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PARTICIPANT EDUCATION AS A DEFENSE TO BREACH OF FIDUCIARY DUTY CLAIMS

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INTRODUCTION

Knowledge is power and information is king: these fundamental precepts govern much of the business world, and they are no less important when it comes to a fiduciary's operation of a benefit plan, including a 401(k) or pension plan. A fiduciary is subject to a statutory set of obligations, which look, in ERISA itself, innocuous enough. The statute requires that:

> (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 . . .

29 U.S.C. § 1104(a) [ERISA § 404(a)].

The provision, though relatively short and in many ways consisting of generic language, has nonetheless spawned more litigation, resulting in more recovery, than likely almost any aspect of federal law. A recent report explained that "between 2001 and March 2019, large corporations have paid out over $6.2 billion in ERISA class-action settlements, and at least 15 corporations have had total ERISA payouts of $100 million or more." Dechert, LLP, "A Look at the Current State of ERISA Class Action Litigation," Nov. 20, 2020.

Separate from the numbers, however, is the fact that the statutory provision can support a wide range of theories of liability, meaning that any of a number of actions or omissions by a plan's fiduciaries can give rise to litigation. Plaintiffs in breach of fiduciary duty cases have alleged under this statutory language everything from failure to advise employees of actuarial complexities of plan benefits, to errors in selecting mutual funds, to self-dealing, and dozens of other alleged violations.

The vagaries of breach of fiduciary duty litigation under ERISA effectively means that an employer, plan sponsor or plan administrator essentially cannot bar the door prospectively to such claims: no matter how a plan is run, the amorphous nature of the fiduciary obligation imposed by ERISA will allow a disgruntled participant and his or her lawyer to design a claim alleging a breach. The key to controlling the (almost invariably) substantial litigation costs and the potential damages that run alongside such claims, and alongside such freedom on the part of a plaintiff to characterize many types of conduct as constituting fiduciary breaches, is to proactively limit the ability of participants and their lawyers to construct such claims. The best offense for most plan sponsors and fiduciaries, in other words, is a good defense, consisting of following practices that provide as much evidence of reasonable plan management as possible and that, hopefully, foreclose certain avenues by which plaintiffs may seek to turn the routine actions of running a plan into allegations of fiduciary breach.

BREACH OF FIDUCIARY DUTY THEORIES BASED ON ASYMMETRICAL ACCESS TO INFORMATION

One of the most widely litigated types of alleged fiduciary breach concern the knowledge of participants and the information provided to them. Plaintiffs often allege that a plan fiduciary misled them, or provided incomplete information, or failed to inform them of important information, causing them to suffer losses. Courts have approached these types of allegations of breaches of fiduciary duty in a wide range of manners.

In some instances, courts have held that a fiduciary actually possessed an affirmative duty to provide information to participants and committed fiduciary breaches if it fails to do so. Although fiduciaries often argue that they have no affirmative duty to volunteer information, beyond whatever may be expressly required by the notice and related aspects of the ERISA statute itself, even courts that have been conservative in terms of imposing liability in these circumstances have held that a fiduciary may have an affirmative duty to disclose information if the fiduciary is aware that the participant needs, but lacks, important information to be able to make an informed decision. *See e.g. Watson v. Deaconess Waltham Hosp*., 298 F.3d 102, 114–17 (1st Cir. 2002); *DiFelice v. U.S. Airways, Inc*., 397 F. Supp. 2d 758, 769–71 (E.D. Va. 2005). It is not hard to conjure an almost unlimited set of circumstances in which a participant could claim to have been left in the dark as to important information known to a fiduciary.

Likewise, the United States Supreme Court has held that a breach of fiduciary duty occurs if a fiduciary intentionally provides misleading information. *Varity v. Howe*, 516 U.S. 489 (1996). While one can say that such a scenario is rare, and most plan sponsors or fiduciaries would not intentionally mislead participants, the simple fact is that it can often be in the eye of the beholder whether a fiduciary has done so. What looks to one side as simply a mistake in communicating information can be depicted as something more, and in fact nefarious, by the other. All it takes is one unexpected but poor performance by a defense witness at a deposition or, worse yet, in the witness stand at trial to turn an otherwise arguably innocent or defensible course of conduct by a fiduciary into one that a court believes was intentional and sufficient to impose liability. Indeed, a close review of cases where fiduciaries have been found by courts to be in breach of their duties related to informing participants finds that those cases typically went against the defendant due to testimony concerning actions that, to the company, may have appeared at the time to be routine business-related conduct, but that, in hindsight, was enough to give rise to significant liability for having allegedly misinformed participants. *See, e.g., Osberg v. Foot Locker, Inc*., 138 F. Supp. 3d 517 (S.D.N.Y. 2015), *aff'd*, 862 F.3d 198 (2d Cir. 2017)(relying on testimony as to process by which changes to plan were selected to demonstrate that participants were misled).

