



# “Who Is the Fiduciary?”

## The Non Fiduciary Position of Vendors in Legal Filings

April 19, 2013

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Chief Executive Officer  
Unified Trust Company, NA



# The Word “Fiduciary” Is Used Often Today

The screenshot shows a Google search interface with the search term "fiduciary" entered. The search results are categorized by type: Web, Images, Maps, Videos, News, Shopping, and More. The "Web" category is expanded, showing several results:

- Fiduciary - Wikipedia, the free encyclopedia**  
[en.wikipedia.org/wiki/Fiduciary](https://en.wikipedia.org/wiki/Fiduciary)  
A **fiduciary** (from Latin *fiduciarius*, meaning "(holding) in trust"; from *fides*, meaning "faith", and *fiducia*, meaning "trust") is a legal or ethical relationship of trust ...  
[Duty in different jurisdictions](#) - [Relationships](#) - [Elements of duty](#) - [Accountability](#)
- Meeting Your Fiduciary Responsibilities**  
[www.dol.gov](http://www.dol.gov) > [EBSA](#) > [Publications](#)  
A plan's **fiduciaries** will ordinarily include the trustee, investment advisers, all individuals exercising discretion in the administration of the plan, all members of a ...
- Fiduciary - Legal Dictionary | Law.com**  
[dictionary.law.com/default.aspx?selected=744](http://dictionary.law.com/default.aspx?selected=744)  
The most common is a trustee of a trust, but **fiduciaries** can include business ...  
Characteristically, the **fiduciary** has greater knowledge and expertise about the ...
- Fiduciary | Define Fiduciary at Dictionary.com**  
[dictionary.reference.com/browse/fiduciary](http://dictionary.reference.com/browse/fiduciary)  
**Fiduciary** definition at Dictionary.com, a free online dictionary with pronunciation, synonyms and translation. Look it up now!  
[Fiduciary duty](#) - [Fiduciary relation](#) - [Fiduciary bond](#)
- Fiduciary - Definition and More from the Free Merriam-Webster ...**  
[www.merriam-webster.com/dictionary/fiduciary](http://www.merriam-webster.com/dictionary/fiduciary)  
1fī-du-cia-ry. noun \-'dū-shē-er-ē, -shē-rē, -'dyū-\, plural fī-du-cia-ries. Definition of **FIDUCIARY**. : one that holds a **fiduciary** relation or acts in a **fiduciary** ...

# DOL and the Courts Have Increased Their Fiduciary Enforcement

## DOL Cracks Down on Retirement Plan Advisors for Fiduciary Negligence

Advisors and plan sponsors are surprisingly still unaware that DOL has jurisdiction over them, says Larson of Retirement Learning Center

BY MELANIE WADDELL, ADVISORONE  
February 24, 2012 • Reprints



So far this year, the Department of Labor's Employee Benefits Security Administration (EBSA) has significantly raised its enforcement efforts in what Andy Larson, director of the Retirement Learning Center, said should serve as a wakeup call to advisors who advise retirement plans and plan sponsors.

In 2011, EBSA said it had closed 3,472 civil cases and obtained monetary results of nearly \$1.39 billion. EBSA also closed 302 criminal cases that resulted in 129 individuals being indicted and 75 cases being closed with guilty pleas and/or convictions. DOL also wants to increase the number of its enforcement personnel from 913 to 1,003 this year.



In an interview with [AdvisorOne](#), Larson (left) called those EBSA enforcement numbers "astonishing," and warned that many advisors are surprisingly still unaware that the DOL has jurisdiction over them.

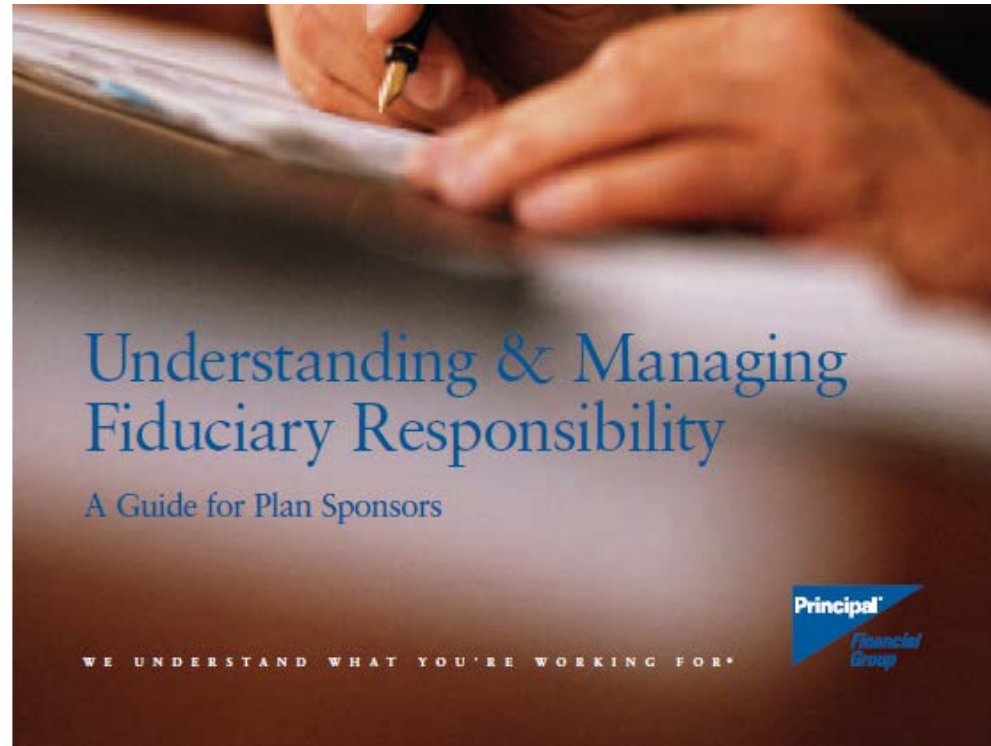
What's the biggest area EBSA is zeroing in on? Fiduciary negligence. EBSA is "seeing very high levels of non-compliance with fiduciary" duties. And when the EBSA releases its [re-proposed fiduciary rule](#) in the first half of this year, the rule "will affect advisors and their fiduciary role" not plan sponsors, Larson says.

