§ 12.05A Litigation Over Hidden Section 401(k) Fees

Corporate governance events in the financial services industry over the last few years have caused employer plan sponsors to pay more attention to "transparency" or full disclosure and explanation of fees charged by plan service providers. This is at the top of the priority list at the U.S. Department of Labor as well as a favorite subject of the plaintiff class action bar, who have brought more than a dozen major lawsuits accusing Fortune 100 companies and members of their boards of directors and senior officers of violating ERISA by allowing their employees to be overcharged by their 401(k) plan vendors for investment management and administration services. In this environment, and with increased congressional interest in fees charged to plans, plan service providers having complex payment structures such as revenue sharing arrangements must be mindful that their acts are causing enormous fiduciary issues and concerns to plan sponsors. Furthermore, new legislation will almost certainly require more transparency concerning the fees charged to plans. In this regard, service providers may want to review their current revenue payment structures and arrangements to be adequately prepared in the event of new legislation, but at a minimum to avoid being a named defendant in a costly class action lawsuit.

Cases in this area are examined below.

[1]—Compliance with ERISA Reporting and Disclosure Requirements

A Wisconsin federal district court dismissed claims that Deere & Co., by allowing its 401(k) plan participants to pay excessive and unreasonable fees, breached its fiduciary duties under ERISA.[1] The court adopted a narrower interpretation of ERISA's fiduciary requirements than is customary in ERISA cases, creating a split of authority among the district courts before which these excessive fee cases are currently pending. The court held that since Deere had complied with all of the statutory reporting and disclosure requirements mandated by ERISA (i.e., requiring plans to provide summary plan descriptions, annual reports and summary annual reports), it did not breach its duties. The court found "no merit" in the participants' contention that ERISA's fiduciary duty rules impose additional disclosures separate and apart from those described in the statute's minimum reporting and disclosure requirements.

The court reached this conclusion even though Deere agreed with Fidelity Trust that it would limit twenty-three of the twenty-six investment options available to the 401(k) plan participants to Fidelity Funds. Fidelity Trust is compensated in part for its duties as trustee and record keeper by direct payment from Deere. However, each of the funds for which defendant Fidelity Research is investment advisor charges fund investors an asset-based fee ranging from .07% to 1.01%. Although these fees are set forth in each fund prospectus, the fact that Fidelity Research shares some of the fee revenue it receives with Fidelity Management, and the amount of this revenue sharing

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[1] Hecker v. Deere & Co., 496 F. Supp.2d 967 (W.D. Wis. 2007).

of asset-based revenue, was not known to Deere or disclosed to plan participants.[2] However, the court held that "[n]othing in the statute or regulation directly requires such a disclosure."

According to the court, the disclosure in the reports and prospectuses accurately reflected the expenses actually paid to the fund manager for fund management. To the extent that the charge includes profit, said the court, it is unlikely that the fund sponsor would know or be in a position to control its redistribution among related corporations and "there is no evidence of intent in the statute or regulations to reach this type of detail."[3] The court emphasized that proposals to amend the DOL regulations[4] to require revenue sharing disclosures in the Form 5500 or annual reports make it apparent that present regulations do not require it.

Accordingly, the court found that "failure to include such information does not violate *existing* ERISA standards for disclosure."[5]100 Moreover, the court emphasized that "there is no merit to plaintiffs' contention that disclosure not required by the statutory disclosure requirements is separately required by the general ERISA fiduciary obligations."[6] According to the court, disclosure requirements are generally limited to those expressly prescribed by the statutory language of ERISA[7] and that the latitude of courts to develop the meaning of general fiduciary duties is limited as applied to disclosure obligations.[8]

On appeal, the Seventh Circuit affirmed the district court's opinion, finding that Fidelity Trust and Fidelity Research were not "functional fiduciaries" because they did not have "final authority"; that Deere's omission of information about revenue-sharing was not material or constitute a breach of Deere's fiduciary duty; and that selecting funds from one management company did not in and of itself constitute a breach of Deere's fiduciary duty. The court also found that the Section 404 safe harbor provided protection to "a fiduciary that satisfies the criteria of § 404(c) and includes a sufficient range of options so that the participants have control over the risk of loss."[9]

It is notable that the court went to great lengths to not make a blanket rule on fiduciary liability with regard to investment fees. Rather, the holding in this case is specific to "fee distribution by the management company post-collection."[10] The court explicitly failed to define a "functional fiduciary," and instead ruled that a party that allegedly "played a role" does not have the "final authority" necessary to be considered a fiduciary.[11] While information about a revenue-sharing arrangement was not found to

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[2] Moreover, the court emphasized that Deere could have negotiated lower fees with Fidelity Research, or could have selected different funds from different providers with lower rates, but made no efforts to do so.

[3] *Hecker v. Deere & Co.*, N. 1 *supra*, 496 F. Supp.2d at 973.

[4] See 71 Fed. Reg. 41,392, 41,394 (July 21, 2006).

[5] *Hecker v. Deere & Co.*, N. 1 *supra*, 496 F. Supp.2d at 974. (Emphasis added.)

[6] *Id.*

[7] Ames v. American National Can Co., 170 F.3d 751, 759 (7th Cir. 1999).

[8] Jordan v. Federal Express Corp., 116 F.3d 1005 (3d Cir. 1997).

[9] Hecker v. Deere, 556 F.3d 575, 589 (7th Cir. 2009).

[10] *Id.*

[11] *Id.*, 556 F.3d at 584.

be material and using a selection of funds from one management company was not found to be imprudent, the court failed to determine what would be a material omission or an imprudent selection of funds so as to constitute a breach of a fiduciary duty. Finally, the court did not rule with regard to whether the safe harbor under Section 404 applies to the selection of a plan's investment options, but specifically applied protection to the situation in which all criteria of Section 404(c) had been satisfied and participants had enough options to control the risk of loss.

The Seventh Circuit denied reconsideration of the dismissal in June 2009, rejecting the contention by the Secretary of Labor that a fiduciary was not relieved from liability by the safe harbor under Section 404(c) for plan losses resulting from imprudent selection and monitoring of an investment option offered by the plan.[12] The Supreme Court subsequently denied review of the case.[13]

[2]—Rejection of Reporting and Disclosure Safe Harbor

A California federal district court denied Bechtel's motion to dismiss ERISA breach of fiduciary claims against the Bechtel Corporation, the Bechtel Plan Committee and its Vice President of Retirement Plans for failure to disclose unreasonable and excessive fees to plan participants since the court was unable to conclude that plaintiffs will be unable to prove any set of facts to support their claim.[14] The court refused to dismiss those claims before discovery commenced.

The court, unlike the court in *Deere*, rejected Bechtel's argument that its compliance with the statutory reporting and disclosure requirements mandated by ERISA created a safe harbor from fiduciary liability. The court stated: "To hold otherwise would be to hold that any amount of misrepresentation or dishonest dealing on behalf of the Plan, at least with respect to the fees and expenses charged against the Plan, cannot provide the basis for a cause of action so long as such fees and expenses are disclosed in the manner prescribed by ERISA and the [DOL's] regulations. Defendants have provided no authority for such a proposition, and the Court declines to adopt that position here."[15]

The court further ruled that the ERISA Section 404(c) safe harbor does not preclude plaintiff's claims at the pleading stage of the litigation. In its ruling, the court emphasized that "the safe harbor provision is essentially an affirmative defense that permits a fiduciary to avoid liability upon a showing that the alleged losses were in fact due to choices made by plan participants in exercising control over the assets in the Plan. It is not possible to determine, at the pleadings stage, whether Defendants' conduct falls within ERISA's safe harbor provision. Such a determination hinges against the 'beneficiary's exercise of control,' an issue that is called into question by the disclosures, or more precisely by the alleged lack of disclosures, that Defendants provided to participants in the Plan."

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[12] Hecker v. Deere, 569 F.3d 708 (7th Cir. 2009).

[13] Hecker v. Deere, 558 U.S. 1148, 130 S.Ct. 1141, 175 L.Ed.2d 973 (2010).

[14] Kanawi v. Bechtel, No. 3:06-cv-05566-CR (N.D. Cal. June 15, 2007).

[15] *Id.*, at 4.

[3]—Employer Cannot Hide Behind Investment Consultant's Advice

Under ERISA, plan fiduciaries are required to understand the fees and expenses charged and the services provided to the plan. While ERISA does not specify a permissible level of fees, the Section 404(a)[16] fiduciary rules require that fees charged to a plan be "reasonable."

An examination of whether fees paid to service providers and other expenses of the plan are "reasonable" is a critical ERISA fiduciary requirement. Not only is there potential fiduciary liability for failure to examine fees and expenses, but also the ERISA Section 404(c)[17] safe harbor (which insulates a plan sponsor from ERISA fiduciary liability) may be negated by a failure to identify and disclose all plan fees and expenses to plan participants.

In addition, arrangements with service providers may be considered prohibited transactions under ERISA Section 406[18] if the exemption provided in Section 408(b)(2)[19] is not satisfied, subjecting the plan fiduciaries and the service providers to tax penalties. To satisfy the requirements of this exemption, an arrangement between a plan and a service provider will not be a prohibited transaction if: (1) the contract or arrangement is "reasonable," (2) the services provided are necessary for the operation of a plan, and (3) the compensation received by the service provider is "reasonable" compensation for such services. Currently, the standard for evaluating what fees are "reasonable" is unclear, making it difficult for plan sponsors to determine whether a service provider arrangement will constitute a prohibited transaction.

This has led to a flurry of "hidden fee" litigation, reflecting the dissatisfaction of plan participants with inadequate fee disclosure requirements and the need for protection from excessive fees. Plan participants claiming that the decision to pay excessive investment and administrative fees was imprudent and a breach of the fiduciary duty of care have filed multiple lawsuits against plan sponsors.

As a result, employer plan sponsors have hired investment consultants to advise them on the reasonableness of plan investment and administrative fees and expenses. There is a tendency to rely on such independent advice from outside experts.

[a]—District Court Decision

In the first "excessive and unreasonable fees" decision to go to trial, the U.S. District Court for the Central District of California held that while securing independent advice from an investment consultant is "some evidence" of a thorough investigation, it is not a complete defense to a charge of imprudence.[20] At the very least, said the court, the plan fiduciaries must

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[16] ERISA § 404(a), 29 U.S.C. § 1104(a).

[17] ERISA § 404(c), 29 U.S.C. § 1104(c).

[18] ERISA § 406, 29 U.S.C. § 1106.

[19] ERISA § 408(b)(2), 29 U.S.C. § 1108(b)(2).

[20] Tibble v. Edison International, No. CV 07-5359 SVW (AGRx), 2010 U.S. Dist. LEXIS 69119 (C.D. Cal. July 8, 2010).

"make certain that reliance on the expert's advice is reasonably justified." According to the court, this is accomplished with evidence demonstrating the thoroughness and scope of the consultant's review. In effect, an employer plan sponsor cannot hide behind a consultant but must be able to produce evidence of a robust and thorough investigation through procedural and substantive prudent process standards and a fee forensic audit and benchmarking.

In a comprehensive eighty-two-page decision, which is must reading for employers that are concerned about "hidden fee" liability, the district court found that the fiduciaries of Southern California Edison's (SCE) Section 401(k) plan breached their duty of prudence under ERISA when they selected more costly retail class mutual funds for the plan instead of attempting to secure institutional class mutual funds.

The fiduciaries found liable were the employer plan sponsor as well as members of the Plan Investment Committee and Benefits Committee, the Vice-President of Human Resources and the manager of the sponsor's Human Resources Service Center.

In concluding that the fiduciaries breached their duty of prudence, the court emphasized that there was no evidence that the fiduciaries investigated the difference between the retail class funds and the institutional class funds. Had the fiduciaries considered the institutional class funds and weighed the relative merits of the institutional class funds against the retail class funds, said the court, "they would have realized that the institutional share classes offered the exact same investment at a lower cost to the Plan participants."

Plaintiffs representing the Plan participants argued that when deciding to invest in the retail share classes rather than the cheaper institutional share classes of these funds, the Defendant fiduciaries were improperly motivated by a desire to capture more revenue sharing for SCE, even though doing so increased the fees charged to Plan participants. Plaintiffs argued that defendants put the interests of SCE in offsetting the Plan's record-keeping costs through revenue sharing above the interests of the Plan participants in paying lower fees. Plaintiffs relied primarily on a series of e-mails, generally between members of SCE's investments staff and the Human Resources Department, to support their claim that the Plan fiduciaries were improperly motivated by a desire to capture revenue sharing.

To determine whether the decision to invest in retail share classes constituted a breach of the duty of prudence, the court stated that it must examine whether the fiduciaries engaged in a thorough investigation of the merits of the investment at the time the funds were added to the Plan. In this regard, the court found that "there is no evidence that Defendants even considered or evaluated the different share classes when the funds were added to the Plan. Not a single witness testified regarding any discussion or evaluation of the institutional versus retail share classes for these funds."

The court further emphasized that the presentation materials that the SCE investments staff prepared for the meeting of the Plan Investment Committee during which the investments staff recommended adding these funds to the Plan "contained no information about the institutional share classes." According to the court: "The Investment Staff simply recommended adding the retail share classes of these funds without any consideration of whether

the institutional share classes offered greater benefits to the Plan participants. Thus, the Plan fiduciaries responsible for selecting the mutual funds (the Investment Committees) were not informed about the institutional share classes and did not conduct a thorough investigation."[21]

On the basis of this evidence, according to the court, plaintiffs had met their burden of demonstrating that the Plan fiduciaries did not act with the care, skill and diligence of a prudent man acting in a like capacity when deciding to invest in the retail share classes. In so holding, the court rejected defendants' argument that their investment selection process was reasonable and thorough because they relied on their investment consultant for advice regarding which mutual fund share classes should be selected for the Plan. Defendants' expert had testified that the Plan fiduciaries did not have access to information about different share classes and, therefore, reliance on the investment consultant's advice was reasonable.

While securing independent advice from an investment consultant is some evidence of a thorough investigation, according to the court, it is not a complete defense to a charge of imprudence. At the very least, emphasized the court, the Plan fiduciaries must "make certain that reliance on the expert's advice is reasonably justified."[22] In this instance, the court could not conclude that reliance on the investment consultant's advice was reasonable.

Most importantly, according to the court, defendants had not presented any evidence regarding the review and evaluation the investment consultant did in connection with the funds. Defendants did not present evidence of the specific recommendations the investment consultant made to the Investment Committee regarding those funds, what the scope of the consultant's review was, whether the consultant considered both the retail and the institutional share classes, whether the consultant provided information to the Investment Committee about the different share classes, what questions were asked regarding the recommendations, and what steps the Investment Committee took to evaluate the consultant's recommendations. Thus, while reliance on the consultant's recommendations may be justified in some circumstances, according to the court, in the absence of any evidence about the thoroughness and scope of the consultant's review, the court could not conclude that such reliance was prudent.

[b]—Ninth Circuit Decision

On appeal, the Ninth Circuit Court of Appeals ruled that 401(k) plan fiduciaries breached their duty of prudence in selecting investment options for the plan and unreasonably relied on a consultant's advice because they could not prove that either they, or the consultant, considered institutional-class (instead of retail-class) shares of mutual funds as proper investments under the plan.[23] The Ninth Circuit opined that fiduciaries must make certain that their reliance on a consultant's advice is reasonably justified and cannot "reflexively and uncritically adopt [a consultant's] recommendations."[24]

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[21] *Id.*, 2010 U.S. Dist. LEXIS 69119 at *82.

[22] *Id.*, 2010 U.S. Dist. LEXIS 69119 at *86.

[23] Tibble v. Edison International, 711 F.3d 1061 (9th Cir. 2013).

[24] *Id.*, 711 F.3d at 1086.

The Ninth Circuit made several other holdings, including: (i) the statute of limitations for a fiduciary breach claim alleging that the plan's investment menu was designed "imprudently" begins to run at the "act of designating an investment for inclusion" in the plan, not from the date fiduciaries of the plan failed to remove the investment option; (ii) that Section 404(c) of ERISA did not shield the plan fiduciaries from liability because that defense only applies where the alleged losses are a "direct and necessary result" of the participant's decision; and (iii) affirming that the fiduciaries did not breach their fiduciary duties when choosing mutual funds, STIFs and a unitized company stock fund for the plan because those choices were "objectively reasonable as well as informed," and "because the evidence establish[ed] that the [fiduciaries] oversaw the fund as conditions change."[25]

On appeal, the Ninth Circuit Court of Appeals upheld the District Court and ruled that 401(k) plan fiduciaries breached their duty of prudence in selecting investment options for the plan and unreasonably relied on a consultant's advice because they could not prove that either they, or the consultant, considered institutional-class (instead of retail-class) shares of mutual funds as proper investments under the plan. The Ninth Circuit emphasized that fiduciaries must make certain that their reliance on a consultant's advice is reasonably justified and cannot "reflexively and uncritically adopt [a consultant's] recommendations." In rejecting SCE's argument that it relied on its expert consultant, the Ninth Circuit emphasized that ERISA's duty to investigate requires a fiduciary to review, assess and, where necessary, supplement the data a consultant gathers and that SCE failed to make any showing of the steps it took to evaluate the consultant's recommendations.

The DOL filed an amicus brief with the Ninth Circuit because most of the prudence and prohibited transaction claims were held to be barred by the District Court since the fiduciaries first selected the challenged investments more than six years before the suit was filed. The DOL's amicus brief asserted that the six-year statute of limitations should not apply since SCE violated a "continuing duty" to monitor and manage plan investments and eliminate imprudent investments in the process.

The Ninth Circuit rejected the DOL's continuing violation theory and held that the act of designating an investment for inclusion on the plan's menu starts the six-year statute of limitations period. In the Ninth Circuit's view, characterizing the continued offering of a plan investment option as the commission of a second breach would (in the absence of other circumstances, such as fraud or concealment) make the statute of limitations meaningless and expose the current plan fiduciaries to liability for decisions made by their predecessors, which may have occurred decades before and as to which institutional memory may have ceased. Responding to the DOL's argument that plan fiduciaries would be empowered to leave imprudent investment menus in place, the Ninth Circuit noted that Tibble was given the opportunity at trial to show that changed circumstances within the limitations period warranted a full due diligence review of the investment menu, but had been unable to establish that this resulted in a breach of fiduciary duty.

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[25] *Id.*, at 1085.

The Ninth Circuit's rejection of the continuing violation theory (which the DOL has asserted in numerous cases) is a significant victory for plan fiduciaries. It means that plaintiffs have to establish that there has been a change in conditions warranting review of an investment decision more than six years old.

A petition submitted by SCE asked the Supreme Court to reverse its decision to review key parts of *Tibble vs. Edison International*, including issues relating to ERISA's limitations period and whether retirement plan fiduciaries have an ongoing duty to monitor plan investment options that is distinct from the initial duty to select.[26]

According to SCE, Tibble's position has a "problem" in that the district court did not actually bar him from pursuing that claim.

To the contrary, said SCE, Tibble tried exactly that claim, after the district court explicitly held that ERISA's statute of limitations did not bar claims that accrued during the limitation period. For example, said SCE, Tibble at trial sought to prove that SCE breached its fiduciary duties by imprudently monitoring and retaining the challenged funds. Specifically, Tibble argued that while SCE monitored all investment options according to specific investment criteria with periodic (quarterly) reviews, there were "significant changes" within the three challenged funds that should have triggered a much deeper, "full due diligence review" of those funds, which would have identified the availability of less expensive share classes. The district court rejected that theory of imprudence, said SCE, not on limitations grounds, but solely because Tibble's evidence was insufficient to support its own changed circumstances theory.

[c]—Solicitor General Brief Endorsing Appeal

According to SCE, the Solicitor General's invitation brief endorsing Tibble's appeal adds very little.

For example, said SCE, the Solicitor General's argument for review of the limitations issue rests primarily on his assertion that the decision below "conflicts with the decisions of other courts of appeals." According to SCE, that assertion "borders on frivolous" since the Fourth, Ninth, and Eleventh Circuits have all held that a claim challenging the selection of mutual funds for a 401(k) plan lineup is barred by the six-year limitations period of ERISA § 413(1)(A) if the claim challenges funds that were selected more than six years before the claim was filed and the claim does not allege that any materially new circumstances arose within the previous six years that required removal of the funds.[27] Also, multiple district court decisions agree.[28] No

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[26] Tibble v. Edison International, On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit, Supplemental Brief in Opposition, No. 13-550 (U.S. Sept. 3, 2014).

[27] See:

Fourth Circuit: David v. Alphin, 704 F.3d 327, 331-332 (4th Cir. 2013).

Eleventh Circuit: Fuller v. Suntrust Banks Inc., 744 F.3d 685, 700-702 (11th Cir. 2014).

[28] See, e.g.:

Ninth Circuit: Kanawi v. Bechtel Corp., 590 F. Supp.2d 1213, 1225 (N.D. Cal. 2008).

circuit has reached a contrary conclusion on the application of § 413(1)(A), said SCE, and the Solicitor General does not suggest otherwise.

According to SCE, the Solicitor General instead asserted the same non-conflict asserted by Tibble relying on two decades-old decisions (Martin and Morrissey) standing for the proposition that ERISA fiduciaries have an ongoing duty to monitor investments and remove options that become imprudent.[29] However, said SCE, nobody disagrees with that rule—not SCE, not the district or appellate courts in this case, and not the circuits that agree with them. Indeed, said SCE, the district court here specifically found that Edison did monitor all 401(k) investment options on a monthly, quarterly, annual, and as-needed basis, ensuring that all investment options continued to meet the "Investment Criteria" for the Plan, including with respect to performance on a net-of-fee basis.

According to SCE, neither *Martin* nor *Morrissey* required doing more than that.

To the contrary, said SCE, the court in Morrissey which is not even a limitations case, and thus on its face does not present the kind of "conflict" that normally justifies *certiorari*, simply held that plaintiffs were entitled to fact finding into whether the fiduciary should have liquidated an investment *given the lack of return over several years*.[30]

In other words, the court allowed the plaintiffs to challenge not the original decision itself to invest, but the failure to monitor and react when the investment did not perform. Far from disagreeing with *Morrissey*, said SCE, the district court here permitted Tibble to litigate exactly that kind of claim, authorizing discovery and a full trial into whether SCE failed to react to any material new information during the limitations period that required removal of the challenged funds and Tibble was unable to identify any such failure.

[d]—Supreme Court Decision

On May 18, 2015, a unanimous U.S. Supreme Court held[31] that fiduciaries who select investment options for 401(k) plans have a continuing duty under ERISA to monitor their selections and remove imprudent investment options. In so holding, the Supreme Court reversed a ruling by the Ninth Circuit that dismissed certain claims brought against fiduciaries of the SCE 401(k) Plan as untimely because they related to investment options that were selected

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Eleventh Circuit: Stargel v. SunTrust Banks, Inc., 968 F. Supp.2d 1215, 1230 (N.D. Ga. 2013).

See also:

Seventh Circuit: Biglands v. Raytheon Savings and Investment Plan, 801 F. Supp.2d 781, 788-789 (N.D. Ind. 2011).

Eighth Circuit: Angell v. John Hancock Life Ins. Co., 421 F. Supp.2d 1168, 1175 (E.D. Mo. 2006).

[29] See:

Second Circuit: Morrissey v. Curran, 567 F.2d 546, 548-549 & n.9 (2d Cir. 1977).

Seventh Circuit: Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1087-1088 (7th Cir. 1992).

[30] *Morrissey v. Curran*, N. 117.5 *supra*, 567 F.2d at 548-549 & n.7.

[31] Tibble v. Edison International, 135 S.Ct. 1823, 191 L.Ed.2d 795 (2015).

for the Plan more than six years [ERISA statute of limitations] before the complaint was filed.

This Supreme Court decision rejects the holdings of several circuit courts and confirms that plan fiduciaries are not shielded by ERISA's statute of limitations from lawsuits alleging breach of fiduciary duty for investment options selected in the past. Instead, the Court held that plan fiduciaries have a continuing duty to monitor investment options under the plan, separate and apart from the duty to exercise prudence in selecting investments at the outset, and can be found liable for breach of fiduciary duty in connection with funds that were initially selected many years earlier by different fiduciaries.

[i]—Background

In 2007, participants in the SCE 401(k) Savings Plan (Plan) sued SCE and the Plan fiduciaries to recover damages for losses suffered to the Plan from alleged breaches of fiduciary duties. The participants argued that SCE violated its fiduciary duties with respect to three mutual funds added to the Plan in 1999 and three mutual funds added to the Plan in 2002. They argued that SCE acted imprudently by offering six higher priced retail-class mutual funds as Plan investments when materially identical lower priced institutional-class mutual funds were available. Because ERISA requires a breach of fiduciary duty complaint to be filed no more than six years after "the date of the last action which constitutes a part of the breach or violation" or "in the case of an omission the latest date on which the fiduciary could have cured the breach or violation,"[32] the District Court held that petitioners' complaint as to the 1999 funds was untimely because they were included in the Plan more than six years before the complaint was filed, and the circumstances had not changed enough within the six-year statutory period to place SCE under an obligation to review the mutual funds and to convert them to lower priced institutional-class funds. The Ninth Circuit affirmed, concluding that the participants had not established a change in circumstances that might trigger an obligation to conduct a full due diligence review of the 1999 funds within the six-year statutory period.

The Supreme Court held that the Ninth Circuit erred by applying the six-year statute of limitations to a breach of fiduciary duty claim based on the initial selection of the investments "without considering the contours of the alleged breach of fiduciary duty."[33] ERISA's fiduciary duty is "derived from the common law of trusts,"[34] said the Court, which provides that a trustee has a continuing duty—separate and apart from the duty to exercise prudence in selecting investments at the outset—to monitor, and remove imprudent, trust investments. So long as a plaintiff's claim alleging breach of the continuing duty of prudence occurred within six years of suit, the claim is timely. In so holding, the Court said that it expresses no view on the scope of SCE's fiduciary duty in this case, e.g., whether a review of the

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[32] 29 U.S.C. § 1113.

[33] *Tibble v. Edison International*, N. 31 *supra*, 135 S.Ct. at 1825.

[34] *Id.,* citing Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985).

contested mutual funds is required, and, if so, just what kind of review. However, it did emphasize that in performing such a review a fiduciary must discharge his responsibilities under ERISA's "prudent expert" rule "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use.[35]

[ii]—Decision

The Supreme Court pointed out that ERISA Section 413 reads, in relevant part, that "[n]o action may be commenced with respect to a fiduciary's breach of any responsibility, duty, or obligation" after the earlier of "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."[36] Both clauses of that provision require only a "breach or violation" to start the six-year period said the Supreme Court. SCE breached its fiduciary duty by offering higher priced retail-class mutual funds.

The Supreme Court then emphasized that the Ninth Circuit, "without considering the role of the fiduciary's duty of prudence under trust law, rejected the participants' claims" as untimely under ERISA Section § 413 on the basis that SCE had selected the three mutual funds more than six years before the participants brought this action.[37] The Supreme Court agreed that the Ninth Circuit correctly asked whether the "last action which constituted a part of the breach or violation" of respondents' duty of prudence occurred *within* the relevant six-year period.[38] However, the Ninth Circuit's mistake, said the Court, is that it focused upon the act of "designating an investment for inclusion" to start the six-year period.[39] The Ninth Circuit found that "[c]haracterizing the mere continued offering of a plan option, without more, as a subsequent breach would render"[40] the statute meaningless and could even expose present fiduciaries to liability for decisions made decades ago and concluded that *only* a significant change in circumstances could engender a new breach of a fiduciary duty.

The Supreme Court said that the Ninth Circuit was wrong in applying a statutory bar to a claim of a "breach or violation" of a fiduciary duty without considering the nature of the fiduciary duty.[41] According to the Supreme Court, the Ninth Circuit did not recognize that under trust law a fiduciary is "required to conduct a regular review of its investment" with the nature and timing of the review contingent on the circumstances and only after considering trust-law principles, is it possible for a court to conclude that SCE did conduct the sort of review that a prudent fiduciary would have conducted absent a significant change in circumstances.[42]

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[35] ERISA § 404 (a)(1).
[36] Tibble v. Edison International, 135 S.Ct. 1823, 1827, 191 L.Ed.2d 795 (2015).
[37] *Id.*
[38] *Id.*
[39] *Id.*, citing Tibble v. Edison International, 729 F.3d 1110, 1119 (2013).
[40] *Id.*
[41] Tibble v. Edison International, 135 S.Ct. 1823, 1827, 191 L.Ed.2d 795 (2015).
[42] *Id.*, 135 S.Ct. at 1827-1828.

The Supreme Court emphasized that an ERISA fiduciary must discharge his responsibility "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use.[43] The Supreme Court said that it has often noted that an ERISA fiduciary's duty is "derived from the common law of trusts."[44]

In determining the contours of an ERISA fiduciary's duty, said the Supreme Court, "courts often must look to the law of trusts. We are aware of no reason why the Ninth Circuit should not do so here."[45]

"Under trust law," said the Supreme Court, "a trustee has a continuing duty to monitor trust investments and remove imprudent ones. This continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset."[46] "The trustee cannot assume that if investments are legal and proper for retention at the beginning of the trust, or when purchased, they will remain so indefinitely."[47] Rather, the trustee must "systematic[ally] conside[r] all the investments of the trust at regular intervals" to ensure that they are appropriate.[48] Also, said the Supreme Court, trust law states the following:

> "[A] trustee's duties apply not only in making investments but also in monitoring and reviewing investments, which is to be done in a manner that is reasonable and appropriate to the particular investments, courses of action, and strategies involved."[49]

Moreover, the Uniform Prudent Investor Act confirms that "[m]anaging embraces monitoring" and that a trustee has a "continuing responsibility for oversight of the suitability of the investments already made"[50] and "[w]hen the trust estate includes assets that are inappropriate as trust investments, the trustee is ordinarily under a duty to dispose of them within a reasonable time."[51]

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[43] 29 U.S.C. § 1104(a)(1)(B). See also, Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 134 S.Ct. 2459, 189 L.Ed.2d 457 (2014).

[44] *Tibble v. Edison International*, N. 41 *supra*, 135 S.Ct. at 1828, citing Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985).

