VOL. 34, NO. 1 SPRING 2021

BENEFITS LAW JOURNAL

Fee and Investment Litigation 2015-2020: Five Year Review of Developments and Best Practices to Mitigate Risk – Part I

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In this two-part article, the authors provide a brief overview of 2020 trends and developments in fee and investment litigation and then explore more closely the key rulings and developments since 2015 and their impact on ERISA fee and investment litigation. The first part of the article follows below. The second part of this article will appear in the next issue of Benefits Law Journal *and will cover updates in 403(b) litigation, proprietary fee litigation, procedural and jurisdictional issues and defenses, and the potential practices to mitigate risk as informed by the decisions discussed in Part I and Part II of this article.*

Defined contribution plans, including 401(k) and (for certain non-profit companies) 403(b) plans, now occupy a key role

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in providing retirement benefits to the American workforce.[1] The enhanced role of 401(k) and 403(b) plans has put increased pressure on plan performance and, since 2006, has led to multiple waves of ERISA litigation challenging the fees and the selection and retention of mutual funds and other investments offered in these plans ("fee and investment litigation").

The latest wave of litigation began in late 2015[2] and is clearly the largest and longest sustained wave, with hundreds of cases filed against plan sponsors, fiduciaries, and service providers. There is no indication the current wave will end anytime soon. Rather, the pace of new complaints has surged to historic levels with nearly 100 new cases filed in 2020, accounting for the largest one-year increase in ERISA fee and investment litigation.[3]

The five-year period since 2015 has also led to major developments in the substantive and procedural law in this litigation with the Supreme Court issuing two rulings,[4] at least 10 circuit courts of appeals issuing dozens of decisions,[5] and five district courts issuing bench trial rulings on the merits.[6] During this period, plaintiffs also secured nearly a billion dollars in settlements that included $330 million for attorneys' fees.[7]

Our articles for the *Benefits Law Journal*'s winter 2015 edition and spring editions for 2016-2019 provided, in one-year reviews, key developments in fee and investment litigation through late-2019, and discussed potential best practices to lessen that exposure.[8]

In this article, we provide a brief overview of 2020 trends and developments and then explore more closely the key rulings and developments since 2015 and their impact on ERISA fee and investment litigation. Set forth below is a brief summary of the topics that will be covered.

- *Supreme Court Rulings*. The Supreme Court issued two rulings in ERISA fee and investment litigation cases.

  The first, issued in 2015, *Tibble v. Edison Int'l*, reversed a decision by the U.S. Court of Appeals for the Ninth Circuit holding that ERISA's six-year statute of repose foreclosed challenges to investment options added to a plan more than six years before the filing of the suit. *Tibble* applied the trust law principle that plan fiduciaries have a continuing duty periodically to monitor funds selected as investment alternatives.[9] While the *Tibble* decision relied on long standing trust principals and was not necessarily remarkable, its impact was immediate as it essentially insulated duty to monitor claims from ERISA's statute of repose and bolstered plaintiffs' confidence at the beginning of the 2015 wave.

The second ruling, issued in 2020, *Intel Corp. Inv. Policy Comm. v. Sulyma*,[10] held that plaintiffs do not have "actual knowledge" of fiduciary breaches necessary to start ERISA's three-year statute of limitations solely from being sent statutory disclosures required under ERISA. The Supreme Court also issued another decision in 2020, *Thole v. U.S. Bank N.A.*,[11] an ERISA fee and investment litigation case involving a defined benefit plan (which is not the subject of this article), making clear that ERISA claims remain subject to Article III's constitutional standing requirement, including that a plaintiff that receives not a "penny more" in victory or a "penny less" in defeat does not have Article III standing in ERISA suits.

- *New Theories of Liability*. Plaintiffs developed and pursued new theories, including:

  (i) Claims based on index funds having modestly higher fees and/or slight underperformance as compared to plaintiffs' handpicked comparable;

  (ii) Claims attempting to establish a *per se* rule of imprudence for offering any capital preservation option other than stable value funds;

  (iii) Claims challenging the ERISA-exempt status of stable value funds offered by insurers;

  (iv) Claims challenging the offering of alternative and actively managed investments;

  (v) Claims based on service providers' use of participant data to market related services; and

  (vi) Claims challenging fees paid to robo-advisors.

  As discussed below, plaintiffs had mixed results overall with these claims with some being rejected at the motion to dismiss stage, trial or appellate levels, but others resulting in settlements.

- *403(b) University Fee Cases*. Starting in 2016, plaintiffs filed over two dozen cases against large universities, who were previously not the target of fee and investment litigation. The complaints also introduced several new theories of liability, including claims that it was imprudent to offer too many investment options because it caused "confusion" and that it was imprudent to retain multiple recordkeepers.

The cases have resulted in four appellate decisions, including three on motions to dismiss (and arguably created a circuit split between the U.S. Courts of Appeals for the Third and Seventh Circuits), one trial victory for defendants, and numerous settlements. The U.S. Supreme Court has also expressed interest in hearing a petition for certiorari in *Divane v. Northwestern Univ.*,[12] where plaintiffs have asked the Supreme Court to rule on whether plaintiffs' excessive fee allegations are sufficient to survive a motion to dismiss.

- *Proprietary Fee Cases*. Plaintiffs brought many cases challenging plans that offer participants investment options that are managed directly or indirectly by the plan's sponsors.

  Plaintiffs enjoyed early success at the motion to dismiss stage, but defendants were able to make gains after several high-profile cases were dismissed and affirmed in appellate decisions.

  Defendants also won complete victories in both proprietary fee cases tried since 2015 (although one was reversed and settled before retrial).[13]

  Plaintiffs were successful in settling many of these cases, and were awarded $7.3 million at summary judgment in a unique case involving alleged self-dealing brought by the U.S. Department of Labor, *Acosta v. City Nat'l Corp*.[14]

- *Procedural and Other Developments*. There were several developments and key rulings in non-substantive areas since 2015. The Ninth Circuit ruled that an arbitration agreement limited plaintiff's relief in a putative class action brought on behalf of the plan to the impaired value of the plan assets in the plaintiff's own 401(k) account. Plaintiffs largely failed in their attempt to secure jury trials, including at the Seventh Circuit, but had some success in the U.S. Court of Appeals for the Second Circuit, where the issue is currently on appeal.

  Additionally, courts issued important rulings on damages, including providing parameters for calculating damages for lost investment earnings and for claims related to mapping from one fund to another.[15] Some of the statute of limitations defenses were noted above. As discussed below, plan exhaustion defenses are also being raised in these types of litigation.

The rulings and developments over the last five years provide a wealth of important insight into how courts will judge plan fiduciaries' actions for both procedural and substantive prudence, and how they will evaluate plaintiffs' efforts to establish imprudence by comparison to proffered benchmarks and plaintiffs' proffered experts. This article analyzes these rulings to identify best practices that can help mitigate fiduciary risk and make plans unattractive targets for these lawsuits.

BRIEF OVERVIEW OF 2020 TRENDS AND DEVELOPMENTS

In 2020, plaintiffs brought historic levels of new complaints involving plans of all sizes in nearly all industries (although only one against a university sponsored plan).[16] The complaints generally do not introduce new theories of liability (although one new trend is that the vast majority challenge a suite of target date funds) and instead appear to be largely copycat type suits alleging excessive fees and underperformance, with six law firms bringing over 85 of the 97 cases filed in 2020.[17]

In response, defendants have started urging plan exhaustion requirements and, as in previous years, have also asserted, plan limitations defenses (often used to defend benefit claims) against these fiduciary claims – defenses that to date have had some success in the U.S. Court of Appeals for the Eleventh Circuit.[18]

Plaintiffs continued their nearly perfect record on motions to certify fee litigation class actions over the last five years[19] and, several defendants continued the increasing trend of foregoing opposing class certification, including with respect to three classes of over 240,000 members.[20] Plaintiffs also successfully acquired approximately $245 million in settlements that included $75 million for attorney's fees.[21]

Plaintiffs had mixed results at the pleading stage in 2020 with several cases dismissed[22] and some narrowed[23] but others allowed to move to the discovery phase of litigation.[24] On the merits, plaintiffs had mixed results in the only fee and investment trial in 2020 where they obtained a judgement for over $2 million as to their excessive recordkeeping claim but lost on their remaining claims involving the prudence of various plan investment options.[25]

Defendants had success at the appellate level[26] but, as discussed below, plaintiffs won key rulings at the Supreme Court on statute of limitations in *Intel Corp. Inv. Policy Comm. v. Sulyma*[27] and at the U.S. Court of Appeals for the Eighth Circuit on the fiduciary status of managers offering guaranteed investment options in *Rozo v. Principal Life Ins. Co.*[28]

2015-2020 FEE AND INVESTMENT LITIGATION RULINGS AND DEVELOPMENTS

U.S. Supreme Court Rulings

As mentioned above, the U.S. Supreme Court has been fairly active in ERISA litigation over the last five years. The Supreme Court issued two rulings in ERISA fee and investment litigation cases involving defined contribution plans, both of which ruled on procedural defenses. *Tibble v. Edison International*,[29] addressed ERISA's six-year statute of repose under ERISA § 413(1) and *Intel Corp. Investment Policy Committee v. Sulyma*,[30] addressed ERISA's "actual knowledge" three-year statute of limitations under ERISA § 413(2).[31] The Supreme Court also issued a decision in *Thole v. U.S Bank, N.A.*,[32] which held, in the defined benefit plan context (which is not the subject of this article), that ERISA remains fully subject to Article III's constitutional standing requirement. And the Court issued a decision right before the 2015 wave began addressing the pleading standard in ERISA stock-drop cases (which are also not the subject of this article) in *Fifth Third Bancorp v. Dudenhoeffer*.[33]

In *Tibble*, the Supreme Court applied trust law principles to ERISA to hold that a fiduciary has a duty to periodically monitor plan investments, and as a result, ERISA's six-year statute of limitations for fiduciary breach claims did not necessarily bar claims challenging the retention of investments selected outside the limitations period.[34]

By way of background, plaintiffs originally brought a litany of claims, most of which were dismissed on summary judgment in the district court.[35] Some claims remained for trial, including whether Edison breached its fiduciary duty to monitor the reasonableness of three mutual funds added to the plan in 1999 and three mutual funds added to the plan in 2001.[36] Plaintiffs alleged that Edison breached its fiduciary duty to monitor these funds by offering higher priced retail-class mutual funds as plan investments when materially identical lower priced institutional-class mutual funds were available.[37]

The district court found that defendants failed to adequately investigate the possibility of lower-cost institutional share class alternatives for the mutual funds selected in 2001, but dismissed as time-barred claims against the three funds selected in 1999, which was more than six years before suit was filed in 2007.[38] The Ninth Circuit affirmed, ruling that treating a defendants' fiduciary duties as "ongoing" would "make hash" out of ERISA's statute of repose and lead to an unworkable result because it would expose fiduciaries to potential liability for decisions made decades ago.[39]

On appeal, the Supreme Court reversed, explaining that under trust law, a fiduciary is required to conduct a "regular review" of its investments, with the nature and timing of the review contingent on the circumstances.[40] Relying on trust law, the Court then noted that this "continuing duty" exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset.[41] The Court ruled that a plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones, so long as the alleged breach of the continuing duty occurred within six years of suit.[42] Based on these principles, the Supreme Court remanded to the lower courts to flesh out the contours of this duty to periodically monitor plan investments.[43]

The Supreme Court's decision often forecloses a six-year limitations defense in the context of a claim alleging failure to monitor a plan's investments since the duty to monitor is a "continuing" one. The Supreme Court did however acknowledge that a plaintiff would need to allege circumstances warranting a review of investment options, and that the alleged failure to monitor must occur within the preceding six-year period before suit was filed.[44] The *Tibble* decision preceded the explosion of new cases and its "continuing duty to monitor" language is often cited in these complaints.

