DOL Aims to End 'Regulation by Litigation'

By Kerry Pechter *Thu, Jan 15, 2026*

*(continued from Incoming!) Few avenues of recourse for participants Plaintiffs' attorneys are the short-sellers of the legal system—taking significant risk for significant reward. In federal class action suits, as in personal injury cases, they typically work for "contingency fees" (contingent on a large financial settlement or judgment in their clients' favor). Victory can reap them**... Read more »*

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Plaintiffs' attorneys are the short-sellers of the legal system—taking significant risk for significant reward. In federal class action suits, as in personal injury cases, they typically work for "contingency fees" (contingent on a large financial settlement or judgment in their clients' favor). Victory can reap them tens of millions in fees by suing ERISA plan sponsors.

The plan participants in the suits may only stand to receive hundreds or thousands of dollars each, and the cases can take several years to play out. Such suits, especially when initiated by the attorneys themselves, are often perceived by their targets as tantamount to legal gold-digging.

But plaintiffs' attorneys, like short-sellers, serve a purpose. Their class action suits arguably shed light on the impact of costs on retirement accumulations, and may help lower those costs at plans nationwide, saving billions for plan participants generally.

Since a one-percent average investment fee may equal a third to a fifth of the average annual gain on a conservatively-invested 401(k) account, even modest fees can significantly erode 401(k) accumulations over time. High fees and between-job withdrawals ("leakage") over decades of employment can result in inadequate savings at retirement for millions of Americans.

Ironically, the sponsors of small 401(k) plans are most likely to offer the worst terms to participants—high fees, no matching contributions, etc., long vesting periods—but it's the deeper-pocketed corporate targets that attract the interest of the plaintiffs' bar.

The suits serve a more general purpose. In the U.S., rank-and-file retirement plan participants may have no other way to recourse when trying to hold plan sponsors accountable for actions perceived as harming participants. If there's weak regulation,

litigation may be the only alternative.

In the Netherlands, by contrast, representatives of labor and management make retirement plan decisions together, with input from government. That's not true in the U.S., where the decision to sponsor and maintain a 401(k) plan rests entirely with the company's managers or owners. Retirement plans are mandatory for most companies in the Netherlands, but optional here.

Taken at face value, the DOL's statements suggest that suing plan sponsors could backfire by discouraging them from sponsoring plans at all. Statements also indicate that the Trump DOL, as a regulator, doesn't want help or interference from the plaintiffs' bar. But if the plaintiffs' bar represents the plan participants, then the DOL is, in effect, aligning itself against the participants—whom it is supposed to protect.

Labor Department leans against labor

The DOL surprised some members of the plaintiffs' bar by filing an "amicus curiae" brief at the Supreme Court in support of Home Depot. That was counterintuitive, since ERISA was created in 1974 (sparked in part by the 1963 failure of Studebaker's defined benefit plan) to protect the interests of plan participants, and mandated the plan sponsors to act "exclusively in the interests of plan participants."

As DOL website puts it:

> The primary responsibility of fiduciaries is to run the plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and paying plan expenses. Fiduciaries must act prudently and must diversify the plan's investments in order to minimize the risk of large losses…
>
> Fiduciaries who do not follow these principles of conduct may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of plan assets. Courts may take whatever action is appropriate against fiduciaries who breach their duties under ERISA including their removal.

But, with its amicus brief, the Trump DOL added its weight to the corporate pan of the balance of justice by asserting that plan participants bear the burden of proving allegations of financial damage. It chose to focus on the law rather than on the substance of the complaint, and raised the legal hurdle for bringing excessive fee cases.

“The department made the facts clear: ERISA does not impose a special burden-shifting framework requiring defendants to disprove loss causation. Consistent with Supreme Court precedent, plaintiffs bear the burden of proving the essential elements of their claims, including loss causation,” said Solicitor Jonathan Berry, a DOL attorney, who filed the amicus brief.