ERISA COMPLIANCE, **ERISA LITIGATION INDEX**

PLAINTIFFS FAIL TO FLOAT CLAIM PAST DISTRICT COURT

MARCH 25, 2015 DAVID WITZ LEAVE A COMMENT

The U.S. District Court for the District of Massachusetts in *In re Fidelity ERISA Float Litigation*, No. 13-10222, 2015 WL 1061497 (D. Mass. March 11, 2015) has determined that float income is not a plan asset. This may be the last we hear about ERISA claims involving float targeting Fidelity, or any other service provider, as the defendant. Nonetheless, this case is just another example of why retirement practitioners should keep a close watch on case law that impacts fiduciary governance obligations. Unless Congress legislates new law, the Department of Labor ("DOL") addresses the question raised by the courts, or the losing plaintiffs appeal to a higher court, it is looking like in most circumstances, float earnings are not considered plan assets.

As early as September 13, 1993 the DOL issued an Advisory Opinion addressing the collection of interest earning on assets in transit, be it contributions not invested, or distributions not cashed. This Advisory Opinion was followed by an August 1994 Information Letter and finally a Field Assistant Bulletin issued on November 5, 2002. Collectively, these three DOL publications have influenced the governance activities of knowledgeable fiduciaries by encouraging open negotiation between covered service provider and plan sponsor as to the retention of float income to avoid a prohibited transaction claim. But by determining that float income is not a plan asset; the court in *In re Fidelity ERISA Float Litigation* found that retention of float income is not a prohibited transaction. The Court referenced three other circuit court decisions which all held float was not a plan asset.

At this point, a fiduciary must now determine whether it is important to continue the same governance activities of the past or abandon those activities as a waste of time. Of course, under the current short-term interest rate environment float earnings do not amount to much especially for small plans, so the question is where do we go from here?

It is very important to realize that the point of this lawsuit was to go after the service providers like Fidelity where the damages across all plans could be done collectively in one case. Now that this method appears to not be viable, the remaining avenue is to go after the plan fiduciaries themselves. Although these cases are finding that float is not a plan asset, none have held that it is not a form of indirect compensation that must be considered by a prudent fiduciary under their 408(b)(2) responsibilities.

Practically then what does this mean? Float negotiations are still important because they involve compensation paid to service providers, but will be reserved to those plans with the most assets where the amount generated is the greatest. One thing to keep in mind. If, in fact, we see a rising interest rate environment, float income will increase and become a more meaningful profit source for a covered service provider. If and when that happens, the group of plans that must take into consideration negotiations over float will necessarily increase.