No. 09-56190, 09-56248

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREDERICO QUAN, et. al.,
Plaintiffs-Appellants
v.

COMPUTER SCIENCES CORP., et. al,
Defendants-Appellees,
And

VAN B. HONEYCUTT, HAYWARD D. FISK,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Master File No. CV 08-02398 SJO (JWJx)

BRIEF OF THE SECRETARY OF LABOR, HILDA L. SOLIS, AS AMICUS CURIAE IN SUPPORT OF PETITION FOR EN BANC REHEARING

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation

THOMAS TSO
Attorney
United States Department of Labor
200 Constitution Avenue, N.W., N-4611
Washington, DC 20210
Phone: (202) 693-5626

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT PURSUANT TO CIRCUIT RULE 29-2 AND RULE 35 1

ARGUMENT 2

The Panel's Decision Creates a "Presumption of Prudence" That Conflicts With Plain Statutory Language, Supreme Court, and Ninth Circuit Precedent 2

CONCLUSION 17

CERTIFICATE OF COMPLIANCE OF BRIEFS AND VIRUS CHECK

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Federal Cases ....Page

Almaraz v. Universal Marine Corp.,
472 F.2d 123 (9th Cir. 1973)...14

Baker v. U.S.,
613 F.3d 224 (9th Cir. 1980).. 11 n.2

Black & Decker Disability Plan v. Nord,
538 U.S. 822 (2003) 10, 11

Boggs v. Boggs,
520 U.S. 833 (1997) 10

Braden v. Wal-Mart Stores, Inc.,
588 F.3d 585 (8th Cir. 2009)...14

Cent. States Se & Sw Areas Pension Fund v. Cent. Transp., Inc.,
472 U.S. 559 (1985) 15

Condus v. Howard Sav. Bank,
781 F. Supp. 1052 (D. N.J. 1992) 9

Converse v. Udall,
399 F.2d 616 (9th Cir. 1968).. 11 n.2

Donovan v. Mazzola,
716 F.2d 1226 (9th Cir. 1983).. 8, 14, 15

Gilliam v. Nev. Power Co.,
488 F.3d 1189 (9th Cir. 2007)... 3 n.1

Granite Rock Co. v. Int'l Bro. of Teamsters,
130 S. Ct. 2847 (2010) 12

Hardt v. Reliance Standard Life Ins. Co.,
130 S.Ct. 2149 (2010) 11, 13

Federal Cases-- (continued): ....Page

Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.,
530 U.S. 238 (2000) 14

Herman v. NationsBank Trust Co.,
126 F.3d 1354 (11th Cir. 1997)..15

Howard Johnson Co., Inc. v. Detroit Local Joint Executive Bd.,
417 U.S. 249 (1974) 14

Howard v. Shay,
100 F.3d 1484 (9th Cir. 1996).. 8, 17

Imel v. Laborers Pension Trust Fund for N. Cal.,
904 F.2d 1327 (9th Cir. 1990)..16

In re Computer Sciences Corp. Erisa Litig.,
635 F. Supp.2d 1128 (C.D. Cal. 2009) 1

In re Enron Corp. Sec. & Derivative & ERISA Litig.,
284 F. Supp. 2d 511 (S.D. Tex. 2003) 9

