No. 13-3230

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM DOUGLAS FULGHUM, et al.,
Plaintiffs-Appellants,

v.

EMBARQ CORPORATION, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Kansas
The Honorable Eric F. Melgren
(D.C. No. 2:07-CV-2602-EFM)

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS URGING REVERSAL AND REMAND

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases: Page

Federal Cases--(continued): Page

Federal Cases--(continued): Page

Federal Cases--(continued): Page

Federal Cases--(continued): Page

Federal Cases--(continued): Page

Federal Statutes:

Miscellaneous:

Miscellaneous--(continued):

QUESTION PRESENTED

Whether the district court erred in holding that the "fraud or concealment" provision of ERISA's statute of limitations only applies if the defendant takes additional affirmative steps to conceal the underlying alleged fiduciary breach.

STATEMENT OF INTEREST

The Secretary of Labor has primary enforcement and regulatory authority for Title I of the Employee Retirement Income Security Act ("ERISA"). 29 U.S.C. § 1001, et seq. The Secretary's interests include protecting beneficiaries, enforcing fiduciary standards, and ensuring ready access to the federal courts. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 689-94 (7th Cir. 1986) (en banc). Integral to such access is ERISA's statute of limitations provision, ERISA section 413, 29 U.S.C. § 1113, which allows a plan fiduciary, participant, beneficiary, or the Secretary additional time to bring suit (i.e., six years from "discovery" of the breach or violation) for a fiduciary breach "in the case of fraud or concealment." The Tenth Circuit has not addressed ERISA Section 413's "fraud or concealment" provision.

The Secretary has a strong interest in interpreting the provision to prevent fiduciaries from "running out the clock" on potential claims by misrepresenting or failing to disclose material information. If upheld, the district court's decision will

diminish the protection of ERISA plans by inhibiting the ability of parties, including potentially the Secretary, to seek redress for fiduciary breaches. Accordingly, the Secretary has a compelling interest to see that the district court's erroneous decision is corrected. This amicus brief is filed as a matter of right pursuant to Fed. R. App. P. 29(a).

STATEMENT OF THE CASE

Plaintiffs are seventeen retirees of several different telephone companies that eventually became wholly-owned subsidiaries of Defendant Embarq Corporation after its spin-off from Defendant Sprint Nextel in May 2006. A9410 (Mem. & Order, Feb. 14, 2013 (Fulghum v. Embarq Corp., 938 F. Supp. 2d 1090, 1098 (D. Kan. 2013)).[1] Most of these Plaintiffs worked for Defendants for approximately thirty-five years before retiring; all of them retired between 1976 and 2003. A9451-52. As retirees, Plaintiffs and their spouses and dependents were participants and beneficiaries in Defendants' various ERISA plans, and were entitled to certain medical and life insurance benefits. A9410, A9452. Defendants subsequently reduced these benefits on several occasions and in several respects.

[1] Numerous companies and welfare benefit plans, as well as an employee benefit committee and one individual, were named as defendants. A9411-12. Unless otherwise specifically noted, this brief collectively refers to them as Defendants.

A9453-54 (e.g., modified prescription drug benefits; eliminated or capped life insurance coverage).

On December 28, 2007, Plaintiffs filed suit challenging Defendants' reduction and elimination of benefits and asserting various state and federal causes of action, including claims under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3). A9408, A9451, A9460.[2] That section allows participants to file a civil action seeking to "enjoin any act or practice" or "obtain other appropriate equitable relief" to redress violations of ERISA Title I, including the statute's fiduciary provisions. 29 U.S.C. § 1132(a)(3). Plaintiffs asserted "that Defendants breached their fiduciary duty by misrepresenting the terms of the plans by affirmatively telling Plaintiffs that their medical and life insurance benefits were lifetime benefits" and also "fail[ing] to inform them that their benefits could change." A9451.

Defendants moved for summary judgment on the basis that these 502(a)(3) misrepresentation claims were time-barred. A9454. Plaintiffs responded that the claims were timely under ERISA section 413's "fraud or concealment" provision,

[2] Plaintiffs also sought relief under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), alleging that the summary plan descriptions (SPDs) in effect when they retired, as well as other written documents and oral representations, provided contractually vested benefits that could not be reduced. A9408. The district court held in Defendants' favor that these benefits were not guaranteed lifetime vested benefits, and therefore could be reduced. A9410-49. The Secretary expresses no opinion on this ruling.

