

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 THE SECRETARY OF LABOR’S AMICUS CURIAE BRIEF IN SUPPORT OF
TRUSTEE’S RESPONSE TO DEFENDANT MID ATLANTIC
CAPITAL CORPORATION’S MOTION TO DISMISS**

Defendant Mid Atlantic Capital Corporation (“MACC”) respectfully submits this reply brief in opposition to the Secretary of Labor’s amicus curiae brief (“Amicus Brief”) and in further support of MACC’s motion to dismiss the Bankruptcy Trustee’s complaint. The Secretary’s Amicus Brief in most respects reiterates legal arguments made in the Bankruptcy Trustee’s response in opposition to MACC’s motion to dismiss (“Bankruptcy Trustee’s Response Brief”). With respect to those arguments, MACC relies on its reply in response to the Bankruptcy Trustee’s Response (“MACC’s Reply Brief”), which is incorporated herein by reference. This brief addresses a few particularly notable aspects of the Amicus Brief.

First, it is telling that the Secretary, the chief ERISA official in the country, does not cite a single case or other legal authority permitting a bankruptcy trustee to bring ERISA fiduciary claims to recover assets that are not property of the bankruptcy estate. Indeed, the Secretary does not cite a single example in which a bankruptcy trustee has even asserted such a claim. One

would presume that if such authority existed, the Secretary would be aware of it and would have cited it.

Second, the Secretary asks the Court, for the purposes of this adversary proceeding, to ignore the fact that the Bankruptcy Trustee is a bankruptcy trustee and, as a result, to ignore entirely the restrictions and requirements placed on bankruptcy trustees by the Bankruptcy Code and applicable case law. In making this argument, the Secretary ignores governing bankruptcy law and congressional intent, fails to consider the implications of her argument for the Bankruptcy Trustee's responsibilities under bankruptcy law, and asks the Court to create new law in the absence of any support for doing so.

Third, acknowledging that the Bankruptcy Trustee is subject to the limitations of bankruptcy law will not deprive the ERISA plans of any remedies properly available under ERISA. Indeed, the Secretary's position ignores the reality that the Bankruptcy Trustee has brought this action against MACC notwithstanding that 401(k) plans representing the vast majority of what MACC understands the Bankruptcy Trustee's monetary claim against MACC to be have, through separate counsel of their choice, brought their own separate lawsuit against MACC, which is pending before this same Court and which seeks the same relief, based on the same facts and asserting the same legal claims. *See Heritage Equity Group 401(k) Sav. Plan v. Mid Atlantic Capital Corp.*, No. 3:07-cv-00841 (M.D.Tenn. Aug 16, 2007).

I. The Secretary Does Not Cite a Single Authority that Stands for the Legal Proposition She Is Advocating

The Secretary sought to intervene in this action to support the Bankruptcy Trustee's effort to bring ERISA claims¹ against the Defendants to recover assets not on behalf of the bankruptcy estate, but on behalf of individual ERISA plans. In light of that purpose, the

¹ The Secretary does not offer any support for the Bankruptcy Trustee's assertion of common law claims against MACC.

Secretary's brief is particularly notable for the complete absence of reference to any legal authority in support of the Bankruptcy Trustee's position. The Secretary contends that she "has primary authority to interpret and enforce the provisions of Title I of ERISA." (Amicus Br. 1.) As a result, one would expect that, if any authority existed for the Bankruptcy Trustee's position, the Secretary would be aware of it and would have cited it. Yet the Secretary fails to cite a single authority allowing a bankruptcy trustee² to bring ERISA fiduciary claims to recover assets that are not property of the estate. Indeed, the Secretary does not cite a single authority in which a bankruptcy trustee has even asserted such a claim or any analogous claim. Instead, the Secretary relies on a single case, *Mutual Life Insurance Co. v. Yampol*, 840 F.2d 421 (7th Cir. 1988), that is inapposite on a number of grounds. (MACC's Reply Br. 2-3.) The Secretary's inability to cite any apposite authority in her favor reinforces the novelty of the position she and the Bankruptcy Trustee are asking the Court to adopt.

