No. 06-12642-CC

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JIMMY R. WOODS, individually and on behalf
of a class of all others similarly situated,
Plaintiff,

MARK T. SPIVEY, individually and on behalf
of a class of all others similarly situated,
Plaintiff-Appellant,

v.

SOUTHERN COMPANY, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia, Atlanta Division

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF THE APPELLANT AND REQUESTING REVERSAL

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Spivey v. Southern Co., et al.
No. 06-12642-CC

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 11th Cir. R. 26.1, the Secretary of the United States Department of Labor (the "Secretary"), through her undersigned counsel, certifies that the Secretary is aware of the following persons who have an interest in the outcome of this appeal:

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Spivey v. Southern Co., et al.
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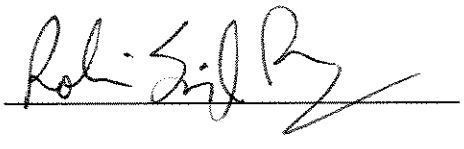
Certified By: 

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INTEREST OF THE SECRETARY

The Secretary of Labor has primary enforcement authority for Title I of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq. The Secretary's interests include promoting uniformity of law, protecting beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc). Because private enforcement actions play an important role in ensuring proper administration of employee benefits plans and compliance with ERISA's statutory requirements, the Secretary has a substantial interest in ensuring that courts do not unduly restrict participants' access to federal court by requiring exhaustion of internal review procedures designed for determination of individual benefit claims before a participant may bring suit in federal court to restore losses to the plan caused by a fiduciary breach.

STATEMENT OF THE ISSUES

1. Whether a plan participant must exhaust internal review procedures established for determination of individual benefits before bringing suit under sections 502(a)(2) and 409(a) of ERISA, 29 U.S.C. § § 1132(a)(2) and 1109(a), for recovery of losses to a plan caused by a fiduciary breach.

2. Even assuming exhaustion of such claims is generally required, whether resort to internal review procedures was not required under the facts of this case.

STATEMENT OF THE FACTS

1. Mark T. Spivey is a former employee of Southern Company, and a participant in the Southern Company Employee Savings Plan ("Plan").[1] The Plan is a 401(k) defined contribution plan that offers participants various investment options. The Plan is funded, in part, by employee contributions, which the employees direct into one or more of the investment options. Southern provides matching contributions, which are automatically invested in the Southern Company Stock Fund, one of the investment options under the Plan. Woods v. Southern Co., 396 F. Supp. 2d 1351, 1357 (N.D. Ga. 2005).

Mirant Corporation, an energy trading company, was a long-time subsidiary of Southern. In 2000, Mirant became a publicly-traded company by offering approximately 20 percent of its stock in an initial public offering. The following year, Southern spun off its remaining interest in Mirant by providing Southern shareholders with fractional shares of Mirant stock. As a result, the Plan, which was a large shareholder in Southern, acquired a large number of shares of Mirant stock. The Plan held the Mirant stock in the Mirant Stock Fund which, like the Southern Company Stock Fund, was an investment option under the Plan. Woods, 396 F. Supp. 2d at 1357.

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[1] Spivey was substituted as the class representative for the original plaintiff, James P. Woods, who died during the pendency of the suit.

The Plan's initial Mirant holdings allegedly were worth hundreds of millions of dollars. The value of the Mirant holdings declined, however, as allegations of illegal manipulation of the energy market and unlawful trading and accounting practices became public in 2002 and 2003. In May 2003, Mirant posted a $2.4 billion loss for 2002. After the announcement, Mirant's stock price fell from $47 per share to $2.01 per share, and on July 14, 2003, Mirant filed for Chapter 11 bankruptcy. Following the announcement of the bankruptcy filing, Mirant stock fell to below $0.25 per share. Throughout this period, the Southern Plan continued to hold its Mirant stock. Woods, 396 F. Supp. 2d at 1357-58.

2. In June 2004, plaintiff James Woods (for whom plaintiff Spivey was later substituted) brought suit under ERISA sections 409(a) and 502(a)(2), alleging that defendants Southern, Southern Company Services ("SCS"), SCS's Board of Directors, the Employee Savings Plan ("ESP") Committee, and the Pension Investment Fund Review Committee, all acted in various capacities as fiduciaries of the Plan, and all breached their fiduciary duties in various ways. Woods, 396 F. Supp. 2d at 1358. More specifically, plaintiff alleged that the defendants breached their fiduciary duties to the Plan and its participants by: (1) failing to manage the Plan's investment in Mirant stock prudently and loyally inasmuch as they knew or should have known that financial misconduct taking place at Mirant ultimately would cause the value of Mirant stock to drop precipitously; (2) failing to provide

participants with complete and accurate information regarding Mirant sufficient to advise participants of the true risks of investing their retirement savings in Mirant stock during the relevant time; and (3) failing to properly monitor the performance of those they appointed as fiduciaries and failing to provide them with complete and accurate information regarding Mirant. Id. Woods sought, among other things, an order requiring the defendants to restore losses to the Plan resulting from the alleged fiduciary breaches. Id.

