No. 09-447

In The Supreme Court of the United States

DENNIS HECKER, JONNA DUANE, and JANICE RIGGINS,

Petitioners,

v.

DEERE & COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONERS

PETER J. WIEDENBECK
Counsel of Record
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Drive
Saint Louis, Missouri 63130
(314) 935-6442

November 16, 2009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES, REGULATIONS, AND RULES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS

OTHER MATERIALS

TABLE OF AUTHORITIES – Continued

Blank Page

INTEREST OF *AMICI CURIAE*[1]

Amici are legal scholars at American universities whose research and teaching interests focus on the law of pensions and deferred compensation and the federal regulation of employee benefit plans.[2] *Amici* have no financial stake in the outcome of this case but are interested in ensuring a uniform and coherent interpretation of the Employee Retirement Income Security Act of 1974 and related provisions of the Internal Revenue Code. We file this brief to urge this Court to clarify the proper scope of the duties owed by plan trustees and other fiduciaries under participant-directed defined contribution plans. We are prompted to submit this brief because the decision in this case will have wide-ranging consequences for tens of millions of American workers and the trillions of dollars they save and invest under 401(k) plans and other participant-directed defined contribution pension plans. These consequences could substantially

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. No counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici curiae* has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Counsel for Petitioners filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs, and a letter reflecting the consent of Respondent to the filing of this brief has been filed with the Clerk. *See id.*

[2] A full list of *amici*, who join this brief as individuals and not as representatives of any institutions with which they are affiliated, is set forth in Appendix 3 to this brief.

impact the standard of living of millions of future retirees.

SUMMARY OF ARGUMENT

Today, the private pension system is overwhelmingly dominated by 401(k) and other defined contribution plans, a large proportion of which call on participants to decide how their account balance should be invested by selecting from a number of options designated by the employer or plan fiduciaries. The accumulated retirement saving available under such plans depends in large measure on the investment and plan administration expenses charged to the participant's account. The Seventh Circuit's interpretation of ERISA section 404(c) in this case effectively releases plan fiduciaries from any obligation to monitor or control investment expenses, and encourages plan sponsors to offer a bewildering array of investment alternatives, thereby undermining ERISA's goals of increasing pension savings and promoting better informed employee financial decision making.

The lower court's interpretation is erroneously overbroad because it fails to construe the act as a whole and in light of its origins. The decision below overlooks related provisions of ERISA, specifically the mandatory trusteeship rule of section 403 and the cofiduciary liability standards of section 405. 29 U.S.C. §§ 1103, 1105. ERISA section 404(c) was intended only to shield the trustee from derivative liability for losses resulting from imprudent or conflicted investment decisions *by the participant* that were made possible by improper delegation (trustee enablement of the participant's breach). Consequently, claims premised on imprudence or disloyalty *by the trustee* in the selection or continuance of investment alternatives, as is alleged in this case, should not be barred.

Dismissal of the complaint under Federal Rule of Civil Procedure 12(b)(6) presents the Court with a pure question of law that is well suited to final resolution. The lower court's speculation that high retail fees might be justified by provision of extensive services is an improper basis for dismissal on the pleadings.

INTRODUCTION

Congress declared that the policy of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (2006), is "to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal Courts." ERISA § 2(b), 29 U.S.C. § 1001(b). The issues presented in this case will directly affect the *retirement income security* of tens of millions of Americans. The federal courts have labored for 35 years to adapt the competing policies that animate ERISA into a stable and coherent body of law. *See generally* Peter J. Wiedenbeck, ERISA in the Courts 17-26 (Fed. Jud. Ctr. 2008) (hereinafter ERISA in the Courts). In this case, the Seventh Circuit adopted an interpretation of the scope of obligations owed by defined contribution pension plan fiduciaries to participants, in situations where the plan calls for participant-directed investments. Its interpretation conflicts with the view of the Fourth Circuit, *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410 (4th Cir. 2007), and the consistent interpretation of the Department of Labor, threatens to upset the balance between ERISA's competing policies, and undermines *the* central goal of the legislation (as advertised by the act's title).

