Is a Normal Transaction a Prohibited Transaction? Prohibited Service Transactions in Retirement Plan Administration: Navigating Circuit Splits and Policy under ERISA

Alexander Sewall†

TABLE OF CONTENTS

† 3L, University of Cincinnati College of Law. This paper was for the 2024 ACEBC Writing Competition. I would like to thank Professor Sean Mangan, Professor Norman Stein, and Nathan Hensley for their continued support throughout this paper's research.

§ 1 - INTRODUCTION

Employee benefit plan fiduciaries[1] serve an important role in the coordination and administration of benefit plans, and these fiduciaries are subject to several state and federal statutes regarding their involvement of such plans. Arguably, the most important of these statutes includes the federal regulations promulgated by Congress under the Employee Retirement Insurance Security Act (ERISA) of 1974.[2] ERISA states that fiduciaries must act solely in the interest of plan participants and beneficiaries, and for the exclusive purpose of providing benefits to them.[3] In enacting ERISA, Congress intended to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits.[4]

Among the many requirements that Congress imposed on employee benefit plans under ERISA, Congress prohibited certain transactions involving such plans.[5] These prohibited transactions include parties in interest that participate in management of the respective employee benefit plan, plan fiduciaries, and the plan[6] itself; however, ERISA limits the applicability of the prohibited transactions statute by providing certain exemptions that would otherwise be prohibited.[7] Prohibited transactions, and the applicable exemptions, can be broadly implicated in

---

[1] ERISA states that a person is a "fiduciary" to the extent that "(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). This broad definition focuses on the actual control and authority exercised over the plan.
[2] Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (2024).
[3] 29 U.S.C. § 1104(a)(1).
[4] *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15 (1987).
[5] 29 U.S.C. § 1106.
[6] *Id.*
[7] 29 U.S.C. § 1108(b)(2).

the administration of an employee benefit plan[8] and actions against employers in violation of the statute can be brought by plan participants, beneficiaries of plan participants, or the federal government itself.[9]

Interestingly, over the past 15 years, six federal circuits have issued opinions as to what is necessary to sufficiently plead a claim that an employer engaged in a prohibited transaction for services under 29 U.S.C. § 1106(a)(1)(C). The overarching concern in these cases is whether an ordinary service agreement for services to an employee benefit plan – without anything more – constitutes a prohibited transaction for services under ERISA. These opinions have led to several splits among the federal courts of appeals.[10] Four interpretations of the § 1106(a)(1)(C) pleading standard have arisen out of these decisions: (1) applying the statutory text as written and allowing plaintiffs to bring a simple pleading of a violation of the statute; (2) requiring plaintiffs to show that the fiduciary had intent to engage in a prohibited transaction; (3) exempting the first contract between the plan and the fiduciary and examining the preexisting relationship between

[8] Judicial history pertaining to 29 U.S.C. § 1106 demonstrates a wide range of transactions that can be considered violations. This can be attributed to the broad applicability of the statute and its exemptions. *See e.g., Haley v. Teachers Ins. & Annuity Ass'n of Am.*, 377 F. Supp. 3d 250 (2019) (case regarding the transfer of plan assets to a party in interest without adequate consideration); *Guardsmark, Inc. v. BlueCross and BlueShiel*d, 169 F. Supp. 2d 794 (2001) (the court held that a fiduciary that wrongfully overpaid claims with plan assets dealt in its own interest for its own benefit).

[9] 29 U.S.C. § 1132. ERISA provides a private right of action for plan participants and their beneficiaries, but the government may also bring a private right of action against an employer as well. *See Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 303 (7th Cir.1985) (noting that the Secretary of Labor does not have a greater public interest than plan participants since "the Secretary's only public interest enforceable under Section 1132 is that the rights of the participants and beneficiaries of a given plan are protected"). ERISA does allow for the government to bring criminal actions if the government can prove crimes such as embezzlement, theft, extortion, or bribery. 29 U.S.C. § 1111.

[10] The splits among the Federal Courts of Appeals have created incongruity as to what is necessary to plead a prohibited transactions claim. The splits threaten ERISA's intended goal of uniformity, a regime that has been scrupulously maintained since the statute's inception nearly half a century ago. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (stating that ERISA is "a 'comprehensive and reticulated statute'" (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)) that "is 'enormously complex and detailed'" (quoting *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 262 (1993)). The Supreme Court has addressed questions regarding ERISA's invariability, holding that the statutes "not be supplemented by extratextual remedies." *See Hughes Aircraft Co.* at 447. *See also Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990) (quoting "as a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text").

the two; and (4) requiring plaintiffs to plead facts that would implicate the § 1108 exemptions. The different pleading standards among the Circuit Courts are concerning for both plaintiffs bringing prohibited transaction claims and employers defending such claims. An identical claim in one circuit may yield a different outcome in another, impacting the rights of both plaintiffs and defendants. The Supreme Court has recently granted certiorari in the most recent of the cases, *Cunningham v. Cornell Univ.*, and will, hopefully, bring clarification to plaintiffs, defendants, and the courts, as to what is required to plead a violation under 29 U.S.C. § 1106(a)(1)(C).[11]

This paper analyzes how six Circuit Courts have interpreted the pleading standard under 29 U.S.C. § 1106(a)(1)(C) and explores the schools of thought among the circuits in addressing the pleading requirements under the statute. The paper will also determine policy implications that may result if the Supreme Court decides to resolve the circuit split.

§ 2 – THE STATUTE AT ISSUE

ERISA's extensive breadth mandates that employers must comply with various fiduciary duties. Under ERISA, fiduciaries must act sensibly and prudently.[12] Additionally, ERISA requires a fiduciary to manage an employee benefit plan solely in the interests of plan participants and its beneficiaries.[13] 29 U.S.C. § 1106(a)(1) "supplements the fiduciary's general duty of loyalty to the plan's beneficiaries . . . by categorically barring certain transactions deemed 'likely to injure the pension plan.'"[14] Using broad language, Congress placed prohibited

---

[11] *Cunningham v. Cornell University*, 86 F.4th 961 (2d Cir. 2023), *cert. granted* __ S.Ct. __ (2025).

[12] 29 U.S.C. § 1104(a)(1)(b). The statute maintains that a "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and…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." *See also Beck v. Levering*, 947 F.2d 639, 641 (2d Cir.1991) (stating that ERISA prohibits certain transactions that compromise the duty of trust that is imposed upon a fiduciary). *See also* John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1325 (2003).

[13] 29 U.S.C. § 1104(a)(1).

[14] *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 241-42, (2000) (quoting *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993)).

transactions into three separate buckets: transactions between a plan and a party in interest, transactions between plans and fiduciaries, and transactions regarding the transfer of real or personal property to plan by a party in interest.[15] A "party in interest" includes a fiduciary, but the term also includes other roles in the scope of benefits administration, such as a person or corporation providing services to an employee benefit plan[16]

Prohibited transactions between a plan and a party at interest are subject to certain exemptions that will excuse a fiduciary from liability and allow for a plan and a party in interest to enter into contract.[17] For instance, permissible transactions between a plan and a party in interest may include entering into a contract for group health insurance or participating in the sale of securities, as long as the relevant exemption permits the plan to take part in such transactions.[18]

Among these prohibited transactions, 29 U.S.C. § 1106(a)(1)(C) has often appeared in ERISA litigation regarding management of retirement plan assets.[19] The text of § 1106(a)(1)(C) states that, subject to exemption, "a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he 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."[20] Importantly, ERISA provides an exemption to this broadly stated provision.[21] A prohibited

