2019 ERISA Litigation Update

What's Going On?
What Happened This Year?
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Southwest Benefits Association
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Attribution

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Today's Topics

- What's Going On:
- The 2019 – 2020 Supreme Court Docket.
- What Happened This Year:
- Arbitration of ERISA Cases, Class Action Waivers
- 401(k)/403(b) Plan Fee Litigation
  - Non-proprietary and proprietary fee cases
  - University cases

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Supreme Court ERISA Litigation 2019 - 2020 term

Thole v. U.S. Bank, 873 F.3d 617 (8th Cir. 2017), *cert. granted*, 139 S. Ct. 2771 (2019)

- Allegations related to the management of the defined benefit plan from 2007 – 2010.
- But, by 2014, the plan became overfunded; the plan had more money in assets than needed to meet its obligations.
- Amended complaint filed in 2014 alleged that in 2007, the ***entire*** plan portfolio was invested in equities, either direct stock holdings or through mutual funds, and this lack of diversification resulted in $1.1 billion of losses.
- The district court dismissed because the claim was moot given the plan's current overfunded status.

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Thole v. U.S. Bank, 873 F.3d 617 (8th Cir. 2017), *cert. granted*, 139 S. Ct. 2771 (2019)

- The 2-1 majority holds that because the plan is overfunded, Plaintiffs no longer fall within the class of persons enumerated under ERISA § 502(a)(2) or ERISA § 502(a)(3) to bring suit.
- To proceed under either section, Plaintiffs must show actual injury to fall within the class of plaintiffs authorized by Correspondence to sue.
- Because the plan is overfunded, there is no actual or imminent injury to the plan itself that caused injury to the plaintiffs' interests in the plan.

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Thole v. U.S. Bank, 873 F.3d 617 (8th Cir. 2017), *cert. granted*, 139 S. Ct. 2771 (2019)

- Certiorari granted to consider the following question: Whether petitioners have demonstrated Article III standing.
- May defined benefit plan participants sue over alleged fiduciary breach if defined benefit plan is fully funded?
- Plaintiffs allege Defendants high-risk equity moves caused over $1.1 billion of losses and violated the duty of loyalty.
- Circuit Split: 4th, 5th, 9th, and now the 8th Circuit – no standing in similar situations.
- 2nd, 3rd,and 6th Circuits – breach of fiduciary duty is an injury conferring standing regardless of plan's funding status.

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Jander v. IBM, 910 F.3d 620 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 2667 (2019).

- Classic insider knowledge – employer stock drop facts alleged.
- Alleged insider knowledge: in 2013 IBM failed to disclose that its microelectronics business was on track to incur annual losses of ($700 million); instead business valued at $2 billion.
- In 2014, IBM announced that it would pay $1.5 billion to the acquirer of the business; IBM announced a $4.7 billion pre-tax charge as a result of the transaction.
- IBM shares fell $12.00 per share upon disclosure.
- Retirement Committee members were the Chief Accounting Officer; the Chief Financial Officer, and the General Counsel.
- According to Plaintiffs, these insiders were charged with the responsibility under the securities laws to make corrective disclosures and had the requisite knowledge.

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Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014)

- To state a claim for breach of the duty of prudence on the basis of ***inside information***, a plaintiff must plausibly allege:
  - An alternative action that the defendant could have taken that would have been consistent with the securities laws, *and*
  - A prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.
- Lower courts should consider:
  - Duty of prudence does not require that fiduciary break securities laws.
  - Whether a plan fiduciary's decision to purchase (or refrain from purchasing) additional stock comports with federal securities laws and their objectives.
  - Whether a fiduciary's failure to disclose information to the public conflicts with federal securities laws and their objectives.
  - Whether a prudent fiduciary could not have concluded that stopping purchases or publicly disclosing negative information would do more harm than good to the stock fund.

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Jander v. IBM, 910 F.3d 620 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 2667 (2019).

- Plaintiffs here alleged:
- Fiduciaries should have made an early corrective disclosure, conducted alongside the regular SEC reporting process.
- Defendants uniquely situated to fix the problem because they had primary responsibility for public disclosure.
- Failure to disclose prolonged the negative consequences for IBM stock.
- Defendants knew they would be unable to hide the overvaluation because once the sale of the microelectronics business occurred, disclosure would occur.

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Jander v. IBM, 910 F.3d 620 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 2667 (2019).

- The District Court Judge followed *Dudenhoeffer*, and dismissed holding that Plaintiff failed to plead facts giving rise to an inference that Defendants could not have concluded that public disclosures, or halting the Plan from further investing in IBM stock, were more likely to harm than help the fund.
- The Second Circuit reversed and drawing all reasonable inferences for Plaintiff held the complaint sufficiently pleaded that no prudent fiduciary in the Plan defendants' position could have concluded that earlier disclosure would do more harm than good.

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Jander v. IBM, 910 F.3d 620 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 2667 (2019).

- Question posed by IBM’s Supreme Court brief.
- Whether *Dudenhoeffer*’s “more harm than good” pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time.
- Second, Fifth, Sixth and Ninth Circuits have dismissed analogous ERISA stock-drop claims.
- Supreme Court oral argument – November 6, 2019.

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Sulyma v. Intel, 909 F.3d 1069 (9th Cir. 2018*), cert. granted, Intel v. Sulyma,* 139 S. Ct. 2692 (2019)

- When does three-year statute of limitations – actual knowledge – run for claims for breach of fiduciary duty?
- Plaintiff challenges investment mix of 401(k) Plan.
- The plan disclosed the investment mix in Fund Fact sheets on various web sites.
- Plaintiff accessed some of the information but testified he was not actually aware his retirement accounts were invested in alternative investments.
- District court grants summary judgment holding Plaintiff had actual knowledge of the alternative investments more than three years before suit was filed.

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Sulyma v. Intel, 909 F.3d 1069 (9th Cir. 2018*), cert. granted, Intel v. Sulyma,* 139 S. Ct. 2692 (2019)

- 9th Circuit: reverses district court and holds actual knowledge is something between bare knowledge of the underlying transaction and actual legal knowledge that only a lawyer would possess.
- Actual knowledge means knowledge that is actual not merely a possible inference.
- Rejects *Brown v. Owens Corning,* 622 F.3d 564, 571(6th Cir. 2010) that held Plaintiff’s failure to access plan documents and failure to read documents will not shield Plaintiff from having actual knowledge of documents’ contents.

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Sulyma v. Intel, 909 F.3d 1069 (9th Cir. 2018*), cert. granted, Intel v. Sulyma,* 139 S. Ct. 2692 (2019)

- Question Intel presents in its Supreme Court brief:
- Whether the three-year limitations period in Section 413(2) of the Employee Retirement Income Security Act, 29 U.S.C. 1113(2), which runs from "the earliest date on which the plaintiff had actual knowledge of the breach or violation," bars suit where all of the relevant information was disclosed to the plaintiff by the defendants in statutorily mandated disclosures more than three years before the plaintiff filed the complaint, but the plaintiff chose not to read or could not recall having read the information.

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Brotherston v. Putnam Invs., LLC, 907 F.3d 17 (1st Cir. 2018)

- Case to keep an eye on.
- Burden of proof – there was an alleged loss.
- Acknowledging Circuit split, 1st Cir. holds that the burden of proof as to loss causation falls on the imprudent fiduciary.
- Focus of ERISA: protection of participant rights.
- 1st Circuit aligns with the Fourth, Fifth, and Eighth Circuits and hold that once an ERISA plaintiff shows a breach of fiduciary duty and loss to the plan, the burden shifts to the fiduciary to prove that such loss was not caused by its breach, that is, to prove that the resulting investment decision was objectively prudent.
- The Sixth, Ninth, Tenth and Eleventh Circuits have ruled that after workers show there's been misconduct and a loss, the burden of proof stays with them, and they must connect the misconduct and the loss or their case will be dismissed.
- *Certiorari* pending since (January 11, 2019). The Solicitor General was asked to file brief expressing the views of the United States. (April 22, 2019).

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Arbitration of ERISA Class Actions

Supreme Court Arbitration Case Law

- The Supreme Court has taken a favorable view of arbitration.
- *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (rejecting NLRA concerted activity concerns as a bar to arbitration).
- *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (rejecting argument that class waiver would prevent effective vindication of statutory rights even though enforcement of a class waiver prevented plaintiffs from pursuing a representative antitrust claim, which was the only economically viable way for them to assert such claims).
- *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) (enforcing arbitration and class action waiver even though ADEA permits collective action).
- *Henry Schein, Inc. v. Archer & White Sales, Inc.,* 139 S. Ct. 524 (2019) (when contract delegates the question of the arbitrability of a particular dispute to an arbitrator, a court may not override the contract, even if it thinks that the argument that the arbitration agreement applies to a dispute is groundless).
- *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (rejecting class arbitration where arbitration agreement was ambiguous as to class arbitration).

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Brown v. Wilmington Trust,

2018 WL 3546186 (S.D. Ohio July 24, 2018)

- Class action alleging Trustee paid more than FMV for employer stock in ESOP transaction.
- After 30 years, Plaintiff terminates in May 2015, taking full distribution of ESOP account in November 2016.
- Effective January 1, 2017, plan amended to add a "Mandatory and Binding Arbitration provision." Key provision:
  - **Covered Claims must be brought solely in *Claimant's* individual capacity, not in a representative capacity or on a class, collective, or group basis.**
- District Court held Plaintiff did not agree to arbitrate and even if she did, her claims fall outside the scope of the Arbitration Procedure contained within the Plan.
- **Court denied motion to compel arbitration** and to strike any claims purportedly brought on a class or representative basis.

Brown v. Wilmington Trust, 2018 WL 3546186 (S.D. Ohio July 24, 2018)

- “Although plan administrators and employers have broad discretion to modify the terms of a plan, those modifications do not necessarily bind individuals like Plaintiff, who have ceased all participation in the plan and whose cause of action accrued prior to the modification.”
- The Arbitration Procedure encompasses a wide variety of claims, including claims of breach of fiduciary duty asserted against a Trustee. Nevertheless, by its terms, the Arbitration Provision applies only to “Covered Claims,” and those claims include only claims asserted “by a Claimant.”
- Plaintiff had terminated her employment, cashed out the entire balance in her ESOP account, and ceased all participation in the Plan. Thus, she no longer qualified as a “Participant.” Accordingly, she cannot be a “Claimant” and her claims are not subject to the Arbitration Procedure.
- The District Court reasoned, “[T]he fact that Plaintiff has statutory standing, as a “participant,” to assert claims on behalf of the Plan does not necessarily mean that she qualifies as a “Participant” who is contractually bound by the Plan’s Arbitration Procedure.”

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Munro v. Univ. of Southern Cal.,
896 F.3d 1088 (9th Cir. 2018), *cert. den.,* 139 S. Ct. 1239 (2019)

- Defendant sought arbitration and class action waiver of Plaintiff's class action ERISA § 502(a)(2) fee claims.
- District Court denied Defendant's motion to compel arbitration, determining that the agreements, which the Employees entered into individually, do not bind the Plans ***because the Plans did not themselves consent to the arbitration of the claims***.
- The Ninth Circuit held **the arbitration agreements did not apply to fiduciary-breach claims brought under Section 502(a)(2**) of ERISA, because such claims are brought on behalf of the plan.
- Relying on a *qui tam* holding in *Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3D 791, 796 (9TH Cir. 2017), the panel affirmed, reasoning that the ERISA § 502(a)(2) claims were brought on behalf of the Plan, not on behalf of Munro himself.
- Supreme Court refused to grant writ of certiorari on February 19, 2019.

