401(k) Fee Cases
Groom Law Group, Chartered

October 21, 2009

Participant Claims Against Sponsors And Related Fiduciaries						
No.	Case Name & Judges	Counsel for Parties	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Other Events/ Noteworthy Items
Second Circuit						
1.	*Taylor v. United Technologies Corp.*, 3:06-cv-01494-WWE (D. Conn. filed 9/22/06) Amended complaint filed on 12/11/07 Second amended complaint field on 4/9/08. Judge Warren W. Eginton	Schlichter, Bogard; Cohen & Wolf for plaintiffs Covington & Burling; Day Pitney for defendants	Motion to dismiss granted, in part, on 8/9/07, dismissing breach of fiduciary duty claim based on non-disclosure of revenue sharing fees, holding that ERISA does not require such disclosure.	Motion to Certify Class granted on 6/5/08.	Motion for summary judgment filed by United Technologies on 6/7/08. Motion for summary judgment filed by United Technologies on 6/6/08 specific to two named plaintiffs who are allegedly barred from asserting claims pursuant to claims release agreements.	**Significance:** 1. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) did not consider/capture float; and (2) chose to use actively-managed mutual funds. Plaintiffs also allege (although it is not entirely clear) that there is an issue as to whether defendants engaged in prohibited transactions by receiving a "corporate benefit" (and benefiting Fidelity) due to plan participants' investing in Fidelity managed high cost mutual funds which paid revenue sharing to Fidelity. Plaintiffs allege that Fidelity is defendant's "largest shareholder." Plaintiffs also allege that participants investing in revenue-sharing mutual funds paid a disproportionately higher portion of the plan's administrative fees. 2. In dismissing fiduciary breach claims based on failure to disclose revenue sharing, court cited the *Hecker* decision, which has since been affirmed by the Seventh Circuit on appeal. 3. Summary judgment granted in favor of United Technologies on March 3, 2009. The court ruled that: (1) defendants properly monitored the level of cash in the company stock fund; (2) defendants properly selected mutual funds; (3) recordkeeping fees were reasonable when compared to the market rate; (4) information on revenue sharing is not material to an objectively reasonable investor; and (5) defendants did not breach

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						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. 4. Decision appealed to the United States Court of Appeals for the Second Circuit.
2.	*Montoya v. ING Life Ins. and Annuity Co.*, 1:07-cv-02574 (NRB) (S.D.N.Y. filed 3/28/07) Judge Naomi Reice Buchwald	Keller Rohrback; Rosen Preminger; Sanctuary Centre; Jeffrey Engerman for plaintiffs Jorden Burt; Groom Law Group; Meyer, Suozzi for defendants	Motion to dismiss for lack of jurisdiction renewed on 9/2/08 upon completion of jurisdictional discovery. Motion to dismiss for lack of jurisdiction granted on 8/31/09.	Not made.	Not made.	**Significance:** 1. Alleges that New York State United Teachers recommended ERISA § 403(b) plan providers in return for endorsement fees and that the plan providers improperly received revenue sharing payments. 2. On 8/31/09, the court granted the defendants' motion to dismiss the action for lack of subject matter jurisdiction, finding that the plan in issue is a governmental plan exempt from Title I of ERISA.
Third Circuit						
3.	*Renfro v. Unisys Corp.*, 2:07-cv-2098-BWK (E.D. Pa. filed 12/28/06 in the C.D. Cal.) Amended Complaint filed 7/17/2007 Second Amended Complaint filed 9/3/09. Judge Berle M.	Schlichter, Bogard; Fox, Rothschild; Hill, Farrer & Burrill for plaintiffs Morgan, Lewis for Unisys; O'Melveny & Myers; Hangley Aronchick for Fidelity	Motion to dismiss filed by Fidelity on 9/7/07. Motion to dismiss first amended complaint filed by Fidelity dismissed as moot on 10/8/09. Motion to dismiss second amended complaint filed by Fidelity on	Not made.	Motion for summary judgment filed by Unisys on 9/07/07. Motion for summary judgment filed by Unisys dismissed as moot on 10/8/09. Motion to dismiss or for summary judgment filed by Unisys on	**Significance:** 1. Case transferred from Central District of California by order dated 4/17/07. 2. The second amended complaint alleges that defendants (1) did not monitor what similar 401(k) plans were paying for investment management and administrative services; (2) did not consider offering less expensive investment options providing similar services; (3) did not ensure that the plan did not pay retail investment management fees and administrative fees without receiving services beyond those received by retail investors; (4) did not ensure that

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

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			denied by order dated 10/19/07.			did not need to be disclosed; (2) the plan offered a sufficient mix of investments so that inclusion of allegedly expensive funds did not constitute a fiduciary breach; and (3) even if there was a breach with respect to fund selection, section 404(c) precluded liability for the breach. 7. On 3/9/09, plaintiffs filed a motion for panel rehearing or for rehearing en banc. Plaintiffs argue that defendants only offered retail mutual funds which are never appropriate for a large plan, and that as no proper investment option was offered, 404(c) cannot shield defendants from liability. 8. On 6/24/09, the Seventh Circuit denied plaintiffs' petition for rehearing. The Seventh Circuit commented on the Secretary of Labor's amicus brief in support of rehearing by stating that a footnote (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.
5.	*Abbott v. Lockheed Martin Corp.*, 3:06-cv-00701-MJR-DGW (S.D. Ill. filed 9/11/06) Judge Michael J. Reagan	Schlichter, Bogard for plaintiffs Mayer, Brown; Armstrong Teasdale for defendants	Court denied motion to dismiss on 8/13/07, holding complaint satisfied notice pleading standard. Motion to dismiss did not address merits of claims.	Class certification proceedings stayed pursuant to order dated 9/14/07 due to *Lively* appeal. On 11/6/08, motion for class certification was denied without prejudice in light of the filing of an amended	Not made. Defendants' motion for summary judgment granted in part and denied in part on 3/31/09. Plaintiffs' motion for partial summary judgment as to liability on their excessive	**Significance:** 1. Amended complaint filed on 11/7/08. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) used retail mutual funds; (2) used fraudulent benchmarks; (3) falsely represented a money market fund as a stable value fund, and made it the plan's default investment option; (4) used a unitized company stock fund; and (5) engaged in prohibited transactions. 2. On 3/31/09, the court denied plaintiffs' motion for partial summary judgment, and granted in part and denied in part defendants' motion for summary judgment. The

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				complaint. On 1/22/09, plaintiffs filed a second motion for class certification. On April 3, 2009, the court granted class certification as to the claims regarding the excessive fees and the stable value fund, but denied class certification as to the claim regarding the company stock fund. The court ruled that participants whose frequent trading activities created the need for a greater cash buffer in the company stock fund were antagonistic to other participants.	recordkeeping fee claim denied on 3/31/09.	revenue sharing claims were dismissed based on the Seventh Circuit's ruling in *Hecker v. Deere*. The claims regarding float and a growth fund were both dismissed for not falling within the scope of the amended complaint. As an alternative basis for the dismissal of the claim regarding the growth fund, the court held that *Hecker v. Deere* (7th Cir.) precluded plaintiffs from arguing that the growth fund was improper because it was a retail mutual fund instead of a separate account. The court also held that: only acts that took place within six years of the filing of the complaint could form the basis of a fiduciary breach claim due to ERISA's statute of limitations; plaintiffs had standing to assert claims with respect to funds in which they may have not invested in because ERISA allows plan participants to seek to recover damages owed to the plan; and *Hecker v. Deere* (7th Cir.) precluded plaintiffs from challenging 404(c) conditions that were not challenged in the amended complaint. The court ruled that the following issues would need to be resolved at trial: whether investment options with excessive fees were offered in the plan; whether the stable value fund was managed in accordance with disclosure documents; and whether there was excessive cash in the company stock fund. 3. On 4/3/09, the court vacated the trial date set for 4/6/09 and ordered briefing on one of the named plaintiff's desire to pursue the company stock fund claim directly, in light of the court's denial of class certification as to the company stock fund claim.
6.	*Beesley v. International Paper Co.*, 3:06-cv-00703-DRH-	Schlichter, Bogard for plaintiffs Morgan, Lewis;	Court denied motion to transfer venue on 8/24/07.	The stay on class certification proceedings, imposed on	On 1/23/09, plaintiffs filed a motion for summary judgment	**Significance:** 1. Amended complaint filed on 5/1/08. In addition to revenue sharing, plaintiffs allege – without alleging details

