No. 03-11087

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL MILOFSKY, et al.

Plaintiffs-Appellants

v.

AMERICAN AIRLINES, INC., et al.

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF OF AMICUS CURIAE ELAINE L. CHAO, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR SUPPORTING THE PLAINTIFFS-APPELLANTS AND REQUESTING REVERSAL OF THE DISTRICT COURT'S DECISION

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STATEMENT OF THE ISSUES

1. Whether participants in individual account pension plans have standing to sue plan fiduciaries under section 502(a)(2) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(2), for relief to the plan when the alleged violations affected some, but not all, of the plan participants' accounts.

2. Whether participants are required to exhaust internal plan remedies before bringing suit to recover losses resulting from fiduciary breaches under section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2).

INTEREST OF THE SECRETARY OF LABOR

The Secretary of Labor is charged with interpreting and enforcing the provisions of Title I of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq. As the federal agency with primary interpretation and enforcement authority for Title I of ERISA, the Department of Labor has a strong interest in ensuring that courts correctly interpret ERISA. This case presents an important and recurring issue – whether participants in individual account plans may obtain relief to the plan under section 502(a)(2) of ERISA when the alleged violations affected some, but not all, of the plan participants' accounts. Because several courts have held that participants may not obtain losses for fiduciary breaches which harm individuals under section 502(a)(3) of ERISA, participants in individual account plans, including many who have been harmed by plan investments in employer stock, may be unable to recover losses caused by fiduciary breaches if the district court's decision is affirmed.[1] At the end of 2002, over $1.8 trillion of all pension plan assets were held in individual account plans, representing well over half of all pension plan assets. Fed. Res. Bd., Flow of Funds Accounts of the United States: Flow and Outstanding Third Quarter 2003, Fed. Res. Statistical Release 2.1, at 113 (Jan. 15, 2004).

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[1] This court has not considered the question whether section 502(a)(3) of ERISA authorizes participants to recover direct monetary losses caused by a fiduciary breach. Both the Second and Seventh Circuits have held that participants can obtain such relief. Strom v. Goldman, Sachs & Co., 202 F.3d 138, 144 (2d Cir. 1999); Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 592 (7th Cir. 2000). The Fourth, Sixth, Eighth and Ninth Circuits have held the opposite. Rego v. Westvaco Corp., 319 F.3d 140 (4th Cir. 2003); Helfrich v. PNC Bank, Kentucky, Inc., 267 F.3d 477 (6th Cir. 2001), cert. denied, 535 U.S. 928 (2002); Kerr v. Charles F. Vatterott & Co., 184 F.3d 938 (8th Cir. 1999); FMC Med. Plan v. Owens, 122 F.3d 1258 (9th Cir. 1997). As discussed in footnote 4, the Secretary believes that participants may recover direct monetary losses under section 502(a)(3) of ERISA. Absent a finding by this court that compensatory relief is available under section 502(a)(3), however, private plaintiffs and the Secretary could be without any adequate remedy if a case involving alleged losses cannot be brought unless all of a plan's participants have incurred a reduction in their account values.

The Secretary also has an interest in assuring that plan participants are not required to exhaust internal plan remedies before bringing suit in federal court alleging breaches of fiduciary duty. To require exhaustion of remedies for suits involving fiduciary breaches would serve no useful purpose and would hinder the participants' ability to recover losses to their plans, placing a greater burden on the Secretary to obtain such recoveries.

The Secretary believes that the district court erred in dismissing the case for the reasons stated in the opinion and, therefore, pursuant to Federal Rules of Appellate Procedure 29, respectfully submits this brief as amicus curiae.

STATEMENT OF THE CASE

The plaintiffs were former airline pilots for Business Express, Inc. ("BEX").[2] See Class Action Complaint ¶¶ 11, 17. BEX was acquired by AMR Eagle Holding Corporation ("Eagle Holding") in March 1999. Id. After the acquisition, the pilots remained on the BEX payroll and continued to participate in the Business Express, Inc. Saving and Profit Sharing Plan ("the BEX Plan"). See id. at ¶ 18. The pilots were transferred to Eagle

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[2] The Secretary takes no position on the factual matters presented by this case. The Statement of the Case is taken from the plaintiffs' complaint and is not intended to express the Secretary's opinion about how the Court should rule on any particular fact.