# Vendors Offer Plan Sponsors Help With Their Fiduciary Duties



There's a lot of pressure on you every day – your employees are all relying on you to help them achieve a financially secure retirement, which is even more important in today's economic environment. As a fiduciary, it's important for you to have a top-tier provider to help safeguard your retirement plan. One conversation can tell us a lot about where you want to go and

# Vendors Offer Plan Sponsors Help With Their Fiduciary Duties



# Vendors Offer Plan Sponsors Help With Their Fiduciary Duties

## LEAVE IT TO THE EXPERTS

With the Principal Financial Group® (The Principal®) and the Principal Due Diligence Program<sup>SM</sup> on your side, we understand your concerns with selecting and monitoring investment managers. In partnership with your advisor, the Principal Life Insurance Company is a fiduciary with respect to the initial selection and ongoing monitoring of investment options among our Foundation Options as appropriate investment options offered for a retirement plan.



## A Recognized Program



*For the second year in a row, Wilshire Associates has validated our due diligence program for the selection and ongoing monitoring of our investment managers among our overall platform of Foundation Options. It's a program you can trust to help you manage your fiduciary responsibilities. Look at some of the highlights of our program:*

- 24 sub-advisors whose investment managers average more than 18 years in the industry
- 55 sub-advised investment options
- Over 20 investment professionals supporting the Principal Due Diligence Program and investment platform
- 70 face-to-face visits with 22 managers in 2005 alone

## WHY GO IT ALONE?

Why face the challenges of selecting and monitoring investment managers alone, when The Principal is here to help? Put our experience and expertise to work for you today.

# Yet Vendors Speak Differently In Court

28. “Defendant The Principal Financial Group, Inc. (“PFG”) is a Delaware corporation, and is a fiduciary with respect to the Plans. PFG offers and provides retirement savings investment and insurance products and services, including the Property Account.

PFG maintains the “Principal Due Diligence Program,” which is a “qualitative and quantitative” review process “for identifying, selecting, and monitoring investment management firms” for investment options, including the Property Account. Through the Principal Due Diligence Program, PFG placed Principal Real Estate on a “Watch List,” and had the power to monitor and select (and thus to remove) Principal Real Estate as a fiduciary for the Property Account.

**ANSWER: To the extent a response is required, Defendants deny the allegations in Paragraph 28.**

Mullaney v. Principal, No. 4:10-cv-00198-RP-TJS, Southern District of Iowa, 2009



# Yet Vendors Speak Differently In Court

145. “As a consequence of the Principal’s breaches of fiduciary duties alleged in this Court, the Plans and participants who invested retirement savings in the Property Account have suffered and continue to suffer massive losses.

Had the Monitoring Defendants discharged their fiduciary duties to monitor Principal Real Estate and investment of the Property Account’s assets and maintenance of adequate liquidity in the Property Account, the losses suffered by the Plaintiffs and the Class would have been minimized or avoided.

Therefore, as a direct and proximate result of the breaches of fiduciary duty alleged herein, Plaintiffs and the other Class members have lost hundreds of millions of dollars of retirement savings.

**ANSWER: Principal denies the allegation in Paragraph 145.**



# Yet Vendors Speak Differently In Court

146. Pursuant to 29 U.S.C. 1109(a), 1132(a)(2) & (a)(3), the Monitoring Defendants (Principal) are liable to restore the losses to the Plans caused by their breaches of fiduciary duty alleged in this Court and to provide other equitable relief as appropriate.

**ANSWER: Defendants deny the allegations in Paragraph 146.**

Mullaney v. Principal, No. 4:10-cv-00198-RP-TJS, Southern District of Iowa, 2009

# Vendors Offer Plan Sponsors Help With Their Fiduciary Duties

FIDELITY FIDUCIARY SUPPORT SERVICES

## Assigning Fiduciary Responsibilities

Facts to understand when considering a "cofiduciary" arrangement.



Can an investment manager or other provider relieve you of part of your fiduciary responsibility? "Cofiduciary" is an approach to fiduciary responsibility that some may consider. But what does it really mean, and is there reason for caution?

All employee benefit plans subject to ERISA must have one or more named fiduciaries. These individuals have both the authority and the responsibility to control and manage the operation and administration of the plan. And the law does allow a named fiduciary to formally delegate well-defined aspects of that authority — such as the selection and monitoring of plan investments.

action on behalf of your retirement plan and participants. And so, we've outlined some of the questions you should be asking when considering a possible cofiduciary arrangement.

