No. 11-15472; 11-16024;
11-16081; 11-16082

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID BARBOZA,
Plaintiff-Appellant

v.

CALIFORNIA ASSOCIATION OF FIREFIGHTERS; et al.,
Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of California
Case No. 2:08-CV-02569-FCD-GGH

Brief of the Secretary of Labor as Amicus Curiae in Support of the Plaintiff-Appellant for Panel Rehearing

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INTRODUCTION AND INTEREST OF THE SECRETARY OF LABOR

Defendant California Association of Professional Firefighters (CAPF) is a non-profit mutual benefit association that sponsors the disability plan for firefighters at issue here. Subject to exceptions not applicable here, ERISA section 403(a) requires that:

> all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 402(a) or appointed by a person who is a named fiduciary,[1] and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan . . .

29 U.S.C. § 1103(a) (emphasis added). The Secretary of Labor's governing regulation in turn provides that "all assets of an employee benefit plan shall be held in trust by one or more trustees pursuant to a written trust instrument." 29 C.F.R. § 2550.403a-1(a) (emphasis added). This case presents an important issue under these provisions: whether section 403's hold-in-trust requirement, named trustee and exclusive control requirements were met in this case. The Court ruled that those requirements were met despite the lack of a written trust agreement or any

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[1] ERISA section 402(a), 29 U.S.C. § 1102(a), in turn, provides:

> Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly and severally shall have authority to control and manage the operation and administration of the plan.

language in a written document governing the plan clearly expressing the intent to create a trust, the lack of any writing formally appointing one or more trustees, the resulting failure of any trustee to accept appointment as such, and the failure of the supposed trustee, CAPF, to exercise exclusive control over the plan assets, resulting in the party that actually exercised control over the plan assets engaging in prohibited self-dealing in setting and deducting its own fees and expenses from plan assets. Barboza v. Cal. Ass'n of Prof. Firefighters, 782 F.3d 1072, 1079-80, 1081 (9th Cir. 2015). Panel rehearing is warranted because the Court misapprehended both the background trust law on the sufficiency of language for creating an express trust under a written instrument, as well as the particular need for clarity for ERISA plans, overlooked the specific statutory and regulatory requirements for acceptance of the trusteeship and exercise of exclusive control over the assets by the trustee, and failed to give proper deference to the reasonable interpretation of the regulation by the Secretary, the entity charged both with rulemaking and enforcement authority under ERISA. See 29 U.S.C. §§ 1134-1135. Contrary to the Court's holding, Section 403(a) and the regulation are satisfied only when a written document unambiguously demonstrates the intent to have a named or appointed trustee, who formally accepts such appointment, exclusively hold all plan assets in trust for the benefit of the plan participants and beneficiaries.

ARGUMENT

PANEL REHEARING IS WARRANTED TO CORRECT THE PANEL'S MISTAKES OF LAW AND FACT IN MISCONSTRUING SECTION 403 AND DECLINING TO DEFER TO THE SECRETARY'S REASONABLE INTERPRETATION OF HIS SECTION 403 REGULATION

Although recognizing that "it may be better practice" to do so, this Court held "parties entering into a trust" need not "use express words of trust, and clearly label the trustees, beneficiaries and trust res using defined terms." 782 F.3d at 1079. Likewise, the Court rejected the notion that a trust for the plan assets must be set up "in a document entitled 'trust instrument' and that uses the terms 'trust' and 'trustee,' and expressly states that the party is holding the assets 'in trust.'" Id. Finally, the Court held, without citation to the record, that because the "Plan Instrument requires CAPF to hold legal title to all 'property, monies, and contract rights' as well as all of the funds maintained in connection with the Plans . . . [and CAPF] holds these assets for the Plan on behalf of the participants," this document meets the requirements of section 403 by establishing a trust over the assets, with CAPF as the trustee and the plan participants as beneficiaries. Id. at 1080.

