

ERISA Litigation and Enforcement: The Role of the Independent Fiduciary and Best Practices for Financial Advisors

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[Tom Clark](#) is Of Counsel with The Wagner Law Group, a law firm specializing in ERISA & Employee Benefits, Estate Planning, and Employment, Labor & Human Resources Law. His expertise encompasses all aspects of employee benefits programs, including the design, implementation and compliance of retirement plans, health and welfare plans, and executive and incentive compensation arrangements. He also has a robust practice assisting covered service providers in meeting their ERISA compliance needs.

Tom is also a well-seasoned ERISA litigator. Earlier in his career, he worked for the law firm of Schlichter, Bogard & Denton including on such landmark cases as *Tibble v. Edison*, which will be heard by the U.S. Supreme Court this year.

Tom is Editor-in-Chief of the Fiduciary Matters Blog, a blog visited over 120,000 times since its first publication in March 2013. He also teaches ERISA Fiduciary Law as an Adjunct Professor at the Washington University in St. Louis School of Law, his alma mater.

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DR. SUSAN MANGIERO

Dr. [Susan Mangiero](#) is a managing director with Fiduciary Leadership, LLC. Susan is a CFA® charterholder, certified Financial Risk Manager®, Accredited Investment Fiduciary Analyst® and Professional Plan Consultant™. She has provided testimony and behind-the-scenes forensic analysis, calculation of damages and rebuttal report commentary for various investment governance, investment performance, fiduciary breach, hedge funds, derivatives, investment committee, private equity funds, fees, asset allocation, prudence, risk and valuation matters. Her work includes defense, plaintiff and regulatory disputes that involve banks, asset managers, executive compensation recipients, board members, ERISA plans (including ESOP plans), family offices, public pension funds, endowments and foundations.

She has keynoted or led workshops for organizations such as the Stable Value Investment Association, Harvard Law School, Florida Public Pension Trustees Association, New York State Department of Insurance, Association of Public Pension Auditors, AICPA – Employee Benefits Section, National Association of Corporate Directors and Financial Executives International. She is a member of the 401(k) vendor RFP best practices committee for the Association of Financial Professionals.

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MITCHELL SHAMES, ESQUIRE

[Mitchell Shames](#) is the founder of the Harrison Fiduciary Group and a leading expert in fiduciary practices for domestic and global institutional clients.

He was the General Counsel for State Street Global Advisors (SSgA), the \$1.8 trillion global investment management unit of State Street Corporation. He established the Fiduciary Review Committee for the purposes of overseeing all fiduciary activities within SSgA. Mitch drafted Policies and Procedures that were upheld in numerous high profile fiduciary cases. He was an Executive Vice-President of State Street Corporation.

He is the lead contributor to a blog about fiduciary issues which is known as The Prudent Expert.

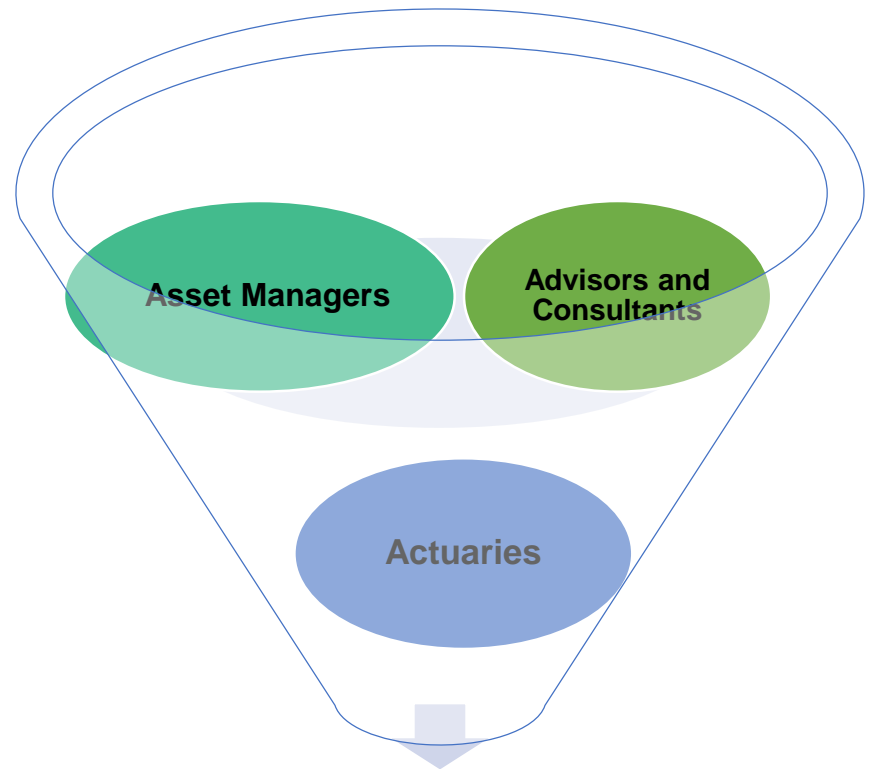
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INTRODUCTION

