



# **I SIGN THE FORM 5500 [PART 2] PLAN SPONSOR = 3(16) FIDUCIARY = DEFENDANT? WHAT ELSE DID YOU SIGN UP FOR?**



*By: Gina Migliore  
Client Relations Manager  
Priority Pension Services, Inc. (AFI)*

In my first article, I discussed when a Plan Sponsor signs a Form 5500, they have established themselves as a 3(16) Fiduciary of a retirement plan (whether they wanted the job or not). As a 3(16) Fiduciary, that Plan Sponsor is responsible for the day-to-day operations of that plan. This time I thought I'd talk about something else you signed up for (which I'd bet wasn't in the plan sponsor brochure either).

Did you know you could be named as a defendant in a 401(k) lawsuit? Yes, that's right, you will mostly likely be named as a defendant if your company gets sued on their 401(k) plan. I'm sure this seems pretty farfetched. I might as well say you might get struck by lightning too. But the truth of the matter is in both

scenarios, the lawsuit and the lightning, both are true and both can happen.

Most of the headlines we see on 401(k) lawsuits involve larger companies with multi-million dollar plans. There's been dozens of them: Boeing, Chevron, Verizon, Intel, Lockheed Martin, just to name a few. The defendants in these cases were always the company, and then the Investment Committee, Benefits Committee, Investment Policy Committee, various combinations of both and the occasional named individual. While the claims in these cases vary from action to action, most 401(k) lawsuits center around excessive fees and costs and failure to monitor the investments in a plan.

Recently however, another 401(k) lawsuit made the headlines, Damberg, et al. v. LaMettry's Collision, Inc., et al. I suspect you never heard of LeMettry's Collision. I never did either. LaMettry's Collision is

an auto body shop with various locations in Minnesota.

This case represented the smallest 401(k) lawsuit to date and here's why. The plan had only 114 participants (in 2014) and under \$10 million in assets. The defendants in this case were LaMettry's Collision of course, but also Stephen P. Daniel (the company's CFO) and Joanne M. LaMettry (the company President) -- two individuals who could have been held personally liable for plan losses if awarded. The plaintiffs who brought this class-action lawsuit were two lifelong employees, Debbie Damberg who worked for LaMettry for 30 years and Tony Severson who worked there for almost 25 years. Both parties contributed to the plan throughout their entire career. Pretty compelling story. I can only imagine how the defendants must have felt.

Less than 1 month after this lawsuit was filed, the plaintiffs withdrew their claims and filed a Notice of Voluntary Dismissal on June 17, 2016.

While the outcome of this particular case seems like a victory for the defendants, I wasn't concerned about it while writing this article. And I wouldn't make any assumptions about future 401(k) lawsuits either. Most of them have very different outcomes.

My goal here was to show what this case represented and the message it sent. No plan is truly "safe" from

litigation. It doesn't matter how many participants are in a plan, or the amount of assets or how long you know your employees. There is nowhere to hide and most certainly is not the end.

There are a lot of critics out there who call the attorneys who bring these 401(k) lawsuits ambulance chasers. My response to that is, call them what you want. Frankly, I don't think they care. The only thing they're chasing is the money and who are we to judge?

I can't stress enough how important it is for Plan Sponsors to understand what they are paying in fees and expenses. Remember, so many fees in these plans are hidden so ask your providers for guidance. It's what you pay them for, they are supposed to help you. And benchmark, benchmark, benchmark. Shop your plans against other providers -- not to move but to negotiate. And lastly, and most importantly, understand that you can be held responsible for the investment line-ups in your plans. There's a big misconception out there that the participants "pick" their own investments. Now while that is true to a point, you (and the other fiduciaries in your organization) gave them the line-up to pick from, so as far as the law, the DOL, ERISA and the so called "ambulance chasing" lawyers are concerned, you are responsible.

Remember, all it takes is one, one complaint, one participant, one small 401(k) lawsuit.



370 N. Iowa Avenue, North Massapequa, NY 11758 • 516-584-2755 • [info@ppsafi.com](mailto:info@ppsafi.com)

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