ENCORE FIDUCIARY℠
Division of Specialty Program Group, LLC

2025 Excessive Fee Litigation Webinar

The Current State of Fiduciary Excess Fee & Imprudent Investment Litigation

January 28, 2025 | 12:00-1:00 EST

by Daniel Aronowitz, President, Encore Fiduciary

About our Speaker

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Daniel Aronowitz is the President of Encore (formerly Euclid) Fiduciary, a leading Fiduciary Liability insurance underwriting company for America's employee benefit plans. He has over thirty years of experience in the professional liability industry as a coverage lawyer and underwriter and is a widely recognized fiduciary liability expert and thought leader. He is the author of The **Fiduciary Liability Insurance Handbook**, **The Fid Guru Blog** and the fiduciary liability insurance chapter of the **Trustee Handbook** published by the International Foundation of Employee Benefit Plans. He is a graduate of The Ohio State University and Vanderbilt University School of Law and has achieved the RPLU+ designation from the Professional Liability Underwriting Society.

Encore Fiduciary's Value Proposition – Fiduciary Expertise

- **Encore (formerly Euclid) Fiduciary** is a premier fiduciary liability insurance underwriting company. We protect America's employee benefit plan sponsors based on our superior fiduciary expertise and experience. We are known as fiduciary liability thought leaders and advocates for America's plan sponsors. Starting in 2011, Encore Fiduciary has grown into the choice of many of America's most sophisticated and complex single-employer, multi-employer, and governmental employee benefit plans.

- Our growth has been fueled by our fiduciary value propositions for America's plan sponsors:
  1. Superior Fiduciary Expertise – we have innovated many of the coverages used in modern fiduciary policies, and Encore underwriters can answer complex questions and provide educational resources;
  2. Premier Fiduciary Claims Service – we proactively defend and favorably resolve complex fiduciary claims, helping leading ERISA lawyers defend plan sponsors, while ensuring that defense costs are reasonable;
  3. Industry-Leading Thought Leadership – Encore is known as a preeminent fiduciary thought leader through our **FID Guru Blog** (https://encorefiduciary.com/blog/) and other fiduciary education and risk management services. We identify and inform plan sponsors and fiduciary about the key fiduciary issues and trends.
  4. Unique Advocacy for Plan Fiduciaries – Beyond just thought leadership and publications, we advocate for America's Plan Sponsors by exposing unfair lawsuits and plaintiff law firm tactics. In addition to our amicus advocacy in the Supreme Court, the best example of Encore's unique plan sponsor advocacy is the Encore Recordkeeping Benchmark.

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Agenda

1. Excessive Fee Cases and Settlements – The Numbers
2. The Types of Recordkeeping, Investment Fees, and Imprudent Investment Claims and Key Issues
3. Court Decisions and Trials
4. Lessons for Plan Sponsors and Fiduciaries from the litigation – Preview of Encore Fiduciary's Advanced Fiduciary Training
5. State of the Fiduciary Insurance Market

What is an Excessive Fee Lawsuit?

Three primary excess fee and imprudent investment 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.

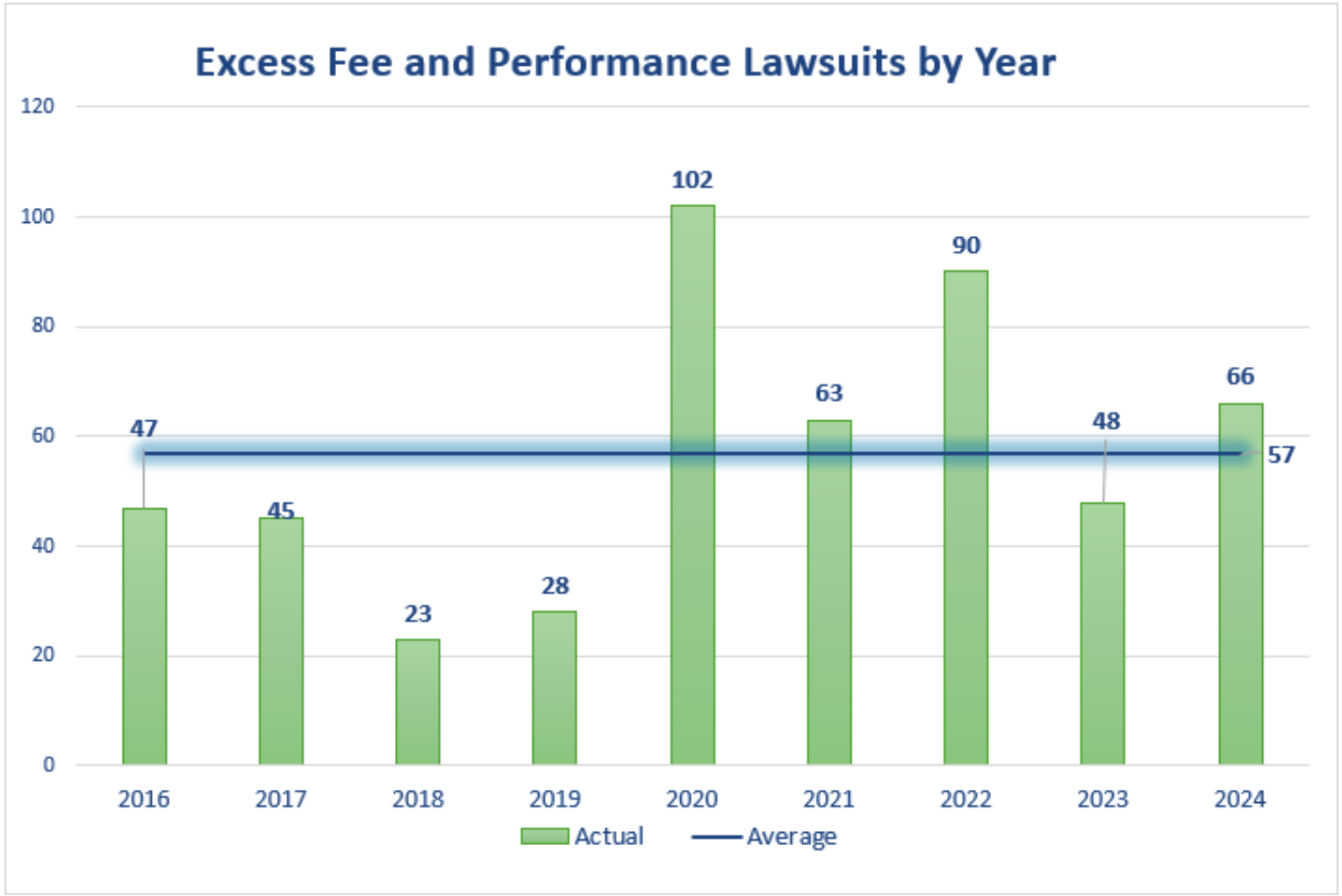
Excessive Fee Case Trends

- (1) **SPIKE IN CASE FILINGS IN SECOND HALF OF YEAR:** After a lower frequency for eighteen months, excessive fee case filings spiked in second half of 2024 – 35% increase for year; second half of the year resumed record pace of ERISA class action filings against DC and DB plans
  - Key trend is legacy firms pursuing novel forfeiture theory of liability
  - Less excess recordkeeping fee cases, but more imprudent investment claims
- (2) **FOUR TRIAL WINS FOR PLAN SPONSORS:** Four trial wins for plan sponsors in 2024 – six consecutive trials won by plan sponsors until American Airlines January 2025 adverse verdict.
- (3) **RECORD SETTLEMENTS, BUT REDUCED AVERAGE:** Record number of settlements, as backlog of cases resolved, but settlement average continues to decline as more cases settled immediately after MTD denied.
- (4) **JUDICIAL CRAPSHOOT REMAINS:** Court decisions on the pleading standard continue to be a crapshoot, with inconsistent decisions, even on the appellate level.
- (5) **MORE AGGRESSIVE CASE THEORIES:** The key trend is that plaintiffs have become more emboldened to challenge plan design – beyond fees or performance: the cases have transformed into challenges to change or create new benefits. The line between settlor and fiduciary functions is becoming blurred.

