No. 08-4814

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MICHELLE WENDEL, Plaintiff-Appellee

v.

HERZLINGER, et al., Defendants-Appellants

On Appeal from the United States District Court
for the District of New Jersey

No. 03-CV-01294
JUDGE KATHARINE S. HAYDEN

Brief Of The Secretary Of Labor, Hilda L. Solis, As Amicus Curiae In Support Of Plaintiff-Appellee And Requesting Affirmance

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STATEMENT OF THE ISSUES

1. Whether ERISA section 404(c), 29 U.S.C. § 1104(c), immunizes fiduciaries from liability for alleged imprudence in maintaining Schering-Plough stock as a plan investment option.

2. Whether LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020 (2008), means, as the defendants assert, that there are no plan claims in the context of defined contribution plans and that, as a consequence, a claim for losses under section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), is merely a claim for individual participants' losses that does not lend itself to class action treatment.

STATEMENT OF INTEREST

The Secretary of Labor has primary enforcement authority for Title I of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq. Accordingly, the Secretary has a strong interest in the proper construction of ERISA's fiduciary provisions, which were enacted to ensure the prudent management of pension plan assets and to safeguard the security of retirement benefits.

This case concerns, in part, a 1992 Department of Labor regulation that delineates when fiduciaries are relieved from potential liability for imprudent investment choices by the participants' exercise of control over

assets held in certain participant-directed individual account plans. 29 U.S.C. § 1104(c); 29 C.F.R. § 2550.404c-1. Under this regulation, promulgated by the Secretary after notice-and-comment rulemaking pursuant to an express delegation of statutory authority, fiduciaries to such plans remain obligated to ensure that the investment options offered by the plans are selected and maintained in accordance with ERISA's fiduciary provisions, while plan participants bear responsibility for losses that stem from the allocation of investments between funds appropriately chosen by the plans' fiduciaries. The Secretary has a strong interest in urging the Third Circuit to hold that the regulation, as interpreted by the Secretary from its inception, is reasonable because a decision to the contrary would absolve fiduciaries that have imprudently selected or maintained investment options in participant-directed individual account plans from liability and thereby deprive participants in those plans of adequate remedies for fiduciary misconduct.

The Secretary also has a strong interest in urging the court to reject the defendants' argument, which they attempt to glean from the Supreme Court's decision in LaRue, that all claims involving defined contribution plans are individual claims that do not lend themselves to class action treatment. To the contrary, the LaRue decision affirmed the Secretary's

position that even claims for plan losses that inevitably benefit only a few plan participants in individual account plans are nevertheless plan claims, a holding consistent with the Third Circuit's previous decision in this case.

STATEMENT OF THE CASE

The plaintiff, Michele Wendel, is a former employee of Schering-Plough Corporation, a pharmaceutical research, development and production company. Schering-Plough sponsored the Schering-Plough Employee Saving Plan (the Plan), an ERISA-covered defined contribution plan, which offered a variety of investment options, including a company stock fund. Joint Appendix, "J.A.", 1, 2. The plaintiff is a participant in the Plan whose account was and is partially invested in the company-stock fund. She and several other named plaintiffs, who have since dropped out of the suit, brought this class action suit under ERISA section 502(a)(2), alleging that as a result of Schering-Plough's expensive, yet failed attempt to develop and introduce a new allergy medicine, for which the company was heavily fined by the Food and Drug Administration, the Plan suffered substantial losses. J.A. 3-5. Plaintiff sued the company and a number of Plan fiduciaries under ERISA sections 409 and 502(a)(2), claiming that the defendants acted imprudently and disloyally under the circumstances in maintaining the

company stock fund as an investment option for the Plan, and in making misleading and incomplete disclosures about the stock fund. Id.

Shortly thereafter, the defendants filed a motion to dismiss the case in its entirety, which the district court granted in 2004. The court accepted the defendants' argument that the case was not properly brought under sections 409 and 502(a)(2) because the plaintiffs sought recovery of supposedly individual losses, and not Plan-wide relief to the extent that not every single participant's account would benefit from the recovery. The plaintiffs appealed and the Secretary filed a brief in support of their argument that Plan losses need not be allocated to every single account in a defined contribution plan to be recoverable under section 502(a)(2) because the loss of any money held in the Plan's accounts constitutes a loss to the Plan within the meaning of that section. The Third Circuit agreed with this position, In re Schering-Plough ERISA Litigation, 420 F.3d 231 (3d Cir. 2005), as the Supreme Court ultimately did in its decision in LaRue.

