Jury Slaps Pentegra with $39 Million in Damages in MEP Excessive Fee Suit

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By:
Nevin E. Adams, JD
Author
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The allegations here (*Khan v. Bd. of Directors of Pentegra Defined Contribution Plan, S.D.N.Y., No. 7:20-cv-07561, complaint 9/15/20*) are similar to those in other excessive fee suits; that rather than "using the Plan's bargaining power to benefit participants and beneficiaries, Defendants acted to enrich themselves, including Pentegra, by allowing exorbitantly unreasonable expenses to be charged to participants for administration of the Plan."

The suit also alleged that the defendants "profit from collecting additional fees directly from employers who participate in the Plan–putatively to pay for "outsourced" fiduciary responsibility–but act directly contrary to that assumed fiduciary responsibility by draining the retirement assets of Plan participants to enrich themselves."

MEP Marketing

While that's a common refrain in excessive fee suits, the MEP structure did come in for some particular scrutiny. For example, the suit invoked claims drawn from Pentegra marketing materials where they say that "Pentegra's claims that its status as a plan administrator under 29 U.S.C. § 1002(16) (ERISA §3(16)) shifts fiduciary responsibility away from Participating Employers. Pentegra has, however, publicly acknowledged that 3(16) fiduciary services may be of no additional value to retirement plans[ii]."

All in all, the plaintiffs had claimed that, "had Defendants performed their fiduciary duties, the Plan would not have suffered over $70 million in losses from September 2014 through September 2020." Moreover, and "pleading in the alternative," the suit claims that if the defendants HAD performed their fiduciary duties, the Plan would not have suffered over $60 million in damages–at least that's what they determined by taking the aforementioned "reasonable fee per participant ($65) in the applicable year by the number of participants, subtracting the reasonable fees from the disclosed direct compensation to Pentegra for "contract administration" in the Plan's Form 5500 from September 2014 until 2018." Oh, and then bring those amounts forward yearly by the return of an S&P 500 index fund to account for lost investment opportunity.

Questions Considered

Jury trials in ERISA cases are rare. Bloomberg Law notes that that is because many courts have ruled that ERISA lawsuits seek equitable remedies that must be tried by a judge, rather than legal remedies – like money damages – that can be submitted to a jury. Readers will likely remember an unusual outcome from a case involving Yale University (where the plaintiffs were also represented by Schlichter Bogard, which routinely requests a jury trial).

The jury in this case (*Khan v. Bd. of Dirs. of Pentegra Defined Contribution Plan, S.D.N.Y., No. 7:20-cv-07561, jury verdict 4/23/25*) was asked to consider six questions (according to the proposed Jury Verdict Form submitted by the plaintiffs), specifically:

1. *Have the plaintiffs proved by a preponderance of the evidence that the Board of Directors of the Pentegra Defined Contribution Plan and its members – Sandra L. McGoldrick, Lisa A. Schlehuber, Michael N. Lussier, William E. Hawkins, Jr., Brad Elliott, and George W. Hermann – breached their fiduciary duty by causing the Plan to pay unreasonable fees to Pentegra Services, Inc. ("PSI")?*
2. *Have the plaintiffs proved by a preponderance of the evidence that John E. Pinto breached his fiduciary duty by causing the Plan to pay unreasonable fees to PSI?*
3. *Have the plaintiffs proved by a preponderance of the evidence that PSI breached its fiduciary duty by causing the Plan to pay unreasonable fees to PSI?*
4. *Have the plaintiffs proved by a preponderance of the evidence that John E. Pinto was a fiduciary to the Plan AND: (a) knowingly participated in an act or omission of the Board, knowing such act or omission was a breach; OR (b) had knowledge of a breach by the Board and did not make reasonable efforts under the circumstances to remedy the breach?*
5. *Have the plaintiffs proved by a preponderance of the evidence that PSI was a fiduciary to the Plan AND: (a) knowingly participated in an act or omission of the Board, knowing such act or omission was a breach; OR (b) had knowledge of a breach by the Board and did not make reasonable efforts under the circumstances to remedy the breach?*

And then – if the answer to any of the above was Yes – the amount of damages. Which – as the jury unanimously responded "yes" to ALL of the above, was ...$38,760,232.

Next Steps

To put that in some context, the plaintiffs had been seeking damages ranging from $33 million to $115 million on this claim. The judge may, of course, modify this.

Additionally, there was a second count/claim; that the defendants committed prohibited transactions by causing the Plan to retain PSI and pay Plan assets to PSI. The plaintiffs are seeking to recover up to $157 million on this claim, as well as "affirmative equitable relief related to the future management and operation of the Plan."

The parties' presentation to the jury on the first count ended April 22, and then the Court heard the prohibited transaction claim in a bench trial format, meaning no jury is present, and the judge makes all related decisions.

Wagner Law Group's Tom Clark notes that given the Court set a filing date for additional parties of May 2, it would not be expected that the Court will immediately issue an opinion on the second count – but instead will need the time to write a full trial order and opinion. Stay tuned.

- Nevin E. Adams, JD

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[i] Schlichter Bogard and Capozzi Adler PC had both vied for the opportunity to be lead counsel in this action. But in February 2021 Judge Philip M. Halpern of the U.S. District Court for the Southern District of New York noted that, "considering the totality of the circumstances, the Court concludes that the Schlichter Firm is the more appropriate choice to serve as interim lead class counsel, in light of the number of attorneys dedicated to 401k excessive fee litigation who are committed to work on this matter, and the fact that the Schlichter Firm handled the precatory work in connection with the anticipated motion to dismiss by Defendants."

[ii] If this kind of statement strikes you as odd coming from Pentegra, which has long championed these services, there's a reason. It appears to be drawn from an old Pentegra whitepaper which, after extolling the advantages and benefits of a 3(16) outsourcing arrangement, rhetorically posits the question "Or…perhaps it's all just smoke and mirrors. Perhaps 3(16) is a hoax and any competent TPA already does this stuff. If this is your view, the strategy proposed in the article is not for you." Apparently the Schlichter firm failed to recognize the sarcasm (or simply chose to ignore the context).

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