

The logo for Fi360, featuring the text "Fi360" in a white, sans-serif font. The "Fi" is bold and the "360" is regular weight. The logo is centered within a white square frame.

Fi360

A Broadridge® Company

Whatever Happened to the Class of 2016?

*Lessons Learned From the
ERISA Excessive Fee Complaints filed in '16*

November 18, 2021



Blaine Aikin, AIFA®, CFP®, CFA
Fiduciary Subject Matter Expert

Duane Thompson, AIFA®
Senior Policy Analyst

Overview – Can Fiduciaries See Through the Clutter?

- Hundreds of ERISA cases filed in last decade
 - Common-law precedent fuzzy
 - Are lawsuits heading downstream?
- Ways to analyze changing fiduciary contours
 - A look at common claims (i.e. allegations)
 - Investments at issue
 - Claims dismissed
 - Settlement conditions
- Takeaways

ERISA CASES
2019

added to \$449 Million in

to 401k

COUNT I

ERISA § 404, 29 U.S.C. § 1104 –
Breach of Duty of Loyalty and Prudence –
Unreasonable Administrative Fees

85. Plaintiffs repeat and reallege each of the allegations in the foregoing paragraphs as if fully set forth herein.

86. ERISA § 404, 29 U.S.C. § 1104 requires that Xerox HR and FE perform their fiduciary duties with respect to the plan solely in the interest of the

NYU lawsuit becomes first 403(b) fee case to go to trial

The university was one of about a dozen prominent schools sued by Jerry Schlichter in 2016.

The New York Times

M.I.T., N.Y.U. and Yale Are Sued Over Retirement Plan Fees

Fiduciary Liability Claim Trends

Prepared by the Lockton Financial Services Claims Practice

Background – Why 2016 and 2021?



- 2016 saw novel claims tested in court
 - Claims: cross-selling, too many options, multiple RKs
 - Defendants: Financial firms, universities, mega plans
- Five years later
 - Outcomes (2016)
 - Next generation of claims, defendants (2021)
- Intensive review of 91 ‘excessive fee’ ERISA class-actions
 - 51 from 2016
 - 40 from 2021 (through Oct. 31)
 - ‘Excessive fee’ cases include underperformance, breach of loyalty claims
 - Excludes ‘stock drop,’ church plan exemption cases
- Key Takeaways for advisors

Active vs. Passive Debate - BEFORE



“Actively managed equity funds, particularly those managed by Neuberger Berman, **rarely outperform their benchmarks**. For example, Neuberger’s 2014 Annual Report notes that 71% of their equity investments failed to meet their benchmarks over the prior 5-year period and 74% failed to meet their benchmarks over the prior 3-year period.

Thus, Defendants knew that Neuberger managed equity investments, like the [Value Equity Collective Trust] Fund, are nearly three-times as likely to underperform their benchmark as they are to outperform it.”

— *Bekker v. Neuberger-Berman* complaint (Aug. 2, 2016)

Active vs. Passive Debate - AFTER



Bekker v. Neuberger Berman Group 401(k) Plan Investment Committee

Welcome to the Bekker v. Neuberger Berman Group 401(k) Plan Investment Committee Settlement Website

U.S. Federal Court for the Southern District of New York

Case No. 16-cv-06123-LTS-BCM

The final approval hearing for this settlement is November 19, 2020. On November 2, 2020, the Court ordered the final approval hearing be conducted by telephone. Therefore, you should not attend in person at the Courthouse. Class members and members of the public wishing to listen to the final approval hearing should dial-in at 10am ET on November 19 by calling 888-363-4734, using access code 1527005#, security code 4158#, and identifying themselves when asked to do so. Class Members wishing to speak must also follow the procedures identified in the Class Notice as found in the Case Documents on this website.

Your rights may be affected by the legal proceedings in this action if you are a person or entity who:

Participated in the Neuberger Berman Group 401(k) Plan (the “Plan”) and invested some or all of your Plan account in the Neuberger Berman Value Equity Fund (“VEF”) between June 15, 2010 and December 16, 2019.

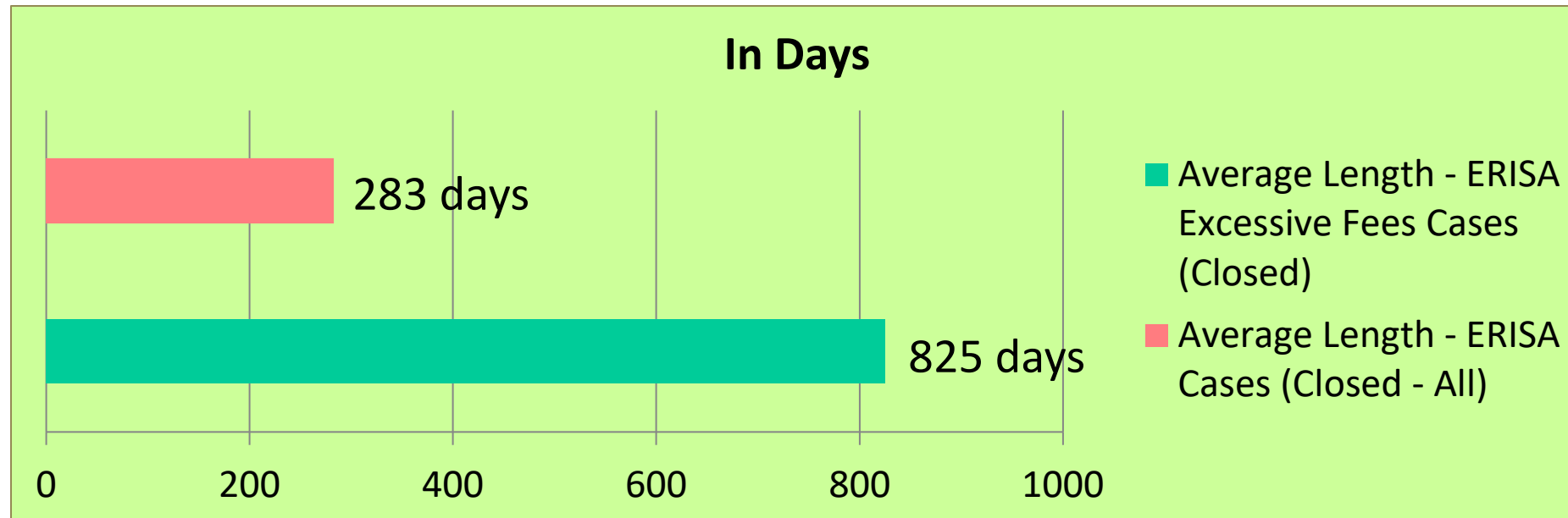
Plaintiff Arthur Bekker (“Plaintiff”) sued the Neuberger Berman Group 401(k) Plan Investment Committee (the “Committee” or “Defendant”) in the U.S. Federal Court for the Southern District of New York on behalf of a class of persons who participated in the Plan and invested some or all of their Plan account in the VEF between June 15, 2010 and December 16, 2019 (the “Class”).

