Fee Litigation 2017 Round-Up: Recent Developments and Best Practices to Mitigate Risk

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Defined contribution plans, including 401(k) and (for certain nonprofit companies) 403(b) plans, now occupy a key role in providing retirement benefits to the U.S. workforce. The enhanced role of 401(k) and 403(b) plans has thus put increased pressure on plan performance and, since 2006, has led to multiple waves of Employee Retirement Income Security Act (ERISA) litigation challenging the fees and the selection of mutual fund and other investments offered in these plans. The latest wave of litigation began in late 2015 and continued throughout 2017. With more than 35 new class action lawsuits filed challenging the fees and investments in 401(k) and 403(b) plans since October 2016, it appears that the wave has not yet crested.

An overview of some of the key 2017 developments (detailed later in this article) include:

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• Plaintiffs continued to file 403(b) lawsuits against universities and hospitals in 2017, while several motions to dismiss were decided in 403(b) cases in 2017. Most of these lawsuits survived the motions to dismiss but many of the novel theories, such as the alleged imprudence of offering too many investment options, were dismissed.

• Plaintiffs have generally been able to survive motions to dismiss on claims challenging in-house or proprietary funds offered in plans if they can allege some fact that appears consistent with acting in the employer/fund provider’s interest—e.g., limiting the available funds to proprietary funds, having higher-cost proprietary index funds, or using plan investments to seed new proprietary funds.

• Courts have generally dismissed claims related to stable value funds, with the exception of one notable case, which is proposed to settle for $75 million.

• Courts have dismissed claims challenging fees that recordkeepers paid to robo-advisors when these agreements were disclosed and agreed to by the plan fiduciaries.

• Claims challenging the prudence of plan investments have generally survived motions to dismiss when they alleged long-term underperformance of the fund, particularly if the fund had high fees; plaintiffs have also generally survived motions to dismiss if the recordkeeping fees were alleged not to have been monitored and were excessive when compared to alleged comparable benchmarks.

• Plaintiffs have had mixed success on claims that the plans should have offered a cheaper institutional share class instead of a retail share class; typically, these claims have survived motions to dismiss if they alleged that the cheaper share class was identical and there was no obvious reason (such as revenue sharing to lower the plan’s recordkeeping expenses) not to have offered it.

• Fulsome disclosures have defeated claims challenging the riskiness of concentrated funds, and of funds that invest in nontraditional investment options.

• The enforceability and effect of arbitration agreements has become a frequent focus of litigation in these cases. The Supreme Court is currently considering whether the National Labor Relations Act bars agreements in which workers waive
their right to pursue class actions. ERISA also raises the issue of whether these agreements can prohibit suits on behalf of the plan under ERISA Section 502(a)(2).

Plaintiffs again had success in settling fee litigation cases in 2017, which resulted in close to $40 million in attorney's fees. This would help to explain the steady pace of filing new ERISA fee class actions in 2017 (35 to date), including cases against smaller and midsize plans with assets ranging from $2.8 million to $500 million. Plaintiffs also brought claims against a union retirement plan for the fees in a 401(k) plan, again demonstrating that no plan is immune from suit.

However, defendants also had success dismissing fee claims in 2017, including in In re Disney ERISA Litig., White v. Chevron Corp., Meiners v. Wells Fargo & Co., and Sweda v. Univ. of Pennsylvania. These cases show that some courts will take a hard look at claims that attempt to use hindsight and per se cost-focused rules to judge investments, or to label certain investment products, such as money market funds or actively managed funds, as per se imprudent. If followed, Disney and Chevron can also provide important opportunities to limit unwarranted fee litigation. Disney's application of Dudenhoeffer's standards on the importance of using motions to dismiss to weed out meritless claims can save plan fiduciaries and plans from burdensome litigation, which otherwise can force costly settlements and potential adverse changes in plan practices, regardless of the ultimate merits of the claims. This article analyzes these cases and the developing rulings to identify best practices that can help mitigate fiduciary risk, and to help make plans unattractive targets for these lawsuits.

RECENT RULINGS ADDRESSING NEW THEORIES OF LIABILITY

As discussed in the 2016 Update, plaintiffs have expanded their theories of liability in recent filings. Set forth below are recent rulings addressing some of these new theories.

Index/Vanguard Claims

Plaintiffs have started to challenge Vanguard and other index funds in 401(k) plans, arguing that cheaper share classes of the same Vanguard funds were available. Of note, plaintiffs' counsel had previously argued for the inclusion of Vanguard funds as investment options because of their relatively lower fees or conservative
investment strategy. The new claims indicate that no category or type of fund is immune from attack.

The district court in *White v. Chevron* provided an early look into how courts may evaluate these new theories. As background, in 2016 plaintiffs targeted Chevron’s 401(k) plan, a large plan with assets of more than $19 billion. The plan offered participants a diversified array of investment options (with an overall low-cost fee structure), including 12 Vanguard mutual funds, 12 Vanguard collective trust target-date funds, a Vanguard money market fund, and at least six other non-Vanguard investment options.16 Plaintiffs alleged that participants lost more than $20 million through unnecessary expenses as a result of Chevron’s inclusion of 10 Vanguard funds (including some with fees as low as 5 basis points (bps) because, allegedly, there were identical Vanguard funds available with lower-cost share classes. Additionally, plaintiffs alleged Chevron imprudently paid excessive administrative fees to Vanguard as recordkeeper through revenue sharing from plan investment options—specifically, because Vanguard was compensated for a period of time through an asset-based arrangement, its fees increased as the plan’s assets increased.

In 2016 the district court granted defendants’ motion to dismiss in its entirety. The court rejected the claim that Chevron fiduciaries had a duty to offer cheaper institutional-class funds over retail-class funds, noting that price is not the only investment feature that a fiduciary is required to consider when compiling investment options.17 The court also noted that plaintiffs’ allegations suggested that the plan fiduciaries were periodically monitoring fund costs, including by moving to lower-cost funds, and by offering a diverse mix of investment options, including low-cost funds.18 The *Chevron* court also rejected the argument that defendants acted imprudently in compensating the plan’s recordkeeper through revenue sharing. The court noted that when the plan’s assets grew, the plan fiduciaries renegotiated the arrangement to specify a per-participant fee structure. The court also recognized that the fiduciaries’ actions suggested they were indeed monitoring recordkeeping fees and taking steps to ensure that these fees did not become unreasonable.

