



U.S. Court of Appeals Rules Against 401(k) Plan Fiduciaries in Revenue Sharing Case

MARCH 28, 2014

In the closely watched *Tussey v. ABB*, the U.S. Court of Appeals for the Eighth Circuit affirmed ABB fiduciaries' liability of \$13.4 million for failing to monitor revenue sharing fees paid to a 401(k) recordkeeper.

ABB hired Fidelity to provide recordkeeping services for its two 401(k) plans. Over time, the fees paid to Fidelity shifted from a per-participant-fee model to a revenue-sharing model. In addition to recordkeeping for the plans, Fidelity provided payroll services to ABB and recordkeeping services for ABB's defined benefit and health and welfare plans.

Participants sued the ABB 401(k) plan fiduciaries and Fidelity, claiming violations of fiduciary duties and prohibited transactions related to revenue sharing, the mapping of certain investments, and Fidelity's treatment of float income. The district court held that:

- ABB fiduciaries violated fiduciary duties when they failed to monitor recordkeeping costs, failed to negotiate rebates, selected more expensive share classes when less expensive share classes were available, and mapped funds from a Vanguard fund to Fidelity's Freedom Funds;
- ABB fiduciaries violated fiduciary duties when they agreed to pay to Fidelity an amount that exceeded market costs for plan services in order to subsidize the corporate services provided to ABB by Fidelity, such as ABB's payroll and recordkeeping for ABB's health and welfare plan and its defined benefit plan; and
- Fidelity violated its fiduciary duties when it transferred float income to the plans' investment options instead of the plans.

Against ABB, the district court awarded \$13.4 million for failing to control recordkeeping costs and \$21.8 million for losses resulting from the mapping of the Vanguard fund to the Fidelity Freedom Funds. Against Fidelity, the court awarded \$1.7 million for lost float income. The court held both parties jointly liable for \$13.4 million in attorney fees and costs.

The Eighth Circuit upheld the \$13.4 million award against ABB regarding recordkeeping costs, but reversed and remanded the \$21.8 million award related to the mapping of investments and the \$1.7 million award against Fidelity, agreeing with Fidelity that the float income belonged to the investment options and not the plans under the particular circumstances. Attorneys' fees were vacated.

With respect to the recordkeeping claim, the Eighth Circuit agreed with the district court that ABB fiduciaries breached their fiduciary duties, citing ABB fiduciaries' failure to:

- calculate the amount the plans were paying Fidelity for recordkeeping through revenue sharing;
- determine whether Fidelity's pricing was competitive;
- adequately leverage the plans' size to reduce fees; and
- "make a good faith effort to prevent the subsidization of administration costs of ABB corporate services" with plan assets, even after ABB's outside consultant notified ABB that the plan was overpaying for recordkeeping and might be subsidizing ABB's other corporate services.

Importantly, the Eighth Circuit determined that the district court should have applied an abuse of discretion standard in reviewing fiduciary decisions and specifically rejected the argument that the abuse of discretion standard applies only to benefit claim determinations. This reinforces the importance of including "Firestone" language granting plan fiduciaries broad discretion to interpret and make decisions related to a plan in all plan documents, SPDs, and related materials.

The Court's findings related to recordkeeping services provide important examples of items that plan fiduciaries should address when evaluating recordkeeping and other third-party services. In addition, plan sponsors should ensure that plan fiduciaries receive fiduciary training on a regular basis so that plan fiduciaries understand their legal responsibilities. This training can demonstrate good faith compliance with ERISA requirements and may prevent or mitigate future litigation.

If you have not undertaken fiduciary training in the last year, you may want to consider doing so. We offer a comprehensive [fiduciary training program](#) if you should need it.

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