Fiduciary Update | November 2024

Courts Highlight Key Fiduciary Process Elements

This quarter, several cases considered the details of claims alleging fiduciary breaches in the selection and retention of investments and payment of fees. In each of these cases, the plan fiduciaries prevailed. The judges' observations offer good guidance for practical actions fiduciaries can take as part of a prudent governance process.

In *Luckett v. Wintrust Financial Corp*. (N.D. Ill. 2024), a fiduciary committee decided to replace their actively managed T. Rowe Price Retirement target-date funds with the passively managed BlackRock Lifepath Index target date funds. Unfortunately, the BlackRock funds did not perform as well as the T. Rowe Price funds, so plan participants sued, alleging a fiduciary breach in making the replacement.

- The case was dismissed in favor of the plan fiduciaries with the judge noting: "Comparison can be the thief of accuracy when it comes to two funds with separate goals and separate risk profiles." The BlackRock funds are passively managed to-retirement strategies, unlike the T. Rowe Price funds, which are actively managed through retirement. In view of their different strategies, they are not comparable.
- In support of the idea that the T. Rowe Price and BlackRock strategies are comparable, the plaintiffs noted that the plan fiduciaries had compared these strategies in making their selection. The judge discounted this, observing that the fiduciary process of making investment decisions is very different from a judge's role in evaluating fiduciaries' decisions. "As a policy matter, we want plan fiduciaries to engage in thorough comparisons without fearing liability for their due diligence."
- The judge also noted that "Courts take a longer view of fund performance because a prudent fiduciary may—and often does—retain investments through a period of underperformance as part of a long-range investment strategy."

In *In Re: Prime Healthcare ERISA Litigation* (C.D. Cal. 2024), plan fiduciaries were alleged to have had an inadequate governance process for investment reviews, monitoring investment expenses, and recordkeeping fees. Following an 11-day bench trial, the judge concluded that the fiduciaries' process was prudent and denied all the plaintiff's claims. The opinion made the following points, among others.

- The committee received regular fiduciary updates as part of their quarterly committee meetings, and fiduciary issues were routinely highlighted in quarterly investment reviews. On this basis, "the Court finds that the Committee received regular and substantive training on their fiduciary duties."
- The committee was challenged for not having a charter. However, the judge noted, "The Court cannot conclude it is industry practice to have a charter."
- A challenge to relatively brief minutes that focused on the committee's process was rebuffed. Documentation of a committee's activities includes not only meeting minutes, but also the materials reviewed and considered at meetings.
- It is not industry custom to always conduct a request-for-proposal process to evaluate recordkeeping fees. The combination of requests for information and internal benchmarking was sufficient.

In *In Re: Quest Diagnostics Incorporated ERISA Litigation* (D. N.J. 2024), plan fiduciaries were sued for retaining underperforming investments and having an inadequate governance process. Ruling on a motion for summary judgment, the judge concluded that the fiduciaries' process was prudent. All the plaintiff's claims were denied. The ruling made the following points, among others.

- The following committee actions supported its sound process:
  - hiring an independent investment advisor to provide quarterly investment review reporting;
  - receiving that reporting in advance of committee meetings; and
  - having regular quarterly committee meetings.
- Meeting minutes were challenged as lacking sufficient details. This argument was rejected. Meeting materials are part of the documentary record of the committee's process. No court decisions were cited to support the idea that brief minutes can support a fiduciary prudence breach claim.
- The ERISA duty of prudence does not expect fiduciaries to duplicate their advisors' investigative efforts. Rather, it requires that they review the data a consultant gathers to assess its significance and supplement where necessary.

Fees Litigation Grinds On

The flow of fees cases continues. Many of these cases are settled before progressing to a court decision. A few recent examples of court-approved settlements include the following.

- Cintas Corporation: $4 million settlement for 116,000 class members, with an average

participant award of $34.48. *Hawkings v. Cintas Corporation* (S.D. Ohio 2024)
- MedStar Health: $11.8 million settlement for 48,000 class members, with an average participant award of $245.83. *In Re MedStar ERISA Litigation* (D. Md. 2024)
- Salesforce.com: $1.35 million settlement for 50,000 class members with an average participant award of $27.00. *Miguel v. Salesforce.com* (N.D. Cal. 2024)

Hedge Fund Plan Fiduciaries to Pay $40,000 per 401(k) Plan Participant

The former human resources director of a hedge fund investment management firm filed a class action lawsuit challenging the firm's operation of its $103 million 401(k) plan. Allegedly, the only investments offered in the plan were two of the hedge fund's strategies, both of which included alternative investments. The offered investments suffered significant losses, and a lawsuit followed. A settlement of $7.9 million has been announced, which equates to an average award per participant of $40,000. *Andrew-Berry v. Weiss and GWA, LLC* (D. Conn. 2024)

Recordkeeper Not Responsible for Market Losses During Distribution Delay

In late February 2020, as the COVID-19 pandemic was taking hold and roiling equity markets, a recently retired 401(k) plan participant requested complete distribution of her nearly $1.7 million account balance. Although she was told that a check would be sent the next day, the plan had a mandatory distribution waiting period of 30 days following a participant's retirement. Ultimately, because the market had declined, the distribution amount was about $150,000 lower than the participant's account balance when the distribution was requested.

