GROOM LAW GROUP

401(k) Fee Litigation
Groom Law Group, Chartered

Updated as of: October 2018

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
First Circuit						
1.	*Burgess et al. v. HP Inc. et al.*, 16-cv-04784 (N.D. Cal.); transferred to No. 17-cv-10207 (D. Mass.) Filed 08/18/16 by Schneider Wallace Cottrell Konecky Wotkyns LLP Judge Denise J. Casper	11/2/16: Filed.			Plaintiffs' claims include alleged breaches of fiduciary duty for failing to engage in a cash management process designed to benefit the Plans.	5/26/17: **SETTLED** (undisclosed).
Second Circuit						
2.	*Taylor v. United Technologies Corp.*, No. 06-cv-01494 (D. Conn.) Filed 9/22/06	8/9/07: **GRANTED in part** and **DENIED in part**. Dismissed breach of fiduciary duty claim based on non-disclosure of revenue sharing fees, holding that ERISA does not require such disclosure.	6/5/08: **CERTIFIED**.	3/3/09: Defendant's MSJ **GRANTED**. 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	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	

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	Amended Complaint filed 12/11/07 by Schlichter, Bogard & Denton Judge Warren W. Eginton			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. 12/1/09: **AFFIRMED**.	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. 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.	*Montoya v. ING Life Ins. and Annuity Co.*, No. 07-cv-02574 (S.D.N.Y.) Filed 3/28/07 by Keller Rohrback L.L.P. Judge Naomi Reice Buchwald (S.D.N.Y.) Judge Leonard D. Wexler (E.D.N.Y.) No. 10-cv-02068 (removed 5/7/10); 10-5314, 11-1132 (2d Cir.)	8/31/09: **GRANTED** based on lack of jurisdiction, finding that the plan in issue is a governmental plan exempt from Title I of ERISA. 11/23/10: **GRANTED** based on SLUSA.			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. 2/25/10: 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").	

Participant Claims Against Sponsors And Related Fiduciaries						
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4.	*Cooper v. DST Systems, Inc. et al.*, No. 16-cv-01900 (S.D.N.Y.) Filed 3/14/16 by Shepherd, Finkelman, Miller & Shah, LLP Judge William H. Pauley, III No. 17-2805 (2d Cir.)	8/15/17: **GRANTED**. Arbitration was mandatory per terms of Arbitration Agreement because claims "arose out of" and "related to" Plaintiff's employment Appealed to Second Circuit. No. 17-2805.			Plaintiff alleges that Defendants breached their fiduciary duties and committed prohibited transaction by allowing unreasonable fees to be charged to participants and by retaining high-cost, poor-performing investment options in the plan instead of more prudent alternative investments.	
5.	*Jacobs v. Verizon Communications Inc. et al.*, No. 16-cv-01082 (S.D.N.Y.) Filed 2/11/16 by Harwood Feffer LLP; Edgar Law Firm LLC; and Schneider Wallace Cottrell Konecky Wotkyns LLP Judge Paul G. Gardephe	9/28/17: **GRANTED in part** and **DENIED in part**. Defendants' fee disclosure did not violate DOL rule because revenue sharing explanation did not need to be itemized or identify the specific plan administrative expenses being paid from the fund's operating expenses. Only a general explanation was necessary. However, Plaintiff's duty to monitor performance claim permitted to proceed.			Plaintiff alleges that Defendants designed an investment structure that was overly complex, overly risky, and inappropriate for the average employee. The design was allegedly so layered with investment management fees that it could not be effectively understood or evaluated by employees. Plaintiff also alleges that the plan's target date investment options charged high fees and consistently underperformed.	
6.	*Sandoval v. Novitex Enterprise Solutions, Inc., et al.*, No.	12/19/17: Filed.			Plaintiff alleges that Defendants breached their fiduciary duties by (1) failing to fully disclose to participants the expenses and risks of the Novitex 401(k) Plan's investment options, (2) allowing	

Participant Claims Against Sponsors And Related Fiduciaries						
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	17-cv-01573 (D. Conn.) Filed 9/20/17 by Shepherd Finkelman Miller & Shah, LLP Judge Dominic J. Squatrito				unreasonable expenses to be charged to participants for administration of the Plan, and (3) selecting and retaining opaque, high-cost, and poor-performing investments instead of other available and more prudent alternative investments.	
7.	*Lutz, et al. v. Kaleida Health, et al.*, No. 18-cv-01112 (W.D.N.Y.) Filed 10/11/18 by Thomas & Solomon LLP Judge Elizabeth A. Wolford				Plaintiffs allege that Defendants violated their fiduciary duties by failing to offer a prudent mix of investment options. Defendants also allegedly failed to take advantage of the Plans' bargaining power and impaired participants' returns by only offering actively managed retail mutual funds as investment options instead of identical investor class mutual funds with lower operating expenses.	
8.	*Justin Brown and Telisa Lipscomb v. Daikin America, Inc.*, No. 18-cv-11091 (S.D.N.Y.) Filed 11/28/18 by Wiggins, Childs, Pantazis, Fisher & Goldfarb, LLC				Plaintiffs allege that Daikin, the plan sponsor, acted imprudently by selecting, failing to monitor, and retaining proprietary mutual funds affiliated with John Hancock that charged excessive management fees. Daikin also allegedly acted imprudently by systematically excluding better performing, low-cost benchmark fund alternatives from independent providers.	

Participant Claims Against Sponsors And Related Fiduciaries						
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	Judge _______					
Third Circuit						
9.	*Renfro v. Unisys Corp.*, No. 07-cv-02098 (E.D. Pa.) Filed 12/28/06 in C.D. Cal. by Schlichter, Bogard & Denton Judge Berle M. Schiller No. 10-2447 (3d Cir.) filed 5/23/07	2/19/10: **GRANTED in part** and **DENIED in part**. 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. The court also 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 appropriate.		2/19/10: Unisys' SMJ **GRANTED in part** and **DENIED in part**.	Case transferred from Central District of California by order dated 4/17/07. 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.	

Participant Claims Against Sponsors And Related Fiduciaries						
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		4/26/10: **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				

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		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. 8/19/11: **AFFIRMED**. 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 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				

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		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).				
10.	*Hay v. Gucci America, Inc. et al.*, No. 17-cv-07148 (D.N.J.) Filed 09/15/2017 by Shepherd, Finkelman, Miller, & Shah, LLP Judge Claire C. Cecchi	10/3/18: **DENIED**. Plaintiff had standing despite cashing out of the Plan. Plaintiff sufficiently contested Defendants' selection and retention of certain funds by alleging that Transamerica was subject to a conflict of interest and by alleging excessive fees and underperformance. Revenue sharing allegation survived motion to dismiss because Plaintiff tied it to conflict of interest, underperformance, and comparable funds allegations. Remaining claims were sufficiently pled at early stage of litigation.			Plaintiff alleges that Defendants breached their fiduciary duties by (1) unduly relying on and failing to oversee Transamerica, the Plan's recordkeeper and investment manager, (2) allowing Transamerica to serve as recordkeeper and investment manager despite its conflict of interest in receiving revenue sharing from affiliated funds, (3) allowing the Plan to be subject to excessive fees, and (4) publishing misleading and inaccurate disclosures.	
Fourth Circuit						
11.	*Kruger v. Novant Health, Inc.*, No. 14-cv-00208 (M.D.N.C.) Filed 3/12/14 by Schlichter, Bogard	9/17/2015: **DENIED**. Complaint sufficiently stated a cause of action for breach of fiduciary duty against defendants for offering "only retail class shares to participants when identical, less expensive, institutional class			Current and former participants in two 401(k) plans sponsored by Novant initiated a class action. The complaint alleges that the fiduciaries of the plan violated their fiduciary duties under ERISA by allowing excessive fees to be paid to the plan's broker and record-keeper and by including more	9/29/16: Settlement **APPROVED**. $32M settlement fund. Defendant will also conduct a competitive bidding process to hire a new recordkeeper and will conduct a complete review of the plan's

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	& Denton Judge William L. Osteen, Jr.	shares of the same funds were available." Noting that the Fourth Circuit has never decided whether excessive fee claims can survive a motion to dismiss, the court looked to other circuits in holding that while this was a "close call," the claims were sufficient. In its analysis, the court differentiated *Hecker v. Deere & Co*., 556 F.3d 575, 586 (7th Cir. 2009) on the basis that the fees there were much lower and did not involve identical investment vehicles offered at a lower fee. As for the excessive fees allegedly paid for recordkeeping to the plan service provider, Great-West, the court held that the complaint stated a claim that "the failure to monitor the sudden spike in recordkeeping fees rendered [the fiduciaries' judgment imprudent."			expensive share classes for the plan's mutual funds.	investment options (overseen by an independent consultant).
12.	*Reetz v. Lowe's Companies, Inc. et al.*, No. 18-cv-00075 (W.D.N.C.) Filed 4/27/18 by Nichols Kaster, PLLP Judge Robert J.	6/29/18: Filed by Lowe's Defendants.			Plaintiff alleges that Defendant Lowe's breached its fiduciary duties by selecting and retaining the Hewitt Growth Fund for the Lowe's 401(k) plan. Specifically, Plaintiff alleges that it was imprudent to select the fund because (1) the fund was new and largely untested at the time it was added to the plan, (2) the fund was underperforming its benchmark and continued to underperform after it was added, and (3) similarly-sized plans did not utilize the fund (and it was generally unpopular). Defendant Hewitt served as the plan's investment consultant	

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	Conrad, Jr. Note: GLG represents Lowe's Defendants.				and allegedly gave conflicted advice in recommending the fund for the plan. Note: There is no specific "excessive fee" allegation. Plaintiff alleges instead that the fund was simply too unproven to select as an investment option.	
Sixth Circuit						
13.	*In re Honda of Am. Mfg., Inc. ERISA Fees Litig.*, No. 08-cv-01059 (S.D. Ohio) Filed 11/10/08 by Scott + Scott, LLP Judge Gregory L. Frost	10/9/09: **GRANTED** as to Honda defendants. 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. 10/13/09: **GRANTED** as to Merrill Lynch. The court			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 record-keeper 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.	

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		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.				
14.	*Shirk v. Fifth Third Bancorp*, No. 05-cv-00049 (S.D. Ohio) Filed 1/26/05 by Scott + Scott, LLC Judge Timothy S. Black	4/10/07: **DENIED** except as to any claim for monetary damages against a non-fiduciary. The court found that: (1) the complaint sufficiently states a claim that defendants breached their fiduciary duties by investing in Fifth Third stock, enough to rebut the *Moench* presumption of reasonableness, (2) the complaint sufficiently states allegations of material misrepresentations or omissions based on material statements in public filings and omissions, but that the complaint need not satisfy Rule 9 of the Federal Rule of Civil Procedure's heightened pleading requirement since these claims do not sound in fraud, (3) claims for damages after the date of when defendants allege they provided "curative information" is a fact question not resolved on a motion to dismiss, (4) the complaint sufficiently states claims for duty to monitor, an actionable conflict of interest, and co-fiduciary	9/30/08: **CERTIFIED**.	9/29/09: **GRANTED** in favor of Defendants on counts I-VI of the complaint, which were claims for (1) breach of fiduciary duty of prudence by offering Fifth Third Stock as an investment option, (2) breaching fiduciary duties by providing incomplete and misleading information, (3) failing to monitor other fiduciaries, (4) not avoiding conflicts of interest, (5) co-fiduciary liability, and (6) knowing participation by Fifth Third. The court found that there was insufficient evidence to rebut the presumption that company stock was a reasonable investment, the outside directors were not fiduciaries, and there was no evidence of any material misrepresentations or omissions. 9/30/09: **GRANTED** in favor of Fifth Third on excess fee claims. The court ruled that these claims were barred by ERISA's three-year statute of limitations since the participants had actual knowledge of offering Fifth Third stock through public	Plaintiffs complain that Fifth Third, its CEO, and the Outside Directors (1) knew or should have known that Fifth Third stock was not a prudent investment for the plan and of false and misleading statements in public filings and (2) did not provide participants with information regarding Fifth Third's improper activities and failed to protect participants against unnecessary losses. Plaintiffs bring claims for breach of fiduciary duties for (1) not prudently and loyally managing plan assets, (2) not providing complete and accurate information, (3) failing to monitor the investment advisors and other plan fiduciaries, (4) not avoiding conflicts of interest, (5) co-fiduciary liability, and (6) knowing participation by Fifth Third.	

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		liability, and (5) the complaint sufficiently states a claim against Fifth Third for knowing participation but the claim must be dismissed to the extent that it seeks to recover money damages from Fifth Third as a nonfiduciary. 9/26/08: **DENIED**. After Complaint was amended, the court found that the complaint sufficiently stated allegations that defendants breached their fiduciary duties and engaged in prohibited transactions by allowing Fifth Third and its affiliates to charge the plan excessive and unreasonable fees and expenses. The court held that (1) the complaint sufficiently pled a causational nexus alleging harm resulting from the alleged breach, (2) there is a duty to inform where the fiduciary has created a misimpression about the company's future prospects, (3) there were sufficient allegations about the outside directors' fiduciary status given allegations about the authority and control they exercised, (4) the additional claims were within the scope of the court's leave to amend, (5) whether defendants are actually within the scope of an exemption to prohibited		filings, semi-annual and annual reports, and various plan communications.		

