December 14, 2022

Fiduciary Claim TRENDS · 2022

Daniel Aronowitz
Euclid Fiduciary

Our Presenters

Daniel Aronowitz

Managing Principal of Euclid Specialty Managers

- Nationally renowned fiduciary liability insurance expert with over 30 years as a fiduciary underwriter and management liability insurance coverage lawyer.
- Author of the Fiduciary Liability Handbook and the Fid Guru Blog.

Jeffrey Koonankeil

Chief Claims Officer of Euclid Specialty Managers

- Jeff has extensive Professional Liability claims experience having worked on Fiduciary Liability, Directors and Officers, Employment Practices Liability and Fidelity claims for leading professional liability insurance companies for over 20 years.

About Euclid Fiduciary

- **Euclid Fiduciary's mission is to protect the fiduciaries and plan sponsors of America's best managed employee benefit plans with the best-in-class fiduciary liability and related professional liability insurance coverages.**
- Euclid insures many of the best-run employee benefit plans in the country, including the largest governmental, multiemployer and church plans, as well as insuring many of America's largest public and private companies.
- <u>Fiduciary Expertise</u>: Euclid fiduciary underwriters and claims professional are experts in fiduciary liability. We provide a leading scope of fiduciary coverage and thought leadership to address the evolving and complex fiduciary risks facing America's plan fiduciaries and sponsors.

Introduction

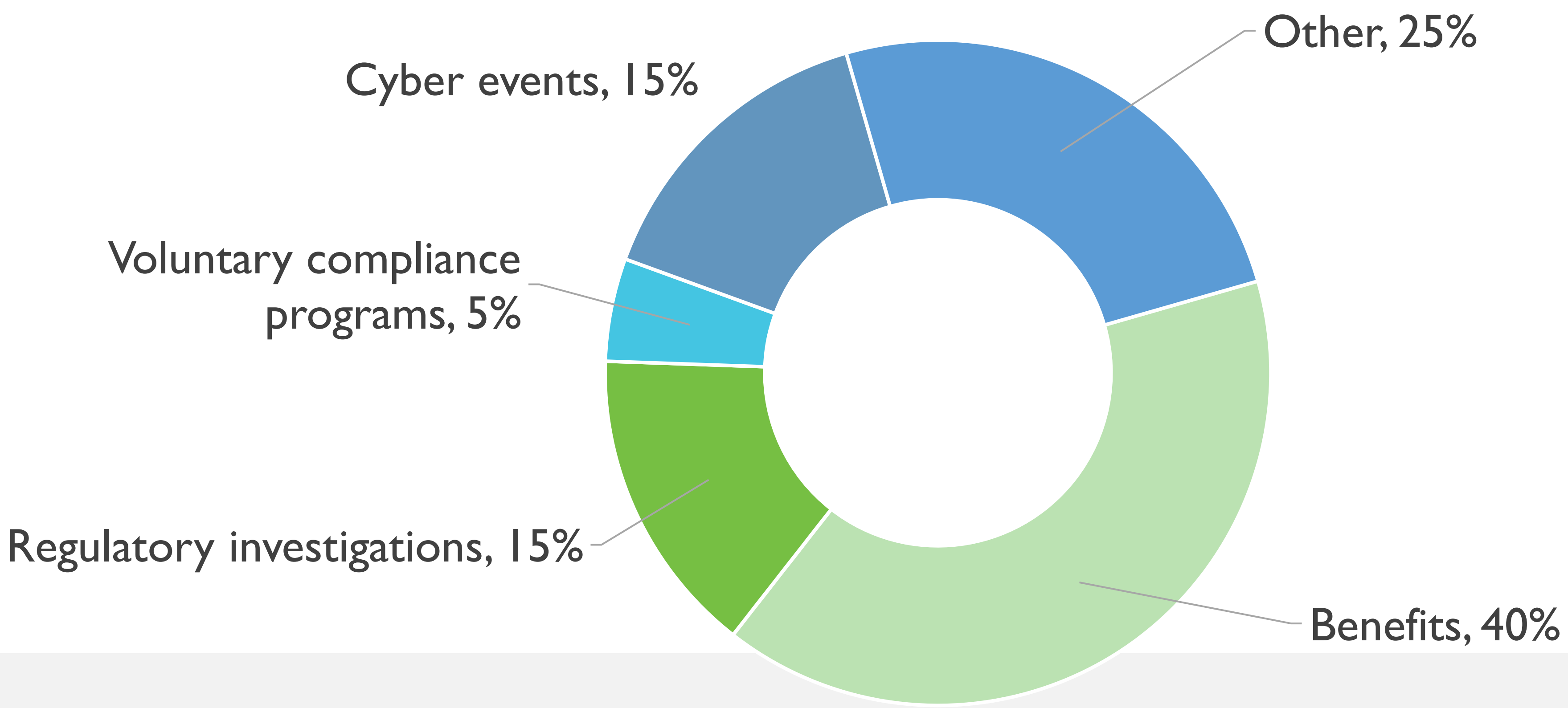
- As fiduciary underwriters for some of America's best employee benefit plans, we have a unique perspective on the fiduciary risk and claims facing employee benefit plan fiduciaries and plan sponsors.
- The risk of sponsoring an employee benefit plan has never been greater.
- This presentation is designed to provide a helpful guide for plan professionals, to guide their ability to protect plan fiduciaries.
- We offer a unique format in which we describe the claim trends by each type of sponsored employee benefit plan.


EXPERTS ONLY
Key Fiduciary Claim
Trends in 2022

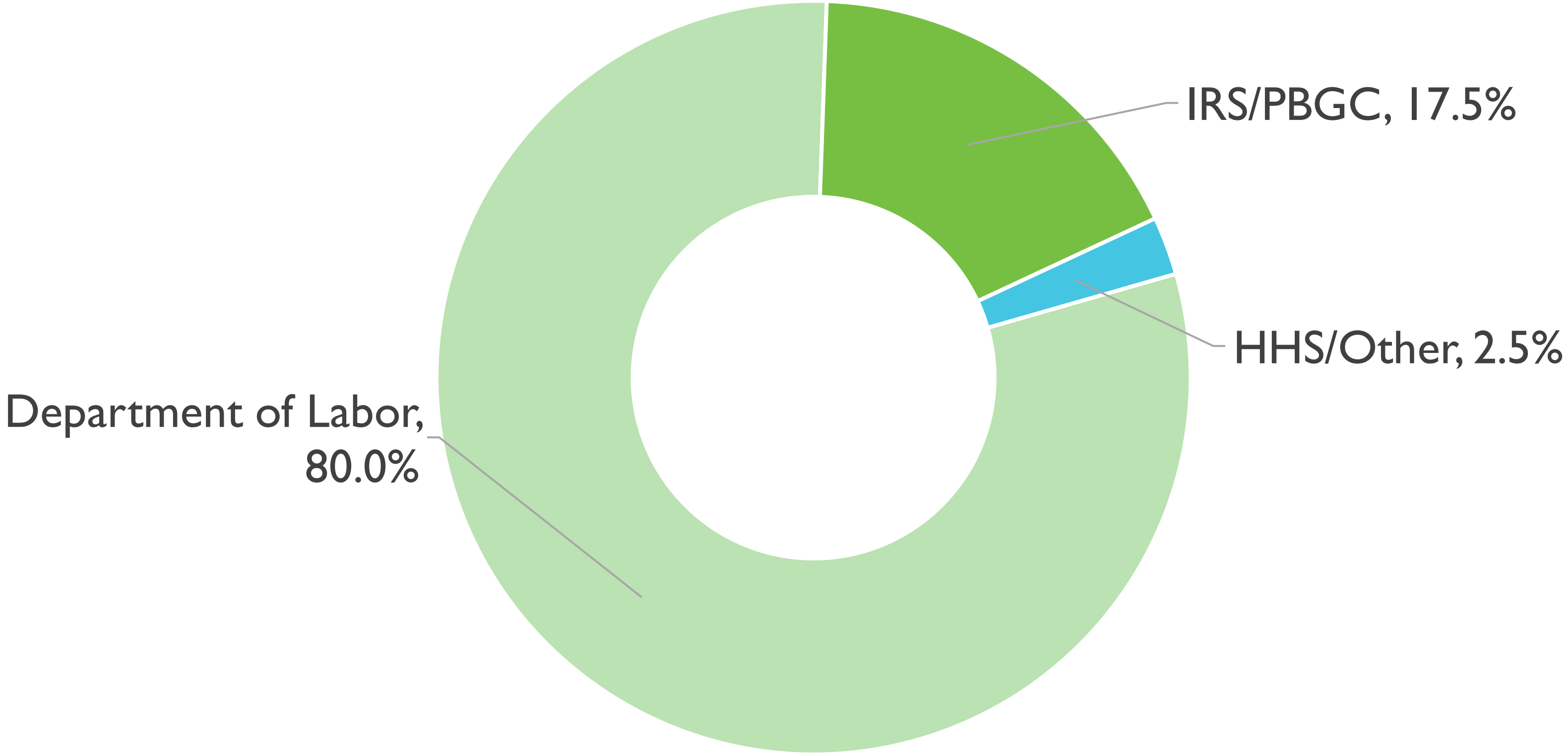
OVERALL FIDUCIARY CLAIM TRENDS

1) Continued increase in lawyer-driven class action litigation against employee benefit plans: excessive fees; imprudent investments; actuarial equivalence; and COBRA notice violations.
2) Increased risk of cyber events, including regulatory exposure and participant lawsuits.
3) Regulatory audits are more focused on targeted issues, like missing participants, cybersecurity readiness, and mental health parity compliance.
4) Sharp Rise in Cyber Incidents, and the rise of Participant Account Theft and Third-Party Cyber Class Actions.
5) Continued Increase in Early Retirement Disability Claims.
6) Direct Provider Benefit Claims Against Health Plans Under Participant Assignments.

Fiduciary Claim Distribution



Fiduciary Claim Distribution
Regulatory Investigations




EXPERTS ONLY
Key Claim Trends –
Defined Benefit Plans

KEY DEFINED BENEFIT PLAN TRENDS

1. Actuarial Assumption Litigation has resumed after a brief pause in 2020-21.
2. Challenges to early-retirement calculations.
3. Imprudent Investment Claims remain the highest-severity exposure. But the June 1, 2020 standing decision in *Thole v. U.S. Bank is a game-changer* – no standing for imprudent investments when plan sponsor made additional contributions to solve underfunding -- unclear whether there would be a concrete injury when plan is underfunded.
4. Increased frequency of cyber events involving employee benefit plans.
5. Benefit overpayments are a persistent problem: has led to an increase in benefit overpayment litigation.
6. Increased use of voluntary compliance program to correct operational errors.

EUCLID FIDUCIARY

Key DB Trend #1: Actuarial Equivalence Litigation?

- **What is Actuarial Equivalence Litigation?**
  - Since 2019, plaintiff law firms have filed approximately 20 class action lawsuits against plan sponsors and fiduciaries alleging that the plans use "unreasonable" actuarial equivalence factors, primarily "outdated" mortality tables, when calculating the benefits of the class members, the plan participants and beneficiaries.
  - The plaintiffs allege that these older mortality tables (e.g., 1951 GAM, 1971 GAM, 1984 Unisex) result in optional forms of benefits, such as a joint and survivor annuity or a certain and life annuity, or early retirement benefits that are not "actuarially equivalent" to their plans' normal retirement benefits in violation of ERISA.
  - Plaintiffs allege that using "current" mortality tables – e.g., those set by the Secretary of Treasury under IRC section 417(e)(3) and 430(h)(3) – class members would receive greater monthly benefits.
  - Most cases survive a motion to dismiss.

Motions to Dismiss in Actuarial Equivalence Litigation – Uncertainty in Results

- Many courts hold that an allegation that a plan's actuarial equivalence factors are unreasonable is sufficient to state a claim under ERISA. These court reason that unreasonable factors violate ERISA's requirement that early retirement and optional forms of benefits be "actuarially equivalent" to the plan's normal retirement benefit.
- These courts reject defendant plan sponsor arguments that ERISA does not require plan to use "reasonable" actuarial factors when converting the normal retirement benefit to other forms of payment.
- Many courts also conclude that, while ERISA does not explicitly contain a reasonableness requirement, the Treasury regulations, which do require reasonable actuarial equivalence assumptions, may inform ERISA's undefined actuarial equivalence requirement.

Sample Actuarial Equivalence Cases

- **See *Smith v. Rockwell Automation, Inc.*:** court denied a motion to dismiss even when no actuarial assumptions at all were used to calculate the plaintiff's 10-year certain and life annuity.
- **Masten v. Metropolitan Life Insurance Company** S.D.N.Y. June 14, 2021 – allows claim that the plan used severely outdated mortality tables from 1971 to 1983 to convert default retirement benefits into the alternative benefits (joint and survivor annuity) they opted to receive.
- Cases have moved forward against:
  - **Huntington Ingalls Industries Inc.**, **U.S. Bancorp**, **Rockwell Automation Inc.**, and **Partners Healthcare System Inc.;**
  - while **Pepsico**, **UPS** and **AT&T** won dismissal of cases against them.

