Nos. 07-3605 and 08-1224

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DENNIS HECKER, JONNA DUANE, and JANICE RIGGINS,

Plaintiffs-Appellants,

v.

DEERE & COMPANY, FIDELITY MANAGEMENT TRUST COMPANY, and FIDELITY MANAGEMENT & RESEARCH COMPANY,

Defendants-Appellees.

On Appeal from the
United States District Court for the Western District of Wisconsin
The Honorable John C. Shabaz
District Court No. 06-C-719-S

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF THE PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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Appellate Court No: 07-3605 & 08-1224

Short Caption: Hecker, et al. v. Deere & Co., et al.

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William A. Birdthistle; James D. Cox; Tamar Frankel; Paul M. Secunda; Peter K. Stris

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Attorney's Signature: ________ Date: March 17, 2009

Attorney's Printed Name: William A. Birdthistle

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [X] **No** [ ]

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

Amici curiae law professors are scholars[1] at American law schools whose research and teaching interests focus on federal securities regulations, ERISA, and the law of investment funds. William A. Birdthistle is Assistant Professor of Law at Chicago-Kent College of Law; James D. Cox is Brainerd Currie Professor of Law at Duke University School of Law; Tamar Frankel is Michaels Faculty Research Scholar and Professor of Law at Boston University School of Law; Paul M. Secunda is Associate Professor of Law at Marquette University Law School; and Peter K. Stris[2] is Visiting Assistant Professor of Law at Whittier Law School.

Although *amici* have no financial interest in the outcome of this case, we are interested in ensuring a uniform and coherent interpretation of ERISA and the standards of fiduciary duty in the context of investment funds. Because the panel opinion raises issues of great importance for the retirement system, savings plans, and investment funds, *amici* respectfully submit this brief to offer their informed view that the case merits reconsideration. We believe that the decision in this case will have material financial consequences for tens of millions of Americans who entrust their retirement savings to ERISA fiduciaries.

For the authority to file this brief, *amici* rely on Federal Rule of Appellate Procedure 29(a), pursuant to which we have contemporaneously submitted the attached Motion for Leave to File an *Amicus Curiae* Brief.

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[1] *Amici* join this brief as individuals and not as representatives of any institutions with which they are affiliated.

[2] Professor Stris served as counsel of record for the petitioner in *LaRue v. DeWolff, Boberg & Associates, Inc.*, 128 S. Ct. 1020 (2008).

SUMMARY OF ARGUMENT

Twice in the past year, panels of this Court have ruled upon the appropriate scope of a fiduciary duty in the context of personal savings and mutual fund fees. *See Hecker v. Deere & Co.*, 2009 WL 331285 (7th Cir. Feb. 12, 2009) ("*Hecker*"); *Jones v. Harris Associates L.P.*, 527 F.3d 627 (7th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3281 (U.S. Mar. 9, 2009) ("*Jones*"). On each occasion, the panel adopted a remarkably narrow interpretation of fiduciary duty that relied crucially upon an assumption that the underlying market for mutual funds is vibrant and competitive. Yet also during the past year, five judges of this Court signed a dissent from denial of rehearing *Jones* en banc that vigorously criticized mutual funds for being part of an industry "where abuses have been rampant" and for employing a "governance structure that enables mutual fund advisers to charge exorbitant fees." *Jones v. Harris Associates L.P.*, 537 F.3d 728, 730-732 (7th Cir. 2008) (Posner, J., dissenting from denial of rehearing en banc). The Court now has an opportunity to choose among those conflicting positions by rehearing this case en banc.

Alternatively, this Court may choose to hold any further ruling on this issue in abeyance while the Supreme Court of the United States – which granted certiorari in *Jones* only a few days ago – evaluates the central question of the competitiveness of mutual funds. *See Jones v. Harris Associates L.P.*, No. 08-586, 2009 WL 578699 (U.S. Mar. 9, 2009). If the Supreme Court decides to reverse in *Jones*, the panel decision in *Hecker* will also be called into doubt. To minimize the potential disruption to this Court's jurisprudence, this Court should therefore hear the case en banc either to develop coherent and unitary doctrine in this area or to remand the matter to the district court with an order to stay the proceedings pending the final decision of the Supreme Court in *Jones*.

