Revamping Retirement Episode 71

**Intro:** Covering the ever evolving retirement plan landscape to help identify the biggest opportunities for plan sponsors, CAPTRUST presents Revamping Retirement.

**Jennifer:** Hello everyone and welcome to Revamping Retirement. I'm Jennifer Doss and I'm joined today by my cohost Pete Ruffell. Pete, how are you today?

**Peter:** I'm great, Jennifer. How are you?

**Jennifer:** I'm great. Pete, I just thought about this. This will be your daughter's first Christmas this year, so all of our viewers need to know whether you're going to be an elf on the shelf family or whether you're going to have some other tradition equally as fun.

**Peter:** it's incredible that a year has almost flown by and we're celebrating another first. I don't think we've thought too much about the traditions that we're going to enjoy together, but my wife and I, we, what we've always done together is always wear matching PJs on Christmas morning. So we'll have to get a third set for our daughter.

One tradition that my family does. So we'll maybe think about working this into what we do in the future is use a pickle ornament. Are you familiar with that?

**Jennifer:** I am. We don't do it in my family, but I know what you're talking about. Yes.

**Peter:** Yeah, it's a little rambunctious. Growing up with us four kids, the pickle ornament was, warfare in Christmas morning of who got to open that first present. So we'll see if we want to bring that out for our growing family, but, for now maybe just the matching PJ set.

**Jennifer:** Yeah, well that, that sounds really cute. I can't wait to see pictures. That’ll be awesome. So today Pete and I are also joined by the talented Bonnie Treichel. Bonnie is the founder and chief solutions officer of Endeavor Retirement. which is a [00:02:00] consulting firm dedicated to solving problems for plan sponsors, advisors, and service providers that are in the retirement plan industry.

Bonnie is also a partner at Endeavor Law, a firm dedicated to supporting the ecosystem of financial services within the retirement plan decision tree in terms of documentation, compliance, regulation, and litigation. So welcome, Bonnie, and thank you for joining us today.

**Bonnie:** Thanks so much for having me. I'm honored to be here.

Yeah, absolutely. And before we dive into litigation, which is the main thing that we wanna talk to you today about, just give a very high level overview of Endeavor and what you do. Absolutely. thanks so much for having me. I've had the honor to present with Jennifer before. I am the founder of Endeavor Retirement, which is a firm that was really created to

empower advisors to have the infrastructure for fiduciary governance and training for their plan sponsor clients. So we do have some participant resources as well, [00:03:00] but really our whole mission is all about retirement plan advisors and creating objective resources that they can go out and use with clients

I do work with litigation resources, regulatory, so everything from when we had CARES to Secure 2. 0, making those resources available so that advisors can leverage them and better support their plan sponsor clients so that they can ensure plan sponsors know all the things that they need to run a compliant retirement plan.

So we also have the law firm to really help if plan sponsors have questions that they run into along the way, but excited to be here and talk more about that today.

**Peter:** Awesome. Thanks, Bonnie. retirement litigation, you can find yourself in the deep end of the pool rather easily. So maybe we can start a little bit big first. One thing that I'm always bewildered by is just the amount of lawsuits that we see on an annual basis. obviously there are hundreds of thousands of different retirement plans out there, but it always is.

Odd to me that there's this amount of potentially disgruntled employees with their employers that want to file these types of grievances. Could you give our audience a sense of maybe how or why these types of suits begin?

**Bonnie:** I will say I'm a recovering litigator. I started in litigation defending broker dealers and investment advisors and quickly found myself determining that I was a better fit for building programs, not fighting over what was left of those programs.

I think that's helped give me some perspective into the ERISA litigation space. And, Pete, you raise a good point, which is, is it really the participant who is running out and saying, Hey, uh, plaintiff's firm, can you please represent me? Or is it really the other way around? And I think what we've found over time is it really all started with one firm based out of St.

Louis in the early to mid 2000s that started some of these cases and really found some big money in them. And then we had 408B2 and 404A5, and it started getting a little bit there was a little bit of a lull for a period of time, but then by about 2016, I believe there were around 50 new cases that were filed.

And really ever since then, we've had just a consistent stream of new cases filed in that ERISA litigation space. One thing that was interesting to me, if you look at the year 2020, What happened in 2020? We had COVID and you would have thought, I mean, courts were shut down, right? at least for a period of time.

