

*ERISA Litigation Alert*

November 9, 2012

*Federal Court Allows ERISA Fiduciaries To Seek Contribution From Other Fiduciaries, Creating More Uncertainty In ERISA Litigation**by Douglas A. Sondgeroth and Michael W. Ross*

*In Guididas v. Community National Bank Corp.*, No. 8:11-cv-2545-T-30TBM (M.D. Fla. Nov. 5, 2012), a federal district court in Florida declined to dismiss a claim for contribution or indemnity that ERISA fiduciaries sought to bring against other plan fiduciaries. In doing so, the court recognized that courts in the Eleventh Circuit and federal circuits generally are split over whether ERISA provides fiduciaries a right to claim contribution or indemnity against one another.

Whether ERISA fiduciaries may obtain contribution from others can be a critical question that affects many strategic and tactical litigation decisions, particularly with respect to settlement. The growing split among federal courts identified in *Guididas* will create uncertainty for ERISA fiduciaries both as to the scope of their potential liability and concerning the federal courts' power to supplement ERISA's express provisions, until the issue is resolved by the Supreme Court. In this alert, attorneys from our ERISA Litigation Practice summarize this case and identify important ramifications of the decision, especially for large, national employers and the attorneys who advise them.

**Background**

Plaintiffs participated in a benefit plan that Community National Bank Corporation sponsored. Plaintiffs brought a class action complaint claiming that certain officers and directors of Community National, as plan fiduciaries, failed "to act solely in the interest of the participants and beneficiaries

of the Plan, and [failed] to exercise the required skill, care, prudence, and diligence in administering the Plan and the Plans' assets." According to the defendants, however, three of the named plaintiffs served on an administrative committee for the plan. As a result, the defendants alleged that these three named plaintiffs were also plan fiduciaries under ERISA with a duty to act for the exclusive benefit of the participants. The defendants filed a counterclaim against these plaintiffs seeking contribution or indemnity from them as co-fiduciaries.

Plaintiffs moved to dismiss the counterclaim, arguing that ERISA does not permit a claim for contribution or indemnification from co-fiduciaries. The district court disagreed.

**Opinion**

The facts that gave rise to the alleged breach of duty underlying the claim and counterclaim were not central to the court's opinion. Instead, the court conducted a detailed legal analysis to identify the legal basis for a right to contribution and indemnification. The court began by recognizing that there is no existing Supreme Court or Eleventh Circuit precedent on this issue. It further stated that federal courts are split on the issue, with the Eighth and Ninth Circuits holding that there is no right to contribution and the Second Circuit holding that there is. In the absence of clear precedent, the court considered "four potential sources for the relief sought." It determined that only one of these four sources provided a basis for a claim.

The court first considered whether ERISA provides a right to contribution or indemnity under its express statutory remedial provisions, ERISA § 502 (civil actions under ERISA) and § 409 (liability for breach of fiduciary duty). As to § 502, the court accepted that contribution could qualify as “appropriate equitable relief” available under § 502(a)(3), but it found that section addressed only violations of ERISA or enforcement of the plan’s terms, not remedies a breaching fiduciary had against another fiduciary. As to § 409, the court concluded that it could not support a contribution or indemnity claim, because, under the Supreme Court’s holding in *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), that section only allows relief that “inure[s] to the benefit of the plan as a whole.” Because claims among co-fiduciaries do not benefit the plan itself – but merely apportion liability among fiduciaries – the court concluded ERISA’s statutory provisions do not expressly provide such a claim.

The court also rejected two other potential grounds for a contribution or indemnity claim. The court considered whether ERISA *implies* a right of action for contribution among co-fiduciaries by applying the test articulated in *Cort v. Ash*, 422 U.S. 66 (1975). The court concluded that because ERISA was passed to protect participants and beneficiaries, not fiduciaries, fiduciaries were not the class ERISA was intended to benefit. Accordingly, there was no implied right under the *Cort* test. The court also concluded that state law could not provide a private right for contribution or indemnity because ERISA’s preemption provision “sweeps expansively” to preclude any such state law claim.

