduciaries of large corporate 401(k) plans and financial institutions that provide retirement services for 401(k) plans. These "401(k) fee lawsuits" are based, in part, on allegations that the defendants breached their fiduciary duties and engaged in transactions prohibited by ERISA when they caused mutual funds with purportedly unreasonable and excessive investment advisory fees to be used as investment options under the plans. The 401(k) fee lawsuits continue to wind their way through the federal courts, and developments in the cases are being closely watched not only by other 401(k) plan sponsors and retirement service providers, but also by the DOL which has filed amicus briefs with the courts in some of the lawsuits.

ERISA, of course, is not the only basis under which mutual fund investment advisory fees may be subject to judicial challenge. Section 36(b) of the Investment Company Act of 1940 (1940 Act)[2] imposes a fiduciary duty on mutual fund investment advisers in connection with their receipt of fees from the funds that they manage. Last year, the Supreme Court in *Jones v. Harris Associates L.P.*[3] clarified the standard that courts are to apply in determining whether a mutual fund investment adviser has breached this fiduciary duty under the 1940 Act. Specifically, the Supreme Court held that an investment adviser breaches its fiduciary duty in charging "a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining."[4]

This article examines whether the Supreme Court's ruling in *Jones* could be instructive to courts in deciding the excessive fee claims brought under ERISA. In this regard, plaintiffs in the 401(k) fee lawsuits and others have analyzed some of the statements in *Jones* as suggesting that the 1940 Act imposes a less exacting fiduciary standard than the standard imposed on ERISA fiduciaries. As discussed below, however, although different terminology is used in analyzing claims under ERISA, courts apply substantially the same principles and evaluate many of the same factors applicable to claims under the 1940 Act. Accordingly, even though the 1940 Act and ERISA regulate different fiduciary relationships, the *Jones* decision under the 1940 Act very well may be instructive to courts in deciding ERISA-based excessive fee claims.

FIDUCIARY STANDARD UNDER THE 1940 ACT

Under Section 36(b) of the 1940 Act,[5] an investment adviser to a mutual fund:

> shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company, or by the security holders thereof, to such investment adviser or any affiliated person of such investment adviser.

In *Jones*, the Supreme Court held that an investment adviser breaches its fiduciary duty under Section 36(b) when the fee it charges is "so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining."[6] Prior to the Supreme Court's decision in *Jones*, this standard had been adopted by a number of federal courts, including the Second Circuit in the widely-cited case *Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*[7]

The Supreme Court described the standard as arising out of a "delicate compromise" reached by Congress in 1970. As the Court explained, prior to the addition of Section 36(b) in 1970, "shareholders challenging investment adviser fees under state law were required to meet common-law standards of corporate waste, under which an unreasonable or unfair fee might be approved unless the court deemed it 'unconscionable' or 'shocking,' and [shareholders] challenging adviser fees under the [Investment Company Act] itself had been required to prove gross abuse of trust."[8] Seeking to give shareholders "a stronger remedy," the Securities and Exchange Commission proposed amending the 1940 Act to include "a provision that would have empowered the Commission to bring actions to challenge a fee that was not 'reasonable' and to intervene in any similar action brought by or on behalf of an investment company."[9] Congress rejected that approach, however, because, in part, "[i]ndustry representatives … objected to this proposal, fearing that it might in essence provide the Commission with *ratemaking authority*."[10] As such, Section 36(b), as enacted, is considered a fiduciary standard that is "more favorable to shareholders than the previously available remedies but that did not permit a compensation agreement to be reviewed in court for 'reasonableness.'"[11]

Section 36(b)(1) of the 1940 Act provides that "the plaintiff shall have the burden of proving a breach of fiduciary duty."[12] Specifically, in deciding breach of fiduciary duty claims under the 1940 Act, courts are to weigh all the "relevant circumstances."[13] Among the factors most often analyzed by courts are six factors that are generally recognized as the *Gartenberg* factors:[14]

