# Q3: Lessons from the Litigation Landscape

While there was plenty of new litigation filed in the third quarter, we also saw several cases reach decisions – many favoring plan fiduciaries, specifically regarding the reallocation of plan forfeitures. Notably, the Department of Labor (DOL) weighed in on behalf of plan fiduciaries in one of those cases, possibly setting a shift in perspective for the courts going forward. There was also a new, and potentially compelling, judicial analysis in a case involving a pension risk transfer (PRT), and yet another ruling that a prudent process – even an imperfect one – can be sufficient.

## Here's What You Really Need to Know

- The DOL backs fiduciaries on forfeiture use in one case, and the recent court trend favors fiduciaries in forfeiture suits, though new suits continue to be filed.
- Plan sponsors should understand who has control over participant data and whether it is being used to cross-sell additional services. A recordkeeper's use of participant data to sell its own managed account in a rollover has drawn a suit – and not for the first time.
- A federal judge recommended dismissal of a suit challenging a pension risk transfer, acknowledging that the decision to do so was a settlor matter, but that the selection of the receiving organization was a fiduciary decision. The latter included consideration of several key factors, notably the establishment of a separate account for those pension obligations.

## Let's Dive In

### DOL Backs Plan Fiduciaries in Forfeiture Suit

Perhaps the biggest news on the litigation front during the prior quarter was the DOL's decision to weigh in via a "friend of the court" amicus brief supporting the fiduciary defendants in a case alleging a fiduciary breach for the use of plan forfeitures to offset employer contributions by HP.  It happens to be the first of more than 60 cases to get to the appellate court level.

Roughly half of the 30-page filing is dedicated to recounting the (long) history of the suit — one that HP has (thus far) managed to prevail on at every stage (though the plaintiffs continue to be provided an opportunity to "improve" their arguments). Each of these suits has their own characteristics (differences in plan language, notably), and though the DOL's comments are limited to the particulars of this specific case, the DOL acknowledged that "the district court correctly held that the HP Plan Committee's allocation of Plan forfeitures was a fiduciary decision because it 'exercised discretion and control over Plan assets and thus w[as] making decisions of Plan administration rather than Plan design,'" and that "this is a quintessential fiduciary decision that is subject to the fiduciary duties of loyalty and prudence."

"However," the DOL's brief continued, "with the added context that funding the Plan remains a settlor decision, the mere fact that the HP Plan Committee decided to use Plan forfeitures to fund matching contribution benefits — an option explicitly granted by the Plan document and the proposed Treasury regulation — does not state a plausible claim for breach." Then in an interesting pivot from plaintiff arguments that the employer should just pony up some "extra" contributions (not to mention what might actually be in the "best interests" of participants), the DOL — reminding us again of the separation of the plan committee decisions from the employer itself — painted a scenario where the plan committee opted to offset expenses instead of employer contributions, and the employer might simply refuse to provide the funds.

Now, considering how most committees operate, that might seem a far-fetched possibility, but the DOL said that "the risks of a dispute between the fiduciary and the plan sponsor are appropriately factored into a fiduciary's assessment of which course of action best satisfies its duties of loyalty and prudence" and deemed that offsetting consideration a decision to protect "participants' contractually promised benefits, like the matching contributions that would have been jeopardized by Plaintiff's proposed course of action, is ERISA's principal function."

Of course, this is the DOL weighing in with a specific opinion in a single case. That said, the broad commentary — the settlor versus fiduciary decisions, the boundaries established by the plan document, and significantly, the acknowledgement of the long-standing norms and legality of the decisions on forfeiture reallocation, are not only a welcome and respected opinion from the government agency regulating these practices, but should be helpful in a handful of cases currently waiting for the ruling in this case.

## Forfeiture Suits (Still) Stacking Up

Those results notwithstanding, a number of forfeiture-related fiduciary breach suits continued to be filed during the quarter, notably WakeMed Hospital System, RTX, Siemens Energy (along with allegations regarding a stable fund option), NextEra (along with some excessive fee allegations), and Aldi. That said, there were also several court decisions in favor of plan fiduciaries in these types of suits, with motions to dismiss granted to Home Depot, Honeywell (for the second time), Amentum/DynCorp (though certain claims not related to forfeitures were left alive) – while Bank of America was rebuffed in its attempt.