A9456, which delays accrual of the six-year statute of limitations for a fiduciary breach claim "in the case of fraud or concealment [until] six years after the date of discovery of such breach or violation." 29 U.S.C. § 1113. "Plaintiffs contend[ed] that the statute does not begin to run until Plaintiffs discovers [sic] the wrong," and, in their view, "Defendants' underlying misrepresentations [regarding their life insurance and medical benefits] were the 'fraudulent' acts" that triggered the "fraud or concealment" provision. A9456-57.

The district court rejected Plaintiffs' interpretation of section 413's "fraud or concealment" provision. A9455-57. In doing so, the court relied on Third Circuit case law holding that the "fraud or concealment" provision incorporates the federal doctrine of fraudulent concealment, which, as construed by the Third Circuit, requires additional affirmative steps, either as part of the original breach of duty or thereafter, to hide the underlying breach. Id. (citations omitted). The district court concluded that, in this case, "the fraud or concealment provision is inapplicable because there is no evidence that Defendants actively concealed their alleged breach of fiduciary duty." A9457. Thus, Defendants' summary judgment motion was granted as to the section 502(a)(3) misrepresentation claims of the fifteen plaintiffs who retired before December 28, 2001, finding that they were untimely.

A9455-61.[3] The claims of the two individuals who retired after December 28, 2011, were permitted to proceed. A9461.[4]

SUMMARY OF THE ARGUMENT

ERISA section 413 provides that where participants or the Secretary have been prevented from discovering fiduciary breaches via "fraud or concealment," they may sue within six years after they discover the breach. The "fraud or concealment" provision applies to either fraud or concealment, and therefore each term is entitled to its own independent meaning. The meaning of these statutorily

[3] Plaintiffs alternatively maintained that their 502(a)(3) misrepresentation allegations were timely under ERISA's six-year statute of limitations even if the "fraud or concealment" proviso does not apply. A9457-61. The six-year statute of limitations provides that a claim for a fiduciary breach accrues, and the limitations period therefore starts to run, on "the date of the last action which constituted a part of the breach or violation," or on "the latest date on which the fiduciary could have cured the breach or violation" arising "in the case of an omission." 29 U.S.C. § 1113(1). Plaintiffs' alternative argument contended that their claims did not accrue until Defendants actually reduced their medical and life insurance benefits in 2005 and 2008. A9457-61. The district court disagreed and held that the misrepresentation claims accrued on "the date the alleged misrepresentations were made" – i.e., prior to the December 28, 2001 statute date for fifteen of the Plaintiffs – because Plaintiffs' fiduciary breach allegations were based on Defendants' misrepresentations. A9460. In this brief, the Secretary focuses exclusively on the court's ruling regarding section 413's "fraud or concealment" proviso, and expresses no opinion on this alternative ruling regarding accrual of a misrepresentation claim that does not constitute "fraud or concealment."

[4] The court granted Plaintiffs' subsequent motion for partial finality under Federal Rule of Civil Procedure 54(b), making this case immediately appealable. A9460-65 (Mem. & Order, July 16, 2013 (Fulghum, 938 F. Supp. 2d at 1137-40)).

undefined terms is informed by their common understanding in ordinary usage, ERISA's remedial purpose, and its trust law antecedents. Thus, "fraud" includes a fiduciary's knowing misrepresentation or omission of a material fact intended to deceive or induce detrimental reliance, and "concealment" includes a fiduciary's active, affirmative acts to conceal the underlying breach. These definitions are consistent with Supreme Court, Tenth Circuit, and other circuit precedents interpreting the same terms in the fiduciary context.

In addition, even if the Court were to incorporate the common law doctrine of "fraudulent concealment" into ERISA 413's "fraud or concealment" provision, the end result should be unchanged, because "fraudulent concealment" is merely a species of either "fraud" or "concealment." The "fraudulent concealment" doctrine, in turn, includes "self-concealment" or "passive concealment," as well as "active concealment" where, as in ERISA, there is a fiduciary relationship. Longstanding Supreme Court and Tenth Circuit precedents both recognize this fiduciary exception to the general fraudulent concealment doctrine. And this exception is directly applicable in the ERISA context, which imposes fiduciary obligations, including the essential duty to disclose material information to participants and beneficiaries. Thus, application of the "fraudulent concealment"

doctrine, while not textually necessary, actually bolsters the Secretary's reading of the provision and leads to the same outcome.