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		transactions is a fact question not appropriate on a motion to dismiss, (6) the fraudulent concealment claims satisfy the heightened pleading requirements of Rule 9, and (7) the equitable relief claims could proceed since they were pled in the alternative of monetary damages.				
15.	*Damberg et al. v. LaMettry's Collision, Inc. et al.*, No. 16-cv-01335 (D. Minn.) Filed 5/18/16 by Madia Law LLC Judge Joan N. Ericksen	6/17/16: Voluntarily **DISMISSED**.			Plaintiffs alleged that Defendants breached their fiduciary duties by (1) causing the plan to pay excessive fees, (2) selecting imprudent mutual fund classes that exposed participants to excessive fees when lower cost options were available, and (3) selecting unnecessarily expensive investment options relative to industry benchmarks.	
16.	*Morin, et al. v. Essentia Health, et al.*, No. 16-cv-04397 (D. Minn.) Filed 12/29/16 by Madia Law LLC and Nichols Kaster PLLP Judge Paul A. Magnuson	10/27/17: **DENIED**. Allegation of excessive fees can support plausible inference of fiduciary breach, and Plaintiffs were not required to plead with specificity their methodology for calculating "comparator" fees. Allegation that plan failed to use its bargaining power to lower administrative expenses was also sufficient to state a claim. 11/27/17: Voluntarily			Plaintiffs alleged the Defendants breached their fiduciary duties by causing the plan to pay excessive recordkeeping fees and by failing to monitor and control the plan's escalating costs. Plaintiffs specifically challenge revenue sharing payments received by recordkeeper.	

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		DISMISSED.				
17.	*Larson et al. v. Allina Health System et al.*, No. 17-cv-03835 (D. Minn.) Filed 8/18/17 by Nichols Kaster PLLP; Kessler Topaz Meltzer & Check, LLP; Bailey Glasser LLP; Izard Kindall & Raabe LLP Judge Susan Richard Nelson	1/1/18: **GRANTED in part** and **DENIED in part**. Plaintiffs had standing despite fact that named Plaintiffs hadn't invested in mutual funds. Plan was not required to offer collective trusts and separate accounts as lower-fee alternatives to mutual funds because it's an apples-to-oranges comparison. Proprietary fund claim dismissed, as it's not a fiduciary breach to allow an investment manager to offer its own proprietary funds. Underperformance claim dismissed to the extent Plaintiffs failed to identify an identical benchmark with better performance. Excessive recordkeeping fee claim survived motion to dismiss because Plaintiffs plausibly alleged that Defendants could have obtained less expensive recordkeeping services and that Defendants had not renegotiated their contract for recordkeeping with Fidelity in 22 years. "Too many options" and duplicative investments claims dismissed because ERISA encourages sponsors to provide more choice to participants. Money market fund claim dismissed as inadequate to			Plaintiffs allege that Defendants breached their fiduciary duties by allowing the plan's trustee, Fidelity, to fill the plan with high-cost mutual funds through which Fidelity received millions of dollars in revenue sharing payments. Defendants also allegedly allowed Fidelity to add any Fidelity mutual fund that it made available, regardless of whether such funds were duplicative of other options, had high costs, or performed poorly. Plaintiffs also allege that Defendants did not use the plan's bargaining power to negotiate lower fees and failed to switch to cheaper, better-performing options available in the market.	

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		survive a motion to dismiss by itself. Revenue sharing claim survived motion to dismiss. Loyalty claim dismissed because Plaintiffs failed to allege that Defendants took an act to benefit themselves or Fidelity with that benefit as the goal. Inadequate fee disclosure claim survived motion to dismiss to the extent Defendants simply identified cost as "fees" without specifying.				
18.	*Disselkamp et al. v. Norton Healthcare, Inc. et al.*, No. 18-cv-00048 (W.D. Ky.) Filed 1/22/18 by Bishop Korus Friend, PSC; Tomlinson Law, LLC; James White Firm, LLC; and Johnston Law Firm, P.C. Judge Rebecca G. Jennings	7/16/18: Filed.			Plaintiffs allege that Defendants breached their fiduciary duties by including as investment options more expensive share classes of mutual funds when less expensive share classes were available, resulting in higher fees than necessary.	
19.	*McGinnes et al. v. FirstGroup America, Inc. et al.*, No. 18-cv-00326 (S.D. Ohio)	9/7/18: Filed.			Plaintiffs allege that Defendant FirstGroup breached its fiduciary duties by removing high-performing funds from its 401(k) plan and replacing them with an unproven set of newly-launched funds from Defendant Hewitt. Since the funds were added, they allegedly	

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	Filed 5/11/18 by Nichols Kaster, PLLP Judge Timothy S. Black				underperformed their benchmarks and underperformed the funds they replaced. Defendant Hewitt served as the plan's investment consultant and allegedly gave conflicted advice in recommending the funds for the plan. Note: There is no specific "excessive fee" allegation. Plaintiffs allege instead that the funds were simply too unproven to select as investment options.	
20.	*Bernaola v. Checksmart Financial LLC, et al.*, No. 16-cv-00684 (S.D. Ohio) Filed 7/14/16 by Shepherd Finkelman Miller & Shah, LLP Judge James L. Graham No. 18-3751 (6th Cir.)	7/12/18: **GRANTED**.		7/12/18: **GRANTED**. Claims foreclosed by three-year statute of limitations under ERISA, as Defendants disclosed expense ratios of various funds more than three years before Plaintiff filed suit. In order for the statute of limitations to run, Plaintiff need not have actual knowledge of the *process* by which the Plan selected the various investment options—he need only have actual knowledge of the Plan's investment options. Appealed to Sixth Circuit. No. 18-3751.	Plaintiff alleges that Defendants breached their fiduciary duties by (1) allowing unreasonable expenses to be charged to participants for administration of the Plan, and (3) selecting and retaining high-cost and poor-performing investments instead of other available and more prudent alternative investments.	**JUDGMENT** for Defendants. On appeal in the Sixth Circuit.
Seventh Circuit						
21.	*Hecker v. Deere & Co.*, No. 06-cv-00719 (W.D. Wis.) Filed 12/8/06 by	6/20/07: **GRANTED**. (a) plaintiffs failed to state a claim for non-disclosure under ERISA; (b) defendants were insulated by 404(c) safe harbor provision; and				

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	Schlichter, Bogard & Denton Judge John C. Shabaz No. 08-1224 (7th Cir.) filed 1/29/08	(c) Fidelity defendants had no fiduciary responsibility for making plan disclosures or selecting plan investments. The court ruled that disclosure of revenue sharing was not required by ERISA or DOL regulation. 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. Fidelity defendants had no fiduciary responsibility for making plan disclosures or selecting plan investments. 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				

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		with respect to fund selection, section 404(c) precluded liability for the breach. 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 (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.				
22.	*Abbott v. Lockheed Martin Corp.*, No. 06-cv-00701 (S.D. Ill.) Filed 9/11/06 by Schlichter, Bogard & Denton Judge Michael J. Reagan	8/13/07: **DENIED**. Complaint satisfied notice pleading standard. Motion to dismiss did not address merits of claims.	4/3/09: **CERTIFIED** as to the claims regarding the excessive fees and the stable value fund, but **DENIED** as to the claim regarding the company stock fund. The court ruled that participants whose frequent trading activities created the	3/31/09: Defendants' MSJ **GRANTED in part** and **DENIED in part**. Plaintiffs' MSJ as to liability on their excessive recordkeeping fee claim **DENIED**. 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	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.	7/20/15: Settlement **APPROVED**. $62M settlement fund. Lockheed also agreed to certain non-monetary relief. First, it has agreed to file annual notices assuring compliance with the settlement. The notice will include monthly evaluations on the average portion of the plan's stable value fund that is allocated to money market instruments;

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Nos. 12-8037 & 12-3736 (7th Cir.) filed 11/30/12		need for a greater cash buffer in the company stock fund were antagonistic to other participants. 3/15/11: **VACATED** by Seventh Circuit. 9/24/12: **CERTIFIED** as to the claims regarding excessive fees and to a sub-class of the company stock fund claim. **DENIED** as to the stable value fund claim, and to a separate subclass of the company stock fund claim. The court granted certification to the claim regarding excessive fees. However, the court denied certification to the claim alleging an improper selection of a stable value fund, taking issue with the benchmark assumptions made by plaintiffs in articulating this proposed class. With respect to the company stock fund claim, the court granted	regarding float and a growth fund were both dismissed for not falling within the scope of the amended complaint. As an alternative basis for the dismissal of the claim regarding the growth fund, the court held that *Hecker v. Deere* (7th Cir.) precluded plaintiffs from arguing that the growth fund was improper because it was a retail mutual fund instead of a separate account. The court also held that: only acts that took place within six years of the filing of the complaint could form the basis of a fiduciary breach claim due to ERISA's statute of limitations; plaintiffs had standing to assert claims with respect to funds in which they may have not invested in because ERISA allows plan participants to seek to recover damages owed to the plan; and *Hecker v. Deere* (7th Cir.) precluded plaintiffs from challenging 404(c) conditions that were not challenged in the amended complaint. The court ruled that the following issues would need to be resolved at trial: whether investment options with excessive fees were offered in the plan; whether the stable value fund was managed in accordance with disclosure documents; and whether there was excessive cash in the company stock fund.		monthly evaluations on the average portion of the plan's company stock funds that are allocated to cash equivalents; and monthly reports summarizing the characteristics of the funds, including with respect to performance. Second, Lockheed must receive bids from at least three third-party recordkeeping services for its savings plan. The bids and the final selection of a record keeper must be reported to the court. Lastly, Lockheed will offer funds that have the lowest expense ratios, if available, and will also consider the use of collective investment trust or separately managed accounts.

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
			certification to one proposed subclass, but denied certification to the other subclass, holding that the proposed subclass was not defined adequately enough to satisfy the typicality requirement. 8/7/13: **REVERSED** by Seventh Circuit, holding that the participants would not be deemed at the class certification stage to lack standing to sue. The Seventh Circuit also held that a reference in the class definition to an index that tracked performance of a varied of stable value funds ("SFV") over time did not improperly prejudge the merits of the SFV claim. Finally, the Seventh Circuit held that the claim was suitable for class treatment despite defendants' contention that it was one of imprudent management due to			

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
			deviation for a mix of investments held by other funds bearing a "stable value" label. 8/1/14: **CERTIFIED**.			
23.	*Beesley v. International Paper Co.*, No. 06-cv-00703 (S.D. Ill.) Filed 9/11/06 by Schlichter, Bogard & Denton Judge David R. Herndon	8/24/07: **DENIED**.	9/26/08: **CERTIFIED**. Seventh Circuit. 1/21/11: **VACATED** by Seventh Circuit. 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	9/17/12: **DENIED** the parties' motions for summary judgment as premature in light of the pending issue of class certification.	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	1/31/14: Settlement **APPROVED**. $30M settlement fund. The settlement creates three sub-classes—the settlement class, the large cap stock fund sub-class, and the company stock fund sub-class. IP agreed to the following terms: IP will not prohibit employees from transferring their investments out of the Company Stock Fund; IP will not offer retail mutual funds; will not allow the Plans' record-keeper to be paid on a percentage of assets basis; will not profit from the Plans; will competitively bid the Plans' recordkeeping services; will rebate to the Plans relationship discounts offered as a result of Plan investments; will provide the Plans with revenue earned from securities lending; and will introduce a passively managed (index) large cap stock option in the Plans' core lineup.

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
			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."		misrepresent the performance of the investment options.	
24.	*Spano v. The Boeing Co.*, No. 06-cv-00743 (S.D. Ill.) Filed 9/27/06 by Schlichter, Bogard & Denton Judge David R. Herndon No. 09-3001 (7th Cir.)	4/18/07: **DENIED**. (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 nondisclosure. 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.	9/26/08: **CERTIFIED**. 1/21/11: **VACATED** by Seventh Circuit. 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	9/19/12: **DENIED** defendants' motion for summary judgment as premature in light of the pending issue of class certification.	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.	3/31/16: Settlement **APPROVED**. $57M settlement fund.

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
			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." 9/19/13: **CERTIFIED**.			
25.	*Boeckman v. A.G. Edwards, Inc.*, No. 05-cv-00658 (S.D. Ill.) Filed 9/15/06 by Korein Tillery LLC Judge G. Patrick	9/26/06: Motion for judgment on the pleadings **DENIED** 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.	8/31/07: **DENIED**.	8/31/07: Defendant's MSJ **GRANTED in part** and **DENIED in part**. 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. 8/31/07: Plaintiff's MSJ on liability	Does not challenge revenue sharing. Challenges the use of mutual funds as investment options in general and use of retail class mutual funds.	6/29/09: Stipulation to dismiss the action with prejudice filed in light of the Seventh Circuit's denial of petition for rehearing in *Hecker v. Deere & Co*.

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Murphy			**DENIED**.		
26.	*Will v. General Dynamics Corp.*, No. 06-cv-00698 (S.D. Ill.) Filed 9/11/06 by Schlichter, Denton & Bogard LLP Judge G. Patrick Murphy	11/14/09: **DENIED**. 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.			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 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.	11/22/10: Settlement **APPROVED**. $15.15M settlement fund. 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

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
						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.
27.	*George v. Kraft Foods Global, Inc.*, No. 07-cv-01713, (N.D. Ill.) Filed 10/16/06 in S.D. Ill. ("*Kraft I*") by Schlichter Bogard & Denton Judge Sidney I. Schenkier	3/16/07: **DENIED** because (a) complaint met notice pleading standard, and (b) burden was on defendant, not plaintiff, to prove 404(c) defense.	7/17/08: **CERTIFIED**.	1/27/10: Defendants' MSJ **GRANTED**. 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	Case transferred from Southern District of Illinois to Northern District of Illinois by order dated 3/16/2007. 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.) 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	NOTE: Case settled along with *Kraft II*. 6/26/12: Settlement **APPROVED**. $9.5M settlement fund.

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
				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. 4/11/11: **AFFIRMED IN PART** and **REVERSED IN PART** by Seventh Circuit. The Seventh Circuit ruled that, although the district court had stated that Kraft had acted prudently by considering the pros and cons of offering company stock funds as unitized funds *and making a decision* to continue offering the funds as unitized funds, the district court 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	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.)	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
				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.		
28.	*George v. Kraft Foods Global, Inc.*, No. 08-cv-03799 (N.D. Ill.) Filed 7/02/08 ("*Kraft II*") by Schlichter Bogard & Denton Judge Ruben Castillo	12/17/09: **GRANTED in part** and **DENIED in part**. 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.	8/25/10: **CERTIFIED**. 7/19/11: **VACATED**.	7/14/11: Defendants' MSJ **GRANTED in part** and **DENIED in part**. 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, 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	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. 2/23/10: The court dismissed without prejudice the company stock funds and the recordkeeping expense claims with respect to the remaining	NOTE: Case settled along with *Kraft I*. 6/26/12: Settlement **APPROVED**. $9.5M settlement fund.

