

**U.S. House of Representatives
Committee on Education and Workforce
Subcommittee on Health, Employment, Labor, and Pensions**

**“Pension Predators: Stopping Class Action Abuse Against Workers’ Retirement”
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Good morning, Chairman Allen, Ranking Member DeSaulnier, and members of the Subcommittee on Health, Employment, Labor, and Pensions (“Subcommittee”).

My name is Andrew Salek-Raham. I am a Principal at Groom Law Group, Chartered (“Groom”), a law firm specializing in employee benefits since it was founded 50 years ago by Theodore R. Groom, who was instrumental in developing ERISA’s landmark fiduciary responsibility provisions and later the Multiemployer Pension Plan Amendments of 1980. I have represented plan sponsors, fiduciaries, and service providers in every major category of ERISA class action lawsuit and in U.S. Department of Labor investigations and enforcement actions for over a decade.

Thank you for the opportunity to testify today about a much-needed legislative course-correction to a plaintiff-friendly pleading standard. That standard has catalyzed an explosion of meritless ERISA class action lawsuits; enriched the class action plaintiffs’ bar at the expense of American workers; and cost plan sponsors, fiduciaries, and service providers hundreds of millions of dollars in strike suit defense costs and settlement payments. **In short, common-sense legislation is necessary to ensure that ERISA class action plaintiffs’ lawyers are required to plead something, rather than nothing.**

I.

To take a step back, at the outset of every ERISA class action lawsuit, the plaintiff must file a complaint that satisfies his or her pleading burden: the complaint must allege facts making it plausible—not just possible—that the defendants violated ERISA, harming the plan and its

participants. If the plaintiff does so and defeats the defendants' early-stage motion to dismiss, the plaintiff is entitled to harness the court's subpoena power to obtain "discovery"—written responses to questions, the production of confidential documents, and deposition testimony—from the defendants and from third parties.

Plaintiffs and defendants in ERISA class actions have asymmetric discovery obligations. The named plaintiffs who purport to represent the class generally have relatively little information or knowledge about the subject matter of the lawsuit. On the other hand, defendants and third-party witnesses—usually companies that sponsor ERISA-covered plans, plan fiduciaries, and plan service providers—typically have voluminous records and employ many witnesses with knowledge potentially relevant to the lawsuit.

These asymmetric obligations impose asymmetric costs. Once past the pleadings stage, the parties know that ERISA class action defendants are likely to spend upwards of seven figures just to reach summary judgment, which is defendants' first opportunity to argue the merits of their case. These astronomical costs create a strong incentive for defendants to agree to a cost-of-defense settlement to buy peace, regardless of whether plaintiffs' claims have any merit.

It is for this reason—to spare defendants from strike suits—that the Supreme Court has called the pleadings-stage motion to dismiss an "important mechanism for weeding out meritless [ERISA] claims."ⁱ Unfortunately, many district courts have elected not to apply this "important mechanism" such that motions to dismiss are often not effective at "separating the plausible sheep from the meritless goats."ⁱⁱ There are two main reasons meritless ERISA lawsuits slip past judicial gatekeepers.

First, plaintiffs' counsel often exploit ERISA's inherent complexity for their own advantage by obfuscating, rather than illuminating, the true nature of their claims. This commonly

takes the form of a complaint containing several hundred paragraphs of dense factual allegations concerning investment theory; economic and market data; and complex, industry-specific terminology and concepts. Courts—drinking from a firehose as a general matter—are often understandably inclined to pass a case through to discovery rather than sift through the morass.

Second, courts have articulated a low bar for pleading prohibited transaction claims under ERISA section 406. In short, these courts have held that a plaintiff need only allege the bare elements of the transactions enumerated in section 406, and it is defendants who are responsible for pleading and proving the exemptions to those prohibited transaction found in ERISA section 408. **The upshot is that some courts have held the most mundane, innocuous allegations—for example, “The plan paid a service provider for necessary services,” or “An employee stock ownership plan purchased employer stock from the company’s owner.”—suffice to allege that a defendant violated ERISA.** The Supreme Court in *Cunningham v. Cornell University* recently endorsed such an interpretation for section 406(a)(1)(C) claims related to fees for plan service providers.ⁱⁱⁱ

II.

