



# ERISA LITIGATION STUDY

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**PENSION GOVERNANCE, INCORPORATED  
AND  
THE MICHEL-SHAKED GROUP**

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## INTRODUCTION

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PensionLitigationData.com is a searchable database of national pension-related litigation activity. Conceived by Pension Governance, Incorporated and The Michel-Shaked Group in 2006, this user-friendly online resource explores nation-wide trends in Employee Retirement Income and Securities Act (“ERISA”) litigation.

PensionLitigationData.com (“PLD”) includes thousands of summary briefs, related court filings, and full-text judicial opinions for over 2,400 ERISA cases filed between January 1, 2005 and August 31, 2008. Each case that is identified by PLD is monitored throughout the litigation process by tracking the individual judicial opinions that are issued under the primary case. Once a particular opinion is selected for inclusion in the database, the PLD team summarizes the important facts, questions of law, and judicial analysis contained in the opinion and provides subscribers with a paired-down, easily understood digest of the opinion. Simultaneously, behind the scenes, the PLD team applies over one hundred unique identifiers to various aspects of the opinion. This allows subscribers to easily locate opinions based on geography, questions of law, factual circumstances, and other highly-particularized considerations.

Given the current market turmoil and increased focus on investment best practices, we believe that pension decision-makers and their service providers, individually and collectively, can benefit from understanding ERISA litigation trends. While each case is different, there are common “lessons learned” that enlighten non-attorney decision-makers and plan counsel alike.

Nothing presented herein is meant to convey or otherwise provide legal, financial, accounting or investment advice. The reader is urged to consult an appropriate professional.

We hope you find this research sampler helpful and look forward to having your comments and suggestions about future research.

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## THE ERISA LANDSCAPE

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ERISA litigation statistics over the last several years reflect a larger number of cases being filed, along with greater complexity of complaints in search of resolution. Unlike more established areas of dispute, experts offer that inconsistencies in adjudication across courts for pension-related lawsuits often make it difficult to know how a trier of fact will decide on any particular case. Multiple persons can be materially impacted by a single fiduciary failure, thereby raising the stakes for both participants and the plan's sponsor. New and copious regulations, significant market volatility and changing demographics are a few of the other realities that challenge pension fiduciaries.

Evaluation of litigation statistics provides decision-makers, counsel, service providers, and labor organizations that are involved in current or threatened litigation with critical data that can assist with making decisions related to the viability of legal claims, jurisdictional and forum issues, and when, and if, to settle claims out of court. Utilization of litigation data and analysis can provide invaluable insight when establishing service thresholds, developing investment and administrative policies, and in the management of participant, beneficiary, and various service provider relationships.

## ERISA OVERVIEW

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Enacted in 1974, ERISA sets minimum participation, fiduciary, and non-discrimination standards for most voluntarily established pension and health plans maintained in private industry.<sup>1</sup> Through a process called “qualification,” employee benefits plans that achieve and maintain the minimum participation, fiduciary, and non-discrimination standards are granted favorable tax status, and the participants and beneficiaries of those plans are provided with an opportunity to save for their retirement and to pay for health and welfare expenses on a tax-advantaged basis.

The choice to offer employee benefits remains a voluntary one. However, once an employer implements a benefit plan, that sponsor is subject to myriad regulatory mechanisms. The goal is to ensure, to the extent possible, that promised benefits are delivered and that the delivery of those benefits is performed in a non-discriminatory manner. It is within this array of oversight and compliance initiatives that the bulk of ERISA litigation arises. The result is a complex composite of Congressional law, judicial analysis, executive agency rules and regulations.

The data that PLD presents herein is meant to offer a summary insight into both long-standing and newly-evolving ERISA litigation activities. If the reader is interested in a customized and in-depth research analysis, please contact one of the paper’s authors.

