LEGAL UPDATE

Case Law Survey–ERISA Section 3(21)(A) and Discretion—Part 1

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[*Editor's Note: In this first installment of a longer article, Legal Update author Marcia Wagner surveys the state of the case law discussing the discretionary authority in the context of fiduciary status under ERISA section 3(21)(A). Additional installments of this case law survey will be published in future issues of 401(k) Advisor.*]

In *Glynn v. Maine OxyAcetalyne Supply Co.*, the District Court of Maine observed that "one's fiduciary responsibility under ERISA is solely attributable to his possession or exercise of discretionary authority."[1] Such a statement is consistent literal language and structure of the provision, [courts] conclude that where the person exercises any authority or control over the management or disposition of plan assets, discretion is not required of a fiduciary."[11]

In *Leimkuehler v. American United Life*, the Court of Appeals for the Seventh Circuit recognized "that some imprecise language in our prior decisions has generated confusion."[12] It referenced its decisions in *Hecker v. Deere & Co.*, in which the court had stated that "in order to find that they were 'functional fiduciaries,' we must look at whether either Fidelity Trust or Fidelity Research exercised discretionary authority or control over the management of plans, the disposition of the plan's assets, or the administration of the plan,"[13] and *Pohl v. National Benefit Consultants*, in which the court stated that "at all events ERISA makes the existence of discretion a sine qua non of fiduciary duty."[14] The Seventh Circuit could also have referenced its decision in *Schmidt v. Sheet Metal Workers' National Pension Fund*, in which it stated that "to be a fiduciary the individual or entity involved must exercise a degree of discretion over the management of the plan or its assets, or over the administration of the plan itself."[15] Such expansive language was not restricted to the Seventh Circuit. In *Reich v. Lancaster,*[16] the Court of Appeals for the Fifth Circuit emphasized that the determinative inquiry in assessing whether one is a fiduciary under ERISA is whether a person has exercised discretionary authority or control over a plan's management, assets, or administration. Even when focusing upon the language in ERISA Section 3(21)(A)[17] that does not contain the word discretion, authority, or control regarding disposition of a plan's assets, the Court of Appeals for the First Circuit in *Cottrell v. Sparrow, Johnson, & Ursillo, Inc.*[18] observed that "the meaning of disposition is to be judged by companion words. Again, these words indicate that the fiduciary exercise authority or control (*i.e.*, discretion or judgment over the disposition), not simply perform a transfer specified by the trustee."

In *Srein v. Frankford Trust Company,*[19] the Court of Appeals for the Third Circuit, relying upon *Websters Unabridged Dictionary*, provided a definition for the relevant terms of ERISA Section 3(21). "Exercise" as a verb means to put into action, practice or use…to discharge, perform. "Authority "means the power to determine, adjudicate, or otherwise settle issues or disputes; jurisdiction; the right to control, command, or determine…a power or right delegated or given. "Control" as a noun refers to the act or power of controlling, regulation, domination, or command. Controlling means exercising restraint or direction over. "Management" means the act or manner of managing, handling, direction or control. "Disposition" means arrangement or placing or final settlement of a matter. Finally, rather than attempting to define plan assets, assets were defined as "items of ownership with cases holding that discretion is the benchmark,[2] the hallmark,[3] the linchpin,[4] the sine qua non,[5] pivotal,[6] and the key determinant[7] of fiduciary status under ERISA.[8] However, as a matter of law, fiduciary status under ERISA does not hinge on the exercise of discretion in some cases[9] because under ERISA Section 3(21)(A), an entity that exercises any authority or control over the disposition of plan assets becomes a fiduciary.[10] As the District Court for the Southern District of Texas stated in *In re Enron Corporation Securities Derivative, and ERISA Litigation*, "from a close reading of the convertible into cash; total resources of a cash or business, as cash, notes and account receivables, securities."

