No. 16-5942

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELOISE HITCHCOCK, et al.,

Plaintiffs-Appellants,

v.

CUMBERLAND UNIVERSITY 403(b) DC PLAN, et al.,

Defendants-Appellees.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PLAINTIFFS-APPELLANTS FOR REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

Federal Cases-(continued):

Federal Cases-(continued):

Federal Statutes:

Internal Revenue Code:

Employee Retirement Income Security Act of 1974, (Title I)
as amended, 29 U.S.C. § 1001 et seq.:

Federal Statutes-(continued):

Miscellaneous:

QUESTIONS PRESENTED

The Secretary of Labor ("Secretary") will address the following questions:

1. Whether the district court erred in requiring administrative exhaustion for plaintiffs' claim that an amendment to a pension plan violates the anti-cutback provision in section 204(g) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1054(g), which bars amendments to pension plans that reduce a participant's accrued pension benefit or reduce or eliminate certain protected benefits under the plan.

2. Whether the district court erred in treating a fiduciary breach claim that fiduciaries administered the pension plan in violation of the anti-cutback provision as a "repackaged" individual claim for benefits.

STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

The Secretary files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

The Secretary has primary regulatory and enforcement authority for Title I of ERISA, see 29 U.S.C. §§ 1132, 1135, which contains ERISA section 204(g), a statutory protection against amendments to employee benefit plans that reduce accrued pension benefits or reduce or eliminate protected benefits, described as the

"anti-cutback" provision.[1] Pursuant to this authority, the Secretary's interests include promoting uniformity of law, protecting plan participants and beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit plan assets. Sec'y of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc). The Secretary also depends on ERISA plan participants to bring their own actions to complement the Secretary's enforcement capabilities. See id. Because private enforcement actions play an important role in ensuring proper administration of employee benefits plans and compliance with ERISA's statutory requirements, the Secretary has a substantial interest in ensuring that courts do not unduly restrict participants' access to federal court by requiring exhaustion of internal review procedures designed for determination of individual benefit claims before participants may bring suit in federal court to ensure their plan is compliant with statutory requirements.

STATEMENT OF THE CASE

Plaintiffs Eloise Hitchcock, Sheryl Kae, and Robert Grubb (collectively, the "plaintiffs"), former employees of Cumberland University and beneficiaries under

[1] Section 411(d)(6) of the Internal Revenue Code of 1986 ("Code") contains rules that are parallel to the rules of section 204(g) of ERISA. Under section 101 of Reorganization Plan No. 4 of 1978 (43 Fed. Reg. 47713), the Secretary of the Treasury has interpretive jurisdiction over these provisions for purposes of ERISA as well as for purposes of the Code. Accordingly, Treasury regulations issued under section 411(d)(6) of the Code apply also for purposes of section 204(g) of ERISA. See 29 C.F.R. sections 1.411(d)-3 and 1.411(d)-4.

the Cumberland University 403(b) DC Plan, an employer-sponsored defined contribution pension plan (the "Plan"),[2] brought a class action lawsuit against the Plan, Cumberland University (the Plan sponsor and Plan administrator), and the plan fiduciaries as Does 1–10.[3] See Hitchcock v. Cumberland Univ. 403(b) DC Plan, No. 3:15-CV-01215, 2016 WL 3197767, at *1 (M.D. Tenn. June 9, 2016) (unpublished); Compl., RE 1, Page ID # 1.

The plaintiffs' claims are based on an amendment that Cumberland University made to the Plan, which retroactively eliminated a provision of the Plan requiring the employer to provide a fixed level of additional contributions to the Plan matching elective salary deferral contributions. Since January 1, 2009, the Plan had provided for an annual employer matching contribution of up to 5% of a Plan participant's wages if the participant contributed up to 5% of his or her own wages to the Plan. See Hitchcock, 2016 WL 3197767, at *1. However, in 2013 and 2014, Cumberland University—allegedly without notice to the Plan participants—did not make matching contributions to participant accounts. Id. On

[2] A defined contribution pension plan "provide[s] for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account[.]" 29 U.S.C. § 1002(34).