**Q. How do you determine whether someone is an ERISA fiduciary?**

**A.** There are a number of ways to become a fiduciary under ERISA.

# Vendor Is Not A Fiduciary---But The Plan Sponsor Is The Fiduciary With Certainty

“By the plain language of the Trust Agreement, Fidelity Trust has no responsibility for reviewing the merits of fund choices made by the Pension Review Committee.

Thus, Fidelity Trust had no responsibility to prevent the addition of the Fidelity Freedom Funds to the Plan’s investment line-up.

For these reasons, the Court finds that Fidelity Trust cannot be held liable for ABB’s breaches under ERISA Section 405(a)(2).”

Tussey v. ABB, Inc., Case 2:06-CV-04305, 2010 Document 103

# Most Plan Sponsors Have Confusion About Their Fiduciary Status and Duties

Unified Trust recently conducted a survey of plan sponsors (non Unified trust clients) revealed the following observations:

- 1) 53% did not think of themselves as a fiduciary
- 2) 52% thought a Fiduciary Warranty would defend them from a participant lawsuit
- 3) 48% understood that the fiduciary must only be loyal to the plan participant
- 4) 57% understood that the fiduciary standard of care is that of an expert

# Most Plan Sponsors Have Confusion About Their Fiduciary Status and Duties

Unified Trust 2009-2010 survey of plan sponsors (non Unified trust clients) revealed the following observations:

- 5) Most (59%) think their vendor accepts full discretion and liability, while they almost certainly do not.
  
- 6) Finally an astonishing 95% are either “very comfortable” or “somewhat comfortable” that they have taken every reasonable precaution to insulate themselves against legal challenges stemming from a breach of fiduciary responsibility.

# Who Is An ERISA Fiduciary?

Many of the actions involved in operating a plan make the person or entity performing them a fiduciary.

Using discretion in administering and managing a plan or controlling the plan's assets makes that person a fiduciary to the extent of that discretion or control.

Thus, fiduciary status is based on the functions performed for the plan, not just a person's title.

# Who Is An ERISA Fiduciary?

A plan must have at least one fiduciary (a person or entity) named in the written plan, or through a process described in the plan, as having control over the plan's operation.

The named fiduciary can be identified by office or by name.

For some plans, it may be an administrative committee or a company's board of directors.



# Who Is An ERISA Fiduciary?

A plan's fiduciaries will ordinarily include an individual serving as trustee, all individuals exercising discretion in the administration of the plan, all members of a plan's administrative committee (if it has such a committee), and those who select committee officials.

Attorneys, accountants, and actuaries generally are not fiduciaries when acting solely in their professional capacities.

The key to determining whether an individual or an entity is a fiduciary is whether they are **exercising discretion or control over the plan assets.**

# ERISA 404(a)(1) “Gold Standard” of Conduct

...a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and – for the exclusive purpose of:

- (i) providing benefits to participants and their beneficiaries; and
- (ii) defraying reasonable expenses of administering the plan;



# Plan Sponsor Fiduciary Conduct Begins With the Duty of Loyalty

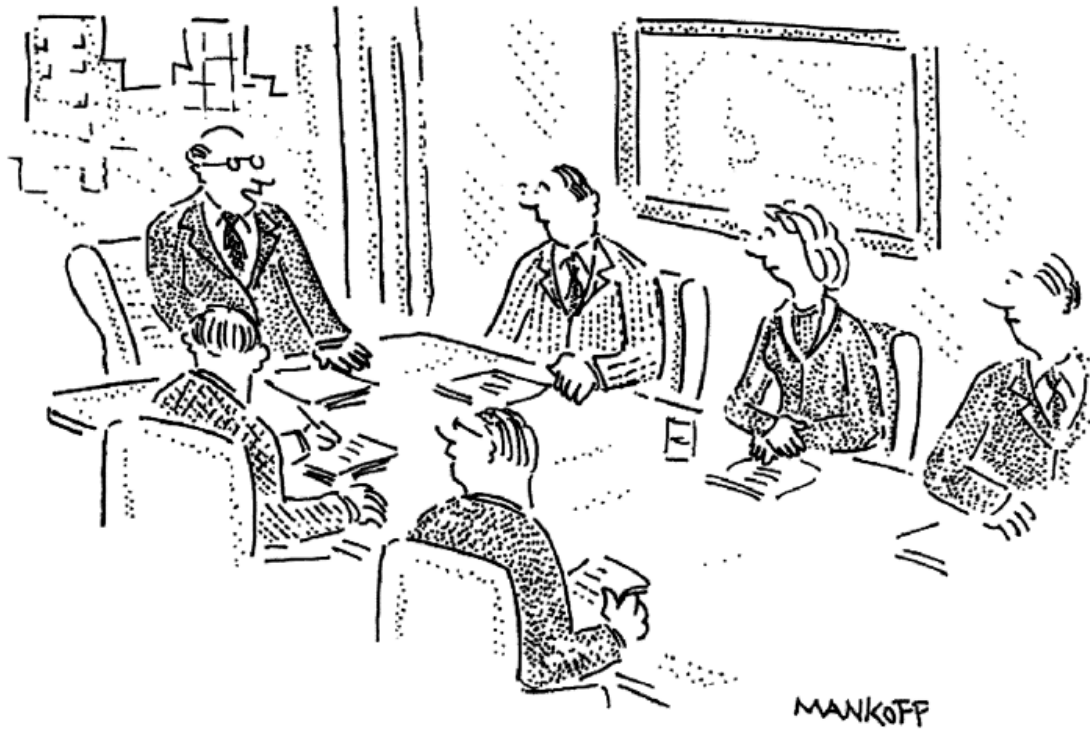
The Duty of Loyalty is to the plan participants and their beneficiaries ERISA 404(a)(1)(A) requires that in discharging his fiduciary duties, the fiduciary's decisions....



