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DISCLOSURE TO WELFARE PLAN PARTICIPANTS

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Trust Law Background

- ◆ Title I of ERISA is based on trust law principles
- ◆ ERISA Section 404 captures four of those fundamental principles:
 - Prudence
 - Loyalty
 - Duty to Diversify
 - Duty to Follow Terms of Trust

Trust Law Background

- ◆ Statutory principles equally applicable to employee pension benefit plans and employee welfare benefit plans
- ◆ Case law development has occurred primarily in pension plan litigation

Common Law of ERISA

- ◆ Common law of trusts is much broader than the four fundamental principles
- ◆ Congress envisioned courts would develop a federal common law of trusts and a federal common law of ERISA
 - Courts look to treatises and Restatement (Second) and (Third) of Trusts
 - While principles of trust law are long standing, task for courts is to apply principles to new circumstances

Common Law of ERISA

- ◆ ERISA's prudence requirements reflect circumstances then prevailing
- ◆ Uniform Trust Act drafters: "The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions."

Changed Circumstances

- ◆ Prudent investment principles in 19th and early 20th century based on a set of assumptions rejected by modern portfolio theory and DOL's regulations with respect to prudence
 - Market risk is only investment risk
 - Focus solely on risk avoidance significantly limits upside potential on investments

Changed Circumstances

- ◆ Cybersecurity not an issue in the 19th and most of 20th century
 - Generally regarded as implicating fiduciary principles today, although precise nature of fiduciary responsibility not yet defined
- ◆ On welfare side, significant advances in health care and technology
- ◆ The scope of information is much expanded even from enactment of ERISA
- ◆ Need for transparency not a concern at common law, but is today

Change in Focus Legislatively

- ◆ ERISA was enacted primarily in response to a breakdown in the pension system
- ◆ Welfare plans were included, but did not receive the same level of protection
 - ◆ No vesting rules
 - ◆ No funding rules
 - ◆ No eligibility requirements

Change in Focus Legislatively

- ◆ Over past three decades, a shift in Congressional focus from pension to welfare plans – Consolidated Appropriations Act, 2021 latest example
 - ◆ Transparency Requirements
 - ◆ Prohibition on Surprise Billing
- ◆ No comparable shift in focus before courts with respect to fiduciary issues

Two Trust Law Components

- ◆ Plan participants must be provided with material information to make informed decisions
 - Preambles to pension plan regulations emphasize the importance of participants making informed decisions
 - Same point made in preamble to recently issued final regulations on health care transparency
- ◆ Decisions must be cost conscious
 - “Wasting beneficiaries’ money is imprudent...trustees are obliged to minimize costs.”

Duty to Inform

- ◆ At common law, duty to inform arose in two circumstances
 - Beneficiary requested information
 - Fiduciary knows beneficiary is unaware of critical information
 - Example: Participants in group health plans are unaware of the value they are receiving (or not receiving) for premiums paid
 - With technological and medical advances, over time increased information will need to be provided

Duty to Inform

- Duty extends beyond duty to answer truthfully and not make misrepresentations
- Fiduciary must inform when he knows that silence may be harmful
- Duty sometimes described as “duty to blurt”

Scope of Duty to Inform

- ◆ As with most fiduciary rules, there are no bright line rules as to what currently needs or what will over time need to be disclosed
- ◆ Standard is materiality
 - Information is material if there is substantial likelihood that nondisclosure would mislead a reasonable employee in the process of making an adequately informed decision

Scope of Duty to Inform

- One ERISA update to common law is that information should be disclosed to participants in manner that is understandable by the average plan participant
- Current communications regarding medical care benefits frequently do not satisfy this goal: not only aren't fiduciaries providing plan participants with all the information that they should be providing, but the information that they are providing is not being presented in an understandable, user-friendly format

Plan Fiduciary Obligation

- ◆ Plan fiduciaries and their advisors have duty to assess the additional information they are being asked to disclose to participants
 - May want to know if results have been duplicated or peer reviewed
 - Not intended to allow plaintiff attorneys to bring “gotcha” claims based on speculative information that may turn out to be useful to participants
 - But should allow participants to be informed as to their choices

Duty to Inform

- ◆ Not judicial activism, or expanding ERISA protections
 - Summary plan descriptions and summary of benefits and coverage provide very useful but different type of information to plan participants and beneficiaries
 - SPD may disclose premiums, plan deductibles, co-pays, co-insurance, difference between in-network and out-of-network costs, exclusions, etc.
 - Participant needs this information to make informed decision, but if fiduciary is aware of greater information necessary to make an informed decision, that disclosure needs to be provided

Cost Conscious Decision

- ◆ Trust law as subset of equity had moral roots, but it has developed economic components
 - Cost consciousness is clearly set forth in Restatement (Third) of Trusts and Uniform Prudent Investors Act
 - Determination of appropriate medical plan to select is a different type of investment decision than investing in a 401(k) plan, but the same fiduciary principles are applicable

Limitations

- ◆ Behavioral economics has taught that not all economic decisions are made in a classic rational method
 - Some participants will continue to make seemingly ill-advised decisions even when provided with additional information
 - Participant may totally ignore the information and still make what in hindsight is correct decision
 - Participants may carefully consider the information and still make what in hindsight is an incorrect decision

Limitations

- ◆ Neither of those possible outcomes affects the fiduciary's responsibility to provide material information to allow plan participants to make informed cost-conscious decisions

Consolidated Appropriations Act, 2021

- ◆ In one sense, enactment of CAA and research that supports the analysis in Webinar were unrelated
 - ◆ We were aware of proposed legislation to address surprise medical billing and increased health care transparency, but the two efforts are otherwise unrelated
- ◆ At more important societal level, however, the two are closely related

Consolidated Appropriations Act, 2021

- ◆ The same concern about the lack of transparency in the welfare plan context is reflected in our White Paper, this Webinar, and the CAA
- ◆ Courts will need to address these issues
- ◆ Welfare plan advisors and welfare plan fiduciaries need to take them into account

Conclusion

- ◆ Information is not static
- ◆ Technology is not static
- ◆ The common law of trusts is not static
- ◆ Fiduciary duties cannot be static
- ◆ Articulation of the ERISA fiduciary duty in this context may be new, but the duty to disclose information to participants of which they are unaware, to allow them to make informed cost-conscious decisions, is not

QUESTIONS?

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