Holding's operating company, American Eagle, Inc. ("American Eagle"), over a sixteen month period, as vacancies became open. Id. Once a BEX pilot became an employee of American Eagle, he became a participant in the Super Saver-A Capital Accumulation Plan for Employees of Participating AMR Corporation Subsidiaries ("Super Saver Plan"). His BEX Plan account was then to be transferred to the Super Saver Plan.

Both the BEX Plan and the Super Saver Plan were individual account plans. See Complaint ¶¶ 5-7; see also 29 U.S.C. § 1002(34) (defining individual account plan). Moreover, they were also 401(k) plans that allowed participants to choose among various investment alternatives. Id. at ¶ 1. The plaintiffs had access to their accounts in the BEX Plan before their transfers, but did not have access to their accounts during a stage in the transfer process called the "blackout period." Id. at ¶ 20. During the blackout period, the pilots' accounts were invested in short-term investment funds while the accounts were reconciled and transferred. Id. After each pilot's account was transferred, it was placed in a credit union investment account. Id. The pilots could then access their accounts and transfer their balances to any investment option available under the Super Saver Plan, including the credit union investment account. Id.

Towers Perrin served as American Eagle's benefits consultant during the time of the transfer, and was responsible for notifying the former BEX pilots of the procedure and timing for transferring their account balances from the BEX Plan to the Super Saver Plan. Complaint ¶¶ 16, 20. Each pilot was given a notice stating when his account would be transferred. Id. at ¶¶ 21, 22.

The pilots sued American Airlines, Inc., ten John Doe defendants who are allegedly members of the Super Saver Pension Asset Administration Committee, ten John Doe defendants who allegedly are members of the Super Saver Pension Benefits Administration Committee, and Towers Perrin. Complaint ¶ 2. They alleged that the defendants breached their fiduciary duties under ERISA by "failing to effectuate the timely transfer of plaintiffs' account balances from the BEX Plan to the Super Saver Plan as promised by numerous representations" and by "failing to give accurate information about the transfer process and/or failing to correct previously given inaccurate information." Id. at ¶ 34. Specifically, they allege that the balance transfers did not occur within the time frames specified in the notices, but instead occurred weeks and sometimes months later than the dates indicated. Id. at ¶ 23. For example, Michael Milofsky began work at American Eagle on September 4, 2000. He received three notices stating that his account would be transferred as of July 31, 2000, then October 31, 2000, and finally February 16, 2001. His account was finally transferred to the Super Saver Plan as of February 16, 2001, more than five months after his transfer to American Eagle. Id.

The plaintiffs alleged that because of the defendants' "misrepresentations," their account balances remained invested in the BEX Plan, where they lost value, instead of being safely invested in the Super Saver Plan's credit union investment option. Complaint ¶ 25. The plaintiffs sought an order requiring the defendants to "pay actual damages to the Super Saver Plan to be allocated among plaintiffs' individual accounts proportionate to plaintiffs' losses" and to "enjoin the defendants from further violating their obligations, duties and responsibilities imposed upon them as fiduciaries of the Super Saver Plan." Complaint ¶¶ C, D (Prayer for Relief).

The district court issued a decision on September 24, 2003, granting the defendants' motions to dismiss. Milofsky v. American Airlines, Inc., 2003 WL 22398799, at *1 (N.D. Tex. Sept. 24, 2003). The court first dismissed Towers Perrin, concluding that the plaintiffs had not alleged any facts to establish that Towers Perrin engaged in fiduciary acts. Id. at *2. Although the court then characterized the plaintiffs' claims as involving misrepresentations and the failure to transfer accounts in a timely manner, the court concluded that the case was a benefit dispute and the complaint should be dismissed for failure to exhaust administrative remedies. Id. at *3.

The district court further held that the complaint should be dismissed because the plaintiffs lacked standing to bring their claim under sections 409 and 502(a)(2) of ERISA. 2003 WL 22398799, at *4. Relying on Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985), the court stated that relief under section 409 was designed to benefit the plan as a whole and not just to benefit individual plan participants. Id. The court stated that the relief the plaintiffs ultimately were seeking was reimbursement to the individual accounts of those suffering losses that would not benefit the Super Saver Plan as a whole. Id. Thus, the court concluded the plaintiffs did not have standing to bring their claim under sections 409 and 502(a)(2) of ERISA.[3] Id.

