

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

May 6, 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>	Filed 11/20/2006	Not made.	<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, Suozzi for</p>	<p>Motions to dismiss for lack of jurisdiction withdrawn pending completion of jurisdictional discovery.</p>	Not made.	Not made.	<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>

Participant Claims Against Sponsors And Related Fiduciaries

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	Buchwald	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 disclosures or</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 Appeals for the Seventh Circuit.
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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
			selecting plan investments. Motion for reconsideration denied by order dated 10/19/07.			
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.	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 lower investment returns and performance for the 401(k)

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						<p>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>
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>Judge David R Herndon</p>	<p>Schlichter, Bogard for plaintiffs</p> <p>Groom Law Group; Bryan Cave for defendants</p>	<p>Motion to dismiss 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. The motion seeks dismissal of claims based on the inclusion of mutual</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>Not made.</p>	<p>Significance:</p> <p>1. 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>2. 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>

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
			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).			
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 transactions involving defendant and mutual funds.</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 ERISA. Summary judgment denied as to plaintiff's claims of breach of duty of prudence.</p> <p>Plaintiff's motion for summary judgment on liability denied on 8/31/07.</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.

9.	<p><i>Will v. General Dynamics Corp.</i>, 3:06-cv-00698-GPM-CJP (S.D. Ill. filed 9/11/06)</p> <p>Amended complaint filed on 10/25/07</p> <p>Judge G. Patrick Murphy</p>	<p>Schlichter, Bogard for plaintiffs</p> <p>Jenner & Block; Hepler, Broom; Lowenbaum for defendants</p>	<p>General Dynamics filed a motion to dismiss on 11/8/07; Fiduciary Asset Management Company filed a motion to dismiss on 12/7/07</p>	<p>Class certification proceeding stayed on 8/29/07, pending <i>Lively</i> appeal.</p>	<p>General Dynamics filed a motion for summary judgment on 1/4/08.</p>	<p>Significance:</p> <p>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.</p>
10.	<p><i>George v. Kraft Foods Global, Inc.</i>, 1:07-cv-01713, (N.D. Ill. filed 10/16/06 in the S.D. Ill.)</p> <p>Judge Sidney I. Schenkier</p>	<p>Schlichter, Bogard for plaintiffs</p> <p>Seyfarth Shaw for defendants</p>	<p>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.</p>	<p>Motion to Certify Class filed on 11/12/07</p>	<p>Not made.</p>	<p>Significance:</p> <p>1. Case transferred from Southern District of Illinois to Northern District of Illinois by order dated 3/16/2007.</p> <p>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 certification is later denied.)</p>
11.	<p><i>Pino v. Kraft Foods Global, Inc.</i>, 1:07-cv-01954 (N.D. Ill. filed 4/9/07)</p> <p>Judge Sidney I. Schenkier</p>	<p>Wexler Toriseva; Squitieri & Fearon; Gainey & McKenna for plaintiffs</p> <p>Seyfarth Shaw for defendants</p>	<p>Not made.</p>	<p>Not made.</p>	<p>Not made.</p>	<p>Significance:</p> <p>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.)</p>

12.	<p><i>Loomis v. Exelon Corp.</i>, 1:06-cv-04900 (N.D. Ill. filed 9/11/06)</p> <p>Judge John W. Darrah</p>	<p>Schlichter, Bogard for plaintiffs</p> <p>Sidley Austin for defendants</p>	<p>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.</p>	<p>Motion for class certification granted on 6/26/07.</p>	<p>Not made.</p>	<p>Significance:</p> <ol style="list-style-type: none"> 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.	<p><i>Martin v. Caterpillar, Inc.</i>, 1:07-cv-01009-JBM-JAG (C.D. Ill. filed 9/11/06)</p> <p>Amended complaint filed 5/25/07</p> <p>Second Amended Complaint filed 7/5/07</p> <p>Judge Joe Billy McDade</p>	<p>Schlichter, Bogard; Vonachen Lawless for plaintiffs</p> <p>Seyfarth Shaw for defendants</p>	<p>Motion to dismiss complaint granted on 5/15/07 due to "prolix language" without prejudice to re-filing an amended complaint.</p> <p>On 7/25/07, defendants filed a motion to dismiss the second amended complaint. Court has not yet ruled on the motion.</p>	<p>First motion denied on 5/15/07 as moot in light of dismissal of original complaint.</p>	<p>Not made.</p>	<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; (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.
14.	<p><i>Nolte v. Cigna Corp.</i>, 2:07-cv-02046-HAB-DGB (C.D. Ill. filed 2/26/07)</p> <p>Amended complaint filed on 7/19/07</p>	<p>Schlichter, Bogard for plaintiffs</p> <p>Morgan, Lewis for defendants.</p>	<p>Motion to dismiss original complaint dismissed as moot on 7/23/07.</p>	<p>Not made.</p>	<p>Motion for summary judgment made on 9/10/07.</p>	<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

	Judge Harold A. Baker					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.
<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>

Ninth Circuit

<p>16.</p>	<p><i>Kanawi v. Bechtel Corp.</i>, 3:06-cv-05566-CRB (N.D. 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>Schlichter, Bogard; Futterman, Dupree for plaintiffs</p> <p>Morgan, Lewis for defendants</p>	<p>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.</p>	<p>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 anytime through re-noticing the motion.</p>	<p>Not made.</p>	<p>Significance:</p> <p>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).</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>
<p>17.</p>	<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>

