401(k) Fee Cases
Groom Law Group, Chartered

April 25, 2012

Active cases are highlighted in yellow.

Participant Claims Against Sponsors And Related Fiduciaries					
No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
Second Circuit					
1.	*Taylor v. United Technologies Corp.*, 3:06-cv-01494-WWE (D. Conn. filed 9/22/06) Amended complaint filed on 12/11/07 Second amended complaint field on 4/9/08. Judge Warren W. Eginton	Motion to dismiss granted, in part, on 8/9/07, dismissing breach of fiduciary duty claim based on non-disclosure of revenue sharing fees, holding that ERISA does not require such disclosure.	Motion to Certify Class granted on 6/5/08.	Motion for summary judgment filed by United Technologies on 6/7/08. Motion for summary judgment filed by United Technologies on 6/6/08 specific to two named plaintiffs who are allegedly barred from asserting claims pursuant to claims release agreements.	**Significance:** 1. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) did not consider/capture float; and (2) chose to use actively-managed mutual funds. Plaintiffs also allege (although it is not entirely clear) that there is an issue as to whether defendants engaged in prohibited transactions by receiving a "corporate benefit" (and benefiting Fidelity) due to plan participants' investing in Fidelity managed high cost mutual funds which paid revenue sharing to Fidelity. Plaintiffs allege that Fidelity is defendant's "largest shareholder." Plaintiffs also allege that participants investing in revenue-sharing mutual funds paid a disproportionately higher portion of the plan's administrative fees. 2. In dismissing fiduciary breach claims based on failure to disclose revenue sharing, court cited the *Hecker* decision, which has since been affirmed by the Seventh Circuit on appeal. 3. Summary judgment granted in favor of United Technologies on March 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 expenses.

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					4. Decision appealed to the United States Court of Appeals for the Second Circuit. Oral arguments held on 11/20/09. 5. On December 1, 2009, the Second Circuit summarily affirmed the district court's decision granting summary judgment in favor of United Technologies.
2.	*Montoya v. ING Life Ins. and Annuity Co.*, 1:07-cv-02574 (NRB) (S.D.N.Y. filed 3/28/07); 2:10-cv-02068-LDW-ARL (removed 5/7/10); 10-5314, 11-1132 (2d Cir.) Judge Naomi Reice Buchwald (SDNY) Judge Leonard D. Wexler (EDNY)	Motion to dismiss for lack of jurisdiction renewed on 9/2/08 upon completion of jurisdictional discovery. Motion to dismiss for lack of jurisdiction granted on 8/31/09. Motion to dismiss based on SLUSA granted on 11/23/2010.	Not made.	Not made.	**Significance:** 1. Alleges that New York State United Teachers recommended ERISA § 403(b) plan providers in return for endorsement fees and that the plan providers improperly received revenue sharing payments. 2. On 8/31/09, the court granted the defendants' motion to dismiss the action for lack of subject matter jurisdiction, finding that the plan in issue is a governmental plan exempt from Title I of ERISA. 3. On 2/25/10, plaintiffs re-filed this action in the Supreme Court of the State of New York, Nassau County, alleging a breach of fiduciary duty under New York common law. On 5/7/10, the case was removed to the U.S. District Court for the Eastern District of New York (10-cv-2068) under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). 4. On November 23, 2010, district court dismissed the lawsuit based on SLUSA. 5. The plaintiffs appealed the district court's order dismissing the case to the Second Circuit. 6. On July 25, 2011, the appeal was dismissed pursuant to a settlement.

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Third Circuit					
3.	*Renfro v. Unisys Corp.*, 2:07-cv-2098-BWK (E.D. Pa. filed 12/28/06 in the C.D. Cal.); 10-2447 (3d Cir. 5/23/2007). Amended Complaint filed 7/17/2007 Second Amended Complaint filed 9/3/09. Judge Berle M. Schiller	Motion to dismiss filed by Fidelity on 9/7/07. Motion to dismiss first amended complaint filed by Fidelity dismissed as moot on 10/8/09. Motion to dismiss second amended complaint filed by Fidelity on 10/19/09. Motion to dismiss second amended complaint filed by Fidelity denied in part on 2/19/10.	Not made.	Motion for summary judgment filed by Unisys on 9/07/07. Motion for summary judgment filed by Unisys dismissed as moot on 10/8/09. Motion to dismiss or for summary judgment filed by Unisys on 10/19/09. Motion to dismiss or for summary judgment filed by Unisys denied in part on 2/19/10.	**Significance:** 1. Case transferred from Central District of California by order dated 4/17/07. 2. The second amended complaint alleges that defendants (1) did not monitor what similar 401(k) plans were paying for investment management and administrative services; (2) did not consider offering less expensive investment options providing similar services; (3) did not ensure that the plan did not pay retail investment management fees and administrative fees without receiving services beyond those received by retail investors; (4) did not ensure that investment management and administrative fees did not increase without a commensurate increase in the services provided; and (5) did not understand how float contributed to service provider compensation. Plaintiffs allege that defendants' improper actions resulted in excessive investment management and administrative fees and inadequate investment performance. Plaintiffs also allege that Fidelity committed fiduciary breach by not disclosing how it earned income from float. 3. On 2/19/10, the court dismissed in part the Unisys defendants' motion to dismiss or for summary judgment. The court rejected the Unisys defendants' argument that plaintiffs failed to demonstrate constitutional standing by failing to allege a personal injury. The court found that the plaintiffs' allegation that the plan and the plaintiffs' class suffered financial losses and damages was sufficient to allege personal injury. 4. On 2/19/10, the court dismissed in part the Fidelity defendants' motion to dismiss. The court rejected the Fidelity defendants' argument that the complaint could be dismissed in its entirety on statute of limitations grounds. The court explained that even if the selection of allegedly expensive funds occurred more than six years ago, the fiduciaries had a continuing duty to monitor investment options, and if necessary, remove funds that were no longer

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					appropriate. 5. On 4/26/10, the court granted Fidelity's motion to dismiss the case and Unisys's motion to dismiss the case or for summary judgment. In ruling that the case should be dismissed, the court found that: (1) Fidelity did not become a fiduciary by exercising a "veto power" over plan investment options because Unisys was not prohibited from establishing an additional trust for the plan and offering non-Fidelity investment options within such trust; (2) whether Fidelity was a fiduciary with respect to float (a plan asset) did not matter because plaintiffs were challenging Fidelity's role in investment options selection; (3) Unisys did not breach its fiduciary duty in selecting investment options for the plan because the plan offered more than 70 mutual funds with fees ranging from 0.1% to 1.21% (and agreeing with *Hecker* that a plan fiduciary "need not select the cheapest fund available"); (4) Unisys had an "incentive" to use its "market power" to negotiate lower fees, and that this incentive suggested that the agreement that Unisys negotiated with Fidelity was a result of "an arm's length bargain and therefore need[ed] less judicial oversight to insure fairness to plan participants and beneficiaries"; and (5) Unisys's failure to disclose revenue sharing information could not form the basis for a fiduciary breach claim since plan participants were made aware of "the fees they would pay for allocating their [p]lan contributions to particular funds," and "[t]o whom that money ultimately flowed would seem irrelevant to a participant once it left his wallet." In ruling that Unisys was entitled to summary judgment, the court concluded that even assuming that Unisys breached its fiduciary duty in selecting "overly expensive funds," ERISA section 404(c) precluded Unisys's liability for any resulting losses. 6. Decision appealed to the Third Circuit. 7. On 8/19/11, the Third Circuit affirmed the district court's order dismissing the case. Following the Seventh Circuit's analysis in *Hecker v. Deere*, the Third Circuit ruled that the plaintiffs failed to state a claim because the plan offered "a reasonable range of investment options with a variety of risk profiles and fee rates." The

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					Third Circuit also ruled that Fidelity did not act as a fiduciary in selecting and maintaining the plan's investment options because Unisys was free to add non-Fidelity investments to the plan's line-up of investment options by administering such investments itself or contracting that function to another party. The Third Circuit did not reach the district court's alternative conclusion that Unisys was entitled to summary judgment based on ERISA section 404(c).
Sixth Circuit					
4.	*In re Honda of Am. Mfg., Inc. ERISA Fees Litig.,* 2:08-cv-01059 GLF-TPK (S.D. Ohio filed 11/10/08) Amended Complaint filed 3/20/09 Judge Gregory L. Frost	Motion to dismiss filed by Honda defendants granted on 10/9/09. Motion to dismiss filed by Merrill Lynch granted on 10/13/09.	Moot in light of dismissal.	Not made.	**Significance:** 1. Plaintiffs alleged that defendants acted improperly by: (1) allowing a sizable number of the investment options to be retail mutual funds affiliated with Merrill Lynch, the plan's recordkeeper and directed trustee; (2) failing to make various disclosures, including the fact that the investment options had excessive fees; and (3) engaging in self-dealing prohibited transactions. 2. On 10/9/09, the court granted the Honda defendants' motion to dismiss the case. The court followed the rationale of *Hecker v. Deere* and ruled that: (1) selecting multiple funds offered by a single provider was not prohibited by ERISA; (2) offering retail mutual funds was not imprudent because such funds' fees are set against the backdrop of market competition, and the plaintiffs were factually incorrect in alleging that the Merrill Lynch funds were retail mutual funds; (3) the defendants did not have a disclosure duty beyond the specific disclosure requirements found in ERISA; and (4) the plaintiffs failed to state a plausible self-dealing claim because the Honda defendants did not benefit financially from any fees paid to Merrill Lynch. 3. On 10/13/09, the court granted Merrill Lynch's motion to dismiss the case. The court declined to decide whether Merrill Lynch was a plan fiduciary, but held that since the claims against Merrill Lynch are identical to the claims against the Honda defendants, the claims against Merrill Lynch must be dismissed for the same reasons.

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Seventh Circuit					
5.	*Hecker v. Deere & Co.*, 3:06-cv-0719-JCS (W.D. Wis. filed 12/8/06) Amended Complaint filed 12/28/06 Second Amended Complaint filed 3/5/07 Judge John C. Shabaz	Motion to dismiss granted with prejudice on 6/20/07 because (a) plaintiffs failed to state a claim for non-disclosure under ERISA; (b) defendants were insulated by 404(c) safe harbor provision; and (c) Fidelity defendants had no fiduciary responsibility for making plan disclosures or selecting plan investments. Motion for reconsideration denied by order dated 10/19/07.	Moot in light of dismissal.	Moot in light of dismissal.	**Significance:** 1. The court ruled that disclosure of revenue sharing was not required by ERISA or DOL regulation. 2. The court ruled that alleged losses resulted from participants' exercise of control over their investments, so that ERISA § 404(c) shielded defendants from liability. The court thus rejected DOL's longstanding position that § 404(c) is not a defense to fiduciaries' improper selection of investment options. 3. Fidelity defendants had no fiduciary responsibility for making plan disclosures or selecting plan investments. 4. Decision appealed to the United States Court of Appeals for the Seventh Circuit. 5. Seventh Circuit held oral arguments on 9/4/08. 6. On 2/12/09, Seventh Circuit affirmed the district court's decision dismissing the case. Seventh Circuit held 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. 7. On 3/9/09, 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. 8. On 6/24/09, the Seventh Circuit denied plaintiffs' petition for rehearing. The Seventh Circuit commented on the Secretary of Labor's amicus brief in support of rehearing by stating that a footnote

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					(in the preamble to the 404(c) regulation) which states that 404(c) does not shield fiduciaries from improper selection of investment options is not entitled to *Chevron* deference. The Seventh Circuit, however, stated that it did not generally rule on the scope of 404(c) defense and that its decision applies only to the facts stated in the *Deere* complaint. 9. On 1/19/2010 the Supreme Court denied plaintiffs' petition for a writ of certiorari.
6.	*Abbott v. Lockheed Martin Corp.*, 3:06-cv-00701-MJR-DGW (S.D. Ill. filed 9/11/06) Judge Michael J. Reagan	Court denied motion to dismiss on 8/13/07, holding complaint satisfied notice pleading standard. Motion to dismiss did not address merits of claims.	Class certification proceedings stayed pursuant to order dated 9/14/07 due to *Lively* appeal. On 11/6/08, motion for class certification was denied without prejudice in light of the filing of an amended complaint. On 1/22/09, plaintiffs filed a second motion for class certification. On April 3, 2009, the court granted class certification as to the claims regarding the excessive fees and the stable value fund, but denied class certification as to the claim regarding the company stock fund.	Not made. Defendants' motion for summary judgment granted in part and denied in part on 3/31/09. Plaintiffs' motion for partial summary judgment as to liability on their excessive recordkeeping fee claim denied on 3/31/09.	**Significance:** 1. Amended complaint filed on 11/7/08. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) used retail mutual funds; (2) used fraudulent benchmarks; (3) falsely represented a money market fund as a stable value fund, and made it the plan's default investment option; (4) used a unitized company stock fund; and (5) engaged in prohibited transactions. 2. On 3/31/09, the court denied plaintiffs' motion for partial summary judgment, and granted in part and denied in part defendants' motion for summary judgment. 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

