UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 10-2447

MARK RENFRO; GERALD LUSTIG, AS REPRESENTATIVES OF A CLASS OF SIMILARLY SITUATED PERSONS, AND ON BEHALF OF THE PLAN,
Plaintiffs-Appellants,

v.

UNISYS CORP.; UNISYS CORP. EMPLOYEE BENEFITS ADMINISTRATIVE COMMITTEE; UNISYS CORP. SAVINGS PLAN MANAGER; PENSION INVESTMENT REVIEW COMMITTEE; FIDELITY MANAGEMENT TRUST CO.; FIDELITY MANAGEMENT AND RESEARCH CO.; FIDELITY INVESTMENTS INSTITUTIONAL OPERATIONS CO. INC.; J.P. BOLDUC; MATTHEW J. EPSE; GAIL D. FOSLER; RANDALL J. HOGAN; CLAYTON M. JONES; CLAY B. LIFFLANDER; THEODORE E. MARTIN; CHARLES B. MCQUADE; FMR LLC,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Pennsylvania, No. 07-2098
The Honorable Berle M. Schiller, Judge Presiding.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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Dated: November 15, 2010

Corporate Disclosure Statement and
Statement of Financial Interest

No. 10-2447

MARK RENFRO, et al., Appellants
v.
UNISYS Corporation, et al., Appellees

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, the Chamber of Commerce of the United States of America, *amicus curiae,* makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

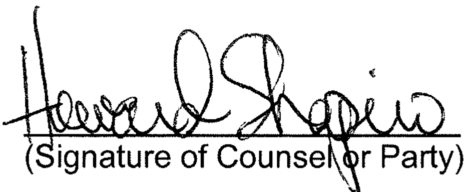
None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not Applicable



(Signature of Counsel or Party)

Dated: November 15, 2010

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

This brief *amicus curiae* is filed on behalf of the Chamber of Commerce of the United States of America ("the Chamber"). The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of three million professional organizations of every size, in every industry sector, and from every geographic region of the country. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the Courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

The issues in this case are of great importance to sponsors of ERISA plans throughout the nation. Many Chamber members provide pension benefits to their employees through plans regulated by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"), including 401(k) plans and other individual account plans. The ability of these Chamber members to continue sponsoring such plans, on an affordable basis, is of vital importance to United States businesses, employees, and to the Chamber. With respect to this case, *amicus*'s interest is to protect its members by supporting a rule of law and

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1 All parties have consented to the filing of this brief.

promoting policies that encourage employers to establish and maintain defined contribution plans as a benefit for employees.

II. SUMMARY OF ARGUMENT

The district court correctly determined that neither the company nor its fiduciaries violated ERISA by offering 401(k) plan participants "retail" mutual funds with allegedly excessive fees, and that even if a fiduciary breach occurred, the Section 404(c) safe harbor precludes liability, because any losses resulted from the participants' individual investment elections.

As a matter of public policy, this is the correct result. The district court's decision should be affirmed in all respects, because it provides protection against unfettered litigation over liability for a participant's investment decision, squarely places the responsibility for such investment decision-making on the participant, and advances one of the ERISA purposes highlighted by the Supreme Court in *Conkright v. Frommert,* 130 S. Ct. 1640, 1648-49 (2010): To encourage employers to create and maintain ERISA plans.

III. ARGUMENT

A. Introductory Statement

Appellants here brought an action claiming that the company's participant-directed 401(k) plans improperly offered investment options with allegedly excessive fees. The district court dismissed, finding nothing imprudent in the actions of the trustee, the company, or the plan fiduciaries.

The district court below properly determined that ERISA Section 404(c), 29 U.S.C. § 1104(c), shields fiduciaries from liability for any losses incurred by participants as a result of their investment choices in self-directed individual account plans, even where the plaintiff-participants allege the losses resulted from the fiduciary's initial investment designations, *i.e.*, the fiduciary's allegedly imprudent inclusion of a purportedly overpriced option within the menu of investments from which the participants may choose. The district court also determined that no breach of fiduciary duty occurred with respect to the designation of investment options in the plan, because the plan offered diverse investment options and disclosed related fees. Based on the plain language of the statute and controlling precedent, the district court's decision is correct as a matter of law. In addition, the decision encourages the maintenance of individual account plans and thus comports with one of the ERISA guiding principles highlighted by the Supreme Court: to encourage the creation and maintenance of ERISA pension benefit plans. *Frommert,* 130 S. Ct. at 1648-49.

A contrary determination by a district court, or reversal of the decision below by the Third Circuit, would lead to what the Supreme Court in *Frommert* cautioned against: additional complexity in the application of ERISA, more frequent and costly litigation, and unpredictable potential liability – all in turn creating a disincentive for employers to establish and maintain these types of plans.

B. The Demise of Defined Benefit Plans

This forecasted disincentive is not hypothetical. Traditional defined benefit plans, long the mainstay of retirement income for American employees, have become scarce. In 1985, employers maintained over 100,000 defined benefit plans; by 2009, this number had declined by 75 percent, to about 27,000.[2] Among the factors cited for this decline are pressures on plan sponsors to control rising costs and funding volatility, increased regulatory burdens, and increased litigation related costs.[3]

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[2] *See 2009 PBGC Pension Ins. Data Book* 25 (2010), *available at* http://www.pbgc.gov/docs/2009databook.pdf (number of single-employer defined benefit plans has "declined substantially" to about 27,650 plans in 2009 from an all-time high of 112,000 plans in 1985, which "primarily reflects a large number of terminations among small plans"); U.S. Gov't Accountability Office, *Defined Benefit Pensions: Survey Results of the Nation's Largest Private Defined Benefit Plan Sponsors* 1 (2009), *available at* http://www.gao.gov/products/GAO-09-291 ("The number of private defined benefit (DB) pension plans . . . has declined substantially over the past two decades[;] about 92,000 single-employer DB plans existed in 1990, compared to just under 29,000 . . . today."); Towers Watson, *Majority of Fortune 100 Companies Offer Only Defined Contribution Plans to New Salaried Employees, Watson Wyatt Analysis Finds* (2009), http://www.watsonwyatt.com/render.asp?catid=1&id=21177 (only forty-five Fortune 100 companies offer defined benefit plans to new hires, and of those, "22 have traditional plans and 23 offer hybrids such as cash balance plans").