1. The "nature and quality of the services provided to the fund and shareholders";

2. The "profitability of the fund to the adviser";

3. The "collateral benefits that accrue to the adviser";

4. The "extent to which the adviser-manager realizes economies of scale as the fund grows larger";

5. The "comparative fee structures"; and

6. The "independence, expertise, care and conscientiousness of the board in evaluating adviser compensation."[15]

In *Jones,* the Supreme Court elaborated on some of these factors. With regard to comparative fee structures, the Supreme Court declined to adopt a categorical rule regarding the relevance of fees that the investment adviser charged to different types of clients. The Supreme Court advised that courts may give such comparisons the weight they merit in light of the similarities and differences between the services required by the clients.[16] However, the Supreme Court cautioned that "courts must be wary of inapt comparisons," citing, as an example, differences in services that an investment adviser may provide to a mutual fund and those it may provide to a pension plan.[17] Even in those cases where such client fee comparisons may be relevant, the Supreme Court described the 1940 Act as "not necessarily ensur[ing] fee parity between mutual funds and institutional clients. …"[18]

The Supreme Court similarly advised that courts should not rely too heavily on comparisons to fees that other investment advisers charged to similar mutual funds.[19] The Court reasoned that comparisons may be problematic because the other mutual funds' fees may not be the product of arm's-length negotiations.

In addition, the Supreme Court held that a court's evaluation of an investment adviser's fiduciary duty under Section 36(b) must consider the process that the mutual fund's board of directors followed in approving the fee.[20] The Court noted that where a fund's board has a robust process for reviewing and approving an investment adviser's compensation, courts should accord "commensurate deference" to the board's decision.[21] In contrast, where a board's fee approval process was deficient or the adviser withholds important information from the fee negotiations, courts "must take a more rigorous look at the outcome."[22]

Thus, in determining whether mutual fund advisory fees are "so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining,"[23] courts are not to engage in "judicial second-guessing of

informed board decisions."[24] If the disinterested board members considered the relevant factors, their decision to approve the investment adviser's fee "is entitled to considerable weight, even if a court might weigh the factors differently."[25] The Supreme Court found that the 1940 Act, therefore, "does not require courts to engage in a precise calculation of fees representative of arm's length bargaining," a calculation that "courts are not well-suited to make."[26]

THE STANDARDS UNDER ERISA

The Statutory Rules

There are a wide range of factors that ERISA plan fiduciaries must take into account in making investment related decisions.[27] This article focuses on one factor—the plan fiduciaries' duties with respect to the fees associated with plan investment options.

The Prudence Standard

ERISA does not directly regulate the fee that a mutual fund investment adviser may charge. However, ERISA does regulate a plan fiduciary's investment decisions and, in this regard, an investment adviser's fee may be evaluated in connection with a court's review of whether the plan fiduciary should have permitted the plan to invest in a fund that paid the fee. In other words, the adviser's fee is indirectly evaluated in the context of a "prudent investment" analysis under ERISA Section 404.[28]

Specifically, ERISA Section 404(a)(1)(B) provides that fiduciaries must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[29] This is a codification of the objective "prudent person" standard developed in the common law of trusts.[30] Under this standard, courts review whether the "fiduciary engaged in a reasoned decision-making process, consistent with that of a prudent man acting in a like capacity."[31]

The Reasonableness Standard

In addition to the prudence requirement, ERISA requires plan fiduciaries to discharge their duties for the exclusive purpose of providing benefits to participants and "defraying the reasonable expenses of administering the plan."[32] This is commonly referred to as the Exclusive Benefit Rule.

Consistent with the Exclusive Benefit Rule, other sections of ERISA regulate the compensation arrangements between plans, on the one hand, and plan service providers and fiduciaries, on the other hand.

