

## ***To What Extent Does the Employer Protect Fiduciaries?***

The issue is who is working for whom and when. ERISA Sec. 1104 clarifies that when one acts as a fiduciary it is an exclusive relationship.

"a fiduciary shall discharge his duties...**solely** in the interest of the participants..."

"**Solely**" is a two edged sword.

A fiduciary acts **solely** for the plan and does not act for the employer.

An employer owes no loyalty to an employee's fiduciary actions.

Lawyers representing the employer/company /plan sponsor have a primary duty to protect the shareholders and their investment in the company. If it so happens that protecting an employee protects the company, that's what they do, but often the company has less exposure to damage awards by distancing itself from the employee.

408(b) 2 documents created on this site serve the **fiduciary**, whether it is the employer, an individual, a committee, etc.

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### ***Real Life Example | Adelphi Communications***

While this is not a fiduciary lawsuit, the employer's position is the same.

In 2000 the Securities and Exchange Commission (SEC) charged the executives of Adelphi Communications, a publicly held cable TV company with securities fraud for manipulating Adelphi's stock price.

Not only did it accuse Adelphi but it also accused a manufacturer /supplier of TV set top boxes, Scientific Atlanta (SA) of conspiring in the stock fraud because of a marketing agreement. In the agreement, Adelphi agreed to pay a higher price for SA's boxes and SA agreed to pay Adelphi a portion of Adelphi's cost for marketing SA's boxes to Adelphi's subscribers. The SEC contended the agreement inflated Adelphi's cost of equipment and the timing and amounts of SA's marketing payments allowed Adelphi to artificially inflate its earnings and thus affect the price of its publicly traded stock.

The SEC also charged several of SA's employees **individually** with conspiracy in the arrangement, contending they knew or should have known about Adelphi's accounting practices.

SA's employees were dumbfounded. They claimed they had negotiated purchase orders for SA's equipment, their job. The purchase price agreed upon depended on SA sharing in the marketing of SA's set top boxes to consumers, also their job. Nothing was hidden, nothing illegal. They saw a simple sales agreement with a long time customer where the SEC saw conspiracy. Surely SA would protect its employees by paying their legal fees.

SA's corporate lawyers felt they might have a conflict of interest in defending both SA and its employees. What if after all there had been a conspiracy as the SEC claimed? It is a violation of legal ethics for a lawyer to defend two defendants if they may then have to cut one defendant loose and protect the other. SA told the employees to get their own lawyers and refused to pay their legal fees.

Six years later, SA paid \$20 million to settle the dispute and "neither admitted nor denied wrongdoing under the accord but agreed to refrain from future violations" (standard language). The SEC cited SA's cooperation in

the agency's investigation.

The president of Adelphi went to jail. None of SA's employees went to jail, but some did go to bankruptcy court, as they did not have millions of dollars for legal fees as SA did and Adelphi and Adelphi's president did. The employees were just collateral damage.