

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAYMOND J. MURREN et al. : CIVIL ACTION  
: :  
v. : :  
: :  
AMERICAN NATIONAL CAN : :  
COMPANY et al. : 99-CV-3136

**MEMORANDUM & ORDER**

**J. M. KELLY, J.**

**JANUARY , 2000**

Presently before the Court is a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) by the defendants, the United Steelworkers of America (“Steelworkers”) and the International Association of Machinists and Aerospace Workers (“Machinists”) (collectively referred to as the “Unions”). Also before the Court is a Motion to Dismiss by defendants American National Can Company (“ANC”), the pension plan between ANC and the Steelworkers (“ANC/Steelworkers Pension Plan”) and the pension plan between ANC and the Machinists (“ANC/Machinists Pension Plan”). The Plaintiffs, Raymond Murren, Carl Gobrecht and Larry Walton, brought suit in this Court pursuant to the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1001-1461 (1994), against ANC and the pension plans for wrongful denial of pension benefits and against the Unions for breach of fiduciary duty. For the following reasons, ANC’s motion is denied and the Unions’ motion is granted.

**I. BACKGROUND**

Accepting as true the facts alleged in the Plaintiffs’ Complaint and all reasonable inferences that can be drawn from them, the facts of the case are as follows. The Plaintiffs were employed by National Can Company, presently known as American National Can Company, at its Hanover, Pennsylvania plant until the plant closed in November 1987. While employed at

ANC, the Plaintiffs were members of the Steelworkers and accordingly were covered under the ANC/Steelworkers Pension Plan. At the time the Hanover plant closed, the Plaintiffs fell into a special category of employees under the ANC/Steelworkers Pension Plan who were, or could become, eligible for "Rule of 65" retirement. Rule of 65 retirement permits an employee to retire with an unreduced pension before the normal retirement age when the sum of his age and at least twenty years of employment equals sixty-five, so long as the employee has been on layoff or absent with a physical disability for two years and has not refused an offer by the employer for "Suitable Long Term Employment" ("SLTE") at another of its plants where employees are represented by the Steelworkers.

On July 19, 1989, within two years from the date of the Hanover plant's closing, ANC offered the Plaintiffs SLTE at its Lehigh Valley, Pennsylvania Steelworkers plant. At the time of ANC's offer of SLTE, the Plaintiffs had been working for approximately nine months at one of ANC's non-Steelworkers plants in LeMoyne, Pennsylvania. Employees at the LeMoyne plant were represented by the Machinists.

The Plaintiffs allege that upon their transfer to the LeMoyne plant, they ceased to be "Employees" pursuant to the terms of the ANC/Steelworkers Pension Plan and therefore were no longer covered by its provisions. Instead, upon their transfer to the LeMoyne plant, each of the Plaintiffs became covered under the ANC/Machinists Pension Plan.<sup>1</sup> Under the terms of the ANC/Machinists Pension Plan, all of the Plaintiffs' years of service with ANC carried over from Hanover to LeMoyne for all purposes other than determining previously accrued pension

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<sup>1</sup> The Court need not decide the issue of which pension plan currently applies to the Plaintiffs for the purposes of the motions presently before it. The terms of the pension plans relevant to these motions are nearly identical and the outcome is therefore unaffected.

benefits. The Plaintiffs allege they became fully vested in the ANC/Machinists Pension Plan at the prior benefit levels on the first of the month following their date of transfer to the LeMoyne plant. Therefore, based on assurances by ANC that they would not lose previously earned pension benefits, and despite the fact that the SLTE offer letter stated that “[a] refusal by an employee who is otherwise eligible . . . for a Rule of 65 Retirement to accept an offer of SLTE will result in his ineligibility for Rule of 65 Retirement” benefits, the Plaintiffs refused to accept the SLTE offer. Defs.’ Motion to Dismiss, at 5.

