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Third Quarter 2026 ERISA Litigation Update: Recent Developments and Areas to Watch

Gibson Dunn's ERISA litigation update summarizes key legal opinions and developments during the past quarter to assist plan sponsors and administrators in navigating the rapidly changing ERISA litigation landscape.

Introduction

The third quarter of 2026 brought further developments in evolving areas of ERISA litigation. Courts continued to reach differing conclusions on newer theories involving tobacco surcharges, pension risk transfers, and prescription-drug costs, while pending appeals may soon provide some of the first appellate guidance on these theories. At the same time, appellate courts addressed recurring questions about how fiduciary-breach claims are pleaded and proved, the remedies participants may pursue, and the documents plan administrators must disclose.

One of the most significant developments since our last update was the Supreme Court's October argument in *Anderson v. Intel Corp. Investment Policy Committee* on the pleading standard for investment-prudence claims. A pending certiorari petition in *Capital Group Companies v. Pover* could also affect the scope of plan-wide relief available under ERISA § 502(a)(2). New agency guidance on tobacco surcharges has begun to shape litigation on that issue, although courts have not treated that guidance as resolving the underlying statutory questions. Together, these developments are beginning to show which newer theories may gain traction and where important questions remain unsettled. In this update, we examine these developments and what they may mean for plan sponsors, fiduciaries, administrators, and

service providers as the case law continues to take shape.

I. Recent Litigation Activity

A. Tobacco-Surcharge Litigation: Agency Guidance Arrives as Appeals Begin

As discussed in our February 2026 update, dozens of class actions filed since 2024 allege that health-plan tobacco surcharges violate ERISA's "full reward" requirement when they are waived only prospectively for participants completing a cessation program, rather than refunded for prior periods.

The quarter's decisions diverged most clearly on Article III standing. In *Spencer v. Campbell Soup Co.*, the district court held that a participant who never attempted the cessation program lacked standing and, alternatively, that the "full reward" requirement does not require retroactive reimbursement.[1] Just one day later, the court in *Janosky v. United Surgical Partners International, Inc.* held that paying an allegedly unlawful surcharge was itself a concrete injury sufficient for Article III standing. But *Janosky*, like *Spencer*, dismissed the plaintiffs' principal retroactive-reimbursement theory.[2] These decisions highlight the continuing divide over standing, while suggesting movement toward what may become a majority view among district-courts rejecting reimbursement of pre-cessation program surcharges.

On August 26, 2026, the Departments of Labor, Health and Human Services, and the Treasury announced in FAQs that, pending further guidance, they will not take enforcement action against programs that provide a reward only prospectively.[3] However, the FAQs do not alter the regulatory text and address only agency enforcement. That limitation became important on October 16 in *Mehlberg v. Compass Group USA, Inc.*, where the district court granted summary judgment to certified classes and held that the "full reward" requirement unambiguously requires retroactive reimbursement. The court declined to treat the FAQs as controlling because they do not bind private litigants and, in the court's view, were inconsistent with prior agency guidance.[4]

Pending appeals could soon provide the first appellate guidance on the viability of plaintiffs' theories. In *Williams v. Bally's Management Group, LLC*, the District of Rhode Island became the first court to dismiss an ERISA tobacco-surcharge class action in its entirety, holding in November 2025 that neither ERISA nor the applicable regulations require retroactive reimbursement and that the plaintiff lacked standing to pursue her fiduciary-breach claim.[5] The First Circuit heard argument in *Bally's* on September 16, 2026, and has not yet ruled.[6] Appeals are also pending in the Second, Sixth, and Seventh Circuits.[7]

What to watch: The first appellate decisions may shed additional light on whether prospective-only surcharge relief is permissible and what weight courts give the agencies' FAQs after *Loper Bright*. Until then, sponsors should be cautious about treating the FAQs as a litigation safe harbor and should consider reviewing how their programs handle retroactive reimbursement and required disclosures.

B. Pension Risk Transfer Standing Split Reaches the Fourth Circuit

Article III standing has also become the threshold issue in challenges to pension risk transfers, in which a defined benefit plan purchases group annuities to cover retirees' benefits. Plaintiffs allege that such transactions benefit plan sponsors while shifting risk to participants where fiduciaries select insurers to provide the annuities that are riskier than available alternatives, thereby breaching their duties. Defendants respond that, under *Thole v. U.S. Bank N.A.*, 590 U.S. 538 (2020), retirees who continue to receive every promised payment have not suffered a concrete injury.

