
**TESTIMONY OF LYNN D. DUDLEY,**

**SENIOR VICE PRESIDENT, GLOBAL RETIREMENT & COMPENSATION POLICY,**

**AMERICAN BENEFITS COUNCIL,**

**BEFORE THE HOUSE EDUCATION AND WORKFORCE COMMITTEE,**

**SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS**

**IN THE HEARING ENTITLED**

# PENSION PREDATORS: STOPPING CLASS ACTION ABUSE AGAINST WORKERS' RETIREMENT

**December 2, 2025**

**COURT SYSTEM IS BEING USED TO BENEFIT PLAINTIFFS' LAWYERS AT THE EXPENSE OF RETIREMENT SECURITY:**

**A UNANIMOUS SUPREME COURT RECOGNIZED THAT THIS IS A PROBLEM THAT ONLY CONGRESS CAN SOLVE**

My name is Lynn Dudley, and I am the Senior Vice President, Global Retirement and Compensation Policy, for the American Benefits Council. Thank you for holding this important hearing and for the opportunity to testify.

The Council is a Washington, D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and their families. Council members include more than 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

This hearing comes at a critical time for the private retirement system. Right now, the top issue for our plan sponsor members is the tidal wave of frivolous litigation draining resources away from benefits, inhibiting plan innovation, preventing many new products and services from being offered, and benefiting only the plaintiffs' lawyers.

We strongly support the Committee's attention to this crisis and we look forward to working with the Committee on a solution that restores common sense and curtails the ability of the plaintiffs' bar to benefit at the expense of retirement security.

**Where we are today: plaintiffs' lawyers can sue and earn millions in fees without any showing of any ERISA violation or issue.**

Today, a plaintiffs' firm can solicit plan participants to sue the plan fiduciary and can file a complaint that simply alleges any *one* of the following: (1) the plan hired a service provider, (2) plan fees were too high, or (3) a plan's investments did not perform as well as others. Such allegations are simple to make because all plans hire service providers, and there is always some other plan with lower fees (and possibly fewer

services or worse investments) or investments with better past performance (and possibly a weaker outlook for the future).

Under the recent U.S. Supreme Court case *Cunningham v. Cornell University*,[1] a mere statement that a plan has hired a service provider is sufficient to survive a motion to dismiss. This was the case because the Court held that (1) simply hiring any service provider is technically a prohibited transaction even if there is a clearly applicable prohibited transaction exemption by reason of the service provider's fees being reasonable, and (2) a defendant cannot rely on a prohibited transaction exemption to support a motion to dismiss.

Even outside the prohibited transaction regime, with respect to alleged underperformance or fees that are allegedly too high, mere conclusory allegations have been enough in many courts to survive a motion to dismiss. This latter concern is a problem that pre-dated the *Cornell* decision, so the problem runs much deeper than just that case. That problem is directly attributable to the so-called current-law "inference standard," which allows plaintiffs to survive a motion to dismiss by alleging facts that give rise to an inference that the fiduciary used an improper process**.** Many courts have interpreted the inference standard to open the floodgates to almost unlimited litigation. The Supreme Court's *Cornell* decision will even further exacerbate this problem.

Why is the motion to dismiss stage in litigation so important? Because if the defendants lose the motion to dismiss, the plaintiffs' lawyers (not the participants) have generally won. If a lawsuit survives a motion to dismiss, the next step is discovery, which can cost the plan sponsor many millions of dollars. This puts enormous pressure on the plan sponsor to settle for millions of dollars, to avoid the greater cost and burden of discovery.

***This concern about the avalanche of litigation post-Cornell is not only shared by our members, it is also the view of the entire Supreme Court in the Cornell case in the unanimous decision of the Court that put the responsibility for correcting this problem squarely on Congress::***[2]

> Lastly, [Defendants] contend that there will be an avalanche of meritless litigation if disproving the applicability of [the relevant statutory exemption] is not treated as a required element of pleading [a prohibited transaction violation based on hiring a service provider]. . . . These are serious concerns but they cannot overcome the statutory text and structure. Here, Congress "set the balance" in "creating [an] exemption and writing it in the orthodox format of an affirmative defense," so the Court must "read it the way Congress wrote it."

[1] 145 S. Ct. 1020 (2025).

[2] *Cornell*, 145 S. Ct. at 1031 (internal citations omitted).

