

**TESTIMONY OF GLENN BUTASH
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THE ERISA INDUSTRY COMMITTEE
TO THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND WORKFORCE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS
HEARING ON
“PENSION PREDATORS: STOPPING CLASS ACTION ABUSE AGAINST
WORKERS’ RETIREMENT”**

DECEMBER 2, 2025

Chairman Allen, Ranking Member DeSaulnier, and Members of the Subcommittee:

On behalf of The ERISA Industry Committee (ERIC), thank you for the opportunity to testify today. My name is Glenn Butash, and I am the Chair of the ERIC Legal Center.¹ Today’s hearing is an important step in addressing abusive litigation affecting employee benefit plans and their employer and union plan sponsors. ERIC appreciates the opportunity to contribute to this discussion.

ERIC and the ERIC Legal Center

ERIC is a national advocacy organization exclusively representing the largest employers in the United States as sponsors of employee benefit plans for their nationwide workforces. ERIC member companies offer benefits to millions of employees and their families and are located in every state, city, and Congressional district. With member companies that are leaders in every economic sector, ERIC advocates before Congress and regulatory agencies on public policy issues that affect the ability of employers to sponsor benefit plans.

The ERIC Legal Center advocates for large employers in the courts on legal matters affecting their ability to provide health, retirement, and other compensation benefits to their nationwide workforces. On behalf of ERIC, the Center engages in litigation against state mandates and other measures that threaten the ability of employers to offer uniform nationwide benefits. The Legal

¹ I also serve as the Managing Counsel, U.S. Compensation and Benefits, at Nokia, an ERIC member company. I am testifying today solely on behalf of ERIC and the ERIC Legal Center, and the opinions expressed in this testimony do not necessarily reflect those of Nokia.

Center also participates in cases that have the potential to significantly affect the design and administration of employee benefit plans under the *Employee Retirement Income Security Act of 1974* (ERISA). For example, in the last few years alone, we have filed dozens of *amicus curiae* (friend of the court) briefs addressing important questions relating to, among other topics, ERISA preemption of state laws affecting employee benefit plans, permissible use of 401(k) plan forfeitures, calculation of actuarially equivalent benefits under a pension plan, and the allegations that must be included in a lawsuit against a benefit plan fiduciary in order to validly state a claim for relief.

For decades, the Committee on Education and Workforce has advanced solutions to some of the most challenging questions facing the tens of millions of Americans that receive health and retirement benefits at work. Oftentimes, those solutions have been creative and bipartisan, such as the SECURE 2.0 Act of 2022. The Committee also recently brought forth legislation to increase transparency and accountability for the U.S. Department of Labor’s Employee Benefits Security Administration (EBSA).²

There is near consensus with the bipartisan, decades-long public policy judgment that encouraging benefit plan sponsorship helps strengthen financial security for American workers and retirees. That judgment is threatened by *abusive* litigation. Yet only modest clarifications of the system’s ground rules would be needed to discourage such litigation while maintaining the ability of plan participants to vindicate their rights. For example, reasonable guardrails for pleading a claim for breach of the fiduciary duty in the area of plan costs, for pleading a claim that the fiduciary engaged in certain prohibited transactions, and for pursuing discovery prior to the court’s determination that the claims asserted are plausible, are straightforward clarifications that would help discourage abusive litigation and further the bipartisan, decades-long, public policy judgment that encouraging plan sponsorship helps strengthen financial security for American workers and retirees.

