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THE FIDUCIARY CORNER: You ARE Your Brother's Keeper - Co-Fiduciary Liability Under ERISA

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Simply minding your own business and following the rules sometimes is not enough to avoid liability under ERISA. Although Department of Labor enforcement efforts and heightened scrutiny by retiring baby boomers are causing plan fiduciaries to pay more attention to their own fiduciary duties, those fiduciaries sometimes forget that they also have an obligation to police the conduct of *other* fiduciaries. ERISA's "co-fiduciary" duty rules can be a trap for the unwary, often placing fiduciaries in extremely difficult positions.

This was certainly the case in a recent lawsuit filed in a federal court in New York. In that case (*Smith v. Stockwell Construction Co.*, W.D.N.Y. Dec. 10, 2011), the ex-wife of a deceased profit sharing plan participant sued the plan sponsor (which served as the plan's administrator), the third-party administrator, and the sponsor's owner (who also served as the trustee of the plan responsible for choosing investment options). Dawn Smith was the ex-wife of plan participant Kevin Smith. While they were married, Kevin designated Dawn as his beneficiary in the event of his death. Although they later divorced, Kevin did not change that beneficiary designation.

After Kevin died, the plan paid his death benefit to his father, rather than to Dawn. After the plan denied her formal claim and appeal, Dawn filed suit in federal court, alleging that the defendants breached their fiduciary duties under ERISA by failing to pay benefits according to the plan's terms. The court dismissed her claim against the TPA, finding that the TPA was not a fiduciary subject to suit under ERISA. It refused to dismiss the claim against the company in its capacity as plan administrator, however, finding that the administrator was a fiduciary under ERISA, and that Dawn had alleged sufficient facts to support her theory that the administrator breached its fiduciary duty.

The sponsor's owner, Harry Stockwell, Jr., asked the court to dismiss the claims against him, as well. Although he was clearly a plan fiduciary – because he had the authority to select investment funds offered under the plan – Harry had no individual responsibility for deciding how and to whom to pay benefits. Thus, he claimed that he could not be sued under ERISA for violating a duty that he clearly did not have.

Although the court acknowledged that Harry could not be held *directly* liable under ERISA for a failing to pay benefits to the proper beneficiary, it found that he *could* be sued for violating his co-fiduciary duties under ERISA. The lawsuit alleged sufficient facts to show that Harry was aware of the plan administrator's decision not to pay benefits to Dawn, and that he did nothing to correct that error. According to the court, "a fiduciary may be liable for the known breach of a co-fiduciary [in this case, the plan administrator], even when the breach occurs in connection with a function which does not fall within the fiduciary's designated or undertaken responsibilities." So even though Harry did not cause the alleged error in this case, the court found that he could be liable for it because he (i) knew about the error, and (ii) did nothing to correct it.

Stockwell's lessons for those responsible for benefit plans are many, including: (1) Know who the plan's fiduciaries are; (2) be vigilant about your own conduct as a fiduciary; (3) be equally vigilant about the conduct of your co-fiduciaries; and (4) do not simply turn a blind eye to fiduciary conduct that you find questionable, even if it is out of your area of responsibility.