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## **Fee Litigation 2016 Round-Up: Mitigating Risk in the Face of Expanding Targets and Theories of Fiduciary Liability**

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*Defined contribution plans, including 401(k) and (for certain nonprofit companies) 403(b) plans, now occupy a key role in providing retirement benefits to the US workforce.<sup>1</sup> Although these plans originally were offered as tax-deferred savings vehicles to supplement the retirement benefits (commonly annuities) provided by traditional defined benefit pension plans, that premise is no longer true.<sup>2</sup> Employees, not employers, bear the risk of investment performance in defined contribution plans, and they also pay the cost of investment management and administrative fees for the plans. The enhanced role of 401(k) plans has thus put increased pressure on plan performance and,*

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*since 2006, has led to multiple waves of Employee Retirement Income Security Act (ERISA) litigation challenging the fees and the selection of mutual fund and other investments offered in the plans.<sup>3</sup> The latest wave of litigation began in late 2015 and continued throughout 2016<sup>4</sup> and also introduced the first large wave of cases challenging the fees and investment offerings in 403(b) plans.*

Our article for the *Benefits Law Journal's* Winter 2015 edition addressed key recent developments in fee litigation through late 2015, including recent litigation recoveries that would likely foster more litigation, and discussed potential best practices to lessen that exposure.<sup>5</sup> The prediction made by many, including the authors, that plaintiff's firms would increase the pace of fee litigation has proven to be true.<sup>6</sup> Accordingly, in this article, we look at important fee litigation developments from late-2015 forward, including (1) the rapidly growing number of lawsuits filed against 401(k) and 403(b) plan fiduciaries, (2) the first rulings on the new wave of lawsuits, and (3) the pleading and fiduciary standards that courts have applied in adjudicating these suits.

Bolstered by multiple large class settlements in 2015, which included more than \$80 million in combined attorney fees,<sup>7</sup> plaintiffs have filed an ever-increasing number of lawsuits seeking to impose heightened and novel fiduciary standards for 401(k) plans.<sup>8</sup> In dozens of new lawsuits, plaintiffs have alleged that fiduciaries breached their ERISA duties by offering:

- Vanguard and other index funds, which are regarded as low-cost options, because even cheaper allegedly comparable investment funds were available;<sup>9</sup>
- Stable value funds, which are regarded as conservative, low-risk options (and for that reason have generated claims when not offered) because they did not perform as well as asserted benchmarks;<sup>10</sup>
- Nontraditional investments, such as hedge funds or natural resources and real estate limited partnerships, including when offered through target date funds, that did not perform well relative to the equity markets;<sup>11</sup>
- Guaranteed benefit contracts that plaintiffs contend do not meet the requirements to be considered exempt from ERISA's fiduciary requirements;<sup>12</sup> and

- Investments in target date funds that plaintiffs contend charged excessive fees or underperformed.<sup>13</sup>

Although many of these lawsuits are still in early stages, recent court rulings in *In re Disney ERISA Litigation*<sup>14</sup> and *White v. Chevron Corp.*<sup>15</sup> indicate that some courts may take a harder look at claims that attempt to use hindsight and *per se* cost-focused rules to judge investments.

Plaintiffs also ventured into new territory in 2016 by bringing more than a dozen fee-litigation lawsuits against 403(b) retirement plans administered by private nonprofit universities<sup>16</sup> and at least one health-care system.<sup>17</sup> These 403(b) plans are similar to 401(k) plans except that they are limited to eligible employees of public schools, employees of certain tax-exempt organizations, and certain ministers.<sup>18</sup> These suits include many of the same theories asserted in the 401(k) lawsuits but also express new theories, including that plan fiduciaries breached their ERISA fiduciary duties by:

- Offering too many investment options, which allegedly diluted the individual investment size and the plan's overall ability to negotiate for lower-cost institutional share class funds; and<sup>19</sup>
- Maintaining more than one recordkeeper to administer the plan because doing so allegedly caused the plan to pay excessive and unreasonable administrative investment fees.<sup>20</sup>

Plaintiffs had not previously made 403(b) plans the focus of their fee litigation cases. However, as discussed later, there are certain historical quirks in the creation of these plans that plaintiffs appear to be trying to exploit.

Plaintiffs also had continued success in settling cases in 2016, including reaching final settlement in the fee litigation case *Kruger v. Novant Health, Inc.*, which included an award of \$10.6 million in attorney fees.<sup>21</sup> It is thus no surprise that ERISA fee cases continue to be filed, including ones asserting new theories of liability. And, with the expansion of fee litigation, there is a risk that plaintiffs' firms may target more mid-market size plans, where they may hope to find less experienced fiduciaries or less well-documented practices.<sup>22</sup> Although these developments can be worrying for plan sponsors and plan fiduciaries, the cases and claims also can provide insights on best practices to mitigate the risk of what appear to be ever-heightening fiduciary standards. The article ends with some suggestions on possible ways to lessen the risk of fiduciary exposure.

## **EXPANDING THEORIES OF FIDUCIARY STANDARDS IN 401(K) FEE LITIGATION**

### ***Index/Vanguard and Stable Value Fund Claims***

One of plaintiffs' new strategies is to challenge the inclusion of Vanguard<sup>23</sup> and other index funds, and also stable value funds<sup>24</sup> in 401(k) plans, on the grounds that there are comparable funds with lower cost or higher returns. These challenges are noteworthy because plaintiffs' counsel have previously argued for the inclusion of these types of funds as investment options due to their relatively lower fees or conservative investment strategy. The new claims indicate that no category or type of fund is immune from attack.