ERISA Cases: Long, Complex, Hard-Fought*



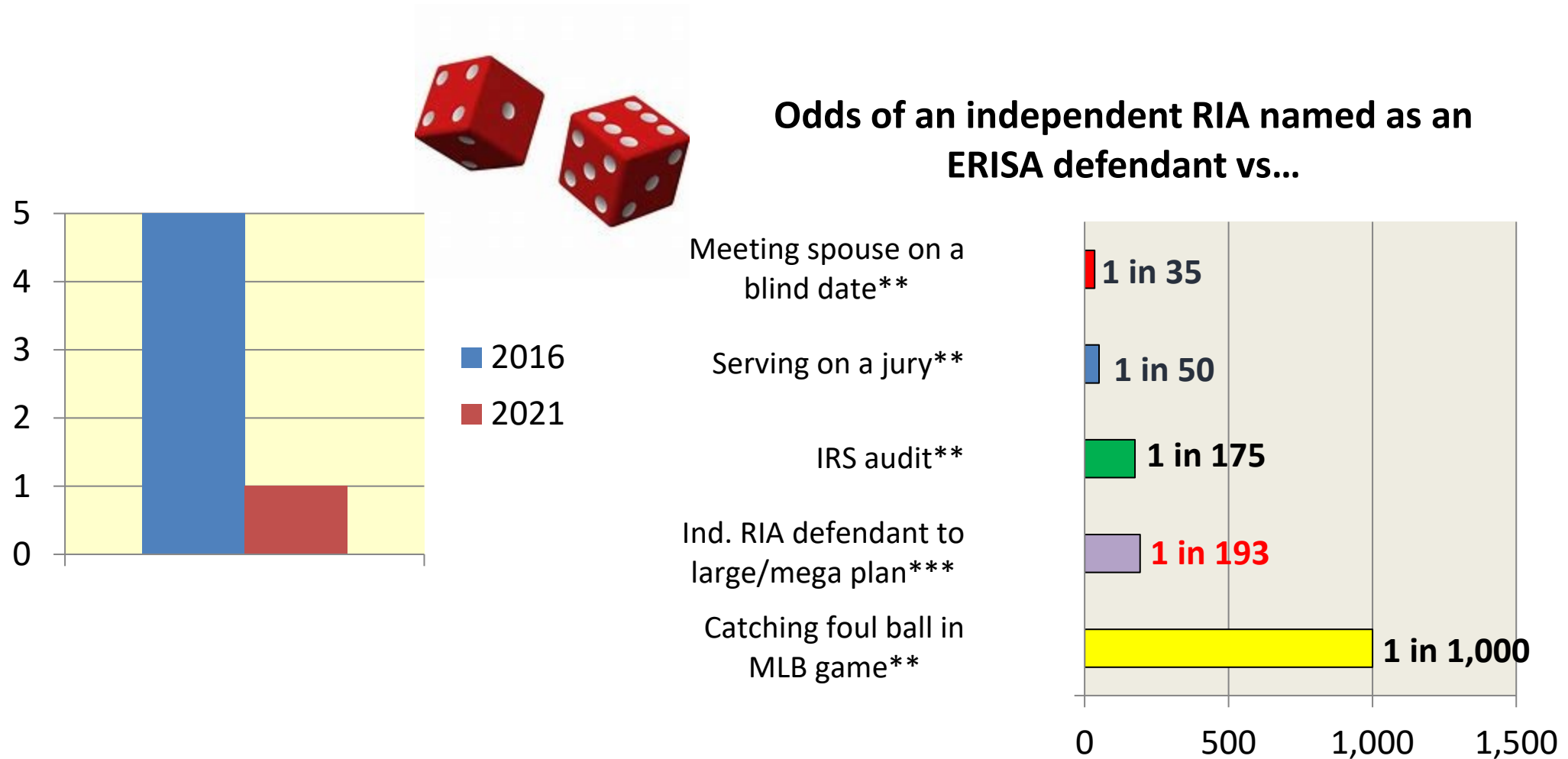
Class of 2016

- Shortest (case closed) **33 days**
- Longest (case closed) **1,883 days**
- Longest (case still open) **2,104 days**



* Source: Unless cited, all data in this presentation was compiled from Bloomberg Law database.

