

LEGAL UPDATE

Respondeat Superior in ERISA Context

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With respect to interpreting a statute as complex as ERISA, it is not surprising that Courts will reach different conclusions on certain issues, particularly those issues that are on the margin of the statute. In theory, the Supreme Court can resolve differing interpretations by the Circuit Court of Appeals, but for a number of reasons, only a few of these conflicts will be heard by the Supreme Court. Thus, these issues will remain open for some time, at least in those jurisdictions in which the Court of Appeals has not rendered a decision.

One such issue involves the legal theory of “respondeat superior.” That term stands for the simple legal proposition that one party is responsible for the actions of its agent. For example, if my employee causes harm to a third party in the

Since the entity appointing a fiduciary is itself a fiduciary and has the obligation under ERISA to prudently select and monitor the activities of the Committee, rejection of the respondeat superior doctrine may not appear significant. In fact, in *Woods v. Southern Co.* (N.D. Ga. 2005), a District Court judge had commented that it would be difficult to envision a situation in which a principal would be liable under a respondeat superior theory without also being a functional fiduciary. The potential difference, however, relating to the concept of respondeat superior, includes a tort law concept based upon the law of agency. As Judge Posner explained in *Konradi v. United States* (7th Cir. 1990). “The liability of an employer for torts committed by its employees – without any fault on his part-when they are acting within the scope of their employment – the liability that the law calls respondeat superior – is a form of strict liability. It neither requires the plaintiff to prove fault on the part of the employer nor allows the employer to exonerate himself by proving his freedom from fault.” There is clearly conflicting authority in this area. The Court of Appeals for the Fifth Circuit, in *American Federation of Union Local 202 Health and Welfare Fund v. Equitable Life Assurance Society* (5th Cir. 1988), concluded that a nonfiduciary would have ERISA respondeat superior liability only where it actively and knowingly participated in its agent’s breach, although that holding is a clear departure from the common law understanding, and has been explicitly rejected at least by the Court of Appeals for the Sixth Circuit.

Courts have analyzed this issue in a number of different ways. In *Koing v. Fidelity Management Trust Co.* (D. Mass. 2004), the Court reasoned that respondeat superior may be inferred in a statute absent an express intent otherwise, and found no such intent in ERISA. In *Stanton v. Shearson Lehman/American Express, Inc.*, the District Court held a brokerage firm liable for the fiduciary acts of its

course of the employee’s duties for me, I the employer can be held equally liable for that harm.

The recent case of *In Re: M&T Bank Corporation ERISA Litigation* (W.D.N.Y. 2018) discussed one of those issues. In that case, plaintiff, relying solely upon the doctrine of respondeat superior, alleged that the defendant corporations were fiduciaries because their shared Board of Directors appointed the Committee, which, acting within the scope of its authority, had breached its duties. The Court noted that the respondeat superior doctrine had not been uniformly rejected in other Circuits, but a series of District Court cases in the Second Circuit had concluded that the respondeat superior doctrine was not applicable under ERISA.

broker-employee because making brokerage firms responsible for their violations of fiduciary duty served ERISA’s protective purpose.

Courts have also rejected respondeat superior for a variety of reasons. In *Tool v. National Employee Benefit Services* (N.D. Cal. 1996), the District Court rejected the concept because defining an entity as a fiduciary through common law agency principles would expand the statute. In *In re: AOL Time Warner, Inc. Securities and ERISA Litigation*, (S.D.N.Y. 2015), the District Court refused to find respondeat superior liability because ERISA limits liability to named and functional fiduciaries and expresses no intent to hold nonfiduciaries liable for a fiduciary’s breaches. Similarly, in *Woods v. Southern Company*, the District Court noted the absence of any express contemplation of vicarious liability in either the text or history of ERISA. In part, these cases rely upon the Supreme Court decisions in *Great-West Life & Annuity Insurance Company v. Knudson* and *Mertens v. Hewitt Associates* which cautioned against tacking remedies and causes of action onto ERISA.

Conclusion. The better view is that respondeat superior should not apply in the ERISA context. Although common law is often a starting point in analyzing ERISA issues, it does not mandate a result if it is inconsistent with ERISA’s language, structure, or purpose. As the District Court in *Goodman v. Crittenden Hospital Association Inc.* (E.D. Ark. 2015) stated, “effectively expanding ERISA liability through respondeat superior would not fill a statutory gap; it would discombobulate the statutory balance.”

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