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Dorman v. Charles Schwab & Co.,
2018 WL 467357 (N.D. Cal. Jan. 18, 2018)

- Plaintiff, a former Charles Schwab employee, alleged that Defendant breached fiduciary duties by offering Schwab-affiliated funds which charged higher fees and performed more poorly than other investment options on the market.
- Court denied Motion to Dismiss and Motion to Compel Arbitration:
  - Because Plaintiff was a former employee, he could not be compelled to arbitrate based on new provisions implemented *after* his termination.
  - Furthermore, the “Compensation Plan Acknowledgment” arbitration provision was limited to claims “arising out of or relating to the employment or the termination of employment.”
  - Court held ERISA claims are not “worked-related legal claims.”
- “Because the arbitration provisions . . . do not encompass Plaintiff’s claims, they do not require him to submit his claims to arbitration.”
- Appealed to 9th Circuit.

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Dorman v. Charles Schwab & Co., 934 F.3d 1107 (9th Cir. 2019)

- Published opinion held ERISA claims can be subject to mandatory arbitration.
- In December 2014, the Plan was amended to add an arbitration provision. That provision took effect on January 1, 2015, nine months before Dorman ended his employment at Schwab and nearly a year before he terminated his participation in the Plan.
- The arbitration provision includes a waiver of class or collective action that requires individual arbitrations, even if absent the waiver Dorman could have represented the interests of other Plan participants.

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Dorman v. Charles Schwab & Co., 934 F.3d 1107 (9th Cir. 2019)

- The panel noted that over 35 years ago, the Ninth Circuit held that ERISA cases could not be arbitrated. *See Amaro v. Cont'l Can,* 724 F.2d 747 (9th Cir. 1984).
- Since *Amaro*, the Supreme Court has ruled that arbitrators are competent to interpret and apply federal statutes.
  - *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).
- Because the Supreme Court has held that federal statutory claims are generally arbitrable and arbitrators can competently interpret and apply federal statutes, *Amaro* is no longer binding precedent and this dispute is subject to arbitration.

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Dorman v. Charles Schwab & Co., 2019 WL 3939644 (9th Cir. 2019)(unpub'l)

- District court erred by failing to enforce the arbitration provision. The relevant question is not whether Dorman agreed to arbitration but whether the Plan did. *Munro.*
- Here the Plan expressly agreed all ERISA claims are subject to arbitration.
- Plan arbitration provision also requires the arbitration to be conducted on an individual rather than collective basis.
- The panel then held the district court's reasons for not enforcing arbitration and the class action waiver were incorrect.

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Dorman v. Charles Schwab & Co., 2019 WL 3939644 (9th Cir. 2019)(unpub'l)

- 1st, the class action waiver does not relieve the fiduciary from liability under ERISA § 410(a) because arbitration merely selects a different forum for litigation.
- 2nd, once a dispute falls within the scope of an arbitration agreement, a court must order arbitration unless the agreement is unenforceable under contract rules.
- 3rd, claims alleging a violation of federal statutes – such as ERISA – are generally arbitrable absent a contrary Congressional command.
  - ERISA contains no such contrary Congressional command.

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Dorman v. Charles Schwab & Co., 2019 WL 3939644 (9th Cir. 2019)(unpub'l)

- No party can be compelled to arbitrate on a class-wide or collective basis unless it agrees to do so by contract.
- As a matter of contract, the Plan waived class-wide and collective arbitration. Enforces the contract terms and holds the arbitration will be conducted on an individualized basis.
- Relying upon *LaRue v. DeWolff,* 128 S. Ct. 1020 (2008), recognizes that ERISA § 502(a)(2) claims seek relief on behalf of a plan, but that relief is inherently individualized when brought in the context of a defined contribution plan.
- The Plan and Dorman both agreed to arbitration on an individualized basis and this is consistent with *LaRue*.

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401(k) Plan Fee Litigation: Non-Proprietary Funds

401(k) Plan Non-Proprietary Fee Cases

- Generally, these complaints consist of three (3) types of claims:
  - Excessive administrative fees
    - More than one recordkeeper
    - No competitive bidding
    - Asset-based fees and revenue sharing instead of or in addition to fixed-dollar fees
    - Occasionally, kick-back allegations
    - Failure to monitor fee payments to recordkeepers
  - Excessive management fees and performance losses
    - Duplicative investment options for each asset class, which underperformed and charged higher fees than lower-cost share classes of certain investments
  - Failure to monitor and evaluate appointees

Bloomberg Law Chart (2016): Data on Fee Litigation Settlements/Attorneys Fees

Defendant	Amount
Caterpillar Inc. (2010)	5,500,000
General Dynamics (2010)	5,050,000
Lockheed Martin Corp. (2015)	20,666,666
International Paper Co. (2012)	10,000,000
Bechtel Corp. (2011)	6,100,000
Boeing Co. (2016)	19,000,000
Kraft Foods Inc. (2012)	3,166,666
CIGNA Corp. (2013)	11,666,667
Ameriprise Financial (2015)	9,166,666
Mass Mutual (2013)	10,300,000
Novant Health (2016)	10,666,666
Total	111,283,331

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White v. Chevron Corp.,

2017 WL 2352137 (N.D. Cal. May 31, 2017)

- Defendant's 401(k) offered participants a diversified array of investment options with an overall low-cost fee structure.
- Plaintiffs alleged that participants lost more than $20M through unnecessary expenses as a result of Defendant's inclusion of 10 Vanguard funds because there were "identical" Vanguard funds available with lower-cost share classes.
- Plaintiffs also alleged that Defendant paid excessive administrative fees to Vanguard as recordkeeper through revenue-sharing from investment plan options – specifically, because Vanguard was compensated for a period of time through an asset-based arrangement, its fees increased as the plan's assets increased.

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White v. Chevron Corp.,
2017 WL 2352137 (N.D. Cal. May 31, 2017)

- **Court granted Motion to Dismiss in its entirety**:
  - Rejected claim that Defendant fiduciaries had a duty to offer cheaper institutional-class funds over retail-class funds, noting that price is not the only investment feature that a fiduciary is required to consider when compiling options.
  - Rejected the argument that Defendant acted imprudently in compensating the plan's recordkeeper via revenue-sharing.
- Plaintiffs, with leave from the court, amended their complaint, but all **claims were dismissed again**:
  - Insufficient to merely provide comparisons between funds that were in the plan lineup and funds that plaintiffs claim were less expensive.
  - Chevron provided a valid rationale for being in the retail-class shares, specifically noting that the revenue sharing fees associated with these higher-cost share classes paid the plan's recordkeeping expenses.

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White v. Chevron Corp., 752 F. App'x 453, 454 (9th Cir. 2018)(unpub'l), *cert. denied*, 139 S. Ct. 2646 (2019)

- 9th Circuit held that plaintiff had failed to plead a plausible ERISA claim.
- To each count [breach of duty loyalty, prudence, and prohibited transaction], the allegations showed only that Chevron could have chosen different vehicles for investment that performed better during the relevant period, or sought lower fees for administration of the fund.
- Found that the prohibited transaction allegation was time-barred because the alleged transaction—hiring Vanguard—occurred in 2002, which was 14 years before the suit was filed.
- On May 28, 2019, the Supreme Court denied Plaintiffs' writ of *certiorari*. *White v. Chevron Corp.,* 139 S. Ct. 2646 (2019).

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Marshall v. Northrop Grumman Corp.,
2017 WL 2930839 (C.D. Cal. Jan. 30, 2017)

- Plaintiffs alleged several claims for breaches of ERISA-imposed duties on the Plan fiduciaries, including:
  - Breach of fiduciary duties of Loyalty and Prudence;
  - Failure to Monitor;
  - Defendants individually responsible for breaches of Administrative Committees
- Motion to dismiss granted on claims for breach of fiduciary duty because Defendant was not a "named or functional fiduciary" with respect to duties of loyalty and prudence.
- Motion to dismiss for failure to monitor denied as a result of allegations that Defendant "did nothing at all to monitor their appointed fiduciaries."
- Motion to dismiss allegations that defendants are "individually" responsible for the alleged breaches of the Committees was denied because the individual defendants are ERISA fiduciaries (officers of Northrop who served on the Committees).
- Class certification granted, 2017 WL 6888281 (C.D. Cal. Nov. 2, 2017).
- Additional proceedings: 2019 WL 4058583 (C.D. Cal. Aug. 14, 2019)
- Case settled on October 15, 2019 the date the trial was to start. Terms have not been announced as of October 24, 2019.

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Bell v. Pension Comm. of ATH Holding Co., 2019 WL 387214 (S.D. Ind. Jan. 30, 2019)

- Plaintiffs attacked Money Market Fund (MMF) as an investment option instead of including a Stable Value Fund (SVF).
- The court first noted that there is no duty requiring a fiduciary to "absolutely" offer a SVF over a MMF.
- The court then rejected as conclusory plaintiffs' argument that had defendants considered a SVF and weighed the benefits, defendants would have favored a SVF over a money market fund.
- The court did not dismiss claims for excessive administrative fees and a reporting and disclosure claim.
- The court also declined to find the surviving claims untimely holding there was no disclosure by Defendants of identical, available lower cost alternatives (assuming such were available).
- On January 24, 2019, the court certified two subclasses to reflect the company's changing fee structures from a revenue sharing fee structure to flat fee structure.
- Defendant's motion for summary judgment for fiduciary breach claims was rejected on January 31, 2019.
- Approved preliminary settlement (April 9, 2019): $23,700,000 including $7,885,545 in attorney fees (Schlicter Bogard & Denton LLP).

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Troudt v. Oracle Corp., 2019 WL 1006019 (D. Colo. Mar. 1, 2019)

- Plaintiffs in Oracle's 401(k) Savings and Investment Plan ($12 billion in assets), asserted 2 claims:
  - Defendants allowed Fidelity to collect excessive recordkeeping/admin fees.
  - Defendants caused the Plan to make imprudent investments.
- Defendants did not oppose class certification *per se*, but argued Plaintiffs' proposed class definition did not meet Rule 23 requirements:
  - Overly broad in terms of its proposed time frame; and
  - With respect to the imprudent investment claims, insufficiently specificity as to defining who is a class member.
- Court held it was premature to limit proposed class to 6-year SOL.
- Regarding the imprudent investment claims, the court narrowed the class definition to class members in two funds and permitted a class as to excessive fees, plan wide.
- Class certification granted (Jan. 30, 2018); class of 70,000 participants.
- Partially granted summary judgment for claims of excessive recordkeeping fees and certain claims relating imprudent investments

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Green v. Morningstar Inv. Mgmt. LLC, 2019 WL 216538 (N.D. Ill. Jan. 16, 2019)

- Plaintiff participated in 401(k) which "designates" 17 investment options and gives investors the ability to choose how their contributions will be invested.
- Plaintiff alleged that an enterprise worked together to procure "kickbacks" in violation of RICO, specifically 18 U.S.C. § 1962(c) and (d) and 18 U.S.C. § 1954, through their self-interested administration of "GoalMaker" (an asset-allocation service that automatically diversifies investments) by:
  - (1) Developing and configuring GoalMaker which intended to produce revenue-sharing payments;
  - (2) Repeatedly influencing the selective limitation of investment choices to be utilized by GoalMaker in the Plan to maximize the revenue-sharing payments made to Defendants; and
  - (3) Accepting revenue sharing payments.
- Initial Motion to Dismiss granted: Complaint failed to adequately allege existence of an enterprise because it lacked "concerted, structured and purposeful conduct by the Defendants involved…"
- Plaintiff filed amended complaint. Motion to dismiss filed May 25, 2018.
- Amended Motion to Dismiss granted (January 16, 2019).

