IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-11087

MICHAEL MILOFSKY, et. al.,
Plaintiff/Appellant,

v.

AMERICAN AIRLINES, INC., et. al.,
Defendant/Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND THE PENSION RIGHTS CENTER IN SUPPORT OF PLAINTIFF/APPELLANT

Robert E. McKnight, Jr.
Counsel of Record
Murphy & McKnight, LLC
P.O. Box 30210
New Orleans, LA 70190-0210
Tel: (504) 522-1102

Jeffrey Lewis
Claire Kennedy-Wilkins
Lewis, Feinberg, Renaker & Jackson, P.C.
1330 Broadway, Suite 1800
Oakland, California 94612-2509
Tel: (510) 839-6824

Counsel for Amici Curiae
Additional Counsel Listed On Inside Cover

ADDITIONAL COUNSEL

Marissa M. Tirona
Program Director
National Employment Lawyers Association
44 Montgomery Street, Suite 2080
San Francisco, CA 94104
Tel: (415) 296-7629

John Holtz
Deputy Director
Pension Rights Center
1140 Nineteenth St., NW, Suite 602
Washington, D.C. 20036-6608
Tel: (202) 296-3776

Supplemental Certificate of Interested Persons

The undersigned counsel certifies that the following listed persons have an interest in the outcome of this case, in that they wish to file this brief as *amici curiae*. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Robert E. McKnight, Jr.
Murphy & McKnight, LLC
P.O. Box 30210
New Orleans, LA 70190-0210

Marissa M. Tirona
National Employment Lawyers Association (NELA)
44 Montgomery Street, Suite 2080
San Francisco, CA 94104

Jeffrey Lewis
Claire Kennedy-Wilkins
Lewis, Feinberg, Renaker & Jackson, P.C.
1330 Broadway, Suite 1800
Oakland, CA 94612

John Holtz
Pension Rights Center
1140 Nineteenth St., NW, Suite 602
Washington, D.C. 20036-6608

Robert E. McKnight, Jr.
Counsel of Record for *Amici Curiae*

Table of Contents

Table of Authorities

Federal Cases Page

Federal Statutes

Other Authorities

INTERESTS OF THE *AMICI*

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

The National Employment Lawyers Association ("NELA") and its 67 state and local affiliates have a membership of over 3,000 attorneys. NELA is the nation's only professional membership organization of lawyers who represent employees in labor, employment, and civil rights disputes. These employees are, for the most part, not unionized. Consequently, unlike their employers, who often participate in organizations such as the U.S. Chamber of Commerce and the National Association of Manufacturers that file *amicus* briefs on behalf of parties such as Appellees, employees represented by NELA's members do not belong to organizations that seek to advance those members' collective interests. It falls on NELA to represent them in precedent-setting litigation affecting their rights.

Accordingly, NELA has filed *amicus curiae* briefs in the Supreme Court and federal courts of appeals regarding the interpretation and application of the Employee Retirement Income Security Act ("ERISA"). *See, e.g., Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); *Central Laborers' Pension Fund v. Heinz,* 541 U.S. 739 (2004); *Egelhoff v. Egelhoff,* 532 U.S. 141 (2001); *UNUM Life Ins. Co. of Am. v. Ward,* 526 U.S. 358 (1999); and *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

PENSION RIGHTS CENTER

Established in 1976, after the enactment of ERISA, the Pension Rights Center ("PRC") is a Washington, D.C. non-profit, consumer organization that has as its mission the protection and promotion of the pension rights of workers, retirees and their families. For the past 29 years, the PRC has provided legal representation, informal assistance, and information to tens of thousands of pension plan participants and beneficiaries seeking to recover benefits and ensure that their plans are managed prudently. Like NELA, PRC has filed *amicus curiae* briefs regarding the interpretation and application of ERISA. *See, e.g., Langbecker v. Electronic Data Systems Corp.*, No. 04-41760 (5th Cir. filed 2004).