**“Must be made with an eye single to the interests of the participants and beneficiaries.”**

Donovan v. Bierworth, 680 F.2d 263, 271 (2d Cir.), cert. denied, 459 U.S. 1069 (1982)

# The ERISA Fiduciary Cannot Be Conflicted and Must Be Transparent



*"Let's never forget that the public's desire for transparency has to be balanced by our need for concealment."*

# Plan Sponsor Fiduciary Duties Require the Highest Standard of Care

404(a)(1)(B) requires that in discharging his fiduciary duties, the fiduciary must act....

“With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”



# The Prudent Process Always Involves Two Parts--Each with Three Steps

## **Procedural Prudence:**

- 1) Consider what information is relevant to the decision
- 2) Obtain the information
- 3) Analyze the information

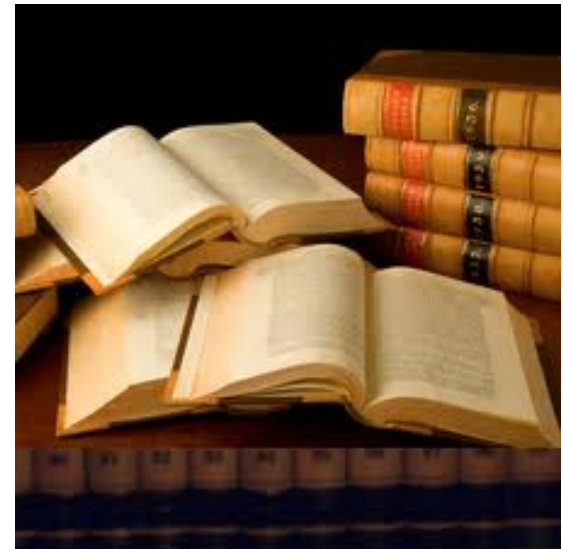
## **Substantive Prudence:**

- 1) Make a reasoned decision that other experts in similar situations would make
- 2) Verify Implementation of the required action
- 3) Document the decision

# The Plan Fiduciaries May Need to Seek an Outside Expert

“Where a trustee does not possess the education, experience and skill required to make a decision concerning the investment of a plan’s assets, he has an affirmative duty to seek independent counsel in making the decision.”

Katsaros v. Cody, 744 F.2d 279 (2d Cir.), (1984)





# It May Be Imprudent for the Plan Sponsor to Not Use an Outside Expert

“The failure to seek outside counsel when “under the circumstances then prevailing ... a prudent man acting in a like capacity and familiar with such matters” would seek outside counsel, is imprudent and a violation of ERISA.”

Katsaros v. Cody, 744 F.2d 279 (2d Cir.), (1984)



# However—The Plan Sponsor May Not “Blindly” Follow the Expert

“While we would encourage fiduciaries to retain the services of consultants when they need outside assistance....

We believe that ERISA’s duty to investigate requires fiduciaries to review the data a consultant gathers, to assess its significance and to supplement it where necessary. ”

Unisys Savings Plan Litigation, 74 F. 3d 420 (3rd Cir.), 1996



# Who Is Not An ERISA Fiduciary?

A number of decisions are not fiduciary actions but rather are business decisions made by the employer.

For example, the decisions to establish a plan, to determine the benefit package, to include certain features in a plan, to amend a plan, and to terminate a plan are business decisions not governed by ERISA.

When making these decisions, an employer is acting on behalf of its business, not the plan, and, therefore, is not a fiduciary.

**Most vendors refuse to serve as a plan fiduciary.**

# Three Types of Trustee Roles

## **SELF-TRUSTEE**

Most common, individual or group of individuals (owners)

## **DIRECTED CORPORATE TRUSTEE**

Accepts nominal title of “trustee”, serves as custodian, passive or name-only

## **DISCRETIONARY CORPORATE TRUSTEE**

An institutional body, bank or trust company, accepting full discretion and liability for the prudent management of plan assets

# Originally the ERISA Trustee Had a Key Role

ERISA §403(a) clearly specifies who has the responsibility to manage plan assets. The primary responsibility falls to the plan sponsor and the plan trustee.

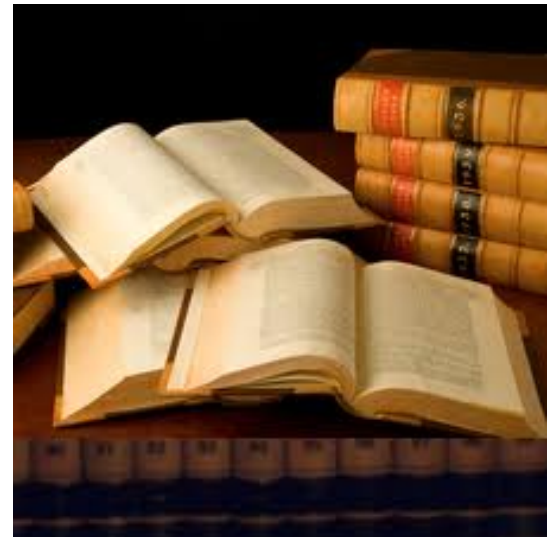
ERISA envisioned that the plan sponsor would hire the trustee to make prudent decisions. Since the trustee was empowered to make decisions, they were always a discretionary trustee, and would take over day to day plan management.

