LEGAL UPDATE

Fiduciary Liability Defenses under ERISA

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In recent years, a popular series of books has been written called "Everything I Need to Know About," and the source of this guidance comes from an unlikely source such as Kindergarten or Little Golden Books. This article is not going to state that everything you need to know about Title I of ERISA can be derived from these elementary sources, but it will provide insight into possible defenses against breach of fiduciary claims under ERISA. If an investment adviser makes a recommendation to a plan sponsor or investment manager who follows that recommendation and the investment is later challenged as a breach of fiduciary duty, what type of defenses are available?

For example, the investment advisor could say "I made the recommendation, but the investment committee did not need to follow it so it is not my fault." The technical question is what degree of involvement subjects a party to liability for breach of fiduciary duty under ERISA? Putting this in ERISA terms, the initial question is what is the meaning of the phrase "resulting from"? ERISA Section 409 provides that a fiduciary who breaches his or her duties, responsibilities, or obligations is personally liable for any losses to the plan "resulting from" such breach. There is agreement among the courts that there must be some causal link, but while the courts have addressed and reached conflicting standards as to who has the burden of proof, there is relatively little case law. In *Silverman v. Mutual Benefit Lifi Insurance Co.,* 138 E 3d 98 (2d Cir. 1998), the Court of Appeals for the Second Circuit indicated that a plaintiff must show some causal link between the alleged breach of duty and the loss plaintiff seeks to recover, but did not address the issue of what standard governs an ERISA plaintiff's case. Other circuit courts have taken the same basic approach as *Silverman,* holding that the language in ERISA Section 409 requires that a plaintiff show a causal connection between the breach and the loss suffered, but without further elaboration as to how strong a causal connection must be shown. The Court of Appeals for the Third Circuit appears to require that, in order for there to be personal liability, the breach be both a "cause in fact" and "a substantial factor" in bringing about the loss incurred." The Court of Appeals for the Eleventh Circuit in *dicta in Willett v. Blue Cross Blue Shield of Alabama in* 1992 indicated that proximate cause was the appropriate standard, and the Court of Appeals for the Sixth Circuit referenced proximate cause as the appropriate standard in an unpublished 2007 opinion, but the issue is an open one at this point. In a 2012 case, the Federal District Court for the Southern District of New York, based on an unrelated Supreme Court case interpreting statutory language similar to "resulting from," suggested a third possible meaning for "resulting from"—a "substantial nexus"—but no reported cases have followed up on that suggested alternative basis for defining the causation standard.

A related possible defense an advisor might think of is superseding cause which, if it could be applied, "operates to cut off the liability of an admittedly negligent defendant." That is, the advisor would be asserting that "had the person who acted after me not breached his or her fiduciary duty, none of the alleged losses would have occurred, so it is not my fault." The Restatement of Torts, which courts occasionally refer to in deciding ERISA matters, defines a "superseding cause" as an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about. However, only two reported cases have addressed the possible application of this doctrine in the ERISA context, and in neither case did the court squarely decide whether it was applicable in the ERISA context. Further, in the typical case involving an investment advisor, the superseding cause defense would be difficult to establish, because one of the factors that a court would likely take into account is whether the intervention brings about a harm different in kind from that which would otherwise have resulted from the advisor's negligence.

The next line of defense might be "if we are both at fault, and I am found liable, the other guy should pay up as well." The Restatement of Trusts (Second) expresses a similar concept: "where two trustees are liable to the beneficiary for a breach of trust, each of them is entitled to contribution from the other." However, there is a split of authority between the Circuit Courts of Appeal, as to whether contribution is an available remedy under ERISA. Some courts believe that traditional trust law remedies should be retained under ERISA, while other Circuits believe that the objective of ERISA was to benefit plan participants rather than fiduciaries, and

Congress specifically did not provide such a remedy for breaching fiduciaries under ERISA. If an advisor is working in a jurisdiction in which the right to contribution is recognized, it should seek to take advantage of it. However, if an advisor is the party again whom contribution is being sought in a Circuit that recognizes the doctrine, the advisor may seek to limit that doctrine's application to a situation where co-fiduciaries acted together to violate a single ERISA obligation to plan or plan beneficiaries.

Finally, if an advisor is the party from whom contribution is being requested, his defense might be that "perhaps I am somewhat to blame, but the responsibility should rest with the other entity because it was primarily his or her fault." This concept is also reflected in more technical terms in the Restatement (Second) ofTrusts, which provides in Section 258 that: "where a breach of trust is committed and one of two trustees is substantially more at fault than the other, although both are liable to the beneficiary for the breach of trust, the loss should ultimately be borne by the trustee who is more at fault". The difficulty for the investment advisor seeking to invoke this doctrine is the same as that existing with respect to the superseding cause defense: based upon the factors cited in the Restatement of Trusts (Second), it is a difficult defense to establish.

Bottom Line. While the applicable standard of causation has not yet been determined under ERISA, and some defenses at common law to breaches of fiduciary duty may be available to eliminate any damages for an advisor who breached his or her fiduciary duty under ERISA, except in those Circuits in which contribution for breach of fiduciary duty is available, an advisor is always best served by avoiding breaches of fiduciary duty under ERISA and following best practices.

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