



# ERISA Litigation – 2022 Mid-Year Update

Presenters:

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**Seyfarth Shaw LLP**

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# Speakers

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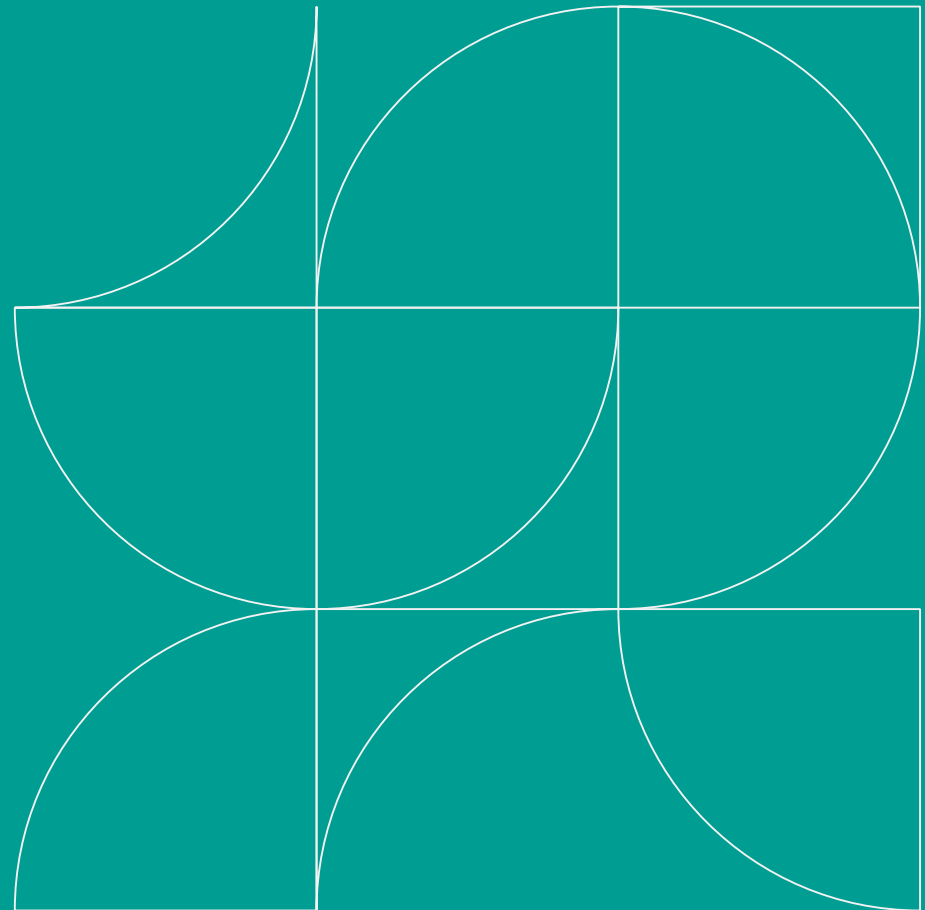
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# Agenda

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- 01** Current Status of 401(k) Fee Cases
- 02** Fiduciary Claims Update: Health & Welfare
- 03** Key Litigation: Arbitration Clauses
- 04** Key Legislative Action: Arbitration & Discretionary Clauses

# Current Status of 401(k) Fee Cases – *After Hughes*



## Recall *Hughes v. Northwestern* ...

**Background:** The District Court and Seventh Circuit dismissed the case as a matter of law. They explained that (among other things) because prudent (low-cost) funds were available, the plaintiffs had the ability to select the investments they wanted. The ability to select prudent options eliminated any concerns about other allegedly imprudent options.

The Supreme Court, in an 8-0 remand decision, rejected that broad interpretation and sent the case to the Seventh Circuit to apply the *Twombly/Iqbal* motion to dismiss standard.

**Update:** The parties are briefing the case on remand, focused on whether the complaint states a claim and whether the plaintiffs' should have been allowed to further amend their complaint.

## 21-2789, *Andrew Albert v. Oshkosh Corp.* (Appeal Pending in 7th Circuit, argued 6/2)

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- This case was one of a large number filed in Wisconsin.
- It was dismissed by E.D. Wis. Judge Griesbach shortly based on the now-reversed *Hughes* holding before most of the other cases were stayed pending a decision in *Hughes*
- The appeal was argued on June 2.
  - At argument, Judge Easterbrook expressed his view that *Hughes* mandates that these cases must be disposed of at the summary judgment stage.
  - Defense counsel argued this was incorrect and the case had been sent back to apply *Twombly/Iqbal* to the remaining claims.

