UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND
(Southern Division)

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 MARTIN AEROSPACE HOURLY PENSION PLAN, *Plaintiffs*, v. LOCKHEED MARTIN CORPORATION,	Civil Action No. 8:24-cv-00750 Hon. Peter J. Messitte

Brief of the Pension Rights Center and the National Retiree Legislative Network as Amici Curiae in Support of Plaintiffs

Norman P. Stein (*pro hoc vice*)
4542 N.E. 45th Street
Seattle, Washington. 98115
(205) 410-0989

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Miscellaneous

AMICI CURIAE AND THEIR INTEREST IN THE LITIGATION

The Pension Rights Center

The Pension Rights Center (the "Center") is a Washington, D.C. nonprofit, nonpartisan consumer organization that has been working for more than 45 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 plans and is the technical assistance advisor to six regional pension information and counseling centers providing free legal assistance on retirement issues in 31 states. 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.

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

Interest of 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, often exceeds three decades. A reduction of a benefit can have a devastating impact on the participant. *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*").

ERISA's structure for ensuring that a defined benefit plan meet its long-term obligations has three primary components: minimum funding standards for such plans and the sponsors of such plans; the plan sponsor's contingent 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. 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 generous guaranteed level so that relatively few participants have suffered any loss or delay in payment of guaranteed vested benefits.

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 defendant acknowledges, transferred to a system of local regulation—in which the insurance company alone rather than the plan *and* the plan sponsor—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. 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 defined benefit plans. And the Department of Labor has recognized this by requiring that in a risk-transfer transaction, the plan fiduciary responsible for selecting an annuity provider select not simply an annuity by a licensed insurance carrier, but rather the "*safest available annuity*," which maximizes the chances that the participants will receive uninterrupted benefits throughout their retirement.

We submit this brief not only because we believe the fiduciary process that resulted in the selection of Athene falls short of a process designed to select the safest available annuity, but also because the position taken by Defendant—that the allegations that Defendant failed to prudently select an annuity in the sole interest of the participants cannot be tested in court so long as the annuity provider has not yet failed—could ultimately lead to a nation-wide catastrophe for retirees

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 I.B. 95-1, that is to conduct a search to identify the "safest available annuity." The injury that Plaintiffs suffered was the difference between a safest available annuity and the riskier annuity the plan actually distributed to them.

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 the Studebaker entity from 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 2024 is a monthly life annuity commencing at age 65 of up to $7,107 per month (or $85,295 annually). *See* PBGC, Monthly Guarantee Tables, https://www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee. 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[1]) without interruption, even in the event of plan *and* plan sponsor insolvency.

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.

[1] 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, if a plan, even though without sufficient assets to pay all plan benefits to all participants, is often 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.

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 benefit. 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").[2] 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. *Id.* Congress ultimately incorporated this provision into the statute. ERISA § 4041(b)(3)(A), 29 U.S.C. 1341(b)(3)(A).

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 adopted the proposal.

---

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

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.[3]

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%. *Mill 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

---

[3] **Plans did not typically purchase and distribute private annuity contracts to participants in ongoing plans as a means of satisfying benefit liabilities during the first twenty years of ERISA. As Defendant Lockheed itself notes, "risk transfers" became part of the ERISA market landscape about thirty years ago. The practice became attractive to employers for a number of reasons, including reduction of PBGC premiums, which are not paid on behalf of former plan participants.**

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."[4]

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 received . . . their full benefits from Athene" on the plan's distribution of the Athene annuity contract and thus have not suffered an injury in fact sufficient to support Article III standing to proceed with this action. Memorandum of Law in Support of Defendant's Motion to Dismiss, at

[4] Defendants argue, however, that a fiduciary has no obligation to follow the process described in I.B. 95-1, citing two 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 the "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 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 the "safest available annuity" standard in I.B. 95-1, is not substantively very different.

Defendant also cites *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.

Moreover, in December of 2022, Congress enacted the Secure 2.0 Act of 2022. Section 321 of that Act directed the Secretary, after consultation with the ERISA Advisory Council, "to determine whether amendments to section 2509.95-1 of Title 29 of the Federal Regulations are warranted and to report to Congress of the findings of such review consultation, including an assessment of any risk to participants." Section 321 thus reflects Congressional understanding that I.B. 95-1 is the current standard for assessing fiduciary responsibility in choosing an annuity provider when a defined benefit plan is distributing benefits in the form of an insurance contract.

2 ("Defendant's Memorandum of Law"). 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 five, six or even seven 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, I.B. 95-1, but they allege that they received an annuity contract subject to much greater risk of default than other available annuity contracts.

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 time; the residual liability of the plan sponsor 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 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, including putting the insurer in receivership; ultimately, if the state regulators are unable to rehabilitate the plan 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 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.[5]

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.[6] (The PBGC maximum guarantee amount, in contrast, is $7,107 for a 65-year-old participant in a plan terminating in 2024. *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 guaranty is the benefit up to a present value of $250,000, and then 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. *See* Daniel Hartley, *Insurance on Insurers: How State Insurance Guaranty Funds Protect Policyholders, supra* note 5.

