Revamping Retirement Episode 90_FINAL

Intro: [00:00:00] Covering the ever evolving retirement plan landscape to help identify the biggest opportunities for plan sponsors, CAPTRUST presents Revamping Retirement.

Audrey Wheat: Hello and welcome everyone to Revamping Retirement. We're so excited to be back, for our September episode. Today we are joined by Brandon Long, who is a partner at a law firm, McAfee & Taft, based out of Oklahoma City. Brandon, welcome to the podcast.

Brandon Long: Thank you. Thanks for having me

Audrey Wheat: So Brandon, we're recording this the week after college football kicked off.

So being from Oklahoma, and I also am from [00:01:00] Oklahoma, you know you have to pick an allegiance when you are in Oklahoma, even if you didn't go to that specific college. So are you an OU or OSU fan?

Brandon Long: I'm an OU fan, the Sooners are my team and, hoping we can win at least nine games this year. it's an exciting, very exciting time here.

Audrey Wheat: That's a very specific number,

nine games

Brandon Long: it's-- 10 would be better, but nine is what we're hoping for. We got a very hard schedule this year, so

Audrey Wheat: Okay. best of luck to you and Boomer Sooner. Jennifer, you hail from North Carolina, so here you also have to pick a college even if you didn't go to that college. So are you, UNC or are you NC State?

Jennifer Doss: So I did go to NC State, so I am firmly Wolfpack. However, it's really interesting because my son just started at UNC Chapel Hill, so we got some-- rivalry at home now, he was rooting for his team this past weekend, and I was rooting for ours, and they won and we lost.

So didn't go my way this time, but, should be exciting football season.

Audrey Wheat: Okay. you'll be getting some [00:02:00] house divided things for Christmas, I'm sure. I won't, keep you all waiting for me. guess if I had to choose, being from Oklahoma, I would choose Boomer Sooner. I would choose OU. but then I do, for North Carolina, I do cheer for Carolina.

My husband is a huge Carolina basketball fan, so I'll go with Carolina.

So Brandon, what we wanna talk to you about today is, since we have an attorney with us, we just wanna do, an assortment of questions kind of like ask an ERISA attorney. So I would just love to start off by learning a little bit more about your firm, and how you help plan sponsors.

Brandon Long: So McAfee and Taft is a mid-size firm, about 200-ish lawyers. we're the largest firm in Oklahoma, but, regionally we're viewed as a mid-size firm. We're a full service firm. We do everything except for criminal law. Our firm was founded 70-something years ago by two accountants, and so we have a very strong business and tax practice.

Our ERISA practice, our benefits practice, was started pre-ERISA, in the early 1970s. And [00:03:00] so we're kind of unusual in the sense that we have about 14 legit ERISA lawyers, benefits lawyers, and at even much larger firms, that's an unusually large group of lawyers.

I think we're gonna start off with a bang here in our potpourri of topics, and we're gonna talk about DOL activity, Department of Labor activity. So, fun stuff out of the way upfront, Department of Labor audits. so I know that there was some communication about, focuses and timeframes and things like that that came out, a couple of months ago.

Jennifer Doss: But what are you seeing, Brandon, in your practice? what are EBSA investigators, most focused on today? Have you seen any shifts in that, focus up the last few years? Like what are you seeing on the ground?

Brandon Long: for most of my career, a Department of Labor audit or investigation, as they call it, has focused on the retirement side. I've been involved in a number of, investigations where they're looking at, like on defined contribution plans, late deposits, and plenty of other issues.

But, [00:04:00] the investigations have all been retirement-focused and that is really all that we've worried about. I would say now, the Department of Labor, if you were talking to an investigator, they would tell you that they're mostly focused on the health and welfare side, and specifically, on mental health parity compliance.