## 21-2014, *Boley v. Universal Health Services, Inc.*, (Op., June 2, 2022)

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- UHS argued that the class representatives lacked standing to bring claims related to funds in which they didn't invest and cited the Supreme Court's 2020 decision in *Thole v. U.S. Bank N.A.* , as precedent showing why the retirees lacked Article III standing to sue.
- Third Circuit rejected that analysis, pointing to broader alleged breaches that affected multiple funds. “Because the class representatives allege actions or a course of conduct by ERISA fiduciaries that affected multiple funds in the same way, their claims are typical of those of the class.”
- Not clear if the decision will apply broadly or be limited to cases involving broad attacks on plan-wide practices.

***Davis v. Salesforce.com*, 2022 U.S. App.  
LEXIS 9527 (9th Cir. Apr. 8, 2022)  
(unpublished)**

- Ninth Circuit reversed district court's dismissal of Plaintiffs' claim that Defendants imprudently failed to select lower-cost share classes; dismissal of the derivative duty to monitor claim; and dismissal of Plaintiffs' claim that Defendants imprudently failed to investigate and timely switch to available collective investment trusts (CITs).
- But Ninth Circuit affirmed district court's dismissal of the breach of prudence claim for failure to consider passively managed investment options instead of active funds.

**Other Notable  
Recent Class  
Action Fee  
Cases...**

***Kong v. Trader Joe's Co.*, 2022 U.S. App.  
LEXIS 10323 (9th Cir. Apr. 15, 2022)  
(unpublished)**

- Ninth Circuit reversed district court's dismissal of Plaintiffs' claim for breach of fiduciary duty
- Complaint plausibly alleged a failure to provide cost-effective investments with reasonable fees where Plaintiffs alleged Defendants offered mutual funds with retail share classes that carried higher fees than institutional share classes of the same investments.

**Other Notable  
Recent Class  
Action Fee  
Cases...**

# The U.S. Chamber of Commerce

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*The Chamber has set out on a legal campaign against the expansion of proposed class actions challenging 401(k) plan fees.*

- The organization has filed six amicus briefs, most recently in late February and early March urging federal district courts to dismiss claims; similar briefs filed last fall.
- By getting involved in district court cases, the Chamber may be trying to shape that case's record—which can be particularly important on appeal.

## Key takeaway...

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*There are over  
700,000 401(k)  
plans in the U.S  
--there is no  
end in sight*

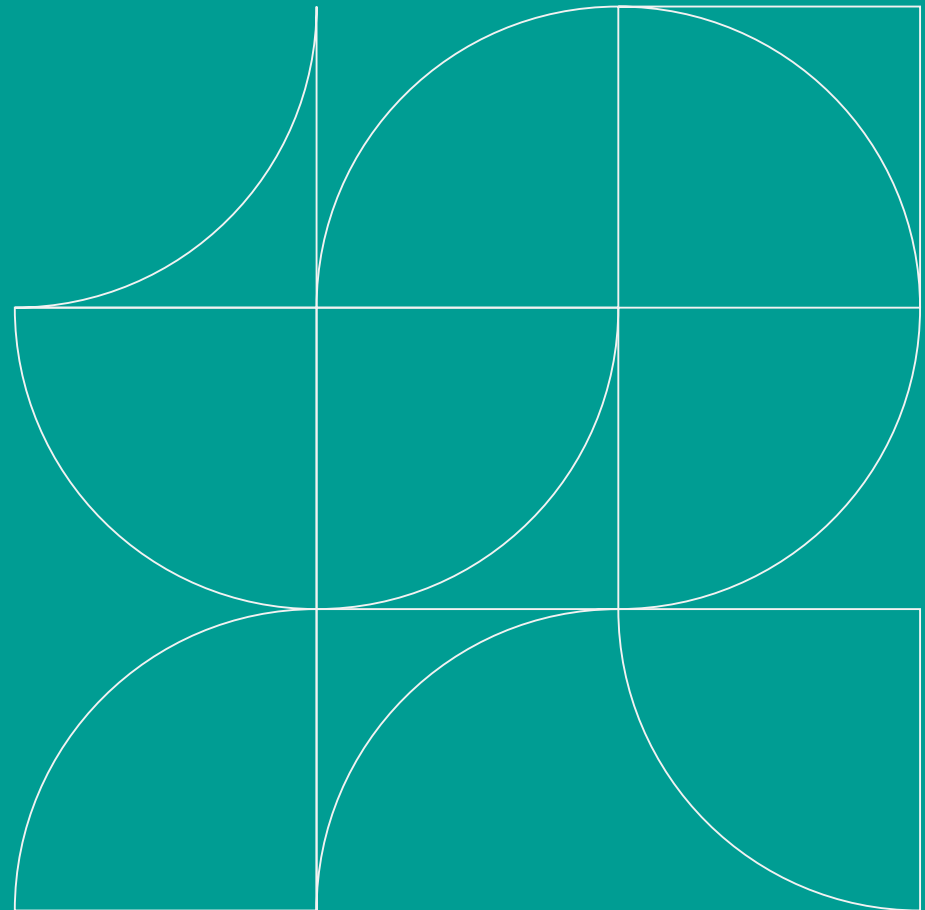
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- While more than 240 excessive fee lawsuits have been filed in federal court since 2005, approximately 90 of them were filed in 2020 alone.
  - Pleading is one thing; proof of a breach of fiduciary duty is something else entirely.
  - The fee litigation will continue to disrupt the market of fiduciary fee liability insurance. To date, over 40 excessive fee cases have settled for more than \$10 million.
  - At this point, the best defense is a good offense.