On August 18, 1989, ANC sent the Plaintiffs a letter confirming that they had rejected the SLTE offer. The letter also informed them that their refusal of the SLTE offer made them ineligible “for a Rule of 65 Pension pursuant to the pension agreement between [ANC] and the [Steelworkers] relative to the Hanover plant closing.” Id.

The Plaintiffs remained employed at the LeMoyne plant until December 1990 when they were laid off. They were on layoff until January 1, 1993 when their employment with ANC was terminated. Prior to their termination with ANC in 1993, each Plaintiff filed a pension application form. While each of the Plaintiffs had by this time been employed by ANC for twenty-eight years, ANC, as the plan administrator, determined that they were each eligible for benefits based on only their three years of service at the LeMoyne plant. According to ANC, the Plaintiffs’ failure to accept the SLTE resulted in a forfeiture of benefits for their prior twenty-five years of employment until each Plaintiff qualified for retirement benefits at age sixty-two.

The Complaint alleges that none of the Plaintiffs received a written denial of benefits in response to their applications for benefits. Accordingly, they sought to rectify this through writings to the Unions, ANC and government officials. Eventually, the Plaintiffs sought the

formal aid of the Steelworkers and on September 14, 1994, the union demanded arbitration on behalf of the Plaintiffs. The Steelworkers, however, failed to contact the ANC representative to schedule the arbitration and the dispute was never arbitrated. After other unsuccessful efforts to resolve this matter, the Plaintiffs filed suit in this Court on February 18, 1997. They sued ANC to recover pension benefits and for breach of fiduciary duty. Adopting the Report and Recommendation of Magistrate Judge Reuter, this Court dismissed the Plaintiffs' wrongful denial of benefits claim without prejudice for failure to exhaust administrative remedies and entered judgment for ANC on the breach of fiduciary duty claim because it was time-barred. The United States Court of Appeals for the Third Circuit affirmed the grant of summary judgment on appeal. While the matter was being decided by the Third Circuit, and subsequent thereto as well, the Plaintiffs made numerous demands to ANC and the Unions to initiate arbitration. Neither ANC nor the Unions agreed to arbitrate the Plaintiffs' claims. Therefore, on June 21, 1999, the Plaintiffs filed suit in this Court a second time. In Count I they allege that ANC, as the plan administrator, wrongfully denied them pension benefits. Count II alleges that the Unions breached their fiduciary duties in violation of ERISA by failing to initiate arbitration on behalf of the Plaintiffs. ANC and the Unions seek to dismiss the respective claims against them.

## **II. STANDARD OF REVIEW**

In considering whether to dismiss a complaint for failing to state a claim upon which relief can be granted, the court may consider those facts alleged in the complaint as well as matters of public record, orders, facts in the record and exhibits attached to the complaint. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1391 (3d Cir. 1994). The court must accept those facts as true. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1983).

Moreover, the complaint is viewed in the light most favorable to the plaintiff. See Tunnell v. Wiley, 514 F.2d 971, 975 n.6 (3d Cir. 1975). In addition to these expansive parameters, the threshold a plaintiff must meet to satisfy pleading requirements is exceedingly low; a court may dismiss a complaint only if the plaintiff can prove no set of facts that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

### **III. DISCUSSION**

#### **A. Wrongful Denial of Benefits Claim**

ANC moves to dismiss the Plaintiff's wrongful denial of benefits claim alleging they have failed to exhaust their administrative remedies. As the Third Circuit recognized in the predecessor to this case, generally a district court will not entertain a suit pursuant to § 1132(a)(1)(B) unless and until the plaintiff has exhausted the administrative remedies available under the plan. See Murren v. American Nat'l Can Co., No. 98-1299, at 8 (3d Cir. Feb. 8, 1999); see also Weldon v. Craft, 896 F.2d 793, 800 (3d Cir. 1990). This judicially-created requirement was designed to promote Congress' intent to give the parties adequate notice of and an opportunity to review benefits disputes. See Murren, No. 98-1299, at 8-9; see also 29 U.S.C. § 1133. The Third Circuit emphasized that:

When a plan participant claims that he or she has unjustly been denied benefits, it is appropriate to require participants first to address their complaints to the fiduciaries to whom Congress, in Section [1133], assigned the primary responsibility for evaluating claims for benefits. This ensures that the appeals procedures mandated by Congress will be employed, permits officials of benefits plans to meet the responsibilities properly entrusted to them, encourages the consistent treatment of claims for benefits, minimizes the costs of delays of claim settlement in a nonadversarial setting, and creates a record of the plan's rationales for denial of the claim.