On remand, the district court adopted the recommendations of the magistrate that was assigned to the case and certified a class for three of the four counts (denying class certification on the misrepresentation count). J.A. 25-34. In so doing, the court agreed with the many courts that have held that a fiduciary breach claim under section 502(a)(2) is a classic example of the

sort of claim that can be brought as a class action under Rule 23(b)(1). See J.A. 18 (relying on the committee notes to Rule 23 to conclude that the class was properly certified under Rule 23(b)(1)(B), as essentially a "breach of trust" case that was likely to "similarly affect[] the members of a large class" of trust beneficiaries); see also J.A. 28, 32. Moreover the court rejected, as unpersuasive, the defendants' numerous objections to class certification. As an initial matter, the court was not persuaded that the plaintiff's claims were atypical merely because she testified that she continued to believe that Schering-Plough stock was a good investment, or because she had signed a release and covenant not to sue. Id. 12-15, 29-30. The court found the plaintiff's testimony expressing affection for and confidence in her former employer did not amount to a repudiation of the allegations of the complaint. J.A. 14, 30. And the court held that the release and covenant were invalid under ERISA section 410, 29 U.S.C. § 1110, and thus had no bearing on the certification inquiry. J.A. 30-31. The court likewise rejected defendants' argument that the availability of a 404(c) defense bars class certification. The court saw no reason to believe that the defense would be unique to any of the plaintiffs, and also noted that 404(c) is an affirmative defense, the applicability of which had not yet been established. J.A. 32. The court adopted the open-ended class period granted by the magistrate and certified

a class of all Plan participants and beneficiaries whose accounts held Schering-Plough stock during the class period. J.A. 33.

The defendants petitioned for interlocutory review under Rule 23(f), which this Court granted on December 10, 2008. J.A. 37-38.

SUMMARY OF ARGUMENT

The statutory safe harbor in section 404(c) does not immunize the Plans' fiduciaries to the extent they acted imprudently in offering the company stock fund as a plan investment. The Secretary's regulation interpreting section 404(c), issued after notice and comment pursuant to an express delegation of authority, reasonably interprets 404(c) as providing no defense to the imprudent selection or retention of an investment option by the fiduciaries of an individual account plan that provides for participant-directed investments. The Secretary's contemporaneous interpretation to that effect is expressed in the preamble to her regulation, in briefs, and in Department of Labor Opinion Letters, and is therefore entitled to the highest level of deference under controlling Supreme Court precedent. This interpretation has effectively ensured for fourteen years that plan fiduciaries retain responsibility – and accountability – for the prudent selection and monitoring of plan investment options in accordance with ERISA's stringent fiduciary obligations.

Nor is there merit to the defendants' argument that there are no plan claims in the context of defined contribution plans and that, consequently, a claim for losses under ERISA section 502(a)(2), is merely a claim for individual participant losses that does not lend itself to class action treatment. This Court has already held to the contrary in its prior decision in this case. And far from holding that section 502(a)(2) claims are individual claims when brought by participants in defined contribution plans, the Supreme Court in LaRue v. DeWolff unanimously recognized just the opposite, i.e., that all losses in individual accounts within a defined contribution plan count as losses to the plan. Thus, the plaintiff's claim to recover plan losses allegedly stemming from the fiduciaries' imprudence in selecting and maintaining an overpriced company stock fund as an investment option for the plan is not merely a collection of conflicting individual claims for losses as the defendants assert. Instead, it is a claim for an aggregate loss recovery for the plan that lends itself to class action treatment on behalf of the plan participants and beneficiaries, as the court below held.

ARGUMENT

I. ERISA SECTION 404(c) DOES NOT PROVIDE A DEFENSE TO THE DEFENDANTS' ALLEGED IMPRUDENCE IN MAINTAINING THE SCHERING-PLOUGH STOCK FUND

Congress enacted ERISA expressly to safeguard the "financial soundness" of employee benefit plans "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(a), (b). To this end, ERISA imposes on all plan fiduciaries the familiar trust law standards of prudence and loyalty, and provides that plan participants and fiduciaries may bring suit to recover plan losses stemming from the breach of those duties. 29 U.S.C. §§ 1104, 1109, 1132(a)(2). Although ERISA fiduciaries are generally responsible under these provisions for all plan losses caused by their breaches and those of their co-fiduciaries, see 29 U.S.C. §§ 1132(a)(2), 1109(a), 1105, section 404(c) provides a limited exception for losses resulting from a participant's or beneficiary's exercise of control over his individual account in a defined contribution plan. 29 U.S.C. § 1104(c). Thus, ERISA section 404(c)(1)(B) provides that "in the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the

assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) . . . no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control." Id. § 1104(c)(1)(B) (emphasis added).

