# FIDELITY NOT ACTING AS ERISA FIDUCIARY IN CHARGING ACCESS FEE TO MUTUAL FUNDS HOSTED ON ITS RETIREMENT PLAN INVESTMENT PLATFORM

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The First Circuit court of appeals has affirmed a federal district court's dismissal of a class action lawsuit brought against Fidelity, arguing that it breached its duties as an ERISA fiduciary when it charged "infrastructure fees" to mutual funds hosted on its investment platform.

Fidelity is a well-known recordkeeper and directed trustee, providing services to thousands of U.S. retirement plans. Fidelity offers a "supermarket" of mutual funds from which employer-sponsors can choose when creating the slate of investments offered to retirement plan participants. Fidelity charges an "infrastructure fee" to unaffiliated mutual fund managers in exchange for offering their funds on its platform, hence giving those funds access to millions of retirement plan investors.

In evaluating plaintiffs' claims, the court noted that fiduciary status was not an "all-or-nothing designation" under ERISA. The plaintiffs argued that Fidelity acted as a functional fiduciary under ERISA by charging the infrastructure fees for two primary reasons: (1) because Fidelity exercised control over the compensation it received from the retirement plans, and (2) because Fidelity's control of the "supermarket" menu of investment choices, ultimately impacted the array of retirement plan funds offered to participants.

The court disagreed with the plaintiffs' theory that in charging the infrastructure fee, Fidelity controlled compensation that was passed through to the plans. This theory was rejected because it, "overlooks the numerous intervening and independent decisions inherent in the so-called pass-through," including the mutual funds' decision to be included on the Fidelity platform and negotiation of the fee, the mutual funds' decision whether to pass on all or part of the fee as an expense to investors, the retirement plan investment fiduciaries' selection of the funds to include on the retirement plan's investment slate, and, ultimately, the participant's individual choice among the plan's investment options.

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Next, the court addressed the argument that Fidelity's control of the "supermarket" indirectly controlled the funds the retirement plans offered to participants. Citing caselaw and a DOL advisory opinion letter directly on point, the court discarded the argument that a plan service provider acts as a fiduciary when selecting or removing a fund from its program of investment offerings. Indeed, Fidelity's role as directed trustee precluded from consideration any notion that it had a fiduciary advisor role in making the investment selections at the plan level.

The case indicates that retirement plan service providers do not take on functional fiduciary duties merely by maintaining an investment platform, where the authority over the investment options offered to participants is retained by the plan-level investment fiduciaries.

*In re: Fidelity ERISA Fee Litigation, 2021 WL 836766 (1st Cir. 2021)*