PUBLICATION

Prohibited Transactions Post-Cunningham v. Cornell University

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Last year, in *Cunningham v. Cornell University*, 604 U.S. 693 (2025), the Supreme Court resolved a circuit split on pleading standards for prohibited transaction (PT) claims under the Employee Retirement Income Security Act of 1974 ("ERISA"). This article provides an overview of how that decision has affected motions to dismiss those claims.

Transactions described by the PT statute, ERISA §406(a), 29 U.S.C. § 1106(a), occur frequently in the ordinary course of administering ERISA-governed plans, but prudent fiduciaries endeavor to have such transactions fall under one of the statutory exemptions under ERISA §408(b), 29 U.S.C. §1108(b). Before *Cunningham*, the Second, Third, Seventh, and Tenth Circuit U.S. Courts of Appeal required plaintiffs alleging a PT claim under ERISA §406(a) to plead that an exemption under ERISA §408(b) does not apply. The Eighth and Ninth Circuits held that it was sufficient to allege that a plan fiduciary caused the plan to enter into a transaction with a party-in-interest to state a PT under ERISA §406(a). In a rare unanimous decision, the Supreme Court sided with the Eighth and Ninth Circuits.

In *Cunningham*, the Supreme Court clarified that to plead a PT claim under ERISA §406(a) plaintiffs do not need to anticipate and plead around statutory exemptions under ERISA §408(b), because they are affirmative defenses and, thus, they are left for the defendant to raise and prove. In litigation, plaintiffs bear the burden of proof and must plead sufficient factual allegations to plausibly allege each of their claims. If plaintiffs fail to plausibly allege a claim, defendants can move to dismiss that claim—ending the litigation early. However, again, defendants have the burden to prove any affirmative defenses. The Supreme Court responded to concerns raised by the Respondents, Cornell University, and *amici* (friends of the court) that this would allow frivolous PT claims to advance past the pleading stage to discovery (which can be prohibitively expensive). In so doing, the Supreme Court acknowledged "[t]hese are serious concerns but they cannot overcome the statutory text and structure [of ERISA §406(a) and §408(b)]." The Supreme Court noted that plaintiffs are still required to establish Article III standing under the U.S. Constitution. (To establish standing in federal courts, a plaintiff must plausibly allege (1) they have suffered an injury in fact, (2) that there is a causal connection between that injury and defendants actions, and (3) it must be likely, not speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).) The Supreme Court also noted that courts have other tools to limit meritless litigation, such as by bifurcating the issues and through less commonly used procedures that require the plaintiff to file a reply to affirmative defenses plausibly

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alleged in an answer. At first, practitioners were concerned that the ruling in *Cunningham* would make it harder to dismiss meritless PT claims; however, over the last year, we have seen courts continue to dismiss these claims.

What is a Prohibited Transaction?

The PT statute covers many transactions that ERISA plans enter into with service providers. The language in the statute is very broad in prohibiting ERISA plan fiduciaries from engaging in specified transactions, including "furnishing of goods, services, or facilities" between a plan and a "party in interest." ERISA §406(a). A "party in interest" with respect to an employee benefit plan includes both a plan fiduciary as well as any "person providing services to such plan." ERISA §3(14), 29 U.S.C. §1002(14). To determine whether service providers are parties-in-interest to a plan, courts look at whether the entities (or their affiliates) were service providers *at the time of the transaction*. This statute does not govern transactions with new service providers, but would include renewed services or new services from an existing provider. Further, the plan fiduciary must be acting in their fiduciary capacity when causing the plan to enter the transaction—they cannot be solely wearing their plan sponsor/settlor hat.

As noted above, there are statutory exemptions under ERISA §408(b). To fall under the most common exemption, described in ERISA §408(b)(2), the plan fiduciary needs to show that (i) the arrangement is reasonable; (ii) the services are necessary for operation of the plan; and (iii) the plan pays no more than reasonable compensation for those services.

This article also addresses PTs under ERISA §406(b). PT claims under ERISA §406(b) involve transactions between the plan and a fiduciary. Under §406(b), plan fiduciaries shall not (1) deal with plan assets in their own interest or account, (2) act (in any capacity) in a transaction on behalf of a party with interests adverse to a plan, or (3) receive consideration for their personal account from any party dealing with a plan in a transaction involving plan assets.

Types of Prohibited Transaction Litigation

PT claims arise in a variety of cases. We have traditionally seen these claims in retirement plan litigation involving Employee Stock Ownership Plans ("ESOPs"), excessive recordkeeping fees, use of funds in forfeiture accounts, and pension risk transfer cases. There are certainly other types of cases where PT claims are alleged, including disputes between plan fiduciaries and service providers, but the categories listed here are the most common.

