U.S. Chamber of Commerce

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December 11, 2025

The Honorable Rick Allen
Chairman
Subcommittee on Health, Employment, Labor, and Pensions
2176 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

The US Chamber of Commerce (Chamber) submits this letter as a statement for the record for the subcommittee's December 2, 2025, hearing entitled "Pension Predators: Stopping Class Action Abuse Against Workers' Retirement." The Chamber has long been concerned with litigation against retirement plans that seeks to undermine one of the goals of the Employee Retirement Income Security Act of 1974 (ERISA), which is to encourage employers to establish and maintain plans. Unfortunately, the Supreme Court's decision in *Cunningham v. Cornell* will further exacerbate this problem. We submit this statement for the record to help the subcommittee understand the original purpose of the prohibited transaction provision in ERISA and how targeted legislation can restore the balance that Congress sought in 1974.

<u>Summary</u>

Although the drafters of ERISA explicitly provided for civil actions to enforce ERISA, they did not contemplate that such actions would be used to police exempted prohibited transactions, especially for run-of-the mill transactions, such as contracting with a vendor to run the plan, that are not only necessary but often required under ERISA. The recent Supreme Court decision in *Cunningham v. Cornell* upends this understanding. However, Congress can restore its original intent with targeted legislation requiring a plaintiff to plead facts showing that the transaction was not exempt.

<u>Prohibited Transaction Legislative History</u>

Long before ERISA, pension plans were mostly regulated through the Internal Revenue Code (Tax Code) and by the Internal Revenue Service (IRS) starting as early as 1914 when the IRS ruled on the deductibility and inclusion of pension contributions.[1]

[1] William Wiatrowski, Changing retirement age: ups and downs – laws and research, United States – Statistical Data Included, Monthly Labor Review (Apr. 2001) available at http://www.bls.gov/opub/mlr/2001/04/art1full.pdf.

The Revenue Act of 1921 was the first time pensions were specifically included in the Tax Code, including that a profit-sharing or stock bonus plan must be established for the exclusive benefit of "some or all" employees, which is the precursor to ERISA's current exclusive benefit rule. The Revenue Act of 1926 extended the exclusive benefit rule to pension plans.

The War Labor Board's ruling during World War II that the wage freeze in the Wage and Salary Act of 1942 did not apply to fringe benefits is attributed to the growth of pensions and health and welfare benefits as an alternative means to attract workers. War-related increases in personal and corporate taxes may also have served as an incentive for businesses to offer more generous pensions as a means of avoiding such taxes.

It was not until 1947 that pensions were regulated outside of the Tax Code, but The Labor-Management Relations Act of 1947 was limited to multiemployer plans, namely plans jointly administered by an employer and a union. Instead, most pension regulations continued through the Tax Code. The 1954 Tax Code codified many of the IRS rulings on employee benefits, and it also supplemented the exclusive benefit rule by adding a prohibited-transaction rule. This rule did not allow a pension trust to transact with a related party, such as the plan sponsor, on less favorable terms than the trust could obtain in an arm's length transaction.[2] The penalty for non-compliance was the loss of favorable tax status, which, in essence, was a penalty on the employees covered by the plan and the employer.

It was not until 1959 that the Department of Labor (DOL) became involved with pensions with the passage of the Welfare and Pension Plans Disclosures Act of 1959. The WPPDA required plan sponsors to file plan descriptions and annual reports with DOL, which were also available to participants. In 1962, the WPPDA was amended to give the Secretary of Labor enforcement, interpretative, and investigatory powers over employee benefit plans.

