

Minimizing Legal Risks in the Designs, Implementation & Administration of Employee Benefit Plans

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ERISA REMEDIES, LIABILITIES AND EXPOSURES

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Tweeting about this conference?

#ACIBenefits



Section 502

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan;



Denial of Benefit Claims

- Vast Majority of Claims
- Death by a Thousand Cuts
- Examples:
 - LTD
 - Group Life
 - Health
- Individual Pension and 401(k) Claims



Denial of Benefit Claims (2)

- Arbitrary and Capricious Review
- This Is Not Your Father's Oldsmobile
- Narrowing scope of review
- Closer Examination of Decision Making Process
- Defendant Win 10 Years Ago May Be A Loss Today



Breach of Fiduciary Duty Claims

- **Big Ticket Cases in the Media**
 - Excessive Fees
 - Large Class Actions
 - Keep You Up at Night Cases
- **Not Only Big Ticket Cases**
 - 100 Employee 204(h) cases
 - 240 ESOP participants
 - 800 Employees' 401(k) Deferrals Disappear
 - One Very Mad and Very Aggrieved Employee
 - For Most Companies, These Are the Key Exposures



Section 404 – Scope of Fiduciary Duties

(a) Prudent man standard of care

(1) . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.



Theories of Fiduciary Breach

- Very Elastic
- Very Broad
- Like an Astrology Forecast: Anything Could Fit Within It and Look Correct
 - With apologies to Walker Percy. See “Lost in the Cosmos: The Last Self-Help Book.”
- Impact on Insurance?
 - The Nature of the Remedy
 - The Nature of the Theory



Examples of Fiduciary Breach

Theories and Liabilities

- Classic Formulation:
- “ERISA requires fiduciaries to employ “appropriate methods to investigate the merits of the investment and to structure the investment” as well as to “engage in a reasoned decision[-]making process, consistent with that of a ‘prudent man acting in [a] like capacity.’ The duty of prudence also requires fiduciaries to monitor the prudence of their investment decisions to ensure that they remain in the best interest of plan participants.”
 - Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 358 (4th Cir. 2014) cert. denied, 135 S. Ct. 2887 (2015)
- Basically – what would an intelligent, thoughtful, informed, knowledgeable person do?



Examples of Fiduciary Breach Theories and Liabilities (2)

- Governance Practical Problems
- October 2015 ERISA Litigation Conference, Panel on In-House Perspectives
- “One hour Committee Meeting of Very Busy People – What Do You Put on the Agenda and In How Much Depth?”



Examples of Fiduciary Breach Theories and Liabilities (3)

- What if They Didn't Cover Something in Depth in that One Hour that Could Be Linked to a Loss?
- “The district court carefully examined the relevant facts and made extensive factual findings to support its conclusion that RJR failed to engage in a prudent decision-making process. The court found that ‘the working group's decision in March 1999 was made with virtually no discussion or analysis and was almost entirely based upon the assumptions of those present and not on research or investigation.’ Indeed, the court found that the group's discussion of the Nabisco stocks lasted no longer than an hour.”
- Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 358 (4th Cir. 2014) cert. denied, 135 S. Ct. 2887 (2015)



Examples of Fiduciary Breach Theories and Liabilities (4)

- Different Theories, Different Recoveries, and How Would They Affect Your Insurance?
- Paid too much for employee investment options?
 - Liable for paying for retail, not institutional shares, is now the classic formulation
- Should be an ERISA plan, but are acting as though not?
 - The Church Plan cases



Examples of Fiduciary Breach Theories and Liabilities (5)

- **Public Company Stock Drop?**
 - Is the lost value of the stock a covered loss?
- **Private Company ESOP Valuation Error?**
 - Participants paid too much for their stock or bought out for too little
 - Is the value of the stock lost to the participants covered?



Fiduciary Liability

- “A fiduciary who breaches the duties imposed by ERISA is ‘personally liable’ for ‘any losses to the plan resulting from [the] breach.’ Section 1109(a), ERISA's fiduciary liability provision, provides in full: Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.”
- *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 356 (4th Cir 2014) cert. denied, 135 S. Ct. 2887 (2015)



Fiduciary Liability (2)

- Lots of Different Ways to Skin a Cat Here
- Why are You as a Fiduciary Being Held Liable Here/Having to Make Up a Loss to the Plan?
 - Liable for too much paid out in fees?
 - Liable for a stock drop?
 - Liable for wrongly valuing private company stock in an ESOP?
 - Liable for Misusing or Not Making Employee Deferrals?
 - Liable for Withdrawing Excess Matching Contributions?
- Does the Nature of the Liability Impact Coverage?



Section 502: Equitable Relief Claims

- Equitable Relief Claims
- Estoppel
 - Varies among jurisdictions
 - Some place barriers you wouldn't normally see in common law estoppel litigation
 - Why?
- Surcharge
 - CIGNA Corp. v. Amara, 563 U.S. 421 (2011)
 - “monetary ‘compensation’ for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment . . . this kind of monetary remedy against a trustee, sometimes called a ‘surcharge,’ was ‘exclusively equitable.’ . . . The surcharge remedy extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary.”
- Reformation
 - Estoppel, in some ways, by another name
 - More successful class wide, than individual equitable estoppel claims?



Plan Communications

- One of the Most Frequent Disjuncts Between Governance and Execution
- One of the Most Likely to Give Rise to Suit
 - As Either Substantive Exposure
 - Or Just the Last Straw for a Participant, Provoking Suit
- Variance in Liability Theories and Risk
 - As an estoppel claim?
 - As a breach of fiduciary duty claim?
 - As a reformation theory?



Plan Communications (2)

- What Do the Liabilities and Responsibilities Look Like?
- “The most important way in which the fiduciary complies with its duty of care is to provide accurate and complete written explanations of the benefits available to plan participants and beneficiaries.”
 - Osberg v. Foot Locker, Inc., No. 07 CIV. 1358 KBF, 2015 WL 5786523, at *29 (S.D.N.Y. Oct. 5, 2015)



Plan Communications (3)

- Communication Failures Can Support a Breach of Fiduciary Duty Claim
- “Although the statute articulates a number of fiduciary duties, it is not exhaustive. . . An ERISA fiduciary ‘may not, in the performance of its duties, materially mislead those to whom the duties of loyalty and prudence are owed.’ ‘The responsibility encompasses not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.’”
 - GEORGETTE M. BRADY, Individually & as Ex'x of the Estate of David V. Brady, Plaintiff, v. AIRGAS, INC., Defendant., No. 15-4099, 2015 WL 6599750, at *3 (E.D. Pa. Oct. 30, 2015)

