# Strategic Insights into the Future of ERISA 401(k) Fee Litigation

## Trends, Case Analysis, and Emerging Claims

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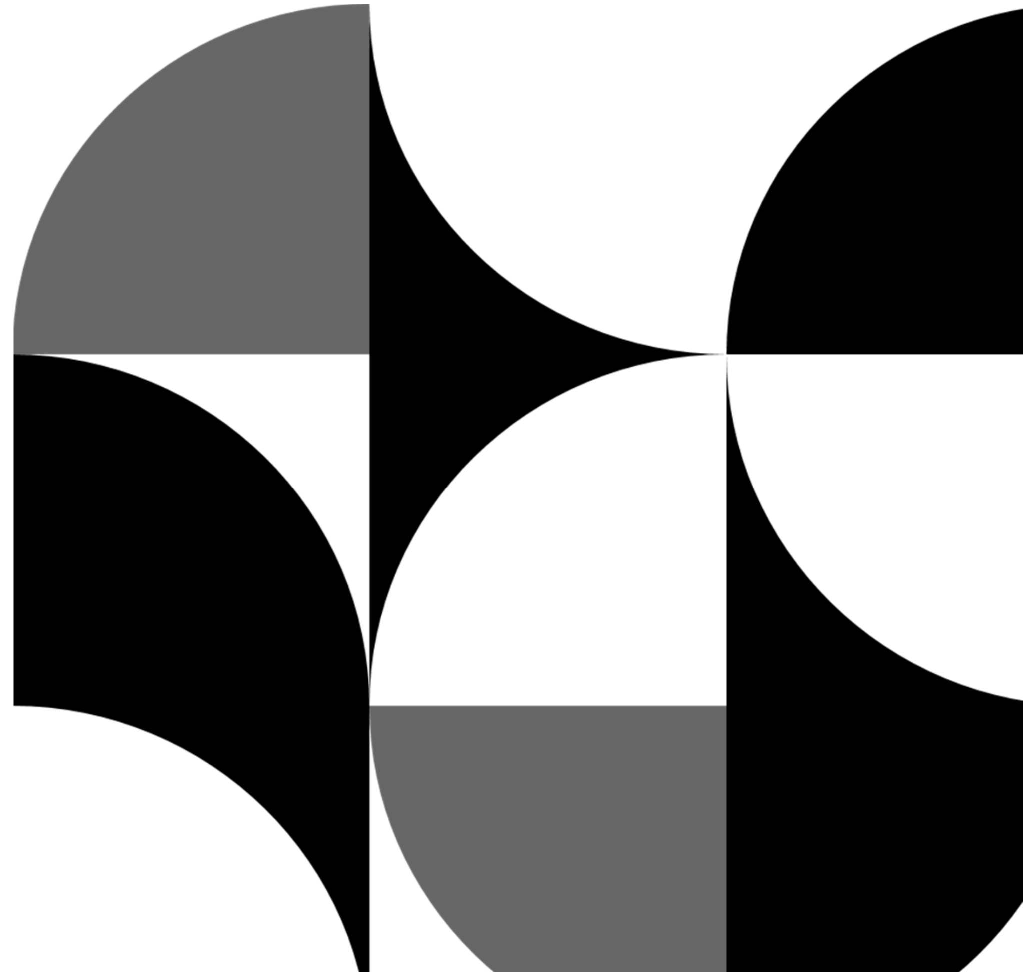

