No. 16-1928

United States Court of Appeals
for the Eighth Circuit

SHERRY SMITH and JAMES J. THOLE, on behalf of themselves individually, and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

U.S. BANK, NATIONAL ASSOCIATION, individually and as successor in interest to FAF ADVISORS, INC.,
Defendants-Appellees,

(For Continuation of Caption, See Inside Cover)

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
NO. 0:13-CV-02687-JNE-JJK

BRIEF FOR AARP AND AARP FOUNDATION AS AMICI CURIAE IN SUPPORT OF APPELLANTS URGING REVERSAL

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NUVEEN ASSET MANAGEMENT, LLC, as successor in interest to FAF ADVISORS, INC.;

Defendants,

U.S. BANCORP, RICHARD K. DAVIS, DOUGLAS M. BAKER, JR., Y. MARC BELTON, PETER H. COORS, JOEL W. JOHNSON, OLIVIA F. KIRTLEY, O'DELL M. OWENS, CRAIG D. SCHNUCK, ARTHUR D. COLLINS, JR., VICTORIA BUYNISKI GLUCKMAN, JERRY W. LEVIN, DAVID B. O'MALEY, PATRICK T. STOKES, RICHARD G. REITEN, WARREN R. STALEY, and JOHN and JANE DOE 1-20,

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

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) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

Dated: July 15, 2016

/s/ *Mary Ellen Signorille*
Mary Ellen Signorille

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INTEREST OF AMICI CURIAE[1]

AARP is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people's financial security, health, and well-being. AARP's charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals fifty and older to secure the essentials so that they do not fall into poverty during retirement. Among other things, AARP and AARP Foundation seek to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits that countless members and older individuals receive or may be eligible to receive including through participation as amicus curiae in state and federal courts.[2]

One of amici's main objectives is to ensure that participants receive those benefits that they have been promised in accordance with the protections of the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. § 1001

[1] Pursuant to Fed. R. App. P. 29(c)(5), amici state that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or any person or entity other than AARP, AARP Foundation, AARP's members, and their counsel, contributed money intended to fund preparing or submitting this brief. The parties have consented to the filing of this brief.

[2] *E.g.*, *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008) (ERISA's civil enforcement provision); *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013) (participant standing to sue defined benefit plan for ERISA violations); *McCullough v. AEGON USA, Inc.*, 585 F.3d 1082 (8th Cir. 2009) (same); *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002) (same).

et seq. The quality of the lives of these workers in retirement depends substantially on their ability to obtain those benefits that they have been promised. To achieve that goal, amici work to ensure that fiduciaries prudently and loyally manage and administer participants' plans.

If employees cannot police their pension plans by suing the plan fiduciaries, it will be impossible for them to ensure proper and prudent plan administration and management of plan assets. Moreover, participants' ability to sue is crucial because the Department of Labor consistently has had inadequate resources to police the retirement system.[3] *See, e.g.*, U.S. Gov't Accountability Office, GAO-07-22, EMPLOYEE BENEFITS SECURITY ADMINISTRATION – ENFORCEMENT IMPROVEMENTS MADE BUT ADDITIONAL ACTIONS COULD FURTHER ENHANCE PENSION PLAN OVERSIGHT 10, 28 (2007); U.S. Gen. Accounting Office,[4] GAO-02-232, PENSION AND WELFARE BENEFITS ADMINISTRATION – OPPORTUNITIES EXIST FOR IMPROVING MANAGEMENT OF THE ENFORCEMENT PROGRAM 2-3 (2002); U.S. Dep't of Labor, PWBA TASK FORCE ON ASSISTANCE TO THE PUBLIC (1992).

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[3] The Employee Benefits Security Administration in the Department of Labor is responsible for policing over "681,000 retirement plans, approximately 2.3 million health plans, and a similar number of other welfare benefit plans, such as those providing life or disability insurance." U.S. Dep't of Labor, *EBSA Restores Over $696.3 Million to Employee Benefit Plans, Participants and Beneficiaries*, https://www.dol.gov/ebsa/pdf/fsfy15agencyresults.pdf (last visited June 22, 2016). It closed 2,441 civil investigations in fiscal year 2015. *Id.*

[4] In 2004, the General Accounting Office changed its name to the Government Accountability Office.

How the Court decides this case will have a significant impact on the integrity of the administration of employee benefit plans and individual participants' ability both to protect their pension plans from mismanagement and to obtain redress for such mismanagement, if it occurs. In light of the significance of the issues presented by this case, AARP and AARP Foundation respectfully submit this brief because the court decision below unnecessarily limits participants' ability to sue where fiduciaries have breached their duties of loyalty, prudence and diversification to participants and to continue those lawsuits to remedy the breach of those duties.

