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ERISA Fee and Investment Litigation – 2021 Developments and Best Practices to Mitigate Risk

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The last two years have witnessed a remarkable proliferation of ERISA fee and investment litigation with hundreds of new cases filed and numerous key rulings. In this article, the authors provide a brief overview of 2021 ERISA fee and investment litigation trends and developments and then explore more closely the key rulings and developments from 2021, before discussing potential best practices to lessen the exposure to these claims.

Defined contribution plans, including 401(k) and (for certain non-profit companies) 403(b) plans, provide the primary source of retirement benefits to most of the American workforce.[1] The enhanced role of 401(k) and 403(b) plans has put increased pressure on plan performance and, since 2006, has led to multiple waves of ERISA litigation challenging the fees and the selection and retention of mutual

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funds and other investments offered in these plans ("fee and investment litigation"). The latest wave of litigation began in late 2015 and is clearly the largest and longest sustained wave, with hundreds of cases filed against plan sponsors, fiduciaries, and service providers. In 2021, 46 new cases were filed, accounting for the second largest one-year filings in ERISA fee and investment litigation (2020 was the largest with nearly 100 new cases filed). Historically, the litigation waves in this space would come and then recede. However, given the continued historic pace of new cases, driven in part by plaintiffs' continued success in obtaining large settlements, the 2015 wave arguably has moved into a novel phase whereby the "new normal" is that plaintiffs will bring dozens of new cases each year. As discussed below, it is unclear whether the U.S. Supreme Court's recent decision in *Hughes v. Northwestern Univ.*,[2] will materially affect the filing of fee and investment cases.

Our annual *Benefits Law Journal* articles from 2015-2020 addressed key developments in fee and investment litigation through late-2020.[3] In this article, we provide a brief overview of 2021 trends and developments and then explore more closely the key rulings and developments from 2021, before discussing potential best practices to lessen the exposure to these claims.

BRIEF OVERVIEW OF 2021

In 2021, plaintiffs brought 46 new fee and investment litigation complaints, second only to the 97 new complaints filed in 2020. The complaints target plans of all sizes in nearly all industries.[4] They generally do not introduce new theories of liability (although one continuing trend from 2020 is that many challenge a suite of target date funds) and instead appear to be largely copycat suits alleging excessive fees and underperformance. Five law firms are responsible for over 30 of the 46 new cases filed in 2021.[5]

The historic levels of new complaints filed in 2020 and 2021 led to district courts issuing nearly 60 motion to dismiss decisions in 2021, which is easily the most rulings in a one-year period ever for fee and investment litigation. The results were mixed with 17 motions granted on all claims (most with leave to amend),[6] 17 denied as to all claims,[7] and 22 granted in part but allowed to move forward to discovery on some claims.[8] In many instances, there were inconsistent rulings on substantially similar claims and arguments, including:

- Whether plaintiffs lack Article III standing as to claims involving investment funds in which they did not invest;[9]

- Whether it is appropriate at the pleading stage to compare the fees and performance of actively managed funds with that of passively managed funds;[10] and
- Under what circumstances plaintiffs had sufficiently pled claims of excessive recordkeeping fees[11] and on mutual fund share classes.[12]

One noteworthy effect of the increase in new cases, and the concomitant increase in cases reaching discovery, is the strain put on the fiduciary liability insurance market, which has resulted in substantially increased retention rates (the amount that must be paid by the insured before insurance coverage begins) and has made it increasingly more difficult for plan fiduciaries to obtain coverage at all.[13]

Plaintiffs continued their nearly perfect record on motions to certify fee litigation class actions over the last five years and, several defendants continued the increasing trend of foregoing opposition to class certification, including in a case involving a $15 billion plan.[14] Plaintiffs also successfully acquired approximately $109.1 million in settlements with $35.2 million for attorneys' fees,[15] though this amount represents less than half of the total monetary value of settlements obtained in 2020.[16]

At the summary judgment stage, defendants had success in defeating two cases[17] but plaintiffs moved four cases forward to the trial stage (although some settled before trial).[18] On the merits (as discussed below), defendants won both of the fee and investment cases that were tried in 2021,[19] thus continuing defendants' overall run of success at trial since 2015.[20]

Defendants and plaintiffs both had success at the appellate level. Defendants were successful in affirming two trial decisions in the U.S. Courts of Appeals for the Second and Tenth Circuits,[21] a summary judgment decision in the U.S. Court of Appeals for the Fifth Circuit,[22] a motion to dismiss decision in the U.S. Court of Appeals for the First Circuit,[23] and a decision enforcing a forum selection clause in a plan document in the U.S. Court of Appeals for the Ninth Circuit.[24] Plaintiffs won key rulings in the U.S. Courts of Appeals for the Second and Seventh Circuits on the enforceability of arbitration provisions with class action waivers in fee and investment cases,[25] in the Second Circuit on the pleading standard for claims involving the offering of retail share classes of mutual funds, and in the U.S. Court of Appeals for the District of Columbia Circuit on the timeliness of seeking leave to amend a dismissed complaint.[26]

2021-2022 FEE AND INVESTMENT LITIGATION SIGNIFICANT RULINGS AND DEVELOPMENTS

U.S. Supreme Court

In *Hughes v. Northwestern Univ.*, the Supreme Court addressed the dismissal of fee and investment claims and for the first time had an opportunity to establish a workable pleading standard specific to excessive fee claims. As background, starting in 2016 plaintiffs filed more than two dozen cases against the sponsors and fiduciaries of 403(b) plans in the university setting. In general, the university cases alleged that defendants breached their fiduciary duties of loyalty and prudence by:

(i) "Locking" plans into "bundled" arrangements with the plans' recordkeepers in which certain investments were required to be offered and could not be removed;

(ii) Paying unreasonable administrative fees by using more than one plan recordkeeper and by paying recordkeeping fees through an "asset-based" arrangement that generated higher per participant fees than comparable plans with a flat per-person fee;

(iii) Paying 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

(iv) Selecting and retaining underperforming funds.[27]

While many of plaintiffs' claims are substantially similar to those asserted in 401(k) plan litigation, several are based on the unique history of university sponsored plans, dating back to when they consisted of a diverse collection of individual annuity accounts. These plans tended to have more recordkeepers and unique types of annuity fund options than is common in the 401(k) plan context.[28]

In 2020, the Seventh Circuit became the first court of appeals to uphold the early dismissal of such claims in *Hughes* (previously styled *Divane v. Northwestern*). In pertinent part, the Seventh Circuit concluded that plaintiffs' claims did not assert plausible ERISA violations, but rather merely amounted to plaintiffs' preference for certain investment options and recordkeeping arrangements.[29]

In reaching its decision, the Seventh Circuit provided various legal reasons why plaintiffs' claims failed – e.g., there is no requirement in ERISA to offer the cheapest fund – and also recognized that there could be "valid reasons" for the challenged decisions. For example, the court found that the share class claim was insufficiently pled, in part because the extra fees charged by the retail version of some mutual funds may generate revenue sharing credits that were used to pay recordkeeping fees that would otherwise have been paid out of participant accounts.

Similarly, the Seventh Circuit found that the claim for excessive recordkeeping fees was insufficiently pled, in part because the complaint did not identify another recordkeeper that would have performed the same services for less. The Seventh Circuit also stated throughout its ruling, however, that plaintiffs' claims were insufficient because the plans included a wide range of options and, therefore, plaintiffs could choose not to invest in the more expensive funds.[30]

On January 24, 2022, the Supreme Court issued a short unanimous opinion, reversing and remanding the Seventh Circuit's ruling.[31] Relying on its earlier ruling in *Tibble v Edison Intl.*,[32] which requires fiduciaries periodically to monitor all plan investments and remove imprudent ones, the Court ruled that providing a selection of prudent funds does not immunize other funds from challenge.

The Court did not rule, however, that plaintiffs had pled plausible claims as a matter of law. Because the Seventh Circuit had improperly relied on investor choice to dismiss these claims, the Court remanded for the Seventh Circuit to reconsider them in light of the applicable pleading standards. As to that, the Court said:

> On remand, the Seventh Circuit should consider whether petitioners have plausibly alleged a violation of the duty of prudence as articulated in *Tibble*, applying the pleading standard discussed in *Ashcroft v. Iqbal*, 556 U. S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544 (2007). Because the content of the duty of prudence turns on the circumstances . . . prevailing at the time the fiduciary acts, 1104(a)(1)(B), the appropriate inquiry will necessarily be context specific. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U. S. 409, 425 (2014). At times, the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise.[33]

Time will tell whether this concluding discussion, including the need for "due regard to the range of reasonable judgments a fiduciary may make," may be the most significant part of *Hughes*.

Notable Appellate Court Decisions

Circuit courts issued key decisions in 2021 covering a wide range of substantive, procedural, and jurisdictional issues, including the enforceability of arbitration agreements and forum selection clauses, Article III standing, the pleading standard to state a claim involving the use of retail mutual fund share classes, appropriate damages, and trial decisions. Below are summaries of the key decisions.

