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Lawsuit Alleges Anthem 401(k) Plan Exposed Participants to Higher Fees

Suit says company could have selected lower-cost versions of the same investments for plan



Lawsuit against Anthem Inc. is among the first to put the spotlight on passively managed index funds, which typically charge far less than funds managed by stock pickers. *PHOTO: ASSOCIATED PRESS*

By **ANNE TERGESEN**

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A lawsuit filed last month against Anthem Inc. is taking the health insurer's 401(k) plan to task for selecting Vanguard Group mutual funds that had lower-cost versions of the same investments available to it.

Filed in the U.S. District Court for the Southern District of Indiana on Dec. 29, the suit—Bell v. Anthem—alleges that Anthem breached its fiduciary duty by allowing “unreasonable” investment and record-keeping fees in its \$5 billion 401(k) plan.

It is the latest in a series of lawsuits over 401(k) plan fees.

Fueling the trend, experts say, are a handful of recent multimillion-dollar settlements of 401(k) fee cases by companies, including Boeing Co. and Lockheed Martin Corp., as well as the Supreme Court’s May decision in *Tibble v. Edison*, which put retirement plans on notice that they have an ongoing duty to monitor plan investments, including fees.

Another factor behind the litigation: A growing recognition that “people collectively are not sufficiently prepared for retirement,” says Susan Mangiero, managing director of Fiduciary Leadership LLC in Trumbull, Conn., who serves as an expert witness in 401(k) cases. “There has been quite a focus on the retirement crisis which has created significant nervousness about this gigantic pool of” 401(k) money and whether it is being managed properly, she adds.

While plaintiffs in other 401(k) fee cases have challenged the use of retail mutual funds, which often charge higher fees than institutional versions of the same investments, experts say *Bell v. Anthem* is among the first to put the spotlight on passively managed index funds, which typically charge far less than funds managed by stock pickers.

Plan sponsors often “think that if they just stick with passive index funds that are low priced, they will be inoculated” from lawsuits, says Marcia Wagner, a specialist in employee benefits at the Wagner Law Group.

In *Bell v. Anthem*, the plaintiffs—three Anthem 401(k) plan participants who are seeking class action status on behalf of the plan’s 59,000 other participants—allege that Anthem breached its fiduciary duty by allowing “unreasonable expenses to be charged to participants for administration of the plan” and by selecting and retaining “high-cost and poor-performing investments compared to available alternatives.”

The suit alleges that until the plan switched in mid-2013 from retail shares of mutual funds from Vanguard and two other companies to lower-cost institutional versions of the same investments, the 401(k) plan’s participants paid “far higher fees than they should have, which resulted in receiving lower

returns on their retirement investments.” From Dec. 29, 2009 to July 22, 2013, the suit maintains plan participants lost more than \$18 million due to those higher fees.

By abandoning retail share classes, the suit says, the plan cut its expense ratios—for example, from 0.16% to 0.09% on Vanguard Prime Money Market fund and from 0.04% to 0.02% on Vanguard Institutional Index fund.

Prior to 2013, the 401(k) plan “failed to adequately investigate and to offer non-mutual fund alternatives” such as collective trusts, the complaint says. Available only to retirement plans, collective trusts often feature lower fees in part because they are exempt from the Investment Company Act of 1940, which requires mutual funds to deliver prospectuses and other periodic reports to investors.

Jerome Schlichter, whose St. Louis law firm Schlichter Bogard & Denton LLP filed the case, says Anthem “could still do better” on fees by shifting more assets into investment vehicles including collective trusts.

The complaint also says that “Anthem failed to monitor and control” the record-keeping fees participants paid Vanguard, the plan’s record keeper.

While the plaintiffs argue that a “reasonable record-keeping fee for the plan would have been \$30 per participant,” they say the plan paid approximately \$80 to \$94 per person annually from 2010 to 2013, when administrative fees were assessed as a percentage of plan assets. In 2013, the plan switched to a flat \$42 per person administrative fee, an amount Mr. Schlichter says is still too high.

In total, Mr. Schlichter’s firm has about 20 401(k) fee cases and has settled nine, including a \$62 million suit against Lockheed Martin. It led the class-action case against Edison International the Supreme Court ruled on in May.

When 401(k) plans grow in size, Mr. Schlichter says, plan sponsors “should be looking at whether there are lower cost options available through negotiations or other investment vehicles, rather than simply keeping employees in the same investment options.” From 2010 to 2014, the Anthem plan’s assets grew from \$3.3 billion to \$5.1 billion, the complaint says.

Anthem had no comment. In a statement, Vanguard says, “This case appears to challenge the prudence of all mutual funds as plan investments for very large plans and any asset-based record-keeping fee arrangement, going well beyond

established legal guidance. Claims of this type turn on the prudence of a plan sponsor's process and the reasonableness of their fee arrangements.”

Ms. Wagner says the suit may encourage more large 401(k) plans to switch from mutual funds to alternatives including collective trusts. Such trusts currently account for \$2.4 trillion, or 16%, of the \$15 trillion in 401(k)-style and pension plans, up from \$1.3 trillion—and 12.7% of the total—in 2009, according to the Investment Company Institute and research firm Cerulli Associates.

For sponsors of 401(k) plans of all sizes—and the fiduciaries who advise them—the latest suits are reminders that it pays to thoroughly research and document decisions, says David Levine, a principal at the Groom Law Group, which specializes in employee benefits.

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