Episode 62

Hello, and welcome to Revamping Retirement, a podcast brought to you by CAPTRUST, where we explore the opportunities and challenges facing today's retirement plan sponsors and fiduciaries. Our hosts lead the employer sponsored retirement plan practice at CAPTRUST, one of the largest registered investment advisors in the U. S., and a thought leader in the retirement plan, advisory, and consulting space. We hope you enjoy Revamping Retirement.

Jennifer: Hello everyone and welcome to Revamping Retirement. I am Jennifer Doss and I am joined today by Dawn McPherson as my cohost. So, Dawn, welcome back.

Dawn: Thanks so much. Glad to be [here].

Jennifer: Yep. Dawn and I are joined today by a special guest: Dan Aronowitz. Dan is the president of Encore Fiduciary, which is formerly Euclid.

Some of you might know it by that name. It’s [a] fiduciary liability underwriter. So Dan has over 30 years in the industry. And the thing that I think makes Dan's firm very unique is really his deep analysis of litigation case law.

I think the fiduciary guru blog is… what it's called? I read your analysis on case decisions, litigation trends, and I find it very insightful and instructive on how to help think better about managing a retirement plan. [And] maybe sometimes [things to] ignore when managing a retirement plan.

What is just noise that is flying by our face? Anyway, that is why we are here today — to help share that insight with our readers, I guess. So, Dan.

Dan: No, thank you, Jennifer. I'm pleased to be [here]

Jennifer: Yeah, so before we dive in, I just gave a very high-level overview of you and your firm, but maybe you could just spend a minute talking about Encore Fiduciary, what role you play in the industry, how many you serve, that sort of thing.

Dan: Thank you, Jennifer. We try at Encore, formerly Euclid, Fiduciary, to be a best-in-class fiduciary underwriter, and we are leaders in multi-employer, governmental, and single-employer plans. What we hope distinguishes us from other fiduciary underwriters is we try to bring a high scope of coverage based on expertise — excellent claim service based on expertise.

And then we try to go beyond just being fiduciary experts. We try to put out thought leadership to help plan sponsors. And then we're trying to go even further to advocate for plan sponsors against litigation trends that we think are unfair. So we hope we're bringing expertise, thought leadership, and advocacy for plan sponsors.

Dawn: Thanks for that overview, Dan. One of the things Jennifer highlighted in your introduction is that she finds the insights on litigation so helpful. I also agree and enjoy reading your blog. So let's talk about that first. You recently published a 2023 report covering retirement plan litigation trends that you're seeing. What are some of the big takeaways from last year?

Dan: We think last year was a year of what we call a fever pitch of activity. There were [fewer] cases filed, 48 versus 80 the prior year, but the main thing we saw is that the primary firms that are bringing these cases were busy. They were having to litigate the different phases of litigation in the several hundred cases which are still pending. And so [fewer] cases were filed, but the void was filled by newer law firms. Sometimes lawyers leaving Capozzi, Adler, or Walczewski and moving to other firms. But new firms were filling the void and filing additional cases. Last year there were five trials. That's different than most years. There's only been about eight trials in the history of the 475 cases. So more cases were being tried. There were more settlements, more motions dismissed, decided more summary judgment. So it was less about cases being filed than the fever pitch of activity in these cases. And we started seeing some new trends with the forfeiture claims that we're seeing, so what we're seeing is that, even though there are [fewer] cases filed, it's still very busy and there's still significant litigation risk.

Jennifer: Yeah, it's interesting. I think you talk about this where you kind of see the cyclical...

The next year, you got to digest all those. And then the next year is some of those, you know, Or, or go to trial is as it was last year. Then now, you know, maybe every other year. Maybe you see kind of a, an in filing versus that. was interesting

Dan: That is correct, because in 2020 Kaposi Edler filed 40 cases alone and then they filed [fewer] the next year. They were busy.

And last year, Schlichter tried three cases, just his firm alone. Three of the five cases. So he's busy.

And that's where I think you see the cyclical activity.

