No. 11-2520

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DANIELLE SANTOMENNO, et al.
Appellants,

v.

JOHN HANCOCK LIFE INSURANCE CO., et al.
Appellees.

On Appeal from the United States District Court
for the District of New Jersey

BRIEF OF THE SECRETARY OF LABOR, HILDA L. SOLIS, AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND REQUESTING REVERSAL

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STATEMENT OF THE ISSUE

ERISA sections 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a)(2), (a)(3), expressly authorize plan participants to sue plan fiduciaries who have breached their statutory duties for remedial, injunctive and other equitable relief. The question presented is whether the district court erred in requiring plan participants to first request that plan trustees bring suit against breaching fiduciaries as a condition to exercising their independent statutory right to sue under sections 502(a)(2) and (a)(3).

STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

The Secretary of Labor is charged with interpreting and enforcing the provisions of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 et seq. Accordingly, the Secretary has significant interests in the proper application of the safeguards Congress established through ERISA for the administration of employee benefit plans and the protection of participants in those plans. These interests include promoting uniformity of law, protecting beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc).

Although the Secretary of Labor has primary interpretative and enforcement authority for Title I of ERISA, the Secretary does not have the resources to pursue litigation regarding every allegation of fiduciary imprudence. Accordingly, the Secretary has an interest in ensuring that courts do not erect unwarranted barriers to the ability of private litigants to sue to protect their statutory rights under ERISA. The district court's erroneous conclusion that plan participants must first make a pre-suit demand on the trustees of their plans before exercising their right to sue for fiduciary breach under ERISA undermines this interest.

The Secretary files this brief as amicus curiae under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF FACTS

1. Defendant John Hancock Life Insurance Co. (U.S.A.) (John Hancock) is a Michigan company that, among other things, issues and administers group annuity contracts to sponsors of 401(k) plans. Plaintiffs-appellants are participants or beneficiaries in ERISA-covered 401(k) retirement plans that invested in these group annuity contracts. Joint Appendix ("JA") 8.

In establishing each group annuity contract, John Hancock selects a menu of investment options, both from John Hancock funds and from several independent funds that pay John Hancock revenue-sharing payments. John Hancock generally selects funds for their menus of investment options from three John Hancock series trusts, each trust containing a portfolio of funds: John Hancock Trust (JHT), John Hancock Funds II (JHF II), and John Hancock Funds III (JHF III) (collectively, the JH Trusts). JA 23-24.

John Hancock provides a menu of options to employers, who select subsets of the funds to offer to the 401(k) plans that they sponsor. Once the array of funds has been selected for each plan, plan participants then direct their monies into their own separate sub-accounts, and from there the monies are allocated into particular funds within the portfolios. John Hancock charges plan sponsors a contract level fee, and charges participants and beneficiaries fees for their investments in the sub-accounts. JA 8-9.

Defendant John Hancock Investment Management Services, LLC (JHIMS) provides investment advice to the JH Trusts and all of the investment funds/portfolios within them. Defendants John Hancock Funds, LLC (JHF) and John Hancock Distributors, LLC (JHD) are JHIMS subsidiaries that make distributions from the JH Trusts' individual funds or portfolios to participants or beneficiaries. JA 9.

The named plaintiffs in this case, Danielle Santomenno, Karen Poley and Barbara Poley were participants in 401(k) plans sponsored by their employers, whose assets were invested in one or more of the John Hancock funds described above. They filed suit in 2010 in the United States District Court for the District of New Jersey challenging various investment fees under various provisions of the Investment Company Act of 1940 (which the Secretary's brief does not address) and ERISA, on behalf of themselves and a putative class of all participants and all retirement plans whose trustees contracted with John Hancock for retirement plan services. JA 8.

With regard to their ERISA claims, the plaintiffs allege that John Hancock is a fiduciary under ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A), based on various activities it performs related to their plan investments. In particular, they allege that John Hancock is a fiduciary because it "retains the authority, at its discretion, to add or delete the available investment options"; "select[s], monitor[s] and replac[es] the plans' investment options"; "holds all of Plaintiffs' investments in its separate accounts"; and "negotiate[s] and/or extract[s] revenue sharing payments, which are derived from Plaintiffs investments, from the advisors to the independent funds and the subadvisers, unaffiliated with the defendants, to funds/portfolios contained in the JHT, the JHFII and the JHFIII."[1] JA 53, 59, 61.

