ENCORE FIDUCIARY℠
Divison of Specialty Program Group, LLC

The Encore Fiduciary Large-Plan Recordkeeping Benchmark Study

What Large Defined Contribution Plans Pay for Recordkeeping Services

By Daniel Aronowitz, President, Encore (Formerly Euclid) Fiduciary

January 2024

America's Fiduciary Insurance **Experts**.

Introduction

Hundreds of fiduciary imprudence lawsuits have been filed in the last eight years alleging that large plan sponsor fiduciaries are "asleep at the wheel" by allowing recordkeepers to charge excessive fees to plan participants. But while the initial lawsuits against universities and other corporate plans might have alleged legitimate claims of high asset-based plan administration fees and uncapped revenue sharing, many of the current purported excessive fee cases are based on misleading facts, pure conjecture, and improper benchmarks. In some cases, the recordkeeping fees alleged in these fiduciary malpractice lawsuits are just plain false. But even when the fees at issue are properly alleged in the complaint, which is very rare, the purported recordkeeping benchmarks proposed in these lawsuits have no support in reality.

The problem is that there is no national, reliable benchmark to demonstrate what large plans actually pay for recordkeeping fees. With this void of reliable data, a cottage industry of plaintiff law firms continue to file fiduciary malpractice lawsuits designed to mislead busy and distracted federal judges who lack context or knowledge as to whether the plaintiff benchmarks are legitimate. They are not. Plaintiff firms masquerade as helping plan participants, but in most cases they are misleading courts with flimsy allegations that lack credibility. Plaintiff law firms routinely file cases comparing the targeted large plans to a random assortment of cherry-picked comparators of super low fees – all designed to mislead courts into believing that all large plans pay under $20-25 per participant for recordkeeping services. It is a false and prejudicial litigation tactic against America's large-plan sponsors, who are forced to spend millions of dollars to defend and settle illegitimate fiduciary breach lawsuits.

Given the rampant misrepresentations of actual fee levels in the excess fee lawsuit claims, federal courts have not been given the proper context to make informed decisions on threshold pleading motions. The Supreme Court in Hughes v. Northwestern, 142 S. Ct. 737 (2022), held that all excess fee imprudence claims based on circumstantial evidence must be subjected to context-based scrutiny in order to survive as a plausible lawsuit. The only credible way to meet this context-based plausibility standard in an excess recordkeeping fee case is if the fees are egregious based on a reliable, third-party benchmark. Fees within a reasonable range of established benchmarks — not plaintiff-manufactured benchmarks — are not plausible under the Supreme Court pleading standard.

Encore (formerly Euclid) Fiduciary set out to fill the void of reliable recordkeeping data to provide context that shows what large plans actually pay for recordkeeping services. Encore reviewed Department of Labor-mandated fee disclosures from recordkeepers for over 2,500 large plans with assets over $100m and over 1,000 participants for the years 2020, 2021, and 2022 and compiled the results of the recordkeeping fees. The results of our recordkeeping survey demonstrates that while large plans pay significantly less than small plans under $100m in assets, large plans still pay significantly more than what the purported fiduciary malpractice lawsuits are alleging. Under the Encore recordkeeping database, most excess recordkeeping fee claims lack credibility and should be dismissed.

The following analysis reviews: (1) the type of misleading benchmarks that are being used in excess fee imprudence cases; (2) the results of the Encore Fiduciary recordkeeping benchmark survey; and (3) how the more reliable Encore benchmark survey statistics can be applied to debunk pending excess recordkeeping fee imprudence cases, using the January 2023 case filed against U.S. Bancorp as an example.

The Benchmarks Used by Plaintiff Law Firms in Excess Recordkeeping Fee Cases

Given the lack of a reliable benchmark for what large plans pay for recordkeeping services, plaintiff law firms have filled the void with misleading comparators to support their fiduciary malpractice claims. The false and improper recordkeeping comparators used by plaintiff law firms fall into three broad categories: (1) comparing distorted small plan statistics to large plans; (2) claiming that Fidelity has represented that its large plan recordkeeping services is worth $14-21 per participant; and (3) cherry-picking five to ten random large plans with purportedly low fees to claim that all large plans should have similar low fees.

Plaintiff Benchmark Tactic #1:

Distorting small-plan recordkeeping statistics from the 401k Averages Book:

Large plans should pay less than small plans for the same type of recordkeeping services. It is hard to argue with that premise. But that assumes that you can trust what plaintiff lawyers claim small plans actually pay. Unfortunately, you cannot believe any number asserted by the current plaintiffs' bar in an excess fee imprudence lawsuit, even when they are citing from a published study.

