No. 08-1952

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RANDAL E. MCCULLOUGH,
Plaintiff-Appellant,

v.

AEGON USA, INC., ET AL.,
Defendants-Appellees.

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

On Appeal from the United States District Court
for the Northern District of Iowa – Cedar Rapids

DEBORAH GREENFIELD
Acting Deputy Solicitor

TIMOTHY D. HAUSER
Associate Solicitor, Plan
Benefits Security Division

ELIZABETH HOPKINS
Counsel for Appellate and
Special Litigation

ROBYN M. SWANSON
Trial Attorney

U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
P.O. Box 1914
Washington, D.C. 20013
202-693-5803
202-693-5610 (FAX)

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STATEMENT PURSUANT TO RULES 29 AND 35 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Petitioner Randall McCullough seeks en banc reconsideration and reversal of the panel decision in this case. Relying on this Court's decision in Harley v. Minn. Mining and Mfg. Co., 284 F.3d 901 (8th Cir. 2002), the panel affirmed the dismissal of the petitioner's case, holding that a participant in a fully funded defined benefit pension plan who alleges that fiduciary breaches caused losses to his plan does not have standing to sue under Section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), and cannot establish injury in fact for purposes of Article III of the Constitution, unless he can show that the remaining pool of assets will be inadequate to pay for the plan's outstanding liabilities. The Secretary of Labor, who has primary authority for enforcing and administering Title I of ERISA, 29 U.S.C. §§ 1002(13), 1136(b), disagrees and files this brief in support of the rehearing en banc.

En banc rehearing is appropriate under Fed. R. App. P. 35(b)(1)(A) because this decision is in significant tension with Supreme Court decisions construing ERISA section 502(a)(2), including Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985), and because it conflicts with decisions of the Supreme Court broadly construing Article III standing, most notably, Sprint Communications Co. v. APCC Services, Inc., 128 S. Ct. 2531 (2008). The decision is also of exceptional importance under Fed. R. App. P. Fed. R. App. P. 35(a)(2) and (b)(1)(B) because it

undermines the remedial purposes of the statute by, among other things, improperly placing a substantial burden on the Secretary to police defined benefit plans in the Eighth Circuit. These significant issues deserve the attention of the full court and the case should be reheard en banc. See Western Pac. Ry. Corp. v. Western Pac. Ry. Co., 345 U.S. 247, 262-63 (1953).

ARGUMENT

I. THE PANEL'S CONCLUSION THAT PETITIONER LACKS STATUTORY STANDING TO SUE IS CONTRADICTED BY PLAIN STATUTORY LANGUAGE AND SUPREME COURT PRECEDENT

The panel, relying on this Court's decision in Harley, held that ERISA section 502(a)(2) "does not permit a participant in a defined-benefit plan to bring suit claiming liability under § 1109 for alleged breaches of fiduciary duties when the plan is overfunded." McCullough v. Aegon USA Inc., 2009 WL 3575518, at *2 (8th Cir. Nov. 9, 2009). The plain language of section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), however, grants to "the Secretary, or [] a participant, beneficiary, or fiduciary" the right to sue for "appropriate relief under § 409." Moreover, ERISA broadly defines a participant as "any employee or former employee of an employer, or any member or former member of an employee organization who is or may become eligible to receive a benefit of any type," 29 U.S.C. § 1002(7), but beyond this definition, does not place any restrictions on the

types of participants who may bring suit under section 502(a) or limit litigation to under-funded plans. Thus, the statute simply and expressly allows participants to bring suit against breaching fiduciaries for appropriate relief under section 409.

As Judge Bye noted in dissent, Harley did not identify any statutory language that even arguably supported its holding that participants in overfunded defined benefit plans lack standing.[1] 2009 WL 3575518, at *6. The panel in this case suggested that such participants are not seeking "appropriate relief" under 29 U.S.C. §1132(a)(2). Id. at *2. But the reference to "appropriate relief" in that section by its terms cross-references section 409, which makes clear that "appropriate" relief includes restoration of "any losses" to a plan "resulting from each" breach of "any" fiduciary obligation under ERISA, without limitation based upon who brings suit or whether a plan is overfunded, 29 U.S.C. § 1109(a). Cf. LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020, 1029 (2008) (Thomas, J. concurring) ("Congress' repeated use of the word 'any' in § 409(a) clarifies that the key factor is whether the alleged losses can be said to be losses 'to the plan'").

