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Indemnity and Contribution in ERISA Litigation

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This article discusses the origins of the Federal Circuit Court split in regard to indemnity and contribution, the law that has emerged in the various circuit courts, and the impact that the question has on ERISA litigation.

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For decades, federal courts have wrestled with the question of whether fiduciary defendants in cases brought under the Employee Retirement Income Security Act of 1974, as amended (ERISA), can sue other fiduciaries for indemnity and/or contribution to compel others to bear responsibility for alleged breaches of duty. The issue is a significant one: Some circuits allow defendants to pursue equitable indemnity and contribution from other fiduciaries while other circuits do not.

Indemnity and contribution are equitable doctrines that originated in the traditional common law of trusts. Where the common law imposed joint and several liability (that is, where one fiduciary bore full responsibility for a loss regardless of the proportion of that fiduciary's fault for the loss), the doctrine of contribution enabled a trustee to recover from a co-trustee if he paid more than his fair share of liability. The concept of equitable indemnity enabled a trustee to recover from a co-trustee who was substantially more

at fault, even in the absence of an express indemnity agreement.

Although ERISA includes a detailed statutory scheme to rectify breaches by plan fiduciaries, it does not expressly allow claims for indemnity or contribution among breaching fiduciaries. In the absence of an express statute governing indemnity and contribution, circuit courts have split as to whether ERISA permits a fiduciary to sue another fiduciary for indemnity and contribution.

Whether courts recognize indemnity and contribution actions has real-world implications for ERISA fiduciaries, as there are many circumstances in which more than one party may be responsible for a loss sustained by a plaintiff. Consider this common scenario: An employer offers a plan of life insurance for its employees. Benefits are funded by a group life insurance policy. The policy offers two levels of benefits: (1) "basic" benefits that are automatically available to all employees, and (2) higher "supplemental" benefits. Supplemental life insurance benefits are typically available only if the participant submits "evidence of good health" and agrees to payment of additional premiums for the enhanced coverage.

The insurer's contract with the plan sponsor requires the plan sponsor to secure the requisite health information from the participant and provide it to the insurance carrier, who would determine whether to assume the risk of the supplemental coverage. Assume also that (1) the additional premiums are withheld from the employee's paycheck, and are remitted "in bulk" along with all other employee premiums to the insurer, and (2) the employer neglects to notify the employee of the need to complete a supplemental health questionnaire to qualify for the supplemental insurance, while nevertheless withholding the additional premiums from the employee's paycheck, and submitting that additional payment to the insurance carrier along with premiums for all other participants. The employee dies, and her beneficiary seeks life insurance benefits equal to the higher supplemental benefit amount. The insurance company (which is a fiduciary for the plan with respect to the claim review process) denies the claim on the grounds that no evidence of good health was submitted by the employee during her lifetime. The beneficiary sues the insurance company, but not the plan sponsor, seeking to recover the difference between the "basic" life insurance and the supplemental benefit.

In circuits where indemnity and contribution are unavailable, the insurance company could be left "holding the bag" for the entire loss (assuming the court holds the insurer liable), regardless of whether the plan sponsor may have some responsibility for failing to strictly follow the terms of its contract with the insurer.

To better understand how this might come about, we first discuss ERISA's detailed framework governing fiduciary duties and liability for breach of those duties. We then discuss the split between the circuit courts on the issue of indemnity and contribution in ERISA cases and consider potential alternatives available to defendants sued in jurisdictions that disallow indemnity and contribution. We conclude with practical considerations plan sponsors and other ERISA fiduciaries should keep in mind in seeking to mitigate potential liability flowing from other fiduciaries' conduct.

