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Fee Litigation 2018 Round-Up: Recent Developments and Best Practices to Mitigate Risk

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Defined contribution plans, including 401(k) and (for certain nonprofit companies) 403(b) plans, now occupy a leading role in providing retirement benefits to the American workforce.[1] The enhanced role of 401(k) and 403(b) plans has put increased pressure on plan performance and, since 2006, has led to multiple waves of ERISA litigation challenging the fees and the selection of mutual fund and other investments offered in these plans. The latest wave of litigation began in late 2015 and continued throughout 2017. Our articles for the Benefits Law Journal's Winter 2015 edition,[2] Spring 2017 edition (2016 Update),[3] and Spring 2018 edition (2017 Update)[4] addressed key developments in fee litigation through late 2017 (including the recent targeting of nonprofit 403(b) plans), and discussed potential best practices to lessen that exposure. In this article, we explore important fee litigation developments from late 2017 forward.

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OVERVIEW

While plaintiffs' counsel brought notable cases in 2018,[5] the overall pace of new cases substantially decreased when compared to the 2015 to 2017 time period—a period that saw the most 401(k) lawsuits brought since the great recession in 2008.[6] Whether this is a temporary or a permanent downturn is unknown, and will likely depend, at least in part, on how the pending cases are resolved.[7] Another key factor likely will be future market performance; more than two-thirds of 401(k) participants are invested directly or indirectly in equities,[8] and prior market downturns have resulted in upticks in fee and performance litigation.

Some of the notable trends and key developments we discuss here include the following:

- Plaintiffs continued to have success in the initial stages of 403(b) lawsuits, with courts denying the majority of motions to dismiss. In addition, courts certified class actions in six cases, and the first settlements occurred in the 403(b) university cases. However, defendants did win several motions to dismiss, and obtained a complete victory in the first 403(b) university case to go to trial.

- Unlike in 2017, defendants' success increased in claims challenging in-house or proprietary funds offered in plans, with courts granting three motions to dismiss, and the Eighth Circuit affirming the only victory for defendants in 2017. Plaintiffs, however, survived several motions to dismiss, settled additional cases, and the First Circuit reversed a 2017 judgment in favor of defendants in the first of these cases to go to trial.

- The First and Ninth Circuits affirmed decisions that dismissed stable value fund claims, ruling that ERISA does not require fiduciaries to offer stable value funds as an option, and plaintiffs' novel theories challenging the investment strategies of those funds did not show fiduciary breaches.

- Defendants had some success on statute of limitations arguments, but the Ninth Circuit's ruling in an ERISA fiduciary breach case that a plan participant was not held accountable to read plan documents provided him may limit this trend.

- Defendants continued to have success dismissing claims challenging fees recordkeepers paid to robo-advisors when these agreements were disclosed and agreed to by the plan fiduciaries. However, plaintiffs have recently sued plan fiduciaries, claiming the fees they agreed to for these advisors are excessive.

- The enforceability and effect of arbitration agreements has become a frequent focus of litigation in these cases.

- Plaintiffs continue to develop and pursue new theories, such as that plan participant data is a plan asset that the plan fiduciaries must protect and manage.

Plaintiffs continued to have some success in settling fee litigation cases in 2018 (including the first settlements in the 403(b) university cases),[9] but the overall number of settlements and monetary value appears to have dropped in 2018 when compared with the 2015 to 2017 period.[10] Although the number of new cases and settlements decreased in 2018, the new cases filed suggest plaintiffs' counsel are still targeting the same players, including (1) financial services companies that offer affiliated funds in their own 401(k) plans, (2) large universities that maintain 403(b) plans (often with multiple recordkeepers) and that offer traditional annuity options, and (3) sponsors of jumbo 401(k) plan's (plans with billions of dollars in plan assets) that are accused of not offering the cheapest or best performing options.[11] Plaintiffs also continued bringing cases against smaller and midsize plans[12] with a new case brought involving a plan with assets of $100 million.[13]

Despite plaintiffs' general successes overall, defendants achieved early dismissals in *Patterson v. Capital Group Cos.*,[14] *Divane v. Northwestern University*,[15] *Davis v. Washington University*,[16] *Birse v. CenturyLink, Inc.*,[17] and *Harmon v. FMC Corp.*[18] Defendants also had success at the appellate stage with the First, Eighth, and Ninth Circuits' affirming early defense victories from 2017 in *White v. Chevron Corp.*,[19] *Barchock v. CVS Health Corp.*,[20] and *Meiners v. Wells Fargo & Co.*[21] In these cases, the courts took a hard look at claims seeking to use hindsight and per se cost-focused rules to judge investments, or to label certain investment products, such as money market funds or actively managed funds, as per se imprudent. These rulings also provide important grounds to limit unwarranted fee litigation. *Meiners*' rulings that plaintiffs must use a "meaningful benchmark" to infer imprudence, and that a court should not infer unlawful conduct when lawful conduct could also have resulted in the same decision, can save plan fiduciaries and plans from burdensome litigation.

This article analyzes these recent cases and developing rulings to identify best practices that can help mitigate fiduciary risk, and make plans unattractive targets for these lawsuits.

RECENT RULINGS ADDRESSING NEW THEORIES OF LIABILITY

As discussed in the 2016 and 2017 Updates, plaintiffs expanded their theories of liability in recent filings. Below are 2018 rulings addressing some of these new theories:

Index/Vanguard Claims

Plaintiffs have challenged the offering of Vanguard and other index funds in 401(k) plans, arguing, for example, that cheaper share classes of the same Vanguard funds were available and that plan fiduciaries allowed Vanguard to charge excessive recordkeeping fees.[22] Of note, plaintiffs' counsel elsewhere have argued for inclusion of Vanguard funds as investment options because of their relatively lower fees.

The two most notable cases asserting these new theories are *White v. Chevron* and *Bell v. Anthem*. Although the allegations in both cases are similar, they have taken different paths, with *Chevron* being dismissed (twice) and the dismissal affirmed at the Ninth Circuit, while *Anthem* survived a motion to dismiss and had a class certified. These cases also illustrate the tactic of filing multiple complaints across jurisdictions simultaneously with similar allegations to increase chances that some will survive motions to dismiss.

In *White v. Chevron*, the Ninth Circuit affirmed the district court's dismissal of all claims,[23] effectively endorsing the district court's rigorous analysis of complaint allegations. As background, in 2016, plaintiffs targeted Chevron's 401(k) plan, a very large plan with assets over $19 billion. The plan offered participants a diversified array of investment options (with an overall low-cost fee structure), including 12 Vanguard mutual funds, 12 Vanguard collective trust target-date funds, a Vanguard money market fund, and at least six other non-Vanguard investment options.[24] Plaintiffs alleged that participants lost more than $20 million through unnecessary expenses because Chevron included 10 Vanguard funds—including some with fees as low as 5 basis points (bps)—for which there were allegedly identical Vanguard funds available with lower-cost share classes. Additionally, plaintiffs alleged Chevron imprudently paid excessive recordkeeping fees to Vanguard through revenue sharing from plan investment options, since Vanguard was compensated for some time through an asset-based arrangement, and thus its fees increased as the plan's assets increased.

In 2016, the district court granted defendants' motion to dismiss in its entirety. The court rejected the claim that Chevron fiduciaries had a duty to offer cheaper institutional-class funds over retail-class funds, noting that price is not the only investment feature that a fiduciary is required to consider when compiling investment options.[25] The court also noted that plaintiffs' own allegations suggested that the plan fiduciaries were periodically monitoring fund costs, including by moving to lower-cost funds, and by offering a diverse mix of investment options, including low-cost funds. The *Chevron* court also rejected the argument that defendants acted imprudently in compensating the plan's recordkeeper through revenue-sharing. The court noted that when the plan's assets grew, the plan fiduciaries renegotiated the arrangement to specify a per-participant fee structure. The court also noted that the fiduciaries' actions suggested they were indeed monitoring recordkeeping fees and taking steps to ensure these fees did not become unreasonable.[26]

Plaintiffs amended their complaint, with leave from the court, adding allegations in support of their excessive fee claims and introducing new allegations that Chevron favored its recordkeeper Vanguard over plan participants, but in 2017 the district court again dismissed all claims.[27] In rejecting plaintiffs' amended claims of excessive fees, the court reiterated that the test of prudence is whether the fiduciaries employed the appropriate methods to investigate the merits of the investment, and that it was insufficient to merely provide comparisons between funds that were in the plan lineup and funds that plaintiffs claim were less expensive.[28] The court also stated that Chevron had provided a valid rationale for being in the retail-class shares, specifically noting that the revenue-sharing fees associated with these higher-cost share classes paid the plan's recordkeeping expenses.[29]

Although the Ninth Circuit did not provide a lengthy explanation in affirming this dismissal, it did explicitly reject plaintiffs' hindsight attacks. It explained that plaintiffs failed to provide a plausible inference of breach of fiduciary duty and prohibited transaction where the "allegations showed only that Chevron could have chosen different vehicles for investment that performed better during the relevant period, or sought lower fees for administration of the fund." The court found those allegations did not make it "more plausible than not that any breach of fiduciary duty occurred."[30]

In *Bell v. Pension Comm. of ATH Holding Co.,* a case similar to *Chevron,* plaintiffs alleged that Anthem's 401(k) plan (with total assets worth over $5 billion) failed to leverage its considerable size to demand lower-cost investment options.[31] The allegedly "high-cost" investment options included Vanguard funds, with one Vanguard fund offering fees as low as 4 bps. Plaintiffs claimed that the plan fiduciaries should have used their bargaining power to obtain even lower-cost share classes, in this case an identical lower-cost mutual fund that charged a fee of 2 bps.[32] In contrast to *Chevron*, in 2017 the district court in *Anthem* denied defendants' motion to dismiss, reasoning that at this stage plaintiffs had sufficiently alleged it was imprudent to offer higher-cost investment options when the same investment options were available at a lower cost.[33] The court did not address the earlier ruling in *Chevron* dismissing similar claims.

While plaintiffs survived the motion to dismiss stage in *Anthem*, they encountered difficulty at the class certification stage. Plaintiffs sought to certify two classes, one for the Vanguard administrative and investment management fee claims, and the other for the claim that it was imprudent to offer a money market fund as the plan's sole capital preservation option (*see infra* note 50 for discussion on the money market fund class).[34] As to the fee class, defendants argued plaintiffs could not satisfy Rule 23(a)'s typicality requirements because, during the class period, Anthem paid Vanguard under two distinct fee structures, causing a lack of congruence between the named plaintiffs and the class members. During the first half of the class period, the plan paid Vanguard through revenue sharing (which allegedly averaged between $80 and $94 per participant), while during the second half of the class period the plan paid Vanguard at a flat rate of $42 per participant. Plaintiffs argued that regardless of the fee structure, the plan overpaid because the reasonable market rate was allegedly $30 per participant, and therefore Rule 23(a)'s typicality requirement was satisfied.[35] The district court agreed with defendants, noting that more than 51 percent of the proposed class, including one of the named plaintiffs, did not pay more than the alleged market rate of $30.[36] The court found these differences caused substantial intraclass conflicts because a significant portion of the class may have interests adverse to that of the class representatives, and thus denied plaintiffs' request to certify the fee class.[37] This class analysis also exposed the benefits to small account holders of using a revenue sharing as opposed to a flat fee approach, and how plaintiffs' claims can be inconsistent with their interests.[38]

Stable Value Fund Claims

Plaintiffs brought claims challenging plan fiduciaries' decisions not to include stable value funds as a capital preservation option in lieu of money market funds, and claims challenging the underlying investment strategy of the stable value funds that were offered. Unlike in

2017, where many of these claims were dismissed, plaintiffs had mixed results in 2018 with several courts dismissing these claims[39] but other courts allowing them to move forward,[40] and one court certifying a class for a stable value fund claim.[41] Defendants, however, were successful in having three dismissals of stable value fund claims affirmed by the Ninth Circuit and the First Circuit.