The Secretary's interpretation of "fraud or concealment" in ERISA section 413 is most consistent with ERISA's remedial purpose. The Supreme Court has historically recognized the need for a "discovery rule" in order to disallow a defendant's deceptive conduct from preventing a plaintiff from knowing about a claim until after the applicable statute of limitations has run. The 'fraud or concealment" proviso of section 413 evinces Congress's intent to codify such a discovery rule, and including "self-concealing" fraud or "passive concealment" within the scope of that proviso not only comports with the statutory text by giving "fraud" its ordinary meaning but also furthers the statute's protective purpose.

The circuits that have adopted a narrower construction of "fraud or concealment" disregard the above-referenced principles. Primarily, contrary to basic rules of statutory construction, these courts have read the disjunctive "or" in "fraud or concealment" out of the statute. Moreover, in effectively fusing the two terms into one "fraudulent concealment" standard, these courts have applied that doctrine in an unduly narrow manner (i.e., requiring additional affirmative acts of concealment) that ignores the above-referenced Supreme Court and circuit authority, under which it is settled law that "self-concealment" and "passive

concealment" are included within the doctrine's scope where there is a fiduciary relationship. Indeed, many circuits that have adopted the narrower interpretation of "fraudulent concealment" also acknowledge its potentially broader construction. Yet, by adopting the narrower reading, those circuits further ignore the basic canon of construction that remedial statutes, such as ERISA, should be liberally construed in favor of those they are meant to protect.

ARGUMENT

ERISA Section 413's "Fraud or Concealment" Provision Applies to Fiduciary Misrepresentations and Omissions of Material Information

ERISA is a remedial statute that was enacted to "protect . . . interests of participants in employee benefit plans and their beneficiaries" by setting forth "standards of conduct, responsibility, and obligation for fiduciaries of [those] plans" and providing for "remedies, sanctions, and ready access to the Federal Courts." 29 U.S.C. 1001(b). Access to the federal courts for the purpose of prosecuting fiduciary breach claims is governed, in part, by the statute's limitations provision contained in ERISA section 413, 29 U.SC. § 1113. Trustees of Wyoming Health and Welfare Plan v. Morgen & Oswood Constr. Co., Inc., 850 F.2d 613, 618 n.8 (10th Cir. 1988) (Section 413 "applies only to actions brought to redress a fiduciary's breach."). Section 413 states:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113 (emphasis added). By its terms, the "fraud or concealment" proviso is a discovery-based accrual rule that delays the running of the six-year statute of limitations until the plaintiffs "discover[]" that a breach or violation occurred, and that applies only in limited circumstances involving allegations of either "fraud" or "concealment."

The Tenth Circuit has not yet addressed the scope and application of the section 413 "fraud or concealment" provision. See A9456. Proper construction of the provision requires adherence to the plain text of ERISA, informed by the statute's trust law foundations and remedial purpose.

A. By Its Terms, Section 413 Applies to Either Fraud or Concealment

1. "In ERISA cases, '[a]s in any case of statutory construction, [the court's] analysis begins with the text of the statute.'" Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 254 (2000) (quoting Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999)). The pertinent text of section 413 gives plaintiffs six years after the discovery of a breach to file suit where there is "fraud or concealment." 29 U.S.C. § 1113 (emphasis added). The disjunctive word "or" should be construed literally, because Congress's "use of the disjunctive 'or' suggests each term has distinct meaning." Direct Mktg. Ass'n v. Brohl, 735 F.3d 904, 912 (10th Cir. 2013) (citing Garcia v. United States, 469 U.S. 70, 73 (1984) ("Canons of construction indicate that terms connected in the disjunctive . . . be given separate meanings.")). Thus, "fraud" in ERISA section 413 is distinct from "concealment" because "[o]therwise the term 'or' in the statute would be superfluous." United States v. Gonzales, 456 F.3d 1178, 1182 (10th Cir. 2006) (statute's "inclusion of the term 'or' between [the words] indicates [that they] are to have different meanings"); see generally Knutzen v. Eben Ezer Lutheran Hous. Ctr., 815 F.3d 1343, 1348 (10th Cir. 1987) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or

insignificant"). The two terms can overlap in meaning, but they cannot be entirely synonymous and one term cannot completely subsume the other.

