THE MONEY'S GONE!

Prosecuting ERISA Fiduciary Liability Claims: A Road Map for Bankruptcy Trustees

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Editor's Note: This is the first part of a two part series on the topic of ERISA fiduciary liability claims. In this issue, the attorney representing a trustee in such an action provides an overview of prosecuting such claims. In Part Two, the trustee himself authors an article regarding the initial steps to be taken by trustees including identifying employee benefit plans and potential causes of action. The use of bankruptcy estate funds to pay for ERISA plan administration and trustee compensation will also be examined.

INTRODUCTION

With the advent of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)[1], not only must bankruptcy trustees familiarize themselves with the obligations of the ERISA plan administrator, they must also acquire some base-level understanding of fiduciary liability under ERISA, as they are now responsible for investigating and prosecuting such claims on behalf of the plan or its participants. With that in mind, the goal of this article is to help trustees put on their "litigator's hat" as they sift through the wreckage of a post-bankruptcy ERISA plan so that they can better (1) identify potential causes of action, (2) identify potential defendants, and (3) navigate the procedural minefields that can encumber their pursuit of such claims.

A GENERAL OVERVIEW OF ERISA'S CIVIL ENFORCEMENT SCHEME [2]

ERISA's civil enforcement scheme, 29 U.S.C. §1132, is specific as to who may bring a civil cause of action under ERISA and the types of claims that those persons may bring. In addition to allowing a plan participant or beneficiary to assert civil claims to recover plan benefits and enforce contractual rights under the terms of the plan, ERISA also permits a "participant, beneficiary, or fiduciary" to bring a civil action (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. §1132(a)(3)

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Not only are bankruptcy trustees in their capacity as plan administrators authorized to pursue such claims, in some circumstances they may be *required* to pursue claims to fulfill their fiduciary obligations to plan participants and beneficiaries. As one bankruptcy court recently noted:

> [A] strong argument can be made that under ERISA, a plan administrator does have a fiduciary duty to pursue valuable claims that the ERISA Plan has against other persons. *See generally Harris v. Koenig*, 602 F. Supp.2d 39, 54-55, 65 n.26 (D.D.C. 2009) (noting, among other things, that "[t]he duties of loyalty and prudence mandated in Section 404(a) of ERISA [29 U.S.C. § 1104(a)] include the 'duty to take reasonable steps to realize on claims held in trust.'") (citation omitted). Such an argument is even stronger in a case like this one, where it appears that the only ERISA plan fiduciaries other than the plan administrator are the very targets of the Plan's claims, who obviously cannot be expected to pursue such claims for the Plan.

In re Trans-Industries, Inc., 419 B.R. 21, 39 (Bankr. E.D. Mich. 2009).[3]

It follows that bankruptcy trustees who have been thrust in the role of ERISA plan administrator should take a pro-active approach to investigating and pursing possible claims instead of relying on other participants or fiduciaries to do so. This is especially true when the former fiduciaries or participants have caused injury to the plan through their malfeasance, self-dealing or other proscribed conduct under ERISA.

Who Can Be Sued? The Expanding Universe of Potential ERISA Defendants

The pool of potential defendants in an ERISA fiduciary liability case is larger than most practitioners realize. Determining fiduciary status is a mixed question of law and fact. *Reich v. Linecaster*, 55 F.3d 1034, 1044 (5th Cir. 1995). While typically plan fiduciaries are expressly appointed in the plan documents[4], someone who holds no formal position with respect to a plan may nonetheless rise to the level of a fiduciary by exercising *de facto* control over a fiduciary function.[5] "Fiduciary status under ERISA is to be construed liberally, consistent with ERISA's policies and objectives," and is defined "'in functional terms of control and authority over the plan, … thus expanding the universe of persons subject to fiduciary duties – and to damages –under §409(a).'" *Arizona State Carpenters Pension Trust Fund v. Citibank (Arizona)*, 125 F.3d 715, 720 (9th Cir. 1997); *Concha v. London*, 62 F.3d 1493, 1501-02 (9th Cir. 1995) ("there need not be an express delegation of fiduciary duty in the Plan instrument itself for persons performing duties of a fiduciary nature to be considered fiduciaries"). Thus, it is important to determine at the outset anyone who may have exercised discretionary authority either in terms of managing the plan or the plan's assets.

