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Tenth Circuit Addresses Damages for Excessive Recordkeeping Fee Claims

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One of the multitude of recent cases challenging the recordkeeping fees of 401(k) plans recently made its way to the Tenth Circuit Court of Appeals. *Ramos v. Banner Health*, No. 20-1231, — F.3d —- (10th Cir. June 11, 2021). Following a bench trial that resulted in a determination that the fiduciaries of Banner Health's 401(k) plan had failed to monitor the plan's uncapped, asset-based, revenue sharing arrangement with Fidelity, the Court affirmed the district court's rejection of the plaintiffs' expert testimony on damages and fashioning of its own method to calculate the plan's losses due to the excessive recordkeeping fees.

First, the district court found the expert testimony concerning reasonable recordkeeping fees to be unreliable because it was based vaguely on the expert's experience, which was mostly with smaller plans. And, while there were 4,770 mega plans available for comparison, the expert claimed not to have relied upon their data in forming his opinion. Second, when devising its own damages calculation, the district court took into account the fact that the recordkeeper eventually offered to create a revenue credit account to refund some of its uncapped revenue sharing proceeds to the plan. The court noted that the amount of the revenue credits "may be viewed as the amount that Fidelity itself considered to be excessive" and thus could be used to approximate the loss. This measure led to the court finding no losses to the plan for the years in which the revenue credit account was in place.

Proskauer's Perspective

Plaintiffs' difficulties in proving loss due to excessive recordkeeping fees is becoming a recurring theme. Currently on appeal before the Second Circuit is *Cunningham v. Cornell Univ.*, No. 16-CV-6525 (PKC), 2019 WL 4735876 (S.D.N.Y. Sept. 27, 2019), *appeal filed*, No. 21-88 (2d Cir. Jan. 13, 2021), wherein the district court granted summary judgment to the defendants on the ground that, even if they had failed to monitor the recordkeeping fees of the Cornell 403(b) plans, the plaintiffs had failed to prove any resulting loss because their expert testimony concerning reasonable recordkeeping fees was unreliable. In particular, reminiscent of *Banner Health*, the testimony was based vaguely on the experts' experience and a cherry-picking of a few university plans with lower recordkeeping fees.

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