SUMMARY OF ARGUMENT

In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, No. 13-1339, 2016 U.S. LEXIS 3046, at *15-16 (May 16, 2016), the Supreme Court reaffirmed that, to have standing, plaintiffs could allege an intangible injury as long as it was concrete and particularized. In determining what constitutes an intangible injury, the Court suggested that if the alleged harm is related to a harm that has been regarded as providing a basis for a lawsuit in English or American courts and Congress has judged the alleged harm to meet Article III standards, then it follows that the plaintiff can satisfy the injury-in-fact criteria. *Id.*

When a participant sues a fiduciary for breaches of the duty of loyalty, prudence, and diversification under ERISA, such as in this case for improper diversification, imprudent investments, and conflicts of interest, the participant is relying both on the fiduciary duties under the common law of trusts that form the foundation of ERISA's fiduciary requirements and Congress's judgment that participants can sue to remedy those breaches. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43, 156 (1985). The participant's injury-in-fact is the breach of the fiduciary's promise to administer and manage the plan prudently and solely in her interests, regardless of any potential economic loss. This injury—grounded in the common law of trusts—is not speculative, but real and concrete, and is sufficient injury-in-fact to support standing under *Spokeo*. Consequently, even if a plan is no longer underfunded, Plaintiffs-Appellants have not lost their standing because of the fiduciary's abuse of trust.

Moreover, Congress authorized participants, along with the Secretary of Labor and plan fiduciaries, to file in a representative capacity on behalf of the plan to recover any losses to the plan. *See* ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2); *Russell*, 473 U.S. at 142 n.9. The common interest shared by the potential plaintiffs is the "financial integrity of the plan." *Russell*, 473 U.S. at 142 n.9. Congress was concerned with the manner in which fiduciaries administered and managed their plans. *Id*. at 140 n.8. With the common law of trusts as a foundation, Congress expressly intended that private litigants along with the Secretary of Labor prosecute claims against plan fiduciaries arising from injuries to the plan caused by breaches of the fiduciary liability standards imposed under ERISA.

ARGUMENT

I. PARTICIPANTS SUFFER AN INJURY-IN-FACT WHEN FIDUCIARY BREACHES INCREASE RISK TO THE SECURITY OF DEFINED BENEFIT PLAN ASSETS.

A. The Supreme Court Recently Reaffirmed That An Injury-In-Fact Does Not Require Economic Damages.

In this case, Plaintiffs-Appellants allege U.S. Bank Pension Plan and its committees improperly diversified the plan's investments by holding 100% in equities; were imprudent by doing so, contrary to third party advice; and used proprietary funds resulting in a conflict of interest through the generation of fees. The district court held that the case was moot merely because the plan was no longer underfunded. *Adedipe v. United States Bank*, Civ. No. 13-2687, 2015 U.S. Dist. LEXIS 178380 (D. Minn. Dec. 29, 2015). Because the issue of mootness is closely related to standing, we will discuss the Supreme Court's subsequent decision in *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, No. 13-1339, 2016 U.S. LEXIS 3046 (May 16, 2016). We submit that *Spokeo* requires both a different analysis and a different result.

The Supreme Court reaffirmed that, although Congress can create federal claims, to have standing a plaintiff must allege an injury-in-fact that (i) is both concrete and particularized, (ii) is traceable to the defendant, and (iii) a federal court can redress. *Id.* at *12. For an injury to be concrete, the Court reiterated that the alleged injury must actually exist; that is, it must be real. The Court also explained that the alleged injury may be tangible or intangible, noting that it has "confirmed in many of [its] previous cases that intangible injuries can nevertheless be concrete." *Id.* at *15-16. Although economic damages clearly indicate that there has been an injury, the Court clarified that economic damages, either direct or indirect, are not required for there to be an injury-in-fact. *Id*. The Court declared that, in determining what constitutes an intangible injury, "both history and the judgment of Congress play important roles." *Id*. It recognized that it is "instructive to consider whether an alleged intangible harm has a close relationship to a harm that traditionally has been regarded as providing a basis for a lawsuit in English or American courts." *Id*. The Court confirmed that Congress's "judgment is also instructive and important" because it "is well positioned to identify intangible harms that meet minimum Article III requirements." *Id*. The Court acknowledged that "a risk of real harm" can "satisfy the requirement of concreteness," even if is difficult to measure. *Id*. Thus, the Court found that some statutory requirements create legally cognizable rights, and a court can assume concrete harm when a defendant breaches these statutory rights. *Id*. at *16-17 (identifying, as examples, libel, slander, and violations of statutes that require government agencies to release certain information to the public).

