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Directed Trustees

By Barry L. Salkin

In this article, the author reviews the law regarding directed trustees and discusses their potential liability and obligations in a variety of circumstances.

Outside of and preceding[1] the ERISA context, a directed trust was one in which powers normally exercised by the trustee – typically the authority to make investment decisions – are delegated to one or more third parties. These delegates then instruct or direct the trustee to implement these decisions.[2]

Similarly, ERISA allows a plan to designate a person or entity as a directed trustee of the plan, as opposed to an ordinary or discretionary trustee.[3] While ERISA does not employ the directed trust terminology, the concept of a directed trust is set forth in ERISA Section 403(a),[4] which provides that the trustee or trustees of an employee benefit plan have the exclusive authority and discretion to manage and control the assets of the plan, except to the extent that, "the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary[5] who is not a trustee or an investment manager,[6] in which case the trustees shall be subject to proper directions

Barry L. Salkin, a member of the Editorial Advisory Board of *Benefits Law Journal*, is of counsel at The Wagner Law Group, concentrating his practice in ERISA and employee benefits law. He is a fellow of the American College of Employee Benefits Counsel and is the author of numerous articles and book chapters dealing with employee benefits issues.

of such fiduciary which are made in accordance with the terms of the plan and not contrary to the Act."[7]

A party's status as a trustee, directed or otherwise, must be determined by reference to the plan and the trust agreement.[8] Thus, whether a trustee is a directed trustee begins with the language of the plan document.[9] If the trustee is a directed trustee, then the trust and/or plan establishes the parameters of the directed trustee's duties.[10]

CHARACTERIZING DIRECTED TRUSTEES

One district court characterized directed trustees, whose fiduciary obligations are circumscribed by the parameters of their duties under ERISA Section 403(a),[11] as "primarily recordkeepers and transaction handlers, rather than decision makers."[12] A directed trustee is "not required to exercise its independent judgment in deciding how and whether to invest employee funds, as directed."[13]

Consistent with that characterization, there is a general consensus that a directed trustee's duty of prudence, to the extent that it exists,[14] is "quite constricted."[15] Their duties have been described as "extremely narrow,"[16] "extremely limited,"[17] "very limited,"[18] "substantially constricted,"[19] "significantly limited,"[20] and "significantly narrower than the duties generally described to a discretionary trustee under common law principles."[21] Courts in the U.S. Court of Appeals for the Third Circuit have stated that, at least with respect to the direction of plan assets in specific securities, directed trustees are "essentially immune from judicial inquiry."[22]

There is also consensus that a directed trustee will escape liability only if it relies upon directions that are proper,[23] consistent with plan terms,[24] and not contrary to ERISA.[25] There is also agreement that if a directed trustee knows that the instructions are contrary to ERISA and, despite such knowledge,[26] the directed trustee follows the instructions, he or she does so at his or her peril, and ERISA Section 403(a) will not absolve him or her of liability.[27] Consequently, there is also agreement that a directed trustee can disobey a named fiduciary's directions when it is plain that they are imprudent.[28]

STATUTORY GUIDANCE

However, notwithstanding these wide areas of agreement, with respect to the responsibilities of a directed trustee, "the standard is easier stated than applied."[29] One commentator's view was that there was no guidance in the statute as to what constitutes a proper direction. Furthermore, there is no guidance in the statute as to what lengths

the directed trustee must go to ascertain whether the direction is in accordance with the terms of the plan and ERISA.[30] Another commentator raised a series of questions about the scope of a directed trustee's status and potential liability under ERISA: "Is a directed trustee a fiduciary at all?"[31]

Does a directed trustee have a duty to investigate the named fiduciary's direction to determine that it is proper, "made in accordance with the terms of the plan" and "not contrary to ERISA"? If so, how intensive must the investigation be? Can a named fiduciary contractually bind the trustee to make an investment without the directed trustee's prior knowledge or approval?"[32]

In *In re: Enron ERISA Litigation*,[33] the U.S. District Court for the Southern District of Texas stated that: "The underlying issue here can be rephrased as to what extent, if at all, is the directed trustee a fiduciary, as defined in 3(21)(A)[34] and thus subject to the standards, duties and obligations of an ERISA fiduciary under 404(a)(1). . . . Difficulties in construing the scope of the directed trustee's fiduciary obligations pursuant to the statute are compounded by: (1) the lack of a statutory definition of 'proper' with respect to the named fiduciary's directions and (2) a lack of guidance about the nature and extent of a directed trustee's duty to determine whether the fiduciary's directions are 'in accordance with the terms of the plan' and 'not contrary to ERISA' under 403(a)(1). For example, if the instruction on its face looks consistent with the plan and statute,[35] does a directed trustee have any duty to investigate further? What if the directed trustee knows or suspects that the directing fiduciary has breached his fiduciary duties?"[36]

FIRSTIER BANK V. ZELLER

Perhaps the case most frequently cited for the proposition that the duties of a directed trustee under ERISA are those of a directed trustee at common law is the decision of the U.S. Court of Appeals for the Eighth Circuit in *FirsTier Bank v. Zeller*.[37] The Eighth Circuit held that ERISA Section 1103(a) "no doubt modifies . . . but does not eliminate, the trustee's fiduciary duty when handling assets. When the direction comes from another fiduciary, . . . the law of trusts does not excuse a compliant trustee from all fiduciary responsibility."[38] It relied upon Scott on Trusts for a rule that it determined that Congress had adopted in enacting ERISA: "Where the holder of the power [to direct the trustee] holds it as a fiduciary, the trustee is not justified in complying with his directions if the trustee knows or ought to know that the holder of the power is violating his duties to the beneficiaries in giving the directions."[39]

From the same section of Scott on Trusts, the Eighth Circuit concluded that a directed trustee had a duty to inquire even if it did not know that the directing trustee was breaching its fiduciary duties: "The trustee is not necessarily justified in complying with the directions of the holder of the power merely because he does not actually know that the latter is violating his duty as a fiduciary. [The trustee] is ordinarily under a duty to make a reasonable inquiry and investigation in order to determine whether the holder of the power is violating his duty."[40]

Applying that principle, the panel concluded that a directed trustee must make a reasonable inquiry and investigation to determine if the named fiduciary's order was "proper," and was made "in accordance with the terms of the plan . . . and not contrary to ERISA."[41] In summary, the Eighth Circuit concluded that "[A]n ERISA trustee who deals with plan assets in accordance with proper directions of another fiduciary is not relieved of its fiduciary duties to conform to the prudent man standard of care . . . to attempt to remedy known breaches of duty by other fiduciaries . . . and to avoid prohibited transactions."[42]

FIELD ASSISTANCE BULLETIN 2004-03

A frequently cited authority addressing some of these issues is Field Assistance Bulletin 2004-03,[43] although its particular focus was upon the duties of a directed trustee with respect to publicly traded securities.[44] In the introductory paragraph of FAB 2004-03, the U.S. Department of Labor (DOL) acknowledged that during investigations of actions taken by directed trustees, "difficult questions may arise regarding the scope of the directed trustees' fiduciary duties."[45] The DOL stated that a plan trustee would always be a fiduciary under ERISA as a result of its authority or control over plan assets.[46] In support of that statement, it cited language from *In re: Enron Corp. Securities, Derivative, and ERISA Litigation*[47] and *In re: Worldcom, Inc. ERISA Litigation*.[48] Next addressing the specific statutory language, the DOL stated that "for purposes of section 403(a)(1), a direction is proper[49] only if the direction is 'made in accordance with the terms of the plan' and not contrary to the Act [ERISA]."[50]

