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IRS Rules That Student Loan Program under 401(k) Plan Does Not Violate the Contingent Benefit Rule, but Important Compliance Issues Are Left Unanswered

NICHOLAS J. WHITE

OCTOBER, 2018

Research shows that student loan debt is now second only to mortgages in consumer debt. More than 44 million Americans owe collectively $1.5 trillion in student loan debt, with the average student in the Class of 2016 owing over $37,000. Many of these individuals cite their outstanding student loans (or the loans they have taken out to finance their children's education) as a significant reason for not saving more through their employer's retirement program. At the same time, numerous studies demonstrate that many — if not most — American workers are financially ill prepared for retirement.

This situation appears to be crying out for a solution and, in fact, some assistance has come recently from what some would consider an unlikely source: the IRS. The help is in the form of a private letter ruling (the "PLR") that may pave the way for employers to provide a new type of student loan

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Best Lawyers® 2019 Recognizes Trucker ✦ Huss Attorneys

We are pleased to announce that three of the firm's attorneys were recently selected by their peers for inclusion in *The Best Lawyers in America®* 2019 in the areas of Employee Benefits (ERISA) Law and ERISA Litigation.

The Trucker Huss attorneys named in The Best Lawyers in America® 2019:

- R. Bradford Huss — Employee Benefits (ERISA) Law and ERISA Litigation
- Benjamin F. Spater — Employee Benefits (ERISA) Law
- Charles A. Storke — Employee Benefits (ERISA) Law

Earlier this year, Trucker Huss was recognized as one of the *2018 Best Law Firms* by *U.S. News & World Report* and *Best Lawyers* in the areas of ERISA litigation and employee benefits law.

repayment benefit to their employees — as part of the company 401(k) plan.

The IRS released the PLR on August 17, 2018 (PLR 201833012, issued May 22, 2018) in response to an employer's request to amend its 401(k) plan to include a voluntary student loan program, under which it would make contributions to the accounts of participants making student loan repayments. Specifically, the employer requested a ruling on whether amending its plan to provide a nonelective contribution conditioned upon an employee's student loan repayment would violate the "contingent benefit rule" in Internal Revenue Code (the "Code") §401(k)(4)(A). That Code section prohibits conditioning employer-provided benefits in a Section 401(k) arrangement (except for matching contributions) on whether an employee elects to make elective deferral contributions. The IRS ruled that the student loan repayment program, as described in the PLR request, would not violate the contingent benefit rule. This program and the contingent benefit rule are more fully described below.

The Student Loan Repayment Program

The pre-ruling version of the employer's 401(k) plan provided employees with the opportunity to elect to contribute a portion of their compensation to the plan each payroll period as pre-tax or Roth 401(k) elective deferrals, or after-tax employee contributions (collectively, "elective contributions"). If an employee makes an elective contribution during a payroll period equal to at least 2% of their compensation, the employer makes a matching contribution to their plan account equal to 5% of the employee's compensation during the pay period. The matching contributions are made each pay period.

Trucker ✦ Huss Director Ben Spater Inducted as a Fellow of the American College of Employee Benefits Counsel

We are pleased to announce that Director Benjamin F. Spater was inducted as a Fellow of the American College of Employee Benefits Counsel, Inc. (ACEBC). The event was held the evening of September 15 in Nashville, Tennessee. The ACEBC is dedicated to elevating professional standards and advancing the public's understanding of the practice of employee benefits law.

Ben concentrates his practice on the design and tax-qualification of retirement plans including pension, profit sharing and 401(k) plans, the taxation of employee benefits, executive compensation and ERISA.

Five other Trucker Huss attorneys are also Fellows of the ACEBC, including:

- Barbara Creed
- Brad Huss
- Charles Storke
- Lee Trucker (retired)
- Nick White

In the request for a private letter ruling, the employer proposed to amend the plan to offer a voluntary student loan program (the "Program"), under which the employer would make a nonelective contribution on behalf of an employee conditioned on the employee making student loan repayment. Specifically, if an employee makes a student loan repayment equal to at least 2% of compensation during a pay period, the employer will contribute to the employee's plan account a nonelective contribution equal to 5% of their compensation for the pay period. Employees are not required to make a student loan repayment each pay period; rather, employees can opt in and out of the Program on a prospective basis. An employee participating in the Program would at all times remain eligible to make elective contributions, but would not be eligible to receive matching contributions on those elective contributions. That is, employees cannot receive matching contributions in addition to nonelective contributions in the same pay period.

