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ERISA Section 3(21)(A) and Discretion

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In this article, the author explains that fiduciary status under ERISA does not hinge on the exercise of discretion in some cases because, under ERISA Section 3(21)(A), an entity that exercises any authority or control over the disposition of plan assets becomes a fiduciary.

In *Glynn v. Maine OxyAcetalyne Supply Co.*, the U.S. District Court for the District 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 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 U.S. 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 literal language and structure of the provision, [courts] conclude that where the person exercises

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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 U.S. 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 U.S. 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 U.S. Court of Appeals for the Third Circuit, relying upon Webster's 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 convertible into cash; total resources of a cash or business, as cash, notes and account receivables, securities."

DISCRETION UNNECESSARY

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."[20]

In *Board of Trustees of Bricklayers and Allied Craftsmen Local 6 of New Jersey Welfare Fund v. Wettlin Assoc,*[21] the Third Circuit stated that subsection (1) of 29 U.S.C. § 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.[22] 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."[23]

In *IT Corp. v. General American Life Ins. Co.*,[24] the U.S. 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. . . . Any control over disposition of plan money makes the person who has the control a fiduciary."[25]

In *FirstTier Bank N.A. v. Zeller,*[26] the U.S. 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."[27]

In *Chao v. Day,*[28] the U.S. Court of Appeals for the District of Columbia 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."[29]

In *Briscoe v. Fine,*[30] the U.S. Court of Appeals for 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' 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.[31]

In *Coldesina, DDS PC Emp. Profit Sharing Plan and Trust v. Estate of Simper*,[32] the U.S. 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."[33]

In *Lopresti v. Terwilliger*,[34] the U.S. 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.[35]

In April 2023, in *Massachusetts Laborers Health & Welfare Fund v. Blue Cross Blue Shield of Massachusetts*[36] the U.S. Court of Appeals for the First Circuit joined its "sister circuits in concluding that even non-discretionary control or authority over plan assets suffices to render a person a fiduciary."[37] 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."[38] However, the status of that principle in the U.S. Court of Appeals for the Eleventh Circuit is unclear. *In Leimkuehler*,[39]

the Seventh Circuit listed *Herman v. Nationsbank Trust Co.*[40] 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."[41]

Similarly, in *ITPE Pension Fund v. Hall*,[42] 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.[43] However, in footnote 1 in *Chao v. Day*, the District of Columbia Circuit Court 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*,[44] 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.*,[45] an unpublished per curiam decision, the Eleventh Circuit declined to rule on the issue.

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,[46] and the inquiry in each case is granular, asking whether the entity is a fiduciary with respect to the particular action in question.[47] 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."[48] 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."[49] Fiduciary authority must amount to more than mere possession or custody of a plan's assets.[50] Courts have concluded that a plain vanilla custodian of plan assets, or one performing ministerial tasks for a plan, is not a fiduciary,[51] 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."[52]

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."[53] In *Nagy v. DeWise,*[54] the U.S. 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.

CONTROL

The control that a party must exercise to be an ERISA fiduciary under the second clause of ERISA 3(21)(A) is practical control[55] or meaningful control.[56] In *Santomenno v. TransAmerica Life Ins. Co.*,[57] 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."[58] 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."[59]

In *Srein v. Frankford Trust Co.*,[60] 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.[61] In *Morgan and Oswood Construction Company v. Nationwide Life Ins. Co.*, the U.S. 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.[62]

In *Chao v. Unique Holding Company*, the U.S. 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."[63] 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;[64] payments to plan subscribers;[65] being the signatory and name on the account that held plan funds;[66] a corporate officer who withdrew plan funds for the company's benefit;[67] commingling company assets with benefit funds and using them to pay company debts;[68] disbursing funds from a trust's bank account;[69] handling

a plan participant's insurance premiums;[70] where contributions to a plan are withheld by an employer.[71] In *Chao v. Crouse*,[72] 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.*,[73] 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:

(i) Was responsible for authorizing the checks for the payment of employee contributions and settlement funds to the Trust Fund;

(ii) Signed every check that made payment to the trust fund;

(iii) Was 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."[74] It quoted from the Sixth Circuit's decision in *DeLuca v. Blue Cross Blue Shield of Michigan*:[75]

> 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.[76]

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 non-fiduciaries perpetuated various anti-competitive 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."[77]

NOTES

1. 2020 WL 2770678, 2020 EBC 199, 287 (D. Me. May 28, 2020), citing Beddall v. State Stret 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, 2012); 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, 656-65 (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. 3d 698 (W.D. Wisc. June 28, 2022); Cottrell v. Sparrow, Johnson, and Ursillo, 74 F. 3d 20, 22 (1st Cir. 1996); Kling v. Fidelity Management Trust Co., 291 F. Supp. 2d 1 (D. Mass. 2003); Anthony v. Jet Direct Aviation, 725 F. Supp. 2d 249 (D. Mass. 2010); Feeney Bros. Excavation, LLC v. Morgan Stanley & Co., LLC 2020 WL 2527851 (D. Mass. May 18, 2020).

6. Coleman v. Nationwide Life Ins. Co., 969 F. 2d 54,61-62, (1993) cert. den. 506 U.S. 1081 ("the discretionary authority or responsibility which is pivotal to the statutory definition of fiduciary"); Adams v. The Brinks Company, 261 Fed. Appx. 583 (4th Cir. 2008); Acosta v. Ameriguard Soc. Servs. Inc., 2018 WL 4158349 (D. Md. Aug. 30, 2018); Plumb v. Fluid Pump Services, 1995 WL 324557 (N.D. Ill. May 26, 1995); Woods v. Northrop Gruman Corp., 2010 WL 11564991 (E.D. Va. June 14, 2010); Richard v. Bankers United Life, 1993 WL 99187 (E.D. La. March 30, 1993); Dr. Alan Resnick and Dr. James Thompson v. Dr. Donald Schwartz, 2018 WL 4191525 (N.D. Ill. Sept. 3, 2018); Scardaletti v. Bobo, 897 F. Supp. 913,918 (D. Md. 1995).

7. Beddall v. State Street Bank and Trust Co., supra, n. 1; Guardsmark, Inc v. Blue Cross and Blue Shield of Tennessee, 169 F. Supp 2d. 794 (W.D. Tenn. 2001); Boucher v. Williams, 13 F. Supp. 2d 84 (D. Me. 1998); Emory v. Metropolitan Life Ins. Co., 489 F. Supp. 2d 121 (D. Me. 2007); Dall v. The Chrent Company, 33 F. Supp. 2d 26 (D. Me. 1998); Torres v. Bella Vista Hospital, 2007 WL 3174486 (D. Puerto Rico 2007); Mandarinis III v. Accurate Engineered Concrete, Inc., 2019 WL 7373091 (D. Mass. 2019); LaLonde v. Textron, Inc., 270 F. Supp 2d 272 (D.R.I. 2003). See also Colleen E. Medill, "The Law of Directed Trustees under ERISA: A Proposed Blueprint for the Federal Courts," 61 Missouri Law Rev. 825, 829 (1996) ("The case law concerning the definition of a fiduciary has focused primarily on the discretionary functions with respect to plan management and administration which qualify a person as an ERISA fiduciary.

8. There are some cases that do not refer to discretion in this manner. See, for example, Hartline v. Sheet Metal Workers, 134 F. Supp 2d 1 (D.D.C. 2000) ("plan management and plan administration are the hallmarks of fiduciary status"); Sweda v. University of Pennsylvania, 923 F. 3d 320 (3d Cir. 2019) (Prudence is the hallmark of fiduciary status); Pipefitters Local 636 Insurance Fund v. Blue Cross Blue Shield of Michigan, 654 F. 3d 618 (6th Cir. 2011) ("duty of care which is the hallmark of fiduciary status").