[45] *Tibble v. Edison International*, N. 41 *supra*, 135 S.Ct. at 1828. (Citations omitted.)

[46] *Id.*

[47] Hess, Bogert, & Bogert, *Law of Trusts and Trustees*, § 684, pp. 145-146 (3d ed. 2009).

[48] *Id.*, at pp. 147-148. See also:

Second Circuit: In re Stark's Estate, 15 N.Y.S. 729, 731 (Surr. Ct. 1891) (stating that a trustee must "exercis[e] a reasonable degree of diligence in looking after the security after the investment had been made").

District of Columbia Circuit: Johns v. Herbert, 2 App. D. C. 485, 499 (1894) (holding trustee liable for failure to discharge his "duty to watch the investment with reasonable care and diligence").

[49] Tibble v. Edison International, 135 S.Ct. 1823, 1828, 191 L.Ed.2d 795 (2015), quoting *The Restatement (Third) of Trusts*, § 90, Comment *b*, p. 295 (2007).

[50] 7B *Uniform Laws Annotated*, § 2, Comment, 21 (1995).

[51] 4 Scott, Fratcher, & Ascher, *Scott and Ascher on Trusts*, § 19.3.1, p. 1439 (5th ed. 2007). Bogert says the same. Bogert, *The Law of Trusts and Trustees*,

In short, said the Supreme Court, under trust law, a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones. A plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones. In such a case, so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely. "The Ninth Circuit erred by applying a 6- year statutory bar based solely on the initial selection of the three funds without considering the contours of the alleged breach of fiduciary duty."[52]

Finally, the Supreme Court emphasized that all the parties to the litigation agree that the duty of prudence involves a continuing duty to monitor investments and remove imprudent ones under trust law.

The parties disagree, however, with respect to the scope of that responsibility. The Supreme Court refused to express a view on the scope of SCE's fiduciary duty in this case. However, in determining the scope of fiduciary duty, the Court emphasized the importance of complying with ERISA's "prudent expert" rule which provides that a fiduciary must discharge his responsibilities "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use.[53]

[iii]—Implications

The Supreme Court's decision affirms an ERISA fiduciary's obligation to be vigilant in managing plan assets. The duty to make informed and reasoned decisions regarding each investment option, its share class, the disposition of any revenue share derived thereof, and the continuing responsibility for oversight of the suitability of the investment options are all parts of the overall fiduciary obligation.

The Supreme Court decision is a wake-up call to plan sponsors that they can't just set up plans and walk away. They need to establish investment policies and review options on a regular basis in the best interest of participants. Service providers will need to provide enhanced and more frequent information (such as investment analysis and reasonableness of expenses) to plan sponsors or the plan fiduciaries responsible for decisions regarding investment alternatives, such as an investment committee, so the fiduciary duty of monitoring investment alternatives can be met. Service providers, particularly those who rely more on retail investment offerings, will need to revisit how these offerings are disclosed and the information that is provided to the participants in the Plans that are serviced, to show how these investment offerings would truly be in the participant's best interest."

§ 685, at 156–157 (3d ed. 2000) (explaining that if an investment is determined to be imprudent, the trustee "must dispose of it within a reasonable time"). See, e.g., State Street Trust Co. v. DeKalb, 259 Mass. 578, 583, 157 N.E. 334, 336 (1927) (trustee was required to take action to "protect the rights of the beneficiaries" when the value of trust assets declined).

[52] *Tibble v. Edison International*, N. 49 *supra*, 135 S.Ct. at 1829.

[53] ERISA § 404(a)(1).

If a plan sponsor is not able to stay involved and provide support to employees, there are service providers already in the market taking on fiduciary and other responsibilities for them at a low cost. This helps take the burden off of the Plan sponsor while leveraging experts in the field with a reputation for handling this type of responsibility on a daily basis.

For example, a prudent plan sponsor will likely outsource the selection, monitoring, and replacement of plan investment options to an ERISA Section 3(38) fiduciary; which is a registered investment adviser, bank, or insurance company that is engaged to manage the Plan's investment process and, under ERISA, relieves the plan sponsor of fiduciary responsibility for the investment decisions made by the investment professional.

Since revenue sharing is among the suspect fees spawning this and other ERISA class action litigation, plan sponsors should be looking at different share classes and consider eliminating those type of "back-door payments." In addition, plan sponsors should see if their recordkeepers can credit any revenue sharing monies directly back to the participants who generated those credits since sharing revenue sharing with all participants (even those who are not in funds generating revenue sharing) can create other ERISA breach of fiduciary issues.

As a result of the Supreme Court ruling, (plan sponsors being held liable for failure to select lower cost class shares) the trend toward more institutional funds and less expensive index funds will continue to accelerate. In most cases, these will be the institutional class of shares for any particular fund. In a similar sense, funds with identical portfolios will be subject to the same "low fee" hurdle and if the expenses of a fund are more than others, there should be a good reason for it.

Under the Supreme Court's decision, the plan sponsor's fiduciary meter runs continually. Also, this decision emphasizes the plan sponsors duty to monitor the relationship between fees and value on an ongoing basis. As a function of fee monitoring, the plan sponsor has an obligation to negotiate fees commensurate with the services provided and utilized. For example, a recordkeeper who charges a higher wrap fee than another to pay a financial advisor for a group annuity contract, may be acceptable in the first year but not in year seven of the contract as the insurance company is still amortizing the expense. Service providers will need to start documenting the work that they perform to justify higher expenses. Also, as plan sponsors monitor a prudent balance between fees and service, they should insist that service providers document the work performed for the plan.

[e]—Additional Damages

A California district court has ordered SCE to pay more than $7.5 million to compensate employees for its decision to include high-fee retail share mutual funds in its 401(k) plan when identical institutional share classes were available at lower cost.[54]

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[54] Tibble v. Edison International, No. 2:07-cv-05359-SVW-AGRX, 2017 U.S. Dist. LEXIS 130806 (C.D. Cal. Aug. 16, 2017).

The district court said it was imprudent for SCE to include seventeen mutual funds in its 401(k) plan that could have been obtained at lower cost. Because SCE should have made the switch "immediately," the court said damages could be calculated from the day the statute of limitations began to run.

The parties agreed that damages between 2001 and 2011 were about $7.5 million, and the district court ordered them to calculate damages from 2011 onward by comparing the returns of the disputed funds to the returns of the plan as a whole during that period.

The district court's decision against SCE comes ten years after the case was first filed in 2007. Since that time, the case has seen two trials, multiple trips to the U.S. Court of Appeals for the Ninth Circuit, and a significant 2015 U.S. Supreme Court ruling making it harder for 401(k) plan fiduciaries to have lawsuits challenging particular investment funds dismissed as untimely.[55]

In this decision, the district court decided that SCE's breach of duty occurred on the earliest possible date that it could have chosen institutional share classes over retail. This is significant because it increases the amount of money investors can recover.

However, the district court cautioned that not all fiduciary breach cases will compel this conclusion, because fiduciaries aren't expected to take a "daily accounting of all investments." However, SCE's case presented an "extreme situation," said the district court, because SCE "always knew, or should have known, that institutional share classes existed."[56]

The district court declined to use plaintiff's proposed method for calculating damages that occurred after the SCE plan removed all mutual funds in February 2011. Specifically, the Plaintiffs favored comparing the challenged mutual funds' returns to the returns of the S&P 500 index, which nearly doubled since February 2011.

This comparison would be "unambiguously irrational," said the district court, because there's no indication that participants who invested in the disputed mutual funds moved their investment to the plan's S&P 500 index fund, which the court said made up a "rather small portion" of the plan's assets.

The better comparison would be between the returns of the challenged mutual funds and the returns of the plan as a whole, said the court. It's a reasonable approximation that these investors, who already invested in diversified mutual funds, continued to invest in a diversified strategy that approximates the Plan's returns, said the court.

Under the parties' agreement on the calculation of the plan's losses from 2011 through July 2017, SCE agreed to pay $5.6 million in additional damages.[57]

The stipulation was entered into three weeks after the district court issued a $7.5 million judgment against SCE for its decision to include high-fee retail

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[55] For further discussion, see § 12.05[7][c][iv] *supra*.

[56] *Tibble v. Edison International*, N. 54, *supra*, 2017 U.S. Dist. LEXIS at *39.

[57] *Id.,* (C.D. Cal. Sept. 5, 2017) (joint stipulation regarding methodology for plan return calculations).

share mutual funds in its 401(k) plan when identical, lower-cost institutional share classes were available. The parties agreed that damages between 2001 and 2011 were about $7.5 million. The district court ordered the parties to calculate damages from 2011 onward by comparing the returns of the disputed funds to the returns of the plan as a whole during that period. The parties' agreement means that SCE will pay a total of $13.16 million as a result of this 401(k) fee litigation.

[4]—$35 Million Verdict in 401(k) Fee Case

In the first class action over 401(k) fees to be tried and decided on its merits, a Missouri federal district court ruled that manufacturer ABB Inc. breached its ERISA fiduciary duties.[58] The court's opinion is a *must read* for all plan sponsors and service providers. The company must pay $35.2 million to the plaintiff class for (1) failing to monitor the recordkeeping fees and revenue-sharing payments made to the plan's trust company, (2) failing to negotiate rebates to offset or reduce the cost of providing administrative services to plan participants, and (3) replacing an actively balanced mutual fund with the trust company's target date fund that generated more in revenue sharing for the trust company. (Revenue sharing refers to any portion of the expense ratio fees as a percentage of plan assets that is used to pay administrative fees other than investment costs.) In so holding, the court emphasized, above all other considerations, the importance of implementing and adhering to prudent processes and focusing on the merits of the investments.

The court acknowledged that ERISA fiduciaries may use revenue sharing to pay for administrative fees (rather than paying with a "hard dollar" per-participant fee). But it held that if a fiduciary opts for revenue sharing, "it also must have gone through *a deliberative process* for determining why such a choice is in the Plan's and participants' best interest."

Such analysis was particularly critical, according to the court, because the plan's Investment Policy Statement (IPS) required that revenue sharing "be used to offset or reduce the cost of providing administrative services to plan participants." According to the court, without calculating the dollar amount of the recordkeeping fees, ABB could not know whether revenue sharing was offsetting or reducing the cost.

In that regard, the court noted that ABB's monitoring of the reasonableness of the overall expense ratio was insufficient because it did not show how much revenue was flowing, did not show the competitive market for comparable funds, and failed to take into account the size of the plan. Also, the court held that the IPS was part of the plan document, and by failing to comply with the IPS provision, ABB breached its fiduciary duty to operate the plan in accordance with the plan document's terms.

The court's opinion described in detail many actions it viewed as failing to achieve a deliberative process and evaluation, failing to follow plan documents such as the IPS, failing to follow up the findings of an adviser

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[58] Tussey v. ABB, Inc., 2012 U.S. Dist. LEXIS 45240 (W.D. Mo. March 31, 2012).

that the plans were overpaying fees, and making decisions not in the best interests of the plan.

Also, in view of the Labor Department's fee-disclosure rules, it is even more important that plan fiduciaries understand the fees, including revenue sharing, being paid by and through plans, particularly 401(k) plans. It is also crucial for fiduciaries to examine the process and procedures for evaluating and approving investment options and provider arrangements, and the documentation of those actions.

[a]—Failure to Monitor Recordkeeping Expenses

All investment options offered by the plan paid revenue sharing to a trust-company affiliate. According to the court, ABB never calculated the dollar amount of the recordkeeping fees the plan paid to the trust company via revenue-sharing arrangements, nor did it consider how the plan's size could be leveraged to reduce recordkeeping costs.

In fact, the court noted that ABB did not obtain a benchmark cost of services prior to choosing revenue sharing as the plan's method for compensating the trust company, even though an outside consulting firm told ABB it was overpaying for recordkeeping and that it appeared the plan was subsidizing the corporate services provided to ABB by the trust company.

The court said that it was also unconvinced that ABB monitored the reasonableness of the trust company's recordkeeping fees by determining the reasonableness of the expense ratio for the retail investments chosen for the plan. According to the court, the expense ratio did not show how much revenue was flowing from the investment company to the record keeper. Also, it did not portray the competitive market for recordkeeping fees of comparable funds.

Most importantly, according to the court, "in this case, it fails to take into account the size of the retirement plan and the competitive benefit that an investment company acquires when it is selected to be on a retirement plan platform. Participant choices are generally limited to those investments on the platform, substantially increasing the visibility of these investments and limiting competition from other funds. While there are legitimate reasons for limiting choices, the reality is that being put on a platform is a valuable benefit and gives a large plan the opportunity to negotiate for rebates in exchange for that benefit."[59]

Moreover, the court emphasized that the IPS clearly states that revenue sharing should be used to offset or reduce recordkeeping costs. Thus, in accordance with the IPS, ABB was required to leverage the plan's size and assets to reduce recordkeeping costs. In other words, the court stated that ABB had to use its purchasing power to negotiate for rebates from the trust company, either in the form of basis points or hard-dollar amounts if the amount of revenue sharing generated exceeded market value for the trust's services.

In that regard, the court emphasized that a fair negotiation for such rebates cannot occur without determining the amount of income generated from

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[59] *Id.*, 2012 U.S. Dist. LEXIS 45240 at *13.

revenue sharing, knowing the market costs for comparable services, affirmatively evaluating the quality provided by the trust company, and evaluating the costs and benefits of risk sharing. ABB did none of this, according to the court, "and did not even ask the Trust Company for a rebate or even discuss the issue with them."

The court also found that the plan overpaid for the recordkeeping services provided by the trust company, since the revenue sharing generated by the plan's assets far exceeded the market value for recordkeeping and other administrative services provided by the trust company.

[b]—Failure to Negotiate Rebates

According to the court, ABB's permitting the trust company to take the revenue sharing resulted in the above market costs. That was in violation of the IPS, which required that at "all times, rebates will be used to offset or reduce the cost of providing administrative services to plan participants." ABB did not use the rebates/revenue sharing to offset or reduce the cost of the plan's administrative services, in violation of the IPS.

That was particularly disturbing, according to the court, because the IPS is a governing plan document under ERISA Section 404(a)(1)(D), which establishes a statutory duty of prudence requiring that fiduciaries discharge their duties in accordance with governing plan documents. The court found that to assess the prudence of a revenuesharing arrangement, ABB had to determine the market rate for the recordkeeping services provided to the plan.

Without such a baseline, it would be impossible to determine whether a revenue-sharing arrangement would add value to the plan. Also, such a baseline was necessary for ABB to evaluate whether the trust company was justified when seeking additional hard-dollar fees to replace lost revenue from declining plan assets in investment options that provide revenue sharing.

While revenue sharing is accepted industry-wide as a method of paying for plan recordkeeping services, according to the court, the prudence of choosing that option must be evaluated under the circumstances of each plan. Here, the process by which ABB determined to use revenue sharing as the plan's payment model was imprudent, since ABB did not analyze how revenue sharing would benefit the plan, nor negotiate revenue sharing by leveraging the plan's size to offset or reduce recordkeeping costs.

As the IPS is a governing plan document within the meaning of ERISA Section 404(a)(1)(D) according to the court, ABB breached its fiduciary duties when it failed to comply with this provision of the IPS.

The court emphasized that "if a plan sponsor opts for revenue sharing as its method of paying for recordkeeping services, it must not only comply with its governing plan documents, it must also have gone through a deliberative process for determining why such a choice is in the Plan's and participants' best interest. Such an inquiry involves more than a raw assessment of the reasonableness of expense ratios; particularly, given the inherent difficulty of identifying how expense ratios are broken down between administration and investment services and the fact that the expense ratio doesn't show whether there is a revenue sharing agreement with the recordkeeper

or for how much. Nor does it show what the market value is for recordkeeping services."[60]

[c]—Generating More Revenue Sharing by Replacing Funds

The court also found the ABB fiduciaries liable for transferring assets invested in an actively balanced mutual fund to the trust company's target-date fund. The court found that the fiduciaries had deleted the actively balanced mutual fund not because of performance concerns, but because the trust company's target-date fund that replaced it generated greater revenue sharing. The court also found that ABB breached its fiduciary duties by selecting share classes with more revenue-sharing loads in order to maintain the revenue-sharing level of the trust company.

[d]—Monetary Relief

The court found that the plan suffered losses of $13.4 million as a result of ABB's failure to monitor recordkeeping costs and to negotiate for rebates. The court also assessed $21.8 million in damages against ABB for losses to the plans caused by the "improper" transfer of assets that generated greater revenue sharing.

[e]—Lost Float Income

While the court largely exonerated the trust company from liability for the ABB fiduciary breaches, the court found the trust company liable to the plan for float income paid from the plan accounts. Finding that the trust company acted as a fiduciary when it handled the plan's assets, the court found that the trust company engaged in self-dealing, in violation of ERISA prohibited transaction rules. In that regard, the court relied on the testimony of an expert in concluding that the plan suffered total losses of $1.7 million for trust-company breaches concerning the float.

[f]—U.S. Supreme Court Denial of Fiduciary Liability Review

ABB was unable to convince the U.S. Supreme Court to review whether there is fiduciary liability when changing a retirement plan's investment options which causes a minimal increase in fees paid by participants and a minimal decrease in the administrative services fees paid by employers.[61]

The denial leaves standing a decision by the U.S. Court of Appeals for the Eighth Circuit that remanded to the district court the issue of how much in damages ABB owes to participants in its 401(k) plan.

In 2015, the ABB fiduciaries were held liable for breaching their fiduciary duties under ERISA. However, they escaped paying damages when the district court ruled that the participants failed to show how the fiduciaries' actions caused them any harm.

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[60] *Id.*

[61] ABB, Inc. v. Tussey, *cert. denied* 138 S.Ct. 281 (2017).

The Supreme Court denial means that the participants will have another chance to prove the alleged damages they suffered when the fiduciaries decided to replace Vanguard funds with Fidelity funds in the company's retirement plan. ABB was accused of making the changes in its own interest rather than because it was best for the plans, which would be a breach of ERISA fiduciary duties.

[g]—ABB Inc. Still Fighting Over Money Owed for 401(k) Fund Swap

ABB Inc. and its workers will have to continue the fight over how much the company owes for switching 401(k) Investments from a Vanguard fund to funds offered by Fidelity.[62]

The correct way to calculate damages is by comparing the Vanguard fund's performance to that of the Fidelity funds between 2001 and 2007, a federal judge ruled December 12, 2017.[63] The judge largely rejected both parties' proposed damages calculations and ordered them to file papers explaining what the total amount would be under this calculation.

The decision is the latest development in a decade-long case challenging the management of ABB's 401 (k) plan that has resulted in two trips to a federal appeals court and multiple appeals to the U.S. Supreme Court. After a sixteen-day trial in 2012, a Missouri district court said ABB owed $21.8 million for wrongly swapping the funds, plus attorneys' fees of $12.9 million. The judgment was partly undone by the U.S. Court of Appeals for the Eighth Circuit in 2014, and the case has been bouncing back and forth between the courts ever since.

Among other things, the employees argued that ABB replaced the Vanguard fund with targetdate funds from Fidelity because doing so would generate higher fees for Fidelity, which would in turn reduce the out-of-pocket costs ABB paid to Fidelity for plan administration. The courts have largely agreed that this was a disloyal act that violated ERISA, but they've disagreed on how to calculate damages stemming from this breach.

Although this decision by the Missouri District Court rejected both parties' proposed calculations, the court dealt a blow to the employees by limiting their damages to actions that occurred before 2007. The employees said the damages calculation should be extended forward to the present day, but the court disagreed, saying that they never claimed damages beyond 2007.

[5]—Bundled Vendor May Be ERISA Fiduciary with Responsibility to Monitor Own Compensation[64]

A plan participant filed a class action lawsuit against Transamerica Life Ins. Co. (TLIC) seeking to represent a class of over 15,000 retirement plans serviced by TLIC. TLIC is an insurance company that sells 401(k)

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[62] Tussey v. ABB Inc., 2:06-cv-04305-NKL, 2017 U.S. Dist. LEXIS 203969 (W.D. Mo. Dec. 12, 2017) (order on damages calculation).

[63] *Id.*

[64] Santomenno v. Transamerica Life Insurance Co., No. 12-2782, 2013 U.S. Dist. LEXIS 59597 (C.D. Cal. April 25, 2013).

plans "bundled" administrative services and investments through a Group Annuity Contract (GAC). The investments offered by TLIC are all separate accounts, typically with mutual funds as the underlying investment. Some of the mutual funds and collective trusts are managed by Transamerica Investment Management, LLC (TIM) or Transamerica Asset Management, Inc. (TAM), affiliates of TLIC. Plaintiffs alleged that all or nearly all mutual funds selected for inclusion as a separate account, have a contractual agreement with TLIC to pay it revenue sharing.

In a sweeping decision on TLIC's motion to dismiss, a California district court found that plaintiffs have plausibly alleged numerous fiduciary violations of ERISA including that TLIC may be a fiduciary with responsibility to monitor its own compensation.

The Court also criticized a "fiduciary warranty" included in the plan's contracts. "Based on the allegations before the court, it appears that the Fiduciary Warranty amounts to insurance provided by TLIC to employers against law suits by employees for breach of fiduciary duty, but this insurance is paid for by the fees assessed on the employees' assets. The court has found no indication that the employers pay TLIC separately for such insurance. Thus, instead of an insurance company bargaining with a party seeking to obtain the best rate for itself in its insurance purchase, the insurer is bargaining with a party who is not in fact bearing the financial burden of the insurance, though it will reap the benefits. Because the contract does not appear to have been negotiated at arm's length, TLIC may not shield itself behind the contract from an alleged breach of duty."[65]

[a]—TLIC Is a Fiduciary Accountable for Reasonableness of Its Fees

TLIC did not contest that under the GAC it has fiduciary responsibility for the separate accounts. For example, it admitted that it has "limited fiduciary responsibilities" for monitoring the investment performance within its separate account investment products. But TLIC argued that it did not have any fiduciary duty with respect to its fees because they were set by contract before TLIC assumed its fiduciary responsibilities as defined in the same contract.

The Court rejected this "formalistic line-drawing." According to the Court, "TLIC is negotiating to become a fiduciary and negotiating for the fees that, as a fiduciary, it will assess on the employees' retirement accounts. The *reductio ad absurdum* of the principle that a future fiduciary is not responsible for the terms of its own compensation is that the fiduciary could negotiate for a fee of 99% of each separate account and still be considered to be fulfilling its fiduciary duty of managing the separate account simply because it negotiated this fee by contract. The contract can immunize the future fiduciary TLIC from fiduciary breach no more than it can immunize the employer. To hold otherwise would allow fiduciaries to contract themselves out of their duties, so long as it was done prior to the assumption of

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[65] Santomenno v. Transamerica Life Insurance Co., No. CV 12-02782 DDP (MANx), 2013 U.S. Dist. LEXIS 22354 at *24 (C.D. Cal. Feb. 19, 2013).

those duties. TLIC is entitled to reasonable fees and profits for the services that it provides to the plans, but as a fiduciary TLIC is accountable for the reasonableness of those fees. This conclusion does no damage to the sanctity of contracts; it simply acknowledges that where fiduciary duties are involved, the fiduciary rules apply. Because TLIC is negotiating to assume the high duties of an ERISA fiduciary, it must be accountable to the beneficiaries of the plan for the reasonableness of its compensation."[66]

[b]—Ability to Change Fee Schedule Is "Discretionary" Activity

TLIC found also argued that the ability to change its fee schedule upon advance notice did not provide it "discretion" over its fees because employers could reject any noticed fee changes by terminating their contracts. The Court rejected this argument, holding that "whether the employer chooses to terminate the contract or not is immaterial to determining whether TLIC has the discretion to change the fees," and that "[t]his is all the more true where, as here, there are financial and logistical hurdles to prevent an employer from cancelling a contract."[67]

[c]—Ability to Add or Delete Investment Options Is Fiduciary "Discretionary" Activity

The Court found that TLIC has a fiduciary duty that attaches from its power to add and delete investment options, since it "'exercises authority or control over plan assets by determining and altering which mutual funds are available for the Plans' and the participants' investment" citing the Federal District of Connecticut.[68]

[d]—Having or Exercising Discretion Are Both Fiduciary Functions

The Court held that in the ERISA context, having and exercising discretionary authority are so close as to be identical, and that under ERISA, "a fiduciary duty attaches not because a party takes a discretionary action but when that party acquires the power to take a discretionary action."[69]

[6]—Service Provider Not a Fiduciary in Negotiating Its Contract

A federal district court in Iowa dismissed a putative class action complaint brought by several 401(k) plan sponsors who alleged that Principal Life Insurance Company breached its fiduciary duties to the plans by charging

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[66] *Id.*, 2013 U.S. Dist. LEXIS 22354 at *18-19.

[67] *Id.*, at *24.

[68] Haddock v. Nationwide Financial Services Inc., 419 F. Supp.2d 156, 166 (D. Conn. 2006).

[69] Santomenno v. Transamerica Life Insurance Co., No. CV 12-02782 DDP (MANx), 2013 U.S. Dist. LEXIS 22354 at *33-34 (C.D. Cal. Feb. 19, 2013).

excessive fees in connection with certain investment options and services provided to plan participants.[70] The Court determined that Principal Life was not acting as a plan fiduciary because service providers do not act as fiduciaries when negotiating the terms of their service with the plans as long as the service providers do not control the named fiduciary's negotiation and approval of those terms. Here, there was no showing that Principal Life controlled the decision of the plan sponsors to hire it as a service provider to the plans. Furthermore, although Principal Life may have acted as a fiduciary in other respects (e.g., because it had discretion to select investment accounts and was an investment advisor), plaintiffs' excessive fee claims did not arise from actions taken by Principal Life in performance of those other functions. Thus, the alleged fiduciary status created by these other functions did not confer fiduciary status upon Principal Life with respect to the excessive fee claims.

[7]—Fiduciary Breach Claims Barred by ERISA's Six-Year Statute of Limitations

The Eleventh Circuit recently dismissed a participant's fiduciary breach claims against SunTrust's 401(k) plan fiduciary committee members on the ground that the claims for imprudently selecting certain investment options was time barred by ERISA's six-year statute of limitations.[71] Plaintiff Barbara Fuller argued that the addition of proprietary mutual funds was imprudent because the funds performed poorly and their high fees served as revenue to SunTrust subsidiaries. The district court dismissed her claim on the ground that she had "actual knowledge" of Defendants' alleged fiduciary breaches over three years before filing her complaint. The Eleventh Circuit disagreed, observing that Fuller could not be said to have "actual knowledge" of the alleged breaches because Defendants did not show that the plan documents were provided to her or that she obtained knowledge of the facts in the documents from a different source. The Eleventh Circuit held, however, that ERISA's six-year statute of limitations barred Fuller's claims. It reasoned that the committee's selection of the challenged investment funds occurred more than six years before Fuller filed her complaint. Moreover, to the extent that she also claimed that the alleged failure to remove the funds in subsequent years was imprudent, the Court determined that the claim was "in all relevant respects identical to the allegations concerning the selection process."[72]

[8]—Lockheed Agrees to Pay $62 Million to Settle for $1.3 Billion ERISA Class Action

Lockheed Martin Corporation (LMC) agreed on February 20, 2015 to pay $62 million and implement extensive affirmative relief to settle an ERISA Class Action lawsuit over claims for 120,000 Plan participants in excess of

[70] McCaffree Financial Corp. v. Principal Life Insurance Co., 65 F. Supp.3d 653 (S.D. Iowa 2014).

[71] Fuller v. Suntrust Banks, Inc., 744 F.3d 685 (11th Cir. 2014).

[72] *Id.*, 744 F.3d at 701.

$1.3 billion under the LMC Savings Plans.[73] The participants argued that LMC as Plan Sponsor and Named Fiduciary of its Salaried and Hourly Savings Plans and Lockheed Martin Investment Company (a wholly owned subsidiary of LMC), responsible for the Plan's investments and appointment and monitoring of investment managers, breached their ERISA fiduciary duties resulting in lost retirement savings and damages by allowing the Plans to pay excessive fees and by imprudently managing the Plan's Stable Value Fund and Company Stock Funds.

The Plan participants accused LMC of subjecting them to excessive fees and leaving those investing in its stock fund with returns that were worse than if they had bought shares on the open market and that LMC's in-house investment manager charged them excessive fees and under delivering on performance in the Savings Plans.

LMC Plan participants claimed they were charged "unreasonable and excessive" fees that were not incurred solely for their benefit and were not disclosed. LMC and its investment management company were also accused of mismanaging Plan assets, including offering a fund that did not benefit Plan participants.

The law suit traces all the way back to 2006, when Anthony Abbott brought a complaint on behalf of participants in the two LMC Savings Plans who held units of a stable-value fund (SVF) investment option from September 2000 through September 2006.

Abbott claimed that LMC imprudently managed that investment option by putting too much of the fund in short-term money market investments, which translated to far lower returns that the SVF should have provided. The district court narrowed the case down to three claims (i) the administrative fees paid the Plans were excessive; (ii) SVF investment option was imprudently managed resulting in underperformance, and (iii) the Company Stock Fund (CSF) investment option was imprudently managed due to allegedly excessive fees and a high level of cash held in the fund.

Abbott had a class certification bid partially granted in 2009, but the class certification order was vacated and remanded by the Seventh Circuit Court of Appeals in 2011 in light of a Seventh Circuit decision in another ERISA case,[74] which barred any plan wide class for "fund-specific," performance-related fiduciary breach claims that only hurt certain participants.

Subsequently, Abbott sought certification of three separate classes, including the SVF class in a way that only covered those who suffered losses.

The District Court certified two classes, one with respect to the administrative fee claim and a second with respect to the CSF but declined to certify a third class of participants who invested in the SVF during a six-year period when the fund underperformed relative to a specified index. However, on appeal, the Seventh Circuit found that certification was appropriate holding that there could be harm aside from underperformance relative to the fund index.

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[73] Abbott v. Lockheed Martin Corp., No. 3:06-CV-00701-MJR-DGW, Order Granting Motion for Preliminary Approval of Settlement Agreement (S.D. Ill. Feb. 20, 2015).

[74] Spano v. Boeing Co., 633 F.3d 574 (7th Cir. 2011).