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
				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. 7/19/11: Plaintiffs' MSJ **DENIED**. 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.	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.	
29.	*Loomis v. Exelon Corp.*, No. 06-cv-04900 (N.D. Ill.) Filed 9/11/06 by Schlichter Bogard & Denton Judge John W. Darrah	2/21/07: **GRANTED in part** and **DENIED in part**. Plaintiff's prayer for investment losses stricken because plaintiff failed to allege nexus between administrative fees charged by participants and market-based losses. 12/9/09: **GRANTED**. 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	6/26/07: **CERTIFIED**.		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.	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		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. 9/6/11: **AFFIRMED** by Seventh Circuit. The Seventh Circuit ruled that the plaintiffs failed to state a claim because the plan—like the plan in *Hecker v. Deere*—offered a sufficient mix of investment options with varying expense ratios. The Seventh Circuit also noted that it was not clear that institutional				

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		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.				
30.	*Martin v. Caterpillar, Inc.*, No. 07-cv-01009 (C.D. Ill.) Filed 9/11/06 by Schlichter Bogard & Denton Judge Joe Billy McDade	9/25/08: **DENIED**. Although the court denied 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."			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.	10/28/10: Settlement **APPROVED**. $16.5M settlement fund. For a settlement period of two years (which may be extended to four years upon a material breach of the agreement), Caterpillar agreed to: (1) not engage any investment consultant as an investment manager for the plans; (2) provide certain annual disclosures to participants regarding administrative and investment fees; (3) not offer retail mutual funds, except those available through the plans' brokerage windows; (4) generally limit the cash holding in the company

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
						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.
31.	*Bell et al. v. Pension Committee of ATH Holding Company, LLC et al.*, No. 15-cv-02062 (S.D. Ind.) Filed 12/29/15 by Schlichter Bogard & Denton LLP Judge Tanya Walton Pratt	3/23/17: **GRANTED in part** and **DENIED in part**. Plaintiffs sufficiently pled fiduciary breach by claiming that Defendants selected high-cost investment options when cheaper, identical options were available. They also sufficiently pled that Defendants acted imprudently by failing to solicit bids and to monitor recordkeeping fees. Claim that fiduciaries should have considered using stable value fund instead of money market fund was dismissed.	9/14/18: **GRANTED in part** and **DENIED in part**.		Plaintiffs allege that Defendants breached their fiduciary duties by allowing unreasonable investment management and administrative expenses to be paid by the plan and by selecting and retaining high-cost, poor-performing investments compared to available alternatives. Plaintiffs also allege that Defendants imprudently provided a money market investment instead of considering a stable value fund.	
32.	*Ramsey et al. v. Philips North America LLC*, No. 18-cv-01099 (S.D.				Plaintiffs allege that Defendant breached its fiduciary duties by selecting and retaining high-cost, poor-performing investments for its 401(k) plan, allegedly causing the plan to pay	10/15/18: Settlement **APPROVED**. $17 million settlement fund.

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Ill.) Filed 05/10/2018 by Schlichter, Bogard & Denton, LLP Judge Nancy J. Rosenstengel				unreasonable administrative fees.	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
Eighth Circuit						
33.	*Tussey v. ABB, Inc.*, No. 06-cv-04305 (W.D. Mo.) Filed 12/29/06 by Schlichter Bogard & Denton Judge Nanette K. Laughrey No. 12-2056, 12-2060 (8th Cir.) filed 5/3/12) No. 12-3875 (8th Cir.) filed 12/12/12 No. 15-2792 (8th Cir.) filed 8/18/15 No. 16-1127 (8th Cir.) filed 1/15/16	2/11/08: **DENIED**. The court held that: (1) ABB was not required to disclose revenue sharing arrangements, but where a participant makes investment decisions without knowledge of revenue sharing arrangements, the participant may not be exercising investment decisions within the meaning of § 404(c); and (2) Fidelity Trust could qualify as a fiduciary because it does the first-cut screening of investment options, and has veto authority over the inclusion of investment options. The court ruled that, even if Fidelity Trust is not the final arbiter of plan decisions, it may still be a fiduciary with respect to selecting funds. The court also ruled that Fidelity Management, the investment adviser to certain mutual funds, could be a fiduciary if it paid Fidelity Trust to steer plan assets toward mutual funds that it advised or if it set fees paid with plan assets.	12/3/07: **CERTIFIED**.		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. 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	3/31/12: **JUDGMENT** for Plaintiffs, finding (1) ABB Defs liable for $13.4M for failure to monitor recordkeeping fees and negotiate for rebates; $21.8M lost by Plan by mapping Vanguard Wellington Fund to Fidelity Freedom Funds; and (2) Fidelity Defs liable for $1.7M for lost float income 11/2/12: **AWARD** to Plaintiffs for $13M in attorneys' fees, $500k in costs, $25,000 to each named Plaintiff. 3/19/14: **AFFIRMED IN PART** and **REVERSED IN PART** by Eighth Circuit: (1) affirming judgment and award against ABB Defs re: recordkeeping; (2) vacating judgment and award on investment selection/mapping; (3) reversing district court's judgment against Fidelity; and (4) vacating attorney fee award. 7/9/15: **JUDGMENT** for Defendants. 12/9/15: **AWARD** to Plaintiffs for $10.7M in attorneys' fees, $500k in costs, $25,000 to each

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
					on notice. The Court found that the $13.4 million award for excess 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	named Plaintiff. 3/9/17: **VACATED** by Eighth Circuit.

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
					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. 3/19/14: The Eighth Circuit issued its opinion, which affirmed the district court's judgment that ABB fiduciaries failed to fully investigate and monitor recordkeeping fees. It vacated the district court's ruling that the plans' fiduciaries breached their duties when they decided to remove a certain mutual fund investment option and to "map" the assets that had been invested in the mutual fund into The replacement investment options. Also, the Eighth Circuit concluded that the district court failed to apply the correct standard of review with respect to the fiduciaries' determinations. Specifically, the Court recognized that a fiduciary's interpretation is entitled to deference once the plan vests authority in that fiduciary to interpret the plan. The Court recognized this as true regardless of the type of interpretation—benefits determination or investment selection. Accordingly, the Eighth Circuit vacated the judgment against ABB based on its allegedly imprudent fund selection and remanded the claim for further proceedings. Finally, the Court held that Fidelity did not breach its fiduciary duties by retaining float income and so vacated the damages award against Fidelity, while also vacating the district court's finding of joint and several liability against Fidelity for attorneys' fees. 7/9/15: The court entered a judgment in favor of defendants. Specifically, the court found that while defendants abused their discretion, noting that, "the	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
					ABB defendants knew that removing the Wellington Fund and mapping its assets to the Freedom Funds would result in persistent increased revenues to Fidelity, which ultimately would benefit ABB." The court found that defendants abused their discretion "when they removed the Wellington Fund and mapped its assets into the Fidelity Freedom Funds." Yet the court ultimately ruled in favor of defendants since it found that plaintiffs failed to prove any damages. Applying the Eighth Circuit's damages standard, the court rejected plaintiffs' argument in favor of an alternative "prudent alternative" standard "that provides the largest damages unless the breaching fiduciary sustains their burden of proof to establish that a lower yielding award is justified." Accordingly, the Eighth Circuit found that plaintiffs failed to meet their burden of proof on damages and ruled in favor of defendants. 3/9/17: **VACATED** by Eighth Circuit. The district court incorrectly measured the plans' losses from ABB fiduciaries' breach. Award of attorneys' fees also vacated. 9/21/18: The parties are in mediation on the measurement of losses.	
34.	*Braden v. Wal-Mart Stores, Inc.*, No. 08-cv-03109 (W.D. Mo.) Filed 3/27/08 by Keller Rohrback LLP	10/28/08: **GRANTED**. 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			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.	3/19/12: Settlement **APPROVED**. $13.5M settlement fund. 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

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Judge Gary A. Fenner	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				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.

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		exempted by ERISA § 408(b)(2) exempting a party in interest's receipt of reasonable compensation for services. 11/25/09: **VACATED** by Eighth Circuit. The Eighth Circuit ruled that from the facts pled by the plaintiff – e.g., that defendants selected retail shares of mutual funds when the plan could have obtained less expensive institutional shares – it is reasonable to infer that the process used by the defendants was flawed. The Eighth Circuit also ruled that a plan fiduciary has a duty to disclose material information and that a reasonable trier of fact could find that the fund expense and revenue sharing information sought by plaintiff is material to a reasonable plan participant. In addition, the Eight Circuit ruled that: (1) the plaintiff had Article III standing because he allegedly suffered a redressable personal harm due to defendants' conduct; (2) the relief that could be sought by the plaintiff under ERISA "is not necessarily limited to the period in which [the plaintiff] personally suffered injury"; and (3) as to whether ERISA section 408(b)(2) exemption was applicable to the plaintiffs'				

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		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."				
35.	*Lequita Dennard v. Transamerica Corporation, et al.*, No. 15-cv-00030 (N.D. Iowa) Filed 2/6/15 by Stris & Maher LLP Judge Edward J. McManus				Plaintiff alleged that Defendants breached their fiduciary duties and committed prohibited transactions by burdening the plan with layers of superfluous fees paid to recordkeeper and investment manager. Specifically, the service provider allegedly charged an excessive investment management fee because its managers didn't actually manage portfolios. Defendants also engaged sub-advisers who charged layers of additional fees with no added value. Finally, Defendants charged an asset-based fee for recordkeeping services, which allegedly increased without any additional services being provided.	10/28/16: Settlement **APPROVED**. $3.8M settlement fund. Defendants also agreed to (1) abide by certain fee limits, (2) add low-fee index funds to the plan, (3) to retain an unaffiliated investment consultant, (4) to revise the SPD to describe investment structures, (5) to rebate revenue sharing payments to the plan, (6) to provide recordkeeping services at no cost, and (7) to offer nonaffiliated mutual funds to the plan.
36.	*DuCharme v. DST Systems, Inc. et al.*, No. 17-cv-00022 (W.D. Mo.) Filed 1/13/17 by The Klamann Law Firm; Kapke & Willerth; White, Graham, Buckley & Carr; and Humphrey,	6/23/17: **GRANTED**. Plaintiff bound by arbitration agreement.			Plaintiff alleged that Defendants breached their fiduciary duties by, among other things, failing to determine the reasonableness of compensation paid to the plan's investment manager. The 1% asset-based fee was allegedly grossly excessive. Defendants allegedly had selfish interest in selecting investment manager due to services that Defendants performed on behalf of investment manager (*i.e.*, fees running in both directions).	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Farrington & McClain Judge Brian C. Wimes					
Ninth Circuit						
37.	*Kanawi v. Bechtel Corp.*, No. 06-cv-05566 (N.D. Cal.) Filed 9/11/06 by Schlichter Bogard & Denton Judge Charles R. Breyer	5/15/07: **DENIED** 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. 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).	8/24/07: **DENIED**. 10/10/08: **CERTIFIED**.	11/3/08: **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. 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 statute of limitations provision; dismissed plaintiffs' self-dealing claims except for a four-month period during which the court said the plan, and not Bechtel, paid fees to FIA; dismissed claims alleging improper retention of investment options; and dismissed claims alleging that the plan is entitled to some of the proceeds from the sale of FIA to a third party.	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.	3/11/11: Settlement **APPROVED**. $18.5M settlement fund. 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.

