GROOM LAW GROUP

401(K) FEE LITIGATION

Jason H. Lee
Alexander P. Ryan*
Groom Law Group, Chartered

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I. BACKGROUND

A. DOL'S VIEWS ON REVENUE SHARING

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

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

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

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

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

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

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

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

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

3. Non-Fiduciary Provider's Receipt of Payments

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

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

B. LITIGATION CHALLENGES "TRADITIONAL" VIEW

1. Beginning in September 2006, one plaintiffs' firm, Schlichter, Bogard & Denton, began filing a series of class action lawsuits on behalf of plan participants in 401(k) plans sponsored by major corporations, alleging that the plan participants paid unreasonable and excessive fees for investment and administrative services in their 401(k) plans.

a. These complaints focused on "revenue sharing" as a source of compensation for plan service providers. According to these complaints, revenue sharing payments were not properly disclosed and accounted for in determining compensation paid to plan service providers.

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

2. More recently, amended complaints have been filed in many of these cases to further allege, among other things, that plan fiduciaries acted improperly in: (1) not accounting for sources of revenue for plan service providers (in addition to the revenue sharing already complained of) such as finder's fees, float, fees from securities lending, and profits from foreign currency exchange; (2) offering as investment options (i) actively-managed mutual funds rather than index funds and (ii) mutual funds instead of separate accounts[1]; and (3) engaging in prohibited transactions.

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

[1] For a case brought against the plan sponsor and challenging the offering of mutual funds as investment options, but not challenging revenue sharing, *see Boeckman v. A.G. Edwards, Inc.*, 2007 WL 4225740 (S.D. Ill. 2007).

II. CLASS ACTIONS ON BEHALF OF PLAN PARTICIPANTS

A. Cases Against Plan Sponsor Fiduciaries

1. At least 15 lawsuits have been brought on behalf of plan participants, alleging that plan fiduciaries imprudently allowed plan service providers to receive "revenue-sharing" payments. Most of these lawsuits have been brought by Schlichter, Bogard & Denton.

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

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

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

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

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

3. As to the newer claims that plan fiduciaries failed to consider (in evaluating a service provider's compensation) or capture (for the plans) fees a service provider receives from sources of revenue (besides revenue sharing), plaintiffs argue that plan service providers received undisclosed compensation by receiving finder's fees from investment managers, float from trustees or custodians, fees from securities lending, and profits from foreign currency exchange (with respect to foreign investments). *E.g.*, *Spano v. The Boeing Co.*, Civil Action No. 3:06-CV-00743 (S.D. Ill.); *Martin v. Caterpillar, Inc.*, Civil Action No. 07-CV-01009 (C.D. Ill.); *Renfro v. Unisys Corp.*, Civil Action No. 2:07-CV-02098 (E.D. Pa.).

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

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

6. As to the claims that plan fiduciaries engaged in prohibited transactions, plaintiffs have not provided details. For example, in the case against International Paper, Civil Action No. 3:06-cv-00703 (S.D. Ill.), plaintiffs allege – without alleging details – that International Paper engaged in prohibited transactions by: (1) entering into agreements with service providers, whereby International Paper benefited rather than plan participants; (2) placing revenue generated from plan assets in corporate accounts; (3) causing participant contributions to be transferred into accounts held by International Paper, and from which International Paper received a benefit at the expense of the participants; (4) entering into service agreements with service providers, with whom there were conflicts of interest; (5) allowing company stock to remain as an investment option; (6) forcing plan participants to own company stock in order to have a 401(k) plan and "prohibiting them from selling it until age 55"; and (7) favoring the defined benefit plan which was run by the same managers, and thereby causing lower investment returns and performance for the 401(k) plan. It will be interesting to see if plaintiffs could support any of these claims with facts. *See also, Kanawi v. Bechtel Corp.*, Civil Action No. 3:06-CV-05566 (N.D. Cal.) (alleging that service provider engaged in a prohibited transaction by receiving revenue sharing); *Taylor v. United Technologies Corp.*, Civil Action No. 3:06-CV-01494 (D. Conn.) (alleging that plan sponsor engaged in a prohibited transaction by receiving a "corporate benefit").