Although the 1962 amendments gave the DOL Secretary enforcement authority, employees covered by the plans did not have a private right of action to obtain benefits. In fact, before ERISA, the only avenue for a claim for benefits was through the state courts, which, "did not afford the employee effective protection, because the

[2] Internal Revenue Code of 1954, Public Law 591, 83d Cong. 2d sess. (August 16, 1954), Section 503(c)(1).

majority of courts traditionally viewed such benefits as 'mere gratuities' which the employer could grant and withdraw freely."[3]

After the bankruptcy of Studebaker and the termination of its plan in the 1960s and as other practices came to light, Congress felt that neither the Tax Code nor the WPPDA was sufficient to protect pensions, workers, retirees, and taxpayers. The main concerns throughout the debate leading up to ERISA were:

- Vesting standards
- Minimum funding standards
- Reporting and disclosure
- Pension insurance
- Fiduciary standards and self-dealing

Early versions of pension reform provided for a private right of action to recover money lost from the plan. However, many of the early versions placed restrictions on the right, such as requiring court approval before bringing a claim, requiring the posting of a security for the costs and fees, or filing a copy of the complaint with DOL. As ERISA scholar Professor James Wooten notes "[s]o, what conclusions may we draw from this legislative history? One thing I found striking was that legislative drafters appear to have been quite concerned about the possibility that participants or beneficiaries would bring unworthy or vexatious claims."[4]

The reasons that the restrictions ultimately did not make it into ERISA may be because the drafters were more concerned with the Congressional committees of jurisdiction over where the legislation should originate and which agency should enforce it, especially given that pensions had been enforced for years mainly through the Treasury and IRS. Although the precursors to ERISA had been debated for years, by 1973, there were two competing pieces of legislation: HR 4200 (as passed by the Senate) and HR 2 (as reported by the House Education and Labor Committee). HR 4200 was handled by the Ways and Means Committee and split jurisdiction between DOL and Treasury, including prohibited transaction exemptions for common transactions, such as contracts for services. The idea behind this approach was to split the baby between civil enforcement through the labor provisions (including enforcement by DOL and participants) and the application of excise taxes on parties

[3] "ERISA Enforcing Oral Promises to Pay Employee Benefits," Boston College Law Review, Volume 28:723, p. 728-29 available at https://bclawreview.bc.edu/articles/1528/files/63c77963a24be.pdf.
[4] "Enforcement of ERISA Rights and Responsibilities: An ERISA @ 40 Event Background Memo on Discussion Topics", Jim Wooten available at https://pensionrights.org/wp-content/uploads/2020/08/01-_wooten_background_memo_10_03_14.pdf

in interest through the IRS. Even with this approach, HR 4200 recognized the need to exempt certain transactions altogether from both civil enforcement and excise taxes. Specifically:

> it would not be a prohibited transaction to pay reasonable compensation to parties in interest for office space or for other services necessary to operate the plan, nor would it be prohibited for an individual to serve as an officer, employee, etc., of a party in interest. The bill also allows receipt by fiduciaries or parties in interest of benefits as participants or beneficiaries in a plan. **These exceptions from the prohibited transaction rules would apply equally to the civil action and tax provisions. (Emphasis added).**[5]

Although HR 2 was similar to HR 4200, it specifically kept jurisdiction only within DOL and would have only had a prohibition on self-dealing, unless for adequate consideration, and would not have including the litany of prohibited transactions that were included in HR 4200.

The inclusion of the broader prohibited transactions, as noted above, was not meant to subject plan fiduciaries to a "gotcha" for common, everyday transactions necessary to run a plan. This may be because the prohibited transaction rules were not only put into ERISA to protect plans or participants, but also as a way for the tax committees to obtain jurisdiction over the legislative process as ERISA was working its way through Congress. As Frank Cummings, past Chief of Staff to Senator Jacob Javits, stated:

> Long before those fights took place, the notion of a prohibited transaction in the first place was part of the strategy of putting the whole bill—not part of the bill, the whole bill—in the Internal Revenue Code. The idea was if you were going to have fiduciary behavior standards, how in the devil could you put that in the Internal Revenue Code? As I recall someone had remembered that the private foundation rules... preceded ERISA by fifteen years—was it five years? Well, it was a while.
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> But at any rate, that was the model for these prohibited transaction provisions but the provisions were really invented for the purpose of preempting the Labor Committee—so it was really part and parcel of whether the Labor or Tax

[5] "Summary of HR 4200: retirement income security for employees act, as passed by the Senate", p. 21 available at https://sshelco-primo.hosted.exlibrisgroup.com/primo-explore/fulldisplay?vid=STLIBPA&tab=alma_tab&docid=01SSHELCO_STLIBPA_ALMA21142599480003572&lang=en_US&context=L.

