

Labs: Defined Contribution

RECENT CASE STUDIES IN FIDUCIARY FAILURES

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Why Plan Sponsors Are Being Sued and the Importance of Process

Since early 2012, several high-profile 401(k) class-action lawsuits have been either decided by the courts or finalized through a settlement. In this white paper, we'll take a closer look at five of these cases (Tussey v. ABB, Inc.¹; Tibble v. Edison International.²; Beesley v. International Paper³; Abbott et. al. v. Lockheed Martin et. al.⁴; and Spano et al. v. The Boeing Co. et al.⁵) which are important in our view because the lessons learned can help plan sponsors and investment committees make better-informed decisions regarding their company's retirement plan.

Introduction

This recent trend of class-action lawsuits by employees alleging fiduciary breaches by their company creates an excellent opportunity for plan sponsors and their fiduciaries to understand that the law is evolving and their responsibilities under ERISA are not static. Plan fiduciaries need to understand how the federal courts and the Department of Labor (DOL) currently interpret those responsibilities against the practical backdrop of a plan's decision-making process. This article will review the following:

- + Overview of Recent Class-Action Lawsuits
- + What We Learned from These Lawsuits
- + Action Plan for Sponsors

These cases can be instructive not just about the facts of the particular plan but for the broader implications about the necessity of a prudent process. We will begin by taking a look at a brief summary of these five recent cases.



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¹ Tussey v. ABB, Inc U.S. District Court in the Western District of Missouri (March 2012)

² Tibble v. Edison Int'l, No-56406 (9 Cir 2013)

³ Beesley v. International Paper, U.S. District Court for the Southern District of Illinois (October 1, 2013)

⁴ Abbott et. al. v. Lockheed Martin et. al., U.S. District Court for the Southern District of Illinois (February 2015)

⁵ Spano et. al. v. The Boeing Company, et. al., U.S. District Court for the Southern District of Illinois (November 2015)

Overview of Recent Class-Action Lawsuits

① The ABB Case – Tussey v. ABB, Inc.

On March 31, 2012, the U.S. District Court for the Western District of Missouri ordered ABB and its service provider to pay a combined \$36.9 million in damages for breaching their fiduciary duties. The bulk of the damages, \$35.2 million, was assessed against ABB for the following fiduciary violations:

- + Failure to follow the plan's Investment Policy Statement (IPS)
- + Failure to monitor recordkeeping costs and revenue sharing
- + Failure to negotiate rebates for the plans
- + Failure to prudently deliberate prior to removing and replacing investments
- + Selecting expensive share classes when less expensive classes were available
- + Using plan revenue sharing to subsidize other corporate services

In November 2013, the court ordered ABB and its service provider to pay \$13.4 million in legal fees and other costs. On March 19, 2014, the Eighth Circuit Court of Appeals affirmed a \$13.4 million award for excessive recordkeeping fees against ABB but vacated a \$21.8 million award regarding investment selection and mapping and remanded the issues back to the District Court. In addition, the appellate court vacated all attorney fee awards.

On November 11, 2014, the Supreme Court denied petitions to review the case.

On July 9, 2015, the U.S. District Court ruled in favor of ABB and reversed its earlier 2012 decision that awarded the plaintiffs \$21.8 million. In the court's opinion the plaintiffs failed to provide calculations for damages consistent with the mandate the Eighth Circuit Court set out.

② The Edison Case – Tibble v. Edison International

On March 21, 2013, the Ninth Circuit Court affirmed the district court's decision in which participants alleged that 401(k) plan fiduciaries breached their duties of loyalty and prudence. Damages of \$370,000 were awarded. Although the damages were relatively nominal, this case is important because of the court's findings. The case held that the plan sponsor and other fiduciaries had imprudently selected more expensive retail mutual fund share classes for certain funds over less expensive institutional share classes of the same funds. This was the only issue to be decided by the Federal Court of Appeals.

