

**401(k) Fee Cases
Groom Law Group, Chartered**

October 4, 2008

Participant Claims Against Sponsors And Related Fiduciaries						
No.	Case Name & Judges	Counsel for Parties	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
<i>Second Circuit</i>						
1.	<p><i>Taylor v. United Technologies Corp.</i>, 3:06-cv-01494-WWE (D. Conn. filed 9/22/06)</p> <p>Amended complaint filed on 12/11/07</p> <p>Second amended complaint filed on 4/9/08.</p> <p>Judge Warren W. Eginton</p>	<p>Schlichter, Bogard; Cohen & Wolf for plaintiffs</p> <p>Covington & Burling; Day Pitney for defendants</p>	<p>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.</p>	<p>Motion to Certify Class granted on 6/5/08.</p>	<p>Court has not yet ruled on motion for summary judgment filed by United Technologies on 6/7/08.</p> <p>Court has not yet ruled on 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.</p>	<p>Significance:</p> <p>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.</p> <p>2. In dismissing fiduciary breach claims based on failure to disclose revenue sharing, court cites the <i>Hecker</i> decision, which is being appealed to the Seventh Circuit.</p>
2.	<p><i>Montoya v. ING Life Ins. and Annuity Co.</i>, 1:07-cv-02574 (NRB) (S.D.N.Y. filed 3/28/07)</p> <p>Judge Naomi Reice</p>	<p>Keller Rohrback; Rosen Preminger; Sanctuary Centre; Jeffrey Engerman for plaintiffs</p> <p>Jorden Burt; Groom Law Group; Meyer,</p>	<p>Motions to dismiss for lack of jurisdiction renewed on 9/2/08 upon completion of jurisdictional discovery.</p>	<p>Not made.</p>	<p>Not made.</p>	<p>Significance:</p> <p>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.</p>

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	Buchwald	Suozzi for defendants				

Third Circuit

3.	<p><i>Renfro v. Unisys Corp.</i>, 2:07-cv-2098-BWK (E.D. Pa. filed 12/28/06 in the C.D. Cal.)</p> <p>Amended Complaint filed 7/17/2007</p> <p>Judge Bruce W. Kauffman</p>	<p>Schlichter, Bogard; Fox, Rothschild; Hill, Farrer & Burrill for plaintiffs</p> <p>Morgan, Lewis for Unisys; O'Melveny & Myers; Hangley Aronchick for Fidelity</p>	<p>Court has not yet ruled on motion to dismiss filed by Fidelity on 9/7/07.</p>	<p>Not made.</p>	<p>Court has not yet ruled on motion for summary judgment filed by Unisys on 9/07/07.</p>	<p>Significance:</p> <ol style="list-style-type: none"> 1. Case transferred from Central District of California by order dated 4/17/07. 2. 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.
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Seventh Circuit

4.	<p><i>Hecker v. Deere & Co.</i>, 3:06-cv-0719-JCS (W.D. Wis. filed 12/8/06)</p> <p>Amended Complaint filed 12/28/06</p> <p>Second Amended Complaint filed 3/5/07</p> <p>Judge John C. Shabaz</p>	<p>Schlichter, Bogard; Solehim Billing for plaintiffs</p> <p>Morgan, Lewis for Deere; Reinhart, Boerner; O'Melveny & Myers; Goodwin Proctor for Fidelity</p>	<p>Motion to dismiss granted with prejudice on 6/20/07 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</p>	<p>Moot in light of dismissal.</p>	<p>Moot in light of dismissal.</p>	<p>Significance:</p> <ol style="list-style-type: none"> 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
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			disclosures or selecting plan investments. Motion for reconsideration denied by order dated 10/19/07.			Appeals for the Seventh Circuit. 5. Seventh Circuit held oral arguments on 9/4/08.
5.	<i>Abbott v. Lockheed Martin Corp.</i> , 3:06-cv-00701-MJR-DGW (S.D. Ill. filed 9/11/06) Judge Michael J. Reagan	Schlichter, Bogard for plaintiffs Mayer, Brown; Armstrong Teasdale for defendants	Court denied motion to dismiss on 8/13/07, 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 <i>Lively</i> appeal.	Not made.	
6.	<i>Beesley v. International Paper Co.</i> , 3:06-cv-00703-DRH-CJP (S.D. Ill. filed 9/11/06) Amended complaint filed on 5/1/08. Judge David R. Herndon	Schlichter, Bogard for plaintiffs Morgan, Lewis; Donovan Rose for defendants	Court denied motion to transfer venue on 8/24/07.	The stay on class certification proceedings, imposed on 8/24/07 due to <i>Lively</i> appeal, was lifted on 4/4/08. The order lifting the stay notes that the litigants in the <i>Lively</i> case are set to settle their case before the class certification issue is resolved by the Seventh Circuit. Motion for class certification	Not made.	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 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

