Case No. 10-5480

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: 1POINT SOLUTION, LLC
Debtor,

JOHN C. MCLEMORE, TRUSTEE,
Plaintiff-Appellant,

vs.

REGIONS BANK, as Successor in
Interest by Merger to AmSouth Bank
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE
DIVISION

BRIEF OF THE SECRETARY OF LABOR, HILDA L. SOLIS, AS AMICUS CURIAE SUPPORTING APPELLANTS

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STATEMENT OF THE ISSUES

1. Whether a bankruptcy trustee, who also is an ERISA fiduciary, has standing to bring an ERISA action on behalf of plan participants against a former fiduciary of an employee benefit plan.

2. Whether the defense of in pari delicto can be asserted against an innocent ERISA fiduciary seeking to remedy a fiduciary breach caused by the defendant fiduciary.

INTEREST OF THE SECRETARY OF LABOR

The Secretary of Labor directs the federal agency which has primary authority to interpret and enforce the provisions of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-93 (7th Cir. 1986) (en banc) (Secretary's interests include promoting the uniform application of the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets). The Secretary has a strong interest, both with regard to her own litigation and private litigation, in ensuring that the full range of ERISA remedies intended by Congress are afforded to ERISA plaintiffs. Therefore, the Secretary, who participated as amicus curiae in the district court on the issues addressed in this brief, has a strong interest in ensuring that bankruptcy trustees who also are fiduciaries

of ERISA plans have standing pursuant to 29 U.S.C. § 1132 to bring suit to remedy violations of ERISA, and are not subject to a defense (in pari delicto) imported from bankruptcy law that, in any event, has no force when applied to a completely innocent plaintiff.

STATEMENT OF THE CASE

This is an appeal from two decisions of the United States District Court for the Middle District of Tennessee, Nashville Division. Both decisions were decided on the pleadings. The appellant, McLemore, is the chapter 11 trustee in the jointly administered chapter 11 cases of 1Point Solutions, LLC ("1Point") and Barry Stokes ("Stokes"). R.E. 99, Amended Complaint, ¶ 1.[1]

1Point (which was solely owned and managed by Stokes) was the third party administrator for fifty-two 401(k) plans and 751 "cafeteria plans" (including flexible spending accounts, health spending accounts, health reimbursement accounts, and dependent care accounts) (collectively, the "Plans") at the time 1Point's involuntary bankruptcy was commenced in 2006. Id. at ¶¶ 7, 14 and 18. The Plans' funds were held in at least 58 commingled accounts at AmSouth Bank, which subsequently merged into Regions Bank ("Regions"). Id. at ¶ 44. Stokes embezzled the Plans' assets

[1] All references herein are to the Chapter 11 Trustee's Second Amended Complaint, R.E. 99, unless otherwise indicated.

for his personal use and the use of 1Point and used the deposited assets of one Plan to meet the demands of other Plans and Plan participants. Id. at ¶¶ 47-55. When the bankruptcies were commenced there was a substantial shortage of dollars in the Plan accounts. Id. at ¶¶ 14 and 18. McLemore asserts that Regions, rather than being simply a depository for the Plans' funds, became a fiduciary to the Plans by its assertion of control over the funds. R.E. 18, Complaint, ¶ 142.

In its first decision ("McLemore I"), which issued September 9, 2008, the district court dismissed multiple ERISA claims for relief brought by McLemore against Regions and Mid-Atlantic Capital Corp ("MACC"), a registered broker-dealer used by 1Point, on the grounds that neither of the defendants was an ERISA fiduciary. R.E. 33, McLemore I, pp. 18-25.

