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401(k) Fee Litigation After Tibble v. Edison Int'l: Navigating the Continuing Duty to Monitor Plan Investments

Establishing ERISA Plan Investment Policies to Avoid Fee Challenges and Costly Liability

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Retreat from the High Water Mark: Breach of Fiduciary Duty Claims Involving Excessive Fees After Tibble v. Edison International

By Stephen D. Rosenberg

Of the many metaphors bequeathed to writers by the American Civil War, perhaps none is as useful in analyzing the development of legal doctrine as the high water mark, understood in historic terms as the farthest point north traversed by the Confederate army. The concept is particularly apt when applied to the development of excessive fee claims involving 401(k) plans under ERISA, and provides a ready framework for understanding both the recent history and the likely future development of that theory of liability.

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Viewed through that prism, the less than two year old decision by the United States Court of Appeals for the Seventh Circuit in Hecker v. Deere & Co.—trumpeted at the time as a major development in the defense of plan fiduciaries against such claims—can best be seen, in light of subsequent judicial and regulatory developments, as the high water mark in the defense of such claims, with the still more recent decision in Tibble v. Edison International demarcating the path down from that point. Buttressed by regulatory developments, Tibble v. Edison International shows us what is likely the future of these types of claims, and teaches, indirectly, not only how such claims need to be defended, but also how plan sponsors must prepare for them well in advance of any litigation.

Certainly the starting point for any discussion of this issue should be an understanding of the nature of excessive fee claims. ERISA lawyers, like other specialists, tend to use shorthand to which only they are privy, and this type of claim is no exception. Pithy references to excessive fee claims, however, shortchange the depth and complexity of what is at issue. Teasing out the phrase's full meaning gives a much more nuanced picture of what is at stake, and how it impacts fiduciary liability.

The level of expenses in investment options offered to participants in company-sponsored 401(k) plans has become an issue of significant concern, as well as litigation. A series of interrelated issues involving the expense levels in 401(k) plan investment options coalesce to simultaneously impact both the performance of participants' plan investments and the performance of fiduciaries' duties. The starting point for these problems is the accepted premise that greater fees severely reduce the growth in assets over time in individual participants' account [Miller, Ross M., "Paying the High Price of Active Management: A New Look at Mutual Fund Fees," *World Economics,* Vol. 11, No. 3, July-Sept. 2010].

To illustrate the impact of mutual fund fees in such accounts, the Department of Labor ("DOL") prepared

an example comparing two different levels of fees and their impact on a $25,000 investment in a 401(k) plan that provided annual investment growth of seven percent for a period of 35 years. The DOL analysis concluded that increasing the annual fee from 0.5 percent to 1.5 percent had "the effect of slicing nearly 28 percent off the value of assets" at retirement, or the difference at retirement between $227,000 and $163,000.

Thus, obviously the amount of fees contained in mutual funds or other investment options in a 401(k) plan significantly impacts the long-term outcome for plan participants. However, the interrelated problem for plan participants, which significantly amplifies the risk posed to participants by high fees, is the corollary finding that higher fees do not correspond to equivalently higher returns under mutual funds, which make up much of the investment menu open to 401(k) plan participants. Accordingly, excessively high fees not only reduce returns, but appear to reduce returns without any substantial benefit to the plan participants that is sufficient to warrant paying fees any higher than is absolutely necessary.

A compounding and further interrelated problem for both plan participants and fiduciaries is that, under the operation of a 401(k) plan, large numbers of plan participants are limited to the investment options provided in a plan menu. Regardless of any other variable that could otherwise come into play with regard to fees, plan participants have limited, if any, control over the fees they pay to invest for retirement; they are, instead, at the mercy of the fee and expense decisions made by the plan's fiduciaries, who, in turn, are expected to act both in their interest and as their stand-in in addressing the fees charged for the investment options. This, in essence, is the foundation of a so-called "excessive fee" claim by plan participants against fiduciaries, which is that the fiduciaries had an obligation to avoid higher than necessary fees in the mutual fund options offered in a plan menu, and failed to do so.