In addition to the pre-petition fiduciaries of the plan, the list of potential defendants includes former plan administrators, plan trustees, third party administrators, and non-fiduciary officers, managers, or directors that happened to exercise discretion over the plan or the plan's assets. *Briscoe v. Fine*, 444 F.3d 478, 488 (6th Cir. 2006) ("any person or entity that exercises control over the assets of an ERISA-covered plan, including third-party administrators, acquires fiduciary status with regard to the control of these assets.").

About the Author

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Some courts, stressing the functional definition of a fiduciary under ERISA, have held that individuals within the corporation who actually exercised the fiduciary discretionary control or authority in their official capacity may also be personally liable, depending on the facts of the particular case. See e.g., *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1459-61 (9th Cir. 1995); *Stuart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143, 1156 (9th Cir. 2000) ("Where, as here, a committee or entity is named as the Plan fiduciary, if the corporate officers or trustees who carry out the fiduciary functions are themselves fiduciaries and cannot be shielded from liability by the company.").

What Type of Conduct is Actionable? The Scope of Basic Fiduciary Duties under ERISA

The general duties of a fiduciary are outlined in ERISA § 404(a)(1), and include the following:

1. Duty of Loyalty

Fiduciaries are required to act "solely in the interest of the participants and beneficiaries," and to "exclude all selfish interest and all consideration of the interests of third persons." 29 U.S.C. §1104(a)(1)(B). A fiduciary must demonstrate "complete and undivided loyalty" to Plan participants and beneficiaries, "for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the Plan." 29 U.S.C. §1104(a)(1)(A). Claims involving breach of the duty of loyalty most commonly arise in instances where the fiduciary has placed its own interests above those of the Plan participants and beneficiaries, such as converting plan assets for personal use. Good faith is not a defense to a violation of the duty of loyalty. *Chao v. Rhodes*, 2006 WL 995050, at *5 (M.D. N.C. Apr. 13, 2006); *see also Byrne v. Calastro*, 205 Fed. Appx. 10, 15 (3rd Cir. 2006) ("ERISA does not require a showing of bad faith").

2. Duty of Prudence

A 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" and "with single minded devotion" to the Plan participants and beneficiaries. 29 U.S.C. §1104(a)(1)(B).

The duty of prudence generally involves two considerations: (1) "procedural prudence" – i.e., whether the fiduciaries undertook a reasonable investigation of the merits of the particular investments; and (2) "substantive prudence" – i.e. whether, regardless of the investigation undertaken, the plaintiff can show that an adequate investigation would have revealed to a reasonable fiduciary that the investment was improvident.

a. Procedural Prudence

Procedural prudence concerns a fiduciary's conduct surrounding the investment decision as opposed to the actual results of the investment decision. With respect to investment decisions and strategies regarding plan assets, fiduciaries must: "(1) employ proper methods to investigate, evaluate and structure the investment, (2) act in a manner as would others who have the capacity and familiarity with such matters, and (3) exercise independent judgment when making investment decisions." *DiFelice v. U.S. Airways*, 397 F. Supp. 2d 758, 772 (E.D. Va. 2005) (citations omitted); *Chao v. Moore*, 2001 WL 74324, at *3 (D. Md. June 15, 2001) ("[A] fiduciary is obligated to investigate all decisions that will affect the [benefit] plan, and must act in the best interests of the beneficiaries").

b. The "Modern Portfolio Theory"

The Department of Labor has issued "safe harbor" guidelines which provide that a fiduciary satisfies ERISA's prudence provision if the fiduciary:

> (i) Has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role that investment or investment course of action plays in that portion of the Plan's investment portfolio with respect to which the fiduciary has investment duties; and
>
> (ii) has acted accordingly.

"Appropriate consideration" for purposes of this regulation includes but is not limited to

> (i) a determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment course of action, and
>
> (ii) Consideration of the following factors as they relate to such *portion* of the portfolio:
>
> > (A) The composition of the portfolio with regard to diversification;
> >
> > (B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and
> >
> > (C) The projected return of the portfolio relative to the funding objectives of the plan.

