No. 10-2447

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARK RENFRO, et al., Plaintiffs-Appellants

v.

UNISYS, et al., Defendants-Appellees

On Appeal from the United States District Court
For the Eastern District of Pennsylvania

BRIEF OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 10-2447

Mark Renfro, et al.

v.

Unisys Corp., et al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the 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 an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Securities Industries and Financial Markets Association ("SIFMA") makes the following disclosure:
(Name of Party)

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

None. Although SIFMA is the U.S. regional member of the Global Financial Markets Association ("GFMA").

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.

/s/ Nancy G. Ross
(Signature of Counsel or Party)

Dated: 11/15/2010

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The Securities Industries and Financial Markets Association ("SIFMA") brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington D.C., is the U.S. regional member of the Global Financial Markets Association ("GFMA"). For more information, visit www.sifma.org.

SIFMA supports the defendants-appellees in this case, and particularly the Fidelity Defendants.[1] SIFMA and its members have a strong interest in maintaining firm boundaries between what is and is not a fiduciary role in providing services to retirement benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 et seq. SIFMA also strongly supports increased investor opportunity, diversity and choice in a wide variety of investment options. SIFMA firmly opposes any judicially-created rule precluding ERISA plans from offering mutual funds, which have long been the foundational investment of choice for most retirement plans.

[1] As used herein, the Fidelity Defendants refers collectively to Fidelity Management Trust Company, Fidelity Management & Research Company and Fidelity Investments Institutional Operations Company, Inc.

II. SUMMARY OF ARGUMENT

The district court order includes at least two unremarkable holdings, but which are of significant interest to SIFMA members. First, the district court held that the Fidelity Defendants were not fiduciaries with regard to the conduct alleged in the complaint. Second, the district court held that a plan fiduciary need not select the cheapest investment option available. So long as participants exercise control over assets in their individual account and are offered a "broad range of investment alternatives" from which to choose, the fiduciary is protected from a claim that an individual option was a poor choice.

Investment broker-dealers often serve as service providers to ERISA plans, providing investment vehicles and, in some cases, ministerial recordkeeping services. SIFMA's members, which include many broker-dealers, have a strong interest in maintaining firm boundaries between what is and is not a fiduciary role in servicing ERISA plans, particularly where the parties have contracted in writing and that contract delineates the role of the respective parties. Plaintiffs' proposed expansion of ERISA's definition of fiduciary responsibilities and corresponding fiduciary liability threatens to seriously rock the foundation in which ERISA is embedded, discouraging the willingness of broker-dealers and other entities to provide services to such plans, or to do so only at a vastly increased cost which ultimately will be borne by plan participants.

SIFMA also strongly supports increased investor opportunity, diversity and choice in all investment environments, including employer-provided retirement plans. Any judicially-created rule precluding an ERISA plan from offering mutual funds which are available to the public, as opposed to only institutional alternatives, would significantly impair an investor's ability to control his or her investment funds and build a desirable retirement portfolio, particularly given that an employer-sponsored retirement plan is the primary investment vehicle for many individuals.

III. ARGUMENT

A. Participant Interests Are Served By Courts Maintaining Firm Boundaries On The Scope Of Fiduciary Duties And Recognizing Contractually Negotiated Limitations

Critical to both SIFMA members and the private employers that they service in connection with retirement plans, is the courts' recognition and enforcement of contractually negotiated boundaries, duties, and powers of plan service providers. An unexpected expansion of the scope of those duties beyond the intention of the parties creates uncertainty and unpredictability on the part of all concerned and serves to disincentivize those entities critical to retirement plans from providing the necessary services. Where a service provider, such as Fidelity in this case, has not agreed to perform a certain fiduciary role, and in fact has contractually negotiated to avoid such status, is nevertheless put at risk of a court's broad expansion of

ERISA's definition of fiduciary, ERISA's carefully balanced system of benefit plan regulation is jeopardized. What follows are unintended, and potentially enormous, ramifications upon the nation's privatized retirement benefit system.

In enacting ERISA, Congress envisioned a reticulated design whereby each provision would play a meaningful role in fostering the willingness of employers to voluntarily provide a vehicle for individuals to invest for retirement. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) (noting that ERISA is a "comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans"). Congress intended to encourage the formation of employee benefit plans, and critical to that purpose is incentivizing service providers to provide assistance. See Id. at 54 (ERISA's framework recognized "the public interest in encouraging the formation of employee benefit plans").

