No. 20-cv-599-TCF

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

RENITA CONNOLLY, et al.

Plaintiff-Appellant,

v.

NATIONAL LABORERS HOLIDAY AND VACATION FUND, BOARD OF TRUSTEES OF THE NATIONAL LABORERS HOLIDAY AND VACATION FUND, JOE SCHLITZ, LETITIA BECK, REGAL CONSULTING LLC, and RAUL DEMISAY

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR PLAINTIFF-APPELLANT

Team 7
Counsel for Plaintiff-Appellant

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The District Court for the District of Columbia has jurisdiction over these claims under the Employee Retirement Income Security Act of 1974 (“ERISA”). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. This appeal is from the final judgment of the District Court.

ISSUES PRESENTED

1. Whether the information and data that was stolen are ERISA “plan assets” of the Fund.

   Suggested Answer: Yes.

2. Whether Regal is liable under ERISA for any loss suffered by the Fund and its participants.

   Suggested Answer: Yes.

STATEMENT OF THE CASE

On September 1, 2020 Ms. Renita Connolly ("Ms. Connolly") on behalf of herself and all similarly situated participants in the National Holiday and Vacation Fund ("Fund") filed a civil action in the United States District Court of the District of Columbia against the Fund and Regal Consulting LLC ("Regal"). R.5 Ms. Connolly's complaint alleged (1) that each of the defendants are fiduciaries under ERISA (2) the Defendants had an obligation to prudently administer the fund (3) the Defendants had an obligation to prudently safeguard the Fund's assets which included its information and data and (4) the Defendants failed in their duty to prudently administer and safeguard the Fund's assets. R. 6.

Defendants Regal and Fund both filed motions to dismiss which the District Court granted. R. 13. The District Court held (1) Regal is not an ERISA fiduciary (2) Regal and its representative acted negligently but their conduct did not rise to the level of gross negligence or willful misconduct and (3) the Agreement between Regal and the Fund did not invoke ERISA's duty of prudence so Regal was not liable for the Fund's or its participants losses. R. 9-13.
Ms. Connolly filed a timely appeal to the United States Court of Appeals for the Thirteenth Circuit which was granted. The issues on appeal are (1) Whether ERISA "plan assets" include the plan participants data and information and (2) Whether Regal is liable for failing ERISA's duty of prudence.

STATEMENT OF THE FACTS

Appellant Renita Connolly ("Ms. Connolly") had her identity stolen, bank account drained, and entitled benefits stolen. R. 5. Ms. Connolly's address, email, employer, and social security number were exposed after a representative of appellee Regal Consulting LLC ("Regal")

used a company issued computer to log into a restaurant's free public wi-fi and the computer was hacked. R. 2-3.

Ms. Connolly is a journeyman electrician and participates in several multiemployer plans including the National Holiday and Vacation Fund ("Fund"). R. 2. Regal has an Administrative Services Agreement ("Agreement") with the Fund and provides administrative services for the Fund and its participants. R. 3-4.

> 13. Section 1 of the Administrative Services Agreement by and between Regal and the Fund (the "Agreement") provides that in consideration of the Fund's payment of the Per Capita Fee specified in Section 4.4 of the Agreement, Regal will provide the Contractual Services specified in Section 4.2 of the Agreement.
>
> 14. Section 4.1 of the Agreement provides that "Regal [shall] [shall not] be regarded as a fiduciary for purposes of ERISA."
>
> 15. Section 4.2 of the Agreement entitled "Contractual Duties" provides that "In consideration of the Per Capita Fee specified in Section 4.4 of the Agreement, Regal shall provide administrative services to include: (i) maintenance of records for the Fund and (ii) a phone-in service center in which Fund participants can request information concerning account balances."
>
> 16. Section 8 of the Agreement provides as follows: "The Fund agrees to indemnify and hold harmless Regal and any and all of its affiliates, subsidiaries, directors, officers, employees, agents, contractors, and former employees from any and all claims related to the administration or operation of the Fund and services provided to Fund participants; provided, however, that notwithstanding the above, Regal shall be responsible for all claims arising from gross negligence, willful

misconduct, knowing deviation from prudent practices, or any violation of established standards of care."

R. 3-4.

The Fund's Board ("Board") appoints two people to co-manage and its monetary assets are kept at Union Bank of South Bend, Indiana ("Union Bank"). R. 11, 19. The Fund's fiscal year ends in February and distributions are made to eligible participants on March 31st of each year. R. 4. The Fund did not make its March distribution in 2020. R. 5. In February of 2020 its balance of $2,642,863.12 had been transferred to an account at GloboBank to other various banks and then invested in Bitcoin. R. 3.

On February 21, 2020 Regal's representative Raul Demisay was meeting with a client at a Panera Bakery. R. 2. Mr. Demisay received an email containing a file which needed to be approved and return seven days; Mr. Demisay used his Regal issued laptop to log into Panera's free wi-fi and download the file. R. 2-3. That same day the computer which had connected to a restaurant's free wi-fi was hacked and all the information on it copied. R. 3. The information included Mr. Demisay's email and contacts. *Id*. Mr. Demisay waited over a month before he returned his compromised laptop back to Regal. *Id*.