Jennifer: It's interesting. And you did some of the newer items that came up from a topic perspective that we saw last year. So you said forfeitures. I've seen some float income, lawsuit claims and, I guess, passive target date funds, maybe specifically to BlackRock, is what we saw last year as a couple of those were filed.

So I guess, can you speak a little bit more to some of those newer claims? I mean, obviously we have the standard performance and, you know, but, but what about newer ones?

Dan: We still have the bread and butter. Your record-keeping fees are too high. Your investment fees are too high. We're seeing more and more. Performance cases, the nuances of what we're seeing where we are seeing, there were eight cases in which the

record-keeping claim or the fee claim is also that you are improperly taking float income. And that's new. That's the first time plan sponsors were being accused of improperly not acting in the best interest of plan participants and taking the interest on float income. The forfeiture cases are all new. There's now six, all in California, all the same law firm. But this is a novel theory that what we thought, and the IRS has blessed for years and years, that when a, when an uninvested participant loses that or leaves the company, and then you can take that contribution and apply it against future contributions. The allegation is, again, that should somehow go to the participants. That's a novel theory. We think it will be thrown out, but there's six of these cases, and the plaintiffs are trying to, if you throw out as many cases as possible, maybe one judge will handle it. On the investment fee claims, we're seeing less of the active to passive because the courts are throwing that out, but we're seeing more comparisons.

Active target date funds or even some passive funds, but typically what the case is the What they're doing is, if they're not alleging that your target date funds or your QDIA has excessive fees or is imprudent, they're going to your ancillary funds. We're seeing the first time where guaranteed investment contracts or stable value funds are being alleged to not have the proper crediting rate.

We just saw that in the Hermel case, where they're saying a 3 percent crediting rate is unfair and you should have given a higher crediting rate. And we saw it in the Bed Bath & Beyond case, where there were claims that the plan was stopped, and interest rates are going up, and so the value of what you have in your account goes down and they're saying that's unfair, that you should have known you were going bankrupt. And you should have known that this was an issue and pulled it out of the stable value fund. So we're seeing more claims against ancillary investments in the plan and [fewer] where they're just going after the target date funds or the QDIA, where most of the money is very misleading because you read these complaints and you would think in the Hormel case, that all that they're suing is about that they have one investment or two investments and they have BlackRock LifePath really low-fee, big index funds.

And so we're seeing more claims against plans that have super-low-cost index funds and the plaintiffs are filing a misleading complaint against the few active funds in an otherwise diversified plan. We think the other place we're seeing where the puck is going in these type of cases — it is more performance cases, and that's because there is a higher damages model certainly higher than the record-keeping damages model, and we're seeing more performance allegations, less on a performance of active to passive and more comparing to the best plans.

And so you're seeing more, for example, JP Morgan target date funds, but they're being compared, not necessarily to the index funds, like what happened for years. They're now being compared to American Funds or T. Rowe Price. And why is that? Because those were the highest-performing funds of the last 10 years. You're not supposed to look in hindsight, but that's exactly what these complaints are doing. They're saying you had mediocre performance and you're comparing it to someone that had 90th-percentile or 100th-percentile performance. And so that's not necessarily a novel theory, but that's where the plaintiffs are trying to get more sophisticated so that the damage model could be just 1 percent off, and what we're seeing is more complaints against funds that either

had an inflation hedge when there was no inflation or some sort of conservative hedge, and you didn't need it because in hindsight, the market had significant performance.

Jennifer: It's tough because it's hard to take away as a plan sponsor from these suits what to do, right? Because there is no clear [next step], and there shouldn't be, right? Because it's supposed to be, you know, fiduciary discretion, but it's like money market, stable value. You know, you've got being sued for having money market and not stable value or having stable value and not money market.

I mean, it's the You know, darn if you don't, like, are you supposed to do? Right? And it's just, you do the best you can, and you have the best fiduciary process. And decisions you can [make] for your plan with a prudent process.

And that's now one of the things that I've been hearing about. That’s an area where people are a little bit more concerned about, like, “Oh, are we seeing more litigation in this area?” I don't think we've seen that so. fees are kind of the main that people are worrying about that.