[3] This is an appeal of the district court's grant of the defendants' motion to dismiss. The factual background is therefore based on the district court's June 9, 2016 Memorandum Opinion granting the defendants' motion to dismiss, and the plaintiffs' complaint and attached exhibits.

October 9, 2014, Cumberland University then amended the Plan to replace the 5% match with a discretionary match, in which Cumberland University would determine the amount of the employer matching contribution on a yearly basis, and made the amendment retroactively effective as of January 1, 2013. Id. Thereafter, Cumberland University announced that it would not provide employer matching for the 2013–14 fiscal year, and on May 29, 2014, Cumberland University announced that it would not provide employer matching for the 2014–15 fiscal year.[4] Id.

On November 12, 2015, the plaintiffs filed a class action lawsuit pursuant to section 502(a) of ERISA, 29 U.S.C. § 1132(a), alleging four counts. Count I alleges wrongful denial of benefits under section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), based on the University's failure to make the 5% match in Plan years 2013 and 2014. Compl. ¶¶ 33–42, RE 1, Page ID ## 7–8. Count II alleges an anti-cutback claim under section 204(g) of ERISA, 29 U.S.C. § 1054(g), based on elimination of a protected benefit—the requirement for the employer to provide a 5% employer matching contribution for Plan years 2013 and 2014. Compl. ¶¶

[4] The district court treated the defendants' motion to dismiss as a motion for judgment on the pleadings and took "all the factual allegations in the complaint as true." Hitchcock, 2016 WL 3197767, at *1 (citing Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009)). Accordingly, the Secretary does not take a position on the ultimate merits of the plaintiffs' claims, but assumes for the purposes of this appeal that the plaintiffs' complaint and attached exhibits accurately describe the Plan amendment and the Plan terms.

43–50, RE 1, Page ID ## 8–9. Count III alleges failure to provide notice of the Plan amendment and the amount of the discretionary match prior to the start of the 2013, 2014, and 2015 Plan years. Compl. ¶¶ 51–59, RE 1, Page ID ## 9–11. Finally, Count IV alleges breach of fiduciary duties in violation of section 404 of ERISA, 29 U.S.C. § 1104, specifically failure to act with loyalty, care, and for the exclusive purpose of providing benefits to the Plan participants, and failure to administer the Plan in compliance with ERISA. Compl. ¶¶ 60–69, RE 1, Page ID # 11.

Counts I, II, and IV were brought on behalf of the "Benefits Class," i.e., all participants in or beneficiaries of the Plan who were eligible for an employer matching contribution at any time during the 2013 or 2014 Plan years. See Hitchcock, 2016 WL 3197767, at *1; Compl. ¶ 44, RE 1, Page ID # 8. Counts III and IV were brought on behalf of the "Notice Class," i.e., all participants in or beneficiaries of the Plan at any time during the 2013, 2014, or 2015 Plan years. See Hitchcock, 2016 WL 3197767, at *1; Compl. ¶ 52, RE 1, Page ID # 9.

The plaintiffs' complaint seeks various forms of relief including an injunction requiring the defendants to make matching contributions of up to 5% for Plan years 2013, 2014, and 2015;[5] an award of benefits owed under the terms of

[5] The request for an injunction requiring the defendants to make a matching contribution for Plan year 2015 is connected to Count III, the plaintiffs' notice claim. Compare Compl. ¶ 48, RE 1, Page ID # 9 (stating that anti-cutback claim

the pre-amendment Plan; an award to the Plan in the amount of the losses sustained by the Plan; and an award of investment earnings on any monetary award. Compl., RE 1, Page ID # 12.

The defendants moved to dismiss the complaint arguing that all of the plaintiffs' claims must be dismissed for failure to exhaust their administrative remedies. See Def. Cumberland Univ. 403(b) DC Plan & Cumberland Univ.'s Mem. Law in Supp. Mot. Dismiss, RE 14, Page ID ## 124–26. On June 9, 2016, the district court issued a memorandum opinion dismissing the plaintiffs' complaint in its entirety and granting judgment on the pleadings to the defendants pursuant to Federal Rule of Civil Procedure 12(c). Hitchcock, 2016 WL 3197767, at *2–3. The district court dismissed the plaintiffs' benefit claim on the grounds that the plaintiffs did not exhaust their administrative remedies or allege that exhausting their administrative remedies would be futile. Id. at *2–3. It also summarily dismissed the plaintiffs' anti-cutback claim for failure to exhaust administrative remedies without analyzing whether anti-cutback or other statutory claims under ERISA are subject to administrative exhaustion. Id. at *3. Next, the district court dismissed the plaintiffs' notice claim, stating that the plaintiffs had not responded to the defendants' argument that the claim was not pleaded with particularity. Id.

