

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Matthew T. Zilhaver, Individually and On Behalf of All Others Similarly Situated,	Court File No. 06-2237 JMR/FLN
Plaintiff,	DECLARATION OF STEVE W. GASKINS
vs.	
UnitedHealth Group, Inc., et al.,	
Defendants.	

I, the undersigned, Steve W. Gaskins, do hereby declare under the penalty of perjury pursuant to 28 U.S.C. § 1746 as follows:

1. I am a partner with the law firm of Flynn, Gaskins & Bennett, LLP, 333 South Seventh Street, Suite 2900, Minneapolis, Minnesota 55402, (612) 333-9500, attorneys of record for Defendant William W. McGuire in the above-captioned litigation. I am admitted to, and am in good standing in, the Bars of the State of Minnesota and of this Court. I respectfully submit this declaration in support of the Memorandum of Law of Defendant William W. McGuire in support of his Motion to Dismiss Amended Complaint for Lack of Subject Matter Jurisdiction Under Rule 12(b)(1) and Failure to State a Claim Under Rule 12(b)(6).

2. Attached hereto are true and correct copies of the following documents:

Exhibit A: *Pipefitters Local 636 v. Blue Cross & Blue Shield*, 2007 WL 128773 (6th Cir. 2007).

Exhibit B: *Holdeman v. Devine*, —F.3d—, 2007 WL 102980 (10th Cir. 2007).

Exhibit C: Dep't of Labor, Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8.

Dated: February 6, 2007

s/Steve W. Gaskins
Steve W. Gaskins

EXHIBIT A



Slip Copy

Page 1

Slip Copy, 2007 WL 128773 (C.A.6 (Mich.)), 2007 Fed.App. 0043N
(Cite as: Slip Copy)

Briefs and Other Related Documents

Pipefitters Local 636 v. Blue Cross & Blue Shield of Michigan C.A.6 (Mich.), 2007. This case was not selected for publication in the Federal Reporter. NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

United States Court of Appeals, Sixth Circuit.
PIPEFITTERS LOCAL 636, Trustees of Pipefitters Local 636 Insurance Fund; John R. Green; Charles Inman; John O'Neil; Greg Sievert; E. Thomas Devlin; Gerald Hoover, Plaintiffs-Appellants,
v.
BLUE CROSS & BLUE SHIELD OF MICHIGAN,
Defendant-Appellee.
No. 05-2580.

Jan. 17, 2007.

On Appeal from the United States District Court for the Eastern District of Michigan.

Ronald S. Lederman, Sharon S. Almonrode, Sullivan, Ward, Asher & Patton, Southfield, MI, for Plaintiffs-Appellants.

Francis R. Ortiz, Dickinson, Wright, PLLC, Joseph W. Murray, Blue Cross & Blue Shield of Michigan, Detroit, MI, for Defendant-Appellee.

Before DAUGHTREY and COLE, Circuit Judges, and RESTANI,^{FN*} Judge.

FN* The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

RESTANI, Judge.

*1 Plaintiffs-Appellants Pipefitters Local 636 Insurance Fund, et al. ("Fund") appeal from a judgment of the United States District Court for the Eastern District of Michigan. The district court granted a motion to dismiss in favor of Defendant-Appellee Blue Cross & Blue Shield of Michigan ("BCBSM") on federal claims of breach of fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001, et al., and related claims under Michigan law. The motion to dismiss was granted on the grounds that the complaint did not state adequate claims that BCBSM acted as a fiduciary under ERISA with regard to the actions in question.

On appeal, the Fund argues that BCBSM acted as an ERISA fiduciary with respect to its use of fund assets to pay for an "Other Than Group" ("OTG") subsidy and its refusal to provide claims-related records as requested by the Fund. The district court granted BCBSM's motion to dismiss, holding that the dispute concerns contractual duties under state law rather than fiduciary duties under ERISA.

For the reasons that follow, we conclude that the Fund's complaint sets forth sufficient allegations that BCBSM was acting as a fiduciary in control of fund assets when it assessed and failed to disclose the OTG subsidy fees. As to BCBSM's refusal to release requested claims-related information, however, we conclude that the Fund's complaint does not set forth sufficient allegations to establish a separate basis for fiduciary liability under ERISA. Accordingly, we reverse in part and remand to the district court to further consider BCBSM's status as a fiduciary with respect to the OTG subsidy fee. We affirm the district court's dismissal of the Fund's claims arising from BCBSM's refusal to release the requested claims-related information.

FACTUAL AND PROCEDURAL

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Slip Copy, 2007 WL 128773 (C.A.6 (Mich.)), 2007 Fed.App. 0043N
(Cite as: Slip Copy)

BACKGROUND

The Appellant is a multiemployer trust fund ^{FN1} administered pursuant to ERISA ^{FN2} and the Labor Management Relations Act, 29 U.S.C. § 186, for the purpose of providing health and welfare benefits to its participants and beneficiaries. For several years, the Fund was an insured group customer of BCBSM, purchasing insurance coverage by paying premiums. The Fund converted in June 2002 to a self-funded plan, providing benefits by using fund assets. At that time, the Fund entered into an Administrative Services Contract ("ASC") with BCBSM for services including: claims processing; financial management and reporting; negotiation of participating provider agreements; cost containment initiatives; maintenance of all necessary records; and provision of information through established audit procedures. *See* J.A. at 171-73 (ASC at 3-5).

FN1. The complaint states that the Fund intends to pursue class status on behalf of other similarly situated funds. The district court properly considered a motion to dismiss prior to considering class certification. *See Heckler v. Ringer*, 466 U.S. 602, 610 n. 5 (1984).

FN2. ERISA defines applicable employee welfare benefits plans to include "any plan, fund, or program which ... [is] maintained by an employer or by an employee organization ... for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise ... medical, surgical, or hospital care or benefits." 29 U.S.C. § 1002(1). ERISA also covers employee pension benefit plans. *Id.* § 1002(2)(A).

Under the terms of the ASC, the Fund agreed to pay claims and administrative charges, including amounts billed during the year, hospital prepayments, actual administrative charges and group conversion fee, any late payment charges, statutory and/or contractual interest, and "[a]ny other amounts which are the Fund's responsibility

pursuant to this Contract." *Id.* at 178 (ASC at 10). The ASC also states that "[t]he Provider Network Fee, contingency, and any cost transfer subsidies or surcharges ordered by the State Insurance Commissioner as authorized pursuant to [Michigan law] will be reflected in the hospital claims cost contained in Amounts Billed." *Id.*

*2 From June 2002 to January 2004, BCBSM collected from the Fund an OTG fee ^{FN3} to subsidize coverage for non-group clients. The OTG subsidy was regularly collected from BCBSM's group clients. Self-insured clients, however, were not always required to pay the fee, and the parties dispute whether Michigan law authorized the imposition of OTG subsidy fees on such clients. ^{FN4} In January 2004, BCBSM unilaterally eliminated the OTG subsidy charge to the Fund.

FN3. The parties appear to agree that the OTG subsidy is a type of "cost transfer subsidy."

FN4. The Fund argues that "M.C.L. 550.1221 forbids entities such as [BCBSM] from imposing a cost transfer subsidy/OTG against administrative services clients such as the Plaintiff Fund." Appellant's Br. 8-9. BCBSM asserts that the OTG subsidy "is a charge required by the State Insurance Commissioner to help fund Medigap coverage for senior citizens." Appellee's Br. 5. Neither of these positions has been clearly established.

The Fund alleges that BCBSM breached its fiduciary duties under ERISA by imposing the OTG subsidy from June 2002 to January 2004, and by failing to disclose the fee in its quarterly statements. The Fund also alleges that BCBSM improperly refused to provide claims-related information for evaluation at the Fund's request. In district court, the Fund brought claims against BCBSM for: 1) breach of fiduciary duties under ERISA for imposing and failing to disclose the OTG subsidy fee; 2) breach of fiduciary duties under ERISA for refusing to provide claims-related information; and 3) breach of contract, negligence and

Slip Copy, 2007 WL 128773 (C.A.6 (Mich.)), 2007 Fed.App. 0043N
(Cite as: Slip Copy)

misrepresentation under state law.

BCBSM moved for dismissal pursuant to Rules 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. BCBSM argued that it was not acting as a fiduciary under ERISA when it took the actions in question. The district court granted the motion to dismiss,^{FN5} and the Fund appeals. This court has jurisdiction over a final decision of the district court pursuant to 28 U.S.C. § 1291, and review of a district court's decision on a motion to dismiss is generally *de novo*. See *Simon v. Pfizer Inc.*, 398 F.3d 765, 772 (6th Cir.2005).

FN5. The district court did not specify whether it granted the motion to dismiss under Rule 12(b)(1), Rule 12(b)(6), or both.

DISCUSSION

I. Evaluating ERISA Fiduciary Status

Under ERISA, a third-party administrator such as BCBSM is deemed a fiduciary^{FN6} to the extent that it exercises "discretionary authority or discretionary control respecting management of [a] plan or ... any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A)(i). A fiduciary under ERISA is required to perform its actions with the utmost "care, skill, prudence, and diligence ... [and] in accordance with the documents and instruments governing the plan." *Id.* § 1104(a)(1)(B)-(D).

FN6. ERISA defines "person" and "fiduciary" to include a corporation. See 29 U.S.C. § 1002(9).

ERISA defines "fiduciary" in functional terms with regard to each action in question. See *Hamilton v. Carell*, 243 F.3d 992, 998 (6th Cir.2001). An ERISA fiduciary is permitted to make business decisions in its own interest, so long as it is not acting as a fiduciary at that time. See *Hughes*

Aircraft Co. v. Jacobson, 525 U.S. 432, 443-44 (1999). When acting as a fiduciary, however, "ERISA does require ... that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions." *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000). ERISA "does not describe fiduciaries simply as administrators of the plan," but evaluates the fiduciary role "to the extent that [an administrator] acts in such a capacity in relation to the plan." *Id.* (quotation marks and citation omitted).

