No. 05-5050

ORAL ARGUMENT SCHEDULED FOR MONDAY, DECEMBER 12, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELAINE L. CHAO, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff-Appellee,

v.

BRITTIAN P. DAY and
A&D INSURANCE AGENCY, INC.,
Defendants-Appellants.

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

BRIEF OF APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants.

Rulings Under Review

References to the rulings at issue appear in the Brief for Appellant.

Related Cases

The case on review was previously pending before the United States District Court for the District of Columbia, Chao v. Day, C.A. No. 02-1516 (LFO). A related case is pending before the United States District Court for the District of Columbia, U.S. v. Brittian Perry Day, Cr. No. 04-358 (PLF). Sentencing is currently scheduled for December 6, 2005.

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STATEMENT OF JURISDICTION

This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq., and was brought by Elaine L. Chao, Secretary of the United States Department of Labor (the "Secretary"). The Secretary, pursuant to ERISA sections 502(a)(2) and 502(a)(5), 29 U.S.C. §§ 1132(a)(2) and 1132(a)(5), has the authority to enforce the provisions of Title I of ERISA by, among other things, the filing and prosecution of claims against persons who violate ERISA. The district court had subject matter jurisdiction over the action pursuant to ERISA section 502(e)(1), 29 U.S.C. § 1132(e)(1), and granted relief to the Secretary pursuant to ERISA sections 409 and 502, 29 U.S.C. §§ 1109 and 1132, in a final judgment dated January 12, 2005. This Court has jurisdiction of the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

The issue presented is whether Appellants became de facto fiduciaries, pursuant to ERISA section 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i), of various employee pension and welfare benefit plans by exercising authority and control over plan assets, which were intended for the purchase of insurance policies, but were instead diverted to Appellants' own accounts and own use.

STATEMENT OF THE CASE

On August 1, 2002, the Secretary filed a complaint in the District Court for the District of Columbia against A&D Insurance Agency ("A&D") and its President, Brittian P. Day ("Day") (collectively, "Appellants"), alleging that Appellants violated their fiduciary responsibilities through an illegal scheme to misappropriate plan assets. Joint Appendix ("JA") 11-17. Specifically, the Secretary alleged that, during the relevant period, Appellants accepted hundreds of thousands of dollars from various ERISA-covered employee benefit plans for the purpose of purchasing insurance on the plans' behalf, but that Appellants instead deposited the monies into their own accounts and provided the plans with false insurance policies. JA 12-13. Accordingly, the Secretary sought a temporary restraining order and preliminary injunction, as well as a permanent injunction and other relief, including losses.

Appellants opposed the Secretary's request for a temporary restraining order and filed a motion to dismiss the Secretary's complaint, claiming that neither Appellant was a fiduciary under ERISA. JA 18-19. A hearing was held before the district court, and on August 2, 2002, the district court denied the Secretary's request for a temporary restraining order and preliminary injunction because the district court did not believe it likely that the Secretary would prevail on her contention that Appellants were fiduciaries. JA 20-23. Thereafter, the Secretary

opposed Appellants' motion to dismiss and moved the district court to reconsider its denial of the Secretary's request for a temporary restraining order. JA 24-43.

After additional briefing on the issue of Appellants' fiduciary status under ERISA, the district court denied both Appellants' motion to dismiss and the Secretary's motion for reconsideration. JA 65-71. The district court was "persuaded that the Secretary's allegations and existing law support a finding of fiduciary status under ERISA, sufficient to withstand Appellants' Motion to Dismiss." JA 70. The district court, however, stated that "[a]s it appears that the status quo has been preserved, neither a TRO nor a preliminary injunction is currently warranted." JA 71.

After completing discovery, the Secretary filed a motion for summary judgment on May 3, 2004. JA 75-125. In her motion, the Secretary argued that the undisputed material facts showed that Appellants were ERISA fiduciaries by virtue of their exercise of authority and control over plan assets, and that Appellants violated ERISA section 404(a), 29 U.S.C. § 1104(a), and § 406, 29 U.S.C. § 1106, when they took money that was entrusted to them by ERISA-covered plans for the purpose of purchasing insurance policies for the plans. JA 75-101. In opposition, Appellants challenged only one aspect of the Secretary's motion. JA 126-133. Appellants argued that the Secretary was not entitled to an adverse inference due to the Appellants' invocation of the Fifth Amendment

privilege against self-incrimination during discovery. Id. Appellants did not dispute any of the facts cited by the Secretary in support of her motion. Indeed, conceding that their fiduciary status was the law of the case, Appellants did not dispute that Appellants were ERISA fiduciaries or that Appellants violated their obligations under ERISA.