> Committee was going to get control of the legislation, and of course control in the tax-writing committees meant you weren't going to get a bill. So later, after they had developed a lot of this for the Internal Revenue Code, then you had to go back and fit that into Title I, but not all of the tax-prohibited transactions got back into Title I.[6]

So, at the end of the day, the result is that the prohibited transactions that had originally been part of the Tax Code pre-ERISA and which were based on the private foundation rules that were only enforceable by the IRS, ended up in both the labor code and Tax Code. However, it was not contemplated that the civil actions in Title I would apply to exemptions because of the recognition that a plan could not function without many of the exemptions. This is why the very first line of the final version of the prohibited transactions in ERISA Section 406(a) explicitly states that "Except as provided in section 1108 of this title:" (which is the list of exemptions), the enumerated items in 406 are prohibited.

This reading in no way dilutes Congress' original intent of allowing for a private right of action in ERISA. This is because the prohibited transaction provision in Title I (and II) are a type of belts and suspenders to the fiduciary provisions in Section 404 of ERISA. In 1995, two prominent ERISA practitioners observed that the prohibited transaction rules "increase the marginal cost of nearly every investment transaction that does not take place in public [markets]."[7] The authors reported asking "[s]everal experienced ERISA attorneys [if] they were aware of any case in which these rules had prevented or punished some abusive act that was not also proscribed by the general fiduciary rules. None could identify a single case."[8] This is likely because as the Supreme Court has noted, Section 406 "supplements the fiduciary's general duty of loyalty to the plan's beneficiaries … by categorically barring certain transactions deemed 'likely to injure the [retirement] plan.'"[9]

Cunningham v. Cornell

Generally, there had not been a rash of participants seeking to enforce the prohibited transaction rules. The bulk of enforcement is through the excise taxes from

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[6] "Panel 4: ERISA and the Fiduciary" available at https://drexel.edu/~/media/Files/law/law%20review/Spring2014/Panel%204_revised.ashx?la=en.
[7] "The Regulation of Pensions: Twenty Questions after Twenty Years", 21 J. Pension Plan & Compliance, 1, 13, Kathleen P. Utgoff & Theodore R Groom (1995).
[8] "Pension Simplification", 35 J. Marshall L. Rev. 565,602-603 (2002), David A. Pratt citing Kathleen P. Utgoff & Theodore R. Groom, "The Regulation of Pensions: Twenty Questions After Twenty Years", 21 J. Pension Planning & Compliance 1, 13 (1995).
[9] Harris Trust & Savings Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 241–42 (2000) (citation omitted).

the IRS and through DOL's granting of individual and class exemption. However, as reflected in the history of *Cunningham v. Cornell*, because most prohibited transaction claims also have been brought as breach of fiduciary duty claims under ERISA section 404 based on the exact same allegations, plaintiffs easily can include these as additional claims.[10] For example, if the allegations are that there was a breach of fiduciary duty because the service provider's compensation was excessive, that also would be a prohibited transaction because excessive compensation would not be reasonable.[11] However, at the end of the day, the remedy would be the same: undoing the transaction and returning any losses to the plan.

