

Prohibiting ERISA

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The U.S. Supreme Court is currently reviewing the decision of the Second Circuit in *Cunningham vs. Cornell University*, which addresses the requirements for pleading a prohibited transaction under ERISA section 406(a)(1)(C). In an earlier case, *Braden vs. Wal-Mart Stores, Inc.*, the Eighth Circuit held that a plaintiff must allege only facts needed for section 406(a)(1)(C) – specifically, that a fiduciary caused a plan to receive services from what ERISA calls a “party in interest.” In *Cunningham*, by contrast, the Second Circuit held that a plaintiff must allege facts needed for section 406(a)(1)(C) and facts needed to defeat the exemption in ERISA section 408(b)(2)(A) – specifically, that the services were not necessary or that the plan paid more than reasonable compensation for them. Because the ERISA definition of “party in interest” includes every plan fiduciary, every plan employee, and every plan service provider, the Eighth Circuit approach allows a prohibited transaction lawsuit for *any* services provided to a plan, even services that the plan needs to comply with ERISA. The Supreme Court should reject the Eighth Circuit approach and affirm the Second Circuit’s decision in *Cunningham*.

George Orwell is said to have said that some ideas are so foolish that only intellectuals believe them.² I have no idea whether the judges on the U.S. Courts of Appeals for the Eighth and Ninth Circuits count as proper intellectuals, but they certainly are equal to the task of believing foolish ideas. In 2009, the Eighth Circuit held in *Braden vs. Wal-Mart Stores, Inc.* that a receipt of services by an employee benefit plan, in and of itself, is a prohibited transaction under the Employee Retirement Income Security Act of 1974 (“ERISA”).³ The more recent decision of the Ninth Circuit in *Bugielski vs. AT&T Services, Inc.* is to the same effect.⁴ By contrast, the U.S.

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² What Orwell actually said was similar but different. In a 1945 essay, Orwell dismissed the notion that the United States fought the Second World War not to defeat National Socialist Germany but to prevent revolution in the United Kingdom: “One has to belong to the intelligentsia to believe things like that: no ordinary man could be such a fool.” George Orwell, “Notes on Nationalism,” *Polemic*, p. 46 (Oct. 1945).

³ *Braden vs. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009).

⁴ *Bugielski vs. AT&T Services, Inc.*, 76 F.4th 894 (9th Cir. 2023).

Courts of Appeals for the Second, Third, Seventh, and Tenth Circuits have held that a receipt of services by an employee benefit plan, without more, is not a prohibited transaction.⁵ The most recent of those cases, the Second Circuit’s decision in *Cunningham vs. Cornell University*, is now under review at the Supreme Court. The Second Circuit reached the right result, and the Supreme Court should affirm. It is, after all, what the statute requires, and it avoids outcomes so foolish that not even Congress, to say nothing of Orwell’s intellectuals, could believe them.

I. They Stumble That Run Fast

In *Cunningham*, participants in two Cornell University defined contribution retirement plans brought a class action against Cornell and plan fiduciaries.⁶ The suit alleges various breaches of fiduciary duties stemming from the fees paid by the plans to their third-party recordkeepers, TIAA and Fidelity.⁷ The participants argue that, by authorizing those recordkeeping fees, the fiduciaries caused the Cornell plans to engage in what ERISA section 406(a)(1)(C) designates as a “prohibited transaction.”⁸ As that term implies, a prohibited transaction is a transaction that is forbidden outright, without regard to whether there is a breach of the general fiduciary duties under ERISA section 404, such as the duties of prudence and loyalty. If a fiduciary causes an ERISA plan to engage in a prohibited transaction, the fiduciary is liable, even if the plan suffers no loss from the transaction. Like many of the provisions that Congress included in ERISA, the prohibited transaction rules were informed by prominent cases in which retirement plan assets had been misused by corporate or union

⁵ *Cunningham vs. Cornell University*, 86 F.4th 961 (2d Cir. 2023); *Sweda vs. University of Pennsylvania*, 923 F.3d 320 (3d Cir. 2019); *Albert vs. Oskosh Corp.*, 47 F.4th 570 (7th Cir. 2022); *Ramos vs. Banner Health*, 1 F.4th 769 (10th Cir. 2021).

