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ARTICLE

How Misapplying *Twombly* Erodes Retirement Funds

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Abstract. Excessive fees erode billions from Americans' retirement plans each year. Over time, a mere two percent "junk" fee can devour half of workers' retirement savings and may determine whether they can retire—or if their retirement will be one of impoverished subsistence. Problematically, plan participants claiming fiduciary malfeasance for excessive fees face a nearly insurmountable pleading standard in some federal circuits. These courts' "context specific" inquiries of whether plaintiffs state a cognizable malfeasance claim under ERISA for excessive fees surpass Twombly *and* Iqbal*'s plausibility pleading requirements, amounting to a probability pleading standard. Courts' misunderstanding of—and plan participants' lack of insight into—why and how fiduciaries select plan recordkeeping services and corresponding fees exacerbates the problem. Evaluating the information asymmetry and strong public policy at play, this Article will assess this flawed and normatively undesirable standard and its broader implications.*

To do so, this Article will apply quantitative methods to qualitatively analyze the rates of dismissal of excessive fee claims for failure to state a claim. It will demonstrate a remarkably high reversal rate of these dismissals on appeal, identify the optimal pleading conventions and approaches for excessive fee claims, and evaluate and debunk flawed rationales courts often apply when dismissing these claims. Thus, this Article will call for courts to correct course, realign pleading standards, and stop blocking courtroom access for plaintiffs who are tasked by Congress with protecting their own retirements. Until courts do so, by misapplying established pleading standards, they

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enable and contribute to the erosion of Americans' retirement savings.

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Introduction

You don't always get what you pay for—at least when it comes to retirement savings. Imagine working for decades and diligently saving for retirement throughout your career. As you ready for retirement, an ostensibly minor fee may determine whether you: (1) should (if you are physically able) delay your retirement; (2) will subsist below the poverty threshold while in retirement; or (3) may retire securely. As workers do not have a say in their retirement plans' service providers, and are rarely able to monitor and avoid excessively high retirement plan recordkeeping and administration fees, millions of Americans' retirement prospects play out this scenario each year—whether they know it or not.[1]

Seemingly inconsequential fees paid to recordkeeping service providers for administering 401(k)s and providing automated services (such as monthly electronic statements) can reduce workers' retirement plan savings by shocking amounts.[2] Excessive fees of even one to two percent can consume one-third to one-half of a person's retirement funds over the course of that person's career.[3] Worse still, the Biden administration labeled these excessive fees as "junk fees," akin to the service fees charged on concert ticket sales, because they have been repeatedly shown not to benefit the retirees or workers paying them.[4]

The U.S. Supreme Court has rightly recognized these fees' ability to "significantly reduce" a person's retirement savings.[5] Even a ten basis point (0.1%) fee reduction across retirement plans would save American workers more than $4.4 billion each year.[6] But excessive recordkeeping fees do much more than harm individuals and their families. Excessive fees imposed on retirement plans by malfeasant fiduciaries pose a substantial

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1 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-357, 401(K) RETIREMENT PLANS: MANY PARTICIPANTS DO NOT UNDERSTAND FEE INFORMATION, BUT DOL COULD TAKE ADDITIONAL STEPS TO HELP THEM 8–10 (2021) [hereinafter GAO REPORT], https://perma.cc/X5YR-J449; Leslie A. Muller & John A. Turner, *Financial Literacy, the "High-Fee Puzzle," and Knowledge About the Importance of Fees*, J. RET., Winter 2021, at 36–37.

2 *Small Differences in Mutual Fund Fees Can Cut Billions from Americans' Retirement Savings*, PEW CHARITABLE TRS. (June 30, 2022), https://perma.cc/E76W-G56U; *see also* OFF. INV. EDUC. & ADVOC., SEC. EXCH. COMM'N, SEC PUB. NO. 164, INVESTOR BULLETIN: HOW FEES AND EXPENSES AFFECT YOUR INVESTMENT PORTFOLIO 3 (2014), https://perma.cc/F39A-JYWW ("In 20 years, the total amount paid for a 1% annual fee adds up to almost $28,000 for a $100,000 initial investment.").

3 EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LAB., A LOOK AT 401(K) PLAN FEES 2 (2019) [hereinafter EBSA, PLAN FEES], https://perma.cc/4PH7-WPUZ; Chris Arnold, *Is Wall Street Eating Your 401(k) Nest Egg?*, NPR (Oct. 19, 2015, 4:24 AM), https://perma.cc/58M6-E3SK.

4 *See infra* note 68 and accompanying text.

5 Tibble v. Edison Int'l, 575 U.S. 523, 525 (2015).

6 Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 YALE L.J. 1476, 1480 (2015).

threat to the American retirement system and the U.S. economic outlook.[7] In recent years, increased competition among service providers, coupled with fiduciary litigation seeking to rectify and prevent disastrous retirement outcomes for workers, have contributed to some curbing of excessive retirement plan recordkeeping and administration fees.[8] Though this diminution in *some* fees for *some* plans is a positive development, much ground remains to be gained in reducing excessive fees overall. Consistent with congressional intent behind the Employee Retirement Income Security Act of 1974 ("ERISA"), excessive fee litigation asserting breaches of fiduciary duty, referred to as "excessive fee claims," is the primary enforcement mechanism for combating the excessive fees devouring Americans' retirement prospects.[9]

But how to successfully bring such claims is "unclear."[10] Specifically, what constitutes adequate pleading for a fiduciary claim under ERISA for excessive fees remains an open question. In *Hughes v. Northwestern University*,[11] the Supreme Court held that determining whether a plan participant stated a plausible excessive fee claim involves a "context-specific inquiry" of the fiduciary's ongoing duty to monitor the plan and, if necessary, to remove any imprudent investments or services from it.[12] But recent lower court decisions differ drastically in their reading and application of *Hughes*.[13] For example, the Court of Appeals for the Sixth Circuit, noting that "context often is destiny," upheld dismissal of an excessive fee claim based on the plaintiffs' perceived failure to plead sufficiently meaningful benchmarks the court could use to evaluate the challenged fees.[14] Courts in the Second Circuit, however, largely view the question of what constitutes a sufficiently meaningful benchmark or comparator service and related fee as an issue of fact not appropriately decided at the pleadings stage.[15]

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7 *See* John Scott, *America Has a Retirement Crisis. We Need to Make It Easier to Save*, PEW CHARITABLE TRS. (Jan. 18, 2024), https://perma.cc/T88Y-6YEP.

8 *See infra* notes 92–93 and accompanying text.

9 Employee Retirement Income Security Act (ERISA) of 1974 §§ 409, 502, 29 U.S.C. §§ 1109, 1132 [hereinafter ERISA]; *see generally* James A. Wooten, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683 (2001).

10 Perkins v. United Surgical Partners Int'l, No. 3:21-CV-00973-X, 2022 WL 824839, at *6 (N.D. Tex. Mar. 18, 2022).

11 142 S. Ct. 737 (2022).

12 *Id.* at 740.

13 Forman v. TriHealth, Inc., 40 F.4th 443, 452 (6th Cir. 2022) (affirming the district court's dismissal of the plaintiffs' excessive fee claim); Albert v. Oshkosh Corp., 47 F.4th 570, 575, 579–81 (7th Cir. 2022).

14 *Forman*, 40 F.4th at 448–49.

15 *See, e.g.*, *In re* Omnicom ERISA Litig., No. 20-cv-4141, 2021 WL 3292487, at *13 (S.D.N.Y. Aug. 2, 2021) ("[T]he overwhelming trend with district courts in this Circuit is to defer deciding the question of whether two funds are proper comparators until after discovery.").

Heightened pleading standard requirements for excessive fee cases impose unreasonable and sometimes insurmountable barriers to the courtroom by requiring plan participants to include specific details that courts acknowledge are rarely in plaintiffs' possession at the filing stage.[16] Other courts, unfamiliar with the nature of recordkeeping services, mistakenly presume plan participants' payment of higher fees reflects, ipso facto, their receipt of enhanced or increased services.[17] Despite the substantial risks posed by these fees, many courts remain doggedly unwilling to acknowledge that people saving for retirement do not always get what they pay for when it comes to recordkeeping services. In addition to harming plan participants and retirees individually, these pleading standards surpass the high bar set by *Bell Atlantic Corp. v. Twombly*[18] and *Ashcroft v. Iqbal*,[19] the seminal precedents on civil pleading standards. Straying from the already high plausibility pleading standard erodes ERISA's effectiveness. It hamstrings enforcement of ERISA and the vital role plan participant actions play in Congress's remedial framework, all but upending "the highest [duty] known to the law"[20]—that of a fiduciary managing a retirement plan. The result is the weakening of the enforcement regime designed to protect American workers and retirees and is a departure from procedural mainstays.

In the wake of *Hughes*, a need exists to clarify the pleading standards for ERISA excessive fee claims. Leading benefits plaintiffs' lawyers have recently begun to assert that retirement plan recordkeeping services are fungible commodities, enabling some plaintiffs to sidestep the need to plead specific information that they lack before discovery. This Article surveys the effectiveness of treating retirement plan recordkeeping services as fungible commodities and other pleading approaches by analyzing excessive fee cases' dismissal rate for failure to state a claim as well as the reversal rate of such dismissals. Based on that data, this Article concludes that probability pleading requirements often applied to excessive fee cases not only stray far from the strictures of *Twombly* and *Iqbal* but also weaken ERISA's enforcement regime by denying plan participant plaintiffs access to the courtroom.[21]

This Article proceeds in four parts. Part I lays out the doctrinal framework surrounding initial civil pleading requirements generally and in ERISA excessive fee claims. It also contextualizes recordkeeping and administration fees and the important role ERISA contemplates plan participants should play in protecting their retirement savings. Part II

16 *See infra* notes 158–163 and accompanying text.

17 *See infra* Section III.B.

18 550 U.S. 544 (2007).

19 556 U.S. 662 (2009).

20 *See infra* note 30 and accompanying text.

21 *See infra* Section IV.E.

details the methodology used to analyze courts' decisions on motions to dismiss in excessive fee claims. Part III summarizes the data resulting from that analysis. Part IV discusses the implications of that data, weighing the normative dimensions of the present probability pleading requirements for excessive fee claims and evaluating the efficacy of different pleading approaches. This Article concludes by calling for a rebalancing of pleading standards and a refreshed commitment to applying *Twombly* and *Iqbal*'s plausibility pleading standard to excessive fee claims to uphold ERISA's purpose of protecting Americans' retirement savings.

I. Retirement Plan Recordkeeping Fees, Pleading Standards, and the Increasingly Locked Door to the Courthouse

In the past twenty years, the general standard of pleading has evolved (or devolved, as some would assert) from "fair notice" to "plausibility" under *Twombly* and *Iqbal.*[22] Some courts, however, have modified that standard for excessive fee claims under ERISA, requiring that plaintiffs plead not just *plausibility*, but rather what this Article refers to as "probability." Much like the "clear and convincing" standard of proof, probability standards require plaintiffs to plead claims with such detail to persuade a court that a breach of fiduciary duty *likely* occurred. But many plaintiffs lack sufficient information at the pleading stage to satisfy that requirement. Because ERISA charges retirement account holders and beneficiaries with the responsibility of protecting their retirements, a heightened pleading requirement can have disastrous results by blocking account holders from challenging the fees that unnecessarily reduce their retirement savings. It can also hamper both the implementation and development of substantive law.[23] To fully evaluate the problems arising from imposing a probability pleading requirement on excessive fee claims, this Article proceeds with (1) an overview of retirement plan recordkeeping fees, (2) fiduciaries' duty of prudence to minimize fees, and (3) the harmful effects of seemingly minor fees.

A. *Fees on Top of Fees: ERISA's Enforcement Regime Is Designed to Police Excessive Fees Borne by Retirement Plans—But Can It?*

Defined contribution plans,[24] such as the ubiquitous 401(k) and its nonprofit equivalent the 403(b), are the most common retirement plans

22 *See infra* Section I.B.

23 Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 855 (2012).

24 Defined contribution plans are "structured so that each employee-participant 'has an individual account and benefits are based on the amounts contributed to that participant's account.'" Stegemann v. Gannett Co., 970 F.3d 465, 469 (4th Cir. 2020) (quoting Schweitzer v. Inv. Comm. of the Phillips 66 Sav. Plan, 960 F.3d 190, 193 (5th Cir. 2020)). Plan fiduciaries select an array of investment

in America.[25] Participating employees contribute part of their pretax earnings to their retirement plan accounts and select from a menu of investments plan fiduciaries have chosen.[26] The goal is to grow those funds over time so participants can fully benefit from their investments. The funds available to plan participants during retirement are the sum of their contributions, any contributions by their employers, and returns earned on those contributions, less fees associated with the management and maintenance of their accounts.[27] Without sufficient contributions or returns—or if excessive fees consume that corpus of funds—plan participants may lack the means to retire. This is the unfortunate case for too many Americans,[28] all too often including members of underserved communities.[29]

Due to the pivotal role these funds play in plan participants' retirements and the important public policy associated with ensuring that American workers retire with dignity and security, ERISA imposes fiduciary duties of prudence and loyalty on plan fiduciaries that are regularly characterized as the "highest known to the law."[30] ERISA's duty of loyalty requires those fiduciaries to administer plans "solely in the interest of the [plan] participants and beneficiaries," and its duty of prudence impels fiduciaries to act with "care, skill, prudence, and diligence under the circumstances."[31] Fiduciaries also owe plan

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options and plan participants choose amounts to contribute and the investments in which they wish to allocate their assets. *Id.*

25 *See* EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LAB., PRIVATE PENSION PLAN BULLETIN: ABSTRACT OF 2020 FORM 5500 ANNUAL REPORTS 2–3 (2022).

26 Hughes v. Nw. Univ., 142 S. Ct. 737, 740 (2022).

27 *See* Tibble v. Edison Int'l, 575 U.S. 523, 525 (2015).

28 *See* Jack VanDerhei, *Retirement Savings Shortfalls: Evidence from EBRI's 2019 Retirement Security Projection Model*, EMP. BENEFIT RSCH. INST. (Mar. 7, 2019), https://perma.cc/FD99-6GGT. Another problem is the number of Americans (reportedly more than 50%) who lack access to retirement savings plans. Aimee Picchi, *Half of Americans Lack Access to a Retirement Plan. Here Are the Worst States*, CBS NEWS (Aug. 21, 2023, 5:16 PM), https://perma.cc/V8BD-EZB9.

29 *See* Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu with assistance from Julia Hewitt, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF FED. RSRV. SYS. (Sept. 28, 2020), https://perma.cc/3DYS-LWG5.

30 Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 415–16 (2014); *see, e.g.*, Fuller v. SunTrust Banks, Inc., 744 F.3d 685, 695 (11th Cir. 2014) (noting "ERISA's fiduciary duties are the 'highest known to law'" (quoting ITPE Pension Fund v. Hall, 334 F.3d 1011, 1013 (11th Cir. 2003))); LaScala v. Scrufari, 479 F.3d 213, 219 (2d Cir. 2007) (obligations of trustees of an express trust are "the highest known to the law" (internal quotation marks omitted) (quoting Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982))).

31 29 U.S.C. § 1104(a)(1). For a detailed discussion of the nature and history of the fiduciary duty applicable to defined contribution plans and the characteristics of plans, see Lauren K. Valastro, *Did the Superbowl Ad Curse Heighten Defined Contribution Plan Fiduciary Duties?: Deciphering the Legal and Ethical Landscape of Cryptocurrency Options in 401(k)s*, 57 U. MICH. J.L. REFORM 109, 115–25 (2023).

participants the duty of disclosing "complete and accurate information" and "material facts" affecting participants' interests.[32]

The duty of prudence likewise requires fiduciaries to keep costs borne by plans and plan participants low. Fiduciaries therefore must seek to minimize costs and "defray[] reasonable expenses."[33] Inherent in a fiduciary's duty is the obligation to understand and monitor fees and expenses,[34] to cause plans to incur only "reasonable" and "appropriate" fees,[35] and to remove any services for which the fees have become unreasonable.[36] As such, fiduciaries should carefully compare costs associated with similar products and services and should use every tool available to them, including the ability to negotiate for lower fees, to decrease costs borne by plans.[37]

1. Fees, Fees, and More Fees

Evaluating whether fiduciaries have satisfied their duties with respect to fees typically necessitates ascertaining a plan's fees and comparing them with those borne by similar plans receiving similar services.[38] These comparables are called "meaningful benchmark[s]."[39] Determining fees, however, is imprecise, expensive, and needlessly opaque.[40] So too is the process of identifying and pleading adequate comparators. A closer look at the nature and structure of fees reveals why.

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32 Kenseth v. Dean Health Plan, Inc., 610 F.3d 452, 466 (7th Cir. 2010) (collecting cases and observing that ERISA's duty of prudence incorporates an "affirmative obligation to communicate material facts affecting the interests of beneficiaries"); Eddy v. Colonial Life Ins. Co. of Am., 919 F.2d 747, 750 (D.C. Cir. 1990) (noting that "[t]he duty to disclose material information is the core of a[n ERISA] fiduciary's responsibility").

33 29 U.S.C. § 1104(a)(1)(A)(ii); *accord* Tibble v. Edison Int'l, 843 F.3d 1187, 1197–98 (9th Cir. 2016) (en banc).

34 Sweda v. Univ. of Pa., 923 F.3d 320, 328 (3d Cir. 2019); *see also* Davis v. Wash. Univ. in St. Louis, 960 F.3d 478, 483 (8th Cir. 2020) (discussing a fiduciary's duty to keep plan expenses under control).

35 Hughes v. Nw. Univ., 63 F.4th 615, 625–27 (7th Cir. 2023) (quoting *Tibble*, 843 F.3d at 1197); RESTATEMENT (THIRD) OF TRS. § 90(c)(3) (AM. L. INST. 2007); *see also id.* § 88 cmt. a ("Implicit in a trustee's fiduciary duties is a duty to be cost-conscious.").

36 Tibble v. Edison Int'l, 575 U.S. 523, 529–30 (2015). Of note, the Ninth Circuit in *Tibble*, 843 F.3d at 1198 n.4, compared fees ranging up to two percent with fees of one percent despite their dramatically different impact on a plan participant's retirement savings. *See* EBSA, PLAN FEES, *supra* note 3, at 2.

37 *See* Sacerdote v. N.Y. Univ., 328 F. Supp. 3d 273, 286 (S.D.N.Y. 2018); RESTATEMENT (THIRD) OF TRS. § 90 cmt. m (AM. L. INST. 2007).

38 Meiners v. Wells Fargo & Co., 898 F.3d 820, 822 (8th Cir. 2018); Matousek v. MidAmerican Energy Co., 51 F.4th 274, 278 (8th Cir. 2022).

39 *Meiners*, 898 F.3d at 822.

40 *See* ADRIENNE L. ROBERTSON, 401(K) ANSWER BOOK Q 4:54 (2024 ed.) [hereinafter 401(K) ANSWER BOOK] ("[C]alculating costs is not an exact science . . . .").

Investment management services typically design an investment portfolio by selecting and maintaining the investment products available to plan participants, generally calculating their fees as a percentage of assets invested.[41] Many types of fees fall under two broad classifications: (1) investment management service fees and (2) recordkeeping and administration service fees, often called RK&A fees.[42] In fact, the U.S. Department of Labor's Sample 401(k) Plan Fee Disclosure Form defines *twenty-three different types of fees* associated with 401(k)s.[43] While those fees will generally fall within one of these two categories, different fiduciaries define fees differently, rendering direct comparisons difficult and sometimes impossible.[44]

Because much has been written on excessive investment management fees and on the litigation over such fees,[45] this Article focuses on RK&A services and fees, on which little scholarship exists.[46] RK&A services include enrolling participants, conducting payroll deductions for contributions,[47] preparing and filing disclosures,[48] maintaining websites for participants' use, providing account statements, offering call centers, creating educational materials, and keeping track of accounts and transactions.[49] These services are largely automated.[50] Recordkeepers

41 Hughes v. Nw. Univ., 142 S. Ct. 737, 740 (2022).

42 *Id.*; Sigetich v. Kroger Co., No. 1:21-cv-697, 2023 WL 2431667, at *1–3 (S.D. Ohio Mar. 9, 2023).

43 EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LAB., 401(K) PLAN FEE DISCLOSURE FORM, https://perma.cc/MNK5-WRCK; *see also* 401(K) ANSWER BOOK, *supra* note 40, at Q 4:58 (identifying 9 types of fees); David Ramirez, *401(k) Fee Disclosures: A Comprehensive Guide to 408(b)(2) Fee Disclosures*, FORUSALL (Oct. 16, 2023), https://perma.cc/WC9S-XBCS (listing 11 types of fees commonly paid from plan assets).

44 401(K) ANSWER BOOK, *supra* note 40, at Q 4:53.

45 *See generally* Quinn Curtis & John Morley, *An Empirical Study of Mutual Fund Excessive Fee Litigation: Do the Merits Matter?*, 30 J.L. ECON. & ORG. 275 (2014); John P. Freeman, Stewart L. Brown & Steve Pomerantz, *Mutual Fund Advisory Fees: New Evidence and a Fair Fiduciary Duty Test*, 61 OKLA. L. REV. 83 (2008); William A. Birdthistle, *Compensating Power: An Analysis of Rents and Rewards in the Mutual Fund Industry*, 80 TUL. L. REV. 1401 (2006).

46 Given the challenges in identifying all categories and denominations of fees, this Article follows the Supreme Court's simple breakdown between fees as outlined in *Hughes v. Northwestern University*, 142 S. Ct. 737, 740 (2022).

47 29 C.F.R. § 2550.408b-2(c)(1)(viii)(D) (2024).

48 *See* U.S. DEP'T OF TREASURY, U.S. DEP'T OF LAB. & U.S. PENSION BENEFIT GUARANTY CORP., INSTRUCTIONS FOR FORM 5500, at 29 (2023), https://perma.cc/UQX6-R3Y9.

49 EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LAB., UNDERSTANDING RETIREMENT PLAN FEES AND EXPENSES 2–4 (2021) [hereinafter EBSA, UNDERSTANDING FEES AND EXPENSES], https://perma.cc/MPE2-AAVX; Matousek v. MidAmerican Energy Co., 51 F.4th 274, 279 (8th Cir. 2022).