Plaintiffs, with leave from the court, amended their complaint, but in 2017 the court again dismissed all claims.19 In rejecting plaintiffs’ amended claims of excessive fees, the court reiterated that the test of prudence is whether the fiduciaries employed the appropriate methods to investigate the merits of the investment, and that it was insufficient to merely provide comparisons between funds that were in the plan lineup and funds that plaintiffs claim were less expensive.20 The court also stated that Chevron had provided a valid rationale for being in the retail-class shares, specifically noting that the revenue-sharing
fees associated with these higher-cost share classes paid the plan’s recordkeeping expenses.21

In *Bell v. Anthem*, a case similar to *Chevron*, plaintiffs allege that Anthem’s 401(k) plan (with total assets worth more than $5 billion) failed to leverage its considerable size to demand lower-cost investment options.22 The allegedly “high-cost” investment options included Vanguard funds, with one Vanguard fund offering fees as low as 4 bps.23 Plaintiffs claim that the plan fiduciaries should have used their bargaining power to obtain even lower-cost share classes, in this case an identical lower-cost mutual fund that charged a fee of 2 bps. In contrast to *Chevron*, the district court in *Anthem* denied defendants’ motion to dismiss, reasoning that at the motion-to-dismiss stage plaintiffs had sufficiently alleged it was imprudent to offer higher-cost investment options when the same investment options were available at a lower cost.24 The court did not address the earlier ruling in *Chevron* dismissing similar claims.

**Stable Value Fund Claims**

Plaintiffs also brought claims challenging the decision to not include stable value funds as an investment option in lieu of money market funds, and claims challenging the underlying investment strategy of the stable value funds that were offered.25 These claims did not fare well in 2017, with most dismissed on motions to dismiss or motions for summary judgment.

In *Chevron*, plaintiffs alleged that Chevron fiduciaries breached their fiduciary duties of loyalty and prudence by including the Vanguard money market fund instead of a stable value fund. Using hindsight, plaintiffs argued that stable value funds outperformed money market funds during the class period, and that the decision to maintain money market funds caused plan participants to lose more than $130 million in retirement savings.26 The court found plaintiffs’ attempt to infer an imprudent process from inclusion of a money market fund instead of a stable value fund implausible.27 The court noted that plaintiffs’ focus on the performance of the stable value funds and the money market funds over a period of six years was “an improper hindsight-based challenge to the Plan fiduciaries’ investment decision making.”28

In *Pledger v. Reliance Trust Co.*, plaintiffs alleged that it was imprudent to include a money market fund as the plan’s capital preservation option when stable value funds were available that they allege provided the same level of safety but yielded higher returns.29 Plaintiffs also alleged that it was imprudent and disloyal for Reliance to select a proprietary stable value fund when it eventually added a stable value
Fund to the investment lineup. Relying heavily on White v. Chevron, the court dismissed the claim, explaining that plaintiffs inappropriately challenged “the mere selection of one fund over another, with no allegations (other than hindsight financial comparisons) of why the selection was improper.” The court also characterized plaintiffs’ claim on the stable value fund as one that resembled an attack on the “basic structuring of a Plan” rather than on the day-to-day management.

Likewise, in Bell v. Anthem, plaintiffs alleged that defendants breached their fiduciary duty by including a money market fund as an investment option while failing to prudently consider a stable value fund. The court first noted that there is no duty requiring a fiduciary to “absolutely” offer a stable value fund over a money market fund. The court then rejected as conclusory plaintiffs’ argument that had defendants considered a stable value fund and weighed the benefits, defendants would have favored a stable value fund over a money market fund.

The claims in Chevron, Reliance, and Anthem challenging the failure to include a stable value fund are also noteworthy because, in other cases, plaintiffs have challenged the inclusion of such funds. For example, in Barchock v. CVS Health Corp., plaintiffs challenged the inclusion of a stable value fund that allegedly underperformed because of its alleged overweighting of short-term, fixed-income holdings. The magistrate judge recommended dismissing this claim, finding that allegations of deviations from averages, standing alone, meant nothing; instead, the judge focused on whether the duration and disclosure of the investments conformed to the plan’s disclosed investment objective. In adopting the magistrate judge’s recommendation, the district court cited Dudenhoeffer for the proposition that, in the ERISA context, a motion to dismiss “is an ‘important mechanism for weeding out meritless claims.’” The court viewed plaintiffs’ challenge as based on hindsight because the stable value fund was invested in conformity with its stated investment objectives to preserve capital while generating a steady return at a higher rate than that provided by a money market fund.

In Ellis v. Fidelity Mgmt., participants in the Barnes & Noble 401(k) plan brought claims against the plan’s third-party administrator, Fidelity, asserting that Fidelity’s stable value fund underperformed because of an allegedly excessively conservative investment strategy and high fees. Plaintiffs alleged that Fidelity had previously been overly aggressive with the fund’s investment strategy and had overcorrected to an unreasonably conservative strategy. Ellis illustrates the “Goldilocks” nature of plaintiffs’ claims, in which plaintiffs use hindsight to hold fiduciaries accountable when investment options do not perform as planned. The court initially allowed plaintiffs’ claims to survive defendants’ motion to dismiss, stating that in “complex
ERISA cases like the instant ones, dismissal is often inappropriate." However, at the summary judgment stage the court dismissed all claims, finding that plaintiffs failed to show that Fidelity breached a duty of prudence because Fidelity followed a "procedurally prudent" process, including regularly considering whether to change the stable value funds’ investment strategy. The court noted that "in the face of an undisputed process for making investment decisions, the Plaintiffs cannot carry their burden by vaguely asserting that Fidelity breached its duty of prudence without explaining what actions could constitute the breach." 

Plaintiffs are now bringing claims challenging the underlying investment strategy in other funds offered in 401(k) plans. In a case filed at the end of 2017, the plaintiff alleged that it was imprudent for CenturyLink to offer a large-cap stock fund because the fund's underlying investment strategy was "flawed," causing the plan to underperform its benchmark by 2 percent. Plaintiff alleged that the fund's investment strategy was flawed because it had six investment managers charged with the same investment mandate, five of whom were active managers. Plaintiff alleged that this structure made it highly improbable that the active managers would collectively outperform the market because they would essentially cancel each other out, resulting in what amounted to an expensive index fund. This case bears watching, because other plans may offer multiple actively managed funds with similar investment objectives, and may be at risk for similar claims.

**Claims Challenging the Offering of Guaranteed Benefit Policies**

In a number of cases filed beginning in 2015, plaintiffs have challenged the ERISA-exempt status of stable value funds offered by insurers, including New York Life, Prudential, and Great-West Life. These funds are ERISA-exempt to the extent that they are guaranteed-benefit policies. Plaintiffs principally argue that because the insurers can unilaterally set the rate of return on the investments, the investments are not truly guaranteed-benefit policies. If the investments are found not to offer guaranteed benefits, then, according to plaintiffs’ theories, the insurers that manage the funds are subject to ERISA fiduciary standards.

