401(k) Fee Cases
Groom Law Group, Chartered

September 27, 2016

Active cases are highlighted in yellow.

Participant Claims Against Sponsors And Related Fiduciaries						
No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
Second Circuit						
1.	*Taylor v. United Technologies Corp.*, 3:06-cv-01494-WWE (D. Conn. filed 9/22/06) Amended complaint filed on 12/11/07 Second amended complaint field on 4/9/08 Judge Warren W. Eginton	Motion to dismiss granted, in part, on 8/9/07, dismissing breach of fiduciary duty claim based on non-disclosure of revenue sharing fees, holding that ERISA does not require such disclosure.	Motion to Certify Class granted on 6/5/08.	Motion for summary judgment filed by United Technologies on 6/7/08. Motion for summary judgment filed by United Technologies on 6/6/08 specific to two named plaintiffs who are allegedly barred from asserting claims pursuant to claims release agreements.	**Significance:** 1. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) did not consider/capture float; and (2) chose to use actively-managed mutual funds. Plaintiffs also allege (although it is not entirely clear) that there is an issue as to whether defendants engaged in prohibited transactions by receiving a "corporate benefit" (and benefiting Fidelity) due to plan participants' investing in Fidelity managed high cost mutual funds which paid revenue sharing to Fidelity. Plaintiffs allege that Fidelity is defendant's "largest shareholder." Plaintiffs also allege that participants investing in revenue-sharing mutual funds paid a disproportionately higher portion of the plan's administrative fees. 2. In dismissing fiduciary breach claims based on failure to disclose	

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					revenue sharing, court cited the *Hecker* decision, which has since been affirmed by the Seventh Circuit on appeal. 3. Summary judgment granted in favor of United Technologies on March 3, 2009. The court ruled that: (1) defendants properly monitored the level of cash in the company stock fund; (2) defendants properly selected mutual funds; (3) recordkeeping fees were reasonable when compared to the market rate; (4) information on revenue sharing is not material to an objectively reasonable investor; and (5) defendants did not breach fiduciary duty in not disclosing that revenue sharing was used to reduce the amount United Technologies was paying to subsidize the plan's recordkeeping expenses. 4. Decision appealed to the United States Court of Appeals for the Second Circuit. Oral arguments held on 11/20/09. 5. On December 1, 2009, the Second Circuit summarily affirmed the district court's decision granting summary judgment in favor of United Technologies.	

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2.	*Montoya v. ING Life Ins. and Annuity Co.*, 1:07-cv-02574 (NRB) (S.D.N.Y. filed 3/28/07); 2:10-cv-02068-LDW-ARL (removed 5/7/10); 10-5314, 11-1132 (2d Cir.) Judge Naomi Reice Buchwald (SDNY) Judge Leonard D. Wexler (EDNY)	Motion to dismiss for lack of jurisdiction renewed on 9/2/08 upon completion of jurisdictional discovery. Motion to dismiss for lack of jurisdiction granted on 8/31/09. Motion to dismiss based on SLUSA granted on 11/23/2010.	Not made.	Not made.	**Significance:** 1. Alleges that New York State United Teachers recommended ERISA § 403(b) plan providers in return for endorsement fees and that the plan providers improperly received revenue sharing payments. 2. On 8/31/09, the court granted the defendants' motion to dismiss the action for lack of subject matter jurisdiction, finding that the plan in issue is a governmental plan exempt from Title I of ERISA. 3. On 2/25/10, plaintiffs re-filed this action in the Supreme Court of the State of New York, Nassau County, alleging a breach of fiduciary duty under New York common law. On 5/7/10, the case was removed to the U.S. District Court for the Eastern District of New York (10-cv-2068) under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). 4. On November 23, 2010, district court dismissed the lawsuit based on SLUSA. 5. The plaintiffs appealed the district court's order dismissing	

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					the case to the Second Circuit. 6. On July 25, 2011, the appeal was dismissed pursuant to a settlement.	
3.	*Knee v. J.P. Morgan Retirement Plan Services, LLC* No. 13-CV-6337 (JGK) (S.D.N.Y., filed Sept. 10, 2013)	Not made.	Not made.	Not made.	**Significance:** 1. Plaintiffs, participants through several 401(k) plans in American Century's Stable Asset Fund, filed a class action complaint against J.P. Morgan Chase & Co. and its affiliates ("JPM") alleging that they abused their fiduciary roles to acquire control from another company of a "stable" retirement fund by "totally decimat[ing]" the fund then acquiring it at no cost. Plaintiffs alleged that JPM breached its fiduciary duties of loyalty and the exclusive benefit rule under sections 404 and 409 of ERISA, engaged in prohibited transactions, and that JPM affiliates knowingly participated in such breaches. 2. In support of their complaint, plaintiffs cited an August 2011 arbitration award of $380 million against JPM in which the arbitrators ruled that JPM breached a contract with American Century under which JPM had agreed to promote American Century funds. Rather	

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					than honor the contract, the arbitrators found that JPM worked to shift clients from American Century funds to JPM Funds. 3. On 12/8/14, the cases were all consolidated into one matter titled the *In re J.P. Morgan Stable Value Fund ERISA Litigation*.	
4.	*Patrico v. Voya Financial, Inc.* No. 1:16-cv-07070 (S.D.N.Y., filed Sept. 9, 2016) Judge: Lorna G. Schofield Attorneys: Schneider, Wallace, Cottrell, Konecky, & Wotkyns	Not Yet Filed.	Not Yet Filed.	Not Yet Filed.	Plaintiffs filed suit against Defendants alleging a breach of fiduciary duties and ERISA prohibited transaction rules on account of the Plan provider (Voya) receiving "excessive fees" as a result of its contract with a financial advisement company. Specifically, the Plaintiffs allege that the Defendants entered into a forbidden agreement with the investment company in order to gain for itself excessive and inappropriate profits at the expense of plan participants.	**N/A**
Third Circuit						
5.	*Renfro v. Unisys Corp.*, 2:07-cv-2098-BWK (E.D. Pa. filed 12/28/06 in the C.D. Cal.); 10-2447 (3d Cir. 5/23/2007).	Motion to dismiss filed by Fidelity on 9/7/07. Motion to dismiss first amended complaint filed by Fidelity dismissed as moot on	Not made.	Motion for summary judgment filed by Unisys on 9/07/07. Motion for summary judgment filed by Unisys dismissed as moot on 10/8/09.	**Significance:** 1. Case transferred from Central District of California by order dated 4/17/07. 2. The second amended complaint alleges that defendants (1) did not monitor what similar	

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	Amended Complaint filed 7/17/2007 Second Amended Complaint filed 9/3/09 Judge Berle M. Schiller	10/8/09. Motion to dismiss second amended complaint filed by Fidelity on 10/19/09. Motion to dismiss second amended complaint filed by Fidelity denied in part on 2/19/10.		Motion to dismiss or for summary judgment filed by Unisys on 10/19/09. Motion to dismiss or for summary judgment filed by Unisys denied in part on 2/19/10.	401(k) plans were paying for investment management and administrative services; (2) did not consider offering less expensive investment options providing similar services; (3) did not ensure that the plan did not pay retail investment management fees and administrative fees without receiving services beyond those received by retail investors; (4) did not ensure that investment management and administrative fees did not increase without a commensurate increase in the services provided; and (5) did not understand how float contributed to service provider compensation. Plaintiffs allege that defendants' improper actions resulted in excessive investment management and administrative fees and inadequate investment performance. Plaintiffs also allege that Fidelity committed fiduciary breach by not disclosing how it earned income from float. 3. On 2/19/10, the court dismissed in part the Unisys defendants' motion to dismiss or for summary judgment. The court rejected the Unisys defendants' argument that plaintiffs failed to demonstrate constitutional standing by failing to allege a personal injury. The court found	

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					that the plaintiffs' allegation that the plan and the plaintiffs' class suffered financial losses and damages was sufficient to allege personal injury. 4. On 2/19/10, the court dismissed in part the Fidelity defendants' motion to dismiss. The court rejected the Fidelity defendants' argument that the complaint could be dismissed in its entirety on statute of limitations grounds. The court explained that even if the selection of allegedly expensive funds occurred more than six years ago, the fiduciaries had a continuing duty to monitor investment options, and if necessary, remove funds that were no longer appropriate. 5. On 4/26/10, the court granted Fidelity's motion to dismiss the case and Unisys's motion to dismiss the case or for summary judgment. In ruling that the case should be dismissed, the court found that: (1) Fidelity did not become a fiduciary by exercising a "veto power" over plan investment options because Unisys was not prohibited from establishing an additional trust for the plan and offering non-Fidelity investment options within such	

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					trust; (2) whether Fidelity was a fiduciary with respect to float (a plan asset) did not matter because plaintiffs were challenging Fidelity's role in investment options selection; (3) Unisys did not breach its fiduciary duty in selecting investment options for the plan because the plan offered more than 70 mutual funds with fees ranging from 0.1% to 1.21% (and agreeing with *Hecker* that a plan fiduciary "need not select the cheapest fund available"); (4) Unisys had an "incentive" to use its "market power" to negotiate lower fees, and that this incentive suggested that the agreement that Unisys negotiated with Fidelity was a result of "an arm's length bargain and therefore need[ed] less judicial oversight to insure fairness to plan participants and beneficiaries"; and (5) Unisys's failure to disclose revenue sharing information could not form the basis for a fiduciary breach claim since plan participants were made aware of "the fees they would pay for allocating their [p]lan contributions to particular funds," and "[t]o whom that money ultimately flowed would seem irrelevant to a participant once it left his wallet." In ruling that Unisys was entitled to summary judgment, the court concluded	

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					that even assuming that Unisys breached its fiduciary duty in selecting "overly expensive funds," ERISA section 404(c) precluded Unisys's liability for any resulting losses. 6. Decision appealed to the Third Circuit. 7. On 8/19/11, the Third Circuit affirmed the district court's order dismissing the case. Following the Seventh Circuit's analysis in *Hecker v. Deere*, the Third Circuit ruled that the plaintiffs failed to state a claim because the plan offered "a reasonable range of investment options with a variety of risk profiles and fee rates." The Third Circuit also ruled that Fidelity did not act as a fiduciary in selecting and maintaining the plan's investment options because Unisys was free to add non-Fidelity investments to the plan's line-up of investment options by administering such investments itself or contracting that function to another party. The Third Circuit did not reach the district court's alternative conclusion that Unisys was entitled to summary judgment based on ERISA section 404(c).	

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Sixth Circuit						
6.	*In re Honda of Am. Mfg., Inc. ERISA Fees Litig.*, 2:08-cv-01059 GLF-TPK (S.D. Ohio filed 11/10/08) Amended Complaint filed 3/20/09 Judge Gregory L. Frost	Motion to dismiss filed by Honda defendants granted on 10/9/09. Motion to dismiss filed by Merrill Lynch granted on 10/13/09.	Moot in light of dismissal.	Not made.	**Significance:** 1. Plaintiffs alleged that defendants acted improperly by: (1) allowing a sizable number of the investment options to be retail mutual funds affiliated with Merrill Lynch, the plan's record-keeper and directed trustee; (2) failing to make various disclosures, including the fact that the investment options had excessive fees; and (3) engaging in self-dealing prohibited transactions. 2. On 10/9/09, the court granted the Honda defendants' motion to dismiss the case. The court followed the rationale of *Hecker v. Deere* and ruled that: (1) selecting multiple funds offered by a single provider was not prohibited by ERISA; (2) offering retail mutual funds was not imprudent because such funds' fees are set against the backdrop of market competition, and the plaintiffs were factually incorrect in alleging that the Merrill Lynch funds were retail mutual funds; (3) the defendants did not have a disclosure duty beyond the specific disclosure requirements found in ERISA; and (4) the	

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					plaintiffs failed to state a plausible self-dealing claim because the Honda defendants did not benefit financially from any fees paid to Merrill Lynch. 3. On 10/13/09, the court granted Merrill Lynch's motion to dismiss the case. The court declined to decide whether Merrill Lynch was a plan fiduciary, but held that since the claims against Merrill Lynch are identical to the claims against the Honda defendants, the claims against Merrill Lynch must be dismissed for the same reasons.	
7.	*Kruger v. Novant Health, Inc.*, 1:14-cv-208 (M.D.N.C. filed 3/12/14)	Motion to dismiss filed 5/20/14, denied on 9/17/2015.		Not made.	1. On March 12, 2014, current and former participants in two 401(k) plans sponsored by Novant initiated a class action. The complaint alleges that the fiduciaries of the plan violated their fiduciary duties under ERISA by allowing excessive fees to be paid to the plan's broker and record-keeper and by including more expensive share classes for the plan's mutual funds. 2. On September 17, 2015, the district court entered an order denying defendants' motion to dismiss plaintiffs' complaint, finding that the complaint sufficiently stated a cause of	

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					action for breach of fiduciary duty against defendants for offering "only retail class shares to participants when identical, less expensive, institutional class shares of the same funds were available." Noting that the Fourth Circuit has never decided whether excessive fee claims can survive a motion to dismiss, the court looked to other circuits in holding that while this was a "close call," the claims were sufficient. In its analysis, the court differentiated *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) on the basis that the fees there were much lower and did not involve identical investment vehicles offered at a lower fee. As for the excessive fees allegedly paid for recordkeeping to the plan service provider, Great-West, the court held that the complaint stated a claim that "the failure to monitor the sudden spike in recordkeeping fees rendered [the fiduciaries' judgment imprudent."	
Seventh Circuit						
8.	*Hecker v. Deere & Co.*, 3:06-cv-0719 (W.D. Wisc. filed 12/8/06); No. 08-1224 (7th Cir.	Def. Fidelity filed motion to dismiss on 3/9/2007 (Dkt. # 36-37), Def. Deere filed motion to dismiss on 3/19/2007 (Dkt. #	Moot in light of dismissal.	Moot in light of dismissal.	**Complaint Details** 47,000 Plan participants $113 billion in Plan assets as of	District Court affirmed on 2/12/2009 (7th Cir. Dkt. # 58)

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	filed 1/29/2008) Judge John C. Shabaz Plaintiff's Firm: Schlichter, Bogard & Denton	39-40) Motions to dismiss granted with prejudice on 6/20/07 (Dkt. # 102) because (a) plaintiffs failed to state a claim for non-disclosure under ERISA; (b) defendants were insulated by 404(c) safe harbor provision; and (c) Fidelity defendants had no fiduciary responsibility for making plan disclosures or selecting plan investments. Motion for reconsideration denied by order dated 10/19/07 (Dkt. # 112).			March 2006 **Significance:** 1. The court ruled that disclosure of revenue sharing was not required by ERISA or DOL regulation. 2. The court ruled that alleged losses resulted from participants' exercise of control over their investments, so that ERISA § 404(c) shielded defendants from liability. The court thus rejected DOL's longstanding position that § 404(c) is not a defense to fiduciaries' improper selection of investment options. 3. Fidelity defendants had no fiduciary responsibility for making plan disclosures or selecting plan investments. 4. Decision appealed to the United States Court of Appeals for the Seventh Circuit. 5. Seventh Circuit held oral arguments on 9/4/08. 6. On 2/12/09, Seventh Circuit affirmed the district court's decision dismissing the case. Seventh Circuit held that: (1) revenue sharing information is not	

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					material and did not need to be disclosed; (2) the plan offered a sufficient mix of investments so that inclusion of allegedly expensive funds did not constitute a fiduciary breach; and (3) even if there was a breach with respect to fund selection, section 404(c) precluded liability for the breach. 7. On 3/9/09, plaintiffs filed a motion for panel rehearing or for rehearing en banc. Plaintiffs argue that defendants only offered retail mutual funds which are never appropriate for a large plan, and that as no proper investment option was offered, 404(c) cannot shield defendants from liability. 8. On 6/24/09, the Seventh Circuit denied plaintiffs' petition for rehearing. The Seventh Circuit commented on the Secretary of Labor's amicus brief in support of rehearing by stating that a footnote (in the preamble to the 404(c) regulation) which states that 404(c) does not shield fiduciaries from improper selection of investment options is not entitled to *Chevron* deference. The Seventh Circuit, however, stated that it did not generally rule on the scope of 404(c) defense and that its decision applies only to the facts stated in the *Deere*	

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					complaint. 9. On 1/19/2010 the Supreme Court denied plaintiffs' petition for a writ of certiorari.	
9.	*Abbott v. Lockheed Martin Corp.*, 3:06-cv-00701 (S.D. Ill. filed 9/11/06); Nos. 12-8037, 12-3736 (7th Cir. filed 11/30/12). Judge Michael J. Reagan Plaintiff's Firm: Schlichter, Bogard & Denton	Defendants filed motion to dismiss on 11/2/2006 (Dkt. # 20-21) Court denied motion to dismiss on 8/13/07 (Dkt. # 73), holding complaint satisfied notice pleading standard. Motion to dismiss did not address merits of claims.	Class certification proceedings stayed pursuant to order dated 9/14/07 due to *Lively* appeal. On 11/6/08, motion for class certification was denied without prejudice in light of the filing of an amended complaint. On 1/22/09, plaintiffs filed a second motion for class certification. On April 3, 2009, the court granted class certification as to the claims regarding the excessive fees and the stable value fund, but denied class certification as to the claim regarding the company stock fund. On 3/15/11, the Seventh Circuit vacated the district	Not made. Defendants' motion for summary judgment granted in part and denied in part on 3/31/09. Plaintiffs' motion for partial summary judgment as to liability on their excessive recordkeeping fee claim denied on 3/31/09.	**Complaint Details** 120,000 Plan participants $14 billion in Plan assets **Significance:** 1. Amended complaint filed on 11/7/08. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) used retail mutual funds; (2) used fraudulent benchmarks; (3) falsely represented a money market fund as a stable value fund, and made it the plan's default investment option; (4) used a unitized company stock fund; and (5) engaged in prohibited transactions. 2. On 3/31/09, the court denied plaintiffs' motion for partial summary judgment, and granted in part and denied in part defendants' motion for summary judgment. The revenue sharing claims were dismissed based on the Seventh Circuit's ruling in *Hecker v. Deere*. The claims	Joint Motion for Preliminary Approval of Settlement filed 2/20/2015 (Dkt. # 491) Settlement Agreement: Gross Settlement Amount of $62 M, which includes Attorneys' fees not to exceed $20.6M, costs not to exceed $1.85M, Class Representatives' Compensation not to exceed $25k to each rep Final Orders issued 7/20/2015 (Dkt. # 525, 526) – Court approved $20.6M in attorneys' fees, $1.6M in costs, and $25k to each class rep

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			court's order granting class certification. On November 16, 2011, Plaintiffs filed an amended Motion for Class Certification. On September 24, 2012, the district court granted class certification as to the claims regarding excessive fees and to a sub-class of the company stock fund claim. The court denied certification as to the stable value fund claim, and to a separate subclass of the company stock fund claim. On 11/30/12, plaintiffs appealed the denial of class certification to the Seventh Circuit, which issued an opinion reversing the district court on 8/7/13. On 1/3/2014, plaintiffs filed an amended motion to		regarding float and a growth fund were both dismissed for not falling within the scope of the amended complaint. As an alternative basis for the dismissal of the claim regarding the growth fund, the court held that *Hecker v. Deere* (7th Cir.) precluded plaintiffs from arguing that the growth fund was improper because it was a retail mutual fund instead of a separate account. The court also held that: only acts that took place within six years of the filing of the complaint could form the basis of a fiduciary breach claim due to ERISA's statute of limitations; plaintiffs had standing to assert claims with respect to funds in which they may have not invested in because ERISA allows plan participants to seek to recover damages owed to the plan; and *Hecker v. Deere* (7th Cir.) precluded plaintiffs from challenging 404(c) conditions that were not challenged in the amended complaint. The court ruled that the following issues would need to be resolved at trial: whether investment options with excessive fees were offered in the plan; whether the stable value fund was managed in accordance with disclosure documents; and whether there was excessive cash	

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			certify the class.		in the company stock fund. 3. On 4/3/09, the court granted class certification as to the claims regarding the excessive fees and the stable value fund, but denied class certification as to the claim regarding the company stock fund. The court ruled that participants whose frequent trading activities created the need for a greater cash buffer in the company stock fund were antagonistic to other participants. 4. On 2/10/10, the court ruled that plaintiffs' attempt to pursue plan-wide relief for the stock fund claim through a derivative action brought by one of the named plaintiffs would not be allowed. The court explained that plaintiffs' pleadings failed to provide adequate notice that the plaintiffs intended to pursue a direction action claim. The court also explained that plaintiffs cannot seek plan-wide relief without there being procedural safeguards to protect absent members and to prevent redundant suits. 5. On 3/15/11, the Seventh Circuit vacated the district court's class certification order and directed the district court to consider class certification based	