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

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

B. CASES AGAINST PLAN SPONSORS THAT ARE FINANCIAL INSTITUTIONS

1. More recently, several lawsuits have been brought by participants against plan sponsors that are financial institutions. These complaints allege that plan fiduciaries violated their fiduciary duties by selecting "proprietary" mutual funds to be the plan's investment options. *E.g., David v. Alphin,* Civil Action No. 3:07-CV-00011 (W.D.N.C.) (alleging that plan fiduciaries violated ERISA by causing plans to purchase and pay for investment products and services from Bank of America and its affiliates, which charged higher fees than comparable mutual fund options); *Leber v. CitiGroup, Inc.*, Civil Action No. 1:07-CV-09329 (S.D.N.Y.) (plan fiduciaries chose investment products and plan services offered and managed by Citigroup subsidiaries and affiliates); *Gipson v. Wells Fargo & Co.*, Civil Action No. 1:07-CV-01970 (D.D.C.)(alleging that plan fiduciaries put Wells Fargo's interests ahead of the plan's interests by choosing investment products and services offered and managed by Wells Fargo and affiliates).

2. One court recently addressed the investment of plan assets in plan sponsor-affiliated investment products in connection with a pension plan that is not participant-directed. In *Dupree v. Prudential Life Insurance Co. of America*, 2007 WL 2263892 (S.D. Fla. Aug. 10, 2007), the court found that in-house plan fiduciaries were prudent in making investments in the plan sponsor's investment products where there was "appropriate due diligence and procedural prudence in selecting proposed investments and monitoring the Plan's performance." In a detailed set of factual findings, the court noted the procedures followed by fiduciaries, including consideration of non-sponsor-managed products when deciding to make investments, regular reviews of investment performance, and periodic reviews of fees. The court also accorded some weight to the fiduciary investment committee's retention of an independent consultant to provide advice on investment matters.

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

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

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

C. CASES AGAINST PLAN SPONSOR FIDUCIARIES AND SERVICE PROVIDERS

1. Some of the class actions brought by participants against plan sponsors include claims against Fidelity Management Trust Company and Fidelity Management & Research Company (together, "Fidelity"), as directed trustee and plan recordkeeper. *E.g., Hecker v. Deere & Co.*, 496 F.Supp.2d 967 (W.D.Wis. 2007); *Tussey v. ABB, Inc.*, Civil

Action No. 2:06-CV-04305 (W.D. Mo.); *Renfro v. Unisys Corp.*, Civil Action No. 2:07-CV-02098 (E.D. Pa.)

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

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

D. CASES AGAINST SERVICE PROVIDERS

Brewer, et al. v. General Motors Investment Management Corporation, et al., Civil Action No. 1:07-CV-02928 (S.D.N.Y.); *Young, et al. v. General Motors Investment Management Corp., et al.*, Civil Action No. 1:07-CV-01994 (S.D.N.Y.). In these cases, participants in employer-sponsored defined contribution plans sued the plans' investment managers alleging that (1) the defendants breached their fiduciary duties under ERISA § 404 by allowing or causing the plans to maintain investments in undiversified and imprudent investment vehicles, which the plaintiffs allege caused the plans to lose hundreds of millions of dollars; and (2) the defendant General Motors Investment Management Corporation breached its fiduciary duties under ERISA § 404 by causing or allowing the plans to maintain investments in certain mutual funds when similar investment products were available at much lower costs, which the plaintiffs allege caused the plans to pay millions of dollars in excess fees.

E. COURT DECISIONS

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

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

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

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

(2) On the excessive fee claim, the court ruled that defendants could not be liable because ERISA section 404(c) operates to shield fiduciaries from liability where the alleged loss or breach results from a participant's exercise of control over his or her plan account. Citing the fee disclosures provided by the mutual fund prospectuses, and the plan's brokerage window, the court held that "[t]he only possible conclusion is that to the extent participants incurred excessive expenses, those losses were the result of the participants' exercising control over their investments within the meaning of [ERISA § 404(c)'s] safe harbor provision."[2]

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

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

d. On March 9, 2009, plaintiffs filed a motion for panel rehearing or for rehearing en banc. Plaintiffs argue that defendants only offered retail mutual funds which are never appropriate for a large plan, and that as no proper investment option was offered, 404(c) cannot shield defendants from liability.