---

[15] 29 U.S.C. § 1106(a)(1).
[16] 29 U.S.C. § 1002(14)(B); *See also Ramos v. Banner Health*, 1 F.4th 769, 786 (10th Cir.2021) (citing ERISA language that a "party in interest" as "a person providing services to such plan").
[17] 29 U.S.C. § 1108.
[18] *See* 29 U.S.C. § 1108(b)(5); *See also* 29 U.S.C. § 1108(b)(15).
[19] *See generally Marshall v. Snyder*, 430 F.Supp. 1224, 1231 (E.D.N.Y.1977) (The New York Eastern District Court determined that a subsidiary performing administrative functions for a Teamsters' retirement plan had violated § 1106(a)(1)(C) by paying salaries to Teamsters officers since these payments were considered prohibited transactions under § 1106(a)(1)(C)); *See also Buffalo Labor Sec. Fund v. J.P. Jeaneret Assocs. (In re Beacon Assocs. Litigation)*, 818 F.Supp.2d 697, 704 (S.D.N.Y.2011) (plaintiffs alleged that an asset management company violated § 1106(a)(1)(C) when the company received fees based on the falsely-inflated value of fraudulently-invested assets).
[20] 29 U.S.C. § 1106(a)(1)(C) (emphasis added).
[21] 29 U.S.C. § 1108(b)(2)(A).

transaction for services provided to an employer's retirement plan administration will be exempted if the services are *necessary* for the operation of the benefit plan as long as no more than *reasonable* compensation is paid for those services.[22] The Employee Benefits Security Administration (EBSA) offers a broad interpretation of reasonableness under this exemption, allowing courts to take a subjective approach when determining the reasonableness of an administrator's compensation.[23]

ERISA provides individuals connected to a plan with a private right of action that allows for various remedies in the event a fiduciary causes a plan to enter into a prohibited transaction.[24] To hold a fiduciary liable in the civil realm, the Secretary of Labor, plan participants, beneficiaries, or fiduciaries are all afforded general causes of action to sue for monetary damages or other equitable relief.[25] Equitable relief measures may include remedies such as restoration of lost assets, disgorgement of ill-gained profits, and removal of the offending fiduciaries.[26] Plaintiffs may bring these causes of action in order to protect or recover plan assets, enforce accountability measures on breaching parties, and ensure deterrence among fiduciaries from participating in prohibited conduct under ERISA.[27]

---

[22] *Id.* (emphasis added).
[23] 29 C.F.R. § 2550.408c-2(b)(1) (stating that "compensation is 'reasonable'…depend[ent] on the particular facts and circumstances of each case"). This approach allows courts to take different approaches in determining whether compensation is reasonable. For example, in *Davis v. Wash. Univ. in St. Louis*, the Eight Circuit examined whether management fees for a retirement plan were excessive after plaintiffs brought a claim alleging breach of fiduciary duty under 29 U.S.C. §1104(a). 960 F.3d 478, 484 (8th Cir.2020). The Eight Circuit stated that "a sound basis for comparison" would allow the court to determine whether management fees were excessive compared to a benchmark, but the court iterated that "there is no one-size-fits-all approach." *Id.* The Eight Circuit did not examine a prohibited transaction claim in this instance since the District Court dismissed the prohibited transactions claims for failure to state a claim. *Davis v. Washington Univ. in St. Louis*, E.D.Mo. No. 4:17-CV-1641 RLW, 2018 U.S. Dist. LEXIS 167594, at *17 (Sep. 28, 2018).
[24] 29 U.S.C. § 1132(a).
[25] 29 U.S.C. §§ 1132(a)(2), (3); *See Thole v. U.S. Bank N.A.*,140 S.Ct. 1615, 1620 (2020).
[26] *Thole* at 1624.
[27] These three objectives are not the only reasons why plaintiffs bring claims under § 1106(a)(1)(C) but are good examples as to why plaintiffs bring actions under the statute. *Thole* briefly touches on two of these objectives - recovery of plan assets and accountability measures. In *Thole*, plan participant-plaintiffs hoped to (1) recover $750 million allegedly lost by the fiduciary (recovery of assets), and (2) replace the fiduciary for mismanagement of pension assets (accountability measures).

Over the past fifteen years, several circuits have iterated conflicting pleading standards for alleging a prohibited transaction, creating confusion and incongruity.[28] This disruption in the circuits is the crux of the dilemma regarding § 1106(a)(1)(C).[29] The Supreme Court has previously denied petitions for writs of certiorari to review the pleading standard under § 1106(a)(1)(C), but in 2024, the Supreme Court granted a cert petition to consider a Second Circuit decision.[30] The Supreme Court thus has an opportunity to set a single pleading standard for ERISA litigants across the country, ensuring fair and equitable treatment for all plaintiffs.

§ 3 – DISCUSSION OF CIRCUIT SPLITS

A. Schools of Thought – Summarizing the Splits

The federal circuit courts have developed differing variations as to the pleading standards for prohibited transactions under 29 U.S.C. § 1106(a)(1)(C). While not every circuit has addressed this issue, six of the thirteen circuits have provided opinions on the matter.[31] The outcome of these decisions have created four separate interpretations of the necessary pleading standard to state claim under the statute: (1) applying the statutory text as written; (2) requiring plaintiffs to show that the fiduciary had intent to engage in a prohibited transaction; (3) exempting the first contract between the plan and the fiduciary; and (4) requiring plaintiffs to plead facts that would implicate the § 1108 exemptions.

---

[28] *See Cunningham v. Cornell* 86 F.4th 961 (2d Cir.2023); *See also Albert v. Oshkosh Corp.*, 47 F.4th 570, 584-85 (7th Cir. 2022).
[29] 29 U.S.C. § 1144.
[30] *See supra* note 11.
[31] The Second, Third, Seventh, Eighth, Ninth and Tenth Circuits have decided cases on the matter.

B. "As Written" – The Plain Reading Interpretation

i. *Braden v. Wal-Mart Stores, Inc. - The Eighth Circuit's Pioneering Expedition*

The Eighth Circuit was the first circuit to provide an opinion on the pleading standard under 29 U.S.C. § 1106(a)(1)(C) in *Braden v. Wal-Mart Stores, Inc*.[32] In *Braden*, a plaintiff brought a putative class action suit against Wal-Mart regarding the employer's administration of an ERISA-covered profit sharing and 401(k) plan.[33] The plaintiff-class alleged that Wal-Mart had entered into an arrangement with Merrill Lynch, the administrator of Wal-Mart's retirement plan, in which Merrill Lynch received undisclosed amounts of revenue sharing payments in exchange for services rendered to the retirement plan.[34] Further, the plaintiff-class alleged that these revenue sharing payments, a normal compensation practice[35] for retirement plan administrators, were *not* reasonable compensation, but were "kickbacks paid by the mutual fund companies in exchange for inclusion of their funds in the plan."[36] Because these revenue sharing payments were undisclosed and confidential, the plaintiffs did not possess proof that these revenue sharing payments were actually kickbacks.[37] Additionally, the plaintiff-class claimed that there was a dearth of investment options for Wal-Mart employees, and the mutual funds, managed by Merrill Lynch, carried excessive fees and underperformed compared to other, similar mutual funds.[38] The District Court for the Western District of Missouri held that Wal-Mart had no duty to disclose these confidential payments to the plaintiffs.[39] Because the plaintiffs could not show that

---

[32] 588 F.3d 585 (8th Cir.2009).
[33] *Id.* at 589.
[34] *Id.* at 601.
[35] *See Ramos* at 774-775. In a revenue-sharing agreement, the number of total assets will determine the compensation that the retirement plan administrator will receive. Revenue-sharing agreements are a common thread in the cases splitting the circuits.
[36] *Id.* at 590.
[37] *See Id.* (stating that the retirement plan trust agreement requires Wal-Mart to keep the amounts of the revenue sharing payments confidential).
[38] *Id.* at 596.
[39] *Id.* at 591.

the confidential revenue sharing payments involved unreasonable compensation for services provided by Merrill Lynch, as required by § 1108, the plaintiffs failed to sufficiently plead a cause of action under § 1106(a)(1)(C). [40] Thus, the District Court dismissed the claim.[41]

