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A Jury's Reaction to Claims of ERISA Fiduciary Misconduct: Lessons Learned and Takeaways for Managing Risk

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Case Study: Jury Trial in ERISA Class Action

- Mayer Brown Team (led by **Nancy Ross, Reginald Goeke, John Nadolenco, and Brantley Webb**)
- Four-week trial with 27 witnesses, including 8 expert witnesses.
- The jury found for the Defendants on all counts.



Unique Issues with Jury Trials – Preparation

- Focus groups (not necessary in bench trials).
 - Develop key themes.
 - Identify where jurors have concerns.
- Jury selection: What kinds of jurors are preferable?
 - Juror investment experience: 401(k)? Non-401(k)?
 - Juror education.
 - Anticipating the juror pool attrition.
- File motions in limine.
 - More important to control evidence before it comes in.
- Simplify the evidence as much as possible.

Unique Issues with Jury Trials – Keeping the Jury Engaged

- ERISA can be complex and boring; meticulously documenting fiduciary process is necessary, but tedious for the jury.
- **Some Solutions –**
 - Opening that sets up key themes and issues.
 - Avoid repetition across witnesses, aside from key themes.
 - Get witnesses out of the chair; use props and demonstratives.
 - Weave in examples that are relatable to the jury – e.g., personal investment decisions and preferences.
 - Expert cross examinations are an opportunity to go on the attack.

Unique Issues with Jury Trials – Telling Your Story through Plaintiffs' Case

- Plaintiffs put on their case first and will frame the story for jury. They will also examine many defense witnesses, so they cross examine your witnesses *first*.
- **Some Solutions –**
 - Use opening and the first few witnesses to make sure the jury understands your story.
 - Prepare witnesses well for cross examination.
 - Focus on role of plaintiffs' lawyers (and their hired experts) as motivators for the case.
 - Research Plaintiffs' investment history and work circumstances.
 - Show that the fiduciaries *know their plan participants* – while the Plaintiffs' lawyers are outsiders, seeking to impose arbitrary rules.

Unique Issues with Jury Trials – Addressing Legal Issues

- Subsequent remedial measures.
- Identify what plans Jury should consider as similar to at-issue plan.
- Standard for objective prudence.
- Special interrogatories.
- Damages issues.

Recordkeeping Claims – Keys to Success

- Evidence of actions and requests for lower fees throughout class period.
- Focusing on benchmarks from appropriate market (e.g., 403(b) market vs. 401(k) market).
- Comparison to conduct of peers in the market: RFP is strongest evidence, but other reasonable benchmarking can be prudent.
- Minutes reflect thoughtful discussions of RK fees.
- Contemporaneous advice and feedback from advisors on RK fees.
- Evidence of specific services provided.
- Careful documentation on Form 5500s, including consideration of indirect compensation.
- Careful contemporaneous review of 408(b)(2) disclosures.
- Evidence from vendors consistent with evidence from Plan Sponsor.

Recordkeeping Claims – Takeaways

Procedural Prudence Evidence Is Important

- Review minutes for evidence that fees were actively considered.
- Early assessment of recordkeeping fees against relevant benchmarks.
- Consider extent to which client has hired advisor, and the feedback provided by the advisor.
- Demonstrate requests for lower fees and lower share classes.

Prepare to Rebut Plaintiffs' Purported Objective Prudence Evidence

- Be aware of additional compensation to recordkeeper from third parties (e.g., revenue sharing).
- Point to plan-specific services provided by recordkeeper.
- Focus on Plaintiffs' recordkeeping benchmarks and damages calculations.

Investment Claims – Keys to Success

- Evidence of contemporaneous review of investments.
- Committee members should be able to show:
 - They understand investments (or, if not, they sought outside help);
 - They understand their plan participants; and
 - They care.
- Explaining importance of participant choice and preferences.
- Highlighting communications with participants regarding investments' respective risk.
- Explaining value of annuities, or other special features of investments.
- Highlighting inconsistencies between Plaintiffs' experts' testimony and actual practice.
- Focus on the personal success of the named plaintiffs.

Investment Claims – Takeaways

Procedural Prudence Facts Matter

- Consider knowledge-base of committee members and staff.
- Evaluate minutes and other documents for evidence of investment reviews.
- Consider existence of and adherence to investment policy statement.
- Consider extent to which plan offers proprietary funds.
- Consider involvement of consultants and contemporaneous advice offered.

Challenge Plaintiffs' Supposed Evidence of Objective Imprudence

- Focus on Plaintiffs' cherry-picking of challenged investments and proposed comparator investments.
- Focus on Plaintiffs' use of hindsight.
- Focus on Plaintiffs' aim to restrict choice.

Takeaways

- At this point, jury trials limited to 2d Circuit.
- If Court does not dismiss Jury claim, that is not fatal: Juries can get it too.
- But for Juries, the presentation matters more:
 - How reliable witnesses and committee members appear.
 - Highlighting key themes like participant choice.
- Many ERISA Plaintiffs' counsel do not have substantial jury trial experience.
- Recently, we have seen Plaintiffs' counsel withdraw demands for jury trials.

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