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GEORGETOWN UNIVERSITY WINS DISMISSAL OF ERISA 403(b) CASE

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Georgetown University has won dismissal of an ERISA fiduciary breach case alleging the school's two 403(b) retirement plans offered imprudent investment options and allowed participants to pay excessive recordkeeping and investment management fees (*Wilcox v. Georgetown Univ.*, No. 18-422 (D.D.C., Jan. 8, 2019)). The case is one of more than 20 filed against large private universities' 403(b) plans in recent years. Georgetown joins a growing list of schools that have won motions to dismiss all of these claims.

PLAINTIFFS' IMPRUDENCE CLAIMS

The plaintiffs — two participants in the plans — asserted several imprudence claims involving both plans' recordkeeping arrangements and investment offerings.

Multiple Recordkeepers

The plans' investment options included fixed and variable annuities from TIAA and mutual funds from TIAA, Vanguard and Fidelity. Each company served as recordkeeper for its funds and charged asset-based fees for its services. The plaintiffs alleged a single recordkeeper could perform the same services across all three investment platforms for a lesser, fixed fee.

The court viewed this claim as a challenge to the fundamental structure of the two plans, rather than the prudence of the plans' fiduciaries. The use of multiple recordkeepers is common for 403(b) plans, which — can offer both annuities and mutual funds as investment options. The court found the plaintiffs provided no evidence that TIAA, Vanguard, and Fidelity would have agreed to a single recordkeeping arrangement and failed to identify a single college or university 403(b) plan with such an arrangement.

CREF Stock Account

The plaintiffs challenged the fiduciaries' decision to offer TIAA's CREF Stock Account, a variable-annuity fund that invests in a mix of domestic and foreign common stocks. The plaintiffs argued that retaining that fund as an investment option was imprudent because it underperformed compared to the Russell 3000 Index, a domestic equity index.

The court disagreed, noting the Russell 3000 was a suitable benchmark for only domestic holdings in the CREF Stock Account. The appropriate benchmark for the fund's domestic *and* foreign holdings was a composite of the Russell 3000 and a global index identified in the fund's prospectus. As a result, the plaintiffs failed to show that the fund underperformed. The court also noted that, even if the fund had underperformed, that alone would not indicate imprudence because fiduciaries aren't required to pick the best-performing funds.

TIAA Real Estate Account

The plans' fiduciaries also faced an imprudence claim involving the TIAA Real Estate Account, a variable-annuity fund that invests primarily in commercial real estate, with returns driven by the properties' rental income and appreciation. Plaintiffs alleged this fund had excessively high fees and underperformed relative to comparable funds — in particular, Vanguard's real estate investment trust (REIT) account, which invests in property management companies.

Only one of the plaintiffs invested in the TIAA Real Estate Account, and it actually outperformed the Vanguard REIT account, even after accounting for both funds' fees. Accordingly, the court dismissed the complaint because neither plaintiff suffered any harm.

TIAA Traditional Annuity

Both plans offered the TIAA Traditional Annuity, a fixed-annuity contract that returned a specified minimum interest rate. Under one of the plans, this investment option had a higher rate of return but placed certain restrictions on access to the funds. Participants seeking to redirect their investments while still working could do so only in 10 annual installments. After terminating employment, participants taking a lump sum distribution instead of an annuity had to pay a 2.5% surrender charge.

Plaintiffs claimed fiduciaries acted imprudently when they accepted these restrictions, arguing:

- The transfer restriction effectively prevented employees from investing in equity funds and other investments as market conditions or participants' investment objectives changed.

- The surrender charge was an improper penalty under ERISA for early withdrawal from the contract.

Only one of the plaintiffs invested in the TIAA fixed-annuity option, and he did not assert any intent to divest from this option or terminate employment and take a lump sum. So the court dismissed these claims, finding neither plaintiff suffered any harm.

Retail Share Class Funds

Another imprudence claim challenged the fiduciaries' selection of certain Vanguard retail funds rather than institutional funds with lower fees. (Funds in the retail-share class are sold directly to investors; funds in the institutional-share class are sold to retirement plans and financial institutions.) Again, the court found the plaintiffs suffered no harm because neither plaintiff invested in the Vanguard funds.

Too Many Investment Options

The plans offered more than 300 investment options across the TIAA, Vanguard and Fidelity platforms. Arguing that so many options can be overwhelming, plaintiffs claimed "studies show that when people are given too many choices of anything, they lose confidence or make no decision." But the court found no evidence that the plaintiffs were confused or overwhelmed by the available investment options or unable to make decisions regarding those options.

DIGESTING THE DECISION

With all claims dismissed, the case is a definite win for Georgetown. But the court dismissed most of the claims — excessive fees, withdrawal restrictions, retail share class funds, too many investment options — after finding the plaintiffs experienced no harm. This raises the question: What would be the outcome if the plaintiffs could show harm?

Other courts have addressed the ERISA prudence analysis when dismissing similar claims. For example, a case against Northwestern University's 403(b) plans alleged fiduciaries imprudently selected certain funds with excessive fees, chose retail rather than institutional funds, and offered too many investment options (*Divane v. Northwestern Univ.*, No. 16-cv-08157 (N.D. Ill. May 25, 2018)). In dismissing all claims, the court focused on the plans' overall investment lineup and said fiduciaries aren't required to be paternalistic and provide only safe, low-cost investment options. Instead, what matters is that participants have a choice among investment options with varying levels of risk/return and fees.

RECAP OF OTHER 403(b) CASES

In addition to Georgetown and Northwestern, the University of Pennsylvania and Washington University in St. Louis have defeated all claims against their 403(b) plans on a motion to dismiss. New York University won dismissal of some claims against it and defeated the remaining claims at trial. Two schools — the University of Chicago and Duke University — settled their cases for $6.5 million and $10.7 million, respectively. The plaintiffs in cases against Long Island University and the University of Rochester recently dropped their claims. Other cases are ongoing.

RELATED RESOURCES

- Duke University 403(b) Plan Settlement Website (preliminary approval granted Feb. 7, 2019)
- *Wilcox v. Georgetown Univ.*, No. 18-422 (D.D.C. Jan. 8, 2019)
- *Davis v. Wash. Univ. in St. Louis*, No. 4:17-cv-01641 (E.D. Mo. Sept. 28, 2018)
- University of Chicago 403(b) Plan Settlement Website (final approval granted Sept. 12, 2018)
- *Sacerdote v. New York Univ.*, No. 16-cv-6284 (S.D.N.Y. July 31, 2018)
- *Divane v. Northwestern Univ.*, No. 16-cv-8157 (N.D. Ill. May 25, 2018)
- *Sweda v. Univ. of Pennsylvania*, No. 16-4329 (E.D. Pa. Sept. 21, 2017)

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