LEGAL UPDATE

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

Marcia S. Wagner, Esq.

[*Editor's Note: In this third and final installment of a longer article, Legal Update author Marcia Wagner surveys the state of the case law discussing the application of discretionary authority in the context of fiduciary status under ERISA section 3(21)(A). The first and second installments of this survey were published in the November/December and the January issues of 401(k) Advisor.*]

Although ERISA fiduciary status is broadly triggered with any control over plan assets, as is generally true under ERISA, the fiduciary status of an entity in the ERISA context is fact specific,[1] and the inquiry in each case is granular, asking whether the entity is a fiduciary with respect to the particular action in question.[2] Thus, the lack of a discretionary requirement with respect to the exercise of authority and control over the management or disposition of a plan's assets "does not… extend fiduciary status to every person who exercises mere possession or custody over[a plan's] assets."[3] Courts that have interpreted the phrase "any authority or control" have concluded that having physical possession of plan assets is insufficient to incur fiduciary duties, but having practical control of plan assets is sufficient."[4] Fiduciary authority must amount to more than mere possession or custody of a plan's assets.[5] Courts have concluded that a plain vanilla custodian of plan assets, or one performing ministerial tasks for a plan, is not a fiduciary,[6] nor does ERISA consider as a fiduciary an entity such as a bank "when it does no more than receive deposits from a benefit fund on which the funds can draw checks."[7] Taking actions beyond those of physically holding assets does not necessarily convert a non-fiduciary into a fiduciary. As the Court stated in *Beddall v. State Street Bank and Trust Company*, "A financial institution cannot be deemed to have volunteered itself as a fiduciary simply because it undertakes reporting responsibilities that exceed its official mandate."[8] In *Nagy v. DeWise*,[9] the District Court for the Eastern District of Pennsylvania explained that the mere practical ability to act against an account holder's instructions to prevent fraud cannot constitute authority or control over plan assets. Otherwise, any bank holding plan funds would become a fiduciary by virtue of its ability to place restrictions on an account in cases of potential fraud.

The control that a party must exercise to be an ERISA fiduciary under the second clause of ERISA 3(21)(A) is practical control[10] or meaningful control.[11] In *Santomenno v. TransAmerica Life Ins. Co.*,[12] the Ninth Circuit observed that the "withdrawal of predetermined fees amounts to control respecting management or disposition of plan assets in only the hollowest sense of control."[13] Similarly, in *McLemore v. Regions Bank*, the Sixth Circuit commented that "Regions withdrawal of routine contractual fees constitutes no more an exercise of control than any other account holder's request effectuated by a depository bank. Such transactions amount to control respecting management or disposition of assets in only the hollowest sense."[14]

In *Srein v. Frankford Trust Co.*[15] the Court of Appeals for the Third Circuit held that a party will be found to be a fiduciary by virtue of exercising authority or control if it exercises "Undirected authority and control over plan assets," meaning that it did not act at the direction of a person or entity authorized to give such direction.[16] In *Morgan and Oswood Construction Company v. Nationwide Life Ins. Co.*, the District Court for the Eastern District of Pennsylvania elaborated upon Srien: "When a non-fiduciary has no discretion under a policy or plan document and acts at the behest of a person authorized under said document, it does not become a fiduciary with respect to that person's authorized decisions. In contrast, where a non-fiduciary acts at the request of a stranger to the plan's assets, it may be found to have exercised 'undirected authority or control' over those assets."[17]

In *Chao v. Unique Holding Company*, the District Court for the Northern District of Illinois indicated that "case law makes clear that any control over plan assets as for example check writing or other authority on bank accounts holding such assets makes the party a fiduciary regardless of whether any discretion is involved."[18] Other illustrations of the exercise of authority or control over the management or disposition of plan assets include the return of contributions to plan participants;[19] payments to plan subscribers;[20] being the signatory and name on the account that held plan funds;[21] a corporate officer who withdrew plan funds for the company's benefit;[22] commingling company assets with benefit funds and using them to pay company debts;[23] disbursing funds from a trust's bank account;[24] handling a plan participant's insurance premiums;[25] where contributions to a plan are withheld by an employer.[26] In *Chao v. Crouse*,[27] a party was held to be a fiduciary where premiums paid by employers subscribing to the plan were directly deposited into corporate bank accounts, and Crouse and another party exercised authority and control over those accounts. In *Trustees of the National Elevator Indus. Pens. Health Benefit Educ. Elev. Indus.*

Work Pres. Fund v. Gateway Elevators, Inc.,[28] a District Court provided a detailed breakdown of why a party was a fiduciary as a result of exercising authority and control, namely, because he was: (i) responsible for authorizing the checks for the payment of employee contributions and settlement funds to the Trust Fund; (ii) he signed every check that made payment to the trust fund; (iii) he is the president, only board member, registered agent, and 100% shareholder of the organization; and (iv) was the signatory to the collective bargaining agreement and settlement agreements.

