REPORT OF THE
FIDUCIARY RESPONSIBILITY SUBCOMMITTEE

Employer Co-Chairs:
Stacey Cerrone
Proskauer Rose LLP
650 Poydras Street, Suite 1800
New Orleans, LA 70130-6146

Sam Schwartz-Fenwick
Seyfarth Shaw
233 South Wacker Drive
Suite 8000
Chicago, IL 60606

Union Co-Chairs:
Peter S. Dickinson, Esq.
Bush Gottlieb
801 N. Brand Boulevard, Suite 950
Glendale, CA 91203

Nathan Goldstein
Segal Roitman, LLP
33 Harrison Avenue, 7th Floor
Boston, MA 02111

 Plaintiff Co-Chairs:
Gretchen S. Obrist
Keller Rohrback L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101

Radha Pathak
Stris & Maher LLP
725 South Figueroa Street
Suite 1830
Los Angeles, CA 90017

Government Co-Chairs:
Robert M. Lewis, Jr.
Office of the Solicitor
Department of Labor
61 Forsyth Street, Room 7110
Atlanta, GA 30303

Celeste Moran
Office of the Solicitor
Department of Labor
John F. Kennedy Federal Building, Room E-375
Boston, MA 02203
Additional Contributors

Michelle M. Scannell
Seyfarth Shaw
560 Mission Street
Suite 3100
San Francisco, CA 94105

Garrett Heilman
Keller Rohrback L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101

Elizabeth Sloane
Segal Roitman, LLP
33 Harrison Avenue, 7th Floor
Boston, MA 02111

Nancy Smith
Segal Roitman, LLP
33 Harrison Avenue, 7th Floor
Boston, MA 02111

Kirk Prestegard
Bush Gottlieb
801 N. Brand Boulevard, Suite 950
Glendale, CA 91203
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
<td>8</td>
</tr>
<tr>
<td>II. Who Is a Fiduciary</td>
<td>8</td>
</tr>
<tr>
<td>A. ERISA’s Functional Definition of Fiduciary</td>
<td>8</td>
</tr>
<tr>
<td>B. The Three Categories of Fiduciary Conduct</td>
<td>8</td>
</tr>
<tr>
<td>1. Management of the Plan or Investment of Plan Assets</td>
<td>8</td>
</tr>
<tr>
<td>2. Investment Advice</td>
<td>8</td>
</tr>
<tr>
<td>3. Administration of the Plan</td>
<td>8</td>
</tr>
<tr>
<td>a. SEC Filings and ESOP Plans</td>
<td>8</td>
</tr>
<tr>
<td>C. Applications and Limitations of the Functional Fiduciary Standard</td>
<td>8</td>
</tr>
<tr>
<td>1. Plan Sponsors: Employers, Unions, and the “Settlor Function” Rule</td>
<td>8</td>
</tr>
<tr>
<td>2. Corporate Officers and Directors</td>
<td>10</td>
</tr>
<tr>
<td>3. Mutual Funds and Insurers</td>
<td>11</td>
</tr>
<tr>
<td>a. Mutual Funds</td>
<td>11</td>
</tr>
<tr>
<td>b. Insurers and Guaranteed Benefit Contracts</td>
<td>11</td>
</tr>
<tr>
<td>i. Insurer a Fiduciary Because of Authority or Responsibility with Respect to Underlying Fund</td>
<td>11</td>
</tr>
<tr>
<td>ii. Insurer a Fiduciary Because of Authority or Responsibility with Respect to the Contract</td>
<td>11</td>
</tr>
<tr>
<td>c. Other Fiduciary Relationships of Insurers</td>
<td>12</td>
</tr>
<tr>
<td>4. Banks</td>
<td>12</td>
</tr>
<tr>
<td>5. Attorneys, Accountants, and Actuaries</td>
<td>12</td>
</tr>
<tr>
<td>6. Bankruptcy Receivers</td>
<td>13</td>
</tr>
<tr>
<td>7. Investment Consultants, Stock Brokers, and Insurance Agents</td>
<td>13</td>
</tr>
<tr>
<td>8. Third-Party Administrators</td>
<td>14</td>
</tr>
<tr>
<td>a. Joint Boards</td>
<td>15</td>
</tr>
<tr>
<td>b. Contributing Employers and Their Principals</td>
<td>15</td>
</tr>
<tr>
<td>10. Pharmacy Benefit Managers</td>
<td>16</td>
</tr>
<tr>
<td>11. Employee Benefit Plans, Funds, and Trusts</td>
<td>17</td>
</tr>
<tr>
<td>12. Miscellaneous (Directed Trustee)</td>
<td>17</td>
</tr>
<tr>
<td>D. Importance and Identification of Plan Assets</td>
<td>17</td>
</tr>
<tr>
<td>1. General Principles</td>
<td>17</td>
</tr>
<tr>
<td>2. Plan Assets: The Look-Through Rule</td>
<td>18</td>
</tr>
<tr>
<td>a. General Rule</td>
<td>18</td>
</tr>
<tr>
<td>b. Equity Interests</td>
<td>18</td>
</tr>
<tr>
<td>c. Publicly Offered Securities</td>
<td>18</td>
</tr>
<tr>
<td>d. “Significant Participation” by Plan Investors</td>
<td>19</td>
</tr>
<tr>
<td>e. Mandatory Applications of the Look-Through Rule:</td>
<td>19</td>
</tr>
<tr>
<td>Commingled Investment Funds</td>
<td>19</td>
</tr>
<tr>
<td>f. Governmental Mortgage Pools</td>
<td>19</td>
</tr>
<tr>
<td>3. Plan Assets: Insurance Companies and Mutual Funds</td>
<td>19</td>
</tr>
<tr>
<td>4. Plan Assets: Employee Stock Ownership Plans</td>
<td>19</td>
</tr>
</tbody>
</table>
5. Plan Assets: Participant Contributions .......................................................... 19

E. Starting and Stopping as a Fiduciary ............................................................. 20

III. Plan and Trust Requirements ........................................................................ 21
A. Formal Requirements ..................................................................................... 21
   1. Written Instrument ..................................................................................... 21
   2. Named Fiduciary ....................................................................................... 22
   3. Plan Content ............................................................................................. 22
      a. Mandatory Provisions ........................................................................... 22
      b. Optional Provisions ............................................................................... 22
B. ERISA’s Trust Requirement ........................................................................... 22
   1. General Rule ............................................................................................. 22
   2. Exceptions to the Trust Requirement ....................................................... 22
   3. Delegation of Trustee Asset Management Authority .................................... 22
   4. Assets Held by Two or More Trustees ...................................................... 22
C. Indicia of Ownership of Plan Assets Outside the United States ..................... 22
D. Allocation and Delegation of Fiduciary Responsibility .................................... 22
   1. Responsibility of Named Fiduciaries ....................................................... 23
   2. Directed Trustees ...................................................................................... 23
   3. Investment Managers .............................................................................. 23

IV. Fiduciary Standards Under Section 404 ........................................................ 23
A. Exclusive Purpose Rule .................................................................................. 23
   1. In General ................................................................................................ 23
   2. Plan Design Decisions .............................................................................. 24
   3. Fiduciary Expenses Distinguished from Settlor Expenses ......................... 25
B. Prudence Rule ................................................................................................ 25
   1. Procedural Prudence ............................................................................... 25
   2. Use of Experts as Part of Procedural Prudence ......................................... 26
   3. Other Prudence Issues ............................................................................ 26
   4. Safe Harbor Rule - Modern Portfolio Theory .......................................... 26
C. Diversification Rule ........................................................................................ 26
   1. In General ................................................................................................ 26
   2. Individual Account Plans ......................................................................... 26
D. Plan Document Rule ....................................................................................... 27

V. Application of the Section 404 Fiduciary Standards ..................................... 27
A. Fiduciary Communications ............................................................................ 27
   1. Misrepresentations and Failures to Disclose With Respect to Existing
      Plan Terms of Circumstances .................................................................... 27
      a. Where a Participant Has Inquired ............................................................ 27
      b. Where a Participant Has Not Inquired ..................................................... 28
      c. Retiree Health Benefits .......................................................................... 28
      d. Disclosures Concerning Financial Information ..................................... 28
      e. Fiduciaries’ Knowledge of Misrepresentations ..................................... 28
   2. Misrepresentations and Failures to Disclose With Respect to
      Prospective Plan Terms or Circumstances ............................................... 28
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>Affirmative Material Misrepresentations</td>
</tr>
<tr>
<td>b.</td>
<td>Liability for Silence</td>
</tr>
<tr>
<td>3.</td>
<td>Duty to Produce Documents Upon Request</td>
</tr>
<tr>
<td>4.</td>
<td>Duty to Disclose Other Fiduciaries’ Breaches</td>
</tr>
<tr>
<td>5.</td>
<td>Fiduciary Communications in Connection With Employer Stock</td>
</tr>
<tr>
<td>6.</td>
<td>Right of Action and Remedies</td>
</tr>
<tr>
<td>B.</td>
<td>Selection and Monitoring of Service Providers</td>
</tr>
<tr>
<td>C.</td>
<td>Collections</td>
</tr>
<tr>
<td>D.</td>
<td>Benefit Administration</td>
</tr>
<tr>
<td>E.</td>
<td>Employer Securities Issues</td>
</tr>
<tr>
<td>1.</td>
<td>Hostile Tender Offers</td>
</tr>
<tr>
<td>2.</td>
<td>Employee Stock Ownership Plans</td>
</tr>
<tr>
<td>3.</td>
<td>Employer Securities Held in ESOPs and Participant-Directed Individual Account Plans</td>
</tr>
<tr>
<td>a.</td>
<td>Imprudent Investment Claims</td>
</tr>
<tr>
<td>b.</td>
<td>Disclosure Claims</td>
</tr>
<tr>
<td>F.</td>
<td>Excessive Fee Cases</td>
</tr>
<tr>
<td>G.</td>
<td>Investment Policy</td>
</tr>
<tr>
<td>1.</td>
<td>In General</td>
</tr>
<tr>
<td>2.</td>
<td>Nonfinancial Considerations</td>
</tr>
<tr>
<td>3.</td>
<td>Voting Plan Stock</td>
</tr>
<tr>
<td>4.</td>
<td>Directed Individual Account Plans</td>
</tr>
<tr>
<td>a.</td>
<td>Section 404(c) Issues</td>
</tr>
<tr>
<td>b.</td>
<td>Cases Addressing Section 404(c)</td>
</tr>
<tr>
<td>c.</td>
<td>Other Issues Relating to Directed Individual Account Plans</td>
</tr>
<tr>
<td>5.</td>
<td>Participant Education</td>
</tr>
<tr>
<td>VI.</td>
<td>Duty to Protect Against Violations by Other Fiduciaries</td>
</tr>
<tr>
<td>A.</td>
<td>Knowing Participation in or Concealment of Fiduciary Breaches: Section 405(a)(1)</td>
</tr>
<tr>
<td>B.</td>
<td>Failure to Comply with Section 404(a)(1) Fiduciary Standards: Section 405(a)(2)</td>
</tr>
<tr>
<td>C.</td>
<td>Failure to Correct Another’s Breach: Section 405(a)(3)</td>
</tr>
<tr>
<td>VII.</td>
<td>Liability for Breach of Fiduciary Duty</td>
</tr>
<tr>
<td>A.</td>
<td>In General</td>
</tr>
<tr>
<td>B.</td>
<td>Preexisting Breaches</td>
</tr>
<tr>
<td>C.</td>
<td>Burden of Proof and Causation</td>
</tr>
<tr>
<td>D.</td>
<td>Measure of Loss under Section 409</td>
</tr>
<tr>
<td>1.</td>
<td>Investment Loss Cases</td>
</tr>
<tr>
<td>2.</td>
<td>Cases Involving Improper Use of Plan Assets</td>
</tr>
<tr>
<td>E.</td>
<td>Extent of Injunctive Relief</td>
</tr>
<tr>
<td>F.</td>
<td>Plan and Individual Recovery for Breaches of Fiduciary Duty</td>
</tr>
<tr>
<td>G.</td>
<td>Releases of Fiduciary Breach Claims</td>
</tr>
<tr>
<td>H.</td>
<td>Liability of Non-Fiduciaries for Fiduciary Misconduct</td>
</tr>
<tr>
<td>1.</td>
<td>Claims Against Nonfiduciary Defendants</td>
</tr>
<tr>
<td>2.</td>
<td>The Harris Trust Decision</td>
</tr>
</tbody>
</table>
3. Developments After *Harris Trust* ................................................................. 41

I. Civil Penalty for Breach ..................................................................................... 41

J. Contractual Exculpation, Insurance, and Indemnification .................................. 41

K. Equitable Contribution and Indemnification ..................................................... 42

VIII. Prohibited Transactions .................................................................................. 43

A. ERISA ............................................................................................................... 43

1. Statutory Provisions ................................................................................ 43
   a. Definition of Party in Interest ...................................................... 43
   b. ERISA Section 406 ..................................................................... 43
   c. ERISA Section 407(a) ................................................................. 43

2. Knowledge under Section 406(a) ............................................................ 43

B. Internal Revenue Code ..................................................................................... 43

1. Provisions Covering Prohibited Transactions .......................................... 43

2. Individual Retirement Arrangement (IRA) .............................................. 43

C. Penalties for Violation of the Prohibited Transaction Restrictions ............. 44

1. IRS Excise Taxes .................................................................................... 44

2. ERISA Section 502(i) Civil Penalties ..................................................... 44

3. Limitations Period .................................................................................. 44

D. Application of the Prohibited Transaction Rules .......................................... 44

1. Sale, Exchange, or Lease of Property ...................................................... 44

2. Loans ..................................................................................................... 44

3. Furnishing of Goods, Services, and Facilities .......................................... 44

4. Transfer of Assets ................................................................................ 44

5. Employer Security or Property ................................................................ 44
   a. Qualifying Employer Security ..................................................... 44
   b. Qualifying Employer Real Property ................................................ 44
   c. Acquisition ...................................................................................... 44
   d. The 10-Percent Limitation ............................................................. 44
   e. Adequate Consideration .............................................................. 44

6. Section 406(b)—Fiduciary Self-Dealing ......................................................... 45
   a. Personal Use of Plan Assets ......................................................... 45
   b. Acting on Behalf of Adverse Parties ........................................... 45
   c. Receipt of Consideration From a Third Party in a Transaction Involving Plan Assets ......................................................... 45

   d. Fee Payments .............................................................................. 45

E. Exemptions from the Prohibited Transaction Restrictions ........................... 45

1. Statutory Exemptions ................................................................................ 45
   a. Participant Loans - Section 408(b)(1) .......................................... 45
   b. Reasonable and Necessary Services - Section 408(b)(2) .............. 45
      i. Necessary Services ...................................................................... 45
      ii. Reasonable Contract or Arrangement ........................................ 46
      iii. Reasonable Compensation .................................................... 46
   c. ESOP Loans - Section 408(b)(3) ................................................ 46
   d. Bank Deposits - Section 408(b)(4) ............................................... 46
   e. Insurance Transactions - Section 408(b)(5) .................................... 46
   f. Ancillary Bank Services - Section 408(b)(6) .................................... 47
g. Securities Conversion - Section 408(b)(7) ................................... 47
h. Pooled Investment Funds - Section 408(b)(8) ............................. 47
i. Plan Distributions - Section 408(b)(9) ....................................... 47
j. Multiemployer Plans - Section 408(b)(10) ................................. 47
k. Multiemployer Transactions - Section 408(b)(11) ....................... 47
l. Certain Employer Stock Sales - Section 408(b)(12) ..................... 47
m. Retiree Health Account Transfers - Section 408(b)(13) ............... 47
n. Investment Advice - Section 408(b)(14) ..................................... 47
o. DOL Conflict of Interest ("COI") Rule ....................................... 47
p. Litigation Related to the COI ..................................................... 48
q. Block Trades - Section 408(b)(15) ............................................ 49
r. Electronic Trades - Section 408(b)(16) ........................................ 49
s. Additional Service Provider Relief - Section 408(b)(17) .............. 49
t. Foreign Exchange Transactions - Section 408(b)(18) .................. 49
u. Cross Trading - Section 408(b)(19) .......................................... 49
v. Prohibited Transaction Self-Correction Section 408(b)(20) ....... 49

2. Scope of Statutory Exemptions: Do They Apply to § 406(b)? ....... 49
3. Administrative Exemptions .......................................................... 49
   a. Class Exemptions ....................................................................... 49
   b. Individual Exemptions .............................................................. 50
      i. Basic Transactions .............................................................. 50
      ii. Variations on Class Exemptions .......................................... 51
      iii. Developing Situations ...................................................... 51

4. Special Problems .......................................................................... 51
   a. Dual Capacity Trustees .......................................................... 51
   b. Fiduciary Compensation ......................................................... 51
   c. Employee Stock Ownership Plans and Other Transactions
      Involving Employer Securities .............................................. 51
   d. Health Savings Accounts ....................................................... 51

IX. Bonding ..................................................................................... 51
   A. Type of Bond ........................................................................... 51
   B. Amount of Bond ..................................................................... 51
   C. Exemptions From the Bonding Requirements ......................... 51

X. Statute of Limitations for Breach of Fiduciary Duty Claims ......... 51
   A. Three Years After “Actual Knowledge” ..................................... 52
      1. First, Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits .. 52
      2. Third and Fifth Circuits ....................................................... 53
      3. Fourth and Tenth Circuits .................................................... 53
   B. The Six-Year Statute of Limitations ......................................... 53
I. Introduction

Nothing to report.