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					on the Seventh Circuit's class certification opinion in *Spano v. Boeing*. 6. On 9/21/11, the district court issued an order permitting the plaintiffs to amend their complaint to add two new named plaintiffs, but denying plaintiffs permission to amend their complaint otherwise. Plaintiffs filed a second amended complaint on 10/12/11. 7. On 9/24/12, the district court granted in part and denied in part the plaintiffs' amended Motion for Class Certification. The court granted certification to the claim regarding excessive fees. However, the court denied certification to the claim alleging an improper selection of a stable value fund, taking issue with the benchmark assumptions made by plaintiffs in articulating this proposed class. With respect to the company stock fund claim, the court granted certification to one proposed subclass, but denied certification to the other subclass, holding that the proposed subclass was not defined adequately enough to satisfy the typicality requirement. 8. On 11/30/12, plaintiffs	

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					appealed to the Seventh Circuit the parts of the district court's 9/24/12 order denying them class certification with respect to the stable value fund class. The appeal is fully briefed and oral argument was conducted on 5/29/13. 9. On 8/7/13, the Seventh Circuit reversed the district court's denial of class certification holding that the participants would not be deemed at the class certification stage to lack standing to sue. The Seventh Circuit also held that a reference in the class definition to an index that tracked performance of a varied of stable value funds ("SFV") over time did not improperly prejudge the merits of the SFV claim. Finally, the Seventh Circuit held that the claim was suitable for class treatment despite defendants' contention that it was one of imprudent management due to deviation for a mix of investments held by other funds bearing a "stable value" label. The district court then certified the SFV class by order dated 8/1/14. 10. On 12/16/14, the parties cancelled their bench trial set for that day based on a provisional settlement. No proposed	

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					settlement has been filed with the court. 11. On 2/20/15, the parties filed a motion for preliminary approval of settlement that the court approved by order entered on 4/30/15. Pursuant to the terms of the preliminary settlement agreement, Lockheed will pay $62 million to settle plaintiffs' claims. In the settlement, Lockheed also agreed to certain non-monetary relief. First, it has agreed to file annual notices assuring compliance with the settlement. The notice will include monthly evaluations on the average portion of the plan's stable value fund that is allocated to money market instruments; monthly evaluations on the average portion of the plan's company stock funds that are allocated to cash equivalents; and monthly reports summarizing the characteristics of the funds, including with respect to performance. Second, Lockheed must receive bids from at least three third-party recordkeeping services for its savings plan. The bids and the final selection of a record keeper must be reported to the court. Lastly, Lockheed will offer funds that have the lowest expense ratios, if available, and	

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					will also consider the use of collective investment trust or separately managed accounts. The court held a final fairness hearing on 7/17/15 and entered a final order and judgment approving the settlement on 7/20/15.	
10.	*Beesley v. International Paper Co.*, 3:06-cv-00703 (S.D. Ill. filed 9/11/06) Amended complaint filed on 5/1/08 Second amended complaint filed on 9/7/11 Judge David R. Herndon Plaintiff's Firm: Schlichter, Bogard & Denton	Defendants filed motion to dismiss for improper venue on 11/3/2006 (Dkt. # 34-35), which was amended on 3/14/2007 (Dkt. # 64-65) Court denied motion to dismiss on 8/24/07 (Dkt. # 83).	The stay on class certification proceedings, imposed on 8/24/07 due to *Lively* appeal, was lifted on 4/4/08. The order lifting the stay notes that the litigants in the Lively case are set to settle their case before the class certification issue is resolved by the Seventh Circuit. Motion for class certification granted on 9/26/08. On 1/21/2011, the Seventh Circuit vacated the district court's class certification order.	On 1/23/09, plaintiffs filed a motion for summary judgment as to liability on alleged failures by defendants to: (1) allocate to the plan securities lending revenue generated before a securities lending program was implemented; and (2) implement a securities lending program earlier. On 1/23/09, defendants filed a motion for summary judgment on most of the claims alleged in the complaint. Among the arguments that defendants are making is that it is improper to make comparisons to	**Complaint Details** 175,000 current and former Plan participants $4 billion in Plan assets in 2004 **Significance:** 1. Amended complaint filed on 5/1/08. In addition to revenue sharing, plaintiffs allege – without alleging details – that International Paper engaged in prohibited transactions by: (1) entering into agreements with service providers, whereby International Paper benefited rather than plan participants; (2) placing revenue generated from plan assets in corporate accounts; (3) causing participant contributions to be transferred into accounts held by International Paper, and from which International Paper received a benefit at the expense of the participants; (4) entering	Joint Motion for Preliminary Approval of Settlement filed 10/1/2013 (Dkt. # 529) Settlement Agreement: Gross Settlement Amount of $30 M, which includes Attorneys' fees not to exceed $10M, costs not to exceed $1.7M, Class Representatives' Compensation not to exceed $25k to each rep Final Orders issued 1/31/2014 (Dkt. # 559, 560) – Court approved $10M in attorneys' fees, $1.5M in costs, and $25k to each class rep

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				International Paper's defined benefit plan. On 9/17/2012, the district court denied the parties' motions for summary judgment as premature in light of the pending issue of class certification.	into service agreements with service providers, with whom there were conflicts of interest; (5) allowing company stock to remain as an investment option; (6) forcing plan participants to own company stock in order to have a 401(k) plan and "prohibiting them from selling it until age 55"; and (7) favoring the defined benefit plan which was run by the same managers, and thereby causing lower investment returns and performance for the 401(k) plan. Plaintiffs also allege that charging fees through a master trust arrangement not only results in confusing fee disclosures, but that it actually results in higher fees. Plaintiffs allege that using a master trust arrangement – International Paper used a separate master trust for each investment option – results in "layer[s]" of fees. Plaintiffs further allege that International Paper used improper and misleading benchmarks (including "custom-designed[,]" non-market benchmarks) to misrepresent the performance of the investment options. 2. In a supplemental brief filed on 4/27/09 opposing defendants' motion for partial summary judgment, Plaintiffs argue that	

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					Hecker v. Deere (7th Cir.) is not applicable because *Deere* offered mutual funds, whose fees are arguably set at a competitive rate due to market competition, while International Paper offered separate accounts. 3. On 8/10/09, the Seventh Circuit granted defendants' petition for leave to appeal the class certification order. 4. On 2/18/10, the court entered an order staying the case pending resolution of the appeal on the class certification order. 5. On 1/21/2011, the Seventh Circuit vacated the district court's class certification order. The Seventh Circuit ruled that the class definition was too broad to meet the typicality and adequacy of representation requirements. As to these requirements, the Seventh Circuit opined that a class representative must at a minimum have invested in the same funds as the class members and must not have a conflict of interest with the class members. The Seventh Circuit explained that many participants within the approved class may not have a complaint with respect to a challenged fund depending on the dates they	

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No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
					invested and exited the fund. The Seventh Circuit also noted that for some misrepresentation claims, it may be "difficult to find a class representative with claims typical of enough people to justify class treatment." 6. On 3/2/11, the plaintiffs filed an amended motion to certify class (defining subclasses) and a motion, alternatively, to pursue a direct action for fiduciary breach. 7. On 9/8/11, the plaintiffs filed a second amended complaint to add additional named plaintiffs and to revise the class action allegations (defining subclasses). 8. On 10/10/13, the court issued an order granting the parties' motion for approval of a preliminary settlement. In total, International Paper ("IP") agreed to pay $30 million. The proposed settlement creates three sub-classes—the settlement class, the large cap stock fund sub-class, and the company stock fund sub-class. IP agreed to the following terms: IP will not prohibit employees from transferring their investments out of the Company Stock Fund; IP will not offer retail mutual funds; will not allow the Plans'	

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					record-keeper to be paid on a percentage of assets basis; will not profit from the Plans; will competitively bid the Plans' recordkeeping services; will rebate to the Plans relationship discounts offered as a result of Plan investments; will provide the Plans with revenue earned from securities lending; and will introduce a passively managed (index) large cap stock option in the Plans' core lineup. 9. On 1/3/14, the parties filed an amendment to the settlement agreement which modified the definition of the term "Released Parties," provided that neither the class members nor the Plans would sue based on the released claims, and exempted from the settlement claims based on the *Glass Dimensions, Inc.* action pending in the District of Massachusetts. The court approved of the settlement agreement in a final order dated 1/31/14.	
11.	*Spano v. The Boeing Co.*, 3:06-cv-00743 (S.D. Ill. filed 9/27/06); No. 09-3001 (7th Cir.)	Motion to dismiss original complaint denied on 4/18/07 because (a) plaintiffs adequately alleged Boeing and officer	The stay on class certification proceedings, imposed on 9/10/07 due to *Lively* appeal, was lifted on 4/3/08.	Motion for summary judgment filed by defendants on 1/15/2009. Revised motion for summary judgment	**Complaint Details** 189,000 Plan participants in 2004 $25 billion in Plan assets in PY 2005	Joint Motion for Preliminary Approval of Settlement filed 11/5/2015 (Dkt. # 554) Settlement Agreement: Gross Settlement Amount of $57 M, which includes Attorneys' fees

Participant Claims Against Sponsors And Related Fiduciaries						
No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
	Amended complaint filed on 12/17/07 Second amended complaint filed on 8/25/08 Judge David R Herndon Plaintiff's Firm: Schlichter, Bogard & Denton	were plan fiduciaries; (b) plaintiffs' remedy not limited to ERISA § 502(a)(2) and (c) plaintiffs adequately pled claims of nondisclosure. On 1/11/08, defendants filed a partial motion to dismiss first amended complaint. The motion sought dismissal of claims based on the inclusion of mutual funds as investment options (on statute of limitations grounds) and claims based on non-disclosure of information relating to fees (based on no legal duty to disclose). On 9/9/08 defendants filed a partial motion to dismiss the second amended complaint or for partial summary judgment based on statute of limitations grounds.	Motion for class certification granted on 9/26/08. On 1/21/2011, the Seventh Circuit vacated the district court's class certification order. On 3/21/11, plaintiffs filed an amended motion for class certification, which the district court granted on 9/19/13.	filed by defendants on 12/21/2011. On 9/19/2012, the district court denied the motions for summary judgment as premature in light of the pending issue of class certification.	**Significance:** 1. In denying defendants' motion to dismiss the original complaint, the court ruled that plaintiffs' remedy is not limited to ERISA § 502(a)(2), and that they can plead under § 502(a)(3) in the alternative. The court rejected the defense that plaintiffs' ERISA § 502(a)(3) claim is limited by trust law principles which allow an "accounting" claim to be brought only against a plan trustee. 2. Amended complaint filed on 12/17/07. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) did not consider/capture additional revenue streams; (2) chose to use actively-managed mutual funds; and (3) chose to use mutual funds instead of separate accounts. 3. Second amended complaint filed on 8/25/08 added prohibited transaction claims. 4. In a brief filed on 3/20/09 opposing defendants' motion for summary judgment, plaintiffs allege that *Hecker v. Deere* (7th Cir.) is not applicable because Boeing did not use only mutual funds, did not offer a brokerage	not to exceed $19M, costs not to exceed $1.845M, Class Representatives' Compensation not to exceed $25k or $10k to each rep Final Orders issued 3/31/2016 (Dkt. # 587, 588) – Court approved $19M in attorneys' fees, $1.813M in costs, and $25k or $10k to each class rep

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No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
					window, and did not use a bundled arrangement. 5. On 8/10/09, the Seventh Circuit granted permission to appeal the class certification order. 6. On 1/21/2010, the Seventh Circuit entered an order staying the district court proceedings. 7. On 1/21/2011, the Seventh Circuit vacated the district court's class certification order. The Seventh Circuit ruled that the class definition was too broad to meet the typicality and adequacy of representation requirements. As to these requirements, the Seventh Circuit opined that a class representative must at a minimum have invested in the same funds as the class members and must not have a conflict of interest with the class members. The Seventh Circuit explained that many participants coming within the approved class definition may not have a complaint with respect to a challenged fund depending on the dates they invested and exited the fund. The Seventh Circuit also noted that for some misrepresentation claims, it may be "difficult to find a class representative with claims typical	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
					of enough people to justify class treatment." 8. On 3/2/11, the plaintiffs filed an amended motion to certify class (defining subclasses) and a motion, alternatively, to pursue direct action for fiduciary breach. 9. On 12/21/11, the defendants filed a motion for summary judgment on all claims, which on 9/19/12 was dismissed by the court as premature in light of the pending class certification motion. 10. On 9/19/13, the district court granted the plaintiffs' motion for class certification. The court held that the class and subclasses met the commonality requirement for certification and the typicality requirement for certification; the named plaintiffs were adequate; and a failure to certify proposed class would result in inconsistent or varying adjudications with respect to individual members of class. 11. Following the class certification, the defendants renewed their motion for summary judgment on 1/8/14. 12. On 4/9/15, plaintiffs filed a	

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No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
					motion for joinder of two additional plaintiffs and class representatives. 13. On 5/28/15, defendants filed a motion to file an amended answer to the second amended complaint, which the court granted and denied in part on 6/26/15. 14. On 6/29/15, plaintiffs filed an amended answer that raises several affirmative defenses, including that plaintiffs lack standing, there is no loss under Section 409 of ERISA, defendants did not receive a benefit from the alleged transactions, the revenue sharing payments are not plan assets, statute of limitations, failure to exhaust administrative remedies, the fees are not excessive or unreasonable and were properly disclosed, the defendants' conduct was prudent, and the Boeing Stock Fund requires cash for liquidity purposes. 15. On 8/14/15, the court entered an order strongly encouraging the parties to engage in settlement discussions. 16. On 8/25/15, the court set an order setting trial for the following day, 8/26/15. The next	

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No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
					day, the court entered an order cancelling the bench trial in light of the parties' provisional settlement.	
12.	*Boeckman v. A.G. Edwards, Inc.*, 3:05-cv-00658-GPM-PMF (S.D. Ill. filed 9/15/06) Judge G. Patrick Murphy Plaintiff's Firm: Korein Tillery LLC	Motion for judgment on the pleadings denied on 9/26/06 because (a) plaintiff's release did not bar ERISA claim for vested benefits, and (b) although unlikely, plaintiff may be able to prove prohibited transactions involving defendant and mutual funds.	Motion for class certification denied on 8/31/07, with leave to re-file upon resolution of *Lively* appeal.	Defendant's motion for summary judgment granted, in part, and denied, in part, on 8/31/07. Summary judgment granted dismissing plaintiff's claims of prohibited transactions in violation of ERISA. Summary judgment denied as to plaintiff's claims of breach of duty of prudence. Plaintiff's motion for summary judgment on liability denied on 8/31/07.	**Complaint Details** $2 billion in Plan assets **Significance:** 1. Does not challenge revenue sharing. 2. Challenges the use of mutual funds as investment options in general and use of retail class mutual funds.	Stipulation to dismiss the action with prejudice filed on 6/29/09 in light of the Seventh Circuit's denial of petition for rehearing in *Hecker v. Deere & Co* (Dkt. # 99).
13.	*Will v. General Dynamics Corp.*, 3:06-cv-00698 (S.D. Ill. filed 9/11/06) Amended complaint filed on 10/25/07	General Dynamics filed a motion to dismiss the first amended complaint on 11/8/07; Fiduciary Asset Management Company filed a motion to dismiss the first amended	Class certification proceeding stayed on 8/29/07, pending *Lively* appeal. Class certification motion as to the first amended complaint denied without prejudice for	General Dynamics filed a motion for summary judgment as to the first amended complaint on 1/4/08. Motion for summary judgment as to the first amended	**Complaint Details** 68,000 total participants in two plans at end of 2004 **Significance:** 1. Second amended complaint alleges that (1) the defendants failed to consider/capture	Joint Motion for Preliminary Approval of Settlement filed 8/4/2010 (Dkt. # 238) Settlement Agreement (Dkt. # 238-1): Settlement Amount of $15.1 M, as well as one-time engagement of outside consultants to review Plan agreements and other

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No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
	Second amended complaint filed on 8/12/09 Judge G. Patrick Murphy Plaintiffs' Firm: Schlichter, Denton & Bogard LLP	complaint on 12/7/07 Motions to dismiss the first amended complaint denied without prejudice for administrative reasons on 3/2/09. Defendant Piper Jaffray Companies filed a motion to dismiss the second amended complaint on 9/15/09 (Dkt. # 223). Defendant General Dynamics Benefit Plans and Investment Committee ("Committee") filed a motion to dismiss the second amended complaint on 9/15/09. The court denied the Committee's motion to dismiss the second amended complaint as moot on 10/20/09 in light of the voluntary dismissal of the Committee on 10/19/09 The court denied Piper Jaffray Companies'	administrative reasons on 3/2/09.	complaint denied without prejudice for administrative reasons on 3/2/09.	additional revenue streams; (2) General Dynamics improperly selected the plan administrator (Fiduciary Asset Management Company ("FAMCo")); (3) General Dynamics improperly agreed with a fund manager -- providing services to the 401(k) plans and the "corporate-sponsored pension plan" -- to charge the 401(k) plans first before charging the other plan, where a graduated fee structure in effect meant that the 401(k) plans paid fees at a higher rate than the other plan; (4) FAMCo was improperly allowed to designate investment managers and to allocate plan assets among different investment managers, when FAMCo itself was an investment manager; (5) defendants allowed FAMCo to profit from using plan assets as "seed money" in establishing its business and selling the business to Piper Jaffray Companies for a profit; and (6) Piper Jaffray participated in FAMCo's self-dealing and received "distributions of income" after the sale. Plaintiffs no longer claim that revenue sharing caused recordkeeping fees to be excessive. Plaintiffs assert that "hard dollar" recordkeeping fees were excessive.	non-monetary details. Settlement Amount includes Attorneys' fees up to 1/3 of Settlement Amount, costs not to exceed $740k, Class Representatives' Compensation not to exceed $25k to each rep Final Orders issued 11/22/2010 (Dkt. # 259, 260) – Court approved $5.05M in attorneys' fees, $693k in costs, and $25k to each class rep

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No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
		motion to dismiss the second amended complaint on 11/14/09 (Dkt. # 233).			2. In its motion to dismiss the second amended complaint, Piper Jaffray Companies argues that it is not a plausible defendant because (1) it was not a fiduciary; and (2) the plaintiffs failed to identify a res from which restitution could be obtained as "appropriate equitable relief." 3. On 10/19/09, Defendant General Dynamics Benefit Plans and Investment Committee ("Committee") was voluntarily dismissed from the case upon stipulation that General Dynamics was liable for the actions of the Committee and its individual members. 4. On 11/14/09, the court denied Piper Jaffray Companies' motion to dismiss the second amended complaint. The court ruled that the plaintiffs sufficiently alleged that Piper Jaffray was a fiduciary, and that even if Piper Jaffray was not a fiduciary, the plaintiffs can seek equitable relief from Piper Jaffray under section 502(a)(3) of ERISA as a knowing participant in a fiduciary breach. The court further ruled that the plaintiffs may be seeking equitable relief in that the money that they seek may be in Piper Jaffray's possession.	