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3 The theory and factual allegations in the complaint are complicated and need further development before disposition of the case. The alleged violations, misrepresentations and mismanagement of account transfers, involved two separate plans and two separate sets of fiduciaries. Whether, and when, the Super Saver Plan fiduciaries owed ERISA obligations to the plaintiff participants may depend on the factual resolution of issues concerning the plaintiffs' status as participants of the Super Saver Plan, as opposed to the BEX Plan, and the defendants' assumption of fiduciary responsibilities with respect to the participants of either one or both of the plans.

For these and other reasons, it is also unclear whether Towers Perrin was acting as a fiduciary with respect to either Plan. The complaint alleges that Towers Perrin provided administrative services to the Super Saver Plan,

SUMMARY OF ARGUMENT

The district court erred when it held that the plaintiffs did not have standing under sections 409 and 502(a)(2) of ERISA to recover losses to the plan because the losses would be allocated to some, but not all, of the participants' accounts. Section 409 expressly provides for recovery of "any losses" to the plan. The Supreme Court's decision in Massachusetts Mut. Life Ins. Co v. Russell, 473 U.S. 134 does not hold that losses are only recoverable under section 409 if they are allocated to every participant in the plan. The Supreme Court simply limited the relief available under section 409 to relief that is directed to the plan rather than to individual plan participants. The Supreme Court made clear in Russell that sections 409 and

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including "operating and maintaining an '800' service number to assist Super Saver Plan participants with questions concerning the Super Saver Plan, distributing forms and other information in connection with the Super Saver Plan, providing personalized online account information and responding to questions concerning the Super Saver Plan." Complaint ¶ 16. Although the complaint alleges generally that Towers Perrin exercised discretion over the administration of the Super Saver Plan, id., the specific allegations in the complaint, in and of themselves, may not be enough to establish that Towers Perrin was a fiduciary either to the Super Saver Plan or the BEX Plan. See 29 C.F.R. § 2509.75-8, D-2 (explaining that persons providing ministerial services for a plan, including preparation of employee communications materials and advising participants of their rights and options under the plan, are not in and of themselves fiduciaries if they operate within a framework of policies, interpretations, rules, practices and procedures made by other persons).

502(a)(2) were intended to give relief for fiduciary violations involving mismanagement of plan assets, and that such relief "inures to the benefit of the plan as a whole." Id. at 140. It would be contrary to the intent and text of those sections to hold that plan fiduciaries that violate ERISA's fiduciary standards are not liable simply because their violation did not affect the accounts of every single (or even most) plan participants. That result would leave most participants in 401(k) plans covered by ERISA unprotected from fiduciary violations.

The district court also erred by holding that the plaintiffs were required to exhaust plan remedies before bringing a fiduciary breach claim. The exhaustion of remedies requirement applies to benefit claims brought against the plan. Where the claim does not involve benefits, but instead involves the mismanagement of plan assets, no purpose is served by requiring exhaustion. The plan fiduciaries are not in a position to provide a full and fair review of the fiduciary breach claim because they themselves are the subject of the claim. Moreover, relief in a fiduciary breach claim comes from the fiduciary and not the plan. Accordingly, the plan cannot provide the remedy sought by the participants.

ARGUMENT

I. The District Court erred in holding that the plaintiffs do not have standing under sections 409(a) and 502(a)(2) of ERISA to recover losses to a plan if the losses are allocated to some, but not all, of the participants' accounts

The district court erred when it held that the plaintiffs do not have standing under sections 409(a) and 502(a)(2) of ERISA to seek losses if those losses are ultimately allocated to individual accounts. If a fiduciary breach results in a diminution of the total amount of assets held in trust, there is a resulting loss to the plan, even if not every individual participant is affected by the loss. Any recovery is a recovery to the plan, even if it is only allocated to individual accounts that were affected by the violation. Otherwise, participants in a typical 401(k) or other individual account plan with an array of investment options could never sue for plan losses caused by a particular investment unless every single participant had chosen that particular option. The majority of plan assets today are held by individual account plans -- pension plans in which the entire trust corpus is held in trust by one or more trustees, see section 403, 29 U.S.C. § 1103, and the plan's investment income, expenses, gains, and losses are allocated to participant accounts. See section 3(34) of ERISA, 29 U.S.C. § 1002(34). If the defendants' view of the law is correct, participants of these plans would be left without a loss remedy under section 502(a)(2). This result is unsupported by the statute and could leave untold numbers of plan participants with no legal protection from plan losses caused by breaching fiduciaries, a result Congress could not have intended.