In *Intel*, the Supreme Court held that the "actual knowledge" requirement set forth in ERISA's three-year statute of limitations cannot be satisfied by information included in plan disclosures that a plaintiff does not read or cannot recall reading.[45]

By way of background, a former Intel employee brought suit challenging two 401(k) investment options as being over-invested in alternative investments such as hedge funds and private equity, which allegedly caused losses through underperformance and excessive fees.[46]

Defendants argued that the investments and investment strategy were revealed in plan communications that were available to plaintiff via disclosures and notices on plaintiff's personal plan website, and moved to dismiss on the basis that plaintiff had "actual knowledge" of the investment strategy more than three years before bringing suit.[47]

Plaintiff testified at his deposition that he visited the plan's website but was not aware of the plan's investment strategy and did not recall reading the information available on the website.[48]

The district court granted summary judgment in favor of defendants, finding that plaintiff's claims were barred by ERISA's three-year statute of limitations.[49] The district court reasoned that it would be improper to allow plaintiff's claims to survive "merely because he did not look further into the disclosures made to him" and that he had actual knowledge of the "underlying facts" forming the basis of his complaint given that he was repeatedly directed to the disclosures on the website.[50]

The Ninth Circuit reversed, holding that there was a dispute of material fact as to whether plaintiff had "actual knowledge" of the underlying facts because he testified that he had not read the materials containing the information that would have alerted him to these facts.[51] In so ruling, the Ninth Circuit construed actual knowledge to mean "what it says: knowledge that is actual, not merely a possible inference from ambiguous circumstances."[52] The Ninth Circuit then concluded that although plaintiff had sufficient information available to him to know about the allegedly imprudent investments more than three years before filing suit, there was a material dispute as to when he gained that knowledge, given that he testified that he had not read the information available to him.[53]

The Supreme Court affirmed.[54]

The Court first observed that the meaning of "actual knowledge" is plain based on dictionary definitions (both basic and legal definitions), and that accordingly, for a person to have "actual knowledge" she must "in fact be aware of it."[55] The Court further observed that Congress has drawn the distinction between "actual" and "constructive" knowledge elsewhere in ERISA, and when Congress has included both forms of knowledge in a provision limiting ERISA actions, it has done so explicitly.[56] Accordingly, the Court refused to assume that Congress intended ERISA's three year-limitations period to include constructive knowledge in the absence of such language.[57] The Court acknowledged that its construction of the statute may diminish certain protections that ERISA provides fiduciaries, but stated that such policy considerations are better taken up by Congress than by the Court.[58]

The *Intel* decision does offer some potential opportunities to plan fiduciaries because the Court stated that "[n]othing in this opinion forecloses any of the 'usual ways' to prove actual knowledge at any stage in the litigation."[59] The Court explained that:

(1) Plaintiffs who recall reading particular disclosures "will of course be bound by oath" to say so in their depositions;

(2) Actual knowledge may be proved through inference from circumstantial evidence;

(3) A court should not adopt plaintiff's version of the facts if their denial of knowledge is "blatantly contradicted by the record;" and

(4) Defendants are not precluded from contending that evidence of "willful blindness" supports a finding of "actual knowledge."

Therefore, if a fiduciary is able to submit evidence in support of any of (1)-(4) above, ERISA's three-year statute of limitations may still provide a valid defense. The often fact-specific nature of this dispositive defense can also provide strong grounds to attack class claims that seek to recover for fiduciary breaches more than three years before suit was filed.

In the defined benefit plan context, the Supreme Court in *Thole v. U.S. Bank, N.A.*, held that participants in an ERISA defined benefit plan who did not suffer monetary losses lacked constitutional Article III standing to assert breach of fiduciary duty claims.

In *Thole*, two participants in U.S. Bank's defined benefit pension plan sued plan fiduciaries alleging that the plan's investment strategy violated ERISA and that the plan's investment vehicles solely benefited U.S. Bank.[60] Plaintiffs alleged that these breaches caused significant losses to the plan and resulted in the plan being underfunded.[61]

The Eighth Circuit dismissed plaintiffs' claims because they lacked ERISA statutory standing under § 502(a)(3), reasoning that although the plan was underfunded when the suit began, defendants subsequently contributed enough money to meet minimum funding requirements and under Eighth Circuit precedent, if a plan satisfied minimum funding requirements, participants cannot sue for relief under ERISA.[62]

The Supreme Court affirmed dismissal of this suit on Article III grounds, finding that plaintiffs lacked a "concrete stake" in the lawsuit since they would receive the full value of their promised benefits regardless of the outcome of the case.[63] In so ruling, the Court rejected all four of plaintiffs' alternative standing arguments, finding that:

(i) In the defined benefit plan context, the trust law principal that an injury to the plan is an injury to the participant is inapplicable because participants' benefits are fixed and do not depend on the value of the plan;

(ii) Asserting a claim on behalf of an ERISA plan under Section 502(a) does not alleviate the requirement under Article III that the named plaintiff suffer an injury-in-fact;

(iii) Satisfying statutory standing (i.e., being a person authorized to sue to vindicate the statute) does not mean that a plaintiff "automatically" satisfies Article III's injury-in-fact requirement; and

(iv) The question of whether there are independent means to regulate fiduciary conduct is irrelevant to the Article III standing issue and, in any event, defined benefit plans are regulated and monitored in multiple ways, including by the Department of Labor.

Justice Sotomayor authored a lengthy dissent arguing that plan participants have standing to sue for violations of ERISA fiduciary duties regardless of whether the plan's losses reduced participant benefits. While it is too early to know how the lower courts will react to Thole in the defined contribution context, defendants may be able to use its reasoning, especially since they have already had some success in using Article III standing to dismiss claims by plaintiffs who had not invested in the allegedly imprudent investment option.[64]

Finally, in *Fifth Third Bancorp v. Dudenhoeffer*,[65] the Supreme Court rejected the long-standing use of a presumption of prudence for investments in employer stock, but outlined a rigorous pleading standard for ERISA claims against Employee Stock Ownership Plans ("ESOPs"). Claims against ESOPs generally allege that fiduciaries had negative information (insider or public) that if disclosed or acted upon at an earlier time, would have prevented large losses to the plan's investments in an employer's stock.

In *Dudenhoeffer*, the Court held that for claims based on inside information a plaintiff must "plausibly allege an alternative action that a defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it."[66] For claims based on public information, the Court held that "allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances."[67] The Court also noted that motions to dismiss perform an important function to weed out meritless claims of fiduciary breach.[68]

Since *Dudenhoeffer*, most employer stock cases based on inside information have failed to make it past the pleading stage while, of relevance here, courts often cite to *Dudenhoeffer's* pleading standard in fee and investment litigation rulings.

New Theories of Liability

Index/Vanguard Claims

Plaintiffs have not let the overall lower fee environment since 2015 dissuade them from filing lawsuits. Instead, plaintiffs have begun challenging the fees of low-cost index funds. This includes cases where plaintiffs challenged as "excessive" index funds with fees as low as 3bps (i.e., $.30 for every $1,000 invested)[69] and even challenged the offering of Vanguard funds (considered one of the low fee industry leaders) by alleging that cheaper share classes of the same Vanguard funds were available and that plan fiduciaries allowed Vanguard to charge excessive recordkeeping fees. While courts are increasingly rejecting claims challenging such modest fees, plaintiffs now routinely challenge low-fee funds.

The two most notable cases asserting claims against the Vanguard funds were *White v. Chevron* and *Bell v. Anthem*.[70]

The Ninth Circuit affirmed the district court's dismissal of all claims in *White v. Chevron*,[71] effectively endorsing the district court's rigorous analysis of the complaint's allegations. The underlying lawsuit, filed in 2016, targeted Chevron's 401(k) plan, a very large plan with assets over $19 billion. The plan offered participants a diversified array of investment options (with an overall low-cost fee structure), including 12 Vanguard mutual funds, 12 Vanguard collective trust target-date funds, a Vanguard money market fund, and at least six other non-Vanguard investment options.[72] Plaintiffs alleged that participants lost over $20 million through unnecessary expenses because Chevron included 10 Vanguard funds (including some with fees as low as five bps) for which there were allegedly identical Vanguard funds available with lower-cost share classes.[73] Although the Ninth Circuit did not provide a lengthy explanation in affirming the district court's dismissal, it did explicitly reject plaintiffs' hindsight attacks. The court explained that plaintiffs failed to plead facts that, if proven, would make it more plausible than not that any breach of fiduciary duty occurred. Rather, the "allegations showed only that Chevron could have chosen different vehicles for investment that performed better during the relevant period, or sought lower fees for administration of the fund."[74] In 2019, the case concluded after the Ninth Circuit denied plaintiffs' petition for rehearing *en banc* and the Supreme Court denied plaintiffs' petition for writ of *certiorari*.[75]

In *Bell v. Anthem,* a case substantially similar to *Chevron* and brought by the same counsel as *Chevron*, plaintiffs survived a motion to dismiss,[76] certified a large class action,[77] survived a motion for summary judgement,[78] and then settled for $23 million.[79]

Stable Value Fund Claims

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

2015, courts have addressed such claims at all stages of litigation, with mixed results: plaintiffs survived early dismissals in some cases and subsequently settled some of those cases, but defendants defeated stable value claims in several cases on motions to dismiss and at trial and were successful in having three early dismissals affirmed by the Ninth Circuit and the U.S. Court of Appeals for the First Circuit.

