No. 11-2181

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELENA M. DAVID, et al.,
Plaintiffs-Appellants,

v.

J. STEELE ALPHIN, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of North Carolina

BRIEF OF THE ACTING SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC OR PANEL REHEARING

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THE DEPARTMENT'S INTEREST IN REHEARING

In their petition for panel rehearing and rehearing en banc, Petitioners seek review of the panel's opinion concerning Article III standing and the statute of limitations under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq. The panel held that plan participants had no Article III standing to pursue claims against the fiduciaries of an "overfunded" defined benefit plan, even if the fiduciaries' conduct resulted in multimillion dollar losses to the trust holding the assets that fund participants' retirement benefits. Additionally, the panel concluded that even if current plan fiduciaries persist in maintaining imprudent, overpriced, and statutorily prohibited funds on the menu of a 401(k) plan, the plan's participants cannot bring suit if the funds were initially included more than six years beforehand and had always been unlawful in the same way they are currently unlawful. The upshot of these decisions is to significantly curtail the ability of participants to protect vital interests in their own retirement security and to permit fiduciary breaches resulting in large losses to go unchecked.

ERISA protects "the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligations for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). ERISA protects participants, in substantial part, by giving them specific rights and interests in their retirement plans, including the right to have plan fiduciaries hold the assets in trust and manage those assets with prudence, loyalty, and solely in their interest. 29 U.S.C. §§ 1103, 1104. Participants also have the right to sue plan fiduciaries who breach a statutory or plan duty owed to the plan or themselves. Id. §§ 1132(a)(2), (3).

Despite participants' statutorily-protected interest in the trust funds held on their behalf, however, the panel's opinion deprives participants from pursuing appropriate remedies in many circumstances. Under the logic of the panel's Article III opinion, the fiduciary of an overfunded plan could knowingly breach fiduciary duties and engage in prohibited transactions – even steal plan assets for personal use – and plan participants would have no recourse. Similarly, the panel's opinion on the statute of limitations effectively provides that once a fiduciary unlawfully maintains a particular fund as a plan investment for more than six years, the fiduciary has license to continue violating the law from then on, so long as the illegality is "based on attributes of the funds that existed at the time of their initial selection." David v. Alphin, 2013 WL 142072, at *11-12 (4th Cir. 2013).

The Department of Labor enforces and interprets ERISA and, accordingly, is directly affected by the panel's opinion on the statute of limitations. Moreover, the Department has limited resources, and private actions necessarily account for the vast majority of ERISA enforcement. Thus, the Department has a strong interest in reversal of the panel's opinion. As explained below and in the Petition, rehearing or en banc rehearing is appropriate under Federal Rule of Appellate Procedure 35(a)(1) and (b)(1)(A) because the holdings conflict with Supreme Court and Fourth Circuit precedent, as well as under Federal Rule of Appellate Procedure 35(a)(2) and (b)(1)(B) because the issues are of exceptional importance and the panel's resolution of them undermines ERISA's remedial purposes and are in tension with the decisions of other circuits.

ARGUMENT

I. PETITIONERS HAVE ARTICLE III STANDING BASED ON THE INVASION OF THEIR STATUTORY RIGHT TO PROPER MANAGEMENT OF TRUST ASSETS HELD ON THEIR BEHALF

The panel erred by concluding that Petitioners had not sustained an "injury in fact" sufficient to confer Article III standing. Petitioners alleged millions of dollars of losses to money held in trust on their behalf as a direct result of the fiduciary mismanagement of plan assets in violation of ERISA. The invasion of their statutory right to proper management of plan assets gave them a concrete, personal stake in the case and, hence, the "injury in fact" required for Article III standing.

Article III requires a party seeking to invoke federal court jurisdiction to demonstrate an "injury in fact," a causal relationship between the injury and the challenged conduct, and likelihood of redressibility. Lujan v. Defenders of

Wildlife, 504 U.S. 555, 560 (1992). Only "injury in fact" with respect to the Pension Plan (the defined benefit plan) is an issue in this case. Cf. Alphin, 2013 WL 142072, at *4 (Petitioners "have statutory standing to assert claims against [the Defendants] on behalf of the Pension Plan under ERISA § 502(a)(2)."). "Injury in fact" exists when: (1) there is "an invasion of a legally protected interest;" (2) the "invasion" is "concrete and particularized"; and (3) the "invasion" is "actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560.