ERISA's Fiduciary Liability Framework

In drafting ERISA's fiduciary standards, Congress borrowed heavily from the common law of trusts. ERISA "abounds with the language and terminology of trust law." [*Varity Corp. v. Howe,* 516 U.S. 489 (1996).] ERISA's duties of loyalty and care are set forth in ERISA §§ 404(a)(1)(A)-(B). ERISA § 502 provides a series of enforcement mechanisms that are available to plan participants, beneficiaries, and fiduciaries. ERISA § 502(a)(2) allows a fiduciary to bring a civil action on behalf of the plan against a breaching fiduciary. Section 502(a)(3) allows participants, beneficiaries, and fiduciaries to bring an action to enjoin any act or practice that violates ERISA or the terms of the plan, or to obtain "other appropriate equitable relief" to redress such violations or to enforce any provisions of Section 502(a) or the terms of the plan.

ERISA § 405(a)(1)-(3) prescribes specific situations in which a fiduciary may be liable for the breach of another fiduciary—when a fiduciary knowingly participates in or conceals another fiduciary's breach, when a fiduciary's failure to meet his responsibilities enables another fiduciary to commit a breach, or when a fiduciary has knowledge of another's breach and fails to take steps to remedy the breach. ERISA § 410 prohibits contractual provisions that insulate a breaching fiduciary from liability for losses caused by the breach, for example, an employer may not enter into an agreement with an employee who serves as a fiduciary to its employee benefit plans that provides that the employer

will relieve the fiduciary from responsibility for his breaches. However, either the employer, the employee, or the plan may purchase fiduciary liability insurance for the benefit of the fiduciary-employee. [The law surrounding ERISA § 410—and the limits of how far parties may go in agreeing to protect other fiduciaries in the event they are sued for breach of their fiduciary duties—is beyond the scope of this article. A significant number of cases have addressed the issue in the context of fiduciary duties to employee stock ownership plans (ESOPs), where sponsors of ESOP owned companies routinely agree to indemnify persons and companies that act as independent fiduciaries/trustees on behalf of the ESOP. Some courts have disallowed the practice entirely. Others have allowed these provisions to stand, subject to language in the indemnity agreement that would require the breaching fiduciary to reimburse the plan sponsor for any expenses advanced by the plan sponsor in the event a court determines that the fiduciary breached its duty to the plan]

Although ERISA is a "'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system," [*Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) (citation omitted).] ERISA's text is silent with respect to whether one fiduciary may seek indemnity or contribution from another. However, courts have the authority "to develop a 'federal common law' under ERISA," albeit not "to revise the text of the statute." [*Id.*; *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).] The absence of a statutory provision for indemnity and contribution raises the question: Did Congress intend to preclude such relief, and if not, may courts apply their equitable powers to allow for indemnity and contribution?

As discussed below, some federal courts say yes, while others say no.

Indemnity and Contribution in ERISA Cases

The Seventh and Second Circuits Allow Indemnity or Contribution Claims in ERISA Cases

Indemnity or contribution claims are allowed in ERISA cases filed within the territorial boundaries of the Second and Seventh Circuit Courts of Appeals. In *Free v. Briody* [732 F.2d 1331 (7th Cir. 1984)], the Seventh Circuit, exercising its equitable powers, held that ERISA §§ 409 and 502(a)(2) provide fiduciaries with an implied right to indemnity against breaching co-fiduciaries. The Court reasoned that the text of ERISA itself evidenced Congress's intent to provide for indemnity claims "both because the language of ERISA provides protection for co-trustees [that is, ERISA § 405] and because Congress evidenced an intent to apply general trust principles to the trustee provisions of ERISA."

At the same time, the court refused to recognize a right to indemnity founded in federal common law, pointing to the Supreme Court's rejection of similar claims under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 in *Northwest Airlines, Inc. v. Transport Workers Union of America* [451 U.S. 77 (1981)], and under antitrust laws in *Texas Industries, Inc. v. Radcliff Materials, Inc.* [451 U.S. 630 (1981)]. In those cases, the Supreme Court made clear that a joint tortfeasor's right to contribution or indemnity must be found either in the underlying statute or within the "limited scope" of federal common law. The *Briody* court found that ERISA provided for such a right. Although *Briody* recognized a right to *indemnity*, the Seventh Circuit has noted that it is an "open" question whether ERISA defendants have a right of contribution. [*Summers v. State St. Bank & Tr. Co.*, 453 F.3d 404, 413 (7th Cir. 2006)]

