



# Raising the Plaintiffs' Bar

Recent lawsuits warrant greater attention on fees

AS Willie Sutton, the prolific bank robber, said, "Go where the money is ... and go there often." The recent crop of excess fee cases include a subset of lawsuits against banks and financial institutions that sponsor 401(k) plans making their own products available on the investment menu of an in-house plan and utilizing subsidiaries to serve as the plan's trustee and recordkeeper. The plaintiffs' overriding theme in these cases is that the plan sponsors are trying to exploit their employees by charging unreasonable fees from which the sponsors benefit. While these cases have some elements unique to the financial services industry, they continue to suggest that plan fiduciaries should be investigating particular products, as well as following new procedures that could potentially become best practices. A few of those practices and products, described in the context of the cases, are noted below.

**Multiple comparators for investment fees.** The complaints in these cases assert that plan services and investments could have been obtained cheaper elsewhere; over the years, such complaints have grown more sophisticated in making this assertion. For example, instead of using fees charged by Vanguard, the provider of low-fee, passively invested mutual funds, as the sole basis for comparison, the new complaints cite five or six arguably comparable funds with fees lower than those of the proprietary funds of the plan sponsor under attack. Recent complaints are rife with grids showing the fees of alternative mutual funds, intended to demonstrate the savings waiting to be had. It is the job of plan fiduciaries to identify these funds and substitute them for more expensive funds on the plan's investment menu.

**Separate accounts over mutual funds.** A further evolution is the claim that large plans should dispense with mutual fund investments altogether, because they are too expensive and are, therefore, imprudent per se. Plan fiduciaries and their advisers should keep a wary eye on the development of this claim, as, if successful, it would require plans to offer investments through a separate account or other pooled investment vehicle, to obtain more control over fees. Interestingly, many of the investments preferred by the plaintiffs' bar are structured as trusts, and, because the underlying assets of trusts are plan assets, the investment manager would be treated as an Employee Retirement Income Security Act (ERISA) fiduciary with respect to that separate account's management. This could open the way for lawsuits against the investment managers.

**Universal limits on recordkeeping fees.** The latest generation of excess fee complaints also allege that plan sponsors engaged in a breach of their fiduciary duties by allowing their plan to overpay for recordkeeping and trustee services.

Where these services are provided by affiliates of the plan sponsor, this fact will constitute the basis for a claim that a prohibited transaction (PT) has occurred, because of the alleged favoritism afforded to the affiliate. At the very least, this will generate burdensome discovery as the plaintiffs search for evidence of biased decisionmaking.

Even where a service provider is an independent third party, however, the plaintiffs' bar is attempting to establish universal limits on the amount payable for specified services. For example, it is argued that there is a set per-participant limit on the amount that should be paid to plan recordkeepers. This head-count limit varies from one complaint to another; \$30 and \$35 per participant have been cited in different cases, although the evidence from which these standards were derived is not well-explained.

Although it has never been established that revenue sharing is a plan asset, this brings up a valid point: Fiduciaries do have a duty to monitor all amounts received by service providers attributable to plan services, irrespective of whether an amount is received directly from the plan or indirectly by means of revenue sharing. Plan fiduciaries are vulnerable to claims of fiduciary breach if they have failed to monitor the revenue sharing received by service providers.

**Triennial requests for proposals (RFPs).** Recent excess fee complaints also seek to impose another new fiduciary standard by asserting that administrative services should always be put out to bid every three years. The only case in which there has been a degree of success on this point is *George v. Kraft Foods Global* nearly five years ago. If successful, the standard sought by the plaintiffs' bar would narrow the discretion traditionally afforded to plan fiduciaries and rule out consultation with peer companies as to service provider costs or use of fee benchmarking services.

Only time will tell if any of the bright-line fiduciary standards being asserted by plaintiffs will be upheld by the courts. During this period of transition, plan fiduciaries should ensure that all decisions relating to investments or service providers are made pursuant to a formal fiduciary process that: 1) gathers all relevant information on the issue at hand, and 2) makes a rational decision on the basis of this information, in the best interest of plan participants.

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