Proving Prudence—How a Plan Committee Defended Itself

BY TED GODBOUT | SEPTEMBER 11, 2020

CONFERENCES AND EVENTS

While other similar cases have led to settlements, a defendant in a 401(k) excessive fee suit provides an inside look at how the company successfully defended itself thanks to a well-documented and prudent process.

In a Sept. 10 workshop session at the 2020 NAPA 401(k) Cyber Summit, Diane Gallagher, Vice President, Client Marketing and Value-Add Programs with American Century Investments, along with Tom Clark, Partner and Chief Operating Officer at the Wagner Law Group and formerly with the Schlichter law firm, provide their perspective on some of the key moments in Wildman v. Am. Century Servs. and the process involved in overcoming the claims.

The case before the U.S. District Court for the Western District of Missouri consisted of several claims common to the dozen or so excessive fee suits brought by participants in the 401(k) plans sponsored by investment management firms. Among the allegations were that both in selecting the plan’s designated investment alternatives and in monitoring those investments, defendants only considered investments affiliated with American Century, in furtherance of their own financial interests, rather than the interests of plan participants. In January 2019, Chief Judge Greg Kays ruled, however, that the plaintiffs had failed to meet their burden of proving a prima facie case of loss for the alleged breaches.

In her role as the chair of the plan’s retirement committee and a named defendant in the class action lawsuit, Gallagher believes her plan was targeted because of its size and because it is a financial services firm with proprietary investments in the plan.

Beware of Social Media Solicitations

One takeaway is to be watchful of social media solicitations. While the case was filed in June 2016, at some point in 2015 she and others in the firm received social media solicitations through Facebook and others in the form of sponsored ads suggesting that they may have been harmed in their retirement plan. That caught the attention of Gallagher, who brought it up with in-house counsel the next morning. Sure enough, two individuals responded to the solicitation, which eventually led to court-ordered mediation and ultimately a trial.

“The process leading up to the trial was something that I think was really important in our preparation and talking to the judge—is having detailed conversations and detailed answers to questions with respect to the work of the committee,” Gallagher explained, adding that the “entire process is incredibly sobering.”

To that point, Clark observed that “there’s been very few ERISA trials at all in these types of excessive fee cases. And to have a total defense win, I can only think of a couple in the last 15 years, so the fact that you felt confident enough in your defenses and to go to trial is not a common thing.”

Asked by Clark about the decision to go to trial, Gallagher emphasized that their in-house counsel felt confident in fighting because they had “good facts” on their side and felt confident in the work and decisions of the committee, which she acknowledged was not an easy decision.

Another challenging area, according to Gallagher, was having the work of the committee continue while the case was running in a parallel path and compartmentalizing those two things. For example, she noted that, before the social media solicitations, they had already started looking at whether to go ahead with a QDIA reenrollment. To that end, they had to make sure they were continuing the work of the committee and continuing to monitor investments irrespective of what was going on with the case.

To help push through, Gallagher recalled a former Department of Labor official speaking at an industry conference in 1998 who stated that, “attempting to do the right thing for your participants is always defensible,” and that, she explained, became a bit of a “true north” for her.

Process Counts

At the end of the day, the evidence showed the committee thoroughly discussed the composition of the plan’s lineup to ensure it covered the entire risk-reward spectrum, Clark noted. But what comes under the microscope is any time a financial services company uses their own funds, because not only are you accused of doing wrong, but you’re accused of benefiting your employer at the expense of your coworkers.

Clark went on to observe that this decision was one of the most important in the last 20 years if not one of the top in the history of ERISA, because what it shows is—even under the worst allegations someone can make against you—the fact that you have a good process insulates you from any kind of 20-20 hindsight analysis.

“I could pick any plan in this country—it doesn’t matter which one—and go find a lineup that beat that lineup. If I have the score book right after the fact, I can find any lineup to beat any lineup,” Clark explained, noting that it’s mathematically impossible to pick the best lineup at all times for a plan. “And so, what it means to be
As for additional takeaways, Gallagher notes that going through this process has affected the way she communicates electronically and that she is very judicious in her email communications, “as ‘E’ in email stands for evidence.” She also emphasized the importance of having a structured process that is reflected in the meeting minutes. “I think the meeting minutes show deliberation, they show they’re not transcriptions, but they show deliberation. They show a decision or a next step, if there is one. And, I think they are a very good historical record of the work of the committee over time.”

“And very clearly draw out that you’re focused on the best interest of the plan participant, no matter what the decision, because to me, the key to meeting minutes is to be historical, but always focused on why you’re relentlessly focused on your plan participants,” Clark added.

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