One Practitioner’s Perspective on ERISA Litigation
Closing the Barn Doors after the Cows Have Left

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Having worked with the Employee Retirement and Income Security Act of 1974 (ERISA) for more than 30 years, I follow retirement plan litigation closely and have developed opinions as cases and settlements have come and gone. In all litigation, lessons are to be learned, and this article will explore some that I’ve learned about ERISA over the years. I’m not an attorney nor do I profess to be one. I do not speak for any law firm nor can this be construed to be attorney advertising. These views are mine alone and are intended to highlight specific points rather than serve as a comprehensive summary. Attorneys may disagree with me and that is part of the conversation that makes this topic stimulating.

ERISA is an interesting and curious law. It mandates relationships, duties, and responsibilities, but it leaves a lot of defining issues and day-to-day actions unaddressed. Enter the courts where specific ERISA pieces are analyzed and interpreted for the parties in a particular case as well as a broader audience—where we apply interpretations for our practice. Just as it is hard to get cows back under control once they’ve left the barn, the same is true for ERISA litigation. Once the case has been filed, it’s often too late to go back and remedy the situation or clarify the confusion causing or affecting the case. So we look at the settlements and court opinions to help learn from the actions or mistakes of others.

Here I examine some notable cases relating to fiduciary duties and fees and identify how the outcomes apply. I’ll also look at some notable settlements that do not have the weight of the law but are nonetheless instructive.

ERISA—Setting the Baseline
Because ERISA lays out duties and responsibilities for those involved in any capacity for a retirement plan, it is important to identify and define the relevant ERISA statutes. We start with the definition of fiduciary:

[A] person is a fiduciary with respect to a plan to the extent
(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan [ERISA 1974, §404(a)(1)].

What does a fiduciary do and what are his/her standards of care?
A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;
(B) with the care, skill, prudence, and diligence under the circumstances then prevailing ... that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter [ERISA 1974, §404(a)(1)].

The case often used in support of fiduciary definitions is Donovan v. Bierwirth (680 F2nd 263) where fiduciary duties “are the highest known to the law.” Fiduciaries must discharge their duties with “the care, skill and prudence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use ...” If not skilled or knowledgeable in specific areas (record-keeping, investments, legal, etc.), this case also instructs fiduciaries to engage experts.

Upholding the “prudent man” standard is a tall order and applies to anyone identified as a fiduciary, or more com-
monly, anyone who influences the plan investments, operations, or policies.

Anyone who touches a plan is considered to be a party in interest, which is defined in ERISA as:

The term “party in interest” means, as to an employee benefit plan:
(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;
(B) a person providing services to such plan;
(C) an employer any of whose employees are covered by such plan;
(D) an employee organization any of whose members are covered by such plan [ERISA 1974, 3(14)].

You can see that a party-in-interest can easily overlap into becoming a fiduciary. A common example of a nonfiduciary broker effectively determining the plan’s fund lineup is illustrated below. In practice, a fiduciary is a significant subset of a party in interest. There can be a wide interpretation of who is a fiduciary by capacity, function, and actual actions.

Fiduciary Duties Litigation
Who are the fiduciaries? Are the fiduciaries acting in the best interests of the plan and its participants? Are parties that are claiming not to be fiduciaries acting as fiduciaries?

Ellis v. Rycenga Homes Inc. (1:04-cv-694) identified that a retail broker who gave investment advice to a plan was acting in a fiduciary capacity. The broker was liable for his recommendations.

George v. Kraft Foods (06-798 DRH) ruled that the plan fiduciaries were paying excessive recordkeeping fees for value returned. Additionally, the recommendations of their plan advisor were not being followed. (The company stock part of the case settled for $16 million.)

Varity v. Howe (516 U.S. 489 94-1471) ruled that plan fiduciaries must not mislead participants.

Similarly, Cigna v. Amara (US 09-804) ruled that while “Summary Plan Description (SPD)” is not the official word for the plan document, it must be correct and not misleading. Clearly, no communication to participants can be misleading or intentionally incorrect. As a practical matter, SPDs for smaller plans often are drafted from templates and often overlook specific plan details. Plan sponsors, relying on the guidance and processes of the providers they hired to assist them, often simply perform a cursory look before releasing their SPDs. Suffice it to say, a closer look at SPDs is warranted.

Tussey v. ABB Inc. (06-4305-cv-NKL) is a very instructive case. Without consulting its investment policy statement (IPS), ABB, upon the recommendation of its broker, replaced an inexpensive fund with a more-expensive fund. Furthermore, ABB failed to properly oversee provider compensation and did not conduct proper fee benchmarking. Beyond that, float income was left unmonitored and distributed to the wrong parties. Not surprising, recordkeeping fees were identified as unmonitored. In all, ABB was handed a $35-million judgment.

U.S. v. Benjamin Sheftall Eichholz (4:09-cr-0166-2tm-grs-1), a criminal case brought by the Department of Justice, ruled that Eichholz did not act in the best interests of participants, lied to federal investigators, did not file required annual reports, and used plan assets for his own personal use. The defendant is serving a prison sentence and civil charges from the Department of Labor have been filed to recover amounts embezzled and misused.

