LEGAL UPDATE

Case Law Survey - ERISA Section 3(21)(A) and Discretion – Part 2

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[*Editor's Note: In this second 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). We published the first installment of this survey in the November/December issue of 401(k) Advisor. Additional installments of this survey will be published in future issues.*]

The Courts that have held the discretion is not necessary under the second clause of ERISA Section 3(21)(A) have focused upon the structure of that Section. In *Leimkuehler v. Amer. United Life Ins. Co.*, the Seventh Circuit explained that "[t]he concept of discretion is thus integral for plan management, but is conspicuously missing when it comes to asset management or disposition."[1]

In *Board of Trustees of Bricklayers and Allied Craftsmen Local 6 of New Jersey Welfare Fund v. Wettlin Assoc.*,[2] the Court of Appeals for the Third Circuit stated that "Subsection (1) of 29 USC 1002(A)(21) differentiates between those who manage the plan in general, and those who manage the plan assets. These functions are set out in two clauses under subsection (i) separated by the conjunction "or." A significant difference between the two clauses is that discretion is specified as a prerequisite to fiduciary status for a person managing the ERISA plan, but the word discretion is conspicuously absent when the text refers to assets.[3] That Congress established a lower threshold for fiduciary status where disposition or control of plan assets was involved was not surprising to the Third Circuit, given that "at common law fiduciary duties commonly attach to decisions about managing plan assets and distributing assets to beneficiaries… The common law trustee's most defining concern historically has been the payment of money in the interest of the beneficiary."[4]

In *IT Corp. v. General American Life Ins. Co.*,[5] the Court of Appeals for the Ninth Circuit stated that the "statute treats control over cash differently from control over administration" in order to "assur[e] that people who have practical control

over a plan's money have fiduciary responsibility to the plan's beneficiaries.…[a]ny control over disposition of plan money makes the person who has the control a fiduciary."[6]

In *FirstTier Bank N.A. v. Zeller*,[7] the Court of Appeals for the Eighth Circuit stated that ERISA Section 3(21)(A) imposes fiduciary duties only if one exercises discretionary authority or control over plan management but imposes those duties whenever one deals with plan assets. To the Court, "This distinction is not accidental—it reflects the high standard of care trust law imposes on those who handle money or other assets on behalf of another."[8]

In *Chao v. Day*,[9] the Court of Appeals for the D.C. Circuit explained that its analysis that discretion is not required to be a plan fiduciary under ERISA Section 3(21)(A) was buttressed by the language of the statute. The discretion requirement, which is repeated twice in the first clause, "is conspicuously absent altogether from the disposition clause. Instead, in order to qualify as a fiduciary with respect to a plan's assets, a person must simply exercise any authority or control over the management or disposition."[10]

In *Briscoe v. Fine*,[11] the Sixth Circuit elaborated upon why the District Court erred in requiring that the authority over plan assets had to be discretionary: "This confusion stems from the differing language in the two adjacent clauses of ERISA's definition of 'fiduciary.' Under one clause, a person is a fiduciary to the extent that he or she "exercises any discretionary authority or discretionary control over the management of the ERISA plan." The second part of the same sentence, however, confers fiduciary status upon a person to the extent that he or she "exercises any authority or control respecting management or disposition of [the plan's] assets." We will presume under prevailing canons of statutory construction that Congress's omission of the word 'discretionary' in the second part of the sentence was intentional, and that the threshold for acquiring fiduciary responsibilities is therefore lower for persons or entities responsible for the handling of plan assets than for those who manage the plan."[12]

In *Coldesina*, *DDS PC Emp. Profit Sharing Plan and Trust v. Estate of Simper*,[13] the Court of Appeals for the Tenth Circuit commented that "In Congress' judgment and consistent with general trust law, parties controlling plan assets are automatically in a position of confidence by virtue of that control, and as such they are obligated to act accordingly."[14]

In *Lopresti v. Terwilliger*,[15] the Court of Appeals for the Second Circuit pointed out the flaw in the analysis of the District Court: "By focusing on whether the [defendants] were administrators of the Funds…the District Court overlooked the fact that an individual may also be an ERISA fiduciary by…[exercise[ing] any authority or control respecting management or disposition of plan assets."[16]

