

Fiduciary *focus*



Litigation Boom

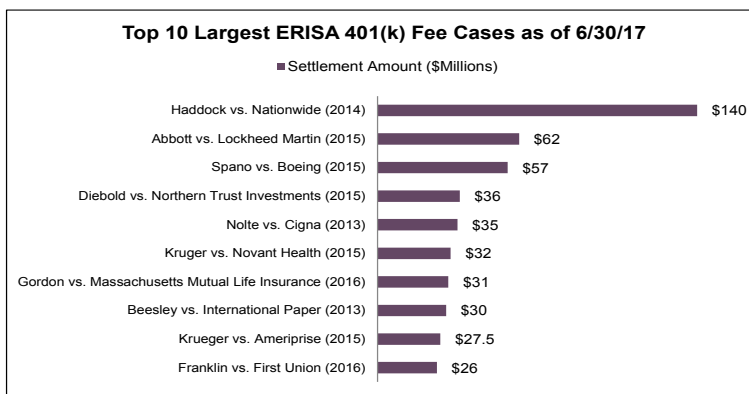
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Last week, after a decade of moving through various courts, a U.S. District Court ruled that Edison International violated fiduciary duties by offering expensive, retail share classes in their 401(k) Plan. Last month, it was announced that Brown University faced a similar lawsuit as a result of unreasonable and excessive fees for investment and administrative services in their 403(b) Plan. Throughout 2017, the retirement industry has seen an increased amount of excessive fee litigations claiming a breach of fiduciary duty under the Employee Retirement Income Security Act (ERISA) of 1974. Plan sponsors and advisors should be aware and familiar with the allegations and rulings as the cases may change industry best practices, types of advice provided to fiduciaries and investment processes going forward.

401 (k) Plans

Tibble vs. Edison was among the 401(k) lawsuits filed against some of the nation’s largest employers in 2005-2007. The Tibble vs. Edison plaintiffs successfully argued that the 17 mutual funds offered should have been institutionally priced rather than retail priced. The lawsuit ultimately made its way to the U.S. Supreme Court and is considered groundbreaking as it establishes severe consequences for fiduciaries violating ERISA guidelines and lacking a prudent investment process.

Many lawsuits from 2005-2007 have been settled (see below chart¹) with the largest awarded to Nationwide employees.



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In addition to fees, below are the common ERISA alleged violations cited in recent years:

- Self-dealing and favoritism to proprietary funds (e.g., offering the proprietary target date suite of a plan's recordkeeper) without proper supporting documentation
- Oversight and investment process related to the offering of company stock
- Revenue sharing arrangements
- Failing to take advantage of size to negotiate lower fees
- Money market vs. stable value offering
- Mutual fund vs. collective investment trust

In July 2017, a self-dealing ERISA settlement was reached for American Airlines Inc. for \$22 million². It was alleged the airliner breached its fiduciary duties under ERISA by selecting and retaining high-cost mutual funds offered by American Beacon, an investment manager affiliated with American Airlines. In 2016, MassMutual agreed to pay \$31 million for the excessive use of proprietary funds as did TIAA CREF for \$5 million earlier this year.^{3,4}

Company stock lawsuits also continue to arise after the Supreme Court's ruling of Fifth Third v. Dudenhoeffer (company stock lawsuits are also pending with Target and Exxon). In early 2017, J.C. Penny participants were successful in winning a company stock related lawsuit claiming retirement sufferings as a result of the company stock being an available investment option in the 401(k) Plan. The participants successfully proved that false, misleading statements and/or omissions regarding Penney's financial condition and prospects caused the stock to trade at artificially inflated prices. Participants were awarded \$4.5 million.⁵

403 (b) Plans

The targets of litigation in recent years have included not only corporate plan sponsors, but university and college retirement plan sponsors. These suits have also primarily related to excessive fees. In May, a federal judge did not dismiss a 403(b) lawsuit against Duke University that claims excessive fees were charged to participants as a result of fiduciary investment and service provider decisions. This is an important ruling as it sets the bar for fee related lawsuits against 403(b) plans. Below is a summarized list of the claims brought against the Duke 403(b) Plan that were determined plausible fiduciary violations and resulted in excessive fees.⁶

- Offering a high number of investment options
- Offering of multiple investments in asset classes depriving the plan the ability to qualify for lower share classes
- Retention of a historically underperforming fund
- Offering of investments that "locked" the plan and participants into specific investments on the TIAA CREF platform
- Retention of multiple record keepers

A similar lawsuit against Emory University was also not dismissed. Current lawsuits are pending for Brown, Cornell, Yale University, New York University, Vanderbilt University, the University of Pennsylvania, and MIT.

How Hartland Can Help

We help plan sponsors develop and follow a fiduciary investment process that includes fee and share class reviews and benchmarking, service provider oversight, and independent, investment due diligence. Hartland is a named fiduciary for more than 70 plans and knows best practices for 401(k) and 403(b) fiduciary oversight. We provide objective investment expertise and help maintain low fees for participants.

Sources:

¹ Source: Investment News, as of 7/13/2017

² American Airlines - Texas Northern District Court, Case No. 3:2016cv01033, Filed April 15, 2016

³ TIAA - UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK Case No. 15-cv-08040-PKC Document 46, Filed 05/10/17

⁴ Mass Mutual - UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS, Case No. 13-CV-30184-MAP, Filed 06/15/16

⁵ JCPenny - Texas Eastern District Court, Case No. 6:2014cv00601, Filed January 3, 2017

⁶ Duke - The United States District Court for the Mideel of North Carolina, Civil Action No. 1:16-cv-1044, Filed 10/8/16

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