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PLAN FEES AND CHARGES: CURRENT ISSUES IN THE U.S. AND MANAGING TRANSPARENCY RISKS TO AVOID HIDDEN FEE LITIGATION

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Plan sponsors and participants in defined contribution plans have been confronted with transparency issues such as hidden and bundled service provider expenses and self-dealing conflicts of interest that sometimes exist with plan vendors. Transparency around indirect fees has been particularly lacking. This has been of considerable interest for pension lawyers in the US where the failure of plan service providers to disclose retirement plan expenses to plan participants is the responsibility of the employer plan sponsor under the Employee Retirement Income Security Act ("ERISA"). The US Department of Labor ("DOL") has issued regulations on participant fee disclosure and 401(k) plan expenses as well as establishing aggressive litigation and plan expense audit initiatives that impose personal liability on employers and other plan fiduciaries for failure to monitor the reasonableness of plan expenses.

This is a high enforcement priority for DOL since just a 1 percent difference in fees over an investment lifetime (i.e., the differences between an expense ratio of 50 and 150 basis points) reduces total retirement savings by more than 25 percent (http://www.dol.gov/ebsa/publications/401(k)_employee.html).

ERISA class action settlements increased dramatically in 2014 with the top 10 settlements totaling $1.31 billion. This number appears poised to jump dramatically in 2015 with a $62 million settlement announced by Lockheed Martin Corp. ("LMC") on February 20, 2015 of an ERISA Class Action lawsuit over claims of 120,000 Plan participants in excess of $1.3 billion that LMC breached its fiduciary duties by allowing the LMC Salaried and Hourly Savings Plans to pay excessive fees and imprudently managing Plan assets (Abbott v. Lockheed Martin Corp., S.D. Ill., No. 3:06-CV-00701-MJR-DGW, order Granting Motion for Preliminary Approval of Settlement Agreement, 2/20/15). See III. E. below.

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I. DOL Initiatives on Undisclosed 401(k) Plan Expenses

Under "bundled" service arrangements, which are common with large 401(k) plans, it is extremely difficult to locate hidden revenue sharing fees (revenue that mutual fund companies pay third party administrators to offset plan expenses). Often the bundled recordkeeper will receive revenue sharing payments from the plan's investments and employer plan sponsors are unaware of such hidden costs. The recordkeeper normally discloses only "hard dollars" received for administration, but often does not disclose to plan fiduciaries the "soft dollars" or hidden fee arrangements between their entity and the investment fund which holds the assets. Employer plan sponsors as Plan fiduciaries are required to probe those hidden costs to find out if revenue sharing is occurring and, if so, what those hard dollars are and what relationships might exist between the parties. It is not permissible or in the best interests of the plan participants if assets are being steered toward an investment manager purely because fees will be "kicked back" to the recordkeeper.

The DOL has issued regulations with respect to ERISA Section 408(b)(2) which require such fees to be reasonable, "necessary and appropriate," and the contract for services must be reasonable. The concern with revenue sharing arrangements is the reasonableness of those fees, as they are generally asset based and can be quite voluminous. The DOL focus is on disclosure of such fees so that fiduciaries can make informed decisions regarding their "reasonableness" and have the ability to so inform participants.

Under the DOL regulations, the responsible plan fiduciary (e.g., employer plan sponsor) must determine the “reasonableness” of service provider direct and indirect compensation to qualify for the ERISA Section 408(b)(2) exemption from prohibited transaction excise taxes. The Prohibited Transaction Exemption depends upon the Plan fiduciary having a “reasonable belief” that service providers disclosed the required information. Also, under the DOL regulations, the discovery of disclosure failure requires the responsible plan fiduciary to notify DOL and determine whether to terminate the contract or arrangement. This puts the plan fiduciary in a precarious “no-win” situation since, despite the Prohibited Transaction Exemption, disclosure failures often result in discovery of “revenue sharing” which can result in DOL or participant claims that the fiduciary failed to monitor service provider compensation in violation of the ERISA requirements.