Section 502(a)(2) of ERISA provides that a civil action may be brought by a participant for "appropriate relief under § 409." 29 U.S.C. § 1132(a)(2). Section 409(a) provides:

> 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 the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a). By its terms, section 409 requires fiduciaries to make good "any losses" to the plan, not just losses that have an impact on every single participant of the plan.

The Supreme Court's decision in Massachusetts Mut. Life Ins. Co v. Russell, 473 U.S. 134, is not to the contrary. In Russell the plan's disability committee terminated a participant's disability benefits. After the benefits were reinstated, the participant brought suit, alleging that "[t]he interruption of benefit payments . . . forced [her] disabled husband to cash out his retirement savings which, in turn, aggravated the psychological condition that caused [the participant's] back ailment." Id. at 137. She brought suit under section 502(a)(2) seeking punitive damages, as well as damages for mental or emotional distress, to be paid directly to her. Id. at 138. After reviewing the text of Section 409, the provisions defining the duties of a fiduciary and the provisions defining the rights of a beneficiary, the Supreme Court held that the participant did not have standing to seek extra-contractual compensatory or punitive damages for improper or untimely processing of a benefit claim under sections 409 and 502(a)(2) of ERISA. In so holding, the court stated "that recovery for a violation of § 409 inures to the benefit of the plan as a whole." Id. at 140.

The district court made too much of Russell's reference to "the plan as a whole" in concluding that relief under section 409 is not available when it is allocated to some, but not all, of the participant accounts in a plan. Russell was simply distinguishing between relief paid directly to the plan for losses that occurred inside the plan (such as damages for plan asset mismanagement) from relief to be paid directly to individuals for losses occurring outside of the plan (such as damages for personal pain and suffering caused by a benefit payment delay). The plaintiff in Russell did not allege that the plan had suffered a loss, that the fiduciaries had mismanaged plan assets, or that the amount of plan assets had been reduced. Rather, she alleged that her claim for benefits had been handled improperly and that she had suffered losses outside of the plan as a result. Thus, Mrs. Russell's claim was premised on individual losses flowing from the alleged mishandling of a benefit claim, and not from any alleged losses to the plan within the meaning of sections 409 and 502(a)(2).

The Court in Russell acknowledged that "the fiduciary obligations of plan administrators are to serve the interest of the participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan." 473 U.S. at 142. The Court explained, however, that section 503 of ERISA, 29 U.S.C. § 1133, and not section 409, protects participants from untimely and improper benefit determinations and section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), authorizes a beneficiary to enforce her rights under a plan. Id. at 143-44. Accordingly, Mrs. Russell had not stated a claim for relief authorized by sections 409 and 502(a)(2) of ERISA, which addresses injuries to the plan and mismanagement of plan assets, rather than individual benefit disputes that do not reduce the plan's assets or otherwise injure the plan.

In contrast, the Supreme Court noted that the language of section 409 focuses on the relationship between the fiduciary and the plan as an entity.

473 U.S. at 140 ("Thus, not only is the relevant fiduciary relationship characterized at the outset as one 'with respect to a plan,' but the potential personal liability of the fiduciary is 'to make good to such plan any losses to the plan ... and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan'") (emphasis in the original). The Court found further support for its conclusion that section 409 provides relief running directly to the plan in other statutory provisions revealing that "the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." Id. at 142-43. Surveying the legislative history, the Court noted that the floor debates revealed "that the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent abuses in the future." Id. at 140 n.8. The Court concluded that "[a] fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." Id. at 141.

