CAPTRUST

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Forfeitures Cases Proceed with Mixed Results & DOL Weighs In

401(k) plan fiduciaries have been challenged in approximately 65 class action suits alleging that they improperly used participant forfeitures to offset employer contributions rather than pay plan expenses that were eventually paid by plan participants. Forfeitures occur when a plan participant leaves employment before the plan sponsor's contributions to the participant's account have vested.

The Internal Revenue Service has previously approved the use of forfeitures to offset employer-matching contributions. So, these cases were initially thought to lack merit. However, there is a valid argument: If a plan document gives fiduciaries discretion to use forfeitures to either favor the employer by offsetting matching contributions or favor the participants by paying plan expenses, not favoring the participants has been argued to be a breach. The Department of Labor (DOL) had not previously addressed the fiduciary aspects of using forfeitures.

Although many of these cases have been dismissed in the early stages, some are proceeding, and one was recently settled. Three cases are on appeal following dismissals at the district court level. In one of the appeals, the DOL has weighed in by filing an amicus brief supporting the defendant plan fiduciaries. An amicus brief is a way for a non-party to offer their view for a court's consideration. The DOL's filing was in *Hutchins v. HP Inc.* (9th Cir. filed 2025; on appeal from C. D. Cal.). In that case, the plan document permitted forfeitures to be used either to pay plan expenses or to offset the employer's matching contributions. The district court found that the decision of how to use forfeitures was a fiduciary decision. However, the court characterized the plaintiff's position that forfeitures must be used to pay expenses as a "novel legal theory." The district court went on to dismiss the case, observing that requiring forfeitures to be used to pay expenses in all cases was too broad to be plausible. It also said that the plaintiff's position is inconsistent with the "settled understanding of Congress and the Treasury Department." The disappointed plaintiffs appealed dismissal of their case.

The DOL's amicus brief supported the defendant fiduciaries, first saying the plaintiff's position contradicts the decades-long understanding that forfeitures may be used to offset employer contributions rather than defray plan expenses. The DOL went on to say that the plan's inclusion of a choice of how to use forfeitures was a settlor (plan sponsor) decision, and the fiduciaries' decision between those proscribed choices could not support a fiduciary breach claim.

Following the Supreme Court's elimination of *Chevron* deference, the DOL's position is non-binding on the court of appeals—or any other court. Even so, the DOL's position is likely to be frequently referenced in other forfeiture challenge cases. We will report on the results of the appeal.

In other forfeiture cases:

- *Rodriguez v. Intuit Inc.* (N.D. Cal. 2025) – settled for $2 million.
- *Sievert v. Knight-Swift Transportation Holdings, Inc.* (D. Ariz. 2025) – dismissed
- *Wright v. JPMorgan Chase & Co.* (C.D. Cal. 2025) – dismissed
- *McWashington v. Nordstrom, Inc.* (W.D. Wash. 2025) – dismissed
- *Buescher v. North American Lighting, Inc.* (C.D. Ill. 2025) – not dismissed
- *Kotalik v. UnitedHealth Group Inc.* (D. Minn. filed 5.28.2025) – pending

In *Wright v. JPMorgan Chase & Co.,* the plan dictated an order for the use of forfeitures: first, to reduce future contributions of the company, and second, if no future company contributions are anticipated, to pay plan expenses. This language permitted the court to quickly resolve the matter.

Fees and Investment Performance Cases—The Churn Continues

The flow of cases alleging that plan fiduciaries have overpaid for services and retained underperforming funds has continued. Good fiduciary process continues to win the day. In a new twist, plan fiduciaries have been challenged for assessing recordkeeping fees from only the accounts of participants with a balance of more than $5,000.

- *Smith v. Recreational Equipment, Inc. (REI)* (W.D. Wash. 2025) – REI's 401(k) plan provides that recordkeeping and administration fees will be charged on an equal per capita basis, and no fees will be assessed from accounts with $5,000 or less. The plan's fiduciaries have discretion to change the $5,000 threshold. Participants with account balances larger than $5,000 sued alleging that it was a fiduciary breach to use their accounts to subsidize the costs of participants with smaller account balances. This approach allegedly increased $5,000+ account holders' annual fee from $38 to $78 per participant. The court was unpersuaded and dismissed the case, saying:
    - There is no obligation to charge fees equally to all participants, whether on a per capita or pro rata basis. Every method of allocating fees could be described as resulting in some participants subsidizing the costs of others.
    - A plan's fee structure must be solely in the best interest of plan participants and have a rational basis. Disfavoring one class of participants over another does not violate this rule.
    - Applying a $5,000 account threshold is akin to charging fees on a pro rata basis, where those with larger account balances pay more. The DOL has acknowledged that both the

pro rata and per capita approaches can be reasonable.

- *Snyder v. UnitedHealth Group* (D. Minn., filed 2021) – Attorney's fees of $23 million were awarded following the record-breaking $69 million settlement of the suit against United Healthcare for retaining underperforming target date funds. In this case underperforming funds were allegedly retained to curry favor with one of the plan sponsor's business partners. The class representative, Kim Snyder, was awarded $50,000. Class representatives are usually awarded $5,000-$15,000.
- *Khan v. Bd. of Dirs. of Pentegra Defined Contribution Plan* (S.D. N.Y. 2025) – Following a jury award of $38.8 million, Pentegra has settled remaining aspects of the case for an additional $9.7 million, bringing the total to $48.5 million. In this case a plan sponsor affiliate was selected and retained as the recordkeeper with no competitive bidding or fee benchmarking over an extended period.
- *England v. Denso International America Inc.* (6th Cir. 2025) – Appeals court affirmed the lower court's dismissal because the complaint failed to provide context-specific facts of alleged overpayment for recordkeeping services.
- *Waldner v. Natixis Investment Managers* (D Mass. 2025) – After a full trial, the court found no fiduciary breach in the plan sponsor's process or its use of its own funds in its 401(k) plan.
    - All investment selections were made through a thoughtful deliberate process and supported by the independent investment consultant.
    - The investment lineup included a range of non-proprietary funds.
    - The Committee received periodic fiduciary training.
    - Although initially not meeting frequently, the committee moved to a cadence of meeting at least three times a year.
    - Although the Committee was "not a shining example of prudence," a breach was not established by the plaintiffs.