Private plaintiffs’ attorneys have taken advantage of the low pleading bar and high defense costs through trial to extract settlements in the millions of dollars—regardless of whether plan sponsors, fiduciaries, and service providers did anything wrong.

Plaintiffs’ attorneys in the ERISA class action space fall into three main categories. The first is **maximalist in their filings and minimalist in discovery**: they file as many cookie-cutter complaints as possible but are generally uninterested in expending time and effort to conduct discovery or try a case. Instead, they rely on baseline costs of defense through trial and appeal—again, typically in the millions—to extract an early cost-of-defense settlement.

The second type employs the opposite model—**minimalist in their filings and maximalist in discovery**. These firms seek to sue as many individuals as possible, no matter how attenuated they may be to the plaintiffs’ claims. Defendants often include board members, members of management, plan service providers and advisors, and company shareholders—and even the spouses, children, and grandchildren of those individuals. Once they have maximized the number of potential defendants, the plaintiffs unleash a torrent of onerous discovery demands disproportionate to the needs of the case. Manufacturing complexity in this way significantly ups the costs of defense, increasing settlement pressure, while simultaneously inflating the plaintiffs’ attorneys’ potential fee award in the likely event of a settlement or unlikely event of a judgment.

The third category combines the worst elements of the first two: these plaintiffs’ firms are **maximalist in their filings and maximalist in discovery**. They bulk-file copies of a stock complaint, pepper defendants with burdensome discovery not proportional to the needs of the case, and use those costs to leverage a settlement.

Examples abound. In one recent lawsuit, plaintiffs’ counsel sued over a dozen defendants—including a defendant’s infant grandchild. Plaintiffs there went so far as to **send a process server to the infant’s home**—a wholly unnecessary step that only harassed the other defendants in an effort to increase settlement pressure. In another recent example, plaintiffs’ counsel unnecessarily sued dozens of defendants, who were eventually represented by roughly a half dozen different law firms. This put enormous financial strain on the plan’s sponsor—which was obligated to indemnify most of the defendants for their defense costs and settlement payments—during the multi-year pendency of the meritless lawsuit.

In an ideal world, class representatives—the individuals named as plaintiffs in a class action complaint—would take seriously their responsibility to engage competent class counsel,

monitor their performance, and ensure that they act in class members' best interests. But ERISA class representatives generally provide no meaningful check on plaintiffs' counsel's behavior. The typical class representative is a former employee who responded to an (often misleading or incomplete) advertisement that plaintiffs' counsel posted to social media. They have little to no knowledge of, or involvement in, the lawsuit's claims or the manner in which their counsel is litigating them. Simply put, most class representatives have no idea what they are signing up for or why.

Many class representatives who might have understood what they signed up for initially do not follow through when the rubber hits the road. To give one example, one class representative quit simply because he did not want to drive a short distance to his deposition. Rather than dismiss the headless lawsuit, the court held it open while class counsel coaxed the named plaintiff back into the fold. He later appeared for his deposition in a limousine that his counsel provided to make sure he showed up.

Without any meaningful oversight from their clients, the ERISA plaintiffs' bar steers lawsuits toward settlements that line their own pockets with millions of dollars in fees but leave *de minimis* recoveries for the plan participants whose interests they purport to represent. I am aware of many examples in which class members received a per-person pittance, while plaintiffs' counsel walked away with a large percentage of a multi-million-dollar settlement.

III.

One of Congress's central goals when it created ERISA's enforcement regime was to fairly balance providing participants with an avenue for pursuing meritorious claims while insulating plan sponsors and fiduciaries from frivolous ones. The ground-level pleading bar that has evolved

in the courts has disrupted this balance, benefiting class action plaintiffs' lawyers and harming American workers and their employers.

Many district and appellate courts have recognized the harm that would result from allowing lawsuits to proceed based only on allegations that, for example, a 401(k) plan paid compensation to service providers, or an employee stock ownership plan ("ESOP") acquired employer stock for its participants. These courts sensibly required plaintiffs to plead something more—for example, that the routine transaction was actually intended to benefit a third party, that the compensation paid to the service provider was unreasonable, or that the ESOP purchased employer stock for more than fair market value. Others did not.