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
38.	*In re Northrop Grumman Corp. ERISA Litig.*, No. 06-cv-06213 (C.D. Cal.) Filed 9/28/06 by Schlichter Bogard and Denton LLP Judge Margaret M. Morrow	2/26/07: **GRANTED** 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. 5/23/07: **GRANTED** with respect to Northrop and its director defendants "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.	8/6/07: **DENIED** because the case is "better taken care of by administrative agencies." 9/8/09: **VACATED** by Ninth Circuit. District judge abused his discretion by failing to make any findings in denying class certification. 3/29/11: **CERTIFIED**.	11/24/15: Defendants' MSJ **GRANTED in part** and **DENIED in part**. Motion granted on claim that defendants breached fiduciary duties by causing Plans to pay unreasonable investment fees; denied as to (1) claim that defendants breached fiduciary duties by causing Plans to distribute plan assets to Northrop as improper admin fees and (2) claim that admin fees constituted prohibited transaction – summary judgment also granted in favor of Investment Committees, Hamlin, and Abelson on all claims	*Heidecker* and *Grabek* actions, and all future actions based on same facts filed in Central District of California, were consolidated on March 26, 2007. 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.	6/12/17: Settlement **APPROVED**. $16.75M settlement fund.
39.	*Tibble v. Edison International*, No. 07-cv-05359 (C.D. Cal.) Filed 8/16/07 by Schlichter Bogard and Denton LLP Judge Stephen V. Wilson No. 10-56406 (9th Cir.) filed 9/8/10 No. 11-56628 (9th Cir.) filed 9/21/11	7/16/08: **GRANTED in part** and **DENIED in part**. 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	6/30/09: **CERTIFIED**.	7/16/09: The court **GRANTED in part** defendants' MSJ 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 lawsuit was brought in 2007 by six Edison employees and Plan participants against various Edison corporate entities and Plan fiduciaries. Plaintiffs claimed the defendants engaged in prohibited transactions and breached their fiduciary duties by entering into an arrangement whereby revenue-sharing payments were used to reduce the amount that the Plan's recordkeeper Hewitt charged Edison for recordkeeping and other costs. Plaintiffs also alleged that the particular mutual funds Edison selected charged excessive fees, which rendered their inclusion imprudent. Finally, Plaintiffs claimed that the fiduciaries breached their duty of prudence by selecting retail-class mutual funds for the Plan instead of attempting to secure institutional-class mutual funds with lower fees, and that Edison's failure to divest the plan of these retail-class funds constituted a continuing fiduciary	8/9/10: **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. Subsequently the Ninth Circuit affirmed the district court; the U.S. Supreme Court vacated the Ninth Circuit decision and remanded; the Ninth Circuit then vacated the district court

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	No. 13-550 (S.Ct.) cert granted 10/2/14 No. 18-55974 (9th Cir.) filed 7/12/18.	Ninth Circuit precedent, ERISA's general fiduciary duty provision requires disclosure of material fee information without a request from a plan participant.		the inclusion of retail mutual funds and sector funds was proper because participants demanded such funds; (5) defendants properly selected, monitored, and removed a technology fund; (6) defendants properly included a money market fund rather than a stable value fund; (7) offering the stock fund as a unitized fund was proper; and (8) statute of limitation barred most of these claims. However, the court held that: (i) § 404(c) was not applicable in light of plaintiffs' claim that defendants offered improper investment options; (ii) triable issues remained as to whether defendants' desire to generate revenue sharing to pay for recordkeeping fees that the plan sponsor was otherwise required to pay under the terms of the plan tainted the defendants' selection of retail mutual funds; and (iii) trial issues remained as to whether the trustee's retention of float constituted a prohibited transaction. 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	breach. 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. 7/8/10: The court ruled that plan fiduciaries did not select and retain the retail share classes of six mutual funds to lower what Edison had to pay as plan recordkeeping fees. The court, however, concluded that plan fiduciaries breached their fiduciary duties by selecting the retail share classes of three mutual funds – which were added to the plan within ERISA's six-year statute of limitations – because, given the plan's asset size, the plan fiduciaries could have obtained institutional share classes with lower fees. With respect to the money market fund, the court ruled that the evidence did not support plaintiffs' claim that the management fees were excessive. The court noted that the plan fiduciaries selected the money market fund following a request for proposal process. 8/9/10: 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. 3/21/13: The Ninth Circuit **AFFIRMED** both the	decision and remanded; the district court then issued **FINDINGS OF FACT AND CONCLUSIONS OF LAW** in favor of Plaintiffs. $7.5 million **JUDGMENT** and $5.6 million in additional damages.

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
				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.	District Court's 7/16/09 grant of partial summary judgment in favor of Edison and the District Court's 8/9/10 judgment in favor of plaintiffs. **Rejection of "Continuing Violation Theory"**: The Ninth Circuit affirmed the District Court's application of ERISA's six-year limitations period for claims of fiduciary breach. The participants and the Department of Labor ("DOL"), as amicus, urged the Court to adopt a "continuing violation theory" to find that claims related to all six challenged plan investments were timely under ERISA section 413, as long as those investments remained in the Plan. The Ninth Circuit rejected the "continuing violation" theory, concluding that it would "make hash out of ERISA's limitation period and lead to an unworkable result." The Court instead held that, here, the limitations period for claims alleging imprudence began to run at the time the plan design decision was made. Accordingly, the Court upheld the dismissal of the claims related to mutual funds that had been added to the Plan prior to the six-year limitations period. However, the Ninth Circuit stopped short of establishing a firm rule that the limitations period for all claims for fiduciary breach concerning a fiduciary's inclusion of an investment option begin to run at the point such investment is included in the lineup. The Ninth Circuit acknowledged the possibility that "a new breach" could have arisen during the limitations period had plaintiffs proven certain "changes in conditions" related to the investment options that "should have prompted a full due diligence review of the funds" by Plan fiduciaries. The Court noted that plaintiffs here failed to present such evidence, and did not explore the issue further.	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
					The Ninth Circuit also rejected Edison's argument that ERISA's three-year limitations period applied to the participants' claims because plaintiffs had "actual knowledge" of the alleged breach at the time of the Plan's inclusion of the challenged funds. The Court disagreed, holding that, because these claims pertained to an allegedly deficient selection process, the "mere notification that retail funds were in the Plan" did not provide "actual knowledge of the breach or violation." **<u>Deference to DOL's Section 404(c) Interpretation:</u>** Edison also argued that the plaintiffs' claims were proscribed by ERISA section 404(c), the safe harbor provision that protects fiduciaries from claims resulting from a participant's exercise of discretion. Edison argued that, by virtue of the Plan participants' selection of each challenged investment, any resulting loss was the product of the participants' exercise of control. The plaintiffs and DOL argued that a fiduciary's designation of plan investment options is a fiduciary function, not "a direct or necessary result" of any participant direction. Joining the Fourth, Sixth, and Seventh Circuits, the Ninth Circuit held that DOL's interpretation was consistent with ERISA's statutory language and entitled to administrative deference. Accordingly, the Ninth Circuit held that section 404(c) did not protect the Plan fiduciaries from claims related to the selection of imprudent plan investment options. **<u>Revenue Sharing Did Not Violate ERISA:</u>** Plaintiffs alleged that the revenue sharing arrangement violated ERISA section 406(b)(3), a provision prohibiting plan fiduciaries from receiving consideration from a party related to the	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
					plan. Here, the Ninth Circuit deferred to the DOL's position that the revenue sharing was not "consideration" for purposes of ERISA section 406(b)(3) and, therefore, there was "not a section 406(b)(3) violation at all." However, the Court expressly limited its holding on revenue sharing to the question of whether the revenue sharing arrangement violated the plan document or ERISA section 406(b)(3). In so holding, the Court noted the possibility that, "on a different record," fiduciary liability could attach with respect to other issues related to revenue sharing, specifically (1) whether the cost of revenue sharing drives up the mutual fund's total 12b-1 fee and, in turn, its expense ratio, and (2) whether fiduciaries are motivated to select funds because they offer the financial benefit of revenue sharing. **Inclusion of Retail Funds Violated Duty of Prudence:** In arguably the most notable part of the Tibble opinion, the Ninth Circuit agreed with the District Court that Plan fiduciaries had violated ERISA's duty of prudence by failing to investigate the possibility of offering the institutional share class. Citing Hecker for the proposition that ERISA does not obligate plan fiduciaries to automatically populate investment menus with the lowest-cost options, the court initially ruled that the inclusion of retail funds in the Plan's investment lineup was not "categorically imprudent." The Court noted that the particular expense ratio range of the Plan's mutual fund menu (0.03 to 2%) was not out of the ordinary to make the funds imprudent, citing the Hecker court's dismissal of similar excessive fee claims where the expense ratios varied from 0.07 to 1%. Id. at 586.	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
					However, the Court went on to conclude that the procedural failure to investigate the institutional share class was a breach of fiduciary duty. Edison argued that it based its decision to offer the retail-class funds on advice from consultant Hewitt. The Court rejected this argument, stating that independent expert advice is not a "whitewash" absolving a fiduciary of responsibility and that there was no evidence that Edison ever considered the possibility of using the institutional class. The court noted that its ruling may have been different had Edison established a prudent process in considering share classes. Specifically, the Court noted the absence in the record of any evidence of • specific recommendations Hewitt made to the investment committee regarding the funds, • the scope of Hewitt's review, • whether Hewitt considered both retail and institutional share classes, or • what questions or steps the Plan investment committee pursued to evaluate Hewitt's recommendations. **Inclusion of Other Higher-Cost Investment Options Did Not Violate Duty of Prudence:** Plaintiffs also alleged that the Plan fiduciaries acted imprudently by including two other types of investment options in the Plan's lineup: a short-term investment fund ("STIF") similar to a money market account and a unitized fund for investment in employer stock. Finding that Plan fiduciaries had discussed the pros and cons of a	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
					stable-value alternative prior to the inclusion of the STIF in the lineup, the Court found no prudence violation associated with the STIF. With respect to the unitized fund, participants argued that the fund's returns fell short of the corresponding gains in company stock because the fund also was invested in cash or similar liquid equivalents. Recognizing that the associated investment "drag" was a common element of unitized funds, and that Plan fiduciaries had evaluated and made efforts to minimize the investment drag, the Court found that the Plan's inclusion of the unitized fund was not imprudent. 5/18/15: **VACATED**. In a unanimous decision, the Supreme Court found that plan fiduciaries have an ongoing fiduciary duty under ERISA to monitor plan investments, a duty separate and apart from the fiduciary's duty to be prudent when first selecting plan investments. The Supreme Court observed that the Ninth Circuit reached its holding "without considering the role of the fiduciary's duty of prudence under trust law." *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015). This, the Court found, was a critical error, given that "under trust law[,] a fiduciary is required to conduct a regular review of its investment with the nature and timing of the review contingent on the circumstances." In reaching its conclusion, the Court relied on principles from the common law of trusts and cited treatises, historical cases, and uniform acts of trust law. These authorities led the court to conclude that "a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones." The Court added: "so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely. The Ninth Circuit	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
					erred by applying a 6-year statutory bar based solely on the initial selection of the three funds without considering the contours of the alleged breach of fiduciary duty." The Court did not opine as to whether Edison actually breached its fiduciary duties with regard to the continuing availability of the mutual funds that were initially selected as investment options in 1999. Instead, the Court vacated the Ninth Circuit's opinion and remanded with instructions for the appellate court "to consider petitioners' claims that respondents breached their duties within the relevant 6-year period under § 1113, recognizing the importance of analogous trust law." 12/16/16: **VACATED** and **REMANDED** because plaintiffs did not have opportunity to present certain statute of limitations arguments due to district court's erroneous standard. 8/16/17: **FINDINGS OF FACT AND CONCLUSIONS OF LAW** in favor of Plaintiffs. Defendants breached fiduciary duty of prudence by failing to invest in lower-cost institutional class shares. The breach occurred on August 15, 2001 when institutional share classes became available. 6/25/18: Plaintiff's motion for reimbursement of expert witness fees and incentive awards **DENIED**. Appealed to Ninth Circuit. 9/16/18: Joint motion for entry of judgment filed.	
40.	*Daniels-Hall v. National Education Association*, No. 07-cv-05339 (W.D.	5/23/08: **GRANTED**. The court ruled that National Education Association, as an employee association, cannot, as a matter of			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	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Wash.) Filed 7/11/07 by Keller Rohrback, LLP Hon. Ronald B. Leighton	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. 12/20/10: **AFFIRMED** by Ninth Circuit. 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.			payments.	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
41.	*Sulyma v. Intel Corporation Investment Policy Committee et al.*, No. 15-cv-04977 (N.D. Cal.) Filed 10/29/15 by Bailey & Glasser LLP Judge Nathanael M. Cousins No. 17-15864 (9th Cir.)			3/31/17: Defendants' MSJ **GRANTED**. All claims time-barred because plaintiff had actual knowledge of elements of claims more than three years before filing case. Financial disclosures provided information about plan asset allocation and an overview of the logic behind investment strategy. Plaintiff therefore had knowledge of underlying facts that formed the basis of his complaint. Appealed. No. 17-15864 (9th Cir.). Oral argument held in October 2018.	Plaintiff's allegations involve failures to manage Plan assets on behalf of the Target Date Class, mismanaging the Global Diversified Fund on behalf of the Diversified Fund Class, and failures to give disclosures regarding investment alternatives concerning both issues.	
42.	*Johnson et al. v. Fujitsu Technology and Business of America, Inc. et al.*, 16-cv-03698 (N.D. Cal.) Filed 06/30/16 by Nichols Kaster PLLP Judge Nathanael M. Cousins	4/11/17: **DENIED**. Plaintiffs' fiduciary breach allegations were "within the realm of plausible allegations" (no reasoning provided). Claims against trustee were also permitted to proceed, as plaintiffs sufficiently alleged that plan was the most expensive "mega plan" in the country and that its recordkeeping expenses were five to ten times higher than similarly-sized plans.			Plaintiffs allege that Fujitsu breached its fiduciary duties by (1) failing to engage in a prudent process to monitor the plan's recordkeeping expenses, and failing to investigate and negotiate reasonable recordkeeping fees, (2) failing to monitor all fees being paid to the plan's service provides such as recordkeeping fees, to ensure the plan's service providers were not receiving compensation that exceeded the reasonable value of their services, (3) failing to investigate the availability of lower-cost share classes and failing to utilize a process to determining whether the higher-cost share classes were necessary to pay the plan's recordkeeping and other administrative expenses, (4) failing to implement and employ a process to control the plan's investment management expenses in the selection and monitoring of the plan's investment options and in the design and implementation of the plan's custom target date funds, (5) imprudently designing the plan's custom target date funds and	5/11/18: Settlement **APPROVED**. $14M settlement fund. Fujitsu will seek bids for recordkeeping services.

