No. 25-2061

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRUCE KONYA, SIMON SHIFF, STEPHEN SCHWARZ, and DIANA VASQUEZ, individually and as representatives of a class of participants and beneficiaries on behalf of the Lockheed Martin Corporation Salaried Employee Retirement Program and the Lockheed Marting Aerospace Hourly Pension Plan,

Plaintiffs-Appellees

v.

LOCKHEED MARTIN CORPORATION,

Defendant-Appellant

On Appeal from the United States District Court for
The District of Maryland, No. 24-cv-750
(Hon. Brendan A. Hurson)

AMICUS CURIAE BRIEF OF THE PENSION RIGHTS CENTER AND THE NATIONAL RETIREE LEGISLATIVE NETWORK IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1(a)(2)(A), each of the Amici Curiae individually certifies that it is a non-profit corporation, that it does not have a parent corporation, and that no publicly held corporation has ten percent or greater ownership.

In accordance with Local Rule 26.1(a)(2)(B), each of the Amici Curiae individually certifies that it is unaware of any publicly held corporation or similarly situated legal entity, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance or indemnity agreement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

AMICI CURIAE AND THEIR INTEREST IN THE LITIGATION[1]

The Pension Rights Center

The Pension Rights Center (the "Center") is a Washington, D.C. nonprofit, nonpartisan consumer organization that has been working for almost 50 years to protect and promote the retirement security of American workers, retirees, and their families. The Center provides education and legal representation to retirees, workers, and their families concerning retirement savings plans. The Center also works to improve pension security and adequacy through common ground initiatives with others in the pension community and working with the Federal agencies and Congress to improve pension outcomes for all Americans.

The National Retiree Legislative Network

The National Retiree Legislative Network ("NRLN"), a non-profit organization, is the only national membership organization solely dedicated to representing the interests of retirees and future retirees. Formed in 2002, the NRLN endeavors to secure improvements in the law to protect retirees' employer-sponsored pension and other benefits and to keep Social Security and Medicare strong. The

[1] All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than Amici, their members, of their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

NRLN is a non-partisan, grass roots coalition representing more than 2 million retirees of nearly 200 major corporate and governmental employers.

INTEREST OF THE AMICI CURIAE IN THE LITIGATION

Participants in a defined benefit plan normally receive an annuity benefit commencing at retirement age and continuing until the death of the participant and, in the case of most married participants, until the death of the participant's spouse. The annuity payout period, typically beginning at age 65, can exceed three decades. A reduction or delay in payment of a benefit, even short term, can have a devastating impact on a participant or beneficiary. *See, e.g.,* Peter Applebome, *Mill Town Pensioners Pay for Wall Street Sins,* New York Times, July 30, 1991, Page 1, https://www.nytimes.com/1991/07/30/us/mill-town-pensioners-pay-for-wall-street-sins.html ("hereinafter "*Mill Town Pensioners Pay for Wall Street Sins*"). We also know from working with working and retired Americans, that pension risk transfers understandably create concern and anxiety among participants when their benefits are transferred to insurance companies that subject those benefits to higher-than-necessary levels of risk.

ERISA's structure for ensuring that a defined benefit plan meets its long-term obligations has three primary components: minimum funding standards for such plans and the sponsors of such plans; the plan sponsor's absolute liability for shortfalls in the plan's ability to pay participants their earned benefits; and ultimately

the Pension Benefit Guaranty Corporation's ("PBGC") guaranty of benefits, which is funded through premiums paid by employers who sponsor defined benefit plans. The system has worked largely as intended for the 50-year history of ERISA, with most plans fully satisfying their liabilities and the PBGC paying benefits up to a guaranteed level in cases of plan insolvency so that participants are largely insulated from loss or delay in payment of guaranteed vested benefits.

