NO. 11-2181

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELENA M. DAVID, ARLEEN J. STACH, and VICTOR M. HERNANDEZ,

Plaintiffs-Appellants

v.

J. STEELE ALPHIN, *et al.*,

Defendants-Appellees

Appeal from Judgment of the U.S District Court
for the Western District of North Carolina

BRIEF AMICUS CURIAE OF THE PENSION BENEFIT GUARANTY CORPORATION IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC OR PANEL REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

United States Code Cited

Other Authorities Cited

STATEMENT OF INTEREST OF THE PENSION BENEFIT GUARANTY CORPORATION AS AMICUS CURIAE

The Pension Benefit Guaranty Corporation ("PBGC") is the federal agency Congress established to administer and enforce the nation's pension insurance program created by Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA").[1] PBGC's board of directors consists of the Secretaries of Labor, Treasury and Commerce, and the agency is administered by a Presidentially appointed Director.[2]

PBGC files this brief to urge the Court to grant Petitioners' request for a rehearing en banc, or in the alternative, for a panel rehearing. Petitioners' request should be granted because the panel's finding that Petitioners did not suffer injury required for Article III standing arose from a misapprehension that such an injury depends on the funding level of the plan at the time the allegation of fiduciary breach is made – an arbitrary standard given the well-documented volatility of pension plan finances. Moreover, the decision overlooked that Petitioners can benefit from recoveries to a defined benefit plan even if it does have a "surplus" at termination. En banc review is also appropriate because participants' ability to

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[1] 29 U.S.C. §§ 1301-1461 (2006 & Supp. V 2011).

[2] 29 U.S.C. §§ 1302(a), (d). As an agency of the United States, PBGC may file an *amicus curiae* brief without leave of Court. Fed. R. App. Proc. 29(a). Through its independent litigating authority, PBGC may represent itself. 29 U.S.C. § 1302(b)(1).

bring suit on behalf of a plan to recover losses caused by fiduciary breach is a fundamental protection afforded to participants under ERISA,[3] and as such, involves a question of exceptional importance.

As *amicus*, PBGC offers its expertise in defined benefit pension plans and the impact of their funding on the benefits that PBGC pays to participants in terminated plans. As the Supreme Court emphasized in *Beck v. Pace Int'l Union*, PBGC's views on the interpretation of Title IV of ERISA – expressed in that case in an *amicus* brief – warrant great deference; "to attempt to answer these questions

[3] In enacting ERISA, Congress sought to correct major flaws in the pension system, which was "weak in its limited disclosure requirements and wholly lacking in substantive fiduciary standards." S. REP. NO. 93-127, at 4841 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838 (1974). The list of fiduciary breaches incorporated into ERISA was meant to "represent the most serious type of fiduciary misconduct" because "the seriousness of the improper practices disclosed indicates the need for additional precautions to insure that these specific examples do not become general conditions. The list of proscriptions is intended to provide this essential protection." *Id.* at 4866-67. Enforcement provisions within ERISA were "designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants." *Id.* at 4871.

without the views of the agencies responsible for enforcing ERISA, would be to embar[k] upon a voyage without a compass." [4]

PBGC and the Nation's Pension Insurance Program.

The PBGC insurance program is vital to the retirement security of more than 43 million American workers and retirees who participate in more than 26,000 single-employer defined benefit plans voluntarily established and maintained by companies like Defendant Bank of America Corp.[5]

The agency is charged with: (i) encouraging the continuation of private defined benefit pension plans; (ii) providing for the payment of benefits to participants of terminated plans; and (iii) keeping employers' termination insurance premiums low.[6] No funds from general federal revenues finance PBGC's program. Instead, agency funds come from employer premiums, investment income, the assets of terminated plans, and recoveries from employers

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[4] 551 U.S. 96, 104 (2007) (quoting *Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989)); *see also Midi v. Holder*, 566 F.3d 132, 136-37 (4th Cir. 2009) (emphasizing deference principles).

[5] *See* 2012 PBGC Ann. Report at 1, *available at* http://pbgc.gov/documents/2012-annual-report.pdf. *See generally PBGC v. LTV Corp.*, 496 U.S. 633 (1990); *Nachman Corp. v. PBGC*, 446 U.S. 359 (1980).

