

# Legal Trends & Regulatory Updates

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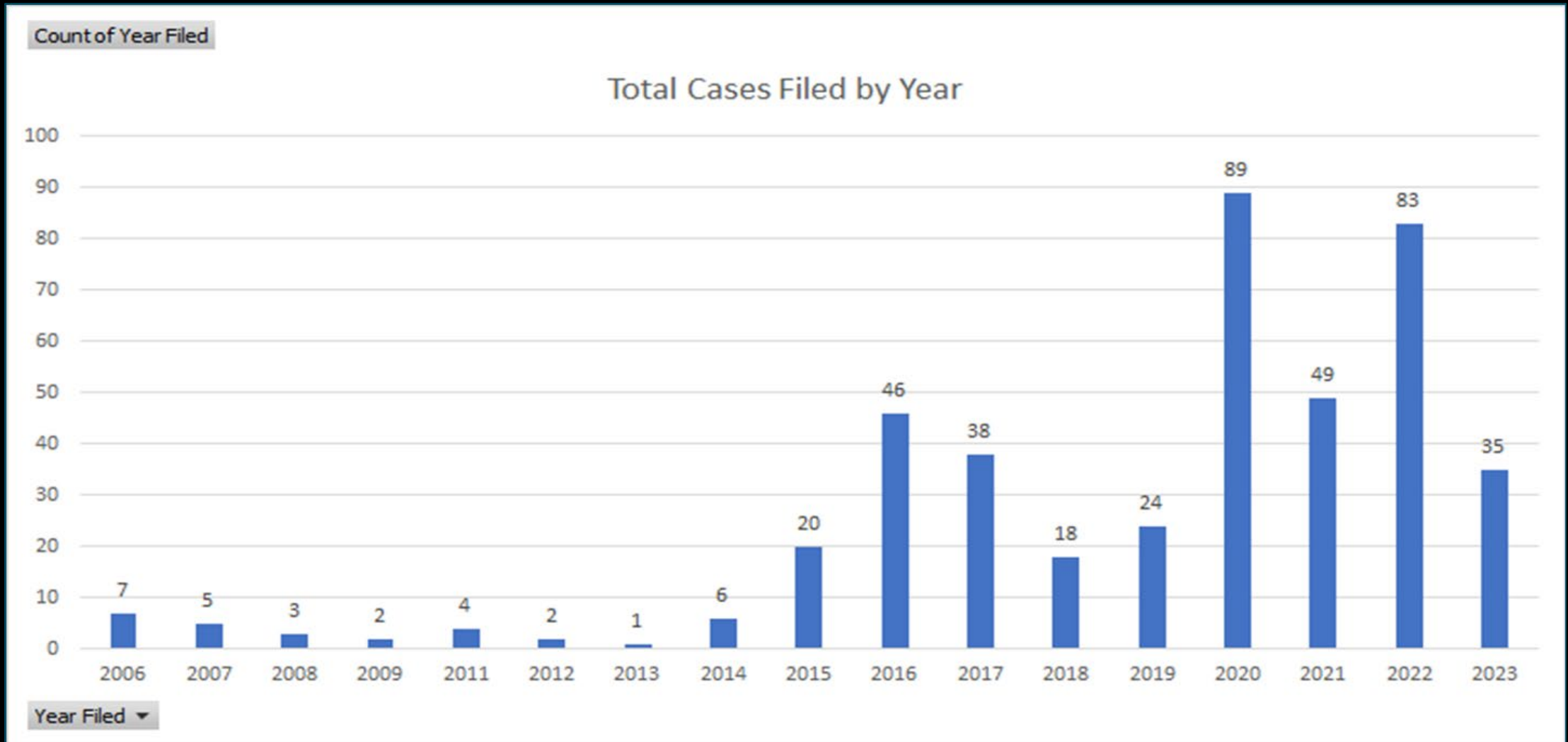
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# **Legal Trends & Regulatory Updates**

# Number of ERISA Lawsuits since 2006





# Current Litigation Issues

# Today's Discussion

- What May Make a Plan More Susceptible to Litigation
- Frequently Challenged Investment Fund
- Plaintiffs' Comparator Funds
- How the Cases Are Going
- Settlements



