No. 11-2181

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELENA M. DAVID, et al.,
Plaintiffs-Appellants,

v.

J. STEELE ALPHIN, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of North Carolina

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS URGING REVERSAL

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STATEMENT OF INTEREST

The Secretary has primary enforcement and regulatory authority for Title I of the Employee Retirement Income Security Act ("ERISA"). 29 U.S.C. § 1001 et seq.; see Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 689-94 (7th Cir. 1986) (en banc). The district court dismissed ERISA claims relating to the Plaintiffs' defined benefit plan based on its determination that, despite millions of dollars in alleged losses, Plaintiffs suffered no redressable Article III injury. The court also ruled that ERISA's six-year statute of limitations barred Plaintiffs' claims related to investment options that had been included in the Plaintiffs' defined contribution plan for more than six years even though the claims were based on breaches that occurred within the limitations period. The Secretary has a strong interest in urging the Fourth Circuit to reverse the district court's rulings in order to ensure ERISA's protections of plan assets. The Secretary submits this brief pursuant to Federal Rule of Appellate Procedure 29(a).

QUESTIONS PRESENTED

1. Whether the district court erred when it held that participants in an overfunded defined benefit plan lack Article III standing to assert ERISA section 502(a)(2) claims because, even if fiduciary breaches caused losses to the plan, the participants suffered no redressable injury in fact.

2. Whether the district court erred in concluding that ERISA's six-year statute of limitations bars claims challenging the continuing imprudent inclusion of employer-affiliated mutual funds as investment options in the defined contribution plan because the funds' initial selection occurred more than six years before suit was filed.

STATEMENT OF THE CASE

A. Factual Background[1]

Plaintiffs are participants in Bank of America's (the "Bank's") Pension Plan (the "Pension Plan") and 401(k) Plan (the "401(k) Plan") (collectively, the "Plans"), which are, respectively, defined benefit and defined contribution plans. David v. Alphin, No. 3:07CV11, 2008 WL 5244483, at *1-*2 (W.D.N.C. July 23, 2008) ("Alphin I"), adopted in relevant part, 2008 WL 5244504 (W.D.N.C. Dec. 15, 2008) ("Alphin II"). Defendants are the Bank and individual members of the Bank's Corporate Benefits Committee. Id.

[1] The Secretary's Factual Background is based on the district court's findings and the Second and Third Amended Complaints ("SAC" and "TAC").

Pension Plan assets are partially invested in Bank-affiliated funds. Alphin I, 2008 WL 5244483, at *1. Participants in the 401(k) Plan can also invest in both Bank-affiliated and unaffiliated funds. Id. Plaintiffs contend that investing the Plans' assets in Bank-affiliated funds violated ERISA section 404's duties of loyalty and prudence and section 406's prohibition on self-dealing, id. at *2-*3; see, e.g., SAC ¶¶ 50, 75-84, and resulted in tens of millions of dollars in losses to the Plans in the form of "excessive or improper" fees. Id. at *1, *6 (citations omitted); see, e.g., SAC ¶¶ 27, 34, 54. Plaintiffs contend that Defendants breached their fiduciary obligations each time they caused the Plans to invest in, or failed to remove, Bank-affiliated funds, which occurred repeatedly throughout the six-year period prior to Plaintiffs' filing suit on August 7, 2006. David v. Alphin, No. 3:07CV11, 2011 WL 4402759, at *10, *14 (W.D.N.C. Sept. 22, 2011) ("Alphin III") (citing TAC ¶¶ 42-60); TAC ¶¶ 108-25 (Counts I - III). Plaintiffs seek, inter alia, recovery of losses to the Plans and the removal of Defendants as trustees to the Plans. TAC ¶¶ 46-47 (Prayer for Relief).

B. Decisions Below

On June 23, 2008, the magistrate judge issued a report and recommendation ("R&R") dismissing Plaintiffs' Pension Plan claims for lack of Article III standing. Alphin I, 2008 WL 5244483, at *3, *8. The R&R stated that Plaintiffs could not "plead and prove that they have suffered an injury that will 'likely' be redressed by a favorable outcome in the litigation . . . as to their claims against the Pension Plan." Id. at *6. The magistrate reasoned that any Pension Plan participant's entitlement is limited to "the full value of the accrued benefits as determined under the Pension Plan's terms – and nothing more," id. at *6-*7, so that "even if plaintiffs were to prevail on their claims against the Pension Plan, they would receive absolutely no benefit." Id. at *8. The district court affirmed the R&R. Alphin II, 2008 WL 5244504.