The best example is how plaintiff law firms have repeatedly misrepresented the published results in the annual 401k Averages Book. A common tactic for the excessive fee plaintiffs' bar is to claim that the recordkeeping fees of challenged large plans are too high based on comparisons to smaller plans documented in the 401k Averages Book, which gives examples of the recordkeeping fees paid by plans under $200m in assets. The theory is that if the small-asset plan cited in the 401k Averages Book pays a certain low amount for recordkeeping fees, then large plan fiduciaries with more bargaining leverage acted imprudently if they do not pay significantly less than the small plan. This theory is perfectly logical, except that plaintiff firms do not accurately depict what the 401k Averages Book states.

A recent, but common example, is the claim in the Matney v. Barrick Gold excessive fee case that plans with $200m in assets pay only $5 per participant in recordkeeping fees. Participants alleged in the Barrick Gold case that the recordkeeping fees for the $500m+ asset Barrick gold plan were too high because the 401k Averages Book supposedly found that smaller $200m plans pay only $5 per participant for recordkeeping fees. Consequently, plaintiffs alleged that larger plans like the Barrick Gold $500m+ plan with more leverage should pay substantially less than $5 annually per participant. The claim is false because no plan in America - large or small - only pays $5 for recordkeeping fees. Indeed, the cited chart in the book, which is never copied into excess fee complaints, shows that the same plan paid over $160 in indirect revenue sharing for a total of at least $165 per participant. Here is the chart in the 401k Averages Book referenced, but not included, in the Barrick Gold complaint to support a claim of fiduciary malpractice:

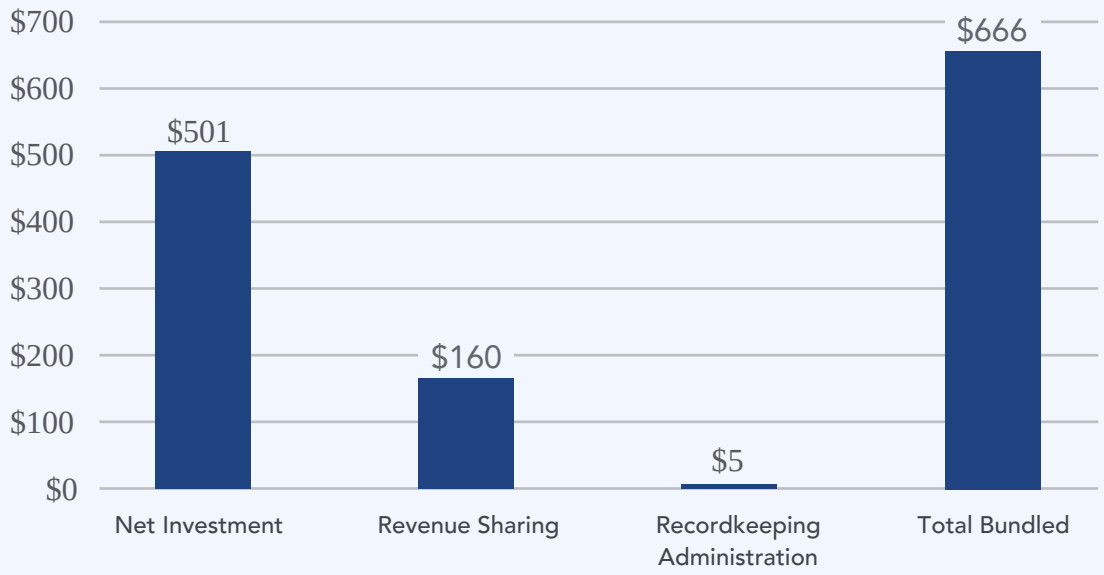
This 401k Averages Book chart shows that the average participant in a $200 million plan with 2,000 participants pays $666 in recordkeeping and investment fees. It further shows that plan recordkeeping is paid almost exclusively from revenue sharing with only a marginal $5 direct recordkeeping fee. The total recordkeeping fee for the average participant in the $200m plan is $165 per participant – not the $5 per participant amount claimed in the Barrick Gold lawsuit and many other fiduciary imprudence complaints. If you accept the premise that large plans with greater leverage should pay less than smaller plans – and we generally accept that premise if the quality and type of recordkeeping services are the same – then large plans should be judged against the correct and truthful $165 average paid by $200m plans.

2,000 Participants and $200,000,000 in Assets

Chart 24.8

Average Plan Cost Per Participant

(Illustrating Net Investment and Revenue Sharing Split)



Source: The 401k Averages book, 20th Edition

Plaintiff Benchmark Tactic #2:

Allege that Fidelity Has Stipulated that its Recordkeeping Services are only worth $14-21 Per Participant.