Joe Schlitz is one of the Fund's appointed managers. R. 4. The same day Regal's computer connected to the free Wi-Fi, Mr. Schlitz received an email from "Demisay.Raul@Reegal.com" that contained salutations and a link at his Fund email address. R. 3. Mr. Schlitz clicked the link after which his computer froze and then rebooted. *Id*. Shortly after receiving the email an Excel sheet with all the Fund's participants' names, addresses, emails, Social Security numbers and employers was downloaded from Mr. Schlitz' account at the Fund. *Id*. That same day Mr. Schlitz' account at the Fund initiated the transfer which emptied the

Fund's account at Union Bank. *Id*. Mr. Schlitz stated under oath that he did not access the Fund's Excel file nor did he initiate the transfer. R. 5. It is believed the transfer was the work of a Russian cyber-criminal R. 3.

On May 15, 2020 Ms. Connolly sent a letter to the Board which requested the benefits she earned and was entitled to. R. 5. Ms. Connolly was told the Fund was "undergoing an extensive audit of certain 'banking issues' and would delayed indefinitely in making distributions." *Id*. On July 1, 2020 Ms. Connolly informed the Board her identity had been stolen and her all the money in her bank had been transferred out. *Id*. Ms. Connolly explained she believed the Board and all those responsible for the Fund's administration were responsible for her attack. *Id*. Ms. Connelly received condolences but was told neither the Fund nor the Board would accept responsibility for the theft that occurred after Regal's computer connected to a restaurants free Wi-Fi. R. 3, 5. On September 1, 2020 Ms. Connolly filed a civil action against the Fund and Regal. R. 5.

SUMMARY OF THE ARGUMENT

The Fund's data and information are ERISA "plan assets" because they are considered as such at common law. Congress incorporated the common law into ERISA's terms and definitions. The courts use the common law to construe terms in ERISA that are not well defined. A complete definition for the term "plan asset" is not provided in ERISA. The DOL has instructed the courts to use the common law of property to identify non-investment "plan assets." The courts hold that ERISA "plan assets" are "property the plan has ownership interest in." The Fund has ownership interest in its data and information so the data and information are ERISA "plan assets."

Regal is liable under ERISA for the losses suffered by the Fund and its participants. The District Court erred in its decision that Regal cannot be held as having a fiduciary duty to the participants of the Plan. While the agreement between the Fund and Regal explicitly stated that they would not be held as a fiduciary to the Plan, the courts have previously recognized that this alone cannot negate fiduciary duty if Regal was acting as a fiduciary at the of the breach. In this case Regal was acting within the court's ruling of a fiduciary when the Plan participants were harmed. Further the District Court ruled that should the Appellate Court be able to find Regal acted as a fiduciary that Regal did in fact breach their fiduciary duty and caused harm to the Appellants. Regal breached their duty to the Fund and its participants by misusing company assets, Mr. Demisay's laptop logging onto a public Wi-Fi to retrieve a non-essential document. Regal then proceeded not to respond to participant's explicit inquiries regarding in the fraudulent links they were receiving, leading to multiple participants clicking on the links further subjecting themselves to a cyberattack. Appellant was subject to one of these further cyberattack when months after the initial hacking her information was used to completely drain her bank account, after Regal and the Fun made no attempts to inform participants of the breach and subsequent cyberattack. Further, Regal is not protected by Section 8 of the agreement as their behavior, in using unsecure public Wi-Fi to retrieve a non-essential document that was not due back for another week, amount to gross negligence on their part. This gross negligence subjects them to be held liable under the agreement to claims relating to the administration and operation of the Fund and services provided to Fund participants. Therefore, Regal is liable to the Fund and its participants. For all these reasons, this Court should reverse the lower court's decision and remand.

ARGUMENT

I. THE DISTRICT COURT'S DECISION SHOULD BE REVERSED BECAUSE THE FUND'S DATA AND INFORMATION ARE ERISA "PLAN ASSETS" APPELLEE REGAL HAD A DUTY TO PROTECT

The District Court for the District of Columbia granted Appellee Regal's motion to dismiss in part because the court held the Fund's data and information are ERISA "plan assets;" however the lower court's decision should be reversed for the following reasons. The Court uses an ERISA term's common law definition for construction when ERISA does not explicitly or helpfully define the term. *Tibble v. Edison Int'l*, 575 U.S. 523, 528 (2015) (principle applied to "fiduciary"); *see also*, *Chamber of Commerce of the United States v. United States DOL*, 885 F.3d 360, 369 (5th Cir. 2018) ("all relevant sources indicate that Congress codified the touchstone of common law [in ERISA]"); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) ("we adopt a common-law test for determining who qualifies as an "employee" under ERISA"). ERISA does not explicitly define the term "plan assets". 29 U.S.C. §1001(b). Common property law is used to construe the ERISA term "plan asset." *Sec'y of Labor v. Doyle*, 657 Fed Appx. 117, 124 (3rd Cir. 2016) ("assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law") quoting 93-14A Op. Dep't of Labor at *10-11 (May 5, 1993). An ERISA "plan asset" is property the plan as ownership interest in. *Solis v. Koresko*, 884 F. Supp. 2d 261, 285-86 (E.D. Pa. 2012). Plan participant data is a valuable asset in the common law of property. *Salamon Smith Barney, Inc v. Vockel*, 137 F.Supp 2d 599 (E.D Pa. 2000) (suit over ownership of plan participant data). The Fund has ownership interests in its data and information so the data and information are protected ERISA "plan assets".