In Counts I and II, plaintiffs alleged that John Hancock breached its duties of prudence and loyalty under ERISA section 404, 29 U.S.C. § 1104, and engaged in prohibited transactions under ERISA section 406, 29 U.S.C. § 1106, through its receipt of excessive fees for sales and service of JH Funds and the independent funds that it offers, and through its receipt of an allegedly spurious administrative charges. JA 143-49. In Counts III and IV, the plaintiffs allege that all of the defendants allowed payment of 12-b(1) fees connected with JH funds and the independent funds, and that John Hancock engaged in prohibited transactions and violated its prudence and loyalty obligations in doing so and the other defendants knowingly participated in John Hancock's breaches in this regard. JA 150-57. In Count V, plaintiffs allege that John Hancock acted imprudently, disloyally and in violation of section 406 by wrongfully allowing JHIMS to charge advisory fees. JA 148-64. In Count VI, plaintiffs allege that John Hancock wrongfully received revenue-sharing payments from plaintiffs' investment into sub-accounts, in violation of ERISA. JA 165-68. In Count VII,

[1] The plaintiffs do not allege that the other John Hancock entities are fiduciaries, but instead seek to impose equitable liability against these entities under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), for their knowing participation in John Hancock's fiduciary breaches.

plaintiffs allege that John Hancock acted in violation of ERISA in selecting JHT Money Market Trust as an investment option to be offered in its menus, despite poor performance and high fees, and wrongfully retained JHIMS as an advisor, despite the fact that it had been disciplined by the SEC. JA 169-73. The plaintiffs seek declaratory relief, as well as disgorgement of all fees and earnings that the defendants obtained in violation of ERISA, damages in the amount sufficient to restore the plaintiffs to the position they would have been in but for the breaches, and attorneys' fees and costs. JA 191-93.

2. On May 23, 2011, the court dismissed the ERISA claims based on its conclusion that participants and beneficiaries cannot sue under ERISA section 502(a)(2) without first making a demand on the plan trustees to bring a fiduciary breach suit. Santomenno v. John Hancock Life Ins. Co., No. 2:10-CV-01655, 2011 WL 2038769 (D.N.J. May 23, 2011) (JA 8-13). Reasoning that section 502(a)(2) claims for fiduciary breach are "akin to" claims for unpaid contributions brought under section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2), the court cited cases that have held that delinquent contribution claims cannot be brought without first making a demand on the trustees that they bring suit for the contributions or establishing that such a demand would be futile. JA 11. To the extent that ERISA left a gap on the issue, the court reasoned that it should follow the common law of trusts

under which it is ordinarily the trustee alone who is permitted to sue a third-party wrongdoer, and noted that, to the extent state law was relevant, state corporate law universally requires a demand on the corporation of its board of directors before a shareholder can file suit. JA 11-12.

The court found that there had been no such demand and that the complaint failed to name the trustees, failed to make well-pled allegations as to whether they joined in the alleged breaches, and failed to join the trustees as defendants. JA 11. The court noted that even if "demand on the trustees is not required, the Third Circuit has required such trustee-related factual allegations." Id. (citing McMahon v. McDowell, 794 F.2d 100, 110 (3d Cir. 1986)). Thus, the court held that "absent demand, or allegations going to demand futility, or some allegations, which, if proven, would establish that the trustees improperly refused to bring suit, it would appear that the beneficiaries of an ERISA plan cannot bring a claim under Section 502," and that any such suit "must join the plan's trustees." Id. (citing McMahon). And, the court concluded that "because there are no such factual allegations and because the trustees have not been joined" dismissal "would seem to be proper." Id.