The petition for writ of certiorari presents the issues, highlights the division among the lower courts, and explains the conflict between the Seventh Circuit's approach and the longstanding construction of the Department of Labor. This brief is submitted to call the Court's attention to three additional relevant matters. First, in the wake of the transformation of the private pension system from a regime dominated by traditional defined benefit pension plans to one characterized by the primacy of 401(k) and other defined contribution plans, the decision below will make it harder for millions of American workers to accumulate adequate retirement savings. Second, the decision below overlooks related sections of the statute and fails to construe ERISA as a whole, thereby obstructing development of a coherent body of employee benefit law. Third, the issues presented in this case are well suited to review and final resolution.

REASONS FOR GRANTING THE PETITION

I. AS APPLIED TO THE EXISTING PRIVATE PENSION SYSTEM, DOMINATED AS IT IS BY 401(k) AND OTHER DEFINED CONTRIBUTION PLANS, THE DECISION BELOW UNDERMINES NATIONAL PENSION POLICY

Since ERISA was enacted the private pension system has shifted from dependence on defined benefit plans, under which the plan sponsor bears the risk of investment performance, to predominant reliance on defined contribution plans, under which the participants shoulder all investment risk. Today, most 401(k) plans and many other defined contribution plans permit participants to control the investment of their account assets by selecting from among a range of options offered under the plan. The selection of investment alternatives whose net rate of return is depressed by unnecessarily high expenses inhibits the growth of the participant's account balance, and over an extended period can substantially retard the accumulation of retirement savings, posing a threat to the adequacy of retirement income. The decision below threatens to expose millions of workers to inappropriate investment choices for their pension savings, jeopardizing their standard of living in retirement.

"Assurance of integrity is the heart and soul of ERISA. Federal fiduciary standards were designed to work in combination with improved disclosure . . . and powerful enforcement tools . . . to stem misconduct in plan administration." ERISA in the Courts, *supra*, at 141 (citing S. Rep. No. 93-127, at 27-28, 29 (1973)). As this Court has recognized, "The focus of the statute thus is on the administrative integrity of benefit plans." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15 (1987).

> In view of Congress's objective to stamp out mismanagement and abuse of employee benefit funds, one might expect that ERISA's fiduciary duties, reinforced by objective prohibited-transaction rules, would apply with special force to investment decision making. While intensive oversight is the norm for defined benefit pension plans and welfare benefit funds, the fiduciaries of many defined contribution pension plans are largely absolved of investment responsibility. That absolution is granted where a plan permits a participant or beneficiary to exercise control over the investment of assets in his own account and the participant or beneficiary actually exercises such control. If the sponsor washes its hands of investment management, ceding responsibility to plan participants and beneficiaries, then fiduciary obligations are relaxed on the theory that employer abuse of pension funds is no longer

> a concern. Instead, the focus in this situation should be on worker autonomy and promoting informed financial decision making.

Peter J. Wiedenbeck, ERISA: Principles of Employee Benefit Law (forthcoming 2010) (footnotes omitted) (hereinafter ERISA Principles).[3]

In the years since ERISA was enacted the private pension system has undergone a dramatic shift away from traditional defined benefit plans, under which each participant is promised a life annuity, the value of which is typically based on a formula that takes into account the participant's compensation and length of service. Formerly defined benefit plans served as the exclusive or primary source of retirement savings for most American workers. Today, defined contribution pension plans, and 401(k) plans in particular, have become the backbone of the private pension system. Under a defined contribution plan the participant's retirement savings depend upon the amount contributed to an individual account, increased by any income or gains and decreased by any losses or expenses that are allocated to the account.[4]

---

[3] Excerpts from this work are used herein with permission of Oxford University Press. Citations refer to the location of material in the first page proofs of the book; final pagination might vary slightly.

[4] Depending on the terms of the plan, a participant's account may also be increased by a share of forfeitures of the accounts of other participants. ERISA alternatively refers to defined contribution plans as "individual account plans." ERISA § 3(34), 29 U.S.C. § 1002(34).

