

Q3: Lessons from the Litigation Landscape Benchmarks, Standing, and the Difference a Few Facts Can Make

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The third-quarter litigation landscape offered what might seem to be conflicting lessons. Courts continued to dismiss claims based on hindsight, speculation, weak comparisons and injuries that had not actually occurred. At the same time, other plaintiffs survived dismissal, or revived previously dismissed claims, by supplying more specific facts, better comparators or a different theory of injury.

However, as the courts repeatedly reminded both sides this quarter, the difference between speculation and a plausible claim — and between disappointing results and fiduciary imprudence — is often found in the details, so let's dive into the details you need to know.

Here's What You Really Need to Know

- The “meaningful benchmark” remains a powerful defense against investment-underperformance claims, but courts are increasingly emphasizing that it is not necessarily the only way to establish imprudence. However, the Supreme Court will take on the “meaningful benchmark” issue on October 6, 2026, so this might be the most important concept to watch right now.
- Pension risk transfer suits continue to turn on standing, with most courts finding that retirees receiving promised benefits have no concrete injury requiring a remedy, or even a trial.
- Forfeiture reallocation challenges continue to be filed, and while most are rejected at the motion-to-dismiss stage, the challenges show no sign of fading.
- Courts remain skeptical of plan provisions that require individualized arbitration when those provisions effectively eliminate the Employee Retirement Income Security Act's (ERISA) plan-wide remedies.

Let's Dive In

Benchmark “Marks”

Perhaps no issue dominated the quarter more than the role of a “meaningful benchmark” in ERISA investment litigation, and with the Supreme Court scheduled to hear *Anderson v. Intel Corporation Investment Policy Committee* on October 6, 2026 the timing could hardly be better.

The quarter began with a reminder of the standard’s practical power. In a suit challenging the Fidelity Stable Value Fund, a federal judge rejected a “cherry-picked assortment of comparators.”ⁱ Merely placing investments in the broad stable value category did not make them comparable; strategy, assets, risk and potential return all mattered. The case was dismissed with prejudice after the plaintiff had already amended the complaint.

The Court of Appeals for the 3rd Circuit supplied an even more fundamental reminder in litigation involving the Quest Diagnostics plan.ⁱⁱ Affirming summary judgment for the fiduciaries, the court began with a refreshingly straightforward observation: “Sometimes, even a good process produces disappointing results.” Quest’s committee hired an outside consultant, met quarterly, reviewed reports, met with investment managers and received annual fiduciary training. Short-term underperformance did not require immediate removal, and better-performing alternatives did not prove that the selected investments were imprudent.

Significantly, the court could describe the process precisely because it had been documented. The victory reflected evidence that the committee reviewed information, sought more when needed, understood its advisor’s recommendations and remained involved.

Then came a pair of target-date fund (TDF) decisions that, at first glance, seem to point in opposite directions.

In *Scholin v. Digi-Key Corp.*, a Minnesota federal judge dismissed a challenge to the American Century TDF series because the complaint did not adequately explain the objectives, strategies or risk profiles of the proposed comparator suites.ⁱⁱⁱ Naming Vanguard, T. Rowe Price, Capital Group and BlackRock TDFs and charting their returns was not enough since, after all, TDFs bearing the same retirement year can have materially different glidepaths, allocations, active/passive approaches and risk objectives.

By contrast, plaintiffs challenging 3M’s custom TDFs got a second chance after an earlier dismissal, and made more of it.^{iv} Their amended complaint supplied detailed

comparisons involving asset allocation, Morningstar categories, risk ratios, management strategy and investment structure. The court found several proposed alternatives sufficiently similar to serve as meaningful benchmarks, allowing portions of the case to proceed.^v

The Court of Appeals for the 11th Circuit complicated the narrative further.^{vi} In the Royal Caribbean litigation, the district court granted summary judgment because the plaintiff failed to establish that Russell TDFs were objectively imprudent compared with funds having the same strategy and risk profile. The appellate panel reversed, explaining that an ERISA plaintiff does not need an apples-to-apples comparator in every case. A fiduciary process based on “prayer, astrology or just blind luck” would not become prudent merely because the investment performed acceptably.

That does not render benchmarks irrelevant. It recognizes that a benchmark — or more precisely, comparisons to a relevant benchmark — is circumstantial evidence of a deficient process, not the statutory duty itself. Direct evidence of a flawed process, or other circumstantial evidence supporting that inference, may also establish imprudence.

Pension Risk “Transfers” — Standing Still Matters

During the quarter, the pension risk transfer (PRT) litigation wave also produced decisions that appear to diverge, though most continue to turn on whether plaintiffs have suffered a concrete, current injury.