Arbitration and Forum Rulings

In 2019, defendants scored a major victory in their multi-year effort to enforce arbitration agreements with class action waivers in ERISA cases. In *Dorman v. Schwab*, the Ninth Circuit overturned its 35-year old precedent to rule that ERISA class action claims brought on behalf of an ERISA plan can be subject to individual arbitration.[34] However, in 2021 the Second and Seventh Circuits issued rulings that appeared to diverge from the Ninth Circuit ruling and declined to enforce arbitration agreements with class action waivers in cases brought by plaintiffs pursuant to ERISA Section 502(a)(2) on behalf of a defined contribution plan.

In *Cooper v. Ruane Cunniff & Goldfarb Inc.*, the Second Circuit concluded that because a plaintiff's ERISA fiduciary-breach claims against a third-party investment manager did not "relate to" his employment, they were not subject to a general employment arbitration agreement.[35] In the underlying complaint, the plaintiff brought class claims on behalf of his employer's 401(k) plan under Section 502(a)(2) of ERISA, arguing that the plan's third-party investment advisor's outsized investment in a stock that declined in value breached its fiduciary duties of prudence and loyalty.[36] The investment advisor invoked the employer's arbitration agreement, which mandated individual arbitration of "all legal claims arising out of or relating to employment" except for claims specifically excluded therein.[37] At issue was whether the plaintiff's fiduciary-breach claims "related to" his employment, and if so, whether the investment advisor could compel arbitration thereof despite not being a signatory to the agreement. The district court, answering both questions in the affirmative, granted the advisor's motion to compel arbitration.[38]

The Second Circuit reversed, holding that the plaintiff's fiduciary-breach claims were not subject to the arbitration agreement because they did not "relate to" the plaintiff's employment.[39] The court held that a claim only "relates to" employment if its merits involve facts particular to the plaintiff's own employment, including his performance, amount of compensation, or workplace conditions.[40] The court then held that while the plaintiff's stake in the plan comprised part of his

compensation, and claims regarding his compensation might "relate to" his employment, the substance of his ERISA claims hinged entirely on the third-party investment advisor's investment decisions and could have been brought by non-employees and thus were not subject to the arbitration agreement.[41] As a result, the court did not reach the question of whether the third-party investment advisor could enforce the arbitration agreement as a non-signatory. But, importantly, the Second Circuit stated, in dicta, that mandating individual arbitration of fiduciary-breach claims would likely contravene the Second Circuit's previous ruling that the representative nature of Section 502(a)(2) requires plaintiffs to protect other participants' interests by invoking procedures, such as class certification or joinder of parties, that are necessarily unavailable in individual arbitration.[42] In doing so, the Second Circuit expressed doubts about the enforceability of any class action waivers with respect to fiduciary breach claims.[43]

Similarly, the Seventh Circuit concluded in *Smith v. Board of Directors Of Triad Mfg.* that while ERISA claims are generally arbitrable, an arbitration provision that prohibited the participant from seeking plan-wide relief expressly permitted under ERISA was unenforceable.[44] The plaintiff in *Smith* brought a putative class action alleging that plan fiduciaries breached their fiduciary duties and engaged in prohibited transactions in their management of the company's Employee Stock Ownership Plan ("ESOP").[45] The district court denied the defendants' motion to compel arbitration per the plan's arbitration provision, which specifically prohibited plaintiff from pursuing "any remedy which has the purpose or effect of providing additional benefits or monetary or other relief" to any other participant.[46]

The Seventh Circuit affirmed. Joining every other circuit to consider the issue, the court agreed ERISA claims are arbitrable.[47] But the court then concluded that the ESOP's arbitration provision was unenforceable under the "effective vindication" exception to compelling arbitration, which permits a court to overrule an arbitration agreement that prospectively waives a party's right to pursue statutory remedies.[48] The court found the ESOP's arbitration provision fell within this exception because it precluded certain remedies available under ERISA that would necessarily affect all plan participants, such as the removal or appointment of a new plan fiduciary.[49] The court made clear that its decision "turn[ed] on the impermissible relief, and not the chosen vehicle, for ERISA claims under the plan," and that a class action waiver prohibiting merely plan-wide representation would not trigger the exception.[50] The court declined to address whether the exception applied equally to claims for other equitable relief under Section 502(a)(3).[51]

Plaintiffs have continued to challenge forum selection clauses contained in ERISA plans, arguing that such clauses are prohibited under

ERISA because they preclude plaintiffs from brining cases in venues authorized under ERISA Section 502(e)(2). The Seventh and Sixth Circuits previously rejected plaintiffs' arguments[52] and, in 2021, the Ninth Circuit joined those circuits when it affirmed the grant of defendants' motion to transfer venue, holding the plan's forum selection clause was valid and enforceable.[53]

Article III Standing

In *Ortiz v. Am. Airlines, Inc.*,[54] the Fifth Circuit affirmed dismissal of fiduciary breach claims for lack of Article III standing where the plaintiffs failed to adequately plead that they were personally injured by the breaches alleged. Plaintiffs claimed defendants breached their fiduciary duties of prudence and loyalty and violated ERISA's prohibited transaction rules by imprudently selecting and retaining a demand-deposit fund – sponsored and managed by defendants' own credit union – as a plan investment option instead of a stable value fund, which allegedly had a higher rate of return.[55] The plaintiffs invested in the credit union fund but did not invest in the stable value fund even after it had been offered to them.[56] The district court dismissed the case, holding that plaintiffs lacked Article III standing to pursue their claims since any harm resulting from defendants' failure to offer a stable value fund was speculative under these circumstances.[57]

The Fifth Circuit agreed with the district court's conclusion, but employed slightly different reasoning.[58] At the outset, the Fifth Circuit rejected the application of a recent Supreme Court decision, *Thole v. U.S. Bank N.A.*,[59] that required participants to plead individual injury because the Supreme Court "explicitly drew a distinction" between the defined benefit plan at issue in *Thole* – in which participants' entitlements to benefits are fixed independent of fiduciaries' investment decisions – and defined contribution plans such as the American Airlines 401(k) plan, in which participants' benefits are tied to their account value.[60] The Fifth Circuit instead focused on the causation prong of the Article III standing analysis.[61] Furthermore, unlike the district court, the Fifth Circuit did not focus on whether plaintiffs would have invested in a stable value offering if one was available, but rather on whether plaintiffs would have done so if, counterfactually, the plan never offered the demand-deposit option at all.[62] Because plaintiffs did not transfer out of the demand-deposit fund even when a stable value option became available, the court found it unlikely that plaintiffs would have invested in a stable value option even if the demand-deposit fund was never available.[63] Accordingly, the Fifth Circuit held that to the extent plaintiffs suffered injuries in the form of investment losses, those injuries were caused by their own investment decisions and not by defendants.[64]

Pleading Standards, Trial and Damages

The Second Circuit affirmed a trial judgment for defendants in *Sacerdote v. New York Univ.* but vacated the district court's early dismissal of claims related to the offering of retail share classes of mutual funds.[65] The case began in 2016, when several participants in New York University's ("NYU") 403(b) plans alleged that NYU breached its fiduciary duties of loyalty and prudence and engaged in prohibited transactions by, inter alia, mandating inclusion of certain funds and the use of a particular recordkeeper, incurring unreasonable fees, and causing the plan to invest in retail-class mutual funds when identical, lower-cost institutional share classes were available.[66] In 2017, the district court granted in part and denied in part NYU's motion to dismiss.[67] Relevant here, the order dismissed in part plaintiffs' imprudence claims to the extent they arose from allegations that NYU offered more costly retail-class shares when institutional-class shares of the same mutual funds were readily available.[68] In 2018, the remaining claims proceeded to an eight-day bench trial resulting in a judgment for NYU.[69]

While affirming the district court's trial decision,[70] the Second Circuit vacated the district court's earlier dismissal of plaintiffs' claim regarding the mutual fund share classes.[71] The Second Circuit explained that an alleged breach of the fiduciary duty of prudence should survive a motion to dismiss "'if the court, based on circumstantial factual allegations, may reasonably infer from what is alleged that the process was flawed' or 'that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident.'"[72] The Second Circuit said that the alleged liquidity advantages of retail-class shares, upon which the district court relied in its dismissal, did not justify dismissal of pleadings that otherwise raised "plausible inferences of the claimed misconduct" and inappropriately went to the merits at the motion to dismiss stage.[73] Plaintiffs adequately pled this claim, the court held, by providing the cost differentials for the different share classes of the challenged mutual funds and alleging that such differentials were readily available to the fiduciaries when they selected the plan's offerings.[74] The Second Circuit, however, warned against overreliance on cost ranges from other ERISA cases because of the context-specific nature at the motion to dismiss stage, the limited utility of such comparisons, and the possibility that fees found prudent in one case could be imprudent in another.[75] With respect to the "mix" of fund offerings, the court agreed with the notion that prudence of an investment should be evaluated in light of the full portfolio, but that this alone could not justify the district court's dismissal because here the alleged imprudence was a simple choice between higher and lower cost versions of the same fund.[76] Accordingly, the

Second Circuit vacated the district court's dismissal of this claim and reinstated it for further proceedings.[77] NYU sought but was denied certiorari.