Under the terms of the Act and the Secretary's 404(c) regulation, plan fiduciaries are shielded only for losses "which result[] from" the participant's exercise of control, and not from losses attributable to their own fiduciary misconduct. 29 U.S.C. § 1104(c)(1)(B); 29 C.F.R. § 2550.404c-1. Consequently, section 404(c) does not give fiduciaries a defense to liability for their own imprudence in the selection or monitoring of investment options available under the plan. The selection of the particular funds to include and retain as investment options in a retirement plan is the responsibility of the plan's fiduciaries, and logically precedes (and thus cannot "result [] from") a participant's decision to invest in any particular option. It is the fiduciary's responsibility to choose investment options in a manner consistent with the core fiduciary duties of prudence and loyalty. If it has done so, section 404(c) relieves the fiduciary from responsibility for losses that "result[] from" the participants' exercise of authority over their own accounts. If, however, the funds offered to the participants were

imprudently selected or monitored, the fiduciary retains liability for the losses attributable to the fiduciary's own imprudence.

This straightforward interpretation of the statute is reflected in the 404(c) regulation, which provides: "If a plan participant or beneficiary of an ERISA section 404(c) plan exercises independent control over assets in his individual account in the manner described in [the regulation]," then the fiduciaries may not be held liable for any loss or fiduciary breach "that is the direct and necessary result of that participant's or beneficiary's exercise of control." 29 C.F.R. § 2550.404c-1(d)(2); see also 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(i).

The preamble to the regulation explains that:

> the act of designating investment alternatives . . . in an ERISA section 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable. All of the fiduciary provisions of ERISA remain applicable to both the initial designation of investment alternatives and investment managers and the ongoing determination that such alternatives and managers remain suitable and prudent investment alternatives for the plan.

57 Fed. Reg. 46,922 (Oct. 13, 1992). The preamble further explains, in a footnote, that the fiduciary act of making a plan investment option available is not a direct and necessary result of any participant direction:

> In this regard, the Department points out that the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan is a fiduciary function which, whether achieved through fiduciary designation or

> express plan language, is not a direct or necessary result of any participant direction of such plan. Thus, . . . the plan fiduciary has a fiduciary obligation to prudently select . . . [and] periodically evaluate the performance of [investment] vehicles to determine . . . whether [they] should continue to be available as participant investment options.

Id. at 46,922 n.27. In other words, although the participants in such defined contribution plans are given control over investment decisions among the options presented to them, the plan fiduciaries nevertheless retain the duty to prudently choose and monitor the investment options.[1]

This regulatory interpretation is consistent with ERISA's purposes and overall structure, which places stringent trust-based fiduciary duties at the heart of the statutory scheme. See 29 U.S.C. §§ 1001(b), 1104. Under this scheme, fiduciaries are defined not simply by their titles, but also functionally, based on the discretionary authority they are granted and the control they exercise over the plan and its assets. See 29 U.S.C. § 1002(21).

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[1] The Secretary has consistently adhered to this interpretation in regulatory pronouncements and amicus briefs. See, e.g., Department of Labor Opinion Letter No. 98-04A, 1998 WL 326300, at *3, n.1 (May 28, 1998); Letter from the Pension and Welfare Benefits Administration, U.S. Department of Labor, to Douglas O. Kant, 1997 WL 1824017, at *2 (Nov. 26, 1997); Hecker v. Deere & Co., 2008 WL 5731147 (Apr. 4, 2008) (Amended Brief of the Secretary of Labor as Amicus Curiae in Support of the Plaintiffs-Appellants); Tittle v. Enron Corp., 2002 WL 34236027 (Amended Brief of the Secretary of Labor as Amicus Curiae Opposing Motion to Dismiss) (Sept. 30, 2002). Indeed, the Secretary asserted this position in a footnote in her previous brief in this case, although the Court's decision did not address this point. See 2004 WL 5215266, *17 n.7 (Oct. 21, 2004).

