

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE AEP ERISA LITIGATION)	
)	MASTER FILE: C2-03-67
)	
THIS DOCUMENT RELATES TO:)	Judge Algernon L. Marbley
ALL ACTIONS)	Magistrate Judge Mark R. Abel
)	

**MEMORANDUM IN SUPPORT OF THE RIGHT OF PLAINTIFF KERMIT D.
BRIDGES TO CONTINUE TO MAINTAIN HIS ERISA SECTION 502(a)(2)
CLAIM ON BEHALF OF THE PLAN NOTWITHSTANDING THE DENIAL OF
CLASS CERTIFICATION**

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1. Introduction

Plaintiff Kermit D. Bridges has pleaded a claim under ERISA section 502(a)(2), 29 U.S.C. §1132(a)(2). This claim survived Defendants' motion to dismiss, and Plaintiff's counsel have conducted document discovery and reviewed other evidence in support of that claim and had noticed Defendants' depositions concerning the merits of that claim when merits discovery was stayed approximately a year ago (D.E. 121). Although the Court has now denied Bridges' motion for class certification (D.E. 127), Bridges can continue to prosecute his section 502(a)(2) claim on behalf of AEP's 401(k) Plan. Pursuant to the Order of September 8, 2008, Bridges submits this Memorandum to demonstrate that, as one court recently noted in a very similar case, "section 502(a)(2) expressly grants the right to bring fiduciary duty claims to 'participants,' and does not appear to require them to sue derivatively or to use any other special procedural devices to represent absent parties . . . the court is unwilling to add such a requirement to ERISA's carefully elaborated design." *Waldron v. Dugan*, 2007 U.S. Dist. LEXIS 91514 *19, 20 (N.D. Ill. Dec. 13, 2007).

2. Argument

ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2), states that "[a] civil action may be brought—" "by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title[.]" ERISA Section 409(a), 29 U.S.C. § 1109(a), sets forth that:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable *to make good to such plan any losses to the plan* resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

(emphasis added).

The statute, by its terms, does not even suggest, much less require, that a lawsuit under section 502(a)(2) to recover a plan's losses must proceed under Federal Rule 23 or 23.1. Consistent with the statute's absence of any requirement that a section 502(a)(2) claim be prosecuted as a class action or a derivative action, the Secretary of Labor's power has been exercised on numerous occasions, successfully resulting in fiduciaries making good on plan losses --- *without* any resort to class action or derivative action rules or procedures. *E.g.*, *Donovan v. Bryans*, 566 F. Supp. 1258 (E.D. Pa. 1983); *Donovan v. Tricario*, 1984 U.S. Dist. LEXIS 17516 (S.D. Fl. 1984); *Whitfield v. Tomasso*, 682 F. Supp 1287 (E.D.N.Y 1988); *Martin v. Harline*, 1992 U.S. Dist. LEXIS 8778 (D. Utah 1992); *Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir. 1988); *Ford v. Bierwirth*, 636 F. Supp. 540, 542 (E.D.N.Y. 1986) (imprudent investment in company stock fund). Since the statute does not distinguish in any way among the status or standing of the Secretary of Labor, a plan fiduciary or a plan participant, the statute provides no basis upon which to claim that a participant stands in procedural shoes that are different from either the Secretary or a fiduciary.

In *Waldron v. Dugan*, 2007 U.S. Dist. LEXIS 91514 (N.D. Ill. Dec. 13, 2007), the defendants argued that an ERISA section 502(a)(2) claim filed by a plan participant "should be dismissed because it was not pleaded as a class action nor as a derivative claim." *Id.* at *14. The *Waldron* court noted that plaintiffs were "seeking, in Count III, to have Dugan make restitution to the Fund for allegedly converting its assets. None of [defendants' cited] cases stands for the proposition that a section 502(a)(2) claim must be pleaded either derivatively or as a class action." *Id.* at *16. The *Waldron* court also relied upon *Thornton v. Evans*, 692 F.2d 1064, 80 n.35 (7th Cir. 1982), which "distinguished [a] judicially-created right to relief from the statutory

right under ERISA section 502(a), which specifically authorizes *individual* suits by participants against plan fiduciaries.” *Id* at *17 (emphasis in original).