Speaker:
Dr. Susan Mangiero

EXTERNAL FIDUCIARY ECOSYSTEM

- Who does what, when, for how much and on what basis?
- What are parameters for discretion and control over plan assets?
- Who can impact policies, procedures and internal and external controls?
- What is the role of the independent fiduciary, if one is used?
- Who is in charge of reviewing conflicts of interest across the fiduciary ecosystem?
- How are attorneys and auditors impacted by fiduciary outsourcing?



ERISA Fiduciary Duties

FIDUCIARIES IN THE SPOTLIGHT

- Low Equity Returns (and high volatility)
- Low Bond Yields
- Longer Life Expectancy
- Cash Contributions
- Increased Regulation – Federal, State, Global
- Higher PBGC Premiums
- Accounting Impact
- Enterprise Riskiness
- Impact on Share Price
- Litigation Expense
- M&A Deals Gone Awry Due to Pension Issues
- Debt Capacity
- Liquidity Constraints
- Cost of Capital
- Fee Levels
- 401(k) Investment Menu Selection
- Reputation and Brand Value



FIDUCIARY OUTSOURCING ON THE RISE



MANY PLAN SPONSORS WANT
OUT
OF THE
RETIREMENT BENEFITS
BUSINESS

LITIGATION TRENDS

Speaker:
Thomas Clark, Esquire

Litigation From 2006 to Now

- ▶ 2006 - Lawsuits Filed Against More Than A Dozen Large Employers
- ▶ Dozens More Lawsuits Filed Since Then
- ▶ DOL Has Passed 3 Specific Disclosure Regulations
- ▶ Industry Has Responded By Offering More Products and Better Services in Reducing Costs

3 (Nearly) Settled Issues

- ▶ Proper Selection of Mutual Fund Share Classes
 - ▶ Tibble v. Edison
 - ▶ Tussey v. ABB
 - ▶ Kruger v. Novant Health
- ▶ Excessive Recordkeeping Fees
 - ▶ Abbott v. Lockheed Martin
 - ▶ Beesley v. International Paper
- ▶ Use of Proprietary Funds
 - ▶ Nolte v. Cigna
 - ▶ Krueger v. Ameriprise
 - ▶ Gordan v. MassMutual

New Threats – Part One

- ▶ *Tatum v. RJR Pension Committee* – 4th Circuit
 - ▶ Majority –
 - ▶ Failure of procedural prudence – no real process
 - ▶ Causation is shifted to defendant
 - ▶ Test of substantive prudence is “would have” rather than “could have”
 - ▶ Dissent –
 - ▶ No violation of procedural prudence
 - ▶ Proving causation stays with the plaintiff
 - ▶ Could have standard is appropriate
- ▶ Defendants have filed cert with the US Supreme Court who then requested the opinion of the Solicitor General/DOL

New Threats – Part Two

- ▶ *Tatum v. RJR Pension Committee* – 4th Circuit
- ▶ Key Takeaways:
 - ▶ Real decision was about fiduciaries not getting a free pass when they failed to perform procedural prudence
 - ▶ Always have a process
 - ▶ Always have participant's best interests in mind

New Threats – Part Three

- ▶ *Blue Moon Fiduciary v. Hutcheson* – M.D. NC
 - ▶ Fall out from embezzlement by Matt Hutcheson from the open MEPs he founded and administered
 - ▶ New fiduciaries and the service providers at the time of wrong doing are the defendants in the case
 - ▶ Major decision in denying Aspire's Motion to Dismiss
 - ▶ Court found that based on Aspire's conduct in allowing Hutcheson to take money and falsely report to plan participants that money was in a bond fund, 502(a)(3) claim can be brought against Aspire as a party-in-interest even though they never received any of the stolen money

New Threats – Part Four

- ▶ 5500/408(b)(2) will continue to be ripe source
- ▶ Plans with \$250 mil. to \$1 bil. will increasingly become targets
- ▶ Advertising is happening now

New Threats – Part Five

- ▶ 5500/408(b)(2) will continue to be ripe source
- ▶ Plans with \$250 mil. to \$1 bil. will increasingly become targets
- ▶ Advertising is happening now

QUESTIONS?