The district court in *White v. Chevron* provided an early look into the way courts may evaluate these new theories. In *White*, plaintiffs targeted Chevron's 401(k) plan, a large plan with assets of more than \$19 billion. The plan offered participants a diversified array of investment options (with an overall low-cost fee structure), including 12 Vanguard mutual funds, 12 Vanguard collective trust target date funds, a Vanguard money market fund, and at least six other non-Vanguard investment options.<sup>25</sup>

Plaintiffs alleged that Chevron fiduciaries breached their ERISA duties of loyalty and prudence by including the Vanguard money market fund instead of a stable value fund. Using hindsight, plaintiffs argued that stable value funds outperformed money market funds during the class period, and that the decision to maintain money market funds caused plan participants to lose more than \$130 million in retirement savings.<sup>26</sup> Plaintiffs also alleged that participants lost more than \$20 million through unnecessary expenses as a result of Chevron's inclusion of 10 Vanguard funds (including some with fees as low as 5 basis points) because there allegedly were identical Vanguard funds with lower-cost share classes available.<sup>27</sup> Additionally, plaintiffs alleged Chevron imprudently paid excessive administrative fees to Vanguard as recordkeeper through revenue sharing from plan investment options—specifically because Vanguard was compensated for a period of time through an asset-based arrangement, in which its fees increased as the plan's assets increased.<sup>28</sup>

The district court granted defendants' motion to dismiss in its entirety. The court found plaintiffs' attempt to infer an imprudent process due to the inclusion of a money market fund instead of a stable value fund "implausible."<sup>29</sup> The court further noted that plaintiffs' focus on the performance of the stable value funds and the money market funds over a period of six years was "an improper hindsight-based challenge to the Plan fiduciaries' investment decision making."<sup>30</sup>

The court similarly rejected plaintiffs' claims that Chevron fiduciaries had a duty to offer cheaper institutional-class funds over retail-class funds, noting that price is not the only investment feature that a fiduciary is required to consider when compiling investment options.<sup>31</sup> The court also noted that plaintiffs' own allegations suggested that the plan fiduciaries were periodically monitoring fund costs, including by moving to lower cost funds, and by offering a diverse mix of investment options, including low-cost funds.<sup>32</sup>

Lastly, the *Chevron* court rejected the argument that defendants acted imprudently in compensating the plan's recordkeeper, Vanguard, through revenue-sharing. The court noted that when the plan's assets grew, the plan fiduciaries renegotiated the arrangement to specify a per-participant fee structure.<sup>33</sup> The court stated that the fiduciaries' actions suggested that they were indeed monitoring recordkeeping fees and taking steps to ensure these fees did not become unreasonable.<sup>34</sup>

In another case similar to *Chevron*, plaintiffs allege that Anthem's 401(k) plan (with total assets worth more than \$5 billion) failed to leverage its considerable size to demand lower-cost investment options.<sup>35</sup> The allegedly "high-cost" investment options included Vanguard funds, with one Vanguard fund offering fees as low as 4 basis points.<sup>36</sup> Plaintiffs claim that the plan fiduciaries should have used their bargaining power to obtain even lower-cost share classes, in this case an identical lower-cost mutual fund that charged a fee of 2 basis points.<sup>37</sup> The Anthem suit is currently awaiting a decision on defendants' motion to dismiss.

The claim in *Chevron* for failure to include a stable value fund is notable in part because in other cases plaintiffs have challenged the inclusion of such funds. For example, in *Barchock v. CVS Health Corp.*, plaintiffs challenged the inclusion of a stable value fund for underperformance because of alleged overweighting of short-term, fixed-income holdings. The court dismissed this claim, finding that allegations of deviations from averages, standing alone, meant nothing, and instead focused on whether the duration and disclosure of the investments conformed to the plan's disclosed investment objective.<sup>38</sup>

In another case, *Ellis v. Fidelity Management*,<sup>39</sup> participants in the Barnes & Noble 401(k) plan brought claims against the plan's third-party administrator, Fidelity,<sup>40</sup> asserting that Fidelity's stable value fund underperformed due to what was alleged to be an excessively conservative investment strategy and high fees.<sup>41</sup> In the same complaint, plaintiffs alleged that Fidelity had previously been overly aggressive with the investment strategy of the stable value fund in question, and had overcorrected to an unreasonably conservative strategy.<sup>42</sup> *Ellis* illustrates the "Goldilocks" nature of plaintiffs' claims, where plaintiffs seek to use hindsight to hold fiduciaries accountable when investment options do not perform precisely as planned. In a short opinion with little analysis, the district court in *Ellis* nonetheless denied

defendants' motion to dismiss, stating that in "complex ERISA cases like the instant ones, dismissal is often inappropriate."<sup>43</sup>

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

In a number of cases, plaintiffs have challenged the ERISA-exempt status<sup>44</sup> of stable value funds offered by insurers, including New York Life, Prudential, and Great-West Life, which are ERISA-exempt to the extent that they are guaranteed benefit policies.<sup>45</sup> Plaintiffs principally argue that because the insurers can unilaterally set the rate of return on the investments, the investments are not truly guaranteed benefit policies.<sup>46</sup> If the investments are found not to offer guaranteed benefits then, according to plaintiffs' theories, the insurers that manage the funds are subject to ERISA fiduciary standards.

