U.S. Department of Labor
Office of the Solicitor
Washington, D.C. 20210

Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 1007

Re: Secretary of Labor's *Amicus Curiae* Letter Brief in Response to the Court's Invitation, Case No. 09-4901-cv, Faber v. Metropolitan Life Ins. Co.

Dear Ms. Wolfe:

On December 1, 2010, this Court requested a letter brief from the Secretary of Labor ("Secretary") on three questions concerning the applicability of the Employee Retirement Income Security Act (ERISA) to a "Total Control Account" (TCA) established by defendant Metropolitan Life Insurance Company ("MetLife") to pay benefits distributed under group life insurance plans sponsored by Kodak and General Motors (the "Plans"). The Court asked (1) to what extent does the "guaranteed benefit policy exemption" in 29 U.S.C. § 1101(b)(2) apply in this case, (2) does MetLife discharge its ERISA fiduciary duty by establishing a beneficiary's TCA, and (3) to what extent does MetLife retain a beneficiary's benefits when it establishes a beneficiary's TCA.

For the reasons set forth below, the Secretary concludes that (1) the guaranteed benefit policy exemption does not apply to the TCAs at issue in this case, (2) MetLife and the Plans effectively discharge their ERISA obligations when they furnish beneficiaries a TCA in accordance with plan terms, and accordingly (3) MetLife does not retain plan benefits by holding and managing the assets that back the TCA. This brief first discusses ERISA's requirements, and then applies them to the facts of this case as presented in the Court's letter.

ERISA's Requirements

ERISA requires fiduciaries to manage plans prudently and solely in the interest of the participants and beneficiaries, and prohibits fiduciaries from dealing with plan assets in their own interest or for their own account. 29 U.S.C. §§ 1104, 1106(b)(1). 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." Id. § 1002(21)(A)(i). A person is also a fiduciary to the extent "he has any discretionary authority or discretionary responsibility in the administration of such plan." Id. § 1002(21)(A)(ii).

ERISA defines "plan assets" only for limited circumstances not applicable to this case. See 29 U.S.C. § 1002(42); In re Halpin, 566 F.3d 286, 290 (2d Cir. 2009) ("ordinary notions of property rights" generally determine plan assets). ERISA does provide, however, that "[i]n the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer." 29 U.S.C. § 1101(b)(2). "The term 'guaranteed benefit policy' means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer." Id. § 1101(b)(2)(B).

The Department of Labor has also provided guidance on the meaning of the term "plan assets." In the Department's view, "the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law"; assets will "include any property, tangible or intangible, in which the plan has a beneficial ownership interest," considering "any contract or other legal instrument involving the plan, as well as the actions and representations of the parties involved." U.S. Dep't of Labor Advisory Op. No. 93-14A (May 5, 1993); see Halpin, 566 F.3d at 290 & n.2 (quoting and deferring to Advisory Op. No. 93-14A). The Department also recognizes that a plan's interest in particular funds depends on "whether the plan sponsor expresses an intent to grant such a beneficial interest or has acted or made representations sufficient to lead participants and beneficiaries of the plan to reasonably believe that such funds separately secure the promised benefits or are otherwise plan assets." U.S. Dep't of Labor, Advisory Op. No. 94-31A, at *7 (Sept. 9, 1994); see also Kalda v. Sioux Valley Physician Partners, Inc., 481 F.3d 639, 647 (8th Cir. 2007) (deferring to Advisory Op. No. 94-31A).

Benefits Provided by the Kodak and GM Plans

This Court's letter describes MetLife's arrangement with the Plans in this way:

> [T]he plaintiffs-appellants were beneficiaries of ERISA-regulated group life insurance plans. The benefits payable under the plans were

> funded with group life insurance policies issued by defendant-appellee Metropolitan Life Insurance Company ("MetLife"). Pursuant to the terms of the plans, if the amount of the proceeds payable to a beneficiary exceeds a specified amount, MetLife pays those benefits through an interest-bearing "Total Control Account" ("TCA"), a form of "retained asset account." MetLife establishes a TCA in the beneficiary's name, credits the account with the amount of benefits due, provides the beneficiary with a "checkbook" that he or she can use at any time to withdraw any or all of the balance, and guarantees the entire amount of the balance. However, until a check is drawn, MetLife retains the funds backing the TCA in its own account, and invests those funds for its own profit, earning the "spread" between its return on investment and the interest paid to the beneficiary.

