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ERISA Litigation Trends: Looking Back at 2019 and Forward to 2020 and Beyond

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The plaintiffs' bar and the Department of Labor (DOL) continue to be active in litigating cases in which plaintiffs allege breaches of fiduciary duty and other violations of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Some of those cases filed with and resolved by the courts may inform plan sponsors, fiduciaries, and service providers on how they should approach their ERISA compliance activities. The following article highlights some of the recent cases and explains how they may provide guidance to ERISA fiduciaries and their advisers in 2020 and beyond with regard to their mitigation of litigation and compliance risks. It focuses on four areas: (1) fee litigation suits brought against smaller plans; (2) developments in 403(b) plan litigation; (3) use of plan data by plan fiduciaries and plan service providers; and (4) cyber-enabled fraud and protection of plan assets.

Fee Litigation Suits Brought Against Smaller Plans

Employees typically are participants in ERISA-covered, tax-qualified defined contribution plans that permit participants to contribute a portion of their pay on a pretax basis (401(k) Plans) pursuant to Section 401(k) of the Internal Revenue Code of 1986, as amended (Code). Participants in 401(k) Plans often have the right to direct the investment of their contributions and any contributions made by their employers in investment options made available under the 401(k) Plan by the plan's named fiduciary.[1] For a number of years, the plaintiffs have brought suits against 401(k) Plan named fiduciaries, for example, the investment committee, for the imprudent selection of allegedly high cost investment options in violation of ERISA's fiduciary duty of prudence[2] and fiduciary duty of loyalty.[3] Plaintiffs continued to bring these suits in 2019 and 2020. However, unlike in prior years, participants and their attorneys appear to be willing to bring these suits against smaller plans.

Previously, breach of fiduciary duty lawsuits had been brought in connection with 401(k) Plans with at least $1 billion in assets.[4] However, more recently, participants have brought lawsuits against fiduciaries of plans with less assets. In *Buescher v. Brenntag North America, Inc.*, the participants of a plan with approximately $440 million in assets brought breach of fiduciary duty claims against the sponsors and named fiduciaries.[5] The claims were the same as those found in suits brought against larger plans. For example, the lawsuit alleges that the plan "could have reaped considerable cost savings by using collective trusts or separate accounts" instead of the mutual funds that were offered in the plan.[6] The lawsuit further alleges that, for the mutual funds that were offered, the plan fiduciaries "fail[ed] to investigate the use of

lower cost share classes," and therefore "caused the Plan to pay millions of dollars per year in unnecessary fees."[7] The plaintiffs also argue that the plan fiduciaries "wholly failed to prudently manage and control the Plan's recordkeeping costs…"[8] In two other cases, the participants in plans with approximately $335 million in assets and $52 million in assets made similar allegations in ERISA breach of fiduciary duty lawsuits.[9]

These cases suggest that plaintiffs' class action attorneys have demonstrated a willingness to move "down market" and represent a class of participants in 401(k) Plans of a smaller size. They also serve as a reminder that the ERISA fiduciary requirements apply to all plan fiduciaries, regardless of plan size. Therefore, plan fiduciaries of such plans should be reminded of their fiduciary obligations to consider, among other things, whether the fees the plan directly or indirectly pays for investments, recordkeeping, and other plan services meet ERISA's fiduciary duty requirements.

Developments in 403(b) Plan Litigation

As explained in an article appearing in the March 2018 edition of *The Investment Lawyer*,[10] the plaintiffs' class action bar began to file lawsuits on behalf of participants alleging breach of ERISA's fiduciary duty requirements by fiduciaries of plans established under Section 403(b) of the Code (403(b) Plans). 403(b) Plans are covered by ERISA if they are sponsored by private colleges and universities and other non-governmental employers. Since those cases were filed in 2017 and 2018, a number have moved through the litigation process and several have resulted in settlements. The development of these cases provides additional insight into the fiduciary responsibilities of 403(b) Plan fiduciaries.

