No. 03-11087

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL MILOFSKY, et al.,

Plaintiffs-Appellants,

v.

AMERICAN AIRLINES, INC., et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

SUPPLEMENTAL AMICUS CURIAE BRIEF FOR THE SECRETARY OF LABOR IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF THE ISSUE

Whether participants in an individual account plan have standing to sue plan fiduciaries under section 502(a)(2) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a)(2), to recover losses to the plan stemming from alleged fiduciary breaches when the alleged breaches affected some, but not all, of the plan participants' accounts.[1]

INTEREST OF THE SECRETARY OF LABOR

The Secretary of Labor (the Secretary) has primary authority to interpret and enforce the provisions of Title I of ERISA. 29 U.S.C. §§ 1132, 1135. The Secretary's interests include promoting the uniform application of ERISA, protecting plan participants and beneficiaries, and ensuring the financial integrity of plans and their assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc).

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[1] It is unclear whether the en banc Court intends to address the exhaustion of remedies issue or send the case to the panel for resolution of that issue. Although we otherwise address this brief solely to the standing issue, the Secretary agrees with Chief Judge King's analysis of the exhaustion issue in her dissent, Milofsky v. American Airlines, Inc., 404 F.3d 338, 352-53 (5th Cir. 2005). As we discussed more fully in our brief to the panel, the exhaustion requirement applies to benefit claims brought against the plan, Chailland v. Brown & Root, Inc., 45 F.3d 947, 950 n.6 (5th Cir. 1995), and requires that a plaintiff exhaust the ERISA-mandated internal review procedure before bringing suit for benefits in court. Here, the plaintiffs' action does not seek review of a benefit denial under the terms of a plan, but rather seeks redress for a fiduciary breach which allegedly diminished the value of the plan's assets. Thus, as Chief Judge King concludes, there is no review procedure to exhaust, and, because relief in a fiduciary breach context must come from the fiduciary and not the plan, the plan cannot provide the remedy sought by the participants. 404 F.3d at 353.

This case raises important issues regarding the duties of fiduciaries with regard to individual account plans and the ability of plan participants and beneficiaries to sue to recover losses that result from the breach of those duties. The decision of the panel appears to undermine, if not eliminate, the ability of participants, fiduciaries and the Secretary to recover monetary losses on behalf of a plan under sections 409(a) and 502(a)(2) of ERISA, 29 U.S.C. §§ 1109(a) and 1132(a)(2), where not every plan participant's account has suffered a loss. If adopted by the en banc Court, the panel's decision would remove $1.75 trillion in plan assets held in 401(k) plans (and potentially all $2.3 trillion held by defined contribution plans) from the remedial reach of the federal statute that was designed to govern such plans by imposing, among other things, strict fiduciary standards of prudence and care, as well as personal liability on those who fail to live up to the Act's standards. The Secretary has a strong interest in ensuring that this Court avoids such a result.

STATEMENT OF THE CASE

The plaintiffs in this case, Michael Milofsky and Robert Walsh, were pilots for Business Express, Inc. (BEX). Class Action Complaint ¶¶ 11, 17. BEX was acquired by AMR Eagle Holding Corporation (Eagle Holding) in March 1999. Id. Although the pilots remained for some time on the BEX payroll and continued, during that period, to participate in the Business Express, Inc. Saving and Profit Sharing Plan (the BEX Plan), a 401(k) individual account plan under ERISA, id. at ¶¶ 5-7, they were

transferred to Eagle Holding's operating company, American Eagle, Inc. (a subsidiary of American Airlines), over a sixteen-month period, as vacancies became available. Id. at ¶ 18. Towers Perrin, a benefits consulting firm hired by American Airlines, informed them that their account balances in the BEX Plan would be transferred to a comparable American Eagle 401(k) plan known as the Super Saver Plan. Id. at ¶¶ 16, 20. The notices informed the plaintiffs when the transfers were to take place and that there would be specified "blackout" periods when they would not be able to choose their investment options or otherwise have access to their accounts, and during which their accounts would be invested in short-term investment funds. Id. at ¶ 20.

These transfers did not occur within the time frames specified in the notices, but instead occurred weeks and sometimes months later than the dates indicated. Complaint ¶ 23. Consequently, the plaintiffs sued American Airlines, a number of individual (John Doe) fiduciaries, and Towers Perrin under ERISA section 502(a)(2), alleging that the defendants breached their duties under ERISA by misrepresenting how the transfer process was to take place, and failing to accomplish the asset transfer in a timely manner. Complaint ¶ 34. They requested losses to be paid to the plan and allocated among their individual accounts. Id. at p.15 (Prayer for Relief ¶ C).

