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Publications

Deference Declined: Fiduciary Status for Rollovers Not a Given and New Developments in Uses of Plan-Related Data Under ERISA

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A September 27, 2022 decision by the Southern District of New York addresses several key theories recently advanced by the plaintiffs' bar in ERISA-based lawsuits against plan service providers. In *Carfora v. TIAA*, S.D.N.Y. No. 1:21-cv-08384 (Sept. 27, 2022), the Southern District of New York (the "Court") dismissed with prejudice a complaint asserting a series of allegations brought by former plan participants who moved plan moneys to IRAs ("Plaintiffs") that defendants Teachers Insurance and Annuity Association of America and TIAA-CREF Individual & Institutional Services, LLC (collectively, the "Provider") acted as fiduciaries when recommending that participants in defined contribution plans take rollover distributions to IRA-based managed account programs. The Court also rejected fiduciary liability claims concerning alleged uses of plan information available to the Provider in its plan service provider role. The decision includes a reasoned analysis of the Department of Labor's ("DOL's") "shifting perspective" on defining investment advice fiduciaries under section 3(21)(A)(ii) of ERISA, including DOL's withdrawal of its 2005 *Deseret* advisory opinion.

The decision is highly significant for three reasons –

- First, the decision rejects a recently adopted DOL position that a single recommendation to take a rollover distribution from an ERISA-covered plan may mark the beginning of an ongoing advice relationship, thereby satisfying the "regular basis" prong of DOL's fiduciary advice regulation, when considered in combination with subsequent recommendations to the rollover IRA. The Court independently applied its own analysis to the 5-part regulatory test for identifying investment advice fiduciaries and concluded differently.
- Second, the Court signaled its agreement with several other District Court cases declining to attribute "plan assets" status under ERISA to plan data. The Court held that "the term 'plan assets' plainly extends to money or invested capital, but does not extend to encompass any information that may potentially benefit a service of the plan."

- Third, the Court rejected arguments that a recordkeeper's use of information related to participants for purposes of marketing other, non-plan products and services constituted fiduciary management or administration of a plan under ERISA section 3(21)(A) (i) or (iii).

While the decision may not bind other courts, it marks something of a setback to DOL in its multi-year effort to expand the scope of those deemed to function as investment advice fiduciaries in a manner that would broadly include providers of rollover recommendations, in that the court, reading the regulation without reference to the DOL's interpretation of the definition in the preamble to PTE 2020-02. The decision also further develops the nascent body of case law addressing the status of participant data as a plan asset and the potential consequences of uses of that data by service providers, and its well-reasoned approach provides a useful roadmap to other courts that will consider these issues.

I. Background

The Plaintiffs alleged that the Provider functioned as a fiduciary and breached its ERISA duties when it "encouraged [participants of plans that is provided services] to take distributions from their defined contribution plans and roll that money" into other Provider accounts where the Provider was able to earn higher fees.

The sales process allegedly included:

- Mining information accessible to the Provider through its provision of plan services to identify participants to target.
- Cold calling participants in client plans to offer "free financial planning services".
- Conducting initial meetings with participants designed "to convince the client that he or she needed [services offered outside of the plan]".
- Creating a curated financial plan for the participant.
- Scheduling a follow-up meeting with the participant, presenting and pitching the higher fee services.

Successful sales allegedly generated additional fees for the Provider and commissions for sales representatives on assets rolled over from an employer-sponsored plan, along with bonus opportunities.

The Plaintiffs asserted that the Provider functioned as an ERISA fiduciary because (1) rollover recommendations delivered to participants, including those accompanied by marketing materials acknowledging that it acted "solely on behalf of [the participants'] interests" or, in some cases, indicating that it satisfied "a fiduciary standard" involved the delivery of fiduciary investment advice, and also (2) the successful targeting of participants for rollovers leveraged its relationship as an existing plan service provider through the use of plan-related data, giving rise to fiduciary plan management and administration activity under ERISA sections 3(21)(A)(i) and (ii), respectively.

II. Plaintiffs failed to adequately allege that the Provider was an investment advice fiduciary.

With respect to the allegation that the Provider was an "investment advice" fiduciary, the Provider argued both that (1) under DOL guidance in effect during the applicable time period it was not an investment advice fiduciary, and that (2) independent of DOL interpretations, plaintiffs failed to allege sufficiently that rollover recommendations are fiduciary recommendations. The Court accepted both of these arguments. It did this by applying the alleged facts to the text of DOL's 1975 regulation defining when an entity is an investment advice fiduciary (the "1975 Test") in light of caselaw developed over the years and DOL guidance. In performing its analysis, the Court noted that DOL's interpretation of the 1975 Test had shifted over time. It also declined to defer to DOL's most recent interpretation in this particular case.