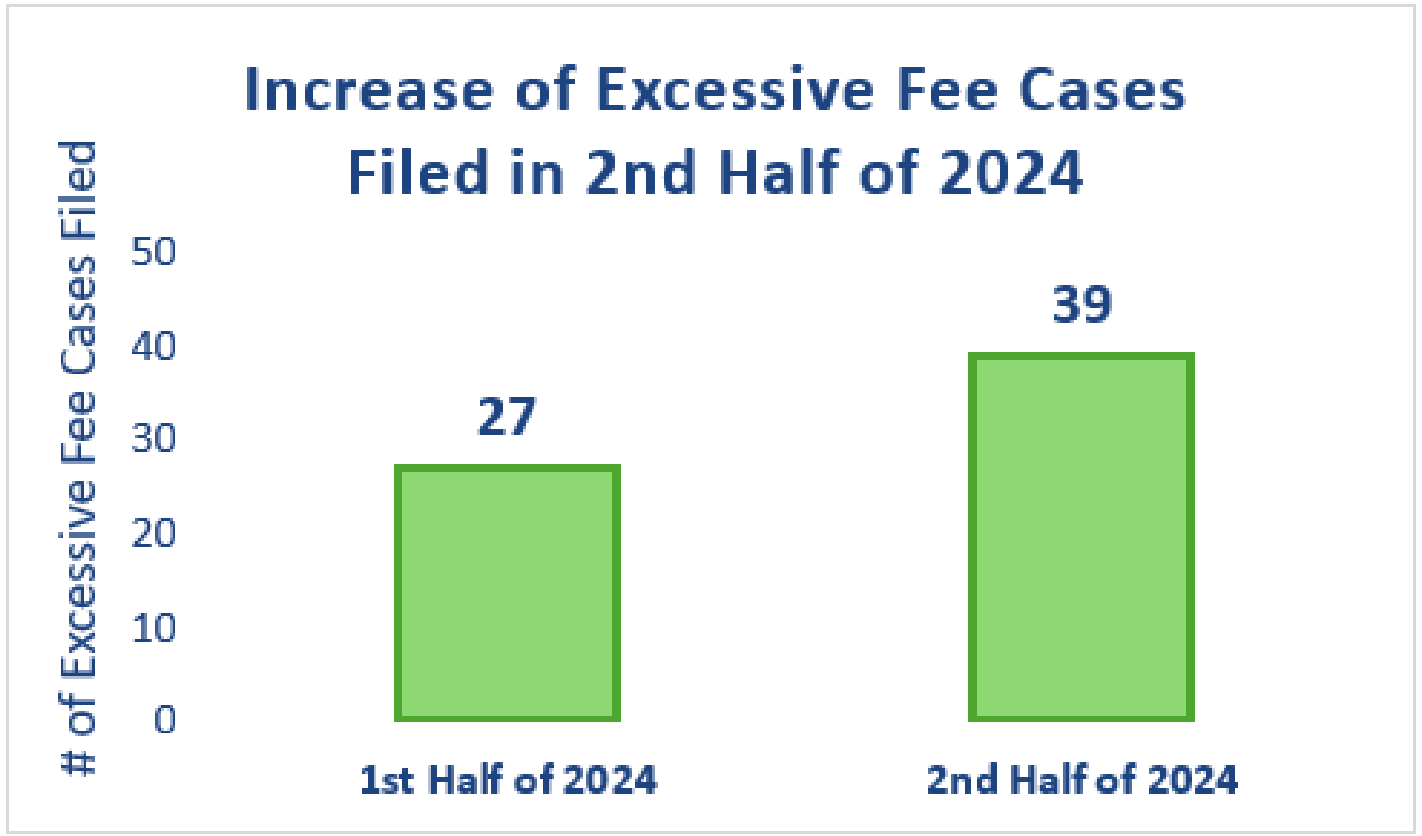
Excessive Fee Cases By the Numbers

Spike in Frequency in Second Half of 2024

66 Cases Files in 2024 – Case Filings Spiked as Legacy Firms Resolved Substantial Case Backlog

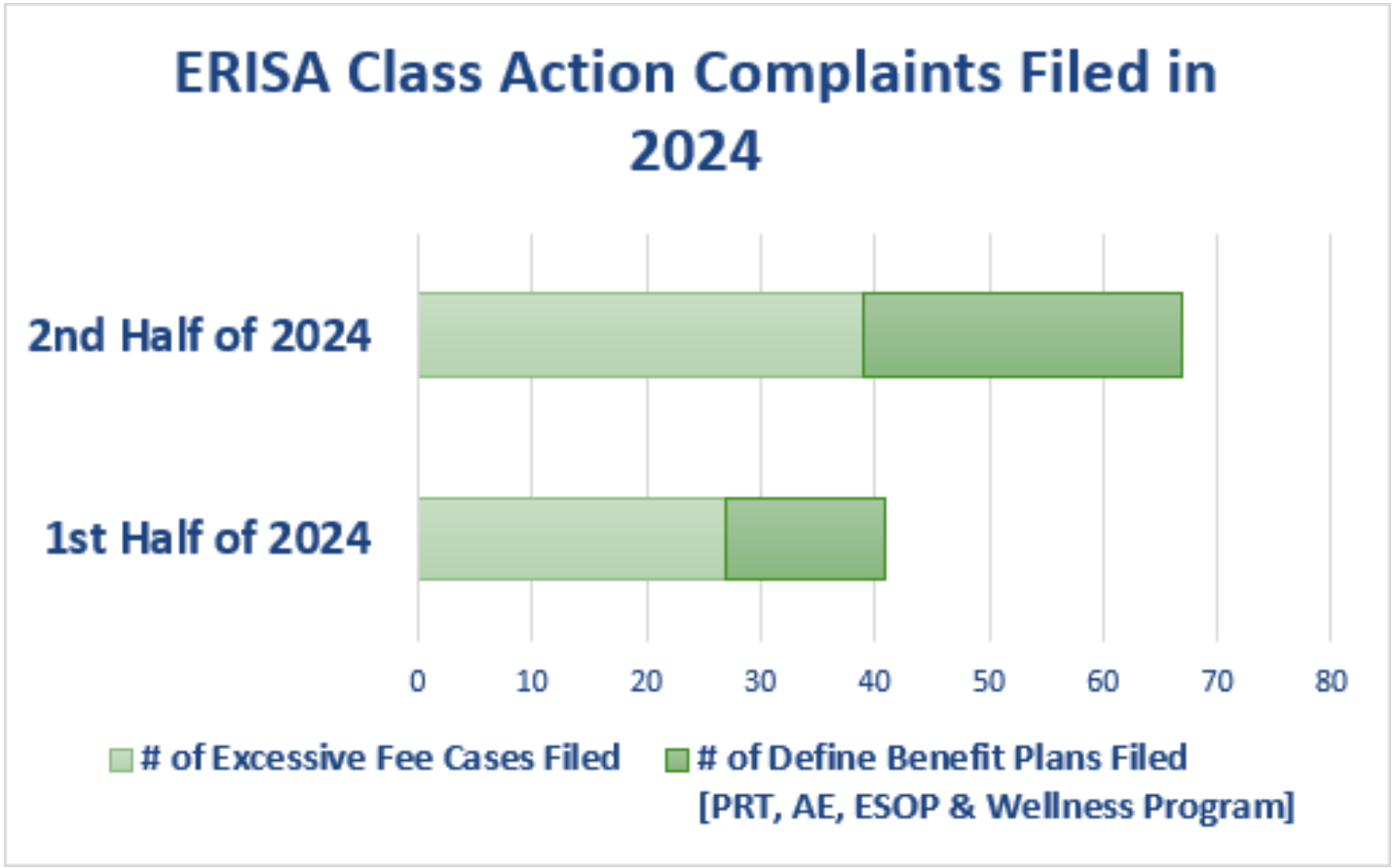


Spike in Frequency in Second Half of 2024



Spike in Class Action Filings in Second Half of 2024

Plaintiff law firms expanding fiduciary-breach claims to defined benefit plans



Leading Plaintiff Law Firms Filed More Cases in 2024

2022		2023		2024	
Plaintiff Law Firm	**Cases Filed**	**Plaintiff Law Firm**	**Cases Filed**	**Plaintiff Law Firm**	**Cases Filed**
Capozzi Adler	25	Capozzi Adler	6	Capozzi Adler	12
Miller Shah	12			Miller Shah	2
Walcheske & Luzi	14	Walcheske & Luzi	7	Walcheske & Luzi	11
Wenzel Fenton Cabassa	10	Wenzel Fenton Cabassa	2	Wenzel Fenton Cabassa	4
Nichols Kaster	6	Nichols Kaster	2		
Tower Legal	3	Tower Legal Group	2		
Schlichter Bogard & Denton	3			Schlichter Bogard	1
Fair Work	2			Fair Work	1
				Haffner Law	4
		Morgan & Morgan [in conjunction with Wenzel Fenton Cabassa]	7	Morgan & Morgan	1
		Hayes Pawlenko	5	Hayes Pawlenko	5
		Christina Humphrey Law	3		
		Pomerantz	1	Pomerantz	2
		Cohen Milstein	1	Cohen Milstein Sellers & Toll	2
		Foulston Siefkin	2	Foulston Siefkin & Figari + Davenport	1
		Edelson Lechtzin	1	Edelson Lechtzin	2
				Engstrom Lee	3
				Wade Kilpela Slade	3
Other Firms Total Cases	15	Other Firms Total Cases	9	Other Firms Total Cases	12

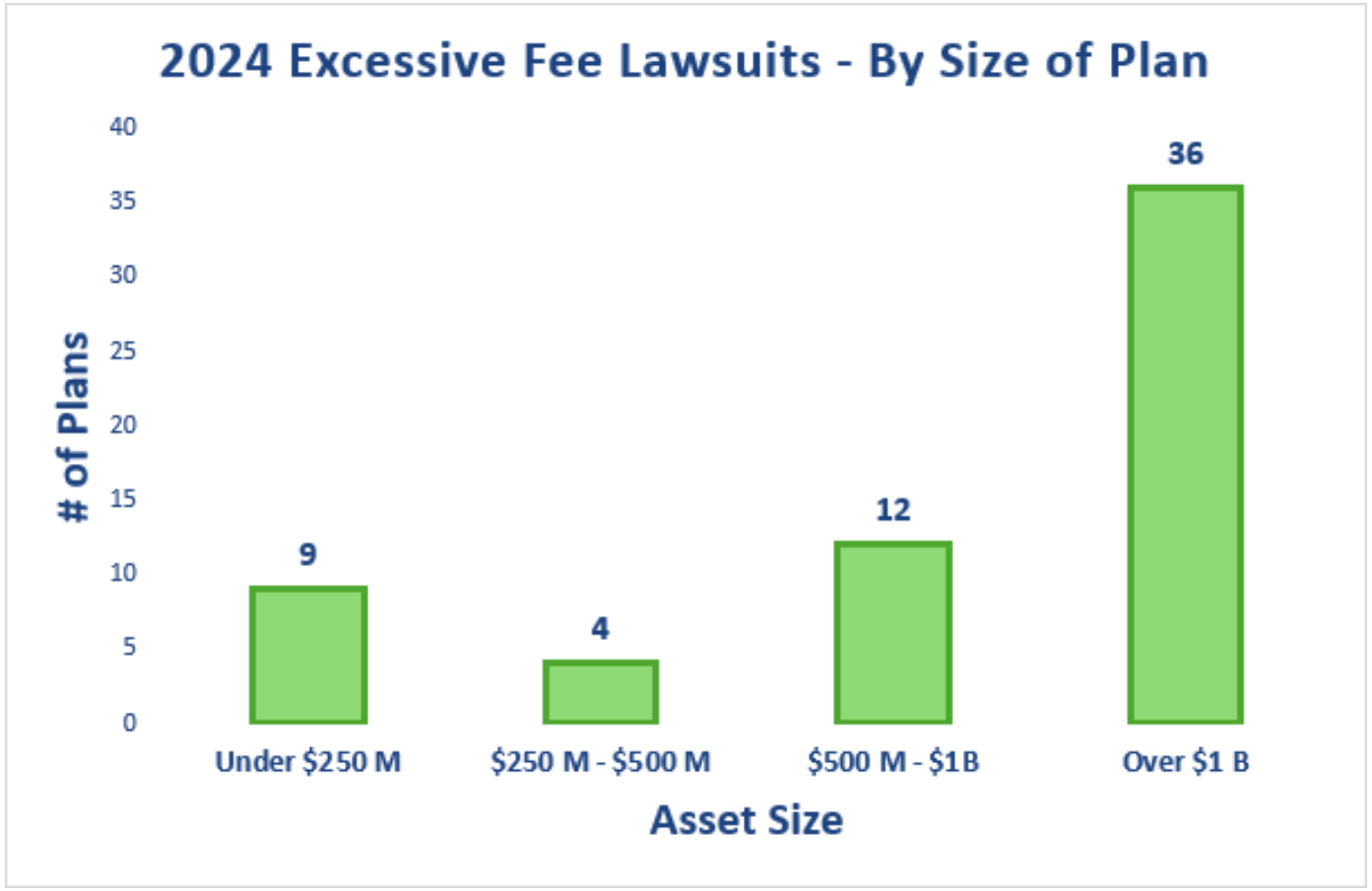
Pending Cases

The lowest number of pending cases in four years – freeing up legacy law firms to file new cases