# ERISA Intended for the Plan Trustee to Be a Discretionary Fiduciary

**“Under ERISA §403(a), the discretionary trustee....**

**“Shall have exclusive authority and discretion to manage and control the assets of the plan.”**

Katsaros v. Cody, 744 F.2d 279 (2d Cir.), (1984)



# The ERISA Trustee Had a Key Role, But There Is a Large Exception

.... except to the extent that—

(1) the plan expressly provides that the trustee or trustees are subject to the **direction of a named fiduciary** who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 402 (c)(3) of this title.



# What Do Vendors Say In Court?



# What Do Vendors Say In Court?

Most often when plans are sued the mutual fund company or insurance company has claimed not to be a fiduciary.

They immediately placed all blame solely on the plan sponsor and their retirement committee.

# Notable Quotes Renfro v. Unisys Corp

“ The trust agreement appointing Fidelity as a directed trustee limited Fidelity's role to ‘hold and invest’ ... plan assets in trust among several Fidelity investment options **selected by the Applicable Fiduciary,**” ...

...and to ‘perform recordkeeping and administrative services’ for the Plan if the services are purely ministerial in nature and are provided within a framework of plan provisions, guidelines and interpretations **conveyed in writing to Fidelity by the Administrator**

Renfro v. Unisys Corp., 671 F. 3d 314 - Court of Appeals, 3rd Circuit 2011

# Notable Quotes Renfro v. Unisys Corp

“ Fidelity's limited role as a directed trustee, delineated in the trust agreement, does not encompass the activities alleged as a breach of fiduciary duty—the selection and maintenance of the mix and range of investment options included in the plan.”

“ As we have explained, a directed trustee is essentially **"immune from judicial inquiry"** because it lacks discretion, taking instructions from the plan that it is required to follow.”

“ See Moench v. Robertson, 62 F.3d 553, 571 (3d Cir.1995).”

Renfro v. Unisys Corp., 671 F. 3d 314 - Court of Appeals, 3rd Circuit 2011

# Notable Quotes from the Hecker Case

“Does someone who serves as the manager and investment advisor for a 401(k) plan, or for some of the plan’s investment options, owe fiduciary duties to the sponsor’s employees?”



These questions arise in a lawsuit brought by some employees of Deere & Company, which sponsors two 401(k) plans relevant to this case.

Fidelity Management Trust Company (“ Fidelity Trust” ) is the directed trustee and recordkeeper for the Deere plans;

Hecker v. Deere, No. 06-C-719-S - Court of Appeals, Western District of Wisconsin, 2009

# Notable Quotes from the Hecker Case

“ Fidelity Trust and Fidelity Research, in contrast, argue that they were not fiduciaries at all.”

“ Hecker argues, however, that one or both of the Fidelity entities functioned as a fiduciary under 29 U.S.C. § 3(21)(A).”

“ In order to find that they were ‘functional fiduciaries’, we must look at whether either Fidelity Trust or Fidelity Research **exercised discretionary authority or control over the management of the Plans**, the disposition of the Plans’ assets, or the administration of the Plans.”

Hecker v. Deere, No. 06-C-719-S - Court of Appeals, Western District of Wisconsin, 2009

# Notable Quotes from the Hecker Case

“ Merely “ playing a role” or furnishing professional advice is not enough to transform a company into a fiduciary.

There is an important difference between an assertion that a firm exercised “ final authority” over the choice of funds, on the one hand, and an assertion **that a firm simply “played a role” in the process, on the other hand.**

Hecker v. Deere, No. 06-C-719-S - Court of Appeals, Western District of Wisconsin, 2009

# Notable Quotes from the Hecker Case

“ Fidelity defendant had no fiduciary responsibilities with respect to either of the tasks plaintiffs targeted.”

“ Under the trust agreements, **Deere had the sole responsibility for the selection of plan investment funds.**”

“ Thus, even if the Fidelity defendants were fiduciaries for some purposes, they were not fiduciaries for the purpose of making plan investment decisions”

Hecker v. Deere, No. 06-C-719-S - Court of Appeals, Western District of Wisconsin, 2009



# Plan Sponsors Are Not Presumed to Act in Good Faith Under ERISA

Plan sponsor and its retirement committee are full fiduciaries and must always prove their actions were prudent.

**“Guilty until proven innocent.”**

Most vendors and salespeople refuse to accept true fiduciary status. The plan sponsor and its retirement committee are required to prove the vendor was a fiduciary, had a duty, and breached their duty.

**“Innocent until proven guilty.”**

**“Co-Fiduciary” offers minimal protection under ERISA.**

# Plan Sponsor Fiduciary Duties Require the Highest Standard of Care

Fiduciary duties under ERISA....

**“are the highest known to law.”**

Donovan v. Bierworth, 680 F.2d 263, 271 (2d Cir.), cert. denied, 459 U.S. 1069 (1982)

When enforcing these duties,

**“the court focuses not only on the merits of the transaction, but also on the thoroughness of the investigation into the merits of the transaction.”**

Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir.) (1983)



# Braden vs Wal-Mart Case

**“Merrill Lynch as trustee is not an ERISA Fiduciary.”**

Under ERISA § 3(21)(A), person is a fiduciary of a plan: to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.



Braden v. Wal-Mart, No. 06-C-719-S - Court of Appeals, Western District of Wisconsin,

# Braden vs Wal-Mart Case

“ Because Merrill Lynch does not meet this definition, it is not a fiduciary and is not subject to Suit.”