To the extent an employee is ineligible for a matching contribution due to receipt of a nonelective contribution, the plan will make a "true-up" contribution to the employee's account. The true-up contribution is equal to 5% of the employee's compensation and is paid for any week the employee made elective contributions, but did not make a 2% of compensation (or more) student loan payment.

Under the Program, all employees eligible for the plan are eligible to enroll in the Program. Nonelective contributions and matching contributions are subject to the same vesting schedule. Nonelective contributions are subject to all plan qualification requirements, including eligibility, the distribution rules, contribution limits, coverage and nondiscrimination testing. While true-up contributions are subject to ACP testing under Code §401(m), non–elective contributions are not. Matching and true-up contributions are paid as soon as practicable after the end of the plan year, provided the employee is still employed on the last day of the plan year (unless the termination is due to death or disability). The employer will not extend any student loans to employees who participate in the Program.

Law and Analysis

With respect to the contingent benefit rule, Code §401(k)(4)(A) provides that:

> A cash or deferred arrangement of any employer shall not be treated as a qualified cash or deferred arrangement if any other benefit is conditioned (directly or indirectly) on the employee electing to have the employer make or not make contributions under the arrangement in lieu of receiving cash. The preceding sentence shall not apply to any matching contribution (as defined in section 401(m)) made by reason of such an election.

Similarly, Income Tax regulations §1.401(k)-1(e)(6) provides that:

> A cash or deferred arrangement satisfies this paragraph (e) [Additional requirements for qualified cash or deferred arrangements] only if no other benefit is conditioned (directly or indirectly) upon the employee's electing to make or not make elective contributions under the arrangement. The preceding sentence does not apply to (A) any matching contribution (as defined in section 1.401(m) 1(a)(2)) made by reason of such an election.

Thus, the contingent benefit rule prohibits conditioning other employer-provided benefits (such as health and welfare benefits, vacation benefits or nonqualified benefits) on whether an employee makes elective deferral contributions. This sole exception to this rule is for employer matching contributions.

In ruling that the Program would not violate the contingent benefit rule, the IRS particularly took into account the following two factors:

- Per plan terms, the nonelective contributions are conditioned solely on whether a plan eligible employee makes a sufficient student loan repayment, and
- Similarly, because an employee is able to make student loan repayments and receive nonelective contributions, regardless of whether the employee makes elective contributions, the nonelective contributions are clearly not conditioned on whether the employee makes an elective contribution under the 401(k) plan.

The IRS also noted that its "ruling is based on the assumption that the [employer] will not extend any student loans to employees who will be eligible for the program."

Simply put, the IRS determined that under the Program, the nonelective contribution would not to any extent be linked to an employee's choice under a cash or deferred arrangement to receive a plan contribution in lieu of taxable wages. Rather, only matching contributions are conditioned on elective contributions, and this is permissible under the law. Certainly, the nonelective contributions are conditioned on making loan repayments to an entity outside of the plan, but there is no prohibition against this under the law.

Impact of the IRS Ruling

The IRS ruling is generally welcome news for employers seeking to help their employees who are burdened by student loan debt to save more for retirement. A program structured along the lines of what is described in the PLR is close to cost-neutral, as the nonelective contribution essentially replaces the matching contribution. This is to be contrasted with a student loan reimbursement program which amounts to an additional cost to employers and, for that reason, may be less desirable.

At the same time, a PLR-type student loan repayment program is more expensive for employees than making elective contributions to a 401(k) plan. This is because deferrals are made from pre-tax income while the student loan repayments are made from after-tax dollars. In this instance, employees need to determine how much they are willing to pay to reduce their student loan debt, taking into account the benefit to be derived from the employer nonelective contributions.