## Practices for Fiduciaries to Consider

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- Consider conducting a competitive RFP process for key service providers to the plan.
- Meet on a regular basis to evaluate plan investments and document the analysis.
- Engage an outside investment advisor to assist in monitoring performance and fees.
- Consider a 3(38) manager or OCIO.
- Evaluate service provider performance and fees regularly.
- Engage third party experts to supplement committee expertise.
- Provide training if for plan fiduciaries.

# Fiduciary Claims Update: Health and Welfare Plans



## ***Wit v. United Behavioral Health Update***

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- In March 2022, the Ninth Circuit reversed decisions from the district court, which had ordered United Behavioral Health (“UBH”) to reprocess over 67,000 claims for behavioral and mental health treatment, based on a finding that UBH had breached its fiduciary duty to insureds by denying their mental health and substance use disorder claims as a result of allegedly pervasively flawed medical necessity criteria that the court concluded are not consistent with generally accepted standards of care (“GASC”).
- While the Ninth Circuit agreed that the plaintiff had standing and certifying the class was not an abuse of discretion, it decided that UBH had properly exercised its discretion in creating its behavioral and mental health guidelines and that the underlying health plans did not require consistency with the GASC.

## ***Wit v. United Behavioral Health Update***

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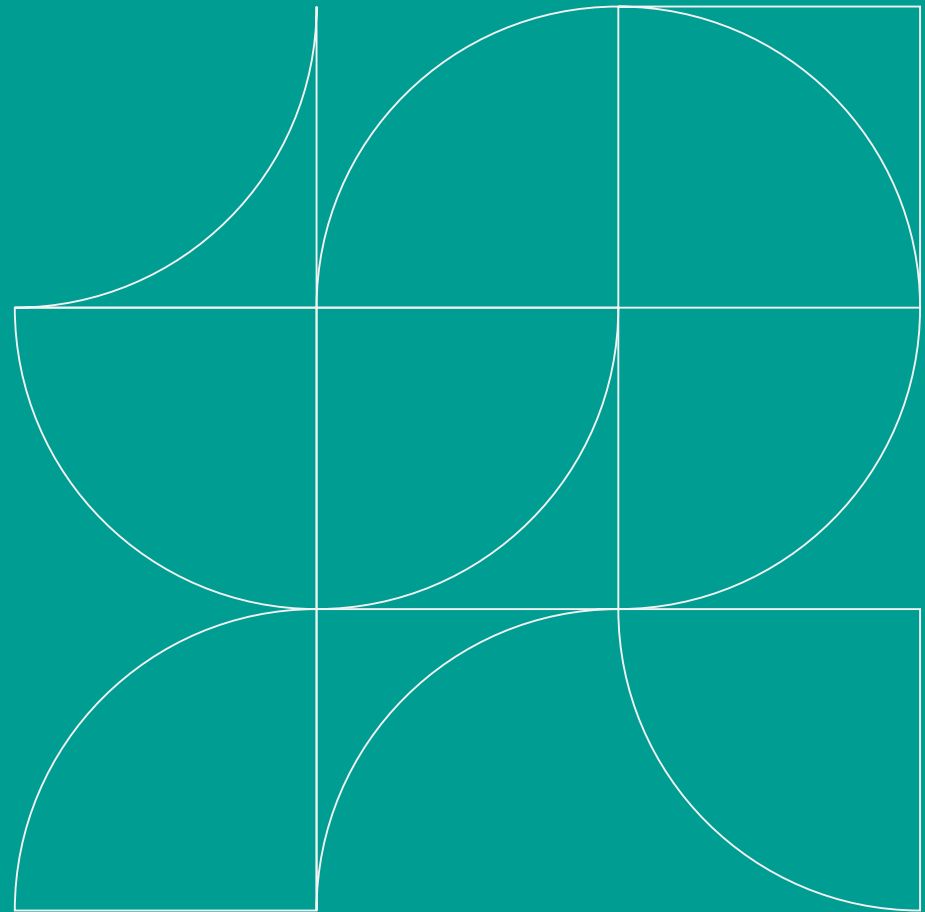
- In a petition for panel rehearing and rehearing *en banc* filed last month, the combined class argued the case will have nationwide consequences for health plans regulated by ERISA.
  - The National Association for Behavioral Healthcare (NABH) and at least eight other healthcare advocacy organizations have requested the full 9th U.S. Circuit Court of Appeals to review this ruling by a three-judge panel, which reversed the trial court's landmark judgment in the mental health class action.
- UBH's response to the Petition for Rehearing En Banc is currently due **6/16**