That seems to be the number one draft pick of issues that they're focused on. I also noticed that, the, EBSA, the component of the Department of Labor that has the folks that enforce the laws related to benefit plans, I think they are down from 800 employees, which is not very many under Lisa Gomez, to somewhere around 500 now or maybe a little less than that.

and Those are not all investigators, but that is the number of people charged with enforcing the law for all benefit plans in the entire country. So it's not very many people to do a lot of work for a lot of different plans. in addition to focusing on health and welfare, plans more than retirement, now,they are, very careful about what they actually choose to investigate.

So in the past, [00:05:00] when an employee would call and complain... 'Cause, you know, any employee can call the Department of Labor and complain about something, and the Department of Labor will call and follow up on each one of those. but they seem to be, much less inclined to open up a full-blown investigation from, just an inquiry.

They are pretty selective, it seems. I also think, maybe lastly on this, they seem to be focusing on service providers instead of auditing, McAfee Taft, they could audit, and I'm just using,Blue Cross, for example, and they could get at a lot more plans or United or Cigna or Aetna or whoever.

but whatever service providers that are out there in the industry, they seem to be focused on trying to audit those,providers because then they can deal with a lot more, they can y- get a lot more bang for their buck, in terms of their time.

Jennifer Doss: Yeah, one-to-many. if you have limited staff, right? Focusing on one-to-many versus the one-to-one hand combat it makes a lot of sense, that sounds like if you're a retirement plan sponsor, at least maybe that's, some-somewhat a bright spot. So the other thing that we've been [00:06:00] talking about with the Department of Labor recently has been their proposed,designated investment alternatives rule.

Sometimes people just call it the alts rule. I'm putting that in air quotes for people that, 'cause they can't see us, obviously. And, they came out with that proposal. They had a comment period. There were a lot of comments made, and now we've gone into the quiet period where they're digesting and we're waiting for them to come back, with the final version, now that they've given it all of the consideration that the industry has provided.

So I guess, what are you hearing on that? Are you getting questions from plan sponsors on that? what should plan sponsors be thinking about in terms of when this is finalized? what should they be asking from their providers?

Brandon Long: this is arguably the most significant piece of regulatory guidance related to fiduciary investments in something like 47 years, and, it's a big deal. I think the questions that I got initially were all about because of President Trump's executive order, which caused this proposed rule, that executive order was issued in, I think, August of [00:07:00] '25.

the questions initially focused on alternative assets and everybody, when you think about alternative assets or alts, as you call them, Clients immediately start talking about Bitcoin, and I'm not gonna let crypto in my plan. And, people have very strong opinions about,Bitcoin and cryptocurrency in retirement plans.

But the executive order is much broader than that, the defining alternative assets much broader to include things like real estate and commodities. And then this proposed rule was issued and created this six-factor safe harbor thatif fiduciaries of plans use these six factors to select investments, then they are safe.

they fit within a safe harbor where they will not be challenged for, breaching their fiduciary duty. I think frankly, it's going to impact people like you guys.

the consulting firms like CAPTRUST that serve often in a 321 role, for plan, committees. the way that recommendations are framed in the future, in terms of selecting investments, I think those six [00:08:00] factors will be used by investment consultants to make their recommendations to committees about what they should or should not do.

I personally think the six factors, performance fees, liquidity valuation, and, complexity of the, investment or something like that those are the factors or some of them anyway. I think most consulting firms including CAPTRUST, are already using those.

They may not, outline those six factors specifically, but I think in the future after this rule is finalized, and I think it will be finalized relatively soon because it seems to be a priority for the Trump administration, I think it, will change the way fiduciary committees get recommendations from their consulting firms.

I find it interesting a couple things, and this is probably reflected in some of the comments, but I do find it interesting if the Trump administration really wanted to, encourage and open the floodgates for alternative assets in defined contribution plans, the proposed rule could have said that fiduciaries have no responsibility for decisions that people make [00:09:00] through brokerage windows.

But the rule did not do that. And so that six-factor framework will apply to the selection of all investments, not just alternative assets. But the, administration, the Department of Labor did not propose what I just mentioned about, brokerage windows and saying, "Hey, fiduciaries have no responsibility."

