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Employee Stock Ownership Plan Participant Cannot Pursue Fiduciary Breach and Bad Faith Claim Against Insurer of Plan's Fiduciaries

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Applying Mississippi law, a federal district court has held that a participant in an employee stock ownership plan cannot pursue his claims against the insurer of the plan fiduciaries because those claims were previously released in a settlement agreement between the plan fiduciaries and the insurer. *Sealey v. Beazley Ins. Co. Inc.*, et al., 2016 WL 4392624 (S.D. Miss. Aug. 17, 2016).

A company, on the advice of its attorney, created an employee stock ownership plan. Lawsuits against the company followed, as the U.S. Department of Labor and two plan participants alleged that certain plan transactions violated various ERISA provisions. The ultimate trial ended with a judgment of more than $6 million entered against the company owner and the plan fiduciaries, along with an additional $3.1 million in attorneys' fees and expenses awarded to the private plaintiffs. The company owner had tendered the underlying actions to the company's fiduciary liability insurance carrier. The insurer responded by reserving its rights and issuing a coverage position, which included a refusal to consent to the attorney who had advised the company on the ESOP to act as defense counsel.

The insureds filed a coverage action against the insurer, demanding defense and indemnity without a reservation along with the right to select their own independent counsel. The parties eventually signed a confidential settlement agreement and release that resolved the coverage action whereby the insurer agreed to withdraw its reservation of rights, pay defense and indemnity but at reduced policy limits, and allow the coverage action plaintiffs to retain independent counsel to represent them in the ERISA actions. The insureds chose the disputed attorney, who represented the insureds throughout the ERISA actions, ultimately exhausting policy limits before the judgments were entered.

One of the successful plan-participant plaintiffs, who had obtained assignments from the plan fiduciaries of any claims they may have had against the insurer, proceeded to institute this case against the insurer, asserting that the insurer breached fiduciary duties and engaged in bad faith. The insurer filed a motion to dismiss based on the affirmative defense of release, which the court granted, dismissing the claims with prejudice.

In so deciding, the court explained that the dispute was whether the agreement actually released the plan fiduciaries' claims, whether the agreement constitutes an unenforceable anticipatory release, and whether the agreement is unconscionable.

The court concluded that the agreement unambiguously releases any and all claims—known or unknown—related to the insurer's handling of the ERISA actions, and that such a release includes all the claims the plaintiff asserted. The court then addressed the plaintiff's argument that, under Mississippi law, claims that accrued after the agreement was executed were not released by the agreement as a party may not use an anticipatory release as a means to escape liability for tortious acts. In rejecting this argument, the court stated that the plaintiff's claims that the insurer failed to provide coverage under the policy, and that the insurer breached various duties concerning the insured's counsel were both litigated in the coverage action. The court also noted that even if those issues had not already been litigated, the parties' intent to release future claims is expressed in clear and unmistakable language in the agreement that was fairly and honestly negotiated.

The court also rejected the plaintiff's contentions that even if the claims were released in the agreement, the agreement cannot be enforced due to the presence of undue influence (in the form of the plan fiduciaries' attorney) and unconscionability. As to undue influence, the court explained that the plan fiduciaries' attorney, who the plaintiff claimed took advantage of the plan fiduciaries to enter into the agreement to benefit himself personally, was an adverse party to the insurer in the context of the coverage action, not the insurer's fiduciary, as well as an attorney that the plan fiduciaries picked on their own, at their own peril. Finally, observing that the agreement was not a contract of adhesion and not procedurally unconscionable, the court noted that it is not a substantively unconscionable result that the plaintiff lacks the ability to resurrect claims that the plan fiduciaries, represented by counsel of their choice, agreed to release.

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