IN THE SUPREME COURT OF THE UNITED STATES

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JAMES LARUE, :

Petitioner :

v. : No. 06-856

DEWOLFF, BOBERG & :

ASSOCIATES, INC., ET AL. :

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Washington, D.C.

Monday, November 26, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

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THOMAS P. GIES, ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in case 06-856, LaRue v. DeWolff, Boberg & Associates.

Mr. Stris.

ORAL ARGUMENT OF PETER K. STRIS

ON BEHALF OF THE PETITIONER

MR. STRIS: Thank you, Mr. Chief Justice, and may it please the Court:

Let me begin with the first question on which this Court has granted certiorari. Sections 502(a)(2) and 409 of ERISA permit restoration of "any losses to the plan."

JUSTICE SCALIA: What are the code numbers of those? I really get confused with you people who work with ERISA all the time -- can refer, you know Section 3 of ERISA. I use the code. What -- what code sections are you talking about?

MR. STRIS: I never thought the day would come, Justice Scalia, when I was described as working with ERISA all of the time, but I will tell you the code provision. The code provision is -- for 502(a)(2) of ERISA -- is 29 U.S.C. 1132(a)(2). It's found on page 10a of the blue brief. Section 409 of ERISA is 29

U.S.C. 1109, and I was quoting specifically from 1109(a), and that is found on page 9a of the blue brief.

JUSTICE SCALIA: Thank you.

MR. STRIS: Now, the statute plainly states that "any losses to the plan" may be recovered if they were caused by fiduciary breach. Our position on the (a)(2) question is straightforward. The plain meaning of "any losses to the plan" includes any diminution in value of defined contribution plan assets, regardless of the number of participants ultimately affected.

CHIEF JUSTICE ROBERTS: But the plan itself is nowhere in the record, is that right?

MR. STRIS: Well, the summary plan description was attached to the complaint.

CHIEF JUSTICE ROBERTS: Right, the summary. And I looked at the summary and saw nowhere the rules about investment options, what you get to choose, how often -- and for all we know, the plan might say you have no choice about investment options, it's all going to be invested in T-bills or whatever.

MR. STRIS: Respectfully, Mr. Chief Justice, that's not true. I would point your attention to page 19a of the appendix to the brief in opposition. And this is the page of the summary plan description that makes clear that participants in the plan like Mr. LaRue will have the opportunity to direct their investments.

JUSTICE SCALIA: But that wasn't in the record.

MR. STRIS: It is in the record.

JUSTICE SCALIA: It is in the record.

MR. STRIS: Yes. And to be clear, Justice Scalia --

CHIEF JUSTICE ROBERTS: Where in the record is it?

MR. STRIS: It is page 19a of the --

CHIEF JUSTICE ROBERTS: No, that's in the opposition to certiorari, and I don't believe that's in the record.

MR. STRIS: It is in the record; it was attached to the complaint that was filed by Mr. LaRue in this case.

CHIEF JUSTICE ROBERTS: Oh, that's the summary of the plan.

MR. STRIS: The summary plan description, that's correct. And as you know, Mr. Chief Justice, if there is a conflict between the summary plan description and the plan, the summary plan description governs; it's a legitimate document.

CHIEF JUSTICE ROBERTS: The summary on the page you mentioned says that you will be able to -- you have certain investment choices are available to you, and that the administrator will provide you with information on what they are and how you can change it.

MR. STRIS: That is correct.

CHIEF JUSTICE ROBERTS: But we don't know those details, correct?

MR. STRIS: That's true, but this case was decided at the pleading stage. And so to be clear, we alleged that the right given to Mr. LaRue under the plan was violated. If true, then that would constitute a fiduciary breach.

CHIEF JUSTICE ROBERTS: It would also presumably more obviously constitute a breach of the plan, correct?

MR. STRIS: Yes, that's correct; and that is a fiduciary breach. Under 404 (a)(1)(D), failure to act in accordance with the terms of the plan is a classic example of breach of fiduciary duty.

CHIEF JUSTICE ROBERTS: Your position is anything that is remediable, if that's a word, under (a)(1) can also be pursued under (a)(2)?

MR. STRIS: No, that is not my position. My position --

CHIEF JUSTICE ROBERTS: Let me step back. Do you agree that you could bring an action under (a)(1) for this breach of the plan?

MR. STRIS: I think that's far from clear, but what is clear is that we could not recover what we wanted under (a)(1). (a)(1) only permits a lawsuit against the plan. Here the plan doesn't have the funds that are relevant.

JUSTICE GINSBURG: Where does it say that (a)(1) is available only against the plan?

MR. STRIS: The specific language of (a)(1) doesn't state that. It states that you can get benefits due under the plan, or you can enforce your rights under the plan. I'm not aware of a single case, Justice Ginsburg, where an (a)(1)(B) action has been permitted to recover personally from a fiduciary. That is the purpose of (a)(2), which specifically states that you can personally recover from a fiduciary.

JUSTICE SCALIA: That's fine, so why doesn't he proceed first under (a)(1)(B), against the plan?

MR. STRIS: Well --

JUSTICE SCALIA: Because the plan owes him this money. And if the plan turns around and says well, you know the fiduciary didn't invest your funds the way it was supposed to, the plan still owes him the money, doesn't it?

MR. STRIS: I think the answer to that -- I think there are two reasons why that's incorrect. And the first reason is 502 (a)(2), unlike 502(a)(3), is not a catchall provision, so if he has a remedy under 502(a)(2) --

JUSTICE SCALIA: I'm talking about (a)(1)(B).

MR. STRIS: Right. And it is -- there is nothing to suggest that that provision is mutually exclusive with another provision. So my first response to your question, Justice Scalia, is that even if he could have proceeded under (a)(1)(B), there is nothing to suggest that he had to, if he wanted to proceed under the express terms of (a)(2).

JUSTICE SCALIA: Well, there is -- there is this to suggest that only -- only that manner of proceeding preserves the structure of -- of the legislation which is that you're supposed to first apply to the plan and exhaust your remedies there before you come into court; and interpreting it that way would preserve that -- that exhaustion requirement. You have to apply to the plan first, and if you establish that the plan owes you money, then it's a loss to the plan and you can sue in court.

MR. STRIS: Well, what I would say to that, Justice Scalia, and is that this administrative exhaustion requirement that you're referring to is a judicial gloss on the statute. I find it hard to believe that the express terms of (a)(2), which the plain language authorizes restoration to the plan of any losses to the plan for any breach of duty --

CHIEF JUSTICE ROBERTS: Your approach, if can you go under (a)(2) -- you're right that we judicially have developed a number of glosses on (a)(1), including I think most importantly the Firestone deference principle. But if you're right that you can go under (a)(2), then all of that work has been in vain. You can avoid all the limitations on (a)(1) just by saying we want the same relief under (a)(2).