29 C.F.R. §2550.404a-1(b) (2000). *See also Young v. Gen. Motors Inv. Mgmt. Corp.*, 325 Fed. Appx. 31, 32-33 (2d Cir. 2009) (the modern portfolio theory limits "failure to diversify" claims to instances where "a Plan is undiversified as a whole," as opposed to when "individual funds within the Plan were undiversified.").

The duty of prudence often arises where a plan has made a significant investment in employer securities which end up substantially declining in value. *Moench v. Robertson*, 62 F.3d 553 (3rd Cir. 1995) (where a plan permits an investment in employer stock, the fiduciary's investment decision is reviewed *de novo*.)

3. Duty of Diversification

Fiduciaries must to diversify a plan's investments "so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so…" 29 U.S.C §1104(a)(1)(C). "To prevail on a claim that a fiduciary violated its duty to diversify, a plaintiff must show that the portfolio, on its face, is not diversified. The burden then shifts to the defendant to demonstrate that it was 'clearly prudent' not to diversify, the expressed statutory exception to the duty to diversify." *In re Enron Corporate Securities, Derivative & ERISA Litigation*, 284 F. Supp. 2d 511 (S.D. Tex. 2003).

The *Enron* court considered the following factors in determining whether the plan at issue was sufficiently diversified: (1) the purposes of the plan; (2) the amount of the plan assets; (3) financial and industrial conditions; (4) the type of investment; (5) distribution as to geographical location; (6) distribution as to industries; (7) the dates of maturity. *In re Enron Corporate Securities, Derivative & ERISA Litigation*, *Supra*, at 667.

Although there are no hard and fast rules governing the duty to diversify, courts generally consider: (1) the nature of the investigation of the purchase, (2) the evaluation of other investment alternatives, and (3) the relative expertise of the trustee.

4. Duty to Act in Accordance with Plan Documents

Many plans have documents and instruments that govern its investment concentration, and ERISA requires fiduciaries to act "in accordance with [those] documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of such subchapter*." *In re Ford Motor Company ERISA Litigation*, 590 F.Supp.2d 883, 889 (E.D. Mich. 2008) (quoting 29 U.S.C. § 1104(a)(1)(D)) (emphasis in the original). However, the U.S. Supreme Court has declared that "trust documents cannot excuse trustees from their duties under ERISA." *Cent. States, S.E. & S.W. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 568, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985).

PROCEDURAL PITFALLS AND POINTERS

You're on the Clock: ERISA's Statute of Limitations

29 U.S.C. §1113 governs the limitations period for suits brought to redress a fiduciary's breach of its responsibilities, duties or obligations under ERISA. *See Medical Mut. of Ohio v. K. Amalia Enterprises, Inc.*, 548 F.3d 383, 390 n.5 (6th Cir. 2008). Under this Section, a claim for breach of fiduciary duty may not be brought after the earlier of

> (1) Six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) Three years after the earliest date on which the plaintiff had *actual knowledge* of the breach of violation. (Emphasis added).

Thus, claims not brought within six years of the alleged violation may be barred, regardless of whether an injury has yet occurred or the participant possesses knowledge of the breach. *Radford v. Gen. Dynamics Corp.*, 151 F.3d 396, 400 ("Section 413 of ERISA is a statute of repose, establishing an outside limit of six years in which to file suit"); *New Orleans Employers Int. Longshoreman's Ass'n v. Mercer Inv.* 635 F.Supp 3d 1451, 1378 (N.D. Ga. 2009) ("ERISA's six-year statute of limitations serves as a statute of repose for actions alleging breach of fiduciary duty").

There is a split among the circuits as to what constitutes the "actual knowledge" required to toll the three-year statute of limitations. The Sixth, Seventh and Ninth Circuits appear to require only that a plaintiff have knowledge of the facts establishing the claim, as opposed to knowledge of the existence of a claim in order to establish actual knowledge. *Wright v. Heyne*, 349 F.3d 329, 330 (6th Cir. 2003) ("[T]he relevant knowledge required to trigger [the three-year statute of limitations]… is knowledge of the facts or transaction that constituted the alleged violation"). Conversely, the Third and Fifth Circuits have held that a plaintiff must not only have knowledge of the events giving rise to a fiduciary breach or violation, but must also have knowledge that a claim exists.

