Q2 2026: Lessons from the Litigation Landscape — Courts Push Back on Expanding ERISA Theories, Even as Plaintiffs Push New Ones

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The ERISA litigation landscape continues to evolve rapidly — but recent rulings suggest courts are becoming less willing to allow creative fiduciary theories to survive without concrete allegations of procedural failure.

Here's What You Really Need to Know

- Forfeiture reallocation challenges continue to be filed, and the Department of Labor (DOL) has now asked and been granted permission to participate in oral arguments in several cases.
- A new voluntary benefits suit has been filed by Schlichter Bogard LLC, suggesting there might be more to come.
- Fund performance suits continue to emerge, though prudent processes still often prevail, particularly if no meaningful benchmark is alleged.
- A massive suit against Ford Motor Company highlights an emerging litigation trend of alleging a "kitchen sink" of fiduciary breach allegations.

Let's Dive In

Forfeiture reallocation suits have proliferated rapidly over the past two years, generally alleging that fiduciaries breached their duties by using forfeited employer contributions to reduce future employer contributions rather than using those forfeitures to offset participant-paid plan expenses. Plaintiffs have argued that this practice improperly benefited employers at the expense of participants.

Recent dismissal rulings continue to give plan sponsors meaningful defenses where the challenged use of forfeitures was expressly permitted by the plan document and consistent with long-standing Internal Revenue Service (IRS) and Department of Treasury guidance. During the quarter, several cases alleging a fiduciary breach in the application of plan forfeitures were dismissed, including suits against BMO, Mohawk Valley Health, and WPP Group USA.[i] Those decisions reinforce that plan sponsors are in a stronger position when their plan documents clearly authorize forfeitures to be used to reduce employer contributions and when fiduciaries can show that they acted within the plan's terms. But the newer suits against Ford Motor Company and U.S. Foods show where plaintiffs are likely to push next, and where plan sponsors and their advisors/consultants should focus their review.[ii]

First, plaintiffs are focusing on plan-document language, arguing (as in the U.S. Foods suit) that forfeitures were required to offset plan expenses before reducing

employer contributions, and treating later retroactive amendments as evidence of prior noncompliance. Second, they are using forfeiture claims as an entry point for broader fiduciary challenges, as in the Ford complaint, which also attacks managed account fees, alleged indirect compensation, disclosure practices, and document production. Third, even where plan sponsors have strong defenses under the plan document and IRS guidance, plaintiffs are likely to press for evidence of a real fiduciary process. The practical takeaway is that plan sponsors should be prepared to show that their forfeiture practices are clearly authorized, consistently administered, and reviewed through an ERISA fiduciary lens.

CIT Selection Challenged

Noting that this case "demonstrates definitively what plan sponsors have observed from 401(k) litigation for decades: they will be a target for strike suits no matter what decisions they make," the U.S. Chamber of Commerce has weighed in on a case challenging the use of a collective investment trust (CIT).[iii] The suit was filed earlier this year and while it targeted — as numerous other suits have — the use of plan forfeitures, not to mention allegedly excessive recordkeeping fees, it also pursued the decision to invest in what it termed "structurally opaque" CIT target-date fund (TDF) series by the $1.03 billion Lithia Motors, Inc. 401(k) Plan.[iv]

"ERISA plaintiffs have spent more than a decade challenging fiduciaries for offering mutual funds instead of collective investment trusts (CITs) that employ the same investment approach, claiming that the inclusion of mutual funds in a 401(k) plan lineup was a clear sign that fiduciaries were asleep at the wheel and failing in their obligation to ensure cost-conscious plan management," the brief begins. "Plaintiff here takes the exact opposite approach, claiming that the decision to offer CITs rather than mutual funds that employ the same investment approach is categorically indicative of imprudence."

"If Plaintiff's theory were the rule, then every fiduciary of a plan investing in CITs could be expected to be hauled into court — simply for making the extraordinarily popular decision to offer this low-cost method of investing to plan participants that ERISA plaintiffs' lawyers have for years posited is the only prudent option. That is not how the statute works."

Participant "Enter" Actions?

