What Colleges and Universities Need to Know About 403(b) Plan Fee Litigation and Fiduciary Liability

Who has Been Sued?

Retirement Fee Lawsuits Hit Vanderbilt, Penn, Johns Hopkins

Lawsuits Target Private Colleges on Pension-Plan Fees

Emory University DC plans latest to face fiduciary-breach suit

Duke Latest School Snared by Coordinated ERISA Lawsuits

Famous Universities Face Lawsuit For Retirement Plans

USC faces federal lawsuit over 'excessive' retirement plan fees

Columbia University targeted in $100 million lawsuit over excessive retirement plan fees

The suit, not brought by Jerry Schlichter's law firm, could signal a 'race to the courthouse' in the university 403(b) market

The Lawsuits

"You have a pretty good case, Mr. Pitkin. How much justice can you afford?"

- Most of the these 403(b) suits have been brought by the same law firm – Schlichter, Bogard & Denton
- A suit against Columbia was brought by another firm
- Each lawsuit alleges a number of different fiduciary breaches
- 403(b) plans are targets because many are "jumbo plans" – over $3 billion in assets

Schlichter Bogard & Denton LLP and Attorneys' Fees

Company	Settlement Amount	Attorneys' Fees
• Lockheed Martin	$62 million	$22.3 million
• Ameriprise Financial	$27.5 million	$9.2 million
• CIGNA	$35 million	
• Boeing	$57 million	$21 million
• Novant	$32 million	$10.7 million
• Mass Mutual	$31 million	$10.3 million

And more. . .

Alleged Breaches of Fiduciary Duty

It turns out "fiduciary" means you have to give it back.

- Failure to ensure plan investment options are prudent
- Failure to ensure plan expenses are reasonable
- Failure to operate retirement plan in the best interest of plan participants
- Failure to monitor the fiduciaries to whom fiduciary power was delegated

The Alleged Facts Behind the Case Against Yale

Failure to ensure that the plan investment options are prudent

- 110+ mutual funds and other products from TIAA and Vanguard
- Multiple recordkeepers
- Failure to monitor the investment options
- Targeted TIAA Traditional Annuity
  - No lump sum
  - Have to withdraw over 10 years to avoid penalties
- CREF Stock Fund historically underperforms its benchmark

Failure to Ensure Plan Expenses are Reasonable

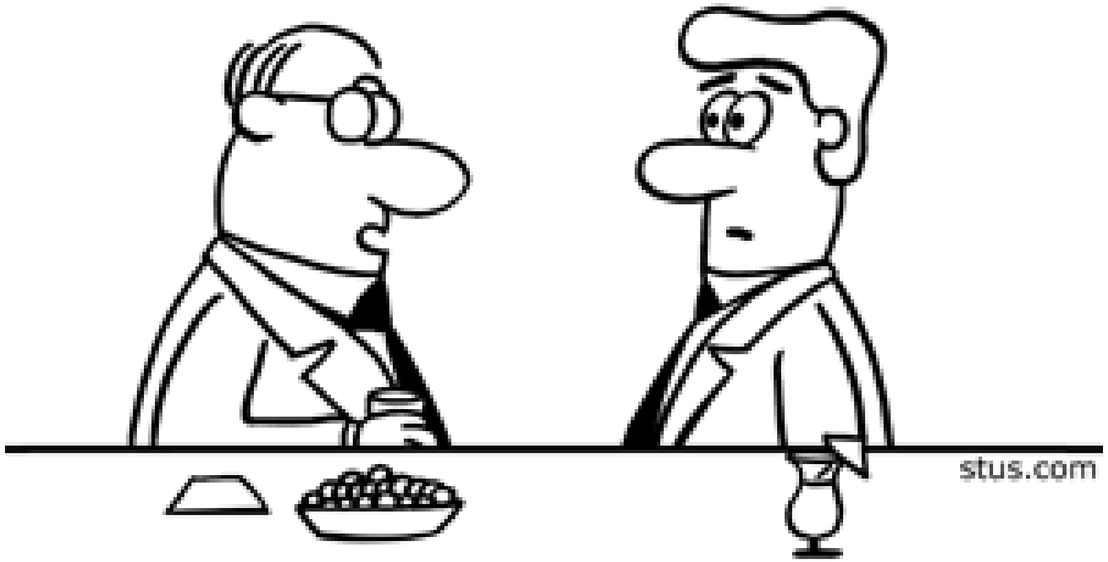
Fisher Phillips

“This is money—get ready to worry about it for the rest of your life.”