The Tenth Circuit affirmed a district court's trial judgment for defendants on certain claims, and the district court's damages calculation for the one claim won by plaintiffs in *Ramos v. Banner Health*.[78] Plaintiffs alleged that the fiduciaries of Banner Health's 401(k) plan breached several fiduciary duties by failing to monitor and retaining certain plan investment options, paying excessive fees by using a revenue sharing model for recordkeeping services, and using plan assets to pay certain plan expenses.[79] After an eight-day bench trial, the district court held in relevant part that the plan's revenue sharing agreement with its recordkeeper was not itself a prohibited transaction but that Banner's failure to revisit its recordkeeping service agreement – resulting in years of overpayment and corresponding losses to plan participants – amounted to a breach of the duty of prudence.[80] In calculating damages for the breach, the district court rejected plaintiffs' expert's proposed damages calculation of $19.4 million because it was "based on vague and insufficient references to his experience in the 401(k) plan industry."[81] Instead, in arriving at $1.6 million in damages, the district court calculated damages by averaging the amount of revenue credits for excessive recordkeeping fees that the plan started receiving from its recordkeeper during part of the class period and applied the average to the four years in which the plan did not receive such payments.[82]

Plaintiffs appealed and the Tenth Circuit affirmed the decision in full.[83] First, the Tenth Circuit upheld the district court's methods of calculating losses and prejudgment interest explaining that the district court had the discretion to make "a reasonable approximation" of losses and using the revenue credits the plan actually received in later years to arrive at its calculations for what was being overpaid in earlier years for recordkeeping fees was well within its discretion.[84] Next, the Tenth Circuit held that a service agreement with an unaffiliated service provider is not itself a prohibited transaction; rather, to avoid "absurd results," "some prior relationship must exist between the fiduciary and the service provider to make the provider a party in interest" under ERISA.[85] Additionally, the Tenth Circuit rejected plaintiffs' argument that the district court should have required Banner to issue a request for proposals for recordkeeping services, since it had not meaningfully tested the market for a more competitive provider in over two decades.[86] The Tenth Circuit affirmed the district court's decision rejecting this relief, noting that because Banner had moved from the challenged revenue-sharing arrangement to a "capped" fee arrangement, there was no ongoing breach sufficient to justify such injunctive relief.[87]

Key Trial and Summary Judgment Decisions

In 2021, defendants had two notable victories at trial and on summary judgment in fee and investment cases alleging imprudence and disloyalty in the selection and retention of certain investment funds. These cases show the importance of having a well-documented decision-making process to defend against allegations of breaches of ERISA's fiduciary duties and the duty of loyalty.

First, defendants secured victory on all counts after a five-day bench trial in *Reetz v. Lowe's Cos.*[88] Plaintiff filed suit against the Lowe's 401(k) plan fiduciaries and Aon Hewitt ("Aon") – the plan's third-party investment advisor and delegated fiduciary, alleging breaches of fiduciary duty in connection with a substantial portion of the plan's investment lineup. As against Aon, the complaint alleged breaches of fiduciary duties in connection with the following conduct: (i) proposing and encouraging, in its non-fiduciary investment advisor role, Lowe's to change its 401(k) plan's investment structure and menu to using Aon affiliated investments and services; (ii) cross-selling its delegated fiduciary services; and (iii) selecting and retaining, in its delegated fiduciary role, an affiliated Aon Growth Fund (the "Growth Fund").[89] Plaintiff and the Lowe's defendants resolved these claims through a court approved settlement[90] and Aon remained the only defendant at trial.[91]

The district court first addressed plaintiff's claims for breaches of the duty of loyalty and prudence based on Aon's recommendation to Lowe's that the plan investment structure and menu be changed to include Aon affiliated products and services.[92] With respect to the duty of loyalty claim, the court held that Aon's motive in providing its recommendations was to benefit plan participants through a consolidated menu of investment choices that was easier to understand and led participants to more diversified investments.[93] The court also found that Lowe's understood that it could have retained primary responsibility for selection of the plan's investment options, as opposed to Aon, and that Aon consultants "actively discussed" ways to implement their recommendation using non-Aon affiliated funds.[94] In support of its conclusion, the court also found that (i) Aon presented the pros and cons of changing the plan's investment menu and structure, and (ii) Aon made suggestions for how to implement plan changes such that Aon would not receive any additional compensation.[95]

With respect to the duty of prudence claim, the court held that Aon's recommendations were the result of a reasoned decision-making process consistent with a prudent man acting in a like capacity.[96] The court explained that Aon's advice to Lowe's about simplifying its investment menu was the result of Aon's "extensive

experience as an investment consultant" and was consistent with a white paper Aon wrote (prior to its recommendations) about a proposed approach for plan restructuring that was the result of a study of 10,000 defined contribution plan portfolios.[97] The court also pointed to evidence that other investment managers had made similar proposals that plan sponsors consider simplifying their investment portfolios, which suggested that Aon "wasn't alone" in thinking that adopting a streamlined menu of funds would benefit plan participants.[98] The court therefore found that Aon had a prudent and "reasoned basis" for its advice to Lowe's concerning the plan.[99] In addition, the court found that Aon followed a reasonable process in conveying this advice because Aon identified the advantages and disadvantages of changing the plan's structure and did not rush Lowe's into making a decision.[100]

Next, the court rejected plaintiff's claim that Aon breached the duties of loyalty and prudence in selecting the affiliated Aon Growth Fund as a plan investment in its role as delegated fiduciary.[101] With respect to the duty of loyalty, the court explained that even where a fiduciary has a "direct financial incentive" to select an affiliated fund, there is no claim for disloyalty based on that fact alone and that, since plan participants had the final choice over which funds to invest in, Aon could not be faulted for offering a fund in which participants ultimately decided to invest.[102] The court also stated that it "must be careful to distinguish the reason for selection of the fund with the inherent effects of that selection" and concluded that Aon's motive for selecting the Growth Fund was its justified belief that it was the best long-term option for plan participants and was created for the purpose of implementing Aon's own strategy for the Growth Fund investing.[103]

With respect to the duty of prudence claim, the court rejected plaintiff's claim that Aon breached it duties by not considering other non-affiliated investment options.[104] In so ruling, the court found the following considerations to be relevant: (i) that Aon understood the investment fund options in the marketplace and then employed "substantial resources and expertise" in creating its "unique" growth fund to be used in the specific way that it was used in the Lowe's Plan; (ii) Aon conducted an investigation of other investment options when it created the fund and did not need to "go through the motions" of again considering (and rejecting) those same options each time it made an investment as a delegated fiduciary; and (iii) the skill and diligence demonstrated in the above efforts "compared favorably" to that normally applied by fiduciaries of other large defined contribution plans.[105] Accordingly, the court held that Aon's lack of a separate, documented discussion of alternative non-affiliated investment funds did not reflect the absence of a careful and thoughtful decision to use the Growth Fund as an investment in plans such as Lowe's.[106]

Finally, the court rejected plaintiff's claim that Aon breached the duty of loyalty and prudence in retaining the Growth Fund as a plan investment[107] for the same reasons it rejected plaintiff's loyalty claim regarding Aon's selection of the Growth Fund. The court also noted that plaintiff failed to offer evidence that there was a different, additional benefit to Aon because the Growth Fund remained in the plan.[108] With respect to the duty of prudence, the court found several points significant:

(i) Plaintiff failed to present evidence that at any point the Growth Fund was an unreasonable investment based on the lack of competence of the underlying investment managers;

(ii) Plaintiff's attacks were based on hindsight;

(iii) Aon over time exercised its expertise to keep apprised of alternate investments in the market;

(iv) Aon closely monitored the Growth Fund and modified the fund to take more advantage of the continuing strong equity market;

(v) Lowe's added a passive equity option to allow participants to obtain full equity investment risk if they chose to do so; and

(vi) Neither Lowes nor its fiduciary counselor ever suggested that the Growth Fund be removed, but rather, appeared to judge the fund as an appropriate investment.[109]

In sum, the court found that Aon did not breach its duties of loyalty and prudence and accordingly held in favor of Aon on all claims.[110] Plaintiff has appealed the decision to the U.S. Court of Appeals for the Fourth Circuit.[111]

A district court granted defendants' and denied plaintiffs' cross motion for summary judgment in *Alas v. AT&T Services*,[112] which had been certified as a class of over 250,000 plan participants. Plaintiffs-participants in AT&T's 401(k) plan had alleged that AT&T's Benefit Plan Investment Committee breached duties of prudence and candor and violated ERISA's prohibited transaction rules by paying excessive recordkeeping fees and by inaccurately reporting indirect compensation the plan recordkeeper received.

