

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOHN C. MCLEMORE, Trustee,)	
)	No. 3:08-cv-00021
Plaintiff,)	JUDGE TRAUGER
)	
v.)	
)	
REGIONS BANK, as Successor in Interest)	
by Merger to AmSouth Bank, and)	
MID ATLANTIC CAPITAL)	
CORPORATION,)	
)	
Defendants.)	

**REPLY TO TRUSTEE’S RESPONSE TO DEFENDANT MID ATLANTIC
CAPITAL CORPORATION’S MOTION TO DISMISS**

The Trustee’s Response to MACC’s motion to dismiss is remarkable in several respects, but primarily for the Trustee’s attempt to ignore the fact that he is a bankruptcy trustee. Instead, the Trustee apparently views himself as an independent enforcer of ERISA rights held by others, unfettered by the restrictions of the Bankruptcy Code or applicable case law. Finding no actual authority for the role he seeks, the Trustee has advanced a series of tortured and unsupported arguments, pleading with the Court to ignore or change existing law in at least four different areas. The Trustee is, however, a bankruptcy trustee, and he is subject to the Bankruptcy Code and the law of the Sixth Circuit. His novel theories about how those bodies of law should not apply to him are entirely lacking in support. The discussion below addresses briefly certain of the points raised in the Trustee’s Response.

I. The Trustee Does Not Have Standing to Sue On Behalf of the Plans

The Trustee premises his standing argument on the novel proposition that he can ignore the Bankruptcy Code and case law limiting the actions of bankruptcy trustees in reliance on ERISA as a “complete independent grounds for his action.” (Trustee’s Resp. 5.) On the

contrary, the Trustee is a “creature” of the Bankruptcy Code and possesses “only those powers conferred upon him” by it. *Cissell v. Am. Home Assurance Co.*, 521 F.2d 790, 792 (6th Cir. 1975). Saying that ERISA provides an “independent” ground for bringing a lawsuit does not give the Trustee the power to shed the limitations of bankruptcy law and use estate resources to attempt to recover assets that are not the property of the estate. As discussed more fully in MACC’s opening brief, the Sixth Circuit, in *In re Cannon*, 277 F.3d 838 (6th Cir. 2002), prohibited a bankruptcy trustee from asserting a claim on behalf of certain creditors based on the Debtor’s status as trustee of an escrow account. *Id.* at 856. In that case, the common law of trusts was no less an “independent” basis for the claim than ERISA is in this case.¹ Neither is a basis for ignoring the law as to the proper scope of a bankruptcy trustee’s activities.

Basically ignoring the case law cited in MACC’s opening brief, and unable to find any case law to support his novel argument that the restrictions of bankruptcy law do not apply to him, the Trustee instead relies on three cases that are inapposite. None of the cases even remotely touches upon the authority of a bankruptcy trustee to bring claims to recover assets that are not property of the estate, which is the critical standing issue presented in the motion to dismiss. The first case the Trustee cites, *Mutual Life Insurance Co. v. Yampol*, 840 F.2d 421 (7th Cir. 1988) (“*MONY*”), does not involve a bankruptcy or bear in any way on the standing or authority of a bankruptcy trustee. For that reason alone, *MONY* is inapposite. Moreover, the receiver in *MONY* was attempting to collect assets only for the entity for which it was responsible, not for individual creditors. In *MONY*, the Director of Insurance was appointed to liquidate an actual ERISA plan and hired a receiver to recover assets for that plan. *MONY*, 840

¹ Other than rhetorically dismissing the common law of trusts as “some common law theory,” the Trustee provides no support for the notion that the common law of trusts is somehow less independent, legitimate or binding than ERISA. (See Trustee’s Resp. 5.)

F.2d at 422. The court found the receiver had standing to bring an action to recover assets for that plan. *Id.* By contrast, the Trustee is attempting to recover assets that belong not to the bankruptcy estate but to individual creditors. *MONY* is not only inapposite, but highlights the key deficiency in the Trustee's position: he is seeking recovery of assets that are not property of the estate for which he is responsible.

