Nos. 00-8009 And 02-8011

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALFRED G. GEROSA, et al.
Appellants/ Cross-Appellees
v.

NEIL J. SAVASTA, et al.
Appellees/ Cross-Appellants

BRIEF FOR THE SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE SUPPORTING REVERSAL

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BRIEF FOR THE SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE SECRETARY OF LABOR

The Secretary of the United States Department of Labor has primary interpretation and enforcement authority for Title I of ERISA, 29 U.S.C. § 1001, et seq. Accordingly, she has a substantial interest in ensuring that ERISA is interpreted to protect plans and their participants, and that preemption principles are applied appropriately.

STATEMENT OF THE ISSUES

1. Whether ERISA authorizes a federal common law cause of action for

damages against a non-fiduciary plan actuary.

2. Whether ERISA preempts state law claims for negligence against a non-fiduciary plan actuary.

STATEMENT OF THE CASE

1. Statement of the facts

Plaintiffs are the trustees of the Cement Masons' Local 780 Pension Fund (the "Fund"), a multi-employer, defined benefit pension plan. Gerosa v. Savasta, 189 F. Supp.2d 137, 138 (S.D.N.Y. 2002). Defendant Savasta and Company, Inc. ("Savasta") served as actuary to the Plan for a number of years. Id. Savasta's annual valuations for the years 1994 through 1996 showed a vested benefit funded ratio of between 110% and 128%. Id. That meant that the assets were more than sufficient to cover the cost of all vested benefits, and that no obligations on the part of contributing employers would arise if the Fund were terminated. In 1997, Savasta advised the trustees of the Fund that certain benefit increases could be made for new retirees without decreasing the vested benefit funded level below 100%. The trustees adopted Savasta's recommendations. Id. In its December 1998 valuation, Savasta advised the trustees that the vested benefit funded level was not 102.4%, as it had calculated the year before, but actually was 71.3%. Id. at 138, 139. Savasta allegedly attributed the decrease to "data correction," although it

could not locate the data it had used to arrive at its erroneous report and recommendation. Id. at 139. The trustees terminated Savasta as of August 31, 2000.

The trustees brought suit against Savasta in federal district court asserting an ERISA claim,[1] as well as state breach of contract and promissory estoppel claims, seeking to recoup damages to the plan allegedly caused by the actuary's miscalculations. 189 F. Supp.2d at 139. Savasta moved to dismiss all claims, arguing that ERISA did not allow the trustees' claim for damages, and that the state law claims were preempted by ERISA. Id.

2. Decision below

The court held the state claim preempted, but concluded that ERISA does provide a federal common law cause for action for damages. As an initial matter, the court acknowledged that the Supreme Court has held that ERISA does not explicitly provide for damage suits against non-fiduciaries, and that the term "equitable relief" in ERISA § 502, 29 U.S.C. § 1132, is to be construed narrowly. 189 F. Supp.2d at 146, citing Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993), and Great-West Life & Annuity Ins. Co. v. Knudson, 122 S. Ct. 708 (2002).

1 The plaintiffs actually styled their ERISA claims as one for equitable relief in the form of restitution, but the court ruled that the suit was seeking compensatory damages. Gerosa v. Savasta, 189 F. Supp.2d at 146 n.4.

Turning then to the preemption issue, the court reasoned that because plan fiduciaries must rely on the opinions of actuaries to determine the level of benefits to provide, just as they must rely on auditors, accountants and lawyers to ensure the financial integrity and proper organization of the plan, the services of these professionals "significantly affect 'the structure, the administration, [and] the type of benefits provided by an ERISA plan.'" 189 F. Supp.2d at 148. The court also was persuaded by the fact that ERISA requires plans to engage actuaries and auditors, "and provides the detailed framework within which they are required to operate and deliver their professional opinions." Id., citing ERISA § 103, 29 U.S.C. § 1023. On this basis, the district court concluded that ERISA preempts state laws regulating the malfeasance of such entities. The court thus expressly rejected the holdings of many other courts that have come to the opposite conclusion, lamenting that "Mertens and, more recently, Great-West Life, and their five-to-four majorities have displaced the sounder analysis of Diduck" v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270 (2d Cir. 1992), a pre-Mertens case in which the Second Circuit held that non-fiduciaries who participated in fiduciary breaches could be sued for damages under ERISA pursuant to a federal common law theory. 189 F. Supp.2d at 150.

