The Current State of Fiduciary Excessive Fee and Imprudent Investment Litigation

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Our Speaker Today

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Agenda

1. **The Numbers:** Frequency and Severity in 2022 – a review of the number of cases being filed; decision results; and settlements.
2. **Analyzing the Cases Being Filed: a** closer analysis of the three primary types of excess fee claims: (1) excess recordkeeping fees; (2) excess investment fees; and (3) imprudent investment claims.
3. **Analyzing the Case Law:** 2022 developments in the plausibility standard – from the January 2022 Supreme Court decision in *Hughes v. Northwestern* to the progress on the motion to dismiss plausibility standard in the federal circuit courts.
4. **Trends to Follow:** the trends to follow in excess fee litigation, including how have plaintiff firms adapted to the evolving plausibility standard in recent filings.
5. **Conclusions:** Results in excess fee and imprudent investment cases remain a crapshoot. While more cases are being dismissed, whether a plan sponsor will win has very little to do with whether their fiduciary process is prudent.

Excess Fee Cases by the Numbers

Frequency is up with new law firms filing cases

Excessive Fee Lawsuits

What is an Excessive Fee Lawsuit?

Three primary excess fee and imprudent investment claims:

- **Plan recordkeeping fees are too high**
- **Plan investment fees are too high**
- **Plan investment performance is too low**

The lawsuits seek damages in the amount of purported excessive recordkeeping and investment fees, and purported amount of investment underperformance.

Reality Check: There is No Excess Fee Problem in America's Large Retirement Plans

- **The current slate of excess fee cases represent lawyer-driven lawsuits designed to make money for the plaintiffs' bar:** except maybe some of the early cases in 2006 against single-employer plans before plan fees went down, and the initial 2016-17 cases against university plans, there is no evidence that most of the plans being sued have a problem with high plan fees or investment underperformance.
- There is also no evidence that any plan participants think their plan fees are too high. To the contrary, these cases are contrived by plaintiff lawyers to make money.
- Simply put, there is no problem in 2023 with high fees in America's retirement plans. Euclid underwriting can confirm that **large plans have significantly lower fees than small plans**.
- **Case in point:** Euclid was just purchased by a larger company with a larger defined contribution plan servicing >15,000 participants compared to our prior plan servicing only 150 participants. The Euclid-plan RK fee for an individual account with $500k in assets was $1700 per year (34 bps); but the RK fee for the same account is now approximately $180, including all plan administrative fees – a 90 percent reduction.

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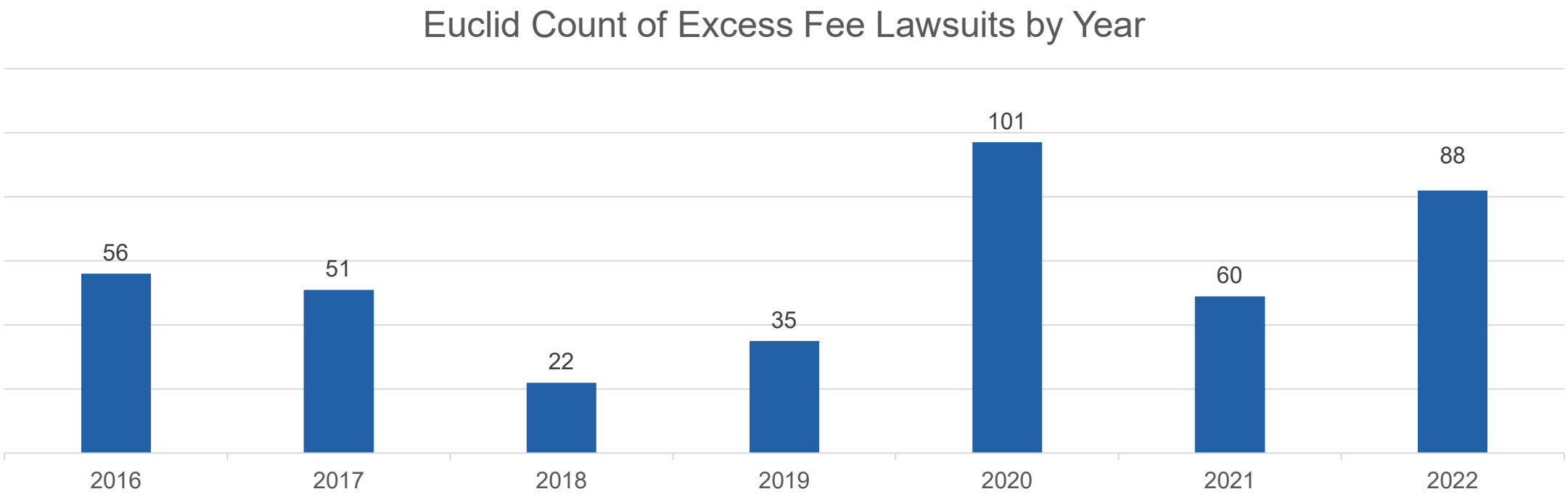
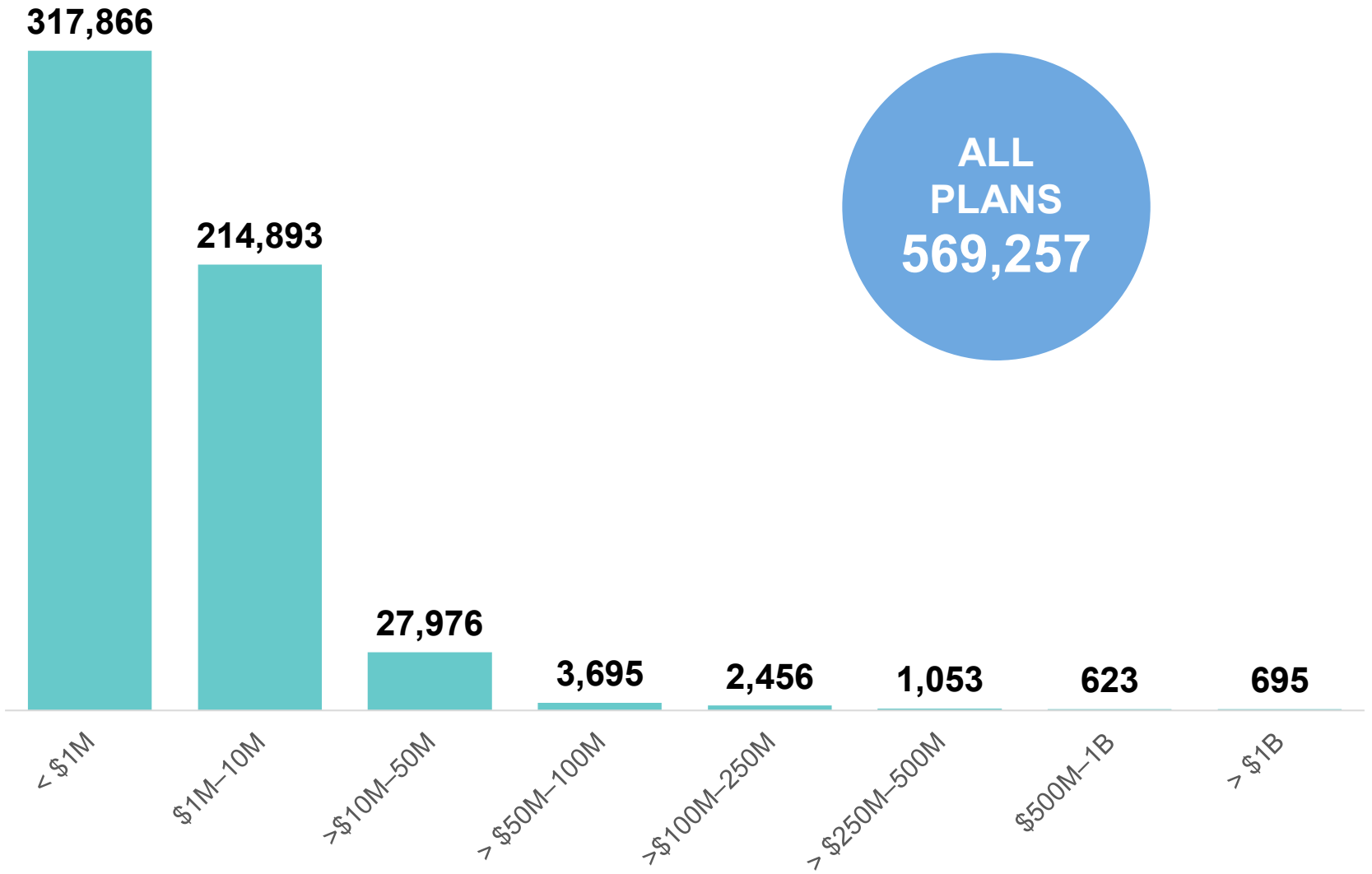
Frequency Remains Very High



High Frequency

- Biggest change in the first half of 2022 was the reemergence of the Capozzi Adler law firm filing 60% of all first-half excess fee cases.
- The second half of the year is noteworthy for Miller Shah filing eleven cases in August against plans invested in low-cost passively managed BlackRock LifePath target-date funds.
- The Wenzel law firm has branched out from COBRA notice cases to file excess fee cases.
  - Other new entrant is Tower Legal Group and first cases filed by Morgan & Morgan.
- 40%+ of 2022 cases involve challenges to target-date funds.
- **KEY POINT: The frequency is high when you take into account the actual (and limited) number of large (over $500m) defined contribution plans in America.**

Universe of 401k Plans by Asset Size



The Universe of Defined Contribution Plans

<$10MM Plan	$10–50MM Plan
Assets: $925,854MM **Plans:** 754,701 **Participants:** 22,685,285	**Assets:** $864,922MM **Plans:** 45,315 **Participants:** 15,490,953

$50–200MM Plan	>$200MM Plan
Assets: $941,229MM **Plans:** 10,299 **Participants:** 14,938,663	**Assets:** $5,531,061MM **Plans:** 5,021 **Participants:** 58,559,073

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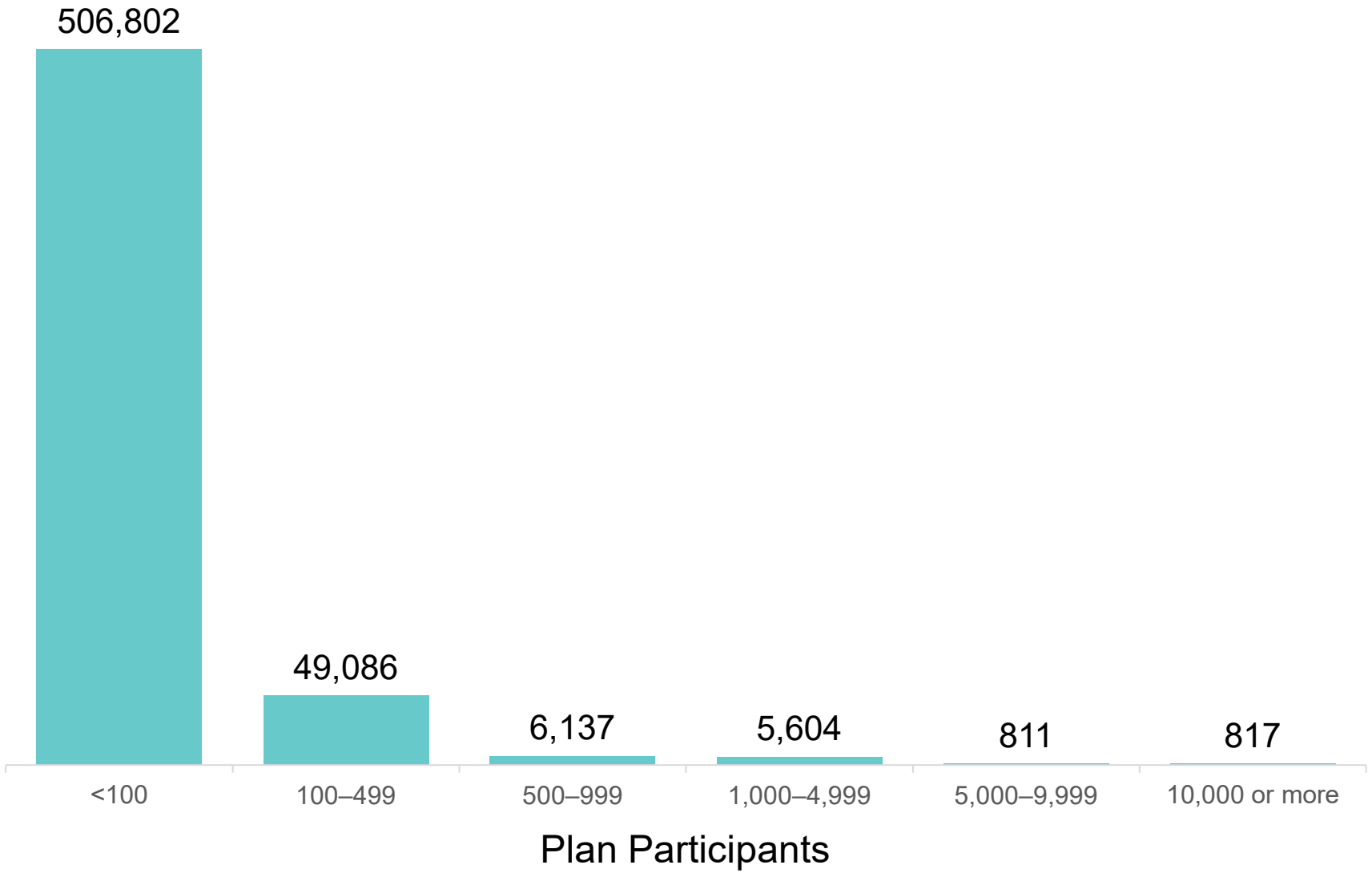
Universe of 401k Plans by Participant Count



