

A Fiduciary Choice:

Taking the Witness Stand or Taking a Stand for Your Employees

Presented by:

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Director of ERISA Services

October 24, 2019



QUALIFIED
PLAN ADVISORS

Your Comprehensive **Fiduciary Partner**



The Price of Bad Answers



Sacerdote et al v. New York University

Case 1:16-cv-06284-KBF Document 348 Filed 07/31/18 Page 1 of 78

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: July 31, 2018

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:
DR. ALAN SACERDOTE, DR. HERBERT :
SAMUELS, MARK CRISPIN MILLER, :
PATRICK LAMSON-HALL, MARIE E. :
MONACO, DR. SHULAMITH LALA :
STRAUSSNER, and JAMES B. BROWN, :
individually and as representatives of :
a class of participants and beneficiaries on :
behalf of the NYU School of Medicine :
Retirement Plan for Members of the :
Faculty, Professional Research Staff and :
Administration and the New York :
University Retirement Plan for Members of :
the Faculty, Professional Research Staff :
and Administration. :
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Plaintiffs. :
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-v- :
:
NEW YORK UNIVERSITY, :
:
Defendant. :
:
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16-cv-6284 (KBF)

OPINION & ORDER

The Price



The second co-chairs were, at various times, Linda Woodruff, Patricia Halley, and others. Meagher's testimony was concerning.³⁶ She made it clear that she viewed her role as primarily concerned with scheduling, paper movement, and logistics; she displayed a surprising lack of in-depth knowledge concerning the financial aspects of managing a multi-billion-dollar pension portfolio and a lack of true appreciation for the significance of her role as a fiduciary. In a number of instances, she

Document 348 Filed 07/31/18 Page 25 of 71
pension portfolio and a lack of true appreciation

recordkeeper for annuity assets) was the favored vendor.
Plaintiffs' second claim is that the Committee acted to remove the TIAA Real Estate Account and the CREF Stock options (thereby continuing to allow plaintiffs to invest in an asset that the Committee used confusing and inappropriate to review their performance and that these funds objectively resulting in significant losses.
After careful review of the record, the Court finds by evidence that while there were deficiencies in the Committee

to test the reliability of their information. (Tr. at 126:13-128:8.) She bluntly testified that "[i]t's not my job to determine whether the fees are appropriate" for the Plans. (Id. at 126:3-9.)
Meagher's supervisor, Sanchez,³⁷ also a Committee member, was similarly unfamiliar with basic concepts relating to the Plans, such as who fulfilled the role of

387:24.) This suggested that Sanchez does not view herself as having adequate time to serve effectively on the Committee. ("Cammack").

details. Sanchez responded that she has a "big job" (three role, not her Committee membership) and that one of many responsibilities she has. (Id. at 386-5)

¹² Dorph, now NYU's Executive Vice President and a Committee member until 2017, also provided somewhat concerning testimony. For instance, on the first day of his testimony, he did not even know whether he was currently a member of the Committee (and, accordingly, whether he was a fiduciary to thousands of employees). (Tr. at 1311:3-6; see also DX888 ("Dorph Decl.")). However, his testimony regarding NYU's information technology ("IT") transitions and their impact on

The Price of Bad Answers



United States Court of Appeals
For the Eighth Circuit

No. 12-2056

Ronald C. Tussey; Charles E. Fisher; Timothy Pinnell

Plaintiffs - Appellees

v.

ABB, Inc.; John W. Cutler, Jr.; Pension Review Committee of ABB, Inc.; Pension
& Thrift Management Group of ABB, Inc.; Employee Benefits Committee of
ABB, Inc.

Defendants - Appellants

Fidelity Management Trust Company; Fidelity Management & Research Company



The Price of Bad Answers

monitor Plan recordkeeping costs based on the ABB fiduciaries' specific findings in this case. The district court found, as a matter of fact, that the ABB fiduciaries failed to (1) calculate the amount the Plan was paying Fidelity for recordkeeping through revenue sharing, (2) determine whether Fidelity's pricing was competitive, (3) adequately leverage the Plan's size to reduce fees, and (4) "make a good faith effort to prevent the subsidization of administration costs of ABB corporate services" with Plan assets, even after ABB recordkeeping services and cautioned that the revenue sharing Fidelity overpaying for recordkeeping Plan might have been subsidizing the other corporate services ABB. ABB did not act on the information it received.