Congress struck a delicate balance – protecting innocent employees from unscrupulous employers who failed to provide benefits promised, while at the same time giving employers the freedom to design retirement plans with great flexibility and with minimal government or judicial interference. Conkright v. Frommert, 130 S.Ct. 1640, 1648-49 (2010) ("ERISA represents a 'careful balancing' between ensuring a fair and prompt system [and] a system that is [not]

so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place."), citing Pilot Life, 481 U.S. at 54 and Varity Corp. v. Howe, 516 U.S. 489, 497 (1996).

A judicial interpretation of any part of the statute unintended by Congress serves to potentially upset this carefully crafted design. This is particularly true when courts put more of an obligation on the myriad service providers who are instrumental to the operation of a retirement plan, but neither a watchdog nor administrator of plan assets, than Congress intended. Such judicial expansions have the dual effect of diminishing an entity's willingness to provide services to a plan or doing so only at significant cost. Both results impede the encouragement of voluntarily-provided retirement plans and the entire construct that Congress envisioned.

1. Congress And The Courts Have Stringently Limited The Application Of Fiduciary Status

In enacting ERISA, Congress set up a design whereby employers must expressly identify a "named fiduciary" of the plan. See 29 U.S.C. § 1102(a)(1) (every employee benefit plan "shall provide for one or more named fiduciaries"). It is that person or entity that bears the first-line fiduciary responsibility to the plan. See 29 U.S.C. § 1102(a)(1) (named fiduciary "shall have authority to control and manage the operation and administration of the plan"). At the same time, Congress

recognized that persons or entities who have discretionary responsibility for managing plan assets should also be held to a higher standard in order to further Congress's goal of protecting participants' retirement security. As such, Congress has prescribed specific activities by which an individual or entity other than the "named fiduciary" is held to fiduciary standards. To that end, Congress has provided that individual and entities are fiduciaries to an ERISA covered-plan:

> to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any money or property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A), ERISA § 3(21)(A). The *sine qua non* of fiduciary status is "discretion" over plan assets or plan administration. Pohl v. National Benefits Consultants, 956 F.2d 126, 129 (7th Cir. 1992) ("ERISA makes the existence of discretion a sine qua non of fiduciary status"); Plumb v. Fluid Pump Serv., 124 F.3d 849, 855 (7th Cir. 1997) (same); Hamilton v. Carell, 243 F.3d 992, 998 (6th Cir. 2001) (same).

The United States Supreme Court and its progeny, including this Court, have emphasized that under ERISA, a person is a fiduciary only *to the extent* that person performs a fiduciary function, as outlined in ERISA § 3(21)(A). See Pegram v.

Herdrich, 530 U.S. 211, 225-26 (2000) (a person is only a fiduciary "to the extent that he acts in such a capacity in relation to a plan"); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1158 (3rd Cir. 1990) ("Fiduciary duties under ERISA attach not just to particular persons, but to particular persons performing particular functions."). See also Hecker v. Deere & Co., 556 F.3d 575, 583 (7th Cir. 2009) (in determining fiduciary roles, a court must look to who owed duties to plaintiffs with respect to the conduct at issue); reh'g denied, 569 F.3d 708 (2009), cert. denied, 130 S.Ct. 1141 (2010). In Pegram, the Supreme Court instructed that in every case charging a breach of ERISA fiduciary duty, the threshold question is "whether [the defendant] was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." Pegram, 530 U.S. at 226.

Accordingly, with the exception of a plan's identification of a "named fiduciary," fiduciary status can never be assumed, nor is it properly deemed all or nothing. Instead, the threshold analysis requires consideration as to whether an individual or entity is *acting* as a fiduciary. Each act by the person at issue must be scrutinized for the necessary discretion to determine whether it rises to the level of a fiduciary function. Wright v. Oregon Metallurgical Corp., 360 F.3d at 1101 (an individual or entity performs a "fiduciary" function only when exercising "discretionary authority or discretionary control respecting the management" of the

plan). As Pegram and other courts make clear, the fact that an individual or entity constitutes a fiduciary for one purpose does not make it a fiduciary for all purposes when providing services to a benefit plan.