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concerns Plan years 2013 and 2014) with Compl. ¶ 54, RE 1, Page ID # 10 (stating that notice claim concerns Plan years 2013, 2014, and 2015). The Secretary takes no position on the plaintiffs' notice claim or the relief sought thereunder.

The district court alternatively held that the plaintiffs' notice claim failed to state a claim upon which relief can be granted. Id. Finally, the district court dismissed the plaintiffs' fiduciary breach claim. Basing its conclusion on the fact that the plaintiffs asked for damages in the amount of the 5% match that the Plan had retroactively eliminated in its amendment, the district court held that the plaintiffs' fiduciary breach claim was a repackaging of a benefits claim, so administrative exhaustion was therefore required. Id.

Plaintiffs Eloise Hitchcock and Sheryl Kae timely filed a notice of appeal of Counts II (anti-cutback), III (failure to provide notice), and IV (fiduciary breach) on June 22, 2016. Notice of Appeal, RE 48, Page ID # 838. They did not appeal Count I, denial of benefits. Id.

SUMMARY OF ARGUMENT

1. The district court erred in dismissing the plaintiffs' anti-cutback claim for failure to exhaust administrative remedies. A majority of circuits have held that administrative exhaustion is not required for statutory claims, as opposed to claims for benefits under the terms of a plan, for which fiduciaries must provide an administrative claims procedure. The claim here asserts a statutory violation under ERISA's anti-cutback provision, which prohibits amendments to a plan that decrease an accrued benefit or reduce or eliminate other protected benefits. See 29 U.S.C. § 1054(g). The plaintiffs here request that the court order the defendants to

restore losses resulting from their actions to retroactively reduce promised employer contributions and associated benefits that participants had already earned through their labor. The plaintiffs seek an order vindicating their statutory right to not have their accrued benefits cut, preventing the fiduciaries from honoring an allegedly invalid Plan amendment that violated that statutory right, and restoring to the Plan the losses resulting from the employer's failure to make promised contributions to the Plan. Such statutory claims are the proper province of the federal courts in actions brought under section 502(a)(2) – (3) of ERISA, 29 U.S.C. § 1132(a)(2) – (3), and, as the majority of circuits have held, plan participants need not exhaust any administrative procedure before filing suit.

2. The district court also erred in dismissing the plaintiffs' fiduciary breach claim on the basis that it was a repackaged claim for individual benefits and thus subject to administrative exhaustion. Contrary to the district court's assumption, the plaintiffs' fiduciary breach claim based on an alleged violation of the anti-cutback provision is not a repackaged claim for individual benefits merely because a portion of the remedy sought may be in the form of monetary relief. Plaintiffs here seek monetary relief that would restore the losses to the Plan caused by the employer's failure to make promised contributions based on a retroactive amendment of the Plan that allegedly violated a statutory provision prohibiting cutbacks in accrued benefits. A claim to recover sums that were never contributed

to the Plan in the first place is not properly characterized as a mere claim for benefits. Overall, the district court's improper holding frustrates Congress's intent to provide plan participants "ready access" to the federal courts to protect their plans. 29 U.S.C. § 1001(b).

ARGUMENT

I. ERISA Does Not Require a Plaintiff to Exhaust Internal Plan Review Procedures Before Bringing Suit Under ERISA's Anti-Cutback Provision

Without analysis, the district court dismissed the plaintiffs' anti-cutback claim for failure to exhaust administrative remedies. The district court's dismissal was in error, because ERISA does not require administrative exhaustion of statutory claims such as the plaintiffs' anti-cutback claim. While a district court's application of exhaustion principles to the facts of an individual case is reviewed for abuse of discretion, see Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 418 (6th Cir. 1998), this Court should "review de novo the applicability of exhaustion principles, because it is a question of law." Harrow v. Prudential Ins. Co. of Am., 279 F.3d 244, 248 (3d Cir. 2002).

