May 10, 2019

After 13 Years of Litigation, *Tussey v. ABB* Finally Settles for $55 Million, Providing a Few Final Lessons for Plan Fiduciaries

On March 28, 2019, the parties to *Tussey v. ABB,* a case whose history stretches back to 2006, entered into a proposed settlement agreement. The settlement provided for an award of $55 million to the plaintiffs, with $18.3 million going to the plaintiffs' lawyers.

After 13 years of litigation and news coverage, most retirement plan fiduciaries are familiar with the *Tussey* case. The claims in *Tussey* provide useful illustrations of the ways in which fiduciaries and lawsuits have become more sophisticated over time. Generally, the plaintiffs in *Tussey* alleged that the ABB plan fiduciaries:

- Imprudently removed the Vanguard Wellington fund from the ABB 401(k) plan and mapped participants to the Fidelity Freedom Funds (the plan's target date funds), based on the interests of the plan sponsor rather than the best interests of plan participants;
- Failed to monitor revenue sharing and negotiate rebates from their recordkeeper, which they should have done considering the size of the plan, and failed to utilize lower-cost share classes; and
- Used revenue sharing to pay for services provided to ABB that were not related to their 401(k) plan.

The settlement, in addition to resolving damages for the outstanding portions of the claims listed above, provided for a number of non-monetary terms that are representative of other similar settlements. Specifically, these include requiring the ABB fiduciaries to:

- Conduct an RFP for recordkeeping services within 18 months;
- Determine the specific dollar amount of revenue sharing that its 401(k) plan is paying to its recordkeeper and leverage the plan's size to take advantage of rebates;
- Choose the lowest expense ratio share classes; and
- Cease using its plan recordkeeper to provide corporate services to ABB.

As *Tussey* has proceeded through the courts over the years, fiduciaries have learned to avoid many of the pitfalls that the ABB plan fiduciaries failed to avoid. However, in the process of avoiding these pitfalls, fiduciaries need to ensure that they do not rely excessively on their own knowledge or that of their service providers. They must also apply the principles learned from *Tussey* to more sophisticated pitfalls facing retirement plan fiduciaries in the current litigation landscape.

Making Fiduciary Mapping Decisions

Tussey has long been used as an example of the importance of having and following a prudent process when it comes to selecting investments for removal and mapping participant assets to alternate investments.

Mapping decisions are one of the most significant fiduciary risks for retirement plan fiduciaries today. In order for a fiduciary's decision-making process to be prudent, it must take into account the legal risks associated with mapping. Fiduciaries must evaluate the availability of Department of Labor safe harbors with respect to mapping decisions, and ensure that their consultants and advisors appreciate the importance of taking advantage of those safe harbors. To aid in this process, fiduciaries should ensure that their process includes a discussion of:

- Whether the replacement fund has similar risk and return characteristics; and
- If the advisor recommends mapping participants to a target-date fund, an explanation of why doing so is in the participants' best interest.

Fiduciaries should be aware that some advisors and recordkeepers have institutional biases toward mapping to target-date funds. While there are good reasons to map assets to target date funds, fiduciaries should only agree to do so after they have considered the benefits and risks of such a decision.

Understanding How Fees Are Charged and Allocated

With the surge of excessive fee litigation since *Tussey*, most fiduciaries have spent significant time and energy focusing on monitoring and benchmarking the amount of fees paid by a plan and attempting to negotiate fee reductions. However, the settlement terms of *Tussey*—including the requirement that the ABB plan fiduciaries track the specific dollar amount of revenue sharing compensation—illustrate the importance of understanding ***both*** how fees are charged to the plan ***and*** how fees are allocated to participants. Fiduciaries should discuss not only the reasonableness of the fees, but a number of other factors including:

- An analysis of the specific dollar amounts of direct and indirect compensation received;
- Whether alternative methods of charging fees to the plan would be more prudent considering the circumstances and demographics of the plan and its participants; and
- Whether alternative methods of allocating fees to participants are in the best interest of plan participants.