The defendants initially moved to dismiss on a number of bases, but did not mention exhaustion. With one exception relating to equitable remedies sought by Woods, the district court denied the motion to dismiss, holding that Woods' allegations of mismanagement of assets, failure to monitor, failure to speak truthfully and correct misinformation, and co-fiduciary liability, stated claims upon which relief could be granted. Woods, 396 F. Supp. 2d at 1379.

Following Woods' death, Spivey was substituted as the putative class representative, and he filed an amended complaint on November 23, 2005. Spivey v. Southern Co., 427 F. Supp. 2d 1144, 1147 (N.D. Ga. 2006); R.E. 3.

After more than eighteen months of litigation, the defendants moved for summary judgment arguing, for the first time, that Spivey had not pursued internal plan remedies before filing suit. Spivey, 427 F. Supp. 2d at 1146 (complaint filed in June 2004); R.E. 5 (portion of summary judgment motion, filed February 21,

2006). The defendants argued that Spivey was required to exhaust the Plan's review procedures under the terms of a publication called "Your Guide to Benefits" (the "Guide"), which Southern distributes to all Plan participants. Id. at 1149, 1151.

3. The district court granted defendants' motion for summary judgment. Spivey, 427 F. Supp. 2d at 1157. The court held that, under Eleventh Circuit precedent, participants are required to exhaust internal review procedures before filing suit, even in actions based on statutory violations. Id. at 1148. Although the district court noted that it had discretion in deciding whether to enforce the exhaustion requirement, the court reasoned that this discretion was circumscribed by the Eleventh Circuit's recognition of only narrow exceptions to exhaustion "when 'resort to administrative remedies would be futile or . . . inadequate,' or where a claimant is denied 'meaningful access' to the administrative review scheme." Id. at 1148. The court held that none of these exceptions were applicable.

First, the court construed the Guide's statement that "'[n]o legal action to recover benefits or enforce or clarify rights under a Plan can be commenced until you have first exhausted the claims and review procedures provided under the Plan'" to require exhaustion. Spivey, 427 F. Supp. 2d at 1151. Although the court recognized that this language, which is in a portion of the Guide entitled "Claim

Denial," does not explicitly refer to fiduciary breach claims, the court reasoned that, "if in doubt, exhaustion is required" in the Eleventh Circuit. Id. at 1152 (citation omitted). Moreover, the court held that language in another section of the Guide, which stated, without qualification, that a participant claiming a misuse of Plan funds could "file suit in federal court," did not excuse a participant from exhausting internal plan remedies, but simply recited the general rights of participants and beneficiaries under ERISA. Id. at 1153-54.[2]

The court also held that Spivey had not shown that exhaustion in this case would have been futile. The court reasoned that, under Eleventh Circuit precedent, exhaustion is not futile merely because the ERISA fiduciary hearing the claim has indicated that it finds the participant's claim meritless. Rather, futility can only be proven when a litigant is unable to present his claim for administrative review and

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[2] This Section of the Guide, entitled "Your Rights Under ERISA," informs plan participants and beneficiaries of their right to seek redress for violations of ERISA's fiduciary provisions as well as benefit claim denials:

> Provided you have fully exhausted the Plan's claims and review procedures, you may file suit in a federal or state court if you have a claim for benefits that is denied or ignored in whole or in part . . . . If a Plan fiduciary misuses Plan money or you are discriminated against for asserting your rights, you may seek assistance from the United States Department of Labor or file suit in federal court.

R.E. 8, p. R5. Thus, this provision contrasts benefit claims, where exhaustion is expressly required, with fiduciary breach claims (at least those involving misuse of plan money and discrimination), where no exhaustion requirement is imposed.

have that claim considered, which the court presumably did not think was the case here. Spivey, 427 F. Supp. 2d at 1154-56.