However, in *DiFelice v. U.S. Airways, Inc.*,[51] the U.S. District Court for the Eastern District of Virginia explained that courts have noted that by requiring directions to be proper, Congress meant to exclude any communications from the named fiduciary that did not meet certain formal requirements,[52] including that a direction be clear, unequivocal,[53] and in writing, and that it was issued "from a person or entity with authority to do so."[54] The district court then further explained that, "The question whether a direction was

'proper' and not contrary to ERISA or the plan documents is essentially a question of statutory interpretation requiring a sharp focus on ERISA Section 403(a)'s plain language, as well as its structure and purposes. Construing 'proper' in this way gives the term a role to play in the application of 403(a) that is independent from the phrase 'in accordance with the terms of the plan' and 'not contrary' to ERISA, which are the primary constraints on a directed trustee's conduct. By so doing, the construction honors the principle of statutory construction that no term should be rendered superfluous, and that statutory language must be read in context because a phrase gather meaning from the words around it."[55]

The DOL indicated that when a directed trustee knows or should know that a direction from a named fiduciary is not in accordance with the terms of the plan or is contrary to ERISA,[56] it may not follow the direction. With respect to plan terms, in order to determine whether a direction is consistent with the terms of a plan, "directed trustees necessarily have a duty to request and review all of the documents and instruments governing the plan that are relevant to its duties."

The DOL then provided more specific guidance: "A direction is consistent with the terms of the plan if the documents pursuant to which the plan is established do not prohibit the direction. It is also the view of the Department that if, in the course of reviewing the propriety of a particular direction, a directed trustee determines that the terms of the relevant document are ambiguous with respect to the permissibility of the direction the directed trustee should obtain a clarification of the plan terms from the fiduciary responsible for interpreting such terms in order to ensure that the direction is proper. In this regard, the directed trustee may rely on the interpretation of such fiduciary."[57]

With respect to not following directions contrary to ERISA, a directed trustee must follow processes that are designed to avoid prohibited transactions. One way in which a directed trustee could satisfy its fiduciary responsibilities is by "obtaining written representations from the directing fiduciary that the plan maintains and follows procedures for identifying prohibited transactions and, if prohibited, identifying the individual or class exemption applicable to the transaction. The directed trustee may rely on the representations of the directing fiduciary unless the directed trustee "knows that the representations are false."[58]

With respect to evaluating the prudence of an investment direction, the DOL indicated that the named fiduciary has primary responsibility for determining the prudence of a particular transaction, whether the transaction involves the buying, selling or holding of particular plan assets. It stated that: "[A]s the courts and the Departments have long recognized, the scope of a directed trustee's responsibility is significantly limited. A directed trustee, in the view of the Department, does not have an independent obligation to determine the prudence

of every transaction. The directed trustee does not have an obligation to duplicate or second guess the work of the plan fiduciaries that have discretionary[59] authority over the management of plan assets and does not have a direct obligation to determine the prudence of a transaction." The DOL cited the opinion of the U.S. Court of Appeals for the Eleventh Circuit in *Herman v. NationsBank Trust Co.*[60] for the proposition that a directed trustee does not have a direct obligation of prudence under ERISA Section 404. Rather, the directed trustee's obligation is "to make sure" that the "directions were proper, in accordance with the terms of the plan, and not contrary to ERISA."[61]

PROPER DIRECTIONS

The DOL did not specifically address in FAB 2004-3 how a directed trustee can make sure that the directions are proper, in accordance with the terms of the plan, and consistent with ERISA. That issue was addressed in *Chesemore v. Alliance Holdings*,[62] which asked whether directed trustees ever have to perform any investigation to decide whether a given direction would be one that it could follow: "Although plaintiffs suggest that a directed trustee may be required to investigate when there is 'evidence that the direction is imprudent,' . . . this notion has the risk of quickly devolving into a requirement that a directed trustee second guess every direction of the named fiduciary. As the court explained in *Summers*, the duty of prudence of the directed trustee should be limited to what is 'plain' where the directed trustee knows or should know (in his or her role as trustee) that a fiduciary's direction is imprudent, there is a duty to disobey the direction."

To provide a frame of reference, comment to Section 185 of Restatement (Second) of Trusts provides that: If a trustee has reason to suspect that the holder of a power is attempting to exercise it in violation of a fiduciary duty to which the holder is subject in the exercise of the power, the trustee is under a duty not to comply and may be liable if he or she does comply. "Reason to suspect" may be a somewhat different standard than should know or ought to know, although one commentary on Section 185 of Restatement (Second) of Trusts states that: "Where the holder of the power [to direct the trustee] holds it as a fiduciary, the trustee is not justified in complying with the directions if the trustee knows or ought to know that the holder of the power is violating his duty to the beneficiaries as fiduciary in giving the direction."[63]

The DOL then applied these principles in two circumstances in which directions were provided regarding employer securities. With respect to non-public information, a directed trustee's obligation to question directions would be quite limited. The primary circumstance

in which this could arise is when a directed trustee possesses material non-public information.[64] "If a directed trustee has material, non-public information that is necessary for a prudent decision, the directed trustee, prior to following a direction that would be affected by such information, has a duty to inquire about the named fiduciary's knowledge and consideration of the information with respect to the direction."[65]

With respect to public information, the DOL stated that a directed trustee will "rarely have an obligation under ERISA to question the prudence of a direction to purchase publicly traded securities at the market price solely on the basis of publicly available information."[66] The directed trustee's decision not to follow a direction without further inquiry may apply only in "limited, extraordinary circumstances where there are clear and compelling public indicators, as evidenced by an 8-K filing with the Securities Exchange Commission (SEC),[67] a bankruptcy filing[68] or similar public indicator, that calls into serious question a company's viability as a going concern." In those situations, a directed trustee "may have a duty not to follow the named fiduciary's instruction without further inquiry."[69] Thus, "knowledge that a company's fortunes are failing do not impose a duty of inquiry."[70]

The DOL further observed that the nature and scope of a directed trustee's fiduciary responsibilities under ERISA Section 403(a) do not change merely because the directed trustee raises questions concerning whether a direction is "proper," or declines to follow a direction that the directed trustee does not believe is a proper direction under ERISA Section 403(a).[71]

The DOL also discussed the potential co-fiduciary liability of a directed trustee under ERISA Section 405.[72] The DOL stated that under ERISA Section 405(a)(1), a fiduciary is liable for the breach of another fiduciary if the fiduciary participates knowingly in the breach. The DOL did not mention ERISA Section 405(a)(3),[73] under which a fiduciary has liability if he or she has knowledge of a breach by another fiduciary, unless he or she makes reasonable efforts under the circumstances to remedy such breach. As a result, if a directed trustee has knowledge[74] of a fiduciary breach, the directed trustee may be liable as a co-fiduciary unless it takes reasonable steps to remedy the breach.[75]

As to the scope of a directed trustee's duty to inquire, an argument that was advanced early on,[76] but which was criticized by most commentators[77] and has not been accepted by the courts, was that unless it was clear on its face that a direction violated the terms of the plan or was contrary to ERISA, the directed trustee could follow the direction. This interpretation of ERISA Section 403(a) was based upon the following discussion in ERISA's legislative history:

> [I]f the plan provides that the trustees are subject to the direction of named fiduciaries, then the trustees are not to have the exclusive management and control over the plan assets, but generally are to follow the instructions of the named fiduciary. Therefore, if the plan sponsor wants an investment committee to direct plan investments, he may provide for such arrangement in the plan. In addition, since investment decisions are basic to plan operations, members of such an investment committee are to be named fiduciaries. If the plan so provides, the trustee who is to be directed by an investment committee is to follow the committee's directions unless it is clear on their face that the actions to be taken under those directions would be prohibited by the fiduciary responsibility provisions of the bill or would be contrary to the terms of the plan or trust.[78]