Thus, the Supreme Court has correctly noted that ERISA "allocates liability for plan-related misdeeds in reasonable proportion to the respective actor's power to control and prevent the misdeeds." Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993). Consistent with these principles, the statute provides that if a fiduciary exercises control over the plan or its assets, it must do so prudently and loyally, and the fiduciary is relieved from liability only in the limited circumstances where the control that the fiduciary would otherwise have exercised is properly delegated to and exercised by someone else. See, e.g., section 405(c)(1), 29 U.S.C. § 1105(c)(1) (permitting the named fiduciary in some circumstances to designate other fiduciaries to carry out specific functions, and relieving the named fiduciary of liability except with respect to appointing or monitoring the designee); 25 C.F.R. § 408b-2(e)(2) (explaining that a fiduciary does not self-deal under section 406(b)(1) if "the fiduciary does not use any of the authority, control, or responsibility which makes such person a fiduciary to cause the plan to pay additional fees"). The Secretary's 404(c) regulation and her interpretation of that regulation are consistent with, and indeed best serve, these statutory principles.

The defendants rely on this Court's decision in the Unisys case for the proposition that if a plan meets the requirement of 404(c), the plaintiff in this case may not recover plan losses even if the Schering-Plough stock fund was

imprudently selected or main by the fiduciaries. Brief of Defendants-Appellants at 47, citing In re Unisys Sav. Plan Litig., 74 F.3d 420, 443-46 (3d Cir. 1996). Unisys does not, however, support this proposition. In fact, the Court in Unisys held that the defendant was not "entitled to summary judgment on its section 404(c) defense." Id. at 446. In reaching this conclusion, the court noted, in dicta, that the "plain terms" of section 404(c) "allows a fiduciary, who is shown to have committed a fiduciary breach in making an investment decision, to argue that despite the breach, it may not be held liable because the alleged loss resulted from a participant's exercise of control." Id. at 445 (emphasis added). But even this dicta is qualified by the Court's candid acknowledgement that the statutory text "neither defines nor clarifies its central element – the 'control' a pension plan may permit a participant or beneficiary to exercise." Id. This dicta is fully consistent with the Secretary's regulatory interpretation of the concept of control in this case, and with giving deference to that interpretation; indeed, the Court in Unisys noted that because the conduct took place before the regulation's effective date, the regulation "does not apply or guide our analysis in this case." Id. at 444 n.21; see also Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only

if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

The defendants also rely on the Fifth Circuit's decision in Langbecker v. Electronic Data Systems (EDS), 476 F.3d 299 (5th Cir. 2007), and on the recent decision of the Seventh Circuit in Hecker v. Deere & Company, 556 F.3d 575 (7th Cir. 2009), to argue that the 404(c) defense is available to plan fiduciaries that imprudently choose or maintain investment options that a reasonable fiduciary would not offer. The Secretary disagrees with the Fifth Circuit's analysis in EDS. Contrary to the holding of the EDS majority, the Secretary's interpretation of section 404(c) as allowing lawsuits against fiduciaries for imprudent investment choices is both consistent with the statutory provision and entirely reasonable, as the dissent in EDS pointed out. 476 F.3d at 320-22 & n.6 (Reavley, dissenting) (collecting cases holding that the fiduciary retains the duty to prudently select and monitor investment options even if a plan qualifies as a 404(c) plan); accord DiFelice v. U.S. Airways, Inc., 497 F. 3d 410, 418 n.3 (4th Cir. 2007).

The Secretary also believes that the Seventh Circuit erred in its analysis of the issue in Deere and has filed a brief in support of a pending rehearing petition that argues that the purpose of the statutory provision and

the regulation is to relieve a fiduciary of liability for a participant's independent investment choices, but not from the fiduciary's own imprudent selection of the plan options from which the participant must choose. "In other words, although section 404(c) does limit a fiduciary's liability for losses that occur when participants make poor choices from a satisfactory menu of options, it does not insulate a fiduciary from liability for assembling an imprudent menu in the first instance." DiFelice, 497 F.3d at 418 n.3. Moreover, the Deere court believed it was not deciding the "abstract question" "whether the safe harbor applies to the selection of investment options for a plan." 556 F.3d at 589.

