Seyfarth

ERISA Back to School Study Session

Key Cases and Trends for Fall 2025

September 8, 2025

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Agenda

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02 Equitable Remedies & Jury Trials

03 Venue & Arbitration

04 Other Key Pending Appellate Matters

05 Healthcare Reimbursement Litigation

ERISA Class Action Trends & Developments

Background

- 401(k) fee 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, we have seen a massive increase in ERISA class action lawsuits targeting benefit plans
  - 100+ ERISA Class Action filings in 2025 already
- Typical allegations are that the plan fiduciaries failed to select prudent investments overpaid service providers,
  - Newer claims include improper use of plan forfeitures, and attacks on stable value funds
- Law firms representing plaintiffs have proliferated
- Even medium-sized and small plans now targeted
- The malaise has spread to defined benefit plans
  - challenges to mortality tables
  - pension risk transfer suits

Pace of Filings Increasing in 2025

- 2023 saw a drop in ERISA class action filings
  - 298 cases from 2020-2023
  - All-time high of 101 in 2020; 89 more in 2022
  - Dropped to 48 in 2023
    - Saturation as plaintiffs' firmed worked through past filings
- 2023 also saw record settlement numbers
  - 42 settlements in excessive fee class actions
  - All-time high of nearly $353 million in settlement payments
- With decrease in 2023 filings and increase in 2023 settlements, capacity returned for plaintiffs' bar to file in 2024
  - More than 50 defined contribution cases filed in 2024
  - Emergence of new trends in forfeiture and pension risk transfer claims
- More than 100 ERISA class actions already in 2025

Pleading Standards in Excessive Fee Cases

- *Hughes v. Nw. University,* 595 U.S. 170 (2022) is a key driver of case filings
  - Participants in two 403(b) defined contribution plans alleged that they were charged excessive record-keeping fees and high investment option fees
  - The District Court granted a motion to dismiss and the decision was upheld by the 7th Circuit Court of Appeals
  - Supreme Court rejected that 7th Circuit law, clarifying that fiduciary has duty to assess prudence of each investment option, not just lineup as a whole
  - On remand from the Supreme Court, the 7th Circuit allowed two claims to proceed:
    - Recordkeeping & Share Class
    - For recordkeeping, Plaintiffs must plausibly allege fiduciary actions outside range of reasonable actions
    - For share class, Plaintiffs must show that comparator share class was plausibly available
  - Since *Hughes*, lower courts have grappled with the extent of facts that a plaintiff must plead to avoid dismissal

Pleading Standards in Excessive Fee Cases

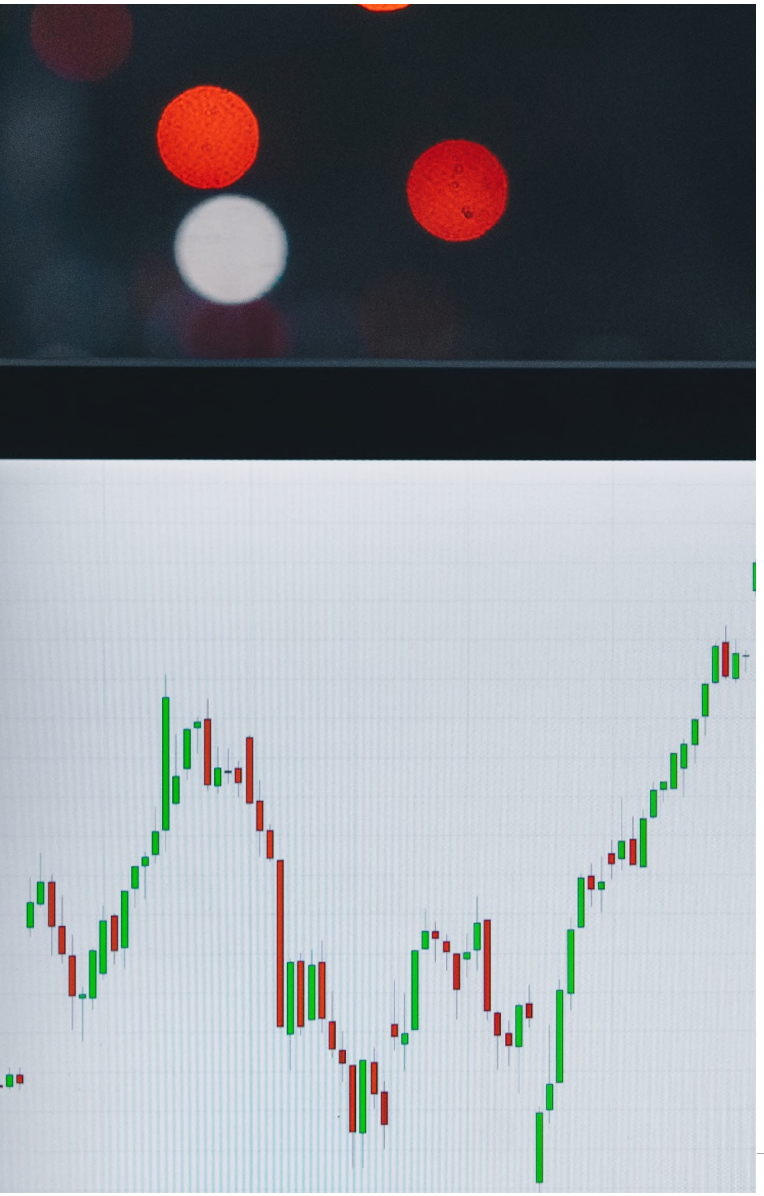
- **Currently pending at the Supreme Court is a petition for certiorari from the 6th Circuit's decision in** *Johnson v. Parker-Hannifin Corp.*, 122 F.4th 205 (6th Cir. 2024)
- *Johnson* reversed (over a dissent) dismissal of claims for **imprudent retention of certain investments, as well as claims that the plan should have used lower-cost share classes.**
- **Key holdings:**
- Plaintiffs **plausibly alleged imprudent retention by pointing to high turnover and underperformance**
- Plaintiffs plausibly alleged the share class claims by alleging that even if the plan did not meet the cheaper share class threshold, it might have been able to obtain a waiver if it requested one