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				granted on 9/26/08.		<p>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.</p> <p>2. <u>Class certified.</u></p>
7.	<p><i>Spano v. The Boeing Co.</i>, 3:06-cv-00743-DRH-DGW (S.D. Ill. filed 9/27/06)</p> <p>Amended complaint filed on 12/17/07</p> <p>Second amended complaint filed on 8/25/08</p> <p>Judge David R Herndon</p>	<p>Schlichter, Bogard for plaintiffs</p> <p>Groom Law Group; Bryan Cave for defendants</p>	<p>Motion to dismiss original complaint denied on 4/18/07 because</p> <p>(a) plaintiffs adequately alleged Boeing and officer were plan fiduciaries;</p> <p>(b) plaintiffs' remedy not limited to ERISA § 502(a)(2) and</p> <p>(c) plaintiffs adequately pled claims of nondisclosure.</p> <p>On 1/11/08, defendants filed a partial motion to dismiss first amended complaint. The</p>	<p>The stay on class certification proceedings, imposed on 9/10/07 due to <i>Lively</i> appeal, was lifted on 4/3/08.</p> <p>Motion for class certification granted on 9/26/08.</p>	Not made.	<p>Significance:</p> <p>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.</p> <p>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.</p> <p>3. Second amended complaint filed on 8/25/08 added prohibited transaction claims.</p> <p>4. <u>Class certified.</u></p>

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No.	Case Name & Judges	Counsel for Parties	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
			<p>motion sought dismissal of claims based on the inclusion of mutual funds as investment options (on statue of limitations grounds) and claims based on non-disclosure of information relating to fees (based on no legal duty to disclose).</p> <p>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.</p>			
8.	<p><i>Boeckman v. A.G. Edwards, Inc.</i>, 3:05-cv-00658-GPM-PMF (S.D. Ill. filed 9/15/06)</p> <p>Judge G. Patrick Murphy</p>	<p>Korein Tillery for plaintiffs</p> <p>Cook, Ysursa; Morgan, Lewis for defendants</p>	<p>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</p>	<p>Motion for class certification denied on 8/31/07, with leave to re-file upon resolution of <i>Lively</i> appeal.</p>	<p>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</p>	<p>Significance:</p> <ol style="list-style-type: none"> 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.

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No.	Case Name & Judges	Counsel for Parties	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
			transactions involving defendant and mutual funds.		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.	
9.	<i>Will v. General Dynamics Corp.</i> , 3:06-cv-00698-GPM-CJP (S.D. Ill. filed 9/11/06) Amended complaint filed on 10/25/07 Judge G. Patrick Murphy	Schlichter, Bogard for plaintiffs Jenner & Block; Hepler, Broom; Lowenbaum for defendants	General Dynamics filed a motion to dismiss on 11/8/07; Fiduciary Asset Management Company filed a motion to dismiss on 12/7/07	Class certification proceeding stayed on 8/29/07, pending <i>Lively</i> appeal.	General Dynamics filed a motion for summary judgment on 1/4/08.	Significance: 1. Amended complaint alleges that (1) the defendants failed to consider/capture 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; and (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.
10.	<i>George v. Kraft Foods Global, Inc.</i> , 1:07-cv-01713, (N.D. Ill. filed 10/16/06 in the S.D. Ill.) Judge Sidney I.	Schlichter, Bogard for plaintiffs Seyfarth Shaw for defendants	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	Motion for class certification granted on 7/17/08.	Not made.	Significance: 1. Case transferred from Southern District of Illinois to Northern District of Illinois by order dated 3/16/2007. 2. Consolidated with <i>Pino v. Kraft</i> 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