Nevertheless, turning to the question of an available remedy under ERISA, the court did not rely directly on Diduck, but instead attempted to distinguish Mertens. The court noted that in this case, unlike in Mertens, the trustees, rather than the participants and beneficiaries, have brought suit against the actuary, not for aiding in fiduciary wrongdoing, but based on the actuaries' own negligent misconduct. 189 F. Supp.2d at 150. Noting that the Supreme Court expressed unwillingness in Mertens to impose direct and consequential damages on those "who had no real power to control what the plan did," the district court attempted to limit the holding of Mertens to claims against nonfiduciaries for knowing participation in a fiduciary breach. Id. quoting Mertens, 508 U.S. at 262. Thus, the court concluded that a damages remedy against the actuary was not precluded by Mertens. Furthermore, because the trustees' claim here is "defined and bound up with standards created by federal law," the court reasoned that "[t]he same federal law . . . must also define the standards that distinguish between reasonable and negligent conduct." 189 F. Supp.2d at 150-51. Thus, the court concluded that ERISA's preemption provision, along with "the Supreme Court's willingness to develop a federal common law thereunder, has created a fair, efficient and comprehensive statutory regime." Id. at 152, citing Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 156 (1985) (Brennan, J., concurring). Accordingly,

the court held that "ERISA litigation is the natural and exclusive forum that should hear and determine the lawsuits of trustees against the actuaries they engaged, for damages caused by those actuaries when they failed to conform their conduct to the standards provided by ERISA." 189 F. Supp.2d at 152.

Both sides sought interlocutory review. The court acknowledged that the case presents controlling legal issues on which there is substantial ground for difference of opinion, and therefore certified the matter for interlocutory appeal

INTRODUCTION AND SUMMARY OF THE ARGUMENT

ERISA is a "comprehensive and reticulated statute," Nachman Corp. v. PBGC, 446 U.S. 359, 361 (1980), designed to provide a complete system of federal regulation of private employee benefit plans. District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 126 (1992). The Act imposes on plan fiduciaries rules concerning reporting, disclosure and fiduciary responsibility for employee benefit plans. See Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90-91 (1983). This "carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" Mertens, 508 U.S. at 254, quoting Russell, 473 U.S. at 146-47. For this reason, the Supreme Court in Mertens and more recently in Great-West has expressly held that monetary damages against nonfiduciaries do not

constitute "equitable relief" under the applicable enforcement provision of ERISA, and is thus precluded as a federal remedy.

ERISA, however, does not leave the plan without a remedy against plan accountants who negligently perform their services or otherwise breach their contracts with plans. As nearly every court to have considered the issue has held, ERISA, which does not itself provide a cause of action for negligence or breach of contract, does not preempt state tort or contract claims against professional consultants who are not fiduciaries. Thus, although ERISA § 514 is broadly preemptive of state laws that would govern the standards of fiduciary conduct or core plan functions, it does not preempt this kind of "run-of the-mill" state action by a plan that allegedly received sub-standard services from an outside party with whom it contracted.

ARGUMENT

I. ERISA DOES NOT AUTHORIZE AN ACTION FOR MONEY DAMAGES AGAINST A NON-FIDUCIARY PLAN ACTUARY

Section 502(a)(3) of ERISA provides, inter alia, that a fiduciary of a plan governed by ERISA may bring a civil action "to enjoin any act or practice which violates . . . the terms of the plan," and to "obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce . . . the terms of the plan." 29 U.S.C.

§ 1132(a)(3). The Supreme Court has expressly held that, under this provision, plan fiduciaries may sue for equitable relief, but may not hold non-fiduciary professional service providers liable for damages. Mertens, 508 U.S. at 262.