MR. STRIS: I would not agree with that characterization because there are very few cases where the specific conditions for (a)(2) are met. You would need to prove a loss to the plan. In welfare plan cases, for example, you would not be able to proceed under (a)(2) because you would never be able to show that the fiduciary breach caused a loss to the plan.

CHIEF JUSTICE ROBERTS: You told me earlier that any breach of the plan was a fiduciary duty.

MR. STRIS: That's correct.

CHIEF JUSTICE ROBERTS: Now you're -- the -- what is it -- the obverse or the converse of that you're saying is not true.

MR. STRIS: No, that's not true. There are two requirements for an (a)(2) action. One is that there be a fiduciary breach. That's what you just spoke to when you referred to a breach of the term of the plan. But there's a second important requirement which goes to the heart of why (a)(2) is what it is. There must be a loss to the plan. This Court recognizes --

JUSTICE ALITO: Could I ask you whether the (a)(2) argument would be available to you on remand even if we agree with your interpretation of that provision? Didn't Judge Wilkinson say pretty clearly that the argument had been waived? He said, "even if the argument were not therefore waived." Doesn't that mean that it was waived?

MR. STRIS: I don't read the Fourth Circuit's decision that way. I read it as -- as dicta, not an alternative holding. And to be clear, the Respondents concede that point on page 5 of their brief in opposition, and I quote. They state: "After suggesting this claim may have been waived" and then they proceed. So even Respondent agrees that it was merely dicta --

JUSTICE ALITO: Well, maybe -- maybe they've waived the waiver, but Judge Wilkinson is a careful writer, and if you use the subjunctive there -- "even if the argument were not therefore waived" -- doesn't that mean it was in fact waived?

MR. STRIS: Not in my opinion, but that's an issue that the Fourth Circuit and the lower courts will need to resolve. If they interpret their opinion as having held that, certainly we would be precluded. I don't think that that is what they held, and I think we have a very strong argument that we pled a 502(a)(2) claim as required under the Federal rules.

JUSTICE SCALIA: Let me come back to your earlier point that the second requirement of (a)(2) -- it's actually a requirement of 1109 --

MR. STRIS: That's correct. Yes.

JUSTICE SCALIA: -- is not met. And that is -- that is to -- to make good to such plan any losses to the plan resulting from each such breach. In these welfare plans, if you sue the plan, claiming some welfare benefits that haven't been provided, wouldn't the plan have to provide those benefits?

MR. STRIS: Yes. That is a classic action under (a)(1)(B), Your Honor.

JUSTICE SCALIA: And that would be a loss to the plan.

MR. STRIS: No. I don't agree with that

characterization. In a defined benefit plan of which a welfare plan is the classic example --

JUSTICE SCALIA: Right.

MR. STRIS: -- there are no assets that you have an entitlement to as a beneficiary.

JUSTICE SCALIA: I have an entitlement to certain -- certain welfare payments.

MR. STRIS: That's -- you have entitlement to a contractually provided benefit. So, if there is a fiduciary breach in terms of the administrator stating, "We're not going to give you this cancer treatment that really was provided under plan" --

JUSTICE SCALIA: Right.

MR. STRIS: Or, "we're not going to give you this drug" --

JUSTICE SCALIA: Right.

MR. STRIS: -- that breach doesn't cause any diminution in value in plan assets.

JUSTICE SCALIA: It does if you sue the plan and require the plan to pay what the plan has committed to pay, whereupon the plan would have a right of action against the fiduciary, I assume, for the fiduciary's failure to do what he was supposed to.

MR. STRIS: Well, that may be true, but with respect, I think that that is -- that's the tail wagging the dog. The argument that you made is that a loss occurs if your fiduciary duty claim is successful. That's another statute. That's --

JUSTICE SCALIA: Well, but that would preserve the necessity of going through the exhaustion requirement first. You apply to the plan and say the plan owes me this cancer treatment, and the plan says "yes, we do" or "no, we don't." If it says "yes, we do," it's liable to you and then the plan can -- can recover over against the trustee.

MR. STRIS: Let me take a step back because I think we are 100 percent in agreement, but I want to be clear what our position is. Under the factual scenario that you described, I agree with you 100 percent that you would need to proceed under (a)(1)(B), because you would be requesting a benefit that you are entitled to under the plan.

In this case, the only benefit that you are entitled to, if you are a participant in an individual account plan, is the value of the contributions that you've put or your employer has put into the account, as they have either appreciated or depreciated. So my first response -- it's actually the second response I was going to give earlier that I never got to is that I believe that it's not clear that there is even a legitimate (a)(1)(B) claim that Mr. LaRue could have asserted here because --

JUSTICE SCALIA: Well, it isn't just if the money is payable to him today. It says, "to enforce his rights under the terms or to clarify his rights to future benefits under the terms of the plan."

MR. STRIS: That is correct.

JUSTICE SCALIA: And if there's no money in his account, it seems to me he could bring an action to clarify that even if there is no money in his account the plan owes him future benefits in that amount.

MR. STRIS: And then one of two things at that point would happen, Justice Scalia. Either he would get paid by the plan, which would pick the pockets of the other participants and require the plan to then bring an action under (a)(2) --

JUSTICE SCALIA: Right.

MR. STRIS: -- which is perfectly legitimate, but my response to that is there is no language in the statute to suggest that that is required. If he has an action to do that directly under (a)(2), there's no language in the statute to suggest that he need bring an (a)(1) action first and require the plan to then proceed under (a)(2).

CHIEF JUSTICE ROBERTS: I -- I'm not sure about your characterization that he would pick the pockets of the other plan participants. By definition he only prevails if this was a benefit to which he was entitled under the plan. So that doesn't seem unfair to the other plan participants.

MR. STRIS: Well, a defined contribution plan is nothing more than a collection of assets that have been allocated to a group of participants. So, if those assets are depleted through fiduciary breach, which is what occurred here, and you bring a claim saying that your interest in the plan was depleted, if you brought that claim against the plan, the plan no longer has the money. So either they can pay you --

CHIEF JUSTICE ROBERTS: Well, it may or may not have the money. You could have failed to follow his instructions in a way that enriched the plan, and it's simply a question of getting that money properly allocated rather than improperly allocated to the other plan participants who are picking the pocket of your client.

MR. STRIS: Well, I think under the example that you just gave, Mr. Chief Justice, there would not be a loss to the plan.