## ***Skelton v. Reliance*, No. 21-264, (8th Cir. May 6, 2022)**

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- The Eighth Circuit affirmed the district court's order finding the insurer, Reliance, failed to fulfil its duty to verify that premiums came only from properly enrolled, eligible participants.
- On appeal by Reliance, the Eighth Circuit agreed with the district court. It found that Reliance was a fiduciary as to enrollment and described its enrollment administration as “a haphazard system of ships passing in the night.” Reliance failed to communicate with Radisson which employees sought coverage but still needed to submit EOI. Combined with the Employer’s bulk premium payment, neither entity learned which employees the other one thought were or were not enrolled. The Court accused Reliance of being blind to a faulty enrollment system, which allowed Reliance to profit.
- **Key Takeaway:** The Fourth Circuit has ruled differently, and this case may be limited to situations where the insurer has discretion over enrollment activities. Nonetheless, the decision is a good reminder for employers/plan fiduciaries to work with their carriers to maintain a safeguarded system for verifying enrollment and collecting premiums. Life plans using bulk billing should consider conducting an eligibility audit with their carrier and legal counsel.

# Key Litigation: Arbitration Clauses



# Appellate Court Decisions

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- *Michael Dorman v. The Charles Schwab Corp. et al.*
  - Ninth Circuit reversed district court's denial of motion to compel arbitration
  - A plan can sign away its own right to sue, if the plan's terms include an arbitration provision, the Ninth Circuit ruled in August.
- *Smith v. Board of Directors of Triad Manufacturing Inc. et al.*
  - The Seventh Circuit upheld district court's order denying motion to compel arbitration.
  - Though the court applied *Schwab* analysis, it reached the opposite outcome by barring the class claims by holding that arbitration agreements unenforceable where they limited rights to plan-wide relief under ERISA.
- *Cooper v. DST Systems Inc. et al*
  - Second Circuit reversed Southern District of New York court order compelling arbitration
  - Finding that an arbitration agreement signed by an employee as part of his employment did not require that he arbitrate any fiduciary breach claims challenging the investment options and fees in his employer's 401(k) plan
- *Raymond Hawkins et al. v. Cintas Corp. et al.*
  - Sixth Circuit upheld Southern District of Ohio court's order denying motion to compel arbitration.