In these cases, participants generally allege that a plan sponsor transferred pension obligations to an insurer that is less safe than a traditional carrier.^{vii} While permitted under ERISA, the transfer ends the federal insurance protection of the Pension Benefit Guaranty Corporation (PBGC), replacing it with that provided by state insurance regulation and guaranty associations. Yet plaintiffs typically continue receiving every dollar promised, a fact that has proved difficult to overcome.

In the *ATI* litigation, involving approximately \$1.5 billion in pension obligations transferred to Athene, concerns about the insurer’s structure, investments and possible future default were deemed “pure speculation,” not an actual or imminent injury.^{viii} Under the Supreme Court’s *Thole* decision, participants receiving their promised benefits lacked Article III standing.^{ix}

A Colorado federal court reached much the same conclusion in the *Lumen* case, involving roughly \$1.4 billion and 22,600 participants.^x Athene had made every required payment, and neither an asserted reduction in value nor the possibility of future default established a present or imminent injury. The case was dismissed without prejudice, allowing plaintiffs to try again.

During the quarter, the Department of Labor (DOL) weighed in on the fiduciaries' side in the *Bristol-Myers Squibb* appeal, arguing that undertaking a PRT is a settlor decision and that fiduciary duties attach to selecting the annuity provider — not the transfer itself.^{xi} The loss of ERISA and PBGC coverage, it argued, is an intended consequence of a transaction that ERISA permits, not a separate injury. According to its brief, no annuity selected in a PRT transaction over the past three decades has defaulted.

However, *Piercy v. AT&T* demonstrates that PRT litigation does not always end at the courthouse door. A magistrate judge recommended dismissing the case against AT&T but allowing a claim against State Street Global Advisors (the independent fiduciary that recommended the PRT provider) to proceed.^{xii} The amended complaint supplied comparisons with other annuity providers and alleged that Athene was comparatively riskier. It still did not show that AT&T interfered with State Street's selection, knew the process was defective or failed to monitor. Delegation did not eliminate AT&T's obligations, but plaintiffs needed facts showing a breach.

The allegations against State Street were different. Plaintiffs cited its alleged connections with Apollo and Athene, its role in other Athene PRTs and its compensation as an independent fiduciary. The magistrate judge concluded that those allegations could support an inference of disloyalty or a flawed process.

Of course, that recommendation still awaits the district judge's action, and the plaintiffs still must prove their allegations. Nonetheless, the decision highlights an important point: hiring an independent fiduciary can be a powerful procedural protection, but the independent fiduciary's own process, conflicts and documentation remain subject to scrutiny.

CITs, Forfeitures and a Fee Claim That Survived

This quarter also brought two variations of a familiar “kitchen sink” complaint, combining challenges to the use of forfeitures to offset employer contributions, allegedly excessive recordkeeping fees and the newer claim that selecting collective investment trusts (CITs) was imprudent.

In a case involving Centene, the court dismissed allegations that the plan acted imprudently by selecting CITs instead of mutual funds. Describing CITs as “structurally opaque” and speculating about liquidity risk did not establish to the court's satisfaction that the participant paid more, lost money or faced imminent harm.^{xiii} The recordkeeping comparisons were similarly deficient: identifying three other “jumbo” plans without describing their services or other relevant characteristics did not render them meaningful comparators.

The court also dismissed the forfeiture claims. Aside from the legality of the option, the plan document expressly allowed Centene to use forfeitures either to pay administrative expenses or reduce employer contributions. Although the court acknowledged that choosing between those options could be a fiduciary act, the complaint did not plausibly allege that the choice was imprudent or disloyal. The court ruled that an incidental benefit to the employer did not constitute a reversion of plan assets, particularly where the forfeitures remained in the plan and contribution obligations owed to participants were satisfied.

That said, the plaintiffs were given leave to amend, though the revised complaint met largely the same fate in September.

Fiduciary defendants also prevailed in a suit involving Lithia Motors, at least on allegations considering the use of plan forfeitures and a transfer of plan assets to a CIT.^{xiv} The court acknowledged that the majority of courts addressing forfeitures have rejected the theory when the governing document authorizes their use to reduce employer contributions.^{xv} This time, the forfeiture claims were dismissed without leave to amend because the legal theory — not merely the factual pleading — was deficient.

Similarly, allegations that converting mutual-fund TDFs to CITs reduced participant transparency did not explain how the structure impaired the fiduciaries' own monitoring or caused a loss. "Opacity" may sound ominous, but it is not itself an injury or a fiduciary breach, according to the court.