The U.S. District Court for the Southern District of Texas in the Enron litigation rejected the contention that "facial compliance" was the applicable standard for directed trustees.[79] It noted that legislative history "should be consulted gingerly, if at all, in aid of statutory construction."[80] The court then noted that "nowhere in [ERISA Section 403(a)] relating to the directed trustee, nor in the statute as a whole, is the phrase 'clear on their face' or any paraphrase of that facial compliance standard to be found."[81] It looked to the advisory opinions of the DOL. While acknowledging that these opinions lacked the force of law and did not carry great weight, they nonetheless "appear to reflect the determination of the agency with expertise in the application of the statute that the directed trustee has obligations requiring more than a superficial determination that the fiduciary's instructions are in compliance with the plan and statute."[82]

Similarly, reviewing the relevant case law with respect to a directed trustee's obligations, the court concluded that, "although far from in agreement, [the case law] also generally appears to place at least some burdens on the directed trustee beyond merely facial compliance with the terms of the plan and of ERISA suggested by the legislative history text. . . . [W]hat the directed trustee knows or should have known plays a significant role in deciding what duties and liabilities would be imposed on the directed trustee."[83]

Again, there does not appear to be disagreement that a directed trustee violates ERISA Section 403(a)[84] if it follows directions that it knows to be false. As the district court stated in *Worldcom*: "To the extent therefore that Merrill Lynch is alleged to have followed instructions to invest employee funds in *Worldcom* stock when a prudent trustee would know that *Worldcom*'s decision to continue to offer its

own stock to employees as an investment option was imprudent or otherwise in violation of *Worldcom*'s obligations under ERISA, then Merrill Lynch may be liable as an ERISA fiduciary."[85]

Similarly, in *Koch v. Dwyer*,[86] the U.S. District Court for the Southern District of New York stated that: "An imprudent investment undertaken without adequate investigation constitutes a breach of fiduciary duty and is contrary to ERISA. If AET was aware that the direction to invest in JWP common stock was imprudent or that the fiduciaries' decision to make that investment was based on inadequate investigation, then AET would not be immune from liability because it would knowingly have carried out a direction that was contrary to ERISA."[87]

The DOL has also addressed the responsibilities of a directed trustee in FAB 2008-01,[88] which dealt with the responsibilities of named fiduciaries and trustees of ERISA covered plans for the collection of delinquent employer and employee contributions.[89] In that FAB, the DOL stated that "authority over a plan's assets subject to the trust requirements of Section 403(a) of ERISA, including a plan's legal claim for delinquent contributions,[90] must be assigned to: (i) a plan trustee with discretionary authority over the assets; (ii) a directed trustee subject to the proper and lawful directions of a named fiduciary, or (iii) an investment manager."[91]

Further, the person or persons with the authority to appoint the plan's trustees "must ensure that the obligation to collect contributions is appropriately assigned to a trustee, unless the plan expressly provides that the trustee will be a directed trustee with respect to contributions pursuant to section 403(a)(1) or the authority to collect contributions is delegated to an investment manager pursuant to section 403(a)(2)."[92]

Additionally, although, as stated above, the responsibilities of directed trustees are determined by the plan and trust documents, "if a nominally directed trustee routinely assumes discretionary responsibility, the trustee cannot seek to limit its liability with respect to the exercise of that discretion on the basis that it is a directed trustee."[93]

Finally, with respect to potential co-fiduciary liability under ERISA Section 405, "if a particular trustee is not responsible for monitoring and collecting contributions under the terms of the trust instrument, that trustee (including a directed trustee) nonetheless would have an obligation under Sections 404(a) and 405(a) to take appropriate steps to remedy a situation where the trustee knows that no party has assumed responsibility for the collection and monitoring of contributions and that delinquent contributions are going uncollected."[94]

INSTRUCTIONS FROM PLAN PARTICIPANTS

While much of the litigation involving directed trustees involves directions and instructions from named fiduciaries and investment managers, directed trustees can also receive directions and instructions from plan participants. The common law rule, as stated in *FirsTier v. Zeller*, is that "when acting at the direction of the ultimate beneficiary of a trust, the trustee's fiduciary duty is satisfied if it simply complies with a direction that does not violate the terms of the trust."[95]

ERISA Section 404(c) is consistent with that common law rule, by stating that the plan participant does not become a fiduciary by exercising control over the assets in his or her individual account, and therefore the directed trustee cannot have co-fiduciary liability under ERISA Section 405. However, the DOL is not in total agreement with that position. As Hatamyar has noted, "The DOL's actions have indicated that it is more likely to infer a duty to investigate thoroughly when the trustee is directed by a participant on voting or tendering plan stock than when the trustee is directed by corporate officers."[96] For example, in a 1994 advisory opinion, the DOL took the position with respect to allocated shares that the trustee remains responsible for determining whether a violation of ERISA would occur if the participant's directions were followed.[97]

The DOL provided more specific guidance about the nature of a directed trustee's duties in such circumstances in the "Labor Department Guidance on Pass-Through Voting Provisions in Collectively Bargained Employee Stock Ownership Plans."[98] In that guidance, the DOL dealt with a directed trustee's role where an employee stock ownership plan (ESOP) granted the participants the authority to direct the trustee regarding the tendering of stock or proxy voting of stock allocated to their own accounts, thus rendering the participants fiduciaries for the limited purpose of giving such directions. The guidance states that the trustee can satisfy ERISA Section 403(a)(1) and assure that a participant's instructions are proper and not contrary to ERISA and the plan if it follows procedures to ensure that the eligible individual account plan's provisions are fairly implemented, that the directing participant has not been subject to coercion or undue pressure in its decision, that the necessary information was provided to the participant, and that clearly false or misleading information that may have been distributed by other parties is corrected.

Furthermore, the fact that the named fiduciary participant issues such a direction with respect to a tender offer or proxy vote related to stock in his or her individual account "does not diminish the trustee's duty to diligently investigate and evaluate the merits of the course of action required by the plan document to determine that the

instructions are consistent with Titles I and IV [of ERISA]."[99] Courts have also distinguished the treatment of allocated and unallocated ESOP shares. With respect to unallocated shares, participants cannot be treated as named fiduciaries if they are not notified.[100] It is impermissible to apply participant directions for allocated shares to unallocated shares, because present participants cannot make decisions for future participants.[101]

NOTES

1. "ERISA did not create the directed trustee structure, although the directed trustee terminology was novel. The common law of trusts had long allowed the settlor to grant a person other than the trustee (even the settlor himself) the power to control the trustee's actions. However, while directed trusts were a permissible common law structure, based on reported cases, they were rare prior to 1930." See Elis J. Freedman, "Trusts: Liability of a Trustee Where Control Over His Acts is Vested in Another." 28 Cornell Law Qtly. 239(1943). Patricia Wick Hatamyar, "See No Evil: The Role of the Directed Trustee under ERISA," 64 Tenn. L. Rev. 1,38 (1996) (Hereinafter Hatamyar, See No Evil). See also, Restatement (Second) of Trusts Section 185, comment(e); George G. Bogert and George T. Bogert, "The Law of Trusts and Trustees," Section 551 at 6(1980); Austin Scott and William F. Fratcher, "The Law of Trusts," Section 185(4th Edit. 1987). Cf. In re Enron Corp. Securities, Derivative and ERISA Litigation, 284 F. Supp. 2d 511(S.D. Tex. 2003) (hereinafter Enron ERISA Litigation) (referencing "the common law roots of the directed trustee concept," and also discussing Restatement (Second) of Trusts Section 185 and Scott's commentary with respect to same). However, as noted by Hatamyar, "The burgeoning law of ERISA directed trustees . . . contains many departures from the common law of trusts," supra, at 6. She listed three ways in which ERISA's provisions differed from trust law. First, Section 410 of ERISA eliminated exculpatory provisions, which was a common feature of testamentary trusts. Second, at common law, the settlor of a trust could authorize a trustee investment that the law otherwise disallowed. Third, the common law of trusts permitted self-dealing by a fiduciary with the knowledge and consent of the beneficiary, so long as the beneficiary was not acting in a fiduciary capacity. See Hatamyar, See No Evil, supra, at. 37. For a detailed discussion of the treatment of directed trusts under Restatement (Second) of Trusts and Restatement (Third) of Trusts, see Jeffrey Schoenblum, "Directed Trustees and the Conflict of Laws," 97 Tulane Law Review 957, 977-983 (2023).