50 *401k Recordkeeping in 2024 and Beyond*, CONGRUENT SOLS. (May 21, 2024), https://perma.cc/5JL6-3E5J; *Digital Retirement Operations: A Path to Automated Record Keeping*, COGNIZANT 2, 7 (Nov. 2020), https://perma.cc/E3NK-9VVL; *The Automation of Retirement Plan Administration*, ADP 3 (2015), https://perma.cc/S2B4-CNR5.

providing RK&A services generally offer standard bundled packages of the same level and quality that many analogize to a "buffet-style" offering—that is, services charged on an "all-you-can-eat" basis.[51] In addition to bundled RK&A services, most providers offer "Ad Hoc RK&A" services based on plan participants' decisions to use services such as brokerage windows, loan processing, distribution assistance, and the processing of certain domestic relations orders.[52] Third parties and investment providers whose funds are included in the plans generally provide RK&A services,[53] which they often package slightly differently from their competitors.[54]

Service providers describe fees for these services in many ways;[55] indeed, "no two fee arrangements are likely to include the exact same set of services under their core fee."[56] Further, no established or industry-wide procedure for calculating recordkeeping fees exists.[57] Typically, RK&A service fees are calculated and charged "[by] participant"; as a "percentage of assets"; on a "plan level"; as a "per service cost" (for Ad Hoc RK&A services); "or all of the above—*sometimes all within one fee arrangement*."[58] Employers may pay fees as an added benefit to employees or, as is most often the case, may require plan participants to bear that burden.[59] Plan participants do not pay out of pocket. Rather, they pay with plan assets, which would otherwise compound on a tax-deferred basis in plan participants' accounts.[60] The fact that plan participants do not receive monthly bills or need to affirmatively pay these fees contributes to plan participants' ignorance of the fees—a situation favorable to service providers alone.

Understanding fees is complicated by revenue sharing, "the most complex development in 401(k) fees," in which revenue generated from

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51 *See, e.g.*, Sigetich v. Kroger Co., No. 1:21-cv-697, 2023 WL 2431667, at *1–3 (S.D. Ohio Mar. 9, 2023) (discussing plaintiffs' allegations concerning the composition of "Bundled RK&A services").

52 *Id.* at *3.

53 *See* EBSA, UNDERSTANDING FEES AND EXPENSES, *supra* note 49, at 2–3.

54 401(K) ANSWER BOOK, *supra* note 40, at Q 4:53.

55 29 C.F.R. § 2550.408b-2(c)(1)(viii)(B)(3) (2024). Service providers' fees may be expressed in dollars, in a formula, as a percentage, through a per capita charge, or "if the compensation or cost cannot reasonably be expressed in such terms, by any other reasonable method" (e.g., float income). *Id.*

56 401(K) ANSWER BOOK, *supra* note 40, at Q 4:53.

57 Smith v. VCA, Inc., No. CV 21-9140, 2022 WL 2037116, at *4 (C.D. Cal. Apr. 6, 2022) ("[T]here appears to be no set method for the recordkeeping fee calculation.").

58 401(K) ANSWER BOOK, *supra* note 40, at Q 4:53 (emphasis added). Plan level fees may be paid either as a flat dollar fixed fee or a basis point floating fee the value of which may change. *Id.* at Q 4:60. See also *Hughes v. Northwestern University*, 142 S. Ct. 737, 740 (2022), for a simplified explanation of fee types.

59 401(K) ANSWER BOOK, *supra* note 40, at Q 4:45; *see* Ayres & Curtis, *supra* note 6, at 1486.

60 401(K) ANSWER BOOK, *supra* note 40, at Q 4:47.

investments pays RK&A fees.[61] When fees are paid through revenue sharing, there is no direct charge to either the employer or plan participant.[62] Instead, those costs are taken out of the fees paid in association with the investment products themselves.[63] Fees are then expressed through an "expense ratio": a percentage of the plan participant's total assets invested.[64] As the Court of Appeals for the Seventh Circuit explained, "expense ratios and revenue-sharing payments move in tandem: the higher a given share class's expense ratio, the more the fund pays [the recordkeeper] in revenue sharing."[65] This structure renders it challenging to pinpoint how much of a mutual fund's expense ratio is going toward paying RK&A fees.[66] And expense ratios are difficult not only for plan participants to pin down but also for service providers to meaningfully disclose "because they typically vary with the volume and nature of plan assets."[67]

If any of this seems less than straightforward, it is—and seemingly by design: Obscure fees are harder to identify, compare, and successfully challenge. Thus, the deleterious effects of high fees are severe for individual plan participants and also on a macro level. A recent White House Fact Sheet stated that "junk fees" are devouring American retirement savings to the tune of $5 billion annually.[68] The retirement savings shortfalls will result in substantial burdens on taxpayers as well as state and federal governments.[69] Analysts predict that by 2044, a $1.3 trillion increase in public assistance costs will be needed.[70] And even more dire predictions for the future are being made, despite the Department of Labor's Employee Benefits Security Administration promulgating a rule aimed at enhancing fee transparency in 2012.[71] The general scholarly and governmental consensus is that, though the rule is a step in the right

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61 *Id.* at Q 4:53.

62 *See* Ayres & Curtis, *supra* note 6, at 1486.

63 *Id.*

64 *See* Garcia v. Alticor, Inc., No. 1:20-cv-1078, 2021 WL 5537520, at *1 (W.D. Mich. Aug. 9, 2021) (explaining that a participant who invested $1,000 in a fund with a 0.1% expense ratio will pay an annual investment management fee of $1,000 × 0.001 = $1).

65 Leimkuehler v. Am. United Life Ins. Co., 713 F.3d 905, 909 (7th Cir. 2013).

66 401(K) ANSWER BOOK, *supra* note 40, at Q 4:53.

67 *Id.* at Q 4:114.

68 Press Release, Off. of the Press Sec'y, The White House, Fact Sheet: President Biden to Announce New Actions to Protect Retirement Security by Cracking Down on Junk Fees in Retirement Investment Advice (Oct. 31, 2023), https://perma.cc/A335-MPWU.

69 *See* Scott, *supra* note 7.

70 *See id.*

71 *See* EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LABOR, FACT SHEET: FINAL RULE TO IMPROVE TRANSPARENCY OF FEES AND EXPENSES TO WORKERS IN 401(K)-TYPE RETIREMENT PLANS (2012), https://perma.cc/YZB8-CMWW.

direction, it falls short of ensuring fees associated with retirement plans are transparent or even entirely calculable.[72]

2. Excessive Fees Compound Harm, So Policing Imprudent Fiduciaries Imposing Them on Plan Participants Is Vital

Scholars have investigated fees in various investment contexts and have yet to consistently identify any benefit derived from higher service fees. Instead, the literature shows that higher fees correspond to decreased earnings and diminished savings.[73] Fees' detrimental effects and negative correlation to investment performance are likewise well established. Professors Javier Gil-Bazo and Pablo Ruiz-Verdú have shown that high investment fees generally do *not* correspond to better performance of actively managed funds.[74] These findings were corroborated only a year later by Professors Laurent Barras, Olivier Scaillet, and Russ Wermers, who showed that once fees are accounted for, only about one percent of actively managed funds are able to beat their index fund alternatives over the long term.[75] Of note, however, even when actively managed funds outperform index funds, they still do not generally earn more for investors because the management fees

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72 *See* GAO REPORT, *supra* note 1; 401(K) ANSWER BOOK, *supra* note 40, at Q 4:114. An anecdote illustrating the challenges associated with identifying fees arose after the Author presented an earlier version of this paper to the faculty of a law school, inspiring a professor there to try to identify recordkeeping fees for that school's retirement plan. In an email to the Author, he described his efforts as follows:

> I looked for fee information. . . . There is no ready link to any fee information. If one searches the Help, 'fees' yields no responses. If one uses the help chatbot, "fees" says to look at the Plan Information page and choose "Required Disclosures." There is no such link or text at the Plan Information page. I connected to a live agent to inquire further. The agent said: . . . based on your plan rules, effective Jan 2019: All participants will pay 3 basis points (bps) for plan admin and 1.5 bps for plan expense for a total of 4.5 bps, or 0.045%, annually. This will be deducted a quarterly basis around 1.125 bps or 0.01125%. You may need to review your Summary plan description for additional details regarding the dollar amount as this information has not been provided . . . .

Email to Lauren Valastro, Visiting Clinical Assoc. Professor, Univ. of Colo. L. Sch. (Oct. 2, 2024, 10:51 AM) (on file with author) (sender of email redacted to protect personal information).

73 *See, e.g.*, Russ Kinnel, *How Does the Timing of Fund Selection and Sale Impact Investor Returns?*, MORNINGSTAR (Aug. 30, 2019), https://perma.cc/ZNL3-ZADT ("Low fees tend to lead to higher investor returns.").

74 *See* Javier Gil-Bazo & Pablo Ruiz-Verdú, *The Relation Between Price and Performance in the Mutual Fund Industry*, 64 J. FIN. 2153, 2178–79 (2009); *see also* Benjamin Curry, *Small Fees Have a Big Impact on Your Investments*, FORBES (May 5, 2023, 12:14 PM), https://perma.cc/XE33-495P (explaining that lower investment fees not only save investors but correlate to better performance).

75 Laurent Barras, Olivier Scaillet & Russ Wermers, *False Discoveries in Mutual Fund Performance: Measuring Luck in Estimated Alphas,* 65 J. FIN. 179, 181 (2010).

completely consume any would-be gain.[76] This problem is compounded for small plans, which are particularly vulnerable to being ravaged by fees, as the corpus from which the fees can be charged is smaller.[77]

In short, paying higher investment-related fees of any type is not akin to buying an enhanced investment service or product. Rather, the inverse is true: Paying more fees generally decreases plan participants' earning ability over time without providing any meaningful benefit. Plan participants thus do not "get what they pay for" in any meaningful sense when it comes to paying higher fees.

Just as increased fees do not correlate to enhanced or improved services,[78] they also do not correspond to value creation for 401(k) plan participants or reflect more work by the recordkeeper (again, with digital recordkeeping technology, services are automated).[79] Rather, when an expense ratio is involved, fees increase only with relation to a plan participant's savings growth or increased contributions. They do, however, compound harm. Professors Ian Ayres's and Quinn Curtis's work undermines any attempt to link high fees to better or more expansive services.[80] To the contrary, excessive fees in retirement plans are so detrimental that they often exceed the typical cost of investing in mutual funds.[81] In sixteen percent of 401(k)s, fees exert so much harm that they eviscerate any tax benefit derived from saving for retirement through a 401(k),[82] gutting the 401(k)'s primary advantage over other investment vehicles. Put simply, some workers would be better off avoiding 401(k) plans altogether.[83]

Given the severe potential harm excessive fees can wreak on plan participants' retirement savings, it is no surprise that ERISA, which borrows heavily from the law of trusts,[84] mandates that fiduciaries be cost

76 Burton G. Malkiel, *Asset Management Fees and the Growth of Finance*, J. ECON. PERSPS., Spring 2013, at 107–08.

77 *See* Ayres & Curtis, *supra* note 6 at 1495; 401(K) ANSWER BOOK, *supra* note 40, at Q 4:47.

78 *See* Ayres & Curtis, *supra* note 6 at 1503.

79 *See* Gil-Bazo & Ruiz-Verdú, *supra* note 74, at 2178–79.

80 *See* Ayres & Curtis, *supra* note 6, at 1522 n.163.

81 *Id.* at 1501.

82 *Id.*

83 *See id.*

84 Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570–72 (1985); *see also* Varity Corp. v. Howe, 516 U.S. 489, 497 (1996) ("ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection. . . . [T]he law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties.").

conscious and ensure plans incur only "reasonable" and "appropriate" fees.[85]

Though ERISA fiduciaries' duties are manifold, the regime for enforcing those duties is not robust. Rather, it largely relies on plan participants to protect themselves as the Department of Labor alone cannot effectively police the retirement system.[86] Congress accordingly gave plan participants and beneficiaries virtually the same right that the Secretary of Labor has to bring excessive fee claims, though they do not enjoy access to the same investigatory tools or power.[87] Indeed, in enacting ERISA, Congress gave plan participants and beneficiaries "ready access to the Federal courts" to pursue such claims.[88]

Breach of fiduciary duty suits, including excessive fee claims, under ERISA § 409, thus constitute "the primary means" plan participants have to protect their savings.[89] And while prevailing on these claims may be an uphill battle, they play a critical role in restraining runaway fees. Multiple federal courts have acknowledged the important role excessive fee litigation has played to depress fees and protect participants' retirement savings over the past several years.[90] Litigation also compels fiduciaries to

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85 Sacerdote v. N.Y. Univ., 328 F. Supp. 3d 273, 286 (S.D.N.Y. 2018); RESTATEMENT (THIRD) OF TRS. § 90 cmt. b; *id.* § 90(c)(3) ("[T]he trustee must . . . incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship . . . .").

86 *See, e.g.*, Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620, 624 (2d Cir. 2018) (noting that plan participants and beneficiaries' private actions are thus key components "for furthering ERISA's remedial purpose" (internal quotation marks omitted) (quoting Salovaara v. Eckert, 222 F.3d 19, 28 (2d Cir. 2000))).

87 H.R. REP. NO. 93-533, at 2 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4640 ("[T]he Committee has placed the principal focus of the enforcement effort on anticipated civil litigation to be initiated by the Secretary of Labor as well as participants and beneficiaries."); H.R. REP. NO. 93-1280 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 5037.

88 29 U.S.C. § 1001(b). Whether that ready access lives up to its promise is the subject of other debates. *See generally* Lauren K. Valastro, *Vindicating Retirees*, 41 GA. ST. U. L. REV. 257, 262 (2025) (discussing arbitration provisions' harmful effects on plan participants' ability to assert ERISA breach of fiduciary duty claims in court).

89 *See* Ayres & Curtis, *supra* note 6, at 1480; 29 U.S.C. § 1109(a).

90 *See, e.g.*, Marshall v. Northrop Grumman Corp., No. 16-CV-6794, 2020 WL 5668935, at *4 (C.D. Cal. Sept. 18, 2020) (noting that class counsel's "efforts have led to enormous fee savings for plan participants, and the firm has had a 'humongous' impact on the 401(k) industry"); Kelly v. Johns Hopkins Univ., No. 1:16-cv-2835, 2020 WL 434473, at *2 (D. Md. Jan. 28, 2020) ("As has been repeatedly recognized, [class counsel's] work on behalf of participants in large 401(k) and 403(b) plans has significantly improved these plans, brought to light fiduciary misconduct that has detrimentally impacted the retirement savings of American workers, and dramatically brought down fees in defined contribution plans."); Tussey v. ABB, Inc., No. 06-CV-04305, 2019 WL 3859763, at *3 (W.D. Mo. Aug. 16, 2019) ("[T]his kind of litigation has made a 'national contribution' in the clarification and refinement of a fiduciary's responsibilities and duties. Indeed, this litigation not only educated plan administrators throughout the country, it educated the Department of Labor."); *see also* Carol Buckmann, *50 Years Later, ERISA Remains a Work in Progress*, LAW360 (July 11, 2024, 2:49 PM),

reevaluate their fee structure by increasing their fiduciary liability insurance rates.[91] Heightened competition, regulation of fees in parallel contexts, and public scrutiny have likely also contributed to reduced RK&A fees.[92] From 2017 to 2022, costs borne by large 401(k) plans declined significantly, including, on average, a ten basis point decrease from 0.95% in 2017 to 0.85% in 2022 for plans holding at least $50 million in assets.[93] Though this trend reflects a move in the right direction, excessive RK&A fees continue to ravage mid-size and smaller plans.[94]

The stakes are high, and the corrosive effects of excessive fees are clear. Equally clear is the nature and purpose of ERISA's enforcement regime aimed at curtailing harm to plan participants by empowering them to police breaches of fiduciary duty. Problematically murky, however, is the first step toward fulfilling that imperative: how plan participants should draft their initial complaints. Section I.B explains the evolution away from notice pleading to plausibility pleading standards under *Twombly* and *Iqbal*. Section I.C then details how far ERISA excessive fee claim jurisprudence has strayed from *Twombly* and *Iqbal* and how that departure from precedent has impacted plan participants trying to vindicate their rights.

B. *Pleading Standards Under* Twombly *and* Iqbal

Since Congress adopted the Federal Rules of Civil Procedure in 1938,[95] Rule 8(a)(2) has required a plaintiff's complaint to plead "a short and plain statement of the claim showing that the pleader is entitled to relief."[96] This liberal "notice pleading system" jettisoned more complex pleading requirements that were previously the norm.[97] In 1957, the Supreme Court

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https://perma.cc/D932-99UT (discussing the fiduciary breach litigation that has "undoubtedly" help reduce fees).

91 Telephone Interview with Chris Tobe, CFA, Principal Litig. Consultant, Tobe Fin. Advisor (June 25, 2024).

92 *See* Ayres & Curtis, *supra* note 6, at 1482; Robert Steyer, *Record Keepers Turning to Smaller Plans to Fuel Growth After Big 2023*, PENSIONS & INVS. (Apr. 15, 2024, 7:31 AM), https://perma.cc/T4HH-XTRA; Jason B. Sobleman & Brooke E. Conner, *SEC Focus on Recordkeeping Obligations Continues: Regulated Entities Face Enhanced Scrutiny*, VEDDER PRICE (June 28, 2023), https://perma.cc/Y4LL-H2FW.

93 Margarida Correia, *401(k) Plan Fees Drop in 2022*, PENSIONS & INVS. (Feb. 24, 2023, 12:30 PM), https://perma.cc/8W8G-WWTP.

94 *See* Ayres & Curtis, *supra* note 6, at 1495; 401(K) ANSWER BOOK, *supra* note 40, at Q 4:47.

95 H.R. COMM. ON THE JUDICIARY, 118TH CONG., FEDERAL RULES OF CIVIL PROCEDURE VII (Comm. Print 2023).

96 *See* FED. R. CIV. P. 8(a)(2).

97 Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002); Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PENN. L. REV. 1767, 1770–71 (2014) [hereinafter Reinert, *The Burdens of Pleading*].

in *Conley v. Gibson*[98] confirmed that plaintiffs need not set out their allegations in detail so long as they gave "fair notice" of their claims.[99] Under that regime, for a defendant to succeed on a Rule 12(b)(6) motion to dismiss for failure to state a claim, it would have to be clear that "no set of facts in support of" the plaintiff's claim could exist that would entitle the plaintiff to relief.[100]

For fifty years, *Conley* stood synonymous with the Rule 8(a)(2) pleading standard. But in 2007, in *Twombly*, the Supreme Court declared that *Conley* had "earned its retirement" and indecorously sent the notice pleading standard into the sunset.[101] Based on policy rationale—that defendants should be protected from meritless claims requiring them to engage in burdensome discovery[102]—*Twombly* did two things. First, it retired *Conley*'s "no set of facts" standard for motions to dismiss under Federal Rule 12(b)(6).[103] Second, it replaced that standard with a new "plausibility" test.[104] A "bare assertion" of claims, the Court explained, "will not suffice" to survive a motion to dismiss.[105] Rather, a complaint's allegations must include "further factual enhancement" to achieve plausibility.[106]

If *Twombly* sent *Conley* into retirement, *Iqbal* cemented *Conley*'s grave.[107] Nearly two years after *Twombly*'s issuance, the Supreme Court in *Iqbal* explained that *Twombly* established the pleading standard in all federal civil cases.[108] It further clarified that courts need not "accept as true" conclusory allegations or "legal conclusions" in a complaint.[109] As such, a "formulaic recitation of the elements" of a claim does not enjoy any presumption of truth, so courts should exclude it from consideration when evaluating a motion to dismiss for plausibility.[110] Further, courts undertaking that "context-specific" analysis may rely on their "judicial experience and common sense" and should "assess pleadings for their substantive merit."[111]

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98 355 U.S. 41 (1957).

99 *Id.* at 47.

100 *Id.* at 45–46.

101 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 (2007).

102 *See* Reinert, *The Burdens of Pleading*, *supra* note 97, at 1772.

103 *Twombly*, 550 U.S. at 562.

104 *Id.* at 570.

105 *Id.* at 556.

106 *Id.* at 557.

107 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); *see* Reinert, *The Burdens of Pleading*, *supra* note 97, at 1773.

108 *See Iqbal*, 556 U.S. at 684 (citing *Twombly*, 550 U.S. at 555–56 & n.3).

109 *Id.* at 678.

110 *Id.* at 681 (internal quotation marks omitted) (citing *Twombly*, 550 U.S. at 555).

111 *Id.* at 679; *see* Reinert, *The Burdens of Pleading*, *supra* note 97, at 1775.

By including a subjective component relying on a court's "common sense" and "experience" in evaluating complaints, *Twombly* unnecessarily cultivated a fertile ground for potential bias and misunderstanding by a court to threaten a plaintiff's meritorious case.[112] That threat, discussed in Part IV, *infra*, is not omnipresent in all types of cases. Rather, it surfaces mercilessly in suits involving excessive fee claims as courts with little experience in the investment or retirement plan management industries cling to theories that are disconnected from the realities of retirement plan administration.

To fully appreciate this critical development in pleading standards, it merits mention that neither *Twombly* nor *Iqbal* are run-of-the-mill cases. Rather, they both involved unique matters affecting substantial national economic (*Twombly*) and security (*Iqbal*) interests. As such, in both *Twombly* and *Iqbal*, context mattered. The class action plaintiffs in *Twombly* asserted antitrust claims against some of the nation's largest telecommunications companies.[113] Had the Court decided that matter differently, the economic aftershock to the nation would likely have been protracted.[114] In *Iqbal*, too, context was paramount as underscored by the unusual first sentence of the opinion: "Javaid Iqbal . . . is a citizen of Pakistan and a Muslim."[115] Plaintiff Iqbal was a Pakistani Muslim and "person 'of high interest'" detained shortly after the September 11th attacks.[116] Iqbal alleged that the U.S. government had wrongfully detained him and violated his constitutional rights while the government asserted its strong interest in preventing future terrorist attacks.[117]

In short, the plausibility pleading standard's development had more than a little to do with the Supreme Court's results-oriented bent in two cases that were anything but cookie-cutter.[118] Both opinions also devoted substantial focus to the hardship defendants would face if required to undergo expensive discovery prior to any assessment of the respective claims' merits.[119] As Professor Jonah Gelbach explained, "Each opinion suggests a belief that district courts will be able to usefully forecast, on the

112 *See* Reinert, *The Burdens of Pleading*, *supra* note 97, at 1784–88.