IMPORTANCE OF THE ISSUES

When Congress enacted ERISA, most Americans who were fortunate enough to be covered by retirement plans participated in defined benefit plans. In the last two decades, however, there has been a dramatic shift from defined benefit plans to defined contribution individual account plans, such as the 401(k) plan at issue in this case.[1] Most defined contribution plans today are designed to provide that employees will allocate the balances of their plan accounts among a menu of investment options

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[1] *See* Brief of *Amicus Curiae* American Association of Retired Persons in this action.

selected by a plan fiduciary and owned by the plan. In these so-called participant-directed plans, performance, and thus the ultimate amount of a participant's retirement income, depends on two factors: (1) the fiduciary's role in selecting investment options that will be made available to employees and (2) each employee's choices among those options. Investment success, then, is a shared responsibility of the plan fiduciary and the employee. If ERISA § 502(a)(2) is read to apply only when a particular percentage of participants' accounts are affected, employees' retirement security will be irreparably damaged. For example, when a fiduciary imprudently selects an investment option or manages some of the plan's assets imprudently, as alleged here, the affected employees, if only a percentage of the plan participants, would be barred from bringing suit for the loss to the plan pursuant to ERISA § 502(a)(2). These employees would be left without a remedy for the fiduciary's breach.

In enacting ERISA, Congress established rules governing the conduct of fiduciaries. Those rules, *inter alia,* require fiduciaries to act prudently and in the sole interest of plan participants and their beneficiaries. Congress also explicitly gave participants the ability to remedy breaches of those rules. Nothing in ERISA suggests that those remedies may be rendered unavailable by the decision of an employer to sponsor a participant-directed defined contribution plan. Yet the arguments made by defendants in this case and accepted by the district court and the majority in the now-vacated panel decision would have precisely that effect. They would deprive employee participants in defined contribution retirement plans of any way to remedy even the most serious lapses in fiduciary duties.

Thus, defendants' arguments and the reasoning of both the district court and the panel majority, if accepted, would have a devastating effect on the retirement security of the millions of Americans who participate in self-directed defined contribution plans, undermining the goals of NELA and the PRC to help Americans accumulate sufficient assets to enjoy their retirement years with dignity.

For these reasons, NELA and the PRC respectfully request that the Court consider their views in support of the Appellants.

SUMMARY OF ARGUMENT

ERISA § 502(a)(2) provides that a participant may bring a civil action for "appropriate relief under section 1109 [section 409]." 29 U.S.C. § 1132(a)(2). Section 409(a), in turn, requires fiduciaries to "make good to such plan *any losses* to the plan." 29 U.S.C. § 1109(a) (emphasis added). In enacting ERISA, Congress explicitly stated its intention that ERISA provide plan participants and beneficiaries with the right to effectively remedy fiduciary breaches, whether those participants were covered by defined benefit plans or defined contribution plans.

The Supreme Court has made it clear that courts are not to read into ERISA's civil enforcement provisions any limitations on the rights and remedies available to participants pursuant to those provisions. Nothing in ERISA Section 502(a)(2) or 409(a) conditions a participant's right to bring suit to remedy a plan's losses resulting from a breach of fiduciary duty on a requirement that most or all participants must be harmed by the plan's loss.

In reading such a requirement into these provisions of ERISA, the district court and the panel majority violated this clear principle of ERISA interpretation. Moreover, in concluding that plaintiffs were asserting individual claims, rather than claims for losses to the $uper $aver Plan ("the Plan"), the district court and the panel majority ignored a fundamental precept of trust law and ERISA -- that all assets are held in trust, notwithstanding that an individual's benefits are determined by his or her "account balance."

Given that participants are foreclosed from seeking monetary relief under ERISA § 502(a)(3), depriving participants of the right to bring claims under Section 502(a)(2) would effectively deprive them of relief, no matter how serious the fiduciary breach. This is contrary to Congressional intent, as stated in ERISA itself.

ARGUMENT

I. CLAIMS UNDER ERISA § 502(a)(2) ARE NOT LIMITED TO SITUATIONS IN WHICH ALL OR ANY PARTICULAR PROPORTION OF PARTICIPANTS HAVE BEEN HARMED BY A REDUCTION IN THE VALUE OF PLAN ASSETS.

The district court and a panel of this court in its now-vacated majority opinion, (Slip op.) ("the panel opinion"), concluded that Appellant Plan participants should be precluded from bringing their fiduciary breach claim under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), for the relief set forth in ERISA § 409, 29 U.S.C. § 1109, on the grounds that, *inter alia*, not all (or a substantial proportion) of Plan participants were affected by the investment loss at issue.

In so holding, the district court and the panel majority, contrary to the Supreme Court's repeated instruction, read into ERISA § 502(a) an exception that does not appear in the carefully crafted language of that provision. As even the panel decision recognized, "[the Court's] task is to apply the text" of the statute, not change it. (Slip op. at 9) (*citing Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 126 (1989)). Notwithstanding this comment, the panel majority essentially changed ERISA's text. That text does not limit actions brought pursuant to Section 502(a)(2) to instances in which every plan participant (or some indeterminate "large proportion" of them) was harmed or suffered the same harm. Rather, as discussed below, the plain language of ERISA § 409 demonstrates that Congress intended that participants may bring suit to remedy "any" losses to their plans.