II. DOL Participant Fee Disclosure Rules

The DOL has published final regulations that require the plan sponsor to disclose certain fee and investment information to participants in ERISA covered participant-directed individual account plans such as 401(k) and 403(b) plans.

The participant disclosure rules are intended to help ensure that all participants in participant-directed individual account plans have the information necessary to make informed decisions about plan participation and selection of investment choices for their accounts. The information required to be disclosed to participants falls into two broad categories: 1) plan-related information; and 2) investment-related information.

1) Plan-related Information

Plan sponsors must disclose the types of plan-related information described below.

- Investment Direction. Explanations must be provided regarding how participants and beneficiaries may give investment instructions, any limitations on such instructions under the plan, and plan provisions relating to the exercise of voting, tender, and similar rights. The plan's investment options must also be identified.

- Plan-Level Administrative Expenses Charged Against Participant Accounts. An explanation must be provided of plan-level administrative service expenses charged against participant accounts (e.g., annual per-participant fees) and how charges are allocated to participant accounts (e.g., per capita, pro rata).

- Individual Expenses Charged Against Participant Accounts. An explanation of fees that may be charged against participant accounts on an individual, rather than plan-wide basis (e.g., loan initiation fees, fees for use of brokerage windows, fees for investment advice programs) must be provided.

- Quarterly Disclosure of Amounts Deducted from Participant Accounts. At least quarterly, the plan sponsor must disclose the dollar amount of fees and expenses that are actually charged during the preceding quarter to the participant's account and must describe the services to which the charges relate (e.g., plan administrative services, individual transactions, such as loans, etc.).

2) Investment-related Information.

Certain types of performance and fee information on plan investment options must be disclosed in a comparative format to help participants make an apples-to-apples comparison across the menu. DOL has provided a safe harbor model chart for use in meeting this comparative format requirement, which can be viewed at www.dol.gov/ebsa/participantfeerulemodelchart.doc

III. ERISA Hidden Fee Litigation

A. Employer Can't "Hide Behind" Investment Consultant's Advice [*Tibble v. Edison Int'l*, (C.D. Cal.) 2010 WL 2757153 aff'd by 9th Circuit Cal. 2013, 711 F.3d 1081]

Under ERISA, plan fiduciaries are required to understand the fees and expenses charged and the services provided to the plan. While ERISA does not specify a permissible level of fees, its fiduciary rules require that fees charged to a plan be "reasonable."

An examination of whether fees paid to service providers and other expenses of the plan are "reasonable" is a critical ERISA fiduciary requirement. Not only is there potential fiduciary liability for failure to examine this issue, but also the ERISA Section 404(c) safe harbor (which insulates a plan sponsor from ERISA fiduciary liability) may be negated by a failure to identify and disclose all plan fees and expenses to plan participants.

In addition, arrangements with service providers may be considered prohibited transactions under ERISA Section 406 if the exemption provided in Section 408(b)(2) is not satisfied, subjecting the plan fiduciaries and the service providers to tax penalties.

This has led to a flurry of "hidden fee" litigation reflecting the dissatisfaction of plan participants with inadequate fee disclosure requirements and the need for protection from excessive fees. Multiple lawsuits have been filed against plan sponsors by plan participants claiming that the decision to pay excessive investment and administrative fees was imprudent and a breach of the fiduciary duty of care.

As a result, employer plan sponsors have hired investment consultants to advise them on the reasonableness and identification of plan investment and administrative fees and expenses. There is a tendency to rely on such independent advice from outside experts.

However, a California U.S. District Court has held that while securing independent advice from an investment consultant is "some evidence" of a thorough investigation, it is not a complete defense to a charge of imprudence. At the very least, said the District Court, the Plan fiduciaries must "make certain that reliance on the expert's advice is reasonably justified." According to the District Court, this is accomplished with evidence demonstrating the thoroughness and scope of the consultant's review. In effect, an employer plan sponsor cannot "hide behind" a consultant but must be able to produce evidence of a robust and thorough investigation through procedural and substantive prudent process standards and a fee forensic audit and benchmarking.

