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## Fidelity, as service provider, wins in appeal of "Tussey v. ABB"

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By Editorial Staff Thu, Mar 20, 2014

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*This week's appeals court decision in the class action suit against Fidelity and one of its 401(k) recordkeeping clients was a "mixed bag for plan sponsors, participants and service providers," wrote ERISA blogger Thomas Clark.*

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The 8th Circuit Court of Appeals yesterday affirmed in part, reversed in part, and vacated in part a U.S. District Court decision in the landmark ERISA case of *Tussey v. ABB, Inc.*, a class action lawsuit filed by plan participants against the plan sponsor and Fidelity Management Trust Company, the plan provider.

The lower court, in a decision now almost two years old, held ABB and Fidelity responsible for violations of their fiduciary duties to plan participants by charging excessive fees or misusing plan assets and awarded the plaintiffs and their attorneys a judgment of some \$33 million. That judgment has been reduced to about \$13.4 million by the [decision](#) of the appellate court judges, and the lower figure will stand, barring further appeal or reversals.

In his [blog](#), ERISA attorney Thomas E. Clark Jr. called the decision "effectively a mixed bag for plan sponsors, participants, and service providers." He offered the following summary:

- (1) The plaintiffs won the issue of excessive recordkeeping fees against ABB. This will stand barring any appeals by ABB;
- (2) ABB won a procedural victory on the issue of share class choice and the mapping of the Wellington Fund to the Fidelity Freedom Funds. The district court will have to decide the issue again, as explained below, using the guidance as provided by the 8th Circuit; and
- (3) Fidelity won the issue of float interest. It has now defeated all claims against it, barring any further appeals by the plaintiffs.

Clark told *RIJ* today, "Fidelity has been cleared legally, because as a service provider it did not have fiduciary responsibility. But it has not necessarily been cleared in the court of public opinion, because now it's been shown that it was being paid too much by its client." The float interest issue is still the subject of other actions against Fidelity, he said.

In a press release, plaintiff's attorney Jerry Schlichter, of the St. Louis firm of Schlichter, Bogard & Denton, LLP, said:

"This is a victory not just for ABB employees but for all 401k plan employees and retirees who have and continue to pay excessive recordkeeping fees. It affirms that plan sponsors have a fiduciary duty to monitor these costs and make sure they are reasonable.

"The Court's decision also supports our call for greater transparency and enforcement regarding 401k plan fees, what the fees are used for, and who gets them. The case is remanded to the Trial Court for further

proceedings and we will move forward to protect the retirement assets of ABB employees and retirees."

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