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

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

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

a. The court acknowledged that ERISA's three-year statute of limitations requires "actual knowledge of the breach or violation." In the Second Circuit, a plaintiff has "actual knowledge" when he has knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated ERISA. When determining whether plaintiffs have actual knowledge of a breach for purposes of ERISA § 413, the courts in the Second Circuit focus on whether documents provided to plan participants sufficiently disclosed the alleged breach of fiduciary duty, *not* whether individual plaintiffs actually saw or read such documents.

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

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

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

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

3. In *Braden v. Wal-Mart Stores, Inc.*, 590 F.Supp.2d 1159 (W.D. Mo. 2008), the court dismissed the complaint by ruling that the defendants could have chosen allegedly expensive funds with revenue sharing "for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility." The court ruled that plaintiffs failed to state a claim because they failed to allege "facts showing [that] Wal-Mart . . . failed to conduct research, consult appropriate parties, conduct meetings, or consider other relevant information" in selecting the allegedly expensive funds. The district court's dismissal has been appealed to the Eighth Circuit. The Department of Labor has filed an amicus brief arguing that the district court misapplied the notice pleading requirement in dismissing plaintiffs' claims.

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

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

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

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

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

a. In *Tussey v. ABB, Inc.*, Civil Action No. 2008 WL 379666 (W.D. Mo. Feb. 11, 2008), the court denied ABB and Fidelity's motions to dismiss.

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

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

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

b. Defendants' motions have also been denied in the following cases: *Kanawi v. Bechtel Corp.*, Civil Action No. 3:06-CV-05566 (N.D. Cal.) (noting that compliance with statutes and regulations regarding fee disclosures would not preclude a fiduciary breach claim and that failure to disclose revenue sharing agreements is relevant to whether a participant exercised investment control within the meaning of ERISA § 404(c)) ; *Spano v. The Boeing Co.*, 2007 WL 1149192 (S.D. Ill. Apr. 18, 2007) (holding that determining fiduciary status requires a factual inquiry and rejecting defendants' assertion that plaintiffs' ERISA § 502(a)(3) claim is limited by trust law principles which allow an "accounting" claim to be brought only against a plan trustee); *George v. Kraft Foods Global, Inc.*, 2007 WL 853998 (S.D. Ill. Mar. 16, 2007) (denying defendants' request to dismiss the complaint for failing to comply with Fed. R. Civ. P. 8 which requires a "short and plain" statement of the claim); *Abbott v. Lockheed Martin Corp.*, 2007 WL 2316485 (S.D. Ill. Aug. 13, 2007) (same as *George v. Kraft Foods Global, Inc.*); *Martin v. Caterpillar, Inc.*, Civil Action No. 1:07-CV-01009 (C.D. Ill.) (denying defendants' motion to dismiss, but holding that revenue sharing was not required to be disclosed to participants)

6. Motions to certify class have been granted in *Loomis v. Exelon Corp.*, 2007 WL 2981951 (N.D. Ill. June 26, 2007), *Tussey v. ABB, Inc.*, 2007 WL 4289694 (W.D. Mo. Dec. 3, 2007), *Taylor v. United Technologies Corp.*, Civil Action No. 3:06-

CV-01494 (D. Conn.), *George v. Kraft Foods Global, Inc.*, Civil Action No. 1:07-cv-01713 (N.D. Ill.), *Beesley v. Int'l Paper Co.*, Civil Action No. 3:06-cv-00703 (S.D. Ill.), *Spano v. The Boeing Co.*, Civil Action No. 3:06-cv-00743 (S.D. Ill), and Kanawi v. Bechtel Corp., 2008 WL 4571947 (N.D. Cal. Oct. 10, 2008), but denied in *Grabek v. Northrop Grumman Corp.*, Civil Action No. 2:06-CV-06213 (C.D. Cal.) (denial of class certification has been appealed to the Ninth Circuit Court of Appeals). In *Abbott v. Lockheed Martin Corp.*, 2009 WL 969713 (S.D. Ill. Apr. 3, 2009), the court denied class certification as to a claim regarding the company stock fund, finding that participants whose frequent trading activities created the need for a greater cash buffer in the company stock fund were antagonistic to other participants; the court otherwise granted class certification as to other claims that survived the court's ruling on summary judgment motions.