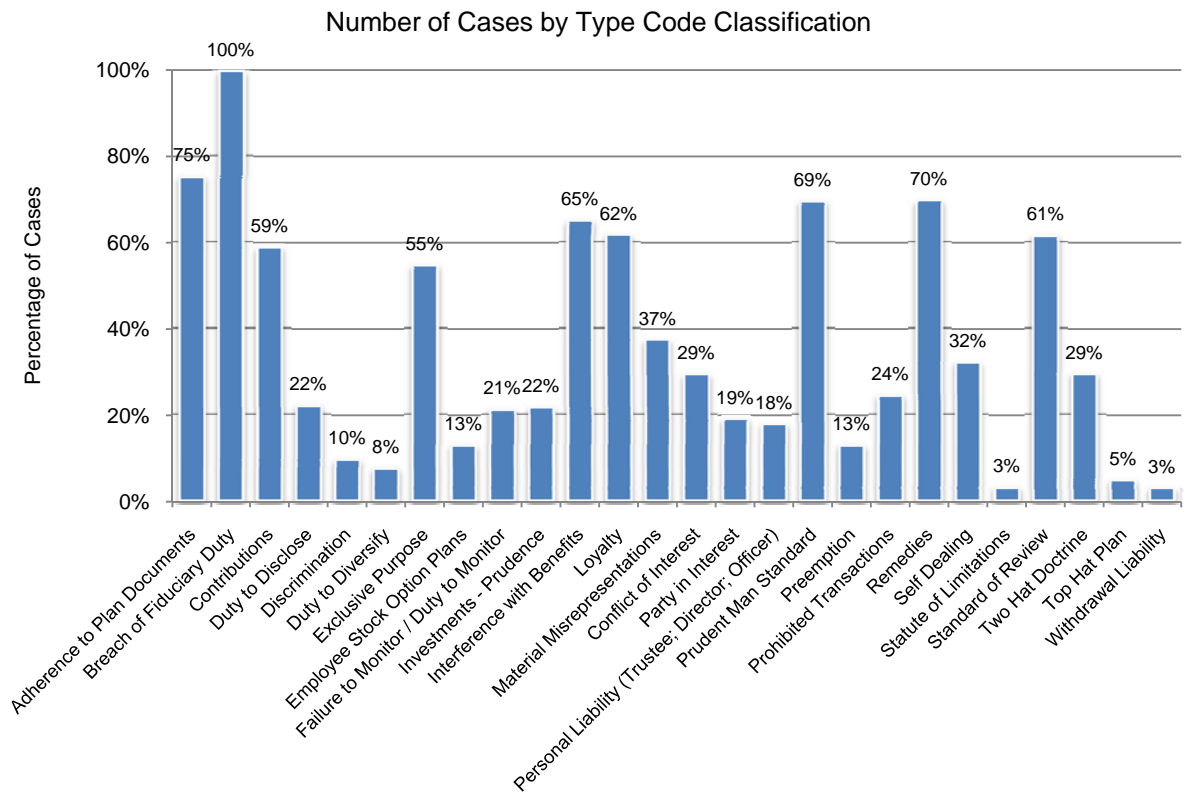
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<sup>1</sup> See <http://www.dol.gov/dol/topic/health-plans/erisa.htm>.

## TYPES OF LITIGATION

As shown in Figure 1, nearly every case included in the PensionLitigationData.com searchable database is classified as involving a fiduciary breach allegation. Other frequently cited issues include (a) adherence to plan documents (b) prudent man standard (c) remedies and (d) interference with benefits.