2. David L. Heald and Joseph P. Mulhern III, "Directed Trustee Liability under ERISA," 9 Loyola Univ. Chic. Law Jrnl. 617 (2015) (hereinafter Heald & Mulhern III, Directed Trustee Liability).

3. In re: Worldcom ERISA Litigation, 354 F. Supp. 2d 423, 441 (S.D.N.Y. 2005); In re: Touch America Holdings, Inc., ERISA Litigation, 2006 WL 7137416 (D. Mont. June 15, 2006); Wright v. Oregon Metallurgical Corp., 360 F. 3d 1090, 1102-1193 (9th Cir. 2004).

4. 29 U.S.C. §1103(a).

5. The named fiduciary terminology did not exist at common law. The closest pre-ERISA analogue was what the Restatement calls a person with "powers to control the actions of a trustee." Restatement (Second) of Trusts Section 185, discussed at Hatamyar, See No Evil, supra, n. 1 at 12. See also, Enron ERISA Litigation, supra, n. 1.

(The common law uses different terminology than ERISA to describe the directed trustee/ directing named fiduciary relationship.).

6. In In re: General Motors ERISA Litigation, 2006 WL 897444, 37 EBC 1951 (E.D. Mich. April 6, 2006), the district court held that it would be possible for a party to be both an investment manager and a directed trustee.

7. Arguably these are not the only circumstances under which a trustee would not be required to follow a direction or instruction. Under trust law, capricious trust purposes need not be followed. As illustrations of capricious trust provisions, Restatement (Third) of Trusts, Section 47, comment (e) provides that "it is capricious to provide that money shall be thrown into the sea; that a field shall be sowed with salt; that a house should be boarded up and remain unoccupied." See also, John Langbein, "Burn the Rembrandt: The Law's Limitations on the Settlor's Powers to Direct Investments," 90 Boston Univ. Law. Rev. 375 (2020).

8. In re: Cardinal Healthcare, Inc., ERISA Litigation, 424 F. Supp. 2d 1002 (S.D. Ohio, 2006).

9. In re: Touch America Holdings, supra, n. 3; LaLonde v. Textron, Inc., 369 F. 3d 1, 5 (1st Cir. 2004); Beddall v. State Street Bank & Trust Company, 137 F. 3d 12, 19 (1st Cir. 1998); Hanson v. Wilcox Veterinary Clinic PLLC, 2022 WL 5336207 (E.D. Tex. July 6, 2022).

10. McCarty v. Holt, 2013 WL 775531, 55 EBC 1204 (D.N.J. Feb. 27, 2013); Longo v. Trojan Horse, Ltd., 2015 WL 7015841 (E.D. N.C. Nov. 12, 2015) (plan document and trust agreement established that directed trustee was a fiduciary with respect to collecting employee contributions). Beauchem v. Rockford Products Corp., 2003 WL 1562561(N.D. Ill. March 24, 2003) (a directed trustee does not have a fiduciary obligation to recoup losses suffered by a plan, obtain an independent appraisal or negotiate the terms of a stock because the plan documents do not vest the directed trustee with the authority or responsibility to engage in these transactions). Moench v. Robertson, 62 F. 3d 553, 571 (3d Cir. 1995), cert. den. 116 S. Ct. 917 (1996); Renfro v. Unisys Corp., 671 F. 3d 314, 323 (3d Cir. 2011); In re RCN Litigation, 2006 WL 753149, 2006 U.S. Dist. LEXIS 12929 (D.N.J. March 21, 2006). Cf. Narda, Inc. v. Rhode Island Hospital Trust National Bank, 744 F. Supp. 685, 12 EBC 2551 (D. Md. 1990) (trustee's duties are delineated by the trust instrument to the extent not inconsistent with ERISA); Sinai Hospital of Baltimore v. Baltimore National Benefit Fund for Hospital and Health Care Employees, 697 F. 2d 562, 566 (4th Cir. 1982) ("There is no firmer principle in the common law of trusts than requiring a trustee to act only in accordance with the terms of the trust."). Consistent with those general principles, ERISA does not impose Good Samaritan liability, and consequently a "financial institution cannot be deemed to have volunteered itself as a fiduciary simply because it undertook a responsibility that exceeds its official mandate.") F.W. Webb Co. v. State Street Bank & Trust Co., 49 EBC 2121, 2010 WL 3219284 at *9 (S.D.N.Y. August 12, 2010), quoting Biddell v. State Street Bank & Trust Co., supra, n. 9 at 21.

11. In re: Worldcom, Inc. ERISA Litigation, supra, n. 3. See also Harley v. New York Bank Mellon, 2017 WL 78901 at *20 (S.D.N.Y. January 9, 2017) ("The fiduciary duties of a directed trustee are limited by statute.").

12. American Continental Corporation/Lincoln Savings and Loan Association Litigation, 794 F. Supp. 1424, CCH Fed., Sec. Rptr., (D. Ariz. 1992). See also, DiFelice v. U.S. Airways, 497 F. 3d 410, 417 (4th Cir. 2007) (A directed trustee is not responsible for "the proper management, administration of plan assets; the maintenance of proper

records; the disclosure of specific information [o] the avoidance of conflicts of interest."); Martone Construction Management, Inc. v. Thomas A. Barnett, Inc., 2023 WL 7489951 (D. Md. Nov. 13, 2023).

13. Herman v. Nationsbank Trust Co., 126 F. 3d 1354, 1371 (11th Cir. 1997).

14. In DiFelice v. U.S. Airways, 397 F. Supp. 2d 735,748 (E.D .Va. 2005), the district court observed that "properly read, 403(a) includes no such implicit duty of prudence," and "to conclude otherwise would effectively eviscerate 403(a) by eliminating any distinction between the duty of a directed trustee under 403(a) and the duty of the ERISA named fiduciary with investment authority who has the duty of ordinary care and prudence prescribed by 404(a)." The concern of the DiFelice court was that imposing a duty of prudence upon a directed trustee could lead to second-guessing and unnecessary litigation. Id. at 747. See also, In re: Cardinal Health, Inc. ERISA Litigation, supra, n. 8. In Field Assistance Bulletin (FAB) 2004-03, the DOL made the arguably inconsistent statements that a directed trustee has a duty of prudence, even if a directed trustee has no "direct obligation to determine the prudence" of an investment or investment strategy.

15. F.W. Webb v. State Stret Bank and Trust Co., supra, n. 10.

16. In re: Lehman Bros. Securities and ERISA Litigation, 2012 WL 6021097 (S.D.N.Y. Dec. 4, 2012); Harley v. Bank of New York Mellon, supra, n. 11; F.W. Webb v. State Street Bank and Trust Company, supra, n. 10; Gernandt v. Sandridge Energy, Inc., 2017 WL 3219490, (W.D. Okla. July 28, 2017).