I guess, any thoughts on that? Have you… is that correct? Have we not really seen any suits there? Do you think we will in the future?

Dan: There have been several, mostly by the Chesky Law firm, that have alleged that there should be lower fees as you get more assets in the plan, and then they compare it to, let's say Vanguard, which might have a more aggressive fee structure that goes down. There've been [fewer] cases than I would have predicted as well.

So, there's only a handful, but that's still an issue and it's still fodder for the plaintiffs bar. I think the reason there's been [fewer] cases is, in one of the cases, the court showed that financial engines [were] putting out a significantly good product and the fees were similar to what other investment providers are providing. So, we think there is a litigation risk, but it's an unfair litigation risk. And we would just recommend plan sponsors with their consultant, compare it to what other firms are putting out. And most of the firms have a similar structure regarding what it costs. The issue is our managed accounts.

Is it too expensive? And that's where you need to do your due diligence. That would be the claim: Financial engines and other providers have very similar fee structures.

Jennifer: That claim is no different than saying your large growth fund is more expensive than this other large growth fund, or you could have gotten a passive large growth fund instead of doing an active large. It's like the concept of you're paying too much for something. I mean, right?

Dan: That is correct.

Dawn: Another area we get asked about, staying on an investment theme here, when a 3(38)-investment manager is involved with the retirement plan, where the advisor has discretion over the investment selection and monitoring, rather than the plan sponsor

having that discretion, we've seen little to no litigation surrounding those. Is that accurate?

And why do you think that would be?

Dan: We are big fans of the 3(38) model, and we think it makes significant sense for a large plan, any plan, to consider delegating to a 3(38) qualified manager because it lowers your litigation risk. And it just makes sense because many committees, many fiduciary committees, need help, and the best way to get help is a qualified manager that can help you.

We're waiting for a decision in the Million Healthcare case. Both cases alleged that NFP used FlexPath and had a conflict … the 3(38) advisors, the 3(38) product, the FlexPath products, had a conflict because it was related to NFP. The claim against the plan sponsors, both Wood, the Multiple Employer Plan, and the Molina Health 401(k) plan, the allegation was that you didn't properly or prudently choose FlexPath as a 3(38) and then you didn't properly monitor FlexPath as a 3(38). The Wood decision from Judge Selna completely repudiates the Schlichter law firm against the Wood plan; it shows that the Wood multiple employer plan committee properly chose NFP as a 3(21) advisor properly vetted FlexPath as a 3(38) discretionary advisor, including looking at five other firms and then chose FlexPath. And so that case is valuable because it shows, what does a prudent process look like in choosing a 3(21) and 3(38) advisor? And the judge said that the Wood committee did everything right and even had an RFP to choose both 3(21) and 3(38) advisors. And then in the part of the case against FlexPath as a 3(38), it said that NFP did it properly because they had a way to manage the conflict.

There is a conflict. When you have a 3(21) related to a 3(38), but they structured their compensation for FlexPath so it wasn't based on assets, and so there was no financial incentive for any of the salespeople… Now it's still dicey when you have a 3(21) related to a 3(38), and that's why that case was filed. Most 3(38)s do not have a relationship and are separate.

But what you learn from the Wood case is that they had a proper process in choosing the 3(38). And then the allegation that the FlexPath funds underperformed, which is a classic performance case where FlexPath has an inflation hedge. There was no inflation in 2016 and '17, the same unfair case.

And the judge said that it's smart to have an inflation hedge as part of your glide path. And there was no underperformance, and you just can't compare it against the fund that doesn't have the same apples-to-apples investment glide path, so we don't know what's going to happen [with] Malina Healthcare, but it's the same case on whether you properly chose the 3(38) and whether they properly monitored. We believe Malina Healthcare will win now that it's in the same court as the Wood case in the Central District of California. And already one judge has said that NFP FlexPath handled the potential conflict and managed the investment properly. So, it's going to be very hard for a judge to say otherwise.

Jennifer: [It's] going to be really obvious when I talk about this, but I've not read these cases the way that you have. But one of the things, when I skimmed over the NFP decision, one of the things I found really interesting, I think… the comment from the judge was around custom target dates, right?

