WealthManagement.com

RPA HIGH NET WORTH RETIREMENT COMMENTARY

Has ERISA Litigation Been Helpful or Harmful?

Defending the amazing defined contribution system is laudable, but not at the expense of objectively considering important issues.

Fred Barstein, Founder and CEO, The Retirement Adviser University
July 28, 2025

4 Min Read

At the lat … and CEO of
Fiduciary … hlichter
Bogard s … of the
many … other
indu … .

With the appointment of Dan Aronowitz, former President of Encore Fiduciary, an insurer against lawsuits the new, as EBSA Director, vocal critic of these lawsuits suggesting a special ERISA court and opining that the DOL, not litigators should be protecting plan and participants, it seemed like a good time to ask some critical questions to both plaintiffs' and defendants' attorneys (*Tom Clark declined to comment*) including:

> Whether there has been any value to ERISA litigation and, if so, please enumerate.
>
> What harm has it caused?
>
> Whether you have evidence it is being funded by PE/VC firms.
>
> What effect will the new EBSA director, Aronowitz, who has not been shy about his views, have?
>
> Do you agree with him that we should have a special ERISA court, like with patents, because it is so technical?
>
> What effect will recent SCOTUS decisions like Chevron et al. have?

Related: Private Equity Is Coming to 401(k) Plans: Will You Be Ready?

Here are some of their responses.

Jerry Schlichter of Schlichter Bogard, who heralded the run on ERISA lawsuits, cited multiple judges who have written that litigation has benefited participants $2.8 billion annually while educating the DOL and has dramatically changed industry practices.

Another plaintiff's attorney, Carl Engstrom of Engstrom Lee, noted that total 401(k) plan costs have declined 30% from 2009, when 5500 forms became publicly available, until 2022, with the steepest declines among mega plans, which are the most frequent litigation targets. Noting that increasing plan sponsor and advisor sophistication, technology advances to lower costs,
DOL disc
s also
played a

Accordin
ans
searchin
the
recently
ells Fargo
target da
lans more
cautious

Litigation has resulted in more transparency, lower fees, and stronger competition, noted Matthew Eickman, Chief Legal Officer at the Fiduciary Law Center and former RPA. Fred Reish, the father of fiduciary and partner at Faegre Drinker Biddle & Reath, noted that investment costs and total plan fees have dropped, though this cannot be traced to a single cause.

Related: 401(k) Real Talk Episode 160: July 23, 2025

Nevin Adams, former Chief Content Officer at ARA, admitted that litigation has made “…all of us more sensitive to the duties and obligations under ERISA, it has also spawned some frivolous attempts to wrest a quick settlement.” Along with financial damage, lawsuits result in “wasted time and energy” by plan fiduciaries making them “reluctant to stick their neck out in adopting new plan designs.”

Reish agrees that plans are less willing to consider new services and investments like guaranteed income, while Eickman conceded that litigation may have fueled the race to zero and created a “nation of timid fiduciaries.” That fear, Eickman noted, may be keeping them from choosing value over costs, particularly target date funds and QDIAs.

Engstrom did not know of a single instance where a company has cancelled their 401(k) plan because of litigation, nor have any switched to safer DB plans, nor has it resulted in layoffs or bankruptcy. “…litigation is just regulation and enforcement through private means,” stated Engstrom.

Related: What Does It Take To Be a Great Retirement Plan Advisor?

No one thought that the Aronowitz EBSA appointment would be bad, with Engstrom thinking it would be good to have someone who understands the business, though he did note that his “white papers have become more vitriolic and less objective in recent years.” Eickman thought
it would that
“Aronow be able to
throttle t

Though / ants,
Schlichte ER been a
case bro clear bias,
it’s hard

Adams and Reish were not opposed to an ERISA court but Adams is not optimistic with Engstrom stating, “This is a profoundly dumb idea,” noting that, “Any benefit from improved sophistication is massively outweighed by the risk of judicial capture by idealogues.”

And most were unsure what effect recent SCOTUS decisions would have on ERISA lawsuits.

Finally, none of these experts have heard of any PE or VC firm funding ERISA litigation, though it is common in some other areas. Defending the amazing DC system is laudable, but not at the expense of objectively considering important issues, which some litigation has addressed, making improvements when needed and not fear-mongering without facts to promote the arguments of those with vested interests appearing to be neutral.

About the Author

Fred Barstein

Founder and CEO, The Retirement Adviser University

Fred Barstein is founder and CEO of The Retirement Adviser University, a collaboration with UCLA Anderson School of Management Executive Education, The Plan Sponsor University and 401kTV. He had been contributing editor for *InvestmentNews* where he created *RPAConvergence* and the RPA...

Source: h
elpful-or-
harmful-