



# Has the Litigation Pendulum Swung Back to Plan Sponsors?: NAPA 401(k) Summit

BY TED GODBOUT | APRIL 04, 2023

## LITIGATION

While a flood of lawsuits from the plaintiff's bar continues at an unprecedented rate, top ERISA attorneys at an April 3 workshop session at the NAPA 401(k) Summit debated whether recent successes from plan sponsors may help finally stem the tide.

Indeed, the *Oshkosh case* is repeatedly being cited in a number of recent cases won by plan sponsors at the early stages, where some courts have ruled in favor of a higher standard of "plausibility," explained Tom Clark, Partner and Chief Operating Officer at The Wagner Law Group, who recently debated Jerome Schlichter in [NAPA's DC Pension Geek Podcast](#).

Clark, who served as moderator of the panel discussion "Suit 'Routes': Lessons Learned from Litigation," was joined by Daniel Aronowitz, Managing Principal of Euclid Fiduciary, and Jamie Fleckner, Partner at Goodwin Procter LLP.

"The whole game these past few years has been to get past the motion to dismiss," noted Aronowitz. But *Commonspirit* and *Oshkosh* for the first time said it's okay to have active funds and that one cannot just compare those funds to passive funds, he explained. Basically, what the courts are saying is that ERISA doesn't give broad 20-20 hindsight to bring cases; you have to give some context, he further observed.

One problem, however, is that the decisions still vary depending on the judge and the court. Posing a question on why some judges let "simplistic views" through the motion to dismiss stage, Fleckner explained that there are a lot of competing issues going on with cases.

If you're looking at the bigger picture and taking a step back, 2022 had the second m the first, with the most litigious involving DC plan fees, he noted. "A lot of discretion





---

of funding methods that have been created by the plaintiff's bar to bring ERISA suits.

Either way, Clark observed that, unfortunately, there's not much else that fiduciaries can do differently, other than doubling down and sticking to a firm process and documenting decision-making.

"You can have the best process in the world, but plaintiff's lawyers are good at making defendants look dumb if a case gets to trial. You have to prove a good process to the judge and it can be very difficult to do," Aronowitz further emphasized.

### ESG, Cybersecurity and Participant Data

Turning to the question of whether there might be an increase in litigation surrounding fiduciaries use of environmental, social and governance (ESG) factors, Aronowitz believes that the "jury is still out," adding that if you have two to three quarters in a row that aren't good, then that will certainly increase the risk of being sued. "If you decide to do it, document it well because it does increase the risk," he added.

Echoing Aronowitz, Fleckner similarly advised having a good process in place. "If you have down quarters, then it probably won't protect you from being sued, but if you can show a good process, that's going to help."

Clark also made the point that he would never recommend offering an ESG fund as the only fund in an asset class.

Additional issues addressed by the panelists included the issue of cybersecurity. Asked by Clark about the **Colgate-Palmolive case**, Fleckner explained that that was a rather unique case where the individual participant lost \$750,000 from an apparent fraud scheme, and for now, these types of cases seem to be one-off cases, rather than class action suits.

The panelists observed that, while this is an ongoing case and most recordkeepers have good indemnification insurance, plan sponsors should have their own coverage as well.

Concerning the use of participant data, Clark noted that if you want to use the data as part of an advisory agreement, it needs to be disclosed and in the agreement, along with other promises. While Schlichter has been losing these types of cases, Clark emphasized that you need something documented to help fend off these types of suits.

ADVERTISEMENT

---

0 Comments

Discussion Policy

LIVE CHAT



[Login](#)

[LIVE CHAT](#)



[Login](#)

---

401(k)s increasingly Under Attack in Wake of SECURE 2.0 Passage

---

Plan Fiduciaries Sue to Recover Costs of Defending 401(k) Excessive Fee Suit

---

Grocery Chain's Excessive Fee Suit Sacked

---

Long-Standing 403(b) Excessive Fee Suit Settles for \$13 Million—and Change(s)

Advertisement

## Recent Headlines

Case of the Week: Plan Establishment and 'Compensation'

---

Here We Go! Voting Opens for the 2023 Top DC Wholesalers

---

Has the Litigation Pendulum Swung Back to Plan Sponsors?: NAPA 401(k) Summit

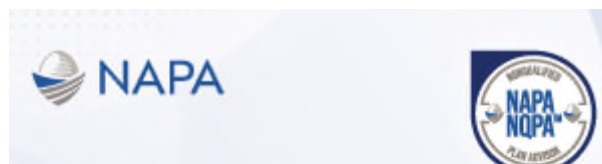
---

Reminders and Remembrances

---

TIAA Ties Up with Auto-Portability Platform

## NAPA's New Nonqualified Plan Advisor (NQPA™) Credential



[LIVE CHAT](#)



Login

in Sign up for The Daily

Subscribe to the NAPA Net Daily.

Advertise

Code of Conduct

Antitrust Policy

### Recent Comments

4401 N. Fairfax Drive, Suite 600  
Arlington, VA 22203  
703.516.9300

Nothing good will come from a federal hostile take-over of the private retirement system. Except...

CustomerCare@napa-net.org  
More than 15 years ago, when adopting automatic features in 2006, effective April 2007, we adopted...

I very much appreciate the support...

Hi Thane, your point has been duly noted.

You can give up a lot when you retire, but not TGIF... No, Really.

THE NATIONAL ASSOCIATION OF PLAN ADVISORS IS A NON-PROFIT PROFESSIONAL SOCIETY.  
THE MATERIALS CONTAINED HEREIN ARE INTENDED FOR INSTRUCTION ONLY AND ARE NOT A SUBSTITUTE FOR PROFESSIONAL  
ADVICE. COPYRIGHT 2023 BY NAPA

LIVE CHAT