In *Teets v. Great-West Life*, the district court denied a motion to dismiss such a claim because, it found, the insurer's ability to unilaterally set the rate of return on the investment at issue raises a genuine issue of whether a reasonable rate of return is guaranteed.<sup>47</sup> The *Teets* court subsequently certified a class of more than 270,000 participants to resolve, in part, the issue of whether ERISA's fiduciary standard applies to Great-West's management of a guaranteed stable value fund, and whether the fund falls under ERISA's guaranteed benefit policy exemption.<sup>48</sup>

### ***Claims Challenging the Offering of Alternative Investments***

Plaintiffs also are attempting to prove new theories of liability related to alternative investments offered in 401(k) plans. For example, in *Johnson v. Fujitsu*, plaintiffs challenged investments in target date funds that allegedly included too many unique and nontraditional asset classes, such as natural resources and real estate limited partnerships.<sup>49</sup> And in *In Re Disney ERISA Litigation*, a consortium of experienced ERISA plaintiffs' counsel challenged Disney's inclusion of the Sequoia Fund as an investment option in Disney's 401(k) plan, principally because this mutual fund had concentrated investments in a pharmaceutical stock, which suffered substantial losses in late 2015.<sup>50</sup> Plaintiffs claimed the Disney plan should have removed this fund at some unspecified time before then, asserting there were concerns and questions about the pharmaceutical company in the public domain before the stock began its decline in October 2015.

The *Disney* court granted defendants' motion to dismiss and, in so doing, identified the flaw in this theory, that is, because the stock price had stayed up after these disclosures, other market investors had rejected these concerns and instead saw positive prospects in the company. Relying on the US Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*,<sup>51</sup> the *Disney* court noted that (1) procedurally, motions to dismiss are an important mechanism to weed out meritless claims challenging the prudence of plan investments, and (2) substantively, allegations that a fiduciary should have discerned that the market was over- or under-valuing stock are, as a general rule, implausible absent special circumstances suggesting flaws in the market's ability to price securities. The court found no allegations that would sustain this theory.

The *Disney* court also noted that the Sequoia Fund's concentrated investment strategy was disclosed to the plan investors, and that in the plan's mix of investment options, this concentrated fund was offered as one with higher growth potential and commensurate risk. Finally, the court was skeptical, at least absent special circumstances, of imposing duties on plan fiduciaries to actively monitor, not just mutual funds, but also their underlying investments in the market.<sup>52</sup>

### ***New Wave of 403(b) Fee Litigation***

Last year, plaintiffs added new targets to their fee litigation suits by filing a dozen cases against private nonprofit universities in a span of two weeks.<sup>53</sup> The university fee cases involve 403(b) plans (also referred to as tax-sheltered annuity arrangements) that are as large as many of the 401(k) plans discussed previously (plaintiffs allege that each of the 12 university plans has more than \$1 billion in total assets). This new wave of lawsuits has not only expanded potential targets for fee litigation but also expanded the types of claims being brought.

The new wave of litigation against 403(b) plans in the university setting is an outgrowth of the unique history of these plans. Congress added Section 403(b) to the Internal Revenue Code in 1958, but they remained lightly regulated until relatively recently.<sup>54</sup> Prior to 1958, many employees of universities funded retirement through the use of individual annuity contracts that were owned by the university employees.<sup>55</sup> This meant that employees had great individual autonomy in the selection and management of their individual accounts. This eventually led many of the university plans to accumulate dozens, and sometimes hundreds, of investment options and multiple recordkeepers.<sup>56</sup>

Several of these new cases allege that plan fiduciaries breached their ERISA fiduciary duties by offering "too many" investment options, which allegedly diluted the plan's ability to negotiate for lower-cost



institutional share class funds.<sup>57</sup> This theory is in tension with the ruling by the US Court of Appeals for the Seventh Circuit in *Loomis v. Exelon*,<sup>58</sup> which approved offering a broad and diversified mix of investments because this “left choice to the people who have the most interest in the outcome, and [defendants] cannot be faulted for doing this.”<sup>59</sup> Plaintiffs also challenge the use of more than one recordkeeper to administer the plan, alleging that this caused the plan to pay excessive and unreasonable administrative and investment fees.<sup>60</sup>

*Clark v. Duke*<sup>61</sup> illustrates the types of claims being asserted in these litigations. In *Clark*, plaintiffs allege that Duke’s 403(b) plan, with assets worth close to \$5 billion,<sup>62</sup> failed to use its considerable bargaining power as a “jumbo plan” to demand lower-cost investment options.<sup>63</sup> Specifically, plaintiffs allege that the Duke fiduciaries violated their ERISA fiduciary duties by selecting and retaining more than 400 investment options, with many duplicative types of funds;<sup>64</sup> that the large amount of investment options deprived the plan of the bargaining power associated with offering a single option for each investment style, which allegedly could have reduced investment fees;<sup>65</sup> and that the number of options also led to “decision paralysis” on the part of plan participants.<sup>66</sup> Plaintiffs also allege that Duke selected and retained investment options that consistently and historically underperformed, and charged excessive fees.<sup>67</sup> Finally, plaintiffs allege that Duke’s decision to retain up to four recordkeepers to administer its many investment options cost the plan \$45 million in unreasonable recordkeeping fees.<sup>68</sup>

In what may be a harbinger of other 403(b) cases to come, plaintiffs also recently sued the healthcare system Essentia Health, a nonprofit corporation, for allegedly failing to monitor excessive recordkeeping fees charged through its two 403(b) plans.<sup>69</sup> As in the university cases, plaintiffs allege that Essentia’s 403(b) plans, valued at more than \$1 billion in combined assets,<sup>70</sup> failed to use the plan’s bargaining power to obtain lower recordkeeping services.<sup>71</sup> Plaintiffs also allege that Essentia paid excessive fees by retaining two recordkeepers, one for each plan, when it could have found a recordkeeper to service both plans.<sup>72</sup> Specifically, plaintiffs allege that a plan of Essentia’s size could have obtained recordkeeping fees between \$35 and \$45 per participant instead of the \$88 to \$94 per participant it paid from 2014 to 2015.<sup>73</sup>