Zipf v. AT&T, 799 F.2d 889, 892 (3d Cir. 1986). It is in this context that the Court examines the

administrative review procedures set forth in the two plans.

Both the ANC/Steelworkers Pension Plan and the ANC/Machinists Pension Plan require that claim disputes be submitted to arbitration. Specifically, the ANC/Steelworkers Pension Plan states:

**16.1 Arbitration**

If any difference shall arise between the Company and an Employee, pensioner, survivor or applicant as to whether an Employee, pensioner, survivor or applicant is entitled to a benefit under the Pension Plan or as to the amount of such benefit and agreement cannot be reached between the Company and the Union, then, except as provided in Section 16.2, such question shall be referred to an arbitrator to be selected by the Company and the Union. . . . The decision of the arbitrator on any such question shall [sic] be binding on the Company, the Union, and the Employee, pensioner, survivor or applicant.

Defs.’ Motion to Dismiss, Exhibit H, § 16.1. The ANC Machinists Plan, using nearly identical language, also mandates arbitration:

**Section 1. Arbitration.** If any difference shall arise between the Company and an Employee or applicant as to whether such Employee or applicant is entitled to a pension hereunder or as to the amount of such pension and agreement cannot be reached between the Company and the Union, then, except as provided in Section 2 of this Article VIII, such question shall be referred to an arbitrator to be selected by the Company and the Union. . . . The decision of the arbitrator on any such question shall be binding on the Company, the Union, and the Employee, or applicant.

Id. Exhibit I, Art. XIII(1). Therefore, generally, the Plaintiffs are obligated to arbitrate their benefits claim dispute.

To this date, their claims have not been arbitrated. The Plaintiff’s argue, however, that their cause of action against ANC should be allowed to proceed nonetheless because they have been denied meaningful access to internal administrative procedures.

The Third Circuit recognizes denial of meaningful access to administrative review

procedures as one of a few exceptions to the exhaustion requirement. This exception applies when “one party has the sole power to invoke the higher levels of the review procedure and has not allowed another party access [and] . . . the other party [has] made attempts to have the higher levels of review initiated.” Lucas v. Warner & Swasey Co., 475 F. Supp. 1071, 1074 (E.D. Pa. 1979). The party invoking the exception must present facts and evidence showing he or she was prevented from exercising administrative remedies.

The Plaintiffs allege that, when looking at their actions collectively, ANC and the Unions have denied them the opportunity to arbitrate their benefits claim dispute. The Unions have denied them access to administrative review by refusing to refer their case to arbitration. ANC has denied them access by claiming that, pursuant to the various plans, only the Unions have the authority to demand arbitration.

Applying the elements stated above, the Court finds that the Plaintiffs have been denied access to the administrative review procedures of the plans; they have therefore exhausted their administrative remedies. Pursuant to the terms of the plans, the Plaintiffs do not have the power to initiate arbitration. It is well settled that questions of arbitrability must be resolved by analyzing the relevant contracts according to the appropriate substantive law. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). Arbitration is a contractual right and therefore, generally, it may be invoked only by those entities party to the agreement who possess the right to compel arbitration. See Nolde Bros., Inc. v. Local 358 Bakery & Confectionery Workers Union, 430 U.S. 243 (1977).