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			On 3/15/11, the Seventh Circuit vacated the district court's order granting class certification. On November 16, 2011, Plaintiffs filed an amended Motion for Class Certification. A hearing on the motion was held on 1/27/12.		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. 3. On 4/3/09, the court granted class certification as to the claims regarding the excessive fees and the stable value fund, but denied class certification as to the claim regarding the company stock fund. The court ruled that participants whose frequent trading activities created the need for a greater cash buffer in the company stock fund were antagonistic to other participants. 4. On 2/10/10, the court ruled that plaintiffs' attempt to pursue plan-wide relief for the stock fund claim through a direct action brought by one of the named plaintiffs would not be allowed. The court explained that plaintiffs' pleadings failed to provide adequate notice that the plaintiffs intended to pursue a direction action claim. The court also explained that plaintiffs cannot seek plan-wide relief without there being procedural safeguards to protect absent members and to prevent redundant suits. 5. On 3/15/11, the Seventh Circuit vacated the district court's class certification order and directed the district court to consider class certification based on the Seventh Circuit's class certification opinion in *Spano v. Boeing*. 6. On 9/21/11, the district court issued an order permitting the plaintiffs to amend their complaint to add two new named plaintiffs, but denying plaintiffs permission to amend their complaint otherwise. 7. Plaintiffs filed a second amended complaint on 10/12/11

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7.	*Beesley v. International Paper Co.*, 3:06-cv-00703-DRH-CJP (S.D. Ill. filed 9/11/06) Amended complaint filed on 5/1/08. Second amended complaint filed on 9/7/11. Judge David R. Herndon	Court denied motion to transfer venue on 8/24/07.	The stay on class certification proceedings, imposed on 8/24/07 due to *Lively* appeal, was lifted on 4/4/08. The order lifting the stay notes that the litigants in the Lively case are set to settle their case before the class certification issue is resolved by the Seventh Circuit. Motion for class certification granted on 9/26/08. On 1/21/2011, the Seventh Circuit vacated the district court's class certification order.	On 1/23/09, plaintiffs filed a motion for summary judgment as to liability on alleged failures by defendants to: (1) allocate to the plan securities lending revenue generated before a securities lending program was implemented; and (2) implement a securities lending program earlier. On 1/23/09, defendants filed a motion for summary judgment on most of the claims alleged in the complaint. Among the arguments that defendants are making is that it is improper to make comparisons to International Paper's defined benefit plan.	**Significance:** 1. Amended complaint filed on 5/1/08. In addition to revenue sharing, plaintiffs allege – without alleging details – that International Paper engaged in prohibited transactions by: (1) entering into agreements with service providers, whereby International Paper benefited rather than plan participants; (2) placing revenue generated from plan assets in corporate accounts; (3) causing participant contributions to be transferred into accounts held by International Paper, and from which International Paper received a benefit at the expense of the participants; (4) entering into service agreements with service providers, with whom there were conflicts of interest; (5) allowing company stock to remain as an investment option; (6) forcing plan participants to own company stock in order to have a 401(k) plan and "prohibiting them from selling it until age 55"; and (7) favoring the defined benefit plan which was run by the same managers, and thereby causing lower investment returns and performance for the 401(k) plan. Plaintiffs also allege that charging fees through a master trust arrangement not only results in confusing fee disclosures, but that it actually results in higher fees. Plaintiffs allege that using a master trust arrangement – International Paper used a separate master trust for each investment option – results in "layer[s]" of fees. Plaintiffs further allege that International Paper used improper and misleading benchmarks (including "custom-designed[,]" non-market benchmarks) to misrepresent the performance of the investment options. 2. In a supplemental brief filed on 4/27/09 opposing defendants' motion for partial summary judgment, Plaintiffs argue that *Hecker v. Deere* (7th Cir.) is not applicable because *Deere* offered mutual funds, whose fees are arguably set at a competitive rate due to market competition, while International Paper offered separate accounts. 3. On 8/10/09, the Seventh Circuit granted defendants' petition for leave to appeal the class certification order. 4. On 2/18/10, the court entered an order staying the case pending

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					resolution of the appeal on the class certification order. 5. On 1/21/2011, the Seventh Circuit vacated the district court's class certification order. The Seventh Circuit ruled that the class definition was too broad to meet the typicality and adequacy of representation requirements. As to these requirements, the Seventh Circuit opined that a class representative must at a minimum have invested in the same funds as the class members and must not have a conflict of interest with the class members. The Seventh Circuit explained that many participants within the approved class may not have a complaint with respect to a challenged fund depending on the dates they invested and exited the fund. The Seventh Circuit also noted that for some misrepresentation claims, it may be "difficult to find a class representative with claims typical of enough people to justify class treatment." 6. On 3/2/11, the plaintiffs filed an amended motion to certify class (defining subclasses) and a motion, alternatively, to pursue a direct action for fiduciary breach. 7. On 9/8/11, the plaintiffs filed a second amended complaint to add additional named plaintiffs and to revise the class action allegations (defining subclasses).
8.	*Spano v. The Boeing Co.*, 3:06-cv-00743-DRH-DGW (S.D. Ill. filed 9/27/06) Amended complaint filed on 12/17/07 Second amended complaint filed on 8/25/08	Motion to dismiss original complaint denied on 4/18/07 because (a) plaintiffs adequately alleged Boeing and officer were plan fiduciaries; (b) plaintiffs' remedy not limited to ERISA § 502(a)(2) and (c) plaintiffs adequately pled claims of	The stay on class certification proceedings, imposed on 9/10/07 due to *Lively* appeal, was lifted on 4/3/08. Motion for class certification granted on 9/26/08. On 1/21/2011, the Seventh Circuit vacated the district	Motion for summary judgment filed by defendants on 1/15/2009. Revised motion for summary judgment filed by defendants on 12/21/2011.	**Significance:** 1. In denying defendants' motion to dismiss the original complaint, the court ruled that plaintiffs' remedy is not limited to ERISA § 502(a)(2), and that they can plead under § 502(a)(3) in the alternative. The court rejected the defense that plaintiffs' ERISA § 502(a)(3) claim is limited by trust law principles which allow an "accounting" claim to be brought only against a plan trustee. 2. Amended complaint filed on 12/17/07. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) did not consider/capture additional revenue streams; (2) chose to use actively-managed mutual funds; and

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	Judge David R Herndon	nondisclosure. On 1/11/08, defendants filed a partial motion to dismiss first amended complaint. The motion sought dismissal of claims based on the inclusion of mutual funds as investment options (on statue of limitations grounds) and claims based on non-disclosure of information relating to fees (based on no legal duty to disclose). On 9/9/08 defendants filed a partial motion to dismiss the second amended complaint or for partial summary judgment based on statute of limitations grounds.	court's class certification order.		(3) chose to use mutual funds instead of separate accounts. 3. Second amended complaint filed on 8/25/08 added prohibited transaction claims. 4. In a brief filed on 3/20/09 opposing defendants' motion for summary judgment, plaintiffs allege that *Hecker v. Deere* (7th Cir.) is not applicable because Boeing did not use only mutual funds, did not offer a brokerage window, and did not use a bundled arrangement. 5. On 8/10/09, the Seventh Circuit granted permission to appeal the class certification order. 6. On 1/21/2010, the Seventh Circuit entered an order staying the district court proceedings. 7. On 1/21/2011, the Seventh Circuit vacated the district court's class certification order. The Seventh Circuit ruled that the class definition was too broad to meet the typicality and adequacy of representation requirements. As to these requirements, the Seventh Circuit opined that a class representative must at a minimum have invested in the same funds as the class members and must not have a conflict of interest with the class members. The Seventh Circuit explained that many participants coming within the approved class definition may not have a complaint with respect to a challenged fund depending on the dates they invested and exited the fund. The Seventh Circuit also noted that for some misrepresentation claims, it may be "difficult to find a class representative with claims typical of enough people to justify class treatment." 8. On 3/2/11, the plaintiffs filed an amended motion to certify class (defining subclasses) and a motion, alternatively, to pursue direct action for fiduciary breach. 9. On 12/21/11, the defendants filed a motion for summary judgment on all claims.

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9.	*Boeckman v. A.G. Edwards, Inc.*, 3:05-cv-00658-GPM-PMF (S.D. Ill. filed 9/15/06) Judge G. Patrick Murphy	Motion for judgment on the pleadings denied on 9/26/06 because (a) plaintiff's release did not bar ERISA claim for vested benefits, and (b) although unlikely, plaintiff may be able to prove prohibited transactions involving defendant and mutual funds.	Motion for class certification denied on 8/31/07, with leave to re-file upon resolution of *Lively* appeal.	Defendant's motion for summary judgment granted, in part, and denied, in part, on 8/31/07. Summary judgment granted dismissing plaintiff's claims of prohibited transactions in violation of ERISA. Summary judgment denied as to plaintiff's claims of breach of duty of prudence. Plaintiff's motion for summary judgment on liability denied on 8/31/07.	**Significance:** 1. Does not challenge revenue sharing. 2. Challenges the use of mutual funds as investment options in general and use of retail class mutual funds. 3. Stipulation to dismiss the action with prejudice filed on 6/29/09 in light of the Seventh Circuit's denial of petition for rehearing in *Hecker v. Deere & Co.*
10.	*Will v. General Dynamics Corp.*, 3:06-cv-00698-GPM-CJP (S.D. Ill. filed 9/11/06) Amended complaint filed on 10/25/07 Second amended complaint filed on	General Dynamics filed a motion to dismiss the first amended complaint on 11/8/07; Fiduciary Asset Management Company filed a motion to dismiss the first amended complaint on 12/7/07 Motions to dismiss the	Class certification proceeding stayed on 8/29/07, pending *Lively* appeal. Class certification motion as to the first amended complaint denied without prejudice for administrative	General Dynamics filed a motion for summary judgment as to the first amended complaint on 1/4/08. Motion for summary judgment as to the first amended complaint denied without prejudice for	**Significance:** 1. Second amended complaint alleges that (1) the defendants failed to consider/capture additional revenue streams; (2) General Dynamics improperly selected the plan administrator (Fiduciary Asset Management Company ("FAMCo")); (3) General Dynamics improperly agreed with a fund manager -- providing services to the 401(k) plans and the "corporate-sponsored pension plan" -- to charge the 401(k) plans first before charging the other plan, where a graduated fee structure in effect meant that the 401(k) plans paid fees at a higher rate than the other plan; (4) FAMCo was improperly allowed to designate investment managers and to allocate plan assets

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	8/12/09 Judge G. Patrick Murphy	first amended complaint denied without prejudice for administrative reasons on 3/2/09. Defendant Piper Jaffray Companies filed a motion to dismiss the second amended complaint on 9/15/09. Defendant General Dynamics Benefit Plans and Investment Committee ("Committee") filed a motion to dismiss the second amended complaint on 9/15/09. The court denied the Committee's motion to dismiss the second amended complaint as moot on 10/20/09 in light of the voluntary dismissal of the Committee on 10/19/09 The court denied Piper Jaffray Companies' motion to dismiss the second amended complaint on	reasons on 3/2/09.	administrative reasons on 3/2/09.	among different investment managers, when FAMCo itself was an investment manager; (5) defendants allowed FAMCo to profit from using plan assets as "seed money" in establishing its business and selling the business to Piper Jaffray Companies for a profit; and (6) Piper Jaffray participated in FAMCo's self-dealing and received "distributions of income" after the sale. Plaintiffs no longer claim that revenue sharing caused recordkeeping fees to be excessive. Plaintiffs assert that "hard dollar" recordkeeping fees were excessive. 2. In its motion to dismiss the second amended complaint, Piper Jaffray Companies argues that it is not a plausible defendant because (1) it was not a fiduciary; and (2) the plaintiffs failed to identify a res from which restitution could be obtained as "appropriate equitable relief." 3. On 10/19/09, Defendant General Dynamics Benefit Plans and Investment Committee ("Committee") was voluntarily dismissed from the case upon stipulation that General Dynamics was liable for the actions of the Committee and its individual members. 4. On 11/14/09, the court denied Piper Jaffray Companies' motion to dismiss the second amended complaint. The court ruled that the plaintiffs sufficiently alleged that Piper Jaffray was a fiduciary, and that even if Piper Jaffray was not a fiduciary, the plaintiffs can seek equitable relief from Piper Jaffray under section 502(a)(3) of ERISA as a knowing participant in a fiduciary breach. The court further ruled that the plaintiffs may be seeking equitable relief in that the money that they seek may be in Piper Jaffray's possession. 5. On 8/9/10, the court granted preliminary approval of an agreement to settle the case. Under the settlement agreement, the liability insurers of General Dynamics and the plan administrator, Fiduciary Asset Management Company ("FAMCO"), are to pay $15.15 million into a settlement fund. The fees and expenses of the plaintiffs' attorneys (up to $5.05 million in fees and $740,000 in expenses), a payment of $25,000 each to the three named plaintiffs, and the expenses of administering the settlement fund are to be deducted from the settlement fund. The remaining amount is to be shared by participants who had an account in one or more of General

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		11/14/09.			Dynamics' 401(k) plans at any time from October 1, 1994, through June 30, 2010. In addition to the monetary payment, General Dynamics agreed to undertake the following actions: (1) engage one or more outside consultants to (i) perform a one-time review of the plans' service arrangements, including float and securities lending arrangements, and (ii) provide recommendations to General Dynamics based on its review; (2) for a one-year period, have an outside consultant review (i) any new service arrangement that will pay more than $250,000 per year in fees and (ii) any renewal of a service arrangement that will result in a fee increase of 10% or more; (3) for a period of eighteen months, have an outside consultant review any new investment funds added to the plans; (4) engage an independent fiduciary to review consultant's recommendations and General Dynamics' actions; (5) amend the service contract with FAMCO to preclude FAMCO from recommending itself (or an affiliate) as an investment manager or from allocating assets to itself (or an affiliate); (6) provide participants with enhanced fee disclosures that list, for each fund held in the participant's account, the estimated amount paid for investment management and the estimated amount paid for plan administration; (7) for a one-year period, continue General Dynamics practice of not paying asset-based recordkeeping fees; and (8) for a three-year period, ensure that service providers do not charge a lower fee on General Dynamics' other benefit plans, based on the amount the service provider is making on the 401(k) plans. General Dynamics did not admit that it engaged in any fiduciary breach under ERISA. 6. On 11/22/10, the court entered an order granting final approval of class settlement. The court also entered an order approving the fees and expenses of plaintiffs' attorneys ($5.05 million in fees and $693 thousand in expenses) and payments of $25,000 each to the three named plaintiffs.