The nature of this theory gives rise, as well, to a corollary for such claims—one that reflects yet another problem with potentially excessive fees that is interrelated with those discussed above. Many so-called "excessive fee" claims also attack the alleged problem of revenue sharing, in which a portion of the fees in the mutual fund options themselves are used to fund the administration of the plan. As one academic has explained it, revenue sharing is "an arrangement by which the administrative costs of the plan are neither covered by the employer nor billed directly to the employee, but simply buried in the mutual fund fees." The absence of a line item for the administration of the plan, or of an actual outlay from the employer directly related to the provision of the plan, has been said to leave "employees with the impression that they are getting something (the administration of the plan) for nothing." From the perspective of a plan fiduciary, the issue of revenue sharing is interrelated with the problems posed by higher fees, in that revenue sharing can create a scenario in which higher expenses—and the selection of mutual fund options with higher fees—reduce or effectively eliminate the plan sponsor's own costs in offering a 401(k) plan, which may not be the case with investment options that have significantly lower fees. This dynamic, at least in theory, creates a potential tension between the short-term financial interests of the plan sponsor and the long-term financial interests of plan participants; there is little doubt that favoring the former over the latter in this regard, if proven in court, would be construed as breaching the duties of loyalty and prudence imposed on fiduciaries.

Over approximately the past 18 months, a trilogy of judicial decisions have addressed the legal and factual issues inherent in this problem in depth. The three cases—Hecker v. Deere & Co., 556 F.3d 575 (7th Cir. 2009) ("*Hecker*"), Braden v. Wal-Mart Stores, Inc., 588 F.3d 585 (8th Cir. 2009) ("*Braden*"), and Tibble v. Edison International, 2010 Westlaw 2757153 (C.D. Cal. 2010) ("*Tibble*")— serve as signposts on the road from the high water mark in defending excessive fee claims, which this article posits passed in the early part of 2009, to an uncharted but likely future. In February 2009, the Seventh Circuit decided *Hecker,* in which a putative class of plan participants sued the plan's sponsor, Deere & Co., as well as Fidelity Management Trust Co. ("Fidelity Trust"), which was the plan's trustee and recordkeeper as well as the manager of two of the investment options available under the plan; Fidelity Management and Research Co. ("Fidelity Research"), the investment advisor for mutual funds that were offered as investment options, was also named as a defendant. The putative class alleged that Deere had violated its fiduciary duties "by providing investment options that required the payment of excessive fees and costs and by failing adequately to disclose the fee structure to plan participants"; the putative class pursued the other two defendants on the theory that they were functional fiduciaries and thus, likewise, potentially liable for breach of fiduciary duty [*Hecker,* 556 F.3d at 578].

Fidelity Trust had undertaken the obligations of advising Deere on selecting investments for the plan, administering the participant accounts, and performing recordkeeping for the plan; as noted, it also managed two of the investment funds offered in the plan. Fidelity Research, in turn, was the advisor for the Fidelity mutual funds offered as investment options. As the discussion of the nature of excessive fee claims above suggests, each of the funds offered as investment options "charged a fee, calculated as a percentage of assets the investor placed with it" and Fidelity Research, as the advisor to the mutual funds that were offered as investment options, shared the revenue from those fees with Fidelity Trust. Fidelity Trust then compensated itself for its services through those fees, rather than directly charging the plan or the plan's sponsor for its services. Of significance, Fidelity Research was the investment advisor for 23 out of 26 investment options available to the plan participants, but none of those funds "operated exclusively for Deere employees; all were available on the open market for the same fee." After finding that the two Fidelity entities did not qualify as fiduciaries, the United States Court of Appeals for the Seventh Circuit then proceeded to affirm the dismissal of the breach of fiduciary duty theories against Deere itself. Although the Court reached this conclusion on a number of interrelated grounds, of interest for the future of "excessive fee" claims is the focus of the Court's analysis on the "allegation that Deere violated its fiduciary duty by selecting investment options with excessive fees." The Court focused on the fact that the funds in question were also offered to the retail marketplace with the same expenses as were charged on those same funds when offered as investment options in the Deere plan. The Court isolated the fact that "all of these funds were also offered to investors and the general public, and so the expense ratios necessarily were set against the backdrop of market competition," and found that there was no obligation on Deere as the fiduciary to seek other funds with lower expense ratios; indeed, the Court concluded that whether the fiduciary could have found such funds "is beside the point."