The Supreme Court in *Cunningham v. Cornell University* recently weighed in on this divide.^{iv} The Court shared the lower courts' concern about the consequences of a toothless pleading standard. It fretted that allowing cases to proceed based only on the fact that a routine transaction occurred would mean that "plaintiffs could too easily get past the motion-to-dismiss stage and subject defendants to costly and time-intensive discovery" for "meritless litigation," thereby "harm[ing] the administration of plans and forc[ing] plan fiduciaries and sponsors to bear most of the associated costs." Unfortunately, the Court's hands were tied: "These are serious concerns but they cannot overcome [ERISA's] statutory text and structure."

The Supreme Court did what it could. It offered a number of "existing tools"—judicial tools—that "district courts can use . . . to screen out meritless claims before discovery." But in my view, employing these options is unlikely to stem the tide of meritless class action litigation. For example, the *Cunningham* Court noted that defendants may be able to recover attorneys' fees and costs under ERISA's cost-shifting provision, but courts are almost universally disinclined to punish plan participants—who would be on the hook, not their attorneys—for filing a lawyer-

driven, class action lawsuit, even when meritless. The Court also suggested that defendants could move for sanctions against plaintiffs' counsel or move to dismiss claims for lack of Article III standing, but lower courts are loath to sanction attorneys and are often reluctant to dismiss claims at the pleadings stage for lack of standing.

The Supreme Court's *Cunningham* decision has had an immediate impact. In the roughly seven months after it was issued, the plaintiffs' bar has filed approximately ten new class action lawsuits including prohibited transaction claims for fees paid to plan service providers. In the seven months before *Cunningham*, just two such cases were filed approximately. Many other plaintiffs in cases predating *Cunningham* have amended their complaints to add prohibited transaction claims.

Legislative action is needed to do what the *Cunningham* Court could not: revise ERISA's text and rebalance the pleadings stage equities. The ERISA Litigation Reform Act offers the following commonsense fixes that would help to restore an appropriate equilibrium.

It would require a plaintiff to plead and prove that a plan paid unreasonable fees for services—**not just that the plan paid a service provider.**

It would require a plaintiff to plead and prove that an ESOP paid more than fair market value for employer stock in a stock purchase transaction—**not just that the transaction occurred.**

And it would require courts to stay onerous discovery while considering an early stage motion to dismiss—**rather than unlocking the doors to discovery before the plaintiff shows that his or her claims have merit.**

IV.

Some have suggested that the issues discussed above are not concerning because, they say, the number of ERISA lawsuits is relatively low. But that view ignores the magnitude of the

settlements the ERISA plaintiffs’ bar has wrung from plan sponsors, fiduciaries, and service providers—especially relative to the value of their claims on the merits. By my firm’s estimate, from 2015 to 2024, plaintiffs’ firms capitalized on a low pleading bar to the tune of **\$1.76 billion in strike suit settlements** in 401(k) cases alone—as compared to just **\$3.2 million in final judgments** against defendants in such cases over that same timeframe.

ERISA’s complexity presents a barrier to entry for new litigants. But a pleading standard—like the current one—that greases the skids to costly discovery and lucrative cost-of-defense settlements will only incentivize more plaintiffs’-side attorneys to enter the space and file more meritless lawsuits. In fact, it has already happened. **By my firm’s estimate, the number of plaintiffs’ firms filing class action lawsuits involving 401(k) plans has at least doubled since 2019.**

V.

At bottom, employers voluntarily sponsor retirement plans—to which many also voluntarily contribute millions of dollars—for the benefit of American workers across the country. ERISA’s current statutory scheme has created an opportunistic plaintiffs’ bar looking to profit at the expense of plan sponsors, fiduciaries, and the very participants whom they purport to represent. But plan sponsors and fiduciaries who have met their obligations under ERISA should not have to choose between shelling out millions of dollars in settlements or paying even more to litigate a meritless case through trial. The proposed legislative reforms will help to even the playing field by requiring plaintiffs to plead something, rather than nothing.^v

ⁱ *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014).

ⁱⁱ *Id.*

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

^{iv} *Id.* at 708-09.

^v I am providing this testimony on my own behalf, and not on behalf of Groom or any of its clients.