

No Good Deed Goes Unpunished

Recent Litigation Involving Retirement Plan Sponsors

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"I see here several good deeds that seem to have gone unpunished."

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Overview of ERISA Fiduciary Rules

- ERISA intended to govern private employer-sponsored retirement plans, including 401(k) plans
- ERISA provides a uniform standard of retirement plan governance drawn from fiduciary standards in trust law
- “Highest duty known to law”

Fiduciary Duties

- Duty of Loyalty
 - Fiduciaries must act for the exclusive benefit of the plan participants
 - Prohibition of Self-Dealing

- Duty of Care and Prudence
 - Duties to monitor service providers' performance and ensure they receive no more compensation than is reasonable
 - Duty to diversify

- Duty to Act in Accordance with Plan Documents

Consequences when Fiduciaries Fall Short of their Duties

- ❑ Failure to comply with fiduciary duties may subject the fiduciary to personal liability, both civil and criminal
- ❑ The amount of money involved, lower pleading standards, statutory attorneys' fees, and the high bar to which fiduciaries are held all encourage litigation
- ❑ Suits typically brought against the employer that sponsors the plan and revolve around issues of fiduciary conduct

Trend: Excessive Investment Fees

Investment Selection

□ *Tibble v. Edison International*

- Plaintiffs filed suit in 2007 alleging a violation of fiduciary duty by Edison in its selection of retail class mutual funds when institutional class funds were available
- District Court and the 9th Circuit both held that a suit could proceed with respect to funds selected in 2001, but funds selected in 1999 were time barred because the statute of limitations had run since their initial selection
- Unanimous Supreme Court held that a fiduciary has a continuing responsibility to monitor investments and remove imprudent ones; 9th Circuit on remand should look beyond just initial selection
- Takeaway: Continuous duty to monitor investments; Effectively tolls the statute of limitations on these types of claims for as long as the investment is in the plan

□ Actively managed mutual funds

Trend: Excessive Service Provider Fees

Service Provider Fees

- Revenue Sharing
 - Payments made by investment options (most often mutual funds) to plan trustees and service providers
 - Fiduciaries must consider all compensation being paid to service provider, including revenue sharing payments
 - *Tussey v. ABB*: 8th Circuit held that, among other fiduciary breaches, defendants had breached duties by allowing plan participants to pay recordkeeping fees to Fidelity via revenue sharing arrangements which were well beyond market rates – failed to calculate actual fees and failed to leverage plan size
- Bundled service arrangements
- Asset-based recordkeeping fees

Trend: Large Settlements

Abbott v. Lockheed Martin Corp (\$62M awarded to plaintiffs)

Beesley v. International Paper Company (\$30M)

Spano v. Boeing (\$57M)

Haddock v. Nationwide (\$140)

Trend: Suits Against Smaller Employers

- ❑ Excessive-fee litigation has usually involved larger plans with hundreds of millions of dollars in assets.
- ❑ *Severson v. LaMettry's Collision, Inc.* – Plaintiffs allege employer breached its fiduciary duties by causing the 401(k) plan to pay excessive fees and by imprudently selecting higher cost investments. The plan has just over 100 participants and approximately \$9.2 million in assets.
- ❑ *Bernaola v. Checksmart Financial LLC* - Plaintiffs sued the loan servicing company for excessive administrative service fees and imprudent investment options. The plan has \$25 million in assets and more than 1,700 participants.

Recent Excessive Fee Cases Filed

- *Bell v. Anthem*: plaintiffs allege:
 - retirement plan committee should have considered using collective trusts, rather than mutual funds,
 - plan should have leveraged size for lower recordkeeping fees, and
 - plan should have used a higher return stable value fund rather than a very low return money market fund.

- *Johnson v. Fujitsu Technology*
 - According to complaint, the average plan with more than \$1 billion in assets has annual costs that amount to 0.33 percent of assets
 - Complaint estimates that Fujitsu's costs were 0.88 and 0.90 percent for 2013 and 2014
 - \$7 million in excess fees alleged

Trend: Service Providers Winning

- Participant suits against service providers, alleging that they are fiduciaries, have largely been unsuccessful
 - *McCaffree Financial Corp v Principal Life Insurance Co,*
 - 401(k) recordkeeper not a fiduciary
 - 3rd and 7th circuit have also ruled in favor of service providers

Scope of Relief for ERISA Plaintiffs

- *Cigna Corp. v Amara dicta*
 - *Amara's* basic ruling: SPDs are not the terms of the plan for purposes of enforcing the terms of the plan, but plaintiffs may seek other appropriate equitable relief when suit is brought against fiduciaries concerning the terms of the plan
 - Dicta in Justice Breyer's opinion regarding the availability of reformation of contracts in the case of mistake or fraud, estoppel, and surcharge to recover monetary make-whole relief from the fiduciary
 - Showing of detrimental reliance unnecessary except in cases of estoppel
 - On remand, District Court relied on Breyer's dicta in ordering reformation of the plan

