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ERISA AND EMPLOYEE  
BENEFITS ATTORNEYS

135 Main Street, 9th Floor  
San Francisco, California 94105-1815

15760 Ventura Blvd, Suite 910  
Los Angeles, California 91436-2964

329 NE Couch St., Suite 200  
Portland, Oregon 97232-1332

Tel: (415) 788-3111  
Fax: (415) 421-2017  
Email: [info@truckerhuss.com](mailto:info@truckerhuss.com)  
[www.truckerhuss.com](http://www.truckerhuss.com)

## Ninth Circuit Decision in *AT&T* Case Could Open Up Potential New Attacks on Retirement Plan Fiduciaries: What Fiduciaries Need to Know

DYLAN RUDOLPH and  
JOSEPH FAUCHER

AUGUST 2023

On August 4, 2023, the Ninth Circuit Court of Appeals revived a lawsuit against AT&T Services Inc. and its retirement plan fiduciaries (together, "AT&T"), reversing a district court's order granting summary judgment in AT&T's favor. This decision, which is published and binding on cases located in the Ninth Circuit, could open up new lines of attack on retirement plan sponsors and fiduciaries based on indirect fees received by plan service providers that, to date, have not played a major role in this area of litigation.

The Ninth Circuit's decision focused on transactions where AT&T: (1) amended its contract with the plan's recordkeeper, Fidelity Workplace Services ("Fidelity"), to provide plan participants with access to Brokeragelink, Fidelity's brokerage account window; (2) contracted with Edelman Financial Engines ("Financial Engines"), an entity that provides optional investment advisory services to participants for a fee; and (3) further amended its contract with Fidelity to provide Financial Engines with access to participant information and to allow Fidelity to contract directly with Financial Engines. The panel emphasized its reliance on evidence that Fidelity received indirect fees from certain mutual



funds offered through its brokerage window, and a share of fees paid to Financial Engines for investment advisory services that Financial Engines provided to the plan's participants.

The Ninth Circuit concluded that these arrangements were prohibited transactions under Section 406(a)(1)(C) of the Employee Retirement Income Security Act of 1974, as amended (ERISA) because, by entering into these contracts, AT&T had caused the plan to engage in transactions that constituted a direct or indirect furnishing of goods and services between the plan and Fidelity (a party-in-interest to the plan). The Ninth Circuit found that the district court should not have granted summary judgment in AT&T's favor because there were triable issues of fact as to whether the arrangements with and compensation to Fidelity were "reasonable," and therefore exempt from ERISA's prohibited transaction provisions pursuant to ERISA § 408(b)(2).

The Ninth Circuit also found triable issues of fact as to whether the plan's fiduciaries breached their duty of prudence by allegedly failing to adequately review all of the compensation paid to Fidelity. The court cited testimony from an AT&T executive who said the compensation between Fidelity and Financial Engines was "between them," while another executive testified that AT&T "really didn't make an inquiry about whether [the fee paid by Financial Engines to Fidelity] was a reasonable one." And, finally, the court held that AT&T failed to adequately disclose the compensation between Fidelity and Financial Engines on its annual Form 5500 filings.

In concluding that the arrangements at issue constituted prohibited transactions under ERISA, the Ninth Circuit declined to follow precedent from the Third Circuit and the Seventh Circuit that took a more narrow view of the prohibited transaction rules and the more fiduciary-friendly view that plaintiffs must plausibly allege nefarious intent by parties entering into these types of alleged prohibited transactions (i.e., that "run of the mill" arrangements between plans and service providers were not what Congress had contemplated when it created the prohibited transaction rules). In AT&T, conversely, the Ninth Circuit read the prohibited transaction rules and regulations more literally — finding that AT&T had engaged in a prohibited transaction by simply amending the contract with Fidelity to incorporate the services of Brokeragelink and Financial Engines.

AT&T still has the option of seeking rehearing by the Ninth Circuit, and/or petitioning the Supreme Court for certiorari. The conflict among the circuit courts raises the likelihood that the Supreme Court would agree to hear the case to resolve the conflict.

Plan fiduciaries should take reasonable steps to obtain information reflecting all compensation, direct and indirect, received by plan service providers in connection with the services they provide. Fiduciaries should also scrupulously document the process that they follow in obtaining and reviewing that information, and be prepared to demonstrate that the total compensation is reasonable considering all relevant facts and circumstances.

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Editor: Nicholas J. White, [nwhite@truckerhuss.com](mailto:nwhite@truckerhuss.com)

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**Jahiz Noel Agard**

jagard@truckerhuss.com  
415-277-8022

**Sarah Bowen**

sbowen@truckerhuss.com  
415-277-8059

**Mia Butzbaugh**

mbutzbaugh@truckerhuss.com  
415-277-8073

**Adrine A. Cargill**

acargill@truckerhuss.com  
415-277-8012

**Nicolas D. Deguines**

ndeguines@truckerhuss.com  
415-277-8009

**Joseph C. Faucher**

jfaucher@truckerhuss.com  
213-537-1017

**Scott E. Galbreath**

sgalbreath@truckerhuss.com  
415-277-8080

**Angel Garrett**

agarrett@truckerhuss.com  
415-277-8066

**Robert R. Gower**

rgower@truckerhuss.com  
415-277-8002

**Alaina C. Harwood**

aharwood@truckerhuss.com  
(415) 277-8047

**R. Bradford Huss**

bhuss@truckerhuss.com  
415-277-8007

**Zachary T. Isenhour**

zisenhour@truckerhuss.com  
415-277-8005

**Ryan Kadevari**

rkadevari@truckerhuss.com  
415-277-8011

**Clarissa A. Kang**

ckang@truckerhuss.com  
415-277-8014

**Sarah Kanter**

skanter@truckerhuss.com  
415-277-8053

**T. Katuri Kaye**

kkaye@truckerhuss.com  
415-277-8064

**Elizabeth L. Loh**

eloh@truckerhuss.com  
415-277-8056

**Brian D. Murray**

bmurray@truckerhuss.com  
213-537-1019

**Kevin E. Nolt**

knolt@truckerhuss.com  
415-277-8017

**Yatindra Pandya**

ypandya@truckerhuss.com  
415-277-8063

**Barbara P. Pletcher**

bpletcher@truckerhuss.com  
415-277-8040

**Mary E. Powell**

mpowell@truckerhuss.com  
415-277-8006

**Catherine L. Reagan**

creagan@truckerhuss.com  
415-277-8037

**Dylan D. Rudolph**

drudolph@truckerhuss.com  
415-277-8028

**Robert F. Schwartz**

rschwartz@truckerhuss.com  
415-277-8008

**Charles A. Storke**

cstorke@truckerhuss.com  
415-277-8018

**Joelle Tavan**

jtavan@truckerhuss.com  
415-277-8030

**Jennifer Truong**

jtruong@truckerhuss.com  
415-277-8072

**Nicholas J. White**

nwhite@truckerhuss.com  
213-537-1018

**PARALEGALS****Jenna McHenry**

jmchenry@truckerhuss.com  
415-277-8020

**Susan Quintanar**

squintanar@truckerhuss.com  
415-277-8069