Case No. 04-41760

IN THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

RICHARD LANGBECKER, et al.,

Plaintiffs-Appellees,

v.

ELECTRONIC DATA SYSTEMS CORPORATION, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION
Civil Action No. 6:03-MD-1512; 6:03-CV-126 (ERISA)

BRIEF OF THE ERISA INDUSTRY COMMITTEE, AMERICAN BENEFITS COUNCIL, AND THE ESOP ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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The ERISA Industry Committee ("ERIC"), the American Benefits Council (the "Council"), and the ESOP Association are all associations whose members maintain, administer, and provide services to pension and other employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.* With the consent of the parties, they respectfully submit this brief as *amici curiae* in support of appellant Electronic Data Systems Corporation.

Interest of Amici Curiae

ERIC is a non-profit organization representing America's largest private employers. ERIC's members provide benefits to millions of active and retired workers and their families through pension, health care, and other employee benefit plans governed by ERISA. All of ERIC's members do business in more than one State, and many have employees in all fifty States.

In cases of exceptional importance, with the potential for far-reaching effects on employee benefit plan design or administration, ERIC has participated as *amicus curiae*.[1] The decision to file an *amicus* brief is made by ERIC's Legal Committee based on established criteria for review that limit ERIC's participation

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[1] *See, e.g., General Dynamics Land Sys. v. Cline*, 540 U.S. 581 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

to significant cases in which the Legal Committee believes that ERIC's discussion of the issue will advance arguments that will not be presented by the parties or other *amici*. Although ERIC rarely participates as *amicus* in the courts of appeals, it has identified this case as one raising an issue of major importance to employers with ERISA-covered plans and one that will set an important precedent.

The Council is a broad-based, non-profit trade association founded in 1967 to protect and foster the growth of privately sponsored employee benefit plans. The Council's approximately 250 members include employer sponsors of employee benefit plans, as well as plan service providers such as consulting and actuarial firms, investment firms, law firms, bankers, insurers, and other professional benefit organizations. Collectively, these members sponsor and administer plans that cover more than 100 million participants.

The ESOP Association (the "Association") is a national non-profit trade association consisting of more than 1,300 corporate members who sponsor employee stock ownership plans ("ESOPs"), as well as 900 individuals who provide services to such corporations. Ninety-seven percent of the Association's members are privately held, and, on average, have less than 250 employees. Sixty percent of the members sponsor ESOPs that hold more than half of all of the corporation's common stock. Thus, employee ownership through ESOPs is fundamental both to the success of the corporations and the financial wellbeing of

their employees. The vast majority of the Association's members are highly successful businesses that provide substantial wealth to their employees through ESOPs. For the average member, the costs of litigating or settling an ESOP-related class action could cause financial ruin to the corporation, which, in turn, would wipe out all of the accumulated wealth in the employee ESOP.

Summary of Argument

The members of ERIC, the Council, and the Association share a strong interest in the issues presented in this case and others like it, which threaten to do far-reaching damage to employee retirement plans and the workers and retirees who participate in them. If cases like this one are permitted to proceed, employers may well be forced to stop offering ESOPs and other employer stock programs as investment options under their retirement plans in order to protect themselves from the risk of a class-action suit under ERISA whenever there is a decline in share value.

Every year, millions of American workers choose to invest in the stock of their employers pursuant to provisions of ERISA and the Internal Revenue Code that encourage employers to offer employer stock as an investment under their retirement plans. A decision that makes ESOPs and other employer stock programs less attractive to employers will directly contravene Congress's intent in

enacting these provisions and will harm the workers and retirees who want to benefit from them.

The continued vitality of ESOPs and other employer stock programs is currently being threatened by a wave of litigation in which putative representatives of individual plan participants bring class action lawsuits "on behalf of the plan" following a decline in the value of the employer's stock. Typically, such suits claim that the employer and its officers and directors breached various fiduciary duties under ERISA, for example by allegedly misrepresenting or omitting material facts about the employer's financial health or by "imprudently" permitting continued investment in employer stock.