In contrast, when a plan transfers benefit liabilities to an insurance company in a so-called risk-transfer transaction, benefit fulfillment through the end of the participant's life is, as defendants acknowledge, removed from ERISA's protections and transferred to a system of state (and sometimes off-shore) regulation—in which the insurance company alone rather than the plan *and* the plan sponsor and the PBGC has responsibility for the benefit—and to 50 state-administered, unfunded, state guaranty funds with varying levels of guarantees for participants depending principally on the residence of the participant.[2] The ERISA system, designed by Congress to ensure that participants in defined benefit plans will receive their benefits, is by far the more robust system for protecting participants' interests in

[2] ERISA includes other important protections that are lost in a derisking transaction, including fiduciary duties for those who administer plans. In this regard, it bears mention that according to a JD Powers study of customer satisfaction with annuity providers, Athene ranks 20th out of the 21 annuity providers included in the study. *See* J.D. Power, 2025 U.S. Individual Annuity Study, Overall Customer Satisfaction Index Ranking, https://www.jdpower.com/business/press-releases/2025-us-individual-annuity-study.

defined benefit plans and no longer applies to protect these retirees. And the Department of Labor has recognized this by requiring that in a pension risk-transfer transaction, the plan fiduciary responsible for selecting an annuity provider must use a selection process that is designed to identify a "*safest available annuity*," see Interpretive Bulletin 95-1, 29 CFR § 2509.95-1, which maximizes the chances that the participants will receive uninterrupted benefits throughout their retirement. Note that the time from a pension risk-transfer transaction and the last scheduled annuity payment can extend for decades, during which time the former participant can look only to the insurer and the state guaranty fund for payment rather than the defined benefit plan *and* the plan sponsor *and* the PBGC.

In this case, in 2021 and 2022, Appellant Lockheed Martin, Inc. (hereinafter "Lockheed") caused two of its pension plans to transfer certain pension liabilities to Athene Annuity and Life Company and Athene Annuity & Life Assurance Company of New York (hereinafter "Athene"). Bruce Konya and three other participants in the plans brought this civil action claiming that Lockheed did not use a process designed to identify the safest annuities and that Athene posed a meaningfully greater risk to the participants than other available annuity providers. In its various filings in district court, Lockheed all but conceded that Athene was not among the safest available annuity providers but argues that it was not required to conduct a process designed to identify the safest available annuity providers. The issue on this

interlocutory appeal, however, is limited to a single, threshold Constitutional issue: whether Appellees have Article III standing to contest the adequacy of Lockheed's fiduciary process, and more particularly, whether they have alleged a concrete injury.

Relying on *Thole v. U.S. Bank, N.A.,* 590 U.S. 538 (2020), Lockheed contends that there is no concrete injury because Athene thus far has met its obligations to pay benefits and is not in imminent danger of insolvency. Tellingly, Lockheed admits that under its theory of standing, a former plan participant would be barred from bringing a civil action against a plan sponsor or other plan fiduciary for selecting a relatively risky annuity provider only if the annuity provider fails (or is in imminent danger of failing) within *six years* from the annuity's purchase, the period of the ERISA statute of limitations. See Appellant's Page-Proof Opening Brief, at 19 ("Lockheed Opening Brief"). This would mean, in effect, that a fiduciary could contract with impunity with the weakest insurance company not on the verge of collapse during a six-year window from the risk-transfer transaction.

Thole, however, is not the standard in this case and in making its argument, Lockheed misreads the decision. In *Thole,* the Court held that a participant *in a defined benefit plan* does not suffer a concrete injury unless the *defined benefit plan* fails to pay benefits or is in imminent danger of failing to pay plan benefits to a plan participant. In a pension-risk transfer, however, the participant is being expelled

from the defined benefit plan and the employer is released from all of its obligations to the participant (and also released from having to pay premiums to the Pension Benefit Guaranty Corporation for the participant). The *Thole* Court's decision turned on the "regulatory phalanx," *Thole,* at 544, to which ERISA fiduciaries are subject and the PBGC guarantees to which participants are entitled. In contrast, once the pension liabilities are transferred from the ERISA plan to an annuity provider, the "regulatory phalanx" and the PBGC guarantees no longer protect the retirees. The contract-like relationship between the employer and the participant, as embodied in an ongoing defined benefit plan, is ended by the distribution of an annuity contract to the participant. *See Thole,* at 544 ("a defined benefit plan is more in the nature of a contract"). And under ERISA's fiduciary rules—requiring that a fiduciary discharges its obligations for the exclusive purpose of providing benefits to participants and their beneficiary—the fiduciary must have a process designed and implemented to select an annuity provider that meets a "safest available annuity" standard before eliminating the ERISA protections. The safest available annuity is, in fact, the benefit to which the former participant is entitled when the employer removes a participant from the plan.

