



We speak **your** language.

**401(k) Plan
Fee and Expense Litigation
Reducing Risk For The C-Suite**

Frank J. Del Barto
fdelbarto@masudafunai.com

MasudaFunai



Topics

- 401(k) Plans At Risk
- Who Exposed the Risk?
- Recognizable Companies Targeted
- Common Lawsuit Allegations
- Who is a Fiduciary under ERISA?
- Fiduciary Duties, Liability and Civil Enforcement
- Case Study - LeMettry's Collision, Inc.
- Fiduciary Liability Reduction Strategies
- Takeaways



401(k) Plans At Risk

- 401(k) Plans Have Been Treated As Install and Forget Plans
 - Focus on medical plan rate increases
 - No rate increases, no annual open enrollments
 - Not comfortable with investments
 - Not looking for issues if issues don't surface
 - Complex administration and changing regulatory environment

- About 513,000 401(k) plans covering 88 million participants

- 75,000 401(k) plans have \$25 million or fewer assets, and more than 4.2 million workers have their savings in these plans (Bloomberg Law, "Uptick in Fee Litigation Reshaping 401(k) Industry, By Jacklyn Wille



Who Exposed the Risk?

■ Schlichter, Bogard & Denton

- appointed class counsel in over 15 ERISA class actions regarding excessive fees in large defined contribution plans.
- a “well-earned reputation as a pioneer and leader in the field” of 401(k) excessive fee litigation. *Abbott v. Lockheed Martin Corp.*, No. 06-701, 2015 U.S. Dist.Lexis 93206 at 4-5 (S.D. Ill. July 17, 2015).
- Lockheed Martin - \$62 million settlement
- Boeing - \$57 million settlement
- Settlements to date, in excess of \$271 million



Recognizable Companies Targeted

■ 401(k) Plans Involved in Fee Lawsuits

■ Verizon Communications Inc.	\$30 billion
■ Chevron Corp.	\$19 billion
■ Intel Corp.	\$14.9 billion
■ Oracle Corp.	\$11 billion
■ American Airlines	\$9.1 billion
■ Anthem Inc.	\$5 billion
■ LaMettry's Collision	\$9.2 Million

Bloomberg Law, "Uptick in Fee Litigation Reshaping 401(k) Industry, By Jacklyn Wille



Common Lawsuit Allegations

- 1. Imprudent Selection and Retention of Investments**
 - retail versus institutional
 - active versus passive
 - share classes
- 2. Receipt of Revenue Sharing Payments**
- 3. Excessive Recordkeeping Fees**
- 4. Self-Dealing**



Who is a Fiduciary Under ERISA?

ERISA – Section 3(21)

- It is a **functional test** – not based on title

Under ERISA, you are a fiduciary **to the extent you:**

Exercise ***discretionary authority or control*** over ***plan management***

Exercise ***any authority or control*** over ***plan assets***

Have ***discretionary authority or responsibility*** for ***plan admin.***

Give investment advice for a fee



Who May Be a Plan Fiduciary?

Ordinarily a plan fiduciary

- Plan sponsor
- Plan administrator
- Trustee
- Plan committee

May be a plan fiduciary

- Human resource professionals
- Officers of plan sponsor
- Directors of plan sponsor
- Record keepers / Third party administrators*

Ordinarily not a plan fiduciary

- Service providers
 - Lawyers
 - Accountants
 - Auditors
 - Record keepers / Third party administrators*
 - Actuaries



Fiduciary Duties

ERISA Section 404(a)

■ A fiduciary shall discharge his duties with respect to a plan solely in the interest of plan participants and beneficiaries and

(A) for the exclusive purpose of:

- (i) providing benefits to participants and their beneficiaries; and
- (ii) **defraying reasonable expenses of administering the plan;**

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that **a prudent man acting in a like capacity** and familiar with such matters would use in the conduct of an enterprise of like character and with like aims (“**prudent expert**”);

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly not prudent to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.



Liability for Breach of Fiduciary Duty

ERISA Section 409(a)

- Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title **shall**
- **be personally liable** to make good to such plan any losses to the plan resulting from such breach, and to
 - **restore to such plan any profits** of such fiduciary which have been made through the use of assets of the plan by the fiduciary, and
 - **be subject to such other equitable or remedial relief** as the court may deem appropriate, including removal of such fiduciary.