SUMMARY OF THE ARGUMENT

The district court erred in holding that the plaintiffs were required to make a demand on the plan trustees before filing their suit in federal court alleging that John Hancock, as an alleged fiduciary to their defined contribution pension plans, acted imprudently and disloyally and engaged in prohibited transactions with regard to the investment fees that it retained. The remedial provisions under which they sued, ERISA sections 502(a)(2) and (a)(3), expressly give plan participants and beneficiaries the co-equal right with plan fiduciaries and the Secretary to sue plan fiduciaries who violate ERISA. These provisions do not condition the participants' right to file suit in any way or imply that, prior to bringing their own action, plan participants must first request that plan trustees file suit. The court's holding is therefore fundamentally at odds with the statutory text of ERISA's "carefully crafted and detailed enforcement scheme," Mertens v. Hewitt Associates, 508 U.S. 248, 254 (1993) (citation omitted), as well as with ERISA's expressly stated intent to remove procedural barriers and to provide plan participants and beneficiaries "ready access to the Federal courts." 29 U.S.C. § 1001(b).

Given the clear statutory text, the district court erred in relying upon ERISA case law concerning suits to recover delinquent plan contributions under ERISA section 502(g)(2), 29 U.S.C. § 1132(g)(2). Unlike sections 502(a)(2) and (a)(3), section 502(g) does not empower plan participants themselves to sue, but only authorizes suit by plan fiduciaries to recover delinquent contributions. In that context, some courts have applied the common law demand rule to allow plan participants to sue for these contributions when the plan fiduciaries have refused to do so. But even in the trust law where the demand rule arose, the rule applies only where a trust beneficiary seeks to enforce a trust's rights (usually contractual) against non-fiduciary third-parties, not where a trust beneficiary sues a fiduciary for breach of its own duties. Because the plaintiffs in this case alleged that John Hancock was a fiduciary, and brought suit against it based on alleged fiduciary breaches (and against the related non-fiduciary defendants for knowingly participating in John Hancock's breaches), application of the trust law rule in this case would not, in any event, require a pre-suit demand. But even if the trust law rule (and the related rule that courts have applied in the corporate context) required such a demand in similar situations, ERISA sections 502(a)(2) and (a)(3), which clearly empower plan participants to sue without precondition, must be viewed as a departure from the common law in this regard.

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT A PLAN PARTICIPANT MUST FIRST DEMAND THAT THE PLAN TRUSTEE BRING SUIT BEFORE FILING AN ACTION AGAINST OTHER FIDUCIARIES UNDER SECTIONS 502(a)(2) AND 502(a)(3) OF ERISA

A. The Plain Language of the Statute Gives Plan Participants the Right to Bring an Action Against Breaching Fiduciaries Without Precondition

ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). It does this primarily by imposing a number of stringent duties on plan fiduciaries, including a duty of loyalty, a duty to act for the exclusive purpose of providing plan benefits and defraying reasonable expenses, and a duty of care and prudence. ERISA section 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A), (B). The statute also flatly prohibits fiduciaries from engaging in certain transactions that are likely to harm the plans they serve. ERISA section 406, 29 U.S.C. § 1106. And, significantly, the statute ensures that not only plan fiduciaries and the Secretary of Labor, but also plan participants and their beneficiaries are granted "ready access to the Federal courts" (29 U.S.C. § 1001(b)) to enforce these fiduciary duties, to recover plan losses stemming from the breach of these duties, and to receive other equitable relief as appropriate. 29 U.S.C. §§ 1109, 1132(a)(2), (a)(3).

Plaintiffs here alleged that, by negotiating and retaining certain investment fees, John Hancock violated its fiduciary duties under ERISA sections 404 and 406, and was liable under ERISA section 409(a), which provides:

> (a) 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 such breach . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate.

29 U.S.C. § 1109(a). They sued John Hancock (and the other John Hancock entities) under ERISA sections 502(a)(2) and (a)(3), which provide:

> (a) A civil action may be brought –
> . . . .
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under [§ 409; or] . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this [title] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this [title] or the terms of the plan.