In an order dated December 17, 2004, the district court granted summary judgment to the Secretary. JA 134-155. The district court found that the Appellants failed to controvert any of the Secretary's Statement of Material Facts, and that the facts as set forth in the Statement were therefore admitted. JA 137. The district court also found that Appellants conceded their fiduciary status for purposes of the motion. JA 144. Finally, the district court found that Appellants violated their duties of prudence and loyalty under ERISA § 404 and engaged in prohibited transactions under ERISA § 406 by misappropriating Plan assets and issuing fake insurance policies to the Plans. The district court ordered both restitution of losses and a permanent injunction against the Appellants. JA 144-153. Addressing the one issue contested by Appellants, the district court stated that the Secretary submitted sufficient competent evidence in support of her motion, and that it was therefore unnecessary for the court to rely on any adverse inferences based on Day's assertion of his Fifth Amendment privilege. JA 143. A final amended order was then issued by the district court on January 12, 2005,

which permanently barred Appellants from being fiduciaries or service providers to ERISA covered plans in the future and which ordered Appellants to pay restitution to the Plans in the amount of $659,810.63, plus pre-judgment interest of $295,704.08, for a total of $955,514.71. JA 156-158.

STATEMENT OF FACTS

From at least August 1994 to August 2002, Day was the president and sole shareholder of A&D. JA 96. Day controlled the day-to-day operations of A&D and had ultimate responsibility for its operations. JA 96. During this time, Appellants were the insurance brokers for twenty-nine pension benefit and welfare benefit plans or their predecessors (collectively, the "Plans"). JA 97. The Plans are employee benefit plans subject to ERISA. JA 97, 103-104.

The Plans engaged Appellants to purchase fiduciary liability insurance and fidelity bonds on behalf of the Plans. JA 98. Appellants represented to the Plans that they contacted various insurance companies on behalf of the Plans in an attempt to locate insurance coverage. JA 33, 35. Appellants represented to Plan officials that Appellants had purchased insurance on the Plans' behalf from Ulico Casualty Company ("Ulico") and/or Reliance Insurance Company ("Reliance"), because Ulico provided the Plans with the "best policy at the best price." JA 33, 98. During the relevant time period, Appellants billed the Plans for insurance that Appellants represented they had purchased for the Plans. JA 99, 105-107. In

response to invoices for insurance from Appellants, the Plans sent checks drawn from the Plans' checking accounts in payment of these invoices. JA 100. Appellants then sent the Plans documents that purported to be insurance policies from Ulico and from Reliance. JA 98-99.

On their face, these policies indicated that they had been issued by Professional Indemnity Agency ("PIA") on behalf of Ulico or Reliance. None of the policies, however, were issued by PIA on behalf of Ulico or Reliance, nor were the policies issued directly by Ulico or Reliance. JA 98-99. In fact, neither Ulico nor Reliance has any record of issuing any policy for insurance to any client of Appellants after 1995. JA 99. Instead of using the Plans' assets for their intended purpose, Appellants deposited all of the Plans' checks into their own accounts at Branch Banking & Trust Company, F.C.N.B. Corp. and Capital Bank, N.A. JA 100. Appellants did not purchase insurance with these checks, but rather forwarded falsified policies to the Plans and kept the monies for their own use. JA 98-100. The total amount of checks sent by the Plans to Appellants after August 1, 1996 is $659,810.63. JA 156.

SUMMARY OF ARGUMENT

Appellants were fiduciaries of the Plans by virtue of their exercise of authority and control over the Plans' assets. Appellants were not merely "vendors" who sold insurance products to the Plans. Appellants were brokers retained by the

Plans to locate and obtain appropriate insurance coverage for the Plans. Once Appellants accepted the Plans' assets for the purpose of purchasing the Plans' insurance coverage, Appellants became fiduciaries of the Plans. Moreover, Appellants exercised discretionary control over Plan assets when they misused their authority by issuing fraudulent insurance policies for the Plans, and misappropriating the Plans' assets to Appellants' own use.

