No. 11-2889

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KATHLEEN G. SCHULTZ and MARY KELLY
on their behalf and on behalf of a class of all persons similarly situated,
Plaintiffs-Appellants

v.

AVIALL, INCORPORATED LONG TERM DISABILITY PLAN and
PERKINS COIE LONG TERM DISABILITY PLAN
on their own behalf and on behalf of a defendant class of certain ERISA plans
insured by PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Defendants-Appellants.

On Appeal from the United States District Court
For the Northern District of Illinois (Castillo, J.)
Civil Action No. 09 C 2387

Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support
of Plaintiffs-Appellants' Petition for Hearing En Banc

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BACKGROUND AND INTEREST OF THE SECRETARY

In this case, Plaintiff Kathleen G. Schultz was approved for long term disability benefits under the Long Term Disability Plan (Plan) sponsored by her former employer Aviall, Inc. Record (R.) 27 (Amended Class Action Complaint (Compl.) ¶¶ 8, 12, 18-19).[1] The Plan is covered under the Employee Retirement Income Security Act of 1974, (ERISA), 29 U.S.C. § 1001 et seq., and insured by Prudential Insurance Company of America (Prudential). R. 27 (Compl. ¶¶ 2, 8). Prudential administers claims, has discretion to approve or deny claims, and pays the benefits for the Plan. R. 27 (Compl. ¶¶ 32, 34).

Schultz was also found entitled to Social Security disability benefits, and her four children became entitled to monthly child's benefits as well. R. 27 (Compl. ¶¶ 13-14). Schultz informed Prudential of these Social Security awards, and Prudential thereafter reduced the amount of her benefit payments under the Plan based on her and her children's Social Security disability benefits. R. 27 (Compl. ¶¶ 15, 17, 20). Schultz demanded, through her attorney, that Prudential stop deducting dependent Social Security benefits from her benefits under the Plan, and return all such previously deducted benefits. R. 27 (Compl. ¶ 21). When Prudential failed to do so, Schultz brought a purported class action suit against Prudential seeking repayment of benefits pursuant to ERISA section 502(a)(1)(B),

[1] Plaintiff Mary Kelly, who joined the case after the district court's initial decision of January 11, 2010, is similarly situated to Schultz. R. 49.

29 U.S.C. § 1132(a)(1)(B), alleging breaches of fiduciary duty and participation in prohibited transactions by Prudential with regard to the handling of her and other class members' claims, for which she sought equitable relief under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), and state law breach of contract claims on behalf of class members participating in ERISA-exempt plans. R. 27 (Compl. ¶¶ 22-40).

The district court dismissed Schultz's ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) claims, holding that under Seventh Circuit law only the Plan, or, in certain limited circumstances, the sponsoring employer, are proper defendants for such claims. R. 36, Appendix. The district court dismissed Schultz's ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3) claims on the grounds that Schultz was precluded from seeking relief under section 502(a)(3) where adequate relief was available under section 502(a)(1)(B). Id. Finally, the court held that Schultz lacked standing to bring the state law claims on behalf of class members. Id.

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. See Donovan v. Cunningham, 716 F.2d 1455, 1462-63 (5th Cir. 1983). The Secretary's interests include promoting the uniform application of ERISA, protecting plan

participants and beneficiaries, and ensuring the financial stability of plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc).

Plaintiffs-Appellants' petition for hearing en banc raises the question whether an insurance company that both decides and pays claims for benefits under an employer-sponsored disability plan is a proper defendant in a claim for benefits pursuant to ERISA section 502(a)(1)(B). The Seventh Circuit law on this issue is unjustifiably restrictive and contradicts the law in other circuits, including a recent Ninth Circuit decision overruling its earlier precedents. See Cyr v. Reliance Standard Life Ins., 642 F.3d 1202 (9th Cir. 2011) (en banc). Under this Circuit's decisions, the limitations placed on section 502(a)(1)(B) benefit suits are extremely troublesome in cases where an insurance company both decides and pays the claims, but is nevertheless deemed an improper defendant. The Secretary has a strong interest in ensuring that ERISA plan participants and their beneficiaries have meaningful recourse to the courts in cases where they have been wrongfully denied benefits, a goal that is difficult if not impossible to achieve if the party responsible for deciding and paying claims may not be sued for benefits under ERISA. Because this Court's limiting gloss on section 502(a)(1)(B) is neither what Congress intended, nor what the terms of the statute provide, the Secretary submits this brief as amicus curiae in support of the petition for en banc

hearing on the issue of who is a proper defendant in a suit under ERISA section 502(a)(1)(B).[2]

