Case No. No. 06-07029

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID TULLIS, et al.,
Appellants,
v.
UMB BANK, N.A.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

BRIEF OF THE SECRETARY OF LABOR, ELAINE L. CHAO, AS AMICUS CURIAE SUPPORTING APPELLANTS AND REQUESTING REVERSAL

JONATHAN L. SNARE
Acting Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

KAREN L. HANDORF
Counsel for Appellate and Special Litigation

ELIZABETH HOPKINS
Senior Appellate Attorney
United States Department of Labor
Plan Benefits Security Division
200 Constitution Ave., N.W., Suite N-4611
Washington, D.C. 20210
Phone: (202) 693-5600
Fax: (202) 693-5610

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases: Page

Federal Statutes:

Other Authorities:

STATEMENT OF THE ISSUE

Whether the plaintiffs, two participants in a 401(k) plan, have standing to bring suit under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2), to recover losses allegedly sustained in their plan accounts as a result of fiduciary breaches.

INTEREST OF THE SECRETARY OF LABOR

The Secretary of Labor has primary authority to interpret and enforce the provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, et seq.; see also Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 689-94 (7th Cir. 1986) (en banc) (Secretary's interests include promoting the uniform application of the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets). The Secretary has a substantial interest in ensuring that participants in individual account plans, such as the 401(k) plan involved in this case, have standing to recover losses sustained in their plan accounts as a result of fiduciary misconduct. If, as the plaintiffs allege, the plan's fiduciaries failed to take proper action to protect from theft and fraud committed by an investment advisor that the fiduciaries knew was untrustworthy, ERISA provides a monetary remedy for the resulting losses. A contrary decision would suggest that plan fiduciaries can disregard ERISA's stringent obligations, cause financial injury to ERISA-covered plans and their participants and, nevertheless, evade all responsibility for the resulting losses.

STATEMENT OF THE CASE

1. Plaintiffs-Appellants David H. Tullis and Michael S. Mack are medical doctors and participants in an ERISA-covered 401(k) pension plan called the Toledo Clinic Pension Fund. See Complaint ¶¶ 1, 6. Defendant-Appellee UMB Bank is the trustee for the plan. Id. at ¶¶ 1, 2. From the early 1990's through 2003, Continental Capital Corporation and its representative, Bill Davis, served as investment advisors with regard to the plaintiffs' investments in the plan, and allegedly caused the loss of nearly $2,000,000 in the plaintiffs' plan accounts through theft and fraud. Id. at ¶¶ 5, 10, 13, 14. Continental Capital currently is in bankruptcy, and Davis is now in jail awaiting sentencing for federal mail, wire and securities fraud convictions, misconduct that the plaintiffs allege UMB Bank knew about but failed to warn them of.

Specifically, the plaintiffs brought suit against the trustee, alleging that the trustee itself had previously sued Continental Capital and Davis on behalf of another investor for similar frauds, but had nevertheless failed to warn the plaintiffs or take any other action to protect them. Moreover, the plaintiffs allege that the trustee gave the plaintiffs monthly account statements of the value of plan investments that the trustee knew or should have known were "overvalued because the majority of those investments had matured or become due many years ago and were never paid," Complaint ¶ 19, and because of the trustee's own dealings with

Continental, as a purchaser of unregistered securities issued by Continental or one of its related business entities. Id. at ¶ 24. The plaintiffs assert that the trustee's actions violated its fiduciary duties under ERISA, as well as various state laws, and seek, inter alia, recovery of the losses in their plan accounts. Complaint p. 16.

2. The trustee filed a motion to dismiss, which the district court granted on November 21, 2006. In relevant part, the court agreed with the defendant that ERISA prohibits recovery by the plaintiffs of "compensatory damages to remunerate for the losses incurred in their individual pension accounts." Tullis v. UMB Bank, 464 F. Supp. 2d 725, 729 (N.D. Ohio 2006). The court held that, under section 409 of ERISA, 29 U.S.C. §1109, a fiduciary is only liable for losses to the plan stemming from its fiduciary breaches and that an action under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2), had to be brought "'in a representative capacity on behalf of the plan as a whole.'" Id. at 729 (quoting Pfaler v. Nat'l Latex Co., 405 F. Supp. 2d 839, 843 (N.D. Ohio 2005) and Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140-43 n.9 (1985)).[1] In the court's view, the plaintiffs' action was not brought in such a capacity. Id.

