No. 16-56418

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRANSAMERICA LIFE INSURANCE COMPANY, an Iowa corporation, TRANSAMERICA INVESTMENT MANAGEMENT, LLC, a Delaware limited liability company, and TRANSAMERICA ASSET MANAGEMENT, INC., a Florida corporation,

Defendants-Appellants,

v.

JACLYN SANTOMENNO, KAREN POLEY, BARBARA POLEY, all individually and on behalf of all others similarly situated,

Plaintiffs-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE DEAN D. PREGERSON, DISTRICT JUDGE
CASE NO. 2:12-CV-02782-DDP (MANX)

BRIEF FOR THE AMERICAN COUNCIL OF LIFE INSURERS, THE AMERICAN BENEFITS COUNCIL, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* SUPPORTING APPELLANTS

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The American Council of Life Insurers has no parent corporation. No publicly held corporation owns 10 percent or more of its stock.

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The Chamber of Commerce of the United States of America has no parent corporation. No publicly held corporation owns 10 percent or more of its stock.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), this brief is being filed with the consent of all parties by the American Council of Life Insurers ("ACLI"), the American Benefits Council ("Council"), and the Chamber of Commerce of the United States of America ("Chamber"), all of which support the defendants-appellants, Transamerica Life Insurance Company, Transamerica Investment Management, LLC, and Transamerica Asset Management, Inc. (collectively, "Transamerica"), in seeking the reversal of the district court's rulings below.[1]

ACLI is a trade association with approximately 290 member companies operating in the United States and abroad. ACLI advocates in state, federal, and international forums for public policy that supports the industry marketplace and the 75 million American families that rely on life insurers' products for financial and retirement security. ACLI members offer life insurance, annuities, retirement plans, long-term care and disability income insurance, and reinsurance, representing 94 percent of industry assets, 93 percent of life insurance premiums, and 97 percent of annuity considerations in the United States. ACLI members' retirement-related business includes group annuities issued to employer-sponsored

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[1] No party's counsel authored this brief in whole or in part, and no party, no party's counsel, and no other person contributed money intended to fund the brief's preparation or submission other than *amici*, their members, or their counsel.

retirement plans like those at issue in this case. ACLI regularly participates as *amicus curiae* in appellate litigation affecting its members and their customers, including several cases that are highly relevant to this one: *McCaffree Financial Corp. v. Principal Life Insurance Co.*, 811 F.3d 998 (8th Cir. 2016), *Santomenno v. John Hancock Life Insurance Co. (U.S.A.)*, 768 F.3d 284 (3d Cir. 2014), and *Leimkuehler v. American United Life Insurance Co.*, 713 F.3d 905 (7th Cir. 2013).

The Council is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 400 members are primarily large multistate employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs. The Council frequently participates as *amicus curiae* in appellate cases that could affect the design and administration of benefit plans.

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important 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 curiae* briefs in cases that present issues of concern to the nation's business community.

INTRODUCTION

At almost every turn in the proceedings below, the district court misunderstood and misapplied a fundamental concept in ERISA jurisprudence: the statutory definition of "fiduciary." Five published opinions from three Courts of Appeals have applied this concept to service providers like Transamerica; in each instance, the court held that the service provider did *not* act as a fiduciary in any relevant respect.[2] The district court's opinions are at odds with each of those opinions, as well as basic and long-established rules about the limits of fiduciary status.

The retirement services industry and the plans and plan sponsors they serve—including many members of the ACLI, the Council, and the Chamber—have come to rely on these long-established rules, which give service providers appropriate freedom to (1) negotiate their fees before being hired, without the constraints of fiduciary status, and (2) collect those agreed-upon fees after being hired. If affirmed, the district court's decision to abandon these rules would lead to severe

[2] *McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998 (8th Cir. 2016); *Santomenno v. John Hancock Life Ins. Co. (U.S.A.)*, 768 F.3d 284 (3d Cir. 2014); *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905 (7th Cir. 2013); *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011); *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir.), *reh'g denied in suppl. opinion*, 569 F.3d 708 (7th Cir. 2009).

and damaging repercussions for the service provider industry and increased complexity and cost for retirement plan sponsors. By making it impossible for service providers to negotiate their fees as a practical matter (because, in the district court's view, they are wearing their fiduciary "hats" when doing so), the district court's approach would likely force many service providers to exit the marketplace, leading to less choice, lower quality services, and higher prices.

