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Multiemployer 401(k) Fund Becomes Latest Target in Wave of Fee Litigation Suits

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Participants of a multiemployer 401(k) fund recently filed a putative class action against the fund's board of trustees alleging that the trustees breached their fiduciary duties of loyalty and prudence when they authorized excessive fees to be paid by the fund's participants. The complaint alleges that the trustees imprudently and disloyally allowed the fund to pay: (1) excessive investment management fees for mutual fund options by failing to offer cheaper institutional share class options instead of the more expensive retail share class options; and (2) excessive recordkeeping fees by failing to monitor the recordkeeping arrangement with the fund's recordkeeper, which allegedly resulted in overpayments of more than $17 million. The plaintiffs seek to represent a class of over 27,000 current and former participants. The case is captioned *Ybarra v. Bd. of Trs. of Supp. Income Tr. Fund,* No. 8:17-cv-02091, ECF No. 1 (C.D. Cal. Nov. 30, 2017).

In response to the complaint the trustees filed a motion to dismiss, seeking an early resolution to the case. The district court granted, in part, the trustees' motion to dismiss with respect to the participants' claim that the trustees violated their fiduciary duties by allowing the fund to offer retail share classes of mutual funds as plan investment options in lieu of cheaper share classes of the same investment options. The court ruled that the participants lacked Article III constitutional standing to bring the claim because they did not identify in which allegedly imprudent mutual fund the participants were invested, and therefore, did not sufficiently establish that the participants had suffered harm by investing in the more expensive retail shares of the challenged investment options. The court, however, granted participants 20 days to correct the complaint and, based on documents provided by the participants, it appears that once the complaint is corrected they will establish standing.

The court also denied, in part, the trustees' motion to dismiss the participants' claim for excessive recordkeeping fees because it found participants provided sufficient factual support for their allegations that the trustees' process for reviewing and monitoring the plan's recordkeeping fees was flawed. *Ybarra* will now presumably enter into the discovery phase of litigation where the participants will seek documents and information from the trustees related to their administration of the 401(k) fund.

The claims asserted in *Ybarra* are similar to those that have been leveled against dozens of 401(k) and 403(b) plan fiduciaries in the last two years in what are commonly referred to as "fee litigations." Like in *Ybarra*, many of these cases have survived the initial pleading stage and have entered into costly discovery. These suits have typically been brought against large plans commonly referred to as "jumbo plans," generally with over a billion dollars in assets. However, as the plaintiffs' bar looks to increase the volume of fee litigation, they have started expanding their targets to include plans of mid-market sized companies and, as *Ybarra* indicates, multiemployer participant-directed annuity or 401(k) funds.

While this potential new trend may give multiemployer fund fiduciaries cause for concern, it also can be used as an opportunity for fiduciaries to re-examine their fund's procedures and implement a strategy to decrease fiduciary liability exposure. Multiemployer fund trustees seeking to prevent the risk of such lawsuits, or to be better prepared to handle any potential lawsuits, can be guided by the evolving case law in the single employer plan fee litigation context.

First, having a well-documented prudent process to review and oversee fund investment options and third-party providers is the most valuable first line of defense. This should include regular meetings to review and monitor the fund's investment options with the guidance of a fiduciary investment consultant to ensure investment manager performance is comparable to stated benchmarks and that the fees charged remain reasonable. As part of a prudent process, fund trustees should also periodically issue requests-for-proposals for major service providers like recordkeepers. If fees appear out of line with benchmarks (note that plaintiffs' counsel are often monitoring these benchmarks), then trustees should investigate the prudence of retaining the existing service providers and document the resolution of the issue. Trustees do ***not*** have to retain the lowest-cost provider; however, quality and service can and should be considered and documented in evaluating any service provider.

Second, another practical way to lessen risk is to offer a diversified mix of investments, including target-date funds and lower-cost index funds. Courts have dismissed cases where funds offered participants a wide range of investment options that included high and low risk options, because doing so allowed fund participants to choose investments according to their personal risk tolerance.

Third, fiduciaries should ensure that they are following statutory requirements with respect to fund disclosures. These disclosures, in addition to being required, can inoculate fiduciaries from hindsight-based claims that "investment mixes" offered by the fund's investment options were imprudent. Courts recognize that investments have risks and if these risks are properly disclosed to participants, courts will be disinclined to use hindsight to second guess inclusion of these investment options in the fund's lineup, particularly when the fund offers a diversified mix of investment options with different risk profiles.

Fourth, a best practice is to have outside counsel conduct fiduciary training to outline in greater detail the steps that should be taken to avoid, or at least mitigate the chance of, being sued. If there are specific concerns, fiduciary legal compliance reviews can help identify and correct problems before litigation occurs. If performed by counsel and properly structured, these reviews can either be maintained as privileged, or can be used to document the prudent fiduciary process used to manage the fund's investment options.

Finally, not all trustees will have the expertise or time to implement and follow the best practices identified above. Accordingly, in appropriate circumstances, the trustees may want to consider out-sourcing fiduciary management of investments to independent fiduciary professionals. But, because this option takes control away from the trustees, strong consideration should be given to whether the guidelines discussed above can be accomplished by the trustees themselves.

The rate of new fee litigation filings does not appear to be declining, with over 35 new fee litigation cases filed in 2017. It is too soon to tell whether *Ybarra* will be an isolated event or the start of a new trend of lawsuits against multiemployer funds. The safest course for trustees is to take preemptive action to mitigate their potential exposure.