In re Syncor ERISA Litig.,
516 F.3d 1095 (9th Cir. 2008)... 5, 6, 11

Johnson v. Couturier,
572 F.3d 1067 (9th Cir. 2009)... 3, 5, 8

Kamen v. Kemper Fin. Servs., Inc.,
500 U.S. 90 (1991) 6

Kayes v. Pacific Lumber Co.,
51 F.3d 1449 (9th Cir. 1995)..16

Kennedy v. Plan Adm'r for DuPont Savings and Inv. Plan,
129 S.Ct. 865 (2009) 10

Magma Copper Co. v. Marshall,
608 F.2d 373 (9th Cir. 1979)..12

Federal Cases-- (continued): .... Page

Martin v. Feilen,
965 F.2d 660 (8th Cir. 1992) 6

Mass. Mut. Life Ins. Co. v. Russell,
473 U.S. 134 (1985) 7, 13

McDermott Int'l, Inc. v. Wilander,
498 U.S. 337 (1991) 3

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993) 7, 8, 13

Milwaukee v. Illinois,
451 U.S. 304 (1981) 6, 7

Moench v. Robertson,
62 F.3d 553 (1995) 1, 5, 7

N.L.R.B. v. Amax Coal Co., a Div. of Amax, Inc.,
453 U.S. 322 (1981) 8, 9, 12

Nw. Airlines, Inc. v. Transp. Workers Union of Am.,
451 U.S. 77 (1981) 8, 11 n.2

Ornelas v. United States,
517 U.S. 690 (1996) 5

Quan v. Computer Sciences Corp.,
-- F.3d --, 2010 WL 3784702, (9th Cir. Sept. 30, 2010) .... 1, passim

Retirement Fund Trust of Plumbing v. Franchise Tax Bd.,
909 F.2d 1266 (9th Cir. 1990) 15

Schikore v. BankAmerica Supplemental Ret. Plan,
269 F.3d 956 (9th Cir. 2001) 14

Snap-Drape, Inc. v. C.I.R.,
98 F.3d 194 (5th Cir. 1996) 12 n.2

Federal Cases-- (continued): .... Page

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 6

Tacoma Ry. & Power Co. v. Hays,
110 F. 496 (9th Cir. 1901) 5

Texas Inds., Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 17

United States v. Coleman,
390 U.S. 599 (1968) 11 n.2

United States v. Gonzales,
520 U.S. 1 (1997) 14

Wright v. Or. Metallurgical Corp.,
360 F.3d 1090 (9th Cir. 2004) 4

State Cases:

Chase v. Pevear,
419 N.E.2d 1358 (Mass. 1981) 16

In re Estate of Lieberman,
909 N.E.2d 915 (Ill. Ct. App. 2009) 16

Federal Statutes:

15 U.S.C. § 77k(c) 3

15 U.S.C. § 77ooo(c) 3

26 U.S.C. § 7518(b)(2) 3

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

Federal Statutes--continued: ....Page

Section 2(a), 29 U.S.C. § 1001(a) 13

Section 2 (b), 29 U.S.C. § 1001(b)..13

Section 3(13), 29 U.S.C. § 1002(13)..1, 2

Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) 1, 3, 5, 7

Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D)..15

Section 404(a)(2), 29 U.S.C. § 1104(a)(2)... 12 n.3

Section 506(b), 29 U.S.C. § 1136(b)..1, 2

Miscellaneous:

S. Rep. No. 93-127,
reprinted in 1974 U.S.C.C.A.N. 4838 .... 3, 15

Fed. R. App. P.

35(a)(2) 2
35(b)(1)(A) 2
35(b)(1)(B) 2

U.S. Dep't of Labor, Private Pension Plan Bulletin,
(June 2010), available at
http://www.dol.gov/ebsa/PDF/2007pensioneplanbulletin.PDF......................17

Restatement of Trusts (Third) § 90 cmt. e (2007) 16

STATEMENT PURSUANT TO CIRCUIT RULE 29-2 AND RULE 35

Petitioner Frederico Quan seeks en banc reversal of the panel decision in this case, which adopts a version of the presumption of prudence first articulated by the Third Circuit in Moench v. Robertson, 62 F.3d 553, 571 (1995). Failing to abide by its own judicial authority, the panel affirmed the dismissal of the petitioners' case based on its creation of a federal-common-law "shield" or "safe harbor" for pension plan fiduciaries, which "insulate[s]" them from ERISA's prudence standard of care otherwise applicable to their actions. Quan v. Computer Sciences Corp., -- F.3d --, 2010 WL 3784702, at *7-*8 (9th Cir. Sept. 30, 2010); id. at *4 & n.5. The district court did not need this "safe harbor" to justify dismissal of the case because the district court's primary basis for granting summary judgment to the defendants was its conclusion that the plan participants failed to show that the fiduciaries acted imprudently even under the normal prudence standard. In re Computer Sciences Corp. Erisa Litig., 635 F. Supp.2d 1128, 1136 (C.D. Cal. 2009). By affirming the dismissal on the basis of the Moench presumption, however, Quan replaces ERISA's objective "prudence" standard of care, embodied in 29 U.S.C. § 1104(a)(1)(B), with a more lenient, judicially-created standard. 2010 WL 3784702 at *8 ("[i]t will not be enough for plaintiffs to prove that the company's stock was not a 'prudent' investment"). The Secretary of Labor, who has primary authority for enforcing and administering Title I of ERISA, 29 U.S.C.