Here, both plans state that if a disagreement arises between ANC and an employee, and “agreement cannot be reached between [ANC] and the Union, then . . . such question shall be

referred to an arbitrator to be selected by [ANC] and the Union.” Defs.’ Motion to Dismiss Exhibit H, § 16.1; id. Exhibit I, Art. XIII(1). The language of the plans indicates that ANC and the Unions were intended to be solely responsible for the resolution of disputes regarding benefits claims, including matters to be referred to arbitration. There is no indication of employee involvement in the appeals procedure whatsoever other than that they are bound by the arbitrator’s decision. Further, several circuits have recognized in an analogous context that an individual cannot prosecute a dispute through arbitration; he or she must rely on the union to exhaust contractual remedies. See, e.g., Robbins v. George W. Prescott Publ’g Co., 614 F.2d 3, 4 (1st Cir. 1980) (noting employee has no power to initiate arbitration against employer on own); Malone v. United States Postal Serv., 526 F.2d 1099, 1106-07 (6th Cir. 1975) (holding in context of § 9(a) of Labor Management Relations Act that employee does not have right to compel employer to resolve dispute and employee must therefore rely on union to exhaust contractual remedies); Harris v. Chem. Leaman Tank Lines, Inc., 437 F.2d 167, 170 (5th Cir. 1971) (noting that when union bears responsibility for dispute resolution with company, employee must rely on union to exhaust contractual remedies on his behalf); Black-Clawson Co. v. International Ass’n of Machinists Lodge 355, 313 F.2d 179, 184 (2d Cir. 1962) (holding employee could not individually pursue grievance or force employer to arbitrate, even though collective bargaining agreement defined grievance as dispute between company and any employee); Moruzzi v. Dynamics Corp., 443 F. Supp. 332, 336 (S.D.N.Y. 1977) (noting arbitration “is ‘not ordinarily a right incident to the employer-employee relationship, but . . . incident to the relationship between employer and union.’” (quoting Procter & Gamble Indep. Union v. Procter & Gamble Mfg. Co., 312 F.2d 181, 184 (2d Cir. 1962))). Therefore, the Court finds that the Plaintiffs do not have the

power to initiate arbitration with ANC.

Similarly, in the context of the Plaintiff's demands for arbitration, ANC is not obligated to invoke the higher levels of administrative review; it is only so obligated when the Union demands such. The Unions, however, clearly have the power to demand arbitration with ANC. Indeed, the terms of the plans require that the Unions do so in the event that an agreement cannot be reached between ANC and the Unions. After initially agreeing to refer the Plaintiffs' benefits claim, however, the Unions have not yet demanded arbitration. Their apparent unwillingness to pursue arbitration, combined with the Plaintiffs' inability to demand it on their own, effectively denies the Plaintiffs any review of their claim. Further, the plans specifically preclude the Plaintiffs from pursuing the grievance procedures set forth in the labor agreements.<sup>2</sup> By operation of these three things, the Plaintiffs have been denied access to the higher levels of

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<sup>2</sup> The ANC/Steelworkers Pension Plan states:

**16.3 Master Agreement Grievance Procedure Inapplicable**

By reason of the fact that the Pension Plan and this Agreement make specific provision for adjustment of all differences which may appropriately arise in connection with the Pension Plan, it is understood and agreed that the grievance and arbitration procedures set forth in the Master Agreement shall not apply to the provisions of this Agreement and the Pension Plan.

Defs.' Motion to Dismiss Exhibit H, § 16.3. The ANC/Machinists Pension Plan similarly states:

**Section 3. Adjustment Conclusive.** By reason of the fact that the Pension Plan as set forth in this Agreement makes specific provision for adjustment of all differences which may appropriately arise in connection with the Pension Plan, it is understood and agreed that the grievance and arbitration procedures set forth in the Labor Agreement shall not apply to the provisions of this Agreement and the Pension Plan as set forth herein.

Id. Exhibit I, Art. XIII(3).

administrative review under the plans. The first element of the exception is therefore met.