EUCLID FIDUCIARY

Motion to Dismiss Victories

- *DuVuske v. PepsiCo, Inc.* – granted defendants' motion to dismiss because the complaint did not allege that any of the plaintiffs had reached normal retirement age when they retired, or that they were deprived of their accrued benefits at normal retirement age.
- *Scott v. AT&T Services* – granted motion to dismiss because court found that the factors used to account for an employee's early retirement were the Treasury Assumptions, and therefore no injury.
- *Brown v. United Parcel Service of America, Inc.* – granted motion to dismiss in N.D. Ga case because plaintiffs did not exhaust their administrative remedies by first bringing a benefit claim through the plan's own appeal process [Eleventh Circuit interprets the requirement of exhaustion of administrative appeals more broadly].

District Court refuses to dismiss CITGO case

- *Urlaub v. Citgo Petroleum Corp. N.D. Ill. 2/22/2022 [Cohen Milstein]* On February 22, 2022, the United States District Court for the Northern District of Illinois refused to dismiss the class action actuarial equivalence lawsuit against CITGO. Unlike the Partners ruling, the CITGO court stated that "it cannot possibly be the case that ERISA's actuarial equivalence requirements allow the use of unreasonable mortality assumptions." The court went on to say that "[o]nly accurate and reasonable actuarial assumptions can convert benefits from one form to another in a way that results in equal value between the two." Noting that the CITGO plan's assumptions may or may not be reasonable, the court found sufficient basis to proceed with the case and denied CITGO's motion to dismiss.
- Court called the statutory text "ambiguous," concluding that the proper comparison is between the surviving spouse pension received at an employee's actual retirement date and the traditional pension they would be entitled to on the same data. This interpretation is in line with ERISA's "central goal" of "providing married participants and their spouses with equal pension benefits."

Victory for Partners in District of Massachusetts

- *Belknap v. Partners Healthcare System Inc.* (D. Mass. 3/4/2022): District of Massachusetts dismissed a putative class action alleging that a plan used outdate, and therefore unreasonable, actuarial assumptions when making benefits calculations.
- Plan used a 7.5% interest rate and a modified version of the 1951 Group Annuity Mortality table. Belknap argued that ERISA requires the use of reasonable, i.e. “current,” actuarial assumptions and alleged that these actuarial assumptions are outdated and, therefore, are unreasonable and not permitted under ERISA.
- Difference was $33.48 versus $821.42 per month.
- The court nevertheless agreed with Partners, holding that nothing in ERISA requires the use of “reasonable” or “current” actuarial assumptions when calculating optional forms of benefits such as joint-and-survivor annuities.
- Court noted that other courts have imposed a reasonableness requirement for the actuarial assumptions. Not necessarily “unfair” because pension plans are private arrangements, and “not part of government social welfare program.”
- Now on appeal in First Circuit Court of Appeals.

Two Denials of Motions for Class Certification

- If a court denies a motion for class certification, the class litigation is over (though individual participants could independently bring an action for relief).
- Courts have denied class certification in two actuarial equivalence cases:
  - *Torres v. American Airlines, Inc.:* court accepted the argument that different interest rates would impact various class members in different directions, which would make it impossible to advocate for use of a single interest rate for all class members [example: absent class member who receive late retirement benefits (benefits taken after normal retirement age) would receive reduced benefits if a current mortality table is used as plaintiffs demanded; and use of a lower interest rate arguably would benefit a participant or beneficiary receiving a certain and life annuity and harm a participant or beneficiary receiving a joint and survivor annuity.]
  - *Smith v. US Bancorp*: court denied class certification for class of early retirement benefits because class members were impacted in different directions by the various possible early retirement factors set forth by the plaintiffs' expert.

Actuarial Equivalence Settlements

- ***Cruz v. Raytheon Company*****:** parties filed a settlement agreement publicly. Parties agreed to a payment to class members equal to 40 percent of the difference in the value of the benefits calculated by plaintiffs versus the benefits actually received by class members under the plan.
  - Value of the settlement is $59 million [attorney fees of almost $9 million are to be paid out of the settlement].
  - Raytheon is required to amend the plan to provide for future benefits as calculated under the agreed-up assumptions
- **Huntington Ingalls**: November 2021 settlement for $2.8 million [used 1971 mortality table].
- **Five other settlements that are not public : PepsiCo Inc.** in 2019; **American Airlines** (July 2020); **Anheuser-Busch Cos.** November 2020**; Rockwell Automation, Inc.** (January 2021); and **U.S. Bancorp** (September 2021).

Recently Filed Actuarial Equivalence Cases

- ***McFadden v. Sprint Communications LLC*, D. Kansas Nov. 11, 2022:** McFadden began receiving his plan benefits as a 100% joint and survivor annuity with his spouse in 2017. he argued that Sprint used a mortality table published in 1976, which is "based on data from the 1960s that does not incorporate improvements in life expectancy that have occurred since that time.
  - By contrast, Sprint used updated mortality table data in its filings with the SEC, referencing tables by the Society of Actuaries, to explain benefit liabilities in financial statements.
  - "Because these two analyses – determining plan liabilities and determining plan benefits actually paid to participants – measure the payment of the same benefit streams over the length of the same lives, they should be determined using the same actuarial assumptions."
- ***Knight v. International Business Machines Corporation D.N.Y. June 02, 2022) – Cohen Milstein law firm. (when the plan converts a single life annuity to a joint and survivor annuity, it uses a mortality table that is more than 40 years out of date, despite massive increases in life expectancy).***
- **Duke v. Luxottica U.S. Holdings Corp. E.D.N.Y. 11/01/2021 – Cohen Milstein**
- **DuVaney v. Delta Airlines, Inc. D. (Nevada 12/10/2021) – Bailey & Glasser.**
- **Second lawsuit filed against US Bancorp : *Adams v. U.S. Bancorp*,** D. Minn. February 2, 2022 – 2019 lawsuit settled about US Bancorp lost motion to deny class certification.

EUCLID FIDUCIARY

DB Trend #2: Early Retirement Pension Litigation

- ***Cockerill v. Corteva, Inc. and Dupont Specialty Products USA***, E.D. Pa. 09-03-2021 – Dupont and Corteva Inc. were sued in a class action lawsuit by an employee who says that the companies' recent restructuring disrupted his early retirement plans, because the pension plan fiduciaries interpreted the corporate transactions as a "termination of employment" event that pushed his early retirement back seven years.

DB Trend #3: Challenges to conversion to cash balance plans

- ***Pessin v. JPMorgan Chase US Benefit Exec.***, No. 1:22-cv-02436 (filed S.D.N.Y. 7/11/2022) – class action lawsuit alleged that there was no communication for conversion to a cash balance plan – no benefits accrued for fifteen years because of "wear-away" in which the benefit under a prior benefit formula must be worn away before the participant earns a benefit under the new formula.
- ***Nolan v. Detroit Edison Co.*****,** No. 2:18-cv-13359 (11-07-2022 settlement The lawsuit accused the company of failing to properly explain the consequences of switching from the company's traditional pension plan to its cash balance plan in 2002. company had adopted a "larger of" benefit formula that resulted in her earning no additional benefits for 15 years. District court had granted the motion to dismiss, but that was reversed by the Sixth Circuit in a March 21, 2021 decision. The company then entered into a $5.5 million settlement representing more than half of the retirees' estimated damages of $10.6 million.
- ***Cigna v. Amara*** *case resolved in reformed cash balance plan with appeal on sanctions motion denied by the Second Court of Appeals on November 10, 2022.*

DB Plan Imprudent Investments

- A dozen public pension funds and other institutional investors sued Allianz Global Investors in 2020 for alleged mismanagement of the enhanced return strategy.
- Claimed that AllianzGI abandoned its investment and risk management strategies and subjected investors to undisclosed risk that led to massive losses in February and March of 2020.
- Plaintiffs included the $21.8 billion Arkansas Teachers Retirement System; Raytheon Technologies Corp.; $1.9 billion Milwaukee City Employees' Retirement System; Blue Cross Blue Shield's national employee benefits committee.
- Allianz set aside $4.2 billion to cover expected settlement with US investors over the collapse of its Structured Alpha funds.

Challenges to Benefit Changes

- *Leighton v. Delta Air Lines*, No. 0:19-cv-01089 – summary judgment granted 03-31-2022: lawsuit claims that in 2015, Delta began reducing certain Northwest retirees' pension payments by as much as $314 per month to "offset" the lump-sum settlements they received following on-the-job injuries. Delta said these reductions were authorized by a provision in the retiree's pension plan allowing benefits to be offset by any workers' compensation payments meant to compensate a retiree after reaching age 65. Court held that Delta exercised its discretion under the pension plan when it reduced workers' monthly benefits to account for lump sum settlements they received after suffering work-related injuries.

Benefit Claim – Misclassified Employee

- ***Alders v. YUM! Brands, Inc.*** *C.D. Ca. July 09, 2021*, Tim **Alders,** formerly an Executive Recruiter for **YUM Brands** Inc. and Taco Bell Corp. filed an ERISA lawsuit alleging that the fast-food conglomerates deprived him of pension and other benefits by deliberately misclassifying him as an independent contractor, rather than an employee. 11-23-2022 – court remands to state court.

EUCLID FIDUCIARY

Defined Benefit Payout Litigation

- <u>Class action challenges to pension plan distribution formula</u>: *Laurent v. PricewaterhouseCoopers*: class action of participants who took a lump sum of retirement benefits. Plaintiffs alleged that the interest rates used by the PwC pension cash balance pension plan artificially deflated the present value of lump sum benefits paid to participants. They argued that ERISA requires whipsaw payments to guarantee that plan participants who take distributions in the form of a lump sum when they terminate employment receive the actuarial equivalent of the value of their accounts at retirement.

Incorrect Benefit Communications – Benefit Calculation Mistakes

- ***Curtis v. Komatsu U.S. Pension Plan et al.,*** *No. 2:20-cv-01611 (E.D. Wis. June 8, 2022): erroneously sent benefit information does not alter terms of pension plan under Cigna v. Amara*.
- ***Curry v. Raytheon Company****, No. 4:22-cv-00129 (D. Ariz. March 16, 2022)* – complaint alleges that prior to his retirement in 2020, the plaintiff received an estimate showing his retirement benefits from the contributory part of the plan under the distribution option he elected would be $7,472.47 per month payable over five years. However, once he retired, he only received $997.29 per month. The company explained the previous calculation was incorrect because it did not account for an offset due to the previous distribution the employee had taken.

EUCLID FIDUCIARY

Challenges to DB Plan Benefit Changes

- ***Cooper v. Willis Towers Watson Pension Plan for U.S. Emps.,*** *(C.D. Cal.* Mar. 3, 2022): a defined benefit plan was amended to require that terminated vested participants commence benefits at age 62. Previously the plan allowed these benefits to be deferred until age 70. A participant filed suit against the Plan, claiming that the plan amendment eliminated a protected optional form of benefit under ERISA section 411(d)(6).
- The court ruled on summary judgment that the right to defer receipt of the pension benefit after age 62 was a protected benefit under Code section 411(d)(6) and was not subject to any exception.
- But contrary to Treasury regulations regarding "involuntary distributions" that are subject to the anti-cutback rule exception (Treasury regulations provide that under both sections 411(a)(11) and 417(e), involuntary distributions are allowed if the benefit is immediately distributable (i.e., for age 62 or normal retirement age, if later).

Benefit Overpayments

- ***Leone v. Olympus Corp. of Ams. No. 2:20-cv-03158 E.D. Pa.*** – proposed class in Philadelphia federal court claims the company mismanaged its pension plan by offering a lump sum cash out window that miscalculated benefit amounts and sought to claw back benefits in the process of being paid. Claims Olympus offered certain retirees the opportunity to take their pensions as a lump sum during a window that closed in March 2020, but then the company incorrectly told retirees that it had overestimated their benefit amounts by as much as 46% by using the wrong interest rate assumption, and it sought to recoup these alleged overpayments.
- ***Hanson v. General Dynamics Corporation*, No. 0:21-cv-01122 D. Minn.** – class action lawsuit to contest the retirement plan actions to reduce future benefits under the plan to remedy a mistake the plan and its agents made in calculating their plan benefits. The plan first reduced benefits to the "correct" amount, and then further reduced benefits to recoup the overpayments made before the plan discovered and corrected its error – a 40% reduction over 10 year after benefits commenced.
  - retirees accusing the company of wrongfully cutting their pensions as much as 40% for participants who chose a "Leveling Option" pension format to correct a calculation error was resolved out of court;
  - case settled in April 2022 for an undisclosed amount.

Benefit Overpayments (cont.)

- *Zirbel v. Ford Motor Company*, (6th Cir. 2020) – Plaintiff received a $351,00 retirement-benefits payment from Ford, but Ford later learned it was improperly calculated and asked for $243,190 overpayment returned. Court held that Ford could recover through an equitable lien and denied equitable estoppel claim.
- *Bafford v. Northrop Grumman Corporation, Ninth Circuit Court of Appeals* – participant in lawsuit claims he retired in 2016 and began receiving monthly pension benefits of about $2000, before Alight a few months later said his benefits had been incorrectly calculated and were actually only $807 per month. Ninth Circuit held that company's committee did not breach their fiduciary duties for sending workers incorrect benefit estimates. Ninth Circuit ruled that a third-party administrator that calculated benefits a pre-set formula is not performing a fiduciary function that could give risk to ERISA liability. DOL filed an amicus brief on the petition for rehearing to the extent that the plan committee are designated plan fiduciaries.

Promissory Estoppel Claim

- ***Kevin v. U.S. Steel Corp. Exec. Mgmt. Supplemental Pension Program***, *W.D. Pa. 2:21-cv-00766 (MTD denied 6-09-2022)* – a former U.S. Steel Corp. employee advanced his lawsuit accusing the company of secretly removing him from an executive retirement plan and not telling him for nearly two decades – company had provided a February 2000 letter advising him that he was no longer in the top-hat plan, but plaintiff denied received it. Court allowed claim based on promissory estoppel to proceed.

