Tussey v. ABB, Inc.: A Lesson in Fiduciary Duties

Court rules that plan fiduciaries breached their duties.

By Ian Kopelman

In the last several years, participant lawsuits claiming a breach of fiduciary duty under ERISA based on excessive 401(k) plan fees have usually been resolved in favor of the plan sponsor and fiduciaries. A recent case from the Western District of Missouri, *Tussey v. ABB, Inc.*, goes against this trend. *Tussey* is one of the first excessive fee lawsuits to proceed to a trial on the merits and a court ruling that the plan fiduciaries breached their fiduciary duties under ERISA. Based on this conclusion, the court ruled that the plan fiduciaries were liable for more than $35 million in losses resulting from their breaches. While the *Tussey* decision is notable, it does not necessarily signal a reversal in the general trend in excessive fee cases. The court's ruling was based on a very specific set of facts, which clearly demonstrated that the plan fiduciaries complied with neither ERISA nor their own investment policy statement.

Facts

ABB, Inc. sponsors two 401(k) plans with identical structures and investment options. ABB, Inc. and an employee benefits committee appointed by its board of directors (collectively "ABB") are the fiduciaries of both plans. Fidelity provides recordkeeping and directed trustee services, investment options, and manages overnight investment of plan contributions. It also provides ABB, Inc. with separate corporate services for benefits outsourcing, such as payroll processing and recordkeeping services for its defined benefit and welfare plans. Fidelity is compensated for recordkeeping and directed trustee services through revenue sharing arrangements with the investment funds offered by the plans.

Fiduciary Breaches

The *Tussey* court found the following fiduciary breaches by ABB:

1. ABB failed to monitor recordkeeping fees by:
   - Never calculating the dollar amount of the fees Fidelity received through revenue sharing.
   - Ignoring advice from an outside consulting firm that the plans were paying above-market fees for Fidelity's services.
   - Using revenue sharing to decrease the company's out-of-pocket costs.
2. ABB failed to consider the ability to leverage the plans' size to negotiate reduced fees for plan participants as required by the investment policy statement.
3. ABB replaced one investment fund with another fund with increased fees and selected more expensive share classes of investment funds when less expensive share classes were available in violation of the selection process set forth in the investment policy statement.
4. ABB agreed to plan fees that exceeded market cost for comparable services in order to subsidize the fees for corporate benefits outsourcing services, ignoring reports that that the plan was paying service fees above market rates to subsidize fees for corporate services.

The court also held that Fidelity breached its fiduciary duties by transferring float income on the overnight investment of plan contributions to investment funds instead of the plans.

Points to Consider

It should be noted that the *Tussey* court did *not* conclude that revenue sharing in general was unacceptable. Instead it concluded that ABB breached its fiduciary duty because it did not act prudently or solely in the interest of plan participants and beneficiaries as required by ERISA's fiduciary responsibility rules by (1) failing to consider the dollar cost of plan recordkeeping and administration services compared to the market price for comparable services and made no effort to obtain reduced fees for these services due to the size of the plans and (2) selecting share classes of investments with greater expenses than other share classes of the same investment.

The court did not find that it was a breach of fiduciary responsibility for Fidelity to provide services to both the plans and the company. ABB breached its fiduciary duty because it did not act solely in the interest of plan participants and beneficiaries by allowing plan fees to subsidize fees for Fidelity's corporate services.

ABB's breaches can be attributed to the failure to comply with the plan terms setting forth fiduciary duties under ERISA and the investment policy statement, which clearly stated the obligation to consider negotiating reduced service fees based on plan size and consider fees in the selection of service providers and investments. The court found that, like the plan and trust, the investment policy statement is a document governing the plan and failure to comply with its requirements may in itself be a breach of fiduciary duty. In this case ABB's failure to follow the investment policy statement resulted in more than $35 million in liability.

Tussey highlights the need to establish and maintain an up-to-date investment policy statement and make sure that plan fiduciaries can show that their actions complied with its requirements. The next Compliance Watch column will discuss the importance and requirements of an effective investment policy statement.

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