The U.S. Supreme Court announced on October 2, 2014, that it would consider whether claims fall within a six-year statute of limitations. At issue were the funds the district court did not consider for damages because the six-year statute of limitations had elapsed. The plaintiff's position was because sponsors have a fiduciary duty to regularly monitor plan investments, that statute of limitations regarding the funds in question had not elapsed. On May 18, 2015, the Supreme Court ruled unanimously that Edison had a "continuing duty" to monitor and remove imprudent investments from its 401(k). In April 2016, the 9th U.S. Circuit Court of Appeals dismissed the suit saying that while the Supreme Court ruled that federal law imposes an ongoing duty to monitor investments on fiduciaries like Edison, the workers failed to raise that argument in lower courts.

③ The Lockheed Martin Case – Abbott et al. v. Lockheed Martin et al.

On February 20, 2015, the parties filed papers indicating they had settled their lawsuit and were seeking approval of the District Court. In total, Lockheed agreed to pay \$62 million and submit to extensive affirmative relief.

In addition to the monetary settlement, Lockheed Martin agreed to the following affirmative changes to the plan:

- + The company will file with the court annual Department of Labor filings which disclose plan fees in addition to information about the assets held in, and performance of, Lockheed's "stable value" fund and company stock funds
- + Confirm limitations on the amount of cash held in the Stable Value Fund and Company Stock Funds
- + Competitively bid the plan's recordkeeping services
- + Offer participants the lowest cost share class available
- + Engage an independent fiduciary to review the terms of the settlement

④ The International Paper Case – Beesley v. International Paper

On October 1, 2013, the parties filed papers indicating they had settled their lawsuit and were seeking approval of the District Court. Approval was granted on January 30, 2014. In total, International Paper agreed to pay \$30 million and complete the following affirmative actions over the next four years to rectify the alleged problems:

- + No longer offer retail share classes of mutual funds
- + No longer allow the plans' record keeper to be paid through asset-based fees
- + Competitively bid the plans' recordkeeping services
- + Rebate any discounts from plan investments back to the plan
- + Provide the plans with revenue earned from securities lending
- + Include a passive large-cap fund
- + Will not profit or derive subsidies from the plans
- + No longer prohibit employees from transferring assets out of International Paper Stock Fund

⑤ The Boeing Company Case – Spano et al. v. The Boeing Company et al.

Spano v. Boeing was originally filed in September 2006. After nine years, on November 5, 2015, the parties filed papers for a court approval of a settlement. In the settlement, Boeing agreed to pay \$57 million which included \$19 million in legal fees. The original allegations in the case were:

- + Failure to monitor recordkeeping costs and revenue sharing
- + Inclusion of imprudent investments, specifically the inclusion of four mutual funds, when superior institutional investment products were available; those same four mutual funds charged excessive fees
- + Inclusion of a technology fund in the plan that was undiversified and was imprudent for a retirement plan
- + Inclusion of a small-cap fund that failed standards of prudence as it provided additional revenue sharing fees to the record keeper
- + The company's stock fund imprudently held high levels of low-yielding cash, which allowed the record keeper to place cash in its own funds and receive multiple layers of fees

As a result of the proposed settlement, Boeing agreed to hire an independent fiduciary to approve the settlement. They also would obtain an opinion and recommendation from an independent investment consultant on whether and how to provide participants access to a technology sector strategy as a core option, and will have a fiduciary monitor the cash levels in the company's stock fund.

Common Themes

Participant Allegations	ABB	Edison	Lockheed Martin	International Paper	Boeing
Excessive Fees	√		√	√	√
Use of Expensive Share Classes	√	√		√	√
Failure to Follow the IPS	√				
Imprudent Investment Allegations			√	√	√
Using Plan Assets to Benefit the Company	√			√	
Prohibiting Transfers Out of Company Stock				√	
Participant Salary Deferral Allegations	√			√	

Important Lessons from These Five Cases

As we consider the holdings in these cases, what are the lessons that plan sponsors and other fiduciaries should take away from these five recent decisions by the federal courts?

Excessive Recordkeeping Costs

The costs of providing plan services may be paid outside of the plan directly by the plan sponsor. In the alternative, the administrative expenses can be paid inside the plan by participants through a direct allocation across all accounts and/or indirectly through a practice known as “revenue sharing.” Generally, “revenue sharing” means the record keeper’s fees will be paid through an internal allocation of a portion of the investment option’s internal operating expenses. Mutual funds with higher expense ratios generally provide higher revenue sharing to cover the cost of a service provider’s administrative fees.

