VOL. 32, NO. 1 SPRING 2019

BENEFITS LAW JOURNAL

Respondeat Superior in the ERISA Context

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Respondeat superior[1] (Latin meaning: "let the master answer,"),[2] is a tort law doctrine based on principles of agency.[3] The doctrine is also referred to as either vicarious liability or imputed negligence. Although the origin of the doctrine dates back to early common law when the servant was treated as property of the master,[4] it has continued in effect. Respondeat superior claims in the ERISA context may be made in one of two ways; while there is no circuit split on this issue, there is a split of authority as to the manner in which these claims should be addressed, and this article considers these rulings.

The most frequently cited statement of the doctrine in current jurisprudence is Judge Posner's opinion in *Konradi v. United States*:[5] "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,[6] 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."[7]

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The Employee Retirement Income Security Act (ERISA), however, does not expressly create a rule of vicarious fiduciary liability.[8] Professor Coleen Medill has suggested the following explanation as to why that issue may not have been addressed: "In moving from a one-dimensional trustee model to a multidimensional fiduciary model, Congress did not attempt to address and anticipate all of the potential complications. One of the omitted details was whether the common law liability rules of respondeat superior would become part of ERISA's system for regulating the conduct of corporate fiduciaries."[9] It is not surprising, therefore, that the Court of Appeals for the Sixth Circuit indicated that whether vicarious liability can extend to ERISA nonfiduciaries is a question "not easily answered,"[10] and the Court of Appeals for the Seventh Circuit described it as a "knotty problem."[11]

"On the one hand, ERISA is a comprehensive statute that spells out exactly who should be liable for what: engrafting extra common law remedies[12] on top of that is something that should not be done lightly. On the other hand, we have *Darden*[13] and many other decisions telling us that ERISA must be read against the backdrop of the common law of agency (as well as other parts of the common law)."[14] It is also not surprising that lower courts disagree over the extent to which ERISA bars the application of federal common law in this area,[15] although it is somewhat surprising the number of courts that have noted the split of authority on this issue.[16] There is, however, no Circuit split because no Court of Appeals has explicitly rejected the concept of respondeat superior for nonfiduciaries.[17] However, while the Ninth Circuit case of *Nieto v. Ecker*[18] does not speak directly to federal common law or respondeat superior, one commentator has concluded that "it is a fair assumption that the court would have ruled similarly in light of the scope of its language,"[19] and several cases in the Ninth Circuit have concluded that a theory of respondeat superior is inconsistent with core principles of ERISA.[20]

Respondeat superior claims in the ERISA context may be made in one of two ways: more typically the allegation is nonfiduciary liability through the agency relationship, although in some instances plaintiffs argue that respondeat superior makes the principal a fiduciary.[21] In this regard, litigants often plead nonfiduciary liability in the alternative in the event that a court determines that defendants are not fiduciaries.[22] Also, respondeat superior is a derivative claim, so that if the employee/agent did not breach his or her fiduciary duty,[23] or if the relationship of principal and agent has not been established, there will be no determination if respondeat superior applies.[24]

Courts that have addressed the split have concluded that four Circuits[25] have explicitly recognized the doctrine[26]–the Third,[27] the

Fifth,[28] the Sixth,[29] and the Tenth.[30] While the Court of Appeals for the Fourth Circuit has yet squarely to address the issue of vicarious liability under ERISA,[31] the affirming of the District Court decision recognizing respondeat superior can be regarded as an implicit recognition of respondeat superior under ERISA.[32]

The Court of Appeals for the Fifth Circuit has explained its rationale for applying the doctrine in the greatest detail. In *Bannister v. Ullman*, the Fifth Circuit stated that "in the context of respondeat superior liability, the issue is whether the principal, by virtue of its de facto control over the agent, had control over the disposition of plan assets."[33] The position of the Fifth Circuit on respondeat superior has been questioned by both the Sixth Circuit[34] and by commentators.[35]

The Fifth Circuit jurisprudence is not the only instance in which the principles of respondeat superior have been departed from in the ERISA context. In *Stanton v. Shearson Lehman/American Express*,[36] a brokerage firm was held liable for the fiduciary acts of its broker employees. The district court, however, did not adopt a theory of strict liability. Rather, the district court concluded that the broker-dealer would not be directly liable under ERISA unless it fails to train and supervise its brokers with the care, skill, diligence, and prudence that a prudent brokerage firm would exercise. If this framework were to be generally applicable, then "imposing a rule of vicarious liability under ERISA would be unlikely to result in an increase in the monitoring costs associated with the employer's internal fiduciary employees. ERISA already imposes these monitoring costs upon employers who appoint their employees as fiduciaries for the employer's plan."[37]

