ERISA Lawsuits Should Benefit Participants, Not the Plaintiffs' Bar

ERISA class-action litigation has flooded courts in recent years. Plaintiffs' attorneys filed more than 500 ERISA "fee cases" from 2016 through 2024, and filings increased by 35 percent between 2023 and 2024.[i] ERISA cookie-cutter lawsuits allege breaches of fiduciary duty through various theories, including:

- Overpaying for recordkeeping services (even when fees were as low as $5 per participant per year);
- Selecting and maintaining investment options that were too expensive (or not expensive enough) or too conservative (or not conservative enough);
- Using mortality tables for defined benefit plans that could harm some participants, but benefited others; and
- Using plan forfeiture accounts to pay for employer contributions, rather than to reduce participants' expenses (even though the IRS and Treasury have allowed this for years and plan language often permitted this).

More recently, plaintiffs' attorneys also are including bare-bones allegations of prohibited transactions, such as the plan contracting for services with a plan service provider, which nearly all plans must do.

Very few of these cases go to court because plaintiffs' attorneys know the target typically will choose to settle rather than face expensive and one-sided discovery potentially followed by a lengthy and costly trial. Settlements have ranged from under $1 million to more than $70 million. In 2024 the average settlement was $3.2. million.[ii] However, each participant often recovers an extremely small amount due to attorney's fees (generally, 1/3 of the settlement amount), expenses, payments to the named plaintiffs, and settlement amounts that are a fraction of the alleged losses.[iii] These settlements have only encouraged more suits, with plaintiffs' attorneys now targeting smaller plan sponsors at a time when Congress is trying to encourage plan adoption by smaller employers.[iv]

This state of affairs contradicts one of ERISA's foundational goals: "to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place."[v]

The legislative proposals below recognize ERISA's original intent to allow a private right of action to obtain benefits and redress fiduciary breaches, while also restoring Congress' goals of encouraging plan formation by limiting frivolous litigation that seeks attorneys' fees rather than pursuing actual wrongdoing. The proposals are intended to be analyzed both holistically and independently from one another. Depending on stakeholder and Congressional feedback, individual proposals may be removed or others could be added. The ultimate goal is to protect workers' retirement savings by reducing the financial incentive for meritless lawsuits while ensuring legitimate concerns can be addressed in the courts.

Legislative Proposals

1. Heighten pleadings standard for breach of fiduciary duty and prohibited transaction claims

The Supreme Court has recognized that "[a]t 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."[vi] It is not enough to say that there could have been a different decision because ERISA does not require hindsight. Rather, ERISA requires a thoughtful process that could result in a range of reasonable decisions. Importantly, the proposal recognizes that a fiduciary's failure to follow such a process can be alleged both through direct allegations or by inference. An appropriate pleading standard should recognize this by requiring well-pleaded facts establishing that no other fiduciary could have made the decision alleged to have been the breach of fiduciary duty.

Amend ERISA section 502 (29 U.S. Code § 1132), by adding a new subsection (n):

(n) In any action commenced by the Secretary, or by a participant, beneficiary or fiduciary for relief based on any alleged violation of any duty or prohibition established under part 4 of this title, no such action shall be maintained unless the plaintiff alleges with particularity facts either directly showing or giving rise to a strong inference that (i) the challenged act or omission was not within a range of reasonable judgments such that no other fiduciary acting under the circumstances could have taken the action alleged to violate the duty or prohibition at issue, (ii) the fiduciary's process relating to the alleged breach was imprudent as a matter of law, and (iii) in the case of an alleged violation of section 1106, no statutory or administrative exemption under section 1108 applies to the alleged violation.

2. Limit liability to acts outside the realm of reasonableness

Just as the pleading standards must require allegations of facts showing no fiduciary could have made the decision at issue, fiduciary liability must also be limited to those circumstances.