Under ERISA, a plan participant may bring a civil action (1) in state or federal district court for "benefits due" under the terms of an employee benefit plan pursuant to section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and (2) in federal district court to remedy any violation of ERISA's statutory requirements pursuant

to section 502(a)(2) – (3), 29 U.S.C. § 1132(a)(2) – (3).[6] The federal circuits have unanimously held that an ERISA plan participant must exhaust administrative remedies under the plan before seeking federal court review of adverse benefit claims brought pursuant to section 502(a)(1)(B). While ERISA does not expressly require exhaustion of administrative remedies before a participant may bring a benefit claim suit in federal court, the exhaustion requirement in benefit claims cases is based, in part, on section 503 of ERISA, 29 U.S.C. § 1133, which requires plans to have claims procedures that afford participants "full and fair review" of their benefit claims. See, e.g., Fallick, 162 F.3d at 418 (stating that "due to ERISA's provision for the administrative review of benefits," federal circuits have read an administrative exhaustion requirement into the statute). There is no such obligation with regard to administrative review of any other requirement imposed under the statute.

The plaintiffs' anti-cutback claim (Count II) alleges that the Plan sponsor amended the Plan in a manner prohibited by ERISA section 204(g). Section

[6] Section 502(a)(2) expressly authorizes a civil action "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409." Section 409(a), 29 U.S.C. § 1109(a), in turn, makes fiduciaries liable for breach of fiduciary duties imposed by the statute and specifies the remedies available against them. Section 502(a)(3) authorizes a plan participant, beneficiary or fiduciary to sue for injunctive or other "appropriate equitable relief" to redress statutory violations and to enforce the terms of the plan. Section 502(e) gives federal district courts exclusive jurisdiction over ERISA claims, except for claims for benefits under section 502(a)(1)(B), over which state courts are granted concurrent jurisdiction. 29 U.S.C. § 1132(e).

204(g) states that an "accrued benefit of a participant under a plan may not be decreased by an amendment of the plan," absent exceptions not relevant in this case, and also provides generally that early retirement benefits, retirement-type subsidies, and optional forms of benefits may not be eliminated or reduced by plan amendment. ERISA's anti-cutback provision is a "substantive legal requirement[]" imposed on employee pension plans and those responsible for designing and amending them to prevent the loss of accrued benefits and provide certain minimum protections. Cent. Laborers' Pension Fund v. Heinz, 541 U.S. 739, 746 (2004). In short, the anti-cutback provision is a flat statutory prohibition against employers amending their pension plans to decrease or eliminate retirement benefits that have already accrued to the participant. See Whisman v. Robbins, 55 F.3d 1140, 1147 (6th Cir. 1995). Thus, a court reviewing an anti-cutback claim must decide whether a plan amendment violates this statutory prohibition, a question reviewed de novo. See Fallin v. Commonwealth Indus., Inc., 695 F.3d 512, 516 (6th Cir. 2012).

The federal circuits are split as to whether claims alleging certain violations of statutory provisions of ERISA are subject to administrative exhaustion. A clear majority of circuits have concluded that statutory claims for either fiduciary breaches or for violations of ERISA's anti-retaliation provision, 29 U.S.C. § 1140,[7]

[7] ERISA section 510, 29 U.S.C. § 1140, states in part:

do not require administrative exhaustion. Analyzing either a claim for a fiduciary breach or a violation of ERISA's anti-retaliation provision, 29 U.S.C. § 1140, the Third, Fourth, Fifth, Ninth, Tenth, and D.C. Circuits have all "held exhaustion is not required when plaintiffs seek to enforce statutory ERISA rights rather than contractual rights created by the terms of a benefit plan." Stephens v. Pension Ben. Guar. Corp., 755 F.3d 959, 965 (D.C. Cir. 2014) (emphasis in original) (discussing fiduciary breach claims) (citing Zipf v. AT & T, 799 F.2d 889, 891–94 (3d Cir. 1986) (retaliation claim); Smith v. Sydnor, 184 F.3d 356, 364–65 (4th Cir. 1999) (fiduciary breach claim); Galvan v. SBC Pension Ben. Plan, 204 F. App'x 335, 338–39 (5th Cir. Aug. 23, 2006) (fiduciary breach claim); Amaro v. Cont'l Can Co., 724 F.2d 747, 751–52 (9th Cir. 1984) (retaliation claim); Held v. Mfrs. Hanover Leasing Corp., 912 F.2d 1197, 1204–05 (10th Cir. 1990) (retaliation claim)). Two circuits have held to the contrary and require exhaustion. Lindemann v. Mobil Oil Corp., 79 F.3d 647, 649–50 (7th Cir. 1996) (retaliation claim); Bickley v. Caremark RX, Inc., 461 F.3d 1325, 1328 (11th Cir. 2006)

