Nos. 07-3605, 08-1224

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DENNIS HECKER, JONNA DUANE, and JANICE RIGGINS,
Plaintiffs-Appellants

v.

DEERE & COMPANY, FIDELITY MANAGEMENT TRUST, and FIDELITY MANAGEMENT AND RESEARCH COMPANY,
Defendants-Appellees.

On Appeal By Petition From The United States District Court For The Western District Of Wisconsin (Shabaz, J.), Civil Action No. 06-C-719-S

BRIEF OF THE SECRETARY OF LABOR, HILDA L. SOLIS, AS AMICUS CURIAE IN SUPPORT OF PANEL REHEARING

CAROL F. DE DEO
Deputy Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation

ROBIN SPRINGBERG PARRY
Senior Trial Attorney
Plan Benefits Security Division
U.S. Department of Labor
200 Constitution Ave., N.W., Room N-4611
Washington, D.C. 20210
(202) 693-5614

TABLE OF CONTENTS

Introduction and Interest of the Secretary of Labor.. 1
`
Argument.. 2

Panel rehearing is warranted to correct the panel's mistakes of law and fact in misconstruing section 404(c) of ERISA and declining to defer to the Secretary's reasonable interpretation of her 404(c) regulation.. 2

Conclusion 15

TABLE OF AUTHORITIES

Cases: Page

Armstrong v. LaSalle Bank Nat'l Assoc.,
446 F.3d 728 (7th Cir. 2006) 2

Auer v. Robbins,
519 U.S. 452 (1997) 7

Bell Atlantic v. Twombly,
127 S. Ct. 1955 (2007) 13

Chevron USA Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 6, 7

Central States, Southeast & Southwest Areas
Pension Fund v. Central Trans. Inc.,
472 U.S. 559, 570 (1985) 2

DiFelice v. US Airways, Inc.,
397 F. Supp. 2d 758 (E.D. Va. 2005), rev'd on other grounds,
497 F.3d 410 (4th Cir. 2007) 7

Donovan v. Bierwirth,
680 F.2d 263 (2d Cir. 1982) 2

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta,
458 U.S. 141 (1982) 7

Harzewski v. Guidant,
489 F.3d 799 (7th Cir. 2007) 3, 10

Hecker v. Deere & Co.,
2009 WL 331285 (7th Cir. Feb. 12, 2009) .... 1, passim

Langbecker v. EDS,
476 F.3d 299 (5th Cir. 2007) 4, 12, 15

Long Island Care at Home v. Coke,
127 S. Ct. 2339 (2007) 7

Mertens v. Hewitt Assocs.,
508 U.S. 248, 262 (1993) 9

Secretary of Labor v. Fitzsimmons,
805 F.2d 682 (7th Cir. 1986) (en banc) 1

U.S. v. Mead Corp.,
533 U.S. 218 (2001) 7

Yellow Trans., Inc. v. Michigan,
537 U.S. 36 (2002) 7

Statutes and Regulations:

Employee Retirement Income Security Act of 1974,
Title I, 29 U.S.C. §§ 1001 et seq.:

Section 2, 29 U.S.C. § 1001(b)..2, 8

Section 3, 29 U.S.C. § 1002(21)...9

Section 404, 29 U.S.C. § 1104(c).. 2, passim

Section 404(c)(1), 29 U.S.C. § 1104(c)(1)... 4

Section 405, 29 U.S.C. § 1105 4

Section 405(c)(1), 29 U.S.C. § 1105(c)(1)...9

Section 409, 29 U.S.C. § 1109 4

Section 502, 29 U.S.C. §§ 1132 1

Section 502(a)(2), 29 U.S.C. §§ 1132(a)(2)..4

Section 505, 29 U.S.C. § 1135 1

29 C.F.R. § 2550.404c-1 .... 1, passim

29 C.F.R. § 2550.408b2(e)(2) 9

56 Fed. Reg. 10,724 (March 13, 1991) 6

56 Fed. Reg. 46, 922 (Sept. 16, 1991) 6

Fed. R. App. P. 40(a)(2) 4

Fed. R. App. P. 12 (b) 3

Miscellaneous:

DOL Opinion Letter, No. 98-04A, 1998 WL 326300,
at *3 n.1 (May 28, 1998) 7

DOL Information Letter to Douglas O. Kant,
1997 WL 1824017, at *2 (Nov. 26, 1997) 6, 11 n.1

H.R. Conf. Rep. No. 93-1280,
reprinted in 1974 USCCAN 5038 5

Nevin E. Adams, "IMHO: 'Winning' Ways? " (Feb. 19, 2009),
http://www.planadviser.com/compliance/article.php/3708 14

INTRODUCTION AND INTEREST OF THE SECRETARY OF LABOR

This case presents an important and recurring question concerning the extent to which section 404(c) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1104(c), immunizes fiduciaries from liability for the imprudent selection of investment options in participant-directed, defined contribution plans. The Secretary of Labor has primary authority to interpret and enforce the fiduciary provisions of Title I of ERISA, including section 404. See 29 U.S.C. §§ 1132, 1135; Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc). Under this general authority, as well as an express delegation of authority in section 404(c), the Secretary has promulgated a regulation that delineates when fiduciaries are relieved from potential liability for imprudence or other breaches by the participants' exercise of control over assets in 404(c) plans.

The panel's decision in this case rejects the Secretary's interpretation of the Act and her 404(c) regulation, 29 C.F.R. § 2550.404c-1, and holds that even "the imprudent selection of mutual funds with excessively high fees" may fall within the safe harbor if the plan otherwise satisfies the criteria of section 404(c) and "includes a sufficient range of options so that participants have control over the risk of loss." Hecker v. Deere & Co., 2009 WL 331285, at *13 (7th Ci.r Feb. 12, 2009). The court's ruling does not discuss and therefore appears to have overlooked or misapprehended the principles of deference applicable to the

Secretary's interpretation. The court also may not have fully understood the potentially far-reaching ramifications of its decision, which permits fiduciaries to evade accountability for the imprudent selection and maintenance of funds in defined contribution plans, plans that, by our estimates, currently hold approximately $2.46 trillion. The Secretary has a strong interest in arguing against this result, and therefore submits this brief in support of the petition for panel rehearing submitted by the plaintiffs-appellants in this case.

ARGUMENT

PANEL REHEARING IS WARRANTED TO CORRECT THE PANEL'S MISTAKES OF LAW AND FACT IN MISCONTRUING SECTION 404(c) OF ERISA AND DECLINING TO DEFER TO THE SECRETARY'S REASONABLE INTERPRETATION OF HER 404(c) REGULATION

ERISA was designed to protect the interests of participants and beneficiaries of employee benefit plans by establishing standards of conduct, responsibility, and obligations for fiduciaries. 29 U.S.C. § 1001(b). "Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility" under ERISA. Central States, Southeast & Southwest Areas Pension Fund v. Central Trans. Inc., 472 U.S. 559, 570 (1985)(citing legislative history). At the core of ERISA's fiduciary obligations are the duties of loyalty and prudence, which are based on trust law principles, and are among the "highest known to law." Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982); see also Armstrong v. LaSalle Bank Nat'l Assoc., 446 F.3d 728, 732 (7th Cir. 2006) ("The duty of an

ERISA trustee to behave prudently in managing the trust's assets, which in this case consisted of the assets of the ESOP, is fundamental."); Harzewski v. Guidant, 489 F.3d 799, 805 (7th Cir. 2007) ("The duty of care, diligence, and loyalty imposed by the fiduciary principle is far more exacting than the duty imposed by tort law not to mislead a stranger.").

Plaintiffs in this case, employees of Defendant Deere and participants in the two 401(k) pension plans (the "Plans") that Deere sponsors, allege that Deere and other fiduciaries of the Plans violated these core fiduciary duties. According to the complaint, the fiduciaries failed to establish, implement and follow any procedures to prudently determine the reasonableness of the fees, and, as a consequence, caused the multi-billion dollar Plans to pay excessive, retail-level fees. Second Am. Compl. ¶¶ 36, 44, 76, 105(a), (b), (f), (j). These allegations were assumed by the panel to be true for purposes of considering the propriety of the dismissal under Rule 12(b) of the Federal Rules of Appellate Procedure, Hecker, 2009 WL 331285, at *4, *10, and are factually supported by materials considered by the panel "showing that Deere believed that Fidelity Trust's services were free." Id. at *9.