**FIGURE 1**



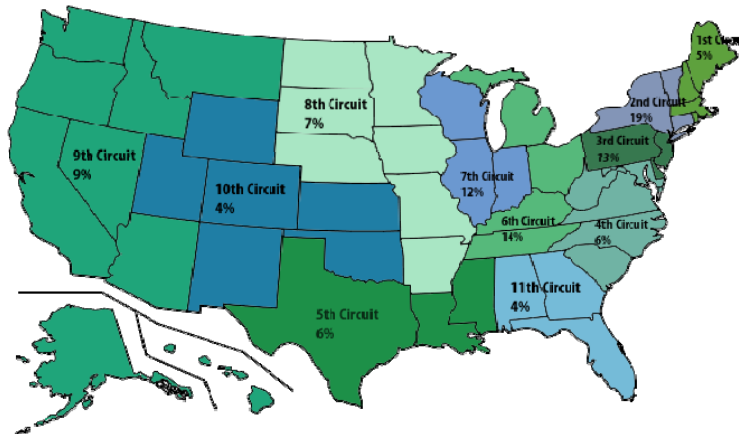
## LITIGATION BY CIRCUIT

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An important factor to consider when evaluating ERISA litigation trends involves the geographic distribution of ERISA litigation throughout the federal circuits. There are 11 federal judicial circuits and a twelfth “DC Circuit.” Figure 2 illustrates the national distribution of ERISA cases on the basis of federal appellate circuits. The 2nd, 3rd and 6th Circuits have the highest occurrence of litigation events while the 10th and 11th Circuits experience the lowest case volume for the data sample examined.

**FIGURE 2**

National Distribution of ERISA Cases by Federal Circuit

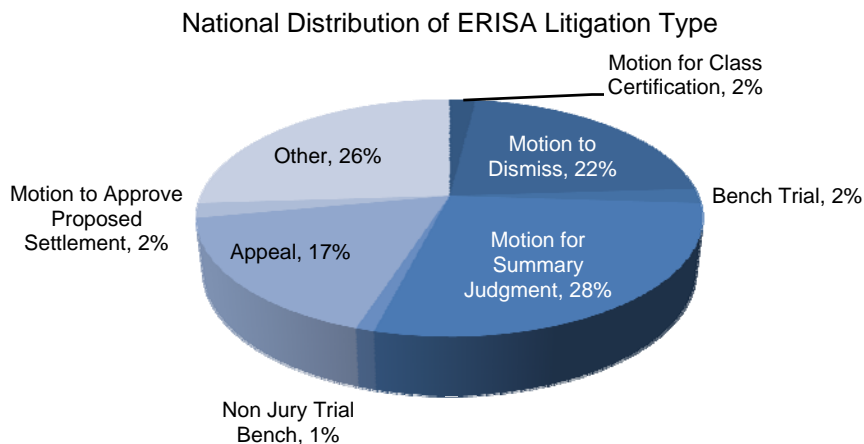


## PHASED DISTRIBUTION OF LITIGATION

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An important consideration for defendants and plaintiffs alike is when to settle out of court. While many factors may be a part of this important decision (and are not discussed herein), it is noteworthy that countless cases are truncated during the litigation process. As Figure 3 illustrates, slightly more than one fifth of all ERISA litigation is resolved before a judge ever considers the factual merits of a plaintiff's case (Motion to Dismiss). Nearly one half of all ERISA litigation is resolved at the Motion to Dismiss or Motion for Summary Judgment stage. Taking appeals, class certifications, and all other motions into consideration, readers may be surprised to learn that a meager three percent of all ERISA cases are disposed of at trial.

