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ERISA

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by
Ian S. Linker

Rivkin Radler LLP

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Commentary

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[Editor's Note: Ian S. Linker is a partner in Rivkin Radler LLP's Insurance Coverage Practice Group. Mr. Linker focuses his practice on ERISA-benefits litigation and other benefits- and insurance claims-related litigation. Prior to joining Rivkin Radler, Mr. Linker worked as in-house counsel for MetLife's litigation department, where he acquired significant appellate experience and a nationwide expertise in ERISA-benefits litigation. In that role, Mr. Linker managed ERISA litigation matters, counseled clients, and trained and supervised attorneys handling ERISA litigation. Mr. Linker also led MetLife's appellate practice group. Mr. Linker can be reached at ian.linker@rivkin.com. Any commentary or opinions do not reflect the opinions of Rivkin Radler LLP or LexisNexis®, Mealey Publications™. Copyright © 2018 by Rivkin Radler LLP. Responses are welcome.]

There has been much litigation around the division of labor between plan administrators and claim administrators of employee welfare benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA). Under fully insured welfare plans (frequently, life insurance plans), the plan administrator – typically the employer – is responsible for enrolling its employees in the plan, ensuring the employees are eligible for coverage before enrolling them, collecting premiums, and remitting them to the insurer – often the claim administrator. The claim administrator, on the other hand, is responsible for receiving premiums, adjudicating claims, making benefit eligibility determinations (frequently based on coverage information received from the employer), and paying benefits. The claim administrator typically does not know the identity of the covered employees or their dependents until it receives a claim.

As Chief Justice Roberts aptly stated in *Conkright v. Frommert,* 559 U.S. 506 (2010): "People make mistakes. Even administrators of ERISA plans." And so from time-to-time a plan administrator will make a mistake with enrollment or plan recordkeeping. For instance, plan administrators err in allowing an employee or a dependent to enroll for or retain coverage despite being ineligible for some reason or misrepresenting the existence or amount of coverage. Down the road, the ineligible individual passes away believing there was coverage and his or her beneficiary submits a claim for benefits. The claim administrator, typically a plan fiduciary in its own right, adjudicates the claim and has a duty to do so in accordance with the terms of the plan. But because the employee or dependent was ineligible for coverage under the plan in the first place, the claim administrator determines the beneficiary is not entitled to benefits.

At that point, the beneficiary feels wronged; understandably so. The employee or dependent was a loved one who died believing he or she had coverage under the plan and is now being told by the claim administrator that, in fact, there was no coverage. So the beneficiary retains counsel and files suit, alleging the claim administrator breached its fiduciary duties.

Under ERISA, however, a breach-of-fiduciary-duties claim should fail if the defendant was not acting as a fiduciary while engaging in the conduct forming the basis of the allegation, or not even engaging in the complained-of conduct at all. *Gordon v. Life Ins. Co. of N. Am., et al.,* No. 17-1188 (4th Cir. May 15, 2018), upholds this principle.

The Facts

In *Gordon*, employees of the defendant employer were eligible for $50,000 in basic life insurance coverage under the employer's ERISA-governed welfare benefit plan, at no cost to the employees. Employees could elect additional coverage – supplemental life insurance. The plan required participants electing more than $100,000 in supplemental coverage, the guaranteed issue amount, to provide medical evidence of insurability.

The plan documents enumerated the plan administrator's responsibilities as well as the claim administrator's responsibilities. Under the plan, the plan administrator, who was also the employer, was responsible for the following:

1. verifying employees' eligibility for coverage,
2. providing enrollment materials,
3. ensuring employees enroll timely and accurately,
4. coordinating changes in employees' benefit elections,
5. completing premium payment procedures,
6. maintaining employee coverage data, and
7. calculating and collecting premiums.

The plan administrator was also responsible for providing accurate recordkeeping of information for those individuals covered under the plan as well as providing accurate and timely information about plan benefits. Further, at the end of each month, the plan administrator submitted to the claim administrator an invoice and bulk premium, reflecting the total monthly premiums for all employees and dependents for both basic and supplemental life insurance coverage under the plan. Neither the invoice nor the payment identified the names of the covered individuals (plan participants or dependents) or the amount paid for any specific covered individual.

Under the plan, the claim administrator was the claims fiduciary, responsible for adjudicating benefit claims under the plan and deciding appeals. Moreover, the plan administrator granted the claim administrator discretionary authority to construe the plan and make benefit eligibility determinations. The plan expressly stated that the claim administrator's responsibilities did not authorize it to administer the plan, except as described therein.

