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Labor Department Disclosure Compliance Is Key to Turning Off Plan Fee Litigation

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The fees charged to plans governed by the Employee Retirement Income Security Act by various service providers have been controversial over the past several years. The Department of Labor has issued three separate regulations addressing disclosure of such fees. Several lawsuits have also been filed alleging that these fees are excessive and not properly disclosed.

Although some of these lawsuits have been dismissed prior to trial, one case has been tried, resulting in a verdict for plaintiffs. Further, the allegations are starting to impact the advice ERISA plans receive about fees. Some consultants, and likely some lawyers as well, are beginning to recommend that plans move away from asset-based fees and bundled service arrangements, and rebid service contracts frequently.

It is not surprising that such recommendations would be made in the wake of the litigation. A major argument in the fee cases has been the claim that fiduciaries failed to ''peel back the onion'' to determine the components of a bundled fee arrangement. In other words, if an employer pays a fixed fee for record keeping, participant communications and management fees, plaintiffs have argued that even if the overall fee is in line with industry averages, the fiduciaries breached their duty if they did not get a breakdown of the portion of the fee attributable to each service. Plaintiffs have also alleged that fiduciaries were asleep at the switch when competitive bids were not periodically obtained and/or fees increased substantially as the value of plan assets rose with no corresponding increase in services.

However, as discussed below, basing categorical recommendations on these allegations may be an overreaction to the litigation. Just because plaintiffs are arguing a particular point does mean their argument is supported by existing law, or will ever become law.

Going forward, the key to avoiding fee litigation is likely to be compliance with the DOL's regulations regarding disclosure coupled with a prudent process for evaluating fees. It is unlikely that the litigation will result in broad judicial pronouncements about the propriety of specific practices, like asset-based fees and bundled services arrangements. Rather, the case law will focus on the application of general fiduciary principles and the prohibited transaction rules to specific circumstances, which are likely to be somewhat unique for each plan. The common denominator, however, will be that the courts will not second-guess fiduciary decisions made pursuant to a prudent decision-making process, with the rationale for a particular decision clearly documented. If that happens, it is very unlikely that a lawsuit would be successful, or even brought, irrespective of whether particular practices, such as bundled service arrangements, are employed.

The legal issues in this area are particularly complex because this relatively new species of litigation overlays a fairly complex statutory and regulatory structure, with new regulations addressing this area specifically. To simplify matters, the following discussion is organized around the five questions that have been most prominent in the litigation, with a discussion of statutes and regulations as they come up in the course of addressing these issues. Those five issues are:

- 1. What is a reasonable fee and how is that determination made?
- 2. Are various service providers plan fiduciaries?
- 3. Are fiduciaries required to look beyond mutual funds or engage in frequent rebidding to drive fees down?
- 4. Can the Section 404(c) safe harbor rules be used as a defense against a fee claim? and
- 5. Is compliance with the new fee regulations sufficient to preclude a fee disclosure claim?

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What Is a ''Reasonable'' Fee and How Is That Determination Made?

Neither the Statute Nor the Regulations Specify a Useful Methodology for Evaluating the Reasonableness of Fees. ERISA requires that fiduciaries who make decisions about fees do so prudently and in the best interests of participants (ERISA Section 404(a), 29 U.S.C. § 1104(a)). Moreover, the prohibited transaction rules generally prohibit the payment of fees to plan service providers unless no more than ''reasonable'' compensation is paid (ERISA Section 408(b)(2), 29 U.S.C. § 1108(b)(2)).

The statute does not define the term ''reasonable'' and the regulations are not much more help. According to the DOL, the appropriate method for determining whether compensation is reasonable is to apply a facts-and-circumstances test on a case-by-case basis.[1] Unreasonable compensation includes any ''excessive'' compensation (i.e., not deductible by a taxpayer as an ordinary and necessary business expense under tax code Section 162).[2] However, compensation that is not ''excessive'' is not necessarily ''reasonable.'' [3]

The way this issue plays out in the litigation is that plaintiffs generally want reasonableness to be measured in relation to how much it costs the vendor to provide whatever service is at issue. This engenders corollary arguments that bundled service arrangements and asset-based fees are not sufficiently related to the actual costs of providing those services to be reasonable.

Bundled Services Arrangements and Asset-Based Fees. As noted above, bundled fee arrangements have led to disputes about whether the relevant test is to compare the overall fee with market averages, or whether each service within the bundle must be analyzed separately. This issue was addressed specifically in the *Tussey v. ABB, Inc.* case.