**FIGURE 3**<sup>2</sup>



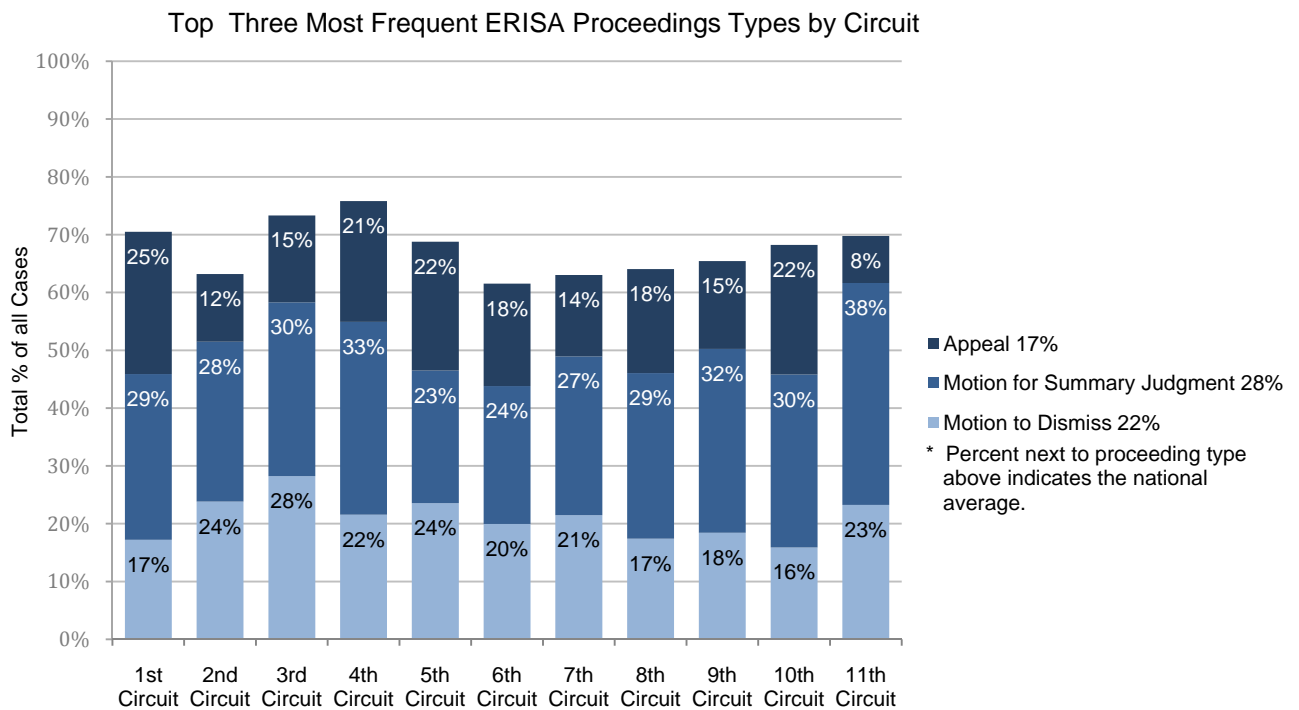
<sup>2</sup> The "Other" category includes a combination of proceeding types such as Motion to Strike, Motion to Transfer Venue and Motion to Compel.



## DISPOSITION OF LITIGATION BY FEDERAL CIRCUIT

Decomposing national statistics into court-specific data can be helpful. Figure 4 provides adjudication statistics at the federal circuit level, illustrating the top three most frequent ERISA proceeding types by federal circuit.

**FIGURE 4**

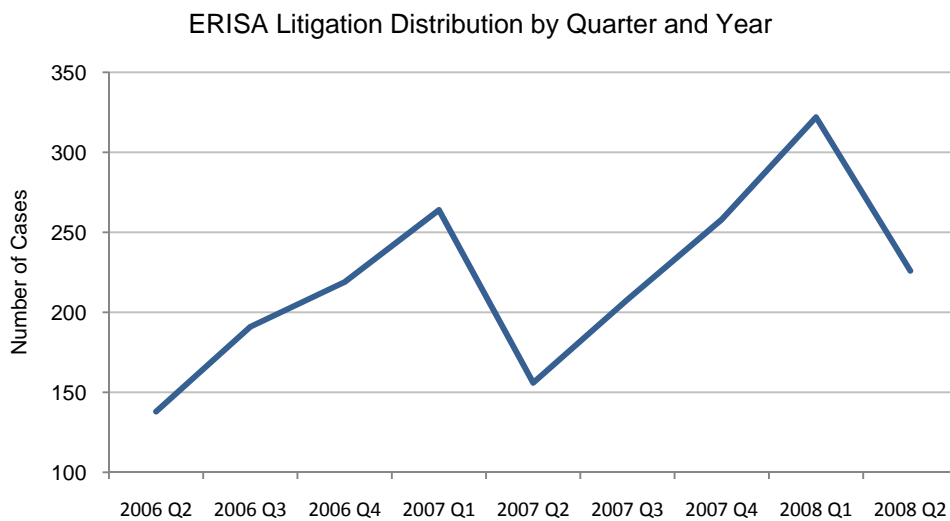


## TIME DISTRIBUTION OF LITIGATION

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As shown in Figure 5, the occurrence of ERISA litigation is on the rise. While not reflected in this graph, recent court filings suggest that pension disputes are unlikely to abate any time soon.

**FIGURE 5**



## UNDERSTANDING DISTRIBUTION OF OUTCOMES

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Figures 6.A and 6.B reflect legal “victories” and “losses” by first classifying litigation events by court level - district and/or appellate court levels – and then further refining the venue categorization.

