ERISA

A Cushman climate-risk lawsuit reveals the ESG debate's new fault line

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PG By **Palash Ghosh**

March 11, 2026 02:15 PM EDT

Amid mounting legal and political efforts to limit the role of ESG factors in U.S. retirement plans, a new lawsuit against Cushman & Wakefield flips the ESG debate — arguing that failing to consider climate risk may itself violate fiduciary duty under ERISA.

The proposed class-action complaint, filed March 3 in U.S. District Court in Seattle by a former employee, alleges that Cushman and its 401(k) plan fiduciaries breached their duties by retaining the Westwood Quality Small Cap Fund despite poor performance and by failing to adequately assess climate-related financial risks facing the companies in its portfolio.

Lawyers involved in the case say the suit could mark a first-of-its-kind legal test of whether climate-risk analysis is a required component of fiduciary oversight in retirement plans.

The complaint, Kvek vs. Cushman & Wakefield U.S. Inc., comes as ESG investing faces sustained political pushback. A 2025 report from Harvard Law School documented that 21 U.S. states had enacted anti-ESG laws restricting the consideration of environmental or social factors in investment decision-making by public entities.

Cohen Milstein Sellers & Toll, one of the law firms representing the plaintiff, said in a statement the suit could have “profound implications” for 401(k)-style plans by potentially establishing a precedent that recognizes climate-risk management as a mandatory component of fiduciary duty.

Specifically, the complaint alleges that Cushman failed to evaluate, monitor and ultimately remove the Westwood Quality SmallCap Fund from the 401(k) plan, exposing retirement savers to high levels of climate-related financial risk while the fund underperformed and charged unreasonably high fees.

The case also claims that Cushman itself is “acutely aware" of climate risks in protecting shareholder value and its clients’ portfolios.

Cushman is a commercial real estate services firm that generated $10.3 billion in revenue in 2025.

“When it comes to protecting shareholder value and its clients’ portfolios, Cushman has a long track record of managing climate-related financial risks,” the suit stated. “In its own operation, Cushman has implemented a sophisticated climate risk strategy, employing a range of climate risk management tools to inform its financial decisions and marketing itself as an expert in assessing and mitigating climate-related risks."

A spokesperson for Cushman told *P&I*: "This claim is a variation on widely asserted legal theories that have been prevalent for many years. We have thoughtful processes in place that are designed to give our plan participants a variety of prudent investment options. Once served, we will appropriately defend this case."

Implications of case

The Westwood fund, which had $921 million in assets as of Dec. 31, delivered an average annualized return of 6.57% for the five-year period through 2025, below the 13.15% return by its primary benchmark, the Russell 3000 index, and charged higher fees than comparable funds.

At the time of its inclusion in the Cushman plan in 2021, the Westwood fund carried a net expense ratio of 0.79%. According to the Investment Company Institute, in 2019, the average net expense ratio for a domestic equity fund mutual fund held by 401(k) plans with more than $1 billion in plan assets was only 0.35%, the suit cited.

The Cushman 401(k) Plan had about 29,000 participants with $1.7 billion in assets at the end of 2024, according to the most recent Form 5500 filing.

Of the plan's total assets, about $39 million was invested in the Westwood fund as of Dec. 31, 2024, the suit stated.

A spokesperson for Westwood Management Corp., the Westwood fund's investment adviser, said that due to ongoing litigation, the firm cannot comment.

The case illustrates the polarization of ESG in the U.S. While some states are enacting anti-ESG bills and pushing asset managers and retirement plans to eschew non-pecuniary factors, it could add weight to the argument that climate change is a worthy consideration in terms of risk to portfolios.

"We argue that climate risk must be treated like any other serious financial risk, and as such fiduciaries already have duty to manage it," Kimberly Blake, a Miami-based co-counsel for Kvek and an attorney at ClientEarth USA, a nonprofit environmental legal group, told *P&I* by email.

“Our case seeks to have a court explicitly recognize this existing legal requirement," Blake wrote. "This means that, for fiduciaries who are doing their jobs appropriately, nothing needs to change."

Outcome on precedent uncertain

Legal experts said that even if plaintiffs ultimately prevail in this case, it will not necessarily establish a national precedent.

“Other courts will be free to take different positions on this issue,” said Carol I. Buckmann, co-founding partner, fiduciary and plan governance practice chair at the Cohen & Buckmann. “A plaintiff victory would still, as a practical matter, impact fiduciary decisions outside the area where the decision was binding. Regardless of whether this suit gets to the trial stage, fiduciaries should be doing risk analyses that include all significant risks, and fiduciaries will want to make sure they are in the best position to defend their decisions if they also are sued.”

Marcia S. Wagner, the founder and managing partner of The Wagner Law Group, a Boston-based ERISA and employment law firm, agreed that the actions of one district court decision has limited precedential effect. “It is not even binding on district courts within the same (judicial) Circuit,” she said.

Still, Wagner added that the “mere fact that this new type of fiduciary breach challenge has been filed will put the relevant plan fiduciaries on notice of a possible exposure that they might have if they or their advisers have not taken client-related risk factors into account in evaluating plan investments.”

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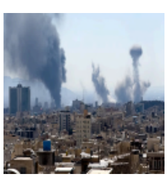

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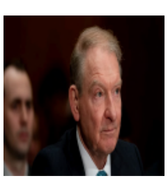

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