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# Third Circuit Resuscitates Claims Against University 403(b) Plan Fiduciaries

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Over the past several years, the ERISA plaintiffs' bar has targeted university-sponsored 403(b) plans, arguing that the plan fiduciaries breached their fiduciary duties and engaged in prohibited transactions in connection with offering certain investment options and the administrative fees associated with such plans. Among other things, they have argued that the plan fiduciaries offered too many investment options, and that the investment options were imprudent because they were too expensive and/or underperformed. They also have argued that the plans retained too many record-keepers and paid those record-keepers unreasonable fees. To date, these lawsuits have had mixed results. Some have been dismissed at the initial pleading stage; some have settled after motions to dismiss were denied; and one lawsuit was dismissed after a full trial.

The Third Circuit recently issued the first circuit court decision addressing these claims and, in doing so, issued a split decision that breathed new life into a case involving a 403(b) plan sponsored by the University of Pennsylvania. *Sweda v. Univ. of Penn.*, No. 17-3244, 2019 WL 1941310 (3d Cir. May 2, 2019). In *Sweda*, the plaintiffs-plan participants argued that the plan fiduciaries breached their fiduciary duties by: (1) locking the plan into investment arrangements with the plan's record-keepers for up to ten years, (2) paying unreasonable administrative fees insofar as they used two plan record-keepers instead of one, (3) paying record-keeping fees through an asset-based arrangement instead of a flat per-participant fee, (4) investing in more expensive retail share class mutual funds when identical lower cost institutional share classes were available, (5) offering numerous duplicative investment options, and (6) selecting and retaining expensive, underperforming funds. Plaintiffs also alleged that the defendants violated ERISA's prohibited transaction rules by paying record-keeping fees through revenue sharing rather than a per participant fee basis and by agreeing to the lock-in agreement.

The district court dismissed all of the claims at the initial pleading stage, and, in doing so, observed that many of the allegations sought to fault the University for rational and competitive business strategies. In a split (2-1) decision, the Third Circuit reversed the district court's decision dismissing all of the fiduciary breach claims, but affirmed the dismissal of plaintiffs' prohibited transaction claims.

As a preliminary matter, the Third Circuit determined that an ERISA plan participant is not required to rule out every lawful explanation for the plan fiduciary's conduct in order to state a plausible claim for relief. According to the Court, that pleading requirement, established in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), is limited to antitrust cases because in such cases "a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."

The Third Circuit next rejected the University's argument that the Court's earlier decision in *Renfro v. Unisys Corp*., 671 F.3d 314 (3d Cir. 2011) insulated plan fiduciaries from liability for a breach of fiduciary duty where plans offer a mix and range of investment options, because such a ruling would allow a fiduciary to avoid liability by stocking a plan with hundreds of options even if the majority were overpriced or underperforming. Furthermore, it would hinder courts from evaluating fiduciaries' performance against contemporary industry practices because practices change over time and ERISA fiduciaries have a duty to act prudently according to current practices.

Next, the Court concluded that plaintiffs plausibly alleged their breach of fiduciary duty claims because there were several "well-pleaded facts" in the complaint. For instance, the Court determined that plaintiffs plausibly alleged that the plan paid $4.5 to $5.5 million in annual record-keeping fees when similar plans paid $700,000 to $750,000 for the same services. The Court also cited plaintiffs' allegation that the percentage-based fees increased as assets in the plan grew, despite there being no corresponding increase in record-keeping services. Plaintiffs also included a table comparing options in the plan with "readily available cheaper alternatives," which allegedly showed that 60% of plan options underperformed comparable benchmarks. The Court further observed that plaintiffs provided examples of prudent actions taken by similarly situated universities, but not here, including hiring an independent consultant to request record-keeping proposals, offering a single record-keeper, and negotiating for revenue sharing rebates. Construing the allegations in the light most favorable to plaintiffs, the Court determined that Plaintiffs had plausibly alleged their breach of fiduciary duty claims.

Lastly, the Court held that plaintiffs' prohibited transaction claims were properly dismissed. In so ruling, the Court determined that plaintiffs did not plausibly allege that the record-keeper was a party-in-interest who provided services to the plan at the time the first lock-in agreement was entered into. The Court also determined that the allegations of revenue sharing did not amount to a prohibited transaction because, among other things, mutual funds were not plan assets and therefore plaintiffs did not plausibly allege that revenue sharing involved a transfer of plan property or assets.

In a separate opinion, Senior Judge Roth agreed with the majority's decision affirming the dismissal of the prohibited transaction claims, and stated that he also would have affirmed the dismissal of all of the fiduciary breach claims. Judge Roth stated his belief that the majority misapplied the Third Circuit's prior ruling in *Renfro*, and that the fiduciary breach claims presented here were "virtually identical" to the claims that the Court dismissed in *Renfro*. Judge Roth also expressed the concern that, by exposing university sponsors and volunteer fiduciaries to the risk of litigation, the majority's decision would cause universities to stop offering benefit plans.

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