

401(K) FEE LITIGATION

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I. BACKGROUND

A. DOL'S VIEWS ON REVENUE SHARING

1. Revenue-sharing – where mutual funds pay fees, including so-called 12b-1 and similar fees, to companies that act as recordkeepers or service providers to defined contribution plans – is common in the retirement services industry.

a. DOL's Views re Plan Sponsor/Fiduciary's Duties

(1) The plan's sponsor/fiduciary has a duty under ERISA section 404 to prudently select and compensate plan providers, including recordkeepers and investment providers. The fiduciary must “engage in an objective process designed to elicit information necessary to assess the qualifications of the provider, the quality of services offered, and the reasonableness of the fees charged in light of the services provided. . . such process should be designed to avoid self-dealing, conflicts of interest or other improper influence.” Field Assistance Bulletin 2002-3 (Nov. 5, 2002). As for a third party payment that may be received by a plan service provider, the plan sponsor/fiduciary must “take the payment into account” in determining whether the plan’s payment to the provider is “reasonable compensation.” See, e.g., DOL Adv. Ops. 97-15A (May 22, 1997) and 97-16A (May 22, 1997).

(2) Although the plan fiduciary is required to take into account third party payments made to the plan's providers, there is no duty on the part of the non-fiduciary provider to disclose these payments. In an effort to create an incentive, if not a duty, on the part of service providers to disclose these payments to plans, DOL proposed an amendment to the regulations under section 408(b)(2) in late 2007. Under the proposal, relief under the “reasonable services” exemption would be conditioned on extensive disclosure by service providers to plans regarding the direct and indirect compensation they receive. Because a plan service provider is a “party in interest” as defined in section 3(14), its continued provision of services to the plan would violate section 406(a)(1)(C) without the relief afforded by the exemption. And, as a party in interest participating in a non-exempt prohibited transaction, a provider would be liable for excise tax under section 4975 (in the case of a pension plan) or section 502(i) penalties (for a welfare plan).

b. Fiduciary Provider's Receipt of Payments from a Third Party in Connection with Plan Investments

(1) A service provider may or may not be a fiduciary with respect to its client plan. And, it is only a fiduciary “to the extent” of its fiduciary acts. ERISA § 3(21)(A).

(2) If a service provider is a fiduciary and receives a payment from a third party in connection with a fiduciary act, the receipt of the payment will violate sections 406(b)(1) and (2) unless the payment is offset against fees the plan would otherwise pay to the provider. DOL Adv. Ops. 97-15A (May 22, 1997) and 2005-10A (May 11, 2005). DOL Advisory Opinion 2005-10A describes a program of asset allocation and investment management services offered by COUNTRY Trust (the "Bank") to IRAs. Under the program, the Bank would use model investment strategies to invest the IRAs' assets among mutual funds, some advised by the Bank ("Affiliated Funds") and some not affiliated with the Bank ("Non-Affiliated Funds"). The IRAs would pay an annual investment fee based on the total value of IRA assets in the program (declining from 1.75% to 1.25% of assets). The Bank could also receive certain advisory and non-advisory fees from the Affiliated Funds, but would reduce the investment fees otherwise payable by the IRAs by the total amount of fees it received from the Affiliated Funds. (It was represented that the Bank would not receive fees from the Non-Affiliated Funds.) Because of this offset arrangement, DOL agreed that the Bank's receipt of fees from the Affiliated Funds would not violate the prohibitions against self-dealing and conflicts under the Internal Revenue Code (Code sections 4975(c)(1)(E) and (F)). (If the Bank offered the program to ERISA-covered plans, the same analysis and conclusions would apply under the provisions of ERISA section 406(b).)

(3) In Advisory Opinion 2005-10A, DOL confirmed that its analysis in Advisory Opinion 97-15A (Frost National Bank) extends to affiliated mutual funds as well as to non-affiliated mutual funds. In the "Frost Letter," DOL explained that a bank with authority to select and substitute mutual fund investment options available to participants under a participant-directed plan was a "fiduciary," and thus could violate the prohibited transaction provisions by receiving 12b-1 or other fees from the mutual funds. However, the opinion also stated that the bank could avoid violations of the prohibited transaction rules if it used all amounts received from the mutual funds to offset fees the plans would otherwise pay on a dollar-for-dollar basis.

(4) Certain exemptions may permit a provider to retain commissions/management fees, e.g., PTEs 75-1, 77-4, and 84-24.

c. Non-Fiduciary Provider's Receipt of Payments

(1) Under ERISA, a non-fiduciary service provider does not owe a direct duty to the plan. If the provider does not act as a fiduciary in connection with a plan transaction (such as an investment), the provider may receive payments from a third party in connection with that transaction. For example, a plan recordkeeper/investment provider who merely offers a "platform" of investments from which plan sponsor choose, are not plan fiduciaries and may retain fees from mutual funds. See DOL Adv. Ops. 2003-09A (June 25, 2003) and 97-16A (May 23, 1997).

(2) A service provider will not be deemed a fiduciary solely because it may remove or substitute investment options from its platform provided that the plan fiduciary "...is provided advance notice of the change, including any fees received, and afforded a reasonable period of time within which to decide whether to accept or reject the change, and in the event of a rejection, select a new service provider." DOL Adv. Op. 97-16.

B. LITIGATION CHALLENGES "TRADITIONAL" VIEW

1. Beginning in September 2006, one plaintiffs' firm, Schlichter, Bogard & Denton, began filing a series of class action lawsuits on behalf of plan participants in 401(k) plans sponsored by major corporations, alleging that the plan participants paid unreasonable and excessive fees for investment management and administrative services in their 401(k) plans. Many of these and other similar lawsuits challenge "revenue sharing" as a source of compensation for plan service providers. According to plaintiffs in these lawsuits, revenue sharing payments were not properly disclosed and accounted for in determining compensation paid to plan service providers. Many of these lawsuits also include allegations that plan fiduciaries acted improperly in: (1) not accounting for sources of revenue for plan service providers (in addition to the revenue sharing already complained of) such as finder's fees, float, fees from securities lending, and profits from foreign currency exchange; (2) offering as investment options (i) actively-managed mutual funds rather than index funds and (ii) mutual funds instead of separate accounts¹; (3) engaging in prohibited transactions; (4) failing to monitor what similar 401(k) plans are paying for investment management and administrative services; and (5) causing the plan to pay retail investment management and administrative fees without receiving more services than retail investors.

¹ For a case brought against the plan sponsor and challenging the offering of mutual funds as investment options, but not challenging revenue sharing, see *Boeckman v. A.G. Edwards, Inc.*, 2007 WL 4225740 (S.D. Ill. 2007). The parties in the *Boeckman* case has filed a stipulation to dismiss the action with prejudice on June 29, 2009 in light of the Seventh Circuit's denial of petition for rehearing in *Hecker v. Deere & Co.*

2. Although 401(k) plan fees and expenses, including revenue sharing arrangements, have been a focus of DOL and media attention for several years, these class action cases signaled the start of a significant wave of new litigation involving 401(k) plan fee and expense issues.

3. In sections II and III below, we provide an overview of claims brought by participants against plan sponsor/fiduciaries and by plan sponsors and fiduciaries against plan service providers.

II. CLASS ACTIONS ON BEHALF OF PLAN PARTICIPANTS

A. Cases Against Plan Sponsor Fiduciaries

1. At least 15 lawsuits have been brought on behalf of plan participants, alleging that plan fiduciaries imprudently allowed plan service providers to receive excessive investment management and administrative fees at the expense of plan participants.

2. Generally, these cases hinge on application of ERISA section 404(a), and raise the following issues:

a. Procedural Prudence – Did the plan fiduciaries exercise due diligence in their consideration of the plan’s compensation arrangement with service providers, including any revenue sharing component?

b. Reasonable Compensation– Did the plan fiduciaries cause the plan to pay excessive compensation to service providers because of revenue sharing or other circumstances?

c. Disclosure – Did the plan fiduciaries violate ERISA in how and what they disclosed to plan participants about revenue sharing and other fees charged to the plan?

Corporations that have been sued include. Bechtel Corp.; The Boeing Co.; Caterpillar Inc.; CIGNA Corp.; Exelon Corp.; General Dynamics Corp.; Honda of America Manufacturing, Inc.; International Paper Co.; Kraft Foods Global, Inc.; Lockheed Martin Corp.; Northrop Grumman Corp.; United Technologies Corp.; Wal-Mart; ABB, Inc. (with Fidelity); Deere & Co. (with Fidelity); and Unisys Corp. (with Fidelity).

3. As to the claims that plan fiduciaries failed to consider (in evaluating a service provider's compensation) or capture (for the plans) fees a service provider receives from sources of revenue (besides revenue sharing), plaintiffs argue that plan service providers received undisclosed compensation by receiving finder's fees from investment managers, float from trustees or custodians, fees from securities lending, and profits from foreign currency exchange (with respect to foreign investments). *E.g.*, *Spano v. The Boeing Co.*, Civil Action No. 3:06-CV-00743 (S.D. Ill.); *Martin v.*

Caterpillar, Inc., Civil Action No. 07-CV-01009 (C.D. Ill.); *Renfro v. Unisys Corp.*, Civil Action No. 2:07-CV-02098 (E.D. Pa.).

4. As to the claims that plan fiduciaries caused plans to pay excessive fees by offering actively-managed mutual funds as investment options, plaintiffs argue that actively-managed mutual funds do not outperform index mutual funds when held as long-term investments. *E.g.*, *Spano v. The Boeing Co.*, Civil Action No. 3:06-CV-00743 (S.D. Ill.); *Martin v. Caterpillar, Inc.*, Civil Action No. 07-CV-01009 (C.D. Ill.); *Renfro v. Unisys Corp.*, Civil Action No. 2:07-CV-02098 (E.D. Pa.).

5. As to the claims that plan fiduciaries caused plans to pay excessive fees by offering mutual funds instead of separate accounts as investment options, the argument is that separate accounts have lower fees than mutual funds. *E.g.*, *Spano v. The Boeing Co.*, Civil Action No. 3:06-CV-00743 (S.D. Ill.); *Martin v. Caterpillar, Inc.*, Civil Action No. 07-CV-01009 (C.D. Ill.); *Renfro v. Unisys Corp.*, Civil Action No. 2:07-CV-02098 (E.D. Pa.).

6. As to the claims that plan fiduciaries engaged in prohibited transactions, plaintiffs have not provided details. For example, in the case against International Paper, Civil Action No. 3:06-cv-00703 (S.D. Ill.), 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) plan. It will be interesting to see if plaintiffs could support any of these claims with facts. *See also*, *Kanawi v. Bechtel Corp.*, Civil Action No. 3:06-CV-05566 (N.D. Cal.) (alleging that service provider engaged in a prohibited transaction by receiving revenue sharing); *Taylor v. United Technologies Corp.*, Civil Action No. 3:06-CV-01494 (D. Conn.) (alleging that plan sponsor engaged in a prohibited transaction by receiving a "corporate benefit").

7. Some of these complaints also include claims relating to the plan's company stock investment alternative. Plaintiffs assert that unitizing the plan's company stock fund improperly dilutes participants' gains when the stock rises because the cash held within the company stock fund depresses the fund's overall returns. Some complaints also allege that plan fiduciaries caused excessive fees to be assessed against participants' accounts in the unitized company stock fund. *E.g.*, *Grabek v. Northrop Grumman Corp.*, Civil Action No. 2:06-CV-06213 (C.D. Cal.); *Abbott v. Lockheed Martin Corp.*, Civil Action No. 3:06-CV-00701 (S.D. Ill.).

8. Some cases include an allegation that the plan sponsor corporation improperly used plan assets for its own benefit in connection with the sale of the plan sponsor's affiliate. *E.g.*, *Nolte v. CIGNA Corp.*, Civil Action No. 2:07-CV-02046 (C.D. Ill.) (alleging that CIGNA improperly benefited from the sale of its retirement business); *Martin v. Caterpillar Inc.*, Civil Action No. 1:07-CV-01009 (C.D. Ill.) (alleging Caterpillar improperly benefited from sale of its investment management subsidiary).

9. *Will v. General Dynamics Corp.*, Civil Action No. 3:06-CV-00698 (S.D. Ill.), contains an allegation that the plan's administrative service provider profited from using plan assets as "seed money" in establishing its business and selling the business for a profit. The case also contains an allegation that the buyer participated in the service provider's self-dealing.

10. *Renfro v. Unisys Corp.*, Civil Action No. 2:07-CV-2098 (E.D. Pa.), contains allegations that the plan's fiduciaries: (1) failed to monitor what similar 401(k) plans were paying for investment management and administrative services; and (2) caused the plan to pay retail investment management and administrative fees without receiving more services than retail investors.

