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An Alternative to a Bundled Retirement Plan

A solution where different entities provide different plan services to a plan has the double-barreled virtues of looking like a bundled plan, without actually being a bundled plan.

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In my last two columns, I wrote about the case of *Tussey v. ABB, Inc.* which was decided on March 31 in Missouri by federal district court judge Nanette Laughrey. In May's column, I discussed the case in terms of the complex, inefficient, and unnecessarily expensive Rube Goldberg-like contraption that is revenue-sharing. In June's column, I discussed *Tussey* in terms of a bundled retirement plan and how that helps disguise where money is flowing from, where money is flowing to, and in what amounts. Without knowing such things, no plan sponsor can determine whether a plan's costs are reasonable in relation to the services for which they're expended within the meaning of section 404(a) of the Employee Retirement Income Security Act (ERISA).

Tussey demonstrates in spades how the revenue-sharing bundled retirement plan model helps keep otherwise presumably competent employees at plan sponsors who are in charge of running 401(k) plans from reaching their full intelligence quotient. The consequences of their ill-informed decision-making contribute directly to a less secure and comfortable retirement lifestyle for plan participants (and their beneficiaries).

Such employees--whether serving in fiduciary or non-fiduciary capacities in their retirement plan--should be ever mindful that they can have an impact for good or ill on real flesh-and-blood people. Because many of these employees are in lower and middle management--and therefore not privy to the special retirement goodies often available to upper management--it would seem that much of their own retirement wealth accrues primarily in their company's 401(k) plan. One would think that, if nothing else, the self interest of these employees would motivate them to influence a company's decision-makers to establish a retirement plan with reasonably low costs and well-diversified investment options that would more efficiently build their own wealth.

Each of the 401(k) plans present in the troika of cases of *Tibble v. Edison International*, *Braden v. Wal-Mart*, and *Tussey* holds more than $1 billion in assets; they are not mom-and-pop plans. These companies have the means to devote significant monetary resources and personnel to their 401(k) plans. Yet despite that, they cannot seem to comprehend the harmful consequences of revenue-sharing or even understand that their plans need not submit to the inflexibilities of a bundled offering. (So just what were those 28 persons--all named defendants--on the retirement plans committee at Wal-Mart in *Braden v. Wal-Mart* doing all day?)

Take a moment to think about it: Isn't it remarkable that giant providers of bundled retirement plans such as Fidelity ordinarily choose not to take onto their own shoulders the legal responsibility (and liability) for selecting, monitoring, and replacing their plans' investment options carried by their plan sponsor clients? In fact, they choose normally not to assume any legally meaningful fiduciary responsibility at all. Even in cases where sponsors have the option of off-loading their selecting/monitoring/replacing duties and decide not to exercise that option, presumably they would still wish to offer plan participants reasonably low-cost (and well-diversified) plan investment options. And yet, as shown in June's column, providers of bundled plans are indifferent to offering such investment options to participants because they have no incentive to do so. In fact, they are motivated to do just the opposite: offer investment options bloated with the added costs of revenue-sharing for the non-proprietary funds (and internal credits for their proprietary funds) on their record-keeping platform.

What's more, even giant providers of bundled plans won't be there to take care of plan sponsors if the sponsors get into legal trouble with plan participants, the DOL, or the IRS. These providers ordinarily are not sued, and even when they are, they rarely incur any serious liability. So any plan sponsor contemplating (or already) using such a giant can take little comfort from any perceived legal advantage offered by such "bigness."