Becoming an ERISA Defendant* Compared to the Odds

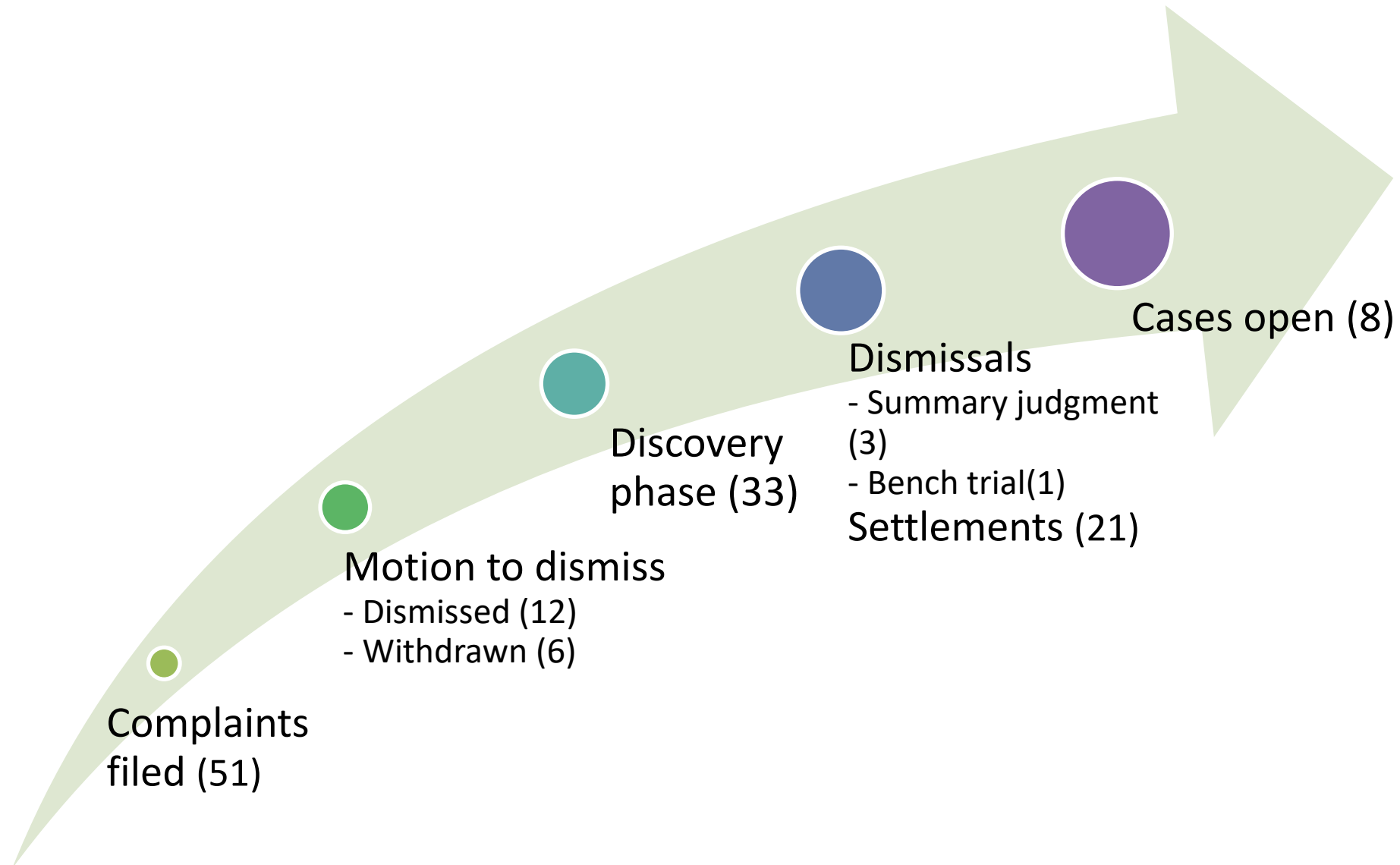


* Independent advisory firms

** Sportsinsider.com ("Here are taxpayers' odds of being audited this year," *FoxBusiness.com*, 4/10/19)

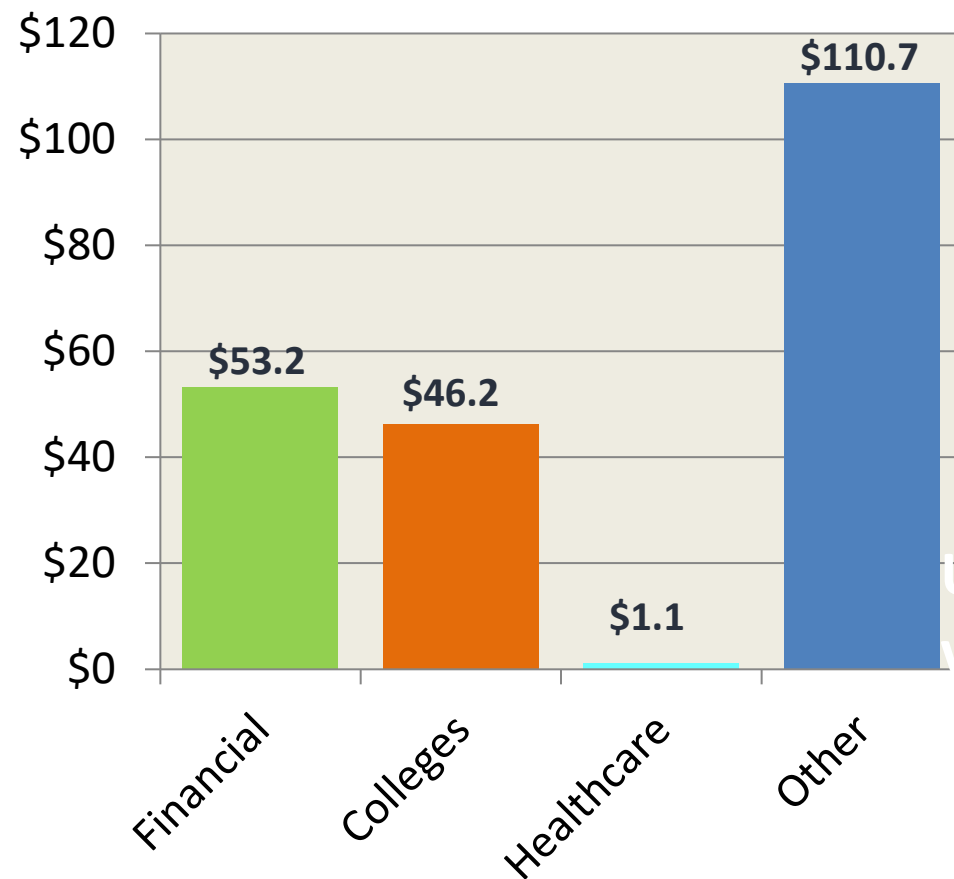
*** Fi360 estimate (risk for independent advisors to \$100m+ plans over 5 years)

The Litigation Process – Class of 2016

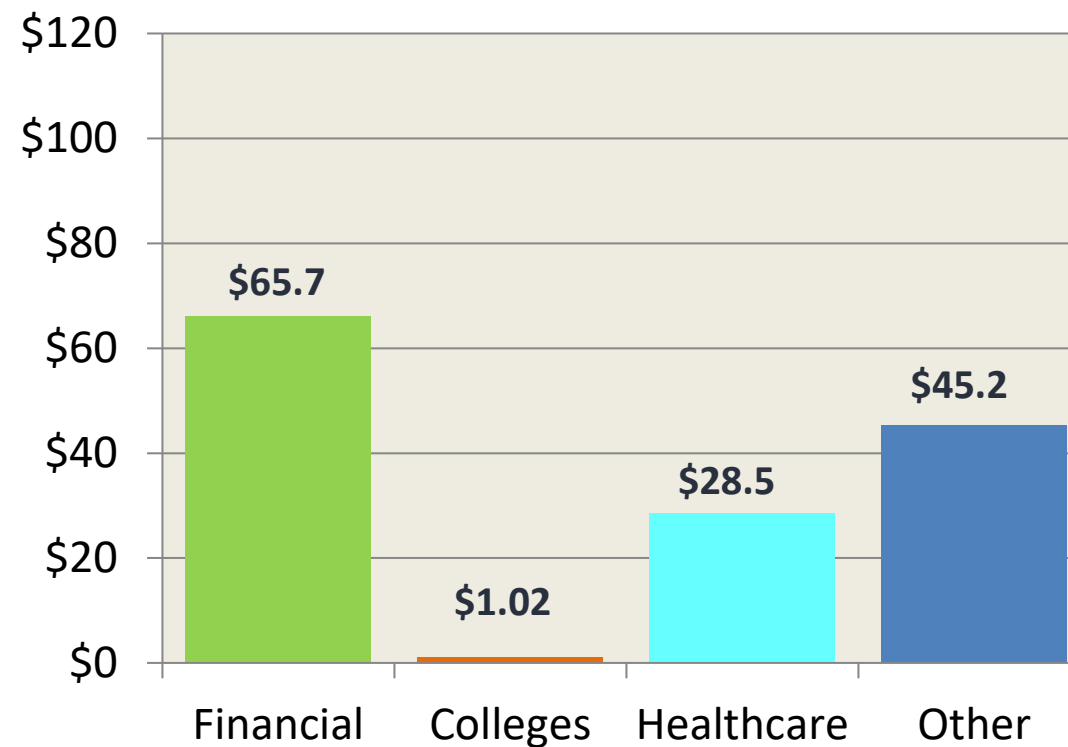


Lawsuits by Industry Sector – 2016 & 2021*

2016 Plan Assets (\$B)



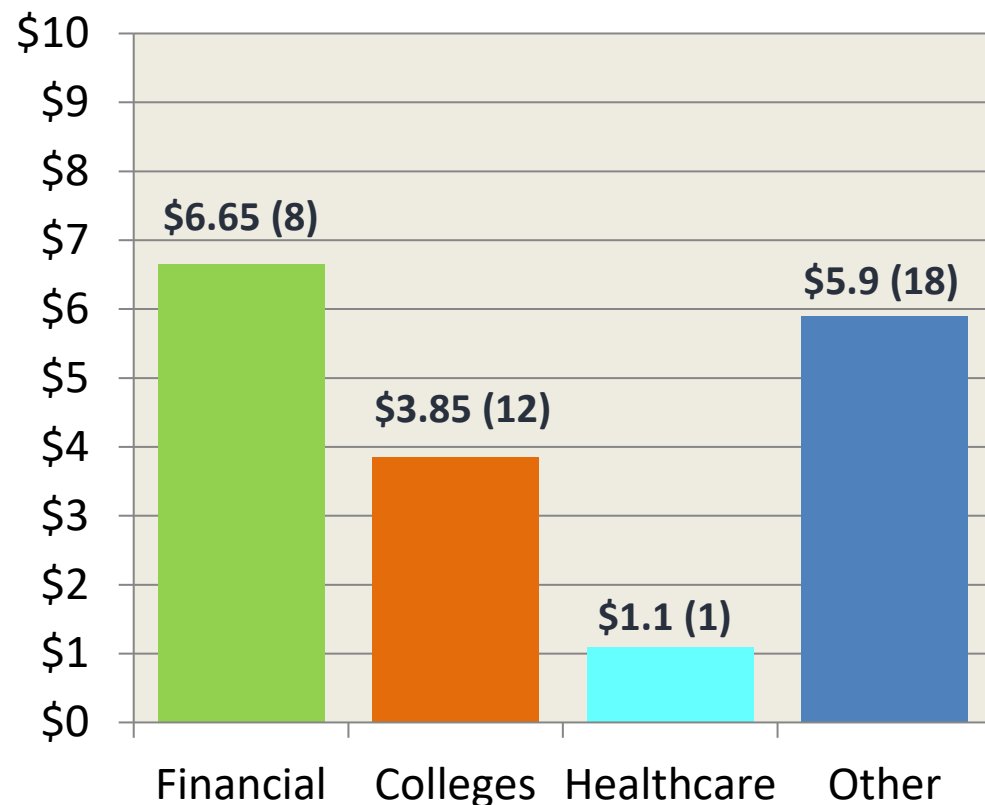
2021 YTD Plan Assets (\$B)



