Revamping Retirement Episode 77

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Intro: Covering the ever evolving retirement plan landscape to help identify the biggest opportunities for plan sponsors, CAPTRUST presents Revamping Retirement.

Peter Ruffel: Hello everyone, and welcome back to Revamping Retirement. We've got another episode for you today. I'm joined by the true host of this podcast, Jennifer Doss. Jennifer, how are you? I.

Jennifer Doss: I'm great. Thanks Pete.

Peter Ruffel: Great to hear. It is a Friday. Certainly a lot to be thankful for, including our guest today. we're joined by Stephanie Guttin.

Peter Ruffel: Stephanie is a partner at, fagre Drinker where she litigates across a few different areas of the law, including erisa, and she's here to help us make some sense of the Cunningham versus Cornell Supreme Court [00:01:00] decision and its potential impacts. Welcome Stephanie.

Stephanie Gutwein: Thanks for having me.

Peter Ruffel: before we get started, maybe we could start with a little bit of background on yourself, Stephanie, and just the scope of the work that you do as a litigator.

Stephanie Gutwein: sure. like you said, I'm a partner at Fakery Drinker. I work in the Indianapolis office of the firm. and I am a litigatorI litigate benefits disputes primarily, but not solely that arise under erisa. I've been doing that for more than a decade. handled all manner of benefits disputes, health plans, retirement plans, and everything that falls under them.

Jennifer Doss: so we're gonna talk about the Cornell, Supreme Court. Case decision, but I think before we get into that, we decided a little background on some of the terminology that people are gonna hear would be appropriate.

Jennifer Doss: So I think to get us started, we're gonna be talking a little bit about, prohibited transactions, which is something that honestly, some people. ERISA plan sponsors are not even really super familiar with, or what it is or what [00:02:00] it isn't. So could you maybe just start us out, give us just a little crash course on what a prohibited transaction is in the, context of a ERISA retirement plan.

Jennifer Doss: what the purpose of those rules are, and then, maybe some examples of what we're talking about.

Stephanie Gutwein: really high level background, ERISA is the federal statute that regulates the vast majority of retirement plans that are provided by. Private employers generally speaking, ERISA is super comprehensive. So it covers, everything that would have to do with those retirement plans.

Stephanie Gutwein: and it has an extraordinary preemptive force. So it not only does it attempt to cover everything, but it also, largely attempts to. block out anything that might otherwise touch on those issues. and so one of the things that erisa, tries to regulate does regulate are the transactions that retirement plans and the fiduciaries who engage in, managing and administering those plans.

Stephanie Gutwein: And so when we [00:03:00] talk about. Prohibited transactions. Usually in the context of erisa, that's referring to a very specific statute, ERISA section 4 0 6, which categorically bars,the fiduciary who's managing, an ERISA plan from engaging or causing the plan to engage in certain kinds of transactions with entities or individuals that the statute and Congress deemed to be Risky in terms of potentially having an interest in the transaction that is not aligned with the interest of the plan and the participants and beneficiaries of the plan. And so the idea is. to reinforce the fiduciary standards that Erisa, imposes on plan fiduciaries, which is that they are supposed to be loyal to the plan and its participants and beneficiaries, and they're supposed to be, prudent, which means, act reasonably.

Stephanie Gutwein: And so Congress says, as a threshold matter, we're not going to allow any of these [00:04:00] transactions where it seems like there's a reasonable chance that the. Plan fiduciary, managing or administering the plan is gonna be entering into a transaction that could be conflicted and could ultimately mean that they're doing something that isn't for the best interest of the plan participants and beneficiaries.

Stephanie Gutwein: So there's a statute 4 0 6, like I said, and ERISA that sets forth, very. specific but broad categories of transactions that are just facially, categorically prohibited. all of them involve the ERISA plan, fiduciary, and then most of them, but not all of them involve. a related party that ERISA calls a party in interest.

Stephanie Gutwein: And if you were to go look at Issa's definition section in section three, you'd see the definition of party in interest. And it is a bear. It is, a lot to parse. But, for purposes of your question about examples include other plan fiduciaries, but they also include, service providers, entities or people that provide all kinds of [00:05:00] services to the plan.

