GROOM LAW GROUP

Proprietary Fund Litigation
Groom Law Group, Chartered

September 2016

Active cases are highlighted in yellow.

	Case Name	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
First Circuit						
1	*Gordan et al. v. Mass Mutual Life Ins. Co. et al.*, No. 13-cv-30184 (D. Mass. filed 11/5/13) Judge Michael A. Ponsor	Filed 01/14/2014 The court denied 1. 3/30/15: The Court denied the motion to dismiss in light of the potential reversal of the Ninth Circuit's decision in *Tibble v. Edison*. 7/2/2015: Defendant filed a renewed motion to dismiss. Before the motion was resolved, the parties moved for preliminary approval of class settlement			1. Current and former participants in the MassMutual Thrift Plan challenge the Plan's investment in separate accounts and a fixed income (general account) option. According to the plaintiffs, 36 of the Plan's 38 investment options are proprietary products, 22 of the proprietary products are advised by Mass Mutual affiliates and the rest are sub-advised by a third party. Plaintiffs claim that MassMutual selected and retained proprietary funds to earn unreasonable compensation, without a prudent process. As related to fees, the complaint alleges that, under the Plan document, MassMutual was required to the pay the administrative fees for the Plan. Plaintiffs assert that fees paid by the Plan (and related MassMutual profits) were greater than those paid by other MassMutual clients who were offered institutional options with graduated, declining fee schedules and that the sub-	7/5/2016: The Court granted the parties' motion for preliminary approval of class settlement, which requires the Defendants to deposit $30.9M into a Litigation Settlement Fund. In addition, Defendants agree to engage an independent consultant to evaluate and make recommendations on the fixed investment structure; to ensure that participants are not charged more than $35 per participant for recordkeeping services; and to ensure all investment options comply with the Plan's Investment Policy Statement, among other forms of non-monetary relief.

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					advisory fees were a fraction of the MassMutual fees for investment funds (and the Plan could have contracted directly with sub-advisors for less). The complaint further alleges that the Plan could have invested in lower priced, alternative investment products like institutional priced mutual funds, exchange traded funds, bank collective trusts since and less expensive, non-proprietary mutual funds (e.g., Vanguard). Plaintiffs also assert that some of the proprietary products failed to meet the Investment Policy Statement performance standards. As to recordkeeping services, plaintiffs claim that an asset based fee is inappropriate and that the Plan fiduciaries failed to engage in a competitive bidding process for such services. Plaintiffs also focus on the CEO's role in setting the terms of the group annuity contract. They assert that the amount and structure of the fees were unreasonable and they otherwise object to certain terms of the contract that prohibit MassMutual from amending the Plan if it would have an adverse effect on MassMutual's administrative procedures or financial experience. 2. As for the fixed account (general account), the complaint	

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					alleges that (1) the investment caused 40% of the Plan's assets to be exposed to undiversified risk; (2) the risk charge and fees exceeded comparable products, (3) fee deductions and spread earnings were not disclosed to participants, (4) the guarantee of an interest rate is fraudulent, (5) similarly plans invested in synthetic GICs with multiple wrappers; and (6) the investment provided working capital for MassMutual to pay claims. 3. 3/30/15: The Court denied the motion to dismiss in light of the potential reversal of the Ninth Circuit's decision in *Tibble v. Edison*. 4. 7/2/2015: Defendant filed a renewed motion to dismiss. Counts I and II allege breach of fiduciary duty through the imposition of unreasonable recordkeeping and administrative fees and the selection of unreasonably-priced and imprudent investment options. Defendants argued this claim should be dismissed because plaintiffs plead no facts about an imprudent or disloyal fiduciary process. According to defendants, it is irrelevant that cheaper funds were available for competitors, as "nothing in ERISA bars every	

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					financial firm except one low cost provider...from offering investments to retirement plans." Defendants also argue that the fees at issue are well within the range that appellate courts have found do not support a claim of breach. Counts III and IV are prohibited transaction claims for entering into contracts with MassMutual. Defendants argue that ERISA allows plans sponsored by insurance companies to acquire the sponsor's annuity contracts, provided that the Plan pays no more than "adequate consideration." Therefore, according to defendants, counts III and IV fail because ERISA expressly exempts the use of MassMutual's Group Annuity Contract and investments. Count V asserts that defendants' violated the terms of the Plan by allowing participant accounts to pay Plan expenses. Defendants argue that this claim fails because this was actually required by the Plan document, which states, "To the extent that expenses are not paid by the Employer, they shall be deducted from Participant Accounts." Defendants also argue that plaintiffs' claims are time-barred under ERISA's three-year statute	

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					of limitations. Defendants argue that plaintiffs' had actual knowledge of everything they complain about: in fact, the Plan document specifically required the use of MassMutual products for many years, and the use of these products and services has always been disclosed to Plan participants, in many ways, including in MassMutual's public filings. Defendants also argue that, even after *Tibble*, plaintiffs' claims are time-barred under ERISA's six-year statute of repose. *Tibble* does not apply to prohibited transaction claims, therefore, because the proprietary products and services were chosen more than six years before suit was brought, the prohibited transaction claims must be dismissed. The breach of fiduciary claims in count II regarding imprudent investment options are also time-barred, defendants argue, because plaintiffs challenge the selection of the investments, and most funds were selected more than six years before suit was brought (and because plaintiffs do not plead that any separate recordkeeping or administrative fee was actually assessed, the fee claims must be dismissed because the count II claims concern the same funds). 5. 8/3/2015: Plaintiffs filed an	

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					opposition to defendants' renewed motion to dismiss. Plaintiffs argue that their recordkeeping fee and excessive management fee claims are valid because defendants did not do anything to monitor the compensation that MassMutual was receiving, and they never put the Plan's recordkeeping services out for competitive bidding to determine the market rate. Plaintiffs also argue that their imprudent and disloyal Plan investment options claim is valid because they have plausibly shown that defendants used the MassMutual affiliated funds despite the ready availability of other options, to benefit themselves at the expense of participants. Plaintiffs further argue that whether proprietary products are mandated by the Plan document or expressly authorized by ERISA is irrelevant as to whether the defendants breached their duty. Plaintiffs also argue that their prohibited transaction claims should not be dismissed because they are only required to plead a violation the prohibited transaction provisions; contrary to defendants' argument, they do not have to plead facts responsive to an affirmative defense before it is raised.	

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					Plaintiffs further argue that their claim that defendants violated the Plan document (count V) should not be dismissed because the Plan document only concerns individual feels that are charged directly to the participant. MassMutual charged the accounts for fees MassMutual was required to pay. Plaintiffs assert that their claims are not time-barred because they did not have "actual knowledge" to start the running of the three-year period, and that, under *Tibble*, defendants have a continuing duty to remove inappropriate investments and terminate excessive administrative expenses regardless of how long those investments and expenses have been in the Plan.	
2	*Bilewicz v. FMR LLC*, No. 13-cv-10636 (D. Mass. filed 3/19/13 by Bailey & Glasser LLP) Amended Complaint filed 2/4/14 Consolidated with *Yeaw v. Fidelity* case on	Motion to Dismiss filed 10/1/13, Plaintiffs Opposed the Motion on 10/29/13, Defendants replied on 11/26/13 Before the motion was resolved, the parties settled.			1. Plan participants brought suit alleging that the Plan's investment exclusively in 160 Fidelity Funds resulted in significantly higher fees than those carried by comparable funds and that it was implausible that the selection of these funds could have been the result of appropriate fiduciary analysis. Plaintiffs allege that (a) the Plan had too many fund options which, among other	On 7/10/14, the Court granted the plaintiffs' unopposed motion for an order consolidating the actions (*Bilewicz v. Fidelity* and *Yeaw v. Fidelity*) and preliminarily approved the settlement. Fidelity agreed to make a payment of $12 million ("Settlement Fund"). Fidelity also agreed to

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	7/10/14				things, meant that the Plan could not take advantage of break points in fee schedules; (b) new Fidelity Funds were added for the purpose of propping up or seeding those funds (with new funds having less than 3 years and often less than 1 year track record); (c) the Plan's position in the funds was too large (more than 5%, and some funds had less than $75 million under management); (d) lower cost target date funds should have been used instead of the Freedom Funds, which sub-invest in actively managed mutual funds; (e) the fees for the investment options were excessive for a "mega plan" and the fiduciaries should have considered other investment options such as collective funds and separately managed accounts.	make certain changes to the plan, which will be in effect for at least two years following the amendment: • The Plan will make available a wide selection of both Fidelity and non-Fidelity mutual funds. • The Plan will also continue to offer: (i) the Fidelity Freedom Funds – Class K as the Plan's qualified default investment alternative; and (ii) Fidelity's portfolio advisory service, Portfolio Advisory Services at Work (PAS-W). PAS-W will continue to be offered at no cost to participants. • Fidelity is increasing auto-enrollment for eligible employees from 3% to 7% of eligible compensation, and will default current participants who are currently deferring below 7% to 7% of eligible compensation. Fidelity will apply its match to those

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						increased contributions. In addition: • The Plan shall provide that revenue sharing attributable to non-Fidelity mutual funds shall be credited to participants in the same way as revenue attributable to Fidelity mutual funds and collective trusts pursuant to the eighth amendment to the 2005 restatement of the Plan is credited to participants. This revision to the Plan shall remain in effect for at least three years. • Fidelity may select an independent fiduciary to provide such authorization as may be required by PTE 2003-39. All costs borne by the independent fiduciary, up to $50,000, shall be borne by the Settlement Fund. • After payment of all fees, costs, expenses

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						and incentive payments, the remaining settlement amount shall be allocated among the settlement class members as described in the settlement agreement (after class counsel fees, costs and expenses, and service payments are paid from the Settlement Fund). • Plaintiffs agreed to release the defendants and other parties, and provide covenants not to sue relating to any claims arising out of or relating in any way to the subject matter of the actions or the new plan lineup. The Court approved the settlement on 10/14/14.
3	*Yeaw v. FMR LLC*, No. 14-cv-10035 (D. Mass. filed 1/7/14)				1. Participants in Fidelity's defined contribution plan, sponsored by Fidelity (a wholly-owned subsidiary of FMR), brought this action against Fidelity, the Fidelity Retirement Committee, and other Plan fiduciaries. Fidelity serves as a recordkeeper for thousands of defined contribution plans, including its own profit sharing plan (the plan at issue here).	On 7/10/14, the Court granted the plaintiffs' unopposed motion for an order consolidating this action with *Bilewicz v. Fidelity* and *Yeaw v. Fidelity*) and preliminarily approved a settlement (please above *Bilewicz* entry for settlement details). The Court gave final approval of the

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					Fidelity allows retirement plans for which they provide recordkeeping services to invest in funds established and managed by the recordkeeper as well as funds established and managed by other, unaffiliated companies. 2. Plaintiffs allege that the defendants violated their duties to 1) act solely in the interests of the Plan and its participants; 2) defray the expenses of Plan administration; and to 3) be prudent with assets. Plaintiffs alleged that the Fidelity Plan did not receive a single dollar in revenue-sharing recapture, despite the Plan's ability to obtain the most favorable revenue-sharing recapture arrangements based on its large size, among other things. Plaintiffs also alleged that had the Plan entered into an arms-length relationship with Fidelity pursuant to an agreement negotiated by a prudent and unconflicted fiduciary, the Plan would have paid a participant fee annually substantially lower than the market fee for such services. Plaintiffs conclude that Fidelity caused its own Plan to give over $88 million to Fidelity through Fidelity's control over the Plan's selection of investments and service-providers. 3. Plaintiffs also allege that	settlement on 10/14/14.