In *Chevron*, the Ninth Circuit summarily affirmed the district court's ruling that plaintiffs failed to allege that Chevron fiduciaries had breached their fiduciary duties of loyalty and prudence when they included the Vanguard money market fund instead of a stable value fund.[42] Plaintiffs argued that stable value funds had outperformed money market funds during the class period, and that the decision to maintain money market funds caused plan participants to lose more than $130 million in retirement savings.[43] The district court rejected as implausible plaintiffs' attempt to infer an imprudent process from inclusion of a money market fund instead of a stable value fund.[44] The district court noted that plaintiffs' focus on the performance of the stable value funds and the money market funds over a period of six years was "an improper hindsight-based challenge to the Plan fiduciaries' investment decision making."[45]

The First Circuit in *Ellis v. Fidelity Mgmt.Trust Co.*[46] and *Barchock v. CVS Health Corp.*[47] affirmed dismissal of slightly different stable value fund claims in which plaintiffs challenged the inclusion of stable value funds based on alleged underperformance from the funds' investment strategies. *Ellis* and *Barchock* illustrate the "Goldilocks" nature of plaintiffs' claims, where plaintiffs use hindsight to sue fiduciaries even when they offer the asserted preferred investment vehicles, but these investments do not perform as well as planned.

In *Ellis*, the First Circuit affirmed summary judgment in favor of defendants where participants brought claims against the plan's third-party administrator, Fidelity, asserting that Fidelity was imprudent in structuring and operating a stable value fund by being overly conservative.[48] In addition to their prudence claims, plaintiffs alleged that Fidelity violated the duty of loyalty by putting its interest ahead of those of all its plan client's plan participants and beneficiaries. Plaintiffs alleged that the stable value fund was overly conservative because Fidelity had agreed to maintain the fund's conservative strategy as a condition for acquiring "wrap insurance" to insure the stable value fund.[49] This, plaintiffs allege, allowed Fidelity to obtain large numbers of these insurance policies, which were in short demand, in an effort to ensure that its competitors would not be able to obtain such coverage, which is required to offer stable value funds. By doing so, plaintiffs alleged that Fidelity was able to limit competitors from entering the stable value fund market and in turn increased its assets under management and fees it collected. On the duty of loyalty, the court first noted that plaintiffs were unable to put forth any evidence that Fidelity was not faced with the "threat" of insufficient wrap coverage that preceded Fidelity's agreement with its insurers to offer a more conservative stable value fund.[50] The First Circuit went on to explain that it is not impermissible for the fiduciary to also benefit from a decision as long as the fiduciary "not place its own interest ahead of those of the plan beneficiary,"[51] and rejected the "notion that a fiduciary violates ERISA's duty of loyalty simply by picking too conservative a benchmark for a stable value fund."[52] As to plaintiffs' prudence claims, the court rejected several arguments by plaintiffs, noting Fidelity "introduced a wealth of undisputed evidence supporting the conclusion that it engaged in an evaluative process prior to making investment decisions."[53]

In *Barchock*, plaintiffs challenged the inclusion of a stable value fund that allegedly underperformed because it overweighted holdings in short-term, fixed income securities.[54]This investment strategy was allegedly imprudent because it made the stable value fund "too much" like a money market fund.[55] The district court dismissed plaintiffs' complaint, which it viewed as based on hindsight, because the stable value fund was invested in conformity with its stated investment objectives to preserve capital, while generating a steady return at a higher rate than that provided by a money market fund.[56] The First Circuit, citing to its decision in *Ellis*, noted that plaintiffs' theory suffered from a flawed circular logic; in other words, plaintiffs conceded that there was nothing per se improper about offering money market funds, but based their imprudence claim on the theory that the stable value fund was too similar to a money market fund. The court also rejected plaintiffs' allegation that it was imprudent to offer the stable value fund where the fund's investment strategy "departed radically" from the practices and financial logic of like funds.[57] The court found that allegations of deviations from averages (based on an industry survey of stable value cash-equivalent allocations), standing alone, meant nothing, especially where the alleged deviation was not material and, in some years, was within the industry range of allocations.[58] The court noted that plaintiffs failed to provide any allegations about the process by which the funds' investment allocation was selected, and that it would require "pure speculation" to infer that the plan fiduciaries did not have a good reason to choose a conservative investment strategy.[59]

Claims Challenging the Offering of Guaranteed Benefit Policies

In a number of cases filed beginning in 2015, plaintiffs challenged the ERISA-exempt status[60] of stable value funds offered by insurers, including New York Life, Prudential, and Great-West Life. These funds are ERISA-exempt to the extent that they are guaranteed benefit policies.[61] Plaintiffs principally argued that because the insurers can unilaterally set the rate of return on the investments, the investments were not truly guaranteed benefit policies.[62] If the courts found the investments are not offering guaranteed benefits, then, according to plaintiffs' theories, the insurers that manage the funds would be subject to ERISA fiduciary standards.

In 2015 and 2016, these lawsuits survived defendants' initial challenges to dismiss,[63] and two resulted in the certification of large classes. In *Teets v. Great-West Life & Annuity Insurance Co.*, the district court certified a class of over 270,000 participants who participated in 13,700 different retirement plans,[64] and in *Rozo v. Principal Life Insurance Co.*, the court certified a class of over 49,000 participants.[65] However, in 2017 *Teets* was dismissed on summary judgment,[66] and in 2018 *Rozo* followed suit.[67]

In *Rozo*, the district court, citing heavily to *Teets*, found that Principal Life did not exercise sufficient discretion over plan assets to be an ERISA fiduciary when it set the guaranteed interest rates every six months on its fixed income option (PFIO). The court based this conclusion on three reasons: (1) Principal Life provided the rates for the PFIO pursuant to a contract with plan sponsors that was the result of an arms-length bargaining process in which the plan sponsor could choose not to offer the PFIO, and the participants could choose not to invest in the PFIO; (2) Principal Life communicated the guaranteed interest rates in advance to plan sponsors, who were in turn required to provide notice to plan participants; and (3) Principal Life did not impose any restrictions at the participant level for leaving the PFIO if the participant objected to the new guaranteed interest rates, and at the sponsor level the restrictions only required 12-month notice of a desire to leave the PFIO.[68] The court also rejected the argument that Principal Life acted as a fiduciary because it controlled its own compensation by retaining the spread between the guaranteed interest rate and the return on the PFIO's underlying investment portfolio. The court reasoned that Principal Life's compensation was not unilaterally controlled by Principal Life, but depended instead on how many participants voluntarily invested in the PFIO.[69]

Claims Challenging the Offering of Alternative Investments

Plaintiffs continue asserting new theories of liability related to alternative investments offered in 401(k) plans. In 2018, district courts ruled on motions to dismiss claims related to the Sequoia

Fund, a nondiversified mutual fund that suffered substantial losses in late 2015 based largely on its high investment concentration in what became a troubled pharmaceutical stock. In *Harmon v. FMC Corp.*,[70] plaintiffs brought various claims related to the Sequoia fund, including that it was imprudent to retain the fund through 2017, asserting there were serious concerns and questions about the pharmaceutical company's business model and accounting methods in the public domain *before* the stock began its precipitous decline in October 2015. The district court, relying on the Supreme Court's decision in *Dudenhoeffer*,[71] dismissed the prudence claim based on the fact that since the stock price had stayed up after these disclosures, other market investors had rejected these concerns and instead saw positive prospects in the company.[72]The court also noted that plaintiffs' allegations regarding defendants' investment-monitoring procedures weakened their case because the allegations showed that defendants regularly met with the Sequoia Fund managers and sought regular reviews of plan investments from outside consulting firms.[73]

In contrast, in *Muri v. National Indemnity Co.*,[74] the district court allowed this same type of claim to move forward. The district court distinguished the case from *Dudenhoeffer* by explaining that plaintiff did not merely allege that defendants held on to the Sequoia Fund after they should have known it was artificially inflated based on public information, but also that they had no meaningful procedures or processes in place to monitor the prudence of the plan's investment offerings.[75] The district court was also persuaded at the motion to dismiss stage by allegations that the Sequoia Fund invested in the plan sponsor's parent company, and that this was a contributing factor for why defendants retained the Sequoia Fund.[76]

Plaintiffs also have brought claims challenging the underlying investment strategy in other funds offered in 401(k) plans. In a case filed at the end of 2017, plaintiff alleged that it was imprudent for CenturyLink to offer a large-cap stock fund[77] because the fund's underlying investment strategy was "flawed," causing the plan to underperform its benchmark by 2 percent.[78] Plaintiff alleged that the fund's investment strategy was flawed because it had six investment managers charged with the same investment mandate, five of whom were active managers. Plaintiff alleged that this structure made it highly improbable that the active managers would collectively outperform the market because they would essentially cancel each other out, resulting in what amounted to an expensive index fund.[79]

In 2018, a magistrate judge recommended that the case be dismissed.[80] The magistrate rejected allegations that using multiple active managers increased the risk of underperformance, noting that the relevant standard acknowledges that fund managers are balancing multiple factors in their investment strategies, and there were no allegations that defendants failed to balance risk/reward and short-term and long-term performance when they diversified the fund across five different managers.[81] The magistrate also found plaintiff's fee allegations did not support an inference of imprudence where they simply alleged that the fees were "substantial" compared to a passively managed fund.[82] The magistrate did not directly address whether paying active management fees was prudent under this multi-manager structure. Finally, as to plaintiffs' allegations that defendants failed to replace the fund after years of underperformance, the magistrate acknowledged that fiduciaries have a continuing duty to monitor investments but reiterated that the focus in such claims should be whether the review process was deficient, not the outcome of the investments.[83] The magistrate found plaintiffs failed to meet that standard because their claims that participants would have realized up to 5-percent higher returns if they were invested in another fund during the class period "improperly focuses on the outcome rather than the process."[84]The magistrate also noted that plaintiffs did not allege when a review of the fund should have taken place or that any review that was conducted was deficient.[85]

Claims Challenging Fees Paid to Robo-Advisors

Plaintiffs also have brought claims against plan recordkeepers for receiving allegedly excessive compensation from fees they received from "robo-advisors" that provide plan participants automated investment advice.[86] Plaintiffs' principal allegations in these cases are that the plans' recordkeepers entered into improper revenue-sharing arrangements with the robo-advisors.[87] For example, in *Scott v. Aon Hewitt Financial Advisors, LLC,* plaintiffs claim that the plan's recordkeeper subcontracted to a third party the responsibility for providing participants with investment advice services, and that, in exchange, the third party agreed to pay the recordkeeper a significant percentage of its fees. Plaintiffs allege that the plan recordkeeper's receipt of a portion of the advice fees is unrelated to any services provided by the recordkeeper, and thus causes the fees for investment advice to become artificially inflated, thereby violating the fiduciary and prohibited transactions provisions of ERISA.[88]

The defendant recordkeepers have argued that these claims fail because defendants are not acting in a fiduciary capacity when they negotiate and enter into the agreements with the third-party advisory firms or once they begin receiving compensation under the agreements. To date, three district courts have agreed with defendants and dismissed these claims. In *Patrico v. Voya Financial, Inc.*,[89] *Scott v. Aon*

Hewitt Financial Advisors, LLC,[90] and *Fleming v. Fidelity Management Trust Co.*,[91] the district courts were persuaded by the fact that the agreement with the robo-advisors was disclosed in the recordkeeping agreements between the plan sponsor and the recordkeeper, and did not provide the recordkeeper the ability to unilaterally alter its compensation going forward. Therefore, the recordkeepers lacked fiduciary status with respect to this compensation.[92] The Ninth Circuit's decision in *Santomenno v. Transamerica Life Insurance Co.*, that a 401(k) service provider does not act as a fiduciary when negotiating its compensation and when withdrawing its predetermined compensation from the plan, supports these rulings in the robo-advisor cases.[93]

Plaintiffs have more recently started bringing suits against plan sponsors and named fiduciaries, as opposed to the recordkeepers, alleging they have imprudently entered into investment advisory services agreements that paid robo-advisors allegedly excessive fees.[94] In *Marshall v. Northrop Grumman Corp.*,[95] the district court dismissed breach of fiduciary duty claims against the plan sponsor related to robo-advisor fees because the plan sponsor was not a named or functional fiduciary. The district court rejected plaintiffs' argument that the plan sponsor became a functional fiduciary simply because it appointed the plan's fiduciaries.[96] Plaintiffs also asserted the same claims against the individual members of the plan's administrative and investment committees (the plan's fiduciaries) but the committees members did not move to dismiss those claims.[97] The district court allowed the claim that the plan sponsor failed to monitor the appointed fiduciaries to move forward.[98]

Claims Challenging the Use of Plan Participant Data

Plaintiffs have started bringing claims alleging that plan fiduciaries breached their fiduciary duties and engaged in prohibited transactions related to the use of participant data in 401(k) and 403(b) plans. These claims raise interesting issues in light of how personal data has become a key economic driver due to the extremely valuable nature of the data, especially in the advertising and marketing space, which currently supports multibillion dollar values of several tech companies, and its use is raising significant issues on privacy. Some of the legal issues raised include: (1) does a participant's information constitute an asset of the plan; (2) regardless whether it is a plan asset, does a fiduciary have duties to protect and regulate the use of this information by plan service providers; and (3) can a fiduciary use this information to lower plan expenses.