Contributions may be made by the plan sponsor (employer), the participant (employee), or both, and the annual amount contributed typically depends upon the employee's compensation (and sometimes other factors). Between 1975 and 2004 the proportion of pension plan participants enrolled in defined benefit plans decreased from about 70 percent to about 30 percent. Robert Clark & John Sabelhaus, *How Will the Stock Market Crash Affect the Choice of Pension Plans?*, 62 Nat'l Tax J. 477, 482 (2009). This sea change is vividly illustrated by Labor Department data graphed in Figure 1 (Appendix 1) and Figure 2 (Appendix 2), below.

Today, there are 12 times as many defined contribution plans as defined benefit plans in operation (Figure 1), and the data show that since ERISA was enacted the ratio of the number of workers covered by a defined benefit plan to the number of workers covered by a defined contribution plan has fallen from about 300 percent to only 40 percent (Figure 2). Many factors, including economic and demographic changes, labor and tax law regulation, and the harnessing of political ideology to social psychology, have contributed to this astounding turn-around. Edward A. Zelinski, The Origins of the Ownership Society 31-92 (Oxford Univ. Press 2007) (explaining in detail how "the defined contribution paradigm became entrenched in American retirement, tax, and social policy").

The recent rise to dominance of defined contribution plans, and 401(k) plans in particular, has been accomplished, in large part, by a shift to plans that call for participant-directed investments. According to a recent study, the proportion of defined contribution plan participants who manage the investment of some or all of their account assets rose from 15 to 86 percent between 1986 and 2005. Participant direction was particularly prevalent in 401(k) plans, where, by 2005, about 95 percent of participants had some say over the investment of their accounts. William E. Even & David A. Macpherson, *The Growth of Participant Direction in Defined Contribution Plans*, IZA (Institute for the Study of Labor) Disc. Paper No. 4088, at 2, 23 (Mar. 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1369834#. Consequently, the triumph of the "defined contribution paradigm" has worked a substitution of worker choice for professional investment decision making by the plan trustee or investment manager. Considering only 401(k) plans, roughly 40 million workers are now left to fend for themselves when it comes to investing for their retirement. The net rate of return that such participants earn, together with the riskiness of their portfolio choices, will determine whether today's workers will struggle with cramped budgets throughout their "golden years" or instead enjoy comfortable retirements. As the Government Accountability Office recently reported to the Chairman of the Committee on Ways and Means, "Lower fees benefit plan participants because they can significantly increase long-term retirement savings. [E]ven a relatively small annual fee taken from a worker's assets represents a large amount of money had it been reinvested over time." GAO, Retirement Savings: Better Information and Sponsor Guidance Could Improve Oversight and Reduce Fees for Participants 20-21 (2009) (GAO-09-641) (referring to a graph showing that 1-percentage point higher annual fees on a $20,000 defined contribution plan investment reduces the account balance over 20 years by about $10,000).

The decision below immunizes careless or disloyal fiduciary decision making in assembling investment alternatives under a participant-directed defined contribution plan. Such plans have become the dominant mode of private pension saving. Applied as precedent, this decision would threaten the retirement income security of millions of Americans. It might undermine national pension policy in another way as well, because the Seventh Circuit's opinion could encourage fiduciaries to include hundreds or thousands of investment options. *But see Hecker v. Deere & Co.*, 569 F.3d 708, 711 (7th Cir. 2009) (disavowing the implication that a plan fiduciary "can insulate itself from liability by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among them"). Such a proliferation of choices is likely to result in workers constructing less rational portfolios than occurs when an employer offers only a small number of investment choices. *See* Ning Tang *et al.*, *The Efficiency of Pension Menus and Individual Portfolio Choice in 401(k) Pensions*, Univ. of Michigan Retirement Res. Ctr. Working Paper No. 2009-203, at

2 (Aug. 2009), http://www.mrrc.isr.umich.edu/publications/papers/pdf/WP203.pdf ("we show that, instead of simply adding funds to a plan menu, it is preferable to design a smarter menu and get participants to select the right set of fund choices"). Promoting better-informed employee financial decision making was a central goal of ERISA. ERISA in the Courts, *supra*, at 18-19.