The second plaintiff benchmark tactic to assert excessive recordkeeping fees is to claim that Fidelity, the recordkeeper for more than sixty percent of large plans because of its high-quality system and services, has admitted that its recordkeeping services for large plans are only worth $14–21 per participant. Fidelity did no such thing, but that has not stopped plaintiff law firms from making these repeated representations in federal courts across the country. This tactic is used in numerous cases, including the excess fee cases against companies like Humana, Koch Industries, and Centene Corporation, among others.

In Williams v. Centene Corporation, filed on February 22, 2022, plantiff's used this tactic in the excess fee complaint:

"Let's start with what Fidelity itself would pay if it were in Defendants' shoes. In a recent lawsuit where Fidelity's multi-billion plan with over 58,000 participants was sued, the parties [] stipulated that if Fidelity were a third party negotiating this fee structure at arms-length, the value of services would range from $14-21 per person per year over the class period, and that recordkeeping services provided by Fidelity to this Plan are not more valuable than those received by other plans of over $1,000,000,000 in assets where Fidelity is the recordkeeper."

Citing Moitoso et al. v FMR, et al, 451 F.Supp.3d 189, 214 (D.Mass 2020) [paragraph 89 of the Complaint].

The argument that Fidelity has somehow conceded that its recordkeeping services are only worth $14-21 per participant in a large plan is used in many excessive fee cases. Nevertheless, it is a false and prejudicial narrative. The *Moitoso* case alleged excessive fees in Fidelity's own plan. The parties in that case entered into a stipulation for the limited purpose of resolving a discovery dispute. Like many stipulations, the *Moitoso* stipulation reflected a compromise between the parties to that case about the value of the recordkeeping services that Fidelity provided to its own plan. The stipulation stated on its face that it was "offered for the purposes of the [*Moitoso*] litigation only," and the parties agreed not to "contest the validity of the stipulation[] in the context of this litigation only."

It is not relevant to the allegations in any other case, and it does not reflect the value of the recordkeeping services that Fidelity provides to different plans pursuant to different recordkeeping contracts for a different set of services.

Fidelity has openly disputed the representation in subsequent cases, but that has not stopped this prejudicial tactic. The logical conclusion of the $14-21 assertion opens up nearly every large plan in America to be sued for fiduciary imprudence. The reason is that nearly every large plan, including plans with over $1B in assets, has recordkeeping fees above $21 per participant. Federal judges tasked with evaluating whether fiduciary malpractice claims are plausible, however, have limited time and lack of experience with ERISA plans. This has allowed many excess fee claims to survive a motion to dismiss based on this false benchmark.

The excess fee plaintiffs' bar knows that the Fidelity argument is disingenuous. But again, their business model is not about credibility or truth. It is about misleading a federal judge into allowing discovery into the case, and then leveraging the huge defense costs into a lucrative settlement. Plaintiff firms keep using the disingenuous Fidelity stipulation argument because it works often enough to score settlements.

Plaintiff Benchmark Tactic #3:

Comparing Cherry-Picked Comparator Plans with Super Low Fees Without Proper Context or Proof.

The most common tactic used in recent excess fee complaints is to include a chart of five to ten large plans with super-low recordkeeping fees from across the entire nation to create the impression that these plans are representative of what the majority of large plans pay. There is no proof that the comparator fee numbers are correct or representative of the majority of large plans in America, but the same plans are cited over and over in many excess fee cases. Plaintiffs know that their allegations are presumed true for purposes of a motion to dismiss, and they exploit this pleading standard advantage. These cherry-picked, random plans give a misleading perspective as to what the actual universe of large plans pay for recordkeeping fees.

A recent example of this tactic is the excess recordkeeping lawsuit filed on September 27, 2023, in *Ulch v. Southeastern Grocers* in the Middle District of Florida. Plaintiffs use Form 5500 direct compensation disclosures to claim that Southeastern participants paid between $13.48 in 2017 and $57.18 in 2021 in recordkeeping fees to T. Rowe Price, and somehow assert that Southeastern participants paid an average of $73.72 per year. The math does not work, but this is common in excess fee cases. Form 5500 data includes transaction fees like loan and QDRO fees that have nothing to do with recordkeeping and thus is not a reliable indicator of what participants pay. Most form 5500 recordkeeping fee data are inflated by transaction fees. The $13.48 fee in 2017 undermines any thought that the numbers are reliable to support a fiduciary malpractice claim. But our focus in this analysis is on whether the benchmarks used by the plaintiff lawyers to claim that the $57.18 fee in 2021 – even if correct, and it is not – is evidence of excessive and imprudent record-keeping fees. The complaint in paragraph 83 provides the following chart of "comparable plan (i.e., meaningful benchmarks) with similar numbers of participants and assets under management for the year 2021":

The chart is designed to give the impression that $1B asset plans with approximately 10,000 participants pay between $4.17 and $21.76 per participant annually for recordkeeping services. Plaintiffs' liability theory is that Southeastern fiduciaries committed fiduciary malpractice by allowing fees that are nearly twenty times higher than the Netflix fiduciaries, or 3.5 times fiduciaries serving on the Ralph Lauren Corp. plan committee. The chart looks very official and authoritative, and misleads many federal judges assigned to these cases, but it is not.