In contrast to the Seventh Circuit's approach in *Briody*, the Second Circuit recognized a federal common law right to contribution and indemnity in *Chemung Canal Tr. Co. v. Sovran Bank/Md.* [939 F.2d 12 (2nd Cir. 1991)] The court in *Chemung* noted that it was "simply following the legislative directive to fashion, where Congress has not spoken, a federal common law for ERISA by incorporating what has long been embedded in traditional trust law and equity jurisprudence." The Second Circuit explained that allowing contribution claims "would have no financial impact on the recovery of plaintiffs," who would continue to recover their full loss from any or all breaching fiduciaries. Additionally, the court was persuaded that, although contribution claims might further complicate an already complex area of law, "[f]ull responsibility [for a plaintiff's loss] should not depend on the fortuity of which fiduciary a plaintiff elects to sue." [*See also In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1029 (2d Cir. 1992) (citing *Chemung* and finding that federal common law governed effect of settlement of ERISA claims on rights to indemnity and contribution)]

The Eighth and Ninth Circuits Disallow Indemnity and Contribution in ERISA Cases

Unlike the Second and Seventh Circuits, the Eighth and Ninth Circuit Courts of Appeals have

ruled against allowing indemnity and contribution claims against co-fiduciaries in ERISA cases. In *Kim v. Fujikawa* [871 F.2d 1427 (9th Cir. 1989)], the Ninth Circuit refused to recognize an implied right of contribution under ERISA. Citing the Supreme Court's decision in *Mass. Mutual Life Ins. Co. v. Russell* [473 U.S. 134 (1985)], the Ninth Circuit reasoned that because ERISA § 409 only establishes remedies for the benefit of *the plan*, that section cannot be read as providing for an equitable remedy of contribution in favor of a *breaching fiduciary*. The court also noted that, in light of ERISA being a "comprehensive and reticulated statute," the absence of a provision allowing for contribution evidenced Congress's intent *not* to allow for contribution. Moreover, the court noted that there is no indication in the legislative history "that Congress was concerned with softening the blow on joint wrongdoers." [*See also Call v. Sumitomo Bank*, 881 F.2d 626 (9th Cir. 1989) (citing to *Fujikawa* in affirming dismissal of contribution claim)]

The Eighth Circuit refused to recognize a federal common law right to contribution in *Travelers Cas. & Sur. Co. of Am. v. IADA Servs., Inc.* [497 F.3d 862 (8th Cir. 2007)] noting that ERISA'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." (Citation omitted). The court also refused to read an implied right of action for contribution into ERISA § 409(a), citing to the same reasoning outlined in *Fujikawa*.

District Courts in Circuits Without Appellate Guidance Are Similarly Split on the Issue

Although the Second, Seventh, Eighth, and Ninth Circuit Courts of Appeals have all weighed in on the issue of indemnity and contribution in ERISA litigation, the remaining circuits have remained silent. In these circuits, district courts are similarly split on the issue. [*See, e.g.*, *Green v. William Mason & Co.*, 976 F. Supp. 298 (D. N.J. 1997) (allowing indemnity and contribution claim); *Guididas v. Community Nat. Bank Corp.*, 2012 WL 5974984 (M.D. Fla. 2012) (allowing indemnity and contribution); *Roberts v.* Taussig, 39 F. Supp. 2d 1010 (N.D. Ohio 1999) (disallowing indemnity and contribution); In *re Enron Corp., Derivative & "ERISA" Litigation*, 228 F.R.D. 541 (S.D. Tex. 2005) (disallowing indemnity and contribution)]

The Circuit Split on the Issue Will Continue for the Time Being

Recently, in *First Reliance Standard Life Ins. Co. v. Giorgio Armani Corp.* [852 Fed. Appx. 304 (9th Cir. June 11, 2021)] the Ninth Circuit ruled—consistent with its prior statements on the subject—that an alleged breaching fiduciary (Giorgio Armani, the plan sponsor) was prohibited from suing a co-fiduciary for indemnity and contribution. As in the hypothetical scenario described above, Armani offered employees supplemental life insurance coverage through its welfare benefit plan. The plan's insurance policy required Armani to obtain proof of insurability from employees who applied for coverage for their spouses. Armani neglected to obtain the required proof of insurability with respect to an employee that selected the spousal coverage. Nevertheless, the insurance company (First Reliance) accepted increased premium payments associated with the spousal coverage. The employee made a claim for benefits under her dependent spouse's life insurance policy. First Reliance denied the claim on the grounds that no evidence of insurability was provided.