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan [or ERISA], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or ERISA].

(holding "exhaustion requirement applies equally to claims for benefits and claims for violation of ERISA itself").

District courts in circuits that reject administrative exhaustion for statutory claims, such as fiduciary breaches and violations of ERISA's anti-retaliation provision, have also rejected an exhaustion requirement for anti-cutback claims. E.g. Traylor v. Avnet, Inc., No. CV-08-0918-PHX-FJM, 2009 WL 383594, at *5 (D. Ariz. Feb. 13, 2009) (unpublished) ("Plaintiffs' anti-cutback claim is not brought to enforce the terms of the Plan, but instead seeks to enforce rights granted by ERISA. Such claims do not require exhaustion."); see also Dooley v. Saxton, No. 3:12-CV-01207-PK, 2012 WL 7660087, at *4 (D. Or. Dec. 12, 2012) (unpublished), adopted by 2013 WL 865975 (D. Or. Mar. 8, 2013) (unpublished) (stating administrative exhaustion was not required for anti-cutback claim); Pikas v. Williams Cos., Inc., 822 F. Supp. 2d 1163, 1166 (N.D. Okla. 2011) (same); Pender v. Bank of Am. Corp., No. 3:05-CV-238-MU, 2010 WL 1434297, at *4 (W.D.N.C. Apr. 7, 2010) (unpublished) (same).

This Court has "not yet decided whether a beneficiary must exhaust administrative remedies prior to bringing claims based on statutory rights[.]" Hill v. Blue Cross & Blue Shield of Mich., 409 F.3d 710, 717 (6th Cir. 2005). Instead, this Court has reached a similar result by resolving the issue of administrative exhaustion for various statutory claims in prior cases "on the grounds that

exhaustion would be futile or that the fiduciary-duty claim is merely a repackaged claim for individual benefits which the beneficiary must administratively exhaust before filing suit." Id.; see also Durand v. Hanover Ins. Grp., Inc., 560 F.3d 436, 440 (6th Cir. 2009). As we discuss in the next section, the anti-cutback claim in this case is not merely a repackaged benefits claim. Moreover, while exhaustion may well be futile in this and other cases, rather than requiring plaintiffs to meet the high burden of establishing futility,[8] this Court should follow the majority of circuits to hold that there is no administrative exhaustion requirement for statutory claims, such as the claim asserted here that defendants violated the statutory anti-cutback provision.

[8] Futility is a high burden which some plaintiffs may not be able to meet, regardless of the merits of their claim. See Hill, 409 F.3d at 719 (quoting Fallick, 162 F.3d at 419) ("A plaintiff must show that it is certain that his claim will be denied on appeal, not merely that he doubts that an appeal will result in a different decision."). A futility analysis can also lead to disparate results for the same challenge to a plan's legality. See Cottillion v. United Ref. Co., 781 F.3d 47, 54 (3d Cir. 2015) (avoiding the question of whether administrative exhaustion applied to an anti-cutback claim alleged to be a repackaged benefits claim by finding no abuse of discretion where district court excused exhaustion for anti-cutback claim based on futility, and noting that relevant factors can include "whether plaintiff diligently pursued administrative relief" and "whether plaintiff acted reasonably in seeking immediate judicial review" (internal citation omitted)). Finally, district courts in this Circuit have noted that excuse on grounds of futility is not available in every instance, and that the question of whether administrative exhaustion applies to statutory claims cannot always be avoided. See Moeckel v. Caremark RX Inc., 385 F. Supp. 2d 668, 680 (M.D. Tenn. 2005) ("[N]one of the routes that courts in the Sixth Circuit have used to avoid the question of whether ERISA requires administrative exhaustion with respect to claims to enforce statutory rights is available to this court.").