⁶ *Cunningham*, 86 F.4th at 968-969.

⁷ *Cunningham*, 86 F.4th at 969.

⁸ *Cunningham*, 86 F.4th at 968.

officers, such as the misappropriation of funds in the Teamsters pension fund that sent Jimmy Hoffa to federal prison.⁹

The prototypical prohibited transaction involves fiduciary self-dealing – for example, a fiduciary loaning plan assets to herself or hiring herself to provide services to a plan. Such transactions are forbidden by ERISA section 406(b). But the legislators who wrote ERISA also wanted to bar a fiduciary from using his authority to confer inappropriate benefits on third persons at the expense of the plan and plan participants (after all, Hoffa had used Teamster pension assets to benefit his business associates as well as himself). For that reason, ERISA section 406(a) proscribes, subject to exemptions set out in ERISA section 408, certain transactions between a plan and what ERISA calls a “party in interest” with respect to the plan. A party in interest, defined in ERISA section 3(14), includes a plan fiduciary, a plan employee, and any “person providing services to [a] plan.” Subject to exemptions, then, section 406(b) broadly prohibits a fiduciary from using plan assets to benefit herself, and section 406(a) broadly prohibits a fiduciary from using plan assets to benefit a party in interest.

As in similar suits over plan fees, the participants in *Cunningham* allege that the fiduciaries of the Cornell retirement plans caused the plans to pay too much for the recordkeeping services provided by TIAA and Fidelity.¹⁰ They argue that the recordkeeping arrangements violate section 406(a)(1)(C), which states that, “[e]xcept as provided in” section 408, “[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if [the fiduciary] knows or should know that such transaction constitutes a direct or indirect . . . furnishing of goods, services, or facilities between the plan and a party in interest.” The participants (petitioners in the Supreme Court) say that both TIAA and Fidelity are parties in interest with respect to the Cornell plans; thus, the “furnishing” of services by TIAA and Fidelity is a prohibited transaction. Cornell and the plan fiduciaries point to section

⁹ In July of 1964, Hoffa, then the President of the International Brotherhood of Teamsters, was convicted in federal court of embezzling from the Teamsters pension fund and receiving kickbacks from a real estate developer who used assets of the pension fund to make property investments in which Hoffa had an interest. Arther A. Sloane, *Hoffa*, pp. 310-311 (1991).

¹⁰ *Cunningham*, 86 F.4th at 970-971.

408(b)(2)(A), which says that “[t]he prohibitions provided in” section 406 “shall not apply to any of the following transactions” – among which is “[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.” The dispute before the Supreme Court concerns the relationship between section 406(a)(1)(C) and section 408(b)(2)(A) for purposes of determining the burden of pleading.

The district court in *Cunningham* dismissed the petitioners’ complaint for failing to allege facts necessary for their prohibited transaction claim, and the Second Circuit affirmed.¹¹ In the view of the Second Circuit, section 406(a)(1)(C) incorporates the terms of section 408(b)(2)(A), which exempts transactions involving necessary services and reasonable compensation.¹² For that reason, the court said, a complaint pleading a section 406(a)(1)(C) prohibited transaction must allege not only that there was a service arrangement between a plan and a party in interest but also that the services were not necessary or that the plan paid more than reasonable compensation for the services.¹³ The Second Circuit emphasized that, although the complaint must allege facts to support that allegation, the burden of proving the exemption under section 408(b)(2)(A) rests with the defendant.¹⁴ Because the plaintiffs’ complaint in *Cunningham* did not allege either that the recordkeeping services provided by TIAA and Fidelity were unnecessary or that the Cornell retirement plans paid TIAA and Fidelity more than reasonable compensation for those services, it affirmed the district court’s dismissal of the complaint.¹⁵

¹¹ *Cunningham*, 86 F.4th at 971.

¹² *Cunningham*, 86 F.4th at 973-977.

¹³ *Cunningham*, 86 F.4th at 968.