2. Broker-Dealers As Service Providers To ERISA Plans

A broker-dealer is a firm or individual that is in the business of buying and selling securities and operating as both a broker and a dealer, depending on the transaction. A broker-dealer license is granted by the United States Securities and Exchange Commission ("SEC"), which entitles the licensee to buy and sell securities for a particular client's accounts. The firm may also act as principal, or dealer, trading securities for its own inventory. Some broker-dealers act in both capacities, depending on the circumstances of the trade or the type of security being traded.[2]

In the context of an ERISA plan, broker-dealers often act as service providers. One service commonly provided is obtaining some or all of the investments the plan sponsor has chosen to offer to its employees through the retirement plan. In providing such services, the broker-dealer acts at the discretion of the plan sponsor or its delegate, such as the plan administrator or other named fiduciary. Typically, broker-dealers do not exercise authority or control over the management or disposition of plan assets, but rather, provide the assets requested

[2] See http://financial-dictionary.thefreedictionary.com/Broker-Dealer.

by the plan sponsor. That is, broker-dealers obtain a product, such as a mutual fund, for the plan to offer. The decision of which investment products to offer to the plan participants, and from whom, remains with the employer. The employer retains the right to choose the broker-dealers or other service providers offering the plan investment options, decide whether or not to purchase from among the products and services offered, and, in turn, decide whether to disassociate with any particular broker-dealer or other service provider.

Notwithstanding the terms and conditions a broker-dealer may insist upon in negotiating with the employer or plan administrator, in the absence of unilateral discretion to determine the investments a retirement plan will offer, the broker-dealer does not possess the discretion necessary to constitute a fiduciary for purposes of plan investment selection. See Hecker v. Deere & Co., 556 F.3d 575, 584 (7th Cir. 2009) (holding that it is "final authority" that is required to instill fiduciary status and that "[m]erely playing a role or furnishing professional advice is not enough to transform a company into a fiduciary" for the selection of investment funds). Simply put, and as recognized by the United States Department of Labor ("DOL"), broker-dealers providing ERISA plans with investment

vehicles such as mutual funds, are not acting in a fiduciary role. 29 C.F.R. § 2510.3-21(d).[3]

The same is true when a broker-dealer or other entity provides recordkeeping services to a plan. Relying on regulations issued by the DOL, courts have long held that record-keeping, deemed a ministerial or administrative act, does not constitute a fiduciary function because the record-keeper does not have discretionary authority over the management of plan assets. See, e.g., Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp., 399 F.3d 692, 700 (6th Cir. 2005) (finding that defendant was a "non-fiduciary service provider" who "performed record-keeping services" for the plan), *relying on* 29 C.F.R. § 2509.75-8 D-2 (entity that performs "ministerial functions" or "administrative functions … within a framework of policies, interpretations, rules, practices and procedures made by other persons" is not a fiduciary).

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[3] The Department of Labor is the governmental agency responsible for the implementation and enforcement of ERISA, including the issuance of regulations consistent with ERISA and which are "necessary or appropriate" to implement the standards established by Congress. 29 U.S.C. § 1135. Regulations properly issued pursuant to an express delegation of authority are entitled to deference and are binding on courts unless "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." United States v. Mead Corp., 533 U.S. 218, 227 (2001). An agency's interpretation of its own regulation is entitled only to "respect" but not deference. Id. at 227-28. Compare Hecker v. Deere & Co., 569 F.3d 708, 709-711 (refusing to accept DOL's footnote to preamble of 29 C.F.R. § 2550.404c-1 and stating "we cannot agree with the Secretary that the footnote in the preamble is entitled to full *Chevron* deference.").

Indeed, the DOL has acknowledged in regulations that broker-dealers may execute transactions on behalf of a plan without acting as a fiduciary. See 29 C.F.R. § 2510.3-21(d). The DOL has stated that a broker-dealer does not act as a fiduciary solely by reason of executing a transaction for the purchase or sale of securities on behalf of a plan pursuant to instructions from a plan fiduciary. Id. In a similar fashion, Congress has instructed that a plan investment in a mutual fund does not make the fund adviser an ERISA fiduciary. See 29 U.S.C. § 1002(21)(B). Nor in the view of the DOL is a service provider acting as a fiduciary by offering bundled services which include mutual funds. See DOL Advisory Opinion 2003-09A (June 25, 2003) (service provider that provided a "bundled service" arrangement, including trustee services, recordkeeping, tax compliance, participant communication and the availability to access mutual funds under "arms length" negotiation did not have discretionary authority over plan assets where it did not control the investment options other than requiring "as a condition of initial engagement" that the plan use a proprietary fund from the service provider); see also DOL Advisory Opinion 1997-16A (May 22, 1997) (service provider providing bundled services was not a fiduciary because it did not have ultimate authority and discretion as to the selection of mutual funds offered).