B. CASES AGAINST PLAN SPONSORS THAT ARE FINANCIAL INSTITUTIONS

1. More recently, several lawsuits have been brought by participants against plan sponsors that are financial institutions. These complaints allege that plan fiduciaries violated their fiduciary duties by selecting "proprietary" mutual funds to be the plan's investment options. *E.g.*, *David v. Alphin*, Civil Action No. 3:07-CV-00011 (W.D.N.C.) (alleging that plan fiduciaries violated ERISA by causing plans to purchase and pay for investment products and services from Bank of America and its affiliates, which charged higher fees than comparable mutual fund options)²; *Leber v. CitiGroup, Inc.*, Civil Action No. 1:07-CV-09329 (S.D.N.Y.) (plan fiduciaries chose investment products and plan services offered and managed by Citigroup subsidiaries and affiliates).³

2. One court recently addressed the investment of plan assets in plan sponsor-affiliated investment products in connection with a pension plan that is not participant-directed. In *Dupree v. Prudential Life Insurance Co. of America*, 2007 WL 2263892 (S.D. Fla. Aug. 10, 2007), the court found that in-house plan fiduciaries were prudent in making investments in the plan sponsor's investment products where there was "appropriate due diligence and procedural prudence in selecting proposed investments

² On September 22, 2011, the court dismissed the case mostly on statute of limitations grounds.

³ On March 16, 2010, the court dismissed prohibited transaction claims, but allowed excessive investment management fee claim to proceed. Also, the court precluded plaintiffs from seeking investment losses because they failed to make allegations regarding how the affiliated funds underperformed. 2010 WL 935442.

and monitoring the Plan's performance." In a detailed set of factual findings, the court noted the procedures followed by fiduciaries, including consideration of non-sponsor-managed products when deciding to make investments, regular reviews of investment performance, and periodic reviews of fees. The court also accorded some weight to the fiduciary investment committee's retention of an independent consultant to provide advice on investment matters.

3. There have also been three notable settlements regarding in-house plan cases:

a. *Mehling v. N.Y. Life Ins. Co.*, 2007 WL 3145344 (E.D. Pa. 2007) approving a \$14 million settlement in a case involving allegations that in-house plan assets were imprudently used as seed money for new mutual fund products affiliated with the plan sponsor.

b. *Franklin v. First Union Corp.*, Civil Action No. 99-CV-344 (E.D. Va.) \$26 million settlement of claims that in-house plan assets were used as seed money and that participants were charged excessive fees by the plan sponsor.

c. *Figas v. Wells Fargo & Co.*, Civil Action No. 08-CV-04546 (D. Minn.) \$17.5 million settlement of claims that plan fiduciaries put Wells Fargo's interests ahead of the plan's interests by choosing investment products and services offered and managed by Wells Fargo and affiliates.

C. CASES AGAINST PLAN SPONSOR FIDUCIARIES AND SERVICE PROVIDERS

1. Some of the class actions brought by participants against plan sponsors include claims against Fidelity Management Trust Company and Fidelity Management & Research Company (together, "Fidelity"), as directed trustee and plan recordkeeper. *E.g.*, *Hecker v. Deere & Co.*, 496 F.Supp.2d 967 (W.D.Wis. 2007); *Tussey v. ABB, Inc.*, Civil Action No. 2:06-CV-04305 (W.D. Mo.); *Renfro v. Unisys Corp.*, Civil Action No. 2:07-CV-02098 (E.D. Pa.).

2. In these complaints, plaintiffs allege that Fidelity is an ERISA fiduciary based on its trustee status, investment manager status, and allegations that Fidelity generally limited investments that plans may offer to participants to primarily proprietary funds.

3. Based on allegations that Fidelity is a fiduciary, these complaints alleged that the plan sponsor fiduciaries and Fidelity did not disclose actual plan expenses to participants, including revenue sharing, allowed plan participants to pay excessive fees, and that all revenue sharing is "plan assets," which should be restored to participants.

D. CASES AGAINST SERVICE PROVIDERS

Brewer, et al. v. General Motors Investment Management Corporation, et al., Civil Action No. 1:07-CV-02928 (S.D.N.Y.); *Young, et al. v. General Motors Investment*

Management Corp., et al., Civil Action No. 1:07-CV-01994 (S.D.N.Y.). In these cases, participants in employer-sponsored defined contribution plans sued the plans' investment managers alleging that (1) the defendants breached their fiduciary duties under ERISA § 404 by allowing or causing the plans to maintain investments in undiversified and imprudent investment vehicles, which the plaintiffs allege caused the plans to lose hundreds of millions of dollars; and (2) the defendant General Motors Investment Management Corporation breached its fiduciary duties under ERISA § 404 by causing or allowing the plans to maintain investments in certain mutual funds when similar investment products were available at much lower costs, which the plaintiffs allege caused the plans to pay millions of dollars in excess fees.

E. COURT DECISIONS

1. In *Hecker v. Deere & Co.*, the district court dismissed all claims against the plan sponsor and Fidelity, 496 F.Supp.2d 967 (W.D.Wis. 2007), and the Seventh Circuit affirmed, 556 F.3d 575 (7th Cir. Feb. 12, 2009).

a. Deere had engaged Fidelity to provide "bundled" 401(k) plan services under an arrangement centered on the use of Fidelity mutual funds. Deere selected the plan's primary investment options from a menu of Fidelity's retail mutual funds and included a plan brokerage window through which participants could invest in more than 2500 different publicly-available investments. The Fidelity funds charged asset-based fees and shared some of that asset-based fee revenue with Fidelity as trustee and recordkeeper.

b. The plaintiffs claimed that Deere and Fidelity breached their fiduciary duties under ERISA by failing to disclose the revenue sharing arrangement to plan participants and allegedly causing the plan to overpay for the bundled services. The district court ruled as follows --

(1) On the disclosure claim, the court ruled that "[n]othing in the statute or regulation directly requires such a disclosure" and that the mutual fund prospectuses admittedly given to the plan participants "accurately reflect the expenses paid to the fund manager." The court was skeptical that participants would gain any practical benefit by knowing precise details about how fund fees were subdivided among profits, revenue sharing and other expenses. The court also cited DOL's proposal to amend existing regulations possibly to require further fee disclosures as proof that disclosures are not required under current law.

(2) On the excessive fee claim, the court ruled that defendants could not be liable because ERISA section 404(c) operates to shield fiduciaries from liability where the alleged loss or breach results from a participant's exercise of control over his or her plan account. Citing the fee disclosures provided by the mutual fund prospectuses, and the plan's brokerage window, the court held that "[t]he only possible conclusion is

that to the extent participants incurred excessive expenses, those losses were the result of the participants' exercising control over their investments within the meaning of [ERISA § 404(c)'s] safe harbor provision."⁴

(3) As an alternative ground for its dismissal of claims against Fidelity, the court ruled that Deere had responsibility for choosing plan investment options, so that Fidelity was not a fiduciary with respect to the disclosure and fund-selection issues.

c. The Seventh Circuit affirmed the dismissal by holding that: (1) revenue sharing information is not material and did not need to be disclosed; (2) the plan offered a sufficient mix of investments so that inclusion of allegedly expensive funds did not constitute a fiduciary breach; and (3) even if there was a breach with respect to fund selection, section 404(c) precluded liability for the breach.

d. On June 24, 2009, the Seventh Circuit denied plaintiffs' petition for rehearing. 569 F.3d 708. The Seventh Circuit commented on the Secretary of Labor's amicus brief in support of rehearing by stating that a footnote (in the preamble to the 404(c) regulation) which states that 404(c) does not shield fiduciaries from improper selection of investment options is not entitled to Chevron deference. The Seventh Circuit, however, stated that it did not generally rule on the scope of 404(c) defense and that its decision applies only to the facts stated in the Deere complaint.

e. On January 19, 2010, the Supreme Court denied plaintiffs' petition for a writ of certiorari.

2. In *Brewer, et al. v. General Motors Investment Management Corporation, et al.*, Civil Action No. 1:07-CV-02928 (S.D.N.Y.) and *Young, et al. v. General Motors Investment Management Corp., et al.*, Civil Action No. 1:07-CV-01994 (S.D.N.Y.), the district court dismissed the plaintiffs claims on the basis of ERISA's three-year statute of limitations, ERISA § 413, 29 U.S.C. § 1113.

a. The court acknowledged that ERISA's three-year statute of limitations requires "actual knowledge of the breach or violation." In the Second Circuit, a plaintiff has "actual knowledge" when he has knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated ERISA. When determining whether plaintiffs have actual knowledge of a breach for purposes of ERISA § 413, the courts in the

⁴ The court in *Hecker v. Deere & Co.* thus rejected the DOL's longstanding position that ERISA § 404(c) is never a defense to the selection of investment alternatives. In this regard, *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 312 (5th Cir. 2007), reaches substantially the same conclusion.

Second Circuit focus on whether documents provided to plan participants sufficiently disclosed the alleged breach of fiduciary duty, *not* whether individual plaintiffs actually saw or read such documents.

b. With respect to plaintiffs' allegations that the defendants breached their fiduciary duties under ERISA § 404 by allowing or causing the plans to maintain investments in undiversified and imprudent investment vehicles, the court found that all such investments were made more than three years before the plaintiffs filed their action and that plan documents, provided to the participants more than three years before the action was filed, accurately described such investments.

c. With respect to plaintiffs' allegations that the defendant General Motors Investment Management Corporation breached its fiduciary duties under ERISA § 404 by causing or allowing the plans to maintain investments in certain mutual funds when similar investment products were available at much lower costs, the court found that the allegedly excessive fees associated with such mutual funds were readily apparent from information provided to plan participants more than three years before the plaintiffs filed their action. The court found that the plaintiffs had actual knowledge that the plan offered such funds as investment options and received performance summaries which disclosed the fees and expenses associated with the funds, including the fact that such costs were higher than those associated with alternative investments.

d. The plaintiffs have appealed the dismissal of their claims to the United States Court of Appeals for the Second Circuit.

e. On May 6, 2009, the Second Circuit affirmed the district court's March 24, 2008 dismissal, but on grounds not addressed by the district court. Specifically, the Second Circuit held that Plaintiffs failed to allege that the plan *as a whole* was undiversified and, instead, merely alleged that certain *options* within the plan were undiversified, which was insufficient to state a claim under ERISA § 404(a)(1)(C). The Second Circuit also held that Plaintiffs failed to allege facts showing that the fees were excessive relative to services rendered and otherwise failed to allege facts relevant to the determination of whether the fees were excessive.

3. In *Braden v. Wal-Mart Stores, Inc.*, Civil Action No. 6:08-CV-03109 (W.D. Mo.), the district court granted the defendants' motion to dismiss the case on October 28, 2008, 590 F.Supp.2d 1159, but the Eighth Circuit vacated that decision and remanded the case to the district court on November 25, 2009, 588 F.3d. 585.

a. On October 28, 2008, the district court granted the defendants' motion to dismiss the case by finding that the plaintiff lacked standing to assert claims for alleged fiduciary breaches that occurred prior to October 31, 2003, the date the plaintiff first contributed to the plan, and that the plaintiff otherwise failed to state a claim upon which relief can be granted. The court explained that

the plaintiff failed to state a claim because the plaintiff failed to allege facts showing that the process used by the defendants to select the allegedly expensive funds was flawed. In this regard, the court stated that the defendants could have chosen allegedly expensive funds with revenue sharing “for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility[,]” and that the plaintiff failed to allege “facts showing [that] Wal-Mart . . . failed to conduct research, consult appropriate parties, conduct meetings, or consider other relevant information” in selecting the allegedly expensive funds. As to the non-disclosure of certain fund expense and revenue sharing information, the court held that the defendants did not have a duty to disclose such information. As to the plaintiff's claim that defendants caused a prohibited transaction by allowing the plan trustee to receive revenue sharing payments from mutual funds offered as investment options, the court held that the plaintiff failed to show that the alleged prohibited transaction was not exempted by ERISA § 408(b)(2) exempting a party in interest's receipt of reasonable compensation for services.

b. On November 25, 2009, the Eight Circuit vacated the district court's decision dismissing the case and remanded the case to the district court. The Eighth Circuit ruled that from the facts pled by the plaintiff – e.g., that defendants selected retail shares of mutual funds when the plan could have obtained less expensive institutional shares – it is reasonable to infer that the process used by the defendants was flawed. The Eighth Circuit also ruled that a plan fiduciary has a duty to disclose material information and that a reasonable trier of fact could find that the fund expense and revenue sharing information sought by plaintiff is material to a reasonable plan participant. In addition, the Eight Circuit ruled that: (1) the plaintiff had Article III standing because he allegedly suffered a redressable personal harm due to defendants' conduct; (2) the relief that could be sought by the plaintiff under ERISA “is not necessarily limited to the period in which [the plaintiff] personally suffered injury”; and (3) as to whether ERISA section 408(b)(2) exemption was applicable to the plaintiffs' prohibited transaction claim, the plaintiff had alleged sufficient facts to “shift the burden to [the defendants] to show that 'no more than reasonable compensation [was] paid' for [the plan trustee]'s services.”