The Impact of a Parallel Criminal Proceeding or Investigation

A potential issue that a bankruptcy trustee may encounter as it pursues an ERISA fiduciary liability claim is the existence of a parallel investigation or criminal prosecution by the government. This may present roadblocks to a civil cause of action as former fiduciaries, trustees and other key witnesses may decline to testify or cooperate on the basis of Fifth Amendment privilege. Worse, a defendant in an ERISA civil case may attempt to stay the action indefinitely.

Requests to stay a civil case are generally disfavored at the pre-indictment stage. *Burgett v. City of Flint*, 2008 WL 363291 (E.D. Mich. 2008) ("pre-indictment requests for a stay are generally denied") (citations omitted). *See also In re MGL Corporation*, 262 B.R. 324, 329 (Bankr. E.D. Pa. 2001) ("There have been few cases where a stay was entered when the defendant was not already the subject of some criminal proceeding"); *State Farm v. Beckham-Easley*, 2002 WL 31111766 (E.D. Pa.) (request for stay denied where there was no indictment, despite the fact two of the defendants received target letters from a United States Attorney).

However, once an indictment has been handed down (or is imminent), courts possess greater discretion to determine whether a stay is appropriate under the circumstances, applying the following six factors:

(1) the extent to which the issues in the civil and criminal cases overlap;
(2) the status of the criminal proceeding, including whether the defendants have been indicted;
(3) the interest of the plaintiff in a civil action proceeding expeditiously and the potential prejudice to the plaintiff arising from a delay;
(4) the burden which the proceeding imposes upon the defendant;
(5) the interest of the court, including the convenience of the court and the management of its cases, and the use of judicial resources; and

continued on page 15

(6) the interest of persons not parties to the civil litigation, including the interests of the public in the pending civil litigation.

In re MGL Corporation, supra, at 327; *Chao*, *supra*, at *1037.

An indefinite stay of proceedings could prove problematic to a civil fiduciary claim on several levels, especially with respect to the trustee's discovery efforts, as witnesses tend to relocate, memories fade, and the ability to pursue unknown leads is compromised with the passage of time. Also, as one court noted, "[t]he longer the civil proceeding is delayed, the less likely it is that the Trustee will be able to recover the assets that are sought," and further, "[d]elay will also prejudice the Trustee's ability to enforce any possible judgment, which further militates against granting a stay…" *In re Who's Who Worldwide Registry, Inc.*, No. 894-81496-478, 197 B.R. 193, 197 (S.D.N.Y. 1996).

Where to File? Jurisdictional Considerations

While BAPCPA provides that a chapter 7 trustee must "continue to perform the obligations required of the [Plan] administrator," no changes were made to the statutes governing subject matter jurisdiction of bankruptcy courts, 28 U.S.C. §§1334 and 157, to reflect this added area of trustee responsibility. Thus, there is some confusion over whether a bankruptcy trustee can pursue ERISA fiduciary liability claims in bankruptcy court as an adversary proceeding, or whether such claims must be asserted in federal district court. The recently issued opinion *In re Trans-Industries, Inc.*, *supra*, marks the first time a court has substantively addressed what impact the BAPCPA amendments have on bankruptcy court jurisdiction.

Thus, there is some confusion over whether a bankruptcy trustee can pursue ERISA fiduciary liability claims in bankruptcy court as an adversary proceeding, or whether such claims must be asserted in federal district court.

In *Trans-Industries,* the chapter 7 trustee filed an adversary proceeding against pre-petition fiduciaries of the debtor's 401(k) and profit sharing plan, alleging breach of fiduciary duties under ERISA and seeking damages for the alleged breaches. One of the defendants filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the adversary proceeding was neither a core proceeding nor a "related to" proceeding.