Although it is not entirely clear, the Court appears to be referring to the CAPF Long Term Disability Plan Effective April 28, 2005, which specifically provides that "funds maintained in connection with the Plan, and all property, monies and contract rights held by the Association [CAPF] pursuant to this Plan, including without limitation any trust assets transferred to the Association by any

predecessor entity of the Association. . . . shall be maintained in the name of the Association." 4 ER 684. In addition, this document states that the CAPF Board of Directors "shall manage the Fund" and that the plan administrator (CAISI), under its supervision, "shall pay Benefits therefrom," id. at 699, and that "no Plan Member or any other person shall have any right, title or interest in or to the assets of the Fund, or in or to any Contribution thereto, such Contributions being made to and held under the Fund for the sole purpose of providing Benefit payments under the Plan and administering the Plan in accordance with its terms." Id. at 730.[2]

These statements in the plan document certainly establish a fiduciary relationship between CAPF (and CAISI) and the plan and its participants since all the funds came from employee contributions and are thus plan assets, as the district court held. 1 ER 26 (citing DOL Advisory Opinion 94-31A to find that funds in the Wells Fargo account are plan assets); see also 29 C.F.R. § 2510.3-102 (defining plan assets to include employee contributions); 29 U.S.C. § 1002(21)(A) (defining

[2] This document also states that "[n]either the Board of Directors [of CAPF] nor the Administrator [CAISI] nor any third party or association in any way guarantees the Fund from loss or depreciation nor do they guarantee the payment of any person under the Plan. The liability of the Board of Directors and/or Administrator or any third party for payment of Disability Income under the Plan as of any date is limited solely to the then assets of the Fund." 4 ER 730. Under ERISA, this kind of clause, if applied to a fiduciary as both CAPF and CAISI are here, is an unenforceable exculpatory clause. 29 U.S.C. §1110; see also Kayes v. Pac. Lumber Co., 51 F.3d 1449, 1460 (9th Cir. 1995) (discussing ERISA's anti-exculpatory provision).

fiduciary in functional terms to include anyone who "exercises any authority or control" over plan assets). Moreover, ERISA empowers the court to impose either a "constructive" trust or a "resulting" trust over the plan assets at issue. See, e.g., S. Rep. No. 93-383, at 105 (1973) reprinted in 1974 U.S.C.C.A.N. 4890, 4989 (recognizing that a "constructive trust [may] be imposed on plan assets"). But, as this Court recognized, section 403 and the regulation require that all plan assets be held under a trust established under a written trust instrument. Barboza, 782 F.3d at 1080 ("[b]ecause the Plan Instrument here is a written instrument that establishes a trusts relationship, it is a written trust instrument" for purposes of section 403 and the regulation). See also Santa Monica Culinary Welfare Fund v. Miramar Hotel Corp., 920 F.2d 1491, 1492 (9th Cir. 1990) (noting that ERISA requires a fund holding plan assets to be established "pursuant to written Trust Agreement"). Thus, the statute and regulation require an express trust under a written agreement. And, just as an express trust differs from both a resulting trust and a constructive trust,[3] so too, a functional fiduciary under section 3(21)(A) is not the same thing as a trustee under section 403. See Rosenbaum, M.D., Inc. v. Hartford Fire Ins. Co., 104 F.3d 258, 262 (9th Cir. 1996) (noting that "[t]here is nothing ambiguous about

[3] "An express trust is created only if a settlor manifests an intention to create it . . . [whereas a] resulting trust arises where circumstances raise an inference that the settlor does not intend the person taking or holding title shall have the beneficial interest. . . . On the other hand, a constructive trust is imposed, not to effectuate intention, but to redress a wrong or unjust enrichment." Restatement (Second) of Trusts § 1, comment e. (1959).

the term trustee, and it cannot be read to embrace all fiduciaries,'" further noting that the terms "fiduciary" and "trustee" are not synonymous and that while "[a]ll trustees are fiduciaries, [] not all fiduciaries are trustees").

The plan document simply is not sufficiently clear to meet the requirement for such a written "Trust Instrument" under trust law principles governing express trusts, particularly when considered in light of ERISA's protective purposes.[4] See George T. Bogert, Trusts § 1, p. 4 (6th ed. 1987) (in the same section quoted by this Court, Bogert goes on to say that although "trusts may be, and are, created orally, they are generally based on a written document which describes the trust property, conveys interests in it, names the trustee, names or describes the beneficiaries and fixes their interests"; "[t]his document generally is called the 'trust instrument', and the details as to powers, rights and duties of the trust parties are called 'trust terms'").

