Case No. 03-11087

**IN THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT**

MICHAEL MILOFSKY, et al.,

Plaintiffs-Appellants,

v.

AMERICAN AIRLINES, INC., et al.,

Defendants-Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION
Civil Action No. 3:02-CV-2441-K**

EN BANC BRIEF OF THE ERISA INDUSTRY COMMITTEE AND AMERICAN BENEFITS COUNCIL AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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October 18, 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

DOCKETED CASES

FEDERAL STATUTES

MISCELLANEOUS

EN BANC BRIEF OF THE ERISA INDUSTRY COMMITTEE AND AMERICAN BENEFITS COUNCIL AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

The ERISA Industry Committee ("ERIC") and the American Benefits Council (the "Council") are 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.* The last few years have seen a tremendous increase in litigation against ERISA plan fiduciaries premised on ERISA Sections 409(a) and 502(a)(2), which establish a fiduciary's duties to a plan and provide a cause of action for breach thereof. As Supreme Court precedent makes clear, these statutuory sections encompass only suits brought on behalf of the plan as a whole, and not those seeking individualized relief.

Because such suits are brought by individual participants on behalf of the plan, courts have struggled with distinguishing those suits which are properly brought under these Sections and those which do not allege breaches of fiduciary duty affecting an entire ERISA plan – an issue that has become of paramount importance in recent years in light of the explosion of litigation against plan fiduciaries. This case provides the Court with the opportunity to address Section 409(a)'s requirement that such suits must seek recovery "to the plan," and the

Supreme Court's mandate that actions under Section 502(a)(2) must be brought on behalf of the plan and for the benefit of the plan as a whole.

Because this case presents an issue of critical importance to companies sponsoring ERISA plans, ERIC and the Council respectfully submit this brief as *amici curiae* in support of appellee American Airlines to assist the Court in its consideration of this case.

Interest of Amici Curiae

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

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 primarily major employer sponsors of employee benefit plans operating in many states (including appellee American Airlines) as well as plan service providers such as consulting and actuarial firms, investment firms, and other professional benefit organizations.

Collectively, these members sponsor and administer plans that cover more than 100 million participants.

ERIC, the Council, and their respective members share a strong interest in the issues presented in this case and others like it. In the last few years, there has been an explosion of cases brought against ERISA plan sponsors in which the actions of the plan sponsor and various corporate officers are claimed to breach the duties that ERISA imposes on plan fiduciaries with respect to plan administration. Many of these recent cases are premised on a decline in the value of a plan participant's individual account in a defined contribution plan (commonly referred to as a 401(k) plan). While in some circumstances ERISA Section 502(a)(2) provides a cause of action for suits brought on behalf of a plan and seeking recovery payable "to such plan" under Section 409(a), Sections 409(a) and 502(a)(2) must be applied in accordance with their text. It is not an open invitation for a participant in a 401(k) plan to bring suit seeking damages to be paid into his or her account. Rather, it is incumbent on courts considering cases brought under Section 502(a)(2) to determine whether the plaintiff has alleged, or can establish, that the defendant was acting as a plan fiduciary with respect to the actions complained of, that the fiduciary breached a duty with respect to the plan (not just a duty to one or more plan participants), and that the plan (not just one or more plan participants) suffered an injury as a result.

In cases of exceptional importance, with the potential for far-reaching effects on employee benefit plan design or administration, ERIC and the Council have participated as *amicus curiae*.[1] ERIC and the Council, jointly with the ESOP Association, recently filed an *amicus* brief in this Court in another case raising similar issues with regard to the interpretation and application of ERISA Sections 409(a) and 502(a)(2), 29 U.S.C. §§ 1109(a), 1132(a)(2), in the context of class certification. *See Langbecker v. Elec. Data Sys. Corp.*, No. 04-41760 (5th Cir. docketed Dec. 29, 2004).

Background

The scope of ERISA Section 502(a)(2) as applied to claims raised by individual account plan participants purporting to act on behalf of an ERISA plan as an entity is an issue of great importance to corporations sponsoring ERISA plans.

Employer sponsorship of retirement plans is voluntary under ERISA. "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).

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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).

