10 ERISA Fiduciary Lessons From 'Game Of Thrones'

By **Jeff Banish**

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Every other day, we read about another plaintiff who has filed another lawsuit against another company alleging that the sponsor of the company's retirement plan breached its fiduciary duties in administering the plan. These lawsuits generally allege similar concerns — inappropriate investments within the plan, excessive fees paid to service providers, acts of self-dealing and conflicts of interest. Settlement amounts read like lottery jackpots — Franklin Resources $13.85 million,[1] American Airlines $22 million,[2] among others — and that is not counting attorney fees for both plaintiffs and defendants.

In the recent case against Franklin Resources, the plaintiffs alleged that Franklin Resources was motivated to invest the plan's assets in Franklin Templeton funds to benefit Franklin Templeton's investment management business, when better-performing and lower-cost funds were available. Similarly, the plaintiffs who filed suit against American Airlines argued that the plan's fiduciaries breached their fiduciary duties by retaining fund alternatives from American Beacon Advisors (in which American Airlines had a financial interest) when superior choices were available.

However, such lawsuits are not reserved for large retirement plans. Plaintiffs have filed lawsuits against retirement plans with assets as low as $9 million and against record-keepers who service retirement plans with assets as low as $2.8 million. Many of these lawsuits could have been avoided, or their impact diminished, if plan sponsors had taken basic steps to minimize their fiduciary risks.

The Employee Retirement Income Security Act mandates that a plan fiduciary:

- Act solely in the interest of participants and beneficiaries for the exclusive purpose of providing benefits and paying reasonable plan expenses;

- Act with the care, skill and prudence that a prudent man or woman would use in the endeavor;

- Diversify investments to minimize the risk of large losses unless it would be prudent to do otherwise; and

- Follow the terms of the plan and applicable laws. A fiduciary also must avoid prohibited transactions involving the retirement plan. Prohibited transactions generally include acts of self-dealing, conflicts of interest and certain related party transactions.

Not all actions involving a retirement plan, however, carry fiduciary concerns. Fiduciary conduct generally involves discretionary functions involving plan assets such as selecting plan investments. Conversely, "settlor" functions, such as designing, establishing and terminating the plan, are not fiduciary functions. It is important, then, to distinguish between the two. A breach of fiduciary duty can result in personal liability for the breaching fiduciary to reimburse the plan for losses resulting from the breach, civil penalties imposed by governmental agencies, and criminal penalties for willful violations of ERISA.

Plan sponsors should take a hard look at their plan governance procedures to determine where the implementation of "best practices" could reduce the risk of a lawsuit. They also should consider the substantial benefits of providing training and education to plan fiduciaries. Additional lessons can be gleaned from an unlikely source: HBO's wildly popular fantasy series, "Game of Thrones." Ten applicable lessons follow below.

1. A strong fortress is critical to protecting the kingdom and serves as a major deterrent against those who would do others harm.

Each of the major houses in "Game of Thrones" was protected from marauding invaders by an imposing fortress, which served as a formidable defense against those who would seek to take the kingdom's treasure. Plan sponsors likewise should build substantial structural defenses to guard against lawsuits through effective plan governance practices.

Every plan sponsor should establish written policies that:

- Clearly document the parties to whom will be granted the authority and discretion over plan matters;
- Provide guidelines for how such parties will operate through written committee charters and investment policy statements;
- Delineate reporting responsibilities to those with oversight over plan fiduciaries;
- Establish a prudent process to review and oversee plan investments;
- Require regular meetings of plan fiduciaries;
- Permit the hiring of appropriate investment and other advisers;
- Establish the need for periodic reviews of those advisers;
- Periodically monitor and evaluate plan fees and expenses; and
- Promote periodic training and education of those with authority and discretion over plan matters.

The plan sponsor should appoint qualified individuals to serve as plan fiduciaries. Individuals appointed to serve on the retirement committee should be knowledgeable and have skills that enable the individual to properly perform his or her duties.

Every plan sponsor also should design its plan to take advantage of ERISA's structural protections. Section 404(c) of ERISA protects fiduciaries against losses resulting from investment directions given by participants, provided the plan satisfies the applicable Section 404(c) requirements. Each plan that permits participants to direct the assets in their accounts should be reviewed for Section 404(c) compliance.