Two third-quarter decisions favored defendants. In *Schoen v. ATI, Inc.*, the Western District of Pennsylvania found no plausible likelihood that the alleged insurer risk would affect plaintiffs' pension payments.[8] The District of Colorado reached the same result in *Dow v. Lumen Technologies, Inc.*[9] By contrast, earlier rulings from district courts in suits brought against Lockheed Martin and Bristol-Myers Squibb found standing, and both rulings are now on interlocutory appeal.[10] The Fourth Circuit heard argument in *Konya v. Lockheed Martin Corp.* on September 16.[11] The Department of Labor participated in support of Lockheed and argued that retirees receiving full benefits lacked standing absent a sufficiently concrete risk of nonpayment.[12]

Why this matters: *Konya* may be the first appellate ruling in this wave. A decision for Lockheed could materially narrow these suits at the threshold, while a decision for the retirees would allow these cases to proceed to the more fact-intensive question whether an annuity provider was prudently selected. Regardless of how *Konya* and similar cases play out, plan sponsors considering de-risking transactions should continue to document the process supporting the annuity-provider decision.

II. Significant Appellate Developments

The quarter also produced appellate decisions addressing how fiduciary-breach claims are pleaded, proved, and litigated. Several of those decisions have direct implications for how plan committees document fiduciary decisions and how plans structure arbitration and other dispute-resolution provisions.

A. Supreme Court Hears Argument in *Anderson v. Intel*

As newer ERISA theories move toward appellate resolution, the Supreme Court is addressing a recurring threshold issue in investment selection challenges: how much comparative detail plaintiffs must plead when challenging plan investments as imprudent based on underperformance. As noted in our prior update, *Anderson v. Intel Corp. Investment Policy Committee* asks whether a plaintiff alleging imprudence based on investment underperformance must plead a "meaningful benchmark."[13] The Ninth Circuit held that underperformance allegations require a comparator with sufficiently similar objectives and risk.[14] In the Supreme Court, the Solicitor General filed an amicus brief supporting Intel, while emphasizing that courts should apply the ordinary *Twombly*/*Iqbal* plausibility framework rather than a special ERISA pleading rule.[15] The Supreme Court heard argument on October 6.[16]

Several Justices focused on how closely a proposed benchmark must resemble the challenged investment and how benchmark allegations should be considered alongside the rest of the complaint.[17] Petitioners' counsel resisted a categorical rule requiring a "meaningful benchmark," but acknowledged that underperformance allegations necessarily involve some comparison and agreed that courts need criteria for evaluating whether that comparison is probative.[18] The questioning therefore explored not only whether a comparison is needed, but what makes it sufficiently meaningful at the pleading stage. Several Justices also asked whether underperformance, even against an appropriate benchmark, could by itself support an inference of imprudence.[19] However, the Court may not need to resolve that broader question to decide the case.

Practical impact: A decision is expected by June 2027 and may clarify how much comparative detail plaintiffs must plead before obtaining discovery on investment-underperformance theories. It could also shape how often these cases survive motions to dismiss and the extent to which plaintiffs must include allegations tailored to an investment's characteristics and risks, rather than relying on performance comparisons alone.

B. Third and Eleventh Circuits Emphasize the Fact-Intensive Nature of Investment Prudence

If *Anderson* addresses what a plaintiff must plead to challenge an investment as imprudent, two recent appellate decisions show how fact-intensive that inquiry becomes at summary judgment. On June 22, 2026, in *In re Quest Diagnostics ERISA Litigation*, the Third Circuit affirmed summary judgment for fiduciaries on an investment imprudence claim, rejecting comparisons between materially different investments and emphasizing the committee's documented process, including its use of an independent adviser, watch lists, and follow-up review of underperformance.[20] By contrast, in *Johnson v. Russell Investment Management, LLC*, the Eleventh Circuit reversed summary judgment where the district court had required an "apples-to-apples" comparator with the same strategy and risk profile. The appellate court held that comparator evidence must be sufficiently meaningful when a plaintiff relies on relative performance, but that no single type of comparator is required in every case.[21]

Why this matters: The decisions are not necessarily inconsistent. Together, they underscore that prudence at summary judgment is a fact-intensive inquiry rather than a mechanical comparator test. *Quest* confirms that better-performing alternatives alone do not establish imprudence, while *Johnson* rejects a categorical rule requiring a perfectly matched comparator in every case. The strength of the contemporaneous decision-making record remains critical.

C. Ninth Circuit Arbitration Ruling Prompts Certiorari Petition on Plan-Wide Relief

As discussed in our May 2026 update, several courts of appeals have refused to enforce arbitration provisions that require individual arbitration of ERISA § 502(a)(2) claims where those provisions would prevent participants from seeking relief on behalf of the plan.[22] In *Pover v. Capital Group Cos.*, a divided Ninth Circuit panel followed that approach, holding that a waiver of

"class, collective or representative" claims impermissibly barred plan-wide relief.[23]

Capital Group's August 19 certiorari petition challenges the premise underlying that ruling.[24] Section 502(a)(2), together with § 409, permits participants to seek relief "to the plan," and the Ninth Circuit concluded that this allowed Pover to pursue losses beyond her own account in a representative capacity.[25] Capital Group argues instead that a defined contribution plan participant may recover only losses attributable to her own account.[26] After the respondent initially waived a response, the Supreme Court requested one on October 1; the response is now due December 2, and industry groups filed an amicus brief supporting review on November 2.[27]

Why this matters: A grant in *Pover* could affect more than arbitration. Supreme Court review could impact whether and under what circumstances an individual participant may pursue monetary relief for losses to other participants' accounts without meeting the procedural requirements of class certification under Rule 23 of the Federal Rules of Civil Procedure.