Panel rehearing is warranted here for two primary reasons. First, the panel rejected the Secretary's interpretation of her 404(c) regulation without addressing the deference owed to the Secretary's interpretation of her own regulation. Unless the Court concludes that the Secretary's interpretation of section 404(c) and her

regulation is simply not reasonable and therefore impermissible, it must defer to the Secretary under established Supreme Court precedent. Second, despite the perceived limitation that the panel placed on its safe harbor holding, id., the possible ramifications of this decision, which the panel did not expressly consider, are far-reaching. Even if the panel's holding in this case is limited to this Circuit (and the Fifth Circuit, under its similar holding in Langbecker v. EDS, 476 F.3d 299 (5th Cir. 2007)), the consequences are significant. These mistakes and omissions with regard to the overpayment claims warrant rehearing and correction by the panel. See Fed. R. App. P. 40(a)(2). We discuss each in turn.

1. Although ERISA fiduciaries are generally responsible for all plan losses caused by breaches of their duties or 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 own account in a pension plan that provides for individual accounts. That section provides: "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 . . . for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control." 29 U.S.C. § 1104(c)(1) (emphasis added). Thus, section 404(c), by its terms, limits the relief from liability solely to losses that result from the participant's own exercise of actual control over

the assets in his account. Because Congress "recognize[d] that there may be difficulties in determining whether [a] participant in fact exercises independent control over his account," it provided that "whether participants and beneficiaries exercise independent control is to be determined pursuant to regulations prescribed by the Secretary of Labor." H.R. Conf. Rep. No. 93-1280, at 305 (1974), reprinted in 1974 USCCAN 5038, 5086.

Pursuant to this express delegation of authority, the Secretary promulgated a 404(c) regulation that sets forth detailed notice, disclosure, voting, and other requirements that must be met before the plan will qualify as a 404(c) plan – all designed to ensure that the plan participants are actually exercising control over the assets in their individual accounts before a fiduciary is relieved of liability. 29 C.F.R. § 2550.404c-1. Thus, the regulation states that "[i]f 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 "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 id. at (b)(2)(i)(B)(1)(i).

The preamble explains, however, that "the act of designating investment alternatives" as well as "the ongoing determination that such alternatives and managers remain suitable and prudent investment alternatives for the plan" are

fiduciary functions "to which the limitation on liability provided by section 404(c) is not applicable." 57 Fed. Reg. 46,922 (Sept. 16, 1991). A footnote to the preamble reiterates that because such selections are not a direct and necessary result of any participant direction, fiduciaries to 404(c) plans are not relieved of liability for any failure to prudently select the investment options under the plan and "to periodically evaluate the performance of such vehicles to determine . . . whether [they] should continue to be available as participant investment options." Id. at 46924 n.27. In other words, the Secretary interprets her regulation to mean that, even if the plan otherwise qualifies as a section 404(c) plan, the fiduciary is not relieved by 404(c) from liability for plan losses resulting from the imprudent selection and monitoring of an investment option offered by the plan because those losses are not the "direct and necessary result of" a participant's exercise of control. The Secretary informed the public of her interpretation before promulgating her 404(c) regulation, see 56 Fed. Reg. 10724, 10732 n.21 (Mar. 13, 1991), and has consistently adhered to this interpretation. See, e.g., DOL Opinion Letter No. 98-04A, 1998 WL 326300, at *3 n.1 (May 28, 1998); DOL Information Letter to Douglas O. Kant, 1997 WL 1824017, at *2 (Nov. 26, 1997) (Kant Letter).