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
					utilizing inappropriate and speculative investments in the process of implementing the funds, and (6) failing to promptly remove imprudent investments and the target-date funds more broadly when it was apparent that each was imprudent.	
43.	*Lorenz v. Safeway, Inc., et al.*, No. 16-cv-04903 (N.D. Cal.) Filed 08/25/16 by Schneider Wallace Cottrell Konecky Wotkyns LLP Judge Jon S. Tigar	3/13/17: **GRANTED in part** and **DENIED in part**. Prohibited transaction claims dismissed as time-barred because Plaintiff had actual knowledge of recordkeeper's services before the limitations period when he received his participant disclosure notice. Excessive fee claims permitted to proceed, as it was sufficient to allege that Defendants had no meaningful record of performance to justify selection of new fund with higher fees. This reflected a flawed decision-making process. Finally, Plaintiff plausibly alleged breach of duty of prudence, as recordkeepers' compensation hinged, at least in part, on revenue-sharing payments that increased even though recordkeepers provided services to a decreasing number of participants.		7/6/18: Plaintiff's MSJ filed. 7/6/18: Defendants' MSJ filed.	Plaintiffs raise claims for breaches of fiduciary duty related to Defendants' alleged selecting investment options with fees unjustified by past performance, revenue sharing, and record keeping fees.	
44.	*White et al. v. Chevron Corporation et al.*, No. 16-cv-00793	8/29/16: **GRANTED**. Duty of loyalty claims dismissed because Plaintiffs merely alleged that plan incurred unreasonable expenses, which is not sufficient			In addition to claims about excessive investment management/administrative fees, Plaintiff alleges that Defendants breached fiduciary duties by (1) failing to provide Vanguard Prime Money Market Fund instead of stable value fund, and (2) providing	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	(N.D. Cal.) Filed 02/17/16 by Schlichter Bogard & Denton Judge Phyllis J. Hamilton No. 17-16208 (9th Cir.)	to state claim for breach of duty of loyalty. All duty of prudence claims dismissed. ERISA does not require plans to offer stable value funds. Moreover, Plaintiffs did not sufficiently plead excessive management fees, as ERISA does not require fiduciaries to scour the market to find the cheapest possible funds. It was not enough to allege that the plan "could have" provided lower-cost versions of funds or "could have" structured investments differently. Finally, Plaintiffs did not sufficiently allege that Defendants paid excessive recordkeeping fees, as "revenue sharing" is not per se excessive or unreasonable. Moreover, Defendants were not required to solicit competitive bids. All other claims dismissed. Plaintiffs subsequently amended their Complaint. 5/31/17: **GRANTED**. With respect to excessive recordkeeping fees, Plaintiffs' allegation—that Chevron retained Vanguard only because Vanguard, as a Chevron shareholder, voted favorably on shareholder resolutions—was too speculative to state claim for breach of duty of loyalty. And, once again, merely alleging that			and failing to remove the Artisan Small Cap Value Fund as an investment option	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		plan offered retail rather than institutional share classes was insufficient to state claim for breach of duty of prudence. As for prudence of administrative fees, Chevron was not required to anticipate that the overall market would rise and thereby increase the plan's asset-based administrative fees. Appealed. No. 17-16208 (9th Cir.) Oral argument scheduled for October 2018.				
45.	*Creamer, et al. v. Starwood Hotels and Resorts Worldwide, Inc.*, No. 16-cv-09321 (C.D. Cal) Filed 12/16/16 by Solouki Savoy, LLP Judge Dale S. Fischer	1/24/18: Voluntarily **DISMISSED**.	12/4/17: **DENIED** (reasoning not provided).		Plaintiffs allege that Defendant breached its fiduciary duties by causing plan participants who invested in index funds to pay seven times more than a reasonable fee due to multiple layers of fees. Plaintiffs further allege that Defendant failed to adequately disclose its practice of revenue sharing and failed to include a stable value fund in the plan instead of a money market fund. Investment options retained by the plan allegedly performed poorly and charged high fees.	
46.	*Marshall v. Northrop Grumman Corp.*, No. 16-cv-06794 (C.D. Cal.) Filed 9/9/16 by Schlichter Bogard	1/30/17**: GRANTED in part** and **DENIED in part**. Plaintiffs' claims were time-barred. Plaintiffs' filing of similar case against different defendant did not give Defendants notice of fiduciary breach that would toll statute of limitations. Plaintiffs	11/2/17: **CERTIFIED**.		Plaintiff's claims include alleged breaches of fiduciary duties by failing to solicit bids for Plan recordkeeper and administrator; and failing to move assets in Emerging Markets Equity Fund from active to passive managers (prior to 2014)	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	and Denton Judge Ronald S.W. Lew	also lacked standing because they failed to allege that they enrolled in investment management services that allegedly generated excessive fees. Fiduciary breach claims against Northrop dismissed, as plaintiffs failed to allege that Northrop acted in a fiduciary capacity beyond simply appointive executives to serve on the plan committees. Finally, prohibited transaction and duty to monitor claims permitted to proceed. 2/15/18: **GRANTED in part** and **DENIED in part**. Plaintiffs amended their complaint and Defendants moved to dismiss. Fiduciary breach claims against Northrop dismissed, as a plan sponsor does not become a fiduciary merely because it appoints its own employees to serve on fiduciary committees. All other claims against Northrop and individual defendants allowed to proceed.				
47.	*Alas v. AT&T*, No. 17-cv-08106 (C.D. Cal) Filed 11/06/17 by Solouki Savoy LLP Judge Virginia A.	8/27/18: Filed.			Plaintiff alleges that Defendants breached their fiduciary duties by failing the use the plan's enormous size to get reasonable fees for plan participants and to obtain low cost funds.	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Phillips					
48.	*McCorvey v. Nordstrom*, No. 17-cv-08108 (C.D. Cal) Filed 11/06/17 by Solouki Savoy LLP Judge Michael W. Fitzgerald	2/12/18: Voluntarily **DISMISSED**.			Plaintiff alleges that Defendants breached their fiduciary duties by (1) failing to use leverage from the plan's size to get reasonable fees for plan participants, (2) failing to act prudently to lower costs, (3) failing to use lower cost investment vehicles, and (4) making inadequate disclosures about fees.	
49.	*Ybarra et al. v. Board of Trustees of Supplemental Income Trust Fund et al.*, No. 17-cv-02091 (C.D. Cal.) Filed 11/30/17 by Frank Sims & Stolpher LLP Judge James V. Selna	9/20/18: Filed.			Plaintiffs allege that Defendants breached their fiduciary duties by (1) offering retail class mutual fund shares when identical lower cost institutional class shares were available, and (2) overpaying for recordkeeping services through revenue sharing arrangements with mutual funds offers as investment options under the plan.	
50.	*Johnson v. Providence Health & Services*, No. 17-cv-01779 (W.D. Wash.) Filed 11/28/17 by Bailey & Glasser, LLP	3/22/18: **GRANTED in part** and **DENIED in part**. Plaintiff sufficiently pled excessive investment management fees by alleging that cheaper, institutional share classes were available. However, Plaintiff failed to plausibly allege excessive recordkeeping fees, as			Plaintiff alleges that Defendants breached their fiduciary duties by allowing the plan's recordkeeper to receive excessive and unreasonable compensation. Defendants allegedly loaded the plan with excessively expensive and underperforming mutual funds when superior alternatives were available.	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Judge John C. Coughenour	Defendant renegotiated its contract with recordkeeper several times and might not have benefitted from competitive bidding process.				
51.	*Solano v. Wal-Mart Stores Inc. et al.*, No. 17-cv-03976 (C.D. Cal.) Filed 5/26/17 by Shepherd, Finkelman, Miller & Shah, LLP Judge John F. Walter	7/26/17: Voluntarily **DISMISSED**.			Plaintiff alleged that Defendants breached their fiduciary duties by (1) failing to disclose the expenses and risks of the plan's investment options, (2) allowing unreasonable administration expenses to be charged to the plan, and (3) selecting and retaining high-cost, poor-performing investments instead of other available and more prudent alternative investments.	
Tenth Circuit						
52.	*Ramos et al. v. Banner Health et al.*, No. 15-cv-02556 (D. Col.) Filed 11/20/15 by Schlichter Bogard and Denton, LLP Judge William J. Martinez	9/29/17: **DENIED** Defendant Slocum's MTD. Plaintiffs sufficiently stated claim for excessive administrative fees by alleging that Defendant (third-party investment consultant) had responsibility and control over negotiating fees and therefore held at least co-fiduciary liability. Plaintiffs also sufficiently pled imprudent investment options by alleging that Defendant at least shared responsibility to evaluate mutual fund offerings.	3/28/18: **CERTIFIED in part**.	6/7/18: Defendant Slocum's MSJ filed.	Plaintiffs' claims include (1) alleged breaches of fiduciary duties by failing to solicit bids for Plan recordkeeper and administrator, and (2) selecting as Plan investment options mutual funds with excessive expenses and poor historical performance.	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
53.	*Troudt et al. v. Oracle Corp.et al.*, No. 16-cv-00175 (D. Colo.) Filed 01/22/16 by Schlichter Bogard and Denton, LLP Judge Robert E. Blackburn	3/22/17: **DENIED**. Defendants did not successfully refute claims of excessive investment fees by arguing that fees were within a reasonable range of expense ratios. Plaintiffs also successfully pled imprudent investments by alleging that two of the funds had inadequate performance histories to warrant investment in them at all and that a third option greatly underperformed its benchmark. Finally, Defendants' argument that revenue sharing payments were not "plan assets" was unavailing under the statutory language.	1/30/18: **GRANTED in part**.	4/16/18: Defendants' MSJ filed.	Plaintiff's claims include (1) alleged breaches of fiduciary duties by failing to solicit bids for Plan recordkeeper and administrator, and (2) selecting as Plan investment options mutual funds with excessive expenses and poor historical performance.	
54.	*Barrett v. Pioneer Natural Resources USA, Inc. et al.*, No. 17-cv-01579 (D. Colo.) Filed 06/08/17 by Franklin D. Azar & Associates, PC-Aurora Judge William J. Martinez		8/27/18: **DENIED** as moot in light of Amended Complaint.	6/29/18: Defendants' partial MSJ **GRANTED**. Money market fund claim dismissed because Plaintiff did not allege injury.	Plaintiff alleges that Defendants breached their fiduciary duties by (1) failing to offer institutional class shares for mutual funds, which resulted in participants paying excessive costs to invest, (2) failing to ensure that plan fees were reasonable, and (3) failing to remove a poorly performing money market fund when a stable value fund was available.	
Eleventh Circuit						
55.	*Duck v. Honda Manufacturing of*	3/31/09: **GRANTED**. Voluntarily dismissed by			Plaintiff alleged that Defendants breached their fiduciary duties by charging multiple layers of	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Alabama, LLC et al., No. 08-cv-02304 (N.D. Ala.) Filed 12/10/08 by Cochran, Cherry, Givens, Smith, Lane & Taylor, P.C. and The Cochran Firm, P.C. Judge Robert R. Armstrong	Plaintiff so that he could exhaust administrative remedies.			investment management fees to the plan, charging other hidden fees, and receiving kickbacks and illegal third-party payments in connection with services provided to the plan.	
56.	*Johnson et al. v. Delta Air Lines, Inc. et al.*, 17-cv-02608 (N.D. Ga.) Filed 12/20/16 by Friedlander & Gorris, P.A. and Tacopina & Seigel Judge Gregory M. Sleet	12/12/17: **GRANTED**. Plaintiffs lacked standing because they did not allege that they were invested in any of the challenged investment funds or paid the allegedly excessive recordkeeping fees.			Plaintiffs alleged that Defendants breached their fiduciary duties by selecting expensive investment options when cheaper options were readily available. Defendants also allegedly allowed the plan to be charged excessive recordkeeping fees.	
57.	*Pizarro v. Smith*, No. 18-cv-01566 (N.D. Ga.) Filed 4/12/2018 by Sanford Heisler Kimpel LLP Judge Leigh Martin	8/27/18: Filed.			Plaintiffs allege that Defendants breached their fiduciary duties by allowing participants to pay unreasonable fees to the plan's investment advisors. Home Depot also allegedly constructed a plan with too many layers of fees, turning a blind eye to the "kickback scheme" between the plan's investment adviser and recordkeeper. Finally, Home Depot allegedly retained too many poor-performing investment options in the plan and did not replace	

Participant Claims Against Sponsors And Related Fiduciaries						
No.	**Case Name & Judges**	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	May Note: GLG represents Defendant Financial Engines.				them with readily available alternative investment options.	

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
First Circuit						
58.	*Columbia Air Services, Inc. v. Fidelity Management Trust Co.*, No. 07-cv-11344 (D. Mass.) Filed 7/23/07 by Robinson & Cole, LLP Judge George A. O'Toole, Jr.	9/30/08: **GRANTED**. The court held that Plaintiff failed to allege that Fidelity was a fiduciary under ERISA with respect to setting its compensation or with respect to the selection or substitution of mutual fund options made available to the plan and its participants. 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. 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.			Plaintiff, the plan sponsor and plan administrator for the Columbia Group of Companies 401(k) Retirement Savings Plan (the "Plan") brought a class action complaint against Fidelity, the Plan's trustee alleging that it breached its fiduciary duties and engaged in prohibited transactions. Specifically, plaintiff alleged that Fidelity breached its duty of loyalty by receiving a share of the investment fees paid by mutual funds and managers. Since Fidelity allegedly provided no services in exchange for these fees, plaintiff alleged the receipt of fees constituted prohibited transactions.	

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
59.	*Charters v. John Hancock Life Insurance Co.*, No. 07-cv-11371 (D. Mass.) Filed 7/26/07 by Shapiro Haber Urmy LLP Judge Nathaniel M. Gorton	12/21/07: **DENIED**. (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; and (b) Plaintiff had standing to assert claims on behalf of trustees of other plans. 9/30/08: **GRANTED** 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.		9/30/08: **GRANTED** Plaintiff's MSJ, finding that Hancock was an ERISA fiduciary because (a) Hancock retained discretion to set and modify the amount of its administrative fees charged to its plan clients (b) Hancock retained discretion to substitute mutual funds offered as investments to its plan clients, and, in the event Hancock's clients rejected such substitution, they would effectively have no option other than transferring their investments to another Hancock-administered sub-account or terminating their contract with Hancock in its entirety, either of which would subject the plans to a fee. According to the court, such "built-in penalties" significantly limited the plans' opportunity to reject such fund changes, compared with the facts addressed in the DOL's 1997 "Aetna Letter." In the same ruling, the court **DENIED** Hancock's MSJ, 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	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.	8/21/09: 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.

