NO. 20-cv-599-TCF

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

Renita Connolly,
Plaintiff-Appellant

v.

Regal Consulting LLC and Raul Demisay,
Defendants-Appellees.

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

BRIEF OF APPELLANT RENITA CONOLLY

/s/ Team 5
Attorney for Plaintiff-Appellant
Renita Connolly

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction to review what information is included as a "plan asset" and the Defendant's liability as defined by the Employee Retirement Income Security Act ("ERISA") pursuant to 28 U.S.C. § 1331. This Court has jurisdiction to review this appeal pursuant to 28 U.S.C. § 1291. This appeal is from a final judgment entered by the District Court within the District of Columbia Circuit on November 30, 2021 dismissing the Appellant's claims. After this judgment was entered, the parties arrived at a partial settlement, leaving only two issues for this appeal. Ms. Connolly filed a timely Notice of Appeal following the District Court judgment.

ISSUES PRESENTED

1. Are the personal and financial data of fund participants considered "plan assets"?
2. Is Regal liable for loss suffered by the Fund and its participants?

STATEMENT OF THE CASE

The Appellant, Renita Connolly, is bringing this case against Regal Consulting LLC (Regal) and their employee, Raul Demisay, for a loss of benefits from the multiemployer plans in which she participated. The District Court found against Ms. Connolly on the issues of finding personal and financial data to be a plan asset and finding Regal liable for the loss of benefits. This Court should find for Ms. Connolly because this data is a plan asset and Regal was a fiduciary and had a duty to Ms. Connolly for which they breached.

Defendant Regal Consulting LLC provides consulting, administration, and recordkeeping services to multiemployer plans, including the Defendant Fund. R. at 2. The Defendant Fund is a multiemployer welfare benefit fund. *Id*. The Fund's named fiduciary is the Board of Trustees. *Id*. Defendant Raul Demisay is a retired employee of Regal who served as the principal consultant to

the Fund from 1998 to 2020. *Id*. The Administrative Services Agreement by and between Regal and the Fund provides that Regal will provide the Contractual Services Specified in Section 4.2 of the Agreement. Section 4.2 specifically provides that Regal will 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." This allows the Fund to provide benefits to 1,321 participants as of March 1, 2020. R at 2.

On February 21, 2020, Defendant Raul Demisay had lunch with a client at Panera Baker in Washington, D.C. During that meeting, Demisay connected his Regal-issued laptop to the Panera public, unsecured Wi-Fi network to download a file. While Demisay's laptop was connected to that network, it was hacked and all data on the laptop, including contact information for the Fund manager, was stolen. Approximately an hour later, the Fund manager received an email which appeared to be from Demisay. The Fund manager clicked on a link in the email.

As part of administration, the Fund maintains financial data for each participant who works at least 1,000 hours during the prior fiscal year. R. at. 18. Moreover, the Fund maintains other sensitive data such as participants' names, addresses, emails, Social Security numbers. R. at 10. The moment the Fund manager clicked on the link, the sensitive financial and personal data from the computer was pirated to an untraceable site on the dark web.

Approximately fifteen minutes after participants' data was downloaded, all of the money in the Fund's account, $2,642,863.12, was transferred to another account. This transfer was traced to the Fund manager's computer account. The Fund manager has sworn under oath that he did not access or email the Excel file, he did not authorize the wire transfer, and he has "no earthly clue" how this could have come from his computer. R. at 5. The Appellant, Renita Connolly, has sued

the Fund and its fiduciaries for their failure to protect plan assets which resulted in a loss of benefits. R. at 33.

SUMMARY OF THE ARGUMENT

ERISA does not explicitly define what constitutes a "plan asset." Accordingly, courts have deferred to the Department of Labor's (DOL) administrative interpretation of ERISA to determine that at minimum, "plan assets" are anything of value within the meaning of ordinary notions of property rights. This is a vague standard for other courts to follow. However, the most basic premise of this principle is that plan assets must be things of value.