In a subsequent ruling, the district court granted Defendants' motion for summary judgment on statute of limitations grounds as to certain of Plaintiffs' 401(k) Plan claims. The court recognized that "ERISA fiduciaries are in fact obliged to monitor funds contained in the Plan lineup," Alphin III, 2011 WL 4402759, at *11, but concluded that Plaintiffs' claims were untimely because all of the funds were initially selected over six years prior to Plaintiffs' filing their complaint. The court found "no continuing obligation to remove, revisit, or reconsider funds based on allegedly improper initial selection" absent some "material" change in those funds. Id. at *11, *14. Accordingly, the court held that Plaintiffs' 401(k) Plan claims were time barred. Id. at *12-*14.

ARGUMENT

I. PARTICIPANTS IN DEFINED BENEFIT PLANS HAVE ARTICLE III STANDING TO ALLEGE ERISA VIOLATIONS IRRESPECTIVE OF THE PLAN'S FUNDING STATUS

A. Introduction

Article III standing requires (1) an injury in fact; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61(1992). The determination of what constitutes an "injury" is thus critical to all three prongs of constitutional standing, and is the pivotal question here.

An "injury in fact" occurs if there is an invasion of a legally protected interest that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" Lujan, 504 U.S. at 560. These requirements are satisfied by a "likelihood" of injury, even if that injury will be indirect or minimal. Clinton v. City of New York, 524 U.S. 417, 432 (1998). An injury is "redressable" if it is likely "that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 561 (internal quotation marks omitted).

In the ERISA context, employee-participants have a protected interest in employee benefit plans that are administered by fiduciaries who owe duties of loyalty and prudence to the participants and beneficiaries. ERISA section 404, 29

U.S.C. § 1104. A fiduciary who breaches his responsibilities is "personally liable to make good to such plan any losses to the plan resulting from each such breach," ERISA section 409, 29 U.S.C. § 1109, and is subject to other equitable and remedial relief. See Solis v. Malkani, 638 F.3d 269, 274 (4th Cir. 2011). This right to "appropriate relief under § 1109" is enforceable in an action filed by a participant. ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2). As explained below, the district court incorrectly held that Plaintiffs-participants' claims regarding losses to the Pension Plan could not proceed because they did not suffer an Article III injury.

B. The Increased Risk of Underfunding in a Defined Benefit Plan is an Article III Injury in Fact.

In passing ERISA, "the crucible of congressional concern was misuse and mismanagement of plan assets," because plan assets are the primary source for assuring that promised retirement benefits get paid. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 n.8 (citing legislative history); Dan M. McGill & Donald S. Grubbs, Jr., Fundamentals of Private Pensions 434 (6th ed. 1989). ERISA was "designed to prevent these abuses," and generally to assure that plan participants receive their promised benefits. Id. at 142; LaRue v. DeWolff, Boberg, & Associates, Inc., 552 U.S. 248, 253 (2008). Proper funding and prudent investment and management of plan assets (e.g., through avoiding excessive investment fees) are key to achieving these goals. ERISA thus decreases the risk that defined benefit plans will fail to provide promised benefits through: (1) the imposition of minimum funding requirements, I.R.C. § 412, ERISA §§ 301-08, 29 U.S.C. §§ 1081-86; and (2) fiduciary enforcement and remedial provisions whose "common interest . . . is in the financial integrity of the plan." Russell, 473 U.S. at 142 n.9 (citing ERISA §§ 502(a)(2) and 409).

In this case, Plaintiffs allege ERISA violations causing multi-million dollar losses to the Pension Plan. Such losses make promised benefits less secure and reduce participants' protection against future losses or a plan sponsor's inability to pay. Even if the Plan is "overfunded" by more than the losses, restoring millions of dollars to the Plan will inevitably put the Plan on a sounder financial footing and decrease the risk that promised benefits are inadequately funded. Just because the Pension Plan may be overfunded at one particular time does not mean that it will be overfunded in the future. Because of the nature of pension plans and the rules regarding their funding, funding levels can change significantly over short periods of time and an overfunded plan can rapidly become underfunded. For example, the value of a plan's assets can plummet quickly when the stock market goes down.[2]

[2] In the wake of the 2008 financial crisis, it is beyond dispute that a pension plan's funding levels and liabilities can change significantly over short periods of time. Following the 2008 recession, there was over a threefold increase (from $150 billion to $503.6 billion) in the total estimated underfunding for Pension Benefit Guaranty Corporation-insured single employer plans. Pension Benefit Guaranty Corp., Pension Ins. Data Book 2009, at 88 (Summer 2010).