The district court granted the defendants' motion to dismiss. Milofsky v. Am. Airlines, Inc., No. 3:02-CV-2441K, 2003 WL 22398799, at *1 (N.D. Tex. Sept. 24, 2003). The court dismissed Towers Perrin, concluding that the allegations in the

complaint did not establish that Towers Perrin engaged in any fiduciary acts. Id. at *2. Furthermore, the court reasoned that the case was essentially a benefit dispute and concluded therefore that the plaintiffs were required, but failed, to exhaust their administrative remedies. Id. at *3. Finally, the court held that the plaintiffs lacked standing to bring their claim under sections 409(a) and 502(a)(2) of ERISA because they were seeking reimbursement of losses to their individual accounts that would not benefit the Super Saver Plan as a whole. Milofsky, 2003 WL 22398799, at *4.

A panel of this Court affirmed in a split decision. Milofsky v. Am. Airlines, Inc., 404 F.3d 338 (5th Cir. 2005). Relying on Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985), the panel held that "plaintiffs lack standing because this case in essence is about an alleged particularized harm targeting a specific subset of plan beneficiaries . . . who seek only to benefit themselves and not the entire plan as required by § 502(a)(2)." 404 F.3d at 347. The panel compared the pilots' claims to those of the plaintiff in Matassarin v. Lynch, 174 F.3d 549 (5th Cir. 1999), reasoning that in both cases "the plaintiffs have alleged breaches of fiduciary duty that uniquely concern only their individual accounts." 404 F.3d at 343. The panel held that because the plaintiffs in Milofsky sought "relief … channeled only to the individual accounts of the plaintiff class members," and their claims did not "otherwise seek to vindicate rights to the entire plan – given that the alleged fiduciary breaches occurred only as to the members of the plaintiff class and were not directed to the whole membership –

this claim does not benefit the entire plan." Id. at 343-44. The panel reasoned that "[t]he central question, in the context of an individual account plan, is whether the suit inures to the benefit of the plan, which occurs whenever all plan participants would directly benefit (by having increased balances in their individual accounts) or when the suit seeks to vindicate the rights of the plan as an entity when alleged fiduciary breaches targeted the plan as a whole – whether the suit is filed by all plan participants or only a subset thereof." Id. at 344 n.16. Although the panel stopped "short, however, of saying that there is no standing unless all plan participants would benefit from the litigation," id., the panel concluded that "it is enough to say, for present purposes, that the specific relief here requested, affecting only 218 individual accounts out of a much larger plan, is much too narrow to qualify." Id. at 345.

Chief Judge King dissented, observing that, under the decision, individual account plan participants in the Fifth Circuit "will be unable to recover monetary losses to the plans caused by fiduciary breaches when fewer than all plan participants would benefit from the litigation," a result that "effectively nullifies Congress's intent to provide a high level of protection to any and all plan participants from fiduciary abuse." 404 F.3d at 348. In Chief Judge King's view, the panel's decision was not supported by either Russell or Matassarin, but was instead in conflict with the one circuit court decision – Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995) – to have squarely addressed the issue. Milofsky, 404 F.3d at 348-52. Chief Judge King

concluded that "[b]y permitting suits by a subset of plan participants under § 502(a)(2) for damages payable to the plan to proceed, this court would ensure that plan participants are not left without a remedy when plan fiduciaries harm the plan by breaching their duties." Id. at 352.

SUMMARY OF THE ARGUMENT

The panel erred when it held that the plaintiffs do not have standing under sections 409(a) and 502(a)(2) of ERISA to seek losses to the plan if those losses will be allocated to some but not all of the individual accounts in that plan. This extraordinary holding is contrary to the plain language of the statutory provisions at issue and misconstrues the structure, under ERISA, of defined contribution or individual account plans. Moreover, as Chief Judge King pointed out, the panel's decision is not supported, much less required, by either the Russell or Matassarin decisions. To the contrary, it conflicts with the decisions of the Sixth Circuit in Kuper, as Chief Judge King noted, and the Seventh Circuit in Steinman v. Hicks, 352 F.3d 1101 (7th Cir. 2003). By reading these sections to foreclose suits to remedy breaches that harmed some, but not all, plan participants, the panel's reasoning, if adopted by the en banc Court, is likely to leave participants in 401(k) plans and other defined contribution plans that offer a number of investment options without an adequate remedy, no matter how serious the breach or how great the harm, in most, if not all, cases. Because the panel's decision finds no support in the statute or the case

law, and is antithetical to the statute's declared purposes, the en banc Court should decline to adopt it, and should instead hold that the plaintiffs have stated a claim under section 502(a)(2).

