The Devil Is In The Detail For The Plan Sponsor

By Ary Rosenbaum, Esq.

One of the great idioms out there is that "the devil is in the detail." It means that there is a catch in the details, which means something might be simple at first look, but it's not. Plan sponsors need to know the devil in the detail because there are plan providers out there that will advertise their services and neglect to tell the plan sponsor the devil in the details, which is usually hidden in the contract. This article is about informing plan sponsors what they should consider when presented by a provider about their services because many times, what is offered isn't what's being promised. As with any business, there are a few snake oil salesman out there that are trying to sell snake oil or a magic bean to plan sponsors. A plan sponsor has the fiduciary duty to find out what type of services they're getting. So this article is to illuminate the details that most plan sponsors will actually neglect.

Hiring an ERISA fiduciary doesn't eliminate all liability

There are financial advisors that tout their service as an ERISA §3(38) fiduciary where they will assume the discretionary control of the fiduciary process of the plan and the liability that goes with it by picking investment options and educating participants. There are third party administrators (TPAs) and other providers that tout their service as an ERISA §3(16) administrator where they will assume the responsibility of the day-to-day administration of a retirement plan and the liability that goes with it. Providers that offer these ERISA type services will say that hiring them will eliminate all liability when it comes to the service they offer. A 3(38) fiduciary will say that hiring them will eliminate all liability for plan investments and a 3(16) administrator will claim that hiring them will eliminate all liability for plan administration and they would all be lying. One of the arguments for hiring an independent fiduciary in a §3(38) or §3(16) setting is that these fiduciaries will assume discretionary control and the liability that goes with it. Through all the marketing you see and hear, it's claimed that the plan sponsor is not going to be on the hook as a fiduciary. While hiring an independent fiduciary is likely a settlor function, the plan sponsor doesn't shed all their liability because they will still retain liability as a plan settlor. The point here is that if the provider does something wrong such as negligence or theft, what does it matter if a plan sponsor is not liable as a fiduciary because they're still liable for hiring the fiduciary that committed the bad act in the first place? Sure, a fiduciary has a higher standard of care than a settlor, but a settlor still has a standard of care. Hiring an independent fiduciary will protect a plan sponsor in most instances, but when hiring an incompetent or corrupt fiduciary, it doesn't really matter. In the scheme of things, what difference does it make if a plan sponsor is being sued for hiring a stealing fiduciary? At the end of the day, the plan sponsor is liable for hiring a fiduciary who stole.

Non-discretionary Corporate trustees aren't a great tool for liability protection

Using a corporate trustee for a retirement plan are a great fit for two instances: when no one for the plan sponsor wants to individually serve as trustee and when the plan requires an audit. Otherwise, it's a waste of money even if those corporate trustee fees are reasonable (and they usually are). They're a great solution when no individual from the plan sponsors wants to serve as a trustee. They're also a great solution for the retirement plan that because of its size requires an independent audit. Plans with corporate trustees can get a much cheaper limited

scope audit because the corporate trustee can certify their trust statements. Non-discretionary trustees do nothing in terms of limiting liability because individuals who might have served as trustees may still be liable if their conduct in running the plan makes them a fiduciary. An individual can be personally liable as a fiduciary even if they're not a plan trustee, it's all about their powers in running the plan. While there are providers that offer discretionary trustee services along with other fiduciary services such as an ERISA §3(38) fiduciary, that's something different and unique than the plain corporate trustee services that are usually offered.

The warranty that doesn't warranty anything

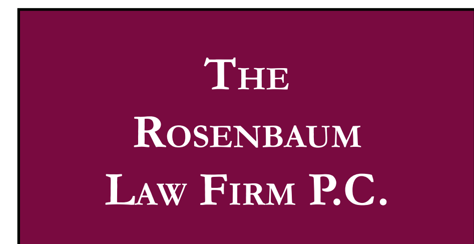
When I was a kid at a private Jewish day school, the Principal got on the speaker and told us that the cookies that we would get with our morning milk would be replaced by something more wonderful. What replaced the delicious cookies were these disgusting tea biscuits that the local fruit store sold 2 for $1. The point is that sometimes people will create a buildup for something not so special. Well in the 401(k) plan business, a fiduciary warranty is like those 2 for $1 tea biscuits. A fiduciary warranty is this marketing ploy by some 401(k) providers (usually an insurance company) that claims to indemnify plan sponsors from certain aspects of the fiduciary process. The big protection is that the provider will indemnify a pan sponsor from any litigation regarding the requirement that the investment lineup for a participant-directed investment satisfy a broad range of investment requirement, which any a monkey and two trainees can satisfy. No plan sponsor gets dues for this broad range requirement because every investment lineup that has a stock fund, bond fund, and stable investment fund pretty much satisfies it. So these providers aren't giving any level of protection because that level of protection is never needed. In addition, insurance companies insure risk for insurance premiums. If insurance companies are giving away a fiduciary warranty for free, what does it say about the risk? It says that the insurance provider knows full well that the warranty will never see a court of law. I also believe that the fiduciary warranty is misleading because it may give a less educated plan sponsor the impression that the provider is serving in a fiduciary capacity, which they clearly aren't doing. Fiduciary warranties are great marketing, they offer no protection to plan sponsors.

What they promise may be different than what the contract says

I'm an attorney and I can say that because I completed three years of law school, passed three different state bar, and remain a member of the bar in good standing in New York, California, and Massachusetts. The problem with some other positions in the retirement plan business, there is a wide leeway in experience and accomplishments among plan providers. For example, anyone can claim to be a TPA whether they have the experience or not. There is a wide difference between the services that different ERISA §3(16) administrators offer. Most will sign Form 5500, some won't. Many will help with payroll, some won't. Many will help with distributing notices, some won't. So it's important to understand what level of service you'll be getting from a plan provider. In addition, some providers will claim that they will offer a level of service that the contract they sign doesn't state. Plan sponsors need to make sure that the promises made by the service provider are also reflected in the contracts. That's why a plan sponsor should make sure that all contracts are reviewed by an ERISA attorney to make sure that the promises made by a plan provider are consistent with the contract that they present to the plan sponsor.

It's not all about a low fee

Thanks to fee disclosure regulations, plan sponsors can determine the administrative expense of running their plan, which is important because they have the fiduciary duty to pay reasonable plan expenses. It's all about reasonableness, not about paying the lowest fee. So a plan sponsor can have the plan pay more in administrative expenses as long as it's reasonable. There are many plan providers that charge too little in fees and make that the centerpiece of their service. However, plan sponsors shouldn't pick a provider because they're the cheapest, they need to pick a provider that offers a great service at a reasonable cost.



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The Rosenbaum Law Firm P.C.
734 Franklin Avenue, Suite 302
Garden City, New York 11530
(516) 594-1557

http://www.therosenbaumlawfirm.com
Follow us on Twitter @rosenbaumlaw