The plaintiffs' anti-cutback claim alleges a statutory violation and not a section 502(a)(1)(B) claim for benefits. Moreover, the plaintiffs here do not simply seek the recovery of promised benefits from the Plan as in a section 502(a)(1)(B) claim, but rather seek to remedy the employer's failure to make contributions to the Plan in the first place as a result of the illegal amendment. Unlike a typical benefits claim, the anti-cutback claim here does not merely seek an order compelling the Plan to pay promised benefits to plan participants. Instead, the claim seeks to have the amendment set aside because it violates the requirements of ERISA and accordingly to compel the defendants to provide the additional contributions that were "wrongfully withheld" from the Plan pursuant to the pre-amendment Plan document. See Rybarczyk v. TRW, Inc., 235 F.3d 975, 987 (6th Cir. 2000) (discussing the contributions to the plan needed to make the plan whole for an anti-cutback claim); see also Costantino v. TRW, Inc., 13 F.3d 969, 974–75 (6th Cir. 1994) (describing an anti-cutback claim as a claim directed to the "legality" of the amended plan) (emphasis in original). The dispute here ultimately concerns the participants' statutory right to protection against plan amendments that improperly decrease accrued benefits or reduce or eliminate protected rights and defendants' obligation to provide additional contributions to the Plan.

Administrative exhaustion should not be required for the anti-cutback claim here because participants should have direct resort to federal court when they assert an infringement of ERISA's statutory protections. 29 U.S.C. § 1001(b) ("It is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by providing for appropriate remedies, sanctions, and ready access to the Federal courts"). "Unlike a claim for benefits under a plan, which implicates the expertise of a plan fiduciary, adjudication of a claim for a violation of an ERISA statutory provision involves the interpretation and application of a federal statute, which is within the expertise of the judiciary." Smith, 184 F.3d at 365. While courts may accord deference to plan administrators because they may have expertise in interpreting plan terms, thereby justifying administrative exhaustion, no similar justification applies to questions of statutory interpretation. As the D.C. Circuit reasoned in Stephens, the most recent circuit case declining to apply an administrative exhaustion requirement to statutory claims, Congress intended "courts to develop a body of federal substantive law that would address issues involving rights and obligations under pension plans" and intended "plan administrators [to] have primary responsibility for adjudicating benefits claims." 755 F.3d at 966. Accordingly, while "claimants [must] exhaust internal remedies when they assert rights granted by a benefit plan," Congress intended "direct resort to the federal

courts where claimants assert statutory rights—a practice that better promotes Congress's intent to create minimum terms and conditions for pension plans." Id.

This rationale is supported by the fact that no provision of ERISA expressly or implicitly requires exhaustion of plan procedures before a participant may bring suit in federal court alleging a violation of a statutory right, and many administrative claims procedures are not designed to accommodate such claims. See Stephens, 755 F.3d at 966 ("ERISA's legislative history and . . . Section 503 of ERISA [do] not require pension plans to create internal remedial procedures to evaluate statutory claims."). Congress only required a claims procedure for benefit claims in section 503. Administrative exhaustion of a claim of statutory violation, including a violation of the anti-cutback provision as alleged here, is not required by the statute.

Indeed, this Court previously rejected an exhaustion requirement for a section 510 claim based on the fact that administrative exhaustion was designed for denial of benefit claims. In Richards v. General Motors Corporation, 991 F.2d 1227 (6th Cir. 1993), the Court held that a plaintiff's retaliatory discharge claim was not precluded based on his failure to exhaust administrative remedies because it was based directly on a statutory provision, ERISA section 510, "as an interference with a right properly his under the [ERISA] plan." Id. at 1235. The Court reasoned that the exhaustion of the plan's review procedures designed for

denial of benefit claims were inapplicable.[9] Id. Furthermore, applying this rationale, district courts within the Sixth Circuit have rejected an exhaustion requirement for statutory claims. See Anderson v. Young Touchstone Co., 735 F. Supp. 2d 831, 836 (W.D. Tenn. 2010) ("[C]ourts have generally held that exhaustion of internal plan remedies is not required where an employee alleges a violation of a statutory provision of ERISA") (emphasis in original) (citing Richards and other district courts within this Circuit); Moeckel, 385 F. Supp. 2d at 681 ("[T]here is authority in this Circuit for ruling that the administrative exhaustion doctrine will not bar claims to enforce ERISA statutory rights, such as breach of fiduciary duty claims.") (citing Richards).