“ Contrary to plaintiff’s suggestion, Merrill Lynch did not acknowledge fiduciary status in either the Trust Agreement or the Plan’s Form 5500—it in fact appears in neither.”

“ For the foregoing reasons, the Merrill Lynch Defendants respectfully request that the Court **dismiss all claims asserted against them** in plaintiff’s Complaint for Violations of the Employee Retirement Income Security Act (ERISA).

Braden v. Wal-Mart, No. 06-C-719-S - Court of Appeals, Western District of Wisconsin, 2009

# Vendors Offer Fiduciary Warranties



## Nationwide® Fiduciary Warranty

Plan sponsors of qualified plans subject to ERISA rules (“Plan”) have a series of education and fiduciary management tools available to them through the Nationwide Group Retirement Series. These management tools, known as the Nationwide Financial Fiduciary Series<sup>SM</sup>, provide a comprehensive and systematic process to help plan fiduciaries select, evaluate and monitor funds using generally accepted investment principles and modern portfolio theories. These are the same standards as ERISA places on fiduciaries for satisfying their investment duties under ERISA’s prudent man rule. While we are not acting as a fiduciary for the Plan in selecting and monitoring the investment options in our offering, we stand behind our comprehensive fiduciary program.

# Vendors Offer Fiduciary Warranties

*John Hancock*

RETIREMENT PLAN  
SERVICES

introducing the

## John Hancock USA Fiduciary Standards Warranty



We are proud to announce the launch of the John Hancock USA Fiduciary Standards Warranty. This unprecedented program offers plan sponsors and fiduciaries greater confidence, security and peace of mind by providing specific assurance for their fund selection. We're so confident, we promise to restore any losses to the plan and pay litigation costs related to the suitability of our investment process and Fund lineup for 401(k) plans. The John Hancock USA Fiduciary Standards Warranty is available to group retirement products offered by John Hancock Life Insurance Company (U.S.A.) and certain of its affiliates.

# Does a Fiduciary Warranty Provide Any Protection to the Plan Sponsor?

## Nationwide® Fiduciary Warranty

Nationwide is not a fiduciary as defined in ERISA.

Nationwide cannot and does not warrant or guarantee that any particular investment option available is suited to the needs of any individual Plan participant(s);

The Warranty does not extend to Claims based on the needs of, or suitability for, any individual participant(s) but instead covers the general prudence of the investment options for long-term investing, such as retirement investment.

# Does a Fiduciary Warranty Provide Any Protection to the Plan Sponsor?

## Nationwide® Fiduciary Warranty

Also since past performance is not a guarantee of future results, we cannot warrant or guarantee either that any investment option we offer will yield any specific return, or even that it will yield a positive return.

Nor does the Warranty extend to Claims that any expenses paid directly or indirectly by the Plan or payments received by Nationwide from investment providers are reasonable.



# The Tussey \$36.9 Million Award Should Be a “Wakeup Call” to Plan Sponsors

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI  
CENTRAL DIVISION

RONALD TUSSEY, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 2:06-CV-04305-NKL
	)	
ABB, INC., ET AL.,	)	
	)	
Defendants.	)	

**ORDER**

Plaintiffs bring their claims on behalf of a class of present and former ABB, Inc., employees who are participants in two retirement plans offered by ABB, Inc. The first is the Personal Retirement Investment and Savings Management Plan and the second is the Personal Retirement Investment and Savings Management Plan for Represented Employees

# Tussey vs ABB, Inc.

## Court Decision March 31, 2012

- ✓ \$36.9 million award, most to be paid by the Plan Committee
- ✓ ABB Defendants are jointly and severally liable for \$13.4 million lost by the Plan due to ABB's failure to monitor recordkeeping fees and negotiate for rebates
- ✓ ABB Defendants are jointly and severally liable \$21.8 million lost by the Plan due to the mapping of the Vanguard Wellington Fund to the Fidelity Freedom Funds
- ✓ Fidelity Defendants are jointly and severally liable for compensating the Plan \$1.7 million for lost float income

# Vendor Is Not A Fiduciary---But The Plan Sponsor Is The Fiduciary With Certainty

**“Counts should be dismissed against Fidelity because the Fidelity defendants have no fiduciary status relevant to plaintiffs’ claims.”**

Tussey v. ABB, Inc., Case 2:06-CV-04305, 2010 Document 103

# Vendor Is Not A Fiduciary---But The Plan Sponsor Is The Fiduciary With Certainty

“ By the plain language of the Trust Agreement, Fidelity Trust has no responsibility for reviewing the merits of fund choices made by the Pension Review Committee.

Thus, Fidelity Trust had no responsibility to prevent the addition of the Fidelity Freedom Funds to the Plan’s investment line-up.

For these reasons, the Court finds that Fidelity Trust cannot be held liable for ABB’s breaches under ERISA Section 405(a)(2).”

Tussey v. ABB, Inc., Case 2:06-CV-04305, 2010 Document 103

# Vendor Should Be Dismissed From The Case, Regardless Of Whether It Is Continued Against The Plan Sponsor

“ Defendant ABB Inc. is the plan sponsor. Defendant Employee Benefits Committee of ABB Inc. (“ EBC” ) is a three-member committee appointed by ABB’s board of directors to oversee all of ABB’s employee benefits programs.

It has sole authority to amend or modify the plan.”

