

Who May Sue a Fiduciary?

Original ERISA law restricted lawsuits.

- The plan could sue.
- The Department of Labor could sue.
- An individual participant could **not** sue.

That changed in 2008 when the Supreme Court ruled (LaRue) that an individual 401(k) participant may sue a fiduciary. The side effect is that beneficiaries and most 403(b) participants may also now sue.

Eighteen months after that ruling a beneficiary (widow) of a former participant in the New York Mets' 401(k) plan sued the Mets billionaire owners personally as 401(k) fiduciaries. Other participants joined her suit; within 6 months projected damages hit \$250 million at which point the Met's owners put part of the team up for sale.

- A single, solitary 401(k) beneficiary sued *because she could*.

Fiduciary SafeHarbor provides fiduciaries with documentation. Courts seldom allow a suit to go forward when evidence proves proper exercise of fiduciary duty.

The fictional account illustrates the critical power of documentation.

Lawsuit Dress Rehearsal

Jane Doe opened a letter informing her that she was being sued as a fiduciary to ABC Corp's 401(k) plan and immediately called ABC's corporate attorney.

"Tom, I just received notice of a lawsuit."

"Jane, who is named in the lawsuit, you as an individual or you as the financial officer of ABC Corp?"

"The letter says Jane Doe and ABC Corp as fiduciaries."

"So both the company and you as an individual are being sued," he said.

"Why are they suing *me*?" asked Jane.

"Retirement plan fiduciaries are personally liable," said Tom.

"But if I did do anything on the plan, it was only because of my position as CFO of ABC," protested Jane.

"Sorry, Jane, fiduciaries are required to act solely in the interests of plan participants and beneficiaries. Employment is irrelevant."

"I am not a fiduciary," protested Jane, "I never signed anything as a fiduciary and was never appointed a fiduciary."

"Fiduciary status does not arise only from appointment; you can be a fiduciary by simply having or exercising discretionary authority over the plan, even if you are not appointed. As a financial officer you had authority over some plan decisions didn't you?"

"Well, I am not sure," said Jane.

"Jane, it kind of doesn't matter. The plaintiff attorney will allege that as the CFO you must have had the authority even if you didn't exercise it. Without conclusive evidence to the contrary a judge will

have a hard time dismissing you from the case, so you will be included.”

“What do we have to do?” Jane asked.

“Send me any documents you have on the plan, contracts, etc. and I will have to read them and get back to you. I have to warn you though that I may not be able to represent you. I am required under the law to represent the interests of ABC Corporation first and foremost. You may have to get your own attorney.”

“We have been using XYZ Investments for years. In fact, they were in our offices a few months ago telling us about our fiduciary duties. They told us they took care of everything or nearly everything. Aren’t they the fiduciaries?” asked Jane.

“Jane, they operate under the terms of their contract with the plan or ABC. Send me a copy of the contract, but under ERISA they cannot remove your fiduciary liability.”

Jane was uncomfortable and called Susan the representative for XYZ investments, the plan’s investment provider.

“Hi, Susan, I received a letter this morning informing me I was being sued over the retirement plan.”

“Oh, Jane, that’s awful! How can I help you?” responded Susan.

“The employee is claiming I failed to provide sufficient information. It’s one of those “You never told me that” claims and since you have been our investment person for the last six years and provide most if not all the investment communications, I think this is going to end up with you, too.”

“Jane, I’d love to help you, but I don’t know what to do. Let me ask my boss what to do and get back to you.”

A few hours later Jane received a call from XYZ Investments’ lawyer. “Ms. Doe, this is Al Righter with Schreiber, Righter, and Quill, attorneys for XYZ Investments. Susan reported to us that you are being sued and I am calling to see how we can help you.”

“Tell me Ms. Doe, did the suit name you as a fiduciary?”

“Yes, and since XYZ manages the money, I guess they are a fiduciary too and will also be sued.”

“It’s a shame about the lawsuit, Ms. Doe, but our client XYZ Investments is not a fiduciary to the plan.”

“But they manage the money.”

“That’s correct. XYZ manages money. That is not the same as being a fiduciary. XYZ’s duties, responsibilities, and liabilities are carefully laid out in its Contract of Service with your employer and retirement plan sponsor, ABC Corp.”

Al continued, “In the contract, you will find the following statement which will help you understand the situation. It says, ‘This Agreement constitutes the entire understanding between the parties signing the Agreement. No other understandings either written or oral exist except those described in this Agreement.’ You may be familiar with these kinds of clauses; aren’t you?”

“Yes, I am.”

“Let me continue. The Agreement further states that the parties agree that neither XYZ Investments, nor any of its representatives is a fiduciary. It also states that XYZ Investments has no discretionary authority over the plan, and provides only ministerial services as directed by ABC. What this means, Ms. Doe, is that not only is XYZ not a fiduciary under the contract, but that its inability to make discretionary decisions prevents it from becoming a fiduciary. XYZ is strictly limited to providing diversified investments as ERISA requires.”

"You should also know, Ms. Doe, that XYZ is a mutual fund management company registered under the Investment Advisers Act of 1940, and as such it is exempt from liability under ERISA.

"Exempt?" Jane asked.

"Yes, mutual funds are exempt from being a fiduciary unless they agree in writing to be a fiduciary. In **my client's contract with your employer** and Plan Sponsor, ABC Corp, it would have to agree to fiduciary status. I am quite familiar with the contract. They make no such agreement."

"At the end of the day, Ms. Doe, XYZ is not a fiduciary, and I might add is not named as a co-fiduciary with you in the suit. And if XYZ were to be named as co-fiduciary in such a suit, we would petition the court to remove XYZ as a defendant under two reasons: XYZ's contract with you prevents XYZ from being a fiduciary and XYZ's actions did not allow XYZ to cross over into taking any responsibilities other than those agreed upon in managing the money. I can assure you from past experience that 100% of the time judges release us from being a fiduciary. **"If there is any way we can help you with your suit, please let us know."**

Jane called the plan's TPA. "Hey, Mary Ellen," Jane said, "I have a problem. I've been named as a defendant in a retirement plan suit."

"Who is suing you?"

"A participant in the plan."

"Oh, Jane, that is awful. Let me know if you need any **documents or copies of filings.**"

"Wait! Isn't this something you can handle for me?"

"No. We are not lawyers. We provide plan administration services and are not a fiduciary to the plan. Call your attorney and he will advise you what to do."

"I already did that."

"Okay, well **let us know how we can help.**"

Jane called ABC's insurance agent, Mike Brown. "Hey Mike," Jane said, "I have a problem. ABC and I have been named as defendants in a retirement plan suit."

"Sorry to hear that, Jane. Do you want me to report this?"

"Yes, please and get back to me as soon as you can."

A few hours later Jane received a call from Mountaintop Insurance.

"Ms. Doe?"

"Yes, this is Jane Doe."

"Ms. Doe, this is Emily from Mountaintop Insurance and I am calling on a recorded line because ABC Corp.'s agent Mike Brown has reported a claim. Unfortunately, Ms. Doe, in the exclusions section of our policy with you Part 2, section 14 **it specifically states that claims arising out of ERISA are not covered.** I will send you a copy of the referenced language in the policy via email. This is not an issue for Mountaintop Insurance. Good luck to you and I suggest you hire an attorney."