In Mertens, a class of beneficiaries sued their plan fiduciaries and the plan actuary for certain funding errors. The class alleged that the actuary "knowingly participated" in breaches of fiduciary duties. As in Gerosa, the class did not allege that the actuary was a plan fiduciary. As authority for their request for damages, petitioners in Mertens cited ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), which authorizes beneficiaries, among others, to bring civil actions to "obtain other equitable relief" to redress violations of ERISA or to enforce plan terms. The only question before the Court was whether petitioners were entitled to a damage award against the actuary under § 502(a)(3). 508 U.S. at 251, 253.

At the outset, the Court expressed its doubt that petitioners had even stated an ERISA claim, noting that ERISA nowhere expressly prohibits "knowing participation" in a fiduciary breach. 508 U.S. at 253. The Court noted its "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" Id. at 254, quoting Russell, 473 U.S. at 146-47 (emphasis

in original).[2] Nevertheless, turning to the issue of available relief under §502(a)(3), which authorizes "appropriate equitable relief," the Court reasoned that Congress intended equitable relief to mean only those categories of relief that were typically available in equity, such as injunctions, mandamus and restitution. 508 U.S. at 256. Because the petitioners, in the Court's view, were seeking classic compensatory damages, a legal remedy that courts of equity did not customarily award, this could not constitute available equitable relief. Id. In Great-West, the Supreme Court extended this holding, concluding that an employee benefit plan cannot sue to be subrogated to a beneficiary's insurance recovery or to be reimbursed by the beneficiary, because, at least where the plan assets cannot be traced to the beneficiary, such a recovery, even if it is characterized as restitution, does not constitute typical equitable relief. 122 S. Ct. at 715.

Prior to Mertens, however, the Second Circuit had held that "one who knowingly participates in a fiduciary's breach of duty is jointly and severally liable with the fiduciary for the resulting damages under ERISA." Diduck, 974 F.2d at 281 (emphasis added). In Diduck, the court concluded "that ERISA's legislative

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2 This dicta in Mertens, questioning knowing participation liability, has since been rejected by the Supreme Court, at least in the context of acts that are strictly prohibited under ERISA § 406, 29 U.S.C. § 1106. Harris Trust v. Salomon Smith Barney, Inc., 530 U.S. 238, 246-48 (2000).

history demonstrated 'Congress wanted federal courts to fill any gaps in the statute by looking to traditional trust law principles.'" Id. at 280, quoting Chemung Canal Trust Co. v. Sovran Bank/Maryland, 939 F.2d 12, 16-18 (2d Cir. 1991) (allowing right of contribution among fiduciaries despite lack of ERISA provision allowing such suit), cert. denied, 505 U.S. 1212 (1992). The Diduck court was influenced by its belief that any state action against non-fiduciaries would be preempted, thus leaving participants and beneficiaries without a remedy against parties who have wronged them. 974 F.2d at 281.

In this case, the district court did not rely directly on Diduck. Indeed, the court lamented the replacement of the "sounder analysis" of Diduck by the 5-4 majorities in Mertens and Great-West. 189 F. Supp.2d at 150. Instead, it attempted to distinguish Mertens by claiming that the actuary in Mertens was sued for having aided and abetted a fiduciary, whereas Savasta is being sued for its own conduct in "failing properly to perform the obligations directly and extensively imposed by ERISA on actuaries." 189 F. Supp.2d at 146. Thus, the court relied on ERISA § 103, 29 U.S.C. § 1023, which "spells out the responsibilities of actuaries," to conclude that the "same federal law that defines what an actuary must do must also define the standards that distinguish between reasonable and negligent conduct." Id. at 151.

The court's reasoning in this regard is unconvincing. Although ERISA §§ 103 and 104 require plan administrators to retain specified professionals, including "enrolled" actuaries (certified by a joint Labor and Internal Revenue Service Board under 29 U.S.C. § 1242), who can provide the necessary services so that the administrator can access necessary information and file annual reports containing this information, these provisions place the primary responsibility in this regard on the administrator. 29 U.S.C. §§ 1023, 1024. Thus, while ERISA elsewhere provides for decertification of enrolled actuaries who fail to "discharge their duties under" ERISA, § 3042, 29 U.S.C. § 1242, ERISA § 103 does not authorize plans to sue actuaries or accountants for failing to comport with its requirements, and indeed, does not itself authorize civil lawsuits at all. Instead, ERISA's civil enforcement scheme is spelled out in § 502, which the Supreme Court in Mertens interpreted as not allowing damages actions against actuaries. More recently, the Supreme Court in Great-West not only recognized that Mertens forecloses a damage remedy in a suit against nonfiduciaries, but also reiterated that plaintiffs may only obtain relief that was "typically available in equity," 122 S. Ct. at 715-16, 718, a holding flatly inconsistent with the court's attempt to fashion a federal common law remedy of damages against a nonfiduciary here. The Supreme Court's admonition in Mertens that "the authority of courts to develop a federal