(3) adequately leverage the Plan's size to reduce fees, (4) make a good faith effort to prevent the subsidization of administration costs of ABB corporate services with Plan assets, even after ABB's own records consistently overpaying for recordkeeping and might be subsidizing services.

The district court's factual findings that ABB did not act on the information it received.

fiduciaries] violated their fiduciary duties to the Plan when they failed to monitor recordkeeping costs, failed to negotiate rebates for either Fidelity or other investment companies chosen to be

in summary fees and costs. 222 F.3d 1153, 1154 (9th Cir. 2007) (the ABB Fidelity trustly appealed).

STION:
 "After a judgment after a bench trial, this court reviews 'the court's findings of fact and its legal conclusions de novo.'" *Outlook Cent., Inc. v. Outlook Cent., Inc.*, 688 F.3d 918, 941 (8th Cir. 2012) (quoting *Edelberg v. Edelberg*, 341 F.3d 540 (8th Cir. 2002)); see also *Fed. R. Civ. P.* 52(a)(6).

Our Roadmap



- 1) Understanding Responsibilities
- 2) Investments - Generally
- 3) Target Date Funds
- 4) Benchmarking
- 5) Modernizing

Ignorance is Not Bliss



DEPOSITION OF PLAN SPONSOR

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ATTORNEY: What do you know about your fiduciary responsibilities?

PLAN SPONSOR: I'm not a fiduciary. We have a broker.

ATTORNEY: Is your broker a fiduciary?

PLAN SPONSOR: I assume so. He and our TPA handle our investments.

ATTORNEY: What is a fiduciary's primary responsibility?

PLAN SPONSOR: To protect ourselves so our company doesn't get sued.

Fiduciary Rule Headlines



planadviser

January 24, 2019

State-Based Fiduciary Regulations Take Shape in 2019

PLANSPONSOR

May 23, 2019

DOL Anticipates Proposing Another Fiduciary Rule This Year

P&I

June 24, 2019

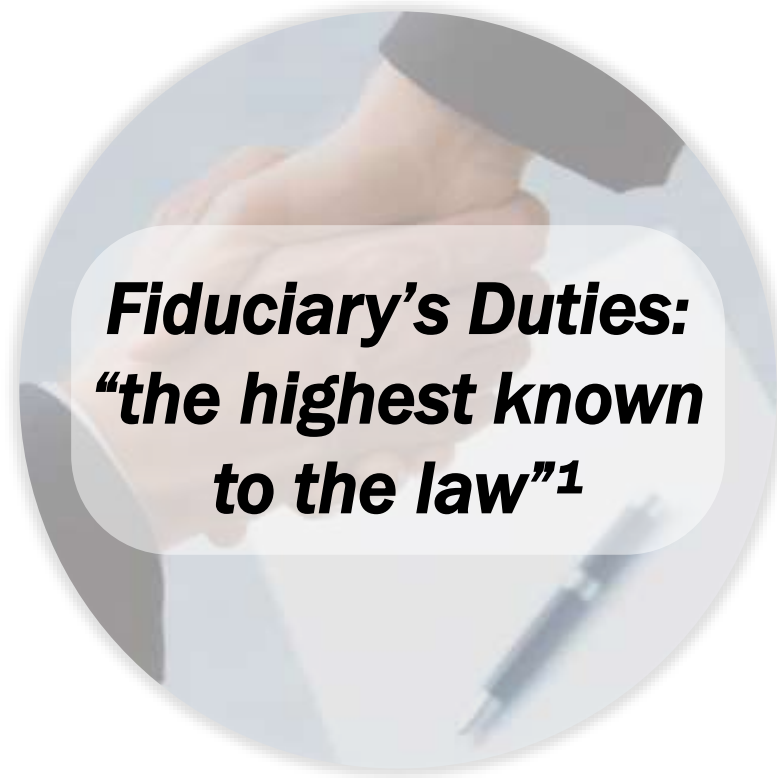
DOL could ride on the back of the Reg BI for fiduciary rule