A. Federal Rules of Civil Procedure To Consider

The court has held in ruling on a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6), a court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *DirecTV, Inc. V. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 566 U.S. 662, 678 (2009). However, courts are "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Turning to the consideration of whether a plaintiff has brought a plausible claim, the court will not rely on extrinsic evidence. See *Cunningham v. Osram Sylvania, Inc.*, 221 Fed. App'x 420, 422-23 (6th Cir. 2007). However, the court will "consider the complaint in its entirety, 'including' documents incorporated into the complaint by reference. *Solo v. United Parcel Serv. Co.*, 819 F.3d 788, 794 (6th Cir. 2016) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

B. Congress Incorporated The Common Law Into ERISA

Congress enacted ERISA to protect plan participants through standards of conduct and sanctions for violating those standards. 29 U.S.C. §1001(b); *Shaw v Delta Air Line*s, 463 U.S 85, 90 (1983) ("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans."). The Fund is a "multiemployer plan" under, ERISA as it is a "plan – (i) to which more than one employer is required to contribute, (ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and (iii) which satisfies such other requirements as the Secretary may prescribe by regulation." 29 U.S.C. § 1002(37). The Fund

establishes itself as a multiemployer welfare benefit plan based out of Washington D.C. R. 2. Congress's intent to incorporate the common law into ERISA is evident because ERISA is not a standalone provision. *E.g.*, 29 U.S.C. §1002; 29 U.S.C §1002(1)(B) (ERISA definitions which reference other statutes). ERISA is a viable statute despite its definition section's non exhaustive nature because Congress incorporated existing common law into ERISA. Reversing the District Court's decision would further Congress's goals for ERISA, with the incorporation of common law, to protect participants and plan assets.

C. The Court Uses The Common Law To Construe ERISA Terms

The Court uses common law to define or construe ERISA terms when they are not explicitly defined in ERISA. *See Nationwide*, 503 U.S. 318; *see also Varity Corp. v. Howe*, 516 U.S. 489 (1996). In *Nationwide*, a party's ERISA protection turned on ERISA's definition of "employee". 503 U.S. at 321. The Court explained "ERISA's nominal definition of "employee"… is completely circular and explains nothing." *Id.*, at 323. The Court held it would use the common law to define employee because "where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Id.*, at 322 quoting *Cmty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). In *Variety Corp.*, the Court applied the same procedure to ERISA's term "fiduciary." 516 U.S at 496. ("we recognize that these fiduciary duties draw much of their content from the common law of trusts").

The term "plan asset" is at issue in the present case and like the terms "employee" and "fiduciary," "plan asset" is not explicitly defined so this Court should construe "plan asset" using its common law meaning. The relevant section in ERISA reads: "the term "plan assets" means

plan assets as defined by such regulations as the Secretary [of Labor] may prescribe." 29 U.S.C. §1002(42). The two regulations the Secretary of Labor has released concerning plan assets only describe certain types of plan assets without excluding other types of "plan assets." 29 CFR 2510.3-101(a)(1) ("[t]his section describes what constitute assets of a plan with respect to a plan's investment"); 29 C.F.R 2510.3-102(a)(1) ("the assets of the plan include"). Like the terms "employee" and "fiduciary," ERISA's definition of "plan asset" is not explicit or helpful so the courts have used the common law to construe the term.

D. The Funds Data And Information Are ERISA "Plan Assets"

The courts have used common property law to construe ERISA's term "plan assets" as property the plan has ownership interest in. As stated above "plan asset" is not explicitly defined in ERISA, instead ERISA authorizes the DOL to create regulations about "plan assets". 29 §U.S.C 1002(42). The DOL's regulations only mention two types of "plan assets", but the DOL has instructed how to identify other plan assets. Those instructions state:

> [I]n situations outside the scope of the plan assets-plan investments regulation (29 C.F.R. 2510.3-101), the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law. In general, the assets of a welfare plan would include anything, tangible or intangible, in which the plan has a beneficial ownership interest.