*3 In order to determine whether ERISA applies to the instant case, the threshold inquiry is whether, when taking each action in question, BCBSM exercised: 1) any authority or control over plan assets, or 2) discretionary authority over plan management. See *Briscoe v. Fine*, 444 F.3d 478, 490-91 (6th Cir.2006).

II. The Fund Sufficiently Alleges that BCBSM Acted as an ERISA Fiduciary With Regard to the Imposition of and Failure to Disclose the OTG Subsidy Fee

The Fund seeks relief on the claim that BCBSM breached a fiduciary duty under ERISA by using fund assets to pay the OTG subsidy fee, and by failing to disclose the fee on its quarterly statements. ERISA §§ 1132(a)(2) and 1109(a) provide a cause of action against a fiduciary "who breaches any of the responsibilities, obligations, or duties imposed ... [for] any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). In reviewing the motion to dismiss, the question is not whether BCBSM actually breached a fiduciary duty under ERISA, but whether the plaintiff has set forth sufficient allegations that such a duty existed and that it was breached. We therefore turn to the issue of whether the Fund has sufficiently alleged that BCBSM acted as a fiduciary with respect to the OTG subsidy fee.

Under ERISA, fiduciary duties arise where an administrator exerts "any authority or control respecting management or disposition of [a fund's] assets." *Id.* § 1002(21)(A). An administrator is deemed a fiduciary when it exercises "practical

Slip Copy, 2007 WL 128773 (C.A.6 (Mich.)), 2007 Fed.App. 0043N
(Cite as: Slip Copy)

control over an ERISA plan's money.' " *Briscoe*, 444 F.3d at 494 (quoting *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1421 (9th Cir.1997)). The administrator's "disposition of funds held in an account over which it exerted control makes it a fiduciary to the extent that it exercised such control." *Id.* at 490. Discretion in the disposition of plan assets is not required; it is "irrelevant whether [the administrator] exercised 'discretion' '[A]ny authority or control' is enough." *Chao v. Day*, 436 F.3d 234, 236 (D.C.Cir.2006).

A fiduciary relationship does not exist, however, where an administrator "performs purely ministerial functions such as processing claims, applying plan eligibility rules, communicating with employees, and calculating benefits." *Baxter v. C.A. Muer Corp.*, 941 F.2d 451, 455 (6th Cir.1991). Fiduciary authority must amount to more than "mere possession, or custody over the plan [']s assets." *Briscoe*, 444 F.3d at 494 (quotations omitted). In addition, fiduciary status under ERISA does not apply where "parties enter into a contract term at arm's length and where the term confers on one party the ... right to retain funds as compensation for services rendered with respect to an ERISA plan." *Seaway Food Town, Inc. v. Med. Mut. of Ohio*, 347 F.3d 610, 619 (6th Cir.2003). Fiduciary status does not extend to an administrator that exercised authority solely over funds that "belonged to [itself] and not to the plan." *Id.* at 618.

*4 Therefore, in order to overcome BCBSM's motion to dismiss, the Fund must set forth sufficient allegations that BCBSM exercised any authority or control over plan assets, and that it performed more than a mere ministerial or contractually compelled function in assessing the OTG subsidy fee. See *Briscoe*, 444 F.3d at 494.

The Fund's complaint sets forth allegations that BCBSM's role in assessing the OTG subsidy fee was an exercise of authority and control over the fund assets, and was not merely ministerial or contractual in nature. The complaint alleges that the monetary assets at issue were "entrusted" to BCBSM, which administered them within its authority as "a fiduciary under ERISA." J.A. at 153-54 (Pl.'s First Am. Compl. ¶ 32, ¶ 44). The

complaint further states that BCBSM "improperly imposed an OTG subsidy on these funds," Pl.'s First Am. Compl. at ¶ 63, and that it "imposed the fee ... claiming it was a mandatory fee." *Id.* at ¶ 42. The complaint alleges that "[t]he ASC contracts prohibit the OTG subsidy [and] BCBSM was not legally required to assess this OTG fee." *Id.* at ¶ 37, ¶ 41. According to the complaint, BCBSM "selectively elected to assess [the] OTG fee," *id.* at ¶ 33, and "in its discretion indicated it would unilaterally stop charging the OTG subsidy [on January 1, 2004]." *Id.* at ¶ 39.

In addition, the ASC attached to the complaint states that BCBSM acquired control over Fund assets by an initial transfer of funds to cover the first two quarters of projected claims and expenses, followed by monthly prepayments in accordance with BCBSM-issued quarterly statements. J.A. at 180 (ASC at 12); see also *id.* at Sched. A. The ASC authorizes BCBSM to allocate and dispose of the transferred funds while the assets are within BCBSM's control. See *id.* at 9-14. In addition, under the terms of the contract, the Fund would be unable to access the transferred funds for a period even beyond the termination of the agreement. *Id.* at 14. Both parties also acknowledge that the OTG subsidy fee was "part of the allocation of the fund's money," J.A. at 280 (Mot. to Dismiss First Am. Compl. Hr'g Tr. 15:17, Sept. 26, 2005), and that BCBSM collected the fee "by keeping a portion of the hospital discount." J.A. at 220 (Letter from Ernie Kafcas, Account Manager, BCBSM, to John M. Shoemaker, Plan Manager, JMS Administrators, Inc. (Jan. 6, 2004)).

In sum, the Fund has alleged in its complaint and attached documents that it entrusted BCBSM with the authority to control and disburse fund assets, and that BCBSM exercised such authority by allocating a portion of the money to itself in the form of the OTG subsidy fee and by failing to disclose this allotment to the Fund. The Fund's complaint also alleges that BCBSM's unilateral decision to discontinue imposing the fee further demonstrates BCBSM's control and authority over the assets' disposition. Therefore, the Fund has set forth sufficient allegations that BCBSM owed a fiduciary duty under ERISA with regard to its

Slip Copy, 2007 WL 128773 (C.A.6 (Mich.)), 2007 Fed.App. 0043N
(Cite as: Slip Copy)

disposal of these assets, and that BCBSM breached its duty by imposing and failing to disclose the fee. As in *Briscoe*, whether BCBSM actually breached any resulting “duty that it owed [under ERISA] is a question that the parties may address on remand.” *Briscoe*, 444 F.3d at 495.

*5 Although BCBSM asserts that this dispute is merely contractual in nature, we find that the Fund's allegations place its OTG fee claims within the scope of ERISA. BCBSM argues that the dispute arises solely from the ASC, and that the meaning of the provision in question should be construed in state court. BCBSM argues specifically that the Fund must have known that the OTG subsidy fees would be assessed because the Fund asked for a waiver of the provision allowing a “Provider Network Fee, contingency, and any cost transfer subsidies or surcharges ordered by the State Insurance Commissioner.” J.A. at 178 (ASC at 10). The Fund responds that the subsidy fee could not have been included in the above provision because there is no evidence that the fee was ordered by the State Commissioner, or even that it was permitted under Michigan law. The Fund's knowledge of the fee, however, would not necessarily negate the exercise of control or authority by BCBSM in its imposition because such knowledge would not alter BCBSM's control over the funds. See *Briscoe*, 444 F.3d at 492 (“The terms of the Agreement may have limited [the administrator's] discretion over the remaining funds, but did not affect its control over those funds.... [T]he Agreement does not alter the fact that [the administrator] acted as a signatory and unilaterally disposed of the remaining funds.” (emphasis omitted)). While this contractual term is relevant to the trial court's determination of the extent of BCBSM's duties under the agreement, there is nothing at this early stage that negates the Fund's assertions set forth in the complaint. The Fund has set forth sufficient allegations that BCBSM acted as a fiduciary under ERISA with respect to the OTG fee.

III. The Fund Fails to Set Forth Sufficient Allegations that BCBSM Acted as an ERISA Fiduciary With Regard to its Refusal to Provide Claims-Related Information

The Fund also asserts a claim against BCBSM on the ground that BCBSM acted as a fiduciary under ERISA by refusing to provide claims information unrelated to the OTG fee and requested outside of contractually agreed-upon audit procedures. J.A. at 156 (Pl.'s First Am. Compl. ¶¶ 50-52). When a third-party administrator exercises authority over non-monetary elements of a plan, ERISA confers fiduciary status only where the administrator exercises “discretionary authority or discretionary control.” 29 U.S.C. § 1002(21)(A)(i).

As indicated previously, discretionary authority under ERISA requires more than a showing of “any authority or control” and requires the exercise of authority to make administrative decisions beyond stringent contractual or policy limitations. See *Briscoe*, 444 F.3d at 490-91. Such discretion is typically found where an administrator has the authority to make benefits determinations or construe the terms of a plan. See *Voyk v. Bhd. of Locomotive Eng'rs*, 198 F.3d 599, 604 (6th Cir.1999); see also *Tregoning v. Am. Cmty. Mut. Ins. Co.*, 12 F.3d 79, 83 (6th Cir.1993). Discretionary authority does not exist where a party merely decides to adhere to an existing contract term, see *Seaway*, 347 F.3d at 619, or makes business decisions on its own behalf, outside of its role as plan administrator. See *Hughes*, 525 U.S. at 443-44.

*6 In the instant case, the Fund's complaint states only that BCBSM was “in possession of the [requested] Claims Records,” J.A. at 155 (Pl.'s First Am. Compl. at ¶ 48), and that it “refused to provide access” to these records when requested. *Id.* at ¶ 51. The complaint does not specify how BCBSM was exercising discretionary authority in deciding not to release the records, and offers only the conclusion that “BCBSM is a fiduciary under ERISA.” *Id.* at ¶ 47. Although the complaint clearly indicates the types of records sought, *id.* at ¶ 49, it does not allege facts to establish that BCBSM was acting as a fiduciary when it decided not to release such information.