In the present case, the plaintiffs argue that plan fiduciaries mismanaged the transfer of plan assets and misrepresented the process by which those assets would be transferred. As a result, the plan allegedly has fewer total assets and the participants' individual accounts are reduced. Although the plaintiffs' case would more clearly involve the mismanagement of plan assets if it turned primarily on the fiduciaries' decisions with respect to the investment of plan assets, rather than on alleged misrepresentations, the plan has nevertheless allegedly suffered a loss. If the allegations are true, the plan and its fiduciaries hold fewer assets in trust, the value of the plan is diminished, and the plan, therefore, has suffered a loss within the meaning of section 502(a)(2). The plaintiffs do not seek to recover losses they have incurred outside of the plan, but rather to restore losses incurred within the plan. Because any recovery will increase the overall assets of the pension plan, such recovery will inure to the benefit of the plan, even if not every participant benefits. Thus, Russell fully supports the availability of a remedy under section 502(a)(2) here.

This understanding of Russell is supported by the Supreme Court's decision in Varity Corp. v. Howe, 516 U.S. 489 (1996). The Court there contrasted the various enforcement provisions contained in section 502, noting that each served a specific purpose. Section 502(a)(1)(B) provides relief "that runs directly to the injured beneficiary" with respect to benefit claims. Id. at 512. Section 502(a)(2), on the other hand, provides the enforcement provision for "fiduciary obligations related to the plan's financial integrity," id. at 512, in accordance with "a special congressional concern about plan asset management" reflected in section 409, id. at 511. Finally, turning to sections 502(a)(3) and (5), 29 U.S.C. § 1132(a)(3) and (5), Varity held that these sections are "catchall" provisions "which could include an award to 'participants and beneficiaries,' rather than to the 'plan,' for breach of fiduciary obligation." Id. at 510. [4] Thus, Varity clarifies that

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[4] Towers Perrin argues that the plaintiffs have not brought this suit under section 502(a)(3) because compensatory damages are not available under that section. Section 502(a)(3), however, provides relief directly to plan participants rather than the plan. The plaintiffs here are seeking relief which would be directly deposited to the plan corpus and not a direct payment to themselves personally. Moreover, as stated in footnote 1, this Court has not determined whether section 502(a)(3) authorizes compensatory relief for fiduciary breaches that harm individuals. Although Towers Perrin argues that the Supreme Court definitively answered the question in Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) and in Mertens v. Hewitt Assocs., 508 U.S. 248 (1993), neither of those cases involved suits against fiduciaries for fiduciary breaches. Great-West instructs the courts to determine whether a remedy is "equitable" by determining whether the remedy was typically available in courts of equity at the time of the divided bench. The Department of Labor has argued in two pending cases in other circuits that relief against a fiduciary is always equitable because historically suits against fiduciaries could only be brought in courts of equity during the days of the divided bench. See I. A. Scott, The Law of Trusts, § 1, at 4; III. Scott, The Law of Trusts, § 197, at 188. Because the plaintiffs have not brought this case under section 502(a)(3), this court need not decide that issue in this case.

Russell's reference to "relief to the plan as a whole" simply stands for the proposition that relief under sections 409 and 502(a)(2) must run directly to the plan.

There is, therefore, no basis for reading Russell so broadly that losses caused by fiduciary mismanagement, that significantly diminish the retirement security of participants or the amount of assets held in trust, cannot be recovered unless all of the participants are affected. In the typical 401(k) plan, participants are given several investment options with differing degrees of risk and return. See, e.g., In re Unisys Sav. Plan Litig., 74 F.3d 420, 426 (3d Cir. 1996) (describing the various investment options in the Unisys Savings Plan). Although participants exercise control over their account balances, the plan fiduciary is responsible, among other things, for choosing the investment options, for monitoring those options, and for providing accurate information to plan participants. See In re Enron Corp. Secs., Derivative & ERISA Litig., 284 F. Supp. 2d 511 (S.D. Tex. 2003). If the defendants' broad arguments are correct, participants in 401(k) plans and other individual account plans, such as the Enron plans, would be unable to recover losses to their accounts unless all of the participants in the plans chose the same investment options, even if the majority of the plans' participants lost most of their retirement savings as the direct result of fiduciary breaches.