Under ERISA Section 406(a), the payment of plan service provider compensation from plan assets constitutes a prohibited transfer of property (plan assets) between the plan and a party in interest (service provider).[33] However, plan service providers and fiduciaries do not run afoul of Section 406's prohibitions—with regard to compensation received by the service provider and fiduciaries—if the compensation is "reasonable."[34] And "whether compensation is 'reasonable' … depends on the particular facts and circumstances of each case"; but reasonable compensation may not be more than the amount that ordinarily would be paid for like services by like enterprises under like circumstances.[35]

The Application of Gartenberg *in ERISA Fee Cases*

As identified above, a series of lawsuits have recently been filed against 401(k) plan fiduciaries and service providers challenging the fees associated with plans' mutual fund investment options and compensation received by plan service providers. In these 401(k) fee lawsuits, the plaintiffs often include breach of fiduciary duty claims under ERISA Section 404 and, in some cases, prohibited transaction claims under ERISA Section 406.

Importantly, the courts in the fee cases have recognized that Second Circuit's decision in *Gartenberg* could be instructive in deciding whether defendants breached their fiduciary duties or engaged in prohibited transactions under ERISA. For example, in *Young v. General Motors Investment Mgmt. Corp.,* the Second Circuit held that "the [*Gartenberg*] standard for excessive fee claims articulated in the context of the Investment Company Act ... [is] useful for reviewing plaintiffs' claim that excessive fees violated ERISA."[36] The Second Circuit concluded the plaintiffs' complaint should be dismissed because the plaintiffs failed to allege sufficient facts concerning the *Gartenberg* factors, including whether the fees were "excessive relative to the services rendered."[37]

In *Taylor v. United Technologies Corp.*,[38] the plaintiffs argued that plan fiduciaries acted imprudently in violation of ERISA Section 404 by offering mutual funds as investment options when they could have offered allegedly less expensive separate accounts.[39] In rejecting this argument, the district court held that comparing mutual fund fees to separate account fees was inappropriate because the plaintiffs failed to demonstrate that separate accounts are equivalent investment vehicles to mutual funds.[40] In reaching this conclusion, the court cited to the Second Circuit's refusal to compare fees of different types of funds in *Gartenberg*.[41]

As shown below, case law and regulatory authority interpreting the ERISA and the 1940 Act establish that liability standards under the two statutes are very similar. Accordingly, in the wake of the Supreme Court's decision in *Jones*, courts may well continue to find

the *Gartenberg* factors instructive in deciding the excessive fee claims asserted under ERISA.

THE ERISA STANDARD VS. THE 1940 ACT STANDARD

Under Both ERISA and the 1940 Act, Courts Use a Range-of-Fees Benchmark for Determining Liability

As described above, for claims under the 1940 Act, the Supreme Court ruled that a plaintiff bears the burden of "show[ing] that the fee is outside the range [of fees] that arm's-length bargaining would produce."[42] In adopting this benchmark, the Court distinguished the "reasonableness" standard that had been proposed by the SEC, which the Court equated to vesting the SEC and courts with "ratemaking authority."[43]

In ERISA cases, courts also look to a range of fees as a benchmark for determining liability and avoid engaging in more precise rate setting.[44] For example, in *Brock v. Robinson,* the court concluded that a service provider's 3.5 percent administrative charge was reasonable based on witness testimony of administrative charges by other service providers of between 3 percent and 4 percent.[45] Also, in *Tibble v. Edison Int'l,* the court concluded that the investment management fees for the plan's money market fund investment option "were well within the reasonable range of fees charged by other short-term investment funds."[46]

Accordingly, under both standards, courts look to whether the fees charged fall outside the fee levels that one would expect to result from arm's length bargaining.

Fees and Compensation Are Evaluated in Relation to the Services Rendered

The *Jones* test requires a court to determine whether a mutual fund adviser's fee "... bears no reasonable relationship *to the services rendered* and could not have been the product of arm's length bargaining."[47] Similarly, ERISA cases have recognized that fees and compensation are to be evaluated in relation to the services rendered. In *Hecker v. Deere & Co.,*[48] the Seventh Circuit affirmed the dismissal of plaintiffs' excessive fee claim, noting that plaintiffs had failed to allege (among other things) that the challenged fees charged by retail mutual funds were excessive in relation to the services rendered.[49] The DOL similarly takes the position that mutual fund fees must be evaluated in relation to the services rendered.[50]

Accordingly, under both the 1940 Act and ERISA, fees and other compensation are analyzed by the courts in relation to the services rendered.

