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Plaintiffs Ramp Up 401(k) Lawsuits

BY ANNE TERGESEN

As 401(k) fee lawsuits have proliferated over the past year, a wider array of retirement-industry practices have come under fire. Now, the results are starting to come in, with some big settlements, and losses, for plaintiffs.

Many of the recent cases involve firms that furnish 401(k) plans with their own investments or allegedly profit from the retirement-plan arrangements. Several suits have been filed by plaintiffs' firms that are relatively new to 401(k) litigation.

"The plaintiffs' bar has definitely gotten more aggressive," said Susan Mangiero, an economist and managing director of Fiduciary Leadership LLC in Trumbull, Conn., who serves as an expert witness in 401(k) cases. "New competitors see it as a very big business. The allegations have expanded in scope."

Fueling the litigation boom, observers said, is a handful of multimillion-dollar settlements by companies such as American Airlines Group Inc.—which disclosed a \$22 million settlement this month—as well as a 2015 Supreme Court victory for plaintiffs in *Tibble v. Edison*, which put retirement plans on notice that they have a duty to monitor plan investments, including fees.

Since 2006, plaintiffs' firms have filed more than 90 lawsuits against employers and other parties alleging excessive fees in 401(k)-style retirement plans, according to **Groom Law Group** in Washington.

Last year alone, firms representing 401(k) participants filed more than 25 such cases, a record annual number.

Many of the latest suits target companies, including a number of financial-services firms, for using their own investments in retirement plans. The suits allege that by selecting proprietary mutual funds, the companies acted in their own interests, rather than exclusively in the interests of the employees in their 401(k) plans.

American Airlines settled allegations that it had breached its fiduciary duty by offering high-cost mutual funds from an affiliated investment company called American Beacon Advisors Inc., an arrangement that

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plaintiffs said allowed American to profit at the expense of its 401(k) participants. American has since removed the American Beacon funds from its 401(k) plan. The airline admitted no wrongdoing in its settlement.

In other decisions, defendants have prevailed. Last month, Judge William G. Young of the U.S. District Court in Boston dismissed a suit against Putnam Investments following a trial.

While Putnam's "review of the Plan lineup was no paragon of diligence," the judge wrote, the plaintiffs "failed to point to specific circumstances in which" Putnam put its own interests ahead of its 401(k) participants.

Stephen Rosenberg, a partner at the Wagner Law Group, which specializes in retirement plans, said the "plaintiffs may have been thinking that it was enough to show that using Putnam funds was good for Putnam. But the judge said, 'You have to prove Putnam deliberately put itself ahead of its 401(k) participants.'"

"This is just one District Court judge's interpretation," Mr. Rosenberg said. But "it's going to create a standard that everybody is going to have to

High-Stakes Settlements

Some of the largest settlements of 401(k) fee cases as of Wednesday

CASE	SETTLEMENT AMOUNT, IN MILLIONS
Haddock vs. Nationwide	\$140
Abbott vs. Lockheed Martin	62
Spano vs. Boeing	57
Diebold vs. Northern Trust Investments	36
Nolte vs. Cigna	35
Kruger vs. Novant Health	32
Gordan vs. Massachusetts Mutual Life Insurance	31
Beesley vs. International Paper	30
Krueger vs. Ameriprise Financial	27.5
Franklin vs. First Union	26.0
Fernandez vs. Merrill Lynch	25.0
Hamby vs. Morgan Asset Management	22.5
Kanawi vs. Bechtel	18.5
Figas vs. Wells Fargo	17.5
Waldbuesser vs. Northrop Grumman	16.8
Martin vs. Caterpillar	16.5
Will vs. General Dynamics	15.2

Sources: Schlichter Board & Denton LLP; Groom Law Group THE WALL STREET JOURNAL.

deal with." Plaintiffs' attorney Carl Engstrom, at Nichols Kaster in Minneapolis, said the plaintiffs plan to appeal.

The decision follows the dismissal of a similar case against Wells Fargo & Co. in May. In that case, the plaintiffs alleged that Wells Fargo breached its fiduciary duty by using its own target-date funds, rather than cheaper alternatives from Fidelity Investments and Vanguard

Group.

The plaintiff recently filed an appeal. Wells Fargo said it expects the ruling to be upheld on appeal.

Minnesota District Judge David S. Doty called into question the widespread practice among plaintiffs' firms of comparing the fees and performance of proprietary funds, such as the ones at issue in the Wells Fargo case, with Vanguard funds.