93-14A Op. Dep't of Labor Pension & Welfare Benefit Progs. at *16, 10-11 (May 5, 1993); *see also* 2005-08A Op. Dep't of Labor at *6-7 (May 11, 2005); 2003-05A Op. Dep't of Labor at *5 (April 10, 2003); 2001-02A Op. Dep't of Labor at *5 n.2 (Feb. 15, 2001); 94-31A Op. Dep't of Labor at *3-4, 7 (Sept. 9, 1994); 92-22A Op. Dep't of Labor at *8-10 (Oct. 27, 1992).

The DOL explicitly states there are other types of "plan assets" outside of investments, clarifies assets can be either tangible or intangible, and instructs principles of common property law should be used to ascertain other "plan assets". Additionally, Congress's wording in ERISA

demonstrates the intent to not limit "plan assets" to investments. *Advocate Heath Care Network v. Stapleton*, 137 S.Ct. 1652, 1659 (2017) (each word in a Congressional statute has weight and meaning). ERISA mentions specific types of assets in some sections but uses general term "plan assets" in others. Contrast 29 U.S.C. §1002(21) where "plan asset" is used broadly with 29 U.S.C. §§1002(18), (20) and (21) which refer to the specific assets "money," "a security," and "securities" respectively The Court has explained all words -as well as their absence- have meaning when interpreting federal statutes. *Chamber of Commerce of the United States v. United States DOL*, 855 F.3d 360, 369, 381 (5th Cir. 2018) ("for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress") citing *Chevron, U.S.A. v. NRDC 467 U.S.*, 837, 842-43 (1984). ERISA's wording shows Congress intended ERISA to protect "plan assets" outside of investments; Congress incorporated the common law definition of "plan asset," and at common law participant data is an asset.

The courts have followed the DOL's instructions and use the common law of property to identify ERISA "plan assets". *Navarre v. Luna*, 406 F.3d 1192 (10th Cir. 2005). In *Navarre* the respondent's fiduciary status partially depended on whether a contractual obligation to pay was an ERISA "plan asset". 406 F.3d at 1198. An entity is an ERISA fiduciary when it exerts discretionary control over "plan assets." *Id.* The respondent argued a contractual obligation was simply a matter of contracts and could not be an ERISA "plan asset". *Id.*, at 1198. The Court held the unpaid contributions were "plan assets" because the plan possessed ownership interest in them. *Id.*, at 1200. The court explained "the obvious starting point is the common law of property," and "central to the definition of "asset," then is that the person or entity holding the asset has an ownership interest in the thing." *Id.*, at 1199.

The court applied that reasoning to ERISA's term "plan asset" and held a "plan asset" is something the plan possesses ownership interest in. *Id.*, at 1199. The court used the restatement of property to explain a plan has ownership interest if it can or would be able to "use, devise, assign, transfer, or otherwise act upon" the property at issue. *Id.* The court determined the contractual obligation to pay was a future interest and thus an ERISA "plan asset." *Id.*, at 1200.

Like the contractual obligation in *Navarre*, the Fund's data and information are intangible property. 406 F.34 at 1199. At common law participant data was an ownable asset before ERISA's 1974 enaction and has continued to be so. *See Arrant v. Georgia Casualty Co.*, 212 Ala. 309, 311 (Ala.S.Ct. 1924) ("property rights exist in information" and the owner of the property can lend it without destroying its property rights); *Goodyear Tire & Rubber Co. v. Vandergriff*, 52 Ga.App 662, 663-65 (Ga.Ct.App. 1936) (survey of prior cases which recognized ownership interest in information); *Sarkes Tarzian v. Audio Devices*, 166 F.Supp 250, 283 (S.D.Cal. 1958) (customer list containing participant data are a valuable asset to have an ownership interest in); *Amgro v. Johnson*, 71 Ill.App.3d 485 (Ill.App.Ct. 1979) (competing ownership claims over participant data); *NCH Corp. v. Broyles*, 749 F.2d 247 (5th.Cir.1985) (similar); *National Legal Research Group v. Lathan*, 1993 U.S Dist. LEXIS 6681 (W.D.Va. 1993) (similar); *Salomon Smith Barney v. Vockel*, 137 F.Supp 2d 599 (E.D.Pa 2000) (similar); *Hayes v. Ohio Nat'l Fin. Servs.*, 642 F.Supp 2d. 456, 463 (E.D.Pa. 2009) (similar); *In re Gibson*, 27 Fla. L. Weekly Fed. B 117 (U.S.Bankr.M.D.Fla 2017) (similar).

Also like *Navarre*, the Fund has ownership interest in intangible property, the participants data. 406 F.34 at 1199; Restatement (First) of Property §10 (Am. Law. Inst. 1936). Regal manages the Fund's data and information but the data and information exist because of the Fund and solely for the Fund's benefit. The Agreement between the Fund and Regal allows Regal

access to the Fund's data, but for the Agreement the Fund would still have complete ownership of its own data. The Fund's ownership interest in its data is not eliminated by Regal's management. "An owner may part with many of the rights, powers, privileges and immunities that constitute complete property and his relation to the thing is still termed ownership both in this Restatement and as a matter of popular usage." Restatement (First) of Property §10 cmt. c (Am. Law Inst. 1936). So the Fund has ownership interest in its data and information which means the data and information are ERISA "plan assets." *Navarre*, 406 F.34 at 1199.