First ESG Fiduciary Lawsuit and "Formal Complaint" against TIAA

- <u>Australian Lawsuit</u>: A lawsuit filed by an environmental scientist in Australia against his pension fund for not adequately disclosing or assessing the effect of climate change on its investments was settled.
- <u>PRI Formal Complaint against TIAA/Nuveen</u>: On October 19, 2022, TIAA received a "Formal Complaint regarding serious violations of the Principles for Responsible Investment (PRI) by signatory Nuveen, a TIAA company."
  - "We take issue with the significant gaps between TIAA/Nuveen's claims of responsible investing and its investments in climate-destructive activities and request the PRI Board to investigate and address both TIAA/Nuveen's irresponsible investments and systematic greenwashing practices."

Covered Transactions in the Voluntary Fiduciary Correction Program

- Delinquent Participant Contributions and Participant Loan Repayments to Pension Plans and Welfare Plans
- Fair market interest rate loans with parties in interest
- Below-market interest rate loans with parties in interest
- Below-market interest rate loans with non-parties in interest
- Participant loans failing to comply with plan provisions for amount, duration, or level amortization
- Defaulted participant loans
- Purchase of assets by plans from parties in interest
- Sales of assets by plans to parties in interest

Covered Transactions in the Voluntary Fiduciary Correction Program (cont.)

- Sale and leaseback of property to sponsoring employers
- Purchase of assets from non-parties in interest at more than fair market value
- Sale of assets to non-parties in interest at less than fair market value
- Holding of an illiquid asset previously purchased by the plan
- Benefit payments based on improper valuation of plan assets
- Payment of duplicate, excessive, or unnecessary compensation
- Improper payment of expenses by plan
- Payment of dual compensation to plan fiduciaries


EXPERTS ONLY
Key Trends for Defined Contribution Plans

KEY DC PLAN CLAIM TRENDS

1. Excessive Fee and Imprudent Investment Claims: High frequency of excessive fee claims in 2022, with more lawsuits alleging imprudent investments.
2. Cyber Account Theft: More DC plans have account losses due to cyber scams.
3. Regulatory Enforcement: Increased regulatory enforcement focused on the failure to collect and timely remit contributions.
4. Stock-Drop and Spun-Off Lawsuits: Two recent stock-drop cases, and lawsuits challenging retention of former parent stock in spun-off companies

EUCLID FIDUCIARY

Frequent DC Plan Claims

- Failure to collect and timely remit contributions — Late Deposit of Participant Contributions
- Investment losses for failing to follow participant investment changes
- Failure to perform ADP testing for highly compensated individuals (excluding bonuses and other compensation)
- Failure to automatically enroll and deduct percentage of wages
- Failure to Calculate Lost Earnings on Plan Forfeitures
- Failure to Execute Salary Deferral Elections
- Failure to Operate as Defined in the Plan Documents and Adoption Agreements
- Failure to Credit Service as a Temporary Employee for Temp-to-Hire Employees in Determining Eligibility
- Two recent cases filed for 401k losses based on cyber fraud

DC Trend #1: Excessive Fee Lawsuits

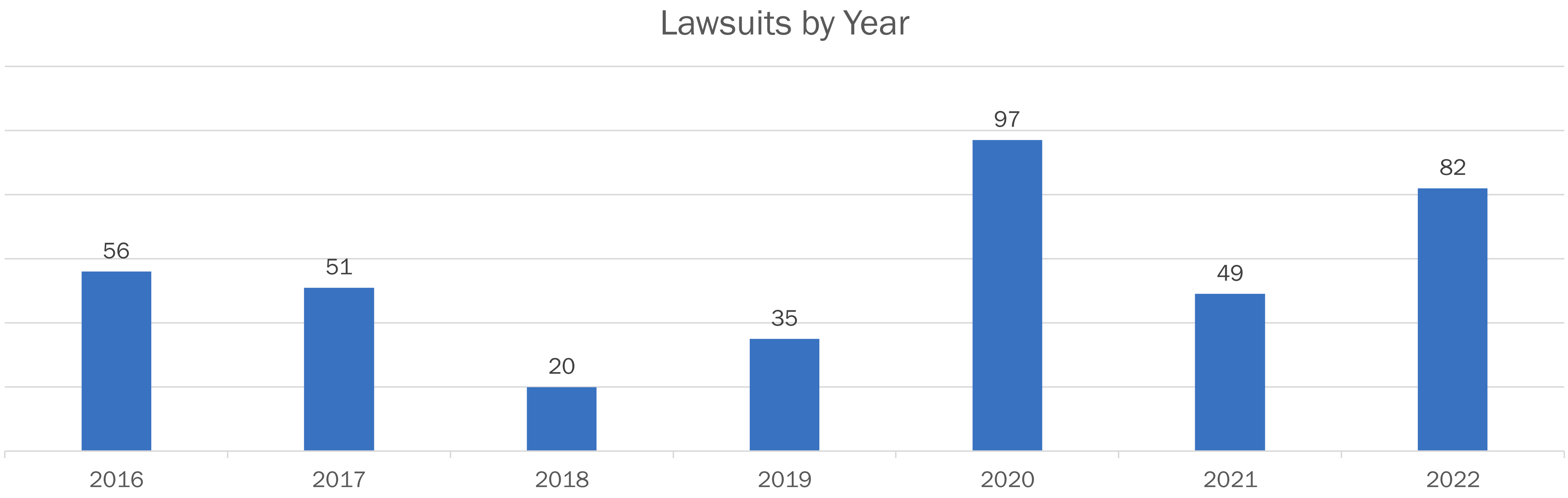
What is an Excessive Fee Lawsuit?

Three primary excess fee claims:

- Plan recordkeeping fees are too high
- Plan investment fees are too high
- Plan investment performance is too low

The lawsuits seek damages in the amount of purported excessive recordkeeping and investment fees, and purported amount of investment underperformance.

Frequency Remains Very High



* 2022 as of 12/01/2022

EUCLID FIDUCIARY

High Frequency

- Biggest change in the first half of year was the reemergence of the Capozzi Adler law firm filing 60% of all first-half excess fee cases.
- Second half of the year is noteworthy for Miller Shah filing eleven cases in August against plans invested in low-cost passively managed BlackRock LifePath target-date funds.
- The Wenzel law firm has branched out from COBRA notice cases to file excess fee cases.
- 40% of 2022 cases involve challenges to target-date funds.

The Plausibility Standard has evolved in 2022

<u>The difference between Notice and Plausibility Pleading:</u>

- **Notice Pleading:** Federal Rules of Civil Procedure 8 only requires a "**<u>short and plain statement</u>** of the grounds for the court's jurisdiction." The Supreme Court in 1957 summarized that a federal complaint was sufficient and should not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief."
- **Plausibility Pleading:** Without amending the Federal Rules of Civil Procedure, the Supreme Court adopted a stricter pleading standard in the *Twombly* antitrust case and applied it to the *Iqbal* 9-11 prisoner case. In *Twombly* the Supreme Court held that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. The pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action, on the assumption that all the allegations in the complaint are true (even if doubtful in fact.)" *Bell Atlantic v Twombly*, 550 U.S. at 555.
  - The *Twombly/Iqbal* pleading standards not only specify that a complaint must be plausible on its face, but it must bring forth sufficient factual allegations that nudge a claim across the line from conceivable to plausible. In other words, a complaint must not simply allege facts that are merely possible, but the alleged facts must be reasonable and likely to occur.

EUCLID FIDUCIARY

Why Plausibility Matters

- 1. Excess fee cases are expensive to defend – cost millions of dollars
- 2. The damage models are huge
- 1 + 2 = **Settlement Trap:** Given the defense expense and high risk, if you lose the motion to dismiss, plaintiffs have undue leverage to extract a settlement. This settlement pressure is why, combined with available fiduciary insurance coverage, most cases settle and only a limited number go to summary judgment or trial. The Motion to Dismiss is the only means to escape this settlement trap [given that objecting to class certification has not proven effective].
- **The problem** with excessive fee cases is that they are based on **circumstantial evidence.** ERISA is supposed to be a law of process, but excess fee cases are alleging that **outcomes** are imprudent.
  - No process is typically alleged – the complaints are inferring imprudence from allegedly inferior outcomes.

Hughes v. Northwestern Decision

- The question in the *Hughes v. Northwestern* excess fee case before the Supreme last year was whether the heightened *Iqbal/Twombly* plausibility standard applies in ERISA cases.
- Despite ruling for participants, the Supreme Court held that the *Iqbal/Twombly* plausibility pleading standard applies to ERISA cases and cited the stock-drop *Dudenhoeffer* case to require a "context specific" inquiry.
- **Key language:** "At times, the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise."
- **Rejected Participant-Choice Defense:** The Court remanded the case back to the Seventh Circuit to apply the plausibility standard to the case. The Court also rejected the Seventh Circuit's ruling to the extent it somehow ignored imprudent investments on the grounds that participants had the choice of prudent or alternative low-cost investments. Oral argument was held November 28. Recap of the Divane v. Northwestern Argument – Are Plan Fiduciaries Protected By The Business Judgment Presumption of Good Faith? - Euclid Fiduciary (euclidspecialty.com)

Life After the *Hughes v. Northwestern* Decision

- The immediate aftermath of the Northwestern decision was not helpful, with 90% of motions to dismiss denied after the case. Most courts were ruling that claims of excessive fees caused a factual dispute that could not be decided on a motion to dismiss.
- The hallmark of the initial post-Northwestern decisions was the Ninth Circuit in April 2022 reversing both the *Trader Joe's* and *Salesforce* cases – holding that plan sponsors could not defend revenue sharing at the pleading stage.
- The plausibility standard took a positive turn on June 21, 2022 when the Sixth Circuit issued its decision in the *CommonSpirit Health* case.

The *CommonSpirit* Decision

- Plaintiffs in *CommonSpirit Health* had alleged that the $3.2b/105,950 jumbo plan had chosen an imprudent QDIA with the Fidelity Freedom Funds in the K-retail share class (.42-.65%) and compared the actively managed TDFs to Fidelity .08% Freedom Index TDFs. Plaintiffs also alleged excessive all-in .54-.55% investment fees compared to the ICI/Brightscope .28% all-in fees for similarly sized plans.
- The Sixth Circuit upheld the district court's granting of the motion to dismiss. The court vindicated that ERISA is a law of process and does not allow hindsight second-guessing of fiduciary decisions: "ERISA for short, does not give the federal courts a broad license to second-guess the investment decisions of retirement plans."

CommonSpirit Plausibility Principles

1. It is not imprudent to offer active funds in a DC Plan. In fact, it may be imprudent not to offer some active funds.
2. Claims of investment imprudence are not plausible based on simply pointing to a fund with better performance: plausible claims require a deficient process and **signs of serious distress**.
3. Plaintiffs cannot rely on a claim that they lack process information – need to prove a process-based defect.
4. Claims of excessive recordkeeping must be proven in proper context, and not by comparisons to a few other plans taken out of context.
5. Plan changes are proof of prudent management and do not support imprudence claims.

Forman v. TriHealth – the *CommonSpirit* Sequel

- For some inexplicable reason, *CommonSpirit* did not involve a retail-share class imprudence claim (despite a fact pattern with retail share class fees).
- The Sixth Circuit addressed this issue on July 13, 2022 in *Forman v. TriHealth*.
- Much smaller plan with $457m/12,168 participants. Plaintiffs alleged all-in fees of .86-1.05% were higher than 90% of all plans between $250m and $500m.
- Also alleged 17 out of 26 investment options in retail-share classes as opposed to lower-fee institutional share classes [T. Rowe Price Adv TDFs = .79-97% v. I shares at .39-59%].

The *TriHealth* Ruling

1) "Disappointing performance in the near term and higher costs by themselves do not by themselves show deficient decision-making, especially when we account for competing explanations and other common sense aspects of long-term investments." Courts need to look at <u>distinct objectives</u> of each investment.
2) Court held that share class claim was plausible – because this claim "has a comparator embedded in it."

- Post Script: Court did not allow justification based on revenue sharing raised by the Chamber of Commerce – only a competing inference = fact issue. It is a process-based inquiry – reminiscent of the Ninth Circuit is *Trader Joe's/Salesforce* cases.

OshKosh in the Seventh Circuit – this is the court that will decide the remanded Northwestern case

- Plaintiffs in *Albert v. Oshkosh* alleged that the $1.1B/12,914 participant plan:
  - (1) imprudently allowed excessive recordkeeping fees [$87 average/$1,004,305 compared to 9 other random plans that paid $31-45 per participant] without revealing substantial revenue sharing rebates;
  - (2) maintained the wrong share classes because the higher-fee share classes contained higher revenue share and thus a lower “net investment expense” to the plan [compared Fidelity K Share TDFS with 20 bps revenue share to Vanguard Retirement .12-15% - active compared to passive]; and
  - (3) excessive fees to Investment Advisor SAI ($1,036,115).