Finally, the court held that Spivey could not avail himself of the exception recognized in Watts v. BellSouth Telecommunications, Inc., 316 F.3d 1203, 1205 (11th Cir. 2003). In that case, the Eleventh Circuit excused a pro se participant who failed to exhaust the administrative process because of her reasonable confusion as to whether exhaustion was required by the plan terms. The district court reasoned that, in this case, Spivey provided no evidence that he misconstrued the Plan or that he failed to file an administrative appeal because he misread the Plan, and thus was not excused from exhaustion under the Watts rule. 427 F. Supp. 2d at 1156-57.

SUMMARY OF THE ARGUMENT

Exhaustion of administrative remedies before bringing suit under ERISA sections 409(a) and 502(a)(2) for losses to a plan caused by fiduciary breach is not supported by the statute and would be an "empty exercise in legal formalism." Perrino v. S. Bell Tel. & Tel. Co., 209 F.3d 1309, 1318 (11th Cir. 2000). For this reason, numerous courts have correctly held that, although ERISA implicitly requires a plaintiff to exhaust statutorily-imposed review procedures before bringing suit for payment of benefits under a plan, there is no exhaustion requirement applicable to fiduciary breach claims. Moreover, while this Court has

applied an exhaustion requirement in a number of contexts in addition to benefit claims, it has never required exhaustion in the situation presented in this case: where a plaintiff claims that fiduciary breaches with regard to the mismanagement of plan assets caused investment losses to the plan. This Court should decline to apply an exhaustion requirement to this kind of claim. Instead, this Court should hold, as have many other jurisdictions as a matter of law, that participants seeking recovery of such losses to a plan under ERISA sections 502(a)(2) and 409 are not required to exhaust administrative remedies.

Alternatively, this Court should hold that this case falls within the Eleventh Circuit's exception for exhaustion when "resort to administrative remedies would be futile or the remedy inadequate, or where a claimant is denied 'meaningful access' to the administrative review in place." Perrino, 209 F.3d at 1316 (citations omitted). Here, the review procedure itself, which is clearly designed for review of benefit denials, does not actually provide for review of fiduciary breach claims. The plaintiffs, therefore, never had meaningful access to review. Moreover, a fiduciary reviewing the breach claim under the benefit review procedures provided by the Plan would be powerless to impose the remedy properly sought by the plaintiffs – the imposition of personal liability on the breaching fiduciaries to restore plan losses stemming from the breaches. Finally, exhaustion would be

futile in light of the vigorous defense of the case and denial of fiduciary liability that defendants have asserted to date.

ARGUMENT

I. ERISA does not require a plaintiff to exhaust internal plan review procedures before bringing suit under sections 409(a) and 502(a)(2) for losses to a plan caused by fiduciary breaches

In the context of benefit claims, the exhaustion requirement is rooted in an express statutory provision requiring plans to adopt procedures ensuring full and fair review in conformity with the Secretary of Labor's detailed regulations. See 29 U.S.C. § 1133; 29 C.F.R. § 2560.503-1. In accordance with ERISA's mandate of a full and fair claims process, the courts have uniformly required plaintiffs to avail themselves of these procedures before bringing suit in federal court to obtain benefits. As the Ninth Circuit observed in its seminal case on exhaustion, "[it] would certainly be anomalous if the same good reasons that presumably led Congress and the Secretary to require covered plans to provide administrative remedies for aggrieved claimants did not lead the courts to see that those remedies are regularly used." Amato v. Bernard, 618 F.2d 559, 567 (9th Cir. 1980).

In contrast, no provision of ERISA expressly or implicitly requires exhaustion of administrative remedies before a participant may bring a fiduciary breach claim in federal court under ERISA section 502(a)(2) for losses to the plan. This is not surprising because, in enacting ERISA, Congress expressly sought to

protect "the continued well-being and security of millions of employees and their dependents" by imposing strict standards of conduct on plan fiduciaries, and providing "ready access to the Federal courts," to enforce those standards. 29 U.S.C. § 1001(a), (b).

To this end, ERISA section 409(a) makes any plan fiduciary "who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title . . . personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). Section 502(a)(2) of ERISA, in turn, provides that a civil action may be brought by a participant, beneficiary, fiduciary or the Secretary of Labor for "appropriate relief under § 409." 29 U.S.C. § 1132(a)(2). As the Supreme Court noted in Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 140 n.8, 105 S. Ct. 3085, 3089 (1985), sections 502(a)(2) and 409 are designed to provide relief to the plan for fiduciary breaches relating to the "misuse and mismanagement of plan assets," precisely what is sought here.