# What Makes A Plan More Susceptible To Litigation?

## Recordkeeping Fee Structure and Pricing

- Paying recordkeeping fees that are structured as a percentage of assets (i.e., basis points), rather than as a fixed, per participant rate
- Not moving to a fixed, per participant rate as plan assets grow
- Use of revenue sharing
- Allowing recordkeeper to keep “float” income/not tracking float
- Not regularly conducting recordkeeping benchmarking
- Not regularly conducting recordkeeping Requests for Information (RFIs)
- Not regularly issuing periodic Requests for Proposals (RFPs)

## Plan Investments

- Not using the lowest cost mutual fund share class available
- Not using the lowest cost vehicle available (collective trust or separate account)
- Not offering index/passively managed funds or not offering enough index funds
- Using investment options that pay revenue sharing to a plan’s recordkeeper
- Retaining funds that have underperformed relative to benchmarks
- Using a recordkeeper’s affiliated funds, especially target date funds
- Using plan sponsor’s proprietary funds

# Frequently Challenged Funds

Certain funds have been more frequently challenged than others in recent years.

## Target Date Series

- Fidelity Freedom Funds (actively managed)
- BlackRock LifePath Index Funds
- JP Morgan Target Date Funds (including “SmartRetirement”)
- Wells Fargo Target Date Funds
- Northern Trust Target Date Funds (including “Focus Funds”)
- American Century One Choice TDFs (actively managed)
- flexPath

## Individual Funds

- Pimco Total Return
- Harbor Capital Appreciation Fund
- Invesco Oppenheimer Developing Markets Fund
- Oakmark International Fund

## Fund Families

- BlackRock Fund
- Aon Funds



# Investment Vehicles & Services Under Attack

## INVESTMENT VEHICLES

- Stable Value Funds
- Money Market Funds
- Lack of Collective Investments Trusts (CIT) / Separate Accounts

## INVESTMENT SERVICES

- Investment Advisors
- Investment Managers
- Individual Investment Advice / Managed Account Services

# Plaintiff's Comparator Funds

Funds Plaintiffs' Counsel Frequently Rely On:

Target  
Date Series

- T. Rowe Price
- American Funds
- TIAA-CREF
- Callan
- Vanguard
- Fidelity

COMPLIANCE

# Recent Settlement Examples

Plan Sponsor	Participants	Plan Assets	Settlement Amount
Wells Fargo	344,287	\$40 billion	\$32.5 million
Takeda Pharmaceuticals, USA, Inc.	8,712	\$1.8 billion	\$22 million
John Hancock Life Ins. Co.	9,800	\$1.8 billion	\$14 million
Walgreen Co.	195,000	\$10 billion	\$13.75 million
Universal Health Services, Inc.	65,770	\$1.9 billion	\$12.5 million
Washington University in St. Louis	24,000	\$3.8 billion	\$7.5 million
T. Rowe Price	8,200	\$1.7 billion	\$7 million*
Costco Wholesale Corp.	167,224	\$15 billion	\$5.1 million
Xerox Corporation	30,693	\$4.3 billion	\$4.1 million
Bronson Healthcare Group, Inc.	9,708	\$550 million	\$3.0 million
Rush University Medical Center	15,500	\$1.2 billion	\$2.95 million
Southcoast Hospitals Group, Inc.	9,896	\$886 million	\$2 million
Garthwait v. Eversource Energy	11,484	\$3 billion	\$15 million
Munro v. USC	40,000	\$3 billion	\$13.05 million



# **Sample Litigation Case**



# Vellali vs. Yale University

- In selecting a service provider, focus is not only on fees, but level and quality of services
  - Decision whether to retain or remove a particular investment also is a multifactor decision
  - No requirement to weigh factors in any particular fashion
- No way to determine the decision that a hypothetical fiduciary would have made if it was faced with the decisions that the relevant plan fiduciaries are making





# **Best Practices for Plan Fiduciaries**

# Keep Complete Records

## What is Complete?

- Advice
- Communications
- Analysis
- Discussions
- Third-Party Reports and Contracting Documents
- Compliance Materials
- Observe the Formalities



Gaps in records suggest the fiduciary process could have been substandard.



Complete does not mean “everything.”

# Document Retention

- ❖ Keep everything you need.
  - Don't keep more than you need!
- ❖ Stray and unnecessary documents and other materials can cause trouble.
- ❖ Automatic Retention Policies:
  - Must be properly crafted and vetted
  - Can save significant costs and aggravation down the road





**QUESTIONS?**





# Thank you!



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