We are also seeing an increase in PT claims in the health and welfare area, including voluntary benefit cases and excessive fee litigation related to Pharmacy Benefit Managers (PBMs); however, this article focuses on retirement plan litigation. For a discussion of recent PBM litigation, read our article *Employees of JPMorgan May Proceed with Their Lawsuit Over High Drug Costs in Health Plan* (https://www.truckerhuss.com/newsletter/jpmorgan-employees-high-drug-costs-lawsuit/), by Mary Powell.

Excessive Fee Cases Post-Cunningham. We have seen waves of class action excessive fee litigation for defined contribution plans. This litigation focuses on breach of fiduciary duty claims for alleged failure to prudently select and/or monitor (i) investment funds that allegedly performed poorly and (ii) recordkeepers that allegedly received excessive direct and indirect compensation. The PT claims were not the focus of this

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litigation before *Cunningham*, but thereafter we are seeing increased focus on the PT issues in these cases because those claims are more difficult to dismiss. That said, courts are still willing to dismiss PT claims under certain circumstances, as exemplified by the following two cases:

***Fleming v. Kellogg Company*, 2025 WL 4053174 (W.D. Mich. Dec. 8, 2025).** In *Fleming v. Kellogg*, the district court dismissed the PT claim challenging that plan's recordkeeping fees. The district court held that collecting a contractually predetermined fee is not a fiduciary act triggering ERISA's PT rules. The district court relied on the Fifth Circuit's decision in *D.L. Markham DDS, MSD, Inc. 401(K) Plan v. Variable Annuity Life Ins. Co.,* 88 F.4th 602, 609–10 (5th Cir. 2023), which held that entities not already providing services to the plan at the time of contracting are not parties-in-interest under ERISA §406(a). In *Fleming*, the court held the recordkeeper was not a party-in-interest at the time it contracted around the challenged transaction. There is an appeal pending in this case.

***Peeler v. Bayada Home Healthcare*, 2026 WL 208630 (W.D.N.C. Jan. 27, 2026).** In *Peeler v. Bayada*, the district court dismissed the PT claim for lack of Article III standing. The district court held the complaint allegations only provided a "speculative basis" for inferring the plaintiffs suffered an actual loss because of the payments for advisory services. The plaintiffs' allegations failed to draw a meaningful comparison between the advisory fees incurred by the Plan and the alleged comparator plans. Plaintiffs in *Peeler* did not allege that the value of their individual accounts declined because of these advisory fees; therefore, there was no harm alleged and the plaintiffs did not have standing for these claims.

Pension Risk Transfer Cases Post-Cunningham. Another common type of case where PT claims are alleged is pension risk transfers. When plan sponsors want to terminate all or part of a defined benefit plan, one option is to transfer the pension liabilities outside the ERISA plan to an annuity provider that then will provide the benefits to participants. Plaintiffs in these types of cases often allege breach of fiduciary duty claims, arguing that the plan fiduciary acted imprudently when selecting what they describe as a risky annuity provider, and that the participants suffered harm because they lost protections under ERISA. In pension risk transfer cases, PT claims have been brought against plan sponsors, plan fiduciaries, independent fiduciaries (hired to evaluate the transaction), and annuity service providers.

***Piercy v. AT&T*, 2025 WL 2505660 (D. Mass. Aug. 29, 2025), R&R adopted (Sept. 30, 2025).** In *Piercy v. AT&T*, the district court dismissed all PT claims. The district court held that ERISA §406(a) claims challenging the engagement of the independent fiduciary failed because that entity had not provided services to the plans before it was retained for this transaction, and therefore was not a party-in-interest. Similarly, ERISA §406(a) claims challenging the selection of the annuity provider failed because the annuity provider was not a party-in-interest to the plan. The district court found further that the ERISA §406(b) claims challenging the plan sponsor's decision to transfer pension liabilities to the annuity provider failed because the plan sponsor was acting as a settlor, not as a fiduciary. The plan sponsor had given the independent fiduciary discretion to select the annuity provider. *See also, Dempsey v. Verizon Commns*, 2026 WL 72197 (S.D.N.Y. Jan. 8, 2026) (dismissing all PT claims brought under both ERISA §§406(a) and (b) for the same reasons in *Piercy*).

***Doherty v. Bristol-Myers Squibb*, 2025 WL 2774406 (S.D.N.Y. Sept. 29, 2025).** In *Doherty v. Bristol-Myers Squibb*, the district court dismissed the ERISA §406(a) claims against the *plan fiduciaries* premised on the purchase of annuities from the annuity provider, because the annuity provider was not a party-in-interest at the time of the transaction. The district court allowed ERISA §406(a) claims to continue based on transactions between the plan and the *independent fiduciary* related to the purchase of annuities, because that entity was a party-in-interest at the time of the transaction.

