

## Seventh Circuit Provides Defined Contribution Plan Fiduciaries with Guidance on Prudence and a Reason to Pause

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The U.S. Seventh Circuit Court of Appeals recently issued its opinion in *George v. Kraft Foods Global, Inc.*, No. 10-1469 (7th Cir. April 2011), impacting fiduciaries to defined contribution retirement plans such as 401(k) plans. The plaintiffs had challenged the plan fiduciaries' decisions on three issues: the use of unitized accounting (a type of accounting in which participants have units in an investment fund instead of shares); the continued renewal of a record-keeper's contract without obtaining competitive bids for fees; and a directed trustee's practice of retaining the float (that is, keeping the interest earned on the funds set aside for a distribution check between the time the check is cut until it is actually cashed). A summary of the issues and the court's holdings can be found below.

**Unitized Accounting of Company Stock Fund** - The plaintiffs argued that the fiduciaries breached their duties by failing to reach a decision about the proposed solutions to the investment drag and the transactional drag in the company stock fund. The court found that there was no evidence that the fiduciaries made a decision with respect to the proposed solutions to investment drag and transactional drag in the company stock funds and that issue had to be returned for further proceedings to determine whether the circumstances prevailing in 2004 would have caused a prudent fiduciary to make a decision on proposed solutions to investment drag in the unitized fund. If that is established, then the fiduciaries would have breached the prudent man standard of care by not making a decision on the proposed solutions to investment and transactional drag. While the court did not say that unitized funds are problematic per se, it did make clear that when an issue about the accounting for an investment option is presented to a plan fiduciary with proposed solutions, it must document (i) its consideration of such proposed solutions and (ii) why it makes the decision it has made.

**Recordkeeping Fees** - The plaintiffs also alleged that the plan fiduciaries acted imprudently in retaining the record-keeper, who was paid out of the plan assets, from 1995 through 2004. The contract with the record-keeper was extended a number of times without obtaining competitive bids. Instead, the plan had obtained the advice of consultants that the fees were reasonable. The opinion is a bit unclear on what a plan fiduciary should do in this regard. The court indicates that the plan prudently relied on the opinion of advisors that the fees were reasonable. But, it goes on to indicate that the consultants' advice did not unequivocally endorse the current record-keeper's fees as reasonable because the advice was caveated with statements such as "without an actual fee quote comparison" and "could not comment on the competitiveness of [the] fees." Thus, the court reversed the grant of summary judgment for the defendants and sent the case back for trial on whether the fiduciaries were prudent in retaining the record-keeper and whether the fees were excessive. How this case is decided on remand will be important to watch, if it is not settled. Documentation of the decision process remains critical. This case does not hold that one must go out for a competitive bid process at any particular time or at all, at least not at this point. It will be worth waiting to see how other courts approach this issue.

**Float** - The court did not find a problem with the plan's directed trustee retaining the float on checks cut for benefits until they were cashed because they could find no evidence that the plan's fiduciary did not know how much float the trustee was retaining. While everyone is acutely aware of the rapidly approaching deadline for compliance with the fee disclosures under the ERISA section 408(b)(2) regulations, it is important to remember the float disclosure is one part of it.