The Sixth Circuit recognized the absurdity of such a reading in Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995). Kuper also involved a delay in the transfer of assets of a group of participants from one plan to another and a diminution in the value of the assets during the delay. The defendants alleged that the plaintiff class failed to state a claim for breach of fiduciary duty under section 409 because the class did not include all of the plan's beneficiaries. Id. at 1452. The Sixth Circuit cited cases holding that recovery under section 409 must go to the plan, and stated that the cases "distinguish between a plaintiff's attempt to recover on his own behalf and a plaintiff's attempt to have the fiduciary reimburse the plan." Id. at 1452-1453. The Sixth Circuit concluded that a subclass of plan participants may sue for a breach of fiduciary duty under section 409 and noted the policy reasons for the result:

> Defendants' argument that a breach must harm the entire plan to give rise to liability under § 1109 would insulate fiduciaries who breach their duty 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."

Id. at 1453 (citations omitted). Accord Kling v. Fid. Mgmt. Trust Co., 270 F. Supp. 2d 121, 126-27 (D. Mass. 2003) ("Kling does sue on behalf of the Plan, and thus meets the requirements of § 409 as interpreted by the Supreme Court in Russell. That the harm alleged did not affect every single participant does not alter this conclusion. To read such a requirement into § 409 that the harm alleged must affect every plan participant would, as the Sixth Circuit observed, 'insulate fiduciaries who breach their duty so long as the breach does not harm all of a plan's participants.'"). See also Steinman v. Hicks, 352 F.3d 1101 (7th Cir. 2003) (clarifying that a claim for losses relating to financial mismanagement is properly brought under section 502(a)(2) even if the relief ultimately flows to individuals).

The district court's reliance on Matassarin v. Lynch, 174 F.3d 549 (5th Cir. 1999), is likewise misplaced. The plaintiff in Matassarin was a beneficiary in an ESOP by virtue of a qualified domestic relations order ("QDRO") obtained at the time of her divorce. She brought suit alleging that her account balance was miscalculated and that she should be entitled to an immediate cash distribution. She additionally alleged that the plan fiduciaries had breached their duties by failing to comply with the tax code, which jeopardized the plan's tax qualified status, by buying back shares of stock from participants who cashed out of the plan for less than fair market value and by failing to diversify her account. As the court correctly noted, only the allegation concerning the tax-qualified status of the plan was properly brought under section 502(a)(2) because it involved the interest of the plan as a whole. Id. at 565-6. The court held that the allegation that the stock was purchased back from those who received distributions for less than fair market value, even if true, only harmed those who cashed out, not the plan itself. Id. at 567. Finally, the court found that the failure to diversify the plaintiff's account was consistent with the QDRO's terms and did not cause any losses to the plan. Id. at 567-8. Therefore, unlike this case, Matassarin did not involve an alleged violation that resulted in the diminution of current participants' accounts and the resulting diminution of the amount of plan assets held in trust. Accordingly, Matassarin provides no support for the proposition that relief under section 502(a)(2) for fiduciary mismanagement of plan assets must inure to the benefit of every participant in a 401(k) plan.[5]

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[5] Contrary to Towers Perrin's argument, Izzarelli v. Rexene Prods., Co., 24 F.3d 1506, 1523 (5th Cir. 1994), does not hold that relief is not available under section 409 if it is allocated to a subclass of plan participants. It is not

II. The District Court Erred by Requiring the Plaintiffs to Exhaust Internal Plan Remedies

The district court also erred when it characterized the plaintiffs' claim as a benefit dispute and dismissed the complaint for failure to exhaust administrative remedies. Although the decision is not entirely clear, it appears to hold that any claim that is specific to individuals, even if it involves investment losses, is a benefit claim requiring exhaustion. This holding is not supported by either the case law or the rationale for exhaustion of administrative remedies. If affirmed by this court, the district court decision will have a significant negative impact on the ability of plan participants to recover investment losses caused by fiduciary breaches in individual account plans.

The statute does not expressly require exhaustion of administrative remedies before a participant may bring a benefit claim suit in federal court. The federal courts, however, have unanimously held that an ERISA plan participant must exhaust whatever administrative remedies exist under the

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clear from the decision that the participants in Izzarelli even brought their claim under sections 502(a)(2) and 409. Moreover, there is no indication that this Court considered whether the plaintiffs had standing under those provisions. Instead, this court simply held in Izzarelli that a fiduciary breach did not occur when one subset of participants was treated differently than another because fiduciaries have an obligation to consider the interest of the plan as a whole rather than a particular group of plan participants. Id. at 1523-24.