	<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>
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>Schlichter, Bogard; Hill, Farrer for plaintiffs</p> <p>O'Melveny & Myers for defendants</p>	<p>Motion to dismiss filed on 10/22/07; the court has yet to rule.</p>	<p>Filing of motion deferred by court on 11/1/07, and parties relieved of time deadlines.</p>	<p>Not made.</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;</p>	<p>Court has not yet ruled on motions to dismiss.</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>

		O'Melveny & Myers; Wilmer Hale; Perkins Coie; Sutherland Asbill; Gordon Thomas for defendants.				
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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	The district court has not yet ruled on Defendant's motion to dismiss. A hearing was held on the motion on February 20, 2008, and the court has taken the matter under advisement.	Not made.	Not made.	Significance: Plaintiff alleges: 1. Defendant had no duty to select the plan's final investment options and, therefore, was not entitled to any fees for investment selection. 2. The plan overpaid for the services provided to it, because, by virtue of making revenue sharing payments to Defendant, the mutual funds performed services for less than the amount of the fees charged to the plan. 3. Defendant's receipt of revenue sharing constituted a breach of fiduciary duty under ERISA § 404(a) and prohibited transactions under ERISA § 406(b)(3).
21.	<i>Charters v. John Hancock Life Insurance Co.</i> , 1:07-CV-11371-NMG, (D. Mass. filed on 7/26/07) Judge Nathaniel M. Gorton	Shapiro Haber & Urmy LLP; Schatz Nobel IZard P.C.; Sarraf Gentile LLP for plaintiff Goodwin Procter LLP for defendant	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	Not made.	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	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.

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>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>The court has not yet ruled on Plaintiffs' motion to dismiss Defendant's counterclaims (for indemnification, contribution, and breach of fiduciary duty by Plaintiff).</p>		<p>fiduciary and, even if it were found to be a fiduciary, Defendant did not breach any fiduciary duties or engage in any prohibited transactions. The court will decide Defendant's motion by August 31, 2008.</p>	

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</p>	<p>Gregory G. Jones; Stanley, Mandel & Iola; Stratton Faxon; Koskoff, Koskoff & Bieder, P.C. for plaintiffs</p> <p>Dewey & LeBoeuf LLP; Wilmer Hale</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</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</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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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>9/6/01</p> <p>Second Amended Complaint filed 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>for defendants</p>	<p>and delete the fund options offered to plans under its variable annuity 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</p>		<p>options offered to plans under its variable annuity 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>	

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			claim and did not waive claim by including in first complaint but omitting from subsequent complaints.			
23.	<p><i>Beary v. ING Life Insurance and Annuity Co.</i>, 3:07-CV-00035-MRK, 520 F.Supp.2d 356 (D. Conn. filed on 1/8/07)</p> <p>Amended complaint filed on 3/9/07</p> <p>Judge Mark R. Kravitz</p>	<p>Law Offices of Allen C. Engerman, PA; Edward A.H. Siedle; Howard, Kohn, Sprague & Fitzgerald; Law Offices of Jeffrey C. Engerman; Stanley, Mandel & Iola for plaintiffs</p> <p>Jorden Burt for defendants</p>	Motion to dismiss granted on 11/5/07.	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 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>
24.	<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</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;</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	Plaintiff filed a motion for class certification on March 4, 2008. Defendants' response in opposition is due May 16, 2008.	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,	<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>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>Willkie Farr & Gallagher LLP for defendants</p> <p>Newman, Creed & Associates for third-party defendants</p>	<p>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;</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</p>		<p>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 participated in Neuberger's breach, fails as a matter of law. Plaintiff filed a response in opposition to Hartford's motion on April 23, 2008. The court has not yet ruled on Hartford's motion.</p>	

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			<p>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 knowingly participating in Neuberger's alleged fiduciary breach.</p> <p>The court has not yet ruled on Plaintiffs' motion to dismiss Defendants' counterclaims.</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>Judge Christopher F. Droney</p>	<p>Schatz Nobel Izard PC; Sarraf Gentile LLP for plaintiff</p> <p>Milbank Tweed; Groom Law Group, Chtd for defendant</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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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. Plaintiffs have moved to vacate judgment.	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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<i>Eighth Circuit</i>						
28.	<i>Ruppert v. Principal Life Ins. Co.</i> , 4:07-CV-00344-JAJ-TJS (S.D. Iowa; case transferred from S.D. Ill. on 7/25/07) Judge John A. Jarvey	Duncan Green Brown Langeness & Eckley PC; Korein Tillery; Simmons Cooper for plaintiffs Sidley Austin LLP; Michael J. Nester; Whitfield & Eddy PLC for defendants	Not made.	Not made.	Not made.	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 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.

Participant Claims Against Plan Providers

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<i>Second Circuit</i>						
29.	<i>Young v. General Motors Investment Management Corp.</i> , 1:07-CV-01994-BSJ-FM (S.D.N.Y. filed 3/8/07) Judge Barbara S. Jones	Rosen Preminger & Bloom LLP; McTigue & Porter LLP for plaintiffs Kirkland & Ellis, LLP; McDermott, Will & Emery, LLP for defendants	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.	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

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			§ 1113.			<p>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-02928-BSJ (S.D.N.Y. filed 4/12/07)</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>	Not made.	Not made.	<p>Significance:</p> <p>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.</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</p>

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						otherwise violated ERISA.