ERISA provides similar protections where participants do not give investment directions and their assets are invested in a default fund. The plan's default fund should satisfy the rules for a qualified default investment alternative to capture those protections. Hint — a qualified default investment fund does not include a money market or stable value fund despite what you may think. Effective policies in the foregoing areas will promote prudent practices and serve as the plan sponsor's most effective defense against fiduciary lawsuits. Additionally, the plan sponsor should make sure that its claims procedures are consistent with ERISA (especially given the recent changes in this area).

Failure to establish and follow compliant claims procedures will result in the loss of the deferential standard of review upon litigation of the claim denial. No need to go to court with one hand tied behind your back.

2. No one without training survives a sword fight with a skilled adversary.

Jaime Lannister, despite his pernicious ways (or maybe because of them), was the most feared swordsman throughout the kingdoms. He acquired his skill through extensive training and practical experience. In that same regard, plan sponsors should provide education and training to those who will exercise authority and discretion over plan matters to help them survive against legal challenges by skilled plaintiffs.

Another of the most important steps a plan sponsor can take to properly equip plan fiduciaries is to provide fiduciary training. The U.S. Department of Labor views fiduciary training as a critical element of prudent plan oversight and is increasingly seeking evidence of such training in its audits. Each plan fiduciary should:

- Fully understand his or her duties and responsibilities and the attendant personal liability under ERISA for breaches of fiduciary duty;
- Acknowledge in writing his or her acceptance of those responsibilities and his or her status as a fiduciary;
- Understand the plan and his or her duty to follow the terms of the plan;
- Be made aware of established plan governance procedures and monitored for adherence; and
- Be educated about new regulatory practices and other legal developments. Understanding current developments provides insight on what plan fiduciaries should be considering during the course of their duties.

Appointing a plan fiduciary who does not have the capabilities to fulfill his or her duties is itself a breach of fiduciary duty. Periodic and effective training will help shore up any weaknesses that may be exploited by savvy plaintiffs.

3. Future generations will believe what is written in the history books.

Jaime Lannister, our master swordsman, had a complicated history which is later revealed to not be quite as consistent with the written record. He was known as the "kingslayer" because he killed the Mad King during the rebellion. It is later revealed that he killed the Mad King to stop him from committing genocide of his own people.

At the end, after Jaime's death, his lover, Brienne of Tarth, writes a passage in the history books to help rehabilitate his reputation for future generations. Similarly, plan sponsors can control how history will judge their actions by appropriate contemporaneous documentation of how plan matters are handled.

All plan governance practices should be in writing. Every plan sponsor should have both an effective written charter to guide each fiduciary's decision making and a written investment policy statement to guide plan fiduciaries in selecting plan investments. Meeting agendas and minutes should be sufficiently detailed to reflect discussions, decisions and pending items.

Without appropriate written documents, the plan sponsor will have great difficulty in proving that prudent processes were undertaken, especially where the ultimate results were unfavorable for plan participants. Written records should establish the appropriate standard of care and distinguish between the actions of a fiduciary (with the attendant fiduciary duties and risks) and those of the settlor (which do not constitute fiduciary actions). Do not let the plaintiff write the plan sponsor's history in court.

4. Protect those who need protection by keeping them out of harm's way.

When the Night King and his zombie army attacked Winterfell, those who needed protection were sealed in the castle's crypts to keep them out of harm's way. Similarly, every plan sponsor needs to take such actions as are appropriate to place responsibilities and risks on the appropriate parties and keep others from becoming the bull's-eye of the plaintiffs.

Every plan sponsor should name responsible fiduciaries in writing and identify each such person's role and responsibilities. The "named fiduciary" is the person or committee with the overall responsibility for the administration of the plan and for oversight of plan investments and costs. Each plan fiduciary's duties and authority should be delineated in writing, including:

- The ability, if any, to delegate responsibilities to others;
- The person to whom the fiduciary reports;
- The fiduciary's ability to engage investment advisers and other service providers; and
- The fiduciary's ability to enter into agreements on behalf of the plan and/or the plan sponsor.