Pleading Standards in Excessive Fee Cases

- Conversely, the 9th Circuit recently affirmed dismissal with prejudice in *Anderson v. Intel Corp. Inv. Pol'y Comm.*, 137 F.4th 1015 (9th Cir. 2025)
- Key holdings:
  - Plaintiffs asking courts to infer a fiduciary used improper methods based on investment performance of the investments, they must point to meaningfully similar investments
  - Plaintiff failed to do so because comparison was to funds with different risk-mitigation profiles
  - Plaintiff's claim that the investments were too expensive failed for similar reasons
  - The loyalty claims failed because a plaintiff must allege an *actual* (rather than potential) conflict of interest

Pleading Standards in Excessive Fee Cases

- The recent case law reflects both different approaches to comparators at the motion to dismiss stage, as well as the fact-bound nature of claims
- The Supreme Court has asked the Solicitor General to file a brief in *Johnson*, so there appears to be some interest in hearing the case and clarifying the relevant standards
- A grant of certiorari may help clarify the pleading standards, though given the fact-bound nature of claims, courts may continue to reach varying outcomes in similar cases



Pleading Standards in Pension Risk Transfer Cases

Another relatively new active area of claims concerns pension risk transfers –the process of an employer limiting or eliminating its defined-benefit pension obligations by using plan assets to purchase annuities from an insurer, which assumes the responsibility of future payments

These claims assert **fiduciary breaches on the theory that the annuity is a riskier investment than the original pension plan assets**

The law in this area is underdeveloped compared to other fiduciary breach claims

A recent decision, *Piercy v. AT&T*, 2025 WL 2505660 (D. Mass. Aug. 29, 2025), addresses these standards in detail

Pleading Standards in Pension Risk Transfer Cases

- In *Piercy*, the magistrate judge recommended denying the motion to dismiss on standing grounds because the fiduciaries had a duty to not select a riskier investment and plaintiffs sufficiently alleged an injury by asserting that the new investment involved a higher risk to participants
- However, the opinion recommended granting the motion on the merits
  - The loyalty claim failed because the plaintiffs did not plausibly allege a conflict of interest relevant to the transaction
  - The prudence claim failed because the plaintiffs did not plausibly allege a failure to conduct an appropriate inquiry into the transaction
  - The prohibited transaction claims failed because simply hiring a service provider is not a PT and the plaintiffs failed to plausibly allege party-in-interest status or self-dealing

Inconsistent Results in Courts Promote More Filings

Burdens of Pleadings and Proof

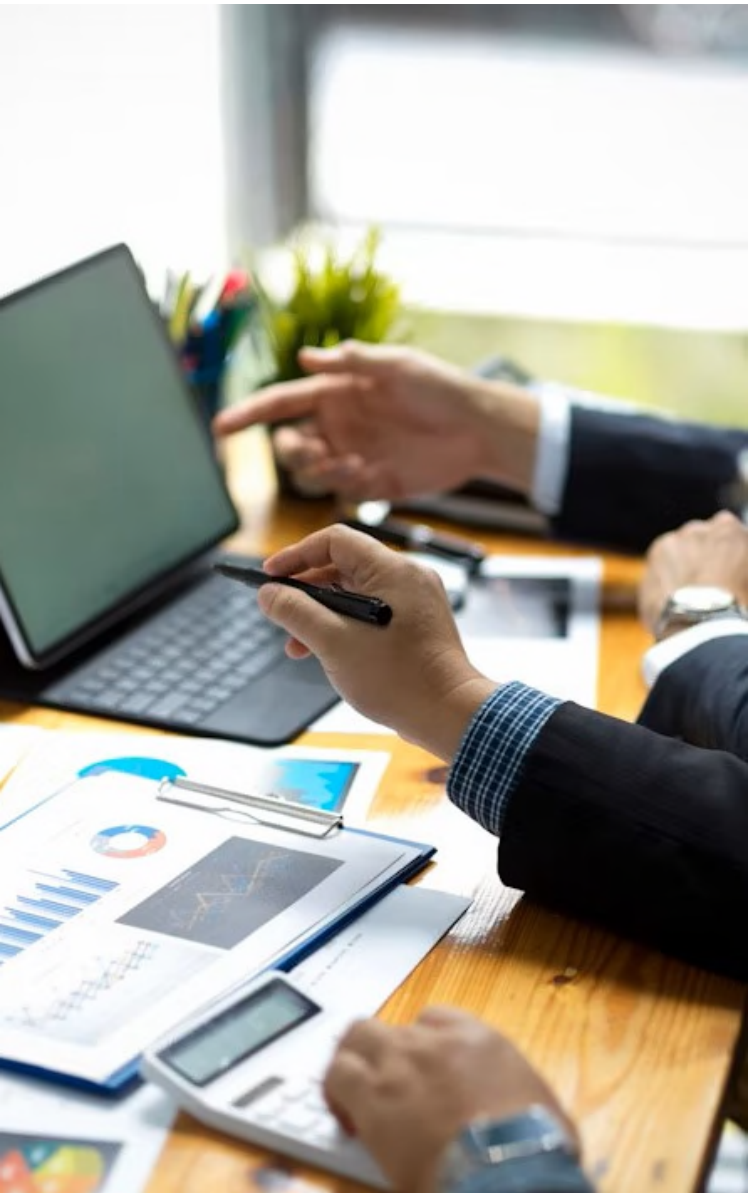
- Courts inconsistent on scrutiny of benchmarks at pleading stage
  - Applies both to comparator funds for investment claims, and to bases to claim "unreasonable" RK&A fees
- Split authority on burden regarding causation