The district court therefore erred when it determined that "fraud or concealment" in ERISA section 413 incorporates the federal doctrine of "fraudulent concealment," as construed by courts like the Third Circuit that narrowly interpret the doctrine to require additional affirmative steps to hide the underlying breach, either as part of the original breach of duty or thereafter. A9456-57 (citing In re Unisys Corp. Retiree Medical Benefits "ERISA" Litig., 242 F.3d 497, 503 (3d Cir.2001); Kurz v. Philadelphia Elec. Co., 96 F.3d 1544, 1552 (3d Cir.1996)). In doing so, the court diverged from the Second Circuit's reasoning in Caputo v. Pfizer, 267 F.3d 181 (2d Cir. 2001), which explained that "principles of statutory interpretation counsel strongly against merging the two terms" into one, and "giving each term independent significance (as one must when terms are used in the disjunctive") prevents either from being rendered superfluous. Id. at 189-90; see Cataldo v. U.S. Steel Corp., 676 F.3d 542, 551 (6th Cir. 2012) (finding Caputo's rationale "persuasive").

Because ERISA does not define the terms "fraud" and "concealment," the "'proper inquiry focuses on the ordinary meaning of the [terms] at the time Congress enacted'" the statute, Nat'l Credit Union Admin. Bd. v. Nomura Home

Equity Loan, Inc., 727 F.3d 1246, 1258 (10th Cir. 2013) (quoting BedRoc Ltd., LLC v. United States, 541 U.S. 176, 184 (2004)), while being mindful that "'ERISA . . . is remedial legislation that should be construed liberally in favor of those persons it was meant to benefit and protect, namely, participants in and beneficiaries under covered pension and welfare plans.'" Jenkins v. Green Bay Packaging, Inc., 39 F.3d 1192, at *2 (10th Cir. 1994) (unpublished); see Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) ("[W]e are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes."); cf. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983) (ERISA is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.").

In ordinary usage, "fraud" is defined as "a false representation of a matter of fact [by] misleading allegations or by concealment of that which should have been disclosed, which . . . is intended to deceive another so that he shall act upon it to his legal injury"; "concealment" is defined as "'withholding of something which one knows and which one, in duty, is bound to reveal.'" Caputo, 267 F.3d at 189-90 (quoting Black's Law Dictionary, 788 (Rev. 4th ed. 1968)). Applying these definitions, as well as the disjunctive "or," the pertinent section 413 provision is satisfied if there is: (1) "fraud," which occurs when "a fiduciary . . . breached its

duty by making a knowing misrepresentation or omission of a material fact to induce an employee/beneficiary to act to his detriment;" or (2) "concealment," which occurs if the fiduciary "engaged in acts to hinder the discovery of a breach of fiduciary duty." Id. at 190 (emphasis added; citation omitted). In other words, "fraud or concealment" occurs if the fiduciary engages in a knowing misrepresentation that has the intent to deceive or induce detrimental reliance or either knowingly withholds material information or actively conceals the underlying breach. Id. (construing section 413 as applying to fraud or fraudulent concealment).

2. The foregoing interpretation is consistent with the Supreme Court's and the Tenth Circuit's treatment of "fraud" in the fiduciary context. In Chiarella v. United States, 445 U.S. 222 (1980), the Supreme Court stated that "one who fails to disclose material information . . . commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.'" Id. at 228 (citation omitted). More recently, the Supreme Court held that a "fraudulent scheme" existed, in part, because "any distinction between omissions and misrepresentations is illusory in the context of a broker who has a fiduciary duty to her clients." SEC v. Zandford, 535 U.S. 813,

824 (2002); accord Dirks v. SEC, 463 U.S. 646, 653 (1983); United States v. Hagan, 521 U.S. 642, 652 (1997).