And then they went virtual and you would have thought. That cases would have slowed down or stopped being filed, but you saw a surge with over a hundred new ERISA litigation cases filed. And I'm talking specific to the retirement plan side. and we'll talk more about those today, but that was an interesting stat to me of how it skyrocketed in 2020,

But kind of back to your question, who's actually filing these? It's not that you have an angry participant in most cases. I think we might talk about some exceptions to that rule, but it's really that you have a plaintiff's attorney who's going and finding participants, not the other way around.

**Peter:** Got it. and I imagine that requires some type of specialty because if you're looking at tax filings to try to find an error or an issue, you need to have a keen eye for this. you mentioned that one firm at the beginning of it all? Is it still only a few that are playing in this sandbox, or is that an ever growing list of plaintiff's firms that are participating?

**Bonnie:** Yeah, so you raise a good point. I have a litigation series that I do with, the famous Nevin Adams. And when we started it, we do a quarterly update on it. And one of the interesting data points was really the number of new firms, new plaintiffs firms, who are entering this arena.

And I think that was something interesting for me to show to folks, not to scare people away, but really just to highlight this issue of kind of what I'm going to call like the copycat lawsuits.

what's become apparent is over time, more folks are throwing their hat in the ring and getting involved. And some law firms that you wouldn't have just noticed that were being a part of this.

And I think we'll talk about this a little bit more when we get into the forfeiture cases. You'll see this spate of cases where one firm will say, Hey, I can spend the time and resources. Probably put some associates on this and go after this specific issue.

I will note these cases are not inexpensive. To file, there is an expense to it. So the math has to add up. So I think, there's certainly this balancing act for folks. I don't describe this to scare people off and say, you should be so afraid because you're probably going to get sued tomorrow because all these new plaintiffs attorneys are getting involved.

not that at all, but there is this dynamic of more plaintiffs attorneys are getting involved. They're doing it as a series of cases, because if you're going to do one, you might as well do a copycat set all at the same time. And you are seeing many more firms get involved that traditionally weren't doing so.

**Jennifer:** Yep, that's a fair point. And, and I just wanna take a moment to point out that. Even though I think courts were supposed to be closed in 2020, I got called in for in person jury duty that year. so I had to physically go in and that was fun. So, yes.

**Bonnie:** You did! Okay, well it probably depends too on what state you were in, right? so that's probably a part of it as well.

**Jennifer:** I know. that was a fun experience though. So to stay on this, again, diving a little bit deeper into the pool, there’s a lot of jargon. So when a suit is filed, there are a lot of potential outcomes I feel like you could read about, right? Things like summary judgment or trial or, a settlement so maybe just help us understand what are the potential outcomes, like once a suit is filed, and then is there one outcome in particular that maybe people, in your shoes would give a little bit more weight to than others,

**Bonnie:** I'm going to give like kind of a high level and then maybe I'll take a step back and talk just a little bit about the process. but two things that I think people get a bit confused about. One outcome is that you can have a settlement. Another [00:09:00] outcome, is that something goes to trial, it's heard, and then we have a judge who actually issues a final, outcome of this case.

We can also end up with, a jury actually hearing something and then getting an outcome that way. But there's a big difference between getting an outcome where we've actually gone to trial and we have a final order or outcome of that trial versus a settlement.

Those are very different outcomes. And so I think it's just a good reminder to folks that in some of the settlements, sometimes we actually get, It disclosed what the outcome of the settlement, which could be monetary, but there can also be some nonmonetary components of settlements.

And those can be directionally important, but it doesn't necessarily mean that that's the So there's this concept of what we get from the common law because a judge says something. And we can get really in the weeds on this a bit later with the outcomes from this Loper Bright case and some things like that.

But it's important to just recognize that just because something happens with a settlement or just because there's some large monetary outcome from a settlement, those can be really business decisions where an organization decides, Hey, it's not worth the money to go all the way to trial. Maybe something related to the insurance coverage, which would be supporting going to trial or just the human capital element

And so there's a lot of reasons why or why not something might settle that you don't necessarily see in the headlines. So I think that's just something to keep in mind when we think about something that's actually gone to trial with an outcome, where we've got an order from a judge or an opinion from a judge versus something that settles.

**Peter:** Yeah, I think we, definitely feel the same way. And often we get asked, even at the beginning stages of a suit, what does this mean? And there's not much we can rely on at that stage. There's not a lot to have learned. So maybe even let's talk about that instance of that first stage gate for a lot of these suits, which is that motion for dismissal, or at least that's what I understand is a big first stage gate.