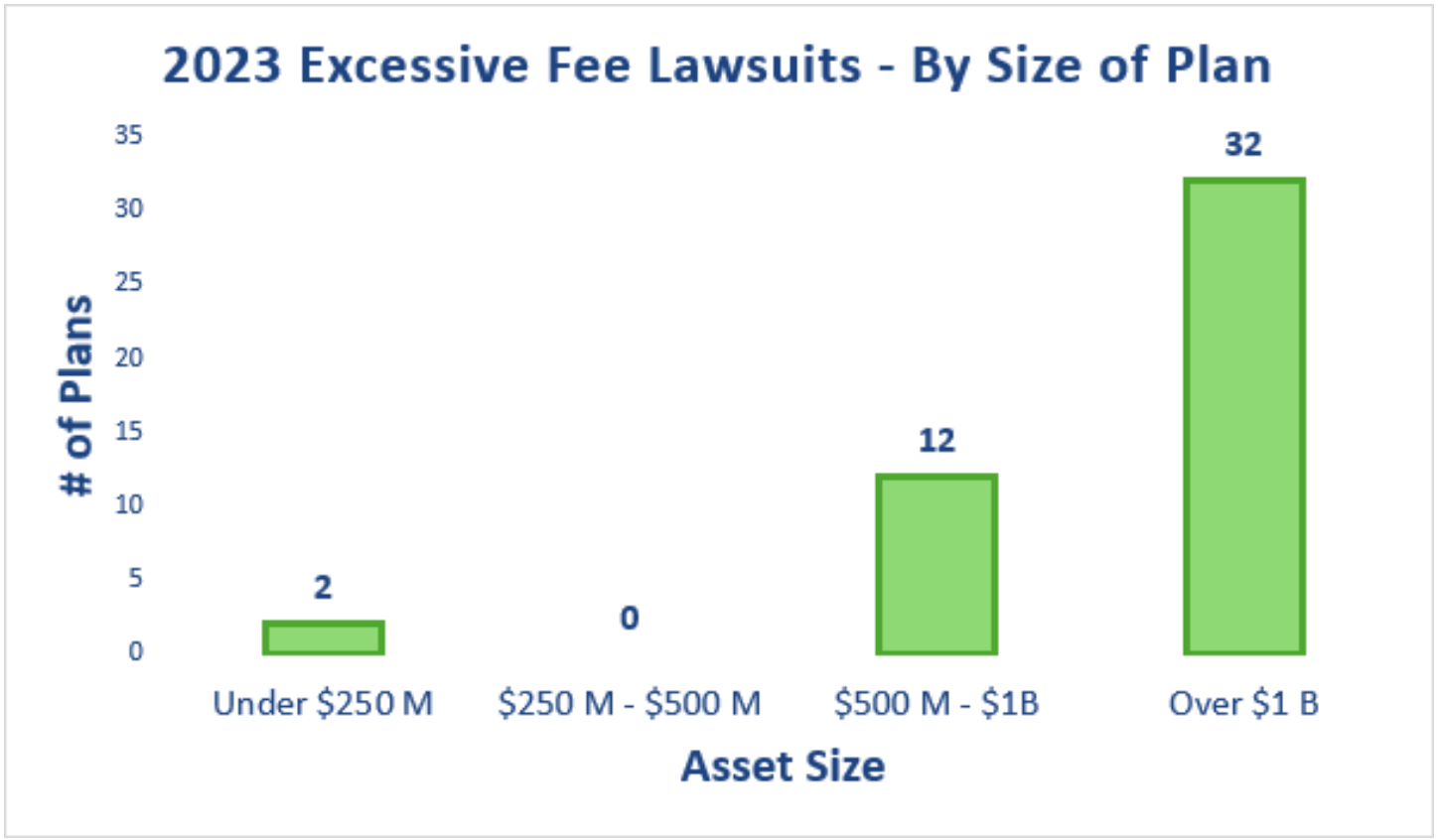
Year	Total Excessive Fees Cases Filed	Pending Cases
2016	47	2
2017	45	2
2018	23	1
2019	28	2
2020	102	12
2021	63	15
2022	90	30
2023	48	35
2024	66	60
Total:	**512**	**159**

More <$500m Plans Sued in 2024

But most cases still filed against mega-sized plan with >$1B in assets



Compare to 2023 When Mega Plans Targeted



Examples of Smaller Plans Sued in 2024

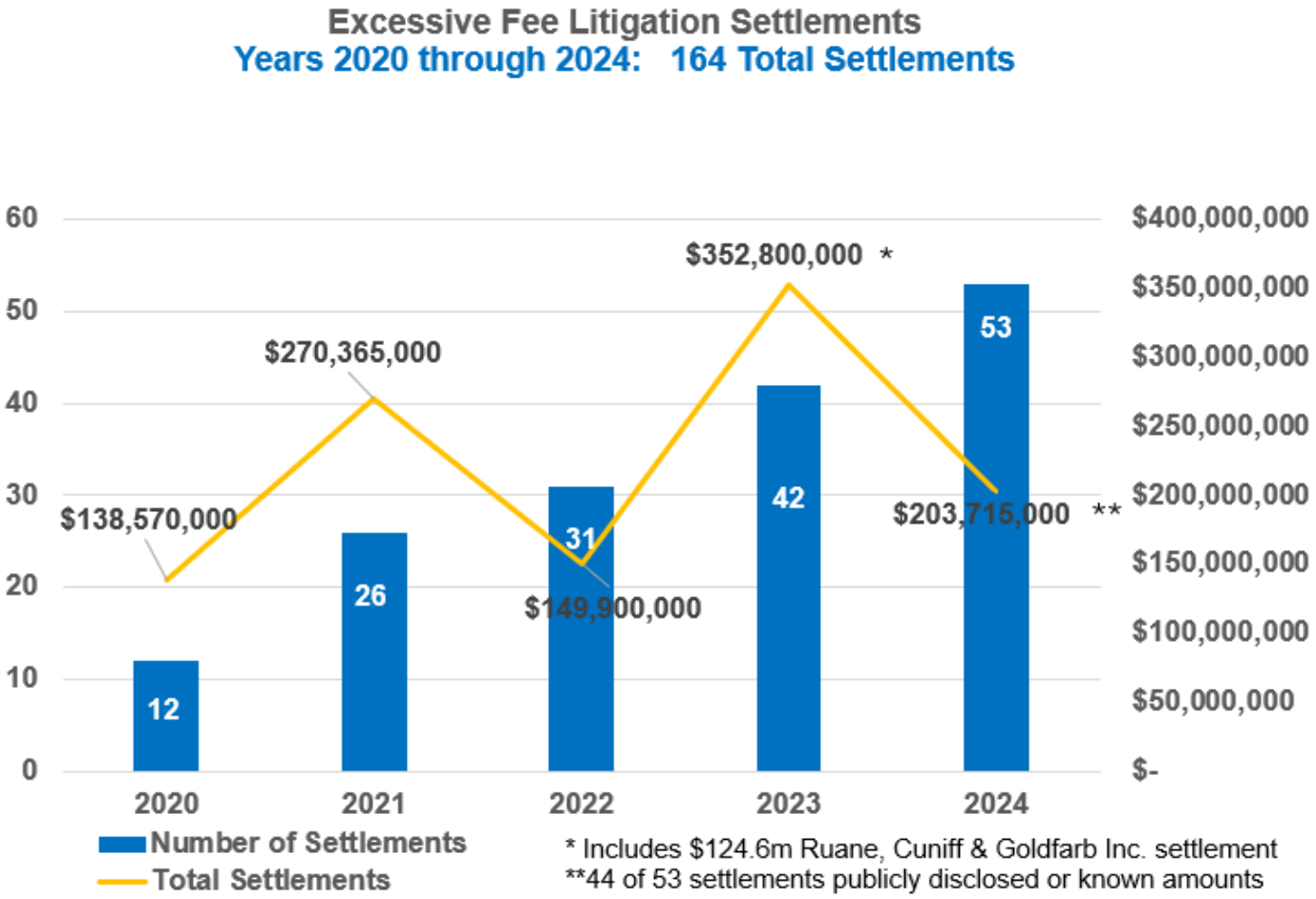
- Garnet: $273m/3,478
- Monster Beverage: $62.4m/1,848
- Saratoga Hospital: $267.7m/2,851
- Northeast Grocery: $272m/2,230

2024 Types of Claims

2024 Filings	
Excessive Recordkeeping Fees	34
Excessive Investment Fees	11
Deficient Investment Performance - Investment Imprudence	16
Wrong Share Class	12
High Fee / Underperformance of Active TDFs	8
Excess Float Income	2
Proprietary Fund Claims	1
Forfeiture Claims	29
Stable Value Fund Claims	5
Excessive Managed Account Fees	4
Other	1

Record Number of Settlements

But settlement average continues to decline



Record Number of Settlements

- **There were a record 53 settlements in 2024 with a total of $203.3 million**, up from 42 in 2023 and 31 in 2022.

  - This trails the record $352.8 million in settlements in 2023, but without the outlier $124.6 million settlement in the Ruane, Cuniff & Goldfarb Inc. case [involving a significant percentage of plan assets invested in one volatile biotech stock], the aggregate settlement amount was close to the 2023 total.

- **The average settlement, however, continued to decline for the third year in a row.** The average settlement in 2024 was **$4.6 million** ($3.2 million without the outlier UnitedHealth settlement of $69 million, a case that involved unique conflicts of interest evidence). Removing the outliers from each year, 2024's average settlement of $3.2 million is far less than the 2023 average of $5.7 million.

  - **<u>27 Settlements < $2m</u>:** Trend of earlier and lower settlements continues: certain plaintiff law firms are willing to accept early cost-of defense settlements before the expense of full-blown discovery.