Tussey v. ABB, Inc., Case 2:06-CV-04305, 2010 Document 552

# Vendor Should Be Dismissed From The Case, Regardless Of Whether It Is Continued Against The Plan Sponsor

“ The Pension Review Committee has final authority under the Trust Agreements to direct Fidelity Trust as to which of the investment options are to be provided to Plan participants.

Although Fidelity Trust had a limited fiduciary role as a directed trustee, it had no fiduciary responsibility for the conduct challenged by plaintiffs.”

Tussey v. ABB, Inc., Case 2:06-CV-04305, 2010 Document 552

# Some Vendors Sue Their Clients!



# Vendor Sues Plan Sponsor Claiming The Plan Sponsor Was Negligent In Hiring The Vendor

“If Nationwide Life is found to have violated ERISA by arranging for, receiving, or retaining payments from funds...then the Trustees are reckless and also at fault to the extent the Plans suffered any harm..., because the Trustees had the ultimate responsibility for managing the Plan, and investing Plan assets.”

Haddock v Nationwide Life and Financial Services, Case 3:01-cv-01552-SRU Document 290 Filed 10/12/2007



# Vendor Sues Plan Sponsor Claiming The Plan Sponsor Was Negligent In Hiring The Vendor

Likewise in *Charters v John Hancock* , John Hancock countersued their client Charters (the plan trustee) for breach of fiduciary duty, monetary contribution and indemnity for being negligent in hiring John Hancock in the first place.

John Hancock also claimed to not be a fiduciary.

*Charters v John Hancock Life Insurance Company*, Civil Action No. 07-11371-NMG, September 30, 2008

# The Plan Sponsor And Their Committee Are Responsible For Any Liability And Dollar Award Payment

“Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach.”

Tussey v. ABB, Inc., Case 2:06-CV-04305, 2012 Document 623

# The Plan Sponsor And Their Committee Are Responsible For Any Liability And Dollar Award Payment

“ To restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

All ABB Defendants are held jointly and severally liable for this award.”

Tussey v. ABB, Inc., Case 2:06-CV-04305, 2012 Document 623

# Vendor “Co-Fiduciary” Status Amounts To Little Protective Benefit

Although the word “co-fiduciary” is tossed around in many sales presentations, it actually has a very narrow meaning under ERISA.

The context is that the secondary party must have had actual knowledge or participated in the fiduciary breach.

In court cases the vendor will require that the narrow meaning be strictly enforced. In addition, such vendor liability will typically be excluded under the “to the extent of” carve out as described above.

# “Co-Fiduciary” Is Like A Third Base Coach--- What Do They Do?



# Vendor “Co-Fiduciary” Status Amounts To Little Protective Benefit

“ Co-fiduciary liability attaches under ERISA Section 405 only where the defendant fiduciary has actual knowledge that its’ co-fiduciary conduct constitutes a breach of fiduciary duty.”

The actual knowledge standard requires more than proof that the fiduciary “ should have known” about the co-fiduciary’s breach—the defendant must actually “ know that it was a breach.”

A limited fiduciary also is only liable for a co-fiduciary’s breach of duties within the scope of the limited fiduciary’s duties.

# Vendor “Co-Fiduciary” status amounts to little protective benefit.

“ Because neither Fidelity Trust nor Fidelity Investments had fiduciary duties concerning investment selections or negotiation of Fidelity compensation, they cannot be liable for any breach by ABB of its duties concerning those subjects.”

Tussey v. ABB, Inc., Case 2:06-cv-04305-NKL Document 552 Filed 02/11/10 Page 52 of 67

# If Vendor Is Proven A Fiduciary, The Alleged Breach Is Not Covered Under The “To The Extent” Clause

One of the greatest misunderstandings among plan sponsors is the “to the extent of” fiduciary language of ERISA .

In *Beddall v. State Street Bank & Trust* , the judge ruled “fiduciary status is not an all or nothing proposition.”

Thus even if a vendor is found to be a fiduciary, it is not for the entire plan operation.

*Beddall v. State Street Bank & Trust Co.*, 137 F.3d 12 (1st Cir. 1998)



# If Vendor Is Proven A Fiduciary, The Alleged Breach Is Not Covered Under The “To The Extent” Clause

It is only “to the extent” of a very, very narrow service, such as selecting an institutional money manager for an insurance company separate account.

Typically the breach alleged by the plaintiff will be for a much wider oversight of the plan, such as fund menu selection for the plan, retirement readiness, revenue payments or asset allocation models.

Thus the litigation will fall back on plan sponsor.

Beddall v. State Street Bank & Trust Co., 137 F.3d 12 (1st Cir. 1998)

# Plan Sponsor Fiduciary Conduct Begins With the Duty of Loyalty

The Duty of Loyalty is to the plan participants and their beneficiaries ERISA 404(a)(1)(A) requires that in discharging his fiduciary duties, the fiduciary's decisions....



**“Must be made with an eye single to the interests of the participants and beneficiaries.”**

Donovan v. Bierworth, 680 F.2d 263, 271 (2d Cir.), cert. denied, 459 U.S. 1069 (1982)

# Vendor Claims They Are Not Required To Be Loyal And Is Allowed To Have Conflicts Of Interest

“ Finally, it was not an ERISA violation for Fidelity to market other services to ABB based on the relationship Fidelity developed providing services to the Plan.

Because Fidelity did not act as a fiduciary in offering Plan services, it did not violate any fiduciary duty in marketing those services.”

