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The Future Is Now for ERISA Fiduciary Duties Around Plan Data

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ERISA needs to catch up with the information age by identifying plan data as a plan asset, resolving the current ambiguity on that point that has led courts to decide otherwise, and developing the related fiduciary duties, argues Michael Schloss of The Wagner Law Group.

It seems like only yesterday, 1978 or so—not long after the Employee Retirement Income Security Act of 1974 was enacted, by the way—that my father brought home a fancy new home computer terminal called a ''Silent 700'' for his high school sons to play with. There were no internet service providers in those days—indeed, there was no internet at all. Instead, there was the ARPANET—a network you could access at home only through a device called an ''acoustic coupler'' built into the Silent 700. The ''acoustic coupler'' consisted of two rubber cups that cradled your phone receiver and would, through sounds and tones, talk through your telephone line to a computer on the other end (making sounds like a fax machine, which, though invented, had yet to explode in common use). The fastest speed for the acoustic coupler was 1,200 bps, less than .002% of the speed available today.

Of course, in those days, there was very little use for a Silent 700 (there was no World Wide Web after all). I had access to a few ''bulletin boards'' that mostly provided lists of recycled jokes and recipes of dubious worth. But, my brother had access to a university computer and, through that computer, we could reach the new ARPANET. We were able to write simple programs, send messages to other computer nerds, and, best of all, play an early text-based computer game called ''Zork.'' Ah, those were the days!

At this point, you are probably thinking something like, ''nice history lesson gramps, but so what?'' My point is to remember that the world is rapidly changing and the information age is constantly evolving. ERISA law needs to evolve too. In particular, it is time to take a cold, hard look at a spate of cases insisting that plan data is not property, that it cannot be a plan asset and that, therefore, only a limited set of fiduciary duties attach to its handling or use by third-party vendors.

Courts Unanimously Reject Arguments That Data Is a Plan Asset. . .

To date, no court has ruled that plan data is a plan asset within the meaning of Title I of ERISA. Four notable opinions deal directly with this issue. In *Divane v. Northwestern University* (2018), an Illinois district court concluded that plan data was not a plan asset, reasoning that (a) no prior court held that it was; (b) plan data does not satisfy ''ordinary notions of property rights under non-ERISA law''; and (c) plan data of the type given to the recordkeeper in that case (TIAA) is not something ''the plan could sell or lease in order to fund retirement benefits.'' The *Divane* court did, however, recognize that the information at issue (participant information) ''has some value (to TIAA at least)'' (*16).

Later courts followed that reasoning. Focusing on the three points from *Divane*, a Texas district court in *Harmon v. Shell Oil Co.* (2021) concluded at *6 (in grammatically correct fashion) that ''participant data are not plan assets under ERISA.'' New Jersey's district court in *Berkelhammer v. Automatic Data Processing, Inc.* (2022) held, ''[w]hile plan participant data might be valuable to Voya and Defendants, nothing in Plaintiffs' Complaint supports the plausible inference that '[t]he information' is something the Plan could, for example, 'sell or lease in order to fund retirement benefits' '' (*23, citation omitted). Even so, it conceded in note 13 that, although the plaintiffs had failed to allege such a theory, ''[f]iduciaries might well be able to use plan participant data as leverage when negotiating lower fees.''

Also last year, the Southern District of New York in *Carfora v. Teachers Insurance Annuity Ass'n of America* (2022) at 151 echoed the *Divane* and *Harmon* courts' conclusions: ''This Court agrees . . . that the term 'plan assets' plainly extends to money or in-

vested capital, but does not extend to encompass any information that may potentially benefit a servicer of the plan.'' The *Carfora* court also rejected an argument that TIAA's use of plan data was an exercise of discretionary control over plan operations and, therefore, TIAA was a fiduciary on that basis. In rejecting that argument, the court noted that fiduciary status focuses on plan ''management'' and ''administration'' and not ''operations'' and that accepting plaintiffs' argument ''would effectively turn every recordkeeper that provides services integral to the day-to-day operation of a plan into an ERISA fiduciary.'' *Id.* at 152.

. . . But Hold That Sponsors Have Fiduciary Duties Regarding Cross-Selling Revenues

Until last year, it appeared that claims against service providers grounded on allegations relating to their use of participant information for cross-selling or other money-making services unrelated to plan administration were dead on arrival. That changed in *Vellali v. Yale University* (2022) where the district court allowed a complaint to proceed premised on allegations that, because Yale, the plan's sponsor, allegedly failed ''to obtain information about TIAA's cross-selling revenues . . . [it] could not make an informed decision about whether TIAA's total compensation, including that from cross-selling, was no more than reasonable'' (*20). As a result, the court ruled that Yale could be subject to suit for breaching its fiduciary obligations with regard to its determination whether compensation was reasonable.