In *Tussey*, ABB Inc. had switched from a per-participant fee structure to a ''revenue-sharing'' model in which Fidelity received revenue-sharing payments from the various mutual funds that were plan investment options.[4]

The trial court was unconvinced by ABB's argument that it sufficiently monitored record-keeping costs by monitoring the expense ratio of the various funds, which indicated total costs for all services. According to the trial court, the expense ratios did not show record-keeping costs specifically, did not provide a comparison of record-keeping expenses and did not take into account the size of the plan.

Thus, the trial judge determined that ABB breached its fiduciary duty by not monitoring record-keeping costs and failing to follow its own investment policy statement (''IPS'').[5] However, the court expressly stated that it was ''not stating that revenue sharing is an imprudent method for compensating a plan's record-keeper, or that evaluating expense ratios many not, in some circumstances, comport with a prudent process for selecting a plan's investment line-up.'' [6] Nonetheless, if a sponsor opts to use revenue sharing to pay record-keeping costs, ''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. [7]

The Seventh Circuit's opinion in *Hecker v. Deere & Co.* seems to have taken a different view on the question of bundled fees. Although *Hecker* addressed this issue in the context of a failure to disclose claim, the court made clear that it viewed only the aggregate fee as relevant:

> Deere disclosed to the participants the total fees for the funds and directed the participants to the fund prospectuses for information about the fund-level expenses. This was enough. The total fee, not the internal, post-collection distribution of the fee, is the critical figure for someone interested in the cost of including a certain investment in her portfolio and the net value of that investment. [8]

The net result is that, even under a pro-plaintiff view of the law, if plan fiduciaries intend to monitor fees by primarily monitoring the expense ratio, they can do so, but should have a fee policy to that effect or otherwise document a process through which the decision was made that monitoring expense ratios is sufficient for a particular plan.

Are Service Providers Fiduciaries?

A major issue in the fee litigation is often whether service providers are fiduciaries. ERISA specifies that a person is a fiduciary ''to the extent'' he exercises any ''discretionary'' authority or control over plan management ''or exercises any authority or control respecting management or disposition'' of plan assets. [9] Service providers will often argue that they are not fiduciaries under this definition because they have no ''discretionary'' authority over the plan's investment decisions.

A good analysis of this issue is contained in the Seventh Circuit's opinion ruling in favor of a service provider in *Leimkuehler v. American United Life Insurance Co.*, 713 F.3d 905, 56 EBC 2407 (7th Cir. 2013) (74 PBD,

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[1] 29 C.F.R. § 2550.408c-2(b)(1) (2006).

[2] 29 C.F.R. § 2550.408c-2(b)(5).

[3] *Id.*

[4] No. 2:06-CV-04305-NKL, 54 EBC 2826 (W.D. Mo., 3/31/12) (63 PBD, 4/3/12; 39 BPR 697, 4/10/12).

[5] The *Tussey* court based a substantial part of its reasoning on the requirements ABB had itself set in its IPS. This provides an important cautionary tale to consider in drafting such a policy. The *Tussey* trial judge determined that the IPS was a binding plan document based on a DOL interpretive bulletin. *Id.* at *15 (citing 29 C.F.R. § 2509.94-2 (1994) (''Statements of investment policy issued by a named fiduciary authorized to appoint investment managers would be part of the 'documents and instruments governing the plan' within the meaning of ERISA § 404(a)(1)(D).''')). However, the inquiry under the statute seems to focus on intent, so having a statement in an IPS that it is not intended to constitute a plan document may help. Further, the contents of the IPS should, where possible, be phrased as guidelines or admonitions, rather than hard and fast rules. Where the IPS does impose mandatory rules, the best practice is to follow those rules or amend the document.

[6] *Id. at *16.*

[7] *Id.*

[8] 556 F.3d 575, 586, 45 EBC 2761 (7th Cir. 2009) (28 PBD, 2/13/09; 36 BPR 357, 2/17/09).

[9] 29 U.S.C. § 1002(21)(A).