Applying the Supreme Court's instruction in Pegram, and its progeny, whether a broker-dealer or other service provider constitutes an ERISA fiduciary –

and the extent of any fiduciary duties – depends upon the specific role they play with respect to plan assets. A service provider may, for example, be considered a fiduciary if it chooses to enter into a mutual agreement to offer for a fee "individualized" advice on a regular basis to the plan or plan participants, as defined under 29 C.F.R. § 2510.3-21(c).[4] However, because a person is only a fiduciary "to the extent" the person acts in a fiduciary capacity, fiduciary status for that one purpose does not make a service provider a fiduciary for all other purposes. See, e.g., Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 61 (4th Cir. 1992) (holding that the inclusion of the phrase "to the extent" in the statute "means that a party is a fiduciary only as to the activities that bring the person within the definition."). As the Seventh Circuit Court of Appeals has noted, "[m]erely 'playing a role' or furnishing professional advice is not enough to transform a company into a fiduciary." Hecker, 556 F.3d at 584; Pappas v. Buck Consultants, Inc., 923 F.2d 531, 535 (7th Cir. 1991). Because of the attendant responsibilities that attach to a fiduciary, often stated as the "highest duty known to

[4] However, DOL regulations permit a person to provide participants with "investment education" without any fiduciary liability attaching including (1) plan information that relates to the plan and plan participation without recommending that an individual participant invest in a particular security; (2) general financial and investment information; (3) asset allocation models; and (4) interactive investment materials that provide a participant a means to estimate future needs and the potential impact of different asset allocations. 29 C.F.R. § 2509.96-1.

the law,"[5] such a label must not attach lightly. A service provider should not have to walk through a minefield to avoid fiduciary status, particularly when it has expressly contracted to the contrary.

As set forth below, to foster the Congressional goal of achieving a comprehensive and uniform system of benefit plan regulation, and to incentivize parties critical to achieving that goal, courts should adhere to the framework Congress provided, and avoid unreasonably burdening necessary but ancillary service providers with an unexpected, and unwarranted, plan fiduciary label.

3. Service Providers Commonly Contract With Benefit Plan Sponsors To Provide Certain Services And Not Others

As explained above, fiduciary liability under ERISA turns on whether a person or entity is a fiduciary for the *specific conduct* at issue. Accordingly, broker-dealers – like many types of service providers – are careful to contractually outline the specific services they will provide in order to assure that they are only responsible for such services and not held responsible for fiduciary duties. It is axiomatic that there is a direct correlation between specific services provided and the costs incurred – i.e., different levels of services warrant different costs. Contemplated in any cost structure of a service provider is the degree of risk the provider will assume. A service which likely causes a service provider to attain

[5] See, e.g., Donovan v. Bierwith, 680 F.2d 263, 272, n. 8 (2nd Cir. 1982) (the duties owed by a fiduciary are the "highest known to the law").

fiduciary status (e.g., generating income by providing individualized investment advice for a fee) will understandably draw increased risk, and thus necessitate a price for services that reflects that risk.

Permitting an employee benefit plan to contract for specific services is central (and, in fact, necessary) to ERISA's purpose and goal of encouraging privatized retirement plans. But *flexibility* in how employers set up their plan, who they purchase services from and under what terms, provides incentives to both employers to provide such plans and service providers to perform the necessary tasks. Notably, ERISA does not require that an employer establish a retirement plan. See Lockheed v. Spink, 517 U.S. 882, 888 (1996) (nothing in ERISA requires employers to establish employee benefit plans or mandates what kind of benefits employers must provide if they choose to have such a plan); Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995) ("ERISA does not create any substantive entitlement" to employer-provided benefits). As this Court has noted, the more restraints imposed by the courts, the less of an incentive there is to offer or provide services to such plans. See, e.g., IUE-CWA v. Visteon Corp. (In re Visteon Corp.), 612 F.3d 210, 232 (3rd Cir. 2010) (noting that in enacting ERISA, Congress believed that a lack of "flexibility would result in employers choosing not to provide the benefits at all.").

Using this case as an example, without the assistance of Fidelity or another service provider in procuring investment options desired by the plan, the Unisys Savings Plan would be but a shell. But Fidelity neither contemplated nor desired to take on the heightened responsibility of a plan fiduciary choosing investment options. In fact, the Trust Agreement at issue expressly provides that defendant Fidelity Management Trust Company "*shall have no responsibility for the selection of investment options* under the Trust and shall not render investment advice to any person in connection with the selection of such options." A364 (Trust Agreement, § 5(a) (emphasis added)). Instead, the plan sponsor, Unisys, is the only person that is entrusted with such powers. Id. Only by honoring and enforcing the respective parties' written intentions in servicing a plan will the courts foster ERISA's reticulated design, and provide employers with the tools necessary to offer employees retirement security.

4. Ignoring Contractual Limitations On Service Provider Duties Results In Significant Uncertainty And Increased Participant Costs

Where a service provider purposefully contracts to avoid fiduciary status and disavows accepting certain responsibilities, as in this case, the contracting parties expect the contract to govern. When those terms are ignored by the courts, ERISA's carefully reticulated design and our nation's dependence on the private sector's willingness to provide retirement security is severely jeopardized.