Scope of Relief for ERISA Plaintiffs

- Impact of *Amara dicta*
 - Following *Amara*, the Fourth, Fifth, Seventh, and Ninth Circuits have all held that surcharge is an available remedy in suits alleging breach of fiduciary duties
 - *McCravy v Metropolitan Life Ins. Co.* (4th Circuit)
 - *Gearlds v Entergy Services, Inc.* (5th Circuit)
 - *Kenseth v Dean Health Plan, Inc.* (7th Circuit)
 - *Skinner v Northrop Grumman Retirement Plan B* (9th Circuit)

Scope of Relief for ERISA Plaintiffs

□ *Skinner*

- *Skinner* plaintiffs alleged Northrop administrative committee failed to furnish a sufficiently accurate SPD that clearly described the terms of a benefit calculation offset
- Ninth Circuit acknowledged that it could no longer enforce SPD terms against plan fiduciaries, but held that reformation and surcharge were available remedies in light of *Amara*
 - Plan reformation available in instances of mutual mistake, fraud
 - Surcharge available to prevent unjust enrichment or as compensatory make-whole damages to remedy a harm caused by fiduciary breach
 - Surcharge available if a Plaintiff can prove the fiduciary failed to provide an accurate SPD, and Plaintiff relief on that SPD to his harm

Scope of Relief for ERISA Plaintiffs

- *Rochow v. Life Ins. Co. of North America* (Sixth Circuit)
 - Disability benefits case in which plaintiff sought to enforce the terms of the plan and to obtain equitable relief in the form of surcharge
 - District Court determined insurer wrongfully denied disability benefits to plaintiff and ordered plaintiff receive the value of the disability benefits and that insurer disgorge all profits obtained from the retention of the plaintiff's benefits
 - Sixth Circuit reversed on issue of surcharge, holding equitable relief is unavailable when the plaintiff can be made whole by enforcing the terms of the plan

Scope of Relief for ERISA Plaintiffs

- *Montanile v. Board of Trustees of National Elevator Industry Health Benefit Plan* (Supreme Court)
 - Plan Trustees could not recover third party settlement proceeds when those proceeds had been dissipated into untraceable items
 - Subrogation rights gave the Plan an equitable lien, and the Plan an equitable remedy
 - Under equity, the specific proceeds must be traceable
- Takeaways for Retirement Plans – While the case concerned settlement proceeds, the reasoning may be just as applicable to recovery of overpayments if the plan does not by its terms provide for repayment

Stock Drop Litigation

- *Fifth Third Bancorp v. Dudenhoeffer* (Supreme Court)
 - Prior to *Dudenhoeffer*, most courts adopted a presumption of prudence for ESOP fiduciaries on holding employer stock
 - Supreme Court held no special presumption – ESOP fiduciaries held to the same standards as other ERISA fiduciaries with the exception of diversification
 - ESOP fiduciaries may no longer rely on plan language requiring investment primarily in employer securities

Stock Drop Litigation

□ *Amgen v. Harris*

- Plaintiffs alleged Amgen fiduciaries should have known about certain product safety issues and illegal off-label marketing that caused Amgen stock to fall, and acted imprudently by continuing to invest in Amgen stock.
- Ninth Circuit held that without a presumption of prudence, Plaintiff allegation sufficient to survive motion to dismiss
- Supreme Court reversed and remanded because the Ninth Circuit failed to assess whether the complaint plausibly alleged that a prudent fiduciary would not have concluded that the alternative action of removing employer stock from investment options would not have done more harm than good
- Supreme Court reinforced alternative action cannot violate insider trading and securities laws

Stock Drop Litigation

- Cases applying *Amgen v. Harris*
 - *Hill v. Hill Bros. Construction Co.* (N.D. Miss. September 2015)
 - *Rinehart v. Lehman Bros. Holdings Inc.* (2nd Cir. 2016)
 - *Saumer v. Cliffs Natural Res. Inc.* (N.D. Ohio 2016)

Steps to Mitigate Litigation Risks

- Amend employee benefit plans to:
 - Add a provision in the plan to limit the period of time within which a lawsuit may be filed against the plan. The time period must be reasonable
 - Add a forum selection provision in the plan to limit where the plan may be sued
 - Reserve to the employer discretionary authority to interpret the plan, find facts relating to the plan and to apply its interpretation to the facts
 - Add provisions to permit the plan to recover benefits mistakenly paid to participants

Steps to Mitigate Litigation Risks

- Make certain that the lines of authority are clearly drawn in plan documents
 - Who has authority to select funds offered as investments under the plan?
 - Who has authority to make decisions regarding the administration of the plan?
- Make certain that fiduciaries under the plan receive education and training regarding their fiduciary duties under ERISA

Steps to Mitigate Litigation Risks

- Make certain that investments offered under the plan are reviewed periodically and benchmarked against the performance and costs of similar investment funds
 - It is good to obtain the advice of an independent investment professional
- Do an RFP periodically with respect to the vendors/service providers to the plan



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Questions?

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