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Update on Fiduciary and Service Provider Litigation

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The Impact of *Cunningham v. Cornell*

Cunningham v. Cornell, 145 S.Ct. 1020 (April 17, 2025)

- Arose in the context of a 2017 403(b) recordkeeping and investment selection case.
- District Court had dismissed PT claims saying plaintiff had to plead “some evidence of self-dealing or other disloyal conduct.”
- Second Circuit affirmed but on different grounds, holding that Plaintiffs had to make sufficient allegations that the affirmative defenses in Section 408(b)(2) did not apply.
- Unanimous SCOTUS decision finding that ERISA plaintiffs need only plausibly allege elements of a Sec. 406 prohibited transaction claim without addressing 408(b) affirmative defenses of potential exemptions.

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The Impact of *Cunningham v. Cornell*

Cunningham v. Cornell, 145 S.Ct. 1020 (April 17, 2025)

- Court was sympathetic to the argument that by not requiring pleading of affirmative defenses the practical implication may be more (implicitly non-meritorious) litigation.
- SCOTUS noted that various tools mitigate that risk, including: FRCP 7, which permits a court to order plaintiffs to file a detailed response to a defendant's answer; (2) dismissal for lack of an injury-in-fact sufficient to establish Constitutional standing; (3) targeted early discovery; (4) Rule 11 sanctions; and (5) cost shifting under ERISA Section 502(g).
- Concurring opinion was even more concerned about "untoward practical results."

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Decisions since *Cunningham v. Cornell*

- Appellate decisions are reversing earlier dismissals that were based on a more rigorous pleading standard. Examples:
- *Collins v. Northwest Grocery, Inc.*, 2025 WL 2383710 (2d Cir. Aug. 18, 2025): reversing dismissals of PT claims impacted by Cunningham's pleading standards.
- *Piercy v. AT&T Inc.*, 2025 WL 2505660 (D. Mass. Aug 29, 2025): Magistrate recommends dismissal of pension risk transfer case, finding on PT claims that the insurer (Athene) and the independent fiduciary who conducted the process of obtaining insurance contracts were not parties in interest and therefore no PTs.

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Decisions since *Cunningham v. Cornell*

- Several Courts are citing dicta from *Cunningham* to justify anti-plaintiff decisions:
- *Kelly v. Alteria Client Services, LLC*, 2025 WL 2313210 (E.D.Va. Aug 11, 2025) (citing *Cunningham* as support for the proposition that there is a wave of “meritless litigation” under ERISA the courts should remedy with cost-shifting).
 - But there are particularly Defendant friendly facts, including the fact Alteria provided tapes of Plaintiffs’ calls to the service center four months before the filing of the Complaint, but Plaintiffs and their counsel apparently never listened to them.
- *Collins v. Northwest Grocery, Inc.*, 2025 WL 2383710 (2d Cir. Aug. 18, 2025): reversing dismissals of PT claims impacted by *Cunningham*’s pleading standards.

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Pension Risk Transfers

When a company transfers some or all of the pension plan liabilities to an insurance company through the purchase of group annuity contracts.

Settlor vs Fiduciary Function

- The decision to do a Pension Risk Transfer is a settlor decision, but implementation (selecting an annuity provider) is a fiduciary decision.

Guidance

- DOL Interpretive Bulletin 95-1 advises fiduciaries to select the “safest annuity available” unless under the circumstances it would be in the interest of participants and beneficiaries to select a different insurer

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But remember *Thole v. US Bank*, 590 U.S. 538

Thole's Article III standing standard:

- “A plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief.”

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Early decisions on Pension Risk Transfers

Camiere v. Alcoa USA Corp., 2025 WL 947526 (Dist DC March 28, 2025)

- Plaintiff lacks standing: to establish Article III standing plaintiff would have to show “a substantial probability of harm” from the “higher risk of failure” compared to other annuity providers.

Konya v. Lockheed Martin, 2025 WL 962066 (D. Maryland March 28, 2025)

- Plaintiff “eked out” standing: “Plaintiffs have adequately alleged facts, if only barely so, sufficient to conclude there is ‘a substantially increased risk’ that Athene will fail and Plaintiffs will suffer harm because of it.”
- Also cited lack of PBGC protection and Plaintiffs seeking the positing of security and disgorgement as protecting their ability to receive their vested benefits.