Where they didn't have performance when they were starting, right? Or they had little performance … And I think, you know, she was Hey, look, by, by definition, um, are going to have no performance to begin with, right? That doesn't make them imprudent because they have, you know, they're starting [with] no performance.

And oh, by the way, the Department of Labor suggests that you consider custom funds for… when you're looking at the DOL tips. So that was one of the things I've found interesting, which didn't have to do with the 3(38) piece you were just talking about, but does have implications, I think, for some of the things where people want to do custom things like that.

Dan: I think it's a valuable insight from the case because too often plaintiff firms will say it is imprudent per se to invest in something that's brand new.

And what the court is saying is you can simulate what is going to happen in the investment. And this particular investment. FlexPath is essentially three glide paths of BlackRock target date funds, which was the original target date fund.

So, there was a performance history that FlexPath had three different glide paths: conservative, moderate, and middle of the road. The moderate one was the generic off-the-shelf BlackRock LifePath fund. The claim was just unfair because there was a performance history. You could judge it. There were 10 to 15 years of Black Rock history from the oldest, most venerable, target date fund.

So that was an unfair claim, but the judge went farther, as you suggest, and said you can look at things. And there are ways to understand what's going to happen in the fund. And it does make sense to figure out how to get funds that match what your particular participant base is. The Wood plan is interesting because they were a merger of five different companies and they had engineers at higher salaries, they had workers in the field that were doing oil rigging, and they were not invested in the plan.

And the Wood committee was trying to figure out, they had a consultant, and the consultant was helping them, how do we get more people in the plan? And that's where a good quality advisor can help you. And that's why they chose FlexPath. Here's three different glide paths. Maybe we can get more participants to actually invest in the plan because they had a low participant rate with some of the companies that they were merging together.

Jennifer: Right. I'm going to get nerdy here in a minute, and then I think we're going to shift over to talking about fiduciary responsibility, which, now that I'm saying that I realize is also a nerdy topic, but bear with me. In your initial prep conversations, we talked about the challenge of maybe where your lawsuit gets filed.

Right now, right? So different courts seem to have different pleading standards, and some are, some cases are getting thrown out at summary judgment and some are getting past that phase with relatively similar fact patterns and claims. Can you [say] why it's important that we have some sort of uniform pleading standard across the country?

Dan: ERISA was supposed to be a nationwide law that gave plan sponsors, many of which have employees in multiple states, one standard for fiduciary liability. Plan sponsors are supposed to know. That these are voluntary plans. But if I offer a voluntary employee benefit, then I know what my responsibilities are because then I know I'm buying into fiduciary responsibility.

So you're supposed to know exactly what it is and what's happened in these cases, when you have the trial bar — I call them the ERISA police — when they're the ones becoming the policemen of what fiduciary law is, we're ending up with different courts.

It makes no sense that you're going to have the same investment in the Columbus, Ohio, company. And in Massachusetts, you get a different standard. The reason it's important to have one plausibility standard is for two reasons. First, we deserve discretion as plan sponsors and consultants and everyone, the plan sponsors, like if we're going to have voluntary benefits, we deserve to have the discretion to make judgments and not be second-guessed on unfair claims. And then we deserve a national fiduciary standard, which is a risk that was supposed to be that tells us exactly what that is.

That's not a plausible claim, and they, the plaintiffs, chose Texas for a reason. They tried to find a conservative judge. They didn't bring that case in Columbus, Ohio, or even Chicago, Illinois, where you might get Posner on the Seventh Circuit. That's not fair where the plaintiff lawyers know that they can have a different standard of care.

So we deserve, as plan sponsors, one standard of care, and we deserve a high threshold to accusing a plan sponsor of fiduciary malpractice. That's a serious claim. It's a serious claim to be accused of a conflict of interest, like in the Wood case. It's a serious claim, and if you have too low of a bar in some parts of the country, you're allowing unserious, attenuated, far-fetched claims, and that's not fair. Because the plaintiff bar knows, if I can get a low pleading standard, then I can leverage the risk, the high cost of defense. And leverage the significant potential liability and leverage the embarrassment. Some companies find it embarrassing to be sued. And so you leverage all of that unfairly. And that's why we need a high threshold to sue in America.