[3] Am. Benefits Council, *The Multiple Threats Facing Our Nation's Defined Benefit Pension System* 2 (2004), *available at* http://www.americanbenefitscouncil.org/documents/definedbenefits_paper.pdf (listing top three threats to defined benefit and hybrid plans as "[v]olatility of costs," "[l]evel of overall costs," and "[c]ash balance litigation and regulatory uncertainty"); Employee Benefit Research Inst., *Retirement Trends in the United States Over the Past Quarter-Century* 1 (2007), *available at* http://www.ebri.org/pdf/publications/facts/0607fact.pdf ("Defined benefit (so-called 'traditional' pension) plans have declined (reflecting

Excessive litigation represents a significant portion of the costs borne by defined benefit plan sponsors. In fact, excessive litigation over one type of defined benefit plan – the cash balance plan[4] – impelled employers simply to stop offering that type of defined benefit plan. In *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006), participants alleged that IBM's cash balance plan discriminated on the basis of age. After three and a half years of litigation, a district court agreed. *Id.* at 637-38. But after the district court decision and while an appeal was pending, IBM first closed its cash balance defined benefit plan to new entrants. This meant that new IBM employees would never obtain the benefit of participation in a defined benefit plan. IBM later announced that it would end additional pension accruals for employees who were already covered under the plan. On appeal, the Seventh Circuit overruled the district court and noted that "[i]t is possible . . . for litigation about pension plans to make everyone worse off.

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pressures on defined benefit plan sponsors to control costs and funding volatility, in addition to increased regulatory burdens), while defined contribution (401(k)-type) plans have grown.").

[4] In a cash balance plan, sometimes referred to as a "hybrid" plan, each participant has an individual cash balance account that is credited with a percentage of the participant's compensation, plus an assumed interest factor. The benefit is defined as the actuarially equivalent life annuity that can be purchased with a defined lump sum cash balance. *See, e.g., Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56, 61-62 (3d Cir. 2007) (discussing characteristics of cash balance plans).

After the district court's decision IBM eliminated the cash-balance option for new workers and confined them to pure defined-contribution plans." *Id.* at 642.[5]

In Congressional testimony provided in 2005, a spokesperson for the American Benefits Council testified:

> [T]he case of *Cooper v. IBM* that [held] hybrid plan designs were inherently age discriminatory . . . has spawned copycat class action lawsuits and exorbitant damage claims against other employers, who are now extremely anxious about the crippling effects of such lawsuits with their potential billion dollar damage awards. Absent congressional action, hybrid plan sponsors are likely to find these risks unbearable and will freeze or terminate their plans.[6]

Without doubt, litigation trends have impacted and contracted the world of cash balance plans. For fear of being sued, corporations froze or gave up on cash balance plans entirely, choosing instead to "stick on the sidelines and watch," a result that has been called "disastrous."[7] "Cash balance litigation and regulatory

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5 *Citing* Ellen E. Schultz & Theo Francis, *How Safe Is Your Pension?*, Wall St. J., Jan. 12, 2006, at D1; Ellen E. Schultz, *IBM to Exclude New Workers From Its Cash-Balance Pension*, Wall St. J., Dec. 9, 2004, at A2.

6 Am. Benefits Council, *Council to Senate HELP Subpanel: Hybrid Plans Can Help Staunch the Defined Benefit System's Decline* (2005), *available at* http://www.americanbenefitscouncil.org/newsroom/pr05-24.cfm.

7 *E.g.*, Jerry Geisel, *Rulings Erase Doubts on Cash Balance Plans*, Bus. Ins., Aug. 25, 2008, at 1 ("[T]he litigation, adverse publicity and fears of adverse rulings have taken their toll. Many companies that were considering converting their traditional plans to cash balance plans changed course and moved entirely to a defined contribution plan approach, at least in part because of fears of being sued and being hit with big damage awards, after the initial IBM decision triggered a wave of lawsuits."); Am. Benefits Council, *supra* note 6 (quoting an American Benefits Council representative's testimony before Congress: "*Cooper* has spawned copycat class action lawsuits and exorbitant damage claims . . . . [P]lan

uncertainty" have been cited together as the third-largest threat to our nation's defined benefit pension system.[8] Indeed, in the aftermath of the IBM litigation and IBM's termination of the cash balance option, many companies joined what some commentators characterized as a "corporate stampede" away from defined benefit plans.[9] Verizon, Sears, Hewlett Packard, General Motors, Wellpoint, and NCR took measures to terminate their cash balance plans during this time period, by

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sponsors are likely to find these risks unbearable and will freeze or terminate their plans. What a disastrous result for the more than seven million employees and their families who rely on these plans."); Steve Bates, *Ruling Clouds Pension Plan Conversions*, HRMagazine, Sept. 1, 2003 (quoting IBM's vice-president of human resources, "This ruling affects not just IBM's pension plan but the pension plans of more than 400 major U.S. companies."); Teresa Dixon Murray, *Pension Plan Showdown: How IBM Solves Retirement Fund Dispute Could Affect The Plans Of Workers All Over*, Plain Dealer (Columbus, Ohio), Apr. 24, 2000, at 1C (quoting a retirement plan consultant: "I've had clients say, 'I'll put in a 401(k) or a profit-sharing plan, but as far as a pension, forget it. It's too complicated.' Companies don't want to mess with this. Until the [legal] uncertainty is gone, they're going to stick on the sidelines and watch.").