common law under ERISA, is not the authority to revise the text of the statute," could hardly be more apt. 508 U.S. at 259 (internal quotations and citation omitted).

Thus, Mertens and Great-West have discredited the analysis of Diduck, which the court below has artfully attempted to resurrect. See Finkel v. Stratton Corp., 962 F.2d 169, 174-75 (2d Cir. 1992) (the rule that one panel may not overrule the decision of a prior panel "does not apply where an intervening Supreme Court decision casts doubt on the prior ruling"). In fact, the Second Circuit has correctly noted, without commenting on the continued vitality of Diduck, that "ERISA does not authorize suits for money damages against nonfiduciaries." Mullins v. Pfizer, Inc., 23 F.3d 663, 666 (2d Cir. 1994). Given the Supreme Court's decisions in Mertens and Great-West, which clearly rule out money damages in this context, Mullins is correct on this point, and the district court's analysis is in error.

II. ERISA DOES NOT PREEMPT GEROSA'S STATE LAW CLAIMS AGAINST SAVASTA

ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." ERISA § 514(a), 29 U.S.C. § 1144(a). Although ERISA preemption is "conspicuous for its breadth," it has its limitations. Some state laws "may affect employee benefit plans in too tenuous,

remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." Shaw v. Delta Air Lines, Inc., 463 U.S. at 100, n.21; see also Ingersoll-Rand v. McClendon, 498 U.S. 133, 139 (1990) ("a generally applicable statute that makes no reference to, or ... functions irrespective of, the existence of an ERISA plan" does not relate to an ERISA plan within the meaning of ERISA § 514(a) and is not preempted). Thus, it should not be "assumed lightly that Congress has derogated state regulation," but rather, a preemption claim should be analyzed "with the starting presumption that Congress does not intend to supplant state law." New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654-55 (1995), citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981)). Put another way, courts should assume, under ERISA as elsewhere "'that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Travelers, 514 U.S. at 655 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). See also Metropolitan Life v. Massachusetts, 471 U.S. 724, 740 (1985) (Congress did not intend to preempt areas of traditional state regulation.).

As we have noted, the Second Circuit assumed in Diduck that state actions against non-fiduciaries who knowingly participate in fiduciary breaches are preempted. In Diduck, the court reasoned that "[i]f an action against non-

fiduciaries is not preempted, Congress' scheme of bringing uniformity to the area of employee benefit plans . . . would be undermined insofar as the conduct and liability of non-fiduciaries would be assessed by varying state laws, while the conduct and liability of the fiduciary whom the third party is claimed to have knowingly assisted in breaching a duty would be governed by federal law." 974 F.2d at 281 (citations omitted). In fact, as we have said, the court justified its creation of a federal common law damages remedy against non-fiduciaries in part based on its conclusion that it was unlikely that Congress intended to "preempt state law remedies without providing a corresponding remedy under federal law." Id.[3]

The vast majority of courts, however, including district courts in the Second Circuit, have concluded that such actions by plans against third-party service providers are not preempted. See, e.g., Painters of Phila. Dist. Council No. 21 Welfare Fund v. Price Waterhouse, 879 F.2d 1146, 1153 n.7 (3d Cir. 1989) (in case against plan auditor, court concludes that "ERISA does not generally preempt state professional malpractice actions"); LeBlanc v. Cahill, 153 F.3d 134, 149-51 (4th

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3 Somewhat circularly, the court also stated that "[o]ne factor pointing in favor of preemption is the 'expectation[ ] that a federal common law of rights and obligations under ERISA-regulated plans would develop.'" 974 F.2d at 280-81, quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987). Thus, the court relied on preemption as supporting the creation of a federal common law remedy and on the availability of such a remedy as supporting preemption.