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					defendants engaged in prohibited transactions with Plan assets. As fiduciaries of the Plan, Fidelity and the Retirement Committee caused the Plan to contract for services to the Plan with a party in interest and paid Fidelity far in excess of reasonable compensation for providing services. 4. *See Bilewicz v. FMR LLC* for information regarding the approval of a settlement on 10/14/14.	
4	*Brotherson et al v. Putnam Investments, LLC et all*, No. 1:15-cv-13825-WGY (D. Mass filed on 11/13/15 by Nichols Kaster, consolidated with *Ellis, et al. v. Fidelity Management Company*) Amended Complaint filed on 01/19/2016 Judge William G. Young	Filed by Defendants on 01/08/2016, declared moot on 01/25/2016. Motion to Dismiss first amended complaint on 02/05/2016. Response in opposition filed by Plaintiffs on 02/22/2016. Reply to response filed by defendants on 03/03/2016. Court grants partial motion to dismiss on 03/09/2016 as to defendant Neary. Court denied motion to dismiss on 04/07/2016.			Plaintiffs allege that Defendants included only Putnam proprietary mutual funds in the Plan's investment lineup, which "costs Plan participants millions of dollars in excess fees every year." The further claim that Defendants failed to adequately monitor the investments and remove poorly performing ones, and included "untested" funds with "no track record." On 4/7/2016, the Court denied Defendants' motion to dismiss. Citing First Circuit case law, the Court concluded that "in factually complex ERISA cases like the instant ones, dismissal is often inappropriate," and that plaintiffs' complaints "allege facts sufficient to state plausible claims."	
Second Circuit						
5	*Leber v.*	Motion to dismiss filed	Filed 9/18/15;	Motion for	1. Participants in Citigroup's in-	

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	Citigroup, Inc., No. 07-cv-09329 (S.D.N.Y. filed 10/17/07 by McTigue & Porter LLP) First Amended Complaint 7/19/08 Second Amended Complaint filed 11/15/11 Third Amended Complaint filed 4/8/13 Fourth Amended Complaint filed 9/18/15 Judge Sidney H. Stein	on 8/29/08. On 3/16/10, the motion was granted in part, and denied in part.	Defendants responded 10/23/15; Plaintiffs filed reply on11/16/15.	summary judgment filed 10/1/2010 (dismissed as moot on 11/21/2011); motion for summary judgment filed 1/10/12; opposition filed 2/14/12; reply filed 3/7/12.	house 401(k) plan challenge (1) the selection of investment products (mutual funds, GICs, and a stable value fund) offered by Citigroup-related entities and (2) the purchase of trustee and record-keeping services from Citigroup-related entities. The complaint alleges that the Plan could have paid lower fees and reaped greater investment returns had the defendants chosen investments and service providers unaffiliated with Citigroup. 2. On 3/16/10, the Court granted in part and denied in part the defendants' motion to dismiss. 2010 WL 935442 (S.D.N.Y. Mar. 16, 2010). The Court found that Plaintiffs validly stated a plausible claim for breach of fiduciary duty insofar as they alleged that the defendants acted imprudent by steering Plan assets to Citigroup affiliated mutual funds with higher (allegedly 200% above market) investment advisory fees than those of competing funds. The Court additionally agreed with the plaintiffs that the issue of timeliness of the action could not be resolved on a motion to dismiss. However, the Court dismissed the prohibited transaction allegations some breach of fiduciary duty	

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					claims finding that the complaint: (1) alleges the very type of activity that the § 406 exemptions expressly allows to occur, and makes no allegations to support a finding that the conduct of the fiduciaries fell beyond the exemption and thus would be actionable; (2) contains no allegations that the services provided were unnecessary to the operation of the Plan, that unreasonable compensation was paid, or that there was anything wrong or improper with the selection of CitiStreet other than the fact that it was an affiliated service provider, which by itself is not actionable; (3) includes no allegation that the defendants acted "on behalf of" either Citigroup or CitiStreet, or that Citigroup or CitiStreet was a party with interests "adverse" to those of the Plan; and (4) contains nothing beyond a bare assertion that Citigroup "knew or should have known" that the defendants "were breaching their duties," which standing alone, does not rise to the level of a plausible claim for relief. 3. The defendants filed a motion for summary judgment on 1/10/12,	

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					arguing that plaintiff's claims are time-barred because they had actual knowledge more than three years before following suit. Specifically, defendants argued that participants were informed of the relevant funds that were offered, the affiliations of the entities, and the fees and expenses charged by the funds. 4. On 3/28/13, the Court granted plaintiffs leave to file a third amended complaint in order to remove and add certain individual Citigroup defendants; third amended complaint filed 4/8/13. 5. On 9/30/14, the Court denied defendants' motion for summary judgment on the issue of timeliness because defendants failed to demonstrate pursuant to 29 U.S.C. § 1113 that plaintiffs had "actual knowledge" of the alleged breaches. 6. 9/18/2015: Plaintiffs filed fourth amended complaint and class certification motion. Defendants filed answer to fourth amended complaint on 10/9/2015. Defendants opposed the class certification motion on 10/23/2015, and Plaintiffs replied on 11/16/2015.	
6	*Richards-Donald and Deprima, et*				1. 10/13/2015: Plaintiffs brought a class action lawsuit against	

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	al. v. Teachers Insurance and Annuity Association of America, et al. 1:15-cv-08040 (S.D.N.Y.) (complaint filed 10/13/15 by Bailey & Glasser LLP) First Amended Complaint filed 4/6/2016 Judge P. Kevin Castel				Defendants, who they allege were all officers or employees of TIAA or an affiliated entity. Plaintiffs claim that Defendants breached their fiduciary duties by forcing the Plans exclusively into investments managed by TIAA or an affiliated entity, and also selecting and retaining TIAA as a recordkeeper, which charged excessive fees that benefitted TIAA, and that TIAA has "profited handsomely" from these arrangements. Plaintiffs also allege that Defendants engaged in prohibited transactions each time the Plans paid fees to TIAA in connection with the Plans' investment in a TIAA-affiliated investment options and for recordkeeping fees. 2. 12/11/2015: Defendants wrote a letter asking the Court to treat this proceeding and *Malone v. Teachers Insurance and Annuity Insurance Association of America*, 15-cv-08038 as related proceedings. 3. Initial pretrial conference set for 2/17/2016. 4. 5/2/2016: Defendants answered Amended Complaint.	
7	*Moreno and O'Halloran v. Deutsche Bank Americas*	Motion to Dismiss First Amended Complaint filed by Defendants on 04/29/2016. Response			1. Participants of the Deutsche Bank Matched Savings Plan brought a class action complaint against the Plan's fiduciaries for	

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	Holding Corp., et al., 5:15-cv-09936 (S.D.N.Y. filed 12/21/15 by Nichols Kaster, PLLP) Amended Complaint field on 03/30/2016 Judge Lorna G. Scholfield	in opposition filed by Plaintiffs on 05/31/2016. Reply filed by Defendants filed on 06/21/2016			breach of fiduciary duties and engaging in prohibited transactions and unlawful self-dealing. Specifically, Plaintiffs claim that the Plan imprudently invested over $300 million in the Deutsche Equity 500 Index Fund (which mimics the S&P 500 index), even though the fees for that index fund were eleven times higher than a comparable index fund from Vanguard and had the identical mix of investments. This investment cost Plan participants millions of dollars in investment management fees that went directly into Deutsche Bank's pocket. Plaintiffs also allege that the Plan had hundreds of millions of dollars invested in other actively-managed proprietary funds that had significantly higher fees than comparable funds and a track record of poor performance. Plaintiffs claim that Deutsche Bank ranked among the worst-performing mutual fund companies in the U.S. and various proprietary funds within the Plan consistently underperformed their benchmark indices. Plaintiffs further claim that not a single defined contribution plan other than the Plan included these funds among its investment offerings.	

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					Plaintiffs further allege that Defendants compounded their imprudence by failing to procure the least expensive available share class for several mutual funds within the Plan. For instance, Defendants retained so-called institutional shares with expense ratios of 0.71% and 0.69%, respectively, even though otherwise identical R6 shares of the same funds had lower expense ratios of 0.60% and 0.62%. Finally, Plaintiffs allege that Defendants failed to investigate the use of separate accounts and collective trusts as alternatives to mutual funds, even though they are typically less expensive and offer the same types of investments.	
8	*Habib, et al v. M&T Bank Corporation, et al*, No. 1:16-cv-00375-FPG (W.D.N.Y. filed on 05/11/2016 by Nichols Kaster, PLLP) Judge Frank P. Geraci, Jr.	Filed by Defendants on 07/20/2016. Plaintiffs filed Amended Complaint on 8/17/2016, and Court denied the motion to dismiss as moot the same day.			Plaintiffs alleged that Defendants included a variety of proprietary M&T funds (8 out of 23 total investment options) "known for extraordinarily high fees and chronic underperformance." Defendants also allegedly failed to investigate the use of T. Rowe Price collective trusts and separate accounts instead of mutual funds that carry higher fees in order to receive greater revenue sharing payments, and also allegedly failed to use the lowest share class of several mutual funds in the	

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					Plan.	
9	*Andrus et al v. New York Life Insurance Company et al*, No. 1:16-cv-05698-KPF (S.D.N.Y. filed on 07/18/2016 by Nichols Kaster, PLLP) Judge Katherine Polk Failla				Plaintiffs alleged that Defendants used the Employee Plan and Agents' Plan to promote proprietary MainStay mutual funds, which they allege carry high fees. On 9/7/2016, the Court granted Defendants' request to extend time to respond to the complaint, in light of the parties' agreement to engage in mediation in November 2016.	
10	*Bekker v. Neuberger Berman Group LLC*, No. 1:16-cv-06123-LTS (S.D.N.Y. filed on 08/02/2016 by Bailey & Glasser LLP) Judge Laura Taylor Swain				Defendants allegedly breached their fiduciary duties "by forcing the Plan into investments managed by Neuberger or an affiliated entity, which charged excessive fees that benefited Neuberger and the managers of the proprietary funds." Plaintiffs also claim Defendants engaged in prohibited transactions with a person whose interests are adverse to the interests of the Plan and participants.	
11	*Patterson v. Morgan Stanley*, No. 1:16-cv-06568-RA (S.D.N.Y filed 08/19/2016 by Sanford Heisler LLP) Judge Richard J.				Plaintiffs allege that Defendants selected and retained high-cost, poorly performing mutual funds, some of which were managed by Morgan Stanley, "without thoroughly investigating whether Plan participants would be better served by investments managed by unaffiliated companies."	