Amend ERISA section 409 (29 U.S. Code § 1109) - Liability for breach of fiduciary duty, by adding a paragraph (c) as follows:

(c) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter unless the act or omission that caused the breach was such that no fiduciary acting in accordance with its responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter could have committed such act or omission.

3. Stay discovery while a motion to dismiss is pending

Discovery in ERISA cases is asymmetrical against plan fiduciaries and plan sponsors and comes at an "ominous" price.[vii] In some cases, discovery may have been nearly completed by the time a motion to dismiss is granted, leaving the plan sponsor on the hook for the time and expense of a one-sided discovery process before a court has made a substantive decision. Discovery should be stayed in all cases while a motion to dismiss is pending, similar to the Private Securities Litigation Reform Act.

Amend ERISA section 502 (29 U.S.C. § 1132), by adding a new subsection (o):

(o) In any action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

4. Response to *Cunningham v. Cornell*

In *Cunningham v. Cornell*, the Supreme Court held that a plaintiff only needs to plausibly allege the elements of a prohibited transaction, without addressing any applicable exemptions. The Court rejected all contrary arguments, stating that Congress wrote the prohibited transaction exemptions "in the orthodox format of an affirmative defense" separate from the prohibitions. The Court stated that requiring plaintiffs to plead and disprove all potentially relevant exemptions would be impractical, "given that there are 21 statutory exemptions and hundreds of regulatory exemptions," ignoring the fact that the statutory exemptions match up to the statutory prohibited transactions and any plaintiff suing over an administrative exemption would know that it exists. Finally, the Court downplayed practical concerns about meritless litigation, claiming that district courts have ways to address this, such as an obscure Rule of Civil Procedure that has rarely been invoked and Rule 11 sanctions which courts historically have been reluctant to impose.[viii]

Before ERISA, the self-dealing provisions were in the Internal Revenue Code and were enforced by the Department of the Treasury. As ERISA moved through Congress, the prohibited transaction rules were

modeled after those applicable to private foundations, which again were enforced by Treasury through excise tax assessments with no private right of action.[ix] There is no indication that Congress ever envisioned exemptions as affirmative defenses, let alone that a private plaintiff could sue any plan fiduciary for employing a service provider or for providing participant loans. The proposal restores this vision either by requiring a plaintiff to plead, with specificity in a complaint, the absence of an exemption; or, alternatively, by allowing enforcement of the prohibited transaction rules only by DOL and Treasury and not through private litigation.

> Amend ERISA section 502(a) (29 U.S.C. § 1132) as follows:
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> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title, provided, however, that only the Secretary may bring an action under this paragraph for a violation of section 1106 or 1108 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan, provided, however, that only the Secretary may bring an action under this paragraph for a violation of section 1106 or 1108 of this title;

5. Plaintiffs have the burden of loss causation

ERISA does not provide which party has the burden of loss causation. Five Circuits have held the burden is on the plaintiff because it is an element of a claim. However, four Circuits have held that the burden of disproving loss causation falls on fiduciaries (somewhat akin to disproving a negative). The proposal clarifies that loss causation is an element of any claim, and it lies with the plaintiff.

> Add a new subsection 502(p) as follows (after new subsections (n) and (o) set forth above):
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> (p) Loss Causation: In any private action arising under this title, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this title caused the loss, as well as the amount of such loss, for which the plaintiff seeks a recovery.