ARGUMENT

APPELLANTS BECAME PLAN FIDUCIARIES WHEN THEY WERE GIVEN PLAN ASSETS TO BE USED TO PURCHASE INSURANCE POLICIES FOR THE PLANS

A. Standard of review

The standard of review of a district court's grant of summary judgment is de novo. Kaempe v. Myers, 367 F.3d 958, 965 (D.C. Cir. 2004). Summary judgment is proper only if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Because Appellants have not challenged at any stage of the litigation the material facts presented by the Secretary, the review here is of the district court's legal conclusions and not the factual findings that formed the basis for those conclusions. Therefore, de novo review is appropriate. See, e.g., LoPresti v. Terwilliger, 126 F. 3d 34, 39 (2d Cir. 1997).

B. Day and A&D Were Fiduciaries Under ERISA

ERISA establishes a functional test for fiduciary status. Section 3(21)(A)(i) of ERISA, 29 U.S.C. § 1002(21)(A)(i), states in relevant part that a person is a fiduciary to the extent "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." Thus, one is a fiduciary under ERISA if he performs any of the enumerated fiduciary functions. See Lockheed Corp v. Spink, 517 U.S. 882, 890 (1996). However, fiduciary status under ERISA is not an all or nothing proposition; a person is a fiduciary only to the extent that he engages in an activity described in the definition. Varity Corp. v. Howe, 516 U.S. 489, 498, 502-504 (1996). Nevertheless, the definition of fiduciary under ERISA is construed liberally, consistent with ERISA's underlying policies and objectives. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 96 (1993).

In the present case, Appellants attained fiduciary status by exercising authority and control over plan assets. The Plans engaged Appellants as their insurance broker to purchase fiduciary liability policies and fidelity bonds for the Plans. JA 98. Acting as the Plans' Broker, Appellants then informed the Plans that they would purchase the insurance policies for the Plans, and billed the Plans for these policies, which, in fact, Appellants did not purchase. JA 98-99. The

Plans, however, entrusted funds to the defendants' custody with instructions to deliver the funds to a specific insurance company. JA 33, 35. The funds that the Plans entrusted to the Appellants for these purposes were Plan assets, JA 33, 35, 39, and remained so while in the Appellants' possession. Because Appellants "handle[d] money or other assets on behalf of" the Plans, they had authority and control over Plan assets. See FirsTier Bank, N.A. v. Zeller, 16 F.3d 907, 911 (8th Cir. 1994). Under the clear language of ERISA section 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i), Appellants were thus fiduciaries subject to strict fiduciary responsibilities under ERISA, which they wholly disregarded when they diverted the money from its intended purpose and kept it for themselves.

In LoPresti v. Terwillinger, 126 F.3d 34 (2d Cir. 1997), the Second Circuit similarly held that a defendant who took plan assets for his own use was a fiduciary, relying on section 3(21)(A)'s clear statement that a person is a fiduciary to the extent he exercises "any authority or control respecting management or disposition of [plan] assets." In LoPresti, money was specifically withheld from employees' paychecks to be forwarded to their benefit plans. Id. at 37. Rather than deposit the funds, which were entrusted to the defendant, he took the money for his own use. Id. The Second Circuit held that because the defendant failed to forward the money to the plan, he exercised control over plan assets and was therefore a fiduciary. Id. at 40.

Similarly, in U.S. v. Grizzle, 933 F.2d 943 (11th Cir. 1991), the president of a company was convicted of embezzlement for converting monies from employee paychecks, designated specifically for deposit into an ERISA-covered plan, to his own use. He appealed, arguing that he was not a fiduciary under ERISA. The Eleventh Circuit held that because the defendant used the plan assets for his personal benefit, he exercised discretionary authority and control respecting disposition of the employee contributions and was therefore a de facto fiduciary. Id.; see also Bannistor v. Ulmann, 287 F.3d 394 (5th Cir. 2002) (parent corporation and officers of corporate debtor become fiduciaries by using plan assets designated for deposit in a particular plan, for their own uses.).