In *Cassell v. Vanderbilt University*, plaintiffs allege that defendants failed to protect "vital and confidential participant information" from being used by one of the plan's recordkeepers to "aggressively" market a variety of financial products to plan participants.[99] In its opinion granting plaintiffs' motion for class certification, the court noted that because plaintiffs had invested with the recordkeeper at issue they had standing to purse this claim.[100] It has not addressed this claim on the merits yet. However, in *Divane v. Northwestern University,* the district court found that it was not imprudent to allow the plan's recordkeeper to use participant information for marketing. The court ruled that the information did not constitute a plan asset under ordinary notions of property rights, reasoning that while that information may have some value to the recordkeeper, the plan itself cannot sell or lease it to fund the plan.[101]

OTHER RECENT NOTABLE 2018 FEE LITIGATION RULINGS

In addition to the fee litigation rulings discussed above, there were several other notable rulings in 2018.[102] These rulings can provide some insight into how courts will address the myriad issues facing fiduciaries administering 401(k) and 403(b) plans.

Proprietary Fee Litigation Cases

Defendants had some success at the motion to dismiss stage in dismissing claims asserting that the decision to include proprietary funds was made to benefit the employer/investment company.[103] These courts rejected the argument that it is per se imprudent to offer proprietary funds as an investment option because to hold otherwise "would mean that almost every plan administrator who offered an affiliated fund would be subject to an ERISA suit."[104] Plaintiffs had continued success, however, in 2018 in other proprietary cases by: (1) surviving several motions to dismiss such cases[105]; (2) surviving motions for summary judgment[106]; (3) settling several cases that survived motions to dismiss and motions for summary judgment[107]; and (4) certifying a class in a long running case.[108] At the appellate level, the results were mixed, with the Eighth Circuit affirming the dismissal in *Meiners v. Wells Fargo & Co.*,[109]but the First Circuit reversing defendants' victory at trial in *Brotherston v. Putnam Investements, LLC.*[110]

In *Meiners,* the district court dismissed claims that plan fiduciaries breached their fiduciary duties by offering proprietary target-date funds that underperformed allegedly comparable and less expensive Vanguard funds. The court rejected plaintiff's underperformance claims because it found that the comparison to the performance of

Vanguard funds was improper since the Vanguard funds had a different investment strategy than the Wells Fargo funds.[111] The court also rejected plaintiff's claims that the Wells Fargo fund fees were excessive, finding that plaintiff had failed to provide a meaningful benchmark with which to compare the fees, and thus plaintiff's claim amounted to nothing more than the insufficient contention that Wells Fargo failed to choose the cheapest fund.[112] The Eighth Circuit agreed with both rulings, finding that allegations that one fund with a different investment strategy performed better or was less expensive does not establish a basis for finding that offering a fund was imprudent.[113]

In *Brotherston v. Putnam Investments, LLC*, the First Circuit reversed judgment in favor of defendant. In doing so it joined the Fourth, Fifth, and Eighth Circuits on the question of who has the burden of proof on ERISA causation, holding that "once an ERISA plaintiff has shown a breach of fiduciary duty and loss to the plan, the burden shifts to the fiduciary to prove that such loss was not caused by its breach, that is to prove that the resulting investment decision was objectively prudent."[114] As background, Putnam was the first in the wave of fee litigation cases filed in 2015 to reach trial. Plaintiffs alleged that defendants (collectively "Putnam") breached their fiduciary duties of loyalty and prudence and engaged in prohibited transactions by including proprietary mutual funds as investment options, and by failing to offer the cheaper share class of these mutual funds for a significant part of the class period.[115]

Plaintiff survived a motion to dismiss and summary judgment, but at a "case stated" hearing the court dismissed plaintiffs' prohibited transaction claims, finding they were either time barred by the applicable statute of limitations or were subject to prohibited transaction exemptions.[116] The remaining claims were then tried in a bench trial. After plaintiffs presented their final witness, the court granted judgment for Putnam on partial findings.[117] The court found, based on the totality of the circumstances, that plaintiffs had failed to show that Putnam's decision to include proprietary funds in the plan amounted to a breach of the duty of loyalty where Putnam also made substantial discretionary contributions to the plan (more than $40 million during the class period), provided additional services to plan participants, and paid for recordkeeping expenses.[118] On the duty of prudence claim, the court declined to enter conclusive findings on whether Putnam failed to monitor the plan investments independently, while recognizing that it was "perfectly conceivable" that, if given an opportunity, defendants would present sufficient evidence to rebut plaintiffs' evidence.[119] The court also concluded that there was no basis to assume that all of the offered Putnam funds were imprudent given the sophisticated techniques Putnam used as investment manager to monitor its funds.[120] The court determined that it did not need to resolve this issue, however, because it found that plaintiffs failed to establish a prima facie case of loss.[121] The court concluded that plaintiffs' damages theory under their "procedural breach" theory (which assumed the entire investment lineup was imprudent if the monitoring process was flawed) was fundamentally flawed.[122] The court considered this theory an "unwarranted expansion of ERISA's seemingly narrow focus on actual losses to a plan resulting from specific incidents of fiduciary breach." The district court also rejected plaintiffs' argument that once a plaintiff makes a prima facie showing of loss, the burden shifts to the fiduciary to disprove loss causation.[123]

The First Circuit affirmed the district court's dismissal of certain prohibited transaction claims and the duty of loyalty claim, but reversed the dismissal of the prohibited transaction claim under Section 1106(b)(3),[124] and the finding that plaintiffs failed as a matter of law to present sufficient evidence of loss.[125] As to the prohibited transaction claim, the First Circuit found that the district court failed to properly consider whether Putnam qualified for the prohibited transaction exemption (PTE 77-3), which required Putnam to treat its plan participants at least as favorably as other shareholders who hold Putnam funds.[126] The First Circuit found that the district court should have considered whether Putnam, by paying directly for plan recordkeeping services for its affiliated funds, treated participants less favorably than non-Putnam plan shareholders who pay recordkeeping services for the Putnam funds through revenue sharing but, in turn, receive revenue sharing rebates if the payments paid exceed the value of services.[127] The First Circuit also instructed the district court that it should not consider the discretionary contributions Putnam made in its analysis of whether PTE 77-3 applies, as those contributions are made in Putnam's capacity as employer and not fiduciary.[128]

Regarding the district court's finding on loss, the First Circuit disagreed that plaintiffs' evidence was insufficient to support a finding of loss where the district court (1) had tentatively found that Putnam breached its fiduciary duty in its inclusion and monitoring of the Putnam funds, and (2) plaintiffs' expert showed that when considering fees and performance, the Putnam funds underperformed two comparable funds by more than $30 million.[129] The First Circuit found that the district court conflated the concepts of loss (which comes first) and causation when the district court had ruled that even though Putnam had not followed a prudent process, this did not mean every fund in the lineup was imprudent since it was possible that many could have been objectively prudent.[130]

On causation, the First Circuit relied heavily on Trust law for the proposition that when defendants possess more knowledge on the element at issue, the burden of disproving causation should be on the defendant.[131] Therefore, the First Circuit instructed the district court to complete the bench trial in order to definitively decide whether: (1) Putnam breached the duty of prudence; (2) plaintiffs have shown loss to the plan; and, if necessary, (3) Putnam can meet its burden of showing that the loss most likely would have occurred even if Putnam had been prudent in its selection and monitoring procedures.[132]

The First Circuit's decision on causation further entrenched a circuit split, with the First Circuit joining the Fourth, Fifth, and Eighth Circuits in requiring defendants to disprove causation once loss is shown, while the Sixth, Ninth, Tenth, and Eleventh require plaintiff to prove causation.[133] Putman has petitioned the Supreme Court (which has previously shown some interest on this issue) for certiorari to resolve this circuit split.[134]

403(b) Rulings

The 2016 wave of litigation against 403(b) plans in the university setting was influenced by the unique history of these plans, dating back to when they consisted of a diverse collection of individual annuity accounts. These plans have thus tended to have more recordkeepers and unique types of annuity fund options than is common in the 401(k) context.[135] Plaintiffs have also brought similar claims against health systems that offer 403(b) plans that are often administered similarly to the university 403(b) plans.[136]

In 2018, district courts ruled on motions to dismiss in over half a dozen of the 403(b) cases. Most courts allowed plaintiffs' principal claims—that fiduciaries selected and retained investment options that charged excessive fees and consistently underperformed comparable funds—to survive motions to dismiss.[137] The courts generally found plaintiffs' allegations were sufficient because the complaints identified specific expensive, allegedly underperforming funds, instead of merely challenging the fees of the plan as a whole. The courts also generally allowed plaintiffs to move forward at this preliminary stage with their claims that the plans imprudently paid excessive recordkeeping fees through revenue sharing,[138] and that it was imprudent to retain multiple recordkeepers.[139] The results were mixed, however, when it came to other claims, with the courts continuing the trend set in 2017 of dismissing claims that it was imprudent to offer too many investment options,[140] and that defendants breached the duty of loyalty based on the University's relationships with the plans' recordkeepers who offer their own products to many of the plans.[141] Plaintiffs also had success in having six 403(b) cases certified as class actions[142] and in settling the first 403(b) university cases from the 2016 wave of litigation.[143]

Notwithstanding the general trend in plaintiffs' favor, defendants had three complete victories at the motion to dismiss stage, two in 2018 and one in January 2019. In both *Davis v. Washington University* in St. Louis and *Divane v. Northwestern University*, plaintiffs alleged many of the same claims discussed above. Both courts found plaintiffs' allegations were insufficient to plausibly allege breaches of ERISA's fiduciary duties, especially where both plans offered participants diversified investment lineups that included low-cost funds (with an overall reasonable range of fees) that plaintiffs could have chosen instead of the challenged funds.[144] In *Wilcox v. Georgetown University*, the district court more broadly rejected plaintiffs' claims, concluding their attacks misunderstood the nature, history, and unique facts applicable to 403(b) plans.[145]