In addition, it is reasonable to assume a student loan repayment program along the lines described in the PLR will be utilized predominantly by nonhighly compensated employees. Further, since loan repayments and nonelective contributions will not count towards the ADP and ACP nondiscrimination tests, respectively, it certainly could be that offering such a program may adversely impact a 401(k) plan's ability to satisfy testing. If this were to occur, it would have the effect of reducing the amounts highly compensated employees can contribute to the plan.

While the IRS ruling is good news, its application is limited. In particular, a PLR is strictly limited to the taxpayer requesting it. (See Code §6110(k)(3).) Therefore, the ruling cannot be relied upon by others, and it cannot be cited as precedent. This means that to the extent the ruling provides comfort to other employers seeking to offer a student loan repayment program in connection with their 401(k) plan, the level of comfort is directly related to the extent to which the program is similar in design to the one under consideration in the PLR.

Also, the ruling also leaves open a number of issues, such as the following:

- Would it be permissible to design a student loan reimbursement program under which the nonelective contribution is subject to eligibility, vesting and distribution rules that differ from other employer contributions under the plan?
- How are the nonelective contributions to be tested for coverage and nondiscrimination?
- Can a student loan repayment program be offered under a safe harbor 401(k) plan?
- Can a student loan repayment program be offered under a non-401(k) plan?
- To what extent, if at all, must the employer verify that the payments are actually being made pursuant to a bona fide student loan? And, if employer responsibility exists in this regard, must/should the employer require payroll withholding and direct payment to the lending institution?

Notwithstanding the PLR's limitations and the important compliance issues it leaves unanswered, it can be reasonably anticipated that the ruling will get attention from employers who want to help their employees save for retirement while properly managing the burden of often substantial student loan debt. Offering a student loan repayment program in a 401(k) plan could also prove to be an effective tool in attracting and retaining talent. Therefore, employers who are interested in such a program should be encouraged by the ruling to explore it with the assistance of their qualified plan advisors, in order to properly address the important compliance issues highlighted above.

Are ERISA Claims Subject to Arbitration?

DYLAN D. RUDOLPH
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OCTOBER, 2018

In recent years, the number of lawsuits filed under the Employee Retirement Income Security Act of 1974 (ERISA) has grown exponentially. So, too, has the typical value of claims asserted in those lawsuits. With the increased risk and expense of litigation, employee benefit plan sponsors and fiduciaries have naturally sought ways to reduce the likelihood that they will be sued and to reduce the expense of claims that can't be avoided altogether. Traditionally, one way that companies have sought to control litigation risk and expense is through arbitration, which may replace litigation in court when parties to a contract agree to arbitrate disputes arising from their contractual relationship.

ERISA allows plan participants, beneficiaries, and fiduciaries to seek several types of relief. This article is concerned with one specific form of relief — monetary relief for losses that are allegedly incurred by an employee benefit plan as a result of fiduciary breach. In ERISA litigation parlance, these claims are brought under ERISA § 502(a)(2). These claims arise when, for example, fiduciaries are alleged to have breached their duty to invest plan assets prudently. ERISA § 502(a)(2) claims are brought for the benefit of the plan as a whole, not for the benefit of the individual participant. The question arises: under what circumstances are those claims susceptible to arbitration, instead of traditional litigation in court? This article addresses the state of the law on this point and offers some thoughts on things that plan sponsors might consider in deciding whether to use arbitration provisions in their employment agreements and/or plan documents.

In some cases, employers enter into employment agreements with their employees. Those agreements may include provisions requiring arbitration of employment-related disputes. In *Munro v. University of Southern California*, 2017 WL 1654075 (C.D. Cal. Mar. 23, 2017), plaintiffs were employees of the University of Southern California (USC), and participants in two USC-sponsored retirement plans. Plaintiffs filed a lawsuit alleging that the committee responsible for overseeing the plans breached its fiduciary duties by imprudently investing the plans' assets and by allowing the plans to pay allegedly excessive administrative fees. The plaintiffs' employment agreements with USC included arbitration agreements, and USC asked the court to compel arbitration pursuant to these provisions.