How this plan compares to the Encore (Formerly Euclid) Benchmark:
When compared to the Encore benchmark study, 80 percent of all $1b plans pay between $35 and $81, with an average of $54 and a median of $57. The $57.18 Form 5500 per-participant amount paid to Southeastern's recordkeeper is exactly at the median for $1B plans in 2021. But this number includes transaction costs, so Southeastern participants likely pay well below the median and average for similarly sized plans.

There are two serious issues with the representations of this complaint: (1) the fee numbers for the comparator plans are not correct; and (2) even if the fees were accurate, and they are not, the purported comparator fees are not representative of what the universe of similarly sized $1B plans pay for recordkeeping services.

Plan Name	Record-keeper	Total # Participants w/ account balances	Dollar value of plan assets	Total reported recordkeeping & administrative service costs paid in 2021	Direct Record-keeping and administrative service costs per-participant basis
Southeastern Grocers 401K Savings Plan	Fidelity	12,174	$1,050,695,424	$897,469.00	$73.72
RPM International Inc. 401(k) Plan	Fidelity	10,039	$1,256,018,208	$92,649	$9.23
Netflix 401(k) Plan	Fidelity	10,070	$1,374,726,213	41,969	$4.76
Optum Care Mgt. LLC 401(k) Plan	Fidelity	13,078	$1,341,037,601	284,537	$21.76
Simplot Retirement Savings Plan	T. Rowe Price	11,277	$1,296,880,259	$143,923	$12.76
Ralph Lauren Corp. 401(k) Plan	T. Rowe Price	8,703	$841,127,245	$186,445	$21.42

First, the numbers represented for all five comparator plans are wrong. Netflix does not have a $4.76 recordkeeping fee for its participants. That is a fictional amount. No plan in America, out of the over 2,500 plans reviewed by Encore, has a $4.00 recordkeeping fee. Netflix – like most other $1B+ asset plans – pays multiple times more than $4.76 annually per participant. The reason the recordkeeping fees of the purported comparator plans are incorrect is that plaintiffs are using Form 5500 disclosures that are not accurate representations of the recordkeeping fees paid by participants. The only reliable source of recordkeeping fees is the plan contract with the recordkeeper, or the participant and plan fee disclosures from the recordkeeper. The only thing these five "comparator" plans represent is that the plaintiff law firm found five employers with Form 5500s with dissimilar, or incorrect data being reported. The data for these five plans – and certainly the absurdly low fee represented for the Netflix plan – is either just plain wrong or anomalous in some way. It is not reliable, and certainly should not be admissible as evidence for the serious charge of fiduciary malpractice. These anomalous data points are not representative of what other large plans pay.

Encore SIDEBAR:
Federal rules presume the truth about allegations in an excess fee complaint, but many claims are not truthful. Pursuant to Federal Rule of Civil Procedure 12(b)(6), a district court may dismiss a complaint, or any part of it, for failure to state a claim upon which relief may be granted if the plaintiff has not set forth factual allegations in support of his claim that would entitle him to relief. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. "Plaintiff law firms in fiduciary imprudence cases exploit the requirement that that allegations must be "accepted as true" for purposes of a motion to dismiss. Many allegations in excess fee cases, including the recordkeeping fees alleged to be charged to participants, are incorrect. But defense counsel often cannot rebut misrepresentations given that they are limited in the motion to dismiss to allegations in the complaint. This means that the plausibility of many cases is judged on false fees and unreliable benchmarks. Plaintiff law firms have taken the presumption of truth in fiduciary imprudence cases as a license to file claims with absurd misrepresentations. The chart of false comparator fees for Netflix and other plans is just one example. See below for the false claim of $326 to $526 of what the MidAmerican plans purportedly paid when the actual recordkeeping fee was $32 per participant – more than ten times lower than what was represented. Plan sponsors are handicapped by procedural rules that presume the truth of claims in federal lawsuits. But the federal rules fail to provide justice when plaintiff lawyers assert claims that are not truthful.

A prime example of the prejudicial impact of allowing plaintiff law firms to misrepresent recordkeeping fees from the Form 5500 is *Matousek v. Mid-Am. Energy Co.*, 51 F.4th 274 (8th Cir. 2022). In that case, plaintiffs alleged that the plan recordkeeper for the MidAmerican Energy plan charged an "unreasonable" fee ranging "between $326 and $526 per plan participant." The representation was false. Rather than relying on the plaintiff law firm, the court took judicial notice of the plan fee disclosures, which provide the truthful recordkeeping fee. The court observed that Merrill Lynch performed both recordkeeping and non-recordkeeping services, the latter of which included compensation for loan origination, individual trades, and check services.