On a full record following a bench trial, the court in *Wildman v. Am. Century Servs.* rejected plaintiffs' claim that it was imprudent to offer a money market fund in lieu of a stable value fund – a decision that allegedly had cost the plan over $31 million in hindsight based on opportunity losses.[80] The court began by explaining that ERISA does not require retirement plans to offer stable value funds; therefore, the issue for trial was whether the plan's fiduciaries considered alternative options to the plan's money market fund and "came to a reasoned decision for omitting them from the plan."[81] Relying on the plan's well-documented meeting minutes and materials, the court concluded that the plan's fiduciaries "carefully" considered various other capital preservation options and considered the risk/reward of including a stable value fund in the plan line-up "before ultimately deciding not to do so."[82] The court explained that "defendants cannot be said to have acted imprudently by thoroughly deliberating but then choosing not to add a stable value fund. . . ."[83]

In *Chevron*, the Ninth Circuit summarily affirmed the district court's ruling that plaintiffs failed to allege that Chevron fiduciaries had breached their fiduciary duties of loyalty and prudence when they included the Vanguard money market fund instead of a stable value fund. Plaintiffs argued that stable value funds had outperformed money market funds during the class period, and that the decision to maintain money market funds caused plan participants to lose more than $130 million in retirement savings. [84]

The district court had rejected as implausible plaintiffs' attempt to infer an imprudent process from inclusion of a money market fund instead of a stable value fund.[85] The district court noted that plaintiffs' focus on the performance of the stable value funds and the money market funds over a period of six years was "an improper hindsight-based challenge to the Plan fiduciaries' investment decision making." [86]

The First Circuit in *Ellis v. Fidelity Mgmt. Trust Co.*[87] and *Barchock v. CVS Health Corp.*[88] affirmed dismissal of claims challenging the *inclusion* of stable value funds based on alleged underperformance from the funds' investment strategies. *Ellis* and *Barchock* illustrate the hindsight-based nature of plaintiffs' claims, insofar as plaintiffs allege that it was imprudent to include funds that elsewhere were alleged to be preferred but here turned out to have underperformed.

In *Ellis*, the First Circuit affirmed summary judgement in favor of defendants where participants brought claims against the plan's third party administrator, Fidelity, asserting that Fidelity was imprudently conservative in structuring and operating a stable value fund.[89] Plaintiffs also alleged that Fidelity breached its duty of loyalty because, in conjunction with offering the stable value fund, it obtained large numbers of insurance policies, which were required to insure these funds and which were in short supply, in an effort to ensure that its competitors would not be able to obtain such coverage.[90] By doing so, plaintiffs alleged that Fidelity was able to limit competitors from entering the stable value fund market and in turn increased its assets under management and fees it collected.[91]

On the duty of loyalty, the court first noted that plaintiffs were unable to put forth any evidence that Fidelity was not faced with the threat of insufficient wrap coverage that preceded Fidelity's agreement with its insurers to offer a more conservative stable value fund.[92] The First Circuit went on to explain that it is not impermissible for the fiduciary to also benefit from a decision as long as the fiduciary does "not place its own interest ahead of those of the plan beneficiary,"[93] and rejected the "notion that a fiduciary violates ERISA's duty of loyalty simply by picking too conservative a benchmark for a stable value fund."[94] As to plaintiffs' prudence claims, the court rejected several arguments by plaintiffs, noting Fidelity "introduced a wealth of undisputed evidence supporting the conclusion that it engaged in an evaluative process prior to making investment decisions."[95]

In *Barchock*, plaintiffs challenged the inclusion of a stable value fund that allegedly underperformed because it over-weighted holdings in short-term, fixed income securities.[96] This investment strategy was allegedly imprudent because it made the stable value fund "too much" like a money market fund.[97]

The district court dismissed plaintiffs' complaint, which it viewed as based on hindsight, because the stable value fund was invested in conformity with its stated investment objectives to preserve capital, while generating a steady return at a higher rate than that provided by a money market fund.[98]

The First Circuit, citing to its decision in *Ellis*, noted that plaintiffs' theory suffered from a flawed circular logic, i.e., plaintiffs conceded that there was nothing *per se* improper about offering money market funds, but based their imprudence claim on the theory that the stable value fund was too similar to a money market fund.[99] The court also rejected plaintiffs' allegation that it was imprudent to offer the stable value fund where the fund's investment strategy "departed radically" from the practices and financial logic of like funds.[100] The court found that allegations of deviations from averages (based on an industry survey of stable value cash-equivalent allocations), standing alone, meant nothing, especially where the alleged deviation was not material and in some years was within the industry range of allocations.[101] The court noted that plaintiffs failed to provide any allegations about the process by which the funds' investment allocation was selected, and that it would require "pure speculation" to infer that the plan fiduciaries did not have a good reason to choose a conservative investment strategy.[102]

Claims Challenging the Offering of Guaranteed Benefit Policies

In several cases filed beginning in 2015, plaintiffs challenged the ERISA-exempt status[103] of stable value funds offered by insurers, including New York Life, Prudential, and Great-West Life. These funds are ERISA-exempt –meaning they are exempt from claims of fiduciary breach under ERISA – to the extent that they are guaranteed benefit policies.[104] Plaintiffs principally argued that because the insurers can unilaterally set the rate of return on the investments, the investments were not truly guaranteed benefit policies, and thus the insurer was exercising fiduciary control over plan assets.[105] If the courts found the investments were not offering guaranteed benefits, then, according to plaintiffs' theories, the insurers that manage the funds would be subject to ERISA fiduciary standards.

In 2015 and 2016 these lawsuits survived defendants' initial motions to dismiss,[106] and two resulted in the certification of large classes.

However, the district courts later granted summary judgment dismissing both of these cases, in 2017 for *Teets v. Great-West Life & Annuity Ins. Co.*,[107] and in 2018 for *Rozo v. Principal Life Ins. Co.*[108]

In 2019, the U.S. Court of Appeals for the Tenth Circuit affirmed summary judgment in *Teets*;[109] however, in 2020 the Eighth Circuit reversed summary judgment in *Rozo*.[110]

In *Teets*, plaintiffs argued that Great-West was a fiduciary because it unilaterally set the interest rate (the "Credited Rate") that plan participants earn on the principal invested on the guaranteed benefit policy at issue, the Key Guaranteed Portfolio Fund ("KGPF").[111] The court rejected plaintiff's argument that Great-West unilaterally set the Credited Rate since plan participants were always informed of the upcoming Credited Rate, and thus had the "final say" on whether to accept the Credited Rate or terminate the contract.[112] The court also rejected plaintiffs' argument that plan participants had no ability to reject changes to the Credited Rate made by Great-West because they were contractually limited by a 12-month waiting period on withdrawing funds from the KGPF, and because Great-West imposed a prohibition on the plans' ability to offer comparable guaranteed investment options.[113]

The Tenth Circuit acknowledged that if Great-West had exercised its contractual option to delay the plan's ability to receive funds based on the termination of the KGPF contract that "may make it a fiduciary."[114] However, the court found that the imposition of the waiting period was discretionary, and plaintiff was unable to provide any evidence that Great-West ever exercised the option. To the contrary, the record showed that participants terminated over 3,000 KGPF contracts during the class period without the imposition of any waiting period.

As to the restriction on offering similar investment options, the court explained that it had found no case law to support imposing fiduciary status on a service provider based on participants' lack of alternative investment options and noted that even if it could, plaintiff provided no evidence that the competing fund provision affected any of the 270,000 class members' decision to retain or reject the KGPF contract.[115]

In *Rozo*, the district court, citing heavily to the lower court decision in *Teets*, found that Principal Life did not exercise sufficient discretion over plan assets to be an ERISA fiduciary when it set the guaranteed interest rates every six-months on its fixed income option ("PFIO"). The court based this conclusion on three reasons:

(i) Principal Life provided the rates for the PFIO pursuant to a contract with plan sponsors that was the result of an arms-length bargaining process in which the plan sponsor could chose not to offer the PFIO, and the participants could chose not to invest in the PFIO;

(ii) Principal Life communicated the guaranteed interest rates in advance to plan sponsors, who were in turn required to provide notice to plan participants; and

(iii) Principal Life did not impose any restrictions at the participant level for leaving the PFIO if the participant objected to the new guaranteed interest rates, and at the sponsor level the restrictions only required 12-month notice of a desire to leave the PFIO.[116]

The court also rejected the argument that Principal Life acted as a fiduciary because it controlled its own compensation by retaining the spread between the guaranteed interest rate and the return on the PFIO's underlying investment portfolio. The court reasoned that Principal Life's compensation was not unilaterally controlled by Principal Life, but depended instead on how many participants voluntarily invested in the PFIO.[117]

On appeal, the Eighth Circuit agreed with *Teets* that a service provider acts as a fiduciary if (1) it "did not merely follow a specific contractual term set in an arm's-length negotiation," and (2) it "took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decision."[118] However, unlike in the Tenth Circuit in *Teets*, the Eighth Circuit held that plaintiffs had shown that both prongs were satisfied.[119]

In regards to (1), the Eighth Circuit concluded that Principal's setting of the guaranteed interest rates was a discretionary decision based on past rates in combination with a new rate that Principal unilaterally input instead of merely following a "specific term" of the contract.[120] The Eighth Circuit then concluded that (2) was satisfied because both Principal's five percent surrender fee on plan assets and retention of plan funds for 12 months in the case of a plan rejecting or wishing to terminate its relationship with Principal impeded termination and therefore Principal effectively exercised control and authority over the guaranteed interest rate.[121]

Claims Challenging the Offering of Alternative and Active Investments

Plaintiffs pursued new theories of liability related to alternative investments offered in 401(k) plans. Some of these claims challenge the underlying investments held in target date funds that are allegedly "overly risky," while others challenge the offering of hedge funds, international funds, and nontraditional assets, or funds with allegedly "flawed" investment strategies.[122] Plaintiffs have had mixed results, with three cases dismissed early (although one was dismissed on procedural grounds that were then reversed in *Sulyma v. Intel*)[123] while another case settled after surviving a motion to dismiss.[124]

Other claims pertained to the Sequoia Fund, a non-diversified mutual fund that suffered substantial losses in late 2015 based largely on its high investment concentration in what became a troubled pharmaceutical stock. These claims have largely failed against plan sponsors who offered the Sequoia Fund with defendants prevailing on a motion to dismiss and having the claim affirmed in the Ninth Circuit (see below), and another court granting defendants' motion for summary judgment on the claim after finding that there was "extensive," well-documented evidence that the plan's fiduciaries prudently monitored the Sequoia Fund.[125]

In *Wilson v. Fid. Mgmt. Trust Co.*,[126] plaintiffs brought various claims related to the Sequoia fund, including that the plan should have removed this fund at some unspecified time in the past, 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.[127]

Relying on the Supreme Court's decision in *Dudenhoeffer*,[128] the district court dismissed the prudence claim noting that since the stock price had stayed up *after* these disclosures, other market investors had rejected these concerns and instead saw positive prospects in the company.[129] The district 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.