Piercy v. AT&T, 2025 WL 2505660 (D. Mass. Aug. 29, 2025)

- “The burden is on Plaintiffs to allege facts that support a plausible inference – not a mere possibility – that Defendants failed to conduct a diligent and prudent selection process.”
- But it does find Art. III standing: “In my view, delivery of less valuable – that is, riskier – annuities as a result of alleged breaches of fiduciary duty by Defendants constitutes an actual injury for Article III standing.”

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Recent decisions on Pension Risk Transfers

Bueno v. General Electric Co., 2025 WL 2719995 (N.D.N.Y. Sept 24, 2025)

- Plaintiff lacks standing: to establish Article III standing plaintiff would have to show “a substantial probability of harm” from the “higher risk of failure” compared to other annuity providers.
- Held that trust law wasn’t helpful to plaintiffs either since the Plan Sponsor allegedly benefitted but didn’t take part in the selection of the annuity provider.

Doherty v. Bristol-Myers Squibb, 2025 WL 277406 (S.D.N.Y.. Sept. 29, 2025)

- At the motion to dismiss stage, Plaintiffs have adequately pled “a substantial risk” of Athene defaulting, sufficient for standing.
- Even if that were not the case, standing exists because “an interest in annuity payments from Athene is worth substantially less than an interest in pension benefits from the Plan”.

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Forfeiture Litigation



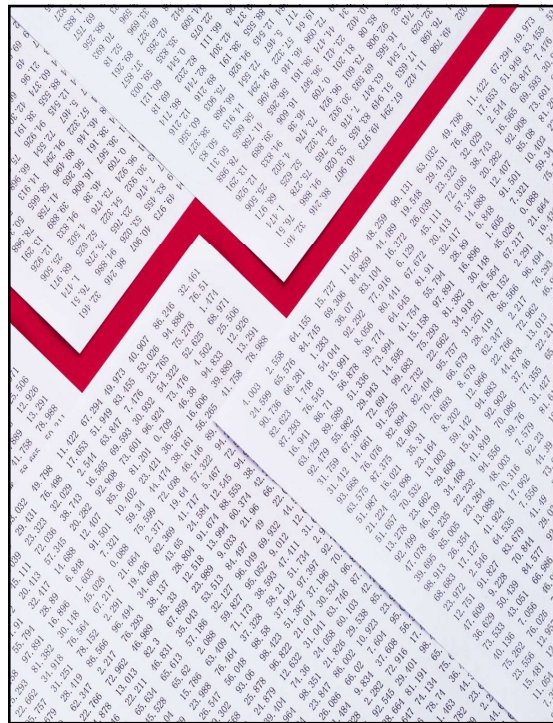
PLAN SPONSORS GENERALLY USE PLAN FORFEITURES TO OFFSET THEIR EMPLOYER CONTRIBUTIONS INTO DC PLANS.



OVER THE PAST 2 YEARS, AROUND 75 CLASS ACTIONS HAVE BEEN FILED TO CHALLENGE THE PRACTICE.

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Forfeiture cases

- Nearly 100 class actions filed in the last two years challenge the practice of using forfeitures to offset company contributions into DC plans.
- Cases asserting that the practice:
 - Breaches the duties of prudence and loyalty
 - Is a prohibited transaction
 - Violates ERISA's anti-inurement clause.
- In some cases, plaintiffs have added these claims to more standard excessive fee cases.

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Defendants' Responses



- (1) Article III Standing: Since plaintiffs are seeking benefits that were not promised to them, there is not a sufficient injury. Decisions are split, with many saying Plaintiffs do have standing where, for example, the forfeiture money otherwise probably would have paid plan administrative expenses that are paid by participants.
- (2) No fiduciary breach if they are just doing what everyone else does.
- (3) Reallocation of forfeitures is not a "transaction" (DOL agrees)
- (4) Anti-inurement would require the reversion of plan assets to the plan sponsor, which doesn't happen because the assets never leave the Plan.