Noticeably missing from sections 502(a)(2) and 409 is any requirement that the enumerated parties exhaust internal review procedures before bringing suit to remedy fiduciary breaches that harm the plan. Nor is there any other provision in

ERISA indicating that Congress intended for an exhaustion requirement to apply in those circumstances.[3]

The Supreme Court has repeatedly commented on "ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.'" Russell, 473 U.S. at 146, 105 S. Ct. at 3092 (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361, 100 S. Ct. 1723, 1726 (1980)). As the Supreme Court noted, "[t]he six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did not intend to authorize other remedies" or presumably other procedural requirements "that it simply forgot to incorporate expressly." Russell, 473 U.S. at 146, 105 S. Ct. at 3092. Thus, the absence of any provision in the statute indicating that Congress intended for plaintiffs bringing suit under sections 502(a)(2) and 409 to first exhaust internal review procedures is telling.

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[3] In other contexts, Congress has required plaintiffs to serve a "notice to sue" letter on the defendants before they can file suit in federal court. See, e.g., ManaSota-88, Inc. v. Tidwell, 896 F.2d 1318, 1321 (11th Cir. 1990) (Clean Water Act); Loggerhead Turtle v. County Council of Volusia County, Fla., 148 F.3d 1231, 1255-56 (11th Cir. 1998) (Endangered Species Act). In those statutes, Congress expressly mandated that plaintiffs send notice letters before filing suit. Similarly, the common law of trusts required that a beneficiary make a demand on a trustee before filing suit. See Scott on Trusts § 294.1 (4th ed. 1989) ("The beneficiary can maintain a suit in equity against the tortfeasor only if the trustee improperly refuses or neglects to bring an action."). In stark contrast, ERISA imposes no such requirement for fiduciary breach claims.

For this reason, numerous courts have correctly held that although ERISA implicitly requires a plaintiff to exhaust statutorily-imposed review procedures before bringing suit for payment of benefits under a plan, there is no exhaustion requirement applicable to fiduciary breach claims. See, e.g., Zipf v. AT & T Co., 799 F.2d 889, 891-92 (3d Cir. 1986); Smith v. Sydnor, 184 F.3d 356, 364 (4th Cir. 1999); Milofsky v. American Airlines, Inc., 442 F.3d 311, 312 (5th Cir. March 2, 2006) (en banc); Richards v. General Motors, 991 F.2d 1227 (6th Cir. 1993); Burds v. Union Pacific Corp., 223 F.3d 814, 817 (8th Cir. 2000); Horan v. Kaiser Steel Retirement Plan, 947 F.2d 1412, 1416 n.1 (9th Cir. 1991); Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197 (10th Cir. 1990).

In other words, because "there is no statutory requirement for an appeals procedure respecting claims not involving benefits, the logic of the exhaustion requirement no longer applies." Licensed Div. Dist. No. 1 v. Defries, 943 F.2d 474, 479 (4th Cir. 1991) (citations omitted). Thus, the primary reason for requiring exhaustion of benefit claims – the statutory text requiring a claims procedure – does not support requiring exhaustion of claims for breach of fiduciary duties involving the investment of plan assets.

Nor do the other reasons on which courts have relied in requiring exhaustion of benefit claims support requiring exhaustion of fiduciary breach claims involving the investment of plan assets. In the benefit context, the plan fiduciary is usually

given discretionary authority to interpret the plan and to make benefit claim determinations, which are generally subject to a deferential standard of review. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 111, 109 S. Ct. 948, 954-55 (1989). In contrast, fiduciary breach claims do not "implicate[] the expertise of a plan fiduciary" but instead "involve[] an interpretation and application of a federal statute, which is within the expertise of the judiciary." Smith, 184 F.3d at 365. Accordingly, this "justification[] for an exhaustion requirement in other contexts, deference to administrative expertise, is simply absent." Zipf, 799 F.2d at 893.

Nor is such a procedure likely to be more efficient, as it is when a plan administrator or other fiduciary reviewing a benefit claim determines that benefits are due and orders the plan to pay. See Spivey, 427 F. Supp. 2d at 1148 (citing efficiency as one justification for exhaustion). In fact, since a plan administrator or other reviewing fiduciary is not likely to have any power over the other breaching fiduciaries, at best, such an official would have to file suit if he determines that a breach has taken place. But ERISA section 502(a)(2) expressly allows plan participants and beneficiaries to bring such suits, and the only thing that will have been accomplished by exhaustion is a delay in such a suit and the substitution of plaintiffs. Thus, "[t]o require that the plaintiffs in this case ask the trustees to personally repay large sums of money would be futile, create needless delay, and would not fulfill the policies underlying exhaustion." Bartz v. Carter, 709 F. Supp.

