

Plan Advisor

[Plan Adviser Giving Investment Advice is a Fiduciary](#)

Adrien Martin – 03/21/2007

A brokerage firm that gave investment advice to a profit sharing plan for a fee is considered a fiduciary under the Employee Retirement Income Security Act (ERISA), according to a court ruling.

The U.S. District Court for the Western District of Michigan rejected brokerage firm Edward D. Jones & Co.'s argument that it did not qualify as a fiduciary for the Rycenga Homes Inc. profit-sharing plan under ERISA because it did not have discretionary authority over the plan.

Judge Joseph Scoville wrote in his opinion that another ERISA provision holds the brokerage firm accountable as fiduciary. "Although it is certainly true that the possession of discretionary authority and control is generally the benchmark for fiduciary status under ERISA, it is also true that, in the special case of those providing investment advice, the existence of discretionary authority is not necessary to a finding of fiduciary status," he wrote.

And even though the brokerage firm did not directly aid Rycenga's former trustee Ronald Retsema in taking illegal loans against the plan that amounted to more than \$2.1 million, it failed in its duties as an investment adviser by turning a blind eye and not inquiring about the loans. The court also said that the brokerage firm might have breached its obligations as a co-fiduciary by not making a reasonable effort to remedy the damage to the plan done by the trustee.

Securities Broker Provided Investment Advice

Rycenga created a 401(k) profit-sharing plan for its employees in 1984, and named the corporation's president Retsema as the sole trustee of the plan from 1984 to 2004, with Edward D. Jones as the securities broker.

During the two decades that Edward D. Jones acted as broker to the plan, it had no plan administration responsibilities, but did render investment advice periodically to Retsema in regard to the plan's asset allocations in return for commissions, service fees and revenue-sharing fees.

In 2001, one of the third party administrators for the plan learned of the prohibited loan transactions and suggested that Rycenga stop borrowing from the plan. In 2004, plan participants called the investment representative at Edward D. Jones who had been advising Retsema to tell him they suspected Retsema had been using plan assets for the benefit of his business, at which point the representative immediately reported the situation and terminated all check-writing privileges on the account.

The lawsuit against Edward D. Jones was originally filed by 50 former employees of Rycenga, but in November 2005 the plan's successor trustee, David Ellis, was substituted as a plaintiff. Default judgment was entered against Retsema and Rycenga, leaving only the claims against Edward D. Jones.

The charges brought by the Rycenga profit-sharing plan claim that Edward D. Jones is liable as a fiduciary of the plan and a co-fiduciary.

No Direct Fiduciary Breach

After finding the brokerage firm qualifies as a fiduciary under ERISA, the court threw out Ellis's contention that Edward D. Jones was a fiduciary because it had ability to terminate Retsema's check-writing ability. "If accepted, plaintiff's argument would include within the definition of fiduciary for ERISA purposes banks and all other depositories, who merely hold plan assets," the court said.

The court also rejected Ellis's claim that Edward D. Jones was liable for a direct fiduciary breach for allegedly actively participating in the illegal loans, but said the firm may have breached its duty by not inquiring about the large and increasing cash investments Retsema made to the plan that enabled him to take the loans.

"Even viewing the scope of defendant's duty as extending only to the narrow issues of plan investment and diversification, a rational trier of fact could conclude that a reasonably prudent person should have inquired into the nature of the cash investments, if only to reach a sound conclusion on the need for diversification of other investments," Scoville wrote.

The case is *Ellis v. Rycenga Homes Inc.*, W.D. Mich., No. 1:04-cv-694, 3/15/07.