II. The Secretary's Position Would Require the Court to Ignore Governing Law

The Amicus Brief is also notable in that the Secretary's suggested framework for addressing this dispute is to ask the Court to ignore the Bankruptcy Code and pretend, at least with respect to the ERISA claims, that the Bankruptcy Trustee is not a bankruptcy trustee. *See* (Amicus Br. 11.) In essence, the Secretary asks the Court to conclude that a bankruptcy trustee who happens to exercise control over assets of ERISA plans is somehow relieved of all

² The Secretary states that "[i]t also appears that there is no dispute that the Bankruptcy Trustee here is an ERISA functional fiduciary...." (Amicus Br. 10.) MACC notes that it has not conceded that the Bankruptcy Trustee is an ERISA fiduciary. To the contrary, MACC expects that to be a subject of discovery and, potentially, dispute at a later stage of the proceedings. MACC agrees, however, that whether the Bankruptcy Trustee is an ERISA functional fiduciary is not an issue MACC has raised in its motion to dismiss.

Furthermore, it should be noted that the Trustee does not claim that he can trace any particular assets he is holding to the account of any particular ERISA plan, or even to know what portion of funds he is holding are plan assets as opposed to general assets of the estate. As a result, he cannot possibly show that he is a fiduciary of each and every plan on whose behalf he has purportedly brought his claims, and it is questionable whether he will be able to show he is even a functional fiduciary of any specific plan, much less a fiduciary whose scope of responsibilities would permit him to bring the instant litigation.

constraints imposed by bankruptcy law with respect to any matters that allegedly touch on ERISA. The Court, according to the Secretary, should consider the Bankruptcy Trustee's claims entirely without reference to the limitations, responsibilities and duties owed by the Bankruptcy Trustee as a bankruptcy trustee. The Secretary even goes so far as to suggest that acknowledging any restrictions on the Bankruptcy Trustee's ability to act that come from bankruptcy law would constitute "a partial repeal by implication" of ERISA. (Amicus Br. 13-14.) The Secretary's position is without merit for a number of reasons.

First, as discussed in MACC's Opening Brief and Reply Brief, the Bankruptcy Trustee is a creature of the Bankruptcy Code, not of ERISA, with a defined role, duties, limitations and responsibilities governed by bankruptcy law. (MACC's Br. Supp. Mot. Dismiss 4-5; MACC's Reply Br. 1-2.) The Bankruptcy Trustee may not simply decide to ignore that role or those duties, limitations and responsibilities to undertake a different role.

A fundamental point that the Secretary's argument overlooks is that the Bankruptcy Trustee's alleged status as an ERISA "functional fiduciary," not chosen by the plans but by the happenstance of the bankruptcy proceedings, is wholly dependent upon his status as a bankruptcy trustee. Absent his appointment as bankruptcy trustee, and consequent alleged exercise of dominion and control over plan assets, the Bankruptcy Trustee would have no relationship whatsoever to the Plans, let alone be an alleged ERISA fiduciary. Thus, it makes no sense to assert that his role as an alleged ERISA fiduciary is "distinct from his statutory role as a bankruptcy trustee" or to consider his status in a hypothetical "non-bankruptcy" context. He acquires whatever relationship he has to the ERISA plans only by virtue of the Bankruptcy Code. As a result, it only makes sense that the Bankruptcy Code continues to apply to his actions thereafter.

Second, Congress’s actions in this area demonstrate that it both: (a) understands that the limitations of the Bankruptcy Code apply to bankruptcy trustees even when they also happen to be ERISA “functional fiduciaries”; and (b) did not intend to create the broad exception advocated by the Secretary. As discussed in MACC’s Reply Brief, prior to the enactment of 11 U.S.C. § 704(11), certain bankruptcy trustees taking over for debtors who had served as plan administrators (ERISA plan administrators, *not* third-party administrators like 1Point), had taken the position that bankruptcy law prohibited them from performing even simple administrative tasks to prevent the collapse of ERISA plans. *See, e.g., In re Esco Manufacturing Co.*, 33 F.3d 509 (5th Cir. 1994). Congress subsequently clarified the extent to which ERISA duties applied to a bankruptcy trustee in 11 U.S.C. § 704(11). That provision of the Bankruptcy Code creates a very narrow exception to otherwise applicable bankruptcy rules by requiring plan “administrators” (again, *not* third-party administrators like 1Point) to continue performing their administrative duties with respect to plans they administered. *See* (MACC’s Reply Br. 3-4.)

