No. 05-10973-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROLAND H. BICKLEY, on behalf of Georgia-Pacific Corporation Life Health and Accident Plan and all other similarly-situated Plans
Plaintiff-Appellant
v.
CAREMARK, INC.
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

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

HOWARD M. RADZELY
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor
Plan Benefits Security Division

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation

MARY F. WILLIAMS
Trial Attorney
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210
(202) 693-5600

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

QUESTIONS PRESENTED 1

STATEMENT OF THE FACTS 2

PROCEDURAL BACKGROUND 4

SUMMARY OF THE ARGUMENT 9

ARGUMENT 10

I. The district court erred in holding that Participants and Beneficiaries are not authorized under sections 502(a)(2) and 502(a)(3) of ERISA to bring an enforcement action seeking to remedy fiduciary breaches on behalf of the Plan 10

II. The district court erred in holding that Bickley was required to exhaust internal plan remedies before bringing suit to remedy fiduciary breaches under sections 502(a)(2) and 502 (a)(3) of ERISA 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Federal Cases:

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

Amato v. Bernard,
618 F.2d 559 (9th Cir. 1980) 16-17

Bickley v. Caremark RX, Inc.,
No. CV-02-HS-2197-S, 2004 WL 3218428
(N.D. Ala. Dec. 30, 2004)... 6,7,8

Curry v. Contract Fabricators Inc. Profit Sharing Plan,
891 F.2d 842 (11th Cir. 1990) 8,15,17

Glanton v. AdvancePCS,
No. 04-1528 (9th Cir. filed July 1, 2004) 7

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204 (2002).. 12

McKnight v. Southern Life & Health Ins. Co.,
58 F.2d 1566, 1570 (11th Cir. 1985) 18-19

Mason v. Continental Group, Inc.,
763 F.2d 1219 (11th Cir. 1985) 16

Massachusetts Mut. Life Ins. Co. v. Russell,
473 U.S. 134 (1985).. 6 & passim

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993).. 6,9,12,14

Moore v. Am. Fed'n of TV & Radio Artists,
216 F.3d 1236 (11th Cir. 2000) 7,9,13,14

Perrino v. Southern Bell Tel. & Tel.,
209 F.3d 1309 (11th Cir. 2000) 16

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

Waller v. Blue Cross of California,
32 F.3d 1337 (9th Cir. 1994) 9

Federal Statutes and Regulations:

Employee Retirement Income security Act of 1974, as amended,
29 U.S.C. § 1001, et seq.: 1

Section 3(21), 29 U.S.C. § 1002(21) 14

Section 409, 29 U.S.C. § 1109 4,9,12,14

Section 409(a), 29 U.S.C. § 1109(a) 6,11,14

Section 410, 29 U.S.C. § 1110 17

Section 502, 29 U.S.C. § 1132 6,11

Section 502(a)(2), 29 U.S.C. § 1132(a)(2) .... 1 & passim

Section 502(a)(3), 29 U.S.C. § 1132(a)(3) .... 1 & passim

Section 502(g), 29 U.S.C. § 1132(a) 13

Section 502(g)(2), 29 U.S.C. § 1132(g)(2) 7,13

Section 503, 29 U.S.C. § 1133 16,17

Section 515, 29 U.S.C. § 1145 7,13

29 C.F.R. § 2509.75-8 14

29 C.F.R. § 2560.503-1 17

Fed. R. Civ. P. 12(b) 6

STATEMENT OF INTEREST

The Secretary of the United States Department of Labor (the "Secretary") 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).

Moreover, 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 "participant" standing. The Secretary also has a substantial interest in ensuring that courts do not unduly foreclose available causes of action under ERISA.

QUESTIONS PRESENTED

1. Whether a plan participant has standing under sections 502(a)(2) and 502(a)(3) of ERISA, 29 U.S.C. §§ 1132 (a)(2) and 1132(a)(3), to bring an enforcement action for a breach of a fiduciary duty.

2. Whether a plan participant must exhaust internal administrative remedies applicable to benefit denials before bringing suit under sections 502(a)(2) and 502(a)(3) of ERISA to remedy fiduciary breaches.