The defendants in a massive participant data usage suit have asked the court to dismiss the case, arguing that as a recordkeeper they weren't fiduciaries, that investment decisions made after a rollover aren't governed by ERISA, and that a single transaction doesn't constitute advice.[v]

The suit, filed in August 2025, argued that Empower used data it possessed as recordkeeper to target rollover candidates that its advisory unit encouraged to move to its managed account product.[vi] The suit further alleged that the additional fees, limited personal customization and incentives to promote that offering were

not disclosed. Moreover, it took issue with the plan sponsors as not monitoring or supervising these activities, though they aren't parties to the suit.

The arguments echo those in a similar case also filed by the law firm of Schlichter Bogard LLC almost a year prior involving TIAA and multiple university plans using its managed account services (provided by Morningstar), which is still active.[vii]

In their new motion, the Empower defendants first argue that their participant interactions did not constitute investment advice for a fee — essentially that it failed to meet the "regular basis" test from the so-called five-part test — "and that failure alone defeats Plaintiffs' theory that Empower acted as an ERISA fiduciary by providing investment advice." The motion also pushed back on an attempt to link "multiple ongoing interactions" as advice, rather than "education or other routine interactions."

Even so, "multiple unspecified 'interactions' leading up to a single rollover transaction do not constitute advice provided 'on a regular basis.' Both ERISA itself and the DOL regulatory test require an ongoing advisory relationship with respect to plan assets — not a series of unspecified pre-transaction 'interactions' culminating in a one-time rollover…Because Plaintiffs do not plausibly allege fiduciary status under any theory, Counts I and II should be dismissed. And because fiduciary status is also a prerequisite to co-fiduciary liability, Plaintiffs' co-fiduciary allegations fail as well," the motion concludes. It also asserts that, as a non-fiduciary, Empower cannot be "charged solely with participating in a fiduciary breach."

The plaintiffs will have the opportunity to brief their response before the court makes its decision on the motion to dismiss, which will decide if this case will proceed.

"Massive" Underperformance

Volatile markets have predictably produced another wave of suits alleging fiduciary breaches tied to allegedly underperforming investments. But while plaintiffs continue to challenge investment lineups based on hindsight comparisons and disappointing returns, courts remain focused on a more fundamental question: whether fiduciaries employed a prudent decision-making process.

Several recent cases underscore that simply alleging underperformance is not enough.

One suit against the fiduciaries of the Aon retirement plan alleged "massive underperformance" relative to supposedly comparable investment options and claimed that the breadth of that underperformance itself suggested a flawed monitoring process.[viii] Yet notably, the complaint itself acknowledged that many of the facts necessary to support those allegations were "known only to Defendants or are exclusively within their control" — effectively conceding that the actual fiduciary process had not yet been identified.

A similar theory appeared in litigation involving the nearly $9 billion American Express plan, where plaintiffs challenged a custom TDF suite that allegedly compounded participant losses by investing heavily in other underperforming funds already included in the plan lineup.[ix] The suit further alleged conflicts of interest tied to relationships with Morgan Stanley Investment Management and claimed those relationships influenced investment selection and retention decisions.

Meanwhile, courts continue to emphasize that ERISA's prudence standard is "process-oriented, not results-oriented." In dismissing excessive fee and underperformance claims involving the Sonic Automotive 401(k) Plan, a federal judge reiterated that courts are not tasked with second-guessing investment outcomes but rather evaluating whether fiduciaries engaged in a reasoned decision-making process.[x]

That distinction proved critical. The court rejected comparisons between actively managed funds and passive indices as "apples to oranges," concluding that without a "meaningful benchmark," allegations of underperformance alone could not plausibly establish imprudence. As the court succinctly observed: "Prudence does not mean clairvoyance."

The same theme emerged in litigation involving the $2 billion Equitable 401(k) plan, where plaintiffs challenged the retention of certain guaranteed investment contracts and alleged excessive indirect compensation tied to recordkeeping arrangements.[xi] There too, the court concluded that the complaint relied primarily on hindsight critiques of investment performance rather than concrete allegations regarding fiduciary methodology or procedural deficiencies.

Taken together, these decisions reflect a continuing judicial reluctance to allow ERISA claims to proceed based solely on poor outcomes, fee comparisons, or retrospective disagreements with fiduciary judgments. Increasingly, courts appear to be demanding specific allegations showing not merely that investments underperformed, but that fiduciaries failed to engage in a prudent and well-documented process in selecting and monitoring those investments.