Like other statutory "minimum terms and conditions for pension plans," Stephens, 755 F.3d at 966, the judiciary is responsible for interpreting the defendants' statutory obligation to provide additional contributions to the Plan as originally promised. The Supreme Court has stated that the anti-cutback provision

[9] Similarly, this dispute concerns a statutory interpretation of ERISA's anti-cutback provision for an allegedly illegal Plan amendment, not a dispute about a Plan interpretation. The defendants do not identify any claims procedure designed to address such statutory claims. Indeed, while the defendants assert that the plaintiffs' anti-cutback statutory claims are subject to administrative exhaustion, see Def. Cumberland Univ. 403(b) DC Plan & Cumberland Univ.'s Mem. Law in Supp. Mot. Dismiss, RE 14, Page ID # 126, the defendants refer to the plaintiffs' failure to avail themselves of the Summary Plan Description's claims procedure for benefit claims. See id. at 122–23 (quoting Compl. Ex. 3, RE 1, Page ID #67).

is "crucial" to ERISA's "object of protecting employees' justified expectations of receiving the benefits their employers promise them." Heinz, 541 U.S. at 743–44. In Durand, this Court addressed the application of the administrative exhaustion requirement for a claim questioning the "legality of [defendants'] methodology for calculating lump-sum distributions pursuant to their defined-benefit pension plan." 560 F.3d at 437. This Court explained that "[a]llowing the administrative process to go forward would thus do little to vindicate the purposes of the exhaustion requirement," because the plan administrator is "not a government agency but a regulated body under ERISA; it has neither discretion to determine the legality of its own Plan nor special expertise in interpreting the statute." Id. The same broad reasons the Court endorsed in Durand to exempt the plaintiff from exhausting her administrative remedies for a statutory claim clearly support this Court's application of the clear majority position of the circuit courts to this case. Accordingly, administrative exhaustion is not a requirement for the statutory claim asserted here.

II. Plaintiffs' Fiduciary Breach Claim Was Not a "Repackaged" 502(a)(1)(B) Claim for Benefits

The plaintiffs alleged several grounds for their fiduciary breach claim. See Compl. ¶ 67, RE 1, Page ID # 11 (alleging failure to act with loyalty, care, and for the exclusive purpose of providing benefits to the Plan participants, and failure to

administer the Plan in compliance with ERISA as grounds for fiduciary breach). A violation of the anti-cutback provision may itself give rise to a fiduciary breach claim here, because the fiduciaries blindly accepted the allegedly illegal Plan amendment to the detriment of the Plan participants in violation of their fiduciary duties of care and loyalty. See Compl. ¶ 64, RE 1, Page ID # 11 (referencing fiduciary duties defined in 29 U.S.C. §1104(a)); see also Thornton v. Graphic Commc'ns Conference of Int'l Bhd. of Teamsters Supplemental Ret. & Disability Fund, 566 F.3d 597, 617, 617 n.20 (6th Cir. 2009) (discussing fiduciary breach claim based on anti-cutback claim and ERISA section 404(a)(1)(D)). Under ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), a fiduciary must discharge his or her duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter," which covers the anti-cutback provision. 29 U.S.C. § 1104(a)(1)(D). As alleged, the Plan amendment was inconsistent with ERISA, and should not have been followed by Plan fiduciaries that owed duties of care and undivided loyalty to the Plan participants who were injured by the amendment. Plaintiffs, for example, allege that the defendant Plan fiduciaries knew about the employer's failure to provide promised contributions before the illegal Plan amendment yet did nothing to alert the Plan participants or otherwise address the failure to contribute and prevent the

illegal Plan amendment from taking effect. See Compl. ¶ 17–25, 67, RE 1, Page ID ## 4–5, 12. Instead, the Plan fiduciaries allegedly knew the employer diverted those contributions for other expenses. See Compl. ¶ 17, RE 1, Page ID # 4.