The District Court refused to compel arbitration of plaintiffs' claims, stating that if it were to hold that "participants' arbitration agreements controlled their §502(a)(2) claims, fiduciaries could mitigate their ERISA obligations to their plans and erect barriers to ERISA enforcement on behalf of plans by requiring employees to sign arbitration agreements . . . as a condition of employment." The Ninth Circuit affirmed the District Court's decision in *Munro v. University of Southern California*, 896 F.3d 1088 (9th Cir. 2018). The Ninth Circuit held that, because the plaintiffs only consented to arbitrate claims brought on their own behalf, and because the plaintiffs brought the § 502(a)(2) claims on behalf of the plans, the lawsuit fell outside the scope of their arbitration agreements.[1]

Munro, therefore, precludes enforcement of arbitration clauses in individual employment agreements in ERISA fiduciary breach claims brought for the benefit of ERISA plans, at least in the Ninth Circuit. (Courts in other circuits are not bound by *Munro*.) But this leaves other issues open. For example, is an arbitration clause contained in a plan document enforceable to require arbitration of claims brought for the benefit of the plan? Decisions in other cases offer some answers, but raise just as many questions. In *Dorman v. Charles Schwab & Co., Inc.*, 2018 WL 467357 (N.D. Cal. Jan. 18, 2018), for instance, a former employee filed a lawsuit on behalf of a plan under ERISA §§ 502(a)(2)-(3). The plan document contained an arbitration clause, which included language waiving participants' right to proceed via class action. (Class action waivers often accompany arbitration provisions.) The court noted that the arbitration clause had been unilaterally adopted by the plan sponsor / defendant, and held that a plan document drafted by fiduciaries "should not prevent plan participants and beneficiaries from vindicating their rights in court." The court, however, did not make clear exactly *how* participants might consent to an arbitration clause in a plan document so as to render the arbitration clause enforceable.

The *Dorman* court also held that the arbitration clause contained in the plan document was unenforceable because the plan document was only executed after the plaintiff had received a full distribution of his account balance and ceased participation in the plan. The court reasoned that it would be inequitable to enforce an arbitration provision that was only included in the plan after the plaintiff stopped participating, and that to hold otherwise "…would allow a plan defendant to amend the plan documents unilaterally at any time, even after a participant has brought suit against the defendant, and put the participant at a disadvantage."[2]

The same issue recently arose in *Brown v. Wilmington Tr., N.A.*, 2018 WL 3546186 (S.D. Ohio July 24, 2018). In *Brown*, a former employee filed a putative class action lawsuit under ERISA on behalf of an employee stock ownership plan in which she had previously been a participant. The defendant moved to compel individual arbitration pursuant to an arbitration clause and class action waiver that was only added to the plan document after the plaintiff had completely cashed out of and ceased all participation in the plan. The defendant argued that "because the breach-of-fiduciary-duty claims belong to the Plan and the Plan has consented to arbitration, it does not matter that plaintiff did not personally agree to arbitrate the claims." The court, citing to *Dorman*, rejected this argument on the grounds that the arbitration provision did not bind the plaintiff because it was adopted after the plaintiff had ceased participation in the plan, and after the plaintiff's claims had accrued.

Is Arbitration of ERISA §502(a)(2) Claims Desirable?

Regardless of how the law surrounding the enforceability of arbitration provisions in ERISA cases ultimately unfolds, plan sponsors should consider the unique characteristics of ERISA litigation when considering whether to adopt and/or seek to enforce arbitration provisions. Almost all ERISA trials take place before federal judges without juries. Federal judges typically maintain strict schedules, and are bound by legal precedent in making decisions. Arbitrators, by contrast, are free to decide the manner in which the proceedings will be conducted, and are less constrained by legal precedent due to the parties' very limited rights of appeal. Additionally, there is a common perception that some result-oriented arbitrators may be more inclined to "split the baby in half" rather than strictly adhere to the law. Although this perception is certainly up for debate, it might weigh against including arbitration provisions in plan documents and employment agreements. Finally, while class action litigation can be burdensome, it has the advantage of ensuring finality. Even if an employer can compel an individual employee to arbitrate disputes, the employer may end up playing "whack a mole" as additional employee lawsuits spring up relating to the same legal issues, requiring repeated arbitration of the same basic claims, with potentially inconsistent results. Given these considerations, the decision about whether to include arbitration provisions in plan documents — even if they are enforceable — should not be made rashly.