If the Court does grant the petition to rehear the case en banc, it should reverse the panel's decision. The panel's assumption that mutual funds operate smoothly and competitively was notably at odds with the opinion of several judges of this Court, the recent litany of market timing and late trading scandals in mutual funds,[3] and the censorious findings contained in a multitude of careful scholarly and regulatory studies of advisory fees and conflicts of interest. *See, e.g.*, Tamar Frankel & Lawrence A. Cunningham, *The Mysterious Ways of Mutual Funds: Market Timing*, 25 Ann. Rev. Banking & Fin. L. 235 (2006); John P. Freeman & Stewart L. Brown, *Mutual Fund Advisory Fees: The Cost of Conflicts of Interest*, 26 J. Corp. L. 610 (2001); Securities and Exchange Commission ("SEC"), *Public Policy Implications of Investment Company Growth*, *reprinted in* H.R. Rep. No. 89-2337 (1966). To the extent the panel concluded that the weight of such contrary evidence was unpersuasive, surely it should have done so only after findings of fact in a trial, not merely upon a motion to dismiss for failure even to state a claim.

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[3] *See generally* 4 Tamar Frankel & Ann Taylor Schwing, *The Regulation of Money Managers* § 34.03[C][4] (2d ed. 2001 & Supp. 2004) (discussing § 36(b) of the Investment Company Act of 1940); William A. Birdthistle, *Compensating Power: An Analysis of Rents and Rewards in the Mutual Fund Industry*, 80 Tul. L. Rev. 1401 (2006) (describing multiple species of alleged malfeasance by investment advisers and the advisers' payment of several billions of dollars to settle those charges); *see also, e.g.*, Greg Farrell, *Bear Stearns to Pay $250M*, USA Today, Mar. 16, 2006; Josh Friedman, *FleetBoston, BofA to Pay $675 Million*, L.A. Times, Mar. 16, 2004.

Moreover, the panel's decision drastically overstated the proper scope of the Section 404(c) safe harbor for fiduciaries of 401(k) plans under ERISA and thereby threatens to undermine the ability of tens of millions of Americans to save effectively for their retirements.[4] The panel's peremptory dismissal at this stage of the proceedings rested upon a series of constructions of the fiduciary duty in the light least favorable to the plaintiffs at several steps in an extensive syllogism and did so over the direct objections of the Department of Labor ("DOL"), which filed as *amicus* in this case to argue strenuously in favor of the plaintiffs' interpretation. The panel's confined view of a fiduciary duty in this context also contradicts leading scholarship into improving the ways in which Americans can save for their retirements. Scholars such as Professor Cass Sunstein and Professor Richard Thaler, as well as the renowned chief investment officer of the Yale University endowment, David Swensen, have all called for *greater* care and duty by those charged with the administration of retirement savings plans as a critical component of effective and secure investment.[5] At a time of a precipitous economic decline,

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[4] Given that the U.S. Government Accountability Office ("GAO") has reported that the number of active participants covered by defined contribution plans has increased from thirty-three million in 1985 to fifty-five million in 2005, the stakes could not be more important in a case such as this. *See* GAO, *Private Pensions: Increased Reliance on 401(k) Plans Calls for Better Information on Fees*, Testimony before the House of Representatives, Committee on Education and Labor 5 (Mar. 5, 2007). The DOL – the agency charged with the oversight of such plans – has expressly found that "plan participants on average pay fees that are higher than necessary by 11.3 basis points per year." Fiduciary Requirements for Disclosure in Participant-Directed in Participant-Directed Individual Account Plans, 73 Fed. Reg. 43,013 (July 23, 2008).

[5] *See* Richard H. Thaler & Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth, and Happiness 130 (2008) (relying upon the importance of selections made "with some care by knowledgeable experts" in advocating a savings system that builds upon behavioral economic theories of "paternalistic libertarianism"); David F. Swensen, Unconventional Success: A Fundamental Approach to Personal Investment 5 (2005)

which has already erased three trillion dollars from retirement accounts,[6] the panel's conception of fiduciary duty moved in precisely the opposite direction.