The recordkeeper recognized its miscommunication about the waiting period and let the participant know within a few days. Acknowledging the communication error, the recordkeeper paid the participant an additional $52,000. Even so, the participant received $98,000 less than she anticipated.

The disappointed participant sued, claiming that, pending completion of the requested distribution, the recordkeeper should have moved her account assets to a safe harbor cash account, where it would have been protected from market volatility. She also claimed that the recordkeeper breached its fiduciary responsibility to her by enforcing the 30-day waiting period.

The court ruled against the participant, noting that the recordkeeper did not have the discretion or authority to change her investment direction pending completion of her requested distribution. Additionally, the recordkeeper was not acting as a fiduciary in enforcing the plan-mandated 30-day distribution waiting period. *Harris v. American Electric Power Service Corporation* (S.D. Ohio 2024)

This case is a good reminder that plan recordkeepers have very limited discretion and rarely take on a fiduciary role.

Health Claim Denial Requires Meaningful Dialogue

Editor's note: Although the Fiduciary Update is focused on retirement plan issues, significant other fiduciary developments are also reported from time to time.

A recent case involving a health benefit claim denial held that, in the course of considering a benefit claim and appeal, there must be a "meaningful dialogue" between the plan administrator and the participant.

In *Dwyer v. United Healthcare Insurance Company* (5th Cir. 2024), a plan beneficiary's eating disorder treatment was dramatically reduced. Appeal of the care reduction was denied with a single paragraph explanation. The court considered each sentence in the concise appeal denial, noting either its inaccuracy or irrelevance. One statement in the appeal denial— "You are better."—was characterized as "a doozy" for both being incorrect and having no medical significance.

When health benefits are denied, the beneficiary has the procedural right to a full and fair review by the appropriate named fiduciary. To meet this requirement there must be a meaningful dialogue between the beneficiary and administrator. Failure to have a good-faith meaningful dialogue represents an independent basis to overturn a denial of benefits. The judge observed, "This back-and-forth is how civilized people communicate with each other regarding important matters."

The court of appeals reversed the plan administrator's benefit reduction and sent the case back to the court to calculate the damages due to the breach.

Du Pont Matriarch's Retirement Program Not Covered by ERISA

We previously reported on a retirement program established in 1947 by Mary Chichester du Pont of the DuPont chemical company for domestic employees and those who provided secretarial, accounting, or other assistance to du Pont family members. (See CAPTRUST's Fiduciary Update | May 2023.] Practically, at this time, the beneficiaries of the retirement program and trust are employees of Mary Chichester du Pont's grandchildren. This litigation began with a dispute over whether one grandchild's employee is covered under the trust. The U.S. District Court concluded that the retirement program was governed by ERISA and that the employee was covered under the plan. A special master was appointed to sort out the details, including an estimated $38 million trust liability. An appeal followed.

The U.S. Court of Appeal for the Third Circuit has reversed the finding that the du Pont family retirement program was an ERISA-covered plan and vacated appointment of the special master. The court of appeals noted that there was no single employer of the participating employees. Therefore, to be covered under the program—as an ERISA plan—the employee would have to show that her employer established or adopted the trust and plan. The employee could not meet this burden, so the court of appeals concluded that ERISA does not apply to this arrangement and reversed the lower court's decision.

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Murderer Cannot Receive Beneficiary Proceeds

Two recent cases have addresses so-called *slayer statutes*, which provide that murderers cannot receive money as the beneficiaries of those who they kill.

In *Standard Insurance Company v. Guy* (6th Cir. 2024), Joel Guy murdered his parents and admitted that the reason for the murders was financial gain. He was a designated beneficiary on his mother's life insurance. The family lived in Tennessee, which has a slayer statute. The district court held that ERISA does not preempt the Tennessee slayer statute and precluded Guy from benefitting from the murder. He appealed, arguing that ERISA preempts state laws and does not include a slayer statute, so he should receive the life insurance proceeds. The circuit court of appeals reviewed the issue and found that, regardless of the Tennessee slayer statute, the federal common law (that is, decisions by other courts) includes a slayer statute. So, he cannot benefit.

In *Hartford Life and Accident Insurance Company v. Nickal* (D. Colo. 2024), Gary Nickal murdered his wife, Molly Jean. Nickal was the designated beneficiary on her life insurance policy. Molly Jean's estate sued to get the life insurance benefits. Colorado, where the family lived, has a slayer statute, but the issue of ERISA preemption had not been addressed. The court considered the matter and concluded that ERISA does not preempt Colorado's slayer statute. The life insurance proceeds were awarded to the estate.