In essence, the Court concluded that fund expenses set at the same level as those paid in the retail marketplace as a whole were sufficient to discharge a fiduciary's obligation with regard to the extent of fees contained in the plan, and strongly suggested that a fiduciary has no obligation to pursue superior pricing for plan participants. Note that *Hecker*'s rejection, with neither discovery or the development of an evidentiary record, of the plaintiffs' cause of action for excessive fees is the aspect of that decision focused on in this article, and which the author believes is undercut by subsequent regulatory and judicial developments. The *Hecker* court also recognized a strong affirmative defense with regard to participant control of investment selections, one that the Department of Labor rejects. The nature and future of that defense could justify an extensive article all its own, and is outside the scope of this piece, which instead focuses on the Seventh Circuit's rejection in *Hecker* of the elements of the plaintiffs' cause of action itself.

It is important to note a particular aspect of the *Hecker* decision, which is that the Seventh Circuit reached this conclusion at the motion to dismiss stage, meaning that no discovery had been conducted into either the actual facts concerning the expenses charged in the plan's investment options, or into the question of what acts or omissions by the fiduciary may have led to an investment mix that, from a fee perspective, was no better—and no worse—than the plan participants could have selected outside of the plan. Instead, the Seventh Circuit found the plaintiffs' theory untenable based on the simple fact that the marketplace as a whole had recognized the fees charged by the investment options as acceptable. This becomes an important point when the case law progresses to *Braden* and eventually to *Tibble*, pursuant to which participants suing a plan's fiduciaries appear to be free to examine the actual acts taken or not taken by fiduciaries to obtain an optimal level of fees and expenses, without regard to whether the marketplace as a whole accepts those same levels of fees and expenses for the same or a similar investment product.

Within months of the Seventh Circuit's decision in *Hecker*, the United States Court of Appeals for the Eighth Circuit reached the essentially opposite conclusion in *Braden*, overturning—rather than affirming, as had the Seventh Circuit in *Hecker*—a district court's dismissal on the papers of a putative class action alleging breaches of fiduciary duty arising from excessive fees on the investment options contained in a 401(k) plan. In short form, the United States Court of Appeals for the Eighth Circuit concluded that the plaintiff's complaint alleged facts that, if true, indicated that the fees in the mutual fund options in the 401(k) plan were higher than necessary, that the plan sponsor had the market power to obtain lower fees, that revenue sharing had occurred without disclosure to the plan participants, and that the plan participants

had been injured as a result. Unlike the Seventh Circuit in *Hecker*, which essentially assumed that marketplace forces would sufficiently police the expense levels in the investment options available under the plan, the Eighth Circuit found that the propriety of the fees was an issue that should not be decided prior to full development of the facts.

The 401(k) plan involved in *Braden* contained a far more limited range of mutual fund investment options than did the plan at issue in *Hecker*, and the Eighth Circuit acknowledged this distinction, noting that:

> The district court in *Hecker* found it "untenable to suggest that all of the more than 2500 publicly available investment options had excessive expense ratios." The far narrower range of investment options available in this case makes more plausible the claim that this Plan was imprudently managed. [*Braden,* 588 F.3d at 596 n. 6.]

