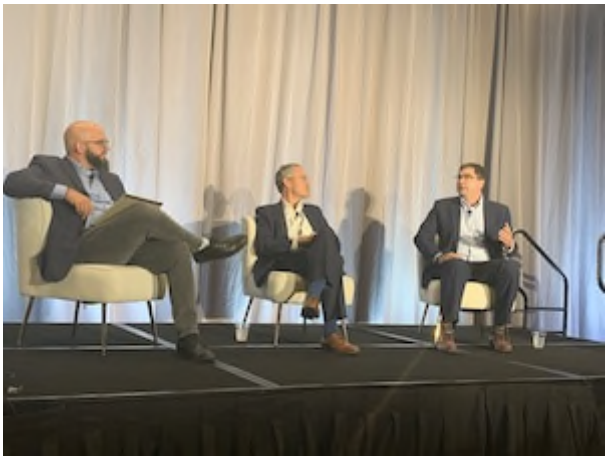
Crypto in 401(k) Plans: a Plaintiff Lawyer's Dream?

BY TED GODBOUT | JULY 28, 2022

LITIGATION



The prospect of 401(k) plans adding cryptocurrency to their plan menu is like waiting for "fruit to ripen," according to a plaintiff's lawyer who spoke as part of a July 26 "Lessons from Litigation" panel at the 2022 NAPA D.C. Fly-In Forum.

Attorney Mark Bokyo (at right in photo), a Partner with Bailey Glasser LLP, explained that anything which exposes participants to that level of risk, particularly when there's no real way to measure expected return moving forward, is not something that he would put in his plan. "I think the DOL's publicly stated position was carefully worded to just say, 'Hey, do your jobs if you're going to consider adding this.' The fact that participants want it is not a reason to do so any more than adding a lottery ticket fund would be," he noted.

Bokyo was joined by Jamie Fleckner (center in photo), a Partner and Chair of Goodwin's ERISA Litigation practice, and moderator Tom Clark (at left), COO and a Partner with The Wagner Law Group, in discussing the latest trends and developments in ERISA litigation.

Actively Managed Options

Turning to the recent Sixth Circuit decision in **Yosaun Smith v. CommonSpirit Health, et al** backing the dismissal of an excessive fee suit, and asking whether that was a watershed moment, Fleckner—who often represents plan fiduciaries/plan sponsors in litigation—observed that he'd love to say it was the start of a trend but he believes it's a little premature to draw that conclusion. In this case, the court rejected the notion that offering actively managed funds by itself didn't support allegations of a fiduciary breach sufficient to overcome a motion to dismiss.

Fleckner explained that this was a situation where a company or fiduciary tries to get the case thrown out at the beginning before the participant who sues knows anything about the process. And so the participant has to make allegations that infer there was a bad process based on the funds that are used in the plan—hoping that the court will find that argument to be plausible. "Now, in this case, it was an actively managed target date suite. And the court said that just having an actively managed target date suite, when you could have had an index target date suite, isn't enough to suggest that there was a bad process," he noted.

Fleckner added that he thinks the court made an excellent decision, but what can happen is that plaintiff's lawyers could get past that obstacle by adding to their allegations to try to give a court "enough flavor" indicating that there's a bad process beyond just making a comparison of an active target date suite

average employee is going to change jobs 12 or 13 times over the course of his or her career and have zero courses in retirement plan savings? "What's wrong with some consistency, so that every employer doesn't have to reeducate each employee about every option every time they change employers?" he asked.

Boyko added that his advice to plan fiduciaries would be to be more open in terms of their rationale and reasoning for plan changes, demonstrating that there was a thoughtful process behind the decisionmaking. As a plaintiff's attorney, he noted, he would be less likely to second-guess a decision that was made by someone looking out for the best interests of the plan participants, noting: "I don't want to bring a bad case; it doesn't further my goal of putting more money in a retiree's pocket to bring a bad case."

In contrast, Fleckner noted that he does believe there is a "bit of a chill" happening today, explaining that he continues to defend companies and sponsors who have tried to do innovative things. As an example, he noted that it wasn't that common for plans to use an OCIO or 3(38) structure 10 years ago, but some of the first movers who took that first step were sued for it.