The Fund compiled the confidential personal and financial data of over 1,000 participants. Moreover, the Fund used the data to administer and manage the Plan. That same personal and financial data that was stolen from the Fund was later sold online. Exposure of Participants' data jeopardizes their finances and personal identity to criminal actors. Thus, Participants' data was of value to the Fund, the Participants, and to the thieves who stole it. Accordingly, Participants' data was the Fund's property under ordinary notions of property rights.

This Court should extend existing case law to cover the type of data presented in this case. The value of data itself is a modern and ongoing development. In an increasingly digital world, ERISA should continue to serve its original purpose, and continue protecting plan Participants. In order to continue to fulfill this objective, the Fund should continue to be responsible for plan assets and their protection. Participants and their beneficiaries deserve the full protection of the law under ERISA.

ERISA and *Teets v. Great-West Life & Annuity Ins. Co.* establish two types of fiduciaries: named and functional. Named fiduciaries have specific duties because they are established as part of the Plan. Functional fiduciaries have duties arising from their authority over part or all of the

Plan. Here, Regal and its employees acted as functional fiduciaries because of the authority they held over the Plan. Regal did not simply act in accordance with a contract and made a unilateral decision regarding management of Plan data and assets which made them a functional fiduciary.

Fiduciaries, whether named or functional, have a set of duties established by ERISA § 1104(a)(1)(B). These duties include the duty of prudence. This requires fiduciaries to make decisions as a prudent person in that position would. Regal breached this duty when it allowed an employee to work remotely and connect a work computer to a public, unsecured Wi-Fi network. This unilateral decision resulted in the computer being hacked and Plan assets and data being stolen. Because Regal and its employees were fiduciaries of the plan and breached their duties, this Court should find them liable.

STANDARD OF REVIEW

The Court reviews de novo the dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. *Citizens for Resp. and Ethics in Washington v. U.S. Dept. of J.*, 922 F.3d 480, 486 (D.C. Cir. 2019). To state a claim under ERISA, a participant must enforce their rights under Section 502 of ERISA, 29 U.S.C. § 1132, which provides 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 . . . to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." In this case there is no question of whether the Fund or its managers can be held liable for a loss of benefits, but whether stolen data is a plan asset under ERISA and Regal and its employees can be held liable for the loss of plan assets.

ARGUMENT

I. Because of *Skidmore* deference, ordinary notions of property rights, and the fundamental purpose of ERISA, Participants' confidential data and information compiled by the Fund are "plan assets."

Under *Skidmore* deference agency interpretations of federal statutes in opinion letters are entitled to respect to the extent they have the power to persuade. *See Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). The Department of Labor has issued an opinion letter which defines "plan assets" to include any property, tangible or intangible, in which the plan has a beneficial ownership interest. *See* U.S. Dep't of Labor, Advisory Op. No. 93–14A. The Fund compiled Participants' data into a form for the Fund's benefit. Therefore, ERISA should interpret Participants' intangible data which the Fund has a beneficial ownership interest in to be "plan assets."

Courts have hesitated to extend the definition of "plan assets" to include plan data, but have nonetheless held "plan assets" to include anything with ordinary notions of property rights. Because the Fund collated Participants' data into a unique work product, the Fund owned Participants' collective confidential data. Therefore, the data became the Fund's property under ordinary notions of property rights. Moreover, ERISA's fundamental mission is to protect employee benefit plan participants and their beneficiaries. Thus, this Court should further the statute's purpose and extend "plan assets" to include participants' confidential information and data compiled by the Fund.

A. Participants' stolen data and information are ERISA "plan assets" of the Fund according to the DOL's regulatory interpretation of ERISA.

Title I of ERISA does not expressly define the types of property that will be regarded as "assets" of an employee benefit plan. "[T]he term 'plan assets' means plan assets as defined by such regulations as the Secretary [of Labor] may prescribe . . . ." 29 U.S.C.A. § 1002.