The Trustee's reliance on *SEC v. Capital Consultants, LLC*, No. Civ.00-1290-KI, 2002 WL 32502450 (D.Or. Dec. 5, 2002) (unreported), is similarly misplaced. As with *MONY*, *Capital Consultants* did not involve a bankruptcy or bear in any way on the standing or authority of a bankruptcy trustee. Moreover, the receiver in *Capital Consultants* apparently had no intention of bringing ERISA claims itself, and whether it could have was never raised. *See id.* at *4. Instead, the issue was whether the receiver, an ERISA fiduciary, could take an offset against distributions owed to individual creditors for amounts those creditors obtained through prosecution of their own suits, brought entirely independently of the receiver, against other fiduciaries. *Id.* The fact that there is not even any discussion of whether the receiver might bring ERISA claims on behalf of the individual creditors highlights the novelty of the Trustee's claim in this action.

The final case cited by the Trustee is *In re ESCO Manufacturing Co.*, 33 F.3d 509 (5th Cir. 1994), the only case he cites that was decided in the bankruptcy context. *ESCO*, however, had nothing to do with whether a bankruptcy trustee could bring claims of any kind, much less ERISA claims. In *ESCO*, the debtor was an employer that had sponsored an ERISA pension plan for its employees. *Id.* at 510. In order to obtain the financial protection of the Pension Benefit Guaranty Corporation ("PBGC") for the plan beneficiaries, the debtor was required to complete the administrative task of terminating the pension plan. *Id.* at 511-12. In spite of the

fact that no one else was in the position to do so, the bankruptcy trustee refused to take this action. *Id.* The question before the court was narrow: “whether the Trustee has an obligation to execute the relatively simple task of terminating Esco’s pension plan and thereby activating the PBGC’s many responsibilities. *Id.* at 511. The court ruled that the Trustee did have that “relatively simple” obligation. *Id.* It is worth noting that that obligation ran only to the debtor’s own plan, not to plans of creditors.

Similarly, 11 U.S.C. § 704(11), cited by the Trustee for this same proposition, protects ERISA plans from collapse when their “administrators,” a specific position defined at 29 U.S.C. § 1002(16)(A),² enter bankruptcy. As with the decision in *ESCO*, this provision simply protects plans from collapse by ensuring someone continues to perform administrative functions. It has no bearing at all on the type of claims asserted by the Trustee in this action. Moreover, the Trustee does not allege that he is an “administrator,” as defined in ERISA, of any of the plans at issue, or even that 1Point or Stokes served as such an “administrator” at any time, much less at the time the bankruptcy was filed. As such, even if § 704(11) applied to these types of claims, it does not apply to this Trustee.

In sum, the Trustee has not identified a single case, within or even outside of the bankruptcy context, that even touches on the issue of whether a trustee or a receiver charged with administering a particular estate can bring ERISA claims for the benefit of particular creditors of that estate. The Trustee is bound by the Bankruptcy Code and applicable law, including *In re Cannon*. He simply lacks standing to bring the claims he has asserted against MACC. His

² ERISA defines the term “administrator” as:

- (i) the person specifically so designated by the terms of the instrument under which the plan is operated;
- (ii) if an administrator is not so designated, the plan sponsor; or
- (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

29 U.S.C. § 1002(16)(A). This is different from the non-ERISA term “third-party administrator,” which is not addressed by 11 U.S.C. § 704(11).

failure to acknowledge this is especially egregious when plans on whose behalf he claims to be acting have independently sued MACC seeking the same recovery.³

II. The Trustee's Claims Are Barred By *In Pari Delicto*

The Trustee makes several arguments in support of his unique theory that *in pari delicto* should not apply to him. First, he argues that there are no cases in which an ERISA fiduciary claim was barred by the doctrine. That, however, is because ERISA fiduciaries making such claims do not normally stand in the shoes of other parties who are subject to the doctrine. Once again, the Trustee ignores the fact that he is a bankruptcy trustee, subject to bankruptcy law. It is bankruptcy law that puts him in the shoes of the debtors and, therefore, that subjects him to *in pari delicto*. The absence of authority in which *in pari delicto* barred a bankruptcy trustee from bringing ERISA fiduciary claims on behalf of individual creditors can best be explained by the fact that the parties have not identified a single case in which a bankruptcy trustee has even attempted to make such a claim.