In 2019, the Ninth Circuit summarily affirmed the dismissal, reiterating that under *Dudenhoeffer* "allegations based solely on publicly available information that a stock is excessively risky in light of its price do not state a claim for breach of the ERISA duty of prudence."[130]

Plaintiffs also challenged fiduciaries' use of actively managed funds. Some of these cases survived early dismissal but once the case reached the merits the district court in *Wildman* rejected plaintiffs' assertions that defendants acted imprudently by failing to offer passive index funds, reasoning that nothing in ERISA requires plan fiduciaries to include a particular mix of investment vehicles.[131] The court also found the evidence "overwhelmingly" demonstrated that the committee gave appropriate consideration, through "constant" and "thorough" deliberations, when deciding whether to continue offering actively managed funds, including: (i) market instability at the time increased the possibility that active managers could beat the market; and (ii) the fiduciaries believed the added cost of the active management was justified given performance.[132] The court also noted that the plan fiduciaries added passive options during the class period.[133]

Claims Challenging Fees Paid to Robo-Advisors

Plaintiffs have unsuccessfully brought claims against plan recordkeepers for receiving allegedly excessive compensation from fees received from "robo-advisors" that provide plan participants automated investment advice.[134] The courts rejected these claims, reasoning that the recordkeepers are not acting in a fiduciary capacity when they negotiate and enter into the agreements with the third party advisory firms or once they begin receiving compensation under the agreements.

In 2019, the district court in *Pizarro v. Home Depot, Inc.* followed this reasoning, noting that it is now "well established that a service provider does not become a fiduciary simply by negotiating its compensation in an arm's-length bargaining process – particularly where, as here, the service provider is not alleged to have had the ability to determine or control the actual amount of its compensation."[135]

In light of these rulings, plaintiffs instead started suing plan sponsors and named fiduciaries, alleging they imprudently entered into investment advisory services agreements that paid robo-advisors allegedly excessive fees.[136]

In *Pizzaro*, the district court dismissed the claim against the recordkeepers for lack of fiduciary status, but the court ruled that plaintiffs' numerous allegations related to the plan sponsor's alleged imprudence in retaining and failing to monitor the plan's recordkeeper were sufficient, at the pleading stage, to survive.[137]

The district court in *Marshall v. Northrop Grumman Corp.* allowed similar claims to proceed against a plan sponsor,[138] but in 2019 it granted defendants' motion for summary judgment on these claims.[139]

First, the district court rejected as lacking any "legal foundation" plaintiffs' allegation that it was imprudent not to conduct competitive bids for recordkeepers every three to five years.[140]

The district court then rejected plaintiffs' allegations that the plan sponsor failed to properly monitor the sources of compensation that the plan's recordkeeper received from the robo-advisor, explaining that taking such an argument to its "logical extension" would require that "a plan sponsor take into account all income that the recordkeeper is obtaining from third parties when it negotiates recordkeeping fees."[141]

The court also rejected plaintiffs' expert opinion that prudent fiduciaries are expected to monitor "all sources of compensation to the recordkeeper" including income from robo-advisors as an improper "experience-based opinion about a practice for which he ha[d] no experience."[142]

Claims Challenging the Use of Plan Participant Data

Plaintiffs have started bringing claims alleging that plan fiduciaries breached their fiduciary duties and engaged in prohibited transactions in connection with the use of participant data in 401(k) and 403(b) plans. This trend is continuing.[143] Although one district court rejected these claims,[144] and that decision was affirmed without discussion by the Seventh Circuit in *Divane v. Northwestern Univ.*,[145] these claims raise interesting issues in light of how the use of personal data in the advertising and marketing space currently supports multi-billion dollar values of several tech companies, while at the same time raising increasingly significant issues on privacy.

Some of the legal issues in the 401(k) and 403(b) context include:

(i) Does a participant's information constitute an asset of the plan;

(ii) Regardless of whether it is a plan asset, does a fiduciary have duties to protect and regulate the use of this information by plan service providers; and

(iii) Can a fiduciary use this information to lower plan expenses.

In *Cassell v. Vanderbilt Univ.*, plaintiffs alleged that defendants failed to protect "vital and confidential participant information" from being used by one of the plan's recordkeepers to "aggressively" market a variety of financial products to plan participants.[146] In 2018, the district court granted class certification and noted that because plaintiffs had invested with the recordkeeper at issue they had standing to pursue this claim.[147]

In 2019, both Vanderbilt University and John Hopkins University agreed to settlements that included non-monetary relief related to the collection and use of plan participant data. In *Cassell* the terms of the settlement included that: (1) Vanderbilt must inform its current recordkeeper immediately "that when communicating with current Plan participants, [the recordkeeper] must refrain from using information about Plan participants acquired in the course of providing recordkeeping services to the Plan to market or sell products or services unrelated to the Plan unless a request for such products or services is initiated by a Plan participant," and (2) the plan must conduct a request for proposal for recordkeeping services and whether it retains the current recordkeeper or a new recordkeeper the plan must "contractually prohibit the recordkeeper from using information about Plan participants acquired in the course of providing recordkeeping services to the Plan to market or sell products or services unrelated to the Plan to Plan participants unless a request for such products or services is initiated by a Plan participant."[148] The parties agreed to substantially similar terms related to plan participant data in *Kelly v. John Hopkins*.[149]

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The second part of this article will appear in the next issue of *Benefits Law Journal*.

NOTES

1. *See, e.g.,* U.S. Dep't of Labor, Emp. Benefits Sec. Admin., Private Pension Plan Bulletin: Abstract of 2018 Form 5500 Annual Reports, at 2-3 (January 2021), *available at https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2018.pdf* (noting 675,007 of the total 721,876 pension plans are defined-contribution plans, and that 588,499 of those defined-contribution plans are 401(k) type plans, which includes 403(b) plans; also noting that defined contribution plans ($6.26 trillion) have more than double the assets of defined benefit plans ($2.96 trillion)).

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

3. *Coviello v. BHS Management Services, Inc.*, No. 3:20-cv-30198 (D. Mass. Dec. 30, 2020), EFC No. 1; *Harding v. Southcoast Hospitals Grp. Inc.*, No. 20-cv-12216 (D. Mass. Dec. 14, 2020), ECF No. 1; *Nicholson v. Wakemed*, No. 20-cv-00662 (E.D.N.C Dec. 8, 2020), ECF No. 1; *Lafreniere v. R.R.Donnelley & Sons, Inc.*, No. 20-cv-7158 (N.D. Ill. Dec. 3, 2020), ECF No. 1; *Milano v. Cognizant Tech. Solutions US Corp.*, No. 20-cv-17793 (D.N.J. Dec. 2, 2020), ECF No. 1; *Jones v. Coca-Cola Consolidated, Inc.*, No. 20-cv-0654 (W.D.N.C. Nov, 24, 2020), ECF No. 1; *Allison v. L Brands, Inc.*, No. 20-cv-6018 (S.D. Ohio Nov. 23, 2020), ECF No. 1; *Matousek v. Midamerican Energy Company*, No. 20-cv-00352 (S.D. Iowa Nov. 13, 2020), ECF No. 1; *Slavens v. Meritor Inc.*, No. 20-cv-13047 (E.D. Mich. Nov. 13, 2020), ECF No. 1; *Garcia v. Alticor, Inc.*, No. 20-cv-1078 (W.D. Mich. Nov. 9, 2020), ECF No. 1; *Callaway v. The Northern Trust Co.*, No. 20-cv-6497 (N.D. Ill. Nov. 2, 2020), ECF No. 1; *Shaw v. Quad/Graphics, Inc.*, No. 20-cv-1645 (E.D. Wis. Oct. 30, 2020), ECF No. 1; *Cutrone v. The Allstate Corp.*, No. 20-cv-6463 (N.D. Ill. Oct. 30, 2020) ECF No. 1; *Guyes v. Nestle USA, Inc.*, No. 20-cv-1560 (E.D. Wis. Oct. 9, 2020) ECF No. 1; *Johnson v. The PNC Fin. Servs. Grp., Inc.*, No. 20-cv-1493 (W.D. Pa. Oct. 2, 2020) ECF No. 1; *Laabs v. Faith Technologies, Inc.*, No. 20-cv-1534 (E.D. Wis. Oct. 2, 2020) ECF No. 1; *Huang v. Trinet HR III, Inc.*, No. 20-cv-2293 (M.D. Fla. Sept. 29, 2020) ECF No. 1; *Peterson v. Insurance Services Office, Inc.*, No. 20-cv-13223 (D.N.J. Sept. 24, 2020) ECF No. 1; *McGowan v. Barnabas Health, Inc.*, No. 20-cv-13119 (D.N.J. Sept. 23, 2020) ECF No. 1; *Johnson v. Duke Energy Corp.*, No. 20-cv-00528 (W.D.N.C. Sept. 23, 2020) ECF No. 1; *Khan v. PTC Inc.* No. 20-cv-11710 (D. Mass Sept. 17, 2020) ECF No. 1; *Khan v. Board of Directors of Pentegra Defined Contribution Plan*, No. 20-cv-7561 (S.D.N.Y. Sept. 15, 2020) ECF No. 1; *Greenberg v. Bd. Of Directors of Pentegra Defined Contribution Plan*, No. 20-cv-08503 (S.D.N.Y. Sept. 13, 2020) ECF No. 1; *Campbell v. Prime Healthcare Servs., Inc.*, No. 20-cv-1887 (C.D. Cal. Sept. 11, 2020) ECF No. 1; *Rosenkranz v. Altru Health System*, No. 20-cv-0168 (D.N.D Sept. 9, 2020) ECF No. 1; *Bonicarlo v. Sutter Health*, No. 20-cv-00877 (E.D. Cal. Sept. 4, 2020) ECF No. 1; *McNeilly v. Spectrum Health System*, No. 20-cv-0870 (W.D. Mich. Sept. 4, 2020) ECF No. 1; *Smith v. Shoe Show, Inc.*, No. 20-cv-0813 (M.D.N.C. Sept. 3, 2020) ECF No. 1; *Gamble v. Biogen Inc.*, No. 20-cv-11625 (D. Mass. Aug. 31, 2020) ECF No. 1; *Tobias v. NVIDIA Corp.*, No. 20-cv-6081 (N.D. Cal. Aug. 28, 2020) ECF No. 1; *Nunez v. B. Braun Medical Inc.*, 20-cv-4195 (E.D. Pa. Aug. 26, 2020) ECF No. 1; *Walker v. iHeart Communications, Inc.*, No. 20-cv-2359 (N.D. Tex. Aug. 19, 2020) ECF No. 1; *In re Prime Healthcare Servs., Inc. ERISA Litig.*, No. 20-cv-1529 (C.D. Cal. Aug. 18, 2020) ECF No. 1; *Bailey v. LinkedIn Corp.*, No. 20-cv-5704 (N.D. Cal. Aug. 14, 2020) ECF No. 1; *Woznicki v. Aurora Health Care, Inc.*, No. 20-cv-1246 (E.D. Wisc. Aug. 14, 2020) ECF No. 1; *Glick v. Thedacare, Inc.*, No. 20-cv-1236 (E.D. Wisc. Aug. 12, 2020) ECF No. 1; *Corcoran v. Eversource Energy Service Co.*, No. 20-cv-1154 (D. Conn. Aug. 11, 2020) ECF No. 1; *Lange v. Infinity Healthcare Physicians, S.C.*, No. 20-cv-0737 (W.D. Wisc. Aug. 7, 2020) ECF No. 1; *Marvin v. Mercy Health Corp.*, No. 20-cv-50293 (N.D. Ill. Aug. 6, 2020) ECF No. 1; *Hill v. Mercy Health Corp.*, No. 20-cv-50286 (N.D. Ill. Aug. 4, 2020) ECF No. 1; *Watson v. Medstar Health, Inc.*, No. 20-cv-2250 (D. Md. Aug. 4, 2020) ECF No. 1; *Maisonette v. Omnicom Grp., Inc.*, No. 20-cv-6007 (S.D.N.Y. July 31, 2020) ECF No. 1; *Rice v. Quest Diagnostics Inc.*, No. 20-cv-9540 (D.N.J. July 28, 2020) ECF No. 1; *Gandy v. Estee Lauder*, No. 20-cv-5779 (S.D.N.Y. July 24, 2020) ECF No. 1; *Sargony v. Sutter Health*, No. 20-cv-1007 (E.D. Cal. July 21, 2020) ECF No. 1; *Gonzalez v. Northwell Health, Inc.*, No. 20-cv-3256 (E.D.N.Y. July 21, 2020) ECF No. 1; *Kinder v. Koch Industries*, No. 20-cv-2973 (N.D. Ga. July 16, 2020) ECF No. 1; *Nohara v. Prevea Clinic, Inc.*, No. 20-cv-1079 (E.D. Wis. July 16, 2020) ECF No. 1; *Covington v. Biogen Inc.*, No. 20-cv-11325 (D. Mass. July 14, 2020) ECF No. 1; *O'Driscoll v. Plexus Corp.*, No. 20-cv-1065 (E.D. Wis. July 14, 2020) ECF No. 1; *Cotter v. Matthews Int'l*, No. 20-cv-1054 (E.D. Wis. July 13, 2020) ECF No. 1;