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[4] Even assuming an instrument establishing a plan could also serve as a trust instrument for purposes of the statute and regulation, it would have to express with sufficient clarity the intent to set up a trust to hold plan assets for the beneficial interests of the plan and its participants and beneficiaries. See Jenkins v. Yager, 444 F.3d 916, 923 n.4 (7th Cir. 2006) (holding that "ERISA does not mandate a separate written trust agreement" and that a plan instrument that "defines the Trust and sets forth Trustee responsibilities [and] . . . refers to itself as '[t]his Plan and Trust'" met the requirements for specifying trustee responsibilities); see also 29 U.S.C. § 1105(c)(3) (defining "trustee responsibility" and "any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager"). The Plan document here fails to do so, as we discuss in text.

Here, not only does this document fail to clearly state in express terms that CAPF will act as trustee and hold the funds at issue in trust for the exclusive benefit of the plan and its participants, there is no language from which such intent can be inferred with reasonable certainty. Indeed, while some language in the plan document might be consistent with such an intent ("such Contributions being made to and held under the Fund for the sole purpose of providing Benefit payments under the Plan and administering the Plan in accordance with its terms"), other language is antithetical to the notion that the plan participants and beneficiaries had a beneficial interest in the funds and that the funds were being held in trust for them ("no Plan Member or any other person shall have any right, title or interest in or to the assets of the Fund, or in or to any Contribution thereto"). Thus, the Plan document lacks critical features of the "classic definition" of a trust which includes that "the beneficiary has an equitable interest in the trust property while legal title is vested in the trustee." In re Columbia Gas Sys. Inc., 997 F.2d 1039, 1059 (3d Cir.1993).

While the Secretary does not, as the Court thought, take the position that the trust necessarily must be established by using "defined terms" or any particular word formulation, 782 F.3d at 1079, the Secretary does take the position that the written document establishing the trust must "clearly label the trustees, beneficiaries and trust res," id., and thus in express and unambiguous terms

establish the intent to have a named or appointed trustee who formally accepts such appointment and exclusively hold all plan assets in trust for the beneficial interest of the plan participants and beneficiaries. This need for clarity is in keeping with the fact that "a trusteeship is serious business and is not to be undertaken lightly or so discharged." Mosser v. Darrow, 341 U.S. 267, 272 (1951). Trust elements must be described completely and with certainty, and the party asserting the trust has the burden to prove its existence with explicit and unequivocal evidence. See George T. Bogert, Trusts § 11, pp. 25-26 (; In re Assoc. Enterprises, Inc., 234 B.R. 718, 720 (Bankr. W.D. Wis. 1999) (same).

Thus, contrary to the Court's conclusion that the Secretary's view is unsupported by trust law, id. at 1079-80, this clarity is exactly what trust law requires for the creation of an express trust. See In re Lovesac Corp., 422 B.R. 478, 485 (D. Del. 2012) (holding that for an express trust, the "essential terms of trust must be clear enough for courts to enforce" the attendant equitable duties and finding that language specifying that one party should hold "legal title" to the property while the other retained the "beneficial title" created "sufficient triable issues of fact as to whether an express trust was created"); In re Desidero, 213 BR 99, 103 (E.D. Pa. 1997) (describing the elements of an "express trust" under Pennsylvania law as "quite demanding" and listing them as "(1) an express intent to create a trust; (2) an ascertainable res; (3) a sufficiently certain beneficiary; and

(4) a trustee who owns and administers the res for the benefit of another"); Eckart v. Hubbard, 184 Mont. 320, 325, 602 P.2d 988 (Mont. 1979) ("express trusts depend for their creation upon a clear and direct expression of intent by the trustor" under evidence that is "practically free from doubt"); Tomlinson v. Tomlinson, 960 S.W. 2d 337, 338 (Tex. App. 1997) ("There exist no particular form or words required to create a trust, if there exists reasonable certainty as to the putative trust's property, object and beneficiaries"). And in the ERISA context, the necessity for clear language is underscored by the fact that section 403 and the regulation require the creation of an express trust under a "written trust instrument" (as was required for some kinds of trusts usually under a statute of frauds). See, e.g., In re Denton, 169 B.R. 608, 611-12 (W.D. Tex. 1994) ("spendthrift trusts, like other express trusts, must be established with certain formalities . . . [under] language in written trust instruments which express[es] the intent of the settlor to create a spendthrift trust"); id. at 612 ("Although no particular form of words is required for creation of a spendthrift trust, intention to establish it must clearly appear in the instrument that creates it in specific language declaring a spendthrift trust or in language from which such a trust may reasonably be inferred.") (internal quotations and citation omitted).