ARGUMENT

The Plaintiffs Have Standing Under Sections 409(a) And 502(a)(2) Of ERISA To Recover Losses To A Plan Even If The Losses Are Allocated To Some, But Not All, Of The Participants' Accounts

A. The plain language of the statute establishes that plaintiffs are entitled to seek relief for any losses to a plan, even if the losses are allocated to a subset of plan participants' accounts.

ERISA section 502(a)(2) permits an action to be brought by the Secretary, or by plan participants, beneficiaries or fiduciaries for "appropriate relief under § 409." 29 U.S.C. § 1132(a)(2). Section 409(a), in turn, provides that:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for violation of §411 of this Act.

29 U.S.C. § 1109(a) (emphasis added).

In this case, the plaintiffs alleged that the Super Saver Plan fiduciaries breached their fiduciary duties and, as a direct result, the plan holds fewer assets in trust than it would have held if the breaches had not occurred. The plaintiffs' lawsuit, therefore, falls squarely within the plain statutory text of section 409(a), which provides for

recovery of "any losses" to a plan resulting from a fiduciary breach, and section 502(a)(2), which permits plan participants to bring suit to recover any such losses.

Despite the breadth of section 409(a) and its express authorization of recovery of "any losses to the plan," the panel failed to follow the plain language of the statute. Under the panel's reading of section 409(a), it is not enough that the plan suffered losses, but the losses must either have occurred in every participant's account or resulted from a violation that was directed at the plan as a whole. Given the highly reticulated nature of ERISA and the "evident care" with which the civil enforcement provisions were crafted, Russell, 473 U.S. at 140, 147, the panel erred in reading these limitations into the provisions where none is expressly stated. See Harris Trust & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 246 (2000) (refusing to read a limitation into the universe of possible defendants under section 502(a)(3)).

As the panel correctly stated, the Court's "task is to apply the text, not improve upon it." Milofsky, 404 F.3d at 347. The panel, however, did not improve upon the text, but interpreted it in a manner that is wholly at odds with ERISA's fundamental purpose of protecting the retirement income of American workers by imposing on plan fiduciaries stringent standards of loyalty and care – "the highest known to the law." See Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982). By limiting the relief available under section 409(a), the panel decision provides plan fiduciaries

with a ready means of avoiding liability, even if their fiduciary breaches involve self-dealing or participants are left with no retirement income as a result of those breaches.

B. Losses attributable to individual accounts in a defined contribution plan constitute losses to the plan.

The panel's holding is also based on a fundamental misunderstanding of the structure and operation of defined contribution plans, which now hold the majority of all pension plan assets (a staggering $2.3 trillion in assets). All pension plans under ERISA are either defined benefit or defined contribution plans. See Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 364 n.5 (1980). Under section 3(34) of ERISA, 29 U.S.C. § 1002(34), a defined contribution plan is a "pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains, and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." The fact that such plans provide for individual accounts does not mean, however, that these plans are simply conglomerations of individual accounts that hold separate assets. Instead, the statute requires that the plan's assets, which consist of all contributions and earnings, be held in trust by one or more trustees who have authority and discretion to manage and control the assets of the plan. See 29 U.S.C. § 1103(a); IRC § 401(a). The "contributions are made to a single funding vehicle," and "as amounts are contributed to the trust," (and as earnings and losses occur within particular investments) these

amounts "are allocated to the participant's account" through accounting or bookkeeping entries. David A. Littell, et al., Retirement Savings Plans; Design, Regulation, and Administration of Cash or Deferred Arrangements 6 (1993).