A. Supreme Court Precedent Dictates that the Precise Language of Sections 502(a)(2) and 409 Must Be Followed; That Language Allows An Action to Recover "Any" Losses to the Plan and the Plan Suffered the Losses at Issue Here.

ERISA § 502(a)(2) provides that a participant may bring a civil action for "appropriate relief under section 1109 [section 409]." 29 U.S.C. § 1132(a)(2). Section 409(a), in turn, requires fiduciaries to "make good to such plan *any losses* to the plan." 29 U.S.C. § 1109(a) (emphasis added). Thus, by its terms, Section 409(a) requires fiduciaries to make good "*any losses*" to a plan, not just those losses which impact all or any particular proportion of participants.

When interpreting ERISA's civil enforcement provisions in Section 502(a), the Supreme Court has repeatedly considered the plain language of ERISA and the "evident care" with which the statute's civil enforcement provisions were crafted. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985). Without exception, the Court has concluded that the precise language of the statute must be followed.

Accordingly, the Court has been unwilling to read into ERISA any implied claims or remedies. *See Russell*, 473 U.S. at 147 (refusing to expand Section 409 to encompass relief to an individual unrelated to any plan loss). Consistent with that same principle, the Court also has been unwilling to read limiting language into Section 502(a). Thus, in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), defendants argued that because Section 502(a)(2) specifically allowed claims to remedy fiduciary breaches, such claims could not be pursued under Section 502(a)(3), 29 U.S.C. § 1132(a)(3). The Court rejected this argument because the plain language of Section 502(a)(3) allows, without limitation, suits to remedy violations of ERISA. *Id.* at 509. Similarly, in *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 239 (2000), the Court refused to limit the universe of defendants who could be sued under Section 502(a)(3) because there was no such limiting language in that section.

Moreover, nothing in the text of Section 502(a)(2) or Section 409 distinguishes between defined benefit plans, on the one hand, and defined contribution plans or any specific type of defined contribution plan (such as a defined contribution plan allowing participants to allocate their plan accounts among options selected by the plan's fiduciaries). Congress well understood the difference between defined contribution and defined benefit plans, and *explicitly* distinguished between the two types of plans in several sections of ERISA. *See* ERISA § 407, 29 U.S.C. § 1107 (limiting defined benefit plans' holdings of employer securities to 10% of their assets, but allowing defined contribution plans to hold more than that percentage under certain circumstances); ERISA § 4021(b), 29 U.S.C. § 1321(b) (excluding defined contribution plans from ERISA's plan termination provisions).

In contrast, Congress did not distinguish between defined benefit and defined contribution plans when it came to the right of participants to bring suit to remedy breaches of fiduciary duty or to obtain effective remedies for such violations, even though, by their nature, individual account plans are more likely to give rise to situations in which some, but not all, plan participants are harmed by a fiduciary breach. As a matter of statutory construction, Congress's refusal to make this distinction in Section 502(a)(2) or Section 409(a), when it made such a distinction elsewhere, warrants rejection of any such distinction here. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted).

Yet the effect of the district court and panel majority's interpretation of ERISA is to read into the statute a distinction between these two types of plans (or at least between defined benefit plans and so-called "participant-directed" defined contribution plans). In order to do so, the district court and the panel majority added a limiting condition on the "any losses to the plan" language in Section 409; namely, that all or a significant percentage of the plan's participants must be harmed by the breach of fiduciary duty in question. As discussed above, this is contrary to the dictates of the Supreme Court. Moreover, to even get to that point, the panel majority had to treat the Plan as a legal fiction despite the fact that the Plan owned the assets in question. This view is contrary to ERISA and the law of trusts on which ERISA is based.

All assets of an individual account pension plan are owned by the plan, not its participants. *See* I.R.S., *Qualification; Participants Rights to Exercise Control of Assets*, Rev. Rul. 89-52, 1989-1 C.B. 110, 1989 WL 572038 (Apr. 10, 1989). Participants do not own their accounts. *Id.* The panel opinion characterized this distinction as formalistic and gave it no significance. However, far from being a formalism, the distinction is fundamental to trust law. Indeed, it is a cardinal principle of trust law that title to trust assets is held by the trustee for the benefit of the trust beneficiaries. *See e.g.*, Loring, *A Trustee's Handbook* (Aspen Pubs., 2001) at 1 ("[T]itle [held by the trustee] and asset aggregation are the keys to unlocking the secret of the trust."); Bogert and Oaks, *Cases on the Law of Trusts,* 4th ed. (Foundation Press) at 1 ("A trust may be defined as a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another.").

