Case No. 04-15328

IN THE

United States Court of Appeals

For the Ninth Circuit

TOMMIE GLANTON, on behalf of the ALCOA PRESCRIPTION DRUG PLAN,

and other similarly-situated plans, and,

TARA MACKNER, on behalf of the KMART COMPREHENSIVE HEALTH PLAN

Plaintiffs-Appellants

vs.

ADVANCEPCS HEALTH, L.P.

Defendant-Appellee

On Appeal from the United States District Court
for the District of Arizona
Civil Action Nos. CIV-02-0507 PHX SRB c/w CIV-03-0607 PHX SRB

AMICUS BRIEF ON BEHALF OF UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFFS/APPELLANTS

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THE NATURE OF THE UNDERLYING LITIGATION

Plaintiffs, the plans' participants and beneficiaries, sued the plans' pharmacy benefits manager asking that it return to the ERISA plans money belonging to those plans. If indeed the benefits manager is a plan fiduciary, and if indeed it is receiving fees and other benefits from parties-in-interest, it is liable to return those funds to the plans under ERISA § 406(b)(3), 29 U.S.C. § 1106(b)(3). This provision is generally known as the "anti-kickback"provision and prohibits a fiduciary from receiving "any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." If a fiduciary receives such improper consideration, it must be paid to the fund no matter whether it is otherwise "ill-gotten." *Lowen v. Tower Asset Management*, 829 F.2d. 1209, 1214-16 (2nd Cir. 1987); *Brink v. DaLesio*, 496 F. Supp. 1350, 1368 (D. Md. 1980), *aff'd in part and rev'd in part*, 667 F.2d 420 (4th Cir. 1981)(plaintiff need not prove that the fiduciary acted in bad faith or received a *quid pro quo* to establish liability under this section).

An underlying factual question is whether the consideration is a "plan asset," and whether the defendant is a "fiduciary." *Patelco Credit Union v. Sahni*, 262 F.3d 897, 908 (9th Cir. 2001) However, the trial judge never reached these issues, but instead said that the plaintiffs have no standing under ERISA to pursue the action.

THE DISTRICT COURT'S DISMISSAL RUNS COUNTER TO THE STATUTE, CONGRESSIONAL INTENT, AND DECISIONAL LAW

Although the trial court held that plaintiffs had sufficient constitutional standing by having sufficiently alleged an injury in fact (Order p. 6, lines 15-16), it then held that plaintiffs did not have standing "under the circumstances of this case." (*Id*. at line 20) What were those special circumstances? They were that the defendant was not a "named fiduciary." It appears, although it is by no means certain, that the district court is suggesting that when participants and beneficiaries sue under ERISA § 502(a)(2), or (a)(3) (29 U.S.C. §§1132(a)(2) and (3)) for breach of fiduciary duty, they have standing only to sue "named fiduciaries."

There is nothing in the statute, the case law, or the legislative history that supports this novel theory. If this decision is upheld, *amicus* is deeply concerned that participants and beneficiaries of ERISA plans will be left outside looking in while fiduciaries who are not "named" fiduciaries will be able to loot plan assets at will with little concern for ever being held to account for their misdeeds.

It is little consolation to participants that they can sue a "named" fiduciary for failure to prevent the breaches for it is not unheard of that fiduciaries declare bankruptcy -- if they can even be found. It is also little consolation that the Department of Labor might be sufficiently intrigued by the case to spend some of their extremely limited resources in seeking restitution for the plan.

The statute: ERISA § 409, 29 U.S.C. § 1109, says that a breaching fiduciary shall make good to the plan any profits the fiduciary has made by the use of plan assets. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) is the enforcement mechanism of § 409. It says that a participant, beneficiary or fiduciary may sue for the relief provided by § 409. The proper defendant in any §409 action is the breaching fiduciary, and § 502(a)(2) gives equal standing to fiduciaries, participants and beneficiaries to sue breaching fiduciaries. If participants and beneficiaries could only sue "named fiduciaries" then fiduciaries, too, would only be able to sue "named fiduciaries." If that were so it would leave no one who is able to sue all the rest of the fiduciaries who are not "named fiduciaries."

The decisional law: In *Kayes v. Pacific Lumber Co*., 51 F.3d 1449 (9th Cir. 1995), the participants and beneficiaries sued a number of defendants, alleged to be fiduciaries, including the "named fiduciary" Pacific Lumber Company ("PLC"). Two other defendants were officers of PLC and they alleged they could not be liable as fiduciaries because they were merely acting in their corporate capacities as officers of the named fiduciary. The court rejected this argument. In doing so, it held that the definition of a "fiduciary" in 29 U.S.C. § 1002(21)(A) was a functional definition – anyone who exercises any authority or control over plan assets. (*Kayes* at 1460). On the other hand, "named fiduciary" is "given a separate and formal definition in 29

U.S.C. § 1102(a)(2).” (*Id.)*

In other words, “fiduciary” and “named fiduciary” are two separate concepts that happen to share a common word. That happenstance, however, is not enough to substitute “named fiduciary” for “fiduciary” wherever it appears in § 409, which is what the district court has done.

Notably, in *Kayes*, the court allowed relief in favor of the participants and beneficiaries against fiduciaries who were specifically found not be to named fiduciaries.