## Participant Data Use in Managed Account "Push" Challenged

In mid-August, a new suit challenged "a scheme to significantly mislead retirement plan participants and greatly enhance corporate profits". The 80-page suit was filed by Schlichter Bogard LLC, representing plaintiffs, all of whom were participants in plans serviced by Empower, naming as defendants Empower Retirement, LLC, Empower Financial Services, Inc., and Empower Annuity Insurance Company of America.

While questions about participant data as a plan asset have come up in prior cases (for example, *Vanderbilt* settlement; *Northwestern* case where it was held that participant data wasn't a plan asset), this suit argues that Empower used data it possessed as recordkeeper to target rollover candidates that its advisory unit encouraged to move to its managed account product. The suit further alleges that the additional fees, limited personal customization (i.e., only seven available asset allocations for the managed account) and incentives to promote that offering were not disclosed. Moreover, it takes issue with the plan sponsors not monitoring or supervising these activities, though they aren't parties to the suit.

Note that while the plan sponsors in which the named plaintiffs participated were not named as parties, their complicity and/or negligence in allowing these kinds of alleged promotions was criticized in the complaint. And, for Empower, they are alleged to be a fiduciary in this case but in the event the court finds they are not a fiduciary, then under an alternative theory, the plaintiffs argue that Empower (as a party in interest) is still responsible for actions of the plan sponsors. However, this case is still in the early phases and will be closely monitored given the issues related to control of participant data as well as the arguments related to a service provider's responsibilities for plan sponsors under a party-in-interest theory.

## Inadequate Disclosures Fined by SEC

The Empower lawsuit provides a remarkably detailed description of the challenged managed account program, and the directions allegedly provided to those who it says steered individuals from their employer-sponsored plans to Empower's managed account platform. The arguments here echo those in a similar case filed by this same law firm of Schlichter Bogard LLC almost exactly a year ago in 2024, which involved TIAA and multiple university plans using its managed account services (provided by Morningstar).

The Empower lawsuit was followed in early September by massive fines imposed by the Securities and Exchange Commission (SEC) regarding "inadequate disclosure of conflicts of interest and misleading statements" regarding managed account investments. The fines — $5,989,969.94 by Empower and $19,500,000 by Vanguard— constituted offers made by the firms and accepted by the SEC after years in which the firms failed to provide "full and fair written disclosure of the capacity in which Retirement Plan Advisors were acting when providing advice or a recommendation that a Plan Participant enroll in their managed account services."

## PRT Suit Recommended for Dismissal

A federal judge reviewing a suit challenging the prudence of AT&T's decision to transfer its pension obligations to a third party says all eleven claims should be dismissed. The plaintiffs in this suit filed March 11, 2024 in the United States District Court for the District of Massachusetts, represented by none other than Schlichter Bogard LLP, alleged that AT&T "decided to fatten its wallet by placing its retirees' futures in the hands of a risky new insurance company that is dependent on its Bermuda-based subsidiary and which has an asset base far riskier than AT&T's" — pocketing "more than $360 million in profit from this scheme."[i] The suit also names State Street (SSGA), contending that the firm assisted in the transaction and "profited handsomely as well."

The recommendation to dismiss all claims was filed by U.S. Magistrate Judge Paul G. Levenson in a report and recommendation.[ii] He determined that the decision to transfer the pension obligations (in what is referred to as a PRT) was a settlor, not a fiduciary decision, and that while there was not yet any evidence of injury (an argument that the defendants had made in their motion to dismiss the suit, and once that has been raised successfully in other PRT suit defenses), the pension participants had standing to bring suit.

However, Judge Levenson ultimately concluded that the plaintiffs failed to plausibly allege breaches of fiduciary duty: either the duty of loyalty or the duty of prudence. Moreover, they failed to allege facts that would support a plausible inference that AT&T was disloyal in selecting SSGA, or that SSGA was disloyal or suffered from conflicts of interest that disqualified it as a fiduciary. Lacking a plausible argument on any of those factors, claims of a failure to monitor fiduciaries fell short as well.