District court litigation is subdivided into four groups:

- (a) DISTRICT PRELIMINARY LITIGATION** (examples include motions to dismiss, motions related to standing, venue, jurisdiction, and other procedural issues);
- (b) DISTRICT SUBSTANTIVE LITIGATION** (examples include, motions for summary judgment, judgment on the administrative record, and to adopt recommendations of a magistrate);
- (c) DISTRICT JUDICIAL REVIEW** (bench trials); and
- (d) DISTRICT ADVOCATE COMPENSATION PROCEEDINGS** (motions for attorney’s fees).

Appellate litigation is subdivided into two groups:

- (a) APPELLATE REVIEW;** and
- (b) APPELLATE ADVOCATE COMPENSATION PROCEEDINGS.**

## DISTRIBUTION OF OUTCOMES

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Figure 6.A illustrates that plaintiffs prevailed in 60% of District Preliminary Litigation and 69% of District Substantive Litigation, respectively, during the examined time period. At Appellate Review, defendants prevailed more often than plaintiffs. Just over half of all plaintiffs obtained a favorable fee award. Plaintiffs won nearly 70% of all motions for summary judgment.

**FIGURE 6.A**

### **Disposition of Cases in Favor of Plaintiffs**

<b>Phase</b>	<b>Percentage</b>
Appellate Review	47%
District Preliminary Litigation	60%
District Substantive Litigation	69%
District Judicial Review Proceedings	48%
District Advocate Compensation Proceedings	52%

**FIGURE 6.B**

### **Disposition of Cases in Favor of Defendants**

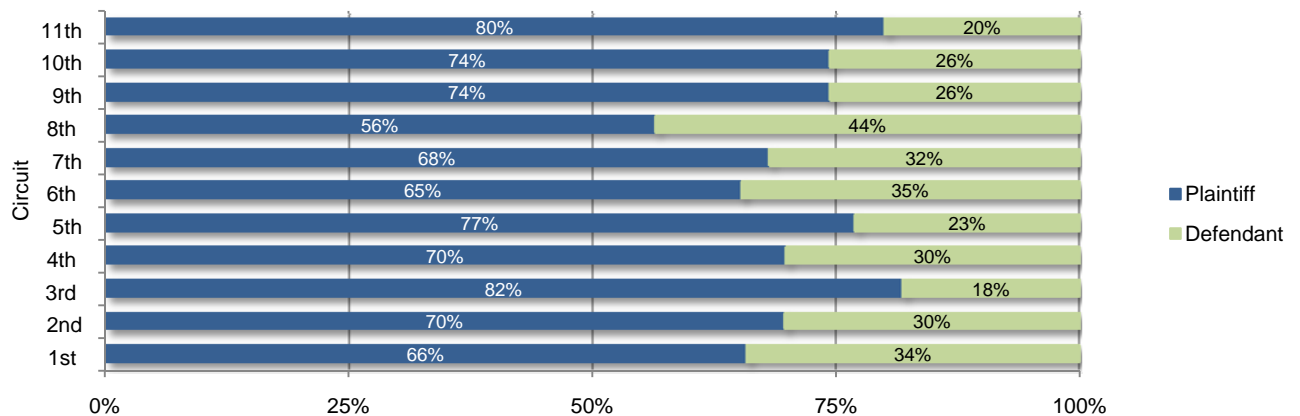
<b>Phase</b>	<b>Percentage</b>
Appellate Review	53%
District Preliminary Litigation	40%
District Substantive Litigation	28%
District Judicial Review Proceedings	52%
District Advocate Compensation Proceedings	48%

## RESOLUTION OF SUBSTANTIVE LITIGATION IN THE DISTRICT COURTS

Expanding on the summary data provided in Figures 6.A and 6.B, Figure 7 explores the distribution of outcomes at the district court level, narrowed to the District Substantive Litigation phase. While plaintiffs statistically appear to receive favorable outcomes, consider that many procedurally non-compliant claims are resolved at the District Preliminary Litigation phase. This results in fewer cases for substantive review. Given the length of time that often transpires between the District Preliminary and Substantive Litigation phases, many cases either settle or are voluntarily dismissed for other reasons.