EUCLID FIDUCIARY

The *Oshkosh* Decision

- Held that the Supreme Court in *Hughes* was a limited ruling on investor choices that did not overturn the prior (plan sponsor friendly) precedent.
- (1) Standing: allowed standing to Albert even though Albert did not invest in most of the challenged funds;
- (2) RK Fees: RK excess fee claim only plausible if comparing fees to the services provided in context (rejected comparison to 5-9 random plans; not required to perform RFP or find a RK willing do services for $35 per participant). BUT warned that a future case could survive if RK claim was context specific.
- (3) Excessive Investment Fees: rejected Walcheske firm's novel theory requiring fiduciaries to chose the highest revenue sharing share class; rejected "threadbare" claim that active funds can be compared to passive funds; and rejected challenge to revenue sharing (but Walcheske has argued for *more* revenue sharing).
- **CAUTION**: *Oshkosh* did not address two key issues: (1) retail share classes; and (2) investment underperformance. Thus unclear if the retail share class claims in the remanded *Divane v. Northwestern* case will survive.

EUCLID FIDUCIARY

Trends in Excessive Fee Cases

- Standing requires only the most tangential relationship to the plan.
- More courts are now dismissing claims of excessive recordkeeping and investment fees after appellate decisions in the Sixth (*CommonSpirit*), Seventh (*Oshkosh*), and Eighth Circuit Courts of Appeal (*MidAmerican*).
  - Motion to dismiss ratios went from 10% in the first five months after *Hughes v. Northwestern* January 2022 Supreme Court decision, to now approximately 60% of motions to dismiss are granted.
  - But the results are still a crapshoot and not coherent, as the same facts in different cases can lead to different results – even some cases filed in the Sixth and Seventh Circuit still survive a motion to dismiss. The key differentiator is whether the court is willing to go outside the pleadings +
- More cases are asserting imprudent investment claims – key issue is what is a “meaningful benchmark”
- More target-date fund litigation [40% of cases] – the 11 BlackRock LifePath cases are noteworthy
- More claims of imprudence against managed accounts.
- Burden of Proof is Consequential: Summary judgment cases involving Goldman Sachs and Home Depot reveal that it is difficult for plan sponsors to prevail when the burden of proof moves to the defense – most victories are won on loss causation and not on the merits.

BlackRock LifePath Purported Investment Imprudence Cases

- In August 2022, the Miller Shah law firm filed eleven lawsuit against low-cost plans alleging investment imprudence for investing in BlackRock LifePath target-date funds.
  - The eleven BlackRock LifePath TDF lawsuits are full of hyperbole claiming that the BlackRock TDFs have suffered "repeatedly inferior returns":
  - "an imprudent decision that has deprived Plan participants of significant growth in their retirement assets."
  - Plan fiduciaries "appear to have chased the low fees charged by the BlackRock TDFs without any consideration of their ability to generate return."
  - "irrational decision-making process."
  - "vastly inferior retirement solution and could not have been justifiably retained in the Plan."
  - "there were many TDF offerings that consistently and dramatically outperformed the BlackRock TDFs, providing investors with substantially more capital appreciation."
  - "repeatedly inferior returns"
  - "consistently deplorable performance of the BlackRock TDFs"
- The key claim is that BlackRock TDFs "are significantly worse performing than many of the mutual fund alternatives" offered by other TDF providers. The lawsuits compared BlackRock LifePath Index's trailing performance starting in 2016 with the five other series with the most assets as of the end of 2021: Vanguard Target Retirement; T. Rowe Price Retirement; American Funds Target Date Retirement; Fidelity Freedom; and Fidelity Freedom Index.
- Motions to dismiss were granted in the **CapitalOne** and **Booz Allen Hamilton** cases on grounds that comparisons to four popular funds are not meaningful benchmarks. But plaintiffs will re-file and try again.

EUCLID FIDUCIARY

More Excessive Fee Lawsuits allege Managed Account claims

- *Iannone, Jr. v. Autozone, Inc., No. 19-cv-2779 W.D. Tenn. (Magistrate Report and Recommendation dated August 8, 2022)* – grants class action status.
- Plaintiffs alleged that Autozone fiduciaries filled its $550 million 401(k) plan with expensive mutual funds and allowing the GoalMaker service to steer money to high-cost investments.
- Plaintiffs allege that GoalMaker, which is designed to diversify and rebalance investors' portfolios over time, forced employees into expensive Prudential funds and "brazenly excluded" reliable, low-cost index funds offered by "reputable providers that did not pay kickbacks to Prudential."

2022 Motion to Dismiss Results

Cases	Outcome
Lafreniere et al v. R.R. Donnelley & Sons [12/03/20]	Denied: 01/03/22
Lucas et al v. MGM Resorts International [09/21/20]	Denied: 01/06/22
Anderson v. Intel Corporation Investment Policy Committee [08/09/19]	Granted: 01/08/22
Holmes v. Baptist Health South Florida [08/17/21]	Denied as Moot: 01/20/22
Ford v. Takeda Pharma [01/19/21]	01/24/22: denied as moot
Goodman v. Columbus Regional Healthcare Sys., Inc. [02/02/21]	Order denying MTD: 01/25/22
Mator v. Wesco Dist. Inc. [03/26/21]	Denied: 01/25/22; Granted: 08/18/22
Moler v. Univ. of Md. Med. Sys. [07/22/21]	Denied: 01/26/22
Bangalore v. Froedtert Health [06/16/20]	Denied: 01/26/22
Shaw v. Quad/Graphics Inc et al [10/30/20]	Denied: 01/26/22
Johnson v. Duke Energy Corporation [09/22/20]	Denied: 01/31/22
Lauderdale v. NFP Retirement [02/16/21]	Granted: 02/08/22
SMITH et al v. SHOE SHOW [09/03/20]	Granted in part: 02/25/22
Nesbeth v. Icon Clinical Research [03/26/21]	Denied as moot: 03/10/22
Soulek v. Costco Wholesale Corporation et al [06/23/20]	Denied as moot: 03/17/22
Perkins v. United Surgical Partners Int'l, Inc. [04/30/21]	Granted: 03/18/22
Sweeney et al v. Nationwide Mutual Insurance Company [03/26/20]	Denied: 03/18/22
Seidner v. Kimberly-Clark Corp. [04/15/21]	Denied: 03/23/22

2022 Motion to Dismiss Results (cont.)

Cases	Outcome
Khan et al v. Board of Directors of Pentegra Defined Contribution Plan [09/15/20]	Granted in part: 03/23/22
Cunningham v. USI Insurance Services [03/02/21]	Granted: 03/25/22
D.L. Markham, DDS, 401(K) Plan v. Variable Annuity Life Ins. Co. [01/04/21]	Denied as moot: 03/25/22; Granted: 10/05/22
Anderson v. Coca-Cola Bottlers' Association [02/01/21]	Granted in Part: 03/30/22
Moore v. Humana [04/13/21]	Denied: 03/31/22
McCAFFREE FINANCIAL CORP. v. ADP [05/04/20]	Granted: 03/31/22
JOHNSON et al v. PNC FINANCIAL SERVICES GROUP [10/02/20]	Granted in part: 03/31/22
Smith v. VCA [11/22/21]	Denied: 04/07/22
Parker v. GKN North Am. Servs. [10/19/21]	Denied as moot: 04/08/22
Carrigan v. Xerox Corp. [08/11/21]	Denied: 04/18/22
Matney et al v. Barrick Gold of North America [04/24/20]	Granted: 04/21/22
Brown v. The Mitre Corp. [09/29/21]	Granted: 04/28/22
Nohara v. Prevea Clinic [07/16/20]	Denied as moot: 05/12/22
Morales v. Capital One Financial Corp [12/31/21]	Granted: 05/27/22
Woznicki v. Aurora Health Care [08/14/20]	Granted in Part: 05/27/22
Coviello et al v. BHS Management Services [12/30/20]	Denied: 06/09/22
Riley v. Olin Corp. [11/09/21]	Order of Dismissal w/o prejudice: 06/21/22
MUNSON HEALTHCARE [03/29/22]	Dismissed as moot: 06/22/22; granting in part dismissing in part 11/09/22
Mattson v Milliman, Inc. et al [01/13/22]	06/30/22: granting in part

EUCLID FIDUCIARY

2022 Excessive Fee Settlements

Case	Date	Settlement
Beth Israel Deaconess Med Center [01/18/22]	10/18/2022	$2.9 million settlement
Rush University Medical Center [01/21/22]	8/2/2022	$2.95 million settlement
Ford v Takeda [01/19/21]	11/14/2022	Settlement ($22 million)
Anderson v Coca-Cola Bottlers' [02/01/21]	10/27/2022	Notice of settlement
Loomis v Nextep [03/10/21]:	7/8/2022	$1.1 million settlement
Conte v WakeMed [04/26/21]	1/10/2022	$975,000 Settlement
Walter v Kerry [04/27/21]	1/10/2022	$975,000 Settlement
Gleason v Bronson Healthcare [05/06/21]	5/3/2022	[$3 million]
Johnson v Carolina Motor [07/06/21]:	6/15/2022	{ $500,000?}
Smith v VCA [11/22/21]	11/14/2022	Notice of settlement $563 million
Becker v Wells [03/13/20]	7/29/2022	$32.5 million settlement
Santiago v University of Miami [04/29/20]	4/7/2022	$1.85 million settlement
Parmer v Land o Lakes [05/26/20]	6/28/2022	$1.8 million settlement
Boley v Universal Health [06/05/20]	10/20/2022	Motion for settlement $12.5 million
Dover v Yanfeng [06/22/20]	7/7/2022; 11/10/2022	Motion for preliminary approval - $990,000 proposed settlement; Motion to stay notice of settlement

2022 Excessive Fee Settlements

Case	Date	Settlement
Soulek v Costco [06/23/20]	3/17/2022	$5.1 Million settlement
Hill v Mercy Health System Corp [08/03/20]	5/6/2022	$3.9 million settlement
Woznicki v Aurora Health Care [08/14/20]	9/16/2022	Settlement
Bailey v LinkedIn [08/14/20]	11/4/2022	Joint status report announcing there will be a settlement
Blackmon v Zachary Holdings [08/21/20]	8/5/2022	$1.875 settlement
Smith v Shoe Show [09/03/20]	8/16/2022	Notice of settlement ($330,000)
McGowan v Barnabas Health [09/23/20]	preliminary approval: 05/26/22	$1.75 million settlement
Slavens v Meritor [11/13/20]	4/14/2022	Settlement
Alison v L Brands [11/20/20]	8/12/2022	$2.75 million settlement
Jones v Coca-Cola Consolidated [11/24/20]	6/17/2022	$3.5 million settlement
Harding v Southcoast Hospital Group [12/14/20]	4/25/2022	$2 million settlement
Rampey v West Corp [05/06/19]	6/28/2022	$875,000 settlement
Davis v Washington University St. [06/08/17]	4/18/2022	$7.5 million settlement
Feinberg v T. Rowe Price Group [02/14/17]	5/26/2022	$ 7 million settlement

DC Trend #2: Two recent stop drop decisions

- In *Fifth Third Bancorp v. Dudenhoeffer*, the Supreme Court held that ERISA stock-drop lawsuits alleging that plan fiduciaries failed to act on non-public information must propose an alternative action that fiduciaries could have taken without violating federal securities laws. Participants also must plausibly allege that no prudent fiduciary in the same circumstances could have concluded such action would have done more harm than good.
- **Perrone v. Johnson & Johnson**, *No. 21-1885 (3rd Cir. Sept. 7, 2022)*: Participants in J&J DC plans alleged that plan fiduciaries were aware of products liability concerns that, when ultimately made public, resulted in a 10% drop in the company's stock price. The Third Circuit Court of Appeals held that participants failed to propose an alternative fiduciary action that would meet the *Dudenhoeffer* standard.
  - Directing new contributions to the ESOP's cash portion is not a viable alternative.
  - Early public disclosure would do more harm than good.
- ***Burke v. The Boeing Co.,*** *No. 20-3389 (7th Cir. Aug. 1, 2022)*: Plaintiffs alleged that the appointing fiduciaries had nonpublic information about safety concerns after one of the plan sponsor's best-selling passenger airplanes crashed. The Seventh Circuit affirmed the dismissal of a stock-drop lawsuit involving corporate insiders because they had retained an independent fiduciary to oversee the plan's ESOP fund with Boeing stock.

EUCLID FIDUCIARY

Imprudent Investment Claims After Spinoff– Failure to Diversify Stock in Former Parent Company

- *Gannett Co. v. Quatrone, US – involving Tegna DC plan:* case stems from a 2015 transaction in which Tegna – which was formerly called Gannett – spun off its publishing business to a new company that kept the Gannett name. Gannett's 401(k) plan continued to hold Tegna stock, which plan participants allege drove losses of up to $57 million.
- The Fourth Circuit ruled against Gannett in a 2-1 split opinion, holding that the participants adequately alleged it was imprudent under ERISA for the plan to keep such a large holding – up to $269 million – in a single-stock fund [adequately alleged a breach of the duty to diversify].
- Several recent cases have challenged 401(k) plans that hold stock of former parent companies after corporate spinoffs. Courts have rejected lawsuits involving **Phillips 66, SunEdison Semiconductor LLC**, and **Marathon Petroleum Corp.** A case involving Seventy Seven Energy Inc. is pending.

Imprudent Investment Claims After Merger

- *Radcliffe v. Aetna, Inc., et al.*, No. 3:20-cv-01274 (D. Conn.) – initial lawsuit brought by Aeta 401k plan participants alleges lost retirement savings by investing in CVS stock that was artificially inflated by the company's 2015 takeover of nursing-home pharmacy Omnicare. Plaintiffs claim that Aetna shareholders were not given full and accurate information about CVS's problems with Omnicare when they voted to approve the merger and accept CVS stock in exchange for their Aetna stock. In early 2019, CVS's stock price tumbled after it announced a new $2.2 billion write-down in connection with the Omnicare deal.
- Court granted initial motion to dismiss but gave opportunity for plaintiffs to amend the complaint.