[8] Am. Benefits Council, *supra* note 3 (listing top three threats to defined benefit and hybrid plans as "[v]olatility of costs," "[l]evel of overall costs," and "[c]ash balance litigation and regulatory uncertainty").

[9] Fran Hawthorne, *Pension Tension: As Traditional Open-Ended Plans Are Being Replaced, It's The Older Workers Who Are Most Likely to Take the Hit*, Newsday, Sept. 29, 2007, at B04 (Conversions to cash balance plans ceased "in 2003 after a federal district court ruled that a cash balance conversion at IBM Corp. discriminated against older employees[; v]irtually no more plans were converted for three years."); Albert B. Crenshaw & Amy Joyce, *IBM Adds Its Name to List Of Firms Freezing Pensions*, Wash. Post, Jan. 6, 2006, at A01 ("IBM's move [to freeze its pension plans and offer instead an improved 401(k) plan] is part of a corporate stampede away from traditional pension plans."); David Cay Johnston, *IBM Settles with Workers in Landmark Pension Case*, N.Y. Times, Oct. 1, 2004, at 19 ("Because of uncertainty about their legality, conversions to cash-balance plans have stopped for now.").

closing them to new employees, eliminating the accrual of future benefits, or both.[10]

Of the defined benefit plans that have survived, many are "frozen," *i.e.*, participants no longer accrue additional benefits, and/or the plans are not accepting new participants.[11] Over 100,000 single employer defined benefit plans were

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[10] Ellen E. Schultz, Charles Forelle, & Theo Francis, *Forecast: More Pension Freezes*, Wall St. J., Jan. 12, 2006, at C1 (noting IBM, Verizon, Sears, Hewlett-Packard, and NCR recently decided to freeze their cash balance plans); Jerry Geisel, *Big Chill for Pensions as Plan Freezes Grow*, Bus. Ins., Mar. 27, 2006 (noting large companies such as GM, Hewlett-Packard, IBM, and Wellpoint are freezing their cash balance plans); *see also* Kaja Whitehouse, *Companies Lock Younger Workers Out of Pensions*, Wall St. J., July 26, 2005, at D2 (listing frozen NCR, Sears, IBM, and Hewlett-Packard's cash balance plans, and noting that, now, instead of converting traditional pension plans to cash balance plans, companies are simply replacing them with 401(k) plans).

[11] *E.g.,* Pension Benefit Guar. Corp., *Hard-Frozen Defined Benefit Plans Findings for 2003-2004 and Preliminary Findings for 2005* 1, 15 (2008), *available at* http://www.pbgc.gov/docs/Frozen_Plans_0808.pdf (as of end of 2005, 14 percent of single-employer defined benefit plans were hard-frozen, and number was expected to rise); Pension Benefit Guar. Corp., *An Analysis of Frozen Defined Benefit Plans* 12 (2005), *available at* frozen_plans_1205.pdf ("almost one out of every ten single-employer [defined benefit] plans were hard-frozen as of the 2003 plan year," most frozen plans were small plans, and "an unknown number of additional plans have been frozen to a lesser degree or closed to new entrants"); Schultz, Forelle, & Francis, *supra* note 10 (noting several large companies including IBM, Verizon, Sears, Hewlett-Packard, and NCR, recently decided to freeze their plans, with the "potential for locking in bigger accounting benefits [due to lower interest rates just] one of several reasons . . . sponsors might choose to freeze a pension now"); Craig Schneider, *Rethinking Cash Balance Plans*, CFO.com, Nov. 19, 2003, *available at* http://www.cfo.com/article.cfm/3011031 (reporting that "plan sponsors continue to fret over" the district court's *Cooper* decision; the longer it takes for the issue to be clarified, "the more likely [plan sponsors will] freeze their cash balance plans;" some companies intended to, or already had, frozen benefit accruals in their cash balance plans).

terminated between 1986 and 2004.[12] A relatively small number of defined benefit plans were terminated because they could not meet their benefit obligations.[13]

These litigation trends have had a demonstrable, real-world impact on defined benefit plans and decreased the number of employees covered by those defined benefit plans. If care is not exercised, the same trend will impact defined contribution plans.

C. The Emergence of the 401(k) Plan as the Retirement Plan of Choice

As defined benefit plans have become less attractive and thus scarcer, individual account plans – in particular, 401(k) plans – have become a more significant component of the retirement savings of American employees, and the impetus to create such plans has strengthened.

Shortly after the passage of ERISA, Congress announced that employees would not be taxed on income deferred until retirement — leading to the "modern-

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12 Pension Benefit Guar. Corp., *An Analysis of Frozen Defined Benefit Plans* 1 (2005), *available at* docs/frozen_plans_1205.pdf (stating, "From 1986 to 2004, 101,000 single-employer plans . . . were terminated."); *see also* Pension Benefit Guar. Corp., *Termination Fact Sheet*, *available at* http://www.pbgc.gov/media/key-resources-for-the-press/content/page13543.html (last visited Oct. 28, 2010) (stating "more than 172,000 standard terminations [have occurred] since PBGC's creation [in 1974]").