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11.	*George v. Kraft Foods Global, Inc.*, 1:07-cv-01713, (N.D. Ill. filed 10/16/06 in the S.D. Ill.) ("*Kraft I*") Amended complaint filed on 8/19/11. Judge Sidney I. Schenkier	Motion to dismiss, motion to strike, and motion for more definite statement denied on 3/16/07 because (a) complaint met notice pleading standard, and (b) burden was on defendant, not plaintiff, to prove 404(c) defense. On 3/3/09, defendants filed a motion for judgment on the pleadings based on the Seventh Circuit's affirmance of *Hecker v. Deere & Co.* dismissal.	Motion for class certification granted on 7/17/08.Motion for amended class certification due 10/31/11.	The defendants' motion for summary judgment granted on 1/27/10. On 4/11/11, the Seventh Circuit granted in part and reversed in part the district court's order granting summary judgment to defendants.	**Significance:** 1. Case transferred from Southern District of Illinois to Northern District of Illinois by order dated 3/16/2007. 2. Consolidated with *Pino v. Kraft* in Northern District of Illinois on 6/5/07. (The two cases are, however, to keep separate dockets for now, just in case the class certification is later denied.) 3. On 4/1/09, the court ruled that plaintiffs' claims regarding float and securities lending are not within the scope of the complaint. The court also noted that plaintiffs have stated on the record that they will not pursue the excessive investment management fee claim at trial. (The court had previously struck plaintiffs' expert's report regarding excessive investment management fees in actively managed funds.) 4. On 1/27/10, the court granted summary judgment in favor of defendants. The court ruled that: (1) defendants did not breach their fiduciary duty in structuring the company stock funds as unitized funds because the defendants properly considered the pros and cons of unitized funds; (2) the multiple times the defendants "reviewed and renegotiated" the recordkeeping contract, and their utilization of "standard industry methods" to determine the reasonableness of recordkeeping fees, compelled a conclusion that defendants did not breach their duty with respect to the recordkeeping arrangement; (3) defendants did not have a duty to disclose revenue sharing information because the Seventh Circuit in *Hecker* ruled that the critical information for participants is the total fees charged by the investment options; and (4) defendants did not breach their fiduciary duty in allowing the plan trustee to retain float because the defendants adequately understood and monitored the float arrangement. 5. Decision appealed to the Seventh Circuit. 6. On 4/11/11, the Seventh Circuit affirmed, in part, and reversed, in part, the district court's decision. The Seventh Circuit ruled that, although the district court had stated that Kraft had acted prudently

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					by considering the pros and cons of offering company stock funds as unitized funds *and making a decision* to continue offering the funds as unitized funds, the district court had not cited to evidence showing that Kraft in fact made a decision. The Seventh Circuit noted that prudence may have required Kraft to make a decision, rather than just debate the pros and cons of unitized funds. The Seventh Circuit also concluded that the district court should not have ignored (as not credible) the testimony of a plaintiffs' expert that Kraft should have used a competitive bidding process in renewing the plan's recordkeeping contract. The Seventh Circuit explained that the district court should not have considered the credibility of the expert's testimony in ruling on a summary judgment motion. The Seventh Circuit, however, affirmed the district court as to the plaintiffs' float claim because the plaintiffs failed to introduce evidence to contradict a declaration submitted by Kraft establishing that it had received annual reports from the trustee that disclosed the dollar amount of the trustee's float income. Accordingly, the unitized funds claim and the recordkeeping fees claim have been remanded to the district court. 7. On 5/26/11, the Seventh Circuit denied Kraft's petition for rehearing or rehearing *en banc*. 8. On 8/19/11, the plaintiffs filed a first amended complaint to add as defendants Altria Corporate Services, Inc. and the Benefits Investment Group of Altria Corporate Services, Inc. The claims in the complaint were not amended. 9. Settlement - On February 23, 2012, the parties agreed to a settlement of both the "Kraft I" and "Kraft II" lawsuits. On February 29, 2012, the court granted the settlement preliminary approval. A fairness hearing is scheduled for June 26, 2012. The proposed settlement calls for defendants to pay $9,500,000 into a settlement fund, to be disbursed to the settlement class of all persons who participated in the Plan at any time between October 16, 2000 and February 23, 2012.

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12.	*George v. Kraft Foods Global, Inc.*, 1:08-cv-03799 (N.D. Ill. Filed 7/02/08) ("*Kraft II*") Judge Ruben Castillo Amended complaint filed on 12/23/08 Second amended complaint filed on 7/31/09	Motion to dismiss granted, in part, and denied in part on 12/17/09	Motion for class certification filed on 3/1/10. The court granted plaintiffs' motion for class certification on 8/25/10. Class certification order vacated on 7/19/11. Motion for class certification filed on 9/2/11.	Plaintiffs filed a motion for partial summary judgment on 1/21/11. Defendants filed a motion for summary judgment on 1/21/11. On 9/12/11, the defendants filed a motion to reconsider the court's partial denial of summary judgment in defendants' favor. The defendants argue that the Seventh Circuit's *Exelon* decision mandates summary judgment in their favor because the Kraft plan offered a sufficient mix of investment options (eleven investment options), including low-cost passively managed and higher-cost actively managed funds.	**Significance:** 1. This lawsuit was filed by the plaintiffs in *Kraft I* when they failed in their attempt to add Kraft's former corporate parent, Altria (formerly, Philip Morris), and certain Altria-related parties as defendants. The second amended complaint in *Kraft II* alleges that: (1) Altria-related defendants breached their fiduciary duty by structuring the company stock funds as unitized funds; (2) Altria-related defendants allowed excessive recordkeeping fees to be paid; and (3) both Kraft-related and Altria-related defendants breached their fiduciary duties by selecting and retaining a growth equity fund and a balanced fund as plan investment options. 2. On 12/17/09, the court dismissed the company stock funds and the recordkeeping expense claims with respect to an Altria committee named as a defendant, based on the court's finding that the six-year limitations period was applicable since the committee stopped being a fiduciary over six years before the complaint was filed. However, these claims were not dismissed with respect to other Altria-related defendants, and *Kraft II* is otherwise still proceeding. 3. On, 2/23/10, the court dismissed without prejudice the company stock funds and the recordkeeping expense claims with respect to the remaining Altria-related defendants. This dismissal is subject to the terms of a joint stipulation, whereby the parties agreed that if the judgment in *Kraft I* is remanded for further proceedings as to the company stock funds and recordkeeping expense claims, the parties consent to the addition of the affected Altria-related defendants to *Kraft I* with respect to the company stock funds and recordkeeping expense claims. 4. On 7/14/11, the court denied, in part, and granted, in part, the defendants' motion for summary judgment. The court ruled that *res judicata* did not bar plaintiffs' claims because a final decision has not been rendered in *Kraft I*. The court also ruled that ERISA section 404(c) does not provide a defense to claims based on the selection and retention of plan investment options. The court ruled, however,

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					that ERISA's six-year statute of limitations barred claims regarding the imprudence of selection and retention of the growth equity fund and the balanced fund before 7/2/02. The court also ruled in favor of the defendants as to plaintiffs' claim that defendants failed to prudently monitor the growth equity fund and the balanced fund. The court explained that the plaintiffs failed to produce evidence to contradict evidence of monitoring produced by the defendants. 5. On 7/19/11, the court denied the plaintiffs' motion for partial summary judgment. The court ruled that the plaintiffs failed to establish that retention of the growth equity fund and the balanced fund after 1999—when actively managed funds were removed from defined benefit plans—was imprudent as a matter of law. 6. On 7/19/11, the court vacated the class certification order based on the Seventh Circuit's class certification opinion in *Spano v. Boeing*. 7. Motion for class certification filed on 9/2/11. 8. Bench trial held on 11/7/11. 9. Settlement - On February 23, 2012, the parties agreed to a settlement of both the "Kraft I" and "Kraft II" lawsuits. On February 29, 2012, the court granted the settlement preliminary approval. A fairness hearing is scheduled for June 26, 2012. The proposed settlement calls for defendants to pay $9,500,000 into a settlement fund, to be disbursed to the settlement class of all persons who participated in the Plan at any time between October 16, 2000 and February 23, 2012.
13.	*Loomis v. Exelon Corp.*, 1:06-cv-04900 (N.D. Ill. filed 9/11/06) Judge John W.	Motion to dismiss granted, in part, and denied, in part, on 2/21/07. Plaintiff's prayer for investment losses stricken	Motion for class certification granted on 6/26/07.	Not made.	**Significance:** 1. Permission to file an amended complaint denied on 11/14/07 with leave to re-file.

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	Darrah Amended complaint filed on 8/19/09	because plaintiff failed to allege nexus between administrative fees charged by participants and market-based losses. Motion to dismiss amended complaint filed on 9/11/09.			2. Prayer for investment losses stricken. 3. Class certified. 4. The amended complaint alleges, among other things, that: (1) defendants improperly used retail mutual funds when less expensive institutional mutual funds, separate accounts, or commingled funds were available; and (2) defendants improperly allowed administrative fees to increase with the increase in plan assets. 5. On December 9, 2009, the court granted defendants' motion to dismiss the amended complaint. The court based its decision on its finding that the case was not "materially distinguishable" from the Seventh Circuit's *Hecker v. Deere* decision. The court ruled that, as in *Hecker*, the gist of the plaintiffs' claim is that defendants violated fiduciary duties by selecting investment options with excessive fees. The court ruled that this claim could not survive defendants' motion to dismiss because *Hecker* found that plan fiduciaries do not have to "scour the market to find and offer the cheapest possible fund." The court noted that the fund expense ratios were in line with the fund expense ratios in *Hecker*. Further, the court noted that the facts were even better for the defendants than the facts in *Hecker* because the plan involved in *Hecker* only offered retail funds while the plan in issue in this case offered both retail and wholesale funds. The court also found that plaintiffs' challenge of revenue sharing arrangements and asset based fees were foreclosed by *Hecker*. Lastly, the court found that plaintiffs failed to state a claim against certain corporate committees named as defendants because the plaintiffs failed to allege anything beyond mere conclusory statements. 6. Plaintiffs have appealed the court's decision dismissing the case to the Seventh Circuit. Oral argument was held on 9/13/10. An attorney for the DOL participated in the oral argument in support of plaintiffs. 7. On 9/6/11, Seventh Circuit affirmed the district court's decision dismissing the case. The Seventh Circuit ruled that the plaintiffs failed to state a claim because the plan—like the plan in *Hecker v.*

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					Deere—offered a sufficient mix of investment options with varying expense ratios. The Seventh Circuit also noted that it was not clear that institutional shares of mutual funds are better than retail shares because institutional shares may be less liquid and harder to value, and retail mutual fund fees reflect market competition. The Seventh Circuit also opined that it was not clear that the plan could have used its bargaining power to secure lower fund expense ratios because the plan could not make a single lump-sum investment in a particular fund. The Seventh Circuit also commented that Exelon was not required to pay for fund expenses.