Defendants also secured a substantial victory in 2018 in *Sacerdote v. New York University,* where the district court found in favor of New York University on all claims after an eight-day bench trial.[146] In *Sacerdote*, plaintiffs alleged that defendants breached their fiduciary duties of loyalty and prudence in connection with two NYU-sponsored 403(b) plans by: (1) "locking" the plan into arrangements with the plan's recordkeeper whereby certain investments were required to be offered in the plan for up to 10 years and could not be removed; (2) paying unreasonable administrative fees by using two plan recordkeepers instead of one, and by paying recordkeeping fees through an "asset-based" arrangement instead of a flat per-person fee; (3) paying a "litany" of unreasonable investment management fees by causing the plan to invest in retail share class mutual funds when identical lower-cost institutional share classes were available, and by offering numerous duplicative investment options; and (4) by selecting and retaining underperforming funds.[147] Plaintiffs also alleged that the revenue sharing arrangement between the plan and the recordkeeper amounted to a prohibited transfer of plan assets.[148] Plaintiffs had alleged that defendants' imprudence caused nearly half a billion dollars in plan losses.[149]

In 2017, the district court allowed the core of plaintiffs' underperformance and excessive fee claims to survive, but dismissed claims that it was imprudent to offer too many funds and funds in the retail share class.[150] The court also dismissed plaintiffs' duty of loyalty and prohibited transaction claims.[151]

Following a bench trial on the remaining claims, the district court found that, while there were some deficiencies in the fiduciaries' processes, plaintiffs had failed to prove that defendants acted imprudently, or that the plans suffered losses as a result.[152] The court reviewed in detail the committee's process for selecting and monitoring the plan's investment options and was troubled that some committee members admitted to overly relying on the plan's outside investment advisor, and by not appreciating the size of the plan or the investment options offered in the plan.[153] The court was persuaded, however, that the committee "performed its role adequately" by, among other things: (1) meeting with the plan's outside investment advisor and reviewing the plan's investment option's performance quarterly; (2) implementing and following an investment policy statement (IPS); and (3) relying on the financially sophisticated committee members who would question the investment advisor on its views about certain funds, and would meet with fund managers outside of committee meetings.[154]

As to plaintiffs' allegations that NYU breached its duty of prudence with regard to recordkeeping fees, the court found that the committee prudently managed its recordkeepers by issuing several Request for Proposals (RFPs) regarding their fees during the challenged period, obtaining lower fees for one of the plans when consolidation was impractical, and consolidating to one recordkeeper for the other plan.[155] The court also found that the committee gave due consideration to the appropriateness of moving to a flat fee per participant recordkeeping arrangement, including considering whether such an arrangement would be fair given that participants with small account balances might pay the same as participants with large accounts.[156] The court also found plaintiffs' expert was not "reliable" in the area of revenue sharing, and that his testimony also showed that as recently as 2016 "25 percent or more of large plans may still have been using revenue-sharing models."[157] The court also rejected plaintiffs' expert's testimony that it was objectively unreasonable to pay more than $23 to $35 per participant for recordkeeping because the expert failed to demonstrate that plaintiffs' proposed fee range was the only plausible or prudent range, or that any comparable plan has ever acquired fees within that range.[158]

The court also reviewed the committee's process for monitoring funds and found that the committee closely monitored the performance of the investment alternatives offered in the plan, including prior to each quarterly meeting receiving and reviewing a detailed report from its investment advisor that analyzed the investment funds.[159] The court also found that each quarter the committee (using the IPS as a guide) reviewed the performance of the investment alternatives and compiled a "watch list" of the funds that warranted additional monitoring due to various reasons, including underperformance or a change in the fund manager.[160] The court also found that the challenged funds were objectively prudent since their performance closely tracked the performance of their benchmarks, and rejected plaintiffs' attempt to use Vanguard comparators that did not have the same underlying investment allocations as the challenged funds.[161]

Sacerdote is now on appeal to the Second Circuit.[162] Any decision rendered will likely have a significant impact on the many 403(b) (and 401(k)) cases involving similar claims.

PROCEDURAL AND JURISDICTIONAL ISSUES AND DEFENSES

The courts addressed several significant procedural and jurisdictional issues in 2018.

Availability of Jury Trials

The U.S. Constitution's Seventh Amendment guarantees a right to a jury trial in suits that seek legal remedies, as opposed to equitable relief.[163] The general rule in ERISA cases, including those alleging breaches of fiduciary duties under Section 502(a)(2), is that they are heard by a judge during a bench trial, not by a jury.[164] Notwithstanding this general rule, plaintiffs continue to request jury trials in ERISA fee litigation cases, arguing they are entitled to juries because plaintiff's claims are asserted under Section 502(a)(2) for the recovery of "any losses to the plan" resulting from breaches of fiduciary duty, and that such losses "are money damages, a classic legal remedy."[165] District courts across all jurisdictions have routinely struck these jury demands, ruling that ERISA fiduciary law is derived from trust law, and that the remedy they seek is the equitable remedy of surcharge.[166]

Plaintiffs, however, recently survived a motion to strike a jury demand in the Southern District of New York in *Cunningham v. Cornell Univ.*[167] The district court agreed that a claim for breach of fiduciary duty is equitable in nature, but noted that it must also determine the nature of the relief sought.[168] The district court found that because plaintiffs sought plan losses in the form of a money judgment for allegedly unreasonable plan fees (including fees for retail versus institutional funds), this part of their claim was legal in nature and should be heard by a jury.[169] The district court relied on a decision by the Second Circuit in *Pereira v. Farace*,[170] a ruling that pre-dated the Supreme Court decisions in *Cigna v. Amara*, which confirmed that monetary relief was recoverable as equitable relief in ERISA claims. The district court in *Cunnningham* did note that the same issue is before the Second Circuit in *Sacerdote v. NYU Univ.* discussed above, and could be resolved prior to the trial.[171] It also ruled that plaintiffs' other claims seeking the removal of trustees, an accounting, and reformation of the plans are claims seeking equitable relief, and will be tried to the court in a bench trial.[172] Defendants sought permission to file an interlocutory appeal of this decision, but that application was denied.[173]

Standing to Bring Claims

Article III of the U.S. Constitution requires that plaintiffs show they suffered an "injury in fact" resulting from the conduct they seek to challenge in their lawsuit.[174] Defendants had some success in using Article III standing to defeat plaintiffs' claims when plaintiffs overreached, such as when plaintiffs had not invested in the allegedly imprudent investment option[175] or did not use an allegedly imprudent plan service (*e.g.*, brokerage window).[176]

Statute of Limitations

Defendants had mixed results in arguing that claims of underperformance and excessive fees were time barred under ERISA's three year "actual knowledge" statute of limitations because plaintiffs received certain plan disclosures. In *Bernaola v. Checksmart Fin. LLC*,[177] the district court found plaintiff's claims were time barred because he received various disclosures showing the fees and performance of the plan's investments, including an enrollment kit when he joined the plan, annual fee disclosures, summary annual reports, and quarterly benefit statements.[178] The court rejected plaintiff's argument that he did not have actual knowledge of the breaches because he did not review the documents, noting that "for purposes of determining actual knowledge it doesn't matter whether he actually saw or read the documents that disclosed the information that forms the basis for his complaint."[179]

In *Sulyma v. Intel. Corp.*, the Ninth Circuit went the other way on this issue, ruling that a plaintiff would not be treated as having actual knowledge of the content of plan documents provided to him when he stated he had not read them.[180]

Defendants have had success in dismissing prohibited transaction claims as time barred based on disclosure of the transaction,[181] and even the Ninth Circuit's *Sulyma* decision appears to accept this defense in this context, insofar as it stated that "knowledge of the transaction is all that is necessary to know that a prohibited transaction has occurred."[182]

Enforceability of Arbitration Agreements

Defendants continued to seek enforcement of arbitration agreements with class action waivers, but they were unable to convince courts to enforce those agreements in ERISA fee litigation cases.[183] In *Munro v. Univ. of S. Cal.*, the Ninth Circuit affirmed denial of a motion to compel arbitration of a 502(a)(2) claim brought on behalf of the plan. The court reasoned that since the arbitration agreements signed by the employees only applied to claims brought on their own behalf, those agreements did not apply to claims brought on behalf of the ERISA plan.[184]

POTENTIAL PRACTICES TO MITIGATE RISK

As the cases discussed above illustrate, plaintiffs continue to aggressively investigate 401(k) and 403(b) plans, and are pursuing new theories of potential liability. These and earlier fee litigation cases also demonstrate, however, that there are certain practices fiduciaries can take to lessen their chance of being a target for suit, and to provide strong defenses to the claims if they are sued.

First, having a well-documented prudent process to review and oversee plan investments and plan service providers is the most valuable first line of defense. *Tibble* confirms that plan fiduciaries should conduct periodic reviews of investments and plan service providers. Cases like *White* (at the pleading stage) and *Sacerdote* (after a trial on the merits) illustrate how this defense protects fiduciaries if the facts show that, for example, the fees paid recordkeepers (in those cases, revenue sharing payments) are periodically monitored by the plan fiduciary in evaluating the recordkeeper's overall compensation.[185] As part of a prudent process, plan fiduciaries should also periodically benchmark fees or issue RFPs for major service providers like recordkeepers. Plaintiffs' counsel often target plans that vary substantially from these benchmarks. Thus, if the fees appear out of line with benchmarks, then the fiduciaries should investigate and document their resolution of the issue. A fiduciary does *not* have to go with the lowest-cost provider, and should consider quality and service in evaluating any service provider.[186]

In contrast, if there is no documented prudent process, fiduciaries risk exposure to litigation and to hindsight-based claims that they should have made a different decision. *Tatum v. RJR Pension Inv. Comm.* illustrates this dynamic. In *Tatum*, a decision that otherwise clearly would have been prudent with a prudent process (the closing of a spun off, undiversified single stock fund in a 401(k) plan), gave rise to substantial litigation and risk of liability. While the courts eventually absolved the fiduciaries of liability, this absolution occurred after *15 years* of burdensome litigation.[187]

Second, cases such as *Chevron* and *CVS Health Corp.* illustrate the importance of fund and other plan disclosures, including how disclosures can inoculate fiduciaries from hindsight-based claims that investment mixes in funds were imprudent. Courts recognize that investments have risks and that, if these risks are properly disclosed to participants, the courts will be disinclined to use hindsight to second guess inclusion of these funds in plans, at least when the 401(k) or 403(b) plan offers a diversified mix of investment options with different risk profiles. In these circumstances, choice is properly left "to the people who have the most interest in the outcome"[188]—the participants. The plan fiduciary with responsibility over plan investments should also consider developing and following an investment policy statement.

Third, and on a related point, another practical way to lessen risk is to offer a diversified mix of investments, including target-date funds and lower-cost index funds. By way of illustration, the court in *Davis* stated that plaintiffs' claims of imprudence were implausible in light of the numerous low-cost investment options available in the plan.[189] The First Circuit in *Brotherston* noted that a fiduciary can "easily insulate itself by selecting well-established, low-fee, and diversified market index funds."[190] Dismissal of fiduciary breach claims was likewise affirmed in the seminal 2011 case of *Loomis v. Exelon Corp.*,[191] where the court found that the defendant "offered participants a menu that includes high-expense, high-risk, and potentially high-return funds, together with low-expense index funds that track the market, and low-expense, low-risk, modest-return bond funds." In upholding this ruling, the Seventh Circuit found that the defendant "left choice to the people who have the most interest in the outcome, and it cannot be faulted for doing this."[192]

Finally, fiduciaries of both small and midsize companies should be vigilant in maintaining a prudent record of their decisions with respect to 401(k) plan investment funds and providers. As the plaintiffs' firms seek to continue their volume of fee litigation, they have expanded their targets to include plans of mid-market size companies. Indeed, as noted earlier, plaintiffs have brought fee litigation against plans with assets of only $9 million, and against recordkeepers who service plans as small as $2.8 million.[193] Not all small to midsize companies will have investment and provider management expertise in-house, however, or have the time to properly document and monitor the 401(k) plan and its various providers. Accordingly, in appropriate circumstances, small and midsize employers may want to consider outsourcing fiduciary management of 401(k) plans to independent fiduciary professionals.

