Docket No. 17-55550

Oral Argument Requested

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLEN L. MUNRO, DANIEL C. WHEELER, EDWARD E. VAYNMAN, JANE A. SINGLETON, SARAH GLEASON, REBECCA A. SNYDER, DION DICKMAN, COREY CLARK, and STEVEN L. OLSON,
Plaintiffs-Appellees,
v.
UNIVERSITY OF SOUTHERN CALIFORNIA, USC RETIREMENT PLAN OVERSIGHT COMMITTEE, and LISA MAZZOCCO,
Defendants-Appellants.

From the United States District Court for the
Central District Of California
The Honorable Virginia A. Phillips | Case No. 2:16-cv-06191-VAP-E

BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES URGING AFFIRMANCE

Mary Ellen Signorille*
msignorille@aarp.org
William Alvarado Rivera
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
(202) 434-2060
**Counsel of Record*
Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure:

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to § 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 § 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: January 4, 2018

/s/ Mary Ellen Signorille
Mary Ellen Signorille

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INTERESTS OF AMICI CURIAE[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to ensure that low-income older adults have nutritious food, affordable housing, a steady income, and strong and sustaining bonds. 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 amici curiae in state and federal courts.[2]

[1] Amici certify that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certifies that no person, other than amici, contributed money intended to prepare or submit this brief. FED. R. APP. P. 29(c)(5). Counsel for both parties have consented to the filing of this brief.

[2] *E.g.*, *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *LaRue v. DeWolff, Boberg & Assocs*., 552 U.S. 248 (2008); *Standard Ins. Co. v. Morrison*, 584 F.3d 837 (9th Cir. 2009).

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 et seq. The quality of the lives of these workers in retirement depends substantially on their ability to obtain those promised benefits. To achieve that goal, amici work to ensure that fiduciaries prudently and loyally manage and administer participants' plans. It is imperative that participants have meaningful recourse under ERISA to protect and enforce their rights under these plans.

AARP and AARP Foundation submit this brief because the court below correctly found that the arbitration agreements did not extend to claims of fiduciary breach under ERISA in that the agreements were neither incorporated into the retirement plan documents nor signed by anyone with authority to bind the plan. The issues in this case directly bear on a court's authority to remedy a violation of ERISA where the fiduciaries allegedly have breached their fiduciary duties. Thus, resolution of the issues in this case will have a significant impact on the integrity of the administration of employee benefit plans and participants' abilities to obtain their retirement benefits. In light of the significance of the issues this case presents, AARP and AARP Foundation respectfully submit this brief amici curiae to facilitate the Court's full consideration of these issues.

SUMMARY OF ARGUMENT

The district court was correct in denying the motion to compel arbitration of the Defendants-Appellants. Under the principle of *expressio unius est exclusio alterius*, arbitration is statutorily disfavored; Congress clearly intended the use of arbitration only for ERISA § 4221 claims, and not for any other type of claim. Moreover, arbitration is an inappropriate forum for the resolution of ERISA § 502(a)(2) claims in that such claims contemplate relief on behalf of the plan – a remedy arbitration cannot provide. Indeed, arbitration limits the possibility of plan-wide claims and relief as permitted under § 502(a)(2), thus reducing a fiduciary's liability under ERISA. Thus, the arbitration clause here violates ERISA § 410, which prohibits such exculpatory clauses.

ARGUMENT

I. ERISA CONTAINS A CONTRARY CONGRESSIONAL COMMAND THAT ON ITS FACE TRUMPS ARBITRATION AGREEMENTS OTHERWISE PROTECTED BY THE FAA.

Congress enacted ERISA to protect the interests of participants and their beneficiaries from abuses in the administration and investment of private employer-sponsored retirement and welfare plans. *See Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980) (Congress's purpose was to ensure that employees would receive the retirement benefits they were promised). ERISA's provisions effectuate its purpose by "establishing standards of conduct, responsibility and obligation for fiduciaries [ ], and by providing appropriate remedies, sanctions and ready access to the Federal courts." *See* ERISA § 2(b), 29 U.S.C. § 1001(b); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004); *Mertens v. Hewitt Assocs*., 508 U.S. 248, 264 (1993). To this end, Congress enabled participants to protect the financial integrity of their plans and, thus, their benefits, through ERISA's civil enforcement provisions to remedy breaches of fiduciary duties. *See* ERISA §§ 409 & 502(a)(2), 29 U.S.C. §§ 1109 & 1132(a)(2).

The Federal Arbitration Act ("FAA") was enacted in 1925 and requires courts to enforce arbitration agreements absent a "contrary congressional command." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226-7 (1987)). Congressional intent to override the FAA must "be deducible from the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes." *Shearson/Am. Express, Inc.*, 482 U.S. at 227. ERISA contains such a contrary congressional command in § 410 of ERISA.