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	CJP (S.D. Ill. filed 9/11/06) Amended complaint filed on 5/1/08. Judge David R. Herndon	Donovan Rose for defendants		8/24/07 due to *Lively* appeal, was lifted on 4/4/08. The order lifting the stay notes that the litigants in the Lively case are set to settle their case before the class certification issue is resolved by the Seventh Circuit. Motion for class certification granted on 9/26/08.	as to liability on alleged failures by defendants to: (1) allocate to the plan securities lending revenue generated before a securities lending program was implemented; and (2) implement a securities lending program earlier. On 1/23/09, defendants filed a motion for summary judgment on most of the claims alleged in the complaint. Among the arguments that defendants are making is that it is improper to make comparisons to International Paper's defined benefit plan.	– that International Paper engaged in prohibited transactions by: (1) entering into agreements with service providers, whereby International Paper benefited rather than plan participants; (2) placing revenue generated from plan assets in corporate accounts; (3) causing participant contributions to be transferred into accounts held by International Paper, and from which International Paper received a benefit at the expense of the participants; (4) entering into service agreements with service providers, with whom there were conflicts of interest; (5) allowing company stock to remain as an investment option; (6) forcing plan participants to own company stock in order to have a 401(k) plan and "prohibiting them from selling it until age 55"; and (7) favoring the defined benefit plan which was run by the same managers, and thereby causing lower investment returns and performance for the 401(k) plan. Plaintiffs also allege that charging fees through a master trust arrangement not only results in confusing fee disclosures, but that it actually results in higher fees. Plaintiffs allege that using a master trust arrangement – International Paper used a separate master trust for each investment option – results in "layer[s]" of fees. Plaintiffs further allege that International Paper used improper and misleading benchmarks (including "custom-designed[,]" non-market benchmarks) to misrepresent the performance of the investment options. 2. <u>Class certified</u>. 3. In a supplemental brief filed on 4/27/09 opposing defendants' motion for partial summary judgment, Plaintiffs argue that *Hecker v. Deere* (7th Cir.) is not applicable because *Deere* offered mutual funds, whose fees are arguably set at a competitive rate due to market competition, while International Paper offered separate accounts.

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						4. On 8/10/09, the Seventh Circuit granted defendants' petition for leave to appeal the class certification order. 5. On 8/18/09, the district court stayed the case pending the outcome of the class certification appeal.
7.	*Spano v. The Boeing Co.*, 3:06-cv-00743-DRH-DGW (S.D. Ill. filed 9/27/06) Amended complaint filed on 12/17/07 Second amended complaint filed on 8/25/08 Judge David R Herndon	Schlichter, Bogard for plaintiffs Bryan Cave; Schiff Hardin; Gibson Dunn for defendants	Motion to dismiss original complaint denied on 4/18/07 because (a) plaintiffs adequately alleged Boeing and officer were plan fiduciaries; (b) plaintiffs' remedy not limited to ERISA § 502(a)(2) and (c) plaintiffs adequately pled claims of nondisclosure. On 1/11/08, defendants filed a partial motion to dismiss first amended complaint. The motion sought dismissal of claims based on the inclusion of mutual funds as investment options (on statue of	The stay on class certification proceedings, imposed on 9/10/07 due to *Lively* appeal, was lifted on 4/3/08. Motion for class certification granted on 9/26/08.	Motion for summary judgment filed by defendants on 1/15/2009.	**Significance:** 1. In denying defendants' motion to dismiss the original complaint, the court ruled that plaintiffs' remedy is not limited to ERISA § 502(a)(2), and that they can plead under § 502(a)(3) in the alternative. The court rejected the defense that plaintiffs' ERISA § 502(a)(3) claim is limited by trust law principles which allow an "accounting" claim to be brought only against a plan trustee. 2. Amended complaint filed on 12/17/07. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) did not consider/capture additional revenue streams; (2) chose to use actively-managed mutual funds; and (3) chose to use mutual funds instead of separate accounts. 3. Second amended complaint filed on 8/25/08 added prohibited transaction claims. 4. <u>Class certified</u>. 5. In a brief filed on 3/20/09 opposing defendants' motion for summary judgment, plaintiffs allege that *Hecker v. Deere* (7th Cir.) is not applicable because Boeing did not use only mutual funds, did not offer a brokerage window, and did not use a bundled arrangement. 6. On 8/10/09, the Seventh Circuit granted permission to appeal the class certification order. 7. On 8/17/09, the district court entered an order staying

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			limitations grounds) and claims based on non-disclosure of information relating to fees (based on no legal duty to disclose). On 9/9/08 defendants filed a partial motion to dismiss the second amended complaint or for partial summary judgment based on statute of limitations grounds.			the case pending resolution of the class certification appeal.
8.	*Boeckman v. A.G. Edwards, Inc.*, 3:05-cv-00658-GPM-PMF (S.D. Ill. filed 9/15/06) Judge G. Patrick Murphy	Korein Tillery for plaintiffs Cook, Ysursa; Morgan, Lewis for defendants	Motion for judgment on the pleadings denied on 9/26/06 because (a) plaintiff's release did not bar ERISA claim for vested benefits, and (b) although unlikely, plaintiff may be able to prove prohibited transactions involving defendant and mutual funds.	Motion for class certification denied on 8/31/07, with leave to re-file upon resolution of *Lively* appeal.	Defendant's motion for summary judgment granted, in part, and denied, in part, on 8/31/07. Summary judgment granted dismissing plaintiff's claims of prohibited transactions in violation of ERISA. Summary judgment denied as to plaintiff's claims of breach of duty of prudence. Plaintiff's motion	**Significance:** 1. Does not challenge revenue sharing. 2. Challenges the use of mutual funds as investment options in general and use of retail class mutual funds. 3. Stipulation to dismiss the action with prejudice filed on 6/29/09 in light of the Seventh Circuit's denial of petition for rehearing in *Hecker v. Deere & Co.*

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					for summary judgment on liability denied on 8/31/07.	
9.	*Will v. General Dynamics Corp.*, 3:06-cv-00698-GPM-CJP (S.D. Ill. filed 9/11/06) Amended complaint filed on 10/25/07 Second amended complaint filed on 8/12/09 Judge G. Patrick Murphy	Schlichter, Bogard for plaintiffs Jenner & Block; Hepler, Broom; Lowenbaum for defendants	General Dynamics filed a motion to dismiss the first amended complaint on 11/8/07; Fiduciary Asset Management Company filed a motion to dismiss the first amended complaint on 12/7/07 Motions to dismiss the first amended complaint denied without prejudice for administrative reasons on 3/2/09. Defendant Piper Jaffray Companies filed a motion to dismiss the second amended complaint on 9/15/09. Defendant General Dynamics Benefit Plans and Investment Committee	Class certification proceeding stayed on 8/29/07, pending *Lively* appeal. Class certification motion as to the first amended complaint denied without prejudice for administrative reasons on 3/2/09.	General Dynamics filed a motion for summary judgment as to the first amended complaint on 1/4/08. Motion for summary judgment as to the first amended complaint denied without prejudice for administrative reasons on 3/2/09.	**Significance:** 1. Second amended complaint alleges that (1) the defendants failed to consider/capture additional revenue streams; (2) General Dynamics improperly selected the plan administrator (Fiduciary Asset Management Company ("FAMCo")); (3) General Dynamics improperly agreed with a fund manager -- providing services to the 401(k) plans and the "corporate-sponsored pension plan" -- to charge the 401(k) plans first before charging the other plan, where a graduated fee structure in effect meant that the 401(k) plans paid fees at a higher rate than the other plan; (4) FAMCo was improperly allowed to designate investment managers and to allocate plan assets among different investment managers, when FAMCo itself was an investment manager; (5) defendants allowed FAMCo to profit from using plan assets as "seed money" in establishing its business and selling the business to Piper Jaffray Companies for a profit; and (6) Piper Jaffray participated in FAMCo's self-dealing and received "distributions of income" after the sale. Plaintiffs no longer claim that revenue sharing caused recordkeeping fees to be excessive. Plaintiffs assert that "hard dollar" recordkeeping fees were excessive. 2. In its motion to dismiss the second amended complaint, Piper Jaffray argues that it is not a plausible defendant because (1) it is not a fiduciary; and (2) the plaintiffs failed to identify a res from which restitution could be obtained as "appropriate equitable relief." 3. On 10/19/09, Defendant General Dynamics Benefit