Second, the Trustee argues that *in pari delicto* is not applicable because he has an independent source of authority to proceed. He cites no support for this proposition. The only case he cites is *Donovan v. Schmoutey*, 592 F. Supp. 1361 (D. Nev. 1984), an inapposite case in which a district court dismissed this defense as against the Secretary of Labor, who, unlike a bankruptcy trustee, does not stand in the shoes of a debtor. *Id.* at 1403.

Third, the Trustee asks the Court to discard governing law and decide that a bankruptcy trustee does not really stand in the debtor's shoes and should not be subject to defenses that

³ Note that, even as the Trustee claims to be acting as a fiduciary for the individual ERISA plans at issue, he is ignoring at least ten of those plans' expressed desire to prosecute themselves, with a lawyer of their choosing, any claims they may have. (See Doc. 9 pp. 2-3.)

would have been valid as against the debtor.⁴ (Trustee’s Resp. 9-11.) This request only confirms that the Trustee can offer no case law or analysis that challenges MACC’s argument that the Trustee is barred by *in pari delicto* from asserting claims against MACC. The Trustee himself even admits later in the Response that he “recognizes the force of the cases holding that a bankruptcy trustee stands in the shoes of the Debtor, and can only recover from third parties if the Debtor could have brought the action itself pre-petition.” *Id.* at 18.

III. MACC is not an ERISA Fiduciary

Nothing in the Trustee’s Response alters the reality that the facts pled in the Complaint establish that MACC did not exercise control or authority over plan assets. (*See* Def’s Br. Supp. Mot. Dismiss 9-14.)⁵ Two points about the Trustee’s Response are worthy of note, however.

First, the Trustee makes the significant admission that in *Ellis v. Rycenga*, 484 F. Supp.2d 694 (W.D. Mich. 2007), “the only way in which the defendant broker was alleged to have exercised control over the funds in its possession was that it was able to suspend the check-writing authority of the Plan Administrator.” (Trustee’s Resp. 14.) By this admission, the Trustee concedes that all of the other actions of the broker in that case, including accepting and holding funds, purchasing securities with those funds and disbursing those funds, all at the direction of plan representatives, do not constitute the exercise of control over funds in that broker’s possession. As discussed in MACC’s opening brief, those are the only activities in

⁴ The Trustee’s position is in direct conflict with the Sixth Circuit’s decision in *In re Dublin Securities, Inc.*, 133 F.3d 377 (6th Cir. 1997). In essence, the Trustee wants to “stand in the shoes” of the Debtor only to obtain the right to sue people, and then to step back out of those shoes to avoid inconvenient defenses that may be raised against him. This same faulty reasoning causes the Trustee to invoke rules applicable to successor fiduciaries under ERISA. The Trustee, however, is not a successor in the sense of a fiduciary who simply replaces the person who was doing the job before in the normal course of business. A critical and necessary distinguishing component of the bankruptcy context is that trustees stand in the shoes of the debtors, for good and bad.

⁵ This court’s decision in *Moeckel v. Caremark RX Inc.*, 385 F. Supp.2d 668, 683 (M.D.Tenn. 2005), clearly does not preclude dismissal when the facts as pled by the plaintiff demonstrate that the defendant is not an ERISA fiduciary.

which MACC is alleged to have engaged here, and the Trustee admits that all of those activities were undertaken at the direction of the plans' duly-appointed representative, IPoint. *Id.* at 13.⁶

Second, the Trustee's argument about directed trustees is entirely irrelevant. The Trustee conflates the concepts of being an ERISA fiduciary and being an ERISA trustee. The Trustee has alleged – incorrectly – that MACC was an ERISA *fiduciary* of the relevant plans. The Trustee has not alleged that MACC was an ERISA *trustee* of the relevant plans.⁷ Nonetheless, the Trustee bases his argument on a provision that is expressly applicable only to plan trustees. MACC neither is nor was a trustee of these plans and, therefore, need not fit within any exception for “directed” trustees, as opposed to standard trustees.⁸