With respect to the issue of whether respondeat superior can be used to attach fiduciary status to a principal, several courts[38] have rejected that approach, although there is contrary authority.[39] Some courts take the view that respondeat superior fits comfortably within the ERISA context. In *Gifford v. Calco, Inc*., the Alaska District Court observed that "application of such a well established concept of American jurisprudence as the doctrine of respondeat superior is appropriately made a part of the formulation Congress authorized under ERISA."[40] In *Stuart Park Association Limited Partnership v. Ameritech Pension Trust*, the Illinois District Court stated that "It is well established that an employee's action within the scope of employment are imputed to the employer, even in the ERISA context."[41] In *Kling v. Fidelity Management*,[42] in upholding the doctrine, the Massachusetts district court indicated that the defendant failed to cite a single authority that evinces an intent within ERISA to eliminate the vicarious liability of a corporation for the acts of its employers or agents. *Kling* also relied upon the U.S. Supreme Court

decision of *Meyer v. Holley*:[43] "When Congress creates a tort action, it legislates against a background of ordinary tort-related, vicarious liability rules and consequently intends its legislation to incorporate those rules."[44] In *Stanton v. Shearson Lehman/American Express*, the District Court commented that making brand name brokerage firms responsible for the employees' violations of fiduciary duty served ERISA's protective purpose.

Those courts that have rejected the doctrine in the ERISA context have done so on a variety of grounds. *In re Mutual Funds Investment Litigation*, the district court explained "In line with the 'two hats'[45] theory, however, any employee who performs services on behalf of her employer's benefit plan may serve two masters, the company(as an employee) and the plan (as a fiduciary or agent thereof). When an employee takes actions regarding the plan, he is not 'acting within the scope of his authority' granted by the employer, but rather that granted by the plan or plan fiduciary. Accordingly, respondeat superior cannot create fiduciary status on behalf of the employer, but could only give rise to liability where the employer is otherwise a plan fiduciary as to the functions performed by the agents."[46]

In *In re AOL Time Warner*,[47] the district court explained that "there is no reason to recognize an implied ERISA cause of action under the doctrine of respondeat superior … since the statute's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."[48] In *Goodman v. Crittenden Hospital Association, Inc.*, the Arkansas district court concluded that "effectively expanding ERISA liability though respondeat superior would not fill a statutory gap. It would discombobulate the statutory balance."[49] *Woods v. Southern Company* noted the absence of any express contemplation of vicarious liability in the text or history of ERISA, and *Tool v. National Employee Benefit Services, Inc.*, rejected vicarious liability because defining an entity as a fiduciary through common law agency principles would expand the statute.

CONCLUSION

Absent a Court of Appeals decision specifically rejecting the respondeat superior doctrine in the ERISA context, this issue will not be addressed by the Supreme Court, and even if there is a contrary circuit court decision, it is questionable whether the Supreme Court would address this particular split. In a circuit that has not decided the issue, this article seeks to identify the arguments that have been advanced by supporters of both positions.

NOTES

1. Bradley R. Humphreys, "Assessing the Viability and Virtues of Respondeat Superior for Nonfiduciary Responsibility for ERISA Actions," 75 University of Chicago Law Review 1683 (2008).

2. Marvin H. Firestone, "Agency, Legal Medicine, 7th Ed. (2007), at 46; Prosser and Keaton on Torts Section 69 at 500 (5th Ed. 1984) translate it as "look to the man higher up," cited in Humphreys, *supra* n.1, fn.34, p.1689.

3. Section 7.03 of the Restatement of Agency 3rd provides that a principal is vicariously liable for the acts of an agent when the agent acts within the scope of the agent's authority; cited in *In re Lehman Bros. Securities ERISA Litigation,* 706 F. Supp. 2d 552, fn.57 (S.D.N.Y. 2010); *see also Gifford v. Calco, Inc*., 2005 WL 984518 (D. Ala. 2005), stating that the standard for imposing liability under a vicarious liability theory is the Restatement (Second) of Agency and *Goodman v. Crittenden Hospital Assn., Inc*., 2015 WL7016992, (E.D. Ark. Nov. 12, 2015) (referring to respondeat superior as "a venerable agency principle.").