Plaintiffs now appear to be taking some of the novel theories asserted in the 403(b) plan context into 401(k) litigation. For example, in a recently filed 401(k) case, plaintiffs challenge the use of a self-directed brokerage system, which generally allows plan participants to invest retirement savings in a wide variety of investment options, as “byzantine” based on its complexity and confusing schedule of fees. As discussed previously, this theory runs counter to precedent that favors offering plan participants a wide variety of investment options.<sup>74</sup>



## NOTABLE RECENT FEE LITIGATION RULINGS

There were several notable fee litigation rulings from late 2015 forward that can provide some insight into how courts will address the myriad of challenges to the fees charged in 401(k), and now also 403(b), plans.<sup>75</sup>

If followed, *Disney* and *Chevron* can provide important opportunities to limit unwarranted fee litigation. *Disney's* application of *Dudenhoeffer's* standards on motions to dismiss to weed out meritless claims can save plan fiduciaries from burdensome litigation, which otherwise can force costly settlements and changes in plan practices, regardless of the ultimate merits of the claims. The *Disney* and *Chevron* rulings can also help plan fiduciaries defend the merits of these claims, insofar as the courts rejected adoption of “assumptions of imprudence” or similar *per se* rules of liability. The US Department of Labor and the courts long ago observed that cost should not be the only criteria to evaluate plan providers. Yet some of plaintiffs’ claims in these lawsuits were, at least implicitly, based on this assumption, and also on the improper use of hindsight to judge plan investments.<sup>76</sup>

Defendants also were victorious in *Rosen v. Prudential Ret. Ins. & Annuity Co.*, in which 401(k) plan participants sued their plan sponsor, Ferguson Enterprises, Inc., and the plan’s service provider, Prudential.<sup>77</sup> Plaintiffs alleged, among other things, that it was imprudent for the plan to include a high concentration of high-cost, actively managed mutual funds, and that Prudential breached its fiduciary duty by participating in revenue-sharing through its management of the separate accounts.<sup>78</sup> In dismissing this claim, the court noted that revenue-sharing is a common practice and that, without more, plaintiffs’ allegations could not withstand a motion to dismiss. The court also rejected plaintiffs’ *per se* cost claims, concluding that, absent additional allegations showing wrongdoing, the inclusion of alleged high-cost investment options is insufficient to state a claim for breach of fiduciary duty.<sup>79</sup>

Not all recent rulings resulted in defense victories. The *Teets* case allowed class claims to proceed regarding whether an investment in a stable value fund was sufficiently guaranteed to fall within ERISA’s guaranteed benefit policy exemption. Plaintiffs have also had early success in surviving motions to dismiss claims challenging the use of proprietary funds, when plaintiffs allege that the decision to include such funds was made to allow the investment company to collect the allegedly excessive administrative and investment fees it charges the plan participants (who are their employees) to benefit themselves.

In the long-running fee litigation case *Tibble v. Edison*, the US Court of Appeals for the Ninth Circuit, sitting *en banc*, reversed its earlier decision that plaintiffs had forfeited their claims that Edison

International breached its fiduciary duties by failing to monitor the allegedly high fees charged in its 401(k) plan, and remanded the issue for trial.<sup>80</sup> As background, plaintiffs originally brought a litany of claims, most of which were dismissed on summary judgment in the district court.<sup>81</sup> Some claims, however, remained for trial, including whether Edison breached its fiduciary duty to monitor the reasonableness of plan investments.<sup>82</sup> The district court found, and the Ninth Circuit affirmed, that defendants failed to adequately investigate the possibility of lower-cost institutional share class alternatives, but dismissed as time-barred claims for funds that were selected more than six years before suit was filed.<sup>83</sup>

The US Supreme Court left the merits of the decision undisturbed, but expanded the defendants' potential liability by reversing the dismissal of some of the claims as time-barred. The Court reasoned that under trust law and ERISA, a fiduciary has a duty to periodically monitor plan investments, even if the investment was selected outside the fiduciary six-year limitations period.<sup>84</sup> After various post-remand rulings, the Ninth Circuit, sitting *en banc*, ordered the district court to open the record and consider the issue of whether Edison breached its continuing duty to monitor consistent with the principles set forth by the Supreme Court and the Ninth Circuit.<sup>85</sup>

### ***Potential Practices to Mitigate Risk***

As the cases discussed previously demonstrate, having a well-documented prudent process to review and oversee plan investments and plan providers is the most valuable first line of defense. *Tibble* confirms that the responsible plan fiduciaries should conduct periodic reviews of investments and plan service providers. Cases like *Chevron* illustrate the defense available to fiduciaries if fees paid to recordkeepers (in that case revenue-sharing payments) are periodically monitored and considered by the plan fiduciary in evaluating the recordkeeper's overall compensation.<sup>86</sup> As part of a prudent process, plan fiduciaries should also periodically benchmark fees or issue request-for-proposals for major service providers like recordkeepers. Note, though, that a fiduciary does *not* have to go with the lowest-cost provider; quality and service can and should be considered in evaluating any service provider.<sup>87</sup>

*Disney* and *CVS Health Corp.* illustrate the importance of fund disclosures, and how these disclosures can inoculate fiduciaries from hindsight-based claims that investment mixes in funds were imprudent. Further, as part of general practices, the plan fiduciary with responsibility over plan investments should consider developing and following an investment policy statement.