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	Sullivan					
	Allen v. M&T Bank Corporation et al, No. 1-16-cv-00704 (W.D.N.Y. filed 09/01/2016 by Kessler Topaz Meltzer & Check, LLP) Judge Frank P. Geraci, Jr.				Plaintiffs allege that Defendants breached ERISA fiduciary duties by retaining proprietary funds in the Plan despite the availability of lower cost and better performing investment options, and by failing to offer collective trusts as investment options despite their lower fees.	
Third Circuit						
12	*Mehling v. New York Life Insurance Company*, 2:99-cv-05417 (E.D. Pa. filed 11/1/99 by Sprenger & Lang)	On 3/29/01, the Court granted the motion to dismiss the plaintiffs' section 406 claims. The Court allowed the section 404 claims to proceed. 163 F. Supp.2d 502 (E.D. Pa. 2001)			1. Participants of the in-house 401(k) Plan sponsored by New York Life Insurance Company alleged that the Plan fiduciaries' investment of Plan assets within an affiliated investment product constituted a per se violation of ERISA's prohibited transaction rules. Plaintiffs contended that defendants: (1) defrauded the Plans by using Plan assets to seed, subsidize, and sustain New York Life's new line of institutional mutual funds; (2) desired to use Plan assets as seed money for the mutual funds rather than use the company's own assets to pay the "high start-up expenses and risk associated with creating a family of mutual funds"; (3) propped up those underperforming funds when	In October 2007, before the Court ruled on the merits of the section 404 claims related to the affiliated funds, the parties settled the lawsuit for $14 million.

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					the market so demanded, such as by pumping money into a particular fund so as to keep it from collapsing after outsiders had fled the fund; and (4) invested Plan assets in untested, poorly performing institutional mutual funds despite knowing that plans of that size can obtain direct, expert money management at a fraction of the cost of even the most inexpensive mutual fund. 2. On 3/29/01, the Court granted the motion to dismiss plaintiff's prohibited transaction claims. Defendants had cited Prohibited Transaction Exemption 77-3, which specifically exempts from the restrictions of Section 406 "the acquisition and sale of shares of a . . . 'mutual fund' by an employee benefit plan which covers employees of the mutual fund or the mutual fund's investment adviser or principle underwriter, or an affiliate thereof." PTE 77-3 applies so long as a plan does not: 1) pay any fees to the investment adviser except via the investment company's payment of its standard advisory and other fees; 2) pay a redemption fee to any party other than the investment company itself; 3) pay a sales commission; or 4) have dealings with the investment company on terms that are less favorable than between the investment company and any other	

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					shareholder. In Advisory Opinion 98-06A, the DOL cautioned that even if the acquisition of the mutual fund shares was exempt by reason of PTE 77-3, a decision motivated by the intent to generate seed money that facilitates the marketing of the mutual fund may leave the plan fiduciary liable for any loss resulting from such breach of fiduciary responsibility. The Court concluded that, since plaintiffs did not allege that the fees paid by the Plans failed to comply with the requirements of PTE 77-3 or that the Plans had dealings with the funds on terms that were less favorable than those that are offered to other shareholders, the conditions of PTE 77-3 were met and defendants were exempt from a section 406 claim. The Court allowed the breach of fiduciary duty claims under section 404(a) to proceed.	
Fourth Circuit						
13	*David et al. v. Alphin, et al.*, No. 3:07-cv-00011 (W.D.N.C. filed 8/7/06) Second Amended Complaint filed 7/31/07	Partial motion to dismiss granted on 12/15/08, in which the Court dismissed all claims against or on behalf of the defined benefit plan on standing grounds.		On 12/29/10, defendants filed a motion for summary judgment on the remaining claims, arguing these claims were time	1. Plaintiffs challenge the fiduciaries of Bank of America's in-house 401(k) and defined benefit pension plans for their use of affiliated mutual fund products. Plaintiffs specifically contended that: (1) Defendants invested in funds	

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	Third Amended Complaint filed 11/19/10 No. 11-2181 (4th Cir. filed 10/20/11)			barred under the statute of limitations. On 9/22/11, the District Court granted the motion for summary judgment and dismissed the remaining claims. Affirmed by the Fourth Circuit on 1/14/13.	managed by Bank of America affiliates that generated millions of dollars in fees for Bank of America, and charged fees that were six times the rate of competitors fees, were not attractive to arms-length investors, and were suffering from market timing and late trading problems; (2) without the "critical mass" or "seed money" provided by the Plans' investment in the affiliated funds, Bank of America would not have been able to attract other investors to its funds and maintain an investment management business; and (3) even if defendants can prove that the transactions are exempt from section 406, ERISA's prudence and loyalty fiduciary duties were breached. The investments at issue were added to the Plans no later than 1999. 3. On 1/14/13, the Fourth Circuit affirmed the District Court's dismissal of the claims related to Bank of America's defined benefit plan on standing grounds. The Fourth Circuit noted that a participant in a defined benefit plan has an interest in fixed future payments only (rather than the assets of the pension fund), and that alleged misconduct by administrators of a defined benefit	

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					plan does not affect such an entitlement unless the misconduct creates a risk of default by the entire plan. The Fourth Circuit also upheld the District Court's 9/22/11 grant of summary judgment to defendants, agreeing with the District Court that plaintiffs' remaining claims concerning the 401(k) plan were time-barred by ERISA's six-year statute of limitations: <u>Prohibited Transactions:</u> Plaintiffs argued that the Plan fiduciaries committed prohibited transactions under ERISA section 406 each time they failed to remove or replace the affiliated funds from the lineup. The Court disagreed, finding that that a decision to continue an investment was not a "transaction" that could be proscribed by section 406 and noting that "the alleged prohibited transactions and breach could only be based on the initial selection of the funds." <u>Breaches of Fiduciary Duty:</u> Plaintiffs argued that Plan fiduciaries had violated their duty of prudence by "failing to remove" the allegedly imprudent affiliated investments. The Fourth Circuit affirmed the District Court's disagreement with this argument, pointing out that the complaint did	

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					not allege that the affiliated funds became imprudent during the limitations period—rather, the complaint centered only upon the attributes of the investments that existed at the time of their initial selection, i.e. alleged poor performance and high fees. As a result, the Fourth Circuit upheld the District Court's ruling that plaintiffs' claims were "simply another challenge to the initial selection of the funds to begin with." Because the funds were selected prior to the relevant six-year limitations period, the Fourth Circuit agreed with the District Court that these claims for fiduciary breach were time-barred.	
14	*Franklin v. First Union Corp.*, No. 3:99-cv-344 (E.D. Va. filed 5/5/99 by Sprenger & Lang), 84 F.Supp.2d 720 (E.D. Va. 2000) *Franklin v. First Union Corp.*, No. 3:99-cv-610 (E.D. Va. filed 9/7/99)			Cross-motions for summary judgment on certain claims were ruled upon on 2/17/00, although there was no ruling on any of the fee-related or affiliated fund claims.	The lawsuit arose from a 1997 merger of Signet Bank into First Union Corporation. As part of the merger, all participant assets within the Signet Bank in-house plan were "mapped" into investment vehicles within the First Union plan, all of which were First Union proprietary funds. Former Signet employees filed the initial lawsuit (No. 99-cv-344) against First Union, alleging in part that the First Union plan fiduciaries had breached their fiduciary duties by discontinuing any non-proprietary investment options within the plan. The second lawsuit (No. 99-cv-	On 3/22/01, before the Court had ruled upon any claims alleging malfeasance in connection with proprietary investment options, the parties reached a $26 million settlement. Plaintiffs recognized that the claims they had brought were novel. Defense counsel speculated that it would be very difficult for plaintiffs to show that a financial firm must hand over money management to a competitor, but, on the other hand, that the amount

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					610) similarly alleged that First Union's lack of non-proprietary options amounted to self-dealing and improper inurement of plan benefits. Plaintiffs contended that defendants improperly: (1) used participants' contributions as seed money to start or grow new funds affiliated with First Union; (2) charged participants excessive fees and expenses while outside investors received fee waivers and discounts; and (3) included First Union's poorly performing mutual funds as investment options in the plan.	potentially at issue was significant.
15	*Bowers, et al. v. BB&T Corporation* (M.D.N.C.) 1:15-CV-732 (complaint filed 9/4/15 by Nichols Kaster, PLLP); Amended Complaint filed 12/1/15 Judge Catherine C. Eagles	Filed 12/23/2015. Response in opposition filed by Plaintiffs on 02/22/2016. Reply filed by Defendants on 03/23/2016. On 4/16/16, the court denied the motion to dismiss.			1. Plaintiffs filed a class action regarding the BB&T Corporation 401(k) Savings Plan, alleging self-dealing and imprudent decision-making in the management of BB&T's retirement Plan. BB&T is the Plan's sponsor, recordkeeper, custodian, and primary investment manager. According to Plaintiffs, Defendants included in the Plan high-cost mutual funds run by BB&T's wholly-owned subsidiary, Sterling Capital, which pays revenue sharing to BB&T. According to Plaintiffs, the revenue sharing costs are two to three times greater than the costs BB&T actually incurs to provide plan services.	

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					Plaintiffs further allege that Defendants' failed to remove poorly performing investments from the Plan, in breach of their fiduciary duties. Plaintiffs specifically point to the BB&T Large Cap Fund and argue that it has been performing poorly relative to its benchmark. Plaintiffs also allege that defendants mismanaged the Plan's fixed investments by using a money market fund instead of a stable value fund that allegedly would have increased the return on assets without an increase in risk. Plaintiffs further allege that defendants retained the Plan's investment in a BB&T deposit account, despite its low yields and the availability of superior investment alternatives. Based on this conduct, Plaintiffs assert claims against Defendants for breach of the fiduciary duties of loyalty and prudence (count one), engaging in prohibited transactions with a party in interest (count two) and a plan fiduciary (count three), and unlawful inurement of plan assets to the benefit of an employer (count four). On 11/30/2015, the court consolidated this case with *Smith, et al. v. BB&T Corporation, et al.,*	

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					1:15-cv-841 2. 12/23/2015: Defendants moved to dismiss on the following grounds: • Count I: claim that recordkeeping fees were excessive should be dismissed because Plaintiff pleads no facts regarding the scope and value of recordkeeping services, and claim that Defendants were required to conduct an RFP for recordkeeping services is baseless. • Count II: claim regarding excessive investment management fees should be dismissed because courts have already concluded that plan fiduciaries fulfill their duties under ERISA by offering a sufficient mix of investment options with varying fee and risk profiles. Also, breach of fiduciary duty claim for retaining investment options that underperformed certain market indices should be dismissed because courts have consistently held that the ultimate outcome of an investment is not proof its imprudence.	

