# Multiemployer 401(k) Fund Settles Fee Litigation Case for $8.75 Million

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The trustees of a multiemployer 401(k) fund have agreed to settle a putative class action lawsuit brought against the fund's board of trustees alleging that the trustees breached their fiduciary duties of loyalty and prudence when they authorized excessive fees to be paid by the fund's participants to the fund's recordkeeper, John Hancock Retirement Plan Services. The settlement requires the trustees to pay $8.75 million to approximately 40,000 former and current participants and requires the fund's fiduciaries to hire an independent consultant to conduct a Request for Proposal ("RFP") for recordkeeping and administrative services. It is reported that the $8.75 million payment completely exhausted the Trustees' fiduciary liability policy. The case is captioned *Ybarra v. Bd. of Trs. of Supp. Income Tr. Fund*, No. 8:17-cv-02091, ECF No. 1 (C.D. Cal. Nov. 30, 2017).

As set forth in our earlier writing on this case (see UllicoBulletin Vo. 6, Issue 1 Summer 2018), the participants alleged that the trustees imprudently and disloyally allowed the fund to pay: (1) excessive investment management fees for mutual fund options by failing to offer cheaper institutional share class options instead of the more expensive retail share class options; and (2) excessive recordkeeping fees by failing to monitor the recordkeeping arrangement with the fund's recordkeeper, which allegedly resulted in overpayments of more than $17 million.

In response to the complaint the trustees filed a motion to dismiss, seeking an early resolution to the case. The court denied the trustees' motion to dismiss the participants' claim for excessive recordkeeping fees because it found participants provided sufficient factual support for their allegations that the trustees' process for reviewing and monitoring the plan's recordkeeping fees was flawed. The district court granted the trustees' motion to dismiss with respect to the participants' claim that the trustees violated their fiduciary duties by allowing the fund to offer retail share classes of mutual funds as plan investment options in lieu of cheaper share classes of the same investment options. The court ruled that the participants lacked Article III constitutional standing to bring the claim because they did not identify in which allegedly imprudent mutual fund the participants were invested, and therefore, did not sufficiently establish that the participants had suffered harm by investing in the more expensive retail shares of the challenged investment options. The court, however, granted participants 20 days to correct the complaint to establish standing. Thereafter, the participants amended the complaint to cure the deficiencies and successfully defeated the trustees' second motion to dismiss the claim.

The trustees agreed to settle the case after engaging in discovery that included deposition of one of the trustees and the production of documents and information from the trustees related to their administration of the 401(k) fund, and opposing multiple motions to compel production of documents and information. The settlement was an insurance *policy limits* settlement that required the monetary portion of the settlement to include the full amount of money remaining within the coverage limits of the trustees' fiduciary liability coverage, which in this case was $8.75 million.

The claims asserted in *Ybarra* are similar to those that have been leveled against dozens of 401(k) and 403(b) plan fiduciaries in what are commonly referred to as "fee litigations." Like in *Ybarra*, many of these cases have survived the initial pleading stage and have ultimately been resolved through settlements. These suits have typically been brought against large plans commonly referred to as "jumbo plans," which generally have over a billion dollars in assets. Several of these jumbo plan cases have resulted in very large settlements, including a handful of settlements over $50 million. However, as the plaintiffs' bar looks to increase the volume of fee litigation, they have started expanding their targets to include plans of mid-market sized companies and, as *Ybarra* indicates, multiemployer participant-directed annuity or 401(k) funds.

While this potential new trend may give multiemployer fund fiduciaries cause for concern, it also can be used as an opportunity for fiduciaries to re-examine their fund's procedures and implement a strategy to decrease fiduciary liability exposure. Multiemployer fund trustees seeking to prevent the risk of such lawsuits, or to be better prepared to defend them, can be guided by the evolving case law in the single employer plan fee litigation context.

**First**, having a well-documented prudent process to review and oversee fund investment options and third-party providers is the most valuable first line of defense. This should include regular meetings to review and monitor the fund's investment options with the guidance of a fiduciary investment consultant to ensure investment manager performance is comparable to stated benchmarks and that the fees charged remain reasonable. As part of a prudent process, fund trustees should also periodically issue requests-for-proposals for major service providers like recordkeepers. If fees appear out of line with benchmarks (note that plaintiffs' counsel are often monitoring these benchmarks), then trustees should investigate the prudence of retaining the existing service providers and document the resolution of the issue. For example, in *Ybarra* plaintiffs focused on the fact that the fund had not conducted a RFP for recordkeeping and administrative services for over 15 years and ultimately plaintiffs were successful in requiring the fund to conduct an RFP as part of the settlement. Trustees do ***not*** have to retain the lowest-cost provider; quality and service can and should be considered and documented in evaluating any service provider.

**Second**, another practical way to lessen risk is to offer a diversified mix of investments, including target-date funds and lower-cost index funds. Courts have dismissed cases where funds offered participants a wide range of investment options that included high and low risk options, because doing so allowed fund participants to choose investments according to their personal risk tolerance. However, offering a mix of investments does not eliminate the fiduciary duty to monitor individual investment options on an ongoing basis.

**Third**, fiduciaries should ensure that they are following statutory requirements with respect to fund disclosures. These disclosures, in addition to being required, can inoculate fiduciaries from hindsight-based claims that "investment mixes" offered by the fund's investment options were imprudent. Courts recognize that investments have risks and if these risks are properly disclosed to participants, courts will be disinclined to use hindsight to second guess inclusion of these investment options in the fund's lineup, particularly when the fund offers a diversified mix of investment options with different risk profiles.

**Fourth**, a best practice is to have outside counsel conduct fiduciary training, which can serve to avoid, or at least mitigate the chance of successfully being sued. Courts have also favorably commented on the practice of providing new members of fiduciary committees with onboarding fiduciary training and providing the new fiduciaries with "tool kits" that include the relevant plan documents. If there are specific concerns, fiduciary legal compliance reviews can help identify and correct problems before litigation occurs.

**Finally**, in appropriate circumstances, the trustees may want to consider out-sourcing fiduciary management of investments to independent fiduciary professionals. But, because this option takes control away from the trustees, strong consideration should be given to adequate fiduciary review process can be accomplished by the trustees themselves.

In addition to the above best practices, *Ybarra* also highlights the importance of fiduciary liability insurance and understanding the terms of coverage. Given the substantial cost and potential exposure of defending ERISA class action lawsuits, trustees should understand the terms and limits of their fiduciary liability insurance, when a fiduciary liability insurance policy is triggered, who is covered by the policy, and what acts may be excluded from such coverage. One of the most important steps that a fiduciary must take when a claim (e.g., lawsuit or Department of Labor audit) has been filed is to inform the fiduciary liability insurance carrier; depending on the terms of the policy, failure to do so within a certain amount of time could result in the loss of coverage. Even if a fiduciary becomes aware of a claim or investigation before it has been officially "filed," the fiduciary should immediately review the fiduciary liability insurance policy to determine his or her obligation (if any) to notify the insurance carrier. Regularly reviewing a fund's insurance liability insurance policy should be incorporated into the trustees' best practices.

While the rate of new fee litigation filings has slowed some since its peak in 2017, plaintiffs' counsel continue to bring fee litigation cases against the fiduciaries of large and midsize plans. It is too soon to tell whether *Ybarra* will be an isolated event or the start of a new trend of lawsuits against multiemployer funds, but given the size of the settlement reached it is likely that plaintiffs' counsel will remain vigilant in looking for other such opportunities. The safest course for trustees is to take preemptive action to mitigate their potential exposure.