We're not still sure exactly what our responsibility is with, brokerage windows, but they did not say that. I also find it interesting, that, they didn't tell us what it means to, adequately monitor the options you currently have, because most of our clients do not have a blank sheet of paper.

They already have investments in their plans, and so this, proposed rule deals with the selection of investments and really doesn't tell us how to monitor investments or what it means to have a diverse investment menu. They indicate that future guidance will cover that, but I'm interested to see if the final rule, once it's finalized, addresses any of those topics, because the proposed rule really did not

Jennifer Doss: I think that will be very interesting in terms of whether they fold in the monitoring piece. Do [00:10:00] they say, "Look, here's the six factors for selection," and then, "Oh, by the way, that's the same framework you have for monitoring on an ongoing basis"? And that's really interesting because we all know that, when you're going through a selection process, that does look different than when you're doing ongoing monitoring.

So I think that'll be something interesting for the industry to digest. So,thank you for all those thoughts.

Brandon Long: Yeah. You bet. And one more comment, I find it interesting, this proposed rule is very pro-employer. It's the way I would phrase it. there's comments about how fiduciaries are not required to be clairvoyant.

there's concern over litigation exposure by fiduciaries, and so that kind of lens that they're looking through when they're crafting these rules just seems to be, to me, a new perspective than what it has been in the past. And, I look through the lens of the employer, also the fiduciaries monitoring these plans, 'cause I know how hard they work to do that.

and I like that, but it's just different, whether you like it or not, it's very different it seems than what it's been in the past.

Audrey Wheat: Well,we promised to cover many topics. I wanna take a,bit of a [00:11:00] hard left turn here. But, Brandon, we're noticing that many retirement providers, andwe're talking about record keepers, we're talking about advisors as well, are offering a broader range of products and services than they did in the past.

so what should plan sponsors understand before approving those additional products or services, whether they're going inside the plan or outside the plan?

Brandon Long: I think any time a fiduciary, that is overseeing a plan is in a meeting with a service provider, including me, and I say, "Hey, let me tell you about, my tax practice at my firm and what they can do for you." The client should have a little bit of a yellow flag and say, "Okay, what is this?

Is it any good? What does it cost? How do I know that it's good, that the cost is reasonable?" and I think we have duties to ask a lot of questions when, potential add-ons are offered to our participants. in the retirement context, just as an [00:12:00] example, there's so much consolidation in the record-keeping space in particular, as you guys know better than me.

the record keepers that exist and seem to be surviving are ones that offer products and often investments. and that's not necessarily bad. if you're sitting in a meeting as a fiduciary and you're using XYZ Record Keeper and they say, "Hey, we have this great service where your participants can get individualized investment advice," or, "We have this great service where we can help your participants, reduce their credit, load outside of the retirement plan," or, "We have a great managed account product that we want to promote to you that can help your participants get more tailored investment help."

Those all may be great. But the question is, How do we know they're any good? like for example,

if we turn someone onto a participant or our participants and say, "We're gonna let you, meet with them and pay you," or we'll let the participant account pay you to help them with their investments, is there some reporting we can get [00:13:00] periodically after the fact to show what advice they were given, whether that advice is working, whether the fee that's being charged is reasonable?

I think we just have an obligation to, ask a lot of questions. I would also say s- specifically related to the topic of wellness on the retirement side, there's a lot of things that seem to fit under the umbrella of, quote-unquote, wellness. Things like budgeting and estate planning,and, financial planning, that kind of thing.

All good stuff, but it can raise some interesting questions like I've already mentioned. You also have to be careful about, services that are offered to participants in the plan, but also may be offered to participants outside the plan. And for example, some of these wellness products can be really good, if they're being offered to employees that are not participants in the plan, then the question is, who's paying for that?

And is it the participants in the plan somehow subsidizing these services or these offerings outside the plan? And that creates risk. the bottom line is I live in the state of [00:14:00] paranoia because of what I do helping people try to,mitigate their risk and meet their legal obligations.