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					• Counts III and IV: claim regarding the use of short-term, fixed income options instead of a stable value fund and claim related to the use of a "unitized" common stock should be dismissed because Defendants fulfilled their duty to act as others in a like capacity would act. • Counts VI and VIII: prohibited transaction claims should be dismissed because Plaintiff failed to properly plead that the transactions at issue are not covered by the applicable statutory and administrative exemptions. • Defendants further argue that the complaint should be dismissed because certain Defendants are not fiduciaries for the conduct at issue; the claim for equitable relief should be dismissed because Plaintiff has not alleged a distinct injury; and certain claims are time-barred.	
16	*Smith et al v. BB&T Corporation et*				On 11/30/2015, the court consolidated this action with *Bowers, et al. v. BB&T*	

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	al, No. 1:15-cv-00841-CCE-JEP (N.C.M.D. filed on 10/08/2015 by Schlichter, Bogard & Denton LLP)				*Corporation* (M.D.N.C.) 1:15-CV-732	
Fifth Circuit						
17	*Main et al v. American Airlines Inc. et al*, No. 3:16-cv-01033-C (D. Tex filed on 04/15/2016 by Nichols Kaster, PLLP) Judge Reed C. O'Connor	Filed by Defendant on 06/10/2016. Plaintiffs amended complaint, and Defendants filed a motion to dismiss the amended complaint on 8/5/2016.			Plaintiffs allege that Defendants breached ERISA fiduciary duties by populating about half of the Plan investment lineup with affiliated American Beacon funds until the fall of 2015, when the Plan was overhauled and the American Beacon funds were removed. Those funds, Plaintiffs claim, were imprudent choices since they carried high fees and underperformed. Defendants allegedly also failed to investigate the use of separate accounts and collective trusts, which have lower fees.	
Sixth Circuit						
18	*In re Regions Morgan Keegan ERISA Litigation*, No. 09-02009 (W.D. Tenn., filed 2/17/09)	On 3/9/10, the court granted in part and denied in part defendants' motion to dismiss. *See* 692 F.Supp.2d 944.			1. The complaint was brought against the fiduciaries of the Regions Financial 401(k) Plan and a predecessor plan. Plaintiffs allege that certain "RMK Select Funds" charged unreasonably high fees and expenses. Plaintiffs claim that the fiduciaries failed to engage in a prudent and adequate process for evaluating, selecting and monitoring the investment	On 6/23/14, the Court granted preliminary approval of a $22.5 million settlement of the excessive fee claims. On 12/29/14 the Court approved the fairness, reasonableness, and adequacy of the settlement.

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					options. Plaintiffs allege that the Plan should not have invested in the retail share class of the proprietary products and that the Plan's investments should have included passively managed funds. Accordingly to Plaintiffs, the RMK Select Funds also underperformed less expensive alternatives. The Court denied Defendants' motion to dismiss the excessive fee breach of fiduciary duty and prohibited transactions claims. The Court concluded that Plaintiffs' breach of fiduciary duty claims were plausible because they had alleged that Defendants (1) fail[ed] to implement a prudent and adequate procedure for evaluating, selecting and monitoring fund investment options and for ensuring that reasonably priced, prudent investment options were selected; (2) through this failed procedure, selected funds that "had expense ratios in some cases upwards of six times the expense ratios for readily available comparable funds"; and (3) offered retail class shares in several of the RMK Select Funds, despite the ability to obtain institutional class shares. As to the prohibited transaction claims, the Court ruled that it could not decide on a motion to dismiss whether the requirements	

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					of PTE 77-3 were satisfied and that the complaint otherwise adequately alleged a factual basis for asserting claims under section 406(a)(1)(C) and 406(a)(1)(D).	
19	*Yost v. First Horizon National Corp.*, No. 08-02293 (W.D. Tenn., filed 5/9/08 by Stember Feinstein Doyle Payne & Kravec LLC)	Motion to dismiss granted on 9/30/09. *See* 2009 WL 3241689. On 9/30/11, Plaintiffs filed a fourth amended complaint.	The first motion was filed on 1/29/10 and subsequently Plaintiffs filed an amended motion on 9/10/10. On 6/3/11, the court granted in part and denied in part the amended motion to certify class.		1. On 5/5/08, participants in the First Horizon National Corporation Savings Plan brought suit alleging that the Defendants breached their duties by selecting funds that generated fees for First Horizon instead of following a prudent selection process and by failing to provide complete and accurate information regarding investment options, including its own products.	On 9/13/12, the Court entered an order granting final approval of a class action settlement. First Horizon paid $6 million, 15% of which was allocated to the excessive fee subclass (85% was attributable to a company stock fund subclass).
Seventh Circuit						
20	*Martin v. Caterpillar, Inc.*, 1:07-cv-01009-JBM-JAG (C.D. Ill. filed 9/11/06 by Schlichter Bogart & Denton LLP) Amended complaint filed 5/25/07 Second Amended Complaint filed	Motion to dismiss complaint granted on 5/15/07 due to "prolix language" without prejudice to re-filing an amended complaint. On 7/25/07, defendants filed a motion to dismiss the second amended complaint. On 9/25/08, the court denied defendants' motion to dismiss the second amended complaint. *See* 45	First motion denied on 5/15/07 as moot in light of dismissal of original complaint.		1. In addition to revenue sharing, Plaintiffs complain that fiduciaries selected imprudent Preferred Group retail mutual funds as eleven of the Plans' thirteen investment options (the Caterpillar Stock Fund and an equity index mutual fund completed the menu); squandered the Plans' immense bargaining power, based on their billions of dollars of assets, by including retail mutual funds as Plan investment options when superior investments were available at lower prices in the wholesale investment marketplace; included, as Plan	On 11/5/09, the parties reached an agreement to settle the lawsuit. Under the settlement agreement which has to be approved by the court and the Evercore Trust Company, acting as an independent fiduciary, Caterpillar will pay $16.5 million to settle the lawsuit without admitting any wrongdoing. The settlement proceeds remaining after deducting attorney's fees, litigation costs, and administrative costs, distributed to the

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	7/5/07	Employee Benefits Cas. 1631. On 2/19/09, defendants filed a motion for judgment on the pleadings based on the Seventh Circuit's affirmance of *Hecker v. Deere & Co.* dismissal.			investment options, shadow index funds, which charged excessive fees for active management while structuring their portfolios to replicate index funds in terms of investment mix and fees; allowed the Plans to pay excessive fees for administrative services, including but not limited to recordkeeping services; and included as the Plans' investment options imprudent actively managed investment options whose performance net of fees did not exceed that of similar investments, including passive i.e., index) investments. 2. Although the court denied Defendants' motion to dismiss the second amended complaint, the Court held that Defendants did not breach their fiduciary duties by "failing to make disclosures regarding revenue sharing" which were "not required by the statutory scheme promulgated by Congress and enforced by the DOL."	class members (participants in the Plans at any time between 7/1/1992 and 9/10/09) 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

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						the Caterpillar 401(k) Plan mentioned in the second amended complaint, but covers all 401(k) plans participating in the master trust. On 8/12/10, the Court granted final approval of the settlement. On 9/9/10, the Court entered an order awarding – out of the settlement fund – $5.5 million (fees) and $315,345.40 (expenses) to the class counsel and incentive awards of $12,500 to each of the three named Plaintiffs. On 10/28/10, the Court entered judgment closing the case.
21	*Nolte v. CIGNA Corp.*, No. 2:07-cv-02046-HAB-DGB (C.D. Ill. Filed 2/26/07 by Schlichter Bogard & Denton LLP) Amended Complaint filed 7/19/07 Third Amended Complaint filed 6/8/10	CIGNA defendants filed a motion to dismiss on 9/6/11. Prudential filed a motion for judgment on the pleadings on 8/9/10.	Motion to certify class filed on 8/12/11.	CIGNA defendants filed a motion for partial summary judgment on 8/9/10, which the Court denied as moot on 12/9/10. CIGNA defendants renewed the motion for summary judgment on	1. Participants in CIGNA's in-house 401(k) plan allege several claims related to affiliated investment products, including that Plan fiduciaries and investment manager (1) undertook a long campaign of self-interested and prohibited transactions by using and retaining subsidiaries to serve as the Plan's investment manager and primary service provider, and thereby generating revenues and profits for the benefits of defendants; (2) caused the Plan to include investment	On 6/21/13, the parties reached a settlement and submitted a proposed agreement for Court approval. Under the proposed settlement, the CIGNA Defendants are to pay $35 million, which will be allocated to participants who maintained accounts in the Plan from 1999-2013. As part of the settlement, the CIGNA Defendants also agreed to a variety of

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	Fourth Amended Complaint filed 9/2/11			9/6/11.	options with fees and expenses that were unreasonable and excessive, for the benefit of defendants; (3) imprudently selected and retained CIGNA's separate accounts and income funds as Plan investment options; (4) improperly invested Plan assets into Defendants' general account, imposing excessive and undiversified risk; and (5) used Plan assets so as to increase the ongoing revenues and profits of their business. 2. On 9/10/07, the CIGNA Defendants filed a motion for partial summary judgment and for dismissal. CIGNA asserted that ERISA's three-year "actual knowledge" statute of limitations bars Plaintiffs' excessive fee breach of fiduciary duty and prohibited transaction claims arising before 2/26/04. The CIGNA Defendants also moved to dismiss the complaint, in part because (a) ERISA class action settlement resolving claims "related to the investment of Plan assets or to other alleged fiduciary misconduct" bars the claims of most named Plaintiffs and putative class members before 3/1/05; and (b) Plaintiff's claims challenging excessive recordkeeping and investment management fees claims fail to state a claim for which relief can be granted. On	changes to plan administration, including: (a) removing Plan investment advisors affiliated with CIGNA, (b) removing service providers more than 5% owned by any Plan fiduciary, (c) removing retail mutual fund options from lineup, (d) obtain an independent consultant's review of stable value investments, and (e) conduct an RFP competitive bidding process for Plan recordkeeping services. The court gave final approval on 10/15/2013.

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					8/28/09, the Court denied the motion as moot. On 9/6/11, CIGNA renewed the motion for summary judgment. 3. On 8/9/10, Defendant Prudential filed a motion for judgment on the pleadings. Prudential asserted that judicial opinions support the principle that service providers (like themselves) do not bear ERISA fiduciary responsibility for deciding the fees at which they will offer investment products and services in the marketplace. Additionally, Prudential asserted that the fourth amended complaint lacks any plausible allegations to justify an exception to the aforementioned principle. On 12/9/10, the Court stayed Prudential's motion, finding that there are genuine issues of material fact that must be resolved through discovery.	
Eighth Circuit						
22	*Gipson v. Wells Fargo*, No. 08-4546 (D.D.C. filed 11/1/07) *Figas v. Wells Fargo*, (transferred to D Minn. 7/8/08) Amended	Motion to dismiss granted in part and denied in part on 6/24/08, in which the Court transferred the action to the District of Minnesota. Motion to dismiss granted in part and	Motion for class certification granted on 4/6/10. Motion for amended class certification granted on 9/1/10.	Motion for summary judgment on claim under section 406 was granted on 4/6/10, after the Court found that the claim was time-barred.	1. Complaint against fiduciaries of Wells Fargo's in-house 401(k) plan, contending that: (1) defendants put their own interests ahead of those of the plan by choosing investment products and pension plan services offered and managed by Wells Fargo subsidiaries and affiliates that generated substantial revenues for	On 8/9/11, before the Court had an opportunity to rule upon the merits of Plaintiffs' remaining claims, it granted final approval of a settlement of the action for $17.5 million.