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No.	Case Name & Judges	Counsel for Parties	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
	Schenkier		(b) burden was on defendant, not plaintiff, to prove 404(c) defense.			certification is later denied.) 3. <u>Class certified.</u>
11.	<i>Pino v. Kraft Foods Global, Inc.</i> , 1:07-cv-01954 (N.D. Ill. filed 4/9/07) Judge Sidney I. Schenkier	Wexler Toriseva; Squitieri & Fearon; Gainey & McKenna for plaintiffs Seyfarth Shaw for defendants	Not made.	Not made.	Not made.	Significance: 1. Consolidated with <i>George v. Kraft</i> 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.)
12.	<i>Loomis v. Exelon Corp.</i> , 1:06-cv-04900 (N.D. Ill. filed 9/11/06) Judge John W. Darrah	Schlichter, Bogard for plaintiffs Sidley Austin for defendants	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 for class certification granted on 6/26/07.	Not made.	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. <u>Class certified.</u> 4. Entire case stayed pending conclusion of <i>Hecker</i> appeal.
13.	<i>Martin v. Caterpillar, Inc.</i> , 1:07-cv-01009-JBM-JAG (C.D. Ill. filed 9/11/06) Amended	Schlichter, Bogard; Vonachen Lawless for plaintiffs Seyfarth Shaw for defendants	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.	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

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	complaint filed 5/25/07 Second Amended Complaint filed 7/5/07 Judge Joe Billy McDade		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.			benefited from the sale of its investment management subsidiary.
14.	<i>Nolte v. Cigna Corp.</i> , 2:07-cv-02046-HAB-DGB (C.D. Ill. filed 2/26/07) Amended complaint filed on 7/19/07 Judge Harold A. Baker	Schlichter, Bogard for plaintiffs Morgan, Lewis for defendants.	Motion to dismiss original complaint dismissed as moot on 7/23/07.	Not made.	Motion for summary judgment made on 9/10/07.	<p>Significance:</p> <ol style="list-style-type: none"> 1. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) did not consider/capture additional revenue streams; and (2) chose to use actively-managed investment options. Plaintiffs also allege that Cigna improperly benefited from the sale of its retirement business. 2. Unlike many of the other companies facing these lawsuits, Cigna chose to use separate accounts instead of mutual funds as investment options. Accordingly, Cigna avoided the allegation found in many of the other lawsuits that plan fiduciaries should have chosen to use separate accounts rather than mutual funds. 3. On May 28, 2008, the court stayed the case pending the outcome of the <i>Hecker v. Deere</i> appeal in the Seventh Circuit.

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<i>Eighth Circuit</i>						
15.	<p><i>Tussey v. ABB, Inc.</i>, 2:06-cv-04305-NKL (W.D. Mo. filed 12/29/06)</p> <p>Amended complaint filed on 7/5/07</p> <p>Judge Nanette K. Laughrey</p>	<p>Schlichter, Bogard, for plaintiffs.</p> <p>Morgan, Lewis; Bryan Cave for ABB; Lathrop & Gage; O’Melveny & Myers; Goodwin Proctor for Fidelity</p>	<p>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.</p>	<p>Motion to certify class granted on 12/3/07.</p>	<p>Not made.</p>	<p>Significance:</p> <p>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.</p> <p>2. On 2/5/08, Eighth Circuit denied Fidelity’s petition to appeal the district court’s order granting class certification.</p> <p>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 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.</p>
<i>Ninth Circuit</i>						
16.	<p><i>Kanawi v. Bechtel Corp.</i>, 3:06-cv-05566-CRB (N.D.</p>	<p>Schlichter, Bogard; Futterman, Dupree for plaintiffs</p>	<p>Motion to dismiss denied on 5/15/07 because (a) plaintiff</p>	<p>Motion for class certification denied without prejudice on 8/24/07. By</p>	<p>On 9/16/08, plaintiffs filed a motion for partial summary</p>	<p>Significance:</p> <p>1. In denying defendant’s motion to dismiss, the court noted that compliance with ERISA and DOL regulations</p>