Imprudent Investment Claims in DC Plans

- ***Hursh v. DST Sys., Inc.*** **8th Circuit November 28, 2022** – 554 individual participants filed individual arbitrations against the plan sponsor DST and the plan's investment advisor Ruane Cunniff & Goldfarb Inc. alleged breach of fiduciary duty for investments in the Valeant stock in which the plan was heavily invested dropped from $257 per share in 2015 to $15 per share in 2016, constituting $400m in losses.
- ***Martin J. Walsh v. Ruane, Cunniff & Goldfarb, Inc.*** No. 19-CV-9302 S.D.N.Y. March 3, 2022 – court denies motion to dismiss of Ruane who served as non-discretionary investment advisor to DST and used an explicit investment strategy of "non-diversification," by which it invested over 45% of DST 401k plan assets in a single stock. DOL had sued for breach of fiduciary duty against DST fiduciaries and Ruane for violating the duty of diversification.

Is Participant Data a Plan Asset?

- The Schlichter law firm has tried repeatedly to allege fiduciary violations for DC plan fiduciaries that allow third-party to use participant data but have been stymied by court decisions that plan participant data is not a plan asset.
- March 30, 2021, The U.S. District Court for Southern District of Texas granted Fidelity Investments' dismissal motion in ***Harmon v. Shell Oil*** (Case No. 3:20-cv-00021), based on the Court's inability to draw a conclusion that plan participant data is a "plan asset," the exercise of control over which would give rise to fiduciary responsibility (and potential liability) under ERISA.
- The *Shell Oil* plaintiffs' ERISA claims against Fidelity were premised in their entirety on an allegation that various elements of plan participant information – names, income levels, social security numbers, contribution levels and investment holdings, *etc.* and information regarding distribution eligibility "triggering events" (collectively, "participant data") – should be regarded, in and of itself, as a "plan asset." Since fiduciary status under ERISA attaches to those who exercise authority or control over the use of plan assets, the plaintiffs argued that Fidelity should be deemed a fiduciary to the Shell Oil plan based on a number of alleged uses of participant data, including for purposes of marketing and selling IRAs, credit cards, life insurance and an array of other retail products and services. The lawsuit alleged that these uses benefitted Fidelity in breach of its fiduciary responsibilities including by giving rise to prohibited transactions.
- The decision referenced and drew support from the 2018 decision in *Divane v. Northwestern University*, 2018 WL 2388118 (N.D. Ill. May 25, 2018), *aff'd,* 953 F.3d 980 (7th Cir. 2020) which, while acknowledging that confidential plan participant information has some level of value, similarly declined to assign plan asset status to participant data under ordinary notions of property rights.
- *See Schlichter lawsuit against TIAA alleging improper rollover advice.*
- **Berkelhammer v. ADP TotalSource Group, Inc.,** *No. 2:20-cv-05696 (D.N.J.)*
- *Issue alleged in **New York University**, **Northwestern University**, and **Vanderbilt University** cases; and participant data cross-selling restrictions were included in **Johns Hopkins University**, **MIT** and **Emory University** settlements.*

EUCLID FIDUCIARY

Participant Account Theft

- ***Bartnett v. Abbott Laboratories*** – suit alleges that defendants "failed to enforce a security question routine set up for security purposes on the Defendants' website" . . . and "instead simply provided a one-time code over the phone that was used to loot Ms. Bartnett's account." And then, "rather than communicating with Ms. Bartnett via email concerning changes to her account, as Defendants knew Ms. Bartnett preferred, they mailed notices, allowing the theft to be consummated and $245,000 to be transferred out of the country via email to an Indian IP address before Ms. Bartnett could take any steps to halt the fraud."

2022 Participant Account Theft Case against Colgate-Palmolive

- *Disberry v. Employee Relations Committee of the Colgate-Palmolive Company*, Case No. 22-CV-5778 S.D.N.Y. On July 7, 2022, Paula Disberry, as a participant in the Colgate-Palmolive Employee Savings and Investment (401k) Plan, filed an ERISA complaint against the Colgate plan fiduciary committee, Alight Solutions as the plan's recordkeeper, and BNY Mellon as the plan custodian, seeking restoration of her 401k account balance that had been distributed to a fraudster.
- The complaint states that "[o]n September 14, 2020, Ms. Disberry was informed that the entire balance of her Plan account, totaling $751,430.53, had been distributed from the Plan in a single taxable lump sum, even though at no point had she authorized or received any such distribution."
- Motions to dismiss filed by recordkeeper, plan custodian and plan fiduciary committees disclaiming fiduciary status and/or fiduciary responsibility.

Wife withdrew all funds from participant account

- *Billy Tyler v. Physicians Mutual*, D. Nebraska 06-14-2022 – husband filed lawsuit that his wife's company failed to notify him when his wife withdrew all funds from her account under the plan.
- Plaintiff lacked standing to bring a civil action under ERISA and the Court lacked subject matter jurisdiction.
- Plaintiff could only be entitled to benefits in two situations: (1) the death of his wife prior to her withdrawal or (2) an alternative allocation of benefits according to a valid QDRO.

EUCLID FIDUCIARY

Tipped Employee Sues Over Missed Deferrals

- A participant in Hyatt Corp.'s defined contribution retirement plan has sued the company saying the company breached its fiduciary duties by not applying his deferral election for the plan to all his pay.
- The plan document defines compensation as "the amount reported for a participant on IRS Form W-2, Box 1 for the plan.
- However, Hyatt has a policy of requiring tipped employees to be paid all charged tips in cash rather than through payroll, interfering with their ability to defer income under the terms of the plan.
- Hyatt's mandatory tips policy "has the effect of discriminating against employees who receive tips as part of their income when compared to employees who do not receive tipped income."

No fiduciary breach when insurer sets guaranteed rate of return

- *Rozo v. Principal Life Ins. Co.*, 2022 WL 4005339 (8th Cir. 2022) – September 2, 2022 decisions finding no fiduciary breach when insurer sets guaranteed rate of return on stable value contract in shared interest of plan participants.
- 401k plan participant brought a class action lawsuit against a life insurance company, claiming a breach of contract of ERISA's fiduciary duty of loyalty and prohibited transaction provisions in connection with the insurer' setting of the guaranteed rate of return on a stable value contract investment option.
- The trial court ruled for the insurer, determining that it was not a fiduciary. The Eighth Circuit reversed, concluding that the insurer was a fiduciary because it unilaterally set the rate of return on the investment option. On remand, the trial court ruled that there was no breach of loyalty when the insurer received a reasonable compensation for setting a composite crediting rate that (1) appropriately accounted for its risks and costs; (2) made the investment options more competitive; and (3) allowed the insurer to fulfill its guarantees to plan participants.

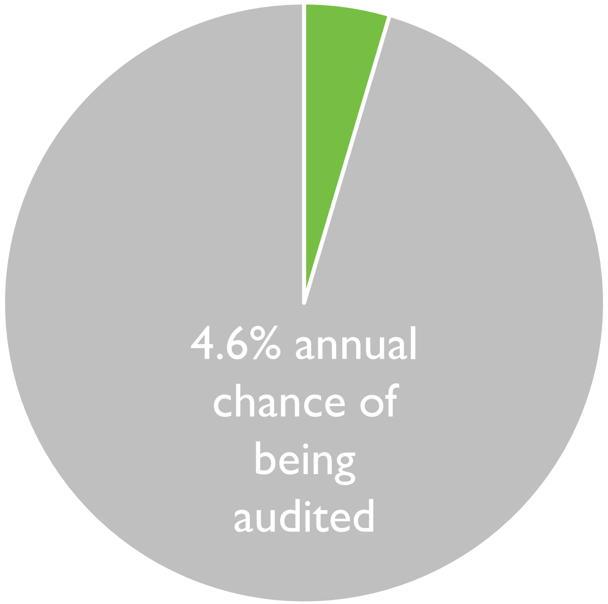
Regulatory Enforcement

Focus on Retirement Plans

DOL Audits and Regulatory Enforcement

Euclid DOL Statistics:

- Historically, a defined benefit plan has a 4.6% annual chance of being audited [up to four times higher than that for a large multiemployer plan]
- That went down 25% in the first 12 months of the Biden Administration [2021], but returned to the historical annual rate in 2022 with increased EBSA audit activity.
- EBSA recovered more than $2.4 billion for direct payments to plans in 2021 – 80% or $1.9 billion recovered was connected to missing participants; in 2022 EBSA recovered $1.4B with $931m from enforcement activities and $542m related to missing participant enforcement.



EUCLID FIDUCIARY

DOL Key Investigation Focal Points – Missing Participants

- **Key Focus on Missing Participants**
- **NEW: focus on Cybersecurity**
- **NEW: cryptocurrency investments**
- **NEW: ESG investments**
- Inadequate fidelity bonds
- Expense Management
- Plan fiduciary processes and claims procedures
- Timeliness of participant contributions
- Required plan documents and disclosures
- Fiduciary duties and prohibited transactions
- Hard to value assets
- Plan investment conflicts
- Proprietary funds and services
- Impact of pre-claim investigation coverage

IRS Regulatory Audits

- Trend: the number of IRS audits are down 25% by historical standards in the last five years (likely because of staffing issues from the IRS), but the IRS has increased its enforcement with computer-generated penalty notices for tax and filing-related violations.
- The IRS states that 95% of audits find non-compliance problems, which is confirmed by Euclid claims experience.
- BUT key trend is IRS sending computer-generated penalty notices to plans.

Top Compliance Monitoring Issues identified during IRS audits

- Errors made in benefit calculations, crediting service, reduction factors, general administration
- **Minimum Funding deficiency** — IRC Section 412 violations
- Plan did not make required actuarial adjustments for benefit payments beginning after normal retirement date
- Deficient plan language and/or conflict between plan document and other agreements (collectively bargained, joinder participation)
- Internal Revenue Code Section 401(a)(9) violation (required minimum distributions)
- Plan fails to follow or does not have a participation agreement for each participating employer
- Accrual/service credit is dependent on employer contributions being made
- **Vesting or Benefit Accruals:** IRC Section 411 violations including cash out/forfeitures from lost participants, wrong vesting schedule used, and error in vesting percentages
- **Delinquent/late contributions**

EUCLID FIDUCIARY

IRS Compliance Issues (cont.)

- **Prohibited Transactions**
- **Required Minimum Distributions**
- **Participation/Coverage** — Plans are failing to meet the testing requirements of section 410(b) since they are not following the participation entry requirements of the plan and law which is resulting in the late entry of employees who must be included for testing purposes.
- **Discrimination of Contributions/Benefits** — Plan did not make required actuarial adjustments for benefit payments beginning after Normal Retirement Date.
- **Non/Late Amender**
- **Joint and Survivor Annuity:** Internal Revenue Code Section 417 violations including spousal consent, QJ&S application, joint and survivor annuity adjustment when the non-spouse beneficiary is more than 10 years younger than the employee, and QDRO.

EUCLID FIDUCIARY

IRS Penalties Continue to Increase

SECURE Act Section 403 penalties:

	Old Penalty	New Penalty
Failure to submit Form 5500	$25/day	$250/day *Not to exceed $150,000*
Failure to file a registration statement of deferred vested participants	$1/participant per day	$10/participant per day *Not to exceed $50,000*
Failure to file a required notification of a change in plan status (e.g. Plan name)	$1/day	$10/day *Not to exceed $10,000*
Failure to provide withholding notice (W-4P) for periodic pension payments	$10/each failure	$100/each failure *Not to exceed $10,000 for all failures during calendar year*

Perspective on DOL Regulatory Investigations

- DOL largely absent from excessive fee litigation, outside of amicus participation in the Northwestern and Brotherston/Putnam excessive fee lawsuits, but we have seen two significant investigation finds alleging investment underperformance of 401k plan investments, including failure to remove underperforming investment options flagged by plan investment advisors.
- DOL is now asking about ESG investments in plan audits.
- DOL cybersecurity investigations appear, at least at this stage, to be efforts for EBSA to learn about cybersecurity.

Regulatory Investigation Coverage

- **Impact of fiduciary coverage for pre-claim investigation:** plan can seek reimbursement of representation for regulatory audits even before an allegation of wrongdoing.
- Note that not all pre-claim coverage is the same: confirm that your policy is not limited to Department of Labor investigations. Some policies do not cover IRS or other regulatory investigations.


EXPERTS ONLY
KEY HEALTH PLAN
CLAIM TRENDS

KEY HEALTH PLAN FIDUCIARY CLAIM TRENDS

1) DOL investigations focused on Mental Health Parity [with a new focus on comparative assessments] and Affordable Care Act compliance.
2) Significant increase by participants suing under the Mental Health Parity Act.
3) Explosion of direct claims by health providers under participant assignments.
4) COBRA notice cases claiming defective notice to terminated employees.
5) Excessive fee claims against health plans.
6) Increase in challenges to termination of retiree health care.