Standing

- *Thole* held that, without win changing the plaintiff's benefit, the plaintiff lacks standing
- Mixed results applying that logic in DC plan context
  - Courts inconsistent on whether plaintiffs need to have invested in any/all funds they seek to challenge

Jury Trials

- Many plaintiffs continue to include jury demands, and resist efforts to strike
- So far, only courts in 2nd Circuit have accepted arguments for trial
- But others have at least allowed for possible advisory juries



Settlement Trends Continue In 2025

To date in 2025, courts have approved settlements in approximately 30 ERISA class actions.

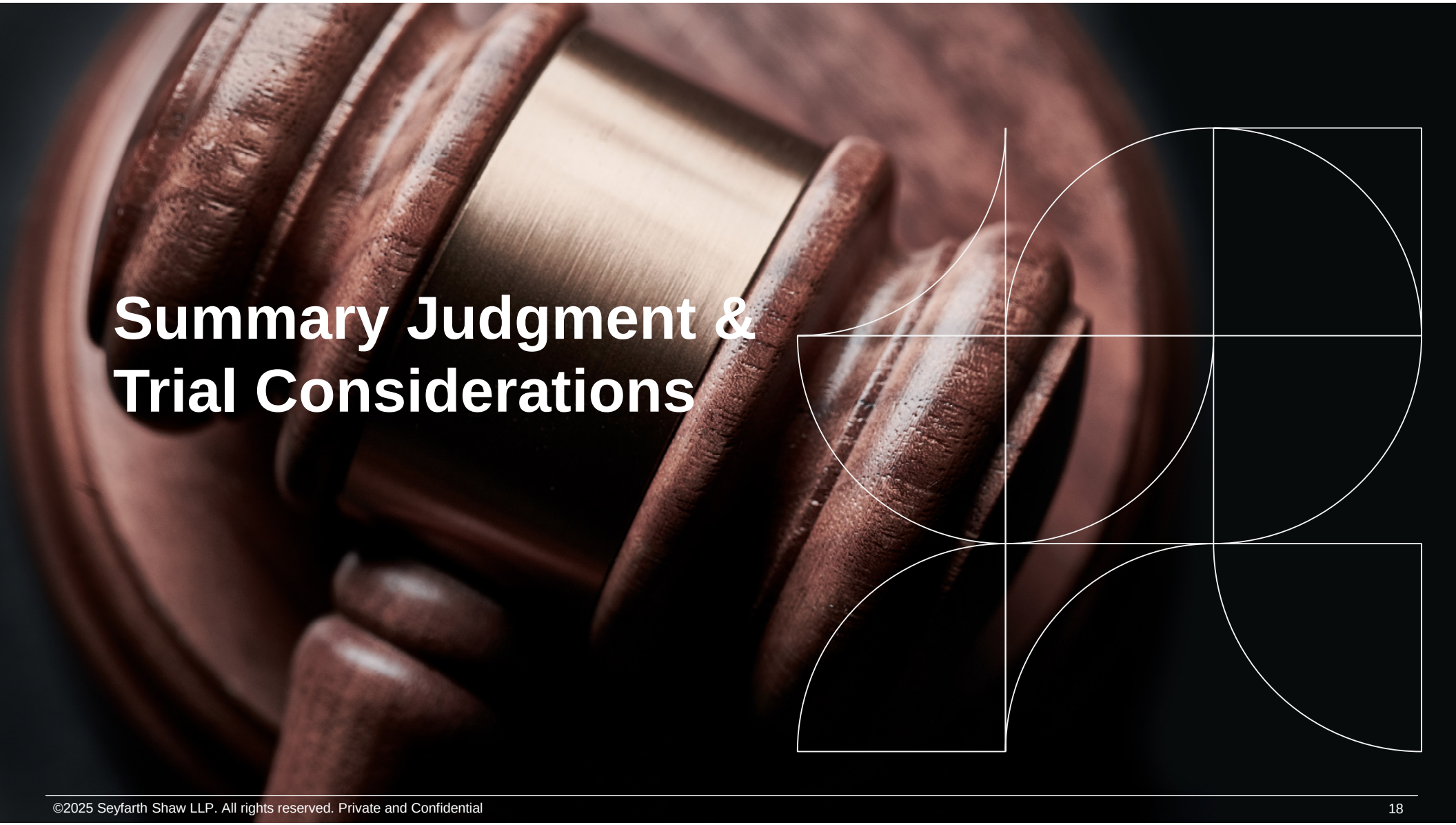
- Approximately 2/3 of the settlements have been in cases involving defined contribution plans
- The total settlement amounts are over $170 million.
- This settlement pace is broadly similar to 2024 (both in total settlements and total settlement amounts)

But Not Everything Settled!