§§ 1002(13), 1136(b), disagrees with this unjustified creation of federal common law that conflicts with the statutory prudence standard.

En banc rehearing is appropriate under Fed. R. App. P. 35(b)(1)(A) because this decision conflicts with Supreme Court and Ninth Circuit decisions concerning the court's authority to create federal common law that contravenes ERISA's plain language and purposes. The decision is also of exceptional importance under Fed. R. App. P. 35(a)(2) and (b)(1)(B) because it undermines the statute's remedial purposes by, among other things, improperly creating a "safe harbor" from fiduciary obligations for employer stock investments, and consequently putting billions of dollars in pension plan assets at undue risk. 2010 WL 3784702, at *7. This significant issue deserves the attention of the full court.

ARGUMENT

THE PANEL'S DECISION CREATES A "PRESUMPTION OF PRUDENCE" THAT CONFLICTS WITH PLAIN STATUTORY LANGUAGE, SUPREME COURT, AND NINTH CIRCUIT PRECEDENT

Based on a "balanc[ing]" of perceived policy considerations, 2010 WL 3784702, at *7, Quan replaces ERISA's statutory "prudence" standard of care with a conflicting, judicially-created "abuse of discretion" standard. Id. at *8. Such an unjustified creation of federal common law contradicts ERISA's plain statutory language and purposes, and contravenes controlling Supreme Court and Ninth Circuit precedent that delimit the courts' authority to make federal common law.

In ERISA, Congress expressly adopted only one standard of care applicable to plan fiduciaries, the prudent man standard first developed in the trust law. 29 U.S.C. § 1104(a)(1)(B) (requiring plan fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims"); S. Rep. No. 93-127, 93rd Cong., 2d Sess. 1974, 1974 U.S.C.C.A.N. 4838, 4863, 4866 (1973) ("the core principles of fiduciary conduct ... place a ... duty on every fiduciary: to act in his relationship to the plan's fund as a prudent man in a similar situation and under like conditions would act") (emphasis added).[1] This prudent man standard is a specific "term of art" well known in the trust law and employed in other statutes, as in ERISA, to impose an exacting standard of care. See, e.g., 15 U.S.C. § 77k(c); 15 U.S.C. § 77ooo(c); 26 U.S.C. § 7518(b)(2); Johnson v. Couturier, 572 F.3d 1067, 1078 (9th Cir. 2009) ("Congress chose to hold plan fiduciaries to a high standard – in fact, 'the highest known to the law.'") (citation omitted); cf. McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 342 (1991) ("when a statute uses [a term of art], Congress intended it to have its established meaning").

[1] In the few instances where the statute exempts fiduciaries from certain fiduciary obligations, it does so expressly. See, e.g., Gilliam v. Nev. Power Co., 488 F.3d 1189, 1192-193 (9th Cir. 2007) (noting that provision exempting administrators of top-hat plans from fiduciary obligations was "no small matter" and "Congress created a special regime to cover them") (citation omitted).

The panel recognized that Congress did not alter the prudence standard for the fiduciaries in this case. 2010 WL 3784702, at *4 & n.5. The panel's decision, however, rejects the statutory standard, holding that "[i]t will not be enough for plaintiffs to prove that the company's stock was not a 'prudent' investment." Id. at *8. Thus, the panel expressly created a special judicial "shield" for fiduciaries whose plans contemplate employer stock holdings that bars the application of the prudence standard unless plaintiffs rebut a "difficult" evidentiary presumption. Id. at *7-*8. This directly contravenes Congress' plain adoption of the prudence standard by supplanting that standard with a special "safe harbor" that provides for a much more lenient "abuse of discretion" standard of review. 2010 WL 3784702, at *5, *8; see also id. at *7-*8 ("[i]n contrast to ERISA's prudence requirement, Moench gives fiduciaries a safe harbor"); id. at *3 (describing the district court as considering the claims under two standards: the Moench presumption and the "prevailing 'prudent man' standard"); Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1097-98 (9th Cir. 2004) (calling the presumption an "intermediate prudence standard").