For comparative purposes, assume that an individual engaged an insurance broker to purchase an annuity from an insurer with the highest credit ratings from major insurance rating firms. And let us assume that the reason the client so

instructed its broker is because the annuity term is 30 years and the client desires the safest available annuity to maximize the probability that all payments will be made over that period. The broker, however, purchases an annuity from Athene, whose ratings are lower than specified by the client and that the broker's motivation for choosing Athene was that Athene offered the broker a larger commission than the insurers who complied with the client's instructions. Certainly, no one would argue that in that the broker's client lacks a concrete injury, notwithstanding that Athene had not yet missed a single contractual payment. And that is the economic position of the class members who, without their consent, were separated from the plan and provided with a less secure annuity contract than they were entitled to under ERISA.

The standing doctrine advocated by Lockheed is inapplicable to the circumstances here and would license Lockheed or any other plan sponsor to select almost any insurer not in immediate danger of failing in the near future, even those with lower ratings and riskier business models than Athene. And as we have already noted, with annuity contracts the future can extend for many decades. Our interest in the litigation is to ensure the security of the earned pension benefits of retirees throughout their retirement.

SUMMARY OF ARGUMENT

The argument is divided into two sections. The first section provides historical context to the pension-risk transfer phenomena, focusing on how such

transactions were initially sanctioned by the PBGC as the means by which a plan with sufficient assets satisfied benefit liabilities when the sponsor terminated the plan. We will show that at the time—indeed arguably until 1990—the PBGC maintained the position that its benefit guarantees continued to back benefit liabilities transferred to annuity providers in plan terminations. By 1990, however, PBGC changed its position, with its Executive Director testifying before the Senate Committee on Finance that "We believe the appropriate role of the federal government is to encourage sponsors to prudently select insurers for pension annuities and to enforce such standards. We do not believe that another large risk fraught with moral hazard should be placed upon the PBGC insurance program." The PBGC's position and the subsequent failure of Executive Life, led the Department of Labor to issue Interpretative Bulletin 95-1, 29 CFR § 2509.95-1 ("Interpretive bulletin relating to the fiduciary standards under ERISA when selecting an annuity provider for a defined benefit pension plan") (hereinafter "I.B. 95-1"), which requires responsible plan fiduciaries to select an insurance company to provide "the safest available annuity."

The second section argues that Plaintiffs have standing under Article III of the Constitution to bring a claim against Defendant for failing to adhere to the guidance in I.B. 95-1, that is to conduct a search to identify a "safest available annuity." The

injury that Plaintiffs suffered was the economic difference between a safest available annuity and the riskier annuity that the plan actually distributed to them.

ARGUMENT

I. History and Context Demonstrate the Importance of the Annuity Selection Process Outlined in Interpretative Bulletin 95-1.

An animating event for the Congress that passed ERISA in 1974 was the termination of an insolvent defined benefit plan sponsored by Studebaker Corporation. When the plan terminated, it had sufficient assets to pay benefits to those who were already retired or eligible to retire, but other participants received either lump sum payments worth only a 15% of their benefits or, in the majority of cases, received nothing. This event was widely covered by the media and gave support to arguments that American workers could not rely on their workplace defined benefit retirement plans. *See generally,* JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, A POLITICAL HISTORY 51-79 (Chapter Four, "The Most Glorious Story of Failure in the Business"/The Studebaker-Packer Corporation and the Origins of ERISA) (University of California Press 2004).

The Studebaker tragedy resulted from the intersection of three gaps in the law. First, Studebaker had not been subject to rules to ensure sound actuarial funding of the promises it made through its plan. Second, Studebaker had no obligation to make the plan whole during the plan's life or in the event of insolvency and the plan document expressly excluded Studebaker from entity liability for the plan's

promises. Third, there was no governmental program to pay benefits in the event of a pension plan default.

ERISA addressed each of these problems: it created minimum funding standards for defined benefit plans; it created sponsor liability for funding shortfalls, both during the plan's life and if the plan became insolvent; and it created the Pension Benefit Guaranty Corporation to step in when both the plan and plan sponsor failed, guaranteeing benefits up to a specified level, which for plans terminating in 2026 is a monthly life annuity commencing at age 65 of up to $7,789.77 per month (or $93,477 annually). *See* PBGC, Maximum Monthly Guarantee Tables, https://www.pbgc.gov/workers-retirees/learn/guaranteed-benefits/monthly-maximum. Although Congress has had to tweak the system several times since 1974, the system has succeeded in ensuring that the benefits of participants in defined benefit plans are paid (at least up to guarantee amounts[3]) without interruption, even in the event of plan *and* plan sponsor insolvency.