II. Who Is a Fiduciary

A. ERISA’s Functional Definition of Fiduciary

Nothing to report.

B. The Three Categories of Fiduciary Conduct

1. Management of the Plan or Investment of Plan Assets

Nothing to report.

2. Investment Advice

Chamber of Commerce v. U.S. Dep’t of Labor, 885 F.3d 360 (5th Cir. 2018). In action brought by the U.S. Chamber of Commerce and other business groups against the United States Department of Labor (“DOL”) challenging the “fiduciary rule” that broadly reinterpreted the term “investment advice fiduciary,” the District Court granted summary judgment for the DOL upholding the interpretation of the term to include a broker-dealer and insurance agents. On appeal, however, the Court of Appeals held that DOL’s expansion of the scope of its “fiduciary rule” to include a broker-dealer and insurance agents conflicted with plain the text of ERISA and vacated the District Court decision.

3. Administration of the Plan

a. SEC Filings and ESOP Plans

Nothing to report.

C. Applications and Limitations of the Functional Fiduciary Standard

1. Plan Sponsors: Employers, Unions, and the “Settlor Function” Rule

Acosta v. Brain, 910 F.3d 502 (9th Cir. 2018). The Department of Labor brought suit against a former trustee and counsel to Taft-Hartley funds alleging a violation of ERISA Section 510 for firing a plan auditor in retaliation for her participation in a Department of Labor investigation, and against the trustee and counsel for ERISA Section 404 fiduciary and co-fiduciary violations related thereto. After a bench trial, the district court concluded that the defendants had violated both sections of ERISA. The trustee and counsel appealed, arguing in-part that the trustee was not acting in a fiduciary capacity and thus fiduciary and co-fiduciary liability could not attach under Section 404. The Ninth Circuit affirmed, reversed, and vacated in-part. The Ninth Circuit held that the relevant inquiry was whether the conduct at issue was management or administration of the plan, or merely a business decision not subject to ERISA. In this case, the Department had not provided record evidence from which the Ninth Circuit...
could determine whether the trustee was a functional or named fiduciary. Further, Section 404 duties are owed to participants and beneficiaries, not employees of the plan, such as the auditor. And the Department had not shown that the funds’ internal auditor was akin to a professional service provider whose retention or termination may give rise to a fiduciary act. Accordingly, the Department had failed to show that the trustee was acting in a fiduciary capacity when he retaliated against the auditor.

*Trs. of Laundry, Dry Cleaning Workers & Allied Indus. Health Fund, Workers United v. FDR Servs. Corp.*, Case No. 17cv7145, 2018 WL 4931541 (S.D.N.Y. Oct. 10, 2018). Taft-Hartley funds brought suit against contributory employer to the funds seeking an audit and contributions. The employer moved to join the union to the lawsuit. The district court granted the employer’s motion on the basis that it had plead sufficient facts that the union and its officials acted in a fiduciary capacity. Specifically, the employer had alleged that the union was responsible for enrolling eligible employees in the health plan, informing them of benefits, forwarding their names to the health plan, and preparing enrollees’ invoices for the employer.

*Acosta v. Ameriguard Sec. Servs., Inc.*, No. 15-cv-3484, 2018 WL 4158349 (D. Md. Aug. 30, 2018). A contributing employer’s motion for summary judgment against the Department of Labor in an ERISA fiduciary breach lawsuit on the basis that it was not a fiduciary to multi-employer plan. The court granted the motion, finding that the Department had adduced no evidence to support its contention that the employer was a fiduciary. Despite the Department’s contention, the employer had no duty to be involved in the establishment or administration of the plans at issue, and had no authority to appoint (and thus monitor) trustees.

*Doe v. United Health Grp. Inc.*, No. 17-cv-4160, 2018 WL 3998022 (E.D.N.Y. Aug. 20, 2018). Plan participants brought claims under ERISA, Federal Parity Act, and the ACA alleging that plan administrators had discriminated against them by imposing arbitrary reimbursement penalties on psychotherapy in comparison to other services under the plan. The court granted administrators’ motion to dismiss on the basis that setting reimbursement rates amounted to a business decision, rather than a fiduciary function.

*Schuman v. Microchip Tech. Inc.*, 302 F. Supp. 3d 1101 (N.D. Cal. 2018); *Berman v. Microchip Tech. Inc.*, 2018 Empl. Benefits Cas 42, 173 (N.D. Cal. 2018) (same claims). Motion to dismiss complaint denied as to successor employer for breach of fiduciary duty related to post-merger administration of predecessor’s severance benefit plan because employees sufficiently alleged that successor employer was a fiduciary to the plan. By announcing that no former employees of predecessor employer would be entitled to any severance benefits under the plan after the merger, the successor employer described the likely future of plan benefits under the plan, which the Court found constituted management and exercise of authority over the plan sufficient to indicate fiduciary status. Additionally, under the circumstances reasonable employees could have thought that the successor employer “was communicating with them both in its capacity as employer and in its capacity as plan administrator.”

*Marshall v. Northrop Grumman Corp.*, 2018 Empl. Benefits Cas. 142, 307 (C.D. Cal. 2018). Granting motion to dismiss claim against employer company for breach of fiduciary duty related to administration and management of employer pension plan as a result of the actions of the plan fiduciary committee appointed by employer. Court held that employer as plan sponsor
does not become or remain a fiduciary merely because it appoints its own employees to serve on fiduciary committees.

2. Corporate Officers and Directors

*Acosta v. Chimes D.C., Inc.*, No. 15-cv-3315, 2018 WL 6492518 (D. Md. Dec. 10, 2018). Individual executives of a plan sponsor brought a motion for summary judgment against the Department of Labor in a case alleging excessive fees and self-dealing, asserting that they were not fiduciaries under ERISA. The Department argued that the executives were functional fiduciaries by virtue of their control over the plan sponsor’s governance committee, which in turn selected and retained service providers involved in the conduct at issue. The court granted the executives’ motion on the basis that the committee had formal and actual control over selection and retention. Despite the fact that the executives held influential positions on the committee, nothing in the record indicated that the executives’ influence was so great as to confer actual decision making authority to them in their personal capacity.

*Laborers’ Combined Funds v. Jennings*, 323 F.R.D. 511 (W.D. Pa. 2018). Court granted summary judgment on ERISA claim for unpaid benefit plan contributions against company president based on finding president was an ERISA fiduciary as a matter of law because she paid all of company’s bills, managed its financials, had exclusive authority to determine which of company bills would be paid or not paid, and had the sole authority to remit benefit contributions to the Funds. Court found company bookkeeper was not a fiduciary because she did not have discretionary authority to issue fringe benefit checks to the Funds, though she co-signed them, and merely prepared the reports.

*Svigos v. Wheaton Sec., Inc.*, 2018 Empl. Benefits Cas. 29, 572 (N.D. Ill. 2018). Court denied motion to dismiss claim of breach of fiduciary duty against two brothers who were officers of corporation while they were acting as corporate agents and/or as they were trustees of an ESOP for wrongfully devaluing or depleting the ESOP’s assets to their personal benefit in violation of their fiduciary duty to the plan. The company was the plan sponsor and plan administrator, the brothers were the company’s agents, and at various times the company’s director, manager, or president, as well as plan trustees. The Court found sufficient facts alleged to support that they acted as plan fiduciaries when they engaged in alleged self-dealing transactions where a sufficiently close relationship between the brothers’ responsibilities with respect to the plan, their positions at the company, the management of the plan, and the management of plan assets indicated that the brothers held almost unlimited power over the plan.

*Trs. of Ohio Bricklayers Health & Welfare Fund v. VIP Restoration, Inc.*, 2018 Empl. Benefits Cas. 53, 721 (N.D. Ohio 2018). Court granted summary judgment to benefit plans on claim against corporate officer for breach of fiduciary under ERISA for failure to pay benefit plan contributions where there was sufficient evidence that owner became a fiduciary to the plan controlling and misappropriating the unpaid contributions which became plan assets when they were due and owing. Corporate owner exercised discretionary authority or control over the corporation’s finances, was the principal officer responsible for the corporation, decided how the company spent its money, and the language of the plans’ trust agreements provided that unpaid benefit contributions become plan assets at the time they became due.
3. Mutual Funds and Insurers
   a. Mutual Funds
      
      Nothing to report.
   
   b. Insurers and Guaranteed Benefit Contracts
      i. Insurer a Fiduciary Because of Authority or Responsibility with Respect to Underlying Fund

      **Rozo v. Principal Life Ins. Co.,--- F. Supp. 3d ----,** No. 14-463, 2018 WL 4693816 (8th Cir. Sept. 25, 2018), appeal docketed, No. 18-3310 (8th Cir. Oct. 30, 2018). A participant in a profit sharing plan filed a class action under ERISA alleging that an insurer offering investments to plan participants breached its fiduciary duty and engaged in prohibited transaction when it set a fixed rate of return for a fund in which the participant invested and which the insurer operated. The insurer provided the fund to plan participants through a group annuity contract, which allowed participants to invest in a different offering of the fund every six months, each time with a certain guaranteed interest rate set by the insurer. On the insurer’s motion for summary judgment, the Eighth Circuit found that the insurer was not a fiduciary with respect to the alleged violative conduct. Because the insurer had announced each new rate in advance, and provided participants a meaningful opportunity to withdraw from the fund, the insurer thus did not retain discretion over plan assets. The Eight Circuit also rejected the participant’s argument that the insurer set its own compensation (and thus was a fiduciary), since the insurer’s ability to make a profit on the fund—through retention of the spread between the guaranteed rate and the insurer’s own rate of return on fund assets—was dependent on how many people chose to invest in the fund.

   ii. Insurer a Fiduciary Because of Authority or Responsibility with Respect to the Contract

   **Atzin v. Anthem, Inc., 2018 Empl. Benefits Cas. 18, 729 (C.D. Cal. 2018).** Motion to dismiss denied as to health insurer and its subsidiary claims administrator where insured participants whose claims were denied alleged facts sufficient to show insurer and subsidiary were fiduciaries because they participated in developing coverage guidelines that determined the types of claims that were granted or denied.
c. Other Fiduciary Relationships of Insurers

*Gordon v. CIGNA Corp.*, 890 F.3d 463 (4th Cir. 2018). Life insurance plan beneficiary brought a putative class action lawsuit against her late husband’s employer and the insurance company entities that provided underwriting and processed claims for the plan, claiming breaches of fiduciary duty and seeking the difference between the $150,000 she had received following her husband’s death and the $300,000 she had expected to receive based on her husband’s supplemental coverage election and the corresponding premiums the employer had deducted from his wages. The district court found the errors that caused the beneficiary to receive lesser coverage rested with the employer and granted summary judgment in favor of the insurance company. After settling with the employer, the beneficiary appealed the district court’s entry of summary judgment for the insurance company entities. The Fourth Circuit affirmed the decision of the district court, finding none of the insurance company entities was a fiduciary with respect to the specific actions that had harmed the beneficiary. The Court found the evidence presented confirmed that the employer had been both formally and functionally responsible for enrolling new employees and alerting an employee if additional documents were required to complete their application for supplemental coverage. Moreover, because the employer had transferred all its employees’ premiums in a bulk payment, the Court found the insurance company entities had no meaningful way to know whether they had received an overpayment for a particular employee. Further, despite the overpayment in the husband’s case, the Court found the premiums were paid in connection with a guaranteed benefit policy and therefore did not constitute plan assets.

4. Banks

*Allen v. Credit Suisse Sec. (USA) LLC*, 895 F.3d 214 (2d Cir. 2018). Named plaintiffs, on behalf of a putative class of participants, beneficiaries, and trustees of various ERISA plans (the “Plans”), brought suit in district court against twelve banks and their affiliates alleging, inter alia, fiduciary breach arising from fraudulent conduct by the banks with respect to foreign currency exchange (“FX”) market transactions they had conducted on behalf of the Plans. The district court dismissed the complaint for failure to state a claim upon which relief could be granted; with respect to the fiduciary breach claims, the district court reasoned the alleged fraudulent conduct with respect to the FX market transactions was insufficient to plead fiduciary status on behalf of the banks. The Second Circuit affirmed the district court’s dismissal of the fiduciary breach claims. Per the Court, the FX market transactions at issue were initiated by the Plans’ independent investment managers, rather than by the banks themselves, and the banks’ services with respect to the FX market transactions were provided through arm’s-length dealings that would not give the banks such control over the disposition of the Plan’s assets as to make them functional fiduciaries. Further, the Court noted, the complaint did not allege the banks exercised any control over the investment managers’ decisions to enter into the FX market transactions with them, or over the factors upon which their compensation would be determined. The Court also concluded any alleged wrongdoing by the banks with regard to the FX market transactions was insufficient to afford them sufficient control over the Plans’ assets to make them ERISA functional fiduciaries.

5. Attorneys, Accountants, and Actuaries
Cheap Easy Online Traffic Sch. v. Peter L. Huntting & Co., No. 16-cv-2644, 2018 WL 6567809 (S.D. Cal. Dec. 13, 2018). Plan trustees brought fiduciary breach claims against the plan’s consultant and actuary alleging that they had caused the plans to become overfunded and ultimately to be terminated. The consultant and actuary moved for summary judgment on the basis that they were not fiduciaries. The Court reviewed at length case law examining the distinction between service providers performing routine ministerial roles, and those serving in roles with discretion sufficient to confer fiduciary status. The Court found that the consultant and actuaries performed ministerial tasks with no discretion over plan assets and held no positions of particular trust and confidence with trustees, and thus were not fiduciaries. The Court rejected the trustees’ contention that the consultant and actuary’s alleged superior expertise and failure to inform trustees about benefit formula changes and plan termination consequences conferred fiduciary status, as the trustees had provided insufficient evidence that the consultant and actuary possessed sufficiently superior expertise or exceeded the scope of usual professional conduct.

It’s Greek to Me, Inc. v. Fisher, 2018 Empl. Benefits Cas. 56, 009 (D. Kan. 2018). Motion to dismiss breach of fiduciary duty claim brought by self-funded health care plan administrator against law firm claiming that firm breached the plan subrogation and reimbursement terms by failing to remit settlement funds to health care plan following a personal injury settlement. The Court dismissed the breach of fiduciary claim because the plan failed to sufficiently allege that the lawyers exercised management or authority to dispose of plan assets, namely the plan’s equitable lien over the settlement funds. The plan did not allege that the law firm exercised management or authority to dispose of a pool of assets, but “at best” alleged that the law firm breached the plan subrogation and reimbursement terms by failing to remit settlement funds. The Court noted “the general consensus among other circuits that lawyers engaged in representation of plan beneficiaries do not assume an ERISA-defined fiduciary relationship with the plan.”

Beta Grp., Inc. v. Steiker, Greenaple, & Croscut, P.C., No. 15-213, 2018 WL 461097 (D.R.I. Jan. 18, 2018). Law firm and advisory firm responsible for operating and administering ESOP failed to succeed on motion to dismiss claims against them for breach of fiduciary duty resulting from failure to remove a plan provision providing for a 4% money purchase plan contribution. Court held that sufficient facts were plead to show that the law firm and advisory firm were fiduciaries to plan where they were engaged for their professional expertise, including with regard to properly amending the plan, and not only for ministerial, non-discretionary tasks.

6. Bankruptcy Receivers

Nothing to report.

7. Investment Consultants, Stock Brokers, and Insurance Agents

Patrico v. Voya Fin., Inc., 2018 Empl. Benefits Cas. 85, 185 (2d Cir 2018). Court denied motion of participants and beneficiaries of a single employer 401(k) plan for leave to file an amended complaint alleging breach of fiduciary duty by VRA, a subsidiary of the plan’s record keeper, Voya, related to its marketing of investment advisory services to the plan for its participants. The Court found the first amended complaint failed to plead sufficiently that the subsidiary was a fiduciary to the plan with respect to the marketing because the facts alleged did
not support an inference that the subsidiary had discretion to engage the investment advisor selected. Additionally, there were insufficient facts plead to show that the investment advisor’s interests were adverse to participants. The Court relied on prior decisions finding that marketing a provider’s services does not itself give rise to fiduciary duties. The Court also denied the motion to amend the complaint with regard to an alleged prohibited transaction by Voya based on its receipt of dividend payments from subsidiary VRA in connection with the investment advisor, finding the claim would be futile because the facts insufficiently alleged that Voya was a fiduciary with respect to the plan.