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			("Committee") filed a motion to dismiss the second amended complaint on 9/15/09. The court denied the Committee's motion to dismiss the second amended complaint as moot on 10/20/09 in light of the voluntary dismissal of the Committee on 10/19/09			Plans and Investment Committee ("Committee") was voluntarily dismissed from the case upon stipulation that General Dynamics was liable for the actions of the Committee and its individual members.
10.	*George v. Kraft Foods Global, Inc.*, 1:07-cv-01713, (N.D. Ill. filed 10/16/06 in the S.D. Ill.) Judge Sidney I. Schenkier	Schlichter, Bogard for plaintiffs Seyfarth Shaw for defendants	Motion to dismiss, motion to strike, and motion for more definite statement denied on 3/16/07 because (a) complaint met notice pleading standard, and (b) burden was on defendant, not plaintiff, to prove 404(c) defense. On 3/3/09, defendants filed a motion for judgment on the pleadings based on	Motion for class certification granted on 7/17/08.	Not made.	**Significance:** 1. Case transferred from Southern District of Illinois to Northern District of Illinois by order dated 3/16/2007. 2. Consolidated with *Pino v. Kraft* in Northern District of Illinois on 6/5/07. (The two cases are, however, to keep separate dockets for now, just in case the class certification is later denied.) 3. <u>Class certified</u>. 4. On 4/1/09, the court ruled that plaintiffs' claims regarding float and securities lending are not within the scope of the complaint. The court also noted that plaintiffs have stated on the record that they will not pursue the excessive investment management fee claim at trial. (The court had previously struck plaintiffs' expert's report regarding excessive investment management fees in

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			the Seventh Circuit's affirmance of *Hecker v. Deere & Co.* dismissal.			actively managed funds.)
11.	*Loomis v. Exelon Corp.*, 1:06-cv-04900 (N.D. Ill. filed 9/11/06) Judge John W. Darrah Amended complaint filed on 8/19/09	Schlichter, Bogard for plaintiffs Sidley Austin for defendants	Motion to dismiss granted, in part, and denied, in part, on 2/21/07. Plaintiff's prayer for investment losses stricken because plaintiff failed to allege nexus between administrative fees charged by participants and market-based losses. Motion to dismiss amended complaint filed on 9/11/09.	Motion for class certification granted on 6/26/07.	Not made.	**Significance:** 1. Permission to file an amended complaint denied on 11/14/07 with leave to re-file. 2. Prayer for investment losses stricken. 3. <u>Class certified</u>. 4. The amended complaint alleges, among other things, that: (1) defendants improperly used retail mutual funds when less expensive institutional mutual funds, separate accounts, or commingled funds were available; and (2) defendants improperly allowed administrative fees to increase with the increase in plan assets.
12.	*Martin v. Caterpillar, Inc.*, 1:07-cv-01009-JBM-JAG (C.D. Ill. filed 9/11/06) Amended complaint filed 5/25/07 Second Amended Complaint filed	Schlichter, Bogard; Vonachen Lawless for plaintiffs Seyfarth Shaw for defendants	Motion to dismiss complaint granted on 5/15/07 due to "prolix language" without prejudice to re-filing an amended complaint. On 7/25/07, defendants filed a motion to dismiss	First motion denied on 5/15/07 as moot in light of dismissal of original complaint.	Not made.	**Significance:** 1. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) did not consider/capture additional revenue streams; (2) chose to use actively-managed mutual funds; and (3) chose to use mutual funds instead of separate accounts. Plaintiffs also allege that Caterpillar improperly benefited from the sale of its investment management subsidiary. 2. Although the court dismissed the defendants' motion to dismiss the second amended complaint, the court held that

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	7/5/07 Judge Joe Billy McDade		the second amended complaint. On 9/25/08, the court denied defendants' motion to dismiss the second amended complaint. On 2/19/09, defendants filed a motion for judgment on the pleadings based on the Seventh Circuit's affirmance of *Hecker v. Deere & Co.* dismissal.			the defendants did not breach their fiduciary duties by "failing to make disclosures regarding revenue sharing" which were "not required by the statutory scheme promulgated by Congress and enforced by the DOL." 4. On 8/4/09, the court entered an order staying the case for 45 days upon plaintiffs' request. The court dismissed all pending motions without prejudice in light of the stay 5. On 10/15/09, the court entered an order staying the case through 10/30/09 upon parties' request and noted that settlement discussions were under way.
13.	*Nolte v. CIGNA Corp.*, 2:07-cv-02046-HAB-DGB (C.D. Ill. filed 2/26/07) Amended complaint filed on 7/19/07 Second amended complaint filed on 8/27/09	Schlichter, Bogard for plaintiffs Morgan, Lewis for defendants.	Motion to dismiss original complaint dismissed as moot on 7/23/07.	Not made.	Defendants' motion for summary judgment as to the first amended complaint dismissed as moot on 8/28/09.	**Significance:** 1. In addition to revenue sharing, plaintiffs complain in the second amended complaint that fiduciaries: (1) did not consider/capture additional revenue streams; (2) invested in funds managed by affiliates; (3) paid layered fees by investing in investment options with subadvisors; (4) invested in funds that charged retail fees; (5) offered a fixed income fund guaranteed by an insurance contract offered by an affiliate; and (6) engaged in prohibited transactions by using CIGNA affiliates as service providers and using plan assets for CIGNA's benefit. Plaintiffs also allege that CIGNA improperly benefited from the sale of its retirement business.

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	Judge Harold A. Baker					2. Unlike many of the other companies facing these lawsuits, CIGNA chose to use separate accounts instead of mutual funds as investment options. Accordingly, CIGNA avoided the allegation found in many of the other lawsuits that plan fiduciaries should have chosen to use separate accounts rather than mutual funds. 3. In a brief filed on 4/8/09 opposing defendants' motion for summary judgment as to the first amended complaint, plaintiffs argued that *Hecker v. Deere* (7th Cir.)'s holding that revenue sharing does not involve plan assets is not applicable because CIGNA used separate accounts instead of mutual funds.
Eighth Circuit						
14.	*Tussey v. ABB, Inc.*, 2:06-cv-04305-NKL (W.D. Mo. filed 12/29/06) Amended complaint filed on 7/5/07 Judge Nanette K. Laughrey	Schlichter, Bogard, for plaintiffs. Morgan, Lewis; Bryan Cave for ABB; Lathrop & Gage; O'Melveny & Myers; Goodwin Proctor for Fidelity	On 2/11/08, the court denied ABB and Fidelity's motions to dismiss. The court held that (1) 404(c) defense may not be available to ABB; (2) Fidelity Trust may be a fiduciary as to selection of investment options; and (3) Fidelity Management, the investment adviser to certain mutual funds, may be a fiduciary because it may have paid Fidelity Trust to steer plan assets	Motion to certify class granted on 12/3/07.	Plaintiffs filed a motion for partial summary judgment on 3/9/09. This motion is under seal. Fidelity defendants filed a motion for summary judgment on 3/9/09. This motion is under seal. ABB defendants filed a motion for summary judgment on 3/9/09. This motion is under seal.	**Significance:** 1. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) did not consider/capture additional revenue streams; (2) chose to use actively-managed mutual funds; and (3) chose to use mutual funds instead of separate accounts. 2. On 2/5/08, Eighth Circuit denied Fidelity's petition to appeal the district court's order granting class certification. 3. In ruling on the motions to dismiss, the court held that: (1) ABB was not required to disclose revenue sharing arrangements, but where a participant makes investment decisions without knowledge of revenue sharing arrangements, the participant may not be exercising investment decisions within the meaning of § 404(c); and (2) Fidelity Trust could qualify as a fiduciary because it does the first-cut screening of investment options, and has veto authority over the inclusion of investment options.