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Harmon v. FMC Corp.,
2018 WL 1366621 (E.D. Pa. Mar. 16, 2018)

- Plaintiffs alleged breach of fiduciary duty by offering imprudent and undiversified investment options (30+ options). No loyalty claim.
- Plaintiffs attack “non-diversified” Sequoia Fund, a long-term growth fund heavily invested in Valeant Pharma stock, as imprudent after Valeant’s shares dropped for 3 years. Sequoia underperformed S&P 500 for 2+ years.
- Motion to Dismiss granted (with prejudice):
  - Plans are allowed to include undiversified options as long as the plans are diversified as a whole.
  - Duty of prudence claim dismissed because it contained no direct allegations of flaws in Defendants’ ***process*** and instead relied upon a hindsight attack based upon publically available information.
  - Citing *Dudenhoeffer,* court holds that "where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over-or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances."

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Muri v. Nat'l Indem. Co., 2019 WL 2513695 (D. Neb. June 18, 2019)

- Similar to *Harmon v. FMC Corp.* with different outcome:
- Imprudence because Sequoia Fund which was over-invested in Valeant stock.
- Disloyalty because Sequoia Fund holds the stock of FMC's parent company, Berkshire Hathaway.
- Motion to Dismiss denied: "The availability of multiple investment options does not absolve a fiduciary of its duty of prudence."
  - As to process, court held a reasonable process would have discovered issues with Valeant stock.
  - Process, Court's footnote 1: A plaintiff is not required to plead specifics concerning Defendant's process at initial pleading stage.
- Loyalty: Sufficient allegations to support claim Defendant did not act with "eye single" to participants. Plaintiffs need not rebut Defendants' explanations for offering Sequoia Fund, *i.e.*, history of strong performance.
- Summary judgment granted (June 19, 2019) because the court found the Plaintiff had failed to show breaches of duties of loyalty and prudence.
- Appeal filed to 8th Cir. on July 3, 2019

Patrico v. Voya Fin.,
2018 WL 1319028 (S.D.N.Y. Mar. 13, 2018)

- Defendants, Voya and VRA, are Nestle USA Plan service providers; Voya provides recordkeeping and other services.
- Voya agreement specifically states it does not provide “investment advisory services” to Plan participants.
- VRA offered investment advice options, but was designated as a fiduciary only “with respect to services provided.”
- Plaintiff alleged Defendants breached fiduciary duties and engaged in prohibited transactions by charging excessive fees.
- Court dismissed because complaint did not adequately allege that Defendants were Plan fiduciaries regarding the challenged conduct.
- Nestle retained authority to accept or reject Defendants’ proposed terms.
- Defendants did not act as fiduciaries because they did not exercise control over the amount of fees, which was set by a pre-determined formula.
- Appeal filed April 12, 2018. Appeal withdrawn on June 15, 2018.

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Scott v. Aon Hewitt Fin. Advisors,
2018 WL 1384300 (N.D. Ill. Mar. 19, 2018)

- Defendant Hewitt, the record-keeper, and AFA, the investment advisor service, allegedly engaged in an improper "pay to play" / kickback scheme.
- Allegedly, AFA sub-contracted with Financial Engines [FE]. In exchange for being selected as the Plan's advisor by AFA, FE agreed to "kick-back" or share fees from automated investment services with Defendants.
- The Court dismissed the fiduciary claims against Hewitt, finding that the arms' length negotiations between Hewitt and FE to provide data transmission and technological services was not an exercise of discretionary authority over the Plan or Plan assets.
- The Court dismissed the excessive fee claims against AFA: "[s]imilar to *Patrico*, AFA did not unilaterally control the compensation it would receive because [the Plan] was free to select a different investment advice service provider or none at all."
- The Court also dismissed the prohibited transactions claims because (a) Hewitt was not a fiduciary and (b) Plaintiffs failed to show that the fees paid to AFA were unreasonable or that it received compensation from the Plan.

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Johnson v. Fujitsu Tech. & Bus. of Am., Inc., 250 F. Supp. 3d 460, 463 (N.D. Cal. 2017)

- Former Fujitsu employees accuse Fujitsu and a plan administrator of breaching their fiduciary duties by making imprudent investments.
- Plaintiff's allege that the plan was the most expensive "mega plan" in the country in 2013 and 2014 and recordkeeping expenses were 5-10 times higher than fees for similarly-sized plans.
- The court denied the defendants motion to dismiss and found the plaintiffs adequately pled the causes of action for breach of fiduciary duty.
- On June 15, 2018 the parties **settled** for $12 million. The class size was 5,600.

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Tussey v. ABB Inc., 2017 WL 6343803 (W.D. Mo. Dec. 12, 2017)

- Plaintiffs allege that ABB allowed Fidelity Management Trust Co. and Fidelity Management & Research Company to overcharge workers for record-keeping services because Fidelity was losing money on other services it provided to ABB.
- The plaintiffs also claimed that ABB kicked a high-quality fund off of the Plan lineup and replaced it with an inferior fund.
- Plaintiffs won at trial in 2012, however, it became a 12 year battle. There were 3 appeals to the 8th Circuit and the Supreme Court denied cert twice.
- Parties settled June 16, 2019 for $55 million. The class size was approximately 12,800.

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401(k) Plan Fee Litigation: Proprietary Funds

Background

- Proprietary funds include mutual funds or collective investment trusts managed by an affiliate of the plan/plan sponsor that pay fees to the affiliate.
- ERISA § 408(b)(8) and PTE 77-3 recognize that investments in affiliated funds is a "common practice" in the financial services industry and provide exemptions for party in interest transactions.
- Recent actions challenging the inclusion of affiliated funds include claims that the funds:
  - Charge excessive fees;
  - Are imprudent investment options because, net of fees, they offer inferior performance to available alternatives; and
  - The payment of fees to an affiliate constitutes a prohibited transaction.

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Tibble v. Edison Int'l, 729 F.3d 1110 (9th Cir. 2013), rev'd and vacated, 135 S. Ct. 1823 (2015).

- The first excessive fees case to ever be considered by the Supreme Court.
- Plaintiffs claimed prudence issues concerning retail mutual funds which had been in the Plan's investment lineup, when they were removed.
- In a unanimous decision, the Supreme Court held that a plan fiduciary has **a continuing duty to monitor** the prudence of investment options.
- Now the law governing defined contribution plans and provides protections to the population of retirees.

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Meiners v. Wells Fargo & Co.,
2017 WL 2303968 (D. Minn. May 25, 2017)

- Plaintiffs alleged that defendants breached their fiduciary duties by including proprietary target-date funds in lieu of allegedly comparable and less expensive Vanguard and Fidelity funds.
- Plaintiffs argued that these proprietary target-date funds were selected to "seed the underperforming funds" and generate fees for Wells Fargo at the expense of Plan participants.
- **District Court dismissed all fiduciary breach claims:**
  - Court rejected underperformance claim because Vanguard funds were not a proper comparator since they utilized a different investment strategy than the Wells Fargo funds.
  - Court rejected excessive fee claims because Plaintiffs failed to provide a meaningful benchmark to compare fees; thus, the claim amounted to nothing more than the insufficient contention that Wells Fargo failed to choose the cheapest fund.
  - The seeding argument failed to allege sufficient facts showing the fiduciaries acted for their own financial interest.

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Meiners v. Wells Fargo & Co.,
898 F.3d 820 (8th Cir. 2018)

- Insufficient factual matter alleged in complaint, MTD affirmed.
- No facts showing the Wells Fargo TDFs = underperforming funds.
  - Plaintiff pled that one Vanguard fund performed better.
  - But, fact that one fund with a different investment strategy ultimately performed better does not establish whether Wells Fargo TDFs were an imprudent choice.
- Court also rejected allegations as to expense.
  - Plaintiff does not allege that cheaper alternative investments with some similarities exist in the marketplace.
  - Plaintiff must allege a meaningful benchmark; merely finding a less expensive alternative fund or two is insufficient.

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Allen v. Credit Suisse Sec. LLC, 895 F.3d 214 (2d Cir. 2018)

- Plaintiffs sued 12 banks and their affiliates for breach of fiduciary duties owed to the Plans or, in the alternative, for Defendants' "knowing participation" in prohibited transactions as non-fiduciary parties-in-interest.
- District Court dismissed the claims, determining that Defendants' alleged fraudulent conduct in conducting foreign currency exchange (FX) market transactions for the Plans was insufficient to plead the banks' ERISA functional fiduciary status. The alternative claim failed in the absence of any allegation that non-party Plan fiduciaries had "actual or constructive knowledge" of the banks' fraud.
- Plaintiffs' challenged the dismissal, arguing that Defendants acquired fiduciary status by exercising control over the disposition of Plan assets by manipulating benchmark rates to which FX transactions were tied, effectively allowing them to determine their own compensation for each transaction.
- **Second Circuit affirmed** (July 10, 2018): "[t]he facts alleged do not show that defendants exercised the control over Plan assets necessary to establish ERISA functional fiduciary status."

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Ellis v. Fidelity Mgmt. Tr. Co.,
257 F.Supp.3d 117 (D. Mass., June 19, 2017), *aff'd,* 883 F.3d 1 (1st Cir. 2018)

- Plaintiffs claimed Fidelity's Stable Value Fund (SVF) underperformed because of a "too conservative" investment strategy and excessive fees.
- Plaintiffs alleged Fidelity was initially "overly aggressive" with the SVF's investment strategy, and had overcorrected to an unreasonably conservative strategy causing remarkably low returns.
  - **District Court granted Summary Judgment**, finding that plaintiffs failed to show that Fidelity breached duty of prudence because Fidelity followed a "procedurally prudent" process, including regularly considering whether to change the SVF's investment strategy.
  - The court noted, "in the face of an undisputed process for making investment decisions, Plaintiffs cannot carry their burden by vaguely asserting that Fidelity breached its duty of prudence without explaining what actions constituted the breach"
- Appeal filed July 10, 2017. **First Circuit affirmed** (Feb. 21, 2018).
  - Participants failed to establish that portfolio's conservative performance benchmark violated administrator's ERISA fiduciary duty of prudence.
  - Participants failed to establish that plan administrator's refusal to seek competitive level of income violated ERISA fiduciary duty of prudence.