The regulation was issued after notice-and-comment rulemaking pursuant to an express delegation of authority to the Secretary to determine the circumstances under which "a participant or beneficiary exercises control over the assets in his account." 29 U.S.C. § 1104(c). Consequently, it is entitled to controlling deference under Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). See Long Island Care at Home v. Coke, 127 S. Ct. 2339, 2349-50 (2007); United States v. Mead Corp., 533 U.S. 218, 229-30 (2001).

The Secretary's interpretation of section 404(c) and of her own regulation is likewise entitled to the highest degree of deference because it is

longstanding and consistently held, thoroughly thought out, and based on the Secretary's consideration of relevant policy concerns. See, e.g., Yellow Trans., Inc. v. Michigan, 537 U.S. 36, 45 (2002) (giving Chevron deference to the ICC's interpretation of the Intermodal Surface Transportation Efficiency Act that was made in explanatory statement announcing the promulgation of the regulation rather than the regulatory text). The preamble language explaining the scope of the regulatory and statutory exemption and declining to shield fiduciaries from liability for losses attributable to their own imprudent selection and monitoring of investment options represents the Secretary's authoritative interpretation of her own regulation and was itself the product of the same notice-and-comment rulemaking. Indeed, this interpretation was announced in the proposed regulation before it was adopted in the final regulation. See 56 Fed. Reg. 10724, 10832 n. 21 (Mar. 13, 1991). The Supreme Court has stressed the strength and importance of deference in such circumstances, Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 877-80 (2000) (giving controlling deference to interpretation in preamble), and consistently has given controlling weight even to interpretations of regulations that were made later in much less formal settings. See Long Island Care, 127 S. Ct. at 2349 (2007) (controlling deference to agency's interpretation of regulation set out

in an advisory memorandum in response to litigation); Auer v. Robbins, 519 U.S. 452, 462 (1997) (controlling deference to an interpretation made for the first time in a legal brief).

Even to the extent that the statutory language – which limits the section 404(c) defense to losses that "result[] from a participant's exercise of control" – leaves open how strict a standard of causation ought to apply, the Secretary's resolution of that issue ought to prevail. See Brand X, 545 U.S. at 982 (Chevron established a "'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'") (citation omitted). As explained above, there are good policy reasons to conclude that losses that flow from a fiduciary's imprudent monitoring of investment options should be understood to result from the fiduciary's decisions rather than the individual participant's subsequent decision to select the flawed option. Thus, the Secretary's regulation sensibly draws the line between losses that "result from" a participant's own imprudence while exercising independent control and those that do not.

The plaintiffs here allege that, as the result of the defendants' imprudent inclusion of the company stock fund during a period when they had reason to know that the stock was overvalued, while plan participants and other investors did not, the Plan overpaid for the stock. If the plaintiffs' allegations are true, the losses are not the "direct and necessary result" of the participant's exercise of control within the meaning of the Secretary's regulation, 29 C.F.R. § 2550.404c-1(d)(2)(i), but rather the result of the fiduciaries' imprudence in selecting or retaining the company stock fund as one of the Plans' investment options when it was imprudence to do so. Application of the 404(c) defense in such a situation would effectively immunize the fiduciaries from liability for their own lack of prudence in this basic act of plan management and would leave the plan participants to suffer the consequences, a result that would be particularly unfair where, as here, the plaintiffs allege that the defendants had knowledge that the stock was overpriced that the plaintiffs did not possess. Moreover, the Secretary's interpretation precluding the application of the defense in the context of a claim involving alleged breaches with regard to employer stock is bolstered by legislative history questioning whether employer stock funds would ever meet the participant control test because participants are likely to be subject to pressure from their employer when making a decision about whether to

invest in company stock funds. H.R. Conf. Rep. No. 93-1280, at 305, reprinted in 1974 U.S.C.C.A.N. 5038, 5086. Although the Secretary did not ultimately determine that such investments in employer stock should be foreclosed altogether by section 404(c) plans, the Secretary elected a more moderate approach that would give "some assurance that these limited investment choices [in a 404(c) plan] will be prudently selected." EDS, 476 F.3d at 321 (Reavely, dissenting).[2]

Because section 404(c) provides no defense to their alleged fiduciary misconduct, the defendants miss the mark in arguing that 404(c) precludes class certification.

