

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| RONALD ABRAMS, individually and as a | : | CIVIL ACTION |
| Trustee of the RONALD ABRAMS PROFIT | : | |
| SHARING PLAN, | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | |
| | : | |
| DEAN WITTER REYNOLDS INC. and | : | |
| NORWOOD P. HALLOWELL, III, | : | |
| | : | |
| Defendants. | : | NO. 98-3988 |

MEMORANDUM -- ORDER

AND NOW, this 11th day of March, 1999, upon consideration of the motion of defendants Dean Witter Reynolds Inc. (“Dean Witter”) and Norwood P. Hallowell, III (“Hallowell”) to dismiss the complaint (Document No. 5), the response of plaintiff Ronald B. Abrams, individually and as a Trustee of the Ronald Abrams Profit Sharing Plan (“Abrams”) (Document No. 6), and the reply of the defendants thereto (Document No. 7), having found and concluded that:

1. Abrams alleges the following in his complaint. Abrams consulted with the defendants about establishing a profit sharing pension plan shortly after starting his law practice in 1974. (Complaint ¶ 14). Once the plan was established, Dean Witter acted as custodian and as the broker in connection with the plan, and Dean Witter and Hallowell provided investment advice for the plan. (Complaint ¶¶ 19-20). In September of 1992, upon seeking advice from Hallowell, Abrams borrowed \$40,000 from the plan on condition that he repay the monies within sixty days. (Complaint ¶

21-22). On November 3, 1992, Hallowell instructed Abrams to open a new IRA rollover account and to repay the monies into that account, which Abrams did on November 11, 1992. (Complaint ¶¶ 25-28). The IRS subsequently audited the plan and made a tax assessment against Abrams because the repayment of monies into the IRA rollover account was improper. (Complaint ¶ 30). Abrams incurred financial damages as a result of the tax assessment. (Complaint ¶¶ 31-35). Abrams alleges that the defendants erroneously advised him regarding the loan and repayment. (Complaint ¶¶ 23, 29). Abrams filed a complaint in this Court, alleging various claims and purporting to bring suit in both his individual capacity and as trustee of the plan. (Complaint ¶ 3).

2. The defendants argue that Count I of the complaint, alleging a claim under the Employee Retirement Income Security Act (“ERISA”), should be dismissed for failure to state a claim because Abrams did not allege the necessary facts to establish that the defendants were fiduciaries under ERISA, that the defendants breached their fiduciary duties, or that a causal connection existed between the alleged breach and Abrams’ loss. The defendants argue that the state law claims in Count II (breach of contract), Count III (breach of fiduciary duty), Count IV (negligence), Count V (contribution and indemnity), and Count VI (punitive damages) are preempted by ERISA and are barred by the statute of limitations. In addition, the defendants argue that the claim of Abrams for punitive damages should be dismissed as such damages are not permitted under ERISA and alternatively, Abrams has not alleged the type of egregious conduct that would justify punitive damages. Finally, the defendants

contend that Abrams' claim for attorneys fees, to the extent it is predicated on state law, should be dismissed.

3. Abrams counters that the allegations of his complaint are sufficient to state a claim under ERISA; alternatively, Abrams requests leave to file an amended complaint to remedy any deficiencies in his pleading. As to the claims alleged in Counts II through VI, Abrams argues that those claims are federal common law causes of action under ERISA and are not barred by the statute of limitations. Finally, Abrams argues that he has sufficiently pled a claim for punitive damages.
4. Rule 12(b) of the Federal Rules of Civil Procedure provides that "the following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief can be granted." In deciding a motion to dismiss under Rule 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishin v. King & Spaulding, 467 U.S. 69, 73 (1984).
5. The first attack on Abrams' claim under ERISA is that Abrams did not allege the necessary facts to show that the defendants were fiduciaries under ERISA. ERISA provides that "a person is a fiduciary with respect to a plan to the extent . . . (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so" 29 U.S.C. § 1002(21)(A). The complaint contains

several allegations that the defendants rendered investment advice for a fee with respect to the plan. (See Complaint ¶¶ 20-22, 25, 28, 37). I conclude that Abrams has sufficiently alleged that the defendants provided investment advice for a fee to the plan so as to impose a fiduciary duty on them under ERISA.

6. The defendants argue that even if they had a fiduciary duty to Abrams in their rendering of investment advice, such a duty does not encompass the advice they gave to Abrams regarding the loan from the plan and its repayment. The defendants argue that the complaint does not allege facts that would establish that the defendants had a fiduciary duty with respect to the loan transaction or that the defendants breached their fiduciary duties with respect to rendering investment advice in rendering advice about the loan and its repayment. It is correct that under ERISA “[a] person is a fiduciary only to the extent he exercises control over those specific breaches of fiduciary duty on which plaintiffs base their claims.” Fechter v. Connecticut General Life Insurance Company, 800 F. Supp. 182, 197 (E.D. Pa. 1992). Thus, to state a claim under ERISA, a plaintiff must allege not only that the defendant had a fiduciary duty, but also that the transaction in question fell within the scope of that duty.
7. Abrams submits a supporting affidavit attesting that Hallowell recommended and directed that securities in the plan’s portfolio be sold to raise cash for the loan. (Pl.’s Response Ex. B. ¶¶ 4-6). Abrams argues that this advice constituted advice regarding the sale of securities, which falls within the fiduciary duties that attach to the defendants’ rendering of investment advice. However, the affidavit is material outside of the pleadings, which the Court will not consider in ruling on the motion to

dismiss. I conclude that Abrams has not sufficiently pled in the complaint that the acts of the defendants relating to the loan and its repayment fall within its fiduciary duty under ERISA.