Our fundamental argument about the plain text of this statute is that a loss to the plan is a diminution in plan assets. If I'm a participant in a plan, and the administrator doesn't like me and takes my money and allocates it, just because they feel like it, to another participant in the plan, it is not our position that there would be a claim under (a)(2) because there has been no diminution in plan assets. One would need to proceed under (a)(3).

JUSTICE SCALIA: But the plan wouldn't necessarily pay out any money. What would happen is, after the administrative determination by the plan that it does owe the money, he would sue the plan for the money and the plan would implead the trustee who was responsible for this. It ends up the same way.

MR. STRIS: Well, I would say two things about that. First, it may end up the same way depending on how the facts play out, which is the perfect evidence for my point, which is 502(a)(3) of ERISA has been interpreted as a catchall provision. 502(a)(2) is anything but. It sets forth very specific conditions and very specific relief that is available if those conditions are met. There is nothing to suggest that the availability of a potential remedy under (a)(1) precludes a remedy under (a)(2).

Now, my second response, Justice Scalia, is that depending on how the facts play out, the result may not be as you suggest. The plan may choose not to go after the fiduciary, and if that's the case, all -- at most my client could get is a declaration under (a)(1) that doesn't ultimately get him any money.

JUSTICE SCALIA: What would happen if the trustee does not have the money? The trustee not only squandered your client's money; he squandered his own. He's just really in bad shape. He has no money to cough up. What happens to your client? Doesn't your client get that money from the plan anyway?

MR. STRIS: I think that that --

JUSTICE SCALIA: By picking, as you put it, by picking the pockets of the other plan participants?

MR. STRIS: I think in an individual account plan, that presents a very difficult question.

JUSTICE SCALIA: What's the answer to it?

MR. STRIS: I think probably he would not be able to recover that money. I think that money would be lost and he would have no remedy because, at that point in time, someone is going to lose. Either my client is not going to recover money that he is entitled to or other participants in the plan are going to have money taken away from them.

JUSTICE SCALIA: They participated in the plan. It was a failure of the trustee for the plan. It seems to me the whole plan should be liable for it. I mean that's how I --

MR. STRIS: I don't think there's any evidence for that. ERISA imposes a duty of loyalty to all plan participants. If they breach a fiduciary duty which causes a diminution in plan assets that ultimately will affect only one participant, there is -- it goes against the very core of ERISA to say that they can remedy that by taking money from innocent fellow participants. And that really goes to the core of the difference between an (a)(2) claim and an (a)(3) claim on one hand, and an (a)(1) claim on the other hand.

One thing is clear here. Whether or not Mr. LaRue could have brought an (a)(1)(B) claim, it would not under any circumstances have resulted in getting money from the fiduciary back into the plan. Absent money being returned to the plan, there can be no meaningful remedy for the breach that occurred.

So it returns us to the core question in this case, which is were the terms of (a)(2) satisfied?

Now, the court of appeals basically advanced two arguments as to why the plain text of the statute should be ignored. The primary argument was a fundamental misinterpretation of this Court's opinion in Russell. So I'd like to speak about that.

JUSTICE ALITO: If we agree to you on (a)(2), is there any need to get to (a)(3)?

MR. STRIS: Certainly if you agree with us on (a)(2), the court of appeals can be reversed on that issue. We ask that you also reach the (a)(3) question, because this case was decided at the pleading stage.

Although it may be unlikely, there are two reasons why we might need to avail ourselves of (a)(3) on remand. The first is that facts could develop. I don't have any reason to believe they will, but facts could develop where there is a loss to Mr. LaRue's beneficial interest but not a loss to the plan. In other words, they took his money and they gave it to someone else.

We should be able to plead, if we have a cognizable claim under two statutes, both of them and then discover the relevant facts.

The second reason why you should reach the (a)(3) question is additional relief may be available under (a)(3) that is not available under (a)(2).

JUSTICE ALITO: What would that be?

MR. STRIS: Well, our theory of surcharge, and it's also the government's theory, is that surcharge is a make-whole remedy for pecuniary losses that are caused by a breach of trust. It is clear that the core losses are diminution in trust assets or failure of trust assets to appreciate. But there are individual pecuniary losses that were historically remediable under surcharge.

For example, if you paid out of pocket for an auditor to figure out what the extent of a fiduciary breach was, a premerger court of equity would not only surcharge your harm, the harm to your interest in the trust, but they also would return to you the money that you spent for that audit.

JUSTICE GINSBURG: I thought your own argument was that (a)(3) is the catchall. So if (a)(2), which is described as very precise, if that's applicable, you would not get to (a)(3). You would be asking us at this point to assume that somehow the (a)(2) case folds, and then we flip over into (a)(3).

But why should we get there prematurely? It seems to me if it's right that (a)(2) comes before (a)(3), it isn't -- it's not quite a ripeness issue, but it's close to that.

MR. STRIS: Well, the Court certainly may choose not to reach the (a)(3) issue, so I can't speak to that. But what I can say is that the dicta in Varity that describes (a)(3) as a catchall provision -- it is clear that at the end of the day if the release is coterminous under the two provisions, it would not be appropriate for us to proceed under (a)(3).

But that is not a pleading question. My position as to why you should reach (a)(3) is if we have a cognizable theory under (a)(2) and (a)(3), and we believe we do, we shouldn't be required to choose at this point in time if, as the litigation proceeds, it turns out that the relief we would be entitled to is coterminous, then we concede it would not be appropriate to proceed under (a)(3).

CHIEF JUSTICE ROBERTS: Thank you, Mr. Stris.

Mr. Roberts.

ORAL ARGUMENT OF MATTHEW D. ROBERTS

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

SUPPORTING PETITIONER

MR. ROBERTS: Mr. Chief Justice, and may it please the Court:

ERISA authorizes a participant in a defined contribution plan to sue to recover losses to the plan caused by a fiduciary breach even if the losses are attributable to the participant's individual plan account.

CHIEF JUSTICE ROBERTS: But that means every participant, right? In other words, for the failure of the plan to follow this individual's instructions, any participant in the plan can bring suit under (a)(2)?

MR. ROBERTS: It's -- that's theoretically possible because the loss to the -- loss to this individual account is a loss to the plan. Although it's unlikely that a participant that has no -- that is -- whose own benefits are not going to be affected has much incentive to sue, and it's also possible that a court might conclude if such a participant did bring suit, that such a suit shouldn't proceed under prudential standing principles or because the suit wouldn't be appropriate, but here --

JUSTICE SOUTER: Wouldn't the theory be that if ultimately the other accounts could be robbed to sort of make up for at least part of the loss of this one, that for a loss to any account is a threat to all the others?

MR. ROBERTS: Well, we agree that a loss to any account is a threat to the plan as a whole, but I think for a different reason. We don't think that you could rob the other accounts to pay this -- this participant. That would likely violate the fiduciary's duty of loyalty to those participants, the fiduciary duty of prudence under -- under ERISA.