InvestmentNews

September 10, 2019

A new litigation saga begins for another 'best interest' rule

Fiduciary Responsibility



- 1 Duty of *Loyalty*
- 2 Duty of *Prudence*
- 3 Duty to *Diversify Investments*
- 4 Responsibility to *Follow the Plan's Terms*
- 5 Duty to *Monitor Service Providers*

1. *Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir. 1982), cert denied, 459 U.S. 1069 (1982).

Fiduciary Responsibility



- ✓ Do your fiduciaries *know who they are?*
- ✓ Are your fiduciaries *educated?*
- ✓ Are they receiving *frequent education from:*



*Advisor/
Consultant*



Recordkeeper



ERISA Counsel



Conferences



Newsletters



Webinars

ERISA does NOT impose a duty to mitigate risk or merely to protect one's self.
A good fiduciary is a proactive – not a defensive – one.

How a Conversation SHOULD Go



DEPOSITION OF PLAN SPONSOR

ATTORNEY: What do you know about your fiduciary responsibilities?

PLAN SPONSOR: At our company, we start by identifying each of our fiduciaries.

ATTORNEY: And then?

PLAN SPONSOR: They receive education - onboarding training and ongoing education from our advisor.

ATTORNEY: And how would you summarize what you've learned from that education?

PLAN SPONSOR: Our committee members clearly understand their core

How a Conversation SHOULD Go



1 DEPOSITION OF PLAN SPONSOR

2 ATTORNEY: What do you know
3 about your fiduciary
4 responsibilities?

5 PLAN SPONSOR: At our company,
6 we start by identifying each of our
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9 PLAN SPONSOR: They receive
10 education - onboarding training and
11 ongoing education from our advisor.

12 ATTORNEY: And how would you
13 summarize what you've learned from
14 that education?

15 PLAN SPONSOR: Our committee
16 members clearly understand their core

17 DEPOSITION OF PLAN SPONSOR

18 responsibilities. We also have
19 implemented several best practices.

20 ATTORNEY: And this allows you
21 to avoid being sued?

22 PLAN SPONSOR: Well we don't
23 think like that. We focus on making
24 decisions in our participants' best
25 interests. Our advisor always says:
26 the safest fiduciaries are the
27 proactive ones.

Our Roadmap



- 1) Understanding Responsibilities
- 2) Investments - Generally
- 3) Target Date Funds
- 4) Benchmarking
- 5) Modernizing

“We’ve Got Good Funds and I Cannot Lie”



DEPOSITION OF PLAN SPONSOR

1 1
1 2 ATTORNEY: How do you accomplish
1 3 not being sued?

2 4 PLAN SPONSOR: Use good funds.

2 5 ATTORNEY: How do you know if
2 6 they’re good?

2 7 PLAN SPONSOR: I don’t know but
2 8 our broker and TPA are good with that
2 9 stuff. Our plan has good returns.

10 ATTORNEY: Do you have an
11 Investment Policy Statement?

12 PLAN SPONSOR: Our attorney and
13 auditor told us not to have one
14 because we wouldn’t follow it.

15 ATTORNEY: Do you have a process
16 for reviewing share classes?

“We’ve Got Good Funds and I Cannot Lie”



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13 auditor told us not to have one
14 because we wouldn’t follow it.

15 ATTORNEY: Do you have a process
16 for reviewing share classes?

DEPOSITION OF PLAN SPONSOR

17
18 PLAN SPONSOR: We don’t share
19 classes with others.

20 ATTORNEY: Have you asked about
21 collective investment trusts?

22 PLAN SPONSOR: I don’t know, but
23 we definitely trust our investments
24 to be collectively awesome. Is that
25 what you meant?