8. Under Federal Rule of Civil Procedure 15(a), leave to amend a complaint shall be freely given in the absence of circumstances such as undue delay, bad faith or dilatory motive, undue prejudice to the opposing party or futility of amendment. See Foman v. Davis, 371 U.S. 178, 182 (1962). Accordingly, Abrams will be granted leave to amend Count I to allege facts, to the extent that the law, the facts, and Rule 11 of the Federal Rules of Civil Procedure will allow, that would establish that the defendants breached their fiduciary duty to Abrams arising from their rendering of investment advice in their actions regarding the loan and its repayment.
9. The defendants also attack Abrams' claim under ERISA on the ground that Abrams failed to allege a causal connection between the breach and his loss, which is required under 29 U.S.C. § 1109. A fiduciary may be liable for a breach of such duty under § 1109, which provides that “[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach. . . .” Abrams alleged in several paragraphs of the complaint that as a result of his repaying the monies into the IRA rollover account, Abrams suffered financial damages. (See Complaint ¶¶ 33, 34, 39). I conclude that, assuming that Abrams will be able to sufficiently amend his complaint to properly allege that the defendants breached their fiduciary duties under ERISA by

recommending this transaction to Abrams, the current allegations of the complaint sufficiently plead a causal connection between the acts of the defendants regarding the loan and its repayment and the loss suffered by Abrams under ERISA.

10. ERISA preempts any state law claims which “relate to” the employee benefit plan. See Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 45 (1987). In § 1144(a), the statute provides that: “the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . .” Thus, ERISA’s civil enforcement mechanism is intended to be the “exclusive” vehicle for enforcement of benefit claims, with limited exceptions that are not applicable here. See Nice v. Independence Blue Cross, 1997 WL 299428 *1 (E.D. Pa.) (holding that a claim for breach of contract was preempted by ERISA). A law “relates to” an employee benefits plan if it has a connection with or reference to such a plan; however, the Supreme Court has held that Congress intended the phrase “relate to” to be broadly interpreted. See Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98 (1983). “A state law relates to an employee benefit plan if it has a connection with or reference to the plan, even if the law is not specifically designed to affect the plan, or if the effect is only indirect.” Mitnik v. Cannon, 784 F. Supp. 1190, 1194 (E.D. Pa. 1992) (holding that state law claims for fraudulent misrepresentation, breach of contract and breach of fiduciary duty were preempted by ERISA).
11. The plaintiffs argue that under the reasoning of Arber v. Equitable Beneficial Life Insurance Co., 848 F. Supp. 1204, 1215-17 (E.D. Pa. 1994), Counts II through V state

causes of action under the federal common law of pension plans and are not preempted by ERISA. The Arber court noted that it was an open question whether ERISA preempts state law claims based on wrongs for which no remedy is available under ERISA, but that it was “well-settled law that federal courts are empowered to create a federal common law of pension plans under ERISA in order to effectuate Congress’ intent to preempt the area and create a comprehensive federal regulatory scheme,” particularly where ERISA itself furnishes no answer. Id. at 1216 (citing Carl Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters & Employers Pension Fund, 847 F.2d 113, 121 (3d Cir. 1988)). However, the claims in Count II through V are factually distinct from the federal common law claims contemplated by Arber, which allowed an employer, who did not have standing to sue under ERISA, to proceed on claims arising from the termination or denial of benefits under an employee benefits plan under the federal common law of pensions. Despite Abrams’ argument in opposition of the motion to dismiss, the complaint does not indicate that Counts II through V are alleged under the federal common law of pensions; indeed, Abrams alleges that the Court has “pendent” jurisdiction over all claims other than the ERISA claim, which indicates that he is alleging such claims under state law, not federal common law. (Complaint ¶ 7). Allowing Abrams to proceed under the federal common law of pension plans would not effectuate Congress’ attempt to preempt the area and create a comprehensive federal scheme, but rather would allow Abrams to proceed indirectly with state law claims that he would not be able to bring directly. In addition, Abrams’ claims in Counts II through

V are based on the same facts and request the same relief for the same injury as his claim in Count I under ERISA; thus, it is clear from the complaint that if Abrams has a remedy under ERISA, there is no reason to create a cause of action under federal common law, even if the complaint could be construed as alleging federal common law claims, rather than state law claims. The Court concludes that the claims in Counts II through V are preempted by ERISA, including the claims for attorney fees.

12. To the extent that Abrams' claim for punitive damages is based on his state law claims, the claim for such relief is preempted by ERISA. See Pane v. RCA Corp., 868 F.2d 631, 635 (3d Cir. 1989). To the extent that Abrams' claim for punitive damages is based on his ERISA claim, such damages are not available under ERISA. See id. at 635 n. 2;

it is hereby **ORDERED** that the motion is **GRANTED**. Count I is **DISMISSED WITHOUT PREJUDICE** to the right of Abrams to file an amended complaint revising Count I only in accordance with this Memorandum-Order no later than **April 12, 1999**. Counts II through VI and the claims for punitive damages throughout the complaint are **DISMISSED**.

LOWELL A. REED, JR., J.