**FIGURE 7**

District Court Substantive Litigation:  
Percent of Dispositions for Plaintiff and Defendant by Circuit



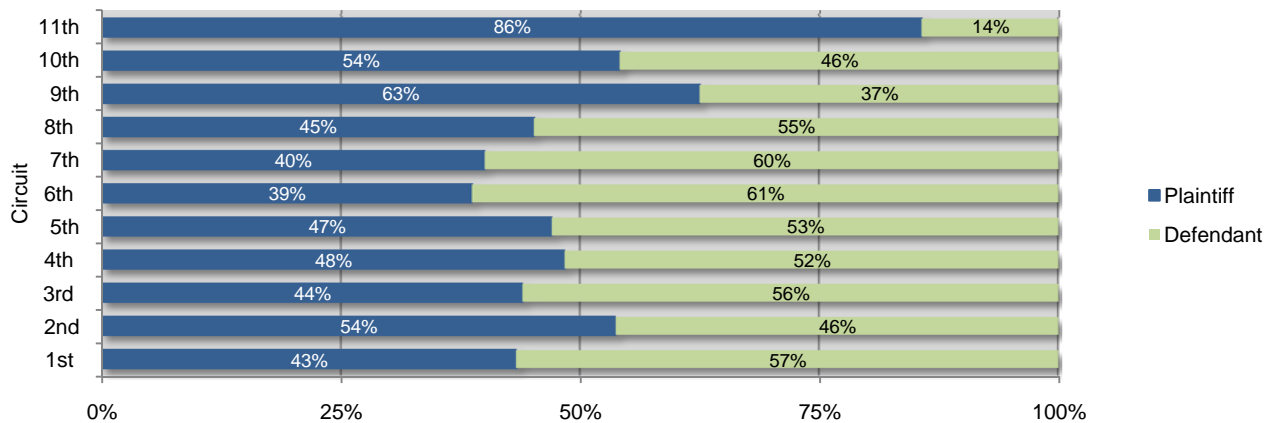
## RESOLUTION OF SUBSTANTIVE LITIGATION IN THE APPELLATE COURTS

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Also expanding on the summary data provided in Figures 6.A and 6.B, Figure 8 explores the distribution of outcomes at the appellate court level, narrowed to the Appellate Review phase. Note that the 11th Circuit overwhelmingly favored plaintiffs for the examined data set.

**FIGURE 8**

Appellate Court Litigation:  
Percent of Dispositions for Plaintiff and Defendant by Circuit



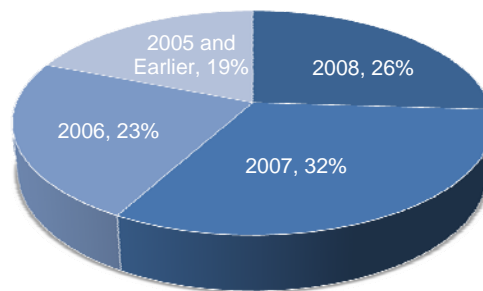
## **PENSION PLANS AS PLAINTIFFS**

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Following the passage of the Private Securities Litigation Reform Act of 1995 (“PSLRA”), increasing numbers of pension plans have served as plaintiff. Their role is thought to have influenced the settlements and governance reforms of large-scale legal actions.<sup>3</sup> Figure 9 contrasts the frequency of cases involving a pension plan plaintiff for the time period from late 2004 through mid-2008.

