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Important Guideposts to Protect Plan Sponsors and Fiduciaries

A federal court in California has provided **important guideposts (below)** that can protect plan sponsors and other plan fiduciaries.

We are continuing to assess interest in a seminar on retirement plan fiduciary governance and best practices. If you would be interested in attending a seminar on this topic, please let us know by replying to this email. Please also indicate if you would be interested in a webinar.

As described in the [attached article](#), the court ruled that **plan fiduciaries were not subject to liability** under ERISA for paying allegedly excessive fees to a mutual fund or maintaining underperforming investment options **where they were able to demonstrate** that their decisions were based upon a **prudent process** (also referred to as “procedural prudence”) and they were able to document the process. The ruling is part of an “excessive fee” lawsuit filed against Bechtel Corporation and its plan fiduciaries.

It’s worth noting that retirement plan fiduciaries who fail to act “prudently” are personally liable to make good on any losses sustained by a plan, including lost earnings.

Court Case Provides Important Guideposts for Plan Fiduciaries

The following factors were of special significance to the court in finding that the plan fiduciaries demonstrated procedural prudence (i.e., prudent fiduciary process):

1. The fiduciaries met regularly to discuss the plan’s investments;

Investech Comment: We recommend that plan fiduciaries meet at least twice a year (and preferably quarterly) to review a retirement plan’s investments.

2. The fiduciaries relied on the advice of disinterested outside consultants;

Investech Comment: Some plan sponsors mistakenly assume that it’s sufficient to rely upon the investment research, analysis, recommendations, etc. provided by a retirement plan’s investment provider (e.g., mutual fund family, insurance company, etc.). This case confirms that such reliance is not prudent fiduciary practice, likely due to the investment provider’s inherent conflict of interest. In the eyes of the

courts and the Department of Labor, the involvement of independent consultants goes a long way in demonstrating prudent fiduciary process.

3. **The fiduciaries employed a benefit structure that was customary for the type of plan being maintained;**
4. **The fiduciaries regularly reviewed the performance of the investment options and considered alternatives; and**
5. **The fiduciaries offered fund options that, as a whole, were competitive with the industry standard.**

Investech Comment: Plan fiduciaries should periodically benchmark a plan and its investments; we recommend the involvement of an independent third party consultant with expertise in retirement plan cost management.

Of at least equal importance in this case was the plan fiduciaries' ability to document the important components of their process.

Although some of the funds may have underperformed, the court emphasized that "the test of prudence is one of conduct and not performance..." The courts and the Department of Labor have often said that fiduciaries are not judged by the results they obtain – they do not guarantee results – but their performance is measured by the steps they have taken to get there. In other words, the process followed in reaching a decision.

We believe, and the guideposts provided by the court confirm, that prudent fiduciary process is a readily attainable goal. This not only protects the plan fiduciaries, but also results in a better retirement plan for employees.

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