The district court erred in dismissing the plaintiffs' fiduciary breach claim on the basis that it was a repackaged claim for individual benefits and thus subject to administrative exhaustion. The district court concluded that the plaintiffs' complaint supported the argument that its fiduciary breach claim was a repackaged claim for individual benefits because "it asks for damages in the amount of the five percent matching that the Plan eliminated in its amendment." Hitchcock, 2016 WL 3197767, at *3. However, the plaintiffs' complaint does not merely seek recovery of promised benefits from the Plan, but rather, as discussed above, seeks redress of the obligation to make the contributions necessary to fund the Plan benefits.

The remedies for the fiduciary breach claim here have a statutory basis in ERISA sections 502(a)(2), 29 U.S.C. § 1132(a)(2), and 409(a), 29 U.S.C. § 1109(a),[10] for recovering "any losses" to a Plan caused by the fiduciary breach. See 29 U.S.C. § 1109(a); Compl., RE 1, Page ID # 12 (seeking "investment earnings on any monetary award"); cf. Tullis v. UMB Bank, N.A., 515 F.3d 673,

[10] ERISA section 409(a) states in part that plan fiduciaries who breach a fiduciary duty "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary[.]" 29 U.S.C. § 1109(a).

680 (6th Cir. 2008) ("[I]f we accept the truth of the plaintiffs' allegations, the plan in which they had invested their retirement savings would have had greater assets but for the defendant's actions"). Pursuant to ERISA section 502(a)(3), the plaintiffs can also plead, in the alternative, equitable relief against the fiduciaries (and the employer) for these additional contributions to the Plan without transforming the fiduciary breach claim into a repackaged claim for individual benefits, even though these additions ultimately will augment the benefits to the individual participants. See, e.g., CIGNA v. Amara, 563 U.S. 421, 441 (2011) (permitting equitable remedies under section 502(a)(3) to compel defendants to "pay to . . . beneficiaries money owed them under the plan as reformed" and holding that "the fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief."); Fed. R. Civ. P. 8(a)(3), 8(d)(2) (permitting the joinder of alternative claims in a single action); see also New York State Psychiatric Ass'n, Inc. v. UnitedHealth Grp., 798 F.3d 125, 134 (2d Cir. 2015) (permitting pleadings in the alternative for ERISA causes of action).

For the reasons stated above in the prior section, plaintiffs' fiduciary breach claim should not be subject to administrative exhaustion. See supra pp. 11– 18. Participants should not be required to administratively exhaust claims for fiduciary breaches because fiduciary obligations are based in the ERISA statute and should

not turn on a fiduciary's own interpretation of the plan or statute. Nor should the courts rely upon the very people who face personal liability for breach of ERISA to adopt "full and fair" review procedures for review of the claims against them. Under such circumstances, the participant cannot obtain a fair review of his fiduciary breach claim nor can he obtain a meaningful remedy through exhaustion of administrative procedures. See Smith, 184 F.3d at 365 n.9 ("By allowing a plaintiff to bring a claim for breach of fiduciary duty in federal court before exhausting administrative remedies, we recognize the general principle . . . that we do not give full credence to an ERISA fiduciary's assessment of his own allegedly wrongful conduct.").

CONCLUSION

For the reasons stated above, the Secretary respectfully requests that the Court reverse the district court's dismissal of the plaintiffs' anti-cutback claim (Count II) and fiduciary breach claim (Count IV).

Dated: September 2, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 32(a)(7), I certify that this amicus brief contains 5,730 words.

Dated: September 2, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this day, September 2, 2016, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PLAINTIFFS-APPELLANTS AND URGING REVERSAL ON THE ISSUES ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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DESIGNATION OF DISTRICT COURT DOCUMENTS

(CASE NO. 3:15-CV-01215)

Description	**Record Entry Number**	**Page ID Range**
Complaint and Exhibits	1	1–74
Defendants' Motion to Dismiss	13	118–120
Defendants' Memorandum of Law in Support of its Motion to Dismiss	14	121–160
Entry of Judgment	46	831
Memorandum Opinion	47	832–37
Notice of Appeal	48	838–39