If Section 502(a)(2) is applied in a way that makes the cost of maintaining a plan excessively high or unpredictable, employers that have previously adopted retirement plans can be expected to curtail or terminate them, and employers that do not already have retirement plans will be discouraged from adopting them. Such results would not be in the interest of either employers or employees and their families, and it is certainly not the result Congress intended when it enacted ERISA. *See Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (stating that ERISA should not be interpreted to impose burdens that "unduly discourage employers from offering welfare benefit plans in the first place"); *Martinez v. Schlumberger, Ltd.*, 338 F.3d 407, 414 (5th Cir. 2003) (quoting same).

In enacting ERISA, Congress distinguished between two types of retirement plans: "defined contribution" plans, also known as "individual account" plans, and "defined benefit" plans. *See* 29 U.S.C. §§ 1002(34), (35). A defined contribution (or individual account) plan is a pension plan that provides benefits based solely on the contributions allocated 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. *Id.*; *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440 (1999).

At present, 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). *See* EBRI Special Report, *Company Stock in 401(k) Plans: Results of a Survey of ISCEBS Members* (Jan. 31, 2002). The Federal Reserve estimates that as of the end of 2004, nearly $2.7 trillion dollars in retirement assets were invested in defined contribution (individual account) plans. Bd. of Governors of the Fed. Reserve Sys., *Flow of Fund Accounts in the United States: Flows and Outstandings, Second Quarter 2005*, Fed. Reserve Statistical Release Z.1, at 113 (Sept. 21, 2005). This represents approximately sixty percent of all pension plan assets in the United States. *Id.*

The growing prevalence of individual account plans underscores the importance of the benefits that these plans provide to both plan participants and plan sponsors. Many individual account plans allow each participant to allocate his or her account among a number of designated investment options. Others allow participants to allocate part of their accounts among the plan's investment options, but stipulate how the remainder of each participant's account is to be invested.

Individual account plans also offer advantages to plan sponsors. Many employers cannot afford the considerable costs and uncertainties associated with funding and maintaining traditional defined benefit plans. *See Hughes Aircraft*, 525 U.S. at 439 (recognizing that in sponsoring a defined benefit plan, "the employer typically bears the entire investment risk and . . . must cover any underfunding as the result of a shortfall that may occur from the plan's investments"). The cost to the employer of maintaining and funding an individual account plan, by contrast, is more predictable, and often lower, than the cost of maintaining and funding a defined benefit plan. The employer does not bear the investment risk under an individual account plan, and most individual account plans are exempt from the minimum funding standards of ERISA and the Internal Revenue Code. *See* 26 U.S.C. § 412; 29 U.S.C. § 1082.

However, the growing prominence of individual account plans has been accompanied by a corresponding increase in litigation against their fiduciaries. These suits are typically premised on the investment experience of individual account plans, and often seek relief allocable to individual participant accounts based on a decline in the value of one of more of the investments that the plan makes available to participants. These cases are even brought where plan participants retain complete discretion to direct the investment of their individual plan accounts, effectively seeking to make plan fiduciaries "virtual guarantors of the financial success of the [ERISA] plan." *Moench v. Robertson*, 62 F.3d 553, 570 (3rd Cir. 1995) (quoting *Martin v. Feilen*, 965 F.2d 660, 666 (8th Cir. 1992)).

The Supreme Court's interpretation of the scope of Sections 409(a) and 502(a)(2) confirms that actions under these sections are "derivative" actions by plan participants who stand in the shoes of the plan. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). It is critical that this Court and other courts confronted with suits alleging breaches of fiduciary duty under ERISA give meaning to the requirement of Sections 409(a) and 502(a)(2) that such suits pursue breaches of fiduciary duty to the plan; be brought on behalf of the plan as an entity; and provide for recovery "to such plan." If these requirements are essentially read out of the statute, and courts allow Section 502(a)(2) suits to proceed based solely on claims that the value of a plan participant's individual account has been adversely affected, the recent wave of litigation against plan fiduciaries threatens far-reaching damage to employee retirement plans and the workers and retirees who participate in them.

Individual claims, improperly brought under ERISA Section 502(a)(2) "on behalf of the plan," pose a real and substantial threat to the employer-sponsored retirement plan system unless the courts give weight and meaning to the requirement that such suits must be for breaches of fiduciary duty to the plan and brought on behalf of the plan for recovery to the plan as a whole. Otherwise, plan sponsors can find themselves at risk of litigation every time the value of a plan participant's individual account declines. Such an outcome makes individual account plans significantly more expensive to maintain, and significantly less attractive to employers. Employers that have decided to offer individual account plans to their employees because they believe that the cost of such plans are affordable and predictable might well determine that the better course for the future is not to offer their employees any retirement plan at all.