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			toward mutual funds that it advised and may have set fees paid with plan assets.			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. 4. <u>Class certified.</u> <u>5. Trial set for 1/4/10.</u>
15.	*Braden v. Wal-Mart Stores, Inc.*, 6:08-cv-03109-GAF (W.D. Mo. filed 3/27/08)	Keller Rohrback for plaintiffs. Steptoe & Johnson; Shook, Hardy & Bacon for defendants.	Motion to dismiss granted on 10/28/08.	Motion for class certification filed on 10/17/08.	Not made.	1. In dismissing the case on 10/28/08, the court ruled that defendants could have chosen allegedly expensive funds with revenue sharing "for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility." The court ruled that plaintiffs failed to state a claim because they failed to allege "facts showing [that] Wal-Mart . . . failed to conduct research, consult appropriate parties, conduct meetings, or consider other relevant information" in selecting the allegedly expensive funds. 2. The district court's dismissal has been appealed to the Eighth Circuit. 3. The DOL has filed an amicus brief arguing that the district court misapplied the notice pleading requirement in dismissing plaintiffs' claims.
Ninth Circuit						
16.	*Kanawi v. Bechtel Corp.*, 3:06-cv-05566-CRB (N.D. Cal. filed 9/11/06)	Schlichter, Bogard; Futterman, Dupree for plaintiffs Morgan, Lewis for	Motion to dismiss denied on 5/15/07 because (a) plaintiff adequately pled	Motion for class certification denied without prejudice on 8/24/07. By order dated 8/27/07	On 9/16/08, plaintiffs filed a motion for partial summary judgment (subsequently	**Significance:** 1. In denying defendant’s motion to dismiss, the court noted that compliance with ERISA and DOL regulations would not preclude a fiduciary breach claim and that

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	Judge Charles R. Breyer Amended complaint filed on 11/9/06. Second amended complaint filed on 3/23/07. Third amended complaint filed on 3/18/08.	defendants	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.	the court explained that the motion may be "renewed" at anytime through re-noticing the motion. On 8/28/08, plaintiffs renewed the motion for class certification. Renewed motion for class certification granted on 10/10/08.	sealed). On 9/19/08, defendant Freemont Investment Advisors filed a motion for summary judgment (subsequently sealed). On 9/22/08, Bechtel defendants filed a motion for summary judgment under seal. On 11/3/08, the court denied plaintiffs' motion for partial summary judgment, and granted in part and denied in part the motions for summary judgment filed by Freemont Investment Advisors and the Bechtel defendants.	failure to disclose revenue sharing is relevant to whether a participant exercised investment control within the meaning of ERISA § 404(c). 2. In addition to revenue sharing, plaintiffs complain that fiduciaries (1) did not consider/capture additional revenue streams; (2) included retail mutual funds (and funds of funds) as investment options; and (3) chose to use actively-managed investment options. Plaintiffs also allege that Fremont Investment Advisors ("FIA") – an entity alleged to have originated from Bechtel's investment advisory and management division – was responsible for: selecting, monitoring, evaluating, and terminating investment managers for the investment options; negotiating agreements with the investment managers; and managing its own proprietary funds, some of which were included as the plan's investment options. Plaintiffs argue that FIA received undisclosed revenue sharing payments from plan service providers that FIA selected, and that this constituted a series of prohibited transactions. Plaintiffs also argue that the plan is entitled to some of the proceeds from the sale of FIA to a third party. 3. <u>Class certified.</u> 4. On 11/3/08, the court denied the plaintiffs' motion for summary judgment on the self-dealing claims alleged in the complaint. The court granted in part and denied in part the motions for summary judgment filed by Freemont Investment Advisors ("FIA") and the Bechtel defendants. The court: dismissed fiduciary breach claims arising more than six years before the filing of the complaint based on ERISA's statue of limitations provision; dismissed plaintiffs' self-dealing claims except for a four-month period during which the court said the plan, and not Bechtel, paid fees to FIA; dismissed claims alleging

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						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. 5. Plaintiffs' sole remaining claim following the 11/3/08 decision – a self-dealing claim relating to a four-month period – was settled by agreement dated March 3, 2009. 6. The plaintiffs have appealed the court's 11/3/08 decision to the Ninth Circuit.
17.	*In re Northrop Grumman Corp. ERISA Litig.*, 2:06-cv-6213-R-JC (C.D. Cal. filed 9/28/06) Amended complaint filed on 3/14/07 Reassigned from Judge Manuel L. Real to Margaret M. Morrow *Waldbuesser* action is restyled *Grabek* and consolidated with *Heidecker* actions *Grabek* plaintiffs file amended complaint on	Schlichter, Bogard; Keller, Fishback; Hill, Farrer; AARP Foundation Litigation for plaintiffs McDermott, Will & Emery for defendants	Motion to dismiss granted on 2/26/07 with prejudice as to claims asserted by plaintiff Waldbuesser (lack of standing) and denied without prejudice (and with leave to file an amended complaint) as to other plaintiffs. Motion to dismiss first amended complaint in *Grabek* with prejudice granted with respect to Northrop and its director defendants on 5/23/07 "for the reasons set forth in defendants' briefs" – which we	First motion denied as moot in light of dismissal of original complaint. Second motion for class certification denied on 8/6/07 because the case is "better taken care of by administrative agencies." On 10/11/07, the Ninth Circuit Court of Appeals granted plaintiff's petition to appeal the district court's denial of class certification.	Not made.	**Significance:** 1. *Heidecker* and *Grabek* actions, and all future actions based on same facts filed in Central District of California, were consolidated on March 26, 2007. 2. Amended complaint includes allegation that funds labeled as actively managed funds operated in reality as passively managed funds, so that the active management fees were unjustified. 3. Class certification <u>denied</u>. 4. On 10/1/07, the Ninth Circuit stayed the district court proceedings while the class certification order is on appeal. 5. On 9/8/09, the Ninth Circuit ruled that the district judge abused his discretion by failing to make any findings in granting class certification. The Ninth Circuit vacated the class certification order and ordered that the case be assigned to a different judge.

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	3/14/07		understand to have addressed whether the complaint's allegations failed to establish that Northrop and its director defendants had or exercised any fiduciary duty.			

