

Jury's Decision in Pentegra MEP Case Raises Questions About Service Provider Selection

The verdict and monetary award serve as a warning for other situations in which plan sponsors and service providers may share ownership or leadership.

Reported by [REMY SAMUELS](#)

Following a jury's [decision](#) to award more than \$38 million to a class of more than 26,000 plan participants of Pentegra's multiple employer plan, the issue of working with providers affiliated with the plan sponsor is sure to be a hot topic.

In *Khan et al v. Board of Directors of Pentegra Defined Contribution Plan et al.*, originally filed in September 2020, the jury found that fiduciaries of the MEP, which has more than \$2 billion in assets, breached their fiduciary duties by paying unreasonable recordkeeping and administrative fees.

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The lawsuit has a complex procedural history, but the core of the plaintiffs' complaint remained allegations that in retaining Pentegra Services Inc. as a service provider, the defendants failed to ensure that the fees paid by the plan were reasonable for the services received. The defendants' attempt to dismiss the lawsuit was denied by U.S. District Judge Philip M. Halpern in March 2022.

Halpern, presiding in the U.S. District Court for the Southern District of New York, wrote in his pre-trial order that the case would be tried in two parts.

The first part, decided this week, addressed Count I—which alleged Pentegra breached its duties by causing the plan to pay unreasonable fees—and was tried by jury. The second part will address Count II—which accuses Pentegra of committing prohibited transactions by causing the plan to retain PSI and pay plan assets to PSI—and will be adjudicated in a bench trial.

Troy Doles, one of the attorneys from Schlichter Bogard LLC who represented the plaintiffs, says the relatively rare instance of a jury trial in a complaint based on the Employee Retirement Income Security Act was appropriate for the type of relief requested.

"We believe the court correctly concluded that since the primary relief was seeking losses on behalf of all participants, the legal remedy of damages called for a jury determination," Doles says.

Andrew Oringer, a partner in Wagner Law Group, which is not involved with the case, says an employer using its own affiliated company as a service provider is a kind of closeness not typically seen in plans governed by the ERISA.

"It's a little bit more novel and unusual here because you're talking about [a] multiple employer plan where it's not even 100% clear who is acting as fiduciary and who isn't," Oringer says. "But that said, what you'll find in most situations involving the retention of service providers ... [is] people advising on ERISA plans advise in favor of steering clear of any possible interlocks and any possible relationships."

The plaintiffs accused Pentegra of profiting from collecting additional fees directly from employers who participated in the MEP.

According to a summary of the case, Pentegra President and CEO John Pinto was a non-voting board member of the plan and was also the president of PSI. Pinto, as well as the other board members, were named in the lawsuit and found by the jury to have breached their fiduciary duties.

When the plan sponsor has a relationship with the service provider, Oringer says plaintiffs' lawyers are more likely to pursue a case.

For plan sponsors, Oringer says the court ruling is a warning sign about the use of providers with even a slight affiliation.

"Where there are situations where it does make sense to use a provider that has some kind of an interlock, ... I think it's a warning sign to absolutely ramp up the procedures that are used to select and monitor [a service provider]," Oringer says.

On the plaintiffs' side, Doles says he and his firm are pleased with jury's decision.

"As the court recognized, we are all very thankful for the careful attention they devoted to this very important trial," Doles says. "The case is not over, but [the decision] was a very important step on behalf of the 25,000-plus employees and retirees that participate in the Pentegra Defined Contribution Plan for Financial Institutions."

The plaintiffs are seeking to recover up to \$157 million from Count II, as well as "affirmative equitable relief related to the future management and operation of the plan."

The court set a filing date of May 2 for additional parties related to Count II.

Pentegra is represented by Groom Law Group in the case.

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