In *Massachusetts Laborers Health and Welfare Fund v. Blue Cross Blue Shield of Massachusetts*, the First Circuit addressed the policy implications of its holding that, even if working capital were treated as a plan asset, Blue Cross Blue Shield of Massachusetts (BCBSMA) did not exercise any authority or control respecting management or disposition of that amount. It found persuasive the argument of BCBSMA and its amici that attributing fiduciary status to BCBSMA on these facts could interfere with its business model. It explained that the appellant "contracted with BCBSMA primarily to take advantage of its network of providers with whom BCBSMA negotiates discounted rates in volume… If BBSMA were required to adhere to strict fiduciary duties in the interests of individual plans, it arguably would need to restructure its networks and procedures based on the needs of each plan, undermining its ability to act in the overall interest of its book of business."[29] It quoted from the Sixth Circuit's decision in *DeLuca v. Blue Cross Blue Shield of Michigan*:[30] "The financial advantage underlying [a TPA]'s rate negotiations arises from the market power that [the TPA] has as a large purchaser of health care services… if, however, [the TPA] would be required to negotiate solely on a plan-by-plan basis, as a practical matter its economic advantage in the market would be destroyed, damaging its ability to do business on a system-wide basis, ultimately to the plan beneficiaries' disadvantage."[31] Further, a finding that fiduciary arrangements stems from this type of arrangement could lead TPAs to increase their fees to account for the imposition of fiduciary obligations.

Amici for the appellant contended that allowing TPAs and insurers to be nonfiduciaries perpetuated various anticompetitive practices, in contracts with plans. The First Circuit did not doubt "that such practices can harm plans and their participants, nor do we question that ERISA could potentially offer relief for these harms. Nevertheless, these concerns cannot override the statutory language."[32]

Marcia S. Wagner *is the Managing Director of The Wagner Law Group. She can be reached at 617-357-5200 or* Marcia@WagnerLawGroup.com.

1 *LaLonde v. Textron, Inc., supra*, n.7; *Board of Trustees of Bricklayers and Allied Craftsmen Local 6 of New Jersey Welfare Fund v. Wettlin Assoc.*, *supra*, n.21; *Kayes v. Pacific Lumber Co.,* 51 F. 3d 1449,1461 (9th Cir. 1995); *In re Freuhauf Trailer Corp.*, *supra*, n.4.

2 *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Michigan*, 722 F. 3d 861, 866 (6th Cir. 2013.; *Chelf v. Prudential Ins. Co.*, 31 F. 4th 459 (6th Cir. 2022).

3 *Chao v. Day*, *supra*, n.28.

4 *Edmonson v. Lincoln National Life Insurance Company*, *supra*, n.4.

5 *Briscoe v. Fine*, *supra*, n.309; *Hausknecht v. John Hancock Life Ins. Co. of New York*, 2018 WL 3861830 (E.D. Pa. Aug. 14, 2018) (mere custody of plan assets does not constitute authority or control). *In re: Mushroom Transportation Co., Inc.*, 382 F. 3d 325,347 (3d Cir. 2004) ("Mere custody or possession of plan assets without more is not enough to give rise to fiduciary status"); *Beddall v. State Street Bank & Trust Co.*, *supra*, n.1 ("the mere exercise of physical control…generally is insufficient to confer fiduciary status"). Cf. *Chao v. Day*, *supra*, n.27 at 237-38 (Distinguishing a mere custodian of plan assets who would not qualify as a fiduciary from the defendant who had solicited, accepted, and then pilfered plan assets.).

6 *Delta Beta Fund, LLC v. Univest Bank and Trust Company*, 2015 WL 1400838, fn.17 (E.D. Pa. March 27, 2015); *Renfro v. Unisys Corp.*, 671 F. 3d 314 (3d Cir. 2011); *Askew v. R.L. Reppert, Inc.*, 902 F. Supp. 2d 676 (E.D. Pa. 2012); *Fechter v. Connecticut General Life Ins. Co.*, 800 F. Supp. 182 (E.D. Pa. 1992); *Trustees of Local No. 72 Pension Fund v. Nationwide Life Ins. Co.*, 783 F. Supp. 899 (D.N.J. 1992); *Useden v. Acker,* 947 F. 2d 1563,1575 (11th Cir. 1991) (A bank is not a fiduciary where its conduct is dictated by a "pre-existing framework of policies, practices, and procedures.").

7 *In re Mushroom Transportation Co.*, Inc., *supra*, n.50; *Board of Trustees of Bricklayers and Allied Craftsmen Local 6 of New Jersey Welfare Fund v. Wettlin Assoc.*, *supra*, n.21; These general principles are not limited to financial institutions. See, for example, *Southern Council of Industrial Workers v. Ford*, 83 F. 3d 966, 968 (8th Cir. 1996) (A lawyer did not become a plan fiduciary merely by his control over settlement proceeds). Cf. In *IT Corp v. General American Life Ins. Co.*, *supra*, n.24, the Ninth Circuit distinguished a bank depositor relationship in which the bank does not have the authority to dispose of the money, from a participant plan administrator who has practical control over plan assets.

