FINAL Nos. 05-3677, -3678

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KATHLEEN PFAHLER, et al.,
Plaintiffs-Appellants,

v.

NATIONAL LATEX PRODUCTS COMPANY, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Ohio

BRIEF OF THE SECRETARY OF LABOR, ELAINE L. CHAO, AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF THE ISSUES

1. Whether fiduciaries of a self-insured health benefit plan have a duty to enforce the employer's obligation under the plan to contribute sufficient funds to a claims account to pay health claims pursuant to their duties of loyalty and prudence under ERISA sections 404(a)(1)(A) and (B).

2. Whether the fiduciaries' diversion of the participants' plan contributions to pay the employer's general creditors and their failure to enforce the employer's obligation to fund the claims account caused plan losses that the participants may recover under ERISA sections 502(a)(2) and 409(a).

3. Whether the plan participants may recover, under ERISA section 502(a)(3), an amount equal to their unpaid health claims from the fiduciaries who misrepresented to them that the claims would be paid.

INTEREST OF THE SECRETARY OF LABOR

The Secretary of Labor has primary authority to interpret and enforce the provisions of Title I of ERISA. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-93 (7th Cir. 1986) (Secretary's interests include promoting the uniform application of the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets) (en banc). Therefore, the Secretary has a strong interest, both with regard to her own litigation and private litigation, in ensuring that ERISA is not interpreted to eliminate remedies intended by Congress.

The Secretary routinely brings enforcement actions in federal court against fiduciaries who allegedly breached their fiduciary duties by failing to remit participant contributions to employee benefit plans or seek collection of the employer's promised contributions. These actions seek recovery of plan losses under ERISA sections 502(a)(2) and 409(a), 29 U.S.C. 1132(a)(2), 1109(a), and, when the plans have been terminated, the appointment of an independent fiduciary to hold the amounts recovered and use them to pay any benefits due. During May 2005 to March 2006, the Secretary filed or resolved approximately 100 court cases. From 2002 to 2005, the Secretary's total enforcement efforts through litigation and without litigation restored approximately $105 million in losses to plans caused by the failure to remit participant contributions or to collect employer contributions.

STATEMENT OF THE CASE

A. Statement of the facts

The National Latex Products Co. ("National Latex") sponsored a self-insured health plan (the "Plan") for employees and retirees. (R235 Mem. Op. & Order 8-9, Joint Appendix ("JA") 1180-81). Under the Plan documents, the Plan administrator was National Latex's Human Resources Manager. (Id. at 9, JA 1181). If that position was vacant, as it was during relevant times, National Latex served as Plan administrator. (Id.). The named fiduciary was National Latex's Chief Financial Officer. (Id.). The benefits were funded in part with participant

contributions that were deducted from the participants' paychecks. (Id. at 8, JA 1180).[1] National Latex was obligated under the Plan to pay the remainder due on any covered claim. (Id. at 8-9, 33, JA 1180-81, 1205).

The Plan was administered by Great West Life Insurance Co. ("Great West") which adjudicated and paid health claims and sought reimbursement from National Latex. (R235 Mem. Op. & Order 9, JA 1181). In September 1999, Stateline TPA, Inc. ("Stateline") assumed responsibility for administrative services to the Plan. (Id.). Under National Latex's contract with Stateline, National Latex was required to deposit sufficient funds in a claims account from which Stateline would pay claims. (See R194 Ex. 41 Administrative Services Agreement, art. 3 ¶ 6 and Ex. C (Oct. 1, 1999), JA 381, 388).

Beginning in the mid-1990s, National Latex experienced an economic decline. (R235 Mem. Op. & Order 4, JA 1176). In 1998, it obtained financing from General Electric Credit Corporation ("General Electric") through a revolving line of credit. (Id.). As National Latex's financial condition continued to decline, National Latex and General Electric agreed to hire a management consultant, Glass & Associates ("Glass"), to either salvage the company or assist in selling it. (Id.).

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[1] The Plan included Flexible Benefit Accounts. Through payroll deductions, some participants made contributions to such accounts on a "pre-tax" basis to pay for medical expenses not otherwise covered by the Plan. (See R195 Ex. 1 The National Latex Products Company, Your Group Benefit Plan at 45-51, JA 707-09). These contributions were made in addition to participant contributions used to pay for covered benefits. (R243 Mem. Op. & Order 12,15, JA 1273, 1276).

Jay AuWerter was the Glass consultant who worked on site at the company. (Id.). On August 27, 1999, Glass reported in a memorandum to General Electric that National Latex's financial condition was so bad that "'any new money coming into the company would not likely generate any return.'" (Id. at 5, JA 1177). "Thus, Glass had concluded that an orderly sale of National Latex was the only viable alternative." (Id.). On December 6, 1999, National Latex's assets were sold for $4.5 million; the proceeds went directly to General Electric to pay off its loan. (Id.).