On appeal, the Eighth Circuit disagreed with the lower court's conclusion, holding that the plaintiff-class had sufficiently pled a claim under § 1106.[42] The Eighth Circuit determined that, based on a plain reading of the prohibited transactions statute, the burden rested with Wal-Mart to show evidence "that no more than reasonable compensation [was] paid" for the administration of the its retirement plan, not the plaintiff.[43] Under this rationale, the Eighth Circuit embraced an expansive reading of § 1106(a)(1)(C).[44] The court supported their position, holding that (1) the prohibited transactions statute does not require a plaintiff to make an allegation of unreasonableness;[45] (2) the construction of the prohibited statute is consistent with principles of trust law;[46] and (3) the plaintiff could not show that the revenue sharing payments were unreasonable because these agreements remained confidential.[47] The Eighth Circuit continued, holding that the § 1108(b)(2)(A) exemption for "reasonable compensation" paid for "necessary services" should be understood as an affirmative defense to a prohibited transaction.[48]

The *Braden* court's interpretation of § 1106(a)(1)(C) is clear: plaintiffs alleging a prohibited transaction claim for services pertaining to the plan need not plead anything more than

---

[40] *Id.*
[41] *Id*.
[42] *Id.* at 601
[43] *Id. See also* 29 U.S.C. § 1108(b)(2).
[44] *Cunningham v. Cornell Univ.*, 86 F.4th 961, 974 (2d Cir.2023)
[45] *Braden* at 601.
[46] *Id.* at 602; *See also Fulton Nat'l Bank v. Tate*, 363 F.2d 562, 571-72 (5th Cir. 1966) (stating that the beneficiary, or plan participant, only needs to show that the fiduciary allowed themselves to be placed in a position in which there could be a conflict of interest between the beneficiary and the fiduciary)
[47] *Braden* at 602.
[48] *Id.* at 601; *See also Cunningham v. Cornell Univ.*, 86 F.4th 961, 974 (2d Cir.2023) (discussing the Eighth Circuit's holding on § 1108(b)(2)(A) and stating that the defense need not be addressed for a complaint to survive a motion to dismiss).

the claim itself to which the defendant must show that reasonable compensation was paid for the necessary services to the plan. In this instance, a well-pleaded prohibited transaction claim could have forced one of the largest employers in the United States,[49] with billions of dollars in retirement assets,[50] to draw back the curtain on their retirement plan and disclose a previously confidential revenue sharing agreement.[51] Based on Wal-Mart's opposition to disclosing this agreement, it is reasonable to see why *Braden* ultimately ended in a settlement.[52]

ii. *Bugielski v. AT&T Services – The Ninth Circuit Takes the Statute at Face Value*

Similarly to the Eighth Circuit, the Ninth Circuit addressed a prohibited transactions claim by relying on the statutory text of § 1106(a)(1)(C).[53] In *Bugielski*, plaintiffs brought a class action suit against their former employer, AT&T, for failing to disclose significant compensation that their retirement plan administrator, Fidelity, received.[54] As part of its service offering to AT&T, Fidelity received compensation based on a flat fee per participant for their recordkeeping services;[55] however, Fidelity also received additional compensation that it may not have

---

[49] Gary Hoover, America's Largest Employers 1994-2022, (Aug. 17, 2023), https://americanbusinesshistory.org/americas-largest-employers-1994-2022/.
[50] *See Braden* at 589. Wal-Mart's retirement plan contained $10 billion in assets at the time of the lawsuit.
[51] Shortly before *Braden* settled, EBSA issued a final regulation requiring that service providers to ERISA-covered retirement plans disclose specified information to a responsible plan fiduciary about direct and indirect compensation that the service provider expects to receive in connection with its services to the plan in order for the contract or arrangement to be considered "reasonable" under 29 U.S.C. § 1108(b)(2)(A). 77 Fed. Reg. at 5655 (Feb. 3, 2012). EBSA stated that the "mandatory proactive disclosure will reduce the plan's information costs, discourage harmful conflicts, and enhance service value." *Id.* at 5651. The overall goal of these disclosures is to enhance fee transparency. *See* Kathryn Moore, NYU REVIEW OF EMPLOYEE BENEFITS § 6.02 (2024). *See also* 29 C.F.R. § 2550.408b-2.
[52] Thom Weidlich, *Wal-Mart $13.5 Million Retirement-Suit Accord is Approved*, Bloomberg, (Mar. 7, 2012), https://www.bloomberg.com/news/articles/2012-03-07/wal-mart-13-5-million-retirement-suit-settlement-is-approved.
[53] *Bugielski v. AT&T Servs.*, 76 F.4th 894 (9th Cir.2023).
[54] *Id.* at 899.
[55] Defined contribution plans utilizing a "flat fee per participant" fee agreement easily pay millions of dollars per year in recordkeeping fees to an administrator if the plan has tens of thousands of participants. The compensation that Fidelity received from AT&T was likely substantial based on this recordkeeping fee alone. *Compare Hughes v. Northwestern Univ.*, 63 F.4th 615, 631 (7th Cir.2023) (stating that Northwestern's retirement plan paid roughly $4 million in annual recordkeeping fees based on an approximate number of 30,000 employees) *with Albert* at 579 (a rough calculation shows that 12,000 participants at an average recordkeeping fee of $87 per plan participant per year would result in approximately $1 million in annual fees to the administrator).

disclosed.[56] The complaint alleged that Fidelity received compensation from the plan through two additional sources: (1) Fidelity's proprietary BrokerageLink platform, which allowed plan participants to invest in mutual funds not available through AT&T's retirement plan for a fee, and (2) through an asset-based fee agreement with Financial Engines Advisors, a third-party who provided optional investment advisory services to plan participants.[57] Since AT&T's express authorization allowed Fidelity to provide plan participants with access to BrokerageLink and permitted Financial Engines to access plan participants' accounts, AT&T had knowledge that these transactions were taking place as part of its plan offering.[58] The question became whether these transactions were prohibited under § 1106(a)(1)(C) since the court needed to determine if the services in which Fidelity was receiving compensation for were "reasonable" under § 1108 and required a disclosure to AT&T.[59]

The District Court for the Central District of California declined to fully analyze the prohibited transaction claim, stating that the prohibited transaction exemption requirement under § 1108(b)(2) was satisfied in showing that Fidelity received reasonable compensation for its recordkeeping services;[60] however, the lower court did not examine the reasonableness of the compensation Fidelity received from BrokerageLink and Financial Engines since the lower court believed that AT&T, as the plan sponsor, had no obligation to consider the additional monies that

[56] *Id.* at 898.
[57] *Id.*
[58] *Id.*
[59] *Id* at 899. For a services contract to be considered "reasonable", a party in interest (a covered service provider providing retirement plan administrative services, in this case) must disclose detailed information to the plan's fiduciary about all compensation the party expects to receive in connection with the services provided pursuant to the contract or arrangement. 29 C.F.R. § 2550.408b-2(c)(1)(iv). The disclosure requirements "should be construed broadly to ensure that responsible plan fiduciaries base their review of a service contract or arrangement on comprehensive information," and that the disclosed information "will assist plan fiduciaries in understanding the services and in assessing the reasonableness of the compensation" the party in interest will receive. *Bugielski* at 910.
[60] *Id.* at 900.

Fidelity made from the plan as compensation.[61] Accordingly, the District Court ruled in summary judgment for AT&T.

On de novo review, the Ninth Circuit found that the lower court failed to apply the correct substantive law to the compensation Fidelity received from the third party. As a threshold issue, the court determined that the contract amendments made to the plan caused the plan to "engage in a transaction that constituted a furnishing of services between the plan and a party in interest," allowing the plaintiff to plead under § 1106(a)(1)(C).[62] The Ninth Circuit observed that transactions between third parties and plan administrators "can create conflicts of interest between service providers and their clients," and that these conflicts of interest require disclosure under § 1108(b)(2)(A).[63] AT&T urged the Ninth Circuit to depart from the text of § 1106(a)(1)(C) and introduce an intent element into the statutory reading, similar to the Third Circuit's interpretation.[64] The court rejected this proposition, holding that the language of § 1106(a)(1)(C) does not include any intent requirement.[65] By refusing to add an intent requirement to the pleading standard, the Ninth Circuit aligned with the Eighth Circuit in interpreting how plaintiffs bring claims under § 1106(a)(1)(C). The *Bugielski* court ultimately remanded the case to the District Court to determine whether the total compensation received by Fidelity, including the compensation received from BrokerageLink and Financial Engines, was "no more than reasonable" for its services.[66]

---

[61] *Id.*
[62] *Id.* at 901 (quoting the statutory language of § 1106(a)(1)(C)).
[63] *Id.* at 902. *See also* 77 Fed. Reg. at 5650.
[64] *Id.* at 906 (reading in *Sweda v. University of Pennsylvania*, 923 F.3d 320, 339 (3d Cir. 2019)).
[65] *Id. See also Hardt v. Reliance Standard Life Ins. Co.*, 560 US 242, 251 (2010) (holding that ERISA's statutes must be enforced in plain and unambiguous statutory language).
[66] *Id.* at 912 (quoting 29 C.F.R. § 2550.408b-2(a)(3)).