Because it is a fundamental characteristic of trusts that all of their assets are held by the trustee, it follows that any loss in the value of those assets is a loss to the trust itself. The fact that in certain types of ERISA plans, such as the Plan here, participants may choose to allocate their account balances among various investment options provided by plan fiduciaries does not alter this trust law principle. Even if a plan is fully compliant with ERISA § 404(c), 29 U.S.C. § 1104(c), fiduciaries still retain responsibility to select the plan's investment options and to manage the plan assets invested in those options in accordance with ERISA's fiduciary principles, including its prudent person standard. *See In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, 284 F. Supp. 2d 511, 578 (S.D. Tex. 2003) (holding that even if a plan "does qualify as a § 404(c) plan, . . . the plan fiduciary . . . retains the duty to prudently select investment options under the plan and to oversee their performance on a continuing basis'"); *In re Worldcom, Inc. ERISA Litigation*, 263 F. Supp. 2d 745, 764 (S.D.N.Y. 2003); *In re Williams Cos. ERISA Litigation*, 271 F. Supp. 2d 1328 (N.D. Okla. 2003). A participant's "direction" constitutes merely a choice among investments selected by the fiduciaries. Thus, compliance with Section 404(c) merely relieves the fiduciary from liability for losses that may result if the participant chooses to allocate his or her account balance poorly, such as by allocating a disproportionate percentage to one option.

In short, nothing in the nature of a defined contribution plan or a "participant-directed" defined contribution plan changes the fundamental nature of the trust – the property interest is held by the trustee for the benefit of the participant. Although ERISA's terminology differs somewhat from that of the common law of trusts, the fact remains that under ERISA, no matter what type of retirement plan is involved, the plan or trust holds title to the assets -- not as a mere formalism, but because the plan fiduciaries ("trustees" at common law) are charged with the duty of managing the plan assets for the benefit of the participants and beneficiaries (jointly "beneficiaries" at common law).

The following example demonstrates this proposition. Assume that a plan provides that participants may choose to allocate portions of their account balances into a plan fund holding an individual stock chosen by the fiduciaries (e.g., the sponsoring employer's stock, as is the situation in the cases of plans sponsored by Enron, Worldcom, Dynegy, etc.) If the stock value plummets as a result of securities fraud, the plan fiduciaries likely would have the obligation to seek to recover losses on the stock by bringing a securities fraud action or by opting into a securities fraud class action brought by some other investor. The fiduciaries would do so in the name of the plan to recover the plan's losses on its purchases of the stock. If the action was to result in a settlement or judgment, the plan would be the recipient of the payment or, in the case of a class action, it would receive its proportional share of the recovery. In either case, recovery would be for the plan's losses, based on the plan's purchases of the company's stock during the class period, not on the basis of the losses of each individual participant on his or her account balance based on his or her allocations of portions of that balance to the plan's fund of that stock. The recovery would go to the plan.

Of course, the plan fiduciaries would then have the duty to allocate the plan's recovery equitably and in accordance with their fiduciary duties. Logically, such an allocation should be proportional to the participants' losses on their individual accounts. However, the fiduciaries' decision in this regard is a separate matter from their decision and duty to recover the plan's losses. Should the fiduciaries not allocate the plan's recovery proportional to the participants' losses, a participant's remedy would *not* be to bring an action asserting conversion of an asset that he *owned*, but to bring an action for breach of fiduciary duty in allocating the recovered money. Similarly, here, the potential recovery on behalf of the Plan pursuant to ERISA §§ 502(a)(2) and 409 for losses on its assets is a separate matter from the Plan fiduciaries' decision as to how to allocate those assets. It is the Plan that suffered the losses at issue in this case, notwithstanding the fact that the fiduciaries have the duty to allocate any recovery in accordance with their duties.[2]

In short, once it is understood that the Plan's ownership of the assets at issue here is no mere formalism, but a fundamental aspect of the trust nature of ERISA plans, the conclusion is inescapable that the Plan suffered a loss. Because ERISA allows an action under Section 502(a)(2) to recover "any" loss to a plan, and the Supreme Court has made it clear that courts are not to read into ERISA's enforcement provisions any limitations that are not explicit in the statutory language, Appellants here and participants in other defined contribution plans must be allowed to proceed on behalf of their plans, notwithstanding that plan fiduciaries may and should allocate any recovery among the accounts of fewer than all plan participants.