The fees paid to Merrill Lynch also included elective-services fees charged against the account of individual participants for participant-initiated transactions. For these reasons, the Form 5500 recordkeeping fee number alleged in the complaint was not an accurate representation of the recordkeeping fee charged to participants. The actual recordkeeping fees paid by participants was only $32 – not the false representation by plaintiffs that the fee was $300-500 higher.

The second core reason that the five plans in the Southeastern complaint are not valid comparators is that there is insufficient context of what the hundreds of other large plans pay for recordkeeping services. No $1B plan in America pays $4 for recordkeeping fees. And $1B+ asset plans do not average between $4-20 for recordkeeping fees. To the contrary, $20 is below what 90% of all $1-5B plans pay for recordkeeping services. The comparator chart is a false and misleading "benchmark." It is only designed for the cynical purpose to get the complaint past a motion to dismiss in order to extract a settlement from plan fiduciaries.

The Results of the Encore (Formerly Euclid) Recordkeeping Benchmark Survey

As noted above, there is no comprehensive and reliable benchmark of large-plan recordkeeping fees that is available publicly. The consulting firm NEPC conducts an annual survey, but it is limited to less than 200 company data points. Plaintiff law firms have exploited this deficiency by creating their own "benchmarks" to support opportunistic and often false excess fee claims. Encore's goal was to provide a comprehensive and reliable benchmark of what large plans actually pay in recordkeeping fees to stop the misrepresentations by plaintiff law firms asserting false fiduciary malpractice lawsuits. The Encore (formerly Euclid) database is designed to provide a reliable benchmark for plan fiduciaries to defend against imprudence lawsuits that are based on false and misleading comparisons.

How we developed reliable recordkeeping statistics

As one of the leading providers of fiduciary insurance to large plans across America with over 3,000+ fiduciary policies in force for plan sponsors that sponsor plans with assets over $100m, Encore annually reviews thousands of rule 408b2 and 404a5 fee disclosures. We have a unique perspective to analyze what large plans actually pay for recordkeeping fees.

- We tracked over 2,500 plans with $100M or more in plan assets over the course of three years in 2020, 2021 & 2022.
- We recorded recordkeeping fees based on both plan assets and the number of plan participants.
- We recorded the fees disclosed by the different plan recordkeepers.
- If the plan included revenue sharing, we totaled the revenue sharing charged from investment fees, and divided that amount by the total number of plan participants in order to arrive at the average recordkeeping fee paid by plan participants. If the plan fee disclosure indicated that revenue sharing was credited back to participants, it was not included in the recordkeeping fee charged to participants.
- The charts isolate the lowest and highest 10% of fees charged to give the range for 80% of all plans, and then indicate both the median and average recordkeeping fee for each plan or participant size.

The Results of the Encore Recordkeeping Survey

- Fee compression for large-plan recordkeeping continues. Fees continue to decline over the last five years and have continued to decline from 2020-2022.
- The vast majority of plans with over $500m in assets have a per-participant recordkeeping fee [as opposed to a percentage of asset charge] with revenue sharing eliminated or minimal; and most revenue sharing is credited back to the plan or plan participants.
- Plans under $250m continue to use revenue sharing as the primary method of paying recordkeeping fees, but the percentage of plans without revenue sharing continues to decline as large plans move to fixed per-participant recordkeeping fees.
- The vast majority of large plans over $250m in assets in America pay substantially less than plans with less than $100 in assets. This is largely because most small plans in America have a recordkeeping arrangement in which they pay for plan administration services on a percentage-of-asset basis or through revenue sharing from investment options in the plan.
- Very few plan sponsors of large plans pay recordkeeping fees on behalf of plan participants. Approximately one in twenty-five large plan sponsors pay the recordkeeping fee. Approximately ten percent of plans charge additional plan costs to participants in addition to recordkeeping fees.
- We found that plans that offer the QDIA with the recordkeeper received a lower recordkeeping fee than plans with investments sponsored by another company.
- The premise of the vast majority of excess fee cases purporting to claim that most large $500m+ asset plans pay $25 or even $35 or less per participant is false.
- The following is what the average large plan pays for recordkeeping services:
  - **$500m-1b Plans:** In 2022, 90% of plans with assets between $500m and $1b in assets paid over $35 per participant, with 80% of plans paying between $35 and $66 per participant.
  - **$1b-5b Plans:** In 2022, 90% of all plans with assets between $1b and $5b paid more than $26 per participant, and 80% of all such plans paid between $26 and $53 per participant.
  - **$5b+ Plans:** In 2022, 90% of all plans with assets over $5b paid $20 or more per participant, and 80% of plans of this size paid between $20 and $40 per participant.