- Multiple recordkeepers – waters down bargaining power to negotiate fees
- Expense ratios – “Asset Based Fees”
  - Too high – failure to negotiate share classes with lower fees
  - Plan has some retail share classes (smaller investor class)
- Revenue Sharing
  - Amount paid for administrative services too high - should be ~$35 per participant; range is from $200 to $300 per participant (2010-2014)
- Multiple Funds with the same investment objectives – e.g., 10 large cap blend funds

Failure to Operate Retirement Plan in the Best Interest of Plan Participants

- Did not negotiate share classes
- Did not get competitive bids for recordkeeping
- Failed to recoup excess revenue sharing amounts for the plan
- Failed to give prudent fund line-up
  - Actively managed funds historically do not outperform index funds because of fees



This "fiduciary" thingy really complicates pillaging a corporation.

Failure to Monitor the VP of HR (designated fiduciary)

University and VP personally liable for the loses resulting from the breach

- Board member?
- Executive Committee?
- President?

Estimate of Plan Losses Due to Fiduciary Breach

- $18 million each year
  - Lost returns on the $18 million compounded
- Excess recordkeeping fees
  - $3.2 million each year
  - Lost returns on that money compounded
- Poor performance of some investment options
  - CREF Stock Fund
  - CREF Money Market
  - TIAA Real Estate Fund
  - Actively managed funds with high fees

"NO SIR, I'M AFRAID THERE ISN'T A PATRON SAINT FOR INVESTORS."

Private Institutions: What Do You Do Now?

- Know who the plan fiduciaries are
- Review governance documents and service agreements
  - Who administers the plan
  - Who provides investment advice
  - Who selects/reviews investment options
- Investigate current plan practices
  - How often are investment options reviewed?
  - Who advises?
  - Who makes the decisions? Qualifications?
  - Who has oversight responsibility? Board or a Committee?

Public Institutions: What do you do Now?

Understand who is responsible for the Plan and what the obligations are

- Enabling statutes
- School governance documents
- Plan documents
- Who is taking responsibility for investments

Don’t just adopt ERISA fiduciary practices

State-by-state; school-by-school analysis

ERISA Fiduciary – the Basics

A person is a fiduciary to the extent he or she is delegated or exercise fiduciary responsibility; Actual authority and actions/functions generally are more important than titles

A person becomes a fiduciary by:

- Being named a fiduciary
- Being delegated fiduciary functions
- Assuming fiduciary obligations
- Having oversight over fiduciary functions

If no one is named a fiduciary, the plan sponsor – usually the employer – becomes the plan administrator

Who is a Fiduciary under ERISA?

- Those who have or exercise discretion over the Plan
  - Administering and interpreting the plan
  - Determining benefits
  - Selecting a recordkeeper
- Those who exercise control over plan assets
  - Selecting and monitoring investment options
  - Selecting and monitoring investment adviser
- Investment professionals
  - Fiduciary to the extent they accept responsibility in their service agreement
  - Fiduciary to the extent the assume a fiduciary role

What are Fiduciary Duties

Operate the Plan in the best interests of participants

- Select and monitor the investment options available to participants - held to prudent investor standard – process and knowledge are key
- Administer the Plan - held to prudent administrator standard
- Ensure the Plan pays reasonable fees
- Follow the Plan documents including the investment policy statement

Fiduciary Liability

- Restore plan losses resulting from a breach
- Disgorge profits resulting from a breach
- “Other equitable or remedial relief…, including removal”
- Personal liability
- Joint liability for breaches by other plan fiduciaries

Plan Governance Targeted in Litigation and DOL Audit

Litigation

- May broaden scope of discovery
- Access to deep pockets – School’s assets, executives’ assets and insurance
- Enhance settlement opportunities

DOL Audit

- DOL will ask to interview plan fiduciaries
- Interview given under penalty of perjury - only an attorney can be present for the interview
- Hard look at fees and how fees are monitored

What is the Litigation Targeting?