STATEMENT OF THE FACTS

Appellant Roland H. Bickley is a participant in the Georgia-Pacific Corporation Life, Health and Accident Plan called LifeChoices (the "Plan"). See First Amended Complaint (Docket No. 17). Georgia-Pacific is the Plan sponsor and Plan administrator. Id. at 5. The Plan is self-funded with Georgia-Pacific paying for the employees drug benefit. Bickley has contributed and continues to contribute to the purchase of prescription drugs directly in the form of co-payments, deductibles, monthly payroll deductions and premiums or payments to retailers, mail order services and the Plan. Id. at 2.

Caremark, Inc. is the pharmacy benefit manager ("PBM") for the Plan. As the PBM, Caremark administers prescription drug benefits to Bickley and other participants and beneficiaries of the Plan. First Amended Complaint, p. 2 (Docket No. 17). Bickley alleges that Caremark buys drugs from manufacturers, sells drugs to retail pharmacies and operates a service whereby Plan participants and beneficiaries can fill their prescriptions through the mail. Caremark negotiates prescription drug prices with both

drug manufacturers and dispensing retail pharmacies. Id. The Plan pays Caremark administrative fees for its services. Caremark also receives discounts, rebates, coupons and other forms of compensation from drug companies and pharmacies through a price differential or "spread" created by Caremark's negotiating a second discount with the pharmacies. Id. Caremark receives a second discount or price "spread" in the dispensing fee paid by the Plan to Caremark and by Caremark to the retail pharmacies that fill prescriptions for Plan participants and beneficiaries. Id. at 8. Caremark allegedly does not disclose any of these practices and money received, although these activities involve the use of Plan assets, including the co-payments, deductibles and other payments or contributions paid by Bickley. Id. at 11. Thus, Bickley contends that Caremark has breached its duty to the Plan and Plan participants and beneficiaries by not disclosing these arrangements and practices to the Plan. Bickley contends further that Caremark breached its duty by keeping the money earned from this arrangement rather than returning it to the Plan. Id.

Bickley alleges that Caremark is unjustly enriched with rebates, administrative fees, "spreads," and other unlawful and unreasonable compensation which Caremark receives in consideration for drugs which are purchased in whole or in part with the co-payments, deductibles, and other

payments of contributions by Bickley. See Second Amended Complaint at ¶ 12 (Docket No. 17). Finally, Bickley alleges that Caremark's course of conduct poses an actual and imminent threat that Bickley will be "switched" by Caremark from one drug to another, which will result in further unjust enrichment to Caremark and an increased cost to Bickley. Id.

Caremark denies that it has done anything illegal, and asserts that Bickley lacks standing to bring this action. See Defendant's Motion to Dismiss Plaintiff's First Amended Complaint (Docket No. 49). Caremark also denies that it is a fiduciary and says that Bickley has failed to exhaust his administrative remedies. Id.

PROCEDURAL BACKGROUND

Bickley originally brought this suit against Caremark in the United States District Court for the Southern District of California on March 22, 2002. See First Amended Complaint (Docket No. 17). He brought suit on behalf of the Georgia-Pacific Corporation Life Health and Accident Plan, and similarly situated plans, and also on behalf of a putative class of the participants and beneficiaries of these plans under sections 409 and 502(a)(2) and 502(a)(3) of ERISA. Caremark, a Delaware corporation, which has its principal place of business in Birmingham, Alabama, moved to dismiss on grounds of improper venue. See Defendant's Motion to Dismiss

or Transfer (Docket No. 1). The case was subsequently transferred to the United States District Court for the Northern District of Alabama.

After filing a Second Amended Complaint, Bickley sought class certification, purporting to represent all participants and beneficiaries of self-funded welfare benefit plans under ERISA that have retained Caremark as their PBM. Motion for Class Certification (Docket No. 75). Bickley argued that he has been statutorily vested, by Congress, with the procedural capacity and representational standing to prosecute a cause of action on behalf of the Plan and its participants, regardless of whether he himself has suffered a loss or injury, in much the same way that an executor has standing to assert a claim for an estate, or a guardian ad litem has standing to assert a claim for a minor. He also contended, however, that he personally suffered a loss in that his co-payments, deductibles and other premiums were higher because of Caremark's self-dealing and other prohibited transactions. First Amended Complaint ¶ 12 as amended (Docket No. 17).