The district court distinguished this Court's decision in Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995), which had permitted the recovery of losses sustained by

[1] Pfaler is currently on appeal in the Sixth Circuit and the Department of Labor filed an amicus brief in the case, but the appeal does not present the precise remedial issues raised in this case.

just a fraction of plan accounts, on the basis that, in Kuper, the plaintiffs had brought their claims as a class action under Rule 23 of the Fed. R. Civ. P. on behalf of all former employees who had participated in the plan during the relevant period. 464 F. Supp. 2d at 729-30. In contrast, the Tullis plaintiffs did not bring their case as a class action or otherwise seek to sue in a representative capacity according to the court. Id. at 730. Furthermore, the court held that, under Kuper, the recovery must go to the plan and benefit the plan as a whole, and in this case, "it cannot be said that a recovery by the Plaintiffs would benefit the Plan as a whole, nor would recovery bring finality by precluding subsequent litigation by other Plan participants." Id. The court similarly distinguished the Third Circuit's decision in In re Schering-Plough Corp. ERISA Litig., 420 F.3d 231 (3d Cir. 2005) and the district court's decision in Rogers v. Baxter Int'l, Inc., 417 F. Supp. 2d 974 (N.D. Ill. 2006), each of which had permitted the recovery of losses sustained by less than all plan accounts. 464 F. Supp. 2d at 730.

The court acknowledged "that a dismissal of the instant action may produce an unjust result," 464 F. Supp. 2d at 730, particularly because any recovery against Davis (who is in jail) and Continental (which is bankrupt) is unlikely. Id. at 731. The court, however, quoted at length from the Fourth Circuit's decision in LaRue v. Dewolff, Boberg & Associates, 458 F.3d 359, 577-78 (4th Cir. 2006), which had denied the recovery of losses sustained by a single plan account, concluding that this was the result intended by Congress. Id. at 730-31.[2]

SUMMARY OF THE ARGUMENT

ERISA section 409(a), 29 U.S.C. § 1109(a), expressly provides for recovery of "any losses" to the plan caused "by each" fiduciary breach. ERISA section 502(a)(2), in turn, permits an action to be brought for "appropriate relief under §409." 29 U.S.C. § 1132(a)(2). Thus, a plan fiduciary who breaches his duties and causes a loss to the plan is subject to liability under the plain language of ERISA sections 409(a) and 502(a)(2), and must restore the losses to the plan.

This is true even when, as here, the plan at issue is a defined contribution or individual account plan, and the recovery will ultimately be allocated to only some of the participants. Nothing in the Act limits the broad sweep of sections 409 and 502(a)(2) or limits recoveries to circumstances in which all, most, or even a substantial minority of plan accounts have incurred a loss. In all individual account plans, such as the 401(k) plan here, the plans' income, expenses, gains, and losses are allocated to individual accounts. Under the Act, "any losses" to the plan resulting from a fiduciary breach – including losses allocated to individual

[2] The court also rejected the plaintiffs' claim for benefits under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and held that the plaintiffs' state-law claims were preempted, with the exception of the securities claims, which the court dismissed without prejudice for failure to plead with particularity. These holdings are not challenged on appeal.

accounts – are recoverable. Certainly, nothing in the Act's language or remedial purposes suggests that Congress intended to immunize the fiduciaries of individual account plans, which currently hold more than $2.5 trillion in assets, from liability for misconduct, or to deprive such plans of meaningful remedies. Assuming the allegations in the complaint are true, the plan here suffered more than $2,000,000 in losses due to fiduciary breaches and is entitled to recover them, even though that recovery is sought on behalf of the plan by two participants who will primarily benefit.

Accordingly, here, as in this Court's decision in Kuper, the plaintiffs are entitled to recover losses allocable to their individual accounts. Moreover, Kuper is consistent with the decisions of most of the courts of appeals that have considered the issue. None have required that all of a plan's participants stand to gain from a recovery or attached significance to the fact that the plaintiffs had brought their suits as class actions, a requirement found nowhere in ERISA. Only the Fourth Circuit has held that a participant whose account within a defined contribution plan suffered losses from a fiduciary breach may not bring suit to recover those losses. The Fourth Circuit's decision, like the district court's decision below, insulates plan fiduciaries from monetary liability in a manner that is inconsistent with the plain language of the statute and directly contrary to the statute's fundamental remedial goal to protect plan assets from mismanagement.