827, 828 (N.D. Ill. 1989). See also Nilles v. Sears, Roebuck & Co., 1997 WL 610339, at *5 (N.D. Ill. Sept. 29, 1997) (where plan administrator is officer of fiduciary alleged to have breached fiduciary duty by intentionally withholding information, review of claim would be futile); Healy v. Axelrod Constr. Co. Defined Benefit Pension Plan & Trust, 787 F. Supp. 838, 842-43 (N.D. Ill. 1992) (where claimant alleges willful fiduciary misconduct, review by these same fiduciaries would therefore probably be futile, and requiring exhaustion would merely delay rather than prevent litigation).

Furthermore, the policies weighing in favor of exhaustion, such as judicial efficiency and promotion of consistent treatment of claims, are far less pertinent to an alleged fiduciary breach causing losses to the plan than to individual disputes over benefits. The financial solvency of the plan involves the public interest as well as the interest of the participant and beneficiaries, as evidenced by ERISA section 502(a)(2), which gives the Secretary of Labor, as well as participants, beneficiaries, and fiduciaries the authority to sue for relief to the plan. See Fitzsimmons, 805 F.2d at 692-93 (Secretary of Labor has authority to bring fiduciary actions "in order that it might sustain the very public confidence so necessary to the vitality of the enormous private pension fund system . . . that substantially influences the revenues of the United States").

Requiring exhaustion when a plaintiff brings suit seeking restoration of plan losses resulting from fiduciary breaches is not only inconsistent with the statutory framework, it is also unworkable. Benefit plans are required to have claims procedures that are consistent with the Secretary's regulations. These regulations set forth the requirements for the statutory requirement in section 503 that plans provide "full and fair review" to participants whose claims for plan benefits have been denied. 29 U.S.C. § 1133. The Secretary's regulations do not require that a plan have procedures for reviewing fiduciary breach claims, see 29 C.F.R. § 2560.503, and for this reason plans generally have no appeal procedures geared for reviewing such claims. See Defries, 943 F.2d at 479 (fact that plans have no appeal procedures for non-benefit claims is further evidence that the appeals procedure required by ERISA § 1133 has no application to non-benefit challenges).

Nor is it likely that such "full and fair" review procedures could be developed, at least in cases, such as this one, where at least some of the fiduciaries accused of breaching their duties would also be the fiduciaries who would review the claim against them. See R.E. 8, pp. Q14, R10 (naming the defendant ESP Committee as the Plan Administrator and giving it "exclusive discretionary authority" to interpret the Plan and decide all questions of benefit eligibility). Under such circumstances, the participant cannot obtain a fair review of his

fiduciary breach claim nor can he obtain a meaningful remedy through exhaustion of administrative procedures. See Smith, 184 F.3d at 365 n.9 ("By allowing a plaintiff to bring a claim for breach of fiduciary duty in federal court before exhausting administrative remedies, we recognize the general principle . . . that we do not give full credence to an ERISA fiduciary's assessment of his own allegedly wrongful conduct.").

Unlike a number of other circuits, this Court has required exhaustion in certain instances other than benefits claims. While this Court has required exhaustion of administrative remedies in some cases alleging statutory violations of ERISA, Perrino, 209 F.3d at 1316 n.6, those suits have generally involved situations where the alleged statutory breach was integrally related to a claim for benefits and the participant sought relief to himself, not to the plan. For instance, in Perrino, the participants sought a benefit (a termination pay allowance) that was based on the terms of the company's collective bargaining agreement, and the court held that the participants had to exhaust their remedies using the procedures provided in that agreement. In Curry v. Contract Fabricators, 891 F.2d 842, 846 (11th Cir. 1990), this Court held that exhaustion would apply (though it ultimately excused it for futility), where the plan paid the participant's benefits after he filed suit, and he continued the suit in order to seek attorneys' fees and the statutory penalty for failing to timely produce documents. Similarly, in Mason v.

Continental Group, 763 F.2d 1219 (11th Cir. 1985), the plaintiffs brought suit under ERISA section 510, 29 U.S.C. § 1140, alleging that they had been wrongfully terminated in order to avoid paying them benefits, and this Court required exhaustion.[4] Likewise, in both Byrd v. MacPapers, 961 F.2d 157 (11th Cir. 1992) and Counts v. American General Life Ins. Co., 111 F.3d 105 (11th Cir. 1997), the participants also brought section 510 claims in connection with their benefit claim.[5]

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[4] ERISA section 510, 29 U.S.C. § 1140, in part, forbids terminating, fining, suspending, or otherwise retaliating or discriminating against a participant or beneficiary for exercising rights to which they are entitled under a plan. The majority of 510 cases are intertwined with a request for benefits; for example, a participant is fired after she makes a benefits claim. Unlike a fiduciary breach claim, a 510 claim involves harm to an individual participant, not losses to a plan, and can often be remedied by re-employment or payment of benefits.