However, the allegations related to excessive fees in *Braden* revolved around the assertion that the mutual funds offered in that plan charged the same fees as those contained in the retail shares generally offered to individual investors, and that the plan was large enough to have instead obtained institutional shares with lower expenses. Logically, then, under the reasoning of the Seventh Circuit in *Hecker*, the pricing on the mutual fund options contained in the 401(k) plan at issue in *Braden* could likewise be said to have been subject to marketplace discipline. The Eighth Circuit's discussion of *Hecker* in its opinion establishes that the Eighth Circuit was well aware of the Seventh Circuit's prior opinion on the same issues, and thus the Eighth Circuit, at least implicitly, departed from the Seventh Circuit's proposition that marketplace discipline is sufficient to establish for purposes of an excessive fee claim that the fees in a mutual fund option are not excessive.

The Eighth Circuit further departed from the Seventh Circuit's conclusion that neither revenue sharing itself nor the failure to disclose the revenue sharing to the plan participants can give rise to a breach of fiduciary duty. The Eighth Circuit discussed in detail the manner in which those events could give rise to such a breach, and noted in particular that such claims are "fact and context sensitive" and should not be decided as a matter of law [*Braden,* 588 F.3d at 600]. Rather, such claims would need to proceed into discovery, with the putative class granted the opportunity to prove them.

Several months after the Seventh Circuit issued its opinion in *Hecker* and shortly before the Eighth Circuit issued its opinion in *Braden*, Judge Stephen Wilson of the United States District Court for the Central District of California conducted a three day bench trial in *Tibble,* a class action asserting the same type of excessive fee claims. Subsequent to the trial, during the summer of 2010, with both *Hecker* and *Braden* available as a backdrop, Judge Wilson issued his 82-page findings of fact and conclusions of law. In its ruling after trial, the Court upheld several claims alleging breach of the duty of prudence with regard to the fees charged in certain investment options, while rejecting the same claims involving certain other investment options.

At the same time, the Court rejected claims that the fiduciaries had also breached their duty of loyalty—which essentially requires that the plan be managed for the benefit of the plan participants—by allowing revenue sharing. The Court recognized that the interaction of higher fees with revenue sharing meant that the plan's expenses might be reduced for the plan sponsor itself as a result of increased fund expenses, but found that the actual evidence submitted to the Court did not support the conclusion that the fiduciaries had selected the investment options for that reason. Rather, the Court found that the evidentiary record was instead only consistent with the conclusion that the decision-making process was not influenced by a desire to decrease direct costs to the plan sponsor by means of higher investment option fees and correspondingly greater revenue sharing. The interesting point about this aspect of the Court's findings and rulings is that the Court expressly rejected the revenue sharing portion of the excessive fee claims on the basis that the actual evidence concerning the fiduciaries' investment choices did not support the underlying assumption of a revenue sharing claim, which is that higher expenses benefit the plan sponsor through increased revenue sharing and that the fiduciaries favor the plan sponsor's interests in reducing administrative costs over the interests of the participants by selecting investment options with unnecessarily high fees. The *Tibble* court found that the evidence did not support this conclusion with regard to the decisions concerning investment options made by the fiduciaries. It is important to recognize the converse, however, which is that an evidentiary record that did not demonstrate a lack of favoritism towards the plan sponsor with regard to the indirect benefit to it of greater fees and increased revenue sharing would likely have resulted in a finding of a breach of

the duty of loyalty by the fiduciaries, with fiduciary liability imposed for this reason.

With regard to the claims that certain investment options had far higher fees than were necessary—which is the excessive fee portion of the case as opposed to the revenue sharing portion of the case—many "quick" analyses of the *Tibble* decision shortly after its issuance reduced the Court's conclusion to the fact that the fiduciaries were found liable for having included retail class shares rather than institutional class shares of the particular investment options. From this, many of those same analyses then recommended that plan sponsors respond by examining whether they had investment options in their plans that were holding retail shares in circumstances where they could have instead been holding less expensive institutional shares, and to change that investment in that event. While this analysis and understanding of *Tibble* is true to a certain extent, looking behind the Court's conclusion that the fiduciaries had breached their duty of prudence by including retail shares rather than institutional shares with regard to certain investment options is far more instructive. This is because the Court made clear in its analysis that the duty of prudence was not breached simply because the plan included retail shares rather than cheaper institutional shares; the Court instead focused on whether the prudence standard's requirement of adequate and thorough investigation into the investment had been satisfied by the fiduciaries. The Court found that the evidence did not establish this point and imposed liability for this reason, rather than simply because the investment option included more expensive retail shares rather than less expensive institutional shares.