Before dismissing the ERISA claims, the district court first held that McLemore, while serving as the chapter 11 trustee, was also an ERISA fiduciary because he had taken over the control of Plan assets, and that in this capacity, he had standing to bring ERISA actions to recover losses to the Plans caused by Regions' and MACC's fiduciary breaches. The court agreed with the contention of the Secretary and the Trustee that McLemore was an ERISA fiduciary "by virtue of the fact that he has taken possession of 1Point's assets, including cash and real and personal property that either

belongs to the affected ERISA plans or that was purchased on behalf of those plans using the plans' own funds." Id. at 12. The court then held that McLemore's status as an ERISA fiduciary gave him a separate basis for standing to bring his ERISA action, apart from his status as chapter 11 trustee. Because ERISA "enables any fiduciary of an ERISA plan to pursue relief under the statute on behalf of the plan for which it is a fiduciary, see 29 U.S.C. § 1132(a)," the district court concluded that "the fact that he [McLemore] serves simultaneously as a bankruptcy trustee does not defeat his standing as an ERISA fiduciary to bring an ERISA claim." Id. at 9, 13.

The district court also accepted the Secretary's view that the in pari delicto defense, which is an unclean hands doctrine that could otherwise constitute an equitable bar to a suit by a bankruptcy trustee stepping into the shoes of a wrongdoing debtor, was not a bar to the ERISA action. Id. at 14-15. Rather than benefiting the wrongdoers (1Point and Stokes), the district court emphasized that:

> [I]n pari delicto does not apply in an ERISA case where, as here, the claims at issue exist between the victims of the wrongdoing and one of the wrongdoers, rather than between two wrongdoers, and where the application of the defense would negatively impact the plan participants and beneficiaries – the very parties whom ERISA was enacted to protect.

Id. at 14.

In McLemore I, the district court also dismissed a non-fiduciary ERISA claim against Regions on the grounds that the funds the chapter 11 trustee sought were not identifiable, and state law aiding and abetting claims against Regions and MACC on the grounds that they were preempted by ERISA. Id. at 27, 32-35. The district court ruled, however, that the state law negligence claims against Regions and MACC could go forward.[2] Id. at 35. In a subsequent decision issued March 18, 2010 ("McLemore II"), however, the district court dismissed the remaining state law claims against Regions on preemption grounds.[3] R.E. 135.

SUMMARY OF THE ARGUMENT

1. Suits by fiduciaries to remedy violations of ERISA are one of the primary ways Congress has chosen to protect employee benefit plans. Under ERISA, any fiduciary has the right, and in many situations the duty, to seek to recover losses to the plan caused by another fiduciary's breach. In seeking dismissal of appellant McLemore's ERISA fiduciary breach claim against it, however, Regions essentially argues that McLemore lacks

[2] MACC is no longer in the case, after entering a settlement following McLemore I with the chapter 11 trustee and various ERISA plans that had been clients of 1Point.

[3] The Secretary did not address the other issues decided in McLemore I and McLemore II in her district court amicus brief, nor is she doing so here.

standing under ERISA because he is a bankruptcy trustee and therefore either cannot be an ERISA fiduciary or cannot exercise the authority ERISA gives a fiduciary to bring such suit. Regions is mistaken as a matter of law and policy.

Anyone who has authority or control over the disposition of the assets of an ERISA plan is considered a fiduciary under the functional definition promulgated by Congress in section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A). McLemore is the bankruptcy trustee of an estate in which the debtors (1 Point and Stokes) were fiduciaries (albeit breaching ones) respecting the assets of numerous ERISA-covered plans that had entrusted them to serve as third-party administrator. By assuming control over the bankruptcy estate, McLemore also gained control over plan assets, thereby fully meeting the ERISA definition of fiduciary. As the district court properly held, such a distinct status and independent set of obligations brings with it an independent basis for standing in order for a trustee to satisfy his fiduciary obligations under ERISA.

Regions seeks to curtail McLemore's ERISA standing based primarily upon a prior decision by this Court in In re Cannon, 277 F.3d 838 (6th Cir. 2002). Cannon addressed the standing of a trustee in bankruptcy, when the trustee was seeking to exercise powers and fulfill obligations exclusively

under the Bankruptcy Code. Under such circumstances, this Court rationally determined that any action must be for the benefit of the bankruptcy estate rather than for the debtor's former clients. But it was equally rational and correct for the district court here to distinguish Cannon on the basis that Cannon did not involve a trustee exercising standing and authority under another federal statute such as ERISA.