## Notable Pending Appeals

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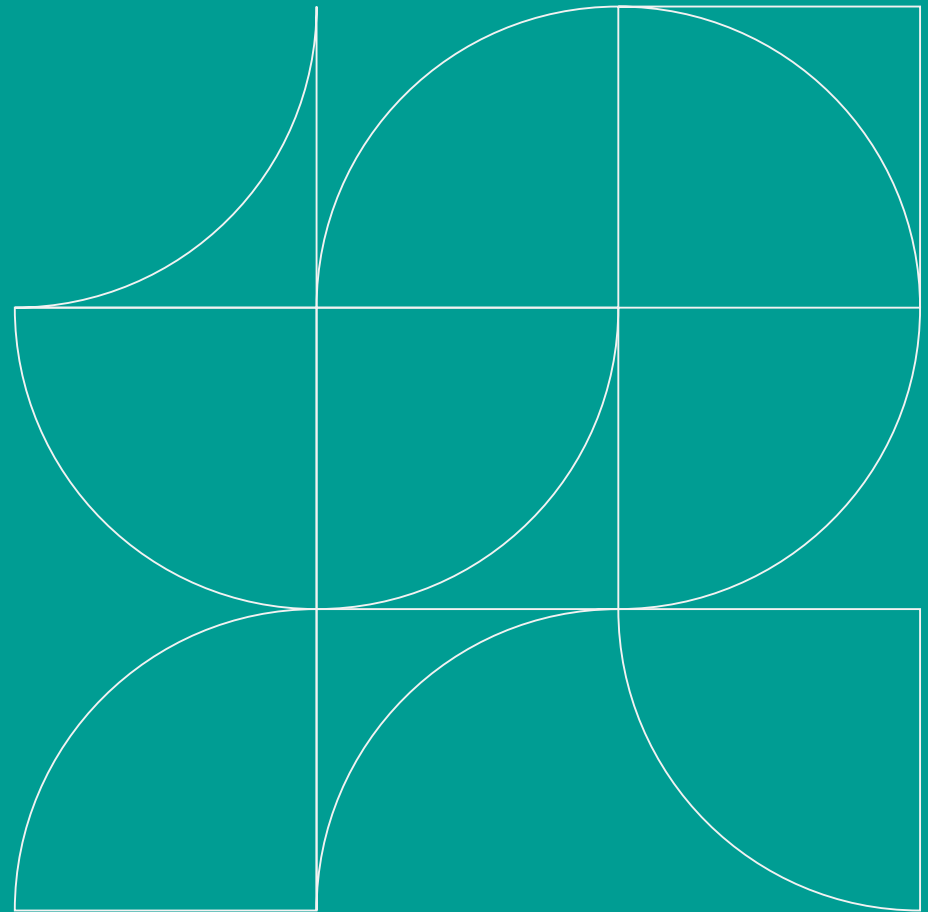
- *Dejesus Cedeno v. Argent Trust Co*
  - Currently on appeal to the Second Circuit, considering the district court's denial of Argent's motion to kick a proposed class action into arbitration. Workers in that suit allege the plan overpaid for company stock
  - U.S. Chamber filed amicus brief in March arguing that the FAA requires enforcement of arbitration agreement in ERISA plan
- *Harrison v. Envision Management Holding Inc. Board et al.*
  - The Tenth Circuit also has a chance to mull a trial court's denial of a motion to compel arbitration of ERISA claims involving an employee stock ownership plan
- *Viking River Cruises v. Moriana, No. 20-1571*
  - The Supreme Court heard oral argument on whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under the California Private Attorneys General Act.
  - This case may shed light on whether the Court will continue to repeatedly has enforce arbitration agreements, as it has over the past decade.

# Predictions for SCOTUS...

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- The sustainability of class action waivers in the context of claims for plan-wide ERISA would have major implications for benefits litigation.
  - A SCOTUS ruling could preserve, or cut off, class status for a wide array of ERISA fiduciary breach claims.

# Legislative Update



# 117th Congress (2021-2022): Employee and Retiree Access to Justice Act of 2022:

## *H.R.7740*

“To amend the Employee Retirement Income Security Act of 1974 to provide that any mandatory predispute or coerced post dispute arbitration clause, class action waiver, representation waiver, or discretionary clause with respect to a plan is unenforceable, to prohibit any such clause or waiver from being included in a plan document or other agreement with plan participants, and for other purposes.”

# Arbitration

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- The bill under consideration by the House - Education and Labor Committee would amend ERISA to prohibit any plan post-dispute arbitration clause, class action waiver, representation waiver, and to make any such existing clauses unenforceable.
- Notably, the bill exempts multiemployer plans from the ban on discretionary clauses to determine plan benefits or interpret plan language.

# Discretion

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- Most ERISA plans have adopted some form of a discretionary clause. This bill's elimination of such provisions would bring an immense shift in the administration of ERISA plans. Courts would no longer give deference to the claims decisions made by plan and claim administrators with discretionary authority under the terms of the plan to make such decisions (and who have expertise in applying the terms of the plan to participants). Cases would very likely start to look more like common law breach of contract cases.
- Notably, there are a large number of states that already ban discretionary clauses from being contained in certain types of insurance policies issued within that state.

**thank  
you**

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