B. Congress Incorporated The Common Law Of Trusts Into ERISA's Fiduciary Rules To Ensure Participants' Receipt Of Expected Benefits Through A Loyally And Prudently Run Pension Plan.

1. The common law of trusts establishes the duties of loyalty, prudence, and diversification that fiduciaries owe to trust beneficiaries.

A person in a fiduciary relationship to another is under a duty to act for the benefit of the other as to matters within the scope of the relationship. Restatement (Third) of Trusts § 2 (2007). In the trust context, that relationship concerns the trust assets. Restatement (Second) of Trusts §§ 2, 74 (1959); Restatement (Third) of Trusts §§ 3, 10. Fiduciary duties safeguard the beneficiary's entitlement to the trust assets. Enforcement of fiduciary duties is a means of upholding the beneficiary's interest.

Among the fiduciary duties of a trustee is the duty of loyalty, which requires the trustee "to administer the trust *solely* in the interest of the beneficiary." Restatement (Second) of Trusts §170(l) (emphasis added), *as continued in* Restatement (Third) of Trusts § 170(l); *see also Lewis v. Welch*, 48 N.W. 608, 609-10 (Minn. 1891) (a trustee is bound not to self-deal because to do so would "tempt him [or her] to act for the promotion of his [or her] own interests, and thus subordinate, disregard, and prejudice the interests which as a trustee he is bound to protect and subserve."). Most importantly, it forbids the trustee from self-dealing with trust assets and from engaging in conflicted transactions adverse to the trust. G. T. Bogert, TRUSTS § 95 (6th ed. 1987); *see also St. Paul Tr. Co. v. Strong*, 88 N.W. 256, 257 (Minn. 1901) ("[N]o rule is more fully settled than that which forbids a trustee's dealing with himself in respect to trust property"); *King v. Remington* 29 N.W. 352, 358 (Minn. 1886) (duty to avoid self-dealing "is absolute, and looks to no other facts than the relation and the purchaser."). Even in those instances where the trustee deals with the trust's property for his own use, he must disgorge any profits to the trust, even if he paid fair value for the property. *See, e.g.*, *Lewis*, 48 N.W. at 611 (restricting reimbursement to trustee, with interest, where trustee engaged in self-dealing); *St. Paul Tr. Co. v. Kittson*, 65 N.W. 74, 76 (Minn. 1895) (trustees who co-mingle trust funds with personal funds and profit must pay a higher interest rate); *In re Rosenfeldt*, 241 N.W. 573, 576 (Minn. 1932) (surcharging trustee for amount lost through his fraudulent dealing); *In re Shotwell*, 51 N.W. 909, 911 (Minn. 1892) (noting a right to recover interest and profits where there is "a palpable breach of the trust."). The duty of loyalty is prophylactic in that it establishes boundaries for the trustee's actions.

The trustee also owes the beneficiary the fiduciary duty of prudence, which is an objective standard of care, that is, one of reasonableness. *See Butler v.*

Butler, 230 N.W. 575, 579-80 (Minn. 1930) ("It was the duty of the trustees to be reasonably diligent in the protection of the trust and the interests of the beneficiaries."); *Minneapolis Tr. Co. v. Menage*, 76 N.W. 195, 197 (Minn. 1898) ("The highest degree of good faith is required of a trustee in the execution of his trust. Public policy demands that this duty be faithfully performed and rigidly enforced."). "The trustee has a duty to administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust." Restatement (Third) of Trusts § 77; *see also* Restatement (Second) of Trusts §§ 172-78, 188 (The trustee is "under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property."); *accord*, A. Hess & G. Bogert, LAW OF TRUSTS AND TRUSTEES § 541 (3d ed. 2009) ("the trustee is required to manifest the care, skill, prudence, and diligence of an ordinarily prudent manager engaged in similar business affairs and with objectives similar to those of the trust in question.").