In a comprehensive 82-page decision, which is "must" reading for employers who are concerned about "hidden fee" liability, the District Court found that the fiduciaries of Southern California Edison's (SCE) Section 401(k) plan breached their duty of prudence under ERISA when they selected more costly retail class mutual funds for the plan instead of attempting to secure institutional class mutual funds.

The fiduciaries found liable were not only the employer plan sponsor but also members of the Plan Investment Committee, Benefits Committee, Vice-President of Human Resources and Manager of the sponsor's Human Resources Service Center.

In concluding that the fiduciaries breached their duty of prudence, the District Court emphasized that there was no evidence that the fiduciaries investigated the difference between the retail class funds and the institutional class funds. Had the fiduciaries considered the institutional class funds and weighed the relative merits of the institutional class funds against the retail class fund, said the District Court, "they would have realized that the institutional share classes offered the exact same investment at a lower cost to the Plan participants."

The Plan participants in this class action suit argued that, when deciding to invest in the retail share classes rather than the cheaper institutional share classes of these funds, the SCE fiduciaries were improperly motivated by a desire to capture more revenue sharing for SCE even though doing so increased the fees charged to Plan participants. The participants argued that SCE put its interests in offsetting the Plan's record-keeping costs through revenue sharing above the interests of the Plan participants in paying lower fees. In so arguing, the participants relied primarily on a series of emails, generally between members of SCE's Investments Staff and Human Resources Department, to support their claim that the Plan fiduciaries were improperly motivated by a desire to capture revenue sharing.

To determine whether the decision to invest in retail share classes constituted a breach of the duty of prudence, the District Court stated that it must examine whether the fiduciaries engaged in a thorough investigation of the merits of the investment at the time the funds were added to the Plan. In this regard, the District Court found that "there is no evidence that Defendants [SCE] even considered or evaluated the different share classes when the funds were added to the Plan. Not a single witness testified regarding any discussion or evaluation of the institutional versus retail share classes for these funds."

The District Court further emphasized that the presentation materials that the SCE Investment Staff prepared for the meeting of the Plan Investment Committee during which the Investments Staff recommended adding these funds to the Plan "contained no information about the institutional share classes." According to the District Court, "The Investment Staff simply recommended adding the retail share classes of these funds without any consideration of whether the institutional share classes offered greater benefits to the Plan participants. Thus, the Plan fiduciaries

responsible for selecting the mutual funds (the Investment Committees) were not informed about the institutional share classes and did not conduct a thorough investigation."

On the basis of this evidence, said the District Court, the Plan participants have met their burden of demonstrating that the SCE Plan fiduciaries did not act prudently under ERISA, when deciding to invest in the retail share classes. In so holding, the District Court rejected SCE's argument that their investment selection process was reasonable and thorough because they relied on their investment consultant for advice regarding which mutual fund share classes should be selected for the Plan.

While securing independent advice from an investment consultant is some evidence of a thorough investigation, said the Court, it is not a complete defense to a charge of imprudence. At the very least, emphasized the District Court, the SCE Plan fiduciaries must "make certain that reliance on the expert's advice is reasonably justified." In this instance, the District Court could not conclude that reliance on the investment consultant's advice was reasonable.

Most importantly, said the District Court, SCE has not presented any evidence regarding the review and evaluation the investment consultant did in connection with the funds. They did not present evidence of: the specific recommendations the investment consultant made to the Investment Committee regarding those funds, what the scope of the consultant's review was, whether the consultant considered both the retail and the institutional share classes, whether the consultant provided information to the Investment Committee about the different share classes, what questions were asked regarding the recommendations, and what steps the Investment Committee took to evaluate the consultant's recommendations. Thus, while reliance on the consultant's recommendations may be justified in some circumstances, said the District Court, in the absence of any evidence about the thoroughness and scope of the consultant's review, the Court could not conclude that such reliance was prudent.