Without providing any precedent or other legal authority, Regions further argues that the scope of an ERISA fiduciary's standing is limited to suits involving those functions. The clear and unambiguous language of section 502(a) of ERISA, 29 U.S.C. § 1132(a), the provision which grants standing to an ERISA fiduciary to commence an action, contains no such limitation. Congress has chosen to broadly define who may be a fiduciary in order to maximize the protections afforded under ERISA. Thus, to exclude certain ERISA fiduciaries from their duties, based solely upon their status as bankruptcy trustees, would contravene the plain meaning of the statute and defeat the intent of Congress to protect the interests of participants in employee benefit plans.

2. Regions attempt to bar the suit by McLemore by use of the in pari delicto defense is equally unavailing. The in pari delicto defense is an unclean hands doctrine that, where applicable, bars wrongdoers from

obtaining recoveries in actions for wrongs for which they have been the perpetrators. Its application in this type of case would be contrary to ERISA, which generally requires fiduciaries to act with complete loyalty and prudence towards plan participants, unqualifiedly confers standing on them to bring suits for fiduciary breach, and specifically directs successor fiduciaries to seek to remedy a prior or co-fiduciary's breach of fiduciary duty. In addition, the in pari delicto defense should not be applied to bar suits being undertaken to further important public policies, such as the protection of employee benefit plans.

As the district court concluded, it particularly makes no sense to impose an in pari delicto bar on McLemore. McLemore has committed no wrong, but is seeking to correct a wrong. Moreover, he is suing Regions not on behalf of the debtors or the debtors' estates, but in a representative capacity as a fiduciary of the ERISA plans, to recover losses to those plans for the benefit of plan participants who were the victims of the debtors' wrongdoings. Thus, the in pari delicto defense simply has no application to this case.

ARGUMENT

I. THE BANKRUPTCY TRUSTEE, MCLEMORE, WHO ALSO IS AN ERISA FIDUCIARY, HAS STANDING TO BRING AN ERISA ACTION ON BEHALF OF PLAN PARTICIPANTS AGAINST A FORMER FIDUCIARY OF AN EMPLOYEE BENEFIT PLAN

A central mechanism for enforcing ERISA is the granting of standing to a fiduciary in 29 U.S.C. § 1132 to bring suit against entities who have violated ERISA. See also 29 U.S.C. § 1105 (co-fiduciary liability). In this case, Stokes literally stole millions of dollars in assets belonging to numerous plans that had entrusted the assets to the debtors, who administered the plans. Asserting standing as an ERISA fiduciary, McLemore, the chapter 11 trustee, brought an ERISA suit (in the form of an adversary proceeding in the bankruptcy court, which was referred back to the district court) to recover losses to the plans caused by wrongful actions the debtors committed allegedly in concert with Regions.

The threshold question is whether McLemore became an ERISA fiduciary when assuming his duties as bankruptcy trustee. ERISA defines "fiduciary" functionally to include anyone who "exercises any authority or control respecting . . . disposition of [a plan's] assets." 29 U.S.C. § 1002(21)(A)(1). As bankruptcy trustee, McLemore legally stepped into the shoes of the debtors who, prior to bankruptcy, functioned as fiduciaries (albeit breaching ones) respecting the various plans' assets that had been

entrusted to them in their capacity as third-party administrator. By assuming control over the bankruptcy estate, McLemore also gained control over plan assets. The district court held that, "regardless of how the Trustee came to have control over the plans' assets, the fact is that he now does exercise control over plan assets and, therefore, he is a fiduciary under the express terms of the statute." McLemore I, at 12.

That holding is exactly right. ERISA 3(21)(A), 29 U.S.C. § 1002(21)(A), provides that "*any* authority or control" respecting the "management or disposition of" plan assets is enough to confer fiduciary status on a person with respect to those assets. Here, the debtors controlled plan assets in their capacity as third party administrators. By assuming control over the bankruptcy estate, McLemore also gained control over the disposition of the plan assets. McLemore has possession of the assets and is responsible for their management and disposition.[4] Consequently, he is an ERISA fiduciary.

