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Fidelity, HP, United Airlines Sued Over 401(k) Float Practice

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By Carmen Castro-Pagan

Aug. 19 — HP Inc., United Airlines Inc. and Fidelity Management Trust Co. were hit with an ERISA class action by 401(k) plan participants challenging Fidelity's practice of allegedly diverting billions of dollars of plan assets for its own benefit (*Burgess v. HP, Inc.*, N.D. Cal., No. 5:16-cv-04784, complaint filed 8/18/16).

The lawsuit, filed Aug. 18 in the U.S. District Court for the Northern District of California, targets Fidelity's float practice and alleges that the firm earned interest on overnight investment of $1.13 billion in contributions to the HP plan and $255 million to the United Airlines plan. Plan sponsors HP and United Airlines allegedly breached their fiduciary duties under the Employee Retirement Income Security Act by failing to adequately investigate the procedures used by Fidelity in connection with their plans' trading activity and distribution of benefits, the complaint said.

"We believe the plaintiffs' case is without merit and intend to defend against it vigorously," Fidelity spokesman Steve Austin told Bloomberg BNA Aug. 19 via e-mail.

The lawsuit comes more than a month after the U.S. Court of Appeals for the First Circuit held that Fidelity's practice of keeping "float" income earned off the 401(k) plans it manages didn't violate ERISA. The Eighth Circuit has also ruled that participants in Fidelity-managed plans couldn't maintain fiduciary breach claims against the company. This new challenge to Fidelity's float practice means that a more participant-friendly appeals court—the U.S. Court of Appeals for the Ninth Circuit—could hear the case and possibly create a circuit split.

The First and Eighth circuits' decisions are at odds with the Department of Labor's position in this matter. The DOL has said that Fidelity's practice of retaining float income generated from its administration of the plans, distributing such income to non-plan entities and its failure to disclose the existence of such income constitutes self-dealing in violation of ERISA.

Class Allegations

According to the complaint, Fidelity withdraws the total amount of cash generated by plan customers and deposits it into an account that is maintained for the benefit of Fidelity. Fidelity holds the cash overnight and allegedly uses it for its own benefit in violation of federal law, the complaint said.

"Fidelity has prevailed in similar cases and we believe that the practice at issue in this case is consistent with the law and fair to all parties," Austin said.

The proposed class, which could include thousands of members, questions why Fidelity doesn't have a contribution account or disbursement account maintained for the benefit of the plans and their participants.

Fidelity's practice is the equivalent of "a bank taking money out of a customer's checking account as soon as, if not before, the check is actually written rather than when then check is presented for payment," the complaint said.

The proposed class also targets plan sponsors. HP and United had a duty to ensure that no more than reasonable compensation was paid for the services being provided by Fidelity, the complaint said.

The lawsuit also names as defendant another Fidelity entity—Fidelity Investments Institutional Operations Co.—which served as the record keeper of the plans.

HP and United didn't immediately respond to Bloomberg BNA's request for comments.

Schneider Wallace Cottrell Konecky Wotkyns LLP represents the class.

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For More Information

Text of the complaint is at http://www.bloomberglaw.com/public/document/Burgess_et_al_v_HP_Inc_et_al_Docket_No_516cv04784_ND_Cal_Aug_18_2.