When the employee decedent began working for the plan administrator in March 2013, he became eligible for $50,000 in employer-paid basic life insurance. Later, when he became eligible for supplemental life insurance coverage, the decedent attempted to enroll for an additional $250,000 in coverage under the plan. However, he never submitted medical evidence of insurability. He designated his spouse, the plaintiff, as beneficiary. The plan administrator began deducting from the decedent's pay premiums for an amount associated with that level of coverage, even though the decedent had not submitted medical evidence of insurability. This was an error.

By July 2013, the decedent became seriously ill. He passed away in January 2014. After the death, the plaintiff made a claim for $300,000 in plan benefits, $50,000 in basic life and $250,000 in supplemental life. However, because the decedent never submitted medical evidence of insurability, as required under the plan for supplemental coverage above the guaranteed issue amount of $100,000, the claim administrator approved the claim and paid $50,000 in basic life and $100,000 in supplemental life and denied the plaintiff's claim to the extent she sought more. The plaintiff appealed to the claim administrator. Although during the appeal review the plan administrator acknowledged making mistakes in the enrollment process, including deducting from the decedent's pay premiums for $250,000 in supplemental life coverage instead of the guaranteed issue amount, the claim administrator upheld its initial determination.

The Case

In the complaint, the plaintiff alleged both the plan administrator and claim administrator were plan fiduciaries and breached their fiduciary duties under ERISA, even though the claim administrator had done nothing wrong. The plaintiff also alleged that to the extent either defendant was not an ERISA fiduciary then it, *i.e.,* the non-fiduciary defendant, was liable for participating, knowingly, in a breach of trust. After the plan administrator settled with the plaintiff, the claim administrator moved for summary judgment, arguing that it was not acting as a fiduciary; thus, it did not breach a fiduciary duty. It also argued that because it had no knowledge of the plan administrator's errors, it should not be held liable.

The Fourth Circuit's Decision

The district court found that because the plan administrator made errors leading to the decedent's reduced

coverage, the claim administrator was not responsible and, therefore, did not breach any fiduciary duty under ERISA, nor did it knowingly participate in a breach of trust by the plan administrator. Accordingly, the district court granted summary judgment in favor of the claim administrator. The plaintiff appealed to the Fourth Circuit.

Under ERISA, a person or entity is a fiduciary "to the extent":

(i) [the person or entity] exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or ...

(iii) [the person or entity] has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A).

Courts point to the statute's "to the extent" language to demonstrate that whether one is a fiduciary is not an "all-or-nothing concept." *Coleman v. Nationwide Life Ins. Co.,* 969 F.2d 54, 61 (4th Cir. 1992). In other words, "the fiduciary function is not an indivisible one." *Id*. As such, courts should "ask whether a person is a fiduciary with respect to the particular activity at issue." *Id*.

The Fourth Circuit in *Gordon* focused its analysis on whether the claim administrator, a fiduciary for some purposes, was acting as a fiduciary over the relevant functions. Because the plaintiff argued the claim administrator "exercised 'authority or control' over the 'management or disposition' of plan assets," the court first considered whether the plan administrator's bulk premium payments to the claim administrator constituted such assets. As such, if the claim administrator exercised authority or control over plan assets, then it was acting as a fiduciary.

Although ERISA does not expressly define the term "plan assets," the statute describes what is excluded from the definition. In *Gordon*, the court considered whether one of these exclusions, the so-called guaranteed-benefit-policy exclusion, applied. *See* 29 U.S.C. § 1101(b)(2). ERISA defines a "guaranteed benefit policy" as "an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer." 29 U.S.C. § 1101(b)(2)(B). In its analysis, the court relied upon *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Banks*, 510 U.S. 86, 106 (1993)(held plan not a guaranteed benefit policy because "the exact level of retirement benefits owed to the plan participants was not guaranteed; they could go up or down based upon market performance"). The court determined that because the insurer, *i.e.,* claim administrator, bore all the risk and guaranteed the amount of plan benefits, the exclusion applied. The court reasoned that the claim administrator received a set amount of premiums every month and "agreed to provide a benefit that was determined purely based upon the level of coverage selected by the employee," "regardless of market performance or other variables." In other words, because the plan "is a life insurance contract that provides a fixed payout not contingent on market performance," the claim administrator bore all the risk and the plan was a guaranteed benefit policy; thus, the exclusion applied. Accordingly, the bulk premium payments were not plan assets.