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) (quoted in Denton v. First Nat'l Bank of Waco Tex., 765 F.2d 1295, 1301 (5th Cir. 1985)). 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. Hall v. Nat'l Gypsum Co., 105 F.3d 225, 231 (5th Cir. 1997).

The rationale for exhaustion of benefit claims does not apply 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. There is, therefore, no statutory basis for requiring exhaustion of plan remedies before filing suit in federal court alleging breaches of fiduciary duty.

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. Thus, the defendants' argument effectively suggests that the plaintiffs should exhaust a plan process that does not exist in order to recover amounts that the plan cannot pay. ERISA requires no such thing.

Moreover, no purpose would be served by requiring a participant to first seek relief from the fiduciary before filing an action under section 502(a), 29 U.S.C. § 1132(a), and ERISA imposes no such duty on the participant. 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. ERISA, in any event, mandates no procedure for review of fiduciary breaches by the fiduciaries themselves, and the defendants have pointed to no such procedure that would have been actually available in this case.

This court recognized the absurdity of requiring exhaustion when the plan is not the defendant and the relief requested comes from a source other than the plan. In Chailland v. Brown & Root, Inc., 45 F.3d 947, 950 (5th 1995), the court held that exhaustion is not required in a case alleging retaliation under section 510 of ERISA, 29 U.S.C. § 1140. In Chailland, the court reviewed Fifth Circuit fiduciary breach cases that applied the common law exhaustion requirement and concluded that they "presuppose that the grievance upon which the lawsuit is based arises from some action of a plan covered by ERISA, and that the plan is capable of providing the relief sought by the plaintiff." Id. at 951. The court stated that, where the action arises from some entity other than the plan and the plan is incapable of providing relief, exhaustion "would make absolutely no sense and would be a hollow act of utter futility." Just as in a section 510 case, exhaustion would make no sense where the claimed violation involves a fiduciary breach and monetary relief is sought from the breaching fiduciary to be paid to the plan.[6]

Simmons v. Willcox, 911 F.2d 1077, 1081 (5th Cir. 1990), cited by the district court as precedent in the Fifth Circuit for its holding, was simply a benefits case recharacterized as a fiduciary breach case. See Chailland, 45 F.3d at 951 n. 8. In Simmons, the participant was seeking information about the status of her retirement and health benefits after being terminated from employment. In response to her request, she received forms on which to file a claim for benefits. Rather than file the claim, she filed suit in federal court for the benefits, alleging that there had been a breach of fiduciary duty when she did not receive the information or benefit that she requested. The Fifth Circuit concluded that her fiduciary breach claim was really a benefit claim and that she could not avoid the exhaustion requirement simply by mischaracterizing it as a fiduciary breach.

Here, the plaintiffs are not, and cannot be, seeking benefits because they are not retired and, therefore, are not eligible to make a claim for benefits under either the BEX Plan or the Super Saver Plan. Their fiduciary

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6 This Circuit's decision in Radford v. General Dynamics Corp., et al., 151 F.3d 396 (5th Cir. 1998), suggested that a participant bringing a fiduciary breach claim under section 502(a)(3) may be required to exhaust administrative remedies. The court, however, concluded that it need not reach the issue because the statute of limitations had already run on the alleged violation.

breach claim is not, therefore, a benefit claim recharacterized as a fiduciary breach claim, and they should not be required to exhaust their administrative remedies.

CONCLUSION

The decision of the district court should be reversed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the Brief of Amicus Curiae Elaine L. Chao, Secretary of the United States Department of Labor Supporting the Plaintiffs-Appellants and Requesting Reversal of the District Court's Decision, along with a diskette in PDF format, was mailed, via federal express overnight delivery, on this 27th day of February 2004 to the following parties:

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As required by Fed. R. App. 32(a)(7)(B), I certify that this brief is proportionally spaced, using Times New Roman 14-point font size, and contains 5,140 words.

I relied on Microsoft Word 2000 to obtain the word count.

Dated: February 27, 2004

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