When the terms of an employer-sponsored plan establish an ESOP or include an employer stock fund as an investment option in a 401(k), the plan's fiduciaries are required to observe the terms of the plan except to the extent that those terms are inconsistent with the provisions of ERISA. 29 U.S.C. § 1104(a)(1)(D). The question whether it was prudent for a fiduciary to continue to invest or permit investment in employer stock, or alternatively, to require plan participants to divest, is likely to vary from participant to participant, depending on such individualized factors as the participant's age, investment portfolio, other sources of retirement income, retirement income needs, plans for future employment and retirement, and risk tolerance. As several courts of appeals have

recognized, only rarely will an ESOP or other employer stock program be so imprudent for all plan participants across the board that plan fiduciaries may be held liable for continuing to invest or permit investment in the employer's stock. *See, e.g., Moench v. Robertson,* 62 F.3d 553 (3d Cir. 1995); *Wright v. Oregon Metallurgical Corp.,* 360 F.3d 1090 (9th Cir. 2004); *Kuper v. Iovenko,* 66 F.3d 1447, 1458-59 (6th Cir. 1995). As these cases establish, an ERISA fiduciary investing in an employer's securities is presumed to have acted prudently absent a "precipitous decline in the price of [the company's] stock" and knowledge of the company's "impending collapse." *See, e.g., Moench*, 62 F.3d at 571-72.

In determining whether the class certification requirements of Rule 23 are met in a suit brought "on behalf of" an ERISA plan, a court must still consider whether the rule's commonality and typicality requirements are met, even though the suit is a derivative one. Those requirements might well be met in a suit claiming that continued investment in a company stock fund or ESOP was so imprudent as to violate the *Moench/Kuper/Wright* standard; in such a case, all plan participants are likely to suffer investment losses from which they cannot recover. In the absence of such a claim, however, the court must determine whether the individual situations and investment decisions of plan participants prevent the plaintiffs from satisfying the typicality and commonality requirements.

Because of the very substantial risks and costs of class action litigation, the certification of a class, in and of itself, can force an employer to settle, even when the employer is confident that the underlying claim has little or no merit. Therefore, it is critical to the sponsors of ESOPs and other employer stock programs that the Rule 23 requirements not be overlooked simply because an ERISA claim purports to be made "on behalf of the plan."

Argument

I. Congress Designed ERISA To Encourage ESOPs And Other Eligible Individual Account Plans That Invest in Employer Stock.

In enacting ERISA Congress distinguished between two types of retirement plans: "defined contribution plan[s]," also known as "individual account plan[s]," and "defined benefit plan[s]." A defined contribution (or individual account) plan is a pension plan that provides benefits based solely on the contributions to the account that the plan maintains for each participant and on the share of the plan's investment experience and expenses (and any forfeitures of other participants' accounts) allocated to the participant's account. Other pension plans are defined benefit plans; typically, a participant's benefit under a defined benefit plan is determined by a benefit formula set forth in the plan. As a result, the plan's investment experience directly affects a participant's benefit under a defined contribution (or individual account) plan, but not under a defined benefit

plan. *See* 29 U.S.C. §§ 1002(34), (35); *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 440 (1999).

Many major employers maintain both individual account plans and defined benefit plans and allow eligible employees to participate simultaneously in both types of plans. Employees who participate in both types of plans have the security that a defined benefit plan provides as well as the investment opportunities offered by an individual account plan. In addition, because of the mobility of the American workforce, many participants in one type of plan sponsored by their current employer are also entitled to benefits that they have accrued under the other type of plan while working for a prior employer.

The fastest growing retirement plans in the country are individual account plans with cash or deferred arrangements, commonly referred to as 401(k) plans after the provision of the Internal Revenue Code that authorizes them, 26 U.S.C. § 401(k). EBRI Special Report, *Company Stock in 401(k) Plans: Results of a Survey of ISCEBS Members* (Jan. 31, 2002). Many of these plans allow each participant to allocate the participant's account among a number of designated investment options. Others allow a participant to allocate part of his or her account among the plan's investment options, but stipulate how the remainder of participant's account is invested. *See id.* As a result, the plan's investment experience does not affect the benefits of all participants uniformly: the effect on

each participant's benefit depends on the participant's investment allocation decisions and on the performance of the investments that the participant has chosen.

Many 401(k) and other individual account plans are employee stock ownership plans (ESOPs), or offer an ESOP or other employer stock fund as an investment option. As of 2003, nearly 42 million Americans participated in 401(k) plans, and approximately one-half of those participants were in plans that provided for investment in employer stock funds. EBRI Issue Brief No. 272, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2003* (Inv. Co. Inst. and Employee Benefit Research Inst., Aug. 2004). The widespread inclusion of employer stock funds in individual account plans has enabled millions of employees to share in their employers' success.