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14.	*Martin v. Caterpillar, Inc.*, 1:07-cv-01009-JBM-JAG (C.D. Ill. filed 9/11/06) Amended complaint filed 5/25/07 Second Amended Complaint filed 7/5/07 Judge Joe Billy McDade	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. 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.	First motion denied on 5/15/07 as moot in light of dismissal of original complaint.	Not made.	**Significance:** 1. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) did not consider/capture additional revenue streams; (2) chose to use actively-managed mutual funds; and (3) chose to use mutual funds instead of separate accounts. Plaintiffs also allege that Caterpillar improperly benefited from the sale of its investment management subsidiary. 2. Although the court dismissed the defendants' motion to dismiss the second amended complaint, the court held that the 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." 4. On 8/4/09, the court entered an order staying the case for 45 days upon plaintiffs' request. The court dismissed all pending motions without prejudice in light of the stay 5. On 10/15/09, the court entered an order staying the case through 10/30/09 upon parties' request and noted that settlement discussions were under way. The stay was subsequently extended through 11/6/09. 6. 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, will be distributed to the class members (participants in the plans at any time between July 1, 1992 and September 10, 2009) according to the number of months in which a class member had an active account in the plans. Also, for a settlement period of two years (which may be extended to four years upon a material breach of the agreement), Caterpillar agreed to: (1) not engage any investment consultant as an investment manager for

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					the plans; (2) provide certain annual disclosures to participants regarding administrative and investment fees; (3) not offer retail mutual funds, except those available through the plans' brokerage windows; (4) generally limit the cash holding in the company stock fund to 1.5 percent; (5) stop paying for recordkeeping fees as a percentage of plan assets; and (6) conduct a request for proposals process for recordkeeping services when the current recordkeeping contract with Hewitt Associates expires. The settlement agreement covers not just the Caterpillar 401(k) Plan mentioned in the Second Amended Complaint, but covers all 401(k) plans participating in a master trust. 8. 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. 9. On 10/28/10, the court approved the settlement as fair, reasonable and adequate.
15.	*Nolte v. CIGNA Corp.*, 2:07-cv-02046-HAB-DGB (C.D. Ill. filed 2/26/07) Amended complaint filed on 7/19/07 Second amended complaint filed on 8/27/09 Third amended complaint filed on	Motion to dismiss original complaint dismissed as moot on 7/23/07. Defendant Prudential Retirement Insurance and Annuity Company filed a motion for judgment on the pleadings on 8/9/10.	Motion for class certification filed on 8/12/11. Motion for class certification refiled on 10/12/11.	Defendants' motion for summary judgment as to the first amended complaint dismissed as moot on 8/28/09. Motion for partial summary judgment and partial dismissal filed by CIGNA on 9/6/11. Motion for judgment on the pleadings filed by PRIAC on	**Significance:** 1. In addition to revenue sharing, plaintiffs complain in the third amended complaint that fiduciaries: (1) did not consider/capture additional revenue streams; (2) invested in funds managed by affiliates; (3) paid layered fees by investing in investment options with subadvisors; (4) invested in funds that charged retail fees; (5) offered a fixed income fund guaranteed by an insurance contract offered by an affiliate; and (6) engaged in prohibited transactions by using CIGNA affiliates as service providers and using plan assets for CIGNA's benefit. Plaintiffs also allege that CIGNA improperly benefited from the sale of its retirement business and that CIGNA obtained services from the purchaser at a discounted rate for its defined benefit and non-qualified plans in exchange for allowing higher fees to be charged on the 401(k) plan. 2. Unlike many of the other companies facing these lawsuits,

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	6/8/10 Fourth amended complaint filed on 9/2/11 Judge Harold A. Baker			9/23/11.	CIGNA chose to use separate accounts instead of mutual funds as investment options. Accordingly, CIGNA avoided the allegation found in many of the other lawsuits that plan fiduciaries should have chosen to use separate accounts rather than mutual funds. 3. In a brief filed on 4/8/09 opposing defendants' motion for summary judgment as to the first amended complaint, plaintiffs argued that *Hecker v. Deere* (7th Cir.)'s holding that revenue sharing does not involve plan assets is not applicable because CIGNA used separate accounts instead of mutual funds. 4. On 9/2/11, the plaintiffs filed a fourth amended complaint to add two new named plaintiffs and to add "additional factual support" to their claims based on discovery. The fourth amended complaint contains an allegation that CIGNA agreed that PRIAC would service CIGNA's plan for at least three years after the sale of CIGNA's retirement business to PRIAC. The plaintiffs also propose separate classes of plaintiffs. 5. In its motion for partial summary judgment and partial dismissal filed on 9/6/11, CIGNA argues that: (1) ERISA's three-year statute of limitations (based on actual knowledge) bars the plaintiffs' excessive fee and prohibited transaction claims arising before 2/26/04 because the total fund expenses and the fact that CIGNA used its subsidiaries as service providers were disclosed to participants; (2) prior ERISA class action settlement (*In re CIGNA Corp. ERISA Litig.*) bars the claims of most named plaintiffs and putative class members against CIGNA Corporation and Corporate Benefit Plan Committee that arose before 3/1/05; and (3) excessive recordkeeping and investment management allegations fail under the Seventh Circuit's *Hecker v. Deere* and *Loomis v. Exelon* decisions because the CIGNA plan offered a "broad array of funds . . . with differing risk and return characteristics and fees . . . ." 6. In its motion for judgment on the pleading filed on 9/23/11, PRIAC argues that: (1) service providers do not bear fiduciary responsibility for deciding fees at which they will offer investment products and services; (2) PRIAC cannot compel the plan to retain

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					its products or services; (3) plaintiffs' allegation that CIGNA agreed that PRIAC would service CIGNA's plan for at least three years after the sale of CIGNA's retirement business to PRIAC, and that CIGNA will not renegotiate PRIAC's fees for at least three years, is consistent with CIGNA (not PRIAC) controlling plan costs; (4) plaintiffs cannot seek monetary relief under ERISA section 502(a)(3); and (5) PRIAC cannot be liable as a co-fiduciary because any "agreement" that CIGNA would retain PRIAC as the plan's service provider preceded PRIAC assuming any fiduciary role with respect to the plan. 7. On 10/7/11, the court suspended briefing on CIGNA's motion for partial summary judgment and partial dismissal pending decision on class certification. A hearing on class certification was held on 10/20/11. 8. The parties are currently engaged in discovery.
Eighth Circuit					
16.	*Tussey v. ABB, Inc.*, 2:06-cv-04305-NKL (W.D. Mo. filed 12/29/06) Amended complaint filed on 7/5/07 Judge Nanette K. Laughrey	On 2/11/08, the court denied ABB and Fidelity's motions to dismiss. The court held that (1) 404(c) defense may not be available to ABB; (2) Fidelity Trust may be a fiduciary as to selection of investment options; and (3) Fidelity Management, the investment adviser to certain mutual funds, may be a fiduciary because it may have paid Fidelity Trust to	Motion to certify class granted on 12/3/07.	Plaintiffs filed a motion for partial summary judgment on 3/9/09. This motion is under seal. Fidelity defendants filed a motion for summary judgment on 3/9/09. This motion is under seal. ABB defendants filed a motion for summary judgment on 3/9/09. This motion is under seal.	**Significance:** 1. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) did not consider/capture additional revenue streams; (2) chose to use actively-managed mutual funds; and (3) chose to use mutual funds instead of separate accounts. 2. On 2/5/08, Eighth Circuit denied Fidelity's petition to appeal the district court's order granting class certification. 3. In ruling on the motions to dismiss, the court held that: (1) ABB was not required to disclose revenue sharing arrangements, but where a participant makes investment decisions without knowledge of revenue sharing arrangements, the participant may not be exercising investment decisions within the meaning of § 404(c); and (2) Fidelity Trust could qualify as a fiduciary because it does the first-cut screening of investment options, and has veto authority over the inclusion of investment options. The court ruled that, even if

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		steer plan assets toward mutual funds that it advised and may have set fees paid with plan assets.			Fidelity Trust is not the final arbiter of plan decisions, it may still be a fiduciary with respect to selecting funds. The court also ruled that Fidelity Management, the investment adviser to certain mutual funds, could be a fiduciary if it paid Fidelity Trust to steer plan assets toward mutual funds that it advised or if it set fees paid with plan assets. 4. Class certified. 5. Trial held from 1/5/10 to 1/28/10. 6. On 9/22/10, the court denied without prejudice the parties' motions for judgment on partial findings. The court explained that it would not address issues piecemeal. 7. On 3/31/12, the court issued a decision finding several fiduciary breaches and awarding the plaintiffs $36.9 million in damages. **Recordkeeping Costs/Revenue Sharing:** The Court found that the ABB defendants had breached by allowing plan participants to pay recordkeeping fees to Fidelity (via revenue sharing arrangements) which were well beyond market rates. The Court found that ABB failed to calculate the amount of actual fees paid and failed to attempt to leverage the plan's size in order to obtain a less expensive recordkeeping arrangement with Fidelity. Also, the Court identified a 2005 consultant's report which identified that the fees were excessive, thereby putting ABB on notice. On this claim, the Court awarded $13.4 million to plaintiffs. **Cross-Subsidy:** In addition to serving as plan recordkeeper, Fidelity provided "corporate" services—as opposed to plan-related services—to ABB, including payroll services and recordkeeping for ABB's health and welfare plans, defined benefits plans, and certain non-qualified plans. The Court found that revenue sharing income generated from plan assets was used to "subsidize" the cost of these corporate services, and that the same 2005 consultant's report had identified this "cross-subsidy" and thus put the ABB defendants on notice. The Court found that the $13.4 million award for excess

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					recordkeeping fees covered the damages on this count. **Fund Replacement & Mapping:** The Court also found that ABB had breached its fiduciary duty by replacing a Vanguard fund with a Fidelity fund through a process which did not comport with the Plan's investment policy statement. Here, the Court suspected that ABB was motivated by its own corporate interests (rather than in the interests of participants and beneficiaries) in deciding to replace the fund on account of the subsidization of other Fidelity services. Here, the Court assessed $21.8 million in damages. **Prohibited Transaction:** The Court also held that ABB's mapping process amounted to a prohibited transaction under ERISA in that ABB engaged in a transaction with Fidelity where ABB used Plan assets to reduce the amount of hard-dollar recordkeeping fees that ABB would have to pay. **Separate Accounts/Co-Mingled Funds:** The Court ruled that ABB did not breach its duty of prudence to the plans by an alleged failure to offer more separate accounts and/or co-mingled funds as investment options, finding that the plan offered an adequate number of co-mingled accounts and had declined to offer more separate accounts for valid reasons. **Fidelity's Retention of Float:** The Court found that Fidelity had breached its fiduciary duty by applying the income and interest earned from plan assets, or "float", to defray certain overnight bank transfer charges which, in the Court's view, should have been borne by Fidelity. As a threshold matter, the court found Fidelity was a fiduciary with respect to these overnight bank transactions due to the discretion exercised by Fidelity in moving the plan assets from account to account. Here, the court ordered Fidelity to pay $1.7 million in damages.

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17.	*Braden v. Wal-Mart Stores, Inc.*, 6:08-cv-03109-GAF (W.D. Mo. filed 3/27/08) Amended complaint filed on 7/21/10 Judge Gary A. Fenner	Motion to dismiss granted on 10/28/08; but the Eight Circuit subsequently reinstated the case on 11/25/09. Motion to dismiss amended complaint filed by Merrill Lynch on 10/1/10. Motion to dismiss amended complaint filed by Wal-Mart on 10/1/10. .	Motion for class certification renewed on 4/21/10.	Not made.	1. On October 28, 2008, the court granted the defendants' motion to dismiss the case by finding that the plaintiff lacked standing to assert claims for alleged fiduciary breaches that occurred prior to October 31, 2003, the date the plaintiff first contributed to the plan, and that the plaintiff otherwise failed to state a claim upon which relief can be granted. The court explained that the plaintiff failed to state a claim because the plaintiff failed to allege facts showing that the process used by the defendants to select the allegedly expensive funds was flawed. In this regard, the court stated that the defendants could have chosen allegedly expensive funds with revenue sharing "for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility[,]" and that the plaintiff failed to allege "facts showing [that] Wal-Mart . . . failed to conduct research, consult appropriate parties, conduct meetings, or consider other relevant information" in selecting the allegedly expensive funds. As to the non-disclosure of certain fund expense and revenue sharing information, the court held that the defendants did not have a duty to disclose such information. As to the plaintiff's claim that defendants caused a prohibited transaction by allowing the plan trustee to receive revenue sharing payments from mutual funds offered as investment options, the court held that the plaintiff failed to show that the alleged prohibited transaction was not exempted by ERISA § 408(b)(2) exempting a party in interest's receipt of reasonable compensation for services. 2. The district court's dismissal was appealed to the Eighth Circuit. 3. On November 25, 2009, the Eight Circuit vacated the district court's decision dismissing the case and remanded the case to the district court. The Eighth Circuit ruled that from the facts pled by the plaintiff – e.g., that defendants selected retail shares of mutual funds when the plan could have obtained less expensive institutional shares – it is reasonable to infer that the process used by the defendants was flawed. The Eighth Circuit also ruled that a plan fiduciary has a duty to disclose material information and that a reasonable trier of fact could find that the fund expense and revenue sharing information sought by plaintiff is material to a reasonable plan participant. In addition, the Eight Circuit ruled that: (1) the plaintiff had Article III standing because he allegedly suffered a

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					redressable personal harm due to defendants' conduct; (2) the relief that could be sought by the plaintiff under ERISA "is not necessarily limited to the period in which [the plaintiff] personally suffered injury"; and (3) as to whether ERISA section 408(b)(2) exemption was applicable to the plaintiffs' prohibited transaction claim, the plaintiff had alleged sufficient facts to "shift the burden to [the defendants] to show that 'no more than reasonable compensation [was] paid' for [the plan trustee]'s services." 4. On 7/21/10, the plaintiff filed an amended complaint to add more detail to the complaint and to add Merrill Lynch as a defendant. Merrill Lynch is alleged to have been a plan fiduciary by restricting available plan investment options and is alleged to have breached its fiduciary duty by offering funds based on the amount of revenue sharing that would be made available to Merrill Lynch. **Settlement** On 3/19/12, the court granted final approval to a settlement of this action. Under the settlement, defendants will pay a total of $13,500,000. Of this total, Wal-Mart agreed to contribute $3,500,000, and Merrill Lynch agreed to contribute $10,000,000 from amounts held within the Plan's forfeiture expense account. The settlement amount initially will be reduced by (a) the cost of providing notice of the settlement to the class members, (b) attorneys' fees in an amount not to exceed 30% of the total settlement, plus costs and expenses, (c) a $20,000 case contribution award to Braden, and (d) any associated taxes. Because of the relatively small losses alleged to have been experienced by the individual Plan participants and the large number of participants, the parties agreed that it would be cost-prohibitive to distribute the remaining settlement proceeds to the class members. Instead, the settlement provides that the amount remaining after payment of (a)-(d) above will be used to reduce future Plan expenses and administrative fees that otherwise would be charged to individual Plan accounts.

