

Class Action Fiduciary Litigation under ERISA

Paul M. Secunda

Walcheske & Luzi, LLC

Outline

I. Types of ERISA Fiduciary Litigation

A. Excessive Fees (Retirement and Welfare)

1. Our Focus Today and Mostly Retirement Cases - DCP vs. DBP (*Thole* (U.S. 2020) makes DBP cases difficult)

B. Other Types of Fiduciary Litigation

1. Pension Overpayment Cases
2. Plan Communication/Misrepresentation Cases
3. Early Retirement Cases

II. The Basics

A. Section 502(a)(2) (Plan) v. Section 502(a)(3) (Individual) Claims

B. Types of Fiduciary Breaches (ERISA Section 404) – six-year SOL

1. Loyalty
2. **Prudence (most common by far)**
3. Prudent Diversification
4. Follow Terms of Plan

C. Co-Fiduciary Breach (ERISA Section 405)

D. Prohibited Transactions (ERISA Sections 406 and 408) - categorically barring certain transactions believed to pose a high risk of fiduciary self-dealing or deemed likely to injure the retirement plan

E. Fee Arrangements – direct compensation vs. indirect compensation (aka “revenue sharing” typically refers to the compensation plan recordkeepers and service providers receive from mutual fund companies (or investment managers, affiliates, etc.) in exchange for assuming part of the mutual fund company's administrative functions)

- a. Revenue sharing can be returned to plan participants or used to defray administrative expenses

III. 401(k) and 403(b) Defined Contribution Plan Fiduciary Litigation

A. **In approximately 2006**, Plaintiff firms, led by Jerry Schlicter, began bringing a new form of ERISA litigation. These claims alleged breaches of fiduciary duty and prohibited transactions based on the

management of 401(k) and 403(b) plan assets and related fees paid to plan service providers.

B. Impact of Cases: Investment and administrative fees have decreased dramatically, and the continued wave of fee and expense litigation cases reflects the increasing importance of defined contribution plans in the landscape of employee retirement plans.

C. Some Stats (Lex Machina's 2010-2022 Graph of ERISA Claims)

1. Total Damages in These Cases: Over \$1.1 billion dollars (2010-2022)
2. 43% of cases settled or resolved at trial; 38% still unresolved; 11% dismissed (based on case filings from 2010-2022)
3. Nature of Allegations: recordkeeping fees, target date funds, individual investment options (fees and returns), stable value funds, managed account services, conflicts of interest/PT
4. 117 filings in 2020, 71 filings in 2021, and 99 filings in 2022
5. Industries: Medical, Utility, Financial, Retail, Insurance, Technology, Auto, Manufacturing
6. Top States: California, New York, Massachusetts, Michigan, Illinois, and Wisconsin

D. Parties

1. **Plaintiffs** – Current or Former Participants (Current or Former Employee)
 - a. Advantages to have current participants because more likely to have standing for prospective relief
2. **Defendants** – Corporate Defendants (mega or large – over \$200m assets normally) or Service Providers (mostly corporate because hard to find service providers are fiduciaries unless under Section 3(38) investment managers)
 - a. Board and Fiduciary Committees, with their Individual Members (sometimes, but . . .)

E. Claims

1. **Excessive Recordkeeping and Administrative Fees (RKA)** (most common – 5 cases in E.D. Wis. GB (Judges Griesbach) and three cases pending in E.D. Wis. MKE (Judge Pepper))
 - a. After *Albert v. Oshkosh*, 47 F.4th 570 (7th Cir. 2022) and *Hughes v. Northwestern II*, 63 F.4th 615 (7th Cir. 2023), the issue is whether have a “meaningful benchmark,” *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018), for comparison between plans.
 - b. More specifically, after *Hughes II*, do allegations of fungibility and commoditization of RKA services meet requirement of having allegations regarding fees paid for specific RKA services (*Tolomeo v. RR Donnelley* (N.D. Ill.) (Yes), *Mazza v. Pactiv Evergreen* (N.D. Ill.) (Yes), but *Mateya v. Cook Group* (S.D. Ind.) (No))
2. **High-Cost Share Classes** (e.g. *Kruzell v. Clean Harbors et al.* (D. Mass))
 - a. Issue is whether total expense ratio or net expense ratio (after taking into account revenue sharing) is more relevant – *Albert* (total expense ratio) vs. *Forman v. TriHealth* (6th Cir. 2002) (suggesting net expense ratio is more relevant)
3. **High-Cost or Low Performing Investments**
 - a. Target Date Funds – Fidelity Freedom Funds Active Suite (e.g., *Munt et al. v. WEC Energy* (E.D. Wis.))
 - b. Stable Value Funds/Excess Spreads (e.g. *Kruzell v. Clean Harbors et al.* (D. Mass))
 - c. Asset allocation programs (e.g. Prudential GoalMaker)
4. **Managed Account Services** (tiered rates based on amount invested – new way to increase revenue for RKs given increased scrutiny on RKA fees)
 - a. *Pizarro v. Home Depot*, Case No. 22-13643 (11th Cir.) (pending) (managed account and loss causation issues)

- b. How to measure damages – compared to average fee for managed account services (25 bps) or against equally effective, less-costly target-date fund options

5. Other Issues

- a. Plaintiff's Access to Plan Documents During Pleadings – Catch 22 – in pleading phase, only have publicly filed 5500 forms, participant fee disclosures under ERISA Section 404(a)(5), and quarterly statements for class representatives. Need also sponsor fee disclosures under ERISA Section 408(b)(2), administrative service agreements, fee transparencies, and committee minutes and materials to understand the fees paid, the services received, and fiduciary process followed (not 20/20 hindsight). Some courts sympathetic to this plight (*Peck v. Munson Healthcare* (W.D. Mich.), some not (*Mateya v. Cook Group* (S.D. Ind.))
- b. Standing/Class Issues – Article III – injury in fact as long as paid some RKA fees, managed account fees, or hold one challenged investment or share class. Class certification easier under 23(b)(1) – non-opt-out class.
- c. Solicitation of Bids - After *Hughes II*, important with RKA claims to establish a reasonable fee in the relevant market place since RKA markets are not transparent like investment fee markets
- d. Duty of Loyalty/PT – need to show Defendant acted in a self-interested, conflicted matter – paid self with plan assets beyond reasonable compensation – hard to show – can't piggy-back on duty of prudence claims
- e. Duty to Monitor – generally derivative of duty of prudence or loyalty claims – rise and fall with them – brought against Plan Sponsor/Board versus Committee
- f. Relief - Monetary relief includes monetary-type harm (equitable surcharge) and “investment losses” (i.e. losses allegedly attributable to the financial markets). Equitable relief sought includes disgorgement of fees (Section 409), removal of fiduciaries, and an accounting of plan assets.

IV. Conclusion and Forecast – No End in Sight for Litigation Wave