17. McCarty v. Holt, supra, n. 10; Srein v. Frankford Trust Co., 323 F. 3d 214, 222 (3d Cir. 2003); Smith v. Provident Bank, 170 F. 3d 609 (6th Cir. 1999).

18. Wells Fargo Bank v. Bourne, Inc., 860 F. Supp. 709, 716 (N.D. Cal. 1994). See also, Maniace v. Commerce Bank, 40 F. 3d 264, 268, 18 EBC 2585 (8th Cir. 1994) ("The obligations of a directed trustee are something less than those owed by typical fiduciaries."), citing Ershick v. United Missouri Bank, 948 F. 2d 660, 665 (10th Cir. 1991).

19. In re: Enron ERISA Litigation, supra, n. 1.

20. FAB 2004-03 and Harley v. The Bank of New York, supra, n. 16.

21. Id. and Gernandt v. Sandridge Energy, Inc., supra n. 16. Cf. When the Moench presumption was in effect, for a directed trustee there was a "lesser degree of judicial scrutiny." Kirschenbaum v. Reliant Energy, Inc., 526 F. 3d 243 (5th Cir. 2008).

22. Moench v. Robertson, supra, n. 10; Renfro v. Unisys Corp., supra, n. 10; In re: RCN Litigation, supra, n. 10. Cf. Perez v. Chimes District of Columbia, Inc., 2016 WL 6124679 (D. Md. Oct. 20, 2016) (where a defendant knows that her action was inconsistent with ERISA, she was "not immunized from liability by virtue of her position as a directed trustee").

23. A directed trustee can be held liable as an ERIA fiduciary where it either fails to follow proper directions or complies with directions that are improper. Perez v. Chimes District of Columbia, Inc., supra, n. 22; Martone Construction Co. v. Thomas A Barrett, supra, n. 12; In re Lehman Bros. Securities and ERISA Litigation, supra, n. 15. Note, however, that a court will often not analyze whether a direction was proper. See, for example, Hensiek v. Board of Directors of Casino Queen Holding Co., Inc., 2024 WL 1345641 (S.D. Ill. March 29, 2024).

24. Wright v. Orefon Metallurgical Corp., supra, n. 3 (directed trustee can only be held liable for following a plan administrator's instructions if the instructions were contrary to the terms of the plan); In re: Parsons v. Anheuser- Busch Companies, 2011 WL

13176238 (M.D. Fla. Jan. 12, 2011) (denying defendant's motion to dismiss, because the specific direction may have violated the plan's terms).

25. In re: Sprint Corp. ERISA Litigation, 388 F. Supp. 2d 1207, 1235 (D. Kan. 2004); In re: Lehman Bros Securities and ERISA Litigation, supa, n. 16; J.P. Morgan Chase & Co. ERISA Litigation, 2016 WL 110521 (S.D.N.Y. January 8, 2016); In re: Delphi Corporation Securities, Derivative, and ERISA Litigation, 602 F. Supp. 2d 810 (E.D. Mich. 2009); Chesemore v. Alliance Holdings, 770 F. Supp. 2d 950, 50 EBC 2781 (W.D. Wisc. 2011); In re: Worldcom, Inc. ERISA Litigation, supra, n. 3.

26. A plaintiff cannot rely upon conclusory allegation of the knowledge of a directed trustee to establish liability. See In re: McKesson HBOC, Inc. ERISA Litigation, 2002 WL 31431588, 2002 U.S. Dist. LEXIS 19473 (N.D. Cal. Sept. 30, 2002). See also, Newton v. Van Otterloo, 756 F. Supp. 1121 (N.D. Ind. 1991). (Because the custodial trustee could not have known of the committee's breach of fiduciary duty, it was bound to follow it).

27. See Solis v. Webb, 931 F. Supp. 2d 936, 951 (N.D. Cal. 2012) (Ruling that a complaint presented a valid cause of action against a plan's directed trustee, even though it followed the fiduciary's direction to purchase the plan sponsor's stock, because the directed trustee knew that carrying out the direction would cause the ESOP to pay more than adequate consideration for the stock in violation of ERISA and the plan document).

28. Dolins v. Continental Cas. Co., 2017 WL 3581143 at * 3, (N.D. Ill. Aug. 18, 2017) (following a direction to cancel a contract was plainly imprudent); Hurtado v. Rainbow Disposal Co., Inc., 2018 WL 3372752 (C.D. Cal. July 9, 2018) ("A trustee always has discretion to reject a transaction that would be contrary to ERISA."); Chesemore v. Alliance Holdings, supra, n. 25; Summers v. State Street Bank and Trust Company, 453 F. 3d 404, 406 (7th Cir. 2006) (a directed trustee can disobey a named fiduciary's directions when it is plain they are imprudent); Fleming v. Rollins, 2023 WL 2170815 (N.D. Ga. Jan. 30, 2023) (as a directed trustee, PB&T was "a fiduciary with an obligation to act prudently by rejecting directions contrary to the plan or ERISA").

29. Gedek v. Perez, 66 F. Supp. 3d 368 (W.D.N.Y. 2014); Pamela Perdue, Qualified Pension and Profit-Sharing Plans, Section 3.04 ("Both the courts and the DOL have struggled to define the actual scope of a directed trustee's responsibilities and potential liabilities"). Cf. SEC No Action letter, Emeritus Consortium for Retiree Health Solutions (Sept 3, 2009) ("The liability of a directed trustee under ERISA is an unsettled area of law. . . . Courts have taken a variety of positions on the fiduciary status of a directed trustee.").

30. Colleen E. Medill, "Law of Directed Trustees under ERISA: A Proposed Blueprint for the Federal Courts," 61 Mo. Law. Rev. 825, 831 (1996) (hereinafter, Medill, Law of Directed Trustees).

31. Whether a directed trustee is an ERISA fiduciary is relevant for purposes of ERISA Sections 404 (fiduciary duties), 405 (co-fiduciary liability); 406(a) and (b) (prohibited transaction); 409 (liability); and 502 (standing to maintain a civil action). As to whether a directed trustee can cause a plan to enter into a prohibited transaction, the question is whether the directed trustee played a discretionary role in bringing it about. Chesemore v. Alliance Holdings, supra, n. 25, and Hurtado v. Rainbow Disposal Co., Inc., supra, n. 28. Some courts, as was the initial position of the DOL, start with the premise that a trustee is necessarily and inherently a fiduciary. Cf. Bremer Trust, NA v. Quality Ingredients Corp., 2015 WL 9412969 (D. Minn. Oct. 30, 2015) (directed trustee had standing as a fiduciary to bring an action under ERISA Section 502) and In re: Touch America Holdings, Inc. ERISA Litigation, supra, n. 3 ("Directed trustees

are ERISA fiduciaries."). Other courts, however, focus upon the functional definition of fiduciary as described in ERISA Section 3(21) to determine whether a directed trustee is a fiduciary. See, Ravarino v. Voya Financial, Inc., 2023 WL 3981280 (D. Conn. June 13, 2023) (directed trustee exercised no discretion so it was not a fiduciary). Sherrill v. Federal Mogul Corp. Retirement Program Committee, 413 F. Supp. 2d 842, 36 EBC 2964 (E.D. Mich. 2006) (directed trustee is not a fiduciary to the extent it does not control the management or disposition of plan assets). In the Enron ERISA Litigation, supra, n. 1, the district court observed that "Courts have started from different assumptions and focused on different issues. Some, without considering the question, have assumed that a directed trustee, acting at the direction of a fiduciary authorized by the plan to exercise control over plan management or assets, is still a fiduciary, but is liable only where he knows of a breach of fiduciary obligations by the named fiduciaries under 404, while other courts analyze the issue of fiduciary duty based on the functional statutory definition under 3(21)(A),29 USC 1002(21)(A), on the language of the plan and trust agreement, and on the facts in the particular case." Some courts have stated that if a plan and trust designate a party as a directed trustee, that designation exempts the directed trustee from fiduciary status. See Kling v. Fidelity Management Trust Co., 270 F. Supp. 2d 121 (D. Mass. 2003) and LaLonde v. Textron, supra, n. 9.