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					The settlement also provides for several forms of injunctive relief, which would require the Retirement Plan Committee for the Plan over the next two years to: - continue to retain an investment consultant who has acknowledged ERISA fiduciary status in writing, and to review the consultant annually for conflicts of interest; - continue to make available web-based investment education resources to Plan participants; - continue an ongoing process to eliminate from the Plan investment options funds that are retail mutual funds, funds that pay 12b-1 fees, and funds that provide revenue sharing or similar fees to any party in interest, including the Plan's trustee or recordkeeper; - consider adding more passively managed funds as investment options; and - comply with the DOL's participant disclosure regulation and, in those materials, provide links to certain DOL and SEC websites on fees.

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Ninth Circuit					
18.	*Kanawi v. Bechtel Corp.*, 3:06-cv-05566-CRB (N.D. Cal. filed 9/11/06) Judge Charles R. Breyer Amended complaint filed on 11/9/06. Second amended complaint filed on 3/23/07. Third amended complaint filed on 3/18/08.	Motion to dismiss denied on 5/15/07 because (a) plaintiff adequately pled non-disclosure; (b) ERISA § 404(c) defense is an affirmative defense that cannot be used on motion to dismiss; and (c) plaintiffs adequately alleged that Bechtel was a plan fiduciary.	Motion for class certification denied without prejudice on 8/24/07. By order dated 8/27/07 the court explained that the motion may be "renewed" at anytime through re-noticing the motion. On 8/28/08, plaintiffs renewed the motion for class certification. Renewed motion for class certification granted on 10/10/08.	On 9/16/08, plaintiffs filed a motion for partial 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 defendants.	**Significance:** 1. In denying defendant's motion to dismiss, the court noted that compliance with ERISA and DOL regulations would not preclude a fiduciary breach claim and that failure to disclose revenue sharing is relevant to whether a participant exercised investment control within the meaning of ERISA § 404(c). 2. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) did not consider/capture additional revenue streams; (2) included retail mutual funds (and funds of funds) as investment options; and (3) chose to use actively-managed investment options. Plaintiffs also allege that Fremont Investment Advisors ("FIA") – an entity alleged to have originated from Bechtel's investment advisory and management division – was responsible for: selecting, monitoring, evaluating, and terminating investment managers for the investment options; negotiating agreements with the investment managers; and managing its own proprietary funds, some of which were included as the plan's investment options. Plaintiffs argue that FIA received undisclosed revenue sharing payments from plan service providers that FIA selected, and that this constituted a series of prohibited transactions. Plaintiffs also argue that the plan is entitled to some of the proceeds from the sale of FIA to a third party. 3. Class certified on October 10, 2008. 4. On 11/3/08, 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

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					claims alleging that the plan is entitled to some of the proceeds from the sale of FIA to a third party. 5. Plaintiffs' sole remaining claim following the 11/3/08 decision – a self-dealing claim relating to a four-month period – was settled by agreement dated March 3, 2009. 6. The plaintiffs appealed the court's 11/3/08 decision to the Ninth Circuit. 7. The parties have agreed 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. The plaintiffs' attorneys are to receive as fees the lesser of $4.86 million or 30% of the net settlement fund (i.e., $18.5 million minus litigations costs of $1.57 million, administration costs, and each named plaintiff's incentive award of $7,500) and litigation costs of $1.57 million. The net settlement fund is to be divided among persons who participated in either of two 401(k) plans (collectively, "plan") from January 1, 1992 through September 30, 2010, as well as their beneficiaries and alternate payees, based on the timing and length of participation in the plan. In addition, for a period of three years, Bechtel agreed to (1) continue not to use for the plan investment managers or service providers owned by Bechtel or any member of the Bechtel Trust & Thrift Plan Committee; (2) engage a service provider to prepare an annual disclosure to all current plan participants regarding fees charged to their plan accounts; (3) not offer retail mutual funds as investment options in the plan; (4) continue not to pay plan recordkeeping fees on a percentage of asset bases; and (5) conduct a competitive bidding process for plan recordkeeping contract in 2012.

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19.	*In re Northrop Grumman Corp. ERISA Litig.*, 2:06-cv-6213-R-JC (C.D. Cal. filed 9/28/06) Reassigned from Judge Manuel L. Real to Margaret M. Morrow Revised consolidated second amended complaint filed on 9/15/10	Motion to dismiss granted on 2/26/07 with prejudice as to claims asserted by plaintiff Waldbuesser (lack of standing) and denied without prejudice (and with leave to file an amended complaint) as to other plaintiffs. Motion to dismiss first amended complaint in *Grabek* with prejudice granted with respect to Northrop and its director defendants on 5/23/07 "for the reasons set forth in defendants' briefs" – which we understand to have addressed whether the complaint's allegations failed to establish that Northrop and its director defendants had or exercised any fiduciary duty.	First motion denied as moot in light of dismissal of original complaint. Second motion for class certification denied on 8/6/07 because the case is "better taken care of by administrative agencies." On 10/11/07, the Ninth Circuit Court of Appeals granted plaintiff's petition to appeal the district court's denial of class certification. On 1/14/11, the plaintiffs filed a motion for class certification. Class certified on 3/29/11.	On 3/28/11, the defendants filed a motion for summary judgment.	**Significance:** 1. *Heidecker* and *Grabek* actions, and all future actions based on same facts filed in Central District of California, were consolidated on March 26, 2007. 2. Amended complaint includes allegation that funds labeled as actively managed funds operated in reality as passively managed funds, so that the active management fees were unjustified. 3. On 10/1/07, the Ninth Circuit stayed the district court proceedings while the class certification order is on appeal. 4. On 9/8/09, the Ninth Circuit ruled that the district judge abused his discretion by failing to make any findings in denying class certification. The Ninth Circuit vacated the class certification order and ordered that the case be assigned to a different judge. 5. On 8/12/10, the court entered an order permitting plaintiffs to file a consolidated second amended complaint that omits Northrop as a defendant. The plaintiffs filed a second amended complaint on 8/20/10. (The plaintiffs filed a revised consolidated second amended complaint to clarify that Northrop is not a defendant.) 6. On 10/5/10, the plaintiffs filed a motion to file a third amended complaint to add Northrop as a defendant based on the alleged discovery of evidence showing that Northrop acted as an ERISA fiduciary. The court denied the motion on 12/9/10, concluding that the plaintiffs did not act diligently in developing evidence as to whether Northrop was a plan fiduciary. 7. Class certified on 3/29/11.

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No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
20.	*Tibble v. Edison International*, 2:07-CV-05359-SVW-AGR (C.D. Cal. filed 8/16/07); 10-56406 (9th Cir.); 11-56628 (9th Cir.) Judge Stephen V. Wilson Amended complaint filed on 8/5/08. Second amended complaint filed on 4/15/09.	Motion to dismiss original complaint granted in part and denied in part on 7/16/08.	Filing of motion deferred by court on 11/1/07, and parties relieved of time deadlines. Motion for class certification filed on 5/8/09. Motion for class certification granted on 06/30/09.	Defendants filed a motion for summary judgment as to the second amended complaint on 5/18/09. Plaintiffs filed a motion for partial summary judgment as to the second amended complaint on 5/29/09.	**Significance:** 1. On 7/16/08, the court dismissed fiduciary breach claims against plan sponsor defendants with leave to file an amended complaint. The court reasoned that the fiduciary breach claims did not relate to the plan sponsors' duties to properly appoint plan fiduciaries. The court, however, allowed the fiduciary breach claims to proceed against other defendants. The court ruled that revenue sharing may involve plan assets, such that prohibited transaction claims can properly be asserted. The court also ruled that under Ninth Circuit precedent, ERISA's general fiduciary duty provision requires disclosure of material fee information without a request from a plan participant. 2. The amended complaint filed on 8/5/08 and the second amended complaint filed on 4/15/09 include allegations that the plan sponsor failed to properly appoint and monitor plan fiduciaries. 3. On 5/29/09, plaintiffs filed a motion for partial summary judgment as to defendants' liability in including mutual funds that paid revenue sharing and in allowing the trustee to retain float. 4. Class certified. 5. On 7/16/09, the court granted in part defendants' motion for summary judgment and denied plaintiffs' motion for partial summary judgment. The court ruled that: (1) plan sponsor did not violate ERISA § 406(b)(3) in offering mutual funds under the plan because the decision to offer mutual funds was made by fiduciaries other than the plan sponsor; (2) plan fiduciary did not violate § 406(b)(2) in deciding to offer mutual funds under the plan because the plan fiduciary did not represent the mutual funds; (3) defendants properly interpreted the plan as allowing the use of revenue sharing to pay recordkeeping fees and allowing the trustee to retain float; (4) the inclusion of retail mutual funds and sector funds was proper because participants demanded such funds; (5) defendants properly selected, monitored, and removed a technology fund; (6) defendants properly included a money market fund rather than a stable value fund; (7)

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No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
					offering the stock fund as a unitized fund was proper; and (8) statute of limitation barred most of these claims. However, the court held that: (i) § 404(c) was not applicable in light of plaintiffs' claim that defendants offered improper investment options; (ii) triable issues remained as to whether defendants' desire to generate revenue sharing to pay for recordkeeping fees that the plan sponsor was otherwise required to pay under the terms of the plan tainted the defendants' selection of retail mutual funds; and (iii) trial issues remained as to whether the trustee's retention of float constituted a prohibited transaction. 6. On 7/31/09, the court granted summary judgment to defendants as to the float claim. The court ruled that the statute of limitations barred plaintiffs' challenge to the defendants' decision to allow the trustee to retain float and ruled that a failure to act within the limitations period cannot form the basis of a prohibited transaction claim. The court also ruled that plaintiffs' float claim did not satisfy the notice pleading requirement. However, the court ruled that triable issues existed as to whether the money market fund charged excessive fees. 7. A bench trial was held on October 20-22, 2009 as to: (1) whether the defendants' desire to generate revenue sharing to pay for recordkeeping fees that the plan sponsor was otherwise required to pay under the terms of the plan tainted the defendants' selection and retention of retail share classes of six specific mutual funds; and (2) whether the money market fund charged excessive fees. 8. On June 8, 2010, the court ruled that plan fiduciaries did not select and retain the retail share classes of six mutual funds to lower what Edison had to pay as plan recordkeeping fees. The court, however, concluded that plan fiduciaries breached their fiduciary duties by selecting the retail share classes of three mutual funds – which were added to the plan within ERISA's six year statute of limitations – because, given the plan's asset size, the plan fiduciaries could have obtained institutional share classes with lower fees. With respect to the money market fund, the court ruled that the evidence did not support plaintiffs' claim that the management fees were

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					excessive. The court noted that the plan fiduciaries selected the money market fund following a request for proposal process. 9. On August 9, 2010, the court entered a judgment in favor of plaintiffs for $370,732 – the excessive fees participants paid on the three mutual funds and the lost investment earnings on the excessive fees paid. The court also ordered defendants to replace one of the retail share classes still offered to participants to an institutional share class of the same fund. 10. Plaintiffs and defendants have both appealed to the Ninth Circuit, where briefing is not yet completed. On 5/25/11, the DOL filed an amicus brief in favor of the plaintiffs. The court has not yet scheduled oral argument. 11. On 8/22/11, the district court entered an order declining to award fees to plaintiffs' attorneys and granting, alternatively, the defendants' request for costs up to the fees requested by the plaintiffs' attorneys. Thus, neither party received any fees or costs.
21.	*Daniels-Hall v. National Education Association*, 3:07-cv-05339-RBL, (W.D. Wash. Filed 7/11/07) Hon. Ronald B. Leighton	Court dismissed plaintiffs' claims on 5/23/08.	Deadline for filing a motion set as 6/7/09.	Not made.	**Significance:** 1. Alleges that National Education Association recommended ERISA § 403(b) plan providers in return for endorsement fees and that the plan providers improperly received revenue sharing payments. 2. The court dismissed plaintiffs' claims on 5/23/08. The court ruled that National Education Association, as an employee association, cannot, as a matter of law, establish or maintain a § 403(b) annuity plan. The court also ruled that pursuant to a safe harbor, the school district employers did not establish or maintain a § 403(b) plan. Accordingly, the court ruled that it lacked subject matter jurisdiction as the § 403(b) annuities were not "plans" under ERISA. 3. The court's order dismissing plaintiffs' claims was appealed to the Ninth Circuit Court of Appeals.