ERISA was deliberately written to be as expansive as possible in this regard to ensure that all plan assets are impressed with a trust and subject to

[4] Although not explicitly addressed below, the fact that plan assets are commingled does not alter their status as plan assets. FAB 2006-1, available at www.dol.gov/ebsa (intermediaries who receive distributions in securities settlements for plan customers are fiduciaries with respect to those commingled assets).

ERISA's fiduciary obligations. See generally 29 U.S.C. § 1102, 1104. Ensuring the fiduciary management of plan assets is central to how ERISA protects plan participants. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 n.8 (1985) (recognizing that fiduciary oversight is the "crucible" of ERISA's protections). Persons who have "any" authority over plan assets must manage those assets prudently and with undivided loyalty to the plans' participants. 29 U.S.C. § 1104(a)(1)(A) and (B). Accordingly, for example, when an employer misuses his employees' plan contributions for his own corporate purposes, he is a fiduciary by virtue of his control over plan assets, and liable for the diversion of those assets. Lopresti v. Terwilliger, 126 F.3d 34, 40 (2d Cir. 1997). Similarly, when an insurance broker misappropriates hundreds of thousands of dollars paid by twenty-nine ERISA plans for insurance coverage, the broker is liable as a fiduciary for his misconduct. Chao. v. Day, 436 F.3d 234, 236 (D.C. Cir. 2006) ("discretionary" authority over plan assets is unnecessary for fiduciary status; it was sufficient that the insurance broker exercised authority over plan assets).

As an ERISA fiduciary, McLemore has standing under ERISA section 502(a)(2) to bring a fiduciary breach suit to recover losses to the plans. See 29 U.S.C. § 1132(a)(2) ("[a] civil action may be brought . . . by a . . .

fiduciary for appropriate relief under section 1109 of this title [i.e., the section on 'liability for breach of fiduciary duty']." Thus, McLemore's pursuit of litigation on behalf of the plans is consistent both with ERISA's express statutory grant of standing to plan fiduciaries, and consistent with his duties of prudence and loyalty as a fiduciary. Indeed, those duties may have required him to file this action if necessary to protect the interests of the plans' participants. Henry v, Champlain Enter., Inc., 288 F. Supp.2d 202,227 (N.D.N.Y. 2003); see also section 405(a)(3) of ERISA, 29 U.S.C. § 1105(a)(3) ("a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary . . . if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach"). Bringing suit under section 502(a)(2) is one way to satisfy this duty. If McLemore is successful, the recovery will be allocated exclusively among the Plans.

Regions argues that even if McLemore is an ERISA fiduciary, he only is a fiduciary for limited purposes, which do not extend to bringing suit against Regions for breach of Regions' fiduciary duties. Regions Brief at 15. The argument is unfounded. While it is true that McLemore is a fiduciary only "to the extent" that he has authority over the management or disposition of plan assets, the statute does not, in any way, qualify his authority to bring

suit as a plan fiduciary.[5] Instead, ERISA simply states that an action for fiduciary breach may be brought "by the Secretary, or by a participant, beneficiary or fiduciary…" without in any way limiting or qualifying the right of plan fiduciaries to bring suit. 29 U.S.C. § 1132(a)(2), (3). Under a plain reading of the statute, as a fiduciary McLemore has standing to bring suit. The significance of the "to the extent" limitation on McLemore's fiduciary status is only that he cannot be held liable as a defendant for plan activities and responsibilities that are unrelated to his authority over plan assets – the sole basis for his status as a plan fiduciary. Accordingly, the cases cited by the defendants merely stand for the proposition that the scope of a fiduciary defendant's liability is circumscribed by the scope of his fiduciary actions. See Briscoe v. Fine, 444 F.3d 478 (6th Cir. 2006) (issue of whether defendant officers and directors were functional fiduciaries); American Fed'n of Unions Local 102 v. Equitable Life Assurance Soc'y, 841 F.2d 658 (5th Cir. 1988) (issue of whether defendant administrator of health and welfare fund was a functional fiduciary). The cases neither challenge

