Case No. 14-4752

IN THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD CIRCUIT

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ROBIN FEEKO; NELIDA MARENGO and JANET RODGERS,
on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

PFIZER, INC. and
WYETH SPECIAL TRANSACTION SEVERANCE PLAN,
Defendants-Appellees.

_____

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
C.A. No. 2:11-cv-04296 (Shapiro, J.)

_____

BRIEF AMICUS CURIAE OF AARP IN SUPPORT OF APPELLANTS URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT OF AARP

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4)(1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, and AARP Insurance Plan, also known as the AARP Health Trust.

AARP has no parent corporation, nor has it issued shares or securities.

Dated: June 8, 2015

/s/ *Mary Ellen Signorille*
Mary Ellen Signorille

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INTEREST OF AMICUS CURIAE[1]

AARP is a nonprofit, nonpartisan organization, with a membership that helps people turn their goals and dreams into real possibilities, seeks to strengthen communities, and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities, and protection from financial abuse. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits which countless members and older individuals receive or may be eligible to receive.[2]

Participants in private, employer-sponsored employee benefit plans rely on Employee Retirement Income Security Act of 1974 (ERISA) to protect their rights

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; with the exception of the fact that the parties' counsel may be members of AARP, and, as such, pay general membership dues. No person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to AARP's filing of this brief.

[2] AARP has participated as amicus curiae in numerous cases to protect the rights of workers and their beneficiaries under ERISA. *See, e.g.*, *Heimeshoff v. Hartford Life & Acc. Ins. Co*., 134 S. Ct. 604 (2013); *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011); *Cottillion v. United Ref. Co*., 781 F.3d 47 (3d Cir. 2015); *In re Schering Plough Corp. ERISA Litig*., 589 F.3d 585 (3d Cir. 2009).

under those plans. *See* ERISA, Title I – Protection of Employee Benefit Rights, 29 U.S.C. §§ 1001-1191(c) (2012). In particular, ERISA's protections, and plan participants' opportunities to enforce the statute's protections, are of vital concern to workers of all ages and to retirees, since the quality of their lives depends heavily on their eligibility for and the amount of their employee benefits.

In order to ensure that they are receiving the benefits to which they are entitled, participants must be able to successfully access ERISA's claims procedures and resolve benefits disputes through it. The issue in this case, upon which AARP writes,[3] revolves around a procedural hurdle for putative class members -- whether unnamed class members must exhaust the plan's internal claims process as a condition to be allowed to be members of the class, even if the disputed issue and reasons for the benefit denial are the same for all putative class members.[4] Where the named class representatives have exhausted the plan's claims

[3] AARP will not address the merits of the benefit claims denial.

[4] In the context of a class action, the issue of whether it is sufficient for the named plaintiffs to exhaust the plan's internal remedies for the class generally arises when the court determines typicality and/or numerosity of the class under Fed. R. Civ. P. 23(a). *See, e.g.*, *Thomas v. SmithKline Beecham Corp*., 201 F.R.D. 386 (E.D. Pa. 2001). Here, the court found it was not sufficient and then denied class certification on the basis that the remainder of the putative class was time barred.

process, the class members, the plan and the courts all gain significant efficiencies by permitting such benefit claim denials to be decided all at once.

The resolution of this procedural issue will have impact beyond this case. It will have a direct and vital bearing on the economic security of millions of workers, including members of AARP. In light of the significance of the issues presented by this case, AARP respectfully submits this brief to facilitate a full consideration by the Court of these issues.

ARGUMENT

THE COURTS CREATED THE EXHAUSTION REQUIREMENT TO FACILITATE THE PROCESS OF PARTICIPANTS OBTAINING THEIR BENEFITS, NOT TO ACT AS A BARRIER.

Congress enacted ERISA to protect participants' and beneficiaries' interests in employee benefit plans by setting out substantive regulatory requirements, including standards of conduct, responsibility, and obligation for fiduciaries, and by providing for appropriate remedies, sanctions, and ready access to the courts. ERISA § 2(b), 29 U.S.C. § 1001(b); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004).