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
				owed by its plan clients.		
60.	*Golden Star, Inc. v. Mass Mutual Life Insurance Co.*, No. 11-cv-30235 (D. Mass.) Filed 10/19/11 by Shapiro Haber & Urmy LLP Judge Michael A. Ponsor			5/20/14: **DENIED** Mass Mutual's MSJ, holding that it is a functional fiduciary because of its ability to set its own compensation as a service provider since it exercised its discretion to set management fees, taking fees out of separate accounts, and offsetting revenue-sharing payments with its fees. However, its authority to substitute funds from the plans' investment lineups did not render it a fiduciary since it never exercised that authority. The Court found that Mass Mutual's ability to substitute funds, without the actual exercise of that authority, was not enough to implicate fiduciary status under either section 3(21)(A)(i) or (iii) of ERISA.	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. Specifically, plaintiff alleged that the "kickback" payments are part of Mass Mutual's pay-to-play scheme in which it uses its ownership and control over separate accounts to negotiate for the receipt of these payments from mutual funds while providing none or only incidental services to the plan. Plaintiff sought a declaratory judgment that Mass Mutual violated ERISA, an injunction prohibiting these practices, disgorgement/restitution of revenue sharing payments, compensatory damages, and attorney's fees. 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. 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 ING action.	6/25/15: Settlement **APPROVED**. $9.475M settlement fund. MassMutual also agreed to make a number of structural changes.
61.	*Bishop-Bristol v. Massachusetts*			4/5/17: Defendant's MSJ filed.	Defendant markets stable value funds, which periodically credit income to plan participants who	

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Mutual Life Insurance Company, No. 16-cv-30082 (D. Mass.) Filed 1/29/16 by Izard Nobel LLP Judge Mark G. Mastroianni			5/17/17: Plaintiff's MSJ filed.	invest in funds. Plaintiff alleges that Defendant breached its fiduciary duties and committed prohibited transactions by setting the crediting rate well below its internal rate of return on the invested capital, thus guaranteeing a substantial profit for itself (and not disclosing the profit to participants).	
62.	*Fleming et al. v. Fidelity Management Trust Company et al.*, No. 16-cv-10918 (D. Mass.) Filed 5/20/16 by Zelle LLP; Schneider Wallace Cottrell Konecky Wotkyns LLP; and Berger & Montague, P.C. Judge Allison D. Burroughs	9/22/17: **GRANTED**. Plaintiffs failed to plausibly allege that Defendants exercised fiduciary function when deciding to make securities available through brokerage product. Plan sponsor retained ultimate authority to include or reject brokerage product from list of investment options.			Plaintiffs alleged that Defendants breached their fiduciary duties by collecting fees from third-party robo-adviser. These fees allegedly had no connection to services provided by Defendants but were instead kickbacks paid as part of a "pay-to-play" arrangement. Defendants also allegedly failed to take advantage of investing in cheaper, institutional share classes.	
63.	*Leal et al v. State Street Bank & Trust Co. et al.*, No. 17-cv-10512 (D. Mass.) Filed 3/25/17 by				Plaintiffs allege that Defendants breached their fiduciary duties and committed prohibited transactions by systematically overcharging plan participants for SWIFT messaging services (*i.e.*, secure electronic messages used to effectuate securities trades). Defendants allegedly charged clients markups far in excess of the actual cost of	

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Schneider Wallace Cottrell Konecky Wotkyns LLP and Keller Rohrback L.L.P. Judge Mark L. Wolf				providing SWIFT messaging services.	
Second Circuit						
64.	*Haddock v. Nationwide Financial Services, Inc.*, 419 F. Supp. 2d 156 (D. Conn. 2006) Filed 8/15/01 by Koskoff, Koskoff & Bieder, P.C. Judge Stefan R. Underhill No. 10-4237 (2d Cir.) filed 10/20/10	9/25/07: **DENIED**. (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 sharing could have involved illegal "kickbacks" prohibited by ERISA. (c) Trustees could have amended complaint to add fund selection	11/6/09: **CERTIFIED**. 2/6/12: **VACATED** by Second Circuit. 7/23/10: **DENIED**. Second Circuit then reversed and remanded. 9/16/13: **CERTIFIED**. *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	3/7/06: Nationwide's MSJ **DENIED**. (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 sharing could have involved illegal "kickbacks" prohibited by ERISA.		4/9/15: Settlement **APPROVED**. $140M settlement fund (the largest ever at the time in a suit involving the use of revenue-sharing agreements—as compared to then-recent settlements of similar claims against ING Life Insurance & Annuity Co. for $14.9M and against MassMutual Insurance Co. for $9.5M, which were both approved). In addition to paying this sum, Nationwide agreed as part of the settlement to supplement its disclosures on all of its annuity contracts and trust agreements that relate to mutual-fund related fees and expenses and to enhance the procedures for making any future changes in connection with annuity contracts or trust platforms.

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		claim and did not waive claim by including in first complaint but omitting from subsequent complaints. 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. 8/11/08: Plaintiffs' MTD **GRANTED**. (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 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	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.			

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		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.				
65.	*Beary v. ING Life Insurance and Annuity Co.*, No. 07-cv-35 (D. Conn.) Filed 1/8/07 by Howard, Kohn, Sprague & Fitzgerald, LLP Judge Mark R. Kravitz	11/5/07: **GRANTED**. 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.			Action brought under state fiduciary law on behalf of IRC § 457(b) plan and similarly situated plans.	

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
66.	*Phones Plus, Inc. v. The Hartford Financial Services, Inc.*, No. 06-cv-01835, 2007 WL 3124733 (D. Conn.) Filed 11/14/06 by Shepherd Finkelman Miller & Shah, LLC Hartford filed a third-party complaint against third-party defendants Thomas Sodemann and Robert Sodemann on 12/6/07. Judge Alfred V. Covello	10/23/07: **DENIED**. (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 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				6/22/10: Settlement **APPROVED**. $13.775M settlement fund. In addition, Hartford will make various 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. 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**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		non-fiduciary liability for knowingly participating in Neuberger's alleged fiduciary breach. 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. 9/29/08: Plaintiff's MTD defendants' counterclaims for contribution, indemnification, and breach of fiduciary duty **DENIED**. 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.				
67.	*Stark v. American Skandia Life Assurance Corp.*, No. 07-cv-01123	11/13/07: Plaintiff voluntarily **DISMISSED** action without prejudice.				

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	(D. Conn.) Filed 7/25/07 by Schatz Nobel Izard, P.C. Judge Christopher F. Droney					
68.	*Zang v. Paychex, Inc.*, No. 08-cv-06046 (W.D. N.Y.) Filed in E.D. Mich. on 8/15/07 by McTigue & Porter LLP Judge David G. Larimer	8/2/10: **GRANTED** on the basis that Paychex could not be considered a fiduciary with respect to the plan. In support of its ruling, the court noted that: (1) the administrative services agreement between the plaintiff and Paychex stated that Paychex was not a fiduciary under ERISA and that Paychex' services were limited to recordkeeping and non-discretionary administrative services; (2) Paychex' mere creation and offering of mutual fund lineups to clients did not make it an ERISA fiduciary because those lineups were created prior to the existence of any contractual relationships between Paychex and the plans; (3) the plaintiff – not Paychex – was responsible for selecting the specific mutual funds included in the plaintiff's plan, and under *Hecker v. Deere & Co.*, merely "playing a role" in the selection of investment options is not sufficient to give rise to fiduciary			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.	

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		status; (4) under the administrative services agreement, Paychex was required to give the plaintiff at least 60 days' advance written notice of proposed deletions or substitutions of mutual fund options, and plaintiff thereafter had the right to reject such proposed changes or terminate his agreement with Paychex, consistent with DOL Advisory Opinion 97-16A (May 22, 1997); (5) the plaintiff failed in his argument that Paychex qualified as a fiduciary because it allegedly controlled how long plan contributions were held in the custodial account pending investment in mutual funds, because the plaintiff failed to allege a basis for concluding that Paychex actually *exercised* control over plan assets, given that the administrative services agreement provided that plan contributions generally would be held in the custodial account for five days, and the plaintiff did not allege that Paychex had deliberately kept amounts in the custodial account for longer than that; and (6) the plaintiff failed to support two additional theories advanced in his briefing on the motion to dismiss – that Paychex was a fiduciary by virtue of				

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		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.				
69.	*Healthcare Strategies, Inc. v. ING Life Ins. And Annuity Co.*, No. 11-cv-00282 (D. Conn.) Filed 2/23/11 by Shepherd Finkelman Miller & Shah, LLP Judge Janet C. Hall	1/19/12: **GRANTED** with respect to the funds which did not hold "plan assets", but denied the motion to dismiss on all other relevant counts. 9/27/12: **GRANTED** motion but provided defendant with guidelines under which to re-assert such counterclaims. Citing *Haddock*, the court made the threshold finding that ILIAC was a fiduciary under ERISA because of its contractual ability to delete and/or substitute investment options from the lineups of the plans sponsored by plaintiffs. The court also dismissed ILIAC's counterclaims for contribution and indemnity under ERISA. However, the court offered guidelines for ILIAC to reassert such counterclaims, holding that such counterclaims could stand if they (a) are limited to any liability established against ILIAC that	9/27/12: **CERTIFIED**.	8/9/13: **DENIED** ILIAC's MSJ, holding that while the provider's discretionary authority to change funds available to plans supported fiduciary status, a fact issue as to whether provider acted in a fiduciary capacity precluded summary judgment.	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 (D. Mass). The same law firm (Shepherd Finkelman Miller & Shah. LLP) filed both complaints.	9/26/14: Settlement **APPROVED**. $14.95M settlement fund. ILIAC also agreed to significant changes to its business practices regarding fees and revenue sharing. Specifically, ILIAC agreed to make the following changes: (1) specifically identify to plan sponsors any changes it initiates to its product menu; (2) disclose its fund-related fees and expenses; (3) offer the opportunity for new investors to pay fees directly by choosing a plan menu that doesn't include revenue-sharing; and (4) disclosure of reinvestments.

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		exceeds any benefit ILIAC received from the revenue sharing payments, and (b) rest upon alleged facts plausibly stating that plaintiff was no so substantially less at fault than ILIAC that plaintiff would be entitled to indemnity from ILIAC under the Restatements.				
70.	*Young v. General Motors Investment Management Corp.*, No. 07-cv-01994 (S.D.N.Y.) Filed 3/8/07 by Rosen Preminger & Bloom LLP Judge Barbara S. Jones	3/24/08: **GRANTED**, holding that Plaintiffs' claims were barred by ERISA's three-year statute of limitations, ERISA § 413, 29 U.S.C. § 1113. 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			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) causing or allowing plans to maintain investments in certain mutual funds when similar investment products were available at much lower costs.	

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		ERISA. 5/6/09: **AFFIRMED** by Second Circuit, 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. 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				

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		ERISA fee cases.				
71.	*Brewer v. General Motors Investment Management Corp.*, No. 07-cv-02928 (S.D.N.Y.) Filed 4/12/07 by Rosen Preminger & Bloom LLP Judge Barbara S. Jones	3/24/08: **GRANTED**, holding that Plaintiffs' claims were barred by ERISA's three-year statute of limitations, ERISA § 413, 29 U.S.C. § 1113. Consolidated on appeal with *Young*, No. 07-cv-01994 (S.D.N.Y.)			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.	
72.	*Lau v. Metropolitan Life Insurance Company*, No. 15-cv-09469 (S.D.N.Y.) Filed 12/3/15 by Bailey & Glasser LLP and Izard Nobel LLP Judge P. Kevin Castel	8/22/16: **DENIED**. Defendant failed to show that 1.5% guaranteed rate was unquestionably reasonable. Plaintiff also sufficiently pled that Defendant was a fiduciary by alleging that it had discretion to set guaranteed rate. 1/12/18: Voluntarily **DISMISSED**.			Plaintiff alleged that Defendant collected millions of dollars annually in undisclosed compensation by retaining the spread earned on funds invested in its “stable value funds.” Defendant retained the difference between the interest rate guaranteed by Defendant and the actual return that Defendant earned by investing the underlying funds.	
73.	*Malone et al. v. Teachers Insurance and Annuity Insurance Association of America*, No.	3/7/17: **GRANTED**. Plaintiffs did not sufficiently allege that TIAA was a fiduciary. “The fact that the fees used to pay for the recordkeeping services are collected *from* Plan assets does			Claims arise out of Defendant’s alleged breaches of fiduciary duties and/or failure to comply with ERISA’s prohibited transaction rules by misusing its dual position as Plan recordkeeper and seller of group annuity contracts to usurp fiduciary authority and control from the Plans’ named fiduciaries and	

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	15-cv-08038 (S.D.N.Y) Filed 10/13/2015 by Bailey & Glasser LLP Judge P. Kevin Castel	not give the collector of those fees authority *over* Plan assets." Plaintiffs did not sufficiently allege that TIAA exercised any discretion over the Plan other than agreeing to provide recordkeeping services and periodically collecting fees, which were not discretionary acts giving rise to a fiduciary duty.			take excessive compensation from plan assets.	
74.	*Walker v. Merrill Lynch & Co. Inc.*, No. 15-cv-01959 (S.D.N.Y.) Filed 3/16/15 by Walker Law LLP Judge Paul G. Gardephe	3/25/16: **GRANTED**. Merrill Lynch was not a fiduciary because plan sponsor had final say over which investment options would be included in plan. Merrill Lynch also did not provide investment advice for a fee. Plaintiff subsequently amended his Complaint. 3/31/17: **GRANTED**. Merrill Lynch's role as a non-discretionary directed trustee meant it had no role in selecting high-fee mutual funds as investment options in the plan.			Plaintiff alleged that 401(k) plan recordkeeper breached its fiduciary duties by (1) charging excessive recordkeeping fees to the plan, (2) including index funds with high fees as options under the plan, (3) including its own proprietary funds as investment options, and (4) engaging in fee sharing with mutual fund providers.	
75.	*Wittman v. New York Life Insurance Company*, No. 15-cv-09596 (S.D.N.Y.) Filed 12/8/15 by	6/6/16: Summarily **DENIED**. Too many factual issues and disputes. 11/30/16: Voluntarily **DISMISSED**.			Plaintiff alleged that Defendant collected millions of dollars annually in undisclosed compensation by retaining the spread earned on funds invested in its "stable value funds." Defendant retained the difference between the interest rate guaranteed by Defendant and the actual return that Defendant	

