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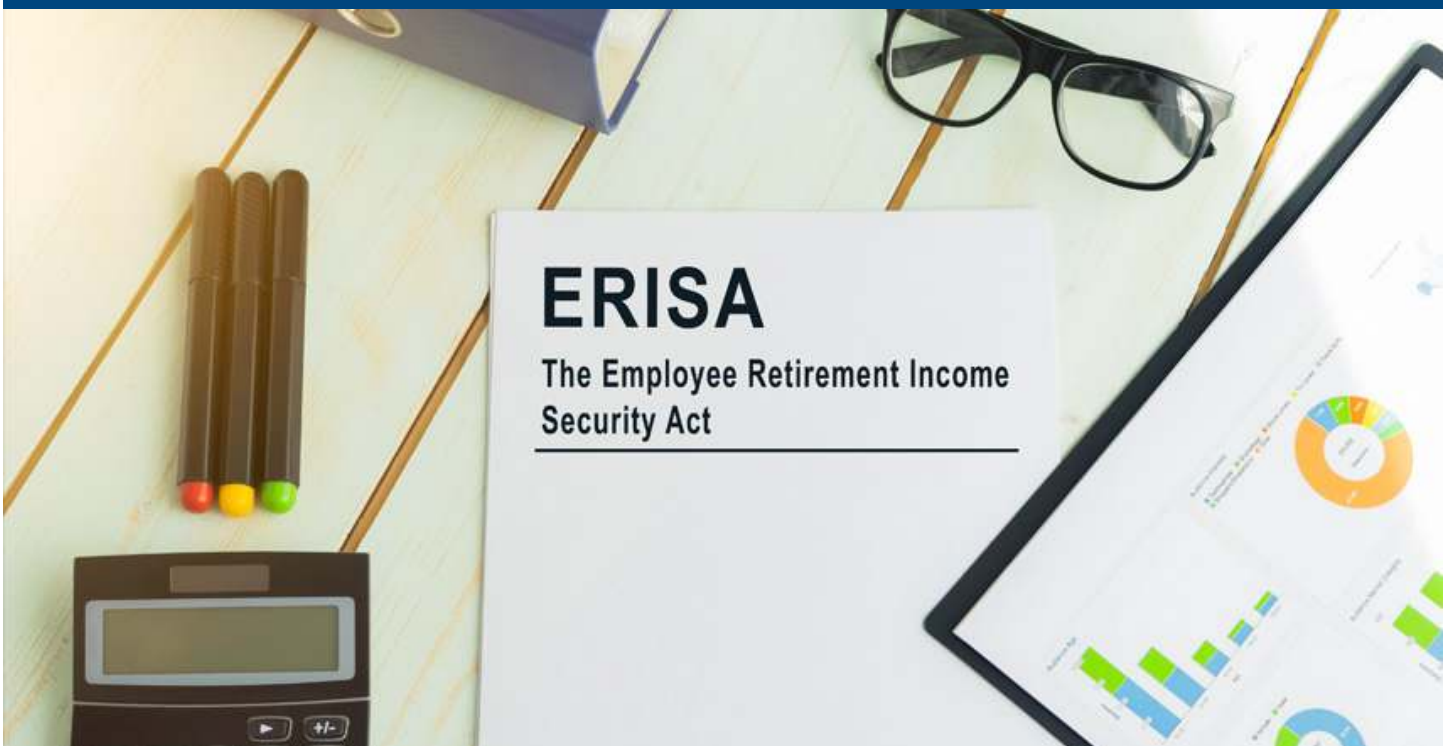
This Week's Feature



Does a Plan Administrator Forfeit the Right to Deferential Review by Delegating Its Discretionary Authority to a Non-Fiduciary?

By Joseph R. Jeffery and Stuart F. Primack

If an ERISA-governed welfare benefit plan grants the plan administrator discretionary authority to adjudicate plan benefit claims, and the administrator then delegates its claim adjudication powers to a non-fiduciary, such as a third-party administrator, how will the non-fiduciary's claim determinations be reviewed? Will a court review them under the deferential arbitrary and capricious standard, or will they be reviewed de novo? ERISA doesn't say, and the courts are split.