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The district court also allowed the ERISA §406(b) claims against the plan fiduciaries to survive. The plaintiffs alleged that the plan sponsor used plan assets to purchase annuities from an allegedly risky annuity provider in order to maximize corporate profits (through cheaper premiums) "jeopardizing the interests" of participants. The district court acknowledged that the decision to terminate the plan is a settlor decision; however, the selection of the annuity provider implementing that decision was a fiduciary function. Unlike in *Piercy*, here the plan sponsor retained control over the selection of the annuity provider, the independent fiduciary only made the recommendation.

Practice Tip for Pension Risk Transfers: For plan sponsors that are considering a pension risk transfer, having the independent fiduciary select the annuity provider (as opposed to recommend one) adds a layer of protection insulating the plan sponsor from the fiduciary duties of implementing the settlor decision to transfer pension liability.

Forfeiture Cases Post-Cunningham. In cases involving the use of forfeiture funds, plaintiffs often allege that the plan fiduciaries caused the plan to enter into a PT when forfeiture funds are used to offset employer contributions. The majority of courts addressing these types of claims have held intra-plan transfers from the forfeiture accounts to individual participant accounts are not the type of transactions prohibited by ERISA §406(a), because money does not leave the plan and it is used for the benefit of the participants. Any benefit plan sponsors receive from the use of forfeitures to offset employer contributions is incidental, not a direct payment from the plan to the employer. While there are still some outlier cases that allow PT claims to proceed beyond a motion to dismiss, the vast majority of cases, even post-*Cunningham,* have dismissed these claims. Compare *Becerra v. Bank of America*, 2025 WL 3032922 (W.D.N.C. Aug. 12, 2025) (allowing PT claims to survive), with *Estay v. Ochsner Clinic Foundation et al*, 2026 WL 809570 (E.D. La. Mar. 24, 2026) (dismissing claims because this is not a transaction under ERISA §§406(a) or (b));*Gardner-Keegan v. W.W. Grainger, Inc.*, 2026 WL 194772, at *11 (N.D. Ill. Jan. 26, 2026) (same)*; Tillery v. WakeMed Health & Hosps*., 2026 WL 125784, at *8 (E.D.N.C. Jan. 15, 2026) (same)*; Brown v. Peco Foods, Inc*., 2025 WL 3210857, at *9 (S.D. Miss. Nov. 14, 2025) (same); *Polanco v. WPP Grp. USA, Inc.,* 2025 WL 3003060, at *10 (S.D.N.Y. Oct. 27, 2025) (same).

ESOP Cases Post-Cunningham. PT claims are quite common in ESOP cases; however, even before *Cunningham*, these types of claims often survived a motion to dismiss. PT claims in ESOP cases focus on transactions to buy stock from the plan sponsor (on behalf of the ESOP plan) or to sell stock (owned by the ESOP) to a third-party buyer. These transactions often involve the owners, board of directors, and other parties-in-interest to the ESOP. The plan sponsor often hires an independent fiduciary to evaluate the transaction. There are specific exemptions for the purchase and sale of employer securities for ESOPs under ERISA §408(e), so long as the transaction is for adequate consideration. Plaintiffs still must allege a concrete injury to establish Article III standing. *Dyer v. Green*, 2025 WL 4056746, at *5 (D. Mass. Nov. 26, 2025) (alleged harm was too speculative because it was based on future loss if the plan is terminated or the company is sold).

***Dalton v. Freeman*, 2025 WL 3771345, at *2 (E.D. Cal. Dec. 31, 2025).** In *Dalton v. Freeman*, an ESOP case, the district court made the plaintiffs file a reply to the answer, relying on *Cunningham*. While plaintiffs did not have to plead around the affirmative defense under ERISA §408 in their complaint, they had to respond to the factual allegations supporting that affirmative defense in the answer by putting forward "specific, nonconclusory factual allegations showing the exemption does not apply." This is one of the first ERISA cases post-*Cunningham* where we have seen the district court require a reply to an answer under Federal Rules of Civil Procedure 7(a)(7). Plaintiffs filed their reply in January 2026, and according to the parties' joint status update the case is moving into the next phase of litigation—discovery.

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Final Comments

One way plan fiduciaries can protect themselves from PT claims is by performing requests for proposals ("RFPs") to evaluate the costs of services offered by other providers, and to document that the fees plans are paying are consistent with the fees paid by other employers of similar size and benefit offerings. This helps support the plan fiduciaries' position that the amount they are paying their service provider is no more than reasonable, when factoring in both direct and indirect compensation.

While the RFP process does not prevent plaintiffs filing a new lawsuit, by going through a prudent process plan fiduciaries can establish support for their position that an exemption applies, which will facilitate a defense on the merits in the event of litigation alleging PT claims.

If you have questions about the legal landscape of PT claims post-*Cunningham* and how best to defend against such claims, please contact us.

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