The Kodak Summary Plan Description ("SPD") provides:

> Payment of a death benefit of $7,500 or more is made under MetLife's Total Control Account. The death benefit amount is deposited in an interest bearing money market account and your beneficiary is provided with a checkbook to use for writing checks to withdraw funds. Other payment options are available. However, if the total death benefit is less than $7,500, a lump sum payment will be made.

Joint Appendix ("J.A."), at 188. The GM SPD similarly states:

> If the benefit from a single claim is $6,000 or more, your beneficiary may receive basic life insurance benefits under one of the several options available under the Beneficiary's Total Control Account (TCA) Program. The TCA Program provides your beneficiary with total control of the proceeds from your life insurance. A personalized checkbook allows your beneficiary to easily use all, or a portion, of the money. Funds left with the insurance company earn interest at competitive rates. Several investment options also are available under TCA. A separate brochure describing the TCA options is available on request from the GM National Benefit Center.

J.A. at 520.

When MetLife establishes a TCA account, it provides the beneficiary with a "Total Control Account Money Market Option Customer Agreement" ("Customer

Agreement"), which sets out the terms for the TCA account. J.A. at 633. Under the terms of the particular Customer Agreements included in the record, the beneficiary was entitled to withdraw insurance proceeds at any time without penalty or loss of interest. Id. MetLife had discretion to set the interest rate weekly based upon the performance of two money market indexes in the preceding week.[1] Id. Additionally, MetLife guaranteed that the annual yield on the account will "not be less than 1.5%, even if money market yields fall below that level." Id. As the Court notes in its letter, MetLife retains the funds backing the TCA in its general account and invests those funds for its own profit, earning the spread between its return on investment and the interest paid under the TCA.

How ERISA's Requirements Apply to MetLife's TCA Accounts

The crux of the plaintiffs' claim is that MetLife, acting as a plan fiduciary, misappropriated plan assets for its own profit. See Appellants' Reply Br. at 5-6 & n.1. The claim thus turns on whether MetLife acts as an ERISA fiduciary after the TCA is created and whether the funds backing the TCA are plan assets.[2] To answer those questions in the context of this case, it is necessary to determine whether the establishment of a TCA constitutes the fulfillment or continuation of an ERISA plan insofar as the individual beneficiary holding the TCA account is concerned. If the plan relationship ends with the establishment of the TCA, it is plain that MetLife is not a plan fiduciary and is not managing or disposing of plan assets during the life of the TCA. See 29 U.S.C. § 1002(21)(A)(i). If, however, the plan relationship continues, MetLife could be a fiduciary controlling plan assets unless the TCA falls within the "guaranteed benefit policy exception" in 29 U.S.C. § 1101(b)(2).

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[1] The Customer Agreement provides: "If your Account balance is $2,500 or more, the rate we set will be equal to or higher than at least one of the following indexes: the prior week's Money Fund Report Averages/Government 7-Day Simple Yield (a leading index of government money market mutual fund rates), or the 'Bank Rate Monitor' National Money Market Rate Index (a leading index of rates paid by 100 large banks and thrifts on money market accounts)." J.A. at A-633.

[2] The use of plan assets (e.g., employee contributions) to purchase the MetLife group policy does not appear to be at issue in the case, and the Secretary, accordingly, does not address the obligations of plan fiduciaries with respect to the initial purchase of the policies.