Federal Law Provides Strong Protections for Employee Benefits

The private sector’s delivery of employee benefits is the backbone of health care coverage and retirement savings in the United States today. More than 150 million Americans get healthcare coverage through employer-provided plans, and nearly 100 million private sector workers have

² ERIC strongly supports the *EBSA Investigations Transparency Act* (HR 2869), which would impose modest annual reporting requirements, such as disclosure about the nature, number, length, and scope of active investigations. The *EBSA Investigations Transparency Act* would aid Congress in fulfilling its critical oversight responsibilities, ensuring that EBSA’s enforcement activities and priorities are transparent and efficient. ERIC also strongly supports the *Balance the Scales Act* (HR 2958), which would bring transparency to EBSA’s reported historical collusion with plaintiffs’ lawyers suing benefit plans. EBSA should document this coordination and be transparent with affected employers – and with Congress. Finally, ERIC also supports the *Retire Through Ownership Act* (HR 5169), which would give certainty to employee stock ownership plan fiduciaries when relying on the work of independent valuation or business appraisers that use practices described in longstanding Internal Revenue Service (IRS) guidance.

access to retirement savings plans such as 401(k) plans.³ Large employers, including ERIC members, are at the forefront of delivering high quality, high value, and innovative benefits to tens of millions of Americans.

ERIC member companies sponsor health and retirement plans governed by ERISA and other laws and regulations overseen by EBSA, the Treasury Department, the Internal Revenue Service, and the Pension Benefit Guaranty Corporation. ERISA establishes myriad responsibilities for the fiduciaries of these benefit plans, including the twin duties of prudence and loyalty encapsulated in section 404(a) of ERISA.⁴ That section states, in part:

a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
(A) for the exclusive purpose of:
(i) providing benefits to participants and their beneficiaries; and
(ii) defraying reasonable expenses of administering the plan;
(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims

ERISA permits plan participants, beneficiaries, the Labor Department, and other plan fiduciaries to sue for breach of these fiduciary duties.⁵ In recent years, there has been a tsunami of litigation, ostensibly brought on behalf of plan participants, attacking all manner of decisions made by plan fiduciaries and plan sponsors. To name a few examples, these lawsuits have challenged decisions such as which recordkeeper was retained, which investment funds were offered, how plan forfeitures were used, which annuity provider was selected in a pension risk transfer transaction, and the actuarial assumptions used by defined benefit plans to convert benefits between different annuity types.

ERIC has no quarrel with plan participants pursuing well-founded claims and vindicating their rights in court. However, the past 15 years have seen a surge in frivolous cases not brought to vindicate rights, but instead too often cynically brought by opportunistic lawyers to extract settlements from deep pocketed corporate plan sponsors. In too many of these cases, the actual merits of the suit are not relevant to the settlement value paid in order to avoid the cost and disruption of continuing litigation. And because the federal courts have not spoken uniformly about what a plaintiff must allege to survive a motion to dismiss, these cases unfortunately sometimes become prolonged and expensive.

³ According to the latest available Federal Reserve data, there are about 136 million private sector workers, on a seasonally adjusted basis. <https://fred.stlouisfed.org/series/USPRIV> (updated Sept, 5, 2025). According to Bureau of Labor Statistics Data, approximately 70 percent of private sector workers have access to a defined contribution retirement plan. “Employee Benefits in the United States, March 2025” available at <https://www.bls.gov/ebs/publications/employee-benefits-in-the-united-states-march-2025.htm> (updated September 2025).

⁴ Codified at 29 U.S.C. § 1104. ERISA section numbers will generally be used in lieu of U.S. Code sections throughout.

⁵ ERISA §502(a)(2); *see also* ERISA §409.

Litigation Has Skyrocketed, Threatening ERISA's Underlying Premise that Employers Should Be Encouraged to Offer Benefits

As this Subcommittee well knows, employers are not required to establish employee benefit plans, but public policy has taken pains to encourage the practice.⁶ Indeed, ERISA reflects a “careful balancing” between ensuring employees receive their promised benefits and encouraging employers to create and maintain benefit plans in the first place.⁷ As the Supreme Court has stated, Congress endeavored “not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.”⁸

This balance has served employees and retirees very well.⁹ ERISA provides the opportunity for judicial remedies in those cases where plan fiduciaries neglect their legal obligations to workers and retirees, cause losses to plan participants, or unscrupulously leverage the plan for self-dealings. These are the situations ERISA was designed to address.