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					5. On 8/9/10, the court granted preliminary approval of an agreement to settle the case. Under the settlement agreement, the liability insurers of General Dynamics and the plan administrator, Fiduciary Asset Management Company ("FAMCO"), are to pay $15.15 million into a settlement fund. The fees and expenses of the plaintiffs' attorneys (up to $5.05 million in fees and $740,000 in expenses), a payment of $25,000 each to the three named plaintiffs, and the expenses of administering the settlement fund are to be deducted from the settlement fund. The remaining amount is to be shared by participants who had an account in one or more of General Dynamics' 401(k) plans at any time from October 1, 1994, through June 30, 2010. In addition to the monetary payment, General Dynamics agreed to undertake the following actions: (1) engage one or more outside consultants to (i) perform a one-time review of the plans' service arrangements, including float and securities lending arrangements, and (ii) provide recommendations to General Dynamics based on its review; (2) for a one-year period, have an	

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					outside consultant review (i) any new service arrangement that will pay more than $250,000 per year in fees and (ii) any renewal of a service arrangement that will result in a fee increase of 10% or more; (3) for a period of eighteen months, have an outside consultant review any new investment funds added to the plans; (4) engage an independent fiduciary to review consultant's recommendations and General Dynamics' actions; (5) amend the service contract with FAMCO to preclude FAMCO from recommending itself (or an affiliate) as an investment manager or from allocating assets to itself (or an affiliate); (6) provide participants with enhanced fee disclosures that list, for each fund held in the participant's account, the estimated amount paid for investment management and the estimated amount paid for plan administration; (7) for a one-year period, continue General Dynamics practice of not paying asset-based recordkeeping fees; and (8) for a three-year period, ensure that service providers do not charge a lower fee on General Dynamics' other benefit plans, based on the amount the service provider is making on the 401(k)	

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No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
					plans. General Dynamics did not admit that it engaged in any fiduciary breach under ERISA. 6. On 11/22/10, the court entered an order granting final approval of class settlement. The court also entered an order approving the fees and expenses of plaintiffs' attorneys ($5.05 million in fees and $693 thousand in expenses) and payments of $25,000 each to the three named plaintiffs.	
14.	*George v. Kraft Foods Global, Inc.*, 1:07-cv-01713, (N.D. Ill. filed 10/16/06 in the S.D. Ill.) ("*Kraft I*") Amended complaint filed on 8/19/11 Judge Sidney I. Schenkier Plaintiffs' Firm: Schlichter Bogard & Denton	Motion to dismiss, motion to strike, and motion for more definite statement denied on 3/16/07 because (a) complaint met notice pleading standard, and (b) burden was on defendant, not plaintiff, to prove 404(c) defense. On 3/3/09, defendants filed a motion for judgment on the pleadings based on the Seventh Circuit's affirmance of *Hecker v. Deere & Co.* dismissal.	Motion for class certification granted on 7/17/08. Motion for amended class certification due 10/31/11.	The defendants' motion for summary judgment granted on 1/27/10. On 4/11/11, the Seventh Circuit granted in part and reversed in part the district court's order granting summary judgment to defendants.	**Complaint Details:** 43,737 Plan participants at end of 2004 PY $5 billion in Plan assets at end of 2005 **Significance:** 1. Case transferred from Southern District of Illinois to Northern District of Illinois by order dated 3/16/2007. 2. Consolidated with *Pino v. Kraft* in Northern District of Illinois on 6/5/07. (The two cases are, however, to keep separate dockets for now, just in case the class certification is later denied.) 3. On 4/1/09, the court ruled that plaintiffs' claims regarding float	NOTE: Case settled along with *Kraft II*. Joint Motion for Preliminary Approval of Settlement filed 2/23/2012 (Dkt. # 327) Settlement Agreement (Dkt. # 327-1): Settlement Amount of $9.5M. Settlement Amount includes Attorneys' fees up to $3,166,666, costs not to exceed $1.6M, Class Representatives' Compensation not to exceed $15k to each rep Final Orders issued 6/26/2012 (Dkt. # 349, 350) – Court approved $3,166,666 in attorneys' fees, $1,496,371.33 in costs, and $15k to each class rep

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No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
					and securities lending are not within the scope of the complaint. The court also noted that plaintiffs have stated on the record that they will not pursue the excessive investment management fee claim at trial. (The court had previously struck plaintiffs' expert's report regarding excessive investment management fees in actively managed funds.) 4. On 1/27/10, the court granted summary judgment in favor of defendants. The court ruled that: (1) defendants did not breach their fiduciary duty in structuring the company stock funds as unitized funds because the defendants properly considered the pros and cons of unitized funds; (2) the multiple times the defendants "reviewed and renegotiated" the recordkeeping contract, and their utilization of "standard industry methods" to determine the reasonableness of recordkeeping fees, compelled a conclusion that defendants did not breach their duty with respect to the recordkeeping arrangement; (3) defendants did not have a duty to disclose revenue sharing information because the Seventh Circuit in *Hecker* ruled that the critical information for participants is the total fees	

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					charged by the investment options; and (4) defendants did not breach their fiduciary duty in allowing the plan trustee to retain float because the defendants adequately understood and monitored the float arrangement. 5. Decision appealed to the Seventh Circuit. 6. On 4/11/11, the Seventh Circuit affirmed, in part, and reversed, in part, the district court's decision. The Seventh Circuit ruled that, although the district court had stated that Kraft had acted prudently by considering the pros and cons of offering company stock funds as unitized funds *and making a decision* to continue offering the funds as unitized funds, the district court had not cited to evidence showing that Kraft in fact made a decision. The Seventh Circuit noted that prudence may have required Kraft to make a decision, rather than just debate the pros and cons of unitized funds. The Seventh Circuit also concluded that the district court should not have ignored (as not credible) the testimony of a plaintiffs' expert that Kraft should have used a competitive bidding process in	

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					renewing the plan's recordkeeping contract. The Seventh Circuit explained that the district court should not have considered the credibility of the expert's testimony in ruling on a summary judgment motion. The Seventh Circuit, however, affirmed the district court as to the plaintiffs' float claim because the plaintiffs failed to introduce evidence to contradict a declaration submitted by Kraft establishing that it had received annual reports from the trustee that disclosed the dollar amount of the trustee's float income. Accordingly, the unitized funds claim and the recordkeeping fees claim have been remanded to the district court. 7. On 5/26/11, the Seventh Circuit denied Kraft's petition for rehearing or rehearing *en banc*. 8. On 8/19/11, the plaintiffs filed a first amended complaint to add as defendants Altria Corporate Services, Inc. and the Benefits Investment Group of Altria Corporate Services, Inc. The claims in the complaint were not amended. 9. **Settlement**: On February 23, 2012, the parties agreed to a	

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No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
					settlement of both the "Kraft I" and "Kraft II" lawsuits. On June 26, 2012, the court granted final approval of the settlement. The settlement calls for defendants to pay $9,500,000 into a settlement fund, to be disbursed to the settlement class of all persons who participated in the Plan at any time between October 16, 2000 and February 23, 2012.	
15.	*George v. Kraft Foods Global, Inc.*, 1:08-cv-03799 (N.D. Ill. Filed 7/02/08) ("*Kraft II*") Judge Ruben Castillo Amended complaint filed on 12/23/08 Second amended complaint filed on 7/31/09 Plaintiffs' Firm: Schlichter Bogard & Denton	Motion to dismiss granted, in part, and denied in part on 12/17/09	Motion for class certification filed on 3/1/10. The court granted plaintiffs' motion for class certification on 8/25/10. Class certification order vacated on 7/19/11. Motion for class certification filed on 9/2/11.	Plaintiffs filed a motion for partial summary judgment on 1/21/11. Defendants filed a motion for summary judgment on 1/21/11. On 9/12/11, the defendants filed a motion to reconsider the court's partial denial of summary judgment in defendants' favor. The defendants argue that the Seventh Circuit's *Exelon* decision mandates summary judgment in their favor because the Kraft plan offered a sufficient mix of investment options	**Complaint Details:** 43,737 Plan participants at end of 2004 PY $5 billion in Plan assets at end of 2005 **Significance:** 1. This lawsuit was filed by the plaintiffs in *Kraft I* when they failed in their attempt to add Kraft's former corporate parent, Altria (formerly, Philip Morris), and certain Altria-related parties as defendants. The second amended complaint in *Kraft II* alleges that: (1) Altria-related defendants breached their fiduciary duty by structuring the company stock funds as unitized funds; (2) Altria-related defendants allowed excessive recordkeeping fees to be paid; and	NOTE: Case settled along with *Kraft I*. Joint Motion for Preliminary Approval of Settlement filed 2/23/2012 (Dkt. # 327) Settlement Agreement (Dkt. # 328): Settlement Amount of $9.5M. Settlement Amount includes Attorneys' fees up to $3,166,666, costs not to exceed $1.6M, Class Representatives' Compensation not to exceed $15k to each rep Final Orders issued 6/26/2012 (Dkt. # 343, 344) – Court approved $3,166,666 in attorneys' fees, $1,496,371.33 in costs, and $15k to each class rep

Participant Claims Against Sponsors And Related Fiduciaries						
No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
				(eleven investment options), including low-cost passively managed and higher-cost actively managed funds.	(3) both Kraft-related and Altria-related defendants breached their fiduciary duties by selecting and retaining a growth equity fund and a balanced fund as plan investment options. 2. On 12/17/09, the court dismissed the company stock funds and the recordkeeping expense claims with respect to an Altria committee named as a defendant, based on the court's finding that the six-year limitations period was applicable since the committee stopped being a fiduciary over six years before the complaint was filed. However, these claims were not dismissed with respect to other Altria-related defendants, and *Kraft II* is otherwise still proceeding. 3. On, 2/23/10, the court dismissed without prejudice the company stock funds and the recordkeeping expense claims with respect to the remaining Altria-related defendants. This dismissal is subject to the terms of a joint stipulation, whereby the parties agreed that if the judgment in *Kraft I* is remanded for further proceedings as to the company stock funds and recordkeeping expense claims, the parties	

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No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
					consent to the addition of the affected Altria-related defendants to *Kraft I* with respect to the company stock funds and recordkeeping expense claims. 4. On 7/14/11, the court denied, in part, and granted, in part, the defendants' motion for summary judgment. The court ruled that *res judicata* did not bar plaintiffs' claims because a final decision has not been rendered in *Kraft I*. The court also ruled that ERISA section 404(c) does not provide a defense to claims based on the selection and retention of plan investment options. The court ruled, however, that ERISA's six-year statute of limitations barred claims regarding the imprudence of selection and retention of the growth equity fund and the balanced fund before 7/2/02. The court also ruled in favor of the defendants as to plaintiffs' claim that defendants failed to prudently monitor the growth equity fund and the balanced fund. The court explained that the plaintiffs failed to produce evidence to contradict evidence of monitoring produced by the defendants. 5. On 7/19/11, the court denied the plaintiffs' motion for partial	

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No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
					summary judgment. The court ruled that the plaintiffs failed to establish that retention of the growth equity fund and the balanced fund after 1999—when actively managed funds were removed from defined benefit plans—was imprudent as a matter of law. 6. On 7/19/11, the court vacated the class certification order based on the Seventh Circuit's class certification opinion in *Spano v. Boeing.* 7. Motion for class certification filed on 9/2/11. 8. Bench trial held on 11/7/11. 9. **Settlement**: On February 23, 2012, the parties agreed to a settlement of both the "Kraft I" and "Kraft II" lawsuits. On June 26, 2012, the court granted final approval of the settlement. The settlement calls for defendants to pay $9,500,000 into a settlement fund, to be disbursed to the settlement class of all persons who participated in the Plan at any time between October 16, 2000 and February 23, 2012.	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
16.	*Loomis v. Exelon Corp.*, 1:06-cv-04900 (N.D. Ill. filed 9/11/06) Judge John W. Darrah Amended complaint filed on 8/19/09 Plaintiffs' Firm: Schlichter Bogard & Denton	Motion to dismiss granted, in part, and denied, in part, on 2/21/07. Plaintiff's prayer for investment losses stricken because plaintiff failed to allege nexus between administrative fees charged by participants and market-based losses. Motion to dismiss amended complaint filed on 9/11/09.	Motion for class certification granted on 6/26/07.	Not made.	**Complaint Details:** $3 billion in Plan assets as of 2006 **Significance:** 1. Permission to file an amended complaint denied on 11/14/07 with leave to re-file. 2. Prayer for investment losses stricken. 3. Class certified. 4. The amended complaint alleges, among other things, that: (1) defendants improperly used retail mutual funds when less expensive institutional mutual funds, separate accounts, or commingled funds were available; and (2) defendants improperly allowed administrative fees to increase with the increase in plan assets. 5. On December 9, 2009, the court granted defendants' motion to dismiss the amended complaint. The court based its decision on its finding that the case was not "materially distinguishable" from the Seventh Circuit's *Hecker v. Deere* decision. The court ruled that, as in *Hecker*, the gist of the	Defendants' motion to dismiss plaintiffs' amended complaint granted 12/9/2009 (Dkt. 143). Judgment at Dkt. 145. 7th Circuit affirmed on 9/6/2011 (D. Ct. Dkt. 176), mandate issued 9/28/2011 (Dkt. 177).

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No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
					plaintiffs' claim is that defendants violated fiduciary duties by selecting investment options with excessive fees. The court ruled that this claim could not survive defendants' motion to dismiss because *Hecker* found that plan fiduciaries do not have to "scour the market to find and offer the cheapest possible fund." The court noted that the fund expense ratios were in line with the fund expense ratios in *Hecker*. Further, the court noted that the facts were even better for the defendants than the facts in *Hecker* because the plan involved in *Hecker* only offered retail funds while the plan in issue in this case offered both retail and wholesale funds. The court also found that plaintiffs' challenge of revenue sharing arrangements and asset based fees were foreclosed by *Hecker*. Lastly, the court found that plaintiffs failed to state a claim against certain corporate committees named as defendants because the plaintiffs failed to allege anything beyond mere conclusory statements. 6. Plaintiffs have appealed the court's decision dismissing the case to the Seventh Circuit. Oral argument was held on 9/13/10. An attorney for the DOL	

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No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
					participated in the oral argument in support of plaintiffs. 7. On 9/6/11, Seventh Circuit affirmed the district court's decision dismissing the case. The Seventh Circuit ruled that the plaintiffs failed to state a claim because the plan—like the plan in *Hecker v. Deere*—offered a sufficient mix of investment options with varying expense ratios. The Seventh Circuit also noted that it was not clear that institutional shares of mutual funds are better than retail shares because institutional shares may be less liquid and harder to value, and retail mutual fund fees reflect market competition. The Seventh Circuit also opined that it was not clear that the plan could have used its bargaining power to secure lower fund expense ratios because the plan could not make a single lump-sum investment in a particular fund. The Seventh Circuit also commented that Exelon was not required to pay for fund expenses.	
17.	*Martin v. Caterpillar, Inc.*, 1:07-cv-01009-JBM-JAG (C.D. Ill. filed 9/11/06)	Motion to dismiss complaint granted on 5/15/07 due to "prolix language" without prejudice to re-filing an amended	First motion denied on 5/15/07 as moot in light of dismissal of original complaint.	Not made.	**Complaint Details:** 32,462 Plan participnats as of 2005	Motion for Preliminary Approval of Settlement filed 11/20/2009 (Dkt. # 162) Settlement Agreement (Dkt. # 162-1): Settlement Amount of

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	Amended complaint filed 5/25/07 Second Amended Complaint filed 7/5/07 Judge Joe Billy McDade Plaintiffs' Firm: Schlichter Bogard & Denton LLP	complaint. On 7/25/07, defendants filed a motion to dismiss the second amended complaint. On 9/25/08, the court denied defendants' motion to dismiss the second amended complaint. On 2/19/09, defendants filed a motion for judgment on the pleadings based on the Seventh Circuit's affirmance of *Hecker v. Deere & Co.* dismissal.			$3.94 in Plan assets as of 2005 **Significance:** 1. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) did not consider/capture additional revenue streams; (2) chose to use actively-managed mutual funds; and (3) chose to use mutual funds instead of separate accounts. Plaintiffs also allege that Caterpillar improperly benefited from the sale of its investment management subsidiary. 2. Although the court dismissed the defendants' motion to dismiss the second amended complaint, the court held that the defendants did not breach their fiduciary duties by "failing to make disclosures regarding revenue sharing" which were "not required by the statutory scheme promulgated by Congress and enforced by the DOL." 3. On 8/4/09, the court entered an order staying the case for 45 days upon plaintiffs' request. The court dismissed all pending motions without prejudice in light of the stay	$16.5M. Settlement Amount includes Attorneys' fees up to $5.5M, costs not to exceed $325k, Class Representatives' Compensation not to exceed $19k to each rep Order re Attorneys' fees issued 9/10/2010 (Dkt. 197); Final Judgment issued 10/28/2010 (Dkt. 198) – Court approved $5.5M in attorneys' fees, $315,345.40 in costs, and $12.5k to each class rep

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					4. On 10/15/09, the court entered an order staying the case through 10/30/09 upon parties' request and noted that settlement discussions were under way. The stay was subsequently extended through 11/6/09. 5. On 11/5/09, the parties reached an agreement to settle the lawsuit. Under the settlement agreement which has to be approved by the court and the Evercore Trust Company, acting as an independent fiduciary, Caterpillar will pay $16.5 million to settle the lawsuit without admitting any wrongdoing. The settlement proceeds remaining after deducting attorney's fees, litigation costs, and administrative costs, will be distributed to the class members (participants in the plans at any time between July 1, 1992 and September 10, 2009) according to the number of months in which a class member had an active account in the plans. Also, for a settlement period of two years (which may be extended to four years upon a material breach of the agreement), Caterpillar agreed to: (1) not engage any investment consultant as an investment manager for the plans; (2) provide certain annual disclosures to	

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					participants regarding administrative and investment fees; (3) not offer retail mutual funds, except those available through the plans' brokerage windows; (4) generally limit the cash holding in the company stock fund to 1.5 percent; (5) stop paying for recordkeeping fees as a percentage of plan assets; and (6) conduct a request for proposals process for recordkeeping services when the current recordkeeping contract with Hewitt Associates expires. The settlement agreement covers not just the Caterpillar 401(k) Plan mentioned in the Second Amended Complaint, but covers all 401(k) plans participating in a master trust. 6. On 8/12/10, the court granted final approval of the settlement. On 9/9/10, the court entered an order awarding – out of the settlement fund – $5.5 million (fees) and $315,345.40 (expenses) to the class counsel and incentive awards of $12,500 to each of the three named plaintiffs. 7. On 10/28/10, the court approved the settlement as fair, reasonable and adequate.	

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Eighth Circuit						
18.	*Tussey v. ABB, Inc.*, 2:06-cv-04305 (W.D. Mo. filed 12/29/06); 12-2056, 12-2060 (8th Cir. filed 5/3/12); 12-3875 (8th Cir. filed 12/12/12); 15-2792 (8th Cir. filed 8/18/15); 16-1127 (8th Cir. filed 1/15/16) Amended complaint filed on 7/5/07 Judge Nanette K. Laughrey Plaintiffs' Firm: Schlichter, Bogard & Denton	On 2/11/08, the court denied ABB and Fidelity's motions to dismiss. The court held that (1) 404(c) defense may not be available to ABB; (2) Fidelity Trust may be a fiduciary as to selection of investment options; and (3) Fidelity Management, the investment adviser to certain mutual funds, may be a fiduciary because it may have paid Fidelity Trust to steer plan assets toward mutual funds that it advised and may have set fees paid with plan assets.	Motion to certify class granted on 12/3/07.	Plaintiffs filed a motion for partial summary judgment on 3/9/09 (Dkt. # 257). This motion is under seal. Fidelity defendants filed a motion for summary judgment on 3/9/09 (Dkt. # 282). This motion is under seal. ABB defendants filed a motion for summary judgment on 3/9/09 (Dkt. # 284). This motion is under seal. These motions were pending at the time of trial and have not been resolved.	**Significance:** 1. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) did not consider/capture additional revenue streams; (2) chose to use actively-managed mutual funds; and (3) chose to use mutual funds instead of separate accounts. 2. On 2/5/08, Eighth Circuit denied Fidelity's petition to appeal the district court's order granting class certification. 3. In ruling on the motions to dismiss, the court held that: (1) ABB was not required to disclose revenue sharing arrangements, but where a participant makes investment decisions without knowledge of revenue sharing arrangements, the participant may not be exercising investment decisions within the meaning of § 404(c); and (2) Fidelity Trust could qualify as a fiduciary because it does the first-cut screening of investment options, and has veto authority over the inclusion of investment options. The court ruled that, even if Fidelity Trust is not the final arbiter of plan decisions, it may	On 3/31/2012 Court entered judgment for Plaintiffs (Dkt. # 624), finding (1) ABB Defs liable for $13.M for failure to monitor recording fees and negotiate for rebates; $21.8M lost by Plan by mapping Vanguard Wellington Fund to Fidelity Freedom Funds; and (2) Fidelity Defs liable for $1.7M for lost float income On 11/2/2012 Court entered Order (Dkt. # 719) to Plaintiffs for $13M in attorneys' fees, $500k in costs, $25,000 to each named Plaintiff On 3/19/2014, 8th Circuit issued Judgment (Dkt. # 739-1) (1) affirming judgment and award against ABB Defs re: recordkeeping; (2) vacating judgment and award on investment selection/mapping; (3) reversing district court's judgment against Fidelity; and (4) vacating attorney fee award On 12/19/2015 Court entered Order (Dkt. # 782) to Plaintiffs for $10.7M in attorneys' fees, $500k in costs, $25,000 to each named Plaintiff Plaintiffs filed appeal on 8/17/15,

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					still be a fiduciary with respect to selecting funds. The court also ruled that Fidelity Management, the investment adviser to certain mutual funds, could be a fiduciary if it paid Fidelity Trust to steer plan assets toward mutual funds that it advised or if it set fees paid with plan assets. 4. Class certified. 5. Trial held from 1/5/10 to 1/28/10. 6. On 9/22/10, the court denied without prejudice the parties' motions for judgment on partial findings. The court explained that it would not address issues piecemeal. 7. On 3/31/12, the court issued a decision finding several fiduciary breaches and awarding the plaintiffs $36.9 million in damages. **Recordkeeping Costs/Revenue Sharing:** The Court found that the ABB defendants had breached by allowing plan participants to pay recordkeeping fees to Fidelity (via revenue sharing arrangements) which were well beyond market rates. The Court found that ABB failed to calculate	which is currently pending. ABB Defendants filed appeal on 1/15/16, which is currently pending.