In 2015 and 2016, these lawsuits survived defendants' initial challenges, and at least two have resulted in the certification of large classes. In Teets v. Great-West Life & Annuity Ins. Co., the district court certified a class of more than 270,000 participants who participated in 13,700 different retirement plans, and in Rozo v. Principal Life
In *Wood v. Prudential Ret. Ins. & Annuity Co.*, however, the court denied plaintiffs’ motion for class certification, in part because determining whether the contracts with Prudential provided guaranteed minimum reasonable rates of return would depend on the terms of thousands of individually negotiated contracts between the retirement plans at issue and Prudential.\(^5^3\)

The court in *Teets* later granted defendants’ motion for summary judgment on all claims.\(^5^4\) The court agreed that the annuity contract offered by Great-West was a guaranteed-benefit policy but found that fact did not resolve the issue. The court explained that even if the contract is a guaranteed-benefit policy, the insurer may still have a fiduciary responsibility to the plan when exercising discretion in administering the underlying contract, such as when the insurer sets the crediting rate.\(^5^5\) The court found here, however, that Great-West was not acting as a fiduciary when setting this rate because it provided plan participants advance notice and the opportunity to reject this rate by moving their investments out of this fund.\(^5^6\)

### Claims Challenging the Offering of Alternative Investments

Plaintiffs also are asserting new theories of liability related to alternative investments offered in 401(k) plans. For example, in *Johnson v. Fujitsu*, plaintiffs challenged investments in target-date funds that allegedly included too many unique and nontraditional asset classes, such as natural resources and real estate limited partnerships.\(^5^7\) In its 2017 decision denying defendants’ motion to dismiss, the district court did not address plaintiff’s novel theory on the target-date funds.\(^5^8\) Instead, the court concluded that plaintiffs’ claims were “within the realm of plausible,” in part, because of plaintiffs’ allegations that during portions of the class period the plan was the “most expensive mega plan” in the country, and that the plan’s recordkeeping fees were 5 to 10 times higher than similar plans.\(^5^9\) Following the district court’s decision on the motion to dismiss, the parties agreed to settle plaintiffs’ claims.\(^6^0\)

In *In re Disney ERISA Litigation*, a consortium of experienced ERISA plaintiffs’ counsel challenged Disney’s inclusion of the Sequoia Fund as an investment option in Disney’s 401(k) plan, principally because this mutual fund had concentrated investments in a pharmaceutical stock that suffered substantial losses in late 2015.\(^6^1\) Plaintiffs claimed the Disney plan should have removed this fund at some unspecified time before then, asserting there were serious concerns and questions about the pharmaceutical company’s business model and accounting methods in the public domain before the stock began its precipitous decline in October 2015.
In 2016, the district court dismissed the original complaint and, in so doing, identified the flaw in plaintiffs’ theory—that is, because the stock price had stayed up after these disclosures, other market investors had rejected these concerns and instead saw positive prospects in the company.62 The Disney court also noted that the Sequoia Fund's concentrated investment strategy was disclosed to the plan participants and that, in the plan's mix of investment options, this concentrated fund was offered as one with higher growth potential and commensurate risk. Finally, the court was skeptical, at least absent special circumstances, of imposing duties on plan fiduciaries to actively monitor not just mutual funds but also their underlying investments in the market.

Plaintiffs then amended their complaint to assert similar claims concerning the Sequoia Fund under a new theory, alleging that it was imprudent to offer this fund because it invested in a “growth stock,” despite having allegedly described itself as a “value” investor.63 In its 2017 decision, the district court rejected plaintiffs' new theory, noting that there is no authority to support the premise that “growth” or ‘value styles’ of portfolio management are preferable to one another”; instead, the relevant inquiry was whether the Sequoia Fund's investments were inconsistent with the representations made to the plan's participants about the fund's investment strategy.64 The court found that the Sequoia Fund's challenged investments in the pharmaceutical company were consistent with these disclosures.65

In Jacobs v. Verizon Commc'ns., Inc., plaintiff alleged that defendants offered participants a 401(k) plan that was “overly complex, overly risky, and layered with excessive fees.”66 One of plaintiff's claims was that the plan's target-date funds were overly risky based on their inclusion of several global equity and high-yield funds in their asset allocation.67 The court found plaintiff's claims insufficient.68 The court explained that it is not per se imprudent to incorporate risky investments into a plan's investment menu, and that the inclusion of risky investments is in line with the U.S. Department of Labor's (DOL) requirement that plans “offer a broad range of investment alternatives that are diversified and have materially different risk and return characteristics.”69

Similarly, in Sulyma v. Intel Corp. Inv. Policy Comm.,70 a participant sued over the inclusion of hedge funds and private equity investments in target date and diversified funds. The participant filed his lawsuit more than three years after he elected these investments, claiming, with the benefit of hindsight, that they had performed unsatisfactorily because of an alleged over-allocation of funds to these alternative investments. The court granted summary judgment, dismissing these claims as time-barred because the participant had ready access to detailed information on the allocation of funds to these investments.71 The court ruled that the participant could not avoid these disclosures by declining to access and read them.72
Claims Challenging Fees Paid to Robo-Advisors

Plaintiffs also have brought claims against plan recordkeepers for receiving allegedly excessive compensation from fees they received from “robo-advisors” that provide plan participants automated investment advice. Plaintiffs’ principal allegations are that the plans’ recordkeepers entered into improper revenue-sharing arrangements with these robo-advisors. For example, in Fleming v. Fid. Mgmt. Trust Co., plaintiffs claim that the plan’s recordkeeper subcontracted to a third party the responsibility for providing participants investment advice services, and that in exchange the third party agreed to pay the recordkeeper a significant percentage of its fees. Plaintiffs allege that the plan recordkeeper’s receipt of a portion of the advice fees is unrelated to any services provided by the recordkeeper, and thus causes the fees for investment advice to become artificially inflated.

The defendant recordkeepers have argued that these claims fail because they are not acting in a fiduciary capacity when they enter into the agreements with the third-party advisory firms. To date, two district courts have agreed with defendants and dismissed these claims. In Fleming v. Fid. Mgmt. Trust Co. and Patrico v. Voya Fin., Inc., the district courts were persuaded by the fact that the agreement with the robo-advisors was disclosed in the recordkeeping agreements between the plan sponsor and the recordkeeper and did not provide the recordkeeper the ability to unilaterally alter its compensation going forward. Therefore, the recordkeepers lacked fiduciary status with respect to this compensation.

OTHER RECENT NOTABLE 2017 FEE LITIGATION RULINGS

In addition to the fee litigation rulings discussed previously, there were several other notable rulings in 2017. These rulings can provide some insight into the way courts will address the myriad challenges and defenses to claims against fiduciaries administering 401(k) and 403(b) plans.

Proprietary Fee Litigation Cases

Plaintiffs generally have had success in surviving motions to dismiss claims challenging the use of proprietary funds, when plaintiffs allege that the decision to include such funds was made to benefit the employer/investment company, such as by charging allegedly excessive fees or by using the plans to provide “seed funding” for the
Defendants, however, achieved early success in *Meiners v. Wells Fargo & Co.* in which the district court dismissed claims that plan fiduciaries breached their fiduciary duties by offering proprietary target-date funds that underperformed allegedly comparable and less-expensive Vanguard funds. The court rejected plaintiff’s underperformance claims because it found that the comparison to the performance of Vanguard funds was improper, because the Vanguard funds had a different investment strategy than the Wells Fargo funds. The court also rejected plaintiff’s claims that the Wells Fargo fund fees were excessive, finding that plaintiff had failed to provide a meaningful benchmark with which to compare the fees, and thus plaintiff’s claim amounted to nothing more than the insufficient contention that Wells Fargo failed to choose the cheapest fund.