Barnett v. Great Plains Tr. Co., 2018 Empl Benefits Cas. 61, 406 (D. Kan. 2018). Investors claimed investment advisor was fiduciary who breached its fiduciary duty to act prudently and diversify. Court denied motion to dismiss, finding that the investors plead factual allegations sufficient to support the assertion that the investment advisor was a functional fiduciary by providing investment advice for a fee. Investment advisor was named as such in written agreement and received a fee based on the quarterly value of the assets for investment advice, provided quarterly statements and quarterly portfolio reviews and its employees interacted with investors, communicating about performance and volatility, and were present when agreement was signed.

8. Third-Party Administrators

Santomenno v. Transamerica Life Ins. Co., 883 F.3d 833 (9th Cir. 2018). Plan participants filed putative class action against plan administrator of employer 401(k) plan alleging (1) breach of fiduciary duty as a result of the plan administrator charging administrative and investment fees on the separate accounts; receiving revenue sharing payments from the investment managers and failing to pass on fee savings to participants; and failing to invest in lowest share classes of mutual funds underlying the separate account investment options; and (2) prohibited self-dealing by receiving revenue sharing payments from the investment managers and withdrawing its fee from the separate accounts. The Court reversed the district court, which had denied the plan administrator’s motion to dismiss for failure to state a claim and ordered three class certification orders vacated. The Court held that the plan administrator was not a fiduciary when negotiating its compensation with employers and with respect to revenue sharing payments received from investment managers, and the administrator’s withdrawal of fees from the pooled participant accounts was not a breach of fiduciary duty. The Court found that the plan administrator’s actions in withdrawing predetermined contractual fees were ministerial and did not involve management of the separate accounts. “Our holding today is narrow. We simply conclude that when a service provider’s definitively calculable and nondiscretionary compensation is clearly set forth in a contract with the fiduciary-employer, collection of fees out of plan funds in strict adherence to the that contractual term is not a breach of the provider’s fiduciary duty.”

Schwartz v. Associated Emp’rs Grp. Benefit Plan & Tr., No. 17-142, 2018 WL 453436 (D. Mont. Jan. 17, 2018). Motion to dismiss denied where Court found plausible that employer health plan’s claims administrator exercised discretionary authority or control over the plan so as to be an ERISA fiduciary. Claims administrator repeatedly assured treating doctor that she would be compensated for treating patient, then denied doctor’s request for compensation multiple times, denied doctor’s administrative appeals, and paid her some of money owed.

   a. Joint Boards

       Nothing to report.

   b. Contributing Employers and Their Principals

       *Glazing Health & Welfare Fund v. Lamek*, 896 F.3d 908 (9th Cir. 2018). Trustees of several employee benefit funds had filed suit in a district court against owner-officers of a signatory employer. The lawsuit sought unpaid contributions and asserted fiduciary claims against the owner-officers based on trust provisions treating unpaid contributions as fund assets. While the suit was pending before the district court, the Ninth Circuit decided *Bos v. Board of Trustees (Bos I)*, 795 F.3d 1006 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1452 (2016). *Bos I* had posed the question of an employer’s fiduciary status with respect to unpaid benefit contributions in the context of a bankruptcy and, in that context, the Ninth Circuit had declined to find the employer was a fiduciary. *Bos I* at 1007, 1010-11. Citing *Bos I*, the district court determined the owner-officers were not subject to fiduciary liability under ERISA and dismissed the trustees’ fiduciary claims upon the owner-officers’ motion for reconsideration of an earlier motion to dismiss. The trustees appealed to the Ninth Circuit. A majority of the Court affirmed the district court’s dismissal of the fiduciary claims, as well as the broader applicability of the Court’s earlier decision in *Bos I*. However, one member of the panel dissented, stating a disagreement with the majority’s reading of the Court’s earlier decisions and the extension of the Court’s holding in *Bos I* beyond the bankruptcy context. (Gleason, J., at 912-14).

       *Trs. of the Nat’l Elevator Indus. Pension v. GMS Elevator Servs., Inc.*, No. 18-538, 2018 WL 4510495 (E.D. Pa. Sept. 20, 2018). In granting a motion for default judgment brought by Taft-Hartley funds against a signatory employer for unpaid contributions, the court held that the owners of the employer were fiduciaries, since the underlying CBA established that unpaid contributions were plan assets, the owners had authority to determine whether to pay monthly contributions, and the owners had acknowledged fiduciary status in a prior settlement agreement.

       *Downs v. JSP Cos., Inc.*, 297 F. Supp. 3d 163 (D.D.C. 2018), *appeal docketed sub nom.*, *Downs v. Canales*, No. 18-7042 (D.C. Cir. Mar. 30, 2018). Court denied motion for default judgment against corporate owner and president for personal liability for unpaid benefit plan contributions under ERISA where benefit plan administrators asserted only that the unpaid contributions were plan assets, and failed to allege or demonstrate that the plan documents defined unpaid contributions as ERISA plan assets.

       *Iron Workers Dist. Council of S. Ohio & Vicinity Benefit Tr. v. J&H Reinforcing & Structural Erectors, Inc.*, No. 18-cv-00017, 2018 WL 1137589 (S.D. Ohio Mar. 1, 2018). Court granted motion for default judgment against company and its owner and principal officer under ERISA for delinquent contributions owed to multiemployer trust funds. The Court found the owner personally liable as a fiduciary under ERISA because he exercised or had exercised authority or control with regard to the management or disposition of monies that the company owed the funds for fringe benefit contributions and the applicable trust agreements defined employer contributions as fund assets “at the time that they become due” as stated in the
collective bargaining agreements, participation agreements, and trust agreements. The Court found the owner personally liable for breach of fiduciary duty for diverting, permitting, or allowing the diversion of employer contributions and other monies from the funds that could have been applied toward contributions owed to the funds, which constituted self-dealing with the funds’ assets in violation of ERISA.

10. Pharmacy Benefit Managers

*Doe One v. CVS Pharmacy, Inc.*, --- F. Supp. 3d. ----, No. 18-cv-01031, 2018 WL 6574191 (N.D. Cal. Dec. 12, 2018). Enrollees in employer-offered prescription drug benefit plan brought action against employer and pharmacy benefit managers under ERISA, challenging a provision of the benefit plans pursuant to which HIV/AIDS medications could be obtained for in-network prices only at in-network pharmacies. On motions to dismiss, the Court held that the plan benefits managers were not a fiduciary, as the relevant contracts conferred no discretionary authority on the PBMs and the employers retained ultimate authority on drug exemptions – the challenged conduct. The Court also found that the employers were not fiduciaries, since the alleged violative conduct (for instance, decreasing or eliminating benefits, or choosing the PBM) concerned plan design, and were thus not fiduciary acts.

*Negron v. Cigna Health & Life Ins.*, 300 F. Supp. 3d 341 (D. Conn. 2018). Motion to dismiss denied where Court found that insured plan participants plausibly alleged that the insurance company and pharmacy benefit services care company (“providers”) were plan fiduciaries where the facts alleged the providers did not simply perform ministerial tasks in accordance with their contract, but exercised discretion, including by determining the cost-sharing pharmacies charged patients for prescription drugs in violation of the plan’s terms; controlling factors affecting the amount of their compensation (such as determining the amount of “spread” and by taking clawbacks); and exercising authority and control over plan assets by using their agreement to impose spread and clawbacks that were in violation of the plan’s terms.

*In re Express Scripts/Anthem ERISA Litig.*, 285 F. Supp. 3d 655 (S.D.N.Y. 2018), argued, No. 18-346 (2d Cir. Oct. 19, 2018). Motion to dismiss claims against pharmacy benefits manager (PBM) brought by health plan subscribers and fiduciaries was granted where facts did not sufficiently allege PBM was ERISA fiduciary with respect to prescription drug pricing under health plan. Claims alleged that PBM breached its fiduciary duty when it set prescription drug pricing at inflated rates and caused the subscribers to pay those rates. While the Court found the PBM exercised some control over prices through interpretation of term “competitive benchmark pricing” in drug administration agreement, the agreement laid out pricing terms, including pricing requirements and limitations, as well as compensation, and the PBM was acting pursuant to the contract and not as a fiduciary. The PBM’s relationship with retail pharmacies did not render it a fiduciary in nature either, because it was distinct from its relationship with insurance providers and subscribers.

The Court also dismissed breach of fiduciary claims against the insurance company (Anthem) with which the PBM (Express Scripts) contracted to provide pharmacy benefit services, while Anthem was simultaneously in the process of selling its own PBM business to Express Scripts for more than $4.5 billion. The Court found insufficient facts alleged to find the insurance company acted as a fiduciary in contracting with the PBM to service its clients and in
making prescription drug pricing term decisions, including those which allowed the PBM to set pricing and control factors that affect pricing. The Court found that the company’s conduct in contracting with the PBM and setting drug pricing terms constituted corporate business decisions rather than discretionary administrative determinations, such as those involving an assessment of a participant’s entitlement to plan benefits. The Court noted the subscribers “have no right under ERISA to receive ‘competitive benchmark pricing’ or even average pricing for prescription drugs” and agreed with the Sixth Circuit DeLuca case that “a health benefits company setting prices in its role as a health insurer is not acting as an ERISA fiduciary.”

In re EpiPen ERISA Litig., 341 F. Supp. 3d 1015 (D. Minn. 2018). Participants in this consolidated putative class action against the “big 4” pharmacy benefit managers alleged that the benefit managers’ negotiations with the pharmaceutical company (Mylan) that sells epinephrine auto-injector pens (“EpiPens”) caused Mylan to raise EpiPen prices. As a result, the PBMs profited through rebates and other payments, while participants’ out-of-pocket expenses rose dramatically. The PBMs moved to dismiss the complaint. Denying their motion to dismiss with respect to whether the participants adequately pleaded the PBMs’ fiduciary status, the district court found that “Plaintiffs have plausibly alleged that Defendants control the amount they receive in rebates or other fees from Mylan and likewise exercise discretion over how much of that money is paid to the plans.” Noting Plaintiffs’ allegations that “the claimed arms’-length bargaining between Defendants and Mylan was in fact a concerted effort to raise the price for EpiPens, increasing profits for both Defendants and Mylan but injuring Plaintiffs in the process,” the Court found that “Plaintiffs have plausibly alleged that Defendants are plan fiduciaries” with respect to plan administration.

11. Employee Benefit Plans, Funds, and Trusts

Hausknecht v. John Hancock Life Ins. Co., 334 F. Supp. 3d 665 (E.D. Pa. 2018). This case is connected to a long-running Department of Labor lawsuit involving a MEWA. In this case, an employee welfare plan, plan sponsor and participant brought an ERISA and RICO action against a life insurer for questionable loans made to the principal of the MEWA in the Department of Labor lawsuit. The insurer brought a motion to dismiss. The court assumed without finding that the assets of the MEWA trust were plan assets. The court then held that the insurer was not a fiduciary with respect to its allowance of the MEWA principal to change owners and beneficiaries of the policy at issue, since the policy specifically required the insurer to comply with the requested change. However, the court found that plaintiffs’ allegation that the insurer had allowed the MEWA principal to take out a loan against the cash value of the policy adequately alleged control over plan assets sufficient to confer fiduciary status. Notably, the policy only allowed the owner of the policy, not the principal, to obtain a loan.

12. Miscellaneous (Directed Trustee)

Nothing to report.

D. Importance and Identification of Plan Assets

1. General Principles

Nothing to report.
2. Plan Assets: The Look-Through Rule

a. General Rule

*Schapker v. Waddell & Reed Fin., Inc.*, No. 17-CV-2365-JAR-JPO, 2018 WL 1033277 (D. Kan. Feb. 22, 2018). In proprietary fund litigation, district court held that prohibited transaction claim survived dismissal. Defendants argued that “the investment management fees at issue ‘are paid by the mutual funds, not the Plan, and thus are not ‘plan assets.’” 2018 WL 1033277, at *10 (internal quotation omitted). The court rejected this argument because the plaintiff had alleged that the payment of fees was made by the plan. “Defendants also argue[d] that Plaintiff’s ‘indirect use’ theory, which asserts that Defendants caused the Plan to invest in WR Financial proprietary funds to increase the amount of fees flowing to WR Financial-affiliated entities, is not cognizable.” Id. The district court rejected this argument and declined to follow *Brotherston v. Putnam Investments, LLC*, No. 15-13825, 2017 WL 1196648 (D. Mass. Mar. 30, 2017), reasoning that the First Circuit’s “narrow, formal approach to identifying ‘plan assets’ was not consistent with the Tenth Circuit’s approach. The court thus held that the plaintiff ‘alleges a plausible indirect transfer claim.’” Id. at *11.

*Wildman v. Am. Century Servs., LLC*, No. 4:16-CV-00737-DGK, 2018 WL 2326627 (W.D. Mo. May 22, 2018). In proprietary fund litigation, court considered the approaches of the Ninth Circuit and First Circuit to the question of whether “mutual fund assets should be considered plan assets because American Century is both the mutual fund company and the Plan sponsor.” 2018 WL 2326627, at *6. “After considering both interpretations of plan assets, the Court finds more persuasive a narrow definition of plan assets because it is more aligned with the regulation's definition. The Court finds the fees paid from mutual fund assets are not fees paid out of plan assets and consequently, Plaintiffs’ prohibited transaction claims under §§ 1106(a)(1)(D) and (b)(1) fail as matter of law.” 2018 WL 2326627, at *7.

b. Equity Interests

*Svigos v. Wheaton Sec., Inc.*, No. 17-CV-04777, 2018 WL 587190 (N.D. Ill. Jan. 29, 2018). Plaintiff was employee of sponsor (Wheaton), “a privately held Illinois corporation that buys and sells securities.” 2018 WL 587190, at *1. She was also a participant in the pension plan, which owned Wheaton and held 100% of its stock. Plaintiff was terminated and decided to transfer her plan account balance, “which she alleges constituted one-third of the fair market value of the Plan’s assets.” Plaintiff further alleged that the plan underpaid her by at least $1.8 million dollars, because defendants had improperly devalued Wheaton’s assets. The court denied defendants’ motion to dismiss. “Whether all of Wheaton’s assets constitute the Plan’s assets under the ‘Look Through Rule,’ 29 C.F.R. § 2510.3-101(a)(2), involves factual questions as to whether Wheaton qualifies as an ‘operating company’ under the rule. An ‘operating company’ is one “primarily engaged” in “the production or sale of a product or service other than the investment of capital.” 29 C.F.R. § 2510.3-101(c). What Wheaton’s business ‘primarily’ consists of is a factual determination inappropriate for resolution on a motion to dismiss.” 2018 WL 587190, at *8.

c. Publicly Offered Securities
d. “Significant Participation” by Plan Investors

Nothing to report.

e. Mandatory Applications of the Look-Through Rule: Commingled Investment Funds

Nothing to report.

f. Governmental Mortgage Pools

Nothing to report.

3. Plan Assets: Insurance Companies and Mutual Funds

Nothing to report.

4. Plan Assets: Employee Stock Ownership Plans

_Hurtado v. Rainbow Disposal Co._, No. 8:17-CV-01605-JLS-DFM, 2018 WL 3372752 (C.D. Cal. July 9, 2018). District court held that prohibition transaction claim under ERISA § 406(b)(1) and (b)(3) survived dismissal because plaintiffs alleged that defendants negotiated personally beneficial employment agreements in connection with the sale of company stock held by an ESOP. The court rejected defendants’ argument that the company stock did not constitute assets of the plan. Even though “corporate assets are not plan assets where the plan is an ESOP,” 2018 WL 3372752, at *9 (citing _Johnson v. Couturier_, 572 F.3d 1067, 1080 (9th Cir. 2009) (internal quotations omitted)), “clearly ‘the assets of the plan would include the employer securities.’” _Id._ (citation omitted).

5. Plan Assets: Participant Contributions

_Wis. Masons 401(k) Fund v. Froode_, No. 16-CV-676-JDP, 2018 WL 1401205 (W.D. Wis. Mar. 19, 2018). Breach of fiduciary suit against president and sole member of employer (LLC). Defendant was responsible for remitting employee contributions to 401(k) plan and union dues to union, but was late in remitting contributions (and failed to remit dues). Pursuant to CBA, interest was owed on the late contributions, but defendant failed to pay it. District court held that defendant was not a fiduciary as to the unpaid interest, because it was not a plan asset. Even though unpaid employee contribution is plan asset, contractually assessed interest on delinquent contribution is not withheld from employee wages and is thus not a plan asset. The court stated, “That distinction proved dispositive in S & S Fashion, which concluded that ‘unpaid contributions, actually withheld from wages by the employer, to which the Funds are legally entitled by the governing documents,’ are ‘plan assets’ giving rise to fiduciary status but that ‘amounts due and owing to the Funds that were never withheld by the employer’ are not.” 2018 WL 1401205, at *3.

_Constr. Laborers Tr. Funds for S. Cal. Admin. Co. v. Precision Masonry Builders, Inc._,
No. 2:16-CV-04358-ODW, 2018 WL 1406604 (C.D. Cal. Mar. 19, 2018). Court granted entry of default judgment against Defendants Precision Masonry Builders, Inc. and its owners (individuals), for, inter alia, failure to transmit employee wage deductions to multi-employer plan. “[E]mployee wage deductions intended as plan contributions are plan assets, regardless of whether such money is ever, in fact, conveyed to the plan.” 2018 WL 1406604, at *6 (citing 29 C.F.R. § 2510.3–102).