In both the ABB and Edison cases, the court held that plan sponsors’ decisions to implement a revenue sharing model did not breach their fiduciary responsibilities. In the ABB case, the court acknowledged that revenue sharing arrangements were common industry practice and that the work done by record keepers reduces the accounting work that normally would have to be done by investment managers. This sub-transfer agent accounting function is seen as part of the quid pro quo that allows the investment firm to share a portion of its internal fees.

While revenue sharing is a legitimate practice used to pay recordkeeping fees, plan sponsors must still ensure that their fees are reasonable in accordance with ERISA’s exclusive benefit rule. Under ERISA, fiduciaries must act solely in the interest of the participants and beneficiaries for the exclusive purpose of (1) providing benefits to participants and their beneficiaries, and (2) defraying the reasonable expenses of administering the plan. ERISA requires a close oversight of fees, plan expenses and revenue sharing arrangements. Plan fiduciaries must have procedures for obtaining and identifying the cost of plan services. They must have a process for ensuring that fees are reasonable under ERISA in light of the services provided.

In the ABB case, the court ruled that the company did not understand the amounts of revenue sharing being paid, never benchmarked their plan’s fees, never attempted to negotiate lower fees, and allowed fees that were excessive relative to what similar size plans were paying. After a class-action lawsuit was filed against International Paper, the court observed that the company negotiated lower recordkeeping fees of \$52 per participant, substantially less than the previous \$112 per participant. As part of the Lockheed Martin settlement, the company must seek bids from at least three third-party record keepers for the plan. Those submitting bids must be serving plans with more than \$5 billion in assets.

Most recently, as part of the Boeing case settlement, the company sought competitive bids which helped decrease recordkeeping costs. The company also plans to allocate a portion of the \$57 million in damages to recordkeeping excesses.

Using “Retail” or Expensive Share Classes

Investment companies typically offer several share class options, with varying levels of internal operating expenses, for a single investment option. The availability of multiple-share classes facilitates a revenue-sharing arrangement. Plan sponsors can actually select a share class that provides sufficient revenue to offset all or some recordkeeping costs. Too little revenue sharing means that the shortfall must be made up either by the sponsor, the plan participants or some combination of the two. Too much revenue sharing may result in a surplus that may be credited back to participants or used in an ERISA budget account to pay other plan expenses (audits, employee education, consultant fees, etc.). Choosing one share class over another can dramatically affect the amount of fees that can be shared to cover plan administrative costs.

While there is no requirement that sponsors always choose the least expensive share class, they must have a deliberation process that includes balancing their prudent selection criteria with an attempt to minimize uncovered plan expenses. In the case of *Tussey v. ABB, Inc.*, ABB’s IPS clearly stated, “When a selected mutual fund offers a choice of share classes, ABB will select the share class that provides plan participants with the lowest cost of participation.” The court found that ABB directly violated its IPS by using a more expensive share class.

In the Edison case, the court determined Edison breached its fiduciary duty because the selection process did not properly investigate lower-fee institutional share classes. The court did not rule that retail funds were imprudent, recognizing only that institutional share classes were less expensive. It is also true that in both the International Paper and Lockheed Martin settlement documents, the companies agreed that they will no longer use retail share classes, and instead, use institutional share classes or separate accounts.

When using a revenue-sharing arrangement, care must be taken to ensure that excessive recordkeeping fees are not paid simply because plan assets increase due to growing participation or appreciating markets. In the International Paper settlement, the company agreed not to pay its record keeper on a percentage of plan assets.

Level hard dollar participant fees and the elimination of retail shares seems to be a trend upmarket - these five cases all involve billion-dollar-plus plans. It may also be true that this developing trend is coming down market. For example, in the under \$100 million market, plan sponsors might see service providers charging asset-based fees with a hard dollar cap or with some guarantee period in which fees will not escalate.