¹⁴ *Cunningham*, 86 F.4th at 977-978.

¹⁵ *Cunningham*, 86 F.4th at 978-979.

By contrast, the Eighth Circuit in *Braden* held that it is sufficient for a plaintiff to allege that a party in interest has provided services to an ERISA plan.¹⁶ The exemption in section 408(b)(2)(A) for a transaction involving necessary services for which no more than reasonable compensation is paid, the Eighth Circuit said, constitutes an affirmative defense to be raised by the plan fiduciary.¹⁷ The fiduciary must plead the exemption in section 408(b)(2)(A), and the fiduciary must prove that section 408(b)(2)(A) has been satisfied. In *Bugielski*, the Ninth Circuit generally agreed with *Braden* that section 406(a)(1)(C) prohibits a plan's receipt of services from a party in interest, *simpliciter* (although the sufficiency of pleadings was not at issue in that case).¹⁸ The Third, Seventh, and Tenth Circuits have addressed the issue differently, by requiring plaintiffs to allege extra-statutory elements in order to state a section 406(a)(1)(C) claim.¹⁹ Thus, the principal fault line on the pleading issue is between *Cunningham* in the Second Circuit – which requires a plaintiff in a prohibited transaction case to allege both that the elements of section 406(a)(1)(C) are satisfied and that the elements of section 408(b)(2)(A) are not satisfied – and *Braden* in the Eighth Circuit – which requires the plaintiff to allege only that the elements of section 406(a)(1)(C) are satisfied. The difference may seem small, but it could hardly be more consequential.

II. All Are Punish'd

Formally, the *Cunningham* case is about which party must plead what, but conceptually, the case is about how to define the transaction that ERISA prohibits. The Eighth Circuit says that section 406(a)(1)(C) prohibits any receipt of services by a plan from a party in interest; the Second Circuit says that section 406(a)(1)(C) prohibits any such receipt of services that is not exempt under section 408(b)(2)(A) (so services that are not necessary or services for which the

¹⁶ *Braden*, 588 F.3d at 601.

¹⁷ *Braden*, 588 F.3d at 601-602

¹⁸ *Bugielski*, 76 F.4th at 905-909.

¹⁹ See Part III, *infra*.

plan pays more than reasonable compensation). A closer look at ERISA shows that the approach taken by the Eighth Circuit prohibits an employee benefit plan from engaging in *any* transaction involving the receipt from *any* person of *any* type of service – even the fiduciary, administrative, legal, accounting, and actuarial services that the plan needs to comply with ERISA.

The problem is fundamental in the statute. Again, section 406(a)(1)(C) says that, except as otherwise provided in section 408, “[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction if [the fiduciary] knows or should know that such transaction constitutes a direct or indirect . . . furnishing of goods, services, or facilities between the plan and a party in interest.” That ban would perhaps be manageable if it were limited to plan insiders, such as plan fiduciaries and the employer or the union maintaining the plan. But it is not. Section 3(14)(B) defines a “party in interest” with respect to an employee benefit plan to include “any person providing services to such plan.” This point bears emphasis. *Anyone who provides services to a plan is a party in interest with respect to that plan.* The Eighth Circuit reads section 406(a)(1)(C) as self-contained and, thus, as unconditionally prohibiting any party in interest from providing services to a plan. The conclusion is as inescapable as it is nonsensical: In the Eighth Circuit, section 406(a)(1)(C) prohibits any person providing services to a plan from providing services to the plan.

On this approach, absolution for the fiduciary’s mortal sin of causing a plan to receive necessary services comes, if ever, only after a lawsuit is brought against the fiduciary; only after the fiduciary pleads the exemption under section 408(b)(2)(A) as an affirmative defense; only after discovery; and often, because matters such as “reasonable” and “necessary” involve factual determinations, only after trial. Once you step through this looking glass, *every* receipt of services by a plan becomes automatically actionable, even the receipt of services that the plan needs to comply with ERISA. Section 403 of ERISA, for example, requires that all plan assets be held in trust, but under the Eighth Circuit’s approach, a plan’s receipt of trustee services is a prohibited transaction. Sections 102, 104, and 105 of ERISA require that the plan make regular disclosures to plan participants, but under the Eighth Circuit’s approach, a plan’s receipt of administrative services to effect those disclosures is a prohibited transaction. Section 103 of

ERISA requires that the plan file an annual report with the government – again, a prohibited transaction if anyone provides that service to the plan by actually filing the report.