_Haley v. Teachers Ins. & Annuity Ass’n, No. 17-CV-855 (JPO), 2018 WL 1585673 (S.D.N.Y. Mar. 28, 2018)._ TIAA (and Vanguard) administered participant loans for Washington University Retirement Savings Plan. For loans administered by TIAA, portion of participant’s account balance was transferred to TIAA’s general account, where it served as collateral for participant's loan. Court held that the amount serving as collateral was a plan asset because it was “drawn from Plaintiff’s contributions.” (And plaintiff could state a claim for prohibited transaction under ERISA § 406(a)(1)(D)).

_Bricklayers & Allied Craftworkers Local 1 of PA/DE v. Torrado Constr. Co., No. CV 17-3297, 2018 WL 2129438 (E.D. Pa. May 9, 2018)._ Court granted summary judgment in favor of plaintiffs in suit against employer for unpaid contributions. In rejecting argument that president and sole shareholder of employer could be held personally liable under ERISA § 409, court held that employee contributions are assets of the plan. Court explained that plan language provided that “benefit contributions become [plan] assets on the day they are due,” and even in the absence of plan language, amounts deducted from employees' wages are plan assets. 2018 WL 2129438, at *5.

E. Starting and Stopping as a Fiduciary

_Members of the Bd. of Admin. of the Toledo Area Indus. UAW Ret. Income Plan v. OBZ, Inc., No. 3:15CV756, 2018 WL 6786234 (N.D. Ohio Dec. 26, 2018)._ This is a case about an employer’s withdrawal liability owed to multiemployer plan, rather than breach of fiduciary duty (or other claim implicating fiduciary status). District court explained that “courts have developed a rule of successor liability under which certain of a seller's liabilities may transfer to the purchaser if the purchaser ‘substantially assumes a predecessor's assets, continues the predecessor's operations without interruption or substantial change, and has notice [of the liability] at the time of acquisition.’” 2018 WL 6786234, at *6 (quoting from and citing Upholsterers’ Int'l Union Pension Fund v. Artistic Furniture of Pontiac, 920 F.2d 1323, 1325 (7th Cir. 1990)). And court further stated that “federal courts across the country have applied the successor-liability rule in ERISA cases involving a predecessor's delinquent contributions to a multiemployer plan as well as its withdrawal liability.” _Id._ (citations omitted). “Under that rule, an asset purchaser may be liable for a seller's ERISA withdrawal liability if the purchaser ‘had notice of the liability prior to the sale and there exists sufficient continuity of operations between the buyer and seller.’” _Id._ Court held that constructive notice was sufficient to satisfy the notice requirement, and undisputed evidence showed that constructive notice existed in this case, but there was genuine issue as to whether there was continuity of operations, so summary judgment was inappropriate and bench trial would be necessary.
III. Plan and Trust Requirements

A. Formal Requirements

1. Written Instrument

_Carlson v. Northrop Grumman Corp._, Case No. 13-CV-02635, 2018 WL 1586241, 2018 Empl. Benefits Cas. 115, 138 (N.D. Ill. Apr. 2, 2018). In this action, where plaintiffs challenged the defendants’ failure to pay cash severance benefits to which plaintiffs contend they were entitled, the court concluded that both component documents, other documents for other component plans, and the wrap document constitute “the ERISA Plan.” The court concluded that based on “on a logical reading of the ERISA Plan documents as a whole,” the deferential, arbitrary and capricious standard of review to the denial of the plaintiffs’ claims applies.

_Daly v. Metro. Life Ins. Co._, Case No. CV-17-95-LPS, 2018 WL 4700224, 2018 Empl. Benefits Cas. 357,183 (D. Del. Sept. 30, 2018), appeal docketed, No. 18-3400 (3d Cir. Oct. 29, 2018). The court concluded that because the plan confers discretionary authority upon MetLife, the court must review MetLife’s benefits determinations under the arbitrary and capricious standard of review. The plaintiff, however, had argued that the language granting discretionary authority to MetLife is not part of the “Plan Documents,” a category that is limited to the certificate of insurance. Disagreeing with this argument, the court noted that the “Discretionary Authority” provision is located in the “ERISA Information” section immediately following a page containing this statement: “This is the end of the certificate. The following is additional information.” The court concluded that “the Plan” includes the certificate of insurance as well as the “additional” ERISA information section (which includes information that law requires the employee to be given). The court observed that no Third Circuit opinion addresses what documents can be considered as a part of a plan for the purpose of determining whether the plan gives the administrator discretionary authority; citing a myriad of other decisions, the court concluded that “all relevant documents must be considered.”

_Moore v. Life Ins. Co._, Case No. 6:17-CV-00030, 2018 WL 1461502 (W.D. Va. Mar. 23, 2018). In deciding whether an abuse of discretion or _de novo_ standard of review applies to the defendant’s decision to cease paying benefits under an ERISA-covered plan, the court concluded that the Plan provided the defendant with the discretion to decide claims. In reaching this conclusion, the court concluded that an “Appointment of Claim Fiduciary” form was in the record, and that this form constitutes part of “the ERISA Plan.” The Appointment of Claim Fiduciary form granted the defendant “the authority, in its discretion, to interpret the terms of the Plan, including the Policies, to decide question of eligibility for coverage of benefits under the Plan; and to make any related findings of fact.” The court was “convinced” that the Appointment of Claim Fiduciary form is part of the ERISA Plan, and explained that the Seventh Circuit’s decision in _Raybourne v. Cigna_, 576 F.3d 444 (7th Cir. 2009), where that court reached the same conclusion, was “squarely on point.”

_Saginaw Chippewa Indian Tribe v. Blue Cross Blue Shield_, --- F. App’x ----, No. 17-1932, 2018 WL 4183717 (6th Cir. Aug. 30, 2018). The court held that the presumption that employee health benefits offered by an employer constituted a single ERISA plan was not applicable here. The tribe provided coverage under a member policy only to tribal members
rather than employees of the tribe, and the tribe was not acting in its capacity as an employer when it offered tribal members, some of whom also happened to be employees, benefits under the member policy. The tribe’s health insurance group policies for its members and its employees were separate plans, rather than two benefit options offered to employees, even though the same plan administrator administered both policies. The policies, however, were funded from different sources, and employees who received coverage under the member policy did so only because of their status as tribe members, not because they worked for the tribe.

2. Named Fiduciary

Nothing to report.

3. Plan Content


_Vest v. Resolute FP US Inc., 905 F.3d 985 (6th Cir. 2018)._ The court held that the employer, as an ERISA fiduciary, had no statutory duty to exercise its own initiative and notify a 30-year employee that he needed to act within 31 days to convert his optional group life insurance policy to an individual life insurance policy, after he became unable to work because of diabetes and began to draw disability benefits. Under ERISA, the fiduciary was only required to provide plan participants a summary plan description and information about the benefits plan, and if the participant requested information, to respond in an accurate and non-misleading way.

b. Optional Provisions

Nothing to report.

B. ERISA’s Trust Requirement

Nothing to report.

1. General Rule

Nothing to report.

2. Exceptions to the Trust Requirement

3. Delegation of Trustee Asset Management Authority

4. Assets Held by Two or More Trustees

C. Indicia of Ownership of Plan Assets Outsides the United States

Nothing to report.

D. Allocation and Delegation of Fiduciary Responsibility

Nothing to report.
1. **Responsibility of Named Fiduciaries**

   *Nothing to report.*

2. **Directed Trustees**

   *Nothing to report.*

3. **Investment Managers**

   *Nothing to report.*

IV. **Fiduciary Standards Under Section 404**

   A. **Exclusive Purpose Rule**

      1. **In General**

      *Acosta v. Brain, 910 F.3d 502 (9th Cir. 2018).* Secretary of Labor brought suit against a former trustee of five employee benefit trust funds and against the former counsel of the trust funds for violations of ERISA’s anti-retaliation and fiduciary duty provisions. While the district court found violations both under ERISA Sections 510 and 404, the Ninth Circuit affirmed the district court’s ruling with respect to the anti-retaliation provisions of Section 510, but reversed the district court’s ruling with respect to the fiduciary duty provisions of Section 404. The Ninth Circuit found that the former trustee was not wearing his fiduciary hat when he placed the whistleblower, the director of the trust funds’ audit and collections department, on administrative leave. The Ninth Circuit reasoned that Section 404 plainly states that fiduciaries owe their duties to participants and beneficiaries, not employees. The Ninth Circuit rejected the Secretary’s contentions that the trustee’s duty of loyalty extended to all who served the plan and its administration, to decisions on hiring, firing, disciplining, and compensating service providers, and that participants and beneficiaries were harmed financially as a result of placing the director on leave. The court further noted that any financial harm under Section 404 was not disaggregated from the Section 510 violation, and that the Secretary did not “allege or prove any standalone breach of fiduciary duty independent of [the trustee’s] retaliatory conduct.”

      *Negron v. Cigna Health & Life Ins., 300 F. Supp. 3d 341 (D. Conn. 2018).* Plaintiffs brought putative class action against Cigna Health and Life Insurance Company and OptumRx, Inc. for breaches of their fiduciary duties of loyalty and prudence, among other things, alleging that defendants artificially inflated prescription drug prices. Defendants filed a motion to dismiss, which the district court granted in part and denied in part. With respect to Plaintiffs’ ERISA Section 404 claims, the district court denied defendants’ motion to dismiss. Plaintiffs alleged that defendants breached their fiduciary duties of loyalty and prudence by arranging for undisclosed spread amounts and taking clawbacks. Defendants argued that a claim was not plausible because the cost-sharing arrangements were legal and they did not have a duty to disclose the spread and clawback arrangements. The district court noted that ERISA fiduciaries have a duty to avoid intentional misrepresentations about plan terms, that they must provide accurate and complete explanations of benefits, and that they have a duty to disclose material facts to beneficiaries for the beneficiaries’ protection. The district court ruled that the complaint included plausible
breaches of the duty of loyalty as defendants profited from the spread and clawbacks, as well as from breaches of the duty not to misrepresent since the cost-sharing payments for prescription drugs differed from the plan terms.

In re EpiPen ERISA Litig., 341 F. Supp. 3d 1015 (D. Minn. 2018). Participants in this consolidated putative class action against several pharmacy benefit managers alleged that the benefit managers’ negotiations with the pharmaceutical manufacturing company of epinephrine auto-injector pens (“EpiPens”) caused the company to raise EpiPen prices. As a result, the benefit managers profited through rebates and other payments, while participants’ out-of-pocket expenses rose dramatically. The benefit managers moved to dismiss the complaint. Denying the benefit managers’ motion to dismiss with respect to whether the participants failed to state a claim for breach of fiduciary duties, the district court found that participants plausibly alleged that the benefit managers’ breached their duties under ERISA Section 404 in asserting that the benefit managers “negotiated such large ‘rebates’ and other expenses from Mylan that it causes Plaintiffs’ out-of-pocket expenses for EpiPens to increase exponentially.”


2. Plan Design Decisions

Eckert v. Chauffeurs, Teamsters & Helpers Local Union 776 Profit Sharing Plan, 306 F. Supp. 3d 659 (M.D. Pa. 2018). Participants brought suit against union serving as plan administrator, as well as plan trustees, for breaches of their duty of loyalty and duty to follow plan documents. Defendants brought a counterclaim against one participant who served as a union official for breaching his duty of loyalty. The case involved the denial of contributions and earnings for participants’ first year of union employment relating to a plan amendment and waiver of a one-year-in-service requirement. After a bench trial, the district court ruled that participants did not establish by a preponderance of evidence that the union and two trustees had violated their duties because the defendants’ decision to deny benefits was based on their belief that the plan amendment was invalidly enacted; “defendants’ decision was premised on an erroneous assumption but does not constitute a breach of fiduciary duty.” With respect to the counterclaim, the district court ruled that the participant who also served as trustee did not breach his duty of loyalty. The court noted that employees had asked for the waiver, unelected staff were apprehensive about making investment decisions without guidance, and both elected and appointed union officials believed the one-year-of-service requirement was an unnecessary penalty for formal positions with the union. As a result, the participant trustee recommended an investment advisor, changing the contract administrator to another, and the waiver of the one-year-in-service requirement. The court ruled that the recommendations were in the participants’ best interests and consistent with the participant trustee’s fiduciary obligations. Furthermore, even though the participant trustee incidentally benefitted from this vote to approve the plan
amendment, the presence of four disinterested officers who voted for the amendment ensured that there was no loyalty breach.


3. **Fiduciary Expenses Distinguished from Settlor Expenses**

_Nothing to report._

B. **Prudence Rule**

_Nothing to report._

1. **Procedural Prudence**

_Brotherston v. Putnam Invs., LLC, 907 F.3d 17 (1st Cir. 2018), petition for cert. filed, (U.S. Jan. 11, 2019) (No. 18-926)._ Participants of employer’s own retirement plan brought class action against employer and other fiduciaries alleging that defendants breached their fiduciary duties by offering all of the employer’s own mutual fund investments, and doing so exclusively for most of the class period, without determining whether they were prudent investments. Participants further alleged that the employer structured fees and rebates both unreasonably and treating participants worse than other investors in the employer’s funds. After a hearing and a bench trial, the district court entered judgment against participants. The First Circuit affirmed the district court’s ruling in part, and vacated and remanded in part. With respect to the duty of prudence, participants argued that defendants violated their duty by not implementing or following a prudent objective process to investigate and monitor each plan investment based on cost, redundancy, or performance. The district court terminated the trial before the defendants could present their defense and did not make a definitive ruling on whether the violation occurred. The district court tentatively concluded that participants’ evidence would be sufficient to support a breach because a defendant failed to monitor the investments independently. Since defendants did not appeal, presumably because of the tentative nature of the district court’s conclusion, the First Circuit accepted that determination and continued to other elements of the breach. With respect to the duty of loyalty, participants argued that defendants breached their duty by including the employer’s funds by fiat, keeping the funds even though they were underperforming, hiding evidence that the funds were underperforming, and not considering other investment options. The Second Circuit agreed with the district court’s dismissal of participants’ claim. The Second Circuit found, *inter alia*, that the district court did not err in requiring a showing of the employer’s improper motivation and more than simply pointing to prohibited transactions. The Second Circuit also found that the sufficiency of evidence regarding improper motivation was not at issue on appeal.

_Meiners v. Wells Fargo & Co., 898 F.3d 820 (8th Cir. 2018)._ Here, the court affirmed dismissal of a putative class action by former 401(k) participants finding that plaintiffs failed to demonstrate the fiduciaries breached their duties by maintaining proprietary investment funds as plan options and by making these funds the plan’s default investment option. The court reasoned plaintiffs did not make the necessary claim that the investment options underperformed, but instead made the inapposite argument that a comparator fund performed better.
Moreno v Deutsche Bank Americas Holding Corp., No. 15-9936, 2018 WL 2727880 (S.D.N.Y. June 6, 2018). Here, the court allowed a claim to survive summary judgment that challenged the prudence of selecting and retaining proprietary mutual funds in a 401(k) plan’s investment portfolio. The Court noted that in analyzing this claim the core issue was not “Did Plaintiffs’ investments perform satisfactorily despite Defendants’ breach of their duties?” but rather “Could Plaintiffs’ investments have performed better had Defendants not breached their fiduciary duties?” While the court stated this proposition, it allowed to survive summary judgment whether there had been a cognizable loss to the plan. Key to this decision was that the experts proffered by each side disagreed as to whether there had been a loss.

2. Use of Experts as Part of Procedural Prudence

Nothing to report.

3. Other Prudence Issues

Hart Interior Design, LLC 401(k) Profit Sharing Plan v. Recorp Invs. Inc., No. 16-2347, 2018 WL 1961643 (D. Ariz. Apr. 26, 2018). Here, a 401(k) plan sued alleged plan fiduciaries arguing that they breached their fiduciary duties by pursuing unmerited litigation. As plan assets were used to litigate the allegedly meritless claims, the Court held that that if the plan could demonstrate that these lawsuits were without merit, they could demonstrate a breach of the duty of prudence and then recover the expenditures related to those lawsuits.


4. Safe Harbor Rule - Modern Portfolio Theory

Nothing to report.

C. Diversification Rule

Nothing to report.