Cunningham v. Cornell has a long history. Over nine years ago, on August 17, 2016, plaintiffs filed a complaint in the Southern District of New York claiming that the defendant had breached their fiduciary duty because they "allowed unreasonable expenses to be charged to participants for administration of the Plans, and retained high-cost and poor-performing investments compared to available alternatives."[12] These claims were brought "on behalf of the Plans under 29 U.S.C. §1132(a)(2) and (3) to enforce Defendants' personal liability under 29 U.S.C. §1109(a) to make good to the Plans all losses resulting from each breach of fiduciary duty and to restore to the Plans any profits made through Defendants' use of the Plans' assets. In addition, Plaintiff seeks such other equitable or remedial relief for the Plans as the Court may deem appropriate."[13] The original complaint only claimed breach of fiduciary duties of prudence and loyalty with respect to the alleged unreasonable administrative fees, unreasonable investment management fees and performance losses and failure to monitor. Nowhere in the 151 paragraph and 69 page complaint did plaintiffs also claim that the same conduct violated the prohibited transaction provisions in ERISA section

[10] ERISA litigation began to surge in 2006 when a plaintiff firm brought breach of fiduciary duty claims against 13 large retirement plans. As these cases made their way through courts and settlements, other plaintiff law firms join in, and the litigation began to expand even more in 2015 and continues to date. See generally "Birth of a Cottage Industry" available at https://401kspecialistmag.com/the-dramatic-rise-in-excessive-401k-fee-litigationand-whos-fighting-it/2/. The creation of this industry predates the current reductions to the Employee Benefits Security Administration. Furthermore, the current cases such as challenges to pension risks transfers, use of forfeitures, and administrative fees are not issues which EBSA generally would investigate or litigate likely because it does not see these as a problem area. For example, from 2011 to 2021 the top consistent topics of investigation at the National Office level were contributory plan crimes, employee stock ownership plans, plan investment conflicts, and protecting benefits distributions. See GAO Report, "EMPLOYEE BENEFITS SECURITY ADMINISTRATION Enforcement Efforts to Protect Participants' Rights in Employer-Sponsored Retirement and Health Benefit Plans", pp. 43-44 (May 2021) available at https://www.gao.gov/assets/gao-21-376.pdf. This same reported noted that in 2013, EBSA changed its investigatory strategy to focus on "cases that would result in large monetary recoveries for participants."

[11] The remedy for a violation of a prohibited transaction is to restore the plan to where it would have been had the prohibited transaction not occurred, which is the same remedy that would result in a claim of fiduciary duty under ERISA 404 and 409.

[12] Cunningham v. Cornell Univ., Civ. Act. No. 16-cv-6525, Compl. at para. 2.

[13] Id. at para. 3.

406. However, months after the original claim was filed, plaintiff filed an amended complaint based on nearly the identical facts in the original complaint to include prohibited transaction claims under ERISA Section 406.[14]

Nearly a year after the initial complaint was filed, the court ruled on defendants' motion to dismiss. With respect to the prohibited transaction claims, in line with the courts in the other university cases brought by the same law firm, the district court found that "absent some evidence of self-dealing or other disloyal conduct" mere allegations that the plan violated section 406(a) by paying a service provider does not state a claim.[15] In citing the Supreme Court, the district court noted that to "hold otherwise would transform § 406—a statutory provision meant to "categorically bar[] certain transactions deemed 'likely to injure the pension plan,'" (Harris Tr. & Sav. Bank, 530 U.S. at 241)—into a statutory provision that proscribes [a] retirement pension plan's most basic operations."[16] Later, the district court decided the remaining claims in defendants' favor on a motion for summary judgement. In that, the court found that plaintiffs failed to show an actual loss to the plan with respect to the recordkeeping fees, which was the basis for the claim of prudence (but would also be necessary were there a remedy for the prohibited transaction violation).[17]

More than seven years after the original complaint was filed, the Second Circuit issued its opinion in November 2023. The Second Circuit affirmed the District Court on all counts. With respect to the prohibited transaction claims, the Second Circuit found that

> [W]e do not agree with the Eighth Circuit that, at the pleadings stage, the § 1108 exemptions should be understood merely as affirmative defenses to the conduct proscribed in § 1106(a). To the contrary, we conclude that at least some of those exemptions—particularly, the exemption for reasonable and necessary transactions codified by § 1108(b)(2)(A)—are incorporated into § 1106(a)'s prohibitions. And, accordingly, we hold that to plead a violation of §1106(a)(1)(C), a complaint must plausibly allege that a fiduciary has caused the plan to engage in a transaction that constitutes the "furnishing of . . . services . . .