On September 1, 1999, Great West terminated its plan administration contract because National Latex was delinquent in reimbursing Great West for health claims allegedly in excess of $162,000. (R235 Mem. Op. & Order 9, JA 1181). On September 22, 1999, Jay AuWerter, using the title "executive vice president," sent a memorandum to employees stating that "'**YOUR MEDICAL, PRESCRIPTION DRUG AND DENTAL BENEFITS ARE NOT CHANGING**'" and that "'all claims that have been recently submitted to Great West for payment, but have not been paid, **WILL BE PAID**, once those claims have been resubmitted to our new network provider [Stateline].'" (Id. at 11, JA 1183 (emphasis in original)). On September 30, 1999, AuWerter sent another memorandum to employees advising them that they could begin sending new

claims to Stateline on October 5, 1999. With respect to the unpaid claims, AuWerter stated:

> We have instructed Great West to forward those unpaid claims onto [sic] Stateline, in which case you would not have to do anything. In isolated instances, you may be asked to call your physician, hospital or whoever is filing the claim and ask them to resubmit the claim(s) to [Stateline].

(Id. at 12, JA 1184 (alterations in original)). AuWerter also told employees to "'please be assured that, although we have changed carriers, your group benefit plan coverage remains unchanged with the same entitlements.'" (Id.). On October 25, 1999, "National Latex Products Management" sent a memorandum to employees asking them to submit information about outstanding claims to Stateline or the Human Resources Department. (Id.).

On November 22, 1999, National Latex deposited $230,091 in a "trust account" that Stateline established for the payment of claims, an amount that was insufficient to pay all of the outstanding claims. (R235 Mem. Op. & Order 12-13, JA 1184-85). Stateline estimated that the total amount of unpaid claims is approximately $312,000, but the total amount of unpaid claims is a "point of heated contention." (Id. at 14, JA 1186).

Participant contributions to the Plan continued to be withheld from the employees' paychecks throughout this period, but it is unclear whether the $230,091 deposited in the Stateline trust account included all employee contributions made before November 22, 1999. (R235 Mem. Op. & Order 30, JA

1202). There is no evidence that participant contributions made after November 22, 1999, were held in trust or used to pay benefits. (Id.).

B. Proceedings below

Four Plan participants with unpaid health claims sued National Latex, Ross Gill (National Latex's president and CEO), Harry and Patricia Gill (members of the company's Board of Directors), Glass, AuWerter, and General Electric in an Ohio court under Ohio law. (R235 Mem. Op. & Order 1-2 & n.1, 6, 23, JA 1173-74, 1178, 1195). Defendants removed the case to the district court which denied plaintiffs' motion to remand, finding that the state claims were preempted by ERISA. (Id. at 2 n.1, JA 1174).

Plaintiffs recast their claims to allege that defendants were fiduciaries and breached their fiduciary duties under ERISA sections 404(a)(1)(A) and (B), 29 U.S.C. 1104(a)(1)(A), (B), by: (1) failing to enforce National Latex's obligation to fund the claims account with sufficient money to pay the health claims; (2) diverting the participant contributions, including contributions to the Flexible Benefits Accounts, to pay National Latex's general creditors rather than health claims; and (3) misrepresenting to participants that the claims would be paid. (R235 Mem. Op. & Order 29-35, JA 1201-07). Plaintiffs allege that these breaches caused Plan losses in the amount the fiduciaries would have collected had they sought to enforce National Latex's funding obligation and the amount of the

diverted participant contributions. Plaintiffs seek to hold the fiduciaries personally liable to restore losses to the Plan pursuant to ERISA sections 502(a)(2) and 409(a), 29 U.S.C. 1132(a)(2), 1109(a). Plaintiffs request that the court appoint an independent fiduciary to hold the recovery in trust, adjudicate the unpaid claims and, to the extent possible, pay the claims and restore the lost assets to the Flexible Benefits Accounts. (R237 Pls.' Mem. Post Summ. J. 4-7, JA 1223-26). Alternatively, Plaintiffs seek make whole relief for the participants in the amount of their unpaid benefits and the misused Flexible Benefit Account contributions. (Id. at 11, JA 1230).

On April 22, 2005, the district court entered partial summary judgment in favor of several of the defendants. The court ruled that Patricia Gill and Harry Gill were not fiduciaries and that General Electric was neither a fiduciary nor a knowing participant in the fiduciary breaches of others. (R235 Mem. Op. & Order 24, 26-28, JA 1196, 1198-1200).[2] The court found that no dispute existed that National Latex was a fiduciary. (Id. at 28, JA 1200). The court also granted

[2] The court found that National Latex was a named fiduciary under the Plan document, but its Board of Directors was not. The Secretary agrees that membership on the board alone was insufficient to make individual board members fiduciaries. The members were fiduciaries only if they engaged in activities that give rise to fiduciary status under ERISA's functional test set forth in ERISA section 3(21)(A), 29 U.S.C. 1002(21)(A), and not solely by virtue of their status as board members. Kayes v. Pac. Lumber Co., 51 F.3d 1449, 1460-61 (9th Cir. 1995) (where corporation is a named fiduciary, corporate officers are fiduciaries only to the extent they perform fiduciary functions under section 3(21)(A)); 29 C.F.R. 2509.75-8, D-4 Q & A.

summary judgment against plaintiffs on their claim that the fiduciaries breached their duty to enforce National Latex's obligation to fund the claims account with sufficient money to pay the health claims because the court found that no such duty exists. (Id. at 32, JA 1204). As to the fiduciary status of other defendants and other fiduciary breach claims, the court found genuine issues of material fact and denied defendants' summary judgment motions. (Id. at 28-35, JA 1200-1207).