[3] Title IV of ERISA allocates plan assets in accordance with statutory priorities. ERISA § 4044(a), 29 U.S.C. § 1334(a) The first two categories are for benefits attributable to employee contributions and the third is to the benefits of individuals already in pay status for three years as of the plan's termination date (or could have been in pay status for such period). Thus, a plan, even though without sufficient assets to pay all plan benefits to all participants, is sometimes in a position to pay full or close to full benefits to participants who are or could have been in pay status for three years even though those benefits exceed PBGC benefit guarantees.

Prior to ERISA, the termination of a plan was governed by plan provisions and state law. Typically, as was the case in the Studebaker plan, the plan expressly exempted the employer from any financial responsibility for benefits under the plan. And plan benefits were often satisfied through the payment of lump sums under plan valuation rules.

The PBGC, by regulation, changed the rules on how a terminating solvent plan must satisfy plan benefits: the regulations required a solvent plan to purchase irrevocable insurance contracts to pay plan annuity benefits to plan participants, unless the participant elected under the plan terms to receive a lump sum distribution or other permissible benefit available under the plan. See Guarantees of Retirement Annuities, Hearing Before the Committee on Finance, United States Senate, 101st Cong. 2nd Sess. at 51, 52 (1990) (prepared Statement of James B. Lockhart III) (hereinafter "Lockhart Statement").[4] PBGC took this position because the normal form of statutory benefit under a defined benefit plan is an annuity benefit or, in the case of married individuals, a joint-and-survivor annuity benefit and on termination a participant should not be forced to take a lump sum payment. *Id.* Congress ultimately incorporated this provision into the statute. ERISA § 4041(b)(3)(A), 29 U.S.C. 1341(b)(3)(A).

[4] The hearings are accessible at https://www.google.com/books/edition/Guarantees_of_Retirement_Annuities/DBs1AAAAIAAJ?hl=en&gbpv=1.

The PBGC position that terminating plans are required to purchase and distribute irrevocable insurance commitments to satisfy benefits raised an important issue: what would happen if the insurance company to which the benefits were transferred failed? Would the PBGC pay guaranteed benefits in the event of insurer default if the state insurance guaranty funds did not cover the loss? In a preamble to a 1981 regulation, PBGC indicated that it would. The preamble stated that "in the unlikely event that an insurance company should fail and its obligations cannot be satisfied (e.g., through a reinsurance system), the PBGC would provide the necessary benefits." 46 Fed. Reg. 9532, at 9534 (1981).

Two years later, however, PBGC became concerned about its potential liability for insurer failure and in 1983, and again in 1985, made legislative proposals that would have provided that the PBGC did not have statutory liability for benefits once transferred from a plan to an insurance company. *Lockhart Statement* at 54. Congress never enacted the PBGC position into law. Notwithstanding Congressional inaction, the PBGC eventually indicated that it would not follow the commitment it made in the Federal Register. *Id.*

The PBGC's Executive Director James Lockhart justified the agency's position in 1990 testimony before the Senate Finance Committee. Mr. Lockhart indicated that PBGC guaranty coverage of payments under annuity contracts "would give the sponsor a perverse incentive to buy the lowest acceptable quality annuity to

minimize the cost of the purchase or to maximize the asset reversion. The insurance company could also be tempted to invest in higher risk assets." *Id.* at 56. Mr. Lockhart concluded his testimony by expressing the view that "the appropriate role of the federal government is to encourage sponsors to prudently select insurers for pension annuities and to enforce standards. We do not believe that another large risk fraught with moral hazard should be placed upon the PBGC insurance program." *Id.* The risk posed by this potential moral hazard was not eliminated by the PBGC's new position but transferred to participants.