The plain language interpretation that the Eighth and Ninth Circuits abide by is in line with the purported policy goals of ERISA[67] and encourages plan participants to bring claims to hold employers accountable for their administration of employee benefit plans. Because employees typically lack information regarding the administration of such plans,[68] asking a plaintiff to show an element of intent would frustrate ERISA's purpose. As the *Braden* court acknowledges, "If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer."[69] While employers may argue that such a standard may encourage fishing expeditions,[70] the prohibited transaction allegation must still contain enough factual allegations to be plausible,[71] shifting the burden to the employer to show that a relevant exemption applies to the alleged prohibited transaction.

C. "Something Else" – An Element of "Intent" Is Required

On the other side of the split, some circuits have rejected a textualist interpretation of § 1106(a)(1)(C) in favor of requiring an additional element to state a claim. While there is no consensus among these circuits as to what intentional act is required, there is an overarching commonality between these two courts in how they have interpreted *Lockheed Corp. v. Spink*.[72] The Third Circuit and Seventh Circuit utilize this case to conclude that a literal reading of § 1106(a)(1) is implausible.[73] Even though *Lockheed Corp*. did not specifically focus on § 1106(a)(1)(C) claims, the Supreme Court addressed the legislative meaning of an § 1106(a)(1)

[67] Specifically, 29 U.S.C. § 1001(b) addresses the standard of conduct fiduciaries are subjected to under ERISA. Those two policy reasons being: to protect interstate commerce and to protect the interests of participants in employee benefit plans and their beneficiaries.
[68] 29 U.S.C. § 1001(a).
[69] *Braden* at 598.
[70] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). *See also Braden* at 598.
[71] *See Braden* at 601.
[72] 517 U.S. 882 (1996).
[73] *See Sweda* at 337. *See also Albert* at 584-85.

transaction, placing prohibited transactions for services under an ERISA plan in this analysis.[74] Justice Thomas suggested that "payment for benefits is…not a transaction in the sense that Congress used the term" in the prohibited transactions statute and is more akin to a "commercial bargain."[75] Crucially, the prohibited transactions under § 1106(a)(1) all involve bargains with plan insiders and the use of plan assets.[76] These two elements can potentially harm plans covered under ERISA by leading to underfunding.[77] While *Lockheed Corp.* specifically focuses on § 1106(a)(1)(D),[78] the Third and Seventh Circuits agree that a textualist approach of § 1106(a)(1)(C) would be "absurd"[79] and "nonsensical."[80] While these circuits agree that a textualist approach is incongruous to Congress's legislative intent, the Third and Seventh Circuits differ as to what requirement is necessary to sufficiently plead a claim under § 1106(a)(1)(C).

i. *Sweda v. Univ. of Penn. – The Third Circuit Requires Intent*

Over ten years after *Braden* was decided, the Third Circuit decided to break from the textualist interpretation of § 1106(a)(1)(C) in *Sweda v. University of Pennsylvania*.[81] Similar to the facts surrounding *Braden*, the Third Circuit addressed a class action brought under ERISA in which the plaintiff-class claimed that the University of Pennsylvania ("Penn") failed to make prudent decision-making regarding administration of its retirement plan.[82] As a large employer with nearly $4 billion in assets between two retirement plan providers, Penn was scrutinized for

[74] *Lockheed Corp*. at 892-893.
[75] *Id.* at 893.
[76] *Id*.
[77] *Id.*
[78] 29 U.S.C. § 1106(a)(1)(D) prohibits plan fiduciaries from engaging in "transfer to, or use by or for the benefit of a party in interest, of any assets of the plan."
[79] *Sweda* at 337.
[80] *Albert* at 585.
[81] 923 F.3d 320 (2019).
[82] *Sweda* at 324.

failing to remove underperforming mutual fund and annuity options as well as failing to reign in excessively large, revenue sharing payments to their retirement plan service providers, TIAA-CREF and Vanguard.[83] In addition to alleging that the defendants breached their § 1104(a) fiduciary duties of prudence and loyalty, the plaintiff-class alleged that the defendants caused the plan to enter into prohibited transactions with a service provider, violating § 1106(a). The District Court for the Eastern District of Pennsylvania dismissed the prohibited transaction claims, holding that the plaintiffs needed to show that Penn possessed a "subjective intent to benefit a party in interest" as an element of a prohibited transaction.[84]

The District Court arrived at this conclusion based on earlier precedent set in *Reich v. Compton*,[85] in which the Third Circuit held that subjective intent was necessary to bring a claim under § 1106(a)(1)(D)[86] because of the statutory phrase "for the benefit of."[87] The *Reich* court held that if subjective intent was not included into a reading of the statute, then any transaction falling under § 1106(a)(1)(D) may be prohibited if the transaction benefits a party in interest, even if a plan were to be greatly advantaged by such a transaction.[88]

On appeal, the *Sweda* court engaged in an analysis of § 1106(a)(1), first acknowledging that while other circuits may have a different application of the statute,[89] the Third Circuit was

[83] *Id.*
[84] *Id.* at 325.
[85] 57 F.3d 270 (3d Cir.1995).
[86] Fiduciaries are prohibited from engaging in transactions that directly or indirectly involve "transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." 29 U.S.C. § 1106(a)(1)(D).
[87] *Id*. at 279. The arguments in *Reich* are interesting, more so because the Secretary of the U.S. Department of Labor is involved with the proceedings. The Secretary, the plaintiff in *Reich*, argued for a different, albeit lower requirement to be added to § 1106(a)(1)(D). The Secretary argued for a middle ground, stating that a benefit to a party in interest that was more than "minimal, incidental, or fortuitous" would be considered a prohibited transaction. The defendants contended that "for the benefit of" meant "subjective intent."
[88] *Id*.
[89] *Sweda* at 336 (citing *Allen v. GreatBanc Trust Co*., 835 F.3d 670, 676 (7th Cir. 2016)).

not inclined to follow such an application[90] because doing so "would require a fiduciary to plead reasonableness as an affirmative defense under § 1108 to avoid suit" for "ordinary" and "ubiquitous" transactions such as service agreements.[91] The Third Circuit believed that exposing fiduciaries to liability for every transaction in which services are rendered to an ERISA plan was not the intention of Congress.[92] By combining these rationales, the Third Circuit extended their application of § 1106(a)(1)(D) and applied the subjective intent element to prohibited transactions for services under § 1106(a)(1)(C), establishing harmony within the Circuit's understanding of the statute.[93] By applying this element to the plaintiff-class's pleading standard, the Third Circuit was able to affirm dismissal of the prohibited transaction claim for failure to show that Penn had a subjective element of intent when engaging in an ordinary service transaction with TIAA-CREF and Vanguard.[94]

ii. *Albert v. Oshkosh Corp. – Self-Dealing in the Seventh Circuit*

The Seventh Circuit considered similar policy concerns when they addressed *Albert v. Oshkosh Corp.*[95] In *Albert*, a former employee of Oshkosh Corporation ("Oshkosh") brought an individual suit and a putative class action suit against Oshkosh for mismanagement of retirement plan assets.[96] Oshkosh retained a recordkeeper, Fidelity, and an investment advisor, Strategic

[90] *Id.* The *Sweda* court rejects *Allen* for its broadness. The 7th Circuit created a per se rule to § 1106(a)(1) transactions, allowing plaintiffs who allege such transactions to make a pleading without showing the unreasonableness of fees in a transaction. The *Sweda* court rejects this rule because the 7th Circuit applied it to a transaction that appeared to be self-dealing, whereas the *Sweda* court is more concerned with fees obtained from ordinary service agreements.
[91] *Sweda* at 336. The Third Circuit reasons that the Supreme Court came to this same conclusion in *Lockheed Corp*.
[92] *Id.* at 337.
[93] *Id* at 338.
[94] *Id.* at 340.
[95] *Albert v. Oshkosh Corp.*, 47 F.4th 570 (7th Cir.2022).
[96] *Id.* at 573.