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4/17/13; 40 BPR 1002, 4/23/13). American United Life Insurance Co. (AUL), provided investment options through a group variable annuity contract to a 401(k) plan for employees of Leimkuehler Inc.[10] Since AUL was not a specifically named fiduciary under the terms of the Leimkuehler 401(k) plan, the U.S. Court of Appeals for the Seventh Circuit analyzed whether AUL qualified as a ''functional fiduciary'' based on three arguments.[11]

Control Over Fund Selection. Under the AUL contract, AUL selected a ''menu'' of mutual funds and then presented this menu to Robert Leimkuehler, the president of Leimkuehler Inc. and the trustee of the plan.[12] Robert Leimkuehler then selected specific funds from the menu.[13] Under the terms of the contract, Robert Leimkuehler retained the right to change his selections.[14] However, AUL also reserved the right to make substitutions to or deletions from Robert Leimkuehler's selections. [15]

Robert Leimkuehler argued that AUL exercised authority or control over the management or disposition of the plan's assets by selecting the mutual fund share classes to include in its investment menu.[16] at 910-12. The Seventh Circuit described this as a ''product design'' theory and found that the argument was foreclosed by the court's prior decision in *Hecker v. Deere & Co.*, 556 F.3d 575, 45 EBC 2761 (7th Cir. 2009) (28 PBD, 2/13/09; 36 BPR 357, 2/17/09).[17] In *Hecker*, the plan had offered a large list of available mutual funds, and the court found that assembling the list of available options was not a fiduciary act. The court recognized that, in *Hecker*, the plan sponsor retained the final say over which funds would be included, whereas in *Leimkuehler*, AUL had a contractual right to change the funds. However, this was ultimately a distinction without a difference, because AUL did not exercise its contractual rights to change the funds in such a way that could give rise to a claim.

This conclusion appears contrary to a district court's opinion in *Haddock v. Nationwide Financial Services, Inc.*, 419 F. Supp.2d 156, 36 EBC 2953 (D. Conn. 2006) (50 PBD, 3/15/06; 33 BPR 740, 3/21/06). In *Haddock*, Nationwide offered a menu of mutual funds from which the plan then selected the more limited set of funds that would be available plan investment options. Nationwide retained the authority to delete or substitute mutual funds from the list of available investment options. The court found that although ''Nationwide does not invest the pension contributions in particular mutual funds, Nationwide does exercise some control over the selection of mutual funds that are available for the Plans' and participants' investments.'' [17]

Accordingly, the *Haddock* court found that Nationwide may be a fiduciary to the extent that it exercised authority or control over plan assets by determining and altering which mutual funds are available for the plans' and participants' investments.[18] The court recognized that fiduciary responsibility is limited to the extent of discretion or control, but suggested that the ability to delete or substitute mutual funds from a list of approved funds was sufficiently related to claims of improper revenue sharing because Nationwide could be eliminating funds that did not pay revenue sharing.[19]

Unexercised Authority to Substitute Funds. In *Leimkuehler*, the DOL made a related argument that AUL was a fiduciary because it had the right to substitute the funds that Robert Leimkuehler selected for the Plan, irrespective of whether it ever exercised that right.[20] The DOL acknowledged that AUL was only a fiduciary ''to the extent'' that it exercised authority, and also acknowledged that neither of the two occasions on which AUL actually exercised its rights to substitute funds gave rise to an ERISA claim.[21] However, under the DOL's theory, AUL need never have affirmatively used its authority under the contract; rather, AUL ''exercises'' its authority every time it invests a participant's contributions in one of the chosen mutual fund share classes as opposed to a less-expensive share class for that same mutual fund.[22] The Seventh Circuit declared that the DOL's theory was ''unworkable'' because it ''conflicts with a commonsense understanding of the meaning of 'exercise,' is unsupported by precedent, and would expand fiduciary responsibilities under 29 U.S.C. § 1002(21)(A) to entities that took no action at all with respect to a plan.''[23]

Having Some Custody or Control Over Plan Assets. Robert Leimkuehler also argued that AUL exercised authority or control over plan assets by depositing contributions into a separate account.[24] To manage the separate account, AUL had to keep track of the individual plan participants' contributions and investment directions, and AUL had to then invest the participants' contributions in the mutual funds the participants selected and credit returns from those funds to the participants' accounts.[25] Although these duties appear ministerial, Robert Leimkuehler argued that they were sufficient to make AUL a fiduciary of the plan because 29 U.S.C. § 1002(21)(A) requires that AUL only exercise ''*any* authority or control respecting management or disposition of its assets.'' [26]

