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Trial Date Set for “Excessive fee” Suit against Boeing

By Kerry Pechter *Thu, Jan 8, 2015*

“This decision reflects the pendulum that has clearly swung in the participants’ favor in recent years,” writes ERISA attorney and blogger Thomas E. Clark, Jr. of FRAPlanTools.com.

Unless the parties settle before then, the lawsuit of *Spano v. Boeing*, one of the first “excessive fee” cases brought by retirement plan participants against a large American employer and retirement plan sponsor, will go to trial next spring—eight years after it was initially filed.

A May 20, 2015 trial date in U.S. District Court in East St. Louis was set after Boeing’s attorneys’ motions for summary judgments were either denied or partially denied last December 30, according to a **report** on The Fiduciary Matters blog by ERISA attorney Thomas E. Clark, Jr. this week.

“This decision reflects the pendulum that has clearly swung in the participants’ favor in recent years…,” Clark writes, noting that no one would have expected such a trend when *Spano v. Boeing* was filed. “Betting a dollar that a decision such as this would be likely someday would have been a waste of a perfectly good dollar.”

The fact that *Spano v. Boeing* has been allowed to proceed to trial is consistent, however, with a recent wave of legal judgments and decisions that have discredited common business practices in retirement plans—practices that in many cases resulted in participants paying high and in some cases even non-competitive prices for services they thought were free.

One of those practices is revenue sharing. It involves offering of mutual fund share classes with high fees in order to subsidize the cost of administering plans. In several class-action suits by participants against plan sponsors and plan providers in recent years, judges and juries have decided that sponsors and providers that practiced revenue sharing were violating the sponsors’ responsibilities to operate the plans solely in the interests of the participants.

The cases and related decisions haven’t outlawed revenue sharing. But they have shined light on it, showed that it is prone to conflicts of interest, and inspired plan sponsors to look for cheaper, more transparent and more fiduciary-minded ways to cover plan administration costs. That trend, in turn, has squeezed profit margins in the 401(k) service provider business and is said to be a factor in the recent decisions by some companies to sell their retirement plan services units.

In *Spano v. Boeing*, plan participants charged that:

- Until 2006, Boeing selected and retained mutual funds as plan investment options that charged excessive investment management expenses and that Boeing used them to “funnel” excessive Plan recordkeeping and administrative fees to State Street/CitiStreet via revenue sharing.
- The Small Cap Fund provided additional revenue sharing fees to State Street/CitiStreet and charged its investors 107 basis points per year in fees, which was grossly excessive, in order to benefit Boeing’s corporate relationship with State Street/CitiStreet.
- Boeing failed to monitor and remove an imprudently risky concentrated sector fund, i.e. the Technology Fund, and instead retained this fund for the purpose of benefiting its corporate relationship, rather than for the sole benefit of the Plan Participants.
- The Boeing Company Stock Fund incurred excessive fees and held excessive cash, impairing the value of the Plan assets. With regard to this fund, Plaintiffs also allege that Defendants failed to remedy the resulting transaction and institutional drag.