By supplanting the statutory prudent man standard with an "abuse of discretion" or "intermediate prudence" standard, the Quan standard improperly holds that plan fiduciaries may make or hold plan investments in employer stock even in circumstances where a prudent fiduciary would not do so, as long as the

"company's viability" is not implicated. 2010 WL 3784702, at *8. Thus, according to the panel, no matter the circumstances, a fiduciary may continue to allow the pension plan to invest in employer stock so long there is not "a precipitous decline in the employer's stock combined with evidence that a company is on the brink of collapse or is undergoing serious mismanagement." Id. This simply cannot be squared with the prudence standard set forth in the statute, which this Court has recognized imposes a high standard of care, see Couturier, 572 F.3d at 1078, that must be gauged under an objective, facts and circumstances test. E.g., Tacoma Ry. & Power Co. v. Hays, 110 F. 496 (9th Cir. 1901) (prudence is "purely [a] question[ ] of fact, determinable from the circumstances of the case as presented by the evidence"); cf. Ornelas v. United States, 517 U.S. 690, 696 (1996) (prudence is "not readily, or even usefully, reduced to a neat set of legal rules") (citation omitted); see also 29 U.S.C. § 1104(a)(1)(B) ("with the care, skill, prudence, and diligence under the circumstances then prevailing") (emphasis added).

Consistent with these controlling decisions, the Ninth Circuit in In re Syncor ERISA Litig., 516 F.3d 1095 (9th Cir. 2008), correctly recognized that the prudence standard requires a case-by-case analysis dependent on the surrounding factual circumstances. For this reason, the Court in Syncor "decline[d]" to "adopt [] the Moench presumption." 516 F.3d at 1102. Syncor thus specifically rejected

a "prudent man standard based only upon a company's alleged financial viability," because such a standard "does not take into account the myriad of circumstances that could violate the standard" and is not sufficiently "determinative of whether the fiduciaries failed to act with care, skill, prudence, or diligence." Id. In direct conflict with this holding, the panel's decision in Quan declares that absent allegations that a company is in serious trouble, a plan's investment in employer stock is presumed prudent. 2010 WL 3784702, at *8. And, contrary to Syncor, Quan even appears to presume that a fiduciary acts prudently by overpaying for "artificially inflated" stock, so long as the inflated price was not due to illegality. Compare id. at *10, with Syncor, 516 F.3d at 1103; Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992).

"Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." Milwaukee v. Illinois, 451 U.S. 304, 312 (1981). Before making federal common law, courts must identify their authority to create a federal-common-law rule of decision in that case and the source for such a rule. See Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991) ("the Court of Appeals was not free to promulgate a federal common law demand rule without identifying the proper source of federal common law in this area"); Sosa v. Alvarez-Machain, 542 U.S. 692, 739 (2004) (Scalia, J., concurring in part and concurring in the judgment)

("federal courts must possess some federal-common-law-making authority before undertaking to craft it"). Quan, and the decisions it relies on, did not properly consider their judicial authority, and in fact exceeded this authority, in creating the Moench presumption.

The Supreme Court clearly marked the limits of the courts' authority, stating that a court may resort to federal common law only when it "is compelled to consider federal questions which cannot be answered from federal statutes alone." Milwaukee, 451 U.S. at 314 (citations omitted). In the ERISA context, these limits apply with even greater force. See, e.g., Mertens v. Hewitt Assocs., 508 U.S. 248, 259 (1993) (citation omitted) ("[t]he authority of courts to develop a 'federal common law' under ERISA … is not the authority to revise the text of the statute"); cf. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985) (calling ERISA a "comprehensive and reticulated statute") (citation omitted).