In Pfeil v. State Street Bank and Trust (10-2302 [6th Circuit 2012]) addressed a drop in stock price and much more. It noted that the fiduciary had a fundamental duty to select and maintain only prudent investment options in the plan, and a single poor-performing investment is likened to “one bad apple that spoils the bunch.” The fact that participants make their own investment decisions does not relieve the fiduciaries of the obligation to monitor the prudence of the investment options. A fiduciary monitoring all investments but letting one stray from the IPS standards and criteria is a red flag for trouble.

In re General Electric ERISA Litigation (Northern District of NY 06-315 8/9/2009), the plan settled for $100 million and GE was required to conduct fiduciary training, add participant-level investment advice, and provide modeling tools for participants.

Fiduciary Duties Litigation—Lessons Learned
Note that these cases involved plan sponsor fiduciaries. It is a very short line from a plan sponsor fiduciary to other fiduciaries.

Note also that anyone who finds out that the plan sponsor fiduciary or any other service provider is involved in potential violations of fiduciary duty is required to advise the plan fiduciaries and ultimately report the event to the Department of Labor. Common in many cases of this type is the charge that someone knew or should have known that a practice is illegal or is to the detriment of the plan and its participants. If you know about it, take action to communicate to those who can fix it. You have a stake in resolving this correctly. While some situations are obvious, the
rules apply to any manner in which a participant is harmed and some of those instances can be more difficult to discern. Ignorance is not an excuse.

Fee Litigation
Most prominent in ERISA litigation are cases over fees. Are fees reasonable? Did the selection of investments focus on suitability and proper due diligence or were they chosen because they pay providers and advisors more than other investments?

**Tibble v. Edison International (CV 07-5359 AGRx)** focused on the use of retail funds when identical or very similar institutional (and less-costly) funds were available. The easiest way to understand this is the difference between retail and wholesale. The plan fiduciary was liable for the difference between the retail and wholesale fund fees.

**Hecker v. Deere (06-c-719s)** is a landmark case that set precedent for many other fee cases. The case addressed the use of more than 70 retail funds in the Deere plan. The plan also had a self-directed brokerage window. The court ruled that the retail funds were appropriate because the plan had included index funds and less-costly alternatives.

In **Braden v. Wal-Mart, (608-cv-03109-GAF, W.D. Mo)**, a highly publicized case, the plaintiffs contended that Wal-Mart should have used its clout and asset size to get less-expensive, institutional-class shares for the plan. The case settled for $13.5 million and Wal-Mart was instructed to add an independent fiduciary to advise the plan, examine conflicts of interest, and add institutional funds to the plan. Similar results occurred in **Martin v. Caterpillar (CV-07-1009 JBM/JAG)**, which included a $16.5-million settlement.

**Phones Plus v. Hartford Life Insurance Company** (306-cv-1835) identified a class of plan sponsors arguing that fund selections by Hartford were based on revenue and that Hartford acted in a fiduciary capacity with respect to fund selection. This case settled for $16 million.

**Fee Litigation—Lessons Learned**
Your steps in performing investment due diligence cannot be overstated. While **Hecker** was decided in favor of the defendants, what kind of real due diligence can be performed on 70 funds? Think about the decisions that confront participants. Can they intelligently pick between five large-cap blend funds, four intermediate bond funds, or three balanced funds? More is not necessarily better.

More on **Hecker**: The investment advisor and platform provider were dismissed from the case, so one can only wonder what undocumented advice Deere received. Be careful in giving direction—particularly verbally. Be aware that you may be acting as a fiduciary. Documentation on both sides is critical.

If you have a client that is eligible for a less-expensive class of shares, the burden is on you and your client to justify why a more-expensive class is in the plan.

**Implications for Practitioners**
We are in a new environment of fee disclosure, determination of the fiduciary, and focus on due diligence. Your role as a trusted advisor has expanded and the smart advisor will embrace that expansion. Some general advice follows:

- **Recognize that**, as a party-in-interest, you have some fiduciary exposure. Be clear on what and how much exposure is involved.
- **Do not provide plan or investment advice and claim you are not a fiduciary**, because you are.
- **With the new fee disclosure rules** that became effective July 1, 2012, all providers and advisors are on the hook to identify and communicate all sorts of expenses. In the spirit of disclosure, exceed the requirements—it will garner trust. Don’t drag your heels here.

- **Advising clients on investment decisions** should be based on whether the investment is suitable and to the plan’s objectives.
- **Ensure the plan is reviewed** annually with respect to the investment options.
- **Develop a due diligence process** for reviewing the investment options.
- **Maintain records** of the due diligence process and the decision-making process.
- **Advise, pick, justify, and communicate clearly** to participants what their investment choices are so they can make the appropriate asset allocation decisions to meet their retirement needs. Help make their decisions straightforward, logical, and appropriate.

- **Re-examine the IPS and ensure that you are monitoring and evaluating the investment options consistently within stated standards and criteria.** Look further to see if the governance committee has addressed IPS issues properly.

- **If your client engages in actions that are unlawful, injure participants, or otherwise compromise the plan**, you are obligated to advise your client appropriately. Remember if you know or should know, you face liability regardless of your capacity. You are that trusted advisor. Earn and reinforce that trust.

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**Endnote**
1 Company stock drop cases will not be directly addressed in this paper with the exception of where a stock drop case has broader application to fiduciary duties. Employee stock ownership plan cases also are not addressed.