The Ninth Circuit held that Armani was deemed to have waived, on First Reliance's behalf, the policy's evidence of insurability requirement. The Court also upheld its prior decisions precluding indemnity and contribution in the ERISA context, and held that First Reliance could not maintain a claim for indemnity or contribution against Armani. Further, the court pointed to the absence of evidence that Congress, in enacting a comprehensive scheme for the protection of ERISA plans and beneficiaries, intended to "soften[] the blow on joint wrongdoers" by allowing for indemnity and contribution.

First Reliance subsequently filed a petition for a *writ of certiorari* seeking review of the Ninth Circuit's decision by the Supreme Court. In support of its petition, First Reliance noted that in an earlier case before the Supreme Court [*Fenkell v. Alliance Holdings, Inc.*, No. 16-473 (Oct. 7, 2016)], the Court had asked the Acting Solicitor General for the government's views on whether indemnity or contribution claims were available in ERISA actions, but the parties dismissed the case before the government could express its position. Notwithstanding the Court's apparent curiosity about the issue in *Fenkell,* on February 22, 2022, the Supreme Court denied First Reliance's petition. Unless and until the Supreme Court decides to address the

issue, the split in authority between the circuit courts on the issue of indemnity and contribution in ERISA cases will continue.

Limited Options Available to Defendants in Suing Third Parties for Indemnity and Contribution

In jurisdictions where indemnity and contribution claims are disallowed, fiduciaries have very limited options to recover against alleged breaching third party co-fiduciaries when plaintiffs opt not to name those co-fiduciaries as defendants in the first place. One option is to file a third-party complaint for breach of fiduciary duty on behalf of the plan against the co-fiduciary under ERISA § 502(a)(2). Claims under that Section inure to the benefit of the *plan*, so in the event the matter proceeds all the way to judgment against the third-party, any recovery would only indirectly benefit the fiduciary that was sued in the first place. If the parties reach a "global" settlement, the original fiduciary may be able to effectively pass on a portion of its own liability to the third-party. But this approach comes with a significant cost: The original fiduciary would likely be required to affirmatively allege that a breach of fiduciary duty occurred—a breach that likely involved the original fiduciary's conduct as well. In other words, filing a third-party complaint arguably precludes the defendant from effectively defending on the grounds that there was no breach of fiduciary duty, and thereby escaping liability entirely.

Practical Considerations and Conclusion

Until the Supreme Court chooses to resolve the split between the circuit courts regarding the availability of indemnity and contribution claims in ERISA actions, plan sponsors and other fiduciaries will face a patchwork of rules governing this area of the law, and the outcome may be determined largely by the forum in which a lawsuit is filed. Fiduciaries named as defendants in ERISA lawsuits should assess whether the law of the jurisdiction in which the action is pending allows claims for contribution or indemnity, and if so, determine whether a viable claim exists against other parties or non-parties. But even before a lawsuit commences, there are steps that ERISA fiduciaries should take to mitigate potential liability vis-à-vis other co-fiduciaries. First, plan sponsors should assess whether to include in plan documents a forum selection clause specifying a forum in a jurisdiction that recognizes indemnity and contribution claims. Second, fiduciaries should consider obtaining fiduciary liability insurance coverage. That coverage may cover the costs of defense against ERISA claims (although it typically excludes coverage for benefits owed by a plan). And third, fiduciaries should engage in ongoing oversight of co-fiduciaries, to ensure that they are fulfilling their fiduciary duties. Together, these steps can help ERISA fiduciaries protect themselves to the greatest extent possible. ■

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