

# Fiduciary-Meaning of?

## Background

Persons performing duties to self-funded health care plans may well ask this question: Do my actions make me a fiduciary with respect to such actions?

These variations of self-funded plans will be considered:

- Plan may be trustee, with assets; or general asset, without assets.
- Plan may have traditional stop-loss or may be a very high deductible traditional group plan.
- Plan may be administered by a TPA or by an insurer under an ASO arrangement.
- Plan may be a single employer plan, a Taft-Hartley Plan or a Multiple Employer Welfare Arrangement.
- Interested parties making inquiry may be a TPA, insurer, officer of employer, bank, actuary, accountant or attorney.

For discussion purposes the determination of who might be deemed a fiduciary will follow this outline:

- a. General Considerations.
- b. Plan Assets are involved.
- c. Only Benefits, or Eligibility for benefits, are involved.
  1. Insured plan.
  2. Self-funded plan.

## Types of Fiduciaries

A fiduciary becomes one in these ways:

- By being named  
The plan document says employer is plan administrator, e.g.
- By action  
A person's conduct over the plan's actions is such that the person will be treated as a fiduciary. If you look and act like one, you are one.

The persons usually named as fiduciaries are these:

- Plan administrators
- Trustees, in jointly managed plans
- Trustees in single employer plans.

The persons who usually become fiduciaries by their conduct are these:

- Claim's service firms
- Investment advisors

- Insurance broker.

## Conduct Which Makes A Fiduciary

Certain tests will be applied to a person's actions.

- Discretionary authority or control of plan assets
- Investment advice for fee
- Discretionary authority or control of plan administration.

Where conduct test is being applied, it matters not what a person's title is but only such person's conduct.

## Extent Of Fiduciary Duties

There are many functions of a plan (asset management, investments, custodial, claims administration, recordkeeping, compliance, auditing, actuarial, e.g.) which may be performed by a variety of persons or firms.

A person or firm may be fiduciary to the plan but for that function only. The fiduciary label is on a person but only as it relates to that particular function performed by such person.

## Fiduciary Standards

There is an objective standard to be followed by a fiduciary.

- Loyalty  
Loyalty exclusively to the persons, other than itself, for whom such fiduciary has responsibility. The duty of loyalty includes fairness; all persons served shall be treated with equal consideration. Such fiduciary must exclude itself from consideration.
- Care, Skill and Diligence  
The person who is the fiduciary must be active, must inquire, and must consider; they may rely on the expertise of others (attorneys, actuaries, investment advisors, accountants, e.g.). but they must follow such advice with due diligence and care; they must monitor and probe to be certain they know what is going on.
- Prudence  
That is, what would a prudent person do in like circumstances. Level of prudence is high – that of an expert, not of a common person. Lack of familiarity of the fiduciary with the subject matter does not excuse the person from a fiduciary liability.
- Diversity

Not all of one's eggs in one basket is a required fiduciary standard. While generally discussed in light of assets, its logic also applies to any act or function, which affects the well being of the plan

## **Failure of a Fiduciary Duty**

A fiduciary, as a result of failing in his duty, may be held personally liable for damages and also be removed as fiduciary; or be held liable for legal fees; be required to repay any compensation received regardless of offsetting revenues offered plus interest; or being banned as a fiduciary in the future.

## **Fiduciary and Conflicting Authority**

A fiduciary will always have a conflict – the beneficiary's interest and the interest of those which appointed him. The fiduciary must have fair, impartial and unwavering loyalties to all beneficiaries – participants, providers and employers.

## **Following Plan Document**

The ERISA plan is in writing; the fiduciary is obligated to understand the plan language and follow it. A plan document, unless inconsistent with ERISA, is the same as law. Remember: the plan document cannot be written to violate the law *but* if no violation is made, it must be followed.

## **Prohibited Transactions**

The primary thrust of the prohibited transaction is this: nobody, fiduciary or party-in-interest, may touch plan assets in such a way that any endangerment to the ultimate plan benefit will result. If such is done, personal liability will result.

## **Use of Outside Experts**

A fiduciary may use outside experts if their recommendations are monitored and studied and then selection made with due diligence. These experts are:

- Investment managers
- Co-fiduciaries (as with committees)
- Actuaries
- Accountants
- Claims administrators
- Attorneys.

## **New Fiduciary Standards**

## **In General**

The Omnibus Budget Reconciliation Act of 1989 (OBRA 1989) has a new penalty with bite:

- Mandatory assessment of 20% to the DOL of amounts received for fiduciary breaches as a result of ERISA enforcement procedures.
- Assessment also applies to non-fiduciaries.

This tough new ERISA provision is a direct result of these situations:

- Congress is concerned with lapses in ERISA enforcement.
- Department of Labor criticized by Inspector General for ineffective enforcement.

Further, proposed ERISA amendments are forthcoming which would govern even tougher enforcement powers to the Department of Labor.

## **Strict Standards for Fiduciaries**

A fiduciary standard is the most strict standard of conduct that is possible. The fiduciary must have the best interest of the beneficiary in mind in every single one of its actions. The fiduciary is above the morals of the marketplace. The actions are measured not by mere honesty but by honor.

ERISA spells out quite well the obligations of the fiduciary:

- A. Act for the exclusive purpose of:
  1. Paying benefits
  2. Defraying *reasonable* expenses
- B. Act as a prudent person might act.
- C. Diversify investments.
- D. Abide by the plan documents.

It must be noted that a non-fiduciary who knowingly participates in a breach of fiduciary is as liable, under ERISA and the clarifying court decisions, as the fiduciary who does the act itself.

In the usual course of events, a Plan Supervisor will be a co-fiduciary with the employer and a fiduciary to the plan. NOTE: the Plan Supervisor is not a fiduciary to the beneficiaries but rather to the plan.