Healthcare "Fare"

We've previously covered a handful of healthcare fiduciary suits – a reminder that ERISA also applies to healthcare, and that the same fiduciary responsibilities with regard to reasonable fees and oversight apply. These healthcare fiduciary suits have struggled to get past the motion to dismiss stage — largely on grounds that the plaintiffs lacked standing (an injury that could be redressed via litigation). However, a federal judge recently shrugged off arguments that had been successful in dismissing other suits.

"The question is not whether the plaintiffs received the healthcare benefits they were promised. The question is instead whether, in receiving those benefits, they

paid too much. Alleging that they paid more for the benefits than they should have is an injury sufficient to confer standing, according to Judge Jeremy C. Daniel.[xii]

The plaintiffs in this case (current and former employees of defendant Northwestern University) filed a putative class action suit on behalf of the Northwestern University Employee Welfare Plan, alleging that Northwestern failed to (i) prudently select and monitor the Plan's preferred provider organization (PPO) insurance options, and (ii) disclose this material information to participants, causing injury in the form of loss from overpayment under the Plan.

In recognizing that participants can establish standing based on allegations of overpaying for benefits — rather than needing to show denied coverage or mismanaged assets — the court distinguished prior precedent and, in the process, lowered a key procedural hurdle. Just as importantly, the judge declined to resolve whether Northwestern acted in a settlor or fiduciary capacity at this stage, emphasizing that decisions around plan design, selection, and monitoring may carry fiduciary obligations — but subject to later factual scrutiny.

The ruling underscores growing judicial openness to claims that plan sponsors must not only offer benefits but do so prudently and transparently — particularly regarding cost-value tradeoffs — raising the stakes for employers in how they structure, evaluate, and communicate healthcare plan options.

VBO "Row"

You may recall that just ahead of the 2025 holiday season, Schlichter Bogard LLC filed four suits alleging fiduciary breaches regarding voluntary benefit programs.[xiii] Well, they've now filed a fifth, and they are not the first firm to do so. In the most recent suit, they are representing plaintiffs in a suit against defendants Banner Health, Lockton Companies, LLC, BCInsourcing, LLC, and John Does 1–20 "for breaches of fiduciary duties and other violations" of ERISA.[xiv]

More specifically, the suit alleged that the plan fiduciaries "violated their duties with respect to the management and administration of accident, critical illness, and hospital indemnity insurance programs ('Voluntary Benefits Insurance') offered as a plan governed by ERISA" — a suit that, as the ones filed last December alleged, involves not only the employer, but the benefits consultant and third-party administrator (TPA).

In April, a suit bringing similar claims against Banner was filed by the Seattle-based law firm Keller Rohrback LLP — no stranger to ERISA litigation.[xv]

Standing "Put"

A federal judge saw the exchange of a pension commitment for an arguably less secure annuity as sufficient to allege injury, but the suit still failed to get past the motion to dismiss.[xvi]

In this case, the defendants entered into an agreement to transfer $1.5 billion of Weyerhaeuser's pension obligations to either Athene Annuity and Life Co. or Athene Annuity & Life Assurance Company of New York (collectively, "Athene"), which the suit described as "a highly risky private equity-controlled insurance company with a complex and opaque structure."

Acknowledging that here "the question is a close one", Judge Kymberly K. Evanson ruled that the plaintiffs had adequately pleaded standing because as a result of defendants' actions, they received a less safe — and, thus, less valuable — annuity than they would have received had defendants complied with their duties under ERISA – a "concrete" injury sufficient to "invoke the Court's jurisdiction."

However, she agreed with the Weyerhaeuser defendants that, as the plaintiffs' allegations concerning Athene's financial condition "almost entirely postdate the transaction at issue and thus have little bearing on whether defendants complied with their fiduciary duties in selecting Athene," she granted their motion to dismiss the suit, though she gave the plaintiffs an opportunity to amend their suit – and try again.