As discussed in the previous article, plaintiffs made allegations regarding breach of fiduciary duty connected to some aspects of 403(b) Plans that are somewhat unique to 403(b) Plans. Thus, such allegations are not made in suits brought against 401(k) Plan fiduciaries. With some exceptions, those alleged breaches have not been accepted by the courts. Therefore, several courts have granted motions to dismiss those claims on the basis that the plaintiffs failed to state a claim on which relief under ERISA could be granted.

For example, the plaintiffs in the 403(b) Plan cases allege fiduciary breaches based on the premise that the plans offer too many investment options, which results in investor confusion. A 403(b) Plan may have different vendors that service the plan and, as a consequence, dozens of investment options, which in many cases is more than the number available under the typical 401(k) Plan. In general, the courts have not been willing to accept that offering too many investment options, by itself, results in a breach. The court's decision in *Divane v. Northwestern University* illustrates this. The court rejected the notion that too many investment options results in a breach of fiduciary duty. Indeed, the court noted that the fact that the 403(b) Plan offered so many investment options gave the participants the opportunity to select from lower cost investment options, for example, index funds, and institutional share classes.[11] The court also stated that "…it does not matter that the plans offered additional funds that [the plaintiffs] did not want to choose…" and that "[t]he types of funds plaintiffs wanted were and are available to them."[12] Other courts reached the same conclusion as the court in *Divane*.[13]

Additionally, in several cases, courts rejected the notion that a "lock in" or "bundling" arrangement is in and of itself imprudent. In *Sacerdote, et al. v. New York University*, the court dismissed the claim that the fiduciaries breached their fiduciary duty of prudence because they entered into a "lock in" arrangement whereby the plan agreed to include an investment option maintained by an affiliate of the recordkeeper as part of its services agreement with the recordkeeper.[14] The court noted that the participants had the ability to invest in dozens of options other than the investment subject to the "lock in" and noted "…there is no allegation that plaintiffs

were required to invest in any particular investment Option…" or that "'the investments at issue were so plainly risky at the relevant times that an adequate investigation would have revealed their imprudence, or that a superior alternative investment was readily apparent such that an adequate investigation would have uncovered that alternative…'"[15] The appellate court in the case brought against the University of Pennsylvania reached similar conclusions.[16]

However, the court in the action brought against Yale University concluded that the plaintiffs adequately plead the allegation that a bundling arrangement was imprudent and would not dismiss the claim.[17] The court held that "Even if bundling arrangements generally benefit participants of other defined-contribution plans, that does not necessarily mean that, under the circumstances here, the defendants prudently concluded that the bundling arrangement would benefit the Plan's participant."[18] Furthermore, if in fact "…the bundling arrangement stymied the defendants' ability to remove investments and that 'Yale agreed to lock its employees into funds which Yale did not Analyze…,'' the court stated that such conduct would violate ERISA's prudence requirement.[19]

Furthermore, as explained in the above-referenced March 2018 article, 403(b) Plans often have multiple recordkeepers in connection with offering one or more annuity contracts and a trust investment platform. The plaintiffs allege that utilizing multiple recordkeepers violates ERISA. The courts are mixed on whether utilization of multiple recordkeepers by a single 403(b) Plan does or could result in a breach of ERISA's fiduciary duty of prudence.

In the case brought by plaintiffs against New York University, the court concluded after a bench trial that the defendants had not proven that the plan fiduciary's failure to consolidate to a single recordkeeper resulted in an imprudent decision by the plan fiduciaries.[20] The court rejected the plaintiffs' notion that "(1) a single vendor is always in the best interests of plan participants, and (2) consolidation necessarily results in lower overall fees." The court pointed to evidence that suggested otherwise.[21] Notably, the fact that the court did not dismiss the claim prior to trial suggests that this court believed the use of multiple recordkeepers could result in a breach, but after considering all of the evidence presented at trial concluded that a breach did not occur. Several other courts also concluded that a motion to dismiss should not be granted on this issue thereby allowing for the plaintiffs to seek additional evidence in the discovery phase of the litigation and, possibly, at trial on the question of whether a breach in fact occurred[22] On the other hand, one court rejected this claim and granted a motion to dismiss.[23]