And we don't have that. We have disparate pleading standards. And that is unfair for all of those reasons.

Dawn: That's good, Dan. I appreciate the perspective on that. I also appreciate that you worked in the term ERISA police. I'm going to start using ERISA police. I haven't used that in my training, but I'm going to adopt it. So Dan, you're involved in the fiduciary liabilities side of the equation. Can you give us a ballpark on the cost of these cases? What's this costing plan sponsors and you as the insurer?

Dan: Thank you for asking that. If I can relate it back to the last question, when a judge has a low threshold to allowing a claim, the thought is, I'm going to give all the benefits to the plaintiff, the poor participant or the plaintiff lawyer, and then you got to prove it at trial. And I'm just going to give you every benefit of the doubt. And the thought is, there's no harm there because I'm giving you your day in court and then you can prove it or not prove it. And the harm is that it costs millions of dollars. To defend these cases and the reputational harm, which is unfair, but let's put numbers on this. When you have a case — the Wood case is a good example — the plan sponsor had three different complaints against them. They won the first motion, dismissed and wash, rinse and repeat, plaintiffs bring a new complaint. Wood won the second motion to dismiss, and then there's a third complaint. So the motion to dismiss stage can be anywhere from $500,000 to $2 million because you can have three different complaints and they keep trying until they get something over the threshold.

So you can spend up to $2 million on the motion to dismiss. Then the case goes into discovery, and you can spend, you can be at $500,000. Then you can be, you can spend $5 million in that phase or more. You get your next try at summary judgment and then you can go to trial. And so you can, to get up to trial, you can be anywhere from $5 million to over $10 million.

And then to get through trial, you can be anywhere from $8 million to $15 million. And these are based on actual cases. Just last week we saw three decisions in different phases of the cases. You saw the American Airlines case get through, get allowed to go past the motion to dismiss. Then you saw a claim against Goldman Sachs, which was thrown out at summary judgment and affirmed in the Second Circuit. That's the next phase on when a judge can throw out a case, and many judges say there's issues of fact, and then you saw a trial decision. All in the same week, we saw all three claims, in my opinion, are far-fetched and are unfairly sued, and you can spend $2 million on the motion to dismiss the case. You can spend $5 to $8 [million] or more on the summary judgment, and you can go all the way up to $15 [million] or more on the trial. There's real money. Now, fiduciary insurance pays for a significant amount of this. Five years ago, most fiduciary policies had very little retentions or deductibles and the fiduciary insurance kicked in 1 or close or $50,000 or $100, 000. The big change is because there's been like $1.5 billion in settlements on the 475 cases, mostly paid by fiduciary insurance, the fiduciary carries to stay in business, have instituted. Significant retentions, whether excessive fee case retentions or class action retentions, and some of those retentions for a billion-dollar plan can be anywhere from a million dollars to five million dollars or more. It depends on the risk tolerance of the company. So we now have, when there's a complaint filed, plan sponsors have dollar one, where they're getting hit to their balance sheet on dollar one, anywhere from a million dollars to $5 million. And it does affect the cost of quality fiduciary insurance. We believe that fiduciary insurance, because of a quality fiduciary carriers, our company being one, other quality companies, Chubb, AIG, Travelers, a lot of good companies are putting out quality policies at reasonable premiums. There is a perception that premiums are high. They're clearly higher than they were five years ago. And the reason is there's $1. 5 billion of settlement. We want to all remain long-term viable. We're in that we need to make money as well. And so there's significant amount of money being spent on these cases. Catherine, sometimes we hear from your clients, plan sponsors or lawyers, saying, if we went to trial, more of these cases would be thrown out. And we don't disagree with that. And the Wood case went to trial, more cases went to

trial last year than ever before. The problem is it costs a lot of money, and some plan sponsors want to get rid of the case that they want to, there's significant money and there's other issues. And then there's the litigation risk. The damages models are very high in these cases, and there's the risk of if you have a $20 million tower of insurance. The damages models are often higher than the $20 million. So it's just not so easy for someone to say we should try more of these cases and it'll make the plaintiffs go away. Because there's just significant settlement leverage in these cases. And thank you for letting me address the issue of what it costs because it's very expensive.