4. In *In re Honda of Am. Mfg., Inc. ERISA Fees Litig.*, Civil Action No. 2:08-CV-01059 (S.D. Ohio), the court granted the defendants' motions to dismiss the case.

a. Plaintiffs alleged that the defendants acted improperly by: (1) allowing a sizable number of the investment options to be retail mutual funds affiliated with Merrill Lynch, the plan's recordkeeper and directed trustee; (2) failing to make various disclosures, including the fact that the investment options had excessive fees; and (3) engaging in self-dealing prohibited transactions.

b. On October 9, 2009, the court granted the Honda defendants' motion to dismiss the case. The court followed the rationale of *Hecker v. Deere* and ruled that: (1) selecting multiple funds offered by a single provider was not

prohibited by ERISA; (2) offering retail mutual funds was not imprudent because such funds' fees are set against the backdrop of market competition, and the plaintiffs were factually incorrect in alleging that the Merrill Lynch funds were retail mutual funds; (3) the defendants did not have a disclosure duty beyond the specific disclosure requirements found in ERISA; and (4) the plaintiffs failed to state a plausible self-dealing claim because the Honda defendants did not benefit financially from any fees paid to Merrill Lynch.

c. On October 13, 2009, the court granted Merrill Lynch's motion to dismiss the case. The court declined to decide whether Merrill Lynch was a plan fiduciary, but held that since the claims against Merrill Lynch are identical to the claims against the Honda defendants, the claims against Merrill Lynch must be dismissed for the reasons the court gave in dismissing the claims against the Honda defendants.

5. In *Loomis v. Exelon Corp.*, 2009 WL 4667092 (N.D. Ill. Dec. 9, 2009), the court granted the defendants' motions to dismiss the case.

a. The court based its decision on its finding that the case was not "materially distinguishable" from the Seventh Circuit's *Hecker v. Deere* decision. The court ruled that, as in *Hecker*, the gist of the plaintiffs' claim is that defendants violated fiduciary duties by selecting investment options with excessive fees. The court ruled that this claim could not survive defendants' motion to dismiss because *Hecker* found that plan fiduciaries do not have to "scour the market to find and offer the cheapest possible fund." The court noted that the fund expense ratios were in line with the fund expense ratios in *Hecker*. Further, the court noted that the facts were even better for the defendants than the facts in *Hecker* because the plan involved in *Hecker* only offered retail funds while the plan in issue in this case offered both retail and wholesale funds. The court also found that plaintiffs' challenge of revenue sharing arrangements and asset based fees were foreclosed by *Hecker*. Lastly, the court found that plaintiffs failed to state a claim against certain corporate committees named as defendants because the plaintiffs failed to allege anything beyond mere conclusory statements.

b. The plaintiffs have appealed this decision to the Seventh Circuit. Oral argument was held on September 13, 2010. An attorney for the DOL participated in the oral argument in support of plaintiffs.

c. On September 6, 2011, the Seventh Circuit affirmed the district court's decision dismissing the case. The Seventh Circuit ruled that the plaintiffs failed to state a claim because the plan—like the plan in *Hecker v. Deere*—offered a sufficient mix of investment options with varying expense ratios. The Seventh Circuit also noted that it was not clear that institutional shares of mutual funds are better than retail shares because institutional shares may be less liquid and harder to value, and retail mutual fund fees reflect market competition. The Seventh Circuit also opined that it was not clear that the plan could have used its

bargaining power to secure lower fund expense ratios because the plan could not make a single lump-sum investment in a particular fund. The Seventh Circuit also commented that Exelon was not required to pay for fund expenses.

6. In *Renfro v. Unisys Corp.*, 2010 WL 1688540 (E.D. Pa. Apr. 26, 2010), the court granted Fidelity's motion to dismiss the case and Unisys's motion to dismiss the case or for summary judgment.

a. In ruling that the case should be dismissed, the court found that: (1) Fidelity did not become a fiduciary by exercising a "veto power" over plan investment options because Unisys was not prohibited from establishing an additional trust for the plan and offering non-Fidelity investment options within such trust; (2) whether Fidelity was a fiduciary with respect to float (a plan asset) did not matter because plaintiffs were challenging Fidelity's role in investment options selection; (3) Unisys did not breach its fiduciary duty in selecting investment options for the plan because the plan offered more than 70 mutual funds with fees ranging from 0.1% to 1.21% (and agreeing with Hecker that a plan fiduciary "need not select the cheapest fund available"); (4) Unisys had an "incentive" to use its "market power" to negotiate lower fees, and that this incentive suggested that the agreement that Unisys negotiated with Fidelity was a result of "an arm's length bargain and therefore need[ed] less judicial oversight to insure fairness to plan participants and beneficiaries"; and (5) Unisys's failure to disclose revenue sharing information could not form the basis for a fiduciary breach claim since plan participants were made aware of "the fees they would pay for allocating their [p]lan contributions to particular funds," and "[t]o whom that money ultimately flowed would seem irrelevant to a participant once it left his wallet." In ruling that Unisys was entitled to summary judgment, the court concluded that even assuming that Unisys breached its fiduciary duty in selecting "overly expensive funds," ERISA section 404(c) precluded Unisys's liability for any resulting losses.

b. Although the court ultimately dismissed the case against both Unisys and Fidelity, the court had earlier rejected (on February 19, 2010): (1) Unisys's argument that plaintiffs failed to demonstrate constitutional standing by failing to allege a personal injury, and (2) Fidelity's argument that the complaint should be dismissed in its entirety based on statute of limitations. The court had found that the plaintiffs' allegation that the plan and the plaintiffs' class suffered financial losses and damages was sufficient to allege personal injury. The court had also found that even if the selection of allegedly expensive funds occurred more than six years ago, the fiduciaries had a continuing duty to monitor investment options, and if necessary, remove funds that were no longer appropriate.

c. On August 19, 2011, the Third Circuit affirmed the district court's order dismissing the case. The Third Circuit ruled that the plaintiffs failed to state a claim because the plan offered "a reasonable range of investment options with a variety of risk profiles and fee rates." In so ruling, the Third Circuit followed the

Seventh Circuit's analysis in *Hecker v. Deere*. The Third Circuit also ruled that Fidelity did not act as a fiduciary in selecting and maintaining the plan's investment options because Unisys was free to add non-Fidelity investments to the plan's line-up of investment options by administering such investments itself or contracting that function to another party. Because the Third Circuit affirmed the district court's decision to dismiss the case, the Third Circuit did not reach the district court's alternative conclusion that Unisys was entitled to summary judgment based on ERISA section 404(c). 2011 WL 3630121.

7. Other defendants have had partial success on motions to dismiss.

a. In *Taylor v. United Technologies Corp.*, 2007 WL 2302284 (D. Conn. Aug. 9, 2007), the court dismissed plaintiffs' failure to disclose claims, holding that "ERISA fiduciaries are under no present duty" to disclose revenue sharing and citing the district court order in *Hecker v. Deere & Co.* However, the court held that plaintiffs satisfied the federal notice pleading requirement by alleging that "the fiduciaries' conduct included failure to take steps to inform themselves [of trends and developments in the retirement industry] and to provide adequate oversight [over plan activities], which if proven, could plausibly entail a breach of fiduciary duty." The court stated that the plaintiffs were not required to allege "specific facts" to survive a motion to dismiss.

b. In *Grabek v. Northrop Grumman Corp.*, Civil Action No. 2:06-CV-06213 (C.D. Cal.), the court dismissed Northrop Grumman and all director defendants from the action, but left certain committees as defendants.

c. A prayer for investment losses was struck from the complaint in *Loomis v. Exelon Corp.*, Civil Action No. 1:06-CV-04900 (N.D. Ill.). The court ruled that the plaintiffs failed to allege a causal nexus between the allegedly excessive fees and the "losses attributable to the ups and downs of the financial market."

d. In *George v. Kraft Foods Global, Inc.*, Civil Action No. 1:08-cv-03799 (N.D. Ill. filed Jul. 2, 2008) ("*Kraft II*"), the court granted in part and denied in part the defendants' motion to dismiss.

(1) This lawsuit was filed by the plaintiffs in *George v. Kraft Foods Global, Inc.*, Civil Action No. 1:07-cv-01713 (N.D. Ill. filed Oct. 16, 2006) ("*Kraft I*") when they failed in their attempt to add Kraft's former corporate parent, Altria (formerly, Philip Morris), and certain Altria-related parties as defendants. The plaintiffs allege in *Kraft II* that: (1) Altria-related defendants breached their fiduciary duty by structuring the company stock funds as unitized funds; (2) Altria-related defendants allowed excessive recordkeeping fees to be paid; and (3) both Kraft-related and Altria-related defendants breached their fiduciary duties by selecting and retaining a growth equity fund and a balanced fund as plan investment options.

(2) On December 17, 2009, the court dismissed the company stock funds and the recordkeeping expense claims with respect to an Altria committee named as a defendant, based on the court's finding that the six-year limitations period was applicable since the committee stopped being a fiduciary over six years before the complaint was filed. However, these claims were not dismissed with respect to other Altria-related defendants, and *Kraft II* is otherwise still proceeding. 2009 WL 4884027.

(3) On February 23, 2010, the court dismissed without prejudice the company stock funds and the recordkeeping expense claims with respect to the remaining Altria-related defendants. This dismissal is subject to the terms of a joint stipulation, whereby the parties agreed that if the judgment in *Kraft I* is remanded for further proceedings as to the company stock funds and recordkeeping expense claims, the parties consent to the addition of the affected Altria-related defendants to *Kraft I* with respect to the company stock funds and recordkeeping expense claims.

8. Defendants' motions to dismiss have been denied in other cases.

a. In *Tussey v. ABB, Inc.*, 2008 WL 379666 (W.D. Mo. Feb. 11, 2008), the court denied ABB and Fidelity's motions to dismiss.

(1) As in *Hecker v. Deere & Co.*, the court held that ABB was not required to disclose revenue sharing arrangements. However, the court differed with *Hecker* in concluding that whether revenue sharing was disclosed to plan participants was relevant to whether ERISA § 404(c) defense is applicable. In this regard, the court held that where a participant makes investment decisions without knowledge of revenue sharing agreements, the participant may not be exercising investment decisions within the meaning of § 404(c).

(2) The court also ruled that Fidelity could qualify as a fiduciary. Plaintiffs had alleged that (1) "Fidelity Trust directly manages Fidelity mutual fund" options, and (2) that "Fidelity Trust plays a central role in the selection of the investment options . . . because Fidelity Trust does the first-cut screening of investment options, and has veto authority over the inclusion of investment options available in the [p]lan" (internal quotation marks omitted). The Trust Agreement also provided that the plan sponsor/fiduciary could select as plan investment options only "(i) securities issued by the investment companies advised by Fidelity Management . . . [or] (ii) securities issued by [other] investment companies . . . as long as Fidelity Trust approves those elections." Based on these allegations, the court ruled that "[e]ven if Fidelity Trust is not the final arbiter of [p]lan decisions, it may still be a fiduciary with respect to choosing [the] funds."

(3) In denying Fidelity Management's motion to dismiss, the court acknowledged Fidelity Management's argument that "an investment adviser to a mutual fund is not a fiduciary to an ERISA plan that invests in the mutual fund[.]" but noted that "[p]laintiffs[]" allegations sufficiently state that Fidelity Management 'indirectly' exercised discretion over [p]lan assets because, according to the revenue sharing scheme, it paid its affiliate, Fidelity Trust, to steer the [p]lan toward mutual funds it advised." The court also held that "if Fidelity Management set fees paid by [p]lan assets, then [p]laintiffs may prove that Fidelity Management acted as a *de facto* fiduciary."

(4) Trial was held from January 5, 2010 to January 28, 2010.

b. In *Will v. General Dynamics Corp.*, Civil Action No. 3:06-CV-00698 (S.D. Ill. Nov. 11, 2009), the court denied a motion to dismiss filed by Piper Jaffray Companies, an entity which purchased the plan's administrative service provider. By way of background, the complaint in this case contains allegations that (1) the plan's administrative service provider profited from using plan assets as "seed money" in establishing its business and selling the business to Piper Jaffray for a profit, and (2) Piper Jaffray participated in the service provider's self-dealing. In denying Piper Jaffray's motion to dismiss, the court ruled that the plaintiffs sufficiently alleged that Piper Jaffray was a fiduciary, and that even if Piper Jaffray was not a fiduciary, the plaintiffs can seek equitable relief from Piper Jaffray under section 502(a)(3) of ERISA as a knowing participant in a fiduciary breach. The court further ruled that the plaintiffs may be seeking equitable relief in that the money that they seek may be in Piper Jaffray's possession.

c. Defendants' motions have also been denied in the following cases: *Kanawi v. Bechtel Corp.*, Civil Action No. 3:06-CV-05566 (N.D. Cal.) (noting that compliance with statutes and regulations regarding fee disclosures would not preclude a fiduciary breach claim and that failure to disclose revenue sharing agreements is relevant to whether a participant exercised investment control within the meaning of ERISA § 404(c)) ; *Spano v. The Boeing Co.*, 2007 WL 1149192 (S.D. Ill. Apr. 18, 2007) (holding that determining fiduciary status requires a factual inquiry and rejecting defendants' assertion 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); *George v. Kraft Foods Global, Inc.*, 2007 WL 853998 (S.D. Ill. Mar. 16, 2007) (denying defendants' request to dismiss the complaint for failing to comply with Fed. R. Civ. P. 8 which requires a "short and plain" statement of the claim); *Abbott v. Lockheed Martin Corp.*, 2007 WL 2316485 (S.D. Ill. Aug. 13, 2007) (same as *George v. Kraft Foods Global, Inc.*); *Martin v. Caterpillar, Inc.*, Civil Action No. 1:07-CV-01009 (C.D. Ill.) (denying defendants' motion to dismiss, but holding that revenue sharing was not required to be disclosed to participants).