It is difficult to make these determinations in the abstract. In general, plan design is a settlor function and the plan sponsor is given wide latitude to design the plan as it sees fit, including specifying the type and level of benefits, the conditions and contingencies attached to the receipt of benefits, and the means of accomplishing the promised distribution of benefits. As the Supreme Court has recognized, ERISA gives the plan settlor broad discretion to establish the content and level of the benefits provided to participants and beneficiaries. Lockheed Corp. v. Spink, 517 U.S. 882, 893 (1996) ("ERISA 'leaves th[e] question' of the content of benefits 'to the private parties creating the plan.... [T]he private parties, not the Government, control the level of benefits'") (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 511 (1981)); Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 444 (1999) (the plan's settlor makes the "decision regarding the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated"); cf. Feifer v. Prudential Ins. Co. of Am., 306 F.3d 1202, 1209 (2d Cir. 2002) ("'[r]ules governing . . . definition of benefits . . . are the sorts of provisions that constitute a plan'") (quoting Pegram v. Herdrich, 530 U.S. 211, 223 (2000)). With respect to welfare plans, including life insurance plans, ERISA places relatively few substantive constraints on the structure of plan benefits. E.g., Moore v. Metro. Life Ins. Co., 856 F.2d 488, 491-92 (2d Cir. 1988) (noting welfare plans are not subject to the specific funding and distribution rules that apply to pension plans). The plan's terms, however, must be comprehensively set out in written plan documents, accurately and comprehensibly communicated to participants in the "summary plan document" (which is itself a governing plan document), and honestly described in other communications to participants. The plan's fiduciaries – the persons or entities who have authority either to administer the plan or manage its assets – must follow the terms of the plan (so long as they do not violate the statute) and are subject to the fiduciary duties of prudence and loyalty with respect to the plan and its assets. 29 U.S.C. §§ 1022, 1102, 1104. Unless ERISA provides otherwise, the determination of whether an asset is the plan's asset is governed by ordinary property law principles. Halpin, 566 F.3d at 290; Kalda, 481 F.3d at 647.

Here, the key question is whether the Kodak and GM Plans satisfy their obligations to a plan's beneficiary, in accordance with the governing plan documents, when MetLife establishes a TCA for the beneficiary, gives full and immediate access to the TCA by providing a "checkbook" allowing for unlimited withdrawals up to the remaining balance on demand, and promises to credit interest on the account balance in accordance with the Plans' terms. Based on the record information the Secretary has seen, specifically the SPDs and Customer Agreements cited above, the Secretary believes that that is a proper interpretation of the Plans, representing the plan sponsors' intent to convert ERISA-covered life insurance plans to individual contracts between the beneficiary and MetLife once the participant has died and the distribution in the form of a TCA is made.[3] There is no indication in these documents that the Plans retain an ongoing interest in the TCA or in the MetLife assets backing the TCA once the account is created; or that they promised beneficiaries something more than the TCA arrangement (e.g., by promising a "lump sum payment" in cash or by deposit to some other account of their choosing); or intended to impress MetLife with ongoing trust duties and require it to segregate the life insurance proceeds in separate funds distinct from its general account. There is also no indication that the manner in which the TCA arrangement was implemented by MetLife contradicted or deviated from plan terms and no claim that MetLife breached any duty it may have had as plan administrator in setting up the TCA accounts or giving notice to the plaintiffs about them.

With this background understanding, there is no basis under the facts and circumstances of this case for overturning the district court decision. This conclusion is informed by the following answers to the Court's three questions.

(1) The "guaranteed benefit policy exemption," 29 U.S.C. § 1101(b)(2), does not apply to the TCAs at issue here

As discussed above, ERISA defines "guaranteed benefit policy" in pertinent part to mean "an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer." 29 U.S.C. § 1101(b)(2)(B). There appears to be no dispute that the group life insurance policies in this case are guaranteed benefit policies to the extent that they promise that each TCA will be credited with a fixed opening balance. See Appellants' Reply Br. at 17-20 (recognizing that the dispute is over whether the "guaranteed benefit policy exemption" applies after benefits become due and payable). The policies entitle beneficiaries to a guaranteed fixed level of insurance proceeds,

[3] The SPDs are governing plan documents under ERISA. See Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan, 129 S.Ct. 865, 877 (2009). The Customer Agreements appear to be the contract between MetLife and the beneficiary that controls the beneficiary's relationship to MetLife with respect to the TCAs once the plan benefit in the form of a TCA is distributed and the beneficiary signals acceptance by opting to keep some or all the insurance proceeds in the TCA. Other plan documents, including significantly the Kodak and GM insurance policies, do not appear to be in the record.

which is payable either in a lump sum or deposited in a TCA depending on the proceeds amount. J.A. at 188, 520. Thus, pursuant to the guaranteed benefit policy exemption, MetLife does not hold plan assets prior to the creation of a TCA. Instead, the Plan's sole asset is the insurance policy, rather than any assets held by MetLife in its general account. See 29 U.S.C. § 1101(b)(2) ("[i]n the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer").