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					the amount of actual fees paid and failed to attempt to leverage the plan's size in order to obtain a less expensive recordkeeping arrangement with Fidelity. Also, the Court identified a 2005 consultant's report which identified that the fees were excessive, thereby putting ABB on notice. On this claim, the Court awarded $13.4 million to plaintiffs. **Cross-Subsidy:** In addition to serving as plan recordkeeper, Fidelity provided "corporate" services—as opposed to plan-related services—to ABB, including payroll services and recordkeeping for ABB's health and welfare plans, defined benefits plans, and certain non-qualified plans. The Court found that revenue sharing income generated from plan assets was used to "subsidize" the cost of these corporate services, and that the same 2005 consultant's report had identified this "cross-subsidy" and thus put the ABB defendants on notice. The Court found that the $13.4 million award for excess recordkeeping fees covered the damages on this count. **Fund Replacement & Mapping:**	

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					The Court also found that ABB had breached its fiduciary duty by replacing a Vanguard fund with a Fidelity fund through a process which did not comport with the Plan's investment policy statement. Here, the Court suspected that ABB was motivated by its own corporate interests (rather than in the interests of participants and beneficiaries) in deciding to replace the fund on account of the subsidization of other Fidelity services. Here, the Court assessed $21.8 million in damages. **Prohibited Transaction:** The Court also held that ABB's mapping process amounted to a prohibited transaction under ERISA in that ABB engaged in a transaction with Fidelity where ABB used Plan assets to reduce the amount of hard-dollar recordkeeping fees that ABB would have to pay. **Separate Accounts/Co-Mingled Funds:** The Court ruled that ABB did not breach its duty of prudence to the plans by an alleged failure to offer more separate accounts and/or co-mingled funds as investment options, finding that the plan offered an adequate number of	

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					co-mingled accounts and had declined to offer more separate accounts for valid reasons. **Fidelity's Retention of Float:** The Court found that Fidelity had breached its fiduciary duty by applying the income and interest earned from plan assets, or "float", to defray certain overnight bank transfer charges which, in the Court's view, should have been borne by Fidelity. As a threshold matter, the court found Fidelity was a fiduciary with respect to these overnight bank transactions due to the discretion exercised by Fidelity in moving the plan assets from account to account. Here, the court ordered Fidelity to pay $1.7 million in damages. 8. On May 3, 2013, both the ABB and Fidelity defendants appealed the district court's order of summary judgment to the Eighth Circuit, where the matter is pending. On 2/25/13, appellant ABB filed its brief, and on 2/26/13, appellant Fidelity filed its brief. Appellee Tussey filed an opening brief on 5/13/13. The Seventh Circuit has announced that it will hold oral argument, yet a specific date has not yet been set.	

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					9. On 3/19/14, the Eighth Circuit issued its opinion, which affirmed the district court's judgment that ABB fiduciaries failed to fully investigate and monitor recordkeeping fees. It vacated the district court's ruling that the plans' fiduciaries breached their duties when they decided to remove a certain mutual fund investment option and to "map" the assets that had been invested in the mutual fund into The replacement investment options. Also, the Eighth Circuit concluded that the district court failed to apply the correct standard of review with respect to the fiduciaries' determinations. Specifically, the Court recognized that a fiduciary's interpretation is entitled to deference once the plan vests authority in that fiduciary to interpret the plan. The Court recognized this as true regardless of the type of interpretation—benefits determination or investment selection. Accordingly, the Eighth Circuit vacated the judgment against ABB based on its allegedly imprudent fund selection and remanded the claim for further proceedings. Finally, the Court held that Fidelity did not breach its fiduciary duties by	

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					retaining float income and so vacated the damages award against Fidelity, while also vacating the district court's finding of joint and several liability against Fidelity for attorneys' fees. 10. On 8/11/14, the plaintiffs filed notice of their petition of writ to the U.S. Supreme Court. 11. On 11/10/14, the U.S. Supreme Court denied the petition. 12. On 2/19/15, the district court entered an order permitting limited discovery regarding damages with a deadline of 3/20/15 to complete it. On 3/24/15 the district court entered an order instructing the parties to submit findings of fact and conclusions of law as to both liability and damages, which the parties filed on 4/10/15. 13. On 7/9/15, the court entered a judgment in favor of defendants. Specifically, the court found that while defendants abused their discretion, noting that, "the ABB defendants knew that removing the Wellington Fund and mapping its assets to the Freedom Funds would result in persistent	

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					increased revenues to Fidelity, which ultimately would benefit ABB." The court found that defendants abused their discretion "when they removed the Wellington Fund and mapped its assets into the Fidelity Freedom Funds." Yet the court ultimately ruled in favor of defendants since it found that plaintiffs failed to prove any damages. Applying the Eighth Circuit's damages standard, the court rejected plaintiffs' argument in favor of an alternative "prudent alternative" standard "that provides the largest damages unless the breaching fiduciary sustains their burden of proof to establish that a lower yielding award is justified." Accordingly, the Eighth Circuit found that plaintiffs failed to meet their burden of proof on damages and ruled in favor of defendants. 14. On 8/5/15, plaintiffs filed a notice of appeal with the Eighth Circuit, which is pending. 15. On 1/4/16, ABB Defendants filed a notice of appeal with the Eighth Circuit, which is pending.	
19.	*Braden v. Wal-Mart Stores, Inc.*, 6:08-cv-03109-GA	Motion to dismiss granted on 10/28/08; but the Eight Circuit subsequently	Motion for class certification renewed on 4/21/10.	Not made.	**Complaint Details:** Estimates over 1,000,000 Plan	Motion for Preliminarily Approving Class Action Settlement filed 12/2/2011 (Dkt. #

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	F (W.D. Mo. filed 3/27/08) Amended complaint filed on 7/21/10 Judge Gary A. Fenner Plaintiffs' Firms: Keller Rohrback LLP	reinstated the case on 11/25/09. Motion to dismiss amended complaint filed by Merrill Lynch on 10/1/10. Motion to dismiss amended complaint filed by Wal-Mart on 10/1/10. .			participants **Significance:** 1. On October 28, 2008, the court granted the defendants' motion to dismiss the case by finding that the plaintiff lacked standing to assert claims for alleged fiduciary breaches that occurred prior to October 31, 2003, the date the plaintiff first contributed to the plan, and that the plaintiff otherwise failed to state a claim upon which relief can be granted. The court explained that the plaintiff failed to state a claim because the plaintiff failed to allege facts showing that the process used by the defendants to select the allegedly expensive funds was flawed. In this regard, the court stated that the defendants could have chosen allegedly expensive funds with revenue sharing "for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility[,]" and that the plaintiff failed to allege "facts showing [that] Wal-Mart . . . failed to conduct research, consult appropriate parties, conduct meetings, or consider other relevant information" in selecting the allegedly expensive	227) Settlement Agreement (Dkt. # 229-1): Settlement Amounts include $3.5M from Walmart and $10M from Merrill Lynch. Plaintiff's Counsel to apply to Court for up to 30% of Settlement Fund for Attorneys' fees and costs to be paid from Settlement Fund. Plaintiff's Counsel also to apply to Court for up to $20k for compensation to Named Plaintiff. Final Order and Judgment issued 3/19/2012 (Dkt. 258). Court approved $4.05M in attorneys' fees, $231,187.689 in costs, and $20k to Named Plaintiff. Court denied Objectors' motion for attorneys' fees on 4/13/2012 (Dkt. 261).

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					funds. As to the non-disclosure of certain fund expense and revenue sharing information, the court held that the defendants did not have a duty to disclose such information. As to the plaintiff's claim that defendants caused a prohibited transaction by allowing the plan trustee to receive revenue sharing payments from mutual funds offered as investment options, the court held that the plaintiff failed to show that the alleged prohibited transaction was not exempted by ERISA § 408(b)(2) exempting a party in interest's receipt of reasonable compensation for services. 2. The district court's dismissal was appealed to the Eighth Circuit. 3. On November 25, 2009, the Eight Circuit vacated the district court's decision dismissing the case and remanded the case to the district court. The Eighth Circuit ruled that from the facts pled by the plaintiff – e.g., that defendants selected retail shares of mutual funds when the plan could have obtained less expensive institutional shares – it is reasonable to infer that the process used by the defendants was flawed. The Eighth Circuit	

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					also ruled that a plan fiduciary has a duty to disclose material information and that a reasonable trier of fact could find that the fund expense and revenue sharing information sought by plaintiff is material to a reasonable plan participant. In addition, the Eight Circuit ruled that: (1) the plaintiff had Article III standing because he allegedly suffered a redressable personal harm due to defendants' conduct; (2) the relief that could be sought by the plaintiff under ERISA "is not necessarily limited to the period in which [the plaintiff] personally suffered injury"; and (3) as to whether ERISA section 408(b)(2) exemption was applicable to the plaintiffs' prohibited transaction claim, the plaintiff had alleged sufficient facts to "shift the burden to [the defendants] to show that 'no more than reasonable compensation [was] paid' for [the plan trustee]'s services." 4. On 7/21/10, the plaintiff filed an amended complaint to add more detail to the complaint and to add Merrill Lynch as a defendant. Merrill Lynch is alleged to have been a plan fiduciary by restricting available plan investment options and is	

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					alleged to have breached its fiduciary duty by offering funds based on the amount of revenue sharing that would be made available to Merrill Lynch. **Settlement** On 3/19/12, the court granted final approval to a settlement of this action. Under the settlement, defendants will pay a total of $13,500,000. Of this total, Wal-Mart agreed to contribute $3,500,000, and Merrill Lynch agreed to contribute $10,000,000 from amounts held within the Plan's forfeiture expense account. The settlement amount initially will be reduced by (a) the cost of providing notice of the settlement to the class members, (b) attorneys' fees in an amount not to exceed 30% of the total settlement, plus costs and expenses, (c) a $20,000 case contribution award to Braden, and (d) any associated taxes. Because of the relatively small losses alleged to have been experienced by the individual Plan participants and the large number of participants, the parties agreed that it would be cost-prohibitive to distribute the remaining settlement proceeds to	

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					the class members. Instead, the settlement provides that the amount remaining after payment of (a)-(d) above will be used to reduce future Plan expenses and administrative fees that otherwise would be charged to individual Plan accounts. The settlement also provides for several forms of injunctive relief, which would require the Retirement Plan Committee for the Plan over the next two years to: - continue to retain an investment consultant who has acknowledged ERISA fiduciary status in writing, and to review the consultant annually for conflicts of interest; - continue to make available web-based investment education resources to Plan participants; - continue an ongoing process to eliminate from the Plan investment options funds that are retail mutual funds, funds that pay 12b-1 fees, and funds that provide revenue sharing or similar fees to any party in interest, including the Plan's trustee or recordkeeper; - consider adding more passively managed funds as	

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					- investment options; and - comply with the DOL's participant disclosure regulation and, in those materials, provide links to certain DOL and SEC websites on fees.	
Ninth Circuit						
20.	*Kanawi v. Bechtel Corp.*, 3:06-cv-05566-CRB (N.D. Cal. filed 9/11/06) Judge Charles R. Breyer Amended complaint filed on 11/9/06 Second amended complaint filed on 3/23/07 Third amended complaint filed on 3/18/08 Plaintiffs' Firm: Schlichter Bogard & Denton	Motion to dismiss denied on 5/15/07 because (a) plaintiff adequately pled non-disclosure; (b) ERISA § 404(c) defense is an affirmative defense that cannot be used on motion to dismiss; and (c) plaintiffs adequately alleged that Bechtel was a plan fiduciary.	Motion for class certification denied without prejudice on 8/24/07. By order dated 8/27/07 the court explained that the motion may be "renewed" at any time through re-noticing the motion. On 8/28/08, plaintiffs renewed the motion for class certification. Renewed motion for class certification granted on 10/10/08.	On 9/16/08, plaintiffs filed a motion for partial summary judgment (subsequently sealed). On 9/19/08, defendant Freemont Investment Advisors filed a motion for summary judgment (subsequently sealed). On 9/22/08, Bechtel defendants filed a motion for summary judgment under seal. On 11/3/08, the court denied plaintiffs' motion for partial summary judgment, and granted in part and denied in part the motions for summary judgment filed by	**Complaint Details:** 16,215 Plan participants at end of 2006 PY $4.2 billion in Master Trust in 2006 **Significance:** 1. In denying defendant's motion to dismiss, the court noted that compliance with ERISA and DOL regulations would not preclude a fiduciary breach claim and that failure to disclose revenue sharing is relevant to whether a participant exercised investment control within the meaning of ERISA § 404(c). 2. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) did not consider/capture additional revenue streams; (2) included retail mutual funds (and funds of funds) as investment options; and	Joint Motion for Preliminary Approval of Settlement filed 10/12/2010 (Dkt. # 794) Settlement Agreement (Dkt. # 794-2): Settlement Amount of $18.5M. Settlement Amount includes Attorneys' fees up to $6,166,666, costs not to exceed $1.845M, Class Representatives' Compensation not to exceed $25k to each rep Final Orders issued 3/1/2011 (Dkt. # 827, 828) – Court approved attorneys' fees as 30% of net settlement fund (not to exceed $4,859,872.33), costs in the amount of $1.571,102.56, and $7500 to each class rep. Class member filed pro se motion for reconsideration on 3/11/2011 (Dkt. 829); motion denied 3/11/2011 (Dkt. 830) Appeal dismissed in light of settlement on 7/11/2011 (Dkt.

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				Freemont Investment Advisors and the Bechtel defendants.	(3) chose to use actively-managed investment options. Plaintiffs also allege that Fremont Investment Advisors ("FIA") – an entity alleged to have originated from Bechtel's investment advisory and management division – was responsible for: selecting, monitoring, evaluating, and terminating investment managers for the investment options; negotiating agreements with the investment managers; and managing its own proprietary funds, some of which were included as the plan's investment options. Plaintiffs argue that FIA received undisclosed revenue sharing payments from plan service providers that FIA selected, and that this constituted a series of prohibited transactions. Plaintiffs also argue that the plan is entitled to some of the proceeds from the sale of FIA to a third party. 3. Class certified on October 10, 2008. 4. On 11/3/08, the court denied the plaintiffs' motion for summary judgment on the self-dealing claims alleged in the complaint. The court granted in part and denied in part the motions for summary judgment filed by	832).

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					Freemont Investment Advisors ("FIA") and the Bechtel defendants. The court: dismissed fiduciary breach claims arising more than six years before the filing of the complaint based on ERISA's statute of limitations provision; dismissed plaintiffs' self-dealing claims except for a four-month period during which the court said the plan, and not Bechtel, paid fees to FIA; dismissed claims alleging improper retention of investment options; and dismissed claims alleging that the plan is entitled to some of the proceeds from the sale of FIA to a third party. 5. Plaintiffs' sole remaining claim following the 11/3/08 decision – a self-dealing claim relating to a four-month period – was settled by agreement dated March 3, 2009. 6. The plaintiffs appealed the court's 11/3/08 decision to the Ninth Circuit. 7. The parties have agreed to settle the case. On 3/1/11, the court granted final approval of the settlement. The settlement provides for a settlement fund of $18.5 million. The plaintiffs' attorneys are to receive as fees the	

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					lesser of $4.86 million or 30% of the net settlement fund (i.e., $18.5 million minus litigations costs of $1.57 million, administration costs, and each named plaintiff's incentive award of $7,500) and litigation costs of $1.57 million. The net settlement fund is to be divided among persons who participated in either of two 401(k) plans (collectively, "plan") from January 1, 1992 through September 30, 2010, as well as their beneficiaries and alternate payees, based on the timing and length of participation in the plan. In addition, for a period of three years, Bechtel agreed to (1) continue not to use for the plan investment managers or service providers owned by Bechtel or any member of the Bechtel Trust & Thrift Plan Committee; (2) engage a service provider to prepare an annual disclosure to all current plan participants regarding fees charged to their plan accounts; (3) not offer retail mutual funds as investment options in the plan; (4) continue not to pay plan recordkeeping fees on a percentage of asset bases; and (5) conduct a competitive bidding process for plan recordkeeping contract in 2012.	

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21.	*In re Northrop Grumman Corp. ERISA Litig.*, 2:06-cv-6213 (C.D. Cal. filed 9/28/06) Judge Margaret M. Morrow Revised consolidated second amended complaint filed on 9/15/10 (Dkt. # 338) Plaintiffs' Firm: Schlichter Bogard and Denton LLP	Motion to dismiss granted on 2/26/07 with prejudice as to claims asserted by plaintiff Waldbuesser (lack of standing) and denied without prejudice (and with leave to file an amended complaint) as to other plaintiffs. Motion to dismiss first amended complaint in *Grabek* with prejudice granted with respect to Northrop and its director defendants on 5/23/07 "for the reasons set forth in defendants' briefs" – which we understand to have addressed whether the complaint's allegations failed to establish that Northrop and its director defendants had or exercised any fiduciary duty.	First motion denied as moot in light of dismissal of original complaint. Second motion for class certification denied on 8/6/07 because the case is "better taken care of by administrative agencies." On 10/11/07, the Ninth Circuit Court of Appeals granted plaintiff's petition to appeal the district court's denial of class certification. On 1/14/11, the plaintiffs filed a motion for class certification. Class certified on 3/29/11.	On 3/28/11, the defendants filed a motion for summary judgment. On 11/24/15, Court granted in part and denied in part defendants' motion for summary judgment (Dkt. # 606) Motion granted on claim that defendants breached fiduciary duties by causing Plans to pay unreasonable investment fees; denied as to (1) claim that defendants breached fiduciary duties by causing Plans to distribute plan assets to Northrop as improper admin fees and (2) claim that admin fees constituted prohibited transaction – summary judgment also granted in favor of Investment Committees, Hamlin,	**Complaint Details** 142,841 participants in NGS Plan, 21,851 participants in FSS Plan at end of 2008 PY **Significance:** 1. *Heidecker* and *Grabek* actions, and all future actions based on same facts filed in Central District of California, were consolidated on March 26, 2007. 2. Amended complaint includes allegation that funds labeled as actively managed funds operated in reality as passively managed funds, so that the active management fees were unjustified. 3. On 10/1/07, the Ninth Circuit stayed the district court proceedings while the class certification order is on appeal. 4. On 9/8/09, the Ninth Circuit ruled that the district judge abused his discretion by failing to make any findings in denying class certification. The Ninth Circuit vacated the class certification order and ordered that the case be assigned to a different judge. 5. On 8/12/10, the court entered	

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				and Abelson on all claims	an order permitting plaintiffs to file a consolidated second amended complaint that omits Northrop as a defendant. The plaintiffs filed a second amended complaint on 8/20/10. (The plaintiffs filed a revised consolidated second amended complaint to clarify that Northrop is not a defendant.) 6. On 10/5/10, the plaintiffs filed a motion to file a third amended complaint to add Northrop as a defendant based on the alleged discovery of evidence showing that Northrop acted as an ERISA fiduciary. The court denied the motion on 12/9/10, concluding that the plaintiffs did not act diligently in developing evidence as to whether Northrop was a plan fiduciary. 7. Class certified on 3/29/11. 8. Case certified to panel mediator on 8/12/16 9. Trial set for 3/14/17	
22.	*Tibble v. Edison International*, 2:07-CV-05359 (C.D. Cal. filed 8/16/07); 10-56406 (9th Cir. filed	Motion to dismiss original complaint granted in part and denied in part on 7/16/08.	Filing of motion deferred by court on 11/1/07, and parties relieved of time deadlines.	Defendants filed a motion for summary judgment as to the second amended complaint on	**Complaint Details:** 17,395 Plan participants as of 2005 PY $3.2 billion in Plan assets as of	On 8/9/10, the court entered a judgment in favor of plaintiffs for $370,732 – the excessive fees participants paid on the three mutual funds and the lost investment earnings on the

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	9/8/10); 11-56628 (9th Cir. filed 9/21/11); 13-550 (S.Ct. cert granted 10/2/14) Judge Stephen V. Wilson Amended complaint filed on 8/5/08 Second amended complaint filed on 4/15/09 Plaintiffs' Firm: Schlichter Bogard and Denton LLP		Motion for class certification filed on 5/8/09. Motion for class certification granted on 06/30/09.	5/18/09. Plaintiffs filed a motion for partial summary judgment as to the second amended complaint on 5/29/09.	2005 **Significance:** 1. The lawsuit was brought in 2007 by six Edison employees and Plan participants against various Edison corporate entities and Plan fiduciaries. Plaintiffs claimed the defendants engaged in prohibited transactions and breached their fiduciary duties by entering into an arrangement whereby revenue-sharing payments were used to reduce the amount that the Plan's recordkeeper Hewitt charged Edison for recordkeeping and other costs. Plaintiffs also alleged that the particular mutual funds Edison selected charged excessive fees, which rendered their inclusion imprudent. Finally, Plaintiffs claimed that the fiduciaries breached their duty of prudence by selecting retail-class mutual funds for the Plan instead of attempting to secure institutional-class mutual funds with lower fees, and that Edison's failure to divest the plan of these retail-class funds constituted a continuing fiduciary breach. 2. On 7/16/08, the court dismissed fiduciary breach claims against plan sponsor defendants	excessive fees paid. The court also ordered defendants to replace one of the retail share classes still offered to participants to an institutional share class of the same fund. Subsequently the Ninth Circuit affirmed the district court; the Supreme Court vacated the Ninth Circuit decision and remanded; the Ninth Circuit re-affirmed; and the Ninth Circuit ordered rehearing en banc, and oral argument occurred on 9/8/16.

