AMERICAN RETIREMENT ASSOCIATION

4401 N. Fairfax Drive | Suite 600 | Arlington, VA 22203
P 703.516.9300 | F 703.516.9308 | info@usaretirement.org | usaretirement.org

Working for America's Retirement

American Retirement Association
Statement for the Record
U.S. House Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor, and Pensions
"Pension Predators: Stopping Class Action Abuse Against Workers' Retirement"
December 2, 2025

Thank you, Chairman Allen, Ranking Member DeSaulnier, and Members of the Subcommittee for the opportunity to submit a statement for the record on behalf of the American Retirement Association (ARA) for the hearing entitled "Pension Predators: Stopping Class Action Abuse Against Workers' Retirement."

ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of professionals serving America's private retirement system: the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), the American Society of Enrolled Actuaries (ASEA), and the Plan Sponsor Council of America (PSCA). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding the success of employer-sponsored plans. In addition, ARA has over 39,000 individual members who provide consulting and administrative services to sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

Executive Summary

Over the past decade, a surge in formulaic ERISA class action litigation has created a chilling effect on innovation across the retirement plan landscape. While litigation remains essential for addressing genuine fiduciary failures, the volume, copy-and-paste nature, and inconsistent standards in recent cases have led plan sponsors to avoid beneficial optional features simply to reduce litigation exposure.

This trend undermines Congress's bipartisan efforts, most recently through SECURE 2.0, to strengthen workers' retirement readiness. It discourages the adoption of improved plan designs, lifetime income options, financial wellness tools, and other innovations that help workers save more effectively and achieve a secure retirement.

The Supreme Court's recent decision in *Cunningham v. Cornell University* has accelerated this troubling trajectory. By lowering the pleading standard for prohibited transaction claims, *Cunningham* now allows plaintiffs to challenge routine retirement plan service transactions without addressing whether even the most common and routine statutory exemptions apply. This significantly increases the ability of plaintiffs to litigate first and investigate later, shifting the burden entirely to fiduciaries and increasing likelihood of expensive litigation and premature

discovery. Consequently, resources that should support plan administration and enhance participant benefits are increasingly redirected toward defensive designs to avoid potential litigation costs and attorneys' fees.

Given the escalating stakes, ARA urges the Subcommittee to consider reforms that restore balance to ERISA enforcement. Among the potential reforms, Congress could revise pleading standards to require plaintiffs to address statutory exemptions in their complaints and limit premature discovery until courts resolve threshold legal issues.

Discussion

I. The Growing Shadow of Retirement Plan Litigation

The retirement plan industry operates under an increasingly heavy cloud of litigation driven primarily by plaintiffs' firms seeking large contingency-fee settlements rather than improved participant outcomes. The recent data illustrate the scope and acceleration of this problem:

- 428 lawsuits were filed between 2006 and 2017;[1]
- One-third of large plans have been sued since 2016;[2]
- Over half of plans with more than $1 billion in assets have faced litigation;[3] and
- 42 settlements in 2023 alone totaled more than $353 million.[4]

These "cookie cutter" lawsuits largely follow a predictable pattern alleging excessive fees, imprudent investment selections, or underperformance relative to cherry-picked benchmarks. Standards applied by courts often vary based on evolving case law and market conditions, creating uncertainty even when plan sponsors follow a prudent, well-documented process.

Under the Employee Retirement Income Security Act (ERISA), plan sponsors have clear obligations to act prudently and solely in the interest of plan participants. While litigation has occasionally exposed real mismanagement, the dominant trend today is backward-looking lawsuits that treat slight differences in fees or performance as evidence of imprudence. This imposes substantial direct and indirect costs on employers, particularly those striving to offer high-quality plans but lacking the resources to maintain constant litigation readiness.

---

[1] George S. Mellman and Geoffrey T. Sanzenbacher, "401(k) Lawsuits: What Are The Causes and Consequences?", Center for Retirement Research at Boston College, No. 18-8 (May 2018) at p. 2, https://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf.

[2] Daniel Aronowitz, "Rebuttal to the American Association for Justice's Supreme Court Amicus Brief Extolling the Virtue of Private ERISA Litigation", Encore Fiduciary (Dec. 10, 2024), https://encorefiduciary.com/rebuttal-to-the-american-association-for-justices-supreme-court-erisa-litigation.

