



but must file her brief within 7 days of the principal brief of the party being supported, which in this case was June 22, 2011. However, the Secretary was not aware of this case at that time or of the important issues it raises, and accordingly seeks leave from the Court for time to file an amicus brief out of time in order to bring to the Court's attention her views in this appeal. In support of this motion, the Secretary states as follows:

1. The Secretary is charged with interpreting and enforcing the provisions of Title I of ERISA. Therefore, she has a substantial interest in the application of ERISA by the courts. See Donovan v. Cunningham, 716 F.2d 1455, 1462-63 (5th Cir. 1983) (the Secretary "vindicate[s] the broader interest of the government"). The Secretary's interests include promoting the uniformity of law, protecting plan participants and beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 693-94 (7th Cir. 1986) (en banc).

2. This case raises a number of important issues concerning ERISA's remedial provision, 29 U.S.C. 1132, including the ability of plan participants and their beneficiaries to alternatively plead a claim for plan benefits along with a claim for fiduciary breach, the available equitable relief for fiduciary breach claims that harm individual plan participants and their beneficiaries,

and the standard of review that a federal court should apply in reviewing a denial of plan benefits. These issues strongly implicate the Secretary's interests as both a plaintiff who enforces ERISA and as a regulator who aims, among other things, to protect the ability of ERISA plan participants to vindicate their statutory rights under ERISA. The Secretary has filed amicus briefs addressing the scope and effect of ERISA's remedial provision in a number of cases before the Courts of Appeals and the Supreme Court, including in CIGNA Corp. v. Amara, 131 S.Ct. 1866 (2011), which should affect the analysis in this case. Because an amicus curiae brief from the Secretary will present "the agency's fair and considered judgment on the matter[s] in question" in an area of law where the Department of Labor is the primary enforcer and regulator, Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan, 129 S.Ct. 865, 872 & n.7 (2009), this Court has found it useful to consider the government's views in the ERISA context in addition to the parties' briefing. E.g., Boggs v. Boggs, 82 F.3d 90, 98 (5th Cir. 1996) (King, J., dissenting) (noting that the Court had requested the Secretary's views on an ERISA issue), rev'd, Boggs v. Boggs, 520 U.S. 833 (1997).

3. The Department of Labor only became aware of this case on August 4, 2011 when a WestLaw database search for any briefing on the Amara decision pulled up one of the defendants' briefs. As the district

court's decision was issued before Amara was decided in May of this year, the decision itself could not have alerted the Secretary to these issues in this case. Soon after the discovery of this appeal, the Secretary decided it was important to present the government's position on the issues in this case and diligently began to prepare a recommendation to that effect.

4. Before the Secretary may file an amicus brief in this Court, she is obligated to first obtain authorization from the Solicitor General. See 28 U.S.C. § 518(b); 28 C.F.R. § 0.20. It is anticipated that this process, including internal reviews within the Department of Labor, consultation with and final approval from the Solicitor General, and preparation of an amicus brief, will be completed three weeks from today, on September 7, 2011. Assuming authorization to file and permission from this Court, the Secretary believes that her brief will aid the Court in resolving the important questions in this case.

5. Although briefing by the parties was scheduled to be completed today, August 17, 2011, with the filing of Appellant's reply brief, oral argument has not been set. Granting this motion will therefore not delay disposition of the case in any material way.

6. Counsel for the parties have been contacted. Counsel for the Appellant does not oppose this motion. Counsels for the Appellees oppose the motion at this time.

WHEREFORE, the Secretary of Labor, through undersigned counsel, respectfully requests that the Court grant this motion for leave to file a brief on September 7, 2011.

Respectfully submitted,

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AUGUST 2011

CERTIFICATE OF SERVICE

I hereby certify that on August, 17, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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