IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GERALD GEORGE, *et al.*,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 10-1469
	)	
KRAFT FOODS GLOBAL, INC., *et al.*,	)	
	)	
	)	
Defendants-Appellees.	)	

Motion of The ERISA Industry Committee, the American Benefits Council, the Profit Sharing/401k Council of America, and Chamber of Commerce of the United States of America for Leave to File Accompanying *Amici Curiae* Brief

---

Pursuant to Federal Rule of Appellate Procedure 29(b), The ERISA Industry Committee ("ERIC"), the American Benefits Council ("ABC"), the Profit Sharing/401k Council of America ("PSCA"), and Chamber of Commerce of the United States of America (collectively, the "Associations") respectfully request leave to file the accompanying Brief as *Amici Curiae* in Support of Appellees' Petition for Rehearing *En Banc*.

In support of their motion, the Associations state as follows:

(1) The Associations' counsel requested the parties' consent to the filing of their *amici* brief. Appellees consented. Appellants did not.

(2) ERIC and ABC are non-profit organizations focusing on benefit issues; their members include many of largest private-sector employers in the nation. PSCA, a non-profit with 1,200 member employers, addresses profit sharing and § 401(k) plan issues. The Chamber is the world's largest business federation. It represents 300,000 direct members and has an underlying membership of over three million businesses and business organizations of every size and in every industry sector and geographic region of the country. The Associations' members provide benefits to millions of active and retired workers and their families through employee benefit plans governed by ERISA.

(3) The Associations participate as *amici curiae* in cases with potentially far-reaching effects on employee benefit plan design or administration. The decision to file an *amici* brief is made with care to limit participation to significant cases in which the Associations' views will not otherwise be presented. The Associations believe that this case meets those criteria.

(4) In two important respects, the Associations believe that their brief "will assist the judges by presenting ideas, arguments, . . . [and] insights" that will not be found in the parties' briefs. *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J., in chambers). First, the proffered brief shows that the panel's unitization ruling conflicts with decisions of the Supreme Court and this Court regarding three important concepts fundamental to ERISA administration and enforcement: (1) the settlor function doctrine, (2) the plan document rule, and (3) the deferential standard of judicial review of fiduciary decisions. Second, on the issue of recordkeeping fees, the proffered brief explains the multiple steps that plans reasonably take to monitor the cost and services of recordkeepers; and that formalized competitive bidding is just one approach and has its own disadvantages. This information bears importantly on the question of whether the panel majority properly relied on the opinion of one expert to set aside the district court's finding that Kraft's approach -- relying on the advice of its consultants -- satisfied its duty of prudence.

(5) Because the majority's decision undercuts concepts important to day-to-day plan administration, many members of the Associations are likely to be affected by the outcome of this case.

Accordingly, pursuant to Rule 29, the Associations respectfully request leave to file the accompanying *amici curiae* brief in support of Appellees' Petition for Rehearing *En Banc*. If such leave is granted, the Associations request that the accompanying brief *amici curiae* be considered filed as the date of this motion's filing, May 13, 2011.

Dated: May 13, 2011

Respectfully submitted,

/s/ Jeffrey G. Huvelle

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Certificate of Service

The undersigned attorney hereby certifies that on May 13, 2011, I caused the foregoing Motion of The ERISA Industry Committee, the American Benefits Council, the Profit Sharing/401k Council of America, and Chamber of Commerce of the United States of America for Leave to File Accompanying *Amici Curiae* Brief to be served via ECF on each of the following:

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No. 10-1469

In the United States Court of Appeals
for the Seventh Circuit

GERALD GEORGE, *et al.*,

Plaintiffs-Appellants,

vs.

KRAFT FOODS GLOBAL, INC., *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois (Schenkier, J.)

Dist. Ct. Civil Action No. 1:07-cv-1713

Brief of The ERISA Industry Committee, the American Benefits Council, the Profit Sharing/401k Council of America, and Chamber of Commerce of the United States of America as *Amici Curiae* in Support of Defendants-Appellees' Petition for Rehearing *En Banc*

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FED. R. APP. P. AND CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned, counsel of record for *amici* The ERISA Industry Committee, the American Benefits Council, the Profit Sharing/401k Council of America, and Chamber of Commerce of the United States of America, hereby furnishes the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:

(1) The full name of every party or *amicus* the attorney represents:

The ERISA Industry Committee, the American Benefits Council, the Profit Sharing/401k Council of America, and Chamber of Commerce of the United States of America.