The investment options offered to participants

- Are the options actively reviewed for quality - TIAA annuity and CREF stock fund
- Actively managed funds v. passively managed funds
- Too many options available; redundancy

Fees (deducted from the fund assets – expense ratio)

- Share classes
- Recordkeeping fees and multiple recordkeepers

Plan Governance: Best Practices

- Delegate fiduciary responsibility to an appropriate committee
  - Select qualified people
  - Provide education/training
  - Meet on a regular basis
  - Keep meeting minutes
  - Document decisions
- Purchase adequate fiduciary insurance
- Engage professional assistance

Plan Governance Process – Establish Clearly Defined Roles

Investment Functions

- Select and monitor plan investment options
- Meet regularly
- Seek advice
- Make well reasoned decisions
- Document processes and decisions

Administrative Functions

- Responsible for day to day administration
    - Disclosures to participants
- Understand the Plan
- Select and monitor recordkeeper
- Seek Advice
- Document processes and decisions

Duty to Monitor and Review Investment Choices

- Meet on a regular basis
- Adopt and follow an investment policy statement
- More options is not better
  - There should be a reasonable and diverse selection to choose from – “dizzying array”
- Review fund options

Review Fees and Expenses

This is at the heart of the college and university litigation

- Monitor and review reasonableness of fees and expenses – professional help is important for large plans – need a basis to know what is reasonable
- Negotiate fees – recordkeeping and share class
- Prudent process
  - Periodic review of service provider’s fees
  - Periodic review of investment adviser’s fees
  - Ongoing review of investment options and share classes
  - Periodic RFPs

Selecting and Monitoring Pension Consultants

"How do we know it's not full of consultants?"

- Get request for proposals (RFPs)
- Select an investment consultant
  - Are they properly registered?
  - Is there a potential for conflicts?
  - How much are their fees and what are they for?
  - How much responsibility do they assume?
  - Will they help you evaluate fees?
- Periodically evaluate the consultant
- Periodically engage in competitive bidding
- Involve legal counsel

Limit Liability When You Can

Appointing and monitoring fiduciaries

Selecting and monitoring administrative service providers

Selecting and monitoring investment advisers

Monitor the fees paid from the plan

Comply with ERISA 404(c) - liability for participants' investment choices is shifted to the participants

Document, document, document

ERISA 404(c) Limits Liability

"I rolled my pension over and over and over, and now I have no idea where the hell it is."

- When plan sponsors comply with 404(c) it acts as a safe harbor to help shield fiduciaries from liability for any losses that a participant incurs as a result of the participant's poor investment decisions
- Notify participants that plan intends to comply with 404(c)
- Provide participants with required investment information
- Consider Participant education

QDIA – Qualified Default Investment Alternative

- When default investments meet DOL requirements fiduciaries are protected by 404(c) even if the participant does not make an election
  - Participants must have a chance direct investments
  - If they don’t, funds go into the QDIA
  - QDIA notices and information
  - Must be diversified
- Types:
  - Lifecycle or target date funds
  - Balanced fund

"Invest? No offense, but I've read about you guys."

Take Away: Ensure Fiduciaries have the Tools they need to Protect the College or University

They should:

- Understand their roles and obligations – best interests of participants
- Have professional support
- Be consistent with their process of selecting and monitoring investments and advisers
- Always seeking lower fees
- Document

QUESTIONS?????

Thank You