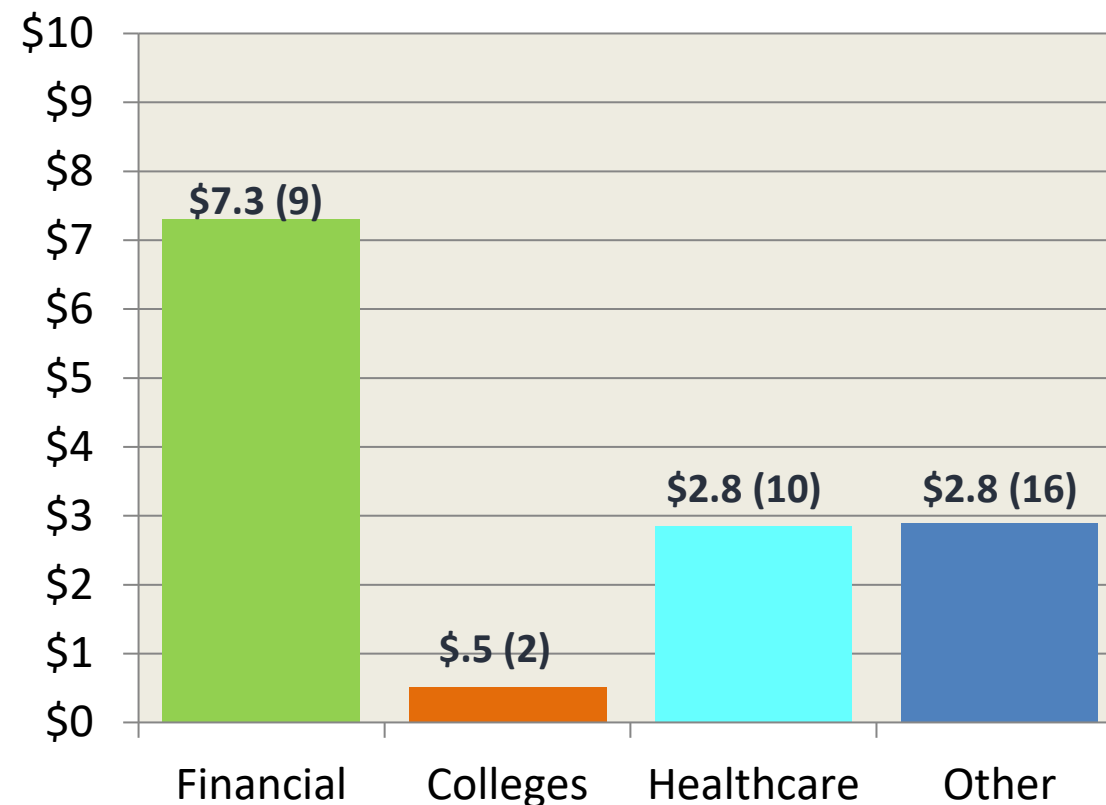
*As of 10/31/21

Defendants by Average Plan Assets – 2016 & 2021*

2016 Plan Average Assets (\$B)



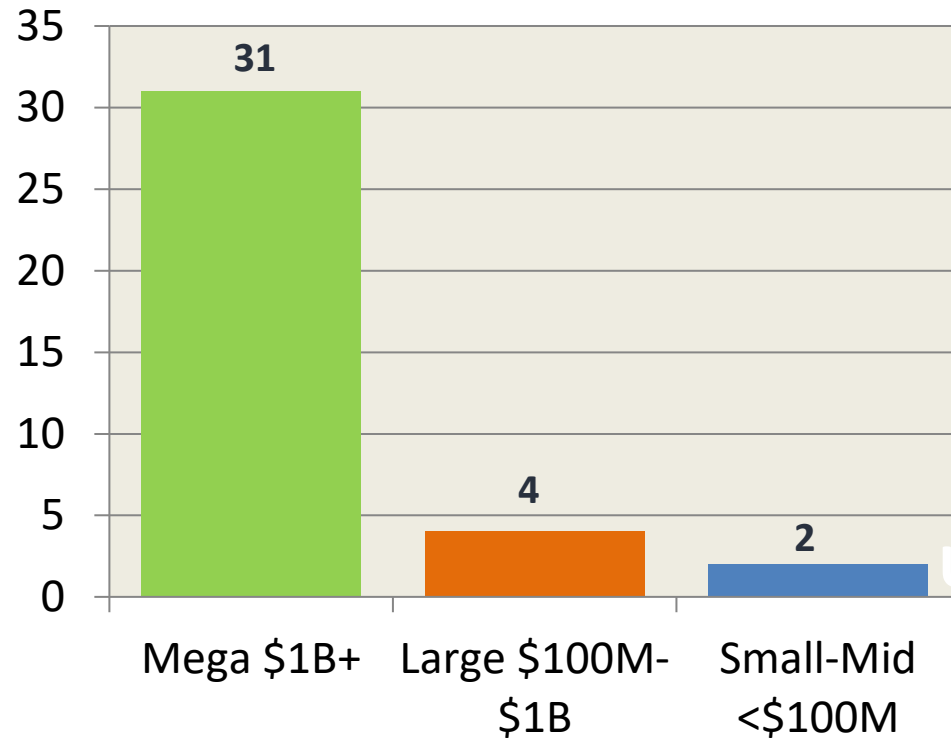
2021 YTD Plan Average Assets (\$B)