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1 2020 WL 2770678, 2020 EBC 199, 287 (D. Me. May 28, 2020), citing *Beddall v. State Street Bank and Trust Co.*, 137 F. 3d 12 (1st Cir. 1988). *See also*, *Bradshaw v. Jenkins*, 5 EBC 2754 (W.D. Wash. 1984) ("To be a fiduciary, a trustee must possess discretionary authority and control in performing its functions."); *Pension Fund Mid Jersey Trucking Ind., Local 701 v. Omni Funding Group*, 731 F. Supp. 161 (D. N.J. 1990) ("A party becomes a fiduciary with respect to pension fund assets when it is vested with or exercises discretionary authority."). These cases and others in which courts looked solely to discretion in determining fiduciary status with respect to directed trustees are discussed in Patricia Wick Hatamyar, "See No Evil: The Role of the Directed Trustee under ERISA," 64 Tenn. Law. Rev. 1,5 (1996)." A widespread judicial misconception that ERISA requires a fiduciary to possess discretion.").

2 *Johnston v. Paul Revere Life Ins. Co.*, 241 F. 3d 623, 632-33(8th Cir. 2001); *Maniace v. Commerce Bank of Kansas City*, NA, 40 F 3d 264 (8th Cir. 1994).

3 *In re Unisys Savings Plan Litigation*, 1997 WL 732473, 21 EBC 2514 (E.D. Pa. Nov. 4, 1997); *Doliner v. Continental Casualty Co.*, 2017 WL 3581143 (N.D. Ill. August 8, 2017).

4 *Curcio v. John Hancock Mutual Life Ins Co.*,33 F. 3d 226, 233 (3d Cir. 1994); *Cerasoli v. Xomed, Inc.*, 972 F. Supp 175 (W.D.N.Y. 1997); *Montvale Surgical Center v. Horizon Blue Cross Blue Shield of America*, 2012 WL 6089814 (D. N.J. Dec 6, 2012); *In re: Freuhauf Trailer Corporation*, 250 B.R. 168, 2000 WL 776829 (D. Del. June 2, 2000); *Inners v. Keystone Human Services of Lancaster*, 2013 WL 5439117 (M.D. Pa. Sept. 27, 2013); *Edwards v. Continental Airlines*, 1999 WL 95719 (E.D. Pa. Jan. 7, 1999); *Professional Orthopedics, P.A. v. Horizon Blue Cross Blue Shield of New Jersey*, 2014 WL 2094045 (D. N.J. May 20, 2014); *Lask v. Reliance Standard Life Ins Co.*, 2016 WL 3362060 (E.D. Pa. June 16, 2016); *Chaney v. Comvest Cable Corp.*, 2003 WL 21973325 (E.D. PA. June 10, 2003); *Anderson v. Reliance Standard Life Ins. Co*, 2022 WL 17490542 (D. N.J. Dec.7, 2022); *Martin v. PNC Financial Services Group*, 2012 WL 1802509 (W.D.N.C. May 17, 2022); *PMTA-ILA Containerization Fund v. Rose*, 1995 WL 461269 (9 E.D. Pa. Aug. 12,1995); *Edmonson v. Lincoln National Life Ins. Co.*, 2011 WL 1234889 (E.D. Pa. April 1, 2011).

5 *Pohl v. National Benefits Consultants*, 956 F. 2d 126, 129 (7th Cir 1992) ("At all events, ERISA makes the existence of discretion a sine qua non of fiduciary duty."); *Depot, Inc., v. Caring for Montanans, Inc.*, 915 F. 3d 643, 656-6577 (9th Cir. 2019); *Cheap Easy Online Traffic School v. Huntting*, 818 Fed. Appx. 683 (9th Cir. 2020); *Dale v NFP Corp.* 2023 WL 2306825 (N.D. Ill Mar 1, 2023); *Tower Loan of Mississippi v. Hospital Benefits*, 200 F. Supp. 2d 642 (S.D. Miss. 2001); *Hamilton v. Carrell*, 243 F. 3d 992 (6th Cir. 2001); *Szalanski v. Arnold*, 609 F. Supp.