Bloomberg Law

Pension & Benefits Daily™



*Fiduciary Responsibility*

# View From Jackson Lewis: Proving Loss Causation in Breach of Fiduciary Claims--The Split Widens

BY RENÉ E. THORNE AND EUGENE U. UBAWIKE

Under Section 409(a) of ERISA, a fiduciary who breaches duties to a plan ''shall be personally liable to make good to such plan any losses to the plan *resulting from* each such breach.''

Based on this ''resulting from'' language in Section 409, most circuit courts of appeals agree that ERISA requires that causation between the alleged breach and the claimed loss must be established before any liability may be imposed upon a breaching fiduciary. The courts are split, however, as to whether an ERISA plaintiff or the defendant-fiduciary bears the burden of proving the causal link between breach and loss. In other words, does the burden compose an element of the claim and thus fall upon the plaintiff, or does the burden constitute an affirmative defense and thus fall upon the defendant-fiduciary?

## The Tenth Weighs In

Joining in the decades-old circuit divide, the Tenth Circuit recently held that because loss causation is an element of the claim, ''the plaintiff [and not the defendant fiduciary] bears the burden of proving it.'' *Pioneer Centers Holding Co. ESOP & Trust v. Alerus Fin., N.A.* (10th Cir. 2017).

*René E. Thorne (ThorneR@jacksonlewis.com) is partner and the litigation manager in the New Orleans office of Jackson Lewis P.C. René's practice covers the full range of employee benefit litigation matters, including representation of employers, plans, plan fiduciaries, trustees, and third party administrators. In that regard, she has handled numerous ERISA class actions.*

*Eugene U. Ubawike (Eugene.Ubawike@jacksonlewis.com) is an associate in the Morristown, N.J., office of Jackson Lewis P.C. His practice focuses on representing employers in workplace law matters, including preventive advice and counsel.*

In that case, Pioneer owned and operated several automobile dealerships in Colorado and California, including Land Rover, Audi, and Porsche. In 2001, Pioneer sponsored an Employee Stock Ownership Plan (''ESOP''). Pioneer's founder, its President, and its Chief Financial Officer, served as the Plan's trustees. The Founder initially owned 100% of Pioneer's stock. Over the course of several years, he sold 37.5% of his Pioneer stock to the Plan and retained 62.5% ownership.

In 2009, the Plan's trustees proposed a stock transaction whereby the ESOP would become the 100% owner of Pioneer by purchasing the Founder's stock. Because the trustees' interests in the transaction were adverse to those of the ESOP, and to avoid any conflict of interest issues, the ESOP hired an independent fiduciary to determine whether, and on what terms, the Plan should purchase the Founder's shares.

The sale of the dealership was blocked by Land Rover, which maintained a prior agreement with Pioneer that granted the automaker the right to block any changes in Pioneer's ownership. Land Rover blocked the sale of Pioneer to the ESOP because it considered that the ESOP was unlikely to have the requisite financial capacity, business acumen, and dedication to properly operate the dealership.

The independent fiduciary for the ESOP advised the ESOP to not purchase the Founder's stock and the sale was ultimately abandoned. Just over a year later, however, Pioneer sold most of its assets to another party for $10 million more than what the ESOP would have paid for it. The ESOP viewed this as a dramatic loss to its portfolio and sued the independent fiduciary to recover the loss.

The U.S. District Court for the District of Colorado found that the ESOP had failed to establish causation between the breach and its claimed loss because the loss was so speculative—nothing showed that Land Rover would have approved the original sale. The district court thus granted summary judgment to the independent fiduciary. On appeal, the ESOP argued that the district court improperly placed on it, rather than on the independent fiduciary, the burden of proving causation.