The Seventh Circuit found that ''discretionary control is not required with regard to the management or disposition of plan assets.'' [27] ''Unfortunately for Leimkuehler, however, this does not help him as much as he might think'' because 29 U.S.C. § 1002(21)(A) states that an entity is a fiduciary only ''to the extent'' it exercises authority or control, the court said.[28] ''Thus, AUL's control over the separate account can support a finding of fiduciary status only if Leimkuehler's claims for breach of fiduciary duty arise from AUL's handling of the separate account.''[29] Indeed, Robert Leimkuehler

[10] *Id.* at 908.
[11] *Id.* at 910.
[12] *Id.* at 908, 910.
[13] *Id.* at 910.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Leimkuehler*, 713 F.3d at 911.
[17] *Id.* at 166.
[18] *Id.*
[19] *Id.* at 116 n. 6.
[20] *Leimkuehler*, 713 F.3d at 914.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Leimkuehler*, 713 F.3d at 912.
[25] *Id.*
[26] *Id.* at 912.
[27] *Id.* at 913.
[28] *Id.*
[29] *Id.*

did not allege that AUL had mismanaged the separate account in any way.[30] Because Robert Leimkuehler was not complaining about actions related to AUL's control over the separate account, the separate account did not render AUL a fiduciary of the plan for purposes of fees.[31]

Float Income. A similar issue arises with control over ''float income.'' Float income is interest earned while money is held by a service provider before its investment or before distribution to participants. In *Tussey v. ABB, Inc.*, the trial court determined that authority and control over float income confers fiduciary status. Finding that Fidelity was a fiduciary due to its control over float income, the trial judge also determined that Fidelity had breached its fiduciary duties to the plan by failing to distribute the float income solely for the benefit of the plan. In *Tussey*, Fidelity had used float income for its own benefit to pay for bank expenses that it otherwise would have paid directly. Due to its breaches of fiduciary duty regarding the float income, the trial judge found Fidelity liable for $1.7 million in losses to the plan. In reaching this amount, the trial judge noted that if the plan had retained the float income, ''its administrative expenses would have been defrayed by such amount and therefore participants would have retained more of their assets in their accounts, which would've earned market returns.'' [32]

While *Tussey* is a cautionary tale for service providers with authority over float income, it does not mean that service providers can never retain float income. Indeed, service providers have long retained float income as part of their ''reasonable'' compensation. The DOL has stressed the importance of ''open negotiation and full and fair disclosure'' prior to plan fiduciaries agreeing to allow service providers to retain float income.[33]

Assuming that proper disclosures are given and the parties provide for retention of the float income, service providers may properly retain the float income without being subject to fiduciary liability.[34] However, a service provider's overall compensation, including the float income, must still be ''reasonable.'' [35] This may mean that the service provider should accept less compensation in exchange for the float income, and/or that the amount of its outside compensation should vary depending on the amount of float income earned during any given period. Further, service providers should also avoid any discretion that would allow them to affect the amount of float income, since doing so may give rise to self-dealing violations of ERISA Section 406(b).[36]

[30] *Id.*
[31] *Id.* at 913-14.
[32] *Id.*
[33] DOL Field Assistance Bulletin 2002–3 (Nov. 5, 2002).
[34] *See, e.g., Ruppert v. Principal Life Ins. Co.*, 813 F. Supp. 2d 1089 (S.D. Iowa 2010) (granting service provider's motion for summary judgment where provider adequately disclosed its retention of float income); *George v. Kraft Foods Global, Inc.*, 641 F.3d 786, 50 EBC 2761 (7th Cir. 2011) (70 PBD, 4/12/11; 38 BPR 787, 4/19/11) (plan sponsor did not breach fiduciary duty in allowing trustee to retain float as part of its compensation; it was disclosed that trustee would retain float in fee schedules, sponsor received annual reports regarding amount of trustee's float income and there was no indication that trustee's total compensation was excessive).
[35] ERISA § 408(b)(2), 29 U.S.C. § 1108(b)(2).
[36] *See* DOL Field Assistance Bulletin 2002–3 (Nov. 5, 2002).

Are Fiduciaries Required to Look Beyond Mutual Funds or Engage in Frequent Rebidding to Drive Fees Down?