DOL: Negative Cryptocurrency Guidance Rescinded; Fiduciary Caution Still Warranted

As previously reported, in 2022 the DOL issued guidance directing plan fiduciaries to exercise "extreme caution" before adding cryptocurrencies to a 401(k) plan's investment lineup. That guidance also warned that plans offering cryptocurrencies would be likely targets for DOL audits. Under new leadership this year, the DOL rescinded the prior guidance on using cryptocurrencies in 401(k) plans . *DOL Compliance Assistance Release No. 2025-01* (5.28.2025).

Importantly, the new guidance did not support or endorse the use of cryptocurrencies in 401(k) plans. We are left with no guidance from the DOL on this issue.

Caution continues to be warranted for 401(k) fiduciaries who are considering cryptocurrency in their 401(k) plans. Some considerations include:

- ERISA mandates that fiduciaries "diversify the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." This has generally been viewed as prohibiting the use of investments in 401(k) plans that can result in large losses. Cryptocurrency and investments that provide exposure to this asset class, are

highly volatile, and have significant uncertainties.
- Most 401(k) plans have diverse participant demographics with widely varied levels of investment knowledge and sophistication. Many individuals may not be suited to thoughtfully evaluate the use of cryptocurrency in their retirement accounts.
- It seems likely that the legal landscape on cryptocurrencies will continue to evolve. It may be appropriate to consider waiting for this area to gel before acting.
- If there is a need for more immediate action, adding a self-directed brokerage window could provide access to cryptocurrency investments while minimizing fiduciary exposure.

Health Insurer’s Alleged Overcharges with “Flip Logic” Approach Revived

A lawsuit was filed against Blue Cross Blue Shield of Michigan (BCBSM) by one of its plan sponsor customers alleging that BCBSM intentionally overpaid out-of-state claims and then systematically recovered the overpayment—while charging the customer a 30 percent fee on the recovered overpayments. When out-of-state charges are incurred in the Blue Cross Blue Shield network, the local insurer, BCBSM in this case, reimburses at the rate negotiated by other state’s Blue Cross Blue Shield affiliate.

According to the complaint, BCBSM would “flip” the out-of-state provider’s status from “in-network” to “out-of-network” and initially reimburse services at the much higher out-of-network rate. Then the “error” would be corrected and the reimbursement reduced to the in-network rate. Internal documents at BCBSM allegedly referred to this arrangement as “flip logic.” Because the plan sponsor self-funded its insurance, it was charged the 30 percent recovery fee.

The U.S. District Court dismissed the case, finding that it was not plausibly alleged that BCBSM was an ERISA fiduciary. On appeal the dismissal was reversed. The appellate court noted that anyone who exercises discretion or control over plan assets is a fiduciary under ERISA. It went on to observe that BCBSM’s overpayments to healthcare providers were an exercise of control over plan assets and found BCBCM to be a plan fiduciary. With respect to BCBSM paying itself 30 percent of recovered overpayment recoveries, the court of appeals acknowledged that there was no discretion in applying the contracted 30 percent recovery rate. However, BCBSM effectively decided how much to reimburse itself by deciding how much to overpay and then recover. *Tiara Yachts, Inc. v. Blue Cross Blue Shield of Michigan* (6th Cir. 2025) The above is based only on the complaint in the case. With dismissal reversed, the case will go back to the district court for consideration of the facts and allegations of “flip logic.”

Incomplete Email Leaves Employer Responsible for Lapsed $663,000 Life Insurance Payout

Thayne Watson was employed by a company that was acquired. As part of the acquisition, heentered into a voluntary separation agreement. He continued to be paid and was eligible for healthand life insurance benefits for 11 months. Under the separation agreement, he was permitted tocontinue health benefits at the employee rate on a self-pay basis after the 11-month pay continuationperiod.

Ten months into the pay continuation period he enrolled in the benefit program so he could continue his benefits after the continuation period. He received confirmation of his enrollment, including that he had $663,000 of group term life insurance coverage.

At the end of the pay continuation period, he sent an email to the HR department asking how to pay for his benefits for the next year. In response he received an email from an HR representative that he would receive a bill from ADP, and “benefits remain active during the transition.” Neither Watson nor the HR representative separately mentioned health and life insurance benefits.

Mr. Watson died about a year later, having paid all bills received from ADP. When his wife tried to collect the life insurance proceeds from MetLife, the claim was denied. The life insurance policy had lapsed at the end of the pay continuation period and was not converted to an individual policy.

Ms. Watson sued her husband’s former employer for breach of fiduciary responsibility, alleging that they should have informed him of the need to convert the group term life insurance policy, and at a minimum the HR representative had a duty to be clear that the ADP bills would cover only health insurance and life insurance premiums would be billed by MetLife.

The court sided with Ms. Watson, finding that Mr. Watson had asked about his benefits as a whole and the HR representative was obligated to respond to his inquiry with complete and accurate information, including that his life insurance had to be converted to an individual policy for that benefit to continue. The former employer was ordered to pay Ms. Watson $633,000 ($663,000 reduced by the unpaid premiums that would have been due). *Watson v. EMC Corp.* (D. Colo. 2025). An appeal of this decision is pending.

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