

Private Credit Under Stress: Emerging Litigation Risks

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I. Introduction

Private credit is an umbrella term for lending that occurs outside public markets and regulated banking channels.¹ Rather than borrowing from a bank or issuing publicly traded debt instruments (such as syndicated loans or high-yield bonds) a company receives a loan directly from a non-bank institutional lender.² The defining characteristics of private-credit loans are direct negotiations between lender and borrower and the absence of the disclosure and pricing mechanisms that characterize public markets. As non-banks, private-credit lenders are not subject to the disclosure requirements, capital adequacy rules, or regulatory oversight that govern traditional banking, and the terms, pricing, and covenants of their loans are agreed upon privately.³

Private credit emerged as a structural response to two converging forces: post-financial-crisis banking regulation, which restrained banks' appetite for leveraged lending, and a decade of historically low interest rates, which drove yield-hungry institutional investors toward illiquid alternative investments.⁴ The asset class grew up as a financing solution for private equity, providing the leveraged debt that buyout sponsors could not necessarily obtain from regulated lenders.⁵ The two ecosystems remain inextricably linked: private credit supplied the debt; private equity supplied the borrowers.⁶

Direct lending is the most straightforward expression of that relationship. A non-bank lender originates and retains a loan to a private-equity-sponsored company, and the loan is bilaterally negotiated, privately documented, and held to maturity rather than distributed or traded.⁷ In functional terms, private credit replicates age-old traditional bank lending, without syndication, public disclosure, or the same regulatory constraints.⁸

What began as a niche solution to the post-2008 financing gap has since expanded well beyond its origins. Private credit has moved into consumer finance, real estate debt, infrastructure, and asset-based lending. It has displaced traditional banks as the dominant originator of loans to sub-investment-grade companies.⁹ The

¹ Blackstone Inc., *Private Credit: Cutting Through the Jargon* (2022), <https://pws.blackstone.com/emea/wp-content/uploads/sites/20/blackstone-secure/Private-Credit-Cutting-Through-the-Jargon-EMEA.pdf>.

² *Id.*

³ Jared A. Ellias & Elisabeth de Fontenay, *The Credit Markets Go Dark*, 134 *Yale L.J.* 779, 825, 847 (2025) [hereinafter Ellias & de Fontenay].

⁴ Howard Marks, *What's Going on in Private Credit?*, Oaktree Capital Management, L.P., at 3-4 (Apr. 9, 2026).

⁵ *Id.* at 2.

⁶ *Id.*

⁷ Blackstone, *supra* note 1, at 2.

⁸ See Natasha Sarin, *This Is Starting to Look Like a Slow-Motion Bank Run*, *N.Y. Times* (Apr. 6, 2026), <https://www.nytimes.com/2026/04/06/opinion/banking-crisis-private-credit.html>; Ellias & de Fontenay, *supra* note 3, at 805 (“In its structure, then, private credit looks virtually identical to relationship lending . . . with a private investment fund substituting for the bank.”).

⁹ Joyce Guevarra, Neel Hiteshbhai Bharucha & Dylan Thomas, *Private Debt's Share of Buyout Financing Hits Decade High*, S&P Global Market Intel. (Feb. 6, 2025), <https://www.spglobal.com/market-intelligence/en/news-insights/articles/2025/2/private-debts-share-of-buyout-financing-hits-decade-high-87373500> (noting that private credit accounted for 77% of global leveraged buyout financing in 2024 and continued to dominate in 2025); see also Degerli, Ahmet, and Phillip Monin (2024). “Private Credit Growth and Monetary Policy Transmission,” FEDS Notes. Washington:

asset class now consists of over \$2 trillion globally, with projections suggesting that it will reach \$4 trillion by the end of the decade.¹⁰ The private credit model is not without merit. By locking up capital for years rather than days, investors have historically earned meaningfully higher returns than they could on comparable publicly traded debt.¹¹

Private credit's primary vehicle is the business development company ("BDC"). This is a closed-end investment fund structure that pools direct loans and sells shares to investors.¹² BDCs come in two varieties: (1) "publicly traded BDCs," whose shares trade on exchanges and whose market prices reflect real-time investor sentiment, and (2) "non-traded BDCs," which do not trade on exchanges and whose valuations are based on periodic net asset value ("NAV") calculations reported by the fund manager, typically on a quarterly basis.¹³ At year-end 2023, there were 132 BDCs with total net assets of \$159 billion, split about evenly between listed and unlisted vehicles.¹⁴ By 2026, tens of thousands of individuals had invested over \$200 billion into BDCs.¹⁵

That growth, however, has not been without consequence. Idiosyncratic features of the private credit market—direct lending with long-term capital commitments and few if any public disclosures—may cause stresses in private markets to manifest differently than how it would in public markets. Rather than being reflected immediately in market prices, it may accumulate quietly over time. The opacity of private credit creates a lack of clarity as to where risk resides and how accurately it is measured.

This note examines those dynamics and the litigation risks they are generating.

- Part II traces private credit's evolution from a post-crisis financing solution to a mainstream asset class.
- Part III surveys the market's current stress points: (1) the opacity and disclosure gaps that obscure where risk resides, (2) the redemption pressures and gating decisions that have tested

Board of Governors of the Federal Reserve System, August 02, 2024, <https://doi.org/10.17016/2380-7172.3565> (noting the decrease in banks' market share of leveraged loans in part because of the post-financial crisis regulatory framework).

¹⁰ Moody's, Private Credit Outlook 2026 Executive Summary (Jan. 21, 2026), <https://www.moody's.com/web/en/us/insights/credit-risk/outlooks/private-credit-2026.html>.

¹¹ Matt Levine, *BlackRock Guards the Gates*, Bloomberg (Mar. 9, 2026, 2:08 PM), <https://www.bloomberg.com/opinion/newsletters/2026-03-09/blackrock-guards-the-gates>.

¹² See Moody's Analytics, *Private Credit & Systemic Risk* 10 (June 2025), <https://www.economy.com/getfile?q=2107637A-C535-4AFF-83BC-6CBA1AD1FAB9&app=download>. [hereinafter Moody's, *Systemic Risk*] (describing BDC structures); see also Bd. of Governors of the Fed. Rsr. Sys., *Bank Lending to Private Credit: Size, Characteristics, and Financial Stability Implications*, FEDS Notes (May 23, 2025) [hereinafter Fed, *Bank Lending*], <https://www.federalreserve.gov/econres/notes/feds-notes/bank-lending-to-private-credit-size-characteristics-and-financial-stability-implications-20250523.html>. (noting that BDCs are "a major vehicle for private credit").

¹³ *Id.*; see also Huw van Steenis, *Private Credit's Stale Pricing Problem*, Fin. Times (Mar. 27, 2026).

¹⁴ Moody's, *Systemic Risk*, *supra* note 12 at 7 n.8 ("At year-end 2023, there were 132 BDCs with total net assets of \$159 billion, according to ICI's 2024 Investment Factbook, corresponding to total assets under management in excess of \$300 billion.").

¹⁵ Antonie Gara, Eric Platt, & Ortenca Aliaj, *Private Capital: What Are the Risks?*, Fin. Times (Apr. 3, 2026) [hereinafter Gara, Platt, & Aliaj, *Private Capital*]; see also Antoine Gara, *Trump to Take First Steps in Opening Retirement Funds to Private Markets*, Fin. Times (Mar. 30, 2026) [hereinafter Gara, *Retirement Funds*] ("Wealthy individuals who had ploughed more than \$200bn into private debt funds over the past decade have sought to pull over \$13bn in recent months.").

fund liquidity, (3) AI-driven disruption of the software portfolios that anchor many direct lending books, (4) the growing exposure of the insurance sector, (5) the expansion of private credit into 401(k) retirement plans, and (6) the entry of distressed-debt investors positioning for dislocation.