D. Disclosure of Service-Provider Agreements May Depend on the Circuit

Whether a plan administrator must produce a service-provider agreement in response to an ERISA § 104(b)(4) request may now depend significantly on where the dispute arises. The Fourth, Seventh, and Tenth Circuits take a broad view of the statute's requirement to produce contracts or instruments under which a plan is "operated," while the Ninth Circuit applies a narrower test focused on whether the document informs participants about their rights and benefits.[28]

In *Kelly v. Altria Client Services, LLC*, the Fourth Circuit held that a 401(k) plan's administrative services agreement with its recordkeeper had to be produced because the agreement governed part of the plan's operation, even though the recordkeeper performed only ministerial functions.[29] The court expressly aligned its approach with Seventh and Tenth Circuit decisions requiring production of health-plan claims-administration agreements that allocated responsibility for administering benefits.[30]

The Ninth Circuit applies a different approach. In *Zavislak v. Netflix, Inc.*, it held that health-plan claims-administration agreements were not subject to § 104(b)(4) because, with limited exceptions, they governed the relationship between the employer and its vendors rather than participants' benefits or the procedures participants must follow to obtain them.[31] The Supreme Court denied certiorari on October 5, leaving that disagreement unresolved.[32]

Why this matters: Plan administrators can no longer assume that the same response to a request for service-provider agreements will be appropriate nationwide. Administrators should identify the governing circuit when evaluating a request and recognize that agreements subject to disclosure in the Fourth, Seventh, or Tenth Circuits may not be required in the Ninth. Multi-jurisdiction plans may prefer a uniform protocol, and vendor contracts in circuits requiring disclosure should anticipate that some service agreements may be disclosed to participants.

E. Eleventh Circuit Overrules Exhaustion Rule for ERISA Fiduciary-Breach Claims

As discussed in a recent update, on October 13, the en banc Eleventh Circuit overruled four decades of precedent in *Bolton v. Inland Fresh Seafood Corp. of America, Inc.*, holding that ERISA itself does not require participants to exhaust a plan's claims procedures before suing for breach of fiduciary duty or other statutory violations.[33] The court preserved the general exhaustion rule for benefit claims and left open whether a plan can require exhaustion of statutory claims.[34]

Practical impact: For fiduciaries in Alabama, Florida, and Georgia, *Bolton* may narrow what a motion to dismiss can accomplish—a participant's failure to pursue a plan appeal may still support dismissal of a claim for unpaid benefits while leaving an independent fiduciary-breach claim to proceed.

Closing

We will continue to monitor these developments and provide updates as additional decisions are issued and new cases progress.

[1] *Spencer v. Campbell Soup Co.*, 2026 WL 2111153, at *2 (D.N.J. July 22, 2026).

[2] *Janosky v. United Surgical Partners Int'l, Inc.*, 2026 WL 2137816, at *1 (N.D. Tex. July 23, 2026).

[3] U.S. Dep'ts of Lab., Health & Hum. Servs. & the Treasury, *FAQs About Affordable Care Act and Health Insurance Portability and Accountability Act Implementation Part 74*, Q1, at 4–5 (Aug. 26, 2026).

[4] *Mehlberg v. Compass Grp. USA, Inc.*, --- F. Supp. 3d ----, 2026 WL 3139083, at *11 (W.D. Mo. Oct. 16, 2026).

[5] *Williams v. Bally's Mgmt. Grp., LLC*, 813 F. Supp. 3d 263, 279 (D.R.I. 2025).

[6] Oral Argument, *Williams v. Bally's Mgmt. Grp., LLC*, No. 25-2159 (1st Cir. Sept. 16, 2026).

[7] *Noel v. PepsiCo, Inc.*, No. 26-862 (2d Cir. docketed Apr. 6, 2026); *Greene v. Progressive Corp.*, No. 26-3351 (6th Cir. docketed Apr. 22, 2026); *Wiederhold v. Res-Care, Inc.*, No. 26-1940 (7th Cir. docketed Apr. 29, 2026).

[8] *Schoen v. ATI, Inc.*, 2026 WL 2146921, at *1 (W.D. Pa. July 27, 2026).