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18.	*Tibble v. Edison International*, 2:07-CV-05359-SVW-AGR (C.D. Cal. filed 8/16/07) Judge Stephen V. Wilson Amended complaint filed on 8/5/08. Second amended complaint filed on 4/15/09.	Schlichter, Bogard; Hill, Farrer for plaintiffs O'Melveny & Myers for defendants	Motion to dismiss original complaint granted in part and denied in part on 7/16/08.	Filing of motion deferred by court on 11/1/07, and parties relieved of time deadlines. Motion for class certification filed on 5/8/09. Motion for class certification granted on 06/30/09.	Defendants filed a motion for summary judgment as to the second amended complaint on 5/18/09. Plaintiffs filed a motion for partial summary judgment as to the second amended complaint on 5/29/09.	**Significance:** 1. On 7/16/08, the court dismissed fiduciary breach claims against plan sponsor defendants with leave to file an amended complaint. The court reasoned that the fiduciary breach claims did not relate to the plan sponsors' duties to properly appoint plan fiduciaries. The court, however, allowed the fiduciary breach claims to proceed against other defendants. The court ruled that revenue sharing may involve plan assets, such that prohibited transaction claims can properly be asserted. The court also ruled that under Ninth Circuit precedent, ERISA's general fiduciary duty provision requires disclosure of material fee information without a request from a plan participant. 2. The amended complaint filed on 8/5/08 and the second amended complaint filed on 4/15/09 include allegations that the plan sponsor failed to properly appoint and monitor plan fiduciaries. 3. On 5/29/09, plaintiffs filed a motion for partial summary judgment as to defendants' liability in including mutual funds that paid revenue sharing and in allowing the trustee to retain float. 4. <u>Class certified</u>. 5. On 6/30/09, the court granted in part defendants' motion for summary judgment and denied plaintiffs' motion for partial summary judgment. The court ruled that: (1) plan sponsor did not violate ERISA § 406(b)(3) in offering mutual funds under the plan because the decision to offer mutual funds was made by fiduciaries other than the plan sponsor; (2) plan fiduciary did not violate § 406(b)(2) in deciding to offer mutual funds under the plan because the plan fiduciary did not represent the mutual

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						funds; (3) defendants properly interpreted the plan as allowing the use of revenue sharing to pay recordkeeping fees and allowing the trustee to retain float; (4) the inclusion of retail mutual funds and sector funds was proper because participants demanded such funds; (5) defendants properly selected, monitored, and removed a technology fund; (6) defendants properly included a money market fund rather than a stable value fund; (7) offering the stock fund as a unitized fund was proper; and (8) statute of limitation barred most of these claims. However, the court held that: (i) § 404(c) was not applicable in light of plaintiffs' claim that defendants offered improper investment options; (ii) triable issues remained as to whether defendants' desire to generate revenue sharing to pay for recordkeeping fees that the plan sponsor was otherwise required to pay under the terms of the plan tainted the defendants' selection of retail mutual funds; and (iii) trial issues remained as to whether the trustee's retention of float constituted a prohibited transaction. 6. On 7/31/09, the court granted summary judgment to defendants as to the float claim. The court ruled that the statute of limitations barred plaintiffs' challenge to the defendants' decision to allow the trustee to retain float and ruled that a failure to act within the limitations period cannot form the basis of a prohibited transaction claim. The court also ruled that plaintiffs' float claim did not satisfy the notice pleading requirement. However, the court ruled that triable issues existed as to whether the money market fund charged excessive fees. 7. On 9/10/09, the court denied plaintiffs' motion to revise the summary judgment ruling. 8. A bench trial was held on October 20-22, 2009 as to: (1) whether the defendants' desire to generate revenue

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						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 (2) whether the money market fund charged excessive fees. Plaintiffs were allowed to argue that defendants breached both their duty of loyalty and duty of prudence in selecting the retail mutual funds. Further trial is to be held as to the duty of prudence claim.
19.	*Daniels-Hall v. National Education Association*, 3:07-cv-05339-RBL, (W.D. Wash. Filed 7/11/07) Hon. Ronald B. Leighton	Law offices of Allen C. Engerman; Keller Rohrback; Edward Siedle; Jeffrey C. Engerman for plaintiffs Bredhoff & Kaiser; Song Mondress; O'Melveny & Myers; Wilmer Hale; Perkins Coie; Sutherland Asbill; Gordon Thomas for defendants.	Court dismissed plaintiffs' claims on 5/23/08.	Deadline for filing a motion set as 6/7/09.	Not made.	**Significance:** 1. Alleges that National Education Association recommended ERISA § 403(b) plan providers in return for endorsement fees and that the plan providers improperly received revenue sharing payments. 2. The court dismissed plaintiffs' claims on 5/23/08. The court ruled that National Education Association, as an employee association, cannot, as a matter of law, establish or maintain a § 403(b) annuity plan. The court also ruled that pursuant to a safe harbor, the school district employers did not establish or maintain a § 403(b) plan. Accordingly, the court ruled that it lacked subject matter jurisdiction as the § 403(b) annuities were not "plans" under ERISA. 3. The court's order dismissing plaintiffs' claims has been appealed to the Ninth Circuit Court of Appeals.

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First Circuit						
20.	*Columbia Air Services, Inc. v. Fidelity Management Trust Co.*, 1:07-CV-11344-GAO (D. Mass., filed 7/23/07) Judge George A. O'Toole, Jr.	Robinson & Cole, LLP; Schatz, Nobel Izard PC; Sarraf Gentile LLP for plaintiffs O'Melveny & Myers LLP; Goodwin Proctor LLP for defendant	On September 30, 2008, the district court granted defendant Fidelity's motion to dismiss The court held that Plaintiff failed to allege that Fidelity was a fiduciary under ERISA with respect to setting its compensation or with respect to the selection or substitution of mutual fund options made available to the plan and its participants. On October 14, 2008, the Plaintiff filed a motion to alter or amend the court's September 30 ruling and for leave to file an amended complaint, adding new allegations in support of its argument that Fidelity is an ERISA fiduciary.	Not made.	Not made.	**Significance:** 1. Fiduciary status under ERISA is not an "all-or-nothing" concept. A service provider only has fiduciary status when – and to the extent – that it *exercises* discretionary authority. 2. Plaintiff failed to allege facts indicating that Fidelity exercised fiduciary responsibilities in negotiating the terms of its engagement as a directed trustee, including its compensation: the contract with the plan was negotiated at arms' length, and the pan's named fiduciaries – not Fidelity – were responsible for selecting the investment options offered to the plan and its participants – the investment options from which Fidelity received revenue sharing payments.

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			On December 22, 2008, the district court denied the Plaintiff's motion to alter or amend/leave to file amended complaint.			
21.	*Charters v. John Hancock Life Insurance Co.*, 1:07-CV-11371-NMG, (D. Mass. filed on 7/26/07) Judge Nathaniel M. Gorton	Shapiro Haber & Urmy LLP; Schatz Nobel Izard P.C.; Sarraf Gentile LLP for plaintiff Goodwin Procter LLP for defendant	Defendant's motion to dismiss denied on 12/21/07 because (a) a reasonable fact finder could determine that the Defendant's right to change the mutual funds included in its lineup of investment options could give rise to ERISA fiduciary status; (b) Plaintiff had standing to assert claims on behalf of trustees of other plans; and On September 30, 2008, the court granted the	Plaintiff's Motion for Class Certification is pending (filed 11/14/08).	Defendant filed a motion for summary judgment as to the claims asserted in Plaintiff's class action complaint on March 7, 2008. Defendant alleges that it is not a fiduciary and, even if it were found to be a fiduciary, Defendant did not breach any fiduciary duties or engage in any prohibited transactions. On June 30, 2008, Plaintiff cross-moved for partial summary judgment on the issue of whether Defendant is a plan fiduciary. On September 30, 2008, the court granted the plaintiff's	In his complaint, the Plaintiff alleged that Defendant, which managed the plans' assets in separate accounts, received revenue sharing payments to which it was not entitled, because the amount of such payments exceeded the amount by which Defendant reduced certain administrative fees and/or exceeded the fees authorized in group annuity contracts issued by Defendant to its plan clients. 1. The court's ruling suggests the fact that Hancock had the discretion to set and modify its administrative maintenance charge was sufficient to confer fiduciary status, whether or not Hancock actually exercised such discretion. 2. The ruling is another instance where courts appear to be giving little deference to the DOL's "Aetna Letter" and suggests that any deference to the Aetna Letter will require service providers to demonstrate that they have identically adhered to the conditions discussed in that letter. On August 21, 2009, the parties agreed to a Stipulation of Dismissal and Judgment, pursuant to which the parties settled this action and the Plaintiff voluntarily dismissed its claims against Hancock in their entirety, with prejudice. The parties' Stipulation notes that

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			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.		motion for partial summary judgment, finding that Hancock is an ERISA fiduciary because (a) Hancock retained discretion to set and modify the amount of its administrative fees charged to its plan clients (b) Hancock retained discretion to substitute mutual funds offered as investments to its plan clients, and, in the event Hancock's clients rejected such substitution, they would effectively have no option other than transferring their investments to another Hancock-administered sub-account or terminating their contract with Hancock in its entirety, either of which would subject the plans to a fee. According to the court, such "built-in penalties" significantly limited the plans' opportunity to reject such fund	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.