Summary of Argument

The district court, and the original panel decision, correctly recognized that an asserted injury to an individual account is not always coextensive with an injury to the plan "as a whole" for which relief can be pursued under Section 502(a)(2). The claim asserted – that there was a misrepresentation that may have affected individual account balances – is a paradigmatic example of the type of individual claim that cannot be brought on behalf of the plan. By their very nature, misrepresentation claims must be assessed and proved individually: plaintiffs do not allege that *the plan* relied on any particular communication, but that *individual plan participants* may have so relied to their detriment. ERISA provides a recourse for such individualized claims under Sections 502(a)(1) and 502(a)(3).

Even assuming that there was fiduciary action directed at the plan in which the alleged loss occurred, the actions taken by the individual plan participants in response to this action were not necessarily the same. Each participant made investment decisions only for that participant's individual account: no participant made investment decisions on behalf of the plan or for other plan participants. Moreover, each participant must demonstrate individual detrimental reliance on the fiduciary communication. ERISA clearly recognizes the distinction between the actions of the plan and those of individual participants regarding their own accounts: The statute 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).

This case gives this Court the opportunity to draw a clear distinction between proper Section 502(a)(2) claims brought on behalf of the plan as an entity, and claims asserting essentially individualized harm that are properly brought under Section 502(a)(1) or 502(a)(3).

Argument

I. ERISA Sections 409(a) and 502(a)(2) Authorize Only Suits that Are Brought On Behalf Of A Plan and that Seek Relief for the Plan As an Entity.

ERISA is a "comprehensive and reticulated statute," enacted following a decade of congressional study of the nation's pension plans. *Nachman Corp. v. Pension Benefit Guar. Trust Corp.*, 446 U.S. 359, 361-62 (1980). To this end, ERISA enumerates in considerable detail the parties who may bring actions under the statute and the claims for which these parties may seek relief. *See Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27 (1983). These "carefully integrated civil enforcement provisions" strongly indicate that "Congress did *not* intend to authorize other remedies" beyond those expressly provided by the statute. *Russell*, 473 U.S. at 146.

In recognition of the evident care with which ERISA was crafted, the Supreme Court has strived to give employees the full scope of benefits and remedies conferred by the statute while resisting efforts to infer benefits and remedies not specifically authorized by the statutory text. *See Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 56 (1987); *Russell*, 473 U.S. 134, 147 (1985). "[B]ecause ERISA is a highly technical statute" the courts must "apply it as precisely as [they] can, rather than . . . make adjustments according to a sense of equities in a particular case."

Johnson v. Georgia-Pacific Corp., 19 F.3d 1184, 1190 (7th Cir. 1994). Thus, this Court and other courts considering challenges under Section 502(a)(2), must "respect the 'policy choices reflected in the inclusion of certain remedies and the exclusion of others.'" *Varity Corp.,* 516 U.S. at 515 (quoting *Pilot Life Ins. Co.*, 481 U.S. at 54).

ERISA Section 502 sets forth the statute's civil enforcement mechanisms. 29 U.S.C. § 1132. Contained in this section are three primary remedial provisions for participants affected by actions violating the terms of the plan or ERISA's statutory requirements. *Id.* §§ 1132(a)(1)-(3). Section 502(a)(1) focuses on the rights of individual plan participants. 29 U.S.C. § 1132(a)(1). This subsection authorizes participants to bring suit to challenge the plan's benefit determinations and to recover benefits due to the participants under the terms of the plan. Section 502(a)(2) focuses on fiduciary obligations with respect to the plan as an entity. *Id.* § 1132(a)(2). And, Section 502(a)(3) provides a cause of action for "appropriate equitable relief" for any statutory violation. *Id.* § 1132(a)(3). This subsection is a "catchall," or "safety net," offering "appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Varity Corp.*, 516 U.S. at512.

Section 502(a)(2), the remedial subsection at issue in this case, authorizes plan participants and beneficiaries to bring suit "for appropriate relief under Section 409." In turn, Section 409(a) provides that a plan fiduciary breaching his or her statutory obligations "shall be personally liable to make good **to such plan** any losses to the plan resulting from each such breach, and to restore **to such plan** any profits of such fiduciary which have been made through use of the **assets of the plan** by the fiduciary." 29 U.S.C. § 1109(a) (emphasis added).