Cir. 1998) (common law fraud and misrepresentation claims by plan trustees against investment bankers); Pappas v. Buck Consultants, Inc., 923 F.2d 531, 540 & n.1 (7th Cir. 1991) (auditors); Airparts Co. v. Custom Benefit Servs. of Austin, Inc., 28 F.3d 1062, 1065 (10th Cir. 1994) (consultant); Berlin City Ford v. Roberts Planning Group, 864 F. Supp. 292, 296 (D.N.H. 1994) (consultant); Bourns, Inc. v. KPMG Peat Marwick, 876 F. Supp. 1116, 1122 (C.D. Cal. 1994) (auditor); Richards v. Union Labor Life Ins. Co., 804 F. Supp. 1101, 1103-04 (D. Minn. 1992) (actuary); Carl Colteryahn Dairy, Inc. v. Western Pa. Teamsters & Employers Pension Fund, 785 F. Supp. 536, 543 (W.D. Pa. 1992) (accountants and actuaries); Framingham Union Hosp., Inc. v. Travelers Ins. Co., 721 F. Supp. 1478, 1490 (D. Mass. 1989) (accountant); Isaacs v. Group Health, Inc., 668 F. Supp. 306, 312-13 (S.D.N.Y. 1987) (actuary). Indeed, as one court has stated, courts, both before and after Travelers, have "[u]niformly" recognized that "ERISA does not preempt state malpractice or similar negligence or fraud actions against outside nonfiduciary providers of professional services to ERISA plans." Harmon City, Inc. v. Nielsen & Senior, 907 P.2d 1162, 1169 (Utah 1995) (collecting cases).

A presumption that ERISA does not preempt negligence claims arises because the law governing professional service providers represents a traditional exercise of state authority. See Mackey v. Lanier Collection Agency & Serv., Inc.,

486 U.S. 825, 833 (1988); Painters, 879 F.2d at 1153 n.7; Coyne & Delaney Co. v. Selman, 98 F.3d 1457, 1471 (4th Cir. 1996) ("[c]ommon law professional malpractice, along with other forms of tort liability, has historically been a state concern"). In Mackey, 486 U.S. at 825, the Supreme Court held that ERISA did not preempt the application of a state garnishment statute, a traditional area of state regulation, to an ERISA-covered welfare benefit plan "even where the purpose [of the state garnishment statute] is to collect judgments against plan participants." Applying the rule more generally, the Court noted that ERISA does not preempt plans from "run-of-the mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan." Mackey, 486 U.S. at 833. See also General Am. Life Ins. Co. v. Castonguay, 984 F.2d 1518, 1522 (9th Cir. 1993) ("ERISA doesn't purport to regulate those relationships where a plan operates just like any other commercial entity.") (citation omitted). The Supreme Court re-emphasized this point in Travelers, noting that "Congress could not possibly have intended to eliminate" the "myriad state laws in areas traditionally subject to local regulation." 514 U.S. at 668. "[S]tate law has traditionally prescribed the standards of professional liability." Painters, 879 F.2d at 1152-53. Federalism concerns strongly counsel against imputing to Congress an intent to displace "a whole panoply of state law in this area" absent some clearly expressed

direction to do so. Id., 879 at 1153 n.7.

Moreover, allowing state law negligence claims against service providers to ERISA plans would not encroach upon the policies that ERISA was designed to promote. In enacting ERISA, Congress sought "to protect ... the interests of participants in employee benefit plans and their beneficiaries, ... by establishing standards of conduct, responsibility, and obligation for fiduciaries ... and ... by providing for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b). Immunizing actuaries such as Savasta from personal liability for their negligence and misrepresentations regarding funding levels will reduce the ability of employees, beneficiaries, and employers to rely on the advice of such actuaries about their plans, and may result either in participants losing plan benefits or in employers being required to make up any shortfall. See Airparts, 28 F.3d at 1066 ("We see no congressional purpose to be furthered by denying an ERISA plan a state cause of action against allegedly negligent third-party service providers."). Furthermore, state actions for malpractice and misrepresentation do "not affect the structure, the administration, or the type of benefits provided by an ERISA plan." Rebaldo v. Cuomo, 749 F.2d 133, 139 (2d Cir. 1984), cert. denied, 472 U.S. 1008 (1985); see also Airparts, 28 F.3d at 1066. Nor does the claim implicate "the relations among the principal

