

Relying on expert advice can be an effective defense for employee benefit plan trustees facing fiduciary breach lawsuits. What is the defense, and how can fiduciaries ensure that it's available?

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Trust Me, I'm an Expert:

A Fiduciary's Practical Guide to Relying on Expert Advice

by | **Michael T. Joliat**



What happens if employee benefit plan fiduciaries reasonably rely on an expert's advice, as allowed under the Employee Retirement Income Security Act (ERISA), and the expert is wrong?

Should the fiduciaries be liable for a breach, even though they were in no position to question the expert's advice?

This article will explore those questions and explain why employee benefit plan fiduciaries may want to consider the defense of reliance on expert advice if they are accused of a fiduciary breach. This underutilized defense can be a powerful tool for fiduciaries when used correctly.

Background

ERISA fiduciaries, including Taft-Hartley benefit plan trustees, are required to act according to the highest standard of conduct—the prudent expert standard.[1] Under ERISA, they are liable for breach of fiduciary duty if they fail to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

Of course, it is impossible for ERISA fiduciaries to be experts in all the many issues they face when administering a plan (legal, actuarial, accounting, investment, etc.). Recognizing this reality, courts have held that fiduciaries have the right and the obligation to seek advice from experts.[2]

Going back to the original question: What if the expert gives bad advice? Are plan fiduciaries liable? The answer is often no.

Under the concept of defense of reliance on expert advice, courts have held that fiduciaries do not breach their duties if they act in reasonable reliance on expert advice—even if the act would otherwise have been a breach of fiduciary duty.[3]

However, expert advice is not a whitewash that exonerates fiduciaries whenever they obtain expert advice; they must demonstrate that it was prudent to follow the expert's advice.[4] For example, it would not be prudent to follow a lawyer's advice on an investment matter.[5] Thus, the defense is limited, and fiduciaries must be vigilant and careful to put themselves in a position to successfully invoke it.

The Requirements for a Successful Defense

When a fiduciary lacks adequate familiarity with a matter, the duty of prudence requires a careful and impartial investigation that may include seeking out the opinions of outside experts.[6] When courts examine whether a fiduciary's reliance on an expert's advice was appropriate, they assess the fiduciary's conduct based on the circumstances that existed at the time that their challenged decision was made.[7] Courts also consider whether a prudent fiduciary in a similar position would have relied on the expert's advice under those same conditions.[8]

When fiduciaries raise the reliance on the advice of an expert defense, their mere consultation with an expert will not serve as a complete defense to a claim of imprudence.[9] For the defense to be successful, fiduciaries must show that they (1) investigated the expert's qualifications, (2) shared complete and accurate information with the expert, and (3) ensured that their reliance on the expert's advice was reasonably justified under the circumstances.[10] In other words, courts analyze whether fiduciaries relied on an appropriate and fully informed expert and evaluated the expert's advice rather than blindly accepting it.[11]

Investigating the Expert's Qualifications

According to the first defense requirement, a fiduciary must investigate whether the expert is qualified.[12] To comply with this requirement, the fiduciary must determine whether the expert is experienced in their area of consultation and whether their advice is impartial.[13] For instance, in *Perez v. Bruister*, trustees were accused of breaching their fiduciary duties by causing a plan to overpay for a plan investment.[14] The trustees relied on the advice of an independent appraiser, but they had selected the appraiser based on the recommendation of a trustee's friend, who had little knowledge of the appraiser's skill set. The trustees did not make further inquiries about the independent appraiser's credentials. Had they done so, they would have discovered that the appraiser had no college degree, had a felony conviction for fraud and was operating under an assumed name. The court held as follows.

> *[t]he Court is not willing to say that [the appraiser was] per se unqualified to appraise any company. But the combination of his background and split loyalty raises concerns that should have been discussed. Instead, the fiduciaries were not focused on this issue. It is a close call, but the Court finds that a proper investigation was lacking. . .*

In short, the court held that the trustees could not invoke the defense of reliance on expert advice because they had not prudently determined that the person who they relied on was indeed an expert.

Sharing Complete and Accurate Information

To rely on expert advice, fiduciaries must provide information that they know to be necessary and material to the expert's analysis.[14] *Perez* furnishes a second example of what not to do. In that case, the trustees assured the independent appraiser that the financial information they provided complied with the Generally Accepted Accounting Principles (GAAP) despite knowing that the statements contained GAAP deviations and errors. The trustees also withheld known risks, such as the company's heavy reliance on a single client for business, increases in company expenses and cash flow issues. Accordingly, the court held that the trustees could not use the reliance-on-expert-advice defense, because they had not duly informed their expert.