With Regard to Claims Under ERISA and the 1940 Act, Courts Give Deference to Decisions Made After Meaningful Procedural Prudence

As discussed above, under *Jones*, courts deciding claims under the 1940 Act are to accord "commensurate deference" to decisions made by the mutual fund's board of directors as to the appropriateness of the investment adviser's fee, "[w]here [the] board's process for negotiating and reviewing investment-adviser compensation [was] robust."[51] Under ERISA, the courts similarly focus on whether a plan fiduciary employed an appropriate process to investigate, for example, the merits and structure of investments, including fees.[52]

For example, in reinstating the 401(k) fee case against the fiduciaries of the Wal-Mart plan,[53] the Eighth Circuit recently ruled that ERISA's:

> prudent person standard is an objective standard … that focuses on the fiduciary's conduct preceding the challenged decision. … In evaluating whether a fiduciary has acted prudently, we therefore focus on the process by which it makes its decisions rather than the results of those decisions.

Similarly, the DOL has stated that a court evaluating an excessive fee claim under ERISA should consider "the diligence with which the fiduciaries compared fees for comparable funds" and "whether the fiduciaries used a reasonable process to determine whether the particular funds were reasonable investments in light of their fees and other attributes."[54] When an ERISA fiduciary undertakes meaningful due diligence and review of plan fees and other expenses, courts are unlikely to hold the fiduciary liable in the absence of evidence the fiduciary was involved in self-dealing, made material misrepresentations, or otherwise engaged in nefarious activity in connection with the challenged transactions.[55] In contrast, courts have found fiduciaries liable when they have not established that they adequately investigated plan fees and exposures.[56]

Fee Comparisons May Be Made, but Only When Apt

The Supreme Court identified in *Jones* that, in considering breach of fiduciary duty claims under the 1940 Act, comparison of the fee structures utilized for different types of clients may be relevant, but cautioned that "courts must be wary of inapt comparisons."[57] The Court also cautioned courts to not rely too heavily on comparisons to fees that other investment advisers charged to other mutual funds.[58]

Because ERISA's prudent person standard is objective and takes into account what a reasonable ERISA fiduciary would do in like circumstances, courts reviewing excessive fee claims often rely, in

part, on similar fee comparisons. For example, in *Hecker,* the Seventh Circuit noted that the retail mutual funds at issue were "offered to investors in the general public," so that the "expense ratios were set against the backdrop of market competition."[59] Also, in *Brock v. Robinson*,[60] the Seventh Circuit affirmed that the trustees acted prudently in approving a service provider's contract based on evidence that, among other things, the trustees analyzed the fees charged by other claims processing companies.[61]

Along these lines, the DOL has taken the position that a court evaluating an excessive fee claim under ERISA should compare "the fees paid by plans of comparable size for comparable funds" while also considering "the diligence with which the fiduciaries compared fees for comparable funds."[62] The defendants in the 401(k) fee lawsuits similarly have argued that they did not breach their fiduciary duty because the fees for the mutual funds at issue were comparable to the fees charged by other similar mutual funds.[63]

Accordingly, "apples to apples" comparison by courts of defendant's fees to those charged by other investment managers, advisers and service providers is consistent with both the *Jones* decision and the ERISA prudent person standard.

Lowest Fees Are Not Required

Under *Jones*, a mutual fund adviser will not be found to have violated the 1940 Act merely because the adviser's fee is not set at the lowest possible level.[64] However, as one of the *Gartenberg* factors, profits earned by an adviser may be considered by the court.[65]

Similarly, ERISA fiduciaries are not required to select the lowest cost investment option or service provider.[66] Indeed, in selecting investment options or service providers, fees are only one of many factors that a plan fiduciary should consider.[67] Unlike claims under the 1940 Act, however, in ERISA matters, a service provider's profit generally is not considered a relevant factor in determining whether the fees charged are reasonable.[68]

The Burden of Proof

In claims under the 1940 Act, the plaintiff has the burden of proving that a mutual fund investment adviser breached its fiduciary duty by charging an excessive fee.[69] Under ERISA, responsibility for the burden of proof on fee issues depends on whether the level of fees is an element of the plaintiff's *prima facie* case of fiduciary breach or a plan fiduciary's defense to a prohibited transaction claim.