1. In General


2. Individual Account Plans

Harmon v. FMC Corp., Civil Action No. 16-6073, 2018 WL 1366621 (E.D. Pa. Mar. 16, 2018). Plaintiffs brought suit against the FMC 401(k) plan fiduciaries claiming the fiduciaries breached their fiduciary duties to monitor plan investments and remove alleged imprudent ones. Specifically, plaintiffs claimed the fiduciaries breached their duties by keeping the Sequoia Fund in the Plan because the Sequoia Fund itself was not diversified. The plan offered over thirty investment options including the Sequoia Fund which for while was primarily invested in Valeant Pharmaceuticals. After Valeant’s stock price dropped, the Sequoia Fund sold its shares and as a result of the high concentration did not meet its benchmarks. Plaintiffs claim
that defendants should have removed the Sequoia Fund from the investment line up before the Fund became so heavily invested in Valeant because the investment policy required diversification. Defendants argued that the investment policy mandated the plan itself be diversified, not each individual investment. The court agreed with defendants. The court first held that Section 404(c) allow plans to include undiversified investment options as long as the plan is diversified as a whole and that a common sense reading of the plan documents led to the same interpretation. The court dismissed the prudence and duty to diversify claims because ERISA and the plan did not require each individual investment option to be diversified, and Plaintiff failed to allege any evidence for the court to infer that the fiduciaries’ decision-making process in deciding to keep the Sequoia Fund was flawed.

D. Plan Document Rule


V. Application of the Section 404 Fiduciary Standards

A. Fiduciary Communications

1. Misrepresentations and Failures to Disclose With Respect to Existing Plan Terms of Circumstances

_Schuman v. Microchip Tech. Inc._, 302 F. Supp. 3d 1101 (N.D. Cal. 2018). Participants brought putative class action against former and successor employers and severance benefit plan alleging that employers breached their fiduciary duties under ERISA Section 404 in making misrepresentations to participants regarding severances in the course of a merger. Defendants filed a motion to dismiss, which the district court granted in part and denied in part. The district court ruled that participants sufficiently alleged their breach of fiduciary duty claim involving misrepresentation because they alleged that the employer misled participants by telling them that the plan expired on a certain date and that it was not responsible for paying severance benefits to employees terminated without cause. Participants also alleged that the employer did not tell terminated employees that the plan still existed and was in effect. The court rejected defendants’ argument that because employees still filed claims for benefits after the employer “expressed its opinion” any suggestion that participants believed the employer made the statements as a fiduciary were negated. The court reasoned that this argument amounted to defendants arguing that because employees filed for benefits despite misrepresentations discouraging them to do so there was no cause of action.


a. Where a Participant Has Inquired

_In re DeRogatis_, 904 F.3d 174 (2d Cir. 2018). Beneficiary brought suit against trustees for benefits and breaches of fiduciary duties of loyalty and prudence involving misrepresentations made to a participant and his beneficiary before the participant’s death regarding how and when they should apply for benefits under a pension plan and a welfare fund.
The district court granted summary judgment to defendants, and the beneficiary appealed to the Second Circuit. With respect to the pension plan at issue, the Second Circuit affirmed summary judgment because the pension plan summary plan description (SPD) clearly communicated the benefit eligibility requirements. Unlike *Estate of Becker v. Kodak Co.*, 120 F.3d 5 (2d Cir. 1997), there was no combination of an unclear SPD and misrepresentations by the fiduciaries or their agents. In regard to the welfare fund, the Second Circuit reversed the district court’s decision finding that the beneficiary may be able to show a fiduciary breach. The Second Circuit ruled that drawing all reasonable inferences in the beneficiary’s favor, the record supported the assertion that neither the plan documents nor the fiduciary’s agents clearly explained how the participant’s retirement would impact health care coverage given a “murky” SPD, a certain letter, and other statements made.

b. Where a Participant Has Not Inquired

*Nothing to report.*

c. Retiree Health Benefits

*Nothing to report.*

d. Disclosures Concerning Financial Information

*Nothing to report.*

e. Fiduciaries’ Knowledge of Misrepresentations

*Nothing to report.*

2. Misrepresentations and Failures to Disclose With Respect to Prospective Plan Terms or Circumstances

a. Affirmative Material Misrepresentations

*Nothing to report.*

b. Liability for Silence

*Nothing to report.*

3. Duty to Produce Documents Upon Request

*Nothing to report.*

4. Duty to Disclose Other Fiduciaries’ Breaches

*Nothing to report.*

5. Fiduciary Communications in Connection With Employer Stock
6. **Right of Action and Remedies**

Nothing to report.

**B. Selection and Monitoring of Service Providers**

*Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018), appeal docketed, No. 18-2707 (2d Cir. Sept. 12, 2018). *See* section V.F.


**C. Collections**

Nothing to report.

**D. Benefit Administration**

*Saginaw Chippewa Indian Tribe v. Blue Cross Blue Shield*, --- F. App’x ----, No. 17-1932, 2018 WL 4183717 (6th Cir. Aug. 30, 2018). Here, the court found plaintiff stated a potential breach of fiduciary duty claim in alleging that an administrator paid more than was necessary for medical claim. Specifically, plaintiff alleged the administrator did not take advantage of federal regulations that permit Indian Tribes to pay reduced rates for services provided by Medicare-participating hospitals.

**E. Employer Securities Issues**

1. **Hostile Tender Offers**

Nothing to report.

2. **Employee Stock Ownership Plans**

*Acosta v. Vinoskey*, 310 F. Supp. 3d 662 (W.D. Va. 2018). Secretary of Labor brought suit against employer, chief executive officer, and two other alleged fiduciaries for ERISA violations stemming from the approval of an ESOP’s purchase of employer stock at an inflated price. The Secretary, as well as some of the defendants, moved for summary judgment. With respect to defendant Evolve, trustee on behalf of the ESOP, the Secretary alleged that Evolve violated its fiduciary duties of prudence and loyalty to the ESOP in paying more than adequate consideration for employer stock. The Secretary further alleged that Evolve also violated its duties of prudence and loyalty by allowing the per-share value of existing stock held by participants to decrease. Among other things, Evolve argued that the court should review its behavior for abuse of discretion citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). The district court found that extending *Firestone* deference would be inappropriate and reviewed Evolve’s actions *de novo*. Ultimately, the district court denied summary judgment with respect to Evolve and the ESOP paying more than adequate consideration. The district court
noted that there were material disputes as to whether: projections for the company should have
been created, the valuation expert was independent; a 2010 appraisal was reasonable; the ESOP’s
attorney was independent; and whether the lack of negotiation was problematic. The court also
noted that there was no clear time frame that a fiduciary should devote to a transaction. With
respect to the decrease of value of current stock decreasing, the district court granted summary
judgment for Evolve. After excluding the Secretary’s expert testimony on these damages finding
unreliable methodology, the court ruled that the Secretary could not provide evidence of the
value of the existing stock.

2018), appeal docketed, No. 18-20379 (5th Cir. June 12, 2018). Participants brought putative
class action against plan administrators alleging that defendants breached their fiduciary duties of
diversification and prudence in spin-off by retaining parent company’s stock in the fund.
Defendants filed a motion to dismiss, which the district court granted. The district court ruled
that participants failed to state a claim under diversification because the fiduciaries did not have
power to allocate assets to the relevant funds since the relevant funds were no longer an
investment option and because participants could remove their assets from the funds. Defendants
did not require participants to keep their assets in the funds and participants did not allege that
the rest of the investment options were not diversified. The district court further found that
participants failed to state a claim with respect to prudence because Dudenhoeffer’s requirement
of special circumstances applied and participants did not plead any special circumstances, and
because participants did not allege specific facts about the process to evaluate the funds or that
an adequate investigation would have revealed more than public information establishing that the
funds were risky.

3. Employer Securities Held in ESOPs and Participant-Directed
    Individual Account Plans

Kopp v. Klein, 894 F.3d 214 (5th Cir. 2018). Here, the Fifth Circuit affirmed dismissal
of fiduciary breach claim regarding disclosures about stock fund, where among other things no
cognizable allegation that public information existed reflecting that market price of company
stock was not fair assessment of stock’s value and where “hiding adverse information about the
company” could be viewed as protecting the value of company stock price.

Graham v. Fearon, 721 F. App’x 429 (6th Cir. 2018). The Sixth Circuit affirmed
dismissal of a claim alleging that failure to disclose information about Company stock was a
fiduciary breach, finding that disclosure of the negative information might have been more
harmful than beneficial due to the risk of market over-reaction.

In re SunEdison, Inc. ERISA Litig., 331 F. Supp. 3d 101 (S.D.N.Y. 2018), appeal
docketed, No. 18-2621 (2d Cir. Aug. 31, 2018). A district court dismissed allegations that ESOP
fiduciaries breached the duty of prudence by continuing to offer a stock-fund when they knew
Company was in “extreme financial peril” as no “special circumstances” suggested the stock
price was riskier than its price suggested, disclosing additional non-public information may have
lowered the stock price further than the Company’s health justified and plaintiffs failed to
plausibly allege that a reasonable fiduciary would have changed the investment line-up to
remove the stock-fund.
Here, an ESOP claim survived a motion to dismiss as it viably pled breaches of loyalty and prudence. Plaintiffs alleged it was imprudent not to disclose the underperformance of a company division based on market studies that early disclosure would have mitigated the eventual decline in stock price.

a. Imprudent Investment Claims

Kinra v. Chi. Bridge & Iron Co., No. 17 Civ. 4251 (LGS), 2018 WL 2371030 (S.D.N.Y. May 24, 2018). Plaintiff brought suit against defendants for breach of fiduciary duty claiming the fiduciaries continued to offer company stock in the 401(k) Plan when they knew or should have known the price of the stock was improperly inflated. In dismissing the claim, the court held that the complaint lacked specific factual allegations about what defendants knew or should have known about the valuation of the company stock and that the workers jumped to conclusions by assuming the retirement committee knew or should have known the company’s stock prices were “overvalued” and due for a fall because of a nuclear project collapse. The court also found that even if the fiduciaries “knew,” their claim failed because the complaint did not list a plausible action the committee could have taken before the stock price fell. While the plaintiff proposed several actions including freezing the purchase of company stock in the Plan, the court found plaintiff’s ideas either violated securities laws or would have been viewed as more likely to harm the fund.

b. Disclosure Claims

In re Wells Fargo ERISA 401(k) Litig., 331 F. Supp. 3d 868 (D. Minn. 2018), appeal docketed sub nom., Allen v. Wells Fargo & Co., No. 18-2781 (8th Cir. Aug. 20, 2018). ESOP participants brought suit against employer and fiduciary corporate insiders alleging that they breached their duties of loyalty and prudence by failing to disclose unethical sales practices that caused a price drop in the employer’s stock after the employer and the federal government announced the practices. Defendants filed a motion to dismiss the complaint, which the district court granted. Among other things, defendants argued that the court should apply the Dudenhoeffer pleading standard to loyalty claims, as well as to prudence claims. The pleading standard in Fifth Third Bancorp v. Dudenhoeffer requires plaintiffs to allege that prudent fiduciaries could not have concluded that disclosing the practice at issue would do more harm than good to the fund. 134 S. Ct. 2459 (2014). The district court ruled that Dudenhoeffer applied to loyalty claims to the extent it requires a rigorous application of the Iqball/Twombly plausibility standard to weed out meritless claims. However, the district court found that the more-harm-than-good standard was inapplicable because it would require plaintiffs to plead something they are not required to prove, i.e., what a prudent fiduciary could have done rather than whether the fiduciary was acting for the exclusive purpose of providing benefits to participants and beneficiaries. Applying the Iqball/Twombly standard to the loyalty claim, the district court found that the claim was not plausible because having an adverse interest is insufficient on its own, corporate insiders do not have a duty to disclose non-public information that might affect the corporation’s stock under ERISA, and affirmatively misleading the general public is insufficient.

Wilson v. Edison Int’l, Inc., 315 F. Supp. 3d 1177 (C.D. Cal. May 29, 2018), appeal docketed sub nom., Wilson v. Craver, No. 18-56139 (9th Cir. Aug. 23, 2018). In a case where participants of the Edison 401(k) Plan alleged that fiduciaries imprudently permitted them to
invest in Edison stock when the stock was artificially inflated, the district court, for the third time, dismissed those claims. Participants brought a class action on behalf of Edison employees who invested in the company stock fund through the 401(k) Plan. In the third iteration of the complaint, plaintiffs claimed that Edison’s stock price was artificially inflated by alleged fraud. Specifically, plaintiffs alleged that the Defendants knew there would be an issue with a settlement related to certain claims with the California Public Utilities Commission (“CPUC”) because there were prohibited undisclosed ex parte communications in violation of CPUC’s rules. After the settlement with CPUC was announced, the price of the stock increased and thus was artificially inflated. Plaintiff claimed that Defendants should have sought permission to disclose the prohibited ex parte communication during the period of time the stock price rose, disclosed it themselves or froze the stock fund to new investments. The court held that again, these allegations did not meet the pleading standard set by the Supreme Court in 

Dudenhoeffer or Amgen. The court held that prudent fiduciaries could have viewed plaintiffs’ alleged alternative actions as more likely to harm the fund than to help it and that the complaint only made non context-specific conclusory allegations that the alternative actions were less likely to harm the fund. The court finally acknowledged that the Dudenhoeffer standard was difficult to meet and allowed the Plaintiff leave to amend their complaint for the third time.

F. Excessive Fee Cases


Sacerdote v. N.Y. Univ., 328 F. Supp. 3d 273 (S.D.N.Y. 2018), appeal docketed, No. 18-2707 (2d Cir. Sept. 12, 2018). Participants of New York University’s (“NYU”) faculty and medical school retirement plans brought putative class action against plan sponsor NYU. Participants alleged that NYU was imprudent in managing and selecting its recordkeepers and not removing certain investment options. After an eight-day bench trial, the district court held that NYU did not breach its fiduciary duty of prudence. The district court found that NYU’s committee for the plans: (1) conducted an appropriate, holistic review of whether to consolidate recordkeepers; (2) conducted sufficiently frequent processes for requests-for-proposals for recordkeepers; (3) engaged in serious and successful negotiation efforts to reduce recordkeeping fees; (4) duly considered the pros and cons of recordkeeping fees though revenue sharing, rather than as a flat per-participant fee; (5) closely monitored investment options for the plans; and, (6) was not imprudent in continuing to offer certain tax-deferred variable annuities as investments. The district court further ruled that participants had failed to adequately show damages for their claims.

Vellali v. Yale Univ., 308 F. Supp. 3d 673 (D. Conn. 2018). Participants brought suit against Yale University (“Yale”), Yale’s vice president of human resources, and the fiduciary committee of a plan alleging, inter alia, that defendants breached their duties of loyalty and prudence with respect to locking the plan into a bundling arrangement, excessive administrative fees, and failing to offer institutional shares, offering too many investment options, and not reducing fees or removing certain investments, among other things. Defendants filed a motion to dismiss, which the district court granted in part and denied in part. The district court found that participants had plausibly stated an imprudence claim with respect to the bundling arrangement given their responsibility to monitor and remove imprudent investments, and to reduce
unreasonable high fees. The district court also ruled that participants had plausibly stated an imprudence claim in regards to excessive administrative fees noting that participants alleged that fees were unreasonable high, detailed a deficient decision-making process, provided a comparison of flat fee arrangements versus the plan’s recordkeeping arrangement, highlighted competition among recordkeepers, and included industry experts’ advice, among other things. However, the district court dismissed participants’ claims with respect to offering too many investment options noting a presumption in favor of a broader range of options, as well as participants’ claim on the failure to reduce fees on certain investments since an alternative investment fee with lower fees was not alleged. Nevertheless, the district court denied the motion in regards to the failure to include institutional shares and to remove certain underperforming investments given the stage of the case and specific facts about the investment at issue, respectively. With respect to the duty of loyalty claims, the district court dismissed the applicable counts explaining that plaintiffs offered no theory suggesting that defendants favored themselves or a third-party over participants in their decision making, and that the duties of prudence and loyalty are conceptually distinct from one another.

* Cassell v. Vanderbilt Univ., 285 F. Supp. 3d 1056 (M.D. Tenn. 2018). * Plaintiffs alleged that the Vanderbilt 403(b) Plan fiduciaries breached their duties of prudence and loyalty, and engaged in prohibited transactions. Specifically, plaintiffs alleged that the defendants mismanaged the Plan by paying excessive fees and maintaining poor investment options in various TIAA CREF funds. The court granted defendants motion to dismiss in part. Consistent with the rulings in other university cases, the court rejected plaintiffs’ breach of loyalty claims, explaining those claims simply “piggyback off [plaintiffs’] prudence claims.” With respect to plaintiffs’ prudence claims, the court dismissed as time-barred plaintiffs’ claim that defendants impermissibly “locked in” record keepers and investment options to the extent those claims arose from the initial agreement with the record keeper. The court also dismissed plaintiffs’ claim that the plan offered too many options. However, the court refused to dismiss plaintiffs’ claim that defendants failed to solicit competitive bids for record keepers, insofar as those claims arose within the statute of limitations. The court also allowed plaintiffs’ claims alleging failure to adequately monitor the “revenue sharing” agreements and use of multiple record keepers to proceed. Defendants argued that having multiple record keepers did not mean it paid unreasonable administrative fees because each record keeper was paid a reasonable fee. In response, the court explained that it could not assess the defendants’ factual claim at this stage of the litigation. The court also dismissed plaintiffs’ prohibited transactions claims with respect to maintaining certain investments in the plan, holding that “a decision to continue certain investments, or a defendant’s failure to act, cannot constitute a ‘transaction’ for purposes of the ‘prohibited transactions’ in 29 U.S.C. § 1106.” However, the court refused to dismiss the prohibited transaction claims regarding multiple record keepers who allegedly were “parties in interest” under ERISA.