9. Edmonson v. Lincoln National Life Insurance Co., supra, n. 4.

10. Gutyan Int'l Inc. v. Prof'l Benefits Administrators, Inc., 689 F. 3d 793,798 (6th Cir. 2012). See also Chao v. Constable, 2006 WL 3759749, 40 EBC 1061 (W.D. Pa. Dec. 19, 2006) (A person who appropriates and controls plan assets is a fiduciary under ERISA.).

11. 284 F. Supp. 2d 511 (S.D. Tex. 2003).

12. 713 F. 3d 905 (7th Cir. 2013).

13. 556 F. 3d 575, 583 (7th Cir. 2009).

14. Supra n. 4.

15. 128 F. 3d 541 (7th Cir. 1997).

16. 55 F. 3d 1034, 1047 (5th Cir. 1995). Cf. Health Care Strategies, Inc v. ING Life Assurance and Annuity Company, 961 F. Supp. 2d 393 (D. Conn. 2013) ("An entity is an ERISA fiduciary only to the extent that it exercises or has discretionary authority related to the plan's management or administration.").

17. 29 U.S.C. § 1002(21)(A).

18. 74 F. 3d 20 (1st Cir. 1996).

19. 323 F. 3d 274 (3d Cir. 2003), fn. 3.

20. Supra, n. 12, at 913.

21. 237 F. 3d 270 (3d Cir. 2001).

22. 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).

23. 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.").

24. 107 F. 3d 1415 (9th Cir. 1997).

25. Id. at 1421.

26. 16 F. 3d. 907 (8th Cir. 1994), cert den. 531 U.S. 871 (1994).

27. Id. at 911.

28. 436 F. 3d 234 (D.C. Cir. 2008).

29. Id. at 236.

30. 444 F. 3d 478 (6th Cir. 2006).

31. Id. at 490-491.

32. 407 F. 3d 1126 (10th Cir. 2005).

33. Id. at 1132.

34. 126 F. 3d 34 (2d Cir 1997).

35. Id. at 40.

36. 66 F. 4th 307 (1st Cir. 2023).

37. Id. at 325.

38. Id. at 324.

39. Supra, n. 12.

40. 126 F. 3d 1354 (11th Cir. 1997).

41. Id. at 1366.

42. 334 F. 3d 1011 (11th Cir. 2003).

43. Id. at 1012.

44. 2014 WL 3721369 (M.D. Fla. July 25, 2014).

45. 658 Fed. Appx. 966, 970, n. 3 (11th Cir. 2016).

46. 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.

47. 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).

48. Chao v. Day, supra, n. 28.

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

50. Briscoe v. Fine, supra, n. 30; 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.).

51. 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.").

52. 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.

53. 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.).

54. 771 F. Supp. 2d 502 (E.D. Pa. 2011).

55. Briscoe v. Fine, supra, n. 30.

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

57. 883 F. 3d 839 (9th Cir. 2018).

58. Id. at 841.

59. 682 F. 3d 414 (6th Cir. 2012).

60. Supra, n. 19.

61. 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).

62. 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. 54 ("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.").

63. 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.

64. Blatt v. Marshall & Lassman, 812 F. 2d 810 (2d Cir. 1987).

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

66. Coldesina v. Estate of Simper, supra, n 32.

67. Yeseta v. Baiman, 837 F. 2d 380,386 (9th Cir. 1988).

68. Lopresti v. Terwilliger, supra, n. 34.

69. Mintjal v. Prof. Ben. Trust, 2016 WL 4493424 (N.D. Ill. 2018).

70. Chelf v. Prudential Insurance Company of America, supra, n. 47.

71. 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).

72. 2004 WL 2750263 (S. D. Ind. Nov. 22, 2004).

73. 2011 WL 2462027 (E.D. Pa. June 21, 2011).

74. Supra, n. 36 at 328.

75. 628 F.3d 743 (6th Cir. 2010).

76. Id. at 747.

77. Supra, n. 36, at 329.