In *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), the 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 (emphasis added).

The Supreme Court explained in *Russell* 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 those remedies that protect an entire ERISA plan. *Id.* at 140-42. In other words, "Congress did not intend [Section 409(a)] to authorize any relief except for the plan itself." *Russell* at 144; *see also Matassarin v. Lynch*, 174 F.3d 549, 566 (5th Cir. 1999) (holding that Section

409(a) and 502(a)(2) actions are limited to “fiduciary breaches that cause harm to a plan as a whole”).

II. Plan Participants Bringing Suit Under Sections 409(a) and 502(a)(2) Must Establish a Breach of Fiduciary Duty Directed at and Affecting the Plan As An Entity.

The Supreme Court’s interpretation of Sections 409(a) and 502(a)(2) in *Russell* highlights that participant claims brought under these sections are “derivative” actions on behalf of an ERISA plan. *See In re Schering-Plough ERISA Litig.*, 420 F.3d 231, 231 (3rd Cir. 2005); *Smith v. Syndor*, 184 F.3d 356, 357 (4th Cir. 1999); *In re Elec. Data Sys. Corp. “ERISA” Litig.*, 224 F.R.D. 613, 623 (E.D. Tex. 2004), *appeal docketed sur nom Langbecker v. Elec. Data Sys. Corp.*, No. 04-41760 (5th Cir. Dec. 29, 2004).

Although these ERISA suits are not derivative shareholder suits and are not governed by Rule 23.1 of the Federal Rules of Civil Procedure, they are similar to Rule 23.1 actions in that a Section 502(a)(2) action plaintiff sues not in his or her individual capacity, but as the representative of an entity in which the plaintiff possesses a legal interest. *Compare Russell*, 473 U.S. at 142 n.9 (recognizing “Congress’ intent that actions for breach of fiduciary duty [under Sections 409(a) and 502(a)(2)] be brought in a representative capacity on behalf of the plan as a whole”) *with Lewis v. Knutson*, 699 F.2d 230, 237 (5th Cir. 1983) (holding that corporate derivate suits are also brought in a representative capacity);

see generally Fed. R. Civ. P. 23.1. Accordingly, derivative plaintiffs may sue only to vindicate injuries suffered by the entity in which the plaintiffs have an interest, and may not sue to recover for related individual harms. *See Daily Income Fund v. Fox*, 464 U.S. 523, 529 (1984) (holding, in the context of Rule 23.1 shareholder derivative actions, that "the right claimed by the shareholder is one the corporation could have itself enforced in court."). Moreover, derivative plaintiffs may recover only damages that rightfully belong to the entity. *Ross v. Bernhard*, 396 U.S. 531, 538 (1970). Derivative plaintiffs may not seek damages payable to them as individuals.

The derivative nature of Section 502(a)(2) claims is apparent in the Supreme Court's decision in *Russell*, which held that individual account plan participants may pursue actions under Sections 409(a) and 502(a)(2) only where the participants allege breaches of fiduciary duties directed at and affecting the plan as an entity. *See Russell*, 473 U.S. at 142 ("A fair contextual reading of [Section 502(a)(2)] makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary."); *see also* 29 U.S.C § 1109(a). Conversely, plan participants cannot pursue Section 502(a)(2) claims for breaches of fiduciary duty if their claims are fundamentally individual claims seeking individualized relief.

As the Supreme Court noted in *Russell*, the clearest example of a breach being directed at a plan occurs when a plan fiduciary misappropriates plan assets, or engages in a self-dealing transaction with plan assets. *See Russell*, 473 U.S. at 142; *see also* 29 U.S.C. § 1106. Thus, a plan fiduciary harms the plan as an entity when the fiduciary misappropriates assets from the plan's trust fund. *See Leigh v. Engle*, 727 F.2d 113, 124-26 (7th Cir. 1984) (holding in suit under Sections 409(a) and 502(a)(2) that plan fiduciary breached duty to plan in using plan assets to defend plan sponsor in corporate control contest). Likewise, a fiduciary who invests plan assets to advance his own personal interest commits a breach of duty directed squarely at the plan, and can be held liable under Sections 409(a) and 502(a)(2). *See Patelco Credit Union v. Sahni*, 262 F.3d 897, 910-12 (9th Cir. 2001).