Litigation Headlines



P&I

December 24, 2018

401(k) suits point to need for litigation risk prevention

WSJ

May 8, 2019

A New Fight Breaks Out Over 401(k) Fees

InvestmentNews

August 6, 2019

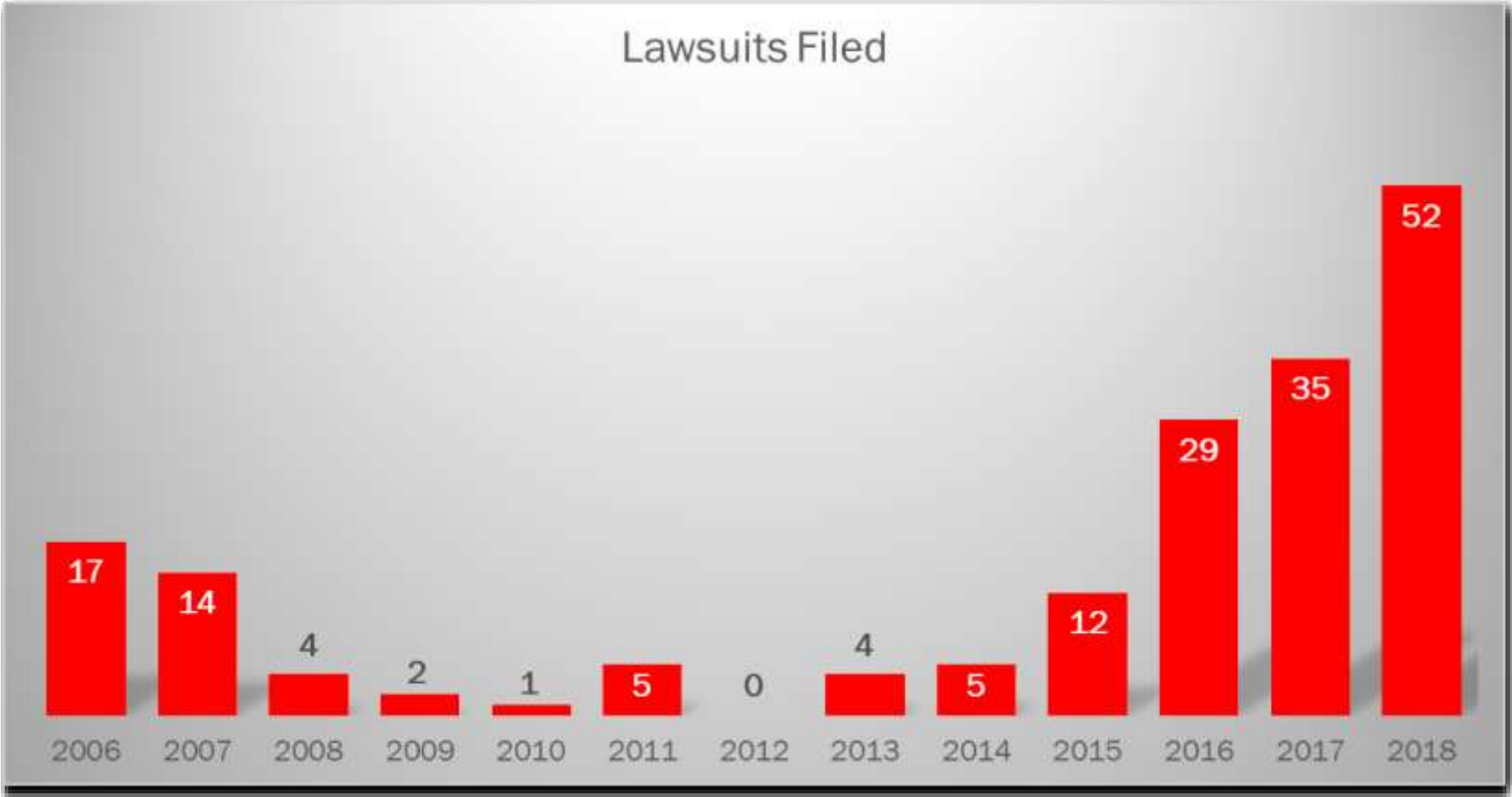
401(k) lawsuits creeping down to smaller plans

InvestmentNews

October 2, 2019

401(k) lawsuits get more complex

Fee Lawsuits: Second Wave



Greg Iacurci, "Jerry Schlichter's fee lawsuits have left an indelible mark on the 401(k) industry", *Investment News*, September 2017.

