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The *WRNewswire* is created exclusively for AALU Members by insurance experts led by Steve Leimberg, Lawrence Brody and Linas Sudzius. The *WRNewswire* provides timely reports and commentary on tax and legal developments important to AALU members, clients and advisors, delivered to your inbox as they happen

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TOPIC: Suit Against Agents for Fraud and Breach of Fiduciary Duty Dismissed

CITE: *Air & Power Transmission, Inc. v. Robin S. Weingast*, 2014 WL 3929880 (Aug. 13, 2014); *Cathy Daniels, Ltd. v. Weingast*, 91 AD3d 431, 433 (2012).

SUMMARY: This was an action to recover damages for fraud, breach of fiduciary duty, and violation of general business law in relation to the sale and implementation of a Section 419(e) plan. The court granted motions of the defendants, Robin S. Weingast and Robin S. Weingast & Associates, Inc., Designs For Finance, Inc., and Massachusetts Mutual Life Insurance Company to dismiss the complaint.

FACTS: The case involved a small business, Air & Power Transmittion, Inc., owned by the plaintiff John F. Barone. The allegation was that the insurance brokers and consultants marketed a Section 419 (e) Single Employer Trust Employee Welfare Benefits Plan called the BETA Plan to them. Massachusetts Mutual Life Insurance Company issued the life insurance policies that funded the BETA Plan. The Weingasts sold the plan, and Designs For Finance, Inc. was the plan's sponsor.

The plaintiffs claimed they set up the plan and purchased the life insurance in reliance upon the defendants' representations that the insurance premiums were fully tax deductible.

However, in October 2007, the Internal Revenue Service published a ruling that effectively disallowed deductions for payment of premiums under plans such as the BETA Plan.

Not long after the IRS ruling, the plaintiffs were audited and the IRS made several costly federal and state tax adjustments on their tax returns.

The plaintiffs alleged that, without the tax deductions, they were unable to afford the policies and were forced to sell them at a substantial loss.

Crucial to the outcome of this case was documentary evidence submitted by the defendants that included forms signed by or on behalf of the plaintiffs that contained specific disclaimer provisions. In these forms, the plaintiffs expressly acknowledged that:

(1) the defendants were not authorized to provide tax advice, and

(2) that they (the plaintiffs) would not rely on any such advice provided.

The court found those forms conclusively established the defendants' defense to the fraud, breach of fiduciary duty, and negligence causes of action. Additionally, an action for rescission asserted as alternative relief for the alleged fraud was dismissed.

The court also held that the plaintiffs' complaint failed to state a viable cause of action against the defendants to recover damages for a violation of the state's deceptive business practices law. The elements of a cause of action to recover damages for deceptive business practices under that law are that:

(1) the defendant engaged in a deceptive act or practice,

(2) that the challenged act or practice was consumer-oriented, and that

(3) the plaintiff suffered an injury as a result of the deceptive act or practice.

The court held that "the conduct complained of was not consumer-oriented, as it did not affect consumers at large."

Likewise, the court held that a cause of action to recover damages for unjust enrichment is a quasi-contract claim and, therefore, is not viable against the defendants where, as here, the parties entered into express agreements.

RELEVANCE: The agents in this case were thrice wise: wise to use attorneys, wise to use competent attorneys, and wise enough to take their advice to insist that their clients sign a written disclaimer acknowledging that the agents were not rendering tax advice. In that EMPLOYER ACKNOWLEDGMENT signed by John Barone as president of the employer were acknowledgments (among many others) that:

(1) No legal or tax advice was given by the Sponsor, Recordkeeper or the Trustee;

(2) Adoption of the Plan and related tax consequences are the responsibility of the Employer and its independent tax and legal advisors;

(3) The Employer or affected Participant has consulted with an independent tax advisor concerning the income tax effects of the Plan participation; and

(4) Neither the Sponsor, the Recordkeeper nor the Trustee represents, guarantees or promises that any particular tax consequence will result from the Employer's or any Employee's participation in the plan. (Click here for the actual case and the full EMPLOYER ACKNOWLEDGMENT on page 7).

There are many lessons here—and one is to not hold yourself out as a tax expert unless you are and unless you are willing to stand behind the expertise you claim.

Another lesson is to be more careful about what you are selling. Not every agent in a case like this will be as fortunate in litigation. It's a sure sign that trouble is likely at some point if there are articles in journals (if you haven't checked to see if there are, how do you know there are not?) warning against the technique or concept you are suggesting. Likewise, if the advanced underwriting departments of major insurers are issuing caution statements, it is likely that the tool or technique will be troublesome.

It is important to remember that it is not whether you win or lose that counts—it is how much it costs to play the game! Here, the agents—even though they won their case once in a lower court and again in this higher court—were *not* saved from the aggravation and loss of time and emotional strain of long drawn out litigation!

Protect yourself by doing due diligence on the "plan" you are suggesting—*before* you suggest it. Even if you are confident it is not only legally *and* ethically sound, be sure it is appropriate for your specific client!

Finally, having done all those things, consider doing what the agents here did: Insist that the client sign a disclaimer specifically stating that you are not rendering legal and/or tax advice and that they will not be relying on any such advice from you.

***WRNewswire* # 14.9.09 was written by Steve Leimberg of Leimberg Information Services, Inc. (LISI) and Leimberg & LeClair, Inc.**

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