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	Complaint filed 8/29/08 Second Amended Complaint 9/8/10	denied in part on 3/13/09, in which the Court found that, while the claims adequately stated a claim for relief, plaintiff Gipson lacked standing to pursue the claims asserted.			Wells Fargo at a great cost to the plan and offered mediocre returns; and (2) the funds charged significantly higher fees than comparable funds. 2. On 3/13/09, the District of Minnesota Court granted in part and denied in part Defendants' motion to dismiss, finding that the claims in the amended complaint sufficiently stated a claim on which relief could be granted. The Court also found that Gipson did not have standing to bring her claims because she was no longer employed by Wells Fargo and took a lump sum distribution of her 401(k) upon her departure. Thus, the action was re-captioned with Figas (another member of the putative class) as the named Plaintiff. 3. On 4/6/10, the Court granted partial summary judgment on Plaintiffs' section 406 claim, holding that the claim was time-barred under ERISA's six-year limitations period. The Court found that Plaintiffs had actual knowledge of the alleged breach (here, the Plan's investments in Wells Fargo-controlled funds) by 2003 at the latest, when the Wells Fargo funds were included in the Plan's lineup. The Court rejected Plaintiffs' "continuing violation" theory, finding that Plaintiff had	

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					cited no authority adopting the "continuing violation" theory to violations of section 406.	
23	*Krueger v. Ameriprise Financial*, 11-02781 (D. Minn. filed 9/28/11 by Schlichter Bogard & Denton LLP) Amended Complaint filed on 10/29/13	Defendants filed a motion to dismiss on 4/11/12. On 11/20/12, the motion to dismiss was denied as to nearly all claims, granted only as to the plaintiff's unjust enrichment claim.	On 10/1/13, Plaintiffs filed a motion to certify a class action. On 11/1/13, Defendants Filed a Response in Opposition to Plaintiffs' Motion to Certify On 12/2/13, Plaintiffs filed a Reply to Defendants' Response	Defendants moved for summary judgment on 7/3/13 based on statute of limitations grounds. Motion for summary judgment filed 10/24/14; opposition filed 11/14/14; reply filed 11/26/14	1. In their first amended complaint, Plaintiffs contend that Ameriprise Financial, Inc. selected investments for the Ameriprise 401(k) Plan that were poorly rated, unduly expensive, and underperformed prudent investment options, yet provided millions of dollars in revenue to Ameriprise and its subsidiaries. Plaintiffs also contend that (1) Ameriprise profited at its employees' expense by having the 401(k) Plan's recordkeeping performed by an Ameriprise subsidiary and, after selling that business to Wachovia, using Wachovia as the Plan's recordkeeper in exchange for kickbacks paid to Ameriprise; (2) Ameriprise's actions cost its employees millions of dollars in unnecessary fees and expenses, nearly all of which went to Ameriprise; (3) the inferior Ameriprise mutual funds cost Ameriprise employees millions more in lost investment returns; and (4) Defendants managed the Plan in a self-interested manner in breach of the strict fiduciary duties	3/26/15: Joint motion for approval of settlement filed. Ameriprise agreed to pay $27.5 million to be allocated among employees and retirees of Ameriprise. The settlement also included non-monetary compensation, including an agreement that Ameriprise will conduct an RFP competitive bidding process for recordkeeping and investment consulting services and will pay fees to the Plan recordkeeper on a flat fee or fee-per-participant basis. 8. Settlement approved on 7/13/2015 and judgment entered 7/14/2015.

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					imposed on them by ERISA. 2. On 11/20/12, the Court granted Defendant's motion to dismiss only as to one claim. <u>Fiduciary Claim:</u> With respect to Plaintiffs' claim for fiduciary breaches in connection with the selection of affiliated investment options, the Court found that Plaintiffs had plausibly alleged that Ameriprise breached its duties by selecting affiliated options with fees that were excessive compared to those of comparable mutual funds, other share classes, or separate accounts. The Court disagreed with Ameriprise's reliance on *Hecker* and *Renfro*, noting that Plaintiff's complaint centered upon the fiduciaries' selection of high-priced affiliated funds, rather than retail funds over wholesale funds. <u>Prohibited Transaction:</u> The Court also allowed Plaintiffs' prohibited transaction claims under ERISA section 406 to continue, finding that the allegation that Ameriprise had (a) engaged in self-interested transactions, (b) profited from those transactions at the expense of participants, and (c) paid more than reasonable compensation to parties-in-interest, was enough to state a claim under section 406.	

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					Excessive Recordkeeping Fees/Revenue Sharing: The Court also refused to dismiss the claim alleging that Ameriprise caused the Plan to pay excessive fees to the Plan recordkeeper (an Ameriprise subsidiary), and received unlawful kickbacks via revenue sharing from Wachovia (which purchased the recordkeeping subsidiary). The Court excused the absence of relevant data in Plaintiffs' complaint (i.e. the amount of recordkeeping fees, the services provided, or how the fees were excessive in light of those services), noting that Plaintiffs could pursue this data in discovery. Unjust Enrichment: The only claim the Court dismissed was one for federal common law unjust enrichment to recover overpayments from the Plan resulting from the alleged fiduciary breaches. In dismissing the claim, the Court noted that ERISA's enforcement mechanism (section 502) was exclusive and did not provide for common law remedies not specifically enumerated in the statute. 3. Plaintiffs filed a second amended complaint on 10/29/13, alleging breaches of the duties of loyalty and prudence, failure to	

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					monitor fiduciaries, prohibited transactions between the Plan and a party in interest, a prohibited transaction by acting on behalf of the Plan and Ameriprise, breach of fiduciary duties due to the sale of Ameriprise's recordkeeping arm to Wachovia, Ameriprise's knowing participation in fiduciary breaches and prohibited transactions, charging excessive recordkeeping fees due to the "float," and fraud and concealment. 4. On 3/20/14, the Court granted, in part, and denied, in part, Defendants' motion for summary judgment based on ERISA's three-year statute of limitations period applicable when the plaintiff has actual knowledge of the breach or violation. The Court ruled that plaintiffs' prohibited transaction claims were time barred because, in the Eighth Circuit, a participant's knowledge of the transaction is enough to start the clock on the limitations period. The Court found that, through the SPD and fund prospectuses distributed to participants, plaintiffs had knowledge of the challenged transactions (the investment in proprietary products and associated fees) more than three years before filing suit. The Court, however, denied Defendants' motion with respect to Plaintiffs' breach of fiduciary	

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					claims based on the selection, retention and monitoring of the plan's investment options, including allegations relating to the seeding of new investment options. The Court concluded that the plaintiffs' claims were premised on a theory the defendants did not engage in a prudent selection process and it found that there existed an issue of fact as to what plaintiffs knew about the selection process more than three years before filing suit. The Court further ruled that plaintiffs' prohibited transaction claim related to the sale of the recordkeeping business to Wachovia was time-barred because plaintiffs knew more than three years before commencing the action that Ameriprise had a recordkeeping affiliate, the recordkeeper received fees from the Plan's investments, and the recordkeeping business had been sold (although the terms of the sale were not disclosed). Because plaintiffs' breach of fiduciary duty claim related to the sale of the recordkeeping business was based on the same set of facts as the prohibited transaction claim, the Court similarly concluded that the breach of fiduciary claim was time-barred. Finally the Court addressed	

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					Plaintiffs' claims that the revenue sharing and float paid to the recordkeeper resulted in the payment of excessive and unreasonable fees and that the Plan fiduciaries failed to engage in a prudent process for evaluating the reasonableness of the recordkeeping fees. The Court dismissed Plaintiffs' prohibited transaction claim finding the plaintiffs received more than three years before commencing the action SPDs and prospectuses that detailed the affiliation between Ameriprise, the funds, and the recordkeeper and disclosed the fact that the investments paid recordkeeping fees. The court allowed plaintiffs to proceed with their breach of fiduciary duty claims challenging the process that defendants' used to select the plan's recordkeeper and evaluate and determine the recordkeeping fee. 5. Motion for summary judgment filed 10/24/14. 6. Final pretrial conference scheduled for 4/3/15.	
24	*Adepipe v. U.S. Bank*, 0:13-cv-02687-JNE-JJK (D. Minn. Filed 09/30/13)	Motion to Dismiss filed on 12/20/2013; Defendants filed Amended Motion to Dismiss, or,		See Motion to Dismiss column.	1. Participants in the U.S. Bancorp. Pension Plan brought a class action against the Plan's fiduciaries (the Investment Committee, Compensation	

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	Amended Complaint filed on 01/13/2014; Answer to Amended Complaint filed 12/19/14 Judge Joan N. Ericksen	alternatively, for Summary Judgment on 4/11/14; Plaintiff filed Opposition on 5/16/14; Defendant filed a Response in support of the Motion on 6/4/14 and a supplemental memorandum on 7/15/14. Motion to dismiss for lack of standing filed 9/4/15; Plaintiffs filed Opposition on 10/5/15; and Defendants filed Reply on 10/19/15; Judge granted on 12/29/15.			Committee, Board of Directors, FAF Advisors, a subsidiary of U.S. Bank, and U.S. Bank Nuveen Asset Management as successor in interest to FAF Advisors) alleging that Defendants breached their fiduciary duties and engaged in prohibited transactions. Plaintiffs' claims are based on allegations that Defendants (a) failed to diversify the Plan's investments by investing virtually 100% of the Plan's assets in equities; (b) retained a subsidiary of U.S. Bank to act as the Plan's investment advisor, despite having evidence that the subsidiary had fraudulently manipulated portfolios and adopted and maintained a risky and imprudent investment strategy; and (c) engaged in prohibited transactions by purchasing equity securities designed to benefit defendants rather than Plan participants. Plaintiffs allege that Defendants' actions caused the Plan to lose over $1.1 billion in assets which resulted in underfunding of the Plan. 2. On 4/22/14, Defendants amended their memorandum of law in support of their motion to dismiss the amended complaint, or alternatively, motion for summary judgment regarding count II (breach of fiduciary duty claim regarding the securities lending	

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					program), arguing: a) Plaintiffs lacked standing and failed to allege personal harm because the Plan is not underfunded under ERISA standards; b) Plaintiffs failed to state claims regarding the equities strategy because 1) it was not a breach of fiduciary duty to not alter the investment strategy in response to the 2008 financial crisis and Plaintiffs did not plausibly allege that this strategy resulted in losses to the Plan and 2) Plaintiffs did not allege that Defendants' equity strategy was adopted for the purpose of benefiting U.S. Bancorp resulting in a prohibited transaction; c) Plaintiffs also failed to state a claim with respect to the use of affiliated funds, because they do not challenge the quality or performance of the affiliated funds or that they weathered the 2008 financial crisis any worse than other funds available to other pension plans; Plaintiffs' prohibited transaction claim regarding affiliated funds fails because ERISA plans are authorized to invest in affiliated products and absent there was a subjective intent to harm the plan,	