For these reasons, the Supreme Court long ago recognized in Russell that 502(a)(2) suits are on behalf of the plan and assert only plan injuries, not individual

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[1] It is for this reason that Judge Bye in his dissent stated that"[t]he notion that Harley turns on a statutory holding is dubious at best." McCullough, 2009 WL 3575518, at *6.

ones, McCullough, 2009 WL 3575518, at *9 (Judge Bye in dissent citing Russell, 473 U.S. at 141; Conley v. Pitney Bowes, 176 F.3d 1044, 1047 (8th Cir. 1999)).[2] Moreover, because "the statute plainly and unambiguously permits" an action by plan participants and beneficiaries to recover plan losses, this Court should "'address the Article III question head-on.'" 2009 WL 3575518, at *9 (citation omitted).

II. THE DECISION CONFLICTS WITH THE SUPREME COURT'S CONSTRUCTION OF ARTICLE III STANDING IN SPRINT

The panel's erroneous statutory reading in this case, like the Court's decision in Harley, was primarily motivated by "constitutional avoidance," 2009 WL 3575518, at *5, based on the concern that a participant in a fully funded defined benefit plan could not show the necessary "injury in fact" even if the plan had suffered losses from a fiduciary breach. Harley, 284 F.3d at 906. This concern is

[2] Likewise, there is no support for the panel's suggestion that injunctive relief is unavailable under section 502(a)(2), at least where a plan is overfunded, an issue not addressed in Harley. Section 409(a) expressly provides for "equitable" relief, and there is no precedent that holds that this does not encompass injunctions. Cf. Mertens v. Hewitt Associates, 508 U.S. 248 (1993) (holding that the term "equitable relief" in section 502(a)(3) of ERISA, "refer[s] to those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)") (emphasis added). The Eighth Circuit's decision, therefore, is in tension with the decisions of numerous circuits that have held that plan participants seeking injunctive relief for violations of ERISA are not required to show individual harm to have standing. See Loren v. Blue Cross & Blue Shield of Michigan, 505 F.3d 598 (6th Cir. 2007); Horvath v. Keystone Health Plan E., Inc., 333 F.3d 450 (3d Cir. 2003).

misplaced. McCullough's injury for purposes of Article III standing can be understood to stem from the invasion of his statutorily-created right to have his pension plan operated in accordance with ERISA's fiduciary and other requirements, and to have its assets managed prudently and loyally. Financial Institutions Retirement Fund v. Office of Thrift Supervision, 964 F.2d 142, 147-48 (2d Cir. 1992) (citing Warth v. Seldin, 422 U.S. 490 (1975), for the proposition that "the crucial issue" was "whether the intervening employee-participants have pleaded a violation of their ERISA-created statutory rights sufficient to satisfy Article III's injury requirement," and concluding that they had done so because "section 1132 essentially empowers beneficiaries to bring a civil action to redress any violation of the statute's fiduciary requirements"); but cf. Kendall v. Employees Retirement Plan, 561 F.3d 112, 121 (2d Cir. 2009) (finding no statutory standing and distinguishing Financial Institutions because the plaintiffs there, as in this case, "could point to an identifiable and quantifiable pool of assets to which they had colorable claims"). If the plan is not operated in compliance with these rules and standards, sections 502(a)(2) and 409(a) authorize participants to sue to recover any resulting losses to the plan.

Thus, the allegation that the Plan in which McCullough is a participant suffered losses as a result of the fiduciary breaches is sufficient to establish standing as both a statutory matter and under Article III. The "injury in fact"

requirement is met by plausibly alleging losses to the Plan, since 502(a)(2) suits may be brought in a representative capacity by plan participants such as McCullough. Russell, 473 U.S. at 142 n. 9 (the fact that 502(a)(2) allows the Secretary, plan participants, beneficiaries and fiduciaries to bring suit is "indicative of Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole," because "the common interest shared by all four classes is in the financial integrity of the plan"). And, as Judge Bye noted, the reasoning of the panel to the contrary conflicts with the Supreme Court's recent decision in Sprint, which explained that "an assignee can sue based on his assignor's injury," 128 S. Ct. at 2542 (citing Vermont Agency Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 777-78 (2000)), even where the relief will not run to the party bringing suit as when "Trustees bring suit to benefit their trusts." Sprint, 128 S. Ct. at 2543. Just as trustees have the right to vindicate the interests of their trusts, so too ERISA participants and beneficiaries are statutorily empowered to sue under ERISA to protect these interests as well.