Ensuring That Reliance Was Reasonably Justified

Fiduciaries must investigate the recommendations they receive to invoke this expert advice defense.[15] In *Riley v. Murdock*, an employee benefit plan fiduciary successfully used the defense after participants accused the fiduciary of

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- Under the concept of *defense of reliance on expert advice*, courts have held that Employee Retirement Income Security Act (ERISA) fiduciaries do not breach their duties if they act in reasonable reliance on expert advice—even if the act would otherwise have been a breach of fiduciary duty.
- To use the defense, fiduciaries must demonstrate that it was prudent to follow the expert's advice. They must demonstrate that they (1) investigated the expert's qualifications, (2) shared complete and accurate information with the expert, and (3) ensured that their reliance on the expert's advice was reasonably justified under the circumstances.
- The reliance-on-expert-advice defense can be a powerful tool because fiduciaries may be able to show that they were justified in relying on expert advice if it was wrong.
- Fiduciaries should ensure that experts are advising within the scope of their expertise and should not try to steer experts into giving particular advice.

breach for the purchase of an annuity backed by junk bonds.[16] During the annuity selection process, the fiduciary established a committee composed of experienced financial managers to assess potential annuity providers. The committee retained both an employee benefits consulting firm and a law firm to assist in the evaluation. In addition to obtaining the recommendations of these firms, the committee undertook its own investigative steps, including conducting a financial analysis, reviewing relevant financial documents, examining insurance company ratings and meeting with other companies that had purchased annuity contracts from the insurer. As a result, the court held that the fiduciary was reasonably justified in relying on expert advice.

There are many situations in which fiduciaries are not reasonably justified in relying on expert advice. For instance, fiduciaries cannot rely on out-of-date advice.[17] In *Donovan v. Cunningham*, a group of plaintiffs alleged that fiduciaries purchased stock at an inflated price that exceeded the fair market value.[18] The fiduciaries relied on an independent appraiser's reports, but the reports were between 13 and 20 months old, and the facts underlying the reports had changed. Because the fiduciaries did not investigate whether the reports remained valid, the court held that the fiduciaries

Tips to Properly Rely on Expert Advice



In any act they undertake, fiduciaries should consider whether a court would say that it was undertaken in reliance on the advice of an appropriate, impartial and fully informed expert whose advice the fiduciary prudently evaluated. Below are tips for putting this into practice:

DO

- **Do retain experts**. It is not uncommon for fiduciaries to take action without soliciting expert advice, sometimes because of the cost of retaining an expert. Fiduciaries who do not obtain advice cannot invoke the expert advice defense. If the cost of expert advice renders a course of action too expensive, it is probably not a prudent course of action.
- **Do investigate experts' qualifications** and ensure that they are contractually obligated to inform the fiduciaries of material subsequent events, such as malpractice claims, that might call into question the experts' qualifications.
- **Do ensure that experts are advising within the scope of their expertise**. Often, fiduciaries may not know whether experts are advising on a matter within the scope of their expertise, and experts don't always volunteer that information. The simple solution is for fiduciaries to ask and to ask again whenever a novel issue arises. If a fiduciary has a concern that an expert is veering outside their lane, the fiduciary should document receiving confirmation from the expert that the issue is within the expert's scope of expertise.
- **Do document the elements of the expert advice defense**. For instance, fiduciaries should retain copies of responses to requests for proposals showing expert qualifications, obtain expert advice in writing and document the information provided to the expert in connection with obtaining advice.

DON'T

- **Don't try to steer experts into giving particular advice**. If there is evidence that fiduciaries retained an expert to bless a course of action that they already intended to take, a court will likely find that they did not rely on the expert's advice at all—even if all the requirements for the defense are otherwise met.
- **Don't ignore inconvenient information**. If the fiduciaries receive indirect or informal information that is problematic for purposes of relying on an expert's advice, they should not ignore it. An example of such information is an informally disclosed conflict of interest. If the information is material to the fiduciaries' defense, a court will probably hold that they should have known it even if there is no evidence that they received the information.