4. Firestone, *supra* n.2 at 46.

5. *Konradi v. United States*, 919 F.2d. 1207 (7th Cir. 1990).

6. *See Cannon v. MBNA Corporation*, 2007 WL 2009672 (D. Del. July 6, 2007) (courts applying respondeat superior doctrine have held that in order for the doctrine to apply in the ERISA context, an employee must breach its fiduciary duty while acting in the scope of employment); thus, in *Ed's Automotive Transmission Service v. Southwestern Life Ins. Co*., 800 F. Supp. 1426 (N.D. Tex. 1992), since the employee's theft of funds was beyond the scope of his authority as the purported agent of Southwestern, Southwestern could not be held liable for a breach of fiduciary duty under a respondeat superior theory. The question of whether an employee is acting within the scope of his or her employment given a particular set of facts is a question of law; *Aliota v. Graham*, 984 F.2d 1350, 1358 (3rd Cir. 1992), cited in *Cannon v. MBNA Corp*., *supra*.

7. *Id*. at 1210; *Konradi* is discussed at Humphreys, *supra* n.1 at 1687, fn.37; and Colleen E. Medill, "The Federal Common Law of Vicarious Fiduciary Liability under ERISA," 44 University of Michigan Journal of Law Reform 249, 253 (Winter 2011); *see also Meyer v. Holly*, 537 US 280 (2003) ("Under the doctrine of respondeat superior, an employer is liable, despite having no fault whatsoever, for the acts of its employees taken within the scope of their employment"), quoted in *In Re Cardinal Health* ERISA Litigation, 424 F. Supp. 2d 1002, fn.48 (S.D. Ohio 2006); Firestone, *supra* n.2 at 46: "Respondeat superior imposes on the principal a 'strict liability' (i.e., liability without fault on the principal, and it attaches notwithstanding the principal's due care in the selection of the agent or employee and the subsequent supervision thereof)"; *cf.* Robert Neuner, "Respondeat Superior in the Light of Comparative Law," 4 Louisiana Law Review 1,2 (1941): ("There are a few indications in the common law which suggests that the basis of the employer's liability is his fault. The control test [for distinguishing servants from independent contractors] suggests perhaps that personal fault on the part of the employer is the basis of vicarious liability; for if it is assumed to be true that only a person who is under the employer's control is his servant, then it may be inferred that the employer is responsible for the negligent use of his right of control").

8. Medill, *supra* n.7 at 256.

9. *Id*. at 263–264; assuming that respondeat superior is part of the federal common law of ERISA, the elements of respondeat superior may be determined under state law; *Kling v. Fidelity Management*, 323 F. Supp. 2d 133 (D. Mass. 2004).

10. *Hamilton v. Carell,* 243 F.3d 992, 994 (6th Cir. 2001).

11. *Howell v. Motorola, Inc*., 633 F.2d. 552, 563 (7th Cir. 2011).

12. Technically, respondeat superior is not an independent cause of action but rather a basis for a principal's vicarious liability for its agent's actions*; O'Bryan v. Holy See,* 556 F.3d 361, 370, fn.1 (6th Cir. 2009), cited *Surrinder Aurora v. Henry Ford Health System*, 2017 WL 4119496 (E.D. Mich. Sept. 18, 2017); *see also McCullough v. American General Insurance*, 2007 WL 274689, n.2 (M.D. Tenn. Sept. 19, 2007) ("Respondeat superior is a theory of recovery, not an actual cause of action") and *Goodman v. Crittenden Hospital Assn., Inc*., *supra* n.3 ("respondeat superior is, carefully speaking, neither a remedy nor a cause of action; it's a principle of liability-holding A responsible for B's actions because the two are one in the law's eyes"); *cf. Gifford v. Calco, Inc*., *supra* n.3, distinguishing *Nieto v Ecker*, 845 F.2d. 868 (9th Cir. 1988), because in that case plaintiffs pursued a remedy not provided for under ERISA, while in the instant case, plaintiff's ERISA cause of action was supplemented by the Alaska state law concept of respondeat superior."*Gifford v. Calco* is discussed in Humphreys, *supra* n.1 at 74.

13. *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992).

14. *Howell v. Motorola, Inc*., *supra* n.11; the court did not answer the question, because vicarious liability is a derivative liability, and the agent/employee did not commit a fiduciary breach. As a result, "whether respondeat superior applies to ERISA claims is an unsettled question in this [7th] Circuit"; *Patton v. The Northern Trust Company*, 703 F. Supp. 2d. 799, fn.12 (N.D. Ill. 2010); *Rogers v. Baxter International, Inc*., 2006 WL 4886949 (N.D. Ill. Feb. 22, 2006).