Civil Enforcement

ERISA Section 502(a)

■ A civil action may be brought

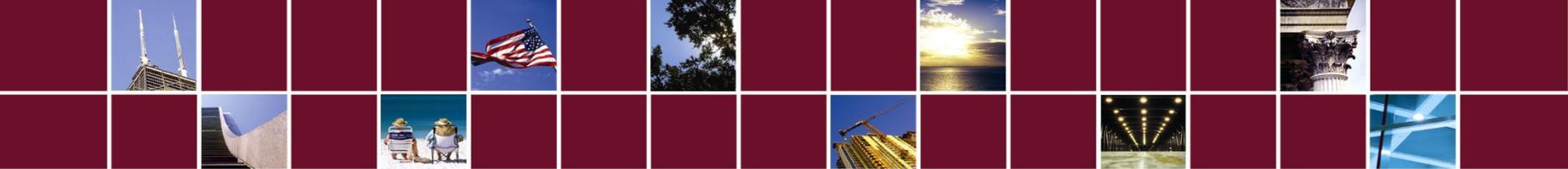
(1) by a participant or beneficiary

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or terms of the plan, or (B) to redress such violation if (i) to enforce any provision of this title.



Case Study – LaMettry’s Collision

Debbie Damberg and Tony Severson, as representatives of a class of similarly situated persons, and on behalf of the LaMettry’s 401(k) Profits Sharing Plan

Plaintiffs

v.

LaMettry’s Collision, Inc., Steven P. Daniel and Joanne M. LaMettry

Defendants.



Case Study: LaMettry's Collision, Inc.

Fiduciary Breach Allegations Similar to Large Plan Litigation

1. 11 retail class share mutual funds, but institutional shares were available
2. Recordkeeping fees charged as a percentage of assets versus per participant
3. Revenue sharing payments, were
 - retained by Voya,
 - not disclosed to participants
 - never reviewed for reasonable against services provided
4. No process for considering, selecting or actively monitoring funds



Fiduciary Liability Reduction Strategies

Establish a Plan Committee

Obtain a commitment from senior management

- Explain litigation environment,
- Fiduciary liability is expensive and personal

Adopt a committee charter (similar to corporate bylaws)

- Purpose and authority, membership, responsibilities, meetings
- Rules and procedures, resources of committee

Appoint members – sign document accepting appointment

- 3 to 5 members who are ready and able to participate fully
- Permanent (CFO and HR) and staggered rotating members
- Meet regularly and as needed



Fiduciary Liability Reduction Strategies

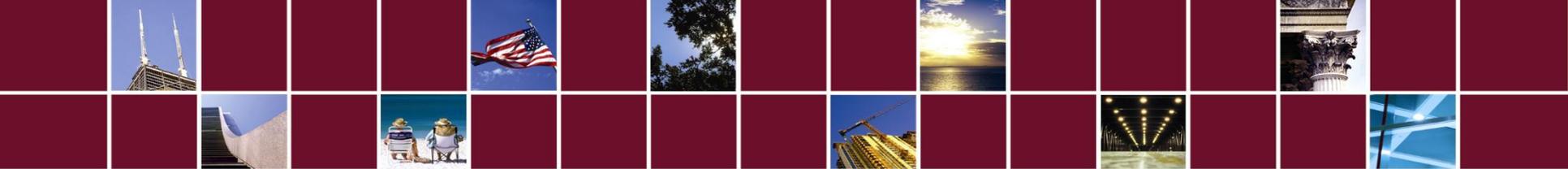
- 1. Document Processes Used To Carryout Fiduciary Responsibilities**
 - Meeting notes, Memo to file
 - Courts won't substitute their judgment for yours, if documented
- 2. Research, Hire and Monitor Service providers**
 - Investment manager
 - Retirement plan consultant
 - Record keeper
 - Auditor
 - ERISA Counsel
- 3. Consider Fiduciary Liability Insurance**



Fiduciary Liability Reduction Strategies

Plan Committee Responsibilities

- Develop investment policy statement (not required, but recommended)
- Review and evaluate
 - administrative fees and expenses,
 - investment selection and managers,
 - investment fees, and
 - plan administration issues
- Meet two to four times per year
- Retain outside investment advisors, consultants, etc.
- Document decisions (meeting agendas, meeting notes)
- Conduct ongoing training and education
- Helps to avoid actual or potential conflicts of interest



Takeaways

- 1. 401(k) plans are an untapped opportunity for plaintiffs**
- 2. Committees and investment policy statements help reduce risk**
- 3. Periodically benchmark plan and services (“RFP”)**
- 4. Utilize outside providers - remember the “Prudent Expert” standard**
- 5. Consider fiduciary liability insurance**



We speak **your** language.

U.S. Supreme Court - 9-0 Decision

ERISA Fiduciaries have,

“a continuing duty to monitor investments and
remove imprudent ones.”

Tibble v. Edison Int'l, 135 S. Ct. 1823, 1829 (2015)

MasudaFunai



We speak **your** language.

Questions

Contact Information

Frank J. Del Barto

Chair, Employment, Labor and Benefits Group

(847) 734-8811

fdelbarto@masudafunai.com

MasudaFunai