Contrary to its own assertions regarding BCBSM's fiduciary status, the Fund's complaint acknowledges that BCBSM refused to provide the requested

Slip Copy, 2007 WL 128773 (C.A.6 (Mich.)), 2007 Fed.App. 0043N
(Cite as: Slip Copy)

information in order to “retain its competitive advantage by limiting the ability of the Fund[] to compare its costs with alternate service providers.” *Id.* at ¶ 52. BCBSM confirmed this reasoning in correspondence to the Fund, stating that “[w]e do not share provider specific charge and payment information with anyone even ... for purposes of claim and benefit analysis. We are not required to and choose not to for legitimate business reasons and we will not do so for the particular purpose of comparing or shopping the price.” J.A. at 227 (Email from Jeffrey Rumley, BCBSM, to Jacqueline Kelly (Apr. 30, 2003, 08:05:00 AM)). These statements are consistent with BCBSM’s position that it was acting in a business capacity, rather than as an ERISA fiduciary, when it decided not to release the information.

In addition, the ASC provides for an established audit procedure for the disclosure and monitoring of relevant claims-related information. The ASC states that “[t]he Fund, at its own expense, shall have the right to audit Enrollee claims ... however, audits will not occur more frequently than once every twelve (12) months and will not include claims from previously audited periods.” J.A. at 174 (ASC at 6). The agreement requires that the Fund provide sixty to ninety days notice of its intent to pursue an audit, and that “[p]rior to any audit, the Fund and BCBSM must mutually agree upon any independent third party auditor ... to perform the audit.” ASC at 7. The case relied upon by the Fund to show a fiduciary obligation to release accounting information on demand is distinguishable from the current dispute, as in that case the applicable agreement was “silent on the right to an audit.” *Libbey-Owens-Ford Co. v. Blue Cross and Blue Shield Mut. of Ohio*, 982 F.2d 1031, 1035 (6th Cir.1993). It is not clear why the Fund sought the claims information at issue outside of the agreed-upon audit procedure; the complaint states only that the Fund “need[s] access to the Claims Records to ... properly monitor costs.” J.A. at 156 (Pl.’s First Am. Compl. at ¶ 50). As mentioned previously, discretionary authority does not arise where a party was simply adhering to a bargained-for contractual provision; in such a case, a claim for breach of fiduciary duty under ERISA would not lie. *See Seaway*, 347 F.3d 619.

*7 In this case, the Fund’s complaint and supporting documents indicate that BCBSM was simply adhering to the contractually agreed-upon audit procedures in refusing to release the information, and that it decided not to release the requested documents in its own business capacity rather than as a fiduciary under ERISA. Therefore, the complaint does not sufficiently allege a claim for relief under ERISA with regard to BCBSM’s decision not to release the specified claims-related information in the manner requested.

CONCLUSION

For the foregoing reasons, we find that the Fund’s complaint sets forth sufficient allegations that BCBSM acted as a fiduciary under ERISA in assessing and failing to disclose the OTG subsidy fees. The Fund’s ERISA claim with respect to the requested claims-related information, however, is not sufficiently set forth by the allegations of the complaint and does not provide a separate basis for federal subject matter jurisdiction.

Accordingly, the district court’s dismissal of the Fund’s claims arising from BCBSM’s refusal to release claims-related information is affirmed. We reverse the district court’s dismissal of the Fund’s claims arising from BCBSM’s imposition of the OTG subsidy fee and remand for further proceedings consistent herewith, including consideration of the status of related state law claims. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

C.A.6 (Mich.),2007.

Pipefitters Local 636 v. Blue Cross & Blue Shield of Michigan
Slip Copy, 2007 WL 128773 (C.A.6 (Mich.)), 2007 Fed.App. 0043N

Briefs and Other Related Documents (Back to top)

- 2006 WL 3319485 (Appellate Brief) Defendant-Appellee’s Final Brief (May 3, 2006)
- 2006 WL 3319484 (Appellate Brief) Plaintiffs-Appellants Pipefitters Local 636 Insurance Fund, et al.’s “final” Reply Brief on

Slip Copy

Page 7

Slip Copy, 2007 WL 128773 (C.A.6 (Mich.)), 2007 Fed.App. 0043N
(Cite as: Slip Copy)

Appeal (Apr. 25, 2006)

- 2006 WL 3319481 (Appellate Brief)
Plaintiffs-Appellants Pipefitters Local 636
Insurance Fund, et al.'s Final Brief on Appeal (Apr.
24, 2006)
- 05-2580 (Docket) (Nov. 25, 2005)

END OF DOCUMENT

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

EXHIBIT B



Westlaw.

--- F.3d ---

Page 1

--- F.3d ---, 2007 WL 102980 (C.A.10 (Utah))
(Cite as: --- F.3d ---)

H

Briefs and Other Related Documents

Holdeman v. Devine C.A.10 (Utah), 2007. Only the Westlaw citation is currently available.

United States Court of Appeals, Tenth Circuit.
Terrence D. HOLDEMAN, Plaintiff-Appellant,
v.

Michael W. DEVINE, Defendant-Appellee,
and Leon Flinders; Medical Group Insurance
Services; James W. Smith; Mary Carol Johnson;
Marian Barnwell; Billie Ann Devine; Gene L.
Jones; Larry Herron, Defendants.

American Association of Retired Persons, Amicus
Curiae.

No. 05-4302.

Jan. 17, 2007.

Background: Representatives of a class of participants in a medical benefit plan governed by the Employee Retirement Income Security Act (ERISA) brought class action against company chief executive officer (CEO), alleging that he breached his fiduciary duties to the plan in various ways. The United States District Court for the District of Utah, Paul Cassell, J., 2005 WL 2893779, entered judgment in favor of CEO, and plan participants appealed.

Holdings: The Court of Appeals, Briscoe, Circuit Judge, held that:

(1) at all times when CEO was deciding whether to allocate company funds to the plan or elsewhere, CEO was acting in his capacity as CEO, and not in his capacity as a plan fiduciary, and

(2) case would be remanded where district court failed in the first instance to consider allegations properly raised below such as whether CEO, as plan fiduciary, considered bringing suit against the sponsoring entities to force adequate funding of the plan.

Affirmed in part, reversed in part, and remanded.

[1] Labor and Employment 231H ↻463

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk460 Who Are Fiduciaries

231Hk463 k. Officers, Directors and Partners. Most Cited Cases

Company's chief executive officer (CEO) did not breach any fiduciary duties to ERISA plan by allegedly failing to allocate adequate funding to the plan and distributing substantial amounts to company principals; at all times when CEO was deciding whether to allocate company funds to the plan or elsewhere, CEO was acting in his capacity as CEO, and not in his capacity as a plan fiduciary. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[2] Federal Courts 170B ↻947

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(L) Determination and Disposition of Cause

170Bk943 Ordering New Trial or Other Proceeding

170Bk947 k. Further Evidence, Findings or Conclusions. Most Cited Cases

Suit in which ERISA plan participants claimed that company's chief executive officer (CEO) breached his fiduciary duties to the plan would be remanded where district court failed in the first instance to consider allegations properly raised below such as whether CEO, as plan fiduciary, considered bringing suit against the sponsoring entities to force adequate funding of the plan. Employee Retirement Income Security Act of 1974, § 515, 29 U.S.C.A. § 1145.

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

--- F.3d ----

Page 2

--- F.3d ----, 2007 WL 102980 (C.A.10 (Utah))
(Cite as: --- F.3d ----)

Brian S. King, (Marcie E. Schaap of King, Burke & Schaap, with him on the briefs), Salt Lake City, Utah, for Plaintiff-Appellant.

Michael W. Homer, (Carl F. Huefner, Jesse C. Trentadue and John D. Luthy with him on the brief) of Suitter Axland, PLLC, Salt Lake City, Utah, for Defendant-Appellee, Michael W. Devine.

Jay E. Sushelsky, (Melvin R. Radowitz), AARP Foundation Litigation, Washington, D.C., filed an amicus curiae brief for the American Association of Retired Persons.

Before KELLY, McKAY, and BRISCOE, Circuit Judges.

BRISCOE, Circuit Judge.

*1 Plaintiffs, the representatives of a class of employees and their dependents who were participants in a medical benefit plan sponsored and funded by their employer and governed by the Employee Retirement Income Security Act of 1974 (ERISA), were left with significant, outstanding medical bills when their employer failed to properly fund the plan and then filed for bankruptcy. Plaintiffs sued defendant Michael Devine, who simultaneously served as an officer of the employer and as a plan fiduciary, alleging he breached his fiduciary duties to the plan in various ways. Following a bench trial, the district court entered judgment in favor of Devine. Plaintiffs now appeal. We exercise jurisdiction pursuant to 28 U.S.C. § 1291, affirm in part, reverse in part, and remand for further proceedings.

I.

A. Factual background

1) The Plaintiffs and the Plan

Plaintiff Terrence D. Holdeman is the class representative of a group of employees, and dependents of those employees, of the State Line Hotel and Silver Smith Casino in Wendover, Nevada. The hotel and casino were owned and operated by State Line Hotel, Inc., and its related entities (State Line).^{FN1}

For many years, State Line had maintained a self-funded employee benefit plan. The funding for this plan came from two sources: contributions made by the covered employees and funds allocated to the plan by State Line. Claims for benefits were paid in the order in which they were received. Claims above a certain dollar amount were covered, to the extent they exceeded the relevant dollar amount, by reinsurance.

Holdeman and the other class members were covered under the State Line & Silver Smith Casino Resorts Employee Benefits Plan (the Plan), which became effective on May 1, 1999. The Plan, like State Line's previous plans, was self-funded. The Summary Plan Description (SPD), as originally drafted, "was inconsistent in its identification of who the plan administrator was." App. at 1370. In particular, the SPD first identified State Line & Silver Smith Casino Resorts as the plan administrator, but later named Michael Devine as the plan administrator and fiduciary of the plan. The third-party administrator for the Plan was identified as MGIS companies. On May 1, 2001, the Plan was amended. The accompanying SPD identified only State Line Hotel, Inc. and Affiliated Entities as the plan administrator and fiduciary. The amended Plan terminated in December of 2001.

