



Are Your ERISA Fiduciaries In the Sights of the Plaintiffs' Bar For a New Wave of Fee Litigation?

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Seyfarth Shaw LLP

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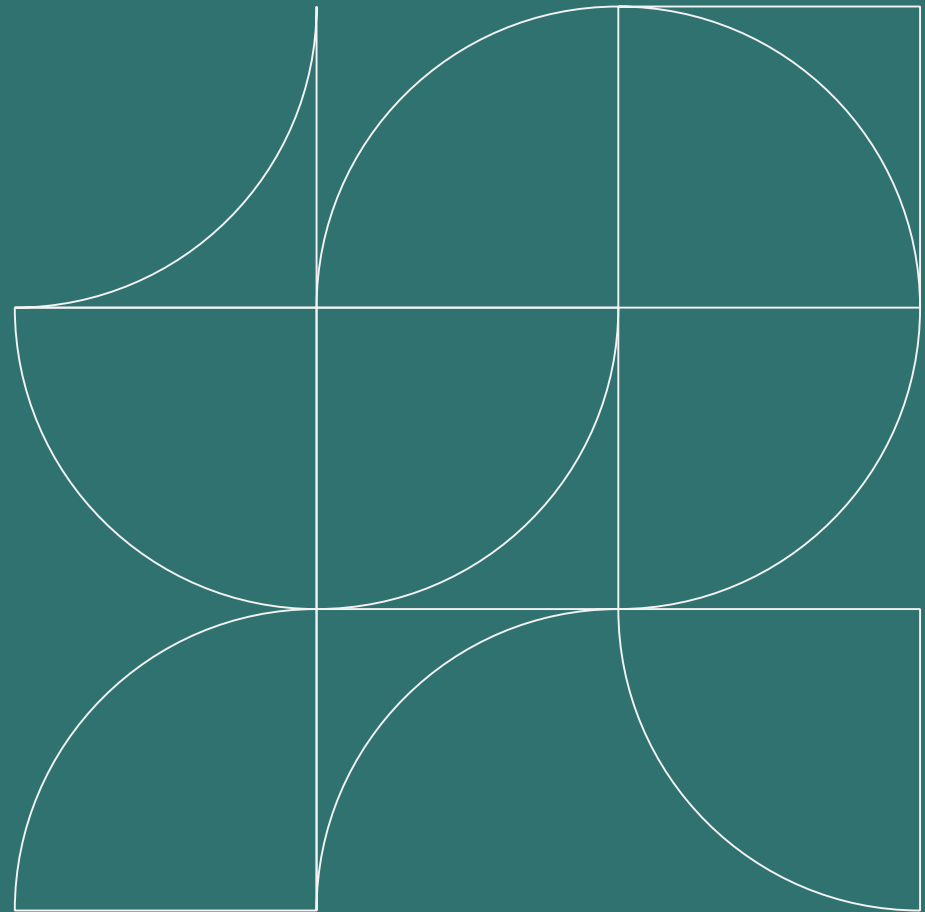


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Agenda

- 01** History of ERISA Fee Litigation
- 02** Signs You Are Being Targeted (And Why Now?)
- 03** What Will The Litigation Issues Be?
- 04** What You Can Do In The Meantime

History of ERISA Fee Litigation



Significant Increase in ERISA Class Action Filings

- These lawsuits began in earnest in September 2006, when a single plaintiffs' firm filed 11 on the same day against Fortune 500 companies
- Since 4Q 2019, have seen a massive increase in ERISA class action lawsuits targeting benefit plans
- Typical allegations are that the plan fiduciaries failed to select prudent investments, overpaid service providers, utilized an incorrect mortality table not in the interest of participants
- Law firms representing plaintiffs have proliferated
- Even medium-sized and small plans now targeted (as small as \$4.5M)
- Two of three complaints survive motions to dismiss, making these cases very costly to defend