Crawford v. CDI Corp., No. 20-cv-3317 (E.D. Pa. July 7, 2020) ECF No. 1; *Reed v. Medstar Health, Inc.*, No. 20-cv-1984 (D. Md. July 6, 2020) ECF No. 1; *Smith v. Commonspirit Health*, No. 2:20-cv-95 (E.D. Ky. July 2, 2020) ECF No. 1; *Miller v. Astellas US LLC*, No. 20-cv-3882 (N.D. Ill. July 1, 2020) ECF No. 1; *Garthwait v. Eversource Energy Serv. Co.*, No. 20-cv-00902 (D. Conn. June 30, 2020) ECF No. 1; *McIntire v. Paychex, Inc.*, No. 20-cv-6445 (W.D.N.Y. June 30, 2020) ECF No. 1; *Johnson v. Quest Diagnostics Inc.*, No. 20-cv-7936 (D.N.J. June 29, 2020) ECF No. 1; *Kong v. Trader Joe's Co.*, No. 20-cv-05790 (C.D. Cal. June 29, 2020) ECF No. 1; *Soulek v. Costco Wholesale Corp.*, No. 20-cv-937 (E.D. Wisc. June 23, 2020) ECF No. 1; *Bilello v. Estee Lauder, Inc.*, No. 20-cv-4770 (S.D.N.Y. June 23, 2020) ECF No. 1; *Dearing v. IQVIA, Inc.*, No. 20-cv-0574 (M.D.N.C. June 23, 2020) ECF No. 1; *Dover v. Yanfeng US Automotive Interior Systems, I LLC*, No. 20-cv-11643 (E.D. Mich. June 22, 2020) ECF No. 1; *Albert v. Oshkosh Corp.*, No. 20-cv-0901 (E.D. Wisc. June 16, 2020) ECF No. 1; *Bangalore v. Froedtert Health, Inc.*, No. 20-cv-893 (E.D. Wisc. June 12, 2020) ECF No. 1; *Boley v. Univ. Health Servs., Inc.*, No. 20-cv-2644 (E.D. Pa. June 5, 2020) ECF No. 1; *Stark v. KeyCorp.*, No. 20-cv-01254 (N.D. Ohio June 4, 2020) ECF No. 1; *Luense v. Konica Minolta Business Solutions U.S.A., Inc.*, No. 20-cv-6827 (D.N.J. June 4, 2020) ECF No. 1; *Tepper v. Omnicom Grp., Inc.*, No. 20-cv-4141 (S.D.N.Y. May 29, 2020) ECF No. 1; *Parmer v. Land O'Lakes, Inc.*, No. 20-cv-1253 (D. Minn. May 26, 2020) ECF No. 1; *Turner v. Schneider Elec. Holdings, Inc.*, No. 20-cv-11006 (D. Mass. May 26, 2020) ECF No. 1; *Gerken v. Mantech Int'l Corp.*, No. 20-cv-0350 (E.D. Va. May 15, 2020) ECF No. 1; *Kennedy v. Aegis Media Am., Inc.*, No. 20-cv-3624 (S.D.N.Y. May 8, 2020) ECF No. 1; *Berkelhammer v. ADP TotalsourceGrp., Inc.*, No. 20-cv-5696 (D.N.J. May 7, 2020) ECF No. 1; *McCaffree Fin. Corp. v. ADP, Inc.*, No. 20-cv-5492 (D.N.J. May 4, 2020) ECF No. 1; *Santiago v. Univ. of Miami*, No. 20-cv-21784 (S.D. Fla. Apr. 29, 2020) ECF No. 1; *Clark v. Cerner Corp.*, No, 20-cv-2194 (D. Kans. Apr. 14, 2020) ECF No. 1; *Kendall v. Pharmaceutical Product Development, LLC*, No. 20-cv-0071 (E.D.N.C. Apr. 15, 2020) ECF No. 1; *Ahmed v. Liberty Mut. Grp., Inc.*, No. 20-cv-30056 (D. Mass. Apr. 10, 2020) ECF No. 1; *Sweeney v. Nationwide Mut. Ins. Co.*, No. 20-cv-1569 (S.D. Ohio Mar. 26, 2020) ECF No. 1; *Edwards v. Nationwide Mut. Ins. Co.*, No. 20-cv-1525 (S.D. Ohio Mar. 24, 2020) ECF No. 1; *Becker v. Wells Fargo & Co.*, No. 20-cv-1803 (N.D. Cal. Mar. 13, 2020) ECF No. 1; *West v. BOKF, N.A.*, No. 20-cv-0101 (N.D. Okla. Mar. 12, 2020) ECF No. 1; *Davis v. Salesforce.com, Inc.*, No. 20-cv-1753 (N.D. Cal. Mar. 11, 2020) ECF No. 1; *Rohan v. Saint Luke's Health Sys., Inc.*, No. 20-cv-0179 (W.D. Mo. Mar. 10, 2020) ECF No. 1; *Silva v. Evonik Corp.*, No. 20-cv-2202 (D.N.J. Feb. 28, 2020) ECF No. 1; *Baker v. John Hancock Life Ins. Co.*, 20-cv-10397 (D. Mass. Feb. 27, 2020) ECF No. 1; *Chiappa v. Cumulus Media, Inc.*, No. 20-cv-0847 (N.D. Ga. Feb. 26, 2020) ECF No. 1; *Kurtz v. Vail Corp.*, 20-cv-0500 (D. Colo. Feb. 24, 2020) ECF No. 1; *Pinnell v. Teva Pharmaceuticals USA, Inc.*, No. 19-cv-5738 (E.D. Pa. Feb. 8, 2020) ECF No. 1; *Glasscock v. Serco, Inc.*, 20-cv-0092 (E.D. Va. Jan. 28, 2020) ECF No. 1; *Harmon v. Shell Oil Co.*, No. 20-cv-0021 (S.D. Tex. Jan. 24, 2020) ECF No. 1; *Freck v. Cerner Corp.*, No. 20-cv-00043 (W.D. Mo. Jan. 21, 2020) ECF No. 1; *Buescher v. Brenntag North America, Inc.*, No. 20-cv-0147 (E.D. Pa. Jan. 8, 2020) ECF No. 1.

4. *See Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768 (2020) (statute of limitations in fee and investment case); *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015) (statute of limitations in fee and investment case); *see also Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020) (Article III standing in defined benefit fee and investment litigation). Although slightly before the 2015 wave began, the Supreme Court's ruling in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014) (addressing standard of prudence in ERISA stock drop case) impacted fee and investment litigation in the following years. While the decision was nominally a plaintiff victory, the Supreme

Court's holding that motions to dismiss are an "important mechanism for weeding out meritless claims" and that it "requires careful judicial consideration of whether the complaint states a claim that the defendant has acted imprudently" has been used to support the dismissal of many cases since 2015.

5. *Ellis v. Fidelity Management Trust Co.*, 883 F.3d 1 (1st Cir. 2017); *Barchock v. CVS Health Corp.*, 886 F.3d 43 (1st Cir. 2018); *Brotherston v. Putnam Investments*, LLC, 907 F.3d 17 (1st Cir. 2018); *Sacerdote v. CammackLarhette Advisors, LLC*, 939 F.3d 498 (2d. Cir. 2019); *Rosen v. Prudential Retirement Ins. & Annuity Co.*, 718 Fed.Appx. 3 (2d. Cir. 2017); *Sweda v. Univ. of Pennsylvania*, 923 F.3d 320 (3d Cir. 2019); *Tatum v. R.J. Reynolds Tobacco Co.*, 855 F.3d 553 (4th Cir. 2017); *Divane v. Northwestern Univ.*, 953 F.3d 980 (7th Cir. 2020); *Tussey v. ABB Inc.*, 850 F.3d 951, 958 (8th Cir. 2017); *Meiners v. Wells Fargo & Co.*, 898 F.3d 820 (8th Cir. 2018); *Davis v. Washington Univ. in St. Louis*, 960 F.3d 478 (8th Cir. 2020); *Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071 (8th Cir. 2020); *Tibble v. Edison Int'l*, 843 F.3d 1187 (9th Cir. 2016); *White v. Chevron Corp.*, 752 Fed. App'x 453 (9th Cir. 2018); *Acosta v. City Nat'l Corp.*, 922 F.3d 880 (9th Cir. 2019); *Sulyma v. Intel Corp. Inv. Policy Comm.*, 909 F.3d 1069 (9th Cir. 2018); *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. Aug. 2019); *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200 (10th Cir. 2019); *Stanley v. George Wash. Univ.*, 801 Fed. App'x 792 (D.C. Cir. 2020).

6. *Tibble v. Edison Int'l*, No. 07-cv-5359, 2017 WL 3523737 (C.D. Cal. Aug. 16, 2017); *Brotherston v. Putnam Invs., LLC*, No. 15-13825-WGY, 2017 WL2634361 (D. Mass. June 19, 2017); *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).