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					changes, compared with the facts addressed in the DOL's 1997 "Aetna Letter." In the same ruling, the court denied Hancock's motion for summary judgment, finding that sufficient fact exists remain as to whether (a) Hancock breached its fiduciary duties in receiving administrative fees in compensation for its services to its clients and the mutual funds in which they invested and (b) Hancock applied the full amount of the revenue sharing payments it received from mutual funds to offset the amount of fees owed by its plan clients. On November 25, 2008, the plaintiff moved for partial summary judgment, alleging that Hancock	

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					breached its fiduciary duty by charging an excess administrative fee and failing to use the revenue sharing payments it received to offset such fee. Plaintiff's motion is pending.	
Second Circuit						
22.	*Haddock v. Nationwide Financial Services, Inc.*, 3:01-CV-1552-SRU, 419 F.Supp.2d 156 (D. Conn. filed on 8/15/01) Amended Complaint filed 9/6/01 Second Amended Complaint filed 2/27/03 Third Amended Complaint filed 5/27/03 Fourth Amended Complaint filed	Gregory G. Jones**;** Stanley, Mandel & Iola; Stratton Faxon; Koskoff, Koskoff & Bieder, P.C. for plaintiffs Dewey & LeBoeuf LLP; Wilmer Hale for defendants	Defendant's motion to dismiss the Amended Complaint denied on 9/25/07 because (a) Nationwide may have been a plan fiduciary because it retained discretion to add and delete the fund options offered to plans under its variable annuity products; (b) revenue sharing payments from funds could be "plan assets" on the basis of Nationwide's receiving payments	Motion to Certify Class denied on 3/8/06. Motion to Certify Class based on Fifth Amended Complaint pending. Class certification briefing has been extended to January 16, 2009. A hearing on the Motion to Certify Class was held on February 27. The court has taken the Motion under advisement. On March 27, the plaintiffs submitted a proposed order	Denied on 3/7/06 with respect to Fourth Amended Complaint. (a) Nationwide may have been a plan fiduciary because it retained discretion to add and delete the fund options offered to plans under its variable annuity products; (b) revenue sharing payments from funds could be "plan assets" on the basis of Nationwide's receiving payments from the mutual funds in exchange for offering the funds as investment options to	**Significance:** In denying Defendant's motion to dismiss, the district court adopted a two-pronged test for determining what constitutes "plan assets" under ERISA: items a defendant holds or receives (1) as a result of its status as a fiduciary or as a result of its exercise of fiduciary discretion or authority; and (2) at the expense of plan participants or beneficiaries.

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	6/16/04 Fifth Amended Complaint filed 3/21/06 Judge Stefan R. Underhill		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 claim and did not waive claim by including in first complaint but omitting from subsequent complaints. Plaintiffs' motion to dismiss Nationwide's counterclaims granted on August	granting class certification. On April 14, the defendants submitted objections to the plaintiffs' proposed order. The court has not yet addressed the plaintiffs' proposed order or the defendants' objections to the same. On July 20, 2009, a trustee of a 401(k) profit sharing plan and member of the proposed class filed a motion to intervene as a plaintiff and class representative in the action, as a result of the parties' inability to agree on a named class representative. The court has ordered that limited discovery be taken with respect to the proposed class representative, such discovery to be concluded by mid-September and	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.	

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			11, 2008 because (a) Even though Nationwide, as a fiduciary, has standing to assert claims for contribution and indemnification against the plaintiffs, there was no indication that the plaintiffs received any benefit from Nationwide's receipt of revenue sharing payments. (b) While Nationwide had standing, as a purported fiduciary, to assert breach of fiduciary duty claims on behalf of the plans, there was no indication that the *plans* suffered any harm as a result of the *plaintiffs'* breach, as required by ERISA § 409. On September 10, Nationwide filed amended	any supplemental briefing to be concluded by mid-October.		

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			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.			
23.	*Beary v. ING Life Insurance and Annuity Co.*, 3:07-CV-00035-MRK, 520 F.Supp.2d 356 (D. Conn. filed on 1/8/07) Amended complaint filed on 3/9/07	Law Offices of Allen C. Engerman, PA; Edward A.H. Siedle; Howard, Kohn, Sprague & Fitzgerald; Law Offices of Jeffrey C. Engerman; Stanley, Mandel & Iola for plaintiffs	Motion to dismiss granted on 11/5/07. On January 4, 2008, the district court denied the plaintiff's motion to alter or amend the court's dismissal of the case.	Moot in light of dismissal.	Moot in light of dismissal.	**Significance:** Action brought under state fiduciary law on behalf of IRC § 457(b) plan and similarly situated plans. The court held that, by pleading so as to avoid dismissal based upon federal securities law preemption, Plaintiff conceded away any viable claim for relief, entitling Defendant to dismissal of the action. Specifically, the court found that the plaintiff had full knowledge of ING's revenue sharing arrangement for several years prior to filing suit and his failure to initiate timely legal action constituted acquiescence to the revenue sharing arrangement, barring his breach of fiduciary duty claim.

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	Judge Mark R. Kravitz	Jorden Burt for defendants				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.
24.	*Phones Plus, Inc. v. The Hartford Financial Services, Inc.*, 3:06-CV-01835-AVC, 2007 WL 3124733 (D. Conn. filed 11/14/06) Amended complaint filed 3/5/07. Hartford filed a third-party complaint against third-party defendants Thomas Sodemann and Robert Sodemann on 12/6/07. On 3/4/09, the court granted the Plaintiff's motion to amend its complaint, noting that the motion was not untimely, given that the defendant fulfilled its discovery	Shepherd Finkelman Miller & Shah LLC; Liner Yankelevitz Sunshine & RegenStreif, LLP; Law Offices of Steven Ross, PA for plaintiffs Jorden Burt; Levy & Droney, PC; Willkie Farr & Gallagher LLP for defendants Newman, Creed & Associates for third-party defendants	Defendants' motion to dismiss amended complaint denied on 10/23/07 because (a) Plaintiffs alleged enough facts in support of their contention that Hartford is a fiduciary, including the fact that Hartford had discretion to make unilateral changes to the menu of investment options offered to plan participants, and that the plan sponsor's ultimate authority concerning Hartford's changes to the menu of investment options was only one factor to be considered; (b) whether a given item constitutes "plan assets" is a	Plaintiff filed a motion for class certification on March 4, 2008, which was not decided by the court. On June 20, 2008, the Plaintiff filed an amended motion for class certification. The court has not yet ruled on Plaintiff's motion. On March 4, 2009, the court denied Hartford's June 20, 2008 class certification motion as moot, in light of its order on the same date permitting Plaintiff to amend its complaint. By agreement of the parties, the court entered an amended scheduling order	Hartford filed a motion for summary judgment on March 3, 2008, as to all three counts in Plaintiff's amended class action complaint. Hartford contends that Plaintiff's claims under ERISA §§ 404, 405, and 406 fail because Hartford is not a fiduciary to the Plaintiff's plan. Hartford also argues that the Plaintiff cannot establish that it suffered any losses as a result of Hartford's purported ERISA violations. In addition, Hartford contends that Plaintiff's claim that Hartford, as a non-fiduciary, knowingly participated in Neuberger's breach, fails as a matter of law.	**Significance:** Notably, the district court also held that DOL Adv. Op. 1997-16A (May 22, 1997) ("Aetna Letter"), upon which Defendants relied in arguing that they are not fiduciaries, was not dispositive, because (1) the Aetna Letter was merely persuasive authority; and (2) Defendants did not make the same fee disclosures and follow the same notification process when making fund line-up changes, as contemplated by the Aetna Letter. On November 14, 2008, Plaintiff and Neuberger advised the court that they had reached a settlement in principle to settle their dispute. On July 17, 2009, the court approved the settlement, dismissing the action against Neuberger with prejudice.