113 *Twombly*, 550 U.S. at 547–48.

114 *See id.* at 559.

115 *Iqbal*, 556 U.S. at 666.

116 *Id.* at 667.

117 *Id.* at 668–69, 682.

118 *See* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1299, 1326 (2010) [hereinafter Steinman, *The Pleading Problem*] ("At best, *Twombly* and *Iqbal* appear to be result-oriented decisions designed to terminate at the earliest possible stage lawsuits that struck the majorities as undesirable.").

119 *Twombly*, 550 U.S. at 559; *Iqbal*, 556 U.S. at 685.

basis of the plaintiffs' complaints, the set of cases in which discovery will yield evidence of liability . . . ."[120]

Scholars, practitioners, and judges widely critiqued these results-oriented opinions and wrote extensively on the then-new plausibility pleading standard.[121] These commentators proposed a host of significant reforms to address problems associated with the new standard and, in trying to sort through the cases' aftermath, harshly criticized them.[122] The most common critiques were that *Twombly* and *Iqbal* strayed too far from established precedent, departed from the Federal Rules of Civil Procedure, and erected new, unreasonable barriers to federal courts—and thus to justice itself.[123] The flurry of empirical scholarship following *Twombly* and *Iqbal* disappointingly demonstrated that the decisions did not necessarily achieve the Court's aim. In addition to not lowering (or even affecting) the summary judgment grant rates, these studies found that trial courts were not particularly effective merits-screeners at the motion to dismiss stage.[124] One empirical work showed how heightened pleading standards tended to increase defendant misconduct and thus litigation costs,[125] in direct contravention of the Court's stated intent.[126]

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120 Jonah B. Gelbach, *Material Facts in the Debate Over* Twombly *and* Iqbal, 68 STAN. L. REV. 369, 381 (2016).

121 Professor Steinman broadly categorized the critiques as: (1) plausibility pleading standards are more restrictive than notice pleading; (2) that lower courts are applying the pleading standard as more restrictive; and (3) such restrictive applications are undesirable normatively. *See* Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 364 (2016) [hereinafter Steinman, *The Rise and Fall of Plausibility Pleading?*]. On balance, more scholarship critical of the plausibility pleading standard has emerged over the years, but plausibility pleading does have its proponents. Professor Redish, for example, asserts that the plausibility test constitutes "an appropriate balance." *See* Redish, *supra* note 23, at 845. Other commentators suggest *Twombly* and *Iqbal* did not have the drastic effects most perceive. *See* Edward A. Hartnett, *Responding to* Twombly *and* Iqbal*: Where Do We Go From Here?*, 95 IOWA L. REV. BULL. 24, 24–25 (2010) (asserting that "the plausibility standard . . . can be understood as equivalent to the traditional insistence that a factual inference be reasonable" and that "the Supreme Court in *Twombly* did not purport to overrule *Conley*").

122 *See* Hartnett, *supra* note 121, at 24–31 (discussing various professors' proposals for reform as well as the Open Access to Courts Act of 2009 and the Notice Pleading Restoration Act of 2009).

123 *See* Steinman, *The Pleading Problem*, *supra* note 118, at 1296.

124 *See generally* Gelbach, *supra* note 120; David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013); Christina L. Boyd, David A. Hoffman, Zora Obradovic & Kosta Ristovski, *Building a Taxonomy of Litigation: Clusters of Causes of Action in Federal Complaints*, 10 J. EMPIRICAL LEGAL STUD. 253 (2013).

125 Sergio J. Campos, Christopher S. Cotton & Cheng Li, *Deterrence Effects Under* Twombly*: On the Costs of Increasing Pleading Standards in Litigation*, 44 INT'L REV. L. & ECON. 61, 62–70 (2015).

126 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) ("Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery . . . ."); Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009).

Among scholars' proposed reforms post-*Twombly* and *Iqbal* were calls to (1) revise the pleading standards articulated by the Federal Rules of Civil Procedure,[127] (2) revert rule design to the formal rulemaking process or Congress,[128] and (3) amend the Federal Rules to include presuit discovery mechanisms analogous to those in place in many states.[129] Congress likewise floated at least two bills aimed at ameliorating the cases' effects, to no avail.[130] Years after these cases' issuance, scholars continue to decry their effects.[131]

Under *Twombly* and *Iqbal*, for a plaintiff's complaint to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[132] Courts undertaking this analysis may disregard legal conclusions and bare restatements of a claim's elements.[133] The allegations that remain must contain enough "factual content" to enable a "court to draw the reasonable inference that the defendant is liable for the misconduct alleged" and that success on the merits is more than a "sheer possibility."[134]

But the standard is not so high as to constitute a "probability requirement"[135]—except for, it would seem, some ERISA excessive fee claims which are subjected to such a standard.

C. *Probability Pleading and the Perverse Need to Plead "Secret" Information in ERISA Excessive Fee Claims*

In the wake of *Twombly* and *Iqbal*, courts have not always strayed from plausibility pleading requirements. Six months after *Iqbal*, the Court of Appeals for the Eighth Circuit, grappling with excessive fee pleading standards, explained that a plaintiff could adequately plead a fiduciary

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127 *See* Hartnett, *supra* note 121, at 33–34 (proposing to add a section (j) to Federal Rule of Civil Procedure 12).

128 Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 851 (2010).

129 Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 54–55, 64 (2010).

130 *See* Hartnett, *supra* note 121, at 25 (discussing the Open Access to Courts Act of 2009 and the Notice Pleading Restoration Act of 2009).

131 *See generally* Anthony Gambol, *The Twombly/Iqbal Plausibility Pleading Standard and Affirmative Defenses: Gooses and Ganders Ten Years Later*, 41 PACE L. REV. 193 (2020); Howard M. Erichson, *What Is the Difference Between a Conclusion and a Fact?*, 41 CARDOZO L. REV. 899 (2020).

132 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

133 *Id.*

134 *Id.*

135 *Id.* (quoting *Twombly*, 550 U.S. at 556).

claim by alleging "facts indirectly showing unlawful behavior."[136] The court reasoned:

> No matter how clever or diligent, ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences. Thus, while a plaintiff must offer sufficient factual allegations to show that he or she is not merely engaged in a fishing expedition or strike suit, we must also take account of their limited access to crucial information. If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer. These considerations counsel careful and holistic evaluation of an ERISA complaint's factual allegations before concluding that they do not support a plausible inference that the plaintiff is entitled to relief.[137]

Indeed, plan fiduciaries regularly hold information concerning service provider selection closely and may even maintain it as a "secret."[138] As such, plan participants' hands are often tied when it comes to pleading information held in secrecy by defendants at the pleading stage.[139] Other courts have likewise acknowledged plaintiffs' general inability to plead detailed inside information until discovery occurs and plaintiffs can get that information from defendants, and to a lesser extent, third parties.[140] Though particularly problematic, this phenomenon is not unique to ERISA excessive fee claims. Professor Scott Dodson explained that "corporate wrongdoing" and "intentional torts" are examples of "information asymmetry," where the defendant will have sole access to information plaintiffs may need to plead their suit.[141] To the chagrin of plan participants and their lawyers, a breach of fiduciary duty for excessive fees constitutes the unlucky marriage of corporate malfeasance and an intentional tort.

In 2022, the Supreme Court in *Hughes* directly addressed pleading standards for ERISA excessive fee claims, raising more questions than it answered. In *Hughes*, plan participant plaintiffs brought an excessive fee claim against Northwestern University.[142] The district court dismissed the amended complaint without leave to amend.[143] The Court of Appeals for the Seventh Circuit upheld the district court's dismissal and denial of

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136 Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 595 (8th Cir. 2009).

137 *Id.* at 598.

138 *Id.* at 602.

139 *Id.*

140 *See, e.g.*, Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 718 (2d Cir. 2013) ("ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." (quoting *Braden*, 588 F.3d at 598)).

141 *See* Dodson, *supra* note 129, at 52 & n.55 (noting Bone's first use of the term "information asymmetry").

142 Hughes v. Nw. Univ., 142 S. Ct. 737, 739–40 (2022).

143 Divane v. Nw. Univ., No. 16 C 8157, 2018 WL 2388118, at *14 (N.D. Ill. May 25, 2018).

leave to amend.[144] The Supreme Court vacated the judgment and remanded it for reconsideration, rejecting the so-called large menu defense, which asserts that so long as plan participants had the option to select low-cost investments on a plan menu, the inclusion of higher-cost investments on that menu was not imprudent.[145] Basing its reasoning on *Tibble v. Edison International*,[146] the Court held the large menu defense inadequate to insulate the defendant from its ongoing duty to monitor and remove imprudent investments from a plan menu.[147]

The Court further instructed lower courts evaluating the sufficiency of a claim to undertake a "context specific" inquiry into the plausibility of allegations that a plan fiduciary acted imprudently, consistent with *Twombly* and *Iqbal*.[148] This is because the nature of prudence under ERISA § 404(a)(1)(B) turns on the circumstances when the fiduciary acted.[149] The Court also highlighted the importance of "giv[ing] due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise."[150] Although the plague of excessive fees affects substantial national economic interests, just as *Twombly* did, the Court did not focus on the perils of those fees.

Though the defense bar's immediate reaction to *Hughes* was that its effects were "narrow" and "unremarkable"[151]—suggesting the case did little more than reiterate plaintiffs' need to plead allegations consistent with *Twombly* and *Iqbal*—that assessment has not been borne out over time. Rather, *Hughes* fundamentally "shifted" ERISA excessive fee claim pleading standards.[152] Before *Hughes*, many practitioners, scholars, and commentators considered the "large menu defense" enough to overcome excessive fee claims.[153] It had largely served as an escape hatch for defendants. After *Hughes*, how to satisfy *Twombly* and *Iqbal*'s plausibility pleading requirements in alleging excessive fee claims became unclear.

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144 Divane v. Nw. Univ., 953 F.3d 980, 994 (7th Cir. 2020), *aff'd in part*, *rev'd in part, remanded sub nom.* Hughes v. Nw. Univ., 63 F.4th 615 (7th Cir. 2020).

145 *Hughes*, 142 S. Ct. at 739–40, 741–42; *see* Ayres & Curtis, *supra* note 6, at 1482.

146 575 U.S. 523 (2015).

147 *Hughes*, 142 S. Ct. at 741–42 (discussing *Tibble*, 575 U.S. at 529–30).

148 *Id.* at 742 (quoting Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 425 (2014)).

149 *Id.*

150 *Id.*

151 *Annual ERISA Litigation Outlook and 2022 Review*, GIBSON DUNN (Mar. 21, 2023), https://perma.cc/AL9G-B586; Myron D. Rumeld, Tulio D. Chirinos & Daniel Wesson, *Hughes v. Northwestern: A Missed Opportunity to Establish a Workable Pleading Standard*, 401K SPECIALIST (Feb. 14, 2022), https://perma.cc/HHU6-LDBD.

152 Bangalore v. Froedtert Health, Inc., No. 20-cv-893, 2024 WL 1051104, at *8 (E.D. Wis. Mar. 11, 2024).

153 *See* Ayres & Curtis, *supra* note 6, at 1482 ("So long as a plan provides *some* attractive [low-cost] options for investors, courts will generally not find the sponsor in breach of fiduciary duties.").

Different federal circuits have answered that question differently.[154] Even the Court of Appeals for the Seventh Circuit in the remanded *Hughes v. Northwestern University*[155] ("*Hughes II*") case did not read *Hughes* to pronounce a set pleading standard.[156] Courts instead have been left to make what they would of the Supreme Court's sparse guidance. The result, as discussed further in Parts III and IV, *infra*, has been a patchwork of, at times, diametrically conflicting analyses and outcomes. In sum, the pleading standard for ERISA excessive fee claims is circuit-dependent, ranging from (1) a *plausibility* requirement to providing facts that go "beyond the threshold of a plausible claim" to (2) a *probability* requirement under which a complaint's allegations must include enough detail to persuade a court that a breach of fiduciary duty was not only plausible but that it likely occurred.[157]

For some courts, satisfying a probability requirement compels plaintiffs to both anticipate and rule out in their complaints potential explanations for defendants' conduct that are simply inconsistent with generally accepted financial principles. But this pleading standard strays from the prevailing general pleading standard articulated by the Supreme Court and required of civil litigants.[158] It is also, unsurprisingly, unattainable for many plaintiffs as it requires them to marshal and plead a substantial amount of detailed information to which they generally lack access. In many instances, plaintiffs lack the needed information because only the defendants have it, it is publicly unavailable, or it can only be accessed at significant cost. As such, the lengths to which plaintiffs feel compelled to go in their pleadings to try to avoid dismissal are remarkable. In one matter, plaintiffs pled at least eleven comparators yet still were forced to fight both a motion to dismiss and a related, ultimately successful, appeal when their complaint was dismissed.[159]

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[154] *See, e.g.*, Smith v. CommonSpirit Health, 37 F.4th 1160, 1166 (6th Cir. 2022) (agreeing that plaintiffs' pointing to the virtues of specific alternative investments as suggestive of imprudence in some cases, but ruling that merely alleging the existence of alternative categories is insufficient to plead a fiduciary breach claim).

[155] 63 F.4th 615 (7th Cir. 2023).

[156] *Id.* at 626.

[157] *See, e.g.*, Mator v. Wesco Distrib., Inc., 2:21-CV-00403, 2022 WL 1046439, at *8 (W.D. Pa. Apr. 7, 2022); Meiners v. Wells Fargo & Co., 898 F.3d 820, 822 (8th Cir. 2018) (stating that, to state a breach of fiduciary duty under ERISA, "a plaintiff must provide a sound basis for comparison—a meaningful benchmark").

[158] *Compare Mator*, 2022 WL 1046439, at *8, *and Meiners*, 898 F.3d at 822, *with* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556–57 (2007), *and* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

[159] *See* Mator v. Wesco Distrib., Inc., 2:21-CV-00403, 2022 WL 3566108, at *7, *9 (W.D. Pa. Aug. 18, 2022), *vacated and remanded*, 102 F.4th 172 (3d Cir. 2024); Mator v. Wesco Distrib., Inc., 102 F.4th 172, 187–88, 191 (3d Cir. 2024).

Many plaintiffs have also begun engaging expert witnesses to help draft their complaints.[160] Those engagements are not cheap. Other plaintiffs, likely with more constrained financial means, have resorted to combing through other litigation dockets to collate the expert testimony of other plaintiffs' expert witnesses.[161] All of this is done before they file their complaints—not only during fact or expert discovery. As the complaint is "the key to the courthouse door,"[162] some plaintiffs may rightly perceive these changes as less akin to swapping out the lock and more akin to deadbolting the door from the inside. Paradoxically, despite these extreme probability pleading requirements, many courts reject fulsome allegations of fiduciary misconduct by relying on misplaced proverbial wisdom and a profound misunderstanding of the nature of retirement plan management and corresponding RK&A fees.[163]

Reacting to these extreme requirements and beginning with *Hughes II*, some plaintiffs started to plead that because recordkeeping services are "commoditized" and "fungible," recordkeepers' main method of distinguishing themselves from their competition was based on price—not on the quality or scope of services.[164] *Dionicio v. U.S. Bancorp*[165] details a recent successful assertion by plaintiffs of the fungibility of RK&A services:

> Plaintiffs identify the particular types of services included in the "typical suite of administrative services" and allege that such services are bundled into a fungible commodity sold to mega plans in a competitive market. Further, plaintiffs allege that numerous national recordkeepers offer bundled RKA services that are materially indistinguishable with respect to their quality. These allegations make it unnecessary to compare individual services to individual services, because all recordkeepers provide the same bundled services, and the total price of the bundle remains the same no matter which of the individual services within the bundle a mega plan chooses to use.[166]

Leading benefits plaintiffs' attorney Jerome Schlichter has expressed his view that fees have evolved over time in response to litigation challenging their reasonableness.[167] Schlichter indicated that prior to the past few

160 Telephone Interview with Chris Tobe, *supra* note 91.

161 *See, e.g.*, Carimbocas v. TTEC Servs. Corp., No. 1:22-cv-02188, 2023 WL 8555384, at *3 (D. Colo. Dec. 11, 2023) (discussing plaintiffs' allegations concerning other cases' expert testimony concerning reasonableness of fees).

162 *See* Steinman, *The Pleading Problem*, *supra* note 118, at 1294–95.

163 *See infra* Section III.B.

164 Hughes v. Nw. Univ., 63 F.4th 615, 632 (7th Cir. 2023); Daggett v. Waters Corp., 731 F. Supp. 3d 121, 137 (D. Mass. 2024) (discussing plaintiffs' assertion that "the total RKA fees are fungible and commoditized and any differences between the plans in these codes are immaterial from a pricing perspective").

165 No. 23-CV-0026, 2024 WL 1216519 (D. Minn. Mar. 21, 2024).

166 *Id.* at *4 (citations omitted).

167 John Manganaro, *An ERISA Litigation Conversation with Jerry Schlichter*, PLANSPONSOR (May 28, 2019), https://perma.cc/J3VW-HTD2.

years, in which many excessive fee claims have been asserted, revenue sharing and asset-based fee arrangements for recordkeeping fees were common.[168] Such fee structures facilitated recordkeeping fees increasing in amount without the service provider enhancing or expanding its services.[169] Schlichter and others contended and obtained rulings "that recordkeeping fees have little to do with asset size or account size."[170] Schlichter's position appears to have been the first step toward litigants and courts disassociating recordkeeping services from any veneer of distinguishability among recordkeeping service providers' scope of services offered or the quality thereof.

This position, when accepted by courts, enables plaintiffs to avoid one of the most challenging aspects of pleading under *Hughes*' context-specific mandate: the need to plead detailed information held only by defendants. In addition to ostensibly improving the odds of surviving a motion to dismiss, such positions, when embraced by courts, automatically arm plaintiffs with more settlement leverage. Though by no means a guarantee of success, many plaintiffs have employed this pleading convention in the past two years.[171] Some courts rejected those characterizations while others accepted them.[172] Still others, granting motions to dismiss without prejudice, went so far as to suggest that the plaintiffs amend their complaints to include fungibility allegations.[173]

The framework for the first analysis of the success of fungibility allegations—and manifold other aspects of ERISA excessive fee claims including their dismissal and reversal rates—follows.

II. The "Meaningful Benchmarks" Analysis

In an effort to understand the impacts of the courts' application of probability pleading standards, this Article qualitatively analyzes excessive

168 *Id.*

169 *Id.*

170 *Id.*

171 *See, e.g.*, *Dionicio*, 2024 WL 1216519, at *4; Seibert v. Nokia of Am. Corp., No. 21-20478, 2023 WL 5035026, at *7 (D.N.J. Aug. 8, 2023) (discussing the complaint's allegations "that the bundled services 'chosen by a large plan do not affect the amount charged by recordkeepers for such basic and *fungible* services.'" (quoting Complaint ¶ 76, *Seibert*, 2023 WL 5035026 (No. 21-20478))); Laabs v. Faith Techs., Inc., No. 20-CV-1534, 2022 WL 17418358, at *3 (E.D. Wis. Nov. 9, 2022).

172 *See infra* Section III.C.

173 Glick v. ThedaCare, Inc., No. 20-CV-1236, 2022 WL 16927749, at *3 n.4 (E.D. Wis. Oct. 27, 2022) ("It's conceivable that recordkeeping services are essentially fungible, meaning that there aren't meaningful differences in services provided by various companies. If that's true, an allegation to that effect, supported by specific data, might suffice under *Albert*."); Nohara v. Prevea Clinic Inc., No. 20-CV-1079, 2022 WL 16927810, at *4 n.4 (E.D. Wis. Oct. 27, 2022) (same).

fee claims' pleading standards using quantitative methods.[174] It evaluates survival and reversal rates of motions to dismiss when plaintiffs lodge different excessive fee fiduciary breach claims. It also examines the survival rates for motions to dismiss complaints alleging a fungibility or commoditization argument and derivations of that argument. This analysis's results reveal trends about how courts evaluate initial pleadings. It further identifies common threads in courts' understanding (or lack thereof) of 401(k) recordkeeping service fees as well as plaintiffs' tendencies when crafting complaints. These findings will inform courts, fiduciaries, and practitioners as well as highlight the urgency with which the Supreme Court should take up and resolve the circuit split and rein in courts that are imposing probability pleading standards on excessive fee claims.

A. *Method for Selecting and Analyzing Decisions and Accompanying Challenges*

To analyze these cases, a Westlaw Precision query[175] was performed searching for all federal cases including "ERISA," "12(b)(6)," and "excessive" within the same sentence as "fee" from January 24, 2022, through June 30, 2024.[176] The search returned 141 hits. After additional searches made to control quality and minimize the risk of omitting relevant decisions, a total of 158 decisions were ultimately identified and included in the initial batch to be analyzed.[177] The dataset was culled by eliminating decisions turning on other causes of action or procedural mechanisms. For example, if the court decided a motion to dismiss based on Rule 12(b)(1) lack of jurisdiction grounds or did not reach the ultimate issue of sufficiency of

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174 Professor Paul Secunda's *Politics Not as Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board* served as a helpful framework for constructing this analysis. 32 FLA. ST. U. L. REV. 51, 78–83 (2004).

175 "ERISA" & "12(b)(6)" & "excessive" /s "fee" with the added filter of a date range starting on "01/24/2022" and ending on "06/30/2024" (hereinafter "primary search").