ERISA gives employee benefit plan participants legally protected interests in their pension plan and requires fiduciaries to hold plan assets in trust for the exclusive benefit of the plan's participants. 29 U.S.C. §§ 1103, 1104. Petitioners here had the right to have these trust assets managed "solely in [their] interest" with prudence, loyalty, and no self-dealing. Id. §§ 1104, 1106. When the fiduciaries breached those duties, Petitioners had the right to bring a civil action holding fiduciaries liable for the alleged breaches of ERISA's prohibited transaction, prudence, and loyalty provisions and to recover the Plan's resulting losses (allegedly millions of dollars in losses stemming from the impermissible inclusion of overpriced funds affiliated with the plan sponsor). Id. § 1132(a)(2); see Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 143 n.10 (1985). The panel's ruling jeopardizes these fundamental rights and protections.

The Supreme Court has long recognized that the "injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" Lujan, 504 U.S. at 578 (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975), and Linda R.S. v. Richard D., 410 U.S. 614, 617, n.3 (1973)); see also Massachusetts v. EPA, 549 U.S. 497, 516 (2007) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," so long as it "identifie[s] the injury it seeks to vindicate and relate[s] the injury to the class of persons entitled to bring suit.").[1] The case that best illustrates this principle is Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), where the Court considered whether "testers" who pose as renters or purchasers of real estate for the purpose of collecting evidence of "unlawful steering practices" had Article III standing when they were falsely told that particular housing was unavailable. Id. at 373. The Court explained that section 804(d) of the Fair Housing Act "conferred on all 'persons' a legal right to truthful information about available housing." Id. Because an Article III injury can exist "solely" by virtue of "'statutes creating legal rights,'" and the "tester" has "suffered an injury in precisely the form the statute was intended to guard against,"

[1] Accord Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982); Sierra Club v. Morton, 405 U.S. 727, 732 & n.3 (1972) ("where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue,' Flast v. Cohen, 392 U.S. 83,100 (1968), is one within the power of Congress to determine."); see Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212, (1972) (White, J., concurring).

id., the Court held that a tester who "alleged injury to her statutorily created right to truthful housing information" had Article III standing, even if the tester never intended to rent or purchase the real estate. Id. at 374.

In its seminal decision on constitutional standing, this Court, sitting en banc, recognized that this "invasion of a statutory right" principle is "well established." Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 156 (4th Cir. 2000) (en banc). Congress in the Clean Water Act legislated "to the full extent of Article III in conferring standing" on "any person with 'an interest which is or may be adversely affected.'" Id. at 162 (citation omitted). The impairments to the individual plaintiff's aesthetic and recreational uses of an allegedly toxic lake were "precisely those types of injuries that Congress intended to prevent by enacting the [Act]." Id. at 160. Accordingly, the Court found the "injury of fact" required for Article III "plainly demonstrated," id. at 156, and distinguishable from the "general grievance" cases like Lujan where the plaintiffs had only an abstract, speculative interest in the subject matter of their claims. Id. at 156, 159.

Here, like the Supreme Court in Havens Realty, the panel should have concluded that the plaintiffs have standing. Under ERISA, Congress has "identif[ied] the injury it seeks to vindicate [i.e., losses to the plan from a fiduciary breach, 29 U.S.C. § 1109] and relate[d] the injury to the class of persons entitled to bring suit [i.e., participants and beneficiaries, fiduciaries, and the Secretary, id. §

1132(a)(2)]." Massachusetts, 549 U.S. at 516. Congress purposefully required plan fiduciaries to hold the assets in trust for the exclusive benefit of participants, thereby creating a beneficial interest in the trust that is correlative to the plan trustee's fiduciary duties. 29 U.S.C. §§ 1103, 1104; see Terry v. SunTrust Banks, Inc., 2012 WL 2511066, at *4 (4th Cir. 2012) (Davis, J.) ("When a trust has been created, the beneficiary remains the 'equitable owner of the trust property'") (citation omitted). Even if the Pension Plan remained overfunded, all the plan assets continued to be held in trust for the benefit of plan participants and beneficiaries, and the fiduciary duties Appellees allegedly violated are owed to the Plan on their behalf to secure those assets and the integrity of the fiducaries' administration of them. Thus, when Congress gave statutory standing to the participants to recover plan losses and other "appropriate relief," 29 U.S.C. § 1132(a)(2), it limited the scope of potential plaintiffs to those individuals with a "personal stake in a dispute to render judicial resolution appropriate." Friends of the Earth, 204 F.3d at 153. No more is needed to establish the injury-in-fact required for Article III standing.