The court later dismissed the remainder of the claims. (R243, JA 1262). The court held that plaintiffs did not have a remedy under ERISA sections 502(a)(2) and 409(a), 29 U.S.C. 1132(a)(2), 1109(a), because they do not seek to restore "losses" to the Plan, but rather seek to recover their own personal losses in the amount of the unpaid health claims. (R243, at 6-8, JA 1267-69). The court also held that to seek relief for all the participants under ERISA section 502(a)(3), 29 U.S.C. 1132(a)(3), plaintiffs were required to obtain class action certification under Rule 23 of the Federal Rules of Civil Procedure. (R243, at 9-11, JA 1270-72). Furthermore, the court held that the four individual plaintiffs had no remedy under ERISA section 502(a)(3) because recovery of their unpaid claims was not "equitable" relief within the meaning of that provision. (Id. at 12-15, JA 1273-76).

ARGUMENT

I. THE FIDUCIARIES HAD A DUTY TO ENFORCE NATIONAL LATEX'S OBLIGATION UNDER THE PLAN DOCUMENTS TO CONTRIBUTE SUFFICIENT FUNDS TO THE CLAIMS ACCOUNT TO PAY HEALTH CLAIMS

The Plan was self-funded. Health claims were funded by contributions from National Latex and its employees, rather than through the purchase of insurance. Under the Plan and National Latex's arrangement with Stateline, National Latex was required to pay its contributions into a claims account that was used by Stateline to pay benefits. National Latex was contractually obligated under the Plan documents to contribute to the account whatever amount was needed to pay health claims over and above the employees' contributions, which were deducted from their paychecks and should have been used to pay benefits. National Latex did not contribute the amount needed to pay the participants' health claims.

National Latex's contractual obligation to fund the Plan was an asset of the Plan. Luna v. Luna, 406 F.3d 1192, 1200 (10th Cir. 2005) ("although the plan does not possess the unpaid contributions themselves, it does possess the contractural right to collect them") (emphasis in original); United States v. LaBarbara, 129 F.3d 81, 88 (2d Cir. 1997). Under ERISA, the Plan fiduciaries had a duty to manage the Plan and its assets "solely in the interest of the participants and beneficiaries" and "with the care, skill, prudence and diligence" of "a prudent man." ERISA sections 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B). For the reasons

discussed below, the Plan fiduciaries were obligated to enforce National Latex's contractual obligation to fund the claims account just as they had a duty to enforce any other valuable contractual promise to the Plan.

"ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants." Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 571 (1985). Furthermore, under ERISA section 502, 29 U.S.C. 1132, "trustees were given the authority to sue to enforce an employer's obligations" to contribute to a plan. 472 U.S. at 578-79. Relying on Central States, this Court has accordingly held that a fiduciary's duties of prudence and loyalty under ERISA sections 404(a)(1)(A) and (B) obligate him to act in the plan participants' interests by attempting to collect contributions owed by the employer under the terms of the plan documents. Best v. Cyrus, 310 F.3d 932, 936 (6th Cir. 2002). Accord Collins v. Pension & Ins. Comm. of S. Cal. Rock Prods. & Ready Mixed Concrete Ass'ns, 144 F.3d 1279, 1283-84 (9th Cir. 1998); Diduck v. Kaszycki & Sons Contractors, Inc., 874 F.2d 912, 918 (2d Cir. 1989); Rosen v. Hotel & Rest. Employees & Bartenders Union, 637 F.2d 592, 600 (3d Cir. 1981). This rule is consistent with the common law of trusts: "if the trustee holds in trust a contract right against a third person and the trustee improperly refuses to bring an action to enforce the contract, the beneficiaries can maintain a suit in equity against

the trustee joining the obligor as a co-defendant." 4 A. Scott & W. Fratcher, The Law of Trusts § 282.1 (4th ed. 1989).[3] Thus, the district court erred in holding that the Plan fiduciaries had no duty to seek collection of the contributions owed by National Latex.[4]

The district court gave two reasons for its decision, neither of which supports its conclusion. First, the court stated that ERISA allows the employer the "freedom to unilaterally terminate" the Plan, suggesting that when the employer stopped funding the claims account, it terminated the Plan and its obligation to fund the account. (R235, at 32, JA 1204). Although it is certainly true that an employer is "generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans," Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995), National Latex did not terminate or modify the Plan. In fact, AuWerter assured the participants that the Plan was ongoing, that they would

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[3] This Court recognizes that ERISA fiduciary duties "draw much of their content from the common law of trusts." Best, 310 F.3d at 935 (quoting Varity Corp. v. Howe, 516 U.S. 489, 946 (1996)).