When performing a fiduciary function, a fiduciary has a duty of undivided loyalty to the plan (i.e., a fiduciary must discharge its duties solely in the interests of the plan and its participants and beneficiaries, for the exclusive purpose of providing plan benefits and defraying reasonable plan expenses). See 29 U.S.C. § 1104(a)(1)(A)-(B). Under ERISA, fiduciaries also must act prudently for the participants and have a duty to diversify plan investments. See 29 U.S.C. § 1104(a)(1)(C). Where a service provider has expressly declined to assume that responsibility, they rightfully believe that their liability is limited. While certainly they must satisfactorily perform the tasks agreed to, they do not expect to be measured by the heightened standard required of a fiduciary.[6] The difference in liability can be monumental. ERISA prescribes not only how a fiduciary must act (prudently and loyally with an "eye single" toward the benefit of participants)[7], but also the liability that results in the event of a breach. The penalty can be severe. Among other consequences, a fiduciary may be jointly and severally responsible for all resulting losses to the plan. See 29 U.S.C. § 1109(a) (fiduciary "shall be personally liable to make good to such plan any losses to the plan resulting from

[6] An example may be a broker who executes a transaction for a plan. That broker is not charged with determining if that trade is the most prudent investment decision for the plan.

[7] Pegram, 530 U.S. at 235 (fiduciary is required to act with an "eye single" toward the benefit of participants and beneficiaries).

each such breach…"). That possibility alone raises the specter of concern by service providers, particularly broker-dealers who are central to assisting the plan sponsors by providing the desired investments.

Allowing plaintiffs to move past contractually-agreed roles to assert fiduciary allegations against unsuspecting service providers wreaks uncertainty and ambiguity throughout the marketplace. In the face of unpredictable fiduciary status, service providers must account for the associated risk, passing on potential litigation and liability costs to plans – which ultimately fall to participants to bear.

The Supreme Court has repeatedly recognized Congress's careful balancing act in protecting participants but not imposing costly standards that discouraged such plans. See Massachusetts Mut. Life Ins. Co., v. Russell, 473 U.S. 134, 148, n. 17 (1985) (warning against expanding liability beyond that intended by Congress, "lest the cost of federal standards discourage the growth of private pension plans") (citations omitted). The Supreme Court has narrowly construed ERISA's statutory scheme and repeatedly warned against judicially expanding what Congress put in place. See Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209 (2002) ("We have observed repeatedly that ERISA is a 'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system (citations omitted). We have therefore been especially 'reluctant to tamper with [the] enforcement scheme' embodied in the

statute…"); see also See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) ("civil enforcement scheme . . . represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans"). This Court in Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155 (3rd Cir. 1990) recognized that very balancing act, noting "Congress's judgment that participants are best served by an enforcement regime that minimizes expected liability for violations – and with it, the disincentives against creating employee benefit plans in the first place." Id. at 1170.

Courts, including this one, have routinely recognized the importance of allowing the contract between the parties to determine fiduciary status. See, e.g., Confer v. Custom Engineering Co., 952 F.2d 34, 37-38, 39 (3rd Cir. 1991) (finding lack of fiduciary status by referring to plan documents which named the plan sponsor as the responsible party rather than other defendants who plaintiffs improperly tried to sue); Beddall v. State Street Bank & Trust Co., 137 F.3d 12, 19 (1st Cir. 1998) (looking to trust agreement to determine fiduciary status and noting that consideration of such document on a motion to dismiss prevents party from avoiding dismissal through artful pleading that mischaracterizes the very documents on which plaintiffs' case depends); Plumb v. Fluid Pump Serv. Inc., 124 F.3d 849, 854 (7th Cir. 1997) (noting that generally a service provider cannot

be liable for a breach of fiduciary duty unless the plan documents show that the person was responsible for the fiduciary activity at issue); Hecker, 556 F.3d at 583 (holding service provider was not a plan fiduciary where the trust agreement gave final say over plan investment selections to the sponsoring employer, not the service provider); Maniace v. Commerce Bank of Kansas City, 40 F.3d 264, 267-68 (8th Cir. 1994) (finding that trust agreement demonstrated that defendant had no discretion, and therefore could not breach fiduciary duties, with regard to stock fund).