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					with leave to file an amended complaint. The court reasoned that the fiduciary breach claims did not relate to the plan sponsors' duties to properly appoint plan fiduciaries. The court, however, allowed the fiduciary breach claims to proceed against other defendants. The court ruled that revenue sharing may involve plan assets, such that prohibited transaction claims can properly be asserted. The court also ruled that under Ninth Circuit precedent, ERISA's general fiduciary duty provision requires disclosure of material fee information without a request from a plan participant. 3. The amended complaint filed on 8/5/08 and the second amended complaint filed on 4/15/09 include allegations that the plan sponsor failed to properly appoint and monitor plan fiduciaries. 4. On 5/29/09, plaintiffs filed a motion for partial summary judgment as to defendants' liability in including mutual funds that paid revenue sharing and in allowing the trustee to retain float. 5. Class certified. 6. On 7/16/09, the court granted in part defendants' motion for	

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					summary judgment and denied plaintiffs' motion for partial summary judgment. The court ruled that: (1) plan sponsor did not violate ERISA § 406(b)(3) in offering mutual funds under the plan because the decision to offer mutual funds was made by fiduciaries other than the plan sponsor; (2) plan fiduciary did not violate § 406(b)(2) in deciding to offer mutual funds under the plan because the plan fiduciary did not represent the mutual funds; (3) defendants properly interpreted the plan as allowing the use of revenue sharing to pay recordkeeping fees and allowing the trustee to retain float; (4) the inclusion of retail mutual funds and sector funds was proper because participants demanded such funds; (5) defendants properly selected, monitored, and removed a technology fund; (6) defendants properly included a money market fund rather than a stable value fund; (7) offering the stock fund as a unitized fund was proper; and (8) statute of limitation barred most of these claims. However, the court held that: (i) § 404(c) was not applicable in light of plaintiffs' claim that defendants offered improper investment options; (ii) triable issues remained as to	

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					whether defendants' desire to generate revenue sharing to pay for recordkeeping fees that the plan sponsor was otherwise required to pay under the terms of the plan tainted the defendants' selection of retail mutual funds; and (iii) trial issues remained as to whether the trustee's retention of float constituted a prohibited transaction. 7. On 7/31/09, the court granted summary judgment to defendants as to the float claim. The court ruled that the statute of limitations barred plaintiffs' challenge to the defendants' decision to allow the trustee to retain float and ruled that a failure to act within the limitations period cannot form the basis of a prohibited transaction claim. The court also ruled that plaintiffs' float claim did not satisfy the notice pleading requirement. However, the court ruled that triable issues existed as to whether the money market fund charged excessive fees. 8. A bench trial was held on October 20-22, 2009 as to: (1) whether the defendants' desire to generate revenue sharing to pay for recordkeeping fees that the plan sponsor was otherwise required to pay under the terms of	

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					the plan tainted the defendants' selection and retention of retail share classes of six specific mutual funds; and (2) whether the money market fund charged excessive fees. 9. On July 8, 2010, the court ruled that plan fiduciaries did not select and retain the retail share classes of six mutual funds to lower what Edison had to pay as plan recordkeeping fees. The court, however, concluded that plan fiduciaries breached their fiduciary duties by selecting the retail share classes of three mutual funds – which were added to the plan within ERISA's six year statute of limitations – because, given the plan's asset size, the plan fiduciaries could have obtained institutional share classes with lower fees. With respect to the money market fund, the court ruled that the evidence did not support plaintiffs' claim that the management fees were excessive. The court noted that the plan fiduciaries selected the money market fund following a request for proposal process. 10. On August 9, 2010, the court entered a judgment in favor of plaintiffs for $370,732 – the excessive fees participants paid	

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					on the three mutual funds and the lost investment earnings on the excessive fees paid. The court also ordered defendants to replace one of the retail share classes still offered to participants to an institutional share class of the same fund. 11. Plaintiffs and defendants both appealed to the Ninth Circuit. On 5/25/11, the DOL filed an amicus brief in favor of the plaintiffs. 12. On 3/21/13, the Ninth affirmed both the District Court's 7/16/09 grant of partial summary judgment in favor of Edison and the District Court's 8/9/10 judgment in favor of plaintiffs. **Rejection of "Continuing Violation Theory"**: The Ninth Circuit affirmed the District Court's application of ERISA's six-year limitations period for claims of fiduciary breach. The participants and the Department of Labor ("DOL"), as amicus, urged the Court to adopt a "continuing violation theory" to find that claims related to all six challenged plan investments were timely under ERISA section 413, as long as those investments remained in the Plan. The Ninth Circuit rejected the "continuing	

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					violation" theory, concluding that it would "make hash out of ERISA's limitation period and lead to an unworkable result." The Court instead held that, here, the limitations period for claims alleging imprudence began to run at the time the plan design decision was made. Accordingly, the Court upheld the dismissal of the claims related to mutual funds that had been added to the Plan prior to the six-year limitations period. However, the Ninth Circuit stopped short of establishing a firm rule that the limitations period for all claims for fiduciary breach concerning a fiduciary's inclusion of an investment option begin to run at the point such investment is included in the lineup. The Ninth Circuit acknowledged the possibility that "a new breach" could have arisen during the limitations period had plaintiffs proven certain "changes in conditions" related to the investment options that "should have prompted a full due diligence review of the funds" by Plan fiduciaries. The Court noted that plaintiffs here failed to present such evidence, and did not explore the issue further. The Ninth Circuit also rejected	

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					Edison's argument that ERISA's three-year limitations period applied to the participants' claims because plaintiffs had "actual knowledge" of the alleged breach at the time of the Plan's inclusion of the challenged funds. The Court disagreed, holding that, because these claims pertained to an allegedly deficient selection process, the "mere notification that retail funds were in the Plan" did not provide "actual knowledge of the breach or violation." **Deference to DOL's Section 404(c) Interpretation:** Edison also argued that the plaintiffs' claims were proscribed by ERISA section 404(c), the safe harbor provision that protects fiduciaries from claims resulting from a participant's exercise of discretion. Edison argued that, by virtue of the Plan participants' selection of each challenged investment, any resulting loss was the product of the participants' exercise of control. The plaintiffs and DOL argued that a fiduciary's designation of plan investment options is a fiduciary function, not "a direct or necessary result" of any participant direction. Joining the Fourth, Sixth, and Seventh Circuits, the Ninth Circuit held	

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					that DOL's interpretation was consistent with ERISA's statutory language and entitled to administrative deference. Accordingly, the Ninth Circuit held that section 404(c) did not protect the Plan fiduciaries from claims related to the selection of imprudent plan investment options. **Revenue Sharing Did Not Violate ERISA:** Plaintiffs alleged that the revenue sharing arrangement violated ERISA section 406(b)(3), a provision prohibiting plan fiduciaries from receiving consideration from a party related to the plan. Here, the Ninth Circuit deferred to the DOL's position that the revenue sharing was not "consideration" for purposes of ERISA section 406(b)(3) and, therefore, there was "not a section 406(b)(3) violation at all." However, the Court expressly limited its holding on revenue sharing to the question of whether the revenue sharing arrangement violated the plan document or ERISA section 406(b)(3). In so holding, the Court noted the possibility that, "on a different record," fiduciary liability could attach with respect to other issues related to revenue sharing, specifically (1) whether	

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					the cost of revenue sharing drives up the mutual fund's total 12b-1 fee and, in turn, its expense ratio, and (2) whether fiduciaries are motivated to select funds because they offer the financial benefit of revenue sharing. **Inclusion of Retail Funds Violated Duty of Prudence:** In arguably the most notable part of the Tibble opinion, the Ninth Circuit agreed with the District Court that Plan fiduciaries had violated ERISA's duty of prudence by failing to investigate the possibility of offering the institutional share class. Citing Hecker for the proposition that ERISA does not obligate plan fiduciaries to automatically populate investment menus with the lowest-cost options, the court initially ruled that the inclusion of retail funds in the Plan's investment lineup was not "categorically imprudent." The Court noted that the particular expense ratio range of the Plan's mutual fund menu (0.03 to 2%) was not out of the ordinary to make the funds imprudent, citing the Hecker court's dismissal of similar excessive fee claims where the expense ratios varied from 0.07 to 1%. Id. at 586.	

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					However, the Court went on to conclude that the procedural failure to investigate the institutional share class was a breach of fiduciary duty. Edison argued that it based its decision to offer the retail-class funds on advice from consultant Hewitt. The Court rejected this argument, stating that independent expert advice is not a "whitewash" absolving a fiduciary of responsibility and that there was no evidence that Edison ever considered the possibility of using the institutional class. The court noted that its ruling may have been different had Edison established a prudent process in considering share classes. Specifically, the Court noted the absence in the record of any evidence of • specific recommendations Hewitt made to the investment committee regarding the funds, • the scope of Hewitt's review, • whether Hewitt considered both retail and institutional share	

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					classes, or • what questions or steps the Plan investment committee pursued to evaluate Hewitt's recommendations. **Inclusion of Other Higher-Cost Investment Options Did Not Violate Duty of Prudence:** Plaintiffs also alleged that the Plan fiduciaries acted imprudently by including two other types of investment options in the Plan's lineup: a short-term investment fund ("STIF") similar to a money market account and a unitized fund for investment in employer stock. Finding that Plan fiduciaries had discussed the pros and cons of a stable-value alternative prior to the inclusion of the STIF in the lineup, the Court found no prudence violation associated with the STIF. With respect to the unitized fund, participants argued that the fund's returns fell short of the corresponding gains in company stock because the fund also was invested in cash or similar liquid equivalents. Recognizing that the associated investment "drag" was a common element of unitized funds, and that Plan fiduciaries had evaluated and made efforts to	

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					minimize the investment drag, the Court found that the Plan's inclusion of the unitized fund was not imprudent. 13. On 10/2/14, the Supreme Court granted certiorari on the following statute of limitations question: "Whether a claim that ERISA plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical lower-cost institution-class mutual funds were available, is barred by 29 U. S. C. §1113(1) when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed." 14. In a unanimous decision, on May 18, 2015, the Supreme Court found that plan fiduciaries have an ongoing fiduciary duty under ERISA to monitor plan investments, a duty separate and apart from the fiduciary's duty to be prudent when first selecting plan investments. The Supreme Court observed that the Ninth Circuit reached its holding "without considering the role of the fiduciary's duty of prudence under trust law." *Tibble v. Edison Int'l*, No. 13-550, slip op. at 4	

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					(U.S. May 18, 2015). This, the Court found, was a critical error, given that "under trust law[,] a fiduciary is required to conduct a regular review of its investment with the nature and timing of the review contingent on the circumstances." In reaching its conclusion, the Court relied on principles from the common law of trusts and cited treatises, historical cases, and uniform acts of trust law. These authorities led the court to conclude that "a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones." The Court added: "so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely. The Ninth Circuit erred by applying a 6-year statutory bar based solely on the initial selection of the three funds without considering the contours of the alleged breach of fiduciary duty." The Court did not opine as to the whether Edison actually breached its fiduciary duties with regard to the continuing availability of the mutual funds that were initially selected as investment options in 1999. Instead, the Court vacated the Ninth Circuit's opinion and remanded with instructions for the	

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					appellate court "to consider petitioners' claims that respondents breached their duties within the relevant 6-year period under § 1113, recognizing the importance of analogous trust law." On 6/23/15, case was remanded from Supreme Court to Ninth Circuit Case reargued before Ninth Circuit on 12/7/15 On 4/13/16, the Ninth Circuit affirmed District Court's judgment, concluding on remand that beneficiaries forfeited their argument re: the fiduciaries' ongoing duty to monitor by failing to raise it either before the district court or in their initial appeal On 8/5/16, Ninth Circuit issued Order that case be reheard en banc – oral argument occurred on 9/8/16	
23.	*Daniels-Hall v. National Education Association*, 3:07-cv-05339-RBL, (W.D. Wash. Filed 7/11/07) Hon. Ronald B.	Court dismissed plaintiffs' claims on 5/23/08.	Deadline for filing a motion set as 6/7/09.	Not made.	**Complaint Details:** 57,000 Plan participants $1 billion in Plan assets **Significance:**	Court granted Defendants' motion to dismiss on 5/23/2008 (Dkt. 88), entered judgment on 5/26/2008 (Dkt. 89). Ninth Circuit affirmed on 12/20/2010 (D. Ct. Dkt. 98), mandate issued 1/11/2011 (Dkt.

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	Leighton Plaintiffs' Firm: Keller Rohrback, LLP				1. Alleges that National Education Association recommended ERISA § 403(b) plan providers in return for endorsement fees and that the plan providers improperly received revenue sharing payments. 2. The court dismissed plaintiffs' claims on 5/23/08. The court ruled that National Education Association, as an employee association, cannot, as a matter of law, establish or maintain a § 403(b) annuity plan. The court also ruled that pursuant to a safe harbor, the school district employers did not establish or maintain a § 403(b) plan. Accordingly, the court ruled that it lacked subject matter jurisdiction as the § 403(b) annuities were not "plans" under ERISA. 3. The court's order dismissing plaintiffs' claims was appealed to the Ninth Circuit Court of Appeals. 4. On 12/20/10, the Ninth Circuit affirmed the district court's order dismissing the case. The Ninth Circuit concluded that the district court had subject matter jurisdiction because the plaintiffs alleged a cause of action arising	99).

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					under ERISA. The Ninth Circuit then concluded that the plaintiffs failed to state a claim because there was no "plan" under ERISA. The court explained that: (1) the NEA's "Valuebuilder Program" is a marketing plan, rather than an ERISA plan; (2) the school districts' ERISA section 403(b) annuity plans are "governmental plans" exempt from Title I of ERISA; and (3) the Valuebuilder annuities were not "established or maintained" by the NEA and therefore not "employee pension benefit plans" subject to ERISA.	
24.	*Marshall v. Northrop Grumman Corp.* No. 2:16-cv-06794 (C.D. Cal. Filed 9/9/16) Judge Ronald S.W. Lew Plaintiffs' Firm: Schlichter Bogard and Denton	Not yet filed	Not yet filed	Not yet filed	**Complaint Details:** 102,565 participants as of 12/31/15 $19 billion in Plan assets as of 12/31/15 Plaintiff's claims include alleged breaches of fiduciary duties by failing to solicit bids for Plan recordkeeper and administrator; and failing to move assets in Emerging Markets Equity Fund from active to passive managers (prior to 2014)	Active case

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First Circuit						
25.	*Columbia Air Services, Inc. v. Fidelity Management Trust Co.*, 1:07-CV-11344-GAO (D. Mass., filed 7/23/07) Judge George A. O'Toole, Jr.	On September 30, 2008, the district court granted defendant Fidelity's motion to dismiss The court held that Plaintiff failed to allege that Fidelity was a fiduciary under ERISA with respect to setting its compensation or with respect to the selection or substitution of mutual fund options made available to the plan and its participants. On October 14, 2008, the Plaintiff filed a motion to alter or amend the court's September 30 ruling and for leave to file an amended complaint, adding new allegations in support of its argument that Fidelity is an ERISA fiduciary. On December 22, 2008, the district court denied the Plaintiff's motion to alter or	Not made.	Not made.	**Significance:** 1. Plaintiff, the plan sponsor and plan administrator for the Columbia Group of Companies 401(k) Retirement Savings Plan (the "Plan") brought a class action complaint against Fidelity, the Plan's trustee alleging that it breached its fiduciary duties and engaged in prohibited transactions. Specifically, plaintiff alleged that Fidelity breached its duty of loyalty by receiving a share of the investment fees paid by mutual funds and managers. Since Fidelity allegedly provided no services in exchange for these fees, plaintiff alleged the receipt of fees constituted prohibited transactions. 2. Fiduciary status under ERISA is not an "all-or-nothing" concept. A service provider only has fiduciary status when – and to the extent – that it *exercises* discretionary authority. 3. Plaintiff failed to allege facts indicating that Fidelity exercised fiduciary responsibilities in	

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		amend/leave to file amended complaint.			negotiating the terms of its engagement as a directed trustee, including its compensation: the contract with the plan was negotiated at arms' length, and the pan's named fiduciaries – not Fidelity – were responsible for selecting the investment options offered to the plan and its participants – the investment options from which Fidelity received revenue sharing payments.	
26.	*Charters v. John Hancock Life Insurance Co.*, 1:07-CV-11371-NMG, (D. Mass. filed on 7/26/07) Judge Nathaniel M. Gorton	Defendant's motion to dismiss denied on 12/21/07 because (a) a reasonable fact finder could determine that the Defendant's right to change the mutual funds included in its lineup of investment options could give rise to ERISA fiduciary status; (b) Plaintiff had standing to assert claims on behalf of trustees of other plans; On September 30, 2008, the court granted	Plaintiff's Motion for Class Certification is pending (filed 11/14/08).	Defendant filed a motion for summary judgment as to the claims asserted in Plaintiff's class action complaint on March 7, 2008. Defendant alleges that it is not a fiduciary and, even if it were found to be a fiduciary, Defendant did not breach any fiduciary duties or engage in any prohibited transactions. On June 30, 2008, Plaintiff cross-moved for partial summary judgment on the	In his complaint, the Plaintiff alleged that Defendant, which managed the plans' assets in separate accounts, received revenue sharing payments to which it was not entitled, because the amount of such payments exceeded the amount by which Defendant reduced certain administrative fees and/or exceeded the fees authorized in group annuity contracts issued by Defendant to its plan clients. On September 30, 2008, the court granted the plaintiff's motion for partial summary judgment, finding that Hancock is an ERISA fiduciary because (a) Hancock retained discretion to set and modify the amount of its administrative fees charged to	

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		the plaintiff's motion to dismiss Defendant's contribution and indemnification counterclaims, finding that such claims are not expressly provided for in ERISA and that, based upon recent Supreme Court and other authority, such claims should not be implied into the federal common law of ERISA.		issue of whether Defendant is a plan fiduciary.	its plan clients (b) Hancock retained discretion to substitute mutual funds offered as investments to its plan clients, and, in the event Hancock's clients rejected such substitution, they would effectively have no option other than transferring their investments to another Hancock-administered sub-account or terminating their contract with Hancock in its entirety, either of which would subject the plans to a fee. According to the court, such "built-in penalties" significantly limited the plans' opportunity to reject such fund changes, compared with the facts addressed in the DOL's 1997 "Aetna Letter." In the same ruling, the court denied Hancock's motion for summary judgment, finding that sufficient fact exists remain as to whether (a) Hancock breached its fiduciary duties in receiving administrative fees in compensation for its services to its clients and the mutual funds in which they invested and (b) Hancock applied the full amount of the revenue sharing payments it received from mutual funds to offset the amount of fees owed	

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					by its plan clients. On August 21, 2009, the parties agreed to a Stipulation of Dismissal and Judgment. The parties' Stipulation notes that discovery in the case revealed that Hancock applied the revenue sharing payments it received from the mutual funds to reduce the administrative fees it charged to the plan. The Stipulation notes that further prosecution of the action would be protracted and unjustifiably costly.	
27.	*Golden Star, Inc. v. Mass Mutual Life Insurance Co.*, 3:11-cv-30235-MAP (D. Mass filed 10/19/11) Judge Michael A. Ponsor		On 12/14/12, plaintiffs filed a motion for class certification.	On 11/20/13, Mass Mutual filed a motion for summary judgment on the issue of whether it acted as a fiduciary with respect to revenue sharing. On 12/18/13, plaintiff filed an opposition to Mass Mutual's motion for summary judgment. The court denied Mass Mutual's motion on 5/20/14.	In this putative class action, the plaintiff 401(k) plan alleges that Mass Mutual, as a plan service provider, breached its fiduciary duty and engaged in prohibited transactions by receiving and mischaracterizing certain revenue sharing payments received from plan-invested mutual funds. Specifically, plaintiff alleged that the "kickback" payments are part of Mass Mutual's pay-to-play scheme in which it uses its ownership and control over separate accounts to negotiate for the receipt of these payments from mutual funds while providing none or only incidental services to the plan.	