A. Because ERISA Provides That the Only Statutory Claim That Must Be Arbitrated Is a Withdrawal Liability Claim, Arbitration Should Not Be Inferred for Any Other Type of ERISA Claim.

ERISA is silent regarding the requirement of arbitrating claims under the statute with one exception – ERISA § 4221, 29 U.S.C. § 1401. In that statutory provision, Congress explicitly required that any dispute between an employer and the plan sponsor of a multiemployer plan concerning withdrawal liability must be resolved through arbitration. Moreover, Congress established a comprehensive process for arbitration of withdrawal liability claims, including express burdens of proof and persuasion. ERISA § 4221(a)(3)(A), (a)(3)(B), 29 U.S.C. § 1401(a)(3)(A), (a)(3)(B).

The canon of construction *expressio unius est exclusio alterius* (or conversely *inclusio unius est exclusio alterius*) means that to express or include one thing implies the exclusion of another, or of the alternative. *Black's Law Dictionary* 620 (B. Garner ed., 8th ed. 2004).The enumeration of inclusions in a statute indicates that the statute should apply only to those situations and not apply to those not specifically included. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed. Norman J. Singer, *Sutherland Statutory Construction* § 47.23, at 227 (5th ed. 1992). Here, Congress expressly specified the use of arbitration for withdrawal liability claims under ERISA. ERISA is silent on the use of arbitration for every other type of claim including fiduciary breach claims. That canon of construction means that Congress did not intend the use of arbitration in fiduciary breach claims. *See Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1234 (9th Cir. 2013) (finding arbitration agreement unenforceable in plaintiff's claim against DirectTV under the rule of construction *expressio unius est exclusio alterius* because the agreement only listed TiVo, Inc., effectively excluding DirectTV); *Barnes v. Indep. Auto. Dealers Ass'n Health & Benefit Plan*, 64 F.3d 1389, 1393 (9th Cir. 1995) ("Under the doctrine of *expressio unius est exclusio alterius*, we must assume that by expressly providing for subrogation in cases in which the Plan makes payment, the Plan document excludes subrogation when no payment is made."); *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312-313 (9th Cir. 1992) (doctrine means that mention of one thing implies exclusion of the other); *Diaz v. Paragon Motors of Woodside, Inc.*, 424 F. Supp. 2d 519, 534-35 (E.D.N.Y. Mar. 29, 2006) (citing *Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")). Moreover, this construction is consistent with Congress's express intent of providing "ready access to the Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b). When interpreting ERISA § 502(a), the Court repeatedly has looked at the plain language of ERISA, the "evident care" with which it was crafted, the structure of the statute, and the policies underlying ERISA. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (this Court is "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA").

Given the circumstances from which ERISA arose, Congress could not have intended to leave 401(k) participants with no judicial enforcement mechanism and remedy for monetary losses if fiduciaries breach their duty to participants. Nor could Congress have intended to leave 401(k) plans – with their trillions of dollars – so unregulated. *See generally* James A. Wooten, *The Most Glorious Story of Failure in the Business: The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683 (2001). Under Defendant's construction, § 502(a)(2) of ERISA will be rendered nugatory.

B. ERISA's Exculpatory Clause Voids Provisions of an Arbitration Agreement That Limits ERISA's Substantive and Procedural Rights.

"It is well-established that a party does not forgo the substantive rights afforded by a statute when she agrees to arbitrate a statutory claim but only submits to their resolution in an arbitral, rather than a judicial, forum." *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 670 (6th Cir 2003) (citations and punctuation omitted); *see generally Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310-11 (2013) (affirming the doctrine that impairments of statutory remedies serves to invalidate an arbitration clause). An arbitration provision that limits a plaintiff's statutory remedies is not enforceable because arbitrability of federal statutory claims rests on the assumption that the arbitration clause does not limit the federally guaranteed substantive rights and permits relief *equivalent* to federal court remedies. *Morrison*, 317 F.3d at 671-73.

1. The Federal Arbitration Act does not preempt ERISA's exculpatory clause.

Given the importance of retirement funds and Congressional concern over misuse and mismanagement of plan assets by plan administrators, Congress imposed strict fiduciary obligations and prohibited exculpatory clauses.[3] Section 410(a) of ERISA prohibits "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty" under ERISA as "void as against public policy." 29 U.S.C. § 1110(a). This provision "prohibits agreements that diminish the statutory obligations of a fiduciary." *Pfahler v. Nat'l Latex Prods. Co.*, 517 F.3d 816, 836-837 (6th Cir. 2007) (quoting *Leavitt v. Nw. Bell Tel. Co.,* 921 F.2d 160, 161 (8th Cir. 1990)); *see also IT Corp. v. Gen. Am. Life Ins. Co.,* 107 F.3d 1415, 1418-19 (9th Cir. 1997) ("a contract exonerating an ERISA fiduciary from fiduciary

