XXVII. [Reserved]

Part 6 of 8
Fiduciary Duties and Plan Administration

XXVIII. Fiduciary Duties Under ERISA

A. Overview of ERISA Fiduciary Duties

ERISA's fiduciary rules are distinguished from many other rules of behavior by the following major characteristics:

- the rules incorporate a broad, functional definition of the term "fiduciary," which sweeps in all kinds of individuals and business entities depending on the duties they actually perform in connection with ERISA plans;
- the standard of behavior expected from ERISA fiduciaries is very high;
- broadly defined fiduciary responsibilities apply to every act taken in a fiduciary capacity;
- certain specifically enumerated transactions between an ERISA plan and "parties in interest" with respect to the plan are absolutely prohibited; and
- ERISA fiduciaries who breach their duties can be personally liable for damages to the ERISA plan and for DOL penalties imposed in connection with fiduciary breaches.

This Section XXVIII discusses the general fiduciary duty provisions of Part 4 of ERISA in subsections A through D. It then focuses—in subsections E through H—on several specific fiduciary duty issues presented by for health and welfare plans. Subsection I concludes with a discussion of the consequences of fiduciary breach, including who is liable and what remedies may be awarded by the courts. (The other fiduciary duty provisions of ERISA Part 4 are discussed elsewhere in this manual, as follows: the plan document requirements of ERISA § 402 (Section VIII); the trust requirement of ERISA § 403 (Section XVI); and the bonding requirement of ERISA § 412 (Section XVIII).)

B. Who Is a Fiduciary?

1. Automatic Fiduciaries: Named Fiduciaries, Plan Administrators, Trustees, and Others

Every ERISA plan must "provide for one or more named fiduciaries who jointly and severally shall have authority to control and manage the operation and administration of the plan." In addition, every plan will have a plan administrator; indeed, many times the named fiduciary and plan administrator are the same person or entity. And some plans may also have a trustee or trustees. A named fiduciary is, of course, a fiduciary by definition.[1] And, as discussed below, plan administrators and trustees also become automatic fiduciaries due to the nature of their positions.

[1] ERISA §§ 402(a)(1) and (a)(2).

Ministerial Actions of an Automatic Fiduciary Are Subject to the Fiduciary Rules. As discussed below, a person or entity not designated as a fiduciary can nevertheless become a fiduciary by performing certain functions in connection with an ERISA plan. In general, however, such persons are not fiduciaries unless they exercise discretion in performing the function in question; in other words, a person performing merely "ministerial" functions is not a fiduciary. This same analysis does not apply to automatic fiduciaries—even ministerial functions performed by an automatic fiduciary will be subject to the fiduciary rules.*

* *See* DOL Reg. § 2509.75-8, Q/A D-3 (Interpretive Bulletin, Oct. 3, 1975) ("Does a person automatically become a fiduciary with respect to a plan by reason of holding certain positions in the administration of such plan?"); *see, e.g., Negley v. Breads of the World Medical Plan*, 31 EBC 1771 (D. Colo. 2003) (rejecting argument that employer/plan administrator was not operating as fiduciary when performing arguably ministerial function of mailing enrollment information to employees).

a. Purpose of Requirement for Named Fiduciary

The purpose of having a "named" fiduciary is to identify a fiduciary responsible for plan administration for the benefit of plan participants.[2] Named fiduciaries are typically not the only fiduciaries of a plan. Other persons, as discussed below, will also have fiduciary status based on the functions they perform relative to the plan.

b. Method of Designating Named Fiduciary

A plan will be deemed to satisfy the requirement to identify a named fiduciary if the plan document clearly identifies one or more persons, by name or by title, and states without any further elaboration that such person or persons have the authority to control and to manage the operation and administration of the plan.[3] It is not unusual for the employer/plan sponsor to be designated as both named fiduciary and plan administrator (although, as a practical matter, the employer must act through individuals such as company officers or a plan administration committee).[4]

c. Named Fiduciary Personally Liable for All Phases of Plan Management

A named fiduciary is personally liable for all phases of plan management and administration, except to the extent that the responsibility for a specific phase has been allocated under a permissible procedure to another named fiduciary or has been delegated under a permissible procedure to another fiduciary.[5]

Caution Regarding Designation of Individuals. The plan sponsor is often designated as the named fiduciary. In such a circumstance, an individual should be identified as the contact person for the named fiduciary. However, because fiduciary liability is personal, care should be taken not to specifically designate the contact person as the named fiduciary.*

* See Section XXIX regarding naming an individual as plan administrator.

d. Plan Administrators and Trustees Are Fiduciaries by Nature of Position

The plan administrator, typically the employer/plan sponsor, and any trustee of the plan will always be fiduciaries because "a plan administrator or a trustee of a plan must by the very nature of the

2 ERISA § 402(a)(1); *see also* H.R. Rep. No. 93-1280 (1974) (Conf. Rep.). In addition, benefit denials appealed through a plan's claims procedure must be reviewed by a named fiduciary or a person designated by a named fiduciary. DOL Reg. § 2560.503-1(g).