Notably, Congress did not enact a provision making the limitations of bankruptcy law inapplicable to bankruptcy trustees when acting as ERISA fiduciaries. Instead, Congress enacted a narrowly-tailored solution that allowed a certain category of ERISA fiduciary, namely the “administrator,” as defined in 29 U.S.C. § 1002(16), to undertake particular administrative duties that no one else would otherwise be responsible for performing.³ If Congress had intended to absolve bankruptcy trustees from any other restrictions of bankruptcy law in order to advance the

³ The Secretary seems to agree with MACC and Regions that neither 1Point, Stokes nor the Bankruptcy Trustee are or were at any time an “administrator” of the plans at issue as defined in 29 U.S.C. § 1002(16). That section states that a person is an administrator if the person is specifically designated under the plan’s governing instrument or, absent such a designation, the employer sponsoring the plan. Congress adopted this definition for the purposes of 11 U.S.C. § 704(11), and that that provision, therefore, does not apply in this case. *See* (Amicus Br. 13 n.12.) Instead, Congress intended this provision to apply “where the debtor was the plan sponsor and administrator of its own plan.” *Id.* In that circumstance, of course, if the plan sponsor and administrator could not fulfill their administrative responsibilities as a result of entering bankruptcy, there would be no one left to perform those functions, thus putting the plans at risk. No similar scenario exists here.

interests of ERISA plans, including bringing claims to recover non-estate property on behalf of individual plans, it would have so provided. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., Local 737 v. Auto Glass Employees Fed. Credit Union*, 72 F.3d 1243, 1248 (6th Cir. 1996) (inclusion of specific items in a statute is evidence that Congress intended to exclude those items not specifically provided for in the statute; also, “[i]t is a settled principle of statutory construction that when Congress drafts a statute, courts presume that it does so with full knowledge of the existing law.”). Congress’s delineation of a trustee’s ERISA-based duties in 11 U.S.C. § 704(11) reflects the considered balance Congress chose to strike between the priorities of the Bankruptcy Code and the priorities of ERISA. The Secretary’s argument would require the Court to ignore Congress’s choice and make new law expanding the powers of bankruptcy trustees who happen to allege control over plan assets.

Third, it is the Secretary, not MACC or Regions, who seeks to rewrite existing laws. The Secretary seeks a ruling that would permit bankruptcy trustees to pursue claims on behalf of individual creditors anytime the bankruptcy trustee happens to hold assets that may or may not constitute property of an ERISA plan. Imposing on bankruptcy trustees an obligation to advocate for the interests of particular creditors, especially when doing so would consume assets of the estate, would constitute a significant interference with the carefully and purposefully-structured role of those bankruptcy trustees. The Secretary can offer no authority for this position, which would rewrite a Bankruptcy Code that otherwise restricts bankruptcy trustees from bringing claims to recover non-estate assets on behalf of individual creditors. (MACC’s Br. Supp. Mot. Dismiss 4-7; MACC’s Reply Br. 1-5.) It is not up to the Secretary to decide to overwrite bankruptcy law because it does not accord with her priorities.

Indeed, the Secretary ignores entirely the conflict her position would create between a bankruptcy trustee's duties to the bankruptcy estate and the separate obligations the Secretary would have the bankruptcy trustee assume under ERISA, which would presumably not be limited to bringing suit against alleged co-fiduciaries. Bankruptcy trustees, of course, have defined duties and responsibilities under bankruptcy law, just as ERISA fiduciaries do under ERISA. The Secretary's argument amounts to a suggestion that the Bankruptcy Trustee act according to two different legal frameworks with separate sets of well-defined responsibilities to two distinct constituencies without taking into account the inherent potential conflicts in doing so.

