No. 07-56448

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY GRABEK, et al.,
Plaintiffs-Appellants,
v.
NORTHROP GRUMMAN CORP., et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLANTS

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Statement of the Issue

The question addressed by the Secretary of Labor in this amicus brief is:

Whether the court properly denied class certification on the basis that "the case is better taken care of by administrative agencies" when ERISA section 502(a)(2) gives individual participants and the Secretary of Labor equal standing to bring an action for fiduciary breach causing harm to a plan and does not make participant-initiated suits at all dependent on the Secretary's intervention or bringing the same action on her own behalf.

Interest of the Secretary of Labor

The Secretary's interest in this matter arises from the intersection of class certification issues with the enforcement of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 et seq. As the federal agency with the primary responsibility for Title I of ERISA, the Secretary of Labor has a strong interest in ensuring that courts correctly interpret ERISA. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-93 (7th Cir. 1986) (en banc) (the Secretary's interests include promoting the uniform application of the Act, protecting plan participants and beneficiaries, and

ensuring the financial stability of plan assets). Although the Secretary takes no position on the ultimate merits of the claims asserted, or even on whether class certification is appropriate, the manner in which the District Court denied class certification threatens the Secretary's enforcement capability. The District Court's bare claim that "the case is better taken care of by administrative agencies" undermines the dual public-private system which Congress created for the enforcement of ERISA fiduciary duties. The District Court's legally incorrect implication that the Secretary must bring this case threatens to overwhelm the Secretary's limited enforcement resources. The Secretary believes, therefore, that it is important for the Court to have the benefit of her views on this fundamental enforcement matter.

Statement of the Case

The Plaintiffs ("the Participants") in this case are participants in two defined contribution plans sponsored by the Northrop Grumman Corporation: the Northrop Grumman Savings Plan and the Northrop Grumman Financial Security and Savings Plan. The Defendants, who are alleged to be fiduciaries of the Plans, are Northrop Grumman ("NG"), various NG committees that administer different aspects of the Plans, and

various NG executives who are members of the committees ("the Fiduciaries"). Both Plans offer participants the opportunity to direct the investment of the assets in their account. The Plans offer 10 "collective trust funds" in which participants may invest.

On March 14, 2007, the Participants filed their First Amended Complaint ("Compl."), which is the complaint at issue for this case. The Complaint seeks to recover losses "suffered by [the Plans] on a plan wide basis and to obtain injunctive and other equitable relief for [the Plans] from the defendants based upon their breaches of fiduciary duties." (Compl. ¶ 1-2). Count I states a 502(a)(2) cause of action and asks for restoration of losses to the Plans. (Compl. ¶ 56-59). Count II states a 502(a)(3) cause of action and seeks an accounting of all transactions, disbursements and dispositions occurring with respect to the Plans, including all fees and expenses, and to "surcharge against the Defendants all amounts for which they cannot account." (Compl. ¶ 60-72).

The gravamen of the Complaint is that the Fiduciaries "[c]harged, or caused to be charged by entering into contracts with third parties, fees and expenses to the Plans that were, or are, unreasonable and/or not incurred for the benefit of participants and beneficiaries of the Plans." (Compl. ¶ 35.B.i; see Compl. ¶ 43-50). In addition, Plaintiffs charge that Defendants failed "to

inform and/or disclose to participants ... the fees and expenses that are, or have been, paid by the Plans ... [and to inform/disclose] in proper detail and clarity the transactions, fees and expenses which affect participants' account balances in connection with the purchase or sale of interests in investment alternatives." (Compl. ¶ 57.F-G).

On July 2, 2007, the Participants filed a motion for class certification, alleging that their suit met the numerosity, commonality, typicality, and adequacy of representation requirements of Fed. R. Civ. P. 23(a) and the requirements of Rule 23(b). (Second Renewed Mot. for Class Certification). On July 23, 2007, the Fiduciaries filed a motion in opposition to class certification. (Defs.' Opp'n to the Grabek Pls.' Second Renewed Mot. for Class Certification). In addition to arguing that the Participants could not meet the Rule 23 factors, the Fiduciaries argued that the Participants could not recover under ERISA sections 502(a)(2) and 409, 29 U.S.C. §§ 1132(a)(2), 1109; the Fiduciaries' primary argument on the latter point was that those statutory provisions only authorize recovery for the plan "as a whole" and not to a subset of a plan, such as the subset of investment funds within the Plans that are alleged here to have been charged excessive management fees. Id. at 7-11.

On August 7, 2007, the district court denied class certification.

Quoted in its entirety, the ruling states:

> Having considered all paper, argument, and evidence presented, the Court hereby FINDS and ORDERS as follows:
>
> 1. This case does not qualify under Fed. R. Civ. P. 23, as the case is better taken care of by administrative agencies.
> 2. The case shall proceed in this Court accordingly.
> 3. The Motion is DENIED.

Order Den. Grabek Pls.' Second Renewed Mot. for Class Certification, at 2.

The ruling followed an August 6, 2007, hearing on the class certification issue in which the court was hardly more expansive in stating how it intended to rule. Cutting short argument by the parties, the court stated:

> I don't think this qualifies under rule 23. I think it's – it's better taken care of by the administrative agencies that do involve themselves in these matters. And therefore, it should be – this is an individual case and it should proceed as an individual case[.]