Advisors, Inc.,[97] to assist in the administration of Oshkosh's retirement plan.[98] Fidelity received compensation through a revenue-sharing agreement[99] and Strategic Advisors received investment-advisor fees.[100] The pertinent claim alleged that Oshkosh engaged in prohibited transactions with both Fidelity and Strategic Advisors by paying excessive fees for their services, placing this claim squarely within § 1106(a)(1)(C).[101]

The Wisconsin Eastern District Court dismissed the plaintiff's prohibited transactions claim for failing to state a claim, agreeing with Oshkosh that a prohibited transaction claim cannot survive if the claim *only* alleges that the plan is paying a party in interest for services in which the plan bargained for with said party in interest.[102] The lower court's identification of the inherent circular reasoning[103] in such claims indicates that these courts are looking for something more to be alleged to bring a prohibited transactions claim.[104]

---

[97] *Id.* at 575. The Seventh Circuit notes that Strategic Advisors is an entity owned by Fidelity, so while the two appear to be legally separate organizations in the suit, it is likely that the two entities have similar, if not, concurrent interests.
[98] *Id.* At the time of the lawsuit, Oshkosh had over 12,000 plan participants with $1.1 billion in plan assets to manage.
[99] *Id.* at 580.
[100] *Id.* at 582.
[101] *Id.* at 583-584.
[102] *Id.*
[103] Other District Courts have identified the circular reasoning that the plaintiff alleged in stating this claim. *See Sellers v. Anthem Life Ins. Co*., 316 F. Supp. 3d 25, 34 (D.D.C. 2018); *See also Sacerdote v. New York Univ.*, S.D.N.Y. No. 16-cv-6284 (KBF), 2017 U.S. Dist. LEXIS 137115, at *41 (Aug. 25, 2017).
[104] The Wisconsin Eastern District Court relied on the Seventh Circuit's decision in *Divane v. Northwestern University*, 953 F.3d 980 (7th Cir.2020), to assert that either allegations of flawed decision-making or self-dealing were needed to establish a complaint. *Albert v. Oshkosh Corp.*, E.D.Wis. No. 20-C-901, 2021 U.S. Dist. LEXIS 166750, at *14 (Sep. 2, 2021) (quoting *Martin v. CareerBuilder, LLC*, N.D.Ill. No. 19-cv-6463, 2020 U.S. Dist. LEXIS 115002, at *10-11 (July 1, 2020) ("[the Seventh Circuit] has accordingly affirmed dismissal of ERISA complaints alleging that some combination of high fees and under-performing funds signaled imprudence, where the plans in question offered some cheaper alternatives, and the complaint did not include allegations speaking to flawed decision-making or self-dealing"). *Divane* involved an § 1106(a)(1)(D) claim in which the plaintiff alleged that Northwestern University engaged in a prohibited transaction each time Northwestern paid fees to their recordkeeping administrator. The court dismissed the claim because the plaintiff failed to show that any defendant benefited from the collected fees, that the fees were assets of the plans, or that any defendant knew or should have known that collecting routine fees may violate ERISA. However, in *Hughes v. Northwestern University*, 595 U.S. 170 (2022), decided months after the lower court's opinion, the Supreme Court vacated *Divane*, so the Seventh Circuit could not consider this support on the subsequent appeal in *Albert*.

On appeal, the Seventh Circuit looked to other circuits, as well as its own precedent, to determine how to address the plaintiff's prohibited transaction claim. To start its analysis, the Seventh Circuit recognized that other circuits, like the Third Circuit in *Sweda*, have declined to take a strict, textual approach to § 1106(a)(1)(C) since a literal approach would classify necessary, third-party services as prohibited transactions.[105] Referring to another Seventh Circuit case, the panel addressed arguments made by both the plaintiff and Oshkosh regarding *Allen v. GreatBanc Trust Co.*[106] The plaintiff argued that an allegation under § 1106(a)(1) can be made broadly whereas Oshkosh argued that the *Allen* court did not even address the circular transaction argument because *Allen* only addressed two, singular transactions, not ongoing ones.[107] The Seventh Circuit agreed with Oshkosh, recognizing that the transaction in *Allen* "looked like self-dealing" whereas the transactions in *Albert* involved ordinary payments for plan services.[108] Absent an allegation of self-dealing, the Seventh Circuit affirmed the lower court's dismissal for failure to state a claim.[109]

iii. *Justifications for Breaking from the Plain Text of the Statute*

By adding an additional requirement to § 1106(a)(1), the Third and Seventh Circuits both set higher pleadings standards for plaintiffs. Justifications for this narrowing of scope are evident in each holding: a literal reading of § 1106(a)(1)(C) would lead to an "absurd result inconsistent with ERISA's purpose,"[110] causing needless litigation in the judicial system;[111] § 1106(a)(1) is

---

[105] *Albert v. Oshkosh Corp.*, 47 F.4th 570, 584 (7th Cir.2022). *See Sweda* at 337.
[106] 835 F.3d 670 (7th Cir. 2016). In *Allen*, an employee stock ownership plan accepted a loan from their employer to fund a stock purchase of their employer's stock; however, the employer's stock price took a precipitous dive after the agreement and the employees had to pay interest on the loan. The Seventh Circuit ruled that the plaintiff had sufficiently pled a prohibited transaction claim.
[107] *Albert* at 585.
[108] *Id.*
[109] *Id.* at 586
[110] *Albert* at 585.
[111] *See Ramos* at 787. Even though *Ramos* was examined by the Tenth Circuit, the Tenth Circuit determined that a literal reading would cause judicial inefficiency. *See also Lockheed Corp.* at 893.

meant to only prevent rather transactions that present legitimate risks to participants and beneficiaries, not necessary service transactions;[112] and, in determining legislative intent, Congress likely did not consider regular administrative service payments as prohibited transactions when drafting § 1106.[113] While these rationales allow these federal circuits to narrow the scope of the text of the statute, adding "intent" cuts against the uniform standards put forth by ERISA and limits the rights of plan participants and their beneficiaries wishing to bring a prohibited transaction claim against their employer or the plan itself.[114]

D. "Prior Relationship"– The First Contract is Free

i. *Ramos v. Banner Health – Prior Ties Guide the Tenth Circuit*

While the two pleading standards asserted by the Third and Seventh Circuits involve elements that can be directly factored into the alleged prohibited transaction itself, the Tenth Circuit took a different approach, examining the plan's relationship, or lack thereof, of a "party in interest" and determining the meaning of the phrase in the context of § 1106(a)(1).[115] In *Ramos*, employees who participated in a 401(k) contribution plan brought a class action suit against their employer, Banner Health ("Banner"), alleging that the plan participated in a prohibited transaction under § 1106 with its retirement plan service administrator, Fidelity.[116]

---

[112] *Sweda* at 338.
[113] *Sweda* at 337. *See also Ramos* at 787.
[114] Even if plaintiffs are unable to plead facts alleging that the plan engaged in "intent" or "self-dealing" for a prohibited transactions claim, plaintiffs may still be able to bring a claim alleging a breach of fiduciary duty under 29 U.S.C. § 1104. These two claims are commonly seen together in litigation. *See Sweda* at 327 (stating that, despite the overlap between § 1104(a) and § 1106(a)(1)(C), "a fiduciary who breaches the duties under § 1104(a) does not necessarily violate § 1106(a)."). *See also Braden* at 594. To be successful on an § 1104 claim, the plaintiff must prove that the actions of the fiduciary were not prudent, not loyal, or both. 29 U.S.C. § 1104(a)(1). Based on the decisions made by the Third and Seventh Circuits, requiring facts showing "intent" or "self-dealing" in a pleading would seemingly overlap with facts necessary to state an § 1104(a) claim; however, a strict, textual reading of § 1106(a)(1)(C), the interpretation taken by the Eighth and Ninth Circuits, would not require the plaintiff to plead facts showing imprudent or disloyal actions from the fiduciary, and would require the fiduciary to show that no more than reasonable compensation was paid for the necessary services to the plan.
[115] *Ramos* at 769.
[116] *Ramos* at 776.

