RISK MITIGATION STARTS WITH RETAINING DEMONSTRATED EXPERTS

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It is widely understood that a plan sponsor that lacks expertise is obligated to seek the advice of qualified experts to assist them in their fiduciary duties. But to what extent can a plan sponsor rely on their expert's advice? According to *Clark v. Feder Semo and Bard, P.C.*, No. 12-7092 (D.C. Cir. Jan. 7, 2014), reliance on an expert is consistent with a fiduciary's obligation to act with loyalty and prudence. While this case focused on reliance on legal counsel, it provides important direction for both plan sponsors and service providers.

The suit was filed on behalf of Clark, an attorney/employee/plaintiff, against her employer/law firm for assumptions used when calculating Clark's distribution upon termination of the retirement plan. Clark argued that the plan's fiduciaries were not entitled to rely on outside counsel's advice but instead should have undertaken an "independent investigation."

The D.C. Circuit ruled in favor of the plan sponsor. According to the court, the plan sponsor:

1. "Properly" relied on the advice of outside counsel,
2. Was "reasonably justified under the circumstances" to rely on counsel's advice,
3. Made a reasonable decision that any prudent trustee would have made under similar circumstances, and
4. Made a prudent decision "based on the circumstances at the time of the challenged decision"

The court came to this conclusion based on ERISA's adoption of the common law's standard of fiduciary care in Section 404(a)(1)(B) which the court has interpreted to mean a plan sponsor can rely on counsel's advice in "appropriate circumstances" when making important decisions. In coming to this conclusion, the court relied on several other decisions, including:

1. *Roth v. Sawyer–Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994);
2. *Howard v. Shay*, 100 F.3d 1484, 1489 (9th Cir. 1996);
3. *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 300–01 (5th Cir. 2000);
4. *Gregg v. Transp. Workers of Am. Int'l*, 343 F.3d 833, 841 (6th Cir. 2003).

Important to all covered service providers (CSP) is the court's conclusions in *Clark* that reliance on counsel's (an expert) recommendation was "reasonable" because counsel:

1. Had expertise in ERISA…the CSP was "qualified"
2. Had been advising the plan since the 1990s…the CSP was "familiar" with the plan
3. Had conducted a thorough review of the relevant documents…the CSP was "deliberate"
4. Made recommendations based on a reasonable investigation…the CSP adopted "procedural prudence"
5. Documented their recommendations…the CSP adopted "substantive prudence" and
6. Made recommendations consistent with the plan sponsor's understanding…the CSP was "collaborative"

Because the plan sponsor's expert made recommendations based on procedural (process) and substantive (merits) prudence, the court concluded the plan sponsor did not need to conduct any further investigation as claimed by Clark. The moral of this case: there is value in retaining qualified expert CSPs. Unfortunately, many CSPs provide counsel to plan sponsors beyond their education, experience, or skills.

There is liability for both the plan sponsor and the CSP in this situation. Plan sponsors should engage in a documented process to select their CSPs and CSPs should provide plan sponsors with validation they are capable of doing the job.

Bottom line, a plan sponsor should trust but verify and a CSP must not misrepresent their expertise. In fact, the court noted that a plan sponsor's reliance on a CSP would be "improper" if there are "significant reasons to doubt the course counsel suggested." This suggests that a plan sponsor should not blindly rely on their CSPs in all circumstances especially when they counsel a plan sponsor about issues they lack expertise in. This is when a plan sponsor is obligated to investigate or seek additional experts depending on the circumstances.