It would also probably violate the terms of the plan, because they have a right to future benefits by the amount that's in their allocation but --

JUSTICE SCALIA: Mr. Roberts, Section (a), (a)(1)(B) --

MR. ROBERTS: Yes.

JUSTICE SCALIA: Unlike Section (a)(2), which refers you to 1109, does not say who gets sued. Under 1109 it's clear who gets sued. It's the fiduciary who gets sued. I find it very curious that (a)(1)(B) just says a civil action may be brought to recover benefits due to him under the terms of his plans or to clarify his right under the terms of the plan.

MR. ROBERTS: Yes, but --

JUSTICE SCALIA: I think the implication there is that the suit -- the suit is against the plan.

MR. ROBERTS: The implication is that the suit is against the plan or against a fiduciary in -- under (a)(1)(B). Against the plan or against the fiduciary whose initial capacity is representative of the plan.

JUSTICE SCALIA: Where?

MR. ROBERTS: If you can't sue the fiduciary under (a)(1)(B), that just reinforces the point even -- even more, Your Honor, that Petitioner's cause of action here arises under (a)(2) because he is seeking relief for the plan not relief from the plan.

JUSTICE SCALIA: It may well. But I'm just talking right now of (a)(1)(B), and it would seem to me that the logical reading of that is that the suit is against the plan.

MR. ROBERTS: Under (a)(1)(B), most courts require that the suit be brought against the plan. I think the suit in certain circumstances could be brought against the fiduciary to require the fiduciary to take action that is required by the terms of the plan such as if you fought against the fiduciary to pay benefits out.

CHIEF JUSTICE ROBERTS: How do we know that this is a breach of fiduciary duty under (a)(2) without having the plan before us? In other words, it may not be a fiduciary obligation to follow an instruction from somebody if the plan provides a different way in which those instructions are going to be handled.

I'd say, as I think a lot of these plans do, you can change your investment options only during a particular period. Well, if the instruction came at a different time, it wouldn't be a breach of fiduciary duties because it wasn't a breach of the plan.

MR. ROBERTS: And if it's not a breach of fiduciary duties, Petitioner will lose on the merits or on remand in their motion for summary judgment based on facts that could be decided.

CHIEF JUSTICE ROBERTS: But I thought his argument -- his argument reduces to the fact that it's a breach of fiduciary duty because it's a breach of the plan. But if not a breach of the plan, then it's not a breach --

MR. ROBERTS: It's a breach of fiduciary duty both of a failure to follow the terms of the plan and a breach of the duty of prudence, because when a plan provides that participants can direct their investments --

CHIEF JUSTICE ROBERTS: So we need to know -- we need to know what the plan provides before we can decide.

MR. ROBERTS: The case was dismissed on the pleadings, Your Honor, and it alleges that there was a breach of fiduciary duty. And Respondent hasn't disputed, in fact, that the plan requires participants -- allows participants direct, in fact --

CHIEF JUSTICE ROBERTS: The pleadings don't include the plan. So we have to assess the pleadings without the terms of the plan.

MR. ROBERTS: Yes, but the inferences shouldn't be construed against the plaintiff in motion to dismiss on the pleadings, Your Honor.

In addition to that, Respondent's answer -- this is on page 2a of the red brief -- admitted that participants in the DeWolff plan are permitted to direct the investment of their contributions to the plan. That's in paragraph eight on page 2a.

CHIEF JUSTICE ROBERTS: But we don't know under what terms. I mean I've seen plans where you are entitled to direct, but that's subject to conditions and limitations.

MR. ROBERTS: That's certainly true, Your Honor. But here, the court of appeals assumed that there was a fiduciary breach. That's on page 3a in the star footnote of the -- it's the appendix to the petition for certiorari. There is no reason for this Court to second-guess that, particularly since Respondent didn't argue in its motion to dismiss that there was no fiduciary breach here. So the case comes to the Court on the assumption that there is a fiduciary breach. And these are very important questions concerning whether assuming there is a fiduciary breach, a participant in a defined contribution plan can sue to recover for the plan the losses to the plan that are caused by that breach when the losses are attributable only to that individual's account.

JUSTICE GINSBURG: Mr. Roberts, would you clarify what the government's position is on this (a)(1)(B) argument? Are you saying it is available, but (a)(2) is available?

MR. ROBERTS: We don't think that there is a claim at this point under (a)(1)(B), because the -- the money the Petitioner seeks -- what's happened here is he has alleged that there has been a fiduciary breach that caused a loss to the plan. The appropriate remedy for that is a recovery from the fiduciary in its personal capacity to put the money back in the plan. That's what section 502(a)(2) provides. Once the money is back in the plan and then it's allocated pursuant to the duty of prudence to the Petitioner's account, then if the plan didn't pay out the money to him when he was entitled to it, which he appears to be entitled to it now since he has withdrawn his account balance, he would have a 502 (a)(2) claim -- a 502(a)(1)(B) claim, excuse me -- but he doesn't have a claim under that provision now. We -- at least we think it's very unlikely that he does, because generally plans provide that the benefits that are owed to people are the money that are in -- in the account.

JUSTICE GINSBURG: Well, now we know what benefits would be due because he has withdrawn, but when he made this complaint and he hadn't been withdrawn, he could have made an unwise investment the next time. And --

MR. ROBERTS: That's right, and then he would -- it would be even clearer, I think that he has no (a)(1)(B) claim, if he didn't have -- say he was still participating in the plan and he wasn't -- he hadn't withdrawn his account balance and didn't have a right to withdraw his account balance at that time, then he wouldn't have a right to any benefits from the plan.

The crux of the matter here is that the plan has suffered a loss and that the appropriate remedy is against the fiduciary in his personal capacity; (a)(1)(B) doesn't provide for suits against the fiduciary in his personal capacity to recover money for the plan. It provides, again, suits against the plan to pay money out of the plan. This money isn't in the plan; it can't paid from the accounts of other participants because it would breach these duties under ERISA. The appropriate remedy is to get the money back in the plan.

CHIEF JUSTICE ROBERTS: Do you agree that if it is within (a)(1)(B) that it's therefore not within (a)(2)?

MR. ROBERTS: No, because (a)(1)(B) provides an action for benefits from the plan and (a)(2) provides an action against -- it's a different -- against a different defendant for a different kind of claim.

CHIEF JUSTICE ROBERTS: Well, I thought your answer would be yes. In other words, if it's in (a)(1), it's not in (a)(2).