B. Nothing in the Supreme Court's *Russell* Decision Warrants Reading Any Limitation into Sections 502(a)(2) and 409.

Both the district court and the panel majority relied on language in *Russell*, 473 U.S. 134, in holding that a claim under Section 502(a)(2) must "seek to vindicate the rights or interests of the plan as a whole." (Slip op. at 5). However, no such requirement is set forth in either the text of Section 502(a)(2) or Section 409, and

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[2] Even if Appellants may have collapsed these two separate matters into one in their pleadings, this should not preclude this Court from holding that they may proceed to seek recovery for the Plan, thus leaving for another day the issue of how the Plan's recovery should be allocated among participants' accounts.

neither *Russell* nor any other authority dictates so limiting the reach of these provisions of ERISA.

First, as discussed above, Section 409 speaks only of relief "to the plan," not to the plan *as a whole*. Moreover, *Russell* and *Matassarin v. Lynch*, 174 F.3d 549, 566 (5th Cir. 1999), upon which the panel majority also relied, merely draw the distinction between claims to remedy certain types of individualized losses, on the one hand, and claims to remedy losses to a plan, on the other. They do not stand for the proposition that claims asserted under Section 502(a)(2) must seek relief that ultimately will redound to the benefit of all or some particular percentage of plan participants.

The facts in *Russell* provide a good illustration of what types of fiduciary misbehavior will harm an individual participant rather than the plan and of what type of remedy will inure to an individual rather than to a plan.[3] As explained by Chief Judge King in her dissent from the panel majority decision in this case, *Russell* dealt with a situation in which an individual sought punitive and emotional distress damages to be paid directly to her, based on a plan committee's temporary termination of her individual disability benefits. (Slip op. at 12.) She did not even allege that the plan

[3] Mrs. Russell wanted to use Section 502(a)(2) rather than Section 502(a)(1)(B) because she sought punitive and consequential damages, which were clearly not available under (a)(1)(B) but at the time might have been seen as available under (a)(2).

assets had lost value. (Slip op. at 13.) In using the phrase "the plan as a whole" and in holding that the plaintiff's claim could not be brought under Section 502(a)(2), the Supreme Court was merely distinguishing between relief sought on behalf of a plan and "extra-contractual" relief sought by an individual. The loss alleged in *Russell* was solely an individual loss and did not result in any loss to the plan's trust corpus. Here, on the other hand, Appellants seek relief that would be paid to the Plan to remedy a loss to the Plan's trust corpus, not extra-contractual individual relief.

Matassarin is similarly distinguishable. In *Matassarin*, this Court affirmed the district court's findings and held that the plaintiff could not maintain an ERISA action against plan fiduciaries based on alleged self-dealing in connection with a repurchase of shares because plaintiff's shares were segregated from the balance of the trust assets pursuant to a qualified domestic relations order. 174 F.3d at 557. As in *Russell*, the plaintiff's claim involved no loss to the plan's trust corpus and the relief sought affected only the plaintiff's individual right to benefits. In contrast, in a participant-directed defined contribution plan, such as the Plan here, there is no such segregation of plan assets. The participant "accounts" are bookkeeping entries only. Although this bookkeeping is necessary and vital to determination of the amount of a participant's benefit, it does not separate any assets from the unified corpus held in trust for the plan.

Thus, neither *Matassarin* nor *Russell* stands for the proposition that Section 409(a) contains an implied requirement that the "losses to the plan" must be losses to the plan as a whole. Indeed, *Russell* instructs courts not to imply terms in construing the statute. *See Russell*, 437 U.S. at 147.

The majority panel opinion also emphasized that the drafters of Section 502(a)(2) "were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." (Slip op. at 6) (citing *Russell*, 473 U.S. at 141). However, this is a false dichotomy that, if applied, would frustrate the stated purpose of Congress in enacting ERISA.

Section 502(a)(2) was drafted to provide for the enforcement of "fiduciary obligations related to the plan's financial integrity," in accordance with the "special congressional concern about plan asset management" reflected in Section 409. *Varity*, 516 U.S. at 511-12. *See also* Section D, below. However, as discussed above, nothing in ERISA indicates that Congress's concern about "plan asset management" stopped short of including management of the assets of "participant directed" defined contribution plans. Here, Appellants' claim arises out of Appellees' mishandling of the transfer of some of the Plan's assets; i.e., "plan asset management." In short, it is exactly the type of claim that Congress was particularly concerned with in drafting ERISA §§ 502(a)(2) and 409.