Quan's creation of an alternative standard of fiduciary conduct untethered to the statute clearly contravenes the limitations on federal-common-law-making authority. Because the statute sets forth and makes applicable a well-defined "prudent man" standard, 29 U.S.C. § 1104(a)(1)(B), the panel was not "compelled to consider [a] federal question[ ] which cannot be answered from the federal statute [ ] alone." Milwaukee, 451 U.S. at 314 (citations omitted). Supplanting the statutory standard with a contradictory standard therefore improperly "revise[s]

the text of the statute." Mertens, 508 U.S. at 259. "[T]he task of the federal courts is to interpret and apply [the "prudent man" standard], not to create common law" that presumes its application. Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 95 & n.34 (1981).

Until Quan, the Supreme Court and the Ninth Circuit consistently rejected attempts to alter or substitute ERISA's fiduciary standards by federal common law. Quan, therefore, is inconsistent with numerous Ninth Circuit decisions that have rejected several requests to weaken the objective prudence standard with alternative formulations. See Couturier, 572 F.3d at 1078 (rejecting a different standard that referred to state law and an indemnification agreement); Howard v. Shay, 100 F.3d 1484, 1489 (9th Cir. 1996); id. at 1490 (O'Scannlain, J., dissenting) (agreeing with the majority to reject the district court's use of a weakened prudence standard); Donovan v. Mazzola, 716 F.2d 1226, 1231 (9th Cir. 1983) (rejecting the defendant's suggestion that "the appropriate test ... is a version of the 'business judgment rule'"). Contrary to the reasoning in these decisions, Quan distorts and supplants the prudence standard.

Quan also conflicts with Supreme Court decisions rejecting other attempts to create common-law rules that would alter ERISA's requirements. For instance, in N.L.R.B. v. Amax Coal Co., a Div. of Amax, Inc., 453 U.S. 322, 330-333 (1981), the Court rejected the Third Circuit's alteration of ERISA's duty of loyalty through

the creation of federal common law. The Third Circuit had ruled that because employers appointed the plan's trustees to be their "representatives" for collective bargaining purposes under the Labor Management Relations Act (LMRA), the trustees were obligated under the LMRA to serve the employers' interests in ERISA plan administration despite their duty of loyalty to participants under ERISA. Id. at 328, 334. The Court, however, declined to dilute ERISA's loyalty requirement based on an asserted conflict with the LMRA. Id.

The panel's decision here dilutes ERISA's fiduciary duties based on a presumed conflict, not with the LMRA, but with the securities law and its insider trading rules. 2010 WL 3784702, at *7. As in Amax, 453 U.S. at 336-37, the conflict in this case is more imagined than real because ERISA fiduciaries can, and indeed must, take action to prevent loss to participants in similar circumstances, and they may do so without running afoul of securities laws or insider trading rules. See In re Enron Corp. Sec. & Derivative & ERISA Litig., 284 F. Supp. 2d 511, 566 (S.D. Tex. 2003) (listing possible actions, including making disclosure to the market and contacting the regulatory authorities, to mitigate the plan's losses that would have been consistent with securities laws). Indeed, because insider trading requires the buying or selling of stock, it is never a violation of insider trading prohibitions to refuse to purchase additional stock, Condus v. Howard Sav. Bank, 781 F. Supp. 1052, 1056 (D. N.J. 1992), as the plaintiffs allege the

fiduciaries should have done here. Plaintiffs' Second Amended Complaint, ¶¶ 102-04. Accordingly, a prudent fiduciary would not knowingly overpay for stock at a price inflated by market fraud whether or not the company remained viable.

In Kennedy v. Plan Adm'r for DuPont Savings and Inv. Plan, the Supreme Court again rejected an attempt to create a federal-common-law waiver that deviated from the "plan documents rule." 129 S.Ct. 865, 877 (2009).
Likewise, in Boggs v. Boggs, 520 U.S. 833, 850 (1997), the Court rejected a request to create an "extratextual" extension of ERISA's fiduciary obligations to "a new class of persons for whom plan assets are to be held and administered." The Quan decision, however, creates just such an "extratextual" class of fiduciaries for whom the statutory standard of prudence need not apply. 2010 WL 3784702, at *9 (reducing "judicial scrutiny" of fiduciaries based on the type of plan document at issue).

