

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

John C. McLemore, Trustee,)	
)	
Plaintiff,)	
)	
v.)	No. 3:08-cv-21
)	Judge Trauger
Regions Bank, as Successor in Interest by Merger to AmSouth Bank, and Mid-Atlantic Capital Corporation,)	Magistrate Judge Bryant
)	
Defendants.)	

**DEFENDANT REGIONS BANK’S REPLY BRIEF
TO THE AMICUS BRIEF FILED BY
THE SECRETARY OF LABOR**

Defendant, Regions Bank, successor by merger to AmSouth Bank (hereafter “Regions”) submits this Reply to the Brief of the Secretary of Labor, Elaine L. Chao (“the Secretary”), as Amicus Curiae in Support of Plaintiff’s Opposition to Defendants’ Motions to Dismiss (the “Amicus Brief”).

I. Introduction

It should first be noted that the Secretary takes no issue with many of Regions’ legal arguments. Most significantly, she takes no position on the one issue determinative of all others with respect to the Motion to Dismiss: the fact that Regions is not an ERISA fiduciary.¹ Nonetheless, the Secretary argues that (1) the Plaintiff, as an ERISA fiduciary, has standing to bring this ERISA action, and (2) that the defense of *in pari delicto* is inapplicable to the present

¹ The Secretary agrees with Regions that Section 704(a)(11) of the Bankruptcy Code does not apply to this case despite Plaintiff’s argument to the contrary, recognizing that Congress added this section to the Code to address bankruptcies “where the debtor was the plan sponsor and administrator to its own plan”, which “is not the situation presented by this case.” *Amicus Brief* p. 13, fn 12. The Secretary also takes no issue with Regions’ position that certain counts in the Complaint should be dismissed as an inappropriate attempt to recover monetary damages against a non-fiduciary under ERISA § 502(a)(3) or as state causes of action preempted by ERISA.

case because Plaintiff is an ERISA fiduciary who may not be held liable for the acts of prior fiduciaries. In making these arguments, the Secretary makes factual assumptions and legal claims that are completely unsupported by the allegations in the Complaint and existing law. As such, her arguments are invalid and the Complaint should be dismissed.

The Complaint alleges that prior to “closing” its business, 1Point had been a third party administrator (“TPA”) with respect to various benefit plans and programs, some of which may have been governed by ERISA (collectively referred to as the “Plans”). Plaintiff does not allege that he has any ongoing relationship with the Plans, except that, by virtue of being the bankruptcy trustee for 1Point, he has come into possession of assets that allegedly belong to one or more of the Plans. Based on these facts, Plaintiff argues that he is an ERISA fiduciary with all of the rights and duties once held by 1Point including the alleged right to bring this suit. The Secretary parrots this argument, although she concedes that not all of the Plans are governed by ERISA. *Amicus Brief*, p.3, fn 4.

Both Plaintiff and the Secretary have described Plaintiff as a “functional” fiduciary and/or a “successor fiduciary” who has “stepped into the shoes” of 1Point. While the term “successor” fiduciary is not defined by ERISA, and under the ERISA definition of “fiduciary” all fiduciaries are “functional” fiduciaries², their use of these terms suggests that Plaintiff is functioning as a TPA for the Plans. This is not the case. Even the Secretary concedes that 1Point ceased serving as a TPA “just prior to the filing” of the involuntary bankruptcy petition which led to the appointment of Plaintiff as trustee. *Id.* p.3, *citing Complaint*, ¶ 9. This distinction is important because, as the Secretary admits, the extent of Plaintiff’s fiduciary duties and powers is governed by the authority and control, or lack thereof, he has with respect to a particular Plan. *Id.* p. 7; *See also Region’s Reply Brief to Plaintiff’s Brief in Opposition to*

² ERISA §3(21)(A); 29 U.S.C. §1002(21)(A)

Defendant's Motion to Dismiss, p. 4. Accordingly, Plaintiff's role is limited to safeguarding Plan assets in his possession until they can be distributed to the present fiduciaries of the respective Plans. Only the current fiduciaries of the Plans, some of which may be "successor" fiduciaries to 1Point, have the legal right to bring suit against other alleged ERISA fiduciaries for any suspected wrongdoing.

In addition, Regions submits that the doctrine of *in pari delicto* is applicable to Plaintiff's claims. Nothing in ERISA allows Plaintiff to avoid the defenses that could have been asserted against 1Point outside of bankruptcy.