The Tenth Circuit disagreed, holding that Section 409 ''is silent as to who bears the burden of proving a resulting loss,'' and thus the rule applies that, ''[w]here a statute is silent on burden allocation, the 'ordinary default rule is that plaintiffs bear the risk of failing to prove their claims.' ''

The court acknowledged an exception to this rule exists within the common law of trusts, whereby once a plaintiff beneficiary has proven that a trustee has committed a breach of trust and that a loss followed, the burden shifts to the trustee to prove that the loss would have occurred even without the breach. But it found that this exception does not apply to Section 409:

> To begin, there is nothing in the language of [section 409] or in its legislative history that indicates a Congressional intent to shift the burden to the fiduciary to disprove causation. Nor is there anything that suggests Congress intended to make the lack of causation an affirmative defense or an exemption to liability. Whether something constitutes an element, as opposed to an affirmative defense or exception, turns on whether 'one can omit the exception from the statute without doing violence to the definition of the offense.'
>
> [Section 409] imposes liability on a breaching fiduciary for ''any losses to the plan resulting from each such breach.'' The requirement that the losses to the plan have resulted from the breach cannot be omitted from the statute without substantially changing the definition of the claim, thereby doing violence to it.

Thus the Tenth Circuit concluded that ''causation is an element of the claim [for breach of fiduciary duty] and that the plaintiff bears the burden of proving it.'' Because the ESOP could not prove causation between the independent fiduciary's conduct and the plan's speculative $10 million loss, the appellate court affirmed the district court's grant of summary judgment to the independent fiduciary.

## The Circuit Split

In placing the burden of causation on plaintiffs, the Tenth Circuit joins the Second, Sixth, Ninth, and Eleventh Circuits on this fractious issue. On the other side of the issue stand the Fourth, Fifth, and Eighth Circuits, holding that ''once a fiduciary is shown to have breached his fiduciary duty and a loss is established, he bears the burden of proof on loss causation.'' See e.g. *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 363 (4th Cir. 2014).

Although divided on the burden allocation issue, both camps agree that the ''resulting from'' language of Section 409 requires proof that an alleged breach caused the claimed loss. For instance, the Tenth Circuit cited to the Fourth Circuit's decision in *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 218 (4th Cir. 2011), which held that ''causation of loss is *not an axiomatic conclusion* that flows from a breach of [fiduciary] duty.''

The circuit split seems to stem, however, from the (mis?)application of the common law of trusts, which carries a burden-shifting framework: once a beneficiary proves a trustee's breach and a following loss, the burden is on the trustee to show that her breach did not cause the loss.

In *Tatum*, the Fourth Circuit applied this common law of trusts principle to Section 409 and shifted the causation burden to the fiduciary defendant. The Fourth Circuit found that application of the common law of trusts burden-shifting framework ''comports with the structure and purpose of ERISA'' because a plaintiff who has established a breach and a following loss ought not to be required to additionally prove a causal link under a statute designed to protect such a plaintiff.

The dissent in *Tatum* disagreed, noting that the majority relied on, among other cases, *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992) to justify shifting the causation burden to the fiduciary. But a key distinction between *Martin* and *Tatum* (and many other cases of fiduciary breach) is that, in *Martin*, the breach constituted dishonest self-dealing, and not just a benign lack of prudence. This distinction, the dissent argued, makes it clear that *Martin* applied the causation burden to the fiduciary because it sought to heed Congressional intent to protect employee benefit plans and their beneficiaries from dishonest stewards. Where however, a fiduciary is not dishonest, but only imprudent or similarly deficient, no burden should be placed on the fiduciary to disprove causation of loss.

Like the *Tatum* dissent, the Tenth Circuit squarely rejected the notion that the common law of trusts should always be woven into ERISA. Citing the U.S. Supreme Court in *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996), the Tenth Circuit observed that ''[t]he 'law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties.' '' Thus, according to the Tenth Circuit, where the plain language of the statute limits the fiduciary's liability to losses *resulting from* a breach of fiduciary duty, there is no reason to read the statute as requiring the plaintiff to show only that the loss is *related* to the breach. It further warned that shifting the burden to defendant-fiduciaries could dis-incentivize employers from undertaking fiduciary responsibility with respect to ERISA plans.

## Conclusion

At bottom, where a circuit court might place the causation burden depends not upon statutory language, but upon trust principles. Circuit courts that place the burden on the plaintiff seem interested in limiting sweeping fiduciary liability. On the other hand, circuit courts that place the burden on the fiduciary seem interested in protecting plan participants. ERISA breach claims are currently pending in the district courts of the Fourth Circuit so perhaps it may soon have the opportunity to reevaluate its holding in *Tatum*.

  