H&W Plans

Health Plan Claim Trends

DOL Investigations – it's all about Mental Health Parity:

- EBSA reported that it investigated and closed 148 health plan investigations in FY 2021 (and 4,086 health plan investigations since FY 2011). 74 involved plans subject to MHPAEA, and EBSA cited 14 violations MHPAEA violations in 12 of those investigations in quantitative treatment limitations, nonquantitative treatment limitations (NGTLs), and financial requirements.
- The largest settlement was $13.6 million for restrictive reimbursement criteria for mental health services.
- The DOL fact sheet indicates that it does not capture DOL's "significantly increased" enforcement with respect to the comparative analysis requirement – we will see more citations in 2022 statistics.
- Mental Health Parity – six categories of violations:
  - Annual dollar limits
  - Aggregate lifetime dollar limits
  - Benefits in all classifications
  - Financial requirements
  - Treatment limitations
  - Cumulative financial requirements and quantitative treatment limitations

DOL Investigations – NQTLs

- DOL is sending health plans audit letters with the title: "We are requesting documentation showing your MHPAEA compliance analyses for non-quantitative treatment limitations, pursuant to ERISA Section 712(a)(8) and Section 504. You must provide the requested materials by [fourteen days after the date of the notice]."
- The first line of the audit: "Section 712(a)(8) of [ERISA] requires group health plans and health insurance issuers that impose non-quantitative treatment limitations (NQTLs) on mental health or substance use disorder benefits to perform and document comparative analyses of the design and application of NQTLs that demonstrate compliance with the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA)."
- <u>In plain English</u>: health plans are required to analyze and document why they provide mental health benefits that differ from other medical benefits. You need to have a document explaining the factors used to justify so-called non-quantitative treatment limitations (NQTLs) on mental health coverage that differ from limits imposed for medical and surgical benefits. <u>The Problem</u>: EBSA has found that most plans do not comply with the NQTL documentation.
- Specifically, the 2021 Consolidated Appropriations Act (CAA) requires group health plans that provide medical both medical/surgical and mental health/substance use disorder benefits to document comparative analyses of the design and application of NQTLs. They must also make the comparative analyses available on request to plan participants and DOL, and to HHS or applicable state authorities.

EUCLID FIDUCIARY

DOL sued UnitedHealth over mental health coverage – settled for >$13m

- DOL settled with UnitedHealth for over $13 million ($2.5m to DOL; $1.1m to resolve state claims; and $10m to resolve private class action claims) to resolved federal, state and private litigation alleging violations of federal and state mental health parity laws.
- In August 2021, DOL sued United Behavioral Health claiming breach of fiduciary duty and that they violated the Mental Health Parity and Addiction Health Equity Act of 2008, which prohibits health plans covered by ERISA from imposing more restrictive limitations on mental health and substance use disorder benefits than on medical/surgical benefits.

DOL Health Plan Investigations - beyond Mental Health Parity

- Compliance with the Affordable Care Act
- Emergency room services
  - $14.5M settlement in *Perez v. Magnacare Administrative Services, LLC, et al.*
- Enforcement of health plan fees

Private Participant Mental Health Parity Claims

- Wilderness Therapy litigation
- Autism Coverage litigation
- Other Mental Health Parity claims: eating disorder coverage; anger management coverage
- Out-of-network reimbursement claims

United Behavioral found liable for not meeting Mental Health Parity requirements

- A March 5, 2021 decision in the Northern District of California in ***Jane Doe v. United Behavioral Health*** found the plan administrator liable for not meeting the law instead of the company sponsoring the plan.
- The court ruled that United Behavioral Health, which manages behavioral health services for insurer UnitedHealthcare, violated the mental health parity law by denying coverage for applied behavior analysis therapy for autism for a participant in a plan sponsored by technology company Wipro Ltd. (and was not a party to the suit).
- ***See also, Wit, et al. v. United Behavioral Health***, No. 14-CV-02345-JCS (N.D. Cal. Nov. 3, 2020): following a 10-day bench trial, the court found for plaintiffs, including that (1) UBH improperly denied benefits for treatment of mental health and substance use disorders because their guidelines did not comply with law; (2) deliberately used internal guidelines inconsistent with plan terms; and (3) lied to state regulators.

KEY TREND: COBRA NOTICE CLAIMS

- **The Consolidated Omnibus Budget Reconciliation Act (COBRA)** requires companies with 20 or more employees to allow workers and their covered family members to continue their employer-sponsored health coverage for a brief period after they have been terminated or experience another qualifying event.
- The statute requires employers to notify workers of their COBRA rights and dictates what information must be included in the notices. Violations are subject to penalties of up to $110 per day for each affected individual. In addition, the IRS can impose an excise tax in the amount of $100 per qualified beneficiary ($200 per family) for each day of COBRA noncompliance, which includes notice deficiencies.
- The **Wenzel Fenton Cabassa PA** law firm and others have filed dozens of proposed class actions alleging COBRA notice failures in the last three years, including against Amazon, General Motors, and Target, that deter individuals from signing up.
- All of these lawsuits are brought by a former employee who terminated employment from their employer, did not elect COBRA coverage, and later incurred medical expenses. The complaints allege that the former employees did not elect COBRA coverage because of alleged deficiencies in the COBRA election notices that they received.
- Plaintiffs allege that the offending COBRA notices do not meet federal standards because they include "ominous" warnings about potential civil or criminal penalties that improperly discourage people from signing up for coverage. ***See, Blessinger v. Wells Fargo & Co.*, M.D. Fla No. 8:22-cv-01029 (stipulation after motion to dismiss hearing on November 7, 2022)**

COBRA Notice decisions and settlements

- Several cases have been settled, including against **Home Depot USA Inc.** ($815,000); **Fiat Chrysler** ($600,000); **Costco** ($750,000); **WCA Management Co.** ($210,000); **Enhanced Recovery Co.** ($140,000); and **Goodman Group, Inc.** ($112,240); **Adventist Health** (unknown settlement); **McDonalds** (unknown settlement).
- ***Earl v. Jewel Food Stores, Inc. MTD denied October 2022*** – court finds employer's evidence of COBRA notice mailing procedures insufficient. MTD also denied October 2022 in Thompson v. Ryder Sys., Inc. (another Wenzel case in Florida).
- ***Howard v. Ivy Creek of Tallapoosa, LLC (November 2022 decision)*** – despite TPA's contractual obligation, employer may still be liable for COBRA notice violation.
- **Buford v. General Motors, LLC (February 2022 decision)** – employers conduct violated COBRA election notice requirements and warranted the imposition of statutory penalties for the failure to timely provide a COBRA election notice (employer failed to switch timely to retiree health coverage).

Other Health Claims

- **KEY TREND: Direct claims by providers under participant assignments**
  - Plans need to evaluate whether to impose anti-assignment clauses
- HHS HIPAA Audits
- Other Health Benefit Claims
- ACA Compliance
- Voluntary Compliance Program claims
- Disclosure of Protected Health Information

- **Improper Trust Expenses**
  - Potential wave of excessive fee cases in welfare plans: *See Acosta v. Chimes District of Columbia, Inc., et al.* (DOL filed suit under ERISA against plan sponsor alleging that the plans paid millions of dollars of excessive fees and engaged in prohibited transactions); *Shore v. Charlotte-Mecklenburg Hospital Authority*; *Chavez v. Plan Benefit Services, Inc.*
- CMS Penalties for failing to comply with reporting obligations under Medicare Secondary Payer (MSP) laws

Direct Provider Claims

- EXAMPLE: *W.A. Griffin, MD v. Coca-Cola Refreshments USA, Inc. (11th Cir. 2021):* Atlanta-based dermatologist has filed more than two dozen lawsuits seeking reimbursement from health plans against Coca-Cola and Delta Airlines.
- Eleventh Circuit: doctor's lawsuits seeking reimbursement from health plans sponsored by both companies fail because both plans included "unambiguous and thus enforceable" anti-assignment clauses preventing plan participants from assigning to their doctors their right to sue for plan benefits.
- **EUCLID BEST-PRACTICE TIP:** consider including anti-assignment clauses in your health benefit plans.

Class Action challenges terminations to retiree health care

H&W Plans

- *Simpkins v. Alcoa USA Corp.*, No. 3:20-cv-278 (S.D. Indiana) – participants and unions sued Alcoa for terminating the retiree healthcare benefits of 3,000 retired hourly workers.
- Similar case alleging that Alcoa illegally terminated their life insurance benefits granted class certification in September 2020 decision ***(see Butch v. Alcoa USA Corp, no 3:19-cv-00258 (S.D. Indiana).***

EUCLID FIDUCIARY

UnitedHealth sued over cross-plan offsetting method of recouping benefits

***Smith v. UnitedHealth Grp, Inc.*, 0:22-cv-01658 complaint filed 6/24/2022 D. Minn.:** proposed class of health plan participants allege UnitedHealth's method of recouping overpaid benefits through a lucrative practice called cross-plan offsetting violates federal law.

Plaintiffs alleged United improperly uses cross-plan offsetting to improperly transfer money from the self-funded health plans it administers – those in which the employer sponsoring the plan pays for medical expenses from its own assets – to the fully-insured plans for which United is on the hook for paying medical bills.

Health Plan Equitable Relief Claims

- *Gimeno v. NCHMD Inc. (Eleventh Circuit June 28, 2022):* in an issue of first impression, the Eleventh Circuit held that an ERISA plan beneficiary can bring a claim against a plan administrator or its agents to recover life insurance benefits lost due to a breach of fiduciary duty.
- An employee elected supplemental life insurance coverage during open enrollment. In order to qualify for the supplemental coverage, evidence of insurability had to be sent to the human resources department. However, the HR department failed to send the employee the proper forms or notify him that they were missing or necessary. Nonetheless, the employer deducted premiums for the supplemental coverage for three years and informed the employee that she had a total of $500,00 in life insurance coverage.
- After the employed died, his spouse filed a claim with the plan's insurance company. The insurance company denied the claim because the proper forms had never been completed. As a result, the spouse brought suit against the employer and plan administrator under ERISA section 502(a)(1)(B).

EUCLID FIDUCIARY

Wellness Bias

- *Kwesell v. Yale Univ., No. 3:19-cv-01098 (D. Conn.)* – filed by AARP Legal Foundation – workers claim that a rule requiring them to participate in a wellness program or pay a fee violated federal disability and genetic information laws.
- The proposed class action filed in July 2019 alleges that Yale's health and education program violated federal statutes because it required employees and their spouses to either participate in its employee wellness program or pay a weekly $25 opt-out fee.
- Yale reached a $1.3 million settlement with workers in March 2022; and Yale will stop collecting a $25 fee from workers who opted out of its Health Expectations Program.

Multiemployer Plan Allowed Self-Help Remedies to Recoup Benefit Payments

H&W Plans

- *Mull v. Motion Picture Industry Health Plan,* No. 20-56315 (Ninth Circuit July 25, 2022): A multiemployer entertainment-industry health plan can stop paying benefits for a movie livestock wrangler and his family in order to claw back payments it says should have been reimbursed after a car accident.
- An ERISA benefit plan fiduciary can use the "self-help remedy" under Section 502(a)(3) of ERISA of stopping future payments when it is otherwise blocked from seeking reimbursement from a participant or beneficiary in court – the remedy require no judicial enforcement and can be included in a plan's terms without violating the text of ERISA.
- Plaintiff had argued his daughter no longer possessed the $100,000 settlement she received following her car accident.

EUCLID FIDUCIARY

Challenges to Nicotine Penalty

- **Lipari-Williams v. Penn Nat'l Gaming, Inc.** , W.D. Mo., No. 5:20-cv-06067: Penn National settles casino workers' suit over tobacco penalty. Workers had challenged the company's decision to charge them an extra $50 per month in health insurance premiums for using tobacco products.
- ***Platt v. Sodexo, S.A.,*** C.D. Cal., No. 8:22-cv-02211, complaint 12/8/22: Sodexo workers file class action suit over health plan nicotine penalty. A provision in the Sodexo SA's health plan requires employees who use nicotine products to pay an extra $1,200 per year.


EXPERTS ONLY
Multiemployer Plans

Unique Fiduciary Claim Trends For Multiemployer Plans

- Higher frequency of DOL audits, particularly for high-asset plans.
- Sharp increase in withdrawal liability counterclaims, and challenges from contributing employers.
- Higher incident of infighting between management and labor trustees leading to litigation.
- Benefit overpayments are a challenge for many plans.
- Challenges to early retirement and health plan benefit changes or termination of benefits.
- Two pending excessive fee claims against ME plans, with plaintiff firms evaluating more cases.
- Imprudent investment claims remain the highest-severity risk if funding implications [See American Federation of Musicians $26.7m historic settlement] – but ARPA is a game-changer (see *New York State Teamsters Retirement Plan*)
- Cyber incidents are frequent risk.

Claim Trends for Multiemployer Plans

- **Regulatory Investigations**: Multiemployer Plans are three times more likely to be audited by the Department of Labor – large plans than single employer plans (plans with over 25,000 participants face a potential audit every five to six years)
- **Benefit Claims:** sharp increase in early retirement disability claims
  - see 2018 California Field Ironworkers Pension Trust $15.4M settlement in lawsuit by workers seeking increased pension benefits for the time they worked late in their careers
- **Plan Expenses**
  - Training funds (long-time DOL focus)
  - Sharing of office and staff members with union
  - Health plan expenses [example: reimbursement of employment-related drug tests]
- **Imprudent Investment Cases**
  - KEY ISSUE: will ARPA reduce the risk of imprudent investment lawsuits against underfunded plans? *Compare* 2020 $26.7M settlement of the American Federation of Musicians class action lawsuit v. stay of New York Teamsters case.
- **Management v. Labor Trustee Disputes**

Multiemployer Plans (cont.)