Fiduciaries should raise the reliance-on-expert-advice defense with their defense counsel if they are ever accused of breaching their fiduciary duties. Most fiduciaries do retain and rely on experts, yet the defense is seldom raised. This is likely because the defense is little known even to members of the bar. Fiduciaries should not assume that their lawyer has considered the defense and decided against invoking it. They should ask.

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could not rely on the advice contained in the reports, and their defense failed.

Implications of Using the Reliance-on-Expert-Advice Defense

The reliance-on-expert-advice defense provides fiduciaries with a powerful tool that minimizes their potential liability under ERISA. When fiduciaries breach their duties, they may face severe consequences that can include monetary damages.[19] They also encounter the risk that courts will issue injunctions against them or remove their fiduciary status.[20]

The tool is powerful partly because a court may find that a fiduciary was reasonably justified in relying on expert advice even if that advice turned out to be wrong.[21] The question of whether a fiduciary's reliance was reasonably justified is about process, not outcome. For example, in *Clark v. Feder Semo & Bard, P.C.*, an employee benefit plan's lawyer provided advice to the plan's fiduciary on a benefit calculation that was wrong due to the lawyer's error.[22] However, the court held that the fiduciaries were justified in following the lawyer's advice because the recommendation was based upon relevant documents, the lawyer's conclusion was consistent with the fiduciaries' understanding of the plan and the fiduciaries had no other reason to doubt the lawyer's findings.

As demonstrated above, courts have recognized that even if fiduciaries' actions have financially harmed participants or led to employee benefit plan losses, the fiduciaries have still satisfied their duty of prudence if they adhered to a well-informed decision-making process. If fiduciaries can prove that they (1) selected a qualified expert, (2) disclosed all information that was relevant and significant to the expert's analysis, and (3) took steps to verify the expert's recommendations, they have a strong evidentiary foundation that supports the prudence of their actions. Given the significant costs associated with litigation, fiduciaries should likely incorporate a process for establishing this defense into all their fiduciary decisions.

Conclusion

In many cases where fiduciaries raised the reliance-on-expert-advice defense, the defense failed for relatively obvious reasons: The advice was out of date. The fiduciary relied on an attorney for investment advice. The fiduciary relied on a felon for investment advice. By taking a commonsense approach to obtaining relevant, informed and impartial advice on matters of plan administration, fiduciaries can provide themselves a powerful tool in their defense against charges of fiduciary breach.

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Endnotes

1. 29 USC §1104(a)(1)(B).
2. See *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 302–03 (5th Cir. 2000); *Gregg v. Transp. Workers of Am. Int'l*, 343 F.3d 833, 841 (6th Cir. 2003); *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 153–54 (3d Cir. 1999); *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983).
3. *Howard v. Shay*, 100 F.3d 1484, 1489 (9th Cir. 1996).
4. *Clark v. Feder Semo & Bard, P.C.*, 739 F.3d 28, 31–32 (D.C. Cir. 2014).
5. Id.
6. See *Bussian Gregg In re Unisys Sav. Plan Litig., Donovan.*
7. *Clark*, 739 F.3d at 31–32.
8. Id.
9. *Howard*, 100 F.3d at 1489.
10. Id.
11. Id.
12. Howard, 100 F.3d at 1489.
13. *Perez v. Bruister*, 54 F. Supp. 3d 629, 662 (S.D.Miss. 2014), aff'd as modified, 823 F.3d 250 (5th Cir. 2016).
14. See id. at 667–68.
15. *Riley v. Murdock*, 890 F. Supp. 444, 458 (E.D.N.C. 1995), aff'd, 83 F.3d 415 (4th Cir. 1996).
16. Id. at 448.
17. *Cunningham*, 716 F.2d at 1473–74.
18. Id. at 1460.
19. *Montgomery v. Aetna Plywood, Inc.*, 39 F. Supp. 2d 915, 942 (N.D.Ill. 1998).
20. *United States v. Mason Tenders Dist. Council of Greater N.Y.*, 909 F. Supp. 882, 887 (S.D.N.Y.), judgment entered, 909 F. Supp. 891 (S.D.N.Y. 1995).
21. *Clark*, 739 F.3d at 30–31. In fact, when a fiduciary successfully invokes the reliance-on-expert-advice defense, it is usually the case that the expert's advice was wrong or the outcome of the advice was unfavorable. Every such case involves a problem for which a plaintiff blames a fiduciary. At its core, the defense consists of the fiduciary deflecting blame onto the expert.
22. Id.