(2) If such party or *amicus* is a corporation:

(i) Its parent corporation, if any:

None. The ERISA Industry Committee, the American Benefits Council, the Profit-Sharing/401k Council of America, and Chamber of Commerce of the United States of America have no parent corporations.

(ii) A list of stockholders that are publicly held companies owning 10% or more of stock in the party:

None. No publicly held company has any ownership interest in The ERISA Industry Committee, the American Benefits Council, the Profit Sharing/401k Council of America, or Chamber of Commerce of the United States of America.

(3) The names of all law firms whose partners or associates have appeared for the party or *amicus* in the case or are expected to appear for the party in this Court:

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National Chamber Litigation Center, Inc. (for Chamber of Commerce of the United States of America)

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FED. R. APP. P. AND CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned, counsel of record for *amicus* American Benefits Council hereby furnishes the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:

(1) The full name of every party or *amicus* the attorney represents:

American Benefits Council

(2) If such party or *amicus* is a corporation:

(i) Its parent corporation, if any:

None. American Benefits Council has no parent corporations.

(ii) A list of stockholders that are publicly held companies owning 10% or more of stock in the party:

None. No publicly held company has any ownership interest in American Benefits Council.

(3) The names of all law firms whose partners or associates have appeared for the party or *amicus* in the case or are expected to appear for the party in this Court:

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The undersigned, counsel of record for *amicus* Chamber of Commerce of the United States of America, hereby furnishes the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:

(1) The full name of every party or *amicus* the attorney represents:

Chamber of Commerce of the United States of America.

(2) If such party or *amicus* is a corporation:

(i) Its parent corporation, if any:

None. Chamber of Commerce of the United States of America has no parent corporations.

(ii) A list of stockholders that are publicly held companies owning 10% or more of stock in the party:

None. No publicly held company has any ownership interest in Chamber of Commerce of the United States of America.

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The undersigned, counsel of record for *amicus* Chamber of Commerce of the United States of America, hereby furnishes the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*

The ERISA Industry Committee ("ERIC"), the American Benefits Council, the Profit Sharing/401k Council of America, and Chamber of Commerce of the United States of America (collectively, the "Associations") are non-profit associations whose members maintain, administer, and provide services to employee benefit plans governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq*. Pursuant to their motion for leave under Federal Rule of Appellate Procedure 29, the Associations respectfully submit this brief as *amici curiae* in support of appellees' petition for rehearing *en banc*.

The Associations participate as *amici curiae* in cases with the potential for far-reaching effects on employee benefit plan design or administration.[1] Each of the Associations has established criteria that limit its *amicus* participation to significant cases in which the

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[1] *See, e.g., LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 259 (2008) (Roberts, C.J., concurring in part and in judgment) (citing ERIC's *amicus* brief); *Hecker v. Deere & Co.*, 556 F.3d 575, 581 (7th Cir. 2009).

Association will present views not presented by others. The Associations believe that this case meets those criteria.[2]

DISCUSSION

The Panel's Unitization and Recordkeeping Fee Rulings Conflict with Decisions of the Supreme Court and This Court and with Prevailing Practice under the ERISA Plans of Major Employers.

The panel's unitization and recordkeeping fee rulings subvert basic objectives of ERISA's fiduciary duty provisions. Instead of applying these provisions in a way that gives fiduciaries the discretion that Congress intended, the rulings subject fiduciaries to costly "make-work" requirements and the threat of litigation that Congress sought to avoid. The rulings' potential impact is widespread: most employer stock funds are unitized funds, and both rulings threaten to complicate the management of funded employee benefit plans of all kinds.