Although the plan assets are allocated to individual accounts in this manner, and the individual participant's benefit is ultimately dependent on the amounts so allocated, ownership of the accounts and of the plan's assets never passes to the participants; rather legal title of all the trust assets is held by the trustee. See Rev. Rul. 89-52, 1989-1 C.B. 110, 1989 WL 572038 (Apr. 10, 1989) ("While a qualified trust may permit a participant to elect how amounts attributable to the participant's account-balance will be invested, it may not allow the participant to have the right to acquire, hold and dispose of amounts attributable to the participant's account balance at will.") (citations omitted). The total amount of assets held in the Super Saver Plan, like any other plan, are not only used to pay plan benefits, but also are used to defray the operating costs of the plan as a whole, including recordkeeping, legal, auditing, annual reporting, claims processing and similar administrative expenses. Thus, a recovery that is (and must be) ultimately allocated to one or more of the plan's individual accounts, must be paid to and held by the trust and increases the overall assets of the trust. This is not a "legal fiction" as the panel states, 404 F.3d at 344, but is inherent in the nature and structure of individual account plans, and in ERISA's stringent trust requirement applicable to pension plan assets. 29 U.S.C. § 1103(a).

C. The panel's decision is unsupported by Russell and Matassarin and is in conflict with Sixth and Seventh Circuit decisions.

Not only is the panel's holding unwarranted under the statute, it is, as Chief Judge King points out, 404 F. 3d at 348, unsupported by the two decisions – Russell and Matassarin – on which the panel relies. Unlike this case, Russell involved a claim by a plan participant for direct recovery of individual damages stemming from a denial of plan benefits. In Russell, a plan's disability committee first terminated, and then reinstated, a participant's disability benefits. Claiming that she was harmed by the interruption in benefit payments, the participant brought suit under section 502(a)(2) for compensatory and punitive damages, payable not to the plan for a loss of plan assets, but directly to her for the injuries she sustained. 473 U.S. 137-38. The Supreme Court held that the participant did not have standing under sections 409 and 502(a)(2) to seek these extra-contractual compensatory or punitive damages payable directly to her for improper or untimely processing of a benefit claim, because those sections provided "relief for the plan as a whole." 473 U.S. at 140. As the Court noted, "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." Id. at 140 n.8.

Russell distinguished relief to be paid to the plan to recoup losses arising from the mismanagement of plan assets – precisely what is sought here – from relief to be paid directly to an individual as damages for personal pain and suffering caused by a benefit payment delay, the relief sought in that case. 473 U.S. at 143-44. The

distinction is easy to understand yet critical: Russell could not assert a section 502(a)(2) claim because she did not allege any injury to the plan or reduction of its assets stemming from mismanagement of such assets by the plan fiduciaries, nor did she seek a recovery payable to the plan; here the plaintiffs have done so. Thus, when the Court stated that recoveries under sections 409(a) and 502(a)(2) must "inure[] to the benefit of the plan as a whole," 473 U.S. at 140, there is every reason to believe that the Court had in mind suits, such as this one, for plan losses stemming from the "misuse and mismanagement of plan assets." Id. at 140 n.8. There is no reason to believe that the Court intended to substitute its descriptive language of the relief provided by sections 409(a) and 502(a)(2) for the actual language of the statute. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 515 (1993) ("[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code.").

If the plaintiffs' allegations are true, the plan holds fewer assets in trust, the value of the plan is diminished, and the plan, therefore, has suffered "losses" within the meaning of section 409(a). Nothing in Russell suggests, much less holds, that such losses are not recoverable under section 502(a)(2), nor does Russell in any way "stand for the proposition that the 'plan as a whole' is synonymous with 'all participants of the plan.'" Milofsky, 404 F.3d at 349 n.4 (King, J., dissenting) (citing Kuper, 66 F.3d at 1453; Kling v. Fidelity Mgmt. Trust Co., 270 F. Supp.2d 121, 124-

27 (D. Mass. 2003); Colleen E. Medill, Stock Market Volatility and 401(k) Plans [hereinafter Stock Market Volatility], 34 U. Mich. J.L. Reform 469, 538-39 (2001)).

Nor does this Court's decision in Matassarin support the panel's reading of section 502(a)(2). The plaintiff in Matassarin was a beneficiary in an ESOP by virtue of a qualified domestic relations order (QDRO) obtained from her ex-husband, the plan participant, at the time of her divorce. She brought suit alleging that her account balance under the QDRO was miscalculated, that her account was undiversified, and that a number of other QDRO holders who had cashed out of the plan had their stock purchased back by the company for less than fair market value.[2] She sought an immediate benefit distribution for herself and those who cashed out allegedly for too little.