This regulation, with its "direct and necessary result" requirement, was promulgated after notice and comment under an express delegation of statutory authority, and is therefore legislative rulemaking entitled to the highest level of

deference under Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). See U.S. v. Mead Corp., 533 U.S. 218, 229-30 (2001). "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 844. The preamble's contemporaneous interpretation of the regulation and the Secretary's consistent adherence to that interpretation are also entitled to a high level of deference. See Yellow Trans., Inc. v. Michigan, 537 U.S. 36, 45 (2002) (interpretation in preamble); Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 158 n.13 (1982) (same); Auer v. Robbins, 519 U.S. 452, 462 (1997) (interpretation of regulation in a brief); Long Island Care at Home v. Coke, 127 S. Ct. 2339, 2349-50 (2007) (same).

The Secretary's 404(c) interpretation of her regulation is therefore not "informal commentary" used to "override the language of the statute and regulations," as the defendants argued. 2009 WL 331285, at *13. Instead, the interpretation reasonably explains what the regulation and statute require. 56 Fed. Reg. at 10729. "As the regulations clearly envision, a breach of a fiduciary's duty to exercise prudence in selecting Plan investment options is not the type of breach for which § 404(c)(1) provides a defense," because the selection and retention of investment options are tasks over which the fiduciary, and not the participant, has control. DiFelice v. US Airways, Inc., 397 F. Supp. 2d 758, 777 (E.D. Va. 2005), rev'd on other grounds, 497

F.3d 410 (4th Cir. 2007); see also id. at 418 n.3 ("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 for assembling an imprudent menu in the first instance"). Accordingly, if a fiduciary has chosen and maintained prudent investment options, the Secretary's regulation provides that a fiduciary is not liable for investment losses that stem from a participant's own choices (e.g., the participant's allocation of investments between various plan options). But if, on the other hand, the fiduciary maintains imprudent investment choices – such as investments with imprudently high fees – then, under the Secretary's regulation, any resulting loss is not a "direct and necessary consequence of the participant's exercise of control" and the fiduciary is not exempt from liability for that loss. In such cases, neither the plan nor the participants would have invested in the overly expensive fund, but for the fiduciary's breach.

Thus, the Secretary's regulation properly holds the fiduciary responsible for its control over the investment vehicles available to the plan – a reasonable result that is consistent with the language of section 404(c), ERISA's protective purposes, and the Act's stringent fiduciary obligations. Indeed, the Secretary's interpretation is not just permissible; it is the interpretation most consonant with the statute's structure and purposes. As we have stated, strict fiduciary duties of loyalty and care lie at the heart of the statutory scheme, see 29 U.S.C. § 1001(b), 1104, and

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). Thus, the Supreme Court has 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, but 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); 29 C.F.R. § 2550.408b-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 these statutory principles.

The panel's decision in this case appears to rest in large part on a mistaken impression that plaintiffs' claims hinge on the fiduciaries' failure "to scour the

market to find and offer the cheapest possible fund," as well as the conclusion that the fees were necessarily prudent because the Plans' array of investment funds were offered "to the general public" at the same expense ratios that the Plans paid. 2009 WL 331285, at *10; see also id. at *11 ("The [404(c)] regulation does not require plans to offer only cost-free investment vehicles."). Based upon this view of the case, the panel concluded that the plaintiffs had failed to state a claim for imprudence.

While the panel could have stopped its analysis there, without calling into question the validity of the Secretary's interpretation of 404(c) and the Secretary's regulation, it did not. Instead, it held alternatively that even if it had "underestimated" Deere's fiduciary duties, and Deere had imprudently selected overpriced funds, 404(c)'s safe harbor gave Deere a defense, a holding at odds with the Secretary's view. Moreover, the crux of plaintiffs' overpayment case was that fiduciaries imprudently failed to use the Plans' large size (cumulatively, the Plans held more than $2 billion in assets at that time) to obtain better than retail-level fees. See Second Am. Compl. ¶¶ 36, 44, 76, 105(a), (b), (f); cf. Harzewski, 489 F.3d 799, 805 (fiduciary duties under ERISA are "far more exacting" than duties owed to unrelated parties in the market). If the fiduciaries had acted imprudently by selecting overpriced funds, it would make abundant sense to conclude that the fiduciaries alone were responsible for any loss associated with their imprudence,

since no individual participant had the ability to secure a better fee structure based upon the Plan's multi-billion dollar asset base – only the plan's fiduciaries had such "control" over Plan assets. This is what the Secretary's 404(c) regulation provides, and the panel erred in not deferring to it.[1]