13 Pension Benefit Guar. Corp., *Termination Fact Sheet*, *supra* note 12 (stating "4,000 underfunded plans . . . have been terminated in PBGC's 35-year history" as compared to "more than 172,000 standard terminations").

day" 401(k) plan.[14] Created as a retirement savings vehicle in 1978, the 401(k) plan permits employees to direct their own investments and accumulate savings on a favorable, tax-deferred basis. By 1983, almost half of large United States companies were offering or considering 401(k) plans.[15] By 1984, approximately 17,000 401(k) plans were being offered.[16] The number of defined contribution plans has increased steadily and significantly in recent years,[17] correlating with the declining number of defined benefit plans.[18] As of 2008, there were almost

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[14] Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763. Regulations on 401(k) plans were proposed in 1981, and issued in 1983. 46 Fed. Reg. 55,545 (Nov. 10, 1981); 26 C.F.R. § 1.401(k).

[15] Employee Benefit Research Inst., *History of 401(k) Plans* 2 (2005), *available at* publications/facts/0205fact.a.pdf ("1981— The IRS issued proposed regulations on 401(k) plans . . . . Many employers replaced older, after-tax thrift plans with 401(k)s and added 401(k) options to profit-sharing and stock bonus plans. Within two years . . . nearly half of all large firms were . . . offering a 401(k) plan or considering one.").

[16] Employee Benefit Research Inst., *supra* note 15 ("1984 — Number of plans with a 401(k) feature[:] 17,303. Number of active participants in these plans: 7,540,000. Total assets in these plans: $91.75 billion.").

[17] *E.g.,* Employee Benefit Research Inst., *Private Pension Plans, Participation, and Assets* 1 (2003), *available at* http://www.ebri.org/publications/facts/index.cfm?fa=0103fact ("As a percentage of all private pension plans, defined contribution plans increased from 66.8 percent in 1975 to 92.3 percent in 1998."); Employee Benefit Research Inst., *supra* note 15 ("Since [1986], 401(k) plans have become the fastest-growing type of retirement plan in the United States."); Towers Watson, *supra* note 2 (announcing, "the majority[], 55 companies in the Fortune 100 offer *only* DC plans to new hires, a jump from 46 at the end of 2007") (emphasis added).

[18] *E.g.,* Employee Benefit Research Inst., *supra* note 3, at 1-2 (showing correlation on charts, and stating that "defined benefit pension plans . . . have been

500,000 401(k) plans, with approximately 50 million participants and $2.3 trillion in assets.[19] In the preamble to the Department of Labor's newly issued fiduciary disclosure regulations, the DOL cited 2007 Form 5000 Data showing there are an estimated 483,000 participant-directed individual account plans, with 72 million participants, and almost $3 trillion in assets.[20] Many employers include retail mutual funds in the menu of investment options available in these 401(k) plans. Approximately 55 percent of all 401(k) assets – or about $1.5 trillion – were invested in mutual fund vehicles at the end of 2009.[21]

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overtaken by defined contribution (401(k)-type) plans"); U.S. Gov't Accountability Office, *Key Questions about Private Pension Plans* 17 & fig. 2 (2002), *available at* http://www.gao.gov/new.items/d02745sp.pdf (showing, via chart, that increased participation in defined contribution plans correlates with decreased participation in defined benefit plans); U.S. Gov't Accountability Office, *Private Pensions: Most Employers That Offer Pensions Use Defined Contribution Plans* 4-5 & fig. 1 (1996), *available at* http://www.gao.gov/archive/1997/gg97001.pdf ("From 1984 to 1993 . . . the percentage of all employers that offered only DC pension plans increased from 68 to 88 percent. The percentage of employers that offered only DB plans decreased from 24 to 9 percent, and the percentage that offered both DC and DB plans decreased from 8 to 3 percent.").

[19] *E.g.*, Employee Benefit Research Inst., *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2008* 6 & n.2 (2009), *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_10-2009_No335_K-Update.pdf.

[20] Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 75 Fed. Reg. 64,910, 64,910 n.1 (Oct. 20, 2010) (to be codified at 29 C.F.R. pt. 2550).

[21] Inv. Co. Inst., *2010 Investment Company Fact Book* 103 (50th ed. 2010), *available at* http://www.ici.org/pdf/2010_factbook.pdf.

D. Costly "Fee Litigation" Threatens the 401(k) Plan

From a policy perspective, we should be mindful of lessons learned from the defined benefit plan experience. Protection of participants' interests in retirement savings plans is one of ERISA's guiding principles, *see Frommert,* and in the face of the decline of the more traditional defined benefit plan, protecting the continued viability of 401(k) plans is a more urgent concern. The threat of class action litigation alleging that 401(k) plan fees or costs violate fiduciary duties, and the unpredictable liabilities and excessive expenses attendant to the defense of those claims, are a profound deterrent to the expansion of 401(k) plan coverage.

Complex ERISA class action litigation, including lawsuits like this one, require the expenditure by the plan sponsor and trustee of significant legal fees when defending these claims. Regardless of the merits or expected outcome on the merits, these class action suits may result in exorbitant settlement costs and high attorney's fee awards. The entire cost of such litigation, without regard to the merits of any case, must be borne by defendants, even where there is no liability.[22]

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[22] ERISA Ind. Comm., *Submission to the Employee Benefits Security Administration & the Internal Revenue Service in Response to their Request for Information Regarding Lifetime Options for Participants and Beneficiaries in Retirement Plans* 11 (2010), forms/uploadFiles/ 20A9000000054.filename.ERIC_Annuity_RFI_Response_050310.pdf ("[T]he flood of ERISA litigation in recent years has made many employers reluctant to subject themselves unnecessarily to even a remote risk of fiduciary liability. The

The expenses associated with the defense of complex ERISA class actions include document preservation and discovery costs; e-discovery is especially expensive.[23]

As 401(k) plan sponsors incur these expenses, their reaction will mirror the defined benefit plan experience. Plan sponsor concerns about these exorbitant litigation costs will have a chilling, negative impact on decisions relating to the establishment and maintenance of defined contribution plans. Plan sponsors will be "reluctant to subject themselves unnecessarily to even a remote risk of fiduciary liability."[24]

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costs of defending class action litigation are so substantial that employers do not wish to incur any risk of litigation that is avoidable -- even if they believe that a court would ultimately find that they have done nothing wrong.").