C. The Analysis of the Sixth Circuit in *Kuper v. Iovenko* and of Other Courts is Persuasive and Should Be Followed Here.

Contrary to the panel opinion's view, Appellants' reliance on *Kuper v. Iovenko,* 66 F.3d 1447 (6th Cir. 1995), is not flawed. The Sixth Circuit, in *Kuper,* and several district courts have allowed plaintiffs to proceed with claims under ERISA § 502(a)(2), notwithstanding that not all plan participants suffered harm as a result of a plan's investment losses. *See* discussion in Chief Judge King's dissent from the panel opinion, Slip op. at 17-19. *See also Musmeci v. Schwegmann Giant Super Markets,* 159 F. Supp. 2d 329, 354 (E.D. La. 2001), *aff'd in part, vacated in part, and remanded*, 332 F.3d 339 (5th Cir. 2003); *Thompson v. Avondale Industries, Inc.*, No. Civ. A. 99-3439, 2001 WL 1543497 (E.D. La. Nov. 30, 2001) (holding that plaintiffs were entitled to sue as plan participants on behalf of the ESOP under Section 502(a)(2)); *Rankin v. Rots,* 220 F.R.D. 511, 520 (E.D. Mich. 2004) (finding standing to sue because any damages for a breach of fiduciary duty would initially go to the plan, even if the damages ultimately would flow to the accounts of plan participants); *see also* Colleen E. Medill, *Stock Market Volatility and 401(k) Plans,* 34 U. Mich. J.L. Ref., 469, 538-39 (2001) ("The better judicial interpretation . . . is to view the relief as flowing to the plan in accord with section 502(a)(2), so long as the monetary award is initially allocated to each participant's plan account rather than to his personal pocketbook.").

Factually, *Kuper* is remarkably similar to the present case. *Kuper* involved a delay in a trust-to-trust transfer of assets allocated to the individual accounts of some plan participants following a corporate takeover. *Kuper,* 66 F.3d 1447. The plaintiffs brought a fiduciary breach claim in connection with a significant decline in stock value during the 18-month delay. *Id.* at 1450. In rejecting the defendants' argument that a group of ESOP participants lacked Section 502(a)(2) standing to bring a fiduciary breach claim, the Sixth Circuit distinguished between a plaintiff's attempt to recover on his own behalf and a plaintiff's attempt to have the fiduciary reimburse the plan. *Id.* at 1452-53. It concluded that because plaintiffs were seeking to have the fiduciary reimburse the plan, they could proceed with their claim notwithstanding that only some participants suffered as a result of the plan's loss. *Id.* at 1453.

The panel majority here rejected *Kuper* because it purportedly "runs afoul" of *Russell*'s "insistence" on "'benefit to the plan as a whole.'" (Slip op. at 6) (quoting *Russell*, 470 U.S. at 140). However, as explained above, contrary to the views of the district court and the panel majority, in using the "plan as a whole" language in *Russell*, the Supreme Court merely was distinguishing between a claim such as Mrs. Russell's for individualized consequential and punitive damages, on the one hand, and a plan's losses resulting from management or investment of assets owned by it, on the other.

As discussed above, nothing in the text of Section 502(a)(2) or Section 409 limits claims brought under these provisions to those which seek to recover a plan's losses under circumstances where every plan participant or a substantial majority of participants are harmed by the loss, and *Russell* does not hold otherwise. Thus, rather than being unaware of *Russell*, as the panel opinion suggested, the *Kuper* court was properly applying Section 502(a)(2), in accordance with *Russell.*

D. Limiting Relief Under Section 502(a)(2) to Situations in Which All Plan Participants are Harmed Would Preclude Participants From Obtaining Any Meaningful Relief.

The panel majority found that Appellants are not precluded from seeking relief for the harm alleged because they have standing to bring suit under Section 502(a)(3), which provides that plan participants may seek "appropriate equitable relief" for acts that violate any term of ERISA or the plan. (Slip op. at 8-9.) However, limiting the relief available to Appellants and other ERISA plan participants to that available under Section 502(a)(3) would effectively sound the death knell for the ability of defined contribution plan participants to remedy breaches of fiduciary duty.

