

Supreme Court weighs new hurdle for 401(k) lawsuits

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- **Key insight:** The Supreme Court's impending decision in *Anderson v. Intel Corp.* will establish whether aggrieved retirement savers must cite meaningful investment benchmarks with similar risk profiles and return characteristics.
- **What's at Stake:** A ruling that relaxes the comparative benchmark standard could expose plan sponsors and investment advisors to more costly ERISA litigation.

- **Expert Quote:** "The metaphor we hear a lot is: It needs to be apples to apples. But does it need to be the same species of apple or not?" – Will Delany, principal at Groom Law Group

A case before the Supreme Court could create a new obstacle for aggrieved investors who want to bring lawsuits over poor retirement returns.

Among the questions posed by *Anderson v. Intel Corp. Investment Policy Committee* are:

- Before such investors can have their day in court, must they first furnish an example of how putting their money into funds other than the ones they were directed to would have produced better results?
- How close does that outside benchmark have to be to what they actually invested in? Must it be an almost exact copy? Or is it enough if the benchmark is designed for similar savings goals and risk tolerances as those espoused by the aggrieved investor?

At its heart, the case looks at whether trustees in charge of providing retirement benefits to Intel employees breached their fiduciary duties under federal retirement law by making changes to 401(k) funds following the 2008 economic collapse. Specifically, the plaintiffs alleged the trustees violated provisions of the Employee Retirement Income Security Act of 1974 by adding hedge and private equity funds to some of the 401(k) investment options for employees.

A suit initially filed by the former Intel employee Winston Anderson in 2019 accused the Intel trustees of violating their fiduciary duties under ERISA in part by drastically departing "from prevailing standards of professional asset managers." Anderson later cited index funds tracking the S&P 500 and funds provided by the asset manager Morningstar as standard setters to gauge the Intel trustees' investments against.

The federal district court in California that first heard the case dismissed the claims after finding the plaintiffs had failed to provide a "meaningful benchmark." That decision was later [upheld by the Ninth Circuit Court of Appeals](#).

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What is the meaning of 'meaningful'?

In taking up the case in oral arguments on Oct. 6, the Supreme Court was asked by the plaintiffs to reject the "meaningful benchmark" standards that various federal appeals courts now turn to in cases alleging retirement plan mismanagement. The justices also considered what attributes a benchmark needs to count as "meaningful."

Justice Elena Kagan raised the possibility that "We could do something useful here — couldn't we? — by saying. 'Yeah, it needs to be meaningfully similar.' That doesn't mean identical. Here are the kinds of things that you look to."

Justice Amy Coney Barrett meanwhile asked whether insisting that benchmarks couldn't be used unless they have "like aims and strategies" might lead lower courts thinking they have to be presented with an exact twin of any fund under scrutiny.

Will Delany, a principal at Groom Law Group in Washington, D.C., and specialist in ERISA law, said the courts clearly seem to think that if a plaintiff is going claim that an investment recommendation was somehow deficient, they need "to do more than just allege that there were other funds in the marketplace that did better."

"A lot of potential funds that an investment advisor might recommend are being recommended for their characteristics in a variety of market cycles and conditions," Delany said. "So for a plaintiff to just be able to come in and say, 'Well, you know, one fund performed better than the fund you picked,' without any consideration of the risks and rewards and return characteristics, is not taking into account the general impacts of the market cycle."

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The possible wider implications of the Supreme Court's decision

Jordan Bock, an appellate lawyer at Goodwin Procter in Boston who wrote an amicus brief on the Intel case for the U.S. Chamber of Commerce, said the justices' final opinions could have far-reaching consequences.

"This decision is probably going to talk about the level of scrutiny being given to investment selection in general, which could trickle down and affect investment advisors to the extent that retirement-plan sponsors are thinking about their degree of liability and what they need to do to avoid being pulled into a lawsuit for breach of fiduciary duty," Bock said.

At the same time, Bock said the court could come back with a decision that does little to further define exactly what constitutes a "meaningful" benchmark.

"The Supreme Court has taken a series of ERISA cases over the last couple years, and sometimes they're big decisions, and sometimes they write these very narrow opinions that sort of just tell the lower courts to keep doing what they're already doing," Bock said.

Although the Intel case initially questioned [the inclusion of hedge and private equity funds](#) in employees' 401(k) plans, both Bock and Delany said they doubt the justices' ultimate decision will have any bearing on whether such alternative investments belong in retirement plans. The Department of Labor in March [proposed a rule designed to provide legal protection](#) for retirement-plan sponsors who recommend alts for 401(k)s and similar accounts.

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Why the Supreme Court is unlikely to rule on alts in retirement plans

Delany said the courts have come to the general consensus that no type of investment can be considered imprudent on its face under ERISA.

"That's the starting point," he said. "That means that if you are going to challenge an alternative type investment — like a hedge fund — then the

plaintiff, if they're going to try to bring a claim based upon an allegation of underperformance, needs to come up with something comparative that has the same aims and objectives as that hedge fund. It's not enough to come in and challenge a hedge fund based upon a conservative, stable value offering."

Delany said in cases involving comparisons, "everybody loves fruit metaphors."

"The Supreme Court is no exception," he said. "The metaphor we hear a lot is: It needs to be apples to apples. But does it need to be the same species of apple or not?"

A decision in *Anderson v. Intel Corp. Investment Policy Committee* is likely to be handed down next year.