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# Agenda

01 The 401(k) Fee Litigation Landscape

02 Recent Summary Judgment and Trial Trends

03 Prohibited Transaction Case Trends

04 New Claims on the Horizon

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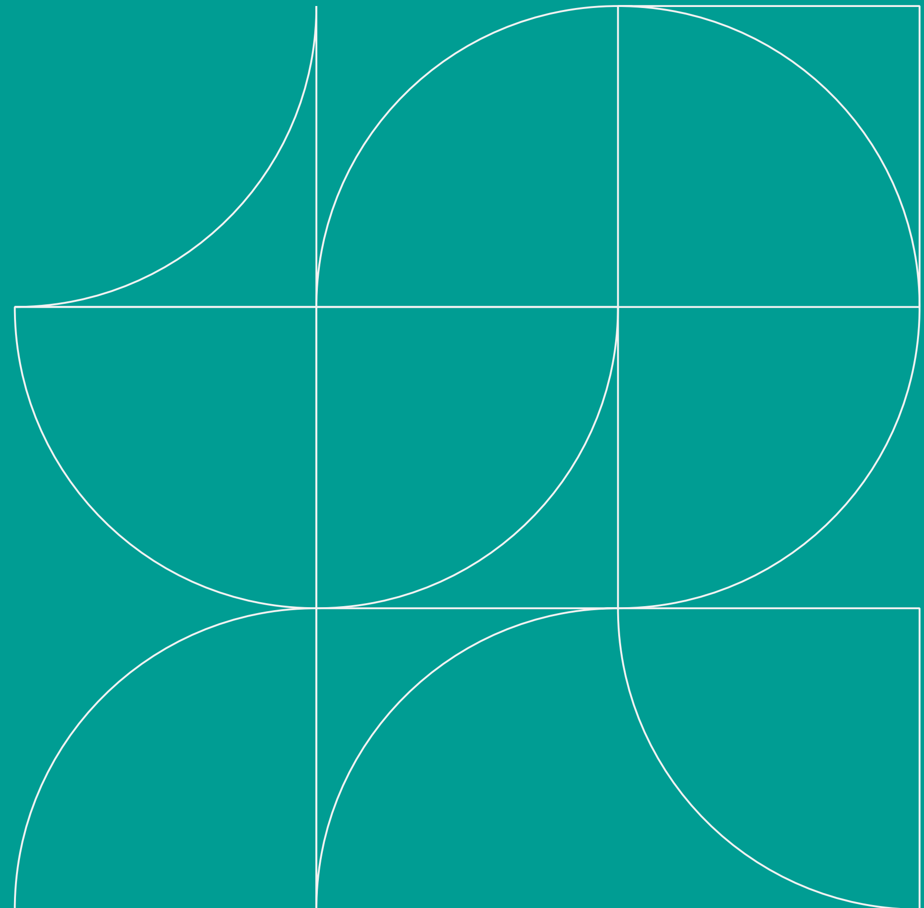
# The 401(k) Fee Litigation Landscape



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# Where We Were Last Time

## A Refresher

- 2023 saw a drop in ERISA class action filings
  - 298 cases from 2020-2023
  - All-time high of 101 in 2020; 89 more in 2022
  - 48 in 2023
- 2023 also saw record settlement numbers
  - 42 settlements in excessive fee class actions
  - All-time high of nearly $353 million in settlement payments

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## What's Happened in 2024?

### "Fever Pace" Continues

- 51 Defined Contribution class actions filed in 2024
- In addition to other ERISA class action filings
  - 10 Pension Risk Transfer class actions
  - 13 Tobacco Surcharge Cases
  - 6 Other retirement plan class actions
- Fiduciary conduct remains a focus of high-volume litigation
- Since the start of 2016
  - More then 33% of DC plans with over $500 million in assets have been sued
  - More than 50% of DC Plans with $1+ billion have been sued

# Inconsistent Results in Courts Promote More Filings

## Burdens of Pleadings and Proof

- Courts inconsistent on scrutiny of benchmarks at pleading stage
  - Applies both to comparator funds for investment claims, and to bases to claim "unreasonable" RK&A fees
- Split authority on burden re causation

## Standing

- *Thole* held that, without win changing the plaintiff's benefit, the plaintiff lacks standing
- Mixed results applying that logic in DC plan context
  - Courts inconsistent on whether plaintiffs need to have invested in any/all funds they seek to challenge

## Jury Trials

- Many plaintiffs continue to include jury demands, and resist efforts to strike
- So far, only courts in 2nd Circuit have accepted arguments for trial
- But others have at least allowed for possible advisory juries