7. *See* our previous *Benefits Law Journal* articles (*infra* note 8), which show over $650 million in settlements that included $255 million in attorney's fees through 2019. 2020 settlements resulted in $245 million in gross settlements that included $75 million in attorney's fees: *Lechner v. Mutual of Omaha* 18-cv-00022 (D. Neb. Oct. 8, 2020) ECF 102-103 (mem. in supp. of mot. for preliminary settlement approval of $6.7 million with $2.2 million in attorney's fees requested); *Kirk v. Ret. Comm. of CHS/Cmty. Health Sys., Inc.,* No. 3:19-cv-00689 (M.D. Tenn. Dec. 8, 2020) ECF 100-101 (mem. in supp. of mot. to approve partial class settlement and order approving $580,000 and no attorney's fees requested); *Pledger v. Reliance Trust Company,* 15-cv-04444 (N.D. Ga. Oct. 14, 2020) ECF 280, 286 (mem. in supp. of mot. for preliminary settlement and order approving $39.9 million with $13.2 million in attorney's fees requested); *Karpik v. Huntington Bancshares, Inc.,* 17-cv-1153 (S.D. Ohio Oct. 14, 2020) ECF 67, 71 (mem. in supp. of mot. for preliminary settlement and order approving $10.5 million with $3.4 million in attorney's fees requested); *Toomey v. DeMoulas Super Markets, Inc.* 19-cv-11633 (D. Mass Nov. 24, 2020) ECF 78, 85 (mem. in supp. of mot. for preliminary settlement and order approving $17.5 million with $5.775 million in attorney's fees requested); *Brotherston v. Putname Investments, LLC,* 15-cv-13825 (D. Mass. Aug. 26, 2020) ECF 228, 232 (mem. in supp. of final settlement approval and order approving $12.5 million with $4.166 million in attorney's fees requested); *Diaz v. BTG Int'l Inc.,* 19-cv-01664 (E.D. Pa. Dec. 7, 2020) ECF 47 (mem. in supp. of final settlement for $560,000 with $186,648 in attorney's fees requested); *Pinnell v. Teva Pharmaceuticals USA, Inc.* 19-cv-05738 (E.D. Pa. Dec. 8, 2020) ECF 68-1, 72 (mem. in supp. of mot. for preliminary settlement and order approving $2.5 million with $825,000 in attorney's fees requested); *Sweda v. Heuer (U Penn),* No. 2:16-cv-04329(E.D. Pa.) ECF 93 (order granting stay pending filing of settlement motions); *Disselkamp v. Norton Healthcare, Inc.* 18-cv-00048 (W.D. Ky. Nov. 18, 2020) ECF 109 (notice of settlement with mot. for preliminary approval of settlement due Jan. 11, 2021); *Cunningham v. Cornell* 16-cv-6525 (S.D.N.Y. Dec. 8, 2020) ECF 437 (mem. in supp. of final settlement approval of

$250,000 with $75,000 in attorney's fees requested); *Breach v. JPMorgan* 17-cv-00563 (SDNY) (Oct. 7, 2020) ECF 220, 232-33 (mem. in supp. of final settlement approval and order approving $9 million with $2.970 million in attorney's fees requested); *Intravaia et al v. National Rural Electric Cooperative Association*, No. 1:19-cv-00973 (E.D. Va. Dec. 17, 2020), ECF No. 102, 108, 112 (mem. in supp. of final settlement approval and order approving $10 million with $3.3 million in attorney's fees requested); *Bekker v. Neuberger Berman Group 401(k) Plan Investment Committee*, No. 16-cv-06123-LTS-BCM (S.D.N.Y Dec. 1, 2020) ECF No. 149-150 (final order approving settlement of $17 million with $4.76 million in attorney's fees requested); *Nicolas v. Princeton University*, No. 3:17-cv-03695 (D. N.J Nov. 24, 2020), ECF Nos. 67-68 (mem. in supp. of final settlement approval of $5.8 million with $1.9 million in attorney's fees requested); *Marshall v. Northrup Grumman,* No. 16-CV-6794 (C.D. Cal.), ECF No. 377, 378 (mem. in supp. of final settlement approval and order approving settlement of $12.375 million and $4.074 million in attorney's fees requested); *Bhatia v. McKinsey*, No. 1:19-cv-01466 (S.D. N.Y. Sept. 18, 2020), ECF No. 74, 94 (mem. in supp. of mot. for preliminary settlement and order approving $39.5 million with $9.8 million in attorney's fees requested); *Henderson v. Emory University*, No. 16-2920 (N.D. Ga.), ECF No. 233, 237, 239 (mem. in supp. of final settlement approval and order approving settlement of $16.75 million and $5.583 million in attorney's fees requested); *Moitoso v. FMR LLC*, No. 1:18-cv-12122 (D. Mass. July 9, 2020), ECF No. 250, 252 (mem. in supp. of mot. for preliminary settlement and order approving $28.5 million with $9 million in attorney's fees requested); *Troudt v. Oracle Corp.,* No. 1:16-cv-00175 (D. Colo. July 9, 2020) ECF 235 (final order approving settlement of $12 million with $4.410 million in attorney's fees requested); *Cervantes v. Invesco Holding Co.,* No. 1:18-cv-02551 (N.D. Ga. Apr. 3, 2020), ECF No. 94, 109-110 (final order approving settlement of $3.47 million with $1.2 million in attorney's fees requested); *Terraza v. Safeway Inc.,* No. 4:16-cv-03994 (N.D. Cal. Nov. 23, 2020), ECF No. 269 (mem. in supp. of mot. for preliminary settlement of $8.5 million with $2.6 million in attorney's fees requested); *Gerken v. Mantech Int'l Corp.*, No. 1:20-cv-01536 (E.D. Va. Dec. 29, 2020) (motion for preliminary approval of $1.2 million settlement with $396,000 requested for attorney's fees), ECF No. 16.

8. 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).

9. 135 S. Ct. 1823 (2015).

10. 140 S. Ct. 768 (2020).

11. 140 S. Ct. 1615 (2020).

12. 953 F.3d 980 (7th Cir. 2020); *see Hughes v. Northwestern Univ.*, No. 19-1401 (U.S. Oct 5, 2020) Dkt. No. 7.

13. *See Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, at *10-18 (W.D. Mo. Jan. 23, 2019); *Brotherston v. Putnam Investments, LLC*, 2017 WL 2634361 (D. Mass. June 19, 2017), *reversed in part by*, 907 F.3d 17 (1st Cir. 2018).

14. 922 F.3d 880 (9th Cir. 2019) (affirming summary judgment finding defendant liable under ERISA's prohibited self-dealing transaction rules under ERISA § 406(b) and rejecting defendant's argument that it was exempt from 406(b)'s prohibition because it only received "reasonable compensation" for its services, ruling this exemption does not apply to fiduciaries who provide services to a plan).

15. *See Tussey v. ABB, Inc.*, 850 F.3d 951 (8th Cir. 2017); *Tibble v. Edison Int'l*, No. 07-cv-5359, 2017 U.S. Dist. LEXIS 130806 (C.D. Cal. Aug. 16, 2017).

16. *See supra* note 3. The sole university case filed in 2020 was *Santiago v. University of Miami*, No.1:20-cv-21784 (S.D. Fla. Apr. 29, 2020), ECF No. 1.

17. These six plaintiffs' counsel brought most of the cases in 2020: Capozzi Adler; Walcheske & Luzi; Shepherd, Finkelman, Miller & Shah; Schlicter Bogard & Denton; Nichols Kaster; and Edelson Lechtzin. *See supra* note 3.

18. *See Fleming v. Rollins, Inc.*, No. 1:19-cv-05732-, 2020 U.S. Dist. LEXIS 227697 (N.D. Ga. Nov. 23, 2020) (dismissing putative fee litigation class action for failure to exhaust plan's administrative remedies prior to filing suit); *Rampey v. West Corp.*, No. 1:19-cv-00220 (S.D. Ala. Feb. 14, 2020) (staying putative fee litigation class action until plaintiffs exhausted the plan's administrative remedies prior to filing suit), ECF No. 46; *Chiappa v. Cumulus Media, Inc.*, No. 1:20-cv-847, 2020 U.S. Dist. LEXIS 237190 (N.D. Ga. Dec. 16, 2020) (dismissing putative fee litigation class action because plaintiffs failed to bring suit within the plan's one year statute of limitations); *but see Falberg v. Goldman Sachs Grp., Inc.*, 2020 U.S. Dist. LEXIS 121457 (S.D.N.Y. July 9, 2020) (denying motion to dismiss putative fee litigation class action and rejecting defendants' threshold arguments for dismal based on plaintiffs' failure to exhaust administrative remedies and failure to bring suit within the plan's two-year limitations period, noting that the U.S. Court of Appeals for the Second Circuit has yet to directly rule on either issue and that other circuit courts are split). Defendants in *Falberg*moved for an immediate interlocutory appeal pursuant to 28 U.S.C. 1292(b) with respect to the threshold timeliness and exhaustion issues but the request was denied. *See Falberg v. Goldman Sachs Grp., Inc.*, 2020 U.S. Dist. LEXIS 242934 (S.D.N.Y. Dec. 28, 2020).

19. *See, e.g.*, *Jacobs v. Verizon Communs.*, 2020 U.S. Dist. LEXIS 179421 (S.D.N.Y. Sep. 29, 2020) (certifying class of over 200,000 plan participants); *Baird v. Blackrock Institutional Tr. Co.*, N.A., No. 4:17-cv-01892 (N.D. Cal. Feb. 11, 2020) (certifying class of 10,000 plan participants in Blackrock plan but denying certification of larger putative class of over 250 plans that invested in the Blackrock affiliated fund at issue), ECF No. 360, *Rule 23(g) petition denied,* 2020 U.S. App. LEXIS 13572 (9th Cir. Apr. 27, 2020). *See, also*, Jacklyn Wille, "Recent Wins for 401(k) Investors Signal New Class Defense Tactic," BNA Pens. & Ben Daily (Mar. 1, 2019) (noting that 20 fee litigation cases have been certified as class actions in recent years).

20. *Karg v. Transamerica Corp.*, 1:18-cv-00134 (N.D. Iowa Jan. 31, 2020) (unopposed motion to certify class of 17,000 plan participants), ECF No. 62-1; *Reetz v. Lowe's Companies, Inc.*, No. 5:18-cv-00075 (W.D.N.C. Oct. 28, 2020) (stipulation regarding certification of class of 250,000 participants), ECF No. 94; *Brown-Davis v. Walgreen Co.*, No.1:19-cv-05392 (N.D. Ill. Dec. 4, 2020) (unopposed motion to certify class of 240,000 plan participants), ECF No. 69; *Alas v. AT&T Services, Inc.*, No. 2:17-cv-8106 (C.D. Cal. Aug. 6, 2020) (order granting unopposed motion to certify class of over 250,000 plan participants), EFC No. 158. This trend started gaining momentum in fee and investment litigation cases in 2019. *See, e.g.*, *In re G.E. ERISA Litig.*, No. 1:17-cv-12123 (D. Mass. Dec. 13, 2019) (unopposed motion to certify class of "hundreds of thousands" of participants in 401(k) plan); *Feinberg v. T. Rowe Price Grp.*, No. 1:17-cv-427 (D. Md. May 17, 2019) (order granting plaintiffs' unopposed motion for class

certification), ECF No. 83; *Moitoso v. FMR LLC*, No. 1:18-cv-12122 (D. Mass. May 7, 2019) (same), ECF No. 83; *Velazquez v. Mass. Fin. Servs. Co.*, No. 1:17-cv-11249 (D. Mass. June 25, 2019) (same), ECF No. 94.