The Seventh Circuit held that simply allowing a class definition that makes reference to underperformance of a fund to an index is not tantamount to accepting that the index is the proper measure of harm or breach. In this regard, the Seventh Circuit emphasized that the class definition is simply a "tool of case management" and does not "sneak into the case of theory of liability that was rejected at summary judgment."

On September 19, 2013, six weeks after the Seventh Circuit decided *Abbott*, the district court certified a class and four sub-classes. The class was comprised of all plan participants, limited to a six-year period who paid recordkeeping fees. Another sub-class was comprised of participants in all mutual funds during that period under the theory that every fund was "laden with imprudently excessive fees," and the three remaining sub-classes corresponded to individual fund choices for specified periods of time.

The U.S. Supreme Court then refused to hear the case in December 2013. The district court in August 2014 then granted class certification per the Seventh Circuit's findings. The suit was scheduled to proceed to trial on December 14, 2014 but was postponed for settlement negotiations after the district court issued an order stating it would not entertain any settlement proposals after the first witness was called. On December 16, 2014, the parties reached an agreement in principle to settle the case. The district court asked for the filing of papers detailing the terms of the settlement agreement so it can determine whether it's fair and reasonable.

On February 20, 2015, the parties submitted a Class Action Settlement Agreement to the district court seeking preliminary approval pending a fairness hearing. Under the Settlement Agreement, LMC has agreed to pay $62 million and implement extensive affirmative relief. The $62 million Gross Settlement Amount will be contributed to a Qualified Settlement Fund and $20,666,666 of attorneys' fees was awarded to Class Counsel along with $1,850,000 litigation costs and expenses. The affirmative relief agreed to is as follows:

1. To publicly file with the Court the annual DOL filing that discloses fees paid by the Plans (know as Schedule C to Form 5500) as well as information about the assets held in, and performance of, the Stable Value Fund and the Company Stock Funds;
2. To confirm current limitations on the amount of cash equivalents held in the Company Stock Funds and the amount of money market equivalent assets held in the Stable Value Fund, and to file notice with the Court if those limitations are changed;
3. To initiate a competitive bidding process for the Plans' recordkeeping services for the Plans, and to publicly file with the Court a notice identifying the entities that submitted bids and the selected recordkeeper.
4. To offer participants the share class of investments that has the lowest expense ration, provided that the share class is available and consistent with the needs and obligations of the Plans; and
5. The terms of the Settlement will be reviewed by an independent Fiduciary.

The settlement of $62 million is the single largest of an excessive fee case again one employer to date. Also, the almost $21 million in attorneys'

fees awarded to Class Counsel assures that such litigation will continue for 2015 and subsequent years.

[9]—Boeing Settles Excessive-Fee Suit for Near-Record $57 Million

The Boeing Company has agreed to pay $57 million as part of a class action settlement agreement reached with plaintiffs in a nearly decade-long 401(k) suit. A joint motion for approval of the settlement was filed on November 5, 2015 by both parties in the U.S. District Court for the Southern District of Illinois.[75]

The settlement, which also included non-monetary provisions, is the second-largest dollar figure among settlements in similar excessive-fee class action litigation. Lockheed Martin Corp. agreed to the largest-ever settlement of $62 million, in February 2015.[76]

This litigation, which was commenced on September 28, 2006, alleged, among other things, that the fiduciaries responsible for overseeing the Boeing 401(k) Plan breached their duties under ERISA by allowing the Plan to pay excessive fees, by including an imprudently risky Technology Sector Fund, and imprudently managing the Plan's Company Stock Fund. Plaintiffs sought to obtain compensatory and affirmative relief for the Plan. Boeing denied and continued to deny any breaches or ERISA violations.

Under the Settlement's Plan of Allocation, the Class and each of the sub-classes—previously certified by the Illinois District Court following an earlier Seventh Circuit ruling on class certification—will share the Settlement based on a formula which considers the alleged injury to each class member and the strength of their claims. The actual recovery per class member will depend on the number of class members who are eligible for an award, the class member's average account balances during the Class Period, and their potential injuries as a member of one or both of the previously certified sub-classes.

Following class certification, Boeing appealed to the Seventh Circuit. Following that appeal, Boeing opposed the new class definition and sub-classes, which, once certified, Boeing attempted to appeal as well. The case was vigorously fought before the Illinois District Court and Seventh Circuit Court of Appeals. According to Plaintiffs' Memorandum in Support of the Parties Joint Motion for Approval of the Class Settlement (Memorandum), the results obtained through this Settlement—both monetary and non-monetary—are very beneficial to the Class.

These claims include claims of excessive administrative and recordkeeping fees, as well as assertions of imprudent management specific to the Company Stock Fund and the decision to include, and continue to offer, the Technology Sector Fund as one of the Plan's core investments.

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[75] Spano v. the Boeing Co., Case 3:06-CV-00743-NJR-DGW, Class Action Settlement Agreement Filed (S.D. Ill. Nov. 5, 2015).

[76] See § 12.05[7][h].

[a]—Background

This litigation began on September 28, 2006 with the filing of Plaintiffs' Complaint which alleged that Boeing engaged in breaches of their ERISA fiduciary duty to ensure that the fees and expenses paid out of the assets in the Plan were reasonable and that the Plan's fiduciaries failed to make decisions concerning the Plan with the care, skill, prudence, and diligence under the circumstances then prevailing that prudent fiduciaries acting in a like capacity and familiar with such matters would have used.

Plaintiffs filed an Amended Complaint on December 17, 2007, to, among other things, add the Boeing Employee Benefits Investment Committee as a defendant.

Defendants filed a Motion to Dismiss related to their defense of Statute of Limitations on September 9, 2008. Plaintiffs filed their opposition on November 10, 2008. Defendants filed their original Motion for Summary Judgment concerning the merits of Plaintiffs' claims on January 15, 2009, which Plaintiffs also opposed. On September 29, 2008, the Illinois District Court granted Plaintiffs' Motion for Class Certification, which Defendants subsequently appealed to the Seventh Circuit. On appeal, the initial order granting class certification was vacated, and the case was remanded for further proceedings.

On March 2, 2011, Plaintiffs filed an Amended Motion for Class Certification. The Illinois District Court ordered rebriefing of summary judgment and Defendants renewed both of their motions. On September 19, 2013, the Illinois District Court granted certification of the current class and sub-classes. The District Court then permitted Defendants to resubmit their motions for summary judgment, which Defendants did on January 8, 2014. Defendants' motion on the merits was denied and their motion based on the statute of limitations was granted in part and denied in part on December 30, 2014.

The case was set for trial on August 26, 2015. That morning, the parties met in one last effort to resolve the case before trial. That effort was successful, and the parties reached a provisional settlement. The Court cancelled the trial and on November 4, 2015, the Parties signed the Settlement Agreement.

[b]—Settlement Terms

Defendants will deposit $57,000,000 (the Gross Settlement Amount) in an interest-bearing settlement account (the Gross Settlement Fund). The Gross Settlement Fund will be used to pay the participants' recoveries as well as Class Counsel's Attorneys' Fees and Costs, Administrative Expenses of the settlement, and Class Representatives' Compensation as described in the Settlement Agreement. In addition to the monetary component of the Settlement, Defendants have agreed to retain an Independent Investment Consultant to review whether and how to offer technology sector exposure within the Plan.

According to the Memorandum, after not undertaking any competitive bidding process for plan recordkeeping during the class period Defendants have recently completed their second such process since the filing of this action. Both of these processes resulted in significant fee savings compared to recordkeeping fees paid during the Class Period. The Plan is no longer

recordkept by CitiStreet (or its successor, Voya), eliminating the concern raised by Plaintiffs that Boeing's banking relationships with State Street and CitiStreet may have undermined their fiduciary processes.

Additionally, according to the Memorandum, Boeing has removed high-priced mutual funds from the Plan and has replaced them with institutionally-priced separately managed accounts. Boeing has also taken steps to limit the need for excess cash holdings within the Company Stock Fund, which Plaintiffs' alleged reduced returns of that fund during the Class Period. The terms of the Settlement, as well as Plaintiffs' request for fees and reimbursement of cost, will be reviewed by an Independent Fiduciary.

Defendants also consented to the Court's continuing jurisdiction over compliance with these requirements for the three-year settlement period. Class Counsel will both monitor compliance with the settlement for three years and take any necessary enforcement action without cost to the Class.

[10]—Novant Reaches $32 Million Settlement in Plan Fees Case

Novant Health Inc. has reached a $32 million settlement with its employees who alleged the company's retirement plan committee breached its ERISA fiduciary duties by overpaying millions of dollars in fees.[77]

Six current and former Novant Health Inc. employees filed a class action suit on March 12, 2014 in a North Carolina federal district court claiming that Novant, as well as its administrative and retirement plan committees, breached their fiduciary duties under ERISA by causing plan participants to pay excessive recordkeeping and administrative services fees. The suit also alleged breaches of fiduciary duties resulting from Novant's decision to invest in imprudent investment options and that these breaches resulted in a substantial reduction of the retirement assets of the plan participants.

Novant's retirement program consists of approximately 25,000 participants with total assets of approximately $1.2 billion, according to the complaint.

The company offers its employees and retirees a Retirement Plus Plan consisting of a Tax-Deferred Savings Plan and Savings Supplement Retirement Plan.

The participants alleged that Great-West Life & Annuity Insurance Co., an administrative and recordkeeping service provider for the plan, received excessive compensation of approximately $8.6 million between 2009 and 2012.

They further argued that D.L. Davis & Co., a brokerage company that provides the plan with limited marketing and enrollment services, was paid excessive fees of up to $9.6 million between 2009 and 2012 in the form of "commissions" by the plan. The participants also alleged that in addition to these fees both companies also received additional funds as "kick-backs" from the plan.

According to the Plaintiffs' Memorandum in Support of Joint Motion For Preliminary Approval of Class Settlement, the settlement provides a

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[77] Kruger v. Novant Health Inc., No. 14-cv-00208, settlement filed (M.D.N.C. Nov. 9, 2015).

$32 million Settlement Fund. Most class members will automatically receive their distributions directly into their tax-deferred retirement account(s). Those who have already left the Plans will be given the option to receive their distributions in the form of a check made out to them individually or, in most cases, as a roll-over into another tax-deferred account. Moreover, the settlement provides future relief in terms of scope and duration while also securing additional commitments for participants' benefit.

The litigation was commenced on March 12, 2014. The Plaintiffs alleged, among other things, that Novant and the Retirement Plus Plan fiduciaries breached their ERISA fiduciary duties by offering unreasonably priced investment options in the Retirement Plus Plan that were used to provide excessive compensation to two of the Plans' service providers, Great-West Life & Annuity Insurance Co. (Great-West) and D.L. Davis & Co. (Davis). In so doing, Plaintiffs argued that Defendants provided participants investment options in the Retirement Plus Plan that were unreasonably expensive. With these offerings, Plaintiffs argued that Defendants caused the Retirement Plus Plan to pay above-market rates to Great-West and millions in excessive fees to Davis. Defendants disputed these allegations and denied liability for any alleged breaches or ERISA violations.

According to the Memorandum, the monetary payment and additional terms provide meaningful relief to each class member. Under the Settlement's "Plan of Allocation," the Settlement Class will share the Settlement based on a formula, which considers the alleged injury to each class member. The actual recovery per Class Member will depend on the number of Class Members who are eligible for an award and the Class Member's average quarterly account balances during the Class Period.

[a]—Monetary Relief

Defendants will deposit $32,000,000 (the Gross Settlement Amount) in an interest bearing settlement account (the Gross Settlement Fund). The Gross Settlement Fund will be used to pay the participants' recoveries as well as Class Counsel's Attorneys' Fees and Costs, Administrative Expenses of the Settlement, and Class Representatives' Compensation as described in the Settlement Agreement.

[b]—Non-Monetary Relief

In addition to the monetary component of the Settlement, Defendants agreed, in advance of or during the four-year Settlement Period, to: (1) conclude a comprehensive request for proposal (RFP) competitive bidding process, conducted and led by an outside consultant, for recordkeeping, investment consulting and participant education services for the Plans; (2) engage a mutually agreed upon Independent Consultant to assess the adequacy of the RFP process and assess Defendants' anticipated selection of service providers for the Plans; (3) ensure that the Plans' administrative service providers are not reimbursed for their services based on a percentage-of-plan-assets basis; (4) review all current investment options in the Plans and revise the investment options, as needed, ensuring that those options are selected or retained for the exclusive best interests of the Plans' participants; (5) the

Independent Consultant reviewing the investment option selection process and provide recommendations, if necessary; (6) the Independent Consultant conducting an annual review, for four years, of Novant's management of the Plans; (7) removing Davis, and related entities, from any involvement with the Plans; (8) removing Davis and related entities from Novant employee benefit plans; (9) not enter into any new real estate or business relationships with Davis and related entities; (10) not offer any Mass Mutual investments in the Plans or any other investment that provides compensation to Davis and related entities; (11) provide accurate communications to participants in the Plans; (12) not offer any brokerage services to the Plans; and, (13) adopt a new investment policy statement to ensure that the Plans are operated for the exclusive best interests of the Plans' participants.

[11]—Anthem Agrees to $23.65 Million Settlement Over 401(k) Fees Paid to Vanguard

Anthem, Inc. has settled an excessive fee lawsuit against the Anthem 401(k) for $23,650,000 and certain nonmonetary conditions.[78]

What is significant about this decision is that most of the "imprudent" funds are provided by Vanguard, widely known for transparency and affordability, and are actually quite cheap from an industry-wide perspective-below 25 bps in annual fees. For example, one fund has just a 4-bps annual fee, but according to the complaint an otherwise identical 2 bps version could have been obtained by an investor with the size and sophistication of the Anthem plan. Therefore, an alleged breach occurred when Anthem continued offering the 4-bps version.

The complaint also alleged that collective trusts and separately managed accounts were available that were even cheaper and that those less expensive investments should have been used. The suit also challenged the record keeping fees paid to Vanguard, which the plaintiffs contend varied between $42 and $94 per participant annually. According to the complaint, the "outside limit" of a reasonable record keeping fee would have been $30 per participant.

In addition to the $23,650,000 monetary settlement, there were several "Nonmonetary Terms":

- The committee must engage an independent investment consultant who is experienced with investment options in defined contribution plans. The consultant must review and make recommendations about the plan's investment lineup, including whether to include a stable value option.
- The committee must meet and review the investment consultant's recommendations and decide whether and to what extent to implement them.
- The committee must consider, with the assistance of the investment consultant, among other things, (1) the lowest-cost share class mutual

[78] Bell v. Pension Committee of the ATH Holding Co., LLC, No. 1:15-cv-02062, TWP-MPB, *motion for settlement approved* (S.D. Ind. April 5, 2019).

funds available to the Plan; (2) the availability of revenue-sharing rebates; and (3) the availability of collective trusts and/or separately managed accounts that have risks and features similar to those of a mutual fund.

- After the committee's consideration of the recommendations, it must provide the plaintiffs' class-action attorneys with a written summary of the recommendations and the committee's decisions. (This means that the plaintiffs' attorneys will oversee the implementation of the settlement agreement for a three-year period, which is unusual in 401(k) plan litigation).
- The committee must also issue an RFP for record keeping services for the plan. The responses from the record keepers must include a fee proposal "based on a total fixed fee and on a per-participant basis." Again, the committee's decision must be communicated to the plaintiffs' attorneys, though only during an 18-month period.

The settlement shows that there is a continued emphasis by plaintiffs on low-cost share classes and push toward the use of even less expensive collective trusts and separately managed accounts. The settlement also indicates that there is a preference among plaintiffs for setting record keeping fees on a per-participant rather than pro rata basis. Since this results in a fee that more accurately reflects the costs for the services and does not automatically grow with increases in the value of assets or with new contributions.

[a]—Background

A class of Anthem Inc. employees accused the Indiana-based health insurer of loading its 401(k) plan with high-fee mutual funds and paying excessive fees to the Vanguard entities that service the plan.[79]

In particular, the employees faulted Anthem for not using the plan's large size—allegedly more than $5.1 billion in assets—to secure lower fees. They accused Anthem of selecting high-priced share classes of mutual funds over the identical, lower-cost share classes that are "readily available" to plans of this size. They also challenged Anthem's failure to investigate and offer non-mutual fund investments such as collective trusts and separately managed accounts prior to 2013.

The employees, individually and as representatives of a class of participants and beneficiaries of the Anthem 401(k) Plan, brought this action under ERISA on behalf of the Plan against Defendants Anthem, Inc., the Pension Committee of ATH Holding Company, LLC and the Board of Directors of Anthem, Inc. for breach of fiduciary duties.

According to the complaint, multi-billion dollar defined contribution plans, like the Anthem 401(k) Plan, have tremendous bargaining power to demand low-cost administrative and investment management services. As fiduciaries to the Plan, Defendants are obligated to act for the exclusive benefit of participants and beneficiaries and ensuring that plan expenses are

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[79] Bell v. Pension Comm. of ATH Holding Co. LLC, No. 1:15-cv-02062, complaint filed (S.D. Ind. Dec. 29, 2015).

reasonable. However, instead of using the Plan's bargaining power to benefit participants and beneficiaries, Defendants allowed unreasonable expenses to be charged to participants for administration of the Plan, and selected and retained high-cost and poor-performing investments compared to available alternatives.

To remedy these fiduciary breaches, Plaintiffs brought this action on behalf of the Plan to enforce Defendants' personal liability under ERISA § 409(a) to make good to the Plan all losses resulting from each breach of fiduciary duty and restore to the Plan any profits made through Defendants' use of the Plan's assets. In addition, Plaintiffs sought such other equitable or remedial relief for the Plan as the Court may deem appropriate.

[b]—Plan Investments

The Anthem employees argued that poor investment performance and unreasonable fees could significantly impair the value of a participant's account. In this regard, the complaint emphasized that over time, even seemingly small differences in fees and performance can result in vast differences in the amount of savings available at retirement.[80]

Anthem controlled the available investment options in which the participants could invest their retirement assets and as of December 31, 2014, Anthem offered eleven Vanguard mutual funds, Vanguard collective trust target date funds, two non-Vanguard mutual funds, and an Anthem, Inc. common stock fund.

[i]—Excessive Fees Compared to Lower-Cost Share Classes of the Plan's Identical Mutual Fund Options

According to the complaint it is a simple principle of investment management that the larger the size of an investor's available assets, the lower the investment management fees that can be obtained in the market. Thus, large retirement plans have substantial bargaining power to negotiate low fees for investment management services.

According to the complaint until July 22, 2013, for the exact same mutual fund option, instead of using the size of the Plan to benefit participants as required, Anthem provided much higher-cost share classes of Plan investment options than were easily available to the Plan based on its size.

The complaint emphasized that despite the availability of much lower-cost share classes for the Plan's mutual fund options, Anthem only recently replaced these higher-cost share classes with their lower-cost versions effective July 22, 2013. Plan participants thus paid far higher fees than they should have, which resulted in receiving lower returns on their retirement

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[80] See, e.g., U.S. Department of Labor, "A Look at 401(k) Plan Fees," 1-2 (Aug. 2013), available at https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf (last visited March 17, 2020) (illustrating impact of expenses with example in which a 1% difference in fees and expenses over thirty-five years reduces participant's account balance at retirement by 28%).

investments, and fewer retirement assets to build for the future, than they would have obtained had Defendants performed their fiduciary duties.

According to the complaint, had the amounts invested in the higher-cost share classes instead been invested in the much lower-cost versions of the Plan's mutual fund options from December 29, 2009 through July 22, 2013, Plan participants would not have lost over $18 million of their retirement savings through unnecessary expenses.

[ii]—Excessive Fees Compared to Other Mutual Funds

According to the complaint, besides being much higher than the fees identical institutional share classes of the same mutual funds charge, the fees charged for certain of the Plan's mutual fund investments are far higher than reasonable investment management fees for such funds. These fees were and are significantly higher than comparable institutional mutual funds available to 401(k) plans, including actively managed and passively managed index Vanguard institutional funds with similar investment styles that were readily available as Plan investment options.

For instance, the complaint emphasized that even after the share class changes, as of December 31, 2014 the fees for these mutual fund options were up to nine times more expensive than available Vanguard alternatives in the same investment style.

Had the amounts invested in the Plan's mutual fund investments instead been invested in the lower-cost mutual funds offered from other mutual fund providers in the same investment style readily available to the Plan, Plan participants would not have lost millions of dollars in their retirement savings through excessive fees.

[iii]—Excessive Fees Compared to Separate Accounts

According to the complaint, large retirement plans, including those with assets over $500 million, can hire investment advisers directly to manage separate accounts tailored for the plan within plan-specific investment parameters and even using the same investment managers as mutual funds with the same investment style. Use of such accounts greatly reduces the cost of investing with the same adviser through a retail mutual fund.

For example, the complaint emphasized that according to the DOL, separate accounts, which require a minimum investment of $15 million to $25 million per account, can "commonly" reduce "total investment management expenses" by "one-fourth of the expenses incurred through retail mutual funds."[81]

According to the complaint, as the Plan had assets of well over $1 billion at all relevant times, separate accounts were readily available to obtain these economies of scale offered in the marketplace. In this regard, the complaint

[81] U.S. Department of Labor, "Study of 401(k) Plan Fees and Expenses," § 2.4.1.3 (April 13, 1998) (Emphasis added.). Available on the Department of Labor's website at https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/study-of-401k-plan-fees-and-expenses.pdf (last visited March 17, 2020).

pointed out that separate accounts have numerous advantages over mutual funds in a 401(k) plan, including the ability to negotiate fees, control by the plan sponsor over the investment guidelines, ability to avoid marketing fees built into the cost of mutual funds, and ability to avoid holding significant cash for shareholder redemption. In a mutual fund, all investors are charged the same fee, and investors have no ability to modify the fund's investment guidelines, which are set by the fund's investment adviser. In a separate account, the plan sponsor can negotiate the best possible fee for the plan using its bargaining power, and can tailor the investment guidelines to fit the demographics of the workforce.

According to the complaint, while certain of the Plan's options after 2013 offered institutional share classes for the mutual funds, they did not, and still do not, capture the lower expenses available given the size of the Plan's investment in each fund.

Also, said the complaint, even after the Plan's transition to institutional share classes for these funds on July 22, 2013, the Plan continued to pay excess fees compared to the DOL separate account fee as of December 31, 2014.

Moreover, the complaint emphasized that separately, the investment adviser or subadviser of the Plan's mutual funds also offered lower-cost separate accounts with the same investment strategy.

According to the complaint, had Anthem selected separate accounts for the Plan's investments instead of retail and institutional share class mutual funds, Plan participants would not have lost millions of dollars in their retirement savings due to unreasonable expenses throughout the relevant time period.

[iv]—Excessive Fees Compared to Collective Trusts

According to the complaint, collective trusts also provide much lower investment management fees than the Plan's mutual funds, and in some instances, separate accounts. Collective trusts are a common investment vehicle in large 401(k) plans, and are accessible even to midsize plans with $100 million or more in total plan assets.

The complaint pointed out that Vanguard offers low-cost collective trust funds to qualified retirement plans in several asset styles, including large cap domestic equities, small cap equities, international equities, and target date funds.

For large cap domestic equities, as an example, Vanguard offers the collective trust Vanguard Employee Benefit Index, which is comparable to the Plan's Vanguard Institutional Index mutual fund. Depending on the fee negotiations between the plan fiduciary and Vanguard, and the amount of investable assets for the mandate, the collective trust version has lower fees and better performance than the mutual fund equivalent. According to the complaint, this collective trust alternative has been offered since September 30, 1985.

With respect to target date funds, Vanguard currently offers five different collective trust funds, including Target Retirement Trust Select, Target Retirement Trust Plus, and Target Retirement Trust I-III. According to the complaint, these funds have far lower fees than the Vanguard target date

mutual funds used in the Plan and are managed by the same investment adviser as those mutual funds.

The complaint emphasized that prior to July 22, 2013, the Plan invested in the higher-cost mutual fund version of the Vanguard Target Retirement Funds, even though much lower-cost collective trust Vanguard target date funds were available to the Plan.

Despite the availability of far lower-cost collective trust target date funds from the exact same investment manager Vanguard, said the complaint, Anthem only recently replaced these higher-cost mutual funds with their lower-cost collective trust version in 2013.

According to the complaint, had the amounts invested in the higher-cost target date mutual funds instead been invested in the lower-cost collective trust target date funds, Plan participants would not have lost millions of dollars in their retirement savings due to unreasonable expenses. Similarly, had Anthem selected collective trusts for the Plan's investments instead of retail and institutional share class mutual funds, Plan participants would not have lost millions of dollars in their retirement savings due to unreasonable expenses throughout the relevant time period.

[c]—Excessive Administrative Fees

The Vanguard Group, Inc. serves as the recordkeeper providing administrative and recordkeeping services to the Plan. Vanguard Fiduciary Trust Company serves as the Plan's trustee tasked with certain duties and responsibilities, including but not limited to: investing Plan assets in accordance with the investment directions provided by the Plan Administrator or participants, and paying all benefits and expenses from the Trust upon the written direction of the Plan Administrator.

According to the complaint, the market for recordkeeping services is highly competitive. There are numerous recordkeepers in the marketplace who are capable of providing a high level of service to a jumbo defined contribution plan, like the Plan, and will readily respond to a request for proposal. These recordkeepers primarily differentiate themselves based on price, and vigorously compete for business by offering the best price. The cost of recordkeeping services depends on the number of participants, not on the amount of assets in the participant's account. Thus, Plans with large numbers of participants can take advantage of economies of scale: a plan with 50,000 participants can negotiate a much lower per participant fee for recordkeeping services than a plan with 1,000 participants.

The complaint emphasized that mutual funds have thousands of shareholders and the expense ratio for those funds includes within it a portion for recordkeeping those thousands of shareholders' accounts. However, since a mutual fund in a 401(k) plan has only one aggregate amount in the plan to track, the recordkeeping must be done by the plan for each participant. In these circumstances, some mutual funds engage in a practice known as revenue sharing.

In a revenue sharing arrangement, a mutual fund or other investment vehicle directs a portion of the expense ratio-the asset-based fees it charges to investors-to the 401(k) plan's recordkeeper for providing recordkeeping and administrative services for the mutual fund. Because revenue sharing

arrangements provide asset-based fees, prudent fiduciaries under ERISA and DOL rules must monitor the total amount of revenue sharing a recordkeeper receives to ensure that the recordkeeper is not receiving unreasonable compensation. A prudent fiduciary ensures that the recordkeeper rebates to the plan all revenue sharing payments that exceed a reasonable, flat per participant recordkeeping fee that can be obtained from the recordkeeping market through competitive bids.

According to the complaint, while revenue sharing payments are ostensibly provided as compensation to the recordkeeper for providing recordkeeping services, the payments can effectively be "kickbacks" for including the fund in a plan's investment lineup. There are vendors readily available that do recordkeeping only and do not sell investment products. These vendors offer pricing on a pure per-participant basis, without any revenue sharing component.

To ensure that plan administrative and recordkeeping expenses are and remain reasonable for the services provided, prudent fiduciaries of large defined contribution plans put the plan's recordkeeping and administrative services out for competitive bidding at regular intervals of approximately three years, and monitor recordkeeping costs regularly within that period. Under ERISA in order to make an informed assessment as to whether a recordkeeper is receiving no more than a reasonable fee for the services provided to a plan, the responsible fiduciary must identify all fees, including recordkeeping fees and other sources of compensation, paid to the service provider.

Accordingly, argued the complaint, Anthem must monitor the compensation received by the Plan's recordkeeper, Vanguard. The Plan's recordkeeping fees became excessive in part because Anthem failed to monitor and control the amount of hard dollar and asset-based revenue sharing amounts allocated to Vanguard. A hard dollar fee refers to a direct payment charged to the participant's account rather than an indirect or revenue sharing payment from the mutual fund.

Prior to September 30, 2013, Vanguard was compensated based on a combination of hard dollar fees and asset-based revenue sharing payments rather than a fixed annual recordkeeping fee charged to each participant's account. According to the complaint, the Artisan Mid Cap Value Fund shared seven bps in revenue sharing with Vanguard. Moreover, the complaint pointed out that Vanguard also received internal revenue sharing from the Vanguard investor share class mutual funds-the high-priced share class. These asset-based payments were assessed as a percentage of the assets Plan participants have invested in each investment option that shares or credits revenue to Vanguard each year.

Based on information currently available to Plaintiffs regarding the Plan's features, the nature of the administrative services provided by Vanguard, the Plan's participant level (roughly 60,000), and the recordkeeping market, the outside limit of a reasonable recordkeeping fee for the Plan would have been $30 per participant.

Based on the direct and indirect compensation levels shown on the Plan's Form 5500s filed with the Department of Labor, and, on the internal revenue share allocated to Vanguard as recordkeeper from the Vanguard investor

share class mutual funds, the Plan paid approximately $80 to $94 per participant per year from 2010 to 2013, over 210% higher than a reasonable fee for these services, resulting in millions of dollars in excessive recordkeeping fees each year.

As of September 30, 2013, Anthem instituted a flat $42 annual recordkeeping fee charged to each participant's account to compensate Vanguard for providing recordkeeping services to the Plan. However, according to the complaint, even though Anthem instituted a flat annual recordkeeping fee, the Plan's recordkeeping fee continues to exceed a reasonable fee by at least 40% for these services.

The complaint also pointed out that the Plan has increased in total assets by over 54% from $3.3 billion as of December 31, 2010, to $5.1 billion as of December 31, 2014. Because the revenue sharing payments are asset based, the recordkeeping fees received by Vanguard increased during this time period even though the administrative services provided to the Plan remained the same. The complaint emphasized that Anthem could have and should have capped the amount of revenue sharing to ensure that excessive amounts were returned to the Plan but failed to do so. Also, that Anthem failed to conduct a competitive bidding process for the Plan's recordkeeping services. A competitive bidding process for the Plan's recordkeeping services would have produced a reasonable recordkeeping fee for the Plan and would have enabled Anthem to select a recordkeeper charging reasonable fees, to negotiate a reduction in recordkeeping fees, and to rebate any excess expenses paid by participants for recordkeeping services.