1 USC has indicated that it intends to ask the Supreme Court to review the Ninth Circuit's decision. It remains to be seen whether the Supreme Court will agree to review the Ninth Circuit's decision, or whether the Supreme Court will wait until the case law is more developed nationwide at the Circuit level before taking up this issue.

2 The District Court's decision in *Dorman* is currently on appeal before the Ninth Circuit.

The Saga Continues: An Update on University Plan Lawsuits with NYU's Victory at Trial

ANGEL L. GARRETT
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OCTOBER, 2018

In January 2017, we informed you that fiduciaries of 12 university retirement plans had recently been hit with lawsuits alleging defendants breached their fiduciary duties to their 403(b) retirement plans by offering what plaintiffs described as overly expensive, poorly performing funds, and/or by allowing their plans to pay excessive recordkeeping fees. The number of university defendants is at least 19, and includes Brown University, Columbia University, Cornell University, Duke University, Emory University, Georgetown University, George Washington University, The Johns-Hopkins University, Massachusetts Institute of Technology, Northwestern University, New York University (NYU), Princeton University, University of Chicago, University of Pennsylvania, University of Southern California (USC), University of Rochester, Vanderbilt University, Washington University, and Yale University. ERISA practitioners and plan fiduciaries have been keeping a close eye on developments in these cases. In recent months, a few significant orders have been issued that provide some insight as to the future of 403(b) plan litigation, while leaving many questions yet unanswered.

NYU's Victory: What This Means for Fiduciaries of Retirement Plans

On July 31, 2018, in the first university plan case to go to trial, NYU prevailed in a lawsuit alleging that its Retirement Plan Committee ("Committee") mismanaged the university's retirement plans. After an eight-day non-jury trial during which the parties presented a total of twenty fact witnesses, five expert witnesses and over 600 exhibits, Judge Katherine Forrest of the U.S. District Court of the Southern District of New York ruled, in a 78-page decision, that the Committee did not breach its fiduciary duty. See *Sacerdote et al v. New York University*, U.S. District Court, Southern District of New York, No. 16-06284. This was not only a victory for NYU; the decision set a precedent sure to be cited by the remaining universities defending their plans.

Summary of the Case and the Two Claims That Made It to Trial

On August 9, 2016, six professors and an instructor ("Plaintiffs") brought a lawsuit against NYU, alleging that NYU's benefit plan Committee caused two of its retirement plans ("Plans") to incur more than $358 million in losses. The Committee, which consisted of nine NYU staff members,[1] was the Plans' fiduciary and responsible for selecting service providers — including the record-keepers — and the Plans' investment lineup. The Committee also engaged an investment advisor, Cammack LaRhette Consulting ("Cammack"), who provided quarterly updates on the Plans' investment options, recordkeeping and other fees, and other financial and fiduciary information. The Committee met approximately every quarter with meetings lasting for about two hours.

The two Plans at issue were the NYU Retirement Plan for Members of the Faculty, Professional Research Staff and Administration ("Faculty Plan") and the NYU School of Medicine Retirement Plan for Members of the Faculty, Professional Research Staff and Administration (the "Medical Plan"), which are both 403(b) plans. As of 2016, the Faculty Plan had 18,551 participants and $2.62 billion in assets, and the Medical Plan had 8,560 participants and $2.02 billion in assets. Unlike 401(k) plans, 403(b) plans may be set up to pay a stream of income at retirement, which can be accomplished through annuities. 403(b) plans are only available to employees of certain non-profit educational, charitable, or religious organizations.

Plaintiffs brought numerous claims, including that the Committee provided too many options in the Plans' line-up causing "decision paralysis" and included funds from expensive share classes. Most of Plaintiffs' claims were disposed of via pre-trial motions, leaving only two claims to proceed to trial.

The first claim involved the Plans' allegedly excessive recordkeeping fees. Plaintiffs argued that the Committee breached its duty by failing to prudently manage a request-for-proposal process for recordkeepers, failing to allow recordkeeper candidates to propose pricing for each of the Plan's assets versus only non-annuity assets, and by pre-determining that TIAA, the recordkeeper for the annuity asset, was the favored vendor.