II. UNDER LARUE V. DEWOLFF, ALL LOSSES TO INDIVIDUAL ACCOUNTS WITHIN A DEFINED CONTRIBUTION PLAN ARE PLAN LOSSES

In order to rebut the district court's suggestion that class certification can be granted almost automatically in a 502(a)(2) case because the plaintiff brings her claims on behalf of the Plan and for its benefit, rather than in an individual capacity, the defendants make the rather astonishing assertion that LaRue somehow establishes the principle that there are no plan losses in the defined contribution context. In fact, LaRue held almost the opposite – that

[2] Otherwise, as Judge Reavely further noted in his dissent, "plan fiduciaries could imprudently select a full menu of unsound investments, among which participants remain free to choose at their peril, while the fiduciaries remain insulated from fiduciary responsibility." 476 F.3d at 321.

in a defined contribution plan, losses attributable to individual accounts are plan losses. See 128 S. Ct. at 1026 ("We therefore hold that although § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account."). Indeed, this was one of the things upon which all the Justices agreed in their concurrences. See id. (Roberts, C.J., concurring) (joining the Court in rejecting the Fourth Circuit's holding "that the loss to LaRue's individual plan account did not permit him to 'serve as a legitimate proxy for the plan in its entirety,' thus barring him from relief under § 502(a)(2)"); id. at 1029 (Thomas, J., concurring) ("Because a defined contribution plan is essentially the sum of its parts, losses attributable to the account of an individual participant are necessarily 'losses to the plan' for purposes of § 409(a).").

So too, the Third Circuit has already rejected the defendants' misguided characterization of the nature of defined contribution plans as merely involving individual interests so that all losses in the context of such plans are individual and not plan losses. As the Third Circuit previously held in this case, "[j]ust as the fact that the assets at issue were held for the ultimate benefit of Plaintiffs does not alter the fact that they were held by the Plan, so, too, the fact that Plaintiffs may have to show individual reliance on

the defendants' alleged misrepresentations to prevail on some claims does not mean they do not seek recovery for Plan losses." 420 F.3d at 236. Indeed, the Third Circuit correctly pointed out that "[w]hile employees were able to choose which fund to invest their assets in, the Savings Plan makes clear that its assets are aggregated and are held in trust by the Savings Plan trustees at all times." Id. at 241. Thus, the very premise of the Third Circuit's prior decision in this case, and the premise of the LaRue decision, is that all losses suffered by a defined contribution plan are plan losses. The defendants' arguments to the contrary – that all defined contribution investment losses are individual in nature and therefore not subject to class action treatment – must be rejected.

Although this does not mean that class certification should have been "automatically granted," as the lower court suggested, in fact it was not. Instead, the court properly considered the four requirements of Rule 23(a) – numerosity, commonality, typicality and adequacy – and found them met, despite defendants' assertions that plaintiff did not establish typicality and adequacy because of the unique nature of her claims and unique defenses applicable to her claim. The court correctly reasoned that "[t]he complaint alleges breaches of various fiduciary duties common to the entire class," J.A. 13. There is no unique fact pattern that varies from participant to participant

when it comes to the allegation that the stock fund was imprudent because the defendants knew that it was overpriced (the misrepresentation claims are no longer at issue). The stock fund was either a prudent fund option or it wasn't during the relevant period; if it was imprudent, the fiduciary is liable for the losses to the plan (particularly since there is no 404(c) defense, as we argue above). Thus, "Wendel's claim is the same claim being brought by any other class member." J.A. 16 (citing DiFelice, 497 F. 3d at 418). Moreover, if the court finds that there was a breach, it will result in a single aggregate recovery of plan losses to the plan. Accordingly, the LaRue decision affords no basis for overturning the district court's certification of the class in this case.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court affirm the decision of the district court.

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Dated: May 26, 2009

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I hereby certify that a virus check, using McAfee Security VirusScan Enterprise 8.0, was performed on the PDF file and paper version of this brief, and no viruses were found.

/s/ ELIZABETH HOPKINS
Counsel, U.S. Department of Labor,
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Dated: May 26, 2009

CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Local Rules 28.3(d) and 46.1(e), the undersigned counsel certifies that she has been admitted to this Court.

/s/ Elizabeth Hopkins

CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I certify that on this 26th day of May, 2009, I caused the Brief of the Secretary of Labor as Amicus Curiae to be electronically filed via the Court's CM/ECF system. I further certify that I caused 10 copies of the Brief to be dispatched to the Clerk of this Court by Federal Express. I certify that I served of this Brief electronically on the following counsel of record:

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