In addition, the trustee owes the beneficiary the duty of diversification, that is, to invest plan assets in such a manner as to "spread the risk." G. T. Bogert, TRUSTS § 106 at 388 (6th ed. 1987); Restatement (Third) of Trusts § 90; *see also* Restatement (Second) of Trusts § 288 ("the trustee is under a duty to the beneficiary to exercise prudence in diversifying the investments so as to minimize the risk of large losses, and therefore he should not invest a disproportionately large part of the trust estate in a particular security or type of security"). The duty of diversification generally is considered part of the duty of prudence. *See* Restatement (Third) of Trusts § 90 (duty to diversify investments is within the prudent investor rule). Other related fiduciary duties such as to keep and render accounts, to furnish information, to invest or preserve trust assets and make them productive, to enforce and defend claims, to diversify investments, and to minimize costs are all under the umbrella of the duties of loyalty and prudence. Restatement (Third) of Trusts § 77; *see also* Restatement (Second) of Trusts §§ 172-78, 188; *accord*, A. Hess & G. Bogert, LAW OF TRUSTS AND TRUSTEES § 541.

Accordingly, under the common law of trusts, a beneficiary could sue a fiduciary for a breach of any of these duties because the injury was the breach of trust itself, regardless of any monetary loss. *See generally* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 647-48 (1995) (comparing different views on whether equitable tracing arises from property or contract).

2. Congress enacted ERISA to ensure that participants would receive promised benefits.

Prior to the passage of ERISA, there were no federal standards requiring persons operating employee benefit plans to pay promised benefits or to avoid transactions that could dissipate plan assets. *See, e.g.*, Jeffrey Lewis, et al., EMPLOYEE BENEFITS LAW xcix-ci (4th ed. 2012). Among the events that prompted Congress to regulate retirement plans were the failure of Studebaker and the termination of its pension plan with insufficient assets to pay benefits, the trial of Jimmy Hoffa alleging (and later finding him guilty of) fraud on the Central States Pension Fund, and instances of other trustees embezzling or using pension funds for their own benefit. *See, e.g.*, James A. Wooten, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 8-10, 51-80, 112-113, 118 (2004); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 n.22 (1980) (quoting 2 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT 1599-1600 (1976)) (discussing closure of Studebaker and sale of P. Ballantine and Sons resulting in termination of insufficiently funded pensions plans and workers' loss of substantial portion of pension benefits). As a result of these horror stories, Congress wanted to "make as certain as possible that pension fund assets would be adequate" to meet expected benefits payments and that fiduciaries would act in the best interests of participants. *Nachman Corp.*, 446 U.S. at 375. Congress believed that if fiduciaries were required to operate pension plans loyally and prudently, and without self-dealing, pension plan assets would be available to pay benefits. Accordingly, ERISA establishes "standards of conduct, responsibility, and obligation for fiduciaries" and provides "for appropriate remedies [and] sanctions" for violations of these fiduciary standards. ERISA § 2(b), 29 U.S.C. § 1001(b).

3. Congress incorporated the common law duties of loyalty, prudence, and diversification into ERISA's fiduciary rules.

For ERISA's fiduciary standards of conduct, Congress incorporated several key measures from the common law of trusts into ERISA. It imposed upon plan fiduciaries duties of loyalty, prudence, and diversification with respect to plan administration and the management of existing trust funds. ERISA § 404, 29 U.S.C. § 1104; *see also Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015) ("In determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts."); *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985) ("Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility" under ERISA); 120 CONG. REC. 29,932 (1974) (statement of Sen. Williams), *reprinted in* 1974 U.S.C.C.A.N. 5177, 5186 ("Despite the value of full reporting and disclosure, it has become clear that such provisions are not in themselves sufficient to safeguard employee benefit plan assets from such abuses as self-dealing, imprudent investing, and misappropriation of plan funds.").

Congress codified the common law duty of loyalty in ERISA by requiring the fiduciary "to discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." ERISA § 404(a), 29 U.S.C. § 1104(a). Congress categorically barred certain transactions between the plan and parties in interest to prevent conflict of interests and self-dealing. ERISA § 406, 29 U.S.C. § 1106. Congress found that these transactions were "likely to injure the pension plan." *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993).

Congress also codified the common law duty of prudence in ERISA by requiring fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

In addition, Congress codified the common law duty of diversification in ERISA by requiring fiduciaries to "[diversify] the investment of the plan so as to minimize the risk of large losses." ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C).

> Ordinarily the fiduciary should not invest the whole or an unduly large proportion of the trust property in one type of security or in various types of securities dependent upon the success of one enterprise or upon condition in one locality since the effect is to increase the risk of large losses.

H. R. REP. NO. 93-1280, 2d Sess. at 304 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5085.

As the Supreme Court explained:

> It is of course true that the fiduciary obligations of plan administrators are to serve the interests of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan. But the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information . . . .

