

Failure to Disclose Revenue Sharing is Not a Breach of Fiduciary Duty But May Jeopardize ERISA § 404(c) Relief

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The United States District Court for the Western Division of Missouri recently ruled that a failure of the plan sponsor to disclose to plan participants “revenue sharing” payments that the affiliated investment advisor and others had made to the plan trustee is not a breach of fiduciary duty because disclosure is not required by the Employee Retirement Income Security Act (“ERISA”) or existing Department of Labor (“DOL”) regulations. In *Tussey v. ABB, Inc.*, Defendants were sued for breach of fiduciary duty pursuant to Sections 502(a) and 409(a) of ERISA by Plaintiffs on behalf of a class of persons who were current or former participants in Defendant ABB, Inc.’s 401(k) plan.

In 1992, Defendant ABB, Inc. created a 401(k) plan for its employees (the “Plan”), which allowed Plan participants to contribute a portion of their income to individual retirement accounts. Several investment options were selected for the Plan participants to choose from, and each participant was able to select his or her individual investment from that list.

In 1995, ABB, Inc. selected Fidelity Trust to manage the Plan. In return for its services, Fidelity trust received two forms of compensation. First, Fidelity Trust received “hard dollar” fees, which were determined based on the number of participants or transactions. Second, Fidelity Trust received “revenue sharing” payments from companies which provide investment options to the Plan. Those companies charged fees to the Plan participants and a portion of the fees were given to Fidelity Trust. The existence and amount of the revenue sharing payments were not disclosed to Plan participants.

As part of the present lawsuit, Plaintiffs made a number of different claims suggesting that Defendants breached their fiduciary duties with regard to the Plan, one of which was that Defendants concealed the true nature of the fees and expenses incurred by the Plan by failing to disclose the details of the revenue sharing agreements to Plan participants.

The ABB, Inc. Defendants moved to dismiss Plaintiffs’ claims, arguing that: (1) Plaintiffs had not and could not show that the ABB Defendants violated their fiduciary duty by failing to disclose the actual fees paid by the Plan to Fidelity Trust because the ABB Defendants made all disclosures required by ERISA and DOL regulations; and (2) Because they made the required disclosures, ABB, Inc. was fully immunized under ERISA Section 404(c) “from any claimed fiduciary breaches stemming from the participants’ individual elections regarding those investments.”

Under ERISA Section 404(c), where a pension plan provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account, then a fiduciary will not be liable for any loss, or by reason of any breach, which results from such participant’s or beneficiary’s exercise of control. To qualify for this protection, ABB, Inc. had to comply with certain regulations which specify the components of disclosure and choice regarding the Plan.

The court determined that the ABB, Inc. Defendants had no duty to disclose the Fidelity Trust Defendants’ revenue sharing agreements, based on Eighth Circuit precedent. The court noted that in *Jenson v. Sipco, Inc.*, the employers’ failure to disclose that a welfare plan’s benefits

were not vested was not a breach of fiduciary duty because this disclosure was not included in the information that Congress determined must be included in a Summary Plan Description. Similarly, in *Anderson v. Resolution Trust Corp.*, the Eighth Circuit held that ERISA's general prudence requirement could not be invoked to create a more stringent disclosure requirement if the statute already dictates what notice is required.

In this case, neither ERISA nor the DOL required that revenue sharing be specifically identified and disclosed to Plan participants. As required by the Eighth Circuit's holdings in *Jensen* and *Anderson*, the court deferred to ERISA and the DOL's specific disclosure and reporting requirements. As a result, the ABB, Inc. Defendants could not have breached their fiduciary duty by failing to disclose the portion of the Plan's fees and expenses attributable to revenue sharing. However, ABB, Inc. could not prevail on its motion to dismiss based on ERISA Section 404(c) because the majority of cases have held that Section 404(c) is an affirmative defense that must be pleaded and proved at trial and is not appropriately resolved in a motion to dismiss. Further, ABB, Inc. had not proven as a matter of law that the Plan's losses were caused solely by choices made by Plan participants. Therefore, the court denied all motions to dismiss the lawsuit.

Although the case is yet to be fully resolved, it does represent an important victory for employers within the Eighth Circuit (i.e., including Missouri employers, or other employers with retirement plans in the same Circuit) in relation to investigation of prior revenue sharing arrangements between various providers of services to the retirement plan. However, such protections may be limited in the future if Congress and/or DOL undertake efforts to increase fiduciary obligations to undertake diligent due diligence processes to uncover and/or take reasonable steps to identify the existence of similar fee arrangements. Correspondingly, the ABB, Inc. case reinforces prior holdings where ERISA Section 404(c) provides some, but not all, protections from participant investment losses from investments selected by the plan's fiduciaries.

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