

EMERGING LITIGATION TRENDS AND FIDUCIARY BEST PRACTICES

Practical lessons from recent ERISA litigation for
retirement plan fiduciaries



Mayleen Santiago-Garcés

T (787)250-2616 M (787)316-1868

Msg@mcvpr.com

Carlos Villafañe-Real

T (787) 250-5609 M (787) 525-9628

cv@mcvpr.com

McConnell Valdés LLC

270 Muñoz Rivera Ave. San Juan, PR 00918



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References to allegations, judicial reasoning and outcomes illustrate fiduciary-governance principles and are not commentary regarding any particular company, plan sponsor, service provider or pending matter.

Today's Roadmap

01	Plan forfeitures	Plan language, discretion and operational alignment
02	Investment monitoring	Target-date funds, stable value and meaningful benchmarks
03	ESG factors, proxy voting and duty of loyalty	Proxy voting, corporate interests and conflict management
04	Cybersecurity	Vendor oversight, controls and incident readiness
05	Action plan	A practical 90-day fiduciary governance review

01

Plan Forfeitures

Plan Forfeiture Litigation

- Increased since September 2023.
- Participant claims that plan sponsors using forfeitures to offset company matching contributions instead of plan expenses breach ERISA's duty of loyalty and prudence.
- Conflict between long-standing IRS guidance and proposed regulations.
- Motions to dismiss denied when plan committees possessed overly broad, ambiguous discretion (i.e., “at the discretion of the company”, or “shall be applied, at the company’s discretion” letting claims to move into discovery.

Keep corporate sustainability discussions separate from ERISA committee deliberations.

Lessons Emerging from Forfeiture Litigation

Clear plan language matters

Expressly authorized uses help demonstrate that operations follow the governing plan document.

Discretion can create exposure

Broad or ambiguous language may turn a mechanical operation into a decision requiring fiduciary judgment.

Design and administration differ

Establishing a provision may be a settlor function; interpreting or exercising discretion may be fiduciary in nature.

Alternatives do not prove breach

The existence of another permitted use does not, by itself, establish an imprudent or disloyal process.

Committee Safeguards

- Audit plan document language – remove ambiguous, discretionary phrasing.
- Zero out balances annually – strictly follow IRS timing rules to avoid holding massive, multi-year pools of unallocated cash.
- Document fiduciary work – clearly outline in committee minutes that forfeiture utilization is an operational execution of plan rules, not a discretionary choice.

02

Investment Selection and Monitoring

Target-date funds, stable value and meaningful benchmarks

Illustrative Target-Date Fund Challenge



1 THE ALLEGATION

Participants alleged that Company breached fiduciary duty of prudence by retaining underperforming actively managed target-date funds rather than replacing them with lower-cost passive alternatives.

2 THE PROCESS EXAMINED

The court examined fiduciary review of the advisor's data, reports and recommendations, follow-up questions, manager meetings and periodic menu changes.

3 THE FIDUCIARY LESSON

The focus was whether the process was informed and prudent, not whether the committee selected the best performer in hindsight.

Process Over Performance

Three Principles for Investment Committees

1 Prudence, not perfection

Performance results alone do not establish whether the original selection or monitoring process was prudent.

2 Informed expert reliance

Hiring a consultant is not enough. The committee should understand, question and evaluate the advice received.

3 Meaningful comparisons

Benchmarks should reflect differences in glide path, risk, asset allocation, management style and investment objective.

What Makes a Comparator Meaningful?

SCREENING FACTOR	WHAT THE COMMITTEE SHOULD CONFIRM	ASSESSMENT		
Investment objective	Comparable purpose and intended outcome	☐	☐	☐
Product structure	Similar vehicle, guarantees and contractual features	☐	☐	☐
Risk profile	Reasonably aligned principal risks	☐	☐	☐
Duration and credit	Comparable duration and credit-quality exposure	☐	☐	☐
Liquidity	Similar withdrawal, transfer and exit provisions	☐	☐	☐
Fees	Expenses measured on a consistent basis	☐	☐	☐
Net return	Returns evaluated after relevant fees	☐	☐	☐

Not aligned Partial Aligned

Performance differences become decision-useful only after the comparator is shown to be economically and structurally relevant.

Committee Safeguards

- Maintain a current IPS: the investment policy statement is not a static document. Review it annually and update it if plan demographics or market environments change significantly.
- Follow IPS criteria to the letter: if your IPS states a fund must go on a watch-list after a static specific period of underperformance, put it there. Failing to follow your own written rules is a plaintiff attorney's favorite evidence.
- Document watch-list decisions: formally record when a fund enters the watch list, what specific metrics are being evaluated, and what the timeline or expectations are for the fund manager to correct the course.
- Document why funds are retained or removed: when deciding to keep an underperforming fund, draft a clear memorandum explaining the “why” (i.e., consistency of the management team, long-term philosophy, or high transition costs).

Keep corporate sustainability discussions separate from ERISA committee deliberations.

Stable Value Funds Litigation

- Designed for capital preservation and steady book-value growth, not high yield.
- Triggers: High interest rate environment cause smoothed SVF crediting rates to temporary lag behind surging short-term bond yields and money market funds.
- Litigation patterns: Retaining products with lower crediting rates compared to higher returning cash alternatives.
- Massive asset base: holds over \$721B to \$900B+ (approximate 8-12% of all DC plan assets).
- Complexity: wrap contracts, crediting rates and exit provisions create blind spots.