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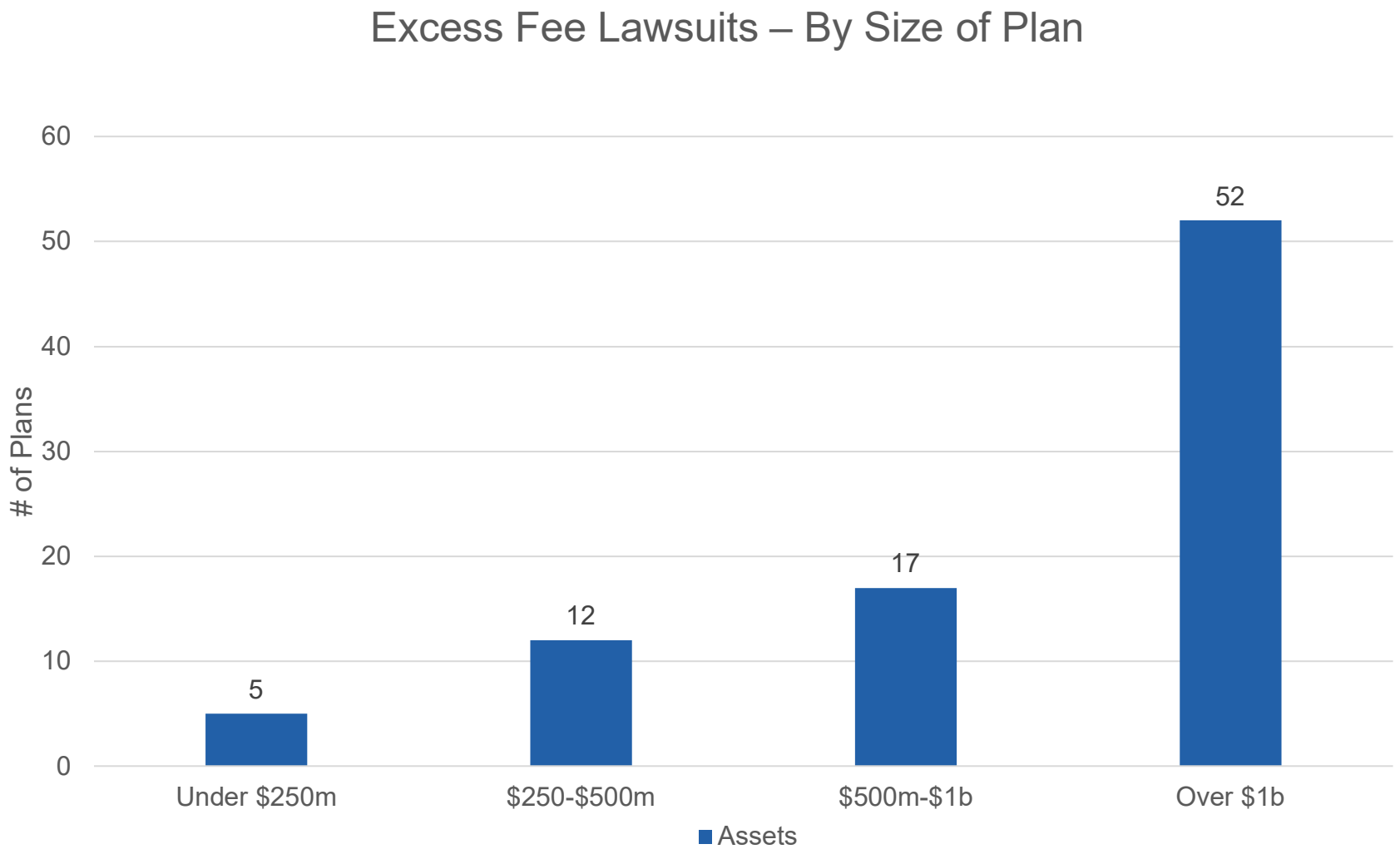
The Size of Plans Being Sued



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The Probability of Being Sued is High for a Large Plan

- This data shows the high probability in any given year that a large plan with over $1B in assets will be sued.
- With 88 cases in 2022 alone – most against plans over $500M in assets – a plan over $1B in assets has at least a 7.5% chance of being sued in any given year, and a $500M plan has at least a >3-5% chance of being sued.
- The actual percentage for large plans is even higher because many large plans have already been sued.
  - **Multiple Lawsuits Against the Same Plan:** Now some plans are being sued more than once: See *Quest Diagnostics* (sued three time) and *Cumulus Media*.
- This also demonstrates why plaintiff firms have started working downstream to sue plans between $100m and $500m.
  - Tower Legal Group sued **99 Cents Only Store** – under $100m plan [$69.9m/2718 participants – 03/05/2022].

Plaintiff Law Firms

- Most cases are filed by the Capozzi Adler, Miller Shah and Walcheske law firms, but new entrants have joined:

Law Firm	Number of cases filed:
Capozzi Adler:	21
Miller Shah:	15
Walcheske & Luzi LLC:	13
Wenzel Fenton Cabassa:	11
Nichols Kaster:	8
Tower Legal:	4
Schlichter Bogard & Denton, LLP:	3
Fair Work:	2
Baillon Thome Jozwiak & Wanta LLP:	2
Roberts Law:	1
Sanford Heisler Sharp, LLP:	1
Other firms:	7

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Types of Excess Fee and Imprudence Claims

Claim type	# of complaints w/type
Excessive RK Fees:	59
Imprudent Investment Claims:	57
Wrong Share Class:	39
Excessive Investment Fees:	66
High Fee / Underperformance of Active TDFs:	16
Excessive Managed Account Fees:	9
Other (self-dealing):	7

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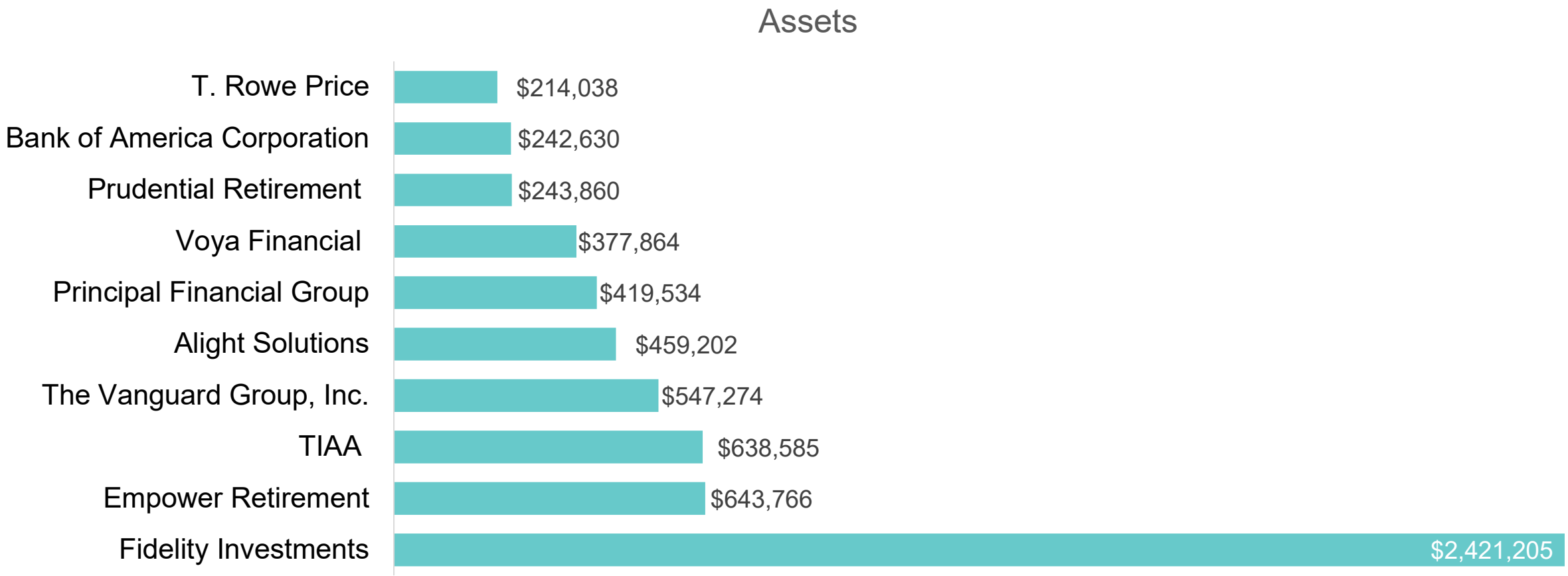
Recordkeeping Fees

How Plaintiffs Allege Plan Administrative Fees Are Too High

Top Recordkeepers



Source: 2020 Best in Class DC Providers - PLANSPONSOR

CLAIMS: Recordkeeping Fees are Too High

BASIC RECORDKEEPING FEE CLAIMS:

- Recordkeeping fees too high on per-participant basis
- Recordkeeping fees too high because they are based on percentage of assets, and not a flat, per-participant fee
- Revenue Sharing is uncapped and increases indirect recordkeeping fees
- Failure to conduct RFPs for lower RK fees

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Types of Excess Recordkeeping Fee Tactics

1: Allegations Without Proof

2: Improper Benchmarks

3: False Facts

4: Inflated Recordkeeping Fees From Form 5500 Filings

5: Allege that Fidelity Has Stipulated on the Record that its Recordkeeping Fees are only worth $14-21

6: Comparing Cherry-Picked Comparator Plans without Proper Context

7: A Moving Target of “Reasonable” Fees and Comparator Plans

8: NEW: Argue that there is no need to provide meaningful comparisons because all mega plans are priced based on the number of participants (**U.S. Bancorp** case filed 01-05-2023]

Tactic #1: Allegations Without Proof

- The original tactic used to allege excess recordkeeping was based on pure conjecture.
  - Plaintiffs alleged that a plan's recordkeeping fee was higher than a low number – usually $35 per participant – with no credible attempt to justify their claim.
  - These original claims gave no supporting benchmark to validate their claims.
- BEST EXAMPLE: ***Hughes v. Northwestern***: Schlichter law firm alleged without any proof that the recordkeeping fees paid by the Northwestern plans were too high without any proof that the recordkeeping fees paid by the Northwestern plan were too high to TIAA and Fidelity.
- Plaintiffs alleged that a reasonable recordkeeping fee would be $1.05m or $35 per participant, compared to $2.3m and $4.1m paid by the Retirement Plan [between $153 and $213 per participant from 2010 to 2015 – allegedly over 500% higher than a reasonable recordkeeping fee for these services].
- *See* ***Tobias v. Nvidia Corporation***, Order Granting With Leave to Amend Motion to Dismiss at 25 ["Plaintiffs provide no basis for how they arrived at the $35 per participant figure."]

