

PLAN SPONSOR FIDUCIARY RISK LITIGATION

December 4, 2025

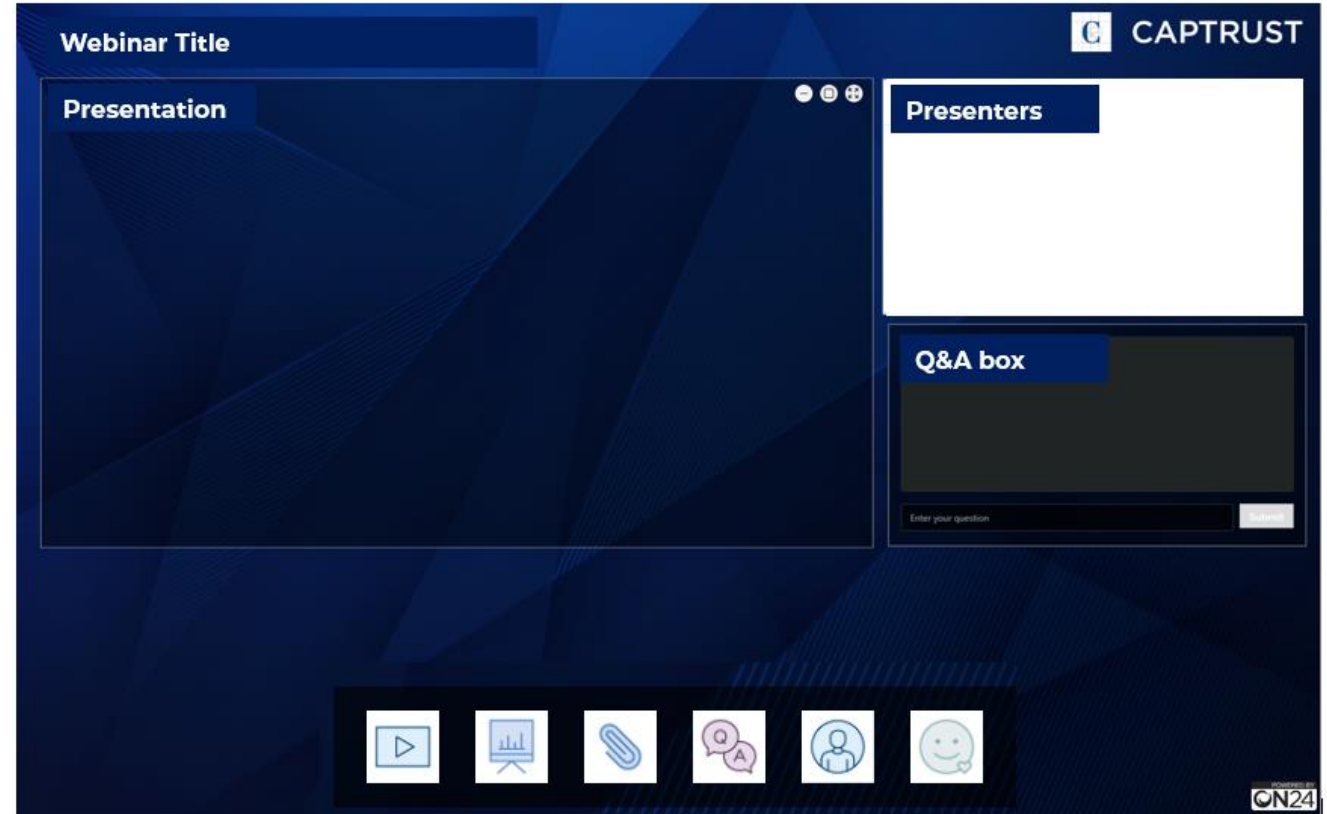


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- Questions may be submitted during the event by selecting the Q&A icon and typing them into the Q&A box.
- Submitted questions will be visible to other attendees.
- Today's session is being recorded. The recording will be available for rewatching within 24–48 hours following the event.



Course Overview



What areas of retirement plan management have been litigation targets



Emerging areas of litigation



What the courts say: what types of fact situations are likely to produce a *bad result*



What are *best practices* for avoiding litigation



FIDUCIARY BASICS

Who Is a Fiduciary?