Among the safeguards that Congress enacted was a claims procedure intended to resolve disputes over benefit claims prior to litigation by affording participants "a reasonable opportunity . . . for a full and fair review" of a denied

claim. ERISA § 503(2), 29 U.S.C. § 1133(2) (2012). Congress also recognized that, despite the pre-litigation plan review procedures of § 503, plans might still deny participants the benefits to which they were entitled under ERISA. To address such situations, Congress enacted § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B) (2012), which provides that participants or beneficiaries may bring a "civil action . . . to recover benefits due to him under the terms of his plan [or] to enforce his rights under the terms of the plan. . . ." *See generally Salovaara v. Eckert*, 222 F.3d 19, 28 (2d Cir. 2000) ("[P]rivate actions by beneficiaries seeking in good faith to secure their rights under employee benefits plans are important mechanisms for furthering ERISA's remedial purpose.").

A. Although No Provision Of ERISA Specifically Requires Exhaustion Of The Internal Claims Process Before Filing Suit, Courts Have Uniformly Required Exhaustion So The Plan Can Address The Dispute And Narrow The Issues Before The Court.

Neither the civil enforcement provisions set forth in ERISA § 502(a) nor any other provision of ERISA require claimants to exhaust their administrative remedies before filing suit in federal court. 29 U.S.C. § 1132(a) (2012); *see Metro. Life Ins. Co. v. Price*, 501 F.3d 271, 279 (3d Cir. 2007) ("ERISA nowhere mentions the exhaustion doctrine.").

However, in light of the language of § 503, this Circuit, consistent with every other circuit, has created a mandatory requirement for exhaustion of the plan's internal claims procedure remedies as a prerequisite to bringing suit for a denial of benefits under ERISA. *See Grossmuller v. Int'l Union, UAW, Local 813*, 715 F.2d 853, 856-58 (3d Cir. 1983); *accord Price*, 501 F.3d at 278-79 ("[Exhaustion] is a judicial innovation. . . ."); *Fallick v. Nationwide Mut. Ins. Co*., 162 F.3d 410, 418 n.4 (6th Cir. 1998) (listing cases) (virtually all of the federal circuits "have recognized the exhaustion requirement.").

Courts have explained the many purposes of exhausting the plan's internal remedies. A review of the legislative history indicates that the main reason was to provide participants with a simple, low cost, efficient, fair method to protect their benefit rights. *See Richardson v. Cent. States, Se. & Sw. Areas Pension Fund*, 645 F.2d 660, 665 (8th Cir. 1981) ("The statute and the regulations were intended to help claimants process their claims efficiently and fairly; they were not intended to be used by the Fund as a smoke screen to shield itself from legitimate claims."); *Halpin v. W.W. Grainger, Inc*., 962 F.2d 685, 693 (7th Cir. 1992) (exhaustion of internal process "enables the claimant to prepare adequately for appeal to the federal courts"); *see generally* Jay Conison, *Suits For Benefits Under ERISA*, 54 U.

Pitt. L. Rev. 1, 21-25 (1992) (reviewing ERISA's legislative history of §§ 502 and 503).

To further Congress' intent, the Department of Labor issued a claims procedure regulation establishing requirements that a plan's internal claims process must meet. 29 C.F.R. § 2560.503-1 (2000); Employee Retirement Income Security Act of 1974; Rules and Regulations for Administration and Enforcement; Claims Procedure, 65 Fed. Reg. 70,246 (Nov. 21, 2000). The purpose of these regulations is to provide participants with the information needed for a meaningful review of their denial of benefits so that they can address the determinative issues. *See Grossmuller*, 715 F.2d at 857-59. This information must include an adequate explanation of the denial of benefits and a record of what evidence the plan relied upon in denying the benefit. The process must provide the participants with an opportunity to address the accuracy and reliability of that evidence and to have the plan consider the participants' arguments prior to reaching its decision. *See id.; Richardson*, 645 F.2d at 665; *accord Schadler v. Anthem Life Ins. Co.*, 147 F.3d 388, 393-95 (5th Cir. 1998); *Booton v. Lockheed Medical Benefit Plan*, 110 F.3d 1461, 1463 (9th Cir. 1997) ("In simple English, what this regulation calls for is a meaningful dialogue between ERISA plan administrators and their beneficiaries."); *Halpin*, 962 F.2d at 689.