Caremark then filed a motion to dismiss, arguing that Bickley does not have standing to bring his suit under ERISA, that Caremark is not an ERISA fiduciary, and that Bickley has failed to exhaust his administrative remedies under the plan. In response, Bickley not only challenged each of these arguments on the merits, but also argued that Caremark had waived its

right to assert the arguments when it did not raise them prior to transfer in the district court in California.

The district court considered Bickley's motion for class certification along with Caremark's motion to dismiss.[1] As an initial matter, the court rejected Bickley's waiver argument, reasoning that standing, exhaustion, and ERISA fiduciary status are not defenses that can be waived under Rule 12(b) of the Federal Rules of Civil Procedure. Bickley v. Caremark RX, Inc., No. CV-02-HS-2197-S, 2004 WL 3218428, at *6 (N.D. Ala. Dec. 30, 2004). Next, although the court noted that section 502(a)(2) expressly authorizes plan participants to bring civil actions, the court concluded that "[s]uch participants, e.g. Bickley, cannot obtain either compensatory or punitive money damages under § 409(a), only 'appropriate equitable relief' pursuant to § 502(a)(3)." Id. at *7. Relying on Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985) and Mertens v. Hewitt Associates, 508 U.S. 248, 253-55 (1993), the court reasoned that only the plan itself may seek money damages, and that section 502 excludes the monetary relief sought by Bickley. 2004 WL 3218428, at *7. In so holding, the court

---

[1] The district court also considered and granted Caremark, Rx, Inc.'s motion to dismiss. Caremark, Rx, Inc., the parent corporation, maintained that it should not be a party to the suit because it was not a party to the agreement, and the court agreed. On appeal, Bickley does not appear to take issue with this holding.

expressly rejected the Secretary of Labor's position to the contrary set forth in her amicus brief filed in Glanton v. AdvancePCS, No. 04-1528 (9th Cir. filed July 1, 2004), which Bickley had submitted to the district court. 2004 WL 3218428, at *7.

Instead, the court relied on the Eleventh Circuit's decision in Moore v. Am. Fed'n of TV & Radio Artists, 216 F.3d 1236 (11th Cir. 2000). 2004 WL 3218428, at *6-*8. In that case, the participants of a multi-employer plan brought suit under ERISA section 502(g)(2), 29 U.S.C. § 1132(g)(2), to enforce a participating employer's obligation to pay contracted-for contributions under ERISA section 515, 29 U.S.C. § 1145. The Eleventh Circuit affirmed the lower court's dismissal of the plaintiff's delinquent contribution claim on the grounds that section 502(g)(2), by its terms, provides only for a fiduciary to bring such a suit, and allowing a participant to do so would improperly permit the participant "to substitute his or her judgment for that of the trustees." 216 F.3d at 1245-46. The district court concluded that allowing Bickley to pursue derivative claims on behalf of the Plan against Caremark would contravene the Moore decision. 2004 WL 3218428, at *8.

The court then reviewed the PBM contract, which Caremark had filed under seal with the court, and concluded that Caremark was not a fiduciary.

2004 WL 3218428, at *9-*10. First, the court reasoned that Caremark was not named as a fiduciary nor did it have discretion over plan benefit decisions. Id. at *10. Moreover, the court reasoned that making an advantageous contractual agreement with an ERISA plan, such as Caremark's arrangement with regard to pharmacy rebates, did not make it an ERISA fiduciary. Id. at *11.

Finally, the court addressed whether Bickley was required to exhaust his remedies under the Plan before bringing suit. Relying on Curry v. Contract Fabricators Inc. Profit Sharing Plan, 891 F.2d 842, 846 (11th Cir. 1990), the court held that, in the Eleventh Circuit, Bickley is required to do so, and there is no exception for a fiduciary breach case. 2004 WL 3218428, at *12-*13. Oddly, although the court then dismissed the case with prejudice based on its conclusion that Bickley lacked standing and that Caremark was not a fiduciary with respect to Bickley, the court issued a separate order dismissing the case without prejudice for failure to exhaust. Id. at *16.