[14] Cunningham v. Cornell Univ., Civ. Act. No. 16-cv-6525, Amended Compl. pp. 121-138.
[15] Cunningham v. Cornell Univ., Civ. Act. No. 16-cv-6525, 017 WL 4358769, *10 (S.D.N.Y. Sept. 29, 2017). In August 2016, the same law firm in the *Cunningham* case also filed suit against 11 other universities with nearly identical breach of fiduciary duty claims. This is the same tactic that the firm used in 2006 when it filed its initial breach of fiduciary duty claims against 13 mega plan sponsors. See "Is Excessive Fee Litigation Headed For Its Dudenhoeffer?", Mark Bieter, Apr. 2, 2018 available at https://www.groom.com/wp-content/uploads/2022/12/Is_Excessive_Fee_Litigation_Headed_For_Its_Dudenhoeffer.pdf.
[16] Id.
[17] Id.

between the plan and a party in interest" where that transaction was unnecessary or involved unreasonable compensation.[18]

The Second Circuit reasoned that its interpretation flows directly from the text of the statute because the "text of § 1106(a) begins with the carveout: "Except as provided in section 1108 of this title . . . ." Thus, the exemptions set out in § 1108—including, most pertinently, the exemption for "reasonable compensation" paid for "necessary" services, § 1108(b)(2)(A)—are incorporated directly into § 1106(a)'s definition of prohibited transactions."[19] The Second Circuit went on to state that

> [W]hen read in isolation from its exemptions, § 1106(a) would encompass a vast array of routine transactions the prohibition of which cannot be consistent with that statutory purpose. To the contrary, if all payments by plan fiduciaries to third parties in exchange for plan services were presumptively prohibited, then the plan would be severely compromised: "Employee benefit plans would no longer be able to outsource tasks like recordkeeping, investment management, or investment advising, which in all likelihood would result in lower returns for employees and higher costs for plan administration." Such a result would be inconsistent with the Supreme Court's "recogni[tion] that ERISA represents a careful balancing" intended to "induce[] employers to offer benefits by assuring a predictable set of liabilities." (citations omitted).[20]

Although there had been a circuit split for years,[21] the lawyers for the plaintiffs in *Cunningham*, who also were the lawyers in many other cases related to claims of violations of the prohibited transaction rules, had not sought certiorari before the Supreme Court until *Cunningham*. And, in requesting certiorari, they were careful to very narrowly tailor the request to exclude the introductory phrase in Section 406(a), namely, "Except as provided in section 1108 of this title…". Instead, they only listed the prohibited transaction itself in 1106(a)(1)(C) and then asked the Supreme Court:

> Whether a plaintiff can state a claim by alleging that a plan fiduciary engaged in a transaction constituting a furnishing of goods, services, or facilities between the plan and a party in interest, as proscribed by 29 U.S.C. § 1106(a)(1)(C), or whether a plaintiff must plead and prove additional elements and facts not contained in the provision's text.[22]

[18] Cunningham v. Cornell Univ., 86 F.4th 961, 975 (2023).
[19] Id.
[20] Id. at 976.
[21] Id. at 974 (discussing the circuit split).
[22] Petition for Writ of Certiorari available at http://www.supremecourt.gov/DocketPDF/23/23-1007/302820/20240311155414499_23-__%20Petition%20For%20A%20Writ%20Of%20Certiorari.pdf

The Supreme Court's decision reflects this omission, and it is also a plea to Congress to address this issue because the Court claims that the decision was based on the statutory text to which they were bound. In her opinion, Justice Sotomayor states that:

> In particular, when a statute has "exemptions laid out apart from the prohibitions," and the exemptions "expressly refe[r] to the prohibited conduct as such," the exemptions ordinarily constitute "affirmative defense[s]" that are "entirely the responsibility of the party raising" them. *Meacham* v. *Knolls Atomic Power Laboratory*, 554 U. S. 84, 91, 95 (2008). That describes exactly how ERISA is structured: The exemptions to §1106(a) prohibited transactions are enumerated separately in §1108, and §1108 recognizes that the substantive "prohibitions" are "provided in section 1106" of the statute. §1108(b).[23]

