OBTAINING FEDERAL JURISDICTION FOR CLAIMS UNDER ERISA FIDELITY BONDS

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As claims under fidelity bonds mandated by the Employee Retirement Income Security Act[1] become more frequent, sureties may prefer to litigate in federal court. Federal courts are more likely than state courts to be familiar with ERISA and issues arising thereunder. Although there is no published case law holding that suits for breach of an ERISA-mandated fidelity bond must be brought in federal court, there are a couple of ways a surety may obtain federal jurisdiction.

ERISA imposes a statutorily defined fiduciary standard on all persons or entities who either exercise discretionary authority over the management and disposition of health and pension plan assets, or render investment advice to such plans.[2] Fiduciaries are subject to civil and criminal penalties for breaches of their fiduciary obligations and may be required to provide restitution to the plans and suffer additional penalties.[3] The breaches of fiduciary duties set forth in ERISA are very broad, ranging from outright theft of plan assets to making loans to a "party in interest" at below market rates.

In order to protect plan assets, Congress has mandated that all plan fiduciaries and persons who handle plan funds be bonded with an ERISA bond,[4] but the scope of the bonding requirements differs from the broad scope of fiduciary duties set forth in ERISA. In addition, ERISA plans, or employers who administer them, often attempt to satisfy the ERISA bonding requirements by purchasing financial institution bonds or commercial crime policies that may contain endorsements or insuring agreements referencing ERISA. As a result, whether a given claim for a violation of ERISA fiduciary duties is covered may not be easily determined.

ERISA grants exclusive jurisdiction to the federal courts over most claims arising thereunder. As such, federal courts are generally acquainted with the complexity of ERISA's fiduciary standards, as well as its asset investment and disposition rules. In addition, the U.S. Secretary of Labor must file actions for civil penalties for breach of ERISA fiduciary duty in federal court.[5] Moreover, federal courts routinely hear criminal cases involving ERISA violations. Therefore, federal courts have a familiarity with the specific ERISA definitions, obligations, and mandates that are implicated in an ERISA bond claim that state courts simply do not have. A surety defending an ERISA bond claim may prefer that civil actions for claims on the bond be adjudicated in federal court.

Typically, insureds will file actions under ERISA-mandated bonds in state court. The complaint often will be silent as to the ERISA bonding requirement and will be pleaded as a common law breach of an insurance contract. A surety may be able to remove the action to federal court, even in the absence of diversity jurisdiction, on the basis that claims under bonds mandated by ERISA may give rise to federal question jurisdiction under both ERISA[6] and under federal jurisdictional statutes.[7]

First, a surety can argue that federal courts have exclusive jurisdiction to adjudicate actions to recover under a fidelity bond required by ERISA. Section 1112 of ERISA specifically mandates bonding of every fiduciary of an ERISA employee benefit plan and every person who handles funds or other property of such a plan.[8] In addition, ERISA expressly states as follows:

> (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter [subchapter I] brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title.[9]

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1 29 U.S.C. § 1001 (1999) [hereinafter ERISA].
2 *Id.* §§ 1002(21), 1104.
3 *See id.* §§ 1109, 1111, 1131.
4 *Id.* §1112.
5 29 U.S.C. § 1132(e).
6 *Id.*
7 28 U.S.C. § 1352 (2006).
8 29 U.S.C. § 1112.
9 29 U.S.C. §1132(e).

Therefore, a surety can argue that, when an employer administering various types of employee benefit plans obtains a fidelity bond in order to comply with the fiduciary bonding requirements under ERISA, ERISA provides for exclusive jurisdiction in the district court to determine the scope of coverage.[10] This argument may be successful even when an insured argues that the action should be remanded when there are no allegations regarding ERISA on the face of the complaint. Often, the complaint will have a copy of the bond or policy attached as an exhibit, and the policy or bond itself will refer to ERISA.

Second, federal jurisdiction may also lie under federal jurisdictional statutes relating to bonds "executed under any law of the United States."[11] Although the general jurisdictional statutes do not confer exclusive jurisdiction upon the district courts, they nonetheless give rise to federal question jurisdiction. These statutes confer federal jurisdiction, for example, for actions relating to the Miller Act.[12] Thus, federal courts may have original jurisdiction over any action on a bond executed under any law of the United States and, therefore, over an insured's claims on fidelity bonds or policies executed under ERISA.[13]

In conclusion, ERISA is a complex statute, and the case law interpreting it adds to the complexity. ERISA violations can be nuanced and difficult to discern for the uninitiated. Who is a "party in interest?" Does a plan violate ERISA when it acquires or sells certain securities? What is a "prohibited transaction" that would subject an ERISA fiduciary to civil or criminal penalties? There are many violations of ERISA that could implicate ERISA bond coverage. By having the federal district courts reviewing ERISA bond claims, the surety can be assured that a certain level of expertise will be brought to decisions.

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10 *See* Machinery Movers, Local 136 Defined Contribution Pension Plan v. Fid. & Dep. Co. of Md., No. 06-cv-2539 (N.D. Ill. Aug. 16, 2006).

11 28 U.S.C. § 1352 provides as follows: "The district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title."

12 40 U.S.C. § 3131 (2006); United States ex rel. Bryant Electric Co. v. Aetna Cas. & Sur. Co., 297 F.2d 665, 669 (2d Cir. 1962)(28 U.S.C. § 1352 gives the district court jurisdiction over all suits on bonds executed under a law of the United States, including the Miller Act).

13 *See* Machinery Movers.