Indeed, Petitioners allege "precisely those types of injuries that Congress intended to prevent by enacting [ERISA]." Id. at 160. In alleging millions of dollars of losses to the Plan they depend upon for the defined benefit (i.e., contractually promised) portion of their pensions, Petitioners satisfy all justiciability requirements for a "case or controversy" and present the court with "a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," id. at 153-54, which is "concrete and particularized," not "conjectural or hypothetical." Lujan, 504 U.S. at 560.

If there were any reason for doubt on this score, the panel needed to look only at traditional trust law to satisfy itself that trust beneficiaries have always had standing to sue for fiduciary breaches in similar circumstances. The Supreme Court has advised that legal history is often "well nigh conclusive" when resolving whether there is a "case[] and controvers[y] of the sort traditionally amenable to, and resolved by, the judicial process.'" Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 774, 777 (2000) (citation omitted).[2]

[2] Vermont Agency decided that a qui tam relator has constitutional standing not only because of the historical roots of the False Claims Act, but also because "the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." Id. at 773; id. at 774 (concluding that "the United States' injury in fact suffices to confer standing on respondent"). Vermont Agency's treatment of statutory assignments demonstrates that the panel erred in rejecting two other arguments for Article III standing: that the injury to the Pension Plan sufficed to confer standing and that the Supreme Court's conclusion that standing could be predicated upon a contractual assignment in Sprint Commc'ns Co. v. APCC Serv., Inc., 554 U.S. 269 (2008), applied with equal force to a statutory assignment of rights (i.e., ERISA's assignment to plan participants of the right to bring claims for plan losses). The panel also mistakenly asserted that the interests of Petitioners and the Pension Plan were misaligned because the Plan will bear the costs of the litigation. Alphin, 2013 WL 142072, at *7. Rather, the parties bear these costs under ERISA. See 29 U.S.C. §§ 1110 (prohibition on exculpatory clauses), 1132(g)(1) (attorney's fees and costs).

Significantly, the Court recently affirmed that "[e]quity suffers not a right to be without a remedy" and the injury from an ERISA violation may come from "the loss of a right protected by ERISA or its trust-law antecedents." Cigna Corp. v. Amara, 131 S.Ct. 1866, 1879, 1881 (2011). Under the common law of trusts, the invasion of the right to proper trust management without self-dealing would have supported a lawsuit (and Article III standing if litigated in federal court) even in the absence of an injury; and the same is true under ERISA.

In particular, the Supreme Court long ago recognized a common law "no further inquiry" rule, which provides that a trustee is per se in breach of fiduciary duty if he engages in self-dealing without advance approval. Michoud v. Girod, 45 U.S. (4 How.) 503, 553, 557, 559 (1846); accord e.g., Magruder v. Drury, 235 U.S. 106, 118-120 (1914); Woods v. City Nat'l Bank & Trust Co. of Chi., 312 U.S. 262, 267-268 (1941); see also George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 543, at 217-69, § 543(P), at 382-83 (2d ed. 1993); Restatement (Third) of Trusts § 78 cmt. d (2007); Mark L. Ascher, et al., Scott and Ascher on Trusts § 17.2, at 1077-1136 (5th ed. 2007). These cases and the trust law treatises make clear that Petitioners would have had standing to assert a claim based on self-dealing, as alleged here, even if they suffered no loss.

The Seventh Circuit recently affirmed the contemporary relevance of the common law of trusts in resolving questions of Article III standing. In Scanlan v.