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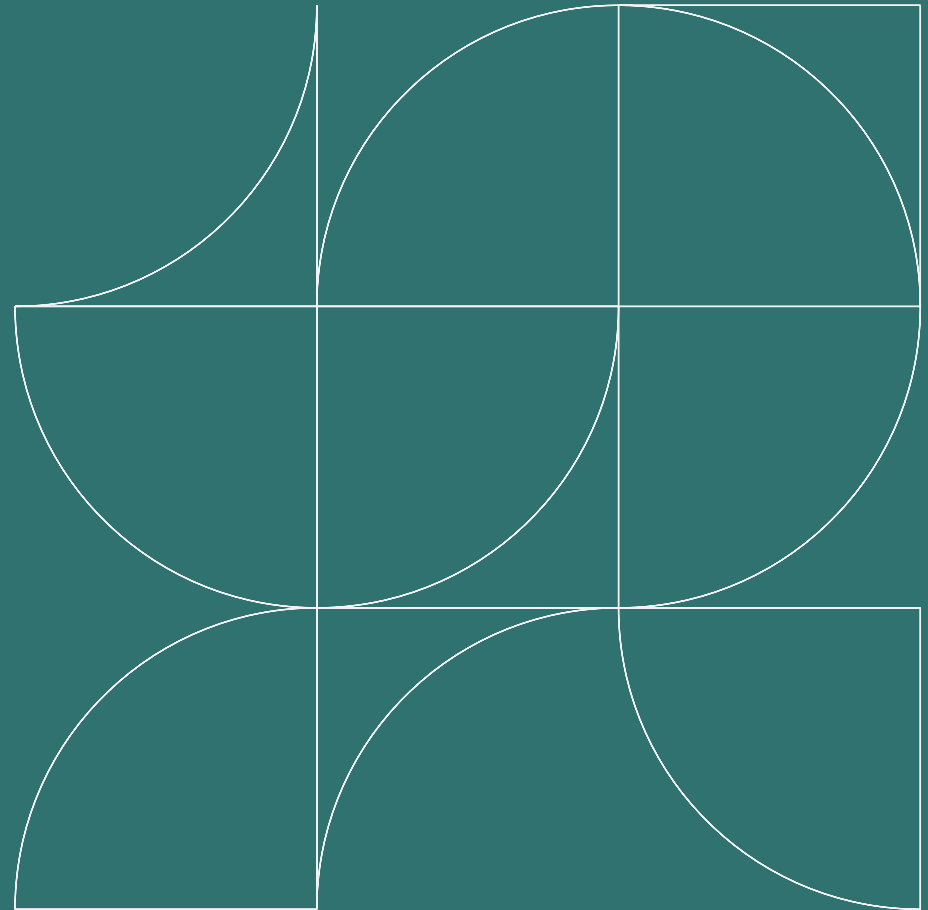
## Settlement Trends Continue

- Despite high number of settlements and low filing activity in 2023, cases have continued settling in 2024
- So far this year, class settlement approvals have been granted in 36 ERISA class actions
  - Some were agreed to in 2023
- Payouts in excess of $200 million
  - More than 25% of that number comes from 1 case

# But Not Everything Settled!

- At least 5 defendants have been granted summary judgment in excessive fee class actions in 2024
  - Opinions reflect a willingness to find fiduciary process prudent from undisputed facts;
  - In contrast to light burdens at pleading stage, courts scrutinized attempts to "infer" a breach from "lacking" items not required by law
  - Several courts rejected plaintiffs' experts for lack of reliable methodology, or lack of qualification
- Since mid-2023, Defendants have prevailed in at least 5 trials – including 1 jury trial – on excessive fee class actions
  - Decisions reflect that trial remains a viable defense strategy where fiduciaries had thorough decision-making process
  - Standards at trial give courts ability to scrutinize and weigh expert testimony

# Recent Summary Judgment and Trial Trends



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## Summary Judgments

- Many judges view MSJs (openly or not) as a waste of time and would rather have a trial.
  - Recent decision in D. Mass. referred to MSJ on excessive recordkeeping claims as “a monumental waste of time,” a “money waster,” and – in comparison to trial -- ”an instinct for the capillaries” rather than an “instinct for the jugular”
- However, some defendants have prevailed
  - Eleventh Circuit affirmed SJ based on failure to show loss causation.
    - Court rejects burden flipping
    - Fiduciaries are liable for damages only when they are caused by misconduct, not by “vagaries of the market”
    - Therefore, investments must be objectively imprudent (that is outside what fiduciaries would reasonably consider)
    - Cannot focus just on short time periods; must look long term and it is appropriate to consider what other plans use