8 *Supra*, n.1 at p. 21. See also *Arizona State Carpenters Pension Fund v. Citibank*, 125 F. 3d 715,722 (9th Cir.1997) ("Preparing reports of account activities and determining whether to use a particular format to inform the trustees of delinquencies does not amount to an assumption of control or authority over the trust funds."). Cf. *Chapman v. Klemick*, 3 F. 3d 1508, 1511 (11th Cir. 1993) (Recognizing a potential conflict between ERISA fiduciary duties imposed on a bank and a bank's fiduciary duty to its shareholders and customers.).

9 771 F. Supp. 2d 502 (E.D. Pa. 2011).

10 *Briscoe v. Fine*, *supra*, n.30.

11 *Beddall v. State Street Bank & Trust Co.*, *supra*, n.1.

12 883 F. 3d 839 (9th Cir.2018).

13 *Id.* at 841.

[14] 682 F. 3d 414 (6th Cir. 2012).

[15] *Supra*, n.19.

[16] *Id.* at 221-222. See also *Chao v. Constable*, 2006 US Dist. LEXIS 915390 at *13 (W.D. Pa. December 19, 2006); *Griels v. Lincoln National Life Ins. Co*., 2022 WL 3357449 (E.D. Pa. Aug. 12, 2022); *Kalan v. Lincoln National Life Ins. Co*., 2022 WL 3350358 (E.D. Pa. Aug. 12, 2022); *Corman v. Nationwide Life Ins. Co*., 2022 WL 2952219 (E.D. Pa. July 26, 2022).

[17] 2022 WL 3042764 (E.D. Pa. Aug. 1, 2022); *Corman v. Nationwide Life Ins. Co*., 396 F. Supp. 3d 530, 545 (E.D. Pa. 2019); *Spokane v. Nationwide Life Ins. Co*., 617 F. Supp. 3d 290 (E.D. Pa. 2022); *Nagy v. DeWise, supra*, n.533 ("merely having the practical ability to dispose of plan assets without any authority to do so absent explicit direction from the plan's trustees does not constitute exercis[ing] authority or control respecting management or disposition of a plan's assets."); *Romano v. John Hancock Life Ins Co*., 2022 WL 9452750 (S.D. Fla. May 9, 2022) (violation of instructions by defendants establishes fiduciary status). Cf. *Hausknecht v. John Hancock Life Ins. Co. of New York*, *supra*, n.51 (A non-fiduciary acting at the direction of an authorized person regardless of the importance of the act, presents a situation distinct from one where it acts for a stranger.). But see *F W Webb Co. v State Street Bank and Trust Company*, 2010 US Dist. LEXIS 82759 (S.D.N.Y. Aug. 12, 2010) (" So long as a person possesses authority or control over plan assets, he is a fiduciary even if he simply handles the assets according to instructions that others give him.").

[18] 2009 WL 63064 (N.D. Ill. Jan. 7, 2009). In *Bannister v. Ullman*, 287 F. 3d 394 (5th Cir. 2002), in a discussion of respondeat superior, the Fifth Circuit raised the issue of whether a principal, by virtue of its de facto control over an agent, has control or disposition of plan assets. That issue will not be discussed in this article. See, however, Salkin, "Federal Common Law of Agency and Respondeat Superior," 2021 New York University Review of Employee Benefits and Executive Compensation.

[19] *Blatt v. Marshall & Lassman*, 812 F. 2d 810 (2d Cir. 1987).

[20] Sixty-Five Security Plan v. Blue Cross 31& Blue Shield, 583 F. Supp. 380 (S.D.N.Y. 1984).

[21] *Coldesina v. Estate of Simper*, *supra*, n.32.

[22] *Yeseta v. Baiman*, 837 F. 2d 380,386 (9th Cir. 1988).

[23] *Lopresti v. Terwilliger*, *supra*, n.34.

[24] *Mintjal v. Prof. Ben. Trust*, 2016 WL 4493424 (N.D. Ill. 2018).

[25] *Chelf v. Prudential Insurance Company of America*, *supra*, n.47.

[26] Secretary of Labor v. Doyle, 675 F. 3d 187, 203 (3d Cir. 2012); *Bricklayers and Allied Craftworkers Local 1 of PA./DE. v. Penn Valley Tile, Inc*., 2016 WL 1221436 (E.D. Pa. Mar. 28, 2016).

[27] 2004 WL 2750263 (S.D. Ind. Nov. 22, 2004).

[28] 2011 WL 2462027 (E.D. Pa. June 21, 2011).

[29] *Supra*, n.36 at 328.

[30] 628 F.3d 743 (6th Cir. 2010).

[31] *Id.* at 747.

[32] *Supra*, n.356, at 329.