A Prudent Process for ERISA Fiduciaries: Why Documentation is More Important Than Ever

What the recent Supreme Court ruling in the Cunningham v. Cornell University opinion teaches us - "The best offense is a good defense"

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Introduction

On April 17, 2025, the United States Supreme Court issued its opinion in *Cunningham v. Cornell University*, resolving a split among lower courts on pleading standards for prohibited transaction claims under ERISA. The decision will make it easier for plan participants to bring suits with minimal or "barebones" allegations that plan fiduciaries engaged in a prohibited transaction.

This ruling is a potential gift to plaintiff attorneys who have aggressively targeted plan fiduciaries in recent years. Their claims often focus on fiduciary missteps such as selecting underperforming or high-cost funds, or—at issue in this case—using plan assets to pay for allegedly unreasonable recordkeeping services.

The question for fiduciaries is clear: **how should you prepare?** The answer is to go on offense by strengthening your documentation and prudent process.

Background: The Rise of ERISA Litigation

"…in modern civil litigation, getting by a motion to dismiss is often the whole ball game because of the cost of discovery."

- Justice Alito in his concurrence

ERISA fiduciary breach cases are not new; they date back to the passage of the law in 1974. But in the mid-2000s, the law firm, Schlichter, Bogard & Denton, ignited a wave of litigation against large employer 401(k) plans. The central claim: fiduciaries failed to act solely in the best interest of participants by allowing excessive administrative and investment fees.

Early settlements averaged more than $10 million, which in turn inspired "copycat" litigation. These cases soon expanded to include 403(b) plans and even smaller 401(k) plans. Today, it is common for plaintiff attorneys to recruit plan participants through online solicitations, targeting plans they view as vulnerable.

While only a handful of cases have gone to trial, the broader goal is often to pressure fiduciaries into costly settlements. Typically, fiduciaries attempt to dismiss the cases early, arguing that the allegations lack concrete evidence. Complaints are usually built on public filings such as Form 5500s and participant disclosures. The real risk for fiduciaries arises in the discovery process, where plaintiff attorneys gain access to internal plan documents—an expensive and potentially damaging stage of the process.

Why Recordkeeping Fees Are in the Crosshairs?

Recordkeeping fees are a frequent focus of litigation because they tie directly to ERISA's prohibited transaction rules.

- **ERISA Section 406** prohibits certain transactions between a plan and a "party in interest," which includes recordkeepers, unless there is an exemption.
- **ERISA Section 408(b)** provides exemptions, including the "service provider exemption," which allows plans to use assets to pay recordkeepers **if three conditions are met**:
    1. The exemption applies,
    2. The services provided are necessary, and
    3. The fees are reasonable.

To assist plan fiduciaries to qualify for the exemption requirements, the DOL issued the 408(b)(2) regulation in 2012, requiring service providers to disclose detailed information about their fees.

Traditionally, courts assumed fiduciaries could easily establish the first two prongs (exemption exists, services are necessary). The third prong—**reasonableness of fees**—was usually reserved for later stages of litigation, after motions to dismiss.

The *Cunningham* decision changes that dynamic. Now, fiduciaries hoping to secure a dismissal based on the Prohibited Transaction Exemption must demonstrate at the very outset that they meet **all three prongs**, including reasonableness of fees. This is known as a "affirmative defense". Plaintiffs, on the other hand, need only allege that a prohibited transaction occurs. Something that happens automatically any time plan assets are used to pay a recordkeeper.

Implications for Fiduciaries

The Supreme Court ruling dramatically increases litigation risk. Any plan that pays recordkeeping fees from plan assets, and most do, could face prolonged and costly lawsuits. Even the Supreme Court acknowledged this risk, but suggested tools for courts to discourage frivolous suits, such as:

- Requiring plaintiffs to pay defendants' legal fees if exemptions clearly apply,
- Limiting discovery to reduce costs, and
- Using rarely used procedural tools to demand more detailed allegations from plaintiffs.

Time will tell if Courts use these tools to deter frivolous lawsuits, but in the meantime ERISA fiduciaries will need to be proactive to reduce their exposure.

Key Takeaway: Go on Offense with Documentation

The lesson is clear: **document, document, document.** A prudent process—backed by thorough documentation—is the strongest defense against claims of fiduciary breach and in particular prohibited transaction claims. Fiduciaries should:

1. **Benchmark Recordkeeping Fees Regularly**
   Compare fees against peer plans and industry data to ensure reasonableness.
2. **Document the Decision-Making Process**
   Keep minutes showing why specific providers, service models, and fee structures were chosen.
3. **Review and Monitor Service Providers**
   Ensure services remain necessary, contracts are reviewed periodically, and fee disclosures are up to date.
4. **Engage Independent Experts When Needed**
   Outside consultants with robust benchmarking capabilities can strengthen the defense of fiduciary decisions and qualification for Prohibited Transaction Exemption.

By building a paper trail that demonstrates a prudent process, fiduciaries can improve their chances of defeating claims early—before litigation spirals into costly discovery.

Conclusion

The *Cunningham v. Cornell University* decision raises the stakes for ERISA fiduciaries. Plaintiffs can now bring claims with little more than bare allegations, shifting the burden onto fiduciaries to prove compliance with exemption requirements from the very start.

In this environment, the best offense truly is a good defense. By proactively documenting a prudent process and fee reasonableness, fiduciaries can protect themselves, their plans, and their participants from costly and distracting litigation.