A. Unitization

The panel's unitization ruling conflicts with decisions of the Supreme Court and this Court regarding (1) settlor functions, (2) plan

[2] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund preparation or submission of this brief. No person, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

documents, and (3) judicial review. These decisions enable employee benefit plans to be administered efficiently, predictably, and uniformly, and prevent potentially costly litigation from defeating ERISA's objective of encouraging employers to establish employee benefit plans voluntarily. *See Conkright v. Frommert,* 130 S. Ct. 1640, 1648-49 (2010); *Young v. Verizon's Bell Atlantic Cash Balance Plan*, 615 F.3d 808, 818 (7th Cir. 2010), *petitions for cert. filed*, 79 U.S.L.W. 3370 (Dec. 7, 2010) (No. 10-765) & 79 U.S.L.W. 3435 (Jan. 10, 2011) (No. 10-911).

Settlor functions. Under the settlor function doctrine, decisions regarding the design of a plan are classified as settlor decisions and are not subject to ERISA's fiduciary standards. *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 442-44 (1999) (citing cases); *Johnson v. Georgia Pacific Corp.,* 19 F.3d 1184, 1188-89 (7th Cir. 1994).

By contrast, the panel's unitization ruling is based on the view that ERISA's fiduciary standards (1) apply to the choice between unitization and real-time trading (Slip Op. at 20-24) and (2) authorize the fiduciaries to change the plan's design by imposing a trading limit (Slip Op. at 22 n.4). This view conflicts with the settlor function doctrine. *See Hecker*, 556 F.3d at 586. ERISA requires plan fiduciaries to administer

lawful plan provisions; fiduciaries do not have the option of changing the plan's design. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

Plan documents. Under ERISA's plan document rule, the plan's terms must be set forth in a written document, and a plan document must include provisions required by ERISA. Further, if the plan's terms are consistent with ERISA, the plan's fiduciaries must administer the plan in accordance with those terms, and the courts may not modify or supplement ERISA's requirements or the plan's terms. *See Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 875-76 (2009); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 85 (1995).

The panel's ruling attaches unwarranted significance to the absence of any place in the record identifying when defendants decided to continue to maintain unitized funds. (Slip Op. at 17-23.) ERISA requires fiduciaries to follow lawful plan terms and requires participants to be informed of material changes in the plan. ERISA §§ 102(a) & 104(b)(1), 29 U.S.C. §§ 1022(a) & 1024(b)(1) (summary of material modifications); ERISA §§ 402(a)(1) & 402(b)(3), 29 U.S.C. §§ 1102(a)(1) & 1102(b)(3) (amendment to plan terms); ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (fiduciary duty to follow plan

terms). ERISA does not require that a decision *not* to change the plan be put in writing or communicated to plan participants. Thus, when a decision is made *not* to change the way a plan is administered, plan fiduciaries do not typically affirm the decision in writing.

Judicial review. Courts in this Circuit generally review plan fiduciaries' decisions deferentially. *See Armstrong v. LaSalle Bank Nat'l Assn.,* 446 F.3d 728, 733-34 (7th Cir. 2006). Deferential review advances Congress's objective of avoiding administrative costs and litigation expenses that discourage employers from establishing plans voluntarily.

But even assuming for the sake of argument that ERISA's fiduciary standards apply to the choice between unitization and other measures, the panel's ruling -- that the record does not support a finding that defendants made a choice -- conflicts with the deferential standard of review. The record shows that after considering the pros and cons of unitization, defendants did not change the unitized funds. Slip Op. at 17-23. Where, as here, fiduciaries reasonably believe that they have made a decision, and have acted consistently with that decision, the fiduciaries' judgment is entitled to deference.

B. Recordkeeping Fees

The panel's recordkeeping fee ruling conflicts with this Court's decisions regarding the duty of prudence. The panel's ruling is based on the view that if a prudent fiduciary would have solicited competitive bids, a fiduciary that does not solicit competitive bids is imprudent. Slip Op. at 26-27. This conflicts with this Court's ruling in *Hecker*, 556 F.3d at 581, that the duty of prudence does not require a fiduciary to "scour the market" to find the lowest-cost service provider and with its ruling in *DeBruyne v. Equitable Life Assurance Society*, 920 F.2d 457, 465 (7th Cir. 1995), that the duty of prudence does not require all fiduciaries to act the same way.