Tactic #2: Distorting Small Plan RK Statistics from the 401k Averages Book

Nvidia Corporation

[$1.0B assets/7,822 participants] Capozzi 08/28/2020.

- $63 flat recordkeeping fee to Fidelity – reduced to $52 in 2017 – not including $458,130 in revenue sharing: for 2018 ($11,701) direct + $458,130 revenue sharing (indirect) = $446,429.00

Paragraph 126: "By way of comparison, we can look at what other plans are paying for recordkeeping and administrative costs. One data source, the *401k Averages Book* (20th ed. 2020) studies Plan fees for smaller plans, those under $200 million in assets. Although it studies smaller plans than the Plan, it is nonetheless a useful resource because we can extrapolate from the data what a bigger plan like the Plan should be paying for recordkeeping. That is because recordkeeping and administrative fee should **decrease** as a Plan increases in size. **For example, a plan with 200 participants and $20 million in assets has an average recordkeeping and administration cost (through direct compensation) of $12 per participants**. *401k Averages Book* at p. 95. **A plan with 2,000 participants and $200 million in assets has an average recordkeeping and administration cost (through direct compensation) of $5 per participant**. *Id.* At 108. Thus, the Plan, with between a half-billion and a billion dollars in assets and over 7,000 participants throughout the Class Period, should have had a direct recordkeeping costs below $5 average, which it clearly did not."

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Misrepresentation of the 401k Averages Book

- **401k Averages Book:** The 200 Participant/$20M asset plan has been misrepresented by the Capozzi law firm: The actual recordkeeping costs are stated as $0 low; $12 average; and $190 high.
- BUT the overall bundled costs of the same plans are $136/$982/$1,284 – not $12. This means that the recordkeepers for small plans are taking most of its compensation from revenue sharing from the investment managers – likely hundreds of dollars in the average plan.
- The 2,000 participant/$200M plan in Chart 24.8 has a $5 direct recordkeeping fee as Capozzi asserts: BUT they leave out the indirect $160 cost per participant of revenue sharing on the chart – with $501 net investment costs – the example is $666 total bunded costs for this plan. **This is much higher than the Nvidia plan – and thus the Complaint is disingenuous, at best.**

Tactic #3: False Facts – Alleging Fees Based on Inaccurate Fee Amounts

- The third tactic is to allege a recordkeeping fee for a plan that is just plain wrong.
- ***Alas v. AT&T, Inc.***, 17-08106-VAP (RAOx) (C.D. Ca.): The CA court denied four successive motions to dismiss in a case alleging an "excessive" recordkeeping fee of $61 per participant.
- After expensive discovery, the undisputed record showed that the recordkeeping fee was $20 – one-third the size of the false allegations, and that AT&T had negotiated a "most favored customer" provision that guaranteed the lowest possible fee that Fidelity provides to similarly sized plans.
- Plaintiffs still have appealed, now arguing that even $20 is too high because of other revenue the Fidelity receives for plan transactions.

Tactic #4: Inflated RK Fees From Form 5500 Filings

- Using Form 5500 compensation data that overstates the plan administration costs when rule 404a5 participant disclosures are readily available.
- KEY POINT: The Form 5500 recordkeeping disclosure nearly always contains all revenue earned by the recordkeeper. This means that it includes transaction costs that do not constitute pure recordkeeping services. The total amount disclosed can be over 50%+ inflated by transaction costs [like loan and QDRO fees]. **The Form 5500 RK number is not the true amount of RK fees.**
- **Matousek v. MidAmerican Energy Company**, No. 4:20-cv-00352-CRW-CFB (S.D. Iowa 11/13/2020), for example, plaintiffs claim a recordkeeping fee of $326.17 to $525.20 per participant [$1.9M to $3.1M], computed from the Merrill Lynch compensation disclosed on the plan's Form 5500 Schedule C listing service provider compensation.
  - The company presented evidence in the rule 404a5 participant disclosures that its recordkeeping fee from Merrill Lynch was only $32 in its motion to dismiss, demonstrating that the number on the Form 5500 was incorrect and inflated, including amounts that have been rebated to participants and transaction fees that are not recordkeeping fees. This shows the dramatic differential between the Form 5500 recordkeeping fee data and actual reality.
- **The prejudice is real**: see ***Soulek v. Costco Wholesale Corporation***, NO. 20-cv-937 (filed June 23, 2020 E.D. Wisc.): settled for $5.1m after Costco lost its motion to dismiss, even though the inflated RK amount in the Form 5500 of $6m divided by the number of participants (174,403) is still only $34.4 (even including extraneous transaction costs).

Compare Form 5500 Data

Kimberly-Clark [$4B/16,792] 4/15/21

- Walcheske & Luzi lawsuit alleges unreasonable recordkeeping fees – solely using estimates from Form 5500 filings of Kimberly-Clark and other companies.
- Estimated K-C RK and took the average from 2015-2019 of $1.36m, even though they declined every year from $2.0M to $720k [$1,360,044 divided by 17,377 = $78 – true 2019 number as $720,175 divided by 16,792 - $42.88].
- Plaintiffs submitted a chart of other companies purported RK fees from Form 5500 filings, ranging from $28 for Vibra Healthcare Retirement Plan [9,750/$107.6M] to $49 for Multicare Health System 403(b) Plan [11,437/$559.8M].
- **BUT NOTE:** the Form 5500 revenue for a recordkeeping includes transaction costs and other non-recordkeeping revenue and may not include revenue sharing – misleading because not apples to apples.
- The rule 408b2 plan fee disclosure would give exact numbers to judge fairly, but not included in the complaint.
- See also **Wesco [$750M/8,870] – Chimicles:** $178 RK fee to Wells Fargo – chart of other plans from Form 5500 – “should have been $40”.

Comparisons to other filed cases

- Other lawsuits compare to recordkeeping fees cited in other cases.
- ***Spano v. Boeing***: 2014 plaintiffs' expert opined market rate of $37-42, supported by defendants consultant's stated market rate of $30.42-$45.42 and Boeing obtaining $32 fees after the class period.
- 2016 Declaration in Boeing case that recordkeeping fees should have been $18 per participant.
- ***George v. Kraft Foods Global, Inc.*:** 2011 case – plaintiffs' expert opined market rate of $20-$27 and plan paid recordkeeper $43-65.
- ***Gordon v. Mass Mutual***, 2016 settlement committing the plan to pay not more than $35 per participant for recordkeeping.

Tactic #5: $14 Fidelity Recordkeeping Fee Discovery Stipulation

- **TACTIC #5: Allege that Fidelity has stipulated on the record that its recordkeeping services are only worth $14-21.**
- In April 2021 filing against **Humana Inc. [$5.3B/46,000]**, Capozzi law firm estimated the Human RK fee of $60.75 and compared it to Fidelity testimony about its own plan: "Recently, Fidelity – a recordkeeper for hundreds of plans – stipulated in a lawsuit that a Plan with tens of thousands of participants and over a billion dollars in assets could command recordkeeping fees as low as $14-21." *See Moitoso v. FMR LLC*, 451 F. Supp. 3d 189, 204 (D. Mass. Mar. 27, 2020)
- **Koch Industries** – Nichols Kaster 10/16/20 lawsuit **[$8.1B/60,000]** – alleged $57-75 RK fees excessive: "a prudent and loyal fiduciary of a similarly-sized plan could have obtained comparable recordkeeping services of like quality for as low as $14 per participant during that same time period." Citing *Moitoso v. Fidelity*.
- The argument that Fidelity has somehow conceded that its recordkeeping services are only worth $14-21 is a false and prejudicial narrative:
  - It was a discovery stipulation for the limited purpose of resolving a discovery dispute. Like many stipulations, the *Moitoso* stipulation reflected a compromiser between the parties to that case about the value of recordkeeping services that Fidelity provides to its own plan.
  - The stipulation stated on its face that it was "offered for the purposes of the [Moitoso] litigation only," and the parties agreed not to "context the validity of the stipulation [] in the context of this litigation only."

Comparison to Lawsuit against Fidelity's own plan

- ***Williams v. Centene Corporation***, E.D. Mo (2/22/22): Capozzi alleges in paragraph 89: "Let's start with what Fidelity itself would pay if it were in Defendants' shoes. In a recent lawsuit where Fidelity's multi-billion plan with over 58,000 participants was sued, the "parties [] stipulated that if Fidelity were a third party negotiating this fee structure at arms-length, the value of services would range from $14-21 per person per year over the class period, and that recordkeeping services provided by Fidelity to this Plan are not more valuable than those received by other plans of over $1,000,000,000 in assets where Fidelity is the recordkeeper." *Moitoso et al. v FMR, et al*, 451 F.Supp.3d 189, 214 (D. Mass 2020).

TACTIC #6: Comparing Cherry-Picked Comparator Plans Without Proper Context

- The most recent tactic is to cite the fees for five to eight large plans with super-low fees from across the entire nation. There is no proof that these numbers are correct, but the same plans are cited over and over in numerous excess fee cases.
- This tactic has two obvious flaws:
  - (1) Lack of Comparison of the level and quality of recordkeeping services.
  - (2) Cherry-picking of the lowest cost plans is not evidence of fiduciary imprudence.

Capozzi Chart of "Comparable" Plans

Comparable Plans' R&A Fees paid in 2019					
Plan Name	**Number of Participants**	**Assets Under Management**	**Total R&A Costs**	**R&A Costs on a Per Participant Basis***	**Recordkeeper**
Publicis Benefits Connection 401K Plan	48,353	$2,167,524,236	$995,358	$21	Fidelity
Deseret 401(k) Plan	34,938	$4,264,113,298	$773,763	$22	Great-West
The Dow Chemical Company Employees' Savings Plan	37,868	$10,913,979,302	$932,742	$25	Fidelity
The Savings and Investment Plan [WPP Group]	35,927	$3,346,932,005	$977,116	$27	Vanguard
The Rite Aid 401(k) Plan	31,330	$2,668,142,111	$930,019	$30	Alight Financial

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Chart from *Williams v. Centene Corporation*, E.D. Mo (2/22/22):

Use of NEPC data for alleged high RK fees

United Surgical [$290M/15,000+] sued by Capozzi law firm on 4/30/21:

- "According to the ICI Study, the median total plan cost for a plan between $250m and $500m is 0.43% of total plan assets" compared to 0.82% in 2018 and 0.79% in 2016 – "83% higher" than peers.
- Used form 5500 for direct + indirect recordkeeping fees: 2018 - $328,716 + $1,304,352 = $1,633,068 = $98.35 per participant.
- "NEPC's survey found that **no plan** with over 15,000 participants paid more than $69 per participant in recordkeeping and administrative fees."
- **Takeaways:** (1) high participant count plans will be targeted even when assets <$500m; (2) Form 5500 RK revenue overstates the RK costs, because other revenue is included – very misleading for plaintiffs not to disclose this; and (3) remember the small size of the NEPC survey.