Cases Finding Consideration of Fees Inadequate. A common claim in fee litigation is that the plan fiduciaries were paying higher fees for a retail share class when the same investment was also available in an institutional share class with lower fees. In *Braden v. Wal-Mart Stores, Inc.*, the plaintiff alleged that Wal-Mart Stores Inc. could have used its market power (allegedly given the large size of its retirement plan and the highly competitive 401(k) marketplace) to include institutional shares rather than solely retail class shares.[37] The U.S. Court of Appeals for the Eighth Circuit determined that such allegations were sufficient to survive a motion to dismiss, finding ''the complaint's allegations can be understood to assert that the plan includes a relatively limited menu of funds which were selected by Wal–Mart executives despite the ready availability of better options.'' [38] While *Braden* involved only the denial of a motion to dismiss, the Eighth Circuit's opinion suggests that fiduciaries should at least consider whether cheaper options are available.

A similar point was litigated in *Tussey v. ABB, Inc.*, in which the court found that it was a breach of fiduciary duty for the plan fiduciaries not to negotiate for rebates from the plan's record keeper. The court determined that ABB was required to leverage its ''purchasing power'' to obtain rebates for the plan.[39] To do so would require ''determining the amount of income generated by Fidelity Trust from revenue sharing, knowing the market costs for comparable services and affirmatively evaluating the quality provided by Fidelity Trust, and evaluating the costs and benefits of risk sharing,'' the court said. [40] In *Tussey*, ''ABB did none of this and did not even ask Fidelity Trust for a rebate or even discuss the issue with them,'' it said. [41] Thus, the court found a breach of fiduciary duty.

Courts have also suggested that fiduciaries are required to engage in frequent rebidding to ensure fees are reasonable. In *George v. Kraft Foods Global, Inc.*, the allegation that plan fiduciaries should have solicited competitive bids prior to extending a record keeper's contract was sufficient to survive a motion for summary judgment.[42]

The Protective Effect of Procedural Prudence. While the above cases all suggest that specific actions (i.e., investigating cheaper options such as institutional funds, negotiating for rebates and seeking competitive bids) may be necessary in certain situations, the broader theme is the importance of procedural prudence. A prudent process may protect defendants from an otherwise successful excessive fee claim.

For example, in *Tibble v. Edison International*, the plaintiff alleged that it was imprudent for Edison to include a short-term investment fund rather than a stable

[37] 588 F.3d 585, 590, 48 EBC 1097 (8th Cir. 2009) (226 PBD, 11/30/09; 36 BPR 2743, 12/1/09).
[38] *Id.* at 595.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] 641 F.3d 786, 798-99, 50 EBC 2761 (7th Cir. 2011) (70 PBD, 4/12/11; 38 BPR 787, 4/19/11).

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value fund.[43] The court found ''fatal'' to this claim evidence that the plan fiduciaries had engaged in a procedurally prudent process, which included a discussion of the pros and cons of a stable-value alternative and a determination that a short-duration bond already on the menu filled the same investment niche.[44] A similar focus on process is found in *Kanawi v. Bechtel Corp.*, in which the court held that plan fiduciaries were not liable for paying allegedly excessive fees where the plan fiduciaries had met regularly and sought the advice of outside consultants.[45]

Thus, the focus of fee planning should be on ensuring that the plan fiduciaries engage in a prudent process. This may include the following:

- regular meetings of plan fiduciaries to review investment performance and fees, and to consider alternatives;
- use of ''purchasing power'' to reduce fees, negotiate rebates and include cheaper share classes, where possible; and
- engagement of outside counsel where appropriate to ensure proper decision making.

How Strong Is the 404(c) Safe Harbor Defense Against a Fee Claim? ERISA Section 404(c) provides a ''safe harbor'' for plan fiduciaries from liability for the results of investment decisions made by plan participants and beneficiaries.[46] To come within the 404(c) safe harbor, fiduciaries must provide participants with ''the opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives available under the plan.'' [47] According to the regulations, ''sufficient investment information'' includes:

- A description of any transaction fees and expenses that affect the participant's or beneficiary's account balance in connection with purchases or sales of interests in investment alternatives (e.g., commissions, sales load, deferred sales charges, redemption or exchange fees); and
- Upon request, ''[a] description of the annual operating expenses of each designated investment alternative (e.g., investment management fees, administrative fees, transaction costs) which reduce the rate of return to participants and beneficiaries, and the aggregate amount of such expenses expressed as a percentage of average net assets of the designated investment alternative.'' [48]

Defendants have argued in the fee cases that Section 404(c) provides a defense to an excessive fee claim if the plan provides lower fee options that were not chosen by the complaining participant. Plaintiffs have argued in reply that Section 404(c) provides a defense as to losses caused by the participants' allocation decisions, but does not protect against a claim that a particular option was an imprudent investment to include in the plan in the first place.