**FIGURE 9**

Percent of Pension Fund Plaintiffs by Year



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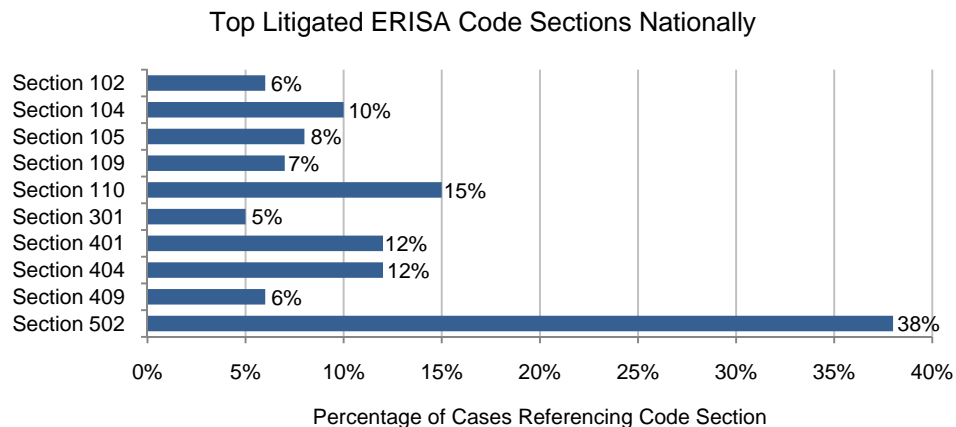
<sup>3</sup> Weiss, Elliot J. “The Lead Plaintiff Provisions of the PSLRA After a Decade, or ‘Look What’s Happened to My Baby,’” *Vanderbilt Law Review*, March 2008.

## CIVIL ENFORCEMENT OF ERISA

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An ERISA plaintiff has several statutory options when preparing a complaint. While the bulk of ERISA civil claims are sought within Section 502 of ERISA, attorneys may reference other provisions of this federal pension law. Section 110 complaints relating to duty to disclose and compliance methods accounted for approximately 15% of all examined litigation events. ERISA fiduciary duties, enumerated in Sections 401 and 404, ranked third and fourth in terms of national litigation activity. Recall that Section 404 of ERISA addresses the prudent man standard which charges fiduciaries to “provid[e] benefits to participants and their beneficiaries...with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”<sup>4</sup> Also included in Section 404 is the important fiduciary duty to diversify investments.

**FIGURE 10**



<sup>4</sup> 29 U.S.C. 1104 (a)(1)(A)&(B).

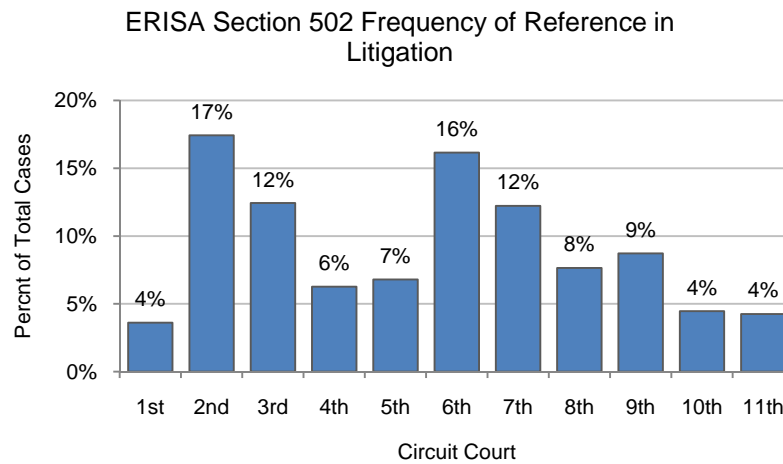


## APPELLATE DISTRIBUTION OF CIVIL ENFORCEMENT ACTIONS

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Expanding on Figure 10, Figure 11 explores the distribution of ERISA Section 502 claims across the federal circuits. Claims arising in the 2nd and 6th Circuits accounted for 33% of all Section 502 claims, while the 1st, 10th and 11th Circuits combined accounted for just 12% of all Section 502 claims.

**FIGURE 11**



## **QUANTIFYING LITIGATION EVENTS - BACKGROUND**

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The PensionLitigationData.com team has developed a coding and analysis process that allows for the categorization and statistical analysis of events and outcomes along the path of an ERISA case. Civil actions can be researched on the basis of types of claims, outcomes at various stages of litigation and a variety of other critical variables such as the type of plaintiff or defendant (individual, governmental, institutional, corporate, etc.), frequency of reoccurring claims, track record of a particular counsel and the location where a particular dispute is adjudicated.