[6] 29 U.S.C. § 1302(a).

whose underfunded plans have terminated.[7] PBGC's deficit – the shortfall between its assets and the benefit liabilities it owes – is over $29 billion.[8]

When an underfunded pension plan terminates, PBGC typically becomes statutory trustee, takes over the plan's assets, adds agency funds as necessary, and pays participants their benefits under the plan, up to the statutory limits.[9] The plan sponsor is liable to PBGC for the plan's underfunding on a termination basis – the difference between the plan's full benefits and its assets, both measured as of the termination date.[10] The plan's benefit liabilities are valued under PBGC regulations, whose method approximates the cost of purchasing annuities to pay all plan benefits.[11] This method of measuring benefit liabilities produces an amount

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[7] *See* 2012 PBGC Ann. Report at 1.

[8] *Id.* at 22.

[9] *See* 29 U.S.C. §§ 1321, 1322, 1361.

[10] 29 U.S.C. §§ 1362(b)(1)(A); 1301(a)(18).

[11] *See Final Rule on Valuation of Plan Benefits in Single-Employer Plans*, 58 Fed. Reg. 50812 (Sep. 28, 1993) (This amendment "continues the regulation's historical approach of assigning values to annuity benefits that are in line with private sector group annuity prices"). Subsequent revisions used the same methodology (regulation currently codified at 29 C.F.R. §§ 4044.41-75).

that is very different from – and typically much greater than – the amount of benefit liabilities resulting from methods used by sponsors of ongoing plans.[12]

PBGC's Interest as Amicus.

PBGC has a strong interest in this rehearing because of its abiding interest in the proper interpretation of ERISA. In its decision, the panel held that the risk to Petitioners in not receiving their full benefit under the plan as a result of the alleged fiduciary breach by plan officials was "insufficiently concrete and particularized" to constitute an injury for the purposes of standing under Article III.[13] This holding is based on a misapprehension that Article III injury depends on

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[12] *See "Understanding the Financial Condition of the Pension Insurance Program – How Does PBGC's Method for Measuring Underfunding Differ From What Companies Report,"* ("The assumptions that companies use to measure liabilities often understate a plan's underfunding compared to its underfunding on a termination basis. …The main differences in measurement bases are the discount rate used to calculate the present value of benefits, the expected retirement age used to estimate when benefits will commence, the amount of early retirement benefits that will become payable, and the methodology used to value plan assets").

With Congress recently enacting the Moving Ahead For Progress in the 21st Century Act ("MAP-21"), 112 Pub. L. 141, 126 Stat. 405 (2012), the interest rates for calculating a plan's ongoing liability are now much higher, which results in an even lower liability. Because interest rates used for calculating liability on a termination basis remain low, MAP-21 increases the discrepancy between these two calculations. *See generally* http://www.irs.gov/Retirement-Plans/MAP-21-New-Funding-Rules-for-Single-Employer-Defined-Benefit-Plans; http://www.irs.gov/Retirement-Plans/Funding-Yield-Curve-Segment-Rates; http://www.pbgc.gov/prac/interest/monthly.html.

[13] *David v. Alphin*, 2013 WL 142072 at *11 (4th Cir. 2013).

a plan's funding level. By linking participants' legal recourse to an inconsistent and technical benchmark, participants may be arbitrarily barred from bringing suit or discouraged from bringing suit altogether. This result is contrary to the Congress's intent[14] and therefore involves a question of exceptional importance.

PBGC interest in this case is also strong because pension plan underfunding, which may be exacerbated by fiduciary breaches, can have a direct financial impact on the agency and its stakeholders, including participants.[15] The panel's holding effectively removes an important weapon from ERISA's arsenal to prevent imprudent or self-interested investments by plan fiduciaries. It overlooks that the existence of a perceived surplus in plan assets may encourage imprudent action, thereby increasing the likelihood of the plan becoming underfunded and of PBGC having to take the plan in with even greater underfunding. Moreover, it leaves a breaching fiduciary in control of plan assets, substantially increasing the risk that assets will be further depleted. The ruling thus removes one of the major checks Congress placed on plan fiduciaries. If participants cannot sue to recover losses on behalf of their plans due to fiduciary breach, PBGC (and indirectly the Title IV

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[14] *See, e.g.*, note 3 *supra*.