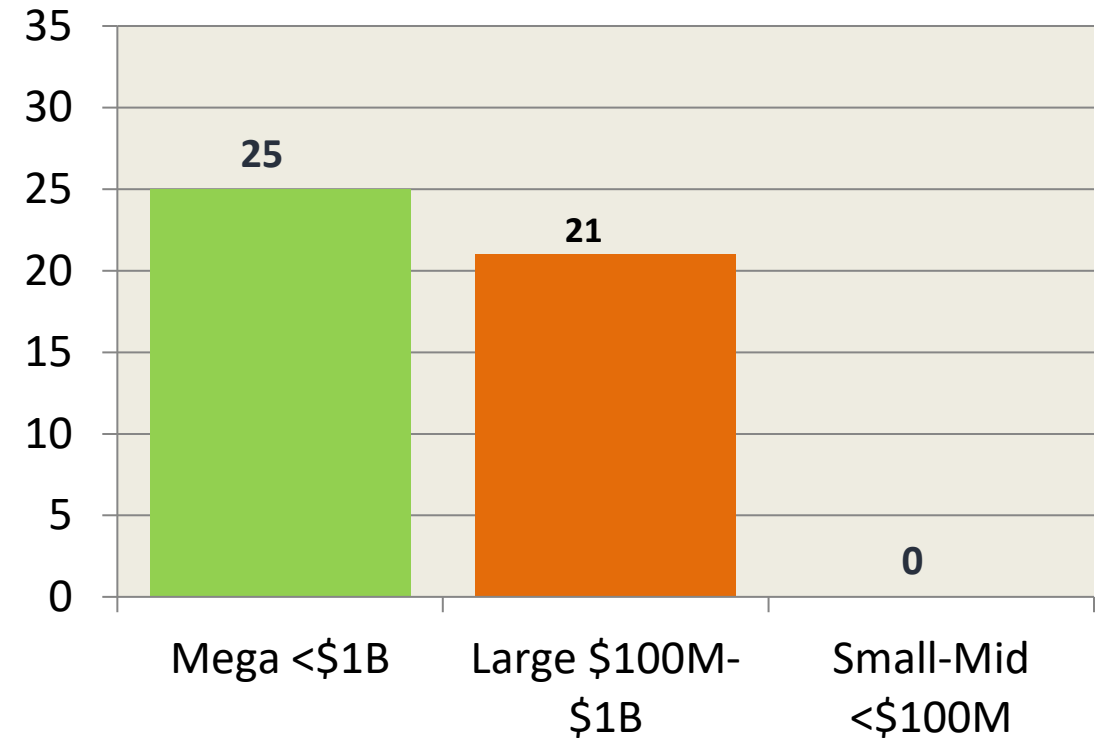
*As of 10/31/21

Plan Defendants By Size & Numbers

2016 Plans

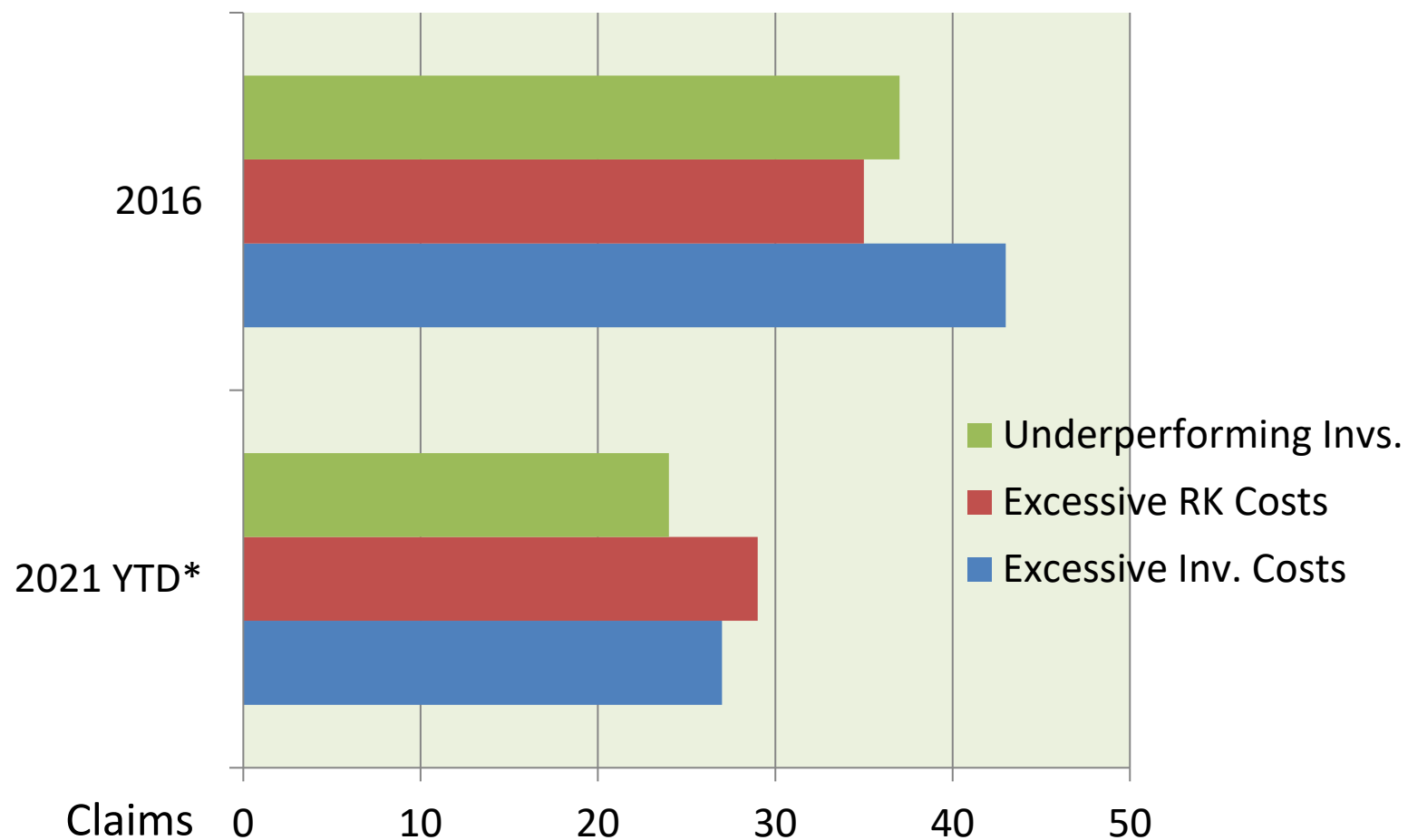


2021 Plans YTD*



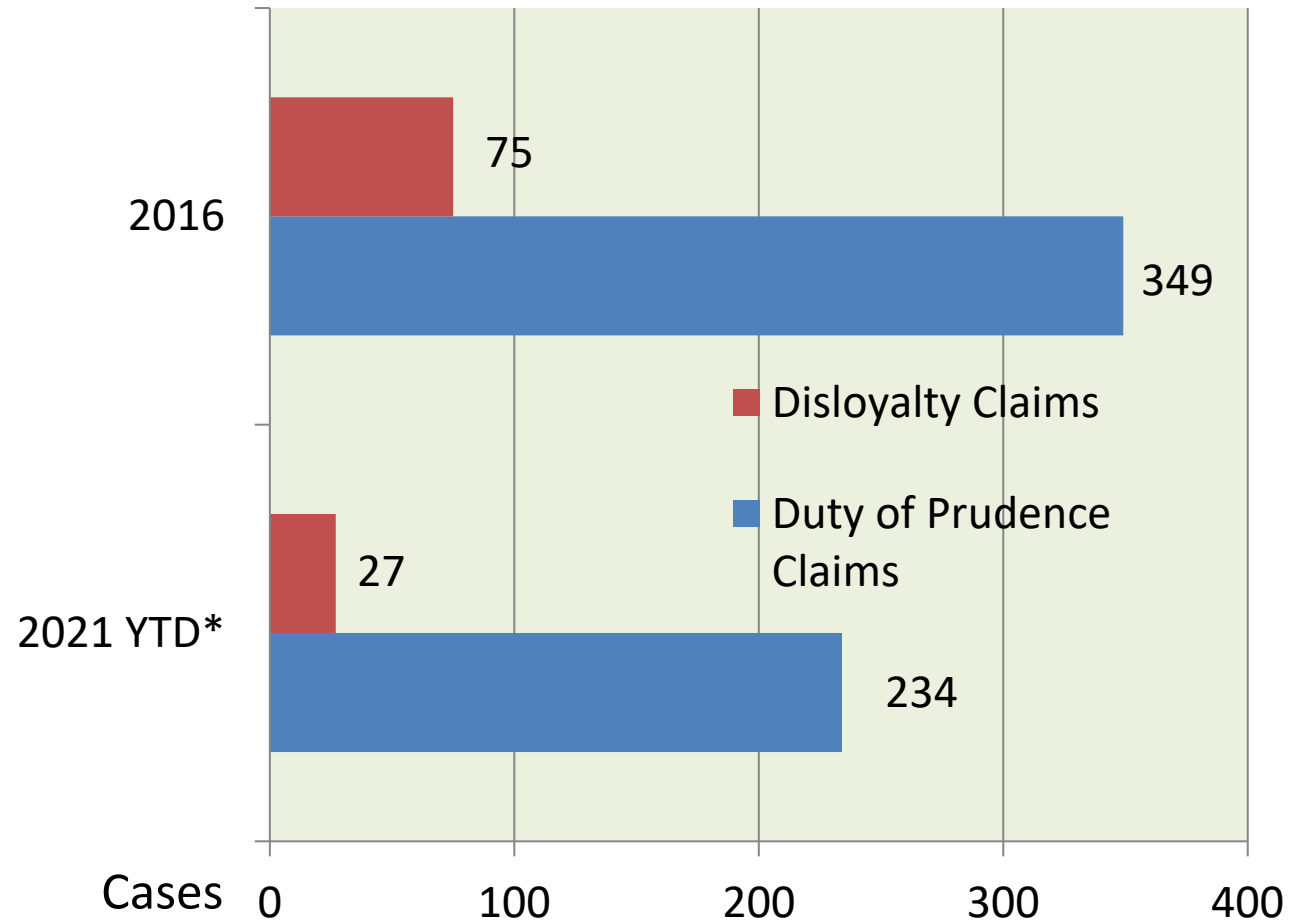
*As of 10/31/21

'Excessive Fee' Cases Not Just About Fees



*As of 10/31/21

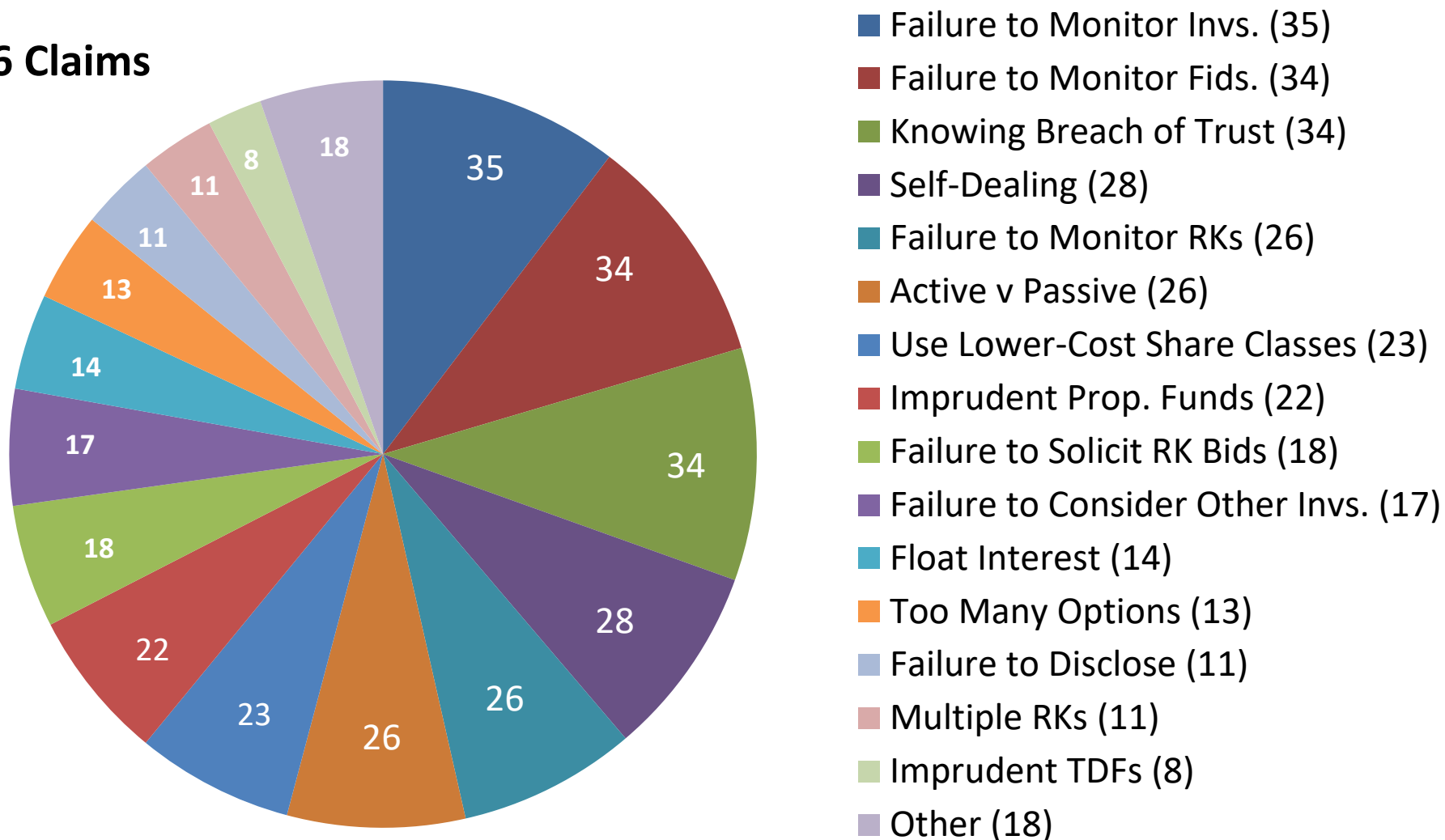
Duty of Prudence Claims Dominate



*As of 10/31/21

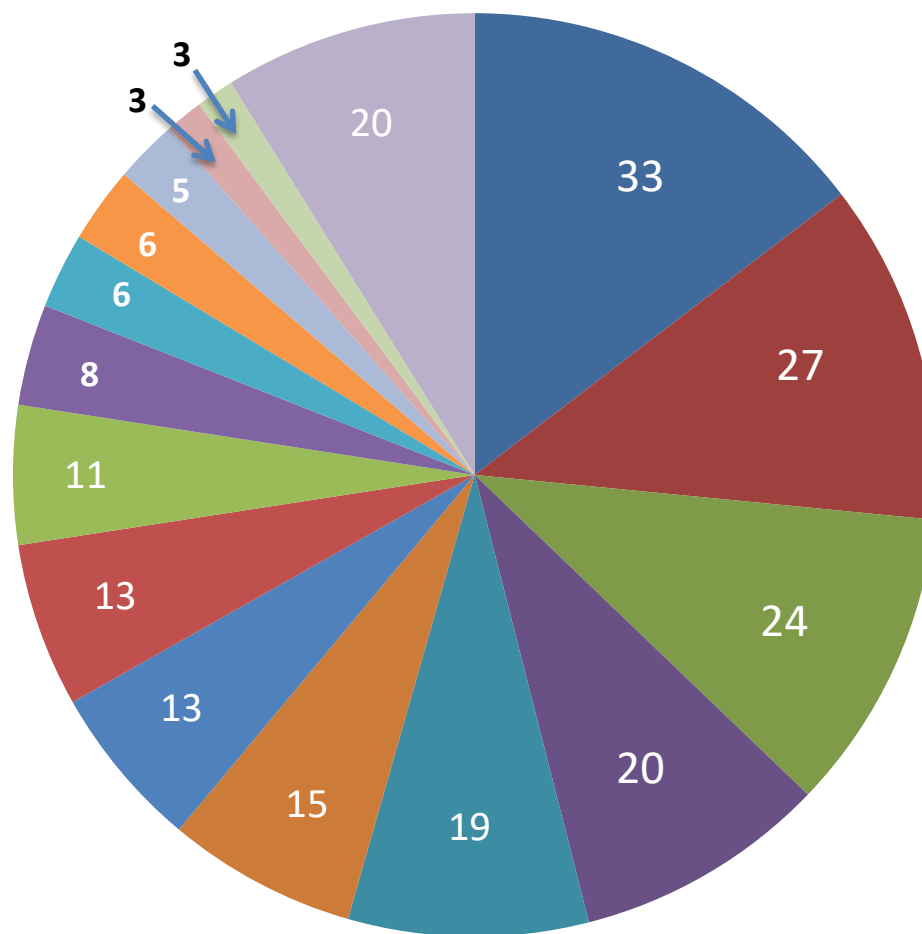
ERISA Top 15 Breach Claims – A Granular View (2016)

2016 Claims



ERISA Top 15 Breach Claims – A Granular View (2021)