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					Plaintiff sought a declaratory judgment that Mass Mutual violated ERISA, an injunction prohibiting these practices, disgorgement/restitution of revenue sharing payments, compensatory damages, and attorney's fees. Note: The complaint is nearly identical to the complaint filed in the District of Connecticut in October 2011 in the case *Healthcare Strategies, Inc. v. ING Life Ins. And Annuity Co.*, 3:11-cv-00282-JCH (D. Conn.). The same law firm (Shepherd Finkelman Miller & Shah. LLP) filed both complaints. On 1/25/12, the parties stipulated to dismissal of claims related to Mass Mutual's Guaranteed Interest Accounts and Capital Preservation Accounts in light of the 1/18/12 ruling in the parallel ING action. Discovery is currently underway. Plaintiffs filed their motion for class certification on December 14, 2012. The Court denied Mass Mutual's motion for summary judgment on 5/20/14, holding that it is a functional fiduciary because of	

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					its ability to set its own compensation as a service provider since it exercised its discretion to set management fees, taking fees out of separate accounts, and offsetting revenue-sharing payments with its fees. However, its authority to substitute funds from the plans' investment lineups did not render it a fiduciary since it never exercised that authority. The Court found that Mass Mutual's ability to substitute funds, without the actual exercise of that authority, was not enough to implicate fiduciary status under either section 3(21)(A)(i) or (iii) of ERISA. On 10/31/14, the parties filed a motion for the court to preliminarily approve their settlement. The first class, the Monetary Relief Class, consists of all current and former retirement plans that are or were serviced by MassMutual pursuant to a group annuity contract from six years before the date the complaint was filed through the date of the court's preliminary approval of the settlement. In the settlement, MassMutual agreed to pay to the Monetary Relief Class a total of	

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					$9,475,000 (less plaintiffs' attorneys' fees, settlement administration fees and a case contribution award to the name plaintiff). The second class is the Structural Changes Class, which consists of all retirement plans receiving services from MassMutual pursuant to a group annuity contract on or after the date of the court's preliminary approval of the settlement. As to this class, MassMutual agreed to make a number of structural changes. On 12/8/14, the court preliminarily approved the settlement. On 6/23/15 plaintiffs filed a supplemental submission in support of their motion to approve the settlement. The court entered an order and final judgment approving the settlement on the same day as the final fairness hearing, 6/25/15.	
Second Circuit						
28.	*Haddock v. Nationwide Financial Services, Inc.*, 3:01-CV-1552-SRU, 419 F.Supp.2d 156 (D. Conn. filed on 8/15/01);	Defendant's motion to dismiss the Amended Complaint denied on 9/25/07 because (a) Nationwide may have been a plan fiduciary because it	A hearing on the Motion to Certify Class was held on February 27. On March 27, the plaintiffs submitted a proposed order granting class	Denied on 3/7/06 with respect to Fourth Amended Complaint. (a) Nationwide may have been a plan fiduciary because it	**Significance:** In denying Defendant's motion to dismiss, the district court adopted a two-pronged test for determining what constitutes "plan assets" under ERISA: items a defendant holds or	

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	10-4237 (2d Cir., appeal 10/20/10) Judge Stefan R. Underhill	retained discretion to add and delete the fund options offered to plans under its variable annuity products; (b) revenue sharing payments from funds could be "plan assets" on the basis of Nationwide's receiving payments from the mutual funds in exchange for offering the funds as investment options to the plans and participants, at the expense of such participants. Further, even if revenue sharing payments are not "plan assets," Nationwide's receipt of revenue sharing could have involved illegal "kickbacks" prohibited by ERISA. (c) Trustees could have amended complaint to add fund selection claim and did not waive claim by including in first complaint but omitting from subsequent	certification. On April 14, the defendants submitted objections to the plaintiffs' proposed order. On July 20, 2009, a trustee of a 401(k) profit sharing plan and member of the proposed class filed a motion to intervene as a plaintiff and class representative in the action, as a result of the parties' inability to agree on a named class representative. The court ordered that limited discovery be taken with respect to the proposed class representative. On November 6, 2009, the court granted the motion to intervene and granted the motion for class certification. Nationwide petitioned the Second Circuit for permission to appeal the class certification order. On 2/6/12, the	retained discretion to add and delete the fund options offered to plans under its variable annuity products; (b) revenue sharing payments from funds could be "plan assets" on the basis of Nationwide's receiving payments from the mutual funds in exchange for offering the funds as investment options to the plans and participants, at the expense of such participants. Further, even if revenue sharing payments are not "plan assets," Nationwide's receipt of revenue sharing could have involved illegal "kickbacks" prohibited by ERISA. On 3/17/14, Nationwide filed a motion for summary judgment.	receives (1) as a result of its status as a fiduciary or as a result of its exercise of fiduciary discretion or authority; and (2) at the expense of plan participants or beneficiaries. *Haddock* is the first of the 401(k) fee cases against ERISA plan service providers to be certified as a class. As such, it stands in sharp contrast to the August 2008 denial of class certification in the *Ruppert v. Principal* fee case, discussed below, where the court found that certification was inappropriate because a determination of Principal's fiduciary status and breach would require an intensive, plan-by-plan inquiry, and because there was substantial variability concerning Principal's relationship with its plan clients. The class consists of trustees of 24,000 ERISA covered plans that had variable annuity contracts with Nationwide or whose participants had individual variable annuity contracts with Nationwide, after the earlier of January 1, 1996 or the first date Nationwide began receiving revenue sharing payments based on a percentage	

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		complaints. Plaintiffs' motion to dismiss Nationwide's counterclaims granted on August 11, 2008 because (a) Even though Nationwide, as a fiduciary, has standing to assert claims for contribution and indemnification against the plaintiffs, there was no indication that the plaintiffs received any benefit from Nationwide's receipt of revenue sharing payments. (b) While Nationwide had standing, as a purported fiduciary, to assert breach of fiduciary duty claims on behalf of the plans, there was no indication that the *plans* suffered any harm as a result of the *plaintiffs'* breach, as required by ERISA § 409. On September 10, Nationwide filed	Second Circuit vacated the order for class certification and remanded to the district court. On January 29, 2010, Nationwide moved for class certification of its counterclaim against the individual plaintiff trustees. On July 23, 2010, the court denied Nationwide's class certification motion and dismissed its counterclaim. The Second Circuit reversed and remanded to the trial court, which on 9/16/13 granted the renewed motion for class certification.		of invested assets. In granting class certification, the court held: (1) that the named plaintiffs had standing to sue on behalf of other plans, even though they were not fiduciaries of such plans; (2) that the named plaintiffs were adequate class representatives, despite technical differences between the named plaintiffs' contracts with Nationwide and those of the class members as a whole; (3) that the plaintiffs satisfied the requirements for class certification under Rule 23(b)(2) in that an individual plan-by-plan determination concerning Nationwide's fiduciary status and breach was not required, the plaintiffs claims for injunctive and declaratory relief predominated over their request for monetary relief (disgorgement of Nationwide's revenue sharing payments); and disgorgement was an appropriate remedy. The Second Circuit granted Nationwide's petition for interlocutory appeal of the district court's 11/6/09 order granting class certification. Oral argument on the appeal was held	

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		amended counterclaims against Plaintiffs for contribution, indemnification, and breach of fiduciary duty, alleging that Plaintiffs benefited from Nationwide's provision of services and receipt of revenue sharing payments, and that any harm to the plans was the result of Plaintiffs' actions or inactions.			on 11/18/11. On 2/6/12, the Second Circuit vacated the district court's class certification order. The Second Circuit ruled that the customer plans ' claims which sought the disgorgement of the revenue sharing payments that Nationwide previously received cannot be certified as a mandatory class under Fed.R.Civ.P 23(b)(2). The Second Circuit remanded the case to the district court to determine whether a class can be certified under Rule 23(b)(3), which will require plaintiffs to establish that common questions of law or fact predominate over questions affecting individual members and that a class action is a superior means to adjudicate the controversy. On 9/6/13, the district court granted the trustees' renewed motion for class certification, holding that common questions predominated in liability case, as required for class certification on grounds that common questions predominated and class action was superior means of adjudicating dispute; common questions predominated with	

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					respect to the trustees' claims for monetary relief; and the class action was superior means of adjudicating the trustees' claims. On 12/11/14, the parties proposed a $140 million settlement that, if approved, would be the largest ever in a suit involving the use of revenue-sharing agreements (as compared to recent settlements of similar claims against ING Life Insurance & Annuity Co. for $14.9 million and against MassMutual Insurance Co. for $9.5 million, which have both been preliminarily approved). In addition to paying this sum, Nationwide agreed as part of the settlement to supplement its disclosures on all of its annuity contracts and trust agreements that relate to mutual-fund related fees and expenses and to enhance the procedures for making any future changes in connection with annuity contracts or trust platforms. On 1/5/15, the court preliminarily approved the settlement. The court held a fairness hearing on 3/31/15 and on 4/9/15 entered a final order approving the settlement.	

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29.	*Beary v. ING Life Insurance and Annuity Co.*, 3:07-CV-00035-MRK, (D. Conn. filed on 1/8/07) Amended complaint filed on 3/9/07 Judge Mark R. Kravitz	Motion to dismiss granted on 11/5/07. On January 4, 2008, the district court denied the plaintiff's motion to alter or amend the court's dismissal of the case.	Moot in light of dismissal.	Moot in light of dismissal.	**Significance:** Action brought under state fiduciary law on behalf of IRC § 457(b) plan and similarly situated plans. The court held that, by pleading so as to avoid dismissal based upon federal securities law preemption, Plaintiff conceded away claim. The court found that the plaintiff had full knowledge of ING's revenue sharing arrangement for several years prior to filing suit and his failure to initiate timely legal action constituted acquiescence to the revenue sharing arrangement. The court also found that the service contract between the plaintiff's plan and ING covered the subject matter of the plaintiff's claim for restitution, *i.e.*, the revenue sharing payments, and, therefore, that the claim was properly dismissed.	
30.	*Phones Plus, Inc. v. The Hartford Financial Services, Inc.*, 3:06-CV-01835-AVC, 2007 WL	Defendants' motion to dismiss amended complaint denied on 10/23/07 because (a) Plaintiffs alleged enough facts in support	Plaintiff filed a motion for class certification on March 4, 2008, which was not decided by the court. On June 20, 2008, the Plaintiff	Hartford filed a motion for summary judgment on March 3, 2008. On March 4, 2009,	**Significance:** Notably, the district court also held that DOL Adv. Op. 1997-16A (May 22, 1997) ("Aetna Letter"), upon which	

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	3124733 (D. Conn. filed 11/14/06) Amended complaint filed 3/5/07 Hartford filed a third-party complaint against third-party defendants Thomas Sodemann and Robert Sodemann on 12/6/07. Judge Alfred V. Covello	of their contention that Hartford is a fiduciary, including the fact that Hartford had discretion to make unilateral changes to the menu of investment options offered to plan participants, and that the plan sponsor's ultimate authority concerning Hartford's changes to the menu of investment options was only one factor to be considered; (b) whether a given item constitutes "plan assets" is a mixed question of fact and law, and the plaintiffs alleged sufficient facts in support of their allegations that the revenue sharing payments constituted plan assets; (c) the court could not conclude as a matter of law that Neuberger, an investment advisor retained by Hartford to review and evaluate the investment options offered to the plan participants and to	filed an amended motion for class certification. On March 4, 2009, the court denied the Plaintiff's June 20, 2008 class certification motion as moot, in light of its order on the same date permitting the Plaintiff to amend its complaint. Plaintiff filed its motion for class certification with respect to its second amended complaint on June 17, 2009.	the court denied Hartford's March 3, 2008 summary judgment motion as moot, in light of its order on the same date permitting Plaintiff to amend its complaint. Defendant Hartford Life filed its motion for summary judgment with respect to Plaintiff's second amended complaint on June 17, 2009.	Defendants relied in arguing that they are not fiduciaries, was not dispositive, because (1) the Aetna Letter was merely persuasive authority; and (2) Defendants did not make the same fee disclosures and follow the same notification process when making fund line-up changes, as contemplated by the Aetna Letter. On November 14, 2008, Plaintiff and Neuberger advised the court that they had reached a settlement in principle to settle their dispute. On July 17, 2009, the court approved the settlement, dismissing the action against Neuberger with prejudice. <u>Settlement</u> The proposed settlement calls for the creation of two settlement classes: (1) a Monetary Relief Class (consisting of current and former trustees, sponsors, fiduciaries, and administrators of ERISA-covered 401(a) or 401(k) plans for which Hartford provided services from November 14, 2003 through the date that the court granted preliminary approval of the settlement) and (2) a Structural	

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		provide investment advice to the plan, had no duty to investigate and inform the plaintiff about revenue sharing payments; and (d) even if not a fiduciary, Hartford could be subject to non-fiduciary liability for knowingly participating in Neuberger's alleged fiduciary breach. On September 29, 2008, the district court denied the plaintiff's motion to dismiss defendants' counterclaims for contribution, indemnification, and breach of fiduciary duty. The court held fiduciaries can pursue claims for contribution and indemnification, that the defendants pled sufficient facts to support such claims, and that defendants' assertion of such rights as counterclaims was procedurally proper.			Changes Class (consisting of trustees, sponsors, fiduciaries, and administrators of ERISA-covered 401(a) or 401(k) plans for which Hartford provides services on or after the date the court granted preliminary approval of the settlement). The court granted final approval of the settlement on June 22, 2010. Per the settlement, Hartford will pay $13,775,000 less attorneys' fees and costs (in the amount of $6,862,500) to the Monetary Relief Class. In addition, Hartford will make several changes to its plan-related documents with respect to the Structural Changes Class. Hartford agreed that these changes would remain in effect for a minimum of five years. Specifically, Hartford: • will remove from prototype plan documents a provision indicating that the prototype plan sponsor may limit the types of property in which plan assets can be invested. Hartford further agreed to not to enforce this	

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					provision as to its existing plan customers; • with regard to its group annuity contracts and group funding agreements, o will seek insurance department approval of revisions to the documents to further explain that Hartford will not delete or substitute an investment option that had been selected by the customer and offered to the plan participants unless the investment option is not available because of either (a) a change in law; or (b) a change or event	

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					initiated by the fund company (for example, due to a fund closure or merger). Hartford further agreed to not to enforce this provision as to existing plan customers. o absent client consent, will not enforce a provision in a Separate Account Rider addressing Hartford's ability to invest plan assets in short term money market instruments, cash, or cash equivalents; o will include in its account opening documents a disclosure that	

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					dividends and capital gain distributions payable on the shares of an investment fund are paid in the form of additional shares (if available), together with a customer instruction that dividends and capital gain distributions should be received in the form of additional shares; • Will provide an additional disclosure to customers that all mutual fund investment options on its platform make revenue sharing payments to Hartford; • Will make available to its customers a list of investment options offered for the plan product and the	

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					associated revenue sharing rates paid by the fund companies; • Will make available to customers information regarding (i) the revenue sharing rates for investment options offered by plan clients to its participants; (ii) the published expense ratios for investment options offered by plan clients to its participants; (iii) the estimated amount of the revenue sharing received by Hartford in relation to plan's investments (based on an estimated account balance in each investment options); (iv) how such estimates were calculated; (v) what types of payments fall within the definition of revenue sharing; and (vi) the separate account fee (in percentage and dollar terms), the annual maintenance fee (in dollar terms) and per participant fees (in dollars per participant	

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					terms). The order approving the settlement agreement provides that Hartford is not a fiduciary with respect to the receipt of revenue sharing payments, as long as it abides by the above changes to the plan-related documents concerning the Structural Changes Class.	
31.	*Stark v. American Skandia Life Assurance Corp.*, 3:07-CV-01123-CFD (D.Conn. filed 7/25/07) Judge Christopher F. Droney	Not made. Plaintiff voluntarily dismissed action without prejudice on 11/13/07.	Not made.	Not made.		
32.	*Zang v. Paychex, Inc.*, 6:08-CV-06046-DGL (W.D. N.Y.; filed in E.D. Mich. on 8/15/07) Judge David G. Larimer	On November 2, 2007 Paychex moved to dismiss the complaint. On August 2, 2010 the court granted Paychex' motion on the basis that Paychex could not be considered a fiduciary with respect to the plan. On September 2, 2010, the plaintiff filed notice of appeal to the United States Court of	Not made.	Not made.	**Significance**: Plaintiff alleged that Defendant was a fiduciary because by providing (1) a lineup of mutual funds from which Plaintiff could select a subset to offer as investment options for contributions to the plan, and (2) a custodial agreement by which Plaintiff could appoint a bank custodian for the plan, Defendant inappropriately "channeled" or "steer[ed]" Plaintiff into mutual funds and a	

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		Appeals for the Second Circuit; however, on December 29, 2010, the plaintiff withdrew the appeal.			bank account that paid revenue sharing to Paychex. Plaintiff claimed that, by seeking and receiving revenue sharing from the mutual fund companies and the custodial bank, Defendant allegedly (1) breached the duty owed by ERISA fiduciaries to act solely in the interest of plan participants, and (2) violated ERISA's prohibited transaction rules. On August 2, 2010, the court granted Paychex's motion to dismiss. In support of its ruling, the court noted that: (1) the administrative services agreement between the plaintiff and Paychex stated that Paychex was not a fiduciary under ERISA and that Paychex' services were limited to recordkeeping and non-discretionary administrative services; (2) Paychex' mere creation and offering of mutual fund lineups to clients did not make it an ERISA fiduciary because those lineups were created prior to the existence of any contractual relationships between Paychex and the plans; (3) the plaintiff – not Paychex – was responsible for selecting the specific mutual funds included in the plaintiff's plan, and under	

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					Hecker v. Deere & Co., merely "playing a role" in the selection of investment options is not sufficient to give rise to fiduciary status; (4) under the administrative services agreement, Paychex was required to give the plaintiff at least 60 days' advance written notice of proposed deletions or substitutions of mutual fund options, and plaintiff thereafter had the right to reject such proposed changes or terminate his agreement with Paychex, consistent with DOL Advisory Opinion 97-16A (May 22, 1997); (5) the plaintiff failed in his argument that Paychex qualified as a fiduciary because it allegedly controlled how long plan contributions were held in the custodial account pending investment in mutual funds, because the plaintiff failed to allege a basis for concluding that Paychex actually *exercised* control over plan assets, given that the administrative services agreement provided that plan contributions generally would be held in the custodial account for five days, and the plaintiff did not allege that Paychex had deliberately kept amounts in the custodial account for longer than that; and (6) the plaintiff failed to	

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					support two additional theories advanced in his briefing on the motion to dismiss – that Paychex was a fiduciary by virtue of allegedly pledging plan assets as security for the company's lines of credit and by allegedly advising clients on selecting mutual funds, as these were unsupported by and/or contrary to documents the plaintiff relied upon in making these assertions.	
33.	*Healthcare Strategies, Inc. v. ING Life Ins. And Annuity Co.*, 3:11-cv-00282-JCH (D. Conn., filed 2/23/11) Judge Janet C. Hall Amended complaint filed 12/27/12	On May 27, 2011, ING moved to dismiss the lawsuit, in part. ING argued that (1) ERISA's statute of limitations period barred any claims alleging fiduciary breaches occurring prior to six years before filing, (2) certain funds referenced in the complaint did not hold "plan assets" and thus ERISA's fiduciary rules do not apply, and (3) ERISA does not provide for a jury trial, as requested by plaintiffs in the complaint. On 1/19/12, the Court granted the motion to dismiss with respect to the funds which did not hold	On 1/31/12, plaintiffs filed a motion for class certification, which was granted by the court on 9/27/12.	On 11/1/12, defendant filed a motion for summary judgment on all claims.	In this putative class action, the plaintiff 401(k) plan alleges that ING Life Insurance and Annuity Co., as a plan service provider, breached its fiduciary duty and engaged in prohibited transactions by receiving and mischaracterizing certain revenue sharing payments received from plan-invested mutual funds. Note: The complaint is nearly identical to the complaint filed in the District of Massachusetts in October 2011 in the case *Golden Star, Inc. v. Mass Mutual Life Insurance Co.*, 3:11-cv-30235-MAP (D. Mass). The same law firm (Shepherd Finkelman Miller & Shah. LLP) filed both complaints. On 1/19/12, the Court granted the motion to dismiss with respect to the funds which did not hold	

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		"plan assets", but denied the motion to dismiss on all other relevant counts. On 3/8/12, plaintiff moved to dismiss defendant's counterclaims for contribution and indemnity under ERISA. On 9/27/12, the court granted the motion but provided defendant with guidelines under which to re-assert such counterclaims. On 1/24/13, plaintiffs moved again to dismiss all counterclaims asserted by ILIAC.			"plan assets", but denied the motion to dismiss on all other relevant counts. On 2/16/12, defendant ILIAC filed several counterclaims, including two for contribution and indemnity under ERISA, alleging that plaintiff HSI (as plan administrator) had breached its own fiduciary duty and was itself liable for the losses to the plan. On 9/27/12, the court granted plaintiff's motion for class certification. Citing Haddock, the court made the threshold finding that ILIAC was a fiduciary under ERISA because of its contractual ability to delete and/or substitute investment options from the lineups of the plans sponsored by plaintiffs. On 9/27/12, the court also dismissed ILIAC's counterclaims for contribution and indemnity under ERISA. However, the court offered guidelines for ILIAC to reassert such counterclaims, holding that such counterclaims could stand if they (a) are limited to any liability established against ILIAC that exceeds any benefit ILIAC received from the revenue sharing payments, and	