Specifically, fiduciaries need to ensure that they adequately consider and document how fee allocation decisions impact disparate groups of participants and how those decisions are in the best interest of plan participants as a whole.

Understanding the Fiduciary Issues Associated with "Extra" Services

In *Tussey*, one of the initial claims at issue was that the ABB plan fiduciaries allegedly used revenue sharing amounts to pay for unrelated services, such as payroll processing and services for other plans. Most retirement plan fiduciaries understand that revenue credits cannot be used for unrelated services such as payroll processing. However, as recordkeepers continue to roll out financial products that involve services unrelated to their plans, plan fiduciaries need to understand the fiduciary issues associated with implementing these services, including:

- Whether plan assets will be used to pay for these non-plan expenses;
- How a fiduciary's duties to a plan participant are separate from the participants' financial well-being with respect to financial issues outside the plan; and
- The fiduciary's need to understand how participant data will be used and protected.

A recent article in the *Wall Street Journal* titled "A New Fight Breaks Out Over 401(k) Fees" (May 8, 2019) highlights "extra" services as part of a broader trend of recordkeepers attempting to generate additional fees in response to declining revenue. That article groups financial wellness services as a tool for increasing non-traditional fees, along with Fidelity's "infrastructure fee" (which is currently being scrutinized by courts and regulators) and high-cost advisory services.

In addition, Vanderbilt University recently settled a lawsuit challenging their fiduciaries' handling of participant data. In addition to paying $14.5 million, Vanderbilt must take steps to prevent its recordkeeper from using information about plan participants to engage in cross-selling of financial products unrelated to the plan.

Many advisors and recordkeepers are, in a non-fiduciary capacity, introducing financial initiatives to participants as a means of recouping the lost revenue attributable to lower recordkeeping fees. These services include financial wellness programs, student debt repayment services, personal debt management services, tools to track spending, and services consolidating information about all of a participant's financial accounts into a single online portal. Paying for these services with plan assets raises fiduciary concerns similar to those raised in *Tussey* regarding the use of plan assets to pay for non-plan services. As these services become more widely available, litigation regarding this issue will affect many plan fiduciaries who adopted such services without adequately considering the fiduciary issues.

Additional Information

If you have any questions regarding the *Tussey* settlement or if you would like assistance reviewing your processes for handling mapping and fee decisions, please contact a member of our Employee Benefits Practice Group listed below. For more information concerning our employee benefits practice, please visit us at www.KutakRock.com.

Contacts

John E. Schembari	Omaha	(402) 231-8886	John.Schembari@KutakRock.com
Michelle M. Ueding	Omaha	(402) 661-8613	Michelle.Ueding@KutakRock.com
William C. McCartney	Irvine	(949) 852-5052	William.McCartney@KutakRock.com
P. Brian Bartels	Omaha	(402) 231-8897	P.Brian.Bartels@KutakRock.com
David S. Anderson	Minneapolis	(612) 334-5000	David.Anderson@KutakRock.com
Cindy L. Davis	Minneapolis	(612) 334-5000	Cindy.Davis@KutakRock.com
Ruth S. Marcott	Minneapolis	(612) 334-5044	Ruth.Marcott@KutakRock.com
Amanda R. Cefalu	Minneapolis	(612) 334-5000	Amanda.Cefalu@KutakRock.com
Alexis L. Pappas	Omaha	(402) 661-8646	Alexis.Pappas@KutakRock.com
Jeffrey J. McGuire	Omaha	(402) 661-8647	Jeffrey.McGuire@KutakRock.com
Sevawn S. Foster	Little Rock	(501) 975-3120	Sevawn.Foster@KutakRock.com
Alexander G. Engelkamp	Omaha	(402) 346-6000	Alexander.Engelkamp@KutakRock.com
Nathan T. Boone	Minneapolis	(612) 334-5014	Nathan.Boone@KutakRock.com