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Bailey & Glasser LLP and Izard Nobel LLP Judge Alvin K. Hellerstein				earned by investing the underlying funds.	
76.	*Carver et al. v. The Bank of New York Mellon et al.*, No. 15-cv-10180 (S.D.N.Y.) Filed 12/31/15 by McTigue Law LLP and Beins, Axelrod, P.C. Judge J. Paul Oetken	3/31/17: **DENIED**. Discovery necessary to determine whether transactions in question were "blind transactions" (*i.e.*, whether Defendants knew identities of parties making foreign exchange transactions). If truly blind, then no prohibited transaction.	5/15/18: Filed.	2/12/18: Partial MSJ filed by Defendants.	Plaintiffs allege that Defendants breached their fiduciary duties and engaged in prohibited transactions by charging excessive rates and markups in the course of executing foreign exchange currency transactions associated with plan.	
77.	*Patrico v. Voya Financial, Inc.*, No. 16-cv-07070 (S.D.N.Y.) Filed 9/9/16 by Schneider, Wallace, Cottrell, Konecky, & Wotkyns Judge Lorna G. Schofield No. 18-1057 (2d	6/20/17: **GRANTED**. Complaint failed to adequately allege that Defendants exercised control over their compensation and therefore failed to allege that Defendants were fiduciaries. 3/13/18: Motion for leave to amend complaint **DENIED**. The proposed Amended Complaint failed to allege any facts establishing Voya as a fiduciary with respect to fees, either during the negotiation or after the execution of the Nestle-VRA Agreement. As a matter of law,			Plaintiffs filed suit against Defendants alleging a breach of fiduciary duties and ERISA prohibited transaction rules on account of the Plan provider (Voya) receiving "excessive fees" as a result of its contract with a financial advisement company. Specifically, the Plaintiffs allege that the Defendants entered into a forbidden agreement with the investment company in order to gain for itself excessive and inappropriate profits at the expense of plan participants.	**DISMISSED**.

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Cir.)	neither Defendant was acting as a fiduciary while negotiating VRA's fees. Appealed to Second Circuit. No. 18-1057. 7/24/18: Appeal withdrawn.				
78.	*Dezelan v. Voya Retirement Insurance and Annuity Company*, No. 16-cv-01251 (D. Conn.) Filed 07/26/16 by Izard, Kindall & Raabe Judge Victor A. Bolden No. 18-2732 (2d Cir.)	7/6/17: **GRANTED**. Plaintiff lacked standing as to general account stable value funds because Voya did not offer them to the plan. Additionally, even if Voya retained the "spread" from its crediting practice, Plaintiff did not sufficiently allege that the spread went to Voya instead of remaining in the separate account. Plaintiff's allegations therefore did not give rise to reasonable inference of misconduct. Plaintiff subsequently amended her Complaint. 8/17/18: **GRANTED**. Plaintiff still did not plausibly allege that Voya kept the spread from its crediting practice. 9/13/18: Appealed to Second Circuit. No. 18-2732.			Plaintiffs' claims arise from the allegation that the Stable Value Funds (SVAs) that Defendants sell to retirement plans have an internal crediting rate that is well below the internal rate of return on the retirement plans deposits to the SVAs – and that this guarantees the Defendants a profit. Plaintiffs contend this practice violates the Defendant's fiduciary obligations.	
79.	*Rosen v. Prudential Retirement Ins. &*	12/30/16: **GRANTED**. Defendants only had authority to			Plaintiff alleges that Defendants breached their fiduciary duties and committed prohibited	**DISMISSED**.

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Annuity Co. et al., No. 15-cv-01839 (D. Conn.) Filed 12/18/15 by Shepherd Finkelman Miller & Shah, LLP Judge Victor A. Bolden No. 17-239 (2d Cir.)	make changes to mutual funds included within the plan after notifying and receiving consent of plan sponsor. They therefore lacked the discretionary authority over the selection of mutual funds to be a fiduciary. Appealed to Second Circuit. No. 17-239. 12/18/17: **AFFIRMED**. Plaintiff did not distinguish between ordinary compensation for services in the form of revenue-sharing payments and illicit kickbacks. Revenue-sharing is not *per se* improper. The Complaint also failed to allege any breach of the duty of loyalty, as Plaintiff simply recast his prudence claim.			transactions by entering into revenue sharing agreements with various mutual funds, generating alleged "kickbacks" to Defendants in exchange for connecting mutual funds to 401(k) plans.	
80.	*Lefkowitz v. Teachers Insurance and Annuity Association*, No. 16-cv-01932 (S.D.N.Y.) Filed 3/15/16 by Toby Golick Judge Valerie E. Caproni	9/9/16: Voluntarily **DISMISSED**.			Plaintiff alleged that Defendant breached its fiduciary duties by engaging in expensive duplicative mailing to beneficiaries and unnecessarily mailing individual monthly statements to beneficiaries, resulting in excessive administrative fees.	

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
Third Circuit						
81.	*Goldenberg v. Indel, Inc. et al.*, No. 09-cv-05202 (D.N.J.) Filed 10/9/09 by Szaferman, Lakind, Blumstein & Blader, P.C. Judge Jerome B. Simandle	9/7/10: **GRANTED in part** and **DENIED in part**. Excessive fee claim permitted to proceed, as Plaintiffs' allegation that plan assets were previously invested in cheaper fund with higher returns created inference that selection of new fund was result of deficient judgment process. Fiduciary breach and self-dealing claims allowed to proceed.	8/30/12: **CERTIFIED**.	6/27/12: Defendants' partial MSJ **GRANTED**. Fee issue became moot after Defendants credited full amount of fees to plan and demonstrated that plan assets would not be reinvested in challenged fund in the future.	Plaintiff alleged that Defendants, among other things, breached their fiduciary duties by paying excessive fees to investment manager. The fee was allegedly seven times greater than the fee paid to a different investment manager. Plaintiff also alleged the Defendants imprudently recommended that assets be invested in mutual fund that charged higher fees and had lower historical returns. Defendants allegedly had a self-interest in recommending the fund because of the fund's relationship to the corporate parent of a particular Defendant.	10/16/13: Settlement **APPROVED**. $2M settlement fund. Defendants will also offer at least three diversified investment alternatives under the plan.
82.	*Santomenno v. John Hancock Life Insurance Company (U.S.A.)*, No. 10-cv-01655 (D.N.J.) Filed 3/31/10 by Szaferman, Lakind, Blumstein & Blader, P.C. Judge William J. Martini No. 11-2520 (3d Cir.) filed 6/3/11	5/23/11: **GRANTED**. 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. 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			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	

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		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. 4/6/12: **AFFIRMED IN PART** and **REVERSED IN PART** by Third Circuit. 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			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 Fiduciary Claims Against Plan Providers						
	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Allegations/Noteworthy Items	Settlement/Judgment
		breach are mentioned at all within the statute. 7/24/13: **DISMISSED** all remaining claims, finding that John Hancock could not be considered an ERISA fiduciary with respect to the service provider fees it charged a 401(k) plan, because the fees were established through arm's-length negotiations with the plan sponsor. The district court dismissed the participants' challenge to certain revenue-sharing payments for the same reason, concluding that John Hancock's decisions with respect to the allocation of its fees did not cause it to assume fiduciary status. 9/26/14: AFFIRMED by Third Circuit, holding that John Hancock is not an ERISA fiduciary. Specifically, the Third Circuit recognized that John Hancock's practice of creating and managing a "Big Menu" of plan investment options that trustees could choose from didn't give rise to fiduciary status under ERISA and that John Hancock's status as a functional fiduciary depended on the specific fiduciary breaches claimed by the participants.				

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
83.	*Danza v. FMR LLC*, No. 11-cv-02893 (D.N.J.) Filed 5/19/11 by Levy Phillips & Konigsberg, LLP Judge Joseph E. Irenas No. 12-3497 (3d Cir.)	8/20/12: **GRANTED**. Defendant was permitted to charge and collect a negotiated service fee without incurring any fiduciary duties. 7/29/13: Summarily **AFFIRMED** by Third Circuit.			Plaintiff alleged that Defendant QDRO administrator charged excessive and unreasonable fees in connection with its QDRO services.	
84.	*Goetz v. VOYA Financial, Inc. et al.*, No. 17-cv-01289 (D. Del.) Filed 9/8/17 by Chimicles & Tikellis LLP; Franklin D. Azar & Associates P.C.; and Sherman & Howard L.L.C. Judge Colm F. Connolly	2/8/18: Filed.			Plaintiff alleges that Defendants breached their fiduciary duties and committed prohibited transactions by charging an unreasonable asset-based fee for their recordkeeping services. Defendants allegedly concealed the true amount of this fee from participants by adding their asset-based fee to the operating costs of various mutual fund options described in participant fee disclosures.	
Sixth Circuit						
85.	*Beary v. Nationwide Life*	9/17/07: **GRANTED** because the action was preempted by the			Action brought under state fiduciary law on behalf	

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Insurance Co, 2007 WL 4643323 (S.D. Ohio) Filed 11/15/06 by Smith Phillips & Associates Judge Edmund A. Sargus	Securities Litigation Uniform Standards Act of 1998. 2/3/10: **AFFIRMED** by Sixth Circuit. 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).			of IRC § 457(b) plan and similarly situated plans.	
86.	*Butler National Corporation et al. v. Union Central Life Insurance Company*, No. 12-cv-00177 (S.D. Ohio) Filed 3/1/12 by Edgar Law Firm Judge Susan J.				Plaintiffs alleged that Defendant service provider breached its fiduciary duties and committed prohibited transactions by entering into revenue sharing agreements with mutual funds. The resulting revenue sharing payments allegedly had no relationship to the cost or value of services and allegedly served as “kickbacks” to Defendant.	Settlement **APPROVED**. $2.25M settlement fund. Defendant also agreed to disclose revenue sharing payments more clearly in its fee disclosures.

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Dlott					
87.	*Chendes, et al. v. Xerox HR Solutions, LLC*, No. 16-cv-13980 (E.D. Mich.) Filed 11/9/16 by Berger & Montague, P.C. and Schneider Wallace Cottrell Konecky Wotkyns LLP Judge Robert H. Cleland	10/19/17: **GRANTED**. Defendant was not a fiduciary because Plaintiffs did not sufficiently allege that it had discretion over its own compensation, elected to engage robo-adviser (plan sponsor did), or exercised de facto control over robo-adviser. Additionally, Plaintiffs did not sufficiently allege that Defendant had non-fiduciary liability because there was nothing to suggest that robo-adviser itself was a fiduciary. Plaintiffs subsequently amended their Complaint. 6/25/18: **GRANTED**. Plaintiffs did not sufficiently allege that Defendant exercised de facto control over robo-adviser. It was not sufficient to allege that Defendant used its influence to encourage plan sponsors to hire robo-adviser, as plan sponsors still controlled that choice.			Plaintiffs allege that Defendant recordkeeper breached its fiduciary duties and committed prohibited transactions by collecting—in addition to recordkeeping fees—investment management fees from third-party robo-adviser. These fees were allegedly unearned "kickbacks" and therefore excessive.	**DISMISSED**.
88.	*Schmitt v. Nationwide Life Insurance Company et al.*, No. 17-cv-00558 (S.D.	8/24/18: **DENIED**. Plaintiff's allegation that Nationwide charged ten times more than other entities cited in survey was sufficient to state a claim. Survey supported inference that			Plaintiff alleges that Defendants committed prohibited transactions by charging excessive recordkeeping fees. Plaintiff specifically challenges Defendants' 1% asset-based fee, which she alleges generates fees that are almost ten times	

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Ohio) Filed 6/27/17 by Dyer, Garofalo, Mann & Schultz Judge Algenon L. Marbley	Nationwide had constructive knowledge that fees were unreasonably high.			more than a reasonable amount.	
Seventh Circuit						
89.	*Leimkuehler v. American United Life Insurance Company*, No. 10-cv-00333 (filed in N.D. Ohio 8/4/2009; transferred to S.D. Ind. on 3/22/2010) Filed by Delaney & Delaney LLC and Korein Tillery LLC Judge Jane Magnus-Stinson No. 12-1213 (7th Cir.)	10/22/10: **GRANTED in part** and **DENIED in part** plaintiff's motion for judgment on the pleadings (2010 WL 4291128).		1/5/12: **GRANTED** defendant's MSJ. 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. 4/16/13: **AFFIRMED** by Seventh Circuit. The Seventh Circuit agreed that AUL Insurance Company did not act as an ERISA fiduciary with respect to the conduct alleged by plaintiffs to amount to a fiduciary	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.	Defendant's motion for summary judgment granted on 1/5/2012 (Dkt. 165); final judgment issued 1/6/2012 (Dkt. 167). 7th Cir. affirmed on 4/16/2013, issued mandates re: notice of appeal and notice of cross-appeal on 7/8/2013 (Dkt. 223); and 6/19/2013 (Dkt. 222), respectively. USSC denied certiorari on 2/24/2014.

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
				breach. Specifically, the court found that (1) AUL did not exercise fiduciary authority by limiting or "winnowing" a list of potential mutual funds, which was then presented to plan fiduciaries who ultimately selected the lineup, Here, the court cited Hecker for the proposition that merely limiting funds does not create "control sufficient for fiduciary status" and noted the named plan fiduciaries (not AUL) had the "final say" on fund selection; (2) while AUL carried out ministerial functions which amounted to the "management or disposition of" plan assets, the plaintiffs had not alleged any breach related to mismanagement of plan assets, so fiduciary status did not attach in this respect; and (3) AUL did not become a fiduciary through a "non-exercise theory," i.e. merely through possessing a contractual right to delete or substitute an allegedly expensive fund on the plan's lineup (where such right was not exercised).		
90.	*Scott v. Aon Hewitt Financial Advisors, LLC*, No. 17-cv-00679 (N.D. Ill.) Filed 1/27/17 by Massey & Gail LLP and Berger &	3/19/18: **GRANTED**. Plaintiff failed to state claim that Defendants were fiduciaries. Defendants exercised no control over plan sponsor's decision to engage sub-adviser. Nor did Plaintiff sufficiently allege that Defendants were fiduciaries for purposes of negotiating their compensation, as Defendants			Plaintiff alleges that Defendants breached their fiduciary duties and committed prohibited transactions by receiving "kickbacks" from sub-adviser despite fact that Defendants allegedly did not perform any investment advisory services in exchange for payments they received.	