The second claim alleged that the Committee was imprudent because it did not remove the TIAA Real Estate Account ("TIAA Account") and the CREF Stock Account ("CREF Account") as investment options for the Plans. The Committee allegedly used confusing and inappropriate benchmarks in reviewing these two funds' performance, which Plaintiffs claimed underperformed.

The Court's Decision

In a lengthy decision, the District Court ultimately held that the Committee did not breach any fiduciary duty. The Court determined that the Committee was not imprudent in keeping the TIAA Account and the CREF Account in the Plans as investment options and that the Plans did not pay excessive recordkeeping fees. The following are some key takeaways from this decision:

1. **Lack of Knowledge by a Few Committee Members Regarding the Plan and the Plan's Investment Options Does Not Necessarily Mean That the Committee as a Whole Breached Its Fiduciary Duties.**

One of the key takeaways from the NYU decision is that although there were alleged deficiencies in the Committee's process, the Court held that the Committee did not act imprudently and that the Plans did not suffer losses as a result of such deficiency. One Committee member's lack of knowledge did not automatically condemn the entire Committee.

At trial, five current and former committee members testified. The Court found several aspects of the testimony concerning. One of the co-chairs testified that she viewed her role as administrative and she lacked in-depth knowledge of the financial aspects of managing the multi-billion dollar Plans. The other co-chair did not recall the TIAA Account even though it was discussed at several meetings. Another Committee member, when asked about her inability to remember details about the Plans, stated that she has a "big job" in human resources and that serving on the Committee was one of her numerous responsibilities. Still another Committee member testified that he had missed a year and a half of meetings and did not know whether he was, at the time of the trial, a Committee member. Moreover, several Committee members stated that they simply relied on Cammack's advice. But other Committee members were knowledgeable about the Plans' investment options, reviewed investment options' prospectuses and met with portfolio managers at TIAA, and one Committee member testified that she questioned Cammack about its reports and the basis for its views.

The Court noted that, "(w)hile there were deficiencies in the Committee's process — including that several members displayed a concerning lack of knowledge relevant to the committee's mandate — plaintiffs have not proven that the committee acted imprudently or that the plans suffered losses as a result."[2] Overall, Judge Forrest found that "[w]hile the court finds the level of involvement and seriousness with which several committee members treated their fiduciary duty troubling, it does not find that this rose to a level of failure to fulfill fiduciary obligations."[3]

2. **Plaintiffs Have the Burden to Show That the Breach Led to Plan Losses.**

Another significant takeaway was the Court's holding that in order to prevail on a claim of breach of the duty of prudence, Plaintiffs had the dual burden of first showing that NYU failed to engage in a prudent process and then establishing that the Plans suffered a loss that was actually caused by the alleged breach. The Court concluded that Plaintiffs were not able to meet this burden because they were not able to show that the Plans suffered a causally related loss. In particular, the Court did not find Plaintiffs' experts who opined on the Plans' alleged damages to be persuasive.

Moreover, the Court held that the Committee closely monitored the performance of the Plans' investment options. It pointed to the evidence showing that the Committee received and reviewed before each quarterly meeting a detailed report regarding each investment option from Cammack. This report included a review of each fund against its benchmark, investment objectives and risk, and expense. The Committee also had a Watch List that it reviewed on a quarterly basis and looked to the investment policy statement for guidance to monitor and analyze each of the funds in the Plans' lineup.

3. While a Committee May Engage an Expert, Such as an Investment Advisor, It Must Still Exercise Independent Judgment.

The Committee engaged Cammack as its investment advisor. Although the Committee relied greatly on Cammack's reports and advice, the Court noted that Committee members asked Cammack questions regarding its report and advice, including questioning the viability of a metric Cammack used to analyze the funds. The Committee may have rarely deviated from Cammack's recommendations, but it did on at least one occasion place a fund on the Watch List instead of replacing it as Cammack recommended. The Court held that "[t]his acceptance of Cammack's recommendations does not mean the Committee improperly deferred to Cammack; it could just as easily mean (and the Court views it as such) that Cammack's recommendations also happened to be appropriate." [4] Thus, while a fiduciary may engage an investment advisor to assist it with understanding and assessing a plan's lineup, the fiduciary is ultimately responsible for the decisions made.

