Aon | Professional Services

A rise in excessive fee litigation – are professional service firms next?

Starting approximately in 2005, the fiduciary liability insurance market has borne the extraordinary costs of settling "excessive fee" class action lawsuits against insured corporations.

Excessive fee litigation generally alleges that fiduciaries of employer-sponsored retirement plans have permitted plan service providers – like investment managers and plan administrators – to be paid excessive fees from plan assets.

The Supreme Court confirmed, in *Tibble v Edison Int'l* (*Tibble III)*, 135 S.Ct. 1823, 1829 (2015), that plan fiduciaries have a continuing duty to monitor and manage plan investment options.

In 2017, the United States District Court for the Central District of California concluded that plan fiduciaries failed to maintain plan investments in appropriate share classes across 17 funds and awarded judgment to the Tibble plaintiff-class, composed of Edison International employees and retirees.

The failure by plan fiduciaries to properly classify assets in those funds as "institutional" investments rather than "retail" investments resulted in the plan paying a greater ratio of its assets in fees to the service-provider. *See Tibble v. Edison Int'l* (*Tibble V*), No. 07-5359, 2017 U.S. Dist. LEXIS 130806 (C.D.Cal. Aug. 16, 2017).

The Tibble "win" for the plaintiff's bar in 2017 prompted even more excessive fee cases to be filed against corporations and other organizations, like large universities, that boast sizable assets in employment-sponsored plans. Over 85 excessive fee cases were filed in federal court in 2020 alone.

Excessive fee claim frequency and severity is on the rise:

- To date, over 40 excessive fee cases have settled for greater than USD$10 million
- Since 2005, plaintiffs' firms have filed more than 240 excessive fee lawsuits
- Over 85 excessive fee cases were filed in 2020 alone

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Common Excessive Fee Allegations

Record Keeping

- Paying record keeper fees as a percentage of assets rather than on a fixed or flat-fee basis
- Paying record keeping fees on a fixed or flat-fee basis at a higher cost per participant than similar plans
- Paying higher fees to the plan's recordkeeper so the employer can receive other services from the recordkeeper (e.g. payroll processing) at or below market cost
- Using revenue sharing that results in the payment of excessive fees to the plan's recordkeeper

Investments

- Failure to remove underperforming investment funds
- Failure to offer less expensive investment funds
- Selecting actively managed funds when equivalent (and less costly) passive investment funds are available
- Selecting a low return money market fund as the plan's "low risk" investment option vs a higher return stable value fund

Record Keeping and Investment

- Failure to leverage plan size to negotiate lower fees
- Failure to competitively bid third party services
- Failure to monitor third party fees/performance

Although excessive fee claims historically targeted major corporations that boasted high employee counts and sizable plan assets, Aon recognizes an emerging trend of excessive fee claims against smaller privately held organizations.

Litigation frequency and claim severity are on the rise in the general marketplace, although we have yet to see plaintiffs' counsel target professional service firms for class action excessive fee litigation. That said, law firms maintaining above average plan administrator fees, for example, could be potential targets of litigation.

If you'd like to discuss any of the issues raised in this article, please contact **Francis Murray**.

Aon resources: Risk Alert - Fiduciary Liability – implications of rising excessive fee litigation for professional service firms