[4] The Eighth Circuit held that failing to sue an employer who breached its contractual obligation to fund a health claims account under its self-insured plan is not a fiduciary breach if the fiduciary would not have succeeded in collecting on the judgment due to the employer's financial condition. Herman v. Mercantile Bank, N.A., 137 F.3d 584, 587 (1998). Because the district court held that the Plan fiduciaries had no duty to collect in any circumstances, the district court did not consider whether collection efforts would have been unsuccessful or whether National Latex could have borrowed enough from General Electric to pay the claims.

continue to receive the same benefits in the future, and that past unpaid claims would be paid. Furthermore, National Latex continued to deduct plan contributions from the participants' wages until it went out of business.

Second, the court held that because the unpaid employer contributions were not Plan assets, the fiduciaries had no duty to secure those contributions. Generally, unpaid employer contributions are not plan assets until they are paid into the plan. Local Union 2134, United Mine Workers v. Powhatten Fuel, Inc., 828 F.2d 710, 714 (11th Cir. 1987). The Plan's contractual right to collect the promised contribution -- the Plan's chose in action -- is a plan asset, however. Luna, 406 F.3d at 1200; LaBarbara, 129 F.3d at 88. As plan fiduciaries charged with duties of loyalty and prudence, defendants had an obligation to enforce the Plan's right to contributions just as they had an obligation to ensure that any other valuable contractual promise to the Plan was honored. Therefore, the district court erred in holding that the fiduciaries had no duty under ERISA to enforce National Latex's contractual duty to contribute to the claims account.

II. THE FIDUCIARIES' DIVERSION OF PARTICIPANT CONTRIBUTIONS AND THEIR FAILURE TO ENFORCE NATIONAL LATEX'S OBLIGATION TO FUND THE CLAIMS ACCOUNT CAUSED PLAN LOSSES THAT MAY BE RECOVERED UNDER ERISA SECTIONS 502(a)(2) AND 409(a)

ERISA section 502(a)(2), 29 U.S.C. 1132(a)(2), gives plaintiffs standing to sue fiduciaries for relief under ERISA section 409(a), 29 U.S.C. 1109(a), which

specifically includes the recovery of "any losses to the plan." If, as plaintiffs allege, the fiduciaries misappropriated employee contributions to the Plan and failed to enforce the Plan's valuable contractual rights to employer contributions, the Plan sustained losses, which plaintiffs can recover under the plain language of the statute. As a direct result of the fiduciaries' misconduct, the Plan allegedly held fewer plan assets and the Plan's fundamental purpose -- the payment of health benefits -- was defeated.

ERISA imposes stringent duties of prudence and loyalty on fiduciaries who manage plan assets, and authorizes recoveries for breach of those duties, precisely in order to ensure the payment of promised benefits. Yet, the district court paradoxically reasoned that plaintiffs failed to state a claim because they sought to recover lost contributions as a means of ensuring the payment of their own individual unpaid health benefits. This reading of the Act misconstrues its text and defeats its purpose. Under the Department's regulations, the employee contributions to the Plan were plan assets, and the Plan's contractual right to employer contributions was similarly a plan asset. If these assets were squandered, the Plan suffered a loss. The plaintiffs' entitlement to recover that loss is not defeated by their request that the assets be held in trust by a fiduciary, as ERISA requires, ERISA section 403(a), 29 U.S.C. 1103(a), or that the assets be used to adjudicate claims and pay benefits, as ERISA also requires, ERISA section

404(a)(1)(A), 29 U.S.C. 1104(a)(1)(A). The purpose of ERISA's remedial provisions is to safeguard benefits, not to defeat the claims of participants who were denied benefits because plan fiduciaries had mismanaged and misappropriated plan assets.

A. The diversion of participant contributions and failure to collect employer contributions caused losses to the Plan

Pursuant to the Secretary's regulations, 29 C.F.R. 2510.3-102(a), the district court correctly found that amounts deducted from the participants' wages as Plan contributions became Plan assets as soon as they could be reasonably segregated from the employer's general assets. (R235, at 29, JA 1201). Accord LoPresti v. Terwilliger, 126 F.3d 34, 39 (2d Cir. 1997). As Plan assets, the participant contributions must be held in trust, must not inure to the benefit of the employer, and must be used exclusively to pay benefits or the reasonable expenses of administering the Plan. 29 U.S.C. 1103(a), (c)(1). Thus, the court initially did not grant summary judgment on the claims related to participant contributions because it found genuine issues of material facts as to whether the fiduciaries misused them to pay National Latex's corporate debts, as plaintiffs claimed, or whether they used them to pay benefits as required by ERISA. (R235, at 31, JA 1203). The court never resolved this factual dispute. Instead, it later dismissed the claims entirely, on the grounds that the participants had no remedy under ERISA sections

502(a)(2) and 409(a) because they did not seek to recover losses to the Plan. (R243, at 6-7, JA 1267-68).

It is undisputed that the participant contributions were Plan assets which, under the Plan's terms, should have been paid into the claims account and, under the terms of ERISA, should additionally have been held in trust. If the fiduciaries used those assets to benefit National Latex rather than to pay benefits or the Plan's reasonable administrative expenses, they not only breached their fiduciary duties to the participants, but they also caused a decrease in the amount of assets available to the Plan. The decrease in Plan assets was a loss to the Plan. Plaintiffs expressly are seeking to compensate the Plan for these lost assets consisting of all the misused participant contributions, so that ultimately any proper claims may be paid from the Plan. The diversion of Plan assets was a loss to the Plan for which the fiduciaries are personally liable under ERISA section 409(a) and which is actionable under ERISA section 502(a)(2).