On appeal, the Ninth Circuit Court of Appeals upheld the District Court and ruled that the SCE Plan fiduciaries breached their duty of prudence in selecting investment options for the plan and unreasonably relied on a consultant's advice because they could not prove that either they, or the consultant, considered institutional-class (instead of retail-class) shares of mutual funds as proper investments under the plan. The Ninth Circuit emphasized that fiduciaries must make certain that their reliance on a consultant's advice is reasonably justified and cannot "reflexively and uncritically adopt [a consultant's] recommendations." In rejecting SCE's argument that it relied on its expert consultant, the Ninth Circuit emphasized that ERISA's duty to investigate requires a fiduciary to review, assess and, where necessary, supplement the data a consultant gathers and that SCE failed to make any showing of the steps it took to evaluate the consultant's recommendations.

B. $35 Million Verdict in 401(k) Fee Case [*Tussey v. ABB, Inc.*, 2012 U.S. Dist. LEXIS 45240 (W.D. Mo. 3/31/12) aff'd by 8th Cir. Mo. 2014, 746 F.3d 327]

In the first class action over 401(k) fees to be tried and decided on the merits, a Missouri U.S. District Court ruled that manufacturing company ABB, Inc. breached its ERISA fiduciary duties. The Court's opinion is a must read for all plan sponsors and service providers. The company must pay $35.2 million to the Plan participant class for (i) failing to monitor the recordkeeping fees and revenue sharing payments made to the Plan's trust company, (ii) failing to negotiate rebates to offset or reduce the cost of providing administrative services to Plan participants and (iii) replacing an actively balanced mutual fund with the trust company's target date fund that generated more in revenue sharing for the trust company. In so holding, the Court emphasized, above all other considerations, the importance of implementing and adhering to prudent processes and focusing on the merits of the investments.

Although the Court acknowledged that ERISA fiduciaries may use revenue sharing to pay for administrative fees (rather than paying with a "hard dollar" per participant fee), it held that if a fiduciary selects revenue sharing, "it also must have gone through a deliberative process for determining why such a choice is in the Plan's and participants' best interest." The Court emphasized that this analysis was particularly critical because the Plan's Investment Policy Statement ("IPS") required that revenue sharing "be used to offset or reduce the cost of providing administrative services to Plan participants." According to the Court, without calculating the dollar amount of the recordkeeping fees, ABB could not know whether revenue sharing was offsetting or reducing the cost. In this regard, the Court noted that ABB's monitoring of the reasonableness of the overall expense ratio was insufficient because it does not show how much revenue is flowing, does not show the competitive market for comparable funds, and failed to take into account the size of the Plan. Also, the Court held that the IPS was part of the Plan document and by failing to comply with the IPS provision, ABB breached its fiduciary duty to operate the Plan in accordance with its terms.

The Court's opinion describes in detail many actions it views as failing to achieve a deliberative process and evaluation, failing to follow Plan documents such as the IPS, failing to follow up the findings of an adviser that the Plan was overpaying fees, and making decisions not in the best interests of the Plan.

Failure to Monitor Recordkeeping Expenses

The Court concluded that ABB, its Pension Review Committee, Pension and Thrift Management Group, the Director of that Group and its Employee Benefits Committee (collectively "ABB") failed to monitor the recordkeeping costs, principally the revenue sharing payments, paid by the Plan to the Trust Company. All of the investment options offered by the Plan paid revenue sharing to a Trust Company affiliate. According to the Court, ABB never calculated the dollar amount of the

recordkeeping fees the Plan paid to the Trust Company via revenue sharing arrangements, nor did it consider how the Plan's size could be leveraged to reduce recordkeeping costs. In fact, said the Court, it did not obtain a benchmark cost of services prior to choosing revenue sharing as the Plan's method for compensating the Trust Company and did not even do so when an outside consulting firm told ABB that it was overpaying for recordkeeping and that it appeared the Plan was subsidizing the corporate services provided to ABB by the Trust Company.