Stephanie Gutwein: And so relevant to What I'm gonna refer to as the Cornell decision, were, record keeping providers who provided record keeping services to the Cornell plans there. And then, when you talk about prohibited transactions, in one breath, we're talking about section 4 0 6, which sets forth all these transactions that are prohibited.

Stephanie Gutwein: And then in the next breath, oftentimes what you'll hear about is, exemptions to those transactions, which you will find in section 4 0 8. And those two sections of erisa were really at the heart of the Supreme Court's decision in Cornell. the key to section 4 0 8 is that it is. The section of ERISA where Congress has said, yeah, we told you that all of these transactions are categorically prohibited, but if you can show us through one way or another that there's actually nothing conflicted about this transaction, then we realize that you're gonna need to go forward with these transactions in many [00:06:00] practical.

Stephanie Gutwein: Circumstances. And so section 4 0 8 contains exemptions right in the statute itself.

Stephanie Gutwein: it's about. 20, maybe 21, that the statute set forth. And then it also empowers the regulators to create other specific exemptions for specific circumstances. And there are at least hundreds of those out there that the regulators have created. And so that is the means by which, planned fiduciaries can engage in these transactions that ERISA 4 0 6 would otherwise preclude.

Jennifer Doss: to summarize, it seems like. What you're saying is when Congress drafted erisa, they just took this broad brush and said, all right, there's

a lot of stuff you can't do. we wanna protect everybody. but here are, in this case, 21 examples of where if you do these things and meet these standards and you can show this, that those things are okay.

Jennifer Doss: Is that fair Summary?

Stephanie Gutwein: yes, I think that's right. we think generally speaking, these transactions should be precluded unless you can [00:07:00] show us that they're, completely above board. And so here are the ways that you can show that they're above board, depending on the type of transaction.

Jennifer Doss: in the circumstance where a plan fiduciary does engage in one of these prohibited transactions,what is the recourse for a plan participant? how do we get to this Cornell case?

Jennifer Doss: How does it start?

Stephanie Gutwein: so as a general matter, ERISA has an enforcement mechanism. It's one statute, one section of erisa, section 5 0 2 that has a variety of, subsections in it that give certain entities, including participants mechanisms to initiate

Stephanie Gutwein: A lawsuit essentially, challenging, any act that they think has violated erisa, essentially. That's an overgeneralization, but good enough for this conversation. So oftentimes a participant's plan will have its own, administrative claim process. That talks about,if you [00:08:00] think that, there's something that's been wrongfully done under the plan, here's the process you need to follow to file a claim and yada, yada, yada under the plan.

Stephanie Gutwein: and many plans have. What we would think of as an exhaustion requirement, which means you have to go through that process before you can go, file your claim in court. But eventually, let's say that either the plan doesn't have that kind of process or it's not applicable to the kind of claim the participant wants to bring, or they get all the way through it and they haven't gotten, the relief that they think is appropriate and that they are due, the next step would be to go.

Stephanie Gutwein: Probably find a lawyer, but then to go to court, right? And to, say to a court, by filing what's called a complaint that, the participant believes that these sections of ERISA have been violated here. It would be 4 0 6, for example. that, the plan fiduciary has caused the plan to engage in a prohibited transaction.

Stephanie Gutwein: [00:09:00] that the participant believes that the plan has been harmed in this way,

Stephanie Gutwein: what we're attempting to do is obviously build the footing to then get into this case, and. tenants that are the prohibited transaction piece of it, and the exemptions as well, and the pleading standards. and so maybe Stephanie, we can get you to talk about a little bit why this case has bubbled up to the Supreme Court or why it did bubble up to the Supreme Court.

Stephanie Gutwein: when you use the term pleading standards, what that means is the level of. Information, for example, or specificity that a plaintiff has to put in their complaint when they file to adequately allege a claim. And so what I mean by that is there is a very baseline standard, of information you have to give the court and a defendant to demonstrate, At least some basis. You have to believe that there's [00:10:00] been some wrongdoing under the applicable legal standards. And so if you don't sufficiently do that as a plaintiff, then the defendant can respond and say your claim fails as a matter of law because you have not.