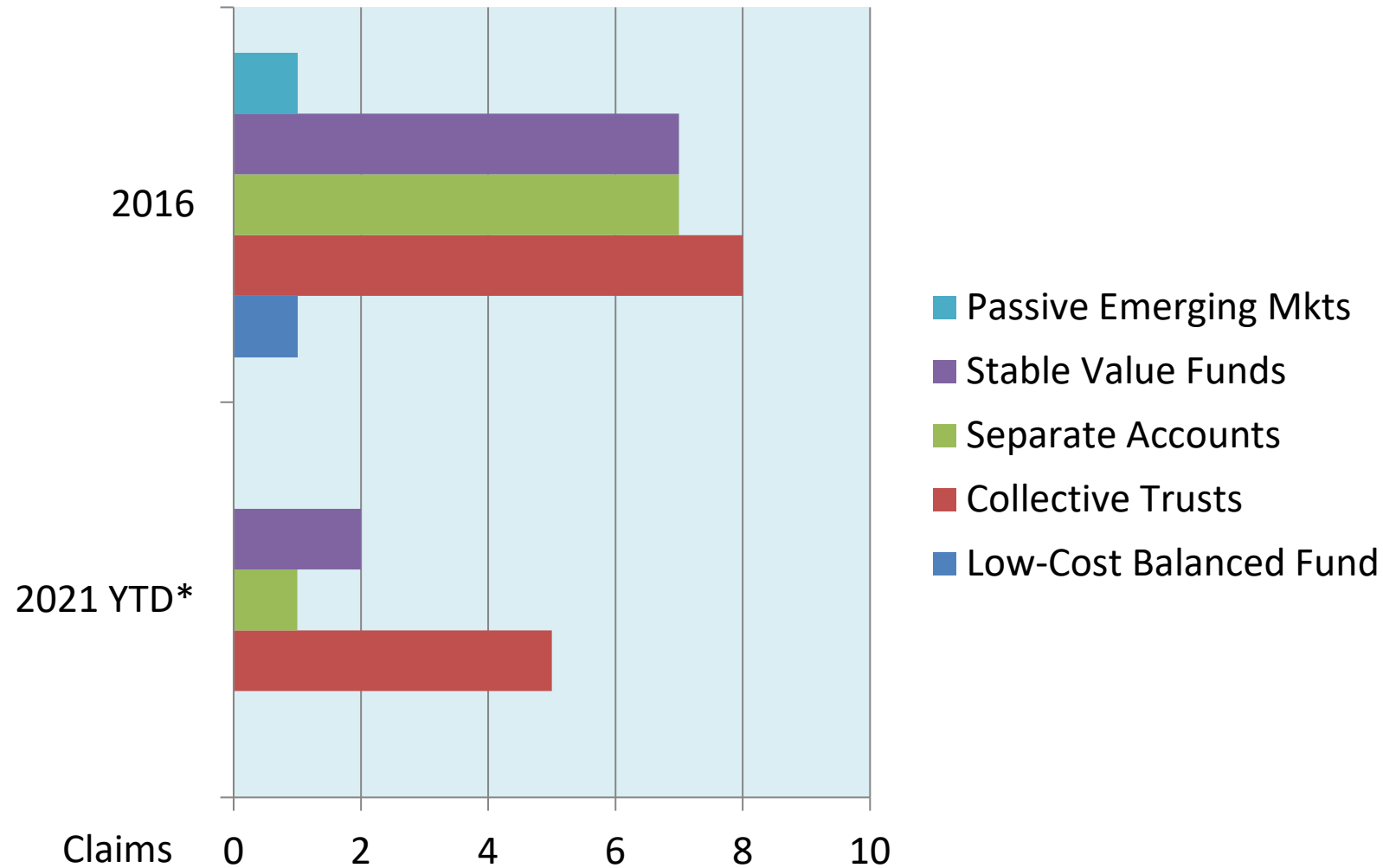
2021 Claims*



- Failure to Monitor Fids. (33)
- Failure to Monitor Invs. (27)
- Failure to Monitor RKs (24)
- Failure to Solicit RK Bids (20)
- Use Lower-cost Share Classes (19)
- Active v Passive (15)
- Self-Dealing (13)
- Imprudent TDFs (13)
- Imprudent Prop. Funds (11)
- Knowing Breach of Trust (8)
- Failure to Disclose (6)
- Failure to Consider Other Invs. (6)
- Use of Untested Invs. (5)
- Failure to Diversify (3)
- Failure to Follow Gov Docs (3)
- Other (20)