Defendants also had eventual success in *Brotherston v. Putnam Invs., LLC,* which became the first case from the wave of fee litigation cases filed in 2015 to reach trial. Plaintiffs alleged that defendants (collectively, Putnam) breached their fiduciary duties of loyalty and prudence and engaged in prohibited transactions by including proprietary mutual funds as investment options, and by failing to offer the cheaper share class of these mutual funds for a significant part of the class period.

Like many of the other rulings in proprietary fund cases, the district court denied Putnam’s original motion to dismiss, allowing plaintiffs’ claims to advance into discovery. The court later denied Putnam’s motion for summary judgment but, after a “case stated” hearing, the court dismissed plaintiffs’ prohibited transaction claims, finding they were either time-barred by the applicable statute of limitations or were subject to prohibited transaction exemptions.

The remaining claims were then tried in a bench trial. After plaintiffs presented their final witness, the court granted judgment for Putnam on partial findings. The court found, based on the totality of the circumstances, that plaintiffs had failed to show that Putnam’s decision to include proprietary funds in the plan amounted to a breach of loyalty because Putnam also made substantial discretionary contributions to the plan (more than $40 million during the class period), provided additional services to plan participants, and paid for recordkeeping expenses. On the duty of prudence claim, the court declined to enter conclusive findings on whether Putnam failed to monitor the plan investments independently, while recognizing that it was ‘perfectly conceivable’ that, if given an opportunity, defendants would present sufficient evidence to rebut plaintiffs’ evidence.

The court determined that it did not need to resolve this issue, however, because it found that plaintiffs failed to establish a *prima facie*
The court stated that plaintiffs' damages theory under their “procedural breach” theory (which assumed the entire investment lineup was imprudent if the monitoring process was flawed) was fundamentally flawed. The court considered this theory an “unwarranted expansion of ERISA’s seemingly narrow focus on actual losses to a plan resulting from specific incidents of fiduciary breach.” The court also concluded that there was no basis to assume that all of the offered Putnam funds were imprudent, given the sophisticated techniques Putnam used as investment manager to monitor its funds. The court also rejected plaintiffs' argument that once a plaintiff makes a prima facie showing of loss, the burden shifts to the fiduciary to disprove loss causation.

Brotherston and Meiners are both on appeal, and the decisions in these appeals should shed additional light on how courts will treat other proprietary fee cases.

### 403(b) Rulings

The 2016 wave of litigation against 403(b) plans in the university setting was influenced by the unique history of these plans. These types of plans have attracted claims because, in light of their history, dating back to when they consisted of a diverse collection of individual annuity accounts, they have tended to have more recordkeepers and unique types of annuity fund options than is common in the 401(k) context.

In 2017, district courts issued rulings on motions to dismiss in nearly a dozen of the 403(b) cases. Most courts allowed plaintiffs' principal claims—that fiduciaries selected and retained investment options that charged excessive fees and consistently underperformed comparable funds—to survive motions to dismiss. This trend appears to be continuing into 2018. The courts have generally found that plaintiffs' allegations were sufficient because they identified specific, expensive, allegedly underperforming funds, instead of merely challenging the fees of the plan as a whole. The courts also generally allowed plaintiffs to move forward with their claims that the plans imprudently paid excessive recordkeeping fees through revenue sharing, and that it was imprudent to retain multiple recordkeepers. Plaintiffs, however, had mixed results when it came to other claims:

- **Claims that the plan offered too many investment options.** Plaintiffs' new theory that it was imprudent to offer too many investment options did not fare well. For example, in *Sacerdote v. N.Y. Univ.*, the district court rejected this theory, noting that “while ERISA requires fiduciaries to
monitor and remove imprudent investments,” it does not require fiduciaries to limit the plans investment options in order to allow the plan to concentrate its assets in one investment option over another.\textsuperscript{104} The court also cited to \textit{Loomis v. Exelon} and explained that courts have “bristled at paternalistic theories that suggest ERISA forbids plan sponsors to allow participants to make their own choices.”\textsuperscript{105}

- **Duty of loyalty claims.** Plaintiffs alleged various disloyal acts by plan fiduciaries related to their relationships with the plans’ recordkeepers in the 403(b) cases, including that it was disloyal to: (1) agree to bundled services with the plan recordkeepers; (2) include a recordkeepers’ proprietary funds in the investment lineup; and (3) fail to consider conflicts of interest associated with the offering of recordkeepers’ proprietary investments in the plans.\textsuperscript{106} The courts that addressed these claims generally found them insufficient because the claims either were based entirely on the duty of prudence allegations, or they failed to assert any allegations that the plan fiduciaries’ actions constituted self-dealing.\textsuperscript{107}

- **Claims based on offering retail share classes.** The courts issued mixed rulings when it came to the claim that it was imprudent to offer retail-class mutual funds in the plans’ investment options when cheaper institutional share classes were available. The courts that dismissed the claims noted that when a wide range of options are offered in a plan, inclusion of retail class mutual funds is not imprudent.\textsuperscript{108} The courts that allowed the claims to move forward have been persuaded by plaintiffs’ allegations that specific retail funds were chosen over identical institutional funds, despite the plans’ substantial bargaining power to obtain lower fees.\textsuperscript{109}

- **Claims for violations of ERISA prohibited transactions rules.** Plaintiffs also had varying degrees of success on their claims asserting violations of ERISA’s prohibited transaction rules. For instance, in \textit{Sacerdote v. N.Y. Univ.}, plaintiffs alleged that the payment of administrative and investment fees to the plan’s recordkeepers through revenue sharing violated ERISA Sections 406(a)(1)(A), (C), and (D) by causing the plan to engage in the: (1) sale or exchange, or leasing, of any property between the plan and a party in interest; (2) furnishing of goods, services, or facilities between the plan
and a party in interest; and (3) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan. In rejecting plaintiffs' prohibited transaction claims, the court noted that "revenue sharing payments or other fee payments drawn from mutual funds' assets and paid" to the plan's recordkeeper are not "transactions involving plan assets." The court then observed that ERISA's use of the term "property" refers to real property and not compensation payments made to plan recordkeepers for "workaday recordkeeping transactions." Finally, the court noted that it was circular logic to claim that a recordkeeper, who becomes a party in interest by providing services to a plan, engages in prohibited transactions "simply because the plans have paid for those services." Other courts have used the same or similar reasoning to reject these claims, while other courts have disagreed and allowed at least some of plaintiffs' prohibited transaction claims to survive motions to dismiss.