Multiplier "Effects"

That focus on fees and provider compensation also appeared in one of the quarter's largest developments: a proposed \$48 million settlement involving the \$4.4 billion ADP TotalSource Retirement Savings Plan.^{xvi}

The case, filed in 2020, alleged excessive fees, poorly performing investments, self-dealing and prohibited transactions. With trial approaching after six years of litigation, the parties (plaintiffs represented by Schlichter Bogard LLC) reached agreement covering roughly 50,000 participants. The defendants admitted no wrongdoing, and a settlement is not an adjudication. Even so, its size and nonmonetary provisions deserve attention.

In addition to the substantial cash payment, the settlement agreement calls for a full TDF review, consideration of at least three alternatives and restrictions on TDF-provider revenue sharing beginning in 2028. A competitively selected independent fiduciary must also review certain payments from plan assets to ADP.

This follows the substantial verdict and settlement involving Pentegra’s multiple employer plan (MEP).^{xvii} The facts differ, but the common structure is hard to ignore. When one provider stands at the center of an arrangement serving many employers, compensation can look like part of the product rather than an expense requiring periodic evaluation. Scale can also turn modest per-participant amounts into very large alleged losses.

For pooled and multiple employer arrangements, scale can provide purchasing power, but it can also create litigation magnitude. Someone must own the obligation to identify every form of direct and indirect compensation, assess the services received, benchmark the arrangement and document why it remains reasonable. As pooled employer plans (PEPs) continue to grow and expand, this will bear watching.

Courthouse “Doors” — and Who Gets Pulled Through Them

Finally, several decisions addressed not the substance of a fiduciary claim, but whether, and at what personal risk, a participant can pursue one.

The Court of Appeals for the 9th Circuit refused to enforce Capital Group plan terms requiring individualized arbitration of a participant’s fiduciary-breach claims.^{xviii} The plan committee had unilaterally added mandatory arbitration and a waiver of class, collective and representative actions. Although federal law generally favors arbitration, the provision effectively prevented the participant from pursuing the plan-wide relief ERISA expressly authorizes under section 502(a)(2). The court therefore found the provision unenforceable under the “effective vindication” doctrine.

The decision adds to the authority rejecting arbitration provisions that eliminate a statutory remedy rather than merely selecting a forum. A circuit split remains, but an individual arbitration clause may not keep plan-wide claims out of court.

Meanwhile, a newly filed suit may expand both the range of benefits challenged and the potential fiduciary defendants. In *McCalla v. USI Insurance Services, LLC*, participants sued their employer, an insurance brokerage and consulting company, over voluntary benefits funded through participant-paid premiums. Unlike most recent voluntary benefit offering (VBO) suits, this one effectively combines the employer, broker and consultant roles in a single defendant.^{xix}

The complaint alleges that USI acted as a fiduciary in selecting and placing voluntary benefit products while also helping determine — and receiving — the commissions and administration fees embedded in participant premiums. Plaintiffs claim USI could influence whether its compensation was a high first-year “heaped”

commission, level commission, flat payment or administration fee through its authority over the plan's insurance arrangements.

Those remain allegations, and USI has not yet tested them at the motion-to-dismiss stage. Still, the suit raises not only whether participants may pursue plan-wide relief, but which providers may be treated as fiduciaries. Receiving commissions or performing services alone does not create fiduciary status. But if a provider exercises discretion over plan management, product selection or its own compensation, plaintiffs will argue that it crossed the line from selling or administering benefits to exercising fiduciary authority. The case also reinforces the emerging focus on voluntary benefits that employers may have viewed as participant-paid and therefore largely outside their fiduciary risk.

At the other end of the access-to-court debate, the Court of Appeals for the 4th Circuit upheld a \$122,951 attorney-fee award against a participant whose unsuccessful case arose from an attempted market-timing transaction.^{xx} The appellate court largely rejected his benefits and fiduciary claims, though it concluded that the plan's administrative services agreement was a document under which the plan operated and therefore should have been produced upon request.

The participant has requested en banc review of the fee award, arguing that imposing defense fees against unsuccessful benefit claimants conflicts with ERISA's remedial purpose and could deter legitimate claims. The Supreme Court itself recently pointed to fee shifting as one tool courts can use against meritless ERISA litigation. The difficult question is where deterrence ends and chilling access to the courts begins.