Where broker-dealers, or other service providers, have disavowed fiduciary roles, market forces are better positioned to assure quality performance. Plan sponsors freely choose from an array of service providers in structuring their plans. Competition in the marketplace is a better choice to assure high standards among service providers, rather than slapping them with the unexpected label of fiduciary. In sum, service providers to ERISA plans, such as broker-dealers, deserve predictability and certainty when defining the terms of their engagement. A system wherein service providers who contract not to have a certain fiduciary role must nevertheless protect themselves against fiduciary liability, and pass on the cost of unpredictable risk, threatens to discourage the retirement security structure that Congress so carefully constructed. See Massachusetts Mut., 473 U.S. at 148,

n. 17 (warning against expanding liability, "lest the cost of federal standards discourage the growth of private pension plans").

B. ERISA Is Not Served By A Judicially-Created Rule That Limits The Type Of Investment-Options Provided To Plan Participants

Plaintiffs and their *amici* seek a judicially-created rule all but banning the use of retail mutual funds as investment options in 401(k)-type ERISA retirement plans.[8] But any such intrusion by the Court would further erode investor opportunity, diversity and choice. Simply put, a judicially-created rule precluding an ERISA plan from offering mutual funds which are available to the public at large, as opposed to only institutional alternatives, would significantly impair an investor's ability to decide how to invest his or her retirement funds – which is one of the hallmarks of participant-directed 401(k) plans.

1. Mutual Funds Are One Of The Most Common Investment Options For 401(k) Plans And Are Widely Used

"A mutual fund is a company that pools money from many investors and invests the money in stocks, bonds, short-term money-market instruments, or other securities." See United States SEC Answers on Mutual Funds, http://www.sec.gov/answers/ mutfund.htm, retrieved on Oct. 5, 2010; see also Jones v. Harris Associates, L.P., 130 S.C.t 1418, 1422 (2010). Mutual funds allow

[8] See, e.g., Brief of Amici Curiae Richard Kopcke and Francis Vitagliano in Support of Appellants (filed Sept. 16, 2010), p. 11 (seeking a rule that "retail mutual funds are not suitable investment options).

shareholders, even with a minimal investment, to collectively and efficiently purchase a diversified and professionally managed portfolio generally with a defined and disclosed fund objective. The fund objectives (e.g. large cap, small cap, geographic, etc.), combined with the fund managers' own investment style, can provide a diverse and unique investment option for an investor.

Some mutual funds share classes require a relatively minor minimum investment (normally $0 to $3,000) which allow individual investors (including outside of a benefit plan) to invest and are sometimes generically referred to as "retail" mutual funds. Other mutual funds, which require larger minimum investments, may be viewed as "institutional" funds, as generally institutions and large benefit plans are the only entities that can satisfy the minimum investment threshold. Generally speaking, institutional funds provide fewer services to their investors and can have a relatively lower overall price – although that is not always the case.

Deloitte Consulting LLP's 2005-2006 survey of 401(k) plans found that 91 percent of 401(k) plans utilized mutual funds as an investment option.[9] That

[9] See Deloitte Consulting LLC, *Annual 401(k) Benchmarking Survey*, 2005/2006 Edition, p. 19, found at www.ifebp.org/pdf/research/2005-06Annual401kSurvey.pdf.

number was virtually unchanged in the same survey done in 2009.[10] There are many reasons why mutual funds are the go-to investment of choice for most 401(k) plans.

One important reason is that mutual funds, unlike many other types of investments, are governed by the securities laws, including the Securities Act of 1940, the Securities Act of 1933, and the related governmental agency regulations. The strict regulatory framework holds advisors to high standards, regulates conflicts of interest and imposes disclosure rules. For example, mutual funds are required to provide a prospectus to investors about their investment objectives and strategy, investment risks, past performance and other related facts. See 15 U.S.C. §§ 77j(a), 80a-8(b); 17 C.F.R. § 274.11A; SEC, "Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies," 74 Fed. Reg. 4546 (Jan 26, 2009). The Supreme Court recently noted that the protections and disclosures that these laws impose on mutual funds require them to incur the costs of "more burdensome regulatory and legal obligations" than many other types of investment vehicles. Jones v. Harris Associates, L.P., 130 S.Ct. 1418, 1429 (2010). Given the regulatory environment in which they exist,

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[10] See Deloitte Development LLC, *401(k) Benchmarking Survey 2009 Edition*, p. 26, found at www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_consulting_401(k)AnnualBenchmarkingSurvey2009_081409.pdf.

mutual funds make good sense as a retirement plan investment option, as they contain the benefit protections that Congress envisioned in enacting ERISA.