176 To confirm the primary search elicited the fullest dataset, two other searches were performed. One search used "ERISA" & "12(b)(6)" & "high" /s "fee" with a date range filter beginning "01/24/2022" and ending on "06/30/2024" (hereinafter "secondary search"). The secondary search resulted in 92 cases, nine of which were not captured by the primary search. Those nine were added to the dataset, though eight of the nine cases were later removed from the dataset as false positives (because they included the search terms but had different procedural postures or claims). A second search was performed by filtering the citing references of *Hughes v. Northwestern University*, 142 S. Ct. 737 (2022), to cases only. That search returned 143 cases, seven of which were not included in the primary search or the secondary search results. Those seven were added to the dataset, though two were later removed as false positives. Finally, when cases that appeared as though they should have fallen within the study's criteria were referenced in other decisions, those cases were notated and cross-referenced to ensure they were included in the dataset. In all but one case in which the plaintiff characterized excessive fees as excessive "expenses," they were. That case was added to the dataset.

177 To confirm the primary search elicited the fullest dataset, two other searches were performed.

the factual allegations, then the case was removed from the dataset because it did not fall within the parameters of the analysis. Relatedly, a few cases concerned summary judgment standards[178] or centered around different claims such as investment performance.[179] Those cases were also removed from the dataset.

This paring process produced 113 decisions arising from fewer lawsuits because several decisions stemmed from the same complaint at different procedural stages.[180] Each decision contained at least the following characteristics:

* A plan participant or beneficiary represented by counsel;[181]

* Asserting a claim for fiduciary malfeasance under ERISA for excessive fees;[182]

* Subject to a motion to dismiss for failure to state a claim under Rule 12(b)(6) or on appeal from a Rule 12(b)(6) dismissal; and

* The respective court ruled as to the merits of Rule 12(b)(6) motion and did not anchor its primary ruling on another argument or legal theory.

These decisions were coded based on the federal circuit; plaintiffs' claims (e.g., "breach of fiduciary duty for excessive recordkeeping fees and failure to monitor");[183] the nature and outcome of the motion or appeal described (e.g., "affirming dismissal of all claims for failure to state a claim");[184] and whether a dismissal was accompanied by leave to amend or seek to amend the complaint. The coding of qualifying decisions was done simply by inputting the numeral "1" into the corresponding column so

178 *E.g.,* Lauderdale v. NFP Ret., Inc., No. 8:21-cv-301, 2022 WL 17260510, at *4 (C.D. Cal. Nov. 17, 2022).

179 Bracalente v. Cisco Sys., Inc., No. 5:22-cv-04417, 2023 WL 5184138, at *3 (N.D. Cal. Aug. 11, 2023).

180 To ensure that no decision was double counted, if the trial-level and appellate-level decisions were both included in the dataset, which was the case for *Perkins* and *Mator*, the appellate decision was not coded to include the trial court's disposition. Thus, the dataset counts 111 allegations, not 113.

181 The allegations in the sole pro se matter included in the dataset, *Huber v. IKORCC Pension Plan*, were so unclear that it was excluded from the study. No. 2:23-CV-71, 2023 WL 4015938, at *4–5 (N.D. Ind. June 15, 2023).

182 *Gleason v. Orth* was removed from the results because plaintiffs were fiduciaries. No. 2:22-cv-00305, 2022 WL 4534405, at *1 (W.D. Wash. Sept. 28, 2022).

183 Appendix A.

184 Appendix A. As denials of dismissals are not appealable interlocutory orders, no categories for affirming or reversing denials of motions to dismiss were needed. *See* 28 U.S.C. §§ 1291–92.

that the total results could be computed through a Microsoft Excel sum formula.[185]

Various allegations and reasoning articulated by the courts were also coded, including whether (1) plaintiffs asserted fungibility or analogs, (2) the court reasoned that higher fees were likely to equate to enhanced services, (3) plaintiffs pled only industry averages as comparators or less robust allegations, (4) plaintiffs made retail versus institutional class allegations, and (5) plaintiffs asserted "repackaged" breach of the fiduciary duty of loyalty claims.[186]

Coding partial grants and partial denials of motions to dismiss presented a challenge. Each court's ruling with respect to excessive fee claims was coded as either an outright grant or denial of the motion to dismiss on that claim, despite other claims having been ruled on differently. This was a difficult choice to make but was supported by critiques of other similar studies that coded decisions as mixed, therefore limiting aspects of their utility.[187] Thus, when plaintiffs asserted multiple breaches of fiduciary duty claims, such as excessive fee claims and investment underperformance claims, and courts partially granted and partially denied motions to dismiss those claims, the coded outcome was based solely on the court's decision concerning the excessive fee claim.[188]

A related challenge associated with coding was that not every excessive fee claim was crisply laid out as one for excessive recordkeeping and administration fees or excessive investment fees. In a few instances, this endeavor relied heavily on judgment and experience because some claims were not clearly articulated and not every court evaluated or addressed the claims as cogently as might have been desired.[189] A

185 As all coding was performed in this way (i.e., by inputting the numeral "1" into the corresponding column to allow for easy tabulation by Microsoft Excel formula), all references to coding refer to this process. In addition, to ensure the integrity of the data, each case included in the study was coded by at least two reviewers.

186 See *infra* Section III.E.

187 Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127, 130 (2012) (discussing various studies of dismissal rates post *Twombly* and *Iqbal* and concluding that "[c]oding by claim could provide a clearer picture of how the new pleading standard is operating").

188 For example, in *Berkelhammer v. Automatic Data Processing, Inc.*, the court granted in part and denied in part a motion to dismiss breach of fiduciary duty claims for prohibited transactions and excessive RK&A services fees. No. 20-5696, 2022 WL 3593975, at *1 (D.N.J. Aug. 23, 2022). This outcome was coded as "Deny Dismissal" as the court denied dismissal of the excessive fee claim.

189 In *Gaines v. BDO USA, LLP*, for example, the court wrote that it "denie[d] defendants' motion to dismiss" but then also ruled "as currently alleged, Gaines cannot sustain a duty of prudence claim to the extent it is premised on allegations that BDO failed to monitor and control recordkeeping fees." 663 F. Supp. 3d 821, 832 (N.D. Ill. 2023). This case was coded as a dismissal due to the more extensive language suggesting the excessive fee claim had been dismissed. To cross-check this coding decision, the parties' pleadings after this order were surveyed and showed the parties understood the excessive fee claim to be dismissed. Answer to Class Action Complaint ¶ 66, at 22, Gaines v. BDO USA, LLP, 663 F. Supp. 3d 821 (N.D. Ill. 2023) (No. 22 C 1878).

corresponding difficulty was whether to include cases in which allegations concerning excessive fees were made but those fees were not recordkeeping fees (e.g., they were fees for active fund management or were otherwise not centric to the underlying claim). Cases lacking any clear inclusion of excessive recordkeeping fee claims were excluded from the dataset.[190]

Delineating between allegations of commoditization and fungibility on the one hand, and other excessive fee allegations on the other was also difficult at times. Explicit claims were easy to identify, classify, and code.[191] In some instances, clear language such as "identical services" was used to describe the services of one provider with those of another.[192] Yet other claims articulated the same concept differently and in such a way that it was a closer call. For example, "materially similar services provided" was the toughest call as it came as close to a fungibility argument as possible without amounting to one.[193]

Additionally, some immaterial liberties were taken with respect to classification of proceedings and outcomes. For example, in *Garcia v. Alticor, Inc.*,[194] the decision involved the court's denial of a motion for reconsideration on its previous denial of a motion to dismiss.[195] For purposes of the analysis, that was characterized as a denial of a motion to dismiss.[196] Similarly, when a motion to dismiss was evaluated by a magistrate court who then issued recommendations to the district court, that procedural posture was coded as though a district court had ruled on a motion to dismiss.[197]

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190 Schissler v. Janus Henderson US (Holdings) Inc., No. 22-cv-02326, 2024 WL 233141, at *2 (D. Colo. Jan. 22, 2024); Schave v. CentraCare Health Sys., No. 22-cv-1555, 2023 WL 1071606, at *1 (D. Minn. Jan. 27, 2023).

191 *See, e.g.*, Dionicio v. U.S. Bancorp, No. 23-CV-0026, 2024 WL 1216519, at *4 (D. Minn. Mar. 21, 2024) (plaintiffs allege the services included were "bundled into a fungible commodity sold to mega plans in a competitive market"); Daggett v. Waters Corp., 731 F. Supp. 3d 121, 128 n.9, 137 (D. Mass. 2024).

192 *See, e.g.*, Mator v. Wesco Distrib., Inc., No. 2:21-CV-00403, 2022 WL 3566108, at *5 (W.D. Pa. Aug. 18, 2022) (alleging that other recordkeepers "provided identical or similar services of the same quality"), *vacated and remanded*, 102 F.4th 172 (3d Cir. 2024).

193 Coppel v. SeaWorld Parks & Ent., Inc., No. 3:21-cv-01430, 2023 WL 2942462, at *13 (S.D. Cal. Mar. 22, 2023).

194 No. 1:20-cv-1078, 2022 WL 19919753 (W.D. Mich. Aug. 23, 2022).

195 *Id.* at *1.

196 *See* Appendix A.

197 *E.g.*, Nohara v. Prevea Clinic Inc., No. 20-CV-1079, 2023 WL 9327202, at *5 (E.D. Wis. July 21, 2023).

B. *Methodological Limitations*

The Meaningful Benchmarks Analysis has four recognized limitations. First, the analysis includes cases dismissed prior to *Hughes* but heard on appeal after it. If *Hughes* revised some courts' understanding of the applicable law, their newfound perspective might have caused some reversals. That largely did not occur; rather, four of the six dismissals before *Hughes* were upheld after *Hughes* on appeal.[198] The remand of *Hughes* itself was one of the two cases reversed.[199]

Second, the analysis starts with trial and appellate court opinions, regardless of whether they were published,[200] instead of the filed complaints. This could be perceived as a limitation for two reasons. One is the potential for a complaint to have included fungibility or other allegations that were overlooked by the court (or simply not stated in the decision). The other is that there may be some potential for selection bias stemming from starting with trial and appellate court opinions. Specifically, it is possible that plaintiffs appealing the dismissal of their complaints are either more motivated or more financially able to pursue an appeal.[201] So either motivation and financial wherewithal may correspond to their ultimate success.

Two factors help mitigate limitations associated with analyzing courts' opinions instead of complaints and the risk that courts overlooked allegations made therein. First, the analysis concerns how courts construe clearly stated fungibility allegations—not how courts might ignore poorly articulated or ambiguous fungibility allegations. In that vein, if a court indiscriminately rejected such an argument without referring to it, including that decision in the dataset would arguably skew the analysis, which is meant to help clarify how courts decide 12(b)(6) motions on

198 The Supreme Court issued its *Hughes* decision on January 24, 2022. Hughes v. Nw. Univ., 142 S. Ct. 737 (2022). *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 283 (8th Cir. 2022), *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1170 (6th Cir. 2022), *Forman v. TriHealth, Inc.*, 40 F.4th 443, 453 (6th Cir. 2022), and *Albert v. Oshkosh Corp.*, 47 F.4th 570, 586 (7th Cir. 2022), were upheld on appeal. *Hughes v. Northwestern University*, 63 F.4th 615, 637 (7th Cir. 2023), and *Kong v. Trader Joe's Co.*, No. 20-56415, 2022 WL 1125667, at *2 (9th Cir. Apr. 15, 2022), were reversed on appeal.

199 *See Hughes*, 63 F.4th at 637.

200 *See* Pauline T. Kim, Margo Schlanger, Christina L. Boyd & Andrew D. Martin, *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J.L. & POL'Y 83, 97–98 (2009) (discussing the "systematic ways" in which published and unpublished opinions differ and the importance of unpublished opinions). Professor Kim et al. also note that studying only published district court opinions "creates significant risks of misleading results." *Id.* at 100.

201 Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 168 (2011) [hereinafter Reinert, *The Costs of Heightened Pleading*]. Conversely, perhaps some defendants undertaking such a costly and vigorous defense at the initial pleading stages did so trying to avoid potentially substantial exposure.

excessive fee claims.[202] Second, ten percent of the underlying complaints in the dataset were spot-checked. All cases in which the respective court's decision indicated that the plaintiff pled fungibility allegations without using those precise terms did, in their complaints, do just that. In other words, the courts' decisions neither inserted nor removed language important to plaintiffs' characterizations of their claims. Likewise, in every case checked in which the court's decision indicated that the complaint did not include allegations of fungibility, the respective complaint did not include those allegations.

Third, as with any study, a possibility exists that a sampling error occurred: some relevant cases might not have been identified. To minimize that possibility, in addition to the primary search, two other overlapping searches were performed.[203] Likewise, when cases that should have fallen within the dataset were referenced in other decisions, those were notated and cross-referenced to ensure that they had already been included in the dataset or, in one outlier instance, that it was added to the dataset.[204]

A fourth but minor limitation is that the analysis does not distinguish whether the complaints analyzed were the *original* complaints or amended complaints.[205] A court's scrutiny of a third amended complaint is higher than that of an original complaint. Also, for some cases, trial and appellate court orders, or magistrate and trial court orders, are analyzed in multiple separate entries even though they pertain to a single case. This method was employed to encompass as many judicial analyses as possible. Steps were taken to ensure no decision was double-counted. Professor Elizabeth McCuskey's work on submerged precedent supports these choices as it highlights the importance of trial court orders that often do not receive public attention yet shape substantive law.[206]

III. Findings of the Meaningful Benchmarks Analysis

Since the Supreme Court's issuance of *Hughes* in January 2022 to mid-2024, plaintiffs have filed many excessive fee claims. More than one

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202 This was not the case with every decision, however. Less than a handful of decisions, though longer than minute entries on a docket, were so short that they did not touch deeply on the plaintiffs' material allegations. *E.g., Kong*, 2022 WL 1125667, at *1; Seidner v. Kimberly-Clark Corp., No. 3:21-CV-867, 2022 WL 865890, at *2 (N.D. Tex. Mar. 23, 2022).

203 *See supra* notes 176–177 and accompanying text.

204 A small number of cases were not identified by their full style or case number. Though efforts were made to cross-reference those matters, it was not always possible to do so.

205 Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193, 203 (2014) (discussing their view that a focus on fatal grants of dismissal instead of dismissals allowing leave to amend would yield better results, but that the optimal approach is "tracking down what happens in those cases").

206 Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 516 (2016).

hundred of those have been subject to motions to dismiss and, as of the writing of this Article, plaintiffs have appealed nine dismissals.[207]

The Meaningful Benchmarks Analysis shows more than simple dismissal and reversal rates, though much can be gleaned from them. Among other findings, it reveals that fungibility and commoditization allegations are highly successful and more likely to be so in certain circuits, while "repackaged" claims for breach of the duty of loyalty for excessive fees are almost certain losers. Most notably, the analysis also shows that trial courts are applying the wrong pleading standard in many cases and that a startling number of trial courts fundamentally misapprehend retirement plan recordkeeping and administration services and fees. Miscomprehending these services and fees throws out of kilter courts' application of their "common sense" and "judicial experience" as contemplated by *Twombly* and *Iqbal*.[208]

A. *Outcome 1: Trial Courts Are Far More Likely to Be Reversed for Dismissing ERISA Excessive Fee Claims than Other Tort Claims*

Courts dismiss slightly fewer excessive fee claims than they allow to proceed: 45.05% of trial courts granted Rule 12(b)(6) motions to dismiss for excessive fee claims while 54.95% denied such motions, finding the complaints adequately stated a claim.[209] This dismissal rate closely aligns with the average tort litigation dismissal rate identified by Professor Alexander Reinert's 2015 study.[210]

Table 1: Outcome of Motions to Dismiss

Outcome	National Average Tort Claims	Excessive Fee Claims
Denied	53%	55%
Granted	47%	45%

Perhaps at least part of the reason for this relatively run-of-the-mill dismissal rate may be found in research demonstrating that increasingly rigorous pleading standards tend to not only encourage increased dismissal motions by defendants, but also plaintiff selection—meaning prospective plaintiffs, in anticipation of costly dismissal motions and barriers to accessing discovery, may elect not to pursue their claims.[211] As

[207] *See* Appendix A. Courts decide Rule 12(b)(6) motions to dismiss these claims, or appeals arising from such motions, at the rate of nearly four per month. *Id.*

[208] *See supra* notes 108–112 and accompanying text.

[209] *See* Appendix A.

[210] Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2146 tbl.3 (2015).

[211] Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2275 (2012).

discussed in Section I.C, *supra*, plaintiffs also seem to enhance their pleading detail trying to satisfy those higher standards.[212] But these dismissal rates are far from telling the whole story.

Among the most significant findings of the Meaningful Benchmarks Analysis is that appellate courts reviewing dismissals of excessive fee claims reversed the dismissals in 44.44% of cases,[213] a reversal rate four times higher than the average reversal rate.[214] In private civil litigation to which the United States is not a party, federal circuit courts reverse only 11.70% of the trial court's decisions.[215] Thus, it would seem that in the appellate courts' view, trial courts are regularly misapplying the pleading and dismissal standards. As Professor McCuskey notes, district courts are "liberate[d]" from much that constrains appellate courts—such as increased public visibility and the demands of precedent binding themselves as well as lower courts.[216] Freedom may also correlate to a less disciplined application of precedent at the trial court level than is observed at the appellate level.

Table 2: Outcome of Appeals of Dismissals

Appellate Outcome	National Average	Excessive Fee Claims
Upheld	88.30%	55.56%
Reversed	11.70%	44.44%

The overwhelming majority of dismissals came from the Courts of Appeals for the Third, Seventh, Eighth, and Tenth Circuits. This finding highlights the stark nature of the circuit split on applicable pleading standards. The need to resolve this split is particularly great given the potential for divergent outcomes among participants in the same plan. In other words, a plan participant and employee of a company might find her complaint dismissed while her colleague who filed an identical complaint in another circuit might be found to have sufficiently stated a claim (and thus be allowed to proceed to discovery). As ERISA excessive fee claims are brought in a representative capacity on behalf of the plan,[217] it is easy to envision thorny judicial estoppel issues if such a scenario arose.

[212] *See supra* Section I.C.

[213] *See* Appendix A.

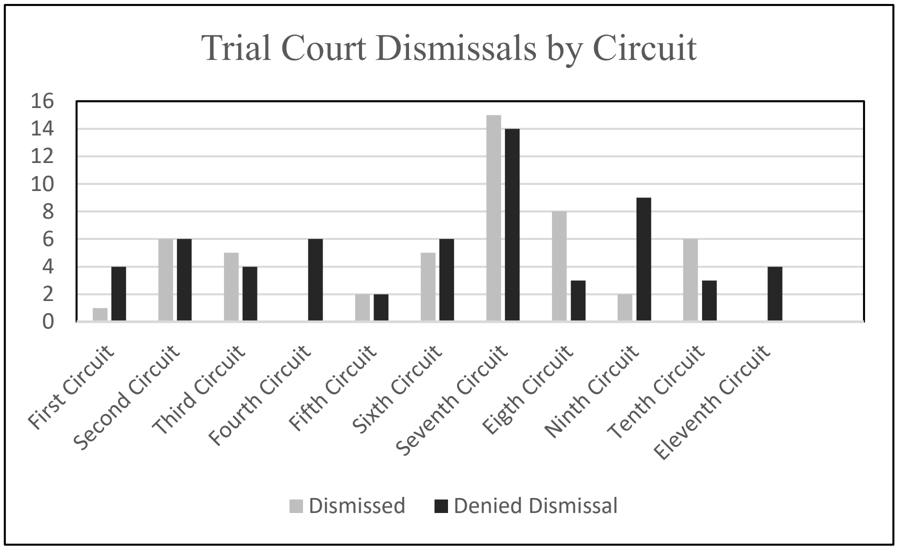
[214] Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 EMORY L.J. ONLINE 1035, 1037 tbl.1 (2019).

[215] *Id.*

[216] *See* McCuskey, *supra* note 206, at 546–47.

[217] Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142 n.9, 144 (1985); LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 256 (2008).

Figure 1: Dismissals by Circuit



At least facially, these outcomes do not appear to flow from a particular interpretation of *Twombly* and *Iqbal* or from any circuit's stricter reading of the two. Rather, as Professor Adam Steinman notes, several circuits indicated *Twombly* and *Iqbal* had not done away with notice pleading or imposed a "specific facts" requirement.[218] Ironically, the trial courts least friendly to plan participant plaintiffs' excessive fee claims in this study come from the same circuits that pronounced *Twombly* and *Iqbal* had not diverged from Rule 8's notice pleading requirement.[219]

B. *Outcome 2: Courts Fundamentally Misapprehend the Nature of 401(k) Recordkeeping Fees*

One of the most consequential and pronounced findings of the Meaningful Benchmarks Analysis is that courts regularly apply a so-called you-get-what-you-pay-for ("YGWYPF") rationale in evaluating the sufficiency of complaints, hypothesizing that plans with higher fees must offer better or more comprehensive services.[220] In at least one out of five cases, courts rationalized that higher fees were related to higher quality or

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218 Adam N. Steinman, *Notice Pleading in Exile*, 41 CARDOZO L. REV. 1057, 1065–66 (2020) (discussing opinions from the Seventh, Eighth, and Tenth Circuits that indicate their view of *Twombly* and *Iqbal* as one in which notice pleading remains alive, detailed factual allegations are not required, and a focus on minutiae is not intended to prevent plaintiffs' access to justice).

219 *See supra* Figure 1.

220 *See infra* notes 223–226.

more comprehensive services.[221] Courts employing such a rationale were *more than ten times more likely* to dismiss a case than not.[222]

For example, the District Court for the Eastern District of Pennsylvania in *Krutchen v. Ricoh USA, Inc.*[223] erroneously rationalized that different plans' "unique needs" could be a fiduciary's reason for "*reasonably choosing to pay more for higher quality services*."[224] Similarly, the District Court for the Western District of Michigan in *Miller v. Packaging Corp. of America*[225] reasoned: "It is common sense that a recordkeeper who provides more services per participant will generally charge a higher fee."[226] Perhaps most troubling is that these courts are disregarding their obligation to draw reasonable inferences in favor of the nonmovant.[227] For example, when one trial court wrote, "Plaintiffs may have identified two apples, but one could be a Honeycrisp and the other a Granny Smith,"[228] the use of the word "could" was a telltale sign that the court drew an inference in favor of the defendant.