Failure to Follow the Plan's Investment Policy Statement

Plan sponsors who use an IPS to assist with the removal of investment options must be sure to follow its provisions. Many lawyers would say that failing to follow an IPS may be far worse than not having one. The process for removing a fund in ABB's IPS involved examining the five-year performance, putting underperforming funds on a watch list, and removing them within a six-month period. The ABB investment committee removed the Vanguard Wellington Fund due to "deteriorating performance." According to the court's ruling, the committee did not consider the fund's five-year performance or put the fund on the watch list required by the IPS. The approximately \$254 million in assets were "mapped" into a new lifestyle fund.

Plan sponsors who use an IPS to assist with the selection of investment options must also be sure to follow its provisions. ABB's IPS also stated that for the selection of a new fund, there must be a "winnowing" process. When the investment committee decided to add a lifestyle fund (target-date fund), they considered three managers including their record keeper's proprietary offering. This option was chosen and the court observed, as a matter of interest, that it subsequently underperformed its predecessor – the Vanguard Wellington Fund.

The court found that ABB did not employ a "winnowing process." Indeed, it could not do so as it only considered three funds, one of which was automatically rejected without any discussion of the merits of the option, e.g., rate of return, management expertise, etc., because it employed a "static" approach. Choosing a fund option between the remaining two funds does not employ a "winnowing process." The court found the committee's research was "scant" and "minimal," and the committee's decision was motivated, at least in part, by the recordkeeping pricing ramifications of their decision.

The March 19, 2014, Eighth Circuit Court of Appeals decision meant that the District Court would have to review the case again to determine if there was failure to prudently deliberate prior to removing and replacing investment options. In addition, the appellate court found that the lower court should have used an abuse of discretion standard to review the imprudent selection breach claim and was too influenced by hindsight

facts, such as the eventual performance of the Wellington funds as compared to the performance of the record keeper's funds. The issue was remanded to the District Court with instructions to reevaluate its method of calculating damages, if any, as the original \$21.8 million was "speculative" and "exceeded losses suffered by participants." The District Court eventually ruled in favor of ABB because the participants "failed to prove damages consistent with the method of damage calculation" as recommended by the Eighth U.S. Circuit Court of Appeals, St. Louis. It should be noted that although ABB prevailed on this aspect of the lawsuit, the decision reads, "The court finds that there are too many coincidences to make the beneficial outcome for ABB serendipitous, particularly considering the powerful draw of self-interest when transactions are occurring out of sight and are unlikely to ever be discovered."

Imprudent Investment Allegations

Under ERISA, decisions regarding plan investments must be made prudently and solely in the interests of participants. In the Lockheed case, participants alleged that "the Stable Value Fund was imprudent because it should have had no more than 5% of its assets invested in money market funds instead of the 50% to 99% that was actually invested. The fund's returns were so poor that it did not beat inflation by a sufficient margin to provide a meaningful retirement asset." Further, the plaintiffs contend that "although the fund was low-risk and did not lose its value, mere preservation of principal was not the fund's sole objective." The plaintiffs made a similar allegation regarding Lockheed Martin's company stock fund. According to the complaint, the fund held an imprudently large investment in cash-equivalent instruments instead of being invested entirely in company stock.

In the Boeing case, a Science and Technology fund was made part of the plan. The fund incurred "excessive fees and investment losses." It was also argued that the inclusion of such a fund in the plan violated fiduciary standards. Based on the settlement, Boeing will now use an independent investment consultant to review if and how such a fund would be included in the plan.

There are no guidelines, only debate, on whether plans should use active or passive managers, but hired active managers must add value. According to the participant allegations, in 2002, International Paper replaced their S&P 500® Index fund with an actively managed fund-of-funds structure. Participants claimed that not only were the fees higher, but the fund failed to outperform its most appropriate benchmark—the Russell 1000 Index®. In the settlement, the company agreed to add a passively managed large-cap equity option to the plan's core lineup.