3 DOL Reg. § 2509.75-5, Q/A FR-1 (Interpretive Bulletin, June 25, 1975) (although the better practice is to explicitly designate the person as "named fiduciary"). A "person" includes an individual, company, partnership, trust, etc. *See* ERISA § 3(9).

4 DOL Reg. § 2509.75-5, Q/A FR-3 (Interpretive Bulletin, June 25, 1975) ("a plan instrument which designates a corporation as 'named fiduciary' should provide for designation by the corporation of specified individuals or other persons to carry out the specified fiduciary responsibilities under the plan, in accordance with [ERISA] section 405(c)(1)(B)").

5 DOL Reg. § 2509.75-8, Q/A FR-16 (Interpretive Bulletin, Oct. 3, 1975). In addition, any person designated by a named fiduciary to carry out fiduciary responsibilities under ERISA § 405(c)(1)(B) automatically becomes an ERISA fiduciary. ERISA § 3(21)(A) (flush language). (The referenced ERISA § 405(c)(1)(B) permits named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities.)

position, have "discretionary authority or discretionary responsibility in the administration" of the plan within the meaning of ERISA § 3(21)(A)(iii).[6]

2. Functional Fiduciaries Under ERISA § 3(21)

a. Performing Particular Functions Creates Fiduciary Status

Under ERISA § 3(21), fiduciary status can also flow from the plan functions performed by a person who is not otherwise a fiduciary, with the person's title, office, or other formal designation not being determinative.[7] Specifically, under ERISA § 3(21), a person is a "fiduciary" with respect to an employee benefit plan to the extent that the person:

- exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of plan assets;
- renders investment advice for a fee or for any other compensation, direct or indirect, or has any authority or any responsibility to do so; or
- has discretionary authority or discretionary responsibility in the administration of the plan.[8]

As to functional fiduciaries, the personal perception that one is not a fiduciary is immaterial.[9] Similarly, representations in a contract or a service agreement about the person's fiduciary status do not generally control.[10]

b. Discretionary vs. Purely Ministerial Functions

According to the DOL, a person who performs plan administrative functions that are purely ministerial (i.e., clerical functions not requiring the exercise of discretion) within a framework of policies, interpretations, rules, practices, and procedures made by other persons is not a fiduciary.[11] The following types of ministerial administrative functions have been cited by the DOL as falling outside the reach of the fiduciary definition:

- applying rules to determine eligibility for participation or benefits;
- calculating service or compensation credit for benefits;
- preparing employee communications materials;
- maintaining participant service records;
- preparing government agency reports;
- calculating benefits;
- orienting new participants and advising participants of their rights and options under the plan;
- collecting and transmitting contributions as provided in the plan;

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6 DOL Reg. § 2509.75-8, Q/A D-3 ("Does a person automatically become a fiduciary with respect to a plan by reason of holding certain positions in the administration of such plan?"); DOL Reg. § 2509.75-8,Q/A FR-16 (Interpretive Bulletin, Oct. 3, 1975); *McNeese v. Health Plan Mktg., Inc.*, 647 F. Supp. 981, 8 EBC 1154 (N.D. Ala. 1986); and DOL Advisory Opinion 93-23A (Sept. 3, 1993). Regarding the duties of a directed trustee, see DOL Field Assistance Bulletin 2004-3 (Dec. 17, 2004) (general guidance on the fiduciary responsibilities of a directed trustee, explaining that although a directed trustee's responsibilities under ERISA are significantly limited, a directed trustee must exercise its duties prudently and solely in the interest of plan participants and beneficiaries) and *In re WorldCom, Inc. ERISA Litig.*, 354 F. Supp. 2d 423,34 EBC 1545 (S.D.N.Y. 2005) (directed trustee not liable for continued investment of Worldcom plan assets in Worldcom stock). Section XXIX discusses the identity of the plan administrator in greater detail, including the benefits and drawbacks of naming an individual or committee as plan administrator.

7 *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 16 EBC 2169 (1993) (ERISA defines "fiduciary" not in terms of formal trusteeship, but in functional terms of control and authority over the plan, thus expanding the universe of persons subject to fiduciary duties).

8 ERISA § 3(21)(A)(i), (ii), and (iii). A "person" includes an individual, company, partnership, trust, etc. *See* ERISA § 3(9). With respect to rendering investment advice, see *American Fed. of Unions Local 102 v. Equitable Life Assur. Soc'y*, 841 F.2d 658, 9 EBC 1769 (5th Cir. 1988) (advice given by insurer to insured plan that it would be advantageous to self-insure was not investment advice for a fee because "the advice was not given on a regular basis pursuant to a mutual agreement for a fee").

9 *See, e.g., Farm King Supply, Inc. Integrated Profit Sharing Plan & Trust v. Edward D. James & Co.*, 884 F.2d 288 (7th Cir. 1989); *McNeese v. Health Plan Mktg., Inc.*, 647 F. Supp. 981, 8 EBC 1154 (N.D. Ala. 1986).