4. Even If Requests for Proposals Are Not Done on a Regular Basis, Negotiating a Lower Fee May Be Sufficient to Show That Fiduciaries Are Carrying Out Their Fiduciary Duties.

The Court dismissed Plaintiffs' recordkeeping claim. First, it rejected Plaintiffs' argument that the Committee should have issued more frequent requests for proposals (RFP). The Committee issued one RFP in September 2009 which then led to the consolidation of recordkeepers for the Medical Plan in 2013. The Committee did not issue another RFP until 2016 — approximately 7 years later. In rejecting the Plaintiffs' argument, the Court held that despite the alleged lack of frequency of RFP processes, NYU's recordkeeping fees consistently decreased as NYU obtained rate reductions. The Court also noted that competitive bidding is not per se required under ERISA but can be an example of an action taken to ensure fees are appropriate.

5. Having Multiple Recordkeepers Does Not, Per Se, Mean the Plan Paid Excessive Recordkeeping Fees.

As for Plaintiffs' argument regarding having more than one record-keeper, the Court rejected the argument, finding that the evidence did not support the assumption that having one record-keeper would reduce the Plans' fees.

The Court specifically noted that three-quarters of the Plans' assets were made up of TIAA annuities. As a fundamental matter, no other vendor has ever recordkept TIAA annuities on their platform. The Court ruled that "the Committee was not imprudent in preventing Plan participants from being a vendor's 'guinea pigs' for whom it tries recordkeeping TIAA products for the first time." [5] Furthermore, TIAA annuities are insurance policies contracted between TIAA and each individual participant. Unlike other types of investments, the plan sponsor is not a party to the contract. Traditional TIAA annuities are not easily mapped to another type of investment. Indeed, the Court summarizes one expert's testimony as opining that "TIAA Traditional annuities could not be mapped out." [6] In other words, the majority of NYU participants were invested in funds which NYU could not transfer. The Court also noted that and that university technology system updates made it imprudent for the Committee to consolidate to a single recordkeeper prematurely.

The Court noted that the Committee did go through a prudent RFP process and obtained lower fees for the Faculty Plan when it was not possible to consolidate the recordkeepers. In fact, the Court held that it was not possible for NYU to transition to one record-keeper until recently.

6. Experts Can Be Key to a Case.

Throughout the opinion, the Court highlights the use of experts by both parties. In total there were five experts (three for NYU and two for Plaintiffs).

In her opinion, Judge Forrest explained that while she found Defendants' experts credible, she was not persuaded by Plaintiffs' experts. In particular, with respect to plaintiffs' recordkeeping expert, "[t]he Court does not believe that he is a true 'expert' on the pricing of the specific products at issue here and he did not demonstrate to the Court that he possesses the requisite qualifications to present relatable opinions on whether NYU's participants paid reasonable recordkeeping fees."[7] The Court found one expert used an improper benchmark (e.g., Plaintiffs' expert used a benchmark that was not in place until mid-2011 to cover a period prior to mid-2011); and with respect to the TIAA fund, Plaintiffs' expert failed to account for this fund's cash holdings. Ultimately, the Court found Defendants' experts to be "highly credible" and "knowledgeable, reasonable, and consistent" and looked to these experts' testimony in rejecting Plaintiffs' claim that the Committee was imprudent for not removing the CREF and TIAA Accounts from the Plans.

Aftermath of the Court's Decision

Following the Court's decision, Plaintiffs filed a motion to amend the decision. They seek the removal of two members from the Committee — one of the co-chairs who testified that she did not recall the TIAA Account as an investment option, and the Committee member who said she did not remember details about the Plans because she has a "big job" in her human resources role and that serving on the Committee was simply one of her numerous responsibilities. Plaintiffs also filed a motion to vacate the Court's decision, asking for a new trial. The Court has scheduled a hearing on these two motions on October 31, 2018. Moreover, Plaintiffs have filed an appeal of the judgment to the United States Court of Appeals for the Second Circuit.

