

Federal District Court Holds Fiduciaries Liable for Breach for Excessive Fees and Imprudent Investments

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The U.S. Federal District Court for the Western District of Missouri determined that plan fiduciaries breached their fiduciary duties by failing to monitor recordkeeping costs, negotiate rebates, and prudently select and retain investment options. This is a federal district court decision and it differs from positions taken by some federal circuit courts which are precedential, but whether this decision is judicial activism or a new trend will need to play out over time. It is a case worth noting in light of the U.S. Department of Labor's recent initiatives on plan fee disclosure whose compliance deadlines are rapidly approaching. The court considered the revenue sharing agreement with Fidelity for recordkeeping services, as assets of the plan grew, revenue sharing with Fidelity would also grow—even if Fidelity provided no additional services. If assets declined, Fidelity would request a payment to make up the loss of revenue. The fiduciaries never calculated the dollar amount of the recordkeeping fees the Plan paid to Fidelity Trust via revenue sharing arrangements, nor did it consider how the Plan's size could be leveraged to reduce recordkeeping costs. The fiduciaries did not obtain a benchmark cost of Fidelity's services prior to choosing revenue sharing even after an outside consulting firm informed them that they were overpaying for recordkeeping and that the plan was subsidizing the corporate service provided by Fidelity, a breach of the duty of loyalty. The fiduciaries failed to determine the accuracy of the information or investigate how linkage might be affecting the interest of plan participants. Fiduciaries did not investigate whether Fidelity was giving a favorable price for corporate services. Fiduciaries did not investigate the market price for comparable recordkeeping fees. Furthermore, fiduciaries failed to comply with the terms of the Plan's investment policy statement (the IPS). The court determined that the IPS is a governing plan document within the meaning of ERISA § 404(a)(1)(D). The duty of prudence requires that fiduciaries comply with the IPS. At the same time, Fidelity was reallocating float income from the plans into a separate account for its own use. The Court held that the employer fiduciaries violated their fiduciary duties to the plan when they failed to monitor recordkeeping costs and negotiate rebates from Fidelity Trust, and selected classes of particular investments to be on the plan's investment platform that had higher expenses when other share classes with lower expenses of those same investments were available. The court further held that the employer fiduciaries violated their fiduciary duty when they removed the Wellington Fund and replaced it with Fidelity Freedom Funds which had a .45 basis point fees rather than .15 basis point fees for the Wellington Fund. The court held that the employer and the Employee Benefits Committee violated their fiduciary duties to the plan when they agreed to pay to Fidelity an amount that exceeded market costs for Plan services in order to subsidize the employer's corporate services. The court held that Fidelity Trust breached its fiduciary duties to the Plan when it failed to distribute float income solely for the interest of the plan, and Fidelity Research violated its fiduciary duties when it transferred float income to the Plan's investment options instead of the Plan. The court found that the Plan suffered losses of \$13.4 million as a result of the employer's failure to monitor recordkeeping costs and to negotiate for rebates, and that the Plan suffered losses of \$21.8 million for improper mapping. All employer fiduciaries were held jointly and severally liable for this amount. The court also found that the plan suffered total losses of \$1.7 million for Fidelity's breaches concerning float and held all Fidelity fiduciaries to be jointly and severally liable for this amount. *Tussey v. ABB, Inc.*, No. 2:06-CV-04305-NKL (W.D. Mo. March 31, 2012).