ERISA requires "care, skill, prudence, and diligence" on the part of a fiduciary to select a suitable menu of investments, not to select a small number of expensive options or to make essentially no selection at all. 29 U.S.C. § 1104(a)(1)(B). Although it is true that section 404(c) eliminates fiduciary responsibilities for plan administrators to the extent participants direct how their pension fund assets are invested, it does not touch the obligation of fiduciaries to prudently select and monitor the menu of possible plan investments. In short, a court must focus not only on the merits of a transaction but also on the thoroughness of the investigation into the merits of that transaction. *See DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007). The panel concluded on mere pleadings that, "even if § [404(c)] does not always shield a fiduciary from an imprudent selection of funds under every circumstance that can be imagined, it does protect a fiduciary that satisfies the criteria of § 1104(c) and includes a sufficient range of options so that the participants have control over the risk of loss." *Hecker* at *13. Yet, under ERISA, "the prudence of investments or classes of investments offered by a plan must be judged individually by a fiduciary, who must initially determine, and continue to monitor, the prudence of each investment option

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(arguing for a retirement savings system that would limit investment choices in tax-advantaged savings accounts "to a well-structured set of choices" such as "low-cost, market-mimicking funds.").

[6] Investment Company Institute, *Trends in Mutual Fund Investing*, January 2009, *available at* http://www.ici.org/stats/latest/trends_01_09.html (showing a one-year decline in mutual fund assets from approximately $12 trillion to $9.4 trillion).

available to plan participants." *DiFelice*, 497 F.3d at 423. So, "although section 404(c) does limit a fiduciary's liability for losses that occur when participants make poor choices from a satisfactory menu of options, it does not insulate a fiduciary from liability for assembling an imprudent menu in the first instance." *Id.* at 418 n.3. The district court and the panel heard no evidence on this decision-making process and therefore could not undertake the necessary analysis in this regard at the pleading stage. As such, granting the defendants' motion was inappropriate and should be reconsidered on this ground as well.

REASONS FOR GRANTING THE PETITION

I. Members of This Court Have Taken Conflicting and Irreconcilable Positions With Respect to Related Fiduciary Duties.

The panel decision marks the second time in the past year that a panel of this Court has interpreted a fiduciary duty narrowly – and consequently declined to find a violation of that duty – in the context of mutual fund fees. *See Hecker* at *8-*14; *Jones*, 527 F.3d at 630-635. In both circumstances, the panel assumed that competitive market forces discipline the price and performance of investment advice based primarily on the mere presence of large numbers of mutual funds. Yet, during that same period, half of the active judges of this Court also signed an opinion that forcefully criticized mutual funds for being part of an industry "where abuses have been rampant" and for employing a "governance structure that enables mutual fund advisers to charge exorbitant fees." *Jones v. Harris Associates L.P.*, 537 F.3d 728, 730-732 (Posner, J., dissenting from denial of rehearing en banc). These positions, together with the analyses and rationales underlying them, conflict with one another and are irreconcilable. By rehearing this case en banc, the Court will have an ideal opportunity to set forth a coherent and unified approach to this body of doctrine.

In *Hecker*, the panel declared that the mix of investments in Deere's 401(k) plan was acceptable because it comprised more than 2,500 funds, a number emphasized four times in the opinion. *See Hecker* at *2, *10, *14. This large number of funds combined with the fact that they were publicly available are the only factors the panel contemplated before concluding that the fees were a product of competitive forces: "Importantly, all of these funds were also offered to investors in the general public, and so the expense ratios *necessarily* were set against the backdrop of market competition." *Id.* at *10 (emphasis added).

The presence of these funds in Deere's plan, according to the panel, transferred the responsibility for poor performance to the individual investors:

> If particular participants lost money or did not earn as much as they would have liked, that disappointing outcome was attributable to their individual choices. Given the numerous investment options, varied in type and fee, neither Deere nor Fidelity . . . can be held responsible for those choices.

Id. at *14.