2. In addition to misapprehending or overlooking the deference due to the Secretary's reasonable interpretation of her regulation and the statute, the Court may also have misapprehended or overlooked the effects of its decision. These effects are likely to be profound for all individual account plans, not just in fee cases, but in any kind of case involving imprudence and even disloyalty of a high order, so long as the plan qualifies as a 404(c) plan and offers a broad menu of investment options.

In its decision, the Court stated that it need not decide the "abstract question" whether 404(c) "applies to the selection of investment options for a plan," reasoning that "[e]ven if § 1104(c) does not always shield a fiduciary from the

---

[1] The Secretary takes no position on the merits of the plaintiffs' case or on their likelihood of success if the case is permitted to proceed to the merits. However, their assertion that the fiduciaries could and should have considered fees and favorable pricing arrangements finds some support in the Secretary's previous pronouncements and the relevant literature. <u>See</u> Kant Letter, 1997 WL 1824017 ("plan fiduciaries must consider, among other things, costs or fees associated with the investments, and their effect on investment returns to the plan participants and beneficiaries"); Investment Company Institute, Research Fundamentals, "The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2007," Vol. 17, No. 5, 6-12 (Dec. 2008) (401(k) plan participants tend to be invested in low-cost, "no load" funds).

imprudent selection of funds under every circumstance that can be imagined, it does protect a fiduciary that satisfies the criteria of § 1104(c) and includes a sufficient range of options so that participants have control over the risk of loss." 2009 WL 331285, at *13. Based upon this test, and relying on the pleading standard set forth in Bell Atlantic v. Twombly, 127 S. Ct. 1955 (2007), the Court found it "implausible" that participants did not have the requisite degree of control in the context of Plans that offered, in addition to the 23 mutual fund options alleged to have excessive fees, BrokerageLink, through which participants could invest in 2500 mutual funds "with fees ranging from .07% to 1%." 2009 WL 331285 at *14.

Although it appears that this Court thought it was deciding the 404(c) issue on narrow grounds, the decision may be more far-reaching than the opinion suggests. Indeed, the decision cites Langbecker as support, a Fifth Circuit case that erroneously rejected as unreasonable the Secretary's interpretation of 404(c). 2009 WL 331285, at *13, citing Langbecker, 476 F.3d at 310-11. And like Langbecker, this Court rejects the Secretary's bright-line view that fiduciaries always retain responsibility for the selection of funds on a plan's menu without specifying an alternative understanding of when a participant can be said to exercise "control." In the context of this case, plaintiffs argue that the fiduciaries of the Plans had the ability, based on the enormous size of the Plans' holdings, to

secure equivalent funds at lower costs, an ability that the participants certainly did not possess. Thus, whatever this Court meant by "control," it is difficult to see how the participants had the kind of control that would have been necessary to obtain better fees.[2]

For this reason, it seems likely that this Court's reference to "control" will be read as allowing a fiduciary to insulate itself from liability for imprudently selecting funds by including a large number of funds or a brokerage window. So too, this Court's disposition of factual issues at the motion to dismiss stage – such as the Court's apparent assumption that the range of expense ratios in the brokerage window were sufficient to allow participant control – without full consideration of any evidence that might be developed and introduced concerning the full expenses and risks associated with that window or the possibly small percentage of participants that actually use the window – suggests that such factual issues do not

---

[2] Admittedly, given that this Court clearly intended to decide the issue narrowly on the facts presented, it might be possible to distinguish this case from some other case involving imprudence with regard to a 404(c) plan, where it would be even more difficult to say that the participants exercised control over the act that caused the loss. But at least in cases alleging imprudent selection of investment options, defendants are likely to argue, and some lower courts are likely to conclude, that this decision immunizes fiduciaries altogether from liability in a 404(c) plan with a sufficient range of investment options (whatever that may turn out to be). And if not, it is difficult to predict, either as a matter of principle or logic, where to draw the line between cases where imprudent fiduciaries are entitled to the protections of the 404(c) safe harbor under the decision and cases where they are not.

matter. All of this lends itself to a very broad reading of the exculpatory reach of 404(c).