CONCLUSION

The recent fee litigation filings and rulings give cause for concern, but they can also illustrate ways to lessen fiduciary exposure. Fiduciary training and following best practices identified in the cases can provide powerful defenses to claims if the fiduciaries are sued, and can make the plan a less-attractive target for suit. If there are concerns, fiduciary legal compliance reviews can help identify and correct problems before litigation occurs.[194]

NOTES

1. *See, e.g.,* U.S. Dep't of Labor, Emp. Benefits Sec. Admin., Private Pension Plan Bulletin: Abstract of 2016 Form 5500 Annual Reports, at 2–3 (December 2018), *available at https://www.dol.gov/agencies/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan* (noting 656,241 of the total 702,540 pension plans are defined contribution (DC) plans, and that 560,373 of those DC plans are 401(k) type plans, which includes 403(b) plans; also noting that DC plans ($5.69 trillion) have almost double the assets of defined benefit plans ($2.92 trillion)).

2. *See* Robert Rachal & Lindsey Chopin, "401(k) Fee Litigation: Recent Case Teachings on Exposures and Practices to Mitigate That Risk," Vol. 28 No. 4 Ben. L.J. 14 (Winter 2015).

3. Robert Rachal, Myron Rumeld & Tulio D. Chirinos, "Fee Litigation 2016 Round-Up: Mitigating Risk in the Face of Expanding Targets and Theories of Fiduciary Liability," Vol. 30 No. 1 Ben. L.J. 17 (Spring 2017).

4. Robert Rachal, Myron Rumeld & Tulio D. Chirinos, "Fee Litigation 2017 Round-Up: Mitigating Risk in the Face of Expanding Targets and Theories of Fiduciary Liability," Vol. 31 No. 1 Ben. L.J. 18 (Spring 2018).

5. *See e.g.*, *Brown v. Daikin Am., Inc.*, No. 1:18-cv-11091 (S.D.N.Y. Nov. 28, 2018), ECF No. 1 (alleging breach of fiduciary duties based on excessive fees in 401(k) plan with only $100 million in plan assets); *Moitoso v. Fidelity*, No. 18-cv-12122 (D. Mass. Oct. 10, 2018), ECF No. 1 (alleging breach of fiduciary duties based on excessive fees and performance losses and prohibited transactions associated with the offering of plan sponsor proprietary investment options in company 401(k) plan) (Am. Compl. filed Nov. 9, 2018, ECF No. 31.); *D'Amore v. Univ. of Rochester*, No. 18-cv-06357 (W.D.N.Y. May 11, 2018), ECF No. 1 (alleging breach of fiduciary duties based on excessive fees in 403(b) plan) (First Am. Compl. filed Nov. 12, 2018, ECF No. 17.); *Mulligan v. Long Island Univ.*, No. 18-cv-02885 (E.D.N.Y. May 15, 2018), ECF No. 1 (alleging breach of fiduciary duties based on excessive fees in 403(b) plan);*Stanley v. The George Washington Univ.*, No. 18-cv-00878 (D.D.C. Apr. 13, 2018), ECF No. 1 (alleging breach of fiduciary duties based on excessive fees and performance losses in 403(b) plan); *Pizarro v. The Home Depot, Inc.*, No. 18-cv-01566 (N.D. Ga. Apr. 12, 2018), ECF No. 1 (alleging breach of fiduciary duties based on excessive fees from robo-advisor services and underperformance of select funds in large 401(k) plan with a putative class of over 300,000) (First Am. Compl. filed July 11, 2018, ECF No. 53.).

6. *See* George S. Mellman & Geoffrey T. Sanzenbacher, "401(k) Lawsuits: What Are The Causes And Consequences?" Center for Retirement Research at Boston College, Vol. No. 18-8, at 1–2 (May 2018) (noting that "over 100 new 401(k) complaints were filed in 2016–2017— the highest two-year total since 2008–2009").

7. This will also affect whether and which firms pursue such claims. *Compare* Carmen Castro-Pagan, "These Law Firms Led the Way in Filing Benefit Class Actions," BNA

Pens. & Ben Daily (Nov. 24, 2017) (noting that 11 law firms brought the vast majority of ERISA fee class actions in 2017).

8. *See* Alessandra Malito, "How Much Of Your 401(k) Retirement Plan Is Affected By Market Volatility?" MarketWatch (Dec. 11, 2018), *available at https://www.marketwatch.com/story/how-much-of-your-401k-retirement-plan-is-affected-by-market-volatility-2018-02-16*.

9. *See Daugherty v. Univ. of Chi.*, No. 1:17-cv-03736 (N.D. Ill.Sept. 12,2018), ECF No. 77 (final order approving settlement of $6.5 million with $1.9 million in attorneys' fees requested); *Moreno v. Deutsche Bank Americas Holding Corp.*, No.1:15-cv-09936 (S.D.N.Y. Aug. 14, 2018), ECF No. 321 (mem. in supp. of mot. for preliminary settlement approval of $21.9 million with $ 6.57 million in attorneys' fees requested); *Schapker v. Waddell & Reed Fin., Inc.*, No. 2:17-cv-02365 (D. Kan. Nov. 19, 2018), ECF No. 70 (mem. in supp. of mot. for preliminary settlement approval of $4.8 million with $ 1.6 million in attorney's fees requested); *Sims v. BB&T Corp.*, No. 1:15-cv-732 (M.D.N.C. Nov. 30, 2018), ECF No. 437 (mem. in supp. of mot. for preliminary settlement approval of $24 million with $8 million in attorney's fees requested); *Pease v. Jackson Nat. Life Ins. Co.*, No.1:17-cv-00284 (W.D. Mich. Nov. 1, 2018), ECF No. 32 (mot. for preliminary settlement approval of $4.5 million with $ 1.485 million in attorneys' fees requested); *Leber v. Citigroup 401(k) Plan Inv. Comm.*, 1:07-cv-09329 (S.D.N.Y. Sept. 4, 2018), ECF No. 282 (mot. for preliminary settlement approval of $6.9 million with $2.3 million in attorney's fees requested); *Ybarra v. Bd. of Trs. of Supplemental Income Tr. Fund*, No. 8:17-cv-02091 (C.D. Cal. Nov. 26, 2018), ECF No. 92 (requesting all pending deadlines and hearings vacated while plaintiffs prepare motion for preliminary approval of class action settlement); *Clark v. Duke Univ.*, No. 1:16-cv-1044; No. 1:18-cv-00722 (M.D.N.C. Jan. 1, 2019), ECF No. 150 (mem. of law in sup. of motion for preliminary settlement approval of $10.65 million with $3.55 million in attorney's fees requested); *Cryer v. Franklin Resources, Inc.*, No.4:16-cv-04265 (N.D. Cal. Dec. 6, 2018), ECF No. 150 (notice of settlement filed with preliminary approval of class settlement due by February 6, 2018).

10. *Compare* Rachal et al., *supra* n.3 at 2 n.7 (noting that settlements resulted in approximately $80 million in attorney's fees in 2015) *and* Rachal et al., *supra* n.4 at 3 n.7 (noting that settlements resulted in approximately $47 million in attorney's fees for 2017), *with supra* n.9 (noting that settlements resulted in approximately $22 million in attorney's fees for 2018); *see generally* Seyfarth Shaw 15th Annual Class Action Report, 22 ("ERISA class action settlements fell precipitously in 2018. The top ten settlements fell nearly three-fold to $313.4 million, which were down from $927 million in 2017 and $807.4 million in 2016.").

11. *See supra* n.9.

12. *See* Rachal et al., *supra* n.4 at 3 n.8 (compiling cases brought in 2017 against plans with assets ranging from $2.8 million to $500 million).

13. *See e.g.*, *Brown v. Daikin Am., Inc.*, *supra* n.5, ECF No. 2 (alleging breach of fiduciary duties based on excessive fees in 401(k) plan with $100 million in plan assets).

14. *Patterson v. Capital Group Cos.,* No. CV 17-4399 DSF (PJWx), 2018 U.S. Dist. LEXIS 24237 (C.D. Cal. Jan. 23, 2018).

15. *Divane v. Northwestern University*, No. 16 C 8157, 2018 U.S. Dist. LEXIS 69127 (N.D. Ill. Apr. 25, 2018).

16. *Davis v. Washington University*, No. 4:17-CV-1641 RLW, 2018 WL 4684244 (E.D. Mo. Sept. 28, 2018).

17. *Birse v. CenturyLink, Inc.,* No. 1:17-cv-02872 (D. Colo. Nov. 19, 2018), ECF No. 78 (Report & Recommendation,).

18. *Harmon v. FMC Corp.*, No. 16-6073, 2018 U.S. Dist. LEXIS 43222 (E.D. Pa. March 16, 2018).

19. *White v. Chevron Corp.*, No. 17-16208, 2018 WL 5919670, ___Fed. Appx. ___ (9th Cir. Nov. 13, 2018).

20. *Barchock v. CVS Health Corp.,* 886 F.3d 43 (1st Cir. 2018).

21. *Meiners v. Wells Fargo & Co.*, 898 F.3d 820 (8th Cir. 2018).

22. *Bell v. Pension Comm. of ATH Holding Co.*, No. 1:15-cv-02062-TWP-MPB (S.D. Ind. Dec. 29, 2015), ECF No. 1; *White v. Chevron Corp.*, No. 4:16-cv-00793 (N.D. Cal. Feb. 17, 2016), ECF No. 1. [Amended Complaint filed Sept. 30, 2016, ECF No. 41].

23. *White v. Chevron Corp.*, *supra* n.19.

24. *White v. Chevron Corp.*, No. 16-cv-0793, 2016 U.S. Dist. LEXIS, at *5-6 (N.D. Cal. Aug. 29, 2016).

25. *Id.* at *31–32.

26. *Id.* at *44–45.

27. *White v. Chevron Corp.*, No. 16-cv-0793, 2017 WL 2352137 (N.D. Cal. May 31, 2017).

28. *Id.* at *44–45.

29. *Id.* at *43.

30. *White v. Chevron*, No. 17-16208, 2018 WL 5919670, at *1,___Fed. Appx. ___(9th Cir. Nov. 13, 2018).

31. *See Bell v. Pension Comm. of ATH Holding Co.*, No. 1:15-cv-02062, at 2 (S.D. Ind. March 16, 2016), ECF No. 23 (Amended Complaint).

32. *Id.* at 38 (The Vanguard Institutional Index Fund (Instl) (VINIX)).

33. *Bell v. Pension Comm. of ATH Holding Co.*, No. 1:15-cv- 02062-TWP-MPB, 2017 U.S. Dist. LEXIS 42107, at *3–4 (S.D. Ind. Mar. 23, 2017).

34. *Bell v. Pension Comm. of ATH Holding Co.,* 2018 U.S. Dist. LEXIS 156927, at *2 (S.D. Ind. Sept. 14, 2018). The fee class was defined as "All participants and beneficiaries of the Anthem 401(k) Plan (formerly the WellPoint 401(k) Retirement Savings Plan) from December 29, 2009, through the date of judgment, excluding the Defendants." *Id.* at *3.

35. *Id.* at *4.

36. *Id.* at *4–5.

37. *Id.* *5–6.

38. The district court later modified its initial class certification order and allowed the fee class to move forward as two subclasses that are split temporally to account for the two different recordkeeping arrangements that the plan had during the class period. *See Bell v. Pension Comm. of ATH Holding Co.*, No. 1:15-cv- 02062-TWP-MPB, (S.D. Ind. Jan. 24, 2019) ECF No. 347 (granting motion to modify class certification order).