Under the Eighth Circuit rule, an employee benefit plan could not engage legal counsel to defend a lawsuit against it without the fiduciary committing a prohibited transaction; so too if the plan engages legal counsel to prosecute a lawsuit against someone who actually harms a plan, such as a defalcating fiduciary. The ramifications are almost endless because an employee benefit plan, like a corporation, can only act through employees, agents, and other parties – but anyone who does anything on behalf of a plan becomes a party in interest and so is prohibited from doing anything on behalf of the plan. Even mailing a pension check to a plan participant would be a prohibited transaction under the Eighth Circuit’s approach; after all, the United States Postal Service would be providing a service to the plan by delivering the check. It is misleading to say, as several of the appellate courts have said, that the Eighth Circuit’s reading of section 406(a)(1)(C) turns “routine” plan service transactions into prohibited transactions. In fact, the Eighth Circuit’s reading of section 406(a)(1)(C) turns *every* plan service transaction into a prohibited transaction.²⁰

There really is no way out of this analytical trap. A plan cannot escape the Eighth Circuit’s rule by obtaining services from its own employees rather than from third-party providers because section 3(14)(A) defines “party in interest” to include all employees of the plan.²¹ The same is true of plan fiduciaries; they too are parties in interest under section 3(14)(A), and so they too cannot provide services to the plan under the Eighth Circuit’s reading

²⁰ This point was raised before the Eighth Circuit, but the court failed to address it. See *Braden*, 588 F.3d at 601 (“[Appellees] argue that unless a plaintiff is required to plead facts plausibly suggesting a transaction is not exempted under [section 408], ERISA fiduciaries will be forced to defend the reasonableness of every service provider transaction.”). The Ninth Circuit’s treatment of the issue was no better. The court in *Bugielski* said that section “406(a)(1)(C) only applies to service contracts with a ‘party in interest,’ and therefore it poses no bar to contracts with parties that do not meet that definition.” *Bugielski*, 76 F.4th at 907. That is sloppy work by the court; under section 3(14)(B), *every* service provider is a party in interest.

²¹ The Seventh Circuit was therefore incorrect to suggest that the problem created by the Eighth Circuit’s reading of section 406(a)(1)(C) is limited to situations in which plans “*outsource* tasks like recordkeeping, investment management, or investment advising.” *Albert*, 47 F.4th at 586 (emphasis added).

of section 406(a)(1)(C).²² A plan cannot even avoid this mess by (somehow) obtaining all the services that it needs free of charge. Section 406(a)(1)(C) proscribes transactions in which services are furnished between a plan and a party in interest, not transactions in which services are furnished for consideration. In other words, section 406(a)(1)(C) picks up even gratuitous transactions. If a fiduciary were to arrange for anyone (a law firm, for example) to provide services on a *pro bono* basis, the fiduciary would commit a prohibited transaction.²³ And the problem is not just *ex post* because ERISA section 502(a)(3) allows a federal court *ex ante* to enjoin any act that would violate any provision of ERISA, including section 406. The scope of potential exposure beggars belief.

The petitioners dismiss all this as a “non-existent problem.”²⁴ They argue that, because of the expense of bringing suit at the front end and the risk of having to pay fees, costs, or sanctions at the back end, a plaintiff will not bring suit under section 406(a)(1)(C) if the plaintiff expects to lose under section 408(b)(2)(A).²⁵ But that dog will not hunt. Saying that a plaintiff’s lawyer, before bringing suit, will properly assess the prospects of losing under section 408(b)(2)(A) is flatly inconsistent with the petitioners’ repeated assertions that it is not possible for a plaintiff to allege facts about section 408(b)(2)(A) in the complaint.²⁶ And the petitioners’ argument ultimately reduces to the suggestion that the proper safeguard here is self-restraint by

²² The Solicitor General is therefore mistaken in her attempt to identify the rule in section 406(a)(1)(C) with the traditional rule of equity that forbids a trustee from delegating the trustee’s duties. See Brief for the United States as Amicus Curiae Supporting Petitioners, pp. 18-20 (Dec. 2024). Section 406(a)(1)(C) reaches a plan trustee’s own provision of services to the plan; it has nothing to do with the delegation of duties.