Using Plan Assets to Benefit the Company

Under ERISA, plan assets must be used for the exclusive and sole purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses. Yet, in the ABB case, the court held that the company ignored a report by its consultant concluding that ABB was substantially overpaying for its 401(k) recordkeeping services and receiving defined benefit, non-qualified and health and welfare services at below market rates. In the International Paper case, participant allegations observed that the company's 401(k) plan and the pension plan engaged in a security lending program. All interest was credited to just the pension plan until 2008.

Each case illustrates an example of how assets in one plan were used to benefit other plans or the company itself. These conflicts of interest violate ERISA's duty of loyalty and the exclusive benefit rule. It is also true that many times service providers are asked by plan sponsors to take into account the extent of the corporate relationship when considering the pricing of services. Plan sponsors must recognize that this is not an ordinary business environment. The ERISA rules clearly state that fiduciaries must act solely in the interests of participants. While the courts may tolerate incidental benefits to the plan sponsor, ERISA will not allow plan assets to be used to benefit anyone other than the plan participants and their beneficiaries and to cover reasonable plan expenses.

Prohibiting Transfers Out of Company Stock

After the series of "Stock Drop" cases, many companies revised and liberalized the employer stock provisions in their 401(k) plans to allow more lenient conditions for transfers and diversification.

Nonetheless, the allegations against International Paper included a restrictive employer stock plan provision that required all matching contributions and employee contributions that were matched to be invested in the International Paper stock fund. Diversification out of company stock was not allowed until age 55, and then only at a rate of 20% per year. The International Paper settlement included affirmative relief that would allow all employees to transfer their investments out of the International Paper stock fund.

Participant Salary Deferral Allegations

Under DOL guidance, 401(k) salary deferrals must be deposited into the retirement trust as soon as administratively feasible, but no later than the 15th business day of the month following the month in which the participant's contributions were withheld from their pay. In the ABB case, the court found that the service provider inappropriately used float income earned on salary deferrals awaiting deposit to pay fees on these depository accounts. On March 19, 2014, the appellate court reversed the lower court's ruling and ruled instead in favor of the service provider.

In the International Paper case, the suit alleged that the company delayed making deposits and kept the accrued interest for its own benefit. Without admitting any wrongdoing in the settlement agreement, International Paper agreed in the future that it would not profit in any way from the operation of the plan.

Action Plan For Sponsors

Fees

The law states that plan sponsors are not required to pay the lowest fees possible, but rather, pay reasonable fees for the services rendered. Plan sponsors need to understand, and document, how much is being paid, the parties being paid and the services being provided. Benchmarking can be a very helpful exercise in determining how a company's plan compares to similar size plans or similar companies within the same industry. Industry experts even suggest that companies should engage in a formal RFP process every three to five years.

If it is determined that plan fees are high relative to the benchmark comparison or bids in a RFP, the plan sponsor should ask their existing service providers to explain their pricing. In some cases, plan sponsors may be able to negotiate lower fees and/or additional services.

Revenue Sharing

As we said earlier, revenue sharing has become a common and acceptable practice. Nevertheless, plan sponsors must understand and rationalize their approach to these arrangements. One clear issue is whether it is "fair" for participants who select funds that pay revenue sharing (*typically actively managed funds*) to subsidize the recordkeeping costs for other participants who choose funds that pay little or no revenue sharing (*typically passively managed, money market and company stock funds*). Some plan sponsors have gone so far as to credit back all revenue sharing to the participants who paid them. Alternatively, some plans are now using investments that pay no revenue sharing. In either case, plan sponsors would then allocate the same level recordkeeping service fee across all participant accounts as a flat-dollar charge.

The Importance of the Investment Policy Statement

The IPS is intended to serve as a "blueprint" to assist fiduciaries and their advisors in the ongoing management of the plan. The IPS defines the roles and responsibilities of fiduciaries, outlines specific guidelines and restrictions, outlines the basis for the plan's menu, and provides for the periodic review of the investments and policies. The IPS defines the criteria for the evaluation, selection, ongoing monitoring, removal and replacement of funds.