39. *See e.g.*, *Larson v. Allina Health Sys.*, No. 17-cv-03835 (SRN/SER), 2018 U.S. Dist. LEXIS 170226 (D. Minn. Oct. 1, 2018) (dismissing claim that it was per se imprudent to offer money market fund in lieu of stable value fund); *Dorman v. Charles Schwab Corp.*, No. 17-cv-00285 (N.D. Cal. Sep. 20, 2018), ECF No. 104 at 9 (same).

40. *See e.g.*, *Schultz v. Edward D. Jones & Co.*, No. 4:16-CV-01346 JAR, 2018 U.S. Dist. LEXIS 49948 (E.D. Mo. Mar. 27, 2018) (denying motion to dismiss claim that it was imprudent to offer a money market fund in lieu of stable value fund); *Cryer v. Franklin Res., Inc.*, No.4:16-cv-04265 (N.D. Cal. Nov. 11, 2018), ECF No. 149 at 21-23 (denying motion for summary judgment where defendants discussed the possibility of adding stable value funds as an investment option but could only proffer evidence that an in-depth review of stable value funds took place after the complaint was filed).

41. *Bell v. Pension Comm. of ATH Holding Co,* No. 1:15-cv-02062-TWP-MPB, 2018 U.S. Dist. LEXIS 156927 (S.D. Ind. Sep. 14, 2018) (certifying "money market fund class" where plaintiffs alleged that it was imprudent to retain a money market fund while failing to investigate a stable value fund). The district court had previously dismissed plaintiffs' stable value fund claim but plaintiffs amended their complaint to include additional allegations in support of that claim, and defendants apparently chose not to challenge the new allegations at this stage. *Id.* at *1.

42. *White v. Chevron*, *supra* n.30.

43. *See White v. Chevron Corp.*, *supra* n.22 (Complaint).

44. *White v. Chevron Corp.*, *supra* n.27*,* at *11 (explaining that there is "no per se rule that a § 401(k) Plan must include a stable value fund as a capital preservation option, even if, in some years, a stable-value fund might outperform some other type of fund.").

45. *Id.* at *9.

46. *Ellis v. Fid. Mgmt. Trust Co.*, 883 F.3d 1 (1st Cir. Feb. 21, 2018).

47. *Barchock v. CVS Health Corp.*, *supra* n.20.

48. *Ellis*, *supra* n.46 at *3.

49. *Id.* at *4–5. A stable value fund often utilizes "wrap insurance," a form of insurance providing that, subject to exclusions, when a stable value fund is depleted such that investors cannot all recover book value, the insurance provider will cover the difference. Because the entity providing the wrap insurance hopes it will not have to make good on its promise, wrap contracts will often contain investment guidelines imposing limitations on the composition of a stable value fund's portfolio. For example, a wrap provider might demand that a certain portion of a portfolio's underlying securities be treasury bonds or similar investments that sacrifice higher returns in favor of increased safety in preserving capital. *Id.* at *3.

50. *Id.*

51. *Id.* at *5.

52. *Id.* at *9. ("Unless we are to say that ERISA plans may not offer very conservative investment options (such as money market funds or treasury bond funds), then we cannot say that plans may not offer different types of stable value funds, including those that are intentionally and openly designed to be conservative. If informed plans or their participants do not want such funds, they will not select them over the innumerable options available.").

53. *Id*. at *11.

54. *Barchock*, *supra* n.20 at 46.

55. *Id*. at 46, 49.

56. *Barchock v. CVS Health Corp*., No. 16-061-ML, at *4 (D.R.I. Apr. 18, 2017) (quoting *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014)).

57. *Barchock, supra* n.20 at 49–50.

58. *Id*. at 52–53.

59. *Id*. at 53 ("After all, we see no reason to accept the plaintiffs' implicit assertion that, in managing a stable value fund, a decision to take the path less traveled is for that reason imprudent.").

60. Under ERISA, a "guaranteed benefit policy" is exempt to the extent that such "policy or contract provides for benefits the amount of which is guaranteed by the insurer." 29 U.S.C. § 1101(b)(2)(B).

61. *See Wittman v. N.Y. Life Ins. Co*., No. 1:15-cv-09596 (S.D.N.Y. Dec. 8, 2015), ECF No. 1 (Complaint); *Wood v. Prudential Ret. Ins. & Annuity Co*., No. 1:15-cv- 01785 (D. Conn. Dec. 3, 2015), ECF No. 1 (Complaint).

62. *See Teets v. Great-West Life & Annuity Ins. Co*., 106 F. Supp. 3d 1198 (D. Colo. 2015); *Rozo v. Principal LifeIns. Co*., No. 14-cv-000463-JAJ, 2015 U.S. Dist. LEXIS 175630, at *5–7 (S.D. Iowa Sept. 21, 2015).

63. *See Teets*, *supra* n.62 at 1203 (denying motion to dismiss where it found the insurer's ability to unilaterally set the rate of return on the investment at issue raised a genuine issue of whether a reasonable rate of return is guaranteed); *see also Rozo*, *supra* n.62 at *5–7(denying motion to dismiss because of fact issue as to who bore investment risk where insurer could influence interest rate risk based on how it set rates for new contracts); *Wood v. Prudential Ret. Ins. & Annuity Co*., No. 3:15-cv-01785, at 6-10, (D. Conn. Sept. 19, 2016), ECF No. 55 (denying motion to dismiss as to guaranteed investment contracts because additional factual development was necessary to determine if defendant was shielded from liability under the fiduciary exemption).

64. *See Teets v. Great-West Life & Annuity Ins. Co.,* 315 F.R.D. 362, 373-374 (D. Colo. 2016).

65. *Rozo v. Principal Life Ins. Co*., No. 4:14-CV-000463-JAJ, 2017 U.S. Dist. LEXIS 82183, at *4 (S.D. Iowa May 12, 2017).

66. *Teets v. Great-West Life & Annuity Ins. Co*., 286 F.Supp.3d 1192, 1209 (D. Colo. 2017) (finding Great-West was not acting as a fiduciary when setting this rate because it provided plan participants advance notice and the opportunity to reject this rate by moving their investments out of this fund). The court also dismissed plaintiff's claim that Great-West is liable as a nonfiduciary under ERISA's prohibited transaction rules because plaintiff failed to show that Great-West knew or should have known that the transaction violated ERISA. *Teets* has been appealed to the Tenth Circuit, which heard oral argument on November 14, 2018. *Teets v. Great-West Life & Annuity Ins. Co*., No. 18-1019 (10th Cir.).

67. *Rozo v. Principal Life Ins. Co*., No. 4:14-cv-00463-JAJ, 2018 U.S. Dist. LEXIS 171605 (S.D. Iowa Sep. 25, 2018).

68. *Id*. at *19–21.

69. *Id*. at 23. The court also dismissed plaintiff's claim that Principal should be held liable as a nonfiduciary under ERISA's prohibited transaction rules because the plaintiff failed to show that Principal knew or should have known that the transaction violated ERISA. *Id*. at 31–34.

70. *Harmon v. FMC Corp*., No. 16-cv-6073, 2018 U.S. Dist. LEXIS 43222 (E.D. Pa. Mar. 16, 2018).

71. *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014) ("[W]here a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances.").

72. *Harmon*, *supra* n.70 at *16. In 2017, a district court dismissed similar claims on similar grounds in *In re Disney ERISA Litig*., No. 16-cv-2251, 2017 U.S. Dist. LEXIS 61202, at *13 (C.D. Cal. Apr. 21, 2017).

73. *Harmon*, *supra* n.70 at *15. The court also rejected the argument that offering the Sequoia Fund violated the plan document because it was an undiversified option because ERISA only requires that the plan be diversified as a whole and not that each individual investment be internally diversified. *Id*.

74. *Muri v. National Indemnity Co.,* No. 8:17-cv-178, 2018 U.S. Dist. LEXIS 30008 (D. Neb. Feb. 26, 2018).

75. *Id*. at *5.

76. *Id*.at *16–17.

77. *Birse v. CenturyLink, Inc*., No. 1:17-cv-02872, at ¶ 2 (D. Colo.), ECF 1 ("The objective of the Large Cap Fund was to 'exceed the return of a broad market index of the largest 1,000 companies using an actively managed multi-manager approach.'"). [Note that an Amended Complaint was filed on Sep. 23, 2018, ECF No. 25, and a Second Amended Complaint was filed on May 2, 2018, ECF No. 53.]

78. *Id*. at ¶¶ 8, 39.

79. *Id*. at ¶¶ 4–6.

80. *Birse v. Centurylink, Inc*., No. 1:17-cv-02872 (D. Colo. Nov. 19, 2018), ECF No. 78 (Report and Recommendation).

81. *Id*. at 12–13.

82. *Id*. at 13–16.

83. *Id*. at 17.

84. *Id*. at 18–19.

85. *Id*. at 19.

86. *See, e.g*., "Robo-Advisers Steer 401(k) Plan Litigation Trend," BNA Pens. & Ben Daily (Feb. 7, 2017). Robo-advisors provide algorithm-based digital investment advice.

87. *Fleming v. Fidelity Mgmt. Trust Co*., No. 1:16-cv-10918 (D. Mass.); *Patrico v. Voya Fin. Inc*., No. 1:16-cv-07070 (S.D.N.Y.); *Chendes v. Xerox HR Solutions, LLC*., No. 2:16-cv-13980 (E.D. Mich.); *Scott v. Hewitt Fin. Advisors, LLC*, No. 1:17-cv-00679 (N.D. Ill.).

88. *Scott v. Aon Hewitt Financial Advisors, LLC* No. 17-cv- 679, 2018 U.S. Dist. LEXIS 44606, at *7–8 (N.D. Ill. Mar. 19, 2018).

89. *Patrico v. Voya Financial, Inc.*, No. 16-cv-7070 (LGS), 2018 U.S. Dist. LEXIS 41157 (S.D.N.Y. Mar. 13, 2018) (denying motion to amend complaint). The district court previously dismissed the case in 2017 but gave plaintiffs permission to file a motion for leave to file a proposed amended complaint, which the court denied in 2018. *Patrico v. Voya Fin., Inc.*, No. 16-cv-7070 (LGS), 2017 U.S. Dist. LEXIS 95735, at *7-11 (S.D.N.Y. June 20, 2017).

90. *Scott v. Aon Hewitt Financial Advisors, LLC*, 2018 U.S. Dist. LEXIS 44606, at *7–8.

91. *Fleming v. Fidelity Management Trust Co.* No. 16-cv-10918-ADB, 2017 U.S. Dist. LEXIS 155222, at *4-6 (D. Mass. Sept. 22, 2017).

92. *Patrico*, *supra* n.89, at *11–15; *Scott, supra* n.90, at *23–25; *Fleming*, *supra* n.91 at *22–23. Plaintiffs have also brought non-ERISA suits against recordkeepers that offer other automated investment services. *See Green v. Morningstar, Inc.*, No.–cv-5652, 2018 U.S. Dist. LEXIS 43245 (N.D. Ill. Mar. 16, 2018) (dismissing claims against Morningstar and Prudential claiming that Moringstar's Goalmaker automated investment advice program violated RICO because it steered plan participants to funds that paid higher revenue sharing).

93. *Santomenno v. Transamerica Life Insurance Co.*, 883 F.3d 833 (9th Cir. 2018).

94. *Pizarro v. Home Depot, Inc.*, No. 18-cv-01566 (N.D. Ga. Apr. 12, 2018), ECF No. 1; *Marshall v. Northrop Grumman Corp.*, No. 2:16-cv-06794 (C.D. Cal. Sept. 9, 2016), ECF No. 1.

95. *Marshall v. Northrop Grumman Corp.*, No. CV 16-cv-06794 AB (JCx), 2018 U.S. Dist. LEXIS 68041 (N.D. Cal. Feb. 15, 2018). The court previously dismissed the claim, finding that where plaintiffs failed to allege that they specifically paid for the robo-advisors investment advice they lacked Article III standing to bring the claim. *See Marshall v. Northrop Grumman Corp.*, No. 16-cv-06794 AB (JCx), 2017 U.S. Dist. LEXIS 174204, at *24–26 (C.D. Cal. Jan. 30, 2017).