2) Defendant Michael Devine

Defendant Michael Devine is the son of Billie Ann Smith Devine, one of the owners of State Line. In late 1997 or early 1998, Devine, who at the time was practicing law in Salt Lake City, was asked by professional advisors of State Line to consider helping out the family business. Devine agreed to do so, and began working as State Line's Executive Vice President and General Counsel in January 1998. Devine later became President of State Line (August 1999), and ultimately President and CEO of State Line (April 2000).

*2 At the time Devine joined State Line in early 1998, State Line was facing financial difficulties resulting from a recent, major expansion project. One of Devine's primary duties thus became working with State Line's lenders to resolve legal

--- F.3d ----

Page 3

--- F.3d ----, 2007 WL 102980 (C.A.10 (Utah))
(Cite as: --- F.3d ----)

issues. For example, Devine was involved in negotiating a forbearance agreement with State Line's lenders in 1998 that allowed State Line to continue to operate and avoid foreclosure. Under the forbearance agreement, State Line had to report monthly to the lenders and was subject to surprise inspections by the lenders' auditors, attorneys, and accountants.

3) Devine's involvement with the Plan

When Devine joined State Line in January 1998, he was aware "there were some funding problems with the [P]lan," but "was not integrally involved in dealing with those problems at that time." App. at 1373. "At some point after joining" State Line, however, Devine became involved in making changes to the Plan. *Id.* For example, he and his managerial staff considered changing to a fully-insured group plan, but concluded that option was too expensive for State Line. Devine and his managerial staff then requested competitive proposals for a new third-party administrator for the Plan, and ultimately chose MGIS as the third-party administrator.^{FN2} Concomitant with selecting MGIS, Devine and State Line implemented a new, self-funded medical benefits plan on May 1, 1999. It is undisputed that, as of May 1, 1999, Devine was considered a fiduciary of the Plan.

When the Plan was first implemented, MGIS "processed all claims and issued all payment checks to providers." *Id.* at 1378. At some point in 2000, "this process changed, and instead of issuing the checks directly to providers, MGIS forwarded the payment checks to State Line for State Line to keep until adequate funding was available, at which point State Line itself would release the checks." *Id.* State Line generally tried to pay the claims on a first-in, first-out basis.

Between May 1, 1999, and April 2000, when he became CEO of State Line, Devine "was vaguely aware of" Plan funding problems and "had been told by one employee ... of a delay in payment." *Id.* at 1375. However, he "did not regularly meet [during this time period] to discuss" these issues. *Id.* Nor did he advise State Line's CEO at that time,

Mac Potter, "that the [P]lan had to be funded before any commercial creditors were paid..." *Id.* According to Devine, "he believed that [State Line] had to pay both and that these responsibilities were competing." *Id.*

In late January 2000, State Line's financial personnel determined that the Plan's unpaid medical claims were \$300,000 greater than previously believed. When all unpaid medical claims were tallied, they totaled approximately \$1.2 million. This determination, in part, led to Devine's appointment as CEO of State Line in April 2000.

After becoming CEO, Devine "began meeting with all of the executive directors," and "[u]nderfunding of the [P]lan became a regular topic of conversation at these meetings, as well as at the meetings of" State Line's Board of Directors, "because the arrearages were [negatively] impact[ing] ... the business and the employees." *Id.* at 1376. Under Devine's direction, State Line "began focusing on growing the 'top line' so that there would be income to pay all expenses-including medical expenses." *Id.* at 1377. As CEO of State Line, Devine generally had no involvement in "deciding the right balance in terms of who would get paid." *Id.* at 1377. Although Devine would "[v]ery occasionally" direct that a particular medical claim be paid in order to prevent the medical provider from cutting off service to State Line employees or refusing to give further discounts, *id.*, State Line's general position, under Devine's leadership, was to "pay first whatever was required to keep the doors open and the companies operating and then turn aggressively to the medical claims." *Id.* at 1378.

*3 During the remainder of 2000, State Line "doubled [its] cash flow which allowed [it] to pay down the arrearages." *Id.* In particular, between April and October of 2000, State Line "bec[a]me much more aggressive in paying the [unpaid] medical claims," and "managed to 'zero out' " the plan's liabilities to medical providers. *Id.* at 1376. This "zero balance" status, however, was short-lived. In 2001, State Line experienced a downturn in its business. This, in turn, again led to the underfunding of the Plan and a new backlog of unpaid medical claims which ultimately grew to a

--- F.3d ---

Page 4

--- F.3d ---, 2007 WL 102980 (C.A.10 (Utah))
 (Cite as: --- F.3d ---)

total of approximately \$1 million by December 2001.

Between May 1999 and December 2001, State Line, at Devine's direction, made a number of distributions to its owners "beyond their salaries in a total amount of approximately \$1,245,000.00." *Id.* at 1379. During most of this time period the Plan was underfunded. The distributions were used by the owners for payment of personal federal income taxes on profits from State Line, and estate tax payments for the estate of Anna Smith (which estate consisted solely of State Line). State Line's lenders allegedly "signed off on the[se] distributions" in an attempt to ensure that the owners, who had personally guaranteed some of State Line's loans, "not get cross-wise with the IRS and have enforcement actions brought against them, which could have threatened the continued viability of" State Line. *Id.* at 1379-80.

State Line also made charitable contributions during this time period. The majority of these contributions "represented group discounts and packages, for organizations and charities such as the Elks Club." *Id.* at 1380. These contributions were intended, in part, to promote State Line's business "at a grass roots level...." *Id.*

In addition to "the backlog of medical claims" that existed during this general time period, State Line was also juggling other bills. *Id.* These expenses included monthly gaming taxes (which if not paid would lead to the casino's immediate shutdown), payments on slot machine agreements, bills from food vendors, advertising costs, maintenance costs, payroll, and FICA and payroll taxes.

At some point during this period, MGIS, the third-party administrator of the Plan, reported the plan-funding problems to the Department of Labor (DOL). In February 2001, the DOL began an investigation into the matter. During the course of the DOL's investigation, the DOL informed Devine of its concerns that "he had violated ERISA's duty of loyalty, duty of prudence, and duty to refrain from prohibited transactions...." *Id.* at 1381. Although the DOL ultimately took no formal enforcement action against State Line or Devine, it

continued to monitor State Line.

In July 2001, with State Line's revenues continuing to drop, Devine concluded that State Line would be unable to make its interest payments to its lenders. In an attempt to solve this problem, Devine asked the owners "to lend whatever personal monies they could to State Line so that the loan agreements would not be breached." *Id.* at 1382. "Marian Barnwell could not afford to loan money to State Line, but Billie Ann Devine lent \$200,000 by cashing out her personal 401(k) account," "Mary Carol Johnson also cashed out her personal 401(k) account and lent State Line \$255,393.63," and "Eve Louis Smith, the wife of partner Jim Smith, lent State Line \$460,000 by taking money out of her personal Schwab Investment Account." *Id.* "These monies were used [by State Line] for principal and interest payments." *Id.*

*4 State Line's gambling revenues declined further following the September 11, 2001 terrorist attacks. On November 6, 2001, State Line's PPO network "terminated the discount arrangement it had with MGIS." *Id.* In turn, MGIS sent a letter to Devine on November 8, 2001, "informing him that MGIS was terminating its agreement with State Line." *Id.* at 1382-83. State Line, after receiving MGIS's letter, terminated the Plan effective December 1, 2001. "As of December 1, 2001," State Line "switched to a fully-funded group plan that offered fewer benefits." *Id.* at 1383. On January 10, 2002, State Line, facing foreclosure by its lenders, filed for Chapter 11 bankruptcy protection. In the bankruptcy proceedings, State Line reported that \$970,706.44 "was left outstanding in unpaid medical claims." *Id.*

Included among the unpaid medical claims at the time of State Line's bankruptcy filing were:

- Approximately \$60,000 in medical expenses incurred by plaintiff Terrence Holdeman. Mr. Holdeman's wife worked for State Line as a pit boss from 1999 to 2001, during which time she and her husband were covered under the plan. Mr. Holdeman incurred the medical expenses with the University of Utah that, despite his "repeated calls to State Line and to the third-party administrator," went unpaid by State Line. *Id.* at 1383.
- Approximately \$10,000 to \$15,000 in medical

--- F.3d ---

Page 5

--- F.3d ---, 2007 WL 102980 (C.A.10 (Utah))
 (Cite as: --- F.3d ---)

expenses incurred by Gerald Anderson, an employee of State Line, and his wife. The Andersons ultimately paid these expenses by charging them to their credit cards.

- Approximately \$25,000 in medical expenses incurred by Ruth Ann Wilson, an employee of State Line. Included among these expenses was a \$15,000 prepayment Mrs. Wilson and her husband had to make, using money from an inheritance and their savings account, to obtain needed back surgery for Mr. Wilson.

B. Procedural background

Plaintiff Holdeman filed this action, on behalf of himself and a purported class comprised of former beneficiaries of the Plan, on May 1, 2002. The complaint named as defendants various officers and directors of State Line, including Devine, and asserted claims under ERISA and the Racketeer Influenced and Corrupt Organizations Act (RICO). The district court dismissed the RICO claims and, on December 15, 2003, certified the ERISA claims as a class action. Holdeman and the class subsequently filed an amended complaint asserting ERISA claims against six State Line officers and directors, including Devine.

After discovery, the parties filed cross-motions for summary judgment. The district court granted summary judgment in favor of all defendants, except for Devine. With respect to Devine, the district court concluded that the “the undisputed evidence indicate[d] that [he] was a fiduciary of the Plan,” but that “the following issues remain[ed] for determination: (1) the extent of [his] fiduciary duties to the Plan; and (2) whether he breached his fiduciary duties to the Plan.” App. at 798.