Although not specifically required under ERISA, some courts, including the court in the ABB case, have found that an IPS is the central guiding instrument and the foundation for a prudent fiduciary process. In the event of a DOL audit, the IPS is at the very top of the list for requested plan documents. Some courts have gone as far as to question how fiduciaries can claim prudent plan management without an IPS. As we saw in the ABB case, having an IPS and then not following it is a clear indication that the fiduciaries are violating ERISA's prudent expert standard of care.

Some ERISA practitioners have suggested that the IPS might contain a provision allowing plan fiduciaries to take appropriate action even though it conflicts with the IPS. Another more formal approach would be to amend the IPS to allow the intended action. As we saw earlier, ABB fiduciaries were found liable for failing to follow the IPS in several instances when making decisions.

Fiduciary Training

There is no regulation that requires formalized fiduciary training and education, but according to the Plan Sponsor Council of America, several recent DOL audits included requests for plan sponsors to provide documentation of training within the last year. Annual fiduciary training is a good way to ensure that fiduciaries are playing by the rules.

A simple formula for such a meeting might consist of an agenda that includes what the law says, what the courts say, a review of the IPS, and a discussion of what is a prudent process. Fiduciaries should walk away with a sense of confidence that the house is in order and that they have the competence to operate prudently.

Working with an Advisor or Consultant

These cases underscore the importance of working with a plan advisor or consultant who specializes in this area. Furthermore, plan sponsors should carefully consider the information provided by their consultant. In the ABB case, the company turned a “blind eye” to its consultant’s conclusion that it appeared the defined contribution plan expenses were “subsidizing” other corporate benefit expenses. In the Edison case, the court ruled that “fiduciaries should make an honest, objective effort to grapple with the advice given, and if need be, question the methods and assumptions that do not make sense.”

Company Stock

The Pension Protection Act of 2006 contained a provision requiring immediate diversification rights for employees upon completion of three years of service for matching and other employer contributions. Companies may elect to institute a more liberal diversification policy. On June 25, 2014, in *Fifth Third Bancorp et al. v. Dudenhoeffer et al.*, the U.S. Supreme Court unanimously overturned the presumption of prudence defense that has been applied to “stock drop” cases brought under ERISA for nearly two decades. The court also provided guidelines for lower courts to assess whether such stock drop complaints were sufficient to merit a trial. Specific guidelines included plan fiduciaries’ responsibilities related to public information about stocks, insider information, securities laws, and plausible alternative actions in the face of a falling stock price. Sponsors who offer company stock as an investment option will want to carefully monitor cases brought in the lower courts and discuss the implications with legal counsel. The cases have clearly portrayed the downside risks of concentrated company stock investments. As a result, many plans have substantially liberalized diversification provisions and removed other restrictions on company stock investment options in 401(k) plans.

Target-Date Funds

According to the 2015 PLANSPONSOR/Janus survey of approximately 5,100 sponsors, more than 56% of respondents report that a target-date fund (TDF) is the best Qualified Default Investment Alternative (QDIA) for their employees. These plan sponsors should review the Department of Labor’s “Tips for Plan Fiduciaries” regarding the selection and monitoring of target-date funds that was issued in February 2013.

The DOL’s TDF guidance was meant to help plan sponsors through the selection process by asking specific questions such as, “How was the TDF investment selection made?”

Many plan sponsors will likely find the TDF selection decision was really just part of the platform provider bundled solution. Unfortunately, that is not a good answer under ERISA and it is not a good answer for the DOL. This is exactly why the DOL recommends in their guidance that plan sponsors also consider non-proprietary target-date fund choices.

Ultimately, the plan will decide to either keep the current TDF investment option or perhaps replace it with a different, more prudent TDF based on a new analysis. In either case, the plan sponsor needs to conduct a prudent decision-making process and in the end construct proper documentation for the TDF selection methodology.

Conclusion

Plan sponsors and their fiduciaries need to understand that the law is always changing and that the federal courts’ interpretation of their duties and responsibilities under ERISA is not a fixed view. For instance, in two of the cases discussed above, fiduciaries are cautioned to seriously consider the data and counsel provided by plan advisors. This white paper is a good review for plan sponsors and their fiduciaries of how the federal courts and the DOL currently interpret those responsibilities against the practical backdrop of a plan’s decision-making process.

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