Not quite a year after the PBGC disclaimed its responsibility for benefits transferred to insurers, the insurance company Executive Life failed, resulting in immediate reduction of benefits for tens of thousands of individuals whose benefits had been transferred from terminating pension plans to Executive Life, with some participants seeing their benefits immediately cut by 30%. *Town Pensioners Pay for Wall Street Sins*. In response to the Executive Life failure and PBGC's decision not to insure against private annuity provider insolvency, the Department of Labor ultimately promulgated Interpretative Bulletin 95-1, which provides that "fiduciaries choosing an annuity provider for the purposes of making a benefit distribution must

take steps calculated to obtain the safest annuity available."[5] And the Bulletin makes clear the importance of taking steps calculated to obtain the safest available annuity:

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[5] Lockheed argues, however, that the bulletin was "non-binding guidance for employers on how to select an insurer." *See* Appellant's Page-Proof Opening Brief, at 32. The actual question, however, is whether the bulletin correctly interprets ERISA's fiduciary duties of loyalty and prudence in the context of pension risk transfers. In any event, Defendant does not in their brief explain its view that the bulletin was wrong, but in its Memorandum of Law in district court relied on two district court cases. *See* Memorandum of Law in Support of Defendant's Motion to Dismiss, at 5. In one of the cases, *Bussian v. RJR Nabisco, Inc*. 223 F.3d 286 (5th Cir. 2000), the court denied *Chevron* deference to I.B. 95-1 because it was not the product of notice-and-comment rulemaking, *id.* at 296. While not endorsing the position that ERISA requires a plan to purchase a safest available annuity, the Court wrote that "We agree with the Bulletin and the Secretary that once the decision to terminate a plan has been made, the primary interest of plan beneficiaries and participants is in the full and timely payment of their promised benefit. We agree that beneficiaries and participants whose plan is being terminated gain nothing from an annuity offered at a comparative discount by a provider that brings to the table a heightened risk of default. We would even add that the purchase of such an annuity can be considered an example of the imposition on annuitants of uncompensated risk—the risk of default is borne by the annuitants." *Id.* And the court, while not accepting the principle that a fiduciary must always select the safest available annuity, wrote that "We view the Bulletin's description of the nature of the investigation to be undertaken in the circumstances of this case as fully consistent with ERISA's [fiduciary] provisions." *Id.* at 300. The court held that the fiduciary satisfies its fiduciary duties only if it selects an "annuity provider it 'reasonably concludes best to promote the interests of [the plan's] participants and beneficiaries." *Id.* Choosing an insurer that poses an identifiably higher level of risk does not meet that standard, whether or not the fiduciary is required to choose the very safest available annuity under I.B. 95-1.

Thus, the *Bussian* court reversed the district court's grant of RJR's motion for summary judgment, writing that "viewing the evidence in the light most favorable to Appellants, a reasonable factfinder could conclude, based on the evidence, that RJR failed to structure, let alone conduct, a thorough, impartial investigation of which provider or providers best served the interests of the participants and beneficiaries. And even if the factfinder were to conclude that RJR's investigation was appropriate, it could conclude, based on the evidence, that RJR could not

> . . . a fiduciary's decision to purchase more risky, lower-priced annuities in order to ensure or maximize a reversion of excess assets that will be paid solely to the employer-sponsor in connection with the termination of an over-funded pension plan would violate the fiduciary's duties under ERISA to act solely in the interest of the plan participant and beneficiaries. In such circumstances, the interests of those participants and beneficiaries who will receive annuities lies in receiving the safest available annuity and other participants and beneficiaries have no countervailing interests. The fiduciary in such circumstances must make diligent efforts to assure that the safest available annuity is purchased.
>
> Similarly, a fiduciary may not purchase a riskier annuity solely because there are insufficient assets in a defined benefit plan to purchase a safe annuity. The fiduciary may have to condition the purchase of annuities on additional employer contributions to purchase the safest available annuity.

Interpretative Bulletin 95-1(d). The Pension Benefit Guaranty Corporation has endorsed the Bulletin in regulations and the Federal Register.[6]

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reasonably determine that Executive Life promoted the interest of plan participants and beneficiaries." The Fifth Circuit standard, while perhaps in some ethereal sense is not identical to a "safest available annuity" standard in I.B. 95-1, is not substantively very different.

Defendant also cited *Riley v. Murdock*, 83 F.3d 415 (1996), https://www.ca4.uscourts.gov/Opinions/Unpublished/ 952414.U.pdf, an unpublished *per curiam* opinion that pointedly noted that I.B. 95-1 was not in effect when the defendant fiduciaries in that case choose an annuity provider and that "the circumstances of this case do not merit" its application.