*5 The district court conducted a bench trial on September 6-8, 2005. On October 31, 2005, the district court issued written Findings of Fact and Conclusions of Law. Therein, the district court “conclude[d] that ... Devine did not breach his fiduciary duties to the [P]lan or the plan participants under ERISA.” *Id.* at 1387. Accordingly, the district court entered judgment in favor of Devine. Plaintiff

Holdeman, on behalf of himself and the class, has since filed a notice of appeal.

II.

Standard of review

“In an appeal from a bench trial, we review the district court’s factual findings for clear error and its legal conclusions de novo....” *Keys Youth Servs., Inc. v. City of Olathe*, 248 F.3d 1267, 1274 (10th Cir.2001).

Plaintiffs’ arguments on appeal

In their appeal, plaintiffs argue generally that the district court “erred in ruling that Devine ... did not breach [h]is fiduciary duties.” Apt. Br. at 17. More specifically, plaintiffs argue that Devine “breached fiduciary duties owed to the Class in many ways,” *id.*, including “1) fail[ing] to ensure that the Plan was fully funded, 2) ... fail[ing] to act with complete loyalty to the Class, 3) ... fail[ing] to act prudently in managing and administering the Plan, and 4) with his fiduciary hat on, ... fail[ing] to act in any way to challenge or question the actions of Devine, acting with his CEO hat, in authorizing distributions of over \$1.2 million to the owners of the Sponsoring Entities.” Apt. Br. at 26. Plaintiffs also argue that the district court erred in relying on Devine’s subjective belief that he was doing the best he could to carry out his dual roles as both CEO and fiduciary, and in ruling that all of Devine’s decisions “were business judgments that fall outside the scope of ERISA’s fiduciary duty requirements....” *Id.* at 17-18.

The decision in Luna

The district court rested its decision almost exclusively on our decision in *In re Luna*, 406 F.3d 1192 (10th Cir.2005). Accordingly, we begin by describing, in some detail, the facts and holding in that case. The plaintiffs therein were the trustees of various employee-benefit funds that, pursuant to the

--- F.3d ---

--- F.3d ---, 2007 WL 102980 (C.A.10 (Utah))
(Cite as: --- F.3d ---)

terms of a 1997 collective bargaining agreement (CBA), served the union-represented employees of Luna Steel Erectors, Inc. (Luna Steel), an Oklahoma construction company. Under the terms of the CBA, Luna Steel agreed to submit monthly employer contributions to the funds for the benefit of its employees. In March 1999, Luna Steel's financial condition worsened, and from March until December of 1999, it failed to make the requisite contributions. On December 31, 1999, Luna Steel, at the decision of its directors, ceased operations. Luna Steel's two shareholders, Joyce Luna and her son, Mark Luna, both filed Chapter 7 bankruptcy petitions in August 2000.

In November 2000, the plaintiff trustees filed an adversary proceeding seeking a determination that the Lunas were personally responsible for the unpaid contributions to the funds. The trustees alleged this debt was nondischargeable because the Lunas had committed "fraud or defalcation" while acting in a fiduciary capacity because they "continued to take some income and personal expenses at a time when they should have been making contributions to the [f]unds." *Id.* at 1197-98. In support of this claim, the trustees further argued that the "Lunas were fiduciaries under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), which states, in part, that a fiduciary is one who 'exercises any authority or control respecting management of disposition of [plan] assets.'" *Id.* at 1198 (quoting statute).

*6 The trustees lost in the bankruptcy court and in their appeal to the federal district court. Both of these courts agreed "that while ERISA imposes fiduciary obligations under § 523(a)(4) of the Bankruptcy Code, because unpaid contributions do not constitute 'plan assets,' the Lunas had committed no defalcation and the debt could be discharged in bankruptcy." *Id.* The trustees then appealed to this court.

In addressing the trustees' appeal, we held at the outset that, "[t]o establish ERISA fiduciary status within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), the [t]rustees had to show (1) that the unpaid contributions were plan assets, and (2) that the Lunas exercised authority and control over

the management or disposition of these assets." *Id.*

Addressing these issues in order, we first concluded, contrary to the two lower courts, "that the contractual right to collect unpaid contributions is a plan asset" under ERISA. *Id.* In reaching this conclusion, we acknowledged that "[u]nder ordinary notions of property rights, an ERISA plan does not have a *present interest* in the unpaid contributions until they are actually paid to the plan." *Id.* at 1199 (italics in original). Nonetheless, we held "the plan [does] hold[] a *future interest* in the collection of the contractually-owed contributions." *Id.* (italics in original). Thus, we concluded, "[t]he plain meaning of the term 'asset' includes a chose in action to collect contractually-owed contributions." *Id.* at 1200. In turn, we held that "the district court erred in concluding that the contributions owed by the Lunas to the [f]unds were not plan assets under ERISA." *Id.*

Turning to the second issue, we began by noting that, under ERISA, an individual "may acquire fiduciary status" either by (a) being expressly appointed by the plan as a fiduciary, or (b) by "exercis[ing] the fiduciary functions set forth in ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A)." *Id.* at 1201. These latter functions, we noted, include "a variety of duties commonly performed by fiduciaries, including the providing of investment advice, administrative control over a plan, advising on whom to retain as legal or investment advisors to a plan, and ultimately, how to invest plan assets." *Id.* In sum, we noted, "[o]nce deemed a fiduciary, either by express designation in the plan documents or the assumption of fiduciary obligations (the functional or de facto method), the fiduciary becomes subject to ERISA's statutory duties." *Id.* "These duties," we stated, "'relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest.'" *Id.* (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985)).

Because the Lunas were not named as fiduciaries in the plan at issue, we proceeded to analyze whether the Lunas "ha[d] assumed functional or de facto

--- F.3d ----

Page 7

--- F.3d ----, 2007 WL 102980 (C.A.10 (Utah))
 (Cite as: --- F.3d ----)

fiduciary status....” *Id.* at 1202. In particular, we noted that the critical issue, based upon the facts presented by the parties, was whether the Lunas exercised any authority or control respecting management or disposition of plan assets. *Id.* Addressing this issue, we concluded that “[i]t [wa]s the [t]rustees, not the Lunas, who control[ed] the contractual right to collect unpaid contributions from the Lunas.” *Id.* More specifically, we concluded that “[w]hether to enforce their contractual rights [wa]s entirely up to the [t]rustees; the Lunas, meanwhile, ha[d] no say over whether this right w[ould] be enforced or not.” *Id.*

*7 In concluding that the Lunas had not assumed functional fiduciary status, we also rejected the Ninth Circuit’s view that “an employer automatically becomes a fiduciary of an ERISA plan as soon as it breaches its agreement to make employer contributions.” *Id.* at 1203 (citing *Northern Cal. Retail Clerks Unions & Food Employers Joint Pension Trust Fund v. Jumbo Markets, Inc.*, 906 F.2d 1371, 1372 (9th Cir.1990)). In our view, “ERISA’s text and purpose, the law of trusts, Department of Labor regulatory pronouncements, and case law all lend support to [the] conclusion” that “an employer cannot become an ERISA fiduciary merely because it breaches its contractual obligations to a fund.” *Id.* In the Lunas’ case, we concluded, “[t]he act of failing to make contributions to the [f]unds c[ould not] reasonably be construed,” under ERISA, “as taking part in the ‘management’ or ‘disposition’ of a plan asset.” *Id.* at 1204. Rather, we concluded, “[t]he asset in question ... [wa]s the [t]rustees’ contractual right to collect the unpaid contributions, and the Lunas exercised no control over how the [t]rustees manage[d] or dispose[d] of that asset.” *Id.* In terms of the law of trusts, we continued, “[a] contract to convey property does not give rise to a fiduciary relationship,” *id.* at 1204 (citing *The Restatement (Third) of Trusts* § 5(i) and cmt. i (2001)), and “the relationship of debtor to creditor that results from contract is not fiduciary in nature.” *Id.* (citing *Restatement* § 5(k)). Finally, applying ERISA case law, we concluded “that a delinquent employer contributor is merely a debtor, not a fiduciary.” *Id.* at 1205. In the Lunas’ case, we noted, they “had no duty other than to make monthly contributions, and

no discretion other than to fail to make those required contributions.” *Id.* at 1206. “The mere discretion whether to pay debts owed to an employee benefit plan,” we held, “does not suffice to confer fiduciary status under ERISA.” *Id.*

Finally, and perhaps most importantly for purposes of the instant appeal, we emphasized that “[a]nother essential ingredient in th[e] case [wa]s the fact that the Lunas, as owners of a closely-held corporation, were required to make business decisions with respect to general corporate funds.” *Id.* at 1207. Continuing, we stated:

Such business decisions must not be confused with fiduciary actions. It is well-established that an ERISA fiduciary can “wear two hats,” meaning an individual can be both an employer and a fiduciary. (citation omitted). Therefore, as the Supreme Court has noted, the “threshold question” in an action for breach of fiduciary duty is whether the alleged fiduciary “was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.” *Pegram v. Herdrich*, 530 U.S. 211, 226, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000).

Because virtually every business decision an employer makes can have an adverse impact on an employee benefit plan, (citation omitted), courts must “examine the conduct at issue to determine whether it constitutes management or administration of the plan, giving rise to fiduciary concerns, or merely a business decision that has an effect on an ERISA plan not subject to fiduciary duties.” (citation omitted). This is so even where some of the decisions personally benefitted the employer, such as some of the payments made by the Lunas to themselves for personal expenses. (citation omitted).