The Court is not holding, however, that every time a union decides not to arbitrate a claim and the claimant has demanded such that the claimant has exhausted his or her administrative remedies. This case is distinguishable in that the Unions agreed to arbitrate the dispute and after they obtained the requisite information regarding whom to contact to schedule arbitration, they never did anything else with regard to the claim. There is no evidence to explain the Unions' failure to pursue this course of action, nor is the Court given an explanation for their decision not to refer the claim to arbitration. Ordinarily, this Court would agree with the Second Circuit's statement that:

Chaos would result if every disenchanted employee, every disturbed employee, and every employee who harbored a dislike for his employer, could harass both the union and the employer by processing grievances through the various steps of the grievance procedure and ultimately by bringing an action to compel arbitration in the face of clear contractual provisions intended to channel the enforcement remedy through the union.

Black-Clawson, 313 F.2d at 336. In this case, however, the language of the plans requiring the Unions to initiate arbitration, the Plaintiffs' inability to do so, the Unions' failure to either do so or to explain why they are not and the absence of an alternate remedy denies the Plaintiffs access to administrative review sufficient to satisfy the first element of the exception.

The second element of the exception requires that the Plaintiffs attempt to have the higher levels of review initiated. The Plaintiffs allege at least six instances where they, through counsel, expressly demanded arbitration of both ANC and the Unions. There is no indication the Unions ever replied to the Plaintiffs' demands. When ANC did reply, it denied the Plaintiffs' request. The second element is therefore met.

Thus, the Court finds that the Plaintiffs have been denied meaningful access to the internal administrative procedures of the plans and this exception to the exhaustion requirement applies. Accordingly, ANC's motion to dismiss for failure to exhaust administrative remedies is denied.

**B. Breach of Fiduciary Duty Claim**

In the Unions' motion to dismiss, they argue that the Plaintiffs cannot recover on their breach of fiduciary claim because the Unions are not ERISA fiduciaries. Pursuant to ERISA, a party can become a fiduciary in one of two ways. First, a party can be formally designated as such by the plan instrument. See 29 U.S.C. § 1102(a)(2); id. § 1105(c)(1). The parties do not dispute that neither of the unions have been formally designated as plan fiduciaries. A party can also become a fiduciary by performing the functions of a fiduciary. As set forth in ERISA:

Except as otherwise provided in subparagraph (B) [which is not applicable here], a person is a fiduciary with respect to a plan to the extent (i) 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, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

Id. § 1002(21)(A); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1159 (3d Cir. 1990); Marks v. Independence Blue Cross, 71 F. Supp. 2d 432, 434 (E.D. Pa. 1999); 29 C.F.R. § 2509.75-8, at 571 (1986). In the instant case, there is no allegation that the Unions exercised discretionary authority over the plan's assets or offered investment advice. Therefore, the relevant inquiry is whether the Unions exercised any discretionary responsibility in the administration of the plan.

The Plaintiffs appear to make two arguments in support of their position that the Unions

exercise discretionary responsibility in the administration of the plan. First, they argue that because the Unions are obligated by the appeals procedures stated in the plans to act on behalf of the employee to resolve differences that arise between the employee and ANC, the Unions therefore must represent the interests of the participants. In doing so, they are then exercising their discretionary responsibility whether to reach an agreement with ANC, or, if need be, whether to refer the matter to arbitration.

The Court does not see how resolving benefits claim disputes relates to the administration of the plan. The parties have not cited to any cases where the Third Circuit addresses the issue of unions as ERISA fiduciaries. The Seventh Circuit, however, in Forys v. United Food & Commercial Workers' International Union, 829 F.2d 603 (7th Cir. 1987), discussed whether the defendant union was a fiduciary pursuant to § 1002(21) of ERISA. See id. at 604.

In Forys, the employer, acting as the plan administrator, denied the plaintiff benefits under an ERISA health insurance plan. See id. at 604. According to the collective bargaining agreement which governed the handling of claims disputes, after utilizing other appeals procedures, the union could, at its discretion, submit matters to an arbitrator for resolution. See id. at 605. Attempts to resolve the plaintiff's benefits dispute were unsuccessful, but the union nonetheless chose not to refer the claim to arbitration. See id.