If interest rates go down simultaneously, the cost of funding the plan's liabilities will increase at the same time the stock has dropped in value (the lower interest rates are, the more expensive it is for a plan to fund a given benefit).[3] Surplus funding provides a cushion against unpredictable plan losses, unexpected actuarial miscalculations, and an employer's inability to make up the funding deficit.[4]

The increased risk, however small, that Plaintiffs' benefits will be underfunded as a result of a fiduciary breach establishes an Article III "injury in fact." "Threats or increased risk . . . constitutes cognizable harm" for Article III purposes, and the Fourth Circuit as well as "other circuits have had no trouble understanding the injurious nature of risk itself." Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 160 (4th Cir. 2000) (en banc) (finding standing based on increased risk to aesthetic and recreational interests from upstream pollution); see also Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 73-74 (1978) (finding standing based on increased risk of disease from nuclear exposure even where physical injury not yet manifested);

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[3] According to the American Academy of Actuaries, a one percent decline in the 30 year treasury rate will cause the liabilities of the average plan to increase by twelve percent. James E. Turpin, The Impact of Inordinately Low 30-Year Treasury Rates on Defined Benefit Plans; A Public Statement by the Pension Practice Council of the American Academy of Actuaries, July 11, 2001.

[4] ERISA discourages plan sponsors from recouping assets from overfunded plans by imposing a fifty percent tax on any reversion. I.R.C. § 4980(d)(1). When participants are denied the right to recover losses to overfunded plans due to a fiduciary breach, they also lose the potential for having their benefits enhanced.

Gollust v. Mendell, 501 U.S. 115, 127 (1991) (plaintiff-owner of one share of stock lacked a direct financial interest in recovery, but his "indirect interest derived through one share of stock is enough to confer standing, however slight the potential marginal increase in the value of the share"); Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1234-35 (D.C. Cir. 1996) (increased risk of wildfire from logging practices constitutes injury in fact); Village of Elk Grove Village v. Evans, 997 F.2d 328, 329 (7th Cir. 1993) ("even a small probability of injury is sufficient to create a case or controversy").[5]

In addition to ignoring "the injurious nature of risk itself," Gaston Copper, 204 F.3d at 160, the district court's ruling is unworkable as a practical matter. The ruling ties standing to the plan's funding level, but, given the volatility of such levels and their dependence on various factors such as market conditions and interest rates, a plan may, for instance, be overfunded at the time of the breach, underfunded when losses were incurred, overfunded at the initiation of litigation, and underfunded when benefit payments became due. In addition, a number of

[5] In Beck v. Pace Int'l Union, 551 U.S. 96 (2007), the Supreme Court addressed a participant challenge to the termination of an overfunded defined benefit plan. Beck supports Plaintiffs' standing, because even where the Court does not "decide constitutional standing in its published opinion, it clearly manifested its belief that the plaintiff. . . suffered an injury that could be redressed by the court." In re Mutual Funds Inv. Litig., 529 F.3d 207, 219 (4th Cir. 2008). On the merits, the Court gave its "traditional[] defere[nce]" to the government's view that a proposed merger of defined benefit plans "created added risk for participants and beneficiaries of the original plan," id. at 104, 110-11, and held such merger to be an impermissible termination method under ERISA.

different actuarial methods can be used to calculate the plan's funding level vis a vis anticipated liabilities. Because pension plans pay benefits over a period of years to many different participants, there is no basis for focusing on one particular date as determinative, or for concluding that overfunding at the time of breach means overfunding at the time of distribution. In any event, whichever date is used to determine standing under the court's decision, there may be no way of resolving with any precision whether the plan was overfunded, thus depriving plaintiffs of standing, or underfunded, and thus conferring standing. Under section 502, all participants in a plan have statutory standing to sue on behalf of the plan. 29 U.S.C. § 1132(a)(2). The court's Article III standing test, however, either requires complex fact-finding on a motion to dismiss or fails to provide the courts and litigants needed guidance as to which participants satisfy the test's elusive "injury in fact" requirement. See, e.g., Sutton v. St. Jude Medical S.C., Inc., 419 F.3d 568, 574-75 (6th Cir. 2005) (allegation of increased future risk of harm from medical device is sufficient for Article III standing because it is "unnecessary" and "premature[ ]" to require evidence of device's injuriousness).

The upshot of the district court's opinion is to immunize fiduciaries from lawsuits by plan participants in any case involving an overfunded defined benefit plan. For example, under the logic of the district court's decision, a fiduciary to an overfunded defined benefit plan with billions of dollars in assets could deliberately divert millions of dollars from the plan to his personal bank account. Based on the district court's reasoning, participants would have no standing to remedy the illegal appropriation of plan assets as long as the billion-dollar plan was overfunded by more than the amount that was stolen. Irrespective of funding risk, however, such a misappropriation, if proven, is a clear violation that must have an ERISA remedy. See CIGNA Corp. v. Amara, 131 S.Ct. 1866, 1879 (2011) (stressing that "a maxim of equity states that '[e]quity suffers not a right to be without a remedy'") (citation omitted); see also Financial Insts. Retirement Fund v. Office of Thrift Supervision, 964 F.2d 142, 147-49 (2d Cir. 1992) (holding that participants in overfunded defined benefit plan have Article III standing "to redress any violation of the statute's fiduciary requirements") (emphasis in original); cf. In re Mutual Funds, 529 F.3d at 215 (individual's entitlement to defined benefit affected if misconduct "enhances the risk of default by the entire plan").