- Part IV identifies five categories of emerging litigation risk: (1) distress, default, and insolvency disputes arising from capital structures that were built in a low-rate environment and are now under strain, (2) securities fraud class actions against BDCs alleging misstated valuations and inadequate disclosures, (3) fiduciary duty and ERISA claims, particularly as retirement plan assets are directed toward illiquid alternative investments, (4) redemption, gating, and contract disputes over the mechanics of investor liquidity in a period of sustained withdrawal pressure, and (5) valuation and fee-related challenges, where the opacity of private credit pricing collides with conflicts of interest in how net asset values are reported and fees are calculated.

II. From Post-Crisis Financing Solution to Mainstream Market

The Global Financial Crisis was private credit's inflection point. The crisis left banks more heavily regulated, and the resulting constraints on bank lending created a vacuum that non-bank lenders filled.¹⁶ As regulators curtailed traditional bank lending to safeguard the financial system, riskier lending to less creditworthy companies shifted to non-bank providers. These were run by investment managers who moved to fill the vacuum through what became known as "private credit."¹⁷ The fastest-growing component was direct lending: private loans extended directly to mid-market, private-equity-sponsored portfolio companies with sub-investment grade ratings, without the involvement of the broadly syndicated loan market.¹⁸

Direct lending offered sponsors advantages over the syndicated loan market. Borrowers could obtain capital from a small number of large lenders, avoiding widely distributed financial disclosures, and avoiding the complexity of renegotiating with a large creditor group if trouble arose.¹⁹ Direct lenders were also willing to support higher leverage levels than would the syndicated market, and to lend to companies that were not yet profitable on the basis of recurring revenue metrics rather than traditional cash-flow measures.²⁰ Rock-bottom interest rates throughout the 2010s further enhanced the appeal of direct lending. The higher prospective

¹⁶ See Sergey Chernenko, Isil Erel & Robert Prilmeier, *Why Do Firms Borrow Directly from Nonbanks?*, 35 Rev. Fin. Stud. (2022) [hereinafter Chernenko, Erel & Prilmeier] (finding that regulations constraining banks' ability to lend to risky firms push borrowers toward nonbank lenders); see also Fed, *Bank Lending supra* note 12.

¹⁷ Gara, Platt, & Aliaj, *Private Capital, supra* note 15 ("As regulators curtailed traditional banks' lending to safeguard the financial system, riskier lending to less creditworthy companies shifted to private capital providers."); see also Chernenko, Erel & Prilmeier, *supra* note 16.

¹⁸ See Ellias & de Fontenay, *supra* note 3, at 785, 805-07.

¹⁹ See *id.* at 823-26 (describing the speed, flexibility, and reduced disclosure requirements that make direct lending attractive to borrowers); see also Bd. of Governors of the Fed. Rsrv. Sys., *Private Credit: Characteristics and Risks*, FEDS Notes (Feb. 23, 2024) [hereinafter Fed, *Private Credit Characteristics*], <https://www.federalreserve.gov/econres/notes/feds-notes/private-credit-characteristics-and-risks-20240223.html> (noting that borrowers value the "speed and certainty of execution, agility, and customization that private lenders offer").

²⁰ See Fed, *Private Credit Characteristics, supra* note 19 ("Additionally, private debt funds have attracted highly leveraged borrowers that are unable to get adequate funding from heavily regulated banks."); see also Iñaki Aldasoro, Sebastian Doerr & Gábor Pintér, *Collateralized Lending in Private Credit*, BIS Working Papers No. 1267, at 2, 6 (2025), <https://www.bis.org/publ/work1267.pdf> (describing the structural features of direct lending including flexibility in loan terms and willingness to lend to riskier borrowers).

returns appeared especially attractive against a backdrop of near-zero yields on investment-grade instruments.²¹ Pension funds and endowments began allocating as much as 30 percent of their portfolios to private markets. Some private capital groups grew to command market capitalizations exceeding those of blue-chip investment banks such as Goldman Sachs.²² At the peak of the cycle in 2021, private equity and credit funds raised \$1.2 trillion from investors.²³ Since then, the growth trajectory of private credit has accelerated, and its investor base has fundamentally transformed, by the marketing of direct lending vehicles to individual investors and retirement accounts.²⁴

III. Recent Developments: A Market Under Strain

A. Growth In Systemic Importance, Opacity and the Disclosure Gap

In recent years, the structural vulnerabilities of the private credit market have often become exposed. Fitch Ratings' private credit default rate rose to 5.8% in January 2026, the highest level it has ever reached, with nearly twice as many default events recorded that month compared to the 2025 monthly average. In consumer products, within those twelve months the default rate rose from 6.1% to 12.8%.²⁵

The collapse of Market Financial Solutions, a U.K. mortgage company that entered bankruptcy in February 2026 amid accusations of fraud and double-pledging of assets, illustrates the risks that private credit's opacity can conceal.²⁶ MFS had significant private credit debt, and its failure left investors facing hundreds of millions of dollars in losses.²⁷ Unlike regulated banks, private credit lenders operate outside the capital requirements, stress-testing regimes, and supervisory oversight that govern traditional finance.²⁸ Disputes between lenders and borrowers are typically resolved through confidential negotiation or bilateral renegotiation

²¹ See Int'l Monetary Fund, *The Rise and Risks of Private Credit*, in Global Financial Stability Report ch. 2 at 54-55 (Apr. 2024) [hereinafter IMF, *Rise and Risks*], <https://www.imf.org/en/publications/gfsr/issues/2024/04/16/global-financial-stability-report-april-2024> (explaining that the prolonged period of low interest rates expanded investor interest in alternative strategies, with private credit offering comparatively high returns across debt markets).

²² Gara, Platt, & Aliaj, *Private Capital*, *supra* note 15.

²³ *Id.*

²⁴ See Gara, *Retirement Funds* *supra* note 15; Exec. Order No. 14330, Democratizing Access to Alternative Assets for 401(k) Investors (Aug. 7, 2025), <https://www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/>.

²⁵ Timothy Lee & Lyle Margolis, *U.S. Private Credit Default Rate Continues Upward March to 5.8% in January 2026*, Fitch Ratings (Feb. 23, 2026).

²⁶ Lawrence White et al., *Wall Street Hit by UK Mortgage Lender Collapse, Raising Fears of More Credit 'Cockroaches'*, Reuters (Feb. 27, 2026, 3:30 AM), <https://www.reuters.com/business/finance/barclays-shares-fall-possible-losses-collapse-market-financial-solutions-2026-02-27/>. Double pledging is the practice of granting different lending vehicles competing securities in the same assets. *Unpacking the MFS Collapse: How Pristine Assets Turn Toxic*, Octus (Mar. 31, 2026), <https://octus.com/resources/podcast/unpacking-the-mfs-collapse-how-pristine-assets-turn-toxic/>.

²⁷ Iain Withers & Sri Hari N S, *Elliott Management Holds \$268 Million Exposure to Collapsed UK Lender MFS, Source Says*, Reuters (Mar. 2, 2026, 12:09 PM), <https://www.reuters.com/business/elliott-management-holds-268-million-exposure-collapsed-uk-lender-mfs-ft-reports-2026-03-02/>.