The Court held that none of these allegations asserted harm to the plan or sought to restore losses to the plan. Matassarin, 174 F.3d at 567-68. Thus, as Chief Judge King pointed out in her dissent, Matassarin is easily distinguishable on this basis because the plaintiff there did not, and could not, assert a loss to the plan or diminution of its assets. Milofsky, 404 F.3d at 350 (King, J., dissenting). Instead, Matassarin claimed that she had been treated differently than other plan members, and

[2] The court held that one additional claim that Matassarin made – that the fiduciaries jeopardized the tax qualification of the plan by failing to comply with the tax code – was properly brought under section 502(a)(2) because it involved the interest of the plan as a whole, but that the plaintiff could not establish that the plan had in fact been harmed. 174 F.3d at 565-66.

sought an immediate distribution of benefits to herself and to others who had already cashed out of the plan. In contrast, the plaintiffs here allege that the fiduciaries' breaches reduced the total amount of plan assets, and seek a recovery payable to the plan. They are not currently entitled to a distribution of benefits, and do not seek any recovery outside of the plan. Rather, the relief they seek can only "be paid to the plan and then distributed within it to individual accounts" and is properly asserted under section 502(a)(2). Milofsky, 404 F.3d at 350 (King, J., dissenting).

For these reasons, the Sixth Circuit in Kuper, on similar facts, correctly rejected a reading of section 502(a)(2) that disallows a claim for plan losses stemming from a fiduciary breach if not all participant accounts would benefit from a recovery. As here, Kuper also involved a delay in the transfer of assets of a group of participants from one plan to another and a diminution in the value of the assets during the delay. The defendants in that case alleged that the plaintiff class failed to state a claim for breach of fiduciary duty under section 409 because the class did not include all of the plan's beneficiaries. 66 F.3d at 1452. The Sixth Circuit cited cases holding that recovery under section 409 must go to the plan, and stated that the relevant cases "distinguish between a plaintiff's attempt to recover on his own behalf and a plaintiff's attempt to have the fiduciary reimburse the plan." 66 F.3d at 1452-53. The court concluded that a subclass of plan participants may sue for a breach of fiduciary duty under section 409, reasoning that "Defendants' argument that a breach must harm the

entire plan to give rise to liability under § 1109 would insulate fiduciaries who breach their duty so long as the breach does not harm all of a plan's participants. Such a result clearly would contravene ERISA's imposition of a fiduciary duty that has been characterized as 'the highest known to law.'" 66 F.3d at 1453 (citation omitted). Accord Kling, 270 F. Supp.2d at 126-27.

Similarly, in Steinman v. Hicks, a subset of a participants in a profit sharing plan brought a class action and sued the fiduciaries for relief to the plan under sections 409(a) and 502(a)(2). Steinman v. Hicks, 252 F. Supp.2d 746, 750 n.4, 751 n.5 (C.D. Ill. 2003). The district court in Steinman held that those plaintiffs could not maintain their action under section 502(a)(2) because they sought to "recover their individual losses . . . rather than suing on behalf of the MMC Plan," and could bring their claims only as claims for individual relief under section 502(a)(3). 252 F. Supp. 2d at 756. The Seventh Circuit flatly repudiated that analysis, reasoning that although:

> [t]here was some confusion . . . over whether the suit was under section 502(a)(3) or 502(a)(2), . . . it is clearly the latter because the plaintiffs are asking that the trustees be ordered to make good the losses to the plan caused by their having breached fiduciary obligations. That is relief expressly authorized by section 409(a), 29 U.S.C. § 1109(a); and section 502(a)(2) is by its terms the vehicle for enforcing that section, while section 502(a)(3) is the vehicle for suits by individuals who are seeking relief just on their own behalf rather than on behalf of the plan.

Steinman v. Hicks, 352 F.3d at 1102 (citations omitted). The Milofsky panel decision thus conflicts with both Kuper and Steinman.

D. Adoption of the panel's reasoning would substantially impair the ability of plan participants, fiduciaries and the Secretary to protect defined contribution plan assets.