With some exceptions, courts have not been willing to grant the defendants' motions to dismiss with regard to claims that are commonly seen in breach of ERISA fiduciary duty cases brought against 401(k) Plans. Such claims focus on, among other things, the failure of the named fiduciary to appropriately evaluate whether the fees paid in connection with the 403(b) Plan's investment options are reasonable[24] and the failure of the named fiduciary to periodically evaluate whether the fees paid to the 403(b) Plan's recordkeeper(s) are reasonable.[25] In several cases, after the court considered the plan fiduciaries' motions to dismiss (often granting those motions in part with regard to some of the claims and denying those motions with regard to the other claims) several universities entered into settlement agreements with the participants who brought suit.[26]

While the success of the plaintiffs in these cases is mixed, the success rate with regard to getting past the defendants' motions to dismiss in these cases should serve as a reminder to 403(b) Plan named fiduciaries that they should pay attention to whether they meet their fiduciary obligations in connection with their plans. They should review their fiduciary governance structure and fiduciary decision-making process to determine if they operate in accordance with ERISA's fiduciary duty and prohibited transactions requirements and if they have taken other appropriate measures to limit exposure to fiduciary

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liability. As such, these fiduciaries should review their 403(b) Plans' investment options, evaluate the fees paid by the plans, determine if a request for proposal is in order, and consider other measures as applicable.

Use of Plan Data by Plan Fiduciaries and Plan Service Providers

In several of the settlement agreements that arose out of the litigation involving 403(b) Plans, the defendants agreed to limit the ability of 403(b) Plan service providers to market products and services to plan participants. More recently, in a breach of ERISA fiduciary duty lawsuit, the participants in a 401(k) Plan allege that both the plan sponsor and the recordkeeper violated their fiduciary duties by using plan data to market products and services to the participants and inducing participants to take a distribution from the plan and rollover to an individual retirement account (IRA). These developments raise some particularly challenging issues for plan fiduciaries and their service providers about their obligations with respect to the use of 403(b) Plan, 401(k) Plan, and other ERISA-covered plan data.

In a complaint filed against Vanderbilt University,[27] the plaintiffs alleged that the named fiduciaries of an ERISA-covered plan sponsored by Vanderbilt University breached their fiduciary duties to the plan by failing to take into consideration "the value of the vendors' access to Plan participants and their data for marketing purposes" when pricing the recordkeeping services.[28] The parties in that litigation entered into a settlement agreement whereby the named fiduciaries agreed, among other things, to not allow the Vanderbilt plan's recordkeeper to use "information about Plan participants acquired in the course of providing recordkeeping services to the Plan to market or sell products or services unrelated to the Plan unless a request for such products or services is initiated by a Plan participant" (Vanderbilt Settlement).[29] The litigants in *Kelly v. Johns Hopkins University* reached a similar settlement. The parties in that case agreed that "The final agreed-upon contract(s) for recordkeeping services shall contractually prohibit the Plan's recordkeeper(s) from soliciting current Plan participants for the purpose of cross-selling proprietary non-Plan products and services, including, but not limited to, Individual Retirement Accounts (IRAs), non-Plan managed account services, life or disability insurance, investment products, and wealth management services, unless a request is initiated by a Plan participant" (Hopkins Settlement, together the Settlements).[30]

Importantly, the Settlements were not statements of law by the courts in those cases. The Settlements were merely agreements between two parties in order to bring an end to the litigation process. However, the above-quoted terms of the Settlements suggested to plan fiduciaries and their service providers that allowing service providers access to participants vis-à-vis the recordkeeping platform in order to make available other products and services, even those that have nothing to do with the ERISA-covered plan, is somehow problematic under ERISA. The Settlement also suggests that any revenue a service provider or its affiliates receives apart from the plan should be considered in the pricing of plan-related services. Finally, plan fiduciaries could infer from the Settlements that ERISA-governed plan data is a "plan asset" for purposes of ERISA and thus the use of that data by the plan sponsor or plan services providers resulted in violations of ERISA's fiduciary duty and prohibited transaction provisions.