When Fidelity began offering its services to the plan in 1999, Banner and Fidelity agreed that Fidelity was to be compensated through an uncapped, revenue sharing arrangement.[117] As Banner became larger in size, growing to over 10,000 employees and over $1 billion dollars in assets, Fidelity earned more money from the revenue-sharing agreement.[118] The plaintiff-class was especially concerned with the fact that Banner, for eighteen years, never performed a market analysis to evaluate Fidelity's service fee.[119] This initial agreement, the plaintiff-class alleged, constituted a prohibited transaction.[120]

The District Court for the District of Colorado disagreed with the plaintiff-class and dismissed the prohibited transaction claim, concluding that the uncapped, revenue-sharing agreement was not a prohibited transaction.[121] The district court stated that § 1106 "only prohibits service relationships with person[s] who are 'parties in interest' by virtue of some other relations…[and] does not prohibit a plan from paying an unrelated party, dealt with at arm's length, for services rendered."[122] The plaintiff-class appealed the district court's interpretation of

---

[117] *Id.* at 774-75. While not uncommon, uncapped revenue-sharing arrangement do not set an upper limit on how much money the retirement plan administrator can make from the plan.
[118] *Id.*
[119] *Id. See also* Medill, *Regulating Fiduciary Outsourcing*, 102 IOWA L. REV. 505, 551. While employers are not required to evaluate the service fee every year, most plans solicit requests-for-proposals from vendors, allowing them to compare vendors based on a market analysis of fees and services each vendor offers. Notably, there is no regulatory guidance on how often a plan should solicit such proposals. Banner's counsel acknowledged that plans evaluate these fees every five to seven years; however, Banner did not take part in any such process between 1999 and 2017. *Ramos* at 775.
[120] *Ramos* at 776.
[121] *Id.*
[122] *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1137 (D.Colo.2020) (quoting *Sellers* at 34). The District Court for the District of Colorado favors the interpretation of a "party in interest" taken by the *Sellers* court. The DC District Court in *Sellers* evaluated the meaning of a "party in interest" for a prohibited transactions claim that was brought against a health insurer. The DC District Court differentiated subsection (E) from the other subsections of the prohibited transactions statute, stating that "subsection (E) prohibits plans from acquiring employer securities under certain conditions, from *anyone*." *Sellers* at 34. The Court concluded that subsections (A) through (D) of the prohibited transactions statute "cannot be read to categorically prohibit the very transactions that cause a person to obtain the status of a party in interest. Otherwise, Subsections (A) through (D) would be just like Subsection (E): they would prohibit plans from engaging in certain forms of economic activity with *anyone*, regardless of that person or entity's relationship to the plan." *Id*. *See also D.L. Markham DDS v. Variable Annuity Life Ins. Co.*, 88 F.4th 602, 609 (5th Cir.2023).

§ 1106(a)(1), urging the Tenth Circuit to interpret the statute in an expansive, broad manner, similarly to the textualist approach adopted by the Eighth and Ninth Circuits.[123] Specifically, The plaintiff-class argued for a broadened definition of a "party in interest" by stating that Fidelity, just by furnishing recordkeeping and administrative services to the plan, should be considered a "party in interest" to the plan.[124]

The Tenth Circuit began their analysis by identifying the issue: whether an initial agreement with a service provider constituted a prohibited transaction with an ERISA plan.[125] If the initial agreement for Fidelity's services simultaneously transformed Fidelity into a party in interest, then under the plaintiff-class's argument, this would be a prohibited transaction under § 1106.[126] The *Ramos* court determined that this argument was "absurd" and hinged on circular reasoning, adding that service agreements are (1) arm's length transactions and (2) not the type of prohibited transaction that ERISA is meant to deter.[127] The Tenth Circuit determined that Fidelity was not a party in interest at the time of the initial service agreement since there was no prior relationship between Banner and Fidelity.[128] Because the plaintiff-class provided no factual evidence to show that the service agreement between Fidelity and Banner was not an arm's length transaction, or that Fidelity had a pre-existing relationship with Banner, the Tenth Circuit affirmed the dismissal,[129] concluding that "some prior relationship must exist between a

---

[123] *Ramos v. Banner Health*, 1 F.4th 769, 774 (10th Cir.2021).
[124] *Id.* at 786.
[125] *Id.* at 787.
[126] *Id.*
[127] *Id.*
[128] *Id. See* 29 U.S.C. § 1002(14)(B); Some courts have taken a textualist approach to the definition of a "party in interest" and have focused on the verbiage of "providing" services to "such a plan" in analyzing prohibited transaction claims. *See also Markham* at 610. The Fifth Circuit in *Markham* demonstrates this approach, stating that "The word 'providing,' used [in the statute] as a present participle, most commonly describes a person who is currently providing services. Further, the modifying phrase 'to such plan' limits the definition to entities providing services to the plan at issue—not service providers in general." *Id.*
[129] *Ramos* at 787-88.

fiduciary and a service provider" in order for the service provider to be considered a party in interest under § 1106(a)(1).[130]

In sum, the Tenth Circuit allows for the initial service contract between a fiduciary and a service provider to be exempted from ERISA's prohibited transaction rules, allowing the first contract to be "free" from § 1106(a)(1) requirements. Under the framework taken by the *Ramos* court, a plaintiff pleading facts that the fiduciary and the service provider already have a relationship, and, presumably, a history of multiple, successive service contracts, would sufficiently show that the service provider is a "party in interest" in the alleged prohibited transaction, shifting the burden to the defendant to prove that the services were necessary and no more than reasonable compensation was paid for the services.[131] Essentially, this approach carves-out the initial service contract, since the service provider is not considered a "party in interest" until *after* consummation of the initial service agreement.[132] The Tenth Circuit approach is distinct from the Third and Seventh Circuits because the Tenth Circuit scrutinizes the relationship between the fiduciary and the alleged party in interest whereas the Third and Seventh Circuits examines the fiduciary's acts, requiring the plaintiff to plead facts alleging

[130] *Id.* Other Federal Circuits have taken similar approaches to showing that initial service contracts are not prohibited transactions. *See Peters v. Aetna Inc.,* 2 F.4th 199, 229 (4th Cir. 2021) ("[I]f a service provider has no prior relationship with a plan before entering a service agreement, the service provider is not a party in interest at the time of the agreement.") (quoting *Sweda* at 337 n.12). *See also Danza v. Fidelity Management Trust Co.,* 533 F. App'x 120, 125 (3d Cir. 2013). These courts have taken a textualist position in interpreting the definition of a "party in interest" and applying the definition to § 1106(a)(1).

[131] *Ramos* at 786. *See also Markham* at 610-11. The Fifth Circuit in *Markham* declined to apply a definition of a "party in interest" to future service providers, favoring the *Ramos* approach by looking at the preexisting relationship of a plan.