ARGUMENT

THE PLAINTIFFS HAVE STANDING UNDER ERISA SECTIONS 409 AND 502(a)(2) TO BRING CLAIMS ALLEGING THAT THE PLAN FIDUCIARIES BREACHED THEIR DUTIES BY IMPRUDENTLY ALLOWING AN INVESTMENT MANAGER TO FRAUDULENTLY MANAGE THEIR PLAN ACCOUNTS AND CAUSE MILLIONS OF DOLLARS IN LOSSES TO THE PLAN

ERISA was a direct response to inadequacies in existing pension laws that became apparent after the economic collapse of the Studebaker-Packard Corporation left terminated employees without their promised pensions. See Nachman Corp. v. PBGC, 446 U.S. 359, 374–75 & n.22 (1980) (quoting 1 Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 1599–1600 (Comm. Print 1976) (statement of Sen. Williams, a chief sponsor of the Senate bill)). Congress enacted ERISA "to protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligation[s] for fiduciaries of [such] plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b).

To this end, ERISA's comprehensive civil enforcement scheme provides, in section 502(a)(2), 29 U.S.C. § 1132(a)(2), that "[a] civil action may be brought" by a plan "participant" to obtain appropriate relief under ERISA section 409, 29 U.S.C. § 1109. To serve ERISA's broad remedial purposes, section 409(a), provides that "any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title, shall be personally liable to make good to such plan, any losses to such plan resulting from each such breach." 29 U.S.C. § 1109(a) (emphasis added).

Although it is not entirely clear from the pleadings, properly understood, the ERISA claims here fall within the plain statutory text of section 409(a), which provides for the recovery of "any losses" to a plan resulting from a fiduciary breach, and section 502(a)(2), which permits a plan participant to bring suit to recover such losses.[3] Tullis and Mack assert that the fiduciaries' actions resulted in a diminution of the plan's assets, in particular the assets allocable to their accounts. Thus, they are entitled to sue the fiduciaries for restoration of the lost assets to the plan, as the Act expressly authorizes. The assets recovered would be paid into the plan, allocated to their individual accounts, and ultimately be paid to them in the form of benefits.[4]

---

[3] In their Complaint, the plaintiffs repeatedly allege that they "suffered damages" for which they seek compensatory and other relief, see Complaint ¶¶ 25, 32, 37, 49, and p. 16, but never specifically allege that the plan suffered such damages or is entitled to such relief. Thus, although Tullis, as a current participant in the plan, and Mack, as a former participant with a "colorable claim" to the larger distribution of plan benefits that he would have received but for the breach, have standing to seek relief for the losses sustained by the plan, the plaintiffs do not state their claims in precisely this manner. The Secretary takes no position on whether the plaintiffs have adequately pled this case under Fed. R. Civ. P. 8(a) or whether, if the Complaint is inadequate, the plaintiffs should be allowed to amend their Complaint under Rule 9.

[4] The fact that one of the plaintiffs has already received a distribution from the plan does not change the analysis. Any money recovered will be paid into the plan and then distributed to the plaintiff in the form of an increased benefit. Thus, the

The ultimate allocation of the losses to Tullis' and Mack's plan accounts does not defeat their status as "losses to the plan." All losses recovered by individual account plans, such as 401(k) plans, are ultimately allocated to individual accounts. The necessity of such an allocation is inherent in the nature of an individual account plan (also called a "defined contribution plan"), which ERISA defines as a "pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains, losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34).

Contrary to the plaintiffs' suggestion in their brief before this Court that an individual account plan is distinct from an "employee benefit pension plan," Br. at 12-13, such a defined contribution or individual account plan is simply one of two types of ERISA-covered "employee benefit pension plans," 29 U.S.C. §1002(2) (the other type of pension plan is the "defined benefit plan"). Under a defined contribution plan, "'the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide.'" Nachman Corp. v. PBGC, 446 U.S. at 364 n.5 (quoting Ala. Power Co. v. Davis, 431 U.S. 581, 593 n.18 (1997)). Indeed, such defined contribution plans are now the predominant type of

---

plaintiff is a participant within the meaning of 29 U.S.C. § 1002(7) with standing to sue under section 502(a)(2) because he is a "former employee" who is or may become "eligible to receive a benefit" from the plan.

pension plan in this country, by current estimate holding approximately $2.9 trillion in assets. Board of Governors of the Federal Reserve Sys., Flow of Fund Accounts of the United States: Annual Flows and Outstandings, Third Quarter 2005, Fed. Res. Statistical Release Z.1, at 113 (June 8, 2006).[5]