²⁸ Marks *supra* note 4, at 4 (noting that sponsors turned to direct lending in part to free themselves from "widely distributed financial disclosure"); Ellias & de Fontenay *supra* note 3, at 836-37

rather than public proceedings, which means problems may not become visible until they have already spread.²⁹ As a result, losses may surface only after they no longer can be addressed through private restructuring or negotiation.³⁰

The opacity compounds at every level. Direct loans carry no market price. There is no exchange, no continuous quotation, and no mechanism to force markets to reality.³¹ Instead, funds value their holdings periodically, often quarterly, based on internal models and assumptions. The periodic reporting creates a structural advantage for investors who redeem ahead of a valuation cycle and a corresponding disadvantage for those who remain.³²

The private ratings system introduces a further layer of uncertainty, particularly in the insurance sector, which is increasingly dominated by private capital firms.³³ The ratings process breeds an agency problem, a classic conflict-of-interest. Insurers seek investment-grade instruments due to favorable risk-based capital treatment. But the ensuing practice of “ratings shopping” can lead to the misclassification of below-investment-grade instruments into the investment-grade bucket.³⁴ These dynamics may become more consequential in periods of stress, when credit quality deteriorates and liquidity constraints tighten. Ultimately, the system breeds systemic risk, particularly visible in economic downturns, as defaults rise and cause liquidity gaps.³⁵

B. Redemptions, Gating, and Liquidity Stress

One visible consequence of the opacity in the private credit model is that valuation practices have not evolved in step with the structural complexity of the private credit fund.³⁶

Investors in non-traded BDCs redeem their shares through periodic tender offers, at a price determined by the fund’s reckoning of its net asset value, subject to a quarterly cap generally set at 5% of NAV.³⁷ As with other direct lending vehicles, BDCs price their holdings quarterly or less frequently and honor

²⁹ Rajat Rana & Alec Bahramipour, *Financing the AI Infrastructure Boom: Emerging Litigation Risks in AI Data Centers*, Quinn Emanuel Urquhart & Sullivan, LLP, at 12 (2026) (“When disputes arise between private credit lenders and borrowers, they are typically resolved through bilateral negotiation or confidential arbitration rather than public litigation, meaning that problems may not become visible until they have already metastasized.”).

³⁰ Ellias & de Fontenay, *supra* note 3, at 787-88.

³¹ *Id.*

³² *Id.* at 839.

³³ Gara, Platt, & Aliaj, *Private Capital* *supra* note 15. Private credit now accounts for about 35 percent of the investment portfolios of North American insurance companies. Int’l Monetary Fund, *Global Financial Stability Report: Shifting Ground beneath the Calm* (2025) Fig. 1.3.1, <https://www.imf.org/-/media/files/publications/gfsr/2025/october/english/text.pdf>.

³⁴ Press Release, U.S. Sen. Comm. on Banking, Hous., & Urb. Affs., *Warren Calls for Stress Test on Private Credit, Presses Ratings Agencies on Inflated Private Credit Ratings* (July 17, 2025), <https://www.banking.senate.gov/newsroom/minority/warren-calls-for-stress-test-on-private-credit-presses-ratings-agencies-on-inflated-private-credit-ratings>; Laura Noonan & Silas Brown, *Private Credit Ratings Face Fresh Scrutiny From Global Watchdogs*, Bloomberg (Dec. 19, 2025), <https://www.bloomberg.com/news/articles/2025-12-19/private-credit-ratings-face-fresh-scrutiny-from-global-watchdogs>.

³⁵ Int’l Monetary Fund, *Global Financial Stability Report: Shifting Ground beneath the Calm* (2025) 43-44, <https://www.imf.org/-/media/files/publications/gfsr/2025/october/english/text.pdf>.

³⁶ Levine, *supra* note 50.

³⁷ *Id.*

redemption requests at that stated NAV. This means that investors who redeem during a period of stress may do so at a value that does not reflect actual market conditions.³⁸ When sentiment turns and redemption requests exceed a fund's available liquidity, managers must either restrict withdrawals, and either cap the proportion of the fund that can exit in any given period, or sell assets into a thin market to raise cash.³⁹

As Howard Marks has noted, direct loans embody no less credit risk than public instruments; it simply is not reflected as readily in prices.⁴⁰ That asymmetry between the risk that is present and the risk that is reported is not merely a technical inconvenience. When redemption pressure builds and reported net asset values (NAVs) come under scrutiny, this asymmetry can become central. Investors who exited at a stated value may have done so at the expense of those who stayed.⁴¹

In the first quarter of 2026 alone, investors sought to pull \$20 billion from private credit funds.⁴² Facing sustained redemption pressure that approached structural liquidity limits, funds invoked gating provisions to limit the redemption amounts.⁴³ These developments highlight the tension between illiquid underlying assets and periodic investor liquidity expectations—a dynamic that may become a focal point in future disputes.

C. Private Credit's Front Seat to AI Disruption of Software Portfolios

Nearly 30% of private credit-focused BDC portfolios are allocated to software and services companies. That is significant when compared to, for instance, the 4–5% of software debt in the U.S. high yield bond market.⁴⁴ The disparity is not an accident.

Software companies historically enjoyed recurring subscription-based cash flows and sustainable competitive advantages, making them attractive candidates for leveraged buyouts.⁴⁵ Direct lenders agreed, and were willing to support debt levels beyond what the syndicated loan or high yield bond market would accommodate, including loans underwritten against annual recurring revenue to companies that were not yet profitable.⁴⁶ The result was a substantial concentration of direct loans to software companies acquired at high

³⁸ Ellias & de Fontenay, *supra* note 3, at 839; Matt Levine, *Private Credit Is Not on Sale*, Bloomberg (Mar. 24, 2026, 2:16 PM), <https://www.bloomberg.com/opinion/newsletters/2026-03-24/private-credit-is-not-on-sale>.

³⁹ Huw van Steenis, *Private Credit's Stale Pricing Problem*, Fin. Times (Mar. 27, 2026), <https://www.ft.com/content/a8337bf7-7b9d-4b8e-8ac3-6a30a8d2e907>; James Chen, *Gate Provision: What It Is, How It Works, Example*, Investopedia (Oct. 28, 2025), <https://www.investopedia.com/terms/g/gateprovision.asp>.

⁴⁰ Marks, *supra* note 4, at 3.

⁴¹ Matt Levine, *BlackRock Guards the Gates*, Bloomberg Law: Money Stuff (Apr. 13, 2026, 12:05 PM), [hereinafter Levine], <https://news.bloomberglaw.com/mergers-and-acquisitions/matt-levines-money-stuff-blackrock-guards-the-gates>.

⁴² Eric Platt, *Investors Sought to Pull \$20bn from Private Credit Funds in First Quarter*, Fin. Times (Apr. 9, 2026), <https://www.ft.com/content/3513f9df-18dd-4ea4-ae20-3523988c106c>.

⁴³ Van Steenis, *supra* note 39.

⁴⁴ Lexie Wang & Mark Fischer, *Octus Private Credit Software Analysis Reveals Almost 30% Exposure to BDCs; 13% of Loans Have PIK Component; Fewer Than 10% Loans Mature Before 2028*, Octus (Feb. 26, 2026), <https://octus.com/resources/articles/octus-private-credit-software-analysis-reveals-almost-30-exposure-to-bdcs/>; Marks *supra* note 4, at 5.