Defendants had a complete victory in Sweda v. Univ. of Pennsylvania. In Sweda, plaintiffs alleged many of the same claims discussed previously, including that defendants breached their fiduciary duties of loyalty and prudence by: (1) "locking" the plan into arrangements with the plan's recordkeeper whereby certain investments were required to be offered in the plan for up to 10 years and could not be removed; (2) paying unreasonable administrative fees by using two plan recordkeepers instead of one, and by paying recordkeeping fees through an "asset-based" arrangement instead of a flat per-person fee; (3) paying a "litany" of unreasonable investment management fees by causing the plan to invest in retail share class mutual funds when identical lower-cost institutional share classes were available, and by offering numerous duplicative investment options; and (4) by selecting and retaining underperforming funds. Plaintiffs also alleged that the revenue-sharing arrangement between the plan and the plan recordkeeper amounted to a prohibited transfer of plan assets.

The district court dismissed all of the plaintiffs' claims. The court began its analysis by noting that the standard set forth in Renfro v. Unisys Corp., which requires courts to look at the "mix and range of options and... evaluate[] the plausibility of claims challenging fund selection against the backdrop of the reasonableness of the mix and range of investment options," prevents plan participants from "second-guessing a plan fiduciary's investment decisions just because they lose money." The court found that the locking-in claim was implausible given that this is a common practice across the business world that allows parties to obtain better terms in
exchange for agreeing to longer periods of contract. The court found the same flaw in the argument that having multiple recordkeepers, which each had their own bundled investment options, was imprudent, because it is common to bundle services to obtain the best possible terms from a recordkeeper. The court further rejected the claim against multiple recordkeepers because the investment menu offered included a diverse range of risk profiles and a range of fees from 0.04 to 0.087 percent, much lower than the range found acceptable in Renfro.

Regarding plaintiffs’ claim that the fiduciaries should have moved from an “asset-based” recordkeeping arrangement to an allegedly cheaper “per-participant” arrangement, the court noted that it was within the discretion of a reasonable plan administrator to determine the best model. The court explained that in the asset-based model, participants with higher account balances pay more, but under the flat per-participant model each participant pays the same amount regardless of account balance, meaning that participants with very small accounts pay as much as those with large accounts. Given that reality, the court noted it would not infer it was imprudent for the fiduciary to choose an asset-based model.

The court also rejected the claim that it was imprudent to offer retail shares rather than identical lower class institutional share classes of mutual funds. The court noted that nearly half of the investment options in the plan were already in the institutional share class, that moving into institutional share classes was not as easy as “checking a box,” and that there are reasons why a plan fiduciary would not, or could not, move into the institutional share classes, including high minimum investment requirements for institutional share classes. The court also rejected plaintiffs’ claim that offering too many investment options was imprudent when the plan had 78 investment options that provided a reasonable mix and range of investment options.

The court rejected plaintiffs’ claim that the fiduciaries imprudently retained underperforming funds by first noting that there is no cause of action in ERISA for “underperforming funds” alone, and that the fact that just under half of the investment options available to plan participants outperformed their benchmark did not “nudge” plaintiffs’ claims across the plausibility line. Lastly, the court rejected plaintiffs’ prohibited-transaction claim based on its revenue-sharing arrangement with the plan’s recordkeeper. The court reasoned that the simple act of paying a recordkeeper for its services cannot, in itself, show a prohibited transaction violation, at least absent additional allegations such as that the arrangement would benefit plan fiduciaries at the expense of the plan participants and beneficiaries.

*Sweda* is now on appeal to the U.S. Court of Appeals for the Third Circuit and will likely become the first of the university cases heard...
by a federal court of appeals. Any decision rendered will likely have a significant impact on the many 403(b) (and 401(k)) cases involving similar claims.

**Damages**

In what appears to be the end of a long-running saga, in *Tibble v. Edison*, the district court awarded plaintiffs $13.16 million in damages, making it only the second judgment reached after trial in a fee-litigation case based on imprudent investment selection. The court’s decision provides some insight into how courts may measure lost investment earnings when it is unknown how the principal would have been invested.

*Tibble* is a long-running, well-known fee-litigation case in which, after trial, the district court concluded that defendants breached their fiduciary duty of prudence by offering in the 401(k) plan more expensive retail share classes instead of institutional share classes. To determine damages on the fee claim, the court ordered the plaintiffs to identify and measure the difference in investment fees between the retail share classes included in the plan and the less expensive institutional share classes that were available but not selected. To calculate damages from lost investment opportunity, the court used the returns of other funds in which participants’ assets were invested. The U.S. Court of Appeals for the Ninth Circuit affirmed but did not specifically address the methodology used to determine damages. On remand, and after a series of appeals including the U.S. Supreme Court’s ruling confirming that fiduciaries have a duty to periodically monitor investments, the parties stipulated that the amount of damages was approximately $7.5 million based on the nine-year period in which the plan offered the retail share classes instead of the institutional share classes of the mutual funds.

The parties disputed, however, how damages for lost investment opportunity should be calculated for the six-year period after the plan ceased offering any mutual funds. The parties proposed four methods: (1) the returns of the S&P 500 index fund, (2) the returns of the plan as a whole, (3) the returns of the target-date funds, and (4) the statutory post-judgment interest rate set out in 28 U.S.C. § 1961.

The court rejected the returns of the S&P 500 index because it would not offer a reasonable approximation of damages when actual investment in the S&P 500 index was only a small portion of the plan’s assets. The court found that the target-date funds, which were created to roll over plan participant investments in the mutual funds once they were eliminated, were likewise inappropriate because during the rollover period more than 50 percent of participants chose to
move their money elsewhere. The court found that the statutory rate was not reasonable for a case involving lost investment opportunity because it is not “reasonable to presume that the money would have been invested in the equivalent of the time value of money.”

The court concluded that the plan’s returns provided a reasonable approximation of the lost opportunity for the six-year period because, following the removal of the diversified mutual funds, the court assumed that plan participants would continue to invest in a diversified strategy. The court also rejected plaintiffs’ request to exclude a pair of poorly performing funds from the calculation of the plan’s returns. Following the court’s decision the parties stipulated to damages of $5.6 million for the 2011 to 2017 period.

In Tussey v. ABB, Inc., the U.S. Court of Appeals for the Eighth Circuit provided some parameters for calculating damages when participants were imprudently mapped out of one fund to another. In Tussey, another long-running fee-litigation case, plaintiffs were originally awarded damages of $13.4 million for various breaches of fiduciary duty, including for failure to monitor the cost assessed against the plan by its recordkeeper and other investment companies, and by selecting more-expensive class shares for the investment options when less-expensive classes were available. The Eight Circuit affirmed the judgment but vacated an award of $21.8 million against ABB for replacing a well-performing Vanguard fund with Fidelity funds because the trial court improperly applied a de novo interpretation of the plan and used hindsight bias regarding the performance of stocks post-transfer.

On remand, the district court again held that ABB breached its fiduciary duty when it removed the Vanguard Fund and transferred its assets to Fidelity funds. The district court noted that a nonconflicted fiduciary could have prudently chosen the Fidelity funds at issue, but that here the ABB fiduciaries chose those funds to further ABB’s interests. The district court, however, found that plaintiffs failed to prove that any damages resulted from the breach based on the method of calculation suggested by the Eight Circuit—that is, by comparing the “difference between the performance of the [Fidelity funds] and the minimum returns of the subset of managed allocation funds the ABB fiduciaries could have chosen without breaching their fiduciary duty.”