Courts have also focused on the benefits that exhaustion of an internal claims process provides the plan. This Circuit has recognized that requiring exhaustion of plan remedies helps "'to . . . reduce the number of frivolous lawsuits under ERISA; to promote the consistent treatment of claims for benefits; to provide a nonadversarial method of claims settlement; and to minimize the costs of claims settlement for all concerned.'" *Harrow v. Prudential Ins. Co. of Am.*, 279 F.3d 244, 249 (3d Cir. 2002) (quoting *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980)). In addition, exhaustion enhances the ability of fiduciaries "'to expertly and efficiently manage their funds by preventing premature judicial intervention in their decision-making processes.'" *Id.* (quoting *Amato*, 618 F.2d at 567). It also has the salutary effect of "refining and defining the problem" for final judicial resolution. *Amato*, 618 F.2d at 568.

B. In An ERISA Class Action, The Underlying Policy Considerations Requiring Exhaustion Do Not Apply To Each Putative Class Member If One Named Plaintiff Has Exhausted The Plan's Internal Process Concerning The Disputed Claim.

In determining whether an action should be dismissed for the failure of every putative class member to exhaust administrative remedies, courts have looked to the various policies underlying the exhaustion requirement. It is well established that, in the context of an ERISA class action, as long as one or more of

the named plaintiffs have exhausted the internal claims process on the disputed issue, then the underlying policy considerations have been served and there is no need for other claimants to exhaust. *See In re Household Int'l Tax Reduction Plan,* 441 F.3d 500, 501-02 (7th Cir. 2006); *Thomas v. SmithKline Beechman Corp.*, 201 F.R.D. 386, 395 (E.D. Pa. 2001); *see also* Frank Cummings, *ERISA Litigation: An Overview of Major Claims and Defenses*, SF76 ALI-ABA 353, 521 (Jan. 18, 2001) ("And in those few cases where a[n ERISA] class action has been dismissed for lack of exhaustion, the deciding factor seems to have been lack of exhaustion by the named plaintiff(s), not by the members of the class.").

Here, the complaint and subsequent filings adequately identify the class members' claims and demonstrate that they are indeed the same as the named plaintiffs. Claims of the named plaintiffs and the proposed class members arise from a uniform interpretation of the plan documents to determine the class members' eligibility for severance benefits. *See In re Household Int'l Tax Reduction Plan,* 441 F.3d at 501-02 (7th Cir. 2006). Defendants know what the dispute is about and can address these claims. *Id*. The plan has not asserted any reason that it would treat the claims of other class members any differently from the named plaintiffs. Indeed, it could not because the class members are making the same request and same argument, that is, they are requesting eligibility for

severance benefits under the plan terms arising from the same set of facts. *See id.* Accordingly, this case is not one in which the development of a separate administrative record for each claimant is likely to be helpful to the court. There was only one issue before the plan and there is only one issue before the court. Instead, "requiring exhaustion by the individual class members [of their internal remedies] would merely produce an avalanche of duplicative proceedings and accidental forfeitures. . . ." *In re Household Int'l Tax Reduction Plan*, 441 F.3d at 502. It serves none of the useful purposes of the exhaustion doctrine. *Id.*

Moreover, considerations of cost and efficiency favor resolving the claims raised in court, rather than through piecemeal separate administrative proceedings. *See Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 420-21 (6th Cir. 1998). There are no individualized claims at issue. Undeniably, a class action over a plan interpretation achieves uniform processing of claims and assures consistency of results.

Instead in this case, exhaustion would "waste[] resources rather than conserve[] them," *Durand v. Hanover Ins. Grp, Inc.*, 560 F.3d 436, 439 (6th Cir. 2009), and would act only as a barrier to participants being able to protect their employee benefit rights, which is completely contrary to ERISA's purposes. Title

I-Protection of Employee Benefit Rights, ERISA §§ 2-734, 29 U.S.C. §§ 1001-1191 (2012).