21. *See supra* note 7.

22. *See, e.g., Chiappa v. Cumulus Media, Inc.*, No. 1:20-cv-847, 2020 U.S. Dist. LEXIS 237190 (N.D. Ga. Dec. 16, 2020); *Fleming v. Rollins, Inc.*, No. 1:19-cv-05732, 2020 U.S. Dist. LEXIS 227697 (N.D. Ga. Nov. 23, 2020); *Davis v. Salesforce.com, Inc.*, No. 20-cv-01753, 2020 U.S. Dist. LEXIS 184283 (N.D. Cal. Oct. 5, 2020); *Kong v. Trader Joe's Co.*, No. 20-cv-05790, 2020 WL 5814102 (C.D. Cal. Sep. 24, 2020); *Martin v. CareerBuilder, LLC*, No. 19-cv-6463, 2020 WL 3578022 (N.D. Ill. July 1, 2020); *Marks v. Trader Joe's Co.*, No. 19-cv-10942, 2020 WL 2504333 (C.D. Cal. Apr. 24, 2020); *In re Fid. Erisa Fee Litig.*, No. 19-cv-10335, 2020 WL 759542 (D. Mass. Feb. 14, 2020).

23. *See, e.g.*, *Bouvy v. Analog Devices, Inc.*, No. 19-cv-881, 2020 U.S. Dist. LEXIS 110747 (S.D. Cal. June 23, 2020); *Brown-Davis v. Walgreen Co.*, No.1:19-cv-05392 (N.D. Ill. Mar. 16, 2020), ECF No. 46; *Sandoval v. Novitex Enterprise Solutions, Inc.*, No. 3:17-cv-1573 (D. Conn. Mar. 30, 2020), ECF No. 48.

24. *See, e.g.*, *Silva v. Evonik Corp.*, No. 20-cv-2202 (D.N.J. Dec. 30, 2020), ECF No. 25; *Boley v. Universal Health Servs.*, No. 20-cv-2644, 2020 U.S. Dist. LEXIS 202565 (E.D. Pa. Oct. 30, 2020); *Miller v. Autozone, Inc.*, No. 2:19-cv-02779, 2020 U.S. Dist. LEXIS 206813 (W.D. Tenn. Sep. 18, 2020); *Baker v. John Hancock*, No. 1:20-cv-10397 (D. Mass. July 23, 2020), ECF No.43; *Falberg v. Goldman Sachs Grp., Inc.*, 2020 WL 3893285, at *7-8 (S.D.N.Y. July 9, 2020); *Rohan v. Saint Luke's Health Sys.*, No. 4:20-cv-00179, 2020 U.S. Dist. LEXIS 149706 (W.D. Mo. June 22, 2020); *Ferguson v. BBVA Compass Bancshares, Inc.*, No. 2:19-cv-01135, 2020 U.S. Dist. LEXIS 82959 (N.D. Ala. May 12, 2020); *Pinnell v. Teva Pharm. USA, Inc*, No. 19-5738, 2020 U.S. Dist. LEXIS 55617 (E.D. Pa. Mar. 31, 2020); *Davis v. Stadion Money Mgmt.*, No. 8:19-cv-556, 2020 U.S. Dist. LEXIS 46418 (D. Neb. Mar. 16, 2020); *Rampey v. West Corp.*, No. 1:19-cv-00220 (S.D. Ala. Feb. 14, 2020), ECF No. 46; *Intravaia v. Nat'l Rural Elec. Coop. Ass'n*, No. 1:19-cv-973, 2020 U.S. Dist. LEXIS 2421 (E.D. Va. Jan. 2, 2020).

25. *Ramos v. Banner Health*, 461 F. Supp. 3d 1067 (D. Colo. 2020) (ruling in favor of plaintiffs on their recordkeeping fee claim and awarding over $2 million in damages but ruling in favor of defendants on all other claims).

26. *See, e.g., Divane v. Northwestern Univ.*, 953 F.3d 980 (7th Cir. 2020); *Davis v. Washington Univ. in St. Louis*, 960 F.3d 478 (8th Cir. 2020); *Stanley v. George Wash. Univ.*, 801 F. App'x 792 (D.C. Cir. 2020).

27. 140 S. Ct. 768 (2020).

28. 949 F.3d 1071 (8th Cir. 2020).

29. 135 S. Ct. 1823 (2015).

30. 140 S. Ct. 768 (2020).

31. ERISA's "Limitation of actions" section provides that no action for breach of fiduciary duty can be commenced "after the earlier of (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation . . . ." ERISA Section 413, 29 U.S.C. § 1113.

32. 140 S. Ct. 1615 (2020).

33. 573 U.S. 409 (2014).

34. *Tibble v. Edison Int'l.*, 135 S. Ct. 1823, 1827–29 (2015).

35. These included claims that the revenue-sharing agreement with the recordkeeper violated ERISA, *Tibble v. Edison*, 639 F. Supp. 2d 1074, 1087-92 (C.D. Cal. 2009), that it was a breach to include a money market fund rather than a stable value fund, *id.* at 1117-18, and that it was a breach to offer the employer's stock in a unitized stock fund. *Id.* at 1118-19.

36. *Tibble*, 135 S. Ct. at 1826.

37. *Id.*

38. *Tibble*, 639 F. Supp. 2d at 1119-20.

39. *Tibble v. Edison Int'l*, 729 F.3d 1110, 1119-20 (9th Cir. 2013).

40. *Tibble v. Edison Int'l.*, 135 S. Ct. 1823, 1827-29 (2015).

41. *Id.* at 1828.

42. *Id.* at 1828-29.

43. *Id.* at 1829.

44. *Id.*

45. *Intel Corp. Investment Policy Committee v. Sulyma*, 140 S. Ct. 768, 774-779 (2020).

46. *Id.* at 774.

47. *Id.* at 774-75.

48. *Id.* at 775.

49. *Sulyma v. Intel Corp. Inv. Policy Comm.*, No. 15-cv-04977, 2017 WL 1217185, at *9 (N.D. Cal. Mar. 31, 2017).

50. *Id.*

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

52. *Id.* at 1076.

53. *Id.* at 1077.

54. *Intel Corp. Investment Policy Committee v. Sulyma*, 140 S. Ct. 768, 774-779 (2020).

55. *Id.* at 776.

56. *Id.* at 777 (citing 29. U.S.C. §§ 1085(e)(9)(I)(iv), 1303(e)(6), (f)(5)).

57. *Id.*

58. *Id.* at 778.

59. *Id.* at 779.

60. *Thole v. U.S. Bank, Nat'l Ass'n*, 140 S. Ct. 1615, 1618-19 (2020).

61. *Thole v. U.S. Bank, Nat'l Ass'n*, 873 F.3d 617, 621 (8th Cir. 2017).

62. *Id.* at 627 (citing *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 906 (8th Cir. 2002)). The reason being that if a plan is sufficiently funded and able to pay benefits, plaintiff cannot show actual injury, i.e., harm to their individual accounts. *Id.*

63. *Thole*, 140 S. Ct. at 1619 ("Thole and Smith have received all of their monthly benefit payments so far, and the outcome of this suit would not affect their future benefit payments. If Thole and Smith were to lose this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny less. If Thole and Smith were to win this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny more"). *Id.*

64. *See, e.g.*, *Brown-Davis v. Walgreen Co.*, No. 19-cv-5392, (N.D. Ill. Mar. 16, 2020) (no standing to assert claims concerning 2 of the 10 funds that plaintiff did not invest in); *Patterson v. Morgan Stanley*, No. 1:16-cv-6568, 2019 U.S. Dist. LEXIS, 147832, at *10-20 (S.D.N.Y. Oct. 7, 2019) (plaintiff lacked standing as to seven funds in which plaintiff did not invest); *Troudt v. Oracle Corp.*, No. 1:16-cv-00175, 2019 U.S. Dist. LEXIS 33017, at *31 (D. Colo. Mar. 1, 2019) (plaintiff lacked standing as to funds that they did not invest in); *Wilcox v. Georgetown Univ.*, No. 1:18-cv-422, 2019 WL 132281 (D.D.C. Jan. 8, 2019) (same); *Barrett v. Pioneer Nat. Res. USA, Inc.*, No. 17-cv-1579, 2018 U.S. Dist. LEXIS 108699 (D. Colo. June 29, 2018) (same); *Brown v. Nationwide Life Ins.*, No. 2:17-cv-558, 2019 WL 4543538 (S.D. Ohio Sept. 19, 2019) (denying class certification as to putative class of thousands of 401(k) plans because plaintiff lacked standing to sue on behalf of the plans in which she did not participate); *but see Cervantes v. Invesco Holding Co.*, No. 1:18-cv-02551, 2019 U.S. Dist. LEXIS 177577 (N.D. Ga. Sept. 25, 2019) (rejecting defendant's argument that plaintiff lacked standing as to his breach of fiduciary duty claims related to the plan's self-directed brokerage account because plaintiff did not invest through the account); *Boley v. Univ. Health Servs. Inc.*, No. 20-cv-2644, 2020 WL 6381395 (E.D. Pa. Oct. 30, 2020) (rejecting defendant's argument that plaintiff lacked standing as to his breach of fiduciary duty claims related to investment options he did not invest in).

65. 573 U.S. 409 (2014).

66. *Fifth-ThirdBancorp*, 573 U.S. at 426.

67. *Id.*

68. *Id.* at 425.

69. *See, e.g., Dorman v. Charles Schwab Corp.,* No. 4:17-cv-00285, 2019 U.S. Dist. LEXIS 34058, at *16-17 (N.D. Cal. Feb. 8, 2019) (challenging as "excessive" investment management fees charged by the plan's index funds, including fees between three and nine bps).

70. For a thorough summary of the procedural history of the two cases, *see* 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. 18 (Spring 2019).

71. 752 F. App'x 453 (9th Cir. Nov. 13, 2018).

72. *White v. Chevron Corp.*, No. 4:16-cv-0793, 2016 U.S. Dist. LEXIS 115875, at *5-6 (N.D. Cal. Aug. 29, 2016).

73. *Id.*

74. *White*, 752 F. App'x at 453.

75. *White v. Chevron Corp.*, 139 S. Ct. 2646 (2019) (denying plaintiffs' petition for writ of certiorari); *White v. Chevron Corp.*, No. 17-16208, 2019 U.S. App. LEXIS 149 (9th Cir. Jan. 3, 2019) (denying plaintiffs' petition for rehearing *en banc*).