II. THE DECISION BELOW OVERLOOKS RELATED PROVISIONS OF ERISA AND FAILS TO CONSTRUE THE ACT AS A WHOLE

ERISA section 404(c) provides that if a participant or beneficiary is granted and exercises control over assets in his account in the manner provided by Labor Department regulations, then "no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control." ERISA § 404(c)(1)(B), 29 U.S.C. § 1104(c)(1)(B). Accordingly, the defense applies if (1) regulatory conditions for the exercise of control are satisfied, and (2) the loss "results from" such an exercise of control. A regulation issued in 1992 provides detailed guidance on the conditions that must be satisfied for a plan to be considered to give participants the opportunity to exercise independent control over the assets in their accounts, 29 C.F.R. § 2550.404c-1, yet as this case illustrates, where a plan complies with the regulation the breadth of the defense (i.e., whether the loss "results from" participant's exercise of control) remains unsettled.

The Seventh Circuit found ERISA section 404(c) shields Deere from claims that it assembled an imprudent menu of investment alternatives because the Deere plans "include[] a sufficient range of options so that the participants have control over the risk of loss." *Hecker v. Deere & Co.*, 556 F.3d 575, 589, *supplemented by* 569 F.3d 708 (7th Cir. 2009). While not entirely clear, that conclusion seems to be based upon a plain meaning reading of the statute. *See Hecker*, 556 F.3d at 58; *In re Unisys Savings Plan Litigation*, 74 F.3d 420, 445 (3d Cir. 1996) (statute's plain language provides that the fiduciary is excused from liability for "any loss" which "results from" a participant's exercise of control). The Fifth Circuit has suggested that section 404(c) protects plan fiduciaries who select investment alternatives in a careless or self-serving manner on the theory that, absent such a breach of fiduciary obligation, the defense would be unnecessary. *Langbecker v. Electronic Data Systems Corp.*, 476 F.3d 299, 311 (5th Cir. 2007) (the Labor Department's interpretation "would render the § 404(c) defense applicable only where plan managers breached no fiduciary duty, and thus only where it is unnecessary"). Both the plain meaning and the surplusage approaches lead to a mistakenly overbroad interpretation of the section 404(c) defense because each overlooks related provisions of ERISA and fails to construe the act as a whole. As explained below, section 404(c) was designed only to protect plan fiduciaries from the derivative liability that participant-directed investments would otherwise trigger due to the operation of ERISA's mandatory trusteeship and cofiduciary liability rules, ERISA §§ 403, 405, 29 U.S.C. §§ 1103, 1105.

> Resort to a broader perspective – interpreting ERISA as a whole and in the context of its trust law origins – supports the Labor Department's position that "[a]ll of the fiduciary provisions of ERISA remain applicable to both the initial designation of investment alternatives and investment managers and the ongoing determination that such alternatives and managers remain suitable and prudent investment alternatives for the plan." Preamble to 29 C.F.R. § 2550.404c-1, 57 Fed. Reg. 46,906, 46,922 (Oct. 13, 1992). The key to understanding section 404(c) lies in its relationship to sections 403 and 405, the mandatory trusteeship and cofiduciary liability provisions of ERISA.
>
> Investment management, including the authority to acquire, hold, or dispose of plan assets, is a trustee function. ERISA section 403(a) makes investment management by the trustee(s) a mandatory, nondelegable duty: "the trustee or trustees shall have *exclusive* authority to manage and control the assets of the plan." ERISA § 403(a), 29 U.S.C. § 1103(a) (emphasis added). The only exceptions are for (1) plans that call for investment management to be under the direction of a named fiduciary and (2) plans that

allow the named fiduciary to appoint one or more investment managers to whom the authority to manage, acquire, and dispose of assets is delegated. ERISA §§ 403(a)(1), (a)(2), 402(c)(3), 29 U.S.C. § 1103(a)(1), (a)(2), 1102(c)(3). That the duty to make investment decisions is personal and nondelegable is confirmed by ERISA's rules governing cofiduciary liability. Dovetailing with the exceptions to the trustee's exclusive responsibility for asset management, section 405 provides that a trustee is absolved from liability (1) for following the instructions of a named fiduciary where the plan provides for investment management by a named fiduciary, and (2) for the acts or omissions of investment managers where the plan provides for delegation of the investment duties to one or more investment managers. *Compare* ERISA § 403(a)(1), (a)(2), 29 U.S.C. § 1103(a)(1), (a)(2), *with* ERISA § 405(b)(3)(B), (d)(1), 29 U.S.C. § 1105 (b)(3)(B), (d)(1). Most revealing is section 405(c), which generally allows a plan to specify procedures for the delegation of *any* fiduciary responsibility, and correspondingly limits the liability of other fiduciaries for the acts or omissions of a proper delegate. The statute expressly restricts that blanket delegation authority in one respect: delegation is forbidden for "trustee responsibilities," defined as any responsibility "to manage or control the assets of the plan." ERISA § 405(c)(1), (c)(3), 29 U.S.C. § 1105(c)(1), (c)(3).