- At least 4 defendants have been granted summary judgment in 401k)class actions in 2025
  - Opinions reflect a willingness to find fiduciary process prudent from undisputed facts;
  - In contrast to light burdens at pleading stage, courts scrutinized attempts to "infer" a breach from "lacking" items not required by law
- Since mid-2023, Defendants have prevailed in at least 6 trials – including 1 jury trial – on excessive fee class actions
  - Decisions reflect that trial remains a viable defense strategy where fiduciaries had thorough decision-making process
  - Standards at trial give courts ability to scrutinize and weigh expert testimony
  - Defendants have prevailed because plaintiffs have failed to prove breaches and/or loss

Key Takeaways

- Defined contribution fee litigation is not going away anytime soon
  - Since the start of 2016
    - More then 33% of DC plans with over $500 million in assets have been sued
    - More than 50% of DC Plans with $1+ billion have been sued
- Motions to dismiss have become more difficult on balance since SCOTUS decision in *Hughes v. Northwestern,* and more difficult still since *Cunningham v. Cornell*
- Combined effect of low pleading bar, ease of class certification, and strong chance of fee shifting if plaintiffs are successful (together with low likelihood of fee shift for defendants if plaintiffs lose) means these are likely to remain attractive cases for plaintiffs' bar



Summary Judgment & Trial Considerations

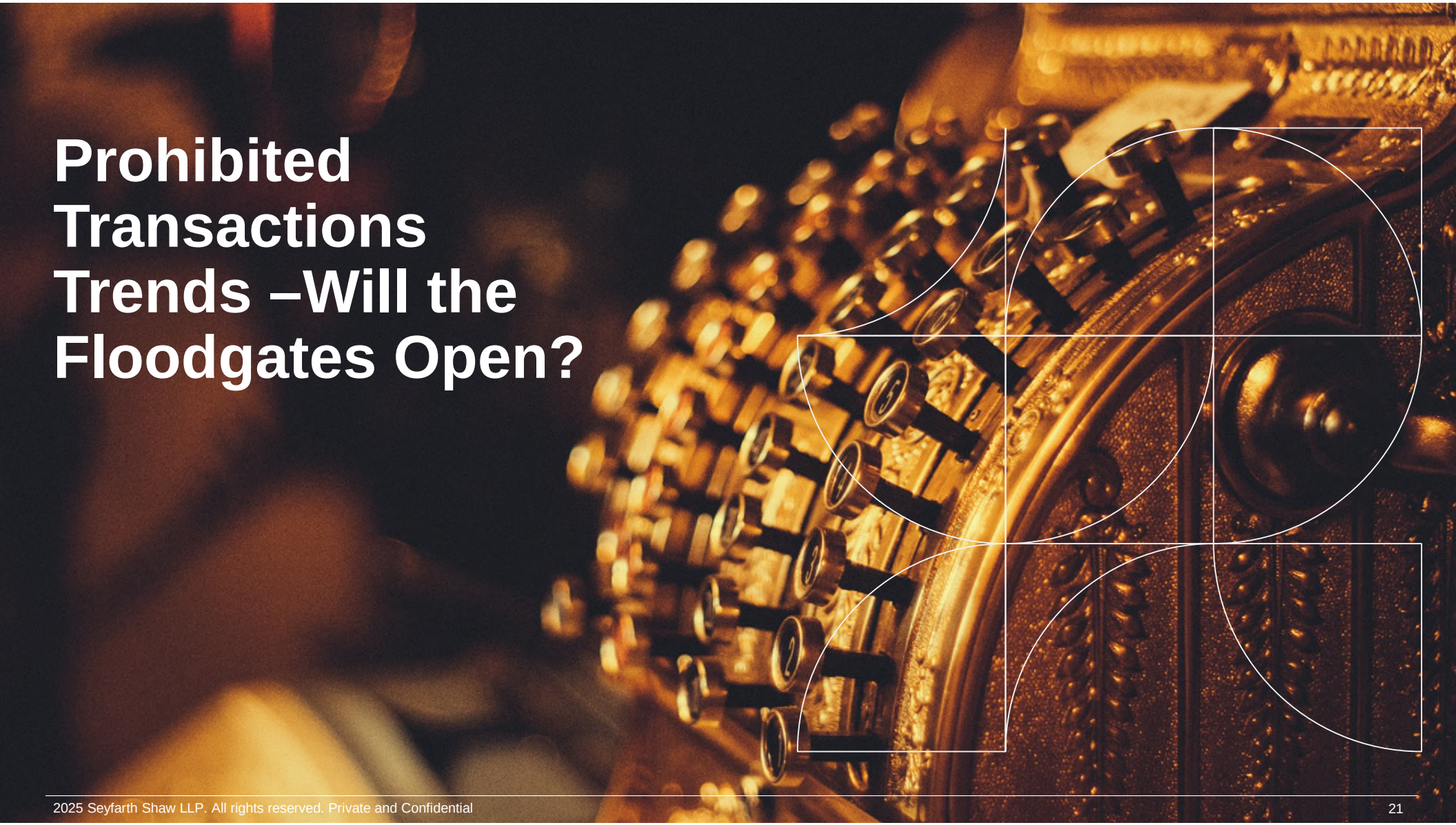
Summary Judgment Considerations

- Many judges view MSJs (openly or not) as a waste of time and would rather have a trial.
- However, some defendants have prevailed
- Consider whether judge is likely to seriously consider the motion
- Address opposing expert testimony head on (and consider a *Daubert* motion)
- Focus on process overall, but address “weaknesses”
- Consider attacking loss causation in jurisdictions that reject burden shifting approach
- Attack the plaintiffs’ assertion that the “best” or “cheapest” are required; focus on “range of reasonable alternatives”

Trial Considerations

- Strong defense witness testimony showing honest, diligent, and consistent process is key
- Nitpicking of the process seldom suffices; courts recognize that plans are managed by people who are never perfect
- Evidence of how the plan compares is persuasive but only if the comparisons are on point
- Strong expert testimony that considers all the facts (good and bad) and uses a reasonable and reliable methodology is essential
- Plaintiff experts often are light on methodology and overreach to justify criticisms; their approach often disintegrates under cross examination

Prohibited Transactions Trends –Will the Floodgates Open?