Applying the Encore (Formerly Euclid) Recordkeeping Survey Results to a Recent Lawsuit Alleging Fiduciary Imprudence Based on Excess Recordkeeping Fees

The excess fee lawsuit file against U.S. Bancorp on January 5, 2023, in the federal district court in Minnesota captioned *Dionicio v. U.S.* Bancorp, Case No. 0:23-cv-00026-PJS-JFD is typical of how plaintiff law firms use misleading, and false recordkeeping benchmarks. The sponsored 401k defined contribution plan at issue in the U.S. Bancorp case had over $9.8B in assets and 86,195 participants in 2021, which is a jumbo-sized plan. You would not know it from either the original or amended complaint, but the U.S. Bancorp defined contribution plan is a state-of-the-art plan with low plan administration fees and high-quality investments at the lowest fees available only to jumbo retirement plans. The U.S. Bancorp plan has a low $29 per participant annual recordkeeping fee and a menu of low-cost Vanguard index funds, with Vanguard index target-date funds as the QDIA at the rock bottom 4.5 bps investment fee – one of the lowest non-proprietary target date investment fee that we have seen available for any plan. The all-in plan fee is close to .10% - a remarkably low fee that represents best-in-class fiduciary oversight. But despite a low plan fee, U.S. Bancorp faces a claim of fiduciary malpractice.

As is now common in excess fee cases, the initial complaint alleged that prudent fiduciaries treat bundled recordkeeping services "as a commodity with little variation in price." Plaintiffs continue that the U.S. Bancorp Plan had a "standard level" of recordkeeping services, and that the rule 404(a)(5) plan disclosure documents have nothing to suggest that the annual administrative fee charged to participants included any services that were "unusual or above and beyond the standard recordkeeping and administrative services provided by all national recordkeepers to mega plan with more than $500,000 in assets." The first claim was that it was imprudent for U.S. Bancorp to pay an average of $41 per participant [$37 in 2021], compared to a chart of eight other (random) plans, with a range from the $7.4B Apple 401k plan that had a recordkeeping fee of $18 per participant, to the $2.3B Raytheon plan that paid $28 per participant. Plaintiffs asserted that "[a]ny differences in the quality or scope of the services delivered are immaterial to the differences between what the Plan paid for RKA services and what [the] reasonable fair market fee was for identical services."

Encore SIDEBAR:
Recordkeeping services are not commoditized. The Sixth Circuit Court of Appeals in *Smith v. CommonSpirit* and Seventh Circuit in *Albert v. Oshkosh* held that a claim of excessive recordkeeping fees is only plausible if comparing the fees relative to the services provided. Other courts have dismissed cases on the same basis. Following those decisions, plaintiff law firms started asserting, like what is alleged in the U.S. Bancorp case, that recordkeeping services for large plans are commoditized with no differences in service type or quality. That is not true. Recordkeeping services can vary based on the level of customer service representatives, educational seminars, investment advisory services, and cyber security. For example, large plans can negotiate a higher level of participant services, including dedicated customer representatives for specific plan participants, and live participant education. The core recordkeeping may be the same for all plans, but the level of participant interaction and education can be negotiated. The quality of recordkeeping services is differentiated between providers, with leading firms like Fidelity able to provide better systems technology and a higher level of cyber security.

The issue of whether plan services are commoditized is another example in which the limited scope of a motion to dismiss under the federal rules of civil procedure has prevented more public evidence of how recordkeeping services are differentiated. The complaint represents is the plaintiff law firm's biased narrative of the case, and the defense is limited at the pleading stage in correcting misrepresentations and misstatements to the four corners of the complaint without the ability to rebut the claims with outside evidence. We believe that as more excess fee cases head to summary judgment or trial, recordkeepers will present more public testimony as to how services vary in large plans.

U.S Bancorp filed a motion to dismiss the original complaint, which asserted that the fee disclosures referenced in the complaint showed a $29 per participant recordkeeping fee, and not the $41 purported average fee asserted in the complaint. The recordkeeping fee was misrepresented, as is common in many cases. The motion to dismiss argued that the true $29 fee was only $1 different than two of the eight purported comparator plans in the complaint.