This concern is already materializing. In August, based on *Cornell*, the U.S. Court of Appeals for the Second Circuit revived a lawsuit against a retirement plan sponsor that had been properly dismissed as baseless in the view of Second Circuit.[3] The Second Circuit fully rejected the plaintiffs' claims:

> First, Plaintiffs failed to plausibly allege that Defendants imprudently selected and monitored the Plan's investment options because certain investment options underperformed alternatives. . . . Second, the complaint did not plausibly allege that the Committee imprudently monitored fees charged by the Plan's investment advisor and recordkeeper. . . . Third, Plaintiffs argue unpersuasively that they pled circumstantial factual allegations supporting an inference that Defendants employed flawed processes in carrying out their duties.

However, because of *Cornell*, the Second Circuit was compelled to revive the baseless case, giving the plaintiffs' lawyers the chance to benefit from filing a frivolous suit.

In *Cornell*, the Supreme Court did go on to suggest a few possible ways to address this avalanche, but even the most promising of the various suggested approaches is "not commonly used," according to the concurring opinion of Justice Alito, joined by Justices Thomas and Kavanaugh.[4] District court judges have full discretion not to use it, and, in our experience, it is almost never used. So, there is not a currently workable solution.

This means that the plaintiffs' lawyers walk away with millions of dollars without any showing that the plan did anything wrong – all the plaintiffs' lawyers did was allege that the defendant's plan hired a service provider or another plan paid lower fees or some other investment performed better, without any showing that the fiduciary did anything wrong. And these allegations generally are held to satisfy the sieve-like inference standard. Since the allegations in the different cases are so similar, complaints

---

[3] *Collins v. Northeast Grocery*, 2025 U.S. App. LEXIS 20982 (2d Cir. 2025).

[4] The opinion states: "For instance, if a fiduciary believes an exemption applies to bar a plaintiff 's suit and files an answer showing as much, Federal Rule of Civil Procedure 7 empowers district courts to 'insist that the plaintiff' file a reply "'put[ting] forward specific, nonconclusory factual allegations'" showing the exemption does not apply." The concurring opinion states that this is the most promising approach to try to avoid the clear problems facing ERISA plans under this opinion, and goes on to say: "It does not appear that this is a commonly used procedure, but the Court has endorsed its use in the past. . . . District courts should strongly consider utilizing this option—and employing the other safeguards that the Court describes—to achieve 'the prompt disposition of insubstantial claims.' . . . Whether these measures will be used in a way that adequately addresses the problem that results from our current pleading rules remains to be seen." In other words, our best hope is a tool not commonly used by the courts.

can be largely reused, making this a low-cost, high-profit business for plaintiffs' lawyers who can and do file multiple lawsuits using extremely similar complaints.

ERISA does not require that fiduciaries make the "best" choice with hindsight; ***ERISA appropriately requires fiduciaries to use a prudent process to pick investments and manage fees.*** Under the approach being used today, plaintiffs' lawyers do not need to know if the fiduciary's process has violated the law and thus have no incentive to go beyond making a statement or claim. Because, again, they can put enormous financial pressure on companies just by getting past the motion to dismiss with boilerplate complaints.

**Participants do not benefit, only their lawyers benefit: for example, $23 million for lawyers versus $153 for participants.**

Over the past decade, retirement plan sponsors have increasingly become the targets of large and expensive class-action litigation. Hundreds of lawsuits have been filed during this period, and in just 2024 alone, for example, 65 retirement plan sponsors were sued because of their voluntary retirement plan offerings – up from roughly 50 lawsuits in 2023 – while in 2022, nearly 90 lawsuits were filed.[5] Also, as noted in a recent amicus brief:

> Since 2016, over half of plans with $1+ billion in assets have been targeted by at least one excessive fee lawsuit. Some have been sued multiple times.[6]

There is an illusion that these cases benefit the plan participants. The clear facts, however, show that the cases do not benefit the participants. ***For example, from the period of 2009 to 2016, attorneys representing plaintiffs in breach of fiduciary duty lawsuits are estimated to have collected roughly $204 million for themselves, while only securing an average per-participant award of $116 (not million, just $116).***[7]

It is very simple to look at almost any settlement and, with simple arithmetic, figure out that the plaintiffs' lawyers are the only ones truly benefiting. For example, just recently, a case was settled (with final court approval)[8] for what the plaintiffs' lawyers