Moreover, contrary to Appellants' suggestion, Brief of Appellants at 7-8, the case law supports the district court's finding that the exercise of any authority or control over plan assets is sufficient to confer fiduciary status, regardless of whether the defendant engages in discretionary or advisory activities. For example, in David P. Coldesina, D.D.S., P.C., Employee Profit Sharing Plan and Trust v. Estate of Simper, 407 F.3d 1126, 1132-1135 (10th Cir. 2005), the court pointed out that "[d]iscretion is conspicuously omitted from the fiduciary function of controlling plan assets. Indeed, the statute provides that 'any authority or control' over the management or disposition of plan assets is sufficient to render fiduciary status. 29 U.S.C. § 1002(21)(A)(i)." Id. at 1132 (emphasis added). The

court further noted that, "this distinction evidences Congress's intent to treat control over assets differently than control over management or administration." Id. The court concluded that "parties controlling plan assets are automatically in a position of confidence by virtue of that control, and as such they are obligated to act accordingly." Id. (emphasis in original). Because, in enacting ERISA, Congress was primarily concerned with the misuse of plan assets, such as the flagrant misuse that occurred here, assigning fiduciary status in such cases clearly serves the purposes of ERISA, as the Tenth Circuit noted. Id.

Other courts have similarly noted that ERISA draws a distinction between plan management, which requires the exercise of discretionary authority, and authority or control over plan assets, which confers fiduciary status regardless of the exercise of any discretion. FirsTier Bank, 16 F.3d at 911 ("[ERISA § 3(21)(A)] imposes fiduciary duties only if one exercises discretionary authority or control over plan management, but imposes those duties whenever one deals with plan assets.") (emphasis in original); LoPresti, 126 F.3d at 40 ("By focusing on whether the Terwilligers were administrators of the Funds, however, the district court overlooked the fact that an individual also may be an ERISA fiduciary by, as just stated, 'exercise[ing] any authority or control respecting management or disposition of [plan] assets.'") (emphasis in original); Board of Trustees of Bricklayers & Allied Craftsmen Local 6 of New Jersey Welfare Fund v. Wettlin Assocs. Inc., 237

F.3d 270, 273 (3d Cir. 2001) ("A significant difference between the two clauses is that discretion is specified as a prerequisite to fiduciary status for a person managing an ERISA plan, but the word 'discretionary' is conspicuously absent when the text refers to assets."); IT Corp. v. Gen. Am. Life Ins. Co., 107 F.3d 1415, 1421 (9th Cir. 1997) ("The statute treats control over the cash differently from control over the administration .... 'Any' control over disposition of plan money makes the person who has the control a fiduciary"); but see O'Toole v. Arlington Trust Co., 681 F.2d 94 (1st Cir. 1982) (bank's "responsibilities as the depository for the funds do not include the discretionary, advisory activities described by the statute").

These cases correctly construe the clear language of ERISA section 3(21)(A)(i). However, even assuming, arguendo, that fiduciary status under ERISA requires discretionary authority or control over plan assets, Appellants' conduct is still sufficient to confer such status in the present case. First, there is evidence that at least suggests that the Appellants decided whether to purchase insurance on the Plans' behalf from Ulico Casualty Company ("Ulico") or Reliance Insurance Company ("Reliance"), based on a purported attempt to obtain for the Plans "best policy at the best price." JA 33, 98. The exercise of such discretion in choosing a policy is sufficient in and of itself to render the Appellants fiduciaries of the Plans. In any event, Appellants were authorized to accept and hold plan

assets for the sole purpose of purchasing insurance for the Plans. JA 33, 35. Acting outside the scope of Appellants' authority, Appellants misappropriated those funds and issued fake policies to hide their misappropriation of the Plans' money.

Again, the case law supports fiduciary status under such circumstances. "A person who usurps authority over a plan's assets and makes decisions about the use or disposition of those assets should know they are acting as a fiduciary." Olson v. E.F. Hutton & Co., Inc., 957 F.2d 622, 626 (8th Cir. 1992). Fiduciary responsibilities are thus conferred "where a party possessing some measure of legitimate control over plan assets exceeds his grant of authority and exercises discretionary control over those assets." Vest v. Gleason & Fritzshall, 832 F. Supp. 2d 1216, 1217 (N.D. Ill. 1993). See also Yeseta v. Baima, 837 F.2d 380 (9th Cir. 1988). That is precisely what occurred here. Appellants, who were given Plan assets for the purpose of purchasing insurance policies for the Plans instead usurped authority over those assets through their deceptive issuance of fake policies and the use of Plan assets for their own unauthorized and illegitimate purposes.