The panel concluded that Sprint is distinguishable because (a) it involved an assignment of a claim and there was no assignment in this case, and (b) it relied on historical recognition of an assignee's ability to sue, and there is no comparable historical recognition of a participant's ability to sue on behalf of a plan.

McCullough, 2009 WL 3575518, at *4. As Judge Bye notes in his dissent, however, "the fact [that ERISA section 502(a)(2)] contains no assignment of the right to recover is irrelevant." 2009 WL 3575518, at *9. Judge Bye correctly observes that "Sprint makes clear that the 'assignment' which mattered in Vermont Agency was the assignment of the right to prosecute, not the right to recover." McCullough, 2009 WL 3575518, at *8 (emphasis supplied). The assignees in Sprint and the plan participants in this case and in Harley are thus analogous for purposes of standing. For "[a]lthough an assignee's right to prosecute another's claim derives from contract, while an ERISA plan participant's right to prosecute a plan's claim derives from statute," "the standing of the party with the right to prosecute the claim turns not on whether they themselves suffered an injury, but on whether the party holding the right-to-recover 'strand' has alleged a concrete injury which can be redressed by the lawsuit." Id. McCullough "has Article III standing to bring a claim arising from the Plan's injuries so long as he possesses the right to prosecute the Plan's claim pursuant to [ERISA section 502(a)(2)]." 2009 WL 3575518, at *8. The deciding factor is not the historical recognition of such claims, but rather that ERISA section 502(a)(2) statutorily assigns the prosecution of the plan's claim to plan participants and beneficiaries. 2009 WL 3575518, at *8-9 (citing Russell).[3]

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[3] In any event, there is historical support for beneficiaries being empowered to sue

Moreover, even if McCullough were required to make a showing of economic injury (either to the plan or its participants), he has done so by alleging that the defined benefit plan in which he participates suffered a loss by, among other things, paying excessive fees. For purposes of constitutional standing, it is enough to show that there is a likelihood of injury, even if the injury is likely to be only an indirect or minimal one. For example, in Clinton v. City of New York, 524 U.S. 417 (1998), plaintiffs were potential purchasers of potato processing plants who argued that they were injured by a veto of a provision that would have given favorable tax treatment to sellers of potato processing plants. The Supreme Court held that they had standing, stating that "[b]y depriving them of their statutory bargaining chip, the [veto] inflicted a sufficient likelihood of economic injury to establish standing." Id. at 432.

Here, McCullough alleged that the Plan, in which he has a current financial interest, lost money as a result of the alleged fiduciary breach. He has a concrete interest in seeing to it that the value of his defined pension benefits – which can be

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trustees even when it is not clear that the beneficiaries will directly benefit. See Restatement (Second) of Trusts § 214 & cmts. a and b (indicating that beneficiaries could sue for breach of trust even if it was not clear that they would ever actually benefit); id. § 282 & cmts. h & i (suggesting that, in some circumstances, a trust beneficiary could sue third parties on the trust's behalf even when the beneficiary was not entitled to immediate payment and that any beneficiary could sue if a suit was permitted). Similarly, at common law, trustees needed no injury in order to have standing to sue on behalf of the plan, see Sprint, 128 S. Ct. at 2543, and section 502(a)(2) expressly puts plan participants and beneficiaries (as well as the Secretary) in the same position as plan fiduciaries for this purpose.

