Comment: Oracle and Others Sued by Schlichter

By Thomas E. Clark, Jr. *Tue, Feb 2, 2016*

'There has been an uptick in the number of ERISA fiduciary breach lawsuits filed in the last few months,' writes Clark at the FRAplantools blog. He comments on four cases filed by plaintiffs attorney Jerry Schlichter, including one against Oracle Corp.

In this **post**, we will address all of the recent lawsuits filed by Schlichter, Bogard & Denton, the 800-pound Gorilla in this space. The most recent was filed last week against Oracle. The case against Anthem has received a lot of attention. But one that has slipped through the cracks a bit is against Reliance Trust and one its clients.

This case may the first of its kind on this scale to go after an outsourced fiduciary who is not related to the plan sponsor. Finally, the case against BB&T will be familiar to readers as involving claims of a provider's own in-house plan.

Troudt v. Oracle Corp.

On January 22, 2016, an excessive fee lawsuit was filed against Oracle Corp., a Fortune 100 company based in Redwood City, California. *Troudt v. Oracle Corp.* was filed in the District of Colorado and alleges that the plan's fiduciaries allowed excessive recordkeeping fees to be paid to Fidelity.

The complaint alleges that Oracle allowed Fidelity to be paid between $68 to $140 per participant rather than a reasonable per head fee of $25. The plan's participant count increased from 38,000 in 2009 to about 60,000 today. Over that same time period, the plan's assets increased from $3.6 billion to over $11 billion.

The complaint also alleges that the following funds underperformed and should not have been selected:

- The Artisan Small Cap Value Fund
- PIMCO Inflation Response Multi-Asset Fund
- TCM Small-Mid Cap Growth Fund

This is not the first time a major client of Fidelity has been sued, which includes cases such as Tussey v. ABB and previously dismissed lawsuits against John Deere, Exelon, and Unisys.

Notably missing from the lawsuit are allegations that cheaper share classes were available but not used, as is alleged in the lawsuit below.

Bell v. Anthem

On December 29, 2015, an ERISA lawsuit was filed against Anthem Inc. in the Southern District of Indiana federal court. This is the first time, to our knowledge, that a plan sponsor has been sued on this scale where Vanguard has been the recordkeeper and their funds have made up the lion's share of the core options available.

The allegations in the complaint included:

- The plan's fiduciaries caused Vanguard to be paid excessive recordkeeping fees. Not until 2013 were more expensive share classes of the plan's funds replaced with cheaper alternatives. This reduced the recordkeeping fees paid to Vanguard through the revenue sharing generated from the funds.
- Cheaper share classes were available much earlier than selected, even as far back as the late 1990s. This failure caused $18 million in losses to the plan.
- Artisan Mid Cap Value Fund and the Touchstone Sands Capital Growth Fund were imprudently included in the plan because they were excessively prices as compared to similar Vanguard funds, in addition to more expensive share classes being used until 2013.
- Failed to use separate accounts for these two funds and collective trusts for the Vanguard target date funds in the plan instead of mutual funds and that this changes would have resulted in less fees paid by participants.

The excessive recordkeeping fees alleged by plaintiffs was between $80 and $94 per participant until 2013 when Anthem negotiated a flat per head fee of $42. This is based on a plan that had between $3.3 and $5.1 billion during the time period in question in the lawsuit.

The plaintiffs also allege that the $42 is too much and was excessive by at least 40%. Finally, the complaint alleges that the plan should have included a stable value fund instead of a money market fund.

Pledger v. Reliance Trust

On December 22, 2015, *Pledger v. Reliance Trust Company* was filed in the Northern District of Georgia federal court. **The issues raised in this complaint are unique** to this case and should be carefully studied by any service provider offering outsourced 3(21), 3(38), or 3(16) services.

The lawsuit was filed by participants in a plan sponsored by Insperity Inc., a professional employer organization ("PEO"). As a PEO, Insperity provides outsourced human resources and business solutions to small and medium sizes businesses. Typically, these outsourced employees are co-employed by Insperity as well as the client business. They become part of a 401(k) plan sponsored and administered by Insperity rather than the client company.