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Patterson v. Capital Grp. Companies, Inc., 2018 WL 748104 (C.D. Cal. Jan. 23, 2018)

- Plaintiffs alleged fiduciary breach by allowing 90% of the investment options in the Capital Group's retirement plans to consist of affiliated funds and by failing to select a lower-cost share class for several of these funds.
- Court dismissed fiduciary breach claim.
  - Plaintiffs failed to plausibly allege that the funds' fees were "unjustified."
  - The fact that the funds were affiliated and that "similar" Vanguard funds charged lower fees was not sufficient to state a claim, especially where the challenged funds charged fees that were not "obviously excessive."
  - Fiduciaries need not choose the cheapest investment options available.
  - Court observed that fiduciaries of other plans were investing substantial amounts in the challenged funds.
- Court dismissed prohibited transaction claim as exempt or time-barred.

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Brotherston v. Putnam Invs.,

2017 WL 2634361 (D. Mass. June 19, 2017), *but see* next slide.

- Plaintiffs alleged breach of Loyalty, Prohibited Transactions and Prudence by including proprietary funds as investment options, and failing to offer the cheaper share class of these funds for part of the putative class period.
- Prohibited Transactions dismissed as time-barred prior to trial. The remaining claims proceeded to trial. After Plaintiffs presented their case, Defendants moved for a judgment on partial findings.
- *Loyalty*: Plaintiffs failed to show that Putnam's decision to include proprietary funds in the plan amounted to a breach of loyalty where Putnam also made substantial discretionary contributions to the plan (more than $40 million during the class period), provided additional services to participants, and paid for recordkeeping expenses.
- *Prudence*: Plaintiffs failed to make a *prima facie* showing of loss, *i.e.*, failed to pinpoint specific investment decisions that resulted in a lose to participants.
  - Court declined to enter conclusive findings on whether Defendant's lack of an independent monitoring process was imprudent.
- **Case was appealed to the First Circuit.**

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Brotherston v. Putnam Invs., LLC, 907 F.3d 17 (1st Cir. 2018)

- Important issue: burden of proof for fiduciary claims.
  - Court holds fiduciary did not investigate Putnam funds before including them as investment options, did not monitor once in Plan, and did not remove a single fund for underperformance, even when certain Putnam funds received a “fail” rating from Advised Asset Group, a Putnam affiliate.
  - This means no procedural prudence and sets up the burden of proof question.
- Prohibited Transaction – affirms judgment for Defendant.
  - Persuaded that other plans offered these funds indicating that cost was FMV as other plans with freedom to invest in other funds in the marketplace also offered these funds.

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Brotherston v. Putnam Invs., LLC, 907 F.3d 17 (1st Cir. 2018)

- Court vacates district court judgment under ERISA §406(b) because Putnam received fees from the funds in which the Plan invested.
- Putnam argued as recordkeeper for the Plan it did not charge any fees to the Plan, and Putnam's investment managers pay no revenue sharing to or for the benefit of the Plan.
- Court remands for fuller factual development of issues under PTE 77-3.

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Brotherston v. Putnam Invs., LLC, 907 F.3d 17 (1st Cir. 2018)

- Burden of proof – there was an alleged loss.
- Acknowledging Circuit split, 1st Cir. the burden of showing that a loss would have occurred even had the fiduciary acted prudently falls on the imprudent fiduciary.
- Focus of ERISA: protection of participant rights.
- 1st Circuit aligns with the Fourth, Fifth, and Eighth Circuits and hold that once an ERISA plaintiff has shown a breach of fiduciary duty and loss to the plan, the burden shifts to the fiduciary to prove that such loss was not caused by its breach, that is, to prove that the resulting investment decision was objectively prudent.
- The Sixth, Ninth, Tenth and Eleventh Circuits have ruled that after workers show there's been misconduct and a loss, the burden of proof stays with them, and they must connect the misconduct and the loss or their case will be dismissed.
- *Certiorari* pending since (January 11, 2019). Solicitor General asked to file brief expressing the views of the United States. (April 22, 2019).

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Moreno v. Deutsche Bank Ams. Holding Corp.,
2018 WL 2727880 (S.D.N.Y. June 6, 2018)

- Defendants allegedly breached their ERISA fiduciary duties:
  - Selecting and retaining Deutsche Bank's expensive and poorly performing proprietary mutual funds as available investments to participants in the Plan
  - Failing to consider non-mutual fund investment alternatives, such as lower cost separate accounts available to other Deutsche Bank clients.
- Defendants allegedly engaged in Prohibited Transactions:
  - Offering "high-cost" investments that generated revenue for Deutsche Bank
  - Offering mutual funds managed by Deutsche Bank
- Summary Judgment denied on breach of Fiduciary Duty claims:
  - Genuine issues of fact as to whether Defendants actions "caused a loss."
  - Court applied 2nd Circuit's "but for" causation test and reject Defendants' reliance on the "objectively prudent" test applied by the 4th Circuit: Plaintiffs were not required to show that the breach led to objectively imprudent investments.

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Moreno v. Deutsche Bank Ams. Holding Corp.,
2018 WL 2727880 (S.D.N.Y. June 6, 2018)

- Summary Judgment granted with respect to Prohibited Transactions claim: Exempt under PTE 77-3: Plan shares in its mutual funds were offered at same price to the participants as other investors.
- Settlement on July 8, 2018, just one day before trial.
- Final settlement and attorney fees (March 31, 2019)
  - $29,000,000, including $6,570,000 in attorney fees
- Equitable relief including all fund selection to be delegated to an independent fiduciary and independent fiduciary will determine within six months whether any of the existing Deutsche Funds or Non-Deutsche funds in the plan should be replaced with alternative investments.

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Schapker v. Waddell & Reed Fin., Inc.,
2018 WL 1033277 (D. Kan. Feb. 22, 2018)

- Plaintiff alleged breach of fiduciary duties and prohibited transactions by charging excessive fees compared to unaffiliated companies for comparable mutual funds, and the performance levels of the available options were worse than the performance achieved by unaffiliated companies for comparable mutual funds.
- Court **denied motion to dismiss** based on 3-year Statute of Limitations:
  - Plaintiff must have acquired “actual knowledge” of the Defendant’s process in selecting the funds > 3 years before filing her original complaint to start the clock.
  - Court determined Plaintiff did not acquire “actual knowledge” > 3 years before the filing.

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Schapker v. Waddell & Reed Fin., Inc.,
2018 WL 1033277 (D. Kan. Feb. 22, 2018)

- Court denied Motion to Dismiss for Failure to State a Fiduciary Breach Claim:
  - Plaintiff alleged more than Defendants simply failed to select the cheapest or highest-performing funds.
  - Rather, Plaintiff showed more than 75 comparable funds that invested in the same industries as the Plan's funds.
  - Additionally, Plaintiff alleged Defendants offered ONLY proprietary investments products which charged higher fees and performed poorly in relation to comparable funds.
- Court denied Motion to Dismiss for Prohibited Transactions claim:
  - Plaintiff sufficiently pled that investment management fees were paid by the "assets of the plan" which is prohibited under 29 U.S.C. § 1106(a)(1)(D).
- Final settlement and attorney fees (March 31, 2019).
- $4,875,000, including $1,625,000 in attorney fees.

Schultz v. Edward D. Jones and Co., L.P.,
2018 WL 1508906 (E.D. Mo. Mar. 27, 2018)

- Plaintiffs alleged certain mutual funds resulted in excessive fees and Total Plan Costs.
  - Plaintiffs showed that Plan fees nearly tripled over the class period while market rates for recordkeeping services declined throughout the class period;
  - Total weighted average expense ratio of the Plan was "high" compared to market rates; and
  - Defendants failed to prudently monitor and control compensation to the plan's recordkeeper in light of the services provided.
- Court reasoned that these facts were sufficient to raise an inference of disloyalty and imprudence and denied Defendant's Motion to Dismiss.
- Class certification hearing scheduled for Jan. 25, 2019.
- Final settlement and attorney fees (April 22, 2019).
- Settlement of $3,175,000, includes $1,058,333 in attorney fees.

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Fernandez v. Franklin Res., Inc.,
2018 WL 1697089 (N.D. Cal. Apr. 6, 2018)

- Plaintiff alleged Defendants breached fiduciary duties by engaging in prohibited transactions and failing to monitor fiduciaries.
- Court denied Defendant's Motion for Summary Judgment:
  - Even though Plaintiff signed a severance agreement after her employment with Defendant that contained a covenant not to sue, it was unenforceable because the agreement did not bar Plaintiff's claims "to restore value to the Plan."
- Court denied Motion to Dismiss for Prohibited Transactions and Failure to Monitor:
  - Plaintiffs' claims "accrued" each time a plaintiff received underpayment of benefits and thus did not violate the statute of limitations.
  - Plaintiffs were not required to plead specific facts about the fiduciary's internal processes "because such information is typically in the exclusive possession of a defendant."
- Consolidated with Cryer v. Franklin Resources, (4:16-cv-04265) on April 3, 2018.
- Class certification granted (July 6, 2018).
- Final settlement and attorney fees (June 3, 2019): $20,000,000 includes $7,490,000 in attorney fees.

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Urakhchin v. Allianz,
2018 WL 8334847 (C.D. Cal. July 30, 2018)

- Plaintiff claimed that Allianz offered only high-cost proprietary funds as “core” investments, failed monitor fees, failed to investigate lower-cost options with comparable performance, retained the high-cost investment options at the direct detriment of Plan participants, and used the Plan to promote untested mutual funds.
- Motion to Dismiss denied in part:
  - Court rejected defendants’ argument that plaintiffs lacked standing regarding options in which they did not invest.
    - Due to defendants’ alleged misconduct “Plaintiffs were unable to select low-cost options when investing in the plan.”
  - “[A]llegations sufficiently state a claim for breach of fiduciary duties.”
- Class Certification conditionally granted on June 15, 2017:
  - Plaintiffs produced enough evidence to suggest that Allianz managed and selected funds based on whether they would benefit Allianz.
  - Plaintiff demonstrated that Allianz charged higher fees on average than participants would have to pay if nonproprietary funds had been chosen
- Final settlement and attorney fees (February 7, 2019): $12,000,000 includes $3,000,000 in attorney fees.

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Pease v. Jackson Nat'l Life Ins. Co.,
No.17-cv-284, W.D. Mich. (filed Mar. 29, 2017)

- Plaintiffs alleged Jackson National Life had improperly profited by choosing proprietary funds for its defined contribution retirement plan and had violated ERISA fiduciary duties of loyalty and prudence.
- The defendant argued claims were barred by the statute of limitation and that Peace lacked standing.
- Case settled before claims construed by the district court.
- Final settlement and attorney fees (April 23, 2019): $4,500,000 includes $1,350,000 in attorney fees.

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Sims v. BB&T Corp., 2018 WL 3128996 (M.D.N.C. June 26, 2018)

- Plaintiffs alleged defendants breached their duties of loyalty and prudence when they failed to solicit bids for the Plan's recordkeeping services and failed to monitor and control recordkeeping fees.
- Plaintiffs also allege fees were excessive, uncapped and asset-based.
- Defendants maintain that the Plan did not incur a loss because the defendants absorbed the full cost of recordkeeping starting in 2008.
- The court granted in part and denied in part the defendants motion for summary judgment.
- On May 6, 2019, the parties settled the case for $24 million. The class size was 32,000.