thought of as the product of the amount of those benefits and the chance that they will actually be paid – is not threatened or undermined as a result of fiduciary misconduct. If pension benefits were freely transferable and there were a market in them, it is clear that a pension benefit backed up by an additional $10 million in assets would be worth more than one that is not. As one commentator has noted, "Plan assets and their capacity to generate future investment earnings are the primary source, at any given point in time, of benefit security, the assurance that the accrued benefit rights of the plan participants will ultimately be honored." Dan M. McGill & Donald S. Grubbs, Jr., Fundamentals of Private Pensions 434 (6th ed. 1989). The likelihood that a participant's benefits will not be paid after a plan has lost millions of dollars by paying excessive fees, as alleged here, is certainly greater than before the loss. The harm to the participant's retirement security is not simply "conjectural" or "hypothetical" but is "concrete" and "actual." The plan corpus has suffered a clear and concrete injury which in turn diminishes the security – and consequently the value – of the participant's interest. See LaRue, 128 S. Ct. at 1025 (recognizing that the risk of default matters to participants in defined benefit plans).

Even where the threat to any individual plaintiff's interest is small and the harm is felt only indirectly, this injury suffices under Supreme Court precedent. In Gollust v. Mendell, 501 U.S. 115 (1991), the Supreme Court concluded that an

investor still had standing even after the company in which he had invested had merged with another company because "the indirect interest derived through [even] one share of stock [in the new company] is enough to confer standing, however slight the potential marginal increase in the value of the share." Id. at 127. The decreased security here of McCullough's benefits under the Plan is more than enough to confer standing.

III. THE PANEL'S DECISION IS OF EXCEPTIONAL IMPORTANCE BECAUSE OF ITS LIKELY IMPACT ON PLANS

At the time ERISA was enacted, "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators," Russell, 473 U.S. at 140 n.8, and defined benefit plans, such as the plan at issue in this case, "were the norm of American pension practice," LaRue, 128 S. Ct. at 1025 (quoting J. Langbein, S. Stabile, & B. Wolk, Pension and Employee Benefit Law 58 (4th ed. 2006)). In enacting ERISA, Congress sought to protect plans and their participants from fiduciary mismanagement through a nationally uniform scheme that is undermined if participants in defined benefit plans in the Eighth Circuit cannot sue for fiduciary breaches that have caused losses to their fully funded defined benefit plans. See Yates v. Herndon, 541 U.S. 1, 17 (2004) ("ERISA's goal, this Court has emphasized, is 'uniform national treatment of pension benefits.'") (citation omitted). Thus, the Court's concern that allowing participants to bring suit in such circumstances would somehow undermine ERISA's primary objective to protect

individual pension rights could not be farther from the mark. Because "the very purpose for allowing beneficiaries and fiduciaries to sue on behalf of the plan under section 502(a)(1) is 'the common interest shared by [participants and beneficiaries] in the financial integrity of the plan,'" 2009 WL 3575518, at *9 (quoting Russell, 473 U.S. at 142 n.9), there are strong policy reasons for reversing the panel's decision, which threatens to turn a straightforward and remedial statutory scheme into an unworkable one.

First, ERISA's funding rules demonstrate the importance that Congress placed on plan assets in the defined benefit context, and thus were in no way intended to do away with the need for fiduciaries to abide by ERISA's fiduciary duties, such as the duties of prudence and loyalty, when managing those assets. In this regard, the panel's decision misses the mark in focusing on the funding status of the plan at a particular point in time in determining whether participants have the right to bring suit either as a statutory or constitutional matter. Because of the nature of pension plans and the rules regarding their funding, funding levels can change significantly over short periods of time, and a plan can move quickly from being over-funded to being under-funded, as was made painfully clear to plan participants when the equity markets collapsed in 2008. The value of a plan's assets can plummet rapidly when the stock market goes down. Similarly, the plan's liabilities can rise dramatically in very little time (for example, when interest rates

drop, the amount of principal necessary to fund the promised benefits increases). Often the value of the plan's assets decline at precisely the same time that the amount of its liabilities rise (e.g., when the Federal Reserve cuts interest rates in response to a decline in the stock market).[4] Consequently, plan participants rely not only on ERISA's funding requirements for the security of their plan benefits, but also on ERISA's fiduciary standards to ensure that promised benefits will be there when they retire.