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Stable Value Funds: Evaluate More Than the Crediting Rate

Product structure

- Crediting-rate methodology
- Fees and wrap-contract expenses
- Portfolio duration and credit quality
- Liquidity and exit provisions

Fiduciary comparison

- Risk profile and investment objective
- Net returns over appropriate periods
- Comparable product structures
- Monitoring under the IPS

Committee Safeguards

- Identify product structure: document exactly what type of stable value product your plan holds (i.e., synthetic GIC, pooled CIT, or general account GIC). Ensure the committee minutes note who bears the credit risk and how the crediting rate is calculated.
- Benchmark against structurally equivalent products: do not compare a stable value fund directly to a standard short-term money market fund or a broad bond index without context. Compare it against a peer universe of other SVFs with similar durations and wrap contract costs.
- Document the trade off rationale: explicitly record in your committee minutes the deliberate decision to retain an SVF. Note that the plan favors the long-term principal insulation and volatility protection provided by the fund, even if short-term yields occasionally lag behind rapidly fluctuating cash instruments.
- Audit total costs and wrap spreads: periodically review the total cost of the SVF arrangement. Ask your consultant to review the “spread” and confirm that any affiliation between the contract issuer and your plan’s recordkeeper is evaluated for conflicts of interest.

Five Themes Across Target Date and Stable Value Funds Recent Litigation



Each theme strengthens the next, creating a repeatable governance discipline.

The recurring question: Was the fiduciary process reasoned, informed and documented?

03

Environmental, Social, and Governance Factors, Proxy Voting and Duty of Loyalty

Separating corporate objectives from plan fiduciary decisions

Regulatory Landscape

- Proxy-voting and shareholder rights attributable to shares held in ERISA governed retirement plans are plan assets.
- Management of those rights are subject to ERISA's fiduciary duties.
- When exercising shareholder rights (including voting proxies), fiduciaries are required to carry out their duties prudently and solely in the interest of participants and of beneficiaries for the exclusive purpose of providing benefits.
- In voting proxies, the fiduciary shall consider only those factors that relate to the economic value of the plan's investment prioritizing the interests of the plan participants and beneficiaries with respect to retirement income rather than unrelated objectives.
- Fiduciaries must avoid letting non-financial objectives (i.e., political or social agendas) override participant financial interest.

Illustrative use of Environmental, Social and Governance Factors Challenge



1 THE ALLEGATION

Participants alleged that Company breached fiduciary duty of prudence by allowing its investment managers to exercise proxy voting rights and corporate activism to advance ESG goals rather than maximizing financial returns.

2 THE PROCESS EXAMINED

The court examined fiduciary review of the advisor's data, reports and recommendations, follow-up questions, manager meetings and periodic menu changes and adherence to prevailing industry standards related to proxy voting and shareholder activism.

3 THE FIDUCIARY LESSON

The focus was whether the process was informed and prudent in connection with the fund line up and selection of investments, and adhered to prevailing industry standards, related to proxy voting.

Illustrative use of Environmental, Social and Governance Factors Challenge



1 THE ALLEGATION

Participants alleged that Company breached fiduciary duty of loyalty by allowing its investment managers to exercise proxy voting rights and corporate activism to advance ESG goals rather than maximizing financial returns.

2 THE PROCESS EXAMINED

The court examined the fiduciaries' participant-focused decision-making.

3 THE FIDUCIARY LESSON

ESG considerations alone do not establish a loyalty breach. The focus was whether the fiduciaries acted solely in participants' financial interests and followed a prudent process.

Prudence and Loyalty Are Distinct Duties

Duty of prudence

- Was there a reasoned monitoring process?
- Were fees and performance reviewed?
- Did the committee receive and evaluate expert advice?
- Were concerns investigated and resolved?

Duty of loyalty

- Were decisions made solely in participants' and beneficiaries' interests?
- Were competing corporate interests identified?
- Were conflicts evaluated and addressed?
- Was the financial rationale documented?

Committee Safeguards

- Review the Investment Policy Statement to ensure the language mandates strictly objective, pecuniary evaluations.
- Adopt a written proxy-voting oversight process.
- Review managers' proxy-voting policies and reporting annually.
- Confirm compliance with contractual attestations.
- Document the financial rationale for oversight decisions.
- Inventory overlapping corporate and plan relationships.
- Committee training and documentation.

Keep corporate sustainability discussions separate from ERISA committee deliberations.

04

Cybersecurity Governance

Questions fiduciaries should be asking of service providers

A Four-Part Cybersecurity Oversight Framework

FIDUCIARY
OVERSIGHT

01	VENDOR CONTROLS	Evaluate internal controls, SOC 2 Type II reports, vendor contracts, insurance and subcontractors.
02	INCIDENT RESPONSE	Define incident notice, responsibilities, audit rights and access to reports.
03	MULTI- FACTOR AUTHENTICAT OR	No longer optional
04	PARTICIPANT EDUCATION	Register the account, maintain access

Oversight continues across the full vendor relationship, not only during initial selection.

Incident Response Plan

FIDUCIARY
OVERSIGHT

01	IDENTIFY & CONTAIN	Detect breaches and isolate affected systems immediately
02	NOTIFY	Alert legal counsel, insurance carriers and affected participants
03	ERADICATE & RECOVER	Clean systems and restore data from secure backups
04	POST INCIDENT RESPONSE	Document lessons learned to harden future defenses.

Oversight continues across the full vendor relationship, not only during initial selection.

Committee Safeguards

- Adopt a written cybersecurity oversight process.
- Review SOC Type II reports.
- Incorporate cybersecurity provisions in all vendor contracts.
- Establish and test a formalized incident response procedure.
- Conduct periodic, documented internal cybersecurity reviews.
- Conduct regular participant education.

90-Day Fiduciary Governance Review



By day 90: establish a documented cadence for ongoing committee oversight.

THE CORE LESSON

**A defensible fiduciary process is deliberate, informed,
conflict-aware and documented.**

**Follow governing
documents**

**Use relevant
information**

Question experts

**Address
conflicts**

**Record the
rationale**

Thank you!!