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Employee Retirement Plans and Alleged Breaches of Fiduciary Obligations (CLE)

Steve Kronheim
TIAA General Counsel

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Employee Retirement Plans and Alleged Breaches of Fiduciary Obligations

403(b) Cases

April 16, 2018

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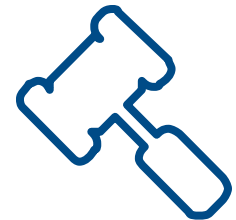
403(b) Litigation Update

Summary:

In August 2016, a plaintiff class action firm filed a series of coordinated complaints against large private universities, including University of Pennsylvania, Yale, Vanderbilt, Johns Hopkins, NYU, Columbia, MIT, and Cornell University, to challenge their 403(b) retirement plan fees and investments. Since then another firm has filed complaints against Princeton, University of Chicago, Brown, Washington University (St. Louis), and Georgetown.

Courts' rulings on a motion to dismiss:

- MTD: does not address the merits of plaintiffs' claims; claims can be dismissed only if not properly pled or the theory is legally invalid
 - **University of Pennsylvania**—the case is dismissed in its entirety.
 - **New York University, Columbia, Duke University, Emory University, Princeton University, MIT, U. Chicago, Cornell, Johns Hopkins**—dismissed certain claims, others will proceed to fact finding/discovery



Complaints: Allegations

Participants allegedly harmed when Plan sponsors:

Fees

- Failed to utilize their size and bargaining power to reduce fees, including using multiple recordkeepers
- Imprudently included funds that charged excessive fees (*i.e.*, retail share class and revenue sharing)
- Allowed record keepers to receive “unlimited” asset-based compensation from proprietary products

Investments

- Offered too many investment options
- Used actively managed funds rather than indexed
- Imprudently retained underperforming funds through use of bundled recordkeeping approach (e.g., use of CREF Stock Account with TIAA Traditional Annuity)

Improper policy loan program:

- Required collateral as security for repayment
- Charged excessive administrative fees
- Violated DOL rules

Defenses

- 1** Failure to state a claim; prudent fiduciary processes were used

- 2** Revenue sharing is not a plan asset

- 3** Cheapest investment options not always appropriate; ERISA does not require only indexed funds

- 4** ERISA does not prohibit use of multiple record keepers or bundled arrangements

- 5** Underperformance claims use apples to oranges comparisons with the benefit of hindsight

- 6** Excessive fees complaint derived from unspecified benchmarks not tied to 403(b) market

- 7** Complaints fail to recognize plan designs for unique populations

- 8** 403(b) plans differ from 401(k): complex administrative requirements; different purpose and history

- 9** Lack of standing (e.g., attacking loan program but plaintiffs did not take out loans)

- 10** ERISA statute of limitations (6 years/3 years)

MTD Update—University of Pennsylvania

University of Pennsylvania

- The case relies heavily on the governing law of the Third Circuit Court of Appeals, which has the most favorable law among the various judicial circuits in which the 403(b) cases are pending.
 - In particular, the Court agreed with the University that the Third Circuit’s 2011 decision in *Renfro* required dismissal of all claims.
- The court analyzed many of the theories alleged across all of the cases and, for each claim, found that plaintiffs had not “nudged their claims across the line from the conceivable to the plausible.”
- The court also found there are lawful explanations for the alleged conduct (including bundling, using multiple recordkeepers, asset-based recordkeeping fees, and retail share classes), and concluded that plaintiffs’ over-reliance on costs ignored the University’s duty to balance cost and value.

403(b) Litigation Update – MTD Examples

New York University and Columbia University

- At the end of August, Judge Forrest (New York Federal District Court) issued an order granting in part and denying in part the NYU motion to dismiss. Three days later, the same judge issued a similar order on the Columbia motion to dismiss, and referred for its reasoning to its more detailed analysis in the NYU decision.

Dismissed claims:

- Breach of duty of prudence relating to:
 - the offering of 100 funds (plaintiffs did not allege that they were confused or overwhelmed by their investment choices);
 - the use of retail rather than institutional share classes (prudent sponsors could reasonably conclude that retail share classes offer benefits);
 - requiring TIAA as a recordkeeper (rejected the claim that the alleged existence of other lower-priced record keepers makes the retention of TIAA as a recordkeeper imprudent)
- Breach of prudence and loyalty claims regarding the “lock in” of TIAA Traditional, CREF Stock and CREF Money Market

403(b) Litigation Update – MTD Examples

Remaining claims (fact finding is needed)

- Prudence with respect to recordkeeping fees. Fact driven inquiries that prevented dismissal related to:
 - the use of multiple recordkeepers;
 - the failure to conduct an RFP on record keeping prices;
 - whether revenue sharing caused excessive plan fees.
- Prudence with respect to allegedly high cost and underperforming funds (including REA and CREF Stock).
 - **Observation from the Court:** focus on the process -- if the process that NYU employed in its selection and review of investment options is thoughtful (which would be subject to further fact development), the inclusion of REA and CREF Stock would not be imprudent as none of these funds, as alleged, is "plainly risky."



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