What is that burden of proof for a plaintiff and how is that? Is that fair for sponsors? Is that dynamic changing in the future? Cause it feels like a lot of these suits are surviving that stage and going through versus being dismissed, at an earlier stage.

**Bonnie:** Pete, that's a really insightful question in and of itself. I was told recently, knowing the right question to ask is the smartest part of all, And you just ask the right question, which is, what is the pleading requirement? And so we keep in mind when a court case starts, there is the first part, which is the complaint.

I guess another couple of things I should mention, I'm making assumptions that we're talking about ERISA as opposed to non ERISA. So we're talking about, largely federal court

So I'm just going to make that kind of broad sweeping statement for purposes of this conversation. and I'm also going to take off the table this concept of someone compelling arbitration and all of that. So we have a complaint, and then usually what happens is that the defendants, they have to respond to that complaint and that would be in an answer.

But what they can do is say, we're not even going to answer, we're going to file a motion to dismiss. And that's where they're basically saying, Hey judge, this complaint, doesn't even warrant us answering because it's not even a viable claim or argument. And so there's going to be something pretty interesting right now from one of the 403b cases that came up in 2016 That the supreme court is going to hear which is all about basically these pleading standards that are at issue.

And that's a big deal if you're in a, ERISA geek world, because you care about this issue of pleading standards. But the court is looking to see at this, motion to dismiss phase. If that complaint on its face, if those claims or, arguments as pled, if that's enough that those facts on their face, if they're plausible to state a claim.

And it's actually a pretty low bar in [00:13:00] that first phase. And what'll happen sometimes, you know, you have your complaint, and then the court will say, Oh, you know what? Actually, You didn't do well enough, but sometimes they'll give another bite at the apple and say, okay, well you can actually do a second amended complaint or a third amended complaint.

And then sometimes the judge will eventually say, nope, no more. But sometimes the plaintiff's get another try. And then that's when they get into this next phase.

Which can be pretty costly from my perspective. And that's the discovery phase. And that's where you get into all of this, what I hate about being a lawyer, which is all this back and forth gamesmanship of really digging into the good stuff. So I think, Pete, you mentioned something at the outset, which is this idea of you're getting things from tax filings or the 5, 500 and publicly available information.

And if I'm a plan sponsor listening to this, one of the takeaways I would have is when you're thinking about things to make publicly available, I know we want to be very transparent with our participants, but we also want to be careful about what we make publicly available in terms of, don't put a tape recorder out on the desk to record your committee meeting and then post that on the website, You want to take really good, Thoughtful minutes, and you want to do so thinking about if I'm putting this as exhibit A, B, and C to, a complaint that's going to be made publicly available, that's what we want to think through, right, is what is going to be part of, publicly available stuff versus what gets past that first bar and is more in discovery, where they can ask you for all kinds of stuff.

**Peter:** I mean, I think you said, geeky, as far as the risk of law and litigation. I think Jennifer and I like to pretend and wear costumes and think that we are in many cases, but no, it's, it's fun to talk to an expert like yourself about all this.

It's certainly a lot to learn. you mentioned settlements. You mentioned the idea that this is costly. Business decisions may be why. Companies, firms go the ways of a settlement. You already mentioned this about judge outcomes are likely what can teach us the most about, practice process procedure from, a fiduciary perspective.

But is there things that we're seeing from settlements, maybe trends, those ideas of yes, there's a monetary element, but maybe the non-monetary element that we're seeing that maybe has progressed over time.

**Bonnie:** there's definitely some things that I've seen from some of the settlements. Maybe the best example would be in that 403b context where we saw quite a bit of non-monetary, outcomes from some of the settlements. there's probably some other things that we've seen too that just really, I'm going to call it best practices that have come from many of the settlements.

But when I say from the 403b side, As I'm sure many of, the plan sponsors listening recall, but I think we initially had around 16, and this was filed back in 2016, and then we topped, well over, 20 plus cases that were filed against prominent, 403B plan sponsors. And really what we started to see is, yes, there was the monetary component, but we saw a trend towards things like, requiring in the [00:16:00] settlements, consolidation of record keepers. We saw the request for proposal. So, it was a requirement as part of the settlement.

And I didn't see this prior to that and things like 401k settlements, I think this started to become more of a trend from some of those 403b cases, but it was the requirement that a RFP had to be conducted. I also saw from some of those settlements, when we think about fee structures, the requirement that if you had, for example, a pure asset based fee, that you started to see that there was a structure change in the way that the fees work.