The prevalence of ESOPs and other employer stock funds in defined contribution plans is not accidental. Both ERISA and related provisions of the Internal Revenue Code encourage employers to offer employer stock funds and exempt them from requirements that would otherwise hamper their operation. For example, although ERISA generally imposes a duty on plan fiduciaries to "diversify[] the investments of the plan so as to minimize the risk of large losses," 29 U.S.C. § 1104(a)(1)(C), there is an exception to the duty to diversify for "eligible individual account plans" investing in employer securities. *See* 29 U.S.C.

§ 1104(a)(2). Most eligible individual account plans are also exempt from the general requirement that no more than 10% of a plan's assets be invested in employer securities and employer real property. 29 U.S.C. § 1107(a), (b). An "eligible individual account plan" is one that "explicitly provides for acquisition and holding of qualifying employer securities." 29 U.S.C. § 1107(d)(3).

Similarly, although ERISA prohibits most transactions between the plan and the employer that sponsors it, 29 U.S.C. §§ 1002(14)(C), 1106(a)(1), the statute exempts from that prohibition purchases and sales of employer securities meeting certain conditions. *See* 29 U.S.C. § 1108(e). ERISA likewise generally prohibits a loan or other extension of credit between the plan and the employer, 29 U.S.C. § 1106(a)(1)(B), but permits an ESOP to borrow from the employer (or from a third party with the benefit of a guarantee from the employer) in order to invest in the employer's stock. *See* 29 U.S.C. § 1108(b)(3); *see also Donovan v. Cunningham*, 716 F.2d 1455, 1464-66 & n.24 (5th Cir. 1983); *Matassarin v. Lynch,* 174 F.3d 549, 568 n. 20 (5th Cir. 1999) ("ERISA sound-investment requirements do not generally apply to an ESOP[.]")

The Internal Revenue Code also creates substantial tax incentives for employers to maintain plans that invest in employer stock. *See, e.g.,* 26 U.S.C. § 404(k) (allowing employers to deduct dividends paid on ESOP stock); 26 U.S.C.§ 402(e)(4) (preferential tax treatment for net unrealized appreciation on

employer stock distributed from tax-qualified plan); 26 U.S.C. § 1042 (deferring tax on gain from sale of employer stock to ESOP).[2]

In addition to these specific provisions, Congress has enacted legislation to convey its general view that employee stock ownership deserves special treatment:

> The Congress is deeply concerned that the objectives sought by this series of laws [promoting employee stock ownership] will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans.

Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520 (1976), *quoted in Donovan*, 716 F.2d at 1466 n. 24.

Consistent with these congressional directives, a number of courts have endeavored to reconcile a fiduciary's general obligations under ERISA with the distinct preference accorded in the statute to ESOPs and other eligible individual account plans that invest in employer securities. One context in which this interplay has been addressed is in cases addressing a fiduciary's continued

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[2] From time to time, Congress has included additional incentives, including tax credits for contributions to an ESOP, *see, e.g.*, P.L. 94-12 § 301, P.L. 94-455, § 803, P.L. 95-600, § 141, and an exclusion from a lender's taxable income of 50% of the interest received on a qualifying loan to finance the acquisition of employer securities by an ESOP, *see* 26 U.S.C. § 133 (repealed).

investment in employer securities. It is well established that an employer's initial decision to set up a plan, such as an ESOP or other eligible individual account plan, is not an act of plan management or administration subject to ERISA's fiduciary responsibilities. *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890-91 (1996). When employers undertake these actions, "they do not act as fiduciaries, but are analogous to the settlors of a trust," *Lockheed*, 517 U.S. at 890 (citations omitted), and plan fiduciaries are expected to administer the plan in accordance with the applicable plan and trust documents and instruments, "insofar as such documents and instruments are consistent with" the other provisions of ERISA. 29 U.S.C. § 1104(a)(1)(D).

Although the question of whether to offer an employer stock fund in a defined contribution plan is initially a settlor function, the courts have had to consider the circumstances in which plan fiduciaries may be required by ERISA's fiduciary rules to override the plan design and eliminate the employer stock fund as an investment. In *Moench v. Robertson,* for example, the U.S. Court of Appeals for the Third Circuit held that a fiduciary who, pursuant to the terms of a qualifying plan, invests plan assets in employer stock is "entitled to a presumption that it acted consistently with" ERISA's duty of prudence unless the plaintiff can point to a "precipitous decline" in the price of employer stock and proof that plan

fiduciaries were aware of the employer's "impending collapse." 62 F.3d 553, 571-72 (3d Cir. 1995). The court recognized that any other standard "essentially would render meaningless the ERISA provision excepting ESOPs from the duty to diversify." *Id.* at 570. Moreover, it concluded that a less stringent presumption would "risk transforming ESOPs into ordinary pension benefit plans, which then would frustrate Congress' desire to encourage employee ownership." *Id.*