Recognizing ERISA protects the Fund's participant's data and information advances Congress intent for ERISA to protect plan participants. *Great-West Life & Annuity Ins. Co. V. Knudson*, 534 U.S. 204 (2002) (ERISA created causes of actions and allows remedies to protect plan participants). Data is an important valuable asset in the modern day that can cause great harm if mismanaged. Regal's mismanagement of the funds data not only subjected the Fund to attack but also made the Fund's participants vulnerable. R. 3, 5. ERISA was designed to and does protect participants data just as much as participants funds, investments, and contractual dues.

The Court in *Navarre* also noted some circuits do turn to the parties' contract to assist in identifying ERISA "plan assets." 406 F.34 at 1199-1200. However when the contract is vague on the matter "a court's purpose in [such] cases…is to construe ERISA and give effect to its plain meaning." *Id.*, at 1201. The court in *Navarre* created a holding in line with Congress's goals for ERISA by following the DOL's instructions and applying the common law of property to the term "plan asset." 406 F.34 1192. *See also Edmonson v. Lincoln Nat'l Life Ins. Co*., 899 F.Supp 2d 310 (E.D. Pa. 2012) (plan did not possess ownership interest so the property was not an ERISA "plan asset")

The relevant portion of the Fund's and Regal's Agreement Section 4.2 reads: “In consideration of the Per Capita Fee specified in Section 4.4 of the Agreement, Regal shall provide administrative services to include: (i) maintenance of records for the Fund and (ii) a phone-in service center in which Fund participants can request information concerning account balances.” R. 4. "Maintenance of records for the Fund" implies Regal possess the Fund's data and information at the behest of the Fund who owns the data; however participant data is not specifically addressed in the contract so the common law meaning of "plan asset" should be used. The Fund has ownership interest in its participant’s data and information so the data and information are protected ERISA assets.

E. The Case Law Does Not Support The Lower Court's Ruling

The District Court's ruling should be reversed because it relied on an incorrect construction of "plan asset." R. 10-11. The District Court stated "Neither of the regulations promulgated by the DOL…either expressly or by any plain-language interpretation includes participant data as plan assets under ERISA." R. 10. However the DOL has instructed courts to use the common law of property to determine if property outside its specified scope is an ERISA "plan asset." "[T]he assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law. In general, the assets of a welfare plan would include anything, tangible or intangible, in which the plan has a beneficial ownership interest." 93-14A Op. Dep't of Labor Pension & Welfare Benefit Progs. at *16, 10-11 (May 5, 1993). As argued above the Fund's data and information are protected ERISA "plan assets" because the Fund has ownership interest in them.

Additionally, the District Court's ruling should be reversed because the case law it relied on was either irrelevant or is inapposite to the holding. The District Court stated "the

undersigned has researched the case law regarding this issue, and the results are surprising. We have not found a single reported case where a court has held that plan data are "plan assets" under ERISA. But the exact opposite has been found in several cases." R. 10 The cases the District Court cites are *Harmon v. Shell Oil Co*., No. 3:20-cv-00021, 2021 U.S. Dist. LEXIS 66312, (S.D. Tex. 2021); *Divane v. Northwestern Univ.,* No. 16 C 8157, 2018 U.S. Dist. LEXIS 87645 (N.D. Ill. 2018), *rev'd. sub nom*. *Hughes v. Northwestern*, 142 S.Ct. 737 (2022); *Patient Advocates v. Prysunka*, 316 F.Supp. 2d 46 (D. Me. 2004); and *Walsh v. Principal Life Ins.*, 266 FRD 232 (S.D. Iowa 2010). R. 11 Footnote 1.

1. ***Harmon v. Shell Oil Co*., No. 3:20-cv-00021, 2021 U.S. Dist. LEXIS 66312, (S.D. Tex. 2021)**

The District Court should not have based its decision on this case because it is contradictory to case law. The relevant issue in the case was whether participant data was an ERISA "plan asset. *Harmon v. Shell Oil Co*., No. 3:20-cv-00021, 2021 U.S. Dist. LEXIS 66312, *13 (S.D. Tex. 2021). The court in this case held 1) the DOLs regulation do not mention data so it cannot be an ERISA "plan asset" and 2) participant data is not a "plan asset" because no other court has held it to be such. *Id.*

Contradictory to the first holding and as argued above the DOL regulations are for specific types of "plan assets" but do not limit the types of property which can be "plan assets." The DOL has instructed the common law of property should be used to define "plan assets" and the courts have held property the plan has ownership interest in is a "plan asset." As to the second holding the court cites to a different case and observed,"[a]nd though the court acknowledged that confidential participant information has some value, it could not "conclude that it is a plan asset under ordinary notions of property rights. *Id.* at *14. Internal quotations

removed. This holding is contradictory to well established case law that considers data and specifically participant data intangible property.

