Fiduciary Status for Service Providers?

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401(k) service providers, such as insurance companies, offer plan-related services and products, including recordkeeping platforms. Recordkeeping platforms provide the core recordkeeping services that are critical for the operation of a 401(k) plan and also offer a broad array of investment funds from which plans are able to construct investment menus for their participants. Once the plan sponsor selects funds for the plan's investment menu, the platform provider typically retains the right to make changes to the funds selected. At issue currently is whether a provider's ability to change the funds comprising a plan's investment menu (from which it could potentially benefit by means of increased revenue sharing) makes it a fiduciary under ERISA.

ERISA Definition of Fiduciary. A person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Department of Labor Advisory Opinion 1997-16A. According to Department of Labor Advisory Opinion 97-16A, an insurer's ability to change the options available on its platform would *not* constitute the exercise of discretionary authority or control over the management of a plan or its assets necessary to make the insurer a fiduciary if the plan sponsor has the power to accept or reject any changes. Under the opinion, ensuring that the final decision rests with the plan sponsor requires the insurer to provide at least 60 days advance notice of any proposed changes, make full disclosure of any fees (*e.g.*, revenue sharing) the insurer will receive as a result of the change, and give the plan sponsor a reasonable amount of time to reject the changes or terminate the arrangement. Doing these things, that is, providing a procedure for the plan sponsor's negative consent to any changes, was thought to ensure that a platform provider would not be treated as a fiduciary and, as a nonfiduciary, would not violate ERISA's prohibited transaction rules by receiving fees from mutual funds on a plan's investment menu.

Leimkuehler v. American United Life Insurance Company. As the recent case of *Leimkuehler v. American United Life Insurance Company* illustrates, the Seventh Circuit would not impose fiduciary status on a 401(k) service provider even where the service provider has the unilateral right to substitute funds. The plan trustee, Mr. Leimkuehler, had objected to the fact that American United Life Insurance Company (AUL) invested plan funds in those share classes of the mutual funds selected by the plan sponsor that resulted in revenue sharing payments to AUL. Mr. Leimkuehler brought a putative class action against AUL on the theory that it was a plan fiduciary and, as such, violated its fiduciary duties by receiving revenue sharing payments.

Mr. Leimkuehler argued that AUL was a fiduciary on two alternative grounds, both of which were rejected by the Seventh Circuit. First, the Seventh Circuit examined whether AUL was a fiduciary as a result of offering a limited range of preselected investment options, including mutual fund share classes with revenue sharing, to the plan trustee. Based on its prior ruling in *Hecker v. Deere*, the Seventh Circuit concluded that "selecting which funds will be included in a particular 401(k) investment product, without more, does not give rise to a fiduciary responsibility." The limitation of available investment options to certain share classes did not affect this conclusion, since, although some share classes are more expensive than others, the cheapest option may not be the best option. The Seventh Circuit also dismissed the trustee's second argument that AUL was a fiduciary since it exercised control over the plan's assets under the group annuity contract by maintaining and controlling a separate account. The Seventh Circuit clarified that, although the definition of "fiduciary" only requires a finding of control or authority over the management or disposition of plan assets (not discretionary control or authority), fiduciary status with respect to the separate account did not carry over to share class selection and revenue sharing issues. In other words, AUL could be an ERISA fiduciary for some purposes, but not for others.

In an *amicus* brief filed in *Leimkuehler*, the Department of Labor advanced a third argument for imposing fiduciary status on AUL. The DOL, in a departure from its Advisory Opinion, argued that AUL is a fiduciary since the group annuity contract gave AUL the right to make substitutions to or deletions from the line-up of plan investment options. Even though AUL only exercised this right two times (neither of which gave rise to a claim under ERISA), the DOL argued that AUL exercised this right every time it chose to offer a share class that optimized the amount of revenue sharing it would receive. According to the DOL, a service provider could exercise the requisite authority over plan assets and become a fiduciary by doing nothing.

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In the view of the Seventh Circuit Court of Appeals, this "'nonexercise' theory of exercise" was not only unworkable but unsupported by precedent. Thus, the court held that ERISA's functional fiduciary characterization is limited to circumstances where the purported fiduciary actually exercises some authority. Following the Seventh Circuit's decision, Mr. Leimkuehler petitioned the Supreme Court for review; however on February 24, 2014, the Court ruled that it would not review the case.

Healthcare Strategies, Inc. v. ING Life Insurance and Annuity Company. In contrast to the Seventh Circuit, a summary judgment by a district court in Connecticut found that the contractual right to substitute mutual funds in a 401(k) platform conferred fiduciary status on the service provider. Similar to *Leimkuehler*, *Healthcare Strategies, Inc. v. ING Life Insurance and Annuity Company*, another class action lawsuit alleging excessive fees, involved an insurance company whose group annuity contract with individual 401(k) plan sponsors allowed it to change, add, or eliminate the funds that are available to plan participants. In the event the insurance company (ING) exercised the right to make a change, it only had to notify the trustee of the 401(k) plan. The group annuity contract did not give the plan trustee the chance to reject changes or substitutions.

ING and Healthcare Strategies agreed ING was acting in a fiduciary capacity only to the extent ING actually exercised its contractual authority to substitute funds in a plan's line-up. Consistent with *Leimkuehler*, ING argued that its fiduciary status is limited to only those two instances where it actually did exercise such authority. However, the district court reviewed the decisions of the Second Circuit and in keeping with the Second Circuit's mandate that the term "fiduciary" be construed broadly, found that ING is a fiduciary because of its discretionary authority or discretionary responsibility in the *administration* of the plan. According to the district court, under clause (iii) of the fiduciary definition, all that is necessary to impose fiduciary status is for ING to *possess* the authority to substitute funds, as opposed to *the actual exercise* of authority as required by clause (i). Since the court found that ING's services could be construed as "plan administration," as opposed to "plan management," it was a fiduciary.

Following the issuance of the summary judgment ruling, the case went to trial in September 2013. In April 2014, the parties agreed to settle the case. According to the settlement agreement, ING agreed to pay $14,950,000 in damages (which represents only 2.33 percent of what was requested at trial) and agreed to certain changes to its business practices regarding fees and revenue sharing. Specifically, ING is to provide plan sponsors with written notice of any removal of a fund from a plan's investment line-up. Plan sponsors also are to be notified by means of ING's Web site of the addition of any fund to a plan's investment menu, and ING will not exercise any authority to make a substitution of one fund for another if the plan already offers such fund on its investment menu. These changes would more or less bring the plan into alignment with Advisory Opinion 97-16A.

Golden Star, Inc. v. MassMutual Life Insurance Company. In May 2014, a Massachusetts district court also grappled with the issue of whether a service provider becomes a functional fiduciary by retaining the right to make changes to an investment line-up. The plan sponsor, Golden Star, selected the investment line-up for its 401(k) plan from an overall menu of funds provided by MassMutual, which could add, delete, or substitute investment options as well as set its own management fees. Golden Star objected to the revenue sharing payments MassMutual received and argued that MassMutual was a fiduciary on a number of theories, including the argument that the insurer's control over investment options conferred fiduciary status. On the defendant's motion for summary

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