Nevertheless, over the past 15 years, the plaintiffs’ bar has exploited ERISA’s civil enforcement provisions as a weapon by opportunistically attacking large plan sponsors and fiduciaries in a systematic way. According to a Supreme Court brief recently filed by Encore Fiduciary, a fiduciary liability insurance underwriter, since 2016, over one half of plans with more than \$1 billion in assets have been targeted by at least one excessive fee or investment performance lawsuit.¹⁰ Plans with \$500 million or more in assets have close to a 10% chance of being sued in a given year.¹¹ There are hundreds of lawsuits, dreamed up by attorneys that use allegations that are bare-bones and amenable to nearly identical allegations applicable to a multitude of companies.

The playbook followed by plaintiffs’ firms in these cases is both enterprising and deeply unfortunate.

- First, identify virtually any set of decisions that many plans must make where there are multiple market actors: for example, plan recordkeeping, investments available on a 401(k) menu, or the selection of an annuity provider in the case of a defined benefit plan pension risk transfer.
- Second, identify any basis where the options available in the market differ, whether by price, risk, or service.

⁶ *E.g. Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996).

⁷ *Conkright v. Frommert*, 559 U.S. 506, 517 (2010).

⁸ *Variety Corp v. Howe*, 516 U. S. 489, 497 (1996).

⁹ For example, workers hold around \$9 trillion in 401(k) plan assets. Investment Company Institute, “401(k) Resource Center, <https://www.ici.org/401k>.

¹⁰ Brief of Encore Fiduciary as *Amicus Curiae* in Support of Petitioners, *Parker-Hannifin Corp., et al v. Johnson* (May 21, 2025), available at https://www.supremecourt.gov/DocketPDF/24/24-1030/359296/20250521120726513_250511a%20AC%20Brief%20for%20efiling.pdf.

¹¹ *Id.*

- Third, argue (oftentimes purely in hindsight) that the decision made by the plan fiduciaries was imprudent, even without **any** particularized evidence that the plan fiduciaries had a flawed process or were cavalier with plan assets and often without any evidence that plan participants even suffered a meaningful, cognizable harm.
- Fourth, identify a set of companies with passably similar plans such that cookie-cutter lawsuit complaints can be drafted with minimal defendant-specific research and optimize the target list for potential settlement value to focus on sophisticated companies with deep pockets and reputations to protect.
- Fifth, after filing suit, threaten to impose hundreds of thousands – even millions – in legal fees related to discovery, motion practice, and ultimately damages, if defendants refuse to accede to unreasonable settlement demands.
- Sixth, collect attorneys’ fees as a result of a settlement, often 30 percent or more, while relegating plan participants (especially in plans with many participants) individually to receiving only nominal amounts.

That sixth and final point, above, ought to be particularly concerning to this Subcommittee. There are dozens of major settlements annually, amounting to hundreds of millions of dollars each year.¹² And while some class action settlements are large, many result in incredibly small recoveries for actual plan participants, after attorney’s fees, expenses, and payments to the named plaintiffs. For example, one suit alleging excessive fees against a large employer settled for \$1.35 million after four years of hard-fought litigation.¹³ After attorneys’ fees and expenses, the 50,000 plan participants averaged a recovery of less than \$20 each.¹⁴

Abusive Litigation Distorts Plan Decisions and Does Not Benefit Plan Participants

Employers offer benefit plans for a variety of business-related reasons, such as attracting and retaining talent and improving the productivity of workers. The costs of providing these benefits should be predictable and oriented towards delivering value: for example, the actual cost of employer contributions to a 401(k) plan (e.g., the employer match), the cost of medical claims, or the cost of engaging necessary plan service providers. The litigation epidemic disrupts this calculus, introducing a host of inefficiencies and externalities into the benefits ecosystem. For example:

¹² D. Aronowitz & K. Jozwiak, PlanAdviser, *401(k) Excessive Fee Litigation Spiked to ‘Near Record Place’ in ’24* (Jan. 13, 2025), <https://www.planadviser.com/401k-excessive-fee-litigation-spiked-near-record-pace-24>.

¹³ Alex Ortolani, *Salesforce Settles 401(k) Suits for \$1.35 Million*, PLANADVISER, available at <https://www.planadviser.com/salesforce-settles-401k-suits-1-35m> (Sept. 23, 2024).