Once a TCA is established, however, the guaranteed benefit policy exemption is no longer relevant to the analysis of the legal relationships between the parties. The definition of "guaranteed benefit policy," applies only to contractual arrangements with plans. See 29 U.S.C. § 1101(b)(2) ("in the case of a plan . . ."). Once the TCA is created, the Plan has discharged its obligations to its beneficiaries and has no ongoing authority over the TCA or the assets held in MetLife's general account.

Accordingly, the guaranteed benefit policy exception does not apply to the post-distribution relationship between the insurer and the individual TCA account holder. The Plans live up to their end of the bargain, when they give beneficiaries a TCA. When the beneficiary receives his "checkbook," he is free to withdraw the funds or to leave the funds in the account subject to the terms of the Customer Agreement between MetLife and the "Account Holder." He has effectively received a distribution of all the benefits that the Plan promised. At that point, the "Account Holder" is the individual beneficiary and the contractual rights associated with the TCA belong to the Account Holder, not the plan. See, e.g., J.A.at 28, 31-33. The Secretary has seen no language in the plan documents or Customer Agreement pointing to any ongoing plan obligations, trust requirement, or continuing fiduciary oversight of the TCA or of MetLife's general account. See n.7 infra. The relevant contractual arrangement is no longer between the Plan and MetLife, but rather between MetLife and the individual Account Holder – a relationship governed by state and other non-ERISA law. Because the Plan has already discharged its obligations, the "guaranteed benefit policy" provision is irrelevant. See, e.g., Harris Trust and Sav. Bank v. John Hancock Mut. Life Ins. Co., 302 F.3d 18, 30-31 (2d Cir. 2002) (agreeing with insurer that it had no extra-contractual fiduciary obligations to a plan fiduciary after fulfilling its obligations under the guaranteed benefit policy). Nothing in this benefit arrangement would support a holding that the assets in MetLife's general account suddenly become plan assets, for the first time, only after the Plan has given the beneficiary all control over the TCA and retained no independent authority over the account.

If, however, the Court disagrees with the Secretary's analysis and concludes that the TCA reflects an ongoing relationship between the Plan and MetLife that is subject to ERISA, the Secretary would disagree with MetLife's contention that the interest rate guarantee set forth in the Customer Agreement (but not the SPDs) satisfies the test for a guaranteed benefit policy. See Appellee's Br. at 34. Even if the interest rates on the TCAs are set prospectively, MetLife retains discretion over the interest rates credited each week; the Agreements do not clearly advise the beneficiary how to ascertain current or prospective rates; and the Agreements do not specifically require any particular timing for MetLife's disclosure of the weekly rate. Because a significant component of the arrangement is insufficiently guaranteed, the contract would fail the test. The Supreme Court has held that "[a] component fits within the guaranteed benefit policy exclusion only if it allocates investment risk to the insurer. Such an allocation is present only when the insurer provides a genuine guarantee of an aggregate amount of benefits payable to retirement plan participants and their beneficiaries." John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank, 510 U.S. 86, 106 (1993). Based on the Customer Agreements and the SPDs, not all of the investment risk has been allocated to the insurer, nor has the beneficiary been provided a full and meaningful opportunity to withdraw assets before MetLife adjusts interest rates.[4] Moreover, the arrangement would also probably fail the statutory test because it is not an insurance contract within the meaning of section 401(b)(2) inasmuch as the insurable event – the death of the insured – occurred prior to the creation of the TCA.[5]

[4] By way of contrast, the Secretary has treated an annuity contract as "a guaranteed benefit policy" in circumstances where the insurer declared the interest rate in advance for multi-year periods, applied the rates prospectively, and gave "full disclosure to the contractholder" regarding interest rate changes with the opportunity to withdraw before the changes took effect. Information Letter from Louis Campagna, Chief, Division of Fiduciary Interpretations, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, to Jon W. Breyfogle, Esq., Groom Law Group, 2004 WL 349101 at *4 (January 6, 2004).

