UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CAROL HARLEY, et al. Plaintiffs-Appellants, v. MINNESOTA MINING & MANUFACTURING COMPANY, Defendant-Appellee.	No. 00-2214
CAROL HARLEY, et al. Plaintiffs-Appellants, v. GIULIO AGOSTINI, et al. Defendants-Appellees.	No. 01-1213

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

EUGENE SCALIA
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

KAREN L. HANDORF
Deputy Associate Solicitor

Sara Pikofsky
Trial Attorney
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Ave., N.W.
N4611
Washington, D.C. 20210
(202) 693-5600

TABLE OF CONTENTS

Page

INTEREST OF THE DEPARTMENT OF LABOR 1

DISCUSSION 1

I. THE PANEL ERRED BY HOLDING THAT PARTICIPANTS IN AN OVER-FUNDED DEFINED BENEFIT PLAN DO NOT HAVE STANDING TO BRING SUIT FOR BREACH OF FIDUCIARY DUTY 1

II. THE EIGHTH CIRCUIT ERRED IN HOLDING THAT ERISA § 408(c)(2) PROVIDED AN EXEMPTION FOR A TRANSACTION PROHIBITED BY ERISA § 406(b)(1) 12

CONCLUSION 17

TABLE OF AUTHORITIES

Federal Cases: Page

Amalgamated Clothing & Textile Workers Union v. Murdock,
861 F.2d 1406 (9th Cir. 1988) 2

Brock v. Robbins
830 F.2d 640 (7th Cir. 1987) 2

Chevron, U.S.A., Inc. v. Natural Resources Defense Council,
467 U.S. 837 (1984) 16

Clinton v. City of New York,
524 U.S. 417 (1998) 5,6

Commissioner v. Keystone Consol. Indus. Inc.,
508 U.S. 152 (1993) 12

Department of Commerce v. U.S. House of Representatives,
525 U.S. 316 (1999) 6

Financial Insts. Retirement Fund v. Office of Thrift Supervision,
964 F.2d 142 (2d Cir. 1992) 7,8

Gilliam v. Edwards,
492 F. Supp. 1255 (D. N.J. 1980) 16

Gollust v. Mendell,
501 U.S. 115 (1991) 6,7

Harley v. Minnesota Mining & Mfg. Co.,
42 F. Supp.2d 898 (D. Minn. 1999), aff'd, 248 F.3d
901 (8th Cir. 2002) 9,14

Hughes Aircraft v. Jacobson,
525 U.S. 432 (1999) 9

LaScala v. Scrufari,
96 F. Supp. 2d 233 (W.D.N.Y. 2000) 15-16

Larson v. Northrop Corp.,
21 F.3d 1164 (D.C. Cir. 1994) 8,11

Lowen v. Tower Asset Mgmt., Inc.,
829 F.2d 1209 (2d Cir. 1987) 16

Massachusetts Mut. Life Ins. Co. v. Russell,
473 U.S. 134 (1985) 2,3

Patelco Credit Union v. Sahni,
262 F.3d 897 (9th Cir. 2001) 15

Pegram v. Herdrich,
530 U.S. 211 (2000) 13

Secretary of Labor v. Fitzsimmons,
805 F.2d 682 (7th Cir. 1986) 1

Whitfield v. Tomasso,
682 F. Supp. 1287 (E.D.N.Y. 1988) 16

Ziegler v. Connecticut Gen. Life Ins. Co.,
916 F.2d 548 (9th Cir. 1990) 8

Federal Statute:

Employee Retirement Income Security Act of 1974, amended:

Section 3(7), 29 U.S.C. § 1002(7) 2

Section 404, 29 U.S.C. § 1104 8

Section 404(a), 29 U.S.C. § 1104(a) 8

Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) 15

Section 406, 29 U.S.C. § 1106 12,13,14,15

Section 406(a), 29 U.S.C. § 1106(a) 13,14,16

Section 406(b), 29 U.S.C. § 1106(b) 13,14,16

Section 406(b)(1), 29 U.S.C. § 1106(b)(1) 12,13,14,15

Section 408(a), 29 U.S.C. § 1108(a) 13

Section 408(b), 29 U.S.C. § 1108(b) 13

Section 408(b)(2), 29 U.S.C. § 1108(b)(2) 13,14,16

Section 408(c), 29 U.S.C. § 1108(c) 14,15

Section 408(c)(1), 29 U.S.C. § 1108(c)(1) 14

Section 408(c)(2), 29 U.S.C. § 1108(c)(2) 12,14,15,16

Section 408(c)(3), 29 U.S.C. § 1108(c)(3) 14

Section 409, 29 U.S.C. § 1109 1,2

Section 413, 29 U.S.C. § 1113 11

Section 502(a), 29 U.S.C. § 1132(a) 2

Section 502(a)(2), 29 U.S.C. § 1132(a)(2) 1,2,7,8

Section 502(l), 29 U.S.C. § 1132(l) 12

Other Authorities:

U.S. Const. Article III 3,6,7

Internal Revenue Code:

I.R.C. § 4980(d)(1) 5

H.R. Conf. Rep. No. 101-386, 1989 U.S.C.C.A.N. 3018 12

29 C.F.R. 2550.408b-2(e) 14

29 C.F.R. 2550.408c-2 15

29 C.F.R. 2550.408c-2(a) 16

Bogert and Bogert, Law of Trusts and Trustees, 543 (2d ed. rev. 1992) 13

Dan M. McGill & Donald S. Grubbs, Jr., Fundamentals of Private Pensions 434 (6th ed. 1989) 3

James E. Turpin, The Impact of Inordinately Low 30-Year Treasury Rates on Defined Benefit Plans: A Public Statement by the Pension Practice Council of the American Academy of Actuaries, July 11, 2001 4

Vineeta Anand, 3M Decision First of Its Kind, Pension & Investments, April 1, 2002 4

INTEREST OF THE DEPARTMENT OF LABOR

The Secretary of Labor has primary enforcement authority for Title I of ERISA. 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). If allowed to stand, the panel's holding that a participant in an over-funded defined benefit pension plan does not have standing to bring suit for breach of fiduciary duty will create an enormous burden for the Secretary as the only person with standing to bring such suits. Moreover, the Secretary has a substantial interest in assuring that the court correctly interprets ERISA's prohibited transaction provisions and applies the Department of Labor's regulations concerning the scope of the exemptions applicable to such transactions.

DISCUSSION

I. THE PANEL ERRED BY HOLDING THAT PARTICIPANTS IN AN OVER-FUNDED DEFINED BENEFIT PLAN DO NOT HAVE STANDING TO BRING SUIT FOR BREACH OF FIDUCIARY DUTY.

Section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), grants to the Secretary, or a participant, beneficiary, or fiduciary the right to sue for relief under ERISA § 409, 29 U.S.C. § 1109. ERISA § 409 provides, among other things, that any fiduciary who breaches any of his responsibilities is "personally liable to make good to such plan any losses to the plan resulting from each such breach." ERISA

§ 409 also subjects breaching fiduciaries to other equitable and remedial relief, including removal and disgorgement of profits. Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406 (9th Cir. 1988); Brock v. Robbins, 830 F.2d 640 (7th Cir. 1987). Recovery under § 409 benefits the plan as a whole, rather than individual participants. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985).

The panel erred when it held that the plaintiffs could not sue under ERISA § 502(a)(2). ERISA broadly defines a participant as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type . . ." ERISA § 3(7), 29 U.S.C. § 1002(7). The statute does not limit the types of participants who may bring suit under ERISA § 502(a) or limit suit based on the funding status of the plan. Rather, the statute simply and clearly allows participants and others to commence litigation against breaching fiduciaries for relief under § 409. This is exactly what the plaintiffs have done in this case.

This is consistent with ERISA's statutory purpose, which was to protect plans and intended benefits by insuring that plan fiduciaries manage the assets of the plan prudently and solely in the interest of the plan participants and beneficiaries. "The floor debate . . . reveals that the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and

that ERISA was designed to prevent these abuses in the future." Russell, 473 U.S. at 140 n.8 (citing the legislative history). Congress sought to achieve this goal by authorizing participants to police their own plans and to bring suit to correct violations of the statute that injure plans.