In *Jones*, this Court was called upon to adjudicate claims related to those raised in *Hecker*: specifically, that a mutual fund investment adviser violated the fiduciary duty imposed by Section 36(b) of the Investment Company Act by charging excessive advisory fees.[7] 15 U.S.C. § 80a-35(b). The *Jones* panel evinced a reliance on classical law and economics similar to the conjectures in *Hecker*, inasmuch it

[7] *See generally* five postings of William Birdthistle to The Conglomerate blog, http://www.theconglomerate.org/ (Mar. 11 & 12, 2009).

"assume[d] a well-functioning market for investment advice, discount[ed] possibly irrational investor behavior, and conclude[d] with a call for greater deregulation of the industry."[8] The opinion began with an express disavowal of a quarter-century of persuasive precedent because "it relies too little on markets." *Jones*, 527 F.3d at 632.

And just as in *Hecker*, the *Jones* panel emphasized the sheer number of funds available: "Today thousands of mutual funds compete. The pages of the *Wall Street Journal* teem with listings." *Id.* at 633. The panel asked why "8,000 mutual funds" should "seem 'too few' to put competitive pressure on advisory fees?" *Id.* at 634.

The panel in *Jones* also cited scholarly support for its conclusions, noting that a "recent, careful study" of the industry by Professors John Coates and Glenn Hubbard "concludes that thousands of mutual funds are plenty, that investors can and do protect their interests by shopping, and that regulating advisory fees through litigation is unlikely to do more good than harm." *Id.* at 634 (citing John C. Coates & R. Glenn Hubbard, *Competition in the Mutual Fund Industry: Evidence and Implications for Policy*, 33 Iowa J. Corp. L. 151, 213 (2007)). Moreover, continued the panel, "It won't do to reply that most investors are unsophisticated and don't compare prices. The sophisticated investors who do shop create a competitive pressure that protects the rest." *Id.*

[8] Floyd Norris, *The Supremes Will Decide Which Economics Makes Legal Sense*, N.Y. Times blog, Mar. 9, 2009, *available at* http://norris.blogs.nytimes.com/2009/03/09/the-supremes-will-decide-which-economics-makes-legal-sense/ (quoting law professor William A. Birdthistle).

The views expressed in *Hecker* and *Jones* could not be more dramatically different than those endorsed by five members of this Court in the dissent to the denial of rehearing *Jones* en banc. The *Jones* dissent adopted "a more behavioralist approach that focuse[d] upon market failures, consider[ed] systemic distortions of incentives, and implicitly countenance[d] a role for regulatory intervention."[9] The dissent began by challenging the majority's contention that mutual funds enjoy vibrant market competition, urging skepticism based on the fact that "mutual funds are a component of the financial services industry, where abuses have been rampant." 537 F.3d at 730.

The dissent dismissed the Coates and Hubbard study as no longer current and cited numerous studies presenting contrary evidence. *See id.* (citing Camelia M. Kuhnen, *Social Networks, Corporate Governance and Contracting in the Mutual Fund Industry* (Mar. 1, 2007), *available at* http://ssrn.com/abstract=849705, and *OEA Memorandum: Literature Review on Independent Mutual Fund Chairs and Directors*, Dec. 29, 2006, *available at* http://www.404.gov/rules/proposed/s70304/oeamemo122906-litreview/pdf).

For the dissenters, the most apparent indicium of a lack of competition in mutual funds is the wide disparity between the fees advisers charge to their own mutual funds and the fees that they charge to unaffiliated institutional investors. *See id.* at 731-732. Comparisons among the fees of retail mutual funds do not sufficiently illuminate the problems with this industry, according to the dissent, because "[t]he governance structure that enables mutual fund advisers to charge

[9] *Id.*

exorbitant fees is industry-wide, so the panel's comparability approach would if widely followed allow those fees to become the industry's floor." *Id.* at 732.

The dissent concluded with a notable emphasis of "the importance of the issue to the mutual fund industry" as well as "the one-sided character of the panel's analysis" and called for a rehearing en banc. Although this Court declined to rehear these issues en banc in *Jones*, the *Hecker* case provides an excellent opportunity to resolve what are profound and recurring disagreements between a substantial number of the members of this Court.

II. This Case Presents An Excellent Opportunity for this Court to Clarify Its Position With Respect To The Role Of The Mutual Fund Market In Assessing Fiduciary Duties.