Russell, 473 U.S. at 142-43. Consistent with the common law of trusts, when a fiduciary breaches his duty to the beneficiary, the beneficiary's injury-in-fact is the breach of the fiduciary's promise to administer and manage the plan prudently and solely in her interests, regardless of any potential economic loss. This injury—grounded in the common law of trusts—is not speculative, but real and concrete, and is sufficient injury-in-fact to support standing under *Spokeo*.

C. Because The Injury Need Not Be Economic, The Plan Participant's Right To Sue For Breaches Of Fiduciary Duties Should Not Be Conditioned On A Plan's Funding Status.

1. Funding status can significantly fluctuate, leading to absurd results as to whether participants can sue to remedy fiduciary breaches.

When a defined benefit plan is underfunded and a fiduciary breaches her duty to the plan by choosing an imprudent investment that results in a loss to the plan, there is no question that the risk of the plan having insufficient assets to pay benefits is increased. And, there is no doubt that participants suffer an injury-in-fact due to that increased risk. However, that is not the only type of injury-in-fact that participants may suffer when fiduciaries breach their duties. *See infra* Section I.C.2. Relying on plan funding status alone leads to absurd results, such that participants cannot remedy fiduciary breaches that cause a loss to the plan or cause the plan to be imprudently managed.

The funding status of a plan is based on actuarial formulas that only give a momentary snapshot into the financial health of a plan that is in constant fluctuation. Contribution obligations and plan funding can change drastically within hours, depending upon economic factors and investment performance. Even assuming that a plan was overfunded at the time of the breach or lawsuit, there is no guarantee that the plan will remain overfunded or that participants will be paid all of the defined benefit as promised.[5] Trilbe Wynne, *Corporate pension funding status rises to highest level since 2007,* PENSIONS & INVESTMENTS (Apr. 28, 2014), http://www.businessinsurance.com/article/20140428/NEWS03/140429850; *cf.* Stuart M. Schulman and James J.Ellis, Brexit: *What It Is and The Impact on Retirement Plans* 2 (June 28, 2016), https://hrlaws.services.xerox.

[5] Although the Pension Benefit Guaranty Corporation (PBGC) insures private defined benefit pension plans, it caps the amount of benefits it pays, limits the types of benefits it pays, and restricts the distribution options from a plan it terminates. 29 U.S.C. § 1322. Thus, the PBGC provides only a minimum guarantee of benefits.

com/wp-content/uploads/sites/2/2016/06/hrc_fyi_2016-06-28-2.pdf (concluding that defined benefit plan's funding status will deteriorate).

Measurement of a defined benefit plan's assets and liabilities is much more art than science. On the asset side of the equation, plan assets are estimated to reflect the market value of assets that may be subject to dramatic fluctuation due to: risky financial instruments or reactions of the stock market to economic news, *S&P 500 Historical Annual Returns from 1927-2015*, http://www.macrotrends.net/2526/sp-500-historical-annual-returns (last visited June 22, 2016); changes in monetary policy, *see, e.g.*, Ben S. Bernanke & Kenneth N. Kuttner. *What Explains the Stock Market's Reaction to Federal Reserve Policy*?, 60 J. FIN. 1221 (2005); Sophia Yan, Charles Riley and Matt Egan, CNN, *Brexit Turmoil Deepens: Dow Down Nearly 900 Points in 2 Days* (June 27, 2016), http://money.cnn.com/2016/06/26/investing/markets-brexit-reaction-monday, and trade deficits or potential legislation, *see* Mark Carlson, *A Brief History of the 1987 Stock Market Crash with a Discussion of the Federal Reserve Response* (Nov. 2006), https://www.federalreserve.gov/pubs/feds/2007/200713/200713pap.pdf. In addition, certain plan assets may be inherently difficult to value, such as real property, hedge funds, private equity funds, and other unique and infrequently traded assets. Dana Muir, *ERISA and Investment Issues*, 65 OHIO ST. L.J. 199, 218 (2004). On the liability side of the equation, a defined benefit plan's obligations depend upon estimates of many variables. For example, workforce turnover, participant longevity, future compensation levels, and age at retirement all affect a defined benefit plan's liabilities, but are incapable of exact prediction. *Id.* Once the plan predicts its future liabilities, it must discount those liabilities to a present value, using an estimated interest rate. *Id.*