The *Moench* standard has since been endorsed and adopted by both the Sixth and the Ninth Circuits, and applied by district courts throughout the nation. *See Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1097-98 (9th Cir. 2004) ("Interpreting ERISA's prudence requirement to subject [eligible individual account plans] to an albeit tempered duty to diversify arguably threatens to eviscerate congressional intent and the guiding rationale behind [eligible individual account plans]."); *Kuper v. Iovenko,* 66 F.3d 1447, 1458-59 (6th Cir. 1995) (same); *In re Syncor ERISA Litig.*, 351 F. Supp.2d 970, 978-83 (C.D. Cal. 2004); *In re Duke Energy ERISA Litig.*, 281 F. Supp. 2d 786, 793-94 (W.D.N.C. 2003); *but see Lalonde v. Textron, Inc.*, 369 F.3d 1, 6 (1st Cir. 2004) (declining to apply *Moench* standard on a motion to dismiss in favor of further record development; court sought additional "input from those with expertise in the arcane area of the law where ERISA's ESOP provisions intersect with its fiduciary duty requirements.").

Recognizing the shared goals and parallel exemptions from ERISA's duty to diversify for both ESOPs and non-ESOP eligible individual account plans that invest in employer securities, courts have regularly applied the *Moench* rule and presumption to both types of plans. *See, e.g., Pa. Fed'n, Bhd. of Maint. of Way Employees v. Norfolk S. Corp. Thoroughbred Ret. Inv. Plan*, No. CIV.A.02-9049, 2004 WL 228685, at *7 (E.D. Pa. Feb. 4, 2004) (holding that for *Moench* fiduciary duty analysis, "the distinction between ESOP & other types of [eligible individual account plans] . . . is irrelevant"); *In re Duke Energy ERISA Litig.*, 281 F. Supp. 2d at 794 n. 5 (W.D.N.C. 2003) (declining to draw distinction between ESOPs and other eligible individual account plans); *Wright* v. *Oregon Metallurgical Corp.*, 222 F. Supp. 2d 1224, 1233 (D. Or. 2002).

II. The Continued Vitality of ESOPs and Other Eligible Individual Account Plans Is Threatened by Suits for Breach of Fiduciary Duty Under ERISA Following A Decline in the Employer's Share Price.

Recently there has been a spate of ERISA litigation against large publicly-held companies claiming that plan fiduciaries breached their duty to plan participants with respect to an ESOP or other employer stock fund that is part of a 401(k) or other defined contribution plan. Typically such suits allege, as the plaintiffs have in this case, that the plan fiduciaries have wrongly failed to divest the plan of its investment in employer stock or have misrepresented the employer's financial condition. These suits have been brought not only when plan participants

were required to have some portion of their investment in employer stock but even when participants were given complete discretion to direct their own investments and an employer stock fund was only one option among the many available to them.

One recently filed case illustrates the difficulties that the current litigation poses for plan fiduciaries. Late last year, W.R. Grace employees who participated in an employer stock fund sued the company for $40 million. Their claim was that W.R. Grace "forced them to sell their Grace stock at a distressed price of $3.50 per share." After the sale, W.R. Grace stock tripled in value. The employees asserted that W.R. Grace must restore this "lost" gain. *See Employees File Suit Against W.R. Grace*, http://moneymag.com/2004/11/04/news/midcaps/wr_grace.reut (Nov. 4, 2004). Cases like this one against W.R. Grace confirm the wisdom of the *Moench* presumption that fiduciaries have acted consistently with ERISA when they invest in employer stock. Otherwise, fiduciaries become "virtual guarantors of the financial success of the . . . plan" — at risk if they permit continued investment in employer stock, and equally at risk if they do not. *Moench*, 62 F.3d at 570 (quoting *Martin v. Feilen*, 965 F.2 660, 666 (8th Cir. 1992)).

The threat to the employer-sponsored retirement plan system posed by ERISA suits—particularly class action suits—brought against plan fiduciaries who

invest or permit investment in employer stock is real and substantial. Plan fiduciaries are at risk of suit whenever the employer's share price declines or does not perform as expected, even if such down turns are only temporary or simply reflect market-wide trends. Plan sponsors and fiduciaries are now questioning the wisdom of continuing to offer employer stock as an investment under their plans. But removing them would undermine Congress's judgment that employee ownership of an employer's stock is a worthy goal in and of itself — a goal which this Court described as "expanding the national capital base among employees — an effective merger of the roles of capitalist and worker." *Donovan*, 716 F.2d at 1458.