The law of this Circuit also holds that a fiduciary commits "fraud" when he fails to disclose material information to individuals with whom he is in a trust relationship. SEC v. Cochran, 214 F.3d 1261, 1264-65 (10th Cir. 2000); Farlow v. Peat, Marwick, Mitchell & Co., 956 F.2d 982, 988 (10th Cir. 1992) (indicating Tenth Circuit's adoption of above-referenced proposition from Chiarella). Accordingly, in SEC v. Cochran, this Court explained that a fraud action may lie (assuming its elements, e.g., intent to deceive, are otherwise met) if "a federal statute . . . or common law recognizes a fiduciary or similar relationship of trust and confidence giving rise to such a duty [to disclose]." 214 F.3d at 1265. Likewise, in United States v. Cochran, 109 F.3d 660, 665 (10th Cir. 1997), this Court explained, in the context of a wire fraud prosecution, that a fiduciary relationship can trigger a duty of disclosure due to the "relationship of trust and confidence between the parties."[5]

[5] Other circuits are in accord. See, e.g., Swanson v. Wilson, 423 Fed. App'x. 587, 599 n.5 (6th Cir. 2011); de la Fuente v. FDIC, 332 F.3d 1208, 1222-23 (9th Cir. 2003); United States v. Brown, 79 F.3d 1550, 1557 (11th Cir. 1996), overruled on other grounds United States v. Svete, 556 F.3d 1157 (11th Cir. 2009) (en banc); United States v. Holzer, 816 F.2d 304, 307 (7th Cir.) ("Fraud in its elementary

Therefore, under precedents established by the Supreme Court, this Court and other circuits, considerable overlap exists between "fraud" and "concealment" in the fiduciary context – the context that pertains to ERISA – with respect to willful omissions of material information. Nonetheless, the two terms are not synonymous and cannot be merged or used interchangeably without undermining some of their independent meanings.

3. Moreover, even if the Court unnecessarily merges the terms "fraud" and "concealment" into "fraudulent concealment," the outcome should be the same. "Fraudulent concealment" is merely a species of either "fraud" or "concealment" that, in the fiduciary context, does not require an affirmative act of concealment in addition to the underlying fraud. Instead, as discussed infra, "fraudulent concealment" includes "self-concealment" or "passive concealment" where the fraud is committed by a fiduciary in breach of his fiduciary relationship. As a result, while there is no need to incorporate the "fraudulent concealment" doctrine into ERISA section 413's "fraud or concealment" proviso under a straightforward textual construction of the statute, doing so only bolsters the Secretary's interpretation.

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common law sense of deceit . . . includes the deliberate concealment of material information in a setting of fiduciary obligation."), vacated, 484 U.S. 807 (1987).

Indeed, the long-established "fraudulent concealment" doctrine, as applied to statutes of limitations like ERISA section 413, provides that when a "fraud has been concealed, or is of such character as to conceal itself, the statute [of limitations] does not begin to run until the fraud is discovered." Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1874). In Bailey, the Supreme Court considered whether to extend the fraudulent concealment doctrine to "actions at law" and explained that:

> [I]n suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

Id. at 348. Subsequently, the Court elaborated that "if the fraud itself be secret in its nature, and such that its existence cannot be readily ascertained, or if there be fiduciary relationships between the parties, there need be no evidence of a fraudulent concealment other than that implied from the transaction itself." Bates v. Preble, 151 U.S. 149, 160-61 (1894). After the merger of the courts of law and equity, the Court reaffirmed its finding in Bailey that equity requires "'no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.'" Holmberg v. Armbrecht, 327 U.S. 392,

397 (1946); cf. Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687, 691 (10th Cir. 1981) (Holmberg's "continuing vitality is attested by the many cases relying upon it").

This Court in Bryan v. United States similarly held that "to constitute fraudulent concealment that will toll the running of the statute of limitations, unless there is a fiduciary or other relation imposing a duty to make disclosure, concealment is necessary and mere silence is not sufficient." 99 F.2d 549, 553 (10th Cir. 1938) (emphasis added, citations omitted). Indeed, many circuits recognize the "passive concealment" exception to the general "fraudulent concealment" doctrine where there is a fiduciary relationship. For example, the Sixth Circuit extensively examined Bailey and agreed that, to show fraudulent concealment, "affirmative acts of concealment must be shown except in cases founded on fraud or breach of fiduciary duty," in which case "self-concealing misconduct may be sufficient." Pinney Dock & Transport Co. v. Penn Cent. Corp., 838 F.2d 1445, 1471 (6th Cir. 1988) (emphasis added, citation omitted). Accordingly, in that circuit "the wrongful concealment prong is satisfied by a showing that the fraud was self-concealing." Venture Global Eng'g, LLC v. Satyam Computer Servs., Ltd., 730 F.3d 580, 587 (6th Cir. 2013) (citing Bailey &

Pinney Dock).[6] Thus, the Supreme Court and various lower courts, including this Circuit, Bryan, 99 F.2d at 543, recognize "self-concealing" fraud or "passive concealment" as a type of "fraud" (or "fraudulent concealment") where there is a fiduciary relationship – without regard for "special efforts" or additional affirmative acts to conceal.