9. Motions to certify class have been granted in *Loomis v. Exelon Corp.*, 2007 WL 2981951 (N.D. Ill. June 26, 2007), *Tussey v. ABB, Inc.*, 2007 WL 4289694 (W.D. Mo. Dec. 3, 2007), *Taylor v. United Technologies Corp.*, Civil Action No. 3:06-CV-01494 (D. Conn.), *Kanawi v. Bechtel Corp.*, 2008 WL 4571947 (N.D. Cal. Oct. 10, 2008), *Tibble v. Edison Int'l*, Civil Action No. 2:07-CV-05359 (C.D. Cal.), and *Grabek v. Northrop Grumman Corp.*, Civil Action No. 2:06-CV-06213 (C.D. Cal.).

10. Class certification orders have been vacated in *Spano v. The Boeing Co.*, Civil Action No. 3:06-cv-00743 (S.D. Ill) (vacated by the Seventh Circuit; see below); *Beesley v. Int'l Paper Co.*, Civil Action No. 3:06-cv-00703 (S.D. Ill.) (same); *George v. Kraft Foods Global, Inc.*, Civil Action No. 1:08-cv-03799 (N.D. Ill) ("*Kraft II*") (vacated by the district court in light of the Seventh Circuit's decision to vacate class certification orders in the *Spano* and *Beesley* cases). See also *George v. Kraft Foods Global, Inc.*, Civil Action No. 1:07-cv-01713 (N.D. Ill.) ("*Kraft I*") (motion for amended class certification is due on October 31, 2011).

a. On January 21, 2011, the Seventh Circuit vacated class certification orders in the *Spano v. Boeing* and *Beesley v. Int'l Paper* cases. The Seventh Circuit ruled that the class definitions in these cases were too broad to meet the typicality and adequacy of representation requirements. As to these requirements, the Seventh Circuit opined that a class representative must at a minimum have invested in the same funds as the class members and must not have a conflict of interest with the class members. The Seventh Circuit explained that many participants within the approved class may not have a complaint with respect to a challenged fund depending on the dates they invested and exited the fund. The Seventh Circuit also noted that for some misrepresentation claims, it may be "difficult to find a class representative with claims typical of enough people to justify class treatment."

11. In *Abbott v. Lockheed Martin Corp.*, 2009 WL 969713 (S.D. Ill. Apr. 3, 2009), the court denied class certification as to a claim regarding the company stock fund, finding that participants whose frequent trading activities created the need for a greater cash buffer in the company stock fund were antagonistic to other participants; the court otherwise granted class certification as to other claims that survived the court's ruling on summary judgment motions.

Relatedly, on February 10, 2010, the court ruled that plaintiffs' attempt to pursue plan-wide relief for the stock fund claim through a direct action brought by one of the named plaintiffs would not be allowed. The court explained that plaintiffs' pleadings failed to provide adequate notice that the plaintiffs intended to pursue a direction action claim. The court also explained that plaintiffs cannot seek plan-wide relief without there being procedural safeguards to protect absent members and to prevent redundant suits.

On March 15, 2011, the Seventh Circuit vacated the district court's class certification order and directed the district court to reconsider the class certification issue consistent with the Seventh Circuit's class certification opinion in *Spano v. Boeing*, 2011 WL 183974 (Jan. 21, 2011).

12. Motions to strike jury demands have been granted in the following cases: *Spano v. Boeing Co.*, 2007 WL 1149192 (S.D. Ill. Apr. 18, 2007); *Loomis v. Exelon Corp.*, Civil Action No. 1:06-CV-04900 (N.D. Ill.); *Will v. General Dynamics Corp.*, Civil Action No. 3:06-CV-00698 (S.D. Ill.); *Abbott v. Lockheed Martin Corp.*, 2007 WL 2316481 (S.D. Ill. Aug. 13, 2007); *Grabek v. Northrop Grumman Corp.*, Civil Action No. 2:06-CV-06213 (C.D. Cal.); *Kennedy v. ABB, Inc.*, 2007 WL 2323395 (W.D. Mo. Aug. 10, 2007).

13. Motions for summary judgment have been granted in part and denied in part in *Kanawi v. Bechtel Corp.*, Civil Action No. 3:06-CV-05566 (N.D. Cal.).

a. In addition to revenue sharing, plaintiffs complained 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 alleged 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 argued that FIA received undisclosed revenue sharing payments from plan service providers that FIA selected, and that this constituted a series of prohibited transactions. Plaintiffs also argued that the plan was entitled to some of the proceeds from the sale of FIA to a third party.

b. On November 3, 2008, the court denied the plaintiffs' motion for summary judgment on the self-dealing claims alleged in the complaint. The court granted in part and denied in part the motions for summary judgment filed by Fremont Investment Advisors ("FIA") and the Bechtel defendants. The court: dismissed fiduciary breach claims arising more than six years before the filing of the complaint based on ERISA's statute of limitations provision; dismissed plaintiffs' self-dealing claims except for a four-month period during which the court said the plan, and not Bechtel, paid fees to FIA; dismissed claims alleging improper retention of investment options; and dismissed claims alleging that the plan is entitled to some of the proceeds from the sale of FIA to a third party.

c. Plaintiffs' sole remaining claim following the November 3, 2008 decision – a self-dealing claim relating to a four-month period – was settled by agreement dated March 3, 2009.

d. The plaintiffs have appealed the court's November 3, 2008 decision to the Ninth Circuit.

e. The parties have agreed to settle the case by an agreement dated October 6, 2010. On March 1, 2011, the court granted final approval of the settlement. The settlement provides for a settlement fund of \$18.5 million. The plaintiffs' attorneys are to receive as fees the lesser of \$4.86 million or 30% of the

net settlement fund (i.e., \$18.5 million minus litigations costs of \$1.57 million, administration costs, and each named plaintiff's incentive award of \$7,500) and litigation costs of \$1.57 million.

14. Motion for summary judgment was granted in favor of defendants in *Taylor v. United Technologies Corp.*, Civil Action No. 3:06-CV-01494 (D. Conn.).

a. On March 3, 2009, the court granted defendants' motion for summary judgment by ruling that: (1) defendants properly monitored the level of cash in the company stock fund; (2) defendants properly selected mutual funds; (3) recordkeeping fees were reasonable when compared to the market rate; (4) information on revenue sharing is not material to an objectively reasonable investor; and (5) defendants did not breach fiduciary duty in not disclosing that revenue sharing was used to reduce the amount United Technologies was paying to subsidize the plan's recordkeeping fees. 2009 WL 535779.

b. On December 1, 2009, the Second Circuit summarily affirmed the district court's decision granting summary judgment in favor of United Technologies. 2009 WL 4255159.

15. Plaintiffs' motion for partial summary judgment was denied, and defendants' motion for summary judgment was granted in part and denied in part, in *Abbott v. Lockheed Martin Corp.*, 2009 WL 839099 (S.D. Ill. Mar. 31, 2009). The revenue sharing claims were dismissed based on the Seventh Circuit's ruling in *Hecker v. Deere*. The claims regarding float and a growth fund were both dismissed for not falling within the scope of the amended complaint. As an alternative basis for the dismissal of the claim regarding the growth fund, the court held that *Hecker v. Deere* (7th Cir.) precluded plaintiffs from arguing that the growth fund was improper because it was a retail mutual fund instead of a separate account. The court also held that: only acts that took place within six years of the filing of the complaint could form the basis of a fiduciary breach claim due to ERISA's statute of limitations; plaintiffs had standing to assert claims with respect to funds in which they may have not invested in because ERISA allows plan participants to seek to recover damages owed to the plan; and *Hecker v. Deere* (7th Cir.) precluded plaintiffs from challenging 404(c) conditions that were not challenged in the amended complaint. The court ruled that the following issues would need to be resolved at trial: whether investment options with excessive fees were offered in the plan; whether the stable value fund was managed in accordance with disclosure documents; and whether there was excessive cash in the company stock fund.

16. Plaintiffs' motion for partial summary judgment was denied, and defendants' motion for summary judgment was granted in part and denied in part, in *Tibble v. Edison Int'l*, Civil Action No. 2:07-CV-05359 (C.D. Cal.).

a. On July 16, 2009, the court granted in part defendants' motion for summary judgment and denied plaintiffs' motion for partial summary judgment. 2009 WL 2382340. The court ruled that: (1) plan sponsor did not violate ERISA § 406(b)(3) in offering mutual funds under the plan because the decision to offer

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

b. On July 31, 2009, the court granted summary judgment to defendants as to the float claim. 2009 WL 2382348. The court ruled that the statute of limitations barred plaintiffs' challenge to the defendants' decision to allow the trustee to retain float and ruled that a failure to act within the limitations period cannot form the basis of a prohibited transaction claim. The court also ruled that plaintiffs' float claim did not satisfy the notice pleading requirement. However, the court ruled that triable issues existed as to whether the money market fund charged excessive fees.

c. A bench trial was held on October 20-22, 2009 as to: (1) whether the defendants' desire to generate revenue sharing to pay for recordkeeping fees that the plan sponsor was otherwise required to pay under the terms of the plan tainted the defendants' selection and retention of retail share classes of six specific mutual funds; and (2) whether the money market fund charged excessive fees.

d. On June 8, 2010, the court ruled that plan fiduciaries did not select and retain the retail share classes of six mutual funds to lower what Edison had to pay as plan recordkeeping fees. The court, however, concluded that plan fiduciaries breached their fiduciary duties by selecting the retail share classes of three mutual funds – which were added to the plan within ERISA's six year statute of limitations – because, given the plan's asset size, the plan fiduciaries could have obtained institutional share classes with lower fees. With respect to the money market fund, the court ruled that the evidence did not support plaintiffs' claim that the management fees were excessive. The court noted that the plan fiduciaries selected the money market fund following a request for proposal process.

e. On August 9, 2010, the court entered a judgment in favor of plaintiffs for \$370,732 – the excessive fees participants paid on the three mutual

funds and the lost investment earnings on the excessive fees paid. The court also ordered defendants to replace one of the retail share classes still offered to participants to an institutional share class of the same fund.

f. Plaintiffs and defendants have both appealed to the Ninth Circuit.

17. Defendants' motion for summary judgment was granted in *George v. Kraft Foods Global, Inc.*, Civil Action No. 1:07-cv-01713 (N.D. Ill. filed Oct. 16, 2006) ("*Kraft I*"), but the case has since been reinstated by the Seventh Circuit.

a. On January 27, 2010, the court granted summary judgment in favor of defendants. The court ruled that: (1) defendants did not breach their fiduciary duty in structuring the company stock funds as unitized funds because the defendants properly considered the pros and cons of unitized funds; (2) the multiple times the defendants "reviewed and renegotiated" the recordkeeping contract, and their utilization of "standard industry methods" to determine the reasonableness of recordkeeping fees, compelled a conclusion that defendants did not breach their duty with respect to the recordkeeping arrangement; (3) defendants did not have a duty to disclose revenue sharing information because the Seventh Circuit in *Hecker* ruled that the critical information for participants is the total fees charged by the investment options; and (4) defendants did not breach their fiduciary duty in allowing the plan trustee to retain float because the defendants adequately understood and monitored the float arrangement. 2010 WL 331695.

b. On April 11, 2011, the Seventh Circuit affirmed in part and reversed in part the district court's decision granting summary judgment in favor of defendants. The Seventh Circuit noted that, although the district court had stated that Kraft had acted prudently by considering the pros and cons of offering company stock funds as unitized funds and making a decision to continue offering the funds as unitized funds, the district court did not cite to evidence showing that Kraft in fact made a decision. The Seventh Circuit noted that prudence may have required Kraft to make a decision, rather than just debate the pros and cons of unitized funds. The Seventh Circuit also concluded that the district court should not have ignored (as not credible) the testimony of a plaintiffs' expert that Kraft should have used a competitive bidding process in renewing the plan's recordkeeping contract. The Seventh Circuit explained that the district court should not have considered the credibility of the expert's testimony in ruling on a summary judgment motion. The Seventh Circuit, however, affirmed the district court as to the plaintiffs' float claim because the plaintiffs failed to introduce evidence to contradict a declaration submitted by Kraft saying that it had received annual reports from the trustee that disclosed the dollar amount of the trustee's float income. Accordingly, the unitized funds claim and the recordkeeping fees claim have been remanded to the district court. 641 F.3d 786.

c. On May 26, 2011, the Seventh Circuit denied Kraft's petition for rehearing or rehearing *en banc*.