Recently, in *Harmon v. Shell Oil Co*,[31] the plaintiffs in a class action suit filed against the fiduciaries to the 401(k) Plan offered to Shell Oil employees (Shell Plan) alleged that plan data is a "plan asset" for purposes of ERISA and that the use of the data violates ERISA. In the complaint, the plaintiffs made the typical allegations that the fiduciaries to the Shell Plan breached their ERISA fiduciary duties by overpaying for recordkeeping and other plan services and failing to prudently evaluate and monitor the Shell Plan's investment options on an ongoing

basis. However, unlike in prior cases, the plaintiffs alleged that the Shell Plan's fiduciaries failed to safeguard Confidential Plan Participant Data (CPPD) by allowing its use by the Shell Plan's recordkeeper to solicit participants to purchase non-plan products and services.

The plaintiffs allege that the Shell Plan's recordkeeper, together with a number of affiliated companies (collectively, the Recordkeeper Defendants), used CPPD to engage in the marketing of non-plan products and services. They also used CPPD to identify participants who were entitled to take a distribution from the Shell Plan and as such could rollover the distribution to the Recordkeeper Defendants' own IRA. The plaintiffs assert that CPPD is an asset of the Shell Plan and, based on that assertion, that the Fidelity Defendants became fiduciaries by exercising authority and control over that asset and then breached their fiduciary responsibilities by using that data for non-plan purposes. Notably, recordkeepers in the normal course of their businesses do not typically operate as fiduciaries for purposes of ERISA.

In the complaint filed with the court, the plaintiffs define CPPD to include the names and contact information of the participants, participants' social security numbers, home and cell phone numbers, work and personal email addresses, investment histories, investment holdings, account balances, investment contribution amounts, ages, income levels, and marital status. Also categorized as CPPD are the recordkeeper's call center notes and the recordkeeper's access to knowledge of various triggering events including when a participant is nearing retirement. Plaintiffs contend that all CPPD is a valuable asset of the Plan that must be protected by plan fiduciaries.

The plaintiffs highlighted and objected to a number of uses of CPPD by the Recordkeeper Defendants including: (1) sharing CPPD with salespeople within the affiliated company group; (2) automatic notification of local sales representatives when certain participant-level triggering events occur so that the representatives may then reach out to the affected participant in an effort to solicit the purchase of non-Plan products; and (3) these uses of CPPD allow the Recordkeeper Defendants to derive substantial revenue from the sale of IRAs, high interest credit cards, life insurance, banking products, advisory accounts, individual brokerage accounts, options trading accounts, accounts established under Section 529 of the Code, that is, a 529 plan, and other products and services outside of the Shell Plan. According to the plaintiffs, such uses resulted in violations of ERISA's fiduciary duty provisions in ERISA Section 404(a)(1), party in interest prohibited transactions provisions in ERISA Section 406(a), and fiduciary prohibited transactions provisions in ERISA Section 406(b).

The possible determination by a court or the DOL that plan data is a plan asset likely would have a significant impact on ERISA-governed plans, sponsors, fiduciaries, and service providers. Pursuant to ERISA Section 3(21)(A)(i), a fiduciary for purposes of ERISA includes a person "…who exercises any authority or control respecting management or disposition of [the plan's] assets…" ERISA, in the absence of an exemption, specifically prohibits a fiduciary from allowing a party in interest, for example, a services provider, from using plan assets for its own benefit. Additionally, Section 406(b)(1) prohibits a fiduciary, for example, the plan sponsor, or a party in which the fiduciary has an interest from using plan assets for its own interest. A fiduciary also, as here relevant, is subject to ERISA's duty of prudence and duty of loyalty when it acts as a fiduciary.

If plan data is a plan asset, parties who deal with plan data likely would be fiduciaries and subject to the above-described prohibited transaction and fiduciary duty provisions. Thus, they will be required to employ an effective exemption and fiduciary duty compliance strategy, particularly if the plan sponsor wishes to continue to make financial wellness programs and other services available to its employees vis-à-vis an ERISA-covered retirement plan. Of course, the *Shell Oil* case is in its infancy and at least one court recently held that plan data is not a plan

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asset.[32] However, plan sponsors, fiduciaries, and service providers would do well to closely follow the *Shell Oil* case. Additionally, they should expect to see similar allegations made in future breach of fiduciary duty class action lawsuits.