So you couldn't have a pure AUM type of charge. you could have an AUM up to a certain amount, but then you had to trend towards having some sort of per head or some sort of cap there. So that was one of the bigger things that I saw from the non-monetary side. The one other thing I would say

on the participant data side, So this is a little bit of an older item, but I do think it'll come back around from the Vanderbilt settlement, and again, I think this was from 2019, so an older one, you saw that there was basically a requirement related to, participant data and whether there was an acknowledgement that participant data was a planned asset.

And you were seeing that bubble up through a settlement. there was no, order from a judge, no outcome from a judge. It was all based on a settlement. you later saw in the Shell Oil case, and that was actually from, a motion to dismiss and an order from a judge in 2021, you actually saw that come back around and a district court judge said, plan data, that wasn't a plan asset.

So that was an interesting one to see. And I think the reason I bring that up is I don't think that that's entirely over. I do think we'll see that come back around and come up as something for folks to pay attention to is, plan data or PII, is that actually a plan asset or not and do you have to protect it?

But I think those are some of the high level trends that I saw from the settlement side.

**Jennifer:** Yeah, it's interesting. And Bonnie, I'm just curious to tie that into how we started this conversation this is not necessarily always the participant going out and starting these, It's really the plaintiffs that are trying to get the participants involved. what is the incentive to have the non monetary settlements in there?

Yeah, that's a good question because really the plaintiff's attorneys, I have to say this very carefully. The plaintiff's attorneys are most incented, probably by the Is it approximately 30 plus percent that they're getting? but I think that there is probably some element of, what they also are doing on behalf of participants.

**Bonnie:** And then there's a class rep. So I guess the one thing I was probably remiss in talking about is that these also are class action lawsuits. So once you've identified that initial. set of participants. These are class representatives who become part of the process.

But as a part of the process, you have to get the class certified. And that's what makes us a bigger kind of monetary opportunity. So it's not like, Okay, they're going out and finding 5, 000 individual participants to all sign on to the lawsuit, but they're getting enough that they've got what's called a certified class and then probably some of the non-monetary things are pushed back potentially a touch more by that actual set of class representatives that are going to make a little bit more off the settlement themselves and then becoming part of that process. I'm guessing they're pushing for some of those more non-monetary things.

**Jennifer:** It's interesting. All right, to switch gears a little bit, just to give us a sense for, we've seen, like you said, a steady state of, in terms of numbers, it kind of waxes and wanes with the year. you see a lot filed and then they have to go to court and then there's a lot more filed the next year and then they have to go to court.

And so you have to digest them is the way that we've talked about it before. how would you Characterize, this year's litigation in terms of just number of cases and settlements, trials, that sort of thing.

**Bonnie:** Yeah, I would say, we're not maxing out past our year 2020 in terms of filings, But we're still staying on a nice steady increase. And the cases are still, I'm going to call it moving across the pipeline. there's always what I would call the historical cases that we see.

Something was too expensive, like record keeping or investment fees, along with you selected the wrong one. IE, you selected the wrong investment. we've still got our continual flow of those, but then plus there's the new, suits or new flavors on top of it.

And those seem to be coming with the--I'm going to say copycat sense of we're layering a slew of those all at the same time. And then to some extent, we're seeing those coupled together where feasible. So [00:21:00] I think that there's a good mix of all the historic ones we've seen, plus the copycat new twist on those, which gives us that continual flow of new cases.

Simply put, I don't see it slowing down.

**Peter:** Bonnie, you've said that term, and I think the naming convention explains itself, copycat, right? Everyone knows a copycat, whether that was in elementary school or elsewhere. Within retirement plan litigation, what does a copycat style case mean? look like, mean, is it the same plaintiff's firm that's then using that same approach with a lot of different cases, or is it another firm that's seeing it and throwing it in?

How does that work?

**Bonnie:** Maybe I'll start with a personal story and then do specific to retirement plans. So I think I mentioned I started as a litigator and one of the things that I thought was funny is, when I was doing it, some of my initial work, It was right after some of the financial crisis, losses.

And so I would see the same law firm would send over these cases they'd send 10 on the same day against one of our broker dealer clients. And it was such poor work. They would forget to sub out some of the names, And it's like, okay, well at least use control find appropriately if you're going to, waste our clients.

And that's what I wanted to write back. So, said differently in this context, not saying I'm actually improperly used CTRL FIND, but it's the same concept, right, of, so you're seeing it, maybe we'll talk a little bit about the BlackRock target date fund suits, but there I think we had 12 suits that were all filed, against really big name plan sponsors, but it's essentially the exact same allegation.