2. Both Congress and the Courts Have Expressed A Preference That ERISA Plans Provide A *Variety* Of Investment Options, Including Mutual Funds, And Reject The Theory That Only Certain Types Of Investments Are Proper

In participant-directed defined contribution plans, participants determine how to allocate their funds among the various investment options offered by the plan. See, e.g., 29 U.S.C. 1104(c) and 29 C.F.R. §2550.404c-1 (describing participant directed plans where participants exercise control over how to invest their funds among the various investment options provide by the plan). In doing so, the participants bear the risk of investing. That arrangement emphasizes the importance of offering participants a wide range of investment options in order to construct portfolios that meet their individual risk profiles, investment goals, investment needs and preferences, as well as diversification targets. A judicially-created restriction on permissible investment vehicles for 401(k) plans impedes on this ability, and is not consistent with the framework for employer-provided retirement plans Congress designed.

Both the purpose and design of ERISA, contemplate a diverse array of investment types in offering a participant-directed plan, and provide incentives for doing so. A fundamental tenet of ERISA is that a plan fiduciary must provide a

diversified investment portfolio. See 29 U.S.C. §1104(a)(1)(C) (fiduciary is required to act prudently "by diversifying the investments of the plan"). With regard to participant-directed plans, the statute and DOL regulations provide a safe harbor from liability where the plan offers a broad array of diverse investments with materially different risk and return characteristics, allowing participants to make individual fiduciary decisions concerning optimal risk and return. 29 U.S.C. § 404(c); 29 C.F.R. §2550.404c-1(b)(1)(ii). Indeed, *the regulations expressly contemplate the use of mutual funds as investments in 401(k) plans*. See 29 U.S.C. § 1002(21)(B) (contemplating that plan investments may include retail mutual funds established pursuant to the Investment Company act of 1940, 15 U.S.C. § 80a-1 *et seq*. and that such investment shall not make the fund adviser a fiduciary).

In a similar fashion, courts have repeatedly rejected the proposition that retail mutual funds are an inherently imprudent investment option for a 401(k) plan. As noted by the Seventh Circuit, "[w]e see nothing in the statute that requires plan fiduciaries to include any particular mix of investment vehicles in their plan." Hecker, 556 F.3d at 586. In Hecker, the Seventh Circuit Court of Appeals found that plaintiffs could not assert breach of fiduciary duty claims even where the investment options were limited to a single brand (Fidelity) of retail mutual funds and a brokerage window. Hecker, 556 F.3d at 586-87; see also Tibble v. Edison International, 639 F. Supp. 2d 1074, 1115-1116 (C.D. Cal. 2009)

(rejecting plaintiffs' contention that "the decision to include retail mutual funds is nearly per se imprudent"); Id. at 1115-1117 (holding that retail mutual funds are a common investment in 401(k) plans and are generally prudent as part of a properly diversified investment mix).

Retail mutual funds offer strength as an investment option because the wide availability of these funds on the open market provides a market check. As noted by the Seventh Circuit, retail mutual funds in 401(k) plans are "also offered to investors in the general public, and so the expense ratios necessarily [are] set against the backdrop of market competition." Hecker, 556 F.3d at 586. Rejecting a similar attack on retail mutual funds, the Hecker court reasoned that the fact that it is possible that non-mutual fund investments "might have had even lower rates is beside the point; nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible" investment which might, of course, be plagued by other problems. Id. Cost is just one factor a person may consider in determining how to invest his or her retirement assets. As explained by the Ninth Circuit Court of Appeals, "ERISA does not create an exclusive duty to maximize pecuniary benefits." Wright v. Oregon Metallurgical Corp., 360 F.3d 1090, 1100 (9th Cir. 2004).

3. Many Participants Often Desire And Prefer Retail Mutual Funds

Plaintiffs' proposed judicially-created rule banning retail mutual funds in 401(k) plans would unnecessarily disrupt long-established common practices of providing flexibility and diversity to participants. For example, the California State Teachers' Retirement Systems, the second largest public plan, informs its plan participants that the retail mutual fund window offered by the plan "affords you more flexibility in choosing your own retirement savings investments by allowing you to invest in a variety of approximately 5,000 different Mutual Funds from over 300 fund families."[11]

In fact, evidence shows that employees across the country, including union-represented employees with bargaining power, *demand* retail mutual funds because of the extra benefits provided. See Tibble v. Edison International, 639 F. Supp. 2d 1074, 1115 (C.D. Cal. 2009) (noting that retail mutual funds were included in the plan, in part, because plan "participants expressed a desire to have such options during the collective bargaining process" and that the "undisputed evidence reveals that union representatives requested a total of forty name-brand retail mutual funds for including in the plan.").

[11] See www.calstrs.com/Help/forms_publications/Printed/MutualFundWindow.pdf.