Excessive Fee Claims

First Type of Claim: Excess Recordkeeping Fee Claims

The Formula for Excess Recordkeeping Fee Claims

- **FALSE FEES compared to FALSE BENCHMARK backed by unreliable JUNK SCIENCE**
  - Several plaintiff law firms have filed hundreds of fiduciary imprudence lawsuits based on the claim that plan fiduciaries of large defined contribution plans have been "asleep at the wheel" and have allowed recordkeepers to charge excessive recordkeeping fees to plan participants.
  - Most of these lawsuits are challenging fees that are reasonable and within the normal range of recordkeeping fees for large plans, but plan sponsors are put on the defensive to disprove a negative.
  - There are at least **two recurring flaws** in these excess recordkeeping fee claims:
    - **First, most of these lawsuits are based on inaccurate and inflated claims** of the actual recordkeeping fees being charged to plan participants, because they are typically based on using Form 5500 fee information that is inflated with transaction fees that do not constitute plan recordkeeping fees. The only reliable proof of what plans actually pay is the recordkeeping contract or the quarterly fee disclosure provided by the plan recordkeepers to plan participants as required by the Department of Labor under Rule 404(a)(5).
    - **Second, the lawsuits contain misleading benchmarks** that do not accurately reflect what large plans actually pay for plan recordkeeping – creating the misimpression that most large plans pay $20-30 for recordkeeping fees.

Excess Recordkeeping Fee Claim

Same three assertions in most excess recordkeeping fee claims

- (1) Recordkeeper **charge based on participant size**, with no variation in pricing models: "Costs for RK Services Vary Little for a Plan with a Substantial Number of Participants"
- (2) Recordkeeping for large plans is **commoditized and fungible** – no differentiation in services offered or service quality between leading recordkeepers.
- (3) **Participants lack access to key information**: rule 408b2 fee disclosures; access to requests for proposals; access to meeting minutes
- **BUT NOTE: The CEM Recordkeeping Fee Study proves that a key driver in lowering the price of recordkeeping fees is whether you include proprietary investments and/or the managed account platform of the recordkeeper – not larger account balances or participant count. The use of proprietary investments from the recordkeeper has a larger impact on lowering fees than even when the plan doubles in size.** The size of the plan makes a difference, with a 16% difference between a $1B and $2B plan. But use of proprietary investments has a 18.2% impact. A $1b plan that uses the proprietary investments and managed account services of the recordkeeper will have a lower recordkeeping fee than a $2B plan that is double in size.

False Fees Compared to False Benchmarks

Most Excess Fees Cases Allege False Fees Compared to False Benchmarks – Against Lower and Lower RK Fees

- ***Trader Joes*** – $1.75b/35,474 – complaint alleges a "roughly $140 per participant" fee when the RK contract had a $11,650 plus $48 per participant charge.
- ***O'Reilly Auto Parts*** – $2.6b/53,184 – complaint alleges a $49.55 RK fee when the participant fee disclosure showed a $31 per participant fee.
- ***Matousek v. Mid-American Energy Co.*:** complaint alleged an "unreasonable fee ranging between $326 and $526" per plan participant: Actual RK fee was $32 per participant.
- ***Teodosio v. Davita, Inc.*:** alleged plan paid $50-96 for RK services worth $14-21, but fee-disclosure showed RK was $34.50 per participant. [One participant serving as plaintiff has a $750 account balance and paid between 12 cents and $10.56 for RK services.].
- ***Kena Moore v. Humana Inc.*:** alleged $59-67 RK fee: Schwab services agreement showed RK fee was reduced from $37 to $23-27.
- ***Bugielski v. AT&T Services, Inc.*:** complaint alleged $61 RK fee: the truth was a $31 RK fee in 2011 lowered to $20 in 2017 with "most favored customer clause" in contract.
- ***Singh v. Deloitte LLP*:** complaint alleged $50.59 to $70.31, but fee disclosures showed $21 to $34.
- ***Montefiore*:** $230 alleged versus actual $41 fee.

More Cases Filed Against Plans With Low Recordkeeping Fees

- **More recent claims against plans with low per-participant recordkeeping fees, compared to lower and lower purported benchmarks:**
  - ***Morales v. Capital One Fin. Corp.*** (E.D. Va. 12/31/2021) [$7.8B/60,876] - $30 RK fee compared to seven large plans.
  - ***Winkelman v. Whole Foods Market, Inc.,*** (W.D. Tex Nov. 6, 2023) - $31 RK fee compared to $14 Fidelity stipulation and unverified fees from seven random out-of-context comparator jumbo plans
  - ***Sigetich v. The Kroger Co.*** (W.D. Ohio 11/5/2021)- $30 recordkeeping fee with defense evidence that portion paid by employer [down to $23.09] alleged to be 50% too high.
  - ***Kena Moore v. Humana, Inc.*** – in $5.3b plan, complaint alleges a $59.01-64.75 RK fee when actual RK fee was $23-28 after two competitive RFPs for RK services
  - ***Bugielski v. AT&T*** – initial complaint alleged a $61 RK fee when the plan had a $20 Recordkeeping Fee with Most Favored Customer Guarantee
  - ***Dionicio v. US Bancorp*****:** plan has $29 RK fee [complaint alleged $42 initially until fee disclosures produced] and 4.5 bps Vanguard index funds – all-in fees < 10 bps; MN court nevertheless allows comparison to five lowest fee plans plaintiffs can find, not credible national survey.

Example of Low RK Fees Challenged

SalesForce Example: Record of Declining RK Fees, but still challenged as excessive

161. During the Class Period, the Plan's per participant total RKA fees were at least as follows:

Year	Participants	Fidelity Per Participant Charge
2018	25,849	$37
2019	30,379	$37
2020	39,589	$33
2021	49,396	$27

Compared to False and Misleading Benchmarks

Plaintiff Benchmark #1: Distorting the small-plan recordkeeping statistics from the 401k Averages Book.

- Claiming that $200m plans only pay $5 per participant – intentionally leaving out that the survey results that the same plan pays $160 per participant in revenue sharing.

Plaintiff Benchmark #2: Allege that Fidelity has stipulated that its recordkeeping services are only worth $14-21 per participant.

- EXAMPLE: *Winkleman v. Whole Foods Market, Inc.* (W.D. Tex. 11/06/2023): Plaintiffs allege $31 recordkeeping fee is imprudent compared to $14 contrived benchmark from Fidelity discovery stipulation in the *Moitoso* case involving Fidelity's internal 401k plan.

Plaintiff Benchmark #3: Chart of Random Large Plans with Purportedly Low Recordkeeping Fees.

- The chart in *Ulch v. Southeastern Grocers* (M.D. Fla. 09/27/2023) alleges that the $1.4B/10,070 Netflix 401(k) Plan only pays $4.17 per participant; and the $1.3b/10,039 RPM International Inc. 401(k) Plan only pays $9.23 per participants. **Many of these fees alleged are false – like Netflix at only $4.17 pp.**

Plaintiff Comparisons to Random Plans

Plaintiff Benchmark Charts Often Contain False or Unreliable Data

Plan Name	Number of Participants	Assets Under Management	R&A Costs on Per-Participant Basis[21]	Record-keeper
Thermo Fisher Scientific Inc. 401(k) Retirement Plan	51,325	$7,716,754,000	$14	T. Rowe Price
Deseret 401(k) Plan	36,079	$5,437,144,766	$22	Great-West
JBS 401(k) Savings Plan	19,420	$374,330,167	$25	Great-West
The Cargill Partnership Plan	41,766	$8,714,511,791	$19	Vanguard
Kaiser Permanente Supplemental Savings and Retirement Plan	47,358	$3,103,524321	$27	Vanguard
Pacific Architects and Engineers, LLC 401(k) Savings Plan	14,583	$693,883,632	$6	Fidelity
The Vanguard Retirement and Savings Plan	24,544	$5,440,681,262	$13	Vanguard

The Junk Science of Excess Fee Claims

- Most cases settle before plaintiffs have to prove their excessive fee claims.
- But when forced to prove their claims, many courts have found that the plaintiff expert benchmarks are based on unreliable "junk science" with no methodology:
  - For example, in the Boston College, Cornell, and PNC case, the same plaintiff's expert Ty Minnich created his own benchmark based on his experience, and not a reliable methodology [like a pricing curve].
  - Plaintiffs' experts seek liability for excessive fees, but do not use a national benchmark to give perspective and context to how the challenged plans fees compare – not even to the national median or average.

PNC – Unreliable Evidence of Purported Excessive Fees

Example of Junk Science in Excess Fee Cases – the PNC Example

- The PNC excessive fee complaint hyperbolically alleged a "shocking breach of fiduciary duty":
  - (1) with false fees [$55-$85 per participant when the actual amount was $46 and declining each year to well under $30];
  - (2) compared to just four plans out of the entire universe of defined contribution plans.
- Plaintiffs used misleading expert testimony with fee benchmarks plucked out of thin air.
  - Plaintiffs filed an expert report from a former Transamerica employee who alleged an arbitrary low recordkeeping amount of $19 to $22 based on no credible methodology. He made up his own personal benchmark, inventing the "reasonable" amount based on his gut feel from his fifteen years of "experience" – and then found plans to support his contrived fee target.
  - **Even his fee evidence was false:** For example, he misrepresented his comparator of the Nike 401k Plan by a factor of three: $20 compared to the actual fee of $63, which was higher than PNC participants paid for recordkeeping fees.

Examples of 2024 Excess Recordkeeping Fee Claims

Note how plaintiffs now including plan administrative fees into the RK calculation

- ***Memorial Herman:*** $40 compared to $22-28.
- ***Smith & Nephew***: $63 v. $32 – Walcheske uses Form 5500 service codes to prove that RK services are fungible between plans
- ***Embry Riddle***: RK fees alleged include float income and short-term trading fees.
- ***NCR***: $42 RK fee + $11 administrative fee in fee disclosure, but complaint calculates $61.42 fee from Form 5500. Also uses service codes.
- ***Nordstrom***: $42 + $13.93 administrative fee – combined to allege $55.72 RK fee.
- ***Salesforce***: RK fees had declined from $37>$33>$27 – compared to random plans with one $693m/14,583 plan with a $6 RK fee.
- ***Toyota:*** $37.47 RK fee – plaintiffs use Form 5500 codes to compare to chart of random plans.