And sadly sometimes when you're trying to do good things for your, employees and your participants in your plans, it can backfire on you because you can be, questioned and second-guessed. And I'm not suggesting we live in fear, but we do need to make sure we ask a lot of questions and understand, and not just turn things on because we're told they're really good, that they don't cost anything to the plan.

it costs somebody somewhere somehow, and it's just asking those kinds of questions, not in a defensive way, but more of a proactive understanding kind of way

Audrey Wheat: That makes sense. And I think it's often easiest, to take the path of least resistance. "Oh, that sounds good. Sure, we'll turn that on." But, our plan sponsors have spent so much time and energy, getting the right advisor in place, And then getting the right record keeper in place.

Why would you stop, making an effort to evaluate products and services after those two [00:15:00] decisions are made?

Brandon Long: one more comment is that on the retirement side, It's relatively squeaky clean in terms of disclosure and objective information, benchmarking data that you can use I know CAPTRUST has the famous no golf ball policy where they won't accept a golf ball from a vendor and that's really good, but it's taken the industry a long time to get to this point.

On the health and welfare side, and a lot of, our clients have responsibility for that health and welfare side too, it's harder to pin down what people are getting paid. There's not, always great benchmarking information available so you can benchmark fees.

But fiduciaries have the same obligations on the health and welfare side that they do the retirement. And so we need to be sure that we understand all the ways that everybody's getting paid and then also ensure that what they're getting paid is reasonable, and that's true on the health side too, so

Jennifer Doss: Okay. We're gonna shift again. I think that's a very complicated topic, Brandon, and we could talk about that for a long time, but I am gonna shift [00:16:00] because, you're in a situation of trust and confidence with some of these people. And, we all work in situations where I have vendors, and if I had to manage fewer vendors, that would be better, and I can get better pricing and these things like that.

So there are a lot of benefits. There's a lot of things to consider. But I think the overall message that you're providing us is, do your due diligence, think about it, make sure that you're looking at things critically and not just accepting them for face value. So I appreciate that. All right. So one of the other things that you also do, in your spare time, is you do some advisor searches, for your clients. And we'd love to hear about that. I think we've talked to some advisor search firms specifically in the past, but we'd love to hear what trends you're seeing in that space.

for instance, are there certain services that are more important to plan sponsors or less important that are coming up, something that's coming up more and more, or again, getting thrown by the wayside, or

Brandon Long: Yeah. Tying back a little bit to the proposed rule on investments, that, safe harbor with the six factors, Most of the [00:17:00] committees that I work with have a investment consultant, usually a 3(21) consultant, where they are standing kind of arm in arm and there's recommendations made and the client asks questions and chooses to accept or decline, but ultimately they're co-fiduciaries with the investment consultant.

I think the proposed rule is pushing people And I'm talking about larger plans that often have sophisticated in-internal investment and finance teams, that are monitoring the investments and selecting investments and plans.

This is causing them to break loose and do searches to look for an investment consultant, Because the proposed rule, if you look at the examples in that proposed rule, and I think there are...something like 30 of them, and I think the conclusion is reached that the fiduciary committee met their responsibility, they're using an investment consultant.

And so I think that's one thing is there's a trend where,it's going to cause more people to use consultants. And I think consulting firms, and I'm not just saying this 'cause I'm talking to you guys. it would be true if I was talking to some of your competitors too. I think now more than [00:18:00] ever, fiduciary committees are going to need people like CAPTRUST to help select and monitor investments.

but then the other thing is, 3(38) services where instead of, recommendations where we're standing arm in arm, you make a recommendation to us and we decide to accept it or not, that 3(21) structure that seems to be most prevalent in my practice among really large plans.

the 3(38) structure where you just turn the advisor or the manager, I guess, the investments over to them and let them decide, what to put in the plan and when to take it out and put new things in. that structure has mostly for me been a small plan, mid-size plan, service in the past.

but I noticed that larger plans are, on a growing basis more interested in 3(38) services just because they can turn the management of the investment selections, over toan expert and let them have the responsibility and frankly the liability for managing the investments in the plan.