Tactic #7: A Downward Moving Target

- Another example demonstrating the lack of credibility of most excess RK fee cases is the tactic of amending complaints with reduced "reasonableness" comparators as defendants prove that the original fee claims were false.
- In ***Moore v. Humana***, the original complaint alleged that reasonable RK fees were about "$40 per participant," but after learning that the plan's fees were less than that, plaintiffs filed an amended complaint alleging that prudently managed plans paid between $25 and $28 per participant for RK fees.
- The same revisionist history took plan in ***In re Am. Nat'l Red Cross Litig.***, No. 1:21-cv-00541-EGJ (D.D.C. June 15, 2021): In the original complaint, plaintiffs alleged that plaintiffs paid $71 per year in RK fees and that "reasonable" fees would have been $34 per year based on "comparator" plans. But the first amended complaint alleged that plaintiffs paid between $31.50 and $45 per year in RK fees compared to a revised "reasonableness" level – now down to $30 based on new "comparator" plans.
- **NEW ARGUMENT: NO NEED TO PROVIDE ANY COMPARISON BENCHMARK**
  - ***Dionicio v. U.S. Bancorp***, No. 0:23-cv-00026-PJS-JFD (01/05/2023 D.Minn) (filed by Walcheske law firm): "Plaintiff does not need to provide examples of similar plans receiving the same services in the same year where the primary drivers of price in large plans are the number of accounts and whether the plan's fiduciaries solicited competitive bids, rather than the marginal cost of recordkeeping for each participant." Citing *Coyer et al. v. Univar Solutions USA Inc. et al.*, 2022 WL 453791, at *5 (N.D. Ill. Sept. 28, 2023) (emphasis in original).

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Investment Fees

How Plaintiffs Allege Investment Fee are Too High

Investment Fees – Common Allegations

The standard Capozzi complaint template will make the four same claims:

1. **Investment fees too high – less expensive options available**
2. **Retail v. institutional fund classes – failure to secure the lowest fund share class**
3. **Passive options cheaper than active funds**
4. **Failure to consider collective trusts or separate accounts**

The Schlicter law firm concentrates on bigger targets with alleged proprietary Investments from plan sponsor, recordkeeper and/or investment manager [example **Schneider Electric** (AON proprietary investments); **Wood Group** and **Molina Health** (NFP proprietary Flexpath target-date investments)

Capozzi Complaint Example

Nvidia [$1B/7,882] – 08/28/20 – Capozzi.

1. **High-cost active funds:** T. Rowe Price .68-.72 versus ICI median of .65%
2. **Lower-fee share classes:** TRP I Share .40-.59
3. **Lower cost collective trusts:** TRP .46%
4. **Lower cost passively managed funds:** Fidelity Freedom Index Investor 0.12%; American Funds R6 .33-.38%

"Too little, too late": complaint admits that "[i]t appears that in 2018, nearly **four years** into the Class Period, the Plan switched to the collective trust versions of the T. Rowe Price target date funds. But this was too little too late as the damages suffered by Plan participants to that point had already been baked in."

Another Capozzi example – so you can see the cut-and-paste work product

Cintas [$1.8B/53,357]: 12-13-2019 – Capozzi

1. **Investment fees too high:** T. Rowe Price TD funds .86-.92 versus ICI Median .56; Domestic Bond Pimco 1.23 v. ICI .18; Dodge & Cox Int'l .63 v. .49 ICI; Artisan MidCap 1.18 v. .31 ICI; Dodge & Cox Income .42 v. .18% [note that TRP fees much higher than prior Nvidia example]
2. **Lower-share class:** TRP I Shares .53 to .59%; TRP TR-A .46 -- .50%.
3. **Lower cost passive alternatives:** Fidelity Freedom Investor .12%; or JP Morgan SmartRetirement .29%

High Target Date Fund Plan Fees – T. Rowe Price

- **United Surgical Partners** [$455m/15,000+] – Capozzi lawsuit 4/30/21: T. Rowe Price Advisor - .83 to .96% v. ICI TD Median of 0.35%
- **Cerner Corporation** [$2.2B/23,915] – Capozzi lawsuit filed 01/21/20: T. Rowe Price TD Retirement TRRDX .72% versus ICI Median 0.56% [alternative TRP I Class 0.50%; Tr-A Class .46%] [passive alternative Blackrock LifePath Index K 0.10%; JP Morgan Smart Retirement Blend R6 0.29%]

NOTE: The TRP target date funds have performed well and are rated in the highest category by Morningstar – **Question**: is it a breach of fiduciary to pay more for TRP by approximately .20% when the return is 1%+ higher than comparable TD funds – no one making this argument.

High Target Date Fund Fees – Fidelity Freedom

- **Bronson Healthcare [$528M/9,915]** – sued 5/06/21 by Walcheske & Luzi: Fidelity Freedom Income K .42 -- .65% minus .20% revenue sharing + .22-.45% versus Fidelity Freedom Index Instl .08%
- "The Index suite has outperformed the Active suite in four out of six calendar years: 3-year trailing return 4.03% to 5.38% compared to 5.05 to 6.39 – a difference of 1.02% v. 1.43%"
- **Universal Health Services [$1.9B/41,872]:** Fidelity Freedom K Share .53-.65% versus ICI Target Date median of .47% versus FIAM Blend Q Fund .32% versus passive Fidelity Freedom Index Investor Class .14% and Institutional .08%
- **Beth Israel Deaconess Medical Center [$1.3B/12,785 – filed 01-18-2022]:** challenge active Fidelity Freedom TDFs in K share class (.42-.65%).

Retail v. Wholesale Share Class Claims

- Most cases against Fidelity Freedom active TDFs involve the claim that plan fiduciaries paid excessive fees by failing to investigate the availability of lower cost mutual share classes as plan investments:
  - See ***Aquino v. 99 Cents Only Stores LLC***, [$70.2m/2715 with account balances/14,088 active participants – filed 03/25-2022 by Tower Legal Group]: contained "summary of losses from defendants' choice of expensive share classes," including comparison of Fidelity Freedom K shares versus K6 share class (differential of .14 to .25%)
  - ***Keller v. North Memorial Health Care*** [$465m/5797 – filed 07/15/2022]: "Several of the Plan's Funds Were Not in the Lowest Fee Share Class": examples J. Hancock Disciplined Value Mid Cap/JVMIX (.087 expense ratio compared to JVMRX .75% expense ratio); and Loomis Sayle Small Cap Growth (LSSIX .92% compared to LSSNX .82%).

Comparison to the ICI Benchmarks

Most Excessive Investment Fee claims are compared to the ICI medians:

- See April 13, 2021 Capozzi lawsuit against **Humana**: "According to the ICI Study, the median total plan cost for plans over $1 billion is 0.22% of total assets in a plan. ICI Study at 57. Here the total plan costs during the Class Period ranged from a high of 0.51% in 2018 to a low of 0.45% in 2017. Total plan costs were .46% in 2019."
- If you use the ICI standard benchmark, any plan with active target date investments and/or active investments will be above the ICI all-in benchmark.

Imprudent Investment Cases

How Plaintiffs Assert that Investment Performance is Too Low

Examples of Investment Underperformance

- ***Snyder v. UnitedHealth*** [D. Minn. 04/23/2021]: alleges that UnitedHealth retained Wells Fargo target-date funds as the QDIA for more than 10 years, even though it was "one of the worst performing investment suites in the entire market" and produced such "abysmal" results that any prudent fiduciary would have quickly removed it from the plan's investment menu.
  - The lawsuit alleges that in 2016, even the company's investment committee, after reviewing the results of a two-year evaluation by the plan's independent investment consultant, concluded that the Wells Fargo target fund suite should be replaced and ranked it as the lowest option among all the alternatives. Nevertheless, UnitedHealth's chief financial officer overruled the committee's objections because Wells Fargo was a "so-called jumbo customer," major lender and main underwriter for UnitedHealth's business, the lawsuit states.
- ***Mattson v. Milliman, Inc.*** [W.D. Wa. 01/13/2022]: alleges that Milliman plan fiduciaries chose and maintained three brand-new and untested target risk funds that performed poorly -- the Unified Trust Wealth Preservation Strategy Target Growth Fund, Unified Trust Wealth Preservation Strategy Target Moderate Fund, and Unified Trust Wealth Preservation Strategy Target Conservative Fund – in which Milliman served as a subadvisor.

Proprietary Investment Cases

- More than 30 companies have been sued over putting their own affiliated mutual funds in their 401(k) plans since 2015, with workers challenging these funds as expensive and poorly performing.
- ***Becker v. Wells Fargo & Co.***, 4:20-cv-01803-KAW filed 03/13/2020 [$40b/344,287]: alleges that retirement plan committee breached duties of loyalty and prudence by selecting proprietary Wells Fargo target-date funds with no performance history over materially identical, yet cheaper, non-proprietary alternatives. Settled for $32.5m.
- ***Falberg v. Goldman Sachs Grp.***, No. 19-cv-9910 (S.D.N.Y. Sept. 14, 2022): class action covering more than 17,0000 people, accuses Goldman of offering its own funds in its employee 401(k) plan, keeping these funds in the plan when they did poorly, charging excessive fees, and engaging in self-dealing under ERISA. Court granted summary judgment, ruling that the company appropriately monitored these funds at regular meetings and with outside investment advice.
- ***Wildman v. American Century Services, LLC***, 362 F. Supp. 3d 685 (W.D. Mo. 2019): after bench trial, court holds that the investment firm did not act disloyally by offering nothing but affiliated funds in its 401(k) plan, because the company truly believed in the quality of these funds and thought employees would benefit from familiarity with the funds and the people managing them.
  - ***Brotherston v. Putnam Investments*** – Putnam defeated similar claims at trial, but saw the victory largely reversed on appeal

BlackRock LifePath Purported Investment Imprudence Cases

- In August 2022, the Miller Shah law firm filed eleven lawsuit against low-cost plans alleging investment imprudence for investing in BlackRock LifePath target-date funds: **alleges that it is now "in vogue" to chase low fees but ignore investment performance**.
  - The eleven BlackRock LifePath TDF lawsuits are full of hyperbole claiming that the BlackRock TDFs have suffered "repeatedly inferior returns":
  - "an imprudent decision that has deprived Plan participants of significant growth in their retirement assets."
  - Plan fiduciaries "appear to have chased the low fees charged by the BlackRock TDFs without any consideration of their ability to generate return."
  - "irrational decision-making process."
  - "vastly inferior retirement solution and could not have been justifiably retained in the Plan."
  - "there were many TDF offerings that consistently and dramatically outperformed the BlackRock TDFs, providing investors with substantially more capital appreciation."
  - "repeatedly inferior returns"
  - "consistently deplorable performance of the BlackRock TDFs"
- The key claim is that BlackRock TDFs "are significantly worse performing than many of the mutual fund alternatives" offered by other TDF providers. The lawsuits compared BlackRock LifePath Index's trailing performance starting in 2016 with the five other series with the most assets as of the end of 2021: Vanguard Target Retirement; T. Rowe Price Retirement; American Funds Target Date Retirement; Fidelity Freedom; and Fidelity Freedom Index.
- Motions to dismiss were granted in the **CapitalOne** and **Booz Allen Hamilton** cases on grounds that comparisons to four popular funds are not meaningful benchmarks. But plaintiffs will re-file and try again.