Under such an individual account plan, any "contributions are made to a single funding vehicle," and "as amounts are contributed to the trust," and earnings and losses occur within particular investments, these amounts "are allocated to the participant's account" essentially through accounting or bookkeeping entries. David A. Littell, et al., Retirement Savings Plans; Design, Regulation and Administration of Cash or Deferred Arrangements 6 (1993). The individual accounts are not, as plaintiffs assert, "separate, self-directed plans," which the individual participants "own." Br. at 11. Instead, although the plan assets are allocated to individual accounts in this manner, and the individual participant's benefit is ultimately dependent on the amounts so allocated, ownership of the accounts and of the plan's assets are not legally owned, even in part, by participants. Rather, as a matter of statutory design, the participants have a beneficial interest in their accounts, but legal

[5] The other type of pension plan is "a 'defined benefit' plan, under which the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits." Nachman, 446 U.S. at 364 n.5. Moreover, contrary to plaintiffs' assertion, Br. at 12, an "employee welfare plan" is not a third category of pension plan, Br. at 12, but is an employee benefit plan that provides non-pension benefits, such as health or disability benefits. See 29 U.S.C. § 1002(1).

title is held in trust by one or more trustees, who have authority and discretion to manage and control the assets of the plan. See 29 U.S.C. § 1103(a); 26 U.S.C. § 401(a); Rev. Rul. 89-52, 1989-1 C.B. 110, 1989 WL 572038 (Apr. 10, 1989) ("While a qualified trust may permit a participant to elect how amounts attributable to the participant's account-balance will be invested, it may not allow the participant to have the right to acquire, hold and dispose of amounts attributable to the participant's account balance at will.").

In fact, the total amount of assets held in the 401(k) plan at issue here, like the assets of any other defined contribution plan, are not only used to pay plan benefits, but may also be used to defray the operating costs of the plan as a whole, including recordkeeping, legal, auditing, annual reporting, claims processing and similar administrative expenses. All of the plan's assets are allocated to individual accounts, and all of those allocated assets are available to defray plan expenses. Therefore, any fiduciary breach that reduces the total value of assets held in trust necessarily reduces the amount available to defray plan expenses.

That the plaintiffs here may sue under sections 409(a) and 502(a)(2) follows from this Court's decision in Kuper, 66 F.3d 1447, which involved losses stemming from the delay in the transfer of assets of a relatively small number of plan participants. This Court concluded in Kuper that a subclass of plan participants could sue for losses stemming from a breach of fiduciary duty under sections 409 and

502(a)(2), as have a number of other courts that have considered the issue. See Langbecker v. Elec. Data Sys. Corp., No. 04-41760, 2007 WL 117465, at *11-12 (5th Cir. Jan. 18, 2007) (rejecting argument that a suit could not proceed under ERISA section 502(a)(2) because, as the defendants would have it, no plan-wide fiduciary duties exist with respect to 401(k) plans and any recovery would have to be allocated among the plan's individual accounts); Milofsky v. Am. Airlines, Inc., 442 F.3d 311 (5th Cir. 2006) (en banc) (permitting the recovery of losses sustained in individual account plans); Schering-Plough, 420 F.3d at 235 (noting that "the fact that the assets . . . were held for the ultimate benefit of Plaintiffs does not alter the fact that they were held by the Plan"); Steinman v. Hicks, 352 F.3d 1101, 1102 (7th Cir. 2003) (same).

Allowing this suit to proceed under section 502(a)(2) is also entirely consistent with the Supreme Court's decision in Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, in which the Court stated that a recovery under section 502(a)(2) must "inur[e] to the benefit of the plan as a whole." Id. at 140. Unlike this case, the plaintiff in Russell brought suit for compensatory and punitive damages payable not to the plan for a loss of plan assets, but directly to her to compensate her for a delay in the payment of her benefits under a disability plan.[6] Id. at 137-38. In holding that the plaintiff in that case did not have standing to sue under sections 409

[6] The complaint also asks for punitive damages, which are unavailable under ERISA, but this remedy may be as an adjunct of their state-law claims, which are no longer at issue.

and 502(a)(2), Russell distinguished relief to be paid to the plan to recoup losses arising from the mismanagement of plan assets – which is available under those provisions – from relief to be paid directly to an individual as damages for pain and suffering caused by a benefit payment delay, as sought in that case. Id. at 143-44. Thus, when the Supreme Court stated in Russell that recoveries under sections 409 and 502(a)(2) must "inure[] to the benefit of the plan as a whole," id. at 140, there is every reason to believe that the Court had in mind suits, such as this one, where, if the plaintiff's allegations are true, the plan holds fewer assets in trust due to the fiduciaries' mismanagement of the investment of some of the plan's assets, and thus has suffered "losses" within the meaning of section 409.