Cyber-Enabled Fraud and Protection of Plan Assets

Fraudsters and other criminals have long tried to steal from participant's account balances in ERISA-covered retirement plans. However, with the development of technology and shifts in the manner in which plan benefits are paid, the means by which criminals commit such crimes have changed. Two recent cases alleging breach of fiduciary duty under ERISA in connection with the distribution of participant account balances in defined contribution plans highlight the compliance and litigation risks associated with plan losses due to cyber-enabled fraud. Plan sponsors, plan fiduciaries, and plan service providers should be aware of these risks and decide how they will address them.

On October 9, 2019, a defined contribution plan participant filed a complaint in *Renaker v. Estee Lauder*.[33] In that case, a plan participant learned that the plan paid approximately $90,000 in distributions to three bank accounts that were not in her name. The participant alleged that the plan sponsor, recordkeeper, and directed trustee failed to meet the duty of prudence under Section 404(a)(1)(B) of ERISA and the duty of loyalty under Section 404(a)(1)(A) of ERISA.

The participant in the *Estee Lauder* complaint pointed to a number of what she believed to be deficiencies in the plan's policies and procedures that lead to the plan making unauthorized distributions. For example, the participant stated that the defendants should have (1) confirmed that the participant authorized the distributions before making them, (2) provided to the plan participant timely notice of the distributions so she could have recognized the fraud, and (3) identified and halted suspicious distribution requests. With regard to the latter, the plaintiff states that requests for multiple distributions to be paid to accounts held at different banks should have made the defendants aware that the distribution requests were possibly fraudulent. The plaintiff also argued that the defendants failed to monitor each other's distribution policies and procedures and the processing of distribution transactions. At bottom, the plaintiff is of the view that appropriate policies and procedures would have detected and stopped the fraud.

In another case, *Leventhal v. MandMarblestone Group LLC*,[34] the plaintiff also filed a complaint seeking relief similar to that requested by the participant in *Estee Lauder*. Leventhal was a participant in a 401(k) Plan sponsored by his employer. Over a period of time, the plan distributed $400,000 based on fraudulent withdrawal forms submitted to the plan administrator by unknown persons. The participant sued the sponsor, a third party who agreed to act as the "plan administrator" as defined in Section 3(16) of ERISA on behalf of the plan, and the plan's custodian for breach of fiduciary duty.

The court refused to grant the defendants' motion to dismiss the plaintiff's claims against the defendants on the basis that the plaintiff failed to state a claim on which relief under ERISA could be granted. According to the court's opinion, the participant used the withdrawal forms required by the plan administrator to request a $15,000 distribution, which the plan paid to him in the normal course of plan operations. However, unknown persons somehow obtained a copy of that withdrawal form using an "'unknown method of cyber-fraud possibly relating to the electronic transmission of [the original] form.'" The fraudsters sent to the plan administrator withdrawal forms from an address that appeared to be from the participant's email account at the plan sponsor. On those forms, the fraudsters requested that the payments be made to a bank account that was different than the one to which the plan paid the original $15,000 distribution and was not an account authorized by the participant.

The court concluded that the plaintiff plead facts sufficient to establish that the plan sponsor, third-party administrator, and custodian were fiduciaries of the plan for purposes of ERISA. Additionally, the court concluded that the plaintiff sufficiently plead facts that supported its claim that the fiduciaries breached their duties of prudence under ERISA. In so doing, the court pointed to the allegations that the defendants "…failed to act with the requisite prudence and diligence where they saw the 'peculiar nature' and high frequency of the withdrawal requests that were to be distributed to a new bank account, but failed to alert Plaintiffs or verify the requests…" and "…that Defendants failed to implement 'the typical procedures and safeguards' used to notify Plaintiffs of the strange requests and/or verify the requests."