The Department of Labor ("DOL") is the primary administrative agency in charge of enforcing ERISA. As part of administering ERISA, the Department of Labor will promulgate regulations furthering the purpose of ERISA. Additionally, the agency issues opinion letters to clarify their interpretation of ERISA's provisions. The DOL has promulgated two regulations defining "plan assets" for the purposes of ERISA. The first regulation, 29 CFR § 2510.3-101, focuses on investments in the plan as "plan assets." The second regulation, 29 CFR § 2510.3-102, focuses on "participant contributions" to the plan. While it's true that the aforementioned regulations promulgated by the DOL do not expressly include participant data as plan assets under ERISA, the DOL has more to say about "plan assets."

Agency interpretations in opinion letters are "entitled to respect" to the extent they have the "power to persuade." *Christensen v. Harris County,* 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944)). Specifically, U.S. Dep't of Labor, Advisory Op. No. 93–14A, held that plan assets will "include any property, tangible or intangible, in which the plan has a beneficial ownership interest."

Here, even though the data is intangible it's nonetheless the property of the Fund because it had a beneficial ownership interest. That is primarily because the Fund compiled Participants' confidential information and data into a single Excel spreadsheet. That Excel spreadsheet contained all of the Participants' names, addresses, emails, Social Security numbers, and designation of employers. This data likely made it far more convenient to administer a fund with over 1,000 participants. Moreover, the data was collated into the Fund's own Excel spreadsheet. This transformed the individual information of participants into an Excel spreadsheet the Fund owned. Furthermore, collating Participants' confidential data in such a way is directly beneficial

to the Fund. Therefore, under Advisory Op. No. 93–14A, Participants' data was a "plan asset" of the Fund.

B. Other courts hesitate to hold that Participants' confidential information and data are "plan assets," however, they recognize an expansive definition of "plan assets."

"By definition, an asset is anything of value to the Plan." *Health Cost Controls v. Bichanich*, 968 F. Supp. 396, 399 (N.D. Ill. 1997) "[T]he [Department of Labor] consistently has stated that the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law. . . . We . . . find this formulation persuasive." *In re Fid. ERISA Float Litig.*, 829 F.3d 55, 60 (1st Cir. 2016). It's true that some courts have refused to define "plan assets" to include participants' data. *See Harmon v. Shell Oil Co.*, 3:20-CV-00021, 2021 WL 1232694, at *3 (S.D. Tex. Mar. 30, 2021); *Divane v. N.W. U.*, 16 C 8157, 2018 WL 2388118, at *12 (N.D. Ill. May 25, 2018), *aff'd,* 953 F.3d 980 (7th Cir. 2020), *vacated and remanded sub nom. Hughes v. N.W. U.*, 142 S. Ct. 737 (2022). Other courts have maintained that the most basic trait of a "plan assets," is something of value. *See Health Cost Controls v. Bichanich,* 968 F.Supp. 396, 399 (N.D.Ill.1997). However, merely "[s]aying that the information has economic value does not make it so." *Patient Advocates, LLC v. Prysunka*, 316 F. Supp. 2d 46, 48 (D. Me. 2004).

Here, the Participants' data was of value to the plan in helping the plan carry out its daily business. Furthermore, after being stolen from the Fund, the Participants' data was sold for profit. Data maintained by the Fund on Participants was of value to them due to the negative impact from the loss of the data. For example, Appellant's identity was stolen due to the data loss. The data was valuable to the Fund, the Participants, and to the people who sold the data. Therefore, the data was demonstrably of economic value and was a plan asset.

In *Patient Advocates, LLC v. Prysunka*, 316 F. Supp. 2d 46 (D. Me. 2004), the court held that data accrued as a mere by-product of administering benefit plans was not a plan asset.

Nonetheless, the court refrained from deciding whether information or data could constitute "plan assets" in the future. *Id.*

Here, unlike in *Patient Advocates*, the data was more than a mere by-product. The data was an intentional compilation of Participants' confidential information and personal data. Therefore, this case represents an extension of the factual circumstances in *Patient Advocates*. Accordingly, this Court should not be dissuaded by non-binding persuasive authorities that still leave open the possibility of considering Participants' data as "plan assets."