* Larson v. Allina Health Sys., --- F. Supp. 3d ---, No. 17-cv-03835, 2018 WL 4700332 (D. Minn. Oct. 1, 2018). * Participants brought putative class action against various fiduciary defendants alleging that they breached their duties of prudence and loyalty, among other things. Defendants filed a motion to dismiss, which the district court granted in part and denied in part. With respect to the duty of prudence, the district court ruled that participants failed to state a claim for claims relating to: the automatic enrollment of contributions into set invested options, offering a managed account option, charging participants an unreasonable yearly fee to
participate in the managed account option, failing to offer a collective trust or separate account option rather than mutual funds, allowing the recordkeeper to include its own funds within the core options and mutual fund window, allowing the recordkeeper to include and failing to remove certain high-cost investment options, offering too many investment options, offering duplicative investments, and offering money market funds. The district court denied the motion to dismiss with respect to one high-cost investment option, improperly monitoring recordkeeping fees and not soliciting bids from other recordkeepers, and revenue sharing operating as kickbacks to the recordkeeper. In regard to all duty of loyalty claims, the district court found that participants did not sufficiently plead them since they were identical to their prudence claims and participants did not plead any facts that defendants acted to benefit themselves or the recordkeeper.

**Patrico v. Voya Fin., Inc., No. 16-7070, 2018 WL 1319028 (S.D.N.Y. Mar. 13, 2018), withdrawn, No. 18-1057 (2d Cir. July 24, 2018).** Plaintiffs were participants in the Nestle 401(k) Savings Plan. Plaintiffs brought claims against Voya Financial, the record keeper of the Plan, and several affiliates, asserting claims over investment advice provided by the Financial Engines investment advice algorithm (robo-advice). Specifically, plaintiffs claim that fees collected by the defendants for investment advice were unreasonably high, because the fees exceeded amount actually paid to Financial Engines. The district court, for the second time, dismissed plaintiffs’ claims; holding that defendants were not acting as fiduciaries in setting fees at a level that allowed them to retain an amount in excess of what was paid to Financial Engines and thus, plaintiffs could not proceed with claims that the defendants breached any fiduciary duties or engaged in self-dealing.

**Johnson v. Providence Health & Servs., Case No. 17-1779, 2018 WL 1427421 (W.D. Wash. Mar. 22, 2018).** Plaintiff brought suit against defendants alleging they breached their fiduciary duties by offering investment options in the Providence 403(b) Plan that carried excessively high fees instead of lower-cost alternatives and paid unreasonable and excessive recordkeeping fees. The court first found that plaintiff’s claim that defendants breached their duty of prudence by failing to remove at least 17 mutual funds in a high-cost share class when identical lower-cost share classes were available was plausible because similar allegations had met the plausibility threshold in other case. However, the court dismissed plaintiff’s claim of excessive recordkeeping fees holding that claim was not plausible where defendants repeatedly renegotiated the agreement to lower the fees and plaintiff did not specifically allege how competitively bidding the recordkeeping contract would have provided a greater benefit to the plan than the renegotiations.

**Wildman v. Am. Century Servs., LLC, No. 4:16-CV-00737-DGK, 2018 WL 2326627 (W.D. Mo. May 22, 2018).** The suit was brought by participants of the American Century 401(k) Plan, a Plan containing all affiliated funds, alleging that defendants breached their fiduciary duties and engaged in prohibited transactions in the selection and monitoring of the Plan investments because they only considered affiliated investments in furtherance of their own financial interests rather than the interests of Plan participants. The defendants moved to dismiss the suit both for failure to state a claim and on statute of limitation grounds. The court denied defendants’ motion to dismiss. However, the court granted partial summary judgment to defendants dismissing some of plaintiffs’ prohibited transaction claims. The court held that plaintiffs’ claims failed because the challenged management fees paid out of mutual fund assets
did not come from plan assets. The court refused to dismiss plaintiffs’ breach of fiduciary duty claims and other prohibited transaction claims holding defendants had not provided undisputed facts. Specifically, the company did not put forth undisputed evidence that would allow the court to determine as a matter of law that a hypothetical prudent fiduciary would have made the same decisions as the defendants.

_Divane v Nw. Univ., No. 16-8157, 2018 WL 2388118 (N.D. Ill. May 25, 2018)._ Plaintiffs alleged primarily that defined contribution plan fiduciaries breached their duties by including retail mutual funds in the investment line-up when indexed mutual funds existed with lower administrative fees. The court dismissed this claim, noting that “the amount of fees paid were within the control of participants, because they could choose in which funds to invest the money in their account.” Plaintiffs also claimed the plans impermissibly offered too many investment options, as the number of options made it “virtually” impossible for participants to make investment decisions. The court rejected this argument noting that the wide range of investment options meant that participants had available to them the very type of low fee investment options being advocated by plaintiffs.

_In re M&T Bank Corp. ERISA Litig., No. 16-375, 2018 WL 4334807 (W.D.N.Y. Sept. 11, 2018)._ In a putative class action on behalf of a participants in a 401(k) plan, the court allowed to survive a motion to dismiss allegations that plan fiduciaries used proprietary mutual funds in the plan instead of better performing and less costly comparable options. The Court found these claims were not time-barred (at least at the motion to dismiss stage) because while plaintiffs were provided information regarding the cost and performance of the proprietary mutual funds, plaintiffs alleged they did not have knowledge of less costly and better performing alternatives. The Court also allowed to survive the argument that it was imprudent to maintain mutual funds when similar, but less expensive, investment options existed. See also Velazquez v. Mass. Fin. Servs. Co., 320 F. Supp. 3d 252 (D. Mass. 2018) (Breach of duty of prudence claim survived a motion to dismiss where it alleged that a proprietary mutual fund was maintained as a plan option in a 401(k) plan, despite the existence of less costly alternatives, because the proprietary fund allegedly profited fiduciaries.); Schapker v. Waddell & Reed Fin., Inc., No. 17-2365, 2018 WL 1033277 (D. Kan. Feb. 22, 2018) (Allowed to survive a motion to dismiss a putative class action alleging that plan fiduciaries breached their fiduciary obligations by maintaining an investment line-up composted of between 97%-100% of proprietary investments. The Court found the claim sufficient to survive a motion to dismiss as it alleged that the plan investments underperformed and overcharged fees in comparison to allegedly comparable non-proprietary options and the Court found the claim timely because despite the Form 5500s listing the proprietary nature of the investments participants did not know the process used for selecting/maintaining these options.); Lechner v. Mutual of Omaha Ins. Co., No. 18-22, 2018 WL 6920749 (D. Neb. Dec. 1, 2018) (allegation that 401(k) plan breached the duty of fair-dealing by selecting the sponsor’s subsidiary as an investment option, was sufficient to state a claim given the allegation that the fees paid to the subsidiary were over 3-times the alleged market rate).

G.  **Investment Policy**

1.  **In General**
Nothing to report.

2. Nonfinancial Considerations

Nothing to report.

3. Voting Plan Stock

Nothing to report.

4. Directed Individual Account Plans


   a. Section 404(c) Issues

      Nothing to report.

   b. Cases Addressing Section 404(c)

      Nothing to report.

   c. Other Issues Relating to Directed Individual Account Plans

      Nothing to report.

5. Participant Education

Nothing to report.

VI. Duty to Protect Against Violations by Other Fiduciaries

A. Knowing Participation in or Concealment of Fiduciary Breaches: Section 405(a)(1)

*Acosta v. Chimes D.C., Inc.*, Civil Action No.: RD-15-3315, 2018 WL 6492518 (D. Md. Dec 10, 2018). In connection with claims by plaintiff alleging a multitude of prohibited transactions, the Secretary also brought knowing participation claims against various officers arguing that even if the court found them not to be fiduciaries, they are still liable as knowing participants in the other claims. In denying the claim at summary judgment, the court found that the record did not show that officers received any value from the alleged prohibited transactions and therefore there was no remedy for the claim.

B. Failure to Comply with Section 404(a)(1) Fiduciary Standards: Section 405(a)(2)

Nothing to report.
C. Failure to Correct Another’s Breach: Section 405(a)(3)

Nothing to report.

VII. Liability for Breach of Fiduciary Duty

A. In General

Nothing to report.

B. Preexisting Breaches

*N.Y.C. Dist. Council of Carpenters Pension Fund v. Forde, No.* 11CIV5474LAPGWG, 2018 WL 2455437 (S.D.N.Y. June 1, 2018), *report and recommendation adopted as modified*, 341 F. Supp. 3d 334 (S.D.N.Y. 2018). Two trustees of union pension and annuity funds pled guilty to accepting bribes to ignore conduct by employers that would have required the employers to make contributions to the funds. *Id.* at *3. As part of the plea, the trustees agreed to pay restitution. *Id.* at *3-4. After the criminal proceedings, the funds sued the former trustees for their losses under ERISA and RICO. *Id.* at *1. On summary judgment, the parties disputed whether the amounts in the restitution orders that are attributable to RICO damages also constitute damages under ERISA—a question that had some import for purposes of the funds’ desire to offset one of the former trustee’s pension benefits against the damages he caused the funds. *Id.* at *15. The court determined the restitution orders provide for the damages to the funds under ERISA. Although the restitution orders covered the defendants’ conduct preceding their appointment as trustees, the case law makes clear that fiduciaries remain liable for pre-existing breaches whose effects they could, during the period they were fiduciaries to the plan, have corrected or ameliorated. *Id.* After they became trustees, the court noted, both defendants obviously still retained the knowledge of their previous corrupt acts and took no action whatsoever to remedy the damages they caused. Accordingly, the court found them liable for damages caused by those unremediated acts. *Id.*

C. Burden of Proof and Causation

*Brotherston v. Putnam Invs., LLC, 907 F.3d 17 (1st Cir. 2018), petition for cert. filed,* (U.S. Jan. 11, 2019) (No. 18-926). The First Circuit aligned itself with the Fourth, Fifth, and Eighth Circuits and held 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. *Id.* at 39. In holding so, the Court relied on interpretive guidance from the Supreme Court and the Restatement (Third) of Trusts. *Id.* at 35. First, while courts ordinarily presume the burden rests on plaintiffs to establish essential aspects of their claims, that presumption does not extend to litigants seeking to establish facts peculiarly within the knowledge of an adversary. *Id.* Second, trust law places the burden of disproving causation on the fiduciary once the beneficiary has established that there is a loss associated with the fiduciary’s breach. *Id.*

*Acosta v. Vinoskey, 310 F. Supp. 3d 662 (W.D. Va. 2018).* In a suit brought by the Secretary to recover losses from fiduciaries of an employee stock option plan, the court explained the nature of the claim determines the parties’ respective burdens of proof. *Id.* at 680. For claims brought under section 1104, alleging a fiduciary breached her/his fiduciary duties, the
plaintiff bears the burden of proof. *Id.* This is reversed for claims brought under section 1106, for engaging in prohibited transactions. *Id.* In the latter, and in the context here, a plaintiff only has the initial burden of proof that the transaction was presumptively prohibited because it was between parties in interest. The fiduciary then bears the burden of proving it fits within the exception for transactions of “adequate consideration.” *Id.* As the court summarized, “while the substance of these claims is the same, the parties bearing the burden of proof are different.”

_Schweitzer v. Inv. Comm. of the Phillips 66 Sav. Plan_, 312 F. Supp. 3d 608 (S.D. Tex. 2018), appeal docketed, No. 18-20379 (5th Cir. June 12, 2018). In a suit brought against a fiduciary for allegedly breaching its duty to diversify plan investments, the court explained a plaintiff must demonstrate that the portfolio is not diversified on its face. *Id.* at 618. Once a plaintiff establishes that a plan is not diversified on its face, the burden shifts to the defendant to show why under the circumstances it was prudent not to diversify the investments of the plan. *Id.*

_Hurtado v. Rainbow Disposal Co._, No. 817CV01605JLSDFM, 2018 WL 3372752 (C.D. Cal. July 9, 2018). Plaintiffs brought a claim under § 404(a)(1) against fiduciaries for failing to properly invest plan assets. *Id.* at *13. Plaintiffs alleged the fiduciaries invested 100% of plan assets in short-term treasury obligations. *Id.* The fiduciaries moved to dismiss the claim, contending their investment in short-term treasury obligations was both prudent and in accordance with the plan documents. *Id.* The court noted that when a plaintiff proves a failure to diversify, the burden shifts to the defendant to prove the non-diversification was nonetheless prudent. *Id.* The court denied the fiduciaries’ motion because, it held, “whether a decision was prudent under the circumstances is not amenable for resolution on a motion to dismiss.” *Id.*

_Sims v. BB&T Corp._, No. 1:15-CV-732, 2018 WL 3128996 (M.D.N.C. June 26, 2018). Plaintiffs brought an action under 406(a) against the fiduciaries of a 401(k) plan, alleging they engaged in prohibited transactions. *Id.* at *11. The fiduciaries moved for summary judgment, claiming the transactions were exempt. *Id.* The court followed the Second, Third, Fourth, Eighth, and Ninth Circuits and held the fiduciaries bore the burden of establishing the transactions were exempt from ERISA’s definition of prohibited transactions. *Id.*

_Bekker v. Neuberger Berman Grp. LLC_, No. 16 CV 6123-LTS-BCM, 2018 WL 4636841 (S.D.N.Y. Sept. 27, 2018). Plaintiff alleged the fiduciaries of a plan violated their duties by engaging in prohibited transactions. *Id.* at *1. The fiduciaries moved to dismiss the claim because the Plaintiff failed to specifically allege facts demonstrating the transaction was not exempt under section 408. *Id.* at *7-8. While the court acknowledged that _Lowen v. Tower Asset Management, Inc._, placed the burden of proving an exemption on a fiduciary, the court noted that _Lowen_ did not explicitly characterize such exemptions as affirmative defenses, which a plaintiff need not negate in its pleading. 829 F.2d 1209, 1215 (2d Cir. 1988). Finding the reasoning of the Seventh and Eighth circuit compelling, the court held section 408(b) constitutes an affirmative defense, which a plaintiff has no duty to negate in her/his complaint. 2018 WL 4636841, at *8.

**D. Measure of Loss under Section 409**

_Pender v. Bank of Am. Corp._, 736 F. App’x 359, 373 (4th Cir. 2018). This action
originates out of an unlawful transfer from a class of employees’ 401(k) plan accounts into the general accounts of an employer’s pension plan. Id. at 361. The employees sued for an equitable accounting of the profits. The employer argued it did not profit from the unlawful transfer because the pension plan’s investment strategy for the unlawfully transferred funds performed far worse than the employees’ investment strategies. After a four-day bench trial, the district court agreed with the employer and dismissed the employees’ action as moot. Id. In a 2-1 split that turned on the proportionate-share-of-the-whole approach, the Fourth Circuit affirmed the district court’s decision. The dissent emphasized that the when, as here, funds are mingled with personal funds of a trustee, the beneficiaries ordinarily should receive a proportionate part of the profits realized. Id. at 374-75. The majority, however, found the district court was not required to follow the proportionate-share-of-the-whole approach and could, as the employer argued, attribute gains and losses to the investment strategy applied to the unlawfully transferred assets. The district court’s decision, the court of appeals held, was not a clear error. Id. at 365-72.

1. **Investment Loss Cases**

   *Nothing to report.*

2. **Cases Involving Improper Use of Plan Assets**

   *Nothing to report.*

E. **Extent of Injunctive Relief**

   *Nothing to report.*

F. **Plan and Individual Recovery for Breaches of Fiduciary Duty**

   *Boden v. Saint Elizabeth Med. Ctr., Inc., No. 2:16-cv-00049, 2018 WL 1629866 (E.D. Ky. Apr. 4, 2018).* In this putative church plan class action, the Court denied a motion to dismiss as to a Section 502(a)(2) claim for fiduciary breach. The court rejected defendants’ assertion that plaintiffs lacked standing because they alleged only “contingent and speculative injury[,]” and thus defendants bore no liability for “‘speculative risk of loss.’” Id. at *5. The court found that “when bringing an action to recover on behalf of a plan under ERISA § 502(a)(2), a plaintiff with statutory standing must also show constitutional standing, but need not show individualized injury.” Id. at *5. The court reasoned that requiring individualized injury for a Section 502(a)(2) claim would render its remedy for the plan meaningless. Id. The court concluded that plaintiffs pled facts sufficient to establish standing for their fiduciary breach claim, premised on alleged underfunding of the plan, which created an allegedly “substantial risk” of harm to plaintiffs. Id. at *5-7.

   *Cave v. Delta of Cal., No. 18-cv-01205-WHO, 2018 WL 5292059 (N.D. Cal. Oct. 23, 2018), appeal docketed, No. 18-17134 (9th Cir. Nov. 2, 2018).* The court granted a motion to dismiss plaintiffs’ Section 502(a)(2) claim for fiduciary breach because plaintiff failed to allege that dental claims other than her own were mishandled. Id. at *4.

