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Motion to Dismiss ERISA Retained Asset Account Claims Denied

A federal judge in Massachusetts last week denied the insurer's motion to dismiss ERISA claims challenging retained asset account practices. *Luitgaren v. Sun Life Assurance Company of Canada, et al.*, No. 1:09-cv-11410-NG. (Please click [here](#) for the order.)

Plaintiff brought a putative class action on behalf of beneficiaries of ERISA life insurance plans who received their benefits from Defendants through retained asset accounts. Plaintiff alleged that Defendants breached fiduciary duties in violation of section 404(a) of ERISA (29 U.S.C. § 1104(a)) by investing retained assets for their own benefit. Plaintiff also alleged that the retained assets constituted plan assets within the meaning of ERISA and that Defendants' investment of those assets constituted prohibited transactions in violation of section 406(b)(1) of ERISA (29 U.S.C. § 406(b)(1)).

Defendants made several arguments in support of their motion to dismiss. First, they argued that, to the extent that Plaintiff was contending that payment through a retained asset account resulted in a delay in paying benefits until Plaintiff withdrew funds from the account, any such delay did not constitute a per se violation of ERISA. Defendants noted that when payment is made by check, the insurer retains the assets until the check is received and deposited. Second, Defendants argued that payment through a retained asset account was permitted by the plan, which did not require a particular method of payment. Accordingly, any fiduciary duties ended when payment was made through the retained asset account. Third, Defendants argued that Plaintiff had no Article III standing because he had not alleged injury and no statutory standing under ERISA because he was not a current beneficiary. Finally, Defendants argued that Plaintiff had failed to state a claim under section 502(a)(3) of ERISA (29 U.S.C. § 1132(a)(3)) and was not seeking relief permitted by that provision.

Judge Nancy Gertner denied the motion in a short electronic order, the text of which is set forth only as a docket entry. With respect to Defendants' first two arguments, Judge Gertner stated as follows:

Sun Life argues that it no longer owed a fiduciary duty to Luitgaren after it paid funds into his Financial Benefit Account, and therefore that Luitgaren cannot state a claim for breach of that duty. The First Circuit has held that until a lump-sum check is cashed by the beneficiary, "the money due to the beneficiary is an asset of the plan." *Mogel v. UNUM Life Ins. Co. of Am.*, 547 F.3d 23, 26 (1st Cir. 2008) (quoting *Commonwealth Edison Co. v. Vega*, 174 F.3d 870, 873 (7th Cir. 1999)). Sun Life argues that the accounts represent only delays in the payment of benefits. If so, then fiduciary duties are active until the money is fully withdrawn from the individual retained asset accounts. The plaintiff has a plausible claim that Sun Life owed him a fiduciary duty while his funds were in Sun Life's account. Plaintiffs plausibly claim that Sun Life violated ERISA's "exclusive purpose" rule. If Sun Life illicitly profit[ed] from plan assets, then plaintiff has stated a valid claim that it violated its fiduciary duty under ERISA to discharge [its] duties with respect to a plan solely in the interest of the participants and beneficiaries and... for the exclusive purpose of... providing benefits to participants and their beneficiaries... 29 U.S.C. § 1104. Sun Life argues that it discharged its [duties] under the benefits plan by paying Luitgaren everything to which he was entitled by the plan documents, and has therefore complied with its fiduciary duties under ERISA. This [all's] well that ends well approach ignores the purpose of ERISA's imposition of fiduciary duties, which was to prevent and punish behavior by administrators that was likely to injure the plan and its beneficiaries.

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Judge Gertner also rejected Defendants' arguments based on standing and the terms of section 502(a)(3):

Luitgaren has sufficiently pled that he has standing to survive a motion to dismiss. While 29 U.S.C. § 1132(a)(3) only gives standing to sue to a "participant, beneficiary or fiduciary," Luitgaren has a plausible argument that he is still a beneficiary. If the Financial Benefit Accounts were plan funds, and Luitgaren was entitled to have those funds managed for his exclusive benefit, then he may argue he is still entitled to the amount that Sun Life made from his assets over and above the interest [it] paid him. See *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1417 (9th Cir. 1988). Defendants also argue that Plaintiff has not alleged an injury-in-fact sufficient to establish standing to sue for disgorgement of profits under Article III. See *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 120 (2d Cir. 2009) (granting ERISA plaintiffs constitutional standing to sue for injunctive relief without a showing of financial loss, but not for disgorgement of profits.) At this stage of proceedings, I disagree. Finally, Sun Life argues that plaintiff cannot show a harm to "redress" within the meaning of § 1132(a)(3). While some dicta points to an implicit requirement that plaintiffs suing under this section establish harm caused by the fiduciary's breach, other circuit opinions repudiate such a requirement. See *Shaver v. Operating Engineers Local 428 Pension Trust Fund*, 332 F.3d 1198, 1203 (9th Cir. 2003). Again, plaintiff has sufficiently alleged a harm to survive a motion to dismiss.

Plaintiffs pursuing ERISA claims relating to retained asset accounts are favoring courts in the First Circuit in light of that court's decision in *Mogel v. UNUM Life Ins. Co.* (Please click [here](#) for our prior Legal Alert on the decision in *Mogel*.) Although *Mogel* was eventually settled by the parties, three other ERISA retained asset account cases (including *Luitgaren*) have been filed in that circuit.



If you have any questions regarding this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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