Reducing the desirability of employer stock programs also poses a more general threat to the employer-sponsored retirement plan system. "Nothing in ERISA requires employers to establish employee benefit plans. Nor does ERISA mandate what kinds of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Many companies electing to make contributions to their employees' individual account plans have done so in the form of employer stock. This is particularly so for start-ups that are rich in stock but not in cash and, while not always the case, many of those investments have proven to be very successful for plan participants. If this

suit and others like it are permitted to proceed, however, these opportunities will surely diminish.

III. "Derivative" Suits Brought "On Behalf of the Plan" Under ERISA Section 502(a)(2) Are Not Exempt From the Rule 23 Class Certification Requirements.

The district court certified plaintiffs' claims for breach of the fiduciary duty of prudence under ERISA Section 502(a)(2), which in turn authorizes plan participants to sue for "appropriate relief" under ERISA Section 409(a). 29 U.S.C. § 1132(a)(2). Section 409(a) provides that a person who is a plan fiduciary and who has breached a fiduciary duty is liable "to make good to such plan any losses to the plan" and must "restore to such plan any profits of such fiduciary which have been made through use of assets of the plan." 29 U.S.C. § 1109(a) (emphasis added).

In *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), the United States Supreme Court considered the scope of the relief authorized by Sections 409(a) and 502(a)(2). Looking to the text of Section 409(a), and to ERISA's statutory provisions defining the duties of fiduciaries and the rights of beneficiaries, the Court held that recovery under Section 502(a)(2) for Section 409(a) violations "inures to the benefit of the plan as a whole." 473 U.S. at 140. The Court explained that the text of Section 409(a) repeatedly emphasizes "the relationship between the fiduciary and the plan as an entity." *Id.* This

emphasis, the Court concluded, demonstrated Congress's intent to authorize under Section 409(a) only "remedies that would protect the entire plan." *Id.* at 140-42. Similarly, the Court determined that a contextual reading of ERISA's fiduciary duty and beneficiary rights provisions made it "abundantly clear" that the drafters of Section 409(a) "were primarily concerned with the possible misuse of plan assets."

In certifying the class below, the district court held that it did not have to apply the Rule 23 standards of commonality and typicality, on the theory that class members were all equally affected because the suit was a "derivative" one brought under Section 502(a)(2). It held that "[t]here can be no conduct or claims conflicts because each class member is bringing suit on the Plan's behalf, not as an individual" and that "[i]n effect, class members, as the Plan's advocates, are each bringing the exact same suit." *In re Elec. Data Sys. Corp.*, 224 F.R.D. 613, 623 (E.D. Tex. 2004). This analysis is flawed. In other ERISA derivative actions brought by plan participants, the courts have recognized that it is critical that the "procedural safeguards" of the federal class certification rules be applied "in order to protect the plan and plan participants." *Coan v. Kaufman*, 349 F.Supp. 2d 271, 275 (D. Conn. 2004) (citing cases); cf. Fed. R. Civ. P. 23.1 ("The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in

enforcing the right of the corporation or association."). Because this case is brought as a class action, the first question is whether there are common issues of fact and law and if the claims of the named plaintiffs are typical under Rule 23; if not, no class can be certified.

As this Court recently emphasized, district courts are required to "take a close look at the parties' claims and evidence" in making a Rule 23 decision on class certification. *Unger v. Amedisys, Inc.*, No. 03-30965, 2005 WL 375684 (5th Cir. Feb. 17, 2005). A court must analyze "the claims, defenses, relevant facts and applicable substantive law in order to make a meaningful determination of the certification issue." *Id.* at *2 (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)). In a case involving fraudulent misrepresentation claims, for example, "a district court must perform sufficient analysis to determine that class members' fraud claims are not predicated on proving individual reliance." *Id.* at *3. If they are, "then reliance is an issue that will have to be proven by each plaintiff, and the proposed class fails Rule 23(b)(3)'s predominance requirement." *Id.* (citing *Castano*, 84 F.3d at 745); *Simon v. Merrill Lynch*, 482 F.2d 880, 882 (5th Cir. 1973).