Neither the *Estee Lauder* court nor the *Levanthal* court concluded that any plan fiduciary failed to meet its duties under ERISA with regard to the payment of participant account balances to parties not otherwise entitled to those benefits. However, both cases highlight that attempts to defraud plans and plan participants of benefits continue and, with the development of technology, such attempts are cyber-enabled. As such, plan sponsors, fiduciaries, and service providers must be aware of this threat to plan asset security and what measures are necessary to appropriately secure plan assets. Additionally, plan sponsors and plan fiduciaries should understand what policies and procedures plan service providers, for example, recordkeepers, trustees, third-party administrators, have in place to secure plan assets and to prevent crimes such as those described in the *Estee Lauder* and *Leventhal* cases. Plan sponsors also should look to their own policies and procedures with regard to securing employee data, employer data, employer-based email systems, and other critical systems in order to assure cyber criminals do not use information acquired from the employer to facilitate fraud committed on the plan and its participants.

Summary

In conclusion, there have been some interesting developments in 2019 and 2020 with regard to the application of ERISA in a variety of contexts including (1) a trend towards plaintiffs filing class action ERISA lawsuits against smaller 401(k) Plans, (2) developments in class action lawsuits brought against 403(b) Plans, (3) claims alleging that plan data is a plan asset and the use of such data to sell products and services apart from the ERISA-covered retirement plan involves fiduciary conduct and a breach of ERISA's fiduciary duty and prohibited transaction provisions, and (4) breach of fiduciary duty suits arising from cyber-enabled fraud. The above-discussed lawsuits affirm that plan sponsors, fiduciaries, and service providers must continuously recognize the situations in which they act as fiduciaries and understand how they should comply with their obligations under ERISA's fiduciary duty and prohibited transaction provisions in such situations. As evidenced by the above discussion, plaintiffs' counsel will always be looking for new, creative theories in support of its allegation that someone acts as a fiduciary and failed to meet his or her obligations under ERISA.

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NOTES

[1] Employee Retirement Income Security Act, 29 U.S.C,§ 402(a)(2) (1974).

[2] *Id.* § 404(1)(B).

[3] *Id.* § 404(1)(A).

[4] *See*, *e.g.*, Taylor v. United Technologies Corp., No. 06-cv-01494, at 17 (D. Conn. filed Sept. 22, 2006) ($1.4 billion of assets); George v. Kraft Foods Global, Inc., No. 07-cv-01713, at 13 (N.D. Ill. filed Oct. 16, 2006) ($5 billion of assets); Spano v. The Boeing Co., No. 06-cv-00743, at 29 (S.D. Ill.filed Sept. 27, 2006) (Over $3 billion of assets); Abbott v. Lockheed

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Martin Corp., No. 06-cv-00701, at 14(S.D. Ill.filed Sept. 11, 2006) ($12 billion of assets).

5 Buescher v. Brenntag North America, Inc., No. 5:20-cv-00147 (E.D. Pa. filed Jan. 8, 2020).

6 *Id*.

7 *Id*.

8 *Id*.

9 Glasscock v. Serco, Inc., No. 1:20-cv-00092 (E.D. Va. filed Jan. 28, 2020); Savage v. Sutherland Global Services, Inc., No. 6:19-cv-06840 (W.D.N.Y. filed Nov. 13, 2019).

10 Kaleda, David C., "Litigation Against 403(b) Plan Fiduciaries," *The Investment Lawyer*, Vol. 25 No. 3, March 2018.

11 Divane v. Northwestern University, No. 1:2016cv08157, slip op. (N.D. Ill. May 25, 2018).

12 *Id*.