The court found defendants had effectively engaged in a prudent process to monitor the plan's recordkeepers compensation, which included periodically reviewing disclosures of the compensation to ensure reasonableness, hiring Deloitte to advise on the

recordkeeper's compensation and contract renewal, and for including a "most favored customer" clause in its contract which requires that fees are not less favorable than fees extended to any other similarly situated customer. The court accepted defendants' calculation of recordkeeping fees per participant per year of $20-$30 and rejected plaintiffs' argument that the fees were closer to $60 because plaintiffs failed to show that the expenses they included in their calculation were for recordkeeping and not other services. The court also found that defendants were not required to take into account the recordkeeper's indirect compensation when monitoring total compensation and that defendants complied with applicable Department of Labor ("DOL") regulations when reporting the recordkeeper's indirect compensation on the plan's Form 5500. Plaintiffs have appealed to the Ninth Circuit.

POTENTIAL PRACTICES TO MITIGATE RISK

As detailed above, plaintiffs continue to aggressively investigate and sue on 401(k) and 403(b) plans, including mid-size and smaller plans – a trend that exploded into over 140 fee and investment litigation putative class actions being filed between 2020-2021. As the motion to dismiss decisions illustrate, the courts are applying evolving and often contradictory standards to evaluate fiduciary conduct and are allowing many cases to move to the (expensive) merits phase of litigation.[113] Time will tell whether *Hughes* and its "due regard" standard may guide and cabin some of this litigation.

The 2021 fee and investment litigation cases, especially defendant victories at trial in *Reetz v. Lowe's Cos.* and on summary judgement in *Alas v. AT&T Services*,[114] show, however, that there are certain practices fiduciaries can take to lessen their chance of being targeted for suit, and to provide strong defenses if sued.

First, having a well-documented, prudent process for periodically reviewing and overseeing plan investments and plan service providers is the most valuable first line of defense. Cases like *AT&T* (at summary judgment) and *Reetz* (after a trial on the merits) illustrate how this periodic review protects fiduciaries if the documentation shows, e.g., that the fees paid to recordkeepers were periodically monitored by the plan fiduciary in evaluating the recordkeeper's overall compensation, or that underperforming funds are closely monitored and were retained for valid reasons. 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. This risk is aptly illustrated by earlier cases like *Bell v. Anthem,*[115] where the court sent to trial fiduciary prudence

claims (involving very low cost index funds) when fiduciaries had testified that they did not know the difference in retail and institutional share classes, and did not question Vanguard as to the availability of cheaper options.[116]

Further, as part of general practices, the plan fiduciary with responsibility over plan investments should consider developing and following an investment policy statement. *Brotherston v. Putnam Invs., LLC*, is instructive here, as the district court in that earlier case questioned defendants' procedural prudence in part because they failed to use an investment policy statement.[117] Although an investment policy statement is not expressly required by ERISA, as part of a settlement Putnam agreed to establish and follow one.[118]

Furthermore, as part of a prudent process, plan fiduciaries should also periodically benchmark fees or issue request-for-proposals for major service providers like recordkeepers. Plaintiffs' counsel often target plans with fees that vary substantially from these benchmarks. Thus, if the fees appear out of line with benchmarks, the fiduciaries should investigate and document their resolution of the issue. A fiduciary does not have to go with the lowest-cost provider, however, and should consider quality and service in evaluating any service provider.[119]

While many courts have rejected plaintiffs' attempts at establishing a set three to five year period for issuing request-for-proposals, in *Ramos v. Banner Health* (after a trial on the merits) the district court awarded plaintiffs over $2 million on plaintiffs' recordkeeping fee claims in part because defendants had not conducted a request-for-proposal in over twenty years.[120]

Second, earlier cases such as *Wilson v. Fid. Mgmt. Trust Co.*,[121] illustrate the importance of plan disclosures protecting fiduciaries from hindsight-based claims that investment funds were imprudent. Courts recognize that investments have risks and that, if these risks are properly disclosed to participants, the courts will be disinclined to use hindsight to second guess inclusion of these funds in plans, at least absent some evidence (other than hindsight-based second guessing) that these funds were imprudent.

Third, and on a related point, another practical way to reduce risk is to offer a diversified mix of investments, including target-date or other asset-allocation funds and lower-cost index funds. While *Hughes* held that offering a mix of lower-cost prudent funds is not, standing alone, a defense to offering imprudent funds, offering a diversified mix of funds can be a powerful defense when coupled with procedural prudence discussed above. That procedural prudence can explain and show why the challenged funds were not imprudent, both in isolation, and as part of the diversified mix of investment options offered plan participants.

Finally, fiduciaries of both small and mid-size companies should take note that as plaintiffs' firms continue filing multiple fee litigation class actions, they have expanded their targets to include plans of mid-market and smaller companies. In fact, a large number of mid-size plans were targeted in cases filed in 2020 and 2021. Not all small to mid-size 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 mid-size employers may want to consider out-sourcing fiduciary management of 401(k) plans to independent fiduciary professionals.

CONCLUSION

The last two years have witnessed a remarkable proliferation of fee and investment litigation with hundreds of new cases filed and numerous key rulings. The Supreme Court's recent decision in *Hughes* may provide some grounds to limit these cases, but that will depend in large part on how lower courts apply the Court's discussion of *Dudenhoeffer*'s "context specific" pleading standards and its "due regard" comment.

In the meantime, plans and fiduciaries remain at high risk for lawsuits and expensive discovery. Fiduciary training and following the best practices identified in these cases and sketched out above can provide powerful defenses to claims if fiduciaries are sued, and they can make plans a less attractive target for suit. If there are concerns, fiduciary legal compliance reviews can help identify and correct problems before litigation occurs.[122]

NOTES

1. *See, e.g.,* U.S. Dep't of Labor, Emp. Benefits Sec. Admin., Private Pension Plan Bulletin: Abstract of 2019 Form 5500 Annual Reports, at 2-3 (January 2022), available at *https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2019.pdf* (noting 686,809 of the total 733,678 pension plans are defined-contribution plans, and that 604,424 of those defined-contribution plans are 401(k) type plans, which includes 403(b) plans; also noting that defined contribution plan assets stood at $7.4 trillion while defined benefit plan assets were $3.3 trillion).

2. 2022 U.S. LEXIS 622 (Jan. 24, 2022).

3. Tulio D. Chirinos, Robert Rachal, Myron Rumeld, & Kyle Hansen, *Fee and Investment Litigation 2015-2020: Five Year Review of Developments and Best Practices to Mitigate Risks – Part 2*, Vol. 34 No. 3 Ben. L.J. 21 (Autumn 2021); Tulio D. Chirinos, Robert Rachal, Myron Rumeld, & Kyle Hansen, *Fee and Investment Litigation 2015-2020:*

Five Year Review of Developments and Best Practices to Mitigate Risks – Part 1, Vol. 34 No. 1 Ben. L.J. 21 (Spring 2021); Robert Rachal, Myron Rumeld & Tulio D. Chirinos, *Fee Litigation 2019 Round-Up: Recent Developments and Best Practices to Mitigate Risk*, Vol. 33 No. 1 Ben. L.J. 20 (Spring 2020); Robert Rachal, Myron Rumeld & Tulio D. Chirinos, *Fee Litigation 2018 Round-Up: Recent Developments and Best Practices to Mitigate Risk*, Vol. 32 No. 1 Ben. L.J. 19 (Spring 2019); Robert Rachal, Myron Rumeld & Tulio D. Chirinos, *Fee Litigation 2017 Round-Up: Mitigating Risk in the Face of Expanding Targets and Theories of Fiduciary Liability*, Vol. 31 No. 1 Ben. L.J. 18 (Spring 2018); Robert Rachal, Myron Rumeld & Tulio D. Chirinos, *Fee Litigation 2016 Round-Up: Mitigating Risk in the Face of Expanding Targets and Theories of Fiduciary Liability*, Vol. 30 No. 1 Ben. L.J. 17 (Spring 2017); Robert Rachal & Lindsey Chopin, *401(k) Fee Litigation: Recent Case Teachings on Exposures and Practices to Mitigate That Risk*, Vol. 28 No. 4 Ben. L.J. 14 (Winter 2015).