Reality Check: BlackRock LifePath Morningstar Ratings

- The BlackRock LifePath TDFs are the #1-rated TDF in the market by Morningstar and “remains a first-class target-date series.”
- Morningstar issued a public report after these lawsuits were filed entitled “New 401k Lawsuits Go Too Far.”
  - Morningstar advises that plan fiduciaries should “trust the process” and not chase higher performance.
  - Euclid has labeled these lawsuits **“ERISA’s Big Lie.”**

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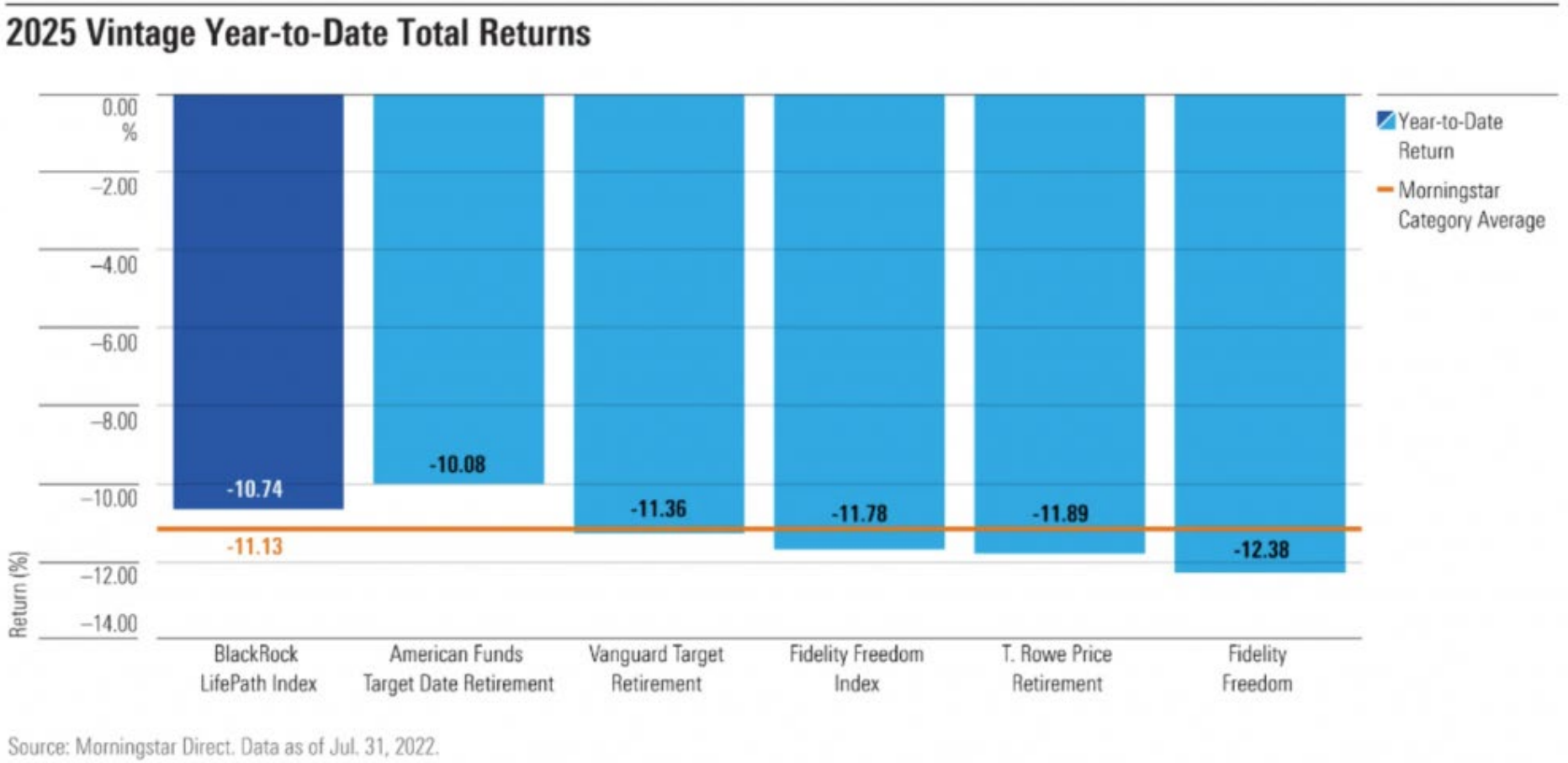
Morningstar Report



Source: Morningstar Direct. Data as of Jul. 31, 2022.

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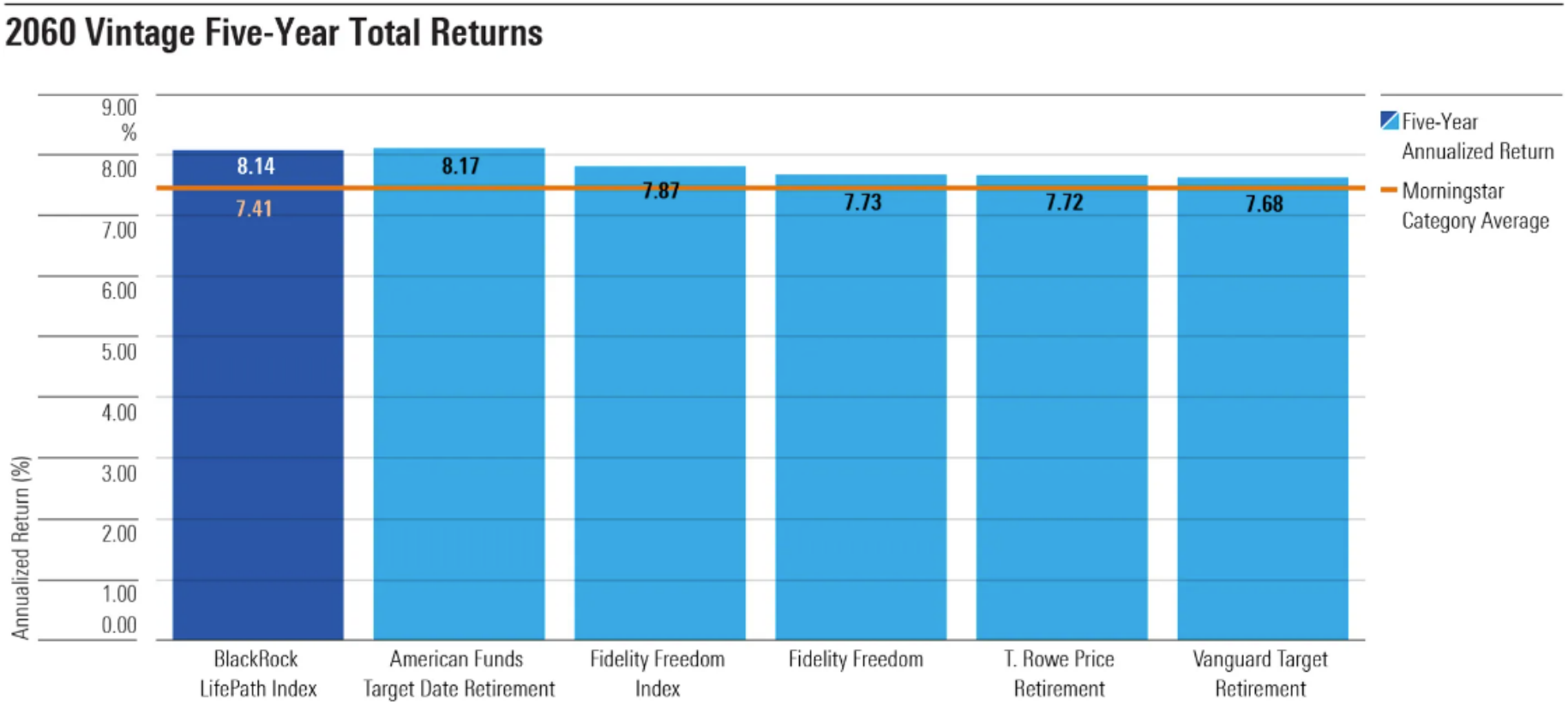
5-Year returns from Morningstar Report



Source: Morningstar Direct. Data as of Jul. 31, 2022.

First Two BlackRock Cases Dismissed (with leave to amend)

- The Eastern District of VA dismissed the cases against *Capital One* and *Booz Allen Hamilton* on the grounds that plaintiffs failed to allege a meaningful benchmark.
- Plaintiffs have filed an amended complaint, and defendants in both cases filed motions to dismiss.
- Court was persuaded by defense pointing out contradictory claims by same plaintiff law firm: that plaintiffs had cited BlackRock LifePath as a comparator of good performance in the *Genentech* case.
- Motions to dismiss are pending in the ***Microsoft*** and other cases.

More Excessive Fee Lawsuits allege Managed Account claims

- ***Iannone, Jr. v. Autozone, Inc., No. 19-cv-2779 W.D. Tenn. (Magistrate Report and Recommendation dated August 8, 2022)*** **–** grants class action status.
- Plaintiffs alleged that Autozone fiduciaries filled its $550 million 401(k) plan with expensive mutual funds and allowing the GoalMaker service to steer money to high-cost investments.
- Plaintiffs allege that GoalMaker, which is designed to diversify and rebalance investors' portfolios over time, forced employees into expensive Prudential funds and "brazenly excluded" reliable, low-cost index funds offered by "reputable providers that did not pay kickbacks to Prudential."

Tracking the Case Law

The Motion to Dismiss Plausibility Standard

The Plausibility Standard Has Evolved in 2022

The Difference between Notice and Plausibility Pleading

- **Notice Pleading:** Federal Rules of Civil Procedure 8 only requires a "**short and plain statement** of the grounds for the court's jurisdiction." The Supreme Court in 1957 summarized that a federal complaint was sufficient and should not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief."
- **Plausibility Pleading:** Without amending the Federal Rules of Civil Procedure, the Supreme Court adopted a stricter pleading standard in the *Twombly* antitrust case and applied it to the *Iqbal* 9-11 prisoner case. In *Twombly* the Supreme Court held that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. The pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action, on the assumption that all the allegations in the complaint are true (even if doubtful in fact.)" *Bell Atlantic v Twombly*, 550 U.S. at 555.
    - The *Twombly/Iqbal* pleading standards not only specify that a complaint must be plausible on its face, but it must bring forth sufficient factual allegations that nudge a claim across the line from conceivable to plausible. In other words, a complaint must not simply allege facts that are merely possible, but the alleged facts must be reasonable and likely to occur.

Why Plausibility Matters

- 1. Excess fee cases are expensive to defend – cost millions of dollars
- 2. The damage models are huge
- 1 + 2 = **Settlement Trap:** Given the defense expense and high risk, if you lose the motion to dismiss, plaintiffs have undue leverage to extract a settlement. This settlement pressure is why, combined with available fiduciary insurance coverage, most cases settle and only a limited number go to summary judgment or trial. The Motion to Dismiss is the only means to escape this settlement trap [given that objecting to class certification has not proven effective].
- **The problem** with excessive fee cases is that they are based on **circumstantial evidence.** ERISA is supposed to be a law of process, but excess fee cases are alleging that **outcomes** are imprudent.
  - No process is typically alleged – the complaints are inferring imprudence from allegedly inferior outcomes.

Hughes v. Northwestern Fact Pattern

- Primary plan had $2.4B assets with 21,622 participants.
- (1) **multiple recordkeepers**, whereas CalTech, Notre Dame, Loyola and Purdue had consolidated to one recordkeeper;
- (2) **Excessive recordkeeping fees**: $3.3/$4.1m = $153-213/participants, but allegedly should have been $35/per participant [with no benchmark provided];
- (3) **No RFP:** Failure to conduct competitive bidding for recordkeeping fees;
- (4) **Hundreds of investment options** – many duplicative [242 total; 32 fixed income; 48 large cap; and 15 mid cap].
- (5) Plan used **retail share classes** for 129 of the 242 investments [“materially identical” to available lower share classes].

Why the Northwestern Case is Important

- The Northwestern case presented the best opportunity to seek a uniform and rigorous standard of review for excessive fee pleadings.
- The problem with excessive fee cases is that they are based on **circumstantial evidence**.
  - ERISA is a law of process, but the cases are alleging that outcomes are imprudent.
  - No process is typically alleged – the complaints are inferring imprudence from allegedly inferior outcomes.
- The goal for plan sponsors in the Northwestern appeal was to seek a higher pleading standard for cases based on circumstantial evidence under the *Iqbal* and *Twombly* antitrust case law:
  - Allegations that are "merely consistent with antitrust violations, but just as much in line with unlawful behavior" fail to state a claim.
  - Must show that a prudent fiduciary in like circumstances would have acted differently = an alternative explanation based on competitive business strategy is consistent with prudent conduct.

