

National Institute May 2018 ABA JCEB ADVANCED ERISA Litigation: Service Provider Litigation

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Topics of Discussion

- Selection and Monitoring of Service Providers
- Service providers as fiduciaries
- Excessive Fee Litigation
- Setting own compensation
- Self-Dealing
- Conflicted Fiduciary
- Kick-backs
- Takeaways

Selection and Retention of Service Providers

The selection and retention of Plan service providers are fiduciary acts.

ERISA Interpretative Bulletin 75–8 D-4, 29 C.F.R. § 2509.75–8 (1983)

Howell v. Motorola, Inc., 633 F.3d 552, 564 (7th Cir. 2011)

Selection and Retention of Service Providers

Fiduciaries Must Evaluate Qualifications of Appointed Fiduciaries

29 CFR 2509.75-8, Q&A FR-11.

Martin v. Harline, 1992 WL 12151224, at *10 (D. Utah Mar. 30, 1992) (failure to conduct independent investigation into qualifications to serve as fiduciary constituted breach of duty of prudence);

Whitfield v. Cohen, 682 F. Supp. 188, 195 (S.D.N.Y. 1988) (breach of fiduciary duty where the fiduciary did not know the experience, education or professional credentials of proposed investment provider);

In re GCO, LLC, 324 B.R. 459, 462 (Bankr. S.D.N.Y. 2005) (sustaining claim for retaining personal friend as investment advisors without proper review of qualifications).

Selection of Service Providers

Compensation paid to Service Provider must be reasonable, need not be the Lowest Bidder

DOL Information Letter, From Bette J. Briggs to Diana Orantes Ceresi, 1998 WL 1638068 (February 19, 1998).

Objectively assess qualifications of service provider, work quality and reasonableness of the fees charged versus service provided.

DOL Letter to Gary E. Henderson, 1998 WL 1638072 (July 28, 1998)

Fiduciary Status of Service Providers

Whether Service Provider is Fiduciary Based on a Functional Test

Santomenno v. Transamerica Life Ins. Co., 883 F.3d 833, 837 (9th Cir. 2018)

Agreement Disclaiming Service Provider as Fiduciary is Generally Without Effect.

IT Corp. v. Gen. Am. Life Ins. Co., 107 F.3d 1415, 1418 (9th Cir. 1997)

When Does Fiduciary Status Begin?

A service provider is not a fiduciary when negotiating its prospective fees.

Santomenno v. Transamerica Life Ins. Co., 883 F.3d 833, 838 (9th Cir. 2018)

McCaffree Fin. Corp. v. Principal Life Ins. Co., 811 F.3d 998, 1003 (8th Cir. 2016)

Hecker v. Deere & Co., 556 F.3d 575, 583 (7th Cir. 2009)

Renfro v. Unisys Corp., 671 F.3d 314, 324 (3d Cir. 2011)

How Can A Service Provide Become a Fiduciary?

A service provider may act as a fiduciary in setting or taking its own fees

- **Third Party Administrator (TPA)**

- *Pipefitters Local 636 Ins. Fund v. BCBS of Michigan*, 722 F.3d 861, 866-867 (6th Cir. 2013)
- *Hi-Lex Corp. Health and Welfare Plan v. BCBS of Michigan*, 751 F.3d 740 (6th Cir. 2014)

- **Pharmacy Benefit Manager (PBM)**

- *Chicago District Council v. Caremark*, 474 F.3d 463 (7th Cir. 2007).

How Can A Service Provide Become a Fiduciary?

A service provider may act as a fiduciary where it has discretion to set its own fees

F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1259 (2d Cir. 1987).

Glass Dimensions, Inc., ex rel. Glass Dimensions, Inc., Profit Sharing Plan & Trust v. State Street Bank & Trust Co., 931 F.Supp.2d 296, 304 (D. Mass. 2013).

Golden Star, Inc. v. Mass Mut. Life Ins. Co., 22 F. Supp. 3d 72, 81 (D. Mass. 2014)

How Can A Service Provide Become a Fiduciary?

A service provider does not act as a fiduciary in merely recommending a menu of investments

Leimkuehler v. Am. United Life Ins. Co., 713 F.3d 905, 912 (7th Cir. 2013)

Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co. (U.S.A), 768 F.3d 284, 295 (3d Cir. 2014)

McCaffree Fin. Corp. v. Principal Life Ins. Co., 811 F.3d 998, 1003 (8th Cir. 2016)

How Can A Service Provide Become a Fiduciary?

A service provider may be fiduciary to the extent that it has authority or control over plan assets by determining and altering which funds are available for Plans or participants.

Haddock v. Nationwide Fin. Services, Inc., 419 F. Supp. 2d 156, 166 (D. Conn. 2006)

Charters v. John Hancock Life Ins. Co., 583 F. Supp. 2d 189, 198 (D. Mass. 2008)

How Can A Service Provide Become a Fiduciary?