## Summary Judgments

- *Silva v. Evonik Corp*. (D.N.J. June 28, 2024)
  - Summary judgment on fee and investment claims
  - Process is key; results are secondary and poor results alone do not create trial issue of fact
  - Regular benchmarking by skilled advisor and RFI were sufficient to defeat recordkeeping fee claim
- *Moore v. Humana, Inc*. (W.D. Ky. May 23, 2024)
  - Rejected plaintiff's expert as not offering reliable methodology to assess reasonableness of fees
  - "Fee policy statement" is not required under ERISA
  - Benchmarking and multiple RFPs trumps "continuous fee negotiations"

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# Summary Judgment Takeaways

- Consider whether judge is likely to seriously consider the motion
- Address opposing expert testimony head on (and consider a *Daubert* motion)
- Focus on process overall, but address "weaknesses"
- Consider attacking loss causation in jurisdictions that reject burden shifting approach
- Attack the plaintiffs' assertion that the "best" or "cheapest" are required; focus on "range of reasonable alternatives"

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# Trials

- *In re: Prime Healthcare ERISA Litig*. (C.D. Cal. 8/22/24)
  - Claims re investment selection and monitoring, administrative fees
  - Court allowed experts to testify but rejected their testimony
    - process expert did not adequately describe industry practice, ignoring contrary evidence, inconsistencies in opinions
    - recordkeeping expert relied on experience with "dummy-proof" pricing model and improperly assumed fiduciaries must get the "best" deal
    - defense expert credited due to real experience and actual research
  - Court rejects plaintiff efforts to nitpick the fiduciary process
    - evidence showed diligent and informed fiduciaries
    - regular meetings and reliance on skilled advisor
  - Use of well regarded recordkeeper and regular fee reviews was sufficient
  - Court rejects claim that plans must always use the cheapest fund

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# Trial Takeaways

- Strong defense witness testimony showing honest, diligent, and consistent process is key
- Nitpicking of the process seldom suffices; courts recognize that plans are managed by people who are never perfect
- Evidence of how the plan compares is persuasive but only if the comparisons are on point
- Strong expert testimony that considers all the facts (good and bad) and uses a reasonable and reliable methodology is essential
- Plaintiff experts often are light on methodology and overreach to justify criticisms; their approach often disintegrates under cross examination

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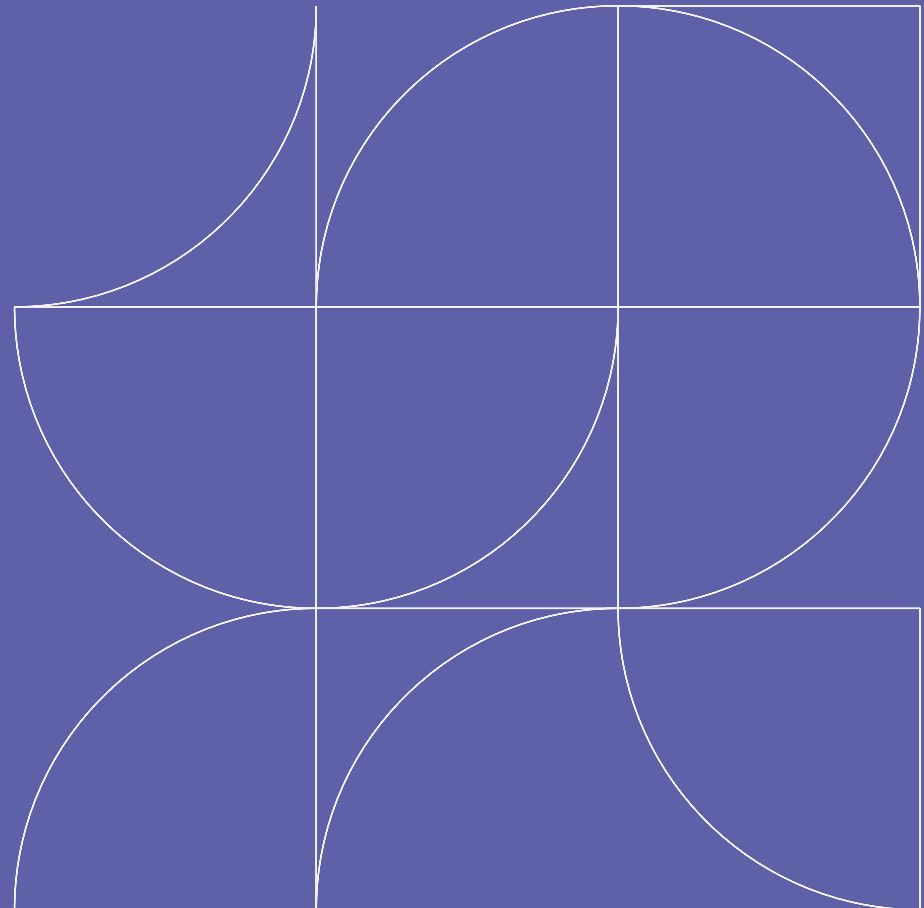
# Prohibited Transaction Case Trends