Because investment management is in general a nondelegable trustee function, in the absence of section 404(c), a trustee who permitted participants or beneficiaries to direct the investment of their accounts would . . . breach [his] fiduciary duty.[5] Consequently, the trustee would be personally liable for any losses resulting from that breach, including losses flowing from imprudent investment decisions made by the account owner. ERISA § 409(a), 29 U.S.C. § 1109(a). Even if the plan expressly called for participant decision making, the trustee's exposure would not be limited. *See* ERISA §§ 404(a)(1)(D) (cannot follow plan terms if in conflict with ERISA), 410(a) (exculpatory provisions void as against public policy), 29 U.S.C. §§ 1104(a)(1)(D), 1110(a). Therefore, absent section 404(c), the trustee who allowed participants or beneficiaries to direct the investment of their own accounts would be liable as a cofiduciary for certain losses caused by their investment decisions. Specifically, the participants granted investment authority would, due to the

[5] Many participant-directed plans provide in the plan document that each participant is a "named fiduciary" with the power to direct the investment of his own individual account. That formal designation renders the participant a cofiduciary with the trustee, and potentially subjects the trustee to cofiduciary liability under section 405(a)(3) based on knowledge of the participant's breach and failure to take remedial action. The directed trustee defense of section 405(b)(3)(B) expressly does not apply to section 405(a) violations. Accordingly, just as in the case where no such designation is made and the participants function as de facto fiduciaries (discussed in the text), the cofiduciary liability analysis applies where the plan formally designates participants as named fiduciaries.

> improper delegation of trustee responsibilities, be acting as de facto or functional fiduciaries.[6]

ERISA Principles, *supra*, at 140-42 (footnotes added; original footnotes incorporated in text).

> Therefore, if such a participant's investment selection is imprudent, or underdiversified, or involves a conflict of interest (e.g., investing in securities of a business that a participant or her spouse owns or controls), then the loss is caused by a breach of fiduciary responsibility, and the trustee would be personally liable for the loss as a cofiduciary.

Id. at 142. The trustee, that is, would be liable for actions (impermissible delegation) that enabled the breach by another (de facto) fiduciary. ERISA § 405(a)(2), 29 U.S.C. § 1105 (a)(2). Moreover, the trustee would be subject to suit by the very participant whose investment choice constituted a breach: the participant has standing to bring a civil action under ERISA section 502(a)(2) to enforce fiduciary obligations against the trustee. 29 U.S.C. § 1132(a)(2).

"The effect of section 404(c), where it applies, is to create a narrow exception to the foregoing rules,

---

[6] *E.g.*, *Hamilton v. Allen-Bradley Co.*, 244 F.3d 819 (11th Cir. 2001) (employer that exercised actual control over claim process by failure to timely provide application for long-term disability benefits was a de facto fiduciary); Explanation of H.R. 12906, 120 Cong. Rec. 3983 (1974) ("Conduct alone may in an appropriate circumstance impose fiduciary obligations."); ERISA in the Courts, *supra*, at 144.

absolving the plan trustee from liability for losses caused by undiversified, imprudent, or conflicted investment decisions made by participants or beneficiaries." ERISA Principles, *supra*, at 142. Observe that section 404(c), besides giving the trustee an affirmative defense, also provides that the participant or beneficiary who exercises control over her account "shall not be deemed to be a fiduciary by reason of such exercise". If the participant cannot be deemed a (de facto) fiduciary, then the trustee cannot be liable as a cofiduciary under section 405(a)(2) for enabling the participant's breach. In contrast,