²³ The Second Circuit was therefore incorrect to suggest that the problem created by the Eighth Circuit’s reading of section 406(a)(1)(C) is limited to situations in which a plan makes “*payments . . . to any entity providing it with services.*” *Cunningham*, 86 F.4th at 973 (emphasis added). The Seventh Circuit made the same error. See *Albert*, 47 F.4th at 584 (stating that the Eighth Circuit’s approach “would prohibit fiduciaries from *paying* third parties to perform essential services in support of a plan”) (emphasis added).

²⁴ Brief for Petitioners, pp. 7 and 46 (Nov. 22, 2024).

²⁵ Brief for Petitioners, pp. 53-54 (Nov. 22, 2024).

²⁶ Brief for Petitioners, pp. 19, 41-42, 47-49, and 55 (Nov. 22, 2024).

the plaintiffs' bar. Really? The cost of bringing meritless ERISA suits has hardly been a deterrent in the past, and no plaintiff's lawyer is likely to worry about being sanctioned for having brought a type of suit that, if the petitioners prevail, will have been expressly authorized by the Supreme Court. Just the threat of bringing suit under section 406(a)(1)(C) for all plan service transactions approved by a plan administrator, trustee, or other fiduciary within the unexpired statute of limitations would confer tremendous leverage on a potential plaintiff, even if the plan administrator, trustee, or other fiduciary could expect full exoneration under section 408(b)(2) after incurring the costs of litigation.²⁷

At least the Solicitor General, in her *amicus curiae* brief, takes this problem seriously, even though the solution that she suggests is rather hard to believe. The Solicitor General argues that the Supreme Court should reject the Second Circuit's approach in favor of the Eighth Circuit's approach, such that a plaintiff should be required to allege only that a fiduciary has caused a plan to receive services from a service provider. But, she says, if the defendant's answer raises section 408(b)(2)(A) as a defense – and why, oh why, one asks, would the defendant's answer *not* raise section 408(b)(2)(A) as a defense? – the district court should order the plaintiff to allege additional facts about why section 408(b)(2)(A) is not satisfied.²⁸ Linger over that for a moment. The Solicitor General's argument is that the plaintiff should not be required to allege facts about section 408(b)(2)(A) in the initial pleading but that, instead, the plaintiff should be required to allege facts about section 408(b)(2)(A) in a supplemental pleading. I promise that I am not making this up.

It simply cannot be that the legislators who wrote ERISA meant to prohibit a fiduciary from arranging for a plan to receive the services necessary for the plan to do what it was set up to do. It cannot be that those legislators meant to prohibit a plan from receiving precisely the administrative, trustee, legal, accounting, actuarial, investment management, investment advisory, and recordkeeping services necessary for the plan to comply with the requirements

²⁷ Certainly the plaintiffs' bar is more than pleased to follow the petitioners in dismissing any concerns about increasing the litigation exposure of plans and plan fiduciaries. See Brief of Amicus Curiae American Association for Justice in Support of Petitioners, p. 3 (Nov. 27, 2024).

²⁸ Brief for the United States as Amicus Curiae Supporting Petitioners, pp. 29-32 (Dec. 2024).

imposed by ERISA. It cannot be that those legislators wanted every service transaction involving an employee benefit plan to be actionable in federal court, so that money otherwise used to provide retirement benefits would instead be spent on discovery, motion practice, and trial – all for the purpose of establishing that the transaction was exempt under section 408(b)(2) in the first place. But if those results sound right to you, I offer you my congratulations. You are an intellectual, at least in Orwell’s book.