18. Defendants' motion for summary judgment has been denied in part and granted in part, and plaintiffs' motion for partial summary judgment has been denied, in *George v. Kraft Foods Global, Inc.*, Civil Action No. 1:08-cv-03799 (N.D. Ill. filed July 2, 2008) ("*Kraft II*").

a. On July 14, 2011, the court denied in part and granted in part the defendants' motion for summary judgment. The court ruled that *res judicata* did not bar plaintiffs' claims because a final decision has not been rendered in *Kraft I*. The court also ruled that ERISA section 404(c) does not provide liability relief for selection and retention of plan investment options. The court ruled, however, that ERISA's six-year statute of limitations barred claims regarding the imprudence of selection and retention of a growth equity fund and a balanced fund before July 2, 2002. The court also ruled in favor of the defendants as to plaintiffs' claim that defendants failed to prudently monitor the growth equity fund and the balanced fund. The court explained that the plaintiffs failed to produce evidence to contradict evidence of monitoring produced by the defendants.

b. On July 19, 2011, the court denied the plaintiffs' motion for partial summary judgment. The court ruled that the plaintiffs failed to establish that retention of the growth equity fund and the balanced fund after 1999—when actively managed funds were removed from defined benefit plans—was imprudent as a matter of law.

c. On September 12, 2011, the defendants filed a motion to reconsider the court's partial denial of summary judgment in defendants' favor. The defendants argue that the Seventh Circuit's decision in *Loomis v. Exelon* mandates summary judgment in their favor because the Kraft plan offered a sufficient mix of investment options (eleven investment options), including low-cost passively managed and higher-cost actively managed funds.

F. SETTLEMENTS

1. The parties reached an agreement to settle the lawsuit in *Martin v. Caterpillar, Inc.*, Civil Action No. 1:07-CV-01009 (C.D. Ill.). Under the settlement agreement, Caterpillar will pay \$16.5 million to settle the lawsuit without admitting any wrongdoing. The settlement proceeds remaining after deducting attorney's fees, litigation costs, and administrative costs, will be distributed to the class members (participants in the plans at any time between July 1, 1992 and September 10, 2009) according to the number of months in which a class member had an active account in the plans. Also, for a settlement period of two years (which may be extended to four years upon a material breach of the agreement), Caterpillar agreed to: (1) not engage any investment consultant as an investment manager for the plans; (2) provide certain annual disclosures to participants regarding administrative and investment fees; (3) not offer retail mutual

funds, except those available through the plans' brokerage windows; (4) generally limit the cash holding in the company stock fund to 1.5 percent; (5) stop paying for recordkeeping fees as a percentage of plan assets; and (6) conduct a request for proposals process for recordkeeping services when the current recordkeeping contract with Hewitt Associates expires. The settlement agreement covers not just the Caterpillar 401(k) Plan mentioned in the complaint, but covers all 401(k) plans participating in a master trust. On August 12, 2010, the court granted final approval of the settlement. On September 9, 2010, the court entered an order awarding – out of the settlement fund – \$5.5 million (fees) and \$315,345.40 (expenses) to the class counsel and incentive awards of \$12,500 to each of the three named plaintiffs. On October 28, 2010, the court approved the settlement as fair, reasonable, and adequate.

2. On November 22, 2010, the District Court for the Southern District of Illinois granted final approval of an agreement to settle the case in *Will v. General Dynamics Corp.*, Civil Action No. 3:06-CV-00698 (S.D. Ill). Under the settlement agreement, the liability insurers of General Dynamics and the plan administrator, Fiduciary Asset Management Company ("FAMCO"), are to pay \$15.15 million into a settlement fund. The fees and expenses of the plaintiffs' attorneys (\$5.05 million in fees and \$693 thousand in expenses), a payment of \$25,000 each to the three named plaintiffs, and the expenses of administering the settlement fund are to be deducted from the settlement fund. The remaining amount is to be shared by participants who had an account in one or more of General Dynamics' 401(k) plans at any time from October 1, 1994, through June 30, 2010. In addition to the monetary payment, General Dynamics agreed to undertake the following actions: (1) engage one or more outside consultants to (i) perform a one-time review of the plans' service arrangements, including float and securities lending arrangements, and (ii) provide recommendations to General Dynamics based on its review; (2) for a one-year period, have an outside consultant review (i) any new service arrangement that will pay more than \$250,000 per year in fees and (ii) any renewal of a service arrangement that will result in a fee increase of 10% or more; (3) for a period of eighteen months, have an outside consultant review any new investment funds added to the plans; (4) engage an independent fiduciary to review consultant's recommendations and General Dynamics' actions; (5) amend the service contract with FAMCO to preclude FAMCO from recommending itself (or an affiliate) as an investment manager or from allocating assets to itself (or an affiliate); (6) provide participants with enhanced fee disclosures that list, for each fund held in the participant's account, the estimated amount paid for investment management and the estimated amount paid for plan administration; (7) for a one-year period, continue General Dynamics practice of not paying asset-based recordkeeping fees; and (8) for a three-year period, ensure that service providers do not charge a lower fee on General Dynamics' other benefit plans, based on the amount the service provider is making on the 401(k) plans. General Dynamics did not admit that it engaged in any fiduciary breach under ERISA.

3. The parties have agreed to settle the lawsuit in *Kanawi v. Bechtel Corp.*, 3:06-cv-05566-CRB (N.D. Cal.). Pursuant to a settlement agreement, Bechtel will provide for a settlement fund of \$18.5 million. The plaintiffs' attorneys are to receive as fees the lesser of \$4.86 million or 30% of the net settlement fund (i.e., \$18.5 million

minus litigation costs of \$1.57 million, administration costs, and each named plaintiff's incentive award of \$7,500) and litigation costs of \$1.57 million. The net settlement fund is to be divided among persons who participated in either of two 401(k) plans (collectively, "plan") from January 1, 1992 through September 30, 2010, as well as their beneficiaries and alternate payees, based on the timing and length of participation in the plan. In addition, for a period of three years, Bechtel has agreed to (1) continue not to use for the plan investment managers or service providers owned by Bechtel or any member of the Bechtel Trust & Thrift Plan Committee; (2) engage a service provider to prepare an annual disclosure to all current plan participants regarding fees charged to their plan accounts; (3) not offer retail mutual funds as investment options in the plan; (4) continue not to pay plan recordkeeping fees on a percentage of asset bases; and (5) conduct a competitive bidding process for plan recordkeeping contract in 2012. The court granted final approval of the settlement agreement on March 1, 2011.

III. ACTIONS BROUGHT BY PLAN SPONSORS AGAINST SERVICE PROVIDERS

A. HADDOCK V. NATIONWIDE FINANCIAL SERVICES, INC.

1. In September 2001, a class of 401(k) plan sponsors filed a lawsuit against Nationwide Financial Services and Nationwide Life Insurance Company ("Nationwide") in connection with revenue sharing payments received by Nationwide from mutual funds offered as investment options under its group annuity contracts issued to plans. *Haddock v. Nationwide Fin. Services, Inc.*, Civil Action No. 3:01-CV-01552, 419 F.Supp.2d 156 (D. Conn.). The plaintiffs alleged that Nationwide's contractual arrangements with and retention of revenue sharing payments from the mutual funds gave rise to Nationwide's breach of fiduciary duties and constituted prohibited transactions under §§ 404(a) and 406(b) of ERISA.

2. In March 2006, the district court denied Nationwide's motion for summary judgment. *Haddock v. Nationwide Fin. Services, Inc.*, 419 F.Supp.2d 156 (D. Conn. 2006). The court held that —

a. Nationwide may have been a plan fiduciary because it retained discretion to select, add and delete the fund options offered to plans under its variable annuity products.

b. Revenue sharing payments from funds could be "plan assets" on the basis of Nationwide's receiving payments from the mutual funds in exchange for offering the funds as investment options to the plans and participants, at the expense of such participants. Further, even if revenue sharing payments are not "plan assets," Nationwide's receipt of revenue sharing could have involved illegal "kickbacks" prohibited by ERISA.

3. The plaintiffs filed an amended complaint on March 21, 2006, following the district court's denial of Nationwide's summary judgment motion. On September 25,

2007, the district court denied the defendant's motion to dismiss the plaintiffs' amended complaint, largely on the same grounds. In addition, the district court held that the plaintiffs could have amended their complaint to add a "fund selection" claim and did not waive this claim by including in their first complaint but omitting the same from subsequent complaints.

4. On August 11, 2008, the district court dismissed Nationwide's counterclaims against the plaintiffs for contribution, indemnification, and breach of fiduciary duty. Although the court held that, under Second Circuit law, ERISA fiduciaries have a common law right to contribution and indemnification, the court dismissed these claims because there was no indication that the plaintiffs received any benefit from Nationwide's receipt of revenue sharing payments. In addition, in dismissing Nationwide's fiduciary breach counterclaim, the district court held that while Nationwide, as a purported fiduciary, had standing to assert such a claim on behalf of the plans, there was no indication that the plans suffered any loss arising from the plaintiffs' breach, as required by the language of ERISA § 409.

5. On February 27, 2009, the court held a hearing on the plaintiffs' motion for class certification based on the fifth amended complaint. Following the hearing, on March 27, 2009, the plaintiffs submitted a proposed order granting class certification, to which the defendants submitted objections.

6. On July 20, 2009, a trustee of a 401(k) profit sharing plan and member of the proposed class filed a motion to intervene as a plaintiff and class representative in the action, as a result of the parties' inability to agree on a named class representative. The court ordered limited discovery with respect to the proposed class representative.

7. On November 6, 2009, the court granted the trustee's motion to intervene and granted the plaintiffs' class certification motion. 262 F.R.D. 97 (D.Conn. 2009). The class consists of trustees of 24,000 ERISA covered plans that had variable annuity contracts with Nationwide or whose participants had individual variable annuity contracts with Nationwide, after the earlier of January 1, 1996 or the first date Nationwide began receiving revenue sharing payments based on a percentage of invested assets. In granting class certification, the court held: (1) that the named plaintiffs had standing to sue on behalf of other plans, even though they were not fiduciaries of such plans; (2) that the named plaintiffs were adequate class representatives, despite technical differences between the named plaintiffs' contracts with Nationwide and those of the class members as a whole; (3) that the plaintiffs satisfied the requirements for class certification under Rule 23(b)(2) in that an individual plan-by-plan determination concerning Nationwide's fiduciary status and breach was not required; that the plaintiffs claims for injunctive and declaratory relief predominated over their request for monetary relief (disgorgement of Nationwide's revenue sharing payments); and that disgorgement was an appropriate remedy.

8. Nationwide petitioned the Second Circuit for permission to appeal the November 6 class certification order, contending that the plaintiffs cannot prove Nationwide's fiduciary status on a class-wide basis, that plaintiffs' fiduciary breach claims

require individualized proof, and that the district court erred in finding that the plaintiffs' claims for injunctive and declaratory relief predominated over their claim for monetary relief. The Second Circuit granted Nationwide's petition, and the issue is currently under appeal. Both parties have submitted briefs and oral argument is scheduled for November 18, 2011. No decision has yet been issued.

9. On January 29, 2010, Nationwide moved for class certification of its counterclaim against the individual plaintiff trustees – that if Nationwide's acceptance of revenue sharing payments gave rise to an ERISA violation, then the trustees breached their fiduciary duties to their plans because they had ultimate authority and responsibility to know about and monitor those payments and because the trustees approved and accepted the advantages of those payments as terms of their plans' annuity contracts. Nationwide seeks certification of a class of counterclaim defendants comprised of the trustees in the plaintiffs' class.

10. On July 23, 2010, the court denied Nationwide's class certification motion and dismissed its counterclaim. The court held that Nationwide's request for certification under Rule 23(b)(2) failed because its claim for injunctive relief did not predominate over its claim for monetary relief; rather, Nationwide was attempting to impose personal liability on the plaintiff trustees. The court further held that Nationwide's Rule 23(b)(3) class certification request failed because, to prevail on its claim, Nationwide must first be liable to the plans and, if Nationwide is liable to the plans, the trustees cannot also be entirely responsible for the plans' losses. In so finding, the court likened Nationwide's counterclaim to one for contribution or indemnification, claims that the court previously dismissed and, accordingly, dismissed the breach of fiduciary duty counterclaim.

11. As stated above, on October 20, 2010, Nationwide appealed the district court's November 11, 2009 order certifying plaintiff's class to the Second Circuit Court of Appeals, where the case is currently pending. On July 13, 2011, both parties submitted briefs in the Second Circuit on the issue of plaintiff's class certification. Oral argument is scheduled for November 18, 2011.

B. ADDITIONAL CASES BY PLAN SPONSORS AGAINST SERVICE PROVIDERS

1. Although the *Nationwide* case was filed in 2001, lawsuits by plan sponsors became more common only after the initial wave of lawsuits were filed against plan sponsors relating to plan fees and expenses and revenue sharing payments. Plaintiffs' class action law firms turned their attention in the direction of the insurance companies providing plan administration and recordkeeping services to plans. *See Phones Plus, Inc. v. The Hartford Financial Services, Inc.*, Civil Action No. 3:06-CV-01835-AVC, 2007 WL 3124733 (D. Conn); *Ruppert v. Principal Life Ins. Co.*, Civil Action No. 4:07-CV-00344-JAJ-TJS (S.D. Ia.); *Beary v. Nationwide Life Ins. Co.*, Civil Action No. C2-06-967, 2007 WL 4643323 (S.D. Oh.). Since then, additional cases have been filed against insurance companies and other plan service providers. *See, e.g., Charters v. John Hancock Life Insurance Co.*, Civil Action No. 07-11371-NMG, 2007 WL 4874807 (D. Mass.); *Columbia Air Services, Inc. v. Fidelity Management Trust Co.*, Civil Action No.