On January 10, 2005, Bickley filed motions to alter or amend the judgment, which the district court denied on February 10, 2005. This appeal followed.

SUMMARY OF THE ARGUMENT

The district court erred in holding that Bickley lacked standing to bring his suit on behalf of the Plan. As a plan participant, Bickley has standing under the plain language of sections 502(a)(2) and 502(a)(3) of ERISA, 29 U.S.C. §§ 1132(a)(2) and 1132(a)(3), to bring a civil action seeking injunctive and monetary relief against a breaching fiduciary whose actions have harmed the participant and his plan. See Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. at 146; Mertens v. Hewitt Associates, 508 U.S. at 253-55. See also Waller v. Blue Cross of California, 32 F.3d 1337, 1339 (9th Cir. 1994); Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock, 861 F.2d 1406, 1409 (9th Cir. 1988). The Moore decision from this Court is not to the contrary, and in fact recognizes that plan participants are empowered to sue under ERISA sections 502(a)(2) and 502(a)(3).

Furthermore, the district court erred when it concluded that Bickley was required to exhaust internal administrative remedies before bringing suit to remedy a fiduciary breach under ERISA sections 502(a)(2) and 502(a)(3). The exhaustion of remedies requirement applies to benefit claims brought against the plan. Where the claim does not involve benefits, but instead involves improper plan administration or mismanagement of plan assets

under ERISA's fiduciary provisions, no purpose is served by requiring exhaustion, and the Secretary does not believe that any exhaustion requirement should be applied. However, even if exhaustion is the general rule in the Eleventh Circuit, exhaustion is inappropriate in this particular case for two reasons. First, the plan itself, in its SPD, requires resort to the plan's administrative procedure only in a benefit claim, and expressly provides that a participant who alleges improper management of plan assets may sue directly in federal court. Moreover, Bickley seeks monetary and other relief from Caremark and not the plan. Accordingly, the plan cannot provide the remedy sought by the participants and resort to an administrative review process would be futile.

ARGUMENT

I. The district court erred in holding that participants and beneficiaries are not authorized under sections 502(a)(2) and 502(a)(3) of ERISA to bring an enforcement action seeking to remedy fiduciary breaches on behalf of the Plan

In this lawsuit, Bickley brought suit under ERISA sections 502(a)(2) and 502(a)(3), seeking to:

- Declare that Caremark is a fiduciary under ERISA and has breached its fiduciary duties to the Plan;
- Enjoin Caremark from engaging in unlawful activities;

- Require Caremark to give an accounting to the Plan for (1) all plan assets retained by Caremark for its own benefit and (2) all profits earned through the receipt of rebates and kickbacks;

- Require Caremark to account for all sums due the Plan and then to place such sums in a constructive trust for distribution to the Plan;

- Require Caremark to account for and restore all losses suffered by the Plan;

- Require Caremark to pay reasonable attorney's fees and costs; and

- Provide any other general, equitable, or remedial relief that the court deems just and appropriate under the circumstances.

Second Amended Complaint, p. 7.

ERISA section 502 sets forth the statute's "six carefully integrated civil enforcement provisions." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. at 146. The second of these, section 502(a)(2), expressly authorizes a civil action "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section (409)" of this title. 29 U.S.C. 1132(a)(2). Section 409(a), 29 U.S.C. § 1109(a), in turn, "makes fiduciaries liable for breach of these duties, and specifies the remedies available against them: The fiduciary is personally liable for damages ('to make good to [the] plan any losses to the plan resulting from each such breach'), for restitution ('to restore to [the] plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary'), and for 'such other

equitable or remedial relief as the court may deem appropriate,' including removal of the fiduciary." Mertens, 508 U.S. at 252. As the Supreme Court in Russell put it "[t]here can be no disagreement with the Court of Appeals' conclusion that § 502(a)(2) authorizes a beneficiary to bring an action against a fiduciary who has violated § 409." 473 U.S. at 140. Nor can there be any disagreement that, under the express terms of section 502(a)(3), ERISA's third remedial provision, a plan participant, beneficiary or fiduciary may sue for injunctive or other "appropriate equitable relief" to redress statutory violations and to enforce the terms of the plan. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209-10 (2002); Mertens, 508 U.S. at 253-55.