III. Wisely and Slow

There is of course a better way. As the Second Circuit held, section 406(a)(1)(C) does not prohibit *every* receipt of services by a plan from a party in interest; it prohibits a receipt of services by a plan from a party in interest only if the transaction is not exempt under section 408. And section 408(b)(2)(A) exempts the transaction if the services are necessary and the plan pays no more than reasonable compensation. Thus, the transaction that is prohibited by section 406(a)(1)(C) is a party in interest’s provision of services to a plan – but only if the services are unnecessary or the plan pays more than reasonable compensation. *That* is the transaction that is actionable, and *that* is the transaction for which a fiduciary has liability.

This is plain from the statutory text. Section 406(a) says that the transactions described there are prohibited “[e]xcept as provided in section 408.” Thus, a transaction covered by section 408 is not covered by section 406. Section 408 itself reinforces this. It provides that “[t]he prohibitions provided in section 406 shall not apply to any of the following transactions,” and it then lists the exempt transactions, including a party in interest’s provision of necessary services for no more than reasonable compensation. The prohibited transaction rules thus state the same point twice – that the transactions described in section 408 are not prohibited by section 406. The pleading requirements follow naturally. A plaintiff alleging that a fiduciary caused a plan to receive services from a service provider does not allege that the fiduciary engaged in a prohibited transaction. But a plaintiff alleging that a fiduciary caused a plan to receive *unnecessary* services from a service provider or that a fiduciary caused a plan to pay *more*

than reasonable compensation for services from a service provider does allege that the fiduciary engaged in a prohibited transaction.²⁹

The statute could hardly be clearer, and this approach avoids all the nonsense that follows from the Eighth Circuit’s reading of section 406(a)(1)(C). The petitioners would like to dismiss the concerns about that nonsense as a policy argument, but they miss the point. Those concerns bear directly on the interpretation of the statute, and they underscore why the plain reading of sections 406(a)(1)(C) and 408(b)(2)(A) is correct. Admittedly, there is a general rule of statutory interpretation that, when the legislature sets out a broad prohibition in one part of a statute and sets out an exception in another part of the statute, the exception is taken to be an affirmative defense that must be pleaded and proved by the defendant.³⁰ The petitioners, with the support of the Solicitor General, center their argument for reversal on this.³¹ But a general rule is only a general rule, and it properly yields to more compelling considerations. Method is meant to serve discernment, not the other way around.

All that said, it is important to note what a plaintiff does not have to allege under section 406(a)(1)(C). The plaintiff does not have to allege that a fiduciary who caused a plan to enter into a prohibited transaction did so with a particular state of mind, that the fiduciary breached one of the general fiduciary duties set out in section 404, or even that the plan suffered a loss. The prohibited transaction rules are categorical bans against certain fiduciary actions, and they

²⁹ The petitioners argue that the Second Circuit’s reading of section 406(a)(1)(C) “would paralyze ERISA enforcement” because “[u]nder the Second Circuit’s rule, plaintiffs must correctly predict *every* exemption that could apply (requiring information they do not know) and then plead plausible allegations negating *each* such exemption (requiring information they do not know) even if these exemptions have conditions which themselves have sub-conditions (requiring information they do not know).” Brief for Petitioners, pp. 48-49 (Nov. 22, 2024) (emphasis in original). This is a red herring. Almost every section 408(b) exemption is directed at a specific type of transaction (such as a plan’s receipt of ancillary bank services, a plan’s investment in a collective trust, or a plan’s participation in a securities block trade). A lawyer who cannot discern which exemptions potentially cover the transaction underlying a planned lawsuit has no business bringing that lawsuit in the first place.

³⁰ See, e.g., *United States vs. Dixon*, 40 U.S. (15 Pet.) 141 (1841); *Meacham vs. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008).

³¹ Brief for Petitioners, pp. 23-29 (Nov. 22, 2024); Brief of the United States as Amicus Curiae Supporting Petitioners, pp. 12-14 (Dec. 2024).

do not require that the fiduciary intend to harm the plan, that the fiduciary intend to benefit a party in interest, that the fiduciary have been disloyal to the plan or its participants, that the fiduciary have been imprudent, or that the transaction actually be detrimental to the plan. The rules simply ban certain transactions. In the case of section 406(a)(1)(C), the banned transaction is the provision of services to a plan if the services are unnecessary or if the plan pays more than reasonable compensation for the services. That is what a plaintiff must plead. Everything else is irrelevant.