On appeal, the Eighth Circuit affirmed the district court’s decision that ABB breached its fiduciary duty, noting that defendants overstated the deference owed to fiduciaries because “the choice of whose interests to favor, the plans’ or their own, was not one over which the ABB fiduciaries could claim any discretion.” The Eighth Circuit, however, vacated and remanded on damages because it said its earlier statements were just “suggestions,” and that it was for the district court...
to determine the correct method of measuring the damages associated with the fiduciary breaches without being bound by its previous suggestions. As part of its ruling, the Eighth Circuit provided new suggestions on how to calculate damages, including (1) that the district court could consider “dynamic” and “static” allocation funds as measures to determine damages, and (2) that the district court could consider the returns of the eliminated Vanguard fund, but that it was not sure such a comparison was required. Only time will tell whether these latest “suggestions” will result in yet a different district court ruling on the method for calculating damages and appeal.

Procedural and Jurisdiction Issues and Defenses

Article III of the U.S. Constitution requires that plaintiffs show they suffered an “injury in fact” from the conduct they seek to challenge in their lawsuit. Defendants have had some success in using Article III standing to defeat plaintiffs’ claims when plaintiffs have overreached, such as when plaintiffs: (1) had not invested in the allegedly imprudent investment options; (2) were not a participant in one of multiple plans sued; or (3) had invested in the allegedly imprudent investment option but only stood to gain a de minimis amount if the lawsuit succeeded.

To date, in the fee-litigation context, defendants have had mixed results in their attempts to enforce arbitration agreements with class action waivers. Two courts concluded that a plaintiff who previously entered into a binding arbitration agreement with class waiver could not bring a class action for breach of fiduciary duty, even if the plaintiff sought to bring the suit on behalf of the plan under ERISA Section 502(a)(2). However, another court held that the plan must first consent before the court will compel individual arbitration of plaintiffs’ Section 502(a)(2) claims brought on behalf of the plan. This is a developing area, with major rulings on the enforceability of class action waivers expected in the not-too-distant future.

POTENTIAL PRACTICES TO MITIGATE RISK

As the cases discussed previously illustrate, plaintiffs are aggressively investigating 401(k) and 403(b) plans, and are pursuing new and expanding theories of potential liability. These and earlier fee-litigation cases also demonstrate, however, that there are certain practices fiduciaries can take to lessen their chances of being a target for suit, and to provide powerful defenses to the claims if they are sued.
First, having a well-documented prudent process to review and oversee plan investments and plan providers is the most valuable first line of defense. *Tibble* confirms that plan fiduciaries should conduct periodic reviews of investments and plan service providers. Cases like *Chevron* illustrate the defense available to fiduciaries when the facts and plan documents show that, for example, the fees paid to recordkeepers (in that case revenue-sharing payments) are periodically monitored and considered by the plan fiduciary in evaluating the recordkeeper’s overall compensation.158

As part of a prudent process, plan fiduciaries should also periodically benchmark fees or issue requests-for-proposal for major service providers like recordkeepers. If fees appear out of line with benchmarks (note that plaintiffs’ counsel are often monitoring these benchmarks), then the fiduciaries should investigate and document their resolution of the issue. A fiduciary does *not* have to go with the lowest-cost provider, however; quality and service can and should be considered in evaluating any service provider.159

In contrast, if there is no documented prudent process, fiduciaries risk exposure to litigation and to hindsight-based claims that they should have made a different decision. *Tatum v. RJR Pension Inv. Comm.* illustrates this dynamic In *Tatum*, a decision that otherwise clearly would have been prudent with a prudent process (the closing of a spun off, undiversified single stock fund in a 401(k) plan) gave rise to substantial litigation and risk of liability.160 Although it appears that the fiduciaries will be absolved of liability, this absolution is occurring after 15 years of litigation.161

Second, cases such as *Disney* and *CVS Health Corp.* illustrate the importance of fund and other plan disclosures, and how these disclosures can inoculate fiduciaries from hindsight-based claims that investment mixes in funds were imprudent. Courts recognize that investments have risks and that if these risks are properly disclosed to participants, then the courts will be disinclined to use hindsight to second guess inclusion of these funds in plans, at least when the 401(k) or 403(b) plan offers a diversified mix of investment options with different risk profiles. In these circumstances, choice is properly left “to the people who have the most interest in the outcome,”162—the participants. Further, as part of general practices, the plan fiduciary with responsibility over plan investments should consider developing and following an investment policy statement.

Third, and on a related point, another practical way to lessen risk is to offer a diversified mix of investments, including target-date funds and lower-cost index funds. By way of illustration, the numerous low-cost investment options available in *Chevron* appeared to influence the court to conclude that plaintiff’s claims of imprudence were implausible. Dismissal of fiduciary breach claims was likewise
affirmed in the seminal case of *Loomis v. Exelon*,\(^1\) in which the court found that the defendant “offered participants a menu that includes high-expense, high-risk, and potentially high-return funds, together with low-expense index funds that track the market, and low-expense, low-risk, modest-return bond funds.” As noted, in upholding this ruling, the U.S. Court of Appeals for the Seventh Circuit found that the defendant “left choice to the people who have the most interest in the outcome, and it cannot be faulted for doing this.”\(^1\)

Finally, small and midsize companies should be equally vigilant in maintaining a prudent record of their decisions with respect to 401(k) plan investment funds and providers. As the plaintiffs’ firms look to increase the volume of fee litigation, they have started expanding their targets to include plans of midmarket-size companies. Indeed, as noted earlier, fee litigation has already been brought against plans with assets of only $9 million, and against recordkeepers who service plans as small as $2.8 million.\(^1\) Not all small to midsize companies will have investment and provider management expertise in-house, however, or have the time to properly document and monitor the 401(k) plan and its various providers. Accordingly, in appropriate circumstances, small and midsize employers may want to consider outsourcing fiduciary management of 401(k) plans to independent fiduciary professionals.

**CONCLUSION**

The recent fee-litigation filings and rulings give cause for concern, but they can also illustrate ways to lessen fiduciary exposure. Fiduciary training and following best practices identified in the cases can provide powerful defenses to claims if sued, and can make the plan a less attractive target for suit. If there are concerns, fiduciary legal compliance reviews can help identify and correct problems before litigation occurs.\(^1\)

**NOTES**


2. There has also been substantial litigation challenging 401(k) plan investments in employer stock. For a discussion of the claims and issues, see Robert Rachal, Howard
Shapiro, and Nicole Eichberger, “Fiduciary Duties Regarding 401(k) and ESOP Investments in Employer Stock,” in BNA ERISA Litigation 1259 (5th Ed. 2014).


14. If a costs-only approach and hindsight could be used to state claims on plan investments then, for example, every plan using actively managed funds would be at risk. Active management is required to keep markets efficient, however, and can outperform passive management. In sum, the plan environment that would arise from the adoption of plaintiffs’ cost-driven theories may not be an optimal one for plan participants, and in fact risks causing them substantial harm. In that sense, cases like Disney and Chevron can provide important limits to protect plans and participants from these negative incentives.