<u>The legislative history</u>: The Conference Report on H.R. 2, the final bill that was to become ERISA, described the civil enforcement provisions of ERISA as follows:

> *Civil actions by participants and beneficiaries.* – In addition, under the bill as passed by both the House and Senate, civil action may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, <u>and for relief from breach of fiduciary responsibility</u>.” (Emphasis added) (3 Subcommittee on Labor and Public Welfare of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974, p. 4593 (Comm. print 1976) (hereinafter Leg. Hist.)

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The report did not limit civil actions for “relief from breach of fiduciary responsibility” to breaches only by “named fiduciaries.” Instead, it said that

participants were entitled to relief for any such breach by any fiduciary.

Senator Harrison A. Williams, Jr., one of the early and most vigorous sponsors of pension reform legislation, in his remarks in support of H.R.2 during the floor debate, said "participants and beneficiaries will also be able to bring suit in Federal court in such instances, as well as to obtain redress of fiduciary violations." (3 Leg. Hist. 4745). Senator Jacob Javits, often considered the "father of ERISA," said during the same debates: "Employees would have the right to enforce new Federal rules of conduct applicable to those who manage pension and welfare funds. Employees could prevent plan administrators and trustees from mismanaging plan assets or engaging in conflict of interest deals which jeopardize their plan." (3 Leg. Hist. 4752).

The overriding public policy served by ERISA, and the central legislative intent supporting its enactment, declares, as follows:

> It is hereby declared to be the policy of (ERISA) to protect...the interests of participants and 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 § 501(b), 29 U.S.C. § 1001(b)

The Congressional intent relating to ERISA's civil enforcement provision is consistent with the clear statutory language, and with the overall public policy to be served by ERISA – participants and beneficiaries are allowed to seek redress for <u>all</u> breaches of fiduciary responsibilities, whether they be breaches by named fiduciaries,

plan administrators, trustees, or pharmacy benefit managers.

<u>The district court's rationale</u>: It appears that the district court was too focused on one case – *Amalgamated Clothing and Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1409-10 (9th Cir. 1988). There, the participants and beneficiaries of a terminated plan sued a fiduciary for the improper use of plan assets. Because the plan had terminated, and the participants and beneficiaries had received all that the plan had promised, any recovery would simply have been determined to have been excess assets and would have been returned to the fiduciary. Under these unusual circumstances, the court held that the recovery would be held in a constructive trust for the benefit of the participants and beneficiaries.

In the present case, the district court below held that in *Murdock* the participants were the "most appropriate party" to bring the action because a constructive trust was necessary to protect the money, while in the case at bar there was no equivalent basis for imposing a constructive trust, and thus the participants did not have standing. (Order, p. 7, lines 6-10)

However, nowhere in the statute, the decisional law, or the legislative history does it suggest that an action for breach of fiduciary duty can only be brought by "the most appropriate party." If that were so, the courts would become mired in endless litigation over whom, in each particular circumstances, is "most appropriate" with no

standards to guide them.

The error of the district court is that *Murdock* is the tail, not the dog. In *Murdock* the court was concerned not with standing, but with the appropriate remedy to prevent a clear injustice. *Murdock* did not hold that participants and beneficiaries are allowed to pursue fiduciary breaches only when there is no one else around who could "most appropriately" pursue them. Rather the participants and beneficiaries have equal stature under the law to remedy these breaches. That is how Congress intended it, that is what the law says, and that is what the case law provides.

<u>The district court's alternative ground for dismissal</u>: In its Order (p. 8, lines 3-8), the district court held that even if the participants and beneficiaries had standing, they could not seek the remedy of a constructive trust. Citing *Bast v. Prudential Ins. Co. of America*, 150 F.3d 1003, 1011 (9th Cir. 1997), the court held that here, as in *Bast*, a constructive trust did not "fit the mold" where a defendant was unjustly enriched but not at the expense of the plan.

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However, *Bast* simply held that under ERISA 502(a)(3), which bars money damages, plaintiffs were simply seeking disguised money damages by seeking a constructive trust for their own benefit. Further, to the extent a constructive trust would be for the benefit of the plan, there would be no amount payable to the

plaintiffs.

Here, however, plaintiffs are suing under 502(a)(2) on behalf of the plan, and seek money for the benefit of the plan, not for themselves. If the PBM used plan assets for personal gain, 502(a)(2) and 406(b)(3) are absolutely clear that those gains must be paid into the trust. Obviously a fiduciary could obtain this remedy and if a fiduciary could obtain this remedy, so can the participants and beneficiaries suing on behalf of the plan.

CONCLUSION

The decision of the district court would give participants and beneficiaries second class status in their right to protect the plan assets that will maintain their health benefits and their retirement benefits. Congress, on the other hand, made clear that participants and beneficiaries were to be equal partners in the efforts to assure that misconduct by fiduciaries was uncovered and appropriate remedies enforced.

We ask this Court to reaffirm that principle of equal partnership and to reject the district court's misguided and unjustified departure from it.

Dated: May 28, 2004

Respectfully submitted,

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For UNITED POLICYHOLDERS

CERTIFICATE OF COMPLIANCE

Pursuant to 9th Cir. R. 32.2 and 32.3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

According to the word and line count of the word processor used to prepare this brief, the brief contains 1,873 words.

The brief has been prepared in proportionately spaced typeface using Corel WordPerfect 10, in Times New Roman 14 pt. font.

The undersigned understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

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Douglas K. deVries

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the above and foregoing Brief, have been served upon all counsel of record, (identified below), by placing said copies in the U.S. Mail, properly addressed and postage prepaid, this 28th day of May, 2004.

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