MR. ROBERTS: If it's a claim for benefits under (a)(1) or to enforce the terms of the plan, such as if the fiduciary says, "I'm just not going to follow your instruction," and the participant wants a clarification of that and an order compelling the fiduciary in his official capacity to do that, yes, that would be a suit under (a)(1)(B) and there would be no suit under (a)(2).

There's only a suit under (a)(2) if there are losses to the plan and if the remedy is to put the money back in the plan by getting it from the breaching fiduciary.

If I could turn to (a)(3) just very briefly, Your Honor. We think that suits against fiduciaries to recover losses by fiduciary breaches are also authorized by section 502(a)(3), which provides for appropriate action, I believe.

JUSTICE SCALIA: Is that 1132 we are talking about?

MR. ROBERTS: Yes, that's 1132(a)(3).

JUSTICE SCALIA: Of the United States Code.

MR. ROBERTS: Of the United States Code, 29 U.S.C. 1132.

JUSTICE SCALIA: It's useful to have a code. It really is.

MR. ROBERTS: Okay. I apologize. That -- that provision -- my time.

CHIEF JUSTICE ROBERTS: You can finish your sentence.

MR. ROBERTS: That provision provides for appropriate equitable relief, and a suit against a fiduciary to recover losses caused by a breach of fiduciary duty seeks equitable relief because it's analogous to an action for breach of trust seeking the equitable remedy of surcharge.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Roberts.

Mr. Gies.

ORAL ARGUMENT OF THOMAS P. GIES

ON BEHALF OF RESPONDENT

MR. GIES: Mr. Chief Justice, and may it please the Court:

Petitioner in our view suggests an awkward reading of Section 409, one that is particularly hard to reconcile with the structure of the civil enforcement provisions of Section %02, 1132 of the U.S. Code, starting of course with Section (a)(1)(B).

To us this is the opposite end of the spectrum of the kind of case the Court was talking about in Russell and what Russell has been assumed to have been meant --

JUSTICE GINSBURG: Russell was about a welfare plan, not a pension -- and as I recall, the plaintiff in Russell was seeking medical benefits that she didn't get and she wanted, not the benefits because she did get those, she wanted straight out damages, compensatory and punitive damages, for delay in the receipt of benefits. That's quite a different thing from saying I want the contributions made so that I will get the benefits to which I'm entitled.

MR. GIES: You're right, Your Honor, that that is certainly distinguishable on the facts. We think the central teaching of Russell, though, applies with equal force to a defined contribution case like this, for several reasons.

The first of which is that Russell has been assumed to reflect the dicing that we are talking about which provision in Section 502 is appropriate. Individual claims have traditionally been brought either under (a)(1)(B) or under (a)(3). When a claim is being brought on behalf of the plan as a whole, Russell teaches and -- and helps define when those claims are available. It is an odd case here, where the plan is a defendant, to at the same time assert that this claim is being brought on behalf of the plan.

JUSTICE SOUTER: Well, that is an oddity but what do you say to Mr. Roberts' argument that the only recovery under (a)(1)(B) is against the plan, and the plan doesn't have the money in the account so that if there is going to be any relief it's got to come from the fiduciary and that gets you into (2).

MR. GIES: Well, because neither (a)(2) or (a)(1)(B) were invoked in the district court and the case comes up on a very spares record, it's hard to --

JUSTICE SOUTER: Okay, but we've got to assume at this point that we've -- we've got a -- a Section (2) claim before us and the argument simply is, is that in effect to be disallowed because it should have been an (a)(1)(B) claim? And the argument that the United States has made, the argument that the other side has made is, we cannot get to any money under (a)(1)(B). We've got to get that from the fiduciary and we can only do that under (2).

MR. GIES: The difference between defined contribution plans and defined benefit plans in ERISA is an important consideration in answering that question. (a)(1)(B), the first clause, speaks of recovering benefits due to him. As you know from our briefs we argue this is a case for lost profits, not benefits, certainly not vested benefits in the way the Court used the term in Firestone.

JUSTICE GINSBURG: So then you would agree that (a)(1)(B) is not available?

MR. GIES: No, Your Honor. We believe that (a)(1)(B) definitely was available for the Petitioner here. What relief he might have recovered under (a)(1)(B) had he invoked that provision remains to -- would have remained to have been seen had it been invoked. There are three --

JUSTICE SOUTER: Well, the argument of the United States is you can't rob Peter to pay Paul, so that if in fact his account didn't have the money, the plan didn't have any place to get the money, and the only way the money could be had would have been from a fiduciary, which again gets you to subsection (2).

MR. GIES: It would only get you into subsection (2) if it could be argued that that claim was for the benefit of the plan as a whole, as this Court has taught in Russell; and it seems to me, Your Honor, that one way to think about this in terms of which provision applies to which of these claims, is whether Congress really intended for these individual kinds of "he said; she said" claims to be brought. We think not.

JUSTICE SOUTER: Okay. But it seems to me you're answering a different question in that response. The argument here is basically an argument between the possibility -- an argument based on the claim that under (a)(1)(B) you can't go against the fiduciary. The only way you can get the money is from a fiduciary and therefore (a)(1)(B) would have been of no value to you. Do you -- do you take issue with that premise?

MR. GIES: Well we think -- no. No, Your Honor. In general we do not take issue with that premise.

JUSTICE SOUTER: Okay, then doesn't that leave you in the position of having to say that you've either got to bring the claim under (a)(1)(B), or you've got -- subsection (2) -- or you've got to bring it under subsection (3)?

MR. GIES: We think not for this reason. The second clause of (a)(1)(B) permits a cause of action to enforce his rights under the terms of the plan. This is a case that if you give the Petitioner full benefit of the doubt probably could have been resolved with a telephone call. (a)(1)(B) permits an action to enforce his rights under the terms of the plan.

JUSTICE SOUTER: And the answer, if the premise you have just agreed to is correct, will be, "you bet. He is entitled to have another $150,000 in his account for the benefit of future payments to him."

MR. GIES: Well, we think --

JUSTICE SOUTER: "But we haven't got the money and we can't rob Peter to pay Paul and therefore we are very sorry, go away." That would necessarily be the answer.

MR. GIES: Well, we think not with respect, Justice Souter, for this reason. Keep in mind the theory here is one for lost appreciation in the account. This plan does not have pooled assets.

JUSTICE SOUTER: But that's going to the -- it seems to -- with respect, I think that's going to the merits. And the question is, if you can recover against anybody, the claim is, the argument is you're going to get nowhere under (a)(1)(B) because the plan can't help you by itself. The only way you can get any value from your lawsuit is by going against the fiduciary. Maybe you have good reasons to defend that, but if you're going to have a suit against anyone, it's got to be under subsection (2).