[23] Joint Project of the Am. Coll. of Trial Lawyers Task Force on Discovery & the Inst. for the Advancement of the Am. Legal Sys., *Final Report* 8, 13, 16 (2009), *available at* AM/Template.cfm?Section=Home& template=/CM/ContentDisplay.cfm&ContentID=4008 ("[D]iscovery is very expensive and time consuming . . . . Often the cost of preservation in response to a "litigation hold" can be enormous, especially for a large business entity. . . . [E]lectronic discovery . . . is . . . enormously expensive and burdensome[; it] has resulted in a disproportionate increase in the expense of discovery and thus an increase in total litigation expense."); Joint Project of the Am. Coll. of Trial Lawyers Task Force on Discovery & the Inst. for the Advancement of the Am. Legal Sys., *Interim Report* 1 (2008), *available at* http://www.actl.com/AM/ Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=3 650 ("There is a serious concern that the costs and burdens of discovery are driving litigation away from the court system and forcing settlements based on the costs, as opposed to the merits, of cases.").

[24] ERISA Ind. Comm., *supra* note 22.

E. The District Court's Correct Interpretation of ERISA Will Ensure the Continued Establishment and Maintenance of 401(k) Plans

1. *The district court decision was correct*

Based on the plain language of Section 404(c) and controlling precedent, fiduciaries cannot be held liable for a participant's losses even assuming, *arguendo*, a threshold breach by the plan fiduciaries, *i.e.*, the allegedly imprudent selection of investments. *See* Brief of Unisys Appellees at 14-15. *See also In re Unisys Savings Plan Litig.*, 74 F.3d 420, 445 (3d Cir. 1996) (protections of 404(c) are available even to a fiduciary who committed a breach of duty when making an investment decision). Further, ERISA does not prohibit a plan fiduciary from including retail mutual funds within a broad and diverse menu of a 401(k) plan's investment options. *See* Brief of Fidelity Appellees at 1, citing *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009).

The gravamen of Appellants' complaint was that Appellees violated fiduciary duties by selecting investments for the 401(k) plan – in particular, retail mutual funds – that charged excessive administrative and investment management fees, and that as a result of these alleged breaches, the 404(c) defense was not available. The district court properly rejected these arguments, stating:

> ERISA does not require fiduciaries to get the best deal imaginable for the Plan; it requires them to act carefully, skillfully, prudently,

> diligently, and solely in the interest of participants and beneficiaries. While this is not a light duty, it does not support a lawsuit that simply claims the fiduciaries could have done better had they worked harder to leverage their market power.

Renfro v. Unisys Corp., No. 07-2098, 2010 WL 1688540, at *6 (E.D. Pa. Apr. 26, 2010). The district court further held that even if Appellees had breached their fiduciary duties by selecting an inappropriate fund for the plan, Section 404(c) protected them from liability. *Id.*, 2010 WL 1688540, at *8-*9.

Appellants' proffered interpretation seeks to diminish both the availability of the Section 404(c) safe harbor defense and the ability of plan sponsors and fiduciaries to designate investment vehicles for their 401(k) plans that they determine are most appropriate for their participants. If Appellants' view is adopted by the courts, it may very well provoke a "corporate stampede" away from defined contribution plans, mirroring the "stampede" away from defined benefit plans. If participants are permitted to assert claims alleging fiduciaries are liable for participant losses in 404(c)-compliant plans, and that the fees associated with particular investments makes inclusion of those investment options imprudent, 401(k) plans may lose their appeal for all the reasons cited in connection with the demise of defined benefit plans: regulatory uncertainty, administrative complexity, and – most significantly – excessive and unpredictable litigation costs and liability. In contrast, retention of the district court's correct interpretation of Section 404(c) and of the scope of fiduciary duty with respect to designating investment options,

reduces the likelihood of the type of chilling litigation that may leave employers with no affordable retirement plan choice, leave employees with no employer sponsored pension plans, and – as noted by the court in *Cooper* – leave everyone worse off.

2. *Section 404(c) encourages employers to establish and maintain 401(k) plans*

Section 404(c) encourages the maintenance of 401(k) plans by protecting ERISA plan fiduciaries and sponsors from excessively costly class action litigation and legal uncertainties. Regulations regarding ERISA Section 404(c) were proposed in 1987;[25] by 1990, almost 100,000 401(k) plans were sponsored by employers and other entities.[26] After the final regulations for ERISA Section 404(c) were issued in 1992,[27] the number of 401(k) plans increased significantly: from almost 100,000 in 1990, to over 200,000 by 1996, and over 300,000 by 1998.[28] As noted above, currently there are an estimated 483,000 participant-

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[25] 52 Fed. Reg. 33,508 (Sept. 3, 1987) (codified at 29 C.F.R. § 2550.404c-1).

[26] Employee Benefit Research Inst., *supra* note 15 ("1990 — Number of plans with a 401(k) feature: 97,614. Number of active participants in these plans: 19,548,000. Total assets in these plans: $384.85 billion.").

[27] 29 C.F.R. § 2550.404c-1(g).