10 *See, e.g., IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 20 EBC 2633 (9th Cir. 1997); *Mortgage Lenders Network USA, Inc. v. CoreSource, Inc.*, 335 F. Supp. 2d 313, 34 EBC 1599 (D. Conn. 2004). *But see Geweke Ford v. St. Joseph's OMNI Preferred Care, Inc.*, 130 F.3d 1355,21 EBC 2222 (9th Cir. 1997).

11 DOL Reg. § 2509.75-8, Q/A D-2 (Interpretive Bulletin, Oct. 3, 1975). *See IT Corp. v. Gen. Am. Life Is. Co.*, 107 F.3d 1415, 20 EBC 2633 (9th Cir. 1997) ("The power to err, as when a clerical employee types an erroneous code onto a computer screen, is not the kind of discretionary authority which turns an administrator into a fiduciary"); *Trustees of the Colo. Laborers' Health & Welfare Trust v. Am. Benefit Plan Adm'rs, Inc.*, 39 EBC 2625 (D. Colo. 2006) (TPA was not an ERISA fiduciary when it failed to timely report plan's stop-loss claim); *Arethas v. S/TEC Group, Inc.*, 2005 WL 991782 (N.D. Ill. 2005) (TPA with ministerial duties not fiduciary).

- processing claims; and
- making recommendations to others for decisions about plan administration.[12]

These examples should not be viewed as safe harbors. As the discussion below regarding third-party administrators (TPAs) illustrates, to the extent that the examples actually involve the exercise of discretion, the entity performing such duties will be a fiduciary.[12.1]

Final Authority Over Benefit Determinations Is a Fiduciary Function. It is important to note that if an administrative function involves final authority to approve or deny benefit payments in cases where coverage is disputed due to the interpretation of plan provisions relating to such benefit payments, then a person performing that function (e.g., a benefit supervisor) would not be performing merely ministerial functions but would instead be a fiduciary under ERISA.*

* DOL Reg. § 2509.75-8, Q/A D-3 (Interpretive Bulletin, Oct. 3, 1975). *See Green v. ExxonMobil Corp.*, 470 F.3d 415, 39 EBC 1806 (1st Cir. 2006) (concluding that plan administrator's decision not to approve retroactive election made by lower-level benefits personnel on behalf of deceased employee was not unreasonable where plan administrator had ultimate decisionmaking authority regarding election and benefits personnel lacked authority to make election); *Arethas v. S/TEC Group, Inc.*, 2005 WL 991782 (N.D. Ill. 2005) (TPA did not have final authority over claims and was not plan administrator).

Any Authority or Control Over Plan Assets Creates Fiduciary Status. By its terms, the fiduciary definition does not require discretionary authority or control over plan assets. Rather, as discussed in more detail in connection below with TPAs, *any* authority or control over plan assets may be sufficient.

3. Plan Sponsors as Fiduciaries: Fiduciary vs. Settlor Functions

a. Plan Design Decisions Are Generally Not Subject to the Rules

Several U.S. Supreme Court cases affirm the distinction between fiduciary and "settlor" functions performed by sponsoring employers in connection with ERISA plans.[13] Under this approach, even though an employer is a plan fiduciary (because, as discussed above, it is the plan administrator or named fiduciary), it will not be treated as a fiduciary when adopting, amending, or terminating an ERISA plan.[14] The reasoning is that, when performing these functions, the employer is more like the settlor of a testamentary trust than like the trustee (who would be a fiduciary under trust law). These functions are in the nature of business activities,[14.1] as opposed to plan administration and management; as a consequence, this rule is sometimes referred to as the "business decision" exception to ERISA's fiduciary rules.

The following general kinds of decisions appear to fall within the settlor or business decision exception to the ERISA fiduciary rules:

- sponsoring one type of benefit plan (or option within a plan) versus another;
- amending a plan, including changing plan options;
- requiring employee contributions and changing required levels of contributions;

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12 DOL Reg. § 2509.75-8, Q/A D-2 (Interpretive Bulletin, Oct. 3, 1975). *See Livick v. Gillette Co.*, 524 F.3d 24 (1st Cir. 2008) (concluding that HR employee who provided participant inaccurate benefit information was not a fiduciary because calculating benefits and preparing reports concerning benefits are nonfiduciary, ministerial functions under DOL regulations); *Wasmund v. Meritain Health, Inc.*, 2008 WL 4415199 (W.D.N.Y. 2008) (TPA did not exceed ministerial functions listed in DOL Reg. § 2509.75-8, and thus did not become an ERISA fiduciary, when it denied claims, contacted plan participants and beneficiaries directly, and had a nurse make medical determinations).

12.1 Also, a TPA that otherwise fits the legal definition of an ERISA fiduciary is a fiduciary even if some of its actions, viewed individually, could be considered ministerial under DOL Reg. § 2509.75-8. *See In re GS Consulting, Inc.*, 2009 WL 301917 (N.D. Ind. 2009).