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## Prohibited Transactions

- ERISA § 406 broadly outlines a series of "prohibited" transactions that fiduciaries are restricted from engaging in (or causing a plan to engage in)
- Two recent cases (reaching divergent results) deepen a circuit split as to plaintiffs' burden to plead prohibited transaction claims
- Supreme Court set to weigh in
- Increased attention to these claims could lead to increase in filings in this space
- Plaintiffs are arguing that they have a lower burden of proof to establish a prohibited transaction claim as compared to a breach of fiduciary duty claim (such as breach of the duty of prudence)

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## Statutory Language At Issue

### 29 U.S. Code § 1106 - Prohibited transactions

**(a) TRANSACTIONS BETWEEN PLAN AND PARTY IN INTEREST**

Except as provided in section 1108 of this title:

**(1)**A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

**(A)** sale or exchange, or leasing, of any property between the plan and a party in interest;

**(B)** lending of money or other extension of credit between the plan and a party in interest;

**(C)** furnishing of goods, services, or facilities between the plan and a party in interest;

**(D)** transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

**(E)** acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

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# Prohibited Transactions

- *Bugielski v. AT&T Servs, Inc*., 76 F.4th 894 (9th Cir. 2023)
  - In reversing summary judgment for the defendants, 9th Circuit took a very broad view of prohibited transactions, and set a low bar for plaintiffs to clear
    - The AT&T plan at issue has used the same recordkeeper since 2005
    - In the mid-2010s, AT&T and the recordkeeper amended their contract to allow the recordkeeper to receive compensation from "additional services from new vendors"
    - The Court of Appeals held that the amended contract was a prohibited transaction under 29 U.S.C. § 1106(a)(1)(c) (furnishing of services) because the recordkeeper was already a party in interest
    - It further held the record was not clear as to whether the recordkeeper received only "reasonable compensation" – a key fact in assessing whether the transaction was "exempt"
  - The holding suggests that any subsequent contract or amendment entered into after a service provider is originally hired gives rise to almost a *per se* prohibited transaction claim

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# Prohibited Transactions

- *Bugielski v. AT&T Servs, Inc.*, 76 F.4th 894 (9th Cir. 2023) – Key Takeaways
  - Because courts have held that the prohibited transaction exceptions in 29 U.S.C. § 1108 are affirmative defenses, the pleading standard to get past a motion to dismiss could be very low (simply alleging that an existing service provider renegotiated its contract)
    - This holding is in some tension with the 9th Circuit's decision in *Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833 (9th Cir. 2018) (holding that negotiating a service provider contract is not a fiduciary action)
    - It also presents something of a Catch-22 from the point of view of the plaintiff-side bar:
      - If there is no RFP/new contract for a service provider, there is a possible prudence claim
      - If there is a new contract, that's a possible prohibited transaction
  - If broadly adopted, the 9th Circuit's opinion would significantly undo progress on pleading standards as to 401(k) fee claims, by reducing plaintiff's burden to show compensation was unreasonable, and shifting burden to defendants as an affirmative defense