15. Humphreys, *supra* n.1 at 1684; this article is limited to the application of respondeat superior in connection with breaches of an employee/agent of the requirements of ERISA Section 401; *cf. High Crest Functional Medicine, LLC v. Horizon Blue Cross/Blue Shield*, 2017 WL 1203654 (D.N.J. Mar. 30, 2017) (respondeat superior does not apply to a request timely to furnish documents under ERISA Section 502(c)(1)(B).

16. *See, e.g., In re M&T Bank Corporation* ERISA Litigation (W.D. N. Y. Sept. 11, 2018); *Rogers v. Baxter*, 2006 WL 488694 (N.D. Ill. Feb. 22, 2006); *Fastener Dimensions v. Mass Mutual Life Ins. Co*., 2013 WL 6506304 (S.D.N. Y. Dec. 12, 2013); *Wasley Products, Inc. v. Bulakitis*, 2006 WL 3834240 (D. Conn. 2006). *In re Cardinal Health Inc*. ERISA Litigation, 424 F. Supp. 2d 1002 (S.D. Ohio 2006); *In re Xerox Corp*. ERISA Litigation, 2007 WL 1137373, fn.5 (D. Conn. Apr. 17, 2007); *Goodman v. Crittenden Hospital Assn., Inc*., 2015 WL 70169929 (E.D. Ark. Nov. 12, 2015); In re *Bank of America Corp*, 756 F. Supp. 2d 330 (S.D.N.Y. 2010); *Cannon v. MBNA Corp*., *supra* n.6; *In re Coca Cola Enterprises, Inc*. ERISA Litigation, 2007 WL 1810211 (N.D. Ga. June 20, 2007); *Woods v. Southern Co*., 396 F. Supp. 2d 1351, fn.10 (N.D. Ga. 2005).

17. Humphreys, *supra* n.1 at 1684.

18. *Nieto v. Ecker, supra* n.12; for a detailed analysis, *see* Kevin B. Bogucki et al., "*Nieto v. Ecker*-The Propriety of Non-Fiduciary Liability under Section 409" 64, Notre Dame Law Rev 271 (1989).

19. Humphreys, *supra* n.1 at 1693–1694.

20. *Glardi v. Pertec Computer Corp*., 761 F. 2d 1323 (9th Cir 1985); *Carr v. International Game Technology*, 770 F. Supp. 2d 1080 (D. Nev. 2011); *Walsh v. Emerson*, 1990 WL 47319 (D. Ore. 1990), 1989 U.S. Dist. LEXIS 18289 (D.Ore. Oct. 3, 1989); *Moreland*

v. Bebl, 1996 U.S. Dist. LEXIS 5652(N.D. Cal. Apr. 17, 1996); and *Tool v. National Employee Benefit Services*, 957 F. Supp. 1114 (N.D. Cal. 1996); *but see Gifford v. Calco, Inc.*, *supra* n.3 and *Contract Cleaning Maintenance Inc. v. Marks*, 1996 WL 264724 (N.D. Ill. May 15, 1996) (citing *Nieto v. Ecker* as supporting respondeat superior with respect to equitable relief in the form of restitution).

21. Humphreys, *supra* n.1 at 1696.

22. *Id.* at 1687.

23. *Bannister v. Ullman*, 287 F. 3d 394 (5th Cir. 2002).

24. *See*, for example, *Miller v. Mellon Long Term Disability Plan*, 2010 WL 2595568 (W.D. Pa. June 25, 2010); *In Re McKesson HBOC* ERISA Litigation, 391 F. Supp. 2d 812 (N.D. Cal. 2005); *Clark v. Board of Trustees Steamship Trade Assoc. Int'l Longshoremen's Benevolent Assoc. Trust Fund*, 896 F.2d. 1366 (4th Cir. 1990); *Fastener Dimensions v. Mass Mutual Life Ins.*, *supra* n.12; *In re Xerox Corp.*, *supra* n.16 at 5; in *Contract Cleaning Maintenance v. Marks*, *supra* n.20, the District Court concluded employer of a nonfiduciary defendant could be held liable under a respondeat superior theory if a nonfiduciary employee was found liable as a nonfiduciary.