⁴⁵ Marks, *supra* note 4, at 4.

⁴⁶ *Id.* at 4-5.

EBITDA multiples of approximately 20x and with aggressive leverage ratios, with the most highly levered borrowers disproportionately represented in direct lending portfolios.⁴⁷

Those underwriting assumptions are now under pressure. AI may compress demand, pricing power, and growth assumptions across parts of the software sector, while declining software valuations reduce the equity cushion beneath many loans. In the last five years, the value of S&P 500 software firms has fallen from 13 to 8 times revenue as measured over the preceding 12 months, and from 8 to 3 times revenue across a broader group of software firms.⁴⁸ Meanwhile, analysts estimate that credit markets have \$500 billion in exposure to the software industry, with the largest of those loans attributed to BDCs.⁴⁹

Companies acquired at ~20x EBITDA with aggressive leverage thus face a narrowing path. If AI-driven disruption erodes the recurring revenue streams that justified those entry valuations, credit losses will follow. According to an S&P Market Intelligence report, one fifth of software debt trades below 90 cents, against a backdrop in which the private credit default rate has already reached 5.8%, the highest level Fitch Ratings has ever tracked.⁵⁰ A fast-approaching maturity wall in 2027 and 2028 may push companies toward more aggressive liability management solutions.⁵¹

D. Insurance Sector Exposure

Private credit now accounts for approximately 35 percent of the investment portfolios of North American insurance companies, according to the IMF's Global Financial Stability Report.⁵² In the United Kingdom, the figure is close to a quarter of total insurer assets, up to 45% for some insurers.⁵³ US life insurers have allocated close to one-third of their approximately \$5.6 trillion in assets to private debt, up from 22 percent a decade ago.⁵⁴ Moody's has reported that US life insurers have increased their allocation to private credit to about one-third of the sector's \$6 trillion in assets.⁵⁵ The growing nexus between private equity and insurance has only accelerated this trend. Since the 2008 financial crisis, private equity firms have either acquired life

⁴⁷ *Id.*

⁴⁸ Schumpeter, *Private-equity Barons Have a Giant AI Problem*, Economist (Feb. 12, 2026), <https://www.economist.com/business/2026/02/12/private-equity-barons-have-a-giant-ai-problem>.

⁴⁹ *Id.*

⁵⁰ Iuri Struta, *Software Debt Sell-Off Signals Cyclical Turn for Private Equity and Credit*, S&P Global Market Intelligence (Mar. 24, 2026), <https://www.spglobal.com/market-intelligence/en/news-insights/articles/2026/3/software-debt-sell-off-signals-cyclical-turn-for-private-equity-and-credit-99811235>; U.S. *Private Credit Default Rate Continues Upward March to 5.8% in January 2026*, Fitch Ratings (Feb. 23, 2026), <https://www.fitchratings.com/research/corporate-finance/us-private-credit-default-rate-continues-upward-march-to-5-8-in-january-2026-23-02-2026>.

⁵¹ Wang & Fischer *supra* note 44.

⁵² See Michelle Celarier, *The IMF Is Raising the Alarm on Insurance Investments in Private Credit*, Institutional Investor (Nov. 21, 2025), <https://www.institutionalinvestor.com/article/imf-raising-alarm-insurance-investments-private-credit>.

⁵³ *Id.*; see also Will Keen-Tomlinson, *Moody's: Insurance Companies Increasing Exposure to Private Credit*, Alternative Credit Inv. (June 17, 2025), <https://alternativecreditinvestor.com/2025/06/17/moodys-insurance-companies-increasing-exposure-to-private-credit/>.

⁵⁴ UBS Warns of Systemic Risk from Weak US Insurance Regulation, *Ins. J.* (Nov. 4, 2025) (citing CreditSights data), <https://www.insurancejournal.com/news/international/2025/11/04/846328.htm>.

⁵⁵ See Will Keen-Tomlinson, *Moody's: Insurance Companies Increasing Exposure to Private Credit*, Alternative Credit Inv. (June 17, 2025), <https://alternativecreditinvestor.com/2025/06/17/moodys-insurance-companies-increasing-exposure-to-private-credit/>.

insurance companies outright or partnered with them to manage their pools of capital, in each case increasing allocations to private credit.⁵⁶

One dimension of this exposure concerns the reliability of credit ratings. A significant and growing share of those ratings are issued privately by smaller, specialized rating agencies rather than by the major agencies (Moody's, S&P, and Fitch). According to the IMF, approximately 7,000 private securities were rated by specialized agencies in 2023, compared to roughly 2,000 in 2019, nearly a fourfold increase, while the major agencies rated only about 1,000 each year.⁵⁷ Moody's has found that, although approximately one-ninth of US life insurers' fixed-income holdings by value carry private ratings, this share exceeds fifty percent for so-called Level 3 holdings—assets that are the least liquid, hardest to value, and priced using models reliant on internal assumptions.⁵⁸

In November 2025, UBS Chairman Colm Kelleher publicly warned that the practice of insurers shopping for ratings constitutes “a looming systemic risk” to global finance, drawing an explicit comparison to the rating-agency arbitrage that characterized the subprime crisis.⁵⁹

Speaking at the Hong Kong Monetary Authority's Global Financial Leaders' Investment Summit, Kelleher stated that the insurance industry was engaging in “rating agency arbitrage” comparable to what banks did with subprime assets before 2008, pointing to a “massive growth in small rating agencies ticking the box for compliance.”⁶⁰ The Bank for International Settlements has similarly cautioned that private credit ratings used by insurance companies tend to be concentrated among smaller firms, raising the risk of inflated assessments of creditworthiness, and that these smaller agencies “may face commercial incentives” to provide more favorable grades.⁶¹ The IMF warned that, if private credit's asset class “remains opaque and continues to grow exponentially under limited prudential oversight, the vulnerabilities of the private credit industry could become systemic.”⁶²

E. Retailization of Private Credit: The 401(k) Frontier

The extension of private credit into ordinary Americans' retirement savings represents the next—and potentially most consequential—phase of the sector's growth. As of the end of 2025, total U.S. retirement

⁵⁶ IMF, *Rise and Risks*, *supra* note 21, at 70 n. 14.

⁵⁷ See Michelle Celarier, *The IMF Is Raising the Alarm on Insurance Investments in Private Credit*, Institutional Investor (Nov. 21, 2025), <https://www.institutionalinvestor.com/article/imf-raising-alarm-insurance-investments-private-credit>.

⁵⁸ See Toby Nangle, *If Private Credit Breaks, Insurers Will Fall Under the Microscope*, Fin. Times (Nov. 15, 2025), <https://www.ft.com/content/6ef2d803-0117-44e0-8f99-947459b55c62>.

⁵⁹ *UBS Warns of Systemic Risk from Weak US Insurance Regulation*, SWI (Nov. 4, 2025), <https://www.swissinfo.ch/eng/ubs-warns-of-systemic-risk-from-weak-us-insurance-regulation/90273746>.

⁶⁰ *Id.*

⁶¹ Matteo Aquilina, et al., *The Transformation of the Life Insurance Industry: Systemic Risks and Policy Challenges*, BIS Papers No. 161, at 31–32 (Oct. 2025), <https://www.bis.org/publ/bppdf/bispap161.pdf> (noting that private credit grades used by insurance companies tend to be concentrated among smaller ratings firms, raising the risk of “inflated assessments of creditworthiness,” and that insurers typically seek higher ratings because of their lower capital requirements while smaller agencies “may face commercial incentives” to provide more favorable grades).