[5] Most recently, in an unpublished per curiam decision, this Court held that a plan participant suing a pharmacy benefit manager to his health care plan for fiduciary breach was required to exhaust the plan's internal review procedures before bringing suit. Bickley v. Caremark RX, Inc., No. 05-10973, 2006 WL 1746928 (11th Cir. June 27, 2006). As an unpublished decision, this case has no precedential value. Eleventh Circuit Rule 36-2. Moreover, the Secretary filed an amicus brief in Bickley saying that exhaustion was not required in that context. In any event, Bickley is distinguishable. Bickley involved allegations of wrongdoing by a third-party service provider, Caremark, with which the plan had contracted. Arguably, the plan's sponsor and the fiduciaries that had contracted with Caremark, rather than the plan's participants, were in the best position to assess Caremark's conduct and performance, and to assert any contractual or fiduciary claims on the plan's behalf. Thus, even though the case involved allegations of fiduciary breach, there were reasons unique to that case for requiring the participants to exhaust that are simply absent here.

None of these cases was a fiduciary breach suit, as here, involving allegations of mismanagement with regard to plan assets, a kind of case far removed from a benefit or section 510 case and singularly unsuited for resolution in an internal review procedure, for the reasons described above. While this Court, thus, has not decided the exhaustion issue in this context, it has cautioned that the facts of the case "necessarily shape the parameters of that requirement," Watts, 316 F.3d at 1207, and that the courts are "still in the process of shaping it insofar as new factual scenarios are concerned." Id. Moreover, this Court has quite correctly recognized that "there are situations where an ERISA claim cannot be redressed effectively through an administrative scheme." Perrino, 209 F.3d at 1318. In such "circumstances . . . requiring a plaintiff to exhaust an administrative scheme would be an empty exercise in legal formalism." Id. A claim for recovery of plan losses stemming from fiduciary mismanagement of plan investments, like the claim presented here, presents just such circumstances.[6]

For all these reasons, exhaustion of a fiduciary breach claim that seeks relief under section 409 is neither required by the statute nor consistent with its purposes. To require exhaustion under such circumstances would needlessly delay resolution

[6] Indeed, in Springer v. Wal-Mart Associates' Group Health Plan, 908 F.2d 897, 899-900 (11th Cir. 1990), this Court distinguished the district court's decision in Bartz, 709 F. Supp. at 828, on exactly such a basis, noting that Bartz involved a fiduciary breach claim, whereas Springer involved a benefit claim where exhaustion was required.

of fiduciary breach claims and would deny participants the "ready access to the Federal courts" that Congress intended the statute to provide. See 29 U.S.C. § 1001(b).

II. Exhaustion was not required in this case because the Plan provides no procedure for review of fiduciary breach claims, the reviewing fiduciary would have been powerless to provide the loss remedy sought by plaintiffs, and exhaustion of the review procedure provided by the Plan would have been futile

Although the district court generally has broad discretion to determine whether to enforce the exhaustion requirement, Perrino, 209 F.3d at 1315, this Court has held that no exhaustion is required where "resort to administrative remedies would be futile or the remedy inadequate, or where a claimant is denied 'meaningful access' to the administrative review scheme in place." Id. at 1316 (citations omitted). All three prongs of the Perrino exception are applicable here. Thus, even if the district court here was correct in holding that exhaustion generally is required before filing suit under ERISA sections 502(a)(2) and 409, it abused its discretion when it held that the exception to exhaustion did not apply in this case.

A. The Plan does not provide a procedure for administrative review of fiduciary breach claims and plaintiffs thus had no meaningful access to review

The district court erred when it held that the plaintiff could have used the administrative procedures set forth in the Guide. The Guide only provides for

submission and review of "[c]laims for benefits." R.E. 8, p. R5. It states that a participant must have "fully exhausted the Plan's claims and review procedures" before he can file suit for a "claim for benefits that is denied or ignored in whole or in part." Id. (emphasis added) It provides that "[c]laims for benefits must be made in the manner provided by the particular Plan," and that "no legal action to recover benefits or enforce or clarify rights under a Plan can be commenced until you have first exhausted the claims and review procedures provided under the Plan." Id. It then goes on to describe the procedures that apply if a participant's "claim for benefits under a Plan offered by the Company is denied, in whole or in part," including the time in which the administrator must give you notice of the denial, and what the written notice of the claim denial must include. It states that upon request, you will be provided copies of documents "that are relevant to any denial of benefits." R.E. 8, p. R6.