2. *Divane v. Northwestern Univ.,* No. 16 C 8157, 2018 U.S. Dist. LEXIS 87645 (N.D. Ill. 2018)

The district Court should not have relied on this case because it was also contradictory to established case law. The relevant issue in the case was whether participant data was ERISA "plan asset." *Divane v. Northwestern Univ.,* No. 16 C 8157, 2018 U.S. Dist. LEXIS 87645, *39 (N.D. Ill. 2018), *rev'd. sub nom*. *Hughes v. Northwestern*, 142 S.Ct. 737 (2022) The court in this case held data and information are not ERISA "plan assets' because 1) it was contrary to congress's goal for ERISA and 2) "[i]t does not appear that courts have recognized a property right in such information.". *Id*. Contrary to the first holding Congress enacted ERISA to protect and guarantee plan participants benefits. Contrary to the second holding courts have long recognized property rights in information an specifically plan participant data. The District Court should not have used this case to reach its holding because it is contradictory to established case law.

3. *Patient Advocates v. Prysunka*, 316 F.Supp. 2d 46 (D. Me. 2004)

The holding in this case is contradictory to the District Court's ruling. The issue was whether participant data was an ERISA "plan asset". *Patient Advocates v. Prysunka*, 316 F.Supp. 2d 46, 48-49 (D. Me. 2004). The court held the participants data were not ERISA "plan assets" because it did not receive any evidence to support the claim. *Id*. The court also stated " [w]ithout deciding whether information or data could ever constitute "plan assets" under ERISA, I conclude that the data here are not plan assets." *Id*. The court reaches its holding without excluding participant from ERISA "plan assets" and implies sufficient evidence could show participant data could be ERISA "plan assets." *Id*. This is contradictory to the District Court's

holing as well as the Harmon and Divine courts holdings all of which cite to this case. Unlike the party in Patient Advocates Petitioner Mrs. Connolly has presented case law to support her position that the Fund's data and information are ERISA "plan assets" Regent had a fiduciary duty to protect.

4. *Walsh v. Principal Life Ins.*, 266 FRD 232 (S.D. Iowa 2010)

The final case the District Court relied on to hold the Fund's data and information are not ERISA "plan assets" is not relevant to the holding. *Walsh v. Principal Life Ins.*, 266 FRD 232 (S.D. Iowa 2010). The issues in *Walsh* were whether an expert's testimony was admissible under Federal Rule of Evidence 702 and whether class certification was appropriate. *Id*. at 235. The court does mention participant data nor does it issue any holing regarding participant data as ERISA "plan assets."

II. REGAL IS LIABLE UNDER ERISA FOR LOSSES SUFFERED BY THE FUND AND ITS PARTICIPANTS AS THE DISTRICT COURT ERRED IN FINDING THAT REGAL DID NOT HAVE A FIDUCIARY DUTY TO THE FUND AND ITS PARTICIPANTS

A. Federal Rule of Civil Procedure To Consider

Under the Federal Rule of Civil Procedure 8(a)(2) it is required that a complaint include “a short and plain statement of the claim showing that the pleader is entitled to relief. The purpose being to “give the defendant fair notice of what the … claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A pleading must contain more than “an unadorned, the-defendant-unlawfully-harmed-me accusation,” *Ashcroft v. Iqbal*, 566 U.S. 662, 678 (2009), and should push the plaintiff’s claim “across the line from conceivable to plausible.” *Bell Atl. Corp.*, 550 U.S. at 570. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678.

ERISA does not require heightened pleading standards, generally notice pleading is the requirement for a valid ERISA complaint. *In Re Coca-Cola Enterprise, Inc. ERISA Litigation*, 2007 U.S. Dist. LEXIS 44991 at *8 (N.D. Ga.). Under the circumstances of this case the Appellant is not alleging fraud, misrepresentation or omission by Regal or the Fund. Rather the Appellant is alleging damages caused by Regal's breach of fiduciary duty and gross negligence. R. 6.

B. Regal As A Fiduciary

Appellant sufficiently pled that Regal is liable under ERISA for any loss suffered by the Fund and its participants. ERISA imposes liability on fiduciaries who breach their fiduciary duties causing employee benefit plans to incur losses, additionally indemnification language does not relieve fiduciaries from liability under ERISA for added plan provisions that hold fiduciaries blameless or free them from responsibility or liability. 29 U.S.C. § 1110. As the 7th Circuit has held to state a claim for breach of fiduciary duty under ERISA, a plaintiff must allege "(1) that the defendant is a plan fiduciary; (2) that the defendant breached its fiduciary duty; and (3) that the breach resulted in harm to the plaintiff." *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 678 (7th Cir. 2016). In order to satisfy the first element, the party can be named or meet ERISA's functional definition of a fiduciary. Under 29 U.S.C. § 1002(21)(A),

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any money or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Under 29 U.S.C. § 1002(9) a 'person' includes partnerships and corporations. Additionally 29 U.S.C. § 1105(c)(1) state that a person which a plan fiduciary delegates to carry out

responsibilities under the plan is also a plan fiduciary. Therefore the Regal and the Fund qualify as persons under ERISA.