⁶² IMF, *Rise and Risks*, *supra* note 21, Chapter 2, at 53.

assets stood at a record \$49.1 trillion, of which \$10.1 trillion was held in 401(k) plans.⁶³ Those plans have historically had almost no exposure to unlisted assets, consisting instead primarily of publicly traded mutual funds, bond funds, and broad index funds.⁶⁴ Only about four percent of defined contribution plans currently offer alternative investments, and just 0.1 percent of defined contribution plan assets are allocated to alternatives.⁶⁵ That could change dramatically under a series of recent federal actions.

On August 7, 2025, President Trump signed Executive Order 14330, titled “Democratizing Access to Alternative Assets for 401(k) Investors.”⁶⁶ The order declared it the “policy of the United States” that participants in employer-sponsored, participant-directed defined contribution plans should have access to funds that include investments in alternative assets—broadly defined to include private market investments (direct and indirect interests in equity, debt, or other financial instruments not traded on public exchanges), real estate, digital assets, commodities, infrastructure, and lifetime income strategies.⁶⁷ The order directed the Department of Labor (“DoL”), the Securities and Exchange Commission, and the Department of the Treasury to reexamine existing guidance on fiduciary duties under the Employee Retirement Income Security Act of 1974 (“ERISA”) as applied to alternative investments and to propose regulations or safe harbors within 180 days.⁶⁸

The DoL’s implementing regulation, titled “Fiduciary Duties in Selecting Designated Investment Alternatives,” was published on March 31, 2026, following the executive order’s original February 3 deadline.⁶⁹ The proposed rule establishes a process-based safe harbor under which an ERISA fiduciary selecting designated investment alternatives for a participant-directed defined contribution plan will be presumed to have satisfied the duty of prudence if the fiduciary objectively, thoroughly, and analytically evaluates six factors: (1) performance, including risk-adjusted expected returns net of fees; (2) fees, including reasonableness relative to comparable alternatives; (3) liquidity, accounting for both plan-level and participant-level needs (such as retirement, hardship withdrawals, and portability); (4) valuation, including the timeliness and accuracy of asset pricing and any conflicts of interest in the valuation process; (5) performance benchmarks; and (6) complexity, requiring the fiduciary to determine whether it possesses the skills, knowledge, and capacity to evaluate the investment, or must engage professional advisors.⁷⁰ Critically, the rule is “asset-class neutral”—it does not

⁶³ Inv. Co. Inst., *The US Retirement Market, Fourth Quarter 2025* (Mar. 26, 2026), https://www.ici.org/statistical-report/ret_25_q4.

⁶⁴ Gara, *Retirement Funds* *supra* note 15.

⁶⁵ Latham & Watkins LLP, *DOL Proposes New ERISA Safe Harbor for Alternative Investments in Retirement Plans* (Apr. 2, 2026), <https://www.lw.com/en/insights/dol-proposes-new-erisa-safe-harbor-for-alternative-investments-in-retirement-plans>.

⁶⁶ Exec. Order No. 14330, *Democratizing Access to Alternative Assets for 401(k) Investors*, 90 Fed. Reg. 38921 (Aug. 12, 2025), <https://www.federalregister.gov/documents/2025/08/12/2025-15340/democratizing-access-to-alternative-assets-for-401k-investors>.

⁶⁷ *Id.* § 2.

⁶⁸ *Id.* § 3 (b).

⁶⁹ Press Release, U.S. Dep’t of Labor, *US Department of Labor Proposes Landmark Rule* (Mar. 30, 2026), <https://www.dol.gov/newsroom/releases/ebsa/ebsa20260330>.

⁷⁰ Sullivan & Cromwell LLP, *U.S. Department of Labor Proposes Rule to Facilitate Alternative Investments in 401(k) Plans* (Apr. 2026), <https://www.sullcrom.com/insights/memo/2026/April/DOL-Proposes-Rule-Facilitate-Alternative-Investments-401k-Plans>.

categorically prohibit or favor any type of investment, including private equity, private credit, or digital assets.⁷¹ If the safe harbor is satisfied, the fiduciary’s judgment is entitled to a presumption of reasonableness and, in the DoL’s view, substantial judicial deference.⁷²

The safe harbor matters for a more immediate reason. The DoL’s preamble to the proposed rule identified litigation risk as a central reason for the near-total absence of alternative investments in defined contribution plans, citing more than 500 ERISA lawsuits filed since 2016 and more than \$1 billion in litigation settlements paid by plan sponsors.⁷³ By establishing a process-based presumption of prudence, the rule is designed to shift the burden in fiduciary litigation from the plan sponsor to the plaintiff, providing, in effect, a legal shield for plan administrators who follow the prescribed process. The DoL estimated that if finalized, the rule could result in approximately \$178 billion in retirement assets across 4.5 million participants being allocated to alternative investments.⁷⁴ The DoL further expects that the primary channel for alternative assets to enter defined contribution plans will be through target-date funds and other asset allocation vehicles — embedding private credit and other illiquid assets within the default investment options that the vast majority of 401(k) participants select through automatic enrollment.⁷⁵

Critics have been vocal. Senator Elizabeth Warren characterized the timing as reckless. She said that the President had decided to channel risky assets into Americans’ 401(k)s precisely as “cracks emerge in the private credit market” and “private equity returns fall to 16-year lows.”⁷⁶ The potential for harm to unsophisticated investors is not hypothetical. The gating provisions that have restricted sophisticated institutional investors from exiting private credit funds would apply with equal or greater force to retirement plan participants, who may have even less understanding of the illiquidity terms embedded in the products to which their retirement savings would be directed and, potentially, rendered illiquid.⁷⁷ The U.S. Supreme Court has granted certiorari in *Anderson v. Intel Corporation Investment Policy Committee*,⁷⁸ which will address whether plaintiffs alleging ERISA fiduciary breach based on fund underperformance must establish a “meaningful benchmark.” The decision in that case could substantially affect the viability of future claims brought by

⁷¹ Proskauer Rose LLP, *DOL Issues Proposed Rule and Safe Harbor Intended to Facilitate the Inclusion of Alternative Assets in 401(k) Plans* (Mar. 31, 2026), <https://www.erisapracticecenter.com/2026/03/dol-issues-proposed-rule-and-safe-harbor-intended-to-facilitate-the-inclusion-of-alternative-assets-in-401k-plans/>.

⁷² *Id.*

⁷³ Gibson, Dunn & Crutcher LLP, *DOL Proposes Safe Harbor for Selection of Designated Investment Alternatives in 401(k) Plans* (Apr. 2026), <https://www.gibsondunn.com/dol-proposes-safe-harbor-for-selection-of-designated-investment-alternatives-in-401k-plans/> (citing the proposed rule’s preamble).

⁷⁴ Latham & Watkins LLP, *supra* note 63.

⁷⁵ *Id.*

⁷⁶ Press Release, U.S. Senate Comm. on Banking, Hous. & Urb. Affs., *Warren Statement on Trump Department of Labor Proposed Rule to Shove Risky Assets Into Americans’ Retirements* (Mar. 31, 2026), [hereinafter *Warren Calls for Stress Test*] <https://www.banking.senate.gov/newsroom/minority/warren-statement-on-trump-department-of-labor-proposed-rule-to-shove-risky-assets-into-americans-retirements>.