Key Issues in Excess Recordkeeping Claims

- **(1) <u>Key determinant is whether the court will allow evidence outside the MTD, including fee disclosures and account statements that include the actual fees</u>.**
  - False Recordkeeping and Investment Fee Claims – Can the Defense Use Fee Disclosures and Account Statements to Rebut False Fee Claims?:
    - **EXAMPLE: *Matousek v. Mid-Am. Energy Co.***, 51 F.4th 274 (8th Cir. 2022): Complaint alleged that the plan recordkeeper for the MidAmerican Energy plan charged an "unreasonable" fee ranging "between $326 and $526 per plan participant," but the truth was that the actual recordkeeping fee was only $32 per participant.
- **(2) <u>What are Proper Benchmarks</u>?: Can you compare a challenged plan to a few random plans?**
  - Plaintiffs are taking advantage of the lack of a comprehensive benchmark for what large plans actually pay for recordkeeping services. **But see** the **Encore Fiduciary Benchmark**.
- **(3) <u>Is Recordkeeping for large plans commoditized, or are there differentiation in services?</u>**
  - In 2023, complaints starting citing Form 5500 service codes: Cina v. CEMEX, Inc. (S.D. Tex (02/21/2023) – complaint against a $877.8m plan alleges a $74 recordkeeping fee from the plan fee disclosure, which is compared to four comparator plans with the came Form 5500 service codes [37, 60, 64, 65, 71].
  - *Carrillo v. Amy's Kitchen* (N.D. Cal. 06/16/2023): complaint alleges that plaintiff attorneys sent the Form 5500 of the Amy's Kitchen plan and received lower bids of $44 and $60 per year.

Will Courts Allow Plan Sponsor to Disprove False Fees?

The issue is case dispositive – plaintiffs can leverage settlements

- ***Matney v. Barrick Gold of North***: Plaintiffs alleged that the JP Morgan Smart Retirement R5 target-date funds ranged in fees from .55-.57%, whereas the R6 share class had a lower .44-.47% fee. The difference between the R5 and R6 share classes was ten basis points in most instances. Utah District Court granted the motion to dismiss because plaintiffs ignored the 15-basis point revenue sharing credit back to participants. The District Court of Utah in the *Barrick Gold* case [which was affirmed on appeal] allowed the defense to proffer evidence of the recordkeeping contract and the participant account statements to demonstrate that the plan paid less than the institutional share-class fees because of a significant 15 bps revenue sharing rebate back to plan participants.
  - **KEY POINT**: court allowed the defense to produce the Trust Agreement and 2018 Form 5500 to validate that the plan implemented a revenue credit that was not alleged properly in the amended complaint.
- ***Shave v. CentraCare Health System*** involved: (1) the exact same JP Morgan target-date investments; (2) the exact same fees charged by JP Morgan; (3) the exact same revenue sharing rebates that reduced the fees paid by participants below the lowest-fee institutional share class price; and (4) the respective plaintiff law firms in both cases misrepresented the actual investment fees paid by participants.
  - But the District of Minnesota Court refused to consider the plan participant account statements, fee disclosures, or recordkeeping contract in the context of a motion to dismiss. This evidence proved the identical 15 bps rebate that the *Barrick Gold* court used to dismiss the complaint, but the Minnesota court ruled that it must allow the claim to proceed even if it is "improbable."
  - Case settled after MTD denied. The strategy of alleging misleading fees worked.

New Theory: Plan Forfeiture Claims

Some Cases Dismissed w/o Prejudice, But Troubling Implications re: Settlor v. Fiduciary Distinction

- Over **thirty cases** filed to date challenging the widespread practice of using plan forfeitures – the nonvested portion of a former employee's account balance – to offset employer contributions.
- The lawsuits allege that using plan assets to offset employer contributions is self-dealing that violates ERISA's prohibited transaction rules and ERISA's fiduciary requirement that plan assets be "for the exclusive purpose" of paying benefits or plan expenses.
  - In every case, plan documents allowed the plan sponsor to offset employer contribution. Question is whether plan documents that allow any discretion or choice as to whether to offset contribution turns this into a fiduciary function that must be made in the sole interest of participants.
- Initial cases filed in California against **Thermo-Fisher; Intuit, Inc; Qualcomm Inc.; Clorox Company; HP Inc.**, have spread like wildfire across the country as legacy excess fee firms like Capozzi Adler, Walcheske, and Edelman have filed forfeiture claims, including forfeiture claims as part of excessive fee lawsuits.
- **Six decisions on motions to dismiss:** two denied; three granted with leave to amend; BAE case granted with leave to amend (but that case had less discretion in plan document).
  - Every decision considers forfeiture decisions as fiduciary functions – troubling. But Honeywell court ruled that plaintiff theory too broad if seeking all contributions to apply to participant fees, and required plaintiff to amend their complaint.

Second Type of Claim: Excess Investment Fee Claims

Many Cases Involve Misleading Fees, Including Revenue Sharing is Rebated

- **Active v. Passive:** Most investment fees claims compare actively managed funds against lower-fee index funds.
- **Share Class Claims:** Claim that the plan offered investment options in the retail share class when a lower-fee share class is available to institutional plans. Share class claim are the most difficult to dismiss, because the comparator is imbedded in the claims. But often share class claims fail to account for revenue sharing rebates back to participants.
- **Investment Fee Claims Involving Revenue Sharing**: Key Issue is Whether Court Allows Defense to Show Revenue Sharing Rebate.

2024 Investment Fee Claims

Increase in share-class claims

- **Eleven cases allege failure to ensure lowest possible share class or use of lower-fee CITS.**
  - Hess Corp: TRP TDFs: .44% v. CIT share class at .37%
  - Hormel: Dimensional Funds: .08% alleged difference in share class
  - Southeast Freight Lines: TRP F shares .43 v. E shares at .30%
- **More traditional excess investment fee claim:**
  - **Coca-Cola Beverage:** compared JP Morgan TDFs at .75-.85 v. American Funds .35-.59

Managed Account Fees

Plans with Managed Accounts as QDIA sued for excessive fees

- **Smith & Nephew:** .51% + $39 RK to Fidelity managed account compared to lower-cost TDFs (Walcheske)
- **Pearson Education:** Empower Professional Management Program (PMP) .30% > $250k v. .10% Lenova plan and Sony plan (.25%); Beaumont (.14%)
- **Bechtel:** Managed account as QDIA: RK $24-29 > $298-348 with managed account fees.
- **Nordstrom:** Managed account with Alight instead of TDFs

Third Type of Claim: Investment Performance Claims

Investment Performance Claims surged in 2024

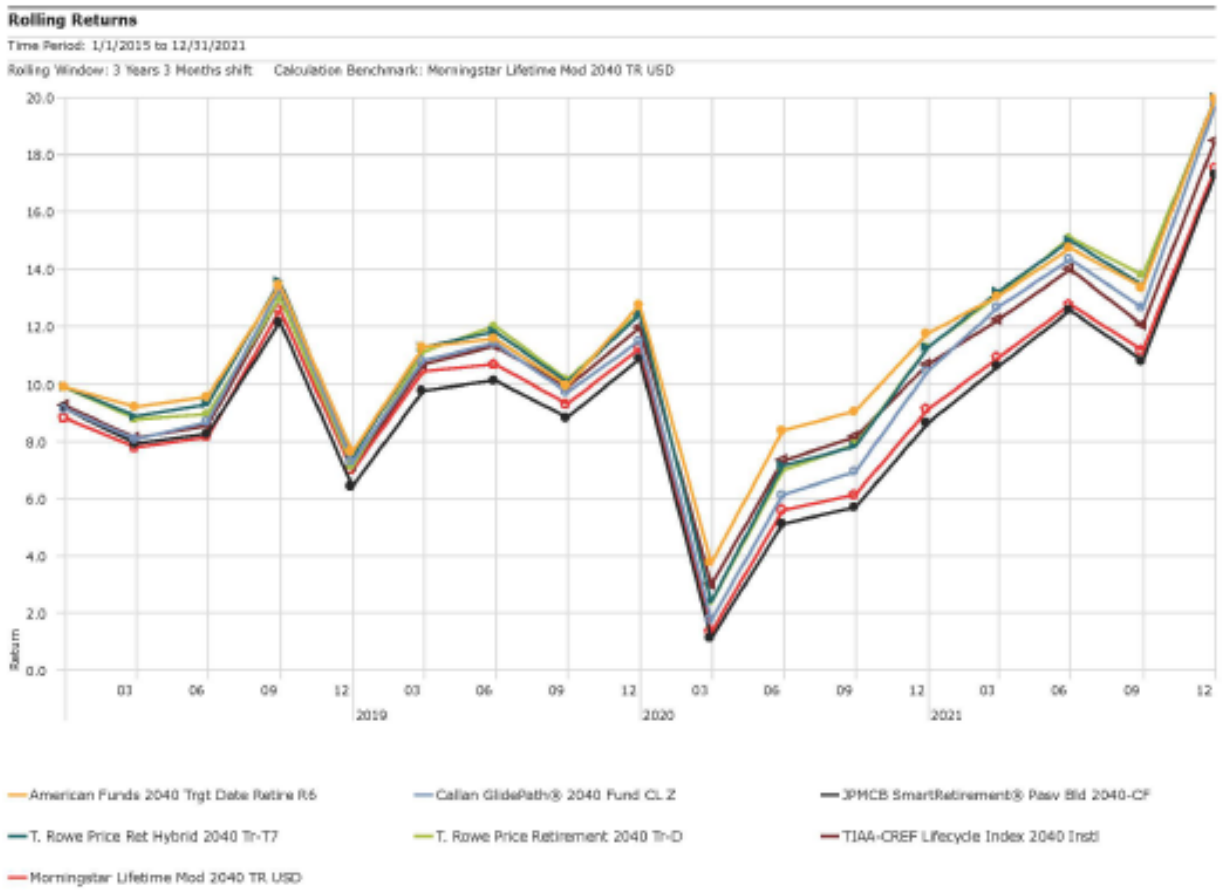
- The original type of investment imprudence claims involved a comparison of actively managed funds to passive funds – essentially arguing that it is imprudent to offer active funds.
  - Most of the claims involving Fidelity Freedom funds fall into this camp.
- **Many claims assert underperformance with very small performance differentials:**
  - Example: FCA US UAW Plan: US Large Cap Equity Fund (custom fund) was 1.17% below S&P benchmark.
  - Turning Stone: .17 to .87 underperformance compared to benchmark
- **Many claims compare performance (in hindsight) against the highest performing funds of the last decade:**
  - Example: Novo Nordisk: Schwab TDFs compared to TRP and American Funds

Performance Claims Based on Tiny Differentials From Leading Funds

Salesforce Example: JP Morgan Smart Retirement Funds compared to American Funds and TRP

99. During the Class Period, the JPMCB SR PB CF Share Class did not perform an

The chart below demonstrates its underperformance:



2024 Investment Performance Claim

- **#1 Target in 2024 lawsuits was JP Morgan Smart Retirement Funds**
  - **SAS:** JP Morgan SR PB CF-B Funds compared to American Funds TDFs (Capozzi Adler)
  - **Salesforce:** investment underperformance of JP Morgan Smart Retirement Funds alleged (also filed by Capozzi Adler)
  - **Memorial Hermann Health:** JP Morgan Smart Retirement Funds – but less than 1% differential from TDF comparators
  - **Coca-Cola SW:** JP Morgan TDFs – underperformance compared to TRPs and American Funds [4.17 v. 5.00% average returns]
- **Some potentially legitimate cases:**
  - **International Bank of Commerce:** only 23% in stock compared to average 68-70% stock in typical plans
  - **Animal Doctor:** 98% of plan invested in three pharmaceutical stocks.