At the time ERISA was enacted, defined benefit plans were "the norm of American pension practice," LaRue, 552 U.S. at 254 (citations omitted), and the Act's funding and fiduciary requirements were designed to assure that they would be adequately funded. Under the court's ruling, however, one would have to believe that, although ERISA explicitly authorized participants to sue breaching fiduciaries to recover plan losses, many, if not most, such suits could not constitutionally go forward for lack of Article III standing.

There will be an untenable burden on the Secretary to monitor and bring suit on behalf of overfunded defined benefit plans if participants in such plans lack standing to remedy fiduciary breaches. The Secretary depends on participant suits to enforce ERISA, because she lacks the resources to do so singlehandedly, and plan fiduciaries are commonly defendants in such cases. The constraints on the Secretary's ability to bring suit are recognized by the statute's authorization of suits by private litigants as well as its legislative history, neither of which the district court considered. H.R. Conf. Rep. No. 101-386, reprinted in,1989 U.S.C.C.A.N. 3018, 3035. It is a misapplication of Article III standing principles to define "injury in fact" so narrowly as to permit obvious harms to plans to go unremedied except in the relatively few cases the Secretary is able to pursue.

Moreover, the increased risk borne by Plaintiffs as a result of the Defendants' alleged breaches is a more concrete injury than others the Supreme Court has found sufficient. In Clinton, 524 U.S. at 432, potato growers challenged the President's line item veto of a tax benefit for sellers of potato processing plants, arguing that they were injured because the vetoed tax benefit would have increased the sellers' willingness to sell them their plants. The Court held that the plaintiffs had standing because "[b]y depriving them of their statutory bargaining chip, the [veto] inflicted a sufficient likelihood of economic injury to establish standing." Id. at 432. Similarly, in Dep't of Commerce v. U.S. House of Representatives, 525

U.S. 316, 332 (1999), the Court held that a resident of Indiana could challenge Census Act procedures that would likely decrease the number of Indiana residents, which would decrease the number of Indiana's representatives in Congress and thereby make the resident's vote less powerful. Dep't of Commerce, 525 U.S. at 332. That the Court deemed these twice- and thrice-removed injuries sufficient to confer an Article III injury supports a finding that millions of dollar in Pension Plan losses likewise "inflicted a sufficient likelihood of economic injury to establish standing" for participants. Clinton, 524 U.S. at 432.

Nor is there any anomaly between a participant's bringing suit on behalf of a plan and asserting his own "injury in fact" to establish standing. In Wilmington Shipping Co. v. New England Life Ins. Co., 496 F.3d 326 (4th Cir. 2007), plaintiff-participant Ruffin alleged that the defendant's fiduciary breaches caused losses to his defined benefit plan which prevented him from receiving his promised benefits in a lump sum. Because Ruffin was destined to receive all of his promised benefits, although not in a lump sum, the defendant argued that Article III standing was lacking because Ruffin would "get the full value of his benefits" regardless of the outcome of the litigation. Id. at 336. The Court first noted that "a plan participant may not sue under ERISA § 502(a)(2) unless he seeks recovery on behalf of the plan." Id. at 334 (emphasis in original). The Court then held that although Ruffin's benefits were not endangered, the violation of his right to a lump sum payment was a redressable Article III injury to the plan. The Court found that the plaintiff's "injury is no less concrete because the benefit to him . . . would derive from the restored financial health of the Plan." Id. at 335. Significantly, the Court rejected the argument that the plan's termination deprived Ruffin of standing, stating that "[i]t is perhaps a massive understatement to say that the plain language of ERISA § 502(a)(2) . . . grants plan participants the right to sue for breach of fiduciary duty without qualification." Id. at 338. Wilmington Shipping thus supports Plaintiffs' standing to seek redress on behalf of the Pension Plan.[6]

Although analytically distinct, proof of the three Article III standing requirements "often overlaps." Gaston Copper, 204 F.3d at 154. Thus, while the district court also questioned the redressability of the injury, see Alphin II, 2008 WL 5244504, at *3, if this Court finds that millions of dollars in Pension Plan losses alleged by Plaintiffs constitute an Article III injury, it logically follows that the injury is redressable by having Defendants restore those losses to the Plan. The restored plan assets, in turn, would not only decrease the risks to funding but could

[6] In re Mutual Funds held that participants in a defined contribution plan who had cashed out their accounts but who were seeking additional recovery for the plan had Article III standing to vindicate harm caused to the plan. 529 F.3d at 210. The opinion hypothesized that former participants in a defined benefit plan may not have had standing to bring a similar section 502(a)(2) suit, but otherwise recognized that if plan administrators "create[ ] or enhance[ ] the risk of default by the entire [defined benefit] plan," then a current defined benefit plan participant's entitlement is affected. Id. at 215, 217-18. Since Plaintiffs here are current participants, the district court's reliance on this dicta to reject standing is misplaced.

only redound to the benefit of the Plaintiffs. See ERISA section 403(a), 29 U.S.C. § 1103(a) (plan's combined assets must be held in trust for benefit of beneficiaries); In re Mutual Funds, 529 F.3d at 219 (redressability exists if fiduciaries are before the court "and can respond to court orders to redress wrongs").