96. *Marshall*, 2018 U.S. Dist. LEXIS 68041, at *10–12.

97. *Id*. at *n.1.

98. *Id*. at *13–14.

99. *Cassell v. Vanderbilt University*, No. 16-cv-2086, 2018 U.S. Dist. LEXIS 181850, at *3 (M.D. Tenn. Oct. 23, 2018).

100. *Id*. at *9–10.

101. *Divane v. Northwestern University,* No. 16-cv-8157, 2018 U.S. Dist. LEXIS 87645, at *38–39 (N.D. Ill. May 25, 2018).

102. Recent significant cases through late 2017 were discussed in Rachal et al., *supra* n.4.

103. *See e.g.*, *Bekker v. Neuberger Berman Grp., LLC*, No. 16-cv-6123, 2018 U.S. Dist. LEXIS 166690 (S.D.N.Y. Sept. 27, 2018) (granting motion to dismiss fiduciary breach claims but allowed prohibited transaction claim to survive); *Dorman v. Charles Schwab Corp.,* No. 17-cv-00285-CW, 2018 U.S. Dist. LEXIS 218049 (N.D. Cal. Sep. 20, 2018) (granting motion to dismiss fiduciary breach claims but allowed prohibited transaction claim to survive); *Patterson v. Capital Grp., Cos.*, No. 17-cv-4399, 2018 U.S. Dist. LEXIS 24237 (C.D. Cal. Jan. 23, 2018) (granting motion to dismiss all claims, including fiduciary breach and prohibited transaction claims).

104. *See Dorman*, *supra* n.39 at *8; *see also Bekker*, *supra* n.103, at *15 (explaining that "sponsor-affiliated funds are permitted under ERISA and do not, standing alone,

support an inference that a defendant breached its fiduciary duties by including such a fund as an investment option").

105. *See Schapker v. Waddell & Reed Fin.Inc.*, No. 17-cv-2365, 2018 U.S. Dist. LEXIS 28458 (D. Kan. Feb. 22, 2018); *Feinberg v. T. Rowe Price Grp. Inc.*, No. 17-cv-0427, 2018 U.S. Dist. LEXIS 140709 (D. Md. Aug. 20, 2018); *Fernandez v. Franklin Res., Inc.*, No. 17-cv-64099, 2018 U.S. Dist. LEXIS 59336 (N.D. Cal. Apr. 6, 2018); *In re G.E. ERISA Litig.*, No. 17-cv-12123, 2018 WL 6592091 (D. Mass. Dec. 14, 2018).

106. *Cryer v. Franklin Res., Inc.*, No. 4:16-cv-04265 (N.D. Cal. Nov. 11, 2018), ECF No. 149 (denying summary judgment as to all claims except the claim that it was imprudent to pay $70 per participant for recordkeeping fees); *Sims v. BB&T Corp.*, No. 15-cv-732, 2018 U.S. Dist. LEXIS 108416 (M.D.N.C. June 26, 2018) (denying summary judgment motion as to most claims but granting summary judgment as to part of plaintiffs' prohibited transaction claim and duty of loyalty claims); *Moreno v. Deutsche Bank Ams.*, No. 15-cv-9936, 2018 U.S. Dist. LEXIS 95324 (S.D.N.Y. June 6, 2018) (denying summary judgment motion as to most claims except plaintiffs' prohibited transaction claims).

107. *Moreno v. Deutsche Bank Ams. Holding Corp.*, No.1:15-cv-09936 (S.D.N.Y. Aug. 14, 2018), ECF No. 321 (mem. of law in supp. of mot. for preliminary settlement approval of $21.9 million with $6.57 million in attorney's fees requested); *Schapker v. Waddell & Reed Fin., Inc.*, No. 2:17-cv-02365 (D. Kan. Nov. 19, 2018), ECF No. 70 (motion for preliminary settlement approval of $4.8 million with $1.5 million in attorney's fees requested); *Sims v. BB&T Corp.*, No. 1:15-cv-732 (M.D.N.C. Nov. 30, 2018), ECF No. 437 (motion for preliminary settlement approval of $24 million with $8 million in attorney's fees requested); *Leber v. Citigroup 401(k) Plan Inv. Comm.*, 1:07-cv-09329 (S.D.N.Y. Sept. 4, 2018), ECF No. 282 (mem. of law in supp. of mot. for preliminary settlement approval of $6.9 million with $2.3 million in attorney's fees requested) [final approval entered 1/3/19 ECF No. 294]; *Cryer v. Franklin Res., Inc.*, No.4:16-cv-04265 (N.D. Cal. Dec. 6, 2018), ECF No. 150 (notice of settlement filed with preliminary approval of class settlement due by February 6, 2019).

108. *Fuller v. SunTrust Banks, Inc.*, No. 11-cv-784, 2018 U.S. Dist. LEXIS 113108 (N.D. Ga. June 27, 2018) (granting class certification after seven years of litigation with eight separate classes certified).

109. *Meiners v. Wells Fargo & Co.*, *supra* n.21.

110. *Brotherston v. Putnam Investements, LLC*. 907 F.3d 17 (1st Cir. 2018).

111. *Meiners v. Wells Fargo & Co.*, No. 16-cv-3981, 2017 U.S. Dist. LEXIS 80606 (D. Minn. May 25, 2017).

112. *Id.* at *7.

113. *Meiners*, *supra* n.21. The Eighth Circuit also affirmed dismissal of plaintiff's duty of loyalty claims because he failed to establish that the funds at issue were imprudent. *Id.* at 824.

114. *Brotherston v. Putnam Investements, LLC*, *supra* n.110 at 39.

115. *Brotherston v. Putnam Invs., LLC*, No. 15-cv-13825, 2017 U.S. Dist. LEXIS 48223, at *7–11 (D. Mass. Mar. 30, 2017).

116. *Id.* at *27–30 (D. Mass. Mar. 30, 2017) (finding prohibited transaction claims on 72 investment funds time-barred because the plan's enrollment kit disclosed that Putnam entities acted as recordkeeper and investment manager for the plan more than three years before the suit was filed). The district court also found that ERISA's

PTE 77-3 afforded Putnam a defense to all of plaintiffs' Section 406 prohibited transaction claims. *Id.* at *21–27.

117. *Brotherston v. Putnam Invs., LLC*, No. 15-cv-13825, 2017 U.S. Dist. LEXIS 93654, at *3 (D. Mass. June 19, 2017).

118. *Id.* at *17–18.

119. *Id.* *19–22.

120. *Id.* at *28–29.

121. *Id.* at *22–30.

122. *Id.* at *24.

123. *Id.* at *28.

124. ERISA Sec. 1106(b)(3), 29 U.S.C. 1106(b)(3) prohibits a fiduciary with respect to a plan from receiving any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

125. *Brotherston*, *supra* n.110 at 41–42.

126. *Id.* at 27–31.

127. *Id.* at 28–29.

128. *Id.* at 28–29.

129. *Id.* at 32–33.

130. *Id.* at 33–34. The First Circuit recognized that "ERISA defendants are not liable for damages that the Plan would have suffered even with a prudent fiduciary at the helm" but noted that this is a causation question. *Id.* at *29.

131. *Id.* at 38–39.

132. *Id.* at 39–40.

133. *Id.* at 35–36.

134. *See Brotherston v. Putnam Invs., LLC*, No. 17-1711 (1st Cir. Oct. 24, 2018) (motion to stay mandate while defendants' petition the Supreme Court for certiorari), *petition for cert. filed* Jan. 11, 2019.

135. Prior to 1958, many employees of universities typically funded retirement through the use of individual annuity contracts that were owned by the university employees. This meant that employees had great individual autonomy in the selection and management of their individual accounts. This eventually led many of the university plans to accumulate dozens and sometimes hundreds of investment options and multiple recordkeepers. *See* David Powell and Mark Bieter, "View From Groom: The University Fee Cases–Product of the Past, Possible Wave of the Future," BNA Pens. & Ben. Daily (Sept. 28, 2016).

136. *See e.g.*, *Larson v. Allina Health Sys.*, No. 17-cv-03835, 2018 U.S. Dist. LEXIS 170226 (D. Minn. Oct. 1, 2018) (noting that the plan had over 300 investment options).

137. *See Johnson v. Providence Health & Servs.*, No. 17-cv-1779, 2018 U.S. Dist. LEXIS 47569 (W.D. Wash. Mar. 22, 2018); *Daugherty v. Univ. of Chi.*, No. 17-cv-3736, 2018 U.S. Dist. LEXIS 6965 (N.D. Ill. Jan. 10, 2018); *Short v. Brown Univ.*, 320 F. Supp. 3d 363 (D.R.I. 2018); *Vellali v. Yale Univ.*, 308 F. Supp. 3d 673 (D. Conn. 2018); *Larson*

v. Allina Health Sys., *supra* n.39. In *Sacerdote v. N.Y. University School of Medicine*, a district court dismissed plaintiffs' attempt to bring what was essentially a duplicate case against another NYU entity after the district court had dismissed many of the claims in an earlier filed case against NYU because it was a "blatant attempt to replead an existing action." No. 17-cv-8834, 2018 U.S. Dist. LEXIS 29565 (S.D.N.Y. Feb. 23, 2018).

138. *See e.g.*, *Larson*, *supra* n.39 at *44–46; *Vellali*, *supra* n.137 at 684–685; *but see Short, supra* n.137 at 369 (dismissing revenue sharing claim because plaintiffs' failed to rebut defendant's arguments that it is not per se imprudent to pay recordkpeeing fees through revenue sharing).

139. *See e.g.*, *Short, supra* n.137 at 370; *Vellali*, *supra* n.137 at 685–686.

140. *See e.g.*, *Larson*, *supra* n.39 at *36–40 (not imprudent to offer over 300 options); *Vellali*, *supra* n.137 at 684–687 (not imprudent to offer over 100 investment options including up to 28 investment options per asset classes); *Short, supra* n.137 at 369 (not imprudent to offer over 200 investment options).

141. *Larson*, *supra* n.39 at *36–40; *Short, supra* n.137 at 368; *Vellali*, *supra* n.137 at 688–689; *but see Johnson*, *supra* n.137, at *25 (allowing duty of loyalty claim to proceed where plaintiff alleged that the plan's recordkeeper's proprietary investment products were offered in the plan with higher expense ratios).

142. *Clark v. Duke Univ.*, No. 16-cv-1044, 2018 U.S. Dist. LEXIS 62532 (M.D.N.C. Apr. 13, 2018); *Cassell v. Vanderbilt Univ.*, No. 16-cv-2086, 2018 U.S. Dist. LEXIS 181850 (M.D. Tenn. Oct. 23, 2018); *Tracey v. MIT*, No. 16-cv-11620, 2018 U.S. Dist. LEXIS 179945 (D. Mass. Oct. 19, 2018) (*Tracey* is a 401(k) plan case but because it was brought at the same time as the other university cases it is generally discussed with the 403(b) university cases); *Sacerdote v. N.Y. Univ.*, No. 16-cv-6284, 2018 U.S. Dist. LEXIS 23540 (S.D.N.Y. Feb. 13, 2018); *Henderson v. Emory Univ.*, No. 16-cv-2920, 2018 U.S. Dist. LEXIS 180349 (N.D. Ga. Sept. 13, 2018); *Cates v. Trs. of Columbia Univ.*, No, 16-cv-6524 (S.D.N.Y. Nov. 15, 2018), ECF No. 218.