C. Exhaustion Of The Plan's Internal Remedies Would Be Futile Because The Dispute Is Over The Same Plan Interpretation.

Like other circuits, this Circuit recognizes that a court is guilty of abusing its discretion if it requires exhaustion of the plan's internal claims procedure where a fact-sensitive balancing of factors reveals that exhaustion of the claims procedure "would be futile," *Harrow v. Prudential Ins. Co. of Am.*, 279 F.3d 244, 249-50 (3d Cir. 2002), the remedy is inadequate, or there is a denial of meaningful access to the plan procedures. *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 916 (3d Cir. 1990) ("Although the exhaustion requirement is strictly enforced, courts have recognized an exception when resort to the administrative process would be futile."); *McGraw v. Prudential Ins. Co. of Am.*, 137 F.3d 1253, 1263-64 (10th Cir. 1998) (collecting cases; exhaustion would be "clearly useless"); *Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980); *see generally* Jeffrey Lewis et al., *Employee Benefits Law* 13-39-41 (3d ed. 2012).

West v. AK Steel Corp., 484 F.3d 395, 405 (6th Cir. 2007), illustrates the rationale for excusing the necessity for putative class members to exhaust the internal class procedure. The court concluded that resort to the internal claims

process would be futile because the dispute was over the legality of the plan provisions; thus, "no amount of administrative review would alter the calculation of benefits under the current terms of the plan." *Id*. at 404. *Accord Cottillion v. United Ref. Co*., 781 F.3d 47, 54-55 (3d Cir. 2015).

This case is no different. Here, the three named plaintiffs claimed they were eligible for severance benefits. Upon the denial of their claim, they appealed. The Severance Plan rejected – three separate times using the exact same denial letter – the named plaintiffs' claim that they are eligible for severance benefits based on its interpretation of the plan's provisions. Every putative class member has the same issue – whether, under the plan language, he or she is eligible to receive severance benefits. There is nothing in the claims denial letters – given they all use the same language – that indicates that the interpretation and outcome would be any different for any of the putative class members. It is certain that the claims of all putative class members on the issue of eligibility for severance benefits will be denied on appeal. The plan has shown it is unwilling to alter its interpretation for eligibility of severance benefits. *See Fallick v. Nationwide Mut. Ins. Co*., 162 F.3d 410, 419-20 (6th Cir. 1998). Inasmuch as the disputed issue is one of plan interpretation and the plan has established its position on its interpretation of the

plan provision, it is certain that Wyeth will not seriously reconsider its interpretation.

"Futility, in conclusion, is a practical doctrine." *Durand v. Hanover Ins. Group, Inc.*, 560 F.3d 436, 443 (6th Cir. 2009). The practical reality is that administrative review of every putative class member's claim would only delay the resolution of these claims. Because the plan interprets the eligibility requirements of the Severance Plan in the same manner for all claimants, this Court should conclude that the exhaustion requirement does not apply to every putative class member in this case. *See Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 395-96 (E.D. Pa. 2001).

CONCLUSION

For the foregoing reasons, the district court's ruling requiring every putative class member to exhaust the plan's internal claims process should be reversed.

Dated: June 8, 2015

Respectfully submitted,

/s/ Mary Ellen Signorille

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CERTIFICATE OF BAR MEMBERSHIP

I, Mary Ellen Signorille, hereby certify that I am admitted to practice before the United States Court of Appeals for the Third Circuit and I am currently a member in good standing.

Dated: June 8, 2015

/s/ *Mary Ellen Signorille*
Mary Ellen Signorille

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) AND L.A.R. 31.1(c)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,677 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font in Times New Roman.

CERTIFICATE OF IDENTICAL COMPLIANCE AND VIRUS CHECK

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Symantec Anti-Virus Endpoint Protection, ed. 2011 has been run on the file containing the electronic version of this brief and no viruses have been detected.

Dated: June 8, 2015

/s/ *Mary Ellen Signorille*
Mary Ellen Signorille

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2015, I served using the appellate CM/ECF system of the Third Circuit which will send notice of such filing to the parties registered through the ECF system a copy of the Brief Amicus Curiae of AARP In Support of Appellants. Seven identical hard copies of this amicus brief will be delivered to the Court's office within five days of electronically filing.

/s/ *Mary Ellen Signorille*
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