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	<p>Cal. filed 9/11/06)</p> <p>Judge Charles R. Breyer</p> <p>Amended complaint filed on 11/9/06.</p> <p>Second amended complaint filed on 3/23/07.</p> <p>Third amended complaint filed on 3/18/08.</p>	<p>Morgan, Lewis for defendants</p>	<p>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.</p>	<p>order dated 8/27/07 the court explained that the motion may be “renewed” at anytime through re-noticing the motion.</p> <p>On 8/28/08, plaintiffs renewed the motion for class certification.</p>	<p>judgment.</p> <p>On 9/19/08, defendant Fremont Investment Advisors filed a motion for summary judgment.</p> <p>On 9/22/08, Bechtel defendants filed a motion for summary judgment under seal.</p>	<p>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).</p> <p>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 (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.</p>
17.	<p><i>In re Northrop Grumman Corp. ERISA Litig.</i>, 2:06-cv-6213-R-JC (C.D. Cal. filed 9/28/06)</p> <p>Amended complaint filed on 3/14/07</p> <p>Judge Manuel L.</p>	<p>Schlichter, Bogard; Keller, Fishback; Hill, Farrer; AARP Foundation Litigation for plaintiffs</p> <p>McDermott, Will & Emery for defendants</p>	<p>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</p>	<p>First motion denied as moot in light of dismissal of original complaint.</p> <p>Second motion for class certification denied on 8/6/07 because the case is “better taken care of by administrative</p>	<p>Not made.</p>	<p>Significance:</p> <p>1. <i>Heidecker</i> and <i>Grabek</i> actions, and all future actions based on same facts filed in Central District of California, were consolidated on March 26, 2007.</p> <p>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.</p> <p>3. Class certification <u>denied</u>.</p>

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	<p>Real</p> <p><i>Waldbuesser</i> action is restyled <i>Grabek</i> and consolidated with <i>Heidecker</i> actions</p> <p><i>Grabek</i> plaintiffs file amended complaint on 3/14/07</p>		<p>other plaintiffs.</p> <p>Motion to dismiss first amended complaint in <i>Grabek</i> 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.</p>	<p>agencies.”</p> <p>On 10/11/07, the Ninth Circuit Court of Appeals granted plaintiff's petition to appeal the district court's denial of class certification.</p>		<p>4. On 10/1/07, Ninth Circuit stayed the district court proceedings while the class certification order is on appeal.</p>

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18.	<p><i>Tibble v. Edison International</i>, 2:07-CV-05359-SVW-AGR (C.D. Cal. filed 8/16/07)</p> <p>Judge Stephen V. Wilson</p> <p>Amended complaint filed on 8/5/08.</p>	<p>Schlichter, Bogard; Hill, Farrer for plaintiffs</p> <p>O'Melveny & Myers for defendants</p>	<p>Motion to dismiss granted in part and denied in part on 7/16/08.</p>	<p>Filing of motion deferred by court on 11/1/07, and parties relieved of time deadlines.</p>	<p>Not made.</p>	<p>Significance:</p> <p>1. On 7/16/08, the court dismissed fiduciary breach claims against plan sponsor defendants 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.</p> <p>2. The amended complaint filed on 8/5/08 includes allegations that the plan sponsor failed to properly appoint and monitor plan fiduciaries.</p>
19.	<p><i>Daniels-Hall v. National Education Association</i>, 3:07-cv-05339-RBL, (W.D. Wash. Filed 7/11/07)</p> <p>Hon. Ronald B. Leighton</p>	<p>Law offices of Allen C. Engerman; Keller Rohrback; Edward Siedle; Jeffrey C. Engerman for plaintiffs</p> <p>Bredhoff & Kaiser; Song Mondress; O'Melveny & Myers; Wilmer Hale; Perkins Coie; Sutherland Asbill; Gordon Thomas for defendants.</p>	<p>Court dismissed plaintiffs' claims on 5/23/08.</p>	<p>Deadline for filing a motion set as 6/7/09.</p>	<p>Not made.</p>	<p>Significance:</p> <p>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.</p> <p>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.</p> <p>3. The court's order dismissing plaintiffs' claims has been</p>

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						appealed to the Ninth Circuit Court of Appeals.

Plan Fiduciary Claims Against Plan Providers

	Case Name & Judge	Counsel for Parties	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
First Circuit						
20.	<i>Columbia Air Services, Inc. v. Fidelity Management Trust Co.</i> , 1:07-CV-11344-GAO (D. Mass., filed 7/23/07) Judge George A. O'Toole, Jr.	Robinson & Cole, LLP; Schatz, Nobel IZard PC; Sarraf Gentile LLP for plaintiffs O'Melveny & Myers LLP; Goodwin Proctor LLP for defendant	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.	Not made.	Not made.	Significance: 1. 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 <i>exercises</i> discretionary authority. 2. Plaintiff failed to allege facts indicating that Fidelity exercised fiduciary responsibilities in 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 plan'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.
21.	<i>Charters v. John Hancock Life Insurance Co.</i> , 1:07-CV-11371-	Shapiro Haber & Urmy LLP; Schatz Nobel IZard P.C.; Sarraf Gentile LLP	Defendant's motion to dismiss denied on 12/21/07	Not made.	Defendant filed a motion for summary judgment as to the claims asserted in	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