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The Lawsuits Continue . . .

- *Barrett v. Pioneer Nat. Res. USA, Inc.*, No. 17-cv-1579, D. Colo. (filed June 28, 2017)
- *Schmitt v. Nationwide Life Ins. Co.*, No. 17-cv-558, S.D. Ohio (filed June 27, 2017)
- *Patterson v. Capital Grp. Cos.*, No. 17-cv-4399 C.D. Cal. (filed June 13, 2017)
- *Baird v. BlackRock Inst. Tr. Co.*, No. 17-cv-1892, N.D. Cal. (filed Apr. 5, 2017)

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The Lawsuits Continue . . .

- *Pease v. Jackson Nat'l Life Ins. Co.*, No. 17-cv-284, W.D. Mich. (filed Mar. 29, 2017)
- *Feinberg v. T. Rowe Price*, 17-cv-427, D. Md. (filed Feb. 14, 2017)
- *Beach v. JPMorgan Chase Bank*, No. 17-cv-563 S.D.N.Y. (filed Jan. 25, 2017)
- *Severson v. Charles Schwab*, No. 17-cv-285 N.D. Cal. (filed Jan. 19, 2017)
- *Brown v. Nationwide Life Insurance Company et. al.*, No. 2:17-cv-00558, S.D. Ohio. (filed June 27, 2017)

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The Lawsuits Continue . . .

- *Torres v. Greystar Management Services, L.P.*, No. 5:19-cv-00510, W.D. Tex. (filed May 13, 2019)
- *Price v. Eaton Vance Corp. et al.,* No. 1:18-cv-12098, D. Mass. (filed May 22, 2019)
- *Enos et al. v. Adidas America, Inc.*, No. 3:19-cv-01073, D. Or. (filed Jul. 10, 2019)

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403(b) Plan Fee Litigation: The University Cases

Background

- At least 20 colleges have been sued under federal benefits law in recent years over alleged mismanagement of their retirement plans.
- Since mid-2016, Plan participants have filed a multitude of suits against universities that sponsor 403(b) plans.
- These actions typically assert claims based on:
  - Offering of imprudent investment options
  - Retention of administrative service providers charging excessive fees
  - Failure to remove poorly performing funds

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The Recent Wave of University Fee Cases

Fee Cases Filed Against University 403(b) Plans:

- Brown University, D.R.I.
- Columbia University, S.D.N.Y.
- Cornell University, S.D.N.Y.
- Duke University, M.D.N.C.
- Emory University, N.D. Ga.
- George Washington, D.D.C.
- Georgetown University, D.D.C.
- Johns Hopkins University, D. Md.
- Long Island University, E.D.N.Y.
- Massachusetts Institute of Technology, D. Mass.
- New York University, S.D.N.Y.
- Northwestern University, N.D. Ill.
- Princeton University, D.N.J.
- University of Chicago, N.D. Ill.
- University of Pennsylvania, E.D. Pa.
- University of Rochester, W.D.N.Y
- University of Southern California, C.D. Cal.
- Vanderbilt University, E.D. Tenn.
- Washington University, St. Louis, E.D. Mo.
- Yale University, D. Conn.

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The Recent Wave of University Cases

3 Main Allegations:

- Excessive administrative fees
  - Multiple recordkeepers
  - No competitive bidding
  - Asset-based fees and revenue sharing instead of or in addition to fixed-dollar fees (allegations of kick-backs)
  - Failure to monitor increase in fees
- Failure to monitor and evaluate appointees
- Excessive Management fees/performance losses
  - Duplicative investment options in each asset class that underperformed and charged higher fees than lower-cost share classes of certain investments
  - Historically underperforming investment options—specifically CREF Stock and TIAA Real Estate funds

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Current Status of Cases

- Motions to dismiss generally have been denied.
- Some case have been dismissed:
- *Divane v. Northwestern Univ.*, 2018 WL 2388118 (N.D. Ill. May 25, 2018) (motion practice).
- *Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018) (trial on the merits).
- *Wilcox v. Georgetown*, 2019 WL 132281 (D.D.C. Jan. 8, 2019) (motion practice).

Current Status of Cases

- Types of claims that generally have been dismissed:
  - Offered too many investment options; and
  - Duty of Loyalty claims.
- Mixed:
  - Claims Based on Offering Retail Share Classes; and
  - Claims for Violations of ERISA Prohibited Transactions Rules
- Types of claims that generally have not been dismissed:
  - Failed to include lower-cost index funds; and
  - Failed to include lower-cost share classes.

University Fee Cases: Settlements

- *University of Chicago* (N.D. Ill.) - Settled for ***$6.5 million*** on 5/23/18; final approval order entered on 9/12/18; other equitable relief.
- *Duke* (M.D.N.C.) - Settled for ***$10.65 million*** on 12/14/18; final approval order entered on 6/24/19; other equitable relief.
- *Vanderbilt (*M.D. Tenn.) - Settled for ***$14.5 million*** on 4/22/2019; preliminary approval order entered on 5/30/19; final approval entered 10/22/19; other equitable relief.
- *Brown* (D.R.I.) - Settled for ***$3.5 million*** on 3/12/19; preliminary approval order entered on 4/15/19; final approval entered 8/2/19; other equitable relief.

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University Fee Cases: Settlements

- *Johns Hopkins* (D. Md.) – Preliminary approval of settlement granted 8/16/19; proposed monetary relief is ***$14 million***; plus other equitable relief.
- *MIT* (D. Mass) – Notice of Settlement and Joint Motion to Stay filed 9/12/19. Case settles four days prior to the start of trial.
  - Plaintiffs' Counsel will file a Motion for Preliminary Approval of Settlement on October 28, 2019, and at that time the details of the settlement will become public.

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Sweda v. Univ. of Pennsylvania,
2017 WL 4179752 (E.D. Pa. Sept. 21, 2017)

- Participants alleged that defendants breached their fiduciary duties of loyalty and prudence by:
  - Locking plan into arrangements with record-keeper
  - Paying unreasonable administrative fees due to asset-based model
  - Paying unreasonable investment management fees
  - By selecting and retaining underperforming funds.
- Plan "lock-in": Court rejected claim as implausible, finding that locking-in rates was a common practice to obtain better terms, as was the use of multiple record-keepers who each bundled their own investment options.
- Administrative Fees**:** Court rejected claim because it was within the Plan fiduciary's discretion to select a prudent arrangement. Court recognized the trade-offs between the asset-based and flat-rate models:
  - Under the asset-based model participants with higher account balances pay more, but under the flat-rate model each participant pays the same regardless of account balance.

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Sweda v. Univ. of Pennsylvania,
2017 WL 4179752 (E.D. Pa. Sept. 21, 2017)

- Management Fees: Court noted that half of the Plan's investment options were in the institutional share class, and there were valid reasons why a fiduciary would not move the other investments into institutional share classes, *e.g.*, high minimum investment requirements.
  - Fiduciaries cannot discharge their duties with a "myopic focus on the singular goal of lower fees."
- Underperformance: Court held it must examine the "mix and range of options and . . . evaluate the plausibility of claims challenging fund selection against the backdrop of the reasonableness of the mix and range of investment options," thereby preventing plan participants from "second-guessing a plan fiduciary's investment decisions just because they lose money."
- Hindsight analysis is insufficient to state a claim for underperformance.

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Sweda v. Univ. of Pennsylvania, 923 F.3d 320 (3d Cir. 2019)

- In a split (2-1) decision, the Third Circuit reversed the district court's decision to dismiss all fiduciary breach claims.
- Panel adopted 8th Circuit's decision in *Braden v. Wal-Mart*, 588 F.3d 585, 597 (8th Cir. 2009) for the proposition that an ERISA plan participant is not required to rule out every lawful explanation for the plan fiduciary's conduct in order to state a plausible claim for relief.
- Court held that the plaintiffs prohibited transaction claims were properly dismissed.
- Rehearing en banc denied; the period to file a writ of *certiorari* to the Supreme Court was extended recently.

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Divane v. Northwestern University,
2018 WL 2388118 (N.D. Ill. May 25, 2018)

- Participants alleged that Defendants breached their fiduciary duties of loyalty and prudence and engaged in prohibited transactions by:
  - Allowing TIAA-CREF to mandate the inclusion of the CREF Stock Account and Money Market Account and by allowing TIAA-CREF to require the plans to use itself as recordkeeper for its proprietary funds;
  - Allowing the plans to pay record-keeping expenses through revenue sharing and by failing to prevent those fees from being excessive; and
  - Providing an overly broad range of investment options.
- The Court held there was no breach of fiduciary duty and rejected plaintiffs' claims, finding that (1) no participants were required to invest in CREF Stock Funds or any other TIAA-CREF product; (2) the Plans had valid reasons to use TIAA-CREF as the record-keeper; (3) the Plans had good reason to offer the TIAA-CREF Traditional Annuity.
- The Court found nothing wrong with charging record-keeper expenses via expense ratios rather than on a flat-rate basis, and noted that it was unclear whether lower prices could be obtained.
- Finally, the Court explained that offering of a broad range of investment options was not a valid claim because the range of investments included inexpensive options.
- Court denied Plaintiffs' motion to alter or amend the judgment (June 27, 2018).
- Plaintiff appealed to 7th Circuit.
- Oral argument on May 13, 2019. No decision as of yet.

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Daugherty v. Univ. of Chicago,

2018 WL 1805646 (N.D. Ill. Jan. 10, 2018)

- Plaintiffs claimed the University breached its fiduciary duties of loyalty and prudence by failing to prudently monitor two of Plans' investment options – the CREF Stock Account and the TIAA Real Estate Account.
- Also claimed that the University improperly paid excessive recordkeeping and administrative fees to the Plans' service providers by retaining two recordkeeping companies when one would have sufficed and would have been less expensive.
- Finally, Plaintiffs claimed a violation of ERISA's prohibited transactions rules with respect to the Plans' participant loan program.
- Court dismissed claims for breach of duty of loyalty and prohibited transactions.
- Court denied Motion to Dismiss for breach of prudence regarding Chicago Retirement Income Plan for Employees and for excessive recordkeeping and administrative fees relating to one of the plans.

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Daugherty v. Univ. of Chicago,
2018 WL 1805646 (N.D. Ill. Jan. 10, 2018)

- The University settles 403(b) fee litigation for $6.5 million; each named plaintiff receives $10,000 incentive award.
- Class counsel (Wexler Wallace LLP, Berger Montague PC, & Schneider Wallace Brayton Konecky LLP) awarded 30% ($1,950,000) of the settlement amount for attorney fees.
- In addition, the University agrees to retain certain structural changes to the Plans, including:
  - Not to increase per-participant recordkeeping fees for three years from the date of Final Approval of the Settlement, and to use commercially reasonable best efforts to continue to attempt to reduce recordkeeping fees.
  - Implementing a new investment lineup for the Plans that reduced the total number of investment options, and
  - Removal of the CREF Stock account as an investment option.