Stephanie Gutwein: Alleged facts sufficient to show that anybody could believe that I have done anything that would violate applicable law. And that's called a motion to dismiss usually is how that, threshold defense gets. adjudicated. And so when the defendant is going to evaluate the allegations in a complaint, the defendant decides, do I wanna respond by filing a motion to dismiss saying This complaint should be dismissed.

Stephanie Gutwein: This lawsuit should be dismissed right away because it doesn't even state a legal claim as a matter of law. Or do they wanna. To the complaint, and then the parties would move forward in the lawsuit. Typically, they move forward to what's called discovery, which is where each side can find facts out about the other side's arguments, and then they, keep litigating.

Stephanie Gutwein: And as it [00:11:00] relates to the prohibited transaction standards in ERISA courts across the country, had somewhat of a difference in opinion as to what, Level of facts a plaintiff needed to plead in his or her complaint to sufficiently state a claim against a defendant for alleged prohibited transactions in violation of Eissa.

Stephanie Gutwein: a big reason is because when you go look at section 4 0 6 and erisa, it does read, as I said before, as a categorical bar. as you summarize it prohibits, every kind of transaction under the sun on its face. And so Courts have tried to grapple with the practical reality of that and whether that really,

could mean that Congress intended to give plaintiffs a cause of action and create an unlawful prohibited transaction every time a plea fiduciary engaged in those very basic transactions. And so [00:12:00] just. by way of example,one subsection of 4 0 6 prohibits a fiduciary from engaging a transaction that is, the sale or exchange or transfer of assets of the plan.

Stephanie Gutwein: to a service provider, for example. again, that's not the exact language of the statute, but it's close. And so the idea would be every time that a plan fiduciary causes a plan to, enter into an agreement with and pay a plan service provider, that is a prohibited transaction. And so courts have tried to grapple with, is it really true that is an unlawful action, at least.

Stephanie Gutwein: Facially under ERISA section 4 0 6. and so there was disagreement about that. So Cornell University was sued, for alleged breaches of violations of ERISA for, violations of 4 0 6 related to Contracts for record keeping services that it entered with two, providers in connection with its retirement [00:13:00] plans, 4 0 3 B plans, I believe.

Stephanie Gutwein: the question that the Supreme Court decided ultimately was whether the plaintiffs had to allege facts that showed. None of the exemptions in ERISA section 4 0 8 apply to the transactions that the plaintiffs were saying were prohibited transactions.

Stephanie Gutwein: I think the Supreme Court justices recognize that there might be big effects on the volume of litigation in this space if all plaintiffs have to do is go to court and plead the facts to state the technical elements of section 4 0 6 without regard to the 4 0 8 exemptions, because as I said.

Stephanie Gutwein: Virtually every transaction that plans engage in is technically prohibited under 4 0 6 until it is exempt under 4 0 8.

Jennifer Doss: just to summarize what you're saying, 'cause it is very technical as you just mentioned, so I'm probably not gonna do this justice, but essentially, the courts were a little, inconsistent in how much. [00:14:00] The plaintiffs, the plan participants in these cases needed to bring in terms of was it enough for them to come at face value and say there was a prohibited transaction.

Jennifer Doss: Look, here you go. they did it. They have a service provider. They engaged in a transaction with a service provider. Or do they have to go further and say, yeah, they did that, but. They didn't meet an exemption either.

and I wanna tie this knot together for people that maybe don't know this. So we know you keep saying, 4 0 6 and 4 0 8,when we talk about 4 0 8 in our industry, in our day-to-day, a lot of times we're referring to 4 0 8 B two disclosure.

Jennifer Doss: And so I think people don't tie those two things together in terms of that disclosure is actually from. The prohibited transaction, like you said, exemption in 4 0 8 that allows you to enter into these agreements for reasonable compensation. And the four eight B two is the disclosure that gives that information to the plan sponsor and allows 'em to make that judgment.

Peter Ruffel: how does the Supreme Court [00:15:00] arrive at that decision?

Peter Ruffel: obviously the district courts, there was some, back and forth opinions about whether or not the plaintiffs had to prove that or not. So what is the Supreme Court doing differently to arrive at the decision that they did?