However, it is unlikely that Congress intended for the exemptions in 408 to act as an affirmative defense. First, as noted above, Congress did not intend for the civil enforcement provisions to apply to exemptions, especially those in 406(a) which are not only permissible under ERISA but are required both by ERISA and for a plan to function. Additionally, it likely would be a breach of fiduciary duty not to engage service providers to assist plan fiduciaries in many instances, which then brings a perverse result that a fiduciary could be sued for engaging a service provider but at the same time sued for not doing so.

Secondly, the Court's reliance on the burden shifting in discrimination cases is misplaced in determining Congressional intent. The first Supreme Court decision articulating the burden shifting approach was *McDonnell Douglas Corp. v. Green,*[24] which was issued on May 14, 1973 in the context of Title VII discrimination based on race. It is highly unlikely that Congress contemplated the exemptions in Section 408 would be affirmative defenses for a variety of reasons. First, both HR 2 and HR 4200 were introduced before *McDonnell Douglas*. Secondly, given the expansive scope of the prohibitions that were in HR 4200 versus the limited defenses Title VII, Congress likely did not look to those as analogous. More importantly, there is nothing in the legislative history to indicate that Congress intended the section 408 exemptions as affirmative defenses rather than exactly what they are – exemptions from the expansive prohibitions. Finally, in *Cunningham*, Justice Sotomayor relies on the Supreme Court decision in *Meacham* v. *Knolls Atomic Power Laboratory*[25] relating to

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[23] Cunningham v. Cornell Univ., 604 U.S. 693, 701 (2025).
[24] 411 U.S. 792 (1973).
[25] 554 U. S. 84, 91, 95 (2008).

the Age Discrimination Act and the burden shifting to show that the employment decision was based on a reasonable factor other than age. Given that Meacham was issued in 2008, 34 years after ERISA was passed, it is unlikely that the drafters of ERISA had that in mind in 1974.

The concurrence in *Cunningham* noted that

> [u]nfortunately, this straightforward application of established rules has the potential to cause—and, indeed, I expect it will cause—untoward practical results. .... The upshot 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.[26]

The concurrence explained the importance of getting past a motion to dismiss:

> In this case, for example, Cornell set up a plan under which employees could invest in the Teachers Insurance and Annuity Association of America-College Retirement Equities Fund and Fidelity funds, and then those companies provided the recordkeeping services for their own funds, as they customarily do. There is nothing nefarious about any of that. 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. (citations omitted).[27]

The concurrence notes that there may be workarounds to this potential problem, but that "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."[28]

Legislative Remedy

Instead of requiring costly litigation to fix the problems created by the Supreme Court ruling that undermines Congressional intent, Congress can solve the problem without restricting participants access to the original civil remedies in ERISA.[29]

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[26] Cunningham, 604 U.S. at 710.
[27] Id. at 710-11.
[28] Id. at 711.
[29] This would not be the first time that Congress amended ERISA to restore it to its original intent after a Supreme Court decision. In 1996, in response to the Supreme Court decision in John Hancock Mutual Life Insurance Co. v.

Proposed legislation that follows the Second Circuit's decision in *Cunningham* will restore the fundamental goal of ERISA which is "to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place."[30]

As noted above, the Second Circuit decision in *Cunningham* simply held that "to plead a violation of §1106(a)(1)(C), a complaint must plausibly allege that a fiduciary has caused the plan to engage in a transaction that constitutes the 'furnishing of . . . services . . . between the plan and a party in interest' where that transaction was unnecessary or involved unreasonable compensation."[31]

The *Cunningham* decision and other similar cases over the years claiming that administrative fees are excessive is illustrative of what burden the Second Circuit pleading standard would require. In many of these cases, the claim is that the administrative recordkeeping fee is excessive. To show that a plan did not meet the exemption in this case, the plaintiff would be required to plead that the administrative service fee is unreasonable. Federal regulation requires that this fee be disclosed at least quarterly to each participant.[32] It is not burdensome to require a plaintiff to include information in a complaint that a federal regulation requires plan administrators to disclose quarterly.