Progress of Other University Plan Litigation

This proliferation of university retirement plan litigation is similar to the excessive fees litigation commenced more than a decade ago by plaintiffs' firms against numerous companies that offered 401(k) plans. The plaintiffs' firm that commenced the initial 401(k) excessive fee litigation is the same firm that started this wave of 403(b) plan litigation against universities. Since August 2016, several other plaintiffs' firms have also brought suit on behalf of participants in university plans. Of the nineteen lawsuits that have been filed against universities, fifteen are currently in litigation. Prior to NYU's victory, courts dismissed claims against the University of Pennsylvania and Northwestern, and the University of Chicago settled the lawsuit brought against its fiduciaries for $6.5 million. We will be providing updates as this wave of litigation continues.

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1 The Committee consisted of NYU Vice President of Human Resources, NYU Director of Benefits, NYU Chief Investment Officer, NYU Senior Vice President of Finance, the NYU Langone Medical Center (NYULMC) Controller, NYULMC Senior Vice President of Finance, NYULMC Senior Vice President of Human Resources, the NYULMC Director of Benefits, and the NYU Provost or her/his designees.

2 *Sacerdote v. New York Univ.*, No. 16-CV-6284 (KBF), 2018 WL 3629598, at *2 (S.D.N.Y. July 31, 2018).

3 *Id.* at *2.

4 *Id.* at *26.

5 *Id.* at *22.

6 *Id.*

7 *Id.* at *2, n. 19.

FIRM NEWS

Joe Faucher was featured in Law360's recent article: *NYU's Victory In ERISA Battle Hinged On Expert Witnesses*. Joe was quoted: "I think, going forward, plaintiffs' attorneys are going to have to be very thoughtful about the experts they choose and the theories the experts advance, because these cases hinge largely on expert testimony." Full article here.

On August 28, **Marc Fosse** presented on *What Employers Need to Know About the Tax Cuts and Jobs Act* at the Bar Association of San Francisco's Tax Section Seminar.

On August 28, **Elizabeth Loh** co-presented at the 37th Annual ISCEBS Employee Benefits Symposium in Boston. The session, *Go All the Way with HSA!,* covered the advanced tax and legal structure of HSAs and the special issues they present.

On September 6, **Tiffany Santos** was a panelist on the JCEB webinar entitled, *Health Care Costs: What's A Fiduciary To Do?*

On September 30 – October 3, five Trucker Huss attorneys spoke at the UCS Mid-Sized Retirement and Healthcare Plan Management Conference in Las Vegas:

- **Jahiz Agard** and **Gisue Mehdi** presented on *Best Practices for Healthcare Plan Compliance* (October 1).
- **Benjamin Spater** and **Adrine Adjemian** presented on *Save Your Retirement Plan from Disqualification Now!* (October 2).
- **Marc Fosse** presented on *Non-Qualified Deferred Compensation Plans Best Practices* (October 3).

On October 5, **Joe Faucher** participated in a panel discussion at The ESOP Association's California/Western States Chapter Annual Conference entitled, *The Current State of ESOP Indemnification*.

On October 6, **Marc Fosse** presented at the ABA Joint Taxation and Real Estate Section's Fall Meeting in Atlanta, GA on *Worker Classification in the Gig Economy*.

On October 21–24, **Nick White** and **Joe Faucher** presented at the ASPPA (American Society of Pension Professionals & Actuaries) Annual Conference in National Harbor, Maryland:

Nick co-presented on *A Primer on Department of Labor Investigations*, a workshop designed to provide attendees with what they need to know about DOL Investigations, and on a session entitled *The Fiduciary Interview*, during which attendees participated in a mock DOL interview of a plan fiduciary.

Joe led the workshop, *Retirement Plan Litigation Trends,* which focused on the latest developments and emerging issues in litigation affecting retirement plans.

On November 7–10, **Clarissa A. Kang** will be speaking on the panel, *The Opioid Epidemic: Challenges for Employers, Unions, Plan Sponsors and Fiduciaries,* at the ABA Section of Labor and Employment Law's 12th Annual Labor and Employment Law Conference in San Francisco.

The Trucker ✦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

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