6. Direct DOL to address frivolous litigation

Before ERISA, employees had very limited ways to enforce their rights to a pension, and some courts viewed pensions as mere gratuities.[x] During the legislative debate, it was recognized that even at that time, private enforcement likely was only feasible through class actions because individual recoveries would be too small to make it worthwhile for an attorney to take a case.[xi] However, the drafters never could have imagined a scenario in which employers are being sued no matter what they do by class action lawyers filing copycat lawsuits in search of settlements not benefits.[xii] You don't have to look far to see how frivolous these cases have become. For example, "[s]ome plaintiffs allege that it is imprudent for a plan to offer more than one investment option in the same style, while others complain that including only one option in each investment style is imprudent. In many cases, plaintiffs allege that fiduciaries were imprudent because they should have offered Vanguard mutual funds, but others complain that defendants were imprudent because they offered Vanguard mutual funds. Some plaintiffs allege that plans offered imprudently risky investments, while others allege that fiduciaries were imprudently cautious in their investment approach. In some instances, fiduciaries have simultaneously defended against 'diametrically opposed' liability theories, giving new meaning to the phrase 'cursed-if-you-do, cursed-if-you-don't.'" (citation omitted).[xiii] As such, the proposal mandates DOL to issue guidance to reduce frivolous litigation while maintaining the original intent of ERISA to allow participants to ensure they receive promised benefits.

> Not later than 12 months after the date of enactment of this Act, the Secretary of Labor shall issue guidance to reduce frivolous class actions brought against plan fiduciaries.

[i] “401(k) Excessive Fee Litigation Spiked to ‘Near Record Pace’ in ’24,” Daniel Aronowitz and Karolina Jozsiak, Jan. 13, 2025, available at https://www.planadviser.com/401k-excessive-fee-litigation-spiked-near-record-pace-24/.
[ii] *Id.*
[iii]For example, one court approved a $1.5 million settlement covering 50,000 individuals. Under the agreement, one-third first went to the attorneys, then up to $150,000 could be spent on expenses, leaving $875,000 to be split 50,000 ways, for an average recovery of $17.50 per participant. *See* “Salesforce Settles 401(k) Suits for $1.35M,” Alex Ortolani, Sept. 23, 2024, available at https://www.planadviser.com/salesforce-settles-401k-suits-1-35m/.
[iv] *Ibid.* at endnote i. *See also* Aquino v. 99 Cents Only Stores LLC, C.D. Cal., No. 2:22-cv-01966 (plan with $69 million in assets) and Damberg v. LaMettry’s Collision Inc. (plan with $9 million in assets).
[v] *Varity Corp.* v. *Howe*, 516 U. S. 489, 497 (1996).
[vi] *Hughes v. Northwestern Univ.*, 595 U.S. 170, 177 (2022).
[vii] *PBGC ex rel. Saint Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013).
[viii]“When a Complaint Is Actually Frivolous: Threatening to Seek Rule 11 Sanctions as an Appropriate and Effective Strategy,” Jack Yoskowitz and Molly Rao, Mar. 18, 2025, available at https://www.law.com/newyorklawjournal/2025/03/18/when-a-complaint-is-actually-frivolous-threatening-to-seek-rule-11-sanctions-as-an-appropriate-and-effective-strategy/?slreturn=20250514150721.
[ix] “The Employee Retirement Income Security Act of 1974, A Political History”, p. 155, James Wooten (2004).
[x] “Pension and Employee Benefits Law”, p. 134, John H. Langbein, et al. (4th ed. 2006) (“Because the plan authorized the employer to revoke promised pension benefits at will, those promises were treated like a promise to make a gift in the future, which is unenforceable until the gift is actually completed.”).
[xi] Private Pension Plan Reform Part II: Hearings Before the S. Comm. on Private Pension Plans of the Comm. Fin., 93d CONG. 222 (1974) (statement of Frank Cummings).
[xii] “Chamber of Commerce Says Cookie-Cutter Excessive Fee Suits Harm Participants”, Aug. 27, 2021 available at https://www.plansponsor.com/chamber-commerce-says-cookie-cutter-excessive-fee-suits-harm-participants/.
[xiii] *See* Brief of Amicus Curiae The United States Chamber of Commerce, Motz v. Citi Retirement Savings Plan, No. No. 3:22-cv-00965-RNC (D. Conn. Mar. 8, 2024) available at https://www.uschamber.com/cases/erisa/motz-v-citigroup-inc.