After the motion to dismiss, plaintiffs filed an amended complaint as if the original, false claims had never happened. Besides a change in font size, the complaint asserted the same two excess recordkeeping and managed account fees claims, except this time Plantiffs alleged that the truthful $29 recordkeeping fee was unreasonable compared to four **different** corporate plans with $19-25 per participant recordkeeping fees, as well as three years of Fidelity's own plans for Fidelity employees with recordkeeping fees from $14-21. The only comparator plan that was the same from the original complaint was the Lowes 401(k) Plan [$5.6B/154,402 - $19 per participant]. The amended complaint moved the goal posts by switching to a new comparator chart to provide lower fee benchmarks:

Comparable Plans' Bundled RKA Fees Based on Publicly Available Information from Participant Fee Disclosures or Financial Statements

Plan	Participants	Assets	Bundled RKA Fee ($)	Bundled RKA Fee ($/pp)	Recordkeeper
Leidos, INC. Retirement Plan	46,995	$10,028,148,473	$939,900	$20	Vanguard
General Dynamics Corporation 401(k)	48,852	$9,863,978,096	$1,221,300	$25	Fidelity
Fidelity Retirement Savings Plan	51,049	$13,250,740,623	$1,072,029	$21	Fidelity
Fidelity Retirement Savings Plan	57,658	$14,730,835,962	$980,186	$17	Fidelity
Fidelity Retirement Savings Plan	64,113	$24,332,734,660	$897,582	$14	Fidelity
Deloitte 401(k) Plan	98,051	$9,949,148,795	$2,157,122	$22	Vanguard
Lowes 401(k) Plan	154,402	$5,619,838,861	$2,856,437	$19	Well Fargo

The comparators are four company plans for unknown years; and then three years of the Fidelity plan for its own employees (and again, the years are not identified). Leaving out the Fidelity plans for the moment, this means that the U.S. Bancorp plaintiffs are claiming fiduciary imprudence by comparing the U.S. Bancorp plan to just four plans out of all $1B+ plans in America. This is hardly a meaningful benchmark, as it represents just four out of approximately 250 mega plans. But holding out these comparator plans as paying "reasonable" and "prudent" recordkeeping fees is further suspect because four out of five of the non-Fidelity comparator plans have been sued for failing to prudently monitor their fees and investment options. The General Dynamics plan was one of the first plans to be sued in 2006; Deloitte was sued in 2021 for allegedly paying $65 per participant in recordkeeping fees; and Lowes was sued in 2020. What plaintiffs fail to mention is that they are comparing U.S. Bancorp to plans that have reduced their fees under pressure of a lawsuit and subsequent settlements. The post-settlement fees of companies that have previously been sued for excess recordkeeping fees are artificial comparators.

The comparison to three years of the Fidelity employee plan, which also was sued for excess fees, is also misleading. Fidelity is America's leading large-plan recordkeeper and can charge a low fee to its own current and former employees if profit is stripped out. In fact, it is curious why Fidelity charges any amount to its own plan participants. The fees for its own plans are just not relevant to what it charges its customer base, and is certainly not a sound basis from which to assert fiduciary malpractice. The Fidelity plan was sued for excess fees in Moitoso v. FMR LLC., No. 1:18-cv-12122 (D. Mass. 2018). In the lawsuit, Fidelity stipulated to certain facts "for purposes of [that] litigation only" to satisfy its discovery obligations to plaintiffs. But the stipulation does not state that the Fidelity plan actually paid an annual $14 to $21 per-participant recordkeeping fee; it states only that these amounts reflected "the value of the recordkeeping services that Fidelity provided to its own plan at the time." As noted above, Fidelity has since made clear that the stipulation was entered into "for the limited purpose of resolving a discovery dispute" and "certainly does not reflect the value of the recordkeeping services that Fidelity provides to different plans pursuant to different recordkeeping contracts for different sets of services." Accordingly, some courts have rejected fee comparisons based on this same Fidelity stipulation. See *Wehner v. Genentech*, Inc., No. 20-cv-06894-WHO, 2021 WL 507599, at 6 (N.D. Cal. Feb. 9, 2021) (refusing to draw any inference from the Moitoso discovery stipulation); *Johnson v. PNC Fin. Servs. Grp.*, Inc., No. 2:22-CV-01493-CCW, 2021 WL 3417843, at *4 (W.D. Pa. Aug. 3, 2021).

The Encore (Formerly Euclid) benchmark shows that the U.S. Bancorp $29 recordkeeping fee is reasonable.

As demonstrated above, the comparator chart in the U.S. Bancorp lawsuit is designed to show that $10B asset plans pay per-participant recordkeeping fees between $14-25 per participant. The legal theory is that any plan fiduciary of a $10B plan that allows an amount higher than this range is guilty of fiduciary malpractice and has personal liability to pay the excess amount to plan participants and the plaintiff lawyers. This is the reason why we need a reliable benchmark as to what similarly sized plans actually pay.

With the largest database of mega plans from across the country with Fidelity and other national recordkeepers, Encore Fiduciary's benchmarking survey validates that the U.S. Bancorp plan has a reasonable $29 per participant recordkeeping fee that is lower than the median and average of other jumbo plans with 15,000 participants and over $5b in assets. In Encore's database of jumbo plans, 80% of plans have a per-participant recordkeeping fee between $23 and $43. The average and median for jumbo plans is $35. No justification exists to allow a plaintiff law firm to sue for fiduciary malpractice. The excess fee complaint is not plausible when compared to a reliable benchmark.