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

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

a. In addition to revenue sharing, plaintiffs complained that fiduciaries (1) did not consider/capture additional revenue streams; (2) included retail mutual funds (and funds of funds) as investment options; and (3) chose to use actively-managed investment options. Plaintiffs also alleged that Fremont Investment Advisors ("FIA") – an entity alleged to have originated from Bechtel's investment advisory and management division – was responsible for: selecting, monitoring, evaluating, and terminating investment managers for the investment options; negotiating agreements with the investment managers; and managing its own proprietary funds, some of which were included as the plan's investment options. Plaintiffs argued that FIA received undisclosed revenue sharing payments from plan service providers that FIA selected, and that this constituted a series of prohibited transactions. Plaintiffs also argued that the plan was entitled to some of the proceeds from the sale of FIA to a third party.

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

improper retention of investment options; and dismissed claims alleging that the plan is entitled to some of the proceeds from the sale of FIA to a third party.

9. Motion for summary judgment was granted in favor of defendants in *Taylor v. United Technologies Corp.*, 2009 WL 535779 (D. Conn. Mar. 3, 2009). The court ruled that: (1) defendants properly monitored the level of cash in the company stock fund; (2) defendants properly selected mutual funds; (3) recordkeeping fees were reasonable when compared to the market rate; (4) information on revenue sharing is not material to an objectively reasonable investor; and (5) defendants did not breach fiduciary duty in not disclosing that revenue sharing was used to reduce the amount United Technologies was paying to subsidize the plan's recordkeeping fees. Plaintiffs have appealed this decision to the Second Circuit Court of Appeals.

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

F. SETTLEMENT

1. The following case was settled on November 20, 2008: *Kanawi v. Bechtel Corp.*, Civil Action No. 3:06-CV-05566 (N.D. Cal.)

III. ACTIONS BROUGHT BY PLAN SPONSORS AGAINST SERVICE PROVIDERS

A. *HADDOCK V. NATIONWIDE FINANCIAL SERVICES, INC.*

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

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

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

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

c. The plaintiffs filed an amended complaint on March 21, 2006, following the district court's denial of Nationwide's summary judgment motion. On September 25, 2007, the district court denied the defendant's motion to dismiss the plaintiffs' amended complaint, largely on the same grounds. In addition, the district court held that the plaintiffs could have amended their complaint to add a "fund selection" claim and did not waive this claim by including in their first complaint but omitting the same from subsequent complaints.

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

such a claim on behalf of the plans, there was no indication that the plans suffered any loss arising from the plaintiffs' breach, as required by the language of ERISA § 409.

e. On September 10, Nationwide filed amended counterclaims against Plaintiffs for contribution, indemnification, and breach of fiduciary duty, alleging that Plaintiffs benefited from Nationwide's provision of services and receipt of revenue sharing payments, and that any harm to the plans was the result of Plaintiffs' actions or inactions.

e. On February 27, 2009, the court held a hearing on the plaintiffs' motion for class certification based on the fifth amended complaint. The court has taken the matter under advisement. Following the hearing, on March 27, the plaintiffs submitted a proposed order granting class certification, to which the defendants have submitted objections. The court has not yet addressed the plaintiffs' proposed class certification order or the defendants' objections.