13 This distinction is addressed in more detail in Section XVI, which discusses use of plan assets for fiduciary versus settlor functions.

14 *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999) (permitting plan sponsor to allocate surplus pension assets derived in part from participant contributions to early retirees and new employees); *Lockheed Corp. v. Spink*, 517 U.S. 882, 20 EBC 1257 (1996) (permitting amendment of a noncontributory pension plan to provide enhanced early retirement benefits, conditioned on participant release of employment-related claims); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 18 EBC 2841 (1995) (permitting amendment of a welfare plan that did not contain an amendment provision); *Miller v. Rite Aid Corp.*, 27 EBC 2961 (E.D. Pa. 2002) (determining which employees would be laid off, and thus be entitled to benefits under severance plan, was settlor function), *vacated, in part, on other grounds*, 30 EBC 2025 (3d Cir. 2003). *See also* DOL Advisory Opinion 2003-04A (Mar. 26, 2003) (the "establishment, design and termination" of ERISA plans are generally not fiduciary activities); DOL Information Letter to Kirk F. Maldonado, 1987 WL 754933 (Mar. 2, 1997).

14.1 *See generally, In re Constellation Energy Group, Inc. ERISA Litigation*, 2010 WL 3221821, 49 EBC 2139 (D.Md. 2010) (company's decision to adopt riskier business model was not fiduciary decision governed by ERISA).

- terminating a plan or portion of a plan; and
- making previously eligible employees ineligible (subject to issues of contractual vesting, explained in Section XII).

b. But Implementation of Plan Design Decisions Are Subject to the Rules

Even though a plan sponsor may generally design its benefit plans free of ERISA's fiduciary restrictions, actions taken to implement plan design (e.g., communicating with employees about new or amended plans, hiring service providers for a new plan) will be subject to the fiduciary rules.[15]

c. Keeping Settlor and Fiduciary Functions Separate

It is important to separate plan administrative functions from settlor functions, particularly where the company is acting through a committee of employees. (It is similarly important to keep these functions separate with respect to third-party service providers, as discussed in Section XXX.) Companies routinely appoint several officers and employees to committees to perform various duties of plan administration, such as establishing plan operational guidelines or rules, approving forms and procedures, deciding disputed benefit claims, interpreting the plan's terms, and deciding appeals of denied claims. Such a committee is often also named in the summary plan description (SPD) as the body that performs plan administration functions. Such a committee should keep a written record of its meetings, actions, and decisions, including benefit claims determinations and other fiduciary decisions. However, when some or all of the same officers and employees are involved in a plan study, task force, or other business process relating to plan design (including possible amendment or termination), they are likely functioning as settlors and not as plan fiduciaries. Records of meetings, actions, and decisions relating to settlor functions should, accordingly, be kept separate and distinct from records relating to the fiduciary functions of the plan administration committee.

d. Individual Directors, Officers, and Employees of the Plan Sponsor May Be Fiduciaries

The plan sponsor often is a plan fiduciary (because it is the named fiduciary, plan administrator, or both). In addition, individual officers and employees of the sponsor may become fiduciaries if they are designated as fiduciaries or if they satisfy the requirements under the functional definition of fiduciary.[16] Individual directors of a corporate plan sponsor will also be fiduciaries to the extent that they exercise discretionary authority or control over plan administration or have control over plan assets; since a corporation cannot act except through its directors, the directors will be fiduciaries when exercising the corporation's functions regarding the plan.[17]

> **Actions by Individual Nonfiduciaries May Create Fiduciary Liability.** A business entity that is the employer sponsoring an ERISA plan cannot act except through individuals (officers, employees, directors, and other agents). While in many cases such individuals will not be fiduciaries in their own right, the actions that they take on behalf of the plan sponsor can expose the sponsor to fiduciary liability.*

* *See, e.g., Horn v. Cendant Operations, Inc.*, 69 Fed. Appx. 421, 31 EBC 1371 (10th Cir. 2003).

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15 *See, e.g., Mahoney v. J.J. Weiser & Co.*, 2008 WL 2649490, 44 EBC 1482 (S.D.N.Y. 2008) (decision to purchase and renew insurance policy was analogous to selecting plan service provider, and therefore subject to ERISA fiduciary oversight). For more information, see the discussion in Section XVI regarding using plan assets to pay plan administrative expenses.

16 DOL Reg. § 2509.75-8, Q/A D-5 (Interpretive Bulletin, Oct. 3, 1975) (officer or employee is not fiduciary solely by reason of holding such office or employment unless he or she performs the functions described in the ERISA definition of fiduciary). *See Baker v. Kingsley*, 35 EBC 2115 (N.D. Ill. 2005) (court rejects individual director's and officer's claims that they were not ERISA fiduciaries); *LoPresti v. Terwilliger*, 126 F.3d 34 (2d Cir. 1997) (employer's president was a fiduciary when he failed to separate insurance premiums deducted from employees' paychecks from corporate assets); *Confer v. Custom Eng'g Co.*, 952 F.2d 34, 14 EBC 2065 (3d Cir. 1991):

> when an ERISA plan names a corporation as a fiduciary, the officers who exercise discretion on behalf of that corporation are not fiduciaries…unless it can be shown that these officers have *individual* discretionary roles as to plan administration. For example, if the plan designates an officer as plan administrator or if…the corporation delegates some of its fiduciary responsibilities to an officer, then the designated individual would be a fiduciary.