Table 3: Outcome of Motions to Dismiss Applying YGWYPF Rationale

Outcome	General Excessive Fee Claims	YGWYPF Rationale
Denied	61 (54.95%)	2 (8.70%)
Granted	50 (45.05%)	21 (91.30%)
Total	111	23

Simply put, courts rationalizing that increased fees necessarily equate to enhanced services are wrong.[229] To date, no literature supports the theory that paying higher fees automatically equates to receiving enhanced or expanded services.[230] Indeed, no scholarship suggests that plan participants derive *any* benefit from paying higher recordkeeping service fees. The benefit to interested service providers receiving higher payments than their competitors for the same automated services,

221 *See* Appendix A.

222 *See id.*

223 No. 22-678, 2022 WL 16950264 (E.D. Pa. Nov. 15, 2022).

224 *Id.* at *3 (emphasis added).

225 No. 1:22-cv-271, 2023 WL 2705818 (W.D. Mich. Mar. 30, 2023).

226 *Id.* at *5; *see also* Nohara v. Prevea Clinic Inc., No. 20-CV-1079, 2023 WL 9327202, at *4 (E.D. Wis. July 21, 2023) (considering whether "plaintiffs may not have received superior services that would justify the higher fees").

227 *See* Phillips v. Cnty. of Allegheny, 515 F.3d 224, 232–33 (3d Cir. 2008) (discussing why *Twombly* did not alter this established principle).

228 Mator v. Wesco Distrib., Inc., 2:21-CV-00403, 2022 WL 1046439, at *6 (W.D. Pa. Apr. 7, 2022).

229 *See* Gil-Bazo & Ruiz-Verdú, *supra* note 74, at 2178–79.

230 *See supra* notes 73–80 and accompanying text.

however, is apparent. Yet courts routinely theorize, without support, that some benefit *must* be conferred in correlation with the higher fees. Those courts continue to dismiss claims based on that misunderstanding.

This outcome reflects the most flawed applications of the "common sense" and "judicial experience" components of *Twombly* and *Iqbal*. Many courts do not have judicial experience with recordkeeping services and the associated fees. In lieu of experience, they seemingly substitute what they see as common sense, embodied in the adage "you get what you pay for." In reality, paying more does not always equate to receiving more.

C. *Outcome 3: Fungibility Allegations Work . . . In Most Circuits*

It's no secret to retirement industry professionals and fiduciaries that recordkeeping services are fungible. As one 401(k) administrative service provider wrote, "Custody and recordkeeping [services] are 'commodity' services. Like any commodity, given materially equal quality, the key benchmark for these services is price. The cheaper you can find competent custody and recordkeeping services, the better for participants."[231]

Post-*Hughes*, plaintiffs began to assert the fungibility and interchangeability of recordkeeping services. Just under 39% of plaintiffs' complaints evaluated in the Meaningful Benchmarks Analysis contained fungibility allegations.[232] At the trial court level, nearly 70% of cases pleading fungibility of RK&A services survived motions to dismiss.[233] But only about fifty-five percent of complaints lacking fungibility allegations survived dismissal motions.[234]

Table 4: Outcome of Motions to Dismiss Complaints Including Fungibility Allegations

Outcome	General Excessive Fee Claims	Fungibility Claims
Denied	61 (54.95%)	30 (69.77%)
Granted	50 (45.05%)	13 (30.23%)
Total	111	43

The strongest excessive fee claims asserted that recordkeeping services are fungible and primarily distinguishable by cost. The following

231 Eric Droblyen, *Evaluating 401(k) Providers: Separating Commodity from Value-Added Services*, EMP. FIDUCIARY (Jan. 26, 2023), https://perma.cc/PC36-MUR5.

232 *See* Appendix A.

233 *See id.*

234 *See id.*

is one court's discussion of how successful fungibility allegations were pled:

> Plaintiffs allege the fungible nature of RK&A fees—that the Plan received a standard bundled RK&A services with "nearly identical level and quality to other recordkeepers who service other mega plans." Plaintiffs state that the market . . . is "price competitive" because "recordkeepers offer the same bundles and combinations of services as their competitors." That any differences are minor and immaterial to the price comparisons in virtually all cases.[235]

Unsurprisingly, many successful plaintiffs further pled that the fees "were excessive relative to the recordkeeping services rendered."[236] Courts were more likely to dismiss complaints that failed to do so. For example, in *Boyette v. Montefiore Medical Center*,[237] the court rejected a fungibility characterization, stating "plaintiffs' allegation that all recordkeepers offer the same range of services does not mean that all plans employing a particular recordkeeper receive an identical subset of services within that range."[238] Also, with a single exception,[239] claims including fungibility allegations were exclusively rejected by trial courts in the Third, Sixth, and Seventh Circuits. Two of those dismissals were reversed on appeal.[240]

D. *Outcome 4: Selecting Higher-Cost Retail Funds Costs Fiduciaries*

Though not a primary inquiry in the study, a secondary observation was that claims asserting imprudent retail share classes offered by fiduciaries, instead of institutional class shares, were more likely to survive dismissal than claims that do not.[241] A "retail class share" claim asserts that fiduciaries offered plan participants higher-cost retail-class

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235 Tolomeo v. R.R. Donnelley & Sons, Inc., No. 20-cv-7158, 2023 WL 3455301, at *4 (N.D. Ill. May 15, 2023) (citations omitted) (quoting Fourth Amended Complaint ¶¶ 55, 58, *Tolomeo*, 2023 WL 3455301 (No. 20-cv-7158)).

236 *E.g.*, Glick v. ThedaCare, Inc., No. 20-CV-1236, 2023 WL 9327209, at *4 (E.D. Wis. July 20, 2023) (internal quotation marks omitted) (quoting Hughes v. Nw. Univ., 63 F.4th 615, 632 (7th Cir. 2023)); Coyer v. Univar Solutions USA Inc., No. 1:22 CV 0362, 2022 WL 4534791, at *5 (N.D. Ill. Sept. 28, 2022) (providing, similarly, "that the recordkeeping fees were excessive relative to the services rendered" (internal quotation marks omitted) (quoting Albert v. Oshkosh Corp., No. 21-2789, 2022 WL 3714638, at *6 (7th Cir. 2022))).

237 No. 22-cv-5280, 2023 WL 7612391 (S.D.N.Y. Nov. 13, 2023).

238 *Id.* at *6 (internal quotation marks omitted) (quoting Singh v. Deloitte LLP, 650 F. Supp. 3d 259, 267 (S.D.N.Y. 2023)).

239 Hagins v. Knight-Swift Transp. Holdings, Inc., No. CV-22-01835, 2023 WL 3627478, at *5–7 (D. Ariz. May 24, 2023).

240 Hughes v. Nw. Univ., 63 F.4th 615, 637 (7th Cir. 2023); Mator v. Wesco Distrib., Inc., 102 F.4th 172, 191 (3d Cir. 2024).

241 The specific degree of success enjoyed by these claims was not calculated. Rather, this finding was developed by filtering out cases coded to have included these claims that survived dismissal and then evaluating which counts survived.

investment options like mutual funds when otherwise identical lower-cost institution-class products were available.[242]

A "share class" investment is one in which a group of investors invest.[243] An "institutional" share class is generally able to pay a discounted rate due to the large number of investors.[244] A "retail" share class is one available to the general public in which general members of the public pay the same fees, which are typically higher than those of an institutional share class.[245] This is akin to purchasing a smaller package at a higher price per ounce when a larger, lower-cost-per-ounce option is equally available at the grocery store.

Table 5: Outcome of Motions to Dismiss Complaints Alleging Retail Share Claims

Appellate Outcome	General Excessive Fee Claims	Excessive Fee with Retail Share Claims
Denied	61 (54.95%)	16 (57.14%)
Granted	50 (45.05%)	12 (42.86%)
Total	111	28

It is unremarkable that complaints containing such powerful allegations of malfeasance—namely, the fiduciary needlessly elected to pay more for the same product when a lower bulk price was available—would be more likely to survive dismissal. For example, it would be difficult to assert that a consumer with sufficient funds to buy either a twelve-ounce box of cereal at $0.30 per ounce or a twenty-ounce box at $0.23 per ounce acts reasonably in paying more per ounce. Of note, courts still dismiss a relatively high number of complaints containing these allegations.

E. *Outcome 5: Repacked Imprudence Claims Are Not Viable Breach of Loyalty Claims*

At least fifteen percent of cases in the study framed the claims as duty of loyalty breaches without pleading essential aspects of a violation of the duty of loyalty.[246] The duty of loyalty impels fiduciaries to act with a sole

242 *See, e.g.*, Sacerdote v. N.Y. Univ., 9 F.4th 95, 108–10 (2d Cir. 2021); Davis v. Wash. Univ. in St. Louis, 960 F.3d 478, 483 (8th Cir. 2020) (plaintiffs "clear[ed] th[e] pleading hurdle" by alleging that defendants offered retail-class shares rather than available institutional-class shares).

243 Albert v. Oshkosh Corp., 47 F.4th 570, 574 (7th Cir. 2022).

244 *Id.*

245 *Id.*

246 *See* Appendix A. Although breach of duty of loyalty claims were not initially included in the Meaningful Benchmarks Analysis, upon initial review of a few cases in the dataset, a surprising number of excessive fee claims were identified as being pled not only as breaches of the duty of

focus on beneficiaries' interests,[247] and a plaintiff may state a claim for breach of the duty of loyalty by alleging enough facts to "support[] an inference that the defendant acted . . . [to] provid[e] benefits to itself or someone else" at the plan participants' expense.[248] The fiduciaries' "motivation" underlying their conduct is paramount.[249] But it is well established that fiduciaries' conduct that "incidentally benefits" fiduciaries is not disloyal so long as, "after careful and impartial investigation, [the fiduciary] reasonably conclude[s]" the action is in the participants' best interest.[250]

These matters stand in contrast to cases in which the excessive fees borne by plan participants were allegedly related to legitimate conflicts of interest or circumstances in which the fiduciary stood to gain from the excessive fees.[251] These repackaged disloyalty claims were largely unsuccessful,[252] and in at least one instance, the plaintiffs withdrew them.[253] In other instances, plaintiffs seemed to confuse the duties of prudence and loyalty, or at least how to articulate them: One decision discussing a complaint stated that plaintiffs alleged "that a loyal fiduciary (i.e., one who was focused solely on the participants' interests) would not have included *all* [defendant's] Funds in the investment menu because of the high fees without commensurate performance. They further allege that a prudent fiduciary likewise would not have done so."[254] To be sufficiently stated, such allegations would need to be clearly articulated as fiduciary acts done self-interestedly. In at least one case, a circuit court of

prudence but also "repackaged" as breaches of the duty of loyalty. *See, e.g.*, Guyes v. Nestle USA, Inc., No. 20-CV-1560, 2022 WL 18106384, at *6 (E.D. Wis. Nov. 21, 2022); Glick v. Thedacare Inc., No. 20-C-1236, 2022 WL 3682863, at *7 (E.D. Wis. Aug. 25, 2022) ("Plaintiff's breach of the duty of loyalty claim is based on the same allegations as the breach of fiduciary duty claim. Plaintiffs must do more than recast allegations of purported breaches of fiduciary duty as disloyal acts."), *R. & R. adopted*, No. 20-C-1236, 2022 WL 16924188 (E.D. Wis. Nov. 14, 2022). Because breach of fiduciary duty of loyalty claims were not within the original scope of the analysis, this Article does not produce comprehensive statistics on these claims but rather sets a floor with the aim of encouraging future study.

247 Pegram v. Herdrich, 530 U.S. 211, 223–24 (2000).

248 Kohari v. MetLife Grp., Inc., No. 21 Civ. 6146, 2022 WL 3029328, at *8 (S.D.N.Y. Aug. 1, 2022) (internal quotation marks omitted) (quoting Ferguson v. Ruane Cunniff & Goldfarb Inc., No. 17-cv-6685, 2019 WL 4466714, at *4 (S.D.N.Y. Sept. 18, 2019)).

249 Johnson v. PNC Fin. Servs. Grp., Inc., No. 2:20-CV-01493, 2022 WL 973581, at *7 (W.D. Pa. Mar. 31, 2022) (quoting Perez v. First Bankers Tr. Servs, Inc., 210 F. Supp. 3d 518, 534 (S.D.N.Y. 2016)).

250 Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982).

251 *See, e.g.*, Anderson v. Coca-Cola Bottlers' Ass'n, No. 21-2054, 2022 WL 951218, at *12 (D. Kan. Mar. 30, 2022) (discussing plaintiff's allegations that defendant acted self-interestedly by including and failing to remove its own, higher cost funds "while it also served as recordkeeper").

252 *E.g.*, Albert v. Oshkosh Corp., 47 F.4th 570, 583 (7th Cir. 2022); Guyes v. Nestle USA, Inc., No. 20-CV-1560, 2022 WL 18106384, at *6 (E.D. Wis. Nov. 21, 2022).

253 Nohara v. Prevea Clinic Inc., 623 F. Supp. 3d 951, 959 (E.D. Wis. 2022).

254 Schissler v. Janus Henderson US (Holdings) Inc., No. 1:22-cv-02326, 2023 WL 6902050, at *3 (D. Colo. Sept. 7, 2023).

appeals appeared to have fundamentally misstated the duty of loyalty—for example, in *Albert v. Oshkosh Corp.*,[255] the Court of Appeals for the Seventh Circuit explained, "Albert has not identified any comparator investment advisors. Without allegations suggesting that the fees SAI charged are unreasonable in light of available alternatives, Albert has failed to state a claim for breach of the duty of loyalty."[256] This analysis would have more appropriately centered on the duty of prudence.[257] Because "the duty of loyalty and the duty of prudence . . . are interrelated and overlapping,"[258] some correlation between the two is to be expected in complaints. But the Meaningful Benchmarks Analysis's findings suggest: (1) a fundamental miscomprehension by plaintiffs (and a court) of ERISA fiduciary duties (including the distinction between the duty of prudence and the duty of loyalty); (2) a mistaken belief by plaintiffs and their counsel that more counts, even if skeletal and likely to lose, create more leverage;[259] or (3) simply sloppy pleading or decision drafting. Plan participant plaintiffs asserting disloyalty claims should distinguish them from imprudence claims or decline to clutter their complaints with a losing count.

F. *Other Notable Observations*

The data from the Meaningful Benchmarks Analysis also yields insights which, although not the focus of the analysis, provide a springboard for future potential research and can inform practitioners, fiduciaries, and courts.[260] First, many plaintiffs responding to motions to dismiss either did not seek leave to amend their complaints[261] or failed to comply with the Federal Rules when doing so.[262] In several instances, courts implied that had a valid motion for leave to amend been sought, it would have been considered.[263] Plaintiffs responding to dismissal motions

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255 47 F.4th 570 (7th Cir. 2022).

256 *Id.* at 583.

257 *See supra* notes 30–36 and accompanying text.

258 Leber v. Citigroup 401(k) Plan Inv. Comm., 129 F. Supp. 3d 4, 13 (S.D.N.Y. 2015).

259 Some counsel may equate more counts to a greater settlement leverage, while a more nuanced perspective may be that including a count likely to be dismissed might bolster a court's hesitation to dismiss viable causes of action.

260 Another line of inquiry meriting study is whether imprudence claims for excessive fees are harder to plead than other breach of fiduciary duty of prudence claims. Likewise, comparing ERISA excessive fee claims to other excessive fee claims like those in securities litigation may be revelatory.

261 *See* Appendix A.

262 *See id.*

263 Munt v. WEC Energy Grp., Inc., 728 F. Supp. 3d 957, 974–75 (E.D. Wis. Mar. 29, 2024); Guyes v. Nestle USA, Inc., No. 20-CV-1560, 2023 WL 9321363, at *6 (E.D. Wis. Aug. 23, 2023), *R. & R. adopted*, No. 20-C-1560, 2024 WL 218420 (E.D. Wis. Jan. 19, 2024); Johnson v. Parker-Hannifin, Corp., No. 1:21-CV-00256, 2023 WL 8374525, at *4 (N.D. Ohio Dec. 4, 2023).

should, therefore, include in the alternative a proper request for leave to amend their complaints. Some trial courts also wrongly denied leave to amend complaints,[264] ignoring Rule 15(a)(2)'s requirement that courts "should freely" grant leave to amend.[265] In *Wilcox v. Georgetown University*,[266] the court denied leave to amend based on a perceived inadequacy of the allegations in the live complaint, not because of a perceived inability to include more robust allegations.[267] Similarly, in a subsequent opinion after the court rejected a fungibility characterization in *Boyette v. Montefiore Medical Center*,[268] the court denied the plaintiffs' motion for leave to amend their dismissed complaint. The court's ruling appears to stand for the proposition that without identifying comparators providing an "identical subset of services" to those received by the plan at issue, no set of facts pled would have survived a motion to dismiss for failure to state a claim.[269] No rule of civil procedure or precedent requires clearing such a hurdle before granting leave to amend a complaint.

Second, plaintiffs alleged that fiduciaries acted imprudently when failing to investigate the availability of lower cost collective investment trusts ("CITs") and offer them as investment options.[270] These claims generally failed but should be watched as they evolve over time, as little case law involving CITs or their corresponding service fees exists. Courts overwhelmingly found CITs too dissimilar from other investment products to allow meaningful comparisons, either of the products

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264 *See*, *e.g.*, Wilcox v. Georgetown Univ., No. 18-0422, 2023 WL 2734224, at *16 (D.D.C. Mar. 31, 2023) (denying leave to amend "[b]ecause plaintiffs have not included the facts needed to support an inference that the plans added as examples are sufficiently similar to give rise to an inference of imprudence on [defendant]'s part, it would be futile to allow plaintiffs to amend the complaint to include this information" and noting that "other district courts have let substantially similar allegations proceed"); Boyette v. Montefiore Med. Ctr., 22-cv-5280, 2024 WL 1484115, at *6 (S.D.N.Y. Apr. 5, 2024) (denying leave to amend where, although plaintiffs identified eight alleged comparators to show the plan at issue was paying higher recordkeeping fees than its peers, plaintiffs' failure to "plead with specificity what services provided by the recordkeepers for the eight comparator plans were the same as those provided by the Plan's recordkeepers" rendered the complaint insufficient for failure to contain "the requisite 'apples to apples' comparison").

265 FED. R. CIV. P. 15(a)(2).

266 No. 18-0422, 2023 WL 2734224 (D.D.C. Mar. 31, 2023).

267 *Id.* at *16.

268 22-cv-5280, 2024 WL 1484115 (S.D.N.Y. Apr. 5, 2024).

269 *Id.* at *6.

270 *See, e.g.*, Garcia v. Alticor, Inc., No. 1:20-cv-1078, 2022 WL 19919753, at *4 (W.D. Mich. Aug. 23, 2022); Riley v. Olin Corp., No. 4:21-cv-01328, 2022 WL 2208953, at *6 (E.D. Mo. June 21, 2022), *reconsideration denied*, No. 4:21-cv-01328, 2023 WL 371872 (E.D. Mo. Jan. 24, 2023). "Collective investment trust funds are funds managed by a bank or trust company that operate in a manner very similar to a mutual fund, but which are not subject to the same securities act rules regarding registration and disclosure as a mutual fund." 401(K) ANSWER BOOK, *supra* note 40, at Q 4:116. For a comprehensive overview of CITs, see Natalya Shnitser, *Overtaking Mutual Funds: The Hidden Rise and Risk of Collective Investment Trusts*, 134 YALE L.J. 1620 (2025).

themselves or the recordkeeping services they received.[271] Whether this conclusion is accurate is questionable when considered alongside other faulty rationales applied by some courts in excessive fee cases. Litigation regarding CITs and their fees is likely to grow with their increased popularity and will accordingly merit evaluation. In one case focused on CITs' fees, for example, plaintiffs alleged that defendant fiduciaries imprudently failed to divest plans of poorly performing CITs that "charged excessive fees" and replace those investments with other CITs.[272]

Third, another potential trend that merits further inquiry is how courts perceive RK&A service fee reductions. Some courts seem to look favorably upon reductions of recordkeeping fees before litigation.[273] Though that in and of itself is not problematic, the concern is that those courts may myopically overlook material evidence supporting imprudence allegations. In other words, fee reductions may be evidence of breaches of fiduciary duty because they reflect a point in time in which fees may have been excessive. If, during a time of heightened inflation, fees are being reduced by a significant number of basis points, but services are not materially being reduced, that strongly suggests that fiduciaries were previously charging potentially unreasonable fees. Defendants asserting an "I charge you less now than when I *drastically* overcharged you" position should not be lauded by courts, nor should that fact serve as an indicator of prudence except with respect to failure to monitor claims.[274]

Finally, the study identified some substantial—and somewhat surprising—derivations of claims. One example involved a novel assertion that higher-cost retail share classes of certain funds should have been offered because the net expense of those funds was lower than the overall

271 *E.g.*, Matney v. Barrick Gold of N. Am., 80 F.4th 1136, 1153 (10th Cir. 2023); Lalonde v. Mass. Mut. Ins. Co., 728 F. Supp. 3d 141, 157 (D. Mass. 2024); *Riley*, 2022 WL 2208953, at *6.

272 Evans v. Associated Banc-Corp, No. 21-C-60, 2022 WL 4638092, at *2–3 (E.D. Wis. Sept. 30, 2022).

273 *See, e.g.*, Cotter v. Matthews Int'l Corp., No. 20-CV-1054, 2023 WL 9321285, at *5 (E.D. Wis. Aug. 9, 2023) ("This inconsistent methodology is especially problematic given that the Matthews International plan significantly reduced its recordkeeping fees over those five years. For example, in 2014, the plan paid $207 in recordkeeping fees per plan participant; however, in 2018, its fees were only $62 per participant."); *Matney*, 80 F.4th at 1156 (stating that in light of the "recordkeeping fees [becoming] cheaper over time," the plaintiff had failed to adequately allege facts supporting "a reasonable inference" of imprudence).