A fiduciary is a person who:

1. Exercises control over plan administration or plan assets.
2. Renders investment advice for a fee.
3. Has any discretionary authority or responsibility with respect to plan administration.

Who Is a Fiduciary?



PLAN SPONSOR



FIDUCIARY COMMITTEE



QUIZ TIME!

Quiz Time

Under ERISA a person is a fiduciary if:

- A. They are an officer of the employer.
- B. They are a highly compensated employee.
- C. They are in HR.
- D. They exercise control over plan administration or plan assets, render investment advice for a fee, or have discretion with respect to plan administration.

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CRITICAL FIDUCIARY DUTIES

Prudence

- Fiduciaries are held to a “prudent expert standard.”
- They must make fiduciary decisions “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”
- The duty to monitor the prudence of, e.g., the selection of a fund for a fund menu (both with respect to fees and performance) is an ongoing duty.

Loyalty



Fiduciaries must act “for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan.”

Prohibited Transactions

Certain prohibited transactions have been an element in some litigation.

1. Generally, the prohibited transaction rules prohibit fiduciaries from causing the plan to engage in a transaction with anyone related to the plan other than plan participants. Fiduciary or service providers can be exposed to liability under ERISA for engaging in a prohibited transaction.
2. There is also an elaborate list of exemptions (PTEs) granted by the Department of Labor (DOL) if certain requirements are met.

Service Providers

Service providers, most significantly recordkeepers and trustees, have been featured in recent litigation.

Service providers are not fiduciaries, but:

- The appointment and monitoring of a service provider is a fiduciary act (e.g., by the committee appointing it).
- Compliance with the service provider PTE has been an element of some cases. That PTE requires that the terms of the contract with the service provider (most importantly its term) and the compensation paid the service provider be reasonable.



QUIZ TIME!

Quiz Time

A fiduciary must:

- A. Act for the exclusive purpose of providing plan benefits and defraying reasonable plan expenses.
- B. Conform to a standard of an experienced professional.
- C. Follow the plan unless it conflicts with ERISA.
- D. Offer a diversified range of investment options.
- E. All of the above.

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LITIGATION PROCEDURE

The Critical Significance of the Motion to Dismiss

- Most cases are disposed of at the motion to dismiss (for failure to state a claim) stage.
- Sponsors are reluctant to proceed to discovery and, if they lose the motion to dismiss, typically settle.

The Critical Significance of the Motion to Dismiss



Did the fiduciary use a prudent process?

Proof

- In this litigation, the critical issue for plaintiffs has been proof. For example, how do you prove fees are *too high* or performance is *too low*?
- Typically use A vs. B comparisons with other plans/funds.
- Much litigation focuses on whether B (the comparator plan/fund) is a fair comparator to A (the target defendant plan/fund).



WHO GETS SUED?

Why DC Plans and Not DB Plans?

- In DB plans, the sponsor generally must make up losses from bad judgments/overpayments through additional funding.
 - Exception: there have been challenges with respect to benefit calculations.
- In DC plans, those losses drop to the participant's bottom line, which can create plaintiffs.

Why Sponsors and Not Providers?

- Sponsors are fiduciaries (in all cases)/subject to ERISA prudence and loyalty standards.
- Providers are generally not fiduciaries, although there have been attempts to re-characterize them as fiduciaries (most of which have failed).



WHY DO THEY GET SUED?

Lawsuit Reasons



Fees



Performance



Company Stock

Fee Litigation

The first big round of litigation focused on fees, and these claims are still quite common.

Typical complaint challenged recordkeeper fees, trustee fees, and investment management fees.

Recordkeeping Fees

Most courts (not all) have accepted that the cost of recordkeeping should be compared on a per capita/per participant basis.

Plaintiffs/courts will also look at how often recordkeeping fees are reviewed (e.g., through an RFI or RFP) by plan fiduciaries/compared to market.

Indirect payments to the recordkeeper—revenue sharing, “pay to play” payments, etc.—should be reviewed, understood, and evaluated for reasonableness.

Fee Litigation

Supreme Court Decision in *Cunningham v. Cornell University* (April 2025)

Paying a service provider out of the plan is a prohibited transaction as to which a plaintiff can bring an ERISA fiduciary claim that cannot be disposed of with a motion to dismiss.