Equally problematic is the district court's holding that it is unlawful for service providers to collect asset-based fees, even under contract terms accepted by an independent plan fiduciary. If allowed to stand, this holding would upend a well-established and entirely lawful means of paying the administrative and other costs of 401(k) plans.

ERISA does not require employers to establish retirement savings programs. Instead, the law is meant to encourage employers to offer retirement plans by lowering costs and reducing regulatory hurdles. *See Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (in enacting ERISA, Congress sought to avoid "a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place"). The district court's ruling would thwart this goal by making it harder for employers to offer such plans, to the detriment of service providers, plan sponsors, and participants alike. As another court warned in an analogous context, "litigation about pension

plans" can sometimes "make everyone worse off." *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006). If the district court's rulings are not reversed, this case would do exactly that.

ARGUMENT

I. The 401(k) landscape.

A. The role of service providers.

This case involves 401(k) plans, a type of "defined contribution" plan. These plans provide a tax-advantaged way for workers to save for retirement, and, as the Supreme Court has observed, they "dominate the retirement plan scene today." *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255 (2008). In 401(k) plans, employees (and usually employers) contribute money on a tax-deferred basis to employees' accounts, and that money grows over time as it earns returns from investment options chosen by the plan sponsor and the employees.

Running a 401(k) plan requires many services, including keeping records of participant accounts, generating account statements, developing educational materials, running call centers, maintaining websites, ensuring regulatory compliance, and processing investment transactions, plan loans, distributions, roll-overs, contributions, and more. As a 1998 report commissioned by the Department of Labor recognized: "The services provided by typical 401(k) plans are elaborate. They evolved, in part, from the requirements of ERISA . . . . Over the years, services have become more elaborate in response to the demand of participants and

sponsors." Economic Systems, Inc., *Study of 401(k) Plan Fees and Expenses*, at 5.2 (1998).[3] Since that report was issued, the services provided by 401(k) plans have only grown in scope and complexity. For example, the number of investment options the average plan offers grew from six in 1995 to fourteen in 2005. Investment Company Institute, *401(k) Plans: A 25-Year Retrospective* 17 (2006).[4] In recent years, plans have also added online and mobile-based options as ways for participants to interact with their plans. Deloitte, *Annual Defined Contribution Benchmarking Survey* 47 (2015) ("Deloitte Survey").[5]

Sponsors of 401(k) plans generally do not have the wherewithal to perform all these services. Instead, they are performed by service providers like Transamerica. The competitors in this marketplace include not only insurance companies, but also mutual fund companies, banks, consulting firms, third-party administrators, brokerage firms, accounting firms, and payroll providers. *See* Keith Clark, *The Defined Contribution Handbook* 26-27 (2003). And the competition is fierce: A 2015 survey showed that 70 percent of plan sponsors had evaluated whether to change their service provider in the previous five years, and 28 percent had in fact changed providers during that time frame. Deloitte Survey at 53. Because of the

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[3] *Available at* http://www.dol.gov/ebsa/pdf/401kRept.pdf.

[4] *Available at* http://www.ici.org/pdf/per12-02.pdf.

[5] *Available at* https://www2.deloitte.com/content/dam/Deloitte/us/Documents/human-capital/us-hc-annual-defined-benchmarking-survey-2015.pdf.

intensity of the competition, service providers generally earn thin profit margins, as illustrated by the fact that it generally takes Transamerica six or seven years before recouping its costs of serving a new customer. Dkt. 13 at 12.