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# Summary of Vendor Legal Arguments

- 1) Vendor is not a fiduciary. Serving as a Directed Trustee does not rise to fiduciary status and is “**immune**”.
- 2) The Plan Sponsor is the fiduciary for certain.
- 3) If it looks like vendor will lose, vendors have countersued the Plan Sponsor claiming the Plan Sponsor was negligent and reckless in hiring the vendor.
- 4) The plan sponsor and their representatives are responsible for any liability and dollar award payment—and attorneys’ fees.

# Summary of Vendor Legal Arguments

- 5) Some offer a Fiduciary Warranty. The Fiduciary Warranty has seldom if ever helped in Court.
- 6) Vendor “ Co-Fiduciary” status amounts to little protective benefit.
- 7) If Vendor is a fiduciary, the alleged breach is not covered under the “ to the extent” of Vendor’s services.
- 8) Vendor claims they are not required to be loyal and is allowed to have conflicts of interest.

# Prudent ERISA Management

- 1) Understand who is, and who is not, a fiduciary. Promises and sales pitches do not count, it must be in writing.
- 2) Fulfill the two ERISA duties, Duty of loyalty and duty for prudent expert standard of care.
- 3) What is measured is managed.
- 4) 401(k) plans are now retirement plans. The prudent process must manage and measure improved retirement success outcomes.



# “Who Is the Fiduciary?”

## The Non Fiduciary Position of Vendors in Legal Filings

April 19, 2013

Questions?

Dr. Gregory W. Kasten  
Chief Executive Officer  
Unified Trust Company, NA



# Disclosures

1. The UnifiedPlan reporting tool helps investors understand whether they are on course to achieve a successful retirement. The UnifiedPlan uses “asset liability” matching. The asset is the money forecast to be accumulated and the liability is the amount of money needed to pay for the retirement. For investors who are planning for retirement, the tool estimates the amount of funds required to meet their retirement spending goals and provides alternatives such as delaying retirement or lowering retirement spending for those who may not be able to save the required amount.
2. For investors who are already retired, the tool estimates the confidence that their portfolio will be able to sustain their desired spending throughout retirement. The tool uses a combination of deterministic methods and Monte Carlo simulation that consider factors that include saving and spending levels, long-term market expectations associated with the risk profile selected, pre- and in-retirement time horizons, and other sources of outside income.
3. The UnifiedPlan limitations relate to the large number of assumptions used in the analysis. The accuracy of these assumptions directly impacts the quality of the tool's assessment. Potential problems may include, but are not limited to, the use of inaccurate financial data by the investor, the selection of a risk tolerance by the investor that does not represent how their portfolio is actually invested, long term market expectations of risk, return, and inflation that are not achieved in the modeled time frame, the inclusion future income that is never received, and unforeseen life emergencies that require decreased saving before retirement, force an earlier retirement, or increase spending needs during retirement.
4. The UnifiedPlan is highly dependent upon assumptions of annual income and annual savings. Any variances or changes in the figures used should be reported immediately by the plan participant. Unified Trust is not responsible for any discrepancies in the data, or output from the UnifiedPlan tool.
5. All mutual fund and collective investment fund data was gathered from publicly available sources of information such as Standard & Poor's, Morningstar, Zephyr or vendors' own websites. We take reasonable care in collecting the data, and believe the data are accurate, but reserve the right to correct any errors. Individual mutual fund or collective fund performance data throughout the document are net of underlying fund expense ratios but gross of add-on expenses such as Trustee fees, administration fees, or advisory fees. The performance histories reported are simply dollar-weighted historical returns for the proposed funds and do not reflect the effects of rebalancing or fund replacements.



# Disclosures

6. Any past performance information for the illustrated investment selections is not indicative of future returns but is merely a snapshot of historical performance. Past performance is not a guarantee of future performance. The investments are not FDIC insured.
7. Differences will probably exist between prospective and your actual results because events and circumstances frequently do not occur as expected, and those differences may be material, especially when making estimates over extended time periods. All figures are shown in current (inflation adjusted) dollars. The estimated inflation rate used in this analysis may vary over time.
8. The UnifiedPlan portfolio changes and time line changes for each participant are governed by the Plan Document, the Investment Policy Statement and the Benefit Policy Statement for their Plan.
9. The calculated 70% income replacement goal includes the estimated Social Security benefit. The actual Social Security benefit may be different from the estimated value.
10. Compensation in excess of the IRC 415 limit is excluded. All figures reported in current (inflation-adjusted) real dollars.
11. The projections or other information generated by the tool regarding the likelihood of various investment outcomes are hypothetical in nature, do not reflect actual investment results, and are not guarantees of future results. Projected growth of assets is based Unified Trust Company's Projected Future Modeled Returns and the asset allocation of your portfolio for this goal. The graphical representations are an approximation taken from the direct path between the pertinent events tied to your goal. Indices are unmanaged, do not incur management fees or expenses, and cannot be invested in directly.
12. Neither the Plan Sponsor nor Unified Trust can guarantee that any participant will achieve a successful retirement. The UnifiedPlan reporting tool helps investors understand whether they are on course to achieve a successful retirement. The UnifiedPlan uses “asset liability” matching. The asset is the money forecast to be accumulated and the liability is the amount of money needed to pay for the retirement. For investors who are planning for retirement, the tool estimates the amount of funds required to meet their retirement spending goals and provides alternatives such as delaying retirement or lowering retirement spending for those who may not be able to save the required amount.
13. Projections are made based upon expected asset transfers. Actual transfer amounts may be different and may require a new retirement solution.