- **Reciprocal Agreements** – contributions for traveling employees
  - See IBEW Pacific Coast Pension Fund and UA 38 Plumbers & Pipefitters Benefit Funds
- **Withdrawal liability disputes with contributing employers**
  - See challenge to the Segal Blend method in the New York Times case and lawsuits related to smoothing methods and interest rates for withdrawal liability
- Benefit Overpayments
- Problems after plan mergers
- Disputes between labor and management trustees
- Section 301 of the Labor Management Relations Act claims relating to collective bargaining agreement

Multiemployer Key Claim Trend: Withdrawal Liability Disputes

At least two ways withdrawal liability leads to claims: (1) lawsuits against successor companies; and (2) challenges to actuarial assumptions in withdrawal liability assessments.

1) *Successor Liability: New York State Teamsters Conference Pension and Retirement Fund v. C&S Wholesale Grocers, Inc.*, No. 20-1185-cv (Jan. 27, 2022 decision 2nd Cir.): $58m withdrawal liability claim on behalf of a warehouse operated by a company from which C&S purchased assets.
   - *Second Circuit rejected a lawsuit by the NY State Teamsters fund, which had argued that the Second Circuit broke from other circuits and improperly required evidence of fraudulent conduct in weighing whether a transaction was done to "evade or avoid" pension withdrawal liability.*

2) *Actuarial Challenges: See United Mine Workers of America 1974 Pension Plan v. Energy West Mining Company (Second Circuit decision 2021)* (district court had rejected withdrawal liability calculation on the expectation that pension assets would return about 2.75% and assessing >$115 million to cover Energy West's share of liability, whereas the plan allegedly should have used the 7.5.% expected return it used for funding calculations.

EUCLID FIDUCIARY

Withdrawal Liability – Key Sixth Circuit Case

- ***KEY CASE: In* Sofco v. Erectors v. Trustees of the Ohio Operating Engineers Pension Fund*, (Jan. 29, 2021 6th Circuit) the court held that the plan could not use the "Segal Blend" (a weighted average of PBGC and funding rates).*** The Sixth Circuit said in its ruling that trustees of an Ohio operating engineers fund **couldn't rely on the blend to assess more than $800,000** in withdrawal liability against Sofco Erectors Inc., because ERISA requires that the interest rate used for those calculations be based on the "anticipated experience under the plan."
- Concern that the Sixth Circuit opened a wave of withdrawal liability exit lawsuits. BUT: PBGC has issued rules that validate discretion in selection of withdrawal liability interest rates that differ from rates used for plan funding assumptions.

A third type of withdrawal liability claim: when members change unions

- *Jofaz Transportation, Inc. v. Local 854 Pension Fund, No. 7:22-cv-03455 (filed 04/28/2022 S.D.N.Y.):* Employers file complaint to compel the "old" pension fund to transfer the pension to a new fund; and seek to compel the old fund to recalculate their withdrawal liability to account for the pension transfer, and reduce or eliminate their interim withdrawal liability payments accordingly.
- Dispute arose from the decision of a group of unionized bus drivers and student escorts to leave the Teamsters union and join a new, independent union.

KEY MULTIEMPLOYER PLAN TREND: Litigation involving infighting between management and union trustees

- *Massaro v. Palladino, No. 20-1807 (2d Cir. Nov. 30, 2021)*: "acrimonious dispute" between union and employer trustees of two Laborers employee benefit plans – question of whether union trustees breached their fiduciary duties under ERISA section 401(a)(1)(D) by passing invalid amendments to the trust agreements requiring unanimous vote to elect trustees.
- Second Circuit ruled that the union trustees were not acting in a fiduciary capacity when they passed the amendments because procedurally invalid amendments was not a fiduciary function within the meaning of ERISA.
- *See Cudjoe v. Building Industry Electrical Contractors Association (and several multiemployer funds), No. 1:21:cv-05084 (filed 09/13/2021 E.D.N.Y.):* participant filed class action alleging that the various fund trustees breached their fiduciary duties by failing to ensure that the trust board has "equal union and management representation" and by engaging in a self-interested transaction.

Challenges to Early Retirement Denials in Multiemployer Plans

- ***Aracich v. The Board of Trustees of the Employee Benefit Funds of Heat & Frost Insulators Local 12, No. 21-CV-9622 (S.D.N.Y decision Sept. 19, 2022):*** union official sued multiemployer plan for failure to provide early retirement benefits.
- Court granted motion to dismiss on the grounds that the union official was employment as the local Building & Construction Trades Council president.
- ***See also, Metzgar v. U.A. Plumbers & Steamfitters Local No. 22 Pension Fund*, No. 20-3791 (2d Cir. Mar. 2, 2022):** Second Circuit denies early retirement benefits in case in which pension plan's retroactively required plan participants to chose between either ceasing their post-retirement employment or foregoing early retirement benefits.

EUCLID FIDUCIARY

Merger Claims: SAG-AFTRA Health Fund class action

- ***Asner v. The SAG-AFTRA Health Fund, No. 2:cv-10914 (C.D. Cal. August 30, 2021 decision denying motion to dismiss):*** *putative class action asserting breach of fiduciary duty in changing retiree health care benefits after the merger of SAG Health Plan with the AFTRA Health Plan in 2017.*
- Plaintiff retirees allege their health plan was financially crippled by taking on the AFTRA health system.
- Court rejected plan's motion to dismiss on grounds that the decision to merge and change benefits were settlor and not fiduciary acts. The court recognized that decisions about plan form and structure were not fiduciary acts, but determined on the pleadings that the gravamen of plaintiffs' claims was not the decision to amend the plan, but the alleged inadequate pre-merger evaluation process, and the allegedly materially misleading communications that pre-date and post-date the merger of the healthcare plans .

Multiemployer Covid Claims

- *See Fontainebleau Fla. Hotel, LLC v. s. Fla. Hotel & Culinary Emps. Welfare Fund*, S.D. Fla. No. 1:20-cv-22667 (complaint filed 06-26-2020).
- Miami's Fontainebleau Hotel filed a lawsuit accusing a health fund covering its unionized workforce of improperly demanding $5.5 million of dollars in contributions on behalf of workers laid off in the wake of the Covid-19 crisis.
- **Endries v. Board of Directors of the Motion Picture Industry Health Plan,** No. 2:20-cv-06347 (C.D. Calif. Filed 07/16/2020): members failed to meet hour minimums to qualify for plan coverage due to COVID.

Multiemployer Excess Fee Claims

- Multiemployer plans have largely avoided the wave of 400+ excessive fee lawsuits, with only three plans sued.
- But the excessive fee case against the Motion Picture Defined Contribution Plan has survived a motion to dismiss.
- And Capozzi Adler filed an October 13, 2022 excessive fee lawsuit against the $4.9B/29,976 participant Elevators Union plan in *McLachlan v. International Union of Elevator Constructors, No. 2:22-cv-04115 (E.D. Pa.).*

Imprudent Investment Claims – Conflict of Interest with Plan Trustee

Multiemployer Plans

- *Trs. Of N.Y Nurses Ass'n Pension v. White Oak Glob. Advisors LLC*, 2022 BL 90812, No. 1:21-cv-08330 S.D.N.Y. (decision 3/17/2022).
- The dispute stems from plan trustees' decision to hire White Oak to manage and invest about $80 million in plan assets pursuant to a two-year contract that ran from late 2013 to late 2015. Near the end of the contract's term, the plan's former chief investment officer began undisclosed negotiations with White Oak that culminated in him being named the company's vice chairman.
- Court ruled that White Oak to return more than $96 million to pension fund based on mismanagement of plan assets, including return of fees it charged the plan, along with paying interest and attorneys' fees.

EUCLID FIDUCIARY

Imprudent Investment Claim – Allianz Structured Alpha losses

- ***Johnson v. Carpenters of Western Washington Board of Trustees*, No. 2:22-cv-01079 (case filed 08/02/2022):** allege breach of fiduciary duty for throwing "caution to the wind" by investing 17% of plan assets in two volatility hedge funds sponsored by Allianz, resulting in losses of more than $250 million – one of only two defined contribution plans to invest in either Allianz Structured Alpha hedge fund.

EUCLID FIDUCIARY

Challenge to MPRA cuts

- *William King v. United States, No. 18-1115 (decision April 8, 2022 Court of Federal Claims)* – challenge to MPRA benefit cuts as unconstitutional taking.
- Separate lawsuit against NY State Teamsters benefit plan directly (alleging breach of fiduciary duty in causing plan underfunding and benefit cuts) was stayed pending ARPA funding to the plan.

Denial of benefits for post-retirement work

- *Helgemo v. Operating Engineers Local 324 Pension Fund,* No. 21-2951 (6th Cir. Mar. 7, 2022): plan participant sued the multiemployer pension fund for stopping his monthly pension benefits after it surfaced that he was engaged in post-retirement work prohibited by the pension plan.
- **Sixth Circuit upholds pension funds suspension of benefits due to post-retirement work.**

Third-Party Cyber lawsuit

- *Vandermark v. Mason Tenders District Counsel Welfare and Pension Funds, No. 1:22-cv-6849 (S.D.N.Y. complaint filed 08/12/2022):* On July 7, 2002, the Mason Tenders benefit funds posted a notice of data incident that "unauthorized access to certain of the Funds' computer systems occurred between December 2, 2021 and April 18, 2021.
- Class action filed for failure to implement adequate cyber-security procedures and protocols necessary to protect participant private and confidential information in the data breach.


EXPERTS ONLY
Governmental Plans

Governmental Plan Claim Trends

- Benefit/Participant Claims
  - Miscalculation of retirement benefits
  - Pension spiking
  - Pro se whistleblowers
- Challenges to Plan Amendments/Benefit Changes – **Changes to benefits or how compensation is calculated is the number one indicator of claims against governmental plans.** Most are styled as class actions (or writ of mandates in states like California).
- Objections to contribution assessments
  - See City of Chicago case filed August 29, 2019
  - ICERS
  - DeKalb County – class action alleges $250M in lost contributions when retirement plan ended for school teachers.
- Inadequate Funding Claims
  - Kentucky Retirement System
  - Singing River Plan in Tennessee

EUCLID FIDUCIARY

Governmental Plan Claim Trends (cont.)

- DROP/Supplemental Benefit Plan challenges
  - Dallas Police & Fire (guaranteed interest rate)
  - Cal Fire – five years of airtime
  - City of Hollywood Firefighters
  - City of Miami Beach
- Long-Term Disability Claims – see CalPERS Long-term Care Plan challenge *Wedding v. CalPERS, No. BC517444 (Superior Ct. Calif)*
- Imprudent Investment claims
- Benefit Overpayment claims
- Voluntary Compliance claims
- IRS penalty claims
- Excessive fee exposure for defined contribution plans

Key Claim Trend: Contribution Challenges

Governmental Plans

- *Alameda Health System v. Alameda County Employees' Retirement Association*, No. CPF-19-516795 (summary judgment granted May 3, 2022): hospital system filed lawsuit claiming that it was paying an unfair percentage of unfunded liability and high contribution rates to ACERA because of the boards chosen allocation method using percentage of payroll, arguing that AHS's had higher growth relative to other employers in the system.

EUCLID FIDUCIARY

Governmental challenge to retiree health care and retirement benefit cuts

Governmental Plans

- **HEALTH CARE BENEFIT CUT CHALLENGES:** ***Donohue v. Cuomo, No. 6 (Court of Appeals of New York decision 02/10/2022):*** rejecting Yardman inference of vesting of retiree health care in absence of explicit benefit.
- Rejects challenge by the Civil Service Employees Association to the cost-cutting reductions in retired state employees' health insurance made in the wake of the 2008 financial crisis. The union claimed these cuts violate multiple collective bargaining agreements that give retired employees a vested right to coverage at the benefit levels previously in effect.
- **RETIREMENT BENEFIT CUT CHALLENGES: Cherry, Jr. v. Mayor and City Council of Baltimore City, *No. 36 Court of Appeals of Maryland decision August 16, 2021:*** Court of Appeals held that the City breaches its contract with members of the Fire and Police Employees' Retirement System who were retired as of June 30, 20210 by retrospectively divesting benefits belonging to those plan members by replacing a market-driven post-retirement cost-of-living adjustment feature with a tiered cost-of-living adjustment. But City did not breach its contract with plan members who were working as of June 30, 2010 and not yet eligible to retire as of that date (the City made reasonable and necessary prospective changes to the Plan).

EUCLID FIDUCIARY

Challenge to Investment Consolidation of Illinois police and firefighter assets

- ***Arlington Heights PPF v. Pritzker*, No. 21-CH-000055 (Circuit Ct. 16th Judicial Circuit):** complaint filed February 23, 2021 challenging Illinois law requiring Illinois police and fire benefit plans to transfer their investment authority, securities, funds, assets and monies to the Police Officers' Pension Investment Fund and the Firefighters' Pension Investment Fund.

Lawsuit alleging governmental plan failed to match DC plan contributions

- *Schaber v. Ramsey County and Minnesota State Retirement System*, MN County of Ramsey filed March 17, 2021: lawsuit alleges that Ramsey County failed to provide an employer-side investment match to Ramsey County employees participating in the Minnesota State Retirement System.
- Instead diverted monies to employees' paychecks as regular taxable compensation, denying employees of retirement investment revenue.