Even if the language at issue in the plan document might be read in other contexts as sufficient to create an express trust over the plan assets for the benefit

of the firefighter participants, it is not sufficient for ERISA purposes. As this Court has recognized, ERISA was enacted to guard against "insecurity, lack of knowledge, and inability to police plan administration." Blau v. Del Monte Corp., 748 F.2d 1348, 1356 (9th Cir. 1985). To this end, section 403(a) and the implementing regulation require that a trusteeship over the plan assets be established in clear terms under an unambiguously drafted written trust instrument. Insofar as the common law allows ambiguity, it undermines ERISA's objective of enhancing the ability of participants to police their own plans, which cumulatively cover millions of individuals and contain trillions of dollars in assets. Given that ERISA is remedial legislation designed to address the unique concerns surrounding employee benefit plans and their enormous financial impact, 29 U.S.C. § 1001, its trust requirements should be strictly enforced regardless of how background trust law might treat trusts in other contexts. "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." Varity Corp. v. Howe, 516 U.S. 489, 497 (1996) (citations omitted); accord Donovan v. Mazzola, 716 F.2d 1226, 1231-32 (9th Cir. 1983) ("in enacting ERISA, Congress made more exacting the requirements of the common law of trusts relating to employee benefit trust funds").

Moreover, the Secretary's interpretation of the regulation as mandating this kind of clarity to meet the "written trust instrument" requirement is entitled to the highest level of deference under Auer v. Robbins, 519 U.S. 452, 462 (1997). As this Court previously recognized in an earlier appeal in this very case, the Court "need not be convinced that [the Secretary's] interpretation is the better one" because the Court "must defer to the agency's interpretation unless it is 'plainly erroneous or inconsistent with the regulation.'" Barboza v. California Ass'n of Prof. Firefighters, 651 F.3d 1073, 1079 (9th Cir. 2011) (Barboza I) (quoting Nat'l Ass'n of Homebuilders v. Defenders of Wildlife, 551 U.S. 644 (2007)). This means that '"unless an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation,' deference is required." Barboza I, 651 F.3d at 1079 (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994). Contrary to the Court's suggestion on this appeal that the Secretary's interpretation '"lacks the hallmarks of thorough consideration'" because it was "raised for the first time in an amicus brief without the opportunity for public comment," 782 F.3d at 1079 (quoting Christopher v. SmithKline Beecham Corp., --- U.S. ---, 132 S. Ct. 2156, 2168-69 (2012), that was the situation in Auer, where the Supreme Court deferred to the Secretary of Labor's interpretation of a labor regulation set out in amicus brief. 519 U.S. at 562. Moreover, unlike the situation addressed by the Supreme

Court in Christopher, the Secretary has never taken a position on ERISA's hold-in-trust requirement that could be deemed inconsistent with its approach in this case, and neither the Court nor the defendants point to any such inconsistency or claim that the defendants or other ERISA entities are surprised in any way by the requirement for a clear and express written trust instrument.[5] Thus, because the regulation requiring a "written trust instrument" is "entirely consistent" with the Secretary's approach of mandating a document that speaks in the express and clear language of a trust and clearly identifies the trust res and beneficiaries, the Court "must defer to the Secretary." Barboza I, 651 F.3d at 1079.

Furthermore, the defendants here violated section 403 for two additional reasons. First, regardless of whether a trustee is appointed in the plan, trust document, or by a named fiduciary, section 403, by its express terms, requires "acceptance [by the trustee or trustees] of being named or appointed." 29 U.S.C. §1103(a); see also H.R. No. 93-1280, at 298, (1974), reprinted in, 1974

[5] Indeed, defendants initially argued that the plan was unfunded and thus not subject to section 403, but the district court correctly rejected this argument since the plan was entirely funded by employee contributions. 1 ER 26. On appeal, defendants primarily relied on a treasury regulation that they read as excusing them from the written trust requirement, and on supposed advice they say they received from an unidentified Department of Labor employee. 1 ER 31 n.12. They also argued that CAPF's corporate bylaws served as the written trust agreement, but, as the Secretary pointed out in his previous brief, the bylaws require CAPF's directors to act in the best interest of the corporation, and thus cannot plausibly be read to establish a trust solely in the beneficial interests of the plan participants and beneficiaries.