Defined benefit plan average funding ratios[6] demonstrate these dramatic fluctuations. The average funding ratio for the 100 largest U.S. corporate defined benefit plans ranged from 93.6% in 2005, rising to 108.6% in 2007, and then dropping to 79.1% in 2008, after the Great Recession. Wynne, *supra.* Average funding ratios of all defined benefit pension plans that the PBGC insures have fluctuated from a high of 144% in 2000 to a low of 72% in 2012. Data Book Listing, *PBGC's Single-Employer Program, Funding of PBGC-Insured Plans (1980-2013) Single-Employer Program* 47, Table S-44, http://www.pbgc.gov/documents/2014-data-tables-final.pdf; *see generally* Stuart M. Schulman and James J.Ellis, Brexit: *What It Is and The Impact on Retirement Plans* 2 (June 28, 2016), https://hrlaws.services.xerox.com/wp-content/uploads/sites/2/2016/06/

[6] The funded ratio of a pension plan equals a value of assets in the plan divided by a measure of the pension obligation. Contribution patterns and investment returns are designed to achieve 100% funding. Am. Acad. of Actuaries, *The 80% Pension Funding Standard Myth* (July 2012), http://www.actuary.org/files/80_Percent_Funding_IB_071912.pdf.

hrc_fyi_2016-06-28-2.pdf (concluding that defined benefit plan's funding status will deteriorate).

Harley v. Zoesch, 413 F.3d 866 (8th Cir. 2005), aptly illustrates these vicissitudes of defined benefit plan valuation. Based on the record evidence, the *Harley* Court determined that 3M's pension plan was overfunded at the time of the alleged breach in 1990. *See id.* at 869-70. By 2002, 3M's plan was underfunded by approximately $600 million dollars, even though 3M had contributed more than $800 million to the plan that year. Muir, 65 OHIO ST. L.J. at 218.

Ultimately, because of the fluctuating funding status of plans, underfunding should not be the only measure of injury-in-fact to determine participant standing. Through ERISA § 502(a)(2),(a)(3), 29 U.S.C. § 1132(a)(2),(a)(3), Congress made clear that it did not intend for the rights of plan participants and beneficiaries to sue for breach of fiduciary duties to ebb and flow with the constant change of the status of a plan's funding, but rather that their ability be a fixed right used to rectify fiduciary malfeasance. *See Russell*, 473 U.S. at 142-43; *Varity Corp. v. Howe*, 516 U.S. 489, 496-97 (1996).

2. When a fiduciary breaches its trust to plan participants through misuse and mismanagement of plan assets, participants should be able to sue to obtain an appropriate remedy to rectify that breach of trust.

ERISA creates a legally protected interest in having a fiduciary properly manage plan assets, even though *direct* economic harm to the participants may not always result from such a breach. ERISA remedies any losses resulting from a breach of that duty by having those losses returned to the plan. By breaching her fiduciary duties, the trustee increases the risk that participants will not receive their expected benefits in the future and increases the risk that the plan will not be prudently run. That is enough to satisfy Article III's injury-in-fact requirement.

An illustrative hypothetical aptly demonstrates the importance of the right of a plan participant to sue a fiduciary for breach of its fiduciary duty. Take the case of a plan fiduciary that goes to Las Vegas and gambles with some of the plan's assets. Assume the fiduciary gambles with $1 million of the plan assets and loses it all. The plan participants should be able to sue the plan fiduciary for breach of the duty of loyalty because she is misusing plan assets by self-dealing. The participants should be able to recover the loss to the plan, regardless of the plan's funding status.

In a slight variation on the hypothetical, the fiduciary goes to Vegas to gamble but neither loses nor wins money and returns the entire $1 million to the plan. The participants should be able to sue the fiduciary for breach of her duty of loyalty due to self-dealing, regardless of the plan's funding status. At minimum, the participants should be able to obtain the removal of the fiduciary and any revenue lost during the period when the fiduciary was using the plan's assets.

Finally, take the case of the plan fiduciary that goes to Vegas, gambles with $1 million of the plan's assets, and doubles the money to $2 million. The fiduciary returns $1 million to the plan. The participants should be able to sue the fiduciary for breach of the duty of loyalty and request that the court order the fiduciary to disgorge the profit of $1 million that she made from the use of the plan's assets, regardless of the plan's funding status.

Under all three scenarios, plan participants should have standing to sue the plan fiduciary for breach of the duty of loyalty under ERISA. Whether the plan is overfunded or underfunded is irrelevant as to whether the plan fiduciary has breached her duties of loyalty, prudence, and diversification by placing all of the plan assets in proprietary equity funds. In the three hypotheticals, the remedies would be different because the injury is different. Clearly, the fiduciary must return the plan's assets, but only in hypothetical number one was there an actual loss to the plan. In hypothetical number three, the fiduciary made a profit on the use of the plan's assets, so in that case the fiduciary must disgorge her profits to the plan. In all three hypotheticals, the court could remove the fiduciary and appoint an independent fiduciary in her place. Regardless, the participants have an injury-in-fact because of the breach of trust, and the plan's funding status bears no relationship to that injury.