In *Hecker*, the court agreed with the defendants' argument that Section 404(c) provided a defense to a fee claim, at least when the plan contained an open brokerage window pursuant to which the participants could choose from more than 2,500 funds.

Whether the 404(c) defense applies to plans without open brokerage windows remains to be seen. The Eighth Circuit in *Braden* distinguished *Hecker* because the plan at issue in *Braden* had more limited investment options. In *Tibble*, the U.S. Court of Appeals for the Ninth Circuit deferred to the DOL's view in holding that the Section 404(c) safe harbor did not apply to the act of ''designating investment options.''[49] There is, thus, a split of authority as to whether Section 404(c) applies to fee claims at all. However, the logic of *Hecker* is compelling where plans contain lower-cost options for particular investment categories but the participants chose a more expensive option.

Is Compliance With the New Fee Regulations Sufficient to Preclude a Fee Disclosure Claim?

The new fee regulations will likely take some steam out of the claim that fiduciaries are liable for failing adequately to disclose fee information. However, the disclosure issue will continue to be a significant part of fee cases because Section 404(c) does not apply absent the disclosure requirements contained in the regulations.

So far, the courts have primarily addressed fee disclosure claims stemming from time periods predating the new disclosure regulations. Eventually, however, the courts will face fee disclosure claims in which the requirements of the fee disclosure regulations have been met. Plaintiffs will argue that the regulatory requirements are a floor, not a ceiling, and additional disclosure may be required in certain circumstances. Defendants will argue that the regulatory requirements are comprehensive, and should not be supplemented on an ad hoc basis.

The question of whether ERISA's general fiduciary principles create disclosure obligations, beyond the specific disclosure requirements set forth in the statute and regulations, has been controversial. Some courts have held that general fiduciary duties create an affirmative disclosure obligation any time silence might be harmful.[50] Other courts have held that ERISA's express, and detailed, disclosure requirements preclude implying additional disclosure requirements not listed in the statute or regulations.[51]

Although the circuits are split on this issue generally, the argument against implying additional disclosure re-

[43] 729 F.3d 1110, 56 EBC 1245 (9th Cir. 2013) (150 PBD, 8/5/13; 40 BPR 1914, 8/6/13).
[44] *Id.* at 1136.
[45] 590 F. Supp. 2d 1213, 1229, 45 EBC 1470 (N.D. Cal. 2008) (218 PBD, 11/12/08; 35 BPR 2602, 11/18/08).
[46] 29 U.S.C. § 1104(c).
[47] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B).
[48] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B).
[49] 729 F.3d at 1121-25.
[50] *See, eg., Bixler v. Cent. Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300, 17 EBC 1934 (3d Cir. 1993) (recognizing ''an affirmative duty to inform when the trustee knows that silence might be harmful'').
[51] *See, e.g., Ehlmann v. Kaiser Found. Health Plan of Texas*, 198 F.3d 552, 555, 23 EBC 2401 (5th Cir. 2000) (27 BPR 85, 1/11/00) (''this court should not add to the specific disclosure requirements that ERISA already provides''); *Sprague v. General Motors Corp.*, 133 F.3d 388, 406, 21 EBC 2267 (6th Cir. 1998) (0109 PBD, 1/9/98; 25 BPR 140, 1/12/98) (''We are not aware of any court of appeals decision imposing fiduciary liability for a failure to disclose information that is not required to be disclosed.'').

quirements is strongest when the explicit disclosure requirements comprehensively cover the area in question. Here, the three separate DOL regulations comprehensively govern what information must be disclosed to plans by service providers, what type of fee disclosure is required to meet the 404(c) safe harbor and what fee disclosures must be made by fiduciaries to participants.[52] Although the courts have not yet addressed the issue, the comprehensive nature of these regulations seems to leave little room for allegations that additional fee disclosures were required.

[52] *See* 29 C.F.R. §§ 2550.404a-5, 2550.404c-1 and 2550.408b-2.

Conclusion

The only way to truly do all that can be done to avoid fee litigation is to set up a prudent process for comprehensively considering plan fees. No single product or consultant is going to be a magic bullet. Each plan should make its own ''facts and circumstances'' analysis of the fees it pays, and consider whether the fees it pays are best suited to that plan's needs. The best practice is to document all decisions with fees.

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