As discussed above, an ERISA claim challenging fees is usually an "imprudent investment" claim under section 404 of ERISA.[70] Like plaintiffs in 1940 Act cases, a plaintiff arguing that an ERISA fiduciary

made an imprudent investment decision has the burden of proving that the fees were excessive as part of his or her *prima facie* case.[71]

In addition to an imprudent investment claim, in cases where the allegation is that the fiduciaries allowed a service provider (like a 401(k) recordkeeper) to receive excessive compensation, a plaintiff may be able to assert that the payment of the fees amounts to a prohibited transaction under ERISA Section 406.[72] For prohibited transaction claims under ERISA, the defendant (*i.e.,* the plan fiduciary) would have the burden of proving that the fees are reasonable within the meaning of exemptions for reasonable compensation paid to a plan service provider or a fiduciary.[73]

CONCLUSION

As discussed above, the standards that courts apply in deciding excessive fee claims under the 1940 Act and ERISA are substantially similar. Under both the 1940 Act and ERISA, courts:

1. Consider a range of permissible fees to determine liability and avoid engaging in precise compensation calculations;
2. Look at compensation in relation to the services rendered;
3. Give substantial weight to the compensation decisions made by the plan fiduciaries/mutual fund boards when they have undertaken appropriate procedural prudence;
4. Analyze and compare fees charged in other settings and by other companies;
5. Do not require the lowest possible fee to be charged; and
6. Generally place the burden on the plaintiff to prove that the fees were excessive.

Accordingly, the *Jones* decision and the *Gartenberg* factors very well may be instructive to courts in deciding ERISA-based excessive fee claims.

NOTES

1. 130 S. Ct. 1418 (Mar. 30, 2010).

2. 15 U.S.C. § 80a-35(b).

3. Jones v. Harris Associates L.P.,130 S. Ct. 1418 (Mar. 30, 2010).

4. *Id.* at 1426.

5. 15 U.S.C. § 80a-35(b).

6. *Jones*, 130 S. Ct. at 1426.

7. Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 694 F.2d 923 (2d Cir. 1982).

8. *Id.* at 1423 (internal quotations omitted).

9. *Id.*

10. *Id.* (citations and internal quotations omitted; emphasis added).

11. *Id.*

12. 15 U.S.C. § 80a-35(b)(1).

13. *Jones*, 130 S. Ct. at 1423.

14. Amron v. Morgan Stanley Investment Advisors Inc., 464 F.3d 338, 340 (2d Cir. 2006).

15. *Id.* at 1426 and n.5.

16. *Jones*, 130 S. Ct. at 1428.

17. *Id.* at 1428–1429.

18. *Id.* at 1429.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 1430.

23. *Id.* at 1426.

24. *Id.* at 1430.

25. *Id.* at 1429. *See also* 15 U.S.C. § 80a-15(c) (imposing duty on fund's board of directors to request and evaluate, and a duty on investment adviser to furnish, the information reasonably necessary to evaluate the terms of the investment adviser's contract; also requiring the contract to be approved by a vote of a majority of the fund directors "who are not parties to such contract or agreement or interested persons of any such party").

26. *Jones*, 130 S. Ct. at 1430.

27. *See* 29 C.F.R. § 2550.404a-1(b) (stating that plan fiduciaries must give appropriate consideration to relevant facts and circumstances in light of the role a "particular investment or investment course of action" plays in the "plan's investment portfolio").

28. *See* Young v. General Motors Investment Mgmt. Corp., 325 Fed. Appx. 31, 33 (2d Cir. 2009) (characterizing "excessive fees claim [as] one of imprudent investment" under ERISA § 404).