The court in *Trans-Industries* first considered whether the ERISA claims involved a core proceeding. Core proceedings are those cases "arising under title 11, or arising in a case under title 11…." 28 U.S.C. §157(b)(1). Section 157(b)(2)(A-O) provides a non-exclusive list of core proceedings, including "(A) matters concerning the administration of the estate," and "(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims…"

BAPCPA significantly expanded the administrative duties of bankruptcy trustees to include performance of the obligations of a plan administrator of an employee benefit plan. Specifically, 11 U.S.C. §704(a)(11) provides: "[t]he trustee shall if at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served as the administrator of an employee benefit plan, continue to perform the obligations required of the administrator." The administration of an ERISA plan is "an integral part of dealing with the debtor's business." *See Collier on Bankruptcy*, ¶ 1106.03[7] (15th ed. Rev. 2005); *see also In re Tom's Foods, Inc.*, 341 B.R. 82, 90 (Bankr. M.D. Ga. 2006) ("an integral part of Debtor's business was dealing with its pension plan.").

Notwithstanding these expanded duties, the court concluded that a bankruptcy trustee's ERISA fiduciary liability claim was not a core proceeding "arising under title 11," nor was it a case "arising in a case under title 11," reasoning that

> This proceeding is not one "arising under title 11" because it does not "involve a cause of action created or determined by a statutory provision of title 11." *See Bliss Technologies, Inc. v. HMI Indus. Inc.* (*In re Bliss Technologies, Inc.*) 307 B.R. 598, 602 (Bankr. E.D. Mich. 2004). The cause of action in Count I is based on ERISA. It is created and will be determined by federal non-bankruptcy law, rather than any provision of title 11 … This proceeding also is not one "arising in a case under title 11," because the claims asserted are not claims that "by their very nature, could only arise in bankruptcy cases." (Citations omitted)

In re Trans-Industries, Inc., *supra*, at 30.

Finding that the trustee's fiduciary liability claim was not a core proceeding, the court next considered whether there was "related to" jurisdiction over the case within the meaning of §1334(b). The court applied the test for "related to" jurisdiction set forth *Pacor, Inc. v. Higgins* (*In Re Pacor, Inc.*), 743 F.2d 984, 994 (3rd Cir. 1984), which provides in part:

> "The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate."

Wolverine Radio, 930 F.2d at 1142 (emphasis in original) (quoting *Pacor, Inc. v. Higgins* (*In Re Pacor, Inc.*), 743 F.2d 984, 994 (3rd Cir. 1984) (emphasis in original)).

The trustee argued that not only could the ERISA adversary proceeding impact the bankruptcy estate, but it already had, and furnished the Court with an extensive affidavit detailing how he was forced to use estate funds to administer the plan and investigate and pursue ERISA claims on behalf of the plan. In its discussion of "related to" jurisdiction, the court referred extensively to the trustee's affidavit, noting that

he has "employed and the Court has approved the employment of accountants, general counsel and special counsel to assist [him] in, among other things, the performance of [his] duties [as Plan administrator under] 11 U.S.C. § 704(a)(11) (the 'Employee Benefit Plan Services');"

- "approximately 25% of [his] overall time as Bankruptcy Trustee has been devoted to administering the Plan and overseeing the pending [a]dversary [p]roceeding;"
- he "has incurred approximately $69,000 of professional fees and expenses in the performance of Employee Benefit Plan Services (excluding Trustee services);"
- "[a]pproximately $48,000 of Estate funds have been expended to date and approximately $18,700 remains due and unpaid;" and
- "[he] expects to continue to expend Estate funds until the litigation against the Plan fiduciaries is concluded, the allocation of funds among the Plan and the estates is distributed, distributions are made to Plan beneficiaries and thereafter, the [employee benefit plans are terminated]."

In re Trans-Industries, Inc., *supra* at 31-32.

The defendant countered that (1) the bankruptcy trustee was not required to file the adversary proceeding and could have waited for one of the ERISA plan's participants to do so, and (2) the bankruptcy trustee could have used assets other than those from the bankruptcy estate to prosecute the ERISA claim.

The court concluded that the "conceivable effect" standard of *Pacor* "is easily met in this case," and that it possessed "related to" jurisdiction over the adversary proceeding, reasoning that

> …the outcome of this adversary proceeding will affect the bankruptcy estate's ability to obtain reimbursement from the ERISA Plan–either positively or negatively–for the fees and expenses the estate has paid for the Trustee's Plan-administration work. This in turn will affect – either positively or negatively – the amount of the distributions that the creditors of the bankruptcy estate will receive.

In re Trans-Industries, Inc., *supra*, at 40-41.

