

The ERISA Edit: Spotlight on Fiduciary Status and Chevron

Employee Benefits Alert

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A Big Win for TPAs in the First Circuit

Last week, in a thorough, detailed decision in *Massachusetts Laborers' Health & Welfare Fund v. Blue Cross Blue Shield of Massachusetts*, No. 22-1317 (1st Cir. Apr. 25, 2023), the First Circuit affirmed a district court ruling that Blue Cross Blue Shield of Massachusetts (BCBSMA) lacked ERISA fiduciary status under the circumstances of the case. In the litigation, a union alleged that BCBSMA, as a third-party administrator (TPA) for an ERISA health benefit plan, engaged in fiduciary breaches and other fiduciary-oriented ERISA violations by paying unauthorized fees to itself, paying medical provider claims at inflated prices, and insufficiently crediting recovered overpayments to the plan. The district court held that BCBSMA was not a fiduciary with respect to the actions at issue in the complaint and dismissed the case on that basis.

The First Circuit affirmed, rejecting each ground for reversal asserted by the union. The court found that BCBSMA applied predetermined standards, rather than discretionary authority, and did not exercise meaningful control over any plan assets – thus, negating any assertion of fiduciary status for BCBSMA. On the plan-assets question, the First Circuit emphasized that a TPA's physical handling of monies in a working capital account established by the parties is insufficient to trigger fiduciary status, where the plan itself had final authority over any disposition of the assets.

The decision is an important one that puts the brakes on recent efforts by certain plan interests, the plaintiffs' bar, and the U.S. Department of Labor (DOL) to expand fiduciary status for TPAs. The DOL filed an *amicus* brief supporting the union and appeared at oral argument in favor of the union's position. Miller & Chevalier filed an *amicus* brief for the Blue Cross Blue Shield Association in support of BCBSMA, which the First Circuit addressed approvingly at length in its decision.

Supreme Court to Reconsider Federal Regulatory Power in Merits Case That Could Overturn *Chevron*

Just days ago, the Supreme Court agreed to reconsider *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), which has governed the federal courts' review of implementing agencies' interpretations of purportedly ambiguous statutes for almost four decades. Under *Chevron*, the question is whether Congress has spoken clearly in a statute and, if not, whether the implementing agency's interpretation is reasonable.

For years, *Chevron* has come under attack as giving unelected bureaucrats too much power. Certain conservative justices on the Supreme Court have repeatedly criticized *Chevron*, but lower courts have continued to apply the doctrine because it remains binding precedent. In case after case, the Supreme Court has tiptoed around the controversy (including when the Court ignored *Chevron* altogether in a [Medicare-reimbursement dispute](#) resolved just last year) and has shied away from deciding whether to overrule the case altogether – until now.

In *Loper Bright Enterprises v. Raimondo*, No. 22-451, a group of commercial fishing companies challenged a rule issued by the National Marine Fisheries Service (NMFS) that requires fishers to pay the salaries of on-board observers who monitor compliance with fishery management plans. A divided panel of the DC Circuit ruled against the fishers, holding that although federal law clearly allows the government to require fishing boats to carry monitors, it does not specifically address who must pay for them. Considering that ambiguity, the DC Circuit held that the statute was reasonably read to allow NMFS to require the fishers to pay the monitors' salaries.

Although [the fishers' petition](#) presented two questions, the Supreme Court granted certiorari specifically to decide only whether it should "overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted

elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." Along with *West Virginia v. EPA*, 142 S. Ct. 2587 (June 30, 2022), in which the Court embraced the "major questions doctrine" to halt the EPA's efforts to regulate greenhouse gases by making industry-wide changes, the fishers' case is a potential blockbuster that could have enormous implications for all federal agencies, including DOL and its various agencies.

No Surprises Act IDR Process Backlog Continues

The Department of Health and Human Services (HHS), DOL, and the Department of the Treasury (Treasury) issued a [report](#) summarizing how the federal Independent Dispute Resolution (IDR) process for determining out-of-network payment disputes under the No Surprises Act (NSA) has functioned during its first year. According to the report, the IDR process is still bogged down, and the Departments may undertake changes to help speed up the process and lessen burdens on all parties.

The report states that between April 15, 2022, and March 31, 2023, 334,828 IDR payment disputes were initiated, a caseload nearly 14 times greater than what the Departments estimated when they rolled out regulations governing the IDR process. IDR entities rendered payment determinations in 42,158 of those disputes, with initiating parties prevailing 71 percent of the time. Additional information about those cases is needed to assess whether payment increases obtained by providers were large enough to outweigh the costs associated with the IDR process and the overall impact the IDR process is having on payor and participant costs.

Whether a claim is eligible for resolution using the IDR process continues to be an issue in a large portion of the disputes, weighing down the disputing parties and IDR entities with additional information exchange and fact-finding. Non-initiating parties challenged eligibility in 122,781 disputes and thus far 39,890 disputes were determined to be ineligible for IDR. The Departments are considering policy and operational improvements, including rulemaking, to streamline the IDR process for determining eligibility. Overall, IDR entities closed approximately 107,000 payment disputes.

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