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[3] 93 H.R. Con. Res. 609 at 29932 (1974); *see also* 120 Cong. Rec. 29932 (1974) ("[The] legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets.") (remarks of Sen. Williams), *reprinted in* 3 Leg. Hist. 4743, 120 Cong. Rec. 29951 (1974); *Private Pension Plan Reform, Part 1: Hearing before H. Subcommittee on Private Pension Plans, Comm. on Finance* (1973) at 447 ("The large numbers of people and enormous amounts of money involved in such plans coupled with the public interest in their financial soundness, as expressed in the Act, require that no such exculpatory provision (referring to § 410) be permitted.").

responsibilities is void as a matter of law"); *Kramer v. Smith Barney*, 80 F.3d 1080, 1085 (5th Cir. 1996) (noting that an arbitration provision could not waive any of ERISA's "substantive duties or liabilities," including a contractual limitations period shorter than the applicable ERISA statute of limitations, because it effectively relieved the fiduciary of liability) (quoting *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc*., 847 F.2d 475, 478 (8th Cir. 1988)). "If an ERISA fiduciary writes words in an instrument exonerating itself of fiduciary responsibility, the words, even if agreed upon, are generally without effect." *Johnson v. Couturier,* 572 F.3d 1067, 1079–80 (9th Cir. 2009) (citing *IT Corp.*, 107 F.3d at 1418). Section 410 overrides "any provision" in any "agreement or instrument" that relieves a fiduciary of liability for violating ERISA and is undeniably a "congressional command" that specifically voids provisions in contracts that violates its terms. *See also* Jeffrey Lewis et al., *Employee Benefits Law* 10-131 (3rd ed. 2012). Section 410 of ERISA was adopted in 1974, long after the FAA.

Although the FAA generally preempts state laws prohibiting exculpatory provisions, the FAA does not preempt federal statutes like ERISA with such prohibitions. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343-44 (2011); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). Indeed, a specific federal statute will always control over a general federal statute. *Morton*, 417 U.S. at 550-51;

Akiak Native Cmty. v. EPA, 625 F.3d 1162, 1173 (9th Cir. 2010). Thus, the FAA does not preempt ERISA because ERISA is the more specific statute, targeted only toward employee benefit plans.

2. ERISA's exculpatory clause voids provisions of an arbitration agreement that permits only the filing of an individual claim for fiduciary breaches.

ERISA authorizes one plan participant or beneficiary to sue a fiduciary in breach of ERISA, ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), to

> make good to [a] plan *any losses to the plan* resulting from each such breach, and *to restore to such plan any profits* of such fiduciary which have been made through use of assets of the plan by the fiduciary, and [the fiduciary] shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

ERISA § 409(a), 29 U.S.C. § 1109(a) (emphasis added). This remedy allows a single participant to recover *all* plan losses and to obtain injunctive relief because, as the Supreme Court has found it "abundantly clear," ERISA's congressional draftsmen "were primarily concerned . . . with remedies that *would protect the entire plan*, rather than with the rights of an individual beneficiary." *Russell*, 473 U.S. at 140-42 (emphasis added). "Congress intended that private individuals would play an important role in enforcing ERISA's fiduciary duties – duties that have been described as 'the highest known to the law.'" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009). Nor was it any accident that Congress gave participants the right to seek plan-wide relief under ERISA

§ 502(a)(2). *Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180, 1189 (9th Cir. 2010) (citing *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 254, 256 (2008)),[4] given that the Supreme Court itself described the "evident care" with which ERISA's remedial provisions were crafted. *See Russell*, 473 U.S. at 147. Any limit on these plan-wide remedies greatly diminishes the statute's remedial goals and deterrent effects.

Accordingly, to achieve Congress's "primary" objectives of preventing the "misuse and mismanagement" of retirement plan assets and providing "remedies that would protect the entire plan," ERISA § 409 provides for recovery of losses that "inure[] to the plan as a whole." *Russell*, 473 U.S. at 142-43. When suing "on

[4] *LaRue* does not authorize a claim for individual relief under ERISA § 502(a)(2). To the contrary, the Court held that a participant in an individual account plan such as the plan here may sue on behalf of the plan under § 502(a)(2), notwithstanding that a fiduciary breach affects fewer than all of the participant accounts within the plan. In fact, the Court emphasized that actions under § 502(a)(2) are brought "on behalf of a plan to recover for violations of the obligations defined in § 409(a)," 552 U.S. at 253. Further, the Court clarified that harm to an individual's account in a defined contribution plan constitutes harm to the plan, even though the harm does not affect all participants, *id*. at 256 ("Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, it creates the kind of harms that concerned the draftsmen of § 409."). Nothing in *LaRue* stands for the proposition that a plaintiff's claim is an individual claim, rather than a claim on behalf of the plan for all its losses. *Accord Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180, 1189 (9th Cir. 2010) (reaffirming prior holding that where employee welfare benefit plans are concerned, 29 U.S.C. § 1109(a) remedies injuries to the entire plan and "does not provide a remedy for individual injuries distinct from plan injuries," citing *LaRue*, 552 U.S. at 254); *Gray v. I.B.E.W. Local 332 Pension Trust*, 495 Fed. Appx. 831, 833 (9th Cir. 2012) (citing *LaRue*, 552 U.S. at 255, for the proposition that § 1132(a)(2) "does not provide a remedy for individual injuries distinct from plan injuries").