Other Investment Performance Claims

More Imprudent Investment Claims

- ***Macias v. Sisters of Leavenworth Health System***, filed 06-13-2023 (D. Colo.) – alleging "mediocre" and "chronic underperformance" of the JP Morgan Smart Retirement target-date funds.
- ***Fitzpatrick v. Nebraska Methodist Health System, Inc.***, filed 01-24-2023 (D. Nebr.) – alleging "chronically underperforming Wells Fargo target date funds].
- ***Drust v. Southwest Research Institute***, No. 5:23-cv-00767-XR (filed 06/16/2023 W.D. Tex.): complaint alleges underperformance of TIAA funds, asserting that the plan sponsored $1.5B plan sponsored by Southwest Research Institute is the only ERISA plan in the country with over $250 million in assets (out of 9,000) to have an exclusive TIAA investment lineup.
- ***Baker v. The University of Vermont Medical Center, Inc.***, No. 2:23-cv-87 (D. Vt. Filed 05/10/2023): complaint alleges imprudence for retaining ten TIAA-CREF legacy investment options.

Increase in Challenges to Stable Value Funds

Challenges to Crediting Rates – very difficult claims to get dismissed at pleading stage

- **Republic Mortgage:** GIC = 41% of plan (compared to 7% typical allocation); also negative market value adjustment in 2022 when interest rates increased).
- **Virtua Health:** Lincoln Stable Value Fund = QDIA: 55 bps + spread income; alleged a lower crediting rate of 2.75 – 3.00 v. MassMutual 4.68 – 4.98 and TIAA – 4.30 – 6.00.
- **Garnet Health:** Principal Stable Value Fund: crediting rate 1.59 – 1.78 v. 2.83 – 3.12.
- **84 Lumber:** Principal Stable Value Fund v. money market fund with higher rates.
- **Hormel:** challenge to crediting rate of guaranteed investment contract.
- **Long Island Community Hospital:** 1.65 crediting rate.
- **Saratoga Hospital:** MetLife Stable Value 1.8 – 2.35 v. MassMutual 4.03 – 4.68 crediting rate

Many Performance Claims are Challenging Conservative Investments

- The evolving performance claims is against conservatively managed investments – all compared to the best performing funds in hindsight that achieved these results with a higher allocation of stock and higher risk profile (most of these cases compare conservative strategies to TRP and American Funds TDFs with higher equity allocations):
  - **Wood Group/Molina Health:** Flexpath Funds with an inflation hedge
  - **Intel:** 30% allocation to risk-mitigation strategy in target-date funds to private equity hedge funds
  - **Milliman:** target-risk funds with strategy to avoid 2008 market collapse
  - **Verizon:** hedge fund component of custom target-date funds to protect against downside market risk.
  - **United Health:** Wells Fargo Funds that avoided volatile tech stocks.
  - **Parker Hannifin:** Northern Trust TDFs – compared to S&P 500 TDF index, TRP and American Funds

First ESG Lawsuit Against a Single-Employer Plan Sponsor

ESG Fiduciary Breach Claim filed against a plan with no-ESG funds – "Covert ESG" Index Funds

- **Spence v. American Airlines (N.D. Tex. 2023):** Lawsuit alleged American Airlines selected and included twenty-five or more investment options in its sponsored defined contribution plan that are more expensive and underperformed (**Challenged Fund Theory**), or otherwise included funds from investment managers who voted for egregious examples of ESG proxy mandates (**Challenged Manager Theory**).
  - After AA proved in the motion to dismiss that is has zero ESG investment options, plaintiffs filed an amended complaint with both Challenged Fund [that all BlackRock funds are covert ESG funds) and Challenged Manager claims.
  - **Intervention Theory**: the case has morphed into conflicting theories that AA's fiduciary committee should have pressured Blackrock's proxy voting to avoid woke-ESG mandates.
  - MTD denied 02-2024 on grounds that it is plausible that AA's corporate ESG mandate was applied to choosing ESG-aligned managers like BlackRock.
  - Summary judgment filed in February 2024.
    - Unique aspect of this case is that the court did not stay discovery while MTD pending – making even this frivolous claim expensive to defend.

Texas Court Finds AA Breached its Duty of Loyalty

Unprecedented Finding of No Breach of Prudence, but Breach of Duty of Loyalty

- January 10, 2025 decision finds AA breached its duty of loyalty:
  - **Unprecedented Ruling – Prudent, but Disloyal:** No prudence violation because AA followed industry standard in outsourcing proxy voting to Aon and Blackrock: no proof that any other fiduciary or plan had sued, fired or intervened into Blackrock's climate-focused ESG campaign.
  - BUT: court finds that there is an incestuous industry that created a bad standard and calls his prudence finding a "shocking result";
  - Instead finds breach of duty of loyalty because of "incestuous relationship" with Blackrock: finds systemic blindness and failure to keep corporate and investing separate; AA found to have done nothing to hold Blackrock accountable for ESG and non-pecuniary investing.
  - Court appears to skip over causation or any analysis as to whether the BlackRock index funds were objectively prudent.
  - Orders post-trial briefing on whether there were any damages for 8-day event window in May 2021 Exxon proxy voting.

Three Key Issues in Imprudent Investment Fee Claims

1) **What is the benchmark for investment underperformance?**
   - Does the comparison need to be against an investment with similar aims, goals and objectives; or can you compare to the S&P 500 or some other index?
   - Can you compare the disputed funds to the best performing funds over the last decade (in hindsight) – note the many comparisons to top-rated American Funds and T. Rowe Price target-date funds.
   - This is the decisive issues in the underperformance claims against conservative target-date funds [FlexPATH; Wells Fargo; Intel custom TDFs; and Capital target-risk funds].

2) **What is the level of investment performance sufficient to be imprudent – is 1-2% underperformance enough?**

3) **How long before fiduciaries have to replace an underperforming investment?**
   - Plaintiff experts are testifying in many cases that investments must be dumped after less than 36 months of underperformance or even one year on the watchlist.
   - ***Jacobs v. Verizon Communications, Inc.*** **(April 20, 2023):** New York court relied on plaintiff's expert testimony that it is imprudent for fiduciaries to retain an investment that underperforms for twelve consecutive quarters. After summary judgment denied, Verizon settled for $30 million.

New Trend of Class Action Litigation Against Defined Benefit Plans

Four Areas of Focus

1. **Actuarial Equivalence Litigation**: over 25 cases alleging that defined benefit plan sponsors and fiduciaries used "unreasonable" actuarial equivalence factors, primarily "outdated" mortality tables, when calculating plan annuities.
   - Participants allege that these older mortality tables (e.g., 1951 GAM, 1971 GAM, or 1984 Unisex) result in optional forms of benefits, such as 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.
   - Most recent cases against Duke University; Dupont; and Ecolab.
   - **Contrary recent results** in *Citgo* [denial of summary judgment] and *Kellogg* [motion to dismiss granted] cases
2. **Pension Risk Transfer Challenges**: Schlichter law firm has filed cases against AT&T, Lockheed Martin and Alcoa, claiming that ERISA requires a fiduciary to obtain the "safest annuity available" when transferring pension obligations to an insurance company. Instead, the complaints allege that these companies transferred defined benefit pension obligations to Athene Annuity & Life Assurance Company of New York, which saved the companies money, but put beneficiaries' "future retirement benefits at substantial risk of default – a risk which devalued their pensions without proper compensation."
3. **Health Plan Fee Litigation**: New theory of liability against defined benefit health plans alleging that health plans imprudently allowed excessive fees exposes plan sponsors to potential significant wave of excess fee litigation. See discussion on J&J case on next slide
   - In April 2, 2024 lawsuit ***S.M.O v. Mayo Clinic,*** a Mayo Clinic employee filed a proposed class action alleging the clinic's employee health plan and its claim administrator systematically underpaid for services performed by out-of-network doctors.
4. **Wellness Programs/Tobacco and Vaccine Surcharges**: The plaintiff trial bar has filed twenty+ cases alleging that it unfair to charge a higher health care premium if you smoke tobacco or decline a vaccine.

New Frontier: Excess Fees in Health Plans

- ***Lewandowski v. Johnson and Johnson,*** Case 1:24-cv-00671 (D.N.J. Feb. 2, 2024): single participant files a class action alleging that the benefits committee of the J&J VEBA plan mismanaged prescription-drug benefits in the health plan for company employees. Case reportedly has litigation funding.
  - Alleged mismanagement of the prescription drug benefits is most "evident" by the prices it agreed to pay Express Scripts, J&J's PBM for many generic drugs that allegedly are widely available at drastically lower prices.
  - For example, the introduction to the complaint claims that the plan pays $10,239.69 for a 90-pill prescription of the generic form of the drug Augagio, which is purportedly available at grocery or drug stores for an out-of-pocket price of $40.55 to $77.41.
- Similar claims in **Navarro v. Wells Fargo & Co.**: participants accuse the bank of requiring participants and beneficiaries to pay high costs for prescription drugs that are "widely available at drastically lower prices."