B. ADDITIONAL CASES BY PLAN SPONSORS AGAINST SERVICE PROVIDERS

1. Although the *Nationwide* case was filed in 2001, lawsuits by plan sponsors became more common only after the initial wave of lawsuits were filed against plan sponsors relating to plan fees and expenses and revenue sharing payments. Plaintiffs' class action law firms turned their attention in the direction of the insurance companies providing plan administration and recordkeeping services to plans. *See Phones Plus, Inc. v. The Hartford Financial Services, Inc.*, Civil Action. No. 3:06-CV-01835-AVC, 2007 WL 3124733 (D. Conn); *Ruppert v. Principal Life Ins. Co.*, Civil Action No. 4:07-CV-00344-JAJ-TJS (S.D. Ia.); *Beary v. Nationwide Life Ins. Co.*, Civil Action No. C2-06-967, 2007 WL 4643323 (S.D. Oh.). Since then, additional cases have been filed against insurance companies and other plan service providers. *See*, e.g., *Charters v. John Hancock Life Insurance Co.*, Civil Action No. 07-11371-NMG, 2007 WL 4874807 (D. Mass.); *Columbia Air Services, Inc. v. Fidelity Management Trust Co.*, Civil Action No. 1:07-CV-11344 (D. Mass.); *Zang v. Paychex , Inc.*, Civil Action No. 6:08-CV-06046-DGL (W.D. N.Y.).

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

3. *Phones Plus, Inc. v. The Hartford Financial Services, Inc.*, Civil Action. No. 3:06-CV-01835-AVC, 2007 WL 3124733 (D. Conn). In this case, the plan sponsor plaintiffs alleged that the Hartford was a fiduciary to its plan customers because it advertises itself as a "full-service" provider, the Hartford and its affiliates review and evaluate the mutual funds available on its investment platform, and the Hartford has

authority to remove investment alternatives from its platform. On October 23, 2007, the court denied Hartford's motion to dismiss, rejecting Hartford's argument that it was not a fiduciary.

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

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

c. Hartford principally moved to dismiss the lawsuit on the grounds that it was not a fiduciary under ERISA and, therefore, could not be held liable for breaches of fiduciary duty or ERISA's prohibited transaction rules. Plaintiffs argued that Hartford qualified as a fiduciary because it had discretionary authority to unilaterally change the lineup of investment funds available to plan clients by adding or removing funds to or from the lineup. Hartford argued that it was not a fiduciary because the plan client had the ultimate authority to accept or reject any such change, citing the DOL advisory opinion issued to Aetna in 1997. *See* DOL Adv. Op. 1997-16A (May 22, 1997) ("Aetna Letter").

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

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

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

Hartford filed a motion for summary judgment on March 3, 2008, as to all three counts in Plaintiff's amended class action complaint. Hartford contends that Plaintiff's claims under ERISA §§ 404, 405, and 406 fail because Hartford is not a fiduciary to the Plaintiff's plan. Hartford also argues that the Plaintiff cannot establish that it suffered any losses as a result of Hartford's purported ERISA violations. In addition, Hartford contends that Plaintiff's claim that Hartford, as a non-fiduciary, knowingly participated in Neuberger's breach, fails as a matter of law. Plaintiff filed a response in opposition to Hartford's motion on April 23, 2008. The court has not yet ruled on Hartford's motion.

On September 29, 2008, the district court denied the plaintiff's motion to dismiss defendants' counterclaims for contribution, indemnification, and breach of fiduciary duty. The court held that the Second Circuit allows ERISA fiduciaries to pursue claims for contribution and indemnification, that the defendants pled sufficient facts to support such claims, and that defendants' assertion of such rights as counterclaims was procedurally proper.

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

On March 4, 2009, the court granted Plaintiff's motion to amend its complaint, finding that the motion was not untimely, given the fact that Hartford had only completed its discovery obligations in November 2008 and finding that permitting Plaintiff to amend its complaint would not cause undue prejudice to Hartford. In so doing, the court denied as moot Hartford's March 3, 2008 motion to dismiss and Plaintiff's June 20, 2008 amended motion for class certification. Plaintiff filed its second amended complaint on March 9. By order of the court, the Defendants' response is due on or before May 26. A trial has been scheduled for July 21, 2009. However, the parties have indicated a desire to attempt to resolve the case through mediation.