143. *Daugherty v. Univ. of Chi.*., No. 1:17-cv-03736 (N.D. Ill.May 22, 2018), ECF No. 58 (mem. of law in sup. of motion for preliminary settlement approval of $6.5 million with $1.9 million in attorney's fees requested). The *Daugherty* settlement included additional equitable relief including removal of the CREF Stock Fund, a fund that is at issue in almost every university case where plaintiffs allege it has persistently underperformed and has high fees. *Id*. at 8. *Clark v. Duke Univ.*, No. 1:16-cv-1044; No. 1:18-cv-00722 (M.D.N.C. Jan. 1, 2019), ECF No. 150 (mem. of law in sup. of motion for preliminary settlement approval of $10.65 million with $3.55 million in attorney's fees requested).

144. *Davis v. Wash. Univ. in St, Louis,* No. 4:17-CV-1641 RLW, 2018 U.S. Dist. LEXIS 167594, at *9–10 (E.D. Mo. Sep. 28, 2018) (holding "that the diverse selection of funds available to Plan participants negates any claim that Defendants breached their duties of prudence simply because cheaper funds were available"); *Divane v. Northwestern University*, No. 16-cv-8157, 2018 U.S. Dist. LEXIS 87645, at *19 (N.D. Ill. May 25, 2018) (explaining that "no plan participant was required to invest in the CREF Stock fund or any other TIAA-CREF product. Thus, any plan participant could avoid what plaintiffs consider to be the problems with those products (excessive record-keeping fees and underperformance) simply by choosing other options"). In *Davis*, the court also rejected allegations challenging two funds out of 100 as imprudent because "the prudence of each investment is not assessed in isolation but, rather, as the investment relates to the portfolio as a whole." *Davis*, 2018 U.S. Dist. LEXIS 167594, at *13–14 (citation omitted).

145. *Wilcox v. Georgetown University*, No. 18-422, 2019 WL 132281, at *8, 11–12 (D.D.C. Jan. 8, 2019).

146. *Sacerdote v. New York University*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018).

147. *Sacerdote v. N.Y. Univ.*, No. 16-cv-6284, 2017 U.S. Dist. LEXIS 137115, at *7–8 (S.D.N.Y. Aug. 25, 2017).

148. *Id.*

149. *Id.* at 279 (alleging losses of $358 million).

150. *Id.* at *32–33, 35–36. For a more detailed summary of the court's holding on the motion to dismiss, *see* Rachal et al, *supra* n.4.

151. *Sacerdote*, *supra* n.147 at *15–19, 36–41.

152. *Sacerdote v. N.Y. Univ.*, *supra* n.146.

153. *Id.* at 291–293 (some fiduciaries did not even know if they were still plan fiduciaries or not).

154. *Id.* The court also noted that its finding that plaintiffs could not prove loss also suggested that "there was not some obvious danger to the plans that the committee failed to recognize." *Id.* at 293 n.43.

155. *Id.* at 293–294.

156. *Id.* at 305–306.

157. *Id.* at 305.

158. *Id.* at 306–307.

159. *Id.* at 307. The report contained detailed summaries of the plan's investments including: (1) summaries of plan assets allocations (*e.g.*, bond, money market, fixed income, etc.); (2) quarterly economic reports; (3) analysis of the investment alternatives performance against its peers; and (4) analysis of the manger tenure of each fund.

160. *Id.* at 309.

161. *Id.* at 311–312, 314–316. The court rejected the opinion of plaintiffs' expert that a Vanguard fund was a proper comparison to evaluate performance and fees against the TIAA Real Estate Account, in part, because the TIAA Real Estate Account invested directly in commercial properties and therefore had a low correlation to stocks. *Id.* at 312. The court rejected plaintiffs' expert's opinion that various passively and actively managed Vanguard funds were proper comparisons to the CREF Stock Fund, in part, because those funds did not take into account foreign stock markets or performance of relevant segments of U.S. and foreign markets. *Id.* at 315–316.

162. *Sacerdote v. N.Y. Univ.*, No. 18-2707 (2d Cir. Sept. 12, 2018). Plaintiffs are also challenging the court's decision based on the allegation that Judge Forrest was biased towards NYU because she planned to (and eventually did) enter into private practice as a partner at a large defense firm that is chaired by an NYU trustee. *See Sacerdote v. N.Y. Univ.*, No. 16-cv-06284 (S.D.N.Y. Oct. 1, 2018), ECF No. 358 (mem. of law in sup. of mot. to vacate judgment and for new trial).

163. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989).

164. *See Divane v. Northwestern Univ.*, No. 16-cv-8157, 2018 U.S. Dist. LEXIS 69127, at *3–5 (N.D. Ill. Apr. 25, 2018).

165. *Id*. at *4–5.

166. *See e.g., Divane., supra* n.164 at *4–5 (striking demand for jury in ERISA § 502(a)(2) case and collecting cases of similar decisions)*; Muri v. Nat'l Indem. Co.*, No. 17-cv-178, 2018 U.S. Dist. LEXIS 30008, at *19–20 (D. Neb. Feb. 26, 2018) (same); *Sacerdote v. N.Y. Univ.*, 16-cv-06284 (S.D.N.Y. Oct. 1, 2018), ECF No. 122 (order granting mot. to strike plaintiffs' jury demand) (same); *Bell v. Pension Comm. of ATH Holding Co. LLC*, No. 15-cv-2062, 2016 U.S. Dist. LEXIS 100148 (S.D. Ind. Aug. 1, 2016) (same).

167. *Cunningham v. Cornell Univ.*, No. 16-cv-6525, 2018 U.S. Dist. LEXIS 152972 (S.D.N.Y. Sept. 6, 2018).

168. *Id*. at *5.

169. *Id*. at *5–6, 11–12.

170. *Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005).

171. *Id*. at 2. The *Sacerdote* appeal is currently stayed pending plaintiffs' motion to vacate discussed *supra*.

172. *Cunningham*, *supra* n.167 at *11–12. The district court in *Tracey v. MIT* has also scheduled a jury trial but that was before defendants' filed a motion to strike and that motion is now pending before the court. *See* No. 1:16-cv-11620 (D. Mass. Aug. 24, 2018), ECF No. 138 (motion to strike jury demand).

173. *Cunningham v. Cornell Univ.*, 1:16-cv-06525 (S.D.N.Y. Oct. 11, 2018), ECF No. 204 (order on motion for certification).

174. *e.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

175. *See e.g.*, *Barrett v. Pioneer Nat. Res. USA, Inc.*, No. 17-cv-1579, 2018 U.S. Dist. LEXIS 108699 (D. Colo. June 29, 2018) (plaintiff lacked standing as to one count alleging that a money market fund was imprudent where plaintiff never invested in that fund); *Wilcox v. Georgetown Univ.*, No. 18-cv-422, 2019 WL 132281 (D.D.C. Jan. 8, 2019) (plaintiff lacked standing as to funds in which plaintiffs did not invest and as to funds that did not underperform plaintiffs' alleged comparable fund).

176. *See e.g., Dorman v. Charles Schwab Corp.,* No. 17-cv-00285-CW, 2018 U.S. Dist. LEXIS 218049, *12–15 (N.D. Cal. Sep. 20, 2018) (plaintiff lacked Article III standing as to optional brokerage window in which he did not participate); *Alas v. AT&T*, No. 17-cv-8106, 2018 U.S. Dist. LEXIS 143682 (C.D. Cal. July 18, 2018) (plaintiff lacked Article III standing where the complaint simply stated that plaintiff invested through a brokerage account to his "financial determent" but provided no detail as to which funds plaintiff invested in and why they were imprudent (*e.g.,* underperformance or high fees); *but see Larson v. Allina Health Sys.*, No. 17-cv-03835, 2018 WL 4700332, at *10–15 (D. Minn. Oct. 1, 2018) (plaintiffs had standing to sue as to ProManage option (a tool that automatically picked investments for participants) and a mutual fund window even though they did not invest through either option because they brought their claims on behalf of the plan in a representative capacity).

177. *Bernaola v. Checksmart Fin. LLC*, 322 F. Supp. 3d 830 (S.D. Ohio 2018).

178. *Id*. at 836–837.

179. *Id*. at 837.

180. *Sulyma v. Intel Corp. Inv. Policy Comm.*, 909 F.3d 1069 (9th Cir. 2018).

181. *See Patterson v. Capital Grp. Cos.*, No. 17-cv-4399, 2018 U.S. Dist. LEXIS 24237, at *9–13 (C.D. Cal. Jan. 23, 2018) (finding prohibited transaction claims time-barred where plaintiff received fee disclosures that gave plaintiff actual knowledge of the prohibited transaction); *but see In re G.E. ERISA Litig.*, No. 17-cv-12123, 2018 WL 6592091, at *3 (D. Mass. Dec. 14, 2018) (finding prohibited transaction claims based on defendants offering of proprietary funds as the sole actively managed account time-barred because plaintiff had actual knowledge as the funds were clearly labeled "GE funds" but denying motion to dismiss prohibited transaction claim based on allegations of poor performance and high fees because plaintiff lacked actual knowledge that the funds were "performing poorer and their fees cost higher compared to other funds"). Defendants are seeking reconsideration in *In re G.E. ERISA Litigation,* arguing that the district court improperly applied statute of limitation precedent as to breach of fiduciary duty claims to plaintiffs' prohibited transaction claims. No. 1:17-cv-12123 (D. Mass. Jan. 11, 2019), ECF No. 106 (mem. of law in sup. of mot. for reconsideration).

182. *Sulyma, supra* n.180 at 1075.

183. *See Munro v. Univ. of S. Cal.,* 896 F. 3d 1088 (9th Cir. 2018) (affirming denial of motion to compel arbitration); *Dorman v. Charles Schwab Corp.*, No. 17-cv-285, 2018 U.S. Dist. LEXIS 9701 (N.D. Cal. Jan. 18, 2018) (denying motion to compel arbitration). Dorman is on appeal to the Ninth Circuit).

184. *Munro*, *supra* n.182 at 1094.

185. *Sacerdote v. N.Y. Univ.*,328 F. Supp. 3d 273, 293–294 (S.D.N.Y. 2018); *White v. Chevron Corp.*, No. 16-cv-0793, 2016 WL 4502808, at *45 (N.D. Cal. 2016). In 2018, the Supreme Court ruled in a 5–4 opinion authored by Justice Gorsuch that the National Labor Relations Act did not preclude arbitration agreements from preventing employees from engaging in collective action through class actions. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

186. *See, e.g., Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) (noting that "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)"); Dep't of Labor Info. Ltr, No. DOL 585, 1998 ERISA LEXIS 6 (Feb. 19, 1998); U.S.Dep't of Labor, *Understanding Retirement Plan Fees and Expenses*, *available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/publications* (last visited Jan. 23, 2019) ("Fees and expenses are one of several factors to consider when you select and monitor plan service providers and investments. The level and quality of service and investment risk and return will also affect your decisions."); U.S. Dep't of Labor; *Meeting Your Fiduciary Responsibilities*, *https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/publications* (last visited Jan. 23, 2019).

187. *Tatum v. RJR Pension Inv. Comm.*, 855 F.3d 553 (4th Cir. 2017).

188. *Loomis v. Exelon Corp.*, 658 F.3d 667, 673–74 (7th Cir. 2011).

189. *Davis v. Wash. Univ. in St. Louis*, No. 17-cv-1785, 2018 U.S. Dist. LEXIS 167594, at *9–10 (E.D. Mo.) (holding "that the diverse selection of funds available to Plan participants negates any claim that Defendants breached their duties of prudence simply because cheaper funds were available").

190. *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 39 (1st Cir. Oct. 15, 2018).

191. *Loomis v. Exelon Corp*, 658 F.3d 667, 673 (7th Cir. 2011).

192. *Id.* at 673–674.

193. *See supra* n.12–13.

194. If done by counsel and properly structured, these reviews may be privileged, or instead they can be structured to document the prudent fiduciary process used to manage the plan.