[9] *Dow v. Lumen Techs., Inc.*, --- F. Supp. 3d ----, 2026 WL 2582196, at *3–5 (D. Colo. Sept. 1, 2026).

[10] *Konya v. Lockheed Martin Corp.*, 2025 WL 962066, at *8 (D. Md. Mar. 28, 2025), *appeal docketed*, No. 25-2061 (4th Cir. Sept. 9, 2025); *Doherty v. Bristol-Myers Squibb Co.*, 2025 WL 2774406, at *3, *6 (S.D.N.Y. Sept. 29, 2025), *appeal docketed*, No. 26-1021 (2d Cir. Apr. 20, 2026).

[11] Oral Argument, *Konya v. Lockheed Martin Corp.*, No. 25-2061 (4th Cir. Sept. 16, 2026).

[12] Amicus Curiae Brief of the U.S. Secretary of Labor in Support of the Appellant and Reversal at 16–18, *Konya*, No. 25-2061 (4th Cir. Jan. 9, 2026), ECF No. 55.

[13] Petition for a Writ of Certiorari at i, *Anderson v. Intel Corp. Inv. Pol'y Comm.*, No. 25-498 (U.S. Oct. 20, 2025).

[14] *Anderson v. Intel Corp. Inv. Pol'y Comm.*, 137 F.4th 1015, 1021–23 (9th Cir. 2025).

[15] Brief for the United States as Amicus Curiae Supporting Respondents at 9–11, 23–24, *Anderson*, No. 25-498 (U.S. July 9, 2026).

[16] Transcript of Oral Argument at 1, *Anderson*, No. 25-498 (U.S. Oct. 6, 2026).

[17] *Id.* at 5–8, 17–20.

[18] *Id.* at 18–19.

[19] *Id.* at 33–34, 45–46.

[20] *In re Quest Diagnostics ERISA Litig.*, 179 F.4th 217, 225–26 (3d Cir. 2026).

[21] *Johnson v. Russell Inv. Mgmt., LLC*, 186 F.4th 1347, 1355 (11th Cir. 2026).

[22] *See, e.g.*, *Parrott v. Int'l Bancshares Corp.*, 167 F.4th 728, 739 (5th Cir. 2026); *Platt v. Sodexo, S.A.*, 148 F.4th 709, 720–21 (9th Cir. 2025); *Parker v. Tenneco, Inc.*, 114 F.4th 786, 801 (6th Cir. 2024).

[23] *Pover v. Cap. Grp. Cos.*, 183 F.4th 1132, 1141–43 (9th Cir. 2026).

[24] Petition for a Writ of Certiorari at i, *Cap. Grp. Cos. v. Pover*, No. 26-267 (U.S. Aug. 19, 2026).

[25] 29 U.S.C. §§ 1109(a), 1132(a)(2); *Pover*, 183 F.4th at 1143.

[26] Petition for a Writ of Certiorari at i, 1–4, *Pover*, No. 26-267 (U.S. Aug. 19, 2026).

[27] Docket Entries of Sept. 16, Oct. 1 & Oct. 9, 2026, *Cap. Grp. Cos. v. Pover*, No. 26-267 (U.S.); Brief of the American Benefits Council, the Committee on Investment of Employee Benefit Assets, and the ERISA Industry Committee as Amici Curiae in Support of Petitioners, *Pover*, No. 26-267 (U.S. Nov. 2, 2026).

[28] *Compare Kelly v. Altria Client Servs., LLC*, 2026 WL 2293854, at *9–10 (4th Cir. Aug. 10, 2026), *M.S. v. Premera Blue Cross*, 118 F.4th 1248, 1267 (10th Cir. 2024), *and Mondry v. Am. Fam. Mut. Ins. Co.*, 557 F.3d 781, 796 (7th Cir. 2009), *with Hughes Salaried Retirees Action Comm. v. Adm'r of the Hughes Non-Bargaining Ret. Plan*, 72 F.3d 686, 690 (9th Cir. 1995) (en banc).

[29] *Kelly*, 2026 WL 2293854, at *9–10.

[30] *Id.* at *10 n.8 (citing *M.S.*, 118 F.4th at 1267, and *Mondry*, 557 F.3d at 796).

[31] *Zavislak v. Netflix, Inc.*, 2025 WL 2717422, at *2 (9th Cir. Sept. 24, 2025) (unpublished memorandum).

[32] Order List at 7, *Zavislak v. Netflix, Inc.*, No. 25-1142 (U.S. Oct. 5, 2026) (denying certiorari).

[33] *Bolton v. Inland Fresh Seafood Corp. of Am., Inc.*, --- F.4th ----, 2026 WL 3056461, at *1–2 (11th Cir. Oct. 13, 2026) (en banc).

[34] *Id.* at *2 n.1.

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