13 Short v. Brown Univ., 320 F.Supp.3d 363, 369 (D. R.I. 2018) ("Allegedly offering too many investment options for participants does not suffice for a breach of ERISA's duty of prudence."); Vellali v. Yale Univ., 308 F.Supp.3d 673, 686-87 (D. Conn. 2018) ("With respect to offering too many investment options, the defendants argue that the plaintiffs have neither alleged that any participant experienced confusion nor stated a claim for relief. The court agrees with both these points. Although the plaintiffs discuss the behavioral economics of 'decision paralysis,' nowhere in the Amended Complaint do they allege a theory of harm, let alone allege facts explaining how the 'dizzying array' 100–plus investment choices harmed the plaintiffs."); Kelly v. Johns Hopkins Univ., 2017 WL 4310229 (D. Md. 2017) ("[T]he Court is persuaded by the reasons set forth in Henderson, Sacerdote, and Sweda that Plaintiffs fail to state a claim to the extent that Plaintiffs allege that offering Plan participants too many investment options is imprudent.").

14 Sacerdote v. New York University School of Medicine, No. 1:16-cv-06284, slip op. at 6 (S.D.N.Y. Aug 25, 2017)

15 *Id*. (*citing* Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc. (PBGC), 712 F.3d 705, 719-20 (2d Cir. 2013)).

16 Sweda vs. Univ. of Penn., 2017 WL 4179752, at 6 (3d Cir. 2019) ("The only fact that the plaintiffs have pled is that the defendants 'locked in' the Plan to TIAA-CREF…This, standing alone, is insufficient to create a plausible inference that this was a breach of fiduciary duty. Locking in rates and plans is a common practice used across the business and personal world. Companies often offer better terms to induce customers to 'lock in' for a longer period.")

17 Vellali v. Yale Univ., 308 F.Supp.3d 673, 684 (D. Conn. 2018) ("[T]he plaintiffs have alleged facts sufficient to state claims for breach of the duty of prudence based on the bundling arrangement…")

18 *Id*.

19 *Id*.

20 Sacerdote v. New York Univ., 328 F.Supp. 3d 273, 294 (S.D.N.Y. 2018).

21 *Id*.

22 Short v. Brown Univ., 320 F.Supp.3d 363, 370 (D. R.I. 2018); Cassell v. Vanderbilt Univ., 285 F.Supp.3d 1056, 1065 (M.D. Tenn. 2018).

23 Davis v. Wash. Univ. in St. Louis, 2018 WL 4684244 (E.D. Mo. 2018) ("Plaintiffs provide no basis for removing the discretion afforded to Plan administrators and mandating recordkeeping fee caps or single recordkeepers.")

24 *Vanderbilt University*, 285 F.Supp.3d at 1066; *Brown Univ*., 320 F.Supp.3d at 371; Henderson v. Emory University, 252 F.Supp.3d 1344, 1349 (N.D. Ga. 2017).

25 *Vanderbilt University*, 285 F.Supp.3d at 1064; *Brown Univ*., 320 F.Supp.3d at 370; *Emory University*, 252 F.Supp.3d at 1353.

26 *See*, *e.g.*, Final Approval Order and Final Judgment, Short v. Brown Univ., No. 1:17-CV-318-WES-PAS (Aug. 2, 2019); Final Order and Judgement; Kelly v. Johns Hopkins Univ., No. 1:16-cv-2835-GLR (Dec 23, 2019).

27 Cassell v. Vanderbilt University, No. 3:16-cv-02086 (M.D. Tenn. filed June 6, 2018).

28 *Id*.

29 Plaintiffs' Memorandum in Support of Unopposed Motion for Preliminary Approval of Class Settlement, Cassell v. Vanderbilt Univ., No. 3:16-cv-02086 (April 22, 2019).

[30] Plaintiffs' Memorandum in Support of Unopposed Motion for Preliminary Approval of Class Settlement, Kelly v. Johns Hopkins Univ., No. 1:16-cv-2835-GLR (Aug. 6, 2019).

[31] Harmon v. Shell Oil Co., No. 3:20-cv-00021, (S.D. Tex. filed Jan. 24, 2020).

[32] Divane v. Northwestern Univ., No. 1:2016cv08157, slip op. (N.D. Ill. May 25, 2018).

[33] Renaker v. Estee Lauder Inc., Case 3:19-cv-06489-TSH, (N.D. Cal. filed Oct. 9, 2019).

[34] Leventhal v. MandMarblestone Group LLC, No. 18-cv-2727, slip op. (E.D. Pa. May 2, 2019).

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