IV. The Trustee Cites an Incorrect Standard for ERISA Preemption

After quoting from case law stating four circumstances in which preemption is appropriate, the Trustee's Response then proceeds to state, without citation to any authority, that preemption will only apply if: “(1) MACC) [sic] is a fiduciary; and (2) the state law claims are fully encompassed within the ERISA claims.” (Trustee's Resp. 16.) Neither of these is a requirement for preemption, and the Trustee does not offer any support or explanation for basing his entire preemption argument on them. The applicable standard in the Sixth Circuit is discussed in MACC's opening brief.⁹ (Def's Br. Supp. Mot. Dismiss 15-16.)

⁶ The Trustee asserts that MACC was not permitted to engage in those activities based on the direction of the plans' duly-appointed representative because it did not receive confirmation of the authority of that duly-appointed representative. As explained in MACC's opening brief, however, confirmation of such authority is irrelevant when the Trustee admits that such authority existed: IPoint was, in fact, the duly-appointed representative of the plans.

⁷ The Trustee is correct in asserting that “it appears that any trustee is a fiduciary,” but that does not mean that any “fiduciary” is therefore a “trustee.”

⁸ MACC also notes a mistake in the Trustee's recitation of the allegations of the Complaint. The Trustee alleges in the Complaint that plans were instructed to liquidate their portfolios and wire the money to an account in the name of *IPoint*, not MACC. (See Trustee's Resp. 12.)

⁹ The Trustee also relies on the recent decision by Judge Haynes in *As You Sow v. AIG Financial Advisors, Inc.*, No. 3:06-1171 (M.D.Tenn. Mar. 26, 2008), addressing claims based on the statutory and common law duties of the

The Trustee also argues that even if he does not have standing to bring his ERISA claims because he is found not to be a fiduciary, he should still be permitted to bring common law claims. (Trustee’s Resp. 18-21.) The Trustee admits, however, that this would require the abandonment of governing Supreme Court law. *Id.* The Trustee has provided no valid justification for abandoning that precedent. Indeed, even his attempt to distinguish the Supreme Court’s decision in *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972), highlights the deficiencies in this action. First, the Trustee asserts that if he is not a fiduciary then “there is no statute which regulates the rights of the plans as a group, nor of participants in those plans, taken as a group.” *Id.* at 19. The plans, however, are governed by ERISA whether the Trustee is a fiduciary or not, and the plans all currently have fiduciaries. The Trustee also argues that it is “highly unlikely” that the claims of plans or participants would “conflict with the claims of the Trustee,” even though he has full knowledge that ten 401(k) Plans, representing at least the vast majority of the money claimed to be lost by 401(k) plans as a result of Stokes’s actions, have brought their own action, in this very Court, rather than leave their claims to the Trustee.¹⁰

V. Conclusion

For these reasons and the reasons stated in MACC’s opening brief, MACC respectfully requests that this Court dismiss Counts I-VIII of the Trustee’s Complaint.

defendants in that case to supervise their agent Stokes. For a variety of reasons, including that MACC did not have an agency relationship with Stokes, that decision is not applicable to the causes of action asserted against MACC. Moreover, the *As You Sow* decision does not appear to account for Supreme Court and Sixth Circuit precedent clearly allowing for preemption of claims made against non-fiduciaries. (*See* Def’s Br. Supp. Mot. Dismiss 15-19.)

¹⁰ The Trustee notes that no suits have been filed by “Cafeteria Plans.” (Trustee’s Resp. at 19.) The Trustee’s claims against MACC, however, have nothing to do with the Cafeteria Plans. The Trustee’s claims with respect to the Cafeteria Plans relate solely to co-defendant Regions Bank.

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CERTIFICATE OF SERVICE

On April 11, 2008, this document was filed electronically with the Clerk's office by using the CM/ECF system and was simultaneously served upon the following using that same system:

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