C. This Court should interpret "plan assets" to encourage funds to protect their participants' data and further ERISA's fundamental goal of protecting the interests of employee benefit plan participants and their beneficiaries generally.

"Businesses that operate in an industry with a history of regulation have no reasonable expectation that regulation will not be strengthened to achieve established legislative ends." *Dist. Intown Properties Ltd. Partn. v. D.C.*, 198 F.3d 874, 884 (D.C. Cir. 1999); *see also Concrete Pipe and Products of California, Inc. v. Constr. Laborers Pension Tr. for S. California,* 508 U.S. 602, 645 (1993). ERISA statutorily requires the Fund to hold plan assets in trust for the exclusive benefit of plan participants. *See* 29 U.S.C.A. § 1104.

Here, the Fund is a business that operates a multiemployer welfare benefit plan. Multiemployer welfare benefit plans are highly regulated under ERISA. Thus, the Fund has no reasonable expectation that the regulations regarding "plan assets" under ERISA will not be strengthened to achieve its goal of protecting participants and their beneficiaries. Certainly, the loss of participants' data has not been to their benefit. It has adversely affected Appellant and other participants in the Fund. Therefore, holding that participants' data is a "plan asset" is consistent with strengthening ERISA's regulatory purpose to hold assets for the benefit of plan participants.

Though courts have hesitated to consider plan data, "plan assets," the proliferation of these cases nonetheless evinces a further issue. The issue of data breaches and the harm that brings to ERISA plan participants is not going away. Therefore, Participants and their beneficiaries should have legal recourse to encourage the protection of their confidential information. Otherwise, ERISA fiduciaries can callously harm their participants by failing to protect their data without any legal repercussions. Such a perverse incentive structure cuts against the core principle of ERISA to protect the interests of employee benefit plan participants and their beneficiaries. Consequently, this court should extend "plan assets" to also apply to participants' data.

II. Regal is a functional fiduciary and should be held liable for the plaintiff's loss of benefits under ERISA because it breached its fiduciary duty of prudence.

The two-part test, established in *Teets v. Great-West Life & Annuity Ins. Co.* and narrowed in *Rozo v. Principal Life Ins. Co.*, should be applied to determine whether Regal and its employees are fiduciaries with regards to management of the Plan. Under this test, Regal should be found to be a functional fiduciary. As a functional fiduciary, Regal has a set of duties as defined by ERISA § 1104(a)(1). Regal breached its fiduciary duty of prudence when it allowed an employee to work remotely and connect to a public, unsecured Wi-Fi network. Regal should be found liable for the breach of the duty of prudence.

A. The *Teets* test should be used to establish Regal's fiduciary status.

Teets v. Great-West Life & Annuity Ins. Co. established criteria for determining fiduciary status in regards to ERISA retirement plans. 921 F.3d 1232, 1238 (10th Cir. 2019). A fiduciary can be either named or functional. *Id.* Named fiduciaries are those specified in the instrument establishing the plan. *Id.* Named fiduciaries are typically the employer or a trustee with the "authority to control and manage the operation and administration of the plan." *Id.* Functional

fiduciaries are established by virtue of their authority over the plan. *Id.* A party becomes a functional fiduciary when

> (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 its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys 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.

29 U.S.C. § 1002(21)(A). Functional fiduciaries do not share the same obligations and authorities over the plan as named fiduciaries. *Teets,* 919 F.3d at 1238. Functional fiduciaries must actually exercise discretionary authority or control over the plan in order to be considered a fiduciary. *Id.* at 1239. The *Teets* criteria were narrowed in *Rozo v. Principal Life Ins. Co.* to a two-step analysis. 949 F.3d 1071, 1073 (8th Cir. 2020). A service provider acts as a fiduciary if (1) it did not merely follow a specific contractual term set at an arm's length negotiation and (2) it took a unilateral action regarding plan management without the plan or its participants having an opportunity to reject that decision. *Id.*