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					4. On 12/20/10, the Ninth Circuit affirmed the district court's order dismissing the case. The Ninth Circuit concluded that the district court had subject matter jurisdiction because the plaintiffs alleged a cause of action arising under ERISA. The Ninth Circuit then concluded that the plaintiffs failed to state a claim because there was no "plan" under ERISA. The court explained that: (1) the NEA's "Valuebuilder Program" is a marketing plan, rather than an ERISA plan; (2) the school districts' ERISA section 403(b) annuity plans are "governmental plans" exempt from Title I of ERISA; and (3) the Valuebuilder annuities were not "established or maintained" by the NEA and therefore not "employee pension benefit plans" subject to ERISA.

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First Circuit					
22.	*Columbia Air Services, Inc. v. Fidelity Management Trust Co.*, 1:07-CV-11344-GAO (D. Mass., filed 7/23/07) Judge George A. O'Toole, Jr.	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	Not made.	Not made.	**Significance:** 1. Fiduciary status under ERISA is not an "all-or-nothing" concept. A service provider only has fiduciary status when – and to the extent – that it *exercises* discretionary authority. 2. Plaintiff failed to allege facts indicating that Fidelity exercised fiduciary responsibilities in negotiating the terms of its engagement as a directed trustee, including its compensation: the contract with the plan was negotiated at arms' length, and the 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.

Plan Fiduciary Claims Against Plan Providers					
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		available to the plan and its participants. 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 to alter or amend/leave to file amended complaint.			
23.	*Charters v. John Hancock Life Insurance Co.*, 1:07-CV-11371-NMG, (D. Mass. filed on 7/26/07) Judge Nathaniel M. Gorton	Defendant's motion to dismiss denied on 12/21/07 because (a) a reasonable fact finder could determine that the Defendant's right to change the mutual funds included in its lineup of investment options could give rise to ERISA fiduciary status;	Plaintiff's Motion for Class Certification is pending (filed 11/14/08).	Defendant filed a motion for summary judgment as to the claims asserted in Plaintiff's class action complaint on March 7, 2008. Defendant alleges that it is not a fiduciary and, even if it were found to be a fiduciary, Defendant did not breach any fiduciary duties or engage in any prohibited	In his complaint, the Plaintiff alleged that Defendant, which managed the plans' assets in separate accounts, received revenue sharing payments to which it was not entitled, because the amount of such payments exceeded the amount by which Defendant reduced certain administrative fees and/or exceeded the fees authorized in group annuity contracts issued by Defendant to its plan clients. 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-

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		(b) Plaintiff had standing to assert claims on behalf of trustees of other plans; On September 30, 2008, the court granted the plaintiff's motion to dismiss Defendant's contribution and indemnification counterclaims, finding that such claims are not expressly provided for in ERISA and that, based upon recent Supreme Court and other authority, such claims should not be implied into the federal common law of ERISA.		transactions. On June 30, 2008, Plaintiff cross-moved for partial summary judgment on the issue of whether Defendant is a plan fiduciary.	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. On August 21, 2009, the parties agreed to a Stipulation of Dismissal and Judgment. The parties' Stipulation notes that discovery in the case revealed that Hancock applied the revenue sharing payments it received from the mutual funds to reduce the administrative fees it charged to the plan. The Stipulation notes that further prosecution of the action would be protracted and unjustifiably costly.
24.	*Golden Star, Inc. v. Mass Mutual Life Insurance Co.*, 3:11-cv-30235-MAP (D. Mass filed 10/19/11) Judge Michael A. Ponsor				In this putative class action, the plaintiff 401(k) plan alleges that Mass Mutual, as a plan service provider, breached its fiduciary duty and engaged in prohibited transactions by receiving and mischaracterizing certain revenue sharing payments received from plan-invested mutual funds. Note: The complaint is nearly identical to the complaint filed in the District of Connecticut in October 2011 in the case *Healthcare Strategies, Inc. v. ING Life Ins. And Annuity Co.*, 3:11-cv-00282-JCH (D. Conn.). The same law firm (Shepherd Finkelman Miller & Shah. LLP) filed both complaints. On 1/25/12, the parties stipulated to dismissal of claims related to Mass Mutual's Guaranteed Interest Accounts and Capital Preservation Accounts in light of the 1/18/12 ruling in the parallel

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					ING action. Discovery is set to commence on May 24, 2012.
Second Circuit					
25.	*Haddock v. Nationwide Financial Services, Inc.*, 3:01-CV-1552-SRU, 419 F.Supp.2d 156 (D. Conn. filed on 8/15/01); 10-4237 (2d Cir., appeal 10/20/10) Judge Stefan R. Underhill	Defendant's motion to dismiss the Amended Complaint denied on 9/25/07 because (a) Nationwide may have been a plan fiduciary because it retained discretion to add and delete the fund options offered to plans under its variable annuity products; (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	A hearing on the Motion to Certify Class was held on February 27. On March 27, the plaintiffs submitted a proposed order granting class certification. On April 14, the defendants submitted objections to the plaintiffs' proposed order. On July 20, 2009, a trustee of a 401(k) profit sharing plan and member of the proposed class filed a motion to intervene as a plaintiff and class representative in the action, as a result of the parties' inability to agree on a named class representative. The court ordered that limited discovery be taken with respect to the proposed class	Denied on 3/7/06 with respect to Fourth Amended Complaint. (a) Nationwide may have been a plan fiduciary because it retained discretion to add and delete the fund options offered to plans under its variable annuity products; (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,"	**Significance:** In denying Defendant's motion to dismiss, the district court adopted a two-pronged test for determining what constitutes "plan assets" under ERISA: items a defendant holds or receives (1) as a result of its status as a fiduciary or as a result of its exercise of fiduciary discretion or authority; and (2) at the expense of plan participants or beneficiaries. *Haddock* is the first of the 401(k) fee cases against ERISA plan service providers to be certified as a class. As such, it stands in sharp contrast to the August 2008 denial of class certification in the *Ruppert v. Principal* fee case, discussed below, where the court found that certification was inappropriate because a determination of Principal's fiduciary status and breach would require an intensive, plan-by-plan inquiry, and because there was substantial variability concerning Principal's relationship with its plan clients. The class consists of trustees of 24,000 ERISA covered plans that had variable annuity contracts with Nationwide or whose participants had individual variable annuity contracts with Nationwide, after the earlier of January 1, 1996 or the first date Nationwide began receiving revenue sharing payments based on a percentage of invested assets. In granting class certification, the court held: (1) that the named plaintiffs had standing to sue on behalf of other plans, even though they were not fiduciaries of such plans; (2) that the named plaintiffs were adequate class representatives, despite technical differences between the named plaintiffs' contracts with Nationwide and those of the class members as a whole; (3) that the plaintiffs satisfied the requirements for class certification under Rule 23(b)(2) in that an

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		sharing could have involved illegal "kickbacks" prohibited by ERISA. (c) Trustees could have amended complaint to add fund selection claim and did not waive claim by including in first complaint but omitting from subsequent complaints. Plaintiffs' motion to dismiss Nationwide's counterclaims granted on August 11, 2008 because (a) Even though Nationwide, as a fiduciary, has standing to assert claims for contribution and indemnification against the plaintiffs, there was no indication that the plaintiffs received any benefit from Nationwide's receipt of revenue sharing payments. (b) While Nationwide had standing, as a purported fiduciary, to	representative. On November 6, 2009, the court granted the motion to intervene and granted the motion for class certification. Nationwide petitioned the Second Circuit for permission to appeal the class certification order. On 2/6/12. the Second Circuit vacated the order for class certification and remanded to the district court. On January 29, 2010, Nationwide moved for class certification of its counterclaim against the individual plaintiff trustees. On July 23, 2010, the court denied Nationwide's class certification motion and dismissed its counterclaim.	Nationwide's receipt of revenue sharing could have involved illegal "kickbacks" prohibited by ERISA.	individual plan-by-plan determination concerning Nationwide's fiduciary status and breach was not required, the plaintiffs claims for injunctive and declaratory relief predominated over their request for monetary relief (disgorgement of Nationwide's revenue sharing payments); and disgorgement was an appropriate remedy. The Second Circuit granted Nationwide's petition for interlocutory appeal of the district court's 11/6/09 order granting class certification . Oral argument on the appeal was held on 11/18/11. On 2/6/12, the Second Circuit vacated the district court's class certification order. The Second Circuit ruled that the customer plans ' claims which sought the disgorgement of the revenue sharing payments that Nationwide previously received cannot be certified as a mandatory class under Fed.R.Civ.P 23(b)(2). The Second Circuit remanded the case to the district court to determine whether a class can be certified under Rule 23(b)(3), which will require plaintiffs to establish that common questions of law or fact predominate over questions affecting individual members and that a class action is a superior means to adjudicate the controversy.

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		assert breach of fiduciary duty claims on behalf of the plans, there was no indication that the *plans* suffered any harm as a result of the *plaintiffs'* breach, as required by ERISA § 409. 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.			

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26.	*Beary v. ING Life Insurance and Annuity Co.*, 3:07-CV-00035-MRK, (D. Conn. filed on 1/8/07) Amended complaint filed on 3/9/07 Judge Mark R. Kravitz	Motion to dismiss granted on 11/5/07. On January 4, 2008, the district court denied the plaintiff's motion to alter or amend the court's dismissal of the case.	Moot in light of dismissal.	Moot in light of dismissal.	**Significance:** Action brought under state fiduciary law on behalf of IRC § 457(b) plan and similarly situated plans. The court held that, by pleading so as to avoid dismissal based upon federal securities law preemption, Plaintiff conceded away claim . The court found that the plaintiff had full knowledge of ING's revenue sharing arrangement for several years prior to filing suit and his failure to initiate timely legal action constituted acquiescence to the revenue sharing arrangement. 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.
27.	*Phones Plus, Inc. v. The Hartford Financial Services, Inc.*, 3:06-CV-01835-AVC, 2007 WL 3124733 (D. Conn. filed 11/14/06) Amended complaint filed 3/5/07. Hartford filed a third-party complaint against third-party defendants Thomas Sodemann and Robert Sodemann on 12/6/07. Judge Alfred V.	Defendants' motion to dismiss amended complaint denied on 10/23/07 because (a) Plaintiffs alleged enough facts in support of their contention that Hartford is a fiduciary, including the fact that Hartford had discretion to make unilateral changes to the menu of investment options offered to plan participants, and that the plan sponsor's ultimate authority concerning Hartford's changes to the menu of investment options was only one factor to be considered; (b) whether a given	Plaintiff filed a motion for class certification on March 4, 2008, which was not decided by the court. On June 20, 2008, the Plaintiff filed an amended motion for class certification. On March 4, 2009, the court denied the Plaintiff's June 20, 2008 class certification motion as moot, in light of its order on the same date permitting the Plaintiff to amend its complaint. Plaintiff filed its motion for class	Hartford filed a motion for summary judgment on March 3, 2008. On March 4, 2009, the court denied Hartford's March 3, 2008 summary judgment motion as moot, in light of its order on the same date permitting Plaintiff to amend its complaint. Defendant Hartford Life filed its motion for summary judgment with respect to Plaintiff's second amended complaint on June	**Significance:** Notably, the district court also held that DOL Adv. Op. 1997-16A (May 22, 1997) ("Aetna Letter"), upon which Defendants relied in arguing that they are not fiduciaries, was not dispositive, because (1) the Aetna Letter was merely persuasive authority; and (2) Defendants did not make the same fee disclosures and follow the same notification process when making fund line-up changes, as contemplated by the Aetna Letter. On November 14, 2008, Plaintiff and Neuberger advised the court that they had reached a settlement in principle to settle their dispute. On July 17, 2009, the court approved the settlement, dismissing the action against Neuberger with prejudice. <u>Settlement</u> The proposed settlement calls for the creation of two settlement classes: (1) a Monetary Relief Class (consisting of current and former trustees, sponsors, fiduciaries, and administrators of ERISA-covered 401(a) or 401(k) plans for which Hartford provided services from November 14, 2003 through the date that the court granted preliminary approval of the settlement) and (2) a Structural Changes Class (consisting of trustees, sponsors, fiduciaries, and