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					the claim must be dismissed; d) Plaintiffs' claims regarding the securities lending program fail because they were released under PTE 2003-30; e) Plaintiffs' derivative claims for breach of fiduciary duty fail because 1) there was no primary breach of fiduciary duty; 2) plaintiffs did not plausibly allege that certain defendants were even fiduciaries; and 3) the claims merely parrot the text of ERISA's co-fiduciary rules and cases discussing ERISA's duty to monitor; f) Plaintiffs' claims are barred by ERISA's six-year statute of limitations. 3. On 11/21/14, the Court granted in part and denied in part the motion to dismiss/motion for partial summary judgment, finding that Plaintiffs made a sufficient showing of constitutional standing because Defendants' actions plausibly caused a risk of default brought about by the losses incurred by an underfunded Plan. The Court dismissed claims regarding the adoption of Defendants' equity strategy and rejected Plaintiffs' continuing violation theory. Defendants also argued that the affiliated funds	

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					claims are time-barred because the Plan's investments in affiliated funds occurred more than six years before the filing of the complaint. The Court disagreed on the grounds that Defendants allowed investment of the Plan's assets in affiliated mutual funds during the relevant time period; however, the Court dismissed claims as to Defendant Nuveen because they were released by the Plan in September of 2013 (but the claims could still be asserted against Defendant U.S. Bank). 4. 12/19/14: Answer to amended complaint filed. 5. 5/14/15 motion for judgment on the pleadings: Defendants argue the only remaining claim concerns an alleged prohibited transaction that U.S. Bank Defendants invested 40% of the plan's assets in mutual funds managed by a U.S. Bank affiliate. Defendants claim that these transactions are permitted if they meet the requirements of Prohibited Transaction Exemption 77-3, which allows plans to invest in mutual funds managed by affiliates so long as they do "not pay any exceptional fees or invest on terms less favorable than those offered to ordinary investors." Defendants provided Plaintiffs with discovery on this point, but	

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					Plaintiffs claim that the complaint encompasses a claim for breach of fiduciary duty under ERISA section 404 relating to the Plan's investment in mutual funds administered by FAF advisors, a subsidiary of U.S. Bancorp, the Plan's sponsor. 6. 6/9/15: Court denies the motion without prejudice pursuant to parties' request to "stay" the motion to allow the parties the opportunity to meet and confer regarding a potential amended complaint in light of *Tibble*. 7. 9/4/2015: Defendants filed motion to dismiss for lack of standing under Rule 12(b)(1). In their opening brief, Defendants argue that the Plan has become overfunded by any measure under current ERISA standards. In a prior decision, the Court ruled that Plaintiffs had Article III standing because, given the Plan's previous "underfunded" status, minimum contributions were required. Since circumstances have changed, according to Defendants, Plaintiffs can no longer show that they have suffered an injury-in-fact for purposes of constitutional standing. Plaintiffs filed opposition on 10/5/2015 and Defendants filed	

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					reply on 10/19/2015. 8. 11/9/2015: Oral argument held on motion to dismiss. 9. 12/29/2015: Court granted Defendants' motion to dismiss. The Court said that Defendants mischaracterized their motion for dismissal as one involving "standing," when the issue was really if the case is moot because the plan is now overfunded. The Court dismissed the case on mootness grounds and found that there was no allegation of continuing misconduct, and any concerns about potential future misconduct are too speculative. 10. 1/12/2016: Plaintiffs filed motion to set aside entry of judgment pursuant to FRCP 58(e). 11. On 4/27/2016, Plaintiffs filed a notice of appeal to the Eighth Circuit.	
25	*Wildman et al v. American Century Services, LLC et al*, No. 4:16-cv-00737-DGK (W.D.M. filed 06/30/2016 by Nichols Kaster, PLLP) On 9/8/2016,	On 8/18/2016, Defendants filed a motion to dismiss			Plaintiffs allege that Defendants violated ERISA fiduciary duties by using the Plan "as an opportunity to promote American Century's mutual fund business and maximize profits at the expense of the Plan and its participants," causing the participants millions of dollars in excess fees. Defendants also allegedly failed to use the least expensive available share class,	

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	plaintiffs filed an amended complaint. Chief Judge Greg Kays				caused the plan to pay excessive recordkeeping costs, and failed to monitor investment options and remove poorly performing ones. On 8/18/2016, Defendants filed a motion to dismiss all claims, and a motion for summary judgment as to all claims on the grounds that Plaintiffs had released all claims against Defendants.	
26	*McDonald v. Edward D. Hone & Co., L.P.*, No. 4-16-cv-01346-NAB (Eastern Dist. Of Missouri filed 08/19/2016 by Bailey Glasser LLP and Izard Kindall & Rabbe LLP) Amended Complaint filed 08/19/2016 Judge Rodney W. Sippel				Plaintiff alleges that Defendants populated the Plan with investment options of its "Preferred Partners" and other investment managers with corporate relationships with Edward Jones, and also caused the Plan to pay excessive recordkeeping and administration fees. Plaintiff claims that Defendants select the investment options because they pay sales fees and revenue sharing in return for being included in the plan investment lineup. Defendants also allegedly offered the American Funds Money Market Fund instead of a stable value fund that would have received a better return. Defendants also allegedly failed to consider index fund alternatives that carried lower fees.	
Ninth Circuit						
27	*Kanawi v. Bechtel Corp.*, 3:06-cv-05566-	Motion to dismiss denied on 5/15/07 because	Motion for class certification denied without prejudice on	On 9/16/08, Plaintiffs filed a motion for partial	1. Plaintiffs allege that Fremont Investment Advisors ("FIA") – an entity alleged to have originated	During the appeal of the 11/3/08 summary judgment decision, the parties agreed

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	CRB (N.D. Cal. filed 9/11/06 by Schlichter Bogard & Denton LLP); Amended complaint filed on 11/9/06 Second amended complaint filed on 3/23/07 Third amended complaint filed on 3/18/08	(a) Plaintiff adequately pled non-disclosure; (b) ERISA § 404(c) defense is an affirmative defense that cannot be used on motion to dismiss; and (c) Plaintiffs adequately alleged that Bechtel was a plan fiduciary.	8/24/07. On 8/28/08, Plaintiffs renewed the motion for class certification. Renewed motion for class certification granted on 10/10/08.	summary judgment (subsequently sealed). On 9/19/08, Defendant Freemont Investment Advisors filed a motion for summary judgment (subsequently sealed). On 9/22/08, Bechtel Defendants filed a motion for summary judgment under seal. On 11/3/08, the court denied Plaintiffs' motion for partial summary judgment, and granted in part and denied in part the motions for summary judgment filed by Freemont Investment Advisors and the Bechtel	from Bechtel's investment advisory and management division – was responsible for: selecting, monitoring, evaluating, and terminating investment managers for the investment options; negotiating agreements with the investment managers; and managing its own proprietary funds, some of which were included as the plan's investment options. Plaintiffs argue that FIA received undisclosed revenue sharing payments from Plan service providers that FIA selected, and that this constituted a series of prohibited transactions. Plaintiffs also argue that the Plan is entitled to some of the proceeds from the sale of FIA to a third party. 2. Class certified on 10/10/08. 3. On 11/3/08, the Court denied 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 Freemont Investment Advisors ("FIA") and the Bechtel Defendants. In granting judgment on the merits for the breach of fiduciary duty claims, the Court found that the Plan committee met regularly to discuss investment options and to consider	to settle the case. On 3/1/11, the Court granted final approval of the settlement. The settlement provides for a settlement fund of $18.5 million. 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. The net settlement fund is to be divided among persons who participated in either of two 401(k) plans (collectively, "Plan") from 1/ 1/1992 through 9/30/10, as well as their beneficiaries and alternate payees, based on the timing and length of participation in the Plan. In addition, for a period of three years, Bechtel agreed to (1) continue not to use for the Plan investment managers or service providers owned by Bechtel or any member of the Bechtel Trust & Thrift Plan Committee; (2) engage a service provider to prepare an annual

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				Defendants.	alternatives, they obtained advice from independent consultants and the performance of the funds was competitive with industry standards. The Court also noted that Plaintiffs cited no authority for the proposition that the Plan was entitled to the proceeds from the sale of FIA. The Court allowed Plaintiffs to proceed with a prohibited transaction claim based on the plan's payment of FIA's fees, but dismissed the prohibited transaction claims to the extent the fees were paid by Bechtel. 4. Plaintiffs' remaining claim following the 11/3/08 decision – a self-dealing claim relating to a four-month period – was settled by agreement dated 3/3/09.	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.
28	*Urakhchin v. Allianz Asset Management of America, L.P., et al.* (8:15-cv-01614) (C.D. Calif.) (complaint filed 10-7-15 by Nichols Kaster, PLLP); Amended Complaint filed 1/6/16 Judge Josephine	Defendants filed a motion to dismiss the amended complaint on 2/5/2016. On 8/5/2016, the court granted the motion as to plaintiffs' third claim for equitable relief ERISA section 1132(a)(3), which it dismissed without prejudice, and denied it as to all remaining claims.			1. Plaintiffs filed a class action complaint alleging that the Plan's fiduciaries and several participating employers in the Plan breached their fiduciary duties and for illegal inurement of Plan assets to an employer in violation of 29 U.S.C. § 1103. Specifically, Plaintiffs allege that the Plan's fiduciaries used the Plan as an opportunity to promote the Allianz Family's mutual fund business and maximize profits at the expense of the Plan and its participants. Defendants allegedly	

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	L. Staton				failed to investigate where the Plan and its participants would be better served by investments managed by unaffiliated companies and instead selected high-cost proprietary mutual funds as investment options. These proprietary funds, according to Plaintiffs, have little or no track record. Moreover, Plaintiffs claim, the Plan's fiduciaries have a pattern and practice of adding new and unproven mutual funds as investment options within the Plan shortly after the new funds are launched, and even use the Plan's default investment option as a mechanism for providing seed money to these funds. Plaintiffs allege that these new and untested funds have consistently underperformed. Plaintiffs assert claims for breach of fiduciary duties of loyalty and prudence and for unlawful inurement of plan assets to the benefit of an employer when AAM entities were paid investment management fees "as a result of the Plan's investments in Allianz Family mutual funds." 2. Defendants moved to dismiss Plaintiffs claims on the grounds that they are time-barred under ERISA's three-year statute of limitations because the investments were fully disclosed	