Soliciting and evaluating competitive bids is expensive and time-consuming. To assure that plans do not pay excessive fees, fiduciaries of plans sponsored by many major employers, like Kraft's, engage in robust negotiations with plans' service providers and obtain information from a variety of sources, such as unsolicited proposals that they receive from other recordkeepers and information they receive from industry surveys, peer companies, consulting firms, and the current recordkeeper. Fiduciaries also evaluate the quality of recordkeepers'

services as well as the size of their fees and take into account the costs, blackout periods, errors, and other disruptions and glitches commonly associated with changes in plan recordkeepers. *See* ERISA § 101(i), 29 U.S.C. § 1021(i) (blackout periods); 29 C.F.R. § 2520.101-3 (same).

In this case, plaintiffs' "expert" offered opinions supporting the view that *some* fiduciaries handle contract negotiations differently from the way defendants handled negotiations with Hewitt. But *no* expert's opinion could support the view that the *only* prudent course of action was to solicit competitive bids or that Hewitt's fees were unreasonable merely because some other recordkeepers charged less for smaller, less complex plans, which are less likely to be affected by business acquisitions and dispositions and the needs of a diverse workforce.

The panel ruled that the district court erred in concluding that defendants satisfied the duty of prudence by relying on the advice of consultants. Slip Op. at 28. But fiduciaries often rely on consultants' advice. Although such advice might not be sufficient to rebut an imprudence claim where the plaintiff alleges self-dealing, there was no self-dealing here. As the dissenting Judge observed, the panel's ruling subjects plans to higher costs (the cost of soliciting competitive bids or

higher litigation costs), and thereby threatens to reduce participants' benefits. (Slip Op. at 36-37 (Cudahy, J., dissenting).)

CONCLUSION

The Associations urge the Court to grant appellees' petition for rehearing *en banc*.

Respectfully submitted,

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May 13, 2011

Counsel for Amici Curiae

Certificate of Compliance

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the length limitation of Fed. R. App. P. 29(d). The brief is proportionally spaced and has typeface of 14 points or more.

/s/ Jeffrey G. Huvelle
Counsel for Amici The ERISA Industry Committee, the American Benefits Counsel, the Profit Sharing/401k Council of America, and Chamber of Commerce of the United States of America

Certificate of Service

The undersigned attorney hereby certifies that on May 13, 2011, I caused the foregoing Brief of The ERISA Industry Committee, the American Benefits Council, the Profit Sharing/401k Council of America, and Chamber of Commerce of the United States of America as *Amici Curiae* in Support of Defendants-Appellees' Petition for Rehearing En Banc and a digital version of the Brief to be served via ECF on each of the following:

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/s/ Jeffrey G. Huvelle
Counsel for Amici The ERISA Industry Committee, the American Benefits Council, the Profit Sharing/401k Council of America, and Chamber of Commerce of the United States of America

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1469

Short Caption: George v. Kraft Foods Global

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The ERISA Industry Committee, the American Benefits Council, the Profit Sharing/401k Council of America, and Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Covington & Burling LLP (for all parties)

National Chamber Litigation Center, Inc. (for Chamber of Commerce of the United States of America)

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: _____ Date: May 13, 2011

Attorney's Printed Name: /s/ Jeffrey G. Huvelle

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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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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American Benefits Council

Chamber of Commerce of the United States of America

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None

Attorney's Signature: _____ Date: May 13, 2011

Attorney's Printed Name: /s/ Janet M. Jacobson

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

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rev. 01/08 AK

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1469

Short Caption: George v. Kraft Foods Global

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The ERISA Industry Committee, the American Benefits Council, the Profit Sharing/401k Council of America, and Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Covington & Burling LLP (for all parties)

National Chamber Litigation Center, Inc. (for Chamber of Commerce of the United States of America)

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: _____ Date: May 13, 2011

Attorney's Printed Name: /s/ John M. Vine

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

Address: Covington & Burling LLP, 1201 Pennsylvania Ave., N.W., Washington, DC 20004

Phone Number: (202) 662-6000 Fax Number: (202) 662-6291

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None

Attorney's Signature: _____ Date: May 13, 2011

Attorney's Printed Name: /s/ Robin S. Conrad

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

Address: National Chamber Litigation Center, Inc., 1615 H St., N.W., Washington, DC 20062

Phone Number: (202) 463-5337 Fax Number: (202) 463-5346

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None

Attorney's Signature: _____ Date: May 13, 2011

Attorney's Printed Name: /s/ Shane B. Kawka

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

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