¹⁴ The settlement deducted \$449,955 in attorneys fees from the \$1.35 million settlement fund and authorized up to \$150,000 more for expenses. More than 50,000 participants shared the remainder.

- **Higher insurance costs can lead to worse benefits.** Fiduciary liability insurance rates are increasing. This is a pure transaction cost to the plan: workers and retirees realize no benefit from the costs of this coverage. Indeed, litigation risk and inconsistent pleading standards are key factors in rising liability insurance rates.¹⁵ To the extent these costs are factored into the overall cost of providing benefits, the economic answer is simple: the value of the remaining benefits will be reduced, likely in the form of reduced employer contributions or lower levels of benefits.
- **Litigation is disruptive to the work of corporate benefits professionals.** Even large employers do not have vast internal departments to manage their employee benefits operations. Employees already face challenges to do the work of managing complex, valuable benefits programs: engaging and overseeing vendors, monitoring results, and interacting with the workforce to ensure that health and retirement plans are delivering the value to workers that the business demands. Lawsuits are incredibly disruptive to these operations. Rather than working their day jobs, key employees are forced to spend countless hours gathering documents, preparing for depositions, and talking to outside counsel that charge many hundreds of dollars an hour. All this in the context of lawsuits that amount to fishing expeditions in cases that do not even plausibly allege identifiable, material harm.
- **Fear of litigation can distort plan decision-making.** When a plan fiduciary is deciding what plan services to contract for, what investment funds to offer, or some other aspect of plan administration, the sole relevant legal standard is whether the decision is prudent under ERISA. And by and large, most plan fiduciaries are appropriately guided by this standard. However, it would be naïve to think that, today, plan fiduciaries do not also have in the back of their mind the litigation risks attendant to virtually any decision of consequence in this environment, such as using a service provider that is not the absolutely cheapest available in the market but that offers enhanced valuable services that justify the added expense. This countervailing pressure is at odds with fiduciary obligations.
- **Rampant litigation threatens to weaken the system.** If a key purpose of ERISA and the myriad tax incentives offered under the Internal Revenue Code is to encourage plan sponsorship, it is counterproductive to have a governing legal regime that introduces litigation risk with virtually any decision. Unfortunately, some employers may decide the costs and risk of offering a defined contribution plan is simply not worth it, which would be a disaster for retirement security. Hence, reform is absolutely necessary.

¹⁵ See e.g. <https://www.wtco.com/en-us/insights/2025/01/fiduciary-liability-a-look-ahead-to-2025> (predicting higher insurance rates if the plaintiffs prevail in the Cornell case, which they subsequently did).

Congress Should Propose Reasonable Initial Reforms to Provide Clarity to ERISA Litigation

ERIC strongly supports legislation to address the litigation epidemic in a responsible, balanced fashion. Such legislation should incorporate several modest but very important changes, which would ensure that meritorious ERISA cases may continue to be brought, while weeding out those founded on pro forma cookie-cutter allegations. Among the improvements that Congress should consider: (i) requiring a plaintiff, in a case alleging that a contract between a plan and a plan service provider constituted a prohibited transaction under ERISA §406(a)(1)(C), to allege with specificity why that arrangement does not meet the exemption under ERISA §408(b)(2) for necessary and reasonable arrangements with service-providers, (ii) requiring a plaintiff, in a case alleging that the plan paid too much for plan services (whether for recordkeeping, investment management, or any other services), to set forth in the complaint a meaningful cost comparison supporting the claim, and (iii) providing for a stay of discovery (with appropriate exceptions) in ERISA lawsuits. The *ERISA Litigation Reform Act*, recently introduced by Representative Fine, is an important first step—one which ERIC strongly supports.

These commonsense reforms are discussed in more detail below.