[28] Employee Benefit Research Inst., *supra* note 15 ("1990 — Number of plans with a 401(k) feature: 97,614. Number of active participants in these plans: 19,548,000. Total assets in these plans: $384.85 billion. . . . 1996 — Number of plans with a 401(k) feature: 230,808. Number of active participants: 30,843,000. Total assets: $1.06 trillion. . . . 1998 — Number of plans with a 401(k) feature: 300,593. Number of active participants: 37,114,000. Total assets: $1.54 trillion.").

directed individual account plans, with 72 million participants, and almost $3 trillion in assets.[29] Of these plans, approximately 318,000 plans covering over 58.2 million participants reported compliance with ERISA Section 404(c).[30] In addition, the vast majority of 401(k) plans offer mutual funds as investment options;[31] and about 55 percent of all 401(k) assets – or about $1.5 trillion – were invested in mutual fund vehicles at the end of 2009.[32]

ERISA Section 404(c)(1)(A) provides that where a pension plan permits a participant to exercise control over the assets in his account, and the participant exercises such control, "no person who is otherwise a fiduciary shall be liable . . . for any loss, or by reason of any breach, which results from such participant's . . . exercise of control." 29 U.S.C. § 1104(c)(1)(A). For this safe harbor to be available, the plan (among other requirements) must provide the opportunity for the participant to exercise control, offer a broad range of investment alternatives,

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[29] Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 75 Fed. Reg. at 64,910 n.1.

[30] *Id.* at 64,928.

[31] Deloitte Consulting LLP, *401(k) Benchmarking Survey* 26 & ex. 77 (2009), http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_consulting_401(k)AnnualBenchmarkingSurvey2009_081409.pdf (noting, via chart, that 91% of the surveyed 401(k) plans of major U.S. companies offered mutual funds as investment options); Sarah Holden & Michael Hadley, Inv. Co. Inst., *The Economics of Providing 401(k) Plans* 9 (2009), http://www.ici.org/pdf/fm-v18n6.pdf ("Virtually all participant-directed 401(k) plans offer a variety of pooled investment options (such as a selection of mutual funds, collective trusts, and/ or separately managed accounts).").

[32] Inv. Co. Inst., *supra* note 21.

and fully inform the participant about the investment alternatives and associated fees and expenses. 29 C.F.R. § 2550.404c-1. As the district court correctly noted, the plan at issue here offered diverse investment options with varying fees, risks, and potential rewards, and there was no dispute that ample information about the investments and fees was provided. *See* Unisys Appellees' Brief at 20.

In the new final regulations to Section 404(a) and 404(c) issued by the Department of Labor last month, the DOL established fiduciary disclosure requirements for all participant-directed individual account plans, including those that do not elect to comply with Section 404(c).[33] Plan fiduciaries now have the responsibility "to ensure that . . . participants . . . are made aware of their rights and responsibilities with respect to the investment of assets held in, or contributed to, their accounts and are provided sufficient information regarding the plan, including plan fees and expenses, and regarding the designated investment alternatives available under the plan, including fees and expenses attendant thereto, to make informed decisions with regard to the management of their individual accounts." *Id.* The DOL reiterated its view that these disclosure requirements do not relieve a fiduciary from its duty to prudently select and monitor designated investment alternatives offered under the plan. *See* 29 C.F.R. § 2550.404c-1(d)(2)(iv). But the DOL stops short of stating in the regulation that an initial, allegedly imprudent,

[33] Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 75 Fed. Reg. 64,910.

investment designation makes the 404(c) safe harbor inapplicable and transfers liability back to the fiduciaries. The DOL's most recent regulatory language in fact recognizes that the statute does not empower the DOL to exclude the fiduciary's initial investment designations from the reach of Section 404(c), as suggested in the Preamble to the 1992 final regulations.[34] Indeed, that misguided construction would turn Section 404(c) on its head and render it useless because, after all, it is an affirmative defense to a claim of breach of fiduciary duty. As the Fifth Circuit explained in *Langbecker v. Electronic Data Systems Corp.*, 476 F.3d 299, 311 (5th Cir. 2007), this construction "would render the 404(c) defense applicable only where plan managers breached no fiduciary duty, and thus only where it is unnecessary." *See also* Brief of Unisys Appellees, at 21-23. Absent a breach of fiduciary duty – including a breach that is alleged to have occurred in the initial designation of investments – there is no need for the Section 404(c) defense.

Where all the requirements of the regulation are satisfied, the fiduciary must remain insulated from liability for the informed participant's self-directed losses. To place the liability for participants' decisions on the fiduciaries by eliminating or narrowing the 404(c) defense makes no more sense than rewarding the fiduciaries when participants have chosen profitable investments. If participants are the

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[34] *See* Brief of Unisys Appellees at 25-30 (citing Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans), 57 Fed. Reg. 46,905, 46,924 n.27 (Oct. 13, 1992) (Preamble)).

investment decision-makers, to impose liability on any other party "is an inequity of heads I win, tails you lose." *In re Unisys Savings Plan Litig.*, No. 91-3067, 1997 WL 732473, at *24 n.30 (E.D. Pa. Nov. 24, 1997) (quoting *Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 163 (7th Cir. 1988)). Here, the full range of investment fees was disclosed to participants. Thus, if a participant determines in retrospect that he could have selected a lower fee investment option, as compared to the fully disclosed, higher fee investment option he selected, any alleged loss is still the result of his fully informed and affirmative choice. Section 404(c) relieves the fiduciary from liability for including the fully disclosed, higher fee investment option as one among many diverse choices.

Appellants' interpretation would conflate two events for purposes of assessing liability: the fiduciary's inclusion of a particular investment, and the participant's choice of that investment. *See Langbecker*, 476 F.3d at 310; *see also* Brief of Unisys Appellees, at 21. Failing to preserve the distinction between these two events is incorrect as a matter of law, as the district court correctly found. Additionally, it would unnecessarily complicate the ERISA scheme by eliminating certainty as to the effect of compliance with the regulation, and spur litigation by participants disappointed with the results of their investment choices.

