



Accessing Participant Data – Another Lawsuit

Philip Chao, Experiential Wealth, February 17, 2020

BACKGROUND

On January 24, 2020, a complaint (“Harman Complaint”) was filed in the U.S. District Court for the Southern District of Texas against Shell Oil and Fidelity (“Defendants”) by Harmon, et al, a class of participants of the Shell Provident Fund 401(k) Plan (“Plan” or “Plaintiffs”) for violations of ERISA’s fiduciary duties and prohibited transactions rules. As of December 31, 2014, the Plan had \$10.5 billion in assets and 36,898 participants with account balances.

In addition to the claim of unreasonable Plan administrative and investment (including managed account) expenses and failure to monitor plan investments, the Plaintiffs further claims that:

“Defendants allowed the Fidelity Defendants to use Plan participants’ highly confidential data, including social security numbers, financial assets, investment choices, and years of investment history to aggressively market lucrative non-Plan retail financial products and services, which enriched Fidelity Defendants at the expense of participants’ retirement security.”

The Harmon Complaint alleges that Fidelity is a party-in-interest and owes a fiduciary duty to the Plan participants and beneficiaries, and as such, Fidelity has carried out transactions that are expressly prohibited by 29 U.S.C. §1106 and are considered *per se* violations. Under §1106(a)(1)(D), it states that “a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect transfer to, or use by or for the benefit of a party in interest, of any assets of the plan.”

Historically, a recordkeeper has not been deemed as a plan fiduciary. This status challenge will again be decided by the Court and not discussed further hereunder.

FIDELITY TRADE PRACTICES – IN ITS OWN WORDS FARMING ITS OWN BOOK

According to the March 20, 2017, Fidelity v. Nordstrom, et al, complaint (“Nordstrom Complaint”) filed in the U.S Eastern District Court of California (case # 2:17-1t-295), Fidelity brought a claim against its ex-Financial Consultant, John Nordstrom, for alleged use of confidential and trade secrets of Fidelity after termination to compete with Fidelity, among other claims. In the Complaint, it states that:

- Fidelity is unique in the retail brokerage field because Fidelity does not have Financial Consultants make “cold calls” to persons who have no relationship with Fidelity or who were not referred to Fidelity. Fidelity requires its Financial Consultants to develop service relationships based upon leads that Fidelity provides. Fidelity provides leads to its Financial Consultants from two primary sources.
 1. Fidelity forwards information to its Financial Consultants from prospective (non-current) customers who initiate contact with Fidelity either by telephone, over the internet, or in person; and
 2. Fidelity forwards information to its Financial Consultants regarding customers, with whom Fidelity already has a relationship, when those customers experience “triggering events,” such as Fidelity 401(k) distributable events, which may lead to interest in Fidelity’s retail financial services. A significant portion of Fidelity’s business is derived from servicing the needs of Fidelity’s existing customers.
- Fidelity’s success with its unique lead-based approach to supporting Financial Consultants is directly tied to Fidelity’s trade secret customer information, which is among Fidelity’s most important assets. Fidelity’s trade secret customer data includes the names of and contact information for Fidelity customers and includes financial information relating to those customers, such as customer financial statements, investment goals, investment history, assets, income, and net worth. Fidelity developed its customer data through significant investments of time, labor, and capital.
- Fidelity maintains its customer data in confidence, both to preserve Fidelity’s competitive advantage in its customer base and to meet customer expectations that Fidelity will maintain sensitive, personally identifiable information (including his/her identity as a customer, contact information and financial information) in confidence. Fidelity derives substantial economic value from preserving its customer data as a trade secret.

PARTICIPANT DATA LOADED ON THE SALES CONVEYOR BELT

The Harman Complaint mirrors the Nordstrom case:

- Fidelity has in its possession sensitive, personal and financial data, call center notes, and access to knowledge of “triggering events” such as when a Plan participant is nearing retirement, among other valuable information (“Confidential Plan Participant Data”).
- Plan participants have an expectation that their Confidential Plan Participant Data will be protected by the Plan sponsor and not disclosed outside of the Plan for non-plan purposes.
- Fidelity has several affiliated businesses that sell non-plan financial products and services. Fidelity shares that data with salespeople at its affiliated companies, including but not limited to, Fidelity Brokerage Services and Fidelity Personal and Workplace Advisors. (They are also Defendants.)
- Once Fidelity Investments Institutional Operations Company Inc. (“FIIOC”), the recordkeeper arm of Fidelity, receives Confidential Plan Participant Data, it uploads Plan

participant data to a customer interaction software program, Salesforce. Each time a Fidelity representative has an interaction with a customer, information concerning that interaction (i.e., the substance of the discussion) is recorded in the “Comments” or “Notes” section of Salesforce. The Salesforce data is shared across all Fidelity affiliates and is used by Fidelity to solicit the purchase of non-plan retail financial products and services.