Another practical way to lessen risk is to offer a mix of investments, including target-date funds and lower-cost index funds. By way of illustration, the numerous low-cost investment options available in *Chevron* appeared to influence the court to conclude that plaintiff's claims of imprudence were implausible. Dismissal of fiduciary breach claims was likewise affirmed in the seminal case of *Loomis v. Exelon*,<sup>88</sup> in which the court found that the defendant "offered participants a menu that includes high-expense, high-risk, and potentially high-return funds, together with low-expense index funds that track the market, and low-expense, low-risk, modest-return bond funds." As noted previously, in upholding this ruling, the Seventh Circuit found that the defendant "left choice to the people who have the most interest in the outcome, and it cannot be faulted for doing this."<sup>89</sup>

Small and mid-size firms must be equally vigilant in maintaining a prudent record of their decisions with respect to 401(k) plan funds and providers. As the plaintiffs' firms look to increase the volume of fee litigation, they will likely move to target not only large companies but also plans of mid-market size companies. Indeed, fee litigation has already been brought against plans with assets of only \$9 million and \$25 million.<sup>90</sup> Not all small to mid-size companies will have investment and provider management expertise in house, however, or have the time to properly document and monitor the 401(k) plan and its various providers. Accordingly, in appropriate circumstances, small and mid-size employers may want to consider outsourcing fiduciary management of 401(k) plans to outside fiduciary professionals.

## CONCLUSION

Although the recent fee litigation rulings and case filings give cause for concern, they also can illustrate ways to lessen fiduciary exposure. One of the old rules of ERISA applies with added force in this area: A documented, prudent fiduciary process is the best, first line of defense to claims challenging 401(k) plan investments and the selection and retention of the plans' service providers.

## NOTES

1. See, e.g., US Dep't of Labor, Emp. Benefits Sec. Admin., Private Pension Plan Bulletin: Abstract of 2013 Form 5500 Annual Reports, at 2-3 (September 2015), available at <https://www.dol.gov/sites/default/files/ebsa/researchers/statistics/retirement-bulletins/2013pensionplanbulletin.pdf> (noting 636,991 of the total 681,154 pension plans are defined-contribution plans, and that 527,041 of those defined contribution plans are 401(k) type plans, which includes 403(b) plans).

2. See, e.g., Teresa Ghilarducci, *Guaranteed Retirement Accounts: Toward Retirement Income Security*, Economic Policy Institute, Agenda for Shared Prosperity (Nov. 2007), available at [http://www.law.harvard.edu/programs/lwp/Guaranteed\\_Retirement\\_Accountsnovember.pdf](http://www.law.harvard.edu/programs/lwp/Guaranteed_Retirement_Accountsnovember.pdf), last accessed March 3, 2017.
3. There has also been substantial litigation challenging 401(k) plan investments in employer stock. For a discussion of the claims and issues, see Robert Rachal, Howard Shapiro, and Nicole Eichberger, “Fiduciary Duties Regarding 401(k) and ESOP Investments in Employer Stock,” in *BNA ERISA Litigation* 1259 (5th Ed. 2014).
4. See, e.g., Robert Rachal and Tulio Chirinos, “View from Proskauer: ERISA Fee Litigation Continues to Expand with New Claims Seeking to Impose Heightened Fiduciary Standards for 401(k) Plans,” *BNA Pens. & Ben. Daily* (July 29, 2016).
5. See Robert Rachal and Lindsey Chopin, “401(k) Fee Litigation: Recent Case Teachings on Exposures and Practices to Mitigate That Risk,” Vol. 28 No. 4 *Ben. L. J.* 14 (Winter 2015).
6. See Robert Rachal and Lindsey Chopin, “401(k) Fee Litigation—Practices to Mitigate Fiduciary Risk,” *BNA Pens. & Ben Daily* (Jan. 7, 2015).
7. See *supra* n.5; *Haddock v. Nationwide Life Ins. Co.*, No. 01-cv-1552, slip op. at 2 (D. Conn. Mar. 26, 2015), ECF No. 597 (Plaintiffs’ Unopposed Memorandum in Support of Final Approval of Class Action Settlement); *Haddock v. Nationwide Life Ins. Co.*, No. 01-cv-1552, slip op. (D. Conn. Apr. 9, 2015), ECF No. 601, (Final Order Approving Settlement); *Abbott v. Lockheed Martin Corp.*, No. 3:06-cv-701 (S.D. Ill. July 2, 2015), ECF No. 520 (plaintiffs’ memorandum in support of joint motion for settlement); *Abbott v. Lockheed Martin Corp.*, No. 3:06-cv-701 (S.D. Ill. July 20, 2015), ECF No. 526 (final order approving settlement); *Krueger v. Ameriprise Fin. Inc.*, No. 11-cv-2781, slip op. at 1–2 (D. Minn. July 13, 2015), ECF No. 624, (Final Order Approving Settlement); *Krueger v. Ameriprise Fin. Inc.*, No. 11-cv-2781, slip op. at 1–2 (D. Minn. July 13, 2015), ECF No. 623 (Order Granting Motion for Attorneys’ Fees).
8. See Complaints, *Barchock v. CVS Health Corp.*, No. 1:16-cv-00061 (D. R.I. Feb. 11, 2016), ECF No. 1; *Bell v. Anthem Inc.*, No. 1:15-cv-02062 (S.D. Ind. Dec. 29, 2015), ECF No. 1, amended March 16, 2016, ECF No. 23; *Bristol v. Mass. Mut. Life Ins. Co.*, No. 3:16-cv-00139 (D. Conn. Jan. 29, 2016), ECF No. 1; *Brotherston v. Putnam Investment Management LLC*, No. 1:15-cv-13825 (D. Mass. Nov. 13, 2015) ECF No. 1, amended (second) Nov. 22, 2016, ECF No. 72; *Burke v. BB&T Corporation*, No. 1:15-cv-00732 (M.D.N.C. Sept. 4, 2015), ECF No.1, amended (second) Dec. 19, 2016, ECF No. 88; *Cryer v. Franklin Resources, Inc.*, No.4:16-cv-04265 (N.D. Cal. July 28, 2016), ECF No.1; *Ellis v. Fidelity Mgmt. Trust Co.*, No. 1:15-cv-14128 (D. Mass. Dec. 11, 2015), ECF No. 1; *In re Disney ERISA Litigation*, No. 2:16-cv-02251 (C.D. Cal. Apr. 1, 2016), ECF No. 1, amended (second) Dec. 5, 2016, No. 51; *Jacobs v. Verizon Commc’n Inc.*, No. 1:16-cv-01082 (S.D.N.Y. Feb. 11, 2016), ECF No. 1; *Johnson v. Delta Air Lines, Inc.*, No. 1:16-cv-01275 (D. Del. Dec. 20, 2016), ECF No. 1; *Meiners v. Wells Fargo & Company*, No. 0:16-cv-03981 (D. Minn. Nov. 22, 2016), ECF No. 1; *Moreno v. Deutsche Bank Americas Holding Corp.*, No. 1:15-cv-09936 (S.D.N.Y. Dec. 21, 2015), ECF No. 1, amended Mar. 30, 2016, ECF No. 27; *Pledger v. Reliance Trust Co.*, No. 1:15-cv-04444 (N.D. Ga. Dec. 22, 2015), ECF No. 1, amended Apr. 15, 2016, ECF No. 37; *Rosen v. Prudential Ret. Ins. & Annuity Co.*, No. 1:15-cv-01839 (D. Conn. Dec. 18, 2015), ECF No. 1, amended Apr. 6, 2016, ECF No. 35; *Urakhchin v. Allianz Asset Management of America, L.P.*, No. 8:15-cv-01614 (C.D. Cal. Oct. 7, 2015), ECF No. 1, amended Jan. 6, 2016, ECF No. 28; *Wittman v. New York Life Ins. Co.*, No. 1:15-cv-09596 (S.D.N.Y. Dec. 8, 2015), ECF No. 1; *White v. Chevron Corp.*, No. 4:16-cv-00793 (N.D. Cal. Feb. 17, 2016), ECF No. 1; *Wood v. Prudential Ret. Ins. & Annuity Co.*, No. 1:15-cv-01785 (D. Conn. Dec. 3, 2015), ECF No. 1.

