

Tussey v. ABB, Inc.: What's Next?

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Tussey v. ABB, Inc. is a landmark class action lawsuit brought by 401(k) plan participants alleging breaches of fiduciary duty involving excessive recordkeeping fees, failure to properly investigate investment options, and retention of float income by the recordkeeper. In March 2012, the trial court, following a 16-day trial, awarded damages amounting to \$36.9 million in favor of plan participants. The district court's findings were affirmed in part, reversed in part, and vacated and remanded for further proceedings by a three-judge panel of the Court of Appeals for the Eighth Circuit in March 2014. Subsequently, the Eighth Circuit denied petitions by both parties to rehear the case. The plan participants also petitioned the U.S. Supreme Court for review, but, in November 2014, the Supreme Court declined to review the case. Given that the Supreme Court has decided not to review the case, the issues to be resolved by the district court are important.

Recordkeeping Fees

ABB, Inc. sponsors two similar 401(k) plans (one for nonunion employees and the other for union members), and hired Fidelity Management Trust Company (FMTC) as the recordkeeper for both plans. FMTC was compensated for these services under a revenue-sharing arrangement that paid a percentage of the income from the mutual funds on the plans' investment platforms that were selected by participants. Under the excessive recordkeeping fee claim, the plan participants alleged that the fiduciaries of the 401(k) plans failed to understand, monitor, and control revenue sharing payments received by FMTC from the plan investments. The district court found that the ABB fiduciaries breached their fiduciary duties by failing to monitor the recordkeeping fees, failing to ascertain whether

such fees were reasonable, and failing to prevent the use of such fees to subsidize administrative costs unrelated to the ABB 401(k) plans.

The Eighth Circuit accepted the district court's factual findings that the ABB fiduciaries failed to calculate the amount the 401(k) plans actually were paying to FMTC and to ascertain whether the recordkeeper's pricing was competitive, even though the ABB fiduciaries had been warned by a consultant that the plan was overpaying. These specific failings overcame the general contention of the ABB fiduciaries that the district court had not afforded them the discretion over investment selection they were due as plan administrator. In addition, the Eighth Circuit rejected the reading of *Hecker v. Deere* that offering participants a wide range of investment options, including low-priced funds, made it impossible to claim that recordkeeping fees were excessive. Accordingly, the Eighth Circuit agreed that the ABB fiduciaries breached their fiduciary duties and affirmed the district court's \$13.4 million judgment in favor of plan participants.

Investment Selection

The plan participants also complained that the ABB fiduciaries improperly replaced a Vanguard balanced fund on the plan's investment lineup with a Fidelity target date fund. Based on its interpretation of the plan document and the plan's investment policy statement, the district court found that the selection of the Fidelity fund and decision to "map" plan investments from the Vanguard fund to the Fidelity fund was imprudent and improperly influenced by conflicts of interest for which it awarded \$21.8 million in damages.

On appeal to the Eighth Circuit, the ABB fiduciaries argued that the district court did not apply the correct standard of judicial review to their

investment decisions, because it failed to grant any deference to the discretion the ABB plans afforded the plan administrator over investment choices. The ABB fiduciaries also argued that the district court's analysis of the decision to remove the Vanguard fund and select the replacement Fidelity fund was evaluated with an "improper hindsight bias" that put too much weight on the fact that the Vanguard fund ultimately performed better than its replacement. Instead of analyzing the investment decision based on the knowledge and process the fiduciaries knew and used at the time of their decision, the district court analyzed the fiduciaries' investment decision based on the subsequent actual results achieved by the funds. The Eighth Circuit remanded the investment selection decision back to the district court for a more careful review of whether the ABB fiduciaries employed a proper process when making the decision to remove the Vanguard balanced fund. On remand, the district court will need to give more deference to the discretion of the ABB fiduciaries and eliminate the influence of any hindsight from its decision on investment selection.

In addition, the district court will need to be more careful with respect to the comparator funds it uses in calculating the loss to the ABB plan resulting from the selection of the Fidelity fund. The lower court calculated damages based on the amount that participants would have made had their contributions been invested continuously in the Vanguard fund. The Eighth Circuit instructed the district court to recalculate the award to using a methodology that compared the difference between the performance of the Fidelity fund and the minimum return of the subset of managed allocation funds the ABB fiduciaries could have chosen without breaching their fiduciary duties.

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Float

The Eighth Circuit reversed the trial court's \$1.7 million judgment against Fidelity for failing to pay to the ABB 401(k) plans the float income generated by Fidelity. The appellate court found that the ABB 401(k) plans had no property rights in the float, because both the depository account and the redemption account were registered for the benefit of the plan's investment options. It appears that the plan participants did not adequately rebut Fidelity's arguments that, based on property rights, float belonged to the investment funds.

Once the ABB 401(k) plans became the owner of shares of a mutual fund, they were no longer the owner of the

money used to purchase such shares. Thus, according to the Eighth Circuit, the plan investment options owned the property rights to the float and were entitled to any float income. However, one of the three judges who heard the *ABB* case authored a dissenting opinion on the float issue, stating that he was persuaded by the ERISA regulations and other Department of Labor guidance that float was in fact a plan asset. The majority's position leaves room for future plaintiffs to redress this by focusing more directly on the property rights issue. This likely will be an issue in future litigation.

Implications for Plan Sponsors

The Eighth Circuit's decision, which will now be implemented by

the district court, reaffirms the plan administrator's role as the primary decisionmaker in the matter of selecting investments and hiring plan service providers. While the decisions of plan officials must be granted deference, they will be subject to challenge if they are not made in accordance with a prudent decisionmaking process that entails the gathering of information sufficient to make a reasonable decision and the documentation of how that decision was made. The *ABB* case remains a classic example of pitfalls to be avoided in the fiduciary decision-making process. ♦

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