Stephanie Gutwein: in some ways what the Supreme Court is doing is not different. What some of the lower courts are doing it was different from what the Second Circuit had decided. but. Most basically, I think what the Supreme Court would say is what we did was look at the statute, And especially with the current court that we have, at face value, that's a really unsurprising way for the court to tackle this problem,

Stephanie Gutwein: And there were a couple of big reasons that the Supreme Court reached the decision It did. First, I think it has generally interpreted. Statutes that are similarly written to have prohibitions in one section and, exemptions or exceptions in another, to have the exceptions or the exemptions be what are called affirmative defenses.

Stephanie Gutwein: And so It didn't depart from that analysis here. It [00:16:00] said, we recognize that there are exemptions, but given that the prohibition is in one section and the exemptions are in another, we think, just like we've said, in other cases, those exemptions are affirmative defenses. And the significance of that is, again, just back to this pleading standard.

Stephanie Gutwein: Typically what that means is an affirmative defense isn't something. That will knock out a plaintiff's complaint right away unless the plaintiff has pled facts showing the application of the affirmative defense.

Stephanie Gutwein: Reasonably, I think in the court's judgment, the exemptions are defendants to prove. So the defendant can decide which exemption, or exemptions might be applicable, and then come forward with the

facts that it thinks support the application of that exemption. And so I think, there are, very potential practical consequences of the court's decision.

Stephanie Gutwein: and it was a unanimous decision. I think the court was grappling with two competing arguments that both had meaningful, practical consequences, in [00:17:00] terms of, making things much more difficult for plaintiffs. If the answer is they have to somehow come up with facts to plead around. potentially hundreds of exemptions or, more difficult for defendants in the sense that they might be subject to more litigation in greater volume. Because all plaintiffs have to do is state the element facts to show the elements of a prohibited transaction, and then defendants have to deal with that until they get to the point in the litigation that they can show that a 4 0 8 exemption applies.

Jennifer Doss: And some of that is tied back to what you said at the very beginning of our conversation, which was, Hey, first you come, take us along the journey, So first you come and you want a motion to dismiss, And you have to plead those certain facts and circumstances. So that's what we're talking about here with Cornell and. based on that, if you get through that stage, now you're into discovery, That's the next stage. And I know we've talked to some other, risk attorneys in the past and, Dan has been on here talking about this, but, once you get past that, that's the really expensive part.

Jennifer Doss: that's where you have to [00:18:00] dig in because it's all the facts and the circumstances andin the case where we're talking about maybe a service provider as a record keeper, and we're saying, no, it's okay because it was reasonable compensation. now you gotta prove that, So you got all this stuff that you gotta go through to prove that to the court.

Jennifer Doss: so I think that's why practically, like you said, it matters to a lot of people in the industry because they're going. Oh man, that bar was just lowered to get into discovery. And again, discovery is the really expensive part.

Stephanie Gutwein: the path that the Supreme Court took means that to the extent that there were courts who were granting motions to dismiss. Dismissing complaints, pleadings, as a threshold matter, before you hit that expensive stage of discovery, because the plaintiffs hadn't pled facts to show an exemption didn't apply.

Stephanie Gutwein: that's not going to be the outcome anymore, So instead of getting the pleading dismissed for a failure to plead those facts, showing the non application or the in-app application of an exemption, the plaintiffs. Will get to

[00:19:00] proceed if they've done enough,theoretically to allege a prohibited transaction.

Stephanie Gutwein: And, then there will be discovery, in theory. And then it will be only after some amount of discovery, that the defendants would have the opportunity to argue the case should be dismissed, because an exemption applied to the transaction. The court, in its opinion flagged a handful of practical, procedural options, I would say for, defendants and for courts, lower courts to consider in grappling with that. Practical consequence. so it's not a foregone conclusion in every case that you will get all the way into and through discovery and that it will be so expensive. Just, in light of these other procedural mechanisms, the court flagged and hopefully by flagging them, the lower courts will be more open-minded to considering and using them as makes sense.

Stephanie Gutwein: But I think, just. speaking in broad strokes, it is much more likely that these suits are gonna go forward to [00:20:00] discovery now, when they might otherwise not have before. And that is the stage of the case that is expensive. and time consuming, really burdensome, For these benefit plans and, plan administrators or plan sponsors, people who their whole job isn't necessarily to.