1:07-CV-11344 (D. Mass.); *Zang v. Paychex, Inc.*, Civil Action No. 6:08-CV-06046-DGL (W.D. N.Y.).

2. As in the lawsuits filed against plan sponsors, plaintiffs in these provider cases challenge various types of "revenue sharing" payments by mutual funds, mutual fund advisers, and other investment providers to plan recordkeepers and other service providers. These cases typically argue that plan recordkeepers or other service providers are fiduciaries, that "revenue sharing" payments constitute assets belonging to the services provider's plan customers, and that a service provider's receipt of revenue sharing payments is a prohibited transaction.

3. *Phones Plus, Inc. v. The Hartford Financial Services, Inc.*, Civil Action No. 3:06-CV-01835-AVC. In this case, the plan sponsor plaintiffs alleged that the Hartford was a fiduciary to its plan customers because it advertises itself as a "full-service" provider, the Hartford and its affiliates review and evaluate the mutual funds available on its investment platform, and the Hartford has authority to remove investment alternatives from its platform. On October 23, 2007, the court denied Hartford's motion to dismiss, rejecting Hartford's argument that it was not a fiduciary.

a. The complaint alleged that revenue sharing payments from mutual funds to the Hartford and its affiliates were not for services provided to the mutual funds, as the revenue sharing agreements provided, but were in fact payments for services the Hartford was already obligated to provide to its plan clients. Because the revenue sharing payments were asset-based rather than being charged on a per-participant basis, plaintiffs argued that the payments bore no reasonable relationship to the services that the Hartford provides to the plans. The plaintiffs also alleged that the revenue sharing payments constituted plan assets because the payments resulted from the Hartford's fiduciary status and were made at the expense of plan participants and because they were generated by plan investments.

b. In the complaint, the plaintiffs sought relief based on Hartford's (1) failure to adequately disclose the receipt of revenue sharing payments from mutual funds included in the line-up of mutual funds offered to plans; (2) failure to adequately disclose the amount of revenue sharing payments; and (3) acceptance of revenue sharing payments that bore no reasonable relationship to the services that the Hartford provided to the plans. The plaintiff plan sponsors also argued that the Hartford's receipt of revenue sharing payments constituted prohibited self-dealing and illegal "kickbacks" under ERISA §§ 406(b)(1) and 406(b)(3).

c. Hartford principally moved to dismiss the lawsuit on the grounds that it was not a fiduciary under ERISA and, therefore, could not be held liable for breaches of fiduciary duty or ERISA's prohibited transaction rules. Plaintiffs argued that Hartford qualified as a fiduciary because it had discretionary authority to unilaterally change the lineup of investment funds available to plan clients by

adding or removing funds to or from the lineup. Hartford argued that it was not a fiduciary because the plan client had the ultimate authority to accept or reject any such change, citing the DOL advisory opinion issued to Aetna in 1997. *See* DOL Adv. Op. 1997-16A (May 22, 1997) ("Aetna Letter").

d. The court held that whether a defendant is a fiduciary is a factual question and that the plaintiffs had alleged enough facts to state a plausible claim for relief. 2007 WL 3124733 (D. Conn). Although the court did not mention the *Haddock v. Nationwide* decision, it reached essentially the same conclusion. Importantly, in denying Hartford's motion to dismiss, the court noted that (i) the Aetna Letter was not entitled to deference, but was merely persuasive authority; and (ii) in any event, because Hartford did not make all the same fee disclosures and follow the exact same notification procedures when changing a fund line-up as described by the Aetna Letter, there were sufficient factual differences to "render moot whatever persuasive authority [the Aetna] opinion might of carried."

e. The court also refused to conclude that revenue sharing is not a plan asset, deciding instead that the plaintiffs had alleged enough facts in support of their theory to allow them to proceed with such a claim.

f. The plaintiffs also brought claims against Neuberger Berman Management, Inc., which selected plan investment options from the investment funds offered by Hartford. Plaintiffs claimed that Neuberger failed to properly advise the plan in light of the revenue sharing payments. Neuberger sought dismissal on the grounds that it was not an ERISA fiduciary with respect to the revenue sharing payments. The court ruled that it could not conclude as a matter of law that Neuberger had no duty to investigate and inform the plaintiff about the revenue sharing payments. Further, the court concluded that Hartford could be liable as a *non-fiduciary*, for knowingly participating in Neuberger's alleged fiduciary breach.

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 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.

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.

On November 14, 2008, Plaintiff and Neuberger advised the court that they had reached an agreement in principle to settle their dispute.

On March 4, 2009, the court granted Plaintiff's motion to amend its complaint, finding that the motion was not untimely, given the fact that Hartford had only completed its discovery obligations in November 2008 and finding that permitting Plaintiff to amend its complaint would not cause undue prejudice to Hartford. In so doing, the court denied as moot Hartford's March 3, 2008 summary judgment motion and Plaintiff's June 20, 2008 amended motion for class certification. Plaintiff filed its second amended complaint on March 9. Defendant answered on May 29. A trial was scheduled; however, the parties attempted to resolve the case through mediation.

The parties were unable to resolve the case through mediation, and the court extended filing deadlines accordingly. Plaintiff filed its motion for class certification on June 17, 2009. Defendant Hartford Life filed its motion for summary judgment that same day. Briefing is now complete, and the motions await the court's decision.

On July 17, 2009, the court approved the settlement between Plaintiff and Neuberger, dismissing Neuberger from the case.

By order dated February 1, 2010, the parties' joint trial memorandum was due February 12, 2010 and the case was to be trial ready on March 15, 2010.

On March 3, 2010, the district court granted preliminary approval of the parties' proposed settlement. The court granted final approval of the settlement on June 22, 2010. The settlement calls for the creation of two settlement classes: (1) a Monetary Relief Class (consisting of current and former trustees, sponsors, fiduciaries, and administrators of ERISA-covered 401(a) or 401(k) plans for which Hartford provided services from November 14, 2003 through the date that the court granted preliminary approval of the settlement) and (2) a Structural Changes Class (consisting of trustees, sponsors, fiduciaries, and administrators of ERISA-covered 401(a) or 401(k) plans for which Hartford provides services on or after the date the court granted preliminary approval of the settlement).

Per the settlement, Hartford will pay \$13,775,000 less attorneys' fees and costs (in the amount of \$6,862,500) to the Monetary Relief Class.

In addition, Hartford will make several changes to its plan-related documents with respect to the Structural Changes Class. Hartford agreed that these changes would remain in effect for a minimum of five years. Specifically, Hartford:

- will remove from prototype plan documents a provision indicating that the prototype plan sponsor may limit the types of property in which plan assets can be invested. Hartford further agreed to not to enforce this provision as to its existing plan customers;

- with regard to its group annuity contracts and group funding agreements,
 - will seek insurance department approval of revisions to the documents to further explain that Hartford will not delete or substitute an investment option that had been selected by the customer and offered to the plan participants unless the investment option is not available because of either (a) a change in law; or (b) a change or event initiated by the fund company (for example, due to a fund closure or merger). Hartford further agreed to not to enforce this provision as to existing plan customers.
 - absent client consent, will not enforce a provision in a Separate Account Rider addressing Hartford's ability to invest plan assets in short term money market instruments, cash, or cash equivalents;
 - will include in its account opening documents a disclosure that dividends and capital gain distributions payable on the shares of an investment fund are paid in the form of additional shares (if available), together with a customer instruction that dividends and capital gain distributions should be received in the form of additional shares;
- Will provide an additional disclosure to customers that all mutual fund investment options on its platform make revenue sharing payments to Hartford;
- Will make available to its customers a list of investment options offered for the plan product and the associated revenue sharing rates paid by the fund companies;
- Will make available to customers information regarding (i) the revenue sharing rates for investment options offered by plan clients to its participants; (ii) the published expense ratios for investment options offered by plan clients to its participants; (iii) the estimated amount of the revenue sharing received by Hartford in relation to plan's investments (based on an estimated account balance in each investment options); (iv) how such estimates were calculated; (v) what types of payments fall within the definition of revenue sharing; and (vi) the separate account fee (in percentage and dollar terms), the annual maintenance fee (in dollar terms) and per participant fees (in dollars per participant terms).

The order approving the settlement agreement provides that Hartford is not a fiduciary with respect to the receipt of revenue sharing payments, as long as it abides by the changes to the plan-related documents agreed to concerning the Structural Changes Class.

4. *Charters v. John Hancock Life Insurance Co.*, Civil Action No. 07-11371-NMG, 534 F.Supp.2d 168 (D.Mass. 2007). Plaintiff, the trustee of a 401(k) plan, brought this action on behalf of his own plan and on behalf of all trustees, sponsors, and administrators of all ERISA plans that owned variable annuity contracts provided by John Hancock. The plaintiff alleged that Hancock, 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 Hancock reduced certain administrative fees and/or exceeded the fees authorized in the group annuity contracts issued by Hancock to its plan clients. The plaintiffs claimed that Hancock breached its fiduciary duty under ERISA by charging excessive fees and by retaining revenue sharing payments for its own benefit. The plaintiffs further claimed that Hancock engaged in ERISA prohibited transactions in doing so.

a. In denying Hancock's motion to dismiss the plaintiff's action, the court held that a reasonable fact finder could determine that Hancock's contractual right to substitute or delete mutual funds from the lineup of investment options offered to its client plans and participants gave rise to fiduciary status under ERISA. The court also acknowledged that, under DOL regulations, Hancock might be deemed a fiduciary based upon its role in issuing variable annuity contracts, though the court declined to decide whether an insurance company that issues such contracts is automatically an ERISA fiduciary.

b. In its motion to dismiss, Hancock also argued that the plaintiff lacked standing to assert claims on behalf of sponsors, trustees and administrators of other plans with which the plaintiff is not associated. The court rejected Hancock's argument as to trustees of other plans, and it deferred deciding whether suit was proper on behalf of administrators of other plans until the class certification stage.

On March 7, 2008, Hancock moved for summary judgment on the claims in the plaintiff's class action complaint, contending that it is not a fiduciary with respect to the plan at issue in the lawsuit and, even if it were found to be a fiduciary, it did not breach any fiduciary duties or engage in any prohibited transactions.

On June 30, 2008, the plaintiff cross-moved for partial summary judgment on the issue of whether Hancock is a plan fiduciary. In his motion, the plaintiff argues that Hancock is a fiduciary because (a) benefits under an annuity contract between Hancock and the plaintiff were variable, depending on the investment performance of assets held by Hancock in separate accounts, and the plan bore all investment risk; and (b) Hancock exercised extensive authority and control over plan assets.

On September 30, 2008, the court granted the plaintiff's motion for partial summary judgment (583 F.Supp.2d 189 (D.Mass. 2008)), 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 plan clients, and, in the event Hancock's clients rejected such substitution, they would effectively have no option other than transferring their investments to another Hancock-administered sub-account or terminating their contract with Hancock in its entirety, either of which would subject the plans to a fee. According to the court, such "built-in penalties" significantly limited the

plans' opportunity to reject such fund changes, compared with the facts addressed in the DOL's 1997 "Aetna Letter."

In the same ruling, the court denied Hancock's motion for summary judgment, finding that sufficient fact exists remain as to whether (a) Hancock breached its fiduciary duties in receiving administrative fees in compensation for its services to its clients and the mutual funds in which they invested and (b) Hancock applied the full amount of the revenue sharing payments it received from mutual funds to offset the amount of fees owed by its plan clients.

The court also granted the plaintiff's motion to dismiss Hancock's contribution and indemnification counterclaims, finding that such claims are not expressly provided for in ERISA and that, based upon recent Supreme Court and other authority, such claims should not be implied into the federal common law of ERISA.

On November 25, 2008, the plaintiff moved for partial summary judgment, alleging that Hancock breached its fiduciary duty by charging an excess administrative fee and failing to use the revenue sharing payments it received to offset such fee.

On August 21, 2009, the parties agreed to a Stipulation of Dismissal and Judgment, pursuant to which the parties settled this action and the Plaintiff voluntarily dismissed its claims against Hancock in their entirety, with prejudice. The parties' Stipulation notes that discovery in the case revealed that Hancock applied the revenue sharing payments it received from the mutual funds to reduce the administrative fees it charged to the plan. The Stipulation notes that further prosecution of the action would be protracted and unjustifiably costly.