[132] Exempting an initial service contract does allow for possible abuse, since fiduciaries would be incentivized to constantly seek out new service providers rather than renew existing contracts, ensuring that the first contract would be exempt. Brief for the Secretary of Labor as Amicus Curiae, p. 24, *D.L. Markham DDS v. Variable Annuity Life Ins. Co.*, 88 F.4th 602 (5th Cir.2023). By allowing the first contract to be "free" from the prohibited transaction requirements, the Secretary of Labor contended that initial contracts with unreasonable or indefinite terms would "be forever immune from ERISA" and even renewal contracts "simply by letting an initial contract lapse" would allow service providers to "shed their party-in-interest status—and then [execute] a new contract." *Id.* The Secretary of Labor takes a position favorable to the plaintiffs in *Ramos*, stating that "there is no reason that this statutory framework should apply only to renewal contracts with service providers but not to initial contracts." *Id.* at 25.

either intent or self-dealing, that occur in the alleged prohibited transactions claim.[133] Ultimately, the *Ramos* court reaches a similar conclusion to the *Albert* court – requiring the plaintiff to plead additional facts when alleging a prohibited transaction prevents an overextension of ERISA litigation.[134]

E. Another Approach?

i. *Cunningham v. Cornell Univ. – The Second Circuit's Synthesis Approach*

Based on the holdings of the other five circuits, three schools of thought emerged when evaluating § 1106(a)(1)(C) pleadings – courts will either embrace a literal reading of the prohibited transactions statute and allow nothing more, require an additional element of intent or self-dealing to narrow the scope of the statute, or exempt the initial service contract between the plan and the service provider. Alternatively, when presented with similar allegations regarding prohibited transactions for services, the Second Circuit decided to take a different approach in *Cunningham v. Cornell Univ.*, rejecting the literal approach of the Eighth and Ninth Circuits, but also deciding not to conform with the approaches taken by the Third, Seventh, and Tenth Circuits. Because of *Cunningham*'s divergent approach, the Supreme Court has granted certiorari to bring clarification as to what pleading standard is required to state an § 1106(a)(1)(C) claim.[135]

In *Cunningham*, a plaintiff-class alleged that Cornell University ("Cornell") and its appointed fiduciaries failed to monitor and control recordkeeping fees paid to both TIAA-CREF and Fidelity.[136] TIAA-CREF and Fidelity provided services for two different retirement plans for Cornell, managing over $3.3 billion in assets among approximately 30,000 participants.[137] Both

---

[133] While this is a major difference between these two approaches, an important commonality between these Federal Circuits is that these courts require the plaintiff to plead additional facts to shift the burden to the defendant and prove that an § 1108 exemption applies.
[134] *Ramos* at 787. *See Albert* at 585-86.
[135] *Cunningham v. Cornell Univ.*, 86 F.4th 961 (2d Cir. 2023), *cert. granted* __ S.Ct. __ (2025).
[136] *Id.* at 970-71.
[137] *Id.* at 969.

administrators were paid fees through a revenue-sharing arrangement; however, the plaintiff-class alleged that, through this agreement, the plan was paying at least three times more per participant than what a "reasonable recordkeeping fee" would have been.[138] The complaint alleged that administrators were paid more than what was reasonably necessary for their services, implying that participant assets were lost as a result of Cornell's failure to control administrative costs.[139] Presented with this issue, the District Court of the Southern District of New York sided with the Third, Seventh, and Tenth Circuits in rejecting a textualist interpretation of § 1106(a)(1)(C), and concluded, that to state a claim under the statute, the plaintiff must show self-dealing or disloyal conduct.[140]

The Second Circuit began their analysis of the prohibited transaction statute by rejecting the literal approach adopted by the Eighth and Ninth Circuits, but the court also rejected the idea that § 1106 was only triggered if there were self-dealing.[141] Instead, the Second Circuit held that the § 1108 exemptions are incorporated into the pleading standard of a prohibited transactions claim, requiring complaints to "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."[142] This view differs from that of the Eighth Circuit*,* which held that the § 1108 exemptions were an affirmative defense and not part of the plaintiff's pleading burden.[143]

---

[138] *Id.* at 978. The plaintiff-class's complaint contained a hypothetical calculation stating that a flat fee of $35 per participant per year would be "reasonable." Allegedly, for both plans, Cornell was annually paying between $115 to $200 per participant.
[139] *Id.*
[140] *Id.* at 974.
[141] *Id.* at 975.
[142] *Id.* (quoting the statutory language from the prohibited transactions statute and its relevant exemption 29 U.S.C. §§ 1106(a)(1)(C), 1108(b)(2)(A)).
[143] *Braden* at 601.

By opting to synthesize § 1106(a)(1) and § 1108(b)(2)(A), the Second Circuit differentiated itself from the other circuits. The *Cunningham* court discussed its extended reading of the two statutes, stating that Congress must have meant for the burden to shift to the plaintiff to plead facts that would implicate the exemptions.[144] This is because Congress specifically drafted § 1106(a) to reference the § 1108 exemptions, whereas § 1106(b) did not.[145] The Second Circuit elaborated on this reasoning, and asserted that the Supreme Court supported the proposition that when exemptions are separated from prohibitions in a statute, the exemptions should be used as affirmative defenses unless the exemptions could be located in the text of the relevant provision.[146] The Second Circuit determined that "when one cannot articulate what the statute seeks to prohibit without reference to the exception, then the exception should be understood as part of the definition of the prohibited conduct and its inapplicability must be pled."[147] In this case, the facts that the plaintiff-class needed to sufficiently plead to state a claim under § 1106(a)(1)(C) were that the services provided to the plan were either "unnecessary" or involved "unreasonable compensation."[148]

While the allegations by the plaintiff-class appeared to allege these facts by stating that Cornell's retirement plan paid substantially more than what was considered a "reasonable recordkeeping fee," the Second Circuit declared that this fact alone was not sufficient to bring a claim.[149] The court held that the fee must be "so disproportionately large that it bears no reasonable relationship to the services rendered" in order to raise an inference that it was not "the

[144] *Id.*
[145] *Id.*
[146] *Id. See also Meacham v. Knolls Atomic Power Lab'y*, 554 U.S. 84, 91 (2008).
[147] *Id.* at 976.
[148] *Id.* at 968.
[149] *Id.* at 978.

product of arm's length bargaining."[150] Additionally, the Second Circuit was specifically looking for facts that indicated the quality of services provided by TIAA-CREF or Fidelity.[151] If the plan administrators were providing superior service to Cornell, then the higher fees paid by the plan could be justified.[152] Absent these facts, the Second Circuit affirmed the dismissal of the prohibited transactions claim.[153]

§ 4 – EFFECT OF THE PLEADING STANDARD ON ERISA POLICY

As shown in the discussion, ERISA can be a technical and intricate area of law. Even when courts are faced with similar facts surrounding § 1106(a)(1)(C) claims, circuits can establish different pleading standards, which can impact the rights of both plaintiff-classes and employer-defendants. With the sheer number of assets involved in defined benefit and defined contribution plans,[154] the Supreme Court would be well advised to resolve the circuit split and bring uniformity to a disputed area within ERISA. By granting a writ of certiorari for *Cunningham*,[155] the Supreme Court has the opportunity to ensure that parties on both sides of an § 1106(a)(1)(C) claim will be not subjected to different outcomes and standards dependent on the Court in which the claim arises.

---

[150] *Id.* at 978-79 (quoting *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 346 (2010)). Even if the Second Circuit's pleading approach is the correct approach, this court's standard in determining the reasonableness of a recordkeeping fee may be flawed. By requiring plaintiffs to plead facts showing that the recordkeeping fee was so "disproportionately large [that it] could not have been the product of arm's-length bargaining," the Second Circuit alters the meaning of "unreasonable compensation" and requires plaintiffs to supercharge their claims with facts that the plaintiffs likely do not have in the early stages of litigation.
[151] *Id.* at 978.
[152] *Id.*
[153] *Id.* at 979.
[154] *See* Employee Benefits Security Administration U.S. Dept. of Lab., *Private Pension Plan Bulletin Abstract of 2021*, 2 (2021), available at https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2021.pdf (highlighting 5500 data showing that, combined, pension plans total over $13 trillion in assets).
[155] *See supra* note 11.

i. *Plain Reading Policy Implications*

A plain reading of the prohibited transactions for service statute allows for plaintiff-classes to broadly assert a claim under § 1106(a)(1)(C).[156] Plaintiff-classes bringing claims under the statute have urged various circuit courts to adopt the broad reasoning from the Eighth and Ninth Circuits so that their claim can be heard before the court.[157] For a party who wants to bring a claim under §1106(a)(1)(C), a broad application of the statute reserves the rights of plan participants and their beneficiaries to hold employers accountable for mismanaging plan funds designated by ERISA itself.[158] Additionally, a broad pleading standard allows plaintiffs to plead a claim without possessing information that may not be available to them until discovery.[159] If the Supreme Court decides that the statute requires a narrower pleading standard, then plaintiffs may be negatively impacted and will not be able to assert some potentially meritorious claims in the future.