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# Prohibited Transactions

- *Cunningham v. Cornell University*, 86 F.4th 961 (2d Cir. 2023), *cert granted 10/4/24*
  - Like the *AT&T* case, complaint alleged that defendants caused the plan to pay recordkeepers more than reasonable compensation, and alleged a prohibited transaction
    - District court dismissed, holding plaintiff failed to plead the lack of an applicable exemption
    - Second Circuit affirmed
    - Cert granted
  - In contrast to the 9th Circuit's opinion, the 2nd Circuit held that "to plead a violation of [Section 406(a)(1)(C)], a complaint must plausibly allege that a fiduciary has caused the plan to engage in a transaction that constitutes the 'furnishing of . . . services . . . between the plan and a party in interest' *where that transaction was unnecessary or involved unreasonable compensation*."
    - Holding was rooted in text of ERISA, and conclusion that the statute incorporates the exemptions into the recitation of what is "prohibited," such that they are an element of claims, not affirmative defenses
- *Cunningham* better aligns pleading burdens for prohibited transaction and post-*Hughes* fiduciary breach claims
  - Protects against risk of frivolous PT lawsuits using discovery to explore other potential claims

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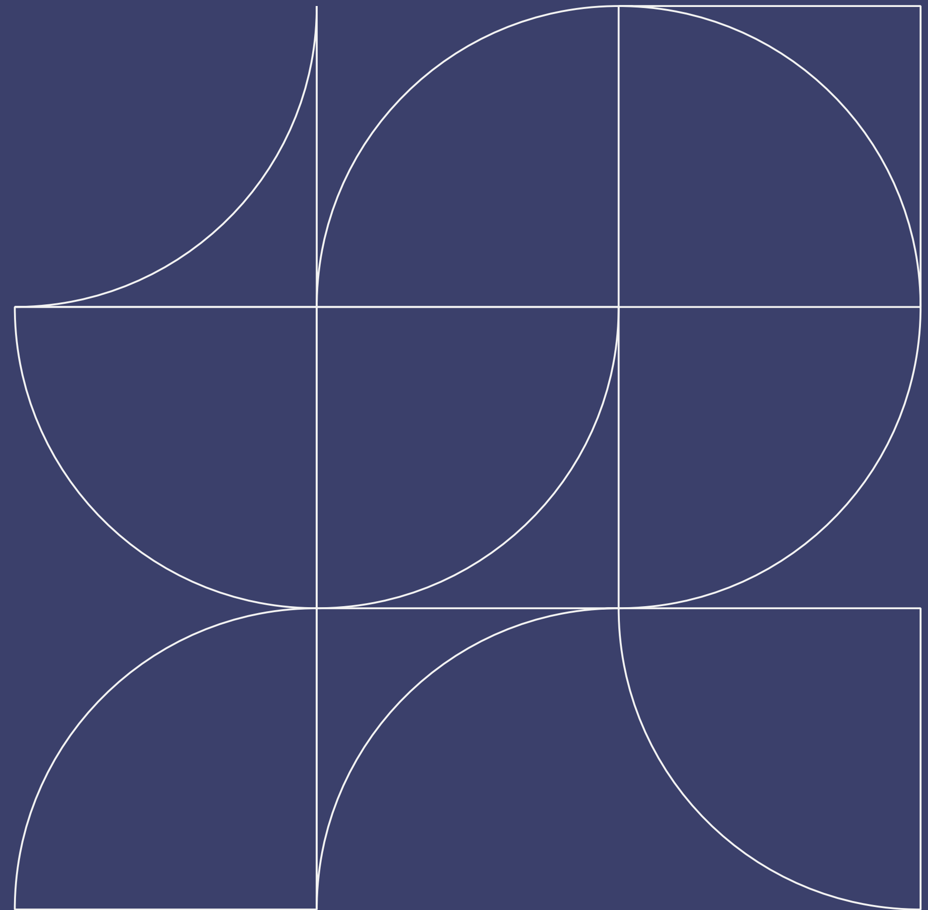
# New Claims on the Horizon