4. No more is required to establish "fraud or concealment" under ERISA section 413. "[A]t common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust." Mertens v. Hewitt Associates, 508 U.S. 248, 256 (1993). Moreover, "ERISA abounds in the language and terminology of trust law [and] ERISA's 's legislative history confirms that the Act's fiduciary responsibility provisions . . . 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'" Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) (quoting H.R. Rep. No. 93-533, p. 11 (1973), U.S. Cong. & Admin. News 1974, pp. 4639, 4649); Ershick v. United Missouri Bank of Kansas City, 948 F.2d 660, 666 (10th Cir. 1991); S. Rep. No. 93-127, p. 29 (1973), U.S. Code Cong. & Admin. News

[6] Accord Sprint Communications Co., L.P. v. F.C.C., 76 F.3d 1221, 1226-227 (D.C. Cir. 1996); State of Tex. v. Allan Const. Co., Inc., 851 F.2d 1526, 1532-33 & n.29 (5th Cir. 1988); Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978); Jamesbury Corp. v. Worcester Valve Co., 443 F.2d 205, 209 (1st Cir. 1971).

1974, 4639, 4865 (Congress recognized that "[an ERISA] fiduciary is one who occupies a position of confidence or trust."). Accordingly, the fiduciary exception to the "fraudulent concealment" doctrine enunciated by the Supreme Court and this Circuit applies to ERISA, which imposes fiduciary relationships and obligations on those in positions of trust, 29 U.S.C. §§ 1000(21), 1104, and particularly to section 413, which is lodged in the statute's "fiduciary responsibility" section.

This fiduciary exception is triggered by a fiduciary's disclosure obligations, which the Tenth Circuit recognizes in the ERISA context to be at "'the core of a fiduciary's responsibility.'" Horn v. Cendant Operations, Inc., 69 Fed. App'x. 421, 427 (10th Cir. 2003) (unpublished) (quoting Eddy v. Colonial Life Ins. Co. of Am., 919 F.2d 747, 750 (D.C. Cir. 1990)). Thus, the fiduciary has the duty to disclose "'those material facts, known to the fiduciary but unknown to the beneficiary, which the beneficiary must know for its own protection.'" Id. (quoting Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Secs., Inc., 93 F.3d 1171, 1182 (3d Cir. 1996)). Because ERISA fiduciaries have a duty to disclose material information to participants and beneficiaries, the knowing or intentional breach of such duty, by affirmative misrepresentations constituting fraud or by purposeful omissions or failures to disclose (i.e., concealment), triggers

the section 413 "fraud or concealment" statute of limitations and thereby affords plaintiffs the benefit of its more liberal discovery rule.

B. The Secretary's Reading Comports with ERISA's Purpose

The Secretary's reading of the "fraud or concealment" provision best comports with ERISA's remedial purpose by protecting participants (as well as the Secretary's ability to bring suit) when, due to "fraud or concealment" by plan fiduciaries, they are unaware of statutory breaches by these fiduciaries. In that circumstance, the statute delays accrual of the claim until the breach is or should have been discovered. Indeed, the Supreme Court "long ago recognized that something different was needed in the case of fraud, where a defendant's deceptive conduct may prevent a plaintiff from even knowing that he or she has been defrauded." Merck & Co., Inc. v. Reynolds, 559 U.S. 633, 644 (2010). Otherwise, "[t]o hold that . . . by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure." Bailey, 88 U.S. (21 Wall.) at 349.