Hughes v. Northwestern Decision

- The question in the *Hughes v. Northwestern* excess fee case before the Supreme last year was whether the heightened *Iqbal/Twombly* plausibility standard applies in ERISA cases.
- Despite ruling for participants, the Supreme Court held that the *Iqbal/Twombly* plausibility pleading standard applies to ERISA cases and cited the stock-drop *Dudenhoeffer* case to require a "context specific" inquiry.
- **Key language:** "At times, the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise."
- **Rejected Participant-Choice Defense:** The Court remanded the case back to the Seventh Circuit to apply the plausibility standard to the case. The Court also rejected the Seventh Circuit's ruling to the extent it somehow ignored imprudent investments on the grounds that participants had the choice of prudent or alternative low-cost investments. Oral argument was held November 28. Recap of the Divane v. Northwestern Argument – Are Plan Fiduciaries Protected By The Business Judgment Presumption of Good Faith? - Euclid Fiduciary (euclidspecialty.com)

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Life After the *Hughes v. Northwestern* Decision

- The immediate aftermath of the Northwestern decision was not helpful, with 90% of motions to dismiss denied after the case [prior dismissal rate had been 3 out of 10 cases]. Most courts were ruling that claims of excessive fees caused a factual dispute that could not be decided on a motion to dismiss.
- The hallmark of the initial post-Northwestern decisions was the Ninth Circuit in April 2022 reversing both the ***Trader Joe's*** and ***Salesforce*** cases – holding that plan sponsors could not defend revenue sharing at the pleading stage.
  - An attorney affidavit was filed in the Trader Joe's case proving that the plan RK fee was only $48 and all revenue sharing was rebated, but the court still found an issue of fact.
- BUT the plausibility standard took a positive turn on June 21, 2022 when the Sixth Circuit issued its decision in the *CommonSpirit Health* case.

Example of Courts with Diluted Pleading Standard

- **Shoe Show** (Feb. 5, 2022): North Carolina court held that it is an issue of fact whether a $40 million plan has sufficient bargaining leverage to negotiate fees.
  - The case settled after the plan sponsor lost the motion to dismiss.
- **Moore v. Humana, Inc.** (D. Ky. Dec. 2, 2022) allowed a challenge to a $37 recordkeeping fee negotiated following a formal request-for-proposal, which was later reduced to $23-27 per participant after another RFP, notwithstanding that the plan fiduciaries had conducted two separate and periodic requests for proposals to ensure that the plan administration fees were reasonable.
  - NOTE: the original model of the excess recordkeeping lawsuit was that the plan fiduciaries failed to conduct a RFP to get the lowest possible RK fee. Humana fiduciaries conducted consecutive RFPs. They did everything right – the best fiduciary practices – but still have to defend a lawsuit.

The *CommonSpirit* Decision

- Plaintiffs in *CommonSpirit Health* had alleged that the $3.2b/105,950 jumbo plan had chosen an imprudent QDIA with the Fidelity Freedom Funds in the K-retail share class (.42-.65%) and compared the actively managed TDFs to Fidelity .08% Freedom Index TDFs. Plaintiffs also alleged excessive all-in .54-.55% investment fees compared to the ICI/Brightscope .28% all-in fees for similarly sized plans.
- The Sixth Circuit on June 21, 2022 upheld the district court's granting of the motion to dismiss. The court vindicated that ERISA is a law of process and does not allow hindsight second-guessing of fiduciary decisions: "ERISA for short, does not give the federal courts a broad license to second-guess the investment decisions of retirement plans."

CommonSpirit plausibility principles

1. It is not imprudent to offer active funds in a DC Plan. In fact, it may be imprudent not to offer some active funds.
2. Passive funds are not a meaningful benchmark for proving that active funds are imprudent.
3. Claims of investment imprudence are not plausible based on simply pointing to a fund with better performance: plausible claims require a deficient process and **signs of serious distress**.
4. Plaintiffs cannot rely on a claim that they lack process information – need to prove a process-based defect.
5. Claims of excessive recordkeeping must be proven in proper context, and not by comparisons to a few other plans taken out of context.
6. Plan changes are proof of prudent management and do not support imprudence claims.

Forman v. TriHealth – the *CommonSpirit* Sequel

- For some inexplicable reason, *CommonSpirit* did not involve a retail-share class imprudence claim (despite a fact pattern with retail share class fees).
- The Sixth Circuit addressed this issue on July 13, 2022 in ***Forman v. TriHealth***.
- Much smaller plan with $457m/12,168 participants. Plaintiffs alleged all-in fees of .86-1.05% were higher than 90% of all plans between $250m and $500m.
- Also alleged 17 out of 26 investment options in retail-share classes as opposed to lower-fee institutional share classes [T. Rowe Price Adv TDFs = .79-97% v. I shares at .39-59%].
- **Euclid Note:** The TriHealth plan is much smaller – one-sixth the size – of the CommonSpirit plan. Nevertheless, the 6th Circuit made no effort to compare plan sizes, like most courts. Despite the operating theory that plan fiduciaries failed to leverage the size of the plan, plaintiff firms – and courts – treat all plans the same as if their leverage is the same.

The *TriHealth* Ruling

1) "Disappointing performance in the near term and higher costs by themselves do not by themselves show deficient decision-making, especially when we account for competing explanations and other common-sense aspects of long-term investments." Courts need to look at distinct objectives of each investment.
2) Court held that share class claim was plausible – because this claim "has a comparator embedded in it."

- **Postscript:** Court did not allow justification based on revenue sharing raised by the Chamber of Commerce – only a competing inference = fact issue. It is a process-based inquiry – reminiscent of the Ninth Circuit is *Trader Joe's/Salesforce* cases.

OshKosh in the Seventh Circuit – this is the court that will decide the remanded Northwestern case

- Plaintiffs in *Albert v. Oshkosh* alleged that the $1.1B/12,914 participant plan:
  - (1) imprudently allowed excessive recordkeeping fees [$87 average/$1,004,305 compared to 9 other random plans that paid $31-45 per participant] without revealing substantial revenue sharing rebates;
  - (2) maintained the wrong share classes because the higher-fee share classes contained higher revenue share and thus a lower "net investment expense" to the plan [compared Fidelity K Share TDFS with 20 bps revenue share to Vanguard Retirement .12-15% - active compared to passive]; and
  - (3) excessive fees to Investment Advisor SAI ($1,036,115).

The *Oshkosh* Decision

- Held that the Supreme Court in *Hughes* was a limited ruling on investor choices that did not overturn the prior (plan sponsor friendly) precedent.
- **(1) Standing:** allowed standing to Albert even though Albert did not invest in most of the challenged funds;
- **(2) RK Fees:** RK excess fee claim only plausible if comparing fees to the services provided in context (rejected comparison to 5-9 random plans; not required to perform RFP or find a RK willing do services for $35 per participant). **BUT** warned that a future case could survive if RK claim was context specific.
- **(3) Excessive Investment Fees:** rejected Walcheske firm's novel theory requiring fiduciaries to chose the highest revenue sharing share class; rejected "threadbare" claim that active funds can be compared to passive funds; and rejected challenge to revenue sharing (but Walcheske has argued for *more* revenue sharing).
- **CAUTION**: *Oshkosh* did not address two key issues: (1) retail share classes; and (2) investment underperformance. Thus unclear if the retail share class claims in the remanded *Divane v. Northwestern* case will survive.

MidAmerican Decision from the Eighth Circuit

- Eighth Circuit upholds dismissal of recordkeeping claims for failure to provide a meaningful benchmark or "sound basis for comparison" (citing 6th Circuit's *CommonSpirit* case that rejected comparison to industry averages because the plaintiff "ha[d] not pleaded that the services that [the plan's] fee covers are equivalent to those provided by the plans comprising the average in the industry publications cite[d]").
  - Rejected NEPC chart because it did not include other Merrill Lynch non-recordkeeping services
  - Rejected comparison to 401k Averages Book as "similarly unhelpful" because it does not include fees arising out of participant-initiated transactions like loans and distributions; and analyzes smaller plans.
- Also rejects investment fee and imprudence claims for failure to provide a "meaningful benchmark" (reject comparison of fund with value strategy to growth strategy; and growth/value combined strategy to value strategy):
  - "There is no way to compare the large universe of funds – about which we know little – to the risk profiles, return objectives, and management approaches of the funds in the MidAmerican lineup. The bottom line is that the aggregate data fails 'to connect the dots in a way that creates an inference of imprudence.'" citing *Davis v. Washington University*)

Barrick Gold – now on appeal to the 10th Circuit

- ***Matney v. Barrick Gold of North America, Inc.*** [$560m/4,858 Capozzi 2020 lawsuit] – 10th Circuit affirms district court's grant of motion to dismiss both excessive investment and recordkeeping claims.
- The ICI Study median is not a meaningful benchmark. [NOTE: ICI filed an amicus brief in the 10th Circuit pending case]
- Also rejected plaintiff's chart of lower-cost investment alternatives because they had different investment strategies and are not meaningful benchmarks.
- High-fee share classes justified by 15 basis point revenue credit [comparison to the lower-fee R6 share class was "problematic" because it "relies on incorrect information about actual fees paid by the Plan's participants.
  - **KEY INSIGHT:** court cited to the Trust Agreement and the 2018 form 5500 in order to validate that the plan implemented a revenue credit that was not alleged properly in the complaint. **Court went outside the misleading complaint to validate revenue sharing – a complete opposite of the Ninth Circuit ***Trader Joe's*** and ***SalesForce*** opinions
- Court rejected plaintiffs' excessive recordkeeping fee claims based on unsuitable comparisons and unsupported speculation that Fidelity did not credit the revenue sharing payments.