The panel incorrectly held that the plaintiffs did not suffer a sufficient injury to have standing under Article III of the Constitution. If the fiduciary breach reduced the plan's assets by $80 million, as alleged by the plaintiffs, then the participants' benefits are less secure. As one commentator has noted, "Plan assets and their capacity to generate future investment earnings are the primary source, at any given point in time, of benefit security, the assurance that the accrued benefit rights of the plan participants will ultimately be honored." Dan M. McGill & Donald S. Grubbs, Jr., Fundamentals of Private Pensions 434 (6th ed. 1989). In light of recent events, such as the collapse of Enron, it should be undisputed that the over-funding of a plan at a particular time neither guarantees that the plan will remain over-funded in the future, nor guarantees that any participant will be paid the full defined benefit promised. The $80 million allegedly lost in this case served as a cushion against the possibilities that (a) the plan would lose money or actuarial circumstances would make it difficult for the plan to meet all of its obligations in the future and (b) the employer -- 3M -- would not have the ability to make good on the deficit. The loss of that $80 million directly injured the participants by reducing the

security of their benefits.

Because of the nature of pension plans and the rules regarding their funding, funding levels can change significantly over short periods of time. An over-funded plan can rapidly become under-funded.[1] Similarly, the plan's liabilities can rise dramatically in very little time. Often the value of the plan's assets declines at precisely the same time that the amount of its liabilities increases. For example, the value of the plan's assets can plummet quickly when the stock market goes down. If interest rates go down at the same time, the cost of funding the plan's liabilities will increase at the same time the stock has dropped in value (the lower interest rates are, the more expensive it is for a plan to fund a given benefit).[2]

Consequently, plan participants rely not only on ERISA's funding requirements for the security of their plan benefits, but also on ERISA's fiduciary standards to protect the plan corpus, thereby insuring that promised benefits will be

[1] In fact, the 3M plan is currently under-funded by approximately half a billion dollars. Vineeta Anand, *3M Decision First of Its Kind*, Pension & Investments, April 1, 2002 (citing 3M's March filing with the Securities and Exchange Commission indicating that the pension fund had $6.05 billion in assets and $6.55 billion in liabilities).

[2] According to the American Academy of Actuaries, a one percent decline in the 30 year treasury rate will cause the liabilities of the average plan to increase by twelve percent. James E. Turpin, The Impact of Inordinately Low 30-Year Treasury Rates on Defined Benefit Plans: A Public Statement by the Pension Practice Council of the American Academy of Actuaries, July 11, 2001.

there when they retire. Under the panel's decision, however, the fiduciaries of over-funded plans can disregard their fiduciary obligations with complete immunity from participants' lawsuits. The panel's decision thereby undermines the fiduciary's incentive to comply with the statute to the detriment of retirement security.[3]

Plaintiffs have also been injured through the loss of the potential to receive richer benefits. When a plan is over-funded, plan sponsors are more likely to increase benefit levels. The statute creates a disincentive for plan sponsors to recoup assets from over-funded plans by imposing a fifty percent tax on any reversion taken by the plan sponsor. I.R.C. § 4980(d)(1). By increasing benefits or establishing a qualified replacement plan, the plan sponsor can reduce the tax to twenty percent. Id. When the plan suffers a loss, the participants' potential for enriched benefits suffers as well.

The Supreme Court has held that even the mere likelihood of an indirect injury suffices to confer standing upon a plaintiff. In Clinton v. City of New York, 524 U.S. 417 (1998), plaintiffs were potato growers interested in purchasing potato

[3] In its decision, the district court was impressed that 3M may have made voluntary contributions to the plan in the years following the breach that exceeded the amount of the plan's losses. As a result of such facts, the plaintiffs' lawsuit may appear to be less sympathetic than would otherwise be the case. However, none of the panel's legal analysis turns on 3M's subsequent contributions to the plan. Indeed, under the panel's analysis, as long as the plan was over-funded, the participants would not have standing even if 3M had deliberately stolen plan assets and never made any additional contributions.

processing plants. Plaintiffs argued that they were injured by a line item veto of a provision that would have given favorable tax treatment to sellers of potato processing plants. The favorable tax treatment to the sellers of the processing plants would result in a greater willingness to sell the plants to the potato growers, thereby making the potato growers more cost-efficient and self-sufficient. The Supreme Court held that the potato growers had standing to challenge the Line Item Veto Act, stating that "[b]y depriving them of their statutory bargaining chip, the [veto] inflicted a sufficient likelihood of economic injury to establish standing." Id. at 432.