By operation of the regulation, when 404(c) requirements are satisfied – *i.e.*, among other things, when a panoply of funds is offered, and participants are fully

educated about the investment choices – it is reasonable for the fiduciary to be relieved of liability for participants' decisions. Class action complaints about relative expenses and fees are not compelling if informed participants have rejected the opportunity to choose funds with lower fees. Even if the plan's fiduciaries are alleged to have breached their duties by including an investment with purportedly excessive fees, the participant's fully informed choice reasonably trumps any liability that could attach to the fiduciaries' antecedent decision. As this Court has recognized, the relevant legislative history approved the application of Section 404(c) to claims that the offered investments were imprudent. See Brief of Unisys Appellees, at 20-21.[35] Liability cannot be imposed on the fiduciary simply because the fiduciary designated a particular investment when a lower cost, alternative investment may have been available; because the participant took the intervening, affirmative, and informed step of choosing a fund with a fully disclosed fee that was higher than the fees of other fully informed options, the participant must bear any loss.

3. *401(k) plans are enhanced by the availability of the 404(c) safe harbor*

The Section 404(c) protection goes hand in hand with a key feature of the 401(k) plan: that individual participants select their retirement funds from among

[35] Citing H.R. Conf. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5086 *and cited in Unisys Savings Plan*, 74 F.3d at 444 n. 21.

various investment options based on their long term plans, age, risk tolerance, cost, and personal financial circumstances. For 404(c) compliant plans, the participant makes choices after receiving detailed information about the investment's historical performance, the manager's investment strategies, and associated fees and expenses. Mutual fund fees and expenses, as well as other information, are fully disclosed in accordance with detailed Securities and Exchange Commission regulations.[36] The availability of the Section 404(c) safe harbor increases the likelihood of a diverse menu of investment options in a 401(k) plan, including investment options with a broad range of fees. Evaluation of the suitability of particular investments and the allocation of funds among these investment vehicles is a task assigned to the individual participant. It is not reasonable to presume that only the lowest cost investments are appropriate and prudent for all participants; a higher fee investment with the potential for higher returns may be the most appropriate choice from the perspective of a particular participant.

In making decisions about establishing plans and determining what investment options will be offered, plan sponsors and plan fiduciaries are charged with considering these diverse participant needs and desires. As a matter of public policy, courts should encourage conditions where the market offers plan sponsors

[36] *See* 15 U.S.C. §§ 77j(a), 80a-8(b); 17 C.F.R. § 274.11A. These disclosure rules require mutual funds to provide a prospectus containing information about the fund's organization, investment strategy, investment risks, and past performance, in addition to information about fees and expenses.

plan options with various cost choices. Whatever choices are made by sponsors and fiduciaries, it is important that they retain the freedom to select among a diverse array of choices, unfettered by class action second-guessing. Appellants' position that participants may assert legal claims based simply on their opinion that fees are too high will constrict the market and the array of choices. If courts validate participant fee complaints, excessive litigation and unpredictable liability will follow, with the possible ultimate result that fiduciaries will restrict plan investment options.

4. *401(k) plans are enhanced by retaining mutual funds within a diverse array of investment options*

Appellants' position that certain investments are simply "too expensive" targets "retail" mutual funds as 401(k) plan investment options. But for fiduciaries and participants, mutual funds are a favored investment vehicle. Employees like mutual funds within their menu of investment options in their 401(k) plans because they are a popular, accessible, understandable investment vehicle. Employees can retrieve information about mutual funds in many media sources, independent of their plan or employer – in newspapers or on the internet, for example. Further, a mutual fund investment offers investment diversification and readily available information to help participants make informed decisions. Even unsophisticated individuals, and those with relatively little to invest, appreciate mutual funds because of the valuable investor services provided by the fund manager, including

communications to participants and compliance with applicable regulations. Mutual funds offer a variety of benefits and services "virtually impossible to find anywhere else," including expert portfolio management, automatic diversification, ease of purchase and sale, small minimum purchases, automatic reinvestment of earnings, automatic payment plans, shareholder services, and easy access to information.[37] Mutual funds are technologically able to provide ongoing recordkeeping and transactional services on a daily basis for participants in 401(k) plans, including online tools to manage the funds and individual accounts, investor education materials, and voice response systems.[38] Most plans offer, and many

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[37] Kiplinger's Pers. Fin., *Kiplinger's Guide to Investing Success* 115-19 (Karen Murphy et al. eds., Kaplan Publishing 6th ed. 2006).

[38] Inv. Co. Inst., *supra* note 21, at 189 (noting mutual funds offer "professional investment management, diversification, and liquidity[, and] may offer other benefits and services, such as asset allocation programs or check-writing privileges on money market fund accounts"); U.S. Sec. & Exch. Comm'n, *Invest Wisely: An Introduction to Mutual Funds* (2008), http://www.sec.gov/investor/pubs/inwsmf.htm ("mutual funds provide an attractive investment choice because they generally offer" professional management, diversification, affordability, and liquidity); Paul Schott Stevens, Inv. Co. Inst., *The Success of America's Mutual Fund Marketplace* (2006), *available at* http://regulation/products/mutual/06_aei_stevens_remarks (noting benefits of mutual funds, including that "their shares [can be redeemed] on a daily basis," there is a "vast amount of information about [them] from a broad range of sources," they "are closely scrutinized by independent mutual fund analysts, [and that analysis is] available to investors at the click of a mouse," and they "have innovated greatly in service . . . for example, in telephone call centers, automated voice-response telephone systems, Internet web sites, and consolidated account reporting[, and] they must continually upgrade and improve such systems to attract and retain customers").

participants expect, such options.[39] Mutual funds are appropriate for 401(k) plans because they provide all of these information and transactional services. As a matter of public policy, further market expansion should be encouraged so that various levels of services are available to 401(k) plans.