MR. GIES: I think the answer to that, Justice Souter, is that it reflects how careful and interrelated these provisions in 502 are.

JUSTICE SOUTER: And they're saying they are careful and interrelated provisions mean that you got to go under subsection (2).

MR. GIES: To which we say --

JUSTICE SOUTER: And you're I think saying, we -- we agree with you that ultimately (1)(B) couldn't get you any relief because the fiduciary -- the plan doesn't have any money. And you're now arguing, well, if you go against the fiduciary, ultimately we have a good defense to that. But the fact is, the question before us is whom do you sue and under what -- under what section? And I think your own logic forces you to say that -- that has got to be subsection (2).

MR. GIES: Well, one more answer to your question about (a)(1)(B), Justice Souter, is this: As you know, ERISA is a statute that provides for limited remedies, and the question of what remedies might be available under (a)(1) and whether or not this defendant would be solvent or somebody else would have to be impleaded in our view need not be decided in this case. We think it's sufficient to identify that --

JUSTICE SOUTER: Well, it hasn't been

reached yet, has it?

MR. GIES: -- as another remedy that could have been pursued here.

CHIEF JUSTICE ROBERTS: If there is a suit under (a)(1)(B) for a breach of the plan by a fiduciary, do you agree that the plan, if it's liable, could then sue the fiduciary? I realize I'm talking about a suit by one of your clients against the other, but would that be a feasible result under the statute?

MR. GIES: Yes, it is, and it's also possible depending on the facts. And again, from this sparse record, it's hard to know that there could be an action filed against whoever it was who is alleged to have made the mistake. One of the issues, of course, in this case is it's not clear who made the mistake or whether or not the mistake was in fact a breach of fiduciary duty.

JUSTICE SCALIA: Is it entirely clear that the plan itself does not have any money to pay this off unless it takes the money from other individual accounts? I thought one of the briefs said that -- that some plans have independent funds. I forget what sources they came from, but some slush fund that they could use for this purpose.

MR. GIES: What you're talking about I

think, Justice Scalia --

JUSTICE SCALIA: It wasn't called a slush fund. I know that.

(Laughter.)

MR. GIES: -- was a plan that provides for pool of assets. This plan does not. And so the answer to your question is no, there is no other place to get the money from, which we think is another reason why this is not on appropriate claim under (a)(2). It is not losses to the plan in the conventional way we understand those words. But the --

JUSTICE GINSBURG: But what is the plan other than a collection of individual -- I mean the trustee is the trustee for the plan. All of the assets are there. The individuals do not have them in their pockets. So the trustee is managing this fund, which is then segmented into accounts for each individual. So I think your -- your suggestion is that these defined contribution plans, they come out entirely because -- because of the segmented accounts. So you could never bring a claim because it would always be an individual.

MR. GIES: Well, we think that (a)(2), properly read, does not permit an individual claim. (a)(3) permits a claim for equitable relief, and (a)(1)(B) would permit a claim for benefits for the other two.

JUSTICE BREYER: Well, why? Why? That's the question, it seems to me, in the case. Why? I mean -- imaginary example -- a plan, a thousand members. The trustee invests in a thousand diamonds. He puts it in a bank deposit vault. One day he takes all 500 diamonds and runs off to Martinique. We catch him enjoying the sun. We can sue him under (2), right? That's what (2) is there for, right? Right. Okay. Now, everything is the same except each of the thousand diamonds was put in individual safe deposit box with the participant's name on it. Everything else is the same. Why should it matter?

MR. GIES: We think relief in that situation, including recovery of the diamonds and any profits associated with it, would be available under (a)(3).

JUSTICE BREYER: Well, I'm sorry. I'm not interested in that question. I'm interested in my question. Why isn't it available under (a)(2)? In both cases, the trustee took 500 diamonds that belonged to the plan and went to Martinique. Now, if you can sue him when the plans are all put in one big safe deposit box with the diamonds, why can't you sue him when they're put in 500 small safe deposit boxes?

MR. GIES: I think the structure of defined contribution plans makes that a little inapt of an analogy, with respect, Justice Breyer. In this plan, as we know, the assets are not pooled. It is, of course, the sum and total of the individual plan accounts, but the question of legal ownership is different from the question of whether or not in this case it ought to be read as losses to the plan. Here it is by definition the most individual kind of claim that anybody could think about. It is a run of the mill, as alleged claim between an investor and a stockbroker essentially that the stockbroker did not execute the trade.

JUSTICE ALITO: But do you dispute that there was not -- that there was a loss to the plan in the literal sense?

MR. GIES: Yes, we do. For --

JUSTICE ALITO: If --

MR. GIES: For two reasons, first of all, there was no distribution until after he cashed out and, second, the nature of this claim, again, is for lost profits. It is not for benefits as in the sense of a defined benefit plan.

JUSTICE ALITO: But if you accept the truth of his allegations, wouldn't the plan have greater assets than it had?

MR. GIES: No. Because there's no way to imagine that anybody made out on this. This is a case where the investment instruction was not followed. There's no way to imagine that my clients made any money on that.

JUSTICE SOUTER: No, but you're arguing that ultimately he couldn't prove damages. We're talking about allegations at the pleading stage.

Let me ask you a slightly different question. You said there's no -- there's no, as Justice Scalia put it, there's no slush fund; there's no pooled assets here. All the assets are assets which are accounted for, attributable to, individual accounts. Therefore there can be no -- there can be no loss to the plan which is not a loss to an individual account, can there be?

MR. GIES: Yes, sir. That's correct.

JUSTICE SOUTER: Then what is your theory on how we determine whether a loss to the plan from an individual account suffices as a loss to the plan for purposes of pleading? Has it got to be, you know, 500 losses out of 1000? I don't see why that should make a difference. I'm going back to Justice Breyer's question.

MR. GIES: Yes, I don't think the actual

number makes any difference, but I think the nature of the allegation, the type of fiduciary breach, does.

JUSTICE SOUTER: No, but why doesn't the --

MR. GIES: In the "stock drop" cases --

JUSTICE SOUTER: There's something I'm not understanding about your argument. When you say the nature of the fiduciary breach pleaded is what makes the difference, I am understanding you to be answering the question whether on the merits ultimately there will be a -- they will be able to make out a claim. And I am saying, as I said once before, that that seems to me a question that comes after you answer the question before us. And the question before us is not whether ultimately you've stated a winning claim, but whether ultimately -- whether right now you have stated a claim for a loss to the plan.

Now, that is not your view. Why is it that I am taking your answer to be an answer on the merits to a different question and you're saying my answer, i.e., nature of duty breached or -- is one that goes to the question of pleading at this stage?