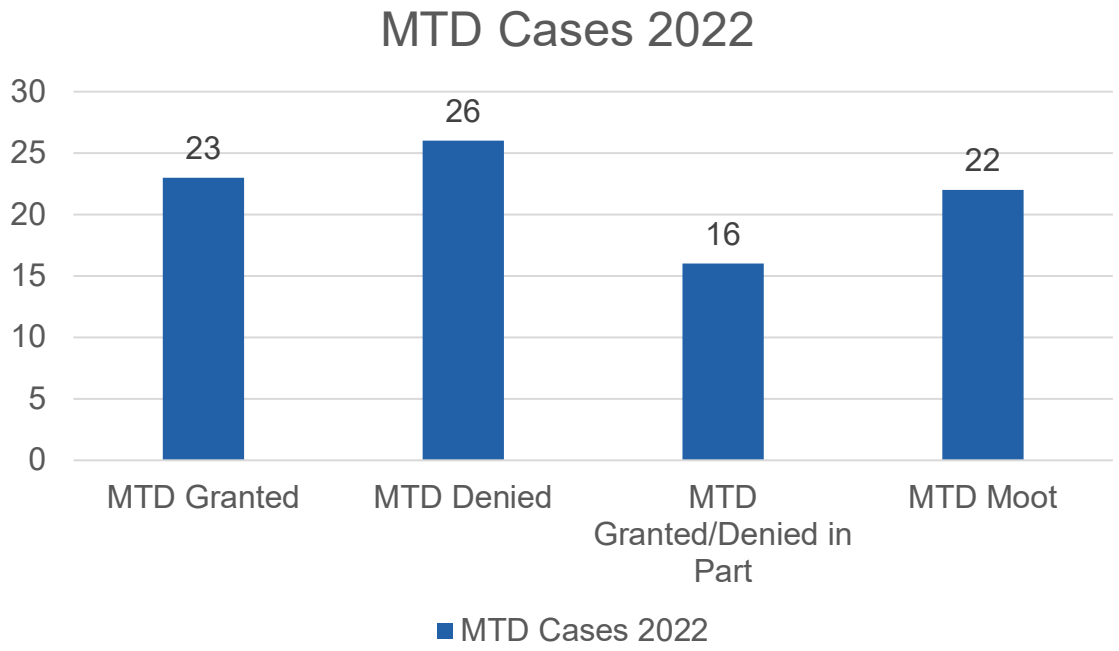
Trends in Excess Fee Cases

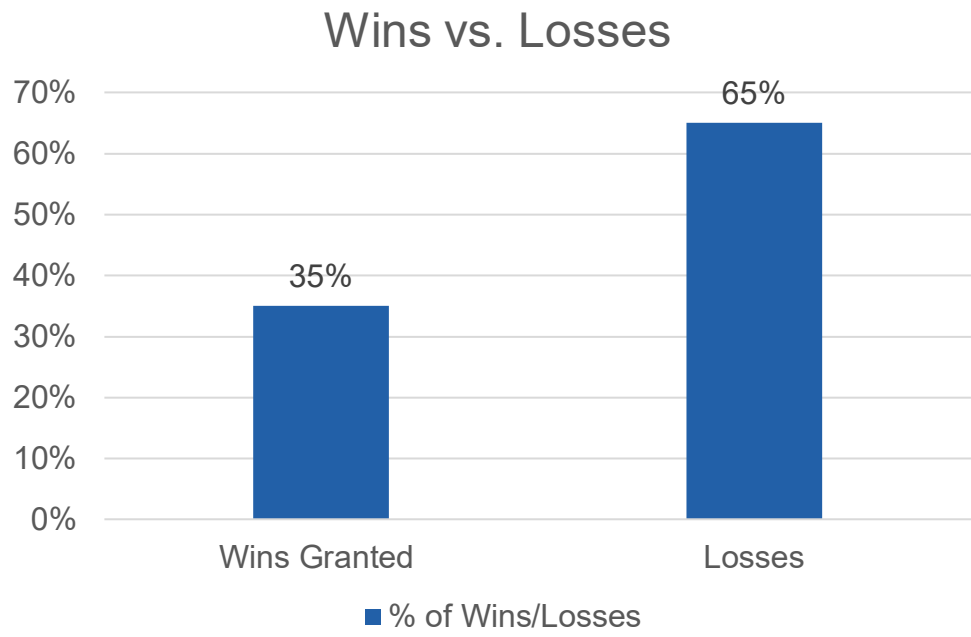
Motion to Dismiss Analysis

The Plausibility Standard after *CommonSpirit* in the District Courts

- More district courts have dismissed cases following the *CommonSpirit* and *Oshkosh* decisions in the Sixth and Seventh Circuits respectively, with many more dismissals in district courts in those two circuits – particularly of Walcheske-filed cases in Wisconsin and other states in those circuits.
  - - But not all cases are dismissed, even in the Sixth and Seventh Circuits
- **Motions to Dismiss Granted:**
  - **Judge Griesach in Wisconsin grants MTD after Oshkosh in four cases: Thedacare, Prevea, Faith and Nestle (but leave to amend for recordkeeping claims only)**
  - **Evans v. Assoc. Banc Corp (E.D. Wisc.)**
  - **Coyer v. Univar Sol. (N.D. Ill.)**
  - **Gonzalez v. Northwell Health (E.D.N.Y.) (first case plan sponsors win in Second Circuit)**
- **Motions to Dismiss Denied:**
  - **Rodriguez v. Hy-Vee, Inc.** (S.D. Iowa Oct. 21, 2022)
  - **Humana, Inc.** (W.D. KY 12/02/2002) (court has to accept plaintiff's assertion that "nearly all recordkeepers in the marketplace offer the same range of services")
  - **Garcia v. Alticor (Amway),** No. 1:20-cv-1078 (W.D. Mich. Aug. 23, 2022)
  - **McNeilly v. Spectrum Health System, W.D. Mich. (12/20/2022)** (complaint more robust than what was filed in CommonSpirit because allege share-class claims and failed to consider passive alternatives for years – not a comparison of passive to active)
  - **Peck v. Munson Healthcare, No. 1:22-cv-294 (W.D. Mich. Nov. 11, 2022)** (denying MTD for alleged excessive recordkeeping fees of $69 per participant despite defense showing contract with lower $37.65 fee after dividing by the number of participants, but rejecting share-class claim in which plaintiffs had asserted that higher revenue share classes should have been selected).

Motion to Dismiss Analysis





Wins: 23 **Granted**
Losses: 26 **Denied** and 16 **Granted in part/Denied in part** = 42 Losses
Moot: 22 cases **Moot** because of amended complaint
Summary: 23 Wins granted and 42 Losses = 65 total

Review of Wins Granted and Losses:
- 23 Wins granted /65 total = 35%
- 42 Losses/65 total = 65%

- Statistics: 35% dismissed and 65% of cases survive dismissal in whole or in part.
- This means that most cases survive a motion to dismiss even after that *CommonSpirit* more favorable case law.

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2022 Motion to Dismiss Results

Cases	Outcome
Lafreniere et al v. R.R. Donnelley & Sons [12/03/20]	Denied: 01/03/22
Lucas et al v. MGM Resorts International [09/21/20]	Denied: 01/06/22
Anderson v. Intel Corporation Investment Policy Committee [08/09/19]	Granted: 01/08/22
Holmes v. Baptist Health South Florida [08/17/21]	Denied as Moot: 01/20/22
Ford v. Takeda Pharma [01/19/21]	01/24/22: denied as moot
Goodman v. Columbus Regional Healthcare Sys., Inc. [02/02/21]	Order denying MTD: 01/25/22
Mator v. Wesco Dist. Inc. [03/26/21]	Denied: 01/25/22; Granted: 08/18/22
Moler v. Univ. of Md. Med. Sys. [07/22/21]	Denied: 01/26/22
Bangalore v. Froedtert Health [06/16/20]	Denied: 01/26/22
Shaw v. Quad/Graphics Inc et al [10/30/20]	Denied: 01/26/22
Johnson v. Duke Energy Corporation [09/22/20]	Denied: 01/31/22
Lauderdale v. NFP Retirement [02/16/21]	Granted: 02/08/22
SMITH et al v. SHOE SHOW [09/03/20]	Granted in part: 02/25/22
Nesbeth v. Icon Clinical Research [03/26/21]	Denied as moot: 03/10/22
Soulek v. Costco Wholesale Corporation et al [06/23/20]	Denied as moot: 03/17/22
Perkins v. United Surgical Partners Int'l, Inc. [04/30/21]	Granted: 03/18/22
Sweeney et al v. Nationwide Mutual Insurance Company [03/26/20]	Denied: 03/18/22
Seidner v. Kimberly-Clark Corp. [04/15/21]	Denied: 03/23/22

2022 Motion to Dismiss Results (cont.)

Cases	Outcome
Khan et al v. Board of Directors of Pentegra Defined Contribution Plan [09/15/20]	Granted in part: 03/23/22
Cunningham v. USI Insurance Services [03/02/21]	Granted: 03/25/22
D.L. Markham, DDS, 401(K) Plan v. Variable Annuity Life Ins. Co. [01/04/21]	Denied as moot: 03/25/22; Granted: 10/05/22
Anderson v. Coca-Cola Bottlers' Association [02/01/21]	Granted in Part: 03/30/22
Moore v. Humana [04/13/21]	Denied: 03/31/22
McCAFFREE FINANCIAL CORP. v. ADP [05/04/20]	Granted: 03/31/22
JOHNSON et al v. PNC FINANCIAL SERVICES GROUP [10/02/20]	Granted in part: 03/31/22
Smith v. VCA [11/22/21]	Denied: 04/07/22
Parker v. GKN North Am. Servs. [10/19/21]	Denied as moot: 04/08/22
Carrigan v. Xerox Corp. [08/11/21]	Denied: 04/18/22
Matney et al v. Barrick Gold of North America [04/24/20]	Granted: 04/21/22
Brown v. The Mitre Corp. [09/29/21]	Granted: 04/28/22
Nohara v. Prevea Clinic [07/16/20]	Denied as moot: 05/12/22
Morales v. Capital One Financial Corp [12/31/21]	Granted: 05/27/22
Woznicki v. Aurora Health Care [08/14/20]	Granted in Part: 05/27/22
Coviello et al v. BHS Management Services [12/30/20]	Denied: 06/09/22
Riley v. Olin Corp. [11/09/21]	Order of Dismissal w/o prejudice: 06/21/22
MUNSON HEALTHCARE [03/29/22]	Dismissed as moot: 06/22/22; granting in part dismissing in part 11/09/22
Mattson v Milliman, Inc. et al [01/13/22]	06/30/22: granting in part

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Right to Jury Trial

- Most courts have denied plaintiff requests for jury trials in recent retirement plan challenges.
  - Legal claims, which usually seek money, can be tried by jury; while equitable claims, which seek specific court-ordered remedies like reforming a plan document or disgorging profits, must be decided in a bench trial.
- Jury trials denied in recent ERISA cases: Anthem Inc.; BB&T Corp.; Duke University; Columbia University; and Oracle Corp.
- Jury trials allowed for some claims in the ***Cornell*** excessive fee case and ***Eversource Energy*** (December 2022 decision in Connecticut federal court)
  - Judge held that participants' claims seeking that Eversource "make good" any plan losses caused by its alleged breaches can be tried by a jury because the claim is legal in nature.

Summary Judgment Results

- **Positive Results:**
  - **Pizzaro v. Home Depot** (N.D. Ga.) (plaintiff failed to prove loss causation)
  - **Falberg v. Goldman Sachs** (S.D.N.Y.) (plaintiffs failed to provide imprudence or disloyalty)
- **Negative Results:**
  - ***Lauderdale v. NFP/Wood Group*** (plan sponsor left in case to prove that it conducted sufficient due diligence in choosing 3(38) discretionary advisor to chose Flexpath TDFs)
  - ***Vellali v. Yale Univ.***, 10/21/2022: motion for summary judgment denied – case can proceed to trail on imprudence claims on most claims, including Yale's "bundled" services arrangement with TIAA, unreasonable administrative and recordkeeping fees to TIAA and Vanguard; TIAA's use of plan data to cross-sell other products; and process for monitoring the performance of plan funds and failure to select institutional share classes over costlier retail share classes.

- **KEY POINT: Very few cases get to summary judgment. But even then, most defense wins are on causation grounds, and not on proving that the fiduciary process was prudent – see the Home Depot case. The Goldman Sachs case is a rare exception.**

Key Issues Going Forward for Excess RK Claims

- **<u>For Recordkeeping Claims</u>: What is the "context" to support a plausible recordkeeping claim?**
  - **Compare *Nestle* with *Humana.***
  - ***Nestle*** ($4b/40,000 - $60 RK fee): number of participants in the comparator plans ranges from 13,248 to 82,788 and total assets of $400m to $17b "the complaint alleges in conclusory fashion that the recordkeeping fees were excessive relative to the recordkeeping services rendered.
    - Complaint alleges that the Nestle plan "received a standard package of [RK] services"
    - Court rules that "the complaint does not contain any allegations supporting a plausible inference that the plan paid more for equivalent services."
  - **Humana**: court allows claim that $37 RK fee is too high compared to the $23 lower fee that the plan later negotiated, even though plan conducted RFPs for both fee amounts.
    - Court accepts as "true" for purposes of a MTD the allegation that "[n]early all recordkeepers in the marketplace offer the same range of services."
  - **KEY QUESTION:** Is there really a meaningful difference in recordkeeping services for large plans?

Plaintiffs Still Filing False Recordkeeping Claims Against Low-Cost Plans

- On January 5, 2023, the Walcheske law firm filed a new case ***Dionicio v. U.S. Bancorp***, No. 0:23-cv-00026-PJS-JFD in the District court of Minnesota with two claims:
  - (1) the recordkeeping fees are excessive based on Form 5500
  - (2) the managed account fees are excessive (.60% for first tier; .45% second tier; and .30% third tier).
- The recordkeeping fees are based on dividing the number of participants (87,317) by the estimated total recordkeeping fees from the Form 5500 (an average of $3,596,421 over six years) for an average of $41 compared to a chart of random plans including Apple ($19/115,686/$7.0B); Google $20 ($11.8B/82,725); and Marriott ($23/$7.7B/115,501)
    - Walcheske lawyers know the Form 5500 contains transaction costs that inflate the actual RK fees;
    - They know that their participants they use as plaintiffs have received fee disclosures that contain the actual RK fee from Alight, but choose to ignore the true RK fees.
    - Walcheske lawyers leave out the critical fact that the U.S. Bancorp

Key Issue Going Forward for Investment Claims

- **What is a Meaningful Benchmark?**
- **Share-class claims are difficult to dismiss.**
  - Most courts do not allow the defense to bring in evidence of revenue sharing rebates. This allows plaintiff firms to manipulate the evidence to withstand a motion to dismiss.