---

[5] Lawrence Fine & John M. Orr, *Fiduciary Liability: A look ahead to 2025*, Willis Towers Watson (Jan. 29, 2025), https://www.wtwco.com/en-us/insights/2025/01/fiduciary-liability-a-look-ahead-to-2025.
[6] https://www.supremecourt.gov/DocketPDF/23/23-1007/336485/20250103100650208_250101a%20AC%20Brief%20for%20efiling.pdf
[7] Thomas R. Kmak, *Protect Yourself at All Times – Emphasize Quality, Service and Value Before Fees*, Nat'l Inst. of Pension Administrators (Apr. 11, 2016), https://www.nipa.org/blogpost/982039/244084/Protect-Yourself-at-All-Times--Emphasize-Quality-Service-and-Value-Before-Fees
[8] Order Granting Motion for Final Approval of Class Action Settlement, Final Judgment and Order of Dismissal With Prejudice, *Snyder v. UnitedHealth Group*, No. 0:21-cv-01049-JRT-DJF (D. Minn. Jun. 24,

called "the largest-ever ERISA settlement alleging breach of fiduciary duty for failure to remove underperforming investment options." That statement could be misread as indicating that participants are really being helped by the settlement, but the fact is that the only ones really benefiting are the plaintiffs' lawyers. ***Under the settlement, as approved by the court, the plaintiffs' lawyers are receiving a third of the recovery—$23 million—while the 300,000 participants will get an average of $153 (the remaining $46 million spread among 300,000 participants).***

**Harm to plan participants and retirement security.**

The Council recently conducted an informal survey of our members on the effects of the avalanche of litigation. The results are very concerning.[9] For example:

- Almost 89% of defined contribution plan sponsors report that the risk of litigation is very, or at least a somewhat, significant factor affecting their decisions to enhance services or provide different investment options.
- Almost 25% have decided against providing more assistance to participants due to the litigation risk.
- Over 43% have decided against offering lifetime income options due to the litigation risk.
- Almost 29% have decided against offering services or investment options simply because other similar plans were not doing so, making the additional services or options vulnerable to litigation.

**Supreme Court standard (in cases where a prohibited transaction is not alleged)**.

As noted, under *Cornell*, in a prohibited transaction case, all the plaintiff must do to survive a motion to dismiss is state that a plan has hired a service provider. Obviously, this needs to be reversed, as the Supreme Court itself admitted. We strongly commend Congressman Randy Fine for introducing his bill (H.R. 6084) to reverse *Cornell* with respect to the hiring of service providers, common-sense legislation that helps plans and participants and should be bipartisan.

But, even in fiduciary breach cases pre-*Cornell*, courts were allowing plaintiffs to survive a motion to dismiss based on conclusory statements or inapt comparisons to other plans' fees or investment performance. This also has to be addressed by holding

2025); *see also* Judgment in a Civil Case [Regarding Attorneys' Fees], *Snyder v. UnitedHealth Group*, No. 0:21-cv-01049-JRT-DJF (D. Minn. Jun. 25, 2025).

[9] https://americanbenefitscouncil.org/pub/?id=80095a3f-cbb8-e46c-854f-a475d2c68358

lower courts to the standard articulated by the Supreme Court. The Supreme Court has been clear. To survive a motion to dismiss:

> Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.[10]

**Pleading standards proposal to address retirement plan litigation crisis**.

The American Benefits Council's proposal would state that in order to survive a motion to dismiss, a complaint must contain specific facts regarding the use of an imprudent process by the plan fiduciary (or specific facts showing an impermissible conflict of interest). Conclusory allegations that the plan fiduciary has violated the law will no longer be a means for plaintiffs' lawyers to benefit at the expense of the retirement plan system by relying on the overly broad inference standard.

Like the Fine bill, our proposal would also provide that plaintiffs cannot avoid this rule by simply asserting that the plan fees paid to service providers are automatically a prohibited transaction, so that all service provider fee cases can automatically survive a motion to dismiss and go straight to discovery. That is the untenable position imposed on the system by the *Cornell* case. That means that, solely by reason of hiring a recordkeeper, for example, all plans could be sued and the case would go directly to discovery.

We look forward to discussing the above solution and other ideas that will effectively address the retirement crisis facing our private retirement plan system.

[10] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).