## **ABOUT PENSIONLITIGATIONDATA.COM**

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PensionLitigationData.com recognizes the urgent need for more information about pension litigation. The Private Securities Litigation Reform Act and global class action filings put pension fund lead plaintiffs front and center. At the same time, 401(K) and traditional pension plan fiduciaries are increasingly being named as defendants. With over 2,400 cases and more than 100 classification codes, this research tool provides invaluable information about a variety of ERISA and some public pension litigation cases.

Decision-makers can save hours of time and gain otherwise hard to find intelligence about pension litigation issues. Assessing statistics, evaluating case precedents, tracking fiduciary issues by circuit, case type and time to settlement are just a few of the information tools available as a PensionLitigationData.com subscriber.

If you would like more information about the cases on which this report's data graphs are based and/or have suggestions about future research highlights, please contact us.

## THE PENSIONLITIGATIONDATA.COM TEAM

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The PensionLitigationData.com team is comprised of a diverse group of professionals. Our project leaders include:

**Dr. Susan Mangiero, AIFA, AVA, CFA, FRM**

President and Founder  
Pension Governance, Incorporated

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Dr. Susan M. Mangiero, CFA is an Accredited Valuation Analyst, Accredited Investment Fiduciary Analyst and certified Financial Risk Manager. She is author of *Risk Management for Pensions, Endowments, and Foundations* (John Wiley & Sons, 2005). Dr. Mangiero has done forensic and expert witness work on a variety of investment, risk and valuation cases. She holds a Ph.D. in finance from the University of Connecticut, an MBA in Finance from New York University, an MA in Economics from George Washington University and a BA in Economics from George Mason University. She is widely quoted in publications such as the *New York Times*, *Wall Street Journal*, *Baltimore Sun*, *Bloomberg* and *Pensions & Benefits* and is regularly invited to address groups such as the U.S. Department of Labor, New York State Department of Insurance, AICPA and National Association of Public Pension Auditors.

**Dr. Israel Shaked**

Managing Director - The Michel-Shaked Group  
Professor of Finance and Economics - Boston University School of Management

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Dr. Israel Shaked received his Doctor of Business Administration from the Harvard Business School, and also has degrees in economics, statistics, and a Masters in Business Administration. He has provided consulting services to a broad array of companies and has testified on numerous matters, including valuation, securities, leveraged buyouts, portfolio management, mergers and acquisitions, and damages. Dr. Shaked has testified on financial topics in U.S. Bankruptcy Court, U.S. District Court and state courts. In addition, he has appeared before the U.S. Congress' House Ways and Means Committee testifying on financial issues, and designed and directed a nationally recognized certification program for pension trustees. Dr. Shaked is a prolific writer, having co-authored three books and more than 50 scholarly articles and he is frequently quoted in the press.

**Bradley Orelowitz, CPA**  
Senior Manager  
The Michel-Shaked Group

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Brad Orelowitz is a senior manager with the Michel-Shaked Group and has worked with PensionLitigationData.com since its inception in early 2005. Brad has represented clients as an expert in valuation, finance and accounting, both in litigation and corporate finance advisory assignments. He has managed many different bankruptcy, securities, ERISA and valuation cases, and has performed numerous valuations and solvency analyses.

**Emilee S. Preble**  
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PensionLitigationData.com

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Emilee Preble is a senior litigation analyst for PensionLitigationData.com and is a graduating law senior at the Indiana University School of Law in Indianapolis. Emilee has been involved with PensionLitigationData.com since 2006, monitoring the electronic court administration systems of the federal government (PACER) on behalf of PensionLitigationData.com and assisting with our opinions selection process. Prior to law school, Emilee worked as a data analyst and database administrator for a university, acquiring many of the skills she has utilized in her work with PensionLitigationData.com.

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Jason Sheffield is the director of legal content for PensionLitigationData.com and an employee benefits attorney with the law firm of McGuireWoods LLP, specializing in employee plans regulation and compliance, as well as employee benefits litigation. Jason's development of the coding sequences utilized by PensionLitigationData.com to codify cases for quantitative survey was instrumental in the design and operation of the PensionLitigationData.com website and he remains an active editorialist and analyst for PensionLitigationData.com, drafting many of the case summaries and litigation updates featured on the website.