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## Ruling provides major boost to employers accused of allowing excessive investment fund fees

Pamela A. MacLean / Staff reporter  
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In the first circuit decision of its kind, a federal appeals court has provided a major boost for employers battling allegations that they allowed excessive fee charges by investment funds overseeing 401(k) plans.

The 7th U.S. Circuit Court of Appeals decision comes as a blow to at least 20 similar excessive fee class actions around the country and a blow to Department of Labor efforts to hold companies to the fire to find the lowest cost investment funds for employees.

The 7th Circuit dismissed the allegations against Deere & Co. and Fidelity Management Trust Co. that Deere breached its fiduciary duties to employees by overpaying for services and by failing to disclose revenue sharing between Fidelity's management and trustee arms. *Hecker v. Deere & Co.*, No. 07-3605 (7th Cir.).

The case provided two major holdings that bolster employer handling of pensions under the Employee Retirement Income Security Act of 1974 (ERISA): Employers do not have a fiduciary duty to find the cheapest plan, and they enjoy a safe harbor from liability if their plans offer a diversified array of funds that spreads risk and discloses the levels of risk and full cost of the plan, according to Sari M. Alamuddin, an ERISA litigator in the Chicago office of Morgan, Lewis & Bockius, who represented Deere & Co.

"What the 7th Circuit has done is provide employers with ammunition to say price [of an investment fund] is a factor, but it is not the only factor," said Alamuddin.

Plaintiffs' attorney Troy Doles of Schlichter Bogard & Denton in St. Louis did not return a call seeking comment.

The plaintiffs, a group of Deere employees lead by Dennis Hecker, alleged that Fidelity Research shared its revenue, which it earned from mutual fund fees, with Fidelity Trust. The trust compensated itself with the shared fees rather than a direct charge to Deere for its services.

"Plaintiffs point to no authority that holds that limiting funds to a sister company automatically creates discretionary control sufficient for fiduciary status," wrote Judge Diane Wood for the panel.

Although Deere did not break down the fee distribution to Fidelity, it did disclose the full cost, according to the court.

"While Deere may not have been behaving admirably by creating the impression that it was generously subsidizing its employees' investments by paying something to Fidelity Trust when it was doing no such thing, the complaint does not allege any particular dollar amount that was fraudulently stated," Wood wrote.

Hecker and the other employees had no claim against Deere or Fidelity based on the revenue-sharing arrangement or the failure to disclose it, she said.

D. Ward Kalstrom, an ERISA litigator in the San Francisco office of Morgan Lewis, said there are more than 20 similar class actions with excessive fee claims under ERISA pending in courts around the country. The 5th Circuit has a case pending in the briefing stage against Wal-Mart Stores Inc., and the 9th Circuit has another against Northrup-Grumman Corp., he said.

The Department of Labor entered the case as an amicus on the side of plaintiffs. The National Association of Manufacturers and the American Benefits Council supported Deere as amicus.