The numerous references to claims "for benefits," and the lack of references to other kinds of claims, demonstrate that these procedures apply only to claims for benefits. Similarly, the Plan language requiring exhaustion of suits to "enforce or clarify rights under a Plan" does not suggest that a participant must exhaust claims to enforce statutory rights, as opposed to those given under the Plan. Although the defendants assert, and the district court found, that the plaintiff should have exhausted administrative remedies, they point to no other provision in the Plan that

actually provides an administrative procedure for review of fiduciary breach claims. See In re Managed Care Litig., 2002 WL 1359734 (S.D. Fla. June 11, 2002) (rejecting the argument that the grievance procedures in the plan "broadly pertain to [all] grievances").

The only reference to fiduciary breach claims in the Guide informs participants that they may file suit in district court, with no mention of a requirement that they exhaust administrative remedies before doing so. The Guide provides that if "a Plan fiduciary misuses Plan money or if you are discriminated against for asserting your rights, you may seek assistance from the Department of Labor or you may file suit in a federal court." R.E. 8, p. R5.

That portion of the Guide providing that "[n]o legal action to recover benefits or enforce or clarify rights under a Plan" can occur without exhaustion of administrative remedies does not, on its face, apply to fiduciary breach claims brought under sections 502(a)(2) and 409. An action to enforce or clarify rights under a plan is brought under a separate ERISA section, 502(a)(1)(B), which allows a participant to bring an action "to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

The district court acknowledged that the Guide did not reference a fiduciary breach claim, but noted that at least two Eleventh Circuit decisions either enforced

or acknowledged a participant's duty to exhaust statutory claims where the language of the plan document appeared to limit review to benefit claims. Spivey, 427 F. Supp. 2d at 1151-52 (citing Mason, 763 F.2d at 1226-27; Curry, 891 F.2d at 845 n.3). Both of those cases, however, involved statutory violations related to benefit claims, not fiduciary breach claims involving the investment of plan assets and seeking recovery to the plan as here. See, supra, at 16. Where the statutory claim relates to the payment of benefits or individual claims, the plan fiduciaries generally have the ability to provide the relief requested by paying the benefit, providing the requested documents, or recommending reinstatement to employment. As discussed above, that is not the case where the participant seeks losses to the plan from a breaching fiduciary.

The district court also misread Eleventh Circuit precedent when it held that language in the Guide stating that a participant claiming a misuse of Plan funds may file suit in district court nevertheless required exhaustion of remedies. Both Springer, 908 F.2d at 898-99 (11th Cir. 1990) and Watts, 316 F.3d at 1208-09, involved claims for benefits. Even though the plan documents in both cases included mandatory language reciting beneficiaries' general rights under ERISA, the plan documents also contained procedures for administrative review of benefit claims. Accordingly, it made sense for the court to conclude that the general language informing participants of their ERISA rights did not excuse the

participant from exhausting the remedies that were available elsewhere in the plan document. That is not the case here where there are no available procedures for exhausting fiduciary breach claims.

B. A fiduciary reviewing the breach claim under the benefit review procedures provided by the Plan would have been powerless to provide the restoration of Plan losses sought by the plaintiffs here

Exhaustion was not required here under the Perrino exception for another reason: the ESP Committee, the named plan administrator under the Guide, is itself one of the named defendants, and has no power, in any case, to force the other fiduciary defendants to remedy the alleged breach. The ESP Committee's authority to resolve the dispute here, therefore, is quite different than that of a claims administrator resolving benefit claims or of an official rendering decisions under a collectively bargained grievance procedure. In a case where a participant complains of a denial of benefits, and also asserts that the denial was a breach of fiduciary duty, the claims process can effectively resolve the dispute by compelling the payment of benefits. Similarly, where, as in Perrino, the claim of fiduciary breach was directed at the company itself, and the company provided grievance procedures under its collective bargaining agreement, the grievance process could result in an effective resolution of the dispute. Perrino, 209 F.3d at 1317.

