Retirement Plans' Fiduciaries Are Found Liable to Plans for $36.9 Million: Tussey v. ABB, Inc.

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In *Tussey v. ABB, Inc.*, No. 2:06-cv-04305 (Western District of Missouri, March 31, 2012), a class action case brought by present and former employees of ABB, Inc., the U. S. District Court for the Western District of Missouri ruled that plan fiduciaries were liable for several breaches of fiduciary duty and ordered the respective defendants to pay a total of $36.9 million to compensate for losses to the plans. The court's detailed order throws a bright light on several instances of plan mismanagement that could be valuable guideposts for other plan administrators, both as to important administrative measures to take and certain actions to avoid.

Defendant ABB, Inc. ("ABB") sponsored two 401(k) retirement plans for its employees (collectively "the Plans"). Participants could direct their contributions to any of the investment options pre-selected by ABB. ABB's Employee Benefits Committee was appointed to oversee all of ABB's benefit plan programs and was the plan administrator. ABB's Pension Review Committee was a named fiduciary responsible for selecting and monitoring the Plans' investment options. These committees were also defendants.

The Plans' investment options included mutual funds offered by Fidelity Investments. Defendant Fidelity Research served as investment advisor to those Fidelity mutual funds. Defendant Fidelity Trust served as the Plans' recordkeeper. For these services Fidelity Trust was paid in two ways: a hard dollar per-participant fee and "revenue sharing" dollars paid by set numbers of basis points when Plan participants invested in Fidelity funds. Over the course of time, Fidelity Trust was paid primarily by revenue sharing. Fidelity Trust also provided total benefit outsourcing services to ABB, such as handling the payroll for all ABB employees and the recordkeeping for ABB's health and welfare plans and defined benefit plan. Fidelity Trust lost money on these other services but made a substantial profit as the recordkeeper for the Plans.

Following a four week trial, the court held that the ABB defendants were liable for losses to the Plans totaling $35.2 million, caused by violations of fiduciary duties including:

- failure to monitor recordkeeping costs, failure to negotiate rebates for the Plans from either Fidelity or other investment companies on the Plans' investment platform, selection of more expensive investment options when less expensive options were available, and removal of a particular non-Fidelity fund and replacing it with a Fidelity fund; and
- agreeing to pay Fidelity fees exceeding the market cost for Plan services in order to subsidize the corporate services that Fidelity provided to ABB.

Fidelity Trust and Fiduciary Research were held liable for violating their respective fiduciary duties by mishandling "float" income derived from the transfers of plan assets under their discretionary control. These defendants were liable for resulting plan losses of $1.7 million.

ABB Liability: The Plans' Investment Policy Statement ("IPS") required that revenue sharing be used to off-set or reduce recordkeeping costs to the Plans. ABB was thus required to leverage the Plans' great size and assets (over $1 billion in assets) to reduce recordkeeping costs. The evidence showed a persistent failure of ABB to fulfill this duty. Instead of rebating the revenue sharing in accordance with the IPS, ABB let the money go into Fidelity Trust's pockets. The court found no "meaningful effort" by the ABB defendants to monitor the revenue sharing. ABB never calculated the amount of fees that the Plans paid Fidelity Trust by revenue sharing arrangements, nor did it consider how the Plans could leverage a reduction of those fees. The Plans also overpaid for the recordkeeping services that Fidelity Trust did provide, far exceeding their market value and even the trend of revenue that Fidelity Trust earned from other plans.

The court also found that ABB did not follow the IPS provisions for the "de-selection" of Plan investment options. A Vanguard Wellington fund that was performing well was dropped in 2000 in favor of a group of Fidelity mutual funds. Under a relevant collective bargaining agreement, ABB was obligated to pay some of the "hard dollar" fees for plan administration. By paying Fidelity for the chosen funds through revenue sharing, ABB reduced its own "hard dollar" exposure. The chosen Fidelity funds cost more in administrative fees, but, by ABB's use of revenue sharing arrangements, the Plans participants would have had difficulty seeing that they were in fact paying for the fees. The court determined that the Fidelity funds were chosen in the interests of ABB's relationship with Fidelity, not in the best interests of the participants.

The ABB defendants also failed to follow the Plans' own directives to select choices of investment share classes that provided participants with the lowest cost to participants. This meant choosing options with the lowest expense ratio. However, the defendants failed to do so, as in the case of replacing the Vanguard Wellington fund with higher fee Fidelity funds.

Fidelity Liability: The court also determined that Fidelity Trust and Fidelity Research were plan fiduciaries to the extent that they exercised discretionary control over plan assets, and this imposed on them a duty to act in the best interests of the plan participants when exercising that control. When ABB's matching contributions were paid into the Plans, the dollars went through a series of bank transfers creating "float" interest income. Fidelity Trust used this income to pay bank expenses that Fidelity Trust itself should have paid. Fidelity Research likewise failed to use the "float" to defray plan administrative expenses, and distributed "float" income to accounts not held for the exclusive benefit of the Plans' participants and their beneficiaries.

Tussey v. ABB is one of the most significant ERISA decisions in the body of recent cases arising from claims of fiduciary mismanagement of 401(k) plans. The district court's decision will likely undergo close judicial scrutiny on appeal to the U. S. Court of Appeals for the Eighth Circuit. In the meantime, other plan administrators should be aware of the liability that

the *Tussey* defendants incurred for failing to follow the Plans' own governing documents, such as the Investment Policy Statement, and for the persistent failure of the Plans' designated fiduciaries to make reasonable inquiries into the compensation arrangements with the Fidelity defendants. *Tussey* does not condemn the use of revenue sharing arrangements *per se*, but it sharply condemns the plan mismanagement disclosed by the detailed record of this case. That factual record, the fruit of a four week trial, will probably be the most difficult obstacle for the defendants to overcome on appeal.

For more information about this topic, please contact the authors or any member of the Williams Mullen ERISA Litigation Team.

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