The Court said that it was also unconvinced that ABB monitored the reasonableness of the Trust Company's recordkeeping fees by monitoring the reasonableness of the expense ratio of the retail investments chosen for the Plan. According to the Court, the expense ratio does not show how much revenue is flowing from the investment company to the recordkeeper. Also, it does not show what the competitive market is for recordkeeping fees for comparable funds. Most importantly, said the Court, "in this case, it fails to take into account the size of the retirement plan and the competitive benefit that an investment company acquires when it is selected to be on a retirement plan platform. Participant choices are generally limited to those investments on the platform, substantially increasing the visibility of these investments and limiting competition from other funds. While there are legitimate reasons for limiting choices, the reality is that being put on a platform is a valuable benefit and gives a large plan the opportunity to negotiate for rebates in exchange for that benefit."

Moreover, the Court emphasized that the IPS clearly states that revenue sharing should be used to offset or reduce recordkeeping costs. Thus, in accordance with the IPS, ABB was required to leverage the Plan's size and assets to reduce recordkeeping costs. In other words, said the Court, ABB must use its "purchasing power" to negotiate for rebates from the Trust Company, either in the form of basis points or hard-dollar amounts, if the amount of revenue sharing generated exceeded market value for the Trust's services. In this regard, the Court emphasized that a fair negotiation for such rebates cannot occur without determining the amount of income generated from revenue sharing knowing the market costs for comparable services and affirmatively evaluating the quality provided by the Trust Company and evaluating the costs and benefits of risk sharing. "ABB did none of this," said the Court, "and did not even ask the Trust Company for a rebate or even discuss the issue with them."

The Court also found that the Plan overpaid for the recordkeeping services provided by the Trust Company since the revenue sharing generated by the Plan's assets far exceeded the market value for recordkeeping and other administrative services provided by the Trust Company. The Plan, on average, paid the following per-participant: $108 in 2001, $65 in 2002, $106 in 2003, $122 in 2004, $100 in 2005, $93 in 2006, and $180 in 2007. According to the Court, based on expert testimony, a reasonable per head fee for such services to the Plan would have been $60 in 2001, $65 in 2002, $70 in 2003, $68 in 2004, $63 in 2005, $60 in 2006, $44 in 2007.

Failure to Negotiate Rebates in Compliance with IPS

According to the Court, ABB permitting the Trust Company to take the revenue sharing resulted in the above-market costs. This was in violation of the IPS which requires that at "all times, rebates will be used to offset or reduce the cost of providing administrative services to plan participants." ABB did not use the rebates/revenue sharing to offset or reduce the cost of the Plan's administrative services in violation of the IPS.

This is particularly disturbing, said the Court, since the IPS is a governing plan document and ERISA's statutory duty of prudence requires that fiduciaries discharge their duties in accordance with governing plan documents. According to the Court, to assess the prudence of a revenue sharing arrangement, ABB had to determine the market rate for the recordkeeping services provided to the Plan. Without such a baseline, it would be impossible to determine whether a revenue sharing arrangement would add to the value of the Plan. Also, such a baseline is necessary for ABB to evaluate whether the Trust Company is justified when seeking additional hard-dollar fees to replace lost revenue from declining Plan assets in investment options that provide revenue sharing.

While revenue sharing is accepted industry-wide as a method of paying for plan recordkeeping services, said the Court, the prudence of choosing that option must be evaluated according to the circumstances of each plan. Here, the process by which ABB determined to use revenue sharing as the Plan's payment model was imprudent since ABB did not analyze how revenue sharing would benefit the Plan, nor negotiate revenue sharing by leveraging the Plan's size to offset or reduce recordkeeping costs. As the IPS is a governing Plan document, said the Court, ABB breached its fiduciary duties when it failed to comply with this provision of the IPS.