Dawn: Yeah, those are not insignificant numbers that you mentioned. And I also appreciated the comment on the reputation. Some people don't even read that much detail into these various cases. They just see your name come across in the news about being sued for some fiduciary liability.

You touched on this a little bit, Dan, but just to make sure, we get lots of questions about how to mitigate these risks and how fiduciaries can protect themselves. And so will you just step back maybe and talk about fiduciary liability insurance and tell us what it is, who should have it, and what it typically covers?

Dan: Yes, fiduciary insurance is essentially the malpractice policy for fiduciaries of plans. Doctors need malpractice insurance. Lawyers need malpractice insurance. So think of it the same way. Someone can accuse you of fiduciary breach, essentially a malpractice claim. They're accusing you of negligence, and so you need a malpractice policy. Fiduciary liability insurance is designed to protect you against claims that you did something wrong in the management or fiduciary duty for a sponsored plan … that's sponsored by a plan sponsor. The fiduciary insurance will cover the plan itself, and it covers anyone involved in the plan, including fiduciaries of the plan, or in some plans that are standalone, employees of the plan.

So all plan fiduciaries, because you have individual liability. It's covering your individual liability, but it's also covering the balance sheet risk. It's covering the plan itself. The main things it covers is we have a duty to defend you and hire a lawyer for you. So we will defend you against claims of breach of fiduciary duty. Misadministration of the plan, or even settler functions, changing benefits or deciding to make a change in the plan or even constructing the plan. A modern producer policy will even cover those business decisions and settler functions. So we're going to cover the duty to offend and then indemnification if there's a settlement, or if you go to trial and there's a judgment.

And that's our job to protect you. So fiduciary insurance is super critical and all plans have it. And hopefully you buy it from a carrier that knows what they're doing and can help you in potential litigation and help you get the right lawyers and position your company for success in these cases. Beyond that, there is significant risk management that can be done. All three of us agree that there is capricious, unfair litigation. Even if you do every single thing right, you still can get sued. The Wood plan, you can read that decision. They did everything right, and they still were unfairly sued. And so you do need fiduciary insurance to help you. There are things that we believe that you can do. And I know CAPTRUST has ideas. And we all know that you can't eliminate all litigation, but we believe you can eliminate some of the litigation. And the things that we talk about is first look back and say, what are the lawsuits alleging? Your record-keeping fees are too high,

your investment fees are too high, or your investments are underperforming. So starting with record keeping, we think that plan sponsors should seriously consider paying for the record-keeping fees, and we realize that most plans do not and a lot of the objection is you have a lot of retirees that are no longer at the company, and that's a fair issue. But if you really want to take the issue off the table, you pay the record-keeping fees.

We think that as you get bigger, you should eliminate revenue sharing and go to per-participant fee, if it makes sense, depending on what your plan makeup and the size of your participant count and the average size of your balances doesn't always make sense. If you have small participant account balances, but at least consider a per-participant fee that's benchmarked below average and eliminate revenue sharing.

That lowers the risk. Nothing wrong with revenue sharing, but it's not clear in your form 5500 and it creates share class issues and it increases your litigation risk. Again, nothing wrong with it, but it increases your litigation risk. Then investment fees: We think that you should have at least some passive funds in your diversified fund. You should compare passive to passive and then you should, in your active funds, you should compare the fees. You should look at the share classes. That's where you need CAPTRUST for help because it's very hard to know and keep up with all the share classes. You need help with that. You need to make sure you're in the lowest possible share class, [that] reduces your litigation risk. On investment performance, we think those are the most insidious, unfair risks, because there's the issue of how long you keep an underperforming fund. Plaintiffs want you to remove it after six months. That can't be right. And then there's the issue of what you're comparing it to, and how long you keep the funds. We think you lower your litigation risk if your QDIA is an index fund. That doesn't mean that's the right mix. If you have the American Funds and T. Rowe Price Targeted Funds, you would have done better than all index funds. So we're not saying that you have to be in index funds, but it does lower your risk. So we think you should at least consider it and have a reason not to have a significant amount of a mix of index. So with the active funds and as far as performance, that's where we think you need an advisor, at least a 3(21) advisor that is documenting and picking what the right comparator is, put it right in the record of your minutes on what your comparator is, why you're keeping the funds and how you're looking at performance. And we think that the cases have taught us that a lot of lawyers have recommended putting a little amount in the minutes because they used to tell you that increases your risk. We're seeing the cases show that the plaintiffs are saying it's not in the minutes so you probably didn't do it. And so we think your firm does it as well as anyone.

