

ALERTS

University Retirement Plans Under Scrutiny for Excessive Fees

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There have been 12 proposed class actions brought against major universities with regard to their employee benefit plans. These lawsuits allege numerous claims of fiduciary breach including plan sponsors retaining expensive and underperforming investment options, incurring duplicative fees from using more than one recordkeeper and offering too many investment options. Federal district courts have issued two recent decisions on motions to dismiss, allowing many of the claims to proceed.

Henderson v. Emory Univ.

In *Henderson v. Emory Univ.*, a class of participants and beneficiaries of Emory University's two 403(b) tax-sheltered annuity plans, both subject to ERISA, brought suit against the plans' fiduciaries alleging that the university breached its fiduciary duties by not using its bargaining power to negotiate for lower expenses and using poor judgment in selecting and retaining investment options.^[1] The court granted Emory's motion to dismiss in part, but allowed the following claims to proceed:

1. That Emory imprudently chose retail-class shares over institutional-class shares;
2. That Emory imprudently selected actively managed funds as opposed to passively managed funds;
3. That Emory imprudently selected funds affiliated with the plans' service providers;

4. That Emory failed to remove underperforming funds with higher costs compared to similar funds;
5. That Emory should have used a stable value fund instead of an annuity fund offered by one of the plans' service providers;
6. That Emory failed to monitor the plans' recordkeepers, who overcharged recordkeepers' fees;
7. That Emory imprudently chose three recordkeepers rather than one recordkeeper; and
8. That Emory imprudently entered into arrangements in which certain investments affiliated with the plans' service providers had to be included in the plans and that there was no process to remove these investments.

Additionally, the plan participants sufficiently alleged that Emory breached its duty of loyalty and engaged in prohibited transactions with parties-in-interest. The district court dismissed the plaintiffs' theory that offering too many investment options constituted a breach of Emory's fiduciary duty.

Clark v. Duke Univ.

In *Clark v. Duke Univ.*, a class of participants and beneficiaries of Duke University's 403(b) defined contribution plan, subject to ERISA, brought suit against Duke University, the plan's fiduciary.^[2] The class participants asserted many of the same theories that were asserted by the plaintiffs in *Henderson v. Emory Univ.* The court in *Clark v. Duke Univ.* allowed the following claims to proceed:

1. That Duke imprudently chose four recordkeepers instead of one and selected the recordkeepers' proprietary investments;
2. That Duke engaged in prohibited transactions with parties-in-interest;
3. That Duke failed to remove underperforming funds with higher costs compared to similar funds; and
4. That Duke failed to monitor the plans' recordkeepers, who overcharged recordkeepers' fees.

Unlike the court in *Henderson v. Emory Univ.*, the court did not dismiss the theory that offering too many investment options constituted a breach of Duke's fiduciary duty.

Best Practices for Plan Sponsors

Plan sponsors must take their fiduciary responsibilities seriously and ensure that their employee benefit plans are operated in accordance with ERISA. Plan sponsors should undertake an internal audit to identify if any corrective actions are appropriate. Some steps that plan sponsors should take to minimize potential liability include:

- Verify that the fiduciaries understand their status, duties and responsibilities under the law;
- Hold fiduciary meetings at least quarterly and retain minutes of the meetings to demonstrate a thorough and prudent governance process;
- Confirm adequate fiduciary liability insurance coverage is in place (fiduciary liability coverage is often a separate endorsement or rider from the regular business liability policy, and plan sponsors should not assume that the coverage is in place);
- Retain an investment consultant to provide expert advice with respect to the plan's investments, investment policy and benchmark and analyze fees, revenue sharing arrangements and expense ratios;
- Adopt an investment policy statement and review it annually;
- Benchmark service providers' fees and plan expenses to ensure reasonableness;
- Review performance of investment funds under the plan regularly (e.g., quarterly) and document the review process, and carefully consider replacing underperforming investment options;
- Scrutinize high-cost investment options and illiquid annuities and consider whether to replace with lower-cost index funds and institutional investment options (ERISA does not require, however, that plan sponsors replace all funds with the cheapest possible investment options);

- Ensure that enough investment options are available to adequately allow plan participants to select from a broad array of investment options with different asset classes, different levels of risk and expense ratios to diversify their accounts, but not so many as to create confusion;
- Reduce the number of recordkeepers to eliminate duplicative costs and increase compliance;
- Review plan documents and operations for compliance issues and voluntarily correct any failures identified; and
- Distribute the required compliance disclosures to participants and beneficiaