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Retirement Plan Fiduciaries Take Heed: Complying with DOL Regulations Was Not Enough to Avoid a $35 Million Judgment

By Daniel Wille

Recent years have brought many challenges by 401(k) plan participants contesting either the reasonableness of fees charged to them for various administrative and investment-related services or the adequacy of the disclosure of such fees. These challenges have largely been unsuccessful. Recently, however, a Missouri federal district court, in *Tussey v. ABB Inc.*, 2012 U.S. Dist. LEXIS 45240 (W.D. Mo. Mar. 31, 2012), reversed this trend and issued an expensive reminder to plan fiduciaries that plan participants may have viable claims in this area. Significantly, the plan fiduciaries in the case were following Department of Labor guidelines; however, the court found that since fiduciaries must administer plans solely in the interest of plan participants and beneficiaries, compliance with government regulations was not sufficient.

In *Tussey*, the court ruled that the corporate fiduciaries of a 401(k) plan violated their fiduciary duties by failing to monitor third-party administrative costs, negotiate plan rebates and prudently select and monitor investment options. The court held the fiduciaries liable for $35 million in damages, concluding that, although the fiduciaries' actions conformed to DOL regulations relating to fee disclosure, their failure to follow their investment policy statement, understand the payments being made under the plan and to investigate the best available investment alternatives resulted in a breach of fiduciary duties. Specifically, after a four-week bench trial, the court ruled that these fiduciaries failed to monitor recordkeeping costs, failed to negotiate rebates for the plan, selected more expensive share classes than warranted for certain investment options, removed one fund without proper deliberation and permitted fees in excess of market rates to subsidize the services provided to other ERISA plans and to the corporation.

The relevancy of the holding from a plan administration and litigation standpoint is that the downfall of the fiduciaries coalesced around an apparent inattention to plan administration and procedure, and a failure to document the process of fiduciary decisionmaking. Either of these failures may make it difficult for a fiduciary to demonstrate prudence or for counsel to defend against allegations to the contrary.

For example, the court found that the fiduciaries did not know the amount of revenue sharing fees the service provider was receiving from year to year under its arrangements with third parties and, therefore, could not have monitored these fees or determined whether they were excessive. Without this information, the court found that the fiduciaries could not have used the size of the plans' assets as leverage to negotiate a better fee arrangement with the service provider or engage in a deliberative process to justify that the fee arrangement it had with the service provider was in the participants' best interests or complied with the plans' Investment Policy Statement ("IPS"). According to the court, the IPS specifically required that revenue sharing be used to offset or reduce the cost of providing administrative services to plan participants. In short, the failure to obtain this fee information cascaded into and fueled the finding of a series of fiduciary breaches.

Another notable aspect of the decision is that, while the revenue sharing fees obtained by the service provider were found to be excessive (1.8 times the amount the court found to be a reasonable rate for the years 2001 through 2007), the excess fees the service provider received from third parties appeared to subsidize other services provided by the service provider to the company's non-qualified plans, health and welfare plans, and even its payroll operations. When a third party consultant opined in 2005 that the revenue sharing fees the service provider received were high compared to the market, and after the service provider informed the company that it had "absorbed" the cost of the non-401(k) plan services it was providing to the company, the fiduciaries of the plans took no action. That is, the excess fees the service provider received from the 401(k) plan services it provided were subsidizing the low fees it charged for non-401(k) plan services. The court inferred from this an improper motive on the part of the fiduciaries that they did not have the best interests of the 401(k) plans or plan participants in mind.

Finally, the court found that the fiduciaries did not conduct a full and proper investigation before deciding to replace the Vanguard Wellington Fund with the Fidelity Freedom Fund, a lifestyle or target-date fund. Here, the court found that the fiduciaries failed to conduct a full inquiry into the options, failed to engage in a "winnowing process" contemplated by the IPS and were motivated in part by a desire to reduce company fees, rather than fees related to the 401(k) plans.

The Practical Implications of *Tussey*

Tussey serves as a reminder for ERISA plan fiduciaries of the importance of acting at all times in the best interests of plan participants and beneficiaries and following clear documentation, such as investment policy statements, which guide fiduciaries' decisions and the procedures taken to reach them. ERISA plan fiduciaries should always assume that their procedures and decisions will be scrutinized by a court and that their counsel will need to rely on their documents to defend the fiduciaries' actions on behalf of the plan.

ERISA plan fiduciaries should keep in mind the following as they consider their plan documents, procedures and documentation practices:

- **The importance of making an effort as plan fiduciaries to learn as much as possible about the plan's retained service providers – both when selecting a service provider and reviewing their work.** As part of the administration of the plan, it may be prudent to schedule standing discussions on the performance of the service provider, taking into consideration an evaluation of the service providers administrative fees.
- **The potential impact of the new U.S. Department of Labor fee disclosure regulations on 401(k) fee litigation.** In this area, it is not clear whether participants may initiate lawsuits with a basis on the newly disclosed information and claim first-time knowledge of alleged fiduciary breaches similar to those found in Tussey.
- **The fact that ERISA plans are separate and distinct entities from each other and their sponsoring companies.** Fiduciary duties are owed to each plan and fiduciaries cannot permit one plan to be advantaged at the expense of another; nor may fiduciaries permit their companies to leverage their ERISA plans for their own financial advantage. To illustrate this point: The fact that the participants in a 401(k) plan are largely the same participants as are in the medical plan does not justify larger fees in the 401(k) plan on the basis that the participants may be benefiting from some administrative cost savings under the medical plan.
- **The importance of developing and following documents that guide fiduciary behavior such as investment policy statements and fiduciary committee charters.** The governing plan documents should be reviewed to assure that language provides clear guidance to fiduciaries. If ambiguities exist, documents should be revised to potentially avoid a circumstance that arose in *Tussey* where the court had a different interpretation of the ISP than the fiduciaries.

Daniel Wille is a Shareholder in Littler Mendelson's Pittsburgh office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Wille at dwille@littler.com.