II. Argument

A. Plaintiff's powers are limited by the clear provisions of the Bankruptcy Code.

The Secretary suggests that, because Plaintiff may be a fiduciary under ERISA (although admittedly a limited fiduciary), he somehow has greater powers than a bankruptcy trustee that is not an ERISA fiduciary. This suggestion evolves from the Secretary's general assertion that ERISA takes precedence over the Bankruptcy Code. The Secretary cites no law supporting this position, however. While the Code certainly does not limit ERISA, neither does ERISA expand the powers of Plaintiff as a bankruptcy trustee. A bankruptcy trustee is a "creature of statute" and has "only those powers conferred upon him by the Bankruptcy [Code]." *Cissell v. Am. Home Assurance Co.*, 521 F.2d 790, 792 (6th Cir. 1975). A bankruptcy trustee does not have the power to sue on behalf of plans or entities separate from the bankruptcy estate simply because he holds some limited amount of ERISA plan assets in constructive trust. See Region's *Memorandum in Support of its Motion to Dismiss*, pp. 8-11. To grant such powers to a bankruptcy trustee would bestow upon him powers beyond those granted by the Bankruptcy Code. It would also create an inherent conflict of interest in regard to his duties to other creditors. *Id.*

Following the Secretary's proposition would allow ERISA to expand the Bankruptcy Code to grant a bankruptcy trustee powers to sue not just on behalf of the bankruptcy estate, but also on behalf of specific creditors (in this case ERISA plans), each of which has existing operational ERISA fiduciaries with independent standing to sue other fiduciaries on the plan's behalf.³ This would be an unprecedented expansion of a bankruptcy trustee's powers and the Secretary cites no case law to support such an outcome.

The Secretary further suggests that denying Plaintiff standing to sue would impair ERISA by depriving a bankruptcy trustee of rights that would have existed outside of bankruptcy. She incorrectly asserts that “[i]n the non-bankruptcy context . . . there would be no question but [that Plaintiff], who has stepped into the shoes of the [sic] 1Point and who is currently controlling plan assets, is a fiduciary for ERISA purposes, including for the purpose of bringing civil actions under the ERISA enforcement scheme.” *See Amicus Brief*, p.11. Plaintiff is not, as the Secretary would suggest, an ERISA fiduciary who is incidentally a bankruptcy trustee — he is a bankruptcy trustee who incidentally may be an ERISA fiduciary, but only to the extent he came into possession of Plan assets. More importantly, there can be no question that 1Point, after converting up to \$18 million of Plan assets and ceasing operations as a TPA would not have been able to bring the current claim. *See Regions' Memorandum in Support of Motion to Dismiss*, p. 21-22 (former ERISA fiduciaries have no standing to bring claims). Nor could 1Point bring the suit by arguing that it was still an ERISA fiduciary merely because it retained possession of some plan assets. Such rights would have been held only by each Plan's current fiduciaries, which might include any new TPA hired to perform the duties previously performed by 1Point. Those rights were not retained by 1Point at its “close of

³ This rebuts another red-herring argument asserted by the Secretary – namely that denying Plaintiff the right to pursue his claims would deprive the Plans and their participants of any remedy for Region's alleged – and denied – wrongdoing. This argument is simply false. Every Plan that Plaintiff purports to represent has a plan administrator and perhaps a trustee and other fiduciaries that can bring claims on behalf of those Plans. Some have already done so and those cases are pending before this Court.

operations” and certainly did not flow to Plaintiff. Plaintiff has no greater rights than the debtor had.⁴

B. ERISA provides Plaintiff no standing to sue.

The Secretary’s characterization of the powers of an ERISA plan fiduciary is so broad that any ERISA plan fiduciary would have standing to sue other fiduciaries on behalf of that plan regardless of how limited the plaintiff fiduciary’s role may be. *Id.* at p. 9. She makes the illogical jump that, because Plaintiff may owe a fiduciary duty to Plans whose money he holds in constructive trust, he has the power to sue any and all other Plan fiduciaries. The Secretary makes this argument despite conceding that the ERISA definition of “fiduciary” is a “functional” one which depends on the authority that a particular person has or exercises over an employee benefit plan. *Amicus Brief*, p.8. The Secretary further notes, correctly, that “[f]iduciary status extends only to those aspects over which the fiduciary exercises authority or control.” *Id.* at p. 7; *See also Region’s Reply Brief to Plaintiff’s Response in Opposition to Motion to Dismiss*, p. 4.

Plaintiff currently exercises no authority or control over the operations of any Plan. Indeed, the only relationship Plaintiff has with the Plans at this point is that he holds certain funds in constructive trust for some of the Plans’ benefit (currently, the Plaintiff does not even know for which Plan(s) he may or may not hold assets). Because his fiduciary status is limited to those aspects of the Plans over which he “exercises authority or control,” his duties under ERISA allow him only to retain those assets in constructive trust until they are distributed to the proper plan(s). Neither the Secretary nor the Plaintiff cites any cases that grant broader powers to Plaintiff.

