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Fidelity Hit With ERISA Suit For Skimming Float Interest

By **David McAfee**

Law360, Los Angeles (March 07, 2013, 7:03 PM ET) -- Fidelity Management & Trust Co. was hit with a putative class action in Massachusetts federal court Thursday by 401(k) plan participants who allege Fidelity misused the plans' "float income" by temporarily investing it for its own benefit, in violation of the Employee Retirement Income Securities Act.

The suit, filed by participants in 401(k) plans for Bank of America, EMC Corp. and Safety Insurance Co. on behalf of those similarly situated, raises allegations that Fidelity and its subsidiaries generated extra income when plan assets were placed in interest-bearing accounts, pending investments or withdrawals of the assets.

Plaintiffs Patricia Boudreau, Alex Gray and Bobby Negron said the defendants breached their fiduciary duties and engaged in prohibited transactions involving plan assets by using the float income to pay its operating expenses and by failing to distribute the money solely for the interest of the plans.

"Fidelity Research breached its fiduciary duties and engaged in or caused the plan to engage in prohibited transactions involving plan assets when it transferred float income to Fidelity mutual funds that were investment options for the plans, instead of to the plans," the complaint says. "In addition, because Fidelity Research's investment manager fees paid by those mutual funds are computed based upon a percentage of the assets under management, by using the float income in this manner, defendants used plan assets to increase Fidelity Research's compensation."

Thomas G. Shapiro, who represents the plaintiffs, said the timing of this case is also important.

"I think at a time when people are more than ever concerned about their 401(k) retirement accounts, it is all the more important that fiduciaries handle the money in a way that is exclusively for the benefit of the participant," Shapiro told Law360 on Thursday.

Just last year, Fidelity was found to have breached its fiduciary duties to participants in a defined contribution plan, known as the ABB Prism Plans, by using float income in the same manner as plaintiffs now allege. Fidelity's diversion of float income for its own benefit was not limited to the ABB Prism Plans, but was done by Fidelity with respect to all the defined contribution plans it served, according to the complaint.

The complaint alleges that the defendants are "functional fiduciaries" to the plans because they are given authority and responsibility over the administration of plan assets when contributions or redemptions are held in temporary accounts.

The defendants exercised complete authority and control over the handling and use of the float interest, according to the suit.

The plaintiffs say Fidelity violated ERISA through its handling of funds that were either being deposited to or withdrawn from the plans, and by using the float income generated from those funds to offset the company's operating expenses, and for the benefit of Fidelity's mutual funds, instead of for the benefit of the plans themselves.

Plaintiffs seek declaratory and injunctive relief pursuant to ERISA, disgorgement, restitution and/or damages, pre-judgment and post-judgment interest and attorneys' fees, costs and other recoverable expanses of litigation.

Representatives for Fidelity didn't immediately return requests for comment on Thursday.

Plaintiffs are represented by Michelle H. Blauner and Thomas G. Shapiro of Shapiro Haber & Urmy LLP.

Counsel information for the defendants wasn't immediately available.

The case is Patricia Boudreau et al. v. Fidelity Management and Trust Co. et al., case number 1:13-cv-10524, in the U.S. District Court for the District of Massachusetts.

--Editing by Sarah Golin.