⁷⁷ See Cong. Rsch. Serv., IN12674, *Private Credit Funds Redemption Restrictions: Market Context and Policy Issues* (2026), <https://www.congress.gov/crs-product/IN12674> (noting that “the recent wave of redemption requests suggests that some investors may not fully appreciate these illiquid features, particularly when asset valuations are uncertain” and that private credit funds generally cap quarterly redemptions at five percent of net asset value).

⁷⁸ *Anderson v. Intel Corp. Inv. Pol’y Comm.*, 137 F.4th 1015 (9th Cir. 2025), *cert. granted sub nom. Anderson v. Intel Corp. Inv.*, No. 25-498, 2026 WL 120679 (U.S. Jan. 16, 2026).

retirement plan participants against fiduciaries who allocated savings to underperforming private credit vehicles.⁷⁹

F. Distressed Investors Circling

The stress accumulating across the private credit landscape has not gone unnoticed by the opportunistic end of the capital markets. Distressed-debt funds, investors that specialize in acquiring distressed assets, typically from companies with impaired balance sheets but viable underlying operations, have identified the current downturn in private credit as their most promising opportunity in nearly two decades.⁸⁰

Whether distressed investors or incumbent private lending managers prove more accurate in their assessment, the divergence in views is itself notable. If losses materialize, contemporaneous public warnings from distressed investors may become part of the factual record by regulators, investors, courts, or counterparties assessing what risks were visible to market participants at the time.

IV. Litigation Risks

The current dislocations in the private credit market are generating litigation risks across multiple fronts. Some of those disputes have already ripened into filed cases. The first quarter of 2026 saw several class action lawsuits filed against BDCs alleging losses for shareholders as a result of false or misleading statements, including inaccurate portrayal of risk.⁸¹ It also saw the commencement of investor suits against banks that underwrote loans to companies that proved less robust than they appeared, alleging among other things the “double-pledging” of collateral and false financial statements.⁸² And as noted above, the Supreme Court agreed to review *Anderson v. Intel Corp. Inv. Pol’y Comm.*, which deals with whether plan sponsors may face fiduciary liability for including alternative investments such as private credit in defined contribution plans.⁸³ These early developments are notable not only as isolated disputes, but as indicators of how stress in private credit may manifest—less through continuous market repricing and more through ex post challenges to valuation, disclosure, and decision-making.

Five categories of litigation risk warrant immediate attention.

⁷⁹ See Alston & Bird LLP, *Investment Funds Advisory: DOL Proposal and Supreme Court Review Poised to Clarify Fiduciary Standards for Alternatives in 401(k) Plans* (Apr. 2026), <https://www.alston.com/en/insights/publications/2026/04/fiduciary-standards-alternative-investments-401k>.

⁸⁰ *Distressed Debt Hedge Funds Circle Private Credit as Dislocation Opportunity Builds*, Hedgeweek (Mar. 31, 2026), <https://www.hedgeweek.com/distressed-debt-hedge-funds-circle-private-credit-as-dislocation-opportunity-builds/> (reporting that distressed-debt funds have identified the private credit downturn as their best opportunity since the 2008 financial crisis).

⁸¹ *Goldman v. Blue Owl Capital Inc.*, No. 25-cv-10047 (S.D.N.Y.); *Burnell v. BlackRock TCP Cap. Corp.*, No. 2:26-cv-01102-AB-DFM (C.D. Cal. Feb. 3, 2026).

⁸² Complaint, *One William Street Capital Master Fund Ltd. v. JPMorgan Chase Bank, N.A.*, No. 1:26-cv-01622 (S.D.N.Y. Feb. 26, 2026); *Jefferies Sued by Investors Over Losses Tied to First Brands Collapse*, Reuters (Feb. 25, 2026, 5:08 PM), <https://www.reuters.com/legal/government/jefferies-sued-by-investors-over-losses-tied-first-brands-collapse-2026-02-25/>.

⁸³ *Anderson v. Intel Corp. Inv. Pol’y Comm.*, 137 F.4th 1015 (9th Cir. 2025), cert. granted sub nom. *Anderson v. Intel Corp. Inv.*, No. 25-498, 2026 WL 120679 (U.S. Jan. 16, 2026).

A. Distress, Default, and Insolvency Litigation

The most fundamental litigation risk in private credit is that borrowers will be unable to service the debt they incurred to finance their acquisition or growth. In the last 15 years, approximately \$2 trillion in direct loans have been made and much of that lending has occurred during a period of historically low interest rates, weakened underwriting standards, and intense competition among lenders to deploy capital.⁸⁴

As interest rates rose sharply beginning in 2022, many portfolio companies were saddled with capital structures that did not anticipate a 400-basis-point increase in borrowing costs, making deals that were lucrative when leverage was cheap far less economically viable.⁸⁵ Higher interest bills have compressed coverage ratios, made refinancing more difficult, slowed asset sales, and reduced distributions to private equity investors. This has created a cascade of pressure that increases the likelihood of covenant breaches, payment defaults, aggressive liability management, and potentially bankruptcy filings.⁸⁶

When defaults occur, they will trigger lender enforcement actions. If distressed private credit borrowers make new pacts with subsets of lenders or enter bankruptcy proceedings, lenders who received transfers from debtors may face fraudulent transfer litigation brought by disgruntled creditors or bankruptcy trustees, on the theory that transfers were made while the borrower was insolvent without receiving reasonably equivalent value in return. Private credit lenders that extended additional capital to troubled borrowers, such as through maturity extension or payment-in-kind arrangements, may face scrutiny, as trustees may argue that such transactions deepened the insolvency rather than remediated it.⁸⁷

The opacity of private credit compounds these risks. As noted, unlike regulated banks, private credit lenders are not subject to comparable capital requirements, stress testing, or ongoing supervisory oversight.⁸⁸ That may create second-order dispute risk if investors contend that material risks were not fully disclosed or appropriately valued.

As private credit lenders increasingly hold a borrower's entire capital structure, the enforcement actions that follow default will generate disputes among competing claimants over priority, valuation, and the conduct of the workout process.⁸⁹ Liability management exercises—credit agreement amendments that restructure lending arrangements in ways that may favor some lenders at the expense of others—are likely to migrate from the broadly syndicated loan market into private credit.⁹⁰ In the syndicated market, such exercises have already produced fierce intercreditor battles and novel litigation, including claims arising from “uptiering” or “dropdown” transactions or other collateral-stripping or dilutive maneuvers.⁹¹ Private credit loan agreements have historically included stronger protections against such tactics, but as deal sizes grow and lender groups

⁸⁴ Marks, *supra* note 4, at 4.

⁸⁵ Marks, *supra* note 4, at 10.

⁸⁶ *Id.*

⁸⁷ Ellias & de Fontenay, *supra* note 3 at 788-89.

⁸⁸ *Id.* at 849.

⁸⁹ *Id.* at 785.

⁹⁰ *Id.* at 832-33.