Plaintiff Law Firms Are Undeterred By Any Change in the Case Law

- Plaintiff law firms continue to file excessive fee lawsuits based on claims that are being rejected by the appellate courts. They remain undeterred by any change in the plausibility standard.
- Example: ***Old Dominion Freight Lines*** [filed 11/18/2022] – Wenzel law firm filed a purported excessive investment fee cases with the exact same excessive fee claim involving the exact same JP Morgan target-date funds with almost the exact investment fees that were dismissed by the Utah District Court in *Barrick Gold* [JP Morgan Smart Retirement TDFs R5 (expense ratio .52-.55% compared to R6 .42-.45%].
  - Wenzel lawyers make no effort to address whether there was revenue sharing to justify the cost differential between the R5 and R6 share classes.
- Example: ***Morales v. Quest Diagnostics Incorporated*** [filed 01/10/2023] – Wenzel law firm alleges imprudence in choses the .42-.65% Fidelity Freedom K shares compared to the Fidelity Freedom .08% passive funds
  - The same claims rejected by the Sixth Circuit in *CommonSpirit Health*
  - The same claims that are subject to a 2020 consolidated lawsuits against the same company alleging imprudence in choosing the K shares of Fidelity Freedom active target-date funds.

Most Courts Grant Standing for Miniscule Damages

- In *Thole v. U.S. Bank* (June 2020), the Supreme court held that participants in a defined benefit pension plan do not have standing to bring breaches of fiduciary duty claims under ERISA unless and until their own benefit has actually been impacted [plaintiffs must establish a "concrete stake" in the outcome of the lawsuit]
- The standing requirement has not been applied to defined contribution plans, as many courts allow plaintiffs to sue the plan even when they have not invested in all of the investments alleged to be excessive.
- ***Covielo v. BHS Management Services, Inc.***, 3:30-cv-30198 (D. Mass. 12/30/2020) (finding that most courts agree that participants in 401(k)-style retirement plans can establish standing to bring representative claims by pointing to an injury to plan assets, even when they did not invest in the individual funds at issue).
- ***Nohara v. Prevea Clinic, Inc.*** ($281m – E.D. Wisc May 2022) – participant with only a 22-cent loss in the plan can sue for alleged excess fees; an actual injury – no matter how small – is enough to create standing).
- ***Brown v. MITRE Corporation***, No. 1:21-cv-11605 (D. Mass. Sept. 29, 2021) (plaintiff has standing to allege excessive recordkeeping fees even though he paid less than $5.00 annually in plan fees, but no standing to allege excess investment fees because plaintiff had only invested in a single fund and that one fund was in the lowest-cost share class).
- But **See *Singh v. Deloitte LLP***, S.D.N.Y. Jan. 12, 2023 decision (granting MTD with leave to amend) – holding that plaintiffs lacked standing to claim imprudence of four of the six challenged funds because plaintiffs only invested in two of those six challenged funds; injury-in-fact requires the plaintiffs to show that they have suffered an actual or imminent injury that is concrete and particularized as to the plaintiffs). "Because the plaintiffs here di not invest in four of the six challenged funds, the "allegedly poor performance of those specific products: could not have affected the "individual account of any of the named plaintiffs.'" citing In re Ominicom ERISA Litigation, No. 20-CV-4141 (S.D.N.Y. Aug. 2, 2021).

Excess Fee Case Settlements

Settlements in most cases that survive a MTD

- Less than 20 cases overall have proceeded to summary judgment or trial.
- This means that most cases have settled even if they have low fees:
  - Example: **Walgreens** case settled after losing the MTD for $13.75m even though the plan had super low-cost target-date investments.

Recent Settlements

- **Icon Clinical Research** ($523m/7000) – settled for $950,000 – note that defense answered the complaint and forced early settlement.
- **Cerner Corporation** -- $4.05m
- **Koch Industries** -- $4m
- **Mercy Health Corp**. - $3.9m
- **Bronson Healthcare Group Inc**. [$737m/21,528] -- $3.0m
- **Costco**: $5.1 million [$15.5b/174,403]
- **George Washington University:** $13.75m
- **Zachry Holdings** [$919m/12,000] [Fidelity Freedom funds
- **Wells Fargo** [$40b/344,287] – proprietary funds case - $32.5b
- **Euclid analysis of the settlements is that plans under $1b settle for approximately 30-40% of the damages model, whereas plans over $1b settle closer to 10% of the alleged damages model, or 1-5 basis points of plan assets.**
- **Proprietary cases involving investments from the plan sponsors, like the Wells Fargo case, generate the highest settlements. Indeed, most of the settlements over $10 million involve proprietary investments from the plan sponsor, representing 5-10 basis points of plan assets.**

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2022 Excessive Fee Settlements

Case	Date	Settlement
Beth Israel Deaconess Med Center [01/18/22]	10/18/2022	$2.9 million settlement
Rush University Medical Center [01/21/22]	8/2/2022	$2.95 million settlement
Ford v Takeda [01/19/21]	11/14/2022	Settlement ($22 million)
Anderson v Coca-Cola Bottlers' [02/01/21]	10/27/2022	Notice of settlement
Loomis v Nextep [03/10/21]:	7/8/2022	$1.1 million settlement
Conte v WakeMed [04/26/21]	1/10/2022	$975,000 Settlement
Walter v Kerry [04/27/21]	1/10/2022	$975,000 Settlement
Gleason v Bronson Healthcare [05/06/21]	5/3/2022	[$3 million]
Johnson v Carolina Motor [07/06/21]:	6/15/2022	{ $500,000?}
Smith v VCA [11/22/21]	11/14/2022	Notice of settlement $563 million
Becker v Wells [03/13/20]	7/29/2022	$32.5 million settlement
Santiago v University of Miami [04/29/20]	4/7/2022	$1.85 million settlement
Parmer v Land o Lakes [05/26/20]	6/28/2022	$1.8 million settlement
Boley v Universal Health [06/05/20]	10/20/2022	Motion for settlement $12.5 million
Dover v Yanfeng [06/22/20]	7/7/2022; 11/10/2022	Motion for preliminary approval - $990,000 proposed settlement; Motion to stay notice of settlement

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2022 Excessive Fee Settlements

Case	Date	Settlement
Soulek v Costco [06/23/20]	3/17/2022	$5.1 Million settlement
Hill v Mercy Health System Corp [08/03/20]	5/6/2022	$3.9 million settlement
Woznicki v Aurora Health Care [08/14/20]	9/16/2022	Settlement
Bailey v LinkedIn [08/14/20]	11/4/2022	Joint status report announcing there will be a settlement
Blackmon v Zachary Holdings [08/21/20]	8/5/2022	$1.875 settlement
Smith v Shoe Show [09/03/20]	8/16/2022	Notice of settlement ($330,000)
McGowan v Barnabas Health [09/23/20]	preliminary approval: 05/26/22	$1.75 million settlement
Slavens v Meritor [11/13/20]	4/14/2022	Settlement
Alison v L Brands [11/20/20]	8/12/2022	$2.75 million settlement
Jones v Coca-Cola Consolidated [11/24/20]	6/17/2022	$3.5 million settlement
Harding v Southcoast Hospital Group [12/14/20]	4/25/2022	$2 million settlement
Rampey v West Corp [05/06/19]	6/28/2022	$875,000 settlement
Davis v Washington University St. [06/08/17]	4/18/2022	$7.5 million settlement
Feinberg v T. Rowe Price Group [02/14/17]	5/26/2022	$ 7 million settlement

Large settlements – highest settlements involve proprietary investments

- **Reliance Trust $39.8M** [$14M attorney fees] – used Reliance Trust TD funds [.53% with 25 bps admin fee share with Insperity (10 bps) and investment management fee up to 18 bps] and [alleged underperformance – example 13.19% v. 13.77% JP Morgan; 15.85% Vanguard; and 18.05% TRP in 2013]
- **McKinsey & Co. $39.5M**
- **SunTrust Banks Inc. $29M**
- **Fidelity Investments $28.5M**
- **BB&T $24M**
- **Deutsche Bank $21.9M**
- **Wells Fargo case –** allege that $5B moved into untested Wells Fargo TD funds that underperformed the benchmark by 2% -- settled for **$32.5M**

Other Defense Strategies

Challenge Class Certification; Arbitration Clauses; Venue Clauses

Other Ways to Limit Litigation – But Do They Work?

- Defense firms have attempted to **(1) challenge class certification** and **(2) compel arbitration**.
- ***Universal Health Services Inc.*** – Third Circuit affirms class certification even though named plaintiffs had not invested in all challenged investments options [alleged concrete injury from fiduciaries' "plan-wide misconduct]
- ***Capital One*****:** court dismissed case in which sole plaintiff was not invested in the three allegedly imprudent funds [instead invested in the index target-date QDIA]
- ***Mitre*****:** case dismissed because single plaintiff not invested in a fund with revenue sharing [only paid $5 in plan administration costs, but court said that could e enough if invested in a challenged fund]
- ***Cintas*** (April 2022): Sixth Circuit rules that plan cannot compel arbitration because the claims are on behalf of the plan and not the individual participants – Supreme Court denied review on January 9, 2023.
- **OTHER IDEAS: (3) Plan venue clauses** [i.e, must sue in Ohio/Sixth Circuit]; and **(4) limit deadline to file claims**

Class Certification

- In the 27 motions for class certification in 2022, we know of no case in which the court denied class certification.
  - In many cases, the defense agrees to class certification
  - ***See Boley v. Universal Health Services, Inc.*** (3rd Cir. June 1, 2022) – in challenge to the expense and prudence of choosing Fidelity Freedom target-date funds, court finds typicality required to bring a class action and "the kind of concrete, personalized injuries traceable to the challenged conduct . . . that *Thole* requires"

State of the Fiduciary Insurance Market

The Fiduciary Insurance Market Has Stabilized

The Fiduciary Liability Insurance Market Has Stabilized

- For several years starting in 2019-2020, the fiduciary liability insurance market contracted as the loss ratios for leading fiduciary insurers skyrocketed with the increased frequency and severity of ERISA class action litigation.
- **Increased Underwriting:** Fiduciary insurers increased the underwriting scrutiny of large plans and required supplemental disclosures of the recordkeeping and investment fees of participant-directed defined contribution plans.
- **Three key coverage changes:** (1) higher premiums; (2) higher retentions – class action and excessive fee retentions; and (3) carriers reduced their limits.
- **Market Turn and Stabilization:** The broader market for management liability insurance turned in mid-2022, with insurance rates for directors and officers insurance experiencing rate decreases for the first time in five years due to significant market competition from new D&O entrants. This soft-market turn in the overall management liability insurance market has had an impact on the smaller market for fiduciary insurance.
  - Leading fiduciary carriers with experience and expertise in fiduciary claims continue to underwrite fiduciary accounts cautiously, and continue to manage limits and require retentions for accounts with excessive fee litigation risks.
  - But rate increases for fiduciary insurance have moderated as several D&O carriers without fiduciary claims experience have attempted to fill their premium losses from their D&O book with fiduciary opportunities.
  - This has caused more competition in the fiduciary market for the first time in several years and allowed many policies to be renewed with minimal rate increases. Many current fiduciary policy renewals are renewing closer to expiring due to the change in the market.
- **Perspective:** Premium rates remain very reasonable in the context of the high frequency and severity of ERISA class action litigation.

Conclusions

The Current State of Excess Fee Cases

The Current State of Excess Fee and Investment Imprudence Litigation

- **The case results are a crapshoot** – plan sponsors are now winning more cases than the prior year, but the results are inconsistent and often incoherent. The ultimate results are more luck and chance, and often are not based on the merits as to whether your plan has high fees and/or a poor or prudent fiduciary process.
- Plaintiff law firms continue to file meritless cases against plans with reasonable fees – even filing claims that have been dismissed in some jurisdictions.
  - The lawyers know that they will force enough settlements on the cases that are not dismissed.
- Like all lawyer-driven lawsuits, most cases that are not dismissed at the pleading stage are settled to make the lawyers go away.
- Most cases never get to analyzing fiduciary process, and those that do often prevail on causation, and not by proving their fiduciary process was prudent.
- The key determinant of whether you will get a meritless case dismissed is if the court is willing to go outside the misleading complaint and look at participant disclosure or plan contracts.

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