Significantly, he noted that the PRT arrangement provided for a separate account to be established for these obligations, a factor outlined as a consideration by the DOL in Interpretive Bulletin 95-1, and one that he noted the plaintiffs glossed over in their recitation of the required considerations. However, that report and recommendation must be adopted by a district judge to become final.

## Prudent Process Prevails Despite "Gaps"

Despite acknowledging that "the contours of this case are not etched in black and white but shaded in grey and charcoal," a federal judge has dismissed a suit arguing imprudence in the selection and monitoring of funds, including proprietary options.

The participant-plaintiff in question was Brian Waldner, who brought suit in 2021 against Natixis Investment Managers, L.P., its Retirement Committee, and the committee members.[iii] The suit claimed that the $440 million plan — which they said included more than 30 investment options (though they counted the suite of target-date funds as a single option) and somewhere between 12 to 15 proprietary options — used "high-cost proprietary mutual funds" that "led to participants incurring excessive fees, substantially more than the average of comparator funds with similar investment styles."

The suit claimed these funds, "underperformed in comparison to prospectus benchmarks and other funds," that the Natixis defendants "failed to prudently monitor and remove them out of self-interest," and that the defendants "employed an imprudent and disloyal fund selection process through only adding proprietary funds to the Plan since 2014."

As it turns out, while there was a documented, deliberate process (with the involvement/engagement of an advisor/consultant), there were some time gaps in its execution, and some unexplained delays in the removal of certain funds. Specifically noted was a period where there was a full year between physical meetings of the plan committee.

But the judge in this case explained that "to establish a breach of the duty of prudence, a plaintiff must "point to a specific moment when [the fiduciary] should have made a different decision;" it is not enough to "vaguely challenge the Portfolio's overall structure without reference to any specific events." For plan fiduciaries, this case shows that there is not a specific number of committee members that must happen at a specific interval, but rather, that there should be a consistent and ongoing process of oversight.

## Action Items for Plan Sponsors

Even if you are the fiduciary of a plan that might not be the perceived subject of a significant class-action lawsuit, these back-to-the-basics best practices apply to plans of all sizes. For plan sponsors, consider the following:

1. Be aware of how/why participant data may be being used or shared by providers outside of a specific focus on servicing the retirement plan. Consider whether permitting that interaction is prudent, and if so, make sure that any disclosures regarding those interactions are well and accurately explained.

2. If forfeitures are used to offset employer contributions, make sure that specific language is in the plan document. Consider changing any language that provides discretion in applying forfeitures to language that directs how they will be used. Also consider which decisions are fiduciary versus settlor in nature and document accordingly.

3. Take steps to ensure that your process for reviewing funds, fees and services is documented, that your committee members are informed on the issues and alternatives, and that your process is deliberative and documented.

4. If you have, or are contemplating a PRT, remember that while the decision to do so is a corporate/settlor decision, the process of reviewing and selecting the provider is a fiduciary one.

[i] Nevin E. Adams, *"Pension Risk Transfers Trigger New ERISA Litigation,"* NAPA, March 19, 2024. https://www.napa-net.org/news/2024/3/pension-risk-transfers-trigger-new-erisa-litigation/.

[ii] [Piercy, Lanell, Willa G. Ward, Thomas L. Mazzeo, Sue Rush, Catherine Schloss, Patricia Tate-Jackson, and Darlene Wilson, on behalf of a class of similarly situated persons, v. AT&T Inc., AT&T Services, Inc., the Benefit Plan Investment Committee, Pascal Desroches, George Goeke, Debra Dial, William Hammond, Julianne Galloway, State Street Global Advisors Trust Co., and Denise R. Sisk, *Report and Recommendation on Motions to Dismiss*, No. 24-cv-10608-NMG, U.S. District Court, District of Massachusetts (Levenson, U.S.M.J.), filed August 29, 2025.
https://assets.law360news.com/2383000/2383160/0829magistrateatt.pdf.

[iii] Nevin E. Adams, *"Dismissal Falls Short in Proprietary Fund Suit,"* NAPA, December 2021. https://www.napa-net.org/news/2021/12/dismissal-falls-short-proprietary-fund-suit/.