9. *Bell v. Anthem Inc.*, No. 1:15-cv-02062 (S.D. Ind. Dec. 29, 2015), ECF No. 1, amended March 16, 2016, ECF No. 23; *White v. Chevron Corp.*, No. 4:16-cv-00793 (N.D. Cal. Feb. 17, 2016), ECF No. 1.
10. *Ellis v. Fidelity Management Trust Co.*, No. 1:15-cv-14128, at 1, 12, 20 (D. Mass. Dec. 11, 2015), ECF No. 1; *Pledger v. Reliance Trust Co.*, No. 1:15-cv-04444 (N.D. Ga. Dec. 22, 2015), ECF No. 1, amended Apr. 15, 2016, ECF No. 37.
11. See, e.g., Complaint, *Johnson v. Fujitsu Tech. & Bus. of Am.*, No. 5:16-cv-03698-NC, at 11, 124 (N.D. Cal. June 30, 2016), ECF No. 1.
12. See *Teets v. Great-West Life & Annuity Ins. Co.*, No. 1:14-cv-02330, ECF No. 118 at \*22–23 (D. Colo. June 22, 2016) (granting class certification of a class of more than 270,000 retirement plan investors challenging the ERISA-exempt status of a guaranteed benefit contract).
13. See, e.g., Complaint, *Johnson v. Fujitsu Tech. & Bus. of Am.*, No. 5:16-cv-03698-NC, at 11, 120–134 (N.D. Cal. June 30, 2016), ECF No. 1.
14. No. CV 16-2251 PA (JCx), ECF No. 50 (C.D. Cal., Nov. 14, 2016).
15. 2016 WL 4502808 (N.D. Ca Aug. 29, 2016).
16. See Complaints, *Cassell v. Vanderbilt University*, No. 3:16-cv-02086 (M.D. Tenn. Aug. 10, 2016), ECF No. 1; *Clark v. Duke University*, No. 1:16-cv-1044 (M.D.N.C. August 10, 2016), ECF No. 1; *Cunningham v. Cornell University*, No. 1:16-cv-06525 (S.D.N.Y. Aug. 17, 2016), ECF No. 1; *Divane v. Northwestern University*, No. 1:16-cv-08157 (N.D. Ill. Aug. 17, 2016), ECF No. 1; *Henderson v. Emory University*, No. 1:16-cv-02920 (N.D. Ga. Aug. 11, 2016), ECF No. 1; *Kelly v. John Hopkins University*, No. 1:16-cv-02835, (D. Md. Aug. 11, 2016), ECF No. 1; *Munro v. University of Southern California*, No. 2:16-cv-06191 (C.D. Cal. Aug. 17, 2016), ECF No. 1; *Sacerdote v. New York University*, No. 1:16-cv-06284 (S.D.N.Y. Aug. 9, 2016), ECF No. 1; *Sveda v. The University of Pennsylvania*, No. 2:16-cv-04329 (D. Penn. Aug. 10, 2016), ECF No. 1-1-1; *Tracey v. Massachusetts Institute of Technology*, No. 1:16-cv-11620 (D. Mass. Aug. 9, 2016), ECF No. 1 (MIT's plan is actually a 401(k) plan but has some similarities to the other 403(b) plans in question, that is, it contains more than 100 investment options); *Vellali v. Yale*, No. 3:16-cv-01345 (D. Conn. Aug. 9, 2016), ECF No. 1.
17. *Morin v. Essentia Health*, No. 0:16-cv-04397 (D. Minn. Dec. 29, 2016), ECF No. 1.
18. IRS Publication 571 (01/2017), Tax Sheltered Annuity Plans (403(b)) available at <https://www.irs.gov/publications/p571/cb01.html>, last accessed March 3, 2017.
19. *Clark v. Duke University*, No. 1:16-cv-1044, at 53–61 (M.D.N.C. Aug. 10, 2016), ECF No. 1.
20. *Vellali v. Yale*, No. 3:16-cv-01345, at 10-19 (D. Conn. Aug. 9, 2016), ECF No. 1.
21. *Kruger v. Novant Health, Inc.*, No. 1:14-cv-208 (M.D.N.C. Sept. 29, 2016), ECF No. 61 (final order approving settlement).
22. See, e.g., Jacklyn Wille, “Uptick in Fee Litigation Reshaping 401(k) Industry,” *BNP Pens. & Ben. Daily* (June 9, 2016).
23. *Bell v. Anthem Inc.*, No. 1:15-cv-02062 (S.D. Ind. Dec. 29, 2015), ECF No. 1, amended March 16, 2016, ECF No. 23; *White v. Chevron Corp.*, No. 4:16-cv-00793 (N.D. Cal. Feb. 17, 2016), ECF No. 1.
24. *Ellis v. Fidelity Mgmt. Trust Co.*, No. 1:15-cv-14128 (D. Mass. Dec. 11, 2015), ECF No. 1; *Pledger v. Reliance Trust Co.*, No. 1:15-cv-04444 (N.D. Ga. Dec. 22, 2015), ECF No. 1, amended Apr. 15, 2016, ECF No. 37.