MR. GIES: Because of the words "losses to the plan" in the text, the words on the page, in the context of the rest of 502. The words "losses to the plan" connotes something collective. The example --

JUSTICE GINSBURG: Yes, but you said -- you said it doesn't have to be every single member of the plan.

MR. GIES: That is correct, Justice Ginsburg.

JUSTICE GINSBURG: You said it has to be more than one. How then do we read the statute to say, well, it doesn't have to be the plan as a whole because there may be some people that are not entitled to this? How do we get that number between more than one and less than everybody?

MR. GIES: I would -- I don't think that that's a useful way to think about it either, Justice Ginsburg, which is why I think the right way to think about it in the context of this statute is to think about the nature of the allegation at the pleading stage. In the stock drop cases, the fiduciary breach alleged is an imprudent investment in holding company stock. I think the diamond analogy is closer to that.

JUSTICE GINSBURG: But I'm -- I'm asking you just -- in your -- you have said, you conceded, that to bring the suit against the trustee, it doesn't have to involve every member, every contributor to this defined contribution plan. But it has to involve --

MR. GIES: I think that's too harsh a rule.

JUSTICE GINSBURG: -- more than one. So that's the question I'd like to you address. You recognize that there can be a claim against the fiduciary for breach of trust on behalf of contributors to the plan? So in that lawsuit, how many people would there have to be to qualify? You say not everybody, but more than one.

MR. GIES: Well, as we've argued we think it ought to be a substantial subset reflecting the nature of the breach alleged. That is, something systemic, something that affects the interests of the plan as a whole rather than just --

JUSTICE GINSBURG: For example.

MR. GIES: -- one individual plan participant. For example, the choice of an imprudent investment, Your Honor, where -- and that's where most of these stock drop cases come -- they involve company stock held in 401(k) plans, and the allegation is that it is imprudent to continue to hold the shares of the stock.

JUSTICE SOUTER: If you do that in two accounts is that enough?

MR. GIES: It -- it very well might be. Two --

JUSTICE SOUTER: Why not one?

MR. GIES: Because --

JUSTICE SOUTER: If it -- if it is the -- and I still don't get this, but if it is the nature of the particular dereliction in duty that counts, why do we need more than one?

MR. GIES: Because the nature of the dereliction of duty here is the most -- hard to conceive of a more individualistic kind of a breach. This is just one dispute, one he said/she said between a participant and the -- -

JUSTICE SOUTER: It's an individualistic kind of breach when it is viewed as -- as only one account, but it is a breach against the plan when it is understood that there is nothing to the plan except an aggregation of accounts. You can't have a breach against one without a breach against the plan.

MR. GIES: To which we would say, Justice Souter, that it's qualitatively different to breach a duty as alleged here on an individual basis, on a one-transaction basis, in one account --

JUSTICE SOUTER: Then why, if that is your answer, why does it matter what the nature of the dereliction is? Because you're -- you're saying the -- the really important question is the nature of the dereliction. If it is, then I don't see why the multiple of the number of accounts affected has anything to do with it.

MR. GIES: Well, I suppose you could imagine, Justice Souter, a fact pattern where there was evidence -- not in this case, of course -- that there was a pattern, a systemic failure to handle properly investment requests made by --

JUSTICE SOUTER: And then you've got a lot of plaintiffs but what difference does it make?

MR. GIES: Well we think that comes closer to what -- how we read Russell and how Russell has been understood.

JUSTICE SOUTER: That may be close to the way you read it, but why is your reading correct? Why should that make any difference?

MR. GIES: Because in context with the rest of 502, 502(a)(2) has been understood, and we think for good reason, not to apply to an individual case. There are other remedies available, in (a)(1)(B) --

JUSTICE GINSBURG: What? What other remedies?

MR. GIES: In (a)(1)(B), and in (a)(3) for equitable relief.

JUSTICE GINSBURG: But you said this isn't -- you said it isn't a claim for benefits. It's a clam for lost profits. You said that a few times. I thought (a)(1)(B) is a claim for benefits, current or future.

MR. GIES: The third part of (a)(1)(B) permits a participant to sue to enforce his rights under the terms of the plan.

JUSTICE SOUTER: Which will -- which will get him nothing.

MR. GIES: It might have got him the trade made, maybe a few days late.

JUSTICE BREYER: I want to go back to amend my example. He only took one diamond. It was a big vault he took it from -- one diamond. You still have the claim, right?

MR. GIES: And -- and is that a --

JUSTICE BREYER: It's a big vault. He took it from one big safe deposit box -- one diamond.

MR. GIES: And -- and is it identified in one account?

JUSTICE BREYER: No, this is just there in the big vault.

MR. GIES: Well, that's -- that's a fundamental difference.

JUSTICE BREYER: Well, of course. Well-- no, no. I'm going to, of course, ask you, since you seem to be turning this thing on how individualized this loss was, well, it was just one diamond, out of thousand.

Now obviously I'm going to ask you, because I haven't yet heard the answer -- at least I didn't seem to hear it -- what the difference is whether that one diamond came from a big vault or from one little safe deposit box with the participant's label on it.

MR. GIES: It's still the same kind of loss, obviously. You're correct, Justice Breyer.

JUSTICE BREYER: Exactly, the same kind of loss. And what we have here is the footnote that was alleged in -- written in the opinion -- we assume the defendant's conduct amounted to a breach of fiduciary duties. So therefore all of the discussion you have, that maybe it didn't -- well, maybe you're right. But we better send it back so that they can decide that question. And I just don't see what the other difference is. It can't be a difference in the size of the diamond. And people are saying, well, why -- well, you see the question.

MR. GIES: I do indeed, Justice Breyer. I think the structure of the plan bears something on the right answer because this plan does not have pooled assets accounts, there is no way that this alleged loss could have had any impact on any other plan participant, nor could any recovery here benefit the plan as a whole.

JUSTICE STEVENS: Can I ask a question about your individual point? What if the individual's account was 60 percent of the assets of the total plan? Because different accounts are of different sizes. Would you give the same answer to that?

MR. GIES: I'd give the same answer, Justice Stevens, in a situation like this with what I call the classic one-off, he said/she said request to make a brokerage trade.

JUSTICE STEVENS: Even if it was 90 percent, you'd give the same answer?

MR. GIES: I could imagine a situation where the percentage gets so high that the assets might be held in such a way that they could be more easily seen to be a loss to the plan as a whole. For example, in some of these plans there's a --

JUSTICE STEVENS: So just one individual, as far as we know it's a very small percentage of the total. That's the whole case as I understand it.

MR. GIES: That -- that's correct, Justice Stevens. I think it probably depends in your hypothetical on the nature of the asset. If it's mutual fund shares, as in this plan held by individuals, I don't think it would make any difference. Some plans hold assets in common. This one does not.