Judge Wilson found that there was no evidence that the defendants had "even considered or evaluated the different share classes . . . when the funds [at issue] were added to the [p]lan" [*Tibble*, 2010 Westlaw 2757153 at *25]. The Court specifically noted that "[n]ot a single witness testified regarding any discussion or evaluation of the institutional versus retail share classes" and that "the [p]lan fiduciaries responsible for selecting the mutual funds (the [i]nvestment [c]ommittees) were not informed about the institutional share classes and did not conduct a thorough investigation." Proceeding from those factual determinations, the Court then concluded that, with proper investigation into the "relative merits of the institutional share classes against the retail share classes," the fiduciaries would have found that the institutional share classes provided the same investment options at a lower cost to the plan participants. Finding that, on the evidence before the Court, the fiduciaries could have obtained waivers that would have allowed use of the institutional share classes—rather than the retail share classes—the Court concluded that the fiduciaries had, therefore, breached the duty of prudence. In short, the evidence showed that the institutional share classes were cheaper while providing the exact same investment option, that the plan could have obtained the institutional shares with their corresponding pricing had they sought to do so, and that the fiduciaries had included investment options with unnecessarily high fees because they did not investigate and understand that possibility.

The Court, then, did not simply find that retail shares were more expensive than the corresponding institutional shares and that there was no reason to have used the retail shares rather than the institutional shares, but rather found that the evidence showed that, in that particular plan, the fiduciaries had never considered the institutional shares or the fact that they could have obtained the institutional share pricing, and that the plan participants were harmed as a result. As with the revenue sharing aspect of the opinion, one can assume that the converse with regard to this issue would also be true: That an evidentiary record demonstrating consideration by the fiduciaries of whether to include retail share classes rather than institutional share classes that led to a defensible, even if arguable, selection of the higher cost option would not support a finding of a breach of the duty of prudence despite the inclusion of the higher-priced investment option. Under the facts detailed in the Court's extensive opinion in *Tibble*, not only did no record of such an investigation exist, but it also appears that no defensible justification for having selected the higher-priced retail shares could likely have existed either. However, this will clearly not be the case in all circumstances in which a plan sponsor and its fiduciaries are charged with having included retail share classes rather than the cheaper institutional share classes. As the *Hecker* court noted and Judge Wilson echoed in *Tibble*, fiduciaries do not have an absolute obligation to locate and include the cheapest possible investment option. There could well be issues with performance, availability of information, investment minimums, or other concerns about institutional share classes in a particular plan that would justify a deviation from including them as investment options.

As a result, it is both simplistic and mistaken to read *Tibble* as simply requiring the use, or at least the

pursuit, of institutional share classes over retail share classes. Rather, what *Tibble* instructs, on both the duty of loyalty and the duty of prudence, is the need to take two steps. The first is to fully investigate the fee levels, as well as the possibility of reducing fee levels not just through the use of institutional shares but also through the use of other investment options that accomplish the same investment goals. The second is to document that investigation and the justification for the outcome in a manner that can be proved in court. It is particularly important to document these events at the time they occur in a manner that can be subsequently admitted into evidence in court under exceptions to the hearsay rule. The statute of limitations for breach of fiduciary duty claims is quite long, and the recollections of relevant events by the participants may not be entirely accurate when questioned in court years later.