The Court summarized the 1975 Test as providing that a defendant is an ERISA fiduciary if "[i] the defendant provided individualized investment advice; [ii] on a regular basis; [iii] pursuant to a mutual agreement, arrangement, or understanding that [iv] the advice would serve as a primary basis for the plan's investment decisions; and [v] the advice was rendered for a fee."

In applying the plain text of the 1975 Test and ERISA, the Court made a number of important observations indicating a narrower view of one prong of the 1975 Test than DOL has recently advanced.

The Court focused on whether rollover recommendations may satisfy the "regular basis" prong. The Court concluded that "two or three interactions are clearly insufficient" and that the Provider's sales process, including the initial phone call, meeting, and then the recommendation to roll over did not satisfy that prong.

Second, the Court concluded that the "regular basis" prong must be satisfied in the context of recommendations delivered at the *plan*-level, as contrasted with a combined series of one-time recommendations to multiple participants in the same plan. Here, the Court rejected the Plaintiffs' theory that the Provider's interactions with multiple participants in the same plan could be aggregated to satisfy the ongoing basis prong, concluding that at most there was an understanding between individual participants and Provider and that those separate recommendations to specific individuals does not rise to the level of an agreement between Provider and a plan as a whole.

Third, the Court broadly analyzed whether rollover recommendations can satisfy the "regular" basis prong of the 1975 Test. The Court noted that DOL had adopted varying positions on whether rollover recommendations can satisfy the regular basis prong. In an advisory opinion and in a 2015 regulation preamble, DOL suggested that they cannot. However, in a later 2020 preamble, DOL indicated that they may. Ultimately, the Court analyzed the text of the 1975 Test and the statute and concluded that under a "plain reading of the 1975 regulations, rollover recommendations do not constitute advice 'on a regular basis' because they are 'one-time' recommendations." In support of its conclusion, the Court noted that the plain meaning of "regular" "runs counter to advisement related to a one- time decision, even if this decision is a consequential one."

Fourth, the Court rejected arguments that actions taken after a rollover occurs could make an entity a fiduciary to the plan from which the assets transferred. In reaching this conclusion, the Court reached conclusions different than the positions taken by DOL in 2020. The Court instead concluded that:

"the 1975 test was promulgated in reference to Section 1002(21)(A)(ii), which says that a "person is a fiduciary with respect to a plan to the extent . . . he renders investment advice . . . with respect to any moneys or other property of such plan." Plaintiffs do not offer an explanation as to why assets, having left the plan, are still 'moneys or property of such plan' as relevant to the regular basis inquiry, and the Court reads this statutory text as inconsistent with such argument."

After making these observations, the Court concluded that the Provider's rollover recommendation activities did not give rise to investment advice fiduciary status under ERISA.

The decision also rejects the Plaintiffs' position that equitable estoppel principles should apply to the Provider's arguments that it did not function as an investment advice fiduciary, given statements to the contrary contained in certain marketing materials. The Court found the nature of those statements to be too generalized to support equitable estoppel. Moreover, the Plaintiffs failed to allege reliance on those statements or sufficiently plead the "extraordinary circumstances" needed to support the equitable estoppel remedy.

III. The Court rejected arguments that the Provider was a fiduciary because it exercised discretion over plan assets and/or over plan management and administration.

In addition to arguing that the Provider functioned as an investment advice fiduciary, Plaintiffs also argued that the Provider was responsible as a fiduciary because it exercised control over plans and their assets. Specifically, the Provider was alleged to have used plan-related information to identify individuals to recommend rollovers.

As noted above, the Court held that plan assets include "money or invested capital, but does not extend to encompass any information that may potentially benefit a servicer of the plan." The Court also rejected Plaintiff's argument that use of plan-related data for purposes of marketing non-plan products and services involved an exercise of control over the management of administration of a plan noting that such an interpretation "would effectively turn every recordkeeper that provides services integral to the day-to-day operation of a plan into an ERISA fiduciary."

The decision highlights that courts will reach their own conclusions about the application of the five-part test to rollovers and may not be inclined to afford deference to DOL's views, particularly where those views have changed over time. The decision also provides clarity on the question of whether plan data is a plan asset as claimed by plaintiffs in various cases throughout the country. While it is possible that the case could be litigated further, the Court's reasoned analysis provides important guideposts for those navigating these thorny issues.

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