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	obligations in November 2008 and that permitting Plaintiff to amend its complaint would not cause undue prejudice to defendants. Plaintiff filed its second amended complaint on March 9. By order of the court, the Defendants' response is due on or before May 26. By agreement of the parties, the court entered an amended scheduling order on May 22, 2009, pursuant to which Defendant Hartford Life was given until May 29, 2009 to file its answer to the Plaintiff's second amended complaint. Defendant filed its answer on May 29. Judge Alfred V. Covello		mixed question of fact and law, and the plaintiffs alleged sufficient facts in support of their allegations that the revenue sharing payments constituted plan assets; (c) the court could not conclude as a matter of law that Neuberger, an investment advisor retained by Hartford to review and evaluate the investment options offered to the plan participants and to provide investment advice to the plan, had no duty to investigate and inform the plaintiff about revenue sharing payments; and (d) even if not a fiduciary, Hartford could be subject to non-fiduciary liability for knowingly participating in Neuberger's alleged fiduciary	on May 22, 2009, pursuant to which Plaintiff was given until June 17, 2009 to move for class certification with respect to its second amended complaint. Plaintiff filed its motion for class certification with respect to its second amended complaint on June 17, 2009. Briefing is now complete and the motion awaits the court's decision.	Plaintiff filed a response in opposition to Hartford's motion on April 23, 2008. Hartford filed a reply on May 14, 2008. The court has not yet ruled on Hartford's motion. On March 4, 2009, the court denied Hartford's March 3, 2008 summary judgment motion as moot, in light of its order on the same date permitting Plaintiff to amend its complaint. Plaintiff filed its second amended complaint on March 9. Defendant answered on May 29. A trial has been scheduled for July 21, 2009. However, the parties have indicated a desire to attempt to resolve the case through mediation. The parties were	

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			breach. On September 29, 2008, the district court denied the plaintiff's motion to dismiss defendants' counterclaims for contribution, indemnification, and breach of fiduciary duty. The court held that the Second Circuit allows ERISA fiduciaries to pursue claims for contribution and indemnification, that the defendants pled sufficient facts to support such claims, and that defendants' assertion of such rights as counterclaims was procedurally proper.		unable to resolve the case through mediation, and by agreement of the parties, the court entered an amended scheduling order on May 22, 2009, pursuant to which Defendant Hartford Life was given until June 17, 2009 to move for summary judgment with respect to Plaintiff's second amended complaint. Defendant Hartford Life filed its motion for summary judgment with respect to Plaintiff's second amended complaint on June 17, 2009. In support of its motion, Defendant argued that Plaintiff could not demonstrate that Defendant acted in a fiduciary capacity with respect to its receipt of revenue sharing payments, that the revenue sharing payments were not made with plan assets, and that	

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					Defendant did not participate in a knowing breach of trust. Briefing is now complete and the motion awaits the court's decision. By order dated September 21, 2009, the parties' deadline to file their pre-trial memoranda is November 18, 2009. Per the same order, the case must be trial ready no later than December 18, 2009.	
25	*Stark v. American Skandia Life Assurance Corp.*, 3:07-CV-01123-CFD (D.Conn. filed 7/25/07) Judge Christopher F. Droney	Schatz Nobel Izard PC; Sarraf Gentile LLP for plaintiff Milbank Tweed; Groom Law Group, Chtd for defendant	Not made. Plaintiff voluntarily dismissed action without prejudice on 11/13/07.	Not made.	Not made.	
26	*Zang v. Paychex, Inc.*, 6:08-CV-06046-DGL (W.D.	McTigue & Porter; Adler & Assoc. for	Motion to dismiss Plaintiff's complaint pending.	Not made.	Not made.	**Significance**: Plaintiff alleges that Defendant is a fiduciary because by

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	N.Y.; filed in E.D. Mich. on 8/15/07) Judge David G. Larimer	plaintiff Groom Law Group, Chtd.; Harris Beach LLP for defendant.	The court heard oral argument on 8/17/09 and the parties are awaiting a ruling.			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 claims 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.
Sixth Circuit						
27.	*Beary v. Nationwide Life Insurance Co.*, 2:06-CV-00967-EAS-MRA, 2007 WL 4643323 (S.D. Ohio filed 11/15/06) Judge Edmund A. Sargus	Smith Phillips & Associates; Stanley, Mandel & Iola, LLP; Allen C. Engerman; Law Offices of Jeffrey C. Engerman, PC; Edward A. H. Siedle for plaintiffs Brickler & Eckler, LLP; Wilmer Hale for defendants.	The district court granted Defendants' motion to dismiss on 9/17/07 because the action was preempted by the Securities Litigation Uniform Standards Act of 1998. Plaintiff moved to vacate the court's judgment. The court denied Plaintiff's motion on September 15, 2008, finding that Plaintiff failed to	Not made.	Not made.	**Significance:** Action brought under state fiduciary law on behalf of IRC § 457(b) plan and similarly situated plans.

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			meet the standard required by Rule 59(e) of the Federal Rules of Civil Procedure, because Plaintiff did not identify a mistake of law, a change in controlling law, or newly discovered facts. The court further held that, while Plaintiff satisfied Rule 15(a)'s standard for amending his complaint, such amendment would be futile in this case, as Plaintiff's claims would remain preempted under the Securities Litigation Uniform Standards Act of 1998. On October 15, 2008, Plaintiff filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit on the dismissal of Plaintiff's claims and the denial of Plaintiff's motion			

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			to vacate. The parties' appeal briefing is complete. Oral argument was held on October 13, 2009.			
Eighth Circuit						
28.	*Ruppert v. Principal Life Ins. Co.*, 4:07-CV-00344-JAJ-TJS (S.D. Iowa; case transferred from S.D. Ill. on 7/25/07) First Amended Complaint filed on May 5, 2008. Judge John A. Jarvey	Duncan Green Brown Langeness & Eckley PC; Korein Tillery; Simmons Cooper for plaintiffs Sidley Austin LLP; Michael J. Nester; Whitfield & Eddy PLC for defendants	On March 30, 2009, the defendant filed a motion for judgment on the pleadings as to claims one and two of the plaintiff's complaint (revenue sharing claims), arguing that such claims are no longer viable based upon the Seventh Circuit's recent holding in *Hecker v. Deere & Co.* The defendant contends that there is no principled basis for distinguishing the plaintiff's claims from those in *Hecker* and,	Motion for Certify Class filed by Plaintiffs on April 21, 2008. On August 27, 2008, the district court denied the plaintiff's motion for class certification, finding that, as the proposed class involved more than 24,000 different plans to which Principal provided services, an intensive, plan-by-plan inquiry would be required in order to evaluate the plaintiff's claims that Principal is an	Not made.	**Significance:** Plaintiffs allege that Defendant is a fiduciary because it (a) offers full service 401(k) retirement plans; (2) has authority to make changes to funds offered to plan participants; (3) has discretion to negotiate for receipt of revenue sharing payments; and (4) provides investment advice. Plaintiffs claim that Defendant breached its fiduciary duties under ERISA by failing to disclose negotiations for, receipt of, and amount of, revenue sharing payments, and by retaining revenue sharing payments. Plaintiffs also claim that Defendant committed a prohibited transaction by using plan assets to generate revenue sharing and retaining revenue sharing payments for its own account. In addition, Plaintiffs claim that Defendant breached its fiduciary duties and engaged in prohibited transactions under ERISA by receiving and retaining, and failing to disclose, income earned on plan contributions between the time that such contributions were deposited in

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			therefore, that the court should grant judgment in favor of the defendant on such claims. A hearing on this motion was held on 6/24/09. No ruling has been issued.	ERISA fiduciary and that it breached its fiduciary duties. In particular, the court found that there was substantial variability in the services offered by Principal from one plan to another, and that such variability precluded the plaintiff from satisfying the "commonality" and "typicality" requirements under Rule 23 of the Federal Rules of Civil Procedure, as necessary for class certification. On September 11, 2008, the plaintiff filed a petition to appeal the district court's August 27th denial of class certification to the United States Court of Appeals for the Eighth Circuit, pursuant to Rule 23(f) of the Federal Rules of Civil Procedure. In		Defendant's custodial account and the time that Defendant transferred the plan contributions into the investment options chosen by the plan's participants.