29. 29 U.S.C. § 1104(a)(1)(B).

30. Katsaros v. Cody, 744 F.2d 270, 279 (2d Cir. 1984).

31. DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 420 (4th Cir. 2007) (internal quotations omitted); Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996) ("[C]ourts focus not only on the merits of the transaction, but also on the thoroughness of the investigation into the merits of the transaction").

32. ERISA § 404(a)(1)(A); 29 U.S.C. § 1104(a)(1)(A).

33. 29 U.S.C. § 1106(a).

34. ERISA § 408(b)(2), 29 U.S.C. § 1108(b)(2) (providing exemption for arrangements with parties in interest "if no more than reasonable compensation is paid therefore").

35. 29 C.F.R. § 2550.408c-2(b)(1) and (5) (citing Treas. Reg. § 1.162-7).

36. *Young*, 325 Fed. Appx at 33.

37. *Id*. (internal quotations omitted).

38. Taylor v. United Technologies Corp., 2009 WL 535779 (D. Conn. 2009).

39. *Id*. at *10.

40. *Id*.

41. *Id*. (citing *Gartenberg*, 694 F.2d at 930 n.3).

42. *Jones*, 130 S. Ct. at 1427.

43. *Id*. at 1423 and 1430 ("Congress rejected a 'reasonableness requirement' that was criticized as charging courts with rate-setting responsibilities").

44. *See* Brock v. Robinson, 830 F.2d 640 (7th Cir. 1987); Dupree v. Prudential Ins. Co. of Am., 2007 WL 2263892 (S.D. Fla. 2007) (noting as an admitted fact that "[f]or any particular type of investment, there is a *range* of fees that is considered reasonable").

45. *Brock*, 830 F.2d at 645.

46. Tibble v. Edison Int'l, 2010 WL 2757153 at *34 (C.D. Cal. 2010).

47. *Jones*, 130 S. Ct. at 1426 (emphasis added).

48. Hecker v. Deere & Co., 556 F.3d 575 (7th Cir. 2009).

49. *Hecker*, 569 F.3d at 711 ("It would be one thing if [the participants] were treated exactly like all other retail market purchasers[,]" but "it would be quite another if, for example, [the participants] received extra investment advice from someone dedicated to the Deere accounts, or if they received other extra services").

50. *See* Brief of the Secretary of Labor, Hilda L. Solis, as *Amicus Curiae* in Support of Plaintiffs-Appellants at 26, Loomis v. Exelon Corp., No. 09-4081 (7th Cir.) ("*Loomis* DOL Brief") ("Given the significant impact fee levels have on the net return of investment over time, plan fiduciaries' duty to select prudent investment options necessarily includes consideration of the reasonableness of the fees charged and the *services received in payment of those fees*") (emphasis added). *Cf.* DOL Adv. Op. 2002-08A (Aug. 20, 2002) ("[P]lan fiduciary must engage in an objective process designed to elicit information necessary to assess the qualifications of the [service] provider, the quality of services offered, and *the reasonableness of the fees charged in light of the services provided*") (emphasis added).

51. *Jones*, 130 S. Ct. at 1429.

52. *See DiFelice*, 497 F.3d at 420.

53. Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 595 (8th Cir. 2009).

54. *Loomis* DOL Brief at 27 (a court evaluating an excessive fee claim under ERISA should consider "the diligence with which the fiduciaries compared fees for

comparable funds" and "whether the fiduciaries used a reasonable process to determine whether the particular funds were reasonable investments in light of their fees and other attributes").

55. *See* Bussian v. RJR Nabisco Inc., 223 F.3d 286, 299 (5th Cir. 2000) ("ERISA's test of prudence is one of conduct, and not a test of performance of the investment"); Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983) ("The focus of the inquiry is how the fiduciary acted in his selection of the investment, and not whether his investments succeeded or failed"); DeBruyne v. Equitable Life Assurance Soc'y of U.S., 920 F.2d 457, 465 (7th Cir. 1990) ("The ultimate outcome of an investment is not proof of imprudence"); Jenkins v. Yager, 444 F.3d 916, 926 (7th Cir. 2006) ("We have stated that investment losses are not proof that [a fiduciary] violated his duty of care").