And so sometimes you have the exact same. that's filing the whole dozen of those cases. Going back to those 403B cases from 2016, you had a firm filing pretty much within, I think it was a week, they filed a whole series of cases. They weren't the exact same allegations, but they were all against, 403B plans.

And there was probably, I think, around 10 different claims. And they were essentially between seven to ten of those all across these different,403b plans. we see it too in the forfeiture cases, which maybe we'll talk a bit about, but you see the same California firm filing in pretty much the same district against, again, A bunch of really big name plan sponsors.

Now you're seeing copycatting where that's getting tacked on to others. So it's not the same firm, but they're copying off of that California firm. And it's like, Oh, this is a good idea. You can get this data from the financials attached to the 5, 500. Awesome. I'll go check that out. And now I'll start adding that to my claims.

Good idea. So that's kind of the copycat nature of it.

**Peter:** Does the outcomes of those copycat style cases, are they indicative of difference in opinions at the court level or more at the plan sponsor level?

Because I imagine a number of these, some might get dismissed, some might get through, some might get settled, some might have a judge outcome. I guess, how do you see that world?

**Bonnie:** Yeah, so the real message for plan sponsors, is, unfortunately, maybe two pieces. one is judges are human. so you, you can't predict necessarily what a judge is going to do. so you do see sometimes different outcomes across different districts.

Things make their way to the Supreme Court, pardon me, because we get circuit splits. Which, again, if you're really interested in this stuff, you think that's really cool.

But if you're a plan sponsor, the practical side of it is that's not cool because you're trying to figure out what am I supposed to do. The forfeiture cases, that is a fantastic example of, well, wait a second. How did we get, some of these were dismissed, Others of these were not dismissed. How did we get different outcomes on what should essentially be the same [00:25:00] issue, but the really big takeaway for plan sponsors is as long as you have, your fiduciary file, you are following your prudent process.

Arisa is ultimately about. The process, not about the outcomes. So as long as you are following your process, you've got a well-documented process, eventually we're going to get to the facts. You can never prevent being sued. And so if we have someone who files 12 cases, they are going to use their blanket complaint and do all the same thing.

**Peter:** Well, you can't prevent that. But if your facts are different that show that your process is different than those other 11, you are probably going to have a different outcome. And you will ultimately win. Or at least you should. I don't know if that's helpful. It definitely is and I think we're going to be echoing some of those same sentiments near the end when I ask you something else. But you mentioned already that some of the allegations, there's evergreen ones, like you picked the wrong investments, you maybe paid too many fees, you've already mentioned the forfeitures case.

My question is, what are some of the other trends that you're seeing that might be fitting that bill of the copycat style, some of the other ones that might be fitting that shotgun approach?

**Bonnie:** Yeah. I think the big one that I saw this year was definitely the Blackrock, the LifePath target date fund suits. I mean, I think those ultimately, that is a really good example of the importance of process. the argument was really like, well, you just went and you went for whatever was the cheapest.

And in the end, even though we did have, one case that really held on for quite some time, so of the 12, there was one case that held on for quite some time, and the court kept giving opportunities to have, additional bites at the apple, but really in the end, That case showed that when you, have a process, all of those cases really have been successful for those plan sponsor defendants.

And so I think that's a really good example of you can have this shotgun approach. I like that of like you can have that approach and, you know, go after all 12 of those. But ultimately, when you show that you've got a process, you're following your investment policy statement and you're staying true to the process, it's kind of cool.

Even if the argument is, about the wrong benchmark, or even if the argument is about, or not necessarily the wrong benchmark, but just a disagreement in which benchmark to use, that disagreement in benchmarks, or Monday morning quarterbacking which benchmark you should have used, or that you just went after lowest fees, if you can actually demonstrate that process you followed, you're, you'll still arrive at the right outcome.

**Jennifer:** I mean, I think that's so important and it feels like we're just broken record sometimes in terms of process, process, process and document, but it really is a lot of what you can do, right? It is about the process and not necessarily like you said about, about the outcome of how it turned out and your selections because we’d have to be, you know, future tellers to, to make that work.

So, it is good. You've mentioned the forfeitures case a couple of times, just to dig into that one a minute, cause I do think that one's interesting, you've got what the IRS allows, you've got. What fits into the DOL fiduciary construct. And, you’ve got, I think, different courts kind of in different areas on this.

Is there anything plan sponsors can do? We get a lot of questions on this, anything they can do, to protect themselves in this area?