Accordingly, the complaint concluded that Anthem failed to prudently monitor and control Vanguard's recordkeeping compensation to ensure that only reasonable fees were charged for recordkeeping and administrative services. Had Anthem ensured that participants were only charged reasonable fees for administrative and recordkeeping services, Plan participants would not have lost millions of dollars in their retirement savings through unreasonable recordkeeping fees.

[d]—Imprudent Retention of Money Market Fund

The complaint pointed out that Stable value funds are a common investment in large defined contribution plans and in fact are designed specifically for use in such plans. Stable value funds are conservatively managed to preserve principal and provide a stable credit rate of interest. And "[b]ecause they hold longer-duration instruments, [stable value funds] generally outperform money market funds, which invest exclusively in short-term securities."[82]

In addition to longer duration instruments generating excess returns over money market investments, stable value funds provide a guaranteed rate of return to the investor, referred to as a crediting rate, and protect against the loss of principal and accrued interest. This protection is provided through a wrap contract issued by a bank, insurance company or other financial institution that guarantees the book value of the participant's investment.

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[82] Abbott v. Lockheed Martin Corp., 725 F.3d 803, 806 (7th Cir. 2013).

According to the complaint, even during the period of market turbulence in 2008, "stable value participants received point-to-point protection of principal, with no sacrifice of return."[83]

Also, the complaint pointed out that according to the 2015 Stable Value Study published by MetLife, over 80% of plan sponsors offer a stable value fund.[84] The study also notes that stable value returns were "more than double" the returns of money market funds from 1988 to 2015, and 100% of stable value providers and almost 90% of financial advisors to defined contribution plans "agree that stable value returns have outperformed money market returns over the last 25 years."[85]

The complaint emphasized that unlike the vast majority of 401(k) plans, the Plan does not offer a stable value fund. Instead, the Plan offered a low-yielding Vanguard Prime Money Market Fund. This money market fund was added to the Plan in early 2006 when Vanguard was selected as the Plan's recordkeeper, eliminating the Plan's stable value fund managed by State Street. Anthem also periodically eliminated stable value funds offered by 401(k) plans that later merged into the Plan, transferring those assets to the Vanguard money market fund.

The complaint concluded that in light of stable value funds' clear advantages and enhanced returns compared to other fixed income options, when deciding which fixed income investment option to include in a defined contribution plan a prudent fiduciary would consider using a stable value fund. The complaint argued that Anthem imprudently and disloyally failed to provide a stable value fund for the Plan. Anthem failed to adequately consider a stable value fund after selecting Vanguard as the Plan's recordkeeper and offering Vanguard investments, or come to a reasoned decision as to its course of action, weighing the benefits of a stable value fund compared to a money market fund.

[e]—ERISA'S Fiduciary Standards

The complaint emphasized that ERISA imposes strict fiduciary duties of loyalty and prudence upon the Defendants as fiduciaries of the Plan. ERISA § 404(a), states, in relevant part, that:

> [A]—fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> (A) for the exclusive purpose of
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> [and]

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[83] Donahue, "Society of Actuaries: Stable Value Re-examined," 54 Risks & Rewards 26, 28 (Aug. 2009), available at http://www.soa.org/library/newsletters/risks-and-rewards/2009/august/rar-2009-iss54-donahue.pdf (last visited March 17, 2020).

[84] MetLife, 2015 Stable Value Study: A Survey of Plan Sponsors, Stable Value Fund Providers and Advisors at 5 (2015).

[85] *Id.*, at 7 (Emphasis added.).

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.

[and]

with certain exceptions not relevant here, the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

Under ERISA, fiduciaries that exercise any authority or control over plan assets, including the selection of plan investments and service providers, must act prudently and solely in the interest of participants in the plan.

ERISA's fiduciary duties are "the highest known to the law" and must be done "with an eye single" to the interests of participants.[86]

ERISA also imposes explicit co-fiduciary liabilities on plan fiduciaries. ERISA § 405(a) provides a cause of action against a fiduciary for knowingly participating in a breach by another fiduciary and knowingly failing to cure any breach of duty. The statute states, in relevant part, that:

In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; or

(2) if, by his failure to comply with section 404(a)(l) in the administration of his specific responsibilities which give risk to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

ERISA § 409(a) provides in relevant part:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by [ERISA] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

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[86] Donovan v. Bierwirth, 680 F.2d 263, 271, 272 n.8 (2d Cir. 1982).

[f]—Complaint Allegations

[i]—Breach of Duties of Loyalty and Prudence-Unreasonable Investment Management Fees

The complaint alleges breach of fiduciary duties against all Defendants. The scope of the fiduciary duties and responsibilities of these Defendants includes managing the assets of the Plan for the sole and exclusive benefit of Plan participants and beneficiaries, defraying reasonable expenses of administering the Plan, and acting with the care, skill, diligence, and prudence required by ERISA. According to the complaint, the Defendants are directly responsible for ensuring that the Plan's fees are reasonable, selecting prudent investment options, evaluating and monitoring the Plan's investments on an ongoing basis and eliminating imprudent ones, and taking all necessary steps to ensure that the Plan's assets were invested prudently.

The complaint emphasized that as the Supreme Court recently confirmed, ERISA's "duty of prudence involves a continuing duty to monitor investments and remove imprudent ones."[87]

Defendants selected and retained as Plan investment options mutual funds with excessively high fees relative to far less expensive investment options, including lower-cost share class mutual funds with the identical investment manager and investments, separate accounts, and collective trusts that were readily available to this jumbo Plan at all relevant times. In so doing, Defendants failed to make Plan investment decisions based solely on the merits of the investment funds and the interest of participants. Defendants therefore failed to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plan, and therefore in breach of their fiduciary duty of loyalty under ERISA § 409(a)(l)(A).

Defendants also failed to discharge their duties with respect to the Plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims. Defendants therefore breached their fiduciary duty of prudence under ERISA § 404(a)(l)(B).

Each Defendant is personally liable under ERISA § 409(a) to make good to the Plan any losses to the Plan resulting from the above breaches of fiduciary duties and is subject to other equitable or remedial relief as appropriate.

Each Defendant also knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach. Thus, each Defendant is liable for the losses caused by the breach of its co-fiduciary under ERISA § 405(a).

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[87] Tibble v. Edison International, 135 S.Ct. 1823, 1829, 191 L.Ed.2d 795 (2015).

[ii]—Breach of Duties of Loyalty and Prudence-Unreasonable Administrative Fees

According to the complaint, the scope of the fiduciary duties and responsibilities of the Defendants includes discharging their duties with respect to the Plan solely in the interest of, and for the exclusive purpose of providing benefits to, Plan participants and beneficiaries and defraying reasonable expenses of administering the plan, and acting with the care, skill, prudence, and diligence required by ERISA.

If a defined contribution plan overpays for recordkeeping services due to the fiduciaries' "failure to solicit bids" from other recordkeepers, the fiduciaries have breached their duty of prudence.[88] Similarly, "using revenue sharing to benefit the plan sponsor and recordkeeper at the Plan's expense" while "failing to monitor and control recordkeeping fees" and "paying excessive revenue sharing" is a breach of fiduciary duties.[89]

Defendants failed to engage in a prudent and loyal process for the selection and retention of a Plan recordkeeper. Defendants failed to solicit competitive bids from vendors on a flat per participant fee, and only effective September 30, 2013, did Defendants institute a flat per participant fee, which, though a lower fee, still remains in excess of a reasonable fee for such services.

The complaint also emphasized that Defendants allowed and continue to allow the Plan's recordkeeper to receive asset-based revenue sharing and hard dollar fees charged to participants, but failed to monitor those payments to ensure that only reasonable compensation was received for the services provided to the Plan. As the amount of assets grew, the revenue sharing payments to the Plan's recordkeeper grew, even though the services provided by the recordkeeper remained the same. This caused the recordkeeping compensation paid to the recordkeeper to exceed a reasonable fee for the services provided. According to the complaint, this conduct was a breach of the duties of loyalty and prudence.

Accordingly, said the complaint, each Defendant is personally liable under ERISA § 409(a) to make good to the Plan any losses to the Plan resulting from the above breaches of fiduciary duties and is subject to other equitable or remedial relief as appropriate.

Each Defendant also knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach, and thus each Defendant is liable for the losses caused by the breach of its co-fiduciary under ERISA § 405(a).

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[88] See George v. Kraft Foods Global, Inc., 641 F.3d 786, 798-799 (7th Cir. 2011).
[89] Tussey v. ABB Inc., 746 F.3d 327, 336 (8th Cir. 2014).

[iii]—Breach of Duties of Loyalty and Prudence-Failure to Consider the Use of a Stable Value Fund Instead of a Money Market Fund

According to the complaint, the scope of the fiduciary duties and responsibilities of the Defendants includes direct responsibility for evaluating and monitoring the Plan's investments on an ongoing basis and eliminating imprudent ones, and ensuring that the Plan offers prudent investment options that will provide meaningful financial benefits to participants.

In particular, the complaint alleged that Defendants maintained as a Plan investment option the Vanguard Prime Money Market Fund which holds very short-term, minimally yielding instruments that generated only microscopic returns for consecutive years that did not even come close to keeping pace with inflation. As a result, this investment option did not provide any meaningful retirement benefits to participants, and, in fact, participants in the money market fund fell farther behind inflation each year in the fund.

The complaint emphasized that prudent fiduciaries of defined contribution plans should know that such minimally returning funds will not and have not kept pace with inflation. However, the Defendants failed to make a reasoned decision whether to use a stable value fund, which invests in medium-term instruments that have consistently provided much greater return than money market funds while offering greater protection through a guarantee. Had Defendants considered a stable value fund and weighed the benefits and higher returns relative to a money market fund, they would have provided a stable value fund, removed the Plan's money market fund, and selected a stable value fund, which would have provided far higher returns than the money market fund without any greater increase in risk. Maintaining this fund in the Plan, while failing to offer a stable value fund as a core investment option, caused the Plan millions of dollars in losses compared to what the assets of the fund would have earned if invested in a stable value fund.

The complaint argued that each Defendant is personally liable under ERISA § 409(a) to make good to the Plan any losses to the Plan resulting from the breaches of fiduciary duties and is subject to other equitable or remedial relief as appropriate.

Each Defendant also knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach, and thus each Defendant is liable for the losses caused by the breach of its co-fiduciary under ERISA § 409(a).

[iv]—Failure to Monitor Fiduciaries

The complaint emphasized that the Board of Directors of Anthem, Inc. is responsible for appointing and removing members of the Pension Committee.

Given that the Board of Directors had explicit fiduciary responsibility to appoint and remove members of the Pension Committee, said the complaint, the Board of Directors and its individual members had a fiduciary responsibility to monitor the performance of the other fiduciaries, including the Pension Committee.

According to the complaint, a monitoring fiduciary must ensure that the monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment and holding of plan assets, and must take prompt and effective action to protect the plan and participants when they are not doing so.

Also, to the extent any of the Board of Directors' fiduciary responsibilities were delegated to another fiduciary, the Board's monitoring duty included an obligation to ensure that any delegated tasks were being performed prudently and loyally.

In sum, said the complaint, Defendants breached their fiduciary monitoring duties by, among other things:

> (a) failing to monitor their appointees, to evaluate their performance, or to have a system in place for doing so, and standing idly by as the Plan suffered enormous losses as a result of their appointees' imprudent actions and omissions with respect to the Plan;
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> (b) failing to monitor their appointees' fiduciary process, which would have alerted any prudent fiduciary to the potential breach because of the excessive administrative and investment management fees and consistent underperforming Plan investments in violation of ERISA;
>
> (c) failing to ensure that the monitored fiduciaries had a prudent process in place for evaluating the Plan's administrative fees and ensuring that the fees were competitive, including a process to identify and determine the amount of all sources of compensation to the Plan's recordkeeper and the amount of any revenue sharing payments, a process to prevent the recordkeeper from receiving revenue sharing that would increase the recordkeeper's compensation to unreasonable levels even though the services provided remained the same, and a process to periodically obtain competitive bids to determine the market rate for the services provided to the Plan;
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> (d) failing to ensure that the monitored fiduciaries considered the ready availability of comparable investment options to such a jumbo plan, including lower-cost share classes of the identical mutual funds, still lower cost separate accounts, and even lower cost collective trusts, that charged far lower fees than the Plan's mutual fund options; and
>
> (e) failing to remove appointees whose performance was inadequate in that they continued to maintain imprudent, excessive-cost investments, and an option that did not even keep up with inflation, all to the detriment of Plan participants' retirement savings.

As a consequence of these breaches of the fiduciary duty to monitor, said the complaint, the Plan suffered substantial losses. Had Defendants discharged their fiduciary monitoring duties prudently as described above, the losses suffered by the Plan would have been avoided. Therefore, as a direct result of the breaches of fiduciary duty alleged herein, the Plan, and the Plaintiffs and the other Class members, lost tens of millions of dollars in their retirement savings.

The complaint alleged that each Defendant is personally liable under ERISA § 409(a) to make good to the Plan any losses to the Plan resulting from the breaches of fiduciary duties alleged in this Count and is subject to other equitable or remedial relief as appropriate.

Each Defendant also knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach, and thus each Defendant is liable for the losses caused by the breach of its co-fiduciary under ERISA § 405(a).[90]

[12]—"Eligible Worksite Employees" Accuse Insperity 401(k) Plan of Excessive Fee

Insperity Inc., a human resources services provider of "eligible worksite employees" to small and medium-sized businesses has been sued by its 401(k) plan participants for selecting high-fee investment funds and paying itself excessive record-keeping fees.[91]

A Georgia District Court refused to dismiss most of the claims against Reliance Trust Co., including the accusation that Insperity filled the 401(k) plan with untested target-date funds that earned fees for the company.[92]

The eight-count lawsuit attacks the management of Insperity's $2 billion 401(k) plan, which participants claim offered expensive and poorly performing investment options and paid excessive fees to a record keeper affiliated with the company.

In addition to challenging the in-house target date funds and the decision to offer a money market fund, the Insperity plan participants also challenged the plan's record-keeping fees. They accused the company of profiting from the plan by using an affiliated record keeper that charged excessive fees.

Although the District Court said it was too late to challenge the initial decision to use an affiliated record keeper, the Court otherwise allowed the recordkeeping fee claim to proceed.

The District Court also refused to dismiss claims that the defendants should have considered less expensive investment options for the plan. Because the allegations of high fees were tied to accusations of self-interested decisionmaking, the Court deemed these claims valid.

With more than $2 billion in assets, the Insperity 401(k) plan is one of the largest in the country, benefiting more than 50,000 workers at the small and medium-size companies that Insperity services. Insperity, Inc. serves as a professional employer organization providing human resources and business solutions to small- and medium-sized businesses (5 to 5,000 employees) throughout the United States. In a class action suit filed December 22, 2015, Insperity is accused of using the plan to earn excessive fees for Insperity's in-house record-keeping service and allowing the plan's trustee, Reliance Trust Co., to load the plan with high-fee, poorly performing proprietary funds.

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[90] 29 U.S.C. § 1132(c)(l); 29 U.S.C. § 2575.502c-1.

[91] Pledger v. Reliance Trust Co., No. 1:15-cv-04444, complaint filed (N.D. Ga. Dec. 22, 2015).

[92] Pledger v. Reliance Trust Co., 240 F. Supp.3d 1314 (N.D. Ga.2017).

[a]—Background

Participants in the Insperity 401(k) Plan (Plan) brought a class action suit on behalf of the Plan for breach of fiduciary duties against Defendants Reliance Trust Company, Insperity, Inc., Insperity Holdings, Inc., Insperity Retirement Services, L.P. and the Insperity Retirement Plan Committee.

According to the complaint, Insperity offers the Plan to employees of small- and medium-sized businesses whose employer has contracted with Insperity to serve as its off-site human resources department. These employees are referred to as "eligible worksite employees."

Specifically, the client company enters into an election agreement with a subsidiary of Insperity, Inc., Insperity Holdings, Inc., to permit its employees to participate in the Plan. The election agreement becomes effective when the client company enters into a client service agreement with another subsidiary of Insperity, Inc., Insperity PEO Services, L.P. to provide off-site, full service human resource services to the client company. Under this client service agreement, the employees of the client company are designated as co-employees of Insperity PEO Services, L.P.

The Plan provides for retirement income for the eligible worksite employees of Insperity Holdings, Inc. and its affiliates. This retirement income depends upon contributions made on behalf of each employee by his or her employer, deferrals of employee compensation and employer matching contributions, and from the performance of investment options net of fees and expenses exclusively controlled by the fiduciaries of the Plan.

According to the complaint, as of December 31, 2014, the Plan is one of the country's largest 401(k) plans with over $2 billion in total assets and over 50,000 participants with account balances.

Under the Trust Agreement between Insperity Holdings, Inc. and Reliance Trust Company, Reliance Trust functions as the Plan's discretionary trustee to "hold, manage and control the assets of the Plan," including the selection, retention and monitoring of investment options made available to participants for the investment of their contributions and provision of their retirement income.

Insperity is the Plan sponsor and Plan administrator and is a fiduciary to the Plan under ERISA § 3(21)(A) because it exercised discretionary authority or control respecting the management of the Plan or disposition of its assets, and exercised discretionary authority or responsibility in the administration of the Plan.

Section 10.2 of the Plan names Insperity as the fiduciary responsible for the control, management and administration of the Plan, with all powers necessary to enable it properly to carry out such responsibilities, which includes the selection and compensation of the providers of administrative services to the Plan and the selection, monitoring, and removal of the investment options made available to participants for the investment of their contributions and provision of their retirement income.

Under Section 10.3 of the Plan, Insperity may delegate, by written instrument, all or any part of its responsibilities under the Plan to such person or persons and may revoke such delegation. Insperity delegated its fiduciary responsibility to hold, manage and control the assets of the Plan to Reliance Trust, which includes the selection, retention and monitoring of Plan investment options.

According to the complaint, Insperity Retirement Services, L.P. (a wholly-owned subsidiary of Insperity, Inc.), has served as the Plan record-keeper since October 1, 2003 providing in-house administrative and record-keeping services.

According to the complaint, as a professional employer organization (PEO), Insperity's core business is providing human resources and business solutions to small- and medium-sized businesses, which range from payroll processing to employee performance management and training. Under a PEO arrangement, Insperity assumes an employer/employee relationship with the employees of the client company.

Under the Insperity's PEO outsourcing service, all client companies execute a client service agreement whereby Insperity is contracted to provide off-site, full service human resource services. This agreement also provides for an ongoing relationship between Insperity and the client company.

The client service agreement divides responsibility between Insperity and the client company. Through this division, Insperity is responsible for providing employee benefits through Insperity-sponsored plans in compliance with ERISA and other federal laws.

According to the complaint, employees of clients who enter into this client service agreement with Insperity are eligible to participate in the Plan upon the client's execution of an election agreement designating the Plan as the retirement savings plan for their employees, who become co-employees of Insperity.

According to the complaint, Insperity promotes the Plan to client companies, emphasizing the fiduciary role it assumes on behalf of clients when administering and managing the Plan for their employees.

Consequently, said the complaint, assuming complete fiduciary authority over the Plan and its assets by Insperity is a central selling point of the Plan offered to small- and medium-sized businesses.

Insperity also promotes the investment services provided by Reliance Trust with respect to the Plan, said the complaint. In participant communications, Insperity refers to Reliance Trust as the "investment manager and trustee" for the Plan who "selects and continually monitors the investment options available to participants in the Plan."

In promotional materials for its retirement services business, Insperity markets Reliance Trust as a provider of investment products who "carefully manages" available investment options by its "experts" at the company to ensure participants are provided "the best possible choice."[93]

[b]—Causes of Action

[i]—Breach of Duties of Loyalty and Prudence— Unreasonable Administrative and Recordkeeping Fees

According to the complaint, the scope of the fiduciary duties and responsibilities of the Defendants includes discharging their duties with respect to

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[93] See Insperity, "Retirement Services – Investment Choices," available at http://www.insperity.com/services/retirement/investment-choices (last visited March 24, 2020).

the Plan solely in the interest of, and for the exclusive purpose of providing benefits to, Plan participants and beneficiaries and defraying reasonable expenses of administering the plan, and acting with the care, skill, prudence, and diligence required by ERISA.

The complaint contends that if a defined contribution plan overpays for recordkeeping services due to the fiduciaries' "failure to solicit bids" from other recordkeepers, the fiduciaries have breached their duty of prudence.[94] Similarly, "using revenue sharing to benefit the plan sponsor and recordkeeper at the Plan's expense" while "failing to monitor and control recordkeeping fees" and "paying excessive revenue sharing" is a breach of fiduciary duties.[95]

Defendants failed to engage in a prudent and loyal process for the selection and retention of a Plan recordkeeper. Defendants failed to solicit competitive bids from vendors on a flat per participant fee and did not institute a flat per participant fee. Defendants allowed the Plan's recordkeeper, Insperity Retirement Services, to receive asset-based revenue sharing and hard dollar fees charged to participants, but failed to monitor those payments to ensure that only reasonable compensation was received for the services provided to the Plan. As the amount of assets grew, the revenue sharing payments to the Plan's recordkeeper grew, even though the services provided by the recordkeeper remained the same. This contributed to the excessive recordkeeping compensation paid to the recordkeeper. This conduct was a breach of the duties of loyalty and prudence.

As a result, said the complaint, each Defendant is personally liable under ERISA § 409(a) to make good to the Plan any losses to the Plan resulting from the breaches of fiduciary duties and is subject to other equitable or remedial relief as appropriate.

Also, said the complaint, each Defendant also knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, and knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach, and thus each Defendant is liable for the losses caused by the breach of its co- fiduciary under ERISA § 405(a).

[ii]—Breach of Duties of Loyalty and Prudence—
Unreasonable Investment Management Fees

According to the complaint, the scope of the fiduciary duties and responsibilities of the Defendants includes managing the assets of the Plan for the sole and exclusive benefit of Plan participants and beneficiaries, defraying reasonable expenses of administering the Plan, and acting with the care, skill, diligence, and prudence required by ERISA. These Defendants are directly responsible for ensuring that the Plan's fees are reasonable, selecting prudent investment options, evaluating and monitoring the Plan's investments

[94] See George v. Kraft Foods Global, Inc., 641 F.3d 786, 798–799 (7th Cir. 2011).
[95] Tussey v. ABB, Inc., 746 F.3d 327, 336 (8th Cir. 2014).

on an ongoing basis and eliminating imprudent ones, and taking all necessary steps to ensure that the Plan's assets were invested prudently.

As the Supreme Court recently confirmed, said the complaint, ERISA's "duty of prudence involves a continuing duty to monitor investments and remove imprudent ones."[96] According to the complaint, Defendants selected and retained as Plan investment options mutual funds and collective trusts with high expenses relative to other investment options, including separate accounts, collective trusts, and lower-cost share class mutual funds with the identical investment manager and investments that were readily available to this jumbo Plan at all relevant times.

In so doing, said the complaint, Defendants failed to make Plan investment decisions based solely on the merits of the investment funds and in the interest of participants. Defendants therefore failed to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plan, and therefore in breach of their fiduciary duty of loyalty under ERISA § 404(a)(1)(A).

According to the complaint, Defendants also failed to discharge their duties with respect to the Plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims. Defendants therefore breached their fiduciary duty of prudence under ERISA § 404(a)(1)(B).

Accordingly, the complaint contended that each Defendant is personally liable under ERISA § 409(a) to make good to the Plan any losses to the Plan resulting from the breaches of fiduciary duties alleged above and is subject to other equitable or remedial relief as appropriate.

According to the complaint, each Defendant also knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach. Thus, each Defendant is liable for the losses caused by the breach of its co-fiduciary under ERISA § 405(a).

[iii]—Breach of Duties of Loyalty and Prudence—Use of a Microscopically Low-Yielding Money Market Fund and Adding an Imprudent Stable Value Fund

According to the complaint, the scope of the fiduciary duties and responsibilities of these Defendants includes direct responsibility for evaluating and monitoring the Plan's investments on an ongoing basis and eliminating imprudent ones, and ensuring that the Plan offers prudent investment options that will provide meaningful financial benefits to participants.

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[96] Tibble v. Edison International, 135 S.Ct. 1823, 1829, 191 L.Ed.2d 795 (2015).

Defendants maintained as a Plan investment option the Federated Prime Obligations Money Market Fund. This fund holds very short-term instruments and generated only the most microscopic returns above zero for consecutive years that did not keep pace with inflation. As a result, this investment option did not provide any meaningful retirement benefits to participants, and participants in fact lost more purchasing power year after year.

According to the complaint, prudent fiduciaries of defined contribution plans know that such minimally returning funds will not and have not kept pace with inflation. However, until adding Reliance Trust's stable value fund in 2014, these Defendants failed to make a reasoned decision or consider whether to use a stable value fund for the Plan, which invests in medium-term instruments that have consistently provided much greater returns than money market funds while offering greater protection through a guarantee. Had Defendants considered a stable value fund, weighed the benefits and higher returns relative to a money market fund, and provided a stable value fund prior to 2014, a prudent stable value fund would have provided significantly higher returns than the Plan's money market fund without any greater increase in risk. Maintaining the money market fund in the Plan while failing to offer a stable value fund as a core investment option caused the Plan millions of dollars in losses compared to what the assets of the fund would have earned if invested in a stable value fund.

Accordingly, each Defendant is personally liable under ERISA § 409(a) to make good to the Plan any losses to the Plan resulting from the breaches of fiduciary duties alleged above and is subject to other equitable or remedial relief as appropriate.

Each Defendant also knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, and knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach, and thus each Defendant is liable for the losses caused by the breach of its co-fiduciary duties under ERISA § 405(a).

[iv]—Failure to Monitor Fiduciaries

According to the complaint, under Section 10.2 of the Plan, Insperity Holdings, Inc. has responsibility to control and manage the operation and administration of the Plan, including the selection of Plan service providers, with all powers necessary to enable it properly to carry out such responsibilities. Exercising this discretionary authority, Insperity Holdings, Inc. appointed Reliance Trust to hold, control and manage the assets of the Plan.

The complaint emphasized that a monitoring fiduciary must ensure that the monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment and holding of plan assets, and must take prompt and effective action to protect the plan and participants when they are not.

To the extent any of Insperity Holdings, Inc.'s fiduciary responsibilities were delegated to another fiduciary, its monitoring duty included an

obligation to ensure that any delegated tasks were being performed prudently and loyally.

Accordingly, the complaint argued that Insperity Holdings, Inc. breached its fiduciary monitoring duties by, among other things:

> (a) failing to monitor its appointees, to evaluate their performance, or to have a system in place for doing so, and standing idly by as the Plan suffered enormous losses as a result of their appointees' imprudent actions and omissions with respect to the Plan;
>
> (b) failing to monitor its appointees' fiduciary process, which would have alerted any prudent fiduciary to the potential breach because of the excessive administrative and investment management fees and consistent underperforming Plan investments in violation of ERISA;
>
> (c) failing to ensure that the monitored fiduciaries had a prudent process in place for evaluating the Plan's administrative fees and ensuring that the fees were competitive, including a process to identify and determine the amount of all sources of compensation to the Plan's recordkeeper and the amount of any revenue sharing payments; a process to prevent the recordkeeper from receiving revenue sharing that would increase the recordkeeper's compensation to unreasonable levels even though the services provided remained the same; and a process to periodically obtain competitive bids to determine the market rate for the services provided to the Plan;
>
> (d) failing to ensure that the monitored fiduciaries, including Reliance Trust, considered the ready availability of comparable and better performing investment options that charged significantly lower fees and expenses than the Plan's proprietary Reliance Trust funds and other investments;
>
> (e) failing to remove appointees whose performance was inadequate in that they continued to maintain imprudent, excessive cost, and poorly performing investments, and options that did not even keep up with inflation, all to the detriment of Plan participants' retirement savings.

The complaint argued that as a consequence of these breaches of the fiduciary duty to monitor, the Plan suffered substantial losses. Had Insperity Holdings, Inc. discharged its fiduciary monitoring duties prudently as described above; the losses suffered by the Plan would have been avoided. Therefore, as a direct result of the breaches of fiduciary duty alleged herein, the Plan, and the Plaintiffs and the other Class members, lost tens of millions of dollars of their retirement savings.

[v]—Prohibited Transactions between the Plan and Parties In Interest

According to the complaint, Defendants caused the Plan to use Reliance Trust-managed investment options and to use Insperity's subsidiary, Insperity Retirement Services, as the Plan's recordkeeper.

As a result, said the complaint, Defendants are all parties in interest because they are entities providing services to the Plan or are fiduciaries to the Plan under ERISA § 3(14).

As a result, said the complaint, Defendants caused the Plan to engage in transactions between the Plan and a party in interest in violation of ERISA § 406(a) by:

> (a) causing the Plan to use Reliance Trust proprietary investments, including the selection and retention of the Reliance Trust target date funds and stable value fund, that benefitted Reliance Trust through excessive investment management fees charged to participants for those investments, and caused the Plan to pay Insperity Retirement Services, and in turn Insperity, Inc., revenue sharing payments from those proprietary investments and other Plan investment options for providing in-house recordkeeping services to the Plan for the benefit of Defendants; and causing the Plan to use Insperity's proprietary recordkeeping services to financially benefit Defendants through uncapped, asset-based revenue sharing payments from Plan investments, all of which constituted an exchange of property between the Plan and a party in interest under ERISA § 406(a)(1)(A);
>
> (b) causing the Plan to use Reliance Trust proprietary investments and services, including the selection and retention of the Reliance Trust target date funds and stable value fund, that benefitted Reliance Trust through excessive investment management fees charged to participants for those investments, and caused the Plan to use Insperity's proprietary recordkeeping services to financially benefit Defendants through uncapped, revenue sharing payments from Plan investments, all of which constituted a direct or indirect furnishing of services between the Plan and a party in interest for more than reasonable compensation under ERISA § 406(a)(1)(C); and
>
> (c) causing the Plan to use Reliance Trust proprietary investments, including the selection and retention of the Reliance Trust target date funds and stable value fund, that benefitted Reliance Trust through excessive investment management fees charged to participants for those investments, and caused the Plan to pay Insperity Retirement Services, and in turn Insperity, Inc., revenue sharing payments from those proprietary investments and other Plan investment options for providing proprietary recordkeeping services to the Plan for the benefit of Defendants; causing the Plan to use Insperity's proprietary recordkeeping services to financially benefit Defendants through uncapped, asset-based revenue sharing payments from Plan investments; and causing the Plan to invest in high-cost mutual funds and collective trusts compared to institutional investment alternatives that were readily available to the Plan, including separate accounts, collective trusts, and lower-cost share classes of the identical investment, to drive uncapped, asset-based revenue to Defendants for their financial benefit, all of which constituted a transfer to or use of Plan assets by or for the benefit of a party in interest under ERISA § 406(a)(1)(D).