Among the many reasons why participants prefer retail mutual fund options as part of their diversified investment mix are the following:

- Retail mutual funds in 401(k) plans are also offered to the public at large and provide participants with familiar names. Brand name recognition can provide comfort for investors and can increase participation in 401(k) plans.

- Retail mutual funds generally have a ticker symbol to allow a participant to track his or her investment on-line and are required to provide daily valuation (see 17 C.F.R. § 270.22c-1(b)(1) and daily redemption (see 15 U.S.C. § 80a-22).

- Retail mutual funds publish prospectuses that contain information on investment objectives, fund management, underlying securities, and expenses. Participants can easily perform research to make informed decisions. See 15 U.S.C. §§ 77j(a), 80a-8(b); 17 C.F.R. § 274.11A; SEC, "Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies," 74 Fed. Reg. 4546 (Jan 26, 2009). Other types of funds (such as comingled funds) may be marginally less expensive, but may not provide the level of disclosure and oversight provided by mutual funds.

- Participants can easily obtain additional information about retail mutual funds from independent fund analysts.

- Mutual funds are subject to greater private and governmental regulation and oversight compared to many other types of investment vehicles, thereby providing an additional level of reassurance to investors. The statutory and regulatory framework applicable to mutual funds provides a market and legal check holding advisers and fund boards to high standards, strict regulations regarding conflicts of interest and imposed disclosure rules that many individual investors have come to expect and prefer. Jones v. Harris Associates, L.P., 130 S.Ct. 1418, 1429 (2010) (noting burdensome regulatory and legal obligations as compared to other investments).

- Retail mutual funds are easily portable. When 401(k) participants leave the plan, they are generally able to access the same fund and share class outside the plan and can continue with the investments they prefer. Other types of investments, including institutional funds,[12] may not be as portable to an individual rolling out of the plan.

ERISA and the courts historically have strongly supported increasing investor opportunity, diversity and choice in investment options in a retirement plan. See, e.g., Hecker, 556 F.3d at 590 (dismissing claim for breach of fiduciary

[12] Most institutional share classes require minimum investment levels that may not be met until large groups of participants elect that option. When an individual participant leaves the plan and attempts to roll his or her investments over to another retirement vehicle, such as an IRA, those institutional shares may not be available to the individual investor outside the company-sponsored 401(k) plan.

duty after noting the "numerous investment options, varied in type and fee" and the inclusion of retail mutual funds); George v. Kraft Foods Global, Inc. 684 F. Supp. 2d 992, 1013 (N.D. Ill. 2010) ("the provision of a large number of investment alternatives, with disclosures allowing participants to make an informed decision as to their investment choices, would preclude a finding that defendants breached their fiduciary duties."). Allowing flexibility in how plans are designed, including a diverse set of investment options, is a goal in and of itself and encourages the use of retirement plans. See, e.g., IUE-CWA v. Visteon Corp. (In re Visteon Corp.), 612 F.3d 210, 232 (3rd Cir. 2010) (noting that in enacting ERISA, Congress believed that a lack of "flexibility would result in employers choosing not to provide the benefits at all.").

This Court should reject any attempt to judicially expand ERISA by adopting a rule mandating any investment mix or impeding the ability of ERISA plans to offer retail mutual funds as part of a diverse line-up of investment options. Congress gave considerable thought in enacting an all-encompassing statue governing employee benefits, and the noted absence of any prohibition on the availability of mutual funds as an investment option in such plans speaks loudly. This Court should decline to write into the statute that which Congress itself did not.

IV. CONCLUSION

For the foregoing reasons, SIFMA respectfully requests that this Court affirm the decision of the district court in Renfro v. Unisys, et al.

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CERTIFICATION OF ADMISSION

I hereby certify that Nancy G. Ross is a member of the Bar of this Court.

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CERTIFICATION OF PARTIES CONSENT

I hereby certify that all parties to this action have consented to SIFMA filing this brief.

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CERTIFICATION OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,447 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Local Rule 29.1(b).

2. This brief also complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) and Local Rule 32.1(c) because the brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman for the main text and footnotes.

3. This brief complies with Local Rule 31.1(c) because the text in the electronic brief is identical to the text in the paper copies, and because Symantec AntiVirus (version 11/11/2010 rev. 2) has been run on the file and no virus was detected.

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CERTIFICATION OF SERVICE

I hereby certify that on November 15, 2010, I filed an electronic version of the foregoing brief in PDF format, to the Office of the Clerk of the Court. I also certify that the ten (10) copies of the foregoing Brief have been filed with the Clerk of the United States Court of Appeals for the Third Circuit via Federal Express, properly addressed as follows:

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