Prohibited Transactions

- ERISA § 406 broadly outlines a series of “prohibited” transactions that fiduciaries are restricted from engaging in (or causing a plan to engage in)
- Increased attention to these claims could lead to increase in filings in this space
- Plaintiffs are arguing that they have a lower burden of proof to establish a prohibited transaction claim as compared to a breach of fiduciary duty claim (such as breach of the duty of prudence)
- The Supreme Court recently adopted a less-demanding pleading standard

Statutory Language At Issue

29 U.S. Code § 1106 - Prohibited transactions

- **(a) TRANSACTIONS BETWEEN PLAN AND PARTY IN INTEREST**
  Except as provided in section 1108 of this title:
  - **(1)** A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
    (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
  - **(B)** lending of money or other extension of credit between the plan and a party in interest;
  - **(C)** furnishing of goods, services, or facilities between the plan and a party in interest;
  - **(D)** transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or
  - **(E)** acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

Prohibited Transactions – How We Got Here

- *Bugielski v. AT&T Servs, Inc*., 76 F.4th 894 (9th Cir. 2023)
  - In reversing summary judgment for the defendants, 9th Circuit took a very broad view of prohibited transactions, and set a low bar for plaintiffs to clear
  - The holding suggests that any subsequent contract or amendment entered into after a service provider is originally hired gives rise to almost a *per se* prohibited transaction claim
- *Cunningham v. Cornell University*, 86 F.4th 961 (2d Cir. 2023)
  - In contrast to *Bugielski*, the 2nd Circuit held that "to plead a violation of [Section 406(a)(1)(C)], a complaint must plausibly allege that a fiduciary has caused the plan to engage in a transaction that constitutes the 'furnishing of . . . services . . . between the plan and a party in interest' *where that transaction was unnecessary or involved unreasonable compensation*."

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

- In April, the Supreme Court resolved the circuit split in favor of a more lenient pleading standard
- Key holding: the exemptions in 29 U.S.C. § 1108 are affirmative defenses, so plaintiffs do not need to plead anything to overcome them at pleading stage
- Despite unanimous ruling, Court acknowledged serious practical problems this ruling may create for plan sponsors and fiduciaries.
  - To state a claim after this ruling, all a plaintiff needs to allege to state a claim that will survive dismissal is to allege that the plan paid money to a "party in interest."
  - The Court found the practical risk that this will open the floodgates to frivolous litigation "cannot overcome the statutory text and structure"

Cunningham v. Cornell – What Comes Next?

- SCOTUS outlined several tools available to district courts to potentially weed out meritless prohibited transaction claims, even under lower pleading burden
  - Focus on standing
    - While lower burden makes it easier to allege statutory violation, plaintiffs still must carry burden to plead standing
  - Require reply to answers
    - SCOTUS pointed lower courts to Fed. R. Civ. P. 7(a)(7) to require plaintiffs to file a reply to an answer to plead how an exemption does not apply (and then, potentially, dismissal on the pleadings if plaintiffs cannot do so)
  - Rule 11 Sanctions
  - ERISA Fee Shifting
- Remains to be seen whether/how lower courts will deploy these tools
  - But, already clear that plaintiffs' firms are shifting traditional duty of prudence fee challenges to prohibited transaction claims

What Can Plan Sponsors and Fiduciaries Do?

- Clarification that exemptions are affirmative defenses (and possibility of requiring reply to answer) amplifies importance of documenting diligent fiduciary process (including substantive prudence of fees)
  - If attempting to plead matter in answer to establish defense, will need ready access to facts establishing exemptions at pleading stage
  - If cases survive dismissal, ready access to exemption-establishing documents might also be means to effectively and efficiently push for limited, expedited discovery on those elements

Equitable Remedies & Jury Trials

Jury Trials in ERISA Matters

- The availability of jury trials in ERISA cases and the closely related question of the availability of certain remedies have recently been percolating
- Background:
  - The vast majority of courts have held that ERISA cases should not be tried to a jury
  - The statute does not provide a jury trial right
  - ERISA is descended from equity (and remedies *generally are* limited to equitable remedies) so there's no constitutional right
  - Exceptions:
    - Certain courts in the 2nd Circuit have followed circuit precedent interpreting pre-*Amara* case law to allow for jury trials where plaintiff seek monetary relief, including seeking to hold fiduciaries personally liable
    - If a Plaintiff raises ERISA and non-ERISA claims, the non-ERISA claims may have a jury trial right
- A 401(k) class action was tried to a jury in 2023 (*Vellali v. Yale* (D. Conn.))
  - Appeal remains pending at Second Circuit—despite oral argument nearly a year ago—following jury verdict for employer
  - The *Cunningham* decision also means that the Second Circuit may address the jury question on remand
- 2025 saw a plaintiff jury trial in (also in the Second Circuit)

Equitable Remedies

- A corollary to the jury trial question is the extent of the remedies available to ERISA plaintiffs
- 29 U.S.C. § 1132(a)(3) allows participants to seek “appropriate equitable relief” to redress plan violations or enforce plan terms
- The Supreme Court has held this limits claimants to relief typically available in equity, excluding monetary damages

