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DOL SCORES ONLY PARTIAL VICTORY IN AN INVESTMENT MANAGER CASE

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Employee Benefits

The U.S. Department of Labor (DOL) filed a lawsuit in a Pennsylvania federal court alleging that a retirement plan committee and its members violated their ERISA fiduciary duties because qualified retirement plan assets were not properly invested for a period during which the committee believed it had a valid agreement in place with an ERISA Section 3(38) investment manager. The DOL further alleged the retirement plan committee and its members were liable as co-fiduciaries for the investment manager's mismanagement of plan assets that resulted in millions of dollars in losses, and were also liable for failing to comply with the duty to monitor the appointed investment manager.

The plan committee and its members filed a motion to dismiss the DOL claims. As to allegations of failing to invest plan assets and co-fiduciary liability, the Committee asserted that because an investment manager had been appointed and was responsible for investing plan assets, they were relieved from any such liability under ERISA Section 405(d)(1) for the acts or omissions of the investment manager and from any obligation to invest the plan assets. The DOL argued, among other things, that the language of ERISA Section 405(d)(1) only insulates "*trustees*" and that none of the defendants were in fact plan *trustees*. The defendants countered by arguing that it is a reasonable reading of ERISA to conclude that any plan fiduciary with the authority to control and manage plan assets (including the authority to appoint a 3(38) investment manager) is entitled to the protection of ERISA 405(d)(1), regardless of whether the fiduciary is a "trustee."

With respect to the DOL's claims relating to failure to invest and co-fiduciary liability, the court sided with the plan committee and ruled that named fiduciaries who have the authority to control plan assets and who have properly appointed an investment manager are protected from liability by ERISA Section 405(d)(1), even though they are not the appointed plan trustees. Because ERISA allows for the possibility that a named fiduciary other than the plan trustee will have the power to control or manage the assets of a retirement plan, the court found it is logical to conclude that whoever had control over the plan assets prior to the appointment of the investment manager should obtain the benefit of the protections afforded by ERISA Section 405(d)(1).

The court, however, was unwilling to dismiss the DOL's claim based on the plan committee's failure to properly monitor the appointed investment manager. In deciding that the DOL properly stated a claim of failure to monitor, the court determined that an appointing fiduciary is required to put reasonable procedures in place and follow the procedures so that the fiduciary can review and evaluate whether an investment manager is properly discharging its responsibilities. While the record before the court was not sufficient to evaluate the committee's conduct with respect to its monitoring of the investment manager in this case, the court found that the DOL had properly stated its failure to monitor claim.

The court's rulings in this case provide an important reminder of the potential advantages of using an investment manager to shield the appointing plan fiduciary from liability associated with appointing an investment manager to invest plan assets. However, the appointing fiduciary is not totally without responsibility once the investment manager has been appointed – the appointing fiduciaries are required to have procedures in place that will allow them to review and evaluate whether the investment fiduciaries (in this case, the investment manager) are properly discharging their investment responsibilities. *Perez v. WPN Corporation* (W.D. Pa. 2017)