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	Covello	item constitutes "plan assets" is a mixed question of fact and law, and the plaintiffs alleged sufficient facts in support of their allegations that the revenue sharing payments constituted plan assets; (c) the court could not conclude as a matter of law that Neuberger, an investment advisor retained by Hartford to review and evaluate the investment options offered to the plan participants and to provide investment advice to the plan, had no duty to investigate and inform the plaintiff about revenue sharing payments; and (d) even if not a fiduciary, Hartford could be subject to non-fiduciary liability for knowingly participating in Neuberger's alleged fiduciary breach. On September 29, 2008, the district court denied the plaintiff's motion to dismiss defendants'	certification with respect to its second amended complaint on June 17, 2009.	17, 2009.	administrators of ERISA-covered 401(a) or 401(k) plans for which Hartford provides services on or after the date the court granted preliminary approval of the settlement). The court granted final approval of the settlement on June 22, 2010. Per the settlement, Hartford will pay $13,775,000 less attorneys' fees and costs (in the amount of $6,862,500) to the Monetary Relief Class. In addition, Hartford will make several changes to its plan-related documents with respect to the Structural Changes Class. Hartford agreed that these changes would remain in effect for a minimum of five years. Specifically, Hartford: • will remove from prototype plan documents a provision indicating that the prototype plan sponsor may limit the types of property in which plan assets can be invested. Hartford further agreed to not to enforce this provision as to its existing plan customers; • with regard to its group annuity contracts and group funding agreements, o will seek insurance department approval of revisions to the documents to further explain that Hartford will not delete or substitute an investment option that had been selected by the customer and offered to the plan participants unless the investment option is not available because of either (a) a change in law; or (b) a change or event initiated by the fund company (for example, due to a fund closure or merger). Hartford further agreed to not to enforce this provision as to existing plan customers. o absent client consent, will not enforce a provision in a Separate Account Rider addressing Hartford's ability to invest plan assets in short term money

Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
		counterclaims for contribution, indemnification, and breach of fiduciary duty. The court held fiduciaries can 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.			market instruments, cash, or cash equivalents; o will include in its account opening documents a disclosure that dividends and capital gain distributions payable on the shares of an investment fund are paid in the form of additional shares (if available), together with a customer instruction that dividends and capital gain distributions should be received in the form of additional shares; • Will provide an additional disclosure to customers that all mutual fund investment options on its platform make revenue sharing payments to Hartford; • Will make available to its customers a list of investment options offered for the plan product and the associated revenue sharing rates paid by the fund companies; • Will make available to customers information regarding (i) the revenue sharing rates for investment options offered by plan clients to its participants; (ii) the published expense ratios for investment options offered by plan clients to its participants; (iii) the estimated amount of the revenue sharing received by Hartford in relation to plan's investments (based on an estimated account balance in each investment options); (iv) how such estimates were calculated; (v) what types of payments fall within the definition of revenue sharing; and (vi) the separate account fee (in percentage and dollar terms), the annual maintenance fee (in dollar terms) and per participant fees (in dollars per participant terms). The order approving the settlement agreement provides that Hartford is not a fiduciary with respect to the receipt of revenue sharing payments, as long as it abides by the above changes to the plan-related documents concerning the Structural Changes Class.

Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
28.	*Stark v. American Skandia Life Assurance Corp.*, 3:07-CV-01123-CFD (D.Conn. filed 7/25/07) Judge Christopher F. Droney	Not made. Plaintiff voluntarily dismissed action without prejudice on 11/13/07.	Not made.	Not made.	
29.	*Zang v. Paychex, Inc.*, 6:08-CV-06046-DGL (W.D. N.Y.; filed in E.D. Mich. on 8/15/07) Judge David G. Larimer	On November 2, 2007 Paychex moved to dismiss the complaint. On August 2, 2010 the court granted Paychex' motion on the basis that Paychex could not be considered a fiduciary with respect to the plan. On September 2, 2010, the plaintiff filed notice of appeal to the United States Court of Appeals for the Second Circuit; however, on December 29, 2010, the plaintiff withdrew the appeal.	Not made.	Not made.	**Significance**: Plaintiff alleged that Defendant was a fiduciary because by providing (1) a lineup of mutual funds from which Plaintiff could select a subset to offer as investment options for contributions to the plan, and (2) a custodial agreement by which Plaintiff could appoint a bank custodian for the plan, Defendant inappropriately "channeled" or "steer[ed]" Plaintiff into mutual funds and a bank account that paid revenue sharing to Paychex. Plaintiff claimed that, by seeking and receiving revenue sharing from the mutual fund companies and the custodial bank, Defendant allegedly (1) breached the duty owed by ERISA fiduciaries to act solely in the interest of plan participants, and (2) violated ERISA's prohibited transaction rules. On August 2, 2010, the court granted Paychex's motion to dismiss. In support of its ruling, the court noted that: (1) the administrative services agreement between the plaintiff and Paychex stated that Paychex was not a fiduciary under ERISA and that Paychex' services were limited to recordkeeping and non-discretionary administrative services; (2) Paychex' mere creation and offering of mutual fund lineups to clients did not make it an ERISA fiduciary because those lineups were created prior to the existence of any contractual relationships between Paychex and the plans; (3) the plaintiff – not Paychex – was responsible for selecting the specific mutual funds included in the plaintiff's plan, and under *Hecker v. Deere & Co.*, merely "playing a role" in the selection of investment options is not sufficient to give rise to fiduciary status; (4) under the

Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
					administrative services agreement, Paychex was required to give the plaintiff at least 60 days' advance written notice of proposed deletions or substitutions of mutual fund options, and plaintiff thereafter had the right to reject such proposed changes or terminate his agreement with Paychex, consistent with DOL Advisory Opinion 97-16A (May 22, 1997); (5) the plaintiff failed in his argument that Paychex qualified as a fiduciary because it allegedly controlled how long plan contributions were held in the custodial account pending investment in mutual funds, because the plaintiff failed to allege a basis for concluding that Paychex actually *exercised* control over plan assets, given that the administrative services agreement provided that plan contributions generally would be held in the custodial account for five days, and the plaintiff did not allege that Paychex had deliberately kept amounts in the custodial account for longer than that; and (6) the plaintiff failed to support two additional theories advanced in his briefing on the motion to dismiss – that Paychex was a fiduciary by virtue of allegedly pledging plan assets as security for the company's lines of credit and by allegedly advising clients on selecting mutual funds, as these were unsupported by and/or contrary to documents the plaintiff relied upon in making these assertions.
30.	*Healthcare Strategies, Inc. v. ING Life Ins. And Annuity Co.*, 3:11-cv-00282-JCH (D. Conn., filed 2/23/11) Judge Janet C. Hall	On May 27, 2011, ING moved to dimiss the lawsuit, in part. ING argued that (1) ERISA's statute of limitations period barred any claims alleging fiduciary breaches occurring prior to six years before filing, (2) certain funds referenced in the complaint did not hold "plan assets" and thus ERISA's fiduciary rules do not apply, and	Not made.	Not made.	In this putative class action, the plaintiff 401(k) plan alleges that ING Life Insurance and Annuity Co., as a plan service provider, breached its fiduciary duty and engaged in prohibited transactions by receiving and mischaracterizing certain revenue sharing payments received from plan-invested mutual funds. Note: The complaint is nearly identical to the complaint filed in the District of Massachusetts in October 2011 in the case *Golden Star, Inc. v. Mass Mutual Life Insurance Co.*, 3:11-cv-30235-MAP (D. Mass). The same law firm (Shepherd Finkelman Miller & Shah. LLP) filed both complaints. On 1/19/12, the Court granted the motion to dismiss with respect to the funds which did not hold "plan assets", but denied the motion to dismiss on all other relevant counts.

Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
		(3) ERISA does not provide for a jury trial, as requested by plaintiffs in the complaint. On 1/19/12, the Court granted the motion to dismiss with respect to the funds which did not hold "plan assets", but denied the motion to dismiss on all other relevant counts.			
Sixth Circuit					
31.	*Beary v. Nationwide Life Insurance Co.*, 2:06-CV-00967-EAS-MRA, 2007 WL 4643323 (S.D. Ohio filed 11/15/06) Judge Edmund A. Sargus	The district court granted Defendants' motion to dismiss on 9/17/07 because the action was preempted by the Securities Litigation Uniform Standards Act of 1998. On October 15, 2008, Plaintiff filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit of the dismissal of Plaintiff's claims	Not made.	Not made.	**Significance:** Action brought under state fiduciary law on behalf of IRC § 457(b) plan and similarly situated plans. On February 3, 2010, the Sixth Circuit affirmed the district court's dismissal. In affirming the dismissal, the Sixth Circuit held that Plaintiff's action was not saved by SLUSA's state-actions exception because (1) Plaintiff did not bring the action as a political subdivision "on its own behalf" but rather on behalf of the *plan* (and only a plan itself may bring actions on behalf of a *plan*); and (2) Plaintiff did not bring the action on behalf of a class of named plaintiffs authorizing participation in the action (Plaintiff named only *himself* as a plaintiff, and SLUSA's state-actions exception requires that 50 or more political subdivisions or state pension plans be named as plaintiffs).

Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
Eighth Circuit					
32.	*Ruppert v. Principal Life Ins. Co.*, 4:07-CV-00344-JAJ-TJS (S.D. Iowa; case transferred from S.D. Ill. on 7/25/07); 11-2554 (8th Cir. appeal 7/12/11) First Amended Complaint filed on May 5, 2008. Second Amended Complaint filed on April 27, 1010. Judge John A. Jarvey	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 holding in *Hecker v. Deere & Co.* On November 5, the court granted the defendant's motion for judgment on the pleadings, dismissing the plaintiff's claims that defendant breached its fiduciary duties by failing to disclose or by failing to adequately disclose its negotiation for and acceptance of revenue sharing payments and that defendant violated ERISA's prohibited transaction provisions by using the plan's assets to generate and retain revenue sharing payments.	Motion for Certify Class filed by Plaintiffs on April 21, 2008. 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	On February 2, 2010, Principal moved for summary judgment on Claim III of the plaintiff's complaint – that Principal breached its ERISA fiduciary duties by failing to disclose or by failing to adequately disclose that Principal earns interest on monies awaiting transfer to mutual funds and other investment options, commonly known as "float." On May 27, 2010, the court granted Principal's summary judgment motion with respect to the plaintiff's "float" claim. The court found that, as to float earned pursuant to the 2004 service agreement between the plaintiff's plan and Principal, Principal complied with DOL Field Assistance Bulletin	**Significance:** Plaintiffs allege that Defendant is a fiduciary because it (a) offers full service 401(k) retirement plans; (2) has authority to make changes to funds offered to plan participants; (3) has discretion to negotiate for receipt of revenue sharing payments; and (4) provides investment advice. Plaintiffs claim that Defendant breached its fiduciary duties under ERISA by failing to disclose negotiations for, receipt of, and amount of, revenue sharing payments, and by retaining revenue sharing payments. Plaintiffs also claim that Defendant committed a prohibited transaction by using plan assets to generate revenue sharing and retaining revenue sharing payments for its own account. In addition, Plaintiffs claim that Defendant breached its fiduciary duties and engaged in prohibited transactions under ERISA by receiving and retaining, and failing to disclose, income earned on plan contributions between the time that such contributions were deposited in Defendant's custodial account and the time that Defendant transferred the plan contributions into the investment options chosen by the plan's participants. The district court's November 5 ruling on the defendant's motion for judgment on the pleadings is significant in several respects. It follows the Seventh Circuit's ruling in *Deere* that disclosure of revenue sharing is not required under ERISA. It also follows *Deere* in holding that "plan assets" do not generally include a registered mutual fund's underlying assets. In addition, the court departed from the position generally taken by the Department of Labor and other courts that certain ERISA exemptions - § 408(b)(2) and § 408(c)(2) – do not provide relief from ERISA § 406(b)'s prohibitions against fiduciary self-dealing.

Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
		In ruling on the plaintiff's disclosure claim, the court followed the Seventh Circuit's reasoning in *Hecker v. Deere & Company* that the total fees collected, not the post-collection distribution of fees, must be disclosed, and that ERISA does not address the practice of revenue sharing itself. In doing so, the court also rejected the plaintiff's argument that the *Deere* holding applies only to disclosures to plan *participants*, as opposed to plan fiduciaries, finding that plan fiduciaries do not have a greater right to information than the plan participants they serve. In ruling on the plaintiff's prohibited transaction claim, the court first distinguished between revenue sharing payments that are paid from mutual funds registered under the Investment Company	Rule 23 of the Federal Rules of Civil Procedure, as necessary for class certification. On April 30, 2010, the plaintiff moved for reconsideration of the court's August 27, 2008 order denying class certification On June 8, 2010, the court denied the plaintiff's April 30 motion for reconsideration, finding that the motion did not meet the requirements of Federal Rule of Civil Procedure 60(b) and that the motion was untimely. On July 12, 2011, after the court entered the consent judgment, the plaintiff appealed the court's denial of his motion for class certification to the U.S. Court of Appeals for the Eighth Circuit. The case is currently	2002-3 (Nov. 5, 2002) by disclosing (1) the specific circumstances under which it earns and retains float; (2) the time frames for investment and the circumstances when allocation of funds is anticipated to take longer; and (3) the rate at which float is earned. The court also relied on case law to find no breach on the part of Principal, finding that the float was openly disclosed and included as part of Principal's overall compensation. As to float earned prior to the 2004 service agreement, the court found that such amounts were not properly disclosed pursuant to DOL FAB 2002-3. However, this portion of the plaintiff's claim was barred by ERISA's three-year statute of limitations, because the plaintiff was	The court's March 31, 2010 order granting the plaintiff's motion for reconsideration was limited to the plaintiff's claims concerning Principal's *non-registered* mutual funds. As a result, the court's November 5 rulings remain intact with respect to the plaintiff's claims concerning *registered* mutual funds. On March 30, 2011, the court denied Principal's motion for summary judgment with respect to counts III (breach of fiduciary duty for failure to disclose revenue sharing) and IV (prohibited transactions on basis of receipt of revenue sharing). Because the Court found genuine issues of material fact as to whether Principal was a functional fiduciary at the time it engaged in revenue sharing payments, the Court did not conduct an analysis of whether a breach of fiduciary occurred or if Principal engaged in a prohibited transaction. In June 2011, the parties agreed to a consent judgment, only with respect to plaintiff's individual claims, for $80,000. Plaintiff appealed the denial of his class certification to the Eighth Circuit, where the case is currently pending. Oral argument was held on 4/18/12.

Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
		Act of 1940 and revenue sharing payments that come from funds that are not so registered. As to payments from *registered* mutual funds, the court looked to *Deere* and the language of ERISA and concluded that such revenue sharing payments do not constitute plan assets. Thus, no prohibited transaction analysis was required as to such revenue sharing payments. However, because the plaintiff also alleged that some of the plan's investments were commingled with *non-registered* mutual funds – which the court concluded *were* made from plan assets – a prohibited transaction analysis was required as to these payments. In analyzing the plaintiff's PT claim, the court held that if the revenue sharing payments were reasonable in relation to the services	pending, and the appellant's brief is due October 12, 2011.	provided actual knowledge that Principal had breached its fiduciary duties with respect to the pre-2004 float when the plaintiff and Principal entered into the 2004 service agreement, which provided for the disclosure of float discussed above. Since the plaintiff did not file his float claim until May 5, 2008, his claim is time barred. On June 29, 2010, Principal moved for summary judgment on its two remaining claims (count III: that Principal breached its fiduciary duty by failing to disclose revenue sharing; and count IV: that Principal engaged in prohibited transactions by receiving revenue sharing). By order dated March 30, 2011, the	

Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
		provided by Principal, there was no violation. The court concluded that, because Principal factored the revenue sharing payments into its overall asset management fees, and because the plaintiff failed to plead that the fees were unreasonably high or inflated, there was no viable prohibited transaction claim. On December 21, 2009, the plaintiff filed a motion for reconsideration of the court's November 5 entry of judgment on the pleadings, in light of the November 25, 2009 Eighth Circuit Court of Appeals decision in *Braden v. Wal-Mart Stores, Inc.* On March 31, 2010, the district court granted the plaintiff's motion for reconsideration of the court's November 5 order with respect to the plaintiff's claims concerning Principal's non-registered		court denied Principal's motion for summary judgment.	

Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
		investment options ("Foundations Options"), in light of the *Braden* decision. The court held the plaintiff alleged sufficient facts from which to infer that inadequate or non-disclosure of revenue-sharing payments could mislead a reasonable investor. Information about the amount and retention of such payments, and the making of such payments in exchange for including options in the plan, might be material. As to the plaintiff's prohibited transaction claim, the court held the plaintiff asserted a plausible inference that Principal engaged in a prohibited transaction. In addition, while § 408 may "save" transactions otherwise prohibited under § 406(b), Principal bears the burden of proof in making this defense.			

Plan Participant Claims Against Plan Providers					
	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
Second Circuit					
33.	*Young v. General Motors Investment Management Corp.*, 1:07-CV-01994-BSJ-FM (S.D.N.Y. filed 3/8/07) Judge Barbara S. Jones	Court granted Defendants' motions to dismiss with prejudice on 3/24/08, holding that Plaintiffs' claims were barred by ERISA's three-year statute of limitations, ERISA § 413, 29 U.S.C. § 1113. On March 31, 2008, the Plaintiffs filed a notice of appeal of the court's March 24 ruling to the United States Court of Appeals for the Second Circuit. 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	Not made.	Not made.	**Significance:** Plaintiffs alleged that Defendants breached their fiduciary duties under ERISA § 404 by (1) allowing or causing plans to maintain investments in undiversified and imprudent investment vehicles; and (2) by causing or allowing plans to maintain investments in certain mutual funds when similar investment products were available at much lower costs. In granting Defendants' motion to dismiss, the court found that all of the investments in the undiversified and imprudent investment vehicles were made more than three years prior to the filing of Plaintiffs' action and that documents accurately describing such investments and the fees associated with other investments were provided to plan participants more than three years before Plaintiffs' action was filed. In making its ruling, the court found that Plaintiffs had the "actual knowledge" required under ERISA § 413, interpreted in the Second Circuit to mean knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated ERISA. In affirming the district court's dismissal, the Second Circuit emphasized that, for purposes of stating a claim under ERISA § 404(a)(1)(c), it is the diversification of the plan as a whole, not particular options within the plan, that matters. Further, in addressing Plaintiffs' excessive fees claim, the court looked to Second Circuit case law interpreting the Investment Company Act, which may open the door to alternative grounds for defendants to explore in pending ERISA fee cases.

Plan Participant Claims Against Plan Providers					
	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
		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.			
34.	*Brewer v. General Motors Investment Management Corp.*, 1:07-CV-02928-BSJ (S.D.N.Y. filed 4/12/07) Judge Barbara S. Jones	Court granted Defendants' motions to dismiss with prejudice on 3/24/08, holding that Plaintiffs' claims were barred by ERISA's three-year statute of limitations, ERISA § 413, 29 U.S.C. § 1113. On March 31, 2008, the Plaintiffs filed a notice of appeal of the court's March 24 ruling to the United States Court of Appeals for the Second Circuit. On May 6, 2009, the Second Circuit	Not made.	Not made.	**Significance:** Plaintiffs alleged that Defendants breached fiduciary duties under ERISA § 404 by (1) allowing or causing plans to maintain investments in undiversified and imprudent investment vehicles; and (2) by causing or allowing plans to maintain investments in certain mutual funds when similar investment products were available at much lower costs. In granting Defendants' motion to dismiss, the court found that all of the investments in the undiversified and imprudent investment vehicles were made more than three years prior to the filing of Plaintiffs' action and that documents accurately describing such investments and the fees associated with other investments were provided to plan participants more than three years before Plaintiffs' action was filed. In making its ruling, the court found that Plaintiffs had the "actual knowledge" required under ERISA § 413, interpreted in the Second Circuit to mean knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated ERISA. In affirming the district court's dismissal, the Second Circuit

Plan Participant Claims Against Plan Providers					
	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
		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.			emphasized that, for purposes of stating a claim under ERISA § 404(a)(1)(c), it is the diversification of the plan as a whole, not particular options within the plan, that matters. Further, in addressing Plaintiffs' excessive fees claim, the court looked to Second Circuit case law interpreting the Investment Company Act, which may open the door to alternative grounds for defendants to explore in pending ERISA fee cases.

Plan and Participant Claims Against Plan Providers					
No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
Third Circuit					
35.	*Santomenno v. John Hancock Life Insurance Company (U.S.A.)*, 2:10-cv-01655-WJM-MF (D. N.J. filed 3/31/10); 11-2520 (3d Cir. appealed 6/3/11) Amended complaint filed on 4/23/10 Judge William J. Martini	On July 16, 2010 John Hancock moved to dismiss the plaintiff's amended complaint. On May 23, 2011, the court granted John Hancock's motion to dismiss. The court held that the plaintiff lacks standing to sue third parties selected by her plan's primary fiduciary without having first made demand on such fiduciary. The court also held that plaintiff's claims under the Investment Company Act failed also due to procedural infirmities.	Not made.	Not made.	**Significance:** This case is brought on behalf of a putative class of ERISA-covered 401(k) plans that held or continue to hold group annuity contracts issued by John Hancock, and on behalf of the participants and beneficiaries of such plans. Plaintiff asserts ERISA breach of fiduciary duty and prohibited transaction claims generally alleging that group annuity contracts issued by John Hancock to the plaintiff plans or their sponsors resulted in unreasonable and excessive fees for products and services that were not materially different from an investment by a standard 401(k) plan directly into a mutual fund. In particular, the plaintiff alleges that John Hancock breached its fiduciary duties and/or engaged in prohibited transactions by: (1) imposing sales and service charges that exceeded the 12b-1 fees already being charged to plaintiff by underlying investment funds and when no additional services were being provided in return for such fees; (2) allowing the imposition of 12b-1 fees on certain investments; (3) investing plan monies in inappropriate share classes (those imposing 12b-1 fees); (4) allowing an affiliate, John Hancock Investment Management Services, to charge excessive investment management fees when no investment management services were provided in exchange therefore; (5) accepting revenue sharing payments from investment options and failing to use such payments to offset administrative expenses charged to the plans or failing to return such revenue sharing fees to the plans or participants; (6) failing to select a low-priced, high-performance money market fund to underlie a John Hancock money market investment options. The plaintiff also asserts claims under the Investment Company Act of 1940 ("ICA"), generally alleging that investment management fees paid to John Hancock's affiliate, John Hancock Investment Management Services, resulted in breaches of fiduciary duty because those fees were so disproportionately large that they bore no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining.

Plan and Participant Claims Against Plan Providers					
No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
					John Hancock moved to dismiss on July 16, 2010, and the court granted the motion to dismiss on May 23, 2011. The court found that plaintiffs' ERISA claims were derivative, in the sense that they belonged to the plan as a whole. Because no demand had been made on the plan trustees, nor were the trustees defendants in the action, the court found that plaintiffs had not pled a recognizable claim under section 502 of ERISA. The court also dismissed the claims based in the Investment Company Act, finding that plaintiffs had terminated their contracts with John Hancock and that such a claim required continuous ownership of the stock throughout the entire litigation. Plaintiffs appealed the court's granting of the motion to dismiss to the Third Circuit Court of Appeals. The Department of Labor filed an amicus brief on September 30, 2011. Oral argument was held on 4/9/12. On 4/6/12, the Third Circuit affirmed in part and vacated in part the District Court's decision. First, the Third Circuit affirmed the District Court's dismissal of the plaintiff's claims under the ICA, agreeing with the District Court that plaintiffs had terminated their contracts with John Hancock and that such a claim required continuous ownership of the stock throughout the entire litigation. Second, the Third Circuit vacated the District Court's dismissal of the plaintiff's ERISA claims, and remanded for further proceedings. The Third Circuit found that that neither a pre-suit demand requirement nor joinder of the plan trustees is a prerequisite to plaintiffs' claims. In so finding, the court pointed out that ERISA is silent as to pre-suit demand and mandatory joinder of trustees, finding that no preconditions on a participant or beneficiary's right to bring a civil action to remedy a fiduciary breach are mentioned at all within the statute.

Plan and Participant Claims Against Plan Providers					
No.	Case Name & Judges	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
Seventh Circuit					
36.	*Leimkuehler v. American United Life Insurance Company*, No. 1:10-cv-00333 (S.D. Ind. filed 8/4/09); No. 12-1213 (7th Cir.) Judge Jane Magnus-Stinson	On October 22, 2010, the court granted in part and denied in part plaintiff's motion for judgment on the pleadings (2010 WL 4291128).	Motion for class certification filed on 7/22/11. Oral arguments held 12/2/11. On 1/5/12, the motion was denied as moot	Motion for summary judgment filed by defendants on 9/1/11. Defendants argue that AUL did not engage in "fiduciary conduct" in connection with the revenue-sharing activity. Oral arguments held 12/2/11. Motion granted on 1/5/12.	Putative class action filed by pension plans to which defendant American United Life Insurance Company ("AUL") has provided 401(k) services. Plaintiff alleges that AUL breached its fiduciary duties by failing to disclose revenue-sharing arrangements with certain mutual funds and by receiving and keeping shared revenue without offsetting plan accounts. Plaintiff also alleges that the revenue-sharing practices violate specific ERISA prohibited transaction provisions, and that AUL is also liable as a non-fiduciary for the arrangement. On October 22, 2010, the court granted in part and denied in part plaintiff's motion for judgment on the pleadings (2010 WL 4291128). Oral arguments on plaintiffs' motion for class certification and for summary judgment were held on 12/2/11. On 1/5/12, the court granted defendant's motion for summary judgment and dismissed as moot the motion for class certification. In granting the motion for summary judgment, the court cited *Hecker* for the proposition that 401(k) providers do not become fiduciaries merely by limiting the universe of mutual funds providers offer to 401(k) plans, nor do they become fiduciaries merely by receiving shared revenue from those funds upon execution of plan participants' investment instructions to whom the total expense of the investment was accurately disclosed. Accordingly, after finding that AUL did not act as an ERISA fiduciary, the court dismissed plaintiff's claims for breach of fiduciary duty. The court also found that AUL was not liable as a non-fiduciary. On 1/10/12, plaintiff appealed the final judgment to the Seventh Circuit, where the case is pending. Appellant's brief is due 5/25/12.