25. In *Goodman v. Crittenden Hospital Assn., Inc.*, *supra* n.3, the court, citing *Howell v. Motorola*, *supra* n.11, concluded that "the Seventh Circuit seems inclined to find it based on ERISA's adoption of general agency principles, and respondeat superior's pedigree in that law."

26. *In Re Wilmington Trust Co.* ERISA Litigation, 943 F. Supp. 2d 478 (D. Del. 2013).

27. *McMahon v. McDowell*, 794 F. 2d. 100, 109 (3rd Cir), cert. den. 479 U.S. 971 (1986). In *Goodman v. Crittenden Hospital Assn., Inc.*, *supra* n.3, the district court commented that the Third Circuit adopted the doctrine "with little analysis."

28. *American Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y*, 841 F. 2d 658 (5th Cir. 1988).

29. *Hamilton v. Carrell*, 243 F. 3d 992, 1001–1002 (6th Cir. 2002) (in dicta stating that respondeat superior may be a source of liability).

30. *NFL Scouting, Inc. v. Continental Assurance Co.,* 931 F.2d 646 (10th Cir. 1998). In *Goodman v. Crittenden Hospital Assn., Inc.*, *supra* n.3, the district court commented that the Tenth Circuit adopted respondeat superior in the ERISA context "with little analysis."

31. *Meyer v. Berkshire Life Ins. Co.*, 250 F. Supp. 2d. 544 (D. Md. 2003), fn.27, aff'd 372 F. 3d 261 (4th Cir. 2004).

32. Humphreys, *supra* n.1 at 1699–1701.

33. *Bannister v. Ullman*, *supra* n.23, quoted in *In Re RCN* Litigation, 2006 WL 753149 (D.N.J. Mar. 21, 2006); *see also Ed's Automatic Transmission Service v. Southwestern Life Ins. Co., supra* n.6 (to establish defendant's vicarious liability under the common law doctrine of vicarious employment, plaintiff must establish (i) that the agent acted as a fiduciary; (ii) that the agent breached his or her fiduciary duty to the plan while acting in the scope of his or her employment; and (iii) the principal actively and knowingly participated in the breach); *Hanlon v. Melillo*, 2004 WL 2049337 (N.D. Tex. Sept. 7, 2004); *In re Dynegy, Inc.* ERISA Litigation, 309 F. Supp. 2d 861 (S.D. Texas 2004); courts in other jurisdictions have followed *Bannister v. Ullman*; *see, e.g., Crowley v. Corning, Inc.*, 234 F. Supp. 2d 22 (W.D.N.Y. 2002) and 2004 WL 763873 (W.D.N.Y. Jan. 14, 2004); other courts have commented that courts that have recognized claims based upon a theory of respondeat superior have required factual allegations that support

a claim that the corporation exercised de facto control over ERISA employees; *see In re Bank of America Corp.*, *supra* n.16, and *Woods v. Southern Co.*, *supra* n.16 at fn.12.

34. *Hamilton v. Carrell, supra* n.29 at 1001–1002.

35. Humphreys, *supra* n.1 at 1697–1698; ("In holding that respondeat superior against nonfiduciaries is viable, American Federation recreated the doctrine in an unorthodox form of direct liability. This conception of respondeat superior is strikingly close to ERISA's functional definition of fiduciary, making the Fifth Circuit's interpretation and application almost certainly wrong as a doctrinal matter"); *See also Woods v. Southern Co.*, *supra* n.16; ("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").

36. *Stanton v. Shearson Lehman/American Express*, 631 F. Supp. 100, 104–105 (N.D. Ga. 1986).