56. *Tibble*, 2010 WL 2757153 at *30 (fiduciaries breached duties when there was no evidence that they discussed minimum investment level for lower cost, institutional share class and did not inquire as to whether fund would waive the investment minimum).

57. *Jones*, 130 S. Ct. at 1428.

58. *Id.* at 1429.

59. *Hecker*, 556 F.3d at 586.

60. *Brock*, 830 F.2d at 645.

61. *See also Tibble*, 2010 WL 2757153 at *34 (no breach of fiduciary duty because the fee charged was within the range of fees proposed by competitors during RFP); I.B.E.W. Local 1448 Health and Welfare Fund v. Thorndyke Int'l, Inc., 1998 WL 764753 at *4 (E.D. Pa. 1998) (finding no breach of fiduciary duty because, among other things, the plaintiff did not offer any evidence that a seven or eight percent commission was contrary to customary business practices or was otherwise unreasonable).

62. *See Loomis* DOL Brief at 27.

63. *See* Defendants' Proposed Findings of Fact and Conclusions of Law at 7, Tussey v. ABB, Inc., No. 06-4305 (W.D. Mo.) ("[T]he expense ratios of the Plan's mutual funds, with limited exceptions, consistently have been below their Morningstar category averages. … In fact, in 2005, the weighted average expense ratio of ABB's actively-managed options was far lower than even the average expense ratio for institutional mutual fund share classes").

64. *Jones*, 130 S. Ct. at 1427 (requiring advisory fees to be within a range of fees that may result from arm's-length bargaining).

65. *Id.* at 1426 n.5.

66. *Hecker*, 556 F.3d at 586 ("[N]othing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund. …"); DOL Employee Benefits Security Administration, *Tips For Selecting and Monitoring Service Providers for Your Employee Benefit Plan* (May 2004), *http://www.dol.gov/ebsa/ newsroom/fs052505.html* ("[P]lan fiduciaries are not always required to pick the least costly provider").

67. *See* DOL Information Letter to Diana Ceresi, 1998 WL 1638068 (Feb. 19, 1998) (stating that a plan fiduciary must consider the "quality of services" provided and "need not select the lowest bidder"); General Accountability Office, *Fulfilling Fiduciary Obligations Can Present Challenges For 401(k) Plan Sponsors* (July 2008)

at 16, *http://www.gao.gov/new.items/ d08774.pdf* ("As with selecting funds, fees are one of many issues—such as providers' qualifications and quality of services—to consider when selecting providers"); DOL Information Letter to Gary Henderson, 1998 WL 1638072 (July 28, 1998) ("In choosing among potential service providers … the trustees must objectively assess the qualifications of the service provider, the quality of the work product, and the reasonableness of the fees charged in light of the services provided").

68. McLaughlin v. Bendersky, 705 F. Supp. 417, 420–421 (N.D. Ill. 1989) ("[W]hat is relevant in determining the reasonableness of the contract … is the amount [the service provider] charges the fund, and the quality of the services it provides, not how much the services cost … or how much profit [the service provider] makes").

69. 15 U.S.C. § 80a-35(b)(1); *Jones*, 130 S. Ct. at 1427.

70. *Young*, 325 Fed. Appx. at 33.

71. *See Jenkins*, 444 F.3d at 924 ("To state a claim for a violation of fiduciary duty, the plaintiff must establish ... that the defendants breached their fiduciary duties ... .") (internal quotations omitted).

72. Because the assets of a registered mutual fund are not considered plan assets under ERISA (*see* ERISA § 401(b)(1), 29 U.S.C. § 1101(b)(1)), plaintiffs likely would not be able to establish that the investment advisory fees for registered mutual funds were paid from plan assets, as may be required to maintain certain prohibited transaction claims under ERISA.

73. ERISA §§ 408(b)(2), (c)(2); 29 U.S.C. §§ 1108 (b)(2), (c)(2).

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