LEGAL UPDATE

Alternative Ways of Becoming a Fiduciary

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Although much of the focus in recent years with respect to determining whether a person was an ER1SA fiduciary had been on the DOL fiduciary rule, which redefined what it means to be an investment advice fiduciary under ERISA Section 3(21)(A)(ii), that is only one of the ways in which a person can become a functional fiduciary under Section 3(21) of ERISA. Under Subsection (i) of ERISA Section 3(21)(A), a person is a fiduciary to the extent: (i) he exercises any discretionary authority or control respecting management of such plan or exercises any authority or control respecting disposition of its assets. Under subsection (iii) of ERISA Section 3(21) (A), a person is a fiduciary to the extent he has any discretionary authority or responsibility in the administration of such plan. Commenting upon this structure, the Court of Appeals for the Second Circuit, *Bar/bon/is v. Transportation Workers Union of America (2nd Cir. 2005)*, has explained that Section 3(21)(A) creates a bifurcated test for fiduciary status. Subsection (i) imposes fiduciary status on those who exercise discretionary authority, regardless of whether such authority was ever granted. Subsection (iii) describes those individuals who have actually been granted discretionary authority, regardless of whether such activity is ever exercised. Although this analysis is interesting, it would seem to have little significance with respect to matters involving plan investment, because although those issues would arise under subsection (i), they would not, at least on the surface, arise under subsection (iii), which would be limited co issues such as eligibility, vesting, and benefit calculation. That is, while neither term is defined under ER1SA. "management" of a plan and "administration" are distinct activities. However, in *Healthcare Strategies, Inc. v. Ing Life Insurance and Annuity Company*, a Connecticut District Court case referenced by the Court of Appeals for the Second Circuit last December, a Federal District Court in Connecticut reached a contrary conclusion. In reaching that conclusion, the District Court relied upon the Supreme Court decision in *Varity Corp. v. Howe*, which looked to common law, on the premise that Congress was drawing from that body of law when enacting ERISA. In so doing, the Supreme Court concluded that trust administration means acting with those "powers as are for the necessary or appropriate carrying out of the purposes of the trust." This is a broad definition of plan administration, and in the particular case, defendant had contractual authority to change investment options in order "to accomplish the purposes" of the plan. On this basis, the District Court concluded that this made the defendant eligible to be a subsection (iii) fiduciary.

This decision is useful to the DOL because it provides the DOL with a work-around to the decision of the Court of Appeals for the Seventh Circuit in *Leimkuehler v. American United Life Insurance Company*. The allegation in that case was that a service provider breached its fiduciary duty by receipt of revenue sharing payments. The service provider in that case also retained the right to change fund selections. The DOL submitted an amicus brief arguing that the service provider defendant exercised its authority to substitute mutual funds every time that it could have unilaterally substituted a less-expensive share class of a fund but failed to do so. The Seventh Circuit rejected this "unworkable" definition of the word "exercise," deciding that an omission does not constitute an exercise of discretionary authority over plan assets. Since a person cannot be liable for a breach of fiduciary duty until it is first determined to be a fiduciary, and most service provider contracts are structured so that the plan sponsor or other relevant plan fiduciary has the final say on investments, so that the service provider cannot be said to be exercising any authority that would make it a fiduciary, the DOL was seeking case law support that a person could be a fiduciary with respect to investments even if they did not exercise any authority or control. *Health Care Strategies* provides such support, although this is an undeveloped field of law and other courts may not follow it.

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