- Fidelity uses the valuable Plan asset of Confidential Plan Participant Data to derive substantial revenue from the sale of individual retirement accounts (“IRAs”), high interest credit cards, life insurance, banking products, advisory accounts, individual brokerage accounts with tools such as Fidelity’s Active Trader Pro that encourages market timing and active trading (and therefore increases Fidelity’s fees and Plan participants’ risk), options trading accounts (where investors’ losses are potentially limitless), 529 accounts, and other retail products and services. Fidelity solicited Plan participants to purchase these products, including soliciting the named Plaintiffs through multiple platforms, including phone calls, in-person meetings and sending emails, using their Confidential Plan Participant Data.
- The revenue generated by these sales is significant and often represents multiples of the recordkeeping fees received by the service provider. The illustration below is used by professionals in the retirement plan industry to demonstrate the effect of non-plan product sales by recordkeepers with affiliated businesses on total recordkeeper compensation:

USE OF PARTICIPANT DATA & THE ERISA EXCLUSIVE PURPOSE RULE

Count IV of the Harman Complaint alleges that FIIOC was required to discharge its duties with respect to the Plan solely in the interest, and for the exclusive purpose of providing retirement benefits to, Plan participants and beneficiaries. However, FIIOC’s disclosure of Plan participant data to Fidelity Defendants for the purpose of soliciting the purchase of non-plan products was a fiduciary breach in that the disclosure was for the purpose of providing benefit to Fidelity Defendants and not for the exclusive purpose of providing benefits to Plan participants and beneficiaries.

Count V of the Harman Complaint alleges that Shell Defendants disclosure of Plan participant data to FIIOC, without any restrictions as to the use of Plan participant data, was a fiduciary breach in that sensitive, highly confidential personal financial data was disclosed and used for purposes of soliciting non-plan retail products from Plan participants. By allowing Fidelity Defendants to use Confidential Plan Participant Data to solicit the purchase of retail non-plan products, Shell Defendants failed to act in the exclusive interest of participants.

CONCLUSION

In today’s ever digitized world, we do not only have to protect our natural selves but also our digital selves. Maintaining confidentiality and privacy protection are not only an individual’s responsibility but are the shared responsibility of employers and plan sponsors. As fiduciaries, plan

sponsors are held to the highest standard to serve solely in the interest of participants and beneficiaries. From the receipt, possession, disclosure, usage, transfer, accessibility to destruction of participant data, plan sponsors should have a clear and well thought out process and view. The question now facing plan sponsors, recordkeepers, asset managers and advisers is who has ownership of the data besides the participants and beneficiaries. The plaintiff bar is pushing to see the boundaries or limits of data ownership, usage and rights by plan sponsors and service providers.

In the August 10, 2016, class action case against Vanderbilt, the decision was based on the belief that participant information should be treated with care and should only be allowed to be used for marketing or sales purposes if participants grant their permission for such use. Regardless if participant information should be deemed Plan Assets or not, there is no question participant information is participant asset.

In the August 17, 2016, class action against Northwestern University, the decision in favor of Northwestern rested on the issue of participant information is not plan asset and thus there was no issue pertaining to prohibitive transaction or self-dealing.

The 2020 Shell case alleges:

- Improper use of confidential, highly sensitive financial information that is solely the property of Plan participants (similar to the Vanderbilt case);
- Improper use of a plan asset, which is confidential, highly sensitive financial information that is solely the property of the Plan participants;
- Loss of confidentiality of Plan participants' records and financial dealings; and
- Continued solicitation of Plan participants, using their Confidential Plan Participant Data, under the auspices of being the chosen Plan service provider to purchase non-plan retail financial products and services.

It is reasonable to expect an increasing number of complaints will be filed against plan sponsors and their service providers regarding data usage and privacy. Plan fiduciaries should develop clear parameters as a part of a prudent process for the protection and treatment of plan and participant data and the guideline for the scope of data usage by their service providers.

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