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Montague, P.C. Judge Jeffrey T. Gilbert	negotiated fees at arm's length. Defendants were only fiduciaries with respect to investment advice, not their compensation. Plaintiff subsequently amended her Complaint. 9/7/18: Filed.				
Eighth Circuit						
91.	*Ruppert v. Principal Life Ins. Co.*, No. 07-cv-00344 (S.D. Iowa; case transferred from S.D. Ill. on 7/25/07) Filed by Korein Tillery LLC Judge John A. Jarvey No. 11-2554 (8th Cir.) filed 7/12/11	11/5/09: **GRANTED** 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. 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	8/27/08: **DENIED**, 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	5/27/10: **GRANTED** Principal's MSJ 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 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	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	6/13/11: Consent **JUDGMENT** with respect to plaintiff's individual claims for $80,000.

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		that the *Deere* holding applies only to disclosures to plan *participants*, as opposed to plan fiduciaries, finding that plan fiduciaries do not have a greater right to information than the plan participants they serve. In ruling on the plaintiff's prohibited transaction claim, the court first distinguished between revenue sharing payments that are paid from mutual funds registered under the Investment Company Act of 1940 and revenue sharing payments that come from funds that are not so registered. As to payments from *registered* mutual funds, the court 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	"typicality" requirements under Rule 23 of the Federal Rules of Civil Procedure, as necessary for class certification. 2/13/13: Appeal **DISMISSED** by Eighth Circuit, concluding that it lacked subject matter jurisdiction to hear the appeal because (1) the terms of the consent judgment were not "a final appealable decision" because plaintiffs' claims had not been dismissed without prejudice, and (2) plaintiff had voluntarily "relinquished" and dismissed his claims and therefore no longer had standing to pursue the action.	2002-3. However, this portion of the plaintiff's claim was barred by ERISA's three-year statute of limitations, because the plaintiff was provided actual knowledge that Principal had breached its fiduciary duties with respect to the pre-2004 float when the plaintiff and Principal entered into the 2004 service agreement, which provided for the disclosure of float discussed above. Since the plaintiff did not file his float claim until May 5, 2008, his claim is time barred. 3/30/11: **DENIED** Principal's MSJ on remaining claims. 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.	custodial account and the time that Defendant transferred the plan contributions into the investment options chosen by the plan's participants.	

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		relation to the services provided by Principal, there was no violation. The court concluded that, because Principal factored the revenue sharing payments into its overall asset management fees, and because the plaintiff failed to plead that the fees were unreasonably high or inflated, there was no viable prohibited transaction claim. The court's ruling 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. 3/31/10: **GRANTED** plaintiff's motion for reconsideration with respect to the plaintiff's claims concerning Principal's non-registered investment options ("Foundations Options"), in light of the *Braden* decision.				

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		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. The court's order 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.				
92.	*McCaffree Financial Corp. v. Principal Life Insurance Co.*, No. 14-cv-00102 (S.D.	12/10/14: **GRANTED**. Defendant was not a fiduciary with respect to the terms in its agreement with Plaintiff because the agreement was negotiated at			Plaintiff alleged that Defendant breached its fiduciary duties and committed prohibited transactions by charging grossly excessive investment management and other fees to participants. Defendant allegedly accomplished	

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Iowa) Filed 3/18/14 by Edgar Law Firm LLC and Schneider Wallace Cottrell Konecky LLP Judge Stephanie M. Rose No. 15-1007 (8th Cir.)	arm's length. 1/8/16: **AFFIRMED**. The agreement was negotiated at arm's length. Plaintiff's allegations that Defendant (1) selected account options made available to participants, (2) had discretion to increase management fees and operating expenses, (3) acted as investment manager, and (4) inadequately disclosed fee, were not sufficient to establish Defendant as a fiduciary with respect to challenged fees.			this through excessive layering of fees connected to its mutual funds.	
93.	*Schultz et al. v. Edward D. Jones & Co., L.P. et al.*, No. 16-cv-01346 (E.D. Mo.) Filed 08/19/2016 by Bailey Glasser LLP and Izard Kindall & Rabbe LLP Judge Rodney W. Sippel	1/26/17: **GRANTED in part** and **DENIED in part**. Defendants' argument that they offered an array of investment options was not sufficient to defeat fiduciary breach claim. Plaintiffs also had standing even though they did not personally invest in every single fund that allegedly caused injury to the plan. Finally, claims against Jones Financial were dismissed because Plaintiffs did not allege that Jones Financial was a plan fiduciary. Plaintiffs then amended their Complaint. 3/27/18: **DENIED**. Allegations that (1) fees nearly tripled while market rates for recordkeeping			Plaintiff alleges that Defendants populated the Plan with investment options of its "Preferred Partners" and other investment managers with corporate relationships with Edward Jones, and also caused the Plan to pay excessive recordkeeping and administration fees. Plaintiff claims that Defendants select the investment options because they pay sales fees and revenue sharing in return for being included in the plan investment lineup. Defendants also allegedly offered the American Funds Money Market Fund instead of a stable value fund that would have received a better return. Defendants also allegedly failed to consider index fund alternatives that carried lower fees.	

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		services declined, (2) the total weighted average expense ratio of the plan was high compared to market rates, and (3) Defendants failed to prudently monitor recordkeeping fees, were sufficient to raise inference of disloyalty and imprudence.				
94.	*Insinga v. United of Omaha Life Insurance Company*, No. 17-cv-00179 (D. Neb.) Filed 5/26/17 by Car & Reinbrecht, P.C.; Feinberg, Jackson, Worthman & Wasow LLP; and Nichols Kaster Judge Robert F. Rossiter, Jr.	10/26/17: **GRANTED**. Defendant was not a fiduciary because it had no discretionary authority over the contract, which functioned as a plan asset. Defendant also had no authority to set its own compensation because such compensation was largely controlled by plan choices and other factors outside Defendant's control (*e.g.*, market return).			Plaintiff alleged that Defendant breached its fiduciary duties and committed prohibited transactions by retaining the "spread" earned on funds invested in its "maturity account" vehicle. Defendant retained the difference between the interest rate guaranteed by contract and the actual return that Defendant earned by investing the underlying funds.	
Ninth Circuit						
95.	*Austin v. Union Bond & Trust Co., Morgan Capital Mgmt. and Principal Life Ins. Co.*, No. 14-cv-00706 (D. Ore.)	11/10/14: Dismissal **RECOMMENDED**. The magistrate judge issued a report recommending dismissal of all the claims asserted against Principal Life and significantly narrowing the claims asserted against Union, the trustee, and Morley, the investment advisor.		2/19/16: Recommendation that Defendants' MSJ be **GRANTED in part** and **DENIED in part**. The Magistrate Judge recommended summary judgment in favor of Defendants on excessive fee claims. Because revenue sharing fees paid by the plan were credited back to the plan, the Magistrate Judge did not	The plaintiff, a participant in the plan, filed a class action complaint on April 29, 2014 based on a principal stable value fund offered as part of his retirement plan. He alleges that Union and Morley, the trustee and investment advisor, respectively, breached their fiduciary duties by investing plan assets in investment contracts that charge excessive undisclosed fees in addition to other substantial disclosed fees. Principal Life issued synthetic	10/31/17: Undisclosed de minimis settlement. **DISMISSED**.

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Filed 4/29/14 by Keller Rohrback LLP Judge Anna J. Brown	The Court determined that Principal Life, as a wrap provider, did not have the ability to control the investment of the Fund's assets, except to the extent that Morley was obligated to manage the assets in accordance with investment guidelines that were "part and parcel of the Principal SIC." The Court further found that earnings on the assets were held by Union as trustee until paid to participants and, therefore, the terms of the Principal SIC did not support – in fact, they contradicted – Plaintiff's claim that Principal Life had a right to receive or retain "spread." The court dismissed the claim that Principal Life breached its duties of prudence and loyalty in setting the crediting rate particularly low to obtain a larger spread. Given their roles as advisor and trustee, the Court was unable to dismiss the claims against Morley and Union on the ground that they were not fiduciaries but recommended dismissing those derived from the allegations based on Principal's retention of spread. 12/23/14: Recommendation **ADOPTED**. 5/17/17: Dismissal of remaining		count them when determining whether fees were excessive (which they were not). 3/30/16: Recommendation **ADOPTED**.	investment contracts and is alleged to have retained the spread on these contracts in addition to the fees it collected, which plaintiffs allege constituted a breach of its fiduciary duties to the plan. Principal's fiduciary status is alleged based on exercising control over the investment of plan assets and by determining the value of the investments to plans participating in the fund.	

	Case Name & Judge	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Allegations/Noteworthy Items	Settlement/Judgment
Plan Fiduciary Claims Against Plan Providers						
		claims **RECOMMENDED**. Plaintiff lacked standing because his losses amounted to less than half a cent, which a court will not redress.				
Tenth Circuit						
96.	*Teets v. Great-West Life & Annuity Ins. Co.*, No. 14-cv-01360 (E.D. Cal. filed 6/4/14; transferred to D. Colo, No. 14-cv-02330 on 8/21/14) Filed by Keller Rohrback LLP Judge William J. Martinez No. 18-1019 (10th Cir.)	5/22/15: **GRANTED in part** and **DENIED in part**. The court first denied Great-West's motion to dismiss on the grounds that it was not a fiduciary under ERISA. Great-West argued that the Fund fell under the guaranteed benefit policy exception under ERISA but the court held that such a determination was inappropriate in the motion to dismiss stage, instead finding that plaintiffs alleged sufficient facts that Great-West exercised discretion with respect to the Fund's assets since it had authority with respect to setting the interest rate. However, the court granted Great-West's motion to dismiss to the extent that it could not be both a fiduciary and a party in interest under ERISA § 406(a), even though plaintiffs in their response explained that they instead meant to plead that Great-West was liable as a party in interest for entering into a prohibited transaction with the Fund. Yet the court dismissed this	6/22/16: **CERTIFIED**. Court certifies following class: "all participants in and beneficiaries of defined contribution employee pension benefit plans within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), who had funds invested in the Great- West Key Guaranteed Portfolio Fund from six years before the filing of this action until the time of trial."	12/14/17: Defendant's MSJ **GRANTED**. Plaintiff's MSJ **DENIED**. Because participants could withdraw their money from the challenged fund at any time without fees or charges, Defendant did not have discretion to force its credited rate upon participants and therefore did not act as a fiduciary. As for Defendant's discretion to set its own compensation, the court held that Defendant's compensation depended on participants' decisions to invest, which they were free not to do. Thus, the court awarded summary judgment to Defendant on fiduciary breach claims. Plaintiff's prohibited transaction claims failed because Plaintiff did not show that Defendant—a non-fiduciary—knew or should have known that the transaction violated ERISA. 1/11/18: Appealed. No. 18-1019 (10th Cir.) Oral argument scheduled for November 2018.	Plaintiff, a participant in Great-West's Guaranteed Portfolio Fund in which plaintiff and the proposed class are participants and beneficiaries, filed a class action complaint against Great-West based on its retention of the spread in addition to the service fees it charged. The allegations against Great-West are based on its role as a service provider to the retirement plans and its fiduciary status is based on its exercise of discretionary authority over the administration of guaranteed investment contracts governing the relationship between the plans and Great-West. Specifically, the complaint alleges that Great-West breached its fiduciary duties and engaged in prohibited transactions by setting its own compensation and charging excessive fees for administering the contracts.	

	Plan Fiduciary Claims Against Plan Providers					
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
		claim without prejudice to plaintiffs to refile an amended complaint.				
97.	*Krikorian v. Great-West Life & Annuity Insurance Company et al.*, No. 16-cv-00094 (D. Colo.) Filed 1/14/16 by Shepherd Finkelman Miller & Shah, LLP Judge Robert E. Blackburn		3/27/17: **DENIED**. Plaintiff subsequently renewed his motion. 9/13/18: **DENIED**.	9/25/17: Defendants' MSJ **DENIED**. Plaintiff presented evidence that Defendants did not consistently offset revenue sharing fees it received against fees owed to Defendants by the plan. DOL permits revenue sharing only if service provider offsets revenue sharing fees.	Plaintiff alleges that Defendants breached their fiduciary duties and committed prohibited transactions by entering into revenue sharing agreements with underlying mutual funds. Revenue sharing payments made to Defendants allegedly amounted to kickbacks in return for providing mutual funds with access to 401(k) plan customers.	
Eleventh Circuit						
98.	*Fernandez v. Merrill Lynch, Pierce, Fenner & Smith Incorporated*, No. 15-cv-22782 (S.D. Fla.) Filed 7/27/15 by Rodriguez Tramont & Nunez P.A. and Levine Kellogg Lehman Schneider + Grossman LLP Judge Marcia G.	8/1/16: **DENIED**. Reasoning not provided.			Plaintiffs alleged that Defendant breached its fiduciary duties by failing to ensure that plans received sales charge discounts that participants were entitled to receive when purchasing shares of mutual funds.	12/18/17: Settlement **APPROVED**. $25M settlement fund.

Plan Fiduciary Claims Against Plan Providers						
	Case Name & Judge	**Motion to Dismiss**	**Motion for Class Certification**	**Motion for Summary Judgment**	**Allegations/Noteworthy Items**	**Settlement/Judgment**
	Cooke					