- The Supreme Court noted that defendants have various tools, some more effective than others, to help lower courts identify and deter meritless strike suits.
- These claims will ultimately resolve into an argument over whether the compensation paid the service provider was reasonable, and it is likely that the defendant will bear the burden of proof on that issue.
- What is compensation? What about third-party fees?
- And the ultimate decision about reasonableness may be made by a jury.

Asset Management Fees

For plaintiffs, the proof problem has been difficult to solve for actively managed funds.

Plaintiffs have gotten some traction with respect to:

- Retail vs. institutional
- Cheaper share class
- Index funds

Issues such as the existence of revenue sharing or securities lending may affect pricing but may not be arguable (by defendants) at the motion to dismiss stage.



QUIZ TIME!

Quiz Time

Generally, fiduciary litigation involves:

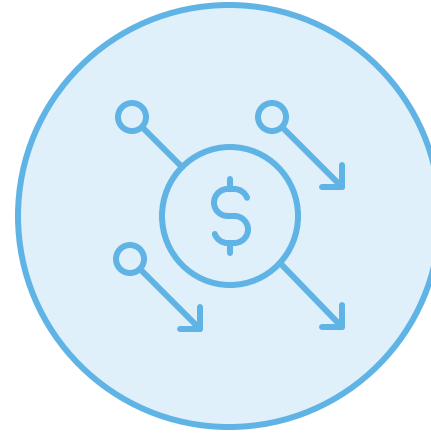
- A. Recordkeeping fees.
- B. Investment management fees.
- C. Investment performance.
- D. All of the above.

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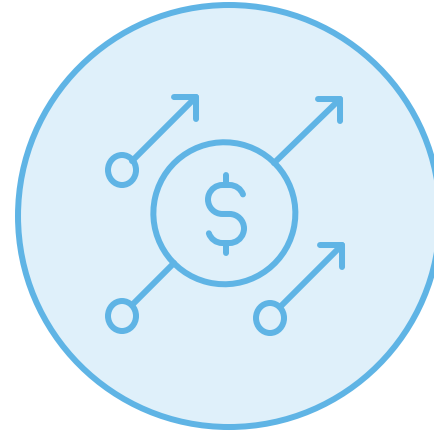
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Example



Tibble v. Edison International (2010)

Example



Tussey v. ABB (2014)

Example



Bugielski v. AT&T (2023)

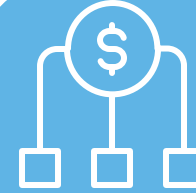
Takeaways: Recordkeeping Fees



Plan fiduciaries should review recordkeeping fees on a regular basis (and document the review).



Per capita fees should be in the range paid by comparable plans.



Asset-based fees and revenue sharing present special risks.

Takeaways: Fund Fees

Plan fiduciaries should understand fund fees and who ultimately gets them (e.g., indirect payments/revenue sharing) in evaluating their reasonableness (and the reasonableness of compensation for other services)

Retail shares (where institutional shares are available) and more expensive share classes (where less expensive share classes are available) can be problematic

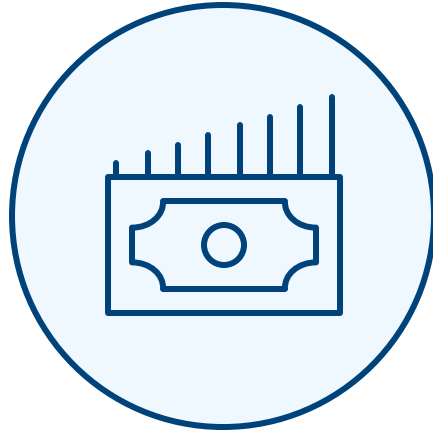
The target date fund will be a target simply because the numbers are so high

Fund Performance Litigation

More recently, plaintiffs have sued alleging that funds included in the plan fund menu have underperformed relative to some comparator fund/funds.

- In these cases, to survive a motion to dismiss, courts have required plaintiffs to show:
 1. a legitimate comparator (with the standard here relatively high and most plaintiffs failing).
 2. “something more,” e.g., evidence of inadequate vetting or monitoring of the fund.
- Plaintiff’s A vs. B comparisons in these cases involve a retrospective analysis, which ERISA jurisprudence is generally opposed to (evaluation of the prudence of a fiduciary’s decision should generally be made based on the facts as of the date of the decision).
- In these cases, much depends on the court’s bias for/against these sorts of suits.