Standing for Excess Fee Claims Against Defined Benefit Plans

- Key issue will be (1) whether participants have standing to sue for excess fees on behalf of a defined benefit health plan; and (2) whether J&J's funding of the plan is a plan asset under ERISA.
  - ***Knudsen v. MetLife Group, Inc.*** (D.N.J. 07/18/2023) – participants lacked standing to sue for PBM rebates to the plan sponsor; upheld on appeal in Third Circuit: test for an overpayment claim against a health plan: **participants can show standing through allegations that their plan sponsor charged them "more . . . than is allowed under Plan documents."**
  - ***Winsor v. Sequoia & Insurance Services***, 62 F.4th 517 (9th Cir. 2023) – participants in a MEWA lack standing to allege breach of fiduciary duty tied to commissions received by the manager and administrative fees paid to the insurers.
  - But see ***Acosta v. Board of Trustees of UNITE HERE Health***, No. 22-C-1458 (N.D. Ill. 03/31/2023) – participants of multiemployer plan have standing to allege that the plan incurred excessive overall administrative expenses based on claim of lost wages, higher cost- sharing, co-insurance payments and less valuable health benefits.
- District Court issued MTD ruling in J&J case on January 24 – granted MTD on standing grounds, but leave to amend with troubling implications [no standing because participant had not met prescription drug cap].

Court Decisions and Trials

2024 Appellate Decisions

	Date Complaint Filed	Case Name	Date at Issue	Circuit	District Court Judgment
1	4/10/2023	Parker et al v. Tenneco Inc et al	8/20/2024	6th	Affirmed
2	5/2/2022	Erica R. Barrett v. O'Reilly Automotive, Inc.	8/29/2024	8th	Affirmed
3	10/13/2021	Singh v. Deloitte, LLP	12/10/2024	2nd	Affirmed
4	1/4/2021	D.L. Markham, DDS, 401(K) Plan v. Variable Annuity Life Ins. Co., et al.,	1/5/2024	5th	Affirmed
5	10/25/2019	Falberg v. The Goldman Sachs Group, Inc. et al	2/14/2024	2nd	Affirmed
6	4/12/2018	Pizarro et al v. The Home Depot	9/12/2024	11th	Affirmed
7	2/23/2018	Wilcox v. Georgetown University	4/23/2024	DC Circuit	Affirmed
8	2/22/2022	Krutchten v. Ricoh USA, Inc.	8/15/2024	3rd	Reversed and Remanded
9	2/1/2021	Johnson, et al v. Parker-Hannifin Corporation, et al	11/21/2024	6th	Reversed and Remanded
10	4/30/2021	Perkins v. United Surgical Partners	5/3/2024	6th	Reversed and Remanded
11	3/26/2021	Mator v. Wesco Dist. Inc.,	5/16/2024	3rd	Vacated and Remanded

Key Appellate Court Rulings – the Pleading Standard for Excess Fee Claims

- **Supreme Court:** *Hughes v. Northwestern University*: Courts "must give due regard to the range of reasonable judgments a fiduciary may make."
- **6th Circuit:** *Smith v. CommonSpirit; Forman v. TriHealth.*
- **7th Circuit:** *Albert v. Oshkosh* and *Hughes v. Northwestern* – Part 2 [after Supreme Court remand].
- **Eighth Circuit:** *Matousek v. MidAmerican Energy* Co. – affirmed dismissal of recordkeeping and investment fee/performance claims.
- **9th Circuit:** In a pair of unpublished decisions, reversed dismissal of recordkeeping, share-class claims and CIT v mutual-fund claims (but rejected plaintiffs' comparisons of active v. passive funds). *Kong v. Trader Joe's and Davis v. Salesforce.com.*
- **10th Circuit:** *Matney v. Barrick Gold* – Affirmed dismissal of share-class claims, investment management fee claims, CIT v. mutual fund claims, and recordkeeping claims.

Key Recent Appellate Decisions in 2024

Lesson for Defense Bar: Admit When Complaints Might Plausibly Allege Excess Fees to Avoid Bad Law

- ***Singh v. Deloitte LLP*:** The Second Circuit held that comparisons to a fee disparity of a few random plans without the context of plan services and service quality does not satisfy the plausibility pleading standard for fiduciary imprudence claims [but still allowed inflated fee claims that did not match participant disclosures].
- **Montefiore:** Second Circuit followed Deloitte case despite percentage-of-asset recordkeeping fee.
- **CONTRAST WITH TWO ADVERSE DECISIONS [Courts allow comparisons to random plans and do not require pleading of service or service quality, but NOTE higher fees in these cases]:**
- **United Surgical:** Fifth Circuit reverses dismissal of excess RK and investment imprudent case [but note that $450m plan with 16,605 participants offered QDIA with revenue sharing: TRP TDFs at .83-.96%; lowest investment fee in plan was .56%].
- **Wesco:** Third Circuit reverses dismissal of excess RK and investment fee case [but note the QDIA was Manning & Napier target maturity funds with gross fees of 2.00% and net fees of .8600%; average RK fees with revenue sharing of $154 – switched to Fidelity for a flat fee in July 2020 of $54].

Goldman Sachs Summary Judgment

Disproving disloyalty claims with fiduciary processes

- Disloyalty claims brought on false pretenses: claim that Goldman Sachs used its 401k plan to support failing investment products.
- **Process Roadmap**: The case provides a roadmap for how to prove sound fiduciary process.
  - Sophisticated members of committee;
  - Fiduciary training;
  - Investment advisor Rocatan – monthly investment report;
  - Outside counsel with Steptoe;
  - Fiduciaries removed underperforming funds: four out of five disputed funds had been removed, and ten investment options had been removed;
  - Fiduciaries were active, with robust questioning of all investment decisions.

Johnson v. Parker-Hannifin Corp. – Sixth Circuit

Sixth Circuit does not require a meaningful benchmark for investment underperformance claims

- **Parker-Hannifin:** Sixth Circuit allows underperformance claims after just eleven months and without a meaningful benchmark to infer fiduciary imprudence.
- Northern Trust offered more conservative TDFs compared to S&P 500 index and top-performing TDFs.
- Same circuit as ***CommonSpirit*** does not require a meaningful benchmark in imprudent investment case.
- **Dissent** says opinion "breaks new ground" by violating key fiduciary process principles:
  - ERISA's fiduciary common law's duty of prudence imposes "standards of conduct" on fiduciaries, not standards of performance of investments
  - a claim that one security underperformed another is meaningless unless the two options are "interchangeable" in all material respects but the return.
  - ERISA requires administrators to act reasonably, not superbly.

Prohibited Transaction Claims

Compare Split of Authority in the Ninth and Second Circuits

- **Ninth Circuit:** In ***Bugielski v. AT&T Services, Inc.***, in August 2023, the U.S. Court of Appeals for the Ninth Circuit held that amending an existing recordkeeping contract constituted a prohibited transaction because the recordkeeper was already a party in interest, disagreeing with the U.S. Court of Appels for the Third Circuit that it "would be absurd" "to prohibit necessary services" unless there was "an element of intent to benefit a party in interest."
- **2nd Circuit:** ***Cunningham v. Cornell University,*** in November 2023, the U.S. Court of Appeals for the Second Circuit held that a plaintiff cannot survive a motion to dismiss merely by alleging that a presumptively prohibited transaction took place. Instead, the Second Circuit held that a plaintiff must plausibly allege both that a prohibited transaction occurred and that no exemption applies, disagreeing "with the Eighth Circuit that, at the pleading stage, the . . . Exemptions should be understood merely as affirmative defenses."

Cornell Prohibited Transaction Case Before Supreme Court

Can participants repackage prudence claims as prohibited transactions w/o proof of excess fees?

- ERISA Section 406(a)(1)(C): ***Except as provided in section 1108 of this title*:** (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or show know that such transaction constitutes a direct or indirect–(C) furnishing of goods, services, or facilities between the plan and a party in interest
- Section 1108 (ERISA Section 408) provides: (2)(A) Contracting or making reasonable arrangements with a party in interest for . . . services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor."
- **Oral argument on January 22, 2025:** Question is whether "except as provided in section 1108" means something: does the pleading standard for prohibited transactions require just notice of service provider contract, or plausible proof that the contract was not necessary or reasonable, i.e., proof of wrongdoing or excessive fees.
- Justice Kavanaugh called Schlichter's position "nuts" in oral argument, but justices seemed to look for a compromise: some type of additional pleading burden, like the rule 7 reply advocated by the Department of Labor as amicus.

Plan Sponsors Won Six Straight Trials Before AA Loss

- Prime Healthcare ERISA Litigation
- Mattson v. Milliman Inc.
- Mills v. Molina Healthcare Inc.
- Lauderdale v. NFP Retirement Inc.
- E.B. Braun
- Yale (jury trial)

Key Lessons From Trial Victories

- **(1) Most plans have a prudent process led by excellent plan investment advisors.**
- **(2) The best way to prove a prudent process is to demonstrate a track record of fee reductions and investment changes.**
- **(3) We can win these cases if we can find a cost-effective way to try them.**
  - Key problem is the cost of expert witnesses.
  - We continue to allow plaintiff lawyers to file the same case theory in multiple jurisdictions, giving them many chances to win.
- **(4) We need ERISA reform to reduce the litigation abuse:**
  - need a business judgment rule to change the presumption from guilt to innocence
  - **NEED A HIGHER PLEADING STANDARD**: The model should be the Private Securities Litigation Reform Act of 1995, which implemented changes to pleading, discovery, liability, class representation and award fees and expenses.

Motion to Dismiss and Summary Judgment Rulings

Higher percentage of cases dismissed in 2024

- **Higher percentage of motions to dismiss granted in 2024 – reflects weaker cases and initial decisions on forfeiture claims (all but one dismissed without prejudice):**
  - 30 out of 53 motions to dismiss granted in 2024 – significantly higher than any previous year
  - 15 out of 53 denied [eight MTDs granted in part]
  - But only 13 out of 53 granted with prejudice
- **5 summary judgment rulings for plan sponsors out of 25 filings, including Hy-Vee, PNC and Humana cases.**

Hy-Vee Summary Judgment

Example of case that should have been dismissed at MTD stage

- **(1) The Hy-Vee Case is Another Example of an Excess Fee Lawsuit Using Fake Fee Amounts Compared to the Four Lowest Fee Plans Plaintiff Lawyers Can Find:** The fiduciary malpractice complaint alleged excessive recordkeeping fees based on (a) false fees [$63+ alleged versus $37 actual] (b) compared to misleading benchmarks [$14-30 from just seven plans]. The case is yet another example confirming that courts must allow the truthful recordkeeping fees and market-wide benchmarks in order to evaluate the fiduciary "context" required under the *Hughes v. Northwestern* pleading standard.
- **(2) False Claims of Deficient Fiduciary Process: The initial complaint alleged harm from the "[t]he devastating effect of unchecked recordkeeping and administration fees."** But the true facts showed that the plan monitored recordkeeping fees with the help of multiple advisors, conducted a 2020 RFI, reviewed six periodic benchmarks from Fiduciary Decisions, and had a six-year record of substantial fee reductions. This plan sponsor should not have had to defend its fiduciary process in a fiduciary imprudence lawsuit, but the complaint cast the plan in a misleading context.
- **(3) Large-Plan Recordkeeping is Not Commoditized:** The complaint alleged that all large-plan recordkeeping is commoditized, but the plan RFI proved that most recordkeepers could not match Principal's customized onsite training and additional work needed because of complex payroll systems and private-company stock matches for a transient participant population. The Hy-Vee case is the best example of how large-plan recordkeeping is not a one-size-fits-all commodity.