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					to participants more than three years ago. Defendants also argue that Plaintiffs lack standing to sue regarding investment options in which they did not invest. Specifically, Defendants argued that the complaint is devoid of well-pleaded allegations regarding the investment selection process; Defendants also argue that there is nothing *per se* wrong with using proprietary funds, and furthermore, there is no allegation that the funds offered to participants performed poorly. Finally, Defendants argue that the anti-inurement provisions do not reach the conduct at issue here because ERISA does not bar an employer-plan sponsor from providing services to a plan and receiving the normal fees from those investment management services. On 8/5/2016, the Court granted the motion as to Plaintiffs' third claim for equitable relief ERISA section 1132(a)(3), which it dismissed without prejudice, and denied it as to all remaining claims. As an initial matter, the court found that Plaintiffs had standing since, taken as a whole, their claims "involve Defendants' alleged practice of selecting and retaining Allianz-affiliated investments solely to benefit the Allianz family, rather	

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					than considering lower-cost, unaffiliated options for the benefit of Plan participants," and thus the harm allegedly suffered relates to the management and fund selection process, which Plaintiffs had standing to challenge. The court also held that Defendants' affirmative defense that the claims were time barred was "not obvious on the face of the complaint," since Defendants had not identified any publicly available data showing that pre-2013 fees were lower than the public information from 2013-14. Finally, the Court found that whether Defendants had breached fiduciary duties was a question of fact inappropriate to resolve at the motion to dismiss stage, and that Plaintiffs had adequately pled a claim for failure to monitor. The court granted Defendants' motion as to Plaintiffs' claim for restitution in disgorgement. Citing *Great-West* and other Supreme Court precedent, the Court held Plaintiffs had failed to allege "that any of the money sought to be disgorged can be traced to particular funds or property in the Defendants' possession"	
29	*Cryer v. Franklin Resources, Inc. et al*, No. 4:16-cv-04265-CW				Plaintiff alleges Defendants breached their fiduciary duties by causing the Plan to invest in funds offered and managed by Franklin	

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	(D. Northern California filed on 07/28/2016 by Bailey & Glasser LLP and Izard Kindall & Raabe LLP) Judge Claudia Wilken				Templeton when better-performing, lower-cost funds were available, in order to benefit Franklin Templeton's investment management business.	
Tenth Circuit						
30	*Kilpatrick v. Great-West*, 15-cv-01927-KLM (D. Colo.) (complaint filed 9/4/15 by Bailey & Glasser LLP) Magistrate Judge Kristen L. Mix	11/17/2015: Defendants filed motion for judgment on the pleadings 9/16/2016: The Court granted Defendants' motion			1. Plaintiff filed a class action complaint alleging that the Plan trustees (which are officers and employees of Great-West or its subsidiaries or affiliates) breached their fiduciary duties and engaged in prohibited transactions by causing Great-West to receive millions of dollars, directly or indirectly, from the Plan for recordkeeping and administrative services. Plaintiff alleges that the trustees caused the Plan to invest tens of millions of dollars in various pooled separate accounts and collective trusts established and managed by Great-West subsidiaries and affiliates. The Plan at issue is a 401(k) defined contribution profit sharing plan sponsored by Great-West, The Plan offers various investment options, including many investment options established and	

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					managed by Great-West. The Committee and the trustees are responsible for selecting, reviewing, and removing Plan investments and service providers. Plaintiff argues the Plan has paid Great-West millions of dollars in investment management fees. The trustees caused the Plan to make payments to Great-West by choosing and maintaining Great-West as recordkeeper to the Plan and by choosing and maintaining investment funds in the Plan established and managed by Great-West affiliates. The trustees also allegedly caused the Plan to use TD Ameritrade, Inc. as the broker for a "brokerage window" in the Plan. TD Ameritrade received direct compensation from the Plan, from participants via trades made through the brokerage window, and revenue sharing from funds purchased through the brokerage window. Accordingly, TD Ameritrade is a party in interest to the Plan. The fiduciaries for the Putnam Retirement Plan, a plan offered to employees of Putnam Investments, LLC ("Putnam"), an affiliate of Great-West, also used TD Ameritrade for brokerage services for that plan. TD Ameritrade received direct compensation from the Putnam	

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					Retirement Plan, from participants via trades made through the brokerage window, and revenue sharing from funds purchased through the brokerage window. TD Ameritrade uses Great-West as a recordkeeper for its own employee benefit plan. According to Plaintiffs, the arrangements between the Great-West, Putnam, and TD Ameritrade with respect to their plans and services give rise to a plausible inference that there is a prohibited quid pro quo agreement that Great-West and TD Ameritrade would use their respective services. 2. 11/17/2015: Defendants filed a motion for judgment on the pleadings, arguing that Plaintiff is not a "Participant" authorized to bring suit under ERISA based on her past participation in the Plan. Defendants also argue that despite Plaintiff's claim that the fiduciaries chose some Great-West products and services for the Plan, she does not allege that there was anything wrong with them, or that the investment funds were somehow mismanaged, for example, or that they underperformed comparable investments in the market. The fiduciaries' use of Great-West, a leading provider of recordkeeping and plan administrative services in the country, as a Plan service	

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					provider does not establish a plausible claim of disloyalty. Great-West has been selected by many unaffiliated ERISA fiduciaries to provide services to their plans. Furthermore, ERISA explicitly allows financial institutions to offer affiliated investment products through their plans, so without more, the decision to include Great-West affiliated investment vehicles on the Plan's investment menu is unexceptionable. Defendants further argue that Plaintiff's alleged "quid pro quo" arrangement with TD Ameritrade is pure speculation, and the complaint offers no facts alleging that TD Ameritrade's brokerage offering was a poor choice for the Plan. Furthermore, Plaintiff never alleges that she used the brokerage services provided by TD Ameritrade to the Plan, so she lacks constitutional standing to bring these claims. Plaintiff responded on 12/11/2015 and Defendants replied on 1/8/2016. 3. Scheduling conference held on 1/11/2016, setting, among other things, a trial date beginning 3/3/2017.	

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					9/16/2016: The Court granted Defendants' motion for judgment on the pleadings, holding that Plaintiff, as a former participant, lacked standing to bring claims seeking disgorgement of profits. Former participants may have standing to seek recovery of "losses to the plan," the Court found, since they presumably would be seeking lots benefits to which they were entitled. By contrast, the Court held that Plaintiff had only alleged that she sought disgorgement of compensation that Great-West had received.	
Eleventh Circuit						
31	*Dupree v. Prudential*, No. 99-8337 (S.D. Fla. filed 4/30/99) First Amended Complaint filed 8/23/99 Second Amended Complaint filed 6/19/01	On 8/1/00, the Court dismissed plaintiffs' First Amended Complaint on account of a failure to exhaust administrative remedies. Plaintiffs subsequently exhausted available administrative remedies and filed the Second Amended Complaint on 6/19/01.			1. Former Prudential employees alleged that the fiduciaries of the company's in-house 401(k) plan caused the plan to pay investment management fees and insurance-related "risk charge" fees to a Prudential affiliate (which managed an annuity contract offered as an option within the Plan) in violation sections 404 and 406 of ERISA. Specifically, plaintiffs challenged the acquisition of an annuity contract known as "PruPar" that was issued by Prudential to its own retirement Plan, as well as the investment of that Plan's assets in investment strategies managed by Prudential affiliates.	

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					2. A bench trial was held in early 2004. On 8/7/07, the Court ruled for the Prudential Defendants on all counts. 2007 WL 2263892 (S.D. Fla. Aug. 10, 2007). Prohibited Transaction Claims: The District Court found that the Plan's payment of investment management fees was exempted from the prohibitions of section 406 by statutory exemptions under ERISA. Specifically, the Court found that the investment management fees were "necessary for the administration of the plan" and thus were exempted under ERISA section 408(b)(2). In view of the extensive due diligence record, however, the Court determined that the fees were reasonable compared to the industry, the fiduciaries' actions were taken primarily for the purpose of benefitting the Plan, and the fiduciaries exercised an appropriate level of diligence and prudence. The due diligence taken by the fiduciaries included: (a) investment strategies were extensively reviewed, including the credentials and track record of the investment managers, the fees, the expected performance, and the investment philosophy to be followed; (b) both a strategic and tactical asset allocation plan was in place; (c) the portfolio manager	

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					prepared detailed quarterly reports for the fiduciary; (d) individual investments were reviewed on a daily basis by comparing each investment's performance to its benchmark return; (e) an annual, and ongoing, review of the fees were conducted; (f) an outside consultant also conducted an annual survey of the fees and compared such against other large pension plans. The Court also found that the Plan's payment of "risk charges" was exempted under ERISA section 408(b)(5), which allows a fiduciary to obtain for the Plan an affiliated annuity contract if the Plan pays "no more than adequate consideration" for such a contract. Finding the amount of the "risk charges" to be reasonable and "adequate," the Court held that the section 408(b)(5) exemption applied. Finally, the Court held that the Plan's payment of investment management fees to affiliated pooled investment funds was exempted by ERISA section 408(b)(8), finding that Plaintiffs had not introduced any evidence to show that these fees were unreasonable. <u>Fiduciary Breach Claims:</u> While the Court recognized that reliance on a class exemption from the prohibited transactions rule does not relieve a defendant of its	

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					fiduciary duties under section 404, the Court found that the Prudential Defendants had not breached section 404 fiduciary duties. In rejecting the claim for fiduciary disloyalty, the Court also found that where a fiduciary takes action that arguably benefits both plan and non-plan interests, the incidental benefit is permissible as long as the primary purpose and effect of the action is to benefit the plan.	
32	*Fuller v. SunTrust Banks, Inc.*, No. 1:11-cv-784 (N.D. Ga., filed Mar. 11, 2011); No. 12-16217 (11th Cir. filed 12/5/12 by McTigue & Veis LLP) 14-13789 After case was consolidated with *Brown* and *Stargell* cases, recaptioned *In re SunTrust Banks, Inc. 401(k) Plan Affiliated Funds ERISA Litigation* Judge Orinda D. Evans	Motion to dismiss granted in part and denied in part on 3/20/12. Second motion to dismiss granted on 10/30/12, appealed to Eleventh Circuit.			1. Participant in SunTrust's in-house 401(k) plan contend that Plan fiduciaries violated ERISA through their inclusion of affiliated mutual funds in the Plan's lineup. Specifically, Plaintiff alleged that the Plan fiduciaries committed prohibited transactions under section 406 of ERISA by selecting and retaining two SunTrust-affiliated "STI Classic" mutual funds. Plaintiff also allege that defendants breached fiduciary duties under section 404 by selecting and retaining these mutual funds in SunTrust's own interests, despite the funds' high costs and poor performance. Also alleged were violations of section 404 and 406 related to the "mapping" of a subsidiary's 401(k) plan to the SunTrust 401(k) plan. 2. On 3/20/12, the Court granted in part and denied in part	