If one sets aside their provenance—the august bench of the Seventh Circuit versus a trial judge somewhere out in the middle of California (with no disrespect intended to Judge Stephen Wilson, as the contents of this article should make clear that the author holds the Court's opinion in *Tibble* in high regard)—it becomes clear that, properly understood, *Tibble*, and not *Hecker*, likely represents the future course of excessive fee litigation under ERISA. In the first instance, the DOL is in the final steps of mandating, through regulation, the disclosure to fiduciaries of both fee and revenue sharing information by service providers and vendors. This disclosure will, in the future, place in front of fiduciaries information about fees, and will likely result in counsel for participants structuring future excessive fee claims in a manner that perfectly mirrors and mimics the *Tibble* court's handling of the issue. The likely theory against fiduciaries in the future will be that they were presented with information about the fees, as required by DOL regulations, and did not act in response to it in the manner required by the duty of prudence. The central liability questions will revolve in that instance around certain key questions concerning what the fiduciaries did in response to that information. Did they understand it, seek more information if it was not enough to be able to act, obtain further analysis of it from outside experts if needed, and use it to either seek lower fees (whether from that vendor or a competitor) or to confirm that the fees were reasonable in comparison to an appropriate benchmark? Or did they not understand the information about fees provided to them, not interpret it, not act on it, and just accept the fees as disclosed? The former, if documented, should lead to exoneration in an excessive fee case; the latter, to liability. A careful review of *Tibble* documents shows that the Court's liability determination flowed along essentially this framework.

But what of *Hecker* and its rejection of such claims without a factual investigation into these issues? In the end, jurisprudential and regulatory developments that post-date the Seventh Circuit's decision in *Hecker* significantly undercut the reasoning of that decision and the rationale for that approach. As noted, the DOL is finalizing regulations requiring the disclosure of fee information to fiduciaries. It is, in light of that, significant that one of the underlying premises of the Seventh Circuit's opinion in *Hecker* was the absence of any regulatory obligations or duties with regard to fee levels and disclosures, with the Seventh Circuit expressly noting that the district court ruling was based in part on the absence of any regulatory obligations in this regard. The Seventh Circuit, in fact, noted that the plan sponsor believed that it was receiving the services of the trustee and recordkeeper for free when, in fact, revenue sharing payments were the actual source of compensation to the trustee and recordkeeper [*Hecker*, 556 F.3d at 586]. Neither of these factual or legal aspects native to *Hecker* will or can exist in future cases once the DOL has, in fact, mandated disclosure to the fiduciaries of the compensation levels and manner of compensation of the service providers. It is worth noting that these facts created a scenario in which the district court, and thus the Seventh Circuit, believed that the plan sponsor had no obligation to take steps to understand the nature of the plan's fees and compensation arrangements. These regulatory changes preclude a repeat of the scenario that was before the court in *Hecker* and instead force any analysis of whether a breach of fiduciary duty has occurred in an excessive fee claim to start from the initial fact that the fiduciaries were on notice of information about fees and revenue sharing, and to proceed from there to the question of whether the fiduciaries breached their duties of loyalty and prudence by failing to act on that information. *Hecker*, in contrast, is in essence a decision about the lack of any obligation on the part of the fiduciaries to even uncover in the first instance, and then act upon, information about fees and their distribution.

Of more importance is the extent to which subsequent events and jurisprudence have significantly undercut the key legal assumption underlying the Seventh Circuit's conclusion that the fee levels were

appropriate, which was the belief that "all of [the] funds were also offered to investors in the general public, and so the expense ratios necessarily were set against the backdrop of market competition" [*Hecker*, 556 F.3d at 586]. The Seventh Circuit assumed that the broad range of investment options offered by the plan, in light of their availability to the public, must have contained reasonable fee levels because they were subject to marketplace forces.