[3] Brief for Encore Fiduciary as Amicus Curiae at 7, *Cunningham v. Cornell Univ.*, No. 23-1007 (U.S. 2023).

[4] Daniel Aronowitz, "Summary of 2023 Excess Fee and Performance Litigation," Encore Fiduciary (Jan. 8, 2024), https://encorefiduciary.com/summary-of-2023-excess-fee-and-performance-litigation/.

II. How Litigation Suppresses Innovation

Beyond settlement amounts, litigation creates significant hidden costs. Plan sponsors must divert resources to legal defense, document production, and internal reviews—resources that could otherwise enhance plan features or participant services. Smaller and mid-sized employers, watching larger plans face litigation, increasingly hesitate to establish or improve their retirement offerings. This "defensive crouch" directly contradicts congressional intent to expand retirement plan coverage and quality.

Plan sponsors face a fundamental challenge of embracing beneficial innovation while avoiding litigation risk. This tension manifests most clearly in three critical areas: (1) investment innovation; (2) participant-focused services; and (3) plan design features.

1. Investment Innovation

Novel investment options—such as lifetime income solutions, private markets, participant-driven strategies, or managed solutions designed for long-term outcomes—are set aside or their value discounted due to concerns that, if they underperform at any point or differ from conventional benchmarks, they may trigger legal scrutiny and increase the costs of the plan. This occurs even when such innovations are designed to deliver better long-term results and address risks that traditional investment menus may not adequately cover.

The irony is stark and troubling: innovations specifically designed to improve retirement security are rejected because of litigation fear, not because they fail to serve participants' interests. Congress has repeatedly encouraged these innovations through legislation, yet the litigation environment systematically discourages their adoption.

2. Participant-Focused Services

Many plan sponsors are reluctant to offer high-quality tools and services, despite their potential to significantly improve participant outcomes. These services include more robust service providers, personalized financial wellness programs, managed account solutions, retirement income planning, emergency savings tools, and automatic portability features. A primary concern is that these enhanced services often carry higher fees, which could cause the plan to become a target in a litigation environment driven by data-mining tactics focused narrowly on costs.

Even when services are demonstrably beneficial, sponsors may forgo them to avoid the risk of being sued over fee levels, regardless of whether participants are actually harmed. This creates a perverse incentive structure where the cheapest option—not the best option—becomes the safest choice from a litigation standpoint.

3. Plan Design Features

New plan features authorized by recent legislation, such as those in the SECURE 2.0 Act of 2022, offer opportunities to better serve participants but may create additional administrative complexity

and potential litigation exposure. Features such as emergency savings accounts, student loan matching, and enhanced catch-up contributions remain underutilized because plan sponsors fear that any administrative misstep could become the basis for litigation.

Plan sponsors recognize that plaintiffs' firms actively search for technical violations or administrative errors, even when no participant has suffered actual harm. The result is slower implementation of bipartisan reforms specifically designed to help workers save more effectively for retirement.

III. How *Cunningham v. Cornell University* Transformed ERISA Litigation

The volume and trajectory of ERISA litigation is only accelerating in light of the Supreme Court's recent decision in *Cunningham v. Cornell University*, which substantially lowered the pleading standard for certain ERISA claims.[5] Understanding this transformation requires recognizing the fundamental structure of ERISA's prohibited transaction framework.

Under ERISA, nearly every transaction that involves the payment of a plan service provider is a "prohibited transaction." This includes paying recordkeepers, investment advisors, third-party administrators, auditors, and other essential service providers. These transactions are permissible only if an exemption applies. As a result, ERISA contains a host of statutory exemptions, which were designed to allow plan fiduciaries to engage in necessary transactions. The exemptions reflect Congress's recognition that retirement plans cannot function without compensating service providers and that reasonable, arm's-length service arrangements should not be prohibited.

Following *Cunningham*, plaintiffs are not required to plead that a statutory exemption does not apply to the alleged transaction. Instead, they need only allege that a transaction falls within the extremely broad class of transactions that are "prohibited transactions" under ERISA (which is nearly all transactions involving the plan and a third party). It then becomes the defendant's responsibility to invoke and prove any applicable statutory exemption as an affirmative defense.