Jennifer: Yeah, I think one of the hardest conversations sometimes we have with plan sponsors is, sometimes these things are aligned, but they're not, So trying to reduce your fiduciary risk or remove these lightning rods from your plan and doing what you think is in the best interest of your participants, sometimes those are not actually, those are two different courses of action.

And so you have to have both. It's good to always have both hats, but at the end of the day, you know, you're trying to do best for your participants. And that means maybe increasing your risk of being sued, unfortunately, so I guess maybe just to clarify, you just hit on a few of these things.

So I can kind of what you were saying, but maybe more specifically, can you talk about the kinds of things when you're underwriting a plan? What are the types of things you're looking at? You know, key cost you might flag for a plan again, just from your perspective, right?

Your goal is to reduce, you know, right? Yep.

Dan: That is correct. We focus on writing the best plan sponsors in America, we're different than some other fiduciary carriers in that we don't look at everyone the same. And we're trying to write the best plans in America, the plans that we think have a lower chance of being sued. And if they're sued, we believe that they have the most defensible record. What are we looking for? We start reverse engineering from what the risk factors are for a plan sponsor in the modern litigation environment. And first, we look at who is their advisor, do they have a 3(21) or 3(38) advisor, are they getting help, and do they have a good fiduciary process? So we're trying to see, sometimes we're given the reports, and we like to see that, and we think that's the best practice, and then we know that they're meeting quarterly.

And it's hard to underwrite to that, but we do that through knowing that we know who we think are the best advisors in America, and so we want to make sure that we're not doing this alone because we think everyone should have a 3(21) or 3(38) advisor. Then we look, we think the easiest thing to look at for a defined contribution plan is the 408(b)(2) plan fee disclosure. And we start looking at what [are] the plan assets. We know if you get bigger, over $500 million, you have a higher risk factor. And then we see how many participants are in it, what's the average account balance? And that gives us an idea of, okay, what's our thoughts? And then we look at the record-keeping fees and is it on a per-participant basis?

Is it asset-based? Is there revenue sharing? If there's revenue sharing, is it rebated back to participants? We prefer no revenue sharing in the ideal account, but we understand that there [are] some. Then we look at the all-in fee of the plan. And it doesn't make sense for this plan.

Does it make sense in terms of what their QDIA is? It is an active plan. It's going to have a higher all-in fee. So we take that into consideration, but we are looking at the all-in fee. Does it make sense? We do look at the ICI benchmark study and have a feel as to, does this plan make sense in terms of what investments they chose? Then we start looking from the highest asset investment on down just right from looking at a Fidelity fee disclosure or Embark. We just look straight down. Embark does it by investment managers. Fidelity does it by the size of the investment. Usually the first one is going to be the 500 index. Is it one, two, or four basis points?

Does it make sense? Is there a share class there? Then we're looking at the QDIA and say, okay, it's most likely a target date fund. Is it active or is it passive? It's active. Have these funds done well? I, we were looking at what Morningstar says about these funds. We know that T. Rowe Price and American Funds and Fidelity Funds, they've done well. We look at the share class, is it a revenue-sharing share class? And if it's a fund that we don't know, we go to the 404(a)(5) fee disclosure or the CAPTRUST report or whoever advisor

and we say, okay, what are the performance of these funds? And just get a feel. Then we look at ancillary investments.