37. Medill, *supra* n.7 at 258.

38. *National Management Association, Inc. v. Transamerica Financial Resources, Inc.*, 197 F. Supp. 2d. 1016 (S.D. Ohio 2002). (The fact that an individual's conduct may be arguably sufficient to make one an ERISA fiduciary is insufficient by itself to render his principal a fiduciary. "In determining whether to impose a fiduciary status, the Sixth Circuit appears to have endorsed looking to the conduct of the party at issue, not to that of its agents"); *Walken v. Massachusetts Financial Services Co.*, 2006 WL 734796 (D.Md. Feb. 27, 2006). ("A principal can be held liable for its agent's violation of ERISA only if the principal is an ERISA fiduciary to begin with"); *Walsh v. Marsh McLellan Cos.*, 2006 WL 734899 (D. Md. Feb. 27, 2006); *In re Mutual Funds Investment Litigation*, 403 F. Supp. 2d 434(D. Md. 2005); *In re Morgan Stanley* ERISA Litigation, 696 F. Supp. 345 (S.D.N. Y. 2009). ("While corporations may act through agents, not every action of a corporate employee can be attributed to the corporation. In the ERISA context, a company does not become a fiduciary merely because its employee is a fiduciary"); *Dupree v. The Prudential Insurance Co. of America*, 2007 WL 2263892 (S.D. Fla. Aug. 7, 2007) (Prudential cannot be considered a fiduciary simply because the committee members performing these actions were its employees); *United Centrifugal Pumps v. Schotz*, 1991 WL 274232, fn.5 (N.D.Cal. June 12, 1991) (dismissing an ERISA breach of fiduciary duty claim based on the allegation that defendant was a vicarious fiduciary and concluding that "nothing in ERISA suggests that Congress intended the wholesale importation of the common law of agency and vicarious liability into the fiduciary provisions of the Act"); *Kannapien v. Quaker Oats*, 507 F. 3d 629 (7th Cir. 2007) (a finding that a plan administrator may breach a fiduciary duty vicariously through the actions of a nonfiduciary would vitiate our requirement that an ERISA claim for breach of fiduciary duty must be asserted against plan fiduciaries); *Kenseth v. Dean Health Plan*, 610 F. 3d 452, 465 (7th Cir. 2013) (same).

39. *See, e.g., Jones v. Sun Edison*, 2014 WL 1213471 (E.D.Mo. Mar. 24, 2004) (concluding that defendants were de facto fiduciaries and explaining under basic principles of corporate law, defendant company "is imputed with knowledge of its officers and employees…regarding the alleged misconduct, even if such knowledge is not communicated to the [plan sponsor]"; *Kling v. Fidelity Management*, *supra* n.9; (Defendants have failed to cite a single authority that evinces an intent within ERISA to eliminate the vicarious liability of a corporation for the acts of its employer agents).

40. *Gifford v. Calco, Inc.*, *supra* n.3.

41. *Stuart Park Ass'n Ltd. Partnership v. Ameritech Pension Trust,* 846 F. Supp.701 (N.D. Ill. 1994); the case is discussed in Humphreys, *supra* n.1 at 1694–1695.

42. *Kling v. Fidelity Management, supra* n.9.

43. *Meyer v. Holly, supra* n.7.

44. The District Court in *Goodman v. Crittenden Hospital Assn. Inc.*, *supra* n.3, disagreed with this analysis in *Kling*, stating that ERISA is not reducible to a tort statute; *Meyer v. Holley*, *supra* n.7, is also discussed in Humphries, *supra* n.1 at 1706–1707, and quoting from the case the principle that "abrogation of the doctrine of respondeat superior liability should not be inferred from a federal statute in the absence of an express Congressional intent."

45. *Pegram v. Herdrich*, 530 U.S. 211, 215 (2000).

46. *In re Mutual Funds Investment Litigation supra* n.38, fn.15; *cf. In re Williams Co.* ERISA Litigation, 271 F. Supp. 2d 1328, 1338 (N.D. Okla. 2003) ("Williams, as settlor or sponsor of the plan, does not act as a fiduciary").

47. *In re AOL Time Warner*, 2005 WL 563166 (S.D.N.Y. Mar. 10, 2015).

48. *Id.* at 4, fn. 5, citing *Mertens v. Hewitt Associates*, 508 US 248,254 (1993); *In re AOL Time Warner* was followed in *Harris v. Finch, Pruyn Co.*, 2008 WL 2064972 (N.D. N.Y., May 13, 2008); *cf. Aull v. Cavalcade Pension Plan*, 185 FRD 618 (D. Colo. 1998); after stating that *Mertens* did not specifically address vicarious liability, it concluded: "The *Mertens* dictum, however strong, cannot be read to overcome the Tenth Circuit's holding in *National Football Security*," although "*Mertens* raises serious questions about a plaintiff's ability to extend ERISA liability beyond one who falls within ERISA's definition of fiduciary"; *cf.* Humphreys, *supra* n.1 at 1685: "The Supreme Court has left substantial ambiguity regarding ERISA's scope, and absent a clear pronouncement from the Court, or a clarification from Congress, lower courts should not read ERISA forbidding a potential useful theory of liability."

49. *Goodman v. Crittenden Hospital Ass'n, Inc.*, *supra* n.3 at 4.