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ERISA authorizes fiduciaries, such as plan administrators, "to designate persons other than named fiduciaries to carry out fiduciary responsibilities…under the plan." 29 U.S.C. §1105(c)(1)(B). For some courts, this is enough to conclude that the right to deferential review is not forfeited when a fiduciary delegates its claim-adjudication powers to a non-fiduciary. They reason that because there is "nothing in the language of the ERISA statute, the logic of *Firestone* [*Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989)], or the background principles of trust law that requires fiduciaries, when delegating authority, to delegate only to other fiduciaries," (*Geddes v. United Staffing Alliance Employee Medical Plan*, 469 F.3d 919, 927 (10th Cir. 2006)), nothing prevents an administrator from delegating portions of its discretionary authority to non-fiduciary third parties. *Connor v. Sedgwick Claims Management Services, Inc.*, 796 F. Supp. 2d 568, 578 (D. N.J. 2011); *Lee v. MBNA Long Term Disability & Benefit Plan*, 136 Fed. Appx. 734, 742 (6th Cir. 2005) ("It is well established that an ERISA fiduciary may delegate its fiduciary responsibilities to either another named fiduciary or a third party if the plan establishes procedures for such delegation").

Other courts look beyond the plain language of §1105(c)(1)(B). The Illinois Appellate Court recently addressed this issue and concluded that a named fiduciary can *only* delegate its fiduciary duties to other fiduciaries. *Watkins v. M Class Mining Health Protection Plan*, 2020 IL App (5th) 180138 at ¶54. The governing documents for the self-funded plan granted the administrator discretionary authority to determine eligibility for benefits and to construe and interpret the terms of the plan. The administrator also had the authority, which it duly exercised, to appoint a third-party administrator to provide "certain claims processing and other technical services." *Id.* at ¶4. The plan documents further provided that the third-party administrator "[was] not a fiduciary of the plan and [did] not have the authority to make decisions involving the use of discretion." *Id.* at ¶55. Notwithstanding those limitations, the record showed that the third-party administrator was responsible for the denial of the claim. *Id.* at ¶58.

The plaintiff argued that the claim decision was reviewable de novo because it was rendered by a non-fiduciary from whom the plan had expressly withheld the "authority to make decisions involving the use of discretion." *Id.* at ¶44. The plan administrator countered that delegation of its discretionary authority to the third-party administrator complied with the procedures that the plan instituted under section 1105(c)(1)(B). The plan thus argued that its delegation of authority to the third-party administrator did not forfeit the right to discretionary review. *Id.* at ¶46.

The Illinois Appellate Court recognized that section 1105(c) did not expressly state that the delegee must be a fiduciary of the plan. It then observed that an administrator acting under the procedures authorized by section 1105(c)(1)(B) could only "*designate* persons other than named fiduciaries to carry out fiduciary responsibilities…under the plan. *Id.* at ¶48 (emphasis added). The power to *designate* such persons, the court appeared to conclude, was limited by 29 U.S.C. §1102(c)(2). *Id.* at ¶¶ 50–51. Section 1102(c) authorizes plan sponsors to include any of three optional features in the plans that they establish. Subsection (2) provides that a plan may allow "a *fiduciary designated* by a named fiduciary pursuant to a plan procedure described in section 1105(c)(1) of this title, to employ persons to render advice to the fiduciary." 29 U.S.C. §1102(c)(2) (emphasis added); *Watkins*, 2020 IL App (5th) 180138 at ¶51. Because a named fiduciary's power to *designate* others who could employ persons was limited under section 1102(c)(2) to designating *fiduciaries*, the court concluded that the power to *designate* under section 1105(c)(1)(B) must be similarly limited. *Watkins*, 2020 IL App (5th) 180138 at ¶¶ 50–51.

The court found support for its holding in precedent from the U.S. Court of Appeals for the Ninth Circuit. It read *Madden v. ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279, 1283 (9th Cir. 1990), as holding that when an ERISA plan expressly gives a fiduciary the discretionary authority to determine eligibility for benefits, or to construe the terms of the plan, and the "named fiduciary properly designates *another fiduciary, delegating its discretionary authority*," the arbitrary and capricious standard of review applies to decisions rendered by the designated fiduciary, as well as the named fiduciary." *Watkins*, 2020 IL App (5th) 180138 at ¶ 53 (emphasis added). Reliance on Madden appears questionable because the *Madden* decision did not address the issue before the court in *Watkins*; that is, which standard of review should be applied to a decision rendered by a non-fiduciary.

In ERISA claims litigation, it is difficult to understate how significant the standard of judicial review is to the outcome of the litigation. Until courts provide a definitive answer to questions about delegating discretionary authority and whether a plan forfeits the right to deferential review, expect to see new and ongoing arguments over this issue in ERISA litigation.

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