The remedial monetary relief sought by Bickley here (restoration of plan losses and an accounting and restoration of allegedly improperly retained plan assets), falls squarely within the terms of section 502(a)(2). Similarly, the injunctive relief Bickley seeks (enjoining Caremark from engaging in the allegedly unlawful practices specified in the Complaint), comes within the terms of section 502(a)(3). Thus, the district court erred when it concluded that "to the extent that Bickley seeks relief on behalf of the Plan where the remedies obtained (monetary or injunctive) would go the Plan, not the Class, Bickley lacks standing." Memorandum Opinion, p. 15.

The district court, however, erroneously relied on this Circuit's holding in Moore v. American Federation of TV & Radio Artists, 216 F.3d 1236. In that case, the participants of a multi-employer plan brought suit under ERISA section 502(g)(2), 29 U.S.C. § 1132(g)(2), for unpaid contributions, interest, and attorney fees under ERISA section 515, 29 U.S.C. § 1145. This Court affirmed the lower court's dismissal of the plaintiff's delinquent contribution claim on the grounds that section 502(g)(2), by its terms, provides only for a fiduciary to bring such a suit, and allowing a participant to do so would improperly permit the participant "to substitute his or her judgment for that of the trustees." 216 F.3d at 1245-46.

Moore is easily distinguishable from the instant case, as Bickley has brought suit here, not for delinquent contributions under section 502(g), but under sections 502(a)(2) and 502(a)(3), which expressly authorize participants and beneficiaries to seek redress for fiduciary breaches. Indeed, the Court's consideration in Moore of whether the plaintiffs had stated a claim under ERISA section 502(a)(3), see 216 F.3d at 1247, would have been unnecessary if the Court had held that a participant cannot sue under section 502(a) in the first place. Instead, the Court there expressly recognized that a participant such as Bickley can bring suit on behalf of the plan against a breaching fiduciary:

> Our holding does not leave beneficiaries without a remedy when the trustees, in breach of their fiduciary duty, unreasonably refuse to sue to recover delinquent contributions. Congress provided that trustees who breach their fiduciary duty "shall be personally liable to make good to [the] plan any losses resulting from each such breach," ERISA § 409(a) (codified at 29 U.S.C. § 1109(a) (1994), and provided for a cause of action by a beneficiary for such a breach in section 502(a)(2). If the fiduciary is judgment proof or continues to refuse to sue to collect delinquent contributions, the court can order "such … equitable or remedial relief … including removal … of such fiduciary," ERISA § 409(a).

216 F.3d at 1247. Thus, the district court erred when it read Moore to preclude what the express statutory terms provide: a suit by a plan participant to redress fiduciary breaches. See Mertens, 508 U.S. at 252-53 (section 502(a)(2) "allows the Secretary of Labor or any plan beneficiary, participant, or fiduciary to bring suit 'for appropriate relief under section [409]'"); Russell, 473 U.S. at 140 (section "502(a)(2) authorizes a beneficiary to bring an action against a fiduciary who has violated" ERISA's fiduciary duty provisions).[2]

---

[2] The Secretary takes no position on whether Caremark is a fiduciary or whether Caremark violated any ERISA duties. While ERISA provides a broad, functional definition of fiduciary, see 29 U.S.C. § 1002(21), the Secretary has previously stated that some of the kinds of activities at issue here would not be fiduciary activities to the extent that they are accomplished "within a framework of policies, interpretations, rules, practices and procedures made by other persons," and thus do not involve the exercise of any discretion. 20 C.F.R. § 2509.75-8 at D-2. This guidance, and not the letter of investigation that Bickley cites on page 49 of his brief, represents the considered view of the Department on at least some of the

II. The district court erred in holding that Bickley was required to exhaust internal plan remedies before bringing suit to remedy fiduciary breaches under sections 502(a)(2) and 502 (a)(3) of ERISA