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					(b) rest upon alleged facts plausibly stating that plaintiff was no so substantially less at fault than ILIAC that plaintiff would be entitled to indemnity from ILIAC under the Restatements. On November 1, 2012, defendant filed a motion for summary judgment on all claims. The motion is currently pending. On August 9, 2013, the court denied ILIAC's motion for summary judgment, holding that while the provider's discretionary authority to change funds available to plans supported fiduciary status, a fact issue as to whether provider acted in a fiduciary capacity precluded summary judgment. A bench trial was held in September and October 2013. On 4/11/14, the parties filed a consent motion for approval of settlement. ILIAC agreed to pay $14,950,000 in damages and agreed to significant changes to its business practices regarding fees and revenue sharing. Specifically, ILIAC agreed to make the following changes: (1) specifically identify to plan	

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					sponsors any changes it initiates to its product menu; (2) disclose its fund-related fees and expenses; (3) offer the opportunity for new investors to pay fees directly by choosing a plan menu that doesn't include revenue-sharing; and (4) disclosure of reinvestments. On 9/26/14, following a hearing, the court entered an order approving the settlement.	
34.	*Young v. General Motors Investment Management Corp.*, 1:07-CV-01994-BSJ-FM (S.D.N.Y. filed 3/8/07) Judge Barbara S. Jones	Court granted Defendants' motions to dismiss with prejudice on 3/24/08, holding that Plaintiffs' claims were barred by ERISA's three-year statute of limitations, ERISA § 413, 29 U.S.C. § 1113. On March 31, 2008, the Plaintiffs filed a notice of appeal of the court's March 24 ruling to the United States Court of Appeals for the Second Circuit. On May 6, 2009, the Second Circuit affirmed the district court's March 24, 2008 dismissal, but on	Not made.	Not made.	**Significance:** Plaintiffs alleged that Defendants breached their fiduciary duties under ERISA § 404 by (1) allowing or causing plans to maintain investments in undiversified and imprudent investment vehicles; and (2) by causing or allowing plans to maintain investments in certain mutual funds when similar investment products were available at much lower costs. In granting Defendants' motion to dismiss, the court found that all of the investments in the undiversified and imprudent investment vehicles were made more than three years prior to the filing of Plaintiffs' action and that documents accurately describing such investments and	

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		grounds not addressed by the district court. Specifically, the Second Circuit held that Plaintiffs failed to allege that the plan *as a whole* was undiversified and, instead, merely alleged that certain *options* within the plan were undiversified, which was insufficient to state a claim under ERISA § 404(a)(1)(C). The Second Circuit also held that Plaintiffs failed to allege facts showing that the fees were excessive relative to services rendered and otherwise failed to allege facts relevant to the determination of whether the fees were excessive.			the fees associated with other investments were provided to plan participants more than three years before Plaintiffs' action was filed. In making its ruling, the court found that Plaintiffs had the "actual knowledge" required under ERISA § 413, interpreted in the Second Circuit to mean knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated ERISA. In affirming the district court's dismissal, the Second Circuit emphasized that, for purposes of stating a claim under ERISA § 404(a)(1)(c), it is the diversification of the plan as a whole, not particular options within the plan, that matters. Further, in addressing Plaintiffs' excessive fees claim, the court looked to Second Circuit case law interpreting the Investment Company Act, which may open the door to alternative grounds for defendants to explore in pending ERISA fee cases.	
35.	*Brewer v. General Motors Investment*	Court granted Defendants' motions to	Not made.	Not made.	**Significance:**	

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	Management Corp., 1:07-CV-02928-BSJ (S.D.N.Y. filed 4/12/07) Judge Barbara S. Jones	dismiss with prejudice on 3/24/08, holding that Plaintiffs' claims were barred by ERISA's three-year statute of limitations, ERISA § 413, 29 U.S.C. § 1113. On March 31, 2008, the Plaintiffs filed a notice of appeal of the court's March 24 ruling to the United States Court of Appeals for the Second Circuit. On May 6, 2009, the Second Circuit affirmed the district court's March 24, 2008 dismissal, but on grounds not addressed by the district court. Specifically, the Second Circuit held that Plaintiffs failed to allege that the plan *as a whole* was undiversified and, instead, merely alleged that certain *options* within the plan were undiversified, which was insufficient to state a claim under ERISA § 404(a)(1)(C). The			Plaintiffs alleged that Defendants breached fiduciary duties under ERISA § 404 by (1) allowing or causing plans to maintain investments in undiversified and imprudent investment vehicles; and (2) by causing or allowing plans to maintain investments in certain mutual funds when similar investment products were available at much lower costs. In granting Defendants' motion to dismiss, the court found that all of the investments in the undiversified and imprudent investment vehicles were made more than three years prior to the filing of Plaintiffs' action and that documents accurately describing such investments and the fees associated with other investments were provided to plan participants more than three years before Plaintiffs' action was filed. In making its ruling, the court found that Plaintiffs had the "actual knowledge" required under ERISA § 413, interpreted in the Second Circuit to mean knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated	

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		Second Circuit also held that Plaintiffs failed to allege facts showing that the fees were excessive relative to services rendered and otherwise failed to allege facts relevant to the determination of whether the fees were excessive.			ERISA. In affirming the district court's dismissal, the Second Circuit emphasized that, for purposes of stating a claim under ERISA § 404(a)(1)(c), it is the diversification of the plan as a whole, not particular options within the plan, that matters. Further, in addressing Plaintiffs' excessive fees claim, the court looked to Second Circuit case law interpreting the Investment Company Act, which may open the door to alternative grounds for defendants to explore in pending ERISA fee cases.	
36.	*Malone et al v. Teachers Insurance and Annuity Insurance Association of America*, No. 1:15-cv-08038-PKC (S.D.N.Y filed on 10/13/2015) Judge: P. Kevin Castel Attorneys: Bailey & Glasser LLP	Filed – 5/6/2016 Response – 6/6/2016 Reply – 6/27/2016	Not yet Filed	Not yet Filed.	Claims arise out of Defendant's alleged breaches of fiduciary duties and/or failure to comply with ERISA's prohibited transaction rules by misusing its dual position as Plan recordkeeper and seller of group annuity contracts to usurp fiduciary authority and control from the Plans' named fiduciaries and take excessive compensation from plan assets.	**N/A**

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	(Greg Porter) First Amended Complaint filed on 03/18/2016					
37.	*Dezelean v. Voya Retirement Insurance and Annuity Company*, No. 3-16-cv-01251-VAB (S.D.S.D filed 07/26/2016) Judge Victor A. Bolden Attorneys: Izard, Kindall & Raabe	Not Yet Filed.	Not Yet Filed.	Not Yet Filed.	Plaintiffs' claims arise from the allegation that the Stable Value Funds (SVAs) that Defendants sell to retirement plans have an internal crediting rate that is well below the internal rate of return on the retirement plans deposits to the SVAs – and that this guarantees the Defendants a profit. Plaintiffs contend this practice violates the Defendant's fiduciary obligations.	N/A
Third Circuit						
38.	*Santomenno v. John Hancock Life Insurance Company (U.S.A.)*, 2:10-cv-01655-WJM-MF (D. N.J. filed 3/31/10); 11-2520 (3d Cir. appealed 6/3/11) Amended complaint filed on 4/23/10	On July 16, 2010 John Hancock moved to dismiss the plaintiff's amended complaint. On May 23, 2011, the court granted John Hancock's motion to dismiss. The court held that the plaintiff lacks standing to sue third parties selected by her plan's primary fiduciary without	Not made.	Not made.	**Significance:** This case is brought on behalf of a putative class of ERISA-covered 401(k) plans that held or continue to hold group annuity contracts issued by John Hancock, and on behalf of the participants and beneficiaries of such plans. Plaintiff asserts ERISA breach of fiduciary duty and prohibited transaction claims generally alleging that group annuity	

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	Judge William J. Martini	having first made demand on such fiduciary. The court also held that plaintiff's claims under the Investment Company Act failed also due to procedural infirmities. On 12/14/12, John Hancock renewed its motion to dismiss all remaining claims. On 7/24/13, the district court granted the motion to dismiss.			contracts issued by John Hancock to the plaintiff plans or their sponsors resulted in unreasonable and excessive fees for products and services that were not materially different from an investment by a standard 401(k) plan directly into a mutual fund. In particular, the plaintiff alleges that John Hancock breached its fiduciary duties and/or engaged in prohibited transactions by: (1) imposing sales and service charges that exceeded the 12b-1 fees already being charged to plaintiff by underlying investment funds and when no additional services were being provided in return for such fees; (2) allowing the imposition of 12b-1 fees on certain investments; (3) investing plan monies in inappropriate share classes (those imposing 12b-1 fees); (4) allowing an affiliate, John Hancock Investment Management Services, to charge excessive investment management fees when no investment management services were provided in exchange therefore; (5) accepting revenue sharing payments from investment options and failing to use such payments to offset	

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					administrative expenses charged to the plans or failing to return such revenue sharing fees to the plans or participants; (6) failing to select a low-priced, high-performance money market fund to underlie a John Hancock money market investment options. The plaintiff also asserts claims under the Investment Company Act of 1940 ("ICA"), generally alleging that investment management fees paid to John Hancock's affiliate, John Hancock Investment Management Services, resulted in breaches of fiduciary duty because those fees were so disproportionately large that they bore no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining. John Hancock moved to dismiss on July 16, 2010, and the court granted the motion to dismiss on May 23, 2011. The court found that plaintiffs' ERISA claims were derivative, in the sense that they belonged to the plan as a whole. Because no demand had been made on the plan trustees, nor were the trustees defendants	

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					in the action, the court found that plaintiffs had not pled a recognizable claim under section 502 of ERISA. The court also dismissed the claims based in the Investment Company Act, finding that plaintiffs had terminated their contracts with John Hancock and that such a claim required continuous ownership of the stock throughout the entire litigation. Plaintiffs appealed the court's granting of the motion to dismiss to the Third Circuit Court of Appeals. The Department of Labor filed an amicus brief on September 30, 2011. Oral argument was held on 4/9/12. On 4/6/12, the Third Circuit affirmed in part and vacated in part the District Court's decision. First, the Third Circuit affirmed the District Court's dismissal of the plaintiff's claims under the ICA, agreeing with the District Court that plaintiffs had terminated their contracts with John Hancock and that such a claim required continuous ownership of the stock throughout the entire litigation. Second, the Third Circuit vacated the District Court's	

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					dismissal of the plaintiff's ERISA claims, and remanded for further proceedings. The Third Circuit found that that neither a pre-suit demand requirement nor joinder of the plan trustees is a prerequisite to plaintiffs' claims. In so finding, the court pointed out that ERISA is silent as to pre-suit demand and mandatory joinder of trustees, finding that no preconditions on a participant or beneficiary‘s right to bring a civil action to remedy a fiduciary breach are mentioned at all within the statute. On 12/14/12, defendants filed a renewed motion to dismiss all remaining claims. On 7/24/13, the district court granted the motion to dismiss, finding that John Hancock could not be considered an ERISA fiduciary with respect to the service provider fees it charged a 401(k) plan, because the fees were established through arm's-length negotiations with the plan sponsor. The district court dismissed the participants' challenge to certain revenue-sharing payments for the same reason, concluding that John Hancock's decisions with	

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					respect to the allocation of its fees did not cause it to assume fiduciary status. The participants appealed to the Third Circuit on 8/19/13, and oral argument was held on 6/12/14. The DOL filed an amicus brief on 1/21/14 in which it asked the Court to reverse the district court decision and find that the company acted as a fiduciary. In support of its position, the DOL argued that John Hancock qualified as a fiduciary under Section 3(21)(A)(ii) by virtue of its discretionary authority over plan administration. On 9/26/14, the Third Circuit issued an order affirming the district court's decision, holding that John Hancock is not an ERISA fiduciary. Specifically, the Third Circuit recognized that John Hancock's practice of creating and managing a "Big Menu" of plan investment options that trustees could choose from didn't give rise to fiduciary status under ERISA and that John Hancock's status as a functional fiduciary depended on the specific fiduciary breaches claimed by the participants.	

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					On 4/20/15 the Supreme Court denied writ of certiorari.	
Fourth Circuit						
Sixth Circuit						
39.	*Beary v. Nationwide Life Insurance Co.*, 2:06-CV-00967-EAS-MRA, 2007 WL 4643323 (S.D. Ohio filed 11/15/06) Judge Edmund A. Sargus	The district court granted Defendants' motion to dismiss on 9/17/07 because the action was preempted by the Securities Litigation Uniform Standards Act of 1998. On October 15, 2008, Plaintiff filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit of the dismissal of Plaintiff's claims	Not made.	Not made.	**Significance:** Action brought under state fiduciary law on behalf of IRC § 457(b) plan and similarly situated plans. On February 3, 2010, the Sixth Circuit affirmed the district court's dismissal. In affirming the dismissal, the Sixth Circuit held that Plaintiff's action was not saved by SLUSA's state-actions exception because (1) Plaintiff did not bring the action as a political subdivision "on its own behalf" but rather on behalf of the *plan* (and only a plan itself may bring actions on behalf of a *plan*); and (2) Plaintiff did not bring the action on behalf of a class of named plaintiffs authorizing participation in the action (Plaintiff named only *himself* as a plaintiff, and SLUSA's state-actions exception requires that 50 or more political subdivisions or state pension	

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					plans be named as plaintiffs).	
Seventh Circuit						
40.	*Leimkuehler v. American United Life Insurance Company*, No. 1:10-cv-00333 (filed in N.D. Ohio 8/4/2009; transferred to S.D. Ind. on 3/22/2010); No. 12-1213 (7th Cir.) Judge Jane Magnus-Stinson Plaintiffs' Firms: Delaney & Delaney LLC, Korein Tillery LLC	On October 22, 2010, the court granted in part and denied in part plaintiff's motion for judgment on the pleadings (2010 WL 4291128).	Motion for class certification filed on 7/22/11. Oral arguments held 12/2/11. On 1/5/12, the motion was denied as moot	Motion for summary judgment filed by defendants on 9/1/11. Defendants argue that AUL did not engage in "fiduciary conduct" in connection with the revenue-sharing activity. Oral arguments held 12/2/11. Motion granted on 1/5/12.	Putative class action filed by pension plans to which defendant American United Life Insurance Company ("AUL") has provided 401(k) services. Plaintiff alleges that AUL breached its fiduciary duties by failing to disclose revenue-sharing arrangements with certain mutual funds and by receiving and keeping shared revenue without offsetting plan accounts. Plaintiff also alleges that the revenue-sharing practices violate specific ERISA prohibited transaction provisions, and that AUL is also liable as a non-fiduciary for the arrangement. On October 22, 2010, the court granted in part and denied in part plaintiff's motion for judgment on the pleadings (2010 WL 4291128). Oral arguments on plaintiffs' motion for class certification and for summary judgment were held on 12/2/11. On 1/5/12, the court granted defendant's motion for summary	Defendant's motion for summary judgment granted on 1/5/2012 (Dkt. 165); final judgment issued 1/6/2012 (Dkt. 167). 7th Cir. affirmed on 4/16/2013, issued mandates re: notice of appeal and notice of cross-appeal on 7/8/2013 (Dkt. 223); and 6/19/2013 (Dkt. 222), respectively. USSC denied certiorari on 2/24/2014.

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					judgment and dismissed as moot the motion for class certification. In granting the motion for summary judgment, the court cited *Hecker* for the proposition that 401(k) providers do not become fiduciaries merely by limiting the universe of mutual funds providers offer to 401(k) plans, nor do they become fiduciaries merely by receiving shared revenue from those funds upon execution of plan participants' investment instructions to whom the total expense of the investment was accurately disclosed. Accordingly, after finding that AUL did not act as an ERISA fiduciary, the court dismissed plaintiff's claims for breach of fiduciary duty. The court also found that AUL was not liable as a non-fiduciary. On 1/10/12, plaintiff appealed the final judgment to the Seventh Circuit. DOL filed an amicus curiae brief on 6/1/12, and also participated in oral argument held on 11/28/12. On 4/16/13, the Seventh Circuit affirmed the District Court's grant of summary judgment to defendants. The Seventh Circuit agreed that AUL Insurance	

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					Company did not act as an ERISA fiduciary with respect to the conduct alleged by plaintiffs to amount to a fiduciary breach. Specifically, the court found that (1) AUL did not exercise fiduciary authority by limiting or "winnowing" a list of potential mutual funds, which was then presented to plan fiduciaries who ultimately selected the lineup, Here, the court cited Hecker for the proposition that merely limiting funds does not create "control sufficient for fiduciary status" and noted the named plan fiduciaries (not AUL) had the "final say" on fund selection; (2) while AUL carried out ministerial functions which amounted to the "management or disposition of" plan assets, the plaintiffs had not alleged any breach related to mismanagement of plan assets, so fiduciary status did not attach in this respect; and (3) AUL did not become a fiduciary through a "non-exercise theory," i.e. merely through possessing a contractual right to delete or substitute an allegedly expensive fund on the plan's lineup (where such right was not exercised). On 5/30/13, appellant Leimkuehler filed a petition for	

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					rehearing, which was denied. On 10/25/13, Leimkuehler filed a petition for writ of certiorari with the United States Supreme Court, which was denied on 2/24/2014.	
41.	*Bell at al v. Pension Committee of Ath Holding Company, LLC et a*, No. 1:15-cv-02062-TWP-MPB (S.D. Ind. filed 12/29/15) Judge Tanya Walton Pratt Amended Complaint filed by Plaintiffs on 03/16/2016 (Dkt. # 23) Plaintiffs' Firm: Schlichter Bogard & Denton LLP	Motion to Dismiss Plaintiffs' Amended Complaint filed by Defendants on 04/08/2016 (Dkt. # 37); Response in opposition filed by Plaintiffs on 05/09/2016 (Dkt. # 42); Reply by Defendants on 05/24/2016 (Dkt. # 43) – Motion pending	Motion for class certification to be filed by 9/15/16	Yet to be filed	**Complaint Details:** 59,000 Plan participants as of December 2014 $5 billion in Plan assets as of December 2014 Notable Counts: - Count III: Failure to Consider the Use of a Stable Value Fund Instead of a Money Market Fund, Failure to Provide a Stable Value Fund, and Failure to Remove the Money Market Fund	
Eighth Circuit						
42.	*Ruppert v. Principal Life Ins. Co.*, 4:07-CV-00344 (S.D. Iowa; case transferred from S.D. Ill. on 7/25/07); 11-2554	On March 30, 2009, the defendant filed a motion for judgment on the pleadings as to claims one and two of the plaintiff's complaint (revenue sharing claims),	Motion for Certify Class filed by Plaintiffs on April 21, 2008. On August 27, 2008, the district court denied the plaintiff's	On February 2, 2010, Principal moved for summary judgment on Claim III of the plaintiff's complaint – that Principal breached its ERISA fiduciary duties by	**Significance:** Plaintiffs allege that Defendant is a fiduciary because it (a) offers full service 401(k) retirement plans; (2) has authority to make changes to funds offered to plan	Named Plaintiff and Defendant came to consent judgment that was entered on 6/13/2011 (Dkt. 278). Plaintiff appealed class certification denial on 7/12/2011 (Dkt. 279), which was dismissed

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	(8th Cir. appeal 7/12/11) First Amended Complaint filed on May 5, 2008 Second Amended Complaint filed on April 27, 2010 Judge John A. Jarvey Plaintiffs' Firm: Korein Tillery LLC	arguing that such claims are no longer viable based upon the Seventh Circuit's holding in *Hecker v. Deere & Co.* On November 5, 2009, the court granted the defendant's motion for judgment on the pleadings, dismissing the plaintiff's claims that defendant breached its fiduciary duties by failing to disclose or by failing to adequately disclose its negotiation for and acceptance of revenue sharing payments and that defendant violated ERISA's prohibited transaction provisions by using the plan's assets to generate and retain revenue sharing payments. On December 21, 2009, the plaintiff filed a motion for reconsideration of the court's November 5 entry of judgment on the pleadings, in light of the November 25, 2009 Eighth Circuit	motion for class certification, finding that, as the proposed class involved more than 24,000 different plans to which Principal provided services, an intensive, plan-by-plan inquiry would be required in order to evaluate the plaintiff's claims that Principal is an ERISA fiduciary and that it breached its fiduciary duties. In particular, the court found that there was substantial variability in the services offered by Principal from one plan to another, and that such variability precluded the plaintiff from satisfying the "commonality" and "typicality" requirements under Rule 23 of the Federal Rules of Civil Procedure, as necessary for class certification. On April 30, 2010, the plaintiff moved for reconsideration of the	failing to disclose or by failing to adequately disclose that Principal earns interest on monies awaiting transfer to mutual funds and other investment options, commonly known as "float." On May 27, 2010, the court granted Principal's summary judgment motion with respect to the plaintiff's "float" claim. On June 29, 2010, Principal moved for summary judgment on its two remaining claims (count III: that Principal breached its fiduciary duty by failing to disclose revenue sharing; and count IV: that Principal engaged in prohibited transactions by receiving revenue sharing). By order dated March 30, 2011, the	participants; (3) has discretion to negotiate for receipt of revenue sharing payments; and (4) provides investment advice. Plaintiffs claim that Defendant breached its fiduciary duties under ERISA by failing to disclose negotiations for, receipt of, and amount of, revenue sharing payments, and by retaining revenue sharing payments. Plaintiffs also claim that Defendant committed a prohibited transaction by using plan assets to generate revenue sharing and retaining revenue sharing payments for its own account. In addition, Plaintiffs claim that Defendant breached its fiduciary duties and engaged in prohibited transactions under ERISA by receiving and retaining, and failing to disclose, income earned on plan contributions between the time that such contributions were deposited in Defendant's custodial account and the time that Defendant transferred the plan contributions into the investment options chosen by the plan's	for lack of jurisdiction on 2/14/2013 (D. Ct. Dkt. 284). USSC denied certiorari on 10/7/2013 (D. Ct. Dkt. 290).