[15] In addressing the standing issue, PBGC is not interpreting Title I of ERISA. The Department of Labor, which we understand will address these issues, is the agency that can authoritatively speak to the proper interpretation of Title I. *See Reorg. Plan No. 4 of 1978*, 44 Fed. Reg. 1065 (1978), *reprinted in* 5 U.S.C. app. at 214 (2000).

premium-payers) will have to make up any shortfall upon plan termination, and some participants may receive lower pension benefits. Although PBGC, as a successor trustee of a terminated plan, has standing to bring suit for an earlier breach of fiduciary duty, the passage of time and the disappearance of offending parties often make this right illusory.

ARGUMENT

PARTICIPANTS' STANDING TO SUE FOR FIDUCIARY BREACH IN AN ONGOING DEFINED BENEFIT PENSION PLAN DOES NOT DEPEND ON THE PLAN'S FUNDING STATUS.

A plan's funding level should not preclude participants from bringing suit for harm caused to the plan by a breach of fiduciary duty. It can be calculated in more than one way and is based on fluctuating factors and assumptions, thus making it an unsuitable mechanism by which to determine when participants can bring suit for fiduciary breach. The panel misapprehended this vital point in implying that Petitioners were not harmed by the alleged fiduciary breach because the Bank of America Plan was "overfunded."[16] That term, without more, is not meaningful. The funding level in an ongoing defined benefit plan continually changes, and depends on asset performance, actuarial assumptions, and related

[16] *Alphin*, 2013 WL 142072 at *11.

factors.[17] Dramatic changes in plan funding are not unusual, and participants still may be adversely affected by an asset loss due to fiduciary breach in an "overfunded" plan. In addition, plan funding varies depending on whether the calculation being performed assumes the plan will be ongoing or terminated.

A leading benefits consulting firm recently reported that the aggregate deficit of pension plans sponsored by the S&P 1500 companies increased by $73 billion to a record year-end high of $557 billion as of December 31, 2012.[18] Despite asset growth, falling interest rates were the cause.[19] Because of the inherent volatility of plan funding levels, a plan's current "overfunded" status should not determine whether its participants can maintain a fiduciary breach suit.

Concluding that the risk of injury to Petitioners is too speculative, the panel cited *Hughes Aircraft Co. v. Jacobson*, which held that participants in a defined

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17 As interest rates go down, present value – and therefore the amount of a plan's benefit liabilities – goes up. And as interest rates rise, plans' benefit liabilities go down. *See, e.g.*, *Brengettsy v. LTV Steel (Republic) Hourly Pension Plan*, 241 F.3d 609, 611-12 (7th Cir. 2001) (Posner, J.).

18 Mercer, *"S&P 1500 Plan Sponsors Finish 2012 With Highest Year-End Pension Deficit Ever," available at* http://www.mercer.com/press-releases/1499735 (January 3, 2013). Similarly, PBGC's deficit is substantially affected by changes in interest rates. In November 2012, the agency reported a $10.83 billion charge due to a reduction in interest rates – an increase of over $9 billion from the 2011 fiscal year. 2012 PBGC Ann. Report at 24; *see also 2011 PBGC Annual Report* at 21, *available at* http://pbgc.gov/documents/2011-annual-report.pdf.

19 *Id.*

benefit plan "only have an interest in their fixed future payments, not the assets of the pension fund."[20] The panel reasoned that it could not find injury where, in the event the plan becomes underfunded, either Defendant Bank of America (through additional contributions to the plan) or PBGC (via the pension insurance system) will pay the participants' benefits under the plan.

But the panel misapprehended *Hughes*, where the plaintiffs sued to recover *for themselves* an alleged surplus in plan assets.[21] That plan participants cannot personally recover an alleged surplus in an ongoing plan, as the *Hughes* Court held, does not mean that participants cannot be injured by a loss resulting from fiduciary breach.[22] A drain of assets can cause underfunding that, upon termination of the plan, can lead to participants' receiving reduced payments regardless of PBGC's payment of a guaranteed benefit.

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[20] *Alphin*, 2013 WL 142072 at *11 (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-40 (1999)).

[21] *See Jacobson v. Hughes Aircraft Co.*, 105 F.3d 1288, 1291 (9th Cir. 1997) ("Plaintiffs seek a variety of remedies, including a distribution of 'all or a portion of the excess Plan assets' in the form of increased benefits."), *rev'd on other grounds*, 525 U.S. 432 (1999).