[5] Whether the TCA is nonetheless subject to state insurance regulation or covered by a state guaranty fund is a separate question and beyond the scope of this brief.

(2) and (3) MetLife discharges its ERISA obligations by establishing a TCA and does not "retain" plan benefits by holding and managing the assets that back the TCA

As this Court recognized, "the third and last question is in many ways encompassed within the previous two." This section primarily addresses question three. The response to the question whether MetLife retains plan assets (question three) also largely answers whether MetLife assumes or retains fiduciary status (question two) because the plaintiffs' claim alleges breaches of fiduciary obligations that exist only if MetLife had "control" over plan assets and thus hinges on whether MetLife's "retained assets" are plan assets.[6]

As discussed supra, pp. 4-5, plan sponsors GM and Kodak were free under ERISA to structure the Plans to provide life insurance benefits through cash payments or in the form of TCAs – ERISA does not dictate a particular choice. Similarly, the Plans' ownership rights, if any, in assets held by MetLife are determined by the specific choices reflected in the plan documents and contractual arrangements between the parties. In general, whether any particular asset belongs to a plan is determined by "ordinary notions of property rights." In re Luna, 406 F.3d 1192, 1199 (10th Cir. 2005); see Halpin, 566 F.3d at 292 ("commonly understood definition of 'assets' ensures that plans and related parties can look to an established body of rules and principles to structure relationships"); Kalda, 481 F.3d at 647 (determining whether assets were plan assets by considering "whether the plan sponsor expresses an intent to grant . . . a beneficial interest or has acted or made representations sufficient to lead participants and beneficiaries of the plan to reasonably believe that such funds separately secure the promised benefits or are otherwise plan assets"). Thus, for example, in Halpin, when an employer failed to comply with its contractual obligations to make plan contributions, the plan did not acquire an ownership interest in the employer's general account, even though the employer had wrongfully retained assets that should have gone to pay contributions. In the absence of an agreement to hold the unpaid amounts in trust for the plan, this Court held that the plan did not have a "beneficial ownership interest" in the employer contributions. Halpin, 566 F.3d at 290 ("the unpaid

[6] The Secretary recognizes, infra, pp.14-15, that MetLife has other fiduciary obligations unrelated to the control of plan assets, including obligations to follow plan documents and to communicate truthfully and accurately about plan benefits. It appears, however, that the plaintiffs have waived any arguments based upon breach of these duties.

amounts are debts; they are not assets held in trust for the benefit of the creditor"). While the Court recognized that the parties were "free to contractually provide for some other result," the parties had chosen to apply the default presumption that employer contributions to the plan are governed by the "language of creditor and debtor." Id.

As in Halpin, 566 F.3d at 290, the underlying property interest after a TCA is created is not described in terms of a fiduciary relationship but in the "language of [a] creditor and debtor" relationship between MetLife and the Account Holder. Accordingly, the Account Holder has a contractual right to payments in accordance with the Customer Agreement and MetLife, for its part, has a corresponding debt obligation to make the required payments on demand. Thus, for all the reasons set forth in the preceding section, the Plans do not have an ownership interest in the MetLife assets backing the TCA. The GM and Kodak Plans discharge their responsibilities by giving the beneficiary a TCA with all of the associated contractual rights, including the unilateral authority to withdraw funds from the account. The Plans do not retain any ongoing ownership interest in the TCA or MetLife's general account. Because there are no "plan assets" after the TCA is created, MetLife cannot be held liable as an ERISA fiduciary for breaching its obligations with respect to "plan assets."