Additionally, as discussed above, the Plan fiduciaries had a duty to attempt to collect the amounts that National Latex was obligated to contribute. Plaintiffs allege that by failing to collect those amounts and failing to remit participant contributions, the Plan had insufficient funds to pay claims. Plaintiffs seek to have defendants compensate the Plan in the amount the Plan would have had but for their breaches. Actions against fiduciaries for failure to remit participant

contributions to a plan are routinely and properly brought under ERISA sections 502(a)(2) and 409(a), even though the recovery of these losses is intended to and will, ultimately, redound to the benefit of plan participants. E.g., Bannistor v. Ullman, 287 F.3d 394, 398 (5th Cir. 2002); Prof'l Helicopter Pilots Ass'n v. Denison, 804 F. Supp. 1447, 1450 (M.D. Ala. 1992); Pension Benefit Guar. Corp. v. Solmsen, 671 F. Supp. 938, 946 (E.D.N.Y. 1987). Similarly, actions against fiduciaries for plan losses caused by a failure to collect employer contributions are also properly brought under ERISA sections 502(a)(2) and 409(a). E.g., Best, 310 F.3d at 934; Mercantile Bank, 137 F.3d at 585; McMahon v. McDowell, 794 F.2d 100, 109 (3d Cir. 1986).

B. Plaintiffs seek relief for the Plan even though the money recovered will ultimately be used to pay benefits

Citing a statement in plaintiffs' brief that they seek "'to make the plan participants whole,'" (R243, at 6 n.7, JA 1267), the district court found that the plaintiffs are not seeking to recover damages suffered by the Plan but are "attempting to recover benefits and contributions which they are allegedly owed by the now defunct" Plan. (Id. at 6, JA 1267). If the phrase is read in context, however, plaintiffs clearly stated that they are seeking relief for the Plan:

> The plaintiffs submit that under ERISA Section 502(a)(2) when a breach of fiduciary duty is proven, then the Plan is entitled to relief from the breaching fiduciaries, sufficient to make the plan participants whole. Section 502(a)(2) also requires under these circumstances that the Plan be

> operated under the supervision of a court appointed trustee to its conclusion. . . .
>
> The court-appointed trustee would administer a trust funded by the make whole relief awarded to the plan.

(R237 Pls.' Mem. Post Summ. J. 4-5, JA 1223-24 (emphases added)). Moreover, the complaint sought "restitution of all damages suffered by the Plan and its participants." (R75 Verified Am. Compl. 3, JA 116). The Plan's losses are the amounts the fiduciaries would have collected had they sought to enforce National Latex's funding obligation and the amount of the diverted participant contributions. Plaintiffs properly seek to hold the fiduciaries personally liable to restore those losses to the Plan pursuant to ERISA sections 502(a)(2) and 409(a), 29 U.S.C. 1132(a)(2), 1109(a).

Because the Plan no longer functions, plaintiffs appropriately seek an order appointing an independent fiduciary to hold any amounts recovered from defendants in trust, adjudicate the unpaid claims and, to the extent possible, pay the claims and restore the lost assets to the Flexible Benefits Accounts. (R237 Pls.' Mem. Post Summ. J. 7, JA 1226). See Jackson v. Truck Drivers' Union Local 42 Health & Welfare Fund, 933 F. Supp. 1124, 1138 (D. Mass. 1996) (where plan is terminated, "ERISA authorizes [a c]ourt to create a trust or other equitable tool to make plan beneficiaries whole") (citing Amalgamated Clothing & Textile Workers

Union v. Murdock, 861 F.2d 1406, 1417-19 (9th Cir. 1988)).[5] Plaintiffs estimate that a total of $430,000 in unpaid claims exists. (R237 Pls.' Mem. Post Summ. J. 5-7, JA 1224-1226). Ultimately, as the district court pointed out, the losses that plaintiffs seek to recover for the Plan will go to pay these benefits in the form of checks to health providers and Plan participants. This fact, however, does not make the recovery of the missed and diverted contributions any less a recovery of "losses to the plan" than would be true of the recoveries in any other case arising under ERISA section 502(a)(2). The money recovered by plans in all 502(a)(2) cases necessarily goes to the payment of plan expenses and benefits because ERISA requires it. See 29 U.S.C. 1104(a)(1)(A) (requiring fiduciary to discharge his duties for "the exclusive purpose" of "providing benefits" and defraying plan expenses). Thus, in every case arising under section 502(a)(2), the recovery ultimately goes to the payment of benefits -- that is the point of the relief and of ERISA's authorization of a recovery, not a basis for denying relief, as the district court erroneously determined.

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[5] Even if the Plan was formally terminated, which the participants contest, plaintiffs' rights to seek relief were not extinguished. Murdock, 861 F.2d at 1418; Sommers Drug Store Co. Employee Profit Sharing Trust, 883 F.2d 345, 347, 350 (5th Cir. 1989) (no significance attached to fact that plan was terminated in holding the participants had standing).