[22] PBGC participated as *amicus curiae* in support of the sponsor in *Hughes Aircraft*, in part for a similar reason to its participation here, to explain that the concept of a surplus in plan assets is an actuarial construct relevant only in the event of termination. *Hughes Aircraft*, No. 97-1287, Brief of PBGC as Amicus Curiae in Supp. of Pet. for Writ of Cert. (Mar. 24, 1998) at 15-16.

Contrary to the panel's holding, the potential effect on participants' benefits from the alleged fiduciary breach here is sufficiently "concrete or particularized" for Article III standing. It is concrete because PBGC often sees plans that were once "overfunded" terminate in an underfunded status. It is particularized because many participants in such plans do have their plan benefits reduced to statutory limits.[23]

ERISA provides that PBGC guarantees "all nonforfeitable benefits," subject to certain limitations.[24] Although PBGC guarantees a minimum benefit for each participant regardless of how well-funded the plan was at termination, some participants receive *more* than their guaranteed amount. This depends on two factors: the level of the plan's assets, and whether part or all of the participant's plan benefit is entitled to priority under the statutory six-tier hierarchy.[25] ERISA

[23] This case therefore is unlike the recent Supreme Court case of *Clapper v. Amnesty Int'l*, __ U.S. __ (Feb. 26, 2013), where a chain of five events involving both government agents and the FISA court would have been required for plaintiffs to suffer an injury, slip op at 12-15. Nor does it involve constitutional claims asserted against a coordinate branch of government, which requires an "especially rigorous" standing inquiry, slip op. at 9. To the contrary, as this panel acknowledged that Congress has provided statutory standing for this case, this is the inverse of *Clapper* where this panel's constitutionally based decision implicitly invalidated congressional action.

[24] 29 U.S.C. § 1322(a).

[25] 29 U.S.C. § 1344(a).

and PBGC's regulations describe this asset-allocation process in detail.[26] For present purposes, the critical point is that participants can – and many do – receive statutory benefits from PBGC in amounts greater than their guaranteed benefits. But this can happen *only* if plan assets are sufficient to cover the payment of those excess amounts when the plan is terminated.

Although a company may have no present intent to terminate its plan, the relevant timeframe for participants is whether the plan will terminate during their *lifetime*, because if it is underfunded at termination – whenever that occurs – they may suffer real economic harm.[27] Accordingly, participants have a vital stake in the assets of their ongoing plan, regardless of the current financial health of the plan or the plan sponsor, because the amount of plan assets can have a direct effect on the benefits they receive from PBGC.

The unfortunate reality is that for many participants, termination of their plan in an underfunded state is a foreseeable possibility, regardless of current plan funding. PBGC is trustee of more than 4,440 underfunded plans, with 155 of them

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[26] *See id.*; 29 CF.R. pt. 4044, subpart A (§§ 4044.1-4044.17); *see also Mead Corp. v. Tilley*, 490 U.S. at 717-18.

[27] *See In re US Airways Group, Inc.*, 369 F.3d 806, 808 (4th Cir. 2004) (retired pilots "would be entitled only to the reduced benefits guaranteed by the PBGC under the old pension plan"); *In re US Airways Group, Inc.*, 296 B.R. 734, 746 (Bankr. E.D. Va. 2003) ("From the evidence presented as well as the numerous letters the court has received, it is obvious that many individuals will indeed suffer great financial hardship [due to plan termination]").

terminating in the last fiscal year.[28] Thus, participants have a real interest in pursuing lost plan assets. As the Eighth Circuit recognized in *Bigger v. American Commercial Lines, Inc.*, better funding "would indirectly benefit employees by helping to insure that the sponsor . . . would be able to pay future earned benefits."[29] A higher level of plan assets results in an increased protection for plan participants in the event of termination – a concept that was the driving force in the enactment of ERISA.[30]

Additionally, the panel relied upon *LaRue v. DeWolff, Boberg & Associates, Inc.*,[31] in holding that the alleged risk of injury to Petitioners was "insufficiently particularized" to give rise to Article III standing. The *LaRue* court stated that misconduct by administrators of a defined benefit plan will not affect an individual's entitlement to a benefit unless it creates or enhances a risk of default by the entire plan.[32] The panel's decision, however, overlooks that a loss of plan

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[28] 2012 PBGC Ann. Report at 22.

[29] 862 F.2d 1341, 1345 (8th Cir. 1988).