*8 Under the circumstances of this case, the Lunas’ decision to use their limited funds to pay other business expenses rather than to make contributions to the [f]unds was a business decision, not a breach of fiduciary duty. (citation omitted). In an attempt to keep the company afloat in the face of deteriorating finances, the Lunas opted to pay expenses such as employee wages, insurance, and equipment leases. The company’s financial condition was so severe, in fact, that Joyce Luna withdrew funds from her IRA to help cover expenses and Mark Luna borrowed money from a

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

--- F.3d ---

Page 8

--- F.3d ---, 2007 WL 102980 (C.A.10 (Utah))
 (Cite as: --- F.3d ---)

local bank for company use. Although the decision to pay expenses rather than make plan contributions had an adverse impact on the [f]unds, we decline to impute fiduciary status to the Lunas based on this fact alone.

Id. at 1207-08.

The district court's application of Luna

The district court, in resolving the instant case, noted that "Devine conceded at trial that he was a fiduciary of the State Line Medical benefits plan at all times relevant to this suit," and thus "the only legal determination left to make [wa]s whether, under the facts as found by the court ..., ... Devine breached any of his fiduciary duties to the plan or the plan participants under ERISA." App. at 1387. Continuing, the district court concluded that "*Luna's* discussion of the analysis to be applied in cases where an individual is both an employer and an ERISA fiduciary [wa]s directly on point with the present case." *Id.* at 1389. Accordingly, the district court stated it would "follow *Luna* and determine whether the actions ... Devine took as an executive and ultimately the CEO of State Line were purely business decisions, not regulated under ERISA, or whether they were decisions taken in his fiduciary capacity under ERISA." *Id.* Doing so, the district court concluded "that all of the actions taken by ... Devine, from the time he joined the companies in 1998, and during the time period relevant to this lawsuit, [we]re properly characterized as business and not fiduciary decisions." *Id.* More specifically, the district court concluded as follows:

- "Failure to fully fund the plan ... was not a result of breach of fiduciary duty to the plan or plan participants, but rather to the pragmatic business decisions ... Devine was forced to make in difficult financial circumstances in order to prevent foreclosure or bankruptcy." *Id.* at 1389.
- "Devine's decisions regarding funding of the plan were ... not 'fiduciary' decisions in any respect, but rather business decisions made to save the companies from bankruptcy—a bankruptcy that would have obviously hurt all the plan participants immediately." *Id.* at 1390.
- "Devine's authorization of distributions to the

owners and of charitable contributions during this time period also constituted business, and not fiduciary, decisions." *Id.*

Plaintiffs' challenges to the conclusions expressly reached by the district court

*9 In their appeal, plaintiffs challenge the conclusions expressly reached by the district court and outlined above. In particular, plaintiffs dispute the district court's conclusion that Devine's decisions regarding how much funding to provide to the plan were purely business decisions that did not implicate his fiduciary duties to the plan. In this regard, plaintiffs argue that "Devine never put on his fiduciary hat to the exclusion of his CEO considerations at any time during the entire 30 months the Plan existed." Aplt. Br. at 32. Plaintiffs further argue that the district court essentially concluded that "what was good for [State Line] was good for the Plan." *Id.* at 30. According to plaintiffs, "the 'business judgment' rule employed by the lower court is the wrong standard." *Id.* Instead, appellants assert, "ERISA's prudent person test at § 1104(a)(1)(B) is the standard against which a fiduciary's actions must be measured." *Id.* Finally, plaintiffs argue that Devine violated the laws of Nevada and Utah when he "declared dividends and distributed over \$1.2 million to his family members at a time when the Sponsoring Entities were losing millions of dollars each year." *Id.* at 37-38. This, plaintiffs argue, constituted a per se violation of his fiduciary duties towards the plan.

The Supreme Court's decision in *Pegram* (cited by us in *Luna*) speaks directly to these issues. The Court noted therein that, "[u]nder ERISA, ... a fiduciary may have financial interests adverse to beneficiaries." 530 U.S. at 225, 120 S.Ct. 2143. For example, the Court noted, "[e]mployers ... can be ERISA fiduciaries and still take actions to the disadvantage of employee beneficiaries, when they act as employers (e.g., firing a beneficiary for reasons unrelated to the ERISA plan)...." *Id.* However, the Court emphasized, ERISA requires "that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making

--- F.3d ----

Page 9

--- F.3d ----, 2007 WL 102980 (C.A.10 (Utah))
 (Cite as: --- F.3d ----)

fiduciary decisions.” *Id.* As a result, the Court noted, “[i]n every case charging breach of ERISA fiduciary duty, ... the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.” *Id.* at 226, 120 S.Ct. 2143.

[1] Applying these principles to the case at hand, we agree with the limited conclusions reached by the district court, all of which regard Devine's alleged failure to allocate adequate funding to the Plan, including his decision to distribute substantial amounts to the principals of State Line. In particular, at all times when Devine was deciding whether to allocate State Line funds to the Plan or elsewhere, it is clear that he was acting in his capacity as CEO of State Line, and not in his capacity as a plan fiduciary. Indeed, Devine did not have any authority, in his role as plan fiduciary, to make decisions regarding State Line's allocation of its assets and revenue. Rather, only in his role as CEO did Devine have authority to make such decisions. Thus, under the principles outlined in *Pegram*, the district court correctly concluded that Devine was “wearing his CEO hat” in making those allocation-of-funding decisions, and in turn did not breach any fiduciary duties to the Plan in doing so.

District court's failure to address certain issues

*10 Plaintiffs also contend that the district court, in its findings of fact and conclusions of law, failed to address certain of their allegations against Devine. Broadly speaking, plaintiffs contend the district court failed to address the fact that Devine “made no independent investigation at all into how he should best manage the Plan and its assets.” *Aplt. Br.* at 29. More specifically, plaintiffs contend that the district court failed to address their allegations that Devine could and should have: (1) resigned as the fiduciary and obtained the appointment of some person or entity who was free from a conflict of interest; (2) resigned as the CEO of State Line; (3) asked the owners to fully fund the Plan; (4) educated the owners about his role as fiduciary and

how it possibly conflicted with his role as CEO of State Line; (5) hired separate, outside counsel for the Plan; (6) reported to the Department of Labor State Line's failure to properly fund the Plan; (7) considered, threatened, and/or sued State Line on behalf of the Plan for the unpaid contributions; (8) sold some property owned by State Line to fund the Plan; (9) terminated the Plan; (10) altered or adjusted existing types and levels of medical benefits; and/or (11) informed the beneficiaries that the Plan was not a reliable source of health care benefits and they might need to make alternative arrangements to obtain medical coverage.

The question that must first be answered is whether plaintiffs adequately asserted these allegations below. Plaintiffs' amended complaint broadly alleged violations of Devine's fiduciary duties towards the Plan. For example, the amended complaint alleged that Devine: “failed to act in a manner required by the Plan terms and ERISA to fund the Plan and allow for payment of the Class members' claims”; failed “to discharge [his] duties with respect to the Plan solely in the interest of the participants and beneficiaries”; failed “to provide complete and timely communications to the Plan participants and beneficiaries and their representatives regarding funding problems for the Plan and the participants' and beneficiaries' eligibility for benefits”; “failed to promptly pursue sources that would allow for recovery of benefits”; and failed to “communicate[] with the Plaintiffs and their representatives completely and truthfully and ha[d] attempted to mislead the Plaintiffs and their representatives and hinder their efforts to obtain information about the status of claims and funding problems for the Plan.”

Plaintiffs' allegations became more specific both before and immediately after trial. In their trial brief, plaintiffs argued, in pertinent part, that “Devine was responsible for managing the assets of the Plan,” and that these duties “included, among other things, the obligation to aggressively pursue the Sponsoring Entities and demand that they live up to their obligation to fully fund the Plan to the extent necessary to pay the Class claims.” *App.* at 780. Plaintiffs stated that “[t]he evidence w[ould] show that the decision about whether, and how

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

--- F.3d ---

Page 10

--- F.3d ---, 2007 WL 102980 (C.A.10 (Utah))
 (Cite as: --- F.3d ---)

aggressively, the contractual right and obligation that existed between the Plan and the Sponsoring Entities would be enforced was entirely up to Devine,” *id.* at 781, and that “Devine’s failure to act by not standing up for the rights of the Class members ... [was an] omission[] that expose[s] him to liability in this case.” *Id.* at 789. In their written “closing argument” brief following trial, plaintiffs argued that Devine violated his fiduciary duties, in pertinent part, by (a) “not hir[ing] separate, outside counsel for the Plan,” *id.* at 1332, (b) “not mak[ing] any attempt to have an individual or entity appointed as the named fiduciary and trustee of the Plan who was removed from the conflicts of interest Devine was experiencing,” *id.*, (c) “never consider[ing] reporting to the Department of Labor the Sponsoring Entities’ failure to fund the Plan,” *id.*, (d) “not recogniz[ing], consider[ing] or threaten[ing] to sue the Sponsoring Entities on behalf of the Plan for the unpaid contributions under 29 U.S.C. § 1145,” *id.* at 1333, and (e) “not ... tell[ing] the Class members about the funding problems of the Plan when MGIS suggested this was necessary and appropriate.” *Id.* at 1334.

*11 In light of these pre- and post-trial allegations and arguments, we conclude that five of the eleven allegations now asserted on appeal by the plaintiffs were properly raised below.^{FN3} The remaining six allegations asserted on appeal by plaintiffs were not, however, properly raised below and thus have been waived. *See Cummings v. Norton*, 393 F.3d 1186, 1190 (10th Cir.2005) (noting “the general rule that issues not raised below are waived on appeal”). These include the allegations that Devine should have: (1) resigned as the CEO of State Line; (2) asked the owners of State Line to fully fund the Plan; (3) educated the owners of State Line about his role as fiduciary and how it possibly conflicted with his role as CEO of State Line; (4) sold some property owned by State Line to fund the Plan; (5) terminated the Plan; and (6) altered or adjusted existing types and level of medical benefits.^{FN4}

Turning to the five allegations that were properly raised by plaintiffs below, it is clear that the district court failed to properly address any of them. To begin with, there is no discussion at all in the district court’s order regarding plaintiffs’ allegations

that Devine should have (1) resigned as the fiduciary and obtained the appointment of a person or entity who was free from a conflict of interest, (2) hired separate, outside counsel for the Plan, or (3) informed the beneficiaries that the Plan was not a reliable source of health care benefits and that they might need to make alternative arrangements to obtain medical coverage.^{FN5} Accordingly, we conclude that the case should be remanded to the district court for a consideration of those allegations in the first instance. *See Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (noting “the general rule ... that a federal appellate court does not consider an issue not passed upon below.”).