Plan Fiduciary Claims Against Plan Providers

	Case Name & Judge	Counsel for Parties	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
	<p>NMG, (D. Mass. filed on 7/26/07)</p> <p>Judge Nathaniel M. Gorton</p>	<p>for plaintiff</p> <p>Goodwin Procter LLP for defendant</p>	<p>because</p> <p>(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;</p> <p>(b) Plaintiff had standing to assert claims on behalf of trustees of other plans; and</p> <p>On September 30, 2008, the court granted 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</p>		<p>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.</p> <p>On June 30, 2008, Plaintiff cross-moved for partial summary judgment on the issue of whether Defendant is a plan fiduciary.</p> <p>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 its plan clients (b) Hancock retained discretion to substitute mutual funds offered as investments to its</p>	<p>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.</p> <ol style="list-style-type: none"> The court's ruling suggests the fact that Hancock had the discretion to set and modify its administrative maintenance charge was sufficient to confer fiduciary status, whether or not Hancock actually exercised such discretion. The ruling is another instance where courts appear to be giving little deference to the DOL's "Aetna Letter" and suggests that any deference to the Aetna Letter will require service providers to demonstrate that they have identically adhered to the conditions discussed in that letter.

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			<p>be implied into the federal common law of ERISA.</p>		<p>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."</p> <p>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</p>	

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					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 by its plan clients.	

Second Circuit

22.	<p><i>Haddock v. Nationwide Financial Services, Inc.</i>, 3:01-CV-1552-SRU, 419 F.Supp.2d 156 (D. Conn. filed on 8/15/01)</p> <p>Amended Complaint filed 9/6/01</p> <p>Second Amended Complaint filed</p>	<p>Gregory G. Jones; Stanley, Mandel & Iola; Stratton Faxon; Koskoff, Koskoff & Bieder, P.C. for plaintiffs</p> <p>Dewey & LeBoeuf LLP; Wilmer Hale for defendants</p>	<p>Defendant's motion to dismiss the Amended Complaint denied on 9/25/07 because</p> <p>(a) Nationwide may have been a plan fiduciary because it retained discretion to add and delete the fund options offered to plans under its variable annuity</p>	<p>Motion to Certify Class denied on 3/8/06.</p> <p>Motion to Certify Class based on Fifth Amended Complaint pending</p>	<p>Denied on 3/7/06 with respect to Fourth Amended Complaint.</p> <p>(a) Nationwide may have been a plan fiduciary because it retained discretion to add and delete the fund options offered to plans under its variable annuity products;</p> <p>(b) revenue sharing</p>	<p>Significance:</p> <p>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 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.</p>
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	<p>2/27/03</p> <p>Third Amended Complaint filed 5/27/03</p> <p>Fourth Amended Complaint filed 6/16/04</p> <p>Fifth Amended Complaint filed 3/21/06</p> <p>Judge Stefan R. Underhill</p>		<p>products;</p> <p>(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.</p> <p>(c) Trustees could have amended complaint to add fund selection claim and did not waive claim by including in first complaint but omitting from</p>		<p>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.</p>	

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			<p>subsequent complaints.</p> <p>Plaintiffs' motion to dismiss Nationwide's counterclaims granted on August 11, 2008 because</p> <p>(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.</p> <p>(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 <i>plans</i> suffered any harm as a result of</p>			

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			<p>the <i>plaintiffs'</i> breach, as required by ERISA § 409.</p> <p>On September 10, Nationwide filed 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.</p>			
23.	<i>Beary v. ING Life Insurance and Annuity Co.</i> , 3:07-CV-00035-MRK, 520 F.Supp.2d 356 (D. Conn. filed on	Law Offices of Allen C. Engerman, PA; Edward A.H. Siedle; Howard, Kohn, Sprague & Fitzgerald; Law	<p>Motion to dismiss granted on 11/5/07.</p> <p>On January 4, 2008, the district court denied the plaintiff's motion to</p>	Moot in light of dismissal.	Moot in light of dismissal.	<p>Significance:</p> <p>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 any viable claim for relief, entitling</p>