> a delegation of investment decision making that does not comport with section 404(c) is itself a breach (violation of ERISA's mandatory trusteeship rule), even if there is no showing of independent fault by the fiduciary (e.g., imprudence) in initially selecting or continuing to make available designated investment alternatives.[7] Because the trustee

---

[7] The fiduciary of a plan that does not satisfy the conditions of the regulation is not entitled to the defense of § 404(c), but the regulation states that its standards do not speak to whether the fiduciary of a non-compliant plan has breached his obligations. 29 C.F.R. § 2550.404c-1(a)(2) (2009); Preamble to 29 C.F.R. § 2550.404c-1, 57 Fed. Reg. 46,906 (Oct. 13, 1992) ("[N]on-complying plans do not necessarily violate ERISA; non-compliance merely results in the plan not being accorded the statutory relief described in section 404(c)."). *Jenkins v. Yager*, 444 F.3d 916, 924 (7th Cir. 2006), relied on these provisions to find an "implied exception" to ERISA §§ 403 and 405 was available to a plan that allowed participants to select investments but that did not satisfy § 404(c). *Id.* at 923-24. Instead of finding that an automatic breach resulted from the delegation of investment

(Continued on following page)

> would be responsible for losses attributable to the account owner's mistakes where the menu of investment alternatives was properly constructed, the defense has a real immunizing effect. It follows that section 404(c) cannot be considered surplusage if its operation is limited to that situation.[8]

ERISA Principles, *supra*, at 142 (footnotes added; original footnotes omitted).

> This contextual and functional reading of section 404(c) is consistent with and lends

---

choice, the court reviewed the selection and monitoring of investment alternatives and the provision of information to plan participants for prudence. *Id.* at 924-26. The interpretation of the relationship between § 404(c) and §§ 403 and 405 presented above indicates that *Jenkins* was wrongly decided.

[8] ERISA section 404(c), in combination with section 403(a), can be viewed as providing a third exception to the ban on delegation of investment management, along with a corresponding narrow limitation on trustee liability, that is applicable to plans that do not formally designate participants as named fiduciaries.

> In effect, then, the trustee is solely responsible for investment management except where: (1) the plan assigns that task to a named fiduciary; (2) the plan authorizes delegation to one or more investment managers; or (3) a defined contribution plan permits a participant or beneficiary to exercise control over the assets in his account, and such control is actually exercised in accordance with the standards of § 404(c). In addition, the trust instrument may permit multiple trustees to divvy up investment management tasks and in so doing limit their exposure for breaches by a cotrustee. ERISA § 405(b)(1)(B), 29 U.S.C. § 1105(b)(1)(B).

ERISA Principles, *supra*, at 142 n.147.

support to the Labor Department's interpretation of the limited scope of the defense. Traditional trust law similarly provides that a trustee is under a duty not to delegate investment decision making. Restatement (Second) of Trusts § 171 & cmt. h (1959). Further, the trustee of a private trust is liable for the acts of an agent "which if done by the trustee would constitute a breach of trust, if the trustee . . . (b) delegates to the agent the performance of acts which he was under a duty not to delegate." Restatement (Second) of Trusts § 225(2). *See also id.* § 224(2)(b) (liability for improper delegation to cotrustee). [T]he Supreme Court has recognized that ERISA's fiduciary obligations "draw much of their content from the common law of trusts" and "reflect[ ] a special congressional concern about plan asset management. . . . " *Varity Corp. v. Howe*, 516 U.S. 489, 496, 511 (1996); *accord*, *LaRue v. DeWolff, Boberg & Assocs.*, 128 S. Ct. 1020, 1024 n.4 (2008).