If the *Trans-Industries* decision is any indication, BAPCPA will allow bankruptcy trustees to pursue ERISA liability claims in bankruptcy court, which may provide some comfort to trustees who prefer to litigate claims before judges who are familiar with the unique set of challenges a trustee faces in winding down the affairs of the debtor's estate. However, other circuits have yet to weigh in on this interesting jurisdictional issue, so a trustee contemplating filing suit should carefully examine whether some of the *Trans-Industries* factors are present before initiating an adversary proceeding. Otherwise, a protracted jurisdictional challenge may distract a trustee from the ultimate goal of recovering assets for the plan and its participants and beneficiaries.

Demanding a Jury Trial

A tactical decision for trustees pursuing ERISA fiduciary claims is whether to demand a jury trial. Generally, in actions to recover benefits due under an ERISA Plan pursuant to §502(a)(1)(B) of ERISA, there is no right to a jury trial, as the relief sought is equitable in nature. *Wilkins v. Baptist Health Care Systems, Inc.* 150 F.3d 609, 616 (6th Cir. 1998). However, there is no consensus among the courts on whether a right to jury trial attaches to an ERISA breach of fiduciary duty claim.

Some courts have held that there is a right to a jury trial under the 7th Amendment for such a claim because the damages sought are viewed as legal in nature, not equitable. *See, e.g., Bona v. Barasch*, No. 01 Civ. 2289, 2009 WL 1395932 (S.D.N.Y., March 20, 2003), at *33-35, *9-12 (and cases cited therein). For example, the Sixth Circuit Court of Appeals held that a plaintiff's requested remedy – that defendant compensate him for losses suffered due to defendant's failure to transfer assets to higher performing mutual funds – was for "money damages, not restitution" because the defendant did not profit from the breach and there was nothing to "restore" to the plaintiff. *Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F. 3d 477, 481 (6th Cir. 2001). Similarly, the Second Circuit categorized a chapter 7 trustee's claims for breaches of fiduciary duty against former officers and directors of the debtor-corporation as legal relief seeking compensatory damages and not restitution for 7th Amendment purposes. The defendants were accused of allowing the debtor's CEO to engage in improper and unchecked transactions that damaged the value of the company. *Pereira v. Farace*, 413 F.3d 330 (2nd Cir. 2005).

The U.S. Supreme Court decision in *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204, 213, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), redefined "restitution" as both a legal and equitable form of relief and thus changed the landscape of ERISA jury trial jurisprudence. The Court stated that in cases in which the plaintiff

> could *not* assert title or right of possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him,' the plaintiff had a right to restitution *at law* through an action derived from the common-law writ of assumpsit." *Id*. at 213 (quoting 1 Dobbs § 4.2(1), at 571)) (emphasis in the original).

There, "the plaintiff's claim was considered legal because he sought 'to obtain a judgment imposing merely personal liability upon the defendant to pay a sum of money.'" *Id.* (quoting Restatement of Restitution § 160, Comment a, pp. 641-42 (1936)). In contrast, "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could *clearly be traced to particular funds or property in the defendant's possession*." *Id*. (citing 1 Dobbs § 4.3(1), at 587-88; Restatement of Restitution § 160, Comment a, at 641-42; 1 G. Palmer, Law of Restitution § 1.4, p. 17; § 3.7, p. 262 (1978)) (emphasis added).

However, where 'the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant].'" *Id*. at 213-14 (quoting Restatement of Restitution, § 215, Comment a, at 867)). Therefore, "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but

to restore to the plaintiff particular funds or property in the defendant's possession." *Id*. at 214.

Other cases, however, have held that a breach of fiduciary duty claim is equitable in nature, and therefore, no right to a jury trial exists. *Trustees of Carpenters Pension Trust Fund-Detroit and Vicinity v. Cimarron Services, Inc*., No. 06-CV-15095, 2007 WL 2081459 (E.D. Mic. July 19, 2007), at *2; *see also Ellis v. Rycenga Homes, Inc.*, No. 1:04-cv-694, 2007 WL 1032367 (W.D. Mich. April 2, 2007), at *2-4. Cases finding no right to a jury trial focus primarily, if not entirely, on the historical treatment given to claims involving breaches of fiduciary duty – that such claims were almost uniformly claims "in equity" carrying with them no right to a trial by jury. *See Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990).