ARGUMENT

In order to further its expressly stated goal to ensure "the continued well-being and security of millions of employees and their dependents" who are participants in or beneficiaries of employee benefit plans, 29 U.S.C. § 1001(a), ERISA imposes stringent duties on plan fiduciaries and provides, in section 502, a number of "carefully integrated enforcement provisions" to enforce those duties. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985). The first of these remedial provisions, ERISA section 502(a)(1)(B), is designed "to protect contractually defined benefits," Russell, 473 U.S. at 146, and permits a civil action to be brought "by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Despite the fact that the terms of this provision place no limitation on the list of possible defendants, this Court has interpreted ERISA section 502(a)(1)(B) to allow suits against the plan only, with two excepting circumstances

[2] Plaintiffs-Appellants raise other issues in their opening brief on the merits of their appeal. The Secretary, however, submits this brief solely in connection with Plaintiffs-Appellants' petition for hearing en banc on the limited issue of proper party defendants under ERISA section 502(a)(1)(B).

in which the Court has allowed 502(a)(1)(B) suits against the employer: (1) where the plan documents refer to the employer and the plan interchangeably; and (2) where the employer and plan are closely intertwined. Otherwise this Court has found that the only proper defendant for a 502(a)(1)(B) claim is the plan itself. These limitations have often been ignored by courts in this Circuit in numerous cases involving insured plans, where the courts have allowed the insurer to be sued for benefits with little or no analysis concerning the insurer's status as a plan administrator. Additionally, this Court's limiting gloss on section 502(a)(1)(B) cannot be squared with the language of the statute, decisions of the Supreme Court, or the case law and practice in the other circuits.

Moreover, this case provides an example of the unworkable results that could follow from a strict application of Seventh Circuit precedent. In this case, because Prudential is neither the Plan nor the employer, this Court's precedent would seem to preclude a suit against the only entity that administers claims, has discretion to approve or deny claims, and pays the benefits for the Plan. R. 27 (Compl. ¶¶ 32, 34). If Prudential cannot be a party to this suit, a determination by the district court that Schultz is in fact entitled to benefits presumably would not bind Prudential, and it is unclear how Prudential could be held accountable to pay the benefits that are due Schultz under the plan and that the plan funded through the insurance policy purchased from Prudential. The failure to bind Prudential, as

the fiduciary and payer of benefits, would undercut ERISA's goal to ensure that plan participants and beneficiaries are paid the benefits which they have been promised. See Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830 (2003) (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989)).

I. THE COURT SHOULD GRANT EN BANC REVIEW BECAUSE THERE IS AN INTER-CIRCUIT CONFLICT CONCERNING WHO IS A PROPER DEFENDANT IN A CLAIM UNDER ERISA SECTION 502(a)(1)(B)

The Seventh Circuit has repeatedly held that claims under ERISA section 502(a)(1)(B) are, in most circumstances, "limited to a suit against the Plan." Mote v. Aetna Life Ins. Co., 502 F.3d 601, 610 (7th Cir. 2007) (citing Blickenstaff v. R.R. Donnelley & Sons Co. Short Term Disability Plan, 378 F.3d 669, 674 (7th Cir. 2004)). See also Feinberg v. RM Acquisition, LLC, 629 F.3d 671, 673 (7th Cir. 2011) (citing Blickenstaff). This Circuit has recognized two narrow exceptions to its general rule that only the plan may be sued in an ERISA section 502(a)(1)(B) claim. First, where the plan documents refer to the employer and the plan interchangeably, and the employer is the plan administrator, the Court has held that the employer may be sued. Mein v. Carus Corp., 241 F.3d 581, 584-85 (8th Cir. 2001). Similarly, the employer may also be sued where the employer and the plan are closely intertwined. Riordan v. Commonwealth Edison Co., 128 F.3d 549, 551 (7th Cir. 1997).