   *Munro v. Univ. of S. Cal., 896 F.3d 1088 (9th Cir. 2018), petition for cert. filed, (U.S. Nov. 29, 2018) (No. 18-703).* The court held that fiduciary breach claims asserted on behalf of
plans under Section 502(a)(2) fell outside the arbitration clauses in individual employment contracts, and affirmed denial of a motion to compel arbitration. *Id.* at 1094. In doing so, the court acknowledged that the Section 502(a)(2) fiduciary breach claims arose from fiduciary misconduct as to the plans as a whole and were not limited to mismanagement of individual retirement accounts. *Id.* The court reasoned that the relief sought demonstrated that the participants were bringing their claims to benefit their respective plans “across the board, not just to benefit their own accounts.” *Id.*

G. Releases of Fiduciary Breach Claims

*Dorman v. Charles Schwab & Co.*, No. 17-cv-00285, 2018 WL 467357 (N.D. Cal. Jan. 18, 2018). The court rejected defendants’ assertion that plaintiff was barred from pursuing Section 502(a)(2) claims based on a release and class action waiver. *Id.* at *4-5. The court found that this would run afoul of the Ninth Circuit’s decision in *Bowles v. Reade*, 198 F.3d 752, 760 (9th Cir. 1999), wherein the court held that a plan participant cannot settle a Section 502(a)(2) claim to restore plan losses without the plan’s consent. *Id.* at *5. Because the plaintiff brought Section 502(a)(2) and 502(a)(3) claims to restore alleged losses to the plan, he could not release the right to sue in court and/or to file a class action, both of which belonged to the plan. *Id.*

*Fernandez v. Franklin Res., Inc.*, No. 17-cv-06409-CW, 2018 WL 1697089 (N.D. Cal. Apr. 6, 2018). In denying a motion to dismiss, the court found that a release signed by plaintiff was not enforceable as to the plaintiff’s Section 502(a)(2) breach of fiduciary claim. *Id.* at *4. The court found that the release was unenforceable in light of the Ninth Circuit’s decision in *Bowles v. Reade*, 198 F.3d 752, 760 (9th Cir. 1999), wherein the court held that a plan participant cannot settle a Section 502(a)(2) claim to restore plan losses without the plan’s consent. *Id.* at *5. Because plaintiff sought to bring the same type of claim to restore value to the plan, she could not have released the claim, or agreed not to bring a lawsuit asserting that claim, without the consent of the plan. *Id.*

*Nistra v. Reliance Tr. Co.*, No. 16 C 4773, 2018 WL 835341 (N.D. Ill. Feb. 13, 2018). In granting class certification, the court rejected defendants’ assertion that several class members who signed individual releases waiving their right to bring ERISA claims on the plan’s behalf, should be excluded from the class definition. *Id.* at *4. The court noted that there was no reason to think that the releases would be relevant, because the case sought recovery for fiduciary breaches only on the plan’s behalf, and thus neither liability nor damages would be affected by the inclusion of members who signed releases. *Id.*

*Ramos v. Banner Health*, 325 F.R.D. 382 (D. Colo. 2018). In ruling on class certification, the Court rejected defendants’ contention that a named plaintiff was not an adequate representative because she signed an individual release that could be “broad enough to release ERISA § 502(a)(2) claims.” *Id.* at 391. The court found that the plaintiff’s release “at most presents a disputed defense as to claims she had before signing the release,” but appeared to have no effect on any claims arising after that date, nor on any other named plaintiffs. *Id.* This release did not make this plaintiff’s claims “a clear loser” and did not defeat class certification. *Id.* (internal citations omitted).

H. Liability of Non-Fiduciaries for Fiduciary Misconduct
1. Claims Against Nonfiduciary Defendants

Gordon v. CIGNA Corp., 890 F.3d 463 (4th Cir. 2018). The Fourth Circuit affirmed summary judgment in favor of an insurer for a participant’s fiduciary breach claim, which alleged that even if the insurer did not owe a fiduciary duty to the participant, the insurer was nonetheless liable for knowingly participating in a breach of a trust by a fiduciary. Id. at 477. The court assumed, without deciding, that such a cause of action existed against a non-fiduciary. Id. However, the claim would still fail because there was no evidence that the insurer knew about the alleged breach until after it occurred. Id. The court proceeded to note that such a cause of action was “of questionable validity.” Id. at 477 n.2. The court noted that in Mertens v. Hewitt Associates, the Supreme Court noted in dicta that “[W]hile ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries, . . . no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty.” Id. at 477 n.2 (citing 508 U.S. 248, 253-54 (1993)). The court observed that some courts, including the Third Circuit, had cited this dicta from Mertens “as reason to reject” a cause of action against a non-fiduciary for knowing participation in an alleged breach. Gordon, 890 F.3d at 477 n.2.

Bekker v. Neuberger Berman Grp. LLC, No. 16 CV 6123-LTS-BCM, 2018 WL 4636841 (S.D.N.Y. Sept. 27, 2018). The court dismissed a Section 502(a)(3) claim for equitable restitution against several non-fiduciary alleged party in interest defendants who allegedly received the proceeds of prohibited transactions. Id. at *11. Citing Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002), the court reasoned that restitution was not a viable remedy unless the money at issue could clearly be traced to particular funds or property in defendant’s possession. Id. Because plaintiff failed to trace the fees paid in violation of Section 406 to any property or funds held by defendants, or articulate why traceability was not required, the equitable restitution claim was not sustainable against the nonfiduciary defendants. Id.

Cent. Valley Ag Coop. v. Anasazi Med. Payment Sols., Inc., No. 8:17CV379, 2018 WL 2056227 (D. Neb. Mar. 29, 2018). The court denied dismissal of a Section 502(a)(3) claim against non-fiduciary service providers because the complaint plausibly alleged that the nonfiduciaries knowingly participated in fiduciary breaches. Id. at *16-17.

2. The Harris Trust Decision

Nothing to report.

3. Developments After Harris Trust

Nothing to report.

I. Civil Penalty for Breach

Nothing to report.

J. Contractual Exculpation, Insurance, and Indemnification
Hurtado v. Rainbow Disposal Co., No. 8:17-cv-01605, 2018 WL 3372752 (C.D. Cal. July 9, 2018). In an ESOP class action, the court denied a motion to dismiss a claim to void as unlawful indemnity provisions of a plan and trustee engagement agreement to the extent they allowed indemnification for fiduciary breach. Id. at *15-16. The court observed that the Ninth Circuit had found a similar indemnification provision unenforceable, and ruled that because the plaintiffs were likely to succeed in proving fiduciary breach, the right to advancement of defense costs in that case was void. Id. at *16 (citing Johnson v. Couturier, 572 F.3d 1067, 1080 (9th Cir. 2009)). The court reasoned that at the pleading stage, the court had not made any determination regarding plaintiffs’ likelihood of success on the merits as to fiduciary breach claims, and it was not clear whether fiduciaries’ defense costs were being advanced from plan assets. Id. at *16. Thus, dismissal of the claim was premature. Id.

Lawrence v. Potter, No. 2:17-CV-1239 TS, 2018 WL 3625329 (D. Utah July 30, 2018). The court declined to dismiss a claim for contractual indemnification under a plan document. As to defendants’ assertion that the plan provision on indemnity was void under ERISA, the court noted that there had not yet been a determination that there was a fiduciary breach, and the fiduciary was not seeking advancement of her legal fees from the plan. Id. at *15. The court concluded “unless and until the finder of fact determines [defendant] violated her fiduciary duties, it would be premature to dismiss [the] claim for indemnification.” Id.

K. Equitable Contribution and Indemnification

Browe v. CTC Corp., 331 F. Supp. 3d 263 (D. Vt. 2018). After granting judgment for plaintiffs on claims that certain defendants breached their fiduciary duties, the court found in favor of defendants on a counterclaim against a co-fiduciary for contribution and indemnification. Id. at 306. The court noted that while some circuits have held that ERISA does not permit contribution against a co-fiduciary, the Second Circuit has “conclude[d] that incorporating traditional trust law’s doctrine of contribution and indemnity into the law of ERISA is appropriate.” Id. (citing Chemung Canal Tr. Co. v. Sovran Bank/Md., 939 F.2d 12, 18 (2d Cir. 1991). Defendants therefore had a right to seek contribution and indemnification from the breaching co-fiduciary. Id. at 306, 309.

Lawrence v. Potter, No.2:17-CV-1239 TS, 2018 WL 3625329 (D. Utah July 30, 2018). The court dismissed a claim for equitable contribution against a co-fiduciary, noting that there was a circuit split on the issue, although the Tenth Circuit had not yet addressed the issue. Id. at *13. The court noted that although courts are tasked with developing a federal common law under ERISA, “the Supreme Court has cautioned against implying remedies that Congress chose not to include. Simply stated, if Congress had intended to include a right of action for contribution and indemnification it would have done so.” Id. (internal quotations and citations omitted).

Swenson v. Lincoln Nat'l Life Ins. Co., No. 17-0417, 2018 WL 2269918 (W.D. La. May 16, 2018). The court granted a motion to dismiss as to an indemnity claim by a claims administrator against a plan administrator concerning a life insurance dispute. Id. at *2-3. Because the plan administrator did not have any fiduciary duty as to the claims administrator, the court rejected the claims administrator’s theory that indemnity could be recovered resulting from an alleged fiduciary breach by the plan administrator against the claims administrator. Id. at *2.
As to the plan administrator’s argument that there was no right of contribution under ERISA, the court noted the circuit split and assumed, without deciding, that the claims administrator had a right of indemnity against the plan administrator, as a co-fiduciary. *Id.* However, the court observed that the only remaining claim alleged by the participant was for wrongful denial of benefits under Section 502(a)(1)(B), and because under the life insurance policy only the claims administrator was potentially liable to pay the benefits, the claims administrator had no right of indemnity or contribution against the plan administrator. *Id.* at *3. The indemnity claim was thus dismissed. *Id.*

VIII. Prohibited Transactions

A. ERISA


   a. Definition of Party in Interest

   *Allen v. Credit Suisse Sec. (USA) LLC*, 895 F.3d 214 (2d Cir. 2018). The Second Circuit held that the district court properly dismissed prohibited transaction allegations against twelve banks because the banks lacked sufficient authority and control over plan assets to make them fiduciaries in connection with alleged manipulation of foreign exchange markets. Moreover, wrongdoing in performing non-fiduciary services does not transform the wrongdoer into a fiduciary.

   b. ERISA Section 406

   *Nothing to report.*

   c. ERISA Section 407(a)

   *Nothing to report.*

2. Knowledge under Section 406(a)

   *Sulyma v. Intel Corp. Inv. Policy Comm.*, 909 F.3d 1069, 2018 Empl. Benefits Cas. 437, 021 (9th Cir. 2018). For purpose of the three-year statute of limitations, defendant is required to show that the plaintiff was actually aware of the facts constituting the breach, not merely that those facts were available. The court ruled that disputes of material facts as to the plaintiff’s actual knowledge precluded summary judgment.

B. Internal Revenue Code

1. Provisions Covering Prohibited Transactions

   *Nothing to report.*

2. Individual Retirement Arrangement (IRA)
Nothing to report.

C. Penalties for Violation of the Prohibited Transaction Restrictions

1. IRS Excise Taxes

Nothing to report.

2. ERISA Section 502(i) Civil Penalties

Nothing to report.

3. Limitations Period

Nothing to report.

D. Application of the Prohibited Transaction Rules

1. Sale, Exchange, or Lease of Property

Nothing to report.

2. Loans

Nothing to report.

3. Furnishing of Goods, Services, and Facilities

Nothing to report.

4. Transfer of Assets

Nothing to report.

5. Employer Security or Property

   a. Qualifying Employer Security

      Nothing to report.

   b. Qualifying Employer Real Property

      Nothing to report.

   c. Acquisition

      Nothing to report.

   d. The 10-Percent Limitation
Nothing to report.

e. Adequate Consideration

6. Section 406(b)—Fiduciary Self-Dealing

   a. Personal Use of Plan Assets

      Nothing to report.

   b. Acting on Behalf of Adverse Parties

      Nothing to report.

   c. Receipt of Consideration From a Third Party in a Transaction Involving Plan Assets

      Nothing to report.

   d. Fee Payments

      The failure to disclose administrative fees may give rise to Section 406(b) liability. Courts have found triable issues in more than a dozen class action cases challenging management fees paid by Section 403(b) college retirement plans. See, e.g., Cassell v. Vanderbilt Univ., 285 F. Supp. 3d 1056, 2018 Empl. Benefits Cas. 4604 (M.D. Tenn. Jan. 5, 2018) (refusing to dismiss the class claims challenging excessive administrative fees, service providers, and high-fee investment options). To date, four colleges have defeated these cases outright: (1) Sweda v. Univ. of Penn., No. 16-4329, 2017 WL 4179752 (E.D. Pa. Sept. 21, 2017) (granting motion to dismiss), appeal docketed, No. 17-3244 (3d Cir. Oct. 13, 2017); (2) Davis v. Wash. Univ. in St. Louis, No. 17-1641, 2018 WL 4684244 (E.D. Mo. Sept. 28, 2018); (3) Divane v. Nw. Univ., No. 16-8157, 2018 WL 2388118 (N.D. Ill. May 25, 2018); and (4) Wilcox v. Georgetown Univ., No. 18-422, 2019 WL 132281 (D.D.C. Jan. 8, 2019). On July 31, 2018, in Sacerdote v. New York University (NYU), 328 F. Supp. 3d 273 (2d Cir. 2018), appeal docketed, No. 18-2707 (2d Cir. Sept. 12, 2018) the court dismissed all claims against NYU after an eight-day bench trial, the first to be held in a 403(b) plan case. The class subsequently filed a motion for a new trial on October 1, 2018, on the grounds of bias. The motion is set for hearing on January 23, 2019.

E. Exemptions from the Prohibited Transaction Restrictions

1. Statutory Exemptions

   a. Participant Loans - Section 408(b)(1)

      Nothing to report.

   b. Reasonable and Necessary Services - Section 408(b)(2)

      i. Necessary Services
ii. Reasonable Contract or Arrangement

Nothing to report.

iii. Reasonable Compensation

Brotherston v. Putnam Invs., LLC, 907 F.3d 17 (1st Cir. 2018), petition for cert. filed, (U.S. Jan. 11, 2019) (No. 18-926). Following a bench trial, the First Circuit reversed judgment against plaintiffs and remanded. The court of appeal affirmed the district court’s determination that defendant’s fee arrangement did not violate Section 406(a)(1)(C), but remanded for further review of the Putnam revenue sharing arrangements in order to determine whether the Putnam defined-contribution 401(k) plan was treated less favorably than comparably situated plans. Further, with regard to the burden of proving causation, the First Circuit followed the Fourth, Fifth, and Eighth Circuits, requiring that once the ERISA plaintiff shows a breach of fiduciary duty and loss to the plan, the burden shifts to the fiduciary to prove that the resulting investment decision was nevertheless objectively prudent. Putnam is seeking Supreme Court review of the First Circuit decision.

Santomenno v. Transamerica Life Ins. Co., 883 F.3d 833 (9th Cir. 2018). A plan administrator is not a fiduciary when negotiating its compensation with a prospective customer. With regard to alleged breaches after the administrator becomes a fiduciary, the administrator is also not a fiduciary with respect to the receipt of revenue sharing payments where such payment arrangements were fully disclosed before the administrator agreement was signed and did not come from plan assets. The Ninth Circuit distinguished its earlier holding in Barboza v. California Association of Professional Firefighters, 799 F.3d 1257 (9th Cir. 2015), where there was no dispute that the service provider was an ERISA fiduciary.

Saginaw Chippewa Indian Tribe v. Blue Cross Blue Shield, --- F. App’x ----, No. 17-1932, 2018 WL 4183717 (6th Cir. Aug. 30, 2018). In an action challenging administrative fees as a breach of fiduciary duty and self-dealing based on charges by defendant as excessive, the Sixth Circuit affirmed summary judgment for defendant on claim that it charged excessive fees in program to raise level of provider care because the additional amounts came out of an annual fee update.

c. ESOP Loans - Section 408(b)(3)

Nothing to report.

d. Bank Deposits - Section 408(b)(4)

Nothing to report.

e. Insurance Transactions - Section 408(b)(5)

Nothing to report.
f. Ancillary Bank Services - Section 408(b)(6)

Nothing to report.

g. Securities Conversion - Section 408(b)(7)

Nothing to report.

h. Pooled Investment Funds - Section 408(b)(8)

Nothing to report.

i. Plan Distributions - Section 408(b)(9)

Nothing to report.

j. Multiemployer Plans - Section 408(b)(10)

Nothing to report.

k. Multiemployer Transactions - Section 408(b)(11)

Nothing to report.

l. Certain Employer Stock Sales - Section 408(b)(12)

Nothing to report.

m. Retiree Health Account Transfers - Section 408(b)(13)

Nothing to report.

n. Investment Advice - Section 408(b)(14)

Nothing to report.

o. DOL Conflict of Interest (“COI”) Rule

The DOL issued the final “Fiduciary Rule,” which has since been referred to as the Conflict of Interest Rule (“COI Rule”), on April 8, 2016. The COI Rule (1) redefined who is a “fiduciary” under ERISA; (2) amended several existing PTEs, including the PTE 84-24 exemption, to now exclude those who sell fixed indexed annuities (“FIA”) and variable annuities; and (3) created a new exemption available to those who cannot obtain exemptive relief from the prohibited transaction rules with stricter conditions than those under PTE 84-24 (the “Best Interest Contract Exemption” or “BIC” exemption). The BIC exemption allows brokers and advisers to market and sell investments to retail plans and IRA investors. The rules also created the “Principal Transaction Exemption,” which is similar to the BIC exemption, except it applies to transactions where the investment advice fiduciary is acting as a principal in the transaction. On November 27, 2017, in response to a directive from the Trump administration to
review the new rules, the DOL delayed implementation of the BIC exemption and the Principal Transaction Exemption until July 1, 2019.

