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The Recent Wave of ERISA Litigation Is Turning into a Tsunami

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In the last six months, the number of ERISA fiduciary breach lawsuits has increased to levels not seen since the fall of 2006. The genesis of this new wave of cases is not clear. However, speculation leads us to the recent success of plaintiff participants in a number of high-profile decisions and settlements. First and foremost, *Tibble v. Edison International* was successfully appealed to the United States Supreme Court, which rejected the severely limiting statute of limitation decisions from the lower courts. The Supreme Court also found an explicit requirement for ERISA plan fiduciaries to regularly monitor plan investments. Other high profile settlements, including $32 million against Novant Health, $57 million against the Boeing Company, $62 million against Lockheed Martin, and $140 million against Nationwide, have resulted in what feels like a long string of victories for plaintiff participants.

The recent cases tend to fall into three categories. First, large plan sponsors continue to be the target of lawsuits over allegedly excessive fees and imprudent investment decisions. Second, financial services companies, acting as plan sponsors, are being targeted for the use of their own products in their plans. Third, insurance companies are facing claims involving general account backed stable value products.

Plan Sponsor Cases

Troudt v. Oracle Corp. A lawsuit was filed in the District of Colorado federal court against Oracle Corp., a Fortune 100 company based in Redwood City, California. The complaint alleges that the plan's fiduciaries allowed excessive recordkeeping fees to be paid to Fidelity. Oracle allegedly allowed Fidelity to be paid between $68 to $140 per participant, rather than what they claimed was a reasonable per head fee of $25. The plan's participant count increased from 38,000 in 2009 to about 60,000 today. Over that same time period, the plan's assets increased from $3.60 billion to over $11 billion. The complaint also alleges that certain funds underperformed and should not have been selected, including the Artisan Small Cap Value Fund, the PIMCO Inflation Response Multi-Asset Fund, and the TCM Small-Mid Cap Growth Fund.

Bell v. Anthem. Another lawsuit was filed against Anthem Inc. in the Southern District of Indiana federal court, later amended to name Anthem's holding company ATH Holding Company, LLC. The allegations in *Bell v. Anthem* have without question ruffled the feathers of plan sponsors and fiduciaries of large 401(k) plans. This is the first time, to my knowledge, that a plan sponsor has been sued on this scale; Vanguard was the recordkeeper and their funds made up the lion's share of the core options available. The primary allegation in the complaint is that Vanguard was paid excessive recordkeeping fees even though Vanguard index funds were used in the plan. The complaint states

that until 2013, the plan failed to use the cheapest share classes of the Vanguard funds that should have been available to them as early as the 1990s. The complaint states that this failure caused $18 million in losses to the plan. The complaint also goes on to allege that the Artisan Mid Cap Value Fund and the Touchstone Sands Capital Growth Fund were imprudently included in the plan because they were excessively priced compared to similar Vanguard funds, in addition to more expensive share classes also being used until 2013. Finally, the complaint alleges that the plan should have included a stable value fund instead of a money market fund.

Additional Cases. The above two cases serve as illustrations of the recent wave of cases. A complaint was recently filed against Banner Health, a nonprofit health care provider based in Colorado alleging, like the case against Oracle, that Fidelity was paid excessive recordkeeping expenses. Chevron Corporation is also facing a lawsuit that is similar in substance to the case against Anthem.

Financial Service Providers as Plan Sponsors

Smith v. BB&T. Current and former employees of BB&T Corporation filed a lawsuit in the Middle District of North Carolina federal court alleging self-dealing by BB&T with regard to its own in-house 401(k) plan. The plaintiffs allege that BB&T has benefited at the expense of plan participants by using BB&T's own funds, which also include those managed by its wholly owned subsidiary Sterling Capital Management. BB&T was also the plan's recordkeeper and allegedly was the beneficiary of excessive administrative fees. The complaint also claims that many of the BB&T funds in the plan were poorly performing including the Sterling Capital International Fund. Finally, the complaint attacks the use of a BB&T money market type product rather than a stable value fund as well as the unitized structure of the BB&T company stock fund in the plan, an issue that also has been litigated in previous cases.

Additional Cases. The case against BB&T has a similar feel to previous cases filed against Ameriprise Financial and CIGNA Corporation. Additional similar lawsuits have recently been filed against Putnam Investments, LLC, Great-West Life & Annuity Insurance Company, Deutsche Bank, and Allianz Asset Management of America. All these lawsuits were filed by participants in each company's in-house 401(k) plan. Like the case against BB&T, all the complaints have foundational arguments alleging that the defendants benefited improperly by using their own products in the plans. The case against Putnam has already survived a motion to dismiss and discovery should be commencing shortly. Other cases with slightly different issues also have been filed against Reliance Trust and DST Systems, Inc.

General Account Cases

Lau v. Met-Life. In *Lau v. Metropolitan Life Insurance Company*, filed in the Southern District of New York, plaintiffs seek to represent a class of all similarly situated clients of

Met-Life. The complaint alleges that the stable value funds put into class members' plans and backed by Met-Life's general account, are not entitled to the protection of being a guaranteed benefit policy as defined by ERISA. Funds that are considered guaranteed benefit policies are not considered ERISA plan assets. However, when a fund loses that status, then those who manage the fund are considered fiduciaries to the extent they control the assets. The plaintiffs allege that Met-Life breached its fiduciary duties in the control they had over the crediting rates of the stable value products. Essentially, they claim that Met-Life controlled its own compensation at the expense of its clients.

Claims similar to those against Met-Life have been filed against New York Life and Prudential. Other cases involving stable value funds and alleged mismanagement have been filed against Fidelity and MassMutual.

Conclusion

With over 15 new suits and counting, practitioners will need to pay careful attention to the decisions that eventually will come from these cases. They may have as much of an impact on our industry as the recent final publication of the Department of Labor conflict of interest rule.

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