

# Seventh Circuit Rejects Novel DOL Position in Affirming Summary Judgment for Retirement Plan Service Provider in 'Revenue Sharing' Class Action

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*May 1, 2013* -- In an important appellate victory for the industry in the long-running series of so-called "revenue sharing" cases, the United States Court of Appeals for the Seventh Circuit affirmed an Indiana district court's decision granting summary judgment to the defendant retirement plan service provider, American United Life Insurance Company ("AUL"), in a putative class action brought under the Employee Retirement Income Security Act of 1974 (ERISA) on behalf of trustees of employer-sponsored retirement plans. As trustee of the Leimkuehler, Inc. 401(k) plan, the plaintiff contracted with AUL to act as the plan's recordkeeper and administrative service provider. Like many group annuity-based service providers, AUL offered a large platform of mutual fund investment options from which the plaintiff trustee could select a subset to in turn offer to plan participants. AUL had "revenue sharing" agreements with many of these funds, whereby the funds or their affiliates paid a portion of their fee revenue to AUL as compensation for the various services and efficiencies AUL provided to or on behalf of the funds in connection with the maintenance of participants' investments. The Leimkuehler trustee sued AUL, alleging that AUL (i) became a "functional fiduciary" under ERISA by unilaterally selecting which mutual fund share classes to use for the funds on its platform, and (ii) breached its duties to the extent that it selected higher cost share classes that paid revenue sharing, to the exclusion of cheaper share classes that it allegedly could have made available to plans. For its part, AUL contended that it was not acting as a fiduciary when it designed and priced its retirement product platform and offered it to Leimkuehler. AUL also contended that it did not thereafter become an ERISA fiduciary because it merely performed ministerial tasks and handled investments solely at the direction of the plan and its participants. The district court agreed with AUL, finding that it was not an ERISA fiduciary, and granted summary judgment to AUL. The plaintiff appealed, and the United States Department of Labor (DOL) joined

the fray by submitting an *amicus* brief in support of the plaintiff, offering an additional theory of fiduciary status. The DOL claimed that because AUL allegedly had the contractual right to add, delete, or substitute funds on its platform, it had exercised "authority or control" over the plan assets so as to come within ERISA's "fiduciary" definition, even if AUL never changed the share classes of the funds originally offered on the investment platform and selected by the plaintiff. The Seventh Circuit, however, affirmed in a unanimous panel opinion. Stating at the outset that it agreed with the district court that "AUL is not acting as a fiduciary . . . when it makes decisions about, or engages in, revenue sharing," the Court went on to dissect the plaintiff's and the DOL's theories. The Court noted that the record established that the share classes of the funds ultimately chosen by Leimkuehler were selected at the time AUL developed its fund menu, *prior to* contracting with Leimkuehler. While AUL did not specifically disclose its receipt of revenue sharing payments from funds when it originally contracted with Leimkuehler, it did disclose the overall expense ratio of each fund. The Court noted that "given that AUL does disclose the bottom line cost of every fund that it offers, Leimkuehler was free to seek a better deal with a different 401(k) service provider . . ." Thus discarding the plaintiff's "plan design" theory, the Court held that "the act of selecting funds and their share classes for inclusion on a menu of investment options . . . does not transform a provider of annuities into a functional fiduciary. . ." The Court also pointed out that, while it was true that AUL had "control" over its own insurance company separate account through which plan investments were made and accounted for (although AUL had no discretion because its investment of those assets was directed by the plan participants), AUL's maintenance of the separate account was not the basis for the claimed breach of fiduciary duty, and, thus, any such "authority or control" was irrelevant to the claims alleged. Finally, the Seventh Circuit dispensed with the DOL's theory that the mere *unexercised* contractual right to substitute or delete funds on the investment menu amounts to the "exercise" of authority or control over plan assets. The Court found that the DOL's "'non-exercise' theory of exercise" was "unworkable" and conflicted with a "common sense understanding" of the meaning of the word "exercise." It further held that the theory was unsupported by precedent and "would expand fiduciary responsibilities under [ERISA] to entities that took no action at all with respect to a plan." It concluded that "AUL's decision *not* to exercise its contractual right to substitute different (less expensive) funds for the Leimkuehler Plan does not make it a fiduciary."

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