FIDUCIARY BASICS

When the ERISA statute was signed into law by President Gerald Ford in 1974, it only codified fundamental principles of common law. While ERISA pertains strictly to private employee retirement and welfare benefit plans, it has long been held that money managers charged with investing someone else's money should not be expected to apply significantly lower standards to non-ERISA assets.

WHO: EVERYBODY

The late Matthew McArthur, Esq. (may you rest in peace, Friend), recounted the case of a company bookkeeper merely doing his job, who was found to be a fiduciary of the company retirement fund because he was responsible for disbursing its assets. Under some financial duress, the company principals instructed the bookkeeper to advance fund assets to the company in the form of a loan. The loan significantly drew down plan assets so that the bookkeeper was unable to collect his own plan benefit when he left the company. When he sued for his benefit, the courts not only denied his claim, but held him liable for the improper loan because he was the one who wrote the checks. He was required to pay in the amount of the difference between the value of his benefit and the loan.

To summarize, fiduciaries include, among others:

* Trustees
* Investment Advisors
* Stockbrokers
* CPAs
* Officers of the Company
* Owners of the Company
* Directors of the Company
* Plan Administrators
* Financial Advisors

A fundamental factor in determining whether someone is a fiduciary or not is the client's reliance on what the party holds itself out to be. This is a sophisticated legal theory called "The Duck Theory". You know--"If it looks like a duck, walks like a duck, quacks like a duck", etc.

A key case that established the prudence standards later incorporated into Federal and State law was the 1971 decision in Blankenship v. Boyle, where the trustees of the United Mine Workers (yes, THAT Tony Boyle) were found to have breached their fiduciary responsibilities by letting substantial cash accumulate interest-free in a Union owned bank, and also directed retirement trust funds to be invested in electric utility companies in order to give the Union proxy control, forcing the utilities to buy Union mined coal. Even though the beneficiaries' interests were clearly served because retirement contributions were directly related to Union mined coal, the trustees' investment activities were found to clearly advance the Union's interests first. The aid to the fund was only incidental to the Union enhancement. The court found the trustees' activities were clearly imprudent in accumulating excess cash and in directing investments not solely in the interest of participants. (But the Unions pushed a lot of coal.)

Fiduciary Liability:

Liability is personal and impersonal. Impersonal in that courts don't care WHO is responsible--they'll get anybody (even Martha Stewart). Personal in that fines and penalties are assessed, and have to be paid directly by the perpetrators.

In GIW Industries v. Trevor Stewart, Burton and Jacobson, a money manager was liable for not inspecting the investment objectives of a fund. Trevor Stewart invested 75% of GIW's portfolio in long-term government bonds. GIW knew of TSBJ's investment philosophy but hired them with no restrictions. No one at TSBJ read plan documents, knew the plan history, their cash needs, or the demographics of the participants. When Trevor was terminated, they had lost over $700,000.00 and collected fees of $17,031.54. The court said TSBJ subjected GIW to too much market risk and liquidity risk and failed to diversify the investments. They were fined $537,000.00 and had to rebate their fees. The court, then, turned around and found the Trustees jointly responsible for "allowing" TSBJ to violate the investment objectives. Guess who paid. (No, TSBJ paid--deeper pockets.)