[6] *See* 29 C.F.R. § 4041.28(c)(3)(requiring compliance with DOL Fiduciary standards in selection of annuity providers). *See also* Preamble to Final Rule, Termination of Single-Employer Plans, codified at 29 C.F.R. § 4041.28, 62 Fed. Reg. 60424, 60425 (November 7, 1997) ("By requiring compliance with Title I fiduciary standards to have a valid termination and by monitoring that compliance, the PBGC is furthering

II. Plaintiffs Suffered an Injury in Fact When they Received an Annuity with Identifiably Higher Levels of Risk than Other Available Annuities.

Lockheed contends that plaintiffs lack standing to bring this civil action because "they have received all benefits due under [the annuity contract) and they remain entitled to those benefits in the future," and thus have not suffered an injury in fact sufficient to support Article III standing to proceed with this action. Appellant's Page-Proof Opening Brief, at 15 ("Lockheed Opening Brief"). But plaintiffs have not received their full benefits and will not until their final annuity payments are made—which in some cases will not occur for several decades. Under I.B. 95-1, Plaintiffs were entitled to have their benefits transferred to an insurance company that would provide them with the safest available annuity to maximize the likelihood that they would be paid their promised benefits, I.B. 95-1, but they allege that they received an annuity contract subject to a measurably greater risk of default than other available annuity contracts.

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one of Title IV's fundamental purposes—'to provide for the timely and uninterrupted payment of pension benefits' (section 4002(a)(1) of ERISA). The Department of Labor's Interpretive Bulletin 95–1 (60 FR 12329, March 6, 1995), codified at 29 CFR § 509.95–1, provides guidance with respect to the application of Title I of ERISA to the selection of annuity providers when purchasing annuities for the purpose of distributing benefits under a pension plan. As explained in Interpretive Bulletin 95–1, the selection process depends in part on the relevant facts and circumstances at the time an annuity is purchased.")

The importance of the "safest available annuity" standard reflects the very real differences between the ERISA structural protections to ensure uninterrupted payment of defined benefit pension promises and the weaker protections of local insurance regulation. In ERISA, there are four assurances of benefit payment: the plan's assets at any given moment; minimum funding rules with the plan sponsor responsible for correcting funding deficiencies over a relatively brief amortization period; the residual liability of the plan sponsor (and members of its controlled group) for plan insolvency on plan termination; and the pre-funded benefit guaranty program administered by the Pension Benefit Guaranty Corporation.

In contrast, when benefit obligations are transferred from a plan to an insurer, the benefit obligation is protected only by the insurer's assets at any given moment, with no obligation on a plan sponsor or an equivalent to make up a funding shortfall. In the event of insurer insolvency, state regulators can take regulatory action (during which time full benefit payments may well be suspended), including putting the insurer in receivership; ultimately, if the state regulators are unable to rehabilitate the insurer by transferring its business to other insurers or otherwise, the state insurance guaranty funds of each participant's domicile will attempt to make up some of the losses to the policyholder, up to guarantee limits. The state guaranty funds, unlike the PBGC, are unfunded and must raise assets through assessments on other insurers doing business in the state. They have not been significantly tested

since the collapse of Executive Life, whose collapse resulted in substantially reduced benefits for many individuals, at least for an extended period of time.[7]

The guaranty limits vary from state to state and are themselves dependent on interest rate assumptions used by a guaranty fund. The majority of state guaranty funds ensure annuity contracts only up to a present value of $250,000, which translates into a monthly annuity for a 65-year-old of approximately $1,500 to approximately $2,000 per month, depending on the underlying actuarial assumptions used to determine present value.[8] (The PBGC maximum guarantee amount, in contrast, is $7,789.77 for a 65-year-old participant in a plan terminating in 2026. *See* PBGC, Monthly Guarantee Tables, https://www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee.)

The reduction in present value would be greatest for people close to their annuity starting date. In California, where one of the named plaintiffs resides, the

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[7] Richard w. Stevens, 2 Concerns Sued Over Pensions, New York Times (June 13, 1991), https://www.nytimes.com/1991/06/13/business/2-concerns-sued-over-pensions.html ("Executive Life, under the direction of regulators, is currently paying over 70% of scheduled payments to holders of its annuities, including company pension plans").