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					Defendants' motion to dismiss. <u>Prohibited Transactions:</u> The Court dismissed as time-barred the majority of Plaintiff's claim alleging prohibited transactions in connection with the Plan fiduciaries' selection of affiliated STI Classic funds. Rejecting Plaintiff's continuing-violation theory, the Court held that the date upon which the limitations period began to accrue would have been the date the fund was added to the lineup. All but one STI Classic fund—the STI Classic International Equity Fund—was added to the lineup prior to the beginning of this period on 4/9/04. With respect to this remaining fund, the Court dismissed the prohibited transaction claim on standing grounds. <u>Breach of Fiduciary Duties:</u> The Court denied the motion to dismiss with respect to the claim alleging that Defendants breached duties of loyalty and prudence by retaining the STI Classic funds. The Court analyzed the timeliness of the claim under both ERISA's six- and three-year statute of limitations. The Court noted that an ERISA breach of fiduciary duty claim is barred if brought more than six years after the "last action which constituted a part of the breach or violation." Having	

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					already established that Plan fiduciaries had selected most funds at issue prior outside of this six-year period, the Court identified that Plaintiffs had also alleged breach through the Defendants' ongoing duty to monitor. The Court refused to dismiss this claim in light of the six-year limitations period, noting that this factual issue could not be resolved on a motion to dismiss. The Court next considered whether ERISA's three-year limitations period applied, which bars claims under section 404 if brought more than three years after the plaintiff acquires "actual knowledge of the breach or violation." The Court noted that Plaintiff was regularly sent information on the fees and performance of the affiliated investment options as part of regular ERISA disclosures. Plaintiff thus had "actual knowledge" of the facts underpinning their claim, and the Court applied the three-year limitations period to exclude any actions of fiduciaries occurring before 4/10/07. The claim was still allowed to survive, however, as Plaintiff had alleged that Defendants failed to adequately monitor and/or replace the funds during the three-year limitations period (i.e. at each quarterly trustee's meeting). Also allowed to	

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					proceed was a derivative claim under section 404 against the chairman of the compensation committee (which had the power to appoint plan trustees). <u>Mapping-Related Claims:</u> The Court went on to dismiss the mapping-related claims under sections 404 and 406, finding that Plaintiff lacked standing to challenge this merger and that, in any event, Plaintiff had not alleged that Defendants' decision to map the fund contributed in any way to the fund's allegedly high fees and poor performance. 3. On 4/5/12, in response to the Court's ruling on the motion to dismiss, Defendants filed another motion to dismiss for lack of standing. Defendants asserted that the remaining claims should be dismissed because the Court had precluded Plaintiff from pursuing any claims that had arose before 4/10/07, and that the sole named Plaintiff had no investments within the Plan after 2005. On 10/30/12, the Court agreed and dismissed the remaining claims. 4. On 12/5/12, Plaintiff appealed the Courts' orders of 3/20/12 and 10/30/12 to the Eleventh Circuit. 5. On 02/26/14, the Eleventh Circuit concluded that the claims	

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					were time-barred under ERISA's six-year statute of limitations. The claims were based on allegations relating to the initial decision to use the proprietary funds as Plan investments more than six years before the complaint was filed and, with regard to Plaintiff's theory that Defendants thereafter failed to remove the funds, Plaintiff did not allege that a material change in circumstances had occurred. The Eleventh Circuit rejected a continuing violation theory. The Eleventh Circuit also held that the district court erred when it dismissed the Plaintiff's claims based on ERISA's three-year limitations period when Plaintiff has actual knowledge of the breach or violation. The Eleventh Circuit ruled that to have actual knowledge, a plaintiff must have specific knowledge of the actual breach. The Eleventh Circuit found that Defendants did not establish that the documents that they relied upon to establish actual knowledge had been provided to Plaintiff. 6. On 5/8/14, Plaintiff filed a motion for relief from judgment, to consolidate the case with *Stargel*, and file a consolidated amended complaint. Plaintiff argued that since the Eleventh	

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					Circuit found that the district court erred with respect to the three-year statute of limitations, the Eleventh Circuit erred by dismissing the case on standing grounds because a statute of limitations issue does not affect the Court's jurisdiction. On 8/6/14, the Court denied the motion, finding that it would be a waste of judicial resources to grant Plaintiff's motion, because the claims would be barred under ERISA's six-year statute of limitations anyway. The Court also denied Plaintiff's request for leave to amend. The Court also refused to consolidate the cases since judgment had been entered in both cases already. 7. On 10/9/2014 Plaintiff filed a notice of appeal and on 10/21/2014, the clerk certified that the record is complete and the case was appealed under Case Number 14-13789. 8. Oral argument was scheduled for 7/16/2015, but the Court decided on 6/20/2015 to vacate and remand in light of *Tibble*. The Court found that the *Tibble* decision abrogated part of the prior panel's decision concerning the application of ERISA's six-year statute of limitations. 9. 2/24/16: The court granted Defendants' unopposed motion to	

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					reopen the case and consolidate it with the *Stargel v. SunTrust Banks, Inc.* and *Brown v. SunTrust Banks, Inc. et al.* pending before the same court.	
33	*Stargel v. SunTrust Banks, Inc.* No. 1:12-cv-3822 (N.D. Ga., filed Mar. 11, 2011) Complaint filed 10/31/2012 Amended Complaint filed 02/19/2013 Consolidated with *Fuller* and *Brown* matters on 2/24/2016 After case was consolidated with *Brown* and *Fuller* cases, recaptioned *In re SunTrust Banks, Inc. 401(k) Plan Affiliated Funds ERISA Litigation*	Filed 03/08/2013	Filed 01/25/2013		1. Lawsuit brought by different plaintiff than in *Fuller*; substantially similar claims are alleged in both cases. 2. On 08/07/13, the District Court dismissed the lawsuit. The Court concluded that the plaintiff did not allege that performance of the funds or the advisory fees changed after the initial selection of the proprietary fund investment options more than six years before the complaint was filed. With regard to the prohibited transaction claims, the Court ruled that a failure to sell investments in a retirement plan is not a "transaction" for purposes of ERISA's prohibited transaction rules. The Court also concluded that the plaintiff lacked standing to assert claims regarding proprietary funds in which she had not invested. 3. 9/8/2015: unopposed motion to re-open case. *See Fuller v. Suntrust*, above.	
34	*Pledger et al. v. Reliance Trust Co., et al.* No. 1:15-cv-04444	Filed by Defendants on 05/16/2016. Response in opposition filed by Plaintiffs on			1. Participants and beneficiaries in the Insperity 401(k) Plan brought an action against Defendants, alleging that the Plan has over $2	

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	(N.D. Ga., filed Dec. 22, 2015 by Schlichter, Bogard & Denton, LLP) Amended Complaint filed on 04/15/2016 Judge Orinda D. Evans	07/25/2016. Reply filed on 8/24/2016.			billion in assets, giving the Plan tremendous bargaining power to demand low-cost services. However, instead of acting in the exclusive best interest of participants, Reliance Trust allegedly selected and retained high-cost and poorly performing investments, including its own proprietary investments, compared to available institutional alternatives, to benefit itself and the other Defendants. Plaintiffs also claim Defendants allowed Insperity's proprietary recordkeeping subsidiary to receive excessive compensation to drive revenues and profits to themselves at the expense of Plan participants. In addition, the complaint alleges breaches of fiduciary duties against the Plan's discretionary trustee, Reliance Trust, concerning its imprudent investment decisions, including the decision to offer its own proprietary investments. These alleged breaches substantially reduced the retirement assets of the Plan participants. The excessive investment management and recordkeeping fees, as well as the performance losses from investing in overly expensive funds, allegedly cost participants millions of dollars of their retirement savings.	

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					The complaint also claims that the Insperity 401(k) Plan failed to solicit competitive bids from outside recordkeepers, allowing Insperity Retirement Services to receive excessive recordkeeping fees. The complaint also alleges that Insperity and Reliance Trust chose mutual funds and collective trusts with high expenses and poor performance, excluding lower-cost share classes of the identical mutual fund investments. The complaint further accuses Insperity Holdings, Inc. of breaching its fiduciary duties by failing to adequately monitor its appointee, Reliance Trust. As a consequence of this breach, the Plan suffered substantial losses, through excessive fees and underperforming investments.	
D.C. Circuit						
35	*Brown v. Suntrust Banks*, 1:14-cv-1090 (D.D.C., filed 6/27/14) 1:14-cv-02965 Amended	Filed 10/9/14.			1. Class action brought against SunTrust Banks, Inc., the SunTrust Benefits Plan Committee, the SunTrust Benefits Finance Committee, and the committees' individual members, and the Plan's investment advisor. Plaintiffs allege that several SunTrust proprietary funds should	

	Case Name	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items	Settlement/Judgment
	Complaint filed 10/27/14. Consolidated with *Fuller* and *Stargell* cases in U.S. District Court for Northern District of Georgia on 2/24/2016 After case was consolidated with *Fuller* and *Stargell* cases, recaptioned *In re SunTrust Banks, Inc. 401(k) Plan Affiliated Funds ERISA Litigation*				have been removed because they had an extended history of poor performance, and the performance did not justify the high management fees charged by these funds. Plaintiffs claim that if the 401(k) had offered comparable funds by Vanguard, participants would have earned roughly $92 million more for their retirement (Plaintiffs claim the fiduciaries did eventually remove the affiliated funds and all SunTrust proprietary mutual funds from the investment lineup and offered Vanguard investment funds instead). Plaintiffs allege breach of fiduciary duty against the committee Defendants for (i) selecting SunTrust-affiliated funds without considering alternatives or otherwise engaging in a prudent and loyal selection process, and (ii) failing to prudently and loyally fulfill their duty to monitor funds in the 401(k) Plan. Plaintiffs specifically allege that the committee defendants pursued SunTrust's, rather than the participants', interests. Plaintiff asserts breach of fiduciary duty claims against the committee defendants in connection with their 401(k) Plan investment options and selection of a particular fund. Specifically, plaintiffs allege that the committee defendants removed unaffiliated	

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					funds as investment vehicles, but never removed affiliated funds until the inception of the litigation, did not remove poorly performing funds from the Plan lineup despite repeated warnings, and employed a conflicted advisor, RidgeWorth (subsidiary and investment advisor). Plaintiffs also claim the committee defendants did not follow any systematic process for monitoring the performance or prudence of the 401(k) Plan investment options for a number of years and, when they did adopt a systematic monitoring process, it was flawed. Plaintiffs allege that the committee defendants were repeatedly warned by outside advisers regarding the affiliated funds, but the committee defendants overruled this recommendation or engaged in "benchmark shifting". Plaintiffs also allege a breach of fiduciary duty in the selection a particular fund which would increase RidgeWorth's fees. Plaintiffs assert RidgeWorth was conflicted when it came to recommending or evaluating any of the affiliated funds in the investment lineup since it served as the investment advisor to all of those funds and received fees proportional to the amount of assets invested in those funds.	

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					2. Case transferred to the Northern District of Georgia. 3. Motion to dismiss filed 10/9/14. Defendants argue that Plaintiff's related claims in *Fuller* and *Stargel* were already dismissed (some on the grounds that they were time-barred) and plaintiffs simply repackaged other claims. 4. 11/12/14: Case was administratively closed pending decision in *Tibble v. Edison*. 5. 9/8/2015: unopposed motion to re-open case. *See Fuller v. Suntrust*, above.	