These decisions are consistent with the statute, which expressly allows a participant to bring a suit against a fiduciary who breaches "any of the responsibilities, obligations, and dut[ies]" imposed upon him and to recover "any losses" to a plan resulting from "each such" breach. 29 U.S.C. § 1109(a). Thus, in Kuper, this Court correctly reasoned that "Defendants' argument that a breach must harm the entire plan to give rise to liability under [section 409] would insulate fiduciaries who breach their duties so long as the breach does not harm all of a plan's participants. Such a result clearly would contravene ERISA's imposition of a fiduciary duty that has been characterized as the 'highest known to law.'" Kuper, 66 F.3d at 1453 (citation omitted). So too here, to the extent that the district court's decision holds that plaintiffs may not bring such a suit under section 502(a)(2), the decision insulates the fiduciaries from liability for their breaches with regard to their allegedly faulty management of plan assets. The fiduciary breaches at issue are matters at the heart of ERISA's fundamental goal to prevent the "misuse and mismanagement of plan assets," Russell, 473 U.S. 140 n.8, and central to the specific purpose of section 502(a)(2), which is designed to allow suits to enforce "fiduciary obligations related to the plan's financial integrity," in accordance with the "special congressional concern about plan management" reflected in section 409. Varity Corp. v. Howe, 516 U.S. 489, 511, 512 (1996).

The district court, however, relied on the Fourth Circuit's decision in LaRue, to conclude that injunctive relief under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), is the sole available relief, unless the case is brought as a class action. This is true even if it produces "an unjust result," 464 F. Supp. 2d at 730, in a case such as this, where the fiduciaries allegedly failed to act on or give the participants important, adverse information about the investment advisors.[7] A petition for certiorari is

[7] Although it is not an issue on appeal, the Secretary also disagrees with this conclusion of the district court that section 502(a)(3) precludes the recovery of monetary losses for a fiduciary breach. Instead, it is the Secretary's position that make-whole relief against a breaching fiduciary, known in equity as "surcharge," is available under section 502(a)(3). See, e.g., Green v. ExxonMobil Corp., 470 F.3d 415, 421 (1st Cir. 2006) (discussing but declining to resolve issue); but see Pereira v. Farace, 413 F.3d 330, 339-42 (2d Cir. 2005) (rejecting argument); Callery v. U.S. Life Ins. Co, 392 F.3d 401 (10th Cir. 2004) (same); cf. Aetna Health Inc. v. Davila, 542 U.S. 200, 222-23 (2004) (Ginsburg & Breyer, J.J., concurring) (noting

pending, however, in LaRue, and the Supreme Court has just asked for the government's views in that case.[8] Contrary to the district court's reasoning and to that of the Fourth Circuit in LaRue, neither this Court in Kuper, nor the courts in Schering-Plough, Milofsky or Steinman, attached any significance to the fact that the plaintiffs in those cases brought class actions. In those cases, as here, recovery will be to only a fraction (and in Milofsky, which the district court did not cite, only to a very small fraction) of the participants' accounts. Moreover, here, as in those cases, it is equally true that, because the fiduciary breaches resulted in a reduction of the assets held by the plan's trust, and because the plan is legally entitled to hold and recover the lost assets to support the payment of benefits and plan expenses, the recovery "does not solely benefit the individual participants," Smith v. Sydnor, 184 F.3d 356, 363 (4th Cir. 1999) (emphasis added), although it will undoubtedly (and primarily) benefit Tullis and Mack.[9]

---

and discussing issue). It is especially disturbing that the district court's decision here leaves the plaintiffs, and those like them, with no possible avenue to obtain suitable relief for the alleged losses stemming from the violation of this important federal law enacted to ensure the integrity of retirement benefits.

[8] If the Supreme Court grants certiorari, it may make sense for this Court to consider holding this case in abeyance (or at least delay deciding this case) pending a decision in LaRue.