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Fiduciary Matters Blog / ERISA Litigation Index
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INDEPENDENT FIDUCIARY ROLE

Speaker:
Mitchell Shames, Esquire



HARRISON FIDUCIARY

INDEPENDENT FIDUCIARY SERVICES

FI 360 WEBINAR

APRIL 8, 2015

The Role of an Independent Fiduciary



Why hire an Independent Fiduciary?

Litigation Environment:

Heightened DOL Scrutiny

- Increase in reviews and investigations
- Lawsuits and amicus briefs
- Sophisticated analytics
- Conflicts of interest

Increased private litigation

Mitigate Fiduciary Liability



Co-Fiduciary Liability

Co-Fiduciary Liability Section 405(a)

- “knowing participation”
- “breach gives rise to breach by other fiduciary”
- “has knowledge of a breach”





Independent Fiduciary

Independent Fiduciary is NOT:

- Competitor of consultants
- Provider of funds of funds
- Investment Manager
- Asset based service provider

Fiduciary provides stewardship,
oversight and governance.



Defining Terms

Independent Fiduciary

Two terms, each are significant:

- Independent [No Conflicts]
- Fiduciary [Prudent Expert]



Conflicts

No Conflicts of Interest (Duty of Loyalty)

- “Follow the Money”
- Understand the relationships of each service provider
- Be careful providing services to the Plan and the Plan Sponsor
 - ESOP & DeRisking Projects



Fiduciary Duties

- Duty of Loyalty — “solely in the interest of” Sec. 404(a)(1)(A)
- Prudence — “prudent expert” Sec. 404(a)(1)(B)



A spectrum of services ranging from specific identified projects to full delegation of fiduciary oversight



Specific Fiduciary Services

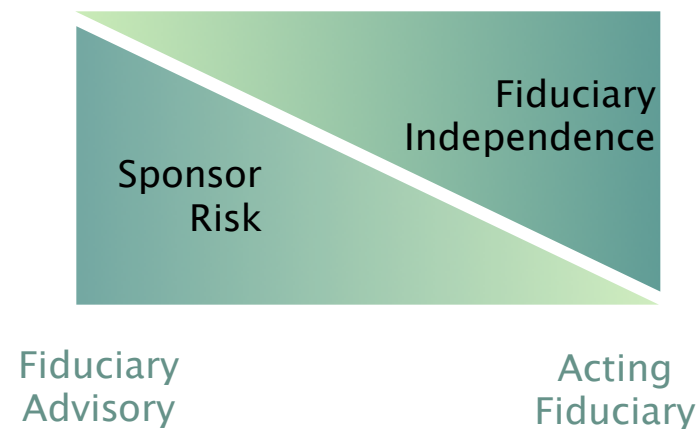


Named Fiduciary Services



fiduciary
risk
assessment

Plan Sponsor's risk tolerance determines HFG's role either as Fiduciary Advisor or as Acting Fiduciary:





Sample Engagements

Areas of Expertise

Stable Value
Securities Lending
Company Stock
Pension Risk Transfer
Bankruptcy
Transitions
Plan Expenses
Asset Pricing Valuations
Litigation
ESOP's



**factors for
relying on
experts and
other
fiduciaries**

Read, analyze and assess any reports, analyses, and relevant documentation

Identify, question and test underlying assumptions

Verify that conclusions are internally consistent with data and analysis

Document all reviews and analysis



**work
product**

Comprehensive, Contemporaneous Written Report

- Completed procedures
- Summary of actions
- List of experts

**DOCUMENT, DOCUMENT,
DOCUMENT !!**



Pending New Fiduciary Regulations

Turns the Financials Services Industry Upside Down

- every relationship must be examined
- hiring of an independent fiduciary can eliminate potential prohibited transactions



questions

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SERVICE PROVIDER DUE DILIGENCE