274 *See Cotter*, 2023 WL 9321285, at *5; *Matney*, 80 F.4th at 1156. While it could be asserted that these facts fall under Federal Rule of Evidence 407 and may not be used as evidence of negligence, they would be admissible evidence of the availability of other, more cost-effective service providers.

costs of institutional shares.[275] Though unsuccessful to date, this line of "inverted" pleading may foreshadow a new trend in fiduciary litigation.[276]

IV. Implications of the Meaningful Benchmarks Analysis

What satisfies the pleading requirements for asserting an excessive fee claim depends on the circuit and sometimes the individual trial court. Ascertaining fee reasonableness entails comparing the fees at issue with those incurred by other similarly situated plans—what courts call comparing meaningful benchmarks.[277] Lower courts drastically differ in the standard they apply and the procedural stage in which they perform this comparison. Specifically, some lower courts assess the sufficiency of comparators at the pleading stage and apply a probability pleading standard that drastically diverges from precedent. Others view the sufficiency of comparators as fact questions best-suited for post-discovery evaluation. The implications of this divergence in the timing of assessing benchmarks and other conclusions flowing from the Meaningful Benchmarks Analysis are many, far-reaching, and normatively undesirable.

A. *Conclusion 1: Probability Pleading Requirements Render "Meaningful Benchmarks" Meaningless*

As the Court of Appeals for the Eighth Circuit explained in *Matousek v. MidAmerican Energy Co.*,[278] to push "an inference of imprudence from possible to plausible requires providing 'a sound basis for comparison—a meaningful benchmark'—not just alleging that 'costs are too high, or returns are too low.'"[279] In theory, plaintiffs need not plead facts to which they have "no access";[280] instead, they may avoid dismissal for failure to state a claim by pleading "circumstantial evidence" suggesting the fiduciary employed an imprudent process.[281] Then, with discovery,

275 *See, e.g.*, Peck v. Munson Healthcare, No. 1:22-cv-294, 2022 WL 17260807, at *8 (W.D. Mich. Nov. 9, 2022).

276 *See id.*

277 Smith v. CommonSpirit Health, 37 F.4th 1160, 1169 (6th Cir. 2022) (plaintiffs must allege "that the [recordkeeping] fees were excessive relative to the services rendered" and provide comparative context).

278 51 F.4th 274 (8th Cir. 2022).

279 *Id.* at 278 (quoting Davis v. Wash. Univ. in St. Louis, 960 F.3d 478, 484 (8th Cir. 2020)).

280 Allen v. GreatBanc Tr. Co., 835 F.3d 670, 678 (7th Cir. 2016).

281 Fleming v. Rollins, Inc., 655 F. Supp. 3d 1243, 1257 (N.D. Ga. 2023) (noting that "high management fees" qualify as "circumstantial evidence" suggesting imprudence).

"plaintiffs will be free to compare whatever steps [the fiduciary] actually took with the procedures that a prudent fiduciary would use."[282]

In practice, however, some courts require plaintiffs to plead a level of detail that far exceeds *Twombly* and *Iqbal*'s strictures and could be equated to compelling plaintiffs to plead clear and convincing evidence.[283] District courts in the Third, Seventh, Eighth, and Tenth Circuits do exactly that (though the appellate courts are often less stringent in construing pleading requirements).[284] As an extreme example, some of those courts require plaintiffs to compare "identically situated plans," stating that a meaningful benchmark cannot exist without comparators of "both the quality and type of recordkeeping services" at issue.[285] These courts wrongly view the question of comparators not as a fact issue but rather an elemental requisite for pleading a viable cause of action.[286]

Though "[p]rudence is largely contextual" and "defies categorization,"[287] many courts require pleading allegations of imprudence and underlying comparators with such excruciating precision that they could rightly be said to require evidence. As mentioned above, one district court rejected "a side by side list comparison" that it deemed to amount to a situation where "Plaintiffs may have identified two apples, but one could be a Honeycrisp and the other a Granny Smith."[288] The Court of Appeals for the Third Circuit, however, reversed the dismissal.[289] Though extreme, this rationale was no outlier; the list of comparator types courts reject is long.[290]

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282 *Allen*, 835 F.3d at 679.

283 "Clear and convincing evidence" is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials . . . ." *Clear and Convincing Evidence*, BLACK'S LAW DICTIONARY (12th ed. 2024).

284 *See supra* Section III.A.

285 Krutchen v. Ricoh USA, Inc., No. 22-678, 2022 WL 16950264, at *3 (E.D. Pa. Nov. 15, 2022) ("A meaningful benchmark must include both the quality and type of recordkeeping services provided by comparator plans to show that *identically situated plans* received the same services for less." (emphasis added)). *But see* Dionicio v. U.S. Bancorp, No. 23-CV-0026, 2024 WL 1216519, at *3 (D. Minn. Mar. 21, 2024) (stating that "plans need not be numerically identical to be similarly sized" to be compared as a meaningful benchmark).

286 *See, e.g.*, Laabs v. Faith Techs., Inc., No. 20-CV-1534, 2022 WL 17418358, at *5 (E.D. Wis. Nov. 9, 2022) ("[T]he question of whether an ERISA plaintiff put forward an appropriate comparator—that is, a 'meaningful benchmark'—is not a fact issue that necessitates discovery, but rather is a threshold issue that must be addressed at the pleadings stage." (citing Albert v. Oshkosh Corp., 47 F.4th 570, 581–82 (7th Cir. 2022))), *R. & R. adopted*, No. 20-C-1534, 2022 WL 17417583 (E.D. Wis. Dec. 5, 2022).

287 Walter v. Kerry Inc, No. 21-cv-0539, 2022 WL 1720095, at *2 (E.D. Wis. May 27, 2022).

288 Mator v. Wesco Distrib., Inc., 2:21-CV-00403, 2022 WL 1046439, at *6 (W.D. Pa. Apr. 7, 2022).

289 Mator v. Wesco Distrib., Inc., 102 F.4th 172, 191 (3d Cir. 2024).

290 For example, the Middle District of North Carolina criticized "allegations comparing the total recordkeeping fees" plaintiffs incurred with "direct fees paid to other recordkeepers" as "an inappropriate and irrelevant comparison." Garnick v. Wake Forest Univ. Baptist Med. Ctr., 629 F. Supp.

Consider the example of *Laabs v. Faith Technologies, Inc.*,[291] where the plaintiff asserted that "[a]n *identical* product was available with higher crediting rates and lower spread fees," but the fiduciary instead chose the same product that "consistently charged the [plan participant] employees on average 119 basis points more and, consequently, returned 119 basis points less than *the very same fund offered by Prudential to another similarly situated retirement plan*."[292] Despite alleging that the investment lost plan participants around $2 million in retirement savings and that the fiduciaries were able to—and should have—negotiated rates closer to that of the less expensive product, the magistrate found the plaintiff "failed to sufficiently allege a meaningful benchmark."[293] The trial court agreed and adopted the magistrate's findings.[294]

In *Mator v. Wesco Distribution, Inc.*,[295] if the plaintiffs' allegations in their amended complaint (i.e., that eleven similarly sized and situated plans engaged recordkeeping services of similar kind and quality but paid sixty-six to eighty percent less for those services than plaintiffs paid for the services they received) were proven as true, a jury could well have found by a preponderance of the evidence that the fiduciary had breached its duty of prudence.[296] Yet, the court dismissed this case for failure to state a claim before the plaintiffs had the opportunity to obtain discovery or make an evidentiary showing.[297] Had plaintiffs or their counsel been financially unable to support an appeal, justice would have been denied to all plan participants and their retirement funds would have been needlessly diminished.[298] At time of this Article's writing, however, discovery is ongoing in the case, and plaintiffs have the opportunity to try to prove their fiduciary imprudence claims.[299]

3d 352, 365 (M.D.N.C. 2022); *see also* Cotter v. Matthews Int'l Corp., No. 20-CV-1054, 2023 WL 9321285, at *5 (E.D. Wis. Aug. 9, 2023) (requiring that comparator plans be "similarly sized" to such a degree that, when it determined such requirement was not satisfied, the court rejected the complaint for failing to allege any "basis" that "recordkeeping fees were excessive relative to the services rendered").

291 No. 20-CV-1534, 2023 WL 9321358 (E.D. Wis. Aug. 30, 2023).

292 *Id.* at *8 (first alteration in original) (internal quotation marks omitted) (quoting Plaintiffs' Amended Complaint ¶¶ 132–33, *Laabs*, 2023 WL 9321358 (No. 20-CV-1534)).

293 *Id.*

294 Laabs v. Faith Techs., Inc., No. 20-C-1534, 2024 WL 218418, at *1–2 (E.D. Wis. Jan. 19, 2024).

295 102 F.4th 172 (3d Cir. 2024).

296 *See Preponderance of the Evidence*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("The greater weight of the evidence . . . . This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.").

297 *Mator*, 102 F.4th at 182–83.

298 *Id.* at 191.

299 *Id.*

When courts require astonishing levels of specificity to be pled prediscovery, plaintiffs feel compelled to draft complaints replete with extensively investigated, hard-to-come-by, and costly detail. The more specific the information required to be pled, the costlier benchmarking becomes.[300] Still, some courts remain untroubled by mandating plaintiffs and their counsel spend cost-prohibitive amounts to simply craft complaints (and often to appeal unwarranted dismissals). As a result, plaintiffs go to great lengths to identify publicly available information, including scouring other excessive fee litigation dockets and including references to expert testimony from those cases concerning the reasonableness of fees in an attempt to bolster their factual allegations.[301] Plaintiffs' counsel seem to have determined this a necessary prerequisite to draft a complaint, though this type of evidence would generally be developed in fact and expert discovery. But going through normal litigation processes is not an option for plaintiffs who must effectively develop the bulk of their cases before filing their complaints.

The rise in protective orders decreases plaintiffs' access to what may have otherwise been publicly available information,[302] and the inadequacy of required disclosures exacerbates the information asymmetry plaintiffs face.[303] Equally problematic is that courts applying these standards are also employing flawed "you get what you pay for" rationales, displaying a fundamental misunderstanding of retirement plan RK&A services and fees. Moreover, they do so while ignoring Federal Rule of Civil Procedure 8, *Twombly*, and *Iqbal*. Sections IV.B and IV.C, *infra*, discuss these latter two concerns.

In contrast, courts in the First, Second, Fourth, and Fifth Circuits have rejected the view that assessing the comparability of benchmarks is an appropriate pleading threshold. Those circuits adhere more closely to *Twombly* and *Iqbal* and rule that determining appropriate comparators is

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300 *See* 401(K) ANSWER BOOK, *supra* note 40, at Q 4:106 ("The least expensive data to obtain are usually generic in nature, so there may be ranges of fees for plans of certain sizes that do not take into account differences in plan design, investment offerings, or other factors that may influence cost. There are also benchmarking services that take a more granular approach and can therefore provide more relevant data, but those services are typically more expensive.").

301 *See, e.g.*, Carimbocas v. TTEC Servs. Corp., No. 1:22-cv-02188, 2023 WL 8555384, at *3 (D. Colo. Dec. 11, 2023) (discussing plaintiffs' allegations concerning other cases' expert testimony concerning reasonableness of fees).

302 *See* Reinert, *The Burdens of Pleading*, *supra* note 97, at 1780; *see also* Heather Abraham, Jonathan Manes & Alex Abdo, *Judicial Secrecy: How to Fix the Over-Sealing of Federal Court Records*, JUST SECURITY (Oct. 21, 2021), https://perma.cc/9XGW-7C8D.

303 A future contemplated project of the Author's is an evaluation of how regulators could combat some of the issues addressed in this Article by strategically revising disclosure regulations and guidance.

a fact issue to be decided after discovery.[304] They hold that evaluating appropriate comparators is "not a question properly resolved at the motion to dismiss stage."[305] That is because "a benchmark determination" is "a factual inquiry,"[306] and such an analysis requires a court "to consider the merits substantively in a manner that would conflict with the Court's obligation to draw all reasonable inferences in favor of the plaintiff."[307] Plaintiffs able to file suit in those jurisdictions need not plead factual allegations pertaining to the fiduciary's "methods employed" if the complaint "allege[s] facts that, if proved, would show that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident."[308] As such, plaintiffs are not required to allege "granular, micro-level 'apples to apples' comparisons, based on data to which they may not yet have access."[309]

Instead, recognizing the importance of ERISA's remedial scheme and the "crucial rights" jeopardized by an analysis requiring plaintiffs to plead more facts than they have before discovery, these courts acknowledge the challenges inherent in obtaining information defendants keep secret.[310] Considering ERISA's protective bent, these courts give "some latitude" to claims in which "a material part of the information" plaintiffs will ultimately need to prevail is in defendants' possession.[311] These courts

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304 *See, e.g.*, *In re* Omnicom ERISA Litig., No. 20-cv-4141, 2021 WL 3292487, at *13 (S.D.N.Y. Aug. 2, 2021) ("[T]he overwhelming trend with district courts in this Circuit is to defer deciding the question of whether two funds are proper comparators until after discovery.").

305 *In re* MedStar ERISA Litig., No. RDB-20-1984, 2021 WL 391701, at *6 (D. Md. Feb. 4, 2021).

306 Garnick v. Wake Forest Univ. Baptist Med. Ctr., 629 F. Supp. 3d 352, 364–65 (M.D.N.C. 2022); *accord* Seidner v. Kimberly-Clark Corp., No. 3:21-CV-867, 2023 WL 2728714, at *7 (N.D. Tex. Mar. 30, 2023); Khan v. Bd. of Dirs. of Pentegra Defined Contribution Plan, No. 20-CV-07561, 2022 WL 861640, at *7 (S.D.N.Y. Mar. 23, 2022) ("The Court cannot conclude that the pleading contains insufficient benchmarks for a meaningful comparison of fees at this stage of the proceedings, where such a conclusion evidently requires the Court to resolve fact disputes.").

307 Brookins v. Ne. Univ., 731 F. Supp. 3d 112, 118–19 (D. Mass. 2024) (citing Decotiis v. Whittemore, 635 F.3d 22, 27 (1st Cir. 2011)).

308 Sellers v. Trs. of Bos. Coll., 647 F. Supp. 3d 14, 25 (D. Mass. 2022) (alteration in original) (quoting Pension Benefit Guar. Corp. v. Morgan Stanley Invest. Mgmt. Inc., 712 F.3d 705, 718 (2nd Cir. 2013)).

309 Nagy v. CEP Am., LLC, No. 23-cv-05648, 2024 WL 2808648, at *4 (N.D. Cal. May 30, 2024).

310 *Brookins*, 731 F. Supp. 3d at 118 (quoting Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 598 (8th Cir. 2009)); Tracey v. Mass. Inst. of Tech., No. 16-11620, 2017 WL 4453541, at *11 (D. Mass. Aug. 31, 2017) (same); *see also* Kruger v. Novant Health, Inc., 131 F. Supp. 3d 470, 479 (M.D.N.C. 2015) ("While Defendants claim that Plaintiffs have not alleged facts regarding why the amount of the recordkeeping fees are excessive, the services provided, or how the fees charged to the Plan were excessive in light of those services, this court finds that those are the types of facts warranting discovery, and, therefore, dismissal at this stage is not appropriate.").

311 *Sellers*, 647 F. Supp. 3d at 21 (internal quotation marks omitted) (quoting García-Catalán v. United States, 734 F.3d 100, 104 (1st Cir. 2013)).

accept as true plaintiffs' allegations that certain fee-related information was inaccessible to them and draw reasonable inferences in their favor.[312]

Ultimately, meaningful benchmarks are so fluid that regardless of the similarity of comparators, they are always subject to attack via motions to dismiss in circuits applying probability pleading standards (and again at later stages in the case if it is allowed to proceed). As the *Dionicio* court noted: "Even if a comparator has similar total assets, defendants will complain that it has too many or too few participants, and even if a comparator has similar total participants, defendants will complain that it has too many or too few assets."[313] Unfortunately, the outcome of those attacks is more likely to be determined not by the sufficiency of the comparators but rather by the way the courts in the circuit view the sufficiency of meaningful benchmarks as a fact question or a pleading threshold.

B. *Conclusion 2: Courts Don't Understand RK&A Fees—But Plaintiffs Must*

Courts, like most everyone,[314] do not understand retirement plan administration, associated fees, or required disclosures.[315] Plan participant plaintiffs should make every effort to educate them. By way of example, courts employing the "you get what you pay for" rationale might be surprised to learn that at least one 401k administrator and service provider advertises a limited-time-only "promotion" with reduced fees,[316] a fact that flies in the face of any hypothesis that higher fees correspond to enhanced or broader services. When the promotion ends, the provider will revert to charging higher fees for the exact same services.[317]

As discussed in Section I.A, *supra*, abundant scholarship has shown that paying higher fees, regardless of context, almost universally hurts

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312 *Brookins*, 731 F. Supp. 3d at 118.

313 Dionicio v. U.S. Bancorp, No. 23-CV-0026, 2024 WL 1216519, at *3 (D. Minn. Mar. 21, 2024).

314 *See* Muller & Turner, *supra* note 1, at 36–37.

315 *See, e.g.*, Gonzalez v. Northwell Health, Inc., 632 F. Supp. 3d 148, 162–63 (E.D.N.Y. 2022) (discussing that ERISA's "extensive disclosure requirements" provide plaintiffs with all "the information needed to put forward persuasive circumstantial evidence to challenge" imprudence (quoting Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 719 (2d Cir. 2013))).

316 *Powerful Plans for Businesses of Any Size*, GUIDELINE, https://perma.cc/E3BC-AU73 ("Get 3 months of no base fees if you're a new 401(k) plan or 12 months of no employer fees and no asset fees on transferred funds if you're switching. . . . Fees may include Guideline's monthly base fee, the monthly active participant fee and annual account fee on 401k assets under management transferred from your prior plan provider. . . . This offer ends December 31, 2024 and cannot be combined with other offers. We reserve the right to modify or discontinue this promotion at any time without prior notice.").

317 *See id.*

investors' long-term investment growth prospects.[318] Plan participants and beneficiaries are among those investors. Yet, as revealed in Section III.B, *supra*, courts tasked with undertaking "context-specific" analyses based on their "judicial experience and common sense"[319] routinely reasoned that higher fees are plausibly related to higher quality or more comprehensive automated services.[320] For example, in *Krutchen*, the court rationalized that different plans' "unique needs" could be fiduciaries' reason for "*reasonably choosing to pay more for higher quality services*."[321] Courts theorizing that plaintiffs automatically get what they pay for are ten times more likely to dismiss plaintiffs' cases than courts not applying that rationale.[322]

Here, the reality of recordkeeping service fees and two of *Twombly* and *Iqbal*'s most significant foibles collide. The Supreme Court in those cases seemingly assumed that judges would successfully predict whether a case would be meritorious upon discovery.[323] In this context, they don't.

Though *Twombly* and *Iqbal* allow for a subjective component of evaluating complaints, the bottom line is that a court's insertion of its "common sense" and "experience" regarding fees and investment paradigms is often simply unsupported by the extensive body of scholarship or any actual relevant experience. This is unsurprising given that most judges' private practice prior to being appointed to the bench likely did not involve investment services work.[324] In short, application of the "you get what you pay for" theory is objectively and demonstrably wrong. But it does not stop courts from dismissing complaints on that basis. Compounding this concern are other potential cognitive biases at play in these evaluations.[325] Professor Reinert posits that heightened pleading standards pose higher and "more troubling risks of error and bias than summary judgment."[326] The findings of the Meaningful Benchmarks Analysis corroborate that thesis.

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318 *See supra* Section I.A.

319 Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

320 *See* Appendix A.

321 Krutchen v. Ricoh USA, Inc., No. 22-678, 2022 WL 16950264, at *3 (E.D. Pa. Nov. 15, 2022) (emphasis added).

322 *See* Appendix A.

323 *See* Gelbach, *supra* note 120, at 383.

324 If a past presidential administration's appointments reflect other federal judiciary appointment trends, the odds are high that the judges determining motions to dismiss were not plaintiff's lawyers prior to becoming members of the judiciary. Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INST. (May 27, 2021), https://perma.cc/MTE8-EWQF.

325 *See* Reinert, *The Burdens of Pleading*, *supra* note 97, at 1786–89.

326 *Id.* at 1784.

Some courts also misapprehend the nature, effectiveness, and accessibility of the disclosures fiduciaries must give plan participants.[327] While 401(k) plan administrators must annually file Form 5500s with the Departments of Labor and Treasury,[328] they do not include all the information a plaintiff would need to satisfy the probability pleading requirements imposed by many courts. In Form 5500, plan administrators must report, among other things, the plan recordkeeper, the amount paid for their services, and the number of plan participants.[329] But crucially, Form 5500 does not require the reporting of *exactly which services were provided*, leaving prospective plaintiffs with a significant information gap when trying to compile comparators. Plan fiduciaries need only identify a service code associated with their services. The legend for these codes provides very little information and is often characterized by one or two words such as "actuarial," "legal," "named fiduciary," and "other."[330] Additionally, no penalty for failure to accurately or fully complete Form 5500 exists, aside from potentially facing a breach of fiduciary duty suit alleging failure to disclose information.[331]

Plaintiffs aiming to cobble together a more robust picture of fees should seek out information from other required disclosure sources. Department of Labor regulations require fiduciaries to disclose to plan participants the fees incurred by participants' individual accounts.[332] These participant disclosures under § 404(a)(5) constitute much clearer information on fees than is present in Form 5500 and thus enable plaintiffs to identify better comparators than they would be able to do by relying on direct compensation or Form 5500 disclosures alone.[333] Section 408b-2 disclosures,[334] though harder to obtain and "harder to read," obligate service providers to provide plan fiduciaries with fee information and thus offer another look at fees.[335] These disclosures, however, may not be comprehensive because the Department of Labor has stated that for

327 Smith v. CommonSpirit Health, 37 F.4th 1160, 1168 (6th Cir. 2022) (noting that under ERISA, "a retirement plan must disclose a range of information about costs and performance, including the administrative expenses it charges to participants and investment-related information explaining the characteristics of the plan's investment options").

328 29 C.F.R. § 2520.103-1 (2024).

329 U.S. DEP'T OF TREASURY, U.S. DEP'T OF LAB. & U.S. PENSION BENEFIT GUARANTY CORP., FORM 5500, ANNUAL RETURN/REPORT OF EMPLOYEE BENEFIT PLAN (2024).