32. Hatamyar, See No Evil, supra, n. 1, p.4.

33. Supra, n. 1.

34. The generally applicable rule under ERISA Section 3(21) that ERISA is not an all or nothing standard applies to directed trustees. See, Dale v. Wells Fargo Bank, N.A., 2005 WL 1119355 (D. Minn. May 6, 2005) ("In other words, a party may be a directed trustee with respect to one task, but a fiduciary with respect to another."). In In re: ERISA Fidelity Fee Litigation, 990 F. 3d 50.2-21 EBC 79045 (1st Cir. 2021), the U.S. Court of Appeals for the First Circuit indicated that "Fidelity does have some fiduciary duties vis-à-vis these plans and their participants," but "Fidelity's fiduciary responsibilities as a directed trustee are distinct from and do not extend to Fidelity's charging of an infrastructure fee." As the U.S. District Court for the Southern District of New York stated more generally in F.W. Webb Company v. State Street Bank & Trust Co., supra, n.10 at *13, "Under ERISA . . . a fiduciary is only liable for conduct that falls within the scope of its fiduciary authority."

35. The formulation of the question in this manner reflects the "clear on its face" sentence in the legislative history of ERISA. See, infra, n. 75-82 and accompanying text.

36. Enron ERISA Litigation, supra, n. 1.

37. 16 F. 3d 907(8th Cir.) cert. den. sub nom. Vercoe v. FirsTier Bank, N.A., 513 U.S. 871 (1994).

38. Id. at 911.

39. Scott on Trusts Section 185 at p. 574 (4th Ed. 1987).

40. 16 F. 3d at 912, citing Id. at 575.

41. Id.

42. Id. at 911. For a criticism of the Eighth Circuit's incorporation of the common law of trusts under ERISA Section 403, see Medill, Law of Directed Trustees, supra, n. 30, p. 844.

43. Field assistance bulletins or FABs are written by the Office of Regulations and Interpretations to the Director of Enforcement and Regional Directors to provide guidance in response to questions that have arisen in field operations. FABs may also

include transitory enforcement relief that permits employers, plan officials, service providers and others time to respond to new laws or regulations.

44. Vyas v. Vyas, 2017 WL 4621539, fn. 5 (C.D. Cal. Oct. 13, 2017) (cases in which a plaintiff asserts a breach of fiduciary duty claims against a directed trustee "typically involve the directed trustee's following a plan fiduciary's investment directions."). Cf. Grindstaff v. Green, 946 F. Supp. 540 (E.D. Tenn. 1996), aff'd 133 F. 3d 416 (6th Cir. 1998) (even if there is under certain circumstances a general duty to investigate the merits of a direction, the court would not extend that duty beyond investigative responsibility regarding investments).

45. FAB 2004-03.

46. FAB 2004-03 was not the first time that the DOL had taken this position. See, DOL Reg. §2590.75-8, Q & A D-3 ("A plan administrator or a trustee of a plan must, by the very nature of his position, have 'discretionary authority or discretionary responsibility in the administration' of the plan within the meaning of section 3(21)(A)(iii) of the Act. Persons who hold such positions will therefore be fiduciaries.") Such a conclusion is consistent with Restatement (Second) of Trusts, Section 2, discussed in Enron ERISA Litigation, supra, n. 1 p. 590 ("The employment of a trust structure necessarily invests a trustee with common-law fiduciary responsibilities.") PWBA Letters of August 20, 1997, and April 10, 1998 ("A directed trustee has residual fiduciary responsibility for determining whether a given direction is proper and whether following the direction would result in a violation of ERISA. Thus, it is the view of the Department that a directed trustee will necessarily perform fiduciary functions"); DOL Advisory Opinions 97-15A, fn. 6 (same) and 92-23A, the latter of which is discussed in Enron ERISA Litigation, supra, n. 1, at p. 593. See also, Reed v. Queens Village Committee for Mental Health for J Corp, Inc., 2019 WL 4452386, 2019 EBC 351095 (E.D.N.Y. Sept. 17, 2019) ("Courts in this district have held that a directed trustee is an ERISA fiduciary, and the DOL has advised that a trustee . . . will by definition always be a fiduciary under ERISA as a result of its authority and control over plan assets.") and Dombek v. Solis, 2012 WL 4757832 (N.D. Ill. Oct. 5, 2012) ("Because defendant is a named directed trustee of the WTSC 401(k) Plan, he is a fiduciary by virtue of his position with the plan"). Courts have also regularly held that directed trustees are ERISA fiduciaries. See, Fleming v. Rollins, Inc., supra, n. 28. See also, Corbett v. Marsh McLellan Cos., 2006 WL 734560 (D. Md. Feb. 27, 2006) ("Directed trustees can retain some modicum of fiduciary responsibility with respect to plan investment options."); Zarate v. Bank One Corp., 2006 WL 735095 (D. Md. Feb. 27, 2006) (same); Calderon v. Amvescaps PLC, 2006 WL 735006 (D. Md. Feb. 27, 2006) (same).

47. Supra, n. 1 ("At least some fiduciary status and duties of a directed trustee are preserved, even though the scope of its exclusive authority and discretion to manage and control the assets of the plan has been substantially constricted by the directing named fiduciary's broadened role"). The district court in the Enron ERISA Litigation also stated that "if trust law is applied, as Congress indicated it should be where not inconsistent with ERISA's purpose and language, as long as the trust remains in existence, the trustee retains a legal interest in, and thus some ultimate authority over the plan's assets, which would qualify a trustee to meet the definition of a fiduciary under 3(21)(A)(i)."

48. Supra, n. 3 (While the directed trustee provision serves as a limiting principle, "section 403(a) does not eliminate the fiduciary status or duties that normally adhere to a trustee with responsibility over ERISA assets."). The DOL's FAB also cited First Tier Bank N.A. v. Zeller, supra, n. 36, and Herman v. Nationsbank Trust Co., supra, n. 13.

49. In Enron ERISA Litigation, supra, n. 1, the district court observed that "the Court agrees that the phrase "proper directions is ambiguous because there is no definition of proper other than an implied relationship to the remainder of the provision requiring also in vague language compliance with the plan and with the statute, similarly undefined."

50. FAB 2004-03. Cf. Hatamyar, See No Evil, supra, n. 1, p. 13 ("It is not clear what the requirement that the direction be 'proper' (an undefined term) adds to the requirement that the direction conform to this plan and to ERISA."). Cf. Enron ERISA Litigation, supra, n. 1 ("as has been noted by many, the statute fails to define 'proper'").

51. Supra, n. 14.

52. See, In re: Cardinal Health ERISA Litigation, supra, n. 8; Herman v. NationsBank Trust Co., supra, n. 13; In re: Delphi Securities, Derivative and ERISA Litigation, supra, n. 25.