C. The cases relied upon by the district court are distinguishable

The district court's reliance on the Supreme Court's statement in Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 140 (1985), that relief under 502(a)(2) must "inure[] to the benefit of the plan as a whole" is misplaced. Unlike this case, the plaintiff in Russell brought suit for compensatory and punitive damages payable not to the plan for a loss of plan assets, but directly to her to compensate her for a delay in the payment of her benefits under a disability plan. Id. at 137-38. In holding that the plaintiff in that case did not have standing to sue under sections 409(a) and 502(a)(2), Russell distinguished relief to be paid to the plan to recoup losses arising from the mismanagement of plan assets -- which is available under those provisions -- from relief to be paid directly to an individual as damages for pain and suffering caused by a benefit payment delay, as sought in that case. Id. at 143-44. Indeed, as the Supreme Court observed in Russell, "the crucible of congressional concern was misuse and mismanagement of plan assets." Id. at 140 n.8. Here, plaintiffs' claim is focused precisely on the alleged mismanagement and loss of the Plan's assets -- the Plan's contractual rights to employer contributions and the diversion of employee contributions to the employer's creditors. Plaintiffs seek to recover the amount that the Plan lost as a direct result of fiduciary breaches, not consequential damages for personal injuries.

Tregoning v. American Community Mutual Insurance Co., 12 F.3d 79 (6th Cir. 1993), is also distinguishable. There, plaintiffs alleged that the administrator of a health plan breached its fiduciary duties by failing to notify the participants that the employer was not funding the account from which the administrator paid claims. Plaintiffs sued under ERISA sections 502(a)(2) and 409(a), alleging that the administrator was "personally liable to plaintiffs for their damages," the unpaid claims. Id. at 83 (emphasis in original). The court dismissed the claims because plaintiffs expressly did not seek relief for the plan. Id. Unlike the instant case, plaintiffs in Tregoning did not allege that the administrator unlawfully diverted plan assets, failed to enforce the plan's contractual right to employer contributions, or otherwise caused a loss to the plan.

The other Sixth Circuit cases cited by the court are also inapposite; they did not involve fiduciary breaches that caused a loss or diversion of plan assets. Bauer v. RBX Indus., Inc., 368 F.3d 569, 581-84 (6th Cir. 2004) (termination of welfare benefits under a collective bargaining agreement is not actionable under 502(a)(2); bare decision to terminate a plan is not a fiduciary act); Weiner v. Klais & Co., 108 F.3d 86 (6th Cir. 1997) (claim for erroneous determination of benefit claim); Adcox v. Teledyne, Inc., 21 F.3d 1381, 1388-90 (6th Cir. 1994) (termination of welfare benefits under a collective bargaining agreement is not actionable under 502(a)(2)).

Therefore, the district court erred in holding that the participants have no remedy under ERISA sections 502(a)(2) and 409(a), 29 U.S.C. 1132(a)(2), 1109(a).

III. UNDER ERISA SECTION 502(a)(3), THE PARTICIPANTS MAY RECOVER THE LOSSES CAUSED BY THE FIDUCIARIES' MISREPRESENTATIONS

Consistent with their duty of undivided loyalty, fiduciaries may not lie to participants. Varity Corp. v. Howe, 516 U.S. 489 (1996). Plaintiffs allege that the fiduciaries breached this duty by representing to them in various memoranda that benefit claims would be paid when they knew they would not be, and they assert, on this basis, that the fiduciaries are liable to pay them an amount equal to the unpaid claims under ERISA section 502(a)(3), 29 U.S.C. 1132(a)(3).[6] Although the district court initially denied defendants' summary judgment motion because genuine issues of material fact existed as to whether the memoranda contained misrepresentations and whether the participants relied on them to their detriment, (R235, at 35, JA 1207), the district court ultimately dismissed plaintiffs' case because the relief they sought was not "appropriate equitable relief" under section 502(a)(3). (R243, at 14-15, JA 1275-76).

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[6] The Secretary takes no position on the factual issues of whether the fiduciaries made misrepresentations or the participants relied on them.

In reaching this conclusion, the district court relied on decisions of this Court which limit relief under section 502(a)(3) to "equitable restitution." (R243, at 11-14, 1272-75) (citing QualChoice v. Rowland, 367 F.3d 638, 649-50 (6th Cir. 2004), cert. denied, 544 U.S. 942 (2005); Crosby v. Bowater, Inc., 382 F.3d 587, 595-96 (6th Cir. 2004), cert. denied, 544 U.S. 976 (2005); Caffey v. UNUM Life Ins. Co., 302 F.3d 576, 583-84 (6th Cir. 2002); Helfrich v. PNC Bank, Ky., Inc., 267 F.3d 477, 482-83 (6th Cir. 2001)). In QualChoice, for instance, a plan sued a participant under a plan provision that required the participant to reimburse the plan for medical expenses it paid if the participant recovers those same expenses from a third party tortfeasor. 367 F.3d at 640. Reading the Supreme Court's decisions to limit relief under section 502(a)(3) to "equitable restitution," this Court held that the plan had not met the requirements for equitable restitution because, although the participant held the tort recovery in an identifiable fund, the plan did not establish that specific property belonging to the plan could be traced to the participant's possession. Id. at 649.