According to the complaint, under ERISA § 409(a), the Defendants are liable to restore all losses suffered by the Plan as a result of these prohibited transactions and to disgorge all revenues received by Reliance Trust,

Insperity, Inc., Insperity Retirement Services, and their subsidiaries from the fees and revenue sharing payments paid by the Plan to these entities, as well as other appropriate equitable or remedial relief.

[vi]—Prohibited Transactions between the Plan and Fiduciaries

According to the complaint, Reliance Trust violated ERISA § 406(b) as follows:

(a) In causing the Plan to use Reliance Trust proprietary investments that benefitted Reliance Trust through excessive investment management fees charged to participants for those investments, causing the Plan to use the Reliance Trust proprietary target date funds, which had no prior performance history at the time of inclusion, and failing to consider prudent alternatives to the proprietary target date funds that were readily available to the Plan, Reliance Trust dealt with the assets of the plan in its own interest or for its own account, in violation of ERISA § 406(b)(1).

(b) In causing the Plan to use Reliance Trust proprietary investments that benefitted Reliance Trust through excessive investment management fees charged to participants for those investments, causing the Plan to use Reliance Trust proprietary target date funds, which had no prior performance history at the time of inclusion, and failing to consider prudent alternatives to the proprietary target date funds that were readily available to the Plan, Reliance Trust acted in a transaction involving the Plan on behalf of a party whose interests were adverse to the interests of the Plan, its participants and beneficiaries, in violation of ERISA § 406(b)(2).

(c) In causing the Plan to pay excessive investment management fees charged to the Reliance Trust proprietary investments, including the Reliance Trust target date funds and the stable value fund, causing the Plan to use Reliance trust proprietary investments, which then directed asset-based revenue sharing payments to Insperity Retirement Services, and in turn Insperity, Inc., and allowing these Insperity entities to profit from the Plan through uncapped, asset-based revenue sharing payments from Plan investment decisions that mutually benefitted Defendants, Reliance Trust received consideration for its own personal account from parties dealing with the Plan in connection with transactions involving the assets of the Plan, in violation of ERISA § 406(b)(3).

Also, according to the complaint, Insperity, Inc., Insperity Holdings, Inc., Insperity Retirement Services, the Insperity Retirement Plan Committee and its members violated ERISA § 406(b) as follows:

(a) In causing the Plan to use Insperity's subsidiary, Insperity Retirement Services, as the Plan's recordkeeper, and allowing it, and in turn Insperity, Inc., to receive uncapped, asset-based revenue sharing payments from Plan investments, these Defendants dealt with the assets of the plan in their own interest or for their own account, in violation of ERISA § 406(b)(1).

(b) In causing the Plan to use Reliance Trust proprietary investments that charged excessive investment management fees, causing the Plan to use Insperity's subsidiary, Insperity Retirement Services, as the Plan's recordkeeper, and allowing it, and in turn Insperity, Inc., to receive uncapped, asset-based revenue sharing payments from Plan investments, these Defendants acted in a transaction involving the Plan on behalf of parties whose interests were adverse to the interests of the Plan, its participants and beneficiaries, in violation of ERISA § 406(b)(2).

Moreover, according to the complaint, in causing the Plan to use Insperity's in-house subsidiary, Insperity Retirement Services, as the Plan's recordkeeper, causing Insperity Retirement Services, and in turn Insperity, Inc., to receive uncapped, asset-based revenue sharing payments from Plan investments, and allowing Reliance Trust to select its own proprietary investments, which then provided a mutual benefit to Insperity Retirement Services, and in turn Insperity, Inc., through asset-based revenue sharing payments from these investments, these Defendants received consideration for their own personal accounts from parties dealing with the Plan in connection with transactions involving the assets of the Plan, in violation of ERISA § 406(b)(3).

According to the complaint, for the reasons discussed above, the Defendants were fiduciaries and parties in interest with respect to the Plan and as a direct result of these prohibited transactions, the Plan, directly or indirectly, paid millions of dollars in investment management and administrative fees that were prohibited by ERISA and suffered tens of millions of dollars in losses.

Accordingly, said the complaint, the Defendants are liable under ERISA § 409(a) to restore all losses suffered by the Plans as a result of the prohibited transactions and to disgorge all revenues received by Reliance Trust, Insperity, Inc., Insperity Retirement Services and their subsidiaries from the fees paid by the Plan to these entities, as well as other appropriate equitable or remedial relief.

[c]—Insperity Motion to Dismiss Denied

A Georgia District Court on March 7, 2017 refused to dismiss most of the claims against Insperity and Reliance Trust Co., including the accusation that Insperity filled the 401(k) plan with untested target date funds that earned fees for the company.[97] This decision marks the third time a judge has allowed plan participants to move forward with claims that the plan was used as "seed money" for untested proprietary investment funds. Similar claims are pending against Putnam Investments and Allianz.

According to the District Court, the duty of prudence requires that fiduciaries act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[98] The duty of loyalty requires fiduciaries

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[97] Pledger v. Reliance Trust Co., 240 F. Supp.3d 1314 (N.D. Ga. 2017).

[98] ERISA § 404(a)(l)(B).

to act "solely in the interest" of plan participants and beneficiaries and "for the exclusive purpose of providing benefits to participants" and "defraying reasonable expenses of administering the plan."[99]

As defined by ERISA, "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."[100] According to the Court, ERISA fiduciaries may wear multiple hats and "may have financial interests adverse to beneficiaries."[101]

In every case charging breach of ERISA fiduciary duty . . . the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.[102]

Proof of an entity's fiduciary status "may come from the plan document, but can also come from the factual circumstances surrounding the administration of the plan, even if these factual circumstances contradict the designation in the plan document."[103] In this regard, the fiduciary function is not an "all-or-nothing concept," and a defendant is only a fiduciary to the extent that he exercises discretionary authority "with respect to the particular activity at issue."[104] For example, "a person is not a fiduciary unless he has discretion or exercises authority with respect to plan assets."[105]

ERISA authorizes a plan participant to bring a civil suit against plan fiduciaries for breaches of the fiduciaries' duties of loyalty and prudence.[106] However, said the District Court, the plan participant cannot seek to recover personal damages for misconduct, but must instead seek recovery that "inures to the benefit of the plan as a whole."[107]

In view of the foregoing, the District Court considered Defendants Motion to Dismiss with respect to each count.

[i]—Count I: Breach of Duties of Loyalty and Prudence—Selection and Retention of Untested, Excessive-Cost, and Poorly Performing Proprietary Target Date Funds

Plaintiffs argued that Reliance established a new series of target date funds, called the Insperity Horizon Risk-Managed Target Date Funds (the

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[99] ERISA § 404(a)(l)(A).

[100] ERISA § 32(21)(A).

[101] Pegram v. Herrlich, 530 U.S. 211, 225, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000).

[102] *Id.*, 530 U.S. at 226.

[103] Hamilton v. Allen-Bradley Co., Inc., 244 F.3d 819, 824 (11th Cir. 2001).

[104] Cotton v. Massachusetts Mutual Life Insurance Co., 402 F.3d 1267, 1277 (11th Cir. 2005).

[105] Herman v. NationsBank Trust Co., 126 F.3d 1354, 1365 (11th Cir. 1997).

[106] ERISA § 502(a)(2).

[107] Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 140, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985).

Insperity TDFs), and added these funds to the Plan without considering alternatives, even though the Insperity TDFs were newly-created, had no performance history, and their investment manager had little experience managing such a fund. Plaintiffs argued that, prior to offering the Insperity TDFs, the Plan offered established target date funds managed by J.P. Morgan, T. Rowe Price, and Vanguard, and that the Insperity TDFs substantially underperformed these previously offered funds with established track records. Although Reliance is responsible for the selection and management of the investment options, and established and added the Insperity TDFs to the Plan, Plaintiffs argued that every Defendant breached their fiduciary duties with respect to the selection and management of the funds and knowingly participated in the breach of the other Defendants, and failed to make any effort to remedy the breach.

[A]—Whether the Insperity Defendants Were Fiduciaries With Respect to the Selection, Retention, and Monitoring of Investment Options

The Insperity Defendants argued that Count I should be dismissed against Insperity and Retirement Services because of Plaintiffs' failure to plead specific facts that either Insperity or Retirement Services is a fiduciary under the Plan. The Insperity Defendants do not dispute that Holdings is the sponsor and a named fiduciary of the Plan, but argued that Holdings, in compliance with ERISA § 405(c), delegated its fiduciary responsibility to hold, manage and control the assets of the Plan to Reliance, which includes the selection, retention and monitoring of the Plan investment options. The Insperity Defendants also argued that Plaintiffs failed to plead any facts that allege Holdings retained any responsibility for the selection or retention of investment options in the Plan.

Plaintiffs argued that Count I states a claim against Insperity for breach of a fiduciary duty relating to the selection, retention, and monitoring of investment options because (1) Insperity acted as a "functional fiduciary" under the Plan, (2) Insperity allowed the creation and retention of the Insperity TDFs by use of the Insperity name, which was "intertwined" with the decision that those funds should be included in the Plan, and (3) it is reasonable to infer that Insperity approved the funds because of revenue sharing payments that would flow to it. Plaintiffs also argued that Retirement Services is a fiduciary because the selection of the Insperity TDFs resulted in it receiving higher fees, which raises an inference that Retirement Services participated in the process of selecting those funds. They further argued that Retirement Services is a wholly-owned subsidiary of Insperity, that all Insperityrelated entities have acted as Insperity's agents, and that Insperity administers the Plan through its subsidiaries. Plaintiffs argued that although Holdings delegated its investment duties to Reliance, Holdings conspired with Reliance to include its proprietary investments in the Plan and to favor Insperity's corporate plan, while failing to monitor Reliance's investments.

In this regard, said the Plaintiffs, Holdings remains liable for Reliance's acts because it knowingly participated in or failed to remedy Reliance's

breach of fiduciary duties, selected and retained high-cost investments that generated excess revenue to benefit both Holdings and Reliance, and failed to offer lower-cost investments that were provided to Insperity's own corporate employees.

Despite the foregoing arguments, the District Court emphasized that it is hesitant to resolve breach of fiduciary claims under ERISA at the motion to dismiss stage. In this regard, the District Court pointed to an earlier Georgia District Court decision[108] in which a former employee of the Southern Company brought a class action against the sponsor of an employee pension retirement plan, as well as the manager of the plan's assets and others who purportedly exercised fiduciary supervision of other plan fiduciaries. The District Court declined to dismiss the complaint because the plaintiff's "allegations respecting their status as fiduciaries, and his assertions that certain acts were undertaken in their fiduciary capacities, are impermissibly vague."[109]

The District Court pointed out that other courts have been hesitant to resolve breach of fiduciary claims under ERISA due to a purported lack of fiduciary status at the motion to dismiss stage, particularly where, as here, the plaintiffs allege the various defendants are interrelated.[110]

The District Court also emphasized that ERISA "allows for a fiduciary to delegate a fiduciary duty."[111]

However, said the District Court, a fiduciary who delegates a fiduciary duty may still be liable for the breach of that duty if the named fiduciary

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[108] In Woods v. Southern Co., 396 F. Supp.2d 1351 (N.D. Ga. 2005).

[109] *Id.*, 396 F. Supp.2d at 1365.

[110] See, e.g.:

Second Circuit: Gedek v. Perez, 66 F. Supp.3d 368, 383 (W.D.N.Y. 2014) ("Whether a trustee has fiduciary status, or has acted as a fiduciary, is for the most part a fact-intensive inquiry, making the resolution of that issue inappropriate for a motion to dismiss.").

Fourth Circuit: Feamster v. Mountain State Blue Cross & Blue Shield, Inc., No. 6:10-cv-241, 2010 U.S. Dist. LEXIS 72870, at *11-12 (S.D. W. Va. July 19, 2010) (concluding that whether a person is a fiduciary with respect to a plan regulated under ERISA involves not only reference to the plan documents but also an examination of whether others have performed specific discretionary functions relating to the management, assets or administration of the plan).

Seventh Circuit: Groussman v. Motorola, Inc., No. 10 C 911, 2011 U.S. Dist. LEXIS 4712, at *20-21 (N.D. Ill. Jan. 18, 2011) (finding that it was premature on a motion to dismiss to determine whether a defendant acted as a functional fiduciary; whether such a duty was possessed by a defendant and whether they complied with that duty are matters more appropriately determined on summary judgment).

Eighth Circuit: Jump v. Speedway LLC, 23 F. Supp.3d 1024, 1031 (D. Minn. 2014) (finding that "it would be premature to determine a defendant's fiduciary status at the motion to dismiss stage of the proceedings, because a determination of fiduciary status based on function is a mixed question of law and fact.").

[111] Willett v. Blue Cross & Blue Shield, 953 F.2d 1335, 1340 (11th Cir. 1992) (citing ERISA § 405(c)(l)) which provides that, "[t]he instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities . . . among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities . . . under the plan.").

would otherwise be liable in accordance with ERISA § 405(a) which provides for the circumstances under which a fiduciary would be liable for a breach of fiduciary duty of another fiduciary, which includes participating in an act or omission of another fiduciary or having knowledge of another fiduciary's breach. Under ERISA, a fiduciary must always be prepared to reassume a delegated fiduciary duty when it becomes apparent to the fiduciary that the party responsible for performing the duty has breached its obligation.[112]

The District Court concluded that at this stage of the litigation, Plaintiffs have sufficiently alleged that Holdings knew, facilitated, or failed to monitor Reliance's purported fiduciary breach after delegating authority over the management and control of the investment of assets to Reliance. The Court also said that it cannot definitively conclude at this stage that Insperity and Retirement Services are not fiduciaries. Plaintiffs have alleged that Insperity is a fiduciary because it had and exercised authority or control over certain of Insperity Holdings, Inc.'s actions with respect to the Plan, and thereby exercised discretionary authority or discretionary control respecting the management of the Plan or management or disposition of its assets, and had discretionary authority or discretionary responsibility in the administration of the Plan.

Plaintiffs contend that all six executive officers of Insperity hold the same positions at Holdings, which is the sole general partner of Retirement Services, that the CEO and President are Insperity board members, and that the CEO is its chairman. The District Court emphasized that in a prior decision they were unable to find any support for the proposition that a meaningful distinction can be drawn between a corporation and the directors through whom it must act.[113] Accordingly, the Court found that it is inappropriate to determine the fiduciary status of allegedly-interrelated corporations at the motion to dismiss stage.

[B]—Whether Reliance Acted Imprudently by Including the Insperity TDFs as an Investment Option

Reliance did not challenge fiduciary status but rather asserted that the fact that the funds were newly-formed does not render them imprudent, particularly because the DOL has encouraged fiduciaries to consider "custom" target date structures out of other plan investment options, despite their nature of having no history of performance. Although the funds have underperformed, Reliance argued that hindsight may not be used to judge fiduciary decision-making. Reliance also argued that layered fees are not inherently excessive or unnecessary and because the Insperity TDFs invested solely in funds unaffiliated with Reliance, a separate fee was necessary to compensate Reliance for its services.

In response, Plaintiffs argued that the replacement of funds having an established track record with proprietary funds two days after their creation from which Reliance would earn substantial profits states a claim for breach of fiduciary duty. Plaintiffs argued that Reliance selected its target date funds

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[112] *Id.*, 953 F.2d at 1341.

[113] In Woods v. Southern Co., 396 F. Supp.2d 1351, 1373 (N.D. Ga. 2005).

with no performance history instead of more prudent alternatives to benefit itself and pay revenue sharing to Insperity. In this regard, Plaintiffs argued that it has been held that an allegation that a fiduciary chose investment options with poor performance histories as opposed to other better performing alternatives states a claim for fiduciary breach where there is also an allegation that the choice benefitted one or more corporate or fiduciary interests over those of the plan.[114]

Plaintiffs further argued that a “non-conflicted fiduciary” making objective evaluations would not have selected funds with no performance history and unnecessary fees, and that their arguments raise an inference that Reliance’s process in selecting the investments was “tainted by failure of effort, competence, or loyalty.”[115] The Plaintiffs emphasized that the arguments in this case are similar to those in another district court case[116] where the court denied a motion to dismiss, finding that the plaintiffs stated a claim for breach of a fiduciary duty.

However, the District Court said that it would be inappropriate to grant Reliance’s motion to dismiss. Plaintiffs allege that in 2012 Reliance removed the Plan’s J.P. Morgan-managed target date funds and replaced them with the Insperity TDFs, for which Reliance is the investment manager and which had been created two days before Reliance included them in the Plan. According to the Plaintiff, Reliance then purportedly transferred $466 million of the Plan’s assets into these funds, using the Plan’s assets as seed money. Like other target date funds, said the Court, Reliance’s assets invested in other funds that had their own fees and expenses that were deducted from fund assets. Unlike other target date funds, including those offered by established competitors such as J.P. Morgan, Vanguard, and T. Rowe Price, Reliance allegedly charged additional management and administrative fees in addition to the fees assessed by the underlying funds.

The District Court emphasized that, according to the Complaint, Reliance’s funds drastically underperformed alternatives from J.P. Morgan, Vanguard, and T. Rowe Price, causing the Plan losses of over $56 million compared to prudent alternatives. Plaintiffs argued Reliance’s choice was made to benefit itself and because its funds paid revenue sharing to Insperity. That, said the District Court, distinguishes this case from those that merely allege underperformance of selected funds without a concomitant allegation of self-dealing.[117]

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114 See Braden v. WalMart Stores, Inc., 588 F.3d 585, 596 (8th Cir. 2009) (reversing the grant of a motion to dismiss a claim for breach of fiduciary duty where the complaint alleged that inferior investment options were selected to benefit the trustee at the expense of the participants).

115 *Id.*, 588 F.3d at 596.

116 Krueger v. Ameriprise Financial, Inc., No. 11-02781, 2012 U.S. Dist. LEXIS 166199 (D. Minn. Nov. 20, 2012). See also, McDonald v. Jones, No. 4:16 CV 1346 RWS, 2017 U.S. Dist. LEXIS 10820, at *4 (E.D. Mo. Jan. 26, 2017) (denying the defendant’s motion to dismiss based upon the defense of offering an array of investment options when the plaintiffs contended the defendants “affiliated themselves with funds which benefited Defendants at the expense of the Plan participants”).

117 See, e.g., Pension Benefit Guaranty Corp., 712 F.3d 705, at 723 (granting motion to dismiss where the plaintiff s bare allegations of questionable investments

Accordingly, the District Court found Plaintiffs' allegations sufficient to state a claim for breach of fiduciary duty against Reliance and therefore Reliance's Motion to Dismiss Count I was denied.

[ii]—Count II: Breach of Duties of Loyalty and Prudence—Unreasonable Administrative and Record Keeping Fees

Plaintiffs argued that Insperity and Holdings selected Retirement Services as the Plan's record keeper without conducting any competitive bidding process. They also argued that all Defendants breached their fiduciary duties as follows: (1) Reliance, which is responsible for monitoring the compensation received by Retirement Services, failed to control the amount of asset-based revenue sharing and record keeping costs as the Plan's assets grew; (2) Retirement Services received compensation that was unreasonable because it drastically exceeded the direct expenses incurred in the administration of the Plan; (3) Holdings failed to adequately monitor Reliance's monitoring of Retirement Services; and (4) Insperity billed participating employers for additional amounts for service and record keeping charges, which were paid to Retirement Services on top of the already allegedly excessive fees assessed. Plaintiffs claimed that each Defendant knew of the breach by the other Defendants and failed to remedy them.

[A]—Whether All Insperity Defendants and Reliance Are Proper Defendants in Count II

The Insperity Defendants argued that Plaintiffs cannot assert a claim against Insperity and Retirement Services for retaining and compensating Retirement Services because Holdings had the fiduciary responsibility for selecting, retaining, and compensating administrative service providers. They argued that Plaintiffs failed to allege that Insperity or Retirement Services played any role in retaining or compensating Retirement Services as the record keeper.

Reliance argued that Count II fails against it because it had no authority to select or remove Retirement Services as the Plan's record keeper. Because Holdings had fiduciary responsibility for selecting and removing Retirement Services before Reliance became trustee, Reliance argued that it only was responsible for reviewing Retirement Services' expenses, but had no power to remove it as record keeper.

Plaintiffs responded that they need not specify how each Insperity entity acted as a fiduciary as to each count, because these facts are hidden from them. Plaintiffs argued that the overlap among the officers and board members acting on behalf of the three Insperity entities, and the multiple hats worn by each, raise a plausible inference that they acted as fiduciaries with respect to the retention and compensation of the record keeper.

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did not give rise to a plausible inference that the fiduciary acted imprudently; "price decreases do not, without further allegations, plausibly show that Morgan Stanley's unspecified subprime investments were imprudent. . . .").

Plaintiffs also claimed that Retirement Services, by receiving more revenue sharing through higher-cost share class funds, arguably participated in selecting the funds, exercising control over its compensation and Plan management. Plaintiffs argued that, at a minimum, Retirement Services is liable under ERISA § 405(a) for participating, enabling, or failing to rectify the co-fiduciaries' breaches regarding record keeping fees.

Plaintiffs further argued that Reliance was responsible for monitoring Retirement Services' compensation and failed to take action when it became unreasonable. Plaintiffs also asserted that, because Reliance provided investment options that were more expensive, this operated to increase the fees paid to Retirement Services. According to the Complaint, Reliance and Holdings were jointly responsible for monitoring the compensation received by Retirement Services. Thus, Plaintiffs argued, Reliance failed to determine a reasonable record keeping fee and to ensure Retirement Services received only reasonable compensation, instead providing excessively expensive Plan investment options that paid more fees to Retirement Services, causing over $30 million in Plan losses.

In view of the foregoing, the District Court found that Plaintiffs sufficiently demonstrated that the Insperity Defendants acted as fiduciaries concerning administrative and record keeping fees to withstand a motion to dismiss since Plaintiffs alleged that Reliance exercised "functional . . . control and authority over the plan"[118] which is a necessary ingredient to fiduciary status. In so holding, the District Court emphasized once again that courts have been hesitant to resolve breach of fiduciary claims under ERISA due to a purported lack of fiduciary status at the motion to dismiss stage when there are allegations that the various defendants are interrelated.

[B]—Whether Plaintiffs State a Plausible Claim That Retirement Services Received Unreasonable or Excessive Fees

The Insperity Defendants argued that Retirement Services only receives reimbursement for actual, legally-permissible expenses which are reviewed and approved by Reliance and that the fees charged are supported by the nature and structure of this unique, and highly complex, plan and the market available to service it. They argued that the Plan is required by the IRS to be operated like a collection of thousands of small, individual plans and therefore it is more expensive to administer and keep records than a traditional 401(k) plan.

Plaintiffs argued that Insperity failed to negotiate the subsidiary's compensation, failed to monitor the amount of asset-based revenue sharing it received, and failed to obtain rebates of excessive compensation, resulting in gross overpayment for administrative services. They also argued that Insperity provides no authority for contending that the Plan requires more record keeping than do other plans and that Insperity's $500 "Annual Base Recordkeeping" charge and $30 "Annual Participant Service Fee" further demonstrate impropriety.

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[118] Hunt v. Hawthorne Associates, 119 F.3d 888, 892 n.2 (11th Cir. 1997).

The District Court emphasized that at this stage of the proceedings it is not Plaintiffs' burden to rule out every possible lawful explanation for the allegedly high fees charged in administering the Plan.[119] For example, said the District Court, if a fiduciary charges record keeping fees as a percentage of assets, it can be a breach of its fiduciary duty to fail to monitor the fees and rein in excessive compensation.[120] Once again, the District Court denied Defendants' Motion to Dismiss for Count II finding that the Insperity Defendants' arguments regarding the propriety and necessity of the fees are more appropriately considered at the summary judgment stage, after the benefit of discovery.

[iii]—Count III: Breach of Duties of Loyalty and Prudence—Unreasonable Investment Management Fees

Plaintiffs argued that the Insperity Defendants and Reliance engaged in self-dealing by offering higher-cost investments to the Plan's participants, because Reliance selected those investments in order to pay a larger amount of revenue-sharing to the Insperity Defendants. Plaintiffs argued that each Defendant is personally liable and also knowingly participated in the other Defendants' breaches.

[A]—Whether the lnsperity Defendants are Proper Parties Under Count III

The Insperity Defendants relied on the same arguments (regarding delegation and fiduciary status) to dismiss Count III as they did to dismiss Count I. For the reasons stated earlier, said the District Court, dismissal on this basis is not appropriate at this stage of the proceedings.

[B]—Whether It Can Be a Breach of a Fiduciary Duty to Fail to Pursue Investment Options With Lower Management Fees

Reliance argued that it has no duty to seek out the cheapest possible investment options and that a prudent fiduciary can make investment choices based on factors other than cost. Reliance further argued that attacks such as Plaintiff's challenge to the investment options chosen by Reliance have been rejected by courts, and that it is not a breach of a fiduciary duty to offer revenue sharing to defray the Plan's expenses. In response, Plaintiffs reference other cases that support such a challenge.

According to the District Court, the Eleventh Circuit has not addressed whether allegations of the imposition of excessive management fees as a part of investment selections are sufficient to state a claim for breach of fiduciary duty. The cases that have been decided in other Circuits can be divided into two categories, said the District Court. The first category is those decisions concluding that there was no violation of a fiduciary duty where investment

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[119] *Braden v. WalMart Stores, Inc.*, N. 114 *supra*, 588 F.3d at 596-597.

[120] Tussey v. ABB, Inc., 746 F.3d 327, 336 (8th Cir. 2014).

options that carried excessive fees were selected. In these decisions, said the District Court, there were no allegations of self-dealing or the use of revenue sharing to benefit corporate interests over those of the plan.[121]

In this regard, the Georgia District Court emphasized that these cases are consistent with the generally accepted principle that a fiduciary's actions are not to be judged "from the vantage point of hindsight" because the prudent person standard under ERISA "does not impose a duty to take any particular course of action if another approach seems preferable."[122]

However, said the District Court, in the second category of cases, claims for breach of fiduciary duty were permitted to proceed where the choice of investments with higher management expenses was linked to allegations of wrongdoing, including allegations that the selections were made to benefit the defendants over the plan participants.[123] The District Court found that the allegations raised by Plaintiffs are consistent with those found to state a claim by the Eighth Circuit. Further, said the District Court, the Seventh Circuit later clarified that it was not meant to give a "green light" to fiduciaries to make reckless or imprudent investment selections; rather, it "was tethered closely to the facts before the court" and "[p]laintiffs never alleged that any of the 26 investment alternatives that Deere made available to its 401(k) participants was unsound or reckless. . . ."[124]

Here, said the District Court, Plaintiffs have alleged that Defendants' selection of the funds with excessive management fees resulted in greater income for Defendants and given the specific allegations at issue here, the District Court found that Plaintiffs have stated a claim for Count III.

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[121] See:

Third Circuit: Renfro v. Unisys Corp., 671 F.3d 314, 327 (3d Cir. 2011) (affirming dismissal where the allegations were "limited to contentions that [the defendant] should have paid per-participant fees rather than fees based on a percentage of assets in the plan" and the plaintiff did not allege any sort of *quid pro quo* between fee payments and the nature of the investments).

Seventh Circuit: Loomis v. Exelon Corp., 658 F.3d 667, 671 (7th Cir. 2011) (affirming dismissal which involved allegations that the fiduciary should have chosen or negotiated fund with lower fees and the plaintiffs "[did] not contend that the funds Exelon selected had any control over it, or over them; there is no reason to think that Exelon chose these funds to enrich itself at participants' expense"); Hecker v. Deere & Co., 556 F.3d 575, 586 (7th Cir. 2009) (finding no breach of fiduciary duty where allegations were limited to selecting investments with excessive fees and there was no dispute that there was a sufficient mix of investments offered to plan participants).

[122] Chao v. Merino, 452 F.3d 174, 182 (2d Cir. 2008).

[123] *Tussey v. ABB, Inc.*, N. 120 *supra*, 746 F.3d at 336 (concluding that "the facts of this case, unlike [Renfro, Loomis, and Hecker], involve significant allegations of wrongdoing, including allegations that [the fiduciaries] used revenue sharing to benefit [the fiduciaries] at the Plan's expense"); *Braden*, N. 120.31r *supra*, 588 F.3d at 596 (concluding that the district court erred in dismissing the claim for breach of fiduciary duty where the complaint alleged that investment "options were chosen to benefit the trustee at the expense of the participants" and that revenue sharing payments were made to the trustee as a quid pro quo for including certain investments in the plan).

[124] Hecker v. Deere & Co., 569 F.3d 708, 711 (7th Cir. 2009).

[iv]—Count IV: Breach of Duties of Loyalty and Prudence—Use of a Microscopically Low-Yielding Money Market Fund Without Consideration or Use of a Stable Value Fund Until Adding a Stable Value Fund and Then Adding an Imprudent One

In Count IV of the Complaint, Plaintiffs argued that stable value funds are unique investments available only to retirement plans, especially large plans, which provide safety of principal and liquidity but far higher returns than money market mutual funds, which are used by retail investors with shorter investment horizons and more rapid trading activity. Plaintiffs argued that Reliance imprudently and disloyally failed to consider including a stable value fund in the Plan by weighing the benefits of a stable value fund compared to a money market fund, and declined to include a stable value option in the Plan without any prudent or loyal basis to do so, until recently in 2014. Even then, rather than considering the many high quality outside stable value fund providers, Reliance Trust added its own in-house proprietary stable value fund.

