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In skier/snowboarder vernacular a wipeout where you lose all your gear is considered a "yardsale." Recently class action plaintiff firms have brought a suit alleging that Vail Corp's 401(k) fiduciaries indicating they may have had a fiduciary yardsale in regards to their plan's fees.

On February 24th a complaint targeting Vail Resorts 401(k) was filed alleging excessive fees and poor performing funds. The allegations raise the common argument of improper use of revenue sharing share classes in lieu of less expensive share classes and higher record keeping costs as compared to a "benchmarking analysis" and peer group. It is important to understand that at this stage the complaint is the only item available for public consumption. Neither the defendants (plan fiduciaries) answer has been made public nor has any court ruled upon any of the allegations.

The facts and allegations, as laid out in the complaint, do not provide much in the way of unique elements. This is all very familiar to the recent spate of fee-related lawsuits. However there are some items regarding this suit that command a bit of attention:

- The Vail plan has only $309,822,304 in plan assets. The term "only" is used due to the fact that overwhelmingly the fee cases that have been brought to date have resided in the "jumbo" plan scale (think billions). So while the Vail plan is a large plan, it's quite a bit smaller than many other plans on which excessive fee lawsuits have been based.
- The complaint relies on "a benchmarking analysis of the type often employed by fiduciaries and financial advisors…" to attempt to prove that administrative fees the plan participants are paying was much greater than comparative plans. This aspect is interesting in that the underpinnings of the analysis should be scrutinized to determine if (a) the data is persuasive; and (b) if it's even relevant (every plan has plan-specific differences that may drive cost, how does this get factored into comparative norms)?
- The complaint also relies on a "peer group" (the complaint actually uses the phrase "per group" but it's safe to assume this is a typographical error) to prove excessive fees. The peer group consists of 21 plans within a $250 million range in terms of plan assets. The Vail plan resides at the lower end of the range. It will be interesting to see if a trier of fact believes this small and skewed ($309M plan in a group of plans ranging from $250M - $500M) data set is dispositive on the determination of whether fees are reasonable. Moreover, it will also be of interest to see how much scrutiny is given by the court, if any, to distinguishable fact sets among the peer group.

The defendants' (fiduciaries) response to the complaint, detailing their particular fact sets and the processes undertaken in selecting investments, share classes, recordkeepers, and negotiating fees will go a long way in determining if the "benchmarking analysis" and "peer groups" cited by the plaintiffs hold water.

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As always this suit is a good reminder that best practice of live-bid benchmarking, undertaking prudent processes, and proper documentation are a fiduciary’s best friend. It also serves as a sobering indicator that plans south of billions in plan assets should not consider themselves invisible to the eye of plaintiff’s attorneys.

As always, ski or ride in control, with proper equipment and training provided by the best instructors (aka your trusted plan advisor) and you should be able to avoid a total yardsale.

Source: https://www.napa-net.org/sites/napa-net.org/files/vail%20complaint.pdf
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