[5] 29 U.S.C. § 1002(21)(A) provides that persons are fiduciaries only "to the extent" that they have the requisite authority or engage in the requisite activities. Thus, assuming McLemore is a fiduciary solely by virtue of his authority over plan assets, he is a plan fiduciary only to the extent that he "exercises any authority or control respecting management or disposition of [the plans'] assets." 29 U.S.C. § 1002(21)(A)(i).

the standing of fiduciaries, like McLemore, to bring suit, nor create an exception to ERISA's express grant of standing to such fiduciaries.

Thus, there is no basis for arguing that a person who is a fiduciary by virtue of his authority over plan assets lacks authority to bring suit under 29 U.S.C. §§ 1132(a)(2) or (a)(3). The civil enforcement provisions of ERISA upon which McLemore relies for standing simply state that an action may be brought "by the Secretary, or by a participant, beneficiary or fiduciary." 29 U.S.C. §§ 1132(a)(2), (a)(3). The statute does not provide that only some fiduciaries may bring fiduciary breach actions only for some purposes. Instead, it draws no distinctions between different classes of fiduciaries. Any fiduciary has standing to bring suit for fiduciary misconduct. See Mutual Life Ins. Co. of N. Y. v. Yampol, 840 F.2d 421, 426, n.6 (7th Cir. 1988) ("it is clear that under the ERISA scheme any person who falls within the scope of the § 1002(21)(A) definition is a fiduciary and therefore may bring a cause of action pursuant to 29 U.S.C. § 1132(a)(2)") cf., e.g., Zuni Pub. Sch. Dist. v. Dep't of Educ., 550 U.S. 81, 93 (2007) (when the language of a statute is unambiguous, the plain meaning of the statute controls). Moreover, McLemore's lawsuit against Regions is, in any event, directly tied to the authority and activities that made him a fiduciary in the first place. He is a fiduciary by virtue of his authority over plan assets and

he is bringing suit to recover assets lost as a result of violations to which the debtors were parties. Accordingly, there is no statutory basis for denying his standing to pursue litigation against Regions.

In addition to clashing with the plain meaning of section 502, Regions' interpretation of the statute would undermine ERISA's policy of protecting employee benefit plans through fiduciary actions against co-fiduciaries who breach their obligations to plans. ERISA makes a co-fiduciary "liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan . . . if he has knowledge of a breach by such other fiduciary" and does not "make reasonable efforts under the circumstances to remedy the breach," 29 U.S.C. § 1105(a)(3), and confers standing equally on any "fiduciary" to bring suit, if necessary, to effect such remedy. Id. § 1132(a)(2), (3). The statute thus specifically contemplates that a fiduciary in McLemore's position can bring suit and, as discussed above, may even require him to institute proceedings if necessary to protect plan participants.

Relying principally on the Cannon decision, however, Regions contends that the Bankruptcy Code effectively limits the ability of a bankruptcy trustee to bring an action for the benefit of a distinct group of creditors. Regions Brief at 13-14. Cannon involved an attorney who

diverted funds that he held in escrow for clients to his own personal use. Cannon, 277 F.3d at 843-44. After Cannon filed for bankruptcy and pleaded guilty to embezzlement and fraud, the bankruptcy trustee brought an adversary proceeding against a third-party commodities broker with whom Cannon maintained an account and made investments with the misappropriated funds, alleging violations of federal commodities laws, breach of fiduciary duties, and fraud, among other claims. Id. at 846. The defendant challenged the trustee's standing, as bankruptcy trustee, to bring the suit. Id. The Sixth Circuit noted that the bankruptcy trustee had "only those powers conferred upon him by the Bankruptcy [Code]." Id. at 853. Generally, under the Bankruptcy Code, "if Cannon himself could have pursued the claims asserted against Defendants . . . then the trustee has standing to maintain [the claims]." Id. at 854. However, since the funds that Cannon misappropriated were held in trust, and as such were not part of his estate property, the court held that "any action brought by the trustee against Defendants would not bring property into the estate for the benefit of the creditors" and, therefore, the plaintiff lacked standing to maintain his claims. Id. at 855.