Although Plaintiffs appear to limit their factual contentions to Reliance, said the District Court, they argued that each of the Defendants breached their fiduciary duties of loyalty and prudence under Sections 1104(a)(l)(A) & (B), Employee Retirement Income Security Act and are personally liable to make good on any plan losses. Moreover, they argued that all Defendants are responsible for knowingly participating in the breach of the other Defendants. Significantly, said the District Court, unlike their allegations in Counts I and III, Plaintiffs do not allege any self-dealing or quid pro quo arrangement that resulted in the selection of the questionable funds, just that selecting one fund over another was improper.

The District Court found that the allegations contained in Count IV fail to state a claim upon which relief can be granted. According to the District Court, there is nothing in the ERISA statute that requires plan fiduciaries to include any particular mix of investment vehicles in their plan. "That is an issue," said the Court "that bears more resemblance to the basic structuring of a Plan than to its day-to-day management."[125]

The District Court pointed out that the same allegations contained in Count IV were held not to state a claim upon which relief can be granted in a recent California district court decision that it found persuasive.[126] In that decision, the plaintiffs alleged that the defendants breached their duties of loyalty and prudence by providing participants with a money market fund as a capital preservation option, instead of offering them a stable value fund. The California district court concluded that this did not state a claim since the complaint simply alleged that defendants violated the "duties of loyalty and prudence" under Sections 404(a)(1)(A) and (B) of ERISA by offering a money market fund instead of a stable value fund and did not plead any

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[125] *Hecker v. Deere & Co.*, N. 121 *supra*, 556 F.3d at 586.

[126] In White v. Chevron Corp., No. 16-CV-0793-PJH, 2016 U.S. Dist. LEXIS 115875 (N.D. Cal. Aug. 29, 2016).

facts sufficient to raise a plausible inference that defendants took any of the actions alleged for the purpose of benefitting themselves or a third-party entity at the expense of the Plan participants, or that they acted under any actual or perceived conflict of interest in administering the Plan.

The court finds that the complaint does not allege sufficient facts to show a breach of the duty of prudence in connection with defendants' selection of the money market fund as the "capital preservation option." Offering a money market fund as one of an array of mainstream investment options along the risk/reward spectrum more than satisfied the Plan fiduciaries' duty of prudence. . . .

According to the California District Court, a complaint that lacks allegations relating directly to the methods employed by the ERISA fiduciary may survive a motion to dismiss only if the court, based on circumstantial factual allegations, may reasonably infer from what is alleged that the process was flawed.

The District Court emphasized that in Count IV, as in the California district court decision, Plaintiffs challenge the mere selection of one fund over another, with no allegations (other than hindsight financial comparison) of why the selection was improper. Therefore, the District Court granted Insperity Defendants' and Reliance's Motions to Dismiss Count IV.

[v]—Count V: Holdings' Failure to Monitor Fiduciaries

In Count V, Plaintiffs argued that Holdings gave preferential treatment to a separate 401(k) plan for Insperity's corporate employees by offering Insperity's corporate employees lower-cost classes for a group of smaller assets than was offered for participants in the Plan. Plaintiffs also argued that Holdings failed to ensure that Reliance considered the better performing investment options contained in the corporate 401(k) plan assets than those offered for the Plan's participants. Finally, Plaintiffs argued that, if Holdings had taken action to monitor the performance of Reliance, it would have been alerted to the excessive administrative and management fees that were assessed against the Plan.

In their motion to dismiss, the Insperity Defendants asserted that Plaintiffs' failure to monitor claim against Holdings is dependent upon their allegations that Reliance breached its fiduciary duties, and that they fail to allege any specific facts as to how Holdings' monitoring activities were deficient. In response, Plaintiffs argued that Holdings is responsible for a breach of fiduciary duty because it included excessive cost investments in the Plan.

As a result of the foregoing, the District Court found that Plaintiffs have included sufficient specific allegations of deficient monitoring on behalf of Holdings to state a claim for relief. Although some of these same allegations with respect to the excessive compensation provided to Retirement Services and the management fees contained in the selection of funds for the Plan are duplicative of those contained in Counts II and III, said the District Court, Count V also includes allegations of preferential treatment with respect to the investments contained in Insperity's corporate plan. Therefore, the District Court denied the Insperity Defendants' Motion to Dismiss Count V.

[vi]—Counts VI: ERISA § 406(a)-Prohibited Transactions Between the Plan and Parties in Interest, and VII: ERISA § 406(b)-Prohibited Transactions Between the Plan and Fiduciaries

Count VI asserted that Defendants violated ERISA § 406(a), which prohibits transactions between the Plan and a "party in interest," by causing the Plan to use Reliance's proprietary investments in order to benefit Reliance through excessive management fees and to pay Retirement Services revenue sharing payments from those proprietary investments. Count VII asserted that Defendants violated ERISA § 1106(b), which prohibits certain transactions between the Plan and its fiduciaries.

The Insperity Defendants argued that there were no transactions between the Plan and Holdings, and reasserted their prior arguments that neither Insperity nor Retirement Services are fiduciaries of the Plan. Moreover, the Insperity Defendants argued that any claim in Count VI against Retirement Services must fail because of the exemptions contained in ERISA § 408(b)(2), which provides that the prohibition on transactions between the Plan and real parties in interest does not apply to "making reasonable arrangements with a party in interest for . . . services necessary for the establishment and operation of the plan, if no more than reasonable compensation is paid therefor," and ERISA § 408 (c)(2), which provides that a fiduciary may receive reasonable compensation for services rendered. Reliance reasserted its argument made in opposition to Count II that it did not retain Retirement Services as the Plan's record keeper, and relied on the exemption contained in ERISA § 408(b)(8), which specifically allows plan investment in a fiduciary trust company's proprietary collective trusts.

As discussed above with respect to Counts II and III, said the District Court, it will not dismiss Plaintiffs' claims based upon arguments suggesting a lack of fiduciary status or seeking a definitive determination as to which entity was a party to the transactions at issue, as those arguments are more appropriate for consideration on motions for summary judgment.

Consequently, the District Court denied Insperity Defendants and Reliance's Motions to Dismiss Counts VI and VII.

[d]—Class Certification

A Georgia District Court has agreed with the class definition acceptable to both Insperity and the Plan participants and certified the case as a class action.[127]

[13]—Principal Life Not Liable for 401(k) Fees

The U.S. Court of Appeals for the Eighth Circuit has rejected an ERISA plan's attempt to hold Principal Life Insurance Co. liable for allegedly excessive plan fees.[128]

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[127] Pledger v. Reliance Trust Co., No. 1:15-cv-04444-MHC (N.D. Ga. Nov. 7, 2017) (order approving stipulation to certify class).

[128] McCaffree Financial Corp. v. Principal Life Insurance Co., No. 15-1007, 2016 U.S. App. LEXIS 214 (8th Cir. Jan. 8, 2016).

The Eighth Circuit's decision in favor of Principal follows the recent judicial trend of dismissing excessive fee claims against 401(k) service providers after finding that the providers don't qualify as fiduciaries under ERISA.

[a]—Background

McCaffree Financial Corp. (McCaffree) sponsors for its employees a retirement plan governed by ERISA. McCaffree brought a class action lawsuit on behalf of participating employees against Principal Financial Group (Principal), the company with whom McCaffree had contracted to provide the plan's investment options. McCaffree alleged that Principal had charged McCaffree's employees excessive fees in breach of a fiduciary duty Principal owed to plan participants under ERISA. An Iowa federal district court granted Principal's motion to dismiss for failure to state a claim. The Eighth Circuit affirmed.

McCaffree and Principal entered into a contract on September 1, 2009. Pursuant to this contract, Principal agreed to offer investment options and associated services to McCaffree employees participating in the McCaffree retirement plan. The contract provided plan participants with a number of investment options. First, participants could maintain retirement contributions in a "general investment account" offering guaranteed interest rates. Alternatively, participants could allocate those contributions among various "separate accounts," which Principal had created to serve as vehicles for retirement-plan customers to invest in Principal mutual funds. Principal reserved the right to limit which separate accounts (and therefore which mutual funds) it would make available to plan participants. However, McCaffree maintained the ability to limit, via written notice to Principal, the accounts in which its employees could invest. Pursuant to these provisions, the full list of sixty-three accounts included in the plan contract was narrowed down to twenty-nine separate accounts (and associated Principal mutual funds) eventually made available to plan participants.

The contract provided that, in return for Principal providing access to these separate accounts, participants would pay to Principal both management fees and operating expenses. Principal assessed the management fees as a percentage of the assets invested in a separate account, and this percentage varied for each account according to its associated mutual fund. In addition, Principal could unilaterally adjust the management fee for any account, subject to a cap (generally 3%) specified in the contract. The contract required Principal to provide participants at least thirty days' written notice of any such change. The operating expenses provision did not place a limit on the amount that Principal could charge for such expenses, but it restricted Principal to passing through only those expenses necessary to maintain the separate account, such as various taxes and fees Principal paid to third parties. Principal assessed both the management fee and operating expenses in addition to any fees charged by the mutual fund assigned to each separate account.

[b]—Class Action Complaint

Five years after entering into this contract, McCaffree filed a class action lawsuit on behalf of all employees participating in the McCaffree plan. The complaint alleged that Principal charged participants who invested in the separate accounts "grossly excessive investment management and other fees"

in violation of Principal's fiduciary duties of loyalty and prudence under ERISA sections 404(a)(1)(A) and (B).[129] McCaffree claimed that the separate accounts served no purpose other than to invest in shares of various Principal mutual funds and therefore involved minimal additional expense for Principal. Because each Principal mutual fund charged its own layer of fees, McCaffree alleged, the additional separate account fees were unnecessary and excessive. McCaffree's suit sought to recover for plan participants these separate account fees as well as the diminution of investment returns that had occurred as a result of the fees.

According to the complaint, Principal imposes these overcharges by structuring its retirement investment products as "Separate Accounts," even though these Separate Accounts merely invest in Principal mutual funds. By structuring its investment products in this way, said the complaint, Principal reaps substantial fees on top of the fees charged by its own mutual funds.

McCaffree brought this action to recover these excessive fees and the additional investment gains that would have accrued in the absence of such fees, on behalf of both: (1) the participants and beneficiaries of the McCaffree Plan and (2) the participants and beneficiaries of all defined-contribution retirement plans subject to ERISA that invested in Separate Accounts offered by Principal and also paid excessive fees to Principal during the relevant time period.

According to the complaint, under the Group Annuity Contract, Principal offers a menu of investment options for participants in the McCaffree Plan and provides other services in connection with the McCaffree Plan in exchange for various fees and charges. Also, the Group Annuity Contract contains a Separate Investment Account Rider that allows participants in the McCaffree Plan to invest in Principal's Separate Accounts, as described below.

Also, according to the complaint, under the Group Annuity Contract, Principal admits that it is an "Investment Manager" as defined by ERISA with respect to the McCaffree Plan assets managed under the contract and also admits that it is therefore an ERISA fiduciary with respect to the McCaffree Plan and those assets.

Under the Separate Investment Account Rider, Principal reserves the right to limit the number of its Separate Accounts available to the contracting plan and/or each beneficiary of the contracting plan. Principal also reserves the right to allow participation in Separate Accounts in addition to those listed in the Separate Investment Account Rider.

Therefore, said the complaint, Principal selects the Separate Accounts that are made available to each contracting plan and the beneficiaries of each contracting plan. In connection with such selection, Principal states that it understands the fiduciary responsibilities plan sponsors face in developing and monitoring an investment lineup and therefore undertakes a "rigorous due diligence process" to help meet the diverse needs of retirement plan participants.[130]

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[129] McCaffree Financial Corp. v. Principal Life Insurance Co., No. 4:14-cv-00102-SMR-HCA, complaint filed (S.D. Iowa March 18, 2014).

[130] Principal Financial Group, "Investment Choices for Employee Retirement Plans," available at www.principal.com/retirement/biz/investmentoptions.htm (last visited March 25, 2020).

According to the complaint, this vaunted "rigorous due diligence process" is completely indifferent to the fees charged by the investment options Principal selects for its contracted plans. Remarkably, said the complaint, Principal attempts to disclaim any responsibility for the fees it charges in connection with these investment options. In a footnote to its description of its investment options, Principal states that "Principal . . . does not guarantee that any investment option will . . . include reasonable fees. . . ."[131]

Under the Separate Investment Account Rider, said the complaint, Principal maintains the power to unilaterally set the Management Fee for the Separate Accounts subject to a maximum fee of three percent of the value of the assets in the Separate Accounts and to change the Management Fee at its discretion with thirty days written notice.

Also, according to the complaint, in addition to the unilaterally set Management Fee, Principal also charges Operating Expenses against the assets of the Separate Accounts, expenses such as "custodial fees, transfer taxes, brokerage fees, processing fees, and other taxes and fees associated with the operation of a Separate Account." These fees are also set unilaterally as there is no formula or other objective measure for how such Operating Expenses are calculated.

[i]—Principal Separate Accounts

In theory, said the complaint, separate accounts offer several advantages to pooled investment funds such as mutual funds. Among other things, separate accounts may allow the holder to employ a bespoke investment strategy that differs from the strategy employed by existing mutual funds. Separate accounts also offer the benefit of portability: the same account can be managed by different investment managers so the holder of the separate account can change investment managers with little difficulty, as the assets are held by a third-party custodian. However, said the complaint, these advantages are not applicable to the Principal Separate Accounts, which are not customized in any way and merely invest in Principal mutual funds and because the smaller employers Principal targets do not need or want the level of customization or portability that in theory can be accomplished through separate accounts.

According to the complaint, each and every one of these Principal Separate Accounts corresponds with a Principal mutual fund that is otherwise available to retail and institutional investors and each and every one of these Principal Separate Accounts invests solely in the shares of the corresponding Principal mutual fund.

Accordingly, said the complaint, there is little or no benefit to participants in defined-contribution retirement plans from "wrapping" a Principal mutual fund with a Principal Separate Account. And any such benefit is far outweighed by the additional fees that this structure allows Principal to charge.

Other investment managers for defined-contribution retirement plans routinely offer to participants the option to invest directly in mutual funds, said

[131] *Id.*, at n.3.

the complaint. However, such direct investments are typically in a share class with relatively low fees comparable to the institutional share class fees charged by Principal.

[ii]—Excessive Fees Associated with the Separate Accounts

The complaint emphasized that Principal unilaterally sets its own Management Fee and Operating Expenses in connection with its Separate Accounts and Principal reserves the right to charge a Management Fee of up to three percent of the value of assets in the Separate Account (except for the U.S. Property Separate Account, which has a maximum management fee of four percent) and there is no stated limit on the Operating Expenses.

According to the complaint, the fees charged by Principal for the Separate Accounts are layered on top of the fees charged by the Principal mutual funds in which the Separate Accounts exclusively invest and this extra layer of fees significantly reduces the net return to participants.

In effect, said the complaint, Principal charges participants an extra fee of between 1.21% (121 basis points) and 1.77% (177 basis points) simply for wrapping its Separate Accounts around its own mutual funds.

According to the complaint, Principal adds an additional layer of fees on top of the fees its affiliates already obtain for managing the mutual funds and no value-added services provided by Principal in connection with its Separate Accounts justify these exorbitant spreads.

To put it another way, said the complaint, the managers and sub-advisors of the Principal mutual funds in which the Principal Separate Accounts exclusively invest provide all the day-to-day investment management services for the underlying mutual funds. They are already well-compensated for these services by the management fees (ranging from 53 basis points to 125 basis points) and according to the complaint, wrapping the Separate Accounts around these mutual funds requires no additional investment management and only minimal additional operating expense.

Also, in addition to the Management Fee and Operating Expenses, said the complaint, Principal charges Administration Charges that may (depending on the plan sponsors' election) be charged against the participants' accounts and thus reduce their net return. Such charges include: (1) a charge of between $30 and $35 annually for each participant that invests in a Separate Account; and (2) a one-time $600 contract charge plus annual charges of between $1400 and $1800.

[iii]—Allegations

[A]—Violation of ERISA § 404(a)(1)(A) Breach of the Duty of Loyalty

ERISA Section 404(a)(1)(A) provides that a "fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administrating the plan."

According to the complaint, Principal is an ERISA fiduciary with respect to the ERISA plans for which it offers Separate Accounts in at least three respects.

First, as Principal admits in the Group Annuity Contract, it is an "Investment Manager" as defined by ERISA with respect to plan assets managed under the contract and is thus an ERISA fiduciary with respect to the plans and such assets pursuant to ERISA § 3(21)(A)(ii).

Second, Principal "exercises . . . discretionary authority or discretionary control respecting the management" of plans for which it offers Separate Accounts and "exercises . . . authority or control respecting management or disposition of its assets" pursuant to ERISA § 3(21)(A)(i). Principal has the discretion to choose which Separate Accounts are offered to each plan and the participants in each plan and has the further discretion to add additional Separate Accounts. Indeed, said the complaint, Principal represents that it exercises "due diligence" in choosing such investment options as a "direct response" to the "challenge" faced by plan sponsors of "developing and monitoring an investment lineup appropriate to help meet the diverse needs of retirement plan participants."[132] Furthermore, Principal has discretionary authority or control of both the management and assets of the plans in that it unilaterally sets the Management Fee and Operating Expenses for its Separate Account products and such charges relate to the management of the plans and reduce the assets of the plans.

Third, Principal "has . . . discretionary authority or discretionary responsibility in the administration" of plans for which it offers Separate Accounts pursuant to ERISA § 3(21)(A)(iii) because it has authority to decide what Separate Account products are offered and how much will be charged to participants for such products.

By charging substantial fees for its Separate Accounts on top of the fees already charged by its mutual funds, said the complaint, while providing little or no additional value for such fees, Principal acted in its own interests and the interests of its affiliates rather than in the interests of participants and beneficiaries of the plans for which it offers Separate Accounts. While a fiduciary may also consider the need to defray the "reasonable expenses" of the plan, said the complaint, the fees charged by Principal in connection with its Separate Accounts were manifestly unreasonable and far in excess of what was required to defray actual expenses incurred by Principal for administering the Separate Accounts.

According to the complaint, a loyal fiduciary in Principal's position would offer only those investment products with the lowest fees and offer products with higher fees only when there were clear benefits to plan participants sufficient to justify the higher fees. There are no such benefits here.

Thus, according to the complaint, Principal breached its fiduciary duty of loyalty contrary to Section 404(a)(1)(A) of ERISA.

As a direct and proximate cause of Principal's breach of the duty of loyalty, said the complaint, Plaintiff and the members of the Class were injured by: (1) the amount of the excessive fees; and (2) the diminution in their investment returns over time caused by such excessive fees.

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[132] *Principal Financial Group*, N. 130 *supra*.

Pursuant to ERISA § 409(a) and ERISA § 502(a)(2), Plaintiff and the Class are entitled to recover from Principal "any losses to the plan[s] resulting" from the breach and to require Principal to "restore to such plan[s] any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary."

Also, pursuant to ERISA § 409(a) and ERISA § 502(a)(3), Plaintiff and the Class are also entitled to enjoin any further breach by Principal and to obtain other appropriate equitable relief.

[B]—Violation of ERISA § 404(a)(1)(B)
Breach of the Duty of Prudence

Section 404(a)(l)(B) of ERISA provides that a fiduciary shall act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

The complaint alleged that Principal is an ERISA fiduciary with respect to the ERISA plans for which it offers Separate Accounts pursuant to ERISA § 3(2l)(A)(i),(ii), & (iii).

By charging substantial fees for its Separate Accounts on top of the fees already charged by its mutual funds, while providing little or no additional value for such fees, Principal did not act with the "care, skill, prudence, and diligence" that a prudent man would have exercised in selecting investment options for a retirement plan.

A prudent fiduciary in Principal's position, said the complaint, would offer only those investment products with the lowest fees and offer products with higher fees only when there were clear benefits to plan participants sufficient to justify the higher fees.

Thus, Principal breached its duty of prudence contrary to Section 404(a)(1)(B) of ERISA, said the complaint.

As a direct and proximate cause of Principal's breach of the fiduciary duty of prudence, Plaintiff and the members of the Class were injured by: (1) the amount of the excessive fees; and (2) the diminution in their investment returns over time caused by such excessive fees.

Pursuant to ERISA § 409(a) and ERISA § 502(a)(2), Plaintiff and the Class are entitled to recover from Principal "any losses to the plan[s] resulting" from the breach and to require Principal to "restore to such plan[s] any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary."

In addition, pursuant to ERISA § 409(a) and ERISA § 502(a)(3), Plaintiff and the Class are also entitled to enjoin any further breach by Principal and to obtain other appropriate equitable relief.

[C]—Violation of ERISA § 406(b)(l)
Prohibited Transactions

Section 406(b)(l) of ERISA prohibits a fiduciary from "dealing with the assets of the plan in his own interest or for his own account."

According to the complaint, for the reasons set forth above, Principal is an ERISA fiduciary with respect to the ERISA plans for which it offers Separate Accounts pursuant to ERISA § 3(21)(A)(i),(ii), & (iii).

By charging substantial fees for its Separate Accounts on top of the fees already charged by its mutual funds, while providing little or no additional value for such fees, Principal dealt with plan assets in its own interest and for its own account because such fees were paid to Principal and its affiliates from the assets of the plans.

Also, the complaint emphasized that the ERISA Section 408(c)(2) prohibited transaction exemption only applies to the fiduciary "receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan." The compensation obtained by Principal in connection with its Separate Accounts was far from reasonable and does not reflect reimbursement for actual expenses because the Separate Account fees obtained by Principal on top of the mutual fund fees do not reflect sufficient additional value or expense to justify the size of such fees. Furthermore, this exemption does not apply where the fiduciary, as Principal did here, sets its own compensation.

Thus, said the complaint, Principal engaged in prohibited transactions contrary to Section 406(b)(l) of ERISA.

As a direct and proximate cause of Principal's engaging in prohibited transactions, Plaintiff and the members of the Class were injured by: (1) the amount of the excessive fees; and (2) the diminution in their investment returns over time caused by such excessive fees.

Pursuant to ERISA § 409(a) and ERISA § 502(a)(2), Plaintiff and the Class are entitled to recover from Principal "any losses to the plans resulting" from the prohibited transactions and to require Principal to "restore to such plans any profits of such fiduciary which have been made through use of assets of the plans by the fiduciary."

In addition, pursuant to ERISA § 409(a) and ERISA § 502(a)(3), Plaintiff and the Class are also entitled to enjoin any further prohibited transactions by Principal and to obtain other appropriate equitable relief.

[c]—District Court Decision[133]

Principal moved to dismiss the complaint making two arguments in support of its Motion to Dismiss. First, Principal argued it cannot be held liable for assessing fees that Plaintiff itself authorized. Second, Principal argued Plaintiff has failed to plead Principal is an ERISA fiduciary in any relevant respect.

[i]—Assessment of Fees Plaintiff Allegedly Authorized

Principal argued that a service provider neither acts as a fiduciary nor breaches any duty when it charges fees that are approved by a plan fiduciary. Principal argued that it merely charged fees authorized by Plaintiff

[133] McCaffree Financial Corp. v. Principal Life Insurance Co., Case No. 4:14-cv-00102-SMR-HCA, filed (D.C. Iowa Dec. 10, 2014).

and therefore, Principal is not a fiduciary. That the only way Plaintiff can state a claim under ERISA is by pleading that Principal controlled Plaintiff's decision to engage Principal and enter into a contract that authorized the fees. Because Plaintiff's Complaint does not allege Principal had any such control, Principal insists, the Complaint should be dismissed.

Plaintiff responded by stating that negotiations between plan sponsors and potential ERISA fiduciaries are not truly at arm's length. Also, even if the Group Annuity Contract was negotiated at arm's length, Plaintiff argued subsequent performance under the contract is subject to ERISA's fiduciary duties. Moreover, Plaintiff argued that it did not agree to these fees anyway. That it is the excessive total fees and charges that Principal actually imposed month after month once the contract was executed that it challenged, not the theoretical maximum management fee purportedly negotiated in the contract. Finally, Plaintiff argued that Principal cannot by contract excuse itself from fiduciary liability.

[A]—Guidance From Other Circuits

According to the district court, neither parties unearthed any controlling Eighth Circuit authority. To establish that a service provider does not act as fiduciary when it charges fees approved by a plan fiduciary, Principal relied on recent cases from other circuits.

Principal cited a Seventh Circuit case,[134] in which the plaintiffs alleged their employer, Deere & Company (Deere), and Fidelity Management Trust Company (Fidelity Trust) and Fidelity Management & Research Company (Fidelity Research), service providers for the two Deere 40l (k) plans, had breached their fiduciary duties. The two 401(k) plan options available to participants included twenty-three different Fidelity mutual funds, two investment funds managed by Fidelity Trust, and access to 2,500 additional funds. Fidelity Research advised the Fidelity mutual funds. Plan participants decided where to invest their 40l(k) funds, subject only to the limitation that the investment vehicle had to be one offered by the Plan. Deere and Fidelity Trust agreed, however, to limit the selections available to Deere employees to Fidelity funds, with some minor exceptions. Each fund charged a fee, which was a percentage of the assets the participant invested. Plaintiffs alleged Fidelity Research shared revenue it earned from mutual fund fees with Fidelity Trust. In turn, Fidelity Trust compensated itself through the shared revenue, instead of charging Deere for Fidelity Trust's services. The plaintiffs filed suit, alleging, among other things, that Fidelity Research's revenue-sharing program caused them to pay unreasonable and excessive fees and expenses. The Seventh Circuit addressed the threshold question of whether Fidelity Trust and Fidelity Research were fiduciaries under ERISA. The plaintiffs argued Fidelity Trust exercised the necessary control to confer upon it fiduciary status by limiting Deere's selection of funds through the Trust Agreement to those managed by Fidelity Research. However, the Seventh Circuit said that this did not matter since the plaintiffs cited no authority holding that limiting funds to a sister company creates discretionary control

[134] Hecker v. Deere & Co., 556 F.3d 575 (7th Cir. 2009).

for fiduciary status. To the contrary said the Seventh Circuit, there are cases holding that a service provider does not act as a fiduciary with respect to the terms in the service agreement if it does not control the named fiduciary's negotiation and approval of those terms."[135]

Principal also cited a Third Circuit decision.[136] There, the plaintiffs brought suit against their employer, Unisys Corp., which offered its employees a 401(k) plan, and Fidelity, the plan's directed trustee. The plan investment options included mutual funds, some of which were managed by Fidelity. Each mutual fund incurred investment management fees expressed as an expense ratio, which is a percentage of each contributor's assets invested in a particular fund. Expense ratios on the mutual funds, which paid for investment management and compliance costs, ranged from 0.1% to 1.21%. All fees were disclosed in materials distributed to the participants.

The plaintiffs alleged the administrative fees and mutual fund fees were excessive in light of the services rendered as compared to other, less expensive, investment options not included in the plan. According to the plaintiffs, Unisys could have chosen investments with lower fees than mutual funds or used leverage to bargain for lower fee rates.

The parties disputed whether Fidelity was a fiduciary with respect to the challenged conduct of selecting and retaining investment options in the Unisys plan. Echoing the Seventh Circuit, the Third Circuit first observed "a party does not act as a fiduciary with respect to the terms in the service agreement if it does not control the named fiduciary's negotiation and approval of those terms."[137] The Third Circuit next quoted a decision of the United States Court of Appeals for the Second Circuit:

> "When a person who has no relationship to an ERISA plan is negotiating a contract with that plan, he has no authority over or responsibility to the plan and presumably is unable to exercise any control over the trustees' decision whether or not, and on what terms, to enter into an agreement with him. Such a person is not an ERISA fiduciary with respect to the terms of the agreement for his compensation."[138]

Under these authorities, the Third Circuit found Fidelity owed no fiduciary duty with respect to its fees because Fidelity was not yet a plan fiduciary at the time it negotiated the fee compensation with Unisys.

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[135] See: Chicago District Council of Carpenters Welfare Fund v. Caremark, 474 F.3d 463 (7th Cir. 2007); Schulist v. Blue Cross of Iowa, 717 F.2d 1127 (7th 1983).

[136] Renfro v. Unisys Corp., 671 F.3d 314 (3d Cir. 2011).

[137] *Id.*, at 324 (quoting *Hecker v. Deere & Co.*, N. 134 *supra*, 556 F.3d at 583). See also, Santomenno *ex rel.* John Hancock Trust v. John Hancock Life Ins. Co. (U.S.A.), 768 F.3d 284, 293 (3d Cir. 2014) ("[A] service provider owes no fiduciary duty to a plan with respect to the terms of its service agreement if the plan trustee exercised final authority in deciding whether to accept or reject those terms.").

[138] *Renfro v. Unisys Corp.*, N. 136 *supra*, 671 F.3d at 324 (quoting F. H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1259 (2d Cir. 1987)).

[B]—Disclosure Of Fees In This Case

Principal argued that under these authorities it is not a fiduciary with respect to the terms in its agreement with Plaintiff. As both the Seventh and the Third Circuits have held, a service provider is not a fiduciary at the time a plan agreement is negotiated and entered into.[139] The Third Circuit has explained this reasoning makes sense because when a plan is negotiated, the plan sponsor, not the service provider, decides whether to accept the service provider's terms.[140] On the other hand, both courts recognize a service provider could be a fiduciary by controlling the named fiduciary's negotiation and approval of a service agreement's terms.[141] Here, however, as Principal emphasized, Plaintiff does not allege that Principal controlled its decision to accept the terms of any agreement. Thus, Principal argued, it cannot be a fiduciary with respect to terms in the agreement.

However, the Iowa District Court pointed out that the case is in one salient way distinguishable from the circuit court cases Principal relies upon. In these circuit court cases, the fees or costs to plan participants were disclosed in plan documents.[142] However, the District Court emphasized that there is dispute regarding the clarity of disclosure in this case.

Plaintiff contends it was unaware the total fees charged on each separate account would be different than the fees and expenses disclosed in the Separate Investment Account Rider and that the totality of the fees was never explained.

However, the District Court held that Plaintiff's argument does not justify departing from the Third and Seventh Circuits' holdings since the Separate Investment Account Rider discloses three fees or expenses: a Management Fee, an Operating Expense, and an underlying mutual fund fee.