Thus, the common law discovery rule provides that "'where a plaintiff has been injured by fraud and remains in ignorance without any fault . . . on his part, the bar of the statute does not begin to run until the fraud is discovered.'" Merck,

559 U.S. at 644 (quoting Holmberg, 327 U.S. at 397) (emphasis in original). "And for more than a century, courts have understood that '[f]raud is deemed to be discovered . . . when, in the exercise of reasonable diligence, it could have been discovered.'" Id. at 645 (quoting 2 H. Wood, Limitation of Actions § 276b(11), p. 1402 (4th ed.1916)); see id. (citing Wood, Limitations of Actions, at 1401–1403, & nn.74–84; Holmberg, 327 U.S. at 397; Kirby v. Lake Shore & Michigan Southern R. Co., 120 U.S. 130, 138 (1887) (the rule "regard[s] the cause of action as having accrued at the time the fraud was or should have been discovered")).

ERISA section 413 codifies the discovery rule, and therefore accounts for these concerns. Cf. United States v. Denny, 694 F.3d 1185, 1189 (10th Cir. 2012) ("Discovery rules are common in [federal] statutes of limitations."). "Clearly, Congress intended to provide a lengthier statute of limitations where the fiduciary breached its duty by misrepresenting or failing to disclose a material fact that ERISA required the fiduciary to disclose." Caputo, 267 F.3d at 190. The Secretary's interpretation of section 413 is therefore "consistent with Congress' intent in ERISA to provide 'broad remedies' and 'to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective . . . recovery of benefits due to participants." Connors v. Hallmark & Son Coal Co., 935 F.2d 336, 343 (D.C. Cir. 1991) (Ginsburg, J.) (citation omitted). As Connors

explained, if "the injury is not of the sort that can readily be discovered when it occurs, then the action will accrue, and the limitations period commence, only when the plaintiff has discovered . . . the injury." Id. (citing Cada v. Baxter Healthcare Corp., 902 F.2d 446, 450 (7th Cir. 1990)).

These considerations are particularly appropriate in the ERISA context, because "[t]he law does not require one to suspect his fiduciary. Surely no one would contend that the . . . statute of limitations was intended to impose upon the defrauded party the burden of discovering a fraud perpetrated by one standing in a position of trust." In re Unisys, 242 F.3d at 514 (Mansmann, J., concurring in part, and concurring in the result) (citing Amen v. Black, 234 F.2d 12, 26 (10th Cir. 1956)). Adopting a contrary, narrower interpretation of ERISA section 413 ignores congressional intent, as well as longstanding Supreme Court and Tenth Circuit precedent that prevents "'the law which was designed to prevent fraud' . . . [from] becom[ing] 'the means by which it is made successful and secure.'" Merck, 559 U.S. at 644 (quoting Bailey, 88 U.S. (21 Wall.) at 349).

C. Narrower Interpretations of Section 413 by Other Circuits are Unpersuasive

The district court erred when it followed the Third Circuit's approach to interpreting "fraud or concealment," which purports to incorporate the doctrine of

"fraudulent concealment" and states that this doctrine requires additional affirmative steps to conceal the violation independent of the fiduciary breach that gave rise to the plaintiffs' clam. A9456-57 (citing Kurz, 96 F.3d at 1552; In re Unisys, 242 F.3d at 503). The Third Circuit's approach, which other circuits have adopted,[7] is unpersuasive. First, by disregarding the disjunctive "or" in ERISA section 413's "fraud or concealment" provision, these courts have abandoned straightforward textual analysis and deprived "fraud" and "concealment" of their independent (albeit overlapping) meanings. See Caputo, 267 F.3d at 189-90. Second, these decisions' narrower interpretations are contrary to the basic canon of construction that remedial statutes, like ERISA, are to be liberally construed in favor of those it was meant to benefit, Jenkins, 39 F.3d at *2, and ERISA 413's goal of ensuring that if "the injury is not of the sort that can readily be discovered when it occurs, then the action will accrue, and the limitations period commence, only when the plaintiff has discovered . . . the injury," Connors, 935 F.2d at 343.