Stephanie Gutwein: Deal with and litigate, erisa, plan litigation, They've got other jobs and they're trying to administer. Even in big companies that have, benefits departments, they're focused on administering their plans, they're not necessarily trying to spend all their time and resources litigating,

Peter Ruffel: when I read about this case, they talked about those, mechanisms as potential off ramps. Are those being used at all today? or is it something new that the Supreme Court was highlighting for the lower courts to use?

Stephanie Gutwein: think it's a combination. ofthe Supreme Court speaking, optimistically about some of these procedural mechanisms. being management tools that district courts have to try to, keep arms around what could otherwise be a flood of litigation.

Stephanie Gutwein: [00:21:00] several of the tools were, our procedural one, for example, is, this concept of, a different rule in the Federal rules of civil procedure, which are the. Procedural rules that govern litigation in federal courts, all of these cases generally have to be in federal court under erisa.

Stephanie Gutwein: And the procedural rules that govern the proceedings, give district courts an opportunity. To require plaintiffs to reply to an answer, which

means, the plaintiff has come to court and filed a complaint rather than moving to dismiss. Now, a defendant might feel like it needs to answer based on the Supreme Court's, judgment in this case, because the defendant doesn't think it has, a meritorious argument at the motion to dismiss stage and.

Stephanie Gutwein: Then usually you'd proceed to discovery. one of the things the Supreme Court said is, district courts have the option under this other rule to make a plaintiff reply to an answer. And so if defendants raise and their answer to the complaint, facts and maybe even evidence, I'm not [00:22:00] sure, about the.

Stephanie Gutwein: Reason that the alleged prohibited transaction is actually exempt under 4 0 8. They could ask, district court to make the plaintiff, reply to that.

Stephanie Gutwein: And I will tell you, I have gone and looked in, legal case databases and the number of, opinions that are out there is.

Stephanie Gutwein: Ginormous and the number of opinions that mention this reply to an answer mechanism is, a hundred maybe. You know? So is it happening? Not never. Almost not. Never though. Really? It's not something that courts really do. They don't do it in practice. I think it's gonna be tough to get courts to do it, and even when they do what standards should they be applying?

Stephanie Gutwein: So it's helpful to have the Supreme Court mention it, but the likelihood that's gonna be able to provide meaningful relief, to defendants who are now subject to this, very bare pleading standard is low. there are Other mechanisms that the Supreme Court mentioned that do happen more often. So one example of [00:23:00] that is, discovery. Sometimes district courts have really broad, discretion to stage the proceedings before them, most of the time in the way that they think is gonna be most efficient. And,most, maximizing, Everybody's time and resources and trying to minimize burden to the extent it makes sense. And so one of the ways they do that is by what's called staging discovery, where you can sometimes get a court to, permit discovery on certain things, but then, pause or postpone discovery on other.

Stephanie Gutwein: Issues or claims, and try to have that staged where theoretically the discovery that you're postponing only has to happen if you, get the case kicked, through the first part of discovery. And so that's one of the things that the Supreme Court flagged was stage discovery, and that makes a lot of sense.

Stephanie Gutwein: Courts do that. hopefully now that the Supreme Court has mentioned it, they would be more inclined to do it in these kinds of cases, just to try to minimize burden.

Stephanie Gutwein:

Stephanie Gutwein: [00:24:00] And there are, what we call sanctions if you don't have a good faith basis for what you have told a court when you're initiating a lawsuit or even as you keep going. So even if you initiate a lawsuit, but then at some point you get enough information to know. There's nothing here. And really, what we thought happened or what we thought was wrong, turns out not to have been, or, turns out it does seem like a prohibited transaction exemption applies, lawyers in particular, but parties have an obligation not to continue litigating what would otherwise be frivolous or groundless claims.

Stephanie Gutwein: And so the Supreme Court flagged that too. And that rule has been around for a long time. You can imagine for good reasons. It's a pretty high bar to invoke it. but it's not brand new. So that's a very long-winded answer of saying some of these mechanisms have been around and get used.