[8] The $1,500 per month reflects an interest assumption of 3% and the $2,000 7%, with an 18-year payout period, reflecting life expectancy of 83. See Annuity Calculator, https://www.calculator.net/annuity-payout-calculator.html?cstartingprinciple=250%2C000&cinterestrate=4&cyearstopayout=20&camounttopayout=5%2C000&cpayfrequency=monthly&ctype=fixlength&x=Calculate#annuity-result. The assumptions for a particular state depend on the state's statute and sometimes the decisions of the state regulatory body.

guaranty is 80% of the present value of the benefit, up to a maximum of $250,000. See California Life & Health Insurance Guarantee Association, Q&A 13, https://www.califega.org/FAQ. Thus, even small benefits would be reduced by 20%.

According to a paper published by the Federal Reserve of Chicago, the state guaranty funds, when tested, have not worked as well as one would have hoped, and "state laws also typically give a guaranty association board the option of asking the state courts to impose "haircuts" on the policies, that is, to not honor the full guarantees for the policyholders of the insolvent insurer if economic conditions for the remaining member insurers are bad." *See* Daniel Hartley, *Insurance on Insurers: How State Insurance Guaranty Funds Protect Policyholders,* Economic Perspectives, No. 3, 2024, *https://ssrn.com/abstract=4939772.* The PBGC, by contrast, has a tested and virtually unblemished record of meeting its commitments.

Given the limits of the system of local insurance regulation, where the state generally cannot force the owners of an insurance company to increase the company's capital in a manner similar to ERISA's minimum funding rules and residual sponsor liability requirements, and where state guaranty funds are less robust, less tested and more complex than ERISA's PBGC program, the notion that a plan must engage in a thorough and prudently conducted process designed to select

the safest available annuity is absolutely critical to the security of a former participant's benefits.

Thole, at its heart, is about benefits payable *under a defined benefit plan*, where the employer is under a continuing obligation to fund the plan and can never walk away from its obligations to fully fund the plan up to 100% of the employer's net worth. In addition, the plan sponsor is required to pay premiums to the PBGC for each plan participant. Those protections are at a far remove from the circumstances of a pension risk transfer. Here, Lockheed took unilateral action to remove Plaintiffs from their defined benefit plan. No matter what happens in the future, neither the plan nor Lockheed nor the PBGC are responsible to ensure continuing payments (and Lockheed, as implicitly recognized by the Supreme Court in *Thole*, is the beneficiary of the difference between the premium cost of Athene's contract and that of a contract issued by an insurer with lower long-term risk exposure than Athene).

Lockheed's Brief, perhaps inadvertently, recognizes that the Supreme Court's standing analysis in *Thole* is based on the relational and structural features of an ERISA defined benefit plans. *See* Lockheed Page-Proof Opening Brief at 15 ("a plaintiff who has received all benefits due under a *defined benefit plan* has not suffered an actual injury"), at 18 ("*Thole* expressly rejected that argument in the context of a *defined-benefit* plan . . ."); at 22 ("a participant in a *defined-benefit plan*

lacks an actual injury if all benefits have been paid and the participant remains 'legally entitled' to those benefits in the future"); at 25 ("Beneficiaries of *defined-benefit plans* who have 'received all of their monthly payments so far' and remained legally entitled to receive the same monthly payments for the rest of their lives' have not suffered an actual injury"); at 34 ("an allegation of underfunding of a *defined-benefit plan* is insufficient to show a substantial risk of non-payment").

A defined benefit plan's distribution of an annuity contract to a plan participant permanently severs the relationship between the participant and the plan. The participant will receive nothing further from the plan and neither the plan nor the employer nor the PBGC has any further obligation to the former participant. And this severance of future obligations of the plan, the plan sponsor, and the PBGC to the participant is the basis for I.B. 95-1's emphasis on a process designed to select those annuities that pose the lowest risk of future non-payment.