Nevertheless, the court went on to find a contribution claim for co-fiduciaries based on federal common law. At the outset, the court observed that because Congress drafted ERISA with a view that “a federal common law of trusts” would evolve under it, “federal courts should be guided by the principles of traditional trust law.” The court relied upon the Eleventh Circuit’s “analytical framework” for determining when trust law should supplement ERISA. The district court found it critical that in

developing this framework, the Eleventh Circuit drew from the Second Circuit’s decision in *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12 (2d Cir. 1991). In *Chemung*, the Second Circuit expressly found there was a right to contribution. It determined that because a right to contribution had “long been embedded in traditional trust law” and Congress intended ERISA to reflect traditional trust principles, a federal common law right to contribution must be available to ERISA co-fiduciaries.

In following *Chemung*, the district court reasoned that a right to contribution among co-fiduciaries did not interfere with ERISA’s statutory scheme. Because ERISA’s purpose was “to protect plan participants and beneficiaries,” allocating fiduciary liability was not within ERISA’s scope or inconsistent with its structure. Further, the court concluded that permitting co-fiduciary relief would not “diminish the recovery for the plan and its beneficiaries.” The court also explained that a key policy consideration favored contributions rights: without contribution, a fiduciary could avoid responsibility simply “by suing their co-fiduciaries first.” The court reasoned “if contribution is not allowed, then jointly-liable ERISA fiduciaries may escape responsibility by simply beating their co-fiduciaries to the courthouse steps.” Based on these considerations, the court found a right under federal common law to contribution or indemnity among ERISA co-fiduciaries and permitted defendants’ counterclaim to proceed.

## Ramifications

Although *Guididas* is a single district court decision and one of several cases that have considered the right of contribution and indemnification, it is notable for multiple reasons. On a practical level, it is yet another example of the continuing disagreement within the federal courts over the scope of the rights of fiduciaries to sue one another. While this disagreement persists, fiduciaries will face continued uncertainty over both their potential liability to other fiduciaries as well as their potential rights to recover against other fiduciaries. This uncertainty also undermines an essential goal of

ERISA: national uniformity in the administration and regulation of employee benefits. The existing split of authority establishes different rights and liabilities in different areas of the country, which particularly affects companies operating in multiple jurisdictions. As things stand now, fiduciaries should continue to be aware of and preserve all their arguments – whether as an ERISA fiduciary seeking contribution or as a fiduciary opposing it – to avoid the possibility of waiving any of their rights.

*Guididas* is also notable for providing a detailed analysis of how a federal court interprets ERISA's silence on a matter when developing federal common law. Here, the court viewed ERISA's silence on contribution among co-fiduciaries to allow it to identify a federal common law right based on its belief that that right was not inconsistent with ERISA's structure and intent. The court recognized

that other courts, such as the Eighth and Ninth Circuits, have rejected that view and determined that if Congress omitted a right to contribution from the act's remedies, the federal courts are not empowered to add one. This ongoing divide over the power of federal courts to supplement ERISA's express terms may have wide-ranging effects on ERISA's provisions and remedies that go far beyond the question of contribution among co-fiduciaries. As a result, ERISA fiduciaries – and counsel who represent them – are well- advised to continue to monitor the developments in this area. This appears to be another instance where the Supreme Court will need to step in to resolve the disagreement and bring clarity to the scope of the federal courts' powers and ERISA's provisions.

Please click [here](#) to view opinion.

---

**For more information, please contact the following Jenner & Block attorneys:**

**Douglas A. Sondgeroth**

Partner

Tel: 312 840-7605

Email: [dsondgeroth@jenner.com](mailto:dsondgeroth@jenner.com)

**Michael W. Ross**

Associate

Tel: 212 891-1669

Email: [mross@jenner.com](mailto:mross@jenner.com)