25. *White v. Chevron Corp.*, No. 16-cv-0793, 2016 WL 4502808, at \*5–6 (N.D. Ca Aug. 29, 2016).
26. See Complaint, *White v. Chevron Corp.*, No. 4:16-cv-00793 at 38 (N.D. Cal. Feb. 17, 2016), ECF No. 1.
27. *Id.* at 55.
28. *White*, No. 16-cv-0793, 2016 WL 4502808, at \*5–6.
29. *Id.* at \*23.
30. *Id.* at \*24.
31. *White*, No. 16-cv-0793, 2016 WL 4502808, at \*31–32.
32. *Id.* at \*44–45.
33. *Id.*
34. *Id.*
35. See Amended Complaint, No. 1:15-cv-02062, at 2 (S.D. Ind. March 16, 2016), ECF No. 23.
36. *Id.* at 38 (The Vanguard Institutional Index Fund (Instl) (VINIX)).
37. *Id.*
38. *Barchock v. CVS Health Corp.*, No. 1:16-cv-00061 (D. R.I. Jan. 31, 2017) (report and recommendation), ECF No. 38.
39. See Complaint, *Ellis v. Fidelity Management Trust Co.*, No. 1:15-cv-14128, at 1, 12, 20 (D. Mass. Dec. 11, 2015), ECF No. 1.
40. *Id.* at 12, 14.
41. *Id.* at 47.
42. *Id.*
43. *Brotherston v. Putnam Invs., LLC*, 2016 U.S. Dist. LEXIS 50849, at \*3 (D. Mass. Apr. 7, 2016) (denying motion to dismiss in joint order as to both *Brotherston v. Putnam* and *Ellis v. Fidelity Management*).
44. Under ERISA a “guaranteed benefit policy” is exempt to the extent that such “policy or contract provides for benefits the amount of which is guaranteed by the insurer.” 29 U.S.C. § 1101(b)(2)(B).
45. See Complaints, *Wittman v. New York Life Ins. Co.*, No. 1:15-cv-09596 (S.D.N.Y. Dec. 8, 2015), ECF No. 1; *Wood v. Prudential Ret. Ins. & Annuity Co.*, No. 1:15-cv-01785 (D. Conn. Dec. 3, 2015), ECF No. 1.
46. See *Teets v. Great-West Life & Annuity Ins. Co.*, 106 F. Supp. 3d 1198 (D. Colo. 2015)); *Rozo v. Principal LifeIns. Co.*, No. 14-cv-000463, 2015 U.S. Dist. LEXIS 175630, at \*5–7 (S.D. Iowa Sept. 21, 2015).
47. See *Teets*, *supra* n.46 at 1203 (D. Colo. 2015); see also *Rozo*, *supra* n.46 at \*5–7 (S.D. Iowa Sept. 21, 2015) (denying motion to dismiss because of fact issue as to who bore investment risk when insurer could influence interest rate risk based on how it set rates for new contracts).
48. See *Teets v. Great-West Life & Annuity Ins. Co.*, No. 1:14-cv-02330, ECF No. 118 at \*22–23 (D. Colo. June 22, 2016). The 270,000 plan participants came from 13,600 different retirement plans. *Teets v. Great-West Life & Annuity Ins. Co.*, No. 1:14-cv-02330, ECF No. 118 at \*13 (D. Colo. June 22, 2016). Plaintiffs have previously had



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

49. See Complaint, *Johnson v. Fujitsu Tech. & Bus. of Am.*, No. 5:16-cv-03698-NC, at 11, 124 (N.D. Cal. June 30, 2016), ECF No. 1.