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				support of his petition, plaintiff argues that (1) the district court applied the wrong standard under Rule 23 (essentially substituting Rule 23(b)(3)'s "predominance" standard for the more lenient "commonality" and "typicality" standards set forth in Rule 23(a)(2) and (3); (2) the district court failed to consider the plaintiff's request for certification under Rule 23(b)(1)(A) (as well as Rule 23(b)(3)); and (3) the district court failed to properly consider Principal's fiduciary status. On September 30, 2008, the district court entered a stay of the proceedings pending resolution of the plaintiff's petition for permission to		

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				appeal. On October 28, 2008, the United States Court of Appeals for the Eighth Circuit denied plaintiff's petition for an interlocutory appeal of the district court's August 27 denial of class certification. On March 5, 2009, the court granted Defendant's motion for a scheduling conference, setting the conference for March 12. The court also ordered that the stay previously entered on September 30, 2008, be lifted, in light of the denial by the Eighth Circuit Court of Appeals of plaintiff's petition for permission to appeal. On April 8, 2009, the district court granted the		

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				plaintiff's request to file a new motion for class certification, based upon arguments that grievances arising from Principal's breach of fiduciary duties in managing Foundation Option Funds, to which Principal admits it was a fiduciary, are common and typical of all members. The plaintiff's new proposed class action will focus on revenue sharing that Principal received from entities that are affiliated with Principal. Class discovery will be completed by December 15, 2009, and Principal will file its opposition to class certification on or before January 30, 2010. On April 23, 2009, Principal filed objections to the		

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				order permitting the plaintiff to file a new class certification motion. On May 11, 2009, the plaintiff filed his new motion for class certification. By order dated June 22, 2009, class discovery must be completed by February 15, 2010, the defendant must oppose class certification by March 31, 2010, and briefing on the class certification motion must be completed by April 16, 2010. By order dated September 11, 2009, the court amended its June 22 scheduling order. The September 11 order requires the parties to complete class discovery by April 15, 2010 and the defendant to file its		

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				opposition to class certification by May 31, 2010. Per the September 11 order, the plaintiff must file any reply to the defendant's class certification opposition by June 16, 2010.		
Second Circuit						
29.	*Young v. General Motors Investment Management Corp.*, 1:07-CV-01994-BSJ-FM (S.D.N.Y. filed 3/8/07) Judge Barbara S. Jones	Rosen Preminger & Bloom LLP; McTigue & Porter LLP for plaintiffs Kirkland & Ellis, LLP; McDermott, Will & Emery, LLP for defendants	Court granted Defendants' motions to dismiss with prejudice on 3/24/08, holding that Plaintiffs' claims were barred by ERISA's three-year statute of limitations, ERISA § 413, 29 U.S.C. § 1113.	Not made.	Not made.	**Significance:** Plaintiffs alleged that Defendants breached their fiduciary duties under ERISA § 404 by (1) allowing or causing plans to maintain investments in undiversified and imprudent investment vehicles; and (2) by causing or allowing plans to maintain investments in certain mutual funds when similar investment products were available at much lower costs. In granting Defendants' motion to dismiss, the court found that all of the investments in the undiversified and imprudent investment vehicles were made more than

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			On March 31, 2008, the Plaintiffs filed a notice of appeal of the court's March 24 ruling to the United States Court of Appeals for the Second Circuit. On May 6, 2009, the Second Circuit affirmed the district court's March 24, 2008 dismissal, but on grounds not addressed by the district court. Specifically, the Second Circuit held that Plaintiffs failed to allege that the plan *as a whole* was undiversified and, instead, merely alleged that certain *options* within the plan were 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			three years prior to the filing of Plaintiffs' action and that documents accurately describing such investments and the fees associated with other investments were provided to plan participants more than three years before Plaintiffs' action was filed. In making its ruling, the court found that Plaintiffs had the "actual knowledge" required under ERISA § 413, interpreted in the Second Circuit to mean knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated ERISA. In affirming the district court's dismissal, the Second Circuit emphasized that, for purposes of stating a claim under ERISA § 404(a)(1)(c), it is the diversification of the plan as a whole, not particular options within the plan, that matters. Further, in addressing Plaintiffs' excessive fees claim, the court looked to Second Circuit case law interpreting the Investment Company Act, which may open the door to alternative grounds for defendants to explore in pending ERISA fee cases.

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			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.			
30.	*Brewer v. General Motors Investment Management Corp.*, 1:07-CV-02928-BSJ (S.D.N.Y. filed 4/12/07) Judge Barbara S. Jones	Rosen Preminger & Bloom LLP; McTigue & Porter LLP for plaintiffs Kirkland & Ellis, LLP; McDermott, Will & Emery, LLP for defendants	Court granted Defendants' motions to dismiss with prejudice on 3/24/08, holding that Plaintiffs' claims were barred by ERISA's three-year statute of limitations, ERISA § 413, 29 U.S.C. § 1113. On March 31, 2008, the Plaintiffs filed a notice of appeal of the court's March 24 ruling to the United States Court of Appeals for the Second Circuit. On May 6, 2009, the Second Circuit affirmed the district court's	Not made.	Not made.	**Significance:** Plaintiffs alleged that Defendants breached fiduciary duties under ERISA § 404 by (1) allowing or causing plans to maintain investments in undiversified and imprudent investment vehicles; and (2) by causing or allowing plans to maintain investments in certain mutual funds when similar investment products were available at much lower costs. In granting Defendants' motion to dismiss, the court found that all of the investments in the undiversified and imprudent investment vehicles were made more than three years prior to the filing of Plaintiffs' action and that documents accurately describing such investments and the fees associated with other investments were provided to plan participants more than three years before Plaintiffs' action was filed. In making its ruling, the court found that Plaintiffs had the "actual knowledge" required under ERISA § 413, interpreted in the Second Circuit to mean knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated ERISA. In affirming the district court's dismissal, the Second Circuit emphasized that, for purposes of stating a claim under ERISA § 404(a)(1)(c), it is the diversification of

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			March 24, 2008 dismissal, but on grounds not addressed by the district court. Specifically, the Second Circuit held that Plaintiffs failed to allege that the plan *as a whole* was undiversified and, instead, merely alleged that certain *options* within the plan were undiversified, which was insufficient to state a claim under ERISA § 404(a)(1)(C). The Second Circuit also held that Plaintiffs failed to allege facts showing that the fees were excessive relative to services rendered and otherwise failed to allege facts relevant to the determination of whether the fees were excessive.			the plan as a whole, not particular options within the plan, that matters. Further, in addressing Plaintiffs' excessive fees claim, the court looked to Second Circuit case law interpreting the Investment Company Act, which may open the door to alternative grounds for defendants to explore in pending ERISA fee cases.