Addressing the Pleading Standard for Claims Predicated on ERISA § 406(a)(1)(C)

The Supreme Court’s recent decision in *Cunningham v. Cornell University*¹⁶ is the quintessential example of a counterproductive court decision that could easily be addressed legislatively to restore balance and reduce ultimately meritless litigation. That case addressed what a plaintiff must plead in a suit alleging a “prohibited transaction” under ERISA with respect to plan services. At issue was section 406(a)(1)(C) of ERISA, which prohibits a plan fiduciary from engaging in a transaction if the fiduciary “knows or should know that such transaction constitutes a direct or indirect— ... furnishing of goods, services, or facilities between the plan and a party in interest.”¹⁷ Notably, ERISA includes in its definition of party in interest any person who provides services to a plan.¹⁸ Accordingly, on its face, section 406(a)(1)(C) presumptively makes all contracts with plan service providers illegal prohibited transactions. However, section 408(b)(2) exempts transactions from this prohibition so long as the transaction is necessary for the operation of the plan and the plan pays only “reasonable compensation” for the services.¹⁹

¹⁶ *Cunningham v. Cornell Univ.*, 604 U.S. 693 (2025).

¹⁷ ERISA §406(a)(1)(C).

¹⁸ ERISA §3(14)(B).

¹⁹ Specifically, section 408(b)(2)(A) provides:

The prohibitions provided in section 406 ... shall not apply to any of the following transactions:

* * *

(2)

(A) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

In the *Cornell* case, the Supreme Court held that the exemptions under section 408 of ERISA were affirmative defenses and that accordingly a plaintiff need only plausibly allege the elements of a prohibited transaction under section 406. As a result of *Cornell*, a plaintiff challenging a plan's engagement of a service provider need only allege the elements of section 406(a)(1)(C); it need not address in its pleading any of the statutory exemptions—even the obvious one in section 408(b)(2). The Supreme Court reached this result based on what it determined to be the structure of the statute and non-ERISA law relating to statutory exceptions to rules of general applicability. In holding that the exemptions to the prohibited transaction rules are affirmative defenses, the Court notably acknowledged that concerns about resultant baseless litigation raised by respondent Cornell University and various *amici*, including ERIC,²⁰ calling those concerns “serious.”

*[I]f plaintiffs must plead only that a transaction barred by 1106(a)(1)(C)'s plain text occurred, respondents argue, plaintiffs could too easily get past the motion-to-dismiss stage and subject defendants to costly and time-intensive discovery. Such meritless litigation, respondents claim, would harm the administration of plans and force plan fiduciaries and sponsors to bear most of the associated costs. These are serious concerns but they cannot overcome the statutory text and structure.*²¹

The concurring opinion was even stronger in explaining the practical disadvantages of the decision:

*The upshot [of the Court's decision] is that all that a plaintiff must do in order to file a complaint that will get by a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is to allege that the administrator did something that, as a practical matter, it is bound to do.... Yet under our decision that is all that a plaintiff must plead to survive a motion to dismiss. And, in modern civil litigation, getting by a motion to dismiss is often the whole ball game because of the cost of discovery. Defendants facing those costs often calculate that it is efficient to settle a case even though they are convinced that they would win if the litigation continued.*²²

Recognizing the real-world implications of its decision, the Court identified some “tools” that it believed might offer solace to defendants. Respectfully, none of these is truly workable. The Court identified the possibility that a court can order a plaintiff to file a response to the defendants' answering affirmative defense,²³ but this is not automatic; a defendant would have to move for such relief, adding cost and delay to the case. The Court also suggested that another limitation on meritless cases is the fact that plaintiffs need to have suffered harm—to have standing under Article III—in order for the case to continue,²⁴ but here again this requires a

²⁰ See Joint Trades Brief as Amici Curiae in Support of Respondents, *Cunningham v. Cornell Univ.* (available at https://www.supremecourt.gov/DocketPDF/23/23-1007/336522/20250103141607914_Cunningham%20Amicus%20Brief.pdf).

²¹ *Cunningham*, *supra* note 16, at 708 (emphasis added).

²² *Id.* at 710 (Alito, J. concurring) (emphasis added).

²³ *Id.* at 708.