If the Court does grant the petition to rehear the case en banc, it should reverse the panel's decision. Neither the panel in *Jones* nor the subsequent panel in *Hecker* attempted to rebut the compelling arguments set forth in the *Jones* dissent and elsewhere that demonstrate why the market has proven to be no panacea for mutual fund fees and expenses.

First, the solitary study cited in defense of the *Jones* and *Hecker* contentions is vastly outweighed by contradictory conclusions set forth in a panoply of other rigorous academic and regulatory studies. *See, e.g.*, Mercer Bullard & Edward O'Neal, *The Costs of Using a Broker to Select Mutual Funds*, Inst. for Higher Educ. Law & Gov. Monograph Series, University of Houston Law Center (Nov. 2006), *available at* http://www.zeroalphagroup.com/studies/113006_Zero_Alpha_Group_

Fund_Democracy_Index_Funds_Report.pdf; John P. Freeman & Stewart L. Brown, *Mutual Fund Advisory Fees: The Cost of Conflicts of Interest*, 26 J. Corp. L. 610 (2001); General Accounting Office, *Mutual Fund Fees: Additional Disclosure Could Encourage Price Competition* (June 2000), *available at* http:// www.gao.gov/ archive/2000/gg00126.pdf; SEC, *Public Policy Implications of Investment Company Growth*, *reprinted in* H.R. Rep. No. 89-2337 (1966); Wharton School of Finance & Commerce, 87th Cong., *A Study of Mutual Funds* (Comm. Print 1962).

But even without engaging in a meticulous, two-sided assessment of the empirical evidence relating to whether mutual funds enjoy market competition, every court has manifest reasons to resist a credulous assumption that this industry operates smoothly: "*e.g.*, the notorious market-timing investigations that have implicated dozens of mutual fund advisers over the past five years; the rigorous and widespread critique of executive compensation in popular and academic literature; and the spectacular recent collapse of the nation's lending and financial industries in which, as [the *Jones* dissent] pointed out, 'abuses have been rampant.'" Brief of Amici Curiae Law Professors in Support of the Issuance of a Writ of Certiorari, at 17-18, in *Jones v. Harris Associates L.P.*, No. 08-586 (U.S. Dec. 3, 2008) (citing James D. Cox & John W. Payne, *Mutual Fund Expense Disclosures: A Behavioral Perspective*, 83 Wash. U. L.Q. 907, 923 (2005)).

In addition, Congress itself has also found competition in this industry wanting. Indeed, Congress's "concern with the potential for abuse inherent in the structure of investment companies" is what prompted that body to impose upon investment advisers "a fiduciary duty with respect to the receipt of compensation for services" as well as a private right of action to enforce violations of that duty. *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984) (quoting *Burks v. Lasker*, 441 U.S. 471, 480 (1979) (internal quotation marks omitted); 15 U.S.C. § 80a-35(b).

To the extent the Court fails to find these and the arguments in the *Jones* dissent persuasive, surely what is needed to elucidate the debate further is the rigorous fact-finding process of a trial. In *Jones*, these issues were not raised at trial and, in *Hecker*, no trial has yet been held. The vigor and durability of the conflicting opinions within the Court on this topic require more comprehensive analysis than can be offered through a dismissal for failure to state a claim.

III. The Panel's Decision to Expand the Section 404(c) Exemption Eviscerates A Fiduciary Duty Essential To The Security of Retirement Savings Plans.

The panel's decision drastically overstates the proper scope of the Section 404(c) safe harbor for fiduciaries of 401(k) plans under ERISA and thereby threatens to undermine the ability of millions of Americans to save effectively for their retirements. Since 1992, the DOL has explained in its regulations that section 404(c) is a defense to liability where the loss complained of is "the direct and necessary result of that participant's . . . exercise of control." 29 C.F.R. § 2550.404c-1(d)(2)(i) (1992). Significantly, an explanatory footnote to the proposed regulation further narrowed the issue: "[T]he act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA § 404(c) plan is a fiduciary function which . . . is not a direct or necessary result of any participant direction of such plan." 57 Fed. Reg. at 46,924-25 & n. 27.