Moreover, the Court emphasized that if a plan sponsor selects revenue sharing as its method of paying for recordkeeping services, it must not only comply with its governing plan documents, it must also have gone through a deliberative process for determining why such a choice is in the Plan's and participants' best interest. Such an inquiry involves more than a raw assessment of the reasonableness of expense ratios; particularly, given the inherent difficulty of identifying how expense ratios are broken down between administration and investment services and the fact that the expense ratio doesn't show whether there is a revenue sharing agreement with the recordkeeper or for how much.

Generating More Revenue Sharing by Replacing Funds

The Court also found the ABB fiduciaries liable for the transferring of assets invested in an actively balanced mutual fund to the Trust Company's target date fund. The Court found that the fiduciaries had deleted the actively balanced mutual fund, not because of performance concerns, but because the Trust Company target date

fund that replaced it generated greater revenue sharing. The Court also found that ABB breached their fiduciary duties by selecting share classes with more revenue sharing loads in order to maintain the revenue sharing level to the Trust Company.

Monetary Relief

The Court found that the Plan suffered losses of $13.4 million as a result of ABB's failure to monitor recordkeeping costs and to negotiate for rebates. The Court also assessed $21.8 million in damages against ABB for losses to the Plans caused by the "improper" transfer of assets that generated greater revenue sharing.

Lost Float Income

While the Court largely exonerated the Trust Company from liability for the ABB fiduciary breaches, the Court found the Trust Company liable to the Plan for float income paid from the Plan accounts. Finding that the Trust Company acted as a fiduciary when it handled the Plans' assets, the Court found that the Trust Company engaged in self-dealing in violation of ERISA's prohibited transaction rules. In this regard, the Court relied on the testimony of an expert in concluding that the Plan suffered total losses of $1.7 million for Trust Company breaches concerning the float.

C. Bundled Vendor May be ERISA Fiduciary with Responsibility to Monitor Own Compensation [*Santomenno v. Transamerica Life Ins. Co.*, (C.D. Cal. 4/25/13) No. 12-2782]

A Plan participant filed a class action lawsuit against Transamerica Life Ins. Co. ("TLIC") seeking to represent a class of over 15,000 retirement plans serviced by TLIC. TLIC is an insurance company that sells 401(k) plans "bundled" administrative services and investments through a Group Annuity Contract ("GAC"). The investments offered by TLIC are all separate accounts, typically with mutual funds as the underlying investment. Some of the mutual funds and collective trusts are managed by Transamerica Investment Management, LLC ("TIM') or Transamerica Asset Management, Inc. ("TAM'), affiliates of TLIC. The Plan participant argued that all or nearly all mutual funds selected for inclusion as a separate account, have a contractual agreement with TLIC to pay it revenue sharing.

In a sweeping decision on TLIC's motion to dismiss, a California U.S. District Court found that the Plan participant has plausibly alleged numerous fiduciary violations of ERISA including that TLIC may be a fiduciary with responsibility to monitor its own compensation.

The Court also criticized a "fiduciary warranty" included in the plan's contracts. "Based on the allegations before the court, it appears that the Fiduciary Warranty amounts to insurance provided by TLIC to employers against law suits by employees for breach of fiduciary duty, but this insurance is paid for by the fees assessed on the

employees' assets. The court has found no indication that the employers pay TLIC separately for such insurance. Thus, instead of an insurance company bargaining with a party seeking to obtain the best rate for itself in its insurance purchase, the insurer is bargaining with a party who is not in fact bearing the financial burden of the insurance, though it will reap the benefits. Because the contract does not appear to have been negotiated at arm's length, TLIC may not shield itself behind the contract from an alleged breach of duty."

TLIC is a Fiduciary Accountable for Reasonableness of its Fees

TLIC did not contest that under the GAC it has fiduciary responsibility for the separate accounts. For example, it admitted that it has "limited fiduciary responsibilities" for monitoring the investment performance within its separate account investment products. But TLIC argued that it did not have any fiduciary duty with respect to its fees because they were set by contract before TLIC assumed its fiduciary responsibilities as defined in the same contract.