Hr'g re: Pls.' Renewed Mot. for Class Certification, at 3-4.

On August 16, 2007, the Participants filed a motion in the United States Court of Appeals for the Ninth Circuit seeking an interlocutory appeal under Fed. R. Civ. P. 23(f). (Rule 23(f) Pet. For Leave to Appeal from the U.S. District Court for the C.D. Cal.). The motion was granted October 11, 2007.

Summary of Argument

The District Court's holding that "the case is better taken care of by administrative agencies" ignores the civil enforcement scheme created by Congress in ERISA. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), authorizes suits not only by the Secretary, but also by participants, beneficiaries, and fiduciaries to recover on the behalf of plans for losses caused by fiduciary breaches. This private right of action does not require any prior action or intervention by the Secretary. Such private actions, which accomplish the purposes of ERISA without expending the Secretary's limited resources, may take the form of class actions. If a class action is sought, the Secretary's decision whether or not to file suit should have no bearing on the court's class certification determination.

Argument

The question before this Court on interlocutory appeal is whether the district court properly denied class certification. The short answer is that the denial is improper because the reasons for the denial are unknown; the district court failed to provide any analysis other than the unadorned statement in its order that "the case is better taken care of by administrative

agencies" and its equally terse and unilluminating hearing statement. That deficiency alone is reason enough for this Court to reverse and remand. The Secretary's interest in this appeal, however, is in having this Court make clear that the district court's stated rationale is not only inadequate, but plainly erroneous insofar as it intends to convey the view that class certification is improper because this case should be brought by the Secretary (the "administrative agenc[y]" primarily charged with enforcing Title I of ERISA), not by the participant Plaintiffs. If that is what the district court means, it entirely ignores the civil enforcement scheme of ERISA.

ERISA section 502(a)(2) authorizes suits "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief" under section 409, 29 U.S.C. § 1109. To suggest a 502(a)(2) claim should only be brought by the Secretary is clearly contrary to the language of the statute. By its terms, a 502(a)(2) action may be brought by one or more participants in a representational capacity on behalf of a plan, and their standing to bring such suit is independent of any parallel action the Secretary may or may not take based on the same facts. See, e.g., Wilmington Shipping Co. v. New England Life Ins. Co., 496 F.3d 326, 340 (4th Cir. 2007) (Secretary is not barred by res judicata from litigating an issue which was previously settled in an ERISA suit by a private plaintiff); Herman v. South Carolina Nat.

Bank, 140 F.3d 1413, 1423-26 (11th Cir. 1998); Beck v. Levering, 947 F.2d 639, 642 (2d Cir. 1991); Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 691-92 (7th Cir. 1986) (en banc) ("Although Congress gave the Secretary of Labor the responsibility and authority to investigate and monitor employee benefit plans, it never mandated that the Secretary must intervene in each and every piece of litigation or forever be barred by the doctrine of res judicata."); Donovan v. Cunningham, 716 F.2d 1455, 1462-63 (5th Cir. 1983). See also, E.E.O.C. v. Goodyear Aerospace Corp., 813 F.2d 1539, 1543 (9th Cir. 1987) (citing Fitzsimmons and Cunningham with approval). ERISA, therefore, is not a statute that makes a private right of action at all contingent on an agency determination that the claim has merit or that subordinates the right to bring or maintain such action to the agency's decision to pursue the litigation on its own. Cf. Fair Labor Standards Act § 16(c), 29 U.S.C. § 216(c) (an action by the Secretary cuts off employees' private right of action under section 16(b)); Surface Transportation Assistance Act, 49 U.S.C. § 31105(b) (alleged whistleblower must file complaint with the Occupational Safety and Health Administration and allow for investigation before filing suit).

The reason for this dual public-private scheme of enforcement is clear: Congress recognized that the Secretary has limited investigatory and

litigation resources that cannot possibly rectify every fiduciary breach affecting an ERISA plan in the nation.[1] Even if the Secretary has the primary responsibility for enforcing Title I of ERISA, Congress clearly intended for participants, beneficiaries, and fiduciaries to perform that function as well. As a practical matter, the vast majority of such cases are brought in private actions, not by the Secretary.

[1] Private pension plans currently hold $6.524 trillion in assets. Board of Governors of the Fed. Reserve Sys., Flow of Funds Accounts of the United States: Flows and Outstandings, Third Quarter 2007, Statistical Release Z.1, at 112 (Dec. 6, 2007) <http://www.federalreserve.gov/releases/Z1/current/Z1.pdf>.

Conclusion

For the reasons stated above, the Secretary of Labor, as amicus curiae, urges this Court to reverse and remand the decision of the District Court denying class certification.

Respectfully submitted,

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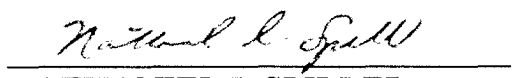

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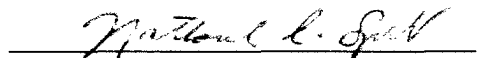
February 5, 2008

CERTIFICATE OF COMPLIANCE
FOR CASE NUMBER 07-56448

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points and contains 1,868 words.



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February 5, 2008

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2008, two copies of the foregoing Brief of the Secretary of Labor as Amicus Curiae were served using Federal Express courier service, postage prepaid, upon the following:

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