Nothing in the SPDs or Customer Agreements cited above gives the GM or Kodak Plans or participants and beneficiaries an ownership interest in MetLife's assets or conveys title to any such assets.[7] These documents do not point to any ongoing role for the Plans after a TCA is established for a particular beneficiary; assert any ownership interest by the Plans in the TCA or in assets backing the TCA; or reasonably suggest to the Plans' beneficiaries that plan fiduciaries would retain responsibility for the disposition of the account or the management of assets held by MetLife. See Dep't of Labor Advisory Op. No. 92-24A ("a welfare plan generally will have a beneficial interest in particular assets if the employer establishes a trust on behalf of the plan, sets up a separate account with a bank or

[7] This case was decided on a 12(b)(6) motion to dismiss, and, as noted, supra n.3, it does not appear that the group insurance policies were included in the record. As a result, the Secretary cannot say if these policies contain any provisions that could change the inherently factual analysis necessary to determine whether the policies gave the Plans an ownership interest in the TCAs or in the MetLife assets backing the TCAs, or indeed conflicted with or rendered ambiguous the SPDs. Accordingly, this Court could consider remanding the case for further discovery and record development.

other third party in the name of the plan, or specifically indicates in the plan documents or instruments that separately maintained funds belong to the plan"). Of course, GM and Kodak could have created a contractual agreement with MetLife under which the Plans retained an ownership interest in the funds backing the TCAs and thereby retained an ownership interest in assets held by MetLife. Cf. Halpin, 566 F.3d at 290 (recognizing that parties can create a contract whereby assets are deemed to be "plan assets" for purposes of ERISA). But that does not appear to have happened here.

Instead, because each Plan promised its benefits in the form of a TCA, the Plan's stated purpose is discharged once the account is created and the beneficiary is given control over his account. At that point, the Plan has effectively distributed the promised benefit and the Plan has no ongoing authority over the TCA. The relationship between MetLife and the individual account holder is now governed by the Customer Agreement defining their contractual relationship under state law, not by a fiduciary relationship established in the plan documents under ERISA. The beneficiary is free, to withdraw some, none, or all funds from the account, without any involvement by the Plan. Any subsequent breaches of the contractual relationship are governed by state and other non-ERISA law. After the creation of the TCA, ERISA no longer governs the relationship between MetLife and the TCA account holders.

There is nothing unusual about a plan discharging a welfare benefit obligation by providing benefits in the form of a promissory instrument similar to a TCA. In other contexts, plans often discharge their obligations by issuing a contract to the beneficiary or by crediting amounts to an account controlled by the beneficiary in this manner. E.g., U.S. Dep't of Labor Field Assistance Bulletin 2006-2 (October 27, 2006) (Q. and A. No. 11) (noting that beneficiaries may choose to receive health benefit distributions from Health Savings Accounts in the form of credit on their "debit, credit, or stored-value cards"); U.S. Dep't of Labor Field Assistance Bulletin 2004-01 (April 7, 2004) (recognizing that employer contributions distributed into Health Savings Accounts, an account controlled solely by the employee, are not covered under ERISA); see generally Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911, 916 (2d Cir. 1982) ("[n]either [ERISA] nor its legislative history comments on the mode or manner in which benefits should be paid"); Fine v. Semet, 699 F.2d 1091, 1093 (11th Cir. 1983) ("[a]ny right to . . . a particular method of payment must be found in the individual agreements"); Woolsey v. Marion Labs., Inc., 934 F.2d 1452, 1457 (10th Cir. 1991) (same) (listing other cases).

Even in the pension context, the Department's regulations provide that an individual is no longer a participant covered under the plan when the individual's benefits "(1) [a]re fully guaranteed by an insurance company, insurance service or insurance organization licensed to do business in a State, and are legally enforceable by the sole choice of the individual against the insurance company, insurance service or insurance organization; and (2) [a] contract, policy or certificate describing the benefits to which the individual is entitled under the plan has been issued to the individual." 29 C.F.R. 2510.3-3(d)(2)(ii). Similarly, the regulatory safe harbors for automatic rollovers to IRAs and for distributions from terminated individual account plans permit plans to discharge their obligations through savings account deposits and insurance contracts meeting certain conditions. 29 C.F.R. 2550.404a-2(b), (c)(iii); 29 C.F.R. 2550.404a-3(d).

Thus, as these rules recognize, a plan can fulfill its obligations by giving the participant a set of contractual rights against a financial institution, rather than by making cash distributions or conveying title to any of the institution's underlying assets. In each instance, neither the participant nor the plan has an ownership interest in the assets of the financial institution, even though the institution "retains" assets backing its contractual obligations and seeks to make a profit through the investment of those assets. In this regard, the only significant difference between pension plans and welfare plans is that ERISA imposes fewer constraints on a welfare plan's authority to structure and define the benefits that the plan provides and the means by which they will be distributed.[8] Nothing in ERISA prohibits a welfare plan from defining the benefit as a contract or TCA, rather than the payment of cash benefits.