Similarly, in Black & Decker Disability Plan v. Nord, 538 U.S. 822, 832 (2003), the Court reversed the Ninth Circuit's adoption of an "assumption that the opinions of a treating physician warrant greater credit than the opinions of plan consultants" because such a rule exceeded the "scope of permissible judicial innovation" on a question for which "the Legislature or superintending administrative agency is best positioned to address." The Quan panel likewise exceeded the scope of its judicial authority by adopting a presumption of prudence

applicable to employer stock investments without considering the "myriad" of specific factual circumstances that may apply. Syncor, 516 F.3d at 1102. Compare Nord, 538 U.S. at 832 (rejecting the "treating physician rule" because factual circumstances may render the rule's factual and policy assumptions inaccurate) with Quan, 2010 WL 3784702, at *7 (fashioning a legal rule based on certain factual and policy assumptions).

Finally, in Hardt v. Reliance Standard Life Ins. Co., 130 S.Ct. 2149, 2156 (2010), the Supreme Court rejected an attempt to add a "prevailing party" test to ERISA's fee-shifting provision because no statutory language limited the discretion of courts in this way. Likewise, no statutory language requires plaintiffs to overcome a "substantial shield" to state a claim based on company stock investments. Compare id. with Quan, 2010 WL 3784702, at *7.[2]

---

[2] Federal courts may, of course, "refine[]" the prudence standard so long as such "refinement" is "complementary" of the statutory provisions as written. See United States v. Coleman, 390 U.S. 599, 603 (1968) (recognizing "marketability" as a "refinement" of the prudence standard applicable to mining claims on federal land because marketability helped measure one "important consideration" when gauging the prudence of mine exploration); see also Converse v. Udall, 399 F.2d 616, 621-23 (9th Cir. 1968) (interpreting Coleman as a "complement" to the prudence test); Baker v. U.S., 613 F.2d 224, 288-30 (9th Cir. 1980) (rejecting, as unwarranted under the mining statute, an extension of the marketability test that measured whether a mining claimant had claimed "too much" of the mineral in question). Far from imposing a "complementary" standard, Quan displaces and contradicts ERISA's prudence standard by creating a "safe harbor" for otherwise imprudent actions. See Nw. Airlines, 451 U.S. at 97 ("the authority to construe a statute is fundamentally different from the authority to fashion a new rule ... which Congress has decided not to adopt").

Quan justifies its adoption of the presumption because the presumption "appropriate[ly] balance[s]" the fiduciary standards with legislative intent, inferred from snippets of unrelated legislative history, to encourage plan investment in employer stock.[3] 2010 WL 3784702, at *5 & n.7, *7. As noted earlier, however, Congress has already adopted a specific prudence standard, which has been applied in numerous statutory contexts and has a settled meaning in the trust law. See Amax, 453 U.S. at 330-333. The prudence standard already strikes a "carefully calibrated" balance between the interests of plan fiduciaries and their participants and beneficiaries. Granite Rock Co. v. Int'l Bro.of Teamsters, 130 S. Ct. 2847, 2864 (2010); cf. Magma Copper Co. v. Marshall, 608 F.2d 373, 376 (9th Cir. 1979) (rejecting Secretary of Labor's attempt to hold defendants to higher work safety standards than what a prudent man would have adopted). There is no basis to supplant that explicit standard or to readjust the struck balance through federal

---

[3] The Secretary does not quarrel with the view that Congress intended, as a general matter, to encourage plans to facilitate the investment in employer stock, other things being equal. Congress, however, explicitly used other means to encourage plans' ownership of employer stock. One such explicit incentive was favorable tax treatment. See, e.g., Snap-Drape, Inc. v. C.I.R., 98 F.3d 194, 201-02 (5th Cir. 1996); Quan, 2010 WL 3784702, at *7 (citing to the legislative history of the tax provisions). Another is ERISA's pass from diversification for certain employer stock investments. 29 U.S.C. § 1104(a)(2). There is no basis to create common-law protections for fiduciaries on top of these explicit incentives, especially where such protections are detrimental to ERISA's explicit goals. Compare Quan, 2010 WL 3784702, at *4, *7, with infra at 13-14.

common law and re-balance the standard of care applicable to fiduciaries. Mertens, 508 U.S. at 263 (Court will not "adjust the balance between those competing goals that the text adopted by Congress has struck"). The Quan standard directly contradicts the statutory prudence standard by requiring plaintiffs to prove not only that the fiduciary's investment was imprudent (the statutory test), but also a "precipitous decline in the employer's stock combined with evidence that a company is on the brink of collapse or is undergoing serious mismanagement" (the new judicially-created standard). 2010 WL 3784702 at *8.