Additionally, even determining the funding status of a plan is a function of a variety of complex actuarial and financial considerations that require a detailed understanding of the plan's assets, liabilities, and demographics. Adding to the complexity, funding status is measured differently for different purposes, and is often the subject of fierce litigation and expert testimony. Thus, any focus on the plan's funding status depends on complex financial and actuarial analyses, which may employ a number of different measures for different purposes, and which plaintiffs likely would have no way of knowing without extrinsic discovery and expert testimony. The Eighth Circuit's decision is unworkable to the extent that it suggests that these sorts of difficult funding issues, ancillary as they are to the

[4] According to the American Academy of Actuaries, a one percent decline in the 30 year treasury rate will cause the liabilities of the average plan to increase by twelve percent. James E. Turpin, The Impact of Inordinately Low 30-Year Treasury Rates on Defined Benefit Plans; A Public Statement by the Pension Practice Council of the American Academy of Actuaries, July 11, 2001.

merits of a case for fiduciary breach, must be the focus of a standing inquiry under ERISA. Moreover, participants in a plan retire over an extended period of time depending on their age, and it makes little sense to focus on a single snapshot of the plan's financial status at the time they happen to bring suit, even though they must rely on the plan's financial health for years in the future.

For similar reasons, the Eighth Circuit's decision is at odds with courts' interpretation of ERISA's statute of limitations, which generally begins to run from the date of the breach or actual knowledge of the breach, not from the likely later date when the harmful consequences of the breach are incurred. See 29 U.S.C. § 1113. The District of Columbia Circuit has correctly held that an injury to the potential plaintiff is not necessary to start the statute of limitations clock running on a breach of fiduciary duty claim. Larson v. Northrop Corp., 21 F.3d 1164 (D.C. Cir. 1994). The court explained that because an actual injury to plaintiff is not necessary for that plaintiff to bring a breach of fiduciary duty claim, an actual injury is likewise not necessary to trigger the statute of limitations. Id. at 1170, citing Ziegler v. Conn. General Life Ins. Co., 916 F.2d 548, 551 (9th Cir. 1990) (holding that a participant may bring a suit for violation of ERISA section 404 "regardless of cost or loss to the participants and their beneficiaries"). The reasoning of these cases is at odds with the Eighth Circuit's holding that participants may not initiate a cause of action under ERISA section 502(a)(2)

unless those participants have been individually and directly harmed. Under the Eighth Circuit's decision, a participant in an overfunded plan could not bring an action until sufficient plan losses were actually realized to change the plan's funding status. Often, however, the funding status would not change until after the statute of limitations has already run on the alleged violation, leaving the participant with no recourse, no matter how significant the losses caused by earlier fiduciary misconduct were to the plan's ultimate underfunding.

Finally, the decision places a heavy and unjustified burden on the Secretary of Labor to monitor and bring suit if an over-funded defined benefit plan suffers losses as a result of a fiduciary breach. Because of limited resources available to enforce pension laws and the vast number of pension plans, Congress expressly authorized, and the Secretary has relied on, plan participants and beneficiaries to vindicate their own rights. Under this decision and Harley, however, suits to redress ERISA violations that harm the plan but that do not immediately threaten the plan's ability to pay outstanding liabilities may be brought only by the Secretary and presumably plan fiduciaries, who themselves may be liable and are therefore unlikely to be motivated to bring such suits. See 284 F.3d at 908 n.5. Because of the Secretary's already strained resources, this is likely to mean that many breaches involving defined benefit plans in the Eighth Circuit will go unremedied.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court grant McCullough's petition for rehearing en banc.

Respectfully submitted,

DEBORAH GREENFIELD
Acting Deputy Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor of Labor
Plan Benefits Security Division

ELIZABETH HOPKINS
Counsel for Appellate and Special
Litigation

s/ *Robyn M. Swanson*
ROBYN M. SWANSON
Attorney
U.S. Department of Labor
Room N-4611
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5803
(202) 693-5610 (fax)

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CERTIFICATE OF COMPLIANCE

The undersigned, attorney for the Secretary of Labor, hereby certifies pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure that, according to the word count of the word-processing system on which the foregoing Brief was prepared, Microsoft Word 97-2003, the brief contains a total of 3,680 words (excluding those portions permitted to be excluded by Rule 37(a)(7)(B)(iii) of the Federal Rules of Civil Procedure) and uses a 14-point proportionally spaced typeface.

Dated: Washington, DC
December 1, 2009

s/ *Robyn M. Swanson*
ROBYN M. SWANSON