Similarly, in Department of Commerce v. U.S. House of Representatives, 525 U.S. 316, 332 (1999), the Court found that a resident of Indiana had standing to challenge the Census Act. The Court held that the challenged procedures would likely result in a decrease in the number of residents of Indiana, which would in turn lead to a decline in the number of Indiana's representatives in Congress and make the resident's vote less powerful. Id. The likelihood that the resident's vote would be diluted was sufficient to confer standing under Article III.

The Supreme Court has indicated that only the smallest personal harm is necessary for standing purposes under Article III. In Gollust v. Mendell, 501 U.S. 115 (1991), the Court held that even an investor with only one share of stock would have standing to continue a suit to enforce a statutory prohibition against insider

trading. This single share would confer upon the investor the necessary continuing financial stake in the litigation to demonstrate the injury to the investor. "A security holder eligible to institute suit will have no direct financial interest in the outcome of the litigation, since any recovery will inure only to the issuer's benefit. Yet the indirect interest derived through one share of stock is enough to confer standing, however slight the potential marginal increase in the value of the share." Id. at 127. Similarly, the increased benefit security of the participants here is enough to confer standing.[4]

The panel's decision that the plaintiffs do not have standing is also in tension with the decisions of other courts. The Second Circuit has held that ERISA creates standing for participants to bring suits for breach of fiduciary duty even if the plan is over-funded. Financial Insts. Retirement Fund v. Office of Thrift Supervision, 964 F.2d 142 (2d Cir. 1992). In Financial Insts. Retirement Fund, the Second Circuit held that Congress may, through statute, override the prudential limits of standing and that ERISA accomplishes this by virtue of ERISA §502(a)(2). Id. at 147. The court further held that the participants' breach of fiduciary duty claim was sufficient to satisfy the standing requirements of Article III

[4] Moreover, that increased security has value to the participant. If a participant could choose between otherwise identical plans which differ only in that one is over-funded and one is not, a rational participant would choose the over-funded plan. Pensions backed by an additional $80 million in assets are worth more than pensions without such backing.

of the Constitution, even though the plan at issue was an over-funded defined benefit plan. Id. The court held that "section 1132 essentially empowers beneficiaries to bring a civil action to redress *any* violation of the statute's fiduciary requirements." Id. at 148.

The panel's decision is also inconsistent with the ERISA cases holding that the statute of limitations clock starts to run at the time of the breach without regard to whether the breach caused a loss. The District of Columbia Circuit held that an injury to the potential plaintiff is not necessary to start the statute of limitations running on a breach of fiduciary duty claim. Larson v. Northrop Corp., 21 F.3d 1164 (D.C. Cir. 1994). The court explained that because an actual injury to a plaintiff is not necessary for that plaintiff to bring a breach of fiduciary duty claim, an actual injury is likewise not necessary to run the statute of limitations. Id. at 1170.[5] The Ninth Circuit similarly has held that a participant may bring a suit for violation of ERISA § 404, 29 U.S.C. § 1104, "regardless of cost or loss to the participants and their beneficiaries." Ziegler v. Connecticut Gen. Life Ins. Co., 916 F.2d 548, 551 (9th Cir. 1990). The reasoning of these cases is in significant tension with the panel majority's holding that participants may not initiate a cause of action under ERISA § 502(a)(2) unless and until those participants have been individually

[5] The panel's decision creates significant problems in applying ERISA's statute of limitations and could foreclose participants from bringing meritorious lawsuits. See discussion, infra pp. 10-11.

and directly harmed.

The panel's reliance on Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439-40 (1999), was misplaced. See Harley v. Minnesota Mining & Mfg. Co., 284 F.3d 901, 905 (8th Cir. 2002). The Court in Hughes stated that "no plan member has a claim to any particular asset that composes a part of the plan's general asset pool" and that "members similarly have no entitlement to share in a plan's surplus." Hughes, 525 U.S. at 439-40. Accordingly, the Court ruled that a plan sponsor had not violated ERISA by amending a plan to provide for the payment of additional benefits to additional participants. Hughes did not address the question of the participants' standing to bring the claim, and is in no way inconsistent with the Department's position in this case.