Congress designed the fiduciary duty provisions of ERISA to protect against the misuse and mismanagement of plan assets, that is, to guarantee, to the extent possible, a plan free from fiduciary malfeasance. It is an objective standard focusing on the conduct of the fiduciaries. *See Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983) (when deciding if plan fiduciaries have met their fiduciary obligations, the court must determine "whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment"). Although Congress was certainly concerned with the tangible monetary loss that comes with plan mismanagement, Congress was also concerned with the increased *risk* of monetary loss to plans that results when fiduciaries engage in the misuse and mismanagement of plan assets. *See supra* Section I.B. Congress recognized that misuse and mismanagement of plan assets increases the risk that plans will be unable to make good on the promise of benefits that defined benefit plans create. *Id.* Therefore, even in the final scenario where the plan has gained from the fiduciary's gambling spree, the focus should not be on monetary gain or loss, or the plan's funding and its ability to absorb a loss. Instead, the focus should be on whether or not the fiduciary has acted in a manner that disloyally or imprudently placed plan assets at *risk*. It is clear that in any of the above scenarios the plan fiduciary put plan assets in jeopardy and acted in a manner inconsistent with the fiduciary duties required under ERISA.

Overfunding does not affect the basic fiduciary obligations outlined in sections 404 and 406 of ERISA. There is no exemption in ERISA for fiduciaries of an overfunded plan to self-deal in the plan assets or make imprudent decisions. It makes no sense to condition the ability to sue for a breach of fiduciary duty on the plan's funding status where the injury is the abuse of trust. Congress wanted to make sure that assets would be available for the payment of benefits and that the plan would be properly managed. If a breach of fiduciary duty is alleged and can be proven, then the plan should be able to recover for the loss from that breach, regardless of its current funding status.

In sum, a proper understanding of participant and beneficiary rights in a defined benefit plan accepts that those rights consist of far more than just a simple right to receive a stream of payments at some time in the future. Instead, as participants in an ERISA-regulated trust, participants enjoy a rich array of legal rights. These rights include a right held by the entire cohort of participants to have all of the plan assets used exclusively for their benefit and invested prudently and a right to membership in a plan free of the types of fiduciary imprudence, fraud and self-dealing that pre-dated ERISA. *See* Muir, 65 OHIO ST. L.J. at 218. Fiduciaries that, through breach of their statutorily imposed duty, impinge on any one of these rights do cause harm—and, thus, injury-in-fact to the legal rights of participants that may be remedied by monetary and injunctive relief. *See supra* Section I.B.2., at 10; *Russell*, 473 U.S. at 140 n.8 ("the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future."). This injury-in-fact is sufficient under *Spokeo*.

In this case, Plaintiffs-Appellants allege U.S. Bank Pension Plan and its committees improperly diversified the plan's investments by holding 100% in equities; were imprudent by doing so, contrary to third-party advice; and used proprietary funds resulting in a conflict of interest through the generation of fees. *Adedipe*, 2015 U.S. Dist. LEXIS 178380. Investing all of a pension plan's assets in one asset class violates modern portfolio theory and the most basic of fiduciary duties. 29 U.S.C. §1104(a)(1)(C); *see also GIW Industries, Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 895 F.2d 729, 733 (11th Cir. 1990) (concluding investment of 70% of the assets in one asset class is not diversified). These actions are also clearly imprudent. 29 U.S.C. §1104(a)(1)(B); *see also GIW Industries, Inc.*, 895 F.2d at 733; *Brock v. Robbins*, 830 F. 2d 640, 647 (7th Cir. 1987) ("Imprudent trustees undermine the purpose of ERISA which is to insure that the assets of a fund will be there when the beneficiaries need them"). Finally, using proprietary funds intrinsically violates ERISA's exclusive benefit rule. 29 U.S.C. §1104(a)(1)(A). It is exactly this type of violation that Congress — through ERISA's fiduciary provisions and the common law of trusts — wanted participants to have the ability to remedy. *Spokeo* permits these plaintiffs to go forward with their claims.

II. CONGRESS AUTHORIZED ALL ENUMERATED PARTIES IN SECTION 502(A)(2) OF ERISA TO FILE IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE PLAN.