Comparing Encore's more reliable database to the misleading chart in the U.S. Bancorp amended complaint, the Encore statistics shows that the plaintiff comparators between $14 and $25 are not reliable, and not indicative of what other large-plan fiduciaries negotiate for their plan participants. Even if you assume that the recordkeeping services for all of these plans are identical, the plaintiff firm's comparator chart in the U.S. Bancorp case is not a reliable source from which to judge fiduciary prudence. In final analysis, the $29 U.S. Bancorp recordkeeping fee is below the $35 average for jumbo plans. The claim of fiduciary imprudence is not valid. This same analysis can be applied to many of the pending and historical excess recordkeeping fee cases that are based on misleading and false benchmarks.

Final Analysis

Plaintiff law firms have exploited the federal rules of civil procedure by filing dozens of fiduciary imprudence cases that assert false fee amounts that are compared to misleading and unreliable benchmarks. There may be a few plans that have allowed excessive fees, but those plans are the exception and not the rule. If plaintiff lawyers are going to continue to sue a high number of large plans, then they must be held to a higher standard of proof that requires truthful fee amounts that are measured against a reliable benchmark of what large plans actually pay – not plaintiff-manufactured comparator plans that distort the truth.

Encore has developed the first publicly available national database that provides reliable evidence of what large plans pay for recordkeeping services. The Encore survey confirms that large plans with assets over $100m pay significantly less than smaller plans with less assets and participants. This is because most small plans pay asset-based fees and often use revenue sharing from investments to pay for plan administration. Large plans have moved to per-participant fixed recordkeeping fees that save participants, particularly with account balances over $100,000, significant amounts because of lower plan administration fees. But the survey also shows that the purported benchmarks used by plaintiff lawyers to sue for fiduciary malpractice are misleading and unreliable. Contrary to the premise of most excess fee cases that large plan fiduciaries are "asleep at the wheel" and overpay recordkeepers, the survey shows that most large plans have used their size leverage to benefit plan participants.

The Encore recordkeeping survey demonstrates that the tactics used by the ERISA plaintiff bar to assert fiduciary imprudence claims are false and prejudicial to plan sponsors. The plaintiff benchmarks, including comparator charts of random plans based on misleading Form 5500 data, are not representative of the true market price for recordkeeping services for large-plan sponsors. While the survey shows that large plans pay less than smaller plans, the recordkeeping fees paid by large plans are higher than what is being alleged in the numerous excess fee cases that have been filed in federal courts across the country. The Encore recordkeeping database disproves many of the claims of fiduciary imprudence.

Get a Copy of the Encore Fiduciary Recordkeeping Benchmark

About the Author

Daniel Aronowitz is the President of **Encore** (formerly Euclid) **Fiduciary**, a leading Fiduciary Liability insurance underwriting company for America's employee benefit plans. Dan has over thirty years of experience in the professional liability industry as a coverage lawyer and underwriter and is a widely recognized fiduciary liability expert and thought leader. He is the author of *The Fiduciary Liability Insurance Handbook*, *The Fid Guru* Blog and the fiduciary liability insurance chapter of the Trustee Handbook published by the International Foundation of Employee Benefit Plans. He is a graduate of The Ohio State University and Vanderbilt University School of Law and has achieved the RPLU+ designation from the Professional Liability Underwriting Society.

Encore (formerly Euclid) **Fiduciary**, a division of Specialty Program Group, is an insurance program administration company specializing in fiduciary liability insurance coverage for America's employee benefit plans. Encore offers best-in-class fiduciary, crime/ERISA fidelity, cyber liability, employment practices, and other professional liability insurance coverages to protect the fiduciaries of U.S. employee benefit plans. Our underwriters and claim professionals are experts in complex fiduciary liability and crime exposures, with decades of fiduciary liability experience and expertise.

Disclaimer: This whitepaper is intended to provide fiduciary thought leadership and advocacy for the plan sponsor community in areas of complex fiduciary litigation. It is not affiliated with any other company and is not intended to represent the views or positions of any policyholder of Encore Fiduciary, or any insurance company to which Encore Fiduciary is affiliated. Quotations from this site should credit ***Encore Fiduciary.***

Download a copy of the Encore Fiduciary Recordkeeping Benchmark

Contact us:

marketing@Encorefiduciary.com
Daniel Aronowitz: daronowitz@Encorefiduciary.com
Phone: 571.730.4810

Click or Scan to Download

Euclid Fiduciary is Now **Encore Fiduciary**

To **learn more** about the **story** behind the rebranding, **changes and FAQs.**

Click or Scan to Learn More

encorefiduciary.com

/encore-fiduciary/