It is consistent with Hughes to recognize that each plan participant has an interest in the continued security of the defined benefits promised to that participant and in seeing to it that the security of those benefits is not compromised by actions that are prohibited by ERISA -- such as breaches of fiduciary duty. The participants here are not asserting a claim to the plan surplus; their claim is that 3M must restore losses to the plan, not to accounts of individual participants. Accordingly, Hughes is not on point.

Moreover, the panel's holding turns a straightforward statutory scheme into an unworkable one. For example, the panel did not address when the funding level

should be measured in order to determine whether the plan is over-funded. The possibilities include the time of the breach, the time of the loss, the time litigation commences, or the time when benefits are to be paid. Under the panel's decision, at different times the plaintiff may or may not have standing depending on the changing funding status of the plan. Pension plans pay benefits over a period of years to many different participants. There is no basis for focusing on one particular date as determinative even if the panel had made clear its choice from the many possible dates.

The panel also did not state which of the various methods should be used to determine the plan's funding level. The district court considered five different funding methods for determining whether the plan was over-funded. Under some methods, the 3M Plan was under-funded, while other methods resulted in a surplus. Although the panel affirmed the district court's finding that the 3M Plan was a "robust" and "richly funded" plan, it did not endorse any of the various methods available to determine a plan's funding status. A standing test that requires the parties to make complex funding calculations and that fails to even specify the method of calculation gives short shrift to the need of the courts and litigants for a standard that can be practically applied.

In addition, the panel decision is at odds with ERISA's statute of limitations, which generally begins to run from either the date the breach occurred or the date

the plaintiff acquired knowledge of the breach. See ERISA § 413, 29 U.S.C. § 1113. It is well established that a loss need not occur before the statute of limitations begins to run. See Larson, 21 F.3d at 1170. Under the panel's decision, however, a participant may be foreclosed from bringing suit until such time as the plan is under-funded. If the plan becomes under-funded more than 6 years after the date of the breach or more than 3 years after the participant obtains knowledge of the breach,[6] the participant will be time-barred from bringing suit, even if the plan would not have been under-funded but for the fiduciary misconduct. This clearly undermines ERISA's purpose of protecting plan participants.

The panel also did not consider the effect of its ruling on a plan that has suffered multiple breaches. If a plan that was over-funded by $80 million suffers two losses of $50 million each, the panel's decision does not answer which loss, if any, is actionable. Although the current case involves only one breach, the holding creates problems that did not exist previously in addressing multiple breaches.

Finally, the decision places an enormous burden on the Secretary of Labor to monitor and bring suit if an over-funded defined benefit plan suffers losses as a

[6] "No action may be commenced under this title with respect to a fiduciary's breach . . . after the earlier of - (1) six years after (A) the date of the last action which constituted a part of the breach . . . or (B) three years after the earliest date on which the plaintiff had actual knowledge of the breach . . . " ERISA § 413, 29 U.S.C. § 1113.

result of a fiduciary breach. The panel stated in a footnote that the decision would not insulate a fiduciary from liability, noting that the Secretary has standing. Because of limited resources available to enforce pension laws and the vast number of pension plans, however, the Department must often rely on private plaintiffs to vindicate their own rights.[7] Under the panel's rule, however, only the Secretary (and a limited number of parties with reversionary interests in plans) will be able to bring suit to redress ERISA violations that harm the plan. This too undermines the effectiveness of the statute in protecting the retirement security of plan participants.

II. THE EIGHTH CIRCUIT ERRED IN HOLDING THAT ERISA § 408(c)(2) PROVIDED AN EXEMPTION FOR A TRANSACTION PROHIBITED BY ERISA § 406(b)(1).

ERISA § 406, 29 U.S.C. § 1106, was drafted to bar entire categories of "insider" transactions that Congress believed posed an especially high risk of abuse of plan assets. Commissioner v. Keystone Consol. Indus. Inc., 508 U.S. 152, 160 (1993) ("Congress' goal was to bar categorically a transaction that was likely to injure the pension plan."). To this end, ERISA § 406 flatly bars specified types of transactions unless covered by statutory and administrative exemptions contained

[7] Congress recognized the Secretary's limited resources when it added the ERISA § 502(l) civil penalty to the statute. In so doing, Congress specifically noted the need for stronger enforcement of the statute, the Secretary of Labor's difficulty in fulfilling "its responsibility to detect and deter abuse of plan assets," and the insufficiency of the Department of Labor's resources to fully protect pension plans. H.R. Conf. Rep. No. 101-386, 1989 U.S.C.C.A.N. 3018, 3035.