C. Plaintiffs have Article III Standing to Assert Claims on Behalf of the Plan to Remedy Fiduciary Breaches that Caused Plan Losses.

Even if Plaintiffs' alleged losses cannot be traced to individual accounts, ERISA section 502(a)(2) authorizes participants to seek relief in a representative capacity on the Pension Plan's behalf. Russell, 473 U.S. at 142 n.9 ("Congress[ ] intended that 502(a)(2) actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan"). Thus, while section 409 is designed "with an eye toward ensuring that 'the benefits authorized by the plan' are ultimately paid to participants and beneficiaries," LaRue, 552 U.S. at 253 (quoting Russell, 473 U.S. at 142), it "characterizes the relevant fiduciary relationship as one 'with respect to the plan' and repeatedly identifies the 'plan' as the victim of any fiduciary breach and the recipient of any relief." Id. at 254 (quoting Russell, 473 U.S. at 140).

The Supreme Court's decision in Sprint Commc'ns Co. v. APCC Services, Inc., 554 U.S. 269 (2008), supports finding representative standing when a participant sues on behalf of a plan. The case involved payphone operators' assignments to collection firms of their rights to sue. The Court held that the assignee collection firm had Article III standing to sue based on the assignor payphone operator's injury even if none of the relief would run to the assignee. Id. at 285. The Court declared that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider," id. at 274, and "federal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit," such as "[t]rustees bring[ing] suits to benefit their trusts." Id. at 287-88. Under Sprint, ERISA section 502(a)(2) appropriately assigns a plan's action to participants whose legal victory "would unquestionably redress the injuries [to the plan] for which [they] bring suit" regardless of how the plan's recovery is ultimately allocated, and thus provides them with the requisite constitutional standing. See Sprint, 554 U.S. at 286-87 (citing Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 773 (2000) (emphasis in original)).

The district court engaged in an unreasonably narrow reading of Sprint, finding it inapplicable to this case simply because Plaintiffs had not received a contractual assignment of rights. Alphin II, 2008 WL 5244504, at *2. This is a distinction without a difference: Sprint relied on Vermont Agency, which held that the False Claim Act's statutory assignment provision confers Article III standing on relators. Sprint, 554 U.S. at 286 (citations omitted). Moreover, Sprint expressly referenced other historical examples of non-contract based assignments of rights that present no Article III concerns, such as a trustee's suit on behalf of trusts. Id. at 285. Sprint's instruction to look to "history and tradition" leads to the conclusion that Plaintiffs' claims can proceed even if they will not directly benefit from the suit. See Restatement (Second) of Trusts § 214 & cmts. a and b (beneficiaries could sue for breach of trust even if it was not clear they would benefit); id. §282 & cmts. h & i (in some circumstances, any trust beneficiary can sue third parties on the trust's behalf, even if they are not entitled to immediate payment); see also infra, at 20-21 (discussing "no further inquiry" rule).

D. Plaintiffs Suffered an Invasion of Their Statutory Right to Have the Pension Plan Operated in Accordance with ERISA's Fiduciary Requirements.

Under ERISA, Plaintiffs have a right to complete loyalty and prudence in the fiduciary management of the Pension Plan. Aside from the increased risk of diminished benefits resulting from the alleged breaches or the harm caused to the Plan directly for which participants have representational standing, the deprivation of this right is itself sufficient to constitute an injury in fact for Article III standing.

The Supreme Court has long recognized that the invasion or breach of such a statutorily-created right establishes an Article III injury. See Lujan, 504 U.S. at 578 (citing Warth v. Seldin, 422 U.S. 490. 500 (1975)). ERISA section 502(a) codifies the right to sue for breach of trust, and many courts have held that the invasion of trust rights confers Article III standing. See Int'l Union of Operating

____________________________________, 563 F.3d 276, 286 (7th Cir. 2009); Huber v. Taylor, 469 F.3d 67, 77 (3d Cir. 2006); Branson School Dist. RE-82 v. Romer, 161 F.3d 619, 631 (10th Cir. 1998); Hendry v. Pelland, 73 F.3d 397 (D.C. Cir. 1996); Ziegler v. Connecticut Gen. Life Ins. Co., 916 F.2d 548, 551 (9th Cir. 1990); FMC Corp. v. Boesky, 852 F.2d 981, 993 (7th Cir. 1988).[7]

In Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), the Court held that plaintiffs, who were "testers" sent by non-profits to investigate housing discrimination, had constitutional standing to sue under section 804 of the Fair Housing Act. Id. at 373. The Court found that the Act gave all persons "an enforceable right to truthful information concerning the availability of housing." Id. "That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of § 804(d)." Id. Instead, the Court determined that the tester "has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages." Id. Not only is the "suffered injury" in an ERISA section 502(a)(2) action – a fiduciary breach of trust – "in precisely the form the statute was intended to guard against," but the plaintiff as a participant (unlike a

[7] Absent actual damages, a plaintiff may file suit seeking nominal damages in order to vindicate his or her rights. See, e.g., Reyes v. City of Lynchburg, 300 F.3d 449, 453 (4th Cir. 2002).

tester standing in for a renter) is specifically identified in the statute as an individual with a nexus to the harm and a directly enforceable statutory right. See 29 U.S.C. 1132(a)(2).

The en banc Fourth Circuit reached a similar conclusion in Gaston Copper. In Gaston Copper, the plaintiffs alleged that upstream waterway pollution resulted in "an increased risk" that was detrimental to their downstream aesthetic and recreational interests. 204 F.3d at 160. The Court found such an allegation "sufficient to provide injury in fact." Id. at 156. In asserting non-economic harms such as "damage to [his] aesthetic or recreational interests," id. at 154, the plaintiffs "alleged precisely those types of injuries that Congress intended to prevent by enacting the Clean Water Act . . . [a]nd it is well established that the 'injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'" Id. at 156 (quoting Warth, 422 U.S. at 500 (internal quotations omitted)).

Similarly, ERISA was intended to "establish judicially enforceable standards to insure honest, faithful, and competent management of pension and welfare funds." Russell, 473 U.S. at 140 n.8 (1985) (emphasis added) (citation omitted). ERISA sections 404 and 406 give particular individuals – participants and beneficiaries – specific rights to a plan untainted by fiduciary breach or conflicts of interest. See 29 U.S.C. §§ 1104, 1106. Thus, under this Court's holding in Gaston Copper, Plaintiffs have standing to redress violations of their statutory rights.

Plaintiffs' right to redress Defendants' alleged ERISA violations irrespective of whether an economic harm has been suffered is further supported by the common law "no further inquiry" rule, which ERISA essentially codified in its prohibited transaction rules. The "no further inquiry" rule, which predates the Constitution's framing, provides that a trustee is per se in breach of its fiduciary duty if he or she engaged in self-dealing without advance approval. See Restatement (Third) of Trusts § 78 cmt. b (2007); Mark L. Ascher, et al., Scott and Ascher on Trusts § 17.2 (5th ed. 2007) ("Scott and Ascher"); see also George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 543 (2d ed. 1993). The rule considers the fiduciary's act of self-dealing to be an injury in itself, in that the trustee has broken his promise to place the beneficiaries' interests ahead of his own. See Scott and Ascher § 17.2. In Michoud v. Girod, 45 U.S. (4 How.) 502, 553, 557 (1846), the Supreme Court held that a trust beneficiary has a cause of action where a trustee engages in a self-interested transaction "without further inquiry" into the nature or fairness of the sale. See also Robertson v. Chapman, 152 U.S. 673, 681 (1894) (principal need not prove injury beyond that the agent discharged duties unfaithfully); Jackson v. Smith, 254 U.S. 586, 588-89 (1921) (same). Thus, the Supreme Court has long recognized, in accordance with the "no further inquiry" rule, that no Article III problem is presented by holding disloyal fiduciaries strictly liable for their actions regardless of monetary loss.

In section 406, 29 U.S.C. § 1106, ERISA specifically proscribes certain types of transactions that, subject to certain exceptions, simply cannot be engaged in without violating ERISA. See, e.g., Patelco Credit Union v. Sahni, 262 F.3d 897, 911-12 (9th Cir. 2001); cf. ERISA section 408, 29 U.S.C. § 1108 (exceptions). Economic harm is neither an element of the violation, nor a jurisdictional prerequisite to bringing suit. Therefore, application of the "invasion of a statutory right" standing principle to ERISA is particularly appropriate because Congress not only based ERISA on the law of trusts, where this principle has long applied, but saw fit to designate certain transactions as per se prohibited. The district court, however, in addition to dismissing Plaintiffs' prudence claims under section 404, also dismissed Plaintiffs' claims under section 406 that Defendants funneled millions of dollars in plan fees to the Bank's own accounts in non-exempt prohibited transactions. But, since proof of loss is not required to establish the violation, Article III standing exists even if no such loss has been alleged.