29 U.S.C. §§ 1132(a)(2), (a)(3).

In these subdivisions of section 502, "ERISA specifically designates the individuals who are authorized to bring a civil action in 29 U.S.C. § 1132. This section is essentially a standing provision. . . . It is clear under §[§] 1132[(a)(2), (a)(3)] that a civil action may be brought by a participant, beneficiary, fiduciary and the Secretary." Rofi v. Connecticut Gen. Life Ins. Co., No. CIV. A. 91-2985, 1993 WL 224728, *3-*4 (E.D. Pa. June 23, 1993) (citing Northeast Dep't ILGWU v. Teamsters Local Union No. 229, 764 F.2d 147, 153 (3d Cir. 1985) (section 1132 must be read literally)); see Hermann Hosp. v. MEBA Med. & Benefits Plan, 845 F.2d 1286, 1288-89 (5th Cir. 1988) ("Where Congress has defined the parties who may bring a civil action founded on ERISA, we are loathe to ignore the legislature's specificity."). Given ERISA's "carefully crafted and detailed enforcement scheme," Mertens v. Hewitt Associates, 508 U.S. 248, 254 (1993) (citing Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146-47 (1985)), there is no reason to believe that Congress inadvertently omitted additional requirements to bring a claim under sections 502(a)(2) and (a)(3).

The plain language of ERISA sections 502(a)(2) and (a)(3) expressly gives participants and beneficiaries the right to bring a civil action to remedy fiduciary breaches, without procedural or other preconditions. The plaintiffs in this case availed themselves of this right, as vast numbers of plaintiffs have done under ERISA, without first making a demand on the trustees or other named fiduciaries.

Thus, all the courts that have addressed the issue have correctly concluded that there is no such prerequisite to a fiduciary breach suit. See Katsaros v. Cody, 744 F.2d 270, 280 (2d Cir. 1984) ("[A]lthough common law may have required a prior demand before bringing an action, Congress did not incorporate that doctrine into the ERISA statute. The ERISA jurisdictional statute, 29 U.S.C. § 1132(a)(3), contains no such condition precedent to filing suit."); Licensed Div. Dist. No. 1 MEBA/NUM v. Defries, 943 F.2d 474, 478-79 (4th Cir. 1991) (citing Katsaros for the proposition that no prior demand requirement is incorporated into ERISA); Brink v. DaLesio, 667 F.2d 420, 428 (4th Cir. 1981) (adoption of a demand requirement would frustrate ERISA's remedial purposes); Kayes v. Pac. Lumber Co., 51 F.3d 1449, 1462-63 (9th Cir. 1995) (no demand requirement for fiduciary breach claim under ERISA section 502(a)(2)).

Not only does a demand requirement on the trustees of the sort the district court imposed here find no support in the statutory language, it is also inconsistent with ERISA's protective purposes. In many instances, the trustees (or named fiduciaries) are among the parties being accused of falling short in their duties under ERISA and thus are unlikely to take action. Even in cases where the plan participants are accusing only fiduciaries other than the trustees of breaching their duties, the trustees themselves may well be concerned about their own exposure as co-fiduciaries and for this reason may be hesitant to take action, or, at a minimum, will be operating under a conflict in deciding whether or not to do so. Given these practical concerns, a demand rule of the kind imposed by the district court would necessarily lessen the protective scope of ERISA.

Because Congress itself placed no such impediment on participants' ability to file suit to remedy fiduciary breaches, the district court was not justified in doing so. See Coan v. Kaufman, 457 F.3d 250, 258 (2d Cir. 2006) ("Section 502(a)(2), unlike section 502(g)(2), provides an express right of action for participants - presumably because the drafters of ERISA did not think fiduciaries could be relied upon to sue themselves for breach of fiduciary duty."); cf. Beck v. Levering, 947 F.2d 639, 642 (2d Cir. 1991) (because trustees may be faced with potential liability and their interest in absolving themselves may conflict with the private litigants' interest in fair adjudication of the issues and full recovery, section 502(a) authorizes the Secretary to bring suit concurrently with private plaintiffs to recover appropriate damages).

