Settlement in Vanderbilt 403(b) Case Raises Plan Data Questions

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Recently, the extent to which individuals should have control over their personal information and the data they generate in the on-line world has seized center stage in our national conversation. A new proposed settlement in Cassell v. Vanderbilt Univ., No. 3:16-cv-02086, (M.D. Tenn.) highlights the importance of these issues in the retirement plan marketplace.

Under the proposed settlement, Vanderbilt would agree to pay $14.5 million to resolve a variety of claims brought in the case, including one based on the plan's recordkeeper's use of participant data. As awareness of the potential value of individual data has grown there is also an increasing focus on whether plan data is a "plan asset" such that the use by a plan service provider of participant information might give rise to "compensation." While the law around plan and participant data remains unsettled, plan sponsors, plan fiduciaries, and plan service providers may want to evaluate how they address the use of plan data.

In Cassel, plaintiffs alleged that the recordkeeping pricing failed to take into consideration "the value of the vendors' access to Plan participants and their data for marketing purposes." As described below, the settlement is one of the first under which a plan fiduciary agrees to place limits on a service provider's use of plan data.

Background

ERISA does not define the term "plan assets," and the U.S. Department of Labor's ("DOL") applicable regulations only discuss the plan assets status of a plan's financial investments and participant contributions. The DOL has opined that in situations where its regulations are not applicable, plan assets status depends upon whether the plan has a beneficial ownership in the property at issue according to "ordinary notions of property rights under non-ERISA law." DOL Adv. Op. 92-02A (Jan. 17, 1992). This approach requires "consideration of any contract or other legal instrument involving the plan . . . [and] of the actions and representations of the parties involved."

Last year, in another of the university retirement plan cases, Divane v. Northwestern Univ., 6-cv-08157 (N.D. Ill., 2d. Amended Compl. filed July 12, 2018) the district court held that participant data is not a plan asset and dismissed the case. The Divane case is currently being appealed to the Seventh Circuit. The court in Divane opined that the participant information was not a plan asset under ordinary notions of property rights. It stated that the data was not "property the plan could sell or lease in order to fund retirement benefits." Additionally, the court considered whether there was any allegation that the plaintiffs could sell their personal information for value and characterized the issue as a privacy right rather than a property right.

Cassell Settlement

As is common in settlements of cases alleging ERISA violations, the parties in Cassell agreed to certain non-monetary terms. Two of the settlement terms relate to the use of participant information for purposes of marketing. While denying the claims, Vanderbuilt agreed that with respect to future recordkeeping contracts, "[t]he Plan's fiduciaries shall contractually prohibit the recordkeeper from using 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 to Plan participants unless a request for such products or services is initiated by a Plan participant." Additionally, as part of the settlement agreement Vanderbilt must inform its current recordkeeper, to "refrain from using information about Plan participants acquired in the course of providing recordkeeping services to the Plan to market of sell products or services unrelated to the Plan to Plan participants unless a request for such products or services is initiated by a Plan participant." Importantly, and in contrast to the Divane opinion, the settlement does not present a court's legal conclusions as to the status of plan data as a plan asset. Therefore, while the settlement does not serve as legal precedent, it could be viewed as the tacit acknowledgement by these two private parties' of the value of participant data. Given that the law firm representing the plaintiffs is very active in the ERISA class action field, it is quite possible that similar claims constructed around the value of plan and participant information could surface in future complaints.

Under the current climate focused on data privacy, from GDPR to California's privacy law, we expect that ownership and control of participant data will continue to be an area of intense interest in the retirement industry and could well be the subject of future court decisions.