Example



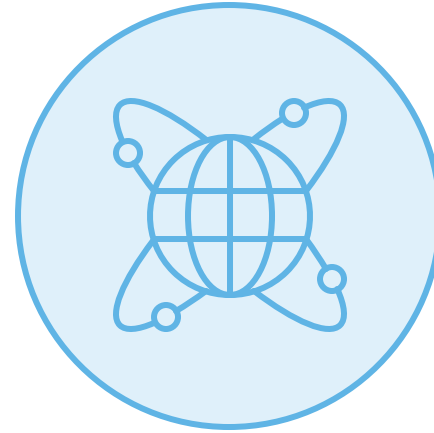
Putnam Investments, LLC v. Brotherston (2018)

Example



Smith v. CommonSpirit Health, et al. (2022)

Example



Beldock v. Microsoft (2023)

Takeaways

- Plan fiduciaries should document their reasons for including/deleting a fund from the plan's fund menu and the standard (benchmark) they intend to use to evaluate the fund.
- Investment policy statements should be drafted with a view to these risks; the IPS should reflect committee practice and committee practice should reflect the IPS.

Other Investment Classes

As a general matter, ERISA does not prohibit inclusion of any particular investment class.

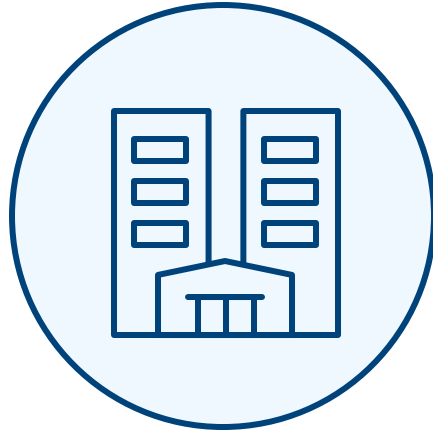
Company stock presents a special risk because of its volatility, and lawsuits have been brought both:

1. where the stock price declined precipitously in value and the plan fiduciaries had continued to invest in it.
2. where the stock price increased precipitously in value and the plan fiduciaries had disinvested in it.

The Supreme Court has ruled that these cases may generally not be brought with respect to publicly traded stock except where:

1. plan fiduciaries were aware of non-public information.
2. disclosing that information would be better for the plan/plan participants than not disclosing it.

Example



Fifth Third Bancorp et al. v. Dudenhoeffer (2014)

Takeaways

Plan fiduciaries should be aware of the special risks associated with investing/disinvesting in company stock and review their decisions (including any decision not to act) with counsel, with a view to the effect of market volatility.

Other Investment Classes

The inclusion of certain investments in the fund menu has come under scrutiny from regulators and plaintiffs' lawyers:

CRYPTOCURRENCY
INVESTMENT

PRIVATE EQUITY
FUNDS

ESG-BRANDED
OR ESG-DRIVEN
INVESTMENTS

Emerging Issue: Allocation of Forfeitures

- A series of lawsuits claiming that plan fiduciaries have an obligation to use forfeitures to benefit participants, e.g., by using them to reduce plan recordkeeping costs rather than to reduce employer contributions.
- Typically, the plan document gives the plan committee discretion over allocation of forfeitures.
- Courts are divided on this issue.

Other Investment Classes

As a general matter, ERISA does not prohibit inclusion of any particular investment class.

Where participants are choosing between investments in a fund menu the following are particularly important:

- Disclosure.
- Transparency/ability to value.
- DOL has singled out crypto and (to a lesser extent) private equity as problematic in these regards.
- It has (depending on the politics of the administration) alternatively raised issues about ESG and sought to allay concerns about ESG.

ERISA's general fiduciary rules (critically, the prudence standard) apply to each of these asset classes—inclusion in the fund menu must be “financially prudent.”



QUIZ TIME!

Quiz Time

ERISA's prudence standard depends on:

- A. Picking the right stock.
- B. How many experts the committee consulted.
- C. How good the investment policy statement is.
- D. Whether the fiduciary used a prudent process to arrive at the decision.

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Q&A

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