B. Delinquent Contributions Cases Brought Under Section 502(g) are not Relevant Because that Statutory Section does not Give Participants and Beneficiaries the Right to Sue Directly

In dismissing the plaintiffs' action based on their failure to make a demand to sue upon the trustees of their plans, the district court relied on cases brought under section 502(g) of ERISA, which, unlike section 502(a), does not grant participants a direct right to enforce the statute. See Coan, 457 F.3d at 258 (distinguishing sections 502(a)(2) and (g) on this basis). The district court relied primarily on this Court's decision in McMahon v. McDowell, 794 F.2d 100 (3d Cir. 1986) and the Second Circuit's decision in Diduck v. Kaszycki & Sons Contractors, 874 F.2d 912, 916 (2d Cir. 1989), which concerned a "derivative claim" by plan participants under ERISA section 502(g) to collect delinquent contributions owing to the plan under ERISA section 515, 29 U.S.C. § 1145.[2]

Unlike sections 502(a)(2) and (a)(3), which expressly allow suit by plan participants, section 502(g) provides:

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[2] Section 515 provides: "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." Section 515 is enforced through section 502(g)(2), 29 U.S.C. § 1132(g)(2), which is set forth above in text.

> (g)(2) In any action under this [title] by a fiduciary for or on behalf of a plan to enforce [section 515] . . . in which a judgment in favor of the plan is awarded, the court shall award the plan --
>
> (A) the unpaid contributions . . .

29 U.S.C. § 1132(g)(2)(A) (emphasis added). Thus, section 502(g), by its express language, gives the right to sue to enforce section 515 only to fiduciaries; participants and beneficiaries have no such right under this section.

Because section 502(g) does not by its terms authorize participants to sue the plan sponsor for unpaid contributions, some courts have held that their only remedy is to sue plan fiduciaries for their own failure to bring suit if such a suit would have been justified. See Moore v. American Fed'n of Television & Radio Artists, 216 F.3d 1236, 1246-47 (11th Cir. 2000). Other courts, however, such as the Second Circuit in Diduck, 874 F.2d at 916, and this Court in McMahon, 794 F.2d at 109-10, have concluded that participants can derivatively sue the plan sponsor for unpaid contributions, but only if they establish that the fiduciaries breached their duties by failing to bring suit. These courts have relied on the common law trust rule that "'if the trustee holds in trust a contract right against a third person and the trustee improperly refuses to bring an action to enforce the contract, the beneficiaries can maintain a suit in equity against the trustee joining the obligor as a co-defendant. . . . If the trustee does not commit a breach of trust in failing or declining to bring an action against the third person, the beneficiaries cannot maintain a suit against the trustee and the third person.'" Struble v. New Jersey Brewery Emps' Welfare Trust Fund, 732 F.2d 325, 337 (3d Cir. 1984) (quoting 4 Austin W. Scott, Law of Trusts § 282.1, at 2339 (3d ed. 1967)), overturned on other grounds by Firestone Tire & Rubber Co. v. Brunch, 489 U.S. 101 (1989); McMahon, 794 F.2d at 110 (same); see also Restatement (Second) of Trusts ("Restatement") § 282, at 44 (1959) (where a trustee can maintain an action against a third person, the beneficiary cannot maintain a suit against the third person, except "[i]f the trustee improperly refuses or neglects to bring an action against the third person, the beneficiary can maintain a suit in equity against the trustee and the third person."). A similar rule has been applied by states in the corporate context to shareholder derivative suits and by federal courts to such derivative actions under Federal Rule of Civil Procedure 23.1. See, e.g., Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90 (1991).