B. Fees for plan services.

Plan services have a cost. The most common way for plans to pay for these services is through an asset-based fee, calculated as a percentage of the assets invested in various investment options. The U.S. Department of Labor, the agency charged with enforcing ERISA, has explained this methodology in a brochure targeted to plan participants:

> In some instances, the costs of administrative services will be covered by investment fees that are deducted directly from investment returns. Otherwise, if administrative costs are separately charged, they will be borne either by your employer or charged directly against the assets of the plan.

U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 3 (2013).[6]

The use of asset-based fees provides flexibility for employers to cover the cost of 401(k) plans, thus making such plans affordable for small employers that might otherwise choose not to offer them. As a 2007 report found, a system of asset-based fees "may be good, in that it reduces overall plan costs and provides the plans, especially small ones, with services and benefits which might not be affordable." *See* U.S. Dep't of Labor, Advisory Council on Employee Welfare and

[6] *Available at* https://www.dol.gov/ebsa/publications/401k_employee.html.

Pension Benefit Plans, *Report of the Working Group on Fiduciary Responsibilities and Revenue Sharing Practices* 6 (2007) ("Advisory Council Report").[7] The same report noted that asset-based charges "allow[] the market to develop efficiencies and innovations that have enhanced the quality of services [and] products available to [defined contribution] and 401(k) plans." *Id.* at 3.

As noted, asset-based charges are by far the most popular way to pay for 401(k) plan services. As of 2015, fully half of 401(k) plans paid their plan costs entirely through asset-based charges, with no additional direct fees, and this percentage was even higher for smaller plans. Deloitte Survey at 43.

The Department of Labor has never suggested that using an asset charge to pay a service provider is problematic in any way, much less unlawful. To the contrary, the Department has promulgated regulations implicitly approving of the practice by requiring robust disclosure of asset-based and other fees. *See* 29 C.F.R. § 2550.404a-5 (participant-level disclosures); 29 C.F.R. § 2550.408b-2 (plan-level disclosures). As the Department explained when promulgating the plan-level regulation:

> The definition of compensation [to be disclosed] under the proposal was very broad and encompassed not only the compensation and fees received by service providers, but also compensation attendant to plan investments and investment options. Disclosures concerning investment-related compensation (i.e., investment management and similar fees charged against investment returns) are particularly

[7] *Available at* http://www.dol.gov/ebsa/publications/AC-1107b.html.

> significant in that they typically constitute a large portion of the total expenses incurred by a plan and its participants.

Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 75 Fed. Reg. 41600, 41611 (July 16, 2010) (codified at 29 C.F.R. 2550.408b-2(c)); *see also* 29 C.F.R. § 2550.408b-2(c)(1)(viii)(B)(3) (noting that compensation "may be expressed as a . . . percentage of the covered plan's assets").

II. The district court's misinterpretation of ERISA would harm service providers, plan sponsors, plans, and plan participants.

A. The district court's "fiduciary" rulings would drive service providers out of the marketplace.

In its rulings on Transamerica's fiduciary status, the district court made several critical errors arising from its misunderstanding of the meaning of "fiduciary" under ERISA. The word is defined in the statute: a person is a fiduciary "to the extent" he does certain things, such as exercise control over plan assets. *See* 29 U.S.C. § 1002(21)(A). This "to the extent" limitation is important because it means a person can be a fiduciary for some purposes but not others. In other words, "fiduciary status under ERISA is not an all-or-nothing concept." *McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998, 1002 (8th Cir. 2016). "In every case charging breach of ERISA fiduciary duty, then, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action

subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000).

Acting as a fiduciary is a prerequisite for all of Plaintiffs' claims, as is breaching a legal duty. See 29 U.S.C. §§ 1104(a), 1106(b). And if there is one principle that is absolutely clear in this factual setting, it is that a service provider neither acts as a fiduciary nor breaches any duty when it charges fees that were authorized in advance by an independent plan fiduciary.[8]