4. *Morgan v. The Allstate Corp.*, No. 21-cv-0044 (N.D. Ill. Jan. 4, 2021), ECF No. 1; *Evans v. Associated Banc-Corp*, No. 21-cv-60, (E.D. Wis. Jan. 13, 2021), ECF No. 1; *Ford v. Takeda Pharma. U.S.A., Inc.*, No. 21-cv-10090 (D. Mass. Jan. 19, 2021), ECF No. 1; *Goodman v. Columbus Regional Healthcare Sys., Inc.*, No. 21-cv-00015 (M.D. Ga. Feb. 2, 2021), ECF No. 1; *Lauderdale v. NFP Retirement, Inc.*, No. 21-cv-0301 (C.D. Cal. Feb. 16, 2021), ECF No. 1; *Waldner v. Natixis Investment Managers, L.P.*, No. 21-cv-10273 (D. Mass. Feb. 18, 2021), ECF No. 1; *Tracy v. The Am. National Red Cross*, No. 21-cv-00541 (D.D.C. Mar. 2, 2021), ECF No. 1; *Krohnengold v. New York Life Ins. Co.*, No. 21-cv-1778 (S.D.N.Y. Mar. 2, 2021), ECF No. 1; *Nesbeth v. Icon Clinical Research, LLC*, No. 2:21-cv-01444 (E.D. Pa. Mar. 26, 2021), ECF No. 1; *Mator v. Wesco Dist. Inc.*, No. 21-cv-0403 (W.D. Pa. Mar. 26, 2021), ECF No. 1; *Hummel v. East Penn. Manufacturing Co, Inc.*, No. 21-cv-1652 (E.D. Pa. Apr. 7, 2021), ECF No. 1; *Moore v. Humana Inc.*, No. 21-cv-0232 (W.D. Ky. Apr. 13, 2021), ECF No. 1; *Seidner v. Kimberly-Clark Corp.*, No. 21-cv-0867 (N.D. Tex. Apr. 15, 2021), ECF No. 1; *Traczyk v. Aspirus, Inc.*, No. 21-cv-00077 (W.D. Mich. Apr. 20, 2021), ECF No. 1; *Snyder v. UnitedHealth Group, Inc.*, No. 21-cv-1049 (D. Minn. Apr. 23, 2021), ECF No. 1; *Johnson v. Univ. of Tampa*, No. 21-cv-1005 (M.D. Fla. Apr. 29, 2021), ECF No. 1; *Perkins v. United Surgical Partners Int'l, Inc.* (N.D. Tex. Apr. 30, 2021), ECF No. 1; *Hundley v. Henry Ford Health System*, No. 21-cv-11023 (E.D. Mich. May 5, 2021), ECF No. 1; *Gleason v. Bronson Healthcare Grp., Inc.*, No. 21-cv-0379 (W.D. Mich. May 6, 2021), ECF No. 1; *Thomson v. Russell Investment Management LLC*, No. 21-cv-0961 (D. Nev. May 19, 2021), ECF No. 1; *Gomes v. State Street Corp.*, No. 21-cv-10863 (D. Mass. May 25, 2021), ECF No. 1; *Conlon v. The Northern Trust Co.*, No. 21-cv-2940 (N.D. Ill. June 1, 2021), ECF No. 1; *Garnick v. Wake Forest Univ. Baptist Med. Ctr.*, No. 21-cv-454 (M.D.N.C. June 4, 2021), ECF No. 1; *Johnson v. Russell Investment Management LLC*, No. 21-cv-743 (W.D. Wa. June 7, 2021), ECF No. 1; *Case v. Generac Power Systems, Inc.*, No. 21-cv-752 (W.D. Wa. June 8, 2021), ECF No. 1; *Johnson v. Carolina Motor Club, Inc.*, No. 21-cv-0319 (W.D.N.C. July 6, 2021), ECF No. 1; *Kohari v. MetLife Grp., Inc.*, No. 21-cv-6146 (S.D.N.Y. July 19, 2021), ECF No. 1; *Moler v. Univ. of Md. Med. Sys.*, No. 21-cv-1824 (D. Md. July 22, 2021), ECF No. 1; *Coppel v. Seaworld Parks & Entertainment, Inc.*, No. 21-cv-1430 (S.D. Cal. Aug. 9, 2021), ECF No. 1; *Carrigan v. Xerox Corp.*, No. 21-cv-1085 (D. Conn. Aug. 11, 2021), ECF No. 1; *Reichert v. Juniper Networks, Inc.*, No. 21-cv-6213 (N.D. Cal. Aug. 11, 2021), ECF No. 1; *Holmes v. Baptist Health South Florida, Inc.*, No. 21-cv-22986 (S.D. Fla. Aug. 17, 2021), ECF No. 1; *Klaskin v. The Mitre Corp.*, No. 21-cv-11452 (D. Mass. Sept. 3, 2021), ECF No. 1; *Brown v. The Mitre Corp.*, No. 21-cv-11605 (D. Mass. Sept. 29, 2021), ECF No. 1; *Singh v. Deloitte, LLP*, No. 21-cv-8458 (S.D.N.Y Oct. 13, 2021), ECF No. 1; *Parker v. GKN North Am. Servs., Inc.*, No. 21-cv-12468 (E.D. Mich. Oct. 19, 2021), ECF No. 1; *Pagans v. Advance Stores Company, Inc.*, No. 21-cv-0549 (W.D. Va. Oct. 20, 2021), ECF No. 1; *Ritorto v. KPMG, LLP*, No. 21-cv-19330 (D.N.J. Oct. 26, 2021), ECF No. 1; *Sigetich v. The Kroger Co.*, 21-cv-0697

(S.D. Ohio Nov. 5, 2021), ECF No. 1; *Riley v. Olin Corp.*, No. 21-cv-1328 (E.D. Mo. Nov. 9, 2021), ECF No. 1; *Smith v. VCA, Inc.*, No. 21-cv-9140 (C.D. Cal. Nov. 22, 2021), ECF No. 1; *Baumeister v. Exelon Corp.*, No. 21-cv-6505 (N.D. Ill. Dec. 6, 2021), ECF No. 1; *Riaz v. Advance Stores Co.*, No. 21-cv-619 (W.D. Va. Dec. 8, 2021), ECF No. 1; *Seibert v. Nokia of Am. Corp.*, No. 21-cv-20478 (D.N.J. Dec. 13, 2021), ECF No. 1; *Ravarino v. Voya Fin., Inc.*, No. 21-cv-1658 (D. Conn. Dec. 14, 2021), ECF No. 1; *Fleming v. Rollins, Inc.*, No. 21-cv-5343 (N.D. Ga. Dec. 30, 2021).

5. These five plaintiffs' counsel brought most of the cases in 2021: Capozzi Adler; Walcheske & Luzi; Schlicter Bogard & Denton; Nichols Kaster; and Edelson Lechtzin. *See supra* note 4.

6. *See, e.g.*, *Mator v. Wesco Distribution, Inc.*, 2021 WL 4523491 (W.D. Pa. Oct. 4, 2021); *Young Cho v. Prudential Ins. Co. of Am.*, 2021 U.S. Dist. LEXIS 185397 (D.N.J. Sept. 27, 2021); *Forman v. TriHealth, Inc.*, 2021 U.S. Dist. LEXIS 183470 (S.D. Ohio Sept. 24, 2021); *Tobias v. Nvidia Corp.*, 2021 U.S. Dist. LEXIS 173539 (N.D. Cal. Sept. 13, 2021); *Smith v. Commonspirit Health*, 2021 U.S. Dist. LEXIS 169922 (E.D. Ky. Sept. 8, 2021); *Albert v. Oshkosh Corp.*, 2021 U.S. Dist. LEXIS 166750 (E.D. Wis. Sept. 2, 2021); *Drake v. BBVA USA Bancshares Inc.*, 2021 U.S. Dist. LEXIS 162603 (N.D. Ala. Aug. 27, 2021); *Enos v. Adidas Am., Inc.*, 2021 WL 5622121 (D. Or. Aug. 26, 2021), *report and recommendation adopted,* 2021 WL 5611481 (D. Or. Nov. 30, 2021); *Klawonn v. Bd. of Dirs. for the Motion Picture Indus. Pension Plans*, 2021 U.S. Dist. LEXIS 152355 (C.D. Cal. Aug. 9, 2021); *Johnson v. PNC Fin. Servs. Group*, 2021 U.S. Dist. LEXIS 149408 (W.D. Pa. Aug. 3, 2021); *Matousek v. Midamerican Energy Co.*, 2021 U.S. Dist. LEXIS 150379 (S.D. Iowa July 2, 2021); *Brown v. Daikin Am., Inc.*, 2021 U.S. Dist. LEXIS 85195 (S.D.N.Y. May 4, 2021); *Davis v. Salesforce.com*, 2021 U.S. Dist. LEXIS 73017 (N.D. Cal. Apr. 15, 2021); *Harmon v. Shell Oil Co.*, 2021 U.S. Dist. LEXIS 66312 (S.D. Tex. Mar. 30, 2021); *Wehner v. Genentech, Inc.*, 2021 U.S. Dist. LEXIS 26227 (N.D. Cal. Feb 9, 2021); *Anderson v. Intel Corp. Inv. Policy Comm.*, 2021 U.S. Dist. LEXIS 12496 (N.D. Cal. Jan. 21, 2021); *Kurtz v. Vail Corp.*, 511 F. Supp. 3d 1185 (D. Colo. Jan. 6, 2021).