330 *Form 5500 Codes and Legends*, FREEERISA.COM, https://perma.cc/3EPY-S75J.

331 TUGGLE DUGGINS & MESCHAN, P.A., PARTICIPANT DISCLOSURE REGULATIONS 8 (2012), https://perma.cc/7KUJ-XLR9.

332 29 C.F.R. § 2550.404a-5(b) (2024).

333 *See* Dionicio v. U.S. Bancorp, No. 23-CV-0026, 2024 WL 1216519, at *4 (D. Minn. Mar. 21, 2024).

334 29 C.F.R. § 2550.408b-2 (2024).

335 Chris Carosa, *How to Uncover 'Hidden' 401(k) Fees*, FORBES (Sept. 24, 2021, 6:11 AM), https://perma.cc/8DN2-WEVJ.

certain investment types, it "will not take enforcement action against any plan administrator who reasonably determines it would be impracticable, or impossible, to obtain the information necessary to meet the disclosure requirements."[336]

Moreover, nothing requires these disclosures be made generally available to the public, thereby in many instances depriving plan participant plaintiffs of the information needed to compare fees their plan incurs with other plans' fees.[337] Data underscoring this fact reveals that many plan sponsors are unaware of fees associated with their retirement plans and that those who are aware of them find it difficult to understand and quantify them.[338] Similarly, the U.S. Government Accountability Office has found that forty-one percent of plan participants did not know they paid fees, while forty percent or more of plan participants did not understand or know how to use the fee information available to them.[339] Commentators continue to urge the government to require streamlined, comprehensible fee disclosures.[340] Rightly so, as one practitioner publication states that fee arrangements are so complex, even plan fiduciaries struggle "to determine what all the service fees are."[341] Indeed, at least one plan administrator agrees: Fee disclosures are inadequate.[342] And revenue sharing arrangements only complicate the matter further.[343]

Courts applying the "you get what you pay for" rationale also disregard simple attorney financial self-interest and logic, which irrationally suggests plaintiffs' lawyers are cavalier about their time and money. Many plaintiffs' counsel work on contingency fee arrangements, meaning that they are uncompensated for any time they spend on a case unless the case's resolution involves the defendant paying the plaintiff some amount of money.[344] It would seem that few plaintiffs' counsel would elect to spend substantial amounts of their uncompensated time

336 EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LABOR, FIELD ASSISTANCE BULL. NO. 2012-02, at 2 (2012), https://perma.cc/S8BL-3QC4.

337 *See* Ayres & Curtis, *supra* note 6, at 1487–88.

338 John Scott & Sarah Spell, *Many Small-Business Leaders Express Limited Knowledge of Retirement Plan Fees*, PEW CHARITABLE TRS. (May 7, 2018), https://perma.cc/H8T2-9JT3; 401(K) ANSWER BOOK, *supra* note 40, at Q 4:52.

339 *See* GAO REPORT, *supra* note 1.

340 *See* Scott & Spell, *supra* note 338.

341 *ERISA Fee Disclosure Requirements Part I: Service Providers*, ARCHER & GREINER, P.C. (May 3, 2012), https://perma.cc/L29P-TZMA.

342 *See* Ramirez, *supra* note 43.

343 *See* Miller v. Packaging Corp. of Am., No. 1:22-cv-271, 2023 WL 2705818, at *6 (W.D. Mich. Mar. 30, 2023) ("[N]one of the forms indicate the amount of that indirect compensation, so it is impossible to discern the total compensation that the recordkeepers received for their services.").

344 Steve P. Calandrillo, Chryssa V. Deliganis & Neela Brocato, *Contingency Fee Conflicts: Attorneys Opt for Quick-Kill Settlements When Their Clients Would Be Better Off Going to Trial*, 26 N.Y.U. J. LEG. & PUB. POL'Y 1, 5 (2023).

undertaking extensive motion to dismiss briefings if, instead, in order to surmount pleading hurdles, they could simply point to the information fiduciaries routinely disclose.

C. *Conclusion 3: Plaintiffs Should Prevail When Allegations Are Equipoised, but Often Do Not*

By requiring plan participant plaintiffs to plead far more than is required to surmount "an obvious alternative explanation" concerning why a fiduciary's conduct may have been reasonable, courts misapply precedent and misconstrue several rules of civil procedure.[345] *Twombly* and *Iqbal* hold that only "*obvious* alternative explanation[s]" for a fiduciary's conduct that undermine a claim's plausibility need be addressed and overcome at the pleadings stage.[346] A plaintiff need only make a *plausible* showing for why the alternate explanation *may not* account for the conduct—not conclusively disprove it.[347] Still, several courts come perilously close to requiring plaintiffs to counter in advance every possible alternative explanation that a defendant may assert.[348] For example, in *Beldock v. Microsoft Corp.*,[349] an ERISA breach of fiduciary duty of prudence case reviewed during this study but not included in the dataset, the court granted a motion to dismiss where plaintiffs' allegations did not "tend to exclude the possibility" that other reasons for the fiduciary's conduct might have existed.[350]

Straying further from *Twombly* and *Iqbal*, the District Court for the Western District of Washington ruled that for plan participant plaintiffs to successfully plead a breach of fiduciary duty of prudence claim, they must plead allegations making "it more probable than not that any breach

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345 *Compare* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 567 (2007) ("[H]ere we have an obvious alternative explanation."), *with* Forman v. TriHealth, Inc., 40 F.4th 443, 452–53 (6th Cir. 2022) ("The theory merely provides a competing inference for why TriHealth offered retail-class funds," but "the facts of another complaint might suggest an alternative explanation that renders implausible an inference of imprudence.").

346 *See* Ashcroft v. Iqbal, 556 U.S. 662, 682 (2009) (emphasis added) (quoting *Twombly*, 550 U.S. at 567).

347 *Id.*; Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 596 (8th Cir. 2009) ("[T]here may well be lawful reasons appellees chose the challenged investment options. It is not Braden's responsibility to rebut these possibilities in his complaint, however."); Davis v. Wash. Univ. in St. Louis, 960 F.3d 478, 483 (8th Cir. 2020) ("WashU has identified one plausible inference, but it is not the only one. On a motion to dismiss, we must draw every reasonable inference in favor of the plaintiffs.").

348 *See, e.g.*, Sealy v. Old Dominion Freight Line, Inc., 1:23-CV-819, 2024 WL 2212905, at *8 (M.D.N.C. May 16, 2024) ("In sum, as Old Dominion has not challenged four of Plaintiffs' alleged benchmarks, it has not demonstrated that it is entitled to dismissal of Plaintiffs' recordkeeping fee claim." (citation omitted)).

349 No. C22-01082, 2023 WL 1798171 (W.D. Wash. Feb. 7, 2023).

350 *Id.* at *6. Of note, the imprudence claim in this case did not involve excessive fees allegations. *Id.* at *6 n.9.

of a fiduciary duty had occurred."[351] In direct violation of *Twombly*,[352] the standard applied was actually the preponderance of evidence standard applicable at trial. In *Miller*, the District Court for the Western District of Michigan wrote a startlingly contradictory opinion, stating that, though many avenues for "find[ing] a reasonable rate for RKA services" existed, plaintiffs who identified nine comparators as benchmarks were unsuccessful because, in part, the plaintiff did not rule out the "many [potential] reasons why a fiduciary might reasonably conclude that it is more prudent to keep a known provider than transition to a new one at a lower price."[353]

Requiring plaintiffs to rule out "many" potential reasons for paying more for services before discovery would compel plan participant plaintiffs to satisfy an unsatisfiable standard inconsistent with Rule 8, *Twombly*, and *Iqbal*: Plaintiffs would need to plead granular information "available to the fiduciary"[354] but not to the plaintiffs, such as details of the fiduciary's decision-making processes. Rule 11(b)(3) likewise becomes hollow in light of this probability standard. Rule 11(b)(3) states that "the factual contentions . . . , if specifically so identified, will likely have evidentiary support *after a reasonable opportunity for further investigation or discovery*."[355] Simply put, no drafter of the Federal Rules would consider the probability pleading standard to be consistent with Rule 8's requirement that a complaint present "a short and plain statement of the claim showing that the pleader is entitled to relief" or Rule 11's clear statement that plaintiffs are not obliged to possess all facts requisite to prove their cases prior to filing their complaints.[356]

In addition to Rules 8 and 11, the probability pleading standard directly conflicts with the essence of Rule 12(b)(6) and the deep-rooted principle employed in evaluating other claims: that for weighing the sufficiency of a complaint's allegations, "(1) the complaint is construed in the light most favorable to the plaintiff, (2) its allegations are taken as true, and (3) all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader."[357] Rule 12(b)(6) mandates dismissal when fiduciary defendants offer an alternative explanation for their conduct that is "obvious," "natural," or "more likely" than the plaintiff's theory of

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[351] *Id.* at *6 (quoting White v. Chevron, 752 F. App'x 453, 455 (9th Cir. 2018)).

[352] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable . . . .").

[353] Miller v. Packaging Corp. of Am., No. 1:22-cv-271, 2023 WL 2705818, at *7 (W.D. Mich. Mar. 30, 2023).

[354] *In re* Citigroup ERISA Litig., 662 F.3d 128, 140 (2d Cir. 2011).

[355] *See* FED. R. CIV. P. 11(b)(3) (emphasis added).

[356] *See* FED. R. CIV. P. 8(a)(2); FED. R. CIV. P. 11(b)(3).

[357] 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, Westlaw (database updated July 2024).

misconduct.[358] But, when plaintiffs need to rebut all possible alternative explanations, thrown out is the time-honored principle of construing allegations favorably to the nonmoving party.[359] *Twombly* and *Iqbal* do not support imposing such a burden on plaintiffs.[360] "Where alternative inferences are in equipoise—that is, where they are all reasonable based on the facts—the plaintiff is to prevail on a motion to dismiss."[361] That is not the case for far too many motions to dismiss on excessive fee claims.

The probability standard applied by many courts also renders other Federal Rules redundant or eviscerates their potency altogether. Rule 9(b) states that plaintiffs "alleging fraud or mistake" are required to "state with particularity the circumstances constituting fraud or mistake.[362] Imposing a probability pleading standard requiring a Rule 9(b) level of pleading conflates excessive fee claims with fraud claims.

Perhaps more significant is the blurring of the lines between Rule 12(b)(6) motions and Rule 56 motions for summary judgment.[363] Though a summary judgment motion should test the sufficiency of evidence before trial, overly heightened pleading standards conflate these different procedural devices intended for different stages of litigation, depriving plaintiffs of the opportunity to obtain and present all material facts to the court. In addition, courts concerned about litigation abuse resulting in unnecessary discovery costs to defendants—a stated concern of the *Twombly* Court[364]—overlook Rule 68, which enables a defendant to serve a plaintiff an offer of judgment (including for a nominal amount). If the plaintiff rejects the offer and then fails to achieve a more favorable judgment, the plaintiff must "pay the costs [the defendant] incurred after the offer was made."[365]

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358 Mator v. Wesco Distrib., Inc., 102 F.4th 172, 184 (3d Cir. 2024) (internal quotation marks omitted) (first quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 567–68 (2007) ("obvious," "natural"); and then quoting Ashcroft v. Iqbal, 556 U.S. 662, 680 (2009) ("more likely")).

359 East v. Minnehaha Cnty., 986 F.3d 816, 820 (8th Cir. 2021).

360 *Twombly*, 550 U.S. at 556; *Iqbal*, 556 U.S. at 677–79.

361 Hughes v. Nw. Univ., 63 F.4th 615, 629–30 (7th Cir. 2023) ("Equally reasonable inferences . . . could exonerate TriHealth . . . [b]ut at the pleading stage, it is too early to make these judgment calls." (alteration in original) (internal quotation marks omitted) (quoting Forman v. TriHealth, Inc., 40 F.4th 443, 450 (6th Cir. 2022))).

362 FED. R. CIV. P. 9(b).

363 *See* Steinman, *The Pleading Problem*, *supra* note 118, at 1330.

364 *Twombly*, 550 U.S. at 559.

365 FED. R. CIV. P. 68(d).

D. *Conclusion 4: Savvy Plaintiffs Will Forum Shop and Follow Established Pleading Roadmaps*

ERISA charges plan participant plaintiffs with protecting their retirement savings and enforcing their substantive rights.[366] Until the Supreme Court resolves the circuit split discussed above, discerning plan participant plaintiffs should consider the leeway ERISA grants plaintiffs with respect to venue and bring their claims in a forum more favorable to them.[367] Specifically, plaintiffs should aim to file in the First, Second, Fourth, and Fifth Circuits, where courts more faithfully apply *Twombly* and *Iqbal*, while avoiding, if possible, the Third,[368] Seventh, Eighth, and Tenth Circuits, as many courts in those jurisdictions apply a probability pleading standard. Plan participant plaintiffs would also do well to closely track the allegations and comparisons laid out in complaints that survive motions to dismiss. Plaintiffs should emphasize that information on services' costs was available to fiduciaries prior to their selection and should have been assessed before engaging them to provide services to a plan and its participants. Fiduciaries who failed to do so arguably acted imprudently.

Similarly, plaintiffs should allege that fiduciaries breached the duty of prudence by both improperly selecting the unreasonably expensive services and by failing to properly monitor the services' costs and remove unreasonably expensive ones. Many successful claims evaluated in the Meaningful Benchmarks Analysis asserted both improper selection of services and failure to monitor their fees.[369] Claims asserting failure to monitor fees likewise ensure plaintiffs survive statute-of-limitations defenses because the duty to monitor is ongoing.[370]

Further, for plan participant plaintiffs in most jurisdictions, pleading "[a] general industry average, without more, cannot serve as a meaningful benchmark."[371] Where plaintiffs either compared recordkeeping costs for

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366 *See supra* Section I.A.

367 Trs. of the Plumbers & Pipefitters Nat'l Pension Fund v. Plumbing Servs., Inc., 791 F.3d 436, 444 (4th Cir. 2015) ("Congress intended in ERISA cases to give a 'plaintiff's choice of forum somewhat greater weight than would typically be the case,' as evidenced by ERISA's 'liberal venue provision.'" (quoting Cross v. Fleet Rsrv. Ass'n Pension Plan, 383 F. Supp. 2d 852, 856–57 (D. Md. 2005))); Holland v. ACL Transp. Servs., LLC, 815 F. Supp. 2d 46, 56 (D.D.C. 2011).

368 Recent reversals of dismissals in cases such as *Mator v. Wesco Distribution, Inc.*, 102 F.4th 172, 187, 191 (3d Cir. 2024) and *Krutchen v. Ricoh USA, Inc.*, No. 23-1928, 2024 WL 3518308, at *4 (3d Cir. July 24, 2024) suggest the Third Circuit is becoming a friendlier forum for plan participants.

369 *E.g.*, Daggett v. Waters Corp., 731 F. Supp. 3d 121, 126 (D. Mass. 2024); Kohari v. MetLife Grp., Inc., 21 Civ. 6146, 2022 WL 3029328, at *1 (S.D.N.Y. Aug. 1, 2022); Schaf v. O-I Glass, Inc., 680 F. Supp. 3d 854, 856 (N.D. Ohio 2023).

370 Hughes v. Nw. Univ., 142 S. Ct. 737, 741 (2022).

371 Williams v. Centene Corp., No. 4:22-cv-00216, 2023 WL 2755544, at *4 (E.D. Mo. Mar. 31, 2023).

their plan to industry-wide averages or failed to compare their plans with similarly sized plans or did not offer a comparison between plans obtaining similar recordkeeping services, they were likely to be dismissed.[372] Thirty-seven percent of cases pleading industry-wide allegations without more context were dismissed.[373] This result is another example of judicial overreach. If a plaintiff needs to plead only "enough facts to show that a prudent alternative action was plausibly available, rather than actually available,"[374] how could identifying industry averages of similarly sized plans that paid less for the same services not fit that bill precisely?

To increase the odds of surviving a motion to dismiss under a probability pleading regime—and until such time as courts return to faithfully applying *Twombly* and *Iqbal*—plaintiffs should try to enumerate in their complaints specific plan comparators rather than industry averages.[375] Further, they should plead that the services paid for with those fees were similar enough to enable an appropriate comparison of them.[376] Plaintiffs should also clearly identify information to which they lacked access and any good-faith efforts they undertook to obtain it. Plan participant plaintiffs should also jettison unsupported breach of loyalty claims that do not further their cause.[377] In some cases, these legally and factually unsupported claims may serve only to undermine plaintiffs' credibility.

E. *The Normative Nightmare*

Applying a probability pleading standard for plaintiffs charged with protecting their retirement savings is a normative nightmare. If, as Professors Steinman and Arthur Miller assert, *Twombly* and *Iqbal* raised barriers to courtroom access and hindered private parties' enforcement of substantive law by requiring plaintiffs to plead matters they were likely to

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372 *See* Matney v. Barrick Gold of N. Am., 80 F.4th 1136, 1155–58 (10th Cir. 2023); Matousek v. MidAmerican Energy Co., 51 F.4th 274, 279–80 (8th Cir. 2022) (stating that "the way to plausibly plead a claim of this type is to identify similar plans offering the same services for less," but "[r]ather than point to the fees paid by other specific, comparably sized plans, the plaintiffs rel[ied] on industry-wide averages" without accounting for differences in the services purchased).

373 Appendix A. Of note, the initial parameters of the study did not include an evaluation of industry averages pleading trends. This line of inquiry was added later and thus does not purport to be comprehensive. Rather, the intent behind including this data is to highlight a trend that merits further inquiry.

374 Hughes v. Nw. Univ., 63 F.4th 615, 630 (7th Cir. 2023).

375 *See* Mator v. Wesco Distrib., Inc., 102 F.4th 172, 188 (3d Cir. 2024).

376 *Id.*

377 *See supra* Section III.E.

uncover only through discovery,[378] then the probability pleading standard applied to many excessive fee claims only compounds the harm to plaintiffs. It further undermines "the smooth functioning of a constitutional democracy"[379] by eroding the predictive value of precedent and retarding the development of substantive law.[380] At a minimum, it undermines ERISA's enforcement regime, the American economy, and the retirement prospects of many American workers. It also fails to enhance justice, a stated purpose of *Twombly*,[381] while shielding defendants from fulsome litigation. To the contrary, Professor Reinert showed that the plausibility pleading standard under *Twombly* and *Iqbal* threatens "to eliminate cases that have better than a 50% chance of being successful."[382] It would seem all the more likely that the probability standard further impairs achieving justice by blocking plan participant plaintiffs with meritorious claims from vindicating their substantive rights—despite Congress's charging these workers (through ERISA) with protecting their retirements.

In that vein, as Professor Reinert showed that no correlation exists between the depth of a complaint's allegations and the plaintiff's ability to prevail—rationales linking the need for factual detail at the pleading stage to a case's merits fall short.[383] Rather, if a court's application of plausibility pleading standards screens out more meritorious cases than those lacking merit,[384] the likely result of applying a more exacting probability standard is that even more injured plaintiffs will be prevented from enforcing the rights Congress so painstakingly gave them. Courts should reject the probability standard and adhere to the already rigorous plausibility standard the Supreme Court articulated in *Twombly* and *Iqbal*.[385] Failure to do so needlessly compounds the erosion of Americans' hard-earned retirement savings.

Conclusion

With apologies to Kurt Vonnegut, you don't always get what you pay for. But, as this Article reveals, many courts do not realize that. District courts, particularly in the Third, Seventh, Eighth, and Tenth Circuits,

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378 Steinman, *The Rise and Fall of Plausibility Pleading?*, *supra* note 121, at 349; Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 10 (2010).

379 *See* Redish, *supra* note 23, at 855.

380 *See* McCuskey, *supra* note 206, at 552–53.

381 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007).

382 *See* Reinert, *The Costs of Heightened Pleading*, *supra* note 201, at 161.

383 *See id.* at 120, 125.

384 *See id.* at 161.

385 *See supra* Section I.B.

remain entrenched in their use of an objectively disprovable theory of the relationship between fees and enhanced recordkeeping services, even though service providers themselves recognize that the services are fungible. Courts instead cling to the theory that higher costs *necessarily* reflect higher quality, akin to the higher costs of a luxury vehicle versus a basic vehicle. While both vehicles possess the same basic capabilities, the luxury model typically offers additional features. This analogy is inapposite for investment vehicles, however, as the overwhelming body of scholarship demonstrates that when fees go up, quality either remains the same or decreases.

Similar to compounded interest's ability to "dramatically increase" a worker's retirement savings, so too can fees drastically—and unnecessarily—erode those savings.[386] Courts' application of the probability pleading standard compounds that harm by unnecessarily impeding plaintiffs' access to the courtroom and impairing their ability to protect their retirement savings. Even if appellate courts reverse these dismissals, which they are prone to do, the harm plan participants suffered at the hands of malfeasant fiduciaries is unnecessarily compounded by an often years-long protraction of the litigation and a delay to the pursuit of discovery vital to resolving these matters.

Pleading standards that require plaintiffs—who lack governmental investigatory tools or fiduciary insider information—to allege such a high level of detail as to show a probable fiduciary breach are both legally and practically problematic. Consequently, for ERISA to be effectively enforced, plan participants must be able to play their part in bringing excessive fee claims despite their limited access to information held by fiduciaries.[387] It is past time for courts to reject the probability pleading requirement that is so harmful to plan participants and recommit to applying *Twombly* and *Iqbal*'s plausibility pleading standard. If plaintiffs are blocked from enforcing their substantive, statutorily endowed rights, Congress's intent for ERISA will be undermined, plan participants harmed, and important public policy objectives—indeed, the rule of law itself—eroded, just like plan participants' retirement savings.

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[386] Smith v. CommonSpirit Health, 37 F.4th 1160, 1163 (6th Cir. 2022).

[387] Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 597 n.8 (8th Cir. 2009) ("The Secretary of Labor, who is charged with enforcing ERISA, depends in part on private litigation to ensure compliance with the statute. To that end, the Secretary has expressed concern over the erection of 'unnecessarily high pleading standards' in ERISA cases." (citation omitted)).