Carmen Castro-Pagan, "These Law Firms Led the Way in Filing Benefit Class Actions", *Bloomberg Law: Big Law Business*, November 2017.

Kirk v. Retirement Committee of CHS/Community Health Systems, Inc. (M.D. Tenn. Aug. 2019)



Allegations focused on index funds

1. Proprietary bias

- Used the recordkeeper's proprietary products
- "Given [the recordkeeper's] conflicts of interest, the CHS Defendants should have closely scrutinized [the recordkeeper's] choice of investments for the TDF separate accounts and its management of those accounts."

2. Excessive costs

- "despite fees that were several times higher than marketplace alternatives that tracked the *exact same index*"
- "The investment fiduciary must further consider which share class of the investment vehicle to use."

3. Tracking error

- "Compared to marketplace alternatives, [the] index funds deviated further from the benchmark index, and consistently had the worst performance even on a pre-fee basis."

"Given the high fees and history of poor performance of [these] index funds, a prudent fiduciary acting in the best interests of the Plan's participants would have removed these index funds from the Plan and replaced them with more competitive marketplace alternatives."

Anderson v. Intel Corp. (N.D. Cal. Aug. 2019)



1. Two participant-directed plans:

- Nearly \$12 billion and more than \$6.5 billion

2. Committee Management:

- Committees responsible for:
 - Core funds list
 - Target date funds (TDFs) built from core funds
 - Risk-based model portfolios (Models) built from core funds

3. Portfolio Composition and Operations

- The TDFs and Models both included hedge funds, private equity funds, and commodities funds (in addition to more traditional components)
- They were maintained via a recordkeeper product (and not as collective investment trusts, until recently)

Anderson v. Intel Corp. (N.D. Cal. Aug. 2019), cont.



Plaintiffs allege that the Committees, their members, and the company breached fiduciary responsibilities because of the following:

1. Imprudent Risk:

- Use of risky component funds (e.g., hedge funds and private equity; the complaint uses the word “hedge fund” 280 times)
- Concentration: those funds making up 27-37% of the TDFs and up to 56% of the Models at various times

2. High Costs:

- Failed to exert leverage of over \$18 billion of combined plan assets
- TDF expenses ranged from 82 to 109 basis points in various years
- Model expenses ranged from 125 to 208 basis points in various years
- Failure to use CITs (until recently)

3. Performance Not in Line with Risk or Cost

4. Conflicts of Interest

- Many of the high-risk funds were managed by companies engaged in outside investments with Intel Capital

Best Practices



Utilize an ERISA
3(38) Fiduciary



Implement and
Follow Investment
Policy Statement



Utilize Cheapest
Share Class Available



Understand Revenue Share



Explore Availability
of CITs



Document,
Document,
Document



Become –
and Remain-
Educated



Our Roadmap



- 1) Understanding Responsibilities
- 2) Investments - Generally
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- 5) Modernizing

Missing the Target?



DEPOSITION OF PLAN SPONSOR

1
2 ATTORNEY: Do you use target date
3 funds?

4 PLAN SPONSOR: We do.

5 ATTORNEY: How did you choose
6 them?

7 PLAN SPONSOR: I can't remember.
8 I think our recordkeeper suggested
9 them.

10 ATTORNEY: How do you monitor
11 those?

12 PLAN SPONSOR: We don't need to.
13 They're our default. They're our
14 "QDIA".

15 ATTORNEY: So how do you know
16 how they perform?

Missing the Target?



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16 how they perform?