[30] *See* H.R. REP. NO. 93-533, at 4645-4646 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639 (1974) ("The promise and commitment of a pension can be fulfilled only when funds are available to pay the employee participant what is owed to him. Without adequate funding, a promise of a pension may be illusory and empty").

[31] 552 U.S. 248 (2008).

[32] *Id.* at 255.

assets resulting from a fiduciary breach – regardless of funding levels – enhances the plan's risk of default because *any* loss of assets weakens the plan financially.

Finally, the panel's statement that Petitioners would not benefit from a surplus that may result from a favorable outcome in this litigation overlooks applicable law. Under Title IV of ERISA, there is no surplus unless a plan has more than enough assets to satisfy all benefit liabilities *at termination*.[33] As the Court held in *Fuller v. FMC Corp.*, "When a single-employer defined benefit plan is terminated, the administrator must pay all liabilities of the plan to participants and their beneficiaries before distributing residual assets to the employer. . . . Thus, to fulfill the duties imposed by [29 U.S.C.] § 1344, the administrator must pay all plan liabilities *before concluding that excess assets exist* which may be returned to the employer."[34] Even if a plan terminates at a time when there are surplus assets, the amount of plan assets can directly affect participants. The surplus must be shared with participants unless the plan provides otherwise.[35] The panel noted that the plan currently provides for any surplus to revert to the plan sponsor at termination, but it overlooked that the plan can be amended at any time

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[33] *See* 29 U.S.C. § 1344(d)(1).

[34] 4 F.3d 255, 263 (4th Cir. 1993) (emphasis added). Plan assets cannot inure to the employer unless there is a surplus at termination. 29 U.S.C. §§ 1103(c)(1); 1344(d)(1)(A); *see generally Mead Corp. v. Tilley*, 490 U.S. at 718.

[35] 29 U.S.C. § 1344(d).

to allow for the reversion of a surplus to be shared with participants, even if said reversion will incidentally benefit the plan sponsor.[36]

Moreover, the law encourages employers to share the surplus with participants at termination. The Internal Revenue Code provides for a 20 percent excise tax on the amount of any reversion.[37] That excise tax increases to 50 percent unless the employer has a qualified replacement plan or the pension plan provides for certain benefit increases.[38] Thus, participants in a plan that terminates with a surplus clearly have an interest in the amount of that surplus, regardless of whether they are currently entitled to the surplus under the terms of the plan.

In sum, participants' standing to sue for fiduciary breach under 29 U.S.C. § 1132(a)(2) does not depend on the plan's supposed funded status at the time the complaint was filed. Regardless of its funding status at that time, participants' risk of the future loss of benefits is both concrete and particularized. Participants receive their full benefit under a plan only if it remains ongoing or terminates

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[36] *See, e.g.*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. at 443-444 ("[P]lan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate [pension plans]. . . . The incidental benefits conferred upon Hughes when it amended the Plan are not impermissible under [ERISA]"); *Lockheed Corp v. Spink*, 517 U.S. 882, 890-894 (1996).

[37] 26 U.S.C. § 4980(a).

[38] 26 U.S.C. § 4980(d)(1), (d)(3).

without being underfunded on a termination basis. The presence of a surplus at the time of an alleged breach says virtually nothing about whether the plan will be fully funded if it terminates in the future, and, thus, such a surplus does *not* mean that participants' benefits are fully protected. For these reasons, standing under section 1132(a)(2) should not depend on such "an actuarial artifact."[39]

CONCLUSION

For all the reasons stated herein, PBGC urges the Court to grant Petitioners request for a panel re-hearing, or alternatively for rehearing en banc.

February 28, 2013

Respectfully submitted,

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[39] *Jacobson v. Hughes Aircraft Co.*, 105 F.3d at 1305 (9th Cir. 1997) (Norris, J., dissenting) ("The existence of a 'surplus' in a pension fund is nothing more than an actuarial artifact"), *maj. op. rev'd*, 525 U.S. 432 (1999).

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed. R. App. P. 29(d) and 32(a)(7)(B). The foregoing brief contains 3,561 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Word 2007 for Windows XP.

Dated: February 28, 2013

/s/ Paula J. Connelly
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 28, 2013, a copy of **Brief Amicus Curiae of the Pension Benefit Guaranty Corporation in Support of the Petitioners' Request for a Panel Re-Hearing and Hearing En Banc** was served via the court's electronic filing system on the following:

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