Speaker:
Dr. Susan Mangiero

CONFLICT OF INTEREST ISSUES – PARTIAL LIST

- Is an asset manager owned by the recommending consultant or financial advisor?
- How is the consultant or advisor being compensated?
- What is the experience of the consultant or financial advisor and representation of that experience to the ERISA plan?
- “Under the Investment Advisers Act of 1940 (Advisers Act), an investment advisor providing consulting services has a fiduciary duty to provide disinterested advice and disclose any material conflicts of interest to their clients. In this context, SEC staff examined the practices of advisers that provide pension consulting services to plan sponsors and trustees. These consulting services included assisting in determining the plan’s investment objectives and restrictions, allocating plan assets, selecting money managers, choosing mutual fund options, tracking investment performance, and selecting other service providers. Many of the consultants also offered, directly or through an affiliate or subsidiary, products and services to money managers. Additionally, many of the consultants also offered, directly or through an affiliate or subsidiary, brokerage and money management services, often marketed to plans as a package of “bundled” services. The SEC examination staff concluded in its report that the business alliances among pension consultants and money managers can give rise to serious potential conflicts of interest under the Advisers Act that need to be monitored and disclosed to plan fiduciaries.” (Source: U.S. SEC)

CONTRACTING

- Who is supposed to do what?
- Is there an expectations gap?
- Is there a functional fiduciary relationship that exists?
- Are there multiple fiduciaries?
- If so, is there a lead fiduciary?
- How does outsourcing change the role of in-house fiduciaries?
- Does the fiduciary liability insurance underwriter recognize an outsourced arrangement in a positive or negative way?

DERIVATIVES AND LEVERAGE

- “If the plan is investing in a pooled fund which is managed by a party other than the plan fiduciary who has chosen the fund, then that plan fiduciary should obtain, among other things, sufficient information to determine the pooled fund's strategy with respect to use of derivatives in its portfolio, the extent of investment by the fund in derivatives, and such other information as would be appropriate under the circumstances.” (Source: U.S. Department of Labor)
- “Plan fiduciaries have a duty to determine the appropriate methodology used to evaluate market risk and the information which must be collected to do so. Among other things, this would include, where appropriate, stress simulation models showing the projected performance of the derivatives and of the plan's portfolio under various market conditions. Stress simulations are particularly important because assumptions which may be valid for normal markets may not be valid in abnormal markets, resulting in significant losses. To the extent that there may be little pricing information available with respect to some derivatives, reliable price comparisons may be necessary. After entering into an investment, a plan fiduciary should be able to obtain timely information from the derivatives dealer regarding the plan's credit exposure and the current market value of its derivatives positions, and, where appropriate, should obtain such information from third parties to determine the current market value of the plan's derivatives positions, with a frequency that is appropriate to the nature and extent of these positions.” (Source: U.S. Department of Labor)

DISCLOSURE

- DOL Disclosure Requirements
- U.S. Securities and Exchange Commission Requirements
- FINRA Requirements
- Questions About Sufficiency For Procedural Prudence
- Use In Contracting and Monitoring Service Providers
- Gauge For Determination of “Excessive” Versus “Normal” Compensation
- Honest and Complete Versus Incomplete Versus Fraudulent

INVESTMENT PERFORMANCE

- How are asset classes categorized?
- Is there sufficient diversification?
- Is the fiduciary benefitting from helping to craft an Investment Policy Statement that lays out permitted strategies and allocations to certain types of asset managers?
- Who is kicking the tires on reported investment metrics?
- How much is being paid in fees to outsiders?
- Who is monitoring style drift?

LIQUIDITY

- Who is monitoring liquidity and how often?
- How much of a drilldown is an outside advisor doing to determine liquidity of an asset manager and/or investment product?
- How is liquidity measured?
- Can a 401(k) plan, defined benefit plan or other type of ERISA benefit arrangement be too liquid?

VALUATION

- “Understand how a fund's assets are valued. Funds of hedge funds and hedge funds may invest in highly illiquid securities that may be difficult to value. Moreover, many hedge funds give themselves significant discretion in valuing securities. You should understand a fund's valuation process and know the extent to which a fund's securities are valued by independent sources.” (Source: U.S. Securities and Exchange Commission)
- Bad valuation numbers drive bad performance data which in turn dictates the level of fees that are paid by an ERISA plan sponsor.
- Who is assessing the valuation models?
- Are assets and liabilities being priced to market or model?
- Bad inputs generate bad output. Who is vetting the integrity of data being used for pricing purposes?

QUESTIONS?

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Good Risk Governance Pays

Investment Best Practices | Risk Management | Valuation

Q&A and Housekeeping



- To ask a question to the presenters, enter it now into the GoToWebinar interface.
- Notes:
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