"The litigation 'tail' shouldn't wag the dog… Congress and the administrative branch are the ones who should be studying policy in terms of what should or shouldn't be allowed in 401(k) plans," he explained. "Litigation shouldn't be 'driving the bus' and judges are not well situated to be making policy decisions. And if a number of plaintiff's lawyers are out with the range of cases that they bring, that does have a chilling effect. I think that's unfortunate."

Service Expansions

When asked by Clark what advice they would have for advisors who may be considering expanding their services beyond 3(21) and 3(38) and moving into money manager roles, the two panelists were in agreement, urging advisors to tread carefully.

In his experience, Fleckner observed, what the courts are looking for is whether the firms have a conflict of interest such that they cannot make asset management decisions that are truly in the best interests of clients and their participants. Additionally, the courts are looking at whether you are favoring certain investments because of your own compensation structure or you are acting in a way that's neutral as to your compensation in terms of what you're putting into that managed product, he noted.

"And so you want to have a process that you can defend as being in the participant's interest, because you are taking on that fiduciary responsibility for money management. And you just want to be very thoughtful about how that will look," Fleckner said. As a litigator, he explained, when he has a client who's been sued, he looks for what kind of objective process the advisor had in making investment decisions that he can then show to the judge as having been in the interest of the participants in the plan.

Plaintiff's attorney Bokyo noted that "self-dealing is the quickest way to get to the top" of his litigation list.

Participant Data

Turning to whether participant data is a plan asset, Clark observed that this has been a hot topic in recent lawsuits, but the argument that data is plan asset has not been supported by any court to date. Moreover, he observed, using data to benefit plan participants is the future of retirement—through the use of wellness tools and managed accounts, for example, providing for a more robust experience for participants.

When asked whether they see those lawsuits going anywhere, Fleckner suggested that the regulators probably need to look at it if they want a different outcome than what the courts have provided so far, noting that the courts are limited to interpreting the law as it exists and the applicable regulations to the extent they are given appropriate deference. "The way the courts have looked at this right now is that, under the Depa
guidance as to what is a plan asset, they don't view plan data as a plan asset," Fleckr

0 Comments Discussion Policy

Sign In to Comment

Most Popular

Another University 403(b) Suit Filed

Latest 2023 Social Security COLA Estimates Nearing Double Digits

Advisory Firm Client Data Exposed Via Vendor Incursion

Galvin Snags $6.25 Million Settlement in TDF Suit

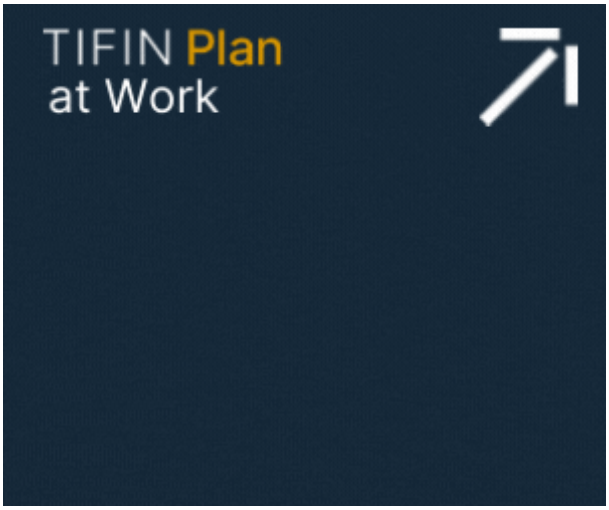
Nevin & Fred: EARN, RISE & SHINE, Auto-Portability & the Way(s) Forward

Recent Headlines

How Are State Auto-IRAs Impacting the Small-Plan Market?

DOL Shares Status of ESG, Crypto, Cybersecurity, Fiduciary and More

TIFIN Plan at Work



Sign up for The Daily

Subscribe to the NAPA Net Daily.

Recent Comments

sorry folks - this is what comes from doing a 5 a.m. update... while on vacation

4401 N. Fairfax Drive, Suite 600
Arlington, VA 22203

703.516.9300

703.516.9308

CustomerCare@napa-net.org