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Sacerdote v. New York Univ., 328 F. Supp.3d 273 (S.D.N.Y. 2018)

- Plaintiff brought standard Prudence and Loyalty claims:
  - The district court dismissed Loyalty claims:
    - Plaintiff cannot adequately plead a claim simply by making a "conclusory assertion" that a defendant failed to act for the exclusive purpose of providing benefits to participants and defraying reasonable administration expenses.
    - Instead, to implicate the concept of loyalty, a plaintiff must allege ***plausible facts*** supporting an inference that the defendant acted for the purpose of providing benefits to itself.
- Court dismissed Prudence claim based on Defendant's contractual agreement to include retail class shares instead of institutional shares:
  - Plaintiffs did not allege sufficient facts to support a plausible claim that the inclusion of retail class shares (versus only specific institutional class shares) breached the duty of prudence.

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Proskauer

Sacerdote v. New York Univ., 328 F. Supp.3d 273 (S.D.N.Y. 2018)

- Plaintiffs did not plausibly allege that defendant engaged in a transaction that in fact (versus in theory) contractually precluded the Plans' fiduciaries from fulfilling their broad duties of prudence to monitor and review investments under this standard.
- However, Court denied Motion to Dismiss breach of prudence claim regarding incurring excessive recordkeeping fees:
  - Court sustained claims that Plan fiduciaries failed to diligently investigate and monitor recordkeeping costs and also permitted claim to stand that Defendants were imprudent in selecting certain investment options.
- Motion for reconsideration denied (Oct. 19, 2017).
- **Class certification granted** (Feb. 13, 2018).
- **Trial occurred on April 16, 2018.**

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Sacerdote v. New York Univ., 328 F. Supp. 3d 273 (S.D.N.Y. 2018)

- After trial on the merits, judgment for NYU.
  - No breach because of failure to consolidate plan's two recordkeepers sooner than it did.
  - No breach because of failure to conduct more frequent request-for-proposals related to plan recordkeeping vendors.
  - No breach in negotiating recordkeeping fee reductions for plans.
  - No breach in opting for revenue-sharing model, rather than flat per-participant model for recordkeeping fees.
  - No proof participants sustained damages for excessive recordkeeping fees and monitoring of recordkeeping vendors;.
  - No breach of prudence: Funds were closely monitored.
  - No breach in offering tax deferred real estate fund as investment option.

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Sacerdote v. New York Univ.,
328 F. Supp. 3d 273 (S.D.N.Y. 2018)

- U.S. District Court Judge Katherine Forrest was the trier of fact; but post-decision re-joined Cravath as a partner.
- Cravath's Chairman is an NYU trustee.
- During a hearing on a motion for retrial, plaintiffs argued that Judge Forrest should have recused herself from the case when she began considering re-joining the firm.
- The district court rejected this argument and stated that Plaintiffs could not prove that Judge Forrest's re-employment at Cravath influenced her decision to rule in favor of NYU. (2019 WL 2763922, July 1, 2019).
- Plaintiffs filed a notice of appeal to the 2nd Circuit on July 19, 2019.

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Vellali v. Yale Univ., 308 F. Supp. 3d 673 (D. Conn. 2018)

- Defendant offered eligible employees the opportunity to “participate” in a 403(b) defined-contribution plan.
- Defendant contracted with Vanguard and TIAA-CREF, who provided a “bundled” services arrangement of investment management and recordkeeping services for the Plan.
  - Plaintiffs alleged the arrangement “did not initially scrutinize every investment” in the plan, leading to unreasonably expensive or poor-performing investments.
  - Plaintiffs further alleged Defendants failed to monitor investments and recordkeeping costs, and that by allowing TIAA-CREF to get higher fees for higher-priced investments, Defendants placed their own interests ahead of the participants.
- Plaintiffs brought claims for breach of fiduciary duties, prohibited transactions, and failure to monitor “Committee members” to ensure compliance with ERISA standards.

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Vellali v. Yale Univ., 308 F. Supp. 3d 673 (D. Conn. 2018)

- Court granted defendant's motion to dismiss regarding the following claims:
  - Prudence: Offering too many investment options.
  - Prudence: Failure to reduce fees on several TIAA-CREF investments.
  - All duty of loyalty breaches.
- Court denied defendant's motion to dismiss regarding the following claims:
  - Breach of duty of prudence with respect to a bundling arrangement under which they "abdicated their responsibility to monitor and remove imprudent investments and reduce exorbitant fees."
  - Breach of duty of prudence based on unreasonably high administrative fees.
  - Breach of duty of prudence based on failure to offer institutional shares.
  - Breach of duty of prudence based on failure to remove underperforming investments.
  - Prohibited transactions.
  - Failure to Monitor.
- Motion for class certification filed (January 16, 2019).

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Clark v. Duke Univ.,

2018 WL 1801946 (M.D.N.C. Apr. 13, 2018)

- Plaintiffs contend Defendants breached fiduciary duties by failing to investigate and include low-cost recordkeeping services, funds with reasonable fees and including imprudent investment funds.
- **Motion to Dismiss granted in part, denied in part:** several key arguments:
  - Unreasonable administrative fees;
  - Unreasonable investment management fees, performance losses;
  - Prohibited transactions;
  - Violation of Plan Investment Policy.
- **Class certification granted** (April 13, 2018).
- **Preliminary settlement and attorney fees (February 07, 2019): $10, 650,000, including $3,550,000 in attorney fees (Schlicter Bogard & Denton LLP and Puryear and Lingle PLLC).**
- **Settlement approved, 2019 WL 2588029 (June 24, 2019).**

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Short v. Brown Univ., 320 F.Supp.3d 363 (D.R.I. 2018)

- Employees alleged Defendant acted imprudently by using more than one record-keeper, not employing competitive bidding in its selection, and allowing the plans to pay excessive administrative fees.
- Employees also alleged that the university breached fiduciary duties by selecting more expensive funds with poor historical performance (such as the CREF stock account and TIAA real estate account).
- Defendant's Motion to Dismiss denied on these claims.
- However, Court dismissed claims for offering investments with multiple layers of fees and using asset-based fees and revenue-sharing (the employees did not respond to Defendant's arguments on these claims so they waived them).
- Employees failed to state a valid claim that the university offered too many investment options and failed to feature a set of core investment options.
- **Preliminary settlement and attorney fees (April, 2019): $3,500,000 including ≤ 30% of settlement in attorney fees (Schneider Wallace LLP and Berger & Montague P.C.).**
- **Settlement approved on August 2, 2019.**

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Cassell v. Vanderbilt Univ., 285 F. Supp. 3d 1056 (M.D. Tenn. 2018)

- The plaintiffs alleged the defendant failed to use the plan's bargaining power to lower administrative costs and fees and chose known mediocre investment products.
- Class certification granted on October 24, 2018.
- Preliminary settlement and attorney fees (May 30, 2019): $14,500,000 including $4,800,000 of settlement in attorney fees (Schlichter Bogard & Denton, LLP and Hawkins Hogan, PLC).
- Final approval of settlement entered on Oct. 22, 2019.

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Cunningham v. Cornell Univ., 2018 WL 4279466 (S.D.N.Y., Sept. 6, 2018)

- Standard panoply of University fee allegations with Plaintiffs demanding a trial by jury.
- In the Amended Complaint Plaintiffs claim Defendants are personally liable to make good to the Plans all losses, labeling this claim for compensation to the Plans as legal, not equitable relief, triable by jury.
- The court held that this claim was for entry of a money judgment against Individual Defendants for amounts Plan paid to 3rd-Party vendors.
- Acknowledging a split in authority, the court concludes this is a claim for legal relief triable to a jury. (2018 WL 4279466, Sept. 6, 2018).
- Class certification granted (2019 WL 275827, Jan. 22, 2019).
  - 2nd Circuit refused to review (June 20, 2019).
- Defendants' summary judgment granted in part leaving the only triable issue as the alleged imprudent retention of TIAA-CREF Lifecycle target date funds. (2019 WL 4735876, Sept. 27, 2019).

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Wilcox v. Georgetown, 2019 WL 132281 (D.D.C. Jan. 8, 2019).

- Plaintiffs sued Georgetown claiming the school failed to properly manage its two retirement plans.
- Plaintiffs claim Georgetown offered more than 300 investment options for participants to choose from, charged high administration fees and provided poor investment options.
- Motion to Dismiss granted in January 2019. The court said the dismissal order was final but appealable, however the plaintiffs failed to file a motion to amend within the required 28 days.
  - If a cat were a dog, it could bark. If a retirement plan were not based on long-term investments in annuities, its assets would be more immediately accessed by plan participants. These two truisms can be summarized: cats don't bark and annuities don't pay out immediately.
- Plaintiffs appealed on June 28, 2019 to address district court decision.

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Breach of Fiduciary Duty: Burden of Proof

Tatum v. RJR Pension Inv. Comm.,
855 F.3d 553 (4th Cir. 2017)

- RJR spun off its food business from its tobacco business, but the Plan document required the food business funds remain frozen in the Plan. After the divestment, the food stocks increased in value.
- Plaintiffs alleged RJR sold the food funds after the spin-off and eliminated them from the Plan without independent counsel or investigation.
- Participants alleged RJR breached fiduciary duties by liquidating the funds without investigating and by imposing an arbitrary liquidation timeline.
- 4th Circuit affirmed lower court's finding that RJR breached fiduciary duties and thus bore the burden of proving causation.
- As a preliminary matter, the court of appeals determined that § 1109(a) required causation in its "resulting from" language ("any losses to the plan ***resulting from*** each such breach.")

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Tatum v. RJR Pension Inv. Comm., 855 F.3d 553 (4th Cir. 2017)

- The default rule that the burden of proof lies with Plaintiff did not apply:
  - “ERISA’s fiduciary duties ‘draw much of their content from the common law of trusts . . . .”
  - Common law trusts use the burden-shifting framework: “Once a fiduciary is shown to have breached his fiduciary duty and a loss is established, he bears the burden of proof on loss causation”.
  - As such, requiring the fiduciary to bear the burden was the “most fair” allocation.
- Case returns to 4th Circuit for the 3rd time:
  - Court affirmed district court and holds the fiduciary’s breach did not cause the losses because a prudent fiduciary would have made the same divestment decision at the same time and in the same manner.
  - Referring to the “would have” vs. “should have” standard, the court held in remanding the case, “[w]e explicitly recognized that, using the correct “would have” standard, the district court might find that RJR met its burden.”
- Plaintiff argued a fiduciary needs a compelling reason to divest, while the decision to invest requires less critical motivation.

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Tatum v. RJR Pension Inv. Comm.,
855 F.3d 553 (4th Cir. 2017)

- **Held:** The district court did not err in refusing to require a more compelling reason for divestment vs. investment decisions.
- Plaintiff has a factual dispute over whether a prudent fiduciary would have refrained from divesting and the district court resolved this issue against Plaintiff while using the more demanding "would have" standard.
- Significant dissent opines that the district court did not apply the "would have" standard appropriately.
  - "…[t]he court failed to explain whether a hypothetical prudent fiduciary would have made the same decisions that RJR did with respect to the timing of the divestment and the fiduciary's disregard for the governing Plan document, both of which we described in our previous opinion as "extraordinary circumstances."