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		Court of Appeals decision in *Braden v. Wal-Mart Stores, Inc.* On March 31, 2010, the district court granted the plaintiff's motion for reconsideration of the court's November 5 order with respect to the plaintiff's claims concerning Principal's non-registered investment options ("Foundations Options"), in light of the *Braden* decision. The court held the plaintiff alleged sufficient facts from which to infer that inadequate or non-disclosure of revenue- sharing payments could mislead a reasonable investor. Information about the amount and retention of such payments, and the making of such payments in exchange for including options in the plan, might be material. As to the plaintiff's	court's August 27, 2008 order denying class certification On June 8, 2010, the court denied the plaintiff's April 30 motion for reconsideration, finding that the motion did not meet the requirements of Federal Rule of Civil Procedure 60(b) and that the motion was untimely. On July 12, 2011, after the court entered the consent judgment, the plaintiff appealed the court's denial of his motion for class certification to the U.S. Court of Appeals for the Eighth Circuit. The appeal was dismissed for lack of jurisdiction on 2/14/2013 (D. Ct. Dkt. 284). USSC denied certiorari on 10/7/2013 (D. Ct. Dkt. 290).	court denied Principal's motion for summary judgment.	participants. On November 5, 2009, the court granted the defendant's motion for judgment on the pleadings. In ruling on the plaintiff's disclosure claim, the court followed the Seventh Circuit's reasoning in *Hecker v. Deere & Company* that the total fees collected, not the post-collection distribution of fees, must be disclosed, and that ERISA does not address the practice of revenue sharing itself. In doing so, the court also rejected the plaintiff's argument that the *Deere* holding applies only to disclosures to plan *participants*, as opposed to plan fiduciaries, finding that plan fiduciaries do not have a greater right to information than the plan participants they serve. In ruling on the plaintiff's prohibited transaction claim, the court first distinguished between revenue sharing payments that are paid from mutual funds registered under the Investment Company Act of 1940 and revenue sharing payments that come from funds that are not so registered. As to payments from *registered* mutual funds, the court looked to *Deere* and the language of ERISA and concluded that such	

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		prohibited transaction claim, the court held the plaintiff asserted a plausible inference that Principal engaged in a prohibited transaction. In addition, while § 408 may "save" transactions otherwise prohibited under § 406(b), Principal bears the burden of proof in making this defense.			revenue sharing payments do not constitute plan assets. Thus, no prohibited transaction analysis was required as to such revenue sharing payments. However, because the plaintiff also alleged that some of the plan's investments were commingled with *non-registered* mutual funds – which the court concluded *were* made from plan assets – a prohibited transaction analysis was required as to these payments. In analyzing the plaintiff's PT claim, the court held that if the revenue sharing payments were reasonable in relation to the services provided by Principal, there was no violation. The court concluded that, because Principal factored the revenue sharing payments into its overall asset management fees, and because the plaintiff failed to plead that the fees were unreasonably high or inflated, there was no viable prohibited transaction claim. The district court's November 5, 2009 ruling on the defendant's motion for judgment on the pleadings is significant in several respects. It follows the Seventh Circuit's ruling in *Deere* that disclosure of revenue sharing is not required under ERISA. It also follows *Deere* in	

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					holding that "plan assets" do not generally include a registered mutual fund's underlying assets. In addition, the court departed from the position generally taken by the Department of Labor and other courts that certain ERISA exemptions - § 408(b)(2) and § 408(c)(2) – do not provide relief from ERISA § 406(b)'s prohibitions against fiduciary self-dealing. The court's March 31, 2010 order granting the plaintiff's motion for reconsideration was limited to the plaintiff's claims concerning Principal's *non-registered* mutual funds. As a result, the court's November 5 rulings remain intact with respect to the plaintiff's claims concerning *registered* mutual funds. On May 27, 2010, the court granted Principal's summary judgment motion with respect to the plaintiff's "float" claim. The court found that, as to float earned pursuant to the 2004 service agreement between the plaintiff's plan and Principal, Principal complied with DOL Field Assistance Bulletin 2002-3 (Nov. 5, 2002) by disclosing (1) the specific circumstances under	

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					which it earns and retains float; (2) the time frames for investment and the circumstances when allocation of funds is anticipated to take longer; and (3) the rate at which float is earned. The court also relied on case law to find no breach on the part of Principal, finding that the float was openly disclosed and included as part of Principal's overall compensation. As to float earned prior to the 2004 service agreement, the court found that such amounts were not properly disclosed pursuant to DOL FAB 2002-3. However, this portion of the plaintiff's claim was barred by ERISA's three-year statute of limitations, because the plaintiff was provided actual knowledge that Principal had breached its fiduciary duties with respect to the pre-2004 float when the plaintiff and Principal entered into the 2004 service agreement, which provided for the disclosure of float discussed above. Since the plaintiff did not file his float claim until May 5, 2008, his claim is time barred. On March 30, 2011, the court denied Principal's motion for	

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					summary judgment with respect to counts III (breach of fiduciary duty for failure to disclose revenue sharing) and IV (prohibited transactions on basis of receipt of revenue sharing). Because the Court found genuine issues of material fact as to whether Principal was a functional fiduciary at the time it engaged in revenue sharing payments, the Court did not conduct an analysis of whether a breach of fiduciary occurred or if Principal engaged in a prohibited transaction. In June 2011, the parties agreed to a consent judgment, only with respect to plaintiff's individual claims, for $80,000. Plaintiff appealed the denial of his class certification to the Eighth Circuit. Oral argument was held on 4/18/12. On 2/13/13, the Eighth Circuit dismissed the appeal, concluding that it lacked subject matter jurisdiction to hear the appeal because (1) the terms of the consent judgment were not "a final appealable decision" because plaintiffs' claims had not been dismissed without prejudice, and (2) plaintiff had voluntarily "relinquished" and	

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					dismissed his claims and therefore no longer had standing to pursue the action.	
Ninth Circuit						
43.	*Teets v. Great-West Life & Annuity Ins. Co.*, No. 2:14-01360 (E.D. Cal. filed 6/4/14; transferred to D. Colo, No. 1:14-02330 on 8/21/14) Judge William J. Martinez Amended Complaint filed 6/16/15 (Dkt. # 47) Plaintiffs' Firms: Lewis, Feinberg, Lee, Renaker & Jackson P.C.; Schneider Wallace Cottrell Konecky LLP; Law Offices of Scot D. Bernstein; Keller Rohrback LLP	Filed 9/11/14 (Dkt. # 22); Granted in part and denied in part on 5/22/15 (Dkt. # 45) – Count III dismissed without prejudice, motion denied in all other respects	Filed 2/16/16 (Dkt. 75); Opposition filed 3/23/16 (Dkt. # 88); Reply flied 4/20/16 (Dkt. # 103); Motion granted 6/22/16 (Dkt. # 118) Court certifies following class: "all participants in and beneficiaries of defined contribution employee pension benefit plans within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), who had funds invested in the Great- West Key Guaranteed Portfolio Fund from six years before the filing of this action until the time of trial."	Yet to be filed	1. Plaintiff, a participant in Great-West's Guaranteed Portfolio Fund in which plaintiff and the proposed class are participants and beneficiaries, filed a class action complaint against Great-West based on its retention of the spread in addition to the service fees it charged. The allegations against Great-West are based on its role as a service provider to the retirement plans and its fiduciary status is based on its exercise of discretionary authority over the administration of guaranteed investment contracts governing the relationship between the plans and Great-West. Specifically, the complaint alleges that Great-West breached its fiduciary duties and engaged in prohibited transactions by setting its own compensation and charging excessive fees for administering the contracts. 2. On 7/28/14, defendant filed a motion to dismiss the complaint. 3. On 8/21/14, the court granted	Active case.

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					defendants' unopposed motion to transfer the case to the United States District Court for the District of Colorado. 4. On 5/22/15, Great-West filed notice of withdrawal of its statute of limitations argument from its motion to dismiss in light of the *Tibble* ruling. That same day, the court entered an order granting in part and denying in part defendants' motion to dismiss. Specifically, the court first denied Great-West's motion to dismiss on the grounds that it was not a fiduciary under ERISA. Great-West argued that the Fund fell under the guaranteed benefit policy (GBP) exception under ERISA but the court held that such a determination was inappropriate in the motion to dismiss stage, instead finding that plaintiffs alleged sufficient facts that Great-West exercised discretion with respect to the Fund's assets since it had authority with respect to setting the interest rate. However, the court granted Great-West's motion to dismiss to the extent that it could not be both cannot be both a fiduciary and a party in interest under ERISA § 406(a), even though plaintiffs in their	

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					response explained that they instead meant to plead that Great-West was liable as a party in interest for entering into a prohibited transaction with the Fund. Yet the court dismissed this claim without prejudice to plaintiffs to refile an amended complaint. 5. On 6/16/15, plaintiffs filed an amended complaint, asserting class action claims based on setting the interest rate in its own interest rather than in the participants' interest. Plaintiffs brought three causes of action: (1) breach of the fiduciary duty of loyalty under sections 502(a)(2) and (a)(3); (2) engaging in prohibited transactions in violation of section 406(b) of ERISA; and (3) engaging in prohibited transactions as parties in interest, in violation of section 406(a) of ERISA. Defendants filed their answer to the amended complaint on 6/30/15, denying the amended complaint's substantive allegations and bringing affirmative defenses for setoff, waiver, Great-West not being an ERISA fiduciary since the Fund is a "guaranteed benefit policy," consenting to the rate in	

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					the contract, and estoppel.	
44.	*Austin v. Union Bond & Trust Co., Morgan Capital Mgmt. and Principal Life Ins. Co.*, No. 3:14-00706 (D. Or filed 4/29/14) Amended Complaint filed 1/14/15 (Dkt. # 43) Judge Anna J. Brown Plaintiffs' Firms: Keller Rohrback LLP; Schneider Wallace Cottrell & Konecky LLP; Edgar Law Firm LLC; Feinberg, Jackson, Worthman & Wasow LLP; Stoll Stoll Berne Lokting & Schlachter, PC	Motion to dismiss Amended Complaint filed 2/9/15 (Dkt. # 46); Oral argument held on 4/20/15; on 4/24/15, motion converted to motion for summary judgment and stayed pending discovery and further briefing (Dkt. # 60).	Not made.	Motion to dismiss converted to motion for summary judgment on 4/24/15 (Dkt. # 60); Defendants' supplemental brief filed 10/2/15 (Dkt. # 84); Plaintiffs' response filed 10/16/15 (Dkt. # 95); Reply filed 11/12/15 (Dkt. # 103) On 2/19/16, MJ issued Findings & Recommendation that motion be granted as to Plaintiffs' theory of liability premised on excessive fees and denied in all other respects (Dkt. # 127) Recommendation adopted by Judge Anna J. Brown on 3/30/16 (Dkt. # 134)	**Complaint Details:** $4 billion in assets in Principal Stable Value Fund at end of 2013 1. The plaintiff, a participant in the plan, filed a class action complaint on April 29, 2014 based on a principal stable value fund offered as part of his retirement plan. He alleges that Union and Morley, the trustee and investment advisor, respectively, breached their fiduciary duties by investing plan assets in investment contracts that charge excessive undisclosed fees in addition to other substantial disclosed fees. Principal Life issued synthetic investment contracts and is alleged to have retained the spread on these contracts in addition to the fees it collected, which plaintiffs allege constituted a breach of its fiduciary duties to the plan. Principal's fiduciary status is alleged based on exercising control over the investment of plan assets and by determining the value of the investments to plans participating in the fund.	Active case.

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	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
					2. On 11/10/14, the magistrate judge issued a report recommending dismissal of all the claims asserted against Principal Life and significantly narrowing the claims asserted against Union, the trustee, and Morley, the investment advisor. The Court determined that Principal Life, as a wrap provider, did not have the ability to control the investment of the Fund's assets, except to the extent that Morley was obligated to manage the assets in accordance with investment guidelines that were "part and parcel of the Principal SIC." The Court further found that earnings on the assets were held by Union as trustee until paid to participants and, therefore, the terms of the Principal SIC did not support – in fact, they contradicted – Plaintiff's claim that Principal Life had a right to receive or retain "spread." The court dismissed the claim that Principal Life breached its duties of prudence and loyalty in setting the crediting rate particularly low to obtain a larger spread. Given their roles as advisor and trustee, the Court was unable to dismiss the claims against Morley and Union on the ground that they were not	

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					fiduciaries but recommended dismissing those derived from the allegations based on Principal's retention of spread. 3. On 1/14/15, plaintiffs filed their first amended class action complaint. In it, plaintiffs first bring claims for breach of fiduciary duty under ERISA §§ 502(a)(2) and (a)(3) based on marketing and selling the Principal Stable Value Fund ("SVF"), which had lower returns and higher fees. Plaintiffs also allege that defendants engaged in a prohibited transaction under ERISA §§ 406(a) and (b) by selling the Principal Stable Value Fund to the Plans. 4. On 2/9/15, defendants filed a motion to dismiss the complaint, which the court converted to a motion for summary judgment on 4/24/15 based on oral argument held on 4/20/15. In the motion, defendants argue that the allegations that the Principal SVF was an imprudent option fail because they are based solely on hindsight and after-the-fact performance, distinguishing the allegations from *Abbott v. Lockheed Martin*. Defendants also argued in their	

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					motion that the amended complaint failed to plead that the fees were excessive since they only allege that other SVFs had lower fees and that, in fact, the Principal SVF charges lower fees than comparable SVFs.	
45.	*Sulyma v. Intel Corporation Investment Policy Committee et al*, No. 5:15-cv-04977 (N.D. Cal. filed 10/29/15) Amended Complaint filed on 04/26/16 Judge Nathanael M. Cousins Plaintiffs' Firms: Bailey & Glasser LLP; Creitz & Serebin, LLP; Major Kahn LLC; Cohen Milstein Sellers & Toll PLLC	Filed on 05/26/16 (Dkt. # 103); Opposition filed on 06/23/16 (DKt. # 108); Reply filed on 07/13/16 (Dkt. # 109); on 8/18/16, motion converted to summary judgment and ordering limited discovery on statute of limitations defense (Dkt. # 114)	Yet to be filed.	Motion to dismiss converted to motion for summary judgment on 8/18/16 (Dkt. # 114), set for argument on Defendants' statute of limitations defense on 12/14/16	**Complaint Details:** 63,518 participants in 401(k) Plan and 50,718 participants in Retirement Plan as of 2014 $6.66 billion in plan assets as of June 2015 Plaintiff's allegations involve failures to manage Plan assets on behalf of the Target Date Class, mismanaging the Global Diversified Fund on behalf of the Diversified Fund Class, and failures to give disclosures regarding investment alternatives concerning both issues.	Active case
46.	*White et al v. Chevron Corporation et al*, No. 4:16-cv-00793 (N.D. Cal. filed on	Filed on 04/18/16 (Dkt. # 27); Opposition filed on 05/16/16 (Dkt. # 32); Reply filed on	Yet to be filed.	Yet to be filed.	**Complaint Details:** $19 billion in Plan assets Plan has over 40,000	Active case.

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
	02/17/16) Judge Phyllis J. Hamilton Plaintiff' Firms: Schlichter Bogard & Denton; Futterman Dupree Dodd Croley Maier LLP	05/31/16 (Dkt. # 35). Motion granted on 8/29/16 (Dkt. # 40) – dismissal is with leave to amend, Plaintiffs have until 9/30/16 to file Amended Complaint			participants In addition to claims about excessive investment management/administrative fees, Plaintiff alleges that Defendants breached fiduciary duties by (1) failing to provide Vanguard Prime Money Market Fund instead of stable value fund, and (2) providing and failing to remove the Artisan Small Cap Value Fund as an investment option	
47.	*Johnson et al v. Fujitsu Technology and Business of America, Inc. et al*, No. 5:16-cv-03698 (N.D. Cal. filed 06/30/16) Judge Nathanael M. Cousins Plaintiffs' Firm: Nichols Kaster PLLP	Yet to be filed.	Yet to be filed.	Yet to be filed.	**Complaint Details:** $1.3 billion in Plan assets as of end of 2013 Plan had 9,891 participants as of 2014 In addition to claims about improper fees and retaining underperforming funds as investment options, Plaintiff alleges that Defendants breached fiduciary duties by creating and offering new and untested target-date funds with allocations that were fundamentally flawed **ADR:** On 9/7/16 the parties agreed to	Active case.

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
					private ADR, to be completed by 2/28/17	
48.	*Lorenz v. Safeway, Inc.*, No. 4:16-cv-04903 (N.D. Cal. filed 08/25/16) Judge Kandis A. Westmore Plaintiffs' Firm: Schneider Wallace Cottrell Konecky Wotkyns LLP	Yet to be filed.	Yet to be filed.	Yet to be filed.	**Complaint Details:** 38,126 Plan participants in 2014 Plaintiffs raise claims for breaches of fiduciary duty related to Defendants' alleged selecting investment options with fees unjustified by past performance, revenue sharing, and record keeping fees.	Active case.
49.	*Burgess et al v. HP Inc. et al*, No. 5:16-cv-04784 (N.D. Cal. filed 08/18/16) Judge Nathanael M. Cousins Plaintiffs' Firm: Schneider Wallace Cottrell Konecky Wotkyns LLP	Yet to be filed.	Yet to be filed.	Yet to be filed.	Plaintiff's claims include alleged breaches of fiduciary duty for failing to engage in a cash management process designed to benefit the Plans	Active case.
Tenth Circuit						
50.	*Ramos et al v. Banner Health et al*, No. 1:15-cv-02556	Not filed – Defendants filed Answer on 1/15/16 (Dkt. 23) and parties proceeded to	Yet to be filed.	Yet to be filed.	**Complaint Details:** Over 30,000 Plan participants as	Active case.

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
	(D. Colo. filed 11/20/15) Judge William J. Martinez, referred to Magistrate Judge Michael J. Watanabe Plaintiffs' Firm: Schlichter Bogard and Denton, LLP	engage in discovery			of 12/31/14 $2 billion in Plan assets as of 12/31/14 Plaintiff's claims include alleged breaches of fiduciary duties by failing to solicit bids for Plan recordkeeper and administrator; selecting as Plan investment options mutual funds with excessive expenses and poor historical performance.	
51.	*Troudt et al v. Oracle Corp.et al*, No. 1:16-cv-00175 (D. Colo. filed 01/22/16) Judge Robert E. Blackburn, referred to Magistrate Judge Craig B. Shaffer Plaintiffs' Firm: Schlichter Bogard and Denton, LLP	Partial motion to dismiss (as to Counts I, III, IV) filed on 03/28/16 (Dkt. # 32); motion withdrawn and denied as moot on 4/6/16 (Dkt. # 39) Motion to Dismiss filed on 3/29/16 (Dkt. # 36); Opposition filed on 04/27/16 (Dkt. # 49); Reply filed on 05/16/16 (Dkt. # 51); motion pending as of 9/14/16	Yet to be filed.	Yet to be filed.	**Complaint Details:** 65,732 participants as of 12/13/14 $12.1 billion in Plan assets as of 12/31/14 Plaintiff's claims include alleged breaches of fiduciary duties by failing to solicit bids for Plan recordkeeper and administrator; selecting as Plan investment options mutual funds with excessive expenses and poor historical performance.	Active case.