Fidelity the target of new lawsuits over float income in 401(k) plans

By Editor Test *Thu, Mar 14, 2013*

“Our practices are in compliance with ERISA and DOL guidelines,” a Fidelity spokeswoman said. “We believe that the practices described in the lawsuit are consistent with the law and fair to all parties."

A putative Class Action Complaint was filed in the United States District Court for the District of Massachusetts last week, accusing Fidelity Management and Trust Company and others of fiduciary breaches over its handling of float income, according to press reports.

The suit was filed by participants in 401(k) plans from Bank of America, EMC Corp. and Safety Insurance Co., and it contains similar allegations to another suit, filed in the Boston federal court February 5, by current or former participants of plans from Hewlett-Packard Co., Delta Air Lines Inc. and Avanade Inc., a subsidiary of Accenture.

The February 5 suit was filed for Timothy Kelley (an ex-participant in the Avanade and Hewlett-Packard 401(k) plans) and Jamie Fine (a participant in the Delta 401(k) plan), but class action status is being sought on behalf of all Fidelity 401(k) participants, not just participants in the Avanade, Delta and HP plans.

According to the February 5 complaint:

> Fidelity caused certain of the Plans’ assets to be deposited on an interim basis in interest-bearing accounts before it invested or disbursed monies as directed by the Plans’ participants. Income earned on or derived from the Plans’ assets while invested in such accounts is “float income.” The float income was an asset of the Plans under ERISA. Fidelity exercised discretion and control over the investment of the Plans’ assets in such accounts and over the collection and allocation of float income. Accordingly, Fidelity was a fiduciary for the Plans with respect to the float income. As a fiduciary, Fidelity was prohibited from dealing with the float income for itself or for the benefit of another and was required to deal with that float income with prudence and unflagging loyalty. Fidelity did not. Instead, it engaged in prohibited transactions and breached its fiduciary duty in two distinct ways.
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> First, Fidelity used float income to pay itself trust and record-keeping fees above and beyond the fees authorized in the trust agreements between the Plans and Fidelity. Thus, Fidelity engaged in repeated self-dealing transactions and breaches of duty in violation of § 406 and § 404 of ERISA whenever it paid itself float income.
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> Second, Fidelity remitted float income into the mutual fund options selected by the Plans’ participants without crediting the amount of that float income to the contributions made by Plans or the Plans’ participants. This had the effect of disseminating the value of the float income generated by the Plans’ assets to all of the investors in the mutual fund, and substantially diluting the value of the float income received by the Plans and the Plans’ participants. Thus, Fidelity engaged in repeated transactions for the benefit of others and breaches of duty in violation of § 406 and § 404 of ERISA whenever it

invested float income into its mutual funds.

Both float-income suits refer to a March 2012 opinion of a judge in U.S. District Court in Kansas City, Mo., in a lawsuit by plan participants against ABB Inc., Cary, N.C., and Fidelity. The judge ruled that Fidelity had “breached its fiduciary duties” in the use of float income, and ordered Fidelity to pay the plan $1.7 million. Fidelity is appealing the decision.

“Our practices are in compliance with ERISA and DOL guidelines,” Jennifer Engle, a Fidelity spokeswoman, told *Pensions & Investments* magazine. “We believe that the practices described in the lawsuit are consistent with the law and fair to all parties and that we provide valuable services to 401(k) clients for whom Fidelity serves as a record keeper and trustee.”