U.S.C.C.A.N. 5030 ("in order that persons who act as trustees recognize their special responsibilities with respect to plan assets, trustees are to accept appointment before they act in this capacity"). Here, even if it could be inferred that the Plan document was intended to constitute a trust instrument appointing CAPF as trustee, as the Court held, there is no indication that CAPF accepted this appointment. If anything, it must be inferred that CAPF did not accept its appointment as trustee, since the only signatories on the Wells Fargo account containing most of the plan assets were two employees of CAISI.

This brings us to the final reason that the defendants violated section 403. To the extent that CAPF, as the plan sponsor, was required to either appoint a trustee or act as one itself, it failed to maintain exclusive control over the plan assets in the Wells Fargo account. 29 U.S.C. § 1103(a) ("upon acceptance . . . the trustee or trustee shall have exclusive authority and discretion to manage and control the assets of the plan"). See also 29 C.F.R. 2550.403a-1 (where the trustee is not identified in the trust instrument, the "named fiduciary" is responsible for ensuring that assets are held in trust). While there are two exceptions to the "exclusive control" requirement – one for "directed trustees" subject to the direction of the named fiduciary and one for "investment managers," 29 U.S.C. § 1103(a)(1) and (2) – neither exception is applicable to the two CAISI officers who actually controlled the Wells Fargo account. But because these are the only two

exceptions to the exclusive control requirement, the fact that "the Plan Instrument delegates the administration of the Plan to CAISI" and "entrusts CAISI with the administration of the Plan under the management and supervision of CAPF's board of directors," 782 F.3d at 1080, does not, as this Court concluded, excuse CAPF's failure to exercise exclusive control over the plan assets in the Wells Fargo account. See Solis v. Koresko, 884 F. Supp. 2d 261, 293-94 (E.D. Pa. 2012) (ruling that administrator breached its fiduciary duties by transferring insurance proceeds on lives of participating employees to accounts that were not controlled by trustees, even though plan document purported to permit delegation of fiduciary duties, where accounts' signatories were not designated as investment managers and did not acknowledge in writing that they were trust fiduciaries); Sinai Hosp. v. Nat'l Benefit Fund for Hosp. Workers, 697 F.2d 562, 565-67 (4th Cir. 1982) (noting that Congress intended that trust law principles be interpreted in light of specific congressional directives and ruling that "[l]abor-management contracting parties" cannot control trust funds "where the trust instrument reposes that authority solely with the trustees"). Indeed, it was this very failure that allowed CAISI to violate the prohibited transaction provisions of 29 U.S.C. § 1106(b)(1), by unilaterally paying its own fees and expenses from plan assets. 782 F.3d at 1081 ("CAISI is a fiduciary that paid its own fees from Plan assets [in the Wells Fargo account], and thus engaged in a prohibited transaction"). See 47 Fed. Reg.

21241, at 21244 (May 18, 1982) (noting, in the preamble to the regulation, that one of "two primary considerations in determining whether a particular arrangement satisfies the trust requirement" is the "trustee's retention of the exclusive authority and discretion to manage and control all of the plan's rights with respect to the property").

CONCLUSION

For the foregoing reasons, the Secretary respectfully asks the Court to grant Barboza's petition for panel rehearing to correct its conclusion that the defendants met the requirements of ERISA section 403.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant with Fed. R. App. P Rule 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 3,886 words.

Dated: May 21, 2015

s/ Marcia E. Bove
Marcia E. Bove
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United States Court of Appeals for the Ninth Circuit
Case Nos. 11-15472; 11-16024
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CERTIFICATE OF SERVICE

I, MARCIA E. BOVE, declare:

I hereby certify that I electronically filed the foregoing Brief of the Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellant for Rehearing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on May 21, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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