In a series of rulings from the courts of appeal, this hornbook ERISA law has been applied to theories of fiduciary status aimed at 401(k) service providers that allegedly collected "excessive" fees. Each time, the plaintiffs' theories have been rejected.[9] Just last year, the Eighth Circuit rejected the same type of claim Plaintiffs make here—a claim that a 401(k) service provider acted as a fiduciary by collecting asset charges from the "separate accounts" of an insurance company holding assets of a 401(k) plan. *McCaffree*, 811 F.3d at 1001. As in this case, the asset charge was authorized by contract and assessed by the service provider,

[8] *See, e.g.*, *Chicago Dist. Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463, 473 (7th Cir. 2007) ("Given that this [pricing] scheme was the very deal for which [plaintiff] bargained at arms' length, [defendant] owed no fiduciary duty in this regard."); *accord Seaway Food Town, Inc. v. Med. Mut. of Ohio*, 347 F.3d 610, 619 (6th Cir. 2003); *Harris Tr. & Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 302 F.3d 18, 31 (2d Cir. 2002).

[9] *Hecker*, 556 F.3d at 583 ("[A] service provider does not act as a fiduciary with respect to the terms in the service agreement if it does not control the named fiduciary's negotiation and approval of those terms."); *see also Santomenno*, 768 F.3d at 295; *Renfro*, 671 F.3d at 324.

another insurance company. As in every other appellate decision to consider the issue, *supra* nn.2, 8-9, the court found that this meant plaintiffs had no viable claim. "Because [the service provider] did not owe plan participants a fiduciary duty while negotiating the fee terms" with the plan fiduciary, it "could not have breached any such duty merely by charging the fees described in the contract that resulted from that bargaining process." *McCaffree*, 811 F.3d at 1003.

These rulings makes sense. Transamerica and other service providers are in the business of selling services to 401(k) plans at market prices. If their prices are too high, plan sponsors can refuse to contract with them and go elsewhere in a highly competitive marketplace. *Id.*; *Santomenno v. John Hancock Life Ins. Co. (U.S.A.)*, 768 F.3d 284, 295 (3d Cir. 2014). The independent plan fiduciary who hires the service provider has a duty to ensure that the prices are reasonable, thereby providing ample protection to plan participants. *See, e.g.*, *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 599 (8th Cir. 2009) (holding that ERISA plan participant stated claim against plan fiduciary for agreeing to excessive fees).

The district court in this case turned these principles on their head. In the district court's view, even when a service provider negotiates an asset-based charge before it assumes any arguable fiduciary duties, and even when an independent fiduciary approves that asset charge in a written contract, it is still unlawful for the service provider to collect that charge because it "is negotiating to

become a fiduciary and negotiating for the fees that, as a fiduciary, it will assess on the employees' retirement accounts." ER196; *see also* ER181 ("Defendants' fiduciary duties attached at the time they negotiated their fees[.]").

This holding is contrary to the well settled law discussed above that an ERISA service provider can properly earn a profit by collecting the compensation it has negotiated in advance. *See also Hannan v. Hartford Fin. Servs., Inc.*, No. 3:15-CV-0395, 2016 WL 1254195, at *4 (D. Conn. Mar. 29, 2016), *appeal filed*, No. 16-1316 (2d Cir. Apr. 26, 2016) ("Insurance is a financial product which is structured, offered and sold by insurance companies for the primary purpose of making a profit. . . . The fact that [defendant] profits from the relationship . . . is neither unique nor improper [under ERISA]"). As the Second Circuit has held, any alternative rule "would render meaningless the negotiation of the terms of the agreement between the parties and would likely destroy the market for long-term ERISA contracts." *Harris Trust*, 302 F.3d at 29.

If not reversed, the district court's ruling would mean the profit margins of ERISA service providers will be further compressed by an unwarranted fiduciary duty to act in the interests of participants when they negotiate their fees. Service providers would likely exit the marketplace and dedicate their capital to more productive uses. The result would be a market with less choice, lower quality services, and, in the long term, higher fees.

The district court's misunderstanding of ERISA's definition of fiduciary is also apparent in its dismissal of the concept of "limited" fiduciary responsibilities, which it characterized as "oxymoronic." *See* ER192. This view, it appears, led the district court to decide that because Transamerica acknowledged that it owed *some* fiduciary responsibility to the plan, that meant that *every* interaction it had with the plan was colored with that same duty. But the idea of limited fiduciary status is embedded in the "to the extent" limitation of the statute itself, as expounded by the Supreme Court's opinion in *Pegram*.