DEPOSITION OF PLAN SPONSOR

17 PLAN SPONSOR: Our recordkeeper
18 says they're good.
19

Brown-Davis v. Walgreen, C.O. (ED. Ill. August 2019)



Two levels of allegations

1. Imprudent Initial Decision

- in 2013, added TDFs that were “chronic poor performers”
- when added:
 - had been underperforming both the Plan’s benchmark and the Morningstar Lifetime Moderate Index
 - had been outperformed by Fidelity, T. Rowe Price, and Vanguard, which have similar management styles

2. Imprudent Ongoing Decisions to Retain

- failed to remove TDFs “despite their abysmal underperformance for almost a decade”
- most of the TDFs have performed worse than between 70% and 95% of peer group options

“The overall breadth and depth of the [TDFs’] underperformance raises a plausible inference that Walgreen's selection and monitoring process was tainted by a failure of competency or effort.”

How the Conversation SHOULD Go



DEPOSITION OF PLAN SPONSOR

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2 ATTORNEY: Do you use target date
3 funds?

4 PLAN SPONSOR: We do.

5 ATTORNEY: How did you choose
6 them?

7 PLAN SPONSOR: Our advisor
8 described differences in glide paths,
9 "to" vs. "through", active vs.
10 passive, fees, and management style.
11 We also studied returns.

12 ATTORNEY: How do you monitor
13 those?

14 PLAN SPONSOR: Our IPS sets out
15 criteria. We look at that every
16 year, at least.

How the Conversation SHOULD Go



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15 criteria. We look at that every
16 year, at least.

DEPOSITION OF PLAN SPONSOR

17 ATTORNEY: So how do you know how
18 they perform?
19

20 PLAN SPONSOR: Our investment
21 consultant evaluates them relative
22 to their peer group, both in terms
23 of performance and expense, and
24 reports on that to us. And we
25 document that review and report in
26 our minutes.

Our Roadmap



- 1) Understanding Responsibilities
- 2) Investments - Generally
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A Job Ain't Nuthin' But Work



DEPOSITION OF PLAN SPONSOR

1
2 ATTORNEY: When did you last
3 benchmark your retirement plan?

4 PLAN SPONSOR: It's been a long
5 time.

6 ATTORNEY: Why?

7 PLAN SPONSOR: I don't want to
8 have to move the plan.

9 ATTORNEY: Why would you have to
10 move the plan?

11 PLAN SPONSOR: Well, we like our
12 guy. He's been with us for a long
13 time. And I don't want to have to
14 move the plan.

15 ATTORNEY: Why would you have to
16 move the plan?

A Job Ain't Nuthin' But Work



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DEPOSITION OF PLAN SPONSOR

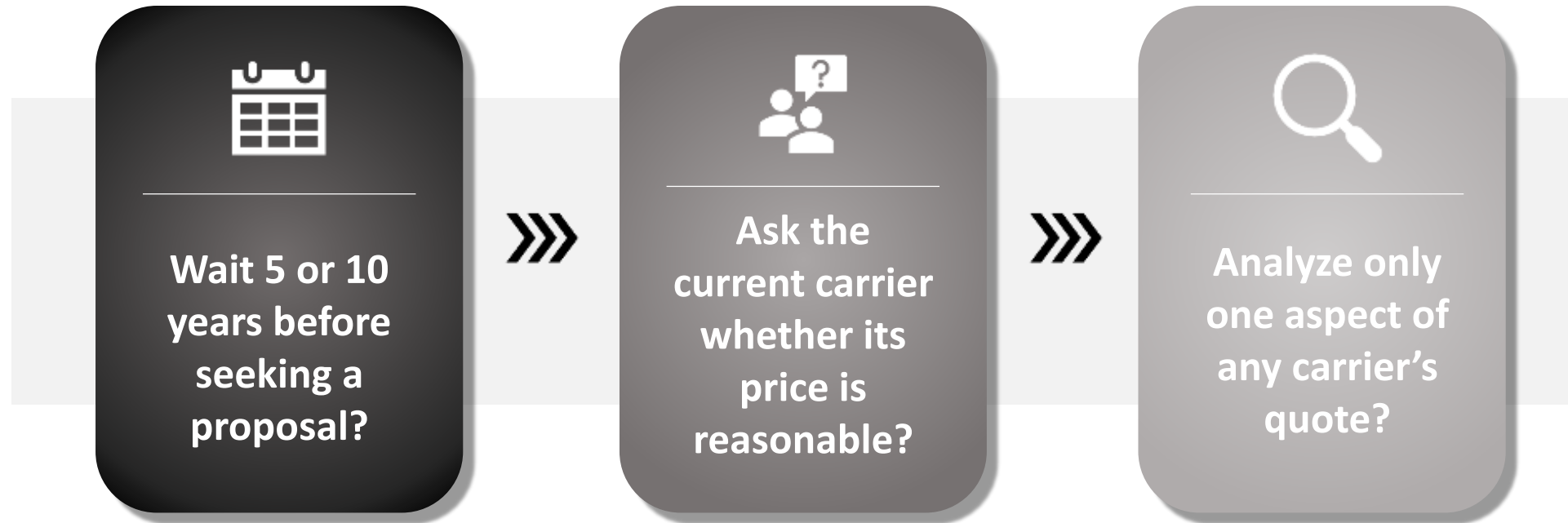
17
18 PLAN SPONSOR: If we found
19 something better.