These potential conflicts are brought into stark relief by the Secretary's discussion in footnote 9 of the Amicus Brief. In that footnote, the Secretary asserts the interest of the ERISA plans at issue by noting that the Bankruptcy Trustee – especially since he is allegedly only a functional fiduciary, not chosen by the plans, by the happenstance that he allegedly holds commingled plan assets, (Compl. ¶ 5.1) – would not have authority to use plan assets to bring the claims he has brought without first, “at a minimum,” obtaining the approval of this Court. (Amicus Br. 11 n.9.) MACC does not know what funds the Bankruptcy Trustee is using to pursue these claims, including to retain his own law firm, or what steps the Bankruptcy Trustee may have taken to ensure that the funds being used are or are not: (a) plan assets generally; (b) assets of particular plans;⁴ or (c) assets of the estate, but the Secretary makes no attempt to explain how the Bankruptcy Trustee could possibly manage the conflicting obligations to

⁴ MACC is not aware of whether the Bankruptcy Trustee sought authority from any of the individual plans to bring these claims on their behalf, but notes that 401(k) plans representing the vast majority of the Bankruptcy Trustee's monetary claim against MACC have, through separate counsel that the plans' administrators presumably chose, brought their own separate lawsuit against MACC pending before this same Court, seeking the same relief, based on the same facts and asserting the same legal claims. *See Heritage Equity Group 401(k) Sav. Plan v. Mid Atlantic Capital Corp.*, No. 3:07-cv-00841 (M.D.Tenn. Aug 16, 2007).

maximize the assets of the estate for the benefit of the creditors at large and, on the other hand, to pursue the claims of individual creditors that will necessarily diminish the pool of assets available to all creditors.

Fourth, the Secretary erroneously asserts that “[t]he fact that McLemore is also the appointed chapter 11 trustee does not alter his status as an ERISA fiduciary nor alter his standing to bring an action based upon violations of ERISA.” (Amicus Br. 11.) In support, the Secretary asserts that, in the non-bankruptcy context, there “would be no question” that McLemore is an ERISA fiduciary. *Id.* The court in *Cannon* explicitly rejected this rationale as it related to the debtor’s independent status as a trustee of assets in the escrow accounts at issue in that case. According to the court, “[a]lthough [debtor] could have brought suit against the Defendants in his capacity as the trustee of the escrow accounts had he not filed for bankruptcy, the bankruptcy code does not allow the trustee to collect money not owed to the estate.” *In re Cannon*, 277 F.3d 838, 856 (6th Cir. 2002). *Cannon* illustrates the basic proposition that certain independent powers that a debtor may have had outside of the bankruptcy context, such as the power to bring suits on behalf of third parties in a fiduciary capacity, are not granted to bankruptcy trustees because of the limitations imposed on trustees by the Bankruptcy Code.

In fact, the proper role of a bankruptcy trustee is well-defined by the Bankruptcy Code and governing law, including *Cannon*, and Congress has chosen not to expand that role to permit bankruptcy trustees to pursue claims on behalf of individual creditors who happen to be ERISA plans. Neither the Secretary nor the Bankruptcy Trustee has provided any basis for upending that established law.⁵

⁵ Nor does the Secretary attempt to explain how the Bankruptcy Trustee is expected to administer the multiple estates he would be required to administer if successful in pursuing these claims. Presumably, the Secretary would not permit the Bankruptcy Trustee to commingle recovered assets with the general bankruptcy estate to be subjected to the claims of 1Point’s creditors. Moreover, if the Bankruptcy Trustee is merely a

III. Recognizing the Bankruptcy Trustee Is Subject to the Bankruptcy Code Will Not Deprive ERISA Plans of ERISA Remedies

The Secretary erroneously argues that subjecting the Bankruptcy Trustee to applicable bankruptcy law will somehow deprive ERISA plans of remedies made available under ERISA. In fact, the ERISA plans will not be deprived of any remedies. Instead, that decision will simply be left to fiduciaries actually chosen by the plans or their existing trustees, plan sponsors and plan administrators.