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Pioneer Centres Holding Co. Emp. Stock Ownership Plan v. Alerus Fin., N.A., 858 F.3d 1324 (10th Cir. 2017)

- Pioneer, a car dealership, began to consider an ESOP transaction where the ESOP would acquire the remaining 62.5% of the company's stock. To avoid a conflict of interest, the Plan hired Alerus to negotiate the purchase of the original owner's shares.
- Pioneer's dealership agreement with Land Rover gave Land Rover a right of refusal of *any* proposed ownership changes. Pioneer sent Land Rover an informal proposal of the contemplated ESOP transaction.
- Land Rover maintained that the prior transaction resulting in 37.5% ownership by the ESOP dealership violated its agreement because it was not pre-cleared by Land Rover.
  - However, Land Rover approved that 37.5% transfer a year later.
- Land Rover rejected the informal proposal for the second new transaction that would transfer all remaining shares to the ESOP.
  - Alerus did not agree to the transaction, so Pioneer never sent a formal proposal to Land Rover.

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Pioneer Centres Holding Co. Emp. Stock Ownership Plan v. Alerus Fin., N.A., 858 F.3d 1324 (10th Cir. 2017)

- After the transaction failed, Pioneer sold most of its assets to a third party.
- The ESOP then sued Alerus for breach of fiduciary duty resulting from the failure to approve the ESOP transaction.
  - The ESOP alleged that expert testimony, state law, and record evidence showed Land Rover would have approved the transaction.
- A divided panel affirmed the lower court's grant of summary judgment:
  - Held ERISA Plaintiffs have the burden of proving causation, not fiduciaries.
- § 1109(a) provides fiduciaries are liable for "any losses to the plan resulting from each such breach."
  - "Resulting from" requires proof that an alleged breach *caused* the claimed loss.

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Pioneer Centres Holding Co. Emp. Stock Ownership Plan v. Alerus Fin., N.A., 858 F.3d 1324 (10th Cir. 2017)

- 10th Cir. noted that although "the statute is silent as to *who* bears the burden of proving a resulting loss," ***the default rule is that pleading burdens reside with the plaintiffs.***
  - Causation is an element of the claim, not a defense. And, the burden of proving loss and causation does not shift to the defendants.
  - "The requirement that the losses to the plan have resulted from the breach cannot be omitted from the statute without substantially changing the definition of the claim, thereby doing violence to it."
- Court determined plaintiffs did not meet the causation burden because:
  - The record evidence only showed that Land Rover would *not* have approved the transaction, regardless of whether Alerus agreed.
  - The expert testimony was merely "speculation" *and* Land Rover's letter stated that it would retroactively approve the prior transfer of 37.5% to the Plan, but that it 'would not support a future ownership change…'
- **Petition for writ of certiorari filed Nov. 2, 2017. Solicitor General invited to file a brief expressing his views on Mar. 19, 2018.**
- **While writ of certiorari was pending, the case settled (September 2018), resulting in the abandonment of the cert. petition.**

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Brotherston v. Putnam Invs., LLC, 2018 WL 4958829 (1st Cir., Oct. 15, 2018)

- Important issue: burden of proof for fiduciary claims.
- Court holds fiduciary did not investigate Putnam funds before including them as investment options, did not monitor once in Plan, and did not remove a single fund for underperformance, even when certain Putnam funds received a “fail” rating from Advised Asset Group, a Putnam affiliate.
- This means no procedural prudence and sets up the burden of proof question.

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Brotherston v. Putnam Invs., LLC,
2018 WL 4958829 (1st Cir., Oct. 15, 2018)

- Burden of proof – there was an alleged loss.
- Acknowledging Circuit split, First Circuit holds that the burden of showing that a loss would have occurred even had the fiduciary acted prudently falls on the imprudent fiduciary.
- Focus of ERISA: protection of participant rights.
- First Circuit aligns with the Fourth, Fifth, and Eighth Circuits and hold that once an ERISA plaintiff has shown a breach of fiduciary duty and loss to the plan, the burden shifts to the fiduciary to prove that such loss was not caused by its breach, that is, to prove that the resulting investment decision was objectively prudent.

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Wildman v. Am. Century Servs., LLC, 362 F.Supp.3d 685, 700 (W.D. Mo. 2019)

- Participants in the Plan filed a putative class action claiming breach of fiduciary duty.
- American Century, investment management firm, allegedly steered pension investments into proprietary funds.
- Plaintiff's argued that there were too many funds retained in the plan.
- Followed the established 8th Circuit standard finding that the plaintiff bears the burden of showing that the defendant breached its fiduciary duties.

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Wildman v. Am. Century Servs., LLC, 362 F.Supp.3d 685, 700 (W.D. Mo. 2019)

- After 11 day trial, court holds Plaintiffs fail to prove Defendants committed a breach of fiduciary duty.
- Court finds that it is "not disloyal as a matter of law to offer only proprietary funds".
- Court states that there is no duty to offer more than one investment company's funds.
- Here, the plaintiffs did not establish the defendants' conduct breached a fiduciary duty, therefore, the burden never shifted to the defendants.

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Who Bears the Burden?

- **Plaintiffs:**
  - Second Circuit
    - *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98 (1998).
  - Sixth Circuit
    - *Kuper v. Iovenko*, 66 F.3d 1447 (1995).
  - Eighth Circuit
    - *Roth v. Sawyer-Cleator Lumber*, 16 F.3d 915, 917 (8th Cir. 1994).
    - *Wildman v. Am. Century Servs., LLC*, 362 F. 3d 685, 700 (W.D. Mo. 2019).
  - Ninth Circuit
    - *Wright v. Ore. Metallurgical Corp.*, 360 F.3d 1090 (2004).
  - Tenth Circuit
    - *Pioneer Centres Holding Emp. Stock Ownership Plan v. Alerus Fin., N.A.*, 858 F.3d 1324 (2017).
  - Eleventh Circuit
    - *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335 (1992).

- **Defendants:**
  - First Circuit
    - *Brotherston v. Putnam Invs., LLC,* 2018 WL 4958829 (1st Cir., Oct. 15, 2018)
  - Fourth Circuit
    - *Tatum v. RJR Pension Inv. Comm.*, 855 F.3d 553 (2017).
  - Fifth Circuit
    - *McDonald v. Provident Idem. Life Ins. Co.*, 60 F.3d 234 (1995).
  - Eighth Circuit
    - *Martin v. Feilin*, 965 F.2d 660 (1992).

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401(k) Plan Class Action
Employer Stock Drop Litigation

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Types of Claims Asserted in Stock Drop Litigation

- **Prudence Claim**: Plan fiduciaries knew or should have known that company stock was an imprudent investment, and breached fiduciary duties by failing to eliminate the stock fund as an investment option or discontinue investments in that fund.
- **Disclosure Claim**: Plan fiduciaries breached fiduciary duties by making material misrepresentations about the company or failing to disclose material (both public and non-public) information re: value of company's stock.

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Prudent Person Standard

- § 404(a)(1)(B): Fiduciaries' investment decisions and disposition of assets are measured by the "prudent person" standard.
- § 404(a)(1)(C): Requires ERISA fiduciaries to diversify plan assets.
- § 404(a)(2): Establishes the extent to which those duties are loosened in the ESOP context to ensure that employers are permitted and encouraged to offer ESOPs.
- *Moench* **Presumption of Prudence**:
  - *Moench v. Robertson*, 62 F.3d 553, 571 (3rd Cir. 1995)
- Fiduciaries ***presumed*** to act prudently when they offer employees the option to invest in employer stock, unless company's viability is in doubt or other "dire circumstances" are present.
- This presumption was the key to many successful Motions to Dismiss.

Fifth Third Bancorp v. Dudenhoeffer,
134 S. Ct. 2459 (2014)

- Rejected Defendants arguments in favor of the Presumption.
- Duty of prudence is not defined by the aims of a particular plan as set out in the plan documents and thus should not be adjusted to take into account the aims of ESOPs.
- ERISA requires fiduciaries to act "in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of this subchapter*."
- ***Hard Wiring***: Plan sponsors cannot reduce or waive prudent man standard of care by requiring investment in the company stock fund; trust documents cannot excuse trustees from their duties under ERISA.
- Although not giving ESOP fiduciaries the benefit of the presumption conflicts with the insider trading prohibition, a presumption is not the appropriate way to weed out claims.

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Fifth Third Bancorp v. Dudenhoeffer,
134 S. Ct. 2459 (2014)

- Instead, whether a fiduciary acted prudently turns on the specific circumstances at the time the fiduciary acts.
- Court instructed the Sixth Circuit to apply the pleading standard as discussed in *Twombly* and *Iqbal* in light of the following considerations.
- Allegations that a fiduciary should have recognized from ***publicly available information*** alone that the market overvalued or undervalued the stock are implausible, absent special circumstances. ERISA fiduciaries may generally and prudently rely on the market price.
  - Court didn't consider if plaintiff can plausibly allege imprudence based on publicly available information by pointing to a special circumstance affecting the reliability of the market price.

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Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014)

- To state a claim for breach of the duty of prudence on the basis of ***inside information***, a plaintiff must plausibly allege:
  - An alternative action that the defendant could have taken that would have been consistent with the securities laws, *and*
  - A prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.
- Lower courts should consider:
  - Duty of prudence does not require that fiduciary break securities laws.
  - Whether a plan fiduciary's decision to purchase (or refrain from purchasing) additional stock comports with federal securities laws and their objectives.
  - Whether a fiduciary's failure to disclose information to the public conflicts with federal securities laws and their objectives.
  - Whether a prudent fiduciary could not have concluded that stopping purchases or publicly disclosing negative information would do more harm than good to the stock fund.

Dudenhoeffer – Aftermath

- ***Amgen v. Harris***, 136 S. Ct. 758 (2016)
  - Reversed the Ninth Circuit.
  - Held: Courts should rely on *Dudenhoeffer*'s **"*not cause more harm than good*"** standard for claims that plan fiduciaries should have acted based on inside information regarding an employer's stock.
  - The Ninth Circuit's assumption that it was "quite plausible" that removing the employer stock fund would not cause undue harm was insufficient.
  - **Plaintiffs must plead specific facts that plausibly show a prudent fiduciary could not have concluded that the alternative action would do more harm than good.**

Dudenhoeffer – Aftermath
“Not Cause More Harm Than Good”

- ***Smith v. Delta***, 619 F. App'x 874 (11th Cir. 2015)
  - Plaintiff alleged that fiduciaries imprudently permitted investment in the Delta stock fund despite concerns about Delta's financial condition and ability to survive.
  - Eleventh Circuit deemed Plaintiff's prudence claim "implausible as a general rule," as it failed to allege any material inside information about Delta's financial condition or any other special circumstances rebut the market-reliance / reliance on the market unreliable claim.
- “[W]hile [*Dudenhoeffer*] may have changed the legal analysis of our prior decision, it does not alter the outcome."