Here, however, even if the ESP Committee has authority to determine the complex fiduciary breach issues presented by the plaintiffs' claims, it could not compel the other fiduciaries to restore any resulting losses to the plan. At best, as discussed above, supra, at p.14, it would have to file its own suit in federal district court against the breaching fiduciaries (and co-defendants) under ERISA section 502(a)(2). Under Perrino, exhaustion is excused under such circumstances. Perrino, 209 F.3d at 1316; see also Salus v. GTE Directories Serv. Corp., 104 F.3d 131, 138 (7th Cir. 1997) (exhaustion is not required where the plan "does not provide a remedy should an employee attempt to bring a claim under [the statutory anti-retaliation] provision, nor has the [reviewing committee] ever addressed" such an issue); Chailland v. Brown & Root, Inc., 45 F.3d 947 (5th Cir. 1995) (exhaustion not required when "the grievance is completely foreign to the plan and plan is incapable of providing a remedy.").

C. The record establishes that exhaustion of any claims procedures in the Guide would have been futile

The district court also abused its discretion when it concluded that exhaustion of the claims procedure in the Guide would not have been futile. Although the Eleventh Circuit does not excuse exhaustion based merely on a probable negative outcome for the claimant, it would be little more than "an empty exercise in legal formalism" to require exhaustion on the facts of this case, and

exhaustion therefore is not required. Perrino, 209 F.3d at 1318. In this case, unlike all of the Eleventh Circuit cases in which participants unsuccessfully sought to fall within the futility exception, the fiduciary responsible for resolving the claim, the ESP Committee, is gravely conflicted and lacks the ability to provide meaningful relief from the plan. Here, the fiduciary would be called upon to decide a claim involving its own alleged mismanagement of plan assets, rather than a benefit claim, and establishing its own liability, rather than the plan's liability, for millions of dollars. There are no analogous Eleventh Circuit cases requiring exhaustion on similar facts.

The defendants, including the ESP Committee responsible for resolving benefit claims, have vigorously defended this lawsuit. The ESP Committee, for example, has asserted that it cannot be liable for the alleged fiduciary breaches because it does not have responsibility for control or management of the Plan's assets and, therefore, was not a fiduciary with respect to the challenged investment. See, e.g., Fifth Affirmative Defense of ESP Committee (the plan administrator), R.E. 4, p. 73. All of the defendants moved to dismiss the complaint, alleging that it did not state a claim under ERISA. Woods, 396 F. Supp. 2d at 1358-60. When, "by vigorously defending that policy in this litigation . . . the defendants have made it clear that there is virtually no possibility that they will voluntarily abandon the policy," it would be futile to require participants to go through the charade of

submitting the question to the defendants. Corsini v. United Healthcare Corp., 965 F. Supp. 265, 269 (D.R.I. 1997), dismissed in part, on other grounds, 51 F. Supp. 2d 103 (D.R.I. 1999).

Thus, the district court erred in holding that exhaustion would not have been futile, where the defendants, who continue to serve as fiduciaries of the Plan, did not raise the exhaustion issue during the first eighteen months of litigation, but instead vigorously defended their own actions. See Donaldson v. Pharmacia Pension Plan, 2006 WL 1669789, at *5 (S.D. Ill. June 14, 2006) (case was a poor candidate for exhaustion of administrative remedies, where "the Plan practices at issue have been the subject of . . . high-profile ERISA class actions in recent years . . . apparently without influencing the behavior of the Plan administrators"); Nasser v. Life Ins. Co. of North America, 2003 WL 23101799, at *3 (S.D. Ind. Sept. 5, 2003) (defendant waived exhaustion defense by waiting eighteen months to argue it; purposes of exhaustion "are not served when a plan waits as the defendant did here before raising the issue").

CONCLUSION

For the reasons set forth above, the Secretary requests that this Court reverse the district court's decision and hold that the plaintiff was not required to exhaust internal review procedures before filing suit for fiduciary breach.

Respectfully submitted,

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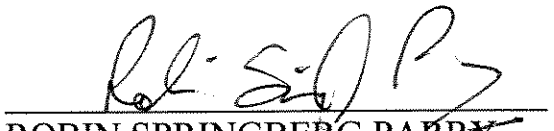
July 14, 2006

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I certify that the attached Brief of the Secretary of Labor As Amicus Curiae in Support of the Appellant and Requesting Reversal contains 6,472 words. This brief has been prepared in a proportionally-spaced typeface using Microsoft XP in Times New Roman 14-point font size.



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Dated: July 14, 2006

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Brief of the Secretary of Labor As Amicus Curiae in Support of the Appellant and Requesting Reversal and a copy of the brief on a disk in PDF file format were served by email and/or 1st class mail and Federal Express courier service, this 14th day of July, 2006, upon:

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