The court below also erred in dismissing Bickley's claims based on his failure to exhaust internal, plan remedies before bringing suit. The district court relied on this Court's decision in Curry v. Contract Fabricators Inc. Profit Sharing Plan, 891 F.2d 842, to conclude that ERISA requires a plaintiff to exhaust the plan's administrative remedies, without exception, even in a suit alleging fiduciary breach. In fact, far from invariably requiring exhausting of plan remedies, the Curry decision upon which the district court relied actually excused the participant in that case from any exhaustion requirement under the futility exception. 891 F.2d at 846. And while this Circuit has held that plaintiffs who were suing their former employer for breaches of fiduciary duties related to the fraudulent use of the pension plan assets were required to exhaust appeal remedies provided for in their plan (which incorporated the grievance requirements of a collective

---

relevant factors in determining whether activities such as those alleged here constitute fiduciary acts. The courts and the parties are in a better position than the Department to apply this guidance to the allegations here, particularly because, in holding that Caremark was not an ERISA fiduciary, the court relied primarily on Caremark's PBM contract with Georgia-Pacific. This contract was filed under seal with the court and the Department does not have access to it. Thus, the Secretary is not in the position to evaluate whether the contract illuminates Caremark's fiduciary status, as Caremark insists.

bargaining agreement), Mason v. Continental Group, Inc., 763 F.2d 1219, 1225-27 (11th Cir. 1985), it has also noted that "there are situations where an ERISA claim cannot be redressed effectively through an administrative scheme." Perrino v. Southern Bell Tel. & Tel., 209 F.3d 1309, 1318 (11th Cir. 2000). "In these circumstances," the Perrino Court held, "requiring a plaintiff to exhaust an administrative scheme would be an empty exercise in legal formalism." Id.

Even in a case involving a benefit claim, the statute does not expressly require exhaustion of administrative remedies before a participant may bring a suit in federal court. The federal courts, however, have unanimously held that an ERISA plan participant must exhaust whatever administrative remedies exist under the plan before seeking federal court review of adverse benefit claims. The exhaustion requirement in benefit claims cases is based, in part, on section 503 of ERISA, 29 U.S.C. § 1133, which requires plans to have claims procedures that afford participants a full and fair review of their benefit claims. 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) (cited by this Circuit in Curry, 891 F.2d at 846. According to the courts, the exhaustion requirement minimizes the number of claims actions filed in federal court, promotes the consistent treatment of benefit claims, provides a nonadversarial dispute resolution process, decreases the time and costs of claims settlement, provides a clear record of administrative action, and assures that judicial review is conducted pursuant to the arbitrary and capricious standard.

The rationale for exhaustion of benefit claims – that Congress must have intended participants to regularly use the benefit claims review process mandated in section 503, 29 U.S.C. § 1133 – does not apply, however, to fiduciary breach claims. There is no administrative process for fiduciary breach claims analogous to the detailed requirements for review of benefit claims under section 503 of ERISA and the Department's implementing regulations, 29 C.F.R. § 2560.503-1. When a participant files a claim for benefits with a plan pursuant to ERISA and the claims regulation, he is entitled to a process in which the relevant facts are reviewed objectively and a decision is rendered which may compel the plan to pay his benefits. In contrast, the plan has no obligation to pay a claim for a fiduciary's breach and is, indeed, precluded by section 410 of ERISA, 29 U.S.C. § 1110, from relieving the fiduciary of liability. Unlike a benefit claim, any recovery for a

fiduciary breach comes from the breaching fiduciary, not the plan. Indeed, plan fiduciaries accused of breaching their fiduciary duties are unlikely to provide a full and fair review of a fiduciary breach claim when they themselves might be required to restore losses out of their own assets. There is, therefore, no basis in the statute or in common sense for requiring exhaustion of plan remedies before filing suit in federal court alleging breaches of fiduciary duty.

However, even if it is the case that exhaustion is generally required in the Eleventh Circuit in fiduciary breach cases, Caremark's exhaustion argument suffers from two related, but distinct, flaws here, as Bickley points out. Appellant's Brief at 17-27. First, not only does the Plan provide no administrative procedure for a fiduciary breach claim, the summary plan description (SPD) given to Bickley and the other Plan participants appears to expressly waive any such requirement where, as here, improper management of the plan or its assets is alleged. Second, to the extent a general undefined "review process" could arguably be invoked, such efforts would necessarily be futile, because Georgia Pacific is powerless to effectuate relief.