(Emphasis in original.)

17 DOL Reg. § 2509.75-8, Q/A D-4 (Interpretive Bulletin, Oct. 3, 1975) (where board of directors is responsible for the selection and retention of plan fiduciaries, members of the board are fiduciaries but only with regard to selecting and retaining those fiduciaries); *but see Holdeman v. Devine*, 474 F.3d 770, 39 EBC 2342 (10th Cir. 2007) (CEO was not wearing his "fiduciary hat" when deciding how to allocate company's limited assets); *Gross v. Hale-Halsell*, 39 EBC 2187 (N.D. Okla. 2006) (CEO who never exercised his signature power over claims account was not a fiduciary).

4. Fiduciary Status of Administrative Service Providers

A company or person providing administrative services to an ERISA plan may be a fiduciary to the plan, depending on the type of service provided. As discussed below, the term "service providers" has been found to include ERISA fiduciaries (including TPAs),[18] insurance companies,[19] insurance agents,[20] and consulting firms.[21] While the contract with the service provider may be relevant in determining whether the provider is a fiduciary, the majority of cases hold that a service provider will be a fiduciary based on the actual functions that it performs, regardless of what the contract provides.[22]

> **Contract Provision Relieving Service Provider of Fiduciary Responsibility Is Void.** Under ERISA § 410(a), "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy."*

* *See, e.g., IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 20 EBC 2633 (9th Cir. 1997). For more information on ERISA § 410(a), see Section XXIX.

a. Service Providers (Including Insurance Companies and Agents) With Discretionary Authority or Control Over Plan Administration

Under ERISA's functional definition of "fiduciary," a service provider will be a fiduciary to the extent[23] that it exercises discretionary authority or control over plan administration or management.[24] Thus, a TPA that provides claims processing services will be a fiduciary if it has discretionary authority over administering claims[25]—for example, if it has final discretionary authority to decide participant claims.[26] And a TPA can become a fiduciary when it assumes discretionary authority over plan administration, even though it is confined by its contract to exercising ministerial duties.[27] In contrast, a TPA is not a fiduciary if it does not

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18 *See, e.g., Harold Ives Trucking Co. v. Spradley & Coker, Inc.*, 178 F.3d 523 (8th Cir. 1999) (TPA that made decision to pay significant claim, over objection of health plan's stop-loss insurer and without consulting with plan sponsor, became a fiduciary as a result).

19 *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 20 EBC 2633 (9th Cir. 1997) (insurer retained to provide administrative services).

20 *Am. Fed. of Unions Local 102 v. Equitable Life Assur. Soc'y*, 841 F.2d 658, 9 EBC 1769 (5th Cir. 1988) (insurance agent whose duties included investigating, processing, resolving and paying claims, and who had authority to grant or deny claims, was ERISA fiduciary).

21 *See, e.g., McNeese v. Health Plan Mktg., Inc.*, 647 F. Supp. 981, 8 EBC 1154 (N.D. Ala. 1986). This case involved a consulting firm that entered into a contract with an employer to design and establish a medical benefits plan. The firm was a fiduciary because the contract designated it as the plan administrator (and it was therefore an automatic fiduciary, as previously discussed).

22 *See, e.g., Harold Ives Trucking Co. v. Spradley & Coker, Inc.*, 178 F.3d 523 (8th Cir. 1999); *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 20 EBC 2633 (9th Cir. 1997) (although service provider's contract stated that it would "perform only ministerial functions…within a framework of policies, interpretations, rules, practice and procedures made by the [plan]," court said that putting such "magic words" into contract did not avoid fiduciary status if characterization was not in fact correct); *Briscoe v. Preferred Health Plan, Inc.*, 2008 WL 4146381 (W.D. Ky. 2008) (even if provision in administrative services agreement permitted TPA to take administrative fee, such provision could not relieve TPA of its fiduciary responsibilities).