The Parties Give Insufficient Weight to the Essentially Contractual Nature of ERISA Plans and Misread Mogel

As discussed above, the determination of whether a particular asset is a "plan asset" requires a factual inquiry into the parties' representations and understandings. See U.S. Dep't of Labor Advisory Op. No. 92-24A, 1992 WL

[8] In the case of a welfare plan, the Department's regulations do not restrict the range of acceptable distributions to specifically defined categories of benefits, as in the pension context. Accordingly, the Department's regulations simply provide that the participant ceases to be "covered under the plan" on the earliest date that the participant is "ineligible to receive any benefit" and is "not designated by the plan as a participant." 29 C.F.R. 2510.3-3(d)(2).

337539, at *3 (Nov. 6, 1992) (noting the "inherently factual" nature of the inquiry). Accordingly, both parties' briefs are wide of the mark to the extent that they seek to formulate broad rules for all retained asset account arrangements in the abstract, without regard to the specific documents and instruments governing specific cases.

The plaintiffs categorically argue (and the defendants categorically deny) that, as a legal matter, MetLife necessarily retains plan assets until the money is fully disbursed from the TCA. Appellant's Br. at 24. Viewed this way, regardless of how the Plans are written, the TCAs are backed by undistributed plan benefits (i.e., plan assets) that MetLife has retained and wrongfully managed in its general account for its own benefit. They also argue that Mogel v. Unum Life Ins. Co. of America, 547 F.3d 23, 26-27 (1st Cir. 2008), supports their position, notwithstanding the significant factual differences between Mogel and the present case. Appellant's Br. at 25.

In Mogel, the First Circuit held that defendant Unum had failed to discharge its responsibilities to the beneficiaries of a death benefit plan – and that it remained an ERISA fiduciary – when it issued a checkbook to a plan's participants, rather than "a lump sum payment," as required by the plan's terms. 547 F.3d at 26. The First Circuit was unwilling to "deem" the sums to have been effectively distributed by the plan until the insurer actually paid beneficiaries the lump-sum benefits as promised by the plan. Id. at 26. Cf. also U.S. Dep't of Labor Advisory Op. No. 93-24A (Sept. 13, 1993) (when trust company sets plan funds aside after cutting benefit check, the funds nevertheless remain plan assets until the check is actually paid).

Unlike the situation in this case, however, the particular plan before the First Circuit in Mogel expressly defined the plan's benefits in the form of lump sum cash payments, which defendant Unum quite literally retained for itself. Mogel, 547 F.3d at 25; see also id. at 26 ("[t]he district court found, and we agree, that delivery of the checkbook did not constitute a 'lump sum payment' called for by the policies"). Notwithstanding arguably broader dicta, therefore, Mogel is best understood as addressing a specific factual setting not present here: when an insurer fails to abide by the settlor's plan terms requiring the benefits to be in the form of a lump sum payment. Contrary to the plaintiffs' view, Mogel does not stand for a broader proposition that the insurance company can never "retain" plan assets and use them for its own benefit, regardless of whether the plan specifically provided for a lump sum cash distribution or simply for the creation of a TCA. Appellant's Reply Br. at 5-6 n.1. Such a broad reading ignores the plan's own definition of the benefit and ignores the many circumstances in which plans discharge their responsibilities through the delivery of a contract or insurance policy, rather than cash.

In contrast to the facts in Mogel, the Kodak and GM Plans here specifically contemplate distribution through the creation of a TCA, subject to the beneficiary's control; only beneficiaries with small balances are entitled to distribution through a cash payment. J.A. at 188, 520. Thus, the Plans discharge their obligation by opening a MetLife account, which the beneficiary controls pursuant to a contractual arrangement with the insurer. No plan language points to any ongoing plan obligations, trust requirement, or continuing fiduciary oversight of the TCA or of MetLife's general account. As explained above, this conclusion hinges on reading the governing plan documents as providing that the Plans' obligations to a beneficiary are satisfied with the creation of a TCA. If, instead, the Plans had provided (as in Mogel) solely for lump-sum cash payments, or if they had contemplated that the assets would be segregated and held in trust for the plan or its beneficiaries pending payment from the TCA, MetLife might well have retained its status as a plan fiduciary.