7. *See, e.g.*,*Snyder v. UnitedHealth Grp., Inc.*, 2021 U.S. Dist. LEXIS 230878 (D. Minn. Dec. 2, 2021);*Cutrone v. Allstate Corp.*, 2021 U.S. Dist. LEXIS 185430 (N.D. Ill. Sept. 28, 2021); *Dover v. Yanfeng US Auto. Interior Sys. I LLC*, 2021 U.S. Dist. LEXIS 185205 (E.D. Mich. Sept. 28, 2021); *Dearing v. IQVIA Inc.*, 2021 WL 4291171 (M.D.N.C. Sept. 21, 2021); *Allison v. L Brands, Inc.*, 2021 WL 4224729 (S.D. Ohio Sept. 16, 2021); *Garcia v. Alticor, Inc.*, 2021 WL 5537520 (W.D. Mich. Aug. 9, 2021); *Ahmed et al. v. Liberty Mutual Group, Inc. et al.*, 20-cv-30056 (D. Mass. June 15, 2021) ECF No. 44; *Bilello v. Estee Lauder, Inc.*, 2021 U.S. Dist. LEXIS 106315 (S.D.N.Y. June 7, 2021); *Becker v. Wells Fargo & Co.*, 2021 U.S. Dist. LEXIS 90207 (D. Minn. May 12, 2021); *In re Quest Diagnostics Inc. ERISA Litig.*, 2021 U.S. Dist. LEXIS 85722 (D.N.J. May 4, 2021); *Khan v. PTC, Inc.*, 2021 U.S. Dist. LEXIS 76605 (D. Mass. Apr. 20, 2021); *McGowan v. Barnabas Health, Inc.*, 2021 WL 1399870 (D.N.J. Apr. 13, 2021); *Davis v. Magna Int'l of Am., Inc.*, 2021 U.S. Dist. LEXIS 62106 (E.D. Mich. Mar. 31, 2021); *Jones v. Coca-Cola Consol., Inc.*, 2021 U.S. Dist. LEXIS 62003 (W.D.N.C. Mar. 31, 2021); *Johnson v. Duke Energy Corp.*, 2021 WL 828480 (W.D.N.C. Mar. 4, 2021); *Savage v. Sutherland Glob. Servs., Inc.*, 521 F. Supp. 3d 308 (W.D.N.Y. 2021); *In re MedStarErisaLitig.*, 2021 U.S. Dist. LEXIS 21792 (D. Md. Feb. 4, 2021).

8. *See, e.g.*,*Rosenkranz v. Altru Health Sys.*, 2021 U.S. Dist. LEXIS 237791 (D.N.D. Dec. 10, 2021); *In re LinkedIn ERISA Litig.*, 2021 U.S. Dist. LEXIS 221294 (N.D. Cal. Nov. 16, 2021); *Coviello et al. v. BHS Management Services, Inc. et al.*, No. 20-cv-30198 (D. Mass. Oct. 15, 2021) ECF No. 59; *Laabs v. Faith Techs, Inc. et al.*, No. 1:20-cv-1534 (E.D. Wis. Sept. 30, 2021) ECF No. 27; *Garthwait v. Eversource Energy Co.*, 2021 U.S. Dist. LEXIS 185228 (D. Conn. Sept. 27, 2021); *Williams v. CenterraGrp., LLC*, 2021 WL 4227384 (D.S.C. Sept. 16, 2021); *Lauderdale et al. v. NFP Ret., Inc. et al.*, 2021 WL

3828646 (C.D. Cal. Aug. 18, 2021); *In re Omnicom ERISA Litig.*, 2021 U.S. Dist. LEXIS 144054 (S.D.N.Y. Aug. 2, 2021); *In re Biogen, Inc. ERISA Litig.*, 2021 U.S. Dist. LEXIS 136919 (D. Mass. July 22, 2021); *In re Prime Healthcare ErisaLitig.*, 2021 U.S. Dist. LEXIS 138132 (C.D. Cal. July 16, 2021); *Lange v. Infinity Healthcare Physicians*, 2021 U.S. Dist. LEXIS 133195 (W.D. Wis. July 15, 2021); *Wehner v. Genentech, Inc.*, 2021 U.S. Dist. LEXIS 111341 (N.D. Cal. June 14, 2021); *Nunez et al. v. B. Braun Med., Inc., et al.*, (E.D. Pa. June 4, 2021) ECF No. 49; *Luense v. Konica Minolta Bus. Sols. U.S.A., Inc.*, 2021 U.S. Dist. LEXIS 98129 (D.N.J. May 24, 2021); *Stark v. KeyCorp*, 2021 U.S. Dist. LEXIS 84813 (N.D. Ohio May 4, 2021); *Miller v. Astellas US LLC*, 2021 U.S. Dist. LEXIS 71187 (N.D. Ill. Apr. 13, 2021); *Peterson v. Ins. Servs. Office, Inc.*, 2021 U.S. Dist. LEXIS 70877 (D.N.J. Apr. 13, 2021); *Kendall v. Pharm. Prod. Dev., LLC*, 2021 U.S. Dist. LEXIS 61671 (E.D.N.C. Mar. 31, 2021); *Santiago v. Univ. of Miami*, 2021 U.S. Dist. LEXIS 57922 (S.D. Fla. Mar. 26, 2021); *McGinnes v. FirstGroup Am., Inc.*, 2021 U.S. Dist. LEXIS 50902 (S.D. Ohio Mar. 18, 2021); *McCool v. AHS Mgmt. Co.*, 2021 U.S. Dist. LEXIS 40773 (M.D. Tenn. Mar. 4, 2021); *Parmer v. Land O'Lakes, Inc.*, 2021 U.S. Dist. LEXIS 24023 (D. Minn. Feb. 9, 2021).

9. *Compare e.g., Drake*, 2021 U.S. Dist. LEXIS 162603 (no standing to assert claims concerning funds that plaintiff did not invest in); *Lange*, 2021 U.S. Dist. LEXIS 133195 (same); *In re Omnicom ERISA Litig.*, 2021 U.S. Dist. LEXIS 144054; (same); *with*, *In re Biogen, Inc. ERISA Litig.*, 2021 U.S. Dist. LEXIS 136919 (rejecting argument that plaintiffs lacked standing to assert claims concerning funds in which they did not invest because plaintiff alleged an injury related to at least one challenged fund in which they did invest and as to other funds "plaintiffs can establish constitutional standing to bring representative claims by pointing to injuries to Plan assets"); *Cates,* 2021 WL 964417 (same); *Khan*, 2021 WL 1550929 (same).

10. *Compare e.g.*, *Smith*, 2021 WL 4097052 (rejecting performance and fee claims related to actively managed target date funds that were compared to passive funds in the complaint because "actively managed funds and passively managed funds are not ideal comparators"); *with*, *In re Omnicom ERISA Litig.*, 2021 WL 3292487 (allowing performance and fee claims challenging actively managed target date funds based on comparisons to passively managed funds because the question of whether they are truly comparable is a question for summary judgment).

11. *Compare e.g.*, *Johnson v. Duke Energy Corp.,* 2021 WL 828480 (holding that plaintiffs sufficiently stated an excessive recordkeeping claim by alleging that the plan paid between $58-$67 while other plans paid less, the plan could have negotiated a fee of $14-21 per participant fee, and that fiduciaries failed to issue RPFs for recordkeeping during the class period); *with*, *Johnson v. Pnc Fin. Servs. Group*, 2021 U.S. Dist. LEXIS 149408 (rejecting plaintiffs' excessive recordkeeping claim that it was imprudent to pay between $51-$57 per participant where industry standard was $35, the plan could have negotiated a fee of $14-21 per participant fee, and fiduciaries failed to issue RFPs for recordkeeping during the class period).

12. *Compare e.g.*, *Tobias*, 2021 U.S. Dist. LEXIS 173539 (N.D. Cal. Sept. 13, 2021) ("Plaintiffs' allegations regarding the availability of lower cost share classes are, without more, insufficient to state a claim for breach of the duty of imprudence."); *with*, *Dover*, 2021 U.S. Dist. LEXIS 185205 ("Plaintiffs have provided factual evidence that there were lower cost options available in the same funds, and allege that the Plan would qualify for the low cost share classes. . . . At this stage these allegations must be accepted as true. . . . [These] allegation[s] [are] sufficient to support a breach of prudence claim.").

13. Jacklyn Wille, "Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market," BNA Pens. & Ben Daily (Oct. 18, 2021) (noting that the "spike in lawsuits over

retirement plan fees has wreaked havoc on the market for fiduciary liability insurance" and that retention rates for some companies went from $0 to $10 million).