23 The courts sometimes apply the "to the extent" language from ERISA's fiduciary definition to limit the reach of fiduciary liability to those activities stated in the definition. *Briscoe v. Preferred Health Plan, Inc.*, 578 F.3d 481, 47 EBC 2020 (6th Cir. 2009) (applying "to the extent" language in concluding that TPA's fiduciary liability was properly limited to amount of health plan assets over which it exercised control); *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 25 EBC 2237 (2d Cir. 2001); *Kearns v. Benefit Trust Life Ins. Co.*, 992 F.2d 214, 16 EBC 2569 (8th Cir. 1993) ("[f]iduciary status . . . is not 'an all-or-nothing concept . . . a court must ask whether a person is a fiduciary with respect to the particular activity in question'"); *Mahoney v. J.J. Weiser & Co.*, 564 F. Supp. 2d 248, 44 EBC 1482 (S.D.N.Y. 2008) (broker was not fiduciary because of authority over claims processing where fiduciary breach claim focused on excessive premiums); *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 34 EBC 2322 (S.D.N.Y. 2005). *See also In re Ins. Brokerage Antitrust Litig.*, 2008 WL 141498, 43 EBC 1954 (D.N.J. 2008) (holding that plan insurers were not fiduciaries with respect to undisclosed fees and commissions paid to brokers; court reasoned that although insurers may have been fiduciaries because of discretionary authority over claims administration, the challenged conduct did not relate to claims); *Deluca v. Blue Cross Blue Shield of Mich.*, 2007 WL 3203131, 42 EBC 1274 (E.D. Mich. 2007) (insurer that provided administrative services for self-funded plan did not breach ERISA fiduciary duties by negotiating lower rates for HMO clients than for self-funded plan clients because it did not exercise discretionary control or authority with respect to self-funded plan when it negotiated rates for HMO clients).

24 ERISA § 3(21).

25 *See, e.g., Kyle Rys., Inc. v. Pac. Admin. Servs., Inc.*, 990 F.2d 513, 16 EBC 2032 (9th Cir. 1993) (insurer was fiduciary because it had discretionary responsibility to make final claims decisions).

26 *See, e.g. Prudential Ins. Co. of Am. v. Doe*, 140 F.3d 785 (8th Cir. 1998) (insurer was fiduciary because it exercised "substantial discretion," which included final discretionary authority to decide employee's claims).

27 *See, e.g., Harold Ives Trucking Co. v. Spradley & Coker, Inc.*, 178 F.3d 523 (8th Cir. 1999) (service provider that made decision to pay significant claim, over objection of health plan's stop-loss insurer and without consulting with plan sponsor, became a fiduciary as a result).

exercise discretion, but merely processes claims within a framework of policies, rules and procedures established by others (such as the employer).[28]

The definition of "fiduciary" can also include insurance companies and agents, depending on their role with respect to the plan.[29] However, the provision of stop-loss coverage by itself does not render an insurance company a fiduciary.[30] Also, insurers usually are fiduciaries to the extent that they grant, deny, or review claims.[30.1] In one case, for example, an insurance agent became a fiduciary to a health plan when he was appointed fund administrator after the fund moved to a self-insured arrangement.[30.2] The agent's authority to grant or deny claims, to manage and disburse fund assets, and to maintain claims files clearly qualified as discretionary control of plan administration and of plan assets. The agent was also found to be a fiduciary with respect to the commissions and administrative expenses paid under his contract because, although the compensation terms were negotiated at arm's length before the agent became a fiduciary, he exercised discretion over which claims would be paid and his compensation was based on a percentage of claims paid.

In another case, even though the contract with an insurance company that was hired to provide administrative services required the company to refer disputed benefit claims back to the plan sponsor, the Ninth Circuit held that the company could still be a fiduciary based on the discretion that it apparently exercised in determining which claims to refer back.[30.3]

Service Provider Discretion to Pursue Subrogation. The DOL has informally indicated that potential claims for subrogation and coordination of benefits are assets of a plan and the discretion of whether or not to pursue them is inherently a fiduciary role. The DOL further advised that the failure to investigate whether to pursue such claims is a breach of fiduciary duty, even if it turns out that none of the claims has any merit.*

* ABA Joint Committee on Employee Benefits, Questions and Answers with the DOL, Q/A-24 (May 18, 2005), available at http://www.abanet.org/jceb/2005/qa05dol.pdf (as visited May 10, 2010).

b. Services Providers With Any Authority or Control Over Plan Assets

Most plan service providers take the position that they are not fiduciaries, arguing that their function is merely ministerial with no exercise of discretion. As discussed previously, authority or control over plan administration must be discretionary before it creates fiduciary status. However, the fiduciary definition by its terms does not require discretion where a person has authority or control over plan assets.[30.4]

