



Protecting Fiduciaries: A Litigator's Perspective

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Trends in Fee Litigation Cases

- More than 90 cases filed since 2006.
- Defendants include companies from financial services, insurance, aviation, and manufacturing sectors.
- Defendants range from small plans (\$1.1 MM) to large plans (\$1 BN).
 - Recent *Nationwide* lawsuit targets plan with only 27 participants.
 - *Voya* lawsuit targets plan with 19 participants and \$2.8 MM in assets.

How Did the Lawyers Find Me?

- Most information is publicly available.
- Form 5500s on DOL website.
 - Identify specific plan options, revenue sharing arrangements, gross compensation to service providers, and QDIAs.
- Prospectuses for mutual funds on company and SEC websites.
 - Identify performance, fees, expenses, and revenue sharing arrangements.

Red Flags for the Plaintiffs' Bar

- Retail share class mutual funds.
- Proprietary mutual funds.
- Mutual funds with expense ratios higher than traditional lower-cost funds.
- “Underperforming” mutual funds.
 - Relative to benchmarks, indices, other comparable funds.
- Stable value v. money market.
- Revenue sharing arrangements.
- Company stock.

When Bad Lawsuits Happen to Good People



Is Litigation Really that Bad?

- Lawsuits are expensive.
- You get to spend time with lawyers.
- Lawsuits are time consuming.
- You get to spend time with more lawyers.
- You get to give your internal documents to the lawyers.
- Service providers and advisors often have to disclose ongoing litigation in RFPs.
- Can impact your insurance rates.

But We Have Insurance, Right??

- Legal fees can easily exceed \$1 million before discovery is concluded.
- Most D&O policies have carve-outs for ERISA.
- Check your insurance coverage to ensure the company has fiduciary liability coverage.
 - Communicate with your broker.
 - Request a legal review.
 - Understand your self-insured retention level.

Can't We Settle This Quickly?

- Early mediation can be more cost-effective.
- The Court will have to approve any class action settlement.
 - Court wants to see that Plaintiffs' counsel have investigated fully their claims.
 - Plaintiffs' counsel have to justify their fees.
- Insurance carriers play an important role in this decision.
 - Most want to see the case develop before settlement discussions.
- Multiple Defendants present challenges.
 - Each has separate counsel.
 - Each typically has separate carriers.
 - Each may have different agendas.

Can't the Court Dismiss Us Early?

- Defendants can file an early Motion to Dismiss.
 - The Court must accept everything in the Complaint as true.
 - Defendants can attach certain public filings (i.e. 5500s, prospectuses, etc.)
- As a matter of law, Plaintiffs cannot succeed on their claims.
- Even if you win, Courts usually allow Plaintiffs to replead.
- Enjoy all that the discovery process has to offer.

What Documents Will We Have to Disclose?

- Plaintiffs *could* gain access to most of your internal records.
 - Emails, emails, emails
 - Meeting minutes, including all documents provided to committees
 - Performance reports
 - Communications with regulators, independent fiduciaries, etc.
- Certain communications with your counsel are not privileged.
 - An ERISA fiduciary cannot assert attorney-client privilege against the beneficiaries.
 - Does not apply to settlor or other non-fiduciary functions.

Depositions Don't Sound So Bad

- “Everybody has a plan until they get punched in the mouth.”
- Initial deposition will open a window into Plaintiffs’ strategy.
- ~~Interrogations~~ Depositions are an opportunity for you to shine.
 - 1-2 days of preparation with your attorney.
 - 7 hours answering questions.
 - Relive old memories through a lot of documents.
- You rarely “get to tell your story.”
 - But, you will know the facts better than the lawyers asking you questions.

Fun with Depositions

B	I	N	G	O
I don't recall	Yes	I don't remember writing that email.	Are you serious?	Maybe
How much longer do you have?	Really?	Holy _____.	I don't understand your question.	Why do you keep kicking me?
I agree that email is inappropriate.	Huh	BATHROOM BREAK	That would not be in line with our policies.	Can I talk to my lawyer?
Yeah, that's what it says . . .	You would need to ask _____ about that.	Did he <i>really</i> say that?	No	But DOL just audited us.
Wow	I don't know why I wrote that email.	I need a smoke.	I have seen [Company X] do worse things than this.	Geez

Call Me When You Have No Class

- Class actions require class representatives.
 - You are safe, so long as every employee is loyal, content, and trustworthy.
 - Counsel will contact employees directly, will set up solicitation websites, and even issue press releases.
- Court must “certify” the class.
 - The claims must be “typical,” which can present challenges in the DC space.

Everyone is an Expert

- Plaintiffs will retain experts to opine on your performance, processes, and people.
 - If you thought the lawyers were bad . . .
- Experts are typically well-informed, experienced professionals.
- Defendants will have their own experts to rebut Plaintiffs' expert(s).

Just Wait Until the Jury Hears My Story.

- No jury trials in ERISA cases.
- Federal court dockets have a 1-2 year backlog.
- Only two fee cases have been taken through to verdict.

Reducing Fiduciary Exposure



“C'mon, c'mon — it's either one or the other.”

1. Maintain a Clear Paper Trail.

- Virtually all 401k lawsuits can be defended by a showing of procedural prudence.
- Fiduciary actions should be documented.
 - Make sure minutes document follow-up actions.
 - Retain all materials provided to Committee as exhibits.
- Review your document retention policies.

2. Measure Effectiveness as Fiduciaries

- Identify core areas of oversight for your fiduciaries.
- Set a recurring agenda to review those areas.
- Document the processes undertaken to address each of these areas.
- Provide periodic training to your fiduciaries.

3. Document Delegation of Duties

- Are the Plan advisors 3(21) or 3(38) fiduciaries?
- Fiduciaries “to the extent” and not for all purposes.
- Investment consultants need to make sure they do not act as discretionary advisors.

4. Give Your Litigator a Hug

- Most are former Pre-Med students-turned-Political Science majors.
- Invite them in to brief your business side.
 - Especially helpful if litigation is rare.
- Keep it local*

Contact Information

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