In April 2023, in *Massachusetts Laborers Health & Welfare Fund v. Blue Cross Blue Shield of Massachusetts*[17] the Court of Appeals for the First Circuit joined its "sister circuits in concluding that even nondiscretionary control or authority over plan assets suffices to render a person a fiduciary."[18] The Court also stated that "every circuit to have directly addressed the issue has concluded that 'discretionary' control or authority is not required with respect to the management or disposition of plan assets."[19] However, the status of that principle in the Eleventh Circuit is unclear. *In Leimkuehler*,[20] the Seventh Circuit listed *Herman v. Nationsbank Trust Co.*[21] as one of the cases holding that discretion was not an essential component of fiduciary status in all circumstances, based upon the following language: "The plain language of 1002(21)(A) clearly states that a person is not a fiduciary unless he either has discretion or exercises authority or control with respect to plan assets."[22] Similarly, in *ITPE Pension Fund v. Hall,*[23] the Eleventh Circuit held that certain persons, including those who exercise any authority or control respecting management or disposition of plan assets, have fiduciary responsibilities to an ERISA fund.[24] However, in footnote 1 in *Chao v. Day*, the D.C. Circuit wrote that "to the extent that *Useden v. Acker*, 447 F. 2d 1563 (11th Cir. 1991), imputes a discretionary requirement to the disposition clause, the Court rejects it," and in *Perez v. Geopharma*,[25] a Florida District Court did not rule on the issue on a defendant's motion to dismiss. In *Carolinas Elec. Workers Ret. Plan v. Zenith Amer. Sols. Inc.*,[26] an unpublished *per curiam* decision, the Eleventh Circuit declined to rule on the issue.

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1 *Supra*, n.12, at 913.

2 237 F. 3d 270 (3d Cir. 2001).

3 *Id.* at 272-273. While the two clauses of subsection one differ in that respect, in both clauses subsection one's reach is limited to circumstances where the individual actually exercises some authority. *Trustees of the Graphic Communications Intl. Union Upper Midwest Local 1 M Health and Welfare Fund v. Bjorkedal*, 516 F. 3d 719, 733 (8th Cir. 2008).

4 Citing *Pegram v. Herdich*, 531 U.S. 211, 231 (2000). The Court also referenced 29 C.F.R. 2509.75-8, FR 15, in which the DOL held that a named fiduciary may not delegate responsibility for management and control of plan assets to anyone other than an investment manager. Cf. John Langbein and Bruce A. Wolk, Pension and Employee Benefit Law 649 (2d ed. 1995) ("By mandating the trust form and by transposing the duty of loyalty from trust to pension law, the drafters of ERISA were able to institute a familiar fiduciary regime to protect pension funds against internal defalcation.").

5 107 F. 3d 1415(9th Cir, 1997).

6 *Id.* at 1421.

7 16 F. 3d. 907(8th Cir. 1994), cert den. 531U.S.871 (1994).

8 *Id.* at 911.

[9] 436 F. 3d 234(D.C. Cir. 2008).
[10] *Id.* at 236.
[11] 444 F. 3d 478 (6th Cir. 2006).
[12] *Id.* at 490-491.
[13] 407 F. 3d 1126 (10th Cir. 2005).
[14] *Id.* at 1132.
[15] 126 F. 3d 34 (2d Cir 1997).
[16] *Id.* at 40.
[17] 66 F. 4th 307 (1st Cir. 2023).
[18] *Id.* at 325.
[19] *Id.* at 324.
[20] *Supra*, n.12.
[21] 126 F. 3d 1354 (11th Cir. 1997).
[22] *Id.* at 1366.
[23] 334 F. 3d 1011 (11th Cir. 2003).
[24] *Id.* at 1012.
[25] 2014 WL 3721369 (M.D. Fla. July 25, 2014).
[26] 658 Fed. Appx. 966,970, n. 3 (11th Cir. 2016).