ERISA's legislative history also seems consistent with this interpretation of section 404(c). Reports on early versions of comprehensive pension reform bills in both the House and Senate indicate that the bills were intended to allow participant-directed investments in certain circumstances.[9] The

[9] S. Rep. No. 93-127, at 29 (Apr. 18, 1973), observes:

It is not the intention of the Committee, however, that where the sole power of control, management or disposition

(Continued on following page)

Senate version of H.R. 2 did not expressly authorize participant-directed investments, apparently because it did not need to. Instead, it defined fiduciary broadly enough to include participants with power to control investments and also permitted agreements "allocating specific duties or responsibilities among fiduciaries." H.R. 2, 94th Cong. §§ 511, 502(a) (1974) (version passed by the Senate on Mar. 4, 1974, [which would have amended] the Welfare and Pension Plans Disclosure Act). In contrast, the House version of H.R. 2 provided that assets shall be held in trust by one or more trustees "who shall have exclusive authority and discretion to manage, and exclusive control of, the assets of the plan." H.R. 2, 94th Cong. § 111(e) (1974) (version passed by House Feb. 28, 1974). That *exclusive* authority was subject to exceptions for investment directions by named fiduciaries (called "administrators" in this bill) and investment managers, and permitted allocation of duties among multiple trustees, but it did not contain an exception for participant-directed investments. Accordingly, it appears that compliance with a plan provision allowing participant-directed

---

> with respect to plan funds rests with the participants themselves, as may be the case with respect to certain plans where the participant has the sole discretion over an individual account established in his name, that such participants shall be regarded as fiduciaries.

Accord H.R. Rep. No. 93-533, at 11 (Oct. 2, 1973) (same).

> investments would have subjected the trustee to liability. Against this background, section 404(c) was added in conference. Apparently, when the conference committee adopted the House's approach, making investment management a (generally) nondelegable trustee function, someone realized that the limited exceptions contained in the House version of the bill would, as a practical matter, rule out participant-directed investments.

ERISA Principles, *supra*, at 143-44 (some footnotes incorporated in text).

Properly understood, "ERISA section 404(c) was intended only to shield the trustee from derivative liability for losses resulting from imprudent or conflicted investment decisions *by the participant* that were made possible by improper delegation (trustee enablement of the participant's breach, that is)." ERISA Principles, *supra*, at 144. Consequently, "claims premised on imprudence or disloyalty *by the trustee* in the selection or continuance of investment alternatives," as is alleged in this case, "should not be barred." *Id.*

III. THE ISSUES PRESENTED IN THIS CASE ARE WELL SUITED TO REVIEW AND FINAL RESOLUTION

The question of the scope of the section 404(c) defense has had time to percolate in lower courts, and the views of the Labor Department, the expert agency charged with administration of ERISA's fiduciary responsibility rules, have been formulated, tested, and reinforced over the course of four presidential administrations. Dismissal of the complaint under Federal Rule of Civil Procedure 12(b)(6) presents the Court with a pure question of law that is well suited to final resolution.

Without discovery it is peculiarly inappropriate to dismiss the suit on the basis of speculation that high retail fees might be justified by provision of extensive services, as the Seventh Circuit did here. *Hecker*, 569 F.3d at 711. Discovery is necessary to rule out other explanations, such as disloyalty or imprudence. A plausible explanation of high fees is that the fund provider may in fact be providing extensive services, but discovery might show that those services are rendered to the employer rather than to the plan participants. If, for example, the mutual fund provider manages other employee benefit plans (such as executive deferred compensation programs) for the sponsor of a section 404(c) plan, the administration of those other plans might be provided at a reduced cost as part of a bundled service agreement. Such a package deal would mean that the high fees charged to the defined contribution pension plan participants are subsidizing the operation of some other plan. ERISA case law on fiduciary obligations establishes that administering one plan in a way that provides advantages to the participants of some other plan of the same employer breaches the exclusive benefit rule, even if there is overlap in the membership of the two plans. *See* ERISA in the Courts, *supra*, at 159-60 (pension plan fiduciary violates the exclusive benefit rule if he acts to advance plan participants' interests in continued employment – wages or other benefits – rather than in retirement benefits). This scenario is of course pure (counter-) speculation, but it shows that resolution of the Petitioner's claim requires the opportunity to develop evidence.

CONCLUSION

Because of the importance of the issues presented to the effectuation of national pension policy and the development of a coherent body of employee benefit law, the petition for writ of certiorari should be granted.

Respectfully submitted,

PETER J. WIEDENBECK
Counsel of Record
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Drive
Saint Louis, Missouri 63130
(314) 935-6442

November 16, 2009

Blank Page