Moreover, the new standard subverts the purposes actually written into ERISA's text: to "establish[ ] standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans," to "provid[e] for ... ready access to the Federal courts," and to set "minimum standards … assuring the equitable character of such plans." 29 U.S.C. §§ 1001(a)-(b); see also Russell, 473 U.S. at 140 n.8 (recognizing that fiduciary oversight is the "crucible" of congressional concern). Quan denies plan participants and beneficiaries "ready access" to the federal courts by creating for defendant-fiduciaries a "substantial shield" and "safe harbor" from complying with the "minimum" fiduciary standards statutorily required by the prudence standard of care. Both the Supreme Court and the Ninth Circuit have correctly rejected this type of "freewheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional

pronouncements." Howard Johnson Co., Inc. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 255-56 (1974); United States v. Gonzales, 520 U.S. 1, 6 (1997) ("[g]iven the straightforward statutory command, there is no reason to resort to legislative history"); Schikore v. BankAmerica Supplemental Ret. Plan, 269 F.3d 956, 964 (9th Cir. 2001) (using ERISA's explicit purposes as stated in 29 U.S.C. § 1001(b) to judge federal common law).

Because the Quan standard is inconsistent with the statutory "prudent man" standard of care and ERISA's explicit purposes, any resort to "trust law" does not justify the adoption of such a standard. See Harris Trust & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 250 (2000) (trust law offers a "starting point for analysis [of ERISA] ... [unless] it is inconsistent with the language of the statute, its structure, or its purposes") (citation omitted); Mazzola, 716 F.2d at 1231 ("[c]ourts have also recognized that in enacting ERISA Congress made more exacting the requirements of the common law of trusts relating to employee benefit trust funds"). The statutory prudence standard is ultimately an objective one not governed by subjective settlor expectations. See Almaraz v. Universal Marine Corp., 472 F.2d 123, 123 & n.2 (9th Cir. 1973) (refusing to deviate from an "objective" test when applying the prudence standard to particular factual circumstances); Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 595 (8th Cir. 2009)

("[t]he statute's 'prudent person standard is an objective standard'") (citation omitted).

Moreover, Quan's reliance on trust law authorities, most notably the importance of the "settlor's expectations" in trust law, is misguided for another reason. 2010 WL 3784702, at *8. The settlor's expectations, as embodied in plan documents, are not relevant to the application of ERISA's fiduciary standards because ERISA specifically requires fiduciaries to disregard their obligation to follow plan documents when doing so is inconsistent with their other statutory duties, such as the duty of prudence. 29 U.S.C. § 1104(a)(1)(D) (fiduciary must follow plan documents only "insofar as such documents and instruments are consistent with the provisions" of Titles I and IV of ERISA); see also S. Rep. No. 93-127, 1974 U.S.C.C.A.N. at 4866 (explaining why ERISA's fiduciary duties, unlike state trust law, bar "deviations" based on settlor's intent); Retirement Fund Trust of Plumbing v. Franchise Tax Bd., 909 F.2d 1266, 1280 (9th Cir. 1990) ("[t]rust documents cannot excuse ERISA trustees from their duties under ERISA") (citing Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 568 (1985)); Herman v. NationsBank Trust Co., 126 F.3d 1354, 1369 & n.15 (11th Cir. 1997) ("the trustee must disregard the provision, just like it would have to disregard any other plan provision controlling the disposition of plan assets which leads to an imprudent result"); Mazzola, 716 F.2d at 1239. Quan ignores

these and other controlling authorities by reducing or eliminating judicial scrutiny of a defendant's compliance with statutory fiduciary obligations based purely on a plan document's language. Compare 2010 WL 3784702 at *9, with Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1460 (9th Cir. 1995) ("any interpretation of the Plan which prevents [the defendant] acting in a fiduciary capacity from being found liable as [a] fiduciar[y] is void") (interpreting 29 U.S.C. § 1110); Imel v. Laborers Pension Trust Fund for N. Cal., 904 F.2d 1327, 1330 (9th Cir. 1990) ("[p]rivate parties may not agree to alter statutory duties").