The *Waldron* court recognized that “[s]ome courts have in fact required that a section 502(a)(2) claim by a plan participant against a trustee be pleaded either derivatively or as a class action” (*id.* at *17), but found that these authorities had read into the statute a requirement which was not there and which Congress had not intended in that “comprehensive and reticulated statute, the product of a decade of congressional study:”

The court respectfully declines to impose such a requirement. The courts that have required plaintiffs to proceed derivatively or as class representatives are motivated by legitimate policy concerns: allowing many individual participants to sue trustees for breach of fiduciary duty creates a risk that the interests of absent plan members will be inadequately protected, as well as a risk of multiple redundant lawsuits. *See, e.g., Coan*, 457 F.3d at 260; *Montgomery*, 956 F. Supp. 781, 1996 WL 189347, at * 3. ***But these concerns, however valid, are insufficient to overcome the fact that neither ERISA itself, nor the Federal Rules of Civil Procedure, require ERISA participants to bring section 502(a)(2) claims derivatively.***

ERISA is a "comprehensive and reticulated statute, the product of a decade of congressional study." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2003) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993)) (quotation marks omitted). ***For this reason, courts should be very reluctant to tinker with its plain language, especially regarding its enforcement scheme. Id. As noted, section 502(a)(2) expressly grants the right to bring fiduciary duty claims to "participants," and does not appear to require them to sue derivatively or to use any other special procedural devices to represent absent parties.*** 29 U.S.C. § 1132(a)(2); *see Thornton*, 692 F.2d 1064, 1080 n.35 (noting that section 502(a) authorizes suits by individuals against plan fiduciaries). Likewise, neither Federal Rule of Civil Procedure 23, which applies to class actions, nor Rule 23.1, which applies to derivative suits, requires all suits against ERISA fiduciaries to be brought using special procedures. See FED. R. CIV. P. 23 (containing no provisions making class action procedures mandatory in any type of lawsuit); *id.* at 23.1 (applying derivative procedures only to suits involving corporations or unincorporated

associations); *Coan*, 457 F.3d at 257-58 (noting that Rule 23.1 does not apply to suits on behalf of an ERISA plan).

A rule requiring section 502(a)(2) claims to be brought in a manner analogous to derivative shareholder lawsuits might be a wise one, but the court is unwilling to add such a requirement to ERISA's carefully elaborated design. For this reason, Dugan's objection to Count III on the ground that it was not pleaded derivatively is overruled.

Id. at *18-20 (emphasis added).¹ *See also Thompson v. Avondale Industries, Inc.*, 27 Employee Benefits Cas. 1325, 2001 WL 1543497 *2 (E.D.La. Nov. 30,2001)(Section 502(a)(2) claim that was not asserted as a class action was sustained).

3. Conclusion

The statutory text is clear and unambiguous. Nothing in Section 502(a)(2) requires that a suit under the statute be brought as a class action under Rule 23, as a derivative action under Rule 23.1, or in any other particular fashion. Similarly, nothing in Rule 23 states that that Rule must be invoked or followed in section 502(a)(2) cases. Any request by Defendants that this Court impose on Bridges' Section 502(a)(2) claim a requirement which is not stated in or imposed by the statutory scheme should be rejected, as it was rejected in *Waldron*. The order staying merits discovery (D.E. 121) should also, accordingly, now be vacated.

¹ Defendant Dugan's "objection" was actually a motion to dismiss the Section 502(a)(2) claim for failing to proceed under Rules 23 or 23.1. *Id.* at *3, 8, 14 *et seq.*

DATED: September 26, 2008

Respectfully submitted,

By: s/Edwin J. Mills

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