Then, just last month, the Southern District of New York issued a new *Carfora* opinion premised heavily on the *Vellali* reasoning, breathing new life into plaintiffs' claims in that case. The court granted leave to file an amended complaint, noting at *13 that the complaint as proposed ''pleads the same theory as that pleaded in *Vellali* with respect to cross-selling revenues.'' In particular, the *Carfora 2* court concluded that, although TIAA might not face claims as a plan fiduciary for its use of plan data in cross-selling activities, it could be subject to suit based on its knowing participation in fiduciary breaches committed by plan sponsors in connection with those same activities. And, although the *Vellali* case focused on the fees paid by Yale, *Carfora 2* focused on the TIAA's alleged ''receipt of ill-gotten profits.'' (*14).

Is There Room to Argue That Plan Data Is a Plan Asset?

As noted above, courts have unanimously concluded that plan data is not a plan asset as defined by ERISA §3(42) or the Department of Labor regulations at 29 C.F.R. §2510.3-101 and 102. For example, the *Harmon* court at *5 stated that ''[n]either of the promulgated regulations either expressly or by plain-language interpretation includes participant data as plan assets under ERISA.'' See also *Berkelhammer* at *22 (citing *Harmon*).

But there is a strong argument that courts must look beyond the four corners of ERISA and its regulations when deciding whether something is a plan asset. The Supreme Court has long recognized that ERISA ''contains no comprehensive definition of 'plan assets','' as stated in *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank* (1993) at 89. And the courts that have looked at the issue with regard to plan data have also recognized that whether plan data may be a plan asset must be considered not only in light of the statute and regulations but also in light of ''ordinary notions of property rights under non-ERISA law.'' For example, the *Berkelhammer* court at *23 (citing DOL Advisory Opinion 93-14A), said ''assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law.''

So, what would be the test here? The *Divane* court noted at *16 that plan data is not something ''the plan could sell or lease in order to fund retirement benefits'' and concluded, therefore, that plan data was not a plan asset under ERISA. And the *Berkelhammer* court, at *23 citing the *Divane* opinion, also concluded that nothing in the complaint in that case supported the plausible inference that ''[t]he information'' is something the Plan could, for example, ''sell or lease in order to fund retirement benefits.''

But, are those conclusions really correct? Could plaintiffs argue that plan data is something that could be sold or leased or otherwise used to fund retirement benefits? ''In today's economy, Big Data is big business,'' the Federal Trade Commission said in a report. ''Data brokers—companies that collect consumers' personal information and resell or share that information with others—are important participants in this Big Data economy.''

California alone lists more than 500 registered data brokers in the state and another 150 entities whose registrations are pending (as of Sept. 8). And public companies like Experian (the largest data broker in the United States), not only describe the personal information they hold as a ''data asset,'' but report a value to their ''databases'' in their regulatory filings on their balance sheet, as seen in the credit agency's 2023 annual report at page 195.

So, personal data of the type held by plans may, in fact be valuable and marketable. It may be bought, leased and sold and (as intimated by both the *Vellali* and *Carfora 2* decisions) used to defray plan expenses. Is it such a stretch to conclude that plan data could also be used to fund retirement benefits? Indeed, plan data may actually satisfy both the *Divane* and *Berkelhammer* tests.

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If Plan Data May Be a Plan Asset, What Is a Fiduciary to Do?

A tantalizing question at this point is: Assuming that plan data is something that can be owned, who actually owns the data? Plans? Plan sponsors? Individual participants? Recordkeepers? Some combination of the four? Frankly, that is a discussion for a separate article.

But, to the extent that plans have a claim to the data, to marketable aspects of the data or to any other aspects of the data, plan fiduciaries likely have duties with respect to those claims.

The DOL in a 2008 Field Assistance Bulletin concluded that plan fiduciaries have a broad duty to enforce claims held by a plan. Quoting the Supreme Court's *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport* decision, the FAB notes: ''One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets, and this encompasses determin[ing] exactly what property forms the subject-matter of the trust [and] who are the beneficiaries. The trustee is thus expected to 'use reasonable diligence to discover the location of the trust property and to take control of it without unnecessary delay.' ''

That same FAB notes that where a trustee is not charged with collecting contributions in the trust document, the trustee is still be responsible for complying with ERISA's fiduciary requirements to use reasonable diligence to collect contributions ''where the trustee knows that no party has assumed responsibility'' and ''contributions are going uncollected.''

There is little reason to think that those same principles would not apply to potential claims relating to plan data. If plan data does have potential value, fiduciaries should consider steps necessary to ascertain and secure that value for the benefit of the plan and its participants.

Conclusion

Today I work at home on a superfast computer, enjoying an ultrawide WQHD monitor attached to the internet via a superfast fiberoptic network. With my state-of-the-art setup, the internet connects me to billions of others around the world and places 64 zetabytes of information at my fingertips. It's many frontiers beyond my old Silent 700 from around the time ERISA was enacted.

As the law continues to develop and the market for personal information continues to evolve, fiduciaries should consider their obligations in the new data-driven world. Plan data certainly does have value and there are considerable questions with regard to whom that data, and its value, belongs. Plan fiduciaries would be well advised to consult with competent advisors as to their recordkeepers' use of plan data for non-plan purposes and to whether the plan's interest in that data may be monetized for the purposes of defraying costs and/or funding plan benefits.

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