The statute provides that an SPD shall be "an accurate and comprehensive document that reasonably apprises the employees of their rights under the plan." McKnight v. Southern Life & Health Ins. Co., 758

F.2d 1566, 1570 (11th Cir. 1985). The Georgia Pacific SPD provides no administrative procedure for these types of claims. It simply provides for submission and review of a "claim," which it defines as "a demand to the Benefits Claim Processor for the payment of benefits for reimbursable expenses under a medical, dental, disability or other insurance plan." If, on the other hand, "plan fiduciaries misuse the plan's money" – as is alleged here – the SPD provides that the participant or beneficiary "may file suit in a federal court." Georgia-Pacific SPD, p. 83 (Docket No. 62, Exhibit A).

Additionally, Bickley argues that Caremark effectively admitted that if his fiduciary breach claim were submitted to Caremark, such efforts would be futile because even if Georgia Pacific has the power or authority to determine whether Caremark is a fiduciary, it could not compel Caremark to return plan assets, disgorge ill-gotten profits, make restitution, or provide other appropriate relief. In the case where a participant complains of a denial of benefits, and alternatively asserts that the denial was a "breach of fiduciary duty," the fiduciary may be in a position to remedy the situation by providing the benefits to the participant or taking other appropriate measures on behalf of the plan. Likewise, in Curry, the claim of fiduciary breach was directed against the company itself, which provided grievance procedures under its collective bargaining agreement. Here, in contrast, the fiduciary

breach claim is directed at a plan service provider that is also alleged to be an ERISA fiduciary, and the rationale for requiring exhaustion of any benefits appeals process provided by the Plan simply does not apply.

Thus, even if exhaustion is generally required in a breach of fiduciary duty claim in this Circuit, Bickley's claim nevertheless is one in which exhaustion should be excused for the reasons stated above.

CONCLUSION

For the reasons set forth above, the Secretary requests that this Court reverse the district court's decision and hold that Bickley has standing to sue for fiduciary breaches under ERISA sections 502(a)(2) and 502(a)(3) for appropriate equitable relief, and that he was not required to exhaust internal plan remedies prior to doing so.

Respectfully submitted this 5th day of May 2005.

HOWARD M. RADZELY
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor
Plan Benefits Security Division

ELIZABETH HOPKINS
Counsel for Appellate and
Special Litigation

____
MARY F. WILLIAMS
Trial Attorney
U.S. Department of Labor
Office of the Solicitor
Plan Benefit Security Division
P.O. Box 1914
Washington, DC 20013
(202) 693-5600

CERTIFICATE OF SERVICE

I hereby certify that copies of the Secretary of Labor's Brief as Amicus Curiae in Support of Appellants' Brief on Appeal were sent to counsel listed below this 5th day of May, 2005:

By Federal Express:

John A. Day, Esq.
Rebecca C. Blair, Esq.
BRANHAM & DAY, P.C.
5300 Maryland Way
Suite 300
Brentwood, TN 37027
(615) 742-4880

David A. McKay, Esq.
Edward C. Konieczny, Esq.
Herman, Mathis, Casey,
Kitchens & Gerel, LLP
230 Peachtree St., N.W.
Suite 2260
Atlanta, GA 30303
(404) 880-9500

Frank E. Pasquesi, Esq.
Robert H. Griffith, Esq.
UNGARETTI & HARRIS
3500 Three First National Plaza
Chicago, IL 60602

By Regular Mail:

W. Michael Atchison, Esq.
Anthony C. Harlow, Esq.
STARNES & ATCHISON, LLP
P.O. Box 598512
Birmingham, AL 35259-8512

____
MARY F. WILLIAMS
Trial Attorney

CERTIFICATE OF COMPLIANCE

Case No. 05-10973-DD

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached Brief of the Secretary of Labor as Amicus Curiae in Support of Appellant and Requesting Reversal of the District Court's Decision is proportional spaced, using Times New Romans typeface of 14 point and contains 4,457 words.

Dated: May 5, 2005

____

Mary F. Williams
Trial Attorney