

LEGAL UPDATE

Burden of Proof in Fiduciary Breach Claim

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When employee benefits attorneys provide fiduciary training to clients with respect to fiduciary issues under ERISA, they appropriately address basic issues such as who is a fiduciary, what are a fiduciary's duties and responsibilities, who are the named fiduciaries with respect to a plan, and to what extent those fiduciary duties can be allocated and delegated. As a warning to clients, the potential of personal liability for breach of fiduciary duty will generally be mentioned. In the ERISA litigation context, breach of fiduciary duty is a frequently raised issue, although in the litigation context the focus is frequently upon narrowly defined issues, as illustrated by the following cases.

In *Pioneer Centres Holding Company Employee Stock Ownership Plan and Trust v. Alerus Financial*, the Court of Appeals for the Tenth Circuit addressed the proper allocation of the burden of proof with respect to the element of causation in an ERISA breach of fiduciary duty claim. Under ERISA, a fiduciary who breaches his duty is personally liable for losses "resulting from the breach." There is agreement among the courts that this phrase means that there must be some nexus between the alleged breach and the loss that plaintiff seeks to recover. That is, establishing a breach of fiduciary duty does not equate to establishing causation of loss and the resulting personal liability. Consequently, a fiduciary can only be found personally liable upon a finding that the breach actually caused a harm to the plan, or, more precisely, for there to be personal liability under Section 409 of ERISA for a breach of fiduciary duty, that breach must be the proximate cause of the losses claimed.

To this point, there is agreement among the Circuit Courts of Appeal, but ERISA is silent as to who has the burden of proving a loss, and with respect to that issue, there is a split of authority among the Circuits, because there are two possible ways of addressing this issue. On the one hand, the general legal default rule where a statute is silent with respect to allocating the burden, is that the plaintiff bears the risk of failing to prove his claims. The majority of Circuit Courts

that have addressed this issue—the Second, Sixth, Ninth, and Eleventh—have refused to incorporate any burden-shifting rules into ERISA breach of fiduciary duty claims because, in their view, the language "resulting from" makes causation of damages an element of the claim, and that consequently the plaintiff bears the burden of proving it.

However, the Fourth, Fifth, and Eighth Circuits, relying upon the common law of trusts, have taken the opposite position. Trust law advocates a burden shifting paradigm whereby once a beneficiary established a *prima facie* case, that is, that there was a breach and that there was a loss, the applicable plan fiduciary would need to establish that the loss would not have occurred. This legal principle is found in the Restatement of Trusts (Third), a source that courts commonly refer to in addressing fiduciary issues under ERISA.

The Court of Appeals for the Tenth Circuit sided with the majority in deciding this issue, relying in part upon a Supreme Court decision that the law of trusts will often inform, but not necessarily determine, the outcome of an effort to interpret ERISA's fiduciary duties. The Supreme Court may ultimately need to resolve this Circuit split, but while there are arguments that can be advanced in support of both positions, the ultimate resolution of this issue has significant policy implications. As explained in a concurring opinion in the Second Circuit decision placing the burden of proof upon the plaintiff, the causation requirement of ERISA Section 409(a) acts as a check on this broadly sweeping liability to ensure that solvent companies remain willing to undertake fiduciary responsibility with respect to ERISA plans.

At some point, the Supreme Court will have to rule definitively on who has the burden of proof in fiduciary cases, and the implications for the industry will be significant and far reaching.

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