Eisenberg, 669 F.3d 838 (7th Cir. 2012), the court held that even though the trust corpus was sufficient to fund the payments required by the terms of the trust (i.e., the $800 million trust was "overfunded"), it was sufficient for Article III standing purposes that the plaintiff alleged that the fiduciary breaches had diminished the value of the trust. Id. at 843 ("[I]t is from that equitable interest [in the trust] that [the plaintiff] acquires standing to enforce Trusts.").

> [Plaintiff] has a legally protected interest in Trusts' corpus and in the proper administration of that corpus. Her claims . . . protect that interest and redress her injury by seeking to remove the Trustee, restore the Trusts' corpus, and disgorge attorneys' fees. [Plaintiff's] injury, therefore is not "too abstract." Nor is the relief she seeks too speculative.

Id. at 844, 846.

Without acknowledging these precedents and antecedents, however, the panel summarily rejected the "invasion of a statutory right" basis for standing in two short, conclusory sentences: "this theory of Article III standing is a non-starter as it conflates statutory standing with constitutional standing. As noted *supra*, these requirements are distinct; we have subject matter jurisdiction over ERISA claims only where the appellants have both statutory *and* constitutional standing." Alphin, 2013 WL 142072, at *9. This ipse dixit, however, is simply wrong. There is no conflation of statutory and constitutional standing here, just as there was not in Havens Realty, Friends of the Earth, and Scanlan and the other common law "no further inquiry" cases.

The panel's decision is also in tension with decisions of at least six other circuits holding that the prohibitions contained in Section 406 of ERISA, which were allegedly violated here, are per se violations, for which lack of harm is not relevant because Congress sought to categorically bar transactions with a high potential for the loss of plan assets. Nat'l Sec. Sys., Inc. v. Iola, 700 F.3d 65, 94 & n.24 (3d Cir. 2012); Chao v. Hall Holding Co., 285 F.3d 415, 439 (6th Cir. 2002); Patelco Credit Union v. Sahni, 262 F.3d 897, 911 (9th Cir. 2001); Etter v. J. Pease Const. Co., Inc., 963 F.2d 1005, 1010 (7th Cir. 1992); Lowen v. Tower Asset Mgmt, Inc., 829 F.2d 1209, 1213 (2d Cir. 1987); Donovan v. Cunningham, 716 F.2d 1455, 1464-65 (5th Cir. 1983). These decisions assumed constitutional standing and their holdings correctly recognized that Congress expected participants would have such standing to allege prohibited transactions regardless of whether they individually experienced pecuniary harm.

Additionally, while the "invasion of a statutory right" basis for standing requires no showing of harm beyond the deprivation of a right to which the plaintiff is entitled, the fact remains that Petitioners alleged multi-million dollar losses to the Pension Plan. From Rameses II (Ozymandias) to Lehman Brothers, the historical landscape is littered with "colossal [w]reck[s]" who at one time were considered too big or clever to collapse. Percy B. Shelley, "Ozymandias," http//www.poetryfoundation.org/learning/guide/238972#poem. Certainly, this has been true of once well-funded pension plans of all sizes. See PBGC Amicus Br. at 13-20 (Dkt. 45). Even assuming the panel's supposition that losses to the Pension Plan threatened Petitioner's retirement security not at all, its decision will be applied in every case involving a defined benefit plan with a current funding surplus, however small or fleeting. Rehearing is warranted to forestall that consequence.

II. THE PANEL'S STATUTE OF LIMITATIONS DECISION WRONGLY IMMUNIZES FIDUCIARIES FROM LIABILITY FOR IMPRUDENCE OCCURRING WITHIN THE LIMITATIONS PERIOD

The panel's dismissal on statute of limitations grounds of Petitioners' claims alleging a failure to monitor and remove imprudent and disloyal investment options in the 401(k) Plan seriously weakens ERISA's fiduciary standards. The ruling is incompatible with the Fourth Circuit's prior statements that, under ERISA, the "generally recognized duty of a Plan fiduciary . . . includes that of investigating and reviewing investment options for an ERISA plan's assets," Plasterers' Local Union No. 96 Pension Plan v. Pepper, 663 F.3d 210, 216 & n.8 (4th Cir. 2011), and that fiduciaries of defined benefit plans "must exercise prudence in selecting and retaining available investment options." DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 418 (4th Cir. 2010) (emphasis added). Fiduciary duties thus do not stop with the initial selection, or even six years thereafter. Absent a material change in the circumstances surrounding an unlawful investment, the panel's opinion reads these previously recognized duties out of the statute.