Following this guidance from the DOL, almost every court to hear this 404(c) issue since has followed the DOL and decided that section 404(c) does not provide a defense to a fiduciary's failure to exercise prudence in selecting investment options.[10] Following the recent case of *Langbecker v. Electronic Data Systems Corporation*, 476 F.3d 299, 310 (5th Cir. 2007), however, the panel held that defendants who breach their fiduciary duties are nevertheless insulated from liability as long as there exists a sufficient breadth of funds made available to participants under the plans.

Both *Langbecker* and the decision below are inconsistent with the strict fiduciary requirements of ERISA. ERISA's fiduciary provisions require "care, skill, prudence, and diligence" on the part of a fiduciary to select a suitable menu of investments. Indeed, a central component of selecting a suitable menu of investments involves providing funds that charge reasonable investment fees.[11] A

[10] *See, e.g., In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 893-94 (S.D. Tex. 2004) (concluding that "plaintiff has . . . stated a claim for breach of fiduciary duty against [the trustees] . . . for offering and failing to eliminate the Dynegy Stock Fund as an investment option for employee-directed accounts" and that the allegations were sufficient "regardless of [§404(c)'s] applicability"); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 574-79 (S.D. Tex. 2003) (agreeing with the DOL that a section 404(c) fiduciary retains the duty of prudence in selecting and maintaining particular investment options); *In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745, 763-65 (S.D.N.Y. 2003) (holding that plaintiffs had stated a claim that fiduciaries failed to meet their obligation to prudently select and monitor plan investment options); *Franklin v. First Union Corp.*, 84 F. Supp. 2d 720, 732 (E.D. Va. 2000) ("[T]he plan fiduciary has the responsibility for selecting investment alternatives . . . ."); *see also Spano v. Boeing Co.*, No. 06-cv-743-DRH, 2007 WL 2688456, at *1 (S.D. Ill. Sept. 10, 2007) ("The majority of courts to have interpreted ERISA §404(c), 29 U.S.C. §1104(c), have adopted the DOL's position.")

[11] The panel decision does not seem to take seriously the reality that plan participants are truly in the dark about these fees. A recent survey indicated that only 26% of participants surveyed were aware that any fees were charged to their account. *See* 9th Annual Transamerica Retirement Survey, (Feb. 28, 2008), *available at* http://www.

single percentage point difference in investment mutual funds fees can mean the loss of 28% of a participant's retirement account value over his or her working life.[12]

Although it is true that section 404(c) eliminates fiduciary responsibilities for plan administrators to the extent participants direct how their pension fund assets are invested, it does not touch the obligation of fiduciaries to prudently select and monitor the menu of possible plan investments. In short, a court must focus not only on the merits of a transaction, but also on the thoroughness of the investigation into the merits of that transaction. *See DiFelice*, 497 F.3d at 418. The panel here concluded on the pleadings that, "even if § [404(c)] does not always shield a fiduciary from an imprudent selection of funds under every circumstance that can be imagined, it does protect a fiduciary that satisfies the criteria of § 1104(c) and includes a sufficient range of options so that the participants have control over the risk of loss." *Hecker* at *13.

Yet, under ERISA, "the prudence of investments or classes of investments offered by a plan must be judged individually by a fiduciary, who must initially determine, and continue to monitor, the prudence of each investment option

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transamericacenter.org; *see also* 401(k) Fee Disclosure, hearing before the Special Committee on Aging, U.S. Senate (Oct. 24, 2007) (testimony of Mercer Bullard), *available at* http://aging.senate.gov/events/hr182mb.pdf.

[12] The following example is drawn from the DOL:

> Assume that you are an employee with 35 years until retirement and a current 401(k) account balance of $25,000. If returns on investments in your account over the next 35 years average 7% and fees and expenses reduce your average returns by 0.5 percent, your account balance will grow to $227,000 at retirement, even if there are no further contributions to your account. If fees and expenses are 1.5 percent, however, your account balance will grow to only $163,000. The 1 percent difference in fees and expenses would reduce your account balance at retirement by 28%.

DOL Publication, *A Look At 401(k) Plan Fees*, *available at* http://www.dol.gov/ebsa/publications/401k_employee.html (last visited March 16, 2009).

available to plan participants." *DiFelice*, 497 F.3d at 423. In short, section 404(c) "does not insulate a fiduciary from liability for assembling an imprudent menu in the first instance." *Id.* at 418 n.3.