in ERISA § 408(a) and (b). Subsection (a) of ERISA § 406 prohibits certain transactions between the plan and parties in interest. Subsection (b) prohibits fiduciaries from acting in conflict of interest situations. Specifically, section 406(b)(1) provides that "[a] fiduciary with respect to a plan shall not -- . . . deal with assets of the plan in his own interest or for his own account." ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1). ERISA is based on the law of trusts, and ERISA § 406 essentially codifies the basic trust law rule against disloyalty and self-dealing, tailored to the special circumstances of employee benefit plans. See generally, Pegram v. Herdrich, 530 U.S. 211, 224 (2000); Bogert and Bogert, Law of Trusts and Trustees, 543 (2d ed. rev. 1992).

The plaintiffs in this case allege that the asset manager set his own compensation in violation of the self-dealing provision of ERISA § 406(b)(1). The asset manager's compensation was to be a percentage of the value of the assets under management. The asset manager allegedly created inflated valuations of the assets, thereby setting his own compensation. This is the type of self-dealing prohibited by ERISA § 406(b)(1).

ERISA § 408(b)(2) exempts from otherwise prohibited transactions "[c]ontracting or making reasonable arrangements with a party in interest for . . . other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." ERISA § 408(b)(2), 29 U.S.C. §

1108(b)(2). As the district court correctly acknowledged, and as the Department of Labor's regulations indicate, ERISA § 408(b)(2) applies only to transactions prohibited by ERISA § 406(a), and does not apply to ERISA § 406(b). See 29 C.F.R. § 2550.408b-2(e); Harley v. Minnesota Mining & Mfg. Co., 42 F. Supp.2d 898, 911 (D. Minn. 1999), aff'd, 248 F.3d 901 (8th Cir. 2002). This is consistent with the statutory language, because transactions prohibited by ERISA § 406(a) involve two or more parties, bargaining at arms-length. In contrast, when a fiduciary deals with plan assets in his own interest in violation of ERISA § 406(b)(1) there is no arms-length negotiation and the arrangement is not a "contract" or "reasonable arrangement" within the meaning of the statute.

The panel erred, when it held that ERISA § 408(c)(2), which provides that "[n]othing in § 406 shall be construed to prohibit any fiduciary from . . . receiving any reasonable compensation for services rendered . . . " allows a fiduciary to set his own compensation as long as that compensation is reasonable. While ERISA § 408(c)(2) may allow a fiduciary to *receive* reasonable compensation, the statute unambiguously prohibits a fiduciary from *establishing* his own compensation. See ERISA § 406(b)(1). Read as a whole, ERISA § 408(c) functions as a series of assurances to fiduciaries that they may still retain other roles with respect to the plan. They may still receive benefits (section 408(c)(1)), receive compensation for services rendered (section 408(c)(2)), and be officers (section 408(c)(3)). In other

words, section 408(c) simply makes it clear that ERISA should not be construed to create a per se rule prohibiting fiduciaries from receiving reasonable compensation. It does not follow, however, that because a fiduciary may receive reasonable compensation, he may also set the compensation himself.

On its face, section 408(c)(2) speaks to the amount of compensation a fiduciary may receive; it does not speak to the manner in which that compensation is determined, an issue that is separately addressed in the provisions of ERISA § 406(b)(1) that were allegedly violated here. Section 408(c) concerns substance, not process. The panel's extreme reading is not compelled by the statutory language and effectively reads the self-dealing prohibitions out of the Act, because a plan may not prudently pay *anyone* more than reasonable compensation even in the absence of the prohibitions of ERISA § 406. See ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). Put differently, section 408(c) does not license a fiduciary to self-deal any more than a law entitling a bank officer to reasonable compensation authorizes him to draw that pay by robbing the bank.