Stephanie Gutwein: others of them are, there, but they don't get used nearly as much.

Peter Ruffel: So Supreme Court reads erisa, they say, Nope, it's now on the [00:25:00] defendants to basically prove that these exemptions apply. And recognizing that that might. Increase the volume of litigation. Supreme Court highlights, these off ramps, these different rules, mechanisms that maybe defendant's counsel can work with the judge in that case to employ, which might stem some of the costliness of discovery, TBD to see how much that gets utilized or not.

Peter Ruffel: I guess what other options are there to Recognize what this rule might do in the sense of increasing the amount of cases that might come against employers in America. Is there things that Congress could do? Is there things like specialized courts that might have an impact on this? It just feels like,the Supreme Court read the room, so to speak, on erisa.

Peter Ruffel: Now it's okay, what else? What's next? What can we do to dampen the impacts of this?

Stephanie Gutwein: Congress could change the statute if it. Saw fit to do so. I'm not sure anybody right now should be holding their breath [00:26:00] on what Congress might do. but you never know. there are no sort of specialized ERISA courts at the moment. Again, Congress in ERISA has required. These kinds of disputes to be heard in federal court.

Stephanie Gutwein: So you could think of federal courts as specialized ERISA courts, but beyond that, there's no version of a trade court or a court of federal claims for erisa. unfortunately from a technical legal perspective, plans are probably stuck. With this ruling, at least for a while, given that this is how the Supreme Court has interpreted the statute, I'm not really sure that there's even anything that regulators could do, through regulation, even if they were so inspired to change it.

Stephanie Gutwein: I think that there are practical steps planned fiduciaries can take, to just try to be thoughtful given that this is. Out there. so that's probably where energy and, [00:27:00] brainpower are better focused at the moment. because that's probably the most effective means navigating this, at least initially.

Jennifer Doss: actually that's a great segue 'cause we wanna talk about those practical day-to-day things that people could actually do. I think one of the other things, I've heard that I don't wanna skip over because we've talked about how expensive discovery is and how resource intensive it is.

Jennifer Doss: And you talked about how, you've got people that are providing benefits on one side of this and that's a, huge resource strain for them. And that's not really what courts wants. It's not what anybody wants. On the other side of that, I don't think attorneys and these law firms have unlimited resources either,

Jennifer Doss: I've heard anyway of some people saying We're not gonna have this huge floodgate because, law firms can only handle so much. It is expensive. every time one of theirs gets to discovery, it's expensive for them as well. it's resource heavy for them as well. And obviously there's the idea that they're just trying to take it far enough to get some type of settlement.

Jennifer Doss: And that's fine. But again, the practical side of this is, all right, if you file a hundred cases and a hundred cases get through to [00:28:00] discovery, Do you actually have the resources to support that? practically speaking, that's another reason why we might not see this huge, flood.

Jennifer Doss: certainly more maybe, but not, ridiculous. let's talk about the practical. so from a plan sponsor perspective, what are some of those practical things you think that they can do,around this topic?

Stephanie Gutwein: In no particular order one thing would be to go back to the plan documents and think about the dispute resolution provisions in your plan documents. And think about when we started this conversation, and I mentioned many plan documents have been administrative process that they require, a participant or a claimant to go through.

Stephanie Gutwein: at a very, high level. One aspect of that is just notice to a plan, When the claimant thinks that he or she has a claim,and then some opportunity to try to resolve that short of court, And there has been a lot in the court.

Stephanie Gutwein: In the last five years, not just in this regard, but there's been a lot of litigation over arbitration [00:29:00] provisions and class action waiver provisions in ERISA plans. And I think any plan that hasn't spent some time in the last a couple years looking at their dispute resolution provisions and really making sure that they say what they want them to say and that they're gonna get them the kind of dispute results that they want in terms of procedure it, it would really behoove them to do that.

Stephanie Gutwein: and so along with thinking about, do you have. the pre-litigation process that you want. Another option, and I just mentioned it, is, many plans have added arbitration provisions to their plan documents, and. I'm not providing legal advice in this podcast to whether any particular plan should do so, but it's certainly something that people should think about, in terms of whether they want to try to require certain kinds of disputes to be arbitrated instead of litigated in, a federal court arbitration is often thought of as less expensive, less burdensome.