**Bonnie:** This one's difficult because for most folks, they've been following what the IRS has said they should be following. And so that becomes difficult. My big takeaway, and we can do a whole nother session on the forfeiture cases. My big takeaway for folks right now has been, I think a lot of plan documents are giving discretion to plan fiduciaries and they, they give some options, that you can use the forfeiture money to pay plan expenses, or you can remit back to participants, or you can use it to reduce your employer contribution. That or language or that discretion is what is putting fiduciaries in a bad spot to be potentially pitted against fiduciary decision versus Doing what's best for the participants or what's best for the company and it's the fiduciary making that decision, which is what's becoming complicated, right?

But if instead we go back to our settler hat or rather our business hat versus our fiduciary hat and we let the settler or the businessperson actually make that decision and we memorialize that in the plan document, I think that's what actually helps us be in a much better situation because it's the business that's making that decision and we're taking away the discretion from the fiduciary.

So that's been my recommendation. Now, the practical side of that is, well, when is the next plan document update? Or is this actually a document that we can, update? I think that's where we've really got to work with our service providers on that piece of it, or maybe we memorialize that, into the minutes or some [00:30:00] sort of resolution, but taking away the discretion from fiduciaries is really, I think, the best that we can do for now until we learn more.

**Jennifer:** Well, the good news with Secure 2. 0 is that we're in that plan document a lot right now. So that's not a problem.

**Bonnie:** Exactly, right.

**Jennifer:** Not a problem.

**Peter:** How about crystal ball time, Bonnie? We've talked about what we've seen this year, maybe influences from the past. What's, what's next? Where's, where's the puck going? What stones haven't been turned over by the plaintiff's bar at this point? So what are, what are you thinking about at night, maybe?

**Bonnie:** Oh, I think about lots of things at night related to retirement plans. my poor dogs. so I'd say there's probably two things. one is kind of retirement plan related and kind of not, and you're already seeing the ads all over. For going back to where we started the conversation, but it's 408b2 on the health and welfare side.

So from CAA. Now, the question will be with a new administration, will there be any changes to that construct? But you are seeing, at least with the current construct under CAA and the healthcare transparency, you're seeing that call for. plaintiffs from the plaintiffs bar. So I think, and we're already seeing with like the Johnson and Johnson case, for example, you're already seeing the litigation.

So again, for those plan sponsors listening, it's probably many of you who have that hat on the health and welfare side. It's just making sure you're mindful of that on both sides of the house. On the retirement plan side, I do think that one potential area is going to be in the realm of probably managed accounts.

I think we've seen some success with some early litigation on the managed account side, but I do think As we start to see more and more growth of assets on the managed account side I do think that's one place not necessarily that the planos bar will have success there But I do think it's an area they will make some attempts to go in that direction.

**Jennifer:** Yeah, I think you said this at the very beginning, but it, it has to be worth it to file these cases. And so there has to be enough money in the areas with which you're filing against, right? So you're, like you said, it has to be enough money there. so anything that's going to amass money is, is going to attract attention most likely.

All right, also keeping your hat on, as you mentioned under the new administration. So, under the new administration, what are your thoughts about what's in store for the Department of Labor's, Prudence and Loyalty in Selecting Planned Investments and Exercising Shareholder Rights rule, also known as why we call it the ESG rule because they made it a mouthful.

that was last year, I think at the beginning of last year, it went into effect. And then obviously we had the fiduciary rule this year. that's now caught up in the courts. So, crystal ball going forward, new administration, what do you think is going to happen with those two?

**Bonnie:** Short answer, effectively dead. but to dig into that a little bit, with the ESG regulation, maybe it will be replaced by a new regulation or pulled apart, essentially. I'm not sure that matters. And maybe that's a controversial thing to say, but I do think that when we think about ES and G factors or environmental, social and governance factors that are utilized in the investment process in retirement plans, We are already seeing and this this plays into a little bit of what I mentioned earlier Which is this case called the Loper Bright case, we saw that the ESG rule actually, it has already had pushback, and that was in a district court in Texas, and it actually survived in that district court in Texas, but now up on appeal, now it's getting pushed back to the district court.

And now we're going to see what's actually going to unfold with it. And I do think under this administration, we will see a change in tune, so to speak. But I'm not sure that that matters, given that if you really just follow a prudent process, and we know that, under ARRESA you have [00:34:00] your duty of care and your duty of loyalty.