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*, 552 U.S. at 256 (2008). Together ERISA § 502(a)(2) and § 409(a) provide broad relief – but only to the plan. *Russell*, 473 U.S. at 140, 144 (acknowledging that §§ 502 and 409 expressly authorize only plan-based relief).

This plan-wide relief provides a powerful deterrent because it greatly raises the stakes for fiduciary liability. "Fiduciary abuses may be deterred [by] . . . impos[ing] personal liability upon trustees for losses sustained by pension plans as a result of such abuses." *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985). Disgorgement of profits earned by a breaching fiduciary plan-wide – instead of from a single participant – also serves as a powerful deterrent. *See Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1414 (9th Cir. 1988). And, injunctive relief can be used to change how a plan is administered and managed. *See*, *e.g*., *CIGNA Corp. v. Amara*, 563 U.S. 421, 440 (2011) (noting district court ordered affirmative and negative injunctions to bring plan into compliance). "[I]t is 'clear that Congress intended to provide the courts with broad remedies for redressing the interests of participants and beneficiaries when they have been adversely affected by breaches of a fiduciary duty.'" *Donovan*, 754 F.2d at 1056 (quoting *Eaves v. Penn,* 587 F.2d 453, 462

(10th Cir. 1978) (citing S. Res. 127, 93d Cong. (1st Sess.), *reprinted in* 1974-3 U.S. Code Cong. & Ad. News 4838, 4871)).

Allowing arbitration agreements to limit fiduciary liability would significantly undermine ERISA's underlying remedial purposes and would inherently conflict with ERISA's carefully crafted enforcement scheme. ERISA states that its purpose is to "provid[e] for appropriate remedies" for fiduciary misconduct through "ready access to Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b); *see also Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996). ERISA § 409 renders fiduciaries of ERISA plans liable *to the plans* – not to individual participants – for their fiduciary misconduct.

For ERISA § 502(a)(2) to be effective and protect the entire plan as Congress intended, the plaintiff must be able to represent the entire plan. *Cf. Coan v. Kaufman*, 457 F.3d 250, 262 (2d Cir. 2006) (holding that because plaintiff has not taken any steps to permit the court to safeguard the interests of other participants, plaintiff cannot properly proceed in a representative capacity under § 502(a)(2)). Given that Defendants' alleged mismanagement of the plan is the same as to all plan participants, resolution of one action against one plan participant would necessarily affect the resolution of any concurrent or future actions by all other plan participants. Arbitration would deny the participants the protection Congress created § 502(a)(2) to provide. Here, the arbitration agreement requires that the individual must arbitrate only his or her claims. Limiting a plaintiff to individual relief would relieve a breaching fiduciary of liability to the entire plan as prohibited under ERISA § 410. Thus, Defendants' motion to compel arbitration must be denied.

If the arbitration agreement is enforced, then every one of the USC plan's more than 25,000 participants would be forced to file arbitration claims in order to collect all of the damages the fiduciaries caused the plan, a highly improbable outcome. Because the arbitration clause applied in this manner would reduce fiduciary liability, it violates ERISA § 410, and is void as against public policy.

CONCLUSION

For the foregoing reasons, the court should affirm the district court's order.

Dated: January 4, 2018

Respectfully submitted,

/s/ Mary Ellen Signorille
Mary Ellen Signorille*
msignorille@aarp.org
William Alvarado Rivera
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
(202) 434-2060
**Counsel of Record*

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because the brief contains 3,364 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

Dated: January 4, 2018

/s/ Mary Ellen Signorille
Mary Ellen Signorille*
msignorille@aarp.org
William Alvarado Rivera
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
(202) 434-2060
**Counsel of Record*

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2018, I filed the foregoing Brief of Amici Curiae AARP, AARP Foundation, And National Employment Lawyers Association in Support Of Plaintiffs-Appellants with the Clerk of the United States Court of Appeals for the First Circuit via the CM/ECF system, which will send notice of such filings to all registered CM/ECF users.

Dated: January 4, 2018

/s/ Mary Ellen Signorille
Mary Ellen Signorille*
msignorille@aarp.org
William Alvarado Rivera
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
(202) 434-2060
**Counsel of Record*

Counsel for Amici Curiae