



Fiduciary Litigation Update — Tussey v. ABB, Inc.

By Seth J. Hanft of Porter Wright Morris & Arthur LLP. Reprinted with permission.

A recent case, *Tussey v. ABB, Inc.*, has received much warranted and unwarranted attention in the Section 401(k) plan arena. In Part 1 of this legal update, we will explain the basics of what happened in this case. In Part 2, we will provide practical aspects of *Tussey* and deliver specific recommendations on how plan sponsors and fiduciaries can help minimize their potential fiduciary liability.

Part 1: Case Summary

By way of background, this case was one of 15 different cases filed in 2006 by a single law firm. These lawsuits were aimed at large employers alleging a breach of fiduciary duties under ERISA related to the fees paid for 401(k) plan services. The primary issue in *Tussey* was whether ABB, Inc., the plan's employee benefits committee, and Fidelity Trust (the plan's recordkeeper) violated their fiduciary duties to the plan. *Tussey* is noteworthy because it the first of these cases to award significant damages to the plaintiffs (but note that the damages were a fraction of those sought).

The district court certified the case as a class action in 2007. The district court refused to dismiss the case in 2008, while also ruling that the failure to disclose revenue sharing payments to plan participants is not a breach of fiduciary duty (because disclosure is not explicitly required by ERISA or the DOL). The case proceeded to a four-week bench trial. Finding in favor of the plaintiffs, the court awarded damages of nearly \$37 million. While the court found a number of deficiencies in ABB, Inc.'s fee monitoring procedures and in the fee arrangement between ABB, Inc. and Fidelity, it is clear that ABB, Inc.'s primary lapse was in not following its detailed investment policy. The court issued the following significant holdings:

- ABB, Inc. failed to monitor recordkeeping costs by:
 - Never calculating the amount paid via the revenue sharing arrangement.
 - Ignoring third-party advice

(Continued on page 4)

Inside this issue:

Fiduciary Litigation	1
Tech Tip: Windows Keyboard Shortcuts	2
Fastcase Webinars	3
New OSBA Materials	3
You and the Legal System: Foreclosure	6
Foreclosure Resources	7

Hamilton County Law Library

Hamilton County Courthouse
1000 Main Street
Room 601
Cincinnati, OH 45202
T: 513.946.5300
F: 513.946.5252

Open Monday-Friday 8 - 4

[www.http://www.hamilton-co.org/cinlawlib/](http://www.hamilton-co.org/cinlawlib/)

Tech Tip: Work smarter not harder with Microsoft Window keyboard shortcuts. By Julie Koehne

Press this key

F1

Ctrl+C (or Ctrl+Insert)

Ctrl+X

Ctrl+V (or Shift+Insert)

Ctrl+Z

Ctrl+Y

Delete (or Ctrl+D)

Shift+Delete

F2

Ctrl+Right Arrow

Ctrl+Left Arrow

Ctrl+Down Arrow

Ctrl+Up Arrow

Ctrl+Shift with an arrow key

Shift with any arrow key

Ctrl+A

F3

Alt+Enter

Alt+F4

Alt+Spacebar

Ctrl+F4

Alt+Tab

Ctrl+Alt+Tab

Ctrl+Mouse scroll wheel

Windows logo key +Tab

Ctrl+Windows logo key +Tab

Alt+Esc

F6

F4

Shift+F10

Ctrl+Esc

To do this

Display Help

Copy the selected item

Cut the selected item

Paste the selected item

Undo an action

Redo an action

Delete the selected item and move it to the Recycle Bin

Delete the selected item without moving it to the Recycle Bin first

Rename the selected item

Move the cursor to the beginning of the next word

Move the cursor to the beginning of the previous word

Move the cursor to the beginning of the next paragraph

Move the cursor to the beginning of the previous paragraph

Select a block of text

Select more than one item in a window or on the desktop, or select text within a document

Select all items in a document or window

Search for a file or folder

Display properties for the selected item

Close the active item, or exit the active program

Open the shortcut menu for the active window

Close the active document (in programs that allow you to have multiple documents open simultaneously)

Switch between open items

Use the arrow keys to switch between open items

Change the size of icons on the desktop

Cycle thru programs on the taskbar by using Aero Flip 3-D

Use the arrow keys to cycle through programs on the taskbar by using Aero Flip 3-D