Failure to properly identity plan fiduciaries and their duties give plaintiffs the leeway to select targets that give the plaintiffs the best chance for recovery. The plan sponsor's board of directors may be surprised when they are sued for breach of their fiduciary duties regarding the plan sponsor's retirement plan even though that responsibility was delegated to others (albeit without proper written documentation). Take action to ensure innocent parties are not exposed to unintended fiduciary risks.

5. There is strength in numbers.

When the battles are won with swords and spears, the larger army with superior weapons usually wins (unless the smaller army has a dragon on its side). Every plan sponsor can erect superior defenses by undertaking appropriate benchmarking. Relying on industry standards and common practices can be a significant barrier when the plaintiff intends to attack what was done (although such practices, no matter how common, must still be consistent with the terms of the plan and applicable laws).

As part of its fiduciary duties, every plan fiduciary should periodically benchmark what it does against the plan sponsor's peers. This means investigating outside practices to benchmark:

- Plan terms and features;
- Investment performance;
- Fees and expenses of service providers; and
- Other matters.

Benchmarking can be accomplished through formal requests for proposals or independent consultant reviews. The Department of Labor has advised previously that it views periodic RFPs as something the plan sponsor should undertake every three to five years (if only to confirm that the terms of the plan sponsor's current arrangements are reasonable).

Excessive fees and expenses are the favorite target of fiduciary lawsuits. While a plan fiduciary is not required to always engage the lowest-cost provider, the plan fiduciary needs to be able to understand if and where costs and fees are out of line with market and determine if those additional costs or fees are reasonable in light of the services received. Moreover, each plan fiduciary should understand how fees are charged against participants' plan accounts.

Currently, there is no legal requirement to equalize fees among participants. But, each plan fiduciary needs to understand that, for example, capturing revenue sharing from plan funds to pay plan expenses may disproportionately shift plan expenses only to those participants who invest in funds with revenue sharing. It might be more prudent to eliminate revenue sharing and charge each participant's account a fixed and/or asset-based fee to cover plan expenses.

6. Resting on your laurels can lead to disastrous results (remain vigilant and proactive).

One of the most shocking and disturbing events in "Game of Thrones" was the treachery of Walder Frey and Roose Bolton at the Red Wedding. Failure to remain vigilant led to terrible consequences. Plan sponsors likewise should be proactive and vigilant at all times.

Even the best plan governance practices need to be refined or updated from time to time. Protecting against fiduciary lawsuits is not a "set it and forget it" practice. Plan fiduciaries should conduct periodic reviews of governance practices, plan investments, plan fees and expenses and service providers. The plan's investment policy statement should detail the process by which plan investments will be monitored and, where necessary, replaced by more appropriate investments.

Such actions should be undertaken no less frequently than quarterly (or more frequently when significant market concerns arise). The plan sponsor should review and update committee charters and investment policy statements no less frequently than annually. Prudent fiduciary practices are not static.

For example, the plan fiduciary should understand how investments change or if different fund classes are offered by the platform provider. If the platform provider offers another share class of a fund within the plan, and that share class is otherwise identical to the fund in the plan except for lower costs, would it not be prudent to replace the fund in the plan with the lower-cost alternative?

7. Know when to engage the professionals to protect you and fight on your behalf.

Tyrion Lannister, while lacking physical size, demonstrated his mental acuity throughout "Game of Thrones." On two separate occasions after being charged with crimes, he chose "trial by combat" to prove his innocence, where he could select his champion to do physical battle on his behalf. If his champion won, he was absolved of all guilt. Bronn saved him from a death sentence (although Oberyn Martell's assistance against the Mountain was not as successful). Plan sponsors can engage their own champions by prudently selecting and relying upon investment advisers and other service providers.

The single most important specialist to engage is the plan's investment adviser. In most cases, the investment adviser is engaged to provide advice and recommendations to the plan's fiduciary regarding plan investments. The plan fiduciary then exercises the discretion to implement desired investment actions. In other cases, the investment adviser may be granted the authority to exercise its discretion regarding plan investments, without the plan fiduciary's acquiescence. Each plan sponsor should confirm in writing the duties and responsibilities of the investment adviser and its specific role as a discretionary or nondiscretionary fiduciary.

Where the investment adviser does not have any discretionary authority to direct plan investments, the plan fiduciary needs to understand that the responsibility for making investment decisions rests with the plan fiduciary (not the investment adviser). The plan's advisers generally should be independent from the plan and related parties, so they can render independent and unbiased advice. The adviser should be focused solely on the interests of the plan and its participants.