This lowered pleading standard has created a litigation environment in which plaintiffs can file lawsuits and effectively hold companies hostage in search of settlements, regardless of whether there is any reasonable evidence the transaction is actually impermissible under ERISA. Because plaintiffs no longer need to address exemptions in their pleadings, complaints can be filed with minimal investigation, shifting the burden entirely onto plan fiduciaries to disprove allegations that lack substance. The resulting dynamic encourages litigation first and factual investigation later.

Compounding the issue, plaintiffs can often initiate wide-ranging and costly discovery before a motion to dismiss is resolved. Although ERISA defendants routinely argue that discovery should be deferred until the court determines whether the complaint is legally viable, many courts permit

[5] *Cunningham v. Cornell Univ.*, 604 U.S. ___ (2025).

discovery to begin immediately or allow plaintiffs to characterize discovery as necessary to respond to anticipated dismissal arguments. Plaintiffs' firms also have strong financial incentives to prolong litigation, including delaying the hearing or resolution of motions to dismiss. During that period, they can accumulate extensive billable hours on discovery, procedural disputes, and related tasks—even if the work was performed prematurely given the timing of settlement—which they then use to justify large awards of attorneys' fees. In many cases, these firms ultimately obtain contingency fees approaching one-third of the settlement value, even where the claim is settled early in the litigation process or underlying claims were weak or would likely have failed had a court fully considered the merits.

As a result, even for plan sponsors and fiduciaries who operate fully within the bounds of ERISA, the cost of defending a case through the motion-to-dismiss stage can be significant. Discovery disputes, early document production, and the need to prepare detailed defenses can require substantial time from internal staff and outside counsel. These pressures create a strong incentive to settle, even where the fiduciaries have complied with ERISA's requirements and the plaintiffs have alleged no plausible facts to suggest the transaction would not be allowed under an exemption.

The combination of the pleading standards, discovery tactics, and settlement structures that reward prolonged litigation has created a system that diverts resources away from plan administration and participant benefits. Money that should enhance retirement outcomes instead flows to defensive positioning, litigation costs, and attorneys' fees. In other words, the regulatory framework Congress created to protect workers' retirement security has been transformed into a mechanism that primarily enriches the plaintiffs' bar.

IV. The Path Forward: Restoring Balance While Preserving Accountability

Given the increasingly aggressive use of ERISA litigation strategies and the financial stakes for plans and participants, there is a growing need for reform. The Subcommittee should explore measures that restore balance to the enforcement framework while maintaining strong protections for participants, including addressing pleading standards for prohibited transaction claims and limiting premature discovery.

1. Addressing Pleading Standards for Prohibited Transaction Claims

Congress should consider legislation that would require plaintiffs alleging prohibited transactions to plead facts demonstrating why applicable statutory exemptions do not apply. This modest requirement would simply restore the reasonable balance that existed in many Circuits prior to *Cunningham*, ensuring that complaints identify plausible claims rather than merely identifying routine transactions that fall within ERISA's intentionally broad prohibition. This reform would not restrict meritorious claims but would prevent plaintiffs from filing complaints with minimal investigation and forcing defendants to bear the entire burden of establishing the legality of standard, necessary plan operations. This will restore balance to the litigation system and ensure

the broad statutory exemptions Congress created to permit retirement plans to function can operate as intended without constant litigation over routine transactions.

2. Limiting Premature Discovery

To address the problem of costly, premature discovery that occurs before courts resolve threshold legal questions, Congress should consider requiring that discovery be restricted pending resolution of motions to dismiss in ERISA prohibited transaction cases. This approach, which courts apply in other contexts where discovery is particularly burdensome relative to the likelihood of success on the merits, would prevent plaintiffs from using discovery costs as leverage to extract settlements in cases that lack legal merit. Legitimate claims with factual substance would still proceed to discovery after surviving a motion to dismiss.

Conclusion

Without reform, the current trajectory threatens to impose increasing costs on retirement plan sponsors, discourage employers from offering or maintaining plans, and ultimately diminish retirement security for American workers. The chilling effect on innovation will only intensify as sponsors become more risk averse in the face of unpredictable litigation exposure. Thoughtful reform can preserve participants' rights while reducing abusive litigation practices that impose unnecessary burdens on compliant fiduciaries and divert resources that could otherwise enhance retirement outcomes.

We thank the Subcommittee for its attention to this critical issue and stand ready to work with its Members on bipartisan approaches that protect workers' retirement security while ensuring the private retirement system remains strong, innovative, and accessible.