None of the cases cited by Appellants detract from the Secretary's position that Appellants were fiduciaries in these circumstances. In fact, many of the cases cited in Appellants' Brief support the position that a person need only exercise

authority or control over plan assets to be a fiduciary under ERISA. For example, in LoPresti v. Terwilliger, 126 F.3d 34 (2d Cir. 1997), discussed in detail above, the Second Circuit held that, despite the fact that John Terwilliger was authorized to write checks on the plan account, he was not a fiduciary because he "did not exercise any authority or control regarding the disposition of plan assets." Id. at 41 (emphasis added).[1]

In addition, in Blatt v. Marshall & Lassman, 812 F.2d 810, 812-813 (2d Cir. 1987), the Second Circuit concluded "that Marshall and Lassman acted as fiduciaries in this case because they exercised actual control over the disposition of plan assets" (emphasis in original) (citing ERISA section. 3(21)(A)(i)). They stated that "[w]hen Marshall and Lassman ignored Blatt's requests and delayed executing the Notice of Change form, they effectively prevented the Retirement Committee from returning Blatt's vested contributions to him. Therefore, within the plain meaning of the statute, Marshall and Lassman exercised actual control respecting disposition of plan assets." Id. at 813. In the present action, Day exercised actual control over the disposition of plan assets by diverting them from their intended purpose of buying insurance to Appellants' own accounts and own uses.

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[1] On page 13 of Appellants' Brief, Appellants include a quote from what appears to be the text of LoPresti. The quoted text, however, does not appear in the decision, and the Secretary has been unable to ascertain the origin of the quoted text.

Moreover, Yeseta v. Baima, 837 F.2d 380 (9th Cir. 1988), supports the position that any authority or control over plan assets confers fiduciary status. The Ninth Circuit stated that "a fiduciary includes a person who 'exercises any authority or control respecting management or disposition of [a plan's] assets.' Whether Yeseta was authorized to make the $14,200 and the $25,000 withdrawals or not, he did exercise control over and disposed of Plan assets. His acts in this respect were not ministerial. On this basis, Yeseta is a fiduciary." Id. at 386. Appellants cite an inapposite portion of the case regarding professional service providers (an attorney and an accountant) to the plan who did not control plan assets. See also Arizona State Carpenters Pension Trust Fund v. Citibank, 96 F.3d 1310, 1316 (9th Cir. 1996) ("To become a fiduciary, the person or entity must have control respecting the management of the plan or its assets, give investment advice for a fee, or have discretionary responsibility in the administration of the plan") (citing Gelardi v. Pertec Computer Corp., 915 F.2d 1323, 1325 (9th Cir. 1985); Yeseta, 837 F.2d at 385); Connors v. Paybra Mining Co., 807 F. Supp. 1242, 1246 (S.D. W.Va. 1992) (Court determined that employer was fiduciary because it held "vested assets of the plaintiff fund" in the form of unpaid contributions).

Several cases cited by Appellants discuss the issue of fiduciary status within the context of a plan's subrogation rights after paying benefits to a plan participant or beneficiary who was injured by another person. Generally speaking, these cases

decide that the plans merely had a claim to the contested assets, and that, accordingly, these assets are not "plan assets" as that term is defined in ERISA. For example, in Chapman v. Klemick, 3 F.3d 1508, 1510, 1512 (11th Cir. 1993), the Ninth Circuit stated that a plan's subrogation claim "did not automatically convert the $25,000.00 settlement which Klemick [the beneficiary's attorney] disbursed into assets of the Trust Fund." The court also pointed out that attorneys generally stand in a different position than others because of the pre-existing framework of policies, practices and procedures under which they work. Under this framework, the attorney had a strict ethical obligation to give undivided loyalty to the client, not to the plan. Id. Finally, the Court found that the attorney in question had no relationship to the plan whatsoever prior to receiving the insurance money. See also Witt v. Allstate Ins. Co., 50 F.3d 536, 537 (8th Cir. 1995) (Allstate not fiduciary because it had no pre-existing relationship with the plan, and the plan merely had a subrogation claim to the money paid by Allstate so that the money was not yet plan assets); Trustees of Central States, Southeast & Southwest Areas Health & Welfare Fund v. State Farm Mut. Ins. Co., 17 F.3d 1081, 1084 (7th Cir. 1994) (same).

Vest v. Gleason & Fritzshall, 832 F. Supp. 1216 (N.D. Ill. 1993), is also a subrogation case, but it arose in a somewhat different context because the parties failed to contest whether or not the insurance monies were plan assets. After

noting that such an argument could be made, the court ruled that the defendant was not a fiduciary under ERISA. Id. at 1218. The court stated, however, that fiduciary status under ERISA may be conferred on a person "by virtue of control he legitimately wields, regardless of any intent to create such a relationship" as well as where a party "possessing some measure of legitimate control over plan assets exceeds his grant of authority and exercises discretionary control over those assets." Id. at 1217.