The district court in McLemore I aptly distinguished Cannon:

> What the defendants ignore, however, is the role that ERISA plays in this case. None of the cases on which the defendants rely, most notably Cannon, are directly analogous to this case, as none of them involved the duties and responsibilities imposed by the federal ERISA statute, as is the case here.

McLemore I, at 8-9. Cannon addressed only the standing of a bankruptcy trustee to bring an adversary action under the Bankruptcy Code. Here, however, McLemore does not bring suit as a bankruptcy trustee seeking to recover assets for the debtors, but rather as an ERISA fiduciary seeking to recover assets for the plans to which he owes fiduciary duties under ERISA. His obligations and authority as an ERISA plan fiduciary are independent of his obligations as a trustee for the bankruptcy estate. In short, McLemore, as a fiduciary under ERISA, has standing to bring this action pursuant to ERISA, seeking remedies unique to ERISA (i.e., the recovery of losses to the plans that were caused by Regions' alleged fiduciary breaches).

Finally, Congress, in a somewhat different context has recognized that a bankruptcy trustee can play a dual role as both a representative of the bankruptcy estate and a representative of an ERISA plan. In 2005, Congress amended the Bankruptcy Code to make clear that a bankruptcy trustee also had to fulfill the duties of an ERISA plan administrator, if those duties were performed by a debtor prior to the bankruptcy. 11 U.S.C. § 704(a)(11).

Thus, in In re Trans-Industries, Inc., 419 B.R. 21 (E.D. Mich. 2009), the opinion explicitly states that it was undisputed that § 704(a)(11) of the Bankruptcy Code gave the chapter 7 trustee standing to bring an adversary proceeding for breach of fiduciary duty, even though any recovery would go to the plan rather than to the bankruptcy estate. Even if this provision is not directly applicable to this case (because the debtor's own plan is not at issue and McLemore is not the plan administrator of the various plans whose assets he controls), the provision reflects Congress's clear understanding that a bankruptcy trustee may have fiduciary status under ERISA at the same time that he is trustee to a debtor's estate under the Bankruptcy Code.

II. THE DEFENSE OF IN PARI DELICTO CANNOT BE ASSERTED AGAINST AN INNOCENT ERISA FIDUCIARY SEEKING TO REMEDY A FIDUCIARY BREACH CAUSED BY THE DEFENDANT FIDUCIARY.

The use of the in pari delicto defense as a means of barring a bankruptcy trustee from bringing an action under ERISA against an entity involved in a fiduciary's embezzlement would unreasonably limit an important means of enforcing ERISA. The in pari delicto doctrine bars "a plaintiff [from] seeking damages or equitable relief [where the plaintiff] is himself involved in some of the same sort of wrongdoing." Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 138 (1968). The doctrine "derives from the Latin, in pari delicto potior est condition

defendentis: 'In a case of equal or mutual fault . . . the position of the [defending] party . . . is the better one.' The defense is grounded on two premises: first, that courts should not lend their good offices to mediating disputes among wrongdoers, and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality." Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306 (1985). Neither of these purposes would be furthered by the application of the in pari delicto doctrine in this action.

First, McLemore, who is the chapter 11 trustee by appointment of the bankruptcy court was not the wrongdoer. Under ERISA a fiduciary is not liable for the breaches of its predecessor. 29 U.S.C. § 1109(b). Instead, where prudent, a fiduciary is obligated to take action to remedy a predecessor's prior breach, an obligation which McLemore is fulfilling by bringing this action. See 29 U.S.C. §§ 1104(a)(1) and 1105(a)(3).

