The Recent NYU ERISA Decision and Best Practices for ERISA Fiduciaries

A class action lawsuit against New York University, which alleged that the fiduciaries of its two retirement plans breached their ERISA duties by failing to diligently monitor the plans' investment funds and allowing the plans to pay excessive fees, was recently dismissed.[1] After an eight-day bench trial, U.S. District Judge Katherine B. Forrest ruled that, despite some "troubling" deficiencies in the manner in which the fiduciaries discharged their duties, the plaintiffs failed to prove any fiduciary breach.

The two NYU plans (like those of many colleges and universities) were so called "403(b) plans" under which participants could direct the investment of their contributions by choosing from a list or roster of mutual funds and tax deferred annuities chosen by the retirement plan committee. The committee was the primary fiduciary of the two plans. The plaintiffs' principal claims were that the committee had breached its fiduciary duties under ERISA by:

- using multiple recordkeepers, which resulted in increased fees, rather than consolidating recordkeeping services in a single vendor (which the plaintiffs claimed was a best practice that all plans should follow);
- including too many investment options in the fund roster (one plan had 103 options, while the other had 84);
- in particular, including too many actively managed options rather than lower-cost index funds (and again, the plaintiffs claimed that primarily using index funds should be a fiduciary best practice); and
- retaining two underperforming funds (the TIAA real estate fund and the CREF stock fund) long after they should have been removed as investment options.

In ruling for NYU, Judge Forrest found the following:

1. Multiple Recordkeepers. In fact, the committee had prudently investigated whether consolidating the plans' multiple recordkeepers could result in lower fees, and did partially consolidate these services. Complete consolidation was impractical because no outside firm had ever serviced the TIAA-CREF annuities (which accounted for the lion's share of the plans' assets), and the committee rightly doubted whether any other firm was qualified to do so.
2. Excessive Fees. The committee established and implemented prudent fiduciary processes with respect to its investment funds and recordkeepers. It issued a request for proposals (RFP) for recordkeeping services, and was successful in reducing the aggregate fees paid by the plans. (The plaintiffs had alleged that the plans should have reissued the RFP every 3 years, and that the fee reductions were too little and too late.)

[1] Sacerdote v. New York Univ., 2018 U.S. Dist. LEXIS 128233 (S. D. N. Y. 7/31/2018).

3. Under-performing Funds. As to the allegation that the fiduciaries improperly allowed under-performing funds to remain in the fund roster, the judge ruled that the committee had established and followed a prudent monitoring process, and that the funds' allegedly poor performance did not reflect a fiduciary breach. In particular, the judge noted that the committee held quarterly meetings where the performance of all the plans' investment funds was reviewed in detail with the plans' investment advisor, using each plan's Investment Policy Statement as a guide. Judge Forrest also noted that the funds did not perform as poorly as the plaintiffs alleged, when compared to appropriate benchmarks, and in any case represented only two funds among a diverse investment fund list.

4. Too Many Investment Options. Finally, as to the claim that the plans simply had too many investment options, Judge Forrest conceded that "a fiduciary can[not] insulate itself from liability by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among them." Nevertheless, the judge ruled that the plaintiffs simply had not alleged facts sufficient to suggest that the participants were harmed by the committee's failure to consolidate the plans' investment options.[2]

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The decision in favor of NYU, and the recent dismissal of two other similar lawsuits against Northwestern University and the University of Pennsylvania,[3] should give some comfort to fiduciaries of ERISA retirement plans, especially those sponsored by higher education institutions. The NYU decision suggests that 403(b) plans do not necessarily violate ERISA simply because they have a very large number of investment funds, including actively managed funds, or because they do not promptly remove underperforming funds from the plan.

On the other hand, the University of Chicago recently paid $6.5 million to settle a similar fiduciary breach lawsuit.[4] And several other cases, that were part of the wave of fiduciary breach lawsuits against colleges and universities that began in 2016, remain to be decided. (For example, the actions against the Yale and M.I.T. retirement plans are still ongoing.) So higher education retirement plans still face significant risks from lawsuits alleging fiduciary breaches.

Two years ago, we discussed this wave of ERISA lawsu its in higher education, and suggested some best practices that retirement plan fiduciaries should follow in order to avoid fiduciary breaches. (You can find our 2016 Alert here.) Judge Forrest's opinion in the recent NYU case confirms the appropriateness of several of those recommendations.

"Procedural Prudence": For example, in our 2016 Alert we advised that plan fiduciaries should exercise "procedural prudence" in vetting and selecting investment options, advisors and other service providers, and that they discuss and negotiate fees with vendors to secure the most favorable arrangements for employees. In the NYU opinion, Judge Forrest noted approvingly that NYU's plan committee had implemented such a prudent process, including by using an RFP to select plan recordkeepers, and had prudently investigated whether the consolidation of recordkeeping services was feasible.

Monitoring: Our earlier Alert also recommended that fiduciaries continually monitor their chosen investments and service

[2] This specific claim had been dismissed by Judge Forrest in an earlier ruling. See Sacerdote v. New York Univ., 2017 U.S. Dist. LEXIS 137115 (S. D. N. Y. 8/25/2017).

[3] Divane v. Northwestern Univ., 2018 U.S. Dist. LEXIS 87645 (N. D. Ill. 2018); Sweda v. Univ. of Pa., 2017 U.S. Dist. LEXIS 153958 (E. D. Pa. 2017).

[4] See "Chicago Settles Pension Lawsuit for $6.5 Million," Insider Higher Education (May 25, 2018), available here.

providers, and make changes when appropriate. The NYU committee's practice of holding quarterly meetings to review the performance of the investment funds was cited several times in Judge Forrest's opinion and was important to her finding that no fiduciary breach occurred.

<u>*Consult Experts When Appropriate*</u>: And finally, we advised two years ago that plan fiduciaries consult with third party advisors whenever "in-house" fiduciaries lack necessary expertise. Judge Forrest's opinion notes that the NYU committee utilized a professional investment advisor to counsel the committee on issues relating to the plans' investments.[5]

<u>*Know What the Job Entails, and Exercise Independent Judgment*</u>: On the other hand, plan fiduciaries should avoid the fiduciary deficiencies that were criticized by Judge Forrest in the NYU opinion. Although she ultimately ruled that no fiduciary breach occurred, the judge noted that several committee members appeared not to understand or appreciate the scope and importance of their fiduciary roles, and appeared to believe that they could simply rely on the advice of the plans' investment advisor. Judge Forrest stated that blind reliance on a co-fiduciary is improper, and that all fiduciaries have a duty to individually assess the appropriateness of advice they receive from others, even expert advisers.

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If they have not already done so, retirement plan fiduciaries should carefully review the manner in which the plan is administered and confirm that they have prudent fiduciary processes in place, especially with respect to the selection and monitoring of investment funds, recordkeepers, and other service providers.

Attorneys in Bond Schoeneck & King's Employee Benefits Practice Group frequently counsel clients with respect to best practices for fulfilling fiduciary duties and avoiding ERISA liability. Often this takes the form of "fiduciary training" we provide to retirement plan committees and other plan fiduciaries.

If you have any questions about the matters discussed in this Alert, please contact Robert W. Patterson, any of the attorneys in our Employee Benefit and Executive Compensation Practice, or the attorney in the firm with whom you are regularly in contact.

[5] In fact, the judge stated that several committee members relied *too* heavily on the investment advisor. This overreliance could have itself constituted a fiduciary breach, but the judge found that there was enough expertise among other committee members to preclude such a finding.