Action Items for Plan Sponsors

- **Document the analysis, not merely the decision.** Committee calendars and consultant reports are useful, but the *Quest* decision shows the value of documenting what fiduciaries actually considered, questioned and concluded.
- **Pressure-test investment comparators.** For TDFs, stable value funds and other specialized investments, confirm that benchmarks reflect objectives, glidepath or strategy, risk, asset allocation and structure. A name-brand index or higher-performing peer is not necessarily a meaningful comparator, but one may well exist even for a "custom" fund.
- **Review independent fiduciary delegation and monitoring (including PRTs).** Document the selection and monitoring of any independent fiduciary, the scope of its authority and the safeguards used to evaluate potential conflicts.

- **Align forfeiture practice with the plan document.** Confirm that the plan document expressly permits the plan’s current use of forfeitures and that operations match its terms. Ambiguous language or inconsistent administration creates needless exposure to litigation.
- **Unbundle the “package.”** Whether the arrangement is a single-employer plan, MEP or PEP, identify and periodically evaluate direct fees, indirect compensation, revenue sharing and proprietary-product economics.
- **Examine litigation provisions carefully.** Arbitration may remain available, but provisions that foreclose plan-wide statutory remedies face substantial judicial resistance. Fee-shifting provisions and litigation strategies should likewise be evaluated with counsel in light of developing circuit law.

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ⁱ *Hensley v. Molson Coors Beverage Co. USA LLC Governance Committee*, No. 2:25-cv-01371 (E.D. Wis. June 30, 2026).

ⁱⁱ *Johnson v. Quest Diagnostics Inc.*, No. 24-2866 (3d Cir. 2026).

ⁱⁱⁱ *Scholin v. Digi-Key Corp.*, No. 0:26-cv-01485 (D. Minn. Aug. 3, 2026) (order granting motion to dismiss without prejudice).

^{iv} *Batt et al. v. 3M Co.*, No. 0:25-cv-03149 (D. Minn.).

^v Of course, surviving dismissal is not proving imprudence; it means only that the allegations, assumed true at that preliminary stage, permit discovery. Still, the case shows why leave to amend matters: a complaint lacking adequate comparisons may return with the missing details.

^{vi} *Johnson v. Russell Investments Trust Co.*, No. 25-10692 (11th Cir. Aug. 17, 2026).

^{vii} To date, most have targeted Athene, a private-equity-backed insurer.

^{viii} *Schoen v. ATI Inc.*, No. 2:24-cv-01109 (W.D. Pa. July 27, 2026).

^{ix} *Thole v. U.S. Bank N.A.*, 590 U.S. 538 (2020).

^x *Dow et al. v. Lumen Technologies Inc.*, No. 1:24-cv-02434 (D. Colo. Sept. 1, 2026).

^{xi} Brief for the Secretary of Labor as Amicus Curiae Supporting Defendants-Appellees, *Doherty v. Bristol-Myers Squibb Co.*, No. 26-1021 (2d Cir. filed July 21, 2026), <https://www.dol.gov/newsroom/releases/dol/dol20260721>.

^{xii} *Piercy v. AT&T Inc.*, Report and Recommendation on Motions to Dismiss Plaintiffs’ Amended Consolidated Class Action Complaint, No. 1:24-cv-10608 (D. Mass. Aug. 31, 2026) (Levenson, Mag. J.).

^{xiii} *Clark v. Centene Corp.*, No. 3:25-cv-09743 (N.D. Cal. July 17, 2026).

^{xiv} *Ventura v. Lithia Motors, Inc.*, No. 2:26-cv-01786 (C.D. Cal. Sept. 2026) (order granting in part and denying in part motion to dismiss).

^{xv} However, Lithia did not win everything. The complaint alleged that direct recordkeeping fees reached approximately \$61 per participant in 2024, compared with \$3 to \$31 for three plans of similar asset and participant size. The court found those allegations sufficiently specific to support prudence and loyalty claims. It also allowed the related prohibited-transaction claim to proceed, rejecting the defendants’ arguments concerning party-in-interest status and the statute of limitations.

^{xvi} *Berkelhammer v. ADP TotalSource Group, Inc.*, No. 2:20-cv-05696 (D.N.J.) (unopposed motion for preliminary approval of class action settlement filed July 31, 2026).

^{xvii} *Khan v. Board of Directors of Pentegra Defined Contribution Plan*, No. 7:20-cv-07561 (S.D.N.Y.) (jury verdict Apr. 2025; settlement reached May 2, 2025, pending court approval).

^{xviii} *Pover v. The Capital Group Companies, Inc.*, No. 24-5298 (9th Cir. July 30, 2026).

^{xix} *McCalla v. USI Insurance Services, LLC*, No. 7:26-cv-07691 (S.D.N.Y. filed Sept. 8, 2026).

^{xx} *Kelly v. Altria Client Services LLC*, No. 25-2080 (4th Cir. 2026).