The rule of law here should favor the availability of a broad array of choices where plan sponsors and fiduciaries may offer diverse investment options, including mutual funds that provide extensive participant services. Ending class action attacks on the inclusion of retail mutual funds in 401(k) plans will facilitate participant opportunity and freedom of choice, enable employers to offer plans that are appealing to a diverse group of employees, and allow participants to maximize their income to the extent of the fee expense and risk they are willing to assume.

IV. CONCLUSION

The Chamber supports the position of Appellees that (1) the trustee, the company, and its fiduciaries did not violate ERISA by offering 401(k) plan participants "retail" mutual funds with allegedly excessive fees, and, (2) even if a

[39] Deloitte, *supra* note 31, at 35 ("Ease-of-use continues to be an expectation for 401(k) programs, as both employers and employees surveyed increasingly use on-line tools to manage the funds and individual accounts. This keeps the pressure on plan providers surveyed to continue upgrading the technological sophistication of their record keeping systems and offerings. . . . Utilizing the Internet and voice response systems, participants can initiate loans, enroll, initiate transfers, make distributions, request hardship withdrawals, etc., simply and accurately."); Holden & Hadley, *supra* note 31, at 4 (participant-focused services provided to 401(k) plans include participant communications, education, and advice, as well as the processing of loans, insurance, and annuities).

fiduciary breach occurred, the Section 404(c) safe harbor shields fiduciaries from liability for "any" losses allegedly suffered because of the participants' individual investment elections.

Section 404(c) appropriately places the responsibility for participants' voluntary investment decisions on the participants, who by operation of the regulation are the informed investment decision-makers for their individually-directed retirement plan accounts. Section 404(c) preserves the fiduciaries' ability to offer a wide range of options in a 401(k) plan and protects fiduciaries from liability for the participants' choices which, though voluntary and fully informed, sometimes yield disappointing results.

Further, the district court properly determined that the Plan was not required to obtain "the best deal imaginable." *Renfro*, 2010 WL 1688540, at *6. In Appellants' view, that best deal would be the lowest fee option for each investment vehicle included in the Plan. But because the Plan included a diverse mix of investment alternatives with varying fees, risks, and potential rewards, *id.* at *5, the district court determined correctly that no fiduciary breach occurred.

Appellants urge an interpretation that will constrain fiduciary choices of investment alternatives to those with the lowest fees, despite the fiduciary's obligation to offer a diversified investment selection. At best, Appellants' view will result in a narrower range of options in 401(k) plans. At worst, and harkening

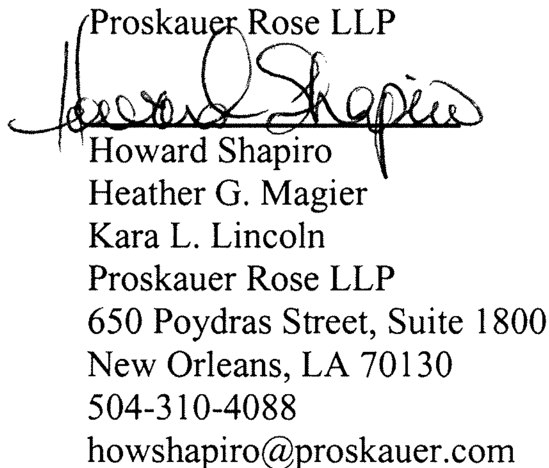
back to the defined benefit plan experience, plan sponsors instead may choose to "sit on the sidelines" and not offer 401(k) plans.

Congress did not intend sponsorship of 401(k) plans to be a hazardous business. Allowing participants to assert these types of claims creates an intolerable hazard and will deter companies from establishing and maintaining defined contribution plans. The specter of endless litigation – with excessive expense and unpredictable liability – threatens to achieve the undesirable outcome foretold by the Supreme Court: employers' reluctance "to [offer] [ERISA] plans in the first place." *Frommert*, 130 S. Ct. at 1649 (citing *Varity Corp v. Howe*, 516 U.S. 489, 497 (1996)).

As a matter of public policy and in furtherance of these purposes, the Chamber respectfully requests that this Court affirm the judgment of the district court.

Respectfully submitted,

Proskauer Rose LLP



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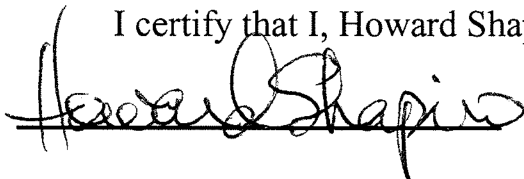
CERTIFICATE OF ADMISSION

I certify that I, Howard Shapiro, am a member of the bar of this Court.



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November 15, 2010

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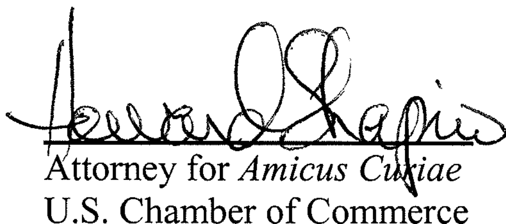

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2010, an electronic copy of the Brief of *Amicus Curiae*, the Chamber of Commerce of the United States of America, was delivered via the CM/ECF system to the following counsel, and that a true and correct copy of the same was mailed, by United States mail, with proper postage prepaid, to:

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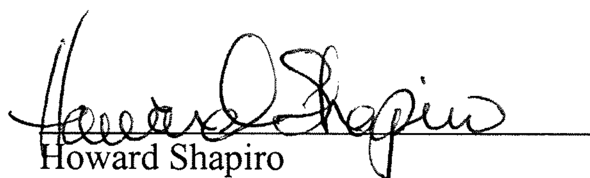

Howard Shapiro

November 15, 2010