## **Who is a Fiduciary?**

The acid test of who is fiduciary rests on one's functions; you are one if you look and act like one. More specifically, a fiduciary with respect to the plan:

- Exercises discretionary control and authority over plan assets
- Renders investment advice for a fee
- Exercises discretionary control and authority over plan administration.

Courts usually follow the functions in determining whether one is or is not a fiduciary. Title alone is of little matter. Of course a title such as a plan administrator (as in ERISA) or trustee automatically conveys the following label.

## **Fiduciary Status**

To narrow down the problem with the non-fiduciary, the DOL has, by regulations, listed numerous persons who are not *ordinarily* fiduciaries. These persons, in the conduct of their usual professional duties, will be nonfiduciaries:

- Attorneys.
- Accountants
- Actuaries
- Plan Consultants.

Also persons who perform mere ministerial functions are not fiduciaries. Examples are these:

- Claim processing where processor does not have review responsibilities
- Preparing 5500, 5301, etc.
- Calculating benefits of a pure mechanical nature.

NOTE: Claims adjusting and claims processing are different functions.

## **Non-fiduciary Problem**

Being a nonfiduciary does not result in a non-liability therefrom. ERISA empowers the courts to redress any fiduciary breaches as it sees fit – including the punishment of a nonfiduciary. The problem, which confronts the nonfiduciary, is the *knowing participation*. This requires two elements:

- The nonfiduciary by commission or omission aided the breach.
- The nonfiduciary had actual or constructive knowledge of the breach.

## **Nonfiduciary Liabilities**

Clearly a liability for the nonfiduciary has been, by statute, established; the burden on the nonfiduciaries are not as great as on the cofiduciary, however.

As previously established, a nonfiduciary becomes a cofiduciary when its discretion/authority fails to be limited to a preexisting framework of policies, practices and procedures.

The newly-used expression *knowing participation* is not well defined.

1. Is it similar to conspiracy with some type of affirmative situation?
2. Does it mean the nonfiduciary merely furthered or completed the breach by an act or a failure to act?
3. Does it only mean that the nonfiduciary had only knowledge that a breach was occurring? Best guess – Number 2.

## How the Nonfiduciary Should Act

A nonfiduciary becomes privy to a breach: what then?

For the nonfiduciary to have the best defense, these responses should be contemplated:

- If the nonfiduciary has done its chores properly and such chores did not aid or abet the breach, and if the nonfiduciary did not have a financial gain from the breach, then nonfiduciary might be found guiltless.
- The nonfiduciary *could* be found guilty, however, if the *knowing participation* requirement is followed. Absent misconduct or actions beyond the normal duties or direct financial gain in the transaction; the nonfiduciary, based upon present court decision will be found not guilty.

## Enforcement Amendment To ERISA

### Background

As a result of criticism by the Department of Labor's (DOL) Inspector General of the laxity of the DOL's ERISA enforcement, changes are being prepared.

The changes will take the form of ERISA amendments.

### Proposed Amendments

The specific changes being proposed are theses:

- Eliminate Limited Scope Audit  
As it stands when auditors see assets in banks and insurance companies, they accept them without question. What is proposed will require the auditors to treat these as any other asset.
- Accountant Peer Review  
For an accountant to be qualified to do ERISA audits, it must pass a peer review every three years.
- Award for Violation Turn-In  
A participant who reports a fiduciary violation will receive a percent of the civil penalty resulting therefrom.
- Award for Legal Costs  
A participant, initiating legal action against a plan fiduciary would receive compensation for the legal fees (and expert witness costs) if successful.
- Stiffer Civil Penalties  
The present 5% excise tax and civil penalty would be increased to 10%
- De Novo Judicial Review  
Require a *de novo* judicial review in some instances (meaning starting anew which implies the court will examine each factual situation as suspect) in lieu of the present practices of arbitrary and capricious judicial review. This is in

response to the *Firestone v. Bruch* decision. The instances where a *de novo* review is mandated would be where the claim adjudicators have both discretion and a financial stake in the outcome.

- MEWA Registration  
All MEWA's (like a gun control law) would have to be registered with the DOL.
- Proxy Voting Records  
Participants in a Taft-Hartley plan would like to know that John, a union trustee, has the undisclosed voting rights with stock the trust owns.

## Possibilities Under Discussion

*Compliance Audits* by accountants have been discussed but as yet no action has been recommended. Reason: too costly.

## ERISA Fiduciary Liability and the Examiner

### The Problem

Paying claims by ERISA rules has certain dangers for the examiner. Complaints made of claims processing in state courts will usually be removed to federal courts on grounds of ERISA preemption. The good news is that the state's punitive damage laws will not apply; the bad news is that access to federal courts is easy and the list of possible compliance and fiduciary breaches is long and growing longer by the month. One can never be certain of these state law preemption's, however.

The law being developed by federal courts in some ways gives the examiner comfort; in other ways discomfort. These examples will illustrate:

- Large punishments in attorney fees being assessed likely if the examiner has been guilty of outrageous, arbitrary or capricious practices.
- Avoidable delay in claims processing.
- Unfeeling or *cavalier* attitude by the examiner.
- Failure to properly and completely develop the information.

### The Solution

The examiner should keep these simple operating principles in mind at all times:

- Be sure the claims system follows ERISA denial procedures.
- Give special care when an unusual feature such as notoriety, emotion, delay, e.g.
- When an attorney is involved on behalf of the participant or assignee be especially careful.
- Review ERISA denial letters carefully to avoid an error or incompleteness, e.g.
- Act promptly.

- Follow a checklist so nothing is forgotten.
- Develop the necessary information early and not later, completely and not haphazardly or partially.