²⁴ *Id.*

motion on the part of defendants to bring the issue before the court, again adding cost and delay. The Court also suggested that lower courts could allow targeted early discovery on the issue of an available exemption,²⁵ something that also would add to expense and lead to delay in weeding out a case that lacks merit. And finally, the Court cited the possibility of sanctions under Rule 11 of the Federal Rules of Civil Procedure, and the imposition of attorneys' fees under section 502(g) of ERISA²⁶ as a possible brake on meritless cases. These possibilities exist currently and, needless to say, have not tamed the wave of meritless litigation. .

The regime created by the *Cornell* decision creates a double-bind for plan fiduciaries any time they consider contracting with a service-provider, such as an investment consultant, investment manager, or recordkeeper: either they engage the service-provider, which is presumptively a prohibited transaction and the case cannot be dismissed based on the pleadings, or they undertake all relevant plan-related services themselves and risk a suit challenging their prudence in not hiring a specialized expert. And let's be clear—the ability to pair a prohibited transaction claim under section 406 with a breach of prudence claim under section 404 adds nothing to a plaintiff's case other than an *in terrorem* value. The relief under both sections is that set forth in section 502 and section 409—making the plan whole for any losses. If a court found there to have been a prohibited transaction, that transaction would need to be reported on the plan's Form 5500 and the fiduciary would need to pay an excise tax on the "amount involved."²⁷ In short, the prohibited transaction claim simply serves to turn up the heat on plan defendants in the hopes of increasing the likelihood of a settlement and increasing the settlement amount.

As a result of the *Cornell* case, there are now no limits on the number of lawsuits that can be brought on the basis of engaging a service provider: these relationships are publicly disclosed in plans' mandatory Annual Return/Report (Form 5500) filings with the Department of Labor.²⁸ Information on plan costs charged to participant accounts is described in the fee-and-expense disclosure furnished each year to plan participants.²⁹ Each regulatory filing and participant disclosure is a potential roadmap for an opportunistic plaintiffs' firm looking to extract a recovery or unlock burdensome discovery. This is the case even if there is no evidence that the compensation paid was unreasonable. That is flatly inconsistent with the Supreme Court's direction to lower courts to give "due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise."³⁰

²⁵ *Id.* at 709.

²⁶ *Id.*

²⁷ *E.g.* 26 U.S.C. §4975.

²⁸ Dep't of Labor, "Form 5500 Series," available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500> ("Schedule C - Service Provider Information").

²⁹ 29 C.F.R. §2550.404a-5. This annual disclosure document also includes information on plan investment fund performance.

³⁰ *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022). See Joint Trades Brief (including ERIC) as *Amici Curiae* Supporting Respondents, *Hughes v. Nw. Univ.*, No. 19-1401 (Oct. 28, 2021) (available at <https://www.eric.org/wp-content/uploads/2021/12/Chamber-Amicus-Brief-Hughes-v.-Northwestern.pdf>).

Legislation, such as the aforementioned *ERISA Litigation Reform Act*, can and should correct this absurd and unnecessary result. A plaintiff alleging that a plan fiduciary entered into an arrangement with a party in interest that violates the prohibited transaction rules should be required also to allege facts that the transaction was not exempt under the statute’s “reasonable compensation” exception. This would weed out those suits that merely allege that a plan fiduciary engaged a plan service provider without plaintiffs having any basis for claiming that the contract was unnecessary or that the compensation paid was unreasonable. In doing so, it would save millions of dollars in legal fees, discovery costs, and wasted employee time, ultimately to the benefit of workers and retirees.

Legislation correcting the result in *Cornell* would not be the first time that Congress addressed a Supreme Court decision that upended a component of the benefits system. For example, in *John Hancock Mutual Life Insurance Company v. Harris Trust & Savings Bank*, the Court considered whether “excess” funds in an insurance company’s general account were ERISA plan assets, subjecting the insurance company to ERISA fiduciary duties.³¹ The insurer, John Hancock, argued that the funds were part of a “guaranteed benefit policy,” and therefore exempt. The district court agreed with John Hancock, but the Second Circuit reversed, holding the excess assets to be ERISA plan assets. The Supreme Court agreed with the circuit court.