50. *In re Disney ERISA Litigation*, 16-cv-2251 PA (JCx), ECF No. 50 (C.D. Ca. Nov. 14, 2016).

51. 134 S. Ct. 2459 (2014).

52. *Id.*

53. See *supra* n.16 for list of complaints.

54. Ron Hallsten & Bob Architect, *Section 403(b) Tax-Sheltered Annuity Arrangements*, Internal Revenue Service 1995 EO CPE, available at <https://www.irs.gov/pub/irs-tege/eotopici95.pdf>, last accessed March 3, 2017.

55. David Powell and Mark Bieter, "View From Groom: The University Fee Cases—Product of the Past, Possible Wave of the Future," *BNA Pens. & Ben. Daily* (Sept. 28, 2016).

56. *Id.*

57. *Cassell v. Vanderbilt University*, No. 3:16-cv-02086, at 91-106 (M.D. Tenn. Aug. 10, 2016), ECF No. 1 (plan contained more than 300 investment options); *Clark v. Duke University*, No. 1:16-cv-1044, at 53-61 (M.D.N.C. Aug. 10, 2016), ECF No. 1 (plan contained over 400 investment options).

58. 658 F.3d 667 (7th Cir. 2011).

59. *Id.* at 673-674.

60. *Kelly v. John Hopkins University*, No. 1:16-cv-02835, at 36-59 (D. Md. Aug. 11, 2016), ECF No. 1 (plan had five recordkeepers prior to January 2016); *Munro v. University of Southern California*, No. 2:16-cv-06191, at 34 (C.D. Cal. Aug. 17, 2016), ECF No. 1 (investment options offered by four separate recordkeepers).

61. *Clark v. Duke University*, No. 1:16-cv-1044, at 53-61 (M.D.N.C. Aug. 10, 2016), ECF No. 1.

62. As alleged in the Complaint. *Id.* at 9.

63. *Id.* at 2, 9.

64. *Id.* at 76-92.

65. *Id.*

66. *Id.* at 76.

67. *Id.* at 92.

68. *Id.* at 63.



69. *Morin v. Essentia Health*, No. 0:16-cv-04397, at 44, 58 (D. Minn. Dec. 29, 2016), ECF No. 1.

70. As alleged in the Complaint. *Id.* at 58.

71. *Id.*

72. *Id.* at 38–60.

73. *Id.* at 58.

74. *Loomis v. Exelon*, 658 F.3d 667, 673–74 (7th Cir. 2011).

75. Recent significant cases through late 2015 were discussed in Robert Rachal and Lindsey Chopin, *supra* n.5.

76. If a costs-only approach and hindsight could be used to state claims on plan investments, *every* plan using actively managed funds would be at risk, and many large plans may be compelled to use collective trusts. But active management is required to keep markets efficient and can outperform passive management, while mutual funds offer liquidity and market competition, and are also subject to substantial federal regulation to protect investors that does not apply to collective trusts. In sum, the plan environment that would arise from the adoption of plaintiffs' cost-driven theories may not be an optimal one for plan participants, and in fact risks causing them substantial harm. In that sense, cases like *Disney* and *Chevron* can provide important limits to protect plans and participants from these negative incentives.

77. *Rosen v. Prudential Ret. Ins. & Annuity Co.*, No. 15-cv-1839, 2016 WL 7494320 (D. Conn. Dec. 30, 2016).

78. *Id.*

79. *Id.* at \*10–11.

80. *Tibble v. Edison*, 2016 U.S. App. LEXIS 22366 (9th Cir. Dec. 16, 2016); For a more complete analysis of the claims and issues arising in *Tibble*, see Howard Shapiro, Robert Rachal, & Tulio Chirinos, "Fees and Expenses Litigation in Defined Contribution Plans," in *BNA ERISA Litigation* 1033, (5th Ed. 2014).

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

82. *Tibble v. Edison Int'l*, 729 F.3d 1110, 1137–39 (9th Cir. 2013).

83. *Id.* at 1119–20.

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

85. *Tibble v. Edison*, 2016 U.S. App. LEXIS 22366 (9th Cir. Dec. 16, 2016).

86. *White v. Chevron Corp.*, No. 16-cv-0793, 2016 WL 4502808, at \*45.

87. See, e.g., *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) (noting that "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)"); DOL Info. Ltr, No. DLO585, 1998 ERISA LEXIS 6 (Feb. 19, 1998); US Department

of Labor, *Understanding Retirement Plan Fees and Expenses*, <http://www.dol.gov/ebsa/publications/undrstndgrtrmnt.html> (last accessed March 3, 2017) (“Fees and expenses are one of several factors to consider when you select and monitor plan service providers and investments. The level and quality of service and investment risk and return will also affect your decisions.”); US Department of Labor, *Meeting Your Fiduciary Responsibilities*, <http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html> (last accessed March 3, 2017).

88. 658 F.3d 667 (7th Cir. 2011).

89. *Id.* at 673–674.

90. See, e.g., Jacklyn Wille, “Uptick in Fee Litigation Reshaping 401(k) Industry,” *BNA Pens. & Ben. Daily* (June 9, 2016).

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