Unlike in Mogel, the plaintiffs do not allege that MetLife deviated from following the plan documents when it established the TCAs, rather than making immediate cash payments to the beneficiaries. Thus, any other fiduciary obligations MetLife may have had with respect to MetLife's establishment of the TCAs are not implicated by this case. It is worth noting, however, that MetLife, as a claims administrator, and therefore, an ERISA fiduciary, has a responsibility to follow the plan documents in distributing the Plans' benefits. Kennedy, 129 S.Ct. at 875; see J.A. at 187-188 (noting that claims for benefits must be submitted to MetLife in accordance with MetLife procedures) (Kodak Plan); J.A. at 609 (referring to MetLife claims procedures) (GM Plan). Accordingly, if MetLife had failed to establish the TCAs in the manner set forth in the governing plan documents, the beneficiaries would have had an action for breach of MetLife's fiduciary responsibilities and to compel compliance with the terms of the plan.

In its capacity as claims administrator and fiduciary, MetLife also has a duty to avoid misrepresentations to participants and beneficiaries concerning the content and structure of benefits paid through the TCAs. E.g., Bouboulis v. Trans. Workers Union of Am., 442 F.3d 55, 65-66 (2d Cir. 2006) (recognizing that exercise of authority to communicate to participants about benefits is a fiduciary function); see also J.A. at 478 (recognizing that MetLife provides information and a package for death benefit claimants) (Kodak Plan); J.A. at 609 (referring beneficiaries to MetLife for claims procedures and information) (GM Plan). The plaintiffs allege, as a factual matter, that MetLife promoted a false impression that the funds in their TCAs would be transferred into a money market account at a bank; they also allege that MetLife had concealed the fact that it "retains and invests the proceeds for its own account"; and concealed the fact that it deposits the amount of death benefits into the TCA upon the presentment of a check for payment from a beneficiary. Faber v. Metro. Life Ins. Co., 2009 WL 3415369, at *2 (S.D.N.Y. Oct. 23, 2009). While the plaintiffs made these factual allegations in their complaint, however, they "expressly disavow any claim that MetLife's alleged concealment of the way in which the TCA would work was itself a breach of duty, and they make no claim for misrepresentation." Id. at *7 n.8. Whether MetLife breached its duty to disclose truthful information and not to mislead participants is, therefore, not at issue in the appeal to this Court.

While MetLife may have had discretion over certain plan administrative tasks and be subject to corresponding fiduciary obligations as described above, such fiduciary obligations do not extend to the otherwise distinct responsibilities for managing non-plan assets; nor does the fiduciary's control over certain plan administrative tasks transform non-plan assets into plan assets subject to fiduciary oversight. See Halpin, 566 F.3d at 289.

In sum, under the facts and circumstances of this case, the Secretary has no reason to believe that MetLife has mismanaged plan assets, or indeed is acting as a plan fiduciary, in its conduct following its creation of the TCAs pursuant to the terms of the Plans. Once a TCA is established, the beneficiary account holder receives all of the rights and benefits that the plan provided, and the beneficiaries (rather than the Plans) are given complete discretion over the exercise of those rights and benefits – including the right to take all, some, or none of the assets out of the account. Accordingly, after establishing the TCAs, ERISA no longer governs the relationship between MetLife and the TCAs' account holders.

Conclusion

For the reasons set forth above, the Secretary submits to this Court her view that (1) the guaranteed benefit policy exemption does not apply to the TCAs at issue in this case, (2) MetLife and the Plans effectively discharge their ERISA obligations when they furnish beneficiaries a TCA in accordance with plan terms, and accordingly (3) MetLife does not retain plan benefits by holding and managing the assets that back the TCA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Secretary of Labor's Amicus Curiae Letter Brief in Response to the Court's Invitation was served by email and U.S. mail or UPS overnight courier, this 17th day of February, 2011, upon:

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