In the ERISA context, that common law rule has been applied only to delinquent contribution suits, which combine an equitable action against the breaching trustee with what is essentially a contract action against the delinquent employer on behalf of the plan. Importantly, the common law rule does not pertain at all to fiduciary breach actions brought by participants under section 502(a), as a number of courts have expressly recognized. Katsaros v. Cody, 744 F.2d at 280; Coan, 457 F.3d at 258 ("Because plan participants are expressly authorized to bring suit under section 502(a)(2), the situation here is not controlled by Diduck."); Defries, 943 F.2d at 478-79; Kayes, 51 F.3d at 1462-63; cf. Donovan v. Schmoutey, 592 F. Supp. 1361, 1404 (D. Nev. 1984) (no conditions precedent to the Secretary's authority to file a suit to enforce ERISA). Indeed, no circuit court has ever required that plan participants make a demand on the trustees before filing suit for fiduciary breach against other fiduciaries, see, supra at 12-13, or that they also sue the trustees alleging fiduciary breach in failing to sue.[3] Indeed, because ERISA's fiduciary liability is joint and several, see In re Masters Mates & Pilots Pension Plan & IRAP Litig., 957 F.2d 1020, 1023 (2d Cir. 1992), numerous courts, including this one, have held that plan participants and other plaintiffs may sue some fiduciaries without suing all of them. Struble, 732 F.2d at 332; District 65 Ret. Trust for Members of Bureau of

[3] Similarly, because plan participants suing for fiduciary breach "assert the right of the fund as if they themselves were trustees," the Third Circuit has held that they need not exhaust the claims procedure applicable to benefit claims. Molnar v. Wibbelt, 789 F.2d 244, 250 n.3 (3d Cir. 1986). But see Lanfear v. Home Depot, Inc., 536 F.3d 1217, 1223-24 (11th Cir. 2008) (imposing exhaustion requirement on fiduciary breach claims).

Wholesale Sales Representative v. Prudential Secs., Inc., 925 F. Supp. 1551, 1565 (N.D. Ga. 1996).

Further, the district court here, in relying on Diduck, ignored the fact that, on remand, the district court in Diduck correctly construed Katsaros and distinguished it on the grounds that Katsaros was brought under 502(a)(3), a section that "allows for direct actions for equitable relief by beneficiaries and participants," and "[t]hus, the lack of a demand requirement as enunciated in Katsaros, was not in the context of a derivative action but in the context of a direct action by pension plan participants for equitable relief pursuant to section 502(a)(3) and a breach of fiduciary claim." Diduck, 737 F. Supp. 792, 800 (S.D.N.Y. 1990), reversed in part on other grounds, 974 F.2d 270 (2d Cir. 1992). More fundamentally, the court misunderstood that the demand rule that this Court addressed in McMahon applies only where a "trustee holds in trust a contract right against a third person and the trustee improperly refuses to bring an action to enforce the contract," 794 F.2d at 110 (internal quotation marks and citations omitted), and not to a fiduciary breach claim of the kind brought against John Hancock here (or to the related knowing participation claims against the related John Hancock entities). This is because, under trust law, the trustee had exclusive authority over trust assets, including the trust's claims against third parties. Therefore, before a beneficiary could bring an action against a third party who wronged the trust, he first had to show that the trustee improperly refused or neglected to bring that action. See Restatement § 282, cmt. a, at 44 ("Ordinarily the interest of the beneficiary is protected against third persons acting adversely to the trustee through proceedings brought against them by the trustee and not by the beneficiary. As long as the trustee is ready and willing to take the proper proceedings against such third persons, the beneficiary cannot maintain a suit in equity against them.").

In contrast, when a trustee breached its obligations to a beneficiary, the right to bring the action was vested directly in the beneficiary. See Eduard A. Lopez, Equitable Remedies For Breach Of Fiduciary Duty Under ERISA After Varity Corp. v. Howe, 18 Berkeley J. Emp. & Lab. L. 323, 340 (1997) ("A trust beneficiary could bring a suit in equity to compel the trustee to perform, or to enjoin him from violating, his duties. A trust beneficiary also could sue to enforce a trustee's personal liability for breach of trust . . . as well as recover for the trust any proceeds held by the trustee from the wrongful sale of trust property.") (citing 2 Thomas Lewin, A Practical Treatise on the Law of Trusts at *900 (8th ed. 1888); and Frederic W. Maitland, Equity at 217-18 (2d ed. 1936)). Thus, the trust beneficiary always had the right to sue the trustees and other fiduciaries for their own fiduciary breaches without making a demand. See Restatement § 199, at 437 (beneficiary of a trust can maintain a suit to compel the trustee to perform his duties and to redress a breach of trust); George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 861, at 33 (rev. 2d ed. 1995) ("The beneficiary's basic remedies are against the trustee individually or for recovery of trust property or its product.").