A service provider (e.g. attorney, accountants, actuaries) performing usual professional functions is not a fiduciary.

29 C.F.R. § 2509.75-5 (D-1)

How Can A Service Provide Become a Fiduciary?

When the tasks transcend the usual scope of services, professionals become fiduciaries.

Attorneys: *Rispler v. Sol Spitz Co., Inc.*, 04-CV-1323 DLI ARL, 2007 WL 1926531, at *5 (E.D.N.Y. June 6, 2007); *Iron Workers Loc. 25 Pension Fund v. Watson Wyatt and Co.*, 04-CV-40243, 2009 WL 3698562, at *10 (E.D. Mich. Nov. 4, 2009)

Accountants: *David P. Coldesina, D.D.S. v. Estate of Simper*, 407 F.3d 1126, 1133-1134 (10th Cir. 2005); *Martin v. Feilen*, 965 F.2d 660, 669 (8th Cir. 1992)

How Can A Service Provider Become a Fiduciary?

Insurers As Fiduciaries

- *Mogel v. UNUM Life Ins. Co. Of Am.*, 547 F.3d 23, 26-27 (1st Cir. 2008): insurer was a fiduciary where death benefits deposited into accounts rather than distributed as lump sums
- *Merrimon v. Unum Life Ins. Co. of Am.*, 758 F.3d 46 (1st Cir. 2014): Insurer not a fiduciary

Service providers engaged in clearing swaps are generally not fiduciaries.

- DOL Opinion Letter 2013-01A 2013 WL 582335 (Feb. 7, 2013).

When do fees breach fiduciary duties?

Receipt of reasonable, definitively calculable, nondiscretionary compensation clearly set forth in a contract, is not a breach of fiduciary duty.

Santomenno v. Transamerica Life Ins. Co., 883 F.3d 833, 841 (9th Cir. 2018)

Chi. Dist. Council of Carpenters Welfare Fund v. Caremark, Inc., 474 F.3d 463, 475–76 (7th Cir. 2007)

Harris Trust and Savs. Bank v. John Hancock Mut. Life Ins. Co., 302 F.3d 18, 29 (2d Cir.2002)

When do fees breach fiduciary duties?

Fees need to be more than reasonable for a plan of similar size and nature

Compare *Perez v. Chimes D.C., Inc.*, CV RDB-15-3315, 2016 WL 5938827, at *4 (D. Md. Oct. 12, 2016) (denying motion to dismiss) with *Young v. Gen. Motors Inv. Mgmt. Corp.*, 325 Fed.Appx. 31, 33 (2d Cir. 2009) (affirming dismissal where no such allegation)

When do fees breach fiduciary duties?

- **Krueger v. Ameriprise Fin'l, Inc., 2012 WL 5873825, at *10–11 (D Minn. Nov. 20, 2012):**
Fees greater than comparable funds & fiduciary receiving kickbacks
- **George v. Kraft Foods Global, Inc., 674 F Supp. 2d 1031, 1039, 1047–48 (N.D. Ill. 2009):**
undisclosed fees from service provider.

Who is liable for excessive fees?

Fiduciaries must monitor and control record-keeping fees and revenue sharing to ensure not excessive.

Tussey v. ABB, Inc., 746 F.3d 327, 336 (8th Cir. 2014)

Even a directed trustee can be liable for paying fees that differ from the schedule agreed upon.

Perez v. Chimes D.C., Inc., CV RDB-15-3315, 2016 WL 6124679, at *4 (D. Md. Oct. 20, 2016)

When are payments prohibited transactions?

Revenue sharing payments made to fiduciaries may potentially be prohibited transactions.

- **Haddock v. Nationwide Fin. Servs., Inc.**, 419 F. Supp.2d 156 (D. Conn. 2006).
- **Phones Plus, Inc. v. The Hartford Fin. Servs. Group, Inc.**, 2007 WL 3124733, at *6 (D. Conn. Oct. 23, 2007).
- **Tibble v. Intl.**, 2008 WL 11284592, at *10 (C.D. Cal. Jul 16, 2008)

When does poor performance amount to a breach of fiduciary duty?

- **Claim for breach of duty of prudence could not stand on allegations of poor investment strategy.** *Barchock v. CVS Health Corp.*, 886 F.3d 43 (1st Cir. 2018)
- **Need meaningful procedures or processes to monitor the prudence of the Plan's investment offerings.** *Muri v. Natl. Indem. Co.*, 8:17-CV-178, 2018 WL 1054326, at *5 (D. Neb. Feb. 26, 2018)
- **No “bright-line approach to prudence” based exclusively on cost.** *Terraza v. Safeway Inc.*, 241 F. Supp. 3d 1057, 1077 (N.D. Cal. 2017)

When does a service provider engage in self-dealing?