And if you stay within those confines, and I think a lot of us have gotten used to being able to look at active managers, and it's really about putting financial interests first. If you stay within those confines, I think that you can really still incorporate those factors while following a prudent process, and I'm not really sure that that rule matters.

So you might have different thoughts, but I think that it's really going to be okay. as to the fiduciary rule, I would give a similar answer. it matters, but it doesn't. I do think that this administration is not going to pay to defend that rule. I think it'll effectively be dead.

It was supposed to be effective in September. I don't think that that will ever happen, but I do think that most firms already have their 2020 02 I don't think that they will stop doing that. And we could go much deeper into kind of what the FAQs, which had some issues in a Florida court, what that really means.

But I think for the most part, for plan sponsors, you're probably already working with a retirement plan fiduciary today. I don't think that that is going to change. The few people that were going to be brushed under that new umbrella, I'm not sure that this changes that much. You weren't going to change your service provider probably anyways as a result of that rule, it's more about on the rollovers for your participants, probably some good education there.

**Peter:** Yeah, those fiduciary roles there on, the participant advice and education side of things, working with record keepers. That's always an interesting topic for plan sponsors to learn about how the participants get help. But you've said Loper Bright a few times, Chevron, yada, yada, yada.

I want to go back to that for a moment and talk about that because when that came out this year, when the Supreme Court turned over that legal standard, I was day two of my COVID symptoms and had the reading comprehension of a kindergartner and could not make sense of what it meant.

So before maybe I ask you a little bit about what it means, could you give us a quick 101 on why it matters or what it is?

**Bonnie:** Yeah, so, I sometimes call this the Chevron case, but what I should be calling it is the Loper Bright case. And so, it's really a case that has nothing to do with retirement plans. In fact, I talked to my corporate attorney about this case because he was dealing with it in some totally unrelated industries.

So what we're talking about here is the Loper Bright case, which actually was a couple days apart from what's called the corner post case. And so these are two Supreme Court cases from this past summer. And they're important because if we think back to what we learned as kiddos, Schoolhouse Rocks, if anyone remembers or watched that, it's really about thinking through our different branches of government.

And we know that we spread out power across our different branches of government. And so we have the courts, which are in our judicial branch, and we have our agencies, which are in our executive branch. So like things like the Department of Labor, that is an agency.

And then we have our courts in like a different branch of government. Well, essentially, this Loper Bright case, it overturned the Chevron case, which was from the 80s. And what had happened in the Chevron case is that in the Chevron case, it basically says, hey, if we have Congress that creates some sort of law, like ERISA, or Secure 2.

0 or something like that, and there is some sort of ambiguity to that law, then we can let our agencies actually provide some interpretation to that. That's what Chevron said. Well, Loper Bright says, no, actually that's not going to happen. We're not going to let our agencies, basically our agencies, they're not smart enough to give us this interpretation.

We're not going to allow that. The better place for interpretation is in the courts. So the only time the agencies would be able to do that is if they've been specifically told to do that. There is some kind of question as to if, for example, it's only final agency action. And I just used air quotes as though everyone can see me.

But final agency action would be like a final regulation as opposed to the target date fund tips from 2013, Those were just like, sub regulatory guidance, like a fact sheet, That's going to be different than an actual final agency action. So things like fact sheets, we can still look to the agencies for, but just those final agency actions, that's where we wouldn't be allowed to look to the agencies for as much

**Jennifer:** Okay. Well, Bonnie, just to, you mentioned data, I think, at the very beginning. So something closely related to that is cyber security. And we had a large record keeper experience of cybersecurity breach this year. I'm sure it will happen again, right? It's just, just the reality that we all live in now.

I guess, what does cybersecurity litigation look like so far? And do you think that that changes in the future? And, can plan sponsors do in that regard?

**Bonnie:** Cybersecurity to me is one of the biggest things we have to be paying attention to because it's [00:39:00] not just big lawsuits, but it is the single participant who loses 700, 000. if I'm thinking about this from a takeaway perspective, one of the things to be taking away is to make sure that, number one, when you're filling out your insurance questionnaires, making sure you fill them out accurately.

I think plan sponsors and service providers, we all want to do our best, but we might get in a hurry and it's making sure we actually accurately fill out our insurance questionnaires and that they extend some sort of cyber coverage. number two, it's making sure we're aware of the Department of Labor published guidance in 2021.

They republished it in 2024. It's the exact same. It just says, Hey, this also extends to your health and welfare plans. That guidance, it's a really short read. But it's a really punchy short read in the sense that, the best practices has 12 points and point one says, have a cybersecurity policy and then has 18 points underneath it.