ERISA entities -- the employer, the plan, the plan fiduciaries, and the beneficiaries." Airparts, 28 F.3d at 1065. Thus, the state law claim does not fall within any of the categories of laws that courts have generally held to be preempted by ERISA: "laws ... that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee." Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 149 (2d Cir.), cert. denied, 493 U.S. 811 (1989); see also Airparts, 28 F.3d at 1064-65.

Title I of ERISA specifically regulates the relationship between fiduciaries and plans, and authorizes fiduciaries, participants, beneficiaries and the Secretary to sue for breaches of fiduciary duty. Accordingly, claims against third-party administrators for breaching fiduciary duties owed to participants for failing to process claims, for example, are preempted because these claims fall within the scope of § 502(a)(1)(B). Nowhere in ERISA, however, did Congress create a cause of action to enforce contracts with service providers to plans. At the same time, it is clear from ERISA's text that Congress contemplated that such contracts would be enforceable. ERISA expressly governs relationships between plans and service providers only to the extent that § 406, 29 U.S.C. § 1106, prohibits certain transactions between plans and parties in interest. ERISA, however, exempts from

the prohibitions provided in § 406 "[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan." ERISA § 408(b)(2), 29 U.S.C. § 1108(b)(2). Congress obviously intended for these arrangements to be enforceable inasmuch as the arrangements were considered "necessary" for plan operation. Absent enforceability, plans and plan sponsors would be powerless to force service providers to adhere to the terms of the contracts. Thus, one may reasonably infer that Congress intended that traditional state law would govern those arrangements not enforceable under ERISA.

Indeed, because there is no ERISA provision that addresses breach of contract or malpractice claims or that in any ways conflicts with such state law claims, courts have correctly eschewed either creating an ERISA cause of action or displacing state causes of action. See Painters, 879 F.2d at 1152-53; Nieto v. Ecker, 845 F.2d 868, 871-72 (9th Cir. 1988). To hold otherwise, a court would have to determine that ERISA was intended to create a large legal vacuum relieving actuaries and other nonfiduciary professional providers of their ordinary standards of care to the overall detriment of plans and their participants and beneficiaries, while at the same time imposing the highest possible standard of care on the fiduciaries dependent on them for their services. Nothing in ERISA, however,

requires such an irrational result. Instead, the Trustees' claims against the actuaries for their negligence in providing services to the plan are the kind of "run-of-the-mill" claims that the Supreme Court has recognized are properly the subject of state regulation. Mackey, 486 U.S. at 833. Thus, the Trustees must be permitted to proceed with their claims under generally applicable contract and tort law, without the interposition of ERISA preemption as a jurisdictional bar to their consideration in state court.

CONCLUSION

The decision of the district court should be reversed and the case remanded to the district court, with instructions to remand the case to state court.

Respectfully submitted.

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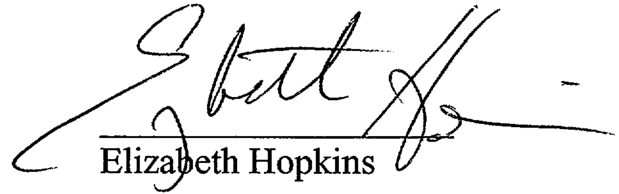
November 2002

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I certify that the attached Brief of the Secretary of Labor as Amicus Curiae Supporting Reversal contains 4418 words.

Dated: November 1, 2002



Elizabeth Hopkins

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief of the Secretary of Labor, United States Department of Labor, as Amicus Curiae Supporting Reversal were served upon all counsel of record by depositing copies thereof in the United States mail, first class postage prepaid, addressed as follows, this 1st day of November, 2002 to:

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