In its *amicus* brief, the Department of Labor argued:

*"[T]he disruptions and costs [of holding insurance companies to be fiduciaries under participating group annuity contracts] would be significant, both in terms of the administrative changes the companies would be forced to undertake (e. g., segregation of plan-related assets into segmented or separate accounts, and re-allocation of operating costs to other policyholders) and in terms of the considerable exposure to the ensuing litigation that would be brought by pension plans and others alleging fiduciary breaches."*³²

Similar to the majority opinion in *Cornell*, the Court in *Harris Trust* conceded the point, but argued its hands were tied, noting: “*These are substantial concerns, but we cannot give them dispositive weight. The insurers' views have been presented to Congress and that body can adjust the statute.*”³³

Congress did act a few years later, requiring the Labor Department to issue regulations to smooth the transition and avoid disruption.³⁴ In a similar way, Congress now could address the “serious concerns” caused by the *Cornell* decision.

³¹ *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86 (1993).

³² *Harris Trust*, at 110 (quoting brief).

³³ *Id.* (citations omitted).

³⁴ §146 of P.L. 104-188 (1996).

Clarifying the Pleading Standards for Breach of Fiduciary Duty Cases

Second, Congress should clarify the pleading standards for a lawsuit alleging a plan paid excessive fees for plan services. Many in the employee benefits community had hoped that the Supreme Court would resolve the question of ERISA pleading standards in the 2022 *Northwestern University* case.³⁵ Safe to say, the Court's decision in that case did not definitively settle the issue. In the absence of authoritative guidance, the appellate and district courts have continued to adopt various approaches. This confusion has bred not only unpredictability, it has also created an incentive for entrepreneurial forum shopping.³⁶ Forum shopping is a real risk in the context of ERISA lawsuits alleging breach of fiduciary duty in light of ERISA's liberal venue provision.³⁷

Nonetheless, certain principles can be distilled and should be legislatively codified. Where ERISA plaintiffs attempt to plead wrongdoing based on circumstantial facts, the Supreme Court has specifically instructed lower courts to apply "careful, context-sensitive scrutiny" to "divide the plausible sheep from the meritless goats."³⁸ In the *Northwestern* case, the Court also acknowledged that "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs," and advised lower courts to "give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise" in evaluating whether a claim is plausible.³⁹ In these cases, many courts are relying on the "meaningful benchmark" analysis articulated by the Eighth Circuit.⁴⁰

Too often, however, the plaintiffs' bar launches these suits by choosing inapt comparators. For example, comparing the fees charged by a target date mutual fund to the fees charged by an S&P 500 index fund is not an appropriate comparison, given different risk profiles and investment purposes. Similarly, comparing investment management fees for funds that use an "active" investment strategy, where the fund manager is seeking to outperform a benchmark through stock selection, and a "passive" strategy, where the manager is seeking simply to match the benchmark, is not a meaningful comparison.

Legislation should resolve in a balanced, reasonable way the ambiguities lingering in the lower courts that continue to be exploited by the plaintiffs' bar. For example, if a plaintiff wants to allege the plan fiduciaries breached their duties of prudence with respect to the fees paid to plan

³⁵ *Hughes v. Nw. Univ.*, 595 U.S. 170 (2022).

³⁶ For a fuller discussion, see Joint Trades Brief (including ERIC) as *amici curiae* in support of Defendants-Appellee's petition for rehearing *en banc*, *Johnson v. Parker-Hannifin Corp.*, No. 21-cv-256 (6th Cir.) (Dec. 23, 2024), available at <https://www.uschamber.com/assets/documents/U.S.-Chamber-Coalition-Amicus-Brief-Johnson-v.-Parker-Hannifin-Sixth-Circuit.pdf>.

³⁷ See ERISA §502(e)(2) (permitting suit in federal district court "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found).

³⁸ *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424-25 (2014).