53. In Harley v. The Bank of New York, supra, n. 16, an officer of Bank of New York, which was acting as a directed trustee in that litigation, testified on deposition that "if indeed they thought the instructions were confusing or a little bit misleading or not exactly filled out properly, then, yes, they should follow up on it."

54. Supra, n. 14, at 748-49. See also, Gernandt v. Sandridge Energy, Inc., supra, n. 16 fn. 8. In Chesemore v. Alliance Holdings, supra, n. 25, the district court indicated that if an independent fiduciary was not a named fiduciary, it was not proper for the directed trustee to follow its direction. Cf. Stanford v. Foamex, L.P., 822 F. Supp. 2d 455 (E.D. Pa. 2011) (Where there is an ambiguity as to who issued the direction, "the question of whether [the directed trustee] breached its duty by following directions from a person other than the named fiduciary cannot be resolved on summary judgment.").

55. Supra, n. 14. at 749.

56. The case law is in accord with the conclusion that a directed trustee cannot act on a direction that the directed trustee knows or should know is inconsistent with the terms of the plan or contrary to ERISA. See, In re: Worldcom, Inc. ERISA Litigation, supra, n. 3 at 445; F.W. Webb Co. v. State Street Bank & Trust Co., supra, n. 10 (directed trustee has a duty "to inquire into any investment instruction it knew or should have known was imprudent, contrary to ERISA, or contrary to the terms of the plan."); In re: Sprint Corp. ERISA Litigation, supra, n. 24; Losardo General Contractors, Inc. v. Fifth Third Bank, 2012 WL 13103324 (E.D.N.Y. March 23, 2012); In re: Touch America Holdings, Inc. ERISA Litigation, supra, n. 3; Afridi, M.D. v. National City Bank, 509 F. Supp. 2d 655 (N.D. Ohio 2007). In re: Enron ERISA Litigation, supra n. 1 at 587 (ERISA Section 403(a) maintains the "fiduciary obligations of a directed trustee to question and investigate where he has some reason to know that the directions he has been given is inconsistent with the plan and/or the statute.").

57. FAB 2004-03.

58. Id. Since in this portion of FAB 2004-03 the DOL does not employ the knows or ought to know construct, presumably the directed trustee must have actual knowledge that the representation is false.

59. Id. See also, Ershick v. United Missouri Bank of Kansas City, N.A., 12 EBC 2323, 1990 WL 126929 (D. Kan. Aug. 28, 1990), aff'd 948 F. 2d 660 (10th Cir. 1991) ("As a directed trustee of an ESOP, the Bank was not required to weigh the merits of an investment in employer stock against all other available investment vehicles each time the plan administrator directed the acquisition or retention of employer stock."); Harley v. The Bank of New York Mellon, supra, n. 16 ("Courts therefore

consistently hold that a directed trustee has no obligation to evaluate the financial merits of a named fiduciary's investment directives, except in extremely limited circumstances."); In re: Lehman Bros., supra, n. 16 (directed trustee has no obligation to duplicate or second guess the work of plan fiduciaries that have discretionary authority); In re: Worldcom, Inc. ERISA Litigation, supra, n. 3 ("A directed trustee has no duty to investigate the wisdom of those [investment] choices or any obligation to render advice regarding those choices."); Springate v. Weighmasters Murphy, Inc. Money Purchase Pension Plan, 217 F. Supp. 2d 1007 (C.D. Cal. 2002). (directed trustee does not have the power to determine where plan assets should be invested and does not have a fiduciary duty to review the appropriateness of plan investments). DiFelice v. U.S. Airways, supra, n. 14 at 751 and 747. ("A directed trustee under 403(a) has no duty to assess the merits of a named fiduciary's direction and to reject that direction if, in the exercise of the directed trustee's independent judgment, the direction is imprudent"). (Directed trustees should not be held to any duty of prudence because to do so would "invite wasteful disputes and litigation between named fiduciaries and directed trustees over the wisdom of each direction.").

60. Supra, n. 13.

61. Id. at 1361-62, 1371.

62. Supra, n. 25.

63. Austin W. Scott and William F. Fratcher, The Law of Trusts, Section 185 at 574 (4th ed. 1997).

64. See also, In re: Touch America Holdings, supra, n. 3.

65. FAB 2004-03. The DOL indicated that generally the knowledge of non-public information by one part of an organization would not be imputed to another part of the organization, such as the personnel performing directed trustee services, where the organization maintains procedures designed to prevent the illegal disclosure of such information under securities, banking, or other law. However, if despite such procedures a directed trustee has actual knowledge of material non-public information, it must take the same action as discussed, supra. With respect to non-public information, the district court in F. W. Webb, supra, n. 10, concluded that typically a directed trustee is only chargeable with knowledge that an investment instruction is imprudent "where the trustee possesses nonpublic information that a company's financial statements are false.")

66. Id. See also, In re: Touch America Holdings, Inc. ERISA Litigation, supra, n. 3 (A directed trustee has responsibility for "questioning investment decisions by a named fiduciary if reliable public information that is known or should have been known calls into question the company's short term viability as a going concern.") See also, In re: Worldcom ERISA Litigation, supra, n. 3 (typically a directed trustee is only chargeable with knowledge that an investment instruction is imprudent "where it possesses public information showing with near certainty that the company is on the breach of collapse"). For an illustration of one of those "limited extraordinary" circumstances, see Gedez v. Perez, supra, n. 29 ("Public information allegedly made it obvious to all but the willfully blind that Kodak was headed towards bankruptcy. Assuming the truth of these allegations, plaintiffs have at least presented a plausible claim that Mellon should at some point have refused to follow the Kodak defendants' directions to continue investing in Kodak stock, or at least questioned the wisdom of the Kodak defendants' directive to maintain the status quo concerning the purchase of company securities.").

67. In footnote 4 to FAB 2004-03, the DOL clarified that not all 8-K filings regarding a company would trigger a duty on the part of a directed trustee to question a direction to purchase or hold securities of that company. "Only those relatively few 8-Ks that call into serious question a company's ongoing viability may trigger a duty on the part of the directed trustee to take some action." Id. In footnote 7 of FAB 2004-03, the DOL clarified that nothing in the text of the FAB should be read to suggest "that a directed trustee would have a heightened duty whenever a regulatory body opens an investigation of a company whose securities are the subject of a direction, merely based on the bare fact of that allegation."

68. See Roe v. Arch Coal, Inc., 2017 WL 3333928 (E.D. Mo. Aug. 4, 2017), citing In re: Avon Products, Inc. Securities Litigation, 2009 WL 848083 (S.D.N.Y. March 3, 2009) (A formal bankruptcy filing is the proper trigger for a duty of inquiry by the plan fiduciary. Neither the public acknowledgment of the possibility of bankruptcy nor the hiring of bankruptcy counsel are sufficient to trigger the trustee's duty to question the prudence of the named fiduciary's direction.).

69. FAB 2004-03. In Summers v. State Street Bank & Trust Co., supra, n. 28, Circuit Judge Posner criticized the DOL's position as "not an administrable standard.; note the hedge in 'may' and the fact that selling when bankruptcy is declared will almost certainly be too late." Id. at 410.

70. In re: Worldcom ERISA Litigation, supra, n. 3; LaLonde v. Textron Corp., supra, n. 9.

71. Id.

72. The co-fiduciary rules under ERISA Section 405 are similar to and likely based upon the common law of trust principles, which are set forth in Sections 184 and 224 of Restatement (Second) of Trusts. Where there were one or more co-trustees, each trustee had a duty to use reasonable care to prevent a co-trustee from committing a breach of duty. Section 224 provides that: "a trustee is liable to the beneficiary if he (a) participates in a breach of trust committed by his co-trustees or (b) improperly delegates the administration of the trust to his co-trustee, or (c) approves or acquiesces in or conceals a breach of trust committed by his co-fiduciary (d) by his failure to exercise reasonable care in his administration of the trust has enabled the co-trustee to commit a breach of trust; (e) neglects to take proper steps to compel his co-trustee to redress a breach of trust."