1. Regal Has A Fiduciary Duty As The Acting Administrator

Section 4.1 of the Agreement provides that "Regal [shall] [shall not] be regarded as a fiduciary for the purposes of ERISA." R. 4. Therefore Appellant does not allege that Regal is a named fiduciary under the plan documents rather that they meet the functional definition of a fiduciary under ERISA. Appellant must sufficiently allege that Regal was "acting in its capacity as a fiduciary at the time it took the actions that are subject of the complaint." *Chicago Dist. Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463, 471-72 (7th Cir. 2007) (citing *Pegram v. Herdrich*, 530 U.S. 211, 223-226, 120 S. Ct. 2143, 147 L.Ed.2d 164 (2000)). Under ERISA, a fiduciary exercises discretionary control or authority over a plan's management, administration, or assets. 29 U.S.C. § 1002(21). In this case Regal provides consulting, administration, and recordkeeping services to Fund for their Plan. R. 2. Under ERISA a fiduciary duty is imposed on those "responsible for plan management and administration." *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200, 1206 (10th Cir. 2019). ERISA provides that "not only the persons named as fiduciaries by a benefit plan, …, but also anyone else who exercises discretionary control or authority over the plan's management, administration or assets, …, is an ERISA 'fiduciary.'" *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993). The 9th Circuit has held "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

The identified plan fiduciary or service provider designated by the plan "need not have absolute discretion with respect to a benefit plan in order to be considered a fiduciary … rather,

fiduciary status exists with respect to any activity enumerated in the statute over which the entity exercises discretion or control." *Blatt v. Marshall & Lassman*, 812 F.2d 810, 812 (2d Cir. 1987). Therefore, in determining whether Regal is a fiduciary under ERISA "we must examine whether each defendant was responsible as a fiduciary for each of the transactions" which relief is sought by the plaintiff. *Martin v. Feilen*, 965 F.2d 660, 669 (8th Cir. 1992). Additionally, 29 U.S.C. § 1104(c) states that a circumstance under which participants are considered to have exercised independent control over the assets of their accounts includes when acting under the terms of the plan, the identified plan fiduciary or service provider designated by the plan fiduciary and complies with the participant's investment instructions. The District Court correctly held that each Fund Defendant is a fiduciary under ERISA. R. v. Regal was assigned duties under Section 4.2 of maintaining records and information concerning account balances by the Fund. Regal is a fiduciary under ERISA as the Fund, the named fiduciary, delegates fiduciary responsibilities in consulting, administration, and recordkeeping to Regal. According to *Briscoe v. Fine*, the threshold for becoming a fiduciary is lower for entities handling plan assets than for entities managing the plan. *Briscoe v. Fine*, 444 F.3d 478, 491 (6th Cir. 2006). Such a third-party administrator would thus be recognized as an ERISA fiduciary when it exercises "practical control over an ERISA plan's money." *Id.* at 494. According to Section 4.2 of the Agreement "Regal shall provide administrative services to include: (i) maintenance of records for the Fund and (ii) a phone-in service center in which Fund participants can request information concerning account balances." R. 4. The 8th Circuit held that a "service provider acts as a fiduciary: if (1) it 'did not merely follow a specific contractual term set in an arm's length-negotiation' and (2) it 'took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decisions." *Rozo v. Principal*, 949 F.3d 1071, 1073 (8th Cir.

2020). In light of these principals, Regal was a fiduciary under ERISA as it provided practical control over the Plan's recordkeeping and administration. Regal had the authority from the Fund to provide members with information concerning their accounts and consulting, by administration of the Plan. Further, Regal was not required to receive any authorization from the Fund prior to plan management and consultations with participants, therefore acting in its unilateral capacity.

The Fund relies on the language of Section 4.1 of the Agreement, meanwhile the 6th Circuit has held that language in a contract purporting to limit fiduciary status does not "override [] [a third-party administrator's] functional status as a fiduciary." *Briscoe*, 444 F.3d at 492. Therefore, it can be concluded that Regal operated under the functional status of a fiduciary under the Fund's appointment and therefore can be held as a fiduciary to the Plan.