II. ERISA'S SIX-YEAR STATUTE OF LIMITATIONS DOES NOT BAR CLAIMS THAT MUTUAL FUNDS OFFERED TO 401(k) PLAN PARTICIPANTS WITHIN THE LIMITATIONS PERIOD ARE IMPRUDENT, AND THEREFORE ACTIONABLE, SOLELY BECAUSE THE FUNDS WERE INITIALLY SELECTED OVER SIX YEARS PRIOR TO THE CLAIMS BEING FILED.

Plaintiffs' claims that Defendants violated ERISA's loyalty, prudence, and prohibited transaction provisions by continuing to offer Bank-affiliated funds as 401(k) Plan options are timely regardless of when those funds were initially offered. The district court erroneously treated Plaintiffs claims as "initial selection" claims, which it held to be statutorily barred because the funds at issue were originally selected over six years prior to Plaintiffs' August 7, 2006 filing. Alphin III, 2011 WL 4402759, at *10-12, 14. However, Plaintiffs' claims are based on the ongoing fiduciary obligations that the district court itself acknowledged. Id. at *11. If upheld, the district court's opinion would mean that so long as a fiduciary first engaged in an illegal transaction in violation of ERISA over six years prior to suit, the same fiduciary could for perpetuity continue to maintain funds in a manner prohibited by the Act. Similarly, a fiduciary could blatantly disregard the duty to prudently and loyally monitor funds under ERISA section 404, and to take prudent action based on the outcome of such monitoring, simply because those funds were initially selected outside the statute of limitations. Even if the initial selection was a violation of ERISA when committed, but is no longer actionable because of the statute of limitations, the subsequent, separate fiduciary violations that occurred within the limitations period are not, as the district court effectively held, immune from liability.[8]

The district court's opinion is in tension with this Court's opinion in Dameron v. Sinai Hospital of Baltimore, Inc., 815 F.2d 975 (4th Cir. 1987). In Dameron, employees alleged that their employer had incorrectly applied Social Security benefit offsets to their pension plan benefits in violation of ERISA section 1053(a)'s anti-forfeiture provision. Id. at 977-78. The defendant argued that Dameron's claim was untimely, because her three-year limitations period (based on actual knowledge) began to run in June 1980, and she did not file her claim until August 1983. Id. at 981, 982 n.7. This Court, however, concluded that the defendant's repeated miscalculation of the offset "constituted a series of successive breaches of the nonforfeiture provisions of ERISA." Id. at 982. Accordingly, Dameron's claims were timely as to benefits lost during the three years preceding the filing of her complaint. Id. at 981-82; see Meyer v. Berkshire Life Ins. Co., 250 F. Supp. 2d 544, 569-70 (D.Md. 2003) (although churning and failure to diversify began in 1983, alleged breaches for same actions within six years of 1997 filing were timely).

Just as the "contract [in Dameron] provide[d] for continuing performance over a period of time, [such that] each successive breach of that obligation begins

[8] It is, of course, entirely possible for an investment to be prudent when initially selected but its continued offering to become imprudent at some later date.

the running of the statute of limitations anew," Cecil v. AAA Mid-Atlantic, Inc., 118 F. Supp. 2d 659, 668 (D.Md. 2000) (citation omitted), each successive breach of Defendants' fiduciary obligations under ERISA in this case causes the limitations period to start running anew for the next six years. As alleged by Plaintiffs, violations occurred within the six-year period preceding the filing of this case and thus are actionable. Plaintiffs' claims are based upon Defendants' mismanagement of plan assets within the six years preceding suit and the attendant losses within those six years, not on losses and events occurring outside the limitations period.

Numerous decisions support this conclusion. In Morrissey v. Curran, 567 F.2d 546, 548 (2d Cir. 1977), the Second Circuit held that there was an actionable claim for fiduciary breach under ERISA for failure to divest the plan of the challenged investment even if the trustees were immune from liability for the original investment decision. In Martin v. Consultants & Adm'rs, Inc., 966 F.2d 1078, 1087-88 (7th Cir. 1992), the Seventh Circuit held that while alleged ERISA violations concerning a 1984 contract bid were time-barred, the bidding activities leading up to the 1987 contract, although similar in nature, involved a new transaction and a distinct violation that was timely. See also Boekman v. A.G. Edwards, Inc., 461 F. Supp. 2d 801, 814-15 (S.D. Ill. 2006) (holding that "[i]n light of the continuing duty of prudence imposed on plan fiduciaries by ERISA, each failure to exercise prudence constitutes a new breach of the duty, that is to say, a new claim"); Buccino v. Cont'l Assurance Co., 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983) (holding that claims related to initial decision to purchase imprudently expensive insurance and the failures to correct that action that occurred more than six years before suit was filed were time-barred, but claims based on defendants' continued failure to take steps to terminate the Fund's insurance arrangement during the limitations period were not).[9]