5. *Ruppert v. Principal Life Ins. Co.* This action involves allegations that Principal is a fiduciary to its plan customers and has breached its fiduciary duty and engaged in prohibited transactions.

a. The complaint alleges that Principal is fiduciary because it (i) offers "full service" 401(k) retirement plans, including a menu of mutual funds from which employers can plan investment options; (ii) retains the authority to substitute funds or close funds to new investment; and (iii) has discretion to negotiate with mutual funds for revenue sharing payments. The complaint also alleges that Principal provides "investment advice" as defined by ERISA section 3(21)(A)(ii) because Principal (x) represents that the mutual funds on its platform are appropriate for plans; (y) recommends mutual funds that are similar to funds previously offered under a plan; and (z) provides investment advice to participants through interactive investment materials and matches specific mutual funds to plan participants' risk tolerance as identified by the interactive tools.

b. The complaint alleges that revenue sharing payments received by Principal are "plan assets" because the payments are a percentage of a plan's assets invested in a fund or family of funds.

c. Based on these allegations, plaintiff claims that Principal breached its fiduciary duties by (i) failing to disclose that it negotiates revenue sharing fees with, and accepts revenue sharing fees from, the mutual funds included its menu of investment options; (ii) failing to disclose the amount of revenue sharing it receives; and (iii) keeping revenue sharing "kickbacks" from mutual funds. The plaintiffs also claim that Principal violated ERISA section 406(b)(1) by using plan assets to generate revenue sharing and retaining revenue sharing payments for its own account. In addition, plaintiffs claim that Principal 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 Principal's custodial account and the time that Principal transferred the plan contributions into the investment options chosen by the plan's participants. The plaintiffs seek disgorgement of any revenue sharing amounts and interest payments that Principal accepted in serving the plan and similarly situated plans.

d. 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.

e. On September 11, 2008, the plaintiff filed a petition to appeal the district court's August 27th denial of class certification to the United 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 argued 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.

f. On September 30, 2008, the district court entered a stay of the proceedings pending resolution of the plaintiff's petition for permission to appeal.

g. On October 28, 2008, the U.S. Court of Appeals for the Eighth Circuit denied plaintiff's petition for interlocutory appeal of the district court's August 27th denial of class certification.

h. On March 5, 2009, the district court granted Defendant's motion for a scheduling conference, setting the conference for March 12. The court also ordered that the stay previously entered on September 30, 2008 be lifted, in light of the denial by the Eighth Circuit Court of Appeals of plaintiff's petition for permission to appeal.

i. On March 30, 2009, the defendant filed a motion for judgment on the pleadings as to claims one and two of the plaintiff's complaint (revenue sharing claims), arguing that such claims are no longer viable based upon the Seventh Circuit's recent holding in *Hecker v. Deere & Co.* The defendant contended that there is no principled basis for distinguishing the plaintiff's claims from those in *Hecker* and, therefore, that the court should grant judgment in favor of the defendant on such claims.

j. On April 8, 2009, the district court granted the plaintiff's request to file a new motion for class certification, based upon arguments that grievances arising from Principal's breach of fiduciary duties in managing Foundation Option Funds, to which Principal admits it was a fiduciary, are common and typical of all members; the plaintiff's new proposed class action will focus on revenue sharing that Principal received from entities that were affiliated with Principal.

k. On May 11, 2009, the plaintiff filed his new motion for class certification. By order dated June 22, 2009, class discovery must be completed by February 15, 2010, the defendant must oppose class certification by March 31, 2010, and briefing on the class certification motion must be completed by April 16, 2010.

l. By order dated September 11, 2009, the court amended its June 22, 2009 scheduling order. The September 11 order requires the parties to complete class discovery by April 15, 2010. The order further requires the defendant to file its opposition to class certification by May 31, 2010. The plaintiff must file any reply to same by June 16, 2010.

m. On November 5, the court granted the defendant's March 30, 2009 motion for judgment on the pleadings, dismissing the plaintiff's claims that defendant breached its fiduciary duties by failing to disclose or by failing to adequately disclose its negotiation for and acceptance of revenue sharing payments and that defendant violated ERISA's prohibited transaction provisions by using the plan's assets to generate and retain revenue sharing payments. Addressing the plaintiff's disclosure claim, the court followed the Seventh Circuit's reasoning in *Hecker v. Deere & Company* that the total fees collected, not the post-collection distribution of fees, must be disclosed, and that ERISA does not address the practice of revenue sharing itself. In doing so, the court also rejected the plaintiff's argument that the *Deere* holding applies only to disclosures to plan *participants*, as opposed to plan fiduciaries, finding that plan fiduciaries do not have a greater right to information than the plan participants they serve.

In ruling on the plaintiff's prohibited transaction claim, the court first distinguished between revenue sharing payments that are paid from mutual funds registered under the Investment Company Act of 1940 and revenue sharing payments that come from funds that are not so registered. As to payments from *registered* mutual funds, the court again looked to *Deere* and the language of ERISA and concluded that such revenue sharing payments do not constitute plan assets. Thus, no prohibited transaction analysis was required as to such revenue sharing payments. However, because the plaintiff also alleged that some of the plan's investments were commingled with *non-registered* mutual funds – which the court concluded *were* made from plan assets – a prohibited transaction analysis was required as to these payments. In analyzing the plaintiff's PT claim, the court held that if the revenue sharing payments were reasonable in relation to the services provided by Principal, there was no violation. The court concluded that, because Principal factored the revenue sharing payments into its overall asset management fees, and because the plaintiff failed to plead that the fees were unreasonably high or inflated, there was no viable prohibited transaction claim.

n. On December 21, 2009, the plaintiff filed a motion for reconsideration of the court's November 5 entry of judgment on the pleadings, in light of the November 25, 2009 Eighth Circuit Court of Appeals decision in *Braden v. Wal-Mart Stores, Inc.* The *Braden* court ruled that a plan fiduciary has a duty to disclose material information and that a reasonable trier of fact could find that the fund expense and revenue sharing information sought by the plaintiff in that case is material to a reasonable plan participant.

o. On February 2, 2010, Principal moved for summary judgment on Claim III of the plaintiff's complaint – that Principal breached its ERISA fiduciary duties by failing to disclose or by failing to adequately disclose that Principal earns interest on monies awaiting transfer to mutual funds and other investment options, commonly known as "float." Principal argues that it adequately complied with DOL guidance (Field Assistance Bulletin 2002-3) regarding the disclosure of float: (1) the service agreement disclosed the time frames when money would be invested in the investment option chosen by participants; and (2) the service agreement disclosed the rate of float or the manner in which such rate will be determined, in this case money market rates.

p. In his February 23, 2010 opposition to Principal's February 2 summary judgment motion, the plaintiff argued that: (1) Principal did not disclose its float retention practices prior to October 2004; (2) Principal's retention of float constituted an ERISA fiduciary breach and prohibited transaction, notwithstanding Principal's disclosure of same pursuant to DOL guidance; (3) Principal's service agreement placed no limits on the manner in which Principal earned float income, thereby giving it discretion over its own compensation; (4) Plaintiff never gave informed consent to Principal's retention of float, because Principal did not disclose its total compensation for providing plan services; and (5) material issues of fact concerning where and how Principal earns float preclude summary judgment.

q. By order dated March 8, 2010, the court stayed all deadlines set forth in its September 11, 2009 scheduling order, pending resolution of Principal's February 2, 2010 summary judgment motion.

r. On March 31, 2010, the district court granted the plaintiff's motion for reconsideration of the court's November 5 order with respect to the plaintiff's claims concerning Principal's non-registered investment options ("Foundations Options"), in light of the *Braden* decision. As to the plaintiff's failure to disclose claim, the court held the plaintiff alleged sufficient facts from which to infer that inadequate or non-disclosure of revenue-sharing payments could mislead a reasonable investor. While there may not be a *per se* duty to disclose revenue-sharing payments, information about the amount and retention of such payments, and the making of such payments in exchange for including investment options in the plan, might be material. As to the plaintiff's § 406(b)(1) and (b)(3) prohibited transaction claim, the court held the plaintiff asserted a plausible inference that Principal engaged in a prohibited transaction. In addition, while § 408 may "save" transactions otherwise prohibited under § 406(b), Principal, as the party relying on § 408 for relief, bears the burden of proof in making this defense.

s. On March 31, 2010, the court struck the plaintiff's May 11, 2009 renewed motion for class certification with respect to plaintiff's claims concerning Principal's non-registered mutual funds and Principal's receipt of float payments. In doing so, the court cited the plaintiff's lack of diligence in renewing his class certification request following the court's original class certification denial in August 2008 and the Eighth Circuit's subsequent denial of interlocutory review.

t. On April 30, 2010, the plaintiff moved for reconsideration of the court's August 27, 2008 order denying class certification, in light of subsequent events in this litigation: the court's analysis in its November 5 order granting Principal judgment on the pleadings concerning whether plan contributions invested in Principal's non-registered investment options are "plan assets"; and the court's March 31 decision granting plaintiff's motion for reconsideration based on the Eighth Circuit's decision in *Braden v. Wal-Mart*. Specifically, the plaintiff argues that it has satisfied Rule 23(a)'s commonality and typicality requirements with respect to the issues of Principal's fiduciary status, whether Principal engaged in ERISA prohibited transactions, and whether Principal breached its fiduciary duties by failing to disclose or adequately disclose its revenue sharing and fee practices to plan sponsors. The plaintiff also argues that it has satisfied the commonality and typicality requirements with respect to its float claims.

u. On May 14, 2010, Principal filed a motion to strike the plaintiff's April 30, 2010 motion for reconsideration, arguing that the plaintiff's

motion inappropriately sought to circumvent the court's March 31, 2010 order striking the plaintiff's May 11, 2009 renewed motion for class certification.

v. On May 27, 2010, the court granted Principal's February 2, 2010 summary judgment motion with respect to the plaintiff's "float" claim. As to float earned pursuant to the 2004 service agreement between the plaintiff's plan and Principal, Principal complied with DOL Field Assistance Bulletin 2002-3 (Nov. 5, 2002) by disclosing (1) the specific circumstances under which it earns and retains float; (2) the time frames for investment and the circumstances when allocation of funds is anticipated to take longer; and (3) the rate at which float is earned. The court also relied on case law to find no breach on the part of Principal, finding that the float was openly disclosed and included as part of Principal's overall compensation. As to float earned prior to the 2004 service agreement, the court found that such amounts were not properly disclosed pursuant to DOL FAB 2002-3. However, this portion of the plaintiff's claim was barred by ERISA's three-year statute of limitations, because the plaintiff was provided actual knowledge that Principal had breached its fiduciary duties with respect to the pre-2004 float when the plaintiff and Principal entered into the 2004 service agreement, which provided for the disclosure of float discussed above. Since the plaintiff did not file his float claim until May 5, 2008, his claim is time barred.

w. On May 28, 2010, the plaintiff filed a response to Principal's May 14 motion to strike. The plaintiff argued that a motion to strike a *motion* (as opposed to a pleading) is neither appropriate nor authorized by the federal rules of civil procedure. The plaintiff further argued that the 8th Circuit's decision in *Braden* and the court's March 31 decision granting the plaintiff's motion for reconsideration warrant the court's reconsideration of its August 27, 2008 order denying class certification. According to the plaintiff, *Braden* and the court's March 31 decision make clear that a plan-by-plan analysis with respect to Principal's fiduciary status, Principal's breach of its fiduciary status, Principal's disclosure of revenue sharing, and Principal's involvement in prohibited transactions is no longer required.

x. On June 8, 2010, the court denied the plaintiff's April 30 motion for reconsideration, finding that the motion did not meet the requirements of Federal Rule of Civil Procedure 60(b) and that the motion was untimely.

y. On June 15, 2010, the court lifted its March 8, 2010 stay.

z. On June 29, 2010, Principal moved for summary judgment on its two remaining claims (count III: that Principal breached its fiduciary duty by failing to disclose revenue sharing; and count IV: that Principal engaged in prohibited transactions by receiving revenue sharing). Principal denied that it is a fiduciary with respect to these issues. Principal further argued that, although it has admitted it is a fiduciary with respect to the selection, monitoring and retention of portfolio managers, *this* fiduciary status is irrelevant to its receipt of revenue sharing.

a1. On March 30, 2011, the court denied Principal's motion for summary judgment with respect to counts III (breach of fiduciary duty for failure to disclose revenue sharing) and IV (prohibited transactions on basis of receipt of revenue sharing). Because the Court found genuine issues of material fact as to whether Principal was a functional fiduciary at the time it engaged in revenue sharing payments, the Court did not conduct an analysis of whether a breach of fiduciary occurred or if Principal engaged in a prohibited transaction.

a2. In June of 2011, the parties agreed to a consent judgment, only with respect to plaintiff's individual claims, for \$80,000.

a3. On July 12, 2011, Plaintiff appealed the denial of his class certification motion to the Eighth Circuit, where the case is currently pending. The appellant's brief is due October 12, 2011.

