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Eighth Circuit Affirms Judgment against Plan Fiduciaries for Excessive Recordkeeping Fees

The Eighth Circuit Court of Appeals recently upheld a \$13.4 million dollar judgment against retirement plan fiduciaries for their failure to monitor excessive recordkeeping fees in *Tussey v. ABB, Inc.*

Background. Participants in ABB, Inc. (“ABB”) retirement plans filed a lawsuit against the ABB fiduciaries and Fidelity, the recordkeeper, for several alleged fiduciary breaches.

Recordkeeping Fees. The Eighth Circuit held that the ABB fiduciaries breached their fiduciary duties by failing to do the following with regard to recordkeeping fees:

- 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 ensure that the fees represented only those costs associated with the plans and not costs associated with the company’s other corporate services.

In contrast to an earlier decision, the court explicitly rejected ABB’s argument that the fiduciaries could not be held liable for excessive recordkeeping fees because the plans offered many different investment options with a broad array of fees from which participants could select low-priced funds.

Investment Fund Selection. In the District Court case, the lower court found that the ABB fiduciaries breached their fiduciary duties by removing the Vanguard Wellington Fund and replacing it with Fidelity’s Freedom Funds. This finding was based, in part, on the Wellington Fund outperforming the Freedom Funds. The Eighth Circuit determined that the lower court was improperly influenced by hindsight and sent this portion of the judgment back to the lower court for further review.

Next Steps. Plan fiduciaries should take this opportunity to examine their recordkeeping fee arrangement and confirm that (i) the proper amount is being calculated, (ii) the price is competitive, and (iii) the fees are covering only those costs associated with the appropriate plans.

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