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	<p>1/8/07)</p> <p>Amended complaint filed on 3/9/07</p> <p>Judge Mark R. Kravitz</p>	<p>Offices of Jeffrey C. Engerman; Stanley, Mandel & Iola for plaintiffs</p> <p>Jorden Burt for defendants</p>	<p>alter or amend the court's dismissal of the case.</p>			<p>Defendant to dismissal of the action. Specifically, 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, barring his breach of fiduciary duty claim. 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>i.e.</i>, the revenue sharing payments, and, therefore, that the claim was properly dismissed.</p>
<p>24.</p>	<p><i>Phones Plus, Inc. v. The Hartford Financial Services, Inc.</i>, 3:06-CV-01835-AVC, 2007 WL 3124733 (D. Conn. filed 11/14/06)</p> <p>Amended complaint filed 3/5/07.</p> <p>Hartford filed a third-party complaint against third-party defendants Thomas Sodemann and Robert Sodemann on 12/6/07.</p> <p>Judge Alfred V. Covello</p>	<p>Shepherd Finkelman Miller & Shah LLC; Liner Yankelevitz Sunshine & RegenStreif, LLP; Law Offices of Steven Ross, PA for plaintiffs</p> <p>Jorden Burt; Levy & Droney, PC; Willkie Farr & Gallagher LLP for defendants</p> <p>Newman, Creed & Associates for third-party defendants</p>	<p>Defendants' motion to dismiss amended complaint denied on 10/23/07 because (a) Plaintiffs alleged enough facts in support 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</p>	<p>Plaintiff filed a motion for class certification on March 4, 2008, which was not decided by the court. On June 20, 2008, the Plaintiff filed an amended motion for class certification. The court has not yet ruled on Plaintiff's motion.</p>	<p>Hartford filed a motion for summary judgment on March 3, 2008, as to all three counts in Plaintiff's amended class action complaint. Hartford contends that Plaintiff's claims under ERISA §§ 404, 405, and 406 fail because Hartford is not a fiduciary to the Plaintiff's plan. Hartford also argues that the Plaintiff cannot establish that it suffered any losses as a result of Hartford's purported ERISA violations. In addition, Hartford contends that Plaintiff's claim that Hartford, as a non-fiduciary, knowingly</p>	<p>Significance:</p> <p>Notably, the district court also held that DOL Adv. Op. 1997-16A (May 22, 1997) ("Aetna Letter"), upon which 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.</p>

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			<p>to be considered;</p> <p>(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;</p> <p>(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 provide investment advice to the plan, had no duty to investigate and inform the plaintiff about revenue sharing payments; and</p> <p>(d) even if not a fiduciary, Hartford could be subject to non-fiduciary liability for</p>		<p>participated in Neuberger's breach, fails as a matter of law.</p> <p>Plaintiff filed a response in opposition to Hartford's motion on April 23, 2008. Hartford filed a reply on May 14, 2008. The court has not yet ruled on Hartford's motion.</p>	

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			<p>knowingly participating in Neuberger's alleged fiduciary breach.</p> <p>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 that the Second Circuit allows ERISA fiduciaries to 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.</p>			
25	<p><i>Stark v. American Skandia Life Assurance Corp.</i>, 3:07-CV-01123-CFD (D.Conn. filed 7/25/07)</p>	<p>Schatz Nobel Izard PC; Sarraf Gentile LLP for plaintiff</p> <p>Milbank Tweed; Groom Law Group,</p>	<p>Not made.</p> <p>Plaintiff voluntarily dismissed action without prejudice on 11/13/07.</p>	Not made.	Not made.	

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	Judge Christopher F. Droney	Chtd for defendant				
26	<i>Zang v. Paychex, Inc.</i> , 6:08-CV-06046-DGL (W.D. N.Y.; filed in E.D. Mich. on 8/15/07) Judge David G. Larimer	McTigue & Porter; Adler & Assoc. for plaintiff Groom Law Group, Chtd.; Harris Beach LLP for defendant.	Motion to dismiss Plaintiff's complaint pending.	Not made.	Not made.	Significance: Plaintiff alleges that Defendant is 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 bank account that paid revenue sharing to Paychex. Plaintiff claims 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.