14. *See e.g.*, *Boley v. Universal Health Servs.*, 337 F.R.D. 626 (E.D. Penn. 2021) (certifying class of over 60,000 plan participants); *Snyder v. UnitedHealth Grp., Inc.*, 21-cv-01049 (D. Minn. Dec. 28, 2021) (ordering granting parties additional time to present a stipulation on class certification of class of allegedly "tens of thousands" of participants), ECF No. 100; *Baker v. John Hancock Life Insurance Co.*, 20-cv-10397 (D. Mass. Feb. 12, 2021) (plaintiffs' unopposed motion for class certification of a class of 9,800 plan participants), EFC No. 53. However, plaintiffs were again unsuccessful in their efforts to certify "plan classes" consisting of large numbers of defined contribution plans due to their inability to show commonality and typicality and with calculating class wide damages with such large plan classes. *See Davis v. Stadion Money Mgmt.*, 2021 U.S. Dist. LEXIS 184619 (D. Neb. Sept. 27, 2021) (denying class certification of class "of thousands of plans" for failure to satisfy "the requirements of commonality and typicality under Rule 23(a)" and "predominance and superiority under Rule 23(b)(3)").

15. *Baird v. BlackRock*, No. 4:17-cv-01892 (N.D. Cal. March 23, 2021), ECF No. 490 (order granting motion for final settlement approval of $9.65 million with $2.7 million in attorneys' fees); *Khan et al. v. PTC Inc.*, No. 1:20-cv-11710 (D. Mass. Oct. 21, 2021), ECF No. 56 (memo of law in support of unopposed motion for prelim. approval of class action settlement of $1.7 million with $575,000 in attorneys' fees); *Allegretti v. Walgreen Co.*, No. 1:19-cv-05392 (N.D. Ill. Oct 22, 2021), ECF No. 99-1 (memo in support of prelim. approval of class action settlement of $13.75 million with $4.58 million in attorneys' fees); *Freck v. Cerner Corp.*, No. 4:20-cv-00043 (W.D. Mo. June 18, 2021), ECF No. 63-1 (suggestions in support of motion for final approval of class action settlement of $4.05 million with $1.35 million in attorneys' fees); *Cates v. Columbia University*, No. 1:16-cv-06524 (S.D.N.Y. May 21, 2021), ECF No. 442 (memo in support of prelim. approval of settlement of $13 million with $4.33 million in attorneys' fees); *Conte v. Wakemed*, No. 5:21-cv-00190 (W.D.N.C. Apr. 26, 2021), ECF No. 11 (memo in support of preliminary approval of class action settlement of $975,000 with $325,000 in attorneys' fees); *Crawford v. CDI Corp.*, No. 2:20-cv-3317 (D. Penn. June 6, 2021), ECF No. 37 (unopposed motion for preliminary approval of class action settlement of $1.8 million with $540,000 in attorneys' fees); *Draney v. Westco Chemicals, Inc.*, No. 2:19-cv-01405 (C.D. Cali. May 27, 2021), ECF No. 60 (memo in support of preliminary approval of class action settlement of $500,000 with $150,000 in attorneys' fees); *Harding v. SouthCoast Hospitals Group, Inc.*, No. 1:20-cv-12216 (D. Mass. Nov 19, 2021), ECF No. 38 (memo in support of preliminary approval of class action settlement of $2 million with $666,666.67 in attorneys' fees); *Baker v. John Hancock*, No. 1:20-cv-10397 (D. Mass. June 1, 2021), ECF No. 63 (memo in support of preliminary approval of class action settlement of $14 million with $4.66 million in attorneys' fees); *Kinder v. Koch Industries, Inc.*, No., 1:20-cv-02973 (N.D. Ga. Nov. 24, 2021), ECF No. 71-1 (memo in support of final approval of class action settlement of $4 million with $1 million in attorneys' fees); *Reetz v. Lowes Companies, Inc.*, No. 5:18-cv-00075 (W.D.N.C. May 28, 2021), ECF No. 221 (memo in support of preliminary approval of class action settlement of $12.5 million with $4,166,667 in attorneys' fees); *Karg v. TransAmerica Corporation*, No. 1:18-cv-00134 (N.D. Iowa June 23, 2021), ECF No. 82-1 (memo in support of motion for preliminary approval of class action settlement of $5.4 million with $1.95 million in attorneys' fees); *Terraza v. Safeway Inc.*, No. 16-cv-03994 (N.D. Cali. Apr. 2, 2021), ECF No. 272 (motion for final approval of settlement of $8.5 million with $2.55 million in attorneys' fees per ECF No. 277); *Sandoval v. Exela Enterprise Solutions,*

Inc., No. 3:17-cv-01573 (D. Conn. Aug. 3, 2021), ECF No. 96-1 (memo supporting final approval of class settlement of $750,000 with $187,500 in attorneys' fees); *Santiago v. University of Miami*, No. 1:20-cv-21784 (S.D. Fla. Nov. 23, 2021), ECF No. 58 (motion for preliminary approval of class action settlement of $1.85 million with $616,666 in attorneys' fees); *Glasscock v. Cerco Inc.*, No. 1:20-cv-00092 (E.D. Va. Feb. 12, 2021), ECF No. 93 (memo supporting preliminary approval of class action settlement of $1.2 million with $396,000 in attorneys' fees); *Slavens v. Meritor, Inc.*, No. 2:20-cv-13047 (E.D. Mich. Nov. 23, 2021) ECF No. 28 (motion for preliminary approval of settlement of $470,000 with $141,000 in attorneys' fees); *Sweda v. University of Pennsylvania*, No. 2:16-cv-4329, 2021 WL 5907947 (E.D. Pa. Dec. 14, 2021) (memo approving award of attorneys' fees of $4,333,333 and total class settlement of $13 million).

16. *See* Tulio D. Chirinos, Robert Rachal, Myron Rumeld, & Kyle Hansen, *Fee and Investment Litigation 2015-2020: Five Year Review of Developments and Best Practices to Mitigate Risks – Part 1*, Vol. 34 No. 1 Ben. L.J. 21, at 5, n. 7 (Spring 2021) (showing that in 2020 plaintiffs acquired $245 million in settlements and $75 million in attorneys' fees).

17. *Alas v. AT&T Services*, 2021 WL 4893372 (C.D. Cal. Sep 28, 2021); *Alfonso v. Cumulus Media, Inc.*, 2021 WL 5033479 (N.D. Ga. Oct. 15, 2021).

18. *Reetz v. Lowe's Companies, Inc.*, 2021 WL 535160 (W.D.N.C. Feb. 12, 2021); *Rozo v. Principal Life Ins. Co.*, 2021 U.S. Dist. LEXIS 74409 (S.D. Iowa Apr. 8, 2021); *Baird v. BlackRock Institutional Trust Company, N.A.*, 2021 WL 105619 (N.D. Cal. Jan. 12, 2021); *Feinberg v. T. Rowe Price Grp., Inc.*, 2021 WL 488631 (D. Md. Feb. 10, 2021). *Baird* and *Feinberg* settled before trial.

19. *Reetz v. Lowe's Cos.*, 2021 WL 4771535 (W.D.N.C. Oct. 12, 2021) (ruling in favor of defendant on all claims following a five-day bench trial); *Rozo v. Principal Life Ins. Co.*, 2021 U.S. Dist. LEXIS 74409 (S.D. Iowa Apr. 8, 2021) (ruling in favor of defendants on all claims following a six-day bench trial).

20. Despite hundreds of fee and investment cases being filed since 2015, only seven cases have reached trial. *See Tibble v. Edison Int'l*, 2017 WL 3523737 (C.D. Cal. Aug. 16, 2017); *Brotherston v. Putnam Invs., LLC*, 2017 WL2634361 (D. Mass. June 19, 2017) (reversed and remanded for new trial and settled before retrial); *Sacerdote v. New York Univ.*, 328 F.Supp.3d 273 (S.D.N.Y. 2018); *Wildman v. Am. Century Servs., LLC*, 362 F.Supp.3d 685 (W.D. Mo. 2019); *Ramos v. Banner Health*, 461 F. Supp. 3d 1067 (D. Colo. 2020); *Rozo v. Principal Life Ins. Co.*, 2021 U.S. Dist. LEXIS 74409 (S.D. Iowa Apr. 8, 2021); *Reetz v. Lowe's Cos.,* 2021 WL 4771535 (W.D.N.C. Oct. 12, 2021). Plaintiffs have only won on two claims in the six trials. *See Ramos*, 461 F. Supp. 3d 1067 (ruling in favor of plaintiffs on their recordkeeping fee claim but ruling in favor of defendants on all other claims);*Tibble*, 2017 WL 3523737 (ruling in favor of plaintiffs on their claim that defendants imprudently retained retail share class mutual funds where identical and cheaper institutional share classes were available).

21. *See Sacerdote v. New York Univ.*, 9 F.4th 95 (2nd Cir. 2021) (affirming defendants' 2018 trial victory on all claims); *Ramos v. Banner Health*, 1 F.4th 769 (10th Cir. 2021) (affirming defendants' 2020 victory at trial as to plaintiffs' prohibited transaction claim and the district court's decision to not adopt plaintiffs' expert's damages estimates of $19.4 million for the recordkeeping fee claim that plaintiffs won and the district court's decision to only award $1.6 million plus interest in damages).