These implications have not gone unnoticed. For instance, a commentator in Plan Sponsor notes that if he were advising an employer with a 401(k) plan based on this decision he would "advocate giving participants LOTS of fund choices – via a brokerage window if possible," and would advise the employer that it "won't have to worry about being prudent in the selection of the fund options for the plan because, according to [this Court's] ruling, that [404(c)] safe harbor applies to that decision." Nevin E. Adams, "IMHO: 'Winning' Ways?" (Feb. 19, 2009), http://www.planadviser.com/compliance/article.php/3708. Thus, even if this Court meant to limit its holding to plans that offer a brokerage window of the type offered by the Deere Plans, 2009 WL 331285, at *13, it is not hard to imagine that plan designers will advocate including this feature for all plans in order to immunize fiduciaries from any liability with respect to the selection of the plan's option.

Moreover, one can imagine cases where this Court's decision could be read to allow fiduciaries of 404(c) plans to act with obvious, even reckless, imprudence in the selection of investments for a plan secure in the knowledge that they are immunized from liability for any resulting losses. For example, under the decision's logic, 404(c) might likewise provide a defense if the plaintiffs had

alleged that plan fiduciaries, for reasons wholly unrelated to the plan's interests, had deliberately chosen an investment vehicle that they believed to be unsound, poorly managed, or unduly expensive, as long as the plan also offered a wide range of other options. In these and other cases, the plan participants and beneficiaries might well be "left at the mercy of whoever made [the] limited [investment] choices." Langbecker, 476 F.3d at 320-21 (Reavley, J., dissenting). If, in effect, "no duty of prudence attaches to selection of investment options, plan fiduciaries could imprudently select a full menu of unsound investments, among which participants would be free to choose at their peril, while the fiduciaries remain insulated from responsibility." Id. at 321. Because that is precisely the imprudence the plaintiffs allege in this case, the panel erred in concluding that 404(c) insulated the fiduciaries from liability.

CONCLUSION

For the reasons stated above, this Court should grant panel rehearing and reverse its holding on 404(c).

Respectfully submitted,

CAROL A. DE DEO
Deputy Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor, PBSD

ELIZABETH HOPKINS
Counsel for Appellate and
Special Litigation

____
ROBIN SPRINGBERG PARRY
Senior Trial Attorney
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
Room N 4611
200 Constitution Avenue, N.W.
Washington, DC 20210

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2009, two copies of the foregoing Brief for the Secretary of Labor as Amicus Curiae were served using Federal Express, postage prepaid, and by courier, upon the following:

FEDERAL EXPRESS

Jennifer L. Amundsen
Solheim, Billing & Grimmer
One S. Pickney Street
Suite 301
Madison, WI 53701

Charles C. Jackson
Morgan, Lewis & Bockius
77 W. Wacker Drive
5th Floor
Chicago, IL 60601

Lewis W. Beilin
Reinhart, Boerner, Van Deuren
22 E. Mifflin Street
Suite 600
Madison, WI 53701-2020

Jerome J. Schlichter
Schlichter, Bogard & Denton
100 S. Fourth Street
Suite 900
St. Louis, MO 63102

James Fleckner
Goodwin Procter
53 State Street
Exchange Place
Boston, MA 02109

COURIER

Robert N. Eccles
O'Melveny & Myers
1625 Eye Street, NW
Washington, DC 20006-4001

ROBIN SPRINGBERG PARRY
Senior Trial Attorney
(202) 693-5614

CERTIFICATE OF VIRUS CHECK

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

____

Robin Springberg Parry
Senior Trial Attorney

Dated: March 17, 2009