Furthermore, the Quan standard is inconsistent with the law of trusts in any event. The "prudent investor rule" of trust law rejects any legal determination that "classif[ies] specific investments or courses of action as prudent or imprudent in the abstract." Restatement Third, Trusts § 90, comment e (2007); see also Chase v. Pevear, 419 N.E.2d 1358, 1365 (Mass. 1981) ("[t]he [prudence] standard avoids the inflexibility of definite classification of securities") (citation omitted); In re Estate of Lieberman, 909 N.E.2d 915, 924 (Ill. Ct. App. 2009) (rejecting the argument that investments permitted by statute are per se prudent). Likewise, even though Congress permitted undiversified plan investments in employer stock, it explicitly declined to otherwise abrogate the fiduciary's duty of prudence. Quan, 2010 WL 3784702, at *4 n.5. As a legal rule, Quan's "presumption of prudence"

would create "prudence per se" "in the abstract," thereby violating these trust law and statutory principles.

In short, Quan, through federal-common-law making, supplants the statute's "minimum" fiduciary standards by adopting a judicially-created "safe harbor." 2010 WL 3784702, at *8; compare Shay, 100 F.3d at 1488 ("[t]hese [ERISA fiduciary] duties are the highest known to the law") (citation omitted). This "safe harbor" eviscerates the participants' ability to enforce ERISA's minimum fiduciary standards for over $280 billion dollars worth of retirement savings invested in employer securities by defined contribution plans, the category of investments at issue in Quan. See U.S. Dep't of Labor, "Private Pension Plan Bulletin," at 24 ("Table C4") (June 2010), available at http://www.dol.gov/ebsa/PDF/2007pensionplanbulletin.PDF. "The choice" to adopt this "safe harbor" created by the Moench presumption is "a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot." Texas Inds., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 642 (1981) (citation omitted).

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court grant Quan's petition for en banc rehearing.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

ELIZABETH HOPKINS
Counsel for Appellate Litigation

Dated: November 1, 2010

___/s/ Thomas Tso_____
THOMAS TSO
Attorney
United States Department of Labor
Plan Benefits Security Division
200 Constitution Ave. N.W. N-4611
Washington, DC 20210

CERTIFICATE OF COMPLIANCE OF BRIEFS AND VIRUS CHECK

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 29-2(c)(2), I certify that this amicus brief uses a mono-spaced typeface of 14 characters per inch and contains four thousand one hundred and ninety-nine (4,199) words. Pursuant to Circuit Rule 29-2(c)(2), this brief complies with the 4,200 word limit.

I further certify that a virus scan was performed on the Brief using McAfee, and that no viruses were detected.

Dated: November 1, 2010

__/s/ Thomas Tso___
THOMAS TSO
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 2010, true and correct copies of the foregoing - THE SECRETARY OF LABOR'S AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR EN BANC REHEARING -were filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system and served electronically via email to the following counsel at the addresses set forth below:

Edwin J. Mills
Michael J. Klein
Stull, Stull & Brody
6 East 45th Street
New York, NY 10017

Patrice L. Bishop
Stull, Stull & Brody
10940 Wilshire Blvd.
Suite 2300
Los Angeles, CA 90024

Dean J. Kitchens
Gibson Dunn & Crutcher, LLP
51st Floor
333 South Grand Avenue
Los Angeles, CA 90071-3197

Paul Blankenstein
Jennifer H. Schulp
Gibson Dunn & Cruthcher, LLP
1050 Connecticut Ave., NW
Washington, DC 20036-5306

Dated: November 1, 2010

___/s/ Thomas Tso____
Thomas Tso
Attorney