73. There is a third circumstance in which a trustee can have fiduciary liability under ERISA, i.e., if by his failure to comply with 404(a)(1) in the administration of his or her specific responsibilities which give rise to his or her status as a fiduciary, he or she has enabled such other fiduciary to commit a breach. It is not clear if the DOL's decision not to address ERISA Section 405(a)(2) in FAB 2004-01 was based on its view that a directed trustee does not have obligations to comply with ERISA Section 404(a)(1).

74. The DOL did not disclose what knowledge means in this context. However, a majority of the courts that have considered this issue have concluded that knowledge for purposes of ERISA Section 405(a)(3) means actual knowledge. See, for example, Donovan v. Cunningham, 716 F. 2d 1455 (5th Cir. 1983); Renfro v. Unisys Corp, supra, n. 10); In re: Sprint Corp. ERISA Litigation, supra, n. 24; Silverman v. Mutual Benefit Life Ins. Co., 138 F. 3d 98 (2d Cir. 1998); Ellis v. Rycenza Homes, Inc., 484 F. Supp. 2d 694 (W.D. Mich. 2007); Pizzella v. Vinoskey, 409 F. Supp. 3d 473 (W.D. Va. 2019); Harris v. Koening, 602 F. Supp. 2d 39 (D.D.C. March 12, 2009); and Zavale v. Kruse Western, 562 F. Supp. 3d 1059 (E.D. Cal. 2021). Cf. DOL Advisory Opinion 77/60/61A and DOL Reg. ¶2509.75-5.

75. See Maniace v. Commerce Bank, supra, n. 18, the U.S. Court of Appeals for the Eighth Circuit held that when a fiduciary duty is allocated by an ERISA plan to the plan sponsor rather than to the directed trustee, the directed trustee retains a fiduciary duty to make reasonable efforts to remedy a breach of fiduciary duty by the plan sponsor if the trustee is aware of the breach. In FirsTier Bank v. Zeller, supra, n. 37, the Eighth Circuit had previously stated that a directed trustee is not relieved of a fiduciary duty to remedy known breaches of duty by other fiduciaries. Cf. Beauchem v. Rockford Products Corp., supra, n. 10 (directed trustee does not have a fiduciary duty to recoup losses suffered by a plan, obtain an independent appraisal or negotiate the terms of a stock because the plan documents do not vest the directed trustee with the authority or responsibility to engage in these transactions).

76. In an amicus brief filed by the American Bankers Association in the Enron ERISA Litigation, supra, n. 1, the Association maintained that the banking and trust industry had relied upon the facial compliance standard since ERISA's enactment in 1974.

77. Hatamyar, See No Evil, p. 30 ("The standard that a trustee must follow the named fiduciary's directions 'unless it is clear on their face' that they are prohibited by ERISA, or the plan documents is so inherently imprecise as to be almost useless."). For a contrary view supporting the clear on its face standard, see Medill, Law of Directed Trustees, supra n. 30.

78. H.R. Conf. Report No. 93-1280 (1973), reprinted in 1974 U.S.C.C.A.N. 5038, 5079.

79. In addition to a detailed rejection of the Association's position in the text of the decision, the district court commented in fn. 86 of the opinion that: "This court cannot help but note the fact that the legislative history sentence's 'clear on their face' standard is vague and ambiguous, too, with no delineated guidelines defining what effort must be made to determine compliance." See also, Kling v. Fidelity Management Trust Co., supra, n. 31 (Neither the statute nor the case law use the "clear on its face" standard and in any event the proper inquiry is whether a given direction is contrary to ERISA) and Koch v. Dwyer, 1999 WL 528181 (S.D.N.Y. July 22, 1999). Cf. Stanford v. Foamex LP, supra, n. 54 (Not deciding whether "clear on its face" is the appropriate standard) and Harley v. The Bank of New York, supra, n. 16 (directed trustee took appropriate action, where the direction to transfer funds from one account to another was "clear on its face").

80. Supra, n. 1, citing Aviall Services, Inc. v. Cooper Industries, Inc., 312 F. 3d 677, 684 (5th Cir. 2002). See also, Perrone v. General Motors Acceptance Corp., 232 Fed. 3d 433, 440 (5th Cir. 2000), cert. den. 532 U.S. 971 (2001) (use of legislative history is appropriate only where language is "opaque," "translucent," or ambiguous.).

81. Ibid, citing Shannon v. United States, 512 U.S. 573, 583 (1994) ("We are not aware of any case in which we have given authoritative weight to a single passage of legislative history that is no way anchored in the text of the statute.").

82. Id. at 593.

83. Id. at 595.

84. Cf. Stanford v. Foamex L.P., supra, n. 54 fn. 20 ("While section 403(a) seems to impose on directed trustees a duty to follow the proper directions of the named fiduciary, it is unclear whether a trustee breaches its duties under section 403(a) by following directions from a person other than a named fiduciary or directions that are otherwise contrary to the plan or ERISA or whether such conduct constitutes a breach of the trustee's fiduciary duties under section 404.").

85. 263 F. Supp. 2d 745,762 (S.D.N.Y. 2003).

86. Supra, n. 79.

87. Id.

88. February 1, 2008.

89. See also, Longo v. Trojan Horse, Ltd., supra, n. 10.

90. The duty to enforce valid claims held by a trust has long been considered a trustee responsibility under common law. FAB 2008-01 (collecting authorities). Under ERISA Section 405(c)(1), trustee responsibilities cannot be allocated. ERISA Section 405(c)(3) defines trustee responsibility as "any responsibility provided in the plan's trust agreement (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with 402(c)3)."

91. FAB 2008-01.

92. Id.

93. Id.

94. Id.

95. Supra, n. 37 at 912.

96. See No Evil, supra n. 1, at 33-34.

97. Aug. 19, 1994. See also, Central Trust Co. v. American Avents, Corp., 771 F. Supp. 871, 874-876 (S.D. Ohio 1989) ("Pass through voting of allocated shares is not impermissible per se, but it is inappropriate when the exercise thereof conflicts with fiduciary duties under ERISA."). See also, Reich v. Nationsbank of Georgia, NA, 19 EBC 1345, 1995 U.S. Dist. LEXIS 5328, 1995 WL 316550 (N.D. Ga. March 29, 1995) (When a directed trustee receives no affirmative direction regarding allocated shares, the trustee must take exclusive responsibility for decisions regarding those shares. Code Section 409(c) does not require that the court sanction mirror voting provisions in all instances).

98. 22 BNA Pens. and Benefit Rep. 2249, 2250-51 (Sept. 28, 1995).

99. Id. at 2250. See also, Hatamyar, See No Evil, supra, n. 1 at 18-19 ("Since at least 1984, the DOL's position has been that a participant acts as a limited 'named fiduciary' under Section 403(a)(1), at least with respect to stock allocated to her individual accounts. Accordingly, the DOL now asserts that the trustee which is directed by participants in voting or tendering shares must determine whether following participant directions would result in a violation of ERISA's fiduciary obligations.").

100. Herman v. NationsBank Trust Co., supra, n. 13.

101. Danaher Corp. v. Chicago Pneumatic Tool Co., 635 F. Supp. 246, 250 (S.D.N.Y. 1986); Reich v. Nationsbank of Georgia, supra, n. 97.