The one thing I keep in mind is it's all about reasonableness still. So, thinking about what is reasonable given the situation and What can be accomplished. It's hard because the DOL doesn't really spell that out. It just says to do all these things, but I think it's still pretty up in the air for a lot of folks as to what they actually have to do.

But it's about, really showing you're doing something, you understand your obligations, you're coordinating with service providers. And I do think that's an area where we'll see more litigation going forward, particularly where, there wasn't an awareness of roles and responsibilities.

**Peter:** Well, let's end on a high note, because I think retirement plan litigation can feel doom and gloom, you've said it can be scary at times. There's obviously wins in the columns of plan sponsors too, not just on the plaintiff's side. You mentioned process, following that process, those feels like scary. Some of the obvious ways that plan sponsors can maybe defend themselves against this type of thing.

Do any of those wins or any recent wins the past couple years have any key takeaways for you that you think about as items that you recommend, advisors and obviously plan sponsors consider as folding into their process?

**Bonnie:** Yeah, there's actually been a lot of wins over the past couple of years that I would say overall are starting to trend that, if you follow a process and you outsource appropriately and work with a knowledgeable retirement plan consultant, that, There is a strong sense that you can actually prevail on these lawsuits.

I think that's been something really exciting to me, is that for a while I felt like all you saw was one headline after another that was like, settlement, settlement, settlement. And you've started to see that some of these cases, they're, taking it all the way. the first one for me was the NYU case.

That was really notable for me that it was like, hey, someone's actually going to fight this. You can have some flaws, but if you overall do some of these right things. You are actually going to prevail. one of the most notable ones for me, just because I like these forfeiture cases is the HP case. I think that's an exciting one because it's, a forfeiture case where it's actually, been dismissed.

I think that's one that for me, I've just, again, reading, dig into that one. But it is one that it's, prevailed on the motion to dismiss phase twice now. And so I think that's just a notable takeaway. But overall, if I were thinking about, what would be my action items of things we've seen, this from the overall wins.

It's, number one, work with a retirement plan advisor or consultant. ERISA not only allows you to but requires you to work with an expert where you lack the expertise. Number two, it is having that good governance. You're not required to have an IPS, but there's a whole set of cases over the past several years that show if you have an investment policy statement, you follow it.

It's demonstration of good process, and number three, it's just showing that, your fiduciary obligations. Again, starting with the NYU case, but there's some others where the NYU case is more the inverse of that, but there's a whole slew of cases that show that if you understand your fiduciary obligation, and you can have documentation showing that as well, there's a lot that shows you're going to be able to demonstrate best practices and that you knew your obligation.

**Peter:** Well, I think it's personal question time, how we usually end the podcast. Bonnie is a bit, as I said, a bit personal. You've been in the retirement industry working as a litigator and now as a consultant working with advisors and plan sponsors, you've had to have thought about this, what does retirement look like for you?

**Bonnie:** So funny. I think we talked a little bit about this, but for me, it does not look like all of a sudden one day I say, and I'm finished. I think that would be such a harsh stop in what I'm doing. I really enjoy the work I do. I did not enjoy being a litigator. That would have been like a, [00:44:00] and I'm done.

I really enjoy the people that I meet and I enjoy the work that I do. I envision that for me, it becomes more of a phase out where I continue to do more writing and just, phase out over time, spend more time walking my dogs, and that sort of thing. But I don't envision that I ever fully stop working because I just really enjoy a lot of the people.

I think, Pete, you might have said this, or Jennifer, it might have been you, but we talked about like, it's the people. There's a people element of this. And I think that's the thing that I really enjoy the most.

**Jennifer:** So what I hear is Bonnie’s going to pull a Nevin Adams and she's gonna never retire. That's what that's what I hear, which is totally fine again, the whole point is that retirement is whatever you want it to be It's whatever fulfills you and that's the reason that we ask so that is a fact Fair, fair answer.

All right. Well, thank you so much, Bonnie, for all of your insights. We really appreciate it. We know we threw a lot of stuff at you. That was a lot to cover, in, 45 minutes or so. So really appreciate it. and [00:45:00] thanks so much to everyone for joining us today. We hope you enjoyed this episode of revamping retirement.

If so, please don't forget to like, and subscribe wherever you do get your podcasts. And since this is our last episode of 2024, we're wishing you all the best and we will see you all in the new year. Thanks everyone.

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