⁹¹ Susheel Kirpalani, et al., *Liability Management Exercises - Managing Litigation Risks in Financing for Distressed Borrowers*, Quinn Emanuel Urquhart & Sullivan, LLP (Nov. 25, 2024), <https://www.quinnemanuel.com/the-firm/publications/client-alert-liability-management-exercises-managing-litigation-risks-in-financing-for-distressed-borrowers/>.

become less cohesive, those protections may erode.⁹² Such financing transactions may generate disputes and can give rise to claims for breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference, fraudulent transfer, and aiding and abetting breach of fiduciary duty, among many others.⁹³

B. Securities Litigation

BDCs and their executives face a growing number of class action lawsuits asserting claims under Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, and Section 20(a) control-person liability.⁹⁴ Securities class actions have been filed against publicly traded BDCs for allegedly understating unrealized losses and misrepresenting loan valuations.⁹⁵ Enforcement and regulatory actions will likely follow. The SEC’s 2026 examination priorities signal heightened focus on investment advisers’ fiduciary duties for products involving illiquid assets and extended lock-up periods.⁹⁶

The SEC priorities document singles out “alternative investments (*e.g.*, private credit and private funds with investment lock-up for extended periods)” as a category of investment products warranting additional scrutiny, and directs examiners to assess whether advisers’ recommendations and disclosures are consistent with their fiduciary obligations with respect to, among other things, the cost, liquidity, risks, and characteristics of the products they recommend.⁹⁷ The SEC further announced that it will examine private fund advisors for regulatory awareness, valuation practices, fee structures, adequacy of disclosures, and differential treatment of investors, and will review compliance programs to determine if they address fee-related conflicts, particularly those arising from account and product compensation structures.⁹⁸

The SEC’s examination priorities are consequential for BDC advisers because several of the identified risk areas map directly onto structural features of private credit. As discussed below, the U.S. Attorney for the Southern District of New York flagged private fund adviser valuation as an enforcement focus, and the SEC

⁹² See Ellias & de Fontenay, *supra* note 3 at 832 n.231.

⁹³ Kirpalani, *supra* note 91.

⁹⁴ O’Melveny & Myers LLP, *Scrutiny in Private Credit—Potential Disputes Market Participants Should Watch Out For* (Mar. 13, 2026) (“BDCs and their executives have seen an uptick in class action lawsuits bringing securities-related claims under Section 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5.”); Kevin P. Broughel, *et al*, *Private Credit Developments: Regulatory Signals and Emerging Litigation Trends*, Katten Muchin Rosenman LLP (Apr. 9, 2026) (noting the uptick in litigation under Section 10(b) and Section 20(a)).

⁹⁵ William Fahey, Risks to watch as private credit’s growth outpaces oversight, Marsh (Mar. 31, 2026), <https://www.marsh.com/en/services/financial-professional-liability/insights/private-capital.html>.

⁹⁶ U.S. Sec. & Exch. Comm’n, Div. of Examinations, Fiscal Year 2026 Examination Priorities (2025) at 5-6, <https://www.sec.gov/files/2026-exam-priorities.pdf>.

⁹⁷ *Id.* at 5 (listing “alternative investments (*e.g.*, private credit and private funds with investment lock-up for extended periods)” as a category of investment products on which the Division will focus, and identifying advisers’ consideration of “cost, investment product’s or strategy’s investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility, likely performance in a variety of market and economic conditions, time horizon, and cost of exit” as areas for review).

⁹⁸ See *id.* at 5-6 (stating that the Division will focus on advisers “that have not previously advised private funds (*e.g.*, reviewing for regulatory awareness, liquidity, valuation, fees, disclosures, and differential treatment of investors, including use of side letters)”; *id.* at 6 (noting that examinations will assess “whether disclosures address fee-related conflicts, with a focus on conflicts that arise from account and product compensations structures”)); O’Melveny & Myers LLP, *supra* note 94 (discussing SEC examination focus on BDC valuation practices).

already settled claims against a fund manager selling loans to private equity sponsors at par value without fair value analysis. Together, those actions suggest that regulatory scrutiny may arrive first through case-by-case civil enforcement targeting valuation and fee practices rather than through new rulemaking.

Lawsuits filed in 2026 against several BDCs allege that fund managers misstated net asset values, delayed recognition of losses, and employed inadequate valuation processes. These claims strike at the structural opacity of private credit vehicles. One securities fraud class action, alleges that the BDC's investments were not being timely or appropriately valued, that unrealized losses were understated, and that the company's reported NAV was overstated, assertions filed shortly after the BDC disclosed in January 2026 that its per-share NAV had fallen 19 percent from the prior quarter and 23.4 percent year over year.⁹⁹

Credit ratings create a further securities litigation risk. If rating agencies' methodologies fail to accurately reflect the risk profiles of private credit portfolios, the agencies may face regulatory scrutiny and claims for fraudulent or negligent misrepresentation by investors who relied on those ratings when deciding to invest.¹⁰⁰ The post-2008 residential mortgage-backed securities litigation against rating agencies provides a template. In 2017, Moody's settled claims with the Department of Justice and a coalition of states alleging that Moody's "used a more lenient standard" than its own published credit rating standard and misled investors into purchasing high-risk mortgage-backed securities.¹⁰¹ As part of the settlement, Moody's acknowledged the conflict of interest that arose from the compensation model, identifying the effects of the same structural agency problem that breeds practices of "rating shopping" or "rating agency arbitrage" in the private credit world.¹⁰² The effects of this dynamic are visible in recent cuts to private credit funds' ratings, suggesting that there may be other funds with understated risk profiles.¹⁰³

C. Fiduciary Duty and ERISA Litigation

Investors in private credit funds may assert that fund managers breached their fiduciary duty of care by failing to conduct adequate due diligence of borrowers, failing to monitor portfolio health, overconcentrating in risky sectors, or delaying restructuring to avoid marking down positions.

Private credit's opacity magnifies these risks. Lending to entities with limited financial transparency, combined with reliance on internal valuation processes, creates conditions in which disputes may turn on the sufficiency of information available to both managers and investors. These issues may be acute where managers oversee multiple funds with overlapping competing exposures, raising questions about how decisions are made across different investors and whether conflicts are appropriately managed.

⁹⁹ See Katten Muchin Rosenman LLP, *Private Credit Developments: Regulatory Signals and Emerging Litigation Trends* (Apr. 9, 2026), <https://katten.com/private-credit-developments-regulatory-signals-and-emerging-litigation-trends>

¹⁰⁰ See *Warren Calls for Stress Test*, *supra* note 76.

¹⁰¹ Press Release, Dep't of Just., Justice Department and State Partners Secure Nearly \$864 Million Settlement with Moody's Arising From Conduct in the Lead up to the Financial Crisis (Jan. 13, 2017), <https://www.justice.gov/archives/opa/pr/justice-department-and-state-partners-secure-nearly-864-million-settlement-moody-s-arising>.

¹⁰² *Id.*; see *supra* notes 47, 80 & 81.

¹⁰³ See, e.g., Press Release, Moody's Ratings, Moody's Ratings downgrades FS KKR Capital Corp's senior unsecured rating to Ba1 from Baa3, changes outlook to stable from negative (Mar. 23, 2026), <https://ratings.moody.com/ratings-news/461835>.

ERISA claims present an additional source of exposure. As private credit expands to reach retail investors, a trend accelerated by a March 2026 proposed Department of Labor rule to broaden access to alternative investments in workplace retirement plans, plan fiduciaries who allocated funds to private credit strategies may face claims that they breached their duties of prudence, care, and loyalty.¹⁰⁴

The litigation environment is already hostile. Nearly 70 ERISA class actions were filed in the first quarter of 2026, nearly double the pace for the same period in each of the two prior years.¹⁰⁵ Twenty of the class actions filed in early 2026 target the performance of specific suites of target-date funds, the very vehicles through which the DoL expects private credit and other alternative assets to enter retirement plans.¹⁰⁶ If private credit vehicles are embedded in target-date funds through automatic enrollment, the range of stakeholders with an interest in those decisions may expand materially. Questions may arise as to whether fiduciaries appropriately evaluated liquidity, valuation, and complexity risks in light of ERISA’s duty of prudence.