As for the remaining two allegations, the district court briefly touched upon them in its findings of fact, but otherwise failed to analyze them in detail in its conclusions of law. With respect to plaintiffs’ assertion that Devine should have reported to the Department of Labor State Line’s failure to properly fund the Plan, the district court found that (a) MGIS reported plan-funding problems to the DOL, (b) the DOL, based upon MGIS’s report, “began an investigation into State Line’s underfunding ... in February of 2001,” (c) State Line “fully cooperated with [the] DOL’s investigation,” and (d) the DOL took no formal enforcement action against State Line, but did “continue[] to monitor State Line.” App. at 1381. The district court did not, however, in its conclusions of law address whether Devine, as a fiduciary of the Plan, violated his fiduciary duties by failing to likewise report the underfunding problems to the DOL. The question on this issue is whether a remand to the district court is necessary. Although a reasonable argument can be made that an independent plan fiduciary (i.e., someone who was not operating under a conflict of interest, like Devine) should have reported the underfunding problems to the DOL, our review of the trial transcript convinces us that such reporting would not have had any noticeable impact, given the fact that the DOL responded to MGIS’s report, investigated the underfunding problem, and ultimately took no formal action against State Line. Thus, we conclude that the district court’s failure to properly analyze this allegation of breach of fiduciary duty on the part of Devine was harmless.

--- F.3d ----

Page 11

--- F.3d ----, 2007 WL 102980 (C.A.10 (Utah))
(Cite as: --- F.3d ----)

*12 [2] That leaves only plaintiffs' allegation that Devine should have considered, threatened, and/or sued State Line on behalf of the Plan for unpaid contributions. In its findings of fact, the district court found that "Devine, as fiduciary of the [P]lan, never considered bringing suit against the sponsoring entities to force adequate funding of the [P]lan." App. at 1375. Notwithstanding this factual finding, the district court did not address plaintiffs' allegation in its conclusions of law. Instead, in a one-sentence parenthetical following the above-quoted factual finding, the district court stated: "(If any such suit had been filed, it would have rapidly led to the dissolution of the State Line entities, with the likely effect of immediately terminating the plan.>"). *Id.* This cursory statement is, in our view, insufficient to properly address plaintiffs' allegation. To begin with, the district court failed to cite any evidence to support its finding that a lawsuit would have rapidly led to the dissolution of State Line. Moreover, even if that finding is correct, we reject what appears to have been the district court's implication that "what was good for [State Line] was good for the Plan." Aplt. Br. at 30. As the uncontroverted facts of this case make clear, the full payment of the plaintiffs' outstanding medical claims was not necessarily dependent upon the ultimate survival of State Line. Rather, the full payment of the plaintiffs' outstanding medical claims was dependent solely on State Line's proper funding of the Plan. The fact that such full funding of the Plan may have meant that State Line had to default on other outstanding debts, or even file for bankruptcy, was not necessarily of consequence to the Plan and its beneficiaries, particularly given State Line's history of underfunding the Plan. Accordingly, we conclude that this issue must likewise be remanded to the district court for further consideration.

The judgment of the district court is AFFIRMED in part and REVERSED in part, and the case is REMANDED to the district court for further proceedings consistent with this opinion.

FN1. These related entities are detailed in the district court's findings of fact. The only relevant fact of note is that all of these

entities were closely held, either in corporate form or in partnership, by Anna Smith and her four children: Marian Barnwell, Billie Ann Smith Devine, Mary Carol Johnson, and James W. Smith. App. at 1369-70.

FN2. Through MGIS, State Line "received access to network discounts with various healthcare providers in the area." App. at 1373. "To be entitled to these discounts, State Line had a number of obligations, including timely payment to medical providers." *Id.* at 1373-74.

FN3. The district court, in its findings of fact and conclusions of law, stated that it had reviewed "the parties' pre- and post-trial briefs...." App. at 1369.

FN4. Notably, all of these allegations appear to have involved Devine's role as CEO of State Line, and not his role as fiduciary of the Plan. For example, only in his role as CEO could Devine have "resigned as CEO," "asked the owners of State Line to fully fund the Plan," or "sold some property owned by State Line to fund the Plan." Under *Pegram*, none of these actions could have given rise to a claim for breach of fiduciary duty.

FN5. Devine suggests in his response brief that the district court granted summary judgment in his favor on this third claim. A review of the appendix indicates that the district court dismissed with prejudice the allegation in plaintiffs' amended complaint that Devine "misl[e]d or fail [e]d to inform Plaintiffs regarding Funding problems for the Plan." App. at 798. However, as noted, plaintiffs argued in their post-trial brief that Devine failed to inform them of funding problems after MGIS suggested it was necessary for him to do so. Because the district court did not address this argument at all in its findings of fact and conclusions of law, at a minimum it would be helpful on remand if the district court

--- F.3d ----

Page 12

--- F.3d ----, 2007 WL 102980 (C.A.10 (Utah))
(Cite as: --- F.3d ----)

could clarify whether it intended for this allegation to be revived and resolved at trial, or whether, instead, it intended to stand by its pretrial dismissal of the allegation.

C.A.10 (Utah),2007.

Holdeman v. Devine

--- F.3d ----, 2007 WL 102980 (C.A.10 (Utah))

Briefs and Other Related Documents (Back to top)

- 2006 WL 1785951 (Appellate Brief) Plaintiff/Appellant's Reply Brief (Apr. 20, 2006)
- 2006 WL 889662 (Appellate Brief) Plaintiff/Appellant's Brief (Addendum to Brief attached as PDF document to electronic submission) (Appendix to Brief submitted in hard copy only) (Feb. 27, 2006) Original Image of this Document with Appendix (PDF)
- 05-4302 (Docket) (Nov. 25, 2005)

END OF DOCUMENT

EXHIBIT C

LEXSTAT 29 C.F.R. 2509.75-8

LEXISNEXIS' CODE OF FEDERAL REGULATIONS
 Copyright (c) 2007, by Matthew Bender & Company, a member
 of the LexisNexis Group. All rights reserved.

*** THIS SECTION IS CURRENT THROUGH THE JANUARY 31, 2007 ISSUE OF ***
 *** THE FEDERAL REGISTER ***

TITLE 29 -- LABOR
 SUBTITLE B -- REGULATIONS RELATING TO LABOR
 CHAPTER XXV -- EMPLOYEE BENEFITS SECURITY ADMINISTRATION, DEPARTMENT OF LABOR
 SUBCHAPTER A -- GENERAL
 PART 2509 -- INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SE-
 CURITY ACT OF 1974

Go to the CFR Archive Directory

29 CFR 2509.75-8

§ 2509.75-8 Questions and answers relating to fiduciary responsibility under the Employee Retirement Income Security Act of 1974.

The Department of Labor today issued questions and answers relating to certain aspects of fiduciary responsibility under the Act, thereby supplementing ERISA IB 75-5 (29 CFR 2555.75-5) which was issued on June 24, 1975, and published in the Federal Register on July 28, 1975 (40 FR 31598).

Pending the issuance of regulations or other guidelines, persons may rely on the answers to these questions in order to resolve the issues that are specifically considered. No inferences should be drawn regarding issues not raised which may be suggested by a particular question and answer or as to why certain questions, and not others, are included. Furthermore, in applying the questions and answers, the effect of subsequent legislation, regulations, court decisions, and interpretive bulletins must be considered. To the extent that plans utilize or rely on these answers and the requirements of regulations subsequently adopted vary from the answers relied on, such plans may have to be amended.

An index of the questions and answers, relating them to the appropriate sections of the Act, is also provided.

Index

Key to question prefixes: D -- refers to definitions; FR -- refers to fiduciary responsibility.

Section No.	Question No.
3(21)(A)	D-2, D-3, D-4, D-5.
3(38)	FR-15.
402(c)(1)	FR-12.
402(c)(2)	FR-15.
402(c)(3)	FR-15.
403(a)(2)	FR-15.
404(a)(1)(B)	FR-11, FR-17.
405(a)	FR-13, FR-14, FR-16.
405(c)(1)	FR-12, FR-15.
405(c)(2)	D-4, FR-13, FR-14, FR-16.
412	D-2.

29 CFR 2509.75-8

Note: Questions D-2, D-3, D-4, and D-5 relate to not only section 3(21)(A) of Title I of the Act, but also *section 4975(e)(3) of the Internal Revenue Code* (section 2003 of the Act). The Internal Revenue Service has indicated its concurrence with the answers to these questions.

D-2 Q: Are persons who have no power to make any decisions as to plan policy, interpretations, practices or procedures, but who perform the following administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, fiduciaries with respect to the plan:

- (1) Application of rules determining eligibility for participation or benefits;
- (2) Calculation of services and compensation credits for benefits;
- (3) Preparation of employee communications material;
- (4) Maintenance of participants' service and employment records;
- (5) Preparation of reports required by government agencies;
- (6) Calculation of benefits;
- (7) Orientation of new participants and advising participants of their rights and options under the plan;
- (8) Collection of contributions and application of contributions as provided in the plan;
- (9) Preparation of reports concerning participants' benefits;
- (10) Processing of claims; and
- (11) Making recommendations to others for decisions with respect to plan administration?