Similarly, the district court dismissed as "formalistic line-drawing" the distinction between (1) contract negotiations that lead to an agreed-upon fee, and (2) potentially fiduciary acts that occur during a contractual relationship. ER195-96. Again, this line-drawing is grounded in the text of the statute, the Supreme Court's ruling in *Pegram*, and multiple other cases. It is hornbook ERISA law, and the district court erred by ignoring it.

The district court compounded its error even further by accepting the theory that things Transamerica *might* do were enough to make it a fiduciary. For instance, the district court held that the "power to add and delete investment options" made Transamerica a fiduciary, and that whether it actually did so was irrelevant. ER202. But ERISA provides that a person becomes a fiduciary by "exercising" control over plan assets, 29 U.S.C. § 1002(21), so the district court's

suggestions that "having and exercising discretionary authority are so close as to be identical," and that the power to exercise authority is the same thing as actually exercising it, *see* ER205, were erroneous. The Seventh Circuit appropriately rejected a similar argument as "unworkable"—"a 'non-exercise' theory of exercise." *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 914 (7th Cir. 2013). The theory is no more workable here.

B. The district court's misunderstanding of ERISA's "prohibited transaction" rules would drive up costs for 401(k) plans and participants.

In addition to a general prohibition on breaching fiduciary duties, ERISA bars certain specific actions, such as fiduciary self-dealing. *See* 29 U.S.C. § 1106(b). This provision of ERISA is what might be called an "unsafe harbor"—it lists specific actions that, unless exempt under another provision of ERISA, create liability. The district court held that Transamerica may have breached this duty because it assessed an agreed-upon asset charge from plan assets, an action the district court viewed as "dealing with those assets for one's own interest." *See* ER40. This ruling was erroneous for at least the same reasons discussed above: Transamerica was not "acting as a fiduciary . . . when taking the action subject to complaint," *Pegram*, 530 U.S. at 226, namely assessing an agreed-upon asset charge.

But the district court went even further by holding that the rules against self-

dealing prohibit service providers from negotiating and collecting fees based on asset-based charges at all. It held that "a fiduciary cannot pay itself out of the plan assets over which the fiduciary exercises its fiduciary duties—period. This rule applies regardless of whether the fees are agreed upon service fees disclosed in a contract and constitute reasonable compensation for services provided." ER93.

As with other aspects of the district court's fiduciary-related rulings, numerous other authorities have rejected this position. The Second Circuit has held that "the mere deduction of [a service provider's compensation] from [plan] assets does not, in itself, create a fiduciary relationship," nor does it violate ERISA, so long as the service provider negotiated the compensation in advance and cannot unilaterally change it. *United States v. Glick*, 142 F.3d 520, 528 (2d Cir. 1998). Similarly, as the Department of Labor has explained in a binding regulation—which the district court inexplicably disregarded—even if Transamerica served as a fiduciary in some respect (as Transamerica acknowledged it did), it cannot be liable for a prohibited transaction unless it used its fiduciary power to "cause a plan to pay additional fees." *See* 29 C.F.R. § 2550.408b-2(e)(2). Nothing in the record suggests that anything like this ever happened.

The district court read this Court's opinion in *Barboza v. California Association of Professional Firefighters*, 799 F.3d 1257 (9th Cir. 2015), as creating a bright-line rule that forbade Transamerica's collection of its agreed-upon fee. ER93. But

Barboza merely applied the longstanding rule that a person who helps himself to plan assets without permission violates ERISA, as Transamerica explained in its opening brief. Dkt. 13 at 47-49. The permission of an independent fiduciary makes all the difference. *See IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1420 (9th Cir. 1997) ("If a fiduciary tells a bookkeeping service to send a check for $950 to Mercy Hospital, the bookkeeping service does not thereby become a fiduciary."). When a plan fiduciary hires a service provider and authorizes that provider to collect an asset-based fee, the service provider neither acts as a fiduciary nor violates any duty when it does what it was authorized to do. *See McCaffree*, 811 F.3d at 1003; *see also Hecker v. Deere & Co.*, 556 F.3d 575, 584 (7th Cir. 2009).