Conversely, employers have pushed back on such a broad application, exhibiting displeasure in having to litigate such claims based on an allegation alone.[160] This type of interpretation may encourage litigants to bring "fishing expeditions,"[161] creating a system that is overly burdensome on employers – a system the Supreme Court expressly wanted to avoid in *Varity Corporation v. Howe*.[162] Additionally, the Supreme Court feared that such an onerous system would discourage employers from offering employee benefit plans, such as 401(k) plans,

[156] *See Bugielski* at 901.
[157] *See Cunningham* at 974. *See also Ramos* at 786.
[158] *Fort Halifax Packing Co.* at 15.
[159] *See* 29 U.S.C. § 1001(a); *See also Braden* at 598; *See also Teets v. Great-West Life & Annuity Ins. Co.* 932 F.3d 1200, 1206 (10th Cir.2019).
[160] *See Albert* at 585-86.
[161] Brief for the Chamber of Commerce as Amicus Curiae, p. 15, *Cunningham v. Cornell Univ.*, 88 F.4th 602 (5th Cir.2023), *cert. granted* __ S.Ct. __ (2025).
[162] 516 U.S. 489, 497 (1996) (The Supreme Court believed that Congress's intent in creating in ERISA was to offer employees a system in which their employee benefits are protected, but not a system that is so overly burdensome and complex that employers decline to offer benefit plans to their employees).

to their employees due to the threat of litigation;[163] however, this fear goes too far. Employers, to attract and retain talent, offer retirement plan benefits to remain competitive in the labor market.[164] The threat of eliminating an attractive recruiting and retention tool is a valid concern, but employers may prefer to stomach litigation than eliminate their retirement plans.

Regardless, if such a broad reading is given to § 1106(a)(1)(C), employee benefit plans may impose internal requirements to closely monitor internal interactions pertaining to a service administrator to discourage any sort of litigation. Documents to assert an § 1108(b)(2)(A) affirmative defense to prove that the plan did not participate in a prohibited service transaction could include: documentation of the marketing analysis (i.e., requests-for-proposals) in which plan services are selected;[165] regular benchmarking of plan performance;[166] and detailed meeting records when discussing administration of the employer's retirement plan.[167] Employers requiring this internal compliance measure will be able to show detailed documentation that the service agreement between the plan and the administrative service provider is an ordinary transaction that is necessary to the administration of the plan and that the compensation paid to the administrator for servicing the plan is not unreasonable. The most likely result of a broad interpretation of § 1106(a)(1)(C) is the creation of more administrative tasks for employee benefit departments, but perhaps such a process will result in more cost-efficient plans.

---

[163] *Id.*
[164] *See* Mike Ranta, *Employee benefits and company performance: Evidence from a high-dimensional machine learning model*, MANAGEMENT ACCOUNTING RESEARCH, 10 (2023), available at https://www.sciencedirect.com/science/article/pii/S104450052300046X?via%3Dihub (stating that as companies operate in competitive environments for labor resources, benefit packages, including retirement plans, must be constantly evaluated and optimized in order to keep up with competitors).
[165] *See* Natalya Schnitser, *The 401(k) Conundrum in Corporate Law*, 13 HARV. BUS. L. REV. 301, 339 (2023) (discussing the request-for-proposal process for service providers, "entails soliciting and comparing information and bids from multiple potential providers…is difficult and time-consuming").
[166] *Id.* (stating that "regular benchmarking is an essential prophylactic measure against ERISA lawsuits").
[167] *Id.* (stating that "regulators review meeting minutes when assessing cases of potential fiduciary breach").

ii. *"Additional Requirements" & "Statute Synthesis" Policy Implications*

Requiring an added element to the § 1106(a)(1)(C) pleading standard would make it more difficult for a plaintiff-class to prove their claim. As acknowledged in the prior section, the plaintiff-class does not usually have information available[168] to assert that the employer had (1) an intent to participate in a prohibited transaction for services;[169] (2) participated in a transaction that appeared to be self-dealing;[170] or (3) a prior relationship with a party in interest before the prohibited transaction occurred.[171] In addressing the Second Circuit's approach, plaintiffs must state factual allegations when implicating the affirmative defenses in § 1108(b)(2)(A) to meet the pleading standard, but plaintiffs, like the plaintiff-class in *Cunningham*, will likely lack facts asserting that a transaction was unnecessary or involved unreasonable compensation.[172] Unless plan-participants possess sufficient facts that can satisfy these elements, the claim will not be heard. This makes it more difficult for plaintiffs to be afforded the opportunity to hold an employer accountable for wasting plan assets.

It is evident as to why employers would be in favor of a statute that adds additional requirements into a broad statute like § 1106(a)(1)(C). By narrowing the scope of the statute, plaintiffs will have a harder time asserting their claims, thus, employers and benefit plans will not have to litigate such claims. Additionally, employers will be able to determine a "more predictable set of liabilities" that arise from the addition of an added element,[173] something that § 1106(a)(1)(C) lacks due to its expansive nature. By requiring an additional element in the pleading standard, courts insulate employers and allow plans to enter ordinary service

---

[168] *See* 29 U.S.C. § 1001(a).
[169] *Sweda* at 338.
[170] *Albert* at 585.
[171] *Ramos* at 787.
[172] *Cunningham* at 978.
[173] *Id.* at 976 (quoting *Conkright v. Frommert*, 559 U.S. 506, 517 (2010)).

agreements with retirement plan administrators without fear that the plan is taking part in a prohibited transaction. However, because different circuits require different elements, there is a need to resolve these distinctions.

§ 5 – CONCLUSION

ERISA empowers plan participants to bring a claim alleging that a fiduciary participated in a prohibited transaction for services, but courts are divided on the standard for stating a claim under § 1106(a)(1)(C). Two federal circuits allow for broad claims under § 1106(a)(1)(C), and four federal circuits agree that there should be additional elements or facts plead by the plaintiff to bring a plausible claim; however, these courts cannot agree on a standard. Different standards among the Circuits may lead to different outcomes, allowing for some claims to proceed with discovery and trial while other claims may be dismissed for failure to state a claim. Future litigants looking to bring claims under § 1106(a)(1)(C) may look to two authorities who can resolve this conflict, either (1) the Supreme Court, as the Court can determine the legislative intent behind § 1106(a)(1)(C) and fashion a uniform standard based on their interpretation; or (2) Congress, so that the legislature can amend ERISA and explicitly clarify the standard that plaintiffs must use when bringing a prohibited transaction claim. Even with the Supreme Court set to provide an opinion on *Cunningham*, Congress can take legislative action and amend ERISA to ensure that meritorious claims are heard and non-meritorious are deterred, further balancing the rights of plans and their participants.[174] Regardless, future litigants bringing claims

[174] Brief for the American Council on Education as Amicus Curiae, p. 14, *Cunningham v. Cornell Univ.*, 88 F.4th 602 (5th Cir.2023), *cert. granted* __ S.Ct. __ (2025). The Council's brief argues that a broadened pleading standard will allow plaintiffs to have a guaranteed path to discovery, which would have the effect of allowing some potentially non-meritorious claims to progress in litigation. While the Council argues in favor of the defendants in *Cornell*, the point raises a question as to whether some meritorious prohibited transaction claims are not receiving equal consideration in circuits that require a higher burden to plead a complaint. By amending ERISA, Congress can clearly state the standard that must be used to state a prohibited transaction claim.

under the statute must wait until either authority decides to issue guidance on what is needed to plead a claim under § 1106(a)(1)(C) to further assess their rights.