This, in turn, highlights the problems with the approaches adopted by the Third, Seventh, and Tenth Circuits. In *Sweda vs. University of Pennsylvania*, the Third Circuit held that a plaintiff in a section 406(a)(1)(C) suit must allege facts “that support an element of intent” by the plan fiduciary “to benefit a party in interest.”³² But neither section 406(a)(1)(C) nor section 408(b)(2)(A) requires that a plan fiduciary have any particular intent at all, much less an intent to benefit a party in interest. Indeed, the whole point of the prohibited transaction rules is that they ban certain transactions without regard to whether a plan fiduciary has otherwise failed to satisfy the general fiduciary duties of section 404, such as the duty of loyalty. Next, in *Albert vs. Oshkosh Corp.*, the Seventh Circuit held that section 406(a)(1)(C) does not reach “services that are essential” for plans, such as “recordkeeping and administrative services.”³³ But that is not right either. It is no more proper for a plan to pay unreasonable compensation for essential services than for other services. And finally, in *Ramos vs. Banner Health*, the Tenth Circuit held that “some prior relationship must exist between the fiduciary and the service provider to make the provider a party in interest.”³⁴ This approach is not consistent with the text of section 3(14), and it absolves an arrangement in which a plan overpays for services, as long as the services are provided by a party that has not had any prior dealings with the plan or its fiduciaries. Also, this approach bans all transactions with repeat service providers, such as an accounting firm that audits a plan every year, an actuarial firm that calculates the pension payments of each

³² *Sweda vs. University of Pennsylvania*, 923 F.3d 320, 338 (3d Cir. 2019).

³³ *Albert vs. Oshkosh Corp.*, 47 F.4th 570, 585 (7th Cir. 2022).

³⁴ *Ramos vs. Banner Health*, 1 F.4th 769, 787 (10th Cir. 2021).

retiring employee, and even the United States Postal Service if it delivers monthly benefit checks.³⁵ Again, the approach taken by the Second Circuit is the correct one, and it should be affirmed.³⁶

Conclusion

The lore surrounding the early years of ERISA includes a story about President Jimmy Carter and Hamilton Jordan, his chief of staff. Carter, the story goes, wanted to pursue certain policy actions on employee benefit plans, but every suggestion was shot down by staff as not permissible under ERISA. When Carter, evidently frustrated, asked what ERISA was, Jordan reportedly said that it was a federal law codifying “Every Ridiculous Idea Since Adam.” Those of us who practice (or who used to practice) employee benefits law can sometimes be hard pressed to disagree with Jordan. ERISA is a highly complicated, highly imperfect statute that sometimes produces unexpected results. But the nonsense of the Eighth Circuit’s reading of section 406(a)(1)(C) is without equal. The notion that the legislators who wrote ERISA intended for a plan fiduciary to be sued for every transaction involving a plan’s receipt of services, even services necessary to comply with ERISA, is altogether too much. Only an intellectual could believe it.

³⁵ This sounds absurd, but it is nonetheless true. Under the Eighth Circuit approach, the first delivery of a plan’s benefit check by the United States Postal Service would escape section 406(a)(1)(C), but all subsequent deliveries for that plan would not, even though the subsequent deliveries would be necessary and even though the plan would pay no more than reasonable compensation for them.

³⁶ Apart from its holding about which party bears the burden of alleging facts concerning section 408(b)(2)(A), the Second Circuit also looked to the Investment Company Act of 1940 to inform the legal standard for whether a party in interest’s compensation is reasonable. See *Cunningham*, 86 F.4th at 977. Although I do not have a view on that issue, my colleague, Quinn Curtis, sets out a cogent argument that this part of the Second Circuit’s opinion is not correct. See Brief of Quinn Curtis, et al[.], as *Amici Curiae* in Support of Petitioners.