In these instances, Sections 409(a) and 502(a)(2) apply because the fiduciary's unlawful conduct is directed at the plan's assets and the effect of the fiduciary's breach can be determined by reference to the plan as an entity. *See, e.g.*, *Leigh*, 727 F.2d at 122 ("ERISA [Section 409(a)] clearly contemplates actions against fiduciaries who profit by using trust assets, even where the plan beneficiaries do not suffer a direct financial loss."). Any impact on individual plan participants stems from their status as beneficiaries of the plan. No analysis of individual participant decision-making is required in order to ascertain whether there has been a breach of fiduciary duty or to measure the recovery available to plan participants.

By contrast, a claim asserting that "the plan" has been injured because of fiduciary conduct that might or might not have affected the value of the investments allocated to an individual participant's account, depending on the actions taken by the individual participant, is not a claim that is properly asserted on behalf of the plan or that properly seeks relief on behalf of the plan as a whole. *See, e.g. In re Elec. Data Sys. Corp.*, 224 F.R.D. at 623-65; *Fisher v. J.P. Morgan Chase & Co.*, 2005 WL 2063813, at *3-*4 (S.D.N.Y. Aug. 26, 2005). The misrepresentation claims brought by plaintiffs in this case exemplify this distinction.

To state an ERISA breach of fiduciary claim based on a misrepresentation, a plan participant must allege detrimental reliance on the asserted misrepresentation. *See Adams v. Freedom Forge Corp.*, 204 F.3d 475, 492 (3d Cir. 2000) ("An employee may recover for breach of fiduciary duty if he or she proves that an employer, acting as a fiduciary, made a material misrepresentation that would confuse a reasonable beneficiary about his or her benefits, *and the beneficiary acted thereupon to his or her detriment*.") (emphasis added); *Weir v. Fed. Asset Disposition Ass'n*, 123 F.3d 281, 290 (5th Cir. 1997). Detrimental reliance, by its very nature, runs to the individual. As the courts have repeatedly recognized, reliance can be alleged and proved only on a person-by-person basis, as one plan participant might detrimentally rely on a communication that other plan participants did not receive or chose to ignore. *See, e.g.*, *In re Elec. Data Sys. Corp.*, 224 F.R.D. at 630 ("In the context of a breach-of-fiduciary-duty suit for misrepresentations about a benefits plan's potential changes, the Fifth Circuit [has] adopted a fact-specific approach to determine whether the alleged misrepresentations were material.") (citing *Martinez*, 338 F.3d 407).

Under this standard, in order to prevail on their misrepresentation claims in this case, plaintiffs are required to show not only that the defendants were acting as plan fiduciaries who misrepresented the timing of the individual account transfers, but also that the plaintiffs relied on any such misrepresentations to their detriment. This is necessarily an individualized inquiry. *See In re Elec. Data Sys.*, 225 F.R.D. at 630. Some participants might not have relied on the plan's communications at all; others might have relied on the communications, but also elected to continue to actively manage their plan accounts until the actual transfer to the American $uper $aver plan. Compounding this inquiry is the additional fact that the claimed misrepresentations were made individually to each plaintiff, based on the timing of that plaintiff's transfer to American Eagle employment.

A plan participant is not suing derivatively on behalf of an ERISA plan, or seeking to recover a loss to the plan, if the court must "examine the specific decisions allegedly made by [each plan participant] in order to determine whether each one is sufficient to establish detrimental reliance" under ERISA. *In re Unisys Corp. Retiree Med. Benefits Litig.*, 2003 WL 252106, at *4-*5 n. 13 (E.D. Pa. Feb. 4, 2003). There can be no injury to the plan when purported "[c]lass members who relied to their detriment on the alleged misrepresentations may have a misrepresentation claim, while class members who did not rely to their detriment may not have a claim." *Renton v. Kaiser Found. Health Plan, Inc.*, 2001 WL 1218773, at *5 (W.D. Wash. Sept. 24, 2001); *see also In re Unisys Savs. Plan. Litig.*, 1997 WL 732473 (E.D. Pa. Nov, 24, 1997), *aff'd*, 173 F.3d 145, 158-59 (3d Cir.) (stating that "[t]o the extent that . . . plaintiffs are suing for [the defendants'] alleged misrepresentations and/or non-disclosures, these claims are individual claims" not actionable under Section 409(a)). Even though individualized claims cannot be brought under ERISA Section 502(a)(2), they still may be brought under the broader remedial provisions of Sections 502(a)(1) and 502(a)(3).