When fiduciaries breach their duties, participants suffer various injuries — both individual and collective. In order to recover for violations of ERISA and the terms of the plan, Congress gave the Secretary of Labor, participants, beneficiaries, and fiduciaries the tools necessary to sue *on behalf of the plan*. In *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996), the Court acknowledged that § 502(a)(2) of ERISA was the only civil enforcement provision focused on fiduciary obligations related to the plan's financial integrity. *See also* S. Rep. No. 93-127, at 35 (1973), *reprinted in* 1 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT 621 (1976) (describing Senate version of enforcement provisions as intended to "provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]"); H.R. Rep. No. 93-533, at 17 (1974), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EMPLOYEE

RETIREMENT INCOME SECURITY ACT 2364 (describing House version in identical terms).

In *Russell*, the Court acknowledged that the inclusion of the Secretary of Labor as one of the four classes of party-plaintiffs in § 502(a)(2)[7] demonstrates that "actions for breach of fiduciary duty [are to] be brought <u>in a representative capacity on behalf of the plan as a whole.</u>" 473 U.S. at 142 n.9 (emphasis added). Indeed, the common interest shared by all four classes is the "financial integrity of the plan." *Id.*

Significantly, the statute makes no distinction among the entities authorized to sue for mismanagement of plan assets. The reason for the absence of such a distinction is simple: Congress was concerned with the manner in which fiduciaries administered and managed their plans. Moreover, Congress had particular trepidation over misuse and mismanagement of plan assets by fiduciaries. *Id.* at 140 n.8. These statutory provisions clearly express Congress's intent that private litigants may serve along with DOL to prosecute claims against plan fiduciaries arising from breaches of the fiduciary liability standards imposed under Section 404 of ERISA. *See* H.R. Rep. No. 93-1280 (1974) (Conf. Rep.), *reprinted in* 1974

[7] Section 502(a)(2) states that "[a] civil action may be brought . . . by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409." 29 U.S.C. § 1132(a)(2). ERISA § 409(a) establishes that breaches of "any of the responsibilities, obligations or duties imposed upon fiduciaries" may give rise to a claim. 29 U.S.C. § 1109(a).

U.S.C.C.A.N. 5037, 5107. Quite simply, no one can police a pension plan as well as its participants.

Moreover, if the four classes of party-plaintiffs could not sue for losses to the plan, there would be a significant gap in ERISA's enforcement provisions. It seems counterintuitive that Congress would have passed a participant-protective statute with no legal standing for participants to actually pursue the remedy Congress specified. As the district court in *Bendaoud v. Hodgson*, 578 F. Supp. 2d 257, 265 (D. Mass. 2008), interpreted *Russell*:

> [R]equiring all plan participants to wait until they had an individuated injury would be to require them to wait until it was too late. Because any individual plaintiff might still be able to draw her full benefits from the remainder of the fund's assets upon retirement, an individual plaintiff could only demonstrate an immediate harm where the loss was so grievous that it threatened the financial integrity of the entire defined benefit plan. *See* [*Russell*, 473 U.S.] at 142-43 & n.9; *see also LaRue*, 128 S. Ct. at 1025 (clarifying *Russell*'s holding). Because ERISA was meant to reach breaches of fiduciary duty that did not endanger the entire plan, the Court interpreted the statute as permitting any participant in a defined benefit plan to sue "on the plan's behalf" for any fiduciary breach — that is, to undo the damage that had been done to the pool of assets, however minuscule an individual share may be. *See Russell*, 473 U.S. at 142.

The language of ERISA § 502(a)(2) shows Congress's intent to define standing broadly for participants in employee benefit plans by creating an actionable statutory entitlement to prudent, loyal management of funds for each participant. When suing "on behalf of" the plan, the participant is recovering not only his proportion of the plan's loss, but the entire amount by which the plan assets were impaired as well as injury due to the abuse of trust. *Russell*, 473 U.S. at 139-40; *accord, LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008).

Together § 502(a)(2) and § 409(a) provide broad relief — but only to the plan. *Russell*, 473 U.S. at 140, 144 (acknowledging that § 409 expressly authorizes only plan-based relief). These sections permit the recovery of "any losses to the plan resulting from each" breach of fiduciary duty, restoration to the plan any profits the fiduciary made through the use of plan assets, and other equitable or remedial relief within the court's discretion, including removal of such fiduciary. 29 U.S.C. §§ 1109(a), 1132(a)(2).

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision.

Dated: July 15, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6448, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: July 15, 2016

/s/ Mary Ellen Signorille
Mary Ellen Signorille

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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