20 ATTORNEY: Okay, so you're
21 prepared to tell employees that you
22 just didn't want to do your job?

Consider the Health Insurance Shopping Process



Does a plan sponsor...



Consider the Health Insurance Shopping Process



Or does a plan sponsor . . .



Why is a Retirement Benchmarking Process So Different?



Shouldn't many of the same considerations apply?



Shouldn't a CFO and HR Department be similarly motivated?



ALSO: with 401(k) plans, there's an additional layer of fiduciary responsibility and risk.

Benchmarking: Why?



**DOL
Regulations**



**Federal
Courts**



**Rapidly
Changing
Marketplace**



**Your
Employees**

Forman v. TriHealth, Inc. (S.D. Ohio July 2019)



Complaint includes these charts:

TriHealth's Plan Benchmarked Against Plans With Similar Number of Participants

| | Plan | Asset Percentage | Cost Per Head |
|------|--------------------|------------------|---------------|
| 2017 | TriHealth | 0.86% | \$328.01 |
| | Peer Plans 90%tile | 0.63% | \$237.00 |
| | Peer Plans 50%tile | 0.43% | \$161.01 |
| | Peer Plans Mean | 0.44% | \$165.53 |
| 2016 | TriHealth | 0.92% | \$257.35 |
| | Peer Plans 90%tile | 0.63% | \$175.82 |
| | Peer Plans 50%tile | 0.43% | \$119.45 |
| | Peer Plans Mean | 0.39% | \$108.84 |
| 2015 | TriHealth | 0.96% | \$217.36 |
| | Peer Plans 90%tile | 0.63% | \$141.62 |
| | Peer Plans 50%tile | 0.43% | \$96.21 |
| | Peer Plans Mean | 0.44% | \$98.91 |
| 2014 | TriHealth | 1.05% | \$193.03 |
| | Peer Plans 90%tile | 0.63% | \$115.71 |
| | Peer Plans 50%tile | 0.43% | \$78.61 |
| | Peer Plans Mean | 0.44% | \$80.81 |
| 2013 | TriHealth | 1.00% | \$151.88 |
| | Peer Plans 90%tile | 0.63% | \$96.63 |
| | Peer Plans 50%tile | 0.43% | \$65.64 |
| | Peer Plans Mean | 0.44% | \$67.48 |