The plaintiffs claim that:

- Insperity used the plan's asset to seed a 401(k) recordkeeping business it started to supplement its core business functions. Previously the plan was with another industry recordkeeper. After Insperity started its recordkeeping division, the plaintiffs claim the plan was moved to it without a competitive bidding process.
- The plan's $1.9 billion in assets represented 95% of Insperity's recordkeeping assets. It is also worth noting that Insperity had a different plan for its corporate workforce and that it was also recordkept by Insperity.
- Insperity derived excessive compensation from the recordkeeping activities and that Reliance Trust Company, also a defendant, was part of the scheme. It alleges that Reliance was hired as the plan's 3(38) fiduciary investment manager as well as a discretionary trustee.
- Insperity received between $119 and $142 per participant per year in recordkeeping fees.
- The more expensive share classes of the Reliance collectives were selected to generate additional revenue sharing to benefit Insperity. They also claim the target date funds had terrible performance that caused losses to the plan of between $41 million and $56 million.
- Reliance selected "untested" and "newly-established" target date funds it managed as collective trusts. Plaintiffs claim that Reliance was charged a sliding scale for managing these assets.

Essentially, the plaintiffs accuse Insperity and Reliance of a quid pro quo that allowed Reliance to pick its own investments for the plan, such as the target date funds selected, which then allowed Reliance to select funds that generated excessive revenue sharing that went to Insperity.

It's unclear from the complaint if Insperity selected the collective trusts and simply hired Reliance as an investment manager or whether all investment decisions were outsourced to Reliance and it then selected its own products for inclusion. The plaintiffs claim it is the latter.

In what may be the most troublesome allegation in the complaint, plaintiffs claim that the Insperity corporate plan, which had only $208 million in assets, had the same investment lineup but used cheaper share classes than the $2 billion plan in six instances. They also claim that the corporate plan was offered a stable value fund where the plan for the outsourced employees was not, in violation of ERISA.

Smith v. BB&T

On October 8, 2015, current and former employees of BB&T Corporation filed a lawsuit in the Middle District of North Carolina federal court alleging self-dealing by BB&T with regard to its own in-house 401(k) plan.

Plaintiffs allege that BB&T has benefited at the expense of plan participants by using BB&T's own funds which also include those managed by its wholly owned subsidiary Sterling Capital Management. The plan is alleged to currently have about $2.93 billion in plan assets.

According to plaintiffs, until 2009, the plan only had BB&T mutual funds, but since then non-proprietary funds have been added. BB&T has also been the plan's recordkeeper in addition to the primary asset manager of the plan.

Plaintiffs allege that through this setup, BB&T profited at the expense of the plan's participants by allowing the plan to generate excessive revenue sharing which went to BB&T and not engaging in an arm's length RFP process to find a different recordkeeper.

Like other lawsuits filed by the Schlichter firm, they claim these funds are also imprudent when compared to a lineup of Vanguard fund or if separate account or collective trusts had been used rather than mutual funds.

The complaint also alleges that many of the BB&T funds in the plan were poorly performing, including Sterling Capital International Fund. It also attacks the use of a BB&T money market type product rather than a stable value fund, as well as the unitized structure of the BB&T company stock fund in the plan, an issue that has been litigated in previous cases.

A separate lawsuit has been filed against BB&T by a different plaintiffs firm. That suit, ***Bowers v BB&T***, will be litigated along with *Smith v. BB&T*.

Our thoughts

The cases against Oracle and Anthem do *not* involve allegations of self-dealing under ERISA. Such allegations have been the linchpin of trial decisions and settlements in the recent successes by the plaintiff's ERISA bar. Instead, the claims attack the process and substance of the fiduciary decision-making by the defendants.

The cases against Reliance/Insperity and BB&T both involve allegations of self-dealing. The case against BB&T has a familiar pattern and is similar to ones previously filed against Ameriprise and Fidelity.

Pledger v. Reliance Trust may be the first case to address the common practice of outsourced investment managers using their own products/solutions as substitutes for more mainstream target date funds. This is become a more common thing to see in the form of model portfolios and collective trusts.

It will be important to pay close attention to the way in which the relationship was established by Reliance and Insperity, as there is definitely a right way to do it and a wrong way.

Having an outsourced fiduciary provider in most instances will *not* stop a plan sponsor from also being sued. In *Pledger v. Reliance Trust*, the complaint states that Reliance was selected as the outsourced investment manager and discretionary trustee.

Yet Insperity was still sued and it is alleged that they are as much responsible for the claims involving investments as is Reliance, the outsourced fiduciary. While I understand that Insperity has its own independent claims against it, it is worth emphasizing that Insperity as the plan sponsor still needs to fight its way out of this lawsuit, like any other plan sponsor who might get sued would.

While a plan sponsor in another situation, or Insperity here, may be able to show that all responsibility over investments was that of the outsourced fiduciary, the time and expense of defending a lawsuit is very real and many times may be more or as much as the ultimate damages that a court could find against them.

The ultimate conclusion here is that, for a plan sponsor, outsourcing a fiduciary role to a service provider is not a total insulation from risk. And this lawsuit provides a nice example of that. Instead, there should be other valid reasons (of which there are many) for outsourcing fiduciary roles to service providers.