Over time, the scope of the type of claims that can be made by participants based on mistakes in providing information has expanded. Fiduciaries should never, and cannot, find either shelter or comfort in relatively early case law, such as the Supreme Court's decision in *Varity*, suggesting that intentional misconduct is necessary. In a watershed moment that vastly expanded the potential liabilities of fiduciaries for providing allegedly misleading information about a plan, the Supreme Court held a decade ago in *Cigna Corp. v. Amara*, 563 U.S. 421, 131 S. Ct. 1866 (2011), that a plaintiff can bring a misrepresentation claim seeking monetary relief under ERISA from a fiduciary. Courts have since expanded the scope and type of claims available where misleading information has been provided. For example, estoppel claims based on misinformation allegedly provided to participants by plan sponsors have become a relative commonplace in the years since. *See, e.g., Guerra-Delgado v. Popular, Inc*., 774 F.3d 776 (1st Cir. 2014; *Gearlds v. Entergy Servs., Inc*., 709 F.3d 448, 451–53 (5th Cir. 2013).

IS THERE VALUE TO PROVIDING EVER MORE INFORMATION TO PARTICIPANTS?

To some extent, the case law suggests that a fiduciary sits on a hairpin trigger, immediately beneath Damocles' sword. Providing too much information to participants may seem to open a fiduciary to claims that, in providing such information, they were inaccurate, made mistakes or otherwise misled participants, giving rise to claims for breach of fiduciary duty. But it would likely be a mistake to read that risk as counseling towards silence. Significant case law imposes an obligation to provide information in certain circumstances, and, moreover, often the worst (from the perspective of fiduciaries, anyway) of the rulings against fiduciaries have, at their core, evidence that the fiduciaries knew of information that would have been important to the participants but that was not provided. Realistically, as the case law continues to develop, the best approach is likely a nuanced one, in which careful consideration is given as to what information should be provided and when, in contrast, it should not be distributed.

Under these circumstances, providing rational, reasonable detailed education to employees on their investment options, so that they can make informed decisions is likely to be a very effective approach to reducing potential exposure of fiduciaries. Educated participants are less likely to be able to effectively claim that they were uninformed, misled or otherwise harmed by fiduciary conduct related to the information provided to them. This can particularly be the case in disputes arising from 401(k) or similar investment vehicles: employees who have been educated about the investments in the plan, how they work and their potential risks would seem to have less window to claim that the fiduciaries should have, but failed, to warn them of the downsides of their investment options. To return to the opening point, knowledge is power: participants who haven't been provided with any are free to widely attack that failure, but those who have been provided with detailed information and education concerning their investment options are more limited in their ability to challenge fiduciary conduct, as they have to argue that they were misled or otherwise mistreated even in the face of that information.

Still another aspect of breach of fiduciary duty litigation augers in favor of more information of this type being provided to employees and participants. To recover for breach of fiduciary duty, a plaintiff must not only show a breach, such as the failure to provide appropriate information where it is otherwise required, but must also prove causation or, in other words, that the breach caused a loss to the plaintiff. *E.g. Brotherston v. Putnam Invs., LLC,* 907 F.3d 17, 34

(1st Cir. 2018). In the case of investment disputes under ERISA, such as pension or 401(k) plans, there is often a legitimate question as to whether the failure to inform participants about certain aspects of investment options – such as, for instance, their fee structure or their returns relative to the market – even if a breach, actually caused a participant to suffer a loss. Oftentimes, there is a legitimate question for the court as to whether the plaintiff's investment behavior would have been any different even if the absent information had been provided; if not, causation is absent as the failure to provide the information did not cause any harm, as the plaintiff's investment behavior would have been the same regardless.

This aspect of such suits suggests that the answer to the question of whether to provide ever more information to participants leans towards increasing the amount of information provided, particularly where the information has the effect of educating plan participants about their investment options and even their investment thinking. The more they know about their investments, the less likely they are to be able to demonstrate causation, or in other words that, if they had only known more, they would not have held the investments in dispute. It is, as a practical matter, much easier for an uninformed participant to claim they were harmed by not being told more details about their investments than for an informed participant to so claim.

CONCLUSION

As with all legal strategies, your results may vary. Nonetheless, decades of legal developments suggest that providing more information and education, not less, may be an effective strategy to reduce litigation costs and potential exposures.