Sereboff v. Mid Atlantic Medical Services, Inc., 126 S. Ct. 1869, 1873 n.1 (2006), expressly rejected this Court's holding in QualChoice and undermined the basis of this Court's decisions under section 502(a)(3). Like QualChoice, Sereboff involved a health plan that sued participants under a plan provision that required the participants to reimburse the plan if the participants recovered medical

expenses from a third party. Contrary to QualChoice, Sereboff held that equitable restitution is not the only remedy available under section 502(a)(3), and that consequently an "equitable lien by agreement" could be enforced without meeting the requirement of equitable restitution that money be traced back to the trust fund. 126 S. Ct. at 1875-76 ("there was no need in [Great-West Life & Annuity Insurance Co. v. Knudsen, 534 U.S. 204 (2002)] to catalog all the circumstances in which equitable liens were available in equity"). Because Sereboff directly undermined the reasoning of this Court's earlier cases, this Court may reconsider and limit or, if necessary, overrule them. See Cobb v. Contract Transp., Inc., 452 F.3d 543, 548 (6th Cir. 2006).

The Supreme Court has not considered the issue in this case: whether monetary or make-whole relief against a fiduciary is available under section 502(a)(3). But see Aetna Health Inc. v. Davila, 542 U.S. 200, 224 (2004) (Ginsberg, J., concurring) ("Congress, or this Court will one day" confirm that Congress "intended ERISA to replicate the core principles of trust remedy law, including the make-whole standard of relief.") (internal quotation marks and citation omitted).[7] The Supreme Court has, however, considered and limited the scope of equitable relief under section 502(a)(3) against non-fiduciaries. Mertens

[7] Moreover, the majority in Davila noted that the government's brief had suggested that monetary relief was available under section 502(a)(3). Although the Court decided the issue was not before them, it certainly treated this as an open issue. 542 U.S. at 222 n.7.

v. Hewitt Assocs., 508 U.S. 248 (1993) (loss remedy unavailable against plan actuary because not "equitable"); Great-West, 534 U.S. at 208-10 (plan could not recover damages from plan participant under plan provision requiring participant to reimburse plan for benefits from tort recovery from third parties).

In those cases, the Supreme Court held that relief is "equitable" within the meaning of section 502(a)(3) only if it falls within a category of relief "typically available in equity" in the days when the bench was divided between law and equity. Sereboff, 126 S. Ct. at 1873-74 (quoting (emphasis in original) and clarifying the test originally set forth in Mertens, 508 U.S. at 256-58); Great-West, 534 U.S. at 219 (same). Sereboff clarified that "equitable restitution" of the sort at issue in Great-West is only one of several categories of remedies that would have been "typically available in equity," 126 S. Ct. at 1875. So long as both the basis for the claim and the nature of the relief are equitable, monetary relief is available. Id. at 1874. Here, plaintiffs' claim (breach of fiduciary duty) and nature of the relief (monetary relief sometimes known in equity as a surcharge) are both equitable.

In contrast to relief against non-fiduciaries, monetary relief sought by a beneficiary against a fiduciary to redress a breach was not only typically, but exclusively, available in equity. See Restatement (Second) of Trusts § 197 cmt. a, (1959); see also id. § 199 (beneficiary's suit to compel fiduciary to redress a breach

of trust seeks an "equitable remedy"). During the days of the divided bench, the beneficiary had no title to the trust property, and therefore, no legal interest in the trust, only an equitable one. Restatement (Second) §§ 2, 74 cmt. a; 3 Scott § 197. Lacking any title or legal interest, the beneficiary could not obtain relief in a law court, but rather could only find relief in the equity court. 3 Scott § 197; 1 Scott § 1.[8]

The equity court, unlike the law court, had the flexibility to compel the trustee to act according to its fiduciary duties to compensate the beneficiary for harm caused when those equitable duties were breached. 3 Scott §§ 197, 199; see also Clews v. Jamieson, 182 U.S. 461, 479-80 (1901). As the Restatement unequivocally sets forth, "the remedies of the beneficiary against the trustee [for a breach of duty] are exclusively equitable." Restatement (Second) § 197 (emphasis added).[9]

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[8] An exception allowed the beneficiary to bring a suit at law against a trustee who has a duty to pay money "immediately and unconditionally" to the beneficiary, as established by the trust instrument. See Restatement (Second) § 198 & cmt. b, illus. 1-4.

[9] See Restatement (Second) § 205 & cmts. a, c & illus. 1-7; 3 Scott § 199.3; see also Restatement (Second) §§ 197, 199 (setting forth "equitable remedies of beneficiary"); G. Bogert & G. Bogert, The Law of Trusts and Trustees § 861, at 3-4 (rev. 2d ed. 1995); see also 3 Scott §§ 199, 206 (enumerating money payment designed to redress fiduciary breach as one of the "equitable remedies" available to a beneficiary).