The plaintiffs filed suit against the union for breach of fiduciary duty under ERISA arguing it was liable for failing to seek arbitration of the claim. See id. at 604. Similar to this case, the plaintiffs argued that the union possessed discretionary authority with regard to the administration of the plan because only it had the authority to decide whether to submit disputed claims to an arbitrator. See id. at 606. The Seventh Circuit affirmed the District Court's

dismissal of the plaintiffs' claim concluding that "when a Union performs solely the task of presenting the claims of its individual members to the fund, in accordance with the terms of the collective bargaining agreement, it is not a fiduciary under ERISA." Id. at 607-08. Such activity does not constitute administration of the plan because "[t]he obligation of the Union pursuant to the collective bargaining agreement to present the claims of its individual members when they apply for benefits is an obligation that the Union has to its individual members—not to the fund." Id. at 607.

The Seventh Circuit relied on ERISA's legislative history, specifically a House report which defined an ERISA fiduciary as "a person who exercises any power of control, management or disposition with respect to monies or other property of an employee benefit fund, or has the authority or responsibility to do so." Id. (quoting H.R. Rep. No. 93-533, at 11, reprinted in 1974 U.S.C.C.A.N. 4639, 4649). The Forys court also relied on the Supreme Court's interpretation of ERISA's statutory scheme and the role of fiduciaries as set forth in Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985). See Forys, 829 F.2d at 607. There, the Supreme Court found that the drafters of ERISA were primarily concerned about the possible misuse of plan assets and remedies that would protect the plan as a whole, not necessarily the rights of individual beneficiaries. See Massachusetts Mut. Life Ins., 473 U.S. at 142-43. The Court noted that while an ERISA fiduciary's duties include serving the interests of individual plan participants and beneficiaries and providing them with appropriate benefits, "the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." Id. at 142.

The Plaintiffs argue that Forys reasoning is no longer sound in light of the Supreme Court's decision in Varity Corp. v. Howe, 516 U.S. 489 (1996). They point out that Forys relied on Massachusetts Mutual Life Insurance for the proposition that an ERISA fiduciary's responsibility was to protect the plan, rather than its individual participants or beneficiaries. Because the union's arbitration duty ran only to individual members, the Plaintiffs argue, the union was not found to be participating in plan administration and therefore was not a fiduciary. The Plaintiffs interpret Varity, however, to stand for the proposition that a fiduciary's duty extends to individual plan participants as well as the entire plan. Therefore, individually-based duties such as arbitration should be deemed plan administration.

The Plaintiffs misinterpret the applicability of Varity to the instant case. The Supreme Court granted certiorari in Varity to resolve a conflict between the courts of appeals regarding the proper interpretation of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). See Varity, 516 U.S. at 495. Section 502(a)(3) states that a civil action may be brought by a participant, beneficiary or fiduciary for injunctive or other appropriate equitable relief. See 29 U.S.C. § 1132(a)(3). Prior to Varity, some courts of appeals held that when applied in a breach of fiduciary duty context, this section does not authorize relief to individuals; rather, relief could only be obtained under this section on behalf of the plan. See Varity, 516 U.S. at 495. Other courts held that relief could be sought on behalf of individuals as well as the plan. See id.

In Varity, the defendant-employer, who was also the plan administrator, made a presentation regarding benefits to its employees. See id. at 493-94. The plaintiffs alleged that through this presentation, they were fraudulently induced to give up their current benefits. See id. at 494. They further alleged that in giving the presentation, the defendant was acting in its

role as the plan administrator, rather than as their employer, and therefore breached its fiduciary duties. See id. After finding that the defendant was acting in its role as the plan administrator, and therefore as an ERISA fiduciary, the Court held that the plaintiffs had a right to relief in their individual capacities. See id. at 513. When an ERISA fiduciary breaches such a duty, § 502(a)(3) includes a right to relief not only on behalf of the plan itself, but also for individual participants. See id.