2. Regal Breached Their Fiduciary Duty And Caused Harm To The Plaintiff

ERISA imposes a fiduciary duty of loyalty and prudence. 29 U.S.C. § 1104(a)(1)(A)-(B). The duty of loyalty requires a fiduciary to act "for the exclusive purpose" of providing benefits to the participants. 29 U.S.C. § 1104(a)(1)(A). With that duty a fiduciary should not "mislead plan participants or misrepresent the terms or administration of a plan." *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 640 (7th Cir. 2004). Following the cyberattack on Regal and the Fund, Regal received approximately 126 calls and texts from Mr. Demisay's contacts list asking about emails received including a link similar to what Mr. Schlitz received. R. 5. There is no record that Regal took action to inform participants not to click the links in the timeline of receiving these 126 communications, it is reported nine people clicked the link they received. *Id*. The duty of prudence requires ERSIA fiduciaries to discharge duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity

and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Regal did not inform the Plan participants reaching out that the links should not be clicked on, resulting in participants, like Ms. Connolly notifying the Fund that her identity had been stolen and that all of the money in her bank account had been transferred to an off-shore financial institution. R. 5. Under the duty of prudence Regal and the Fund should have acted to inform its participants that the links were fraudulent. Though regal received 126 communications regarding these fraudulent links, not duty of loyalty or prudence was exercised causing further harm to the Plan participants. Not only did the participants suffer in the cyberattack by their welfare benefit plan being fully drained, but the participants continued to suffer as they were not given the opportunity to protect themselves from further individual attacks as they were unaware that a spreadsheet with their names, addresses, emails, Social Security numbers and designation of employers had been stolen.

A fiduciary of a welfare benefit plan is subject to the "Prudent Man Standard of Care." The standard of care requires:

> (1) Subject to section 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and – (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III.

29 U.S.C. § 1104(a). Regal did not act under the Prudent Man Standard of Care in their actions when Mr. Demisay downloaded an actuarial file on his work computer while

connected to a free, public Wi-Fi system. R. 2. Regal then proceeded not to address the issue of the cyberattack links with any of the participants which contacted them to gain an understanding of what the links were, allowing these participants to click the links and have their own systems subject to a cyberattack. R. iv. Finally, Regal did not follow this standard of care when they waited over a month to retrieve the laptop which initiated the cyberattack on Regal and the Fund's plan assets and participants. R. ii.

With the determination that Regal was a fiduciary under ERISA, it is fair to conclude that Regal breached its fiduciary duty. This statement is furthered by the District Court's statements for facilitating an appeal where it was determined "[i]f the Court of Appeals decides that one or both Regal Defendants are fiduciaries under ERISA, I would find that such Regal Defendant(s) have breached the ERISA duty of prudence." R. 12.

Based off the harm caused by Regal and the Fund to its participants in their fiduciary capacity these participants must enforce their right under Section 502 of ERISA, providing that:

> "(a) A civil action may be brought – (1) by a participant or beneficiary – (A) for the relief provided for in subsection (c) of this section, or (B) to recover benefits due to him under he terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; (2) by the Secretary, or by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132. Based on the participants rights under ERISA, Appellant seeks to be awarded equitable relief and have Regal replaced as administrative services provider under the Plan.

C. Regal's Actions Amounted To Gross Negligence

The trial court correctly ruled that Section 8 of the agreement intended to invoke ERISA duty of prudence, but erred in determining that the Section was drafted poorly and finding therefore Regal could not be held liable for the losses incurred by the Fund and its participants. Section 8 of the Agreement holds: "[t]he Fund agrees to indemnify and hold harmless Regal and any and all of its affiliates, subsidiaries, directors, officers, employees, agents, contractors, and former employees from any and all claims related to the administration or operation of the Fund and services provided to Fund participants; provided, however, that notwithstanding the above, Regal shall be responsible for all claims arising from gross negligence, willful misconduct, knowing deviation from prudent practices, or any violation of established standards of care." R. 3. Under ERISA, "[p]lan sponsors should maintain and adhere to cybersecurity policies and procedures that demonstrate best practices to protect plan participants and beneficiary data and include a data breach response plan of action if a data breach occurs." *Cybersecurity and ERISA Fiduciary Responsibilities for Retirement Plans,* Practical Law Practice Note w-024-1935. These procedures include training programs for employees to safeguard data. *Id.* Mr. Demisay did not follow the best practices of cybersecurity as he logged onto a public Wi-Fi at a Panera Bakery, he did this in an effort to retrieve a document which he had over a week to review and certify from the date it was downloaded on public Wi-Fi, leading to the hack of his computer. R. 2-3. To make matters worse there was no reaction or enactment of a data breach response plan following the data breach. Rather Mr. Demisay retired as planned on March 10 and his laptop, from which the data breach started, was not retrieved until March 31, over a month following the data breach. R. ii. Meanwhile, during this month long period it was well known from what computer the data breach began, Joe Schlitz at the Fund received an email from who he believed

to be Mr. Demisay about 30 minutes following the initial download. *Id.* By the time Regal retrieved Mr. Demisay's laptop a month later they and the Fund were well aware of the cybersecurity attack and the complete draining of their participant's funds. *Id.* The conduct by Regal in not implementing a data breach response plan and not retrieving Mr. Demisay's laptop amount beyond what the District Court held of negligence to gross negligence.

CONCLUSION

WHEREFORE, Plaintiff- Appellant, RENITA CONNOLLY, et al., respectfully requests that this Court reverse the decision of the United States District Court for the District of Columbia and remand this matter for further proceedings.

Respectfully submitted,

/s/ Team 7
Counsel for Plaintiff-Appellant