Following several decisions of the Supreme Court,[5] lower courts have, for the most part, interpreted Section 502(a)(3) so as to preclude any form of monetary relief that would make participants whole for losses resulting from breaches of fiduciary duty. For example, in *Farr v. U.S. West*, 151 F.3d 908 (9th Cir. 2000), the court held that fiduciaries breached their duties by deliberately withholding information from a group of plan participants about the tax consequences of distributions of their benefits; however, the court also held that the participants had no remedy under Section 502(a)(3) for the losses they suffered as a result of the breach. *See also, e.g., Glencoe v. Teachers Ins. and Annuity Ass'n of Am.*, 232 F.3d 887 (4th Cir. 2000); *Rogers v. Hartford Life & Accident Ins. Co.*, 167 F.3d 933 (5th Cir. 1999); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1335 (5th Cir. 1992).[6]

As documented in other briefs to the Court in this case, businesses have increasingly replaced defined benefit plans with defined contribution plans. *See* Employee Participation in Defined Benefit and Defined Contribution Plans, 1985-2000, available at, http://www.bls.gov/opub/cwc/cm20030325tb01.htm. Frequently, these plans, as did the Plan here, provide that participants must direct the allocation of plan

[5] *See Great West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993).

[6] These *amici* do not agree with the limitation that these and other courts have placed on relief under Section 502(a)(3); however, they are the law at this point.

assets among options chosen by plan fiduciaries. Since participants' accounts then will be allocated among different investment options, fiduciary breaches regarding the offering or management of any particular option may not affect all or even almost all plan participants.[7]

Thus, any requirement that all or any particular percentage of a plan's participants must be harmed before relief under Section 502(a)(2) is available will have widespread implications for the retirement security of many Americans.

Injunctive and non-monetary equitable relief pursuant to ERISA § 502(a)(3) will not restore the retirement savings of hundreds of thousands, if not millions, of American workers.

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[7] Additionally, reading a limitation into claims that can be brought pursuant to Section 502(a)(2) might not only affect those cases involving fiduciary mismanagement of a particular investment option in a participant-directed defined contribution plan. For example, in some defined benefit plans, the plan purchases annuity contracts from commercial insurers for retired participants. Would such a practice effectively shield a fiduciary from financial liability if the fiduciary breaches its statutory duties with respect to other plan assets, since a loss in such other assets would not affect all plan participants? Arguably yes, if Section 502(a)(2) is limited to situations where all plan participants are similarly affected. Additionally, does the fact that the Pension Benefit Guaranty Corporation fully insurers the benefits of some but not all participants in a defined benefit plan mean that a fiduciary breach resulting in massive investment loss is not a loss to the plan as a whole, since only some participants will have their benefits reduced if the plan becomes insolvent? Again, arguably yes, if Section 502(a)(2) is limited to situations where all plan participants are similarly affected.

Congress expressed its purposes in enacting ERISA in the statute's very first section. Those express purposes included providing "adequate safeguards . . . with respect to the operation of . . . plans" and "establishing standards of conduct . . . for fiduciaries" of plans. ERISA § 2(a), (b), 29 U.S.C. § 1001(a), (b). The Supreme Court has stated:

> Indeed, when Congress took up the subject of fiduciary responsibility under ERISA, it concentrated on fiduciaries' financial decisions, focusing on pension plans, the difficulty many retirees faced in getting the payments they expected, and the financial mismanagement that had too often deprived employees of their benefits.

Pegram v. Herdrich, 530 U.S. 211, 232 (2000) (citation omitted). In the words of this Court, "[e]stablishment of standards of fiduciary responsibility in the pension plan context was one of the primary objectives of ERISA." *Donovan v. Cunningham*, 716 F.2d 1455, 1463 (5th Cir. 1983).

In addition to its objective of establishing fiduciary standards, Congress sought to provide participants with broad enforcement rights. *See* ERISA § 2(b), 29 U.S.C. § 1001(b) (stating that policy of ERISA is to protect the interests of plan participants "by providing for appropriate remedies, sanctions, and ready access to the Federal courts.") Thus, in *Varity*, the Supreme Court characterized ERISA's civil enforcement provisions as intended to "'provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA].'" 516 U.S. at 512-513 (citations omitted).

Restricting workers from access to monetary relief for injury under Section 502(a)(2) would eliminate meaningful enforcement of ERISA's fiduciary standards for defined contribution plans, and thereby directly contradict Congress's stated purposes in passing ERISA.