I think we're gonna see [00:19:00] more of that as things continue to get more complicated. But I would say those are the few trends that I'm seeing right now, related to, in-investment selection. the searches that I do for clients I don't really, market this

I don't call people up or email and say, "Hey, I can do an advisor search for you." It's usually a client is upset about something and, they're looking to change vendors and they don't really know where to start, and it's really pretty easy for me to do that for them becausejust working with so many different plans, I get a sense of the firms that I think do a good job.

And I'm really just kinda helping the client send out information, gather that information, and then I really kinda force the client to score the responses themselves, 'cause I don't ever want to be nudging clients in a particular direction. it really is their call.

lastly on this, I had a client one time, and this was a mid-sized client, that called me up and said, we've been doing a record keeper search for our 401plan," and this was a nice mid-sized [00:20:00] plan.

and we've got it narrowed down to record keeper A or record keeper B. and without telling you who A and B are, I told the client, I said, you're either buying a bicycle or a Toyota. are you wanting to ride your bike to work or are you wanting to actually drive a car?"

And so because they didn't really understand, they were, smart and they were working hard to try to make a good choice, but they didn't know that difference. And so I said, "You really need to take a step back and get an investment consultant and let them do that for you." And so my point is, like record keeper RFPs, that is the consultant space and not something I'm really that comfortable with.

I've done it, but really I think,clients need to make sure they have a good consultant first and then let, the consultant run the second step of the record keeper search, which also involves the investments and, what's available, what's not available.

Audrey Wheat: We agree. There is an order of operation that makes sense and,starts at the hire of the advisor. so we'll pivot one more time, Brandon, and we wanna talk about [00:21:00] litigation trends since you are in fact a lawyer. looking across today's litigation landscape, do you have one or two cases that come to mind that you think should be on plan sponsors' radar, that they should be watching, and why?

Brandon Long: So there's a, case at the Supreme Court right now related to when a plaintiff files a lawsuit against a fiduciary committee and says, "You selected the wrong..." I'll just say target date funds as an example, or, "The target date funds you selected were not very good, or they were too expensive, and you could have got a better target date fund selection, at a lower cost."

and by the way, this could apply to any kind of investment, not just target date funds, but that's what's at issue in the Supreme Court case, that's pending right now. The question is, does the plaintiff have to demonstrate or show that they're a meaningful benchmark or have something to compare?

like if I say the target date fund in a plan sucks, Do I have to show that there was a meaningful benchmark that I'm comparing this [00:22:00] so-called deficient fund against, in order to survive early stages in the litigation before the case gets kicked out?

it's a legal academic case, but it's a really big deal because if the Supreme Court ultimately holds that plaintiffs do have to demonstrate or plead a meaningful benchmark, that will reduce the number of, lawsuits filed, most likely, which would be a good thing for plan fiduciaries.

And so I think that's, one big one to watch right now that a lot of people are interested in. Different parts of the country, different appellate courts have different opinions on that, and that's why the case is at the Supreme Court at the moment, because there seems to be a division of thought on whether a plaintiff has to plead a meaningful benchmark or not.

So we'll see. That's one. I think the other is this even less fun to talk about and maybe even more or less interesting to listen about is prohibited transaction litigation. a prohibited transaction is if McAfee Taft hires Fidelity, for example, [00:23:00] Fidelity's our record keeper, but if McAfee Taft hires Fidelity to record keep our 401plan and our plan pays Fidelity, that is a transaction that is prohibited under ERISA.

But there's an exemption that says notwithstanding the fact that our plan is engaging a prohibited transaction by paying Fidelity, and I'm just using that as an example, there's an exemption that says, there's no prohibited transaction if we need Fidelity, which we do, and if the fee that they charge us is reasonable.