Moreover, finding Plaintiffs' claims timely is consistent with Supreme Court precedent under other statutes. In Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618, 621 (2007), the Court determined that Ledbetter's Title VII disparate pay claim was untimely to the extent that it relied on discriminatory acts that occurred prior to the 180-day "charging period." While the Court split 5-4 on this issue, it unanimously agreed that "of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place

[9] The trust law also supports this analysis:

> Thus if a trust has been in operation for forty years and the trustee has been performing his duties, he cannot defend against future performance on the ground that his obligation under the trust is forty years old and therefore barred by some Statute of Limitations. The length of time since he assumed the trust is not material. The only question of importance is how long is it since he violated the trust[.]

George G. Bogert & George T. Bogert, The Law of Trusts & Trustees, § 951 at 627 (2d Ed. 1995); Austin W. Scott & William F. Fratcher, The Law of Trusts § 481.1 at 393 (4th ed. 1987).

when each act is committed." Id. at 629, 646-47 (citing National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002)).

While Ledbetter herself made "no claim that intentionally discriminatory conduct occurred during the charging period." 550 U.S. at 629, Ledbetter's relevance to this case is that Plaintiffs here do claim that violations occurred within the limitations period; indeed, they occurred repeatedly insofar as the allegedly imprudent (and inherently prohibited) investment options were at all times on the menu of options offered to participants and were periodically renewed when Defendants met to discuss plan management. ERISA "clearly contemplates a prolonged course of conduct" imposing an obligation throughout a fiduciary's tenure to monitor funds that does not end with the initial selection decision. Toussie v. United States, 397 U.S. 112, 120 (1970); accord United States v. Smith, 373 F.3d 561 (4th Cir. 2004) (embezzlement); United States v. Blizzard, 27 F.3d 100, 102-03 (4th Cir. 1994) (retaining stolen property).

Similarly, in Bazemore v. Friday, 478 U.S. 385 (1986), which Ledbetter distinguished on its facts, the Court found it "too obvious to warrant extended discussion [that just because the] Extension Service discriminated with respect to salaries prior to the time it was covered by Title VII does not excuse perpetuating that discrimination after the Extension Service became covered by Title VII." Id. at 395 (emphasis in original). As with an imprudent and prohibited fund initially selected outside the statutory period, "[t]o hold otherwise would have the effect of exempting from liability those . . . who were historically the greatest offenders." Id. While recovery is not permitted for fiduciary breaches prior to the applicable statute date, or against fiduciaries who left office in between the initial selection and six years prior to the filing of the lawsuit, to the extent that the breaches occurred anew during the relevant statutory period, "liability may be imposed." See id.; see also Ledbetter, 550 U.S. at 640-41 (citing authorities holding that a new FLSA or NLRA violation occurs for each impermissible paycheck issued).

The district court's opinion created a new "material" change standard that dilutes ERISA's prudence requirement. Alphin III, 2011 WL 4402759, at *11. Under this new standard, the fiduciary duty to act is apparently only triggered if there are "material" changes in the fund's fee structure, the quality of the fund's services, or the attractiveness of other investment options. The appropriateness of a particular fund at any given time, however, depends on the application of ERISA's legal standards to facts and circumstances as they exist at that time, not on whether there has been a "material" change from the status quo. The court's decision effectively treats imprudent, disloyal, and prohibited plan investments as forever permissible if maintained unchallenged for more than six years without material change; but this new "material" change standard has neither a basis in ERISA nor precedential support.

In addition, the district court's belief that allowing Plaintiffs' claims to go forward would render ERISA's statute of limitations "meaningless and expose present Plan fiduciaries to liability for decisions made by their predecessors" is unfounded. Alphin II, 2011 WL 4402759, at *11, *14. Defendants' initial selection of Bank-affiliated funds for the 401(k) Plan is not at issue, and Plaintiffs' do not seek recovery for injuries sustained more than six years before they filed suit. Only new causes of action that accrued during the limitations period (i.e., the six years prior to suit), such as when "a fiduciary continually fails to dispose of an inappropriate investment," are at issue — and they are not time barred. Buccino, 578 F. Supp. at 1522 ("The propriety or impropriety of the initial investment decision . . . would be irrelevant. No stale claim would be litigated, but, conversely, the fiduciary's [long-ago] breach of duty would not serve to shield him from liability for his most recent transgressions."). Thus, because Plaintiffs' claims are only based on actions within six years of filing suit, they are not statutorily barred simply because the investments at issue were initially selected prior to the statutory period.

CONCLUSION

For the reasons stated above, the district court's opinion should be reversed.

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Dated: December 28, 2011

s/ Stephen A. Silverman
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