[9] Nor is there any significance to the fact that the recovery sought here would not "bring finality by precluding subsequent litigation by other Plan participants." 464 F. Supp. 2d at 730. Presumably, principles of collateral estoppel and res judicata would apply in the normal manner to future suits involving these precise losses. Although

The district court's decision not only reads a significant limitation into the statute's broad and unqualified language, but it could preclude most suits to recover losses to a defined contribution plan, even those stemming from the most egregious fiduciary breaches. Thus, for instance, it could preclude many cases that have routinely been brought under ERISA section 502(a)(2), such as the one brought by participants in Bannister v. Ullman, 287 F.3d 394 (5th Cir. 2002), against fiduciaries who failed to forward employee contributions to their plan. The Secretary of Labor brings many such cases annually, some of which involve substantially fewer than all of a plan's participants, and takes the position that if a fiduciary pockets even a single employee's contribution to the plan, the plan has received fewer assets than it is entitled to receive and has suffered a loss under ERISA's plain language. Under the logic of the district court's decision, a suit that could not be brought as a class action, would therefore be precluded if brought by a participant under section 502(a)(2).

Nothing in ERISA, however, suggests that the availability of recovery for a fiduciary breach should turn on whether a claim for plan losses is brought as a class

---

this Court noted in Kuper that the recovery of losses in that case "would foreclose any subsequent litigation because it would cure any harm that the Plan suffered" from the very breaches alleged, 66 F.3d at 1453, nothing in ERISA sections 409(a) or 502(a)(2), or in Kuper, requires that a participant bring his suit as a class action or that the suit bind other participants to the extent they seek the recovery of other losses or for other misconduct.

action.[10] To the contrary, given both the plain statutory text and the fact that "the crucible of congressional concern was misuse and mismanagement of plan assets," Russell, 473 U.S. at 140 n.8, there is simply no support for the district court's conclusion that Congress struck such a one-sided balance that it intended to leave plans and their participants without a monetary remedy under ERISA for plan losses stemming from such mismanagement simply because the losses do not affect a large enough number of participants so that the case may be brought as a class action.

[10] Instead, the legislative history suggests that Congress considered, but rejected, requiring fiduciary claims to be brought as class actions. The House bills specifically provided that "[i]n any action by a participant or beneficiary under subsection (a)(2) or (3), such participant or beneficiary shall maintain such action as a representative of all other participants similarly situated as a class, if (A) the law of the jurisdiction provides for class actions, and, (B) the court is satisfied that the requirements for a class action are not unduly burdensome as applied in the particular circumstances." H.R. 2, 93d Cong. (2d Sess. 1974), 4047-48. ERISA as adopted, however, contains no such provision. Given this history, as well as ERISA's "carefully crafted and detailed enforcement scheme," Mertens v. Hewitt Assocs., 516 U.S. 248, 254 (1993) (quoting Russell, 473 U.S. at 146-47), there is no reason to believe that Congress inadvertently omitted a requirement that plaintiffs proceed under Rule 23, which, in any event, is permissive, not mandatory. Fed. R. Civ. P. 23 ("One or more members of a class may sue . . . in a representative capacity") (emphasis added); see Watkins v. Simmons & Clark, Inc., 618 F.2d 398, 402 (6th Cir. 1980).

CONCLUSION

For the reasons stated above, the Secretary respectfully requests that this Court reverse the order of the district court dismissing the case for failure to state a claim under ERISA sections 409(a) and 502(a)(2).

Respectfully submitted,

JONATHAN L. SNARE
Acting Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

KAREN L. HANDORF
Counsel for Appellate and
Special Litigation

ELIZABETH HOPKINS
Senior Appellate Attorney
United States Department of Labor
Plan Benefits Security Division
200 Constitution Avenue, N.W.
Room N4611
Washington, D.C. 20210
Phone: (202) 693-5584
Fax: (202) 693-5610

MARCH 6, 2007

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 4,770 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Office Word 2003.

Elizabeth Hopkins
Senior Appellate Attorney

Dated: March 6, 2007

Case No. No. 06-07029

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID TULLIS, et al.,

Appellants,

v.

UMB BANK, N.A.,

Appellee.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief of the Secretary of Labor, Elaine L. Chao, as Amicus Curiae Supporting Appellants and Requesting Reversal were served, via a federal express courier service, on the following:

Marvin A. Robon
Gregory R. Elder
D. Hank Mylander
Barkan & Robon Ltd.
1701 Woodlands Drive, Suite 100
Maumee, Ohio 43537-4092
(419) 897-6500

Mark C. Abramson
Scott A. Haselman
Robinson, Curphey & O'Connell
Four SeaGate, Ninth Floor
Toledo, Ohio 43604
(419) 249-7900

Elizabeth Hopkins
Senior Appellate Attorney

Dated: March 6, 2006