In the present case, the district court found that neither exception applies because Schultz did not bring a claim against her employer, but rather the insurance company serving as plan issuer. Schultz v. Prudential Insurance Co. of America, 678 F. Supp. 2d 771, 776 (N.D. Ill. 2010). The district court also considered two decisions in the Northern District of Illinois that allowed 502(a)(1)(B) claims to proceed against insurance companies that insured plans because the identity of the plan was unknown or ambiguous. Id. Because the identity of the plan in the present case is clear, however, the district court declined to follow these cases. Id. Thus, in accord with the precedent of this Court, the district court dismissed Prudential as a defendant in this case. See Mote, at502 F.3d, 610-11 (7th Cir. 2007) (affirming dismissal of benefit claim against plan insurer and administrator).

The Seventh Circuit's restrictive rule regarding proper defendants to 502(a)(1)(B) claims stands in sharp contrast to the rulings of several of its sister circuits, which do not limit the universe of possible defendants in a benefits suit in this way. See Curcio v. John Hancock Mut. Life Ins. Co., 33 F.3d 226, 233 (3d Cir. 1994) (permitting suit for benefits under section 502(a)(1)(B) to be brought against the plan or any fiduciary of the plan); Daniel v. Eaton Corp., 839 F.2d 263, 266 (6th Cir. 1988) (entities responsible for administering the plan are proper defendants in a suit claiming benefits under the plan); Garren v. John Hancock Life

Ins. Co., 114 F.3d 186, 187 (11th Cir. 1997) (same). This inter-circuit conflict has recently been intensified by the en banc decision of the Ninth Circuit overturning prior Ninth Circuit decisions holding that benefits suits could only be brought against the plan or the plan administrator. Cyr. In Cyr, the Ninth Circuit held that an insurance company that made the benefit determinations under a long term disability benefits plan was a proper defendant to a section 502(a)(1)(B) claim, and indeed ruled that the text of that provision placed no limits on who may be sued for benefits. 642 F.3d at 1204, 1207 (citing Harris Trust & Savings Bank v. Salomon Smith Barney, Inc., 530 U.S. 238 (2000)). Now, other than this Court, only the Second Circuit still holds that "ERISA permits suits to recover benefits only against the Plan as an entity," Lee v. Burkhart, 991 F.2d 1004, 1009 (2d Cir. 1993), and notably the Lee decision relied in this regard on Ninth Circuit precedent, Gelardi v. Pertec Computer Corp., 761 F.2d 1323 (9th Cir. 1985), which has now been overruled by Cyr. Cf. Hall v. Lhaco, Inc., 140 F.3d 1190, 1194 (8th Cir. 1998) (acknowledging circuit split regarding proper defendants in ERISA benefits claims, and deciding that the party who controls administration of the plan is the proper defendant).

As in the Second Circuit, the general rule in this Circuit that only a plan is a proper defendant to an ERISA section 502(a)(1)(B) claim was established with reliance upon now overruled Ninth Circuit precedent. For instance, in Jass v.

Prudential Health Care Plan, Inc., 88 F.3d 1482, 1490 (7th Cir. 1997), this Court relied upon the Ninth Circuit's decision in Gelardi. Gelardi held that "ERISA permits suits to recover benefits only against the Plan as an entity", 761 F.2d at 1324, but Gelardi is no longer good law after the recent Cyr decision in the Ninth Circuit, which expressly overrules it. 642 F.3d at 1207. This Court's reliance on no longer valid Ninth Circuit precedent in its decisions limiting the proper defendants to ERISA section 502(a)(1)(B) claims is an additional reason supporting en banc consideration of this issue.