The recovery of monetary losses from a breaching fiduciary was a specific category of relief in equity sometimes called "surcharge." Surcharge required the trustee to pay "the amount necessary to compensate fully for the consequences of the breach." Restatement (Third) of Trusts § 205 & cmt. a (1992); Williams Elecs. Games, Inc. v. Garrity, 366 F.3d 569, 577 (7th Cir. 2004); Mailman Steam Carpet Cleaning Corp. v. Salem, 196 F.3d 1, 7 (1st Cir. 1999); see Morrissey v. Curran, 650 F.2d 1267, 1282 (2d Cir. 1981); see also Mosser v. Darrow, 341 U.S. 267, 270, 274-75 (1951) (remanding for determination of whether to surcharge a breaching trustee). As a monetary remedy designed to redress a breach of trust, surcharge was not only typically an equitable remedy, it was a remedy that could only be granted by courts of equity. See Restatement (Second) § 197; see also Williams Elecs., 366 F.3d at 577; Clews, 182 U.S. at 479-80. Only equity courts had power to enforce a trustee's duties with regard to the trust and its beneficiaries.

Thus, the Supreme Court in Sereboff noted that the relief sought by the plan in that case -- an "equitable lien by agreement" -- was within a category typically available in equity because such a lien derives from the "familiar rule of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing." 126 S. Ct. at 1875 (quoting Barnes v. Alexander, 232 U.S. 117, 121 (1914)) (emphasis added). The Court recognized that the power to order "trustees" to convey property, even when

that property consists of money and conveyance amounts to little more than the payment of such money to the intended beneficiaries of the funds, is within the province of equity. See Sereboff, 126 S. Ct. at 1875.

Therefore, although the Court in Mertens disallowed the recovery of monetary relief from a non-fiduciary, Sereboff supports a decision holding that monetary relief against a fiduciary (in that case a "constructive trustee") stands on an equitable footing. In contrast, although equity courts sometimes granted monetary relief against a non-fiduciary participant in a fiduciary breach rather than force a trust beneficiary to bring a separate suit in a law court, such relief was legal and was granted under the equity court's special powers to grant full relief. See Mertens, 508 U.S. at 255-57; Clews, 182 U.S. at 481; Restatement (Second) § 282 cmt. e; 4 Scott § 282.1.

Like the monetary relief sought in Sereboff, however, the monetary relief sought by plaintiffs from the fiduciaries here does not derive from any "special" power of the equity court. Surcharging a fiduciary for losses stemming from a breach of trust was not simply something that a court of equity could "occasionally" grant "to avoid multiple suits," as was the relief against the

non-fiduciary in Mertens. Instead, it constitutes a category of relief not only typically, but exclusively available in equity.[10]

The Seventh Circuit recognized the equitable nature of a monetary award against a breaching fiduciary in Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574 (7th Cir. 2000). The Seventh Circuit recognized that Section 502(a)(3) excludes legal damages, but explained that "'when sought as a remedy for breach of fiduciary duty [this kind of relief, which the Court called restitution] is properly regarded as an equitable remedy because the fiduciary concept is equitable.'" Id. at 592 (quoting Health Cost Controls of Ill., Inc. v. Washington, 187 F.3d 703, 710 (7th Cir. 1999)).[11]

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[10] The Restatement (Second) gives several examples of monetary awards fiduciaries must pay to redress their breaches. For instance, Illustration 1 explains: "A is trustee of $10,000 in cash. As a result of his negligence the money is stolen. A is liable for $10,000." § 205 cmt. c. Illustration 3 notes: "A is trustee of a claim against B for $1,000. B is solvent and A can collect the claim in full. A negligently fails to take steps to collect the claim until B becomes insolvent with the result that he is able to collect only $400 of the money owed by B. A is liable for $600." Id.; see id. § 197 & cmt. a.

[11] Courts have held that make-whole relief is not available against a fiduciary under Section 502(a)(3). E.g., LaRue v. DeWolff, Boberg & Assocs., 450 F.3d 570 (4th Cir. 2006); Pereira v. Farace, 413 F.3d 330 (2d Cir. 2005), cert. denied, 126 S. Ct. 2286 (2006) (non-ERISA case involving the right to a jury trial); Calhoon v. Trans World Airlines, Inc., 400 F.3d 593, 598 (8th Cir. 2005); Callery v. United States Life Ins. Co., 392 F.3d 401 (10th Cir. 2004), cert. denied, 126 S. Ct. 333 (2005); Helfrich, 267 F.3d at 482-83. Those decisions were incorrect for the same reasons that the district court was incorrect.

Therefore, the district court erred in holding that plaintiffs could not recover the losses caused by the alleged misrepresentations under section 502(a)(3).

CONCLUSION

For the above reasons, the decision of the district court should be reversed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Amicus Brief of the Secretary of Labor complies with the type-volume limitation provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief was prepared using Microsoft Word XP and contains 7000 words or less of Times New Roman (14 point) proportional type, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

Date: March 21, 2007

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CERTIFICATE OF SERVICE

I hereby certify that one copy of the Final Brief of the Secretary of Labor as Amicus Curiae was served upon the following counsel of record using Federal Express, postage prepaid, on March 21, 2007:

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