Whether or not an investment was imprudent six years ago based on the same or similar concerns, the current fiduciaries still have a present duty under existing circumstances to exercise prudence and act loyally. ERISA's six-year statute of limitations, 29 U.S.C. §1113(1), only bars claims that are based on losses and breaches flowing from fiduciary decisions and plan investments that occurred outside the limitations period. It does not give fiduciaries immunity from liability or a perpetual license to do nothing about the current imprudence of an investment option so long as no material change in circumstances intervenes.

Textually, nothing in ERISA exempts a fiduciary (or successor fiduciary) from the obligation to be prudent right now based on his failure to be prudent more than six years ago. Disregarding ERISA's plain language, the panel effectively created a federal common law exception where none is permitted. See Mertens v. Hewitt Associates, 508 U.S. 248, 259 (1993) (citation omitted) ("[t]he authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute"); cf. Russell, 473 U.S. at 146 ("assumption of inadvertent omission is . . . especially suspect" given ERISA's "interlocking, interrelated, and interdependent remedial scheme"); see generally City of Milwaukee v. Illinois, 451 U.S. 304, 314 (1981) (creating federal common law appropriate only when "federal questions . . . cannot be answered from federal statutes alone").

The decision is also difficult to reconcile with decisions of the Second and Seventh Circuits finding that the failure to act prudently within the limitations period, despite similar conduct outside the period, precluded a statute of limitations defense. Morrissey v. Curran, 567 F.2d 546, 549 n.9 (2d Cir. 1977) (recognizing actionable fiduciary breach claim for failure to divest plan of challenged investment even if investment's initial selection immune from liability); Martin v. Consultant & Adm'rs, Inc., 966 F.2d 1078, 1087-88 (7th Cir. 1992) (recognizing actionable fiduciary breach claim for 1987 bidding procedure where same procedure was ongoing since 1984). With specified exceptions not relevant to this case, breaches of fiduciary duty are actionable so long as "the last action" constituting part of the breach or violation, or "the latest date on which the fiduciary could have cured the breach or violation" occurred within six years of the action being commenced. 29 U.S.C. § 1113(1). Thus, a claim alleging that an investment option has been unlawfully maintained in the fund during the last six years prior to suit is not stale under the statute, even if similar violations previously occurred that are no longer actionable.

Finally, the panel's decision has a number of irrational consequences that do not comport with ERISA or the above-cited case law. For example, it forecloses suits not only by participants who were in the plan at the time of the initial imprudent selection, but also new participants whose accounts are currently being harmed by the current fiduciaries' failure to monitor and remove imprudent fund options. Similarly, the decision permits a newly appointed fiduciary to disregard his fiduciary duties of prudence or loyalty regarding investments that have remained relatively static for at least six years. Nor are the adverse consequences limited to defined contribution plans. Taking the panel's analysis of Article III standing and the six-year time-bar together, plaintiffs could lack standing for six or more years if the plan has remained "overfunded" while plan assets are being imprudently invested and causing losses to the plan, yet have their suit dismissed on statute of limitations grounds if the imprudence and losses continue into the subsequent period when the plan is "underfunded." Rehearing should be granted and the decision overturned to prevent such improper denial of "ready access to the Federal courts" from becoming commonplace in this Circuit. 29 U.S.C. § 1001(b).

CONCLUSION

For the foregoing reasons, Petitioners' petition for panel rehearing or rehearing en banc should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2013, service and notification of the foregoing filing was effected electronically using the CM/ECF system.

/s/ Stephen A. Silverman
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CERTIFICATE OF COMPLIANCE & VIRUS CHECK

Pursuant to Fed. R. App. P. 32(a)(5)-(6), and 40(b), I hereby certify that the Brief for the Secretary of Labor is proportionally spaced in 14-point type and within the allowable page limit.

I further certify that a virus scan was peformed in the Brief using McAfee, and that no viruses were detected.

/s/ Stephen A. Silverman
STEPHEN A. SILVERMAN

Dated: February 28, 2013