It also is not burdensome for the plaintiff to know which statutory exemption aligns with each prohibited transaction. In her option, Justice Sotomayor claimed that it would be too burdensome to require a plaintiff to know which of the 21 statutory exemption a fiduciary is relying upon, let alone the individual or class exemptions issued by DOL. However, the opinion fails to note that the statutory exemptions generally align with the prohibited transactions. As explained in the U.S. Chamber of

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Harris Trust & Savings Bank, 510 U.S. 86 (1993), Congress amended ERISA to add Section 401(c) – Clarification of Application of ERISA to Insurance Company General Accounts. This paragraph required the Secretary of Labor (Secretary) to issue final regulations by December 31, 1997, for the purpose of determining which assets held by an insurer (other than plan assets held in its separate accounts) are plan assets.

[30] Varity Corp. v. Howe, 516 U. S. 489, 497 (1996).

[31] H.R. 6084 (ERISA Litigation Reform Act) would codify this holding and merely require that a plaintiff plead that the services were not needed and the compensation was unreasonable. Codification of the Second Circuit's decision aligns with the legislative history showing that the civil action provisions were not meant to apply to the exemptions.

[32] See § 2550.404a-5 Fiduciary requirements for disclosure in participant-directed individual account plans. Although federal regulations require this disclosure, repeated in many of the cases claiming the administrative fees were excessive, plaintiffs misrepresent the administrative fee by using the total administrative fees on the Form 5500, which include the fees all administrative fees (including for qualified domestic relations orders and loans, which are charged only to those who use the services) and divide that by the number of participants. This of course leads to a much higher fee than what the actual per person administrative fee is. See Chamber Amicus, Cunningham v. Cornell, pp. 24-25 available at https://www.uschamber.com/assets/documents/23-1007-Chamber-Amicus-Brief_revised.pdf.

Commerce amicus brief in *Cunningham*, "[i]t is generally quite clear which exemptions are at issue because they correspond to the plaintiffs' claims. That is all the more true because the vast majority of prohibited-transaction claims involve a discrete set of prohibited transactions and a discrete (and corresponding) set of exemptions. If, as here, the plaintiff challenges a transaction with a service provider under § 1106(a)(1)(C), the exemption for contracting with a party in interest (§ 1108(b)(2)) will be at issue."[33]

Conclusion

As Professor Michael Doran stated with respect to *Cunningham*:

> It simply cannot be that the legislators who wrote ERISA meant to prohibit a fiduciary from complying with ERISA. It cannot be that those legislators intended to prohibit a plan from receiving the administrative, trustee, investment management, and other services necessary for the plan to satisfy ERISA and to provide the benefits that employers promise to their employees. It cannot be that those legislators wanted every service transaction involving an employee benefit plan to be actionable in federal court, so that money otherwise used provide retirement benefits would instead be spent on motion practice, discovery, and trial (to say nothing of the cost of buying third-party insurance against all this) – simply for the purpose of establishing that the transaction was exempt under section 408(b)(2)(A) in the first place.[34]

And it cannot be that Congress is incapable of coming up with a targeted legislative solution to restore the original purpose of the prohibited transaction provision in ERISA and the balance that Congress sought in 1974, which is what requiring a complaint to plead that an exemption has not been met would do.

Sincerely,

Chantel Sheaks

Chantel L. Sheaks
Vice President, Retirement Policy
U.S. Chamber of Commerce

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[33] See Chamber Amicus, Cunningham v. Cornell, pp.15-16 available at https://www.uschamber.com/assets/documents/23-1007-Chamber-Amicus-Brief_revised.pdf

[34] Michael Doran, "The Supreme Court Prohibits ERISA", Univ. of Va., Labor Law Journal, Vol. 76, pp. 12-13 (2025) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5514518.