Imprudent Investments against governmental plans

Governmental Plans

- *Overstreet v. Mayberry, as Member and Beneficiary of Trust Funds on behalf of the Kentucky Retirement Systems*, No. 2019-SC-000041-TG (decision July 9, 2020): Kentucky Supreme Court dismissed lawsuit challenging the state public pension system's use of "risky" hedge fund investments.
- Participant class alleged that between 2011 and 2016, KRS plan fiduciaries knew that the plan faced an appreciable risk of running out of plan assets, but concealed the true state of affairs from KRS members and the public.
- Instead, the plaintiffs alleges that KRS trustees and officers "recklessly gambled" their way out of the actuarial shortfall by investing $1.5 billion of KRS assets in the high-risk "fund of hedge funds" products that ultimately lost more than $100 million by 2018, contributing to a now $25 billion funding shortfall in the KRS general pool of assets.

Whistleblower Claim

- February 2022: The general counsel of the $11.4 billion District of Columbia Retirement Board filed a lawsuit alleging she was retaliated against for exposing the pension fund's "gross understatement of investment management fees" and for complying with federal subpoenas.
- Alleges she was placed on administrative leave in October 2021 with the intention of firing her for reporting deficiencies, including the fund's failure to report complete and accurate information in its financial reports, its understating management fees, and failure to monitor investment management agreements; and human resources failures that have resulted in a "toxic culture of fear and retaliation with the agency."

Excess fee lawsuit against Governmental Plan

- ***Montoya v. New York State United Teachers*,** 754 F. Supp. 2d 466 (E.D.N.Y. 2010): challenge the "extremely high cost investments that carry greater risk than comparable lower cost investments."
- Challenge to tax deferred annuity programs offered by Aetna Life Insurance and Annuity Company – the Opportunity Plus and Opportunity Independence programs.
- Factual crux of plaintiffs' complaint is based upon an exclusive endorsement relationship between NYSUT and ING.

Employee Stock Ownership (ESOP) Plans

KEY TREND: Proper Valuation of the plan remains subject to regulatory scrutiny and class action challenges

Employee Stock Ownership Plans

- DOL Enforcement Priority
  - Focus on valuation – whether at fair market value
  - Conflicts of interest
  - DOL Regulation by Litigation: See September 22, 2022 letter from the ESOP Association [signed by Lars Golumbic of Groom Law Group] to EBSA asking DOL is issue rule and comment proceedings under rule 408(e)'s adequate consideration exemption.
- Plaintiff firms also target ESOPs – well over 20 cases in the last three years [over 40% of all ESOPs are sued by plaintiff firms alleging that the company was sold to insiders for an improperly high valuation]
- ESOP Valuation issues *[Plutzer v. BTC* "The financial projections were unreasonably optimistic"]:
  - Projections
  - Control
  - Due diligence
  - Example: ***Brundle v. Wilmington Trust***, 919 F.3d 763 (4th Cir. 2019) – holding that trustee breached duty of prudence because it failed to properly scrutinize an investment bank's valuation. Four failures: (1) trustee's failure to investigate the omission of its consultant's report of another, much lower, valuation of company stock issued months prior; (2) failure to adequately probe the reliability of financial projections prepared by company management and used by consultant; (3) ESOP did not have control over company due to unique arrangement, so "control premium" was too high, almost illusory; and (4) trustee's failure to probe why consultant consistently rounded the valuation of company stock upwards.

Over 20 lawsuits in the last three years

- The most consequential decision in private company ESOP litigation: ***Allen v. GreatBanc***, 835 F.3d 670 (7th Cir. 2016)
- The U.S. Court of Appeals for the Seventh Circuit rejected the applicability of *Fifth Third Bancorp v. Dudenhoeffer*'s "special circumstances" pleading requirement to private stock.
- The Court found the lack of outside funding in an employee stock ownership plan (ESOP) transaction, plus a stock drop following the transaction, sufficient to support an inference that the trustee breached its fiduciary duty.
- To state a claim against a trustee for engaging in a Section 406 prohibited transaction, the Court held that a plaintiff does not have to plead facts negating the Section 408 exemptions.

Recent ESOP decisions

- *Plutzer v. Bankers Trust*, the Second Circuit affirmed dismissal by the S.D.N.Y> *de novo* on standing grounds: a plaintiff must allege concrete, particularized and actual injury in fact to establish subject matter jurisdiction.
- The plaintiff had alleged that the valuation post transaction was lower than the price paid for the stock; further alleged an inference that the ESOP overpaid because the company id not obtain control post-transaction, but failed to allege that the ESOP actually paid a control premium; finally, plaintiff alleged a generic list of potential valuation errors, but failed to specify what errors the company actually committed.

Key Threshold Issue is Whether Plan Can Require Arbitration of Individual Claims

- ***Lloyd v. Argent Tr. Co.***, No. 1:22-cv-04129 (S.D.N.Y. decision 12/6/2022): in case involving claims by workers of WBBQ Holdings Inc. that the ESOP overpaid for stock in their employer, court held that arbitration clause impermissibly limits statutory rights.
- Key case on arbitration of ESOP claims: ***Smith v. GreatBanc Trust Company (Triad Manufacturing ESOP Plan):*** Seventh Circuit upheld district court's decision denying the motion to compel arbitration.

EUCLID FIDUCIARY

Church Plans

KEY TREND: The church plan exemption continues to be challenged for church-affiliated health care entities notwithstanding the 2017 Supreme Court decision

Church Plans

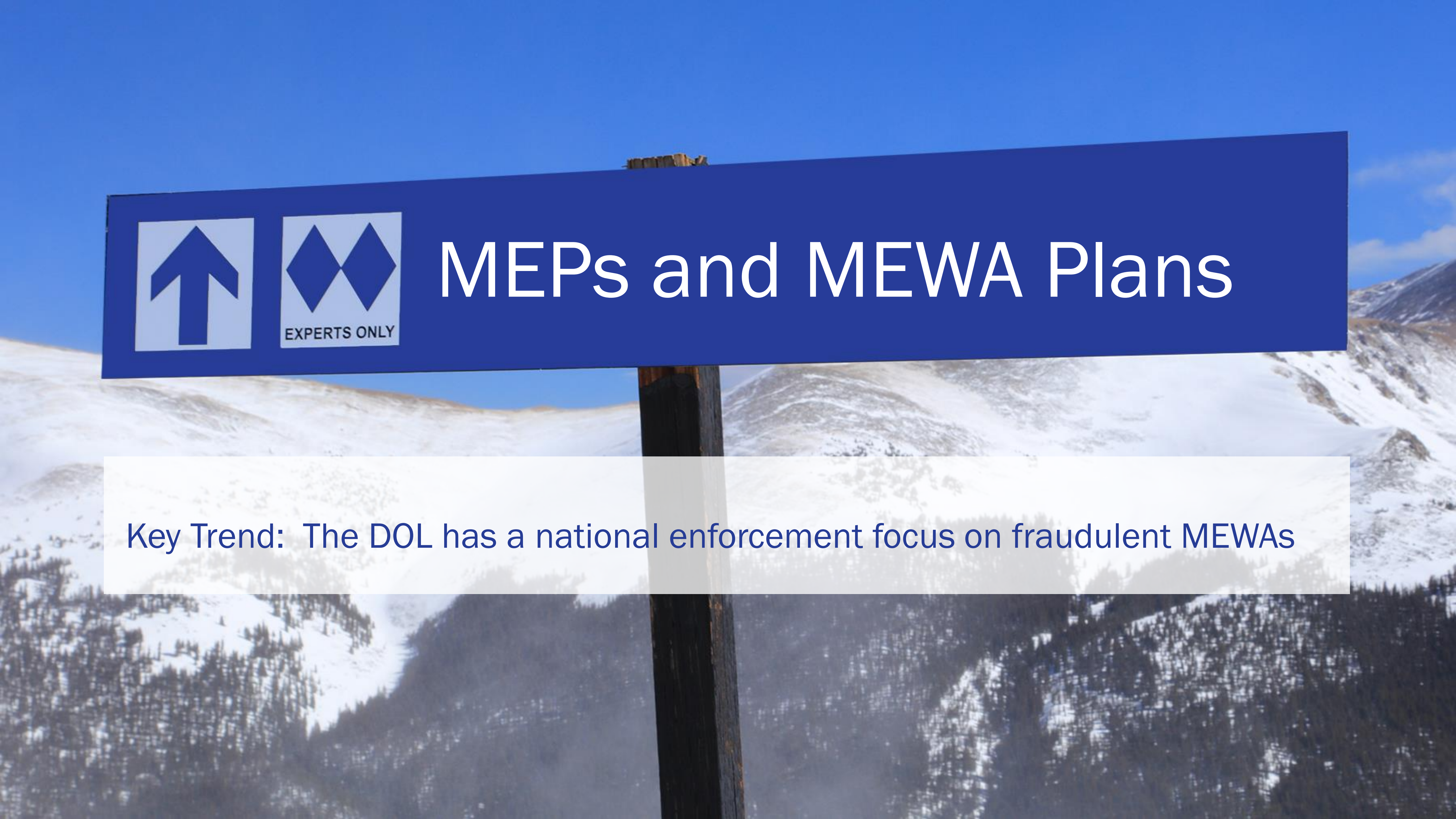
- The Supreme Court ruled in 2017 that pension plans do not have to be established by a church in order to be exempt from ERISA minimum funding rules – but that has not stopped church plan litigation, especially against church-affiliated health care entities.
- **Claim Example:** May 2019 lawsuit against the Archdiocese of Newark in New Jersey by former employees of St. James Hospital over at least $2.7 million in unpaid pension benefits, claiming violations of state law, including breach of contract and breach of fiduciary duty.
- **Claim Example:** The receiver for the insolvent St. Joseph Health Services of Rhode Island Retirement Plan filed several state and federal lawsuits against the plan sponsor and the Diocese of Providence, and to have the Pension Benefit Guaranty Corp. assume responsibility for it. A proposed settlement in the court cases calls for an immediate lump-sum payment of at least $11.15 million and an admission that the plaintiffs' damages are at least $125 million, including unfunded liability.

$50 million+ settlement in Dignity Health Church Plan Lawsuit

- Dignity Health was accused of using the church plan exemption to evade ERISA funding and reporting requirements for its defined benefit plan.
- Settlement was approved after three attempts in May 2022 by Judge Tigar of the District Court for the Northern District of California.
- Dignity Health will contribute $50 million to the plan for the 2020 plan year and will contribute either another $50 million or the amount of the minimum contribution recommendation calculated by the plan's actuaries for the 2021 plan year, if it is greater than $50 million; and will make contributions to the plan for calendar years 2022, 2023 and 2025 in the amount recommended by plan actuaries .

NY AG sues to recover lost retirement benefits for Catholic hospital workers

- *People of the State of New York v. Roman Catholic Diocese of Albany, Supreme Court of the State of New York (filed May 24, 2022)*: lawsuit alleges that St. Clare's Corporation violated its fiduciary duties by removing the plan from protections under ERISA federal law to avoid plan funding obligations.
- after receiving ERISA exemption, the Diocese failed to make contributions in most years, causing the pension fund to be underfunded by $43 million.
- The Diocese hid the collapse of the pension plan from the federal government and former hospital workers who were vested in the plan and rejected all attempts to address the deficit.



MEPs and MEWA Plans

Key Trend: The DOL has a national enforcement focus on fraudulent MEWAs

Multiple Employer Retirement Plans (MEPs) and Multiemployer Employer Welfare Plans (MEWAs)

DOL Enforcement Priority: EBSA is continuing its long-standing efforts:

- To seek out and shut down abusive Multiple Employer Welfare Arrangements (MEWAs) – higher risk for self-insured plans
- To proactively identify known fraudulent MEWA operators to ensure they do not terminate one MEWA just to open another in a different state
- Key issue is expenses paid to the plan sponsor – such as trade associations – for marketing the plan
- ***See August 08, 2022:*** Illinois federal judge ruled that United Employee Benefit fund, a multiple employer benefit fund and its trustees must face a lawsuit from DOL alleging misappropriation of more than $2.8 million in assets from the fund that provides life insurance for at 62 employer-sponsored plans.

Sequoia Benefits MEWA Case on Appeal – do participants have standing to sue MEWA for excessive fees?

- ***Winsor v. Sequoia Benefits and Insurance Services LLC, et al.***, Case No. 3:21-cv-00227-JSC (Ninth Circuit): current and former participants in the RingCentral Plan, one of 180 employee welfare benefits plans that participants in the Tech Benefits Multiple Employer Welfare Arrangement (MEWA), allege that Sequoia, the MEWA administrator and trustee allegedly set its own compensation illegally by negotiating with the MEWA's insurers to collect a fixed percentage of the money the insurers receive from participating plans as a kickback or "commission."
- The district court had dismissed the case for lack of constitutional standing.
- ***See also, McCaffree Financial Corp. v. ADP, Inc.*, No. 20-5492 (D.N.J.):** court held that plan sponsor participant in the ADP TotalSource Retirement Savings Plan (a multiple employer plan) does not have constitutional or statutory standing to sue the plan's administrative committee over allegedly excessive fees.

EUCLID FIDUCIARY

Contact Us

- Daniel Aronowitz
  daronowitz@euclidfiduciary.com
- Jeffrey Koonankeil
  jkoonankeil@euclidfiduciary.com
- John O'Brien
  jobrien@euclidfiduciary.com
- euclidfiduciary.com
- The Fid Guru Blog:
  euclidspecialty.com/blog
- The Fiduciary Liability Insurance Handbook:
  fiduciaryliabilityhandbook.com
- Submissions:
  mail@euclidfiduciary.com
- Phone: 571.730.4810