17. Id. at *31–32.

18. Id. at *44–45.


20. Id. at *44–45.

21. Id. at *43.


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


25. Plaintiffs have also unsuccessfully challenged the inclusion of mutual funds in a plan’s investment lineups as per se imprudent. Main v. Am. Airlines, Inc., 248 F. Supp. 3d 786 (N.D. Tex. 2017) (rejecting the argument that the defendants breached their fiduciary duty by failing to include low-cost separate accounts and collective trust as investment options instead of mutual funds); Terraza v. Safeway Inc., No. 3:16-cv-03994 (N.D. Cal. Dec. 11, 2017), ECF 109 (same).


27. White v. Chevron Corp., No. 16-cv-0793, 2017 U.S. Dist. LEXIS 83474, at *33–34 (explaining that there is “no per se rule that a Sec. 401(k) Plan must include a stable value fund as a capital preservation option, even if, in some years, a stable-value fund might outperform some other type of fund.”).

28. Id. at *29.


30. Id. at ¶ 135.


32. Id. at 1333.


34. Id. at *15–16.


37. *Id.* at *4 (quoting *Fifth Third Bancorp v. Dudenboeffer*, 134 S. Ct. 2459, 2471 (2014)).


39. *Id.* at 12, 14.

40. *Id.* at 47.


42. *Ellis v. Fidelity Mgmt. Trust Co.*, 2017 WL 2636042, at *9 (D. Mass. June 19, 2017) (explaining that “before and during the class period, Fidelity periodically explored changing the Portfolio's benchmark and regularly conducted quantitative analyses of potential alternative benchmarks, including their risks and the impacts changing the benchmark could have on the Portfolio's returns, duration, market-to-book ratio, and tracking error volatility”).

43. *Id.* at *10.

44. *Birse v. CenturyLink, Inc.*, No. 1:17-cv-02872, at 2 (D. Colo.), ECF 1 (“The objective of the Large Cap Fund was to ‘exceed the return of a broad market index of the largest 1,000 companies using an actively managed multi-manager approach.’”).

45. *Id.* at 8, 39.

46. *Id.* at 4–6.

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


50. *See* Teets, *supra* n.49 at 1203 (D. Colo. 2015) (denying motion to dismiss when it found the insurer's ability to unilaterally set the rate of return on the investment at issue raised a genuine issue of whether a reasonable rate of return is guaranteed); see also *Rozo, supra* n.49 (denying motion to dismiss because of fact issue as to who bore investment risk when insurer could influence interest rate risk based on how it set rates for new contracts); *Wood v. Prudential Ret. Ins. & Annuity Co.*, No. 3:15-cv-01785, at 6–10, (D. Conn. Sept. 19, 2016) (denying motion to dismiss as to guaranteed investment contracts because additional factual development was necessary to determine whether defendant was shielded from liability under the fiduciary exemption), ECF No. 55.

52. *Rozo v. Principal Life Ins. Co.*, 2017 U.S. Dist. LEXIS 82183, at *4 (S.D. Iowa May 12, 2017). Plaintiffs have previously had mixed results when attempting to satisfy Rule 23’s “commonality” and “typicality” requirements against service providers who offer multiple plans (sometimes thousands) with substantial variability in the services and structure offered from one plan to another. See *Ruppert v. Principal Life Ins. Co.*, 252 F.R.D. 488 (S.D. Iowa 2008) (denying class certification because there was substantial variability in the services offered by the service provider from one plan to another and that such variability precluded the plaintiff from satisfying the “commonality” and “typicality” class requirements under Rule 23 of the Federal Rules of Civil Procedure); *cf. Haddock v. Nationwide Fin. Servs. Co.*, 293 F.R.D. 272 (D. Conn. 2013) (certifying a class against a service provider that allegedly engaged in revenue sharing in violation of ERISA in the 24,000 ERISA plans it serviced).


55. *Id.* at 12.

56. *Id.* at 12–21. The court also dismissed the plaintiff's claim that Great-West should be held liable as a nonfiduciary under ERISA's prohibited transaction rules because the plaintiff failed to show that Great-West knew or should have known that the transaction violated ERISA. *Id.* at 27.


59. *Id.* at *12–14.


62. *Id.* at 5–6.


64. *Id.* at *13–14.

65. *Id.* at *15.


67. *Id.* at *5–6.

68. *Id.* at *16–17.

69. *Id.* at *19–20. The court also dismissed novel claims that the plan fiduciaries and the plan recordkeeper breached their fiduciary duties by failing to include within the plan's participant fee disclosures an explanation of the exact portion of the expense ratio for the plan's investment options that was applied to recordkeeping expenses. *Id.* at *33. The court found that the DOL regulations governing participant fee...
disclosures do not require such itemized explanations of the plan’s recordkeeping fees. *Id.* at *33–37.


71. *Id.* at *17–22 (setting forth the financial information provided to plaintiff, including in the SPDs and fund fact sheets).

72. *Id.* *25–26. See also Creamer v. Starwood Hotel & Resorts Worldwide, Inc., Case No. CV 16-9321 DSF (MRWx) (C.D. Cal. May 1, 2017) (finding fee claims on BlackRock Index fund time-barred because those fees had been disclosed more than three years before the suit was filed); Brotherston v. Putnam Ins., LLC, No. 15-cv-13825-WGY, 2017 WL 1196648, at *11, 2017 BL103953 (D. Mass. Mar. 30, 2017) (finding prohibited transaction claims on 72 investment funds time-barred because the plan’s enrollment kit disclosed that Putnam entities acted as recordkeeper and investment manager for the plan more than three years before the suit was filed).


76. Plan recordkeepers have also had success asserting that they were not acting as fiduciaries as to the challenged wrongdoing in similar contexts. In *Rosen v. Prudential*, 2017 U.S. App. LEXIS 19821 at *3 (2d Cir. Oct. 11, 2017) (summary order), plaintiffs allege that Prudential, the plan’s recordkeeper, engaged in prohibited transactions and breached its fiduciary duty by receiving revenue sharing payments from certain investment options. The U.S. Court of Appeals for the Second Circuit affirmed the district court’s decision that Prudential was not acting as a fiduciary in its role as directed trustee of the plan’s trust assets because it did not have authority over any changes to the funds available to the trust. *Id.* at *6. The court, however, stated that Prudential may have been acting as a fiduciary with respect to investments in separate accounts, even though Prudential did not actually receive revenue-sharing payments from separate account investments, because Prudential had discretion to invest the separate account assets in any investment. *Id.* at *6–7. The court nonetheless affirmed dismissal because plaintiffs’ allegations that Prudential engaged in prohibited transactions and breaches of duty by merely receiving compensation in the form of revenue sharing were insufficient to plausibly state a claim. *Id.* at *8–9. The court also explained that revenue sharing is “not per se improper” and without allegations that the recordkeeper engaged in illicit kickbacks or received payments without the plan fiduciary’s knowledge, the allegations were insufficient to survive a motion to dismiss. *Id.* at *20–23.