1. Regal did not merely follow a specific contractual term set in an arm's-length negotiation.

A service provider becomes a fiduciary when it makes a decision that does not merely follow a specified contractual term. *Id.* A service provider may still qualify as a functional fiduciary even if the discretionary action is authorized under the contract. *Id.* at 1074. In *Rozo*, the plan service provider was found to be a fiduciary when setting a return rate. *Id.* Although the service provider's ability to set the rate was contractually determined, the actual rate was not. *Id.* at 1073. The service provider exercised its discretion when it determined the actual rate. *Id.* This discretion exercised by the service provider rendered it a fiduciary. *Id.* at 1074.

Here, Regal and its employees, under § 4.2 of the Agreement, have discretionary authority over the maintenance of records for the Fund. R. at 4. The specified contractual term gives them the authority to provide administrative services including record maintenance. *Id.* The Agreement does not specify how Regal will maintain records. *Id.* Mr. Demisay exercised his discretionary authority as an employee of Regal when he chose to connect to a public, unsecured Wi-Fi network with his computer that contained file information related to the Fund. This discretionary maintenance decision qualifies Regal and its employees as fiduciaries of the Plan.

2. Regal took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decision.

Here, Regal and its employees took a unilateral action concerning plan management and assets when it chose to conduct work outside of the office and across a public, unsecured Wi-Fi network. R. at 2. Neither the Plan, its managers, nor its participants had an opportunity to reject the decision to manage the Plan away from Regal's offices. *Id.* By assuming the authority to make this decision, Regal's employee acted as a functional fiduciary. This exertion of fiduciary authority gave rise to Regal's fiduciary duties. Because Regal and its employee acted with authority and without consent from the Plan, they should be held as a functional fiduciary.

B. Defendants breached fiduciary duty of prudence and should be held liable for this breach.

ERISA requires fiduciaries to discharge their 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). Prudence is defined as acting sensibly and carefully, especially in trying to avoid unnecessary risks. PRUDENT, Black's Law Dictionary (11th ed. 2019). Fiduciaries have a duty to act sensibly and carefully when making decisions regarding a plan that is covered by ERISA. *Leventhal v. MandMarblestone Grp. LLC*, No. 18-cv-2727, 2020

U.S. Dist. LEXIS 92059, at 13 (E.D. Pa. May 27, 2020).

Carelessness on the part of a fiduciary that leads to cyber fraud constitutes a breach of the duty of prudence. *Id.* In *Leventhal*, the defendant plan administrator filed a counterclaim against the plaintiff who was also found to be a fiduciary. *Id.* The plaintiff fiduciary breached their duty of prudence when they acted carelessly in managing the plan. *Id.* The plaintiff allowed an employee to work from home and use a personal email for employment duties. *Id.* This crossover of emails led to cyber fraud and was considered a breach of the duty of prudence. *Id.* The court held that carelessness was a direct violation of this duty. *Id.* The employee's email was hacked and information regarding the plan was stolen, constituting a breach of duty *Id.*

Here, Regal's employee used a computer away from work and connected to a public, unsecured Wi-Fi network. R. at. 2. Rather than downloading the file needed while at work on a secured network, this employee waited until they were away from work to connect, giving other users connected to the same Wi-Fi network access to his computer. R. at 2-3. Like in *Leventhal*, this employee's decision led to the computer being hacked and plan data being stolen. The employee had a duty to act with prudence when handling any data related to the plan. This duty was breached when the employee carelessly connected to a public, unsecured network, allowing access to the files on his computer, including plan data. Because Regal and its employee breached their duty of prudence, they should be found liable.

CONCLUSION

This Court should find the data stolen from Raul Demisay's laptop to be a "plan asset." This Court should also find Regal and Mr. Demisay to be functional fiduciaries of the Fund. Mr. Demisay breached his fiduciary duty of prudence when he made a choice which led to the plan assets being stolen. Mr. Demisay and Regal should be held liable for their breach of fiduciary duty.