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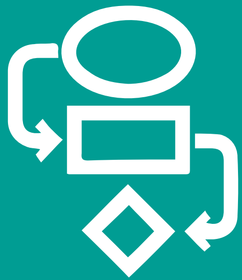


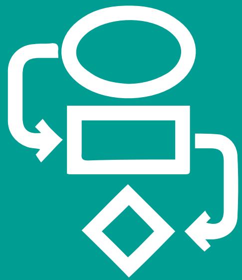
## Welfare Plan Cases

- Mirror 401(k) fee cases in allegations of overpriced fees (especially related to PBMs and rebates)
- Plays on public anger with costs, AND ignores that welfare plans are fundamentally different then 401(k) plans.  This means that plans have strong defenses:

– No standing because the plan is a DB plan and there is no claim that the plan did not pay all benefits it provided.

– Not proper to infer imprudence from the fact that a few of thousands of drugs were allegedly overpriced, especially where the employer pays most of the cost.

– Not enough to allege a cost dispute without pleading that the cost is excessive based on a fair comparison.



## Risk Transfer Cases

- Plaintiffs allege that a Company improperly “offloaded” pension liabilities by purchasing annuity contracts from Athene to provide participants the benefits they would otherwise be owed under the Plan.
- Plaintiffs ask the Court to assume that the selection of Athene as annuity provider means the selection process must have been flawed, because Plaintiffs believe Athene to be “riskier” in certain, hypothetical futures than other insurers would have been.
- Importantly, Plaintiffs do not claim they have been denied benefits or that their benefits will be reduced in any way. Instead, their claims of harm are based on the fact that their benefits will be paid by an insurance company rather than from an ERISA-governed retirement plan.

## Legal Strategy

## Motion to Dismiss For Lack of Standing and Failure to State a Claim (pursuant to 12(b)(1) and 12(b)(6))

- Plaintiffs Lack Article III Standing
- Plaintiffs Misread DOL Interpretive Bulletin 95-1
- No fiduciary conduct at issue

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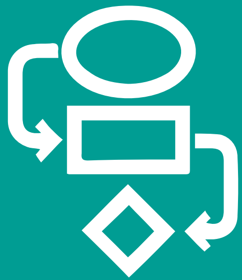

## Forfeiture cases

- Beginning in September 2023, at least 7 cases have been filed related to the use of “forfeiture” assets in 401(k) plans
  - Forfeitures are typically the money left behind when an employee leaves the company before all of their benefits are vested
  - The money usually came from employer contributions
- Plan terms (under applicable regulations) often specify that forfeitures can be used to satisfy employer contribution requirements or offset plan expenses
- These new lawsuits challenge the decision, under those arrangements, to use forfeiture assets to reduce employer expenses, rather than defray costs to participants
- These cases highlight the practice of plaintiffs’ firms targeting historically “routine” plan practices, in hopes of identifying next “trend” in 401(k) litigation
- Viability of these claims against any particular plan is likely to turn significantly on language in individual plan documents

## Forfeiture Litigation – Key Defenses

- How much an employer contributes is non-fiduciary. Employer decided to contribute less thereby forcing the fiduciaries to use forfeitures to make up the shortfall.
- No harm to the plan; it is no worse off as a result than it would otherwise have been.
- No anti-inurement issue or PT because plan assets are not going back to the employer. The money stays in the plan.
- Allocation within the plan is not a "commercial bargain" so it's not covered by the PT rules at all.
- Paying benefits, which is what happened here, is not a PT.

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# Forfeiture Litigation – Conflicting Court Decisions

Southern District of California denied motion to dismiss:

- Plaintiffs plausibly alleged harm by showing that had forfeitures been used for expenses, the participants would have paid no admin fees.
- ON the inurement issue, he said that while these might be treated as mistaken contributions, the law was not clear that they could be, and they were not defined as such in the plan.
- The court said that facially, these could be PTs (though it says the 406(a) claim is a close question).

Northern District of California granted motion to dismiss without prejudice:

- Fiduciary duty theory was novel and implausible; purported categorical rule that did not account for factors a fiduciary may consider
- No “transaction” so no anti-inurement violation or PT

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# thank you

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