Second, McLemore is not bringing the suit to further his own interests or even the interests of the bankruptcy estate. Instead he is suing Regions to vindicate the interests of the victims of the wrongdoers, the ERISA plans.[6]

[6] In the two cases relied upon by Regions (br. at 17), In re Dublin Securities et al, 133 F.3d 377 (6th Cir. 1997), and Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145 (11th Cir. 2006), the plaintiff bankruptcy trustees brought suit for the benefit of the bankruptcy estates, rather than as fiduciaries for an ERISA plan.

As the district court correctly understood:

> This principle [the in pari delicto defense] is not implicated, however, by the ERISA claims brought by the Trustee, because those claims are brought on behalf of the affected ERISA plans, who are victims of wrongdoing rather than participants therein. Moreover, any recovery on those claims would not benefit the Trustee or the bankruptcy estate, but rather the affected plans themselves.

McLemore I at 14. In Donovan v. Schmoutey, 592 F. Supp. 1361 (D. Nev. 1984), the court ruled that the in pari delicto defense did not bar a suit against pension trustees for breach of their fiduciary duties under ERISA by making imprudent loans, failing to diversify the pension fund's investments and engaging in prohibited transactions. Id. at 1368. The court explained: "[A]n in pari delicto defense is inappropriate where, as here, its application would harm the persons - participants and beneficiaries -protected by the law claimed to have been violated." Id. at 1403. As in Schmoutey, if the in pari delicto defense were accepted in this proceeding, it would be the innocent victims of Regions' alleged fiduciary violations who would be further victimized and Regions would be inappropriately shielded from liability.

Third, the Supreme Court has warned against a broad application of the in pari delicto defense, where it would bar private suits that enforce public policy. Thus, in Bateman, it refused an attempt by the defendants to bar a Rule 10-b insider information suit by investor "tippees," because the

Securities Exchange Act of 1934 (the "1934 Act") only provided an implied, rather than an explicit, private cause of action. Bateman, 472 U.S. at 310. "[B]arring private actions in cases such as this," the Court reasoned, "would inexorably result in a number of alleged fraudulent practices going undetected by the authorities and unremedied." Id. at 315. Accord, Perma Life Mufflers, 392 U.S. at 139 (application of the in pari delicto defense "would only result in seriously undermining the usefulness of private actions as a bulwark of antitrust enforcement"). Such policy considerations were made even clearer by Congress in ERISA than in the 1934 Act by explicitly making private suits by fiduciaries a major means of protecting employee benefit plans.

The Supreme Court has advised lower courts that the in pari delicto defense is not applicable where it would "offend the underlying statutory policies." Pinter v. Dahl, 486 U.S. 622, 638 (1988). As described above, section 502(a) of ERISA grants fiduciaries standing to remedy violations of the statute. Where such an action is prudent, bringing suit to remedy past violations of former fiduciaries is not merely an option, but rather may be an obligation under section 405(a)(3) of ERISA, 29 U.S.C. § 1105(a)(3). Indeed, nothing in ERISA prevents a breaching fiduciary from bringing suit to recover losses to the plan caused by a predecessor or co-fiduciary. Thus,

if the in pari delicto defense were interpreted to apply to suits brought by successor, and entirely innocent, fiduciaries, such as McLemore, an important remedy provided by Congress would be undermined. Accordingly, the in pari delicto defense is not a bar to the action brought by McLemore against Regions.

CONCLUSION

For the reasons stated above, the order of the district court with respect to the issue of fiduciary standing and the applicability of the defense of in pari delicto should be affirmed.

Respectfully submitted,

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NOVEMBER, 2010

CERTIFICATE OF COMPLIANCE

I hereby certify that the fore going brief complies with the type-volume limitations provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 4,922 words of Times New Roman (14 point) regular type. The word processing software used to prepare this brief was Microsoft Office Word 2003.

s/ Leonard H. Gerson
Leonard H. Gerson
Trial Attorney

Dated: November 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2010, I electronically filed the Brief for Amicus Curiae, Hilda L. Solis, Secretary of Labor, with the Clerk of the Court using the CM/ECP system, which will send notification of such filing to all registered counsel of record.

s/ Leonard H. Gerson
LEONARD H. GERSON