The written agreements with plan service providers should detail the service providers' duties and responsibilities and compensation. Those agreements should require the service providers to keep participant information secure and prohibit the service providers from using the information other than to render the services they are to provide. Do not let service providers use participant information to sell unrelated products or services to the participants unless the participants make the requests. All service provider agreements should be reviewed by ERISA counsel.

8. Recognize and mitigate conflicts of interest before they become an issue.

As Daenerys Targaryen strived to reclaim her place on the Iron Throne, her tolerance for conflicts of interest resulted in harsh treatment of those who opposed her (oftentimes at the hands of her fire-breathing dragons). She displayed ruthless aggression to eliminate those who would oppose her reign. Plan sponsors should be equally ruthless in identifying and mitigating conflicts of interest.

Under ERISA, each plan fiduciary must act for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying the reasonable expenses of administering the plan. Accordingly, any action the plan fiduciary takes that is contrary to the exclusive benefit of the participant risks a fiduciary breach.

The court cases have numerous examples of conflicts of interest that need to be avoided. For example, the plan fiduciary should not tolerate higher plan costs because the plan sponsor is receiving unrelated no-cost services elsewhere. Members of the committee assigned to engage service providers should not be permitted to direct service engagements to related parties. Even appearances of a potential conflict of interest should be avoided. Conflicts of interest and other prohibited transactions can result in civil penalties, excise taxes and the requirement to restore the plan to its original position.

9. Transparency is good.

The acts of treachery and deceit by the characters in "Game of Thrones" were legendary. From Cersei Lannister's role in her husband's death, the Tyrells' poisoning of King Joffrey to the terrible Red Wedding, it shows the disastrous consequences that oftentimes result when nothing is as it seems. In the ERISA context, minimal disclosure and transparency is not the desired path.

Plan fiduciaries should maintain contemporaneous records of the actions taken and the decisions made. Participants should be fully informed of the costs and expenses relating to plan investments and charges by plan service providers. Participants should be confident that no fiduciary is hiding anything. Investment costs should be readily apparent with no "hidden" fees. Each plan sponsor should be proactive to provide investment education to participants. Plan documents should be drafted to be understandable to those who are not benefits specialists. Written, clear procedures should be consistent with ERISA requirements.

ERISA also imposes a duty to adequately preserve plan records. Failure to adequately preserve plan records can result in the burden of proof shifting to the plan sponsor where the plan sponsor is unable to refute the plaintiff's claims due to inadequate or incomplete records.

10. Learn from others' mistakes.

Aerys II Targaryen was known as the Mad King due to his unpredictable temper. He tried to commit genocide against his own people. His son, Viserys Targaryen, was so obsessed with regaining the Iron Throne that he sold his own sister to the warlord, Khal Drogo. That same sister, Daenerys Targaryen, mother of dragons, rose to power but turned from savior to destroyer in the end. The early takeaway should have been to keep an eye on the Targaryens. Each plan sponsor also should learn from the mistakes of others.

The court cases generally illustrate (quite clearly) where plan sponsors go wrong as well as how they can protect themselves. Case after case demonstrates:

- The need for a written well-documented process for all plan matters;
- The need for periodic reviews of procedures and plan investments;
- The consequences of failing to benchmark plan fees and expenses;
- The benefits of correcting out-of-line fees;
- The importance of fund and other plan disclosures;
- The benefits of offering a diversified mix of reasonable cost investments within the plan; and
- The need for fiduciaries to ask questions and act solely in the interest of plan participants.

Fiduciary training and following best practices illustrated by other lawsuits provide a great defense against costly and unnecessary fiduciary lawsuits.

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[1] Smith, D. N. (2019, February 19). Franklin Templeton Workers Want $14M ERISA Suit Deal OK'd. Retrieved Aug. 14, 2019, from https://www.law360.com/articles/1130515

[2] Campbell, B. (2017, July 10). American Airlines, Ex-Affiliate Agree To $22M ERISA Deal. Retrieved Aug. 14, 2019, from https://www.law360.com/articles/942656/american-airlines-ex-affiliate-agree-to-22m-erisa-deal