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28 *Baker v. Big Star Div. of the Grand Union Co.*, 893 F.2d 288, 11 EBC 2696 (11th Cir. 1989) (court noted that claims processor lacked authority to review benefit denials and to make eligibility determinations); *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 28 EBC 1317 (9th Cir. 1985) (citing DOL Reg. § 2509.75-5); *W.E. Aubuchon Co. v. BeneFirst, LLC*, 661 F. Supp. 2d 37, 47 EBC 2629 (D. Mass. 2009) (TPA did not exercise necessary discretionary authority over plan administration to become functional fiduciary because payment of claims was ultimately subject to employer's direction, with employer reserving final authority over disputed claims); *Jones v. LMR Int'l, Inc.*, 489 F. Supp. 2d 1296, 40 EBC 2776 (M.D. Ala. 2007) (TPA of self-funded plan that performed administrative services in conformity with plan rules lacked requisite discretion to qualify as ERISA fiduciary; in concluding that TPA had no duty to notify participants of employer's failure to fund plan, court noted that evidence that TPA possessed discretionary authority as to other unrelated aspects of plan administration did not impose fiduciary duty to notify participants regarding plan's status); *Sparks v. Duckrey*, 40 EBC 1023 (E.D. Pa. 2007) (TPA with ministerial plan responsibilities, which included investigating claims, was not an ERISA fiduciary); *Hall v. Glenn O. Hawbaker, Inc.*, 2007 WL 2790799 (M.D. Pa. 2007) (TPA that canceled COBRA coverage for nonpayment was not an ERISA fiduciary; TPA performed only ministerial tasks, such as sending notices and processing claims, and discretionary decisions remained with employer and plan administrator; TPA did not act as fiduciary in its communications with qualified beneficiary's ex-spouse); *Samuels v. PCM Liquidating, Inc.*, 898 F. Supp. 711, 19 EBC 1635 (C.D. Cal. 1995) ("[a]person whose duties under a plan are purely ministerial is not a plan fiduciary").

29 *Feigenbaum v. Summit Health Adm'rs, Inc.*, 2008 WL 2386168, 44 EBC 2665 (D.N.J. 2008) (insurance broker that made decisions for plan about what insurance it would purchase, and from whom, might be an ERISA fiduciary).

30 *Geweke Ford v. St. Joseph's OMNI Preferred Care Inc.*, 130 F.3d 1355, 21 EBC 2222 (9th Cir. 1997) (ERISA does not "transform excess liability insurers into fiduciaries under normal circumstances"); *Kyle Rys., Inc. v. Pac. Admin. Servs., Inc.*, 990 F.2d 513, 16 EBC 2032 (9th Cir. 1993) (finding stop-loss insurer not a fiduciary, court said: "[t]he majority of courts that have considered the status of benefit plan insurers have found insurance companies not to be ERISA fiduciaries unless they are given the discretion to manage plan assets or to determine claims made against the plan").

30.1 *See, e.g., Kyle Rys., Inc. v. Pac. Admin. Servs., Inc.*, 990 F.2d 513, 16 EBC 2032 (9th Cir. 1993) (collecting cases); *Libbey-Owens-Ford Co. v. Blue Cross & Blue Shield Mut. of Ohio*, 982 F.2d 1031, 16 EBC 1315 (6th Cir. 1993); *Benvenuto v. Conn. Gen. Life Ins. Co.*, 643 F. Supp. 87 (D.N.J. 1986). See also Sections XXXIV and XXXV.

30.2 *Am. Fed. of Unions Local 102 v. Equitable Life Assur. Soc'y*, 841 F.2d 658, 9 EBC 1769 (5th Cir. 1988).

30.3 *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415 (9th Cir. 1997); *compare Kyle Rys., Inc. v. Pac. Admin. Servs., Inc.*, 990 F.2d 513 (9th Cir. 1993) (service provider required to refer all discretionary questions regarding claims back to sponsor was not fiduciary).

30.4 *See, e.g., Chao v. Day*, 36 F.3d 234, 36 EBC 2384 (D.C. Cir. 2006) (insurance broker with control over disposition over plan assets was a fiduciary even though he had no discretion); *Srein v. Frankford Trust Co.*, 323 F.3d 214 (3d Cir. 2003) (bank was a fiduciary where it wrongfully disbursed plan funds even though no discretion); *see also Mogel v. Unum Life Ins. Co. of Am.*, 547 F.3d 23, 45 EBC 1289 (1st Cir. 2009) (insurer was an ERISA fiduciary when it failed to pay lump-sum benefits when due but instead issued checkbooks to beneficiaries and retained use of funds until beneficiaries wrote checks to draw down benefits). *But see Sec'y of U.S. Dep't of Labor v. Payea*, 2009 WL 2046135, 47 EBC 2495 (E.D. Mich. 2009) (depository bank for retirement plan accounts did not exercise sufficient control or authority over plans' assets to become fiduciary when it used accounts' funds to pay IRS tax lien levy against plan sponsor).

This distinction is often lost in the case law, but several court decisions have found it to be significant. In a Third Circuit decision, an administrative services provider was found to be a fiduciary based on its responsibility to collect contributions from employers participating in the plan, deposit the contributions in the plan's bank account, and make payments in accordance with the plan's directions. Although much of what the service provider did was at the direction of the plan, it was a fiduciary because it had actual control over the plan's bank account.[30.5]

c. Checkwriting Authority Can Make Service Provider a Fiduciary

Several courts have held that TPAs retained to provide administrative services to an ERISA plan could be fiduciaries based on their checkwriting authority over plan assets, even though the TPAs argued that they had no discretion in issuing benefit checks.[30.6]