Turning Toward Health Plans

- Trend began in late 2022
- Common fact pattern: Administrator's refusal to respond to records request for costs of providing services to welfare plan
- Currently have only targeted large insurers (on class and individual basis)
- Could readily expand to include employer under co-fiduciary liability theory

Turning Toward Health Plans—New Lawsuits Over Data and Transparency

Insurance Company Challenges

- *Background:*
 - New transparency reporting guidelines require plans and hospitals to post payment rate
 - Plan Administrator denied requests for plan information on claims payments
 - Based on hospital reporting, plan identified that Plan Administrator was paying billed charges to hospital even though Plan Administrator had lower negotiated network rates
- Suit alleges breach of fiduciary duty & seeks make-whole payments

Turning Toward Health Plans—New Lawsuits Over Data and Transparency

Claim Administrator Challenges

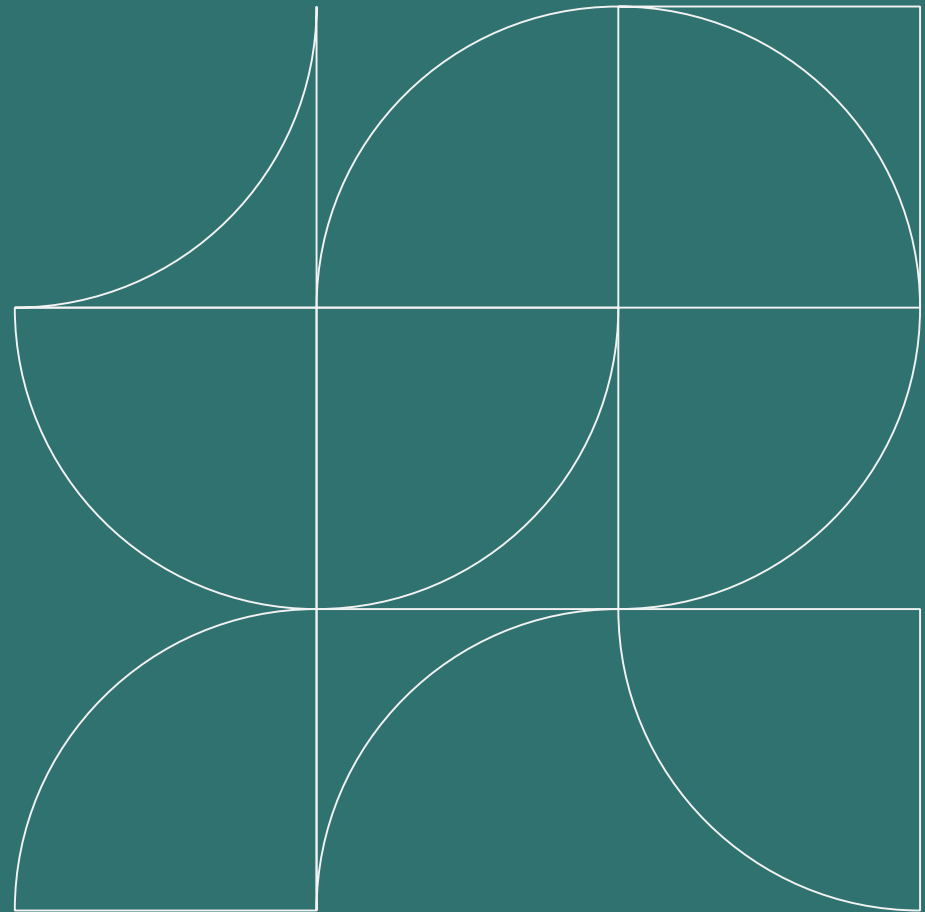
- *Background*
 - Plan attempted (unsuccessfully) for years to obtain claims data from the claims administrator
 - Claims administrator would only permit Plan to perform a limited audit on pre-selected data
- Lawsuit alleges the claims administrator overpaid claims (breach of fiduciary duty)
- Also alleges claims administrator engaged in cross-plan offsetting (breach of fiduciary duty)

Bugielski's Potential Impact- Nearly Every Transaction a Prohibited One?

***Bugielski v. AT&T Servs, Inc.*, 76 F.4th 894 (9th Cir. 2023)**

- The holding here suggests that any contract entered into after a service provider is originally hired gives rise to almost a *per se* prohibited transaction claim
- Because courts have held that the prohibited transaction exceptions in 29 U.S.C. § 1108 are affirmative defenses, the pleading standard to get past a motion to dismiss could be very low (simply alleging that an existing service provider renegotiated its contract)
- This holding is in some tension with the 9th Circuit's decision in *Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833 (9th Cir. 2018) (holding that negotiating a service provider contract is not a fiduciary action)
- It also presents something of a Catch-22 for fiduciaries:
 - If there is no RFP/new contract for a service provider, there is a possible prudence claim
 - If there is a new contract, that's a possible prohibited transaction
- A petition for rehearing en banc was denied last week

Signs You Are Being Targeted (And Why Now?)



New Transparency Guidelines = More Publicly Available Info

- Four key provisions usher in a new era of health plan data transparency:
 1. **Fee Disclosures.** Brokers/consultants must disclose direct/indirect compensation at renewal (or upon entering into initial agreement).
 2. **Price Comparison Tool.** Health plans must create online tool for participants to estimate out-of-pocket costs before receiving health services.
 3. **Machine-Readable Files.** Health plans and hospitals must make publicly available data on network and non-network reimbursement rates.
 4. **Gag Clause Prohibition.** Employer plan sponsors are prohibited from entering into contracts that restrict access to price/quality of care data.

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Are you a current or former ██████████ ██████████ employee who has participated in the company's healthcare plan?

You may have a legal claim—and we'd like to speak with you.

Contact our office today for a no-obligation, confidential consultation.

At ██████████ we protect whistleblowers.



Published Lists of Targets

- Certain firms publish list of companies they are targeting – take seriously



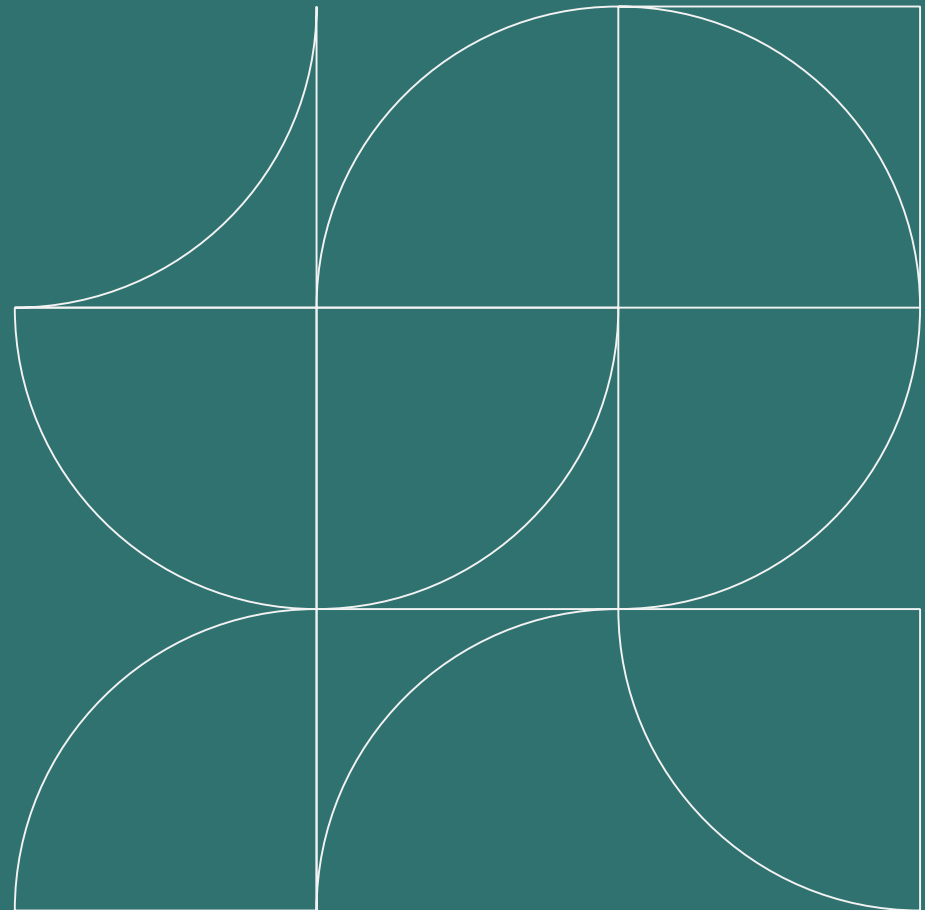
First Step: Request for Information

- First step is typically a request for information pursuant to ERISA (on behalf of plan participant)
 - Plan document, SPD, Form 5500
 - Administrative service agreements
 - Information on price comparison tool and how it was communicated to participants
- Be sure address for notice is accepting mail – watch for requests that may be misdirected (30 days to respond)
- Recommend involving counsel at this early stage

Request May Also Be Made Under Transparency In Coverage (TiC) Rules

- Link to machine readable files (MRFs)
- Link to price comparison tool
- NQTL comparative analysis

What Will The Litigation Issues Be?



What Will the Claims Be?

- Breach of fiduciary duty
 - Imprudent process
 - Unreasonable fees
 - Failure to monitor claims administration
 - Communication failures
 - Failure to act on 408(b)(2) disclosures
- Prohibited transactions
 - Unreasonable increases in compensation to service providers
 - Self dealing
- Statutory violations
 - Failure to provide required disclosures

Key Defense Issues

Standing

- Health plans are defined contribution plans
- Under *Thole*, if benefits are not at risk, no participant standing

Do plaintiffs state any claims?

- Challenge will be to show plan underperformed a valid benchmark
- Are these plan design or fiduciary issues?
- Broad allegations of lack of process – will they suffice?
- Prohibited transaction claims (and exemptions)

Additional Defenses

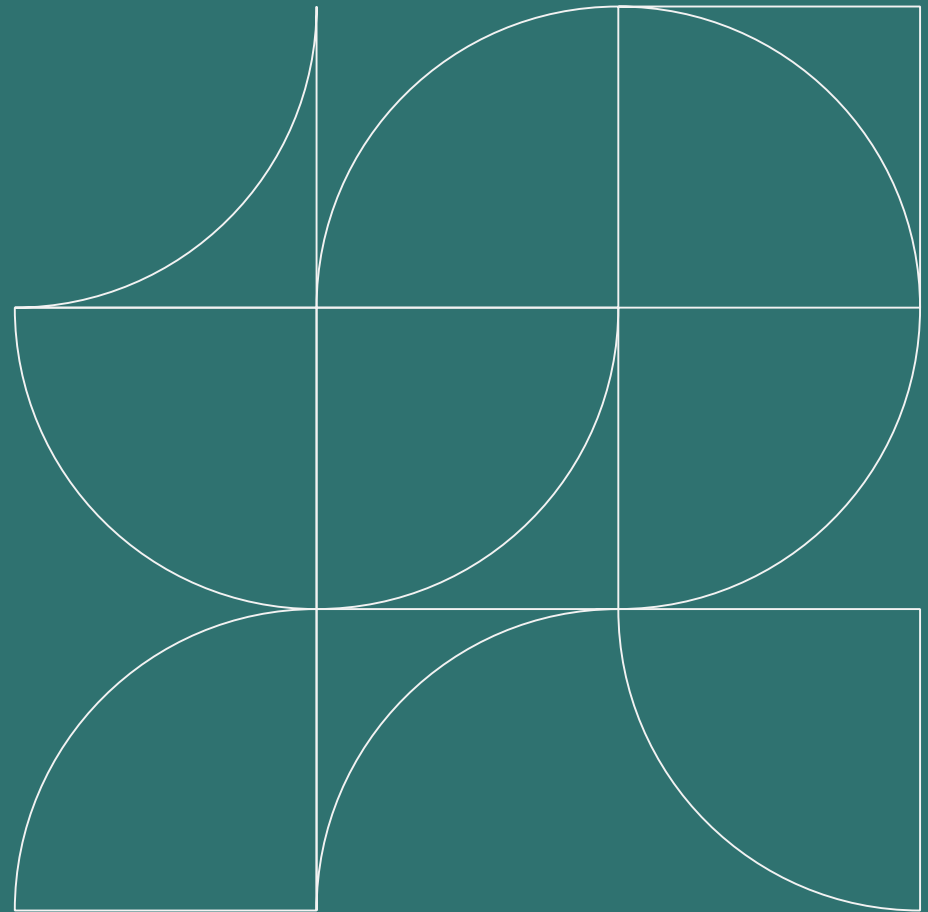
Class certification

- Likely to be a major barrier for plaintiffs
- Unlike in 401(k) plans, how a person is impacted by plan features is highly individualized
- Standing must be uniform and shown for all class members

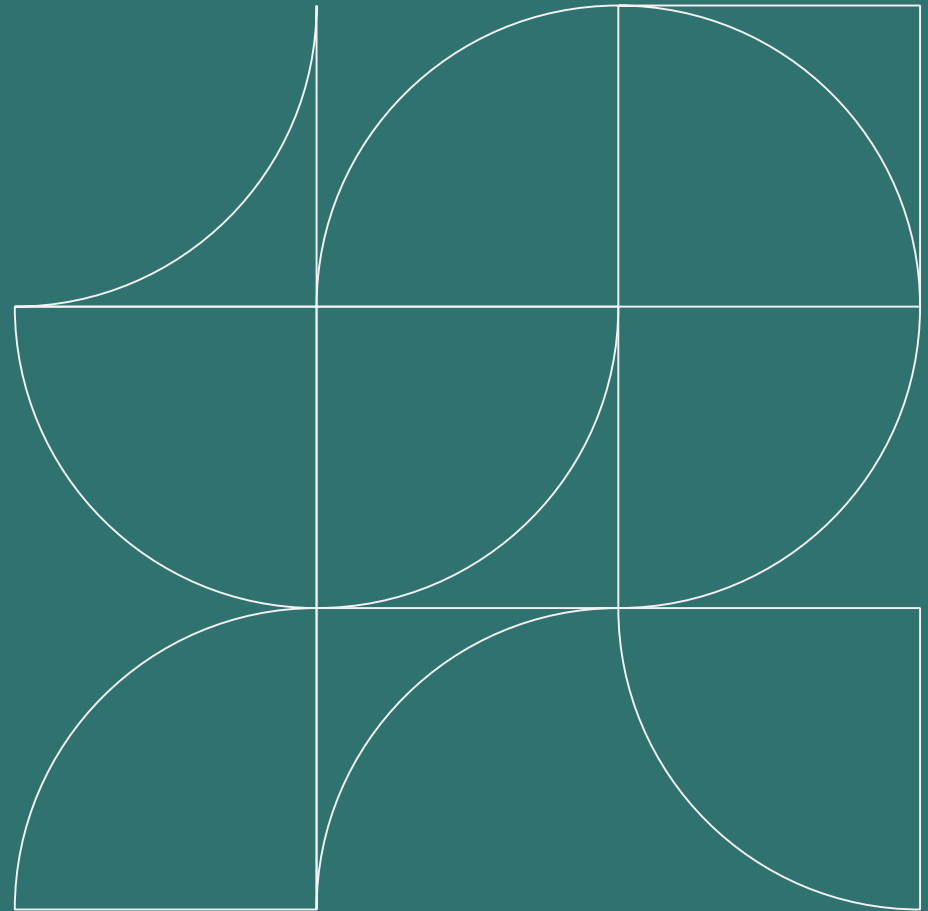
Proving reasonable decision making

- ✓ Likely to be shown by diverse documents
- ✓ Testimony is likely to be key

CLE Code



What You Can Do In The Meantime



Consider Conducting a Privileged Review

- Retain a benefits compliance/benefits litigation team to do a high-level review of current governance and pricing procedures
 - Review decision making structure and areas of oversight
 - Anything out of sync with the plan document?
 - Last time an RFI/RFP was conducted to pressure test vendors, and scope of RFI/RFP
 - Using any affiliated service providers
 - Consider retention/litigation hold obligations and what information is available at the company and at third parties
- Consider additional demands to make in forthcoming contracts

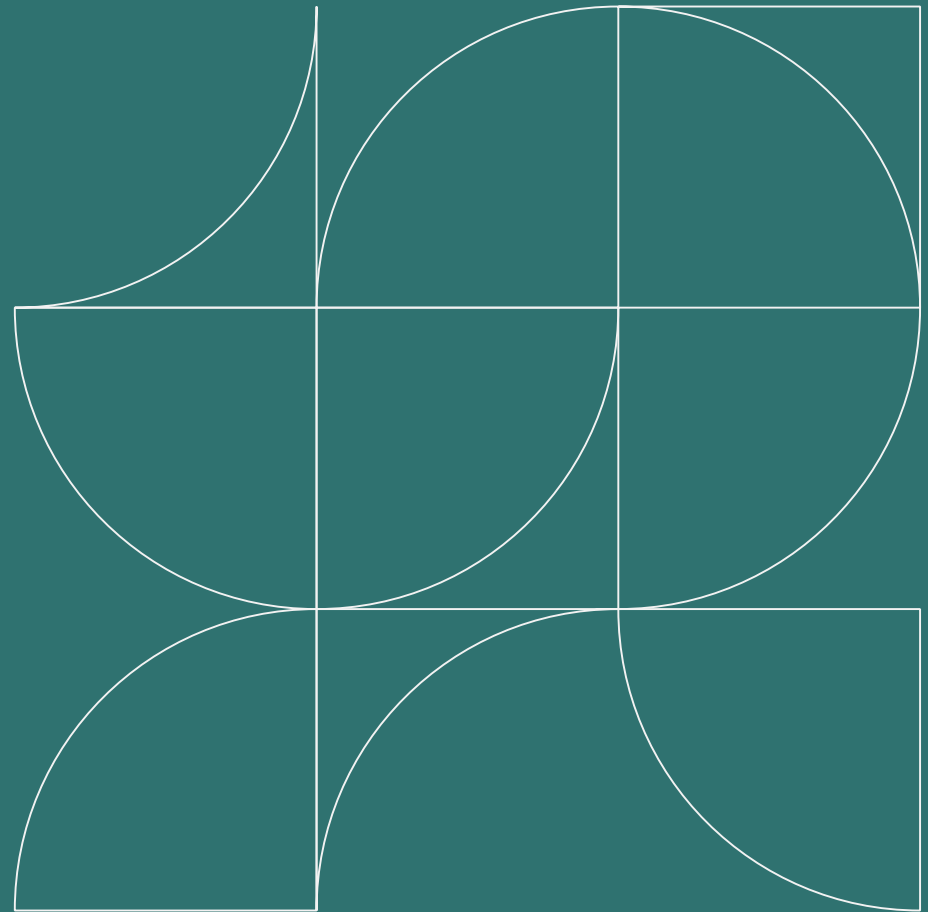
Remember the Fiduciary Exception

- Fiduciary exception to the attorney client privilege may apply in certain circumstances when plan fiduciaries are receiving legal advice regarding fiduciary decisions for the plan (such as certain claims decisions or negotiating service provider contracts with the plan)
- A person may serve in different capacities with respect to a plan (“wear different hats”) and thus different communications with counsel may have different levels of protection

Initiating Litigation Against Co- Fiduciaries

- Recall that ERISA holds each fiduciary 100% liable for the breaches of any other fiduciary
- Not many upsides to targeting, at least initially, one of your own fiduciaries because calls into question your own fiduciary monitoring

Questions?



Thank You

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