4. *Charters v. John Hancock Life Insurance Co.*, Civil Action No. 07-11371-NMG, 2007 WL 4874807 (D. Mass.). Plaintiff, the trustee of a 401(k) plan, brought this action on behalf of his own plan and on behalf of all trustees, sponsors, and administrators of all ERISA plans that owned variable annuity contracts provided by John Hancock. The plaintiff alleged that Hancock, which managed the plans' assets in separate accounts, received revenue sharing payments to which it was not entitled, because the amount of such payments exceeded the amount by which Hancock reduced certain administrative fees and/or exceeded the fees authorized in the group annuity contracts issued by Hancock to its plan clients. The plaintiffs claimed that Hancock breached its fiduciary duty under ERISA by charging excessive fees and by retaining revenue sharing payments for its own benefit. The plaintiffs further claimed that Hancock engaged in ERISA prohibited transactions in doing so.

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

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

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

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

On September 30, 2008, the court granted the plaintiff's motion for partial summary judgment, finding that Hancock is an ERISA fiduciary because (a) Hancock retained discretion to set and modify the amount of its administrative fees charged to its plan clients (b) Hancock retained discretion to substitute mutual funds offered as investments to its plan clients, and, in the event Hancock's clients rejected such

substitution, they would effectively have no option other than transferring their investments to another Hancock-administered sub-account or terminating their contract with Hancock in its entirety, either of which would subject the plans to a fee. According to the court, such "built-in penalties" significantly limited the plans' opportunity to reject such fund changes, compared with the facts addressed in the DOL's 1997 "Aetna Letter."

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

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

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

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

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

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

c. Based on these allegations, plaintiff claims that Principal breached its fiduciary duties by (i) failing to disclose that it negotiates revenue sharing fees with, and accepts revenue sharing fees from, the mutual funds included its menu

of investment options; (ii) failing to disclose the amount of revenue sharing it receives; and (iii) keeping revenue sharing "kickbacks" from mutual funds. The plaintiffs also claim that Principal violated ERISA section 406(b)(1) by using plan assets to generate revenue sharing and retaining revenue sharing payments for its own account. In addition, plaintiffs claim that Principal breached its fiduciary duties and engaged in prohibited transactions under ERISA by receiving and retaining, and failing to disclose, income earned on plan contributions between the time that such contributions were deposited in Principal's custodial account and the time that Principal transferred the plan contributions into the investment options chosen by the plan's participants. The plaintiffs seek disgorgement of any revenue sharing amounts and interest payments that Principal accepted in serving the plan and similarly situated plans.

d. On August 27, 2008, the district court denied the plaintiff's motion for class certification, finding that, as the proposed class involved more than 24,000 different plans to which Principal provided services, an intensive, plan-by-plan inquiry would be required in order to evaluate the plaintiff's claims that Principal is an ERISA fiduciary and that it breached its fiduciary duties. In particular, the court found that there was substantial variability in the services offered by Principal from one plan to another, and that such variability precluded the plaintiff from satisfying the "commonality" and "typicality" requirements under Rule 23 of the Federal Rules of Civil Procedure, as necessary for class certification.

e. On September 11, 2008, the plaintiff filed a petition to appeal the district court's August 27th denial of class certification to the United States Court of Appeals for the Eighth Circuit, pursuant to Rule 23(f) of the Federal Rules of Civil Procedure. In support of his petition, plaintiff argues that (1) the district court applied the wrong standard under Rule 23 (essentially substituting Rule 23(b)(3)'s "predominance" standard for the more lenient "commonality" and "typicality" standards set forth in Rule 23(a)(2) and (3); (2) the district court failed to consider the plaintiff's request for certification under Rule 23(b)(1)(A) (as well as Rule 23(b)(3)); and (3) the district court failed to properly consider Principal's fiduciary status.