5. Lawyers, Accountants, Consultants, and Other Plan Advisors

a. Professional Advisors Typically Are Not Fiduciaries

The DOL has stated that attorneys, accountants, actuaries, or consultants who render legal, accounting, actuarial, or consulting services to a plan (other than investment advisory services) ordinarily will not be considered fiduciaries solely by virtue of performing their usual professional functions. This is because the power to act for the plan is essential to the status of a fiduciary, and providing professional services does not give professionals any decisionmaking authority over the plan or its assets.[30.7] The courts, too, have adhered to this view. The Ninth Circuit, for example, has held that an actuary was not a fiduciary where no inference could be drawn that the actuary acted in any capacity other than as an actuary.[30.8] The Ninth Circuit also has held that an accountant who reviewed the plan's records and prepared year-end financial statements for the plan was not a fiduciary of the plan.[31] In addition, the Eleventh Circuit has held that a law firm did not become a fiduciary by combining "legal advice [to a profit-sharing plan] with incidental business observations."[32]

Under facts that came closer to creating fiduciary duties, the court in *Brown v. Roth* held that an accountant who suggested investments to the plan's trustee could not be sued under ERISA as a fiduciary liable for the plan's investment losses because (1) the accountant performed functions that were well within his

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30.5 *Bd. of Trs. v. Wettlin Assocs., Inc.*, 237 F.3d 270, 25 EBC 1652 (3d Cir. 2001) (collecting cases); *see also Hartsfield, Titus & Donnelly LLC*, 2010 WL 596466, 48 EBC 2286 (D.N.J. 2010) (TPA that made payments in excess of applicable limits was an ERISA fiduciary because it exercised discretionary authority over plan assets). *But see Trustees of the Colo. Laborers' Health & Welfare Trust v. Am. Benefit Plan Adm'rs, Inc.*, 39 EBC 2625 (D. Colo. 2006) (TPA was not an ERISA fiduciary when it failed to timely report plan's stop-loss claim).

30.6 *See Briscoe v. Fine*, 444 F.3d 478, 37 EBC 1779 (6th Cir. 2006) (TPA that exercised power to write checks on plan account was a fiduciary even if TPA had no discretion); *David P. Coldesina D.D.S., P.C. Employee Profit Sharing Plan & Trust v. Estate of Simper*, 407 F.3d 1126 (10th Cir. 2005) (TPA with checkwriting authority over plan contributions held in TPA's business account was a fiduciary); *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 20 EBC 2633 (9th Cir. 1997) ("The words of the ERISA statute, and its purpose of assuring that people who have practical control over an ERISA plan's money have fiduciary responsibility…require that a person with authority to direct payment of a plan's money be deemed a fiduciary"); *Briscoe v. Preferred Health Plan, Inc.*, 2008 WL 4146381 (W.D. Ky. 2008) (TPA breached fiduciary duty to plan by paying itself administrative fee from plan's assets where fee was employer's obligation, not plan's; TPA also breached fiduciary duties by forwarding remaining account balance to bankrupt plan sponsor); *Guardsmark, Inc. v. Blue Cross & Blue Shield of Tenn.*, 313 F. Supp. 2d 739, 33 EBC 1336 (W.D. Tenn. 2004) (Guardsmark #2) (TPA found to be fiduciary based on checkwriting authority and claims administration duties). *But see Gross v. Hale-Halsell*, 39 EBC 2187 (N.D. Okla. 2006) (CEO who never exercised his signature power over claims account was not a fiduciary).

30.7 DOL Reg. § 2509.75-5, Q/A D-1 (Interpretive Bulletin, June 25, 1975). Lawyers and other advisors are usually parties in interest, however, and may be liable on that basis if they participate in prohibited transactions (discussed in subsection D). *See, e.g., Quint v. Freda*, 1999 WL 65045 (S.D.N.Y. 1999); *see also Assocs. in Adolescent Psychiatry v. Home Life Ins. Co.*, 941 F.2d 561 (7th Cir. 1991).

30.8 *Mertens v. Hewitt Assoc.*, 948 F.2d 607, 14 EBC 1973 (9th Cir. 1991). *See also Gerosa v. Savasta & Co.*, 329 F.3d 317 (2d Cir. 2003); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 13 EBC 1337 (7th Cir. 1991); *Bozeman v. Provident Nat'l Assurance Co.*, 1992 WL 328804 (W.D. Tenn. 1992).

31 *Yeseta v. Baima*, 837 F.2d 380, 9 EBC 1377 (9th Cir. 1988). *See also Anoka Orthopedic Assoc., P.A. v. Lechner*, 910 F.2d 514, 12 EBC 2241 (8th Cir. 1990) (accounting firm and attorney who prepared year-end financial statements were not fiduciaries); *Painters of Philadelphia Dist. Council No. 21 v. Price Waterhouse*, 879 F.2d 1146, 11 EBC 1261 (3d Cir. 1989) (plan auditor not a fiduciary).

32 *Useden v. Acker*, 947 F.2d 1563, 14 EBC 2407 (11th Cir. 1991). *See also Femino v. NFA Corp.*, 2005 WL 1999944 (D.R.I. 2005).