In contrast to the funds at issue in the subrogation cases, the monies forwarded by the plans to Appellants were Plan assets, paid directly by ERISA-covered Plans to the Appellants, and entrusted to the Appellants for the specific purpose of obtaining insurance policies for, and on behalf of, the Plans. Moreover, Appellants had an existing brokerage relationship with the Plans, which obligated them to act on the Plans' behalf and to use the money for specific Plan purposes. The subrogation cases, which involve money paid by third parties to entities other than the plan, simply have no relevance to the facts of this case.

The remaining cases cited by Appellants are similarly distinguishable on their facts, and have no relevance to the present matter. See Independent Ass'n of Publishers' Employees, Inc. v. Dow Jones & Co., Inc., 671 F. Supp. 1365 (S.D.N.Y. 1987) (Dow Jones was plan sponsor whose fiduciary obligations extended only to the authority to appoint, retain or remove members of the plan's

advisory committee); Maniace v. Commerce Bank of Kansas City, N.A., 40 F.3d 264 (8th Cir. 1994) (defendant Bank was directed trustee of ESOP which was required to act as directed, as it did, unless action was in violation of plan document or ERISA); Gelardi v. Pertec Computer Corp., 761 F.2d 1323 (plan sponsor that appointed plan administrator to be fiduciary and run long term disability plan was not appropriate defendant in suit alleging wrongful denial of benefits); Munoz v. Prudential Insurance Co. of America, 633 F. Supp. 564 (D. Colo. 1986) (Prudential was not proper defendant in claim for benefits because it was merely a third party administrator responsible for claims processing and had no discretionary authority over plan management); Local Union 2134, United Mine Workers v. Powhatan Fuel, 640 F. Supp. 731 (N.D. Ala. 1986) (president of bankrupt plan sponsor and fiduciary of employee health benefit plan was sued for failing to maintain insurance coverage for employee health plan) , rev'd on other grounds, 828 F.2d 710 (11th Cir. 1987); Beddall v. State Street Bank & Trust Co., 137 F.3d 12, 18 (1st Cir. 1998) (under pension plan trust agreement, State Street, the plan's trustee, had no fiduciary responsibility over plans' real estate investments or their valuation once the plan's administrative committee appointed an investment manager to supervise and manage real estate assets); Useden v. Acker, 947 F.2d 1563, 1574-75 (11th Cir. 1991) (commercial lender to plan did not become fiduciary by exercising its own rights as a lender with respect to collateral;

law firm did not depart from usual legal functions when advising plan so as to become fiduciary). None of these cases remotely suggests that an insurance broker who is paid money by plans in order to purchase insurance policies for them is beyond the fiduciary scope of ERISA when it accepts and misappropriates such funds.

Under the undisputed facts of this case, Appellants were fiduciaries. Appellants were brokers retained by the Plans to locate and obtain appropriate insurance coverage for the Plans, who became fiduciaries when they accepted the Plans' assets for the purpose of purchasing such insurance coverage, and when they misused their authority by issuing fraudulent insurance policies for the Plans, and misappropriating the Plans' assets to Appellants' own use.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court.

Respectfully submitted,

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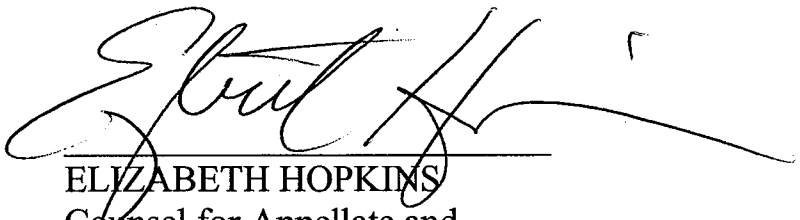

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SEPTEMBER 30, 2005

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2005, two paper copies of the brief for the Appellee, Elaine L. Chao, Secretary of Labor, United States Department of Labor, were served, by courier service, upon the following counsel of record:

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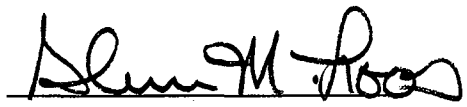

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Attorney for: the Secretary of Labor

Dated: September 30, 2005