In addition, by recasting "fraud or concealment" as "fraudulent concealment" in its narrowest formulation, many of these courts have failed to consider the well-

[7] See J. Geils Band Emp. Benefit Plan v. Smith Barney, 76 F.3d 1245, 1252 (1st Cir. 1996); Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1401-02 (9th Cir. 1995); Larson v. Northrop Corp., 21 F.3d 1164, 1172-73 (D.C. Cir. 1994); Martin v. Consultants & Admins., Inc., 966 F.2d 1078, 1095, 1096 & n.19 (7th Cir. 1992) Schaefer v. Arkansas Med. Soc'y, 853 F.2d 1487, 1491-92 (8th Cir. 1988).

established, broader application of the fraudulent concealment doctrine to fiduciaries who engage in self-concealing fraud, as described above. For example, the D.C. Circuit in Larson v. Northrop Corp., 21 F.3d 1164, 1173 (1994), applied a narrow formulation of "fraudulent concealment" by relying on Wood v. Carpenter, 101 U.S. 135, 143 (1879), which had recited the general "fraudulent concealment" rule without recognizing the fiduciary exception. The Eighth Circuit in Schaefer v. Arkansas Med. Soc'y likewise adopted the "fraudulent concealment" interpretation of ERISA section 413 by relying on cases that had cited to Wood – again, without mention of the fiduciary exception. 853 F.2d 1487, 1491-92 (8th Cir. 1988). Larson, Schaefer, and similar cases were incorrectly decided, in part, because Wood did not address the "fraudulent concealment" rule in the fiduciary context. The Tenth Circuit, in contrast, has cited Wood with approval while also correctly acknowledging the well-established fiduciary exception, which is directly applicable to ERISA section 413. Bryan, 99 F.2d at 553; see Pinney Dock, 838 F.2d at 1466-72 (determining that Wood v. Carpenter is reconcilable with Bailey v. Glover based on the exception where there is "fraud or breach of fiduciary duty").

Moreover, some of these circuits acknowledge that a narrower construction of the "fraudulent concealment" doctrine is inconsistent with circuit precedent finding that the doctrine encompasses both "active concealment" and "self-

concealing wrongs." See Caputo, 267 F.3d at 190 n.3 ("The majority of circuits interpreting § 413 [to incorporate "fraudulent concealment"] have concluded that affirmative misrepresentations of a material fact are self-concealing acts bringing the action within the 'fraud or concealment' provision.") (citations omitted). "Where courts differ is on how [the phrase] 'in the case of fraud or concealment' should be construed, specifically whether it includes both so-called 'self-concealing wrongs' as well as 'active concealment' that is separate from the underlying wrongdoing." J. Geils Band Emp. Benefit Plan v. Smith Barney, 76 F.3d 1245, 1253 n.9 (1st Cir. 1996) (citation omitted); Larson, 21 F.3d at 424 n.15 (noting same division). While J. Geils did not "make a definitive determination as to which side of this dialogue we adhere," it "note[d] for the moment that because the fraudulent concealment doctrine as applied in this Circuit includes both categories . . . and the fact that there is nothing in the language of Section [413] to suggest otherwise, we are inclined to think that the scope of Section [413]'s incorporation of the fraudulent concealment doctrine includes both" "self-concealing wrongs" and "active concealment." 76 F.3d at 1253 n.9 (citation omitted). The Seventh Circuit has likewise recognized that incorporating the fraudulent concealment doctrine for the purpose of ERISA section 413 "would seem to imply that the doctrine was incorporated as it stands in this and other circuits, including the

category of self-concealing acts." Martin v. Consultants & Admins., Inc., 966 F.2d 1078, 1094-95 (7th Cir. 1992) (emphasis in original) ("fraud or concealment" provision is "not specifically restricted to . . . 'active concealment' cases" and "the concealment [in this case] occurred in the course of the fraud itself rather than independently of it"), but see id. at 1095 (ERISA section 413 is not triggered by nature of plaintiffs' underlying claim). This Court can avoid such inconsistency by adopting the Secretary's interpretation of the "fraud or concealment" provision, which is supported by the statute's text and purpose, as well as Supreme Court and Tenth Circuit precedent.

CONCLUSION

For the reasons stated above, the district court's opinion should be reversed.

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I hereby certify that the foregoing brief complies with the type-volume and typeface requirements provided in Fed. R. App. P. 32(a)(7)(B) & (C). The foregoing brief was prepared using Microsoft Office Word 2010 and contains 6071 words of Times New Roman (14 point) regular type.

/s/ Stephen Silverman
Dated: December 18, 2013

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I hereby certify that all privacy redactions required by 10th Cir. Rule 25.5 have been made in this brief.

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