The new definition of fiduciary replaced the previous five-part test – which had a requirement that investment advice be rendered on a “regular basis” – with a new analysis of when one “renders investment advice.” The DOL determined that such a change was necessary because plan assets in fiduciary-protected plans are frequently rolled over into participant-directed 401(k) plans and other IRAs, which are one-time actions not subject to the prohibited transaction rules under the old test. Likewise, the COI Rule removed from the protective relief of PTE 84-24 insurance agents, insurance brokers, and pension consultants that receive a commission in connection with the sale of FIAs and variable annuities. Those who are still eligible for the PTE 84-24 exemption must sign written contracts with customers stating adherence to certain “Impartial Conduct Standards.” Finally, financial institutions that are fiduciaries under the new definition, but that are excluded from PTE 84-24, can only obtain exemption from the prohibited transaction rules by qualifying for BIC or the Principal Transaction Exemption. This requires fiduciaries to give advice that is in the investor’s best interest, implement policies and procedures that are reasonably and prudently designed to prevent violations of the Impartial Conduct Standards, refrain from incentivizing advisors to act contrary to investors’ best interests, and fairly disclose fees, compensation, and material conflicts of interest associated with their recommendations.

There are special provisions for advisers that recommend a rollover or other arrangement under which they will receive only a “level fee.” After the initial recommendation, these “level fee fiduciaries” must provide advice that generally does not involve prohibited transactions. Level fee fiduciaries are not required to enter into a contract with customers but must comply with the impartial conduct standards and provide certain, more streamlined documentation to customers. A level fee under the exemption is a fee or compensation provided that is based on a fixed percentage of the value of the assets under management or a set fee that does not vary with the particular asset recommended. It is not a commission or other transaction-based fee.

p. Litigation Related to the COI

The Department of Labor has defended the COI Rule against challenges brought by investment firms, the Chamber of Commerce of the United States, and other interest groups. On February 3, 2017, the President directed the Secretary of Labor to review the COI Rule “to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice,” and on April 7, 2017, the Department issued a rule extending the applicability deadline of the COI Rule from April 10, 2017, to June 9, 2017, including an implementation period for the applicability of certain exemptions to the COI Rule until July 1, 2019. During the implementation period which ended on January 1, 2018, financial institutions and advisors were required to comply with the Impartial Conduct Standards, but the Department advised that it will not pursue claims against fiduciaries who are working “diligently and in good faith” to comply with the COI Rule and exemptions. On June 29, 2017, the Department issued a Request for Information, soliciting comments on the COI Rule, and announced that the Department invites collaboration with the Securities and Exchange Commission. Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31,278 (June 29, 2017).
In a consolidated civil action titled, *Chamber of Commerce v. U.S. Dep’t of Labor*, 885 F.3d 360, 63 Empl. Benefits Cas. 1957 (5th Cir. 2018), the U.S. Chamber of Commerce and its co-plaintiffs argue that the new rules unlawfully create a private right of action and violate the First Amendment as applied to truthful commercial speech, and that the DOL acted arbitrarily and capriciously in imposing fiduciary obligations on non-fiduciary speech and disfavoring annuities. The Fifth Circuit issued a 2–1 opinion finding that the DOL exceeded its authority and vacating the fiduciary rule *in toto*. This decision is in stark contrast to an opinion issued by the Tenth Circuit two days earlier, in *Market Synergy Group, Inc. v. United States Department of Labor*, 885 F.3d 676 (10th Cir. 2018), which found that the DOL properly exercised its authority in promulgating the fiduciary rule. After the Fifth Circuit’s opinion, the DOL issued a Field Assistance Bulletin permitting investment advice fiduciaries to continue to rely on the DOL’s temporary enforcement policy set forth above, pending the DOL’s issuance of additional guidance. Temporary Enforcement Policy on Prohibited Transactions Rules Applicable to Investment Advice Fiduciaries, Field Assistance Bull. No. 2018-02 (Dept. of Labor May 7, 2018).

q. **Block Trades - Section 408(b)(15)**

*Nothing to report.*

r. **Electronic Trades - Section 408(b)(16)**

*Nothing to report.*

s. **Additional Service Provider Relief - Section 408(b)(17)**

*Nothing to report.*

t. **Foreign Exchange Transactions - Section 408(b)(18)**

*Nothing to report.*

u. **Cross Trading - Section 408(b)(19)**

*Nothing to report.*

v. **Prohibited Transaction Self-Correction Section 408(b)(20)**

*Nothing to report.*

2. **Scope of Statutory Exemptions: Do They Apply to § 406(b)?**

*See DOL Proposed Conflicts of Interest Rule (E)(1)(o) above.*

3. **Administrative Exemptions**

a. **Class Exemptions**

*See DOL Proposed Conflicts of Interest Rule (E)(1)(o) above.*
b. Individual Exemptions

i. Basic Transactions


PTE 2018-02, D-11869, Liberty Mutual Insurance Co. Permits the applicant to offer investment manager services to Benefit Plans sponsored by applicant Liberty Mutual, based on prior PTE 96-23 (INHAM) provided certain controls are observed, and the parties in interest are either vendors or less than 10% owners of Liberty Mutual. Liberty Mutual is not required to qualify as a registered investment advisor. The conditions are more rigorous than as required in the original INHAM exemption and are similar to those of a register investment advisor.

PTE 2018-03, D-11845, Russell Investment Management. Russell Investment Manager: permits Russell to receive fees from “affiliated funds” for services, when Russell also advises certain Benefit Plans directly holding shares in the Affiliated Funds. PTE also permits Russell to provide investment services to the Benefit Plans indirectly holding shares in the Affiliated Funds, provided the fee is not tied to the amount of assets invested in the Affiliated Fund, i.e., that the fee which is based on total assets is net of a credit applied to the total assets.

PTE 2018-04, L-11867, Toledo Electrical Joint Apprenticeship & Training Fund. Permits the Apprentice and Training Fund to purchase unimproved land from the IBEW Local No. 8 Building Trust for a purchase price equal or greater than the fair market value.

PTE 2018-05, D-11821, EXCO Resources, Inc. 401k Plan. Permits individual account holders to receive transferable subscription rights (the “Rights”) in their accounts in connection with a public offering by EXCO, on the condition that EXCO represents that the Rights resulted from an independent corporate action., that it did not direct or advise the participants with respect to election of the Rights, and that three participants who exercised the Rights are “made whole” as if they participated in the direct offering.

PTE 2018-06, D-11895, The Grossberg, Fox & Beyda LLP Profit Sharing Plan. Permits the sale by the Plan of its LLC interest to an entity owned by the partners in the applicant Grossberg, Fox & Beyda on the condition that this is a one-time sale and for the fair market price.

PTE 2018-07, D-11949, BNP Paribas. Permits BNP to continue to rely on PTE 84-14 allowing it to operate as a QPAM, despite convictions of BNP executives subsequent to issuance of the original exemption. BNP may rely on Exemption 84-14 for a further year, and the relief will terminate upon any further conviction other than those referenced in the Exemption. The DOL granted a series of similar exemptions that would allow the affiliated entities of certain companies that provide fiduciary and investment services to employee benefit plans to continue relying on the qualified professional asset manager (QPAM) exemption, notwithstanding criminal convictions entered in federal court against those companies. Without these exemptions,
the affiliated entities would violate Section I(g) of Prohibited Transaction Exemption 84-14, which states neither a QPAM nor an affiliate of a QPAM may be convicted of certain activities that could bear on financial trust, and the plans would incur significant transaction costs if forced to liquidate investments and reinvest plan assets. In a recent filing with the SEC, BNP Paribas disclosed that the DOL declined to extend the exemption beyond January 31, 2019.

ii. Variations on Class Exemptions

Nothing to report.

iii. Developing Situations

Nothing to report.

4. Special Problems

a. Dual Capacity Trustees

Nothing to report.

b. Fiduciary Compensation

See DOL Proposed Conflicts of Interest Rule (E)(1)(o) above.

c. Employee Stock Ownership Plans and Other Transactions Involving Employer Securities

Nothing to report.

d. Health Savings Accounts

Nothing to report.

IX. Bonding

A. Type of Bond

Nothing to report.

B. Amount of Bond

Nothing to report.

C. Exemptions From the Bonding Requirements

Nothing to report.

X. Statute of Limitations for Breach of Fiduciary Duty Claims
A. Three Years After “Actual Knowledge”

1. First, Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits

*Bernaola v. Checksmart Fin. LLC, 322 F. Supp. 3d 830, 2018 Empl. Benefits Cas. 247, 582 (S.D. Ohio 2018), appeal dismissed, No. 18-3751 (6th Cir. Nov. 26, 2018).* After partially converting motions to dismiss into motions for summary judgment, and ultimately granting the motions, the court held that the plaintiff-participant had actual knowledge of allegedly excessive fees charged for investment options in her 401(k) plan, and the three-year period began to run when the plan disclosed expense ratios to the participant in annual notices and on a website. For the three-year date to apply, the participant did not need to have actual knowledge of the process by which the 401(k) plan’s sponsor, administrators and fiduciaries selected the various investments options with the allegedly excessive fees; instead, the participant was required only to have actual knowledge of the plan’s investment options. “Actual knowledge” does not require that the individual participant actually saw or read the documents that disclosed the investments. Rather, she had actual knowledge when the plan disclosed expense ratios in her initial enrollment kit, in annual notices, and on its website. The court also rejected the plaintiff’s continuing violation theory, explaining that the three-year date is the earliest date of actual knowledge of a breach, even if the breach continues.

*Cassell v. Vanderbilt Univ., 285 F. Supp. 3d 1056 (M.D. Tenn. 2018).* The court held that the issue of whether the plaintiffs’ prohibited transaction claim was barred could not be resolved at the motion-to-dismiss stage of the litigation. There was a factual dispute as to when the participants had actual knowledge of the alleged breaches. The court explained that when a plaintiff claims the fiduciary made an imprudent investment, actual knowledge of the breach, as required to trigger the three-year period, would generally require some knowledge of how the fiduciary selected the investment. Defendants contended that plaintiffs had actual knowledge of any alleged breaches more than three years before filing this action through the annual fee disclosures made available to Plan participants beginning in 2012. Plaintiffs, on the other hand, argue that defendants’ disclosures did not inform Plaintiffs, but rather, they had been harmed by a failure to adequately monitor and manage Plan investments and fees. For example, Plaintiffs state that the information provided by defendants failed to disclose anything about comparable fees or performance of comparable funds, anything about the percentage of fees going to revenue sharing, or anything about defendants’ failure to solicit competitive bids. Plaintiffs allege that defendants chose and maintained imprudent investments with excessive fees; the disclosure of fees alone does not reveal defendants’ selection process or the evaluation they undertook to choose those investments or to choose the record-keepers. The court concluded that it is possible that further development of the record will reveal that Plaintiffs had actual knowledge of these alleged breaches prior to August 10, 2013; however, at this point, the Court could not dismiss this particular count based on the three-year statute of limitations. See also Section X.B. (discussing the same case as to the six-year statute of limitations).

*Stolarik v. N.Y. Times Co., 323 F. Supp. 3d 523, 2018 Empl. Benefits Cas. 317, 730 (S.D.N.Y. 2018).* The court held that the adjustable pension plan trustees failed to establish that a freelance newspaper photographer’s claim for benefits was time-barred; although the photographer was made aware that he was classified as an independent contractor, and therefore, ineligible for benefits at the time he signed the freelance agreement, the repudiation of benefits
occurred approximately nine years prior to the creation of the plan. The newspaper failed to demonstrate that the date of repudiation started the limitations period for benefit plans that did not exist as of the date of repudiation. The court explained that a cause of action under ERISA accrues upon a clear repudiation by the plan that is known, or should be known, to the plaintiff, regardless of whether the plaintiff has filed a formal application for benefits.

*Sulyma v. Intel Corp. Inv. Policy Comm.*, 909 F.3d 1069, 2018 Empl. Benefits Cas. 437, 021 (9th Cir. 2018). Reversing the district court which had granted the employer’s motion for summary judgment, the circuit court held that a genuine issue of material fact as to when the retirement plan participant-plaintiff had actual knowledge of the former employer’s alleged breach of ERISA-prescribed duties. The plaintiff challenged certain investments of plan assets. Acknowledging there’s been “some confusion in our case law over the scope of the ‘actual knowledge’ standard,” the court explains what it means for a plaintiff to have actual knowledge of a breach. “Actual knowledge of the breach” does not mean that a plaintiff has knowledge that the underlying action violated ERISA. Further, it does not mean that a plaintiff has knowledge that the underlying action occurred. Therefore, it “must therefore mean something between bare knowledge of the underlying transaction, which would trigger the limitations period before a plaintiff was aware he or she had reason to sue, and actual knowledge, which only a lawyer would normally possess.” The court then holds, “In light of the statutory text and our case law, we conclude that the defendant must show that the plaintiff was actually aware of the nature of the alleged breach more than three years before the plaintiff’s action is filed. The exact knowledge required will thus vary depending on the plaintiff’s claim.”

2. **Third and Fifth Circuits**

*Nothing to report.*

3. **Fourth and Tenth Circuits**

*Nothing to report.*

B. **The Six-Year Statute of Limitations**

*Cassell v. Vanderbilt Univ.*, 285 F. Supp. 3d 1056 (M.D. Tenn. 2018). In this university fee case, among other counts, plaintiffs contended that defendants breached their fiduciary duties of prudence by committing the Plan to an imprudent arrangement in which certain investments had to be included and could not be removed from the Plan, even if they were no longer prudent investments, and in which the Plan was prevented from using alternative record-keepers who could provide superior services at a lower cost. More specifically, Plaintiffs alleged that defendants agreed to an arrangement with TIAA–CREF that mandated inclusion of TIAA’s Traditional Annuity, locked the Plan into using TIAA as a record-keeper, and locked the Plan into including the CREF Stock and Money Market Accounts as Plan investment options. Plaintiffs claimed this arrangement restricted the Plan’s ability to obtain reasonable fees and to eliminate imprudent investments. Plaintiffs argued that Defendants breached their fiduciary duties by failing to independently assess the prudence of each investment option on an ongoing basis, by failing to act prudently and solely in the interest of the Plan’s participants in deciding whether to maintain a record-keeping arrangement, and by failing to remove investments that
were no longer prudent for the Plan. Defendants argued this claim is barred by the six-year statute of limitations under ERISA. The court held that to the extent Plaintiffs are challenging the initial commitment of the Plan to the TIAA–CREF arrangement, that claim is time-barred, because that initial commitment occurred at the latest in 2009, more than six years from the date the complaint was filed. Accordingly, any claim based upon the initial commitment to this specific alleged “imprudent arrangement” was barred by the six-year statute of limitations. (The court separately considered the “maintaining” claim -- the plaintiffs’ argument that defendants also breached their duty of prudence by maintaining the imprudent arrangement and failing to monitor and remove the CREF stock. The court’s discussion on these issues did not revolve around the statute of limitations.) See also Section X.A.1 (discussing the same case as to the three-year statute of limitations).

*In re Express Scripts/Anthem ERISA Litig.*, 285 F. Supp. 3d 655 (S.D.N.Y. 2018), argued, No. 18-346 (2d Cir. Oct. 19, 2018). The court held that this action, brought by healthcare plan subscribers and fiduciary against the pharmacy benefits manager and health benefits company alleging that the agreement between the manager and the company unlawfully allowed for inflation of prescription drug prices, was not barred. Although the agreement was originally executed more than six years before the complaint was filed, the agreement was renewed within the six-year limitations period. The renewal of a contract implicates a fiduciary’s duty under ERISA to review plan investments and eliminate imprudent ones, and the renewal of a contract that violates ERISA is itself a violation of ERISA. Therefore, a plaintiff may sue under ERISA for the renewal of a contract where the renewal took place within six years of the filing of the complaint even if it the original execution of the contract fell outside the statute of limitations.