³⁹ *Hughes*, 142 S. Ct. at 742

⁴⁰ *Meiners v. Wells Fargo & Co.*, 898 F.3d 820 (8th Cir. 2018); see also *Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136 (10th Cir. 2023); Joint Trades Brief (including ERIC), *Matney v. Barrick Gold of N. Am.*, No. 2:20-cv-275-TC-CMR (10th Cir.) (filed 11/4/2022), available at https://www.eric.org/wp-content/uploads/2022/11/FS_Barrick-Gold-Amicus-Brief.pdf.

service-providers (be they investment advisors, investment managers, plan recordkeepers, or others), legislation could require the plaintiff to:

- Plausibly allege a meaningful cost comparison. That means there should be some plausible allegation that a meaningful number of comparable plans paid materially less for similar services, and that such lower-cost services were reasonable to obtain.
- Make a context-specific cost comparison.
- In the case of a suit alleging that investment management fees were imprudently expensive, support the cost comparison with facts plausibly alleging that the alternative investment options on which plaintiffs rely have similar investment strategies, similar investment objectives, or similar risk profiles.

In our view, these are reasonable criteria that a plaintiff ought to meet in order to sustain a claim alleging imprudence with respect to the cost for plan services. And those criteria should easily be met where there is indeed a suspected breach. The desirable standard effectively boils down to a reasonable requirement: compare apples to apples, don't cherry-pick, and compare in context. This will not shut out suits with appropriate comparisons.

Staying Discovery Until a Plausible Claim is Sustained

Third, Congress could consider legislation to stay discovery and other proceedings while there is a motion to dismiss pending or a reply to an answer pending. We applaud inclusion of such a provision in the *ERISA Litigation Reform Act*. This is very important, as discovery is a costly and burdensome process.⁴¹ It should be reserved for those cases in which a breach of fiduciary duty can be plausibly alleged. Prior to forcing defendants to incur these costs and burdens, the lawsuit generally should first survive a motion to dismiss. Decisions on those motions can take six months, or even 18 months. Without a formal stay, defendants are at risk of having to respond to discovery for years, particularly if the plaintiffs are given leave to replead the complaint after the initial grant of a motion to dismiss.

That is why an automatic stay is so crucial. The *ERISA Litigation Reform Act* also includes protections similar to the provisions of the *Private Securities Litigation Reform Act*.⁴² These protections include permitting a court to permit particularized discovery if necessary to preserve evidence or to prevent undue prejudice. Additionally, during the stay, parties would be generally required to treat documents, data compilations, and relevant tangible objects as though they were the subject of a continuing request for the production of documents. This would avoid prejudice to any party during the stay. In total, this change could prevent the expenditure of hundreds of thousands of dollars before a court has concluded that the allegations being made are plausible.

⁴¹ This is exacerbated by the Supreme Court's decision in *Cornell*, which permits discovery in a suit that merely alleges that a plan engaged a service provider, thereby committing a prohibited transaction, without grappling with the myriad exemptions.

⁴² 15 U.S.C. §78u-4(b)(3).

This is money that would be better spent hiring workers, making products and providing services, and maintaining and even improving benefits.

Other Proposals

Congress should also consider other measures to improve the landscape. For example, Congress could consider applying reasonable, heightened pleading standards to all cases brought under section 404(a)(1)(B), such as cases alleging that investment funds offered on a 401(k) menu underperformed, or cases alleging defined benefit plan sponsors breached duties when engaging in pension risk transfer transactions, among others. Congress could also address the split in the federal appellate courts about which party has the burden of proving that a loss suffered by a plaintiff was actually caused by an allegedly imprudent act or omission of a plan fiduciary defendant.

Conclusion

Large plan sponsors provide health and retirement benefits to tens of millions of their employees and their families. Federal law protects these benefits, but abusive litigation and the lack of clarity about relevant legal standards are among the threats the system faces. Congress has an opportunity to reduce these disincentives, ultimately to the benefit of workers, retirees, and job creators. We look forward to working with members of this Subcommittee, with the Committee on Education and Workforce, with other members of Congress, and with the administration to improve the employee benefits system.