The Court rejected this "formalistic line-drawing". According to the Court, "TLIC is negotiating to become a fiduciary and negotiating for the fees that, as a fiduciary, it will assess on the employees' retirement accounts… To hold otherwise would allow fiduciaries to contract themselves out of their duties, so long as it was done prior to the assumption of those duties. TLIC is entitled to reasonable fees and profits for the services that it provides to the plans, but as a fiduciary TLIC is accountable for the reasonableness of those fees. This conclusion does no damage to the sanctity of contracts; it simply acknowledges that where fiduciary duties are involved, the fiduciary rules apply. Because TLIC is negotiating to assume the high duties of an ERISA fiduciary, it must be accountable to Plan participants for the reasonableness of its compensation."

Ability to change fee schedule is "discretionary" activity.

TLIC also argued that the ability to change its fee schedule upon advance notice did not provide it "discretion" over its fees because employers could reject any noticed fee changes by terminating their contracts. The Court rejected this argument, holding that "whether the employer chooses to terminate the contract or not is immaterial to determining whether TLIC has the discretion to change the fees," and that "[t]his is all the more true where, as here, there are financial and logistical hurdles to prevent an employer from cancelling a contract."

Ability to add or delete investment options is fiduciary "discretionary" activity.

The Court found that TLIC has a fiduciary duty that attaches from its power to add and delete investment options, since it "'exercises authority or control over plan assets by determining and altering which mutual funds are available for the Plans' and the participants' investment".

Having OR exercising discretion are both fiduciary functions.

The Court held that in the ERISA context, having and exercising discretionary authority are so close as to be identical, and that under ERISA, "a fiduciary duty attaches not because a party takes a discretionary action but when that party acquires the power to take a discretionary action."

D. Service Provider Not A Fiduciary In Negotiating Its Contract [*McCaffree Fin. Corp. v. Principal Life Insurance Co.* 2014 WL 7060336 (S.D. Iowa, Dec. 10, 2014)

An Iowa U.S. District Court dismissed a class action complaint brought by several 401(k) plan sponsors who alleged that Principal Life Insurance Company breached its fiduciary duties to the Plans by charging excessive fees in connection with certain investment options and services provided to Plan participants. The District Court determined that Principal Life was not acting as a plan fiduciary because service providers do not act as fiduciaries when negotiating the terms of their service with the plans as long as the service providers do not control the named fiduciary's negotiation and approval of those terms. Here, there was no showing that Principal Life controlled the decision of the plan sponsors to hire it as a service provider to the plans. Furthermore, although Principal Life may have acted as a fiduciary in other respects (e.g., because it had discretion to select investment accounts and was an investment advisor), excessive fee claims did not arise from actions taken by Principal Life in performance of those other functions. Thus, the alleged fiduciary status created by these other functions did not confer fiduciary status upon Principal Life with respect to the excessive fee claims.

E. Lockheed Agrees to Pay $62 Million to Settle $1.3 Billion ERISA Class Action [*Abbott v. Lockheed Martin Corp.*, S.D. Ill., Preliminary Approval of Settlement Agreement, 4/30/15, No: 06-701-MJR-DGW]

An Illinois U.S. District Court on April 30, 2015 granted preliminary approval of a settlement agreed to by Lockheed Martin Corporation ("LMC") on February 20, 2015 to pay $62 million and implement extensive affirmative relief to settle an ERISA Class Action lawsuit over claims of 120,000 Plan participants in excess of $1.3 billion under the LMC Savings Plans. The participants argued that LMC as Plan Sponsor and Named Fiduciary of its Salaried and Hourly Savings Plans and Lockheed

Martin Investment Company (a wholly owned subsidiary of LMC), responsible for the Plan's investments and appointment and monitoring of investment managers, breached their ERISA fiduciary duties resulting in lost retirement savings and damages by allowing the Plans to pay excessive fees and by imprudently managing the Plan's Stable Value Fund and Company Stock Funds.