This aspect of the district court's ruling would, if adopted elsewhere, harm plan sponsors, retirement plans, and their participants, insofar as it would force 401(k) plans to stop paying for plan services with asset-based charges. As explained above, roughly half of all 401(k) plans pay for plan services entirely with asset-based charges, and significantly more do so in part. Under the district court's rule, all of these plan sponsors would have to change how they pay for services—assuming they can find a service provider willing to assume the risk of fiduciary liability if the district court's opinion were affirmed.

The district court suggested that this result could be avoided if plan sponsors simply approve the withdrawal of a service provider's fees from the plans' assets

each time it occurs. ER55–56. But this would impose an immense administrative burden because almost all retirement plans allow participants daily access to their accounts.[10] Asset-based charges thus would have to be assessed on a daily basis, which would require at least daily approvals from each independent plan fiduciary.

It is hard to see how plans and employers could function under such a regime. Because few plan sponsors would accept the burden and cost of such an onerous system, the district court's ruling would mean that fewer service providers would offer the option to pay for plan services with asset-based charges. The only alternative for plans would be to increase their direct plan and participant-level charges. But as a report by a Department of Labor Advisory Council suggested, these direct charges may not be as affordable. Advisory Council Report at 6. More direct charges will thus tend to discourage small employers from establishing 401(k) plans and discourage low-income employees from enrolling in them. The foreseeable result is that fewer small employers will offer their employees retirement plans, and fewer participants will find it worthwhile to enroll.

C. The district court compounded its errors by misconstruing an exemption to ERISA's prohibited transaction rules.

The negative consequences described above could be mitigated somewhat

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[10] As of 1997, 64 percent of 401(k) plans allowed daily investment transfers. Economic Systems, Inc., *Study of 401(k) Plan Fees and Expenses*, at 2.3.7 (1998), *available at* http://www.dol.gov/ebsa/pdf/401kRept.pdf. Although exact data is not available, that number is likely higher today, as plan participants have come to expect 24/7 access to their accounts through the internet.

through the application of an exemption to ERISA's prohibited transaction rules, 29 U.S.C. § 1108(b)(8). This exemption expressly permits payments from a plan to a service provider for services rendered, so long as certain criteria are met, including that the service provider (in this case, the insurance company) "receives not more than reasonable compensation." But the district court held that, even if an asset charge qualifies as "reasonable compensation," this exemption does not apply. *See* ER92-93.

The district court's holding conflicts with the plain language of the statute, as well as the legislative history that led to its enactment. This Court need look no further than a Department of Labor opinion that approved a plan's purchase of interests in a collective trust. DOL Adv. Op. No. 2005-09A, 2005 WL 1208696 (May 11, 2005). In concluding that the transaction was exempt, the Department found that "Congress anticipated that the term 'reasonable compensation' would apply to the purchase or sale of an interest in a collective investment fund by a plan and to amounts to be paid by the plan for investment management of such assets." *Id.* at *5. If the Department thought the exemption did not shelter collection of agreed-upon asset-based charges paid from plan assets, it would have said so.

This exemption is important to service providers' ability to offer affordable services. As explained above, if service providers cannot collect asset-based fees, plan sponsors and participants will lose a popular and fair way of paying for 401(k)

plan services, one that has expanded access to 401(k) plans, especially among smaller employers. If it reaches this issue (and it need not, if it reverses on the threshold issue of fiduciary status), this Court should clarify that the exemption permits insurance companies to collect fees from plan assets pursuant to arrangements approved by their clients.

Dated: February 10, 2017

Respectfully submitted,

AMERICAN COUNCIL OF LIFE INSURERS, AMERICAN BENEFITS COUNCIL, and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contain 4,427 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2017, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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