II. SEVENTH CIRCUIT LAW IS CONTRARY TO ERISA AND SUPREME COURT LAW AND PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE BECAUSE OF ITS LIKELY IMPACT ON PLANS AND PLAN PARTICIPANTS AND BENEFICIARIES

The limiting approach applied by this Court finds no support in the statutory language and is inconsistent with the reasoning applied by the Supreme Court in Harris Trust, as the Ninth Circuit recognized in Cyr. In Harris Trust, the Supreme Court considered whether another subsection of ERISA's remedial provision, ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), allows a suit against nonfiduciaries who have participated in ERISA violations. 530 U.S. at 253. Noting that Congress demonstrated "care in delineating the universe of plaintiffs who may bring certain civil actions" under section 502(a)(3), but made "no mention at all of which parties may be proper defendants" under that section, the Court concluded that section 502(a)(3) "admits of no limit . . . on the universe of

possible defendants." Id. at 246-47. Like section 502(a)(3), section 502(a)(1)(B) specifies the proper plaintiffs – participants and beneficiaries – in a suit for plan benefits, but is silent concerning the proper defendants in such a suit, and the same result should pertain. As with section 502(a)(3), in construing section 502(a)(1)(B), this Court should "assume that Congress' failure to specify proper defendants . . . was intentional." Harris Trust, 530 U.S. at 247. Accord Cyr, 642 F.3d at 1206 ("We see no reason to read a limitation into [section 502(a)(1)(B)] that the Supreme Court did not perceive in [section 502(a)(3)].").

Although this Court has pointed to section 502(d)(2), 29 U.S.C. § 1132(d)(2), as supporting its narrow view of the proper defendants in a suit for benefits under section 502(a)(1)(B), see Jass, 88 F.3d at 1490, in fact, as the Cyr decision recognizes, section 502(d)(2) supports the opposite conclusion. 642 F.3d at 1206-07. Cf. Leister v. Dovetail, Inc., 546 F.3d 875, 879 (7th Cir. 2008) (noting that section 502(d)(2) does not "seem[] to be limiting the class of defendants who may be sued"). On its face, this provision simply provides that if a plaintiff obtains a money judgment against a plan, this judgment cannot be enforced against another person, absent a showing that the other person is individually liable. In this way section 502(d)(2) clarifies that plans are not like partnerships, for instance, where the individual partners are automatically liable for any judgments against the partnership. But the latter clause of section 502(d)(2), addressing the

enforceability of a judgment against individuals found liable in their own capacity, likewise makes clear that entities and individuals other than the plan may be sued in some instances for individual liability, as the en banc Ninth Circuit recognized with respect to a claim under 502(a)(1)(B) in Cyr, 642 F.3d at 1206-07.

Under this Court's precedent, plan participants may not name as a defendant an insurance company assigned responsibility to administer and pay claims under the terms of the plan, and are thus precluded from suing the one party that was responsible for the allegedly wrongful denial of benefits and who can most directly provide relief. That would not necessarily mean that the participant has no avenue for relief, but it means that there would be significant obstacles to ultimately obtaining that relief.

For instance, if a participant in a 502(a)(1)(B) action is found to be entitled to benefits under a plan that is funded solely through an insurance policy, it is not clear how the participant could enforce the judgment if the insurer were not even a party to the action. Even if the participant or the plan or plan administrator would be entitled to bring a subsequent suit directly against the insurer as a matter of state contract or insurance law, which is not at all clear given ERISA's broad preemption provision, see 29 U.S.C. § 1144, the ruling in the 502(a)(1)(B) action would not necessarily be binding on the insurer as a matter of res judicata or collateral estoppel since it was not and, in this Circuit, could not be a party to that action.