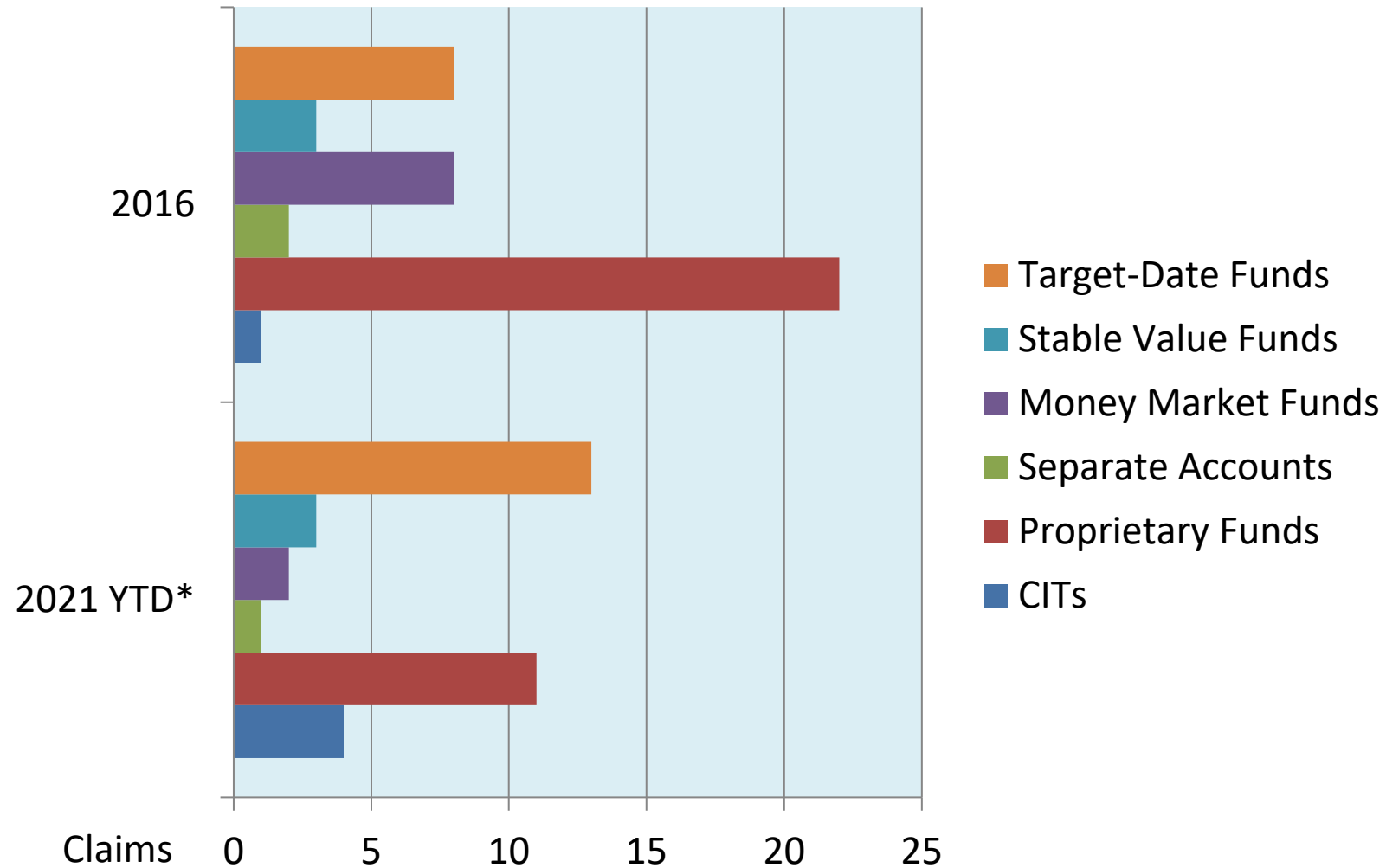
*As of 10/31/21

Plaintiff Claims: Investments Plans Should Consider



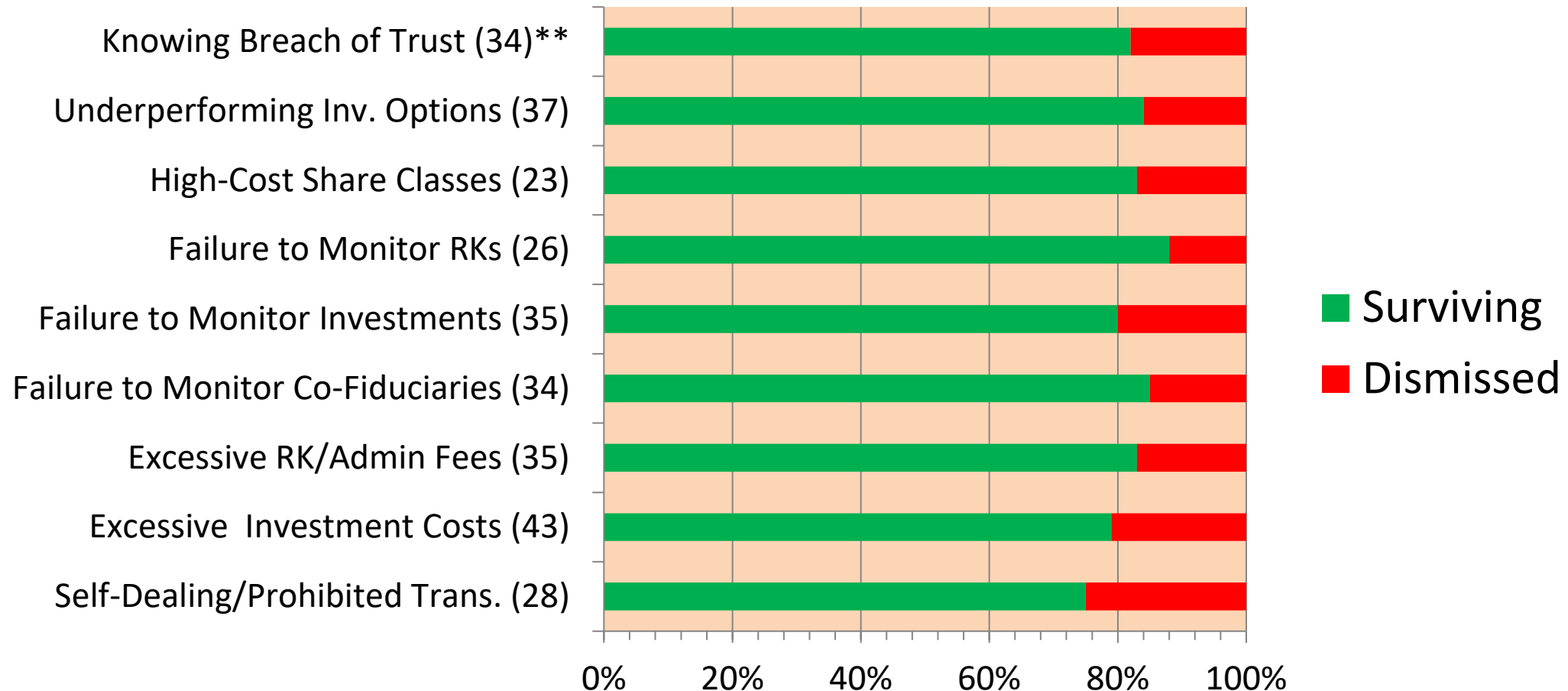
*As of 10/31/21

Breach Claims – Investments at Dispute



*As of 10/31/21

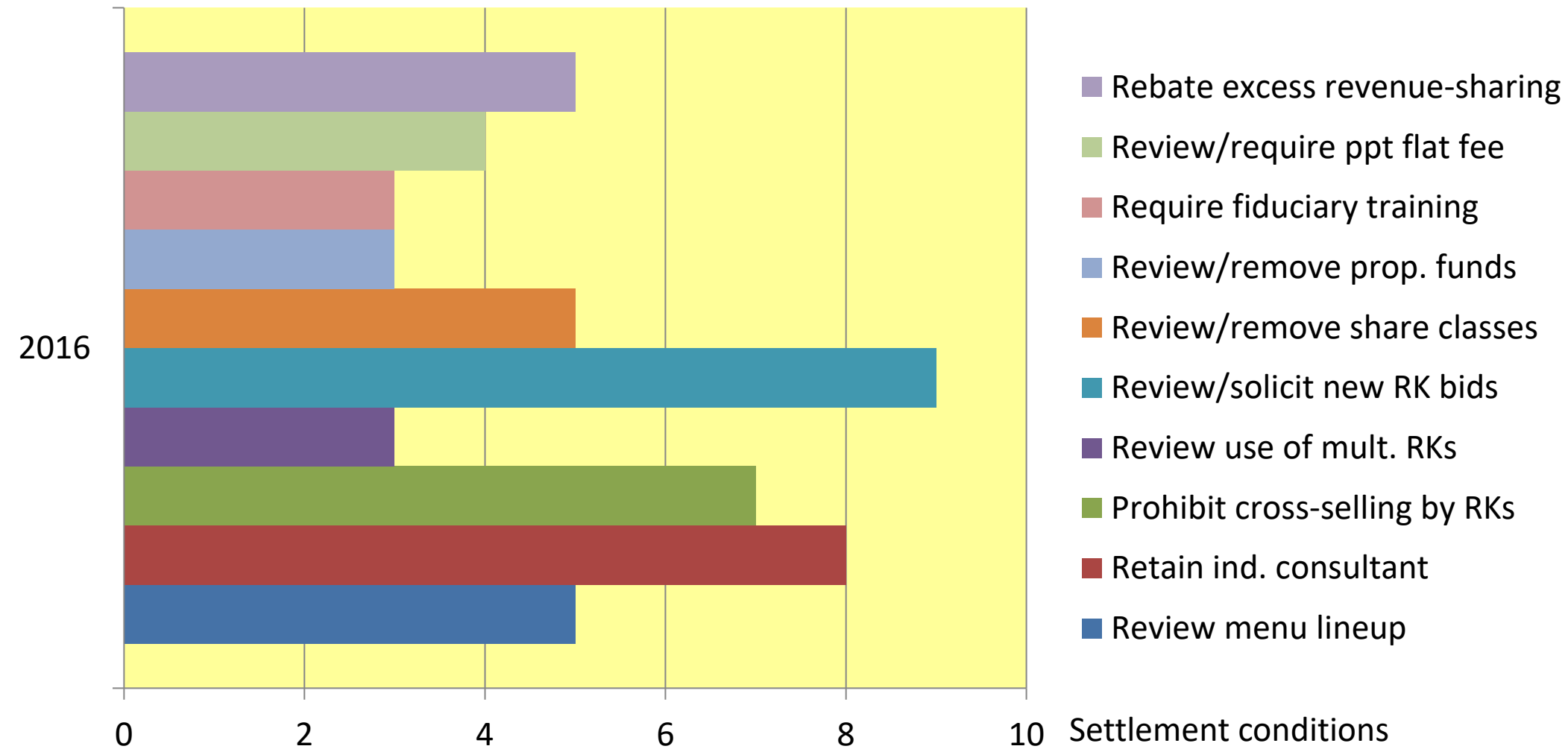
Motion to Dismiss Stage – Surviving/Failed Claims in 2016*



*Displays top 10 claims filed in 2016. Includes only complete victory for defendants at Motion to Dismiss stage.

** Number of claims filed

Settlement Conditions – 2016 Class-Actions



Comparing Bundled RK/Administrative Services

Excerpt from an excessive fee claim:

The Bundled RK&A services include, but are not limited to, the following standard services:

- a. Recordkeeping;
- b. Transaction Processing (which includes the technology to process purchases and sales of participants' assets as well as providing the participants the access to investment options selected by the plan sponsor);
- c. Administrative Services related to converting a plan from one [RK] to another [RK];
- D. Participant communications (including employee meetings, call centers/phone support, voice response systems, web account access, and the preparation of other communications to participants, e.g., Summary Plan descriptions and other participant materials);
- e. Maintenance of an employer stock fund (if needed);
- f. Plan Document Services which include updates to standard plan documents to ensure compliance with new regulatory and legal requirements;
- g. Plan consulting services including assistance in selecting the investments offered to participants;
- h. Accounting and audit services including the preparation of annual reports, e.g., Form 5500 (not including the separate fee charged by an independent third-party auditor);
- i. Compliance support which would include, e.g., assistance interpreting plan provisions and ensuring the operation of the plan is in compliance with legal requirements and the provisions of the plan (which would not include separate legal services provided by a third-party law firm); and
- j. Compliance testing to ensure the plan complies with Internal Revenue nondiscrimination rules.

The second type of essential RK&A services, hereafter referred to as “Ad Hoc RK&A” services, provided by all [providers], often have separate, additional fees based on the conduct of individual participants and the usage of the service by individual participants (usage fees). These...services typically include, but are not limited to, the following:

- a. Loan Processing;
- b. Brokerage services / account maintenance (if offered by the plan);
- c. Distribution services; and
- d. Processing of Qualified Domestic Relations Orders.

It's Never Too Late to Mitigate...