Humana Summary Judgment

- **A Breach of Fiduciary Duty Case for Alleged Excessive Fees Was Pursued Even After Plaintiffs Had Evidence of Humana's Best-in-Class Fiduciary Practices to Ensure Reasonable Plan Fees:** Humana's fiduciary committee engaged in fiduciary best practices with competitive bidding every three to five years through requests for proposals, and worked with outside advisors to perform annual benchmarking of the plan's recordkeeping fees to ensure they remained reasonable.
- Plaintiffs knew this before they filed two amended complaints. Nevertheless, the plan committee had to spend millions of dollars in over three years of litigation to vindicate its fiduciary process and validate that its recordkeeping fees were reasonable.
- Defense summary judgment motion: "several years of litigation and full discovery have given the lie to Plaintiffs' allegations of excessive fees."
  - RK fee lowered from $37 to $23 after RFPs and benchmarking from Fiduciary Decisions

Pleading Standard is a Crapshoot

Different results on same investments and fact patterns

- ***Matney v. Barrick Gold of North***: Plaintiffs alleged that the JP Morgan Smart Retirement R5 target-date funds ranged in fees from .55-.57%, whereas the R6 share class had a lower .44-.47% fee. The difference between the R5 and R6 share classes was ten basis points in most instances. Utah District Court granted the motion to dismiss because plaintiffs ignored the 15-basis point revenue sharing credit back to participants. The District Court of Utah in the *Barrick Gold* case [which was affirmed on appeal] allowed the defense to proffer evidence of the recordkeeping contract and the participant account statements to demonstrate that the plan paid less than the institutional share-class fees because of a significant 15 bps revenue sharing rebate back to plan participants.
  - **KEY POINT**: court allowed the defense to produce the Trust Agreement and 2018 Form 5500 to validate that the plan implemented a revenue credit that was not alleged properly in the amended complaint.
- ***Shave v. CentraCare Health System*** involved: (1) the exact same JP Morgan target-date investments; (2) the exact same fees charged by JP Morgan; (3) the exact same revenue sharing rebates that reduced the fees paid by participants below the lowest-fee institutional share class price; and (4) the respective plaintiff law firms in both cases misrepresented the actual investment fees paid by participants.
  - But the District of Minnesota Court refused to consider the plan participant account statements, fee disclosures, or recordkeeping contract in the context of a motion to dismiss. This evidence proved the identical 15 bps rebate that the *Barrick Gold* court used to dismiss the complaint, but the Minnesota court ruled that it must allow the claim to proceed even if it is "improbable."

Reality of Fiduciary Litigation

No presumption of good faith or business judgment rule

- **Plan fiduciaries do not get a presumption of good faith – fiduciaries are guilty until proven innocent**
  - Different than directors and officers of public corporation under the business judgment rule – fiduciaries have to prove they acted prudently, which is fact intensive, expensive, and difficult, particularly as the trial bar is very effective in belittling plan committee members [consider NYU trial and Boston College claims of TIAA sports tickets.
  - This allow allows the trial bar to sue you affirmatively asserting you acted in bad faith based on circumstantial evidence and speculation – second-guessing plan decisions.

Realities of Fiduciary Litigation

Judicial System is a Crapshoot - no reliable and consistent fiduciary standard in federal courts

- **The current state of the law is unfair to plan sponsors – <u>turn benefit plans into liability traps</u>**
  - Plan sponsors with good fiduciary processes and low fees still get sued.
  - Courts allow many meritless cases to proceed under the plausibility standard – allowing comparisons of just four other plans, often with incorrect fees alleged – **When in any reliable statistical analysis is 4 data points plausible? <u>A comparison to four other random plans is not a meaningful benchmark</u>.**
  - Most cases proceed past a MTD, and very difficult to prove that your process is prudent at summary judgment because of factual disputes.
  - Inconsistent decisions make the federal courts a crapshoot.
  - It costs millions of dollars to prove that you followed a prudent fiduciary process
- **You need to understand the unfair reality and learn from the litigation**
  - **Has become a liability trap – attacks on discretion and judgment of plan fiduciaries**

State of the Fiduciary Insurance Market

- The current fiduciary market is competitive, with brokers requiring rate reductions on some accounts that are already priced competitively.
- The fiduciary market has not calibrated the recent surge in class action cases against defined contribution and defined benefit claims:
  - The only positive is that more cases are being resolved early.
  - We all realize that we can win most cases if brought to trial, but no one has figured out how to do that cost effectively, even as we are are litigating the same issues over and over.
  - Beyond increase defense rates and fees, a key problem is out-of-control expert costs.
- Management liability underwriters are in denial about the rate adequacy of premiums after multiple years of a soft market.
- Class v. Excessive Fee Retentions: carriers pressured to use class action retentions when broker claim advocates dispute purpose of excessive fee retention in forfeiture and other new claim theories.

Encore Fiduciary Excessive Fee Checklist

1. **Does the Plan Sponsor Pay for Recordkeeping Fees?** The best way to eliminate a challenge to the level of your plan's recordkeeping fees is for the plan sponsor to pay for participant's administration costs.
2. **Is the Recordkeeping Fee on a Low, Flat Fee Per Participant?** If participants pay the recordkeeping fee, make sure that it is on a low, flat fee per participant that is fully transparent. This fee should be compared to other companies of similar plan size to ensure that the recordkeeping fee is reasonable.
3. **Use an RFP every three years to bid out your recordkeeping:** Plaintiffs argue that the best way to reduce plan administration fees is to do frequent requests for proposals in which the services are subject to competitive bidding. In an ideal world, plan benchmarking from quality consultants should be enough, but go the extra step and require an RFP to get the lowest possible recordkeeping fee per participant.
4. **Have you eliminated or capped revenue sharing?** The best practice in the current environment is to eliminate all revenue sharing – again, take the issue off the table so that you do not have to defend the practice. If you still have revenue sharing, make sure it is capped and calculate the overall recordkeeping fee so that it is reasonable. Do not allow a percentage of asset fee to grow above a reasonable amount when plan assets grow large.
5. **Are you in the lowest possible institutional share class for every investment option?** This is the number one risk factor for excessive fee litigation. Plaintiff firms look for common investments and check if your plan is in the lowest institutional share class.
6. **Is your QDIA in a low-cost index fund?** Similar to question #5, make sure your default option for the plan is a low-cost index fund that is in the lowest share class for which your plan is eligible.
7. **Are the Target-Date Funds in a low-cost index fund?** The second key risk factor for excessive fee litigation is when plans offer target date suites with active investment management. Excessive fee lawsuits have targeted Fidelity Freedom, T. Rowe Price, Wells Fargo, Northern Trust and other active target-date funds.
8. **Are your investment options related to the plan recordkeeper?** Most recordkeepers require investments sponsored by their companies. The best practice is to offer investments that are not sponsored by your recordkeeper. But if your recordkeeper has investments in the plan, you need additional due diligence to ensure that the investment fees are the lowest possible and the investment performance is sound.
9. **How are you benchmarking your managed account fees?** The newest wave of excessive fee claims is that plan fiduciaries are allowing the managed account provider to charge an excessive fee. Ask your plan consultant how they are evaluating whether the managed account option has a proper fee.
10. **How are you monitoring investment performance, and eliminating underperforming investment options?** The most insidious claim in excessive fee litigation is that plan investment options are underperforming. The reason is that plaintiffs are usually comparing the challenged investment to a Vanguard 500 Index or some other investment in which the strategy is not comparable.

The Fid Guru Blog

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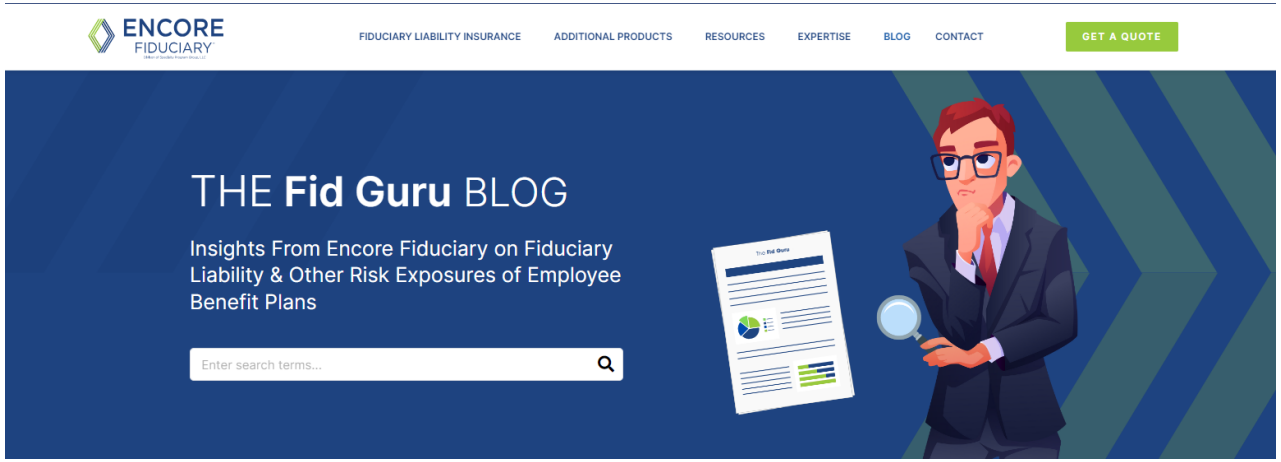

- **Recent Fid Guru Blog Posts:**
- The Cornell Prohibited Transaction Case is ERISA's Most Absurd Case
- The Second Circuit's "Common Sense" Plausibility Pleading Standard in the Deloitte Excess Recordkeeping Fee Case, and How to Distinguish the Recent Adverse Rulings in the Third and Fifth Circuit
- How to Improve 401(k) Plan Fee Disclosures
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