The Varity decision, however, does not address the issues presented in this case, nor does it undermine the reasoning of Forys. Here, as in Forys, the Court must determine whether the Unions have discretionary authority over the administration of their respective plans so as to be deemed fiduciaries. In Varity, the defendant, as the plan administrator, already had such authority and unquestionably was a fiduciary; all that remained to be determined was whether the defendant was acting in that capacity on a particular occasion. The holding that relief for breach of fiduciary duty can be sought on behalf of individual participants does not alter the requirement that defendant be a fiduciary in the first place. In that regard, then, the Forys decision is unaffected by Varity.

Applying the foregoing to the instant case, the Court finds that the Unions do not have discretionary authority over the administration of their respective plans and therefore are not fiduciaries. Pursuant to the terms of the plans, in the event of a disagreement over benefits between ANC and an employee, the Unions have the authority to decide whether to reach an agreement with the company and whether to arbitrate. These powers, however, are unrelated to those duties recognized by the Supreme Court, the drafters of ERISA and the Seventh Circuit as examples of discretionary authority in the administration of a plan. The essence of discretion to

administer a plan is the power to act on behalf of and make decisions regarding the plan. The essence of the Unions' authority, however, is individually-based and reactionary. After ANC has made a decision regarding the plan, the Unions react as they deem appropriate on behalf of individual beneficiaries. The Court holds, therefore, that the Unions' power to refer disputes to arbitration does not constitute discretionary authority over the administration of the plan so as to make them fiduciaries.

The Plaintiffs' argue secondly that under the terms of the plans, specifically a section entitled "Administration," each of the Unions has additional duties which constitute discretionary authority with regard to the administration of the plan. Using identical language, both plans state:

The Company shall report annually to the Union concerning the operation of the Pension Plan and, from time to time during the term of this Agreement, shall make available such additional information as shall be reasonably required for the purposes of enabling the Union to be properly informed concerning the operation of the Pension Plan.

Defs.' Motion to Dismiss, Exhibit H, § 15.3; *id.* Exhibit I, Art. XII(3). The Plaintiffs argue that under these provisions, the Unions are required to assess whether ANC is meeting its responsibilities under the respective plans and in doing so, the Unions are exercising their "discretionary responsibility to determine whether the Company has satisfied its obligations under the respective pension plan." Plaintiff's Response to Motions to Dismiss at 18.

The Court finds this argument to be without merit. The Court does not see any discretionary authority whatsoever in receiving annual reports on the status of the plan. While it seems reasonable that based on these reports the Union could likely assess whether ANC was satisfying its obligations under the plans, there is no indication that the Unions have any

immediate authority to rectify any perceived violations. At most, the Unions' discretionary authority would exist with regard to future negotiations; presently, however, the Court cannot find any such authority with regard to the plans actually in question.

Therefore, the Court holds that the Unions do not exercise discretionary responsibility with regard to the administration of the plans and therefore are not ERISA fiduciaries. The Unions' motion is accordingly granted.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAYMOND J. MURREN et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
AMERICAN NATIONAL CAN	:	
COMPANY et al.	:	99-CV-3136

**ORDER**

**AND NOW**, this        day of January, 2000, in consideration of the Motion to Dismiss by the Defendants, American National Can Company (“ANC”), the pension plan between ANC and the United Steelworkers of America and the pension plan between ANC and the International Association of Machinists and Aerospace Workers (Doc. No. 5), and the Motion to Dismiss by the Defendants, the United Steelworkers of America and the International Association of Machinists and Aerospace Workers (Doc. No. 6), the response of the Plaintiffs, Raymond Murren, Carl Gobrecht and Larry Walton, and the reply thereto, it is ORDERED:

1. That the Motion to Dismiss by ANC, the pension plan between ANC and the United Steelworkers of America and the pension plan between ANC and the International Association of Machinists and Aerospace Workers, is DENIED.

2. That the Motion to Dismiss by the United Steelworkers of America and the International Association of Machinists and Aerospace Workers is GRANTED. The Complaint is dismissed with prejudice as to the United Steelworkers of America and the International Association of Machinists and Aerospace Workers.

BY THE COURT:

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JAMES McGIRR KELLY, J.