...However, be prepared as ERISA allows 'lookbacks.'

"It appears that in 2020, *five years* into the Class Period, some **changes** were made to the Plan **wherein certain Plan investment options**, some of which are the subject of this lawsuit, **were either converted to lower class shares or eliminated unnecessary fees.**

These changes were far too little and too late as the damages suffered by Plan participants to that point had already been baked in. There is no reason to not have implemented these changes by the start of the Class Period when the majority of lower-class shares were available."

— *Loomis v. Nextep Inc.* complaint (Mar. 10, 2021)

Key Takeaway – Who gets in trouble and why?



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1. Perceived breach of trust by plan fiduciaries
2. Calculable harm
3. Apparent cause
 - a) Disloyalty
 - b) Imprudence
4. Available remedies worth pursuing
5. Apparent vulnerabilities of the defendant
 - a) Conflicts
 - b) Self-interested decision-making
 - c) Ignorance
 - d) Negligence
 - e) Indifference

Key Takeaway – Litigation Risk Management

Prevention	Defense	Settlement
<p><u>Fiduciary Best Practices</u></p> <ol style="list-style-type: none"> 1. Organize – Know the rules 2. Formalize – Good governance, documentation standards 3. Implement – Prudence and diligence 4. Monitor – Service providers, policies and procedures 	<p><u>Technicalities</u></p> <ol style="list-style-type: none"> 1. Standing 2. Timeliness 3. Calculable damages 4. Fiduciary status 5. Unclear causes and consequences 	<p><u>Face Reality</u></p> <ol style="list-style-type: none"> 1. Dismissal is pivotal 2. Costs of litigation are high <ul style="list-style-type: none"> - Monetary - Time - Reputation 3. What is the “just” outcome?
<p><u>Education of Fiduciaries</u></p> <ol style="list-style-type: none"> 1. Plan documents 2. Fiduciary responsibilities 3. Retirement and regulatory environment 	<p><u>Documentation</u></p> <ol style="list-style-type: none"> 1. Policies and procedures 2. Independent plan advice 3. RFIs and RFPs 4. Fiduciary audits 	<p><u>Settlement Terms</u></p> <ol style="list-style-type: none"> 1. Pay damages and costs 2. Commit to change 3. Engage independent oversight
<p><u>Watch for Warning Signs</u></p> <ol style="list-style-type: none"> 1. Address participant complaints 2. Conduct fiduciary audits 	<p><u>Disclosures</u></p> <ol style="list-style-type: none"> 1. Mandated disclosures 2. Costs, conflicts, commendations 	<p><u>Don't Let It Happen Again!</u> See Column 1 – Practice Prevention</p>

Q & A

Please submit any questions using the On24 interface

Additional questions can also be sent to support@fi360.com

THANK
YOU