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139 See:

Third Circuit: Santomenno ex rel. John Hancock Trust v. John Hancock Life Insurance Co. (U.S.A.), N. 137 *supra*, 768 F.3d at 295 ("Nothing prevented the trustees from rejecting John Hancock's product and selecting another service provider; the choice was theirs.").

Seventh Circuit: Leimkuehler v. American Life Insurance Co., 713 F.3d 905, 911-912 (7th Cir. 2013) (applying *Hecker* and concluding a service provider was not a fiduciary when deciding which mutual funds to include in a plan); *Renfro v. Unisys Corp.*, N. 136 *supra*, 671 F.3d at 324 (holding a service provider "was not yet a plan fiduciary at the time it negotiated the fee compensation" under an agreement); *Hecker v. Deere & Co.*, N. 134 *supra*, 556 F.3d at 583 (holding service provider was not a fiduciary "with respect to the terms in the service agreement").

140 Santomenno *ex rel.* John Hancock Trust v. John Hancock Life Insurance Co. (U.S.A.), 768 F.3d 284, 293 (3d Cir. 2014).

141 See:

Third Circuit: Renfro v. Unisys Corp., 671 F.3d 314, 324 (3d Cir. 2011).

Seventh Circuit: Hecker v. Deere & Co., 556 F.3d 575, 583 (7th Cir. 2009).

142 See:

Third Circuit: Renfro v. Unisys Corp., N. 141 *supra*, 671 F.3d at 319 ("All fees were disclosed in materials distributed to the participants."); Chicago District Council of Carpenters Welfare Fund v. Caremark, 474 F.3d 463 at 467-468 (setting forth the language of the contracts at issue).

Seventh Circuit: Leimkuehler v. American Life Insurance Co., N. 139 *supra*, 713 F.3d at 910 ("[A]ll parties agree that AUL did disclose each fund's expense ratio.").

The District Court pointed out that it specifically discloses the Management Fee on each separate account at the time the agreement between the parties was entered into, subject to a 3% maximum. Also, the Separate Investment Account Rider discloses that the listed Management Fee does not include the fee of any underlying mutual fund and that the Separate Investment Account Rider discloses that each separate account could be subject to a Management Fee of up to 3% plus another fee on the underlying mutual fund. And the Separate Investment Account Rider discloses that, on top of the other two fees, each separate account is assessed an Operating Expense charge which must be paid in order to operate a Separate Account. Thus, said the District Court, all three fees or expenses alleged to constitute the excessive fees were disclosed in the Separate Investment Account Rider and that the sum of these three fees or expenses may result in costs, even significant costs, to Plan participants is fully disclosed in the Separate Investment Account Rider. Moreover, the District Court noted that there is no evidence, nor any allegation, that Principal ever charged Plaintiff more than these negotiated amounts.

In addition, the District Court emphasized that Plaintiff cites no authority supporting the proposition that to avoid being deemed a fiduciary, a service provider must go beyond disclosing its fees and explain with precision how those fees are calculated. Neither the Seventh nor the Third Circuit cases cited by Principal support this proposition, said the District Court, which concluded that the Separate Investment Account Rider discloses sufficient fee and expense information to enable Plaintiff to determine the cost of each separate account. Principal's disclosure of the fees and expenses left Plaintiff, in the words of the Seventh Circuit, "free to seek a better deal with a different 401 (k) service provider."[143]

[C]—Arm's Length Bargaining

Plaintiff argued negotiations between plan sponsors and service providers are not truly at arm's length.[144] In support, Plaintiff relied on a case in which the court rejected a service provider's assertion it had no control over fees because the fees were the product of arm's length negotiations.[145] There, the court found traditional arm's length bargaining was characterized by adversarial parties pursuing independent interests. However, by contrast,

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[143] *Leimkuehler v. American Life Insurance Co.*, N. 139 *supra*, 713 F.3d at 912. See also, *Santomenno ex rel. John Hancock Trust v. John Hancock Life Insurance Co. (U.S.A.)*, N. 140 *supra*, 768 F.3d at 295 ("Nothing prevented the trustees from rejecting John Hancock's product and selecting another service provider; the choice was theirs."); *Chicago District Council of Carpenters Welfare Fund v. Caremark*, N. 142 *supra*, 474 F.3d at 473 (finding that "this scheme was the very deal for which Carpenters bargained at arms' length," and so "Caremark owed no fiduciary duty in this regard").

[144] See *Chicago District Council of Carpenters Welfare Fund v. Caremark*, N. 142 *supra*, 474 F.3d at 473 (holding service provider owed no fiduciary duty because arm's length bargaining produced the governing contract).

[145] Santomenno v. Transamerica Life Ins. Co., No. CV. 12-02782 DDP (MANx), 2013 U.S. Dist. LEXIS 22354 at *19-20 (C.D. Cal. Feb. 19, 2013).

in the ERISA context, parties collaborate to manage employees' retirement plans. The court thus concluded the ERISA-governed contract at issue had not been negotiated at arm's length, and so the service provider could "not shield itself behind the contract from an alleged breach of duty."[146]

The District Court found this argument unpersuasive. First, Plaintiff does not allege the Group Annuity Contract was not negotiated at arm's length. Even putting that aside, the central premise of the cases relied on by Principal was not that the contract was produced by arm's length bargaining, but rather that the plan sponsor was able, because the contract terms had been disclosed, to seek a contract with another service provider.

Regardless whether the parties engage in arm's length bargaining, said the District Court, a service provider, according to these cases, ordinarily has no control over a plan sponsor's decision to enter into a contract.[147] The District Court emphasized that it follows from a service provider's lack of control that a plan sponsor remains free to seek out another, perhaps less expensive, provider. In these circumstances, these courts hold a service provider is not a fiduciary.[148] Accordingly, the District Court concluded that it is confident these courts would similarly hold Principal is not a fiduciary and found reliance on these authorities is appropriate. Therefore, Principal is not a fiduciary with respect to the fee and expense terms in the Group Annuity Contract.

[D]—Subsequent Performance

Even assuming the Group Annuity Contract was the product of arm's length bargaining, Plaintiff argued that subsequent performance under that contract is subject to ERISA's fiduciary duties. In support, Plaintiff cited the plaintiffs alleged an insurance policy gave the defendants a unilateral right to reduce the rate of return on a policy to a certain minimum and increase the premium rates to a certain maximum.[149] The plaintiffs also alleged the defendants had exercised their authority to do so. However, the defendants, relying on an earlier Seventh Circuit case argued they were not fiduciaries.[150]

In that case, the Seventh Circuit observed, it had held an insurance provider was not a fiduciary because it exercised no discretionary authority in setting rates. Instead, the insurer "had entered into an 'arm's length bargain presumably governed by competition in the marketplace' that specified the premium rate."[151] However, the court rejected this argument they were not fiduciaries. In so holding, the Seventh Circuit rejected the defendants' argument that no

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146 *Id.*, at *22.

147 See, e.g., Renfro v. Unisys Corp., 671 F.3d 314, 324 (3d Cir. 2011) (observing a person with no relationship to an ERISA plan has no authority over or even responsibility to the plan and thus cannot exercise control over the decision whether to enter into an agreement).

148 See *id.* (concluding service provider had not become a fiduciary at the time it negotiated contractual fee compensation).

149 Ed Miniat, Inc. v. Globe Life Insurance Group, Inc., 805 F.2d 732 (7th Cir. 1986).

150 *Id.*, at 737.

151 *Id.*, (quoting Schulist v. Blue Cross Iowa, 717 F.2d 1127, 1132 (7th Cir. 1983)).

action by an insurer can subject it to fiduciary liability so long as discretion to take the action was granted to it by contract and the contract was entered into at arm's length. To the contrary, if a specific term (not a grant of power to change terms) is bargained for at arm's length, adherence to that term is not a breach of fiduciary duty. No discretion is exercised when an insurer merely adheres to a specific contract term. When a contract, however, grants an insurer discretionary authority, even though the contract itself is the product of an arm's length bargain, the insurer may be a fiduciary.[152]

The District Court pointed out that at least two circuit courts have since adopted this reasoning. The Sixth Circuit has held a service provider adhering to a contract term is not a fiduciary but it may be a fiduciary if a contract authorizes it to exercise discretion.[153] Second Circuit also has held a service provider may be a fiduciary if a contract authorizes it to exercise discretion with respect to a contractual right.[154] On the other hand, the Second Circuit held, a service provider is not a fiduciary if it is merely adhering to the contract's terms.[155] Applying this rule, the court in Harris Trust held a service provider was not a fiduciary with respect to an agreement's non-discretionary terms on compensation.[156]

Finally, the Iowa District Court emphasized that controlling Eight Circuit law prevents it from concluding Principal is a fiduciary. According to the District Court, the Eighth Circuit holds that because ERISA § 3(21)(A)(i) "imposes a fiduciary duty on those not named as a fiduciary, its reach is limited to circumstances where the individual actually exercises some authority."[157] Thus, to be a fiduciary under Eighth Circuit law, said the District Court, Principal must have exercised some authority.

In this case, said the District Court, Principal exercised no contractually granted discretion. Defendant had the contractual discretion to raise Management Fees up to 3%, but Plaintiff does not allege Principal exercised its discretion to do so. Plaintiff likewise does not allege that, subsequent to entering the contract, Principal exercised its contractual discretion to limit which separate accounts would be available to Plan participants. Accordingly, the District Court found no support for the conclusion that Principal exercised any contractual discretion and concluded that Principal is not a fiduciary.[158]

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[152] *Ed Miniat, Inc. v. Globe Life Insurance Group, Inc.*, N. 149 *supra*, 805 F.2d at 737.

[153] See Seaway Food Town, Inc. v. Medical Mutual of Ohio, 347 F.3d 610, 619 (6th Cir. 2003).

[154] See Harris Trust & Savings Bank v. John Hancock Mutual Life Insurance Co., 302 F.3d 18, 29 (2d Cir. 2002) (embracing Ed Miniat's reasoning "that where parties negotiate the terms of a contract . . ., the adherence to those terms . . . cannot constitute a breach of fiduciary duties, barring a grant of discretionary authority to the fiduciary"); *accord* F.H. Krear v. Nineteen Named Trustees, 810 F.2d 1250, 1259 (2d Cir. 2987).

[155] See *Harris Trust & Savings Bank v. John Hancock Mutual Life Insurance Co.*, N. 154 *supra*, 302 F.3d at 29 (concluding a service provider lacked discretionary contractual authority to permit withdrawal of plan funds).

[156] *Id.*, at 31.

[157] Trustees of the Graphic Communications International Union v. Bjorkedal, 516 F.3d 719, 733 (8th Cir. 2008).

[158] *Id.*

[E]—Contractual Excusal

Applying available authorities, the Iowa District Court said that it has "performed a careful, holistic evaluation of the Complaint's allegations" and concluded that Principal was not acting as a fiduciary at the time the fees and expenses at issue were negotiated or at the time the agreement was entered into. Thus, said the Court, Principal is not a fiduciary under ERISA § 3(21)(A)(i). Consequently, the District Court granted Principal's Motion to Dismiss.

McCaffree appealed the Iowa District Court decision to the Eighth Circuit Court of Appeals.

[d]—DOL Amicus Brief[159]

The DOL in an amicus brief addressed the question as to whether an insurance company providing investment services to a pension plan acted as a fiduciary under ERISA insofar as it retained and exercised final authority to choose the investment options available to the participants in that plan and retained and exercised unilateral authority to set and pay itself associated fees from ERISA-covered plan assets.

The DOL argued that the District Court's opinion that Principal did not act in a fiduciary capacity is in error based on the plaintiff's allegations. Although the parties contractually agreed to a large menu of possible investment options that might be made available under the plan, and agreed to some corresponding fee maximums, said the DOL, Principal had discretionary authority to choose the final line-up of funds in which the plan participants actually could invest. Principal exercised this authority when it selected the twenty-nine funds that it made available from the initial list of sixty-three possible funds listed in the contract. Principal also retained and exercised discretionary authority to set the total amount of fees it charged the plan out of monies it took from the plan. According to DOL, the District Court's opinion is, it could undermine ERISA's protection of plan assets by permitting disloyal, imprudent and self-dealing conduct in the exercise of fiduciary authority.

[i]—Principal Acted as a Fiduciary in Choosing Plan Investment Options and Setting Associated Fees

The DOL said that the District Court erred by concluding on the pleadings that Principal was not a fiduciary with respect to its discretionary authority to select the funds actually available to the Plan, to add or substitute other funds, to select and change the share classes in each of the selected funds, and to set its own fees paid from Plan assets.[160] According to DOL,

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[159] Brief of the Secretary of Labor as Amicus Curiae, McCaffree Financial Corp. v. Principal Life Insurance Co., No. 15-1007 (8th Cir. April 8, 2015).

[160] Arizona State Carpenters Pension Trust Fund v. Citibank, 125 F.3d 715, 720 (9th Cir. 1997) (citing John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank, 510 U.S. 86, 96, 114 S.Ct. 517, 126 L.Ed.2d 524 (1993)); *accord:*

"Fiduciary status under ERISA is to be construed liberally, consistent with ERISA's policies and objectives."

In reviewing a motion to dismiss, said the DOL, courts of appeals exercise plenary review over the district court decision. The Eighth Circuit must determine whether the "complaint . . . contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[161] A plaintiff need not provide specific facts in support of his allegations, but must include sufficient factual information to provide the grounds on which the claim rests, and to raise a right to relief above a speculative level.[162] Moreover, the Court must read the complaint as a whole, taking into account plaintiff's generally limited access to information at the pleading stage.[163]

Under this standard, said the DOL, the District Court should not have dismissed the claims. The complaint contains sufficient allegations to state plausible claims that Principal was a functional fiduciary under subsections (i) and (iii) of ERISA's definition, and sets out a sufficient nexus between the asserted fiduciary status and the alleged fiduciary breaches of imprudence, disloyalty and self-dealing in directly and indirectly setting its own allegedly excessive fees for Plan investments.

[ii]—Principal Acted as a Fiduciary When it Selected Fund Investments from the Larger List of Possible Investments

Under the alleged facts, said DOL, Principal had ultimate control over the investment options available to the Plan, and its exercise of this control is sufficient to make Principal a functional fiduciary under ERISA. Although McCaffree agreed in the contract to a possible universe of sixty-three separate account funds, Principal in fact exercised its contractual right to limit the number of funds actually available to participants in the Plan to twenty-nine funds that it selected for the Plan line-up after the contract was in place. Because Principal had and exercised its authority to pick and choose the precise funds to include in the investment line-up, it effectively set its own fees, said the DOL. The amount of both the Management Fees and the underlying mutual fund fees were directly determined by which investment options Principal selected. Principal further exercised its authority when it determined the share class of each mutual fund in which the separate account would invest. Although McCaffree had the contractual right to request that

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Olson v. E.F. Hutton & Co., 957 F.2d 622, 625 (8th Cir. 1992) ("the term fiduciary is to be broadly construed" (Internal quotation omitted.)); Consolidated Beef Industries, Inc. v. New York Life Insurance Co., 949 F.2d 960 (8th Cir. 1991). Whether an entity is a fiduciary is a highly fact-intensive inquiry that generally cannot be resolved on a motion to dismiss. See, e.g.: Young v. Principal Financial Group, Inc., 547 F. Supp.2d 965 (S.D. Iowa 2008); In re Xcel Energy, Inc. Sec., Derivative & "ERISA" Litigation, 312 F. Supp.2d 1165, 1181 (D. Minn. 2004).

[161] Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)).

[162] Schaaf v. Residential Funding Corp., 517 F.3d 544, 549 (8th Cir. 2008) (citing Erickson v. Pardus, 551 U.S. 89, 93-94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007)).

[163] *Braden v. Wal-Mart Stores, Inc.*, N. 161 *supra*, 588 F.3d at 594, 598.

Principal remove any particular investment option from the line-up, that contractual right is not alleged to have been exercised here, and it was Principal and not McCaffree that in fact chose the investments from the bigger menu. Thus, said DOL, Principal actually "exercise[ed] . . . discretionary authority or discretionary control" over plan management, within the meaning of subsection (i) of ERISA's fiduciary definition.[164] Moreover, because McCaffree had neither notice of, nor any ability to choose or reject share classes in the mutual fund investments of the separate account, and it was Principal that both chose the share class and deducted the associated fees from plan assets for each separate account, Principal also exercised "authority and control" over management or disposition of plan assets under ERISA § 3(21)(A)(i).

Indeed, said DOL, this authority and control is consistent with how Principal marketed its services to McCaffree and others, and how it described itself in the contract. The complaint in this case cites marketing by Principal that certainly implies that it is undertaking fiduciary responsibility and concomitant "rigorous due diligence" in making these selections.[165] Moreover, said DOL, in its contract with McCaffree, Principal states that it is "an 'investment manager' as described under ERISA solely with respect to Plan assets held in Separate Accounts under this contract," except with respect to the right to direct the split of contributions between certain guaranteed accounts and the separate investment accounts. ERISA defines an investment manager as a fiduciary that, among other things, "has the power to manage, acquire, or dispose of any asset of a plan."[166] That Principal describes itself as an investment manager in its contract with McCaffree certainly bolsters McCaffree's claim that Principal was acting as a fiduciary with regard to the investments and their associated fees.

Thus, said DOL, because Principal had and exercised final say over the investment line-up based on its actual selection of the twenty-nine funds, its ability to change the possible and actual investments at any time (without notice) and its non-disclosed selection of share classes, it is a functional fiduciary under ERISA § 3(21)(A)(i). And it is these factual allegations—that it was Principal and not McCaffree that had the authority to and actually made the final fund selections in the line-up—that distinguishes this case from other cases.[167]

Moreover, said DOL, contrary to the District Court's decision that Principal not only was granted discretion to select available funds, but actually exercised its discretionary authority, by determining the precise funds to be included on the Plan's menu, when it narrowed the list of sixty-three possible

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[164] ERISA § 3(21)(A)(i).

[165] Brief of the Secretary of Labor as Amicus Curiae, McCaffree Financial Corp. v. Principal Life Insurance Co., No. 15-1007 (8th Cir. April 8, 2015) ("The Principal understands the fiduciary responsibilities plan sponsors face in developing and monitoring an investment lineup appropriate to help meet the diverse needs of retirement plan participants. We undertake a rigorous due diligence process as a direct response to this challenge . . .").

[166] ERISA § 3(38).

[167] See:

Third Circuit: Santomenno *ex rel.* John Hancock Trust v. John Hancock Life Insurance Co. (U.S.A.), 768 F.3d 284, 288 (3d Cir. 2014) ("From the Big Menu

funds down to the twenty-three funds actually offered to plan participants in its role as investment manager. Principal's claim that Plaintiff could have always chosen to take their business elsewhere does not change this fact. Plans can generally hire and fire the fiduciaries responsible for managing plan assets, but that fact neither deprives the asset manager of fiduciary status nor excuses it from adhering to ERISA's dictates. Assuming the plaintiffs' allegations are true, said DOL, Principal signed up to be a fiduciary and abused its fiduciary authority. If so, it is no defense that McCaffree could or should have fired Principal.[168]

Plaintiff separately alleges that Principal was a fiduciary with respect to its right to add or delete any funds of its choosing from the menu because it had "discretionary authority or discretionary responsibility" over plan administration under ERISA § 3(21)(A)(iii), regardless of whether it ever exercised that authority. According to DOL, there is good support for this proposition in the Eighth Circuit.[169]

It is true, said DOL, that the Eighth Circuit generally considers an act of omission to be insufficient to satisfy the "exercise" requirement in ERISA § 3(21)(A)(i).[170] However, said DOL, these cases do not preclude the conclusion that an act of omission is sufficient to confer fiduciary status on one who "has" discretionary authority or responsibility for plan administration under ERISA § 3(21)(A)(iii), regardless of whether that individual or entity ever exercised that control. Accordingly, said DOL, even if the court determines that Principal did not exercise its discretionary authority or control

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created by John Hancock the trustees selected which investment options to offer to their Plan participants, known as the 'Small Menu.'"); Renfro v. Unisys Corp., 671 F.3d 314, 324 (3d Cir. 2011) (a party does not act as a fiduciary in negotiating terms of a contract that a plan fiduciary must approve).

Seventh Circuit: Leimkuehler v. American Life Insurance Co., 713 F.3d 905, 910 (7th Cir. 2013) (plan sponsor and administrator "selected from the menu the specific funds [offered by the insurance company] that he wished to make available to Plan participants"); Hecker v. Deere & Co., 556 F.3d 575, 592 (7th Cir. 2009) (Fidelity did not exercise fiduciary authority over plan assets by restricting the funds it was willing to offer to the plan's independent investment fiduciary which retained complete authority to determine whether and to what extent to include Fidelity funds on the menu).

168 Charters v. John Hancock Life Insurance Co., 583 F. Supp.2d 189, 197-198, 199 (D. Mass. 2008) (holding that a service provider was a fiduciary when it retained the discretion to change investments because if "Charters sought to reject a substitution and maintain his investment in the replaced fund, his only option was to terminate the Contract and select a different service provider" and pay a termination fee).

169 See:

Second Circuit: Bouboulis v. Transportation Workers Union of America, 442 F.3d 55, 63 (2d Cir. 2006).

Eighth Circuit: Olson v. E.F. Hutton, 957 F.2d 622, 625 (8th Cir. 1992) (subsection (iii) confers fiduciary status on those "who have actually been granted discretionary authority, regardless of whether such authority is ever exercised"). Board of Trustees of Western Lake Superior Piping Industries Pension Fund v. American Benefit Plan Administrators, Inc., 925 F. Supp. 1424, 1429 (D. Minn. 1996).

170 See, e.g.: Trustees of the Graphic Communications International Union Upper Midwest Local 1M Health & Welfare Plan v. Bjorkedal, 516 F.3d 719, 733 (8th Cir. 2008); FirsTier Bank, N.A. v. Zeller, 16 F.3d 907, 911 (8th Cir. 1994).

in setting the investment line-up, the court can still find that Principal was a functional fiduciary under ERISA § 3(21)(A)(iii) based on Principal's possession of discretionary authority to set the investment options, and that it breached its duties by failing to use that authority in the Plan's interest to lower the Plan's investment fees.[171]

Moreover, the DOL emphasized that although ERISA does not define "plan administration" for purposes of ERISA § 3(21)(A)(iii), the Supreme Court has considered this issue[172] and determined that "plan administration" included those actions that "are necessary and appropriate for carrying out the purposes" of the plan. The selection of investment options is both necessary and appropriate to carry out the purpose of the plan; providing retirement income for the participants, said DOL. Further, the selection of investment options for the plan is similar to those duties that would typically have fallen within the administrative duties of a trustee under common law.[173]

The DOL also pointed out that courts have held that the authority to select investment options for a plan is sufficient to make an entity a functional fiduciary under ERISA § 3(21)(A)(iii).[174]

The DOL also emphasized that the situation in this case is distinguishable from the circumstances addressed in a 1997 advisory opinion.[175] In that case, the DOL said that an insurer providing a similar menu of mutual funds to an ERISA plan would not be a fiduciary by virtue of changing the menu when the changes would be made under a procedure that gave the plan fiduciaries advance notice (including disclosure of all associated fees), and a reasonable opportunity to accept or reject the changes. Under the express terms of the contract addressed in the advisory letter, said DOL, failure to respond to the notice was deemed to be an acceptance of the changes, and a rejection would result in a termination, without penalty and with sufficient time to obtain a new provider. In contrast, said DOL, although McCaffree had some ability to object to the inclusion of funds, the contract does not explicitly make a failure to respond to Principal's selection, as seems to have happened in this case, equivalent to acceptance. Nor does the contract

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171 See, e.g., Healthcare Strategies, Inc. v. ING Life Insurance & Annuity Co., 961 F. Supp.2d 393, 402 (D. Conn. 2013). See also, *Leimkuehler v. American Life Insurance Co.*, N. 167 *supra*, 713 F.3d at 911-914 (considering whether AUL was a fiduciary only under subsection (i)); *Santomenno ex rel. John Hancock Trust v. John Hancock Life Ins. Co. (U.S.A.)*, N. 167 *supra*, 768 F.3d at 300.

172 Varity Corp. v. Howe, 516 U.S. 489, 502, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996).

173 See Pegram v. Herdrich, 530 U.S. 211, 231, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000) ("At common law, fiduciary duties characteristically attach to decisions about managing assets.").

174 See Healthcare Strategies, Inc. v. ING Life Insurance & Annuity Co., 961 F. Supp.2d 393 402 (D. Conn. 2013) ("discretionary authority to change the funds available to 401(k) plans supports fiduciary status under subsection three of 29 U.S.C. section 1002(21)(A)"). The Secretary agrees with the conclusion of this court. See also, *Varity Corp. v. Howe*, N. 120.76 *supra*, 516 U.S. at 502.

175 Department of Labor, Advisory Op. 97-16A, 1997 ERISA LEXIS 17 (May 22, 1997).

require Principal to give advance notice of either its initial selection of funds winnowed from the big menu or its decision to select an entirely new list of separate accounts for the big menu, and it does not adequately disclose all the fees associated with the investments.

[iii]—Principal Acted as a Fiduciary When it Set its Own Fees

In addition to being a fiduciary with regard to Plan investment fees because it controlled the selection of the actual separate accounts available to participants in the Plan, said DOL, Principal was also a fiduciary because the contract granted it discretionary control over plan assets when it allowed Principal to set its own fees in three ways: by authorizing it to change the "Management Fee" up to a pre-set maximum, by allowing it to charge whatever "Operating Expenses" it determined were appropriate, and by allowing it to choose the mutual fund share class that each separate account was invested in (since different share classes charge significantly different fees). And, said DOL, Principal actually exercised such authority with regard to the Operating Expenses and with regard to the underlying mutual fund fees by choosing the share class. The retention and exercise of such discretionary authority suffices to make Principal a fiduciary with respect to the amount of the fees it charged the Plan.[176]

The DOL emphasized that the district court was incorrect in holding that because Principal was not a fiduciary when it entered into the contract, it could not be a fiduciary under ERISA § 3(21)(A)(i) when it exercised the discretion that was granted to it under the terms of the contract. Although Principal may not have acted in a fiduciary capacity when it negotiated the terms of the contract, said DOL.[177] Principal acted as an ERISA fiduciary when it exercised its discretion under the contract to set its own fees.[178]

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[176] See Charters v. John Hancock Life Insurance Co., 583 F. Supp.2d 189, 197-198 (Mass. 2008) (holding that a service provider could be a fiduciary when it retained the discretion to modify its fees without approval).

[177] See Chicago Council of Carpenters Welfare Fund v. Caremark, Inc., 474 F.3d 463, 473 (7th Cir. 2007).

[178] Ed Miniat Inc. v. Globe Life Insurance Group, Inc., 805 F.2d 732, 737 (7th Cir. 1986) ("[w]hen a contract, however, grants an insurer discretionary authority, even though the contract itself is the product of an arm's length bargain, the insurer may be a fiduciary"). See also:

First Circuit: Charters v. John Hancock Life Insurance Co., N. 176 *supra*, 583 F. Supp. 2d at 197 (control to set fee within range is sufficient authority).

Second Circuit: F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1259 (2d Cir. 1987) ("after a person has entered into an agreement with an ERISA-covered plan, the agreement may give it such control over factors that determine the actual amount of its compensation that the person thereby becomes an ERISA fiduciary with respect to that compensation").

Sixth Circuit: Seaway Food Town Inc. v. Medical Mutual of Ohio, 347 F.3d 610, 619 (6th Cir. 2003) ("where the term confers on one party the unilateral right to retain funds as compensation for services rendered with respect to an ERISA plan, that party's adherence to the term does not give rise to ERISA fiduciary status unless the term authorizes the party to exercise discretion with respect to that right").

Thus, said DOL, it is irrelevant whether Principal's discretion to set its own fees was granted under a contract, which it negotiated in a non-fiduciary capacity. When it subsequently exercises that discretionary authority, it acts as a fiduciary. This follows from ERISA's functional test of fiduciary status, under which a person or entity is a fiduciary "to the extent that" that person or entity has or exercises the requisite authority.[179]

Moreover, said DOL, the District Court erred when it rejected plaintiff's argument that Principal was a fiduciary with respect to its fees because it found that "all three fees or expenses alleged to constitute the excessive fees were disclosed" in the contract with sufficient specificity "to enable Plaintiff to determine with rough accuracy the cost of each separate account." Even if "rough accuracy" were enough, this conclusion ignores the reality of the contract, said DOL. Neither the Operating Expenses nor the underlying mutual fund fees were disclosed in a manner that enabled McCaffree to determine, with any level of accuracy, what fees it would be charged. The only information provided about the Operating Expenses was a non-exclusive list of possible charges; no formula or explanation about how such charges would be calculated or justified is provided. The underlying mutual fund fees are referenced only as a footnote, said DOL, the contract instructs the Plan to see the appropriate prospectuses for the amount of the underlying fee, but does not indicate which share classes will be chosen by Principal.

Without this information, said DOL, there is no way to determine the fees accurately. Finally, although plaintiff agreed to be charged up to a maximum rate for the Management Fees, the sole discretion for raising or setting these fees at any level between the contractually specified amount and the very high maximum of 3% (which plaintiff calculates could result in over 25% less wealth for a plan participant at retirement than if more typical fees were charged) lay with Principal.

Indeed, said DOL, in cases referenced by the District Court,[180] the courts determined that the overall fees at issue had been "fully disclosed." Despite a footnote to the contrary in the district court's opinion, said DOL, however, the fees here were not fully disclosed, nor does plaintiff concede they were. At no point did Principal provide a formula or complete explanation as to how the Operating Expenses would be calculated or what precisely would be charged under this category. The underlying mutual fund fees were referenced only in a footnote and make no mention of which share class the fees would track, and thus, unlike in the referenced cases,[181] there was absolutely

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179 ERISA § 3(21)(A). See also, Trustees of the Graphic Communications International Union Upper Midwest Local 1M Health & Welfare Plan v. Bjorkedal, 516 F.3d 719, 732 (8th Cir. 2008) (ERISA fiduciary status "is not an all or nothing concept," but applies "when the individual is performing" specified duties).

180 See:

Third Circuit: Santomenno *ex rel.* John Hancock Trust v. John Hancock Life Ins. Co. (U.S.A.), 768 F.3d 284, 288 (3d Cir. 2014).