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

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

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

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

j. On April 8, 2009, the district court granted the plaintiff's request to file a new motion for class certification, based upon arguments that grievances arising from Principal's breach of fiduciary duties in managing Foundation Option Funds, to which Principal admits it was a fiduciary, are common and typical of all members. The plaintiff's new proposed class action will focus on revenue sharing that Principal received from entities that were affiliated with Principal. Class discovery will be completed by December 15, 2009, and Principal will file its opposition to class certification on or before January 30, 2010. On April 23, 2009, Principal filed objections to the order permitting the plaintiff to file a new class certification motion. The court has not yet ruled on Principal's objections. On May 11, 2009, the plaintiff filed his new motion for class certification

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

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

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

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

d. On September 30, 2008, the district court granted defendant Fidelity's motion to dismiss. The court held that Plaintiff failed to allege that Fidelity was a fiduciary under ERISA with respect to setting its compensation or with respect to the selection or substitution of mutual fund options made available to the plan and its participants. In particular, the court noted that fiduciary status under ERISA is not an "all-or-nothing" concept. A service provider only has fiduciary status when – and to the extent – that it *exercises* discretionary authority. The court also found that Plaintiff failed to allege facts indicating that Fidelity exercised fiduciary responsibilities in negotiating the terms of its engagement as a directed trustee, including its compensation: the contract with the plan was negotiated at arms' length, and the pan's named fiduciaries – not Fidelity – were responsible for selecting the investment options offered to the plan and its participants – the investment options from which Fidelity received revenue sharing payments.

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

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

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

b. The plaintiff alleges that Paychex breached its fiduciary duties under ERISA § 404(a)(1) by (1) steering its client plans into mutual funds that paid Paychex revenue sharing in return; (2) negotiating to receive "float" payments while steering its client plans into mutual funds on the basis of whether

such funds were willing to make revenue sharing and other payments to Paychex; and (3) by failing to offer lower-cost investment options for its client plans' contributions, such as aggregating plan assets, purchasing less expensive share classes, meeting investment minimums, or investing in lower fee alternatives to mutual funds, such as collective investment funds.

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

6. *Beary v. Nationwide Life Ins. Co., et al.*, Civil Action No. 2:06-CV-00967, 2007 WL 4643323 (S.D. Ohio). This lawsuit, brought by a plan sponsor, was not brought under ERISA, but, rather, under state fiduciary law, on behalf of his Internal Revenue Code § 457(b) plan and all similarly situated plans. The plaintiff claimed that Nationwide breached common law fiduciary duties by arranging for, receiving, and keeping revenue sharing payments from mutual funds and mutual fund advisers for its own use. In the alternative, the plaintiff claimed that, even if Nationwide's actions did not constitute a breach of fiduciary duty, Nationwide's retention of the revenue sharing payments was unjust, obligating it to make restitution to the class members. The court granted Nationwide's motion to dismiss on September 17, 2007, holding that the plaintiff's action was preempted by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). The plaintiff filed a motion to vacate the court's judgment seeking leave to file an amended complaint on October 1, 2007. The court denied Plaintiff's motion on September 15, 2008, finding that Plaintiff failed to meet the standard required by Rule 59(e) of the Federal Rules of Civil Procedure, because Plaintiff did not identify a mistake of law, a change in controlling law, or newly discovered facts. The court further held that, while Plaintiff satisfied Rule 15(a)'s standard for amending his complaint, such amendment would be futile in this case, as Plaintiff's claims would remain preempted under the Securities Litigation Uniform Standards Act of 1998. On October 15, 2008, Plaintiff filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit as to the dismissal of Plaintiff's claims and the denial of Plaintiff's motion to vacate. The parties' appeal briefing is complete. No decision has been entered.

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

for several years prior to filing suit and that the plaintiff's failure to initiate timely legal action constituted an acquiescence to the revenue sharing arrangement, barring his breach of fiduciary duty claim. The court also found that the service contract between the plaintiff's plan and ING covered the subject matter of the plaintiff's claim for restitution, *i.e.*, the revenue sharing payments, and, therefore, that the claim was properly dismissed. On January 4, 2008, the district court denied the plaintiff's motion to alter or amend the court's dismissal of the case.

8. *Stark v. American Skandia Life Assurance Corp.*, Civil Action No. 3:07-CV-01123-CFD (D. Conn.). Plaintiff voluntarily dismissed this action without prejudice on November 13, 2007.[3]

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