GROOM LAW GROUP

Publications

Excessive Fee Litigation

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SERVICES
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Over the past decade, more than 75 lawsuits have been commenced alleging claims of "excessive fees" with regards to defined contribution retirement plans. While the suits initially focused on large, company-sponsored defined contribution plans, they have since expanded to sponsors of smaller plans and even non-profits. In most cases, these excessive fee lawsuits can be broken down into three categories.

General Excessive Fee Cases:

The general excessive fee cases can be separated into two types based on the defendant.

Plan Sponsor Cases: this first type of general excessive fee case involves suits against corporate plan sponsors and alleges breaches of ERISA fiduciary duties based on the plan sponsor's selection of specific investment vehicles and receipt of "revenue sharing" payments. These cases allege that the investment options selected by plan sponsors are overly expensive, underperforming, and imprudent compared to alternative investment vehicles available in the marketplace.

Plan Service Provider Cases: this second type of general excessive fee case involves actions against plan service providers. Plaintiffs allege that the service providers are "functional fiduciaries" under ERISA by either putting together the platform of investment options used in the plans or by reserving the right to add, delete, or substitute those investment options. The plaintiffs claim that, in negotiating for and receiving revenue sharing, the service providers breached fiduciary duties and engaged in "prohibited transactions" under ERISA.

Proprietary Fund Cases:

A subset of the "general excessive fee" cases are suits against financial institutions who also happen to be plan sponsors. In these cases, the plaintiffs make similar claims as in general excessive fee cases, but also allege that these plan sponsors used

affiliated investment products and service providers to increase the financial institution's revenue. Such self-interested actions, the plaintiffs claim, are breaches of fiduciary duty and ERISA prohibited transactions.

University Cases:

These lawsuits are the most recent iteration of the excessive fee cases. In mid-2016, the plaintiffs' bar expanded their reach to university-sponsored 403(b) defined contribution plans, filing over a dozen class action lawsuits against private universities throughout the country. The allegations in these actions are similar to those made in the general excessive fee cases – that the university plan fiduciaries breached their ERISA duties by, among other actions, offering large, complex investment lineups with options that were expensive, duplicative, and poorly performing. But the university cases are novel in some respects, particularly because 403(b) plans, which under the Internal Revenue Code allow tax-deferred contributions for employees of educational and charitable organizations were, until recently, not subject to ERISA. The foundation for "university plans" began decades ago, when they were simply loose arrangements that were not "plans" at all but "programs" in which teachers saved for retirement on an individual basis, with little administration by the universities. Over the decades, they gradually became more formal structures, and statutory and regulatory changes eventually compelled university plan sponsors to choose to bring their former 403(b) "programs" into ERISA. That universities would be the targets of litigation challenging the governance of their retirement plans was barely conceivable just a decade ago. These new cases will test the essential structure of such plans and determine whether fiduciary standards developing in the 401(k) world should be applied in the 403(b) context.