Seventh Circuit: Leimkuehler v. American Life Insurance Co., 713 F.3d 905, 910 (7th Cir. 2013); Hecker v. Deere & Co., 556 F.3d 575 (7th Cir. 2009).

181 See:

Third Circuit: Santomenno ex rel. John Hancock Trust v. John Hancock Life Insurance Co. (U.S.A.), N. 180 *supra*, 768 F.3d at 288.

no way for McCaffree to know when it entered into the contract, what these fees would be. And while the minimum and maximum Management Fees for each of the separate accounts was set forth in the contract, Principal retained discretion for setting the fees anywhere in between. Accordingly, said DOL, the Eighth Circuit should conclude that Principal was a fiduciary.

[e]—Eighth Circuit Decision

Because Principal is not a named fiduciary of the plan, McCaffree needed to plead facts demonstrating that Principal acted as a fiduciary "when taking the action subject to complaint."[182] McCaffree makes five arguments in support of its claim that Principal breached a fiduciary duty to charge reasonable fees. None of these arguments, however, demonstrates that McCaffree stated a valid claim under ERISA. The first fails because Principal owed no duty to plan participants during its arms-length negotiations with McCaffree, and the remaining four fail because McCaffree did not plead a connection between any fiduciary duty Principal may have owed and the excessive fees Principal allegedly charged.

First, McCaffree argues that Principal's selection of the sixty-three separate accounts in the initial investment menu constituted both an exercise of discretionary authority over plan management under ERISA § 3(21)(A)(i) and plan administration under (A)(iii). As a result, McCaffree contends, Principal owed a duty to ensure that the fees associated with those accounts were reasonable. However, this argument overlooks the fact that the contract between McCaffree and Principal clearly identified each separate account's management fee and authorized Principal to pass through additional operating expenses to participants in these accounts. The Eighth Circuit said that it agreed with several other circuit courts, which have held that a service provider's adherence to its agreement with a plan administrator does not implicate any fiduciary duty where the parties negotiated and agreed to the terms of that agreement in an arm's-length bargaining process.[183] We agree. Up until it signed the agreement with Principal, McCaffree remained free to reject its terms and contract with an alternative service provider offering more attractive pricing or superior investment products. Under such circumstances, Principal could not have maintained or exercised any "authority" over the plan and thus could not have owed a fiduciary duty under ERISA. Because Principal did not owe plan participants a fiduciary duty while negotiating the fee terms with McCaffree, Principal could not have breached any such duty merely by charging the fees described in the contract that resulted from that bargaining process.

Second, McCaffree contends that Principal acted as a fiduciary when it selected from the sixty-three accounts included in the contract the twenty-nine it ultimately made available to plan participants. McCaffree contends

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Seventh Circuit: Leimkuehler v. American Life Insurance Co., N. 180 *supra*, 713 F.3d at 910.

[182] See Pegram v. Herdrich, 530 U.S. 211, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000).

[183] See:

Third Circuit: Renfro v. Unisys Corp., 671 F.3d 314, 324 (3d Cir. 2011).

Seventh Circuit: Hecker v. Deere & Co., N. 180 *supra*, 556 F.3d at 583.

that this winnowing process, which took place after the parties entered into the contract, gave rise to a fiduciary duty obligating Principal to ensure that the fees associated with those twenty-nine accounts were reasonable. While the parties dispute whether McCaffree adequately pled that Principal, rather than McCaffree, chose the final twenty-nine accounts, we need not decide this issue. Even if McCaffree did so allege, McCaffree failed to plead a connection between the act of winnowing down the available accounts and the excessive fee allegations. At no point does McCaffree assert that only some of the sixty-three accounts in the contract had excessive fees, or that Principal used its post-contractual account selection authority to ensure that plan participants had access only to the higher-fee accounts. Instead, McCaffree's complaint categorically challenges the management fees and operating expenses associated with all of the separate accounts included in the contract, claiming that Principal lacked a legitimate basis for charging these fees for any separate account. Because Principal's alleged selection of the twenty-nine accounts is not "the action subject to complaint,"[184] McCaffree cannot base its excessive fee claims on any fiduciary duty Principal may have owed while choosing those accounts, said the Eighth Circuit.

Third, McCaffree argues that Principal's discretion to increase the separate account management fees and to adjust the amounts charged to participants as operating expenses supports its claim that Principal was a fiduciary. However, McCaffree again has failed to plead any connection between this discretion and the complaint's excessive fee allegations. McCaffree points to Principal's authority to raise the management fees (subject to a cap), but McCaffree does not allege that Principal exercised this authority or that any such exercise resulted in the allegedly excessive fees. The complaint only challenges the management fees as provided for by the contract. Similarly, McCaffree contends that Principal's discretion in passing through operating expenses to plan participants implicated a fiduciary duty to ensure those charges were reasonable. McCaffree's complaint, however, is devoid of any allegation that Principal abused this discretion by passing through fees in excess of the expenses that it actually incurred and that the contract authorized it to pass on to plan participants.

McCaffree attempts to compensate for this shortcoming by explaining that its complaint challenged the total fees associated with the separate accounts, without regard to whether Principal classified the charges as operating expenses or management fees. Any such classification is immaterial, McCaffree contends, because Principal lacked a justification to charge participants in the separate accounts any additional fees. That line of reasoning only further undermines McCaffree's claim, as it demonstrates once again that McCaffree seeks to evade through this lawsuit precisely those fees to which the parties contractually agreed.

Fourth, McCaffree alleges that Principal provided participants with "investment advice," giving rise to a fiduciary duty under subsection (A)(ii). However, McCaffree failed to allege facts establishing a nexus between the separate account fees and any investment advice Principal may have

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[184] *Pegram v. Herdrich*, N. 182 *supra*, 530 U.S. at 226.

provided. Although Principal does act as the investment manager for the mutual funds available through the separate accounts, Principal's management of those funds is not "the action subject to complaint,"[185] To the contrary, McCaffree claims that every investment option included in the plan charged excessive fees. Because a service provider's fiduciary status under ERISA "is not an all-or-nothing concept,"[186] McCaffree cannot support its allegations that the fees in the plan contract are excessive by pointing to an unrelated context in which Principal serves as an investment manager.

Finally, McCaffree argues that Principal inadequately disclosed the additional layer of management fees for the underlying Principal mutual funds in which separate account contributions were invested. McCaffree's complaint did not allege that the mutual fund fees were excessive, and in its reply brief McCaffree confirms that the mutual fund fees are relevant to its claims only to the extent that these fees demonstrate that the additional separate account fees were excessive. Because the mutual fund fees are not "subject to complaint,"[187] The Eighth Circuit declined to decide whether Principal's alleged failure to disclose those fees breached a fiduciary duty.

Principal's enforcement of the terms of its contract with McCaffree did not implicate any fiduciary duties, said the Eighth Circuit, and McCaffree failed to establish a connection between its excessive fee allegations and any post-contractual fiduciary duty Principal may have owed to plan participants. Accordingly, the Eighth Circuit affirmed the District Court's dismissal of McCaffree's claims.

[14]—Hidden Fees Charged to Welfare Benefit Plan

The Sixth Circuit Court of Appeals has decided that Blue Cross Blue Shield of Michigan (Blue Cross) breached its ERISA fiduciary duties by charging hidden fees over a twenty-year period and failing to disclose such fees.[188] In this case, Blue Cross acted as the third-party administrator for self-insured health benefit plans with the terms of engagement set forth in administrative services contracts entered into in 1991 and 2002. Under the contracts, Blue Cross processed healthcare claims in exchange for an administrative fee. In 1993, Blue Cross unilaterally changed the fee structure so that it retained additional revenue by adding markups to the hospital claims paid by certain clients. These fees were in addition to the contractual administrative fee. Under the new fee arrangement, Blue Cross would report a higher charge by the hospital than was actually billed by the hospital. Blue Cross retained the difference between the amount billed to the client and the amount paid to the hospital.

The Sixth Circuit held that Blue Cross engaged in self-dealing since its fees were not identifiable to the plan because they appeared to be funds

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[185] *Id.*, 530 U.S. at 226.

[186] Trustees of the Graphic Communications International Union Upper Midwest Local 1M Health & Welfare Plan v. Bjorkedal, 516 F.3d 719, 732 (8th Cir. 2008).

[187] *Pegram v. Herdrich*, N. 182 *supra*, 530 U.S. at 226.

[188] Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Michigan, 751 F.3d 740 (6th Cir. 2014).

owed to the hospitals for medical services. The fees were added to the hospital charges as a part of "Total Claims Expense" and were reported in monthly quarterly and annual claims reports to the plan and its sponsor. Blue Cross misrepresented that the funds, including both employee and employer contributions to a Blue Cross-controlled bank account, were needed to pay actual plan claims.

In so holding, the Sixth Circuit decided that Blue Cross functioned as an ERISA fiduciary since it exercised discretion in determining how and when fees would be charged to its self-funded plan clients.

The Sixth Circuit also decided that Blue Cross's fees were paid from plan assets. In so finding, the Court noted that although a small portion of the contributions sent to Blue Cross were employee contributions, an examination of the plan documents, the service contract, as well as the actions and representations of the plan sponsor and Blue Cross led to the conclusion that the plan had a beneficial ownership interest in the funds used to pay the fees. According to the Sixth Circuit, the actions and representations established that Blue Cross, the company and the employees all understood that Blue Cross would be holding ERISA-regulated funds to pay health expenses and administrative costs.

In this regard, the Sixth Circuit rejected Blue Cross's argument that the funds, which paid the disputed fees were corporate assets, not "plan assets" subject to ERISA protections. The Court said that it recognized that the funds were not pooled together in a trust account, that rather the funds sent to Blue Cross in its role as TPA came not from a formal trust account, but from a combination of the company's general funds and employee contributions. However, the Sixth Circuit emphasized that Department of Labor regulations state that employee contributions constitute plan assets under ERISA once they are "segregated from the employer's general assets."[189] Thus, the health care contributions deducted from employees' paychecks and sent to Blue Cross to pay claims and administrative costs qualify as plan assets.[190] However, Blue Cross argued that employee contributions represented only a fraction of the funds it received and that the pertinent question is whether the *employer* contributions sent to Blue Cross must also be considered plan assets.

"[T]he assets of an employee benefit plan generally are to be identified on the basis of ordinary notions of property rights."[191] Under this analysis, said the Court, "the assets of a welfare plan generally include any property, tangible or intangible, in which the plan has a beneficial ownership interest."[192] Making the plan assets' determination "therefore requires consideration of

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[189] 29 C.F.R. § 2510.3-102(a)(1).

[190] See U.S. Department of Labor, Advisory Op. No. 92-24A, 1992 WL 337539, *2 (Nov. 6, 1992) ("all amounts that a participant pays to or has withheld by an employer for purposes of obtaining benefits under a plan will constitute plan assets"). See also, United States v. Grizzle, 933 F.2d 943, 946-947 (11th Cir. 1991) (finding that plan assets may be composed of employee contributions even before their delivery to the plan).

[191] U.S. Department of Labor, Advisory Op. No. 92-24A, N. 190 *supra*, at *2.

[192] *Id.*

any contract or other legal instrument involving the plan, as well as the actions and representations of the parties involved."[193] Furthermore, the "drawing benefit checks on a TPA account, as opposed to an employer account, may suggest to participants that there is an independent source of funds securing payment of their benefits under the plan."[194]

The Sixth Circuit emphasized that in this case, the Summary Plan Description (SPD), which is distributed to plan participants, establishes the Company's intention was to place plan assets for its self-funded Health Plan with Blue Cross in its capacity as TPA. The SPD specifically notes that the Company "is not [a] direct payor of any benefits" and "no special fund or trust" exists from which self-insured benefits are paid. Instead, the SPD states that a TPA (designated in the document as Blue Cross) has been hired, and it "reviews [plan participant's] claims and pays benefits from the money we provide." Moreover, although the SPD gives final claims determination to the Company, the document makes clear that enrollees must make their initial benefit claims to Blue Cross, which has both the funds and the discretion to pay claims. Also, said the Sixth Circuit, the language in the Administrative Service Contract (ASC) does nothing to alter the understanding that Blue Cross in its role as TPA would be holding funds to pay the healthcare expenses of Plan beneficiaries.

The Sixth Circuit emphasized that while Blue Cross attempts to characterize its arrangement as a service agreement between two companies—with no thought toward ERISA and its protections—that argument is "unavailing." The SPD contains an entire section disclosing plan beneficiaries' rights under ERISA, including the right to sue "the fiduciaries" (plural) if they "misuse the Plan's money." Additionally, although the ASC lacks any specific reference to plan assets, it does recognize that Blue Cross has certain ERISA responsibilities. For example, in practice, Blue Cross annually submitted data designed for use on the company's ERISA-mandated DOL 5500 forms. Accordingly, the Sixth Circuit concluded that these "actions and representations" establish that Blue Cross, the Company and the Company's employees all understood that Blue Cross would be holding ERISA-regulated funds to pay the health expenses and administrative costs of the Company's employees. As a result, said the Sixth Circuit, the employees had a reasonable expectation of a "beneficial ownership interest" in the funds held by Blue Cross.

In holding that Blue Cross engaged in self-dealing in violation of ERISA § 406(b)(1), the Sixth Circuit relied upon its prior similar decision involving Blue Cross,[195] where it found that Blue Cross unilaterally decided whether to collect the additional fees and determined the rate at which it would collect the fees despite the fact that the service contract did not authorize the exercise of such discretion. According to the Sixth Circuit, these actions constitute the type of self-dealing that ERISA prohibits.

This decision sends a warning to welfare benefit plans and fiduciaries that they need to be aware of their duty to monitor plan fees and expenses.

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[193] *Id.*

[194] *Id.*

[195] Pipefitters Local 636 Insurance Fund v. Blue Cross Blue Shield of Michigan, 722 F.3d 861 (6th Cir. 2013).

Correspondingly, record-keepers should be alerted to the duty to fully disclose all plan fees and expenses so that plan sponsors can determine whether the fees charged to the plan are reasonable.

[15]—DOL Sues MEWA Fund Over Excessive Fees

A multiemployer welfare arrangement (MEWA) covering about 300 small employers paid more than $3 million in excessive fees to a benefits administrator connected to the fund's trustees, the DOL alleged in a complaint filed February 24, 2017 in a Washington District Court.[196]

The complaint attacks the relationship between the Associated Employers Health and Welfare Trust and its benefits administrator, Associated Industries Management Services Inc. (AIMS). According to the DOL, two of the health plan's trustees were officers and employees of AIMS, and the plan secretly authorized steep increases in AIMS's fees during a time in which the plan saw a "sharp decrease" in the number of employers and workers serviced by AIMS.

DOL claimed that by increasing the fees paid to AIMS from 2% to 7% of premiums over a four-year period, the defendants caused the plan to pay more than $3 million in excessive fees.

DOL brought an action under the ERISA, to remedy breaches of Defendant Trustees' ERISA fiduciary duties committed in the course of their management of the Associated Employers Health and Welfare Trust (AET or the Trust) and the ERISA-covered employee benefit plans that participate in the Trust. Approximately three hundred small employers and their employees contributed to the Trust to fund their employee health and welfare benefit plans (the Plans) and pay administrative costs for the Plans. AET's trustees (the Trustees) received those contributions, which were held in trust for the Plans, and spent those funds to purchase insurance and pay administrative costs for the Plans.

According to DOL, Defendant Trustees caused the Trust to retain and pay ever-increasing administrative fee rates to a related, for-profit corporation, Defendant Associated Industries Management Services, Inc. (AIMS), for administrative services for the Plans. Two of the Trustees were officers and employees of AIMS—Defendant James DeWalt was the President, CEO, and a director of AIMS and Defendant Bakie was AIMS's CFO. As a result of Defendants' actions, said DOL, the Trust paid AIMS millions of dollars of additional fees, which were largely taken from financial reserves held by the Trust, without disclosing to the employers or employees that AIMS's fees had been increased or that money to pay for the increased fees was being taken out the Trust's reserve funds. According to DOL, the Trustees' conduct constituted prohibited self-dealing with the Plans' assets and violated their ERISA fiduciary duties of loyalty, prudence, and fidelity to the participants and beneficiaries of the Plans.

Despite Defendants DeWalt's and Bakie's conflict of interest, said DOL, the Defendant Trustees repeatedly paid and increased AIMS's fee rates without researching other firms' fee rates, seeking competing bids, seeking

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[196] Hugler v. DeWalt, 2:17-cv-00082 (E.D. Wash. Feb. 24, 2017).

a consultant's evaluation of the reasonableness of the increased fees for AIMS's services, or taking any efforts to determine if AIMS's services could have been provided by another firm for less. Instead, said DOL, the Trustees increased AIMS's fee rates even as the Trust saw a sharp decrease in the number of employers and participants serviced by AIMS.

At all times relevant to this action, said DOL, AIMS's fees were calculated as a percentage of the insurance premiums paid through the Trust. When the number of participating employers (Participating Employers) in the Trust fell, the total insurance premiums paid through the Trust fell as well. In response, the Trustees raised AIMS's fee percentage (on Trust-paid premiums) from 2.0% to 3.5%, then from 3.5% to 4.0% (applied retroactively), and then from 4.0% to 7.0% (applied retroactively). According to DOL, the Trustees did so for the purpose of maintaining or increasing Defendant AIMS's total revenue from the Plans, which supported AIMS's payment of DeWalt's and Bakie's salaries. The Trustees did this in the face of the falling total premiums and despite the fact that AIMS was providing services to fewer Plans and fewer participants.

The DOL also brought this action against Defendant Associated Industries of the Inland Northwest (the Association), which established the Trust. Defendant Trustee DeWalt was the President and CEO of the Association as well as the President and CEO of AIMS, which was wholly owned by the Association. The Association appointed Defendants DeWalt and Barton to be Trustees and had authority to remove the Trustees. Accordingly, said DOL, the Association had an ERISA fiduciary duty to loyally and prudently monitor the Trustees' performance. DOL alleged that the Association violated that duty and thereby enabled the Trustees to breach their fiduciary duties. Further, because AIMS knowingly participated in the Trustees' fiduciary breaches, DOL also brought this action to hold Defendant AIMS liable under ERISA and for disgorgement, to the Trust, of the fees that AIMS received as a result of those fiduciary breaches.

To remedy these alleged ERISA violations, DOL sought a judgment requiring the Defendant Trustees and the Defendant Association to restore the Plans' losses resulting from their breaches of fiduciary duty. DOL also sought an injunction to bar the Defendant Trustees from acting as fiduciaries to ERISA-covered plans and appointment of an independent fiduciary to hire and determine the compensation for the Trust's service providers, and an accounting of the Trust's assets.

[16]—Defining the Limits of Broad, Complete ERISA Preemption in Health Care Excessive Fee Cases[197]

Over several decades, courts have developed a rich history of broad, complete ERISA preemption of any and all claims in state courts as they relate to ERISA plans and participant rights to receive benefits and coverage pursuant to ERISA. Complete ERISA preemption differs from express,

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[197] This section was prepared by the author's son, Jordan Mamorsky, Esq. who is an ERISA litigator with The Wagner Law Group.

conflict ERISA preemption because it allows removal of a case sitting in state court to federal court.

It is black letter law that any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy —ERISA § 502—conflicts with the clear congressional intent to make the ERISA remedy exclusive and, is therefore, *completely* pre-empted by ERISA. And, ERISA 502(a) sets a broad universe of potential claims that participants, beneficiaries, fiduciaries, and the DOL can bring.

While for decades the Supreme Court, and lower appellate courts, had wrestled with defining the scope of complete ERISA preemption, the Supreme Court, in *Aetna Health Inc. v. Davila*,[198] set the standard courts currently employ to judge whether a claim is subject to complete ERISA preemption under ERISA § 502(a).

The facts of *Davila* involved consolidated cases in which two individuals, Juan Davila and Ruby Calad, participants in ERISA regulated employee benefit plans, brought state law claims against their respective health maintenance organizations (HMOs) for refusing to pay for certain treatment and services recommended by their treating physicians. The Supreme Court held that the *Davila* plaintiffs' claims fell within the purview of ERISA § 502(a) because their claims involved attempts to recover denied benefits—and "only to rectify a wrongful denial of benefits promised under a ERISA-regulated plan."

In reaching this decision in *Davila*, the Supreme Court established a two-part test to determine whether a claim falls "within the scope" of § 502(a)(1). Specifically, the Court directed that claims are completely preempted by ERISA if they are brought (i) by an individual who at some point in time, could have brought his claim under ERISA § 502(a), and (ii) under circumstances in which there is no other independent legal duty that is implicated by a defendant's actions. This test involves a dual inquiry because a state-law cause of action is preempted only if both prongs of the test are satisfied.

A discrete issue that has lingered in the aftermath of *Davila* is to what extent a breach of contract claim is preempted by ERISA where a healthcare provider sues to obtain benefits under a contract with an ERISA regulated health plan.

In such cases, to determine the scope of ERISA preemption under the first prong of *Davila*, several circuits have adopted a "*rate* of payment" versus "*right* of payment" under which claims involving only underpayment are not preempted, whereas claims that were denied because coverage was not afforded for all the submitted procedures may be preempted.[199]

These cases—analyzing the application of the first element of the *Davila* test—hinge on whether the Court finds that the provider-insurer agreement or

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[198] 542 U.S. 200, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004).

[199] See e.g.:

Second Circuit: Montefiore Medical Center v. Teamsters Local 272, 642 F.3d 321, 331-332 (2d Cir. 2011).

Eleventh Circuit: Conn. State Dental Ass'n. v. Anthem Health Plans, Inc., 591 F.3d 1337, 1349-1350 (11th Cir. 2009) (citing Lone Star OB/GYN Assocs. v. Aetna Health Inc., 579 F.3d 525, 533 (5th Cir. 2009)).

ERISA creates a dispute about the "rate of payment" and typically no preemption results, or a "right to payment" dispute which involves benefit and coverage determinations under the terms of the respective ERISA healthcare plan and thus, preemption does result.

Such is the backdrop for the Sixth Circuit's recent decision in *K.B. v. Methodist HealthCare - Memphis Hospitals*.[200] In *K.B.*, the Sixth Circuit examined the differences between *rate* of payment versus *right* of payment dynamic with a twist. Rather than a health care provider claiming breach of contract for underpayment against an ERISA plan, in *K.B.*, a class of individual insureds brought the breach of contract claim, alleging that Methodist Health Care Memphis Hospitals was *overcharging* for services rendered.

Specifically, the insureds alleged that the Defendant hospital had contracts with their insurers (some ERISA healthcare plans but not all) that set fixed and predetermined prices for many of the services the hospital provided for them, and that the hospital charged plaintiffs a price higher than the negotiated contract price for services, thereby breaching their contractual duties to them as beneficiaries of the plans, and in the process, denying them insurance benefits.

In evaluating the core of these allegations, the District Court, the United States District for the Western District of Tennessee, determined that in order to conclude whether Plaintiffs overpaid, or that Plaintiffs were entitled to reduced fees, it must examine not only the contract between Plaintiffs and Defendant, but also the contract between Defendant and the applicable insurance provider(s), which would involve an analysis of coverage determinations by each applicable insurance provider(s). Specifically, the District Court concluded that "if there is an ERISA provider, as there is here, then a determination of whether Defendant breached its contract with Plaintiffs derives entirely from the particular rights and obligations established by [ERISA] benefit plans." Essentially, the District Court decided that the plaintiffs' breach of contract claims involved an analysis of plan coverage determinations, and therefore, fit in the right to payment category of cases.

But the Sixth Circuit disagreed and reversed the District Court's decision. The Sixth Circuit reasoned that Defendant hospital's liability stemmed from the contract between it and the insurer's health care plans—not the terms of the plan itself.

The Court, in reaching this conclusion, attempted to make sense of this novel set of facts by comparing it to a layperson example of a restaurant charging customers more than the price listed on its menu. The Court emphasized, "you sue the first restaurant because it owed you a duty to charge the menu price. Although the restaurant could claim that the terms of your credit card agreement are relevant, the restaurant's duty to charge you the agreed-upon price comes from the terms of its menu, not the terms of your credit card. So, your claim about menu price is independent of your credit card agreement." Under this hypothetical comparison, the credit-card agreement with the individual consumers would be the terms of the ERISA plan.

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[200] 929 F.3d 795 (6th Cir. 2019).

While the Court went to lengths to justify its decision through hypotheticals and suggestions about how Plaintiffs could have modified their allegations to move the needle from a rate of payment to a right to payment case that would completely preempt Plaintiffs' claims, it did concede that "the only reason a court may need to consider the contents of Knox-Bender's ERISA plan is to calculate damages." The Court, however, concluded that where the terms of an ERISA plan are only relevant to calculate damages, ERISA does not preempt the state law's claim.

The Sixth Circuit's reversal of the District Court has significant implications for potential Defendants, e.g., health care providers providing services to insureds pursuant to contracts with ERISA health care plans, and plaintiffs alleging excessive health care charges, like the Plaintiffs in *K.B.*

First, without the preemption defense, health care providers will be forced to battle breach of contract suits in state courts—if there is not another basis of federal jurisdiction—that might be less familiar with the terms and conditions of ERISA health care plans and plan contracts with healthcare providers to provide services to insureds. Second, the *K.B.* decision—that excessive cost of healthcare services provided does not involve a denial of coverage or benefits—could be extended to apply to other fact sets where insureds challenge the cost of healthcare services provided in connection with an ERISA health care plan.

It will be interesting to see if a similar case is brought in a different circuit if the court would side with the District Court in *K.B.* or agree with the Sixth Circuit—that an insured contesting the costs of an ERISA healthcare plan provider does not result in a denial of coverage and is a rate (not a right) to payment case. The *K.B.* decision has the potential to change the landscape of ERISA preemption in the health care arena and limit the usual broad extension of ERISA preemption. Time will tell if it does.

[17]—Union Retirement Plan Sued Over Excessive 401(k) Fees

401(k) fee litigation has reached union retirement plans. A union 401(k) plan covering more than 27,000 Teamsters and other union workers has been sued in a California district court.

The proposed class action, targets the trustees of the Teamsters Supplemental Income 401(k) Plan, a $921 million union retirement plan. According to the complaint, the plan paid excessive fees to its two record keepers and offered expensive, retail share classes of mutual funds when cheaper, institutional share classes were available.[201]

[a]—Background

The Supplemental Income 401(k) Plan is a multi-employer defined contribution retirement plan for union members that enables eligible participants to make tax-deferred contributions from their salaries to the Plan.

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[201] Ybarra v. Board Of Trustees Of Supplemental Income Trust Fund, No. 8:17-cv-02091 (C.D. Cal. Nov. 30, 2017) (complaint filed).

According to the court, as of December 31, 2016, the Plan had 27,178 participants and $921,556,147 in assets and its Board of Trustees is the sponsor and administrator of the Plan as defined under ERISA Section 3(16)(B) and 3(16)(A)(i) and its individual members are Plan fiduciaries under ERISA 3(21)(A)(i) because the Board of Trustees and its individual members have responsibility and discretionary authority to control the operation, management and administration of the Plan.

The complaint emphasizes that ERISA imposes strict fiduciary duties of prudence and loyalty on covered retirement plan fiduciaries. An ERISA fiduciary must discharge his responsibility "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use.[202] A plan fiduciary must act "solely in the interest of [plan] participants and beneficiaries."[203] A fiduciary's duties include "defraying reasonable expenses of administering the plan,"[204] and a continuing duty to monitor investments and remove imprudent ones.[205]

According to the complaint, the Board of Trustees and its individual members breached their fiduciary duties of prudence and loyalty to plan participants by: (i) offering retail class mutual fund shares when identical lower cost institutional class shares were available which resulted in the participants paying additional unnecessary expenses with no value to the Plan; and (ii) overpaying for record keeping by paying the Plan record keeper, John Hancock Retirement Plan Services ("John Hancock") and its predecessor, New York Life Insurance Company, excessive fees through revenue sharing arrangements with the mutual funds offered as investment options under the Plan.

The participants brought this action under ERISA Section 502(a)(2) and (3) to enforce the Trustees' liability under ERISA Section 409(a) to make good to the Plan all losses resulting from the Trustees' breaches of fiduciary duties, and to restore to the Plan any lost profits.

[b]—Allegations

According to the complaint, in a defined contribution plan, participants' retirement benefits are limited to the value of their own individual accounts, which is determined solely by employee and employer contributions plus the amount gained through investment in the options made available in the plan less expenses. Typically, plan participants direct the investment of their accounts, choosing from the lineup of plan investment options chosen by the plan sponsor.

Because retirement savings in defined contribution plans grow and compound over the course of the employee participants' careers, poor investment performance and excessive fees can dramatically reduce the amount of benefits available when the participant is ready to retire, said the complaint. Over time, even small differences in fees and performance compound and

[202] ERISA § 404(a)(l).
[203] *Id.*
[204] ERISA § 404(a)(l)(A)(ii).
[205] Tibble v. Edison International, 135 S.Ct. 1823, 1829, 191 L.Ed.2d 795 (2015).

can result in vast differences in the amount of savings available at retirement. As the Supreme Court explained, "[e]xpenses, such as management or administrative fees, can sometimes significantly reduce the value of an account in a defined-contribution plan."[206]

The impact of excessive fees on employees' and retirees' retirement assets is dramatic, said the district court. The U.S. Department of Labor has noted that a 1% higher level of fees over a 35-year period makes a 28% difference in retirement assets at the end of a participant's career.[207]

In this regard, the complaint emphasized that the marketplace for retirement plan services is established and competitive. On December 31, 2015, the Plan, with $848,600,015 in assets, was one of the top 1% of 500,000 defined contribution plans in the United States.[208] As a result, said the complaint, the Plan has tremendous bargaining power to demand low cost administrative and investment management services and well-performing, low cost investment funds.

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[206] *Id*., 135 S.Ct. at 1825.

[207] U.S. Department of Labor, "A Look at 401 (k) Plan Fees," at 1-2 (Aug. 9 2013), available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf (last visited March 25, 2020).

[208] PLANSPONSOR, "2015 Recordkeeping Survey," (June 15, 2015), available at https://www.plansponsor.com/2015-Recordkeeping-Survey/ (last visited March 25, 2020).