Lockheed, however, does not believe it was obligated to conduct a process to locate an annuity that minimizes the risk of future non-payment, or to put it another way, to choose an annuity that best serves the interests of the participants and their beneficiaries. See *Bussian v. RJR Nabisco, Inc*. 223 F.3d 286 (5th Cir. 2000). Defendant's Memorandum of Law in district court argued that Plaintiffs' theory of the case is that ERISA required defendant to "select the single largest, most expensive insurance provider that Plaintiffs prefer." Defendant's Memorandum of

Law, at 2-3. But this of course is not what Plaintiffs contend at all. They contend only that Lockheed did not conduct a search designed to select a "safest available annuity provider," and thus subjected Plaintiffs to extra risk of non-payment. Indeed, the quote from Defendant's memorandum strongly suggests that defendant may have eliminated some insurers from consideration simply because they were more expensive, notwithstanding that their annuity would have been safer than the Athene annuity Defendant caused the plan to purchase.

In any event, if the fiduciaries failed to use a process designed to identify the lowest risk annuity contracts, the participants have suffered a concrete loss equal to the difference in economic value between the safer annuity that should have been selected and the Athene annuity that the plan actually distributed.

This is not to dismiss Athene's business model—added risk generally results in a lower premium, a choice a consumer in the individual annuity market can rationally make. But unlike an individual consumer balancing risk and cost, the Plaintiffs here had no agency or potential reward in the choice to take a less expensive but riskier annuity. Plaintiffs allege that Lockheed subjected them to a higher level of risk so that Lockheed, through the plan, would pay a lower premium amount.

Lockheed, in an implicit invitation for this Court to conclude as a matter of fact that Athene poses no meaningful risks to participants, notes in its brief that

Athene has an A+ credit rating, at page 2; an A+ rating from S&P and an A1 rating from Moody's, at page 9; and an A+ rating, at pages 16, 32, 36 & 44. In fact, Athene's insurance subsidiaries have ratings from four separate ratings services, and none rank Athene in their top category and three of the services rank them only in their fifth category.

There are meaningful differences between the top rating and Athene's ratings. For example, S&P writes that "An insurer rated 'AAA' has extremely strong financial security characteristics. 'AAA' is the highest insurer financial strength rating assigned by S&P Global Ratings." And an "insurer rated 'AA' has very strong financial security characteristics, differing only slightly from those rated higher." S&P Global, S&P Global Ratings Definitions, https://www.spglobal.com/ratings/en/regulatory/article/190705-s-p-global-ratings-definitions-s504352 (Table 8).

But an insurer, such as Athene, with an A+ rating, has "strong financial security characteristics but is somewhat more likely to be affected by adverse business conditions than are insurers with higher ratings." *Id.*[9]

[9] It warrants mention here that Standard & Poor gave its highest ranking to Executive Life in 1990, the year before that company's rapid collapse. *See* James Flanigan, Buying Insurance Without Getting Stung, Los Angeles Times (April 10, 1991), https://www.latimes.com/archives/la-xpm-1991-04-10-fi-271-story.html. It is not surprising, then, that Interpretative Bulletin 95-1 provides that in evaluating "an annuity provider's claims paying ability and credit worthiness . . Reliance on ratings

We also note that if Defendant prevails at this stage in the litigation, before discovery and on the basis of standing, Plaintiffs will not have meaningful recourse if Athene does default sometime in the future, something Plaintiffs allege is far more likely than a default by an insurer whose annuity contract would satisfy the "safest available annuity" standard. If Athene defaults even ten years from now, could Plaintiffs then bring an action against the plan fiduciary? If the fiduciary is still around, and solvent, it would argue that the complaint now is stale, that the ERISA statute of limitations had already run. See ERISA § 413, 29 U.S.C. § 1113 (generally a six-year statute of limitations from the date of breach). Indeed, Lockheed explicitly notes that ERISA's limitations period would bar a civil action against it six years after it purchased the annuity contracts. And this dilemma—plaintiffs cannot seek a remedy now because a loss has not yet occurred and cannot seek a remedy in the future because it is too late for relief—would encourage conflicted fiduciaries to consider price before risk, thereby effectively demoting I.B. 95-1 and the ERISA fiduciary standards it interprets to a dead letter rather than an enforceable legal standard.

CONCLUSION

The court should affirm the denial of Defendant's motion to dismiss.

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provided by insurance rating services would not be sufficient." Interpretative Bulletin 95-1(c).

Respectfully submitted,

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Dated: January 30, 2025

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Norman P. Stein

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on January 30, 2025.

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