Action Items for Plan Sponsors

- **Revisit and document fiduciary processes — not just outcomes.** Recent rulings continue to emphasize that ERISA prudence claims turn on process, not investment performance alone. Fiduciaries should ensure committee minutes, investment reviews, benchmarking analyses, and monitoring procedures demonstrate a thoughtful and consistent decision-making framework.
- **Review plan provisions and administrative practices.** Given the continuing wave of forfeiture litigation, plan sponsors should confirm that plan documents clearly authorize current forfeiture allocation practices and that administration aligns with those provisions. Even where courts have dismissed these suits, the litigation itself highlights the importance of operational consistency and clear documentation.
- **Evaluate oversight of service providers and participant interactions.** Litigation involving managed accounts, rollover recommendations, voluntary benefits, and participant data usage underscores the need for closer oversight of recordkeepers, consultants, TPAs, and advisory providers. Sponsors should understand how participant data is being used, what disclosures are provided, and whether compensation arrangements create potential conflicts.
- **Stress-test benchmarking and investment comparisons.** Courts continue to reject claims based on weak or inapt comparisons, particularly "apples-to-oranges" benchmarking between active and passive strategies. Fiduciaries should periodically review how investments are benchmarked, how peer groups are selected, and whether IPS standards remain sufficiently specific

and defensible. While addressing these action items, continue to monitor the DOL's proposed regulation to determine its impact on these evolving action items.

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[i] *Shulak v. BMO Financial Corp.*, No. 2:24-cv-09615 (N.D. Ill. Mar. 31, 2026); *Gaetano v. MVHS Inc.*, No. 6:25-cv-00118 (N.D.N.Y. Mar. 31, 2026); *Polanco v. WPP Group USA Inc.*, No. 1:24-cv-09548 (S.D.N.Y. Apr. 28, 2026).
[ii] Complaint, *Fuller v. Ford Motor Co.*, No. 2:26-cv-11541 (E.D. Mich. May 8, 2026); *Bradford et al. v. US Foods, Inc.*, No. 1:26-cv-04758 (N.D. Ill. May 28, 2026).
[iii] Brief of the U.S. Chamber of Commerce as *Amicus Curiae* in Support of Defendants, *Ventura v. Lithia Motors, Inc.* (C.D. Cal. 2026).
[iv] Complaint, *Ventura v. Lithia Motors, Inc.* (C.D. Cal. Feb. 20, 2026).
[v]Motion to Dismiss, *Williams-Linzey v. Empower Advisory Group, LLC*, No. 3:25-cv-14660 (D.N.J. 2026).
[vi] Complaint, *Williams-Linzey v. Empower Advisory Group, LLC*, No. 3:25-cv-14660 (D.N.J. Aug. 15, 2025).
[vii] Complaint, *Kelley v. Teachers Insurance and Annuity Association of America*, No. 24-5945 (S.D.N.Y. Aug. 5, 2024).
[viii] Complaint, *Clayton v. Aon Corp.*, No. 1:26-cv-06026 (N.D. Ill. May 22, 2026).
[ix] Complaint, *Rivetti v. American Express Co.*, No. 1:26-cv-04082 (S.D.N.Y. May 15, 2026).
[x] *Nolan v. Sonic Automotive, Inc.*, No. 3:25-cv-00474 (W.D.N.C. May 1, 2026).
[xi] *Tedford v. Equitable Financial Life Insurance Co.*, No. 25-cv-2180 (D.N.J. May 19, 2026).
[xii] *Barbich v. Northwestern University*, No. 25-cv-6849 (N.D. Ill. Apr. 3, 2026) (denying motion to dismiss).
[xiii] Nevin E. Adams, "Schlichter Bogard Unleashes a New ERISA Suit Genre," *NAPA-Net*, December 23, 2025, https://www.napa-net.org/news/2025/12/schlichter-bogard-unleashes-a-new-erisa-suit-genre/.
[xiv] Complaint, *Haller v. Banner Health*, No. 2:26-cv-03114 (D. Ariz. May 5, 2026).
[xv] Complaint, *Hannum v. Banner Health*, No. 2:26-cv-02944 (D. Ariz. Apr. 28, 2026).
[xvi] *Maneman v. Weyerhaeuser Co.*, No. 2:24-cv-02050 (W.D. Wash. Mar. 31, 2026) (dismissed without prejudice).