Sixth Circuit

27.	<i>Beary v. Nationwide Life Insurance Co.</i> , 2:06-CV-00967-EAS-MRA, 2007 WL 4643323 (S.D. Ohio filed 11/15/06) Judge Edmund A. Sargus	Smith Phillips & Associates; Stanley, Mandel & Iola, LLP; Allen C. Engerman; Law Offices of Jeffrey C. Engerman, PC; Edward A. H. Siedle for plaintiffs Brickler & Eckler, LLP; Wilmer Hale for defendants.	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. Plaintiff moved to vacate the court's	Not made.	Not made.	Significance: Action brought under state fiduciary law on behalf of IRC § 457(b) plan and similarly situated plans.
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			<p>judgment. The court denied Plaintiff's motion on September 15, 2008, finding that Plaintiff failed to meet the standard required by Rule 59(e) of the Federal Rules of Civil Procedure, because Plaintiff did not identify a mistake of law, a change in controlling law, or newly discovered facts. The court further held that, while Plaintiff satisfied Rule 15(a)'s standard for amending his complaint, such amendment would be futile in this case, as Plaintiff's claims would remain preempted under the Securities Litigation Uniform Standards Act of 1998.</p>			
<i>Eighth Circuit</i>						
28.	<i>Ruppert v. Principal Life Ins.</i>	Duncan Green Brown Langeness	Not made.	Motion for Certify Class filed by Plaintiffs on April	Not made.	Significance:

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	<p><i>Co.</i>, 4:07-CV-00344-JAJ-TJS (S.D. Iowa; case transferred from S.D. Ill. on 7/25/07)</p> <p>First Amended Complaint filed on May 5, 2008.</p> <p>Judge John A. Jarvey</p>	<p>& Eckley PC; Korein Tillery; Simmons Cooper for plaintiffs</p> <p>Sidley Austin LLP; Michael J. Nester; Whitfield & Eddy PLC for defendants</p>		<p>21, 2008.</p> <p>On August 27, 2008, the district court denied the plaintiff's 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.</p> <p>On September 11, 2008, the plaintiff filed a petition to appeal the district court's August 27th denial of class certification to the United</p>		<p>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 participants; (3) has discretion to negotiate for receipt of revenue sharing payments; and (4) provides investment advice.</p> <p>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.</p> <p>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.</p> <p>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 participants.</p>

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				<p>States Court of Appeals for the Eighth Circuit, pursuant to Rule 23(f) of the Federal Rules of Civil Procedure. In support of his petition, plaintiff argues that (1) the district court applied the wrong standard under Rule 23 (essentially substituting Rule 23(b)(3)'s "predominance" standard for the more lenient "commonality" and "typicality" standards set forth in Rule 23(a)(2) and (3); (2) the district court failed to consider the plaintiff's request for certification under Rule 23(b)(1)(A) (as well as Rule 23(b)(3)); and (3) the district court failed to properly consider Principal's fiduciary status.</p> <p>On September 30, 2008, the district court entered a stay of the proceedings pending resolution of the plaintiff's petition for permission to appeal.</p>		

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Second Circuit

29.	<p><i>Young v. General Motors Investment Management Corp.</i>, 1:07-CV-01994-BSJ-FM (S.D.N.Y. filed 3/8/07)</p> <p>Judge Barbara S. Jones</p>	<p>Rosen Preminger & Bloom LLP; McTigue & Porter LLP for plaintiffs</p> <p>Kirkland & Ellis, LLP; McDermott, Will & Emery, LLP for defendants</p>	<p>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.</p> <p>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.</p>	Not made.	Not made.	<p>Significance:</p> <p>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.</p> <p>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 ERISA.</p>
30.	<p><i>Brewer v. General Motors Investment Management Corp.</i>, 1:07-CV-</p>	<p>Rosen Preminger & Bloom LLP; McTigue & Porter</p>	<p>Court granted Defendants' motions to dismiss with prejudice on</p>	Not made.	Not made.	<p>Significance:</p> <p>Plaintiffs alleged that Defendants breached fiduciary duties under ERISA § 404 by (1) allowing or causing</p>

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	<p>02928-BSJ (S.D.N.Y. filed 4/12/07)</p> <p>Judge Barbara S. Jones</p>	<p>LLP for plaintiffs</p> <p>Kirkland & Ellis, LLP; McDermott, Will & Emery, LLP for defendants</p>	<p>3/24/08, holding that Plaintiffs' claims were barred by ERISA's three-year statute of limitations, ERISA § 413, 29 U.S.C. § 1113.</p> <p>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.</p>			<p>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.</p> <p>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 ERISA.</p>