The viability of these future claims may turn on the Supreme Court’s forthcoming decision in *Anderson v. Intel Corporation Investment Policy Committee*. Participants in Intel’s defined contribution plans filed a class action alleging that plan trustees had acted imprudently by allocating significant portions of plan assets to hedge funds, private equity, and other alternative investments that yielded lower returns than traditional investment options.¹⁰⁷ The Ninth Circuit affirmed dismissal on the pleadings, holding that when an ERISA plaintiff alleges imprudence based on claims that a prudent fiduciary would have selected a different fund, the plaintiff must identify a comparable investment alternative—a “meaningful benchmark”—to demonstrate that plan fiduciaries acted imprudently.¹⁰⁸ The Ninth Circuit acknowledged that nothing in ERISA’s text explicitly requires such a standard but reasoned that the requirement was implicit in the statute’s standard of care, which measures a fiduciary’s conduct against that of a hypothetical prudent person acting in a like capacity and with like aims.¹⁰⁹ The petitioners argue that this categorical pleading rule conflicts with ERISA’s context-specific prudence standard and with the Supreme Court’s recent decisions in *Hughes v. Northwestern University* and *Cunningham v. Cornell*, which cautioned against categorical rules at the pleading stage.¹¹⁰

The implications for private credit are direct. If the Supreme Court rejects the meaningful benchmark requirement, claims challenging the inclusion of private credit in retirement plan lineups may face fewer obstacles at the pleading stage. If the Court upholds the Ninth Circuit’s approach, the comparator requirement

¹⁰⁴ Fiduciary Duties in Selecting Designated Investment Alternatives, 91 Fed. Reg. ____ (proposed Mar. 31, 2026) (implementing Exec. Order No. 14330, *Democratizing Access to Alternative Assets for 401(k) Investors* (Aug. 7, 2025)).

¹⁰⁵ Jacklyn Wille, *ERISA Class Actions Soar in 2026 as New Legal Theories Emerge*, Bloomberg L. (Apr. 13, 2026), <https://news.bloomberglaw.com/employee-benefits/erisa-class-actions-soar-in-2026-as-new-legal-theories-emerge>.

¹⁰⁶ *Id.*

¹⁰⁷ *Anderson v. Intel Corp. Inv. Pol’y Comm.*, 137 F.4th 1015, 1019-20 (9th Cir. 2025), *cert. granted sub nom. Anderson v. Intel Corp. Inv.*, No. 25-498, 2026 WL 120679 (U.S. Jan. 16, 2026); *see also* Cong. Rsch. Serv., LSB11396, Supreme Court to Examine ERISA Pleading Standards (Feb. 12, 2026), <https://www.congress.gov/crs-product/LSB11396>.

¹⁰⁸ *Id.* at 1021.

¹⁰⁹ *Id.* at 1021-22.

¹¹⁰ *Hughes v. Nm. Univ.*, 595 U.S. 170, 177 (2022) (holding that ERISA’s duty of prudence requires “a context-specific inquiry” and that “[a]t times, the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs”); *Cunningham v. Cornell Univ.*, 604 U.S. 693 (2025); *see also* Sidley Austin LLP, *Anderson v. Intel – U.S. Supreme Court Grants Certiorari: Implications for ERISA “Excessive Fee” Litigation* (Jan. 26, 2026), <https://www.sidley.com/en/insights/newsupdates/2026/01/anderson-v-intel-us-supreme-court-grants-certiorari-implications-for-erisa-excessive-fee-litigation>.

could remain a substantial obstacle where observable public market analogues are difficult to identify. Either outcome will reshape the litigation landscape for private credit in retirement plans, making *Anderson* one of the most consequential pending cases.¹¹¹

D. Redemption, Gating, and Contract Disputes

Contract claims will likely cluster around redemption mechanics, gating decisions, side-letter rights, valuation dates, good-faith exercise of discretion, and compliance with investment guidelines. When a fund honors redemptions for some investors but limits others, changes tender caps, or relies on a challenged NAV, plaintiffs will likely test every procedural step. These disputes are likely in retail-facing vehicles, where expectations about liquidity are often shaped as much by marketing and adviser communications as by the governing documents themselves.

E. Valuation and Fee Related Disputes

The accuracy of reported net asset values will emerge as a point of dispute. Private credit loans do not trade on secondary markets. Their valuations are determined by fund managers with significant discretion, subject to external audits only annually.¹¹² As the IMF has cautioned, the absence of secondary market pricing means that private credit loans may suffer from stale valuations, and the lack of market prices increases the potential for managerial manipulation.¹¹³ These risks may create exposure where valuations are not timely updated or where valuation methodologies later come under scrutiny. Earlier this year, the SEC settled claims against a private fund manager for selling loans to private equity sponsors at par value without consideration of the loans' fair market value.¹¹⁴

Valuation disputes also implicate fee calculations because reported NAV can affect the fees that managers earn. That relationship may create conflict-of-interest questions and, in some circumstances, provide an additional basis for investor, regulatory, or contractual disputes. In November 2025, the U.S. Attorney for the Southern District of New York flagged as an enforcement focus whether private fund advisers “cherry-pick prices” that benefit themselves through higher fees.¹¹⁵ As markdowns increase and redemption pressures mount, disputes over whether reported NAVs accurately reflected portfolio values will intensify. The ongoing push for more frequent valuations may mitigate this risk over time,¹¹⁶ but the transition itself may generate disputes over methodology, timing, and the impact of revised valuations on investor rights.

¹¹¹ Ropes & Gray LLP, *Update on 401(k) Alternatives: Supreme Court Chooses to Hear Intel and DOL Guidance Expected Imminently* (Jan. 20, 2026), <https://www.ropesgray.com/en/insights/alerts/2026/01/update-on-401k-alternatives-supreme-court-chooses-to-hear-intel-and-dol-guidance-expected-imminently>.

¹¹² Elias & de Fontenay, *supra* note 3, at 839.

¹¹³ IMF, *The Last Mile: Financial Vulnerabilities and Risks*, Global Financial Stability Report 64-65 (Apr. 2024); *see also id.* at 65 n.10 (noting that “[t]hird-party valuation may not fully address the risks [of managerial manipulation], as evidence suggests that profit-driven service providers, appointed and compensated by clients, may prioritize client retention over impartiality”).

¹¹⁴ Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Illinois Investment Adviser for Breaching Its Fiduciary Duty and Contravening Its Disclosures (Feb. 25, 2026).

¹¹⁵ Todd S. Fishman & Philip M. Guess, *Private Lending: Unfolding Litigation Developments and Managing Risks*, K&L Gates (Mar. 18, 2026).

¹¹⁶ *See, e.g.*, Liz Kiesche, *Apollo Aims to Mark Private Credit Daily, Eventually – Report*, Seeking Alpha (Mar. 11, 2026, 3:04 PM), <https://seekingalpha.com/news/4563392-apollo-aims-to-mark-private-credit-daily-eventually---report>.

V. Conclusion

Private credit does not need to trigger a financial crisis before it will create litigation. The market's defining features—illiquidity, bespoke documentation, manager-driven valuation, retail distribution, and growing interconnection with banks and insurers—create the kind of factual record from which complex disputes grow. For sponsors, lenders, fund managers, boards, insurers, banks, and plan fiduciaries, this moment is less about predicting collapse than about preparing for inevitable disputes.

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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