JUSTICE SCALIA: You know I could understand your case if you said even if there were a hundred diamonds, each of them in an individual plan, there still is no loss to the plan until the plan itself has been held liable to make up for the loss. Up until that point, it's just a loss in each of the individual accounts.

But you're not willing to say that. You say at some ineffable point it becomes a loss to the plan. I think there is a clear line between -- between saying there is no loss to the plan unless -- unless the plan is first adjudicated to be liable; then there is a loss to the plan.

MR. GIES: Well, we certainly --

JUSTICE SCALIA: Prior to that it's just a loss to the individual account. That makes some sense. I mean, I can understand how that works. I can't understand how your system works. You're telling me it depends on how big the diamond is and -- and what kind of a breach it was. How can we write an opinion like that?

(Laughter.)

MR. GIES: I'm fortunate to have that not as my job, Justice Scalia.

(Laughter.)

MR. GIES: But I think -- I think it's clearly right as this discussion indicates that the right place to begin here is with (a)(1)(B). If you have a claim like this, you look at the statute, it comes first. It has the benefit of being first on the page.

JUSTICE GINSBURG: I know, because in making this, hitching your wagon to the (a)(1)(B) -- I thought you were arguing -- what did you say the remedy for this person would be? Assuming it's true that he put in his slip and he said invest in X set of mutual funds and the trustee missed it, lost it?

MR. GIES: Right.

JUSTICE GINSBURG: What is his remedy?

MR. GIES: That's a very difficult question to answer because this is a defined contribution plan and not a defined benefit plan and this is a claim for lost profits. It's not an easy claim for lost benefits. Now that's why the second clause of (a)(1)(B), to enforce his rights under the plan, we think is the best part of (a)(1)(B) that this individual could pursue.

JUSTICE GINSBURG: Is that what you argue in your brief?

MR. GIES: We did not, but our amici did.

JUSTICE GINSBURG: So what did you argue is his remedy, in your brief?

MR. GIES: What we argue in our brief and what we still say is that he could have pursued equitable relief under (a)(3).

JUSTICE GINSBURG: What would that be?

MR. GIES: He could have picked up the telephone and called and said, like I think most of us would, say I asked you to sell my sells of stock and it hasn't happened yet. And --

JUSTICE GINSBURG: He didn't know until he got the report.

MR. GIES: Well, that's not so clear from the record, Justice Ginsburg, but in any case what equitable relief under (a)(3), just as (a)(1)(B) would permit him, is to get an injunction to force the trade to be executed.

JUSTICE GINSBURG: But it's much too late. It's over and done. It wasn't made.

MR. GIES: It may or may not be much too late, Justice Ginsburg, which we think is another reason why as to (a)(2), we think it's unlikely that Congress intended every one of these he said/she said cases to give rise to a cause of action for damages. There would be no end to the kinds of claims that one could imagine.

JUSTICE GINSBURG: Let's take, because this case was tossed out on the pleadings, the -- there are forms to fill out and says I want this set of investments as opposed to that set of investments. The contributor fills out that form, gives it to the fiduciary. A careless employee for the fiduciary loses it, and that's the story. So what's the remedy for the contributor who gave his instruction that weren't followed, not out of anything deliberate but just carelessness?

MR. GIES: Well, certainly injunctive relief under (a)(3) would have been available.

JUSTICE GINSBURG: Enjoining him to be careless?

MR. GIES: Enjoining him to execute the trade was clearly a remedy available. And perhaps there would have been a remedy --

JUSTICE GINSBURG: If you say I want these funds invested in this particular set of shares for this period, for this six-month period, then two years later you can have that trade made? I don't understand it.

MR. GIES: Well, we think the fact that it took him so long to sue is another reflection of the fact that this is a claim for damages. Had he really intended the trade to have been made, the normal thing to have done would be to call up and say my trade wasn't made, please make it. And if that he didn't get an adequate response, you'd bring an action for an injunction.

JUSTICE SCALIA: What's done meanwhile? He came in right at the bottom and a week later, it had gone up 30 points.

MR. GIES: And we think the Congress --

JUSTICE SCALIA: -- no remedy?

MR. GIES: We think that Congress did not want those kinds of claims to be brought under (a)(2) precisely for that kind of reason. There would be no end to the kind of arguments about damages. And those kind of cases impose costs that will ultimately be borne by the plans, which is inconsistent with the congressional purpose in ERISA to encourage plan formation.

So this statute on this kind of a situation may provide him some remedies but maybe not a complete remedy for loss of all the profits that he claims he was denied.

CHIEF JUSTICE ROBERTS: You view it as a lost profits claim. Would your position be different if he directed a sale of the stock and then the stock went down 30 points instead of going up? That's not lost profits. That's avoiding losses to the plan.

MR. GIES: We think we have a different situation indeed if there actually had been a distribution here and the amount of the account had gone down between the alleged mistake and the distribution. There is clear as a claim for benefits under (a)(1)(B), and there I think quite easily the Court could say that in that situation the full value of the account at the time of the alleged mistake would be benefits under the terms of the plan. And we think that's a material distinction between this case and others, including the case called Glories v. Charles Schwabb that comes out of the Ninth Circuit.

Now with respect to (a)(3), we think that the equitable relief is properly understood not to include compensatory damages and that this Court's decisions have been clear on that. As to surcharge, it would seem to me that the one -- the best that one could say is that it was the exception and not the rule and not typically available in the course of equity as this Court has understood --

JUSTICE GINSBURG: And never available in a court of law.

MR. GIES: And never available in a court of law. You're exactly right.

JUSTICE GINSBURG: Well, then what is it? It's got to be something.

MR. GIES: Well, I think what it was, as I understand the history of the equity jurisprudence, is that you could only sue the trustee in the equity courts. And so if you needed to get money and if it was a damages claim, that was the only place where you could bring the action.

JUSTICE GINSBURG: This isn't like a cleanup.

MR. GIES: It is not, Your Honor. As we understand the argument on surcharge, it is separate from clean up and we understand that and accept that. But it still sounds more like damages. It sounds something very different from what Congress, we think, meant when they wrote the language of 502.

Unlike the Landrum Griffin Act, which permits actions for damages, ERISA does not, and Landrum Griffin was one of the statutes on which ERISA was based.

It also has fiduciary duty obligations. It also has the interests of beneficiaries, members of labor unions at heart. And unlike this provision in ERISA, the Landrum Griffin act explicitly permits an action for damages. And we think that's further evidence of the fact that appropriate equitable relief in a situation like this under (a)(3) does not include a claim like this for compensatory damages.

If there are no further questions, thank you very much.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Gies. The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

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