The panel's unwarranted holding that relief channeled into the individual accounts of only a subset of plan participants is not available under section 502(a)(2), will negatively affect all 401(k) plans and all other defined contribution plans that offer numerous investment options. See Colleen E. Medill, Stock Market Volatility, 34 U. Mich. J.L. Reform at 539 ("The long-term policy consequence [of such an interpretation] is likely to be a significant undermining of the effectiveness of 401(k) plans in providing retirement income security.").[3] Because, in such plans, it is highly unlikely that every participant will be invested in the same investment options during a given period, the investment decisions and actions of fiduciaries with regard to these options will not be subject to scrutiny under ERISA sections 409(a) and 502(a)(2) if the panel's reasoning is adopted by the en banc Court.[4]

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[3] Currently, 401(k) plans hold over $1.75 trillion in assets according to Department of Labor estimates based on Form 5500 filings by such plans, and such plans are growing rapidly. Total contributions by employers and employees to 401(k)-type plans increased from $152 billion in 1999 to $170 billion in 2000. Moreover, according to a survey conducted in 2003, 82.2% of eligible employees participated in 401(k) plans. Profit Sharing/401k Council of America, 47th Annual Survey of Profit Sharing and 401(k) Plans: Overview of Survey Results, available at http://www.psca.org/DATA/47th.html.

[4] As the panel itself recognized, whether participants will be able to obtain individual relief for their losses under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), is questionable. Milofsky, 404 F.3d at 346-47. The Secretary has argued in a number of cases that make-whole relief against a fiduciary is available under section 502(a)(3).

This would preclude many cases that have routinely been brought under ERISA section 502(a)(2). It would preclude, for instance, a suit under section 502(a)(2), such as the one approved by this Court in Bannister v. Ullman, 287 F.3d 394 (5th Cir. 2002), against fiduciaries who fail to forward employee contributions to their plans, so long as the fiduciaries merely pocket the contributions of some, rather than all, participants. The Secretary of Labor brings many of these cases annually and as of June 30, 2005, has recovered $363 million in delayed or diverted contributions for participants in 401(k) plans, and has obtained 150 indictments.[5] And the panel's

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See Aetna Health Inc. v. Davila, 124 S. Ct. 2488, 2503 (2004) (Ginsburg & Breyer, JJ., concurring). At least one district court within this circuit, however, as well as a majority of the circuit courts that have considered the issue, have concluded that such relief is not available. See, e.g., In re Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp.2d 511, 604-613 (S.D. Tex. 2003); Pereira v. Farace, 413 F.3d 330, 339-42 (2d Cir. 2005), (petition for rehearing and suggestion for rehearing en banc pending); Callery v. U.S. Life Ins. Co., 392 F.3d 401 (10th Cir. 2004), petition for cert. filed, 73 U.S.L.W. 3632 (U.S. Apr. 11, 2005) (No. 04-1366); Helfrich v. PNC Bank, Ky., Inc., 267 F.3d 477, 481-82 (6th Cir. 2001); Kerr v. Charles F. Vatterott & Co., 184 F.3d 938, 943-44 (8th Cir. 1999). Consequently, if participants in defined contribution plans cannot obtain losses resulting from fiduciary breaches under section 502(a)(2), they may be without any remedy under ERISA – a result that cannot be squared with the statute or its purposes.

[5] The panel was quite right that under the logic of the Secretary's argument a failure to remit even a single participant's contributions is remediable under section 502(a)(2) as a claim to recoup "losses" to the plan, and the Secretary has brought such suits involving the contributions of substantially less than all of a plan's participants. By avoiding such an interpretation for fear of "dramatically expand[ing] standing," 404 F.3d at 344, the panel's decision in fact dramatically contracts section 502(a)(2) standing as described above. If a fiduciary steals a single employee's contribution to the plan, the plan has received fewer assets than it is entitled to receive and it has suffered a loss recoverable under the Act's plain

reasoning, if adopted by the en banc court, will preclude many other kinds of cases as well. For instance, it would preclude the suit brought by the participants in the WorldCom plan to recoup the alleged losses to their 401(k) plan stemming from serious fiduciary malfeasance and undisclosed corporate wrongdoing, simply because the company did not provide a match in company stock and consequently not every participants' accounts held investment in such stock. In re WorldCom ERISA Litig., 263 F. Supp.2d 754, 754-55 (S.D.N.Y. 2003).

The panel's decision attempts to avoid this drastic result by suggesting that a suit that affected less than all of the participant accounts could "inure[] to the benefit of the plan, . . . when the suit seeks to vindicate the rights of the plan as an entity when alleged fiduciary breaches targeted the plan as a whole." 404 F.3d at 344 n.16 (emphasis in original). We agree with Chief Judge King that this exception, which is not grounded in the statute, is unworkable because the majority does not "explain how a court should determine if an alleged fiduciary breach targeted the plan as a whole." Id. at 349 n.3 (King, J., dissenting).