The required inquiry into "claims, defenses, relevant facts and applicable substantive law" does not fall by the wayside simply because plaintiffs

purport to sue "on behalf of the plan" under ERISA Section 502(a)(2). The courts have held, for example, the fact that suit is brought derivatively under Section 502(a)(2) does not excuse a plaintiff from establishing that he or she individually has standing to bring the claim. *See Harley v. Minnesota Min. & Mfg. Co.*, 284 F.3d 901, 906 (8th Cir. 2002); *Piazzo v. Ebsco Indus. Inc.*, 273 F.3d 1341, 1349-50 (11th Cir. 2001). As the Eighth Circuit noted in so holding, "[a] particular beneficiary cannot maintain a [Section 502(a)(2)] suit for a breach of trust which does not involve any violation of duty to him." *Harley*, 284 F.3d at 907 (quoting Restatement (Second) of Trusts § 214 cmt. b. (1959)). Just as bringing suit under Section 502(a)(2) does not override individual standing requirements, nor does it trump Rule 23's standards for class certification.

Here, the issue of whether a particular investment is a sound choice for a particular plan participant will depend on such individualized factors as the participant's age, investment portfolio, other sources of retirement income, retirement income needs, plans for future employment and retirement, and risk tolerance. That notion is reflected in Section 404(c) of ERISA, which provides that if a participant "exercises control over the assets in his account . . . no person who is otherwise a fiduciary shall be liable . . . for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control." 29 U.S.C. § 1104(c). But even if Section 404(c) was not intended to protect

fiduciaries from claims that it was imprudent even to make a given investment option available to plan participants, *see* 29 C.F.R. § 2550.404c-1, ERISA does not require fiduciaries to ensure that every investment option is a good one for all plan participants.

With respect to investments in ESOPs or other company stock funds, the *Moench/Kuper/Wright* line of cases provides an appropriate and workable standard for determining when such claims can be certified as a class, *i.e.,* when the company stock was in "precipitous decline" and the fiduciaries are alleged to have had knowledge of an "impending collapse." *See, e.g., Moench,* 62 F.3d at 572. Application of that standard would permit class action suits to proceed under Section 502(a)(2) in cases of corporate failures such as Enron and WorldCom, while otherwise protecting employers from suits that purport to be brought "on behalf of the plan" as a whole even though employer stock remains a sound investment for many plan participants.[3]

It is not enough that the *Moench/Kuper/Wright* rule is available as a presumptive defense to plan fiduciaries at a trial on the merits. Because of the risks and cost of class action litigation, the certification of a class, in and of itself,

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[3] Because this case, like most of the recent ERISA litigation against plan fiduciaries, is focused only on the prudence of continued investment in the employer's own securities, *amici* do not address, and the Court need not consider, the standards for certification of a class claiming some other breach of fiduciary duty to plan participants.

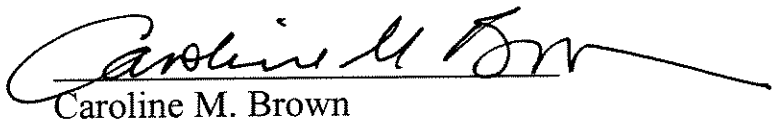
can force a settlement even when the plan fiduciaries are confident that they can ultimately prevail at trial. *See Unger*, 2005 WL 375684, at *4 ("[G]iven the realities of litigation costs, certification can compel settlements without trial...."). It is for that reason that there have been very few opportunities for the courts to address the scope of Section 502(a)(2) and how it relates to the Rule 23 class certification requirements. This case presents a prime opportunity for this Court to provide much needed clarity.

Amici urge the Court to hold that a class action brought under Section 502(a)(2) must still satisfy Rule 23's certification requirements, and further that a claim that plan fiduciaries breached ERISA's duty of prudence by investing or permitting investment in employer stock cannot be maintained on a class basis under Section 502(a)(2), absent evidence that the employer's securities were in precipitous decline and that the plan's fiduciaries knew that the employer's collapse was imminent.

Conclusion

For the reasons given above, the certification of a class under Section 502(a)(2) should be reversed.

Respectfully submitted,



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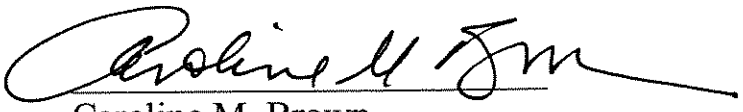
CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief is proportionally spaced, has typeface of 14 points or more, and excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B), contains 4,912 words, as counted by Microsoft Word, the word-processing software used to prepare this brief.



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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and 5th Cir. R. 31.1, I hereby certify that on this 8th day of March, 2005, I caused to be served one electronic copy and one paper copy (sent via Federal Express) of this Brief on the following counsel:

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