II. APPELLANTS NEED NOT EXHAUST ANY REMEDIES BEFORE BRINGING THEIR FIDUCIARY BREACH CLAIMS.

The Fifth Circuit has held that a plaintiff must exhaust all administrative remedies before bringing a benefits claim in federal court. *Chailland v. Brown & Root, Inc.*, 45 F.3d 947, 950 (5th Cir. 1995); *Denton v. First Nat'l Bank of Waco, Tex.,* 765 F.2d 1295, 1301-02 (5th Cir. 1985). However, the Fifth Circuit has never held that a plan participant must exhaust administrative remedies before bringing an ERISA breach of fiduciary duty claim.

In *Simmons v. Willcox*, 911 F.2d 1077, 1080 (5th Cir. 1990), a case relied upon by the majority here, the plaintiff sought individual relief in the form of information about the status of her own plan account. A panel of this Court held that the plaintiff's "fiduciary breach" claim was actually a disguised benefits claim and it concluded that the plaintiff could not avoid exhaustion required under Section 503 by mislabeling the claim as a fiduciary breach claim. *Id.* at 1081.

Amici are aware of no authority that requires exhaustion of remedies before filing a breach of fiduciary duty claim related to plan asset management or investment. The rationale for requiring exhaustion of benefit and benefit-related claims – to allow plan fiduciaries to apply their knowledge of the plan's language and its interpretation to determining an individual's rights to benefits[8] – simply does not apply where, as here, plaintiffs have not requested the distribution of any benefits but, rather, have brought a claim for damages to the Plan based on violation of a statutory provision. This pure breach of fiduciary duty claim for damages to the Plan is wholly different from a claim for individual relief, and is easily distinguishable from *Simmons*.

[8] *See Chailland,* 45 F.3d at 950.

CONCLUSION

Amici respectfully contend that the district court and panel majority erred in concluding that a claim may be brought pursuant to ERISA §§ 502(a)(2) and 409 only when every participant has been harmed by a plan's losses on its assets. Regardless of how any recovery pursuant to those provisions is ultimately allocated by the Plan's fiduciaries, it is the Plan that has suffered the loss. As such, these damages provide relief for "losses to the plan," within the terms of ERISA § 409(a), 29 U.S.C. § 1109(a). Nothing more is required.

Dated: August 11, 2005

RESPECTFULLY SUBMITTED,

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Robert E. McKnight, Jr.
Counsel of Record
Murphy & McKnight, LLC
P.O. Box 30210
New Orleans, LA 70190-0210
Tel: (504) 522-1102

Marissa M. Tirona
Program Director
National Employment Lawyers Association
44 Montgomery Street, Suite 2080
San Francisco, CA 94104
Tel: (415) 296-7629

Jeffrey Lewis
Claire Kennedy-Wilkins
Lewis, Feinberg, Renaker & Jackson, P.C.
1330 Broadway, Suite 1800
Oakland, California 94612-2509
Tel: (510) 839-6824

John Holtz
Deputy Director
Pension Rights Center
1140 Nineteenth St., NW, Suite 602
Washington, D.C. 20036-6608
Tel: (202) 296-3776

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH

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Robert E. McKnight, Jr.
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I hereby certify that on August 11, 2005 true and correct copies of the **BRIEF OF AMICI CURIAE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND THE PENSION RIGHTS CENTER IN SUPPORT OF PLAINTIFF/APPELLANT** were served this day on all counsel of record by Federal Express overnight mail to:

Edward P. Perrin, Jr.
Jennifer R. Poe
Hallet & Perrin, P.C.
2001 Bryan Street
Dallas, TX 75201
Tel: (214) 922-4132

Robert E. Sheeder
T. David Cowart
Jason E. Winford
Jenkins & Gilchrist, P.C.
1445 Ross Avenue, Suite 3200
Dallas, TX 75202-2799
Tel: (214) 855-4371

Jani K. Rachelson
Bruce S. Levine
Elizabeth O'Leary
Cohen, Weiss & Simon
330 W 42nd Street, 25th Floor
New York, NY 10036-6976
Tel: (212) 356-0221

Hal K. Gillespie
Gillespie, Rozen, Watsky, Motley & Jones
3402 Oak Grove Avenue, Suite 200
Dallas, TX 75204
Tel: (214) 720-2009

Karen L. Handorf
Elizabeth Hopkins
U.S. Department of Labor
200 Constitution Avenue NW
Suite N-4611
Frances Perkins Building
Washington, D.C. 20210
Tel: (202) 219-4600

Mary Ellen Signorille
American Association of Retired Persons
601 E Street NW
Washington, D.C. 20049
Tel: (202) 434-2060

This the 11th day of August, 2005.

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