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Where it stands

Courts have been granting motions to dismiss nearly 75% of the time.

IRS and the Treasury Department are looking for finalize regulations allowing for the use of forfeitures in plans. 88 FR 12282-01.

DOL and EBSA are likely to be more proactive in supporting employers who use the practice.

But Plaintiffs are more likely to avoid a motion to dismiss where they allege the language of the particular plan requires forfeitures be used first to pay plan administrative expenses.

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Where it stands

Two settlements thus far:

Singh et al v. Capital One Financial Corp., No. 1:24-8538 (S.D.N.Y.). Case was filed in November 2024 and settlement announced in September 2025. Terms have not yet been disclosed.

Rodeiguez v. Intuit Inc., No. 5:23-5053 (N.D. Cal.). Case was filed in October 2023. Motion to dismiss was denied and the parties settled nine months later for \$1,995,000.

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Actuarial Equivalence



About 30 cases filed challenging the use of outdated mortality tables in calculating DB plan benefits.

Generally this results in lower monthly payments to people who claim alternative forms of benefits (generally married retirees).



Some cases have struggled at the motion to dismiss, class certification, or summary judgment stage but several have settled or are progressing.

Scott v. AT&T Inc., No. 20-7094 (N.D. Cal.) currently headed for trial after denial of MTD.

Drummond v. Southern Company Services, Inc., argued in September in Eleventh Circuit.

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Actuarial Equivalence: What's the BIG Idea

Treasury Regulation 26 C.F.R. 1.401(a)-11(b)(2) states that a "qualified joint and survivor annuity must be at least the actuarial equivalent of the normal form of life annuity" and that "equivalence may be determined, on the basis of consistently applied reasonable actuarial factors, for each participant or for all participants or reasonable groupings of participants".

- Typical defense arguments are that:
 - There's no requirement that the "reasonable actuarial factors" (interest rate and life expectancy) are actually reasonable.
 - There's no requirement to update those assumptions if they were reasonable when the plan was created
 - Any harm done by using a shorter life expectancy is overcome by the use of a higher interest rate
 - Depending on the age and retirement date of individual pensioners there are winners and losers from the use of outdated assumptions.
 - What are we supposed to do, update the assumptions every year and "hold harmless" those who should now get less?

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Hot Topics in ESOP Litigation



FLOW OF LITIGATION CONTINUES
GENERALLY CHALLENGING WHETHER BUY
AND SELL TRANSACTIONS INVOLVING
PRIVATE COMPANY ESOPS WERE AT FAIR
MARKET VALUE



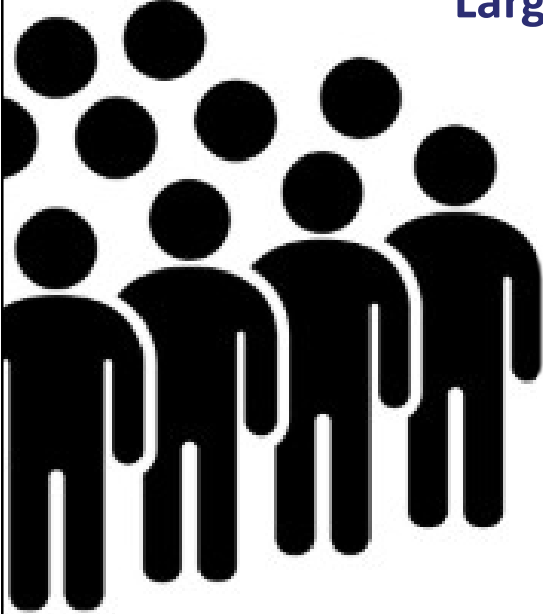
LITIGATION PROGRESSING
OVER 11TH CIRCUIT'S
EXHAUSTION
REQUIREMENT.



ARBITRATION CLAUSES
GENERALLY PROHIBIT
PLAN-WIDE RELIEF & ARE
HELD UNENFORCEABLE,
SINCE ERISA ENTITLES
PLAN TO PLAN-WIDE
RELIEF.

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Large Plan 401(k) Fee Litigation

Cases continue to be filed at a fairly stable rate.

Defendants are having more success at the motion to dismiss stage because: (1) courts are more skeptical of plaintiffs' claims; and (2) the industry has improved.

Generally issue on imprudent investments rests with whether Plaintiffs need to (or have) identified a "meaningful benchmark"

Defendants and Courts are citing SCOTUS decision in *Northwestern* to justify not second-guessing fiduciaries

But, increasing use of alternative investments, ESI funds, and even crypto currency are expected to result in more litigation.

New EBSA chief has a track record of hostility toward these cases in particular.

Spence v. American Airlines, Inc. a telling example.

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Excessive Recordkeeping Litigation – Has it worked?

Over the past 20 years nearly every \$1 billion + 401(k) Plan as been sued about their recordkeeping fees.

As a result:

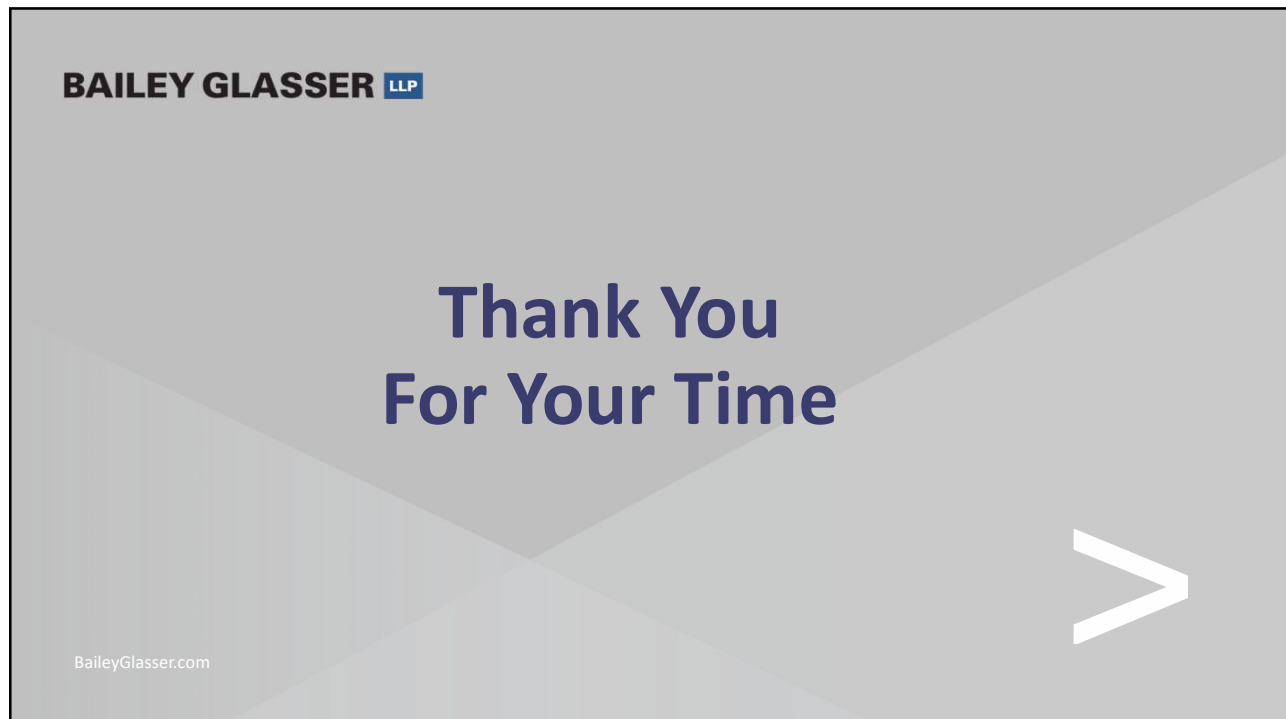
- Recordkeeping fees are the lowest they have ever been, contributing to nearly a 150 bp improvement on 401k returns compared to pensions.
- More defined contribution plans than ever, and employer contribution rates are up slightly.
- Most Plaintiff firms in the field no longer bring excessive recordkeeping fee claims unless there is a plausible self-dealing claim or as an "add-on" claim where another claim is the driver of the case.
- But there are a few prolific exceptions.

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