Cycle through items in the order in which they were opened

Cycle through screen elements in a window or on the desktop

Display the address bar list in Windows Explorer

Display the shortcut menu for the selected item

Open the Start menu



Free Fastcase Webinars

Did you know that remote access to Fastcase comes with your Law Library subscription? Join us this summer for free Fastcase training! We will be hosting the following webinars:

Introduction to Fastcase

Monday, June 4
3:30-4:30pm

Fastcase Legal Research for Paralegals

Tuesday, July 3
10:00-11:00am

Tips for Enhanced Legal Research with Fastcase

Wednesday, August 8
1:00-2:00pm

Keyword (Boolean Search) for Lawyers

Monday, August 27
1:00-2:00pm

For more info, or to register, call 946.5300 or email reference@cms.hamilton-co.org

***Note: these are not CLE programs.**

New OSBA CLE Materials

OSBA CLE books are a great resource if you want an update on legal developments, or ideas for making your practice more efficient. Many of these books are on the New Books shelving but the collection is shelved across from the ORC in the library's main room. Check out [this list](#) of our latest titles. Just call us or email reference@cms.hamilton-co.org if you'd like us to hold some of these for you.

Discipline, documentation, and discharge of problem employees
KFO334.5 .E55 D57

I'm buried in paper-what can I do?
KFO537 .D622

Insurance Staff Counsel
KFO185 .I6

Ipad for Legal Professionals, and Adobe Acrobat for Lawyers
KFO537 .D523

Jury Signs: coded messages from the jury box
KF8972 .S59

Nuts and Bolts of Wills and Trusts
KFO144 .N88

Pulled over, will it be a DUI?
KFO297.8 .P85

Tax Return Preparation: form 1040
KFO470 .T29

Time management and technology: stop the "time suck": own your own technology-don't let it own you!
KFO318 .T56

Updating the Ohio Trust Code
KFO137 .U63

Library Board Meeting

The next regularly scheduled meeting of the Hamilton County Law Library Resources Board will be held at 1:00 p.m. on July 12, 2012 in the Robert E. Kraft Board Room. Meetings of the board are open to the public. Minutes of past meetings are available at

<http://www.hamilton-co.org/cinlawlib/about/trustees.html>

(Continued from page 1)

that revenue sharing exceeded market rates.

- Using the revenue sharing to decrease administrative costs, which ultimately benefited ABB, Inc.

- ABB, Inc. breached its fiduciary duty under ERISA by not considering its ability to leverage the plan's size and not negotiating lower fees for plan participants as was required under investment policy.

- ABB, Inc. violated its fiduciary duty under ERISA by:

- Removing the Wellington Fund and replacing it with the Fidelity Freedom Funds.

- Failing to follow the plan's investment policy, which described investment selection/de-selection processes.

- Decreasing ABB, Inc.'s out-of-pocket costs for recordkeeping fees (as opposed to getting lower costs for plan participants).

- ABB, Inc. and the benefits committee violated their fiduciary duties under ERISA by:

- Agreeing to pay Fidelity an amount that exceeded market costs for plan services.

- Having the 401(k) plan subsidize ABB, Inc.'s corporate services, such as payroll and recordkeeping costs for its health plan and pension plan.

- Ignoring reports indicating that ABB, Inc. overpaid for services and that payments subsidized services for ABB, Inc. corporate plans.

- The trustee and recordkeeper (Fidelity Trust) breached fiduciary duties by transferring float income earned on plan assets to plan investment options rather than distributing it to plan participants.

Part 2: Practical Aspects and Recommendations

As a preliminary note, we would recommend that plan sponsors and fiduciaries not overreact to this case. Some commentators are being rather alarmist in the wake of Tussey.

They are claiming that the holdings in this case will leave plan sponsors and fiduciaries nowhere to hide, and that every 401(k) plan with mutual fund investments is filled with eventual plaintiffs who are planning lawsuits. We would caution that there are many published cases with similar fact patterns to Tussey that have not found any type of breach of fiduciary duties under ERISA. In addition, we would expect ABB, Inc. and Fidelity to appeal this case. So, some of the holdings in this case may ultimately be reversed.

