

Fiduciary Liability Insurance

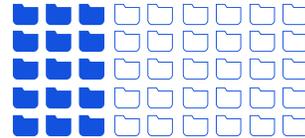
Understanding the rapid rise in excessive fee claims



Benefit plans and their fiduciaries are experiencing a rapid rise in excessive fee claims.



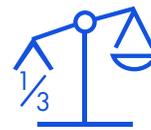
Almost 100 cases were filed in 2020 alone¹, a nearly five-fold increase as compared to the number of filings in 2019.²



~ One-third of those new cases were directed at fiduciaries overseeing plans with **less than \$1 billion of assets**.³



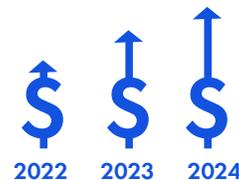
Retirement plans and their fiduciaries across almost every industry and jurisdiction are at risk.



Only ~ one-third of all cases are being dispatched at the motion to dismiss stage, compared with the dismissal of roughly half of all cases in federal, securities-related class action lawsuits.⁴



Settlements totaling more than \$1 billion, including \$330 million in legal fees, were paid between 2015 and 2020.⁵



With dozens of cases still in litigation⁶, the **total cost of projected settlements is likely to increase** by hundreds of millions of dollars, if not more, over the next several years.

1. Chrinis, Tulio D. and Robert Rachal, Myron D. Rumeld, and Kyle C. Hansen. Benefits Law Journal. Vol. 34, No. 1: Spring 2021
 2. Wille, Jacklyn. "401(k) Fee Suits Flood Courts, Set for Fivefold Jump in 2020." Bloomberg Law: news.bloomberglaw.com/employee-benefits/401k-fee-suits flood-courts-on-pace-for-fivefold-jump-in-2020: 21 June 2021
 3. Based on internal research of AIG data
 4. Chrinis, Tulio Russell L, Hirschhorn, "An Update on 401(k) and 403(b) Investment Litigation." Proskauer Rose, LLP. Webinar: 9 June 2020
 5. Chrinis, Tulio D. and Robert Rachal, Myron D. Rumeld, and Kyle C. Hansen. Benefits Law Journal. Vol. 34, No. 1: Spring 2021
 6. Based on internal research of AIG data at the time of publication

Four Factors Exacerbating Excessive Fee Risk



ERISA cases are easy to bring. Under ERISA, if a plaintiff's complaint includes allegations that create a plausible inference of a breach of fiduciary duty and a resulting loss to the plan, the burden of proof often shifts to the defendant fiduciary to show why the choice made was appropriate, prudent and within the bounds of reasonableness.



ERISA excessive fee defenses require costly legal expertise. Plaintiff's ERISA class action lawyers tend to work for highly specialized, boutique firms that mount aggressive and carefully crafted cases.



The ERISA statute of limitations runs from actual knowledge of the violation. Over the past few years, several recent court decisions have been favorable to the plaintiff's bar.



ERISA excessive fee claims are hard to dismiss. Beyond whittling away the statute of limitations dismissal arguments, the nature of most ERISA excessive fee cases makes it very difficult for defendants to achieve a dismissal.

Mitigating the Rise in Fiduciary Litigation Risk

Experts suggest managing and mitigating this risk starts with strong governance practices, including establishing a committee to oversee the plan's financial responsibilities and develop, adopt and periodically review an investment policy statement. Fiduciaries should also keep close tabs on the third parties they engage.

Bracing for the Next Wave of Excessive Fee Litigation

The potential risks that retirement plan fiduciaries face in fulfilling their duties are not new. But the frequency and severity of excessive fee complaints has sharply increased – irrespective of industry, jurisdiction, plan type or size. No retirement plan – or its fiduciaries – is immune.

Please refer to *'Understanding the rapid rise in excessive fee claims'* whitepaper for a full list of best practices to adopt.

At AIG, we are committed to an evidence-based dialogue with our distribution partners and clients. By sharing data and insights that arise from our position as a leading provider of fiduciary liability coverage, we hope to help foster a clearer, mutual understanding of current market dynamics and risk mitigation solutions available.

For more information, visit www.aig.com/excessivefeeclaims or contact your AIG Underwriter or Distribution Leader.



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