CONCLUSION

Intended or not, one of the consequences of the 2005 BAPCPA amendments is that bankruptcy trustees must be prepared to fulfill the role of an ERISA plaintiff by investigating and prosecuting claims against current or former plan fiduciaries for any harm they caused to the plan pre-petition. Therefore, it is essential for bankruptcy trustees to familiarize themselves with the substantive and procedural aspects of ERISA litigation so they can successfully pursue causes of action on behalf of the plan and plan participants. 🏛

Footnotes:

1 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

2 An excellent overview of ERISA fiduciary litigation was presented by Deborah S. Davidson and Emily A. Glunz at the ABA JCEB 19th Annual National Institute on ERISA Litigation held on November 16-17, 2009, in Chicago, Illinois. The author has utilized and recommends the materials as a helpful resource on this topic. The materials are available at www.abanet.org.

3 The trustee in *Trans-Industries* also argued in this case that the adversary proceeding benefitted the bankruptcy estate "by ensuring that the Employer [Debtor] … is not a defendant, an almost certain result had one of the Plan participants/beneficiaries (or the Department of Labor) initiated suit[,]" thus preventing the estate from incurring legal fees and expenses associated with defending against claims of the Plan participants. *Id.* at 32, n. 42.

4 A plan is required to identify a "named fiduciary" with overall fiduciary responsibility for the plan. 29 U.S.C. § 1102(a)(1). Unless otherwise specified, the plan sponsor is deemed the plan administrator. 29 U.S.C. § 1002(16)(A).

5 A *de facto* "fiduciary with respect to a Plan" is described in 29 U.S.C. §1002 (21)(A) as follows:

A person is a fiduciary with respect to a Plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such Plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property such Plan or has any discretionary authority or discretionary responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such Plan.

Policy for Approving the Filing of Amicus Briefs by NABT

Creation of Amicus Committee

Each year, the President will select an amicus committee, consisting of not less than three, nor more than five members of the Association. The committee shall include at least one member of the current board of directors, and shall also include the current contributing editor of NABTalk who is responsible for the recent case articles.

Requests for an amicus brief:

An amicus brief may be requested in any case by any member of NABT. The request shall be made to the chairman of the amicus committee, who will then circulate the request to all members of the committee. Each request shall not be considered unless it contains the following information:

1. The style of the case, and the state, district, and circuit involved
2. The name of the trustee involved
3. A brief description of the underlying facts of the case
4. The legal issue to be briefed by NABT
5. The national significance of this issue to all trustees
6. The name and address of the person who will be preparing the brief
7. The nature and amount of any fees or expenses which will be requested from NABT
8. The timetable for the filing of briefs

Consideration by the Committee:

The amicus committee shall consider all proper requests as soon as practicable, and may schedule conference calls to consider any request. The committee will make one of three recommendations to the President as follows:

1. Approve the request and recommend the filing of a brief. In this case the President has the option of approving the request (which shall operate as an approval by NABT for the filing of the brief pursuant to the terms contained in the request), or vetoing the recommendation (in which case the matter will be put on the agenda for the next full board meeting)
2. Recommend that NABT decline to intervene in the case. In this case, the amicus will not be approved unless the full board, on motion made by any director, votes to approve the filing of a brief.
3. Recommend that the full board consider the matter at the next board meeting.

Factors to be Considered by the Committee:

In its consideration of each request, the amicus committee shall consider, among all relevant factors, including (but not limited to) the following:

1. Whether the requesting party is a member in good standing with NABT
2. Whether the issue involved is legal, or whether it is fact-sensitive
3. Whether the pleadings are "clean" and whether there are any procedural impediments to a determination of the legal issue
4. Whether the legal issue is of national significance to all trustees
5. Whether the decision will hinge on state law, or other matters which may only be relevant to trustees in certain districts
6. Whether the fees and costs being requested are an appropriate expense for the Association. (If the budget does not provide for expenditures for filing amicus briefs, the committee shall consult with the treasurer before acting on any request which involves the payment of fees or expenses.)

Reports to the Board:

The Committee will make a report to the full board at each board meeting concerning all requests made and considered since the previous meeting.