TriHealth's Plan Benchmarked Against Plans With Similar Plan Asset Size

| | Plan | Asset Percentage |
|------|--------------|------------------|
| 2017 | TriHealth | 0.86% |
| | 90%tile Comp | 0.63% |
| | 50%tile Comp | 0.28% |
| | Mean Comp | 0.41% |
| 2016 | TriHealth | 0.92% |
| | 90%tile Comp | 0.63% |
| | 50%tile Comp | 0.28% |
| | Mean Comp | 0.41% |
| 2015 | TriHealth | 0.96% |
| | 90%tile Comp | 0.63% |
| | 50%tile Comp | 0.28% |
| | Mean Comp | 0.41% |
| 2014 | TriHealth | 1.05% |
| | 90%tile Comp | 0.65% |
| | 50%tile Comp | 0.51% |
| | Mean Comp | 0.47% |
| 2013 | TriHealth | 1.00% |
| | 90%tile Comp | 0.65% |
| | 50%tile Comp | 0.51% |
| | Mean Comp | 0.47% |

“As illustrated above, the TriHealth Plan’s administrative fees are consistently the highest among its comparator peers, regardless whether the comparison is based on cost per participant or percentage.”

Montgomery v. H-E-B (W.D. Tex. Sept. 2019)



1. Participant-directed plans:

- More than \$2.5 billion in plan assets

2. General Allegations:

- “[T]he *Plan’s fees were, at a minimum, nearly three times the average* and at least 50% higher than the 90th percentile, making it *one of the most expensive plans in the country* with over \$1 billion in assets.”
- “Defendants failed to prudently monitor the expenses charged within the Plan’s index funds . . . [which] were up to *seven times higher* than comparable alternative index funds”
- “Defendants utilized an internal team to design and manage the [target-risk funds], with no previous experience managing investments for defined-contribution plans.”
- Also: failure to monitor alternatives to money market fund, self-dealing payments of millions of dollars from the plan to H-E-B, and failed to investigate a reasonable share of returns for the Plan’s securities lending program

3. Particularly Noteworthy

- The complaint alleges that the fees were imprudent because they “were not attributable to enhanced services for participants”
- This is a rare admission from plaintiffs’ counsel that price may not be the only key aspect and that, instead, **value is relevant**

Benchmarking Goals



- **Positive Attitude:**
 - Better Pricing?
 - Better Service?
 - A Combination of Both?
- **Do Not Fear a Move**
 - The goal is NOT to transition the plan
 - This will happen only if the results show the current situation to be inferior



How a Conversation SHOULD Go



DEPOSITION OF PLAN SPONSOR

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ATTORNEY: When did you last benchmark your retirement plan?

PLAN SPONSOR: Two years ago.

ATTORNEY: What did you benchmark?

PLAN SPONSOR: Everything - investments, advisor, recordkeeper.

ATTORNEY: And what did you learn?

PLAN SPONSOR: That there was a lot more out there for our employees. We upgraded the tools. We changed share classes and our QDIA. And we lowered our costs.

ATTORNEY: When will you do this again?

How a Conversation SHOULD Go



DEPOSITION OF PLAN SPONSOR

1
2 ATTORNEY: When did you last
3 benchmark your retirement plan?

4 PLAN SPONSOR: Two years ago.

5 ATTORNEY: What did you
6 benchmark?

7 PLAN SPONSOR: Everything -
8 investments, advisor, recordkeeper.

9 ATTORNEY: And what did you
10 learn?

11 PLAN SPONSOR: That there was a
12 lot more out there for our employees.
13 We upgraded the tools. We changed
14 share classes and our QDIA. And we
15 lowered our costs.

16 ATTORNEY: When will you do this
17 again?

DEPOSITION OF PLAN SPONSOR

17 PLAN SPONSOR: In a year or two.

18 ATTORNEY: That seems like a lot
19 of work.
20

21 PLAN SPONSOR: It's worth it. It
22 helps us to make sure we do right by
23 our employees.

Our Roadmap



- 1) Understanding Responsibilities
- 2) Investments - Generally
- 3) Target Date Funds
- 4) Benchmarking
- 5) Modernizing

Reimagine Your Retirement Program Structure



“**Why** do we have our plan(s)?”

.....

“**What** are we trying to accomplish?”

.....

“**Why** do employees participate – or not participate – in our plan?”

.....

“**Why** do we use our current matching or profit sharing structure?”

.....

“**What** other services are available?”

Questions?



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PLAN ADVISORS

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Thank you!