So you have an exemption. And, There was a case a, a year or two ago that made it more easy for plaintiffs to at least allege that there's a prohibited transaction, and the Supreme Court ruling on this has effectively made it where we're worried that it could be easier for these types of claims where someone just says, "Hey, McAfee Taft is using Fidelity, and so you're engaging in a prohibited transaction, and gonna sue you and let you spend a bunch of money to go defend this lawsuit so that we can ultimately prove that we [00:24:00] needed their service and that their fee was reasonable."

the litigation, and sadly lawyers, we are expensive, and if you can get past the early stage of litigation, if you can survive the first motion where you're, someone, the defendant is saying, "Hey, we want to get out of this case because this is baloney." if they survive that initial motion and get farther into discovery, clients get more willing to settle because of the lawyer fees.

and the plaintiff's lawyers, often, they're very skilled and they know that. And so this prohibited transaction angle and what the litigation does related to prohibited transactions is something worth watching. But again, it's sucky to talk about and it's even more sucky to listen about.

That's also a legal term. I would say just very randomly, forfeiture litigation remains a hot topic and we still need some definitive appellate guidance about when forfeitures or whether forfeitures can be, chosen to be used to fund employer contributions. And then on the health side, there's all [00:25:00] sorts of stuff like tobacco litigation and tobacco cessation program litigation and other things too.

Jennifer Doss: the first case you mentioned, the one that's at the Supreme Court or coming up in the fall when they start their session. you mentioned meaningful benchmark, and I've heard a lot of confusion from plan sponsors who are like, what do you mean meaningful benchmark?"

'Cause when we talk about benchmarks, like in a committee meeting, we're talking about, an index, right? We're talking about comparing a, fund in your plan to an index and, maybe a peer group and things like that. But when we see these cases, what they're actually doing is

I'll just go out on a limb here and say they're cherry-picking a few alternatives, So it's not a meaningful benchmark in the benchmark sense that we think about sometimes when we talk about it in reviews. It's really more of a, to your point, another comparator that you could have used because they're similar in some fashion,

they're apples to apples, or we feel they're apples to apples. And then there's a whole conversation around what does apples to apples really mean and how similar does it have to be? But I do hear a lot of confusion about meaningful benchmarks.

what are we really [00:26:00] talking about there? So,those are all good to watch,

Brandon Long:

Jennifer Doss: All right. All right. we've gotten past all the hard questions, so now we wanna ask you the easiest question of all that is personal to you. What does retirement look like to you, Brandon Long?

Brandon Long: So I'm in my early 50s which I feel like is young but not 25, and You know, I advise all these companies and committees and things about different stuff, but it's so-- weird to think about it for myself and you start to think like, "Do I have enough money?

Do I need to save more? what are my expenses going to look like?" I think for me, I've got a long runway left, but,hopefully I'm not sitting here at my desk, at age 70 or something. Maybe I will be. I've got too many children. I've had too many kids, and they're, as it turns out, very expensive.

but anyway, I think probably late 60s and I'm also, at a point where my practice is changing such that I spend as much time managing the firm as I do, advising clients. And so That's a weird thing to, to have all these younger folks [00:27:00] that, you know, me doing other things here at the firm creates opportunities for other younger folks and that's the way it's supposed to be.

So, uh, it's all good, but it's, just weird to think about, and to think about there being an end game here. but it's coming, so

Audrey Wheat: We often joke, Brandon, that we spend more time than any people we know outside of this industry thinking about retirement, but we sometimes have the hardest time retiring in this industry. So definitely feel, what you said there. thank you so much, Brandon, for coming on. We truly enjoyed having you here.

thank you again also to our listeners. Please make sure to like and subscribe to "Revamping Retirement" on all the normal podcast platforms, and we will see you next month

The discussions and opinions expressed in this podcast are those of the speaker and are subject to change without notice. This podcast is intended to be informational only. Nothing in this podcast constitutes a solicitation, investment advice, or recommendation to invest in any securities. [00:28:00] CAPTRUST Financial Advisors is an investment advisor registered under the Investment Advisors Act of 1940.

Nancy: This presentation does not contain legal, investment, or tax advice.Views expressed are those of the speakers and interviewees and not necessarily the views of CAPTRUST. Opinions are subject to change without notice.