Appendix A: Meaningful Benchmarks Analysis Dataset[388]

Table 6: Refined Search Results—Summary

	Granted Dismissal	Denied Dismissal	Affirmed Dismissal	Reversed Dismissal	Relevant Language	Fungibility Not Asserted	YGWYPF Rationale	Industry Averages or Less	Retail Class Asserted	Repackaged Loyalty Claim Asserted
Total	50	61	5	4	43	68	23	24	28	17
Per-cent	45.05 %	54.95 %	55.56 %	44.44 %	38.74 %	61.26 %	20.72 %	21.62 %	25.23 %	15.32 %

Table 7: Refined Search Results—Detailed

ID	Case	Circuit Court	Leave/ Move to Amend Granted	Granted Dismissal	Denied Dismissal	Affirmed Dismissal	Reversed Dismissal	Fungibility Asserted	Fungibility Not Asserted	YGWYPF Rationale	Industry Averages or Less	Retail Class Asserted	Repackaged Loyalty Claim Asserted
1	Matousek v. Mid-American Energy Co.[389]	8	not re-quested	1		1			1	1			
2	Albert v. Oshkosh Corp.[390]	7	not re-quested	1		1		1					1

388 A copy of the spreadsheet containing the full dataset can be found at the following link: https://perma.cc/9VY4-PSRC. Click on "View the live page" and then on "APPENDIX."

389 51 F.4th 274 (8th Cir. 2022).

390 47 F.4th 570 (7th Cir. 2022).

3	Mator v. Wesco Distrib., Inc.[391]	3	dismissal rev'd; amend-ment un-necessary				1						
4	Mator v. Wesco Distrib., Inc.[392]	3	N	1				1		1		1	
5	Mator v. Wesco Distrib., Inc.[393]	3	Y	1					1			1	
6	Matney v. Barrick Gold of N. Am.[394]	10	dismissal rev'd; amend-ment un-necessary	1		1			1			1	
7	Perkins v. United Surgical Partners Int'l, Inc.[395]	5	dismissal rev'd; amend-ment un-necessary				1						
8	Perkins v. United Surgical Partners Int'l, Inc.[396]	5	N	1					1			1	
9	Perkins v. United Surgical Partners Int'l, Inc.[397]	5	Y	1					1	1			
10	Smith v. Com-monSpirit Health[398]	6	inadequate request to amend	1		1			1				
11	Coppel v. Seaworld Parks & Ent., Inc.[399]	9			1				1			1	

391 102 F.4th 172 (3d Cir. 2024).

392 2:21-CV-00403, 2022 WL 3566108 (W.D. Pa. Aug. 18, 2022).

393 2:21-CV-00403, 2022 WL 1046439 (W.D. Pa. Apr. 7, 2022).

394 80 F.4th 1136 (10th Cir. 2023).

395 No. 23-10375, 2024 WL 1574342 (5th Cir. 2024).

396 No. 3:21-CV-0973, 2023 WL 2899539 (N.D. Tex. Mar. 10, 2023).

397 No. 3:21-CV-00973, 2022 WL 824839 (N.D. Tex. Mar. 18, 2022).

398 37 F.4th 1160 (6th Cir. 2022).

399 No. 3:21-cv-01430, 2023 WL 2942462 (S.D. Cal. Mar. 22, 2023).

12	Schissler v. Janus Henderson US (Holdings) Inc.[400]	10			1				1				
13	Stengl v. L3Harris Techs., Inc.[401]	11			1				1			1	
14	Gaines v. BDO USA, LLP[402]	7			1				1				
15	Glick v. Thedacare Inc.[403]	7			1			1				1	1
16	Nohara v. Prevea Clinic Inc.[404]	7			1				1			1	1
17	Carrigan v. Xerox Corp.[405]	2			1				1				
18	Goodman v. Columbus Reg'l Healthcare Sys., Inc.[406]	11			1				1				
19	Lopez v. Embry-Riddle Aeronautical Univ., Inc.[407]	11			1				1			1	
20	Baumeister v. Exelon Corp.[408]	7			1				1				

400 No. 1:22-cv-02326, 2023 WL 6902050 (D. Colo. Sept. 7, 2023).

401 No. 6:22-cv-572, 2023 WL 2633333 (M.D. Fla. Mar. 24, 2023).

402 663 F. Supp. 3d 821 (N.D. Ill. 2023).

403 No. 20-C-1236, 2022 WL 3682863 (E.D. Wis. Aug. 25, 2022).

404 623 F. Supp. 3d 951 (E.D. Wis. 2022).

405 No. 3:21-CV-1085, 2022 WL 1137230 (D. Conn. Apr. 18, 2022).

406 No. 4:21-CV-15, 2022 WL 228764 (M.D. Ga. Jan. 25, 2022).

407 No. 6:22-cv-1580, 2023 WL 7129858 (M.D. Fla. July 12, 2023).

408 No. 21-cv-6505, 2023 WL 6388064 (N.D. Ill. Sept. 29, 2023).

21	Lard v. Marmon Holdings, Inc.[409]	7	Y	1				1					
22	Dale v. NFP Corp.[410]	7	not requested	1					1			1	
23	Probst v. Eli Lilly & Co.[411]	7	N	1				1					
24	Rodriguez v. Hy-Vee, Inc.[412]	8			1				1				
25	Anderson v. Coca-Cola Bottlers' Ass'n[413]	10	Y	1					1				
26	Daggett v. Waters Corp.[414]	1			1			1					
27	Dionicio v. U.S. Bancorp[415]	8			1			1					
28	Sealy v. Old Dominion Freight Line, Inc.[416]	4			1				1				
29	Seibert v. Nokia of Am. Corp.[417]	3			1			1					

409 No. 1:22-cv-4332, 2023 WL 6198805 (N.D. Ill. Sept. 22, 2023).

410 658 F. Supp. 3d 620 (N.D. Ill. 2023).

411 No. 1:22-cv-01106, 2023 WL 178261 (S.D. Ind. Feb. 3, 2023).

412 No. 4:22-cv-00072, 2022 WL 16648825 (S.D. Iowa. Oct. 21, 2022).

413 No. 21-2054, 2022 WL 951218 (D. Kan. Mar. 30, 2022).

414 731 F. Supp. 3d 121 (D. Mass. 2024).

415 No. 23-CV-0026, 2024 WL 1216519 (D. Minn. Mar. 21, 2024).

416 No. 1:23-CV-819, 2024 WL 2212905 (M.D.N.C. May 16, 2024).

417 No. 21-20478, 2023 WL 5035026 (D.N.J. Aug. 8, 2023).

30	Berkelhammer v. Automatic Data Processing, Inc.[418]	3			1				1				
31	Singh v. Deloitte LLP[419]	2	Y	1					1				
32	Munt v. WEC Energy Grp., Inc.[420]	7	not requested	1				1					
33	Cotter v. Matthews Int'l Corp.[421]	7	not requested	1				1					
34	Coppel v. Seaworld Parks & Ent., Inc.[422]	9			1				1			1	
35	Gonzalez v. Northwell Health, Inc.[423]	2	Y	1					1		1		
36	Garnick v. Wake Forest Univ. Baptist Med. Ctr.[424]	4			1				1				
37	Brookins v. Ne. Univ.[425]	1			1			1			1	1	
38	Sellers v. Trs. of Bos. Coll.[426]	1			1			1			1		

418 No. 20-5696, 2022 WL 3593975 (D.N.J. Aug. 23, 2022).

419 650 F. Supp. 3d 259 (S.D.N.Y. 2023).

420 728 F. Supp. 3d 957 (E.D. Wis. 2024).

421 No. 20-CV-1054, 2023 WL 9321285 (E.D. Wis. Aug. 9, 2023).

422 No. 21-cv-1430, 2024 WL 3086702 (S.D. Cal. Jan. 31, 2024).

423 632 F. Supp. 3d 148 (E.D.N.Y. 2022).

424 629 F. Supp. 3d 352 (M.D.N.C. 2022).

425 731 F. Supp. 3d 112 (D. Mass. 2024).

426 647 F. Supp. 3d 14 (D. Mass. 2022).

39	Ruilova v. Yale-New Haven Hosp., Inc.[427]	2			1			1			1		1
40	Mateya v. Cook Grp. Inc.[428]	7	not requested	1					1				
41	Khan v. Bd. of Dirs. of Pentegra Defined Contribution Plan[429]	2			1			1			1	1	1
42	Brown v. MITRE Corp.[430]	1			1			1			1	1	
43	McDonald v. Lab'y Corp. of Am. Holdings[431]	4			1			1			1	1	
44	Kirk v. Principal Life Ins. Co.[432]	8	N	1					1			1	
45	Tolomeo v. R.R. Donnelley & Sons, Inc.[433]	7			1			1			1		
46	Coyer v. Univar Sols. USA Inc.[434]	7	1		1			1			1		
47	Nagy v. CEP Am., LLC[435]	9	1		1				1		1		

427 No. 3:22-cv-00111, 2023 WL 2301962 (D. Conn. Mar. 1, 2023).

428 No. 1:22-cv-01271, 2023 WL 4608536 (S.D. Ind. June 16, 2023).

429 No. 20-CV-07561, 2022 WL 861640 (S.D.N.Y. Mar. 23, 2022).

430 No. 22-cv-10976, 2023 WL 2383772 (D. Mass. Mar. 6, 2023).

431 No. 1:22CV680, 2023 WL 4850693 (M.D.N.C. July 28, 2023).

432 No. 4:21-cv-00134, 2022 WL 19655784 (S.D. Iowa Mar. 28, 2022).

433 No. 20-cv-7158, 2023 WL 3455301 (N.D. Ill. May 15, 2023).

434 No. 1:22 CV 0362, 2022 WL 4534791 (N.D. Ill. Sept. 28, 2022).

435 No. 23-cv-05648, 2024 WL 2808648 (N.D. Cal. May 30, 2024).

48	Seidner v. Kimberly-Clark Corp.[436]	5			1			1			1		
49	Fleming v. Rollins, Inc.[437]	11			1				1				
50	Turpin v. Duke Energy Corp.[438]	4			1				1				
51	Guyes v. Nestle USA, Inc.[439]	7	Y	1					1				1
52	Lalonde v. Mass. Mut. Ins. Co.[440]	1	not requested	1					1		1		
53	Cunningham v. USI Ins. Servs., LLC[441]	2	Y	1					1	1			
54	Fritton v. Taylor Corp.[442]	8	Y	1					1		1		
55	Teodosio v. DaVita, Inc.[443]	10			1			1			1		
56	Jones v. Dish Network Corp.[444]	10	Y	1					1	1	1		1

436 No. 3:21-CV-867, 2023 WL 2728714 (N.D. Tex. Mar. 30, 2023).

437 655 F. Supp. 3d 1243 (N.D. Ga. 2023).

438 No. 3:20-CV-00528, 2022 WL 287548 (W.D.N.C. Jan. 31, 2022).

439 No. 20-CV-1560, 2022 WL 18106384 (E.D. Wis. Nov. 21, 2022).

440 728 F. Supp. 3d 141 (D. Mass. 2024).

441 No. 21 Civ. 1819, 2022 WL 889164 (S.D.N.Y. Mar. 25, 2022).

442 No. 22-cv-00415, 2022 WL 17584416 (D. Minn. Dec. 12, 2022).

443 684 F. Supp. 3d 1117 (D. Colo. 2023).

444 No. 22-cv-00167, 2023 WL 2796943 (D. Colo. Jan. 31, 2023).

57	Sigetich v. Kroger Co.[445]	6	N	1				1		1			
58	In re Sutter Health ERISA Litig.[446]	9			1				1				
59	Krutchen v. Ricoh USA, Inc.[447]	3	N	1				1		1			
60	Krutchen v. Ricoh USA, Inc.[448]	3	Y	1					1	1			
61	Parker v. GKN N. Am. Servs., Inc.[449]	6			1				1	1			1
62	Peck v. Munson Healthcare[450]	6			1			1					
63	Kohari v. MetLife Grp., Inc.[451]	2			1			1					
64	Schaf v. O-I Glass, Inc.[452]	6			1				1				
65	Zimmerman v. Cedars-Sinai Med. Ctr.[453]	9			1				1			1	

445 No. 1:21-cv-697, 2023 WL 2431667 (S.D. Ohio Mar. 9, 2023).

446 No. 1:20-cv-01007, 2023 WL 1868865 (E.D. Cal. Feb. 9, 2023).

447 No. 22-678, 2023 WL 3026705 (E.D. Pa. Apr. 20, 2023).

448 No. 22-678, 2022 WL 16950264 (E.D. Pa. Nov. 15, 2022).

449 No. 21-12468, 2022 WL 3702072 (E.D. Mich. Aug. 26, 2022).

450 No. 1:22-cv-294, 2022 WL 17260807 (W.D. Mich. Nov. 9, 2022).

451 No. 21 Civ. 6146, 2022 WL 3029328 (S.D.N.Y. Aug. 1, 2022).

452 680 F. Supp. 3d 854 (N.D. Ohio 2023).

453 No. 5:23-cv-01124, 2024 WL 1135773 (C.D. Cal. Feb. 18, 2024).

66	McCaffree Fin. Corp. v. ADP, Inc.[454]	3	not requested	1					1	1	1		1
67	Smith v. Shoe Show, Inc.[455]	4			1			1				1	
68	Partida v. Schenker Inc.[456]	9	Y	1					1	1		1	1
69	Williams v. Centene Corp.[457]	8	N	1					1	1	1		
70	Carfora v. Teachers Ins. Annuity Assoc. of Am.[458]	2			1				1				
71	Garcia v. Alticor, Inc.[459]	6			1				1				
72	Lacrosse v. Jack Henry & Assocs.[460]	8			1			1					
73	Laabs v. Faith Techs., Inc.[461]	7	N	1				1					
74	Moler v. Univ. Md. Med. Sys.[462]	4			1				1			1	

454 No. 20-5492, 2023 WL 2728787 (D.N.J. Mar. 31, 2023).

455 No. 1:20CV813, 2022 WL 583569 (M.D.N.C. Feb. 25, 2022).

456 No. 22-cv-09192, 2024 WL 1354432 (N.D. Cal. Mar. 29, 2024).

457 No. 4:22-cv-00216, 2023 WL 2755544 (E.D. Mo. Mar. 31, 2023).

458 No. 21 Civ. 8384, 2024 WL 2815980 (S.D.N.Y. May 31, 2024).

459 No. 1:20-cv-1078, 2022 WL 19919753 (W.D. Mich. Aug. 23, 2022).

460 No. 23-CV-05088, 2024 WL 1578899 (W.D. Mo. Apr. 10, 2024).

461 No. 20-CV-1534, 2023 WL 9321358 (E.D. Wis. Aug. 30, 2023).

462 No. 1:21-cv-01824, 2022 WL 2756290 (D. Md. July 13, 2022).

75	Glick v. ThedaCare, Inc.[463]	7			1			1			1		
76	Cunningham v. USI Ins. Servs., LLC[464]	2	Y	1					1	1			1
77	Miller v. Packaging Corp. of Am., Inc.[465]	6	not requested	1				1		1			
78	Remied v. Northshore Univ. Health Sys.[466]	7			1			1		1			
79	Smith v. VCA, Inc.[467]	9			1			1					
80	Johnson v. PNC Fin. Servs. Grp., Inc.[468]	3			1			1					
81	Riley v. Olin Corp.[469]	8	inadequate request to amend	1					1		1		
82	Riley v. Olin Corp.[470]	8	N	1					1		1		
83	Russell v. Ill. Tool Works, Inc.[471]	7			1			1					

463 No. 20-CV-1236, 2023 WL 9327209 (E.D. Wis. July 20, 2023).

464 No. 21 Civ. 1819, 2023 WL 8603123 (S.D.N.Y. Dec. 12, 2023).

465 No. 1:22-cv-271, 2023 WL 2705818 (W.D. Mich. Mar. 30, 2023).

466 No. 22-cv-2578, 2024 WL 3251331 (N.D. Ill. July 1, 2024).

467 No. CV 21-9140, 2022 WL 2037116 (C.D. Cal. Apr. 6, 2022).

468 No. 2:20-CV-01493, 2022 WL 973581 (W.D. Penn. Mar. 31, 2022).

469 No. 4:21-cv-01328, 2022 WL 2208953 (E.D. Mo. June 21, 2022).

470 No. 4:21-cv-01328, 2023 WL 371872 (E.D. Mo. Jan. 24, 2023).

471 No. 22 C 2492, 2024 WL 2892837 (N.D. Ill. June 10, 2024).

84	Moore v. Humana, Inc.[472]	6			1				1				
85	Laabs v. Faith Techs., Inc.[473]	7	Y	1					1				
86	Jones v. Dish Network Corp.[474]	10			1				1				1
87	Walter v. Kerry Inc.[475]	7			1			1					1
88	Boyette v. Montefiore Med. Ctr.[476]	2	Y	1					1	1			
89	Jones v. DISH Network Corp.[477]	10	Y	1					1	1		1	
90	Ravarino v. Voya Fin., Inc.[478]	2	Y	1					1				
91	Krohnengold v. New York Life. Ins. Co.[479]	2			1				1				
92	Mazza v. Pactiv Evergreen Servs. Inc.[480]	7			1			1			1		

472 No. 3:21-cv-232, 2022 WL 20766503 (W.D. Ky. Mar. 31, 2022).

473 No. 20-CV-1534, 2022 WL 17418358 (E.D. Wis. Nov. 9, 2022).

474 No. 22-cv-00167, 2023 WL 7458377 (D. Colo. Nov. 6, 2023).

475 No. 21-cv-0539, 2022 WL 1720095 (E.D. Wis. May 27, 2022).

476 No. 22-cv-5280, 2023 WL 7612391 (S.D.N.Y. Nov. 13, 2023).

477 No. 22-cv-00167, 2023 WL 2644081 (D. Colo. Mar. 27, 2023).

478 No. 3:21-CV-1658, 2023 WL 3981280 (D. Conn. Jun. 13, 2023).

479 No. 21-CV-1778, 2022 WL 3227812 (S.D.N.Y. Aug. 10, 2022).

480 No. 22 C 5052, 2023 WL 3558156 (N.D. Ill. May 18, 2023).

93	Guyes v. Nestle USA, Inc.[481]	7	not re-quested	1				1		1			
94	Matney v. Barrick Gold of North Am., Inc.[482]	10	N	1					1	1			
95	Evans v. Associated Banc-Corp[483]	7	not re-quested	1					1				1
96	Johnson v. Parker-Hannifin Corp.[484]	6	not re-quested	1					1	1		1	
97	Seidner v. Kim-berly-Clark Corp.[485]	5			1				1				1
98	Woznicki v. Au-rora Health Care, Inc.[486]	7			1				1			1	
99	Fitzpatrick v. Neb. Methodist Health Sys., Inc.[487]	8	N	1					1				
100	Lucero v. Credit Union Ret. Plan Ass'n[488]	7			1			1					
101	Carimbocas v. TTEC Servs. Corp.[489]	10	Y	1					1	1			

481 No. 20-CV-1560, 2023 WL 9321363 (E.D. Wis. Aug. 23, 2023).

482 No. 2:20-cv-275, 2022 WL 1186532 (D. Utah Apr. 21, 2022).

483 No. 21-C-60, 2022 WL 4638092 (E.D. Wis. Sept. 30, 2022).

484 No. 1:21-cv-00256, 2023 WL 8374525 (N.D. Ohio Dec. 4, 2023).

485 No. 3:21-CV-867, 2022 WL 865890 (N.D. Tex. Mar. 23, 2022).

486 No. 20-cv-1246, 2022 WL 1720093 (E.D. Wis. May 27, 2022).

487 No. 8:23CV27, 2023 WL 5105362 (D. Neb. Aug. 9, 2023).

488 No. 22-CV-208, 2023 WL 2424787 (W.D. Wis. Mar. 9, 2023).

489 No. 1:22-cv-02188, 2023 WL 8555384 (D. Colo. Dec. 11, 2023).

102	Nohara v. Prevea Clinic Inc.[490]	7	Y	1					1			1	
103	Glick v. ThedaCare, Inc.[491]	7	Y	1				1		1			
104	Klawonn v. Bd. Dir. Motion Picture Indus. Pension Plans[492]	9			1				1		1		
105	Seibert v. Nokia of Am. Corp.[493]	3			1				1		1		
106	Fritton v. Taylor Corp.[494]	8	not requested	1					1	1		1	1
107	Forman v. TriHealth, Inc.[495]	6	dismissal rev'd; amendment unnecessary	1		1			1			1	1
108	Lauderdale v. NFP Retirement, Inc.[496]	9			1			1				1	
109	Hughes v. Nw. Univ.[497]	7	dismissal rev'd; amendment unnecessary	1			1	1					
110	Kong v. Trader Joe's Co.[498]	9	dismissal rev'd; amendment unnecessary	1			1		1				

490 No. 20-CV-1079, 2022 WL 16927810 (E.D. Wis. Oct. 27, 2022).

491 No. 20-CV-1236, 2022 WL 16927749 (E.D. Wis. Oct. 27, 2022).

492 No. CV 20-9194, 2022 WL 17224708 (C.D. Cal. Sept. 27, 2022).

493 No. 21-20478, 2024 WL 2316551 (D.N.J. May 22, 2024).

494 No. 22-cv-00415, 2023 WL 5348834 (D. Minn. Aug. 21, 2023).

495 40 F.4th 443 (6th Cir. 2022).

496 No. SACV 21-301, 2022 WL 422831 (C.D. Cal. Feb. 8, 2022).

497 63 F.4th 615 (7th Cir. 2023).

498 No. 20-56415, 2022 WL 1125667 (9th Cir. Apr. 15, 2022).

111	England v. DENSO Int'l Am., Inc.[499]	6			1			1					
112	Nohara v. Prevea Clinic Inc.[500]	7			1			1					
113	Hagins v. Knight-Swift Transp. Holdings, Inc.[501]	9			1			1			1	1	

499 No. 22-11129, 2023 WL 4851878 (E.D. Mich. July 28, 2023).

500 No. 20-CV-1079, 2023 WL 9327202 (E.D. Wis. July 21, 2023).

501 No. CV-22-01835, 2023 WL 3627478 (D. Ariz. May 24, 2023).