- **Rosen v. Prudential Retirement Ins. & Annuity Co., 2017 WL 4534782 (2nd Cir. Oct. 11, 2017)**
- **Patrico v. Voya Fin., Inc., 2018 WL 1319028 (S.D.N.Y. Mar. 13, 2018).**
- **Haley v. Teachers Insurance and Annuity Association, 2018 WL 1585673 (S.D.N.Y. Mar. 28, 2018).**

When are payments prohibited transactions?

- ERISA § 406(b)(2) requires the challenged action be a fiduciary action. **DeLuca v. BCBS of Mich.**, 628 F.3d 743, 747 (6th Cir. 2010).
- ERISA § 406(b)(3) prohibits fiduciaries from receiving “any consideration” coming “from any party dealing with” the plan in connection with a transaction “involving” plan assets. **Chesemore v. All. Holdings, Inc.**, 886 F. Supp. 2d 1007, 1056–57 (W.D. Wis. 2012), aff'd, 829 F.3d 803 (7th Cir. 2016)
- ERISA § 406(a)(1)(C) does not require “assets of the plan.” **Chendes v. Xerox HR Sols., LLC**, 2017 WL 4698970, at *10 (E.D. Mich. Oct. 19, 2017)

Revenue Sharing

- **Chendes v. Xerox HR Solutions, LLC, 2017 WL 4698970**
(E.D. Mich. October 19, 2017)
- Setting own compensation
 - Is this service provider setting its own compensation?
 - What discretion does the service provider have to increase its compensation?

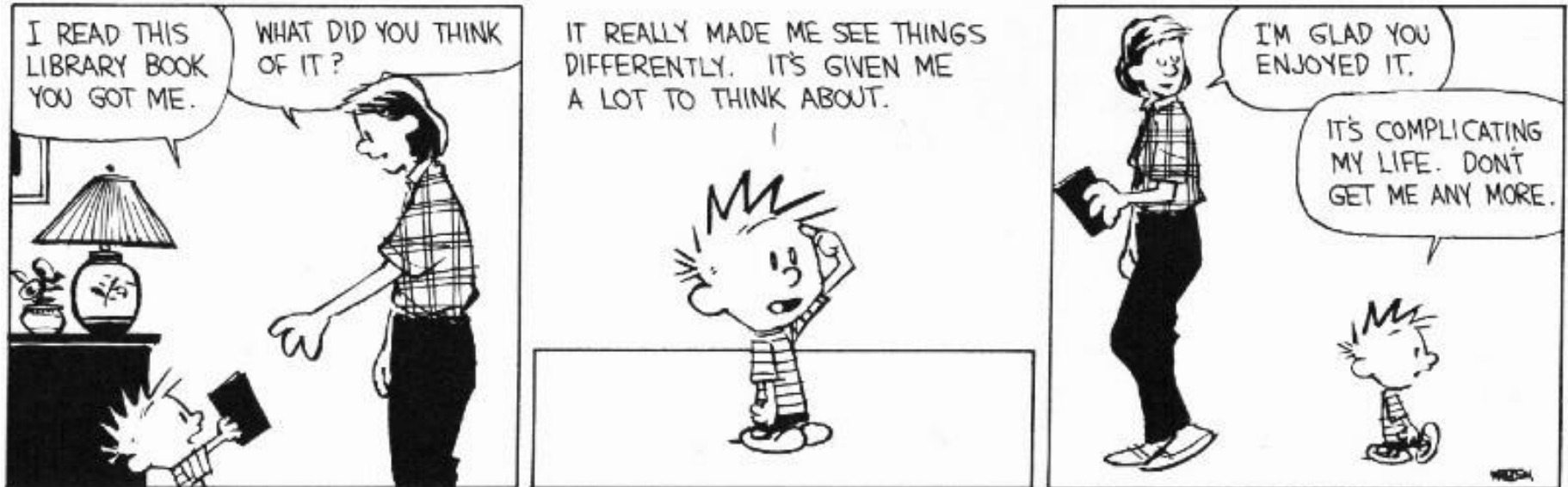
Non-Fiduciary Service Provider Litigation

- **Attorney/Actuary/Accountant Claims**
- **UPMC v. CBIZ, Inc., 2017 WL 4357984 (W.D. Penn. Sept. 29, 2017)** - state law actuarial malpractice action
 - Are such claims preempted?
 - Do you bring a tort and/or contract action?
 - What about state law consumer protection claims?

Non-Fiduciary Service Provider Litigation

- **Advantages of suing service providers as non-fiduciaries?**
 - **State law cause of action**
 - **Damages**
 - **Jury Trial**
 - **State vs. Federal court?**

Lessons to take Away from Discussion



Questions?

