BLOG

Reasonable Reliance on Advice of Counsel May Offer Fiduciary Protection

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A recent case in the Court of Appeals for the D.C. Circuit sheds light on the circumstances under which plan fiduciaries may reasonably rely on the advice of counsel.

In *Clark v. Feder Semo and Bard, P.C.*, decided January 7, 2014, an attorney sued her former law firm employer after the firm shut down and terminated its cash balance retirement plan. The assets of the plan were insufficient to satisfy its liabilities, and the plaintiff received less than the amount of plan benefits to which she believed she was entitled. Among other claims, the plaintiff, Ms. Clark, alleged that the law firm's directors—who also administered the plan—breached their fiduciary duties in placing her in a group of employees whose share of the plan was based on an annual employer contribution equal to 10% of salary rather than in the group whose share was based on a 20% contribution. When Clark asked to be placed in the 20% group instead, the law firm directors consulted their benefits counsel. Counsel concluded that Ms. Clark was properly placed in the 10% group, and the law firm directors denied her request. Clark sued, arguing, among other things, that the directors were not entitled to rely on the attorney's advice because the attorney had made mistakes in his analysis. Clark argued that the directors would have discovered those mistakes had they undertaken an independent investigation. The District Court held that the directors were entitled to rely on the advice of counsel, and the Court of Appeals agreed.

In explaining its decision, the Court began with the words of ERISA itself: An ERISA plan fiduciary must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use." The Court framed the relevant question as follows: Would a prudent fiduciary in a particular set of circumstances have acted in reliance on counsel's advice?

In the case at hand, the plan's counsel consulted the plan documents, analyzed the facts concerning Ms. Clark's plan benefits and employment, and made comparisons to the plan benefits and employment of other plan participants. As it turns out, counsel got some of the facts wrong. Ms. Clark argued that these errors showed that the law firm directors should have independently investigated the matter. The Court disagreed. Whether plan fiduciaries may reasonably rely on the advice of counsel in discharging their duties is based on the facts and circumstances present at the time—there is no strict liability standard for mistakes that the fiduciaries have no reason to suspect.

Still, the Court pointed out that there are circumstances under which it would be improper for fiduciaries to rely on counsel's advice. A fiduciary may not reasonably rely on counsel's advice when there are "significant reasons to doubt the course counsel suggested." If: a fiduciary knows that counsel does not have all the relevant documents or relevant facts; a fiduciary has reason to know that counsel has made a mistake; counsel is unfamiliar with the plan at issue; counsel's analysis does not appear to be based on a reasonable investigation; counsel's conclusion is not accompanied by any supporting documentation or analysis; or counsel's analysis is inconsistent with the fiduciary's understanding of the plan, further investigation is needed. In such cases, a court would likely find that the fiduciary's reliance on counsel's advice was not reasonable.

In conclusion, if a plan fiduciary takes the proper steps, acting on advice of plan counsel can provide a strong case that the fiduciary acted prudently and discharged his or her fiduciary duties appropriately.
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