Conversely, we would recommend that plan sponsors and fiduciaries not disregard this case. Some institutions in the industry are basically recommending that people ignore Tussey. Even if another plan's fact pattern is much different than the situation described in Tussey, this case presents an important reminder that ERISA imposes high standards of fiduciary duties, and the liability for failing to maintain those standards can be significant. In addition, the real problem is that sometimes bad facts, like those presented in Tussey (e.g., ABB, Inc.'s clear disregard of its investment policy), can create bad law. Accordingly, we think that it is advisable to prepare as though litigation may be around the corner.

Rather than overreacting or disregarding this case, we believe that the best advice is somewhere in between. We suggest that the facts and analysis in Tussey provide some important lessons for plan sponsors and fiduciaries of 401(k) plans with mutual fund investments:

- Plan fiduciaries must exercise prudence when making investment-related decisions by:

- Engaging in a thorough decision-making process;

- Following the terms of the investment policy when making decisions; and
- Thoroughly documenting the basis for all investment decisions.

•The Tussey decision was largely driven by the fact that this plan had \$1 billion in assets and by the very specific investment policy statement provisions. Nevertheless, the court indicated that ABB, Inc. should have taken additional steps in reviewing the revenue sharing arrangement. Note that these steps are not explicitly required by the DOL regulations, and one might argue that much of this information is generally not available, and that these steps are not required by other plan fiduciaries. Nonetheless, Tussey suggests that plan sponsors and fiduciaries should press service providers/recordkeepers to provide enough information about revenue sharing arrangements to allow them to:

- Calculate total revenue sharing paid to service providers;
- Determine the plan administrative costs that would be charged in the absence of revenue sharing;
- Compare to the level of plan administrative costs paid by plans of comparable size;
- Determine whether revenue sharing payments provide the service providers/recordkeepers with compensation beyond the administrative cost in the absence of revenue sharing (i.e., beyond the “market rate”); and
- Negotiate rebates of revenue sharing that exceed the market rate.

•Press service providers/recordkeepers to provide better mutual fund share classes (with lower fees for participants) or credit revenue sharing back to the plan for the benefit of participants.

•Plan sponsors and fiduciaries should consult with legal counsel to examine their overall level of fiduciary risk by:

- Determining if administrative procedures are in line with “best practices”; and

- Revising investment policies to make sure they are not creating potential liability like they did in Tussey. ABB Inc.’s primary failure was in not following its very detailed investment policy (which raises the question as to whether “less is more” with regards to investment policies). To avoid these issues, plan sponsors and fiduciaries should make sure that their investment policies are up-to-date and consistent with actual procedures.

For more information, contact Seth Hanft shanft@porterwright.com.

Renewing Books and Overdue Fines

Summer’s coming and it’s vacation time! Don’t forget about your library books while you’re out of town. Please be aware that overdue fines are \$1.00 per day beginning the day after an item is due. Fines are capped at the cost of replacing and processing a new copy or its equivalent.

Sounds scary, but Mary Ann makes courtesy calls to remind patrons of upcoming due dates and to alert patrons to mounting fines. We’ll renew items up to 3 times as long as no one else has a hold on the item.

Libraries charge overdue fines to encourage the prompt return of items so that other patrons can access them. Thanks for helping us by returning books on time!

If you have questions about borrowing or renewing books, just call 513.946.5300 or email us at reference@cms.hamilton-co.org

Subscriber Benefits

All subscribers have access to the following valuable resources and services:

Circulation privileges to borrow from over 40,000 print volumes for up to 6 weeks at a time

Access to extensive electronic databases from the Law Library, including LexisNexis, Shepards', CCH Omnitax, CCH Human Resources Group, and CCH Business Group resources, Hein Online Law Journals and Federal Register, and over 70 Aspen / LOISLaw treatises in 16 substantive areas

Wireless network throughout the Law Library

Polycom videoconferencing

5 meeting rooms with speaker phones

Professional reference service by our law librarians, available via e-mail, telephone, and in person

Free document delivery by fax or e-mail of print and electronic materials

Inexpensive CLE seminars throughout the year, on legal research and substantive topics

In addition, solos and attorneys whose firm has a subscription have 24 hour remote access to Fastcase.com case law, Aspen/ LOISLaw treatises and CCH Newsletters

You and the Legal System: Foreclosure

Kevin Swick is our next speaker in the *You and the Legal System* Series for the public. Mr. Swick will address Foreclosure on Friday, June 15, 2012 at 12:00 noon at the Law Library. The program will focus on

- How to avoid foreclosure
- What to do if sued in foreclosure
- The foreclosure process

The program is free to the public. To register, call 513.946.5300.

Please note that this is not a CLE event; it is intended for the general public. However, attorneys are welcome to attend and may want to pass along the program announcement to clients, staff and community organizations. If you would like more information, please contact Laura Dixon-Caldwell at 513-946-5302.

You and the Legal System is brought to you as a public service by the Hamilton County Law Library, in conjunction with the Cincinnati Bar Association's Lawyer Referral Service.

Save the date for the next event in the *You and the Legal System* Series. Johanna Hutchinson will discuss Landlord Tenant Issues on July 20.



Foreclosure

Law Library patrons have access to a variety of resources on foreclosure. If you have questions about access to the Law Library's online resources, just ask a librarian for guidance.

Books

Boot Camp; foreclosure and loan workout procedures in Ohio
KF130.5 .F6 B59

Ethics, professionalism, and substance abuse: robo-signing: regulatory risks in foreclosure litigation
KF76.5 A2 E85

Foreclosure and repossession in Ohio
KFO130.5 .F6 O7

Foreclosure Prevention Counseling: preserving the American Dream/n Elizabeth Renuart, Odette Williamson, Mark Benson
KF697.F6 R46

*Foreclosure Survival Guide: keep your house and walk away with money in your pocket/
Stephan Elias
KF697.F6 E43

Foreclosures: defense, workouts, and mortgage servicing/John Rao
KF1040.Z9 S542

Law of distressed real estate: foreclosure, workouts, procedures/ BaxterDunaway
KF1524 .D85

Legal issues in real estate foreclosure/ Tami Hart Kirby
KFO 126 .T521

Ohio Foreclosure: what you need to know now
KFO130.5 .F6 O35

Reposessions/Carolyn L. Carter
KF1040.Z9 S541

Titles to Real Estate in Ohio
KFO126 .T52

Top Title Defects Cured in Ohio
KFO127 .A75 T67

*Online remote access available through EBSCO

Helpful Links

Hamilton County Clerk of Courts-Are you facing foreclosure?
<http://www.courtclerk.org/forms/ForeclosureNotice1.pdf>

Hamilton County Treasurer-
Mortgage Foreclosure Timeline and Facing Foreclosure: Where to Get Help
<http://www.hamilton-co.org/treasurer/default.asp>

Hamilton County Recorder's Office Foreclosure Links-
http://recordersoffice.hamilton-co.org/helpful_information/foreclosure_assistance.html

HUD Ohio Foreclosure Resources-
<http://www.hud.gov/local/oh/homeownership/foreclosure.cfm>

Upcoming Events

June 4: Introduction to Fastcase Webinar

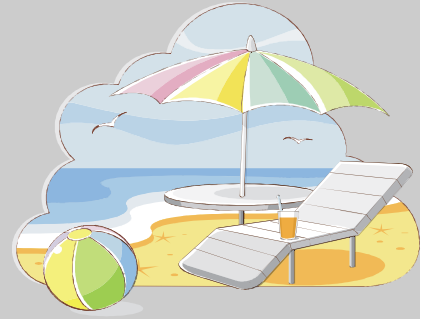
July 3: Fastcase Webinar: Legal Research for Paralegals

July 12: Law Library Board Meeting

July 20: You and the Legal System: Landlord Tenant Issues

August 8: Fastcase Webinar: Tips for Enhanced Legal Research with Fastcase

August 27: Fastcase Webinar: Keyword (Boolean Search) for Lawyers



June 2012 Law Library Newsletter

INSIDE THIS MONTH

- Fiduciary Litigation
- Tech Tip: Windows Keyboard Shortcuts
- Fastcase Webinars
- Foreclosure Resources

ADDRESS CORRECTION REQUESTED

Hamilton County Law Library
Hamilton County Courthouse
1000 Main Street, Room 601
Cincinnati, OH 45202