However, even if the trust law would have treated an entity like John Hancock as a third party that could only be sued by plan participants if they made a demand on their plan trustee and then joined it in a suit against the trustee for breach of its duty, it would not control. ERISA departs from the trust law by its imposing exacting duties of conduct and loyalty not just on trustees, but on all those who act as fiduciaries to ERISA plans; and it does so by intentionally expanding the common law definition of fiduciary beyond trustees and other named fiduciaries, to all those who function as fiduciaries. See 29 U.S.C. § 1002(21)(A); Mertens, 508 U.S. at 251. Thus, whatever the case may have been under the trust law, this Court should follow the text of ERISA's remedial provision, which expressly allows the plan participants to sue John Hancock based on allegations that John Hancock functioned as a fiduciary with respect to the plans and breached its duties under ERISA, and that the other John Hancock entities knowingly participated in those breaches. See Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 246, 254 (2000) (in holding that ERISA allows plan participants to sue non-fiduciary third parties who participate in fiduciary breaches, the Supreme Court declined "to depart from the text" of section 502(a)(3), which imposes "no limits on the universe of possible defendants").

When Congress enacted ERISA, it was concerned with the difficulties workers were having in enforcing their rights and remedies against fiduciaries to their employee benefit plans and it sought to remedy that problem. As the Report of the Senate Labor and Public Welfare Committee states:

> The enforcement provisions [of ERISA] have been designed specifically to provide both the Secretary [of Labor] and participants and beneficiaries with broad remedies for redressing or preventing violations of the [Act].... The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants.

S. Rep. No. 127, 93rd Cong., 2d Sess. 3 (1974), reprinted in 1974 U.S.C.C.A.N. 4838, 4871 (emphasis added).

Thus, while ERISA draws from the common law of trusts, "trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements." Varity Corp. v. Howe, 516 U.S. 489, 497 (1996); see also Donovan v. Cunningham, 716 F.2d 1455, 1464 (5th Cir. 1983) (legislative history indicates that Congress intended to incorporate in ERISA the core principles of fiduciary conduct that were developed in the common law of trusts, "but with modifications appropriate for employee benefit plans.").

The Third Circuit, construing that Senate Report, has noted that "ERISA's legislative history indicates that Congress intended the federal courts to construe the statutory standing requirements broadly in order to facilitate enforcement of its remedial provisions." Leuthner v. Blue Cross & Blue Shield, 454 F.3d 120, 128 (3d Cir. 2006). Far from facilitating enforcement, the district court's novel application of a demand rule not found in ERISA's carefully-crafted enforcement provision to dismiss, on the pleadings, the participants' statutorily-authorized fiduciary breach suit erects just the kind of jurisdictional and procedural barrier that Congress sought to avoid.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court reverse the decision of the district court.

Respectfully submitted,

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FOR CASE NO. 11-2520

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Plan Benefits Security Division
Dated: September 30, 2011

CERTIFICATE OF VIRUS CHECK

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

/s/ Robin Springberg Parry
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Dated: September 30, 2011

CERTIFICATION OF BAR MEMBERSHIP

The undersigned counsel certifies that she is a member in good standing of the Virginia State Bar, No. 37502. As an attorney representing an agency of the United States, I am not required to be a member of the bar of this Court. See 3d Cir. L.A.R. 28.3, Committee Comments.

Dated: September 30, 2011

/s/ Robin Springberg Parry
ROBIN SPRINGBERG PARRY

CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I certify that on this 30th day of September, 2011, true and correct copies of the foregoing – BRIEF FOR THE SECRETARY OF LABOR, HILDA L. SOLIS, AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND REQUESTING REVERSAL – were filed electronically with the Clerk of the Court for the United States of Appeals for the Third Circuit by using the appellate CM/ECF system.

I further certify that I have served 10 copies of the Brief this same day in paper format to the Clerk of this Court by express mail.

I certify that all of the following participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

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