The Plan participants accused LMC of subjecting them to excessive fees and leaving those investing in its stock fund with returns that were worse than if they had bought shares on the open market and that LMC's in-house investment manager charged them excessive fees and under delivering on performance in the Savings Plans.

LMC Plan participants claimed they were charged "unreasonable and excessive" fees that were not incurred solely for their benefit and were not disclosed. LMC and its investment management company were also accused of mismanaging Plan assets, including offering a fund that did not benefit Plan participants.

The law suit traces all the way back to 2006, when Anthony Abbott brought a complaint on behalf of participants in the two LMC Savings Plans who held units of a stable-value fund ("SVF") investment option from September 2000 through September 2006.

Abbott claimed that LMC imprudently managed that investment option by putting too much of the fund in short-term money market investments, which translated to far lower returns that the SVF should have provided. The Illinois U.S. District Court narrowed the case down to three claims (i) the administrative fees paid the Plans were excessive; (ii) SVF investment option was imprudently managed resulting in underperformance, and (iii) the Company Stock Fund ("CSF") investment option was imprudently managed due to allegedly excessive fees and a high level of cash held in the fund.

The District Court certified two classes of Plan participants, one with respect to the administrative fee claim and a second with respect to the CSF but declined to certify a third class of participants who invested in the SVF during a six-year period when the fund underperformed relative to a specified index. However, on appeal, the Seventh Circuit found that certification was appropriate holding that there could be harm aside from underperformance relative to the fund index.

On September19, 2013, six weeks after the Seventh Circuit decision, the District Court certified a class and four sub-classes. The class was comprised of all Plan participants, limited to a six-year period who paid recordkeeping fees. Another sub-class was comprised of participants in all mutual funds during that period under the theory that every fund was "laden with imprudently excessive fees," and the three remaining sub-classes corresponded to individual fund choices for specified periods of time.

The U.S. Supreme Court refused to hear the case in December 2013. The District Court in August 2014 then granted class certification per the Seventh Circuit's findings. The suit was scheduled to proceed to trial on December 14, 2014 but was postponed for settlement negotiations after the District Court issued an order stating it would not entertain any settlement proposals after the first witness was called. On December 16, 2014, the parties reached an agreement in principle to settle the case. The District Court asked for the filing of papers detailing the terms of the settlement agreement so it could determine whether it's fair and reasonable.

On February 20, 2015, the parties submitted a Class Action Settlement Agreement to the District Court seeking preliminary approval pending a fairness hearing. The District Court granted preliminary approval of the Settlement Agreement on April 30, 2015. A fairness hearing to address any objections to the settlement and to settle issues related to fees and expenses is scheduled for July 17, 2015.

Under the Settlement Agreement, LMC has agreed to pay $62 million and implement extensive affirmative relief. The $62 million Gross Settlement Amount will be contributed to a Qualified Settlement Fund and $20,666,666 of attorneys' fees was awarded to Class Counsel along with $1,850,000 litigation costs and expenses. The affirmative relief agreed to is as follows:

1. To publicly file with the Court the annual DOL filing that discloses fees paid by the Plans as well as information about the assets held in, and performance of, the Stable Value Fund and the Company Stock Funds;

2. To confirm current limitations on the amount of cash equivalents held in the Company Stock Funds and the amount of money market equivalent assets held in the Stable Value Fund, and to file notice with the Court if those limitations are changed;

3. To initiate a competitive bidding process for the Plans' recordkeeping services for the Plans, and to publicly file with the Court a notice identifying the entities that submitted bids and the selected recordkeeper.

4. To offer participants the share class of investments that has the lowest expense ratio, provided that the share class is available and consistent with the needs and obligations of the Plans; and

5. The terms of the Settlement will be reviewed by an independent Fiduciary.

$62 million is the single largest settlement of an excessive fee case against one employer to date. Also, the almost $21 million in attorneys' fees awarded to Class Counsel assures that such litigation will continue for 2015 and subsequent years.