⁴ The Secretary relies on *Mutual Life Insurance Co. v. Yampol*, 840 F. 2d 421 (7th Cir. 1988) in support of her argument that Plaintiff has standing to bring this suit. This reliance is misplaced, and Regions has previously distinguished this case. *See Regions’ Memorandum in Support of Motion to Dismiss*, p. 24, fn. 5.

Further undermining her own argument, the Secretary admits that not *every* ERISA fiduciary has the standing to bring a lawsuit against a co-fiduciary. She further recognizes that the duties granted to a fiduciary by ERISA “*can* include bringing suit for recovery of losses due to another fiduciary’s breach.” *Id.* at p. 9 (emphasis added). However, the Secretary explicitly expresses “no opinion on whether, and under what circumstances, it may be appropriate for a co-fiduciary to decide to initiate a lawsuit” and concedes that “there may be certain types of claims . . . where functional fiduciary status would not provide a fiduciary with the necessary authority to sue on the plan’s behalf.” *Id.* This case, brought by a bankruptcy trustee having no ongoing relationship with any Plan other than holding limited Plan assets, falls squarely in that category.⁵

Regions understands the Secretary’s interest in promoting broad powers allowing any ERISA fiduciary to sue co-fiduciaries for the benefit of plan participants. Nonetheless, the position she takes is unsupported by law. She cites no authority indicating that a fiduciary who merely receives or holds a portion of a plan’s assets, with no operational control or authority with respect to the plan, has standing to bring an action to recover additional plan assets. On the contrary, the great weight of the case law, as cited by Regions and the Secretary herself, is against such a broad reading of ERISA. The Secretary’s position advocates an expansive view of a fiduciary’s powers that has never been upheld in the courts and should not be supported by this Court.

⁵ In fact, at the same time the Secretary argues that Plaintiff’s authority over plan assets gives him standing to sue on the Plans’ behalf, the Secretary warns Plaintiff that its authority over any Plan assets is so limited that Plaintiff “does not have the authority in this case as a functional fiduciary to make unilateral decisions to use any plan assets, including paying for fees, costs and expenses of this litigation”. [emphasis added] *Amicus Brief*, p. 11, fn 9. This, in and of itself, suggests that Plaintiff does *not* have authority over Plan assets that would grant him standing to bring this case.

C. The doctrine of *in pari delicto* is applicable to Plaintiff's claims.

The Secretary also argues that the doctrine of *in pari delicto* does not apply in this case.⁶ Plaintiff has already admitted that any recovery in this case is not sought on behalf of the bankruptcy estate itself but on behalf of the Plans. To the extent that *in pari delicto* applies only to claims seeking to recover assets of the estate, the trustee is already exceeding his power by trying to recover funds for specific creditors. However, that is not why the Secretary argues against the doctrine.

The Secretary first argues that §409(b) of ERISA, 29 U.S.C. 1109(b), renders *in pari delicto* inapplicable because it shields an ERISA fiduciary from the liability of a former fiduciary – in this case presumably the debtor. The issue here is not the *liability* of Plaintiff, but whether Plaintiff has *standing to sue* despite the admitted wrongdoing of the debtor. Nothing in §409 prohibits a third party from maintaining a defense, in or out of bankruptcy, based upon the actions of a prior fiduciary. Such language simply doesn't exist in the statute.

Another argument is that *in pari delicto* cannot be applied because Plaintiff's claims arise from ERISA as opposed to being “purely bankruptcy” in nature. She ignores the fact that every case relied on by Regions involves a trustee asserting independent, non-bankruptcy, claims. The Secretary cites no law that a claim grounded in ERISA should be treated differently from other independent causes of action.⁷

The Secretary also claims that application of the doctrine of *in pari delicto* is improper because (1) Plaintiff had no complicity in the alleged ERISA violations at issue and (2) any

⁶ The Secretary claims that applying *in pari delicto* would allow Regions and MACC to “escape” liability and would harm the plan participants protected by ERISA. *See Amicus Brief*, p. 14-15. In addition to nullifying every *in pari delicto* defense, this argument ignores the fact that each Plan that Plaintiff purports to represent has other fiduciaries that can bring claims on behalf of those Plans. *See footnote 3, infra*.