The assumption that the fees on the investment options were, by definition, appropriate because they were subject to marketplace discipline does not stand up to scrutiny after the Court's careful fact finding, after trial, in *Tibble*. In *Tibble*, Judge Wilson was careful to explain that the fiduciaries had offered retail class mutual fund shares to the plan participants, rather than the identical but cheaper institutional class shares. While certainly retail pricing may be the same across the market and subject to the broad forces of the marketplace, it is not necessarily the case that the same holds true for institutional share pricing, which is not subject to the same broad marketplace. Indeed, even within the 401(k) marketplace, not all plans are created equal and not all plans can obtain the same pricing, as Judge Wilson found after hearing the evidence in *Tibble*; one of the key findings in that case was the conclusion, in essence, that size matters, in that large plans can obtain pricing improvements that smaller plans cannot obtain. Simply put, by conducting a trial into mutual fund pricing regarding fees—something the district court and the Seventh Circuit never allowed for in *Hecker*—the *Tibble* court documented the existence of submarkets in the pricing of mutual funds and the existence of different pricing structures. The Seventh Circuit's opinion in *Hecker* does not account for this in its assumption that the fee levels were, by definition, appropriate because the investments were also sold to the general public at the same cost. As the *Tibble* court found, plans can and do get better pricing than the general public, a fact the *Hecker* court did not confront in its analysis. Further, and of significant import, the *Tibble* court found that it was that very fact that established a breach of the duty of prudence, in that the fiduciaries had failed to learn and act upon that fact to obtain lower fees. Unlike the court in *Tibble*, the *Hecker* court simply assumed the propriety of the levels of the fees themselves, without factual development or investigation to determine whether they were in fact consistent with fiduciary obligations; the detailed fact finding in the subsequent decision in *Tibble* documents the fundamentally unsound nature of that assumption.

Indeed, even aside from the questions of institutional versus retail pricing that was the central issue with regard to the findings of breach of fiduciary duty in *Tibble*, other aspects of that decision further document the ability of fiduciaries for larger funds to negotiate unique deals that surpass the marketplace, simply by making use of their own marketplace power. In *Tibble*, the Court found that the fiduciaries had not breached their duties with regard to one particular money market investment option because, in part, the fiduciaries had actively negotiated a reduction in fees over time with that particular vendor. The Court's detailed factual findings in this regard further establish that plan fiduciaries can do better than the marketplace, which in turn further establishes that it is inappropriate to use the retail costs of investment options as a proxy for appropriate pricing, as the Seventh Circuit did in *Hecker*. Indeed, making retail pricing the benchmark for fiduciaries' level of care with regard to the expense ratios on investment options offered by a plan is inherently inconsistent with the obligations imposed on a plan's fiduciaries, which are to act as a reasonably prudent person who is knowledgeable with regard to the investment options, something often referred to as a "prudent expert" standard. There is no credible reason to believe that a reasonable expert in mutual funds or similar investment options would not know that a large dollar investor can do better, simply by basic negotiation, than can the general public as a whole.

And so, in light of what we now know about fee setting in defined contribution investment options through the yeomen's work of the Court and the litigants in *Tibble*, in conjunction with the changes in fee disclosure that are currently being established by the DOL, we are left with the conclusion that the seemingly impregnable wall built by the *Hecker* court against excessive fee claims is likely not to stand the test of time. Instead, we are likely looking at a future course for these types of claims that will far more resemble the Court's processing of that theory in *Tibble* than anything else. In that, though, is both good news and bad news for plan sponsors and fiduciaries. The bad news, obviously, is the increased risk of exposure, something presented anytime a case proceeds against a defendant past the motion to dismiss stage and into the merits. Of more import, though, is likely the good news, which is that the Court in *Tibble* lays out the steps to take to avoid having

liability imposed on fiduciaries at a later date based on the expense levels in the investment options they select. As the *Tibble* court made clear—and as *Hecker* likewise reflects—there is no obligation to find the cheapest investment option or even, for that matter, the fund that offers the optimum combination of fees and performance. Rather, what is required is a proper process that will, as in horse shoes, get the fiduciaries close enough to that outcome to be both acceptable and defensible. Documenting that process is enough to win an excessive fee case when it does show up, down the road, the next time the market tanks and angry participants try to recoup their losses from a plan's fiduciaries. ■