22. *See Ortiz v. Am. Airlines, Inc.*, 5 F. 4th 622 (5th Cir. 2021) (affirming summary judgment in favor of some defendants and reversing the district courts' decision that plaintiffs had standing to sue another defendant).

23. *See Wong v. FMR, LLC (In re Fid. ERISA Fee Litig.)*, 990 F.3d 50 (1st Cir. 2021) (affirming dismissal of plaintiffs' claims based on the finding that defendant's actions with respect to plan assets did not render it a fiduciary under ERISA).

24. *Becker v. United States Dist. Court*, 993 F.3d 731 (9th Cir. 2021).

25. *Cooper v. RuaneCunniff & Goldfarb Inc.*, 990 F.3d 173 (2nd Cir. 2021); *Smith v. Bd. of Dirs. Of Triad Mfg.*, 13 F. 4th 613 (7th Cir. 2021). The district court in *Hawkins v. Cintas Corps.*, 2021 U.S. Dist. LEXIS 14766 (S.D. Ohio Jan. 27, 2021) also denied a motion to compel arbitration in a fee and investment case based on a general employment agreement arbitration clause.

26. *Wilcox v. Georgetown Univ.*, 987 F.3d 143 (D.C. Cir. 2021).

27. *See e.g.*, *Divane v. Northwestern Univ.*, 953 F.3d 980 (7th Cir. 2020); *Sweda v. Univ. of Penn.*, 923 F.3d 320 (3d. Cir. 2019); *Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018).

28. Prior to 1958, many employees of universities typically funded retirement through 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).

29. *Divane v. Northwestern Univ.*,953 F.3d 980, 991 (7th Cir. 2020).

30. *Id.*

31. 2022 U.S. LEXIS 622 (Jan. 24, 2022). (Justice Amy Barrett recused herself).

32. 575 U.S. 523 (2015).

33. *Id.* at **11-12.

34. *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. 2019); *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510 (9th Cir. 2019); *see also Torres v. Greystar Mgmt. Servs., L.P.,* 2019 U.S. Dist. LEXIS 229515 (W.D. Tex. Oct. 25, 2019)(referring to arbitration an action filed by an employee-participant on behalf of a 401(k) plan under Section 502(a)(2) of ERISA against her employer-fiduciary).

35. 990 F.3d 173, 175 (2nd Cir. 2021).

36. *Id.* at 177.

37. *Id.* at 178.

38. *Id.* at 178–79 (citing *Cooper v. RuaneCunniff & Goldfarb Inc.*, 2017 WL 3524682, at *4 (S.D.N.Y. Aug. 15, 2017)).

39. *Cooper*, 990 F.3d 173 at 186.

40. *Id.* at 181.

41. *Id.* at 183–84.

42. *Id.* at 184–85.

43. *See supra* note 34.

44. 13 F. 4th 613, 615 (7th Cir. 2021).

45. *Id.* at 617.

46. *Id.* at 616. The court also noted that the provision was added to the plan via amendment two years after Smith left employment with the employer-sponsor and there was no evidence that Smith ever received notice thereof.

47. *Id.* at 620 (citing cases from the Second, Third, Fifth, Sixth, Eighth, and Tenth Circuits) (citations omitted).

48. *Id.* at 620–22.

49. *Id.*

50. *Id.* at 622.

51. *Id.* at 623.

52. *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922 (6th Cir. 2014); *In re Mathias*, 867 F.3d 727 (7th Cir. 2017).

53. *In re Becker*, 993 F.3d 731 (9th Cir. 2021). Technically the Ninth Circuit denied plaintiff's writ of mandamus although the practical result is the motion to transfer decision was affirmed and the case was transferred.

54. 5 F.4th 622 (5th Cir. 2021).

55. *Ortiz v. Am. Airlines, Inc.*, 5 F.4th 622, 625-26 (5th Cir. 2021).

56. *Id.* at 626.

57. *See Ortiz v. Am. Airlines, Inc.*, 2020 WL 4504385 (N.D. Tex. Aug. 5, 2020), *aff'd in part, vacated in part, rev'd in part*, 5 F.4th 622 (5th Cir. 2021).

58. *Ortiz*, 5 F.4th at 628-30.

59. 140 S. Ct. 1615 (2020).

60. *Id.*

61. *Id.* at 629-30.

62. *Id.*

63. *Id.*

64. *Id.*

65. 9 F.4th 95, 101 (2nd Cir. 2021).

66. *Id.* at 103.

67. *Id.*

68. *Id.* at 103–104.

69. *Id.*; *see also Sacerdote v. New York Univ.*, 2017 WL 3701482 (S.D.N.Y. Aug. 25, 2017).

70. The Second Circuit also affirmed various other rulings from the district court including: (i) the use of written direct testimony at trial in lieu of live testimony; (ii) the use of a bench trial instead of a jury trial; and (ii) the denial of plaintiffs' motion for a new trial based on the trial judge's alleged inappropriate ties to NYU. *Sacerdote*, 9 F.4th at 122–23.

71. *Id.* at 122.

72. *Id*. at 108.

73. *Id*.

74. *Id*.

75. *Id*.

76. *Id*. at 110.

77. *Id*. at 122–23.

78. 1 F.4th 769, 773 (10th Cir. 2021).

79. *Id*. at 775–76.

80. *Id*. at 776.

81. *Id*.

82. *Id*.

83. *Id*. at 777.

84. *Id*. at 777–84.

85. *Id*. at 787 ("ERISA cannot be used to put an end to run-of-the-mill service agreements, opening plan fiduciaries up to litigation merely because they engaged in an arm's length deal with a service provider. . . . Otherwise, a plan participant could force any plan into court for doing nothing more than hiring an outside company to provide recordkeeping and administrative services.").

86. *Id*. at 784–85.

87. *Id*.

88. 2021 WL 4771535 (W.D.N.C. Oct. 12, 2021), *appeal filed Reetz v. Lowe's Cos*., (4th Cir. Nov. 10, 2021).

89. *Reetz v. Lowe's Cos*., No. 18-cv-00075, ECF No. 84 (Mar. 23, 2020).

90. *Id*. at ECF No. 261 (Sept. 9, 2021).

91. *Reetz v. Lowe's Cos*., 2021 WL 4771535, at *1 (W.D.N.C. Oct. 12, 2021).

92. *Id*. at *46-51.

93. *Id*. at *47.

94. *Id*.

95. *Id*. at *47-48.

96. *Id*. at *48-51.

97. *Id*. at *48-49.

98. *Reetz v. Lowe's Cos*., 2021 WL 4771535, at *49-50 (W.D.N.C. Oct. 12, 2021).

99. *Id*. at *50.

100. *Id* at *50-51.

101. *Id*. at *52-56.

102. *Id*. at *52-53.

103. *Id.* at *53.

104. *Id.* at *53-54.

105. *Id.* at *54-55.

106. *Id.* at *55-56.

107. *Id.* at *56-58.

108. *Id.* at *56.

109. *Id.* at *56-58.

110. The court also rejected plaintiff's claim that Aon breached its fiduciary duties by offering its fiduciary services (cross-selling) as part of its recommendations for reasons that are not the subject of this article. *See id.* at *51-52.

111. *Reetz v. Lowe's Cos.*, No. 21-2267 (4th Cir. Nov. 10, 2021).

112. 2021 WL 4893372 (C.D. Cal. Sep 28, 2021).

113. *See supra* notes 9-12.

114. 2021 WL 4893372 (C.D. Cal. Sep 28, 2021).

115. 2019 U.S. Dist. LEXIS 14625 (S.D. Ind. Jan. 30, 2019).

116. *Id.* at *26-27.

117. *Brotherston v. Putnam Invs., LLC*, 2017 U.S. Dist. LEXIS 93654, at *17, n. 9 (D. Mass. June 19, 2017).

118. *Brotherston v. Putnam Investments, LLC,* No.15-cv-13825 (D. Mass. August 26, 2020) ECF 228, 232 (mem. in supp. of final settlement approval and order requiring Putnam to establish and follow an investment policy statement).

119. *See, e.g., Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) (noting that "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)"); Dep't of Labor Info. Ltr, No. DOL585, 1998 ERISA LEXIS 6 (Feb. 19, 1998); U.S. Dep't of Labor, *Understanding Retirement Plan Fees and Expenses*, available at*https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/publications* (last visited Jan. 23, 2019) ("Fees and expenses are one of several factors to consider when you select and monitor plan service providers and investments. The level and quality of service and investment risk and return will also affect your decisions."); U.S. Dep't of Labor; *Meeting Your Fiduciary Responsibilities*, *https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/publications* (last visited Jan. 23, 2019).

120. *Ramos v. Banner Health*, 461 F. Supp. 3d 1067 (D. Colo. 2020).

121. 755 F. App'x 697 (9th Cir. 2019). This case was previously styled "*In Re Disney ERISA Litig*." In an earlier decision affirmed by the Ninth Circuit, the district court had 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.

122. 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.

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