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

77. *See Bell v. Pension Comm. of ATH Holding Co.*, No. 1:15-cv- 02062-TWP-MPB, (S.D. Ind. Jan. 24, 2019) ECF No. 347 (granting motion to modify class certification order).

78. *Bell v. Pension Comm. of ATH Holding Co.*, No. 1:15-cv-02062, 2019 U.S. Dist. LEXIS 14625 (S.D. Ind. Jan. 30, 2019).

79. *Bell v. Pension Comm. of ATH Holding Co., LLC*, No. 1:15-cv-02062 (S.D. Ind. Sept. 4, 2019), ECF No. 381 (final order approving settlement of $23.65 million with $7.88 million in attorneys' fees requested).

80. *Wildman v. Am. Century Servs.*, 362 F. Supp. 3d 685, 704-05 (W.D. Mo. 2019).

81. *Id.* at 704.

82. *Id.* at 704-05.

83. *Id.* at 705.

84. *See White v. Chevron Corp.*, No. 4:16-cv-00793, at 38 (N.D. Cal. Feb. 17, 2016), ECF No. 1 (Complaint).

85. *White v. Chevron Corp.*, No. 4:16-cv-0793, 2016 U.S. Dist. LEXIS 115875 (N.D. Cal. Aug. 29, 2016).

86. *Id.* at *9.

87. 883 F.3d 1 (1st Cir. 2018).

88. 886 F.3d 43 (1st Cir. 2018).

89. *Ellis*, 883 F.3d at 3.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 5.

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

95. *Id.* at 11.

96. *Barchock v. CVS Health Corp.*, 886 F.3d 43, 46 (1st Cir. 2018).

97. *Id.* at 46, 49.

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

99. *Barchock,* 886 F.3dat 49-50.

100. *Id.*

101. *Id.* at 52-53.

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

103. 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).

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

105. *See Teets v. Great-West Life & Annuity Ins. Co.*, 106 F. Supp. 3d 1198 (D. Colo. 2015); *Rozo v. Principal Life Fin. Ins. Co.*, No. 4:14-cv-000463, 2015 U.S. Dist. LEXIS 175630, at *5-7 (S.D. Iowa Sept. 21, 2015).

106. *See Teets*, 106 F. Supp. 3d at 1203 (denying motion to dismiss where it found the insurer's ability to unilaterally set the rate of return on the investment at issue raised a genuine issue of whether a reasonable rate of return is guaranteed); *see also Rozo*, 2015 U.S. Dist. LEXIS 175630, at *5-7 (denying motion to dismiss because of fact issue as to who bore investment risk where insurer could influence interest rate risk based on how it set rates for new contracts); *Wood v. Prudential Ret. Ins. & Annuity Co.*, No. 3:15-cv-01785, at 6-10 (D. Conn. Sept. 19, 2016), ECF No. 55 (denying motion to dismiss as to guaranteed investment contracts because additional factual development was necessary to determine if defendant was shielded from liability under the fiduciary exemption).

107. 286 F. Supp. 3d 1192, 1209 (D. Colo. 2017), *aff'd*, 919 F.3d 1200 (10th Cir. 2019) (finding Great-West was not acting as a fiduciary when setting this rate because it provided plan participants advance notice and the opportunity to reject this rate by moving their investments out of this fund). The court also dismissed plaintiff's claim that Great-West was liable as a nonfiduciary under ERISA's prohibited transaction rules because plaintiff failed to show that Great-West knew or should have known that the transaction violated ERISA.

108. 344 F. Supp. 3d 1025 (S.D. Iowa Sept. 25, 2018).

109. *Teets v. Great-West Life & Annuity Ins. Co.*, 919 F.3d 1200 (10th Cir. 2019).

110. *Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071 (8th Cir. 2020).

111. *Teets*, 919 F.3d at 1215-1217. "The KGPF is a stable-value fund. It guarantees capital preservation. This means KGPF participants will never lose the principal they invest or the interest they earn, which is credited daily to their accounts." *Id.* at 1208. "Great-West retains as revenue the difference between the total yield on the KGPF's monetary instruments and the Credited Rate, also known as the 'margin' or the 'spread.'" *Id.* at 1208-1209.

112. *Id.* at 1217-1219. The U.S. Court of Appeals for the Tenth Circuit also affirmed dismissal of plaintiff's claim that Great-West should be held liable as a nonfiduciary under ERISA's prohibited transaction rules. *Id.* at 1220-1221.

113. *Id.*

114. *Id.* at 1215-1217.

115. *Id.*

116. *Rozo v. Principal Life Ins. Co.*, 344 F. Supp. 3d 1025, 1034-35 (S.D. Iowa Sept. 25, 2018).

117. *Id.* at 1035-36. The court also dismissed plaintiff's claim that Principal should be held liable as a nonfiduciary under ERISA's prohibited transaction rules because the plaintiff failed to show that Principal knew or should have known that the transaction violated ERISA. *Id.* at 31-34.

118. *Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071, 1074 (8th Cir. 2020).

119. *Id.* at 1074-1075.

120. *Id.* at 1074.

121. *Id.* at 1075.

122. *See Sulyma v. Intel Corp. Inv. Policy Comm.,* No.15-cv-04977, 2017 U.S. Dist. LEXIS 49788 (N.D. Cal. Mar. 31, 2017) (challenging the inclusion of hedgefunds and private equity investments in target date anddiversified funds); *Jacobs v. Verizon Commc'ns., Inc.*, No. 16-cv-10822017, U.S. Dist. LEXIS 162703, at *2, 5-6 (S.D.N.Y. Sept. 28, 2017) (alleging 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); *Birse v. CenturyLink, Inc.*, No. 1:17-cv-02872, at ¶ 2 (D. Colo.), ECF 1 (challenging the decision to offer a large-cap stock fund because the fund's underlying investment strategy (comprised of five active managers) was "flawed," causing the plan to underperform its benchmark by two percent); *Johnson v. Fujitsu Tech. & Bus. of Am.,* No. 5:16-cv-03698-NC, at 11, 124 (N.D. Cal. June 30, 2016), ECF No. 1 (challenging investments in target-date funds that allegedly included too many unique and non-traditional asset classes, such as natural resources and real estate limited partnerships).

123. *Birse v. CenturyLink, Inc.*, No. 17-cv-2872, 2020 WL 1062902 (D. Colo. Mar. 5, 2020) (granting defendant's motion for summary judgement after determining that defendants had a robust and prudent decision making process); *Jacobs v. Verizon Commc'ns., Inc.*, No. 16-cv-10822017, U.S. Dist. LEXIS 162703, at *2, 5-6 (S.D.N.Y. Sept. 28, 2017) (granting motion to dismiss and explaining 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 DOL's requirement that plans "offer a broad range of investment alternatives that are diversified and have materially different risk and return characteristics); *Sulyma v. Intel Corp. Inv. Policy Comm.,* No.15-cv-04977, 2017 U.S. Dist. LEXIS 49788 (N.D. Cal. Mar. 31, 2017) (granting summary judgment dismissing these claims as time-barred because theparticipant had ready access to detailed information onthe allocation of funds to these investments). On remand from the Supreme Court, the district court in *Sulyma* dismissed the case for failure to state a claim and lack of standing pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). *Anderson v. Intel Corp. Inv. Policy Comm.*, No. 15-cv-04977, 2021 WL 229235 (N.D. Cal. Jan. 21, 2021). *Anderson* will be discussed in detail in next year's 2021 recap.

124. *See Johnson v. Fujitsu Tech. & Bus. of Am.*, No. 5:16-cv-03698, (N.D. Cal. May 11, 2018), ECF No. 149 (order granting final approval of settlement of $14 million with $3.5 million in attorney's fees requested).

125. *Muri v. Nat'l Indem. Co.,* No. 8:17-cv-178, 2019 U.S. Dist. LEXIS 101540 (D. Neb. June 18, 2019).

126. 755 Fed. App'x 697 (9th Cir. 2019). This case was previously styled "*In re Disney ERISA Litig.*"

127. *In re Disney ERISA Litig.*, 2:16-cv-2251, ECF No. 50 (C.D. Cal. Nov. 14, 2016), at 5-6.

128. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 426 (2014) ("[W]here a stock is publicly traded, allegations that a fiduciary should have recognized from publicly

available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances.").

129. *In re Disney ERISA Litig*., 16-cv-2251, ECF No. 50 (C.D. Cal. Nov. 14, 2016), at 5-6.

130. *Wilson*, 755 Fed. App'x at 698.

131. *Wildman v. Am. Cent. Servs., LLC*, 362 F. Supp. 3d 685, 704 (W.D. Mo. Jan. 23, 2019).

132. *Id*. at 705.

133. *Id*. at 692.

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

135. No.1:18-cv-01566, 2019 U.S. Dist. LEXIS 185808, at *18-19 (N.D. Ga. Sept. 20, 2019).

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

137. *Pizarro*, 2019 U.S. Dist. LEXIS 185808, at *14-16.

138. No. 16-cv-06794, 2018 U.S. Dist. LEXIS 68041, at *13-14 (N.D. Cal. Feb. 15, 2018).

139. *Marshall v. Northrop Grumman Corp*., No. 2:16-cv-06794, 2019 U.S. Dist. LEXIS 149162 (C.D. Cal. Aug. 14, 2019).

140. *Id*. at *32.

141. *Id*. at * 34-35.

142. *Id*. at *21-22.

143. *See* Bloomberg BNA, *Shell, Fidelity Sued Over 401(k) Fees, Handling of Investor Data* (Jan. 27, 2020) (discussing complaint filed in *Harmon v. Shell Oil Co*., No. 3:20-cv-00021 (S.D. Tex. 2020), ECF No. 1, Complaint filed Jan. 24, 2020; *Berkelhammer v. ADP TotalsourceGrp., Inc*., No. 20-cv-5696 (D.N.J.), ECF No. 1, Complaint filed May 7, 2020.

144. *Divane v. Nw. Univ*., No. 1:16-cv-8157, 2018 U.S. Dist. LEXIS 87645, at *38-39 (N.D. Ill. May 25, 2018) (concluding that participant information did not constitute a plan asset under ordinary notions of property rights since, while it may have some value to the recordkeeper, the plan purportedly cannot sell or lease it to fund the plan).

145. 953 F.3d 980 (7th Cir. 2020).

146. No. 3:16-cv-2086, 2018 U.S. Dist. LEXIS 181850, at *3 (M.D. Tenn. Oct. 23, 2018).

147. *Id*. at *9-10.

148. *Cassell v. Vanderbilt Univ*., No. 3:16-cv-02086 (M.D. Tenn. Oct. 8, 2019), ECF No. 166 (motion for preliminary approval of settlement) at 5-6.

149. No. 1:16-cv-02835 (D. Md. Aug. 6, 2019), ECF No. 84-1 (motion for preliminary approval of settlement) at 6-9.