Taken to its logical extreme, the panel's reasoning suggests that a defined contribution plan could never suffer a loss because a plan is just the aggregate of individual accounts, and it is these individual accounts, and not the plan, that sustains

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language that fiduciaries "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a).

the losses. If that is correct, it does not matter whether the suit seeks relief for losses to all participant accounts or only to a subset of those accounts or whether the alleged breach is targeted to the plan as a whole. The relief ultimately goes to the individual accounts and thus, in the panel's view, would not be available under sections 409 and 502(a)(2).

The defendants in the pending appeal in Langbecker v. EDS, No. 04-41760 (5th Cir. filed Dec. 29, 2004) essentially make this very argument in a case now pending in this Court. In that case, the plaintiffs alleged that the fiduciaries imprudently selected and retained a particular stock option for the plan. The defendants argue that, under the logic of the panel's decision in Milofsky, it is the individual accounts in a defined contribution plan, and not the plan, that, in reality, hold all of the assets, and consequently there can never be a breach targeted at the plan or losses to the plan. The Secretary argued that the case is distinguishable from Milofsky because the breach targeted the plan as a whole and concerned an investment option which included all plan participants. Nevertheless, the panel's reasoning appears to be in significant tension with its carve-out for breaches aimed at the defined contribution plan as a whole and for injuries sustained by all of the plan's participants.

In any event, the distinction between breaches aimed at the plan and those aimed at the participants is essentially unworkable. For instance, if the panel is correct in its questionable conclusion that the breaches alleged in Milofsky –

mismanagement in the transfer of plan assets – are not targeted at the plan as whole, it would seem that other breaches, such as incurring excessive fees with regard to an individual investment option, would likewise not be remediable under section 502(a)(2), even though the breach plainly caused the waste of plan assets. This result is not warranted for all the reasons discussed above.

If the panel's decision is adopted, courts will continually be forced to answer the question whether an alleged breach is aimed at the plan or whether every participant is affected by the breach. We believe the appropriate (and easier) question to answer is the one posed by the statute – whether the claim alleges that a fiduciary breach caused any losses to the plan. 29 U.S.C. §§ 1109, 1132(a)(2). If a fiduciary breached its duties with respect to the investment of plan assets (including those allocated to an individual account), and the plan holds fewer assets as a result of the breach, the plan clearly suffered a loss and ERISA just as clearly authorizes a recovery. Thus, for example, if a fiduciary diverts the contributions of any of its employees from the plan to line its own pockets, or manages a fund that includes an imprudent investment in his relative's failing company, the plan's participants can bring an action to make the plan whole for any losses that it suffers as a result. The fact that the participant chose the fund as an investment option should not provide a defense for the fiduciary to an ERISA claim.

Congress declared it to be the policy of ERISA to protect "the continued well-being and security of millions of employees and their dependants," as well as to safeguard employment stability and commerce, by "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(a), (b) (emphasis added). See also Russell, 473 U.S. at 140 n.8 (ERISA was designed to prevent "the misuse and mismanagement of plan assets"); Varity Corp. v. Howe, 516 U.S. 489, 511, 512 (1996) (section 502(a)(2) allows suits to enforce "fiduciary obligations related to the plan's financial integrity," in accordance with the "special congressional concern about plan asset management" reflected in section 409). In light of these statements of purpose, as well as the express terms of ERISA's remedial provisions, it defies common sense to believe that Congress meant, without expressly saying so, to exempt from the reach of ERISA's primary remedial provision, all individual account plans that suffer losses, so long as those losses do not affect every participants' account. This Court should decline to interpret ERISA in such a manner.

CONCLUSION

For the reasons stated above, the Secretary, as amicus curiae, requests that this Court decline to adopt the reasoning of the panel, and instead reverse the decision of the district court.

Respectfully submitted this 11th day of August, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the Supplemental Amicus Curiae Brief for the Secretary of Labor in Support of Plaintiffs-Appellants, along with a diskette in PDF, were mailed, via federal express overnight delivery, on this 11th day of August 2005 to the following parties:

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. 32(a)(7)(B), I certify that this Supplemental Amicus Curiae Brief for the Secretary of Labor in Support of Plaintiffs-Appellants is proportionally spaced, using Times New Roman 14-point font size, and contains 5,984 words.

I relied on Microsoft Word 2000 to obtain the word count.

Dated: August 11, 2005

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Elizabeth Hopkins