The court then considered whether the claim administrator satisfied the other pieces of ERISA's definition of fiduciary, *i.e.,* whether it had discretionary authority under the plan or exercised authority over the plan. The court first looked at the plan documents to make this determination. After analyzing the documents, the court agreed with the district court that the plan did not task the claim administrator with notifying participants, such as the decedent, that they were required to provide medical evidence of insurability for coverage over the guaranteed issue amount. Thus, the court concluded, the claim administrator had no discretion over this function. Indeed, the court recognized that the plan required the plan administrator to carry out these functions and due to its errors, the plan administrator failed to "fulfill its fiduciary duties."

The court next considered whether, even if the plan did not grant discretionary authority, the claim administrator exercised its authority over these functions. The court found that the plan administrator, not the claim administrator, was both formally and functionally responsible for the specific roles at issue in the case, *i.e.,* "requesting the information required to enroll new employees and notifying Plan participants if they

lacked documents required for supplemental coverage," and that the claim administrator did not exercise authority over these functions. Accordingly, the court held the claim administrator was not a fiduciary; as such, it could not have breached a fiduciary duty.[1]

But whether or not an entity is a fiduciary or was acting as such is only part of the analysis. Even if the claim administrator had been acting as a fiduciary, it likely would not have been held liable for the plan administrator's conduct. The court in *Gordon* also should have considered this issue.

As a general matter, a claim administrator is not liable for a plan administrator's breach unless ERISA provides a remedy. And it does. But only in very limited circumstances. For instance, 29 U.S.C. § 1105(a) addresses co-fiduciary liability. To hold a fiduciary liable under § 1105(a)(1), a plaintiff must show: (1) that a co-fiduciary breached a duty to the plan, (2) that the fiduciary knowingly participated in the breach or undertook to conceal it, and (3) damages resulting from the breach. To hold a fiduciary liable under § 1105(a)(2), a plaintiff must show that the fiduciary failed to comply with its duties under ERISA and thereby enabled a co-fiduciary to commit a breach. And finally, to hold a fiduciary liable under §1105(a)(3), a plaintiff must show (1) that the fiduciary had knowledge of the co-fiduciary's breach, and (2) that the fiduciary failed to make reasonable efforts under the circumstances to remedy the breach.

If the *Gordon* court had considered whether the plaintiff had a cause of action under § 1105, it likely would have reached the same result, *i.e.,* that the claim administrator was not liable:

> (1) under (a)(1), because the claim administrator had not knowingly participated in or attempted to conceal the plan administrator's breach of fiduciary duty. In fact, because the claim administrator knew nothing about the decedent or his coverage or that the decedent had not provided medical evidence of insurability, the claim administrator knew nothing about the plan administrator's breach, let alone knowingly participated in it;
>
> (2) under (a)(2), because the court had already determined the claim administrator was not acting as a fiduciary during the relevant time, so it could not have enabled the plan administrator to breach its duties by failing to comply with its own duties; and
>
> (3) under (a)(3), similar to (a)(1), absent knowledge of the plan administrator's breach, the plan administrator's bad acts will not be imputed to the claim administrator.

Conclusion

Gordon is an interesting and useful example of the analysis practitioners should undertake to determine whether an entity is a fiduciary and whether that entity has breached a fiduciary duty under ERISA. If the funds at issue are not plan assets, the plan does not grant discretion to the defendant, or the defendant does not otherwise exercise control over the plan, a claim for breach of fiduciary duties must fail, because even if the defendant is a fiduciary for certain functions, it was not acting as a fiduciary over the relevant functions.

With the recent spate of breach of fiduciary duty cases under ERISA and the apparent trend toward holding claim administrators responsible for the actions of more-culpable plan administrators, the Fourth Circuit in *Gordon* injected badly needed reason into this area of the law. A fiduciary is not always a fiduciary. And practitioners should be advocating in court for *Gordon's* functional approach in analyzing whether a fiduciary is actually a fiduciary.

Endnotes

1. The court also found that the claim administrator was not liable for a fiduciary's breach of trust. The court stated that this cause of action may not even be a valid cause of action, but even if it was, the court found the cause of action also failed, principally because there was "no evidence the [claim administrator] knew about [the plan administrator's] breach of its fiduciary duty until after it occurred." ■

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1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
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