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Dudenhoeffer – Aftermath
"Not Cause More Harm Than Good"

- ***Whitley v. BP P.L.C.*,** 838 F.3d 523 (5th Cir. 2016)
  - Applying *Amgen*, court held "the Plaintiff bears the significant burden of proposing an alternative course of action so clearly beneficial that a prudent fiduciary ***could not conclude*** that it would be more likely to harm the fund than to help it."
  - Plaintiffs alleged Fund, based on nonpublic safety information, should have (1) froze, limited, or restricted company stock purchases; or (2) disclosed the unfavorable safety information.
  - Court held plaintiffs should have made specific fact allegations that for each proposed alternative, a prudent fiduciary could not have concluded that the alternative would not do more harm than good.
  - Unreasonable to conclude that freeze or disclose is enough to meet the pleading standard.

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Dudenhoeffer – Aftermath
"Not Cause More Harm Than Good"

- ***Rinehart v. Lehman Bros. Holdings Inc.***, 817 F.3d 56, 68 (2d Cir. 2016).
  - Dismissed third amended complaint because allegations failed to demonstrate ". . . that a prudent fiduciary during the class period 'would not have viewed [disclosure of material nonpublic information regarding Lehman or ceasing to buy Lehman stock] as *more likely to harm the fund than to help it*.'" (quoting *Amgen* and *Dudenhoeffer).*

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Dudenhoeffer – Aftermath
"Not Cause More Harm Than Good"

- ***Saumer v. Cliffs Nat. Res. Inc.***, 853 F.3d 855 (6th Cir. 2017)
  - Plaintiffs claimed that fiduciaries imprudently retained Cliffs' stock because (1) *public information* revealed Cliffs' high-risk profile, low business prospects, deteriorating financial condition, and the collapse of iron ore/coal prices; and (2) fiduciaries had *inside information* of the stock's overvaluation but neglected to "engage in a reasoned decision-making process regarding the prudence".
  - Court upheld district court's dismissal of public and inside information claims.
  - Reasoned (1) that "*every* company carries significant risk" and the fiduciary's failure to investigate the investment decision alone did not amount to "special circumstances"; and (2) that removing the fund as an investment option was an alternative action, but plaintiff did not allege enough facts to show that doing so would have caused more good than harm.

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Muehlgay v. Citigroup Inc.,
649 F. App'x 110 (2d Cir. 2016)

- Plaintiffs claimed Citigroup breached its duty as plan administrator because public information indicated Citigroup's subprime mortgage exposure made their stock too risky.
- Information included "omnipresent news stories" and "alarming public filings" prior to 2008.
- Court held plaintiffs' had *actual knowledge* of Citigroup's exposure more than three years prior to filing their complaint and were thus time-barred.

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Coburn v. Evercore Trust Co.,

844 F.3d 965 (D.C. Cir. 2016)

- Evercore was the independent fiduciary of the J.C. Penney 401(k) Plan employer stock fund when JCP stock price fell.
- Affirms district court's Motion to Dismiss.
- Applying *Dudenhoeffer,* court holds mere fact that employer stock was risky, where market is efficient, fiduciary may rely upon publicly known information and has no duty to outguess the market.
- The Court holds that when a stock price fluctuates in an efficient market, arguing that a stock is too risky to hold at current market prices is part and parcel of the claim that that stock is overvalued, a claim interdicted by *Dudenhoeffer.*

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Schweitzer v. Inv. Comm. of the Phillips 66 Sav. Plan, 312 F.Supp.3d 608 (S.D. Tex. May 9, 2018), appeal filed 6/12/18.

- Allegation: defendants breached duties of diversification and prudence by retaining a fund consisting of the former parent company's stock as that stock was no longer an "employer security" under ERISA.
  - Case of first impression.
- Plan created after a corporate spin-off; assets transferred from predecessor plan included a fund consisting of former parent's stock.
- After transfer, fund holding former parent stock was closed to new investments; participants only could trade out of fund.
- Court first held diversification was not the real issue because:
  - Fiduciaries and participants could not buy former employer stock;
  - The participants were free to move their assets out of those funds at any time; and
  - There was no claim that the plan's other investments were not diversified.

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Schweitzer v. Inv. Comm. of the Phillips 66 Sav. Plan, 312 F.Supp.3d 608 (S.D. Tex. May 9, 2018), appeal filed 6/12/18.

- Court dismissed prudence claims based upon *Dudenhoeffer*, stating fiduciaries can rely on market prices.
- Because the participants had neither identified plausible special circumstances undermining the fiduciaries' reliance on the market price, nor plausibly alleged that further investigation by the fiduciaries would have revealed nonpublic information showing that the stock investments were too risky, the court ruled that the participants had failed to state a claim.
- Important case to watch because of commonly occurring situation, where there is no insider trading issue, and courts grapple with how 401(k) Plans deal with funds consisting of predecessor's employer stock.

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In re Allergan ERISA Litigation,
2018 WL 8415676 (D.N.J. July 2, 2018)

- Former employees alleged that Allergan colluded with other companies to fix generic drug prices in violation of federal securities laws, creating excess revenue and putting Allergan at risk of civil and criminal liability.
  - Allergan and its executives allegedly violated ERISA when they retained company stock as an investment option *even though they knew or should have known that Allergan's statements artificially inflated its stock price*.
- Plaintiffs didn't sufficiently allege that Allergan/its directors were plan fiduciaries.
- As to insider knowledge:
  - Plaintiffs also failed to show that Allergan breached its ERISA fiduciary duties by keeping company stock as an investment option in its retirement plan while an investigation that affected its stock value was being conducted.
  - Court rejected the argument that Allergan was a fiduciary because it could hire and terminate a third-party administrator. Also rejected the allegation that Allergan was a fiduciary because it made SEC filings as the plan's administrator.
  - Plaintiffs did not allege a prudent fiduciary in Allergan's position could not have concluded that disclosing negative information *would have done more harm than good* to the plan by causing a drop in the stock price.

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Jander v. Retirement Plans Committee of IBM, 910 F.3d 620 (2d Cir. 2018)

- Plaintiffs stated a plausible claim by alleging that a prudent fiduciary in the plan defendants' position could not have concluded that an earlier corrective disclosure about value of the business would do more harm than good.
  - A stock-drop following early disclosure would be no more harmful than the inevitable stock drop that would occur following a later disclosure.
  - Plaintiffs' citations to general economic studies showing that the longer a fraud continues, the more damage is done, supported plaintiffs' imprudence claim and were not merely theoretical.
- Second, Fifth, Sixth and Ninth Circuits have dismissed ERISA stock-drop claims.
- *Certiorari* granted, June 3, 2019. Oral argument set for November 6, 2019.

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In re SunEdison, Inc. ERISA Litig., 331 F.Supp.3d 101 (S.D.N.Y. 2018), *aff'd sub nom. O'Day v. Chatila*, 774 Fed.Appx. 708 (2d Cir. June 7, 2019)

- Participants in an employee stock ownership plan brought a class action suit under ERISA accusing SunEdison of launching an aggressive expansion strategy that led to a collapse in SunEdison's share price and drive the company to bankruptcy.
- Plaintiffs argue that defendants breached their fiduciary duties by continuing to make shares of SunEdison stock an investment option when a reasonable fiduciary would not have done so in light of deteriorating finances.
- The court granted the defendants' motion to dismiss stating the plaintiffs complaint did not plausibly allege a breach of the duty of loyalty or prudence.
- 2nd Circuit affirms holding mere allegations fiduciaries knew to negative, non-public information was insufficient to state claim for breach of duty of loyalty.

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Usenko v. MEMC LLC, 926 F.3d 468, 475 (8th Cir. 2019).

- Alleged breach of fiduciary duty in offering a 401(k) Plan fund invested solely in former parent company stock.
- In February 2018, district court granted Motion to Dismiss based on *Dudenhoeffer*.
- 8th Circuit affirmed and applied *Dudenhoeffer* to former parent company stock fund.
- "[W]e see no indication that the Court intended to limit *Dudenhoeffer* to employer securities." 926 F.3d at 475.
- On October 7, 2019, Plaintiffs filed a writ of *certiorari* to the Supreme Court.

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Motions to Dismiss Granted: 401(k) Plan Stock Drop Litigation

- *Lynn v. Peabody Energy Corp.,* 250 F.Supp.3d 372 (E.D. Mo. Mar. 30, 2017), appeal dismissed by appellants, 2017 WL 5256238 (8th Cir. Sept. 29, 2017)
- *Graham v. Fearon*, 2017 WL 1113358 (N.D. Ohio Mar. 24, 2017), *aff'd,* 2018 WL 315098 (6th Cir., Jan. 8, 2018).
- *Hill v. Hill Bros. Constr. Co., Inc.*, 2016 WL 1252983 (N.D. Miss. Mar. 28, 2016), *reconsideration denied*, 2016 WL 4132255.
- *In re Idearc ERISA Litig.*, 2016 WL 7189981 (N.D. Tex. Oct. 4, 2016), *aff'd*, *Kopp v. Klein,* 894 F.3d 214 (5th Cir. 2018).
- *In re 2014 RadioShack ERISA Litig.*, 2016 WL 8505089 (N.D. Tex. Sept. 29, 2016) (partial), *aff'd,* 882 F.3d 137 (5th Cir. 2018).
- *Brannen v. First Citizens Bankshares Inc.*, 2016 WL 4499458 (S.D. Ga. Aug. 26, 2016) (partial)
- *Vespa v. Singler-Ernster, Inc.*, 2016 WL 6637710 (N.D. Cal. Nov. 8, 2016)

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Insider Allegations: Earlier Disclosure of Negative Corporate Information.

- Four Circuits have now held that a premature disclosure of negative insider corporate information would cause the plan more harm than good.
  - *Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 68 (2d Cir. 2016); *Loeza v. John Does 1-10*, 659 F. App'x 44, 45–46 (2d Cir. 2016).
  - *Martone v. Robb*, 902 F.3d 519, 526–27 (5th Cir. 2018); *Whitley v. BP, P.L.C.*, 838 F.3d 523, 529 (5th Cir. 2016).
  - *Graham v. Fearon*, 721 F. App'x 429, 437 (6th Cir. 2018); *Saumer v. Cliffs Nat'l Resources Inc.*, 853 F.3d 861, 864 (6th Cir. 2017).
  - *Laffen v. Hewlett-Packard Co.*, 721 F. App'x 642, 644–45 (9th Cir. 2018).

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Insider Allegations: Duty to Disclose Corporate Information to Plan Participants

- Cases that hold that corporate fiduciaries have no duty under ERISA to disclose inside information ***about the company*** to plan participants.
  - *Slaymon v. SLM Corp.*, 506 F. App'x 61, 64 (2d Cir. 2012);
  - *In re Citigroup ERISA Litig.*, 662 F.3d 128, 143 (2d Cir. 2011).
  - *Kopp v. Klein*, 722 F.3d 327, 340 (5th Cir. 2013).
  - *Howell v. Motorola, Inc.*, 633 F.3d 552, 572 (7th Cir. 2011).
  - *See Wilson v. Sw. Bell Tel. Co.*, 55 F.3d 399, 406 (8th Cir. 1995).
  - *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1284 (11th Cir. 2012).

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Proskauer's Global Presence

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2019 ERISA Litigation Update

What's Going On?
What Happened This Year?
October 24, 2019

Southwest Benefits Association
30th Annual Benefits Compliance Conference

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