A: No. Only persons who perform one or more of the functions described in section 3(21)(A) of the Act with respect to an employee benefit plan are fiduciaries. Therefore, a person who performs purely ministerial functions such as the types described above for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary because such person does not have discretionary authority or discretionary control respecting management of the plan, does not exercise any authority or control respecting management or disposition of the assets of the plan, and does not render investment advice with respect to any money or other property of the plan and has no authority or responsibility to do so.

However, although such a person may not be a plan fiduciary, he may be subject to the bonding requirements contained in section 412 of the Act if he handles funds or other property of the plan within the meaning of applicable regulations.

The Internal Revenue Service notes that such persons would not be considered plan fiduciaries within the meaning of *section 4975(e)(3) of the Internal Revenue Code of 1954*.

D-3 Q: Does a person automatically become a fiduciary with respect to a plan by reason of holding certain positions in the administration of such plan?

A: Some offices or positions of an employee benefit plan by their very nature require persons who hold them to perform one or more of the functions described in section 3(21)(A) of the Act. For example, 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.

Other offices and positions should be examined to determine whether they involve the performance of any of the functions described in section 3(21)(A) of the Act. For example, a plan might designate as a "benefit supervisor" a plan employee whose sole function is to calculate the amount of benefits to which each plan participant is entitled in accordance with a mathematical formula contained in the written instrument pursuant to which the plan is maintained. The benefit supervisor, after calculating the benefits, would then inform the plan administrator of the results of his calculations, and the plan administrator would authorize the payment of benefits to a particular plan participant. The benefit supervisor does not perform any of the functions described in section 3(21)(A) of the Act and is not, therefore, a plan fiduciary. However, the plan might designate as a "benefit supervisor" a plan employee who has the final authority to authorize or disallow benefit payments in cases where a dispute exists as to the interpretation of plan provisions relating

29 CFR 2509.75-8

to eligibility for benefits. Under these circumstances, the benefit supervisor would be a fiduciary within the meaning of section 3(21)(A) of the Act.

The Internal Revenue Service notes that it would reach the same answer to this question under *section 4975(e)(3) of the Internal Revenue Code of 1954*.

D-4 Q: In the case of a plan established and maintained by an employer, are members of the board of directors of the employer fiduciaries with respect to the plan?

A: Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries only to the extent that they have responsibility for the functions described in section 3(21)(A) of the Act. For example, the board of directors may be responsible for the selection and retention of plan fiduciaries. In such a case, members of the board of directors exercise "discretionary authority or discretionary control respecting management of such plan" and are, therefore, fiduciaries with respect to the plan. However, their responsibility, and, consequently, their liability, is limited to the selection and retention of fiduciaries (apart from co-fiduciary liability arising under circumstances described in section 405(a) of the Act). In addition, if the directors are made named fiduciaries of the plan, their liability may be limited pursuant to a procedure provided for in the plan instrument for the allocation of fiduciary responsibilities among named fiduciaries or for the designation of persons other than named fiduciaries to carry out fiduciary responsibilities, as provided in section 405(c)(2).

The Internal Revenue Service notes that it would reach the same answer to this question under *section 4975(e)(3) of the Internal Revenue Code of 1954*.

D-5 Q: Is an officer or employee of an employer or employee organization which sponsors an employee benefit plan a fiduciary with respect to the plan solely by reason of holding such office or employment if he or she performs none of the functions described in section 3(21)(A) of the Act?

A: No, for the reasons stated in response to question D-2.

The Internal Revenue Service notes that it would reach the same answer to this question under *section 4975(e)(3) of the Internal Revenue Code of 1954*.

FR-11 Q: In discharging fiduciary responsibilities, may a fiduciary with respect to a plan rely on information, data, statistics or analyses provided by other persons who perform purely ministerial functions for such plan, such as those persons described in D-2 above?

A: A plan fiduciary may rely on information, data, statistics or analyses furnished by persons performing ministerial functions for the plan, provided that he has exercised prudence in the selection and retention of such persons. The plan fiduciary will be deemed to have acted prudently in such selection and retention if, in the exercise of ordinary care in such situation, he has no reason to doubt the competence, integrity or responsibility of such persons.

FR-12 Q: How many fiduciaries must an employee benefit plan have?

A: There is no required number of fiduciaries that a plan must have. Each plan must, of course, have at least one named fiduciary who serves as plan administrator and, if plan assets are held in trust, the plan must have at least one trustee. If these requirements are met, there is no limit on the number of fiduciaries a plan may have. A plan may have as few or as many fiduciaries as are necessary for its operation and administration. Under section 402(c)(1) of the Act, if the plan so provides, any person or group of persons may serve in more than one fiduciary capacity, including serving both as trustee and administrator. Conversely, fiduciary responsibilities not involving management and control of plan assets may, under section 405(c)(1) of the Act, be allocated among named fiduciaries and named fiduciaries may designate persons other than named fiduciaries to carry out such fiduciary responsibilities, if the plan instrument expressly provides procedures for such allocation or designation.

FR-13 Q: If the named fiduciaries of an employee benefit plan allocate their fiduciary responsibilities among themselves in accordance with a procedure set forth in the plan for the allocation of responsibilities for operation and administration of the plan, to what extent will a named fiduciary be relieved of liability for acts and omissions of other named fiduciaries in carrying out fiduciary responsibilities allocated to them?

A: If named fiduciaries of a plan allocate responsibilities in accordance with a procedure for such allocation set forth in the plan, a named fiduciary will not be liable for acts and omissions of other named fiduciaries in carrying out fiduciary responsibilities which have been allocated to them, except as provided in section 405(a) of the Act, relating to

the general rules of co-fiduciary responsibility, and section 405(c)(2)(A) of the Act, relating in relevant part to standards for establishment and implementation of allocation procedures.

However, if the instrument under which the plan is maintained does not provide for a procedure for the allocation of fiduciary responsibilities among named fiduciaries, any allocation which the named fiduciaries may make among themselves will be ineffective to relieve a named fiduciary from responsibility or liability for the performance of fiduciary responsibilities allocated to other named fiduciaries.

FR-14 Q: If the named fiduciaries of an employee benefit plan designate a person who is not a named fiduciary to carry out fiduciary responsibilities, to what extent will the named fiduciaries be relieved of liability for the acts and omissions of such person in the performance of his duties?

A: If the instrument under which the plan is maintained provides for a procedure under which a named fiduciary may designate persons who are not named fiduciaries to carry out fiduciary responsibilities, named fiduciaries of the plan will not be liable for acts and omissions of a person who is not a named fiduciary in carrying out the fiduciary responsibilities which such person has been designated to carry out, except as provided in section 405(a) of the Act, relating to the general rules of co-fiduciary liability, and section 405(c)(2)(A) of the Act, relating in relevant part to the designation of persons to carry out fiduciary responsibilities.

However, if the instrument under which the plan is maintained does not provide for a procedure for the designation of persons who are not named fiduciaries to carry out fiduciary responsibilities, then any such designation which the named fiduciaries may make will not relieve the named fiduciaries from responsibility or liability for the acts and omissions of the persons so designated.

FR-15 Q: May a named fiduciary delegate responsibility for management and control of plan assets to anyone other than a person who is an investment manager as defined in section 3(38) of the Act so as to be relieved of liability for the acts and omissions of the person to whom such responsibility is delegated?

A: No. Section 405(c)(1) does not allow named fiduciaries to delegate to others authority or discretion to manage or control plan assets. However, under the terms of sections 403(a)(2) and 402(c)(3) of the Act, such authority and discretion may be delegated to persons who are investment managers as defined in section 3(38) of the Act. Further, under section 402(c)(2) of the Act, if the plan so provides, a named fiduciary may employ other persons to render advice to the named fiduciary to assist the named fiduciary in carrying out his investment responsibilities under the plan.

FR-16 Q: Is a fiduciary who is not a named fiduciary with respect to an employee benefit plan personally liable for all phases of the management and administration of the plan?

A: A fiduciary with respect to the plan who is not a named fiduciary is a fiduciary only to the extent that he or she performs one or more of the functions described in section 3(21)(A) of the Act. The personal liability of a fiduciary who is not a named fiduciary is generally limited to the fiduciary functions, which he or she performs with respect to the plan. With respect to the extent of liability of a named fiduciary of a plan where duties are properly allocated among named fiduciaries or where named fiduciaries properly designate other persons to carry out certain fiduciary duties, see question FR-13 and FR-14.

In addition, any fiduciary may become liable for breaches of fiduciary responsibility committed by another fiduciary of the same plan under circumstances giving rise to co-fiduciary liability, as provided in section 405(a) of the Act.

FR-17 Q: What are the ongoing responsibilities of a fiduciary who has appointed trustees or other fiduciaries with respect to these appointments?

A: At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan. No single procedure will be appropriate in all cases; the procedure adopted may vary in accordance with the nature of the plan and other facts and circumstances relevant to the choice of the procedure.

HISTORY: [40 FR 47491, Oct. 9, 1975. Redesignated at 41 FR 1906, Jan. 13, 1976]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

29 CFR 2509.75-8

29 U.S.C. 1135; Secretary of Labor's Order 1-2003, 68 FR 5374 (Feb. 3, 2003). Secs 2509.75-10 and 2509-75-2 issued under 29 U.S.C. 1052, 1053, 1054. Sec. 2509.75-5 also issued under 29 U.S.C. 1002.

NOTES: NOTES APPLICABLE TO ENTIRE SUBTITLE:

CROSS REFERENCES: Railroad Retirement Board: See Employees' Benefits, 20 CFR chapter II.

Social Security Administration: See Employees' Benefits, 20 CFR chapter III.

EDITORIAL NOTE: Other regulations issued by the Department of Labor appear in 20 CFR chapters I, IV, V, VI, VII; 30 CFR chapter I; 41 CFR chapters 50, 60, and 61; and 48 CFR chapter 29.

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: Nomenclature changes affecting Chapter XXV appear at 68 FR 16399, 16400, Apr. 3, 2003.]

2561 words