⁷ The Secretary cites *Donovan v. Schmoutey*, 592 F. Supp. 1361 (D.Nev. 1984) to argue that the doctrine of *in pari delicto* does not apply in the context of ERISA. Region's has previously distinguished this case. *See Regions' Reply in Support of Motion to Dismiss*, p. 7

relief, or recovery, in this case would accrue to the Plans, and not the wrongdoer. This argument ignores the fact that the trustee was free from wrongdoing in every *in pari delicto* case cited in Regions' prior briefs and that the doctrine exists specifically to address the pre-bankruptcy bad acts of the debtor. Accordingly, the fact that Plaintiff isn't the party that defrauded the Plans is irrelevant. The fact that the money will not go to 1Point is equally irrelevant. In every case cited in Regions' prior briefs, it is the estate's creditors, not the wrongdoing debtor, that would benefit. The Secretary's position on this issue is without merit.⁸

Finally, the Secretary asserts that *in pari delicto* is an affirmative defense that "cannot be the basis for dismissal at the pleading stage." citing *Marwil v. Ent. & Imler CPA Group PC*, 2004 WL 2750255 at *9 (attached to the Amicus Brief).⁹ *Marwil* does not support this proposition, as it recognized that whether an *in pari delicto* defense supported dismissal under Rule 12 depended on whether, as a matter of law, the alleged fault of the plaintiff exceeded that of the defendant. Plaintiff has already conceded that 1Point committed theft, thus resolving this inquiry and making dismissal of this case on grounds of *in pari delicto* appropriate at this stage.

⁸ The Secretary cites *Pinter v. Dahl*, 486 U.S. 672 (1988), for its statement that "the Supreme Court has considered the application of the *in pari delicto* doctrine and declined to apply it." *Amicus Brief*, p. 16. The language quoted from that decision is actually a quotation of language from *Bateman Eichler, Hill Richards, Inc. v. Berner*, which sets forth the rule for applying *in pari delicto*. The *Pinter* Court did not decline to apply the doctrine, stating that "[n]othing in this Court's opinion in that case suggests that . . . the doctrine applies only when the plaintiff's fault is intentional or willful." The Court actually remanded the case for factual consideration of the relative culpability of the parties.

⁹ The Secretary also cites *In Re Adelpia Communications Corp.*, 365 B.R. 24 (Bankr. S.D.N.Y. 2007) for this proposition. See *Amicus Brief*, p. 16, fn. 12. That decision was subsequently modified on appeal, *Adelpia Recovery Trust v. Bank of America, NA., et al*, 2008 U.S. Dist. LESIX 4972 (January 17, 2008). The District Court relied on *In re Educators Group Health Trust*, 25 F.3d 1281 (5th Cir. 1994) for its finding that while *in pari delicto* does not preclude a debtor in bankruptcy from "*bringing the claim*" [italics in original], (*Id.*, at *45), "[t]his does not mean a defendant cannot seek to defeat a debtor's claim through motion under Rule 12. . ." (*Id.*, at fn. 18). *Educators* also makes it clear that certain causes of action cannot be brought by the bankruptcy estate and must be brought by specific creditors because the estate has no standing to bring the claims, eliminating the need for a separate *in pari delicto* defense. *Id.* at 1284-6, citing *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972).

III. Conclusion

For the foregoing reasons, and for the reasons contained in Region's Memorandum in Support of its Motion to Dismiss as well as in its Original Reply Brief, Plaintiff's claims are without merit and the Complaint should be dismissed.

Respectfully submitted,

FROST BROWN TODD LLC

By: /s/ John R. Wingo

John R. Wingo, BPR #16955

James W. Berry, Jr., BPR #03868

John F. Teitenberg, BPR #21940

424 Church Street, Suite 1600

Nashville, Tennessee 37219

Telephone: (615) 254-5550

Facsimile: (615) 251-5551

jwingo@fbtlaw.com

jberry@fbtlaw.com

jteitenberg@fbtlaw.com

ATTORNEYS FOR DEFENDANT
REGIONS BANK

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to the following counsel via electronic filing and/or facsimile/U. S. Mail, postage prepaid, on this 19th day of May, 2008:

Robert M. Garfinkle
John C. McLemore
Garfinkle, McLemore & Walker, PLLC
2000 Richard Jones Rd., Ste. 250
P.O. Box 158249
Nashville, TN 37215-8249
Ph: 383-9495 fx: 292-9848

Craig V. Gabbert, Jr.
Barbara D. Holmes
D. Alexander Fardon
Harwell Howard Hyne Gabbert Manner
315 Deaderick Street, Suite 1800
Nashville, TN 37238
Ph: 256-0500 fx: 251-1057

David L. McClenahan
Matthew J. Fader
Ryan DeMotte
Kirkpatrick & Lockhart Preston Gates Ellis LLP
Henry W. Oliver Building
535 Smithfield Street
Pittsburg, PA 15222
Ph: 412-355-6500

Gregory F. Jacob
Timothy D. Hauser
Nathaniel I. Spiller
Sonya Lorge Levine, Senior Trial Attorney
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-4611
Washington, D.C. 20210

/s/ John R. Wingo