See Nevada v. United States, 463 U.S. 110, 129-30 (1983) (both res judicata and collateral estoppel only apply to bind parties or their privies); Johnson v. Cypress Hill, 641 F.3d 867, 874 (7th Cir. 2011) (same for res judicata); Meyer v. Rigdon, 36 F.3d 1375, 1379 (7th Cir. 1994) (collateral estoppel may only be invoked against a party that was fully represented in a prior action).[3] Accordingly, there is a real potential for inconsistent rulings, i.e., the plan could be found liable for the benefits in an ERISA suit, while the insurer could be absolved of liability in a subsequent suit (assuming such a subsequent lawsuit could even survive a preemption challenge). As a result, either the plan or the plan sponsor would be forced to pay for benefits that were supposed to be insured, or the ERISA participants or beneficiaries would simply be unable to get the benefits that the court had held they were entitled to in the 502(a)(1)(B) action. Such a result is flatly inconsistent with ERISA's goal to provide "a panoply of remedial devices" for participants and beneficiaries of employee benefit plans, Russell, 473 U.S. at 146, as well as with congressional intent to encourage the formation of such plans in the first instance. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987).

[3] Even if the insurer were in privity with the plan for purposes of res judicata, however, it would still be appropriate to join the insurer as a defendant under Rule 19 of the Federal Rules of Civil Procedure in light of the insurer's obvious interest in the proceeding and the preclusive effect that any judgment would then have on the insurer's interest. Certainly, as argued in the text, there is no basis in ERISA for excluding the insurer when it is both the plan fiduciary responsible for adjudicating the claims and the entity responsible for paying the claims.

Precluding a benefit suit against an insurer such as Prudential that is charged with interpreting the plan and making benefit determinations and paying benefits is anomalous for another reason. In deciding benefits cases, particularly cases concerning the standard of review applicable to benefit denials, Supreme Court decisions have long assumed that claims under section 502(a)(1)(B) may be brought against the plan fiduciary that makes the benefit determination, and not just the plan. For instance, in its decision in Firestone at 115, the Supreme Court held that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Similarly, Metropolitan Life Insurance Co. v. Glenn, 128 S. Ct. 2343 (2008), the Supreme Court held that an insurance company that both decides claims and pays benefits under a plan is operating under a conflict of interest that must be weighed as part of an abuse of discretion review of that decision. Like Prudential, MetLife was the issuer of the insurance policy that funds the plan's benefits, and under the express terms of the plan was the "Claim Fiduciary" with "discretionary authority to interpret the terms of the Plan and to determine eligibility for and entitlement to Plan benefits in accordance with the terms of the Plan". Metropolitan Life Ins. Co. and Long Term Disability Plan of Sears, Roebuck and Co. v. Glenn, Brief for Petitioners, 2008 WL 512780, at *3.

Neither the courts nor the parties questioned MetLife's status as a defendant and, indeed, there would be little point to the Supreme Court's holding in Glenn if insurers deciding such claims were not subject to suit.

Thus, the Supreme Court in cases like Firestone, Glenn, and UNUM Life Insurance Company of America v. Ward, 526 U.S. 358 (1999), and lower courts in countless others cases across the country, have simply and correctly assumed that a plan participant or beneficiary claiming benefits under an ERISA plan could sue the insurer that was making the benefit determination, without ever questioning whether the insurer was the proper party. Moreover, under Firestone and Glenn, courts in this Circuit and others deferentially review the decisions of insurers that are granted discretion to interpret plan terms and decide benefit claims, a practice that would make scant sense if such insurers are not proper parties in a suit for benefits. Thus, if given effect and adopted generally, this Court's decisions that hold that plan participants may not sue insurers like Prudential when they deny plan benefits would displace the established practice in thousands of cases every year. This potentially disruptive effect is another reason supporting a grant of Plaintiffs-Appellants' petition for en banc review.

CONCLUSION

Accordingly, this Court should grant Plaintiffs-Appellants' petition to hear this appeal en banc, and should affirm that Schultz properly sued Prudential for plan benefits under ERISA section 502(a)(1)(B).

November 18, 2011

Respectfully submitted,

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/s/ Anna O. Crowell
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Dated: November 18, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November 2011, I electronically filed the Brief for Amicus Curiae, Hilda L. Solis, Secretary of Labor, with the Clerk of the Court using the CM/ECF system, pursuant to Circuit Rule 25, which will send notification of such filing to all registered counsel of record.

/s/ Anna O. Crowell
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