Stephanie Gutwein: More straightforward and so usually [00:30:00] faster. again, not always, but, so that would be something to think about. along those lines, but not litigation specific would be for plans to make sure they've got fiduciary insurance, fiduciary liability insurance in place that, is.

Stephanie Gutwein: appropriate for the plan's needs and for the plan's fiduciary's needs, and I would tell you, it's not uncommon for plan fiduciaries and plans to find themselves in a dispute. To go look at their applicable policies and figure out that they don't really have what they think they need or they wish that they had more.

Stephanie Gutwein: And if you're figuring that out when you're facing a claim, you're too late. so that would be another thing. I think that it's worth. Plans doing prospectively, proactively, and, consulting with advisors, legal or,financial advisors about what you really need in terms of limits and, making sure that you've got, applicable endorsements to cover all your fiduciaries, all that kind of stuff.

Stephanie Gutwein: from a just [00:31:00] day-to-day engagement standpoint in particular, you were talking about. service providers and 4 0 8 B two, and that is the exception, that talks about, transacting for services, for reasonable compensation. I'm paraphrasing, but basically that, and so I think there are a couple of pieces specific to this prohibited transaction.

Stephanie Gutwein: Like claim and one is just the fact of engaging in a transaction, And so fiduciaries who are making these decisions to engage in these transactions would do well to make sure they have a robust process in place for evaluating the transactions and feeling really comfortable. That they've done what they think is prudent to confirm that the transaction is for reasonable compensation, that it fits in one of these 4 0 8 exemptions.

Stephanie Gutwein: And to document that we encourage clients to document. Why you think both that you have engaged in this process and why you [00:32:00] reached the decision that you did. Because Risa's fiduciary duties are not, judged by hindsight, Typically, what they're judged by is process.

Stephanie Gutwein: They're process oriented, and so if a reasonable person in your shoes would have thought to do and done what you did, that is, not a perfect defense again. But, that's usually a pretty good indicator that. You're satisfying your fiduciary duties, and so documenting the process that you've engaged in, having a process,

Stephanie Gutwein: Having,a standard protocol for how you think about these transactions. What are the factors that you considered? What data did you get? and keeping records of that. And then depending on the kind of plan, but certainly when you've got. Service providers and you're using them over time, making sure that you are monitoring those transactions,

Stephanie Gutwein: And you're monitoring the engagements with them. And you've got not just a process at the beginning when you make the first decision to engage in the transaction, but you've gotta process for a regular. Monitoring or check in to make sure that it [00:33:00] continues to be the kind of

transaction that you think is reasonable, fits within the exception and serves the plan participants.

Stephanie Gutwein: and documenting that also. So those are just practical, steps I think plans can take to shore up. the decisions that the plan fiduciaries are making, the documentation that they have of those. and then again, on the dispute resolution mechanism piece in the plan, to give you the plan or the plan fiduciary, a little bit of, breathing room or flexibility that you're gonna have a chance to sort of.

Stephanie Gutwein: Get your arms around a potential dispute and a claim, and potentially even resolve it before you find yourself getting a summons and a federal court complaint.

Jennifer Doss: those are really good steps and, thank goodness we're very much aligned. so before we let you go, we do wanna end with the personal question, which is, again, even though it may be distant in the future for you.

Jennifer Doss: What does retirement look like for you, Stephanie?

Stephanie Gutwein: In a perfect world, Some travel. Travel would be great and probably a lot of volunteering. [00:34:00] and, spending time with my kids.

Peter Ruffel: Good answers.

Jennifer Doss: those are solid. You can't go wrong with those. well, Stephanie, thank you so much for spending, so much time with us to walk us through this really. Technical, complicated topic. I think you've helped clarify, what are the actual implications of the case? Why are people talking about it?

Jennifer Doss: What can people do? And those are the main things that we wanted to hit and I think plan sponsors need to know. So really appreciate your time today. thanks everyone for listening to another episode of Revamping Retirement and, please don't forget to like and subscribe wherever you get your podcast, and we will talk to you guys next time.

Jennifer Doss: Thank you.

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