The district court and the panel heard no evidence on the defendants' decision-making process in selecting its menu of potential investments and therefore they could not have undertaken the necessary analysis based on the pleadings alone. For the panel to make this type of doctrinal modification would warrant close examination of the adverse effects on plan participants, but to do so without the benefit of a trial is remarkable and contrary to almost all other cases involving fiduciary issues under Section 404(c) since the DOL regulation went into effect.[13] This approach is dramatically at odds with the position of the DOL[14] and a burgeoning body of academic work that urges precisely the opposite approach for safeguarding private retirement funds.[15]

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[13] The case of *In re Unisys Savings Plan Litigation*, 74 F.3d 420, 445 (3d Cir. 1996), did come out differently but was not decided based on the new DOL regulation.

[14] *See supra* notes 11, 13. To indicate its belief concerning the stringency of fiduciary requirements in 404(c) plan context, the DOL also recently issued proposed regulations requiring fiduciaries to make fee disclosures to participants in participant-directed individual account plans. *See* Prop. Reg. § 2550.404a-5, 73 Fed. Reg. 43,013 (Jul. 23, 2008).

[15] *See, e.g.,* Debra Davis, *How Much Is Enough? Giving Fiduciaries And Participants Adequate Information About Plan Expenses*, 41 John Marshall L. Rev. 1005 (2008) (arguing that "participants should be given the minimum amount of information necessary to enable them to make decisions about their involvement in the plan and investment decisions. That is, participants, regardless of whether they are in a plan that intends to comply with ERISA section 404(c), need to be given information about any fees that reduce the value of their accounts, either directly or by reducing their investment returns."); Janice Kay McClendon, *The Death Knell Of Traditional Defined Benefit Plans: Avoiding A Race To The 401(K) Bottom*, 80 Temp. L. Rev. 809, 844 (2007) (arguing that "defined contribution plan sponsors must be required to provide universal, regulated investment advice as a cost of ERISA Section 404(c) fiduciary liability relief."); Paul M. Secunda, *Inherent Attorney Conflicts of Interest under ERISA: Using the Model Rules of Professional Conduct to Discourage Joint Representation of Dual Role Fiduciaries*, 39 J. Marshall L. Rev. 721 (2006)

A 404(c) plan fiduciary should not be able to abdicate the selection of investment choices by picking a few expensive funds or making no selections at all from the broader market. The plaintiffs' allegations certainly do state a claim for breach of fiduciary duty under ERISA given the largely unfiltered choice of investment options with which participants are faced. ERISA requires instead that plan fiduciaries exercise "care, skill, prudence, and diligence" to assist plan participants in making their investment decisions. The persuasive dissent in the *Langbecker* decision by Judge Reavley properly characterized the perverse incentives given to fiduciaries going forward after decisions such as the panel's: fiduciaries are released from any responsibility to select prudently the universe of investments offered to participants in a section 404(c) plan. *Langbecker*, 476 F.3d at 299, 320-321 (Reavley, J., dissenting) ("By allowing plans to limit their universe of investment choices and still be considered 404(c) plans, the DOL left participants . . . at the mercy of the wisdom of whoever made these limiting choices."). As such, "plan fiduciaries could imprudently select a full menu of unsound investments, among which participants would be free to choose at their peril, while the fiduciaries remain insulated from responsibility." *Id.* at 321. We ask that rehearing en banc be granted so this perilous state of affairs does not befall tens of

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(arguing for a presumption against joint legal representation of ERISA dual-role fiduciaries because of the importance of strictly maintaining ERISA fiduciary duties); Colleen E. Medill, *Challenging the Four "Truths" of Personal Social Security Accounts: Evidence from the World of 401(k) Plans*, 81 N.C. L. Rev. 901, 907-08, 937-46 (2003) (discussing the deleterious effect of fees on employees' account balances at retirement and the need for change).

millions of Americans who increasingly rely on these types of pension plans for their retirement security.

CONCLUSION

For these reasons, *amici* respectfully urge this Court to grant the petition for a rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because this brief contains 4,942 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

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