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ABB Suit Shows Danger Of 'Scorched Earth' Approach

By **Emily Brill**

Law360 (September 4, 2019, 12:04 PM EDT) -- A 13-year court battle between ABB Inc. and its workers produced the first-ever trial in a suit challenging 401(k) plan fees, one of the largest settlements in these cases and a cautionary tale for employers about taking a "scorched earth" approach to fighting benefits litigation.

After three trips through the appeals courts and two petitions lodged with the U.S. Supreme Court, the case finally **settled in March** for \$55 million — \$18.1 million more than a Missouri federal judge ordered ABB to pay in 2012.

ABB also spent a substantial amount defending the case, doling out \$42 million on attorney fees alone as of 2010. The litigation continued for nine years after that.

"Not only did they lose a large amount of money, but they created positive case law for the plaintiffs that affects everyone who practices law in this area," said Jordan Mamorsky, a management-side associate at benefits-focused firm The Wagner Law Group. "It had a tremendous impact on the [benefits] industry."

ABB passed up two opportunities to settle the case sooner, refusing to reach a deal with the workers during two court-ordered mediations. The workers' attorney, Schlichter Bogard & Denton LLP founding partner Jerome J. Schlichter, said the company was following its insurer's playbook in taking a hardball approach.

"There had never been a case brought for excessive fees in a 401(k) plan. ... It was completely uncharted water, which meant that we could expect the insurance companies insuring fiduciary liability coverage to take a very scorched-earth approach to defending the cases, which is what happened," Schlichter said. "The defense was complete stonewall."

Schlichter said the insurance industry came together to oppose his 401(k) suits, saying an insurer explicitly told him that the companies would "never pay voluntarily on these cases" and that they had "all agreed to that strategy" early on.

The industry committed to that approach for years, Schlichter said. He refers to that time as a "nuclear war" waged by insurance companies that placed their own business interests above their clients', because the insurers had more to lose.

"For each company, it's a one-time, one-off case. Once the case is over, that's it. For the insurers, providing fiduciary liability coverage to many companies, any one case is only part of a much bigger picture," Schlichter said. "What the insurers were doing was operating in their own self-interest and taking the viewpoint that regardless of cost and exposure, they would refuse to settle, or even entertain the concept of settlement."

Some insurers, however, departed from that approach as the years went by. Caterpillar Inc. settled for \$16.5 million in 2009, and Lockheed Martin Corp. agreed to pay \$62 million to end its fee suit in 2015. ABB, though, pressed on. It lost at trial, then appealed, then lost on appeal, then appealed again. Those appeals included petitions lodged with the Supreme Court in 2014 and 2017, which

were both denied.

The company took a great risk when committing to this strategy, Mamorsky said. Noting that the approach was "not necessarily a lawyer-driven litigation strategy," he said that ABB probably agreed to defend the case this way after talking to its insurer.

"[ABB and its insurer] were really trying to limit their exposure — the losses they would have to compensate plaintiffs for. At the end of the day, it really blew up in their face, because the case resolved for about \$20 million more than the original trial amount, which is really unheard of," Mamorsky said.

Mamorsky recommended that companies facing Employee Retirement Income Security Act fiduciary-breach suits look at relevant case law and assess their level of risk based on that. If the risk level is high for other suits featuring the same plaintiff's strategy, the company may want to settle rather than take the case to trial, he said.

If no on-point precedent exists — as was the case in 2006 with 401(k) fee suits — companies should look into how the court resolved similar suits, Mamorsky said.

"You have to look, more generally, at breach of fiduciary duty cases that were occurring around that time," Mamorsky said. "In this case, there was really no comprehensive law on that in 2006."

Tussey v. ABB was part of the first crop of 401(k) fee lawsuits filed by Schlichter Bogard in 2006. The firm **also sued** General Dynamic Corp., United Technologies Corp., Bechtel Group, Exelon Corp., International Paper Co., Boeing Co., Northrop Grumman Corp., Deere & Co., Caterpillar and Lockheed Martin that year.

In a **memorandum and order** approving the firm's \$18.3 million attorney fee request in *Tussey v. ABB* in August, U.S. District Judge Nanette K. Laughrey wrote that the lawsuits "made a 'national contribution' in the clarification and refinement of a fiduciary's responsibilities and duties."

Sean M. Anderson, a benefits law professor at the University of Illinois College of Law, said he's seen the impact that fee litigation has had on the retirement plan industry.

"It's pushed plan sponsors to be a little tougher with their investment providers and record keepers about exactly what they're getting for their fees," Anderson said.

Tussey v. ABB accused the billion-dollar technology company of using workers' 401(k) savings to offset its expenses and wrongly diverting those savings from one investment fund to another, causing workers to lose money.

The named plaintiff, a mechanical engineer named Ron Tussey who worked for ABB plants in Indiana and Missouri for 37 years, said he felt betrayed by the company's actions.

"I felt like I'd been taken advantage of," Tussey said. "There's a lot of people that don't trust the company with their money, and that's their primary reason. They'd rather take the money and bury it in their backyard."

--Editing by Rebecca Flanagan and Alanna Weissman.