6. *Columbia Air Services, Inc. v. Fidelity Management Trust Co.*, Civil Action No. 1:07-CV-11344 (D. Mass.). This lawsuit was brought by a plan sponsor on behalf of a class of plan trustees, plan administrators, and trustees of plans for which Fidelity served as trustee.

a. Plaintiff alleged that Fidelity obtained revenue sharing payments in addition to amounts expressly agreed as compensation, without providing any additional services. In particular, plaintiff alleges that Fidelity had no duty to select the final investment options provided to the plans. Therefore, according to the plaintiff, Fidelity was not entitled to any fees for investment selection or management services.

b. Plaintiff alleged that, in making revenue sharing payments to Fidelity, the mutual funds actually performed their services to the plans for the amount of fees charged to the plans *less* the amount of the revenue sharing payments to Fidelity. As a result, plaintiff alleges that, by virtue of Fidelity's receipt of revenue sharing payments, the plan overpaid for services provided to it, and that the plan's expenses should have been reduced by the amount of "kickbacks" Fidelity received.

c. Plaintiff alleged that, in receiving, retaining, and using the revenue sharing payments, Fidelity breached its duty under ERISA § 404(a) to act for the exclusive purpose of providing benefits to the plans' participants and beneficiaries and defraying reasonable expenses of the plans. Plaintiff also alleges that Fidelity's receipt of revenue sharing payments constituted prohibited transactions under ERISA § § 406(b)(1) and 406(b)(3).

d. On September 30, 2008, the district court granted defendant Fidelity's motion to dismiss. 2008 WL 4457861 (D.Mass. 2008). 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. In particular, the court noted that fiduciary status under ERISA is not an "all-or-nothing" concept. A service provider only has fiduciary status when – and to the extent – that it *exercises* discretionary authority. The court also found that 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.

e. On October 14, 2008, the Plaintiff filed a motion to alter or amend the court's September 30 ruling and for leave to file an amended complaint, adding new allegations in support of its argument that Fidelity is an ERISA fiduciary. On December 22, 2008, the district court denied the Plaintiff's motion.

7. *Zang v. Paychex, Inc.*, Civil Action No. 6:08-CV-06046-DGL (W.D.N.Y.). In this putative class action lawsuit, the plaintiff, a plan trustee, seeks relief on behalf of his plan and all other similarly situated plans, alleging that Paychex breached its fiduciary duties and engaged in prohibited transactions by, among other things, receiving and retaining revenue sharing payments from the mutual funds made available to the plans' participants.

a. The plaintiff sets forth multiple allegations in support of his claim that Paychex is a fiduciary. Specifically, the plaintiff alleges that Paychex is an ERISA fiduciary (1) by exercising the powers of a plan administrator; (2) by designing and implementing prototype plans that channel client-plan assets to Paychex; (3) by having the discretion to determine which mutual funds are included in the Paychex-designed 401(k) platforms and how much to charge those funds; (4) by negotiating with mutual funds for the amount of revenue sharing payments Paychex will receive; (5) by receiving "float" payments from its client plans' assets pending investment of plan contributions; (6) by having discretion to select the financial institution and account where plan contributions will be held; (7) by having discretion as to the length of time the contributions will be held in such account; and (8) because Paychex' affiliate, Paychex Securities Corporation, exercises discretion and control over plan assets when investing plan investments in mutual funds and serving as nominee for such assets.

b. The plaintiff alleges that Paychex breached its fiduciary duties under ERISA § 404(a)(1) by (1) steering its client plans into mutual funds that paid Paychex revenue sharing in return; (2) negotiating to receive "float" payments while steering its client plans into mutual funds on the basis of whether such funds were willing to make revenue sharing and other payments to Paychex; and (3) by failing to offer lower-cost investment options for its client plans' contributions, such as aggregating plan assets, purchasing less expensive share

classes, meeting investment minimums, or investing in lower fee alternatives to mutual funds, such as collective investment funds.

c. The plaintiff also alleges that Paychex engaged in ERISA §§ 406(b)(2) and 406(b)(3) prohibited transactions by steering its client plans' assets to mutual funds and financial institutions that made revenue sharing and float payments to Paychex.

d. On November 2, 2007 Paychex moved to dismiss the complaint. On August 2, 2010 the court granted Paychex' motion on the basis that Paychex could not be considered a fiduciary with respect to the plan. In support of its ruling, the court noted that: (1) the administrative services agreement between the plaintiff and Paychex stated that Paychex was not a fiduciary under ERISA and that Paychex' services were limited to recordkeeping and non-discretionary administrative services; (2) Paychex' mere creation and offering of mutual fund lineups to clients did not make it an ERISA fiduciary because those lineups were created prior to the existence of any contractual relationships between Paychex and the plans; (3) the plaintiff – not Paychex – was responsible for selecting the specific mutual funds included in the plaintiff's plan, and under *Hecker v. Deere & Co.*, merely "playing a role" in the selection of investment options is not sufficient to give rise to fiduciary status; (4) under the administrative services agreement, Paychex was required to give the plaintiff at least 60 days' advance written notice of proposed deletions or substitutions of mutual fund options, and plaintiff thereafter had the right to reject such proposed changes or terminate his agreement with Paychex, consistent with DOL Advisory Opinion 97-16A (May 22, 1997); (5) the plaintiff failed in his argument that Paychex qualified as a fiduciary because it allegedly controlled how long plan contributions were held in the custodial account pending investment in mutual funds, because the plaintiff failed to allege a basis for concluding that Paychex actually *exercised* control over plan assets, given that the administrative services agreement provided that plan contributions generally would be held in the custodial account for five days, and the plaintiff did not allege that Paychex had deliberately kept amounts in the custodial account for longer than that; and (6) the plaintiff failed to support two additional theories advanced in his briefing on the motion to dismiss – that Paychex was a fiduciary by virtue of allegedly pledging plan assets as security for the company's lines of credit and by allegedly advising clients on selecting mutual funds, as these were unsupported by and/or contrary to documents the plaintiff relied upon in making these assertions.

e. On September 2, 2010, the plaintiff gave notice of appeal to the United States Court of Appeals for the Second Circuit. However, on December 29, 2010, the plaintiff withdrew the appeal.

8. *Beary v. Nationwide Life Ins. Co., et al.*, Civil Action No. 2:06-CV-00967, 2007 WL 4643323 (S.D. Ohio). This lawsuit, brought by a plan sponsor, was not brought under ERISA, but, rather, under state fiduciary law, on behalf of his Internal Revenue

Code § 457(b) plan and all similarly situated plans. The plaintiff claimed that Nationwide breached common law fiduciary duties by arranging for, receiving, and keeping revenue sharing payments from mutual funds and mutual fund advisers for its own use. In the alternative, the plaintiff claimed that, even if Nationwide's actions did not constitute a breach of fiduciary duty, Nationwide's retention of the revenue sharing payments was unjust, obligating it to make restitution to the class members. The court granted Nationwide's motion to dismiss on September 17, 2007, holding that the plaintiff's action was preempted by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). The plaintiff filed a motion to vacate the court's judgment seeking leave to file an amended complaint on October 1, 2007. 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. On October 15, 2008, Plaintiff filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit as to the dismissal of Plaintiff's claims and the denial of Plaintiff's motion to vacate. The parties' appeal briefing is complete. Oral argument was held on October 13, 2009. On February 3, 2010, the Sixth Circuit affirmed the district court's dismissal. On appeal, Plaintiff argued that, although his lawsuit constituted a "covered class action" under the Securities Litigation Uniform Standards Act of 1998 (and would therefore normally be preempted), it was "saved" under the Act's state-actions exception. In affirming the dismissal, the Sixth Circuit held that Plaintiff's action was not saved by SLUSA's state-actions exception because (1) Plaintiff did not bring the action as a political subdivision "on its own behalf" but rather on behalf of the *plan* (and only a plan itself may bring actions on behalf of a *plan*); and (2) Plaintiff did not bring the action on behalf of a class of named plaintiffs authorizing participation in the action (Plaintiff named only *himself* as a plaintiff, and SLUSA's state-actions exception requires that 50 or more political subdivisions or state pension plans be named as plaintiffs).

9. *Beary v. ING Life Ins. & Annuity Co., et al.*, Civil Action No. 3:07-CV-00035, 520 F.Supp.2d 356 (D. Conn.) This lawsuit was also brought under state common law, and claimed that ING breached its fiduciary duties by keeping revenue sharing payments for services provided to IRC § 457(b) plans. As in the *Nationwide* § 457(b) plans case, discussed above, the plaintiff also claimed, in the alternative, that even if ING's actions did not give rise to a breach of fiduciary duty, ING was obligated to make restitution to the class members. The court dismissed this action on November 5, 2007, ruling that the plaintiff successfully pled around SLUSA preemption, but at the cost of conceding away any viable claim. In doing so, the plaintiff failed to state a claim upon which relief could be granted, entitling ING to a 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 that the plaintiff's failure to initiate timely legal action constituted an 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.e., the revenue sharing payments, and, therefore, that the claim was properly dismissed. On January 4, 2008, the district court denied the plaintiff's motion to alter or amend the court's dismissal of the case.

10. *Stark v. American Skandia Life Assurance Corp.*, Civil Action No. 3:07-CV-01123-CFD (D. Conn.). Plaintiff voluntarily dismissed this action without prejudice on November 13, 2007.⁵

IV. ACTIONS BROUGHT BY PLANS AND PARTICIPANTS AGAINST SERVICE PROVIDERS

1. *Santomenno v. John Hancock Life Insurance Company (U.S.A.)*, Civil Action No. 2:10-cv-01655-WJM-MF (D. N.J.). This case is brought on behalf of a putative class of ERISA-covered 401(k) plans that held or continue to hold group annuity contracts issued by John Hancock, and on behalf of the participants and beneficiaries of such plans. Plaintiff asserts ERISA breach of fiduciary duty and prohibited transaction claims generally alleging that group annuity contracts issued by John Hancock to the plaintiff plans or their sponsors resulted in unreasonable and excessive fees for products and services that were not materially different from an investment by a standard 401(k) plan directly into a mutual fund.

2. In particular, the plaintiff alleges that John Hancock breached its fiduciary duties and/or engaged in prohibited transactions by: (1) imposing sales and service charges that exceeded the 12b-1 fees already being charged to plaintiff by underlying investment funds where no additional services were being provided in return for such sales and service charges; (2) allowing the imposition of 12b-1 fees on certain investments; (3) investing plan monies in inappropriate share classes (those imposing 12b-1 fees); (4) allowing an affiliate, John Hancock Investment Management Services, to charge excessive investment management fees when no investment management services were provided in exchange therefor; (5) accepting revenue sharing payments from investment options and failing to use such payments to offset administrative expenses charged to the plans or failing to return such revenue sharing fees to the plans or participants; (6) failing to select a low-priced, high-performance money market fund to underlie a John Hancock money market investment option.

⁵ Plaintiff, a plan administrator, brought ERISA §§ 404 and 406 claims on behalf of all trustees, sponsors, and administrators of employee benefit plans that owned variable annuity contracts offered by American Skandia, which provided recordkeeping services and investment options to such plans. The plaintiff alleged that American Skandia breached its fiduciary duties by receiving revenue sharing payments from the mutual funds in which the plan participants invested. According to the plaintiff, American Skandia's compensation was specified according to the terms of the contract between the plan and American Skandia, and any additional compensation received from the mutual funds should have inured to the benefit of the plan.

3. The plaintiff also asserts claims under the Investment Company Act of 1940, generally alleging that investment management fees paid to John Hancock's affiliate, John Hancock Investment Management Services, resulted in breaches of fiduciary duty because those fees were so disproportionately large that they bore no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining.

4. On July 16, 2010 John Hancock moved to dismiss the plaintiff's amended complaint. As to the plaintiff's ERISA claims, John Hancock argues that: (1) the complaint lacks basic information necessary to plead standing to assert any ERISA claim; (2) the plaintiff's allegations are insufficient to raise a plausible inference that John Hancock may be an ERISA fiduciary; (3) the plaintiff fails to plead that John Hancock – even if it is a fiduciary – breached any ERISA fiduciary duties or engaged in prohibited transactions; and (4) the plaintiff lacks standing to sue third parties selected by her plan's primary fiduciary without having first made demand on such fiduciary. As to the plaintiff's claim under § 36(b) of the Investment Company Act of 1940, John Hancock argues that: (1) the plaintiff lacks standing because she is not a "security holder" of any mutual fund advised by John Hancock's affiliate, John Hancock Investment Management Services; (2) the plaintiff has no interest in the majority of mutual funds on whose behalf she purports to sue; (3) the plaintiff's principal assertion -- that John Hancock Investment Management Services provides no services to the sub-advised funds -- is false, and the plaintiff fails to sufficiently plead other essential factors for ICA § 36(b) liability; (4) the plaintiff does not plead, as she must, that any breach occurred within a year of filing the action. As to the plaintiff's claim under § 47(b) of the Investment Company Act of 1940, John Hancock argues that: (1) the plaintiff's claim for rescission should be denied because she has not alleged a violation of ICA § 26; (2) the plaintiff lacks standing to bring suit under ICA § 47(b); (3) ICA § 26 confers no private right of action.

5. On May 23, 2011, the court granted John Hancock's motion to dismiss. The court found that plaintiffs' ERISA claims were derivative, in the sense that they belonged to the plan as a whole. Because no demand had been made on the plan trustees, nor were the trustees defendants in the action, the court found that plaintiffs had not pled a recognizable claim under section 502 of ERISA. The court also dismissed the claims based in the Investment Company Act, finding that plaintiffs had terminated their contracts with John Hancock and that such a claim required continuous ownership of the stock throughout the entire litigation.

6. Plaintiffs appealed the court's granting of the motion to dismiss to the Third Circuit Court of Appeals, where the case is currently pending. The Department of Labor filed an amicus brief on September 30, 2011. John Hancock's brief is currently due October 24, 2011.