Several courts, including the Ninth Circuit, have relied on the Department of Labor's regulations and have held that § 408(c)(2) does not apply to self-dealing transactions. 29 C.F.R. § 2550.408c-2; Patelco Credit Union v. Sahni, 262 F.3d 897 (9th Cir. 2001) (reasonable compensation provision of § 408(c)(2) does not apply to fiduciary self-dealing); LaScala v. Scrufari, 96 F. Supp. 2d 233

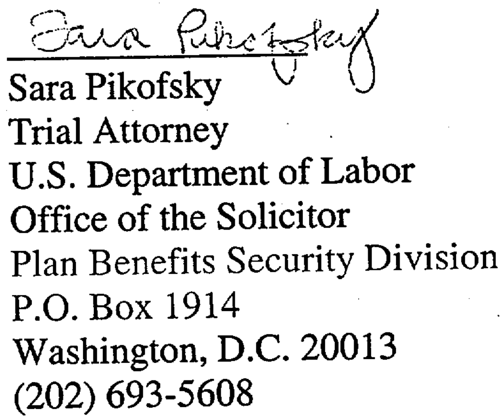
(W.D.N.Y. 2000) (holding that §408(c)(2) does not provide an exemption of an alleged § 406(b) violation); Whitfield v. Tomasso, 682 F. Supp. 1287, 1304 (E.D.N.Y. 1988) (holding that "the exemptive provisions of sections 408(b)(2) and 408(c)(2) apply only to violations of section 406(a), not violations of section 406(b)"); Gilliam v. Edwards, 492 F. Supp. 1255, 1264 (D.N.J. 1980) (holding that § 408(c)(2) serves solely to clarify the meaning of reasonable compensation as found in § 408(b)(2) and has no "independent exemptive power"). In contrast, no case, not even Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1216 & n.4 (2d Cir. 1987), cited by the panel, has held that § 408(c)(2) exempts fiduciary self-dealing. The court should address this issue en banc in order to prevent a split between circuits as to the meaning of ERISA § 408(c)(2).

Because the Department's rules were promulgated after notice and comment (and public hearings), they should be upheld so long as Congress has not clearly expressed an intent to the contrary and they permissibly interpret ERISA. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984). The Department of Labor has interpreted ERISA § 408(c)(2) as not providing for an independent exemption from the prohibitions imposed by ERISA § 406(b) since shortly after the statute was enacted and that interpretation has been endorsed by numerous courts and left undisturbed by Congress. See 29 C.F.R. 2550.408c-2(a). The panel erred by reaching a contrary conclusion.

CONCLUSION

For the reasons discussed above, the court should agree to rehear this matter *en banc*.

Respectfully submitted this 22nd day of May, 2002,



Sara Pikofsky
Trial Attorney
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
P.O. Box 1914
Washington, D.C. 20013
(202) 693-5608

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of the Secretary of Labor as *Amicus Curiae* in Support of Appellants' Petition for Rehearing and Rehearing *En Banc* and a diskette containing the brief were served upon the clerk of the Eighth Circuit Court of Appeals and counsel of record listed below, charges prepaid, this 22nd day of May 2002:

By Federal Express Mail

Michael E. Gans, Clerk
United States Court of Appeals
for the Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
Room 24.329
111 South 10th Street
St. Louis, MO 63102

By First Class Mail

Alan M. Sandals
Scott M. Lempert
SANDALS & LANGER, LLP
One South Broad Street
Suite 1850
Philadelphia, PA 19107-3303

Seymour J. Mansfield
Debra S. Nelson
MANSFIELD, TANICK & COHEN, P.A.
1560 International Centre
900 Second Avenue South
Minneapolis, MN 55402

Steven L. Severson
John D. French
FAEGRE & BENSON LLP
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402

J. Alan Galbraith
Paul M. Wolff
WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, DC 20005

William Hanrahan
Robert Gallagher
Lincoln Weed
GROOM LAW GROUP, CHARTERED
1701 Pennsylvania Avenue, N.W.
Suite 1200
Washington, DC 20006

Michael S. Horne
John M. Vine
Sara L. Gottovi
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004

Charles L. Finke
Assistant General Counsel
PBGC
1200 K Street, N.W.
Washington, DC 200056

Mary Ellen Signorille
AARP
601 E Street, N.W.
Washington, DC 20049

Sara Pikofsky
SARA PIKOFSKY

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief of the Secretary of Labor as *Amicus Curiae* in Support of Appellants' Petition for Rehearing and Rehearing *En Banc* contains 4186 words.

I further certify that the enclosed document was created using Word Perfect 8, and the diskettes have been scanned for viruses and are virus free.

SARA PIKOFSKY

Dated: May 22, 2002