This is not a case where the only fiduciaries of a plan have entered bankruptcy. Instead, based on the allegations in the complaint, 1Point and Stokes merely served as third-party administrator for the plans. (Compl. ¶¶ 9-19.) ERISA provides that each plan shall have one or more “named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.” 29 U.S.C. 1102(a)(1). A “named fiduciary” is a fiduciary specifically named in the plan or pursuant to a procedure set forth in the plan. 29 U.S.C. 1102(a)(2). Named fiduciaries may appoint other fiduciaries and service providers, but the named fiduciary is always responsible for monitoring those fiduciaries and service providers. 29 C.F.R. 2509.75-8 (FR-17). ERISA also provides that all plan assets shall be held in trust and that trustees shall have “exclusive authority to manage and control the assets of the plan.” 29 U.S.C. § 1103(a). Trustees are either identified in the plan’s governing instrument or appointed by a named fiduciary. The named fiduciaries or trustees of the plans appointed 1Point as Third Party Administrator. These fiduciaries, whom Congress charged with responsibility for operation and administration of these plans and exclusive management of their assets, have direct

“functional fiduciary” without regard to the Bankruptcy Code, his bond may not cover actions taken or assets recovered in this separate capacity. If that is the case, the Bankruptcy Trustee’s actions could potentially be harmful to the bankruptcy estate. Such problems illustrate further weaknesses in the Secretary’s and the Bankruptcy Trustee’s arguments and demonstrate further why the Bankruptcy Code and courts do not permit bankruptcy trustees to pursue claims or seek to recover assets that do not belong to the bankruptcy estate.

relationships with the plans and are better positioned to make decisions regarding the proper use of plan assets. Moreover, the plans' named fiduciaries and trustees are not creatures of the Bankruptcy Code with conflicting statutory duties and obligations to other parties. It is a matter of record that a number of trustees of the 401(k) plans the Bankruptcy Trustee purports to represent have independently brought litigation against MACC based on identical factual allegations and claims. *See Heritage Equity Group 401(k) Sav. Plan v. Mid Atlantic Capital Corp.*, No. 3:07-cv-00841 (M.D.Tenn. Aug 16, 2007).

Moreover, the Secretary's argument is necessarily based on the implicit premise that ERISA requires something that bankruptcy law forbids. That is not the case. In fact, it is only the novel argument advanced by the Secretary and the Bankruptcy Trustee that would force a confrontation between ERISA and bankruptcy law. As the Secretary acknowledges, the statute provides only that a fiduciary "may" bring a lawsuit against a co-fiduciary for breach of fiduciary duties; it contains no requirement to do so. *See* (Amicus Br. 9 (quoting 29 U.S.C. § 1132).) The Secretary also acknowledges that a lawsuit is only one of a range of options any fiduciary might have to remedy a co-fiduciary's breach. (Amicus Br. 11.) Indeed, the interpretive bulletin the Secretary cites for this proposition provides that another potential remedy is to simply notify the Secretary of the alleged breach. 29 C.F.R. 2509.75-5 (FR-10).⁶

Given that ERISA does not require any fiduciary – much less a "functional fiduciary" who was not retained or appointed by any plan – to initiate litigation, there is no real conflict between ERISA, which is merely permissive, and the Bankruptcy Code. Under these circumstances, if a bankruptcy trustee who also happens to be an ERISA "functional fiduciary"

⁶ Notably, permitting a bankruptcy trustee to bring suit as an ERISA "functional fiduciary" would effectively permit such a trustee to supplant the views of the ERISA fiduciaries selected by the plan as to the best course of action for the plan. This is especially concerning when the bankruptcy trustee allegedly has control over plan assets even though no plan affirmatively chose to provide him with such control.

does not bring litigation against a co-fiduciary, he has offended neither ERISA nor bankruptcy law. If, on the other hand, a bankruptcy trustee does bring litigation, he may or may not offend ERISA (depending on the limited scope of his fiduciary duty), but has acted contrary to bankruptcy law. In other words, it is the Bankruptcy Trustee's position, not MACC's, that would require the 'implicit repeal' of applicable law. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

IV. Conclusion

For the foregoing reasons, and the reasons stated in MACC's previous briefs, MACC respectfully requests that the Court dismiss Counts I-VIII of the Trustee's Complaint.

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2008, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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