---

[5] Daniel Hartley, *Insurance on Insurers: How State Insurance Guaranty Funds Protect Policyholders,* Federal Reserve Bank of Chicago, Economic Perspectives, No. 3, May 2024, https://www.chicagofed.org/publications/economic-perspectives/2024/3 ("In practice, as illustrated by the two largest insurer insolvencies that I discuss as examples—namely, the Penn Treaty and Executive Life insolvencies—the resolution process can involve delays that deplete assets, introduce uncertainty regarding the degree of coverage for policyholders, and cause inequity across the coverage provided to different types of policies."). *see also* Richard W. Stevens, *2 Concerns Sued Over Pensions,* New York Times, June 13, 1991, Section D, Page 1, https://www.nytimes.com/1991/06/13/business/2-concerns-sued-over-pensions.html (Executive Life, under the direction of regulators, is currently paying only 70 percent of scheduled payments to holders of its annuities, including company pension plans.)

[6] 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.

Defendant incorrectly claims that a "recent study of 500 corporate pension plans taken over by the PBGC shows that 16% of retirees saw a cut in benefits, with an average loss of $220,000 per beneficiary." Defendant's Memorandum of Law, at 6. Defendant misreads the report they cite. The report notes at page 10 that one of the PBGC limitations—the Accrued-at-Normal Limitation, which affected 44,000 participants (and not the 16% of all the participants who had some benefit reductions), resulted in 11% cuts of benefits that had a *pre-reduction* present value of $220,000. See PBGC's Single Employer Guarantee Outcomes: May 2019, https://www.pbgc.gov/sites/default/files/2016-single-employer-guaranty-study.pdf (Table Six). The actual average reduction from the limitation was $24,800, not $220,000. *Id.*

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.

It is hard to take seriously Defendant's argument that its process was designed to serve the best interests of the plan's participants and beneficiaries. The methodology in which the plan selected Athene has not been shared with the Plaintiffs—not how the request for proposals from insurers was formulated (if there were such a request) nor how the responsible fiduciaries analyzed and evaluated pertinent factors in I.B. 95-1. Other than the plan's ultimate choice of Athene, the process remains opaque.

And it is not even clear that defendant believes it was obligated to conduct a process to locate an annuity that would best serve the interests of the participants and beneficiaries. Defendant's Memorandum of Law argues 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 defendant did not conduct a search designed to find the "safest available annuity provider," or an annuity that best served the interests of the plan's participants. Defendant caused the plan to purchase an annuity contract that subjects them to much greater risk than other available annuities. 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.

Defendant argues that the decision in *Thole v. U.S. Bank, N.A.,* 590 U.S. 538 (2020) "decides this case." But Defendant misreads *Thole*. In *Thole*, the plaintiffs alleged that a fiduciary breach had resulted in a plan suffering large investment losses. The Supreme Court wrote that participant had no injury because the alleged breach would not have "substantially increased the risk that the *plan and the employer* would fail and be unable to pay the participant's future benefits," id. (emphasis supplied).

But here the question is not whether a fiduciary breach so impaired a plan's funding that benefit payments are meaningfully jeopardized, but whether the plan's final, terminal set of actions with respect to the Plaintiffs—the purchase and distribution of the Athene annuity contract—caused them injury. If a plan sponsor plans to remove plan participants from the protections of ERISA through the purchase of an annuity, I.B. 95-1 requires plan fiduciaries to

use a prudent process designed to identify the "safest availability annuity," or put another way, to choose an annuity that best served the interests of the participants. See *Bussian v. RJR Nabisco, Inc*. 223 F.3d 286 (5th Cir. 2000). If the fiduciaries fail to do so, the injury to the participants is the difference in economic value between safer annuity that should have been selected and the annuity that the plan actually distributed.

A study by NISA Investment Advisers, one of the nation's largest asset management firms, concluded that Athene had the greatest credit risk of nine major insurance providers in the pension-risk market by comparing each insurer's bond portfolio risk over the risk reflected in United States Treasury instruments. The spread for the safest provider was 7.4%, with Athene coming up dead last with a 21.4% spread. The economic cost to beneficiaries from being saddled with Athene compared to the safest provider was 14%. *See* NISA Investment Advisors, Pension Risk Transfers May Be Transferring Risk to Beneficiaries (Oct. 22, 2022), https://www.nisa.com/perspectives/pension-risk-transfers-prt-may-be-transferring-risk-to-beneficiaries/ The complaint plainly and with specificity alleges an immediate injury in fact.

This is not to dismiss Athene's business model—added risk can result in a lower premium (or higher annuity payment amount), a choice a consumer in the individual annuity market can rationally make. But the Plaintiffs here had no agency or potential reward in the choice to take a riskier annuity. Plaintiffs allege that Defendant subjected them to a higher level of risk so that Defendant would pay a lower premium amount. The allegations are that Defendant effectively pocketed what it shortchanged Plaintiffs.

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 a quarter century or 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 run years earlier. See ERISA § 413, 29 U.S.C. § 1113 (generally a six-year statute of limitations from the date of breach). And this dilemma—plaintiffs cannot seek a remedy now because a loss has not yet occurred and may not be able to seek a remedy in the future because it is legally (or practically) 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 deny Defendant's motion to dismiss.

Respectfully submitted,

Norman P. Stein
4542 N.E. 94th Street
Seattle, Washington. 98115
(205) 410-0989