77. *Id.* at *20–23.


80. Recent significant cases through late 2016 were discussed in Rachal et al., supra n.6.


83. Id. at *5–7.

84. Id. at *7.


89. Brotherston v. Putnam Inv., LLC, supra n.86, at *27–30 (D. Mass. Mar. 30, 2017) (finding prohibited transaction claims on 72 investment funds time-barred because the plan's enrollment kit disclosed that Putnam entities acted as recordkeeper and investment manager for the plan more than three years before the suit was filed).

90. Id. at *21–27 (finding that ERISA's Prohibited Transaction Exemption 77-3 afforded Putnam a defense to all of plaintiffs' Sec. 406 prohibited transaction claims).


92. Id. at *17–18.

93. Id. *19–22.

94. Id. at *22–30.

95. Id. at *24.

96. Id. at *28.

97. Id. at *28–29.

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


103. See e.g., Henderson v. Emory Univ., 252 F. Supp. 3d 1344, 1350 (N.D. Ga. 2017) (not imprudent to offer 111 investment options); Tracey v. Mass. Inst. of Tech., supra n.99 at 35–36 (not imprudent to offer more than 250 investment options), adopted by Tracey v. Mass. Inst. of Tech., No. 16-cv-11620 (D. Mass. Oct. 4, 2017), ECF No. 79; Kelly v. Johns Hopkins Univ., supra n.99 at *3 (not imprudent to offer more than 400 investment options); Sweda v. Univ. of Pennsylvania, supra n.99 at *9 (not imprudent to offer 78 investment options); Cunningham v. Cornell Univ., supra n.99 at *18–19 (not imprudent to offer more than 150 of investment options); Sacerdote v. N.Y. Univ., 2017 U.S. Dist. LEXIS 137115, at *35–36 (not imprudent to offer more than 150 investment options); but see Clark, No. 16 cv 1044, 2017 U.S. Dist. LEXIS 164370 (denying, without analysis, motion to dismiss a claim that offering 400 options was imprudent).


105. Id. (citing Loomis v. Exelon, 658 F.3d 667, 673 (7th Cir. 2011).

106. Id. at *14.


108. See for example, Sacerdote v. N.Y. Univ., supra n.103 at *32–33; Sweda v. Univ. of Pennsylvania, supra n.99 at *26–27; Kelly v. Johns Hopkins Univ., supra n.99 at *3.
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111. *Id.* at *37–38.

112. *Id.* at *39.

113. *Id.* at *40–41.


117. *Id.* at *7–8.

118. 671 F.3d 314 (3d Cir. 2011).


120. *Id.* at *19–20.

121. *Id.* at *21–22.

122. *Id.* at *23–24.

123. *Id.* at *24.

124. *Id.* at *25–26.

125. *Id.* at *26.

126. *Id.* at *27–28.

127. *Id.* at *29–30.

128. *Id.* at *32–33.


130. Carmen Castro-Pagan, “Edison Agrees to Pay $5.6M in Additional Damages in 401(k) Suit,” *BNA Pens. & Ben. Daily* (Sept. 6, 2017). The $13.4 million judgment in *Tussey v. ABB Inc.*, 850 F.3d 951, 958 (8th Cir. 2017) was the other case. *Id.*


132. *Id.* at *122–126.

133. *Tibble v. Edison Int’l*, 711 F.3d 1061, 56 EB Cases (BNA) 1245 (9th Cir. 2013).

134. See *Tibble v. Edison*, 135 S. Ct. 1823, 1828–1829; 834 F.3d 1187 (9th Cir. 2016) (en banc).


136. *Id.* at *43.

137. *Id.* at *43–44.

138. *Id.* at *47.

139. *Id.* at *48.

140. *Id.* at *46.

142. Tussey v. ABB Inc., supra n.130.
143. Tussey v. ABB, Inc., 746 F.3d 327, 336 (8th Cir. 2014).
144. Id. at 338.
146. Tussey, supra n.145 at *9.
147. Id. at *1.
148. Tussey, supra n.143 at 339.
149. Tussey v. ABB Inc., supra n.141.
150. Id. at 960–961.
153. Daugherty v. Univ. of Chicago, supra n.99 at *15–19 (granting motion to dismiss as to claims brought against one of two plans sued because plaintiffs did not participate in that plan and as to prohibited transaction claims based on a loan program in which plaintiffs did not participate). The court ultimately reinstated all of the claims after plaintiffs amended their complaint to include a participant in the dismissed plan who also invested in at least one of the funds at issue. Daugherty v. Univ. of Chicago, No. 1:17-cv-03736 (N.D. Ill. Jan. 10, 2018), ECF No. 52.
154. Austin v. Union Bank & Trust Co., No. 3:14-cv-00706, at (D. Or. May 17, 2017) (recommending dismissal of claims where plaintiff only invested between $0.12 to $0.84 in the allegedly imprudent investment option and only stood to gain $0.0042 if the lawsuit succeeded), ECF 208; Austin v. Union Bank & Trust Co., No. 3:14-cv-00706 (D. Or. Oct. 31, 2017) (granting plaintiff’s voluntary motion to dismiss), ECF 223.
155. See Cooper v. Ruane Cunniff Golfarb, Inc., No. 16-cv-1900, 2017 WL 3524682, at *2–8 (S.D.N.Y. Aug. 15, 2017) (enforcing individual arbitration of Sec. 502(a) (2) claims brought on behalf of the plan in fee litigation case); DuCharme v. DST Sys., Inc., No. 4:17-cv-00022, ECF No. 57, at 2 (W.D. Mo. June 23, 2017) (granting motion to dismiss plaintiff’s Sec. 502(a)(2) claims brought on behalf of the plan in fee-litigation case when the plaintiff was a party to an arbitration agreement with a class waiver).
156. Munro v. Univ. of S. Cal., No. 2:16-cv-06191, 2017 WL 1654075, at **3, 5 (C.D. Cal. Mar. 23, 2017) (denying motion to compel arbitration of ERISA Sec. 502(a)(2) claims because the arbitration agreements were “not signed by anyone with authority to bind an ERISA plan, and not part of the plan documents”).
157. The Supreme Court is currently considering whether the National Labor Relations Act precludes arbitration agreements from preventing employees from engaging in collective action through class actions. See Ernst & Young LLP v. Morris, No. 16-300, and Nat’l Lab. Rel. Bd. v. Murphy Oil USA, No. 16-307. The Ninth Circuit is currently considering whether employees’ agreements to arbitrate extend to block
suits on behalf of the plan under ERISA Sec. 502(a)(2). See *Munro v. Univ. of S. Cal.*, No. 1755550.

158. *White v. Chevron Corp.*, supra n.15 at *45.


160. See id. at 368.


163. *Id.* at 667.

164. *Id.* at 673–674.

165. See supra n.9.

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