[Is] there anything that just seems out of whack? We know that there's a good plan. We'll have some active funds mixed in. We do look at the stable value or guaranteed investment contract. We look if there's employer stock, less of an issue than 10 years ago, but we still want to get a feel on, is there an exposure, employer stock, obviously adds exposure and get nothing wrong with it, but there is an exposure, especially if it's a company that had stock go up or down. And then we're just taking an overall feel once we've tried to get some feel of the record-keeping fees, the investment performance. Sometimes we get those questionnaires and someone has asked, Have you done an RFP? We don't think you need to do an RFP every year or even every three years. We don't buy into the plaintiff lawyers. We feel if you have a CAPTRUST or other investment manager, you're already getting benchmarked every single quarter and every single year.

But we do like to see, the final thing we look at is, again, one of the lessons of litigation is, have there been any changes in the last five years? And because fees have gone down and investments change, if we learn anything from the litigation, the best defense, to prove that you're not asleep at the wheel, is to show that you made something, some change, like your fees came down over six years because they just, they have come down, or your record-keeping fee was 50 and now it's 44, or it was asset-based.

You got bigger and now you went to per-participant and maybe you removed one of your 20 investments over the last several years. That's the final thing that we look at. And we just get an overall feel. We don't get to interview the clients very often. And so we're trying to quote plans and ensure plans that have [an] excellent fiduciary process.

So that's some of our thoughts on how we get there.

Jennifer: That's super helpful and I think probably more detailed than planned sponsors would think. They think you might not get into the individual specifics of, you know, their large growth fund and things like that. But it makes sense as we've been having this conversation.

I think you guys certainly dig in more than maybe others do. All right, Dan, I saved the hardest question. I gave you all the easy questions earlier and now I've got the hardest question for you to wrap up. What does retirement look like for you, Dan Aronowitz?

Dan: For me, it's an opportunity to do something for the community or take the things that I've learned and no longer need to make money. Retirement for me is to work with my wife in the community and try to make a difference. I've learned how to build a business. I've learned certain skills and I want to take those skills and reinvest it in my community without any need to have to think about making money anymore.

So retirement for me is working in my community and trying to help others do what I got to do, which is, I got the American dream. I got to build a business in America in the best 30 years of American history in which entrepreneurship and value creation was unprecedented in American history. I think we've all been lucky to be in this last 30 years.

So I've benefited in terms of working in an industry where you can build a business, sell your business, and so I want to teach others. I'm going to spend my retirement — which is sooner rather than later — for me… I want to teach others how to enjoy the American dream. And that's what retirement looks like to me.

Dawn: Really well said, Dan. And I would also argue that you're doing a lot for this industry now, and we appreciate that. So thanks for all the work you're doing. Thanks for your time today and sharing your expertise. And thank you all for listening today. Don't forget to like and subscribe wherever you get your podcasts. And we'll see you all next month. Rounding out our podcast is our Minute with Mike, where Mike's going to discuss the differences between reporting and disclosure for retirement plan sponsors. Take it away, Mike.

Mike Webb: This month, we will discuss the differences between reporting and disclosure for retirement plan sponsors. Reporting requirements are the requirements for plan sponsors to furnish certain documents to a government agency, such as the Department of Labor, the Internal Revenue Service, and, in the case of defined benefit plans, the Pension Benefit Guaranty Corporation.

The most well-known example of a reporting document is ERISA Covered Retirement Plans. More commonly known as form 5500. However, there are other reporting documents as well, most of which are directly identified by number. Disclosure requirements, on the other hand, relate to documents that are required to be furnished to plan participants, such as the Summary Plan Description and the Summary Annual Report for ERISA plans, and the Safe Harbor Notices for Safe Harbor Retirement Plans.

There are a daunting number of documents that are required to be provided to plan participants, either automatically or upon the request of the plan participant. Fortunately, the Department of Labor issues a brochure titled Reporting and Disclosure Guide for Employee Benefit Plans that outlines the disclosure requirements.

It is important that plan sponsors follow all the reporting and disclosure requirements for their retirement plans, as there are often penalties for noncompliance.

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