As the above cases make clear, "in order to protect the plan and absent participants," plaintiffs asserting claims under Sections 409(a) and 502(a)(2) must, at a minimum, meet the standards of the federal class certification rules. *Coan v. Kaufman*, 349 F. Supp. 2d 271, 276 (D. Conn. 2004) (citing cases). Because Section 502(a)(2) actions are derivative suits on behalf of the plan, application of these "procedural safeguards" is necessary to ensure that plaintiffs' claims fairly represent the interests of other plan participants. *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.").

Plaintiffs, and the Department of Labor as *amicus curiae*, urge that to state a Section 502(a)(2) claim, plan participants need assert only that a breach of fiduciary duty has resulted in a decrease in the value of assets allocated to an individual participant's account, because these assets are held in trust for the plan. This formulation is not faithful to the words of the statute and is so overbroad that it would encompass remedies that Congress clearly intended to be pursued under other parts of Section 502(a). For example, a plan participant alleging that employer contributions to his or her individual account were misallocated to the account of another plan participant would be permitted to sue under Section 502(a)(2), even though such a suit seeks individual relief properly sought under Sections 502(a)(1) or 502(a)(3).

The panel opinion in this case correctly recognized that Section 502(a)(2) claims do not inure to the benefit of a plan "just because the complaint requests that damages be paid to the plan instead of directly to the respective plaintiffs." *Milofsky*, 404 F.3d at 343. The Department of Labor itself similarly recognized this distinction in the *amicus* brief it filed with this Court in *Langbecker* *v. Electronic Data Systems Corp.*, No. 04-41760 (5th Cir. docketed Dec. 29, 2004). In *Langbecker*, the Department of Labor specifically distinguished *Milofsky* as a case involving harms directed at a subclass of plan participants, and not properly brought under Section 502(a)(2). Brief of *Amicus Curiae* Secretary of Labor, Elaine L. Chao, at 14-15, *Langbecker*, No. 04-41760 (5th Cir. docketed Dec. 29, 2004). The Department of Labor's brief further contrasted *Milofsky* with actions alleging breaches of fiduciary duty "that, by their very nature, affect the Plan as a whole." *Id.* at 14.

As the panel opinion and the Department of Labor's *Langbecker* brief both recognized, if a suit is truly derivative, it must be that the claim raised could be asserted by any plan participant, standing in the shoes of the plan itself. The claims that plaintiffs have asserted in this case are not such claims, even assuming *arguendo* that the assets in the plaintiffs' individual accounts decreased after transfer to the American $uper $aver plan. In order to prevail on the claims they have made, each plaintiff would have to establish detrimental reliance and prove individualized loss. That is not a derivative suit brought on behalf of the plan as an entity but instead an amalgamation of individualized claims that can be asserted, if at all, under the individualized relief provisions of Sections 502(a)(1) or 502(a)(3).

ERIC and the Council believe that the the Third Circuit's *In re Schering-Plough* case was wrongly decided. The *Schering-Plough* decision held the plaintiffs in that case sought relief on behalf of the plan because "[t]he Plan held Schering-Plough stock as an asset and that asset was greatly reduced in value allegedly because of breaches of fiduciary duty." 420 F.3d at 235. The *Schering-Plough* court recognized that the misrepresentation claims advanced by plaintiffs in that case might have to be proved individually, *id.* at 236-37, but appears to have concluded that the individual relief question was better considered on the issue of class certification. However, as set forth above, Sections 409(a) and 502(a)(2) do not provide for a cause of action where plan participants assert individual claims that must be established and proved individually.

In any event, the *Schering-Plough* decision is simply not applicable to plaintiffs' case. To the extent that the *Schering-Plough* plaintiffs based their Section 502(a)(2) claims on misrepresentations, these asserted misrepresentations were statements made by the corporation to the general public, and on which every plan participant could theoretically rely. *Id.* at 233-34. In contrast, plaintiffs in this case assert individual misrepresentations made to individual plan participants. By their very nature, these alleged misrepresentations could only be relied upon, if at all, by the specific individual participants to whom the communications were directed. Such individualized claims runs directly contrary to the plain language of Sections 409(a) and 502(a)(2), and to *Russell*.

Conclusion

For the reasons given above, the decision of the district court should be affirmed.

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 5,077 words, as counted by Microsoft Word, the word-processing software used to prepare this brief.

/s/ Vanessa Scott
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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 the 18th day of October, 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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