Scope of Equitable Remedies

- The 6th Circuit's recent decision in *Aldridge* (144 F.4th 828 (6th Cir. 2025)) concerning former top hat plan participants is notable as to its remedies holding
- Top hat plans are unfunded and exempt from ERISA's fiduciary duty requirements, so the participants could not bring a breach of fiduciary duty claim
- Instead, the participants alleged violations of the trust agreement associated with the plan and sought an "equitable surcharge" to recover the lost benefits
- The Court of Appeals held that this remedy was simply a rebranding of a claim for compensatory damages—classic legal relief—and therefore was unavailable
- The court rejected what it termed "dicta" in *Cigna Corp. v. Amara* where the Supreme Court appeared to endorse surcharge as an equitable remedy

Implications of *Aldridge*

- The upside for plans and plan sponsors is that *Aldridge* limits the availability of remedies in suits for appropriate equitable relief
- **But** the *Aldridge* reasoning taken to its logical end might lead to more jury trials
- Other provisions of ERISA (including those regarding breach of fiduciary duty claims) allow participants to seek make whole relief for violations
- If equitable surcharge is not a viable theory, the make whole relief might be construed as *legal* damages, which could authorize jury trials
- However, outside the 2nd Circuit this theory has not gotten traction
- *Aldridge* also raised, but did not address, the question of preemption for top hat plans
- Only the Fourth Circuit has adopted a similarly narrow view of equitable remedies; most circuits have given more weight to the *Amara dictum.*

Jury Trials in ERISA Matters

Considerations for Plans and Fiduciaries

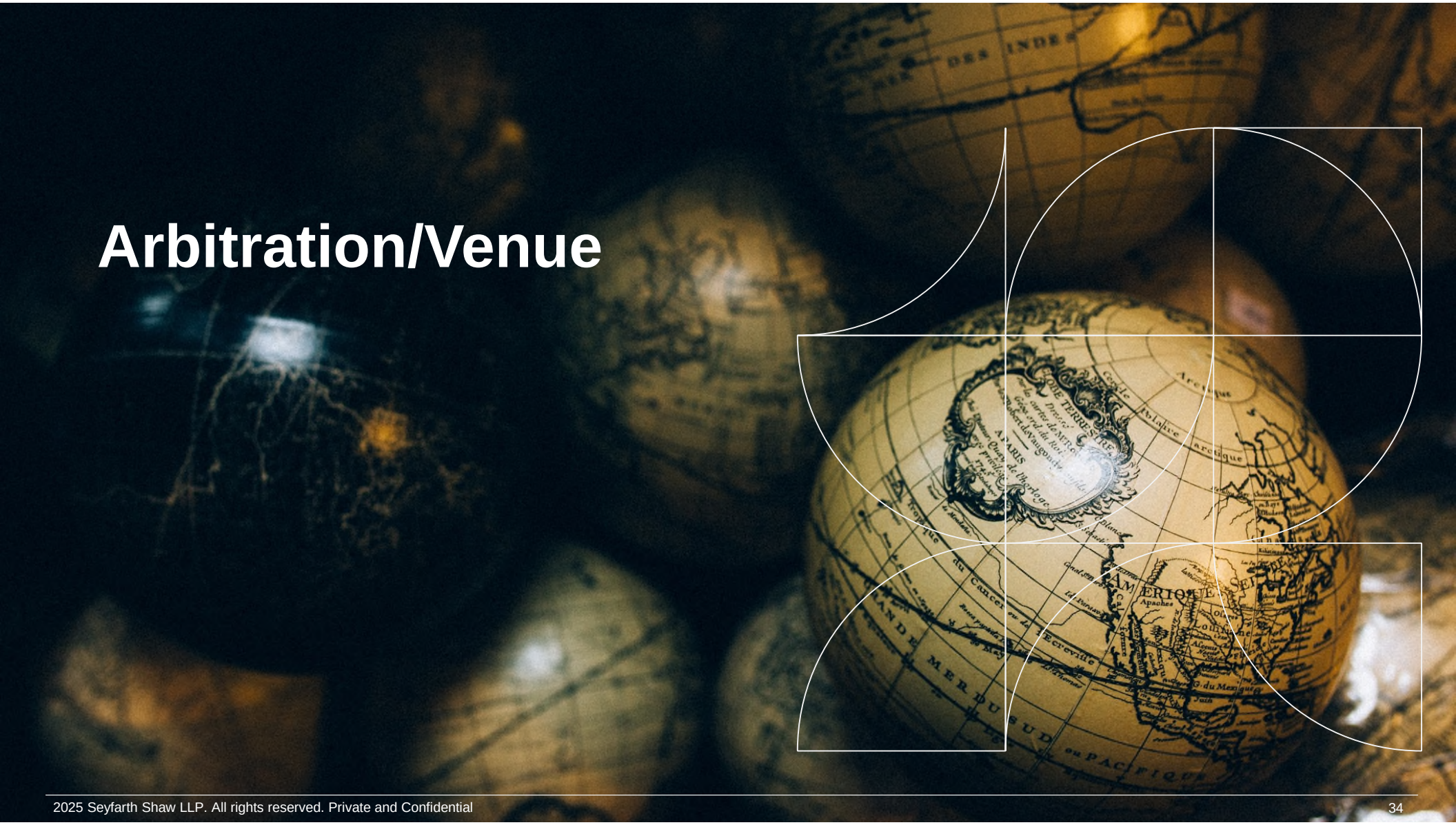
Jurisdiction matters

- Consider whether the Plan has a forum selection clause

If there is a jury, understand how the jury's decisions will bind the Court

Explanation of complicated concepts can be a much higher stakes endeavor given the deference granted to jury verdicts

Arbitration/Venue



Arbitration

- The question of the enforceability of arbitration clauses in ERISA plans continues to percolate through the courts of appeals
- Courts have generally found these arbitration clauses to be valid, but even in courts that allow for arbitration, it may not be allowed in all situations
- For example, courts have declined to enforce arbitration agreements that do not cover ERISA benefit claims
- Multiple courts of appeals (including in 2025) have declined to enforce arbitration agreements that prevent plaintiffs from pursuing plan-wide relief otherwise available under ERISA
- To the extent that an arbitration provision does not provide for severability, enforceability may be an all or nothing question

Risks of Arbitration of ERISA Claims

- Even enforceable arbitration clauses are not without risk
  - Arbitration
    - Very limited review of arbitrator's decision
    - Under recent Supreme Court precedent, plans might be required to file a motion to confirm an award in state court. *Hursh v. DST Systems, Inc.*, 54 F.4th 561 (8th Cir. 2022) (district court lacked jurisdiction to hear motion to confirm from participants in light of *Badgerow v. Walters*, 142 S. Ct. 1310, (2022)).
    - Arbitration clauses in service provider agreements may not cover claims against a plan
    - Supreme Court might invalidate these, but it recently denied certiorari when presented with the question

Recent Arbitration Decisions

- In one recent decision, the Ninth Circuit largely rejected the enforceability of a plan arbitration provision in a case involving claims for benefits, breach of fiduciary duty, and other equitable relief
- Key holdings:
  - Class waivers are not permissible if they impede effective vindication of statutory rights (including the ability to seek plan-wide relief for breach of fiduciary duty)
  - A plan cannot be *unilaterally* amended to require arbitration; rather the relevant counterparty must consent under the Federal Arbitration Act
    - For benefit claims and equitable relief, the relevant counterparty is the participant; for fiduciary breach claims, the plan itself can consent, but the participant can raise unconscionability defenses

Considerations Moving Forward

- Recent caselaw reflects potential pitfalls in including an arbitration provision and limits their effectiveness
- If a plan is amended to include an arbitration provision, the best bet for enforceability is affirmative evidence that the participants were made aware of the provision

Selecting an ERISA Forum - Considerations

- Plan forum selection clauses are not without risk
  - Although generally allowed, chosen venue may have unfavorable case law
    - Example: Jury trial in breach of fiduciary duty cases
    - Most courts hold no jury trial right, but the 2d Cir. has case law (*Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005), broadly interpreting *Great–West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002)) that certain courts have interpreted to allow a jury trial right when plan participants seek "make-whole" relief against a fiduciary. *E.g. Garthwait v. Eversource Energy Co*., No. 3:20-CV-00902 (JCH), 2022 WL 17484817, at *2 (D. Conn. Dec. 7, 2022)
    - This is true even though *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011) held that such claims against fiduciaries are equitable claims for equitable relief.

Other Key Appellate Matters

M & K Employee Solutions, LLC v. Trustees of the IAM Nat. Pension Fund, No. 23-1209 (U.S. June 30, 2025 amended July 3, 2025)

- At the end of June, the Supreme Court granted certiorari to consider a component of how much employers withdrawing from multiemployer pension funds are obligated to pay
- The case concerns withdrawal liability—the amount employers leaving multiemployer pension funds have to pay to cover their portion of the fund's unfunded vested benefits (*i.e.* the amount of vested benefits that a fund is legally obligated to pay but for which the fund does not have sufficient assets to meet)
- There is currently a circuit split regarding whether plans can change assumptions used to compute liability *after* the date relevant to determining liability (the D.C. Circuit said yes in 2024, the Second Circuit said no in 2020)
- A decision allowing changes after the end of the relevant plan year might leave employers in the dark as to what their liability might be until after withdrawal
- A decision is expected by June

Hoak v. Ledford, 2025 WL 2450919 (11th Cir. Aug. 26, 2025)

- Key facts: a top hat plan terminated and paid participants an actuarially equivalent lump sum (based on mortality tables and discounting to present value) to the annuity they would have received had the plan continued
- Key holdings:
  - The lump sum improperly and adversely affected plan benefits, as it *lowered* the benefit for any participants who would have survived beyond the average life expectancy in the mortality table
  - The Court of Appeals affirmed the district court's remedy requiring the company to pay an additional lump sum sufficient to purchase an annuity equivalent to what the plan would have paid had it not been terminated
- The Court of Appeals did not discuss the possibility that some or all participants would not outlive the average life expectancy
- This case if followed by other courts could greatly increase the cost of termination

Healthcare Reimbursement Litigation

Pleading Requirements for ERISA

New complaint analysis

- What do they want?
- How do they want it?
- Specificity
- Plausibility
- Removal
  - Complete preemption
  - Conflict preemption

Early dispositive motions

- ERISA § 502(a) provides that "a participant or beneficiary" may bring a civil action to "recover benefits due to her under the terms of her plan, to enforce her rights under the terms of the plan, or to clarify her rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a). Accordingly, the right to bring an action under ERISA is "limited to [ERISA Plan] participants and beneficiaries." 29 U.S.C. § 1132(a)(3)
- ERISA is unequivocal that a claim for benefits rests with the terms of the operative plan documents, requiring a plaintiff to demonstrate an entitlement to "benefits due to him under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B)

ERISA Standing: *Assignments*

- Assignments / Derivative Right to Sue
  - What does the assignment say?
    - Old, out-of-scope services, not properly executed…
    - Other defects?
- Anti-assignment provisions
  - Argue valid and enforceable – rendering an assignment void
  - Waiver arguments

Wave of Power of Attorney Theories

- While enforceable, anti-assignment provision does not preclude provider who holds valid power of attorney from asserting patient's ERISA claims.
  - *See American Orthopedic & Sports Medicine v. Independence Blue Cross Blue Shield, et al.*, 890 F.3d 445 (3d Cir. 2018).
  - "A power of attorney…does not transfer an ownership interest in the claim, but simply confers on the agent the authority to act on behalf of the principal." *Am. Orthopedics*, 890 F.3d at 455.
- State laws govern a valid power of attorney
- Attorneys-in-fact lack standing to sue in their own name
  - *See Lutz Surg. Partners PLLC v. Aetna, Inc.*, 2021 WL 2549343, at *6 (D.N.J. 2021) (a provider could not litigate in its own name, rather than on behalf of patients, pursuant to a power of attorney) Does the complaint satisfy *Iqbal/Twombly*?

OON Hospital/Provider-Based Provider Disputes: Provider Themes

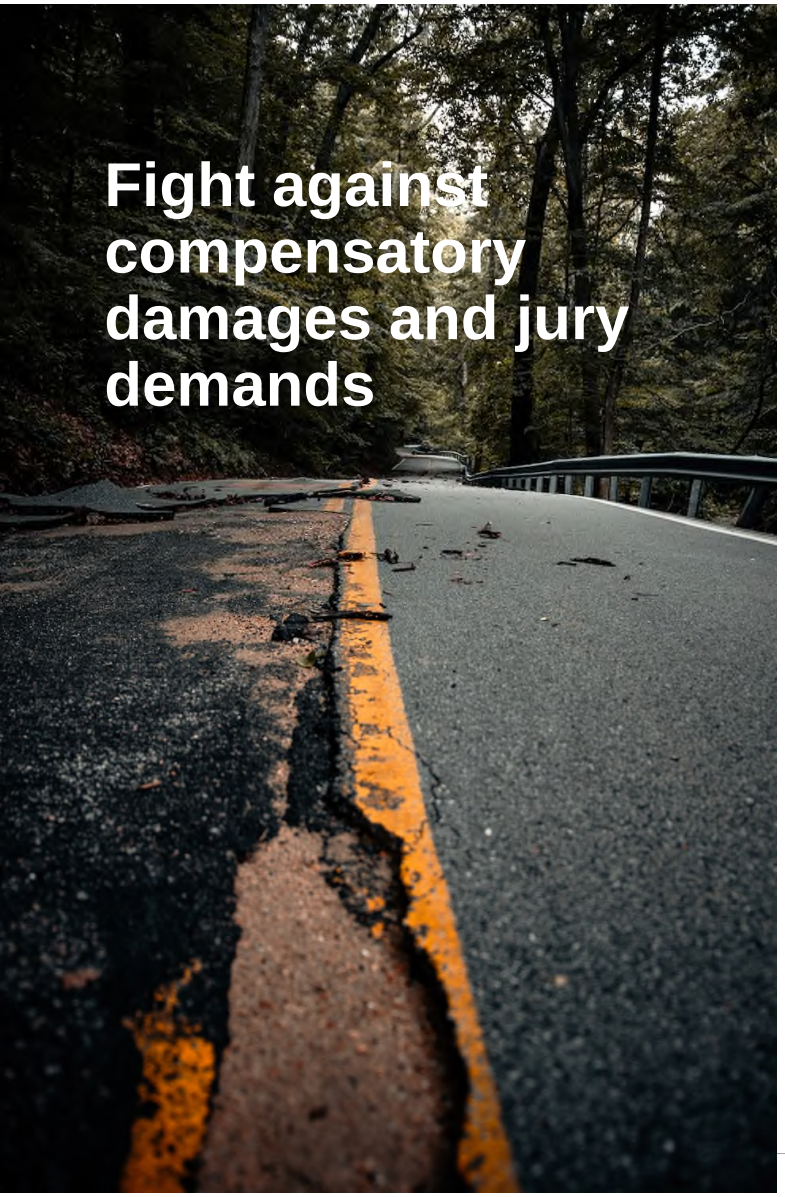
- **Provider narrative**
- **Claims (note ERISA preemption)**
  - State UCR statute
  - Breach of implied contract
  - Unjust enrichment
  - Prompt pay
  - Punitive damage claim

OON Hospital/Provider-Based Provider Disputes: Payor Themes

- **Payor Narrative**
- **Considerations**
  - Juror bias
  - System is complicated
  - Data is complicated
  - Impact on network contracting

Exhaustion of Administrative Remedies
Attack early and often

- A plaintiff must exhaust all remedies available under an ERISA-governed health benefits plan before bringing a civil action for benefits.
  - What is alleged?
  - Proof in the complaint?
  - Requests for judicial notice
- Scant allegations of purported "excuse" and "futility" do not meet the required pleading threshold. *See Cherry v. McKenney*, No. 16-cv-07467-SVW-PLA, 2017 WL 2992736, at *1 (C.D. Cal. Apr. 26, 2017) ("Plaintiff's only reasoning for failing to exhaust administrative remedies is the bare assertion that an appeal would be futile. There is no case that has found a bare assertion of futility to warrant an exception to the exhaustion requirement.")



Fight against compensatory damages and jury demands

- Remedies are limited to those set forth in ERISA
- ERISA does not permit recovery of extra-contractual damages. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) ("[T]he statutory provision explicitly authorizing a beneficiary to bring an action to enforce his rights under the plan . . . says nothing about the recovery of extracontractual damages . . . .")
- No right to a jury trial in an ERISA case

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