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Employee Benefits Groups Seek High Court Ruling on Recordkeeper Disclosure

A coalition argued that the U.S. Supreme Court should revisit a prior ruling that would change the standards for plan sponsors around reporting updates related to their contracts with recordkeepers.

By Sabrina Kharrazi | May 13, 2024

The **Erisa Industry Committee** and three other employee benefits industry groups asked the U.S. Supreme Court to revisit a long-running lawsuit that challenges **AT&T** over excessive recordkeeping fees paid to **Fidelity**, the Thursday filing showed.

The **American Benefits Council**, the **Committee on Investments of Employee Benefit Assets Inc.** and the **Spark Institute** all signed the petition submitted to the Supreme Court.

Last August, the 9th Circuit Court of Appeals reversed a lower court's decision in favor of AT&T as fiduciary of its 401(k), writing that plan sponsors must report adjustments to their agreements with recordkeepers.

That court's decision requires unrealistic reporting standards of all minor contract adjustments, invites "speculative" litigation and contradicts multiple other court rulings, according to the petition for Supreme Court review.

Under the 9th Circuit ruling, an added burden would fall on plan sponsors to prove that compensation for recordkeepers is reasonable, even for renewals or small modifications, according to **Lynn Dudley**, senior vice president of global retirement and compensation policy at the American Benefits Council.

"There's a cost and then administrative burden associated with that," she said. "But it also means that employers will approach the service provider contracts very differently, in the sense that they know they'll have to prove the compensation upfront."

The original complaint alleged that AT&T violated its duties under the Employee Retirement Income Security Act by allowing Fidelity to bring on **BrokerageLink** and **Financial Engines** for plan brokerage and investment advisory services without sufficient due diligence, resulting in a "prohibited transaction," the November 2017 filing stated.

"AT&T needed to consider the compensation Fidelity received from Financial Engines and BrokerageLink when determining whether 'no more than reasonable compensation' was paid for Fidelity's services," the 9th Circuit opinion reads.

"The case could discourage plan sponsors from engaging their service providers for additional services that will benefit plan participants," according to **Tim Rouse**, executive director of the Spark Institute.

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The petition for Supreme Court review aims to ensure that plan sponsors aren't subject to a new wave of unsubstantiated litigation from Erisa attorneys, according to **Dennis Simmons**, executive director of the Committee on Investment of Employee Benefit Assets.

"[Plan sponsors have] been dragged into court to defend what are oftentimes frivolous claims by lawyers looking to extract quick settlements," he said. "At some point, you might see companies simply throw up their hands and stop offering plans to begin with."

The 9th Circuit's decision will create "frivolous" and costly lawsuits that are already challenged by other circuit court rulings, the industry groups' petition stated.

"The primary danger is exposure to lawsuits that have no merit but which cannot be put to rest with a simple motion to dismiss," said **Tom Christina**, executive director of the Erisa Industry Committee's **ERIC Legal Center**.

In 2019, the 3rd Circuit Court of Appeals ruled in favor of the plan sponsor in a suit against the **University of Pennsylvania**, rejecting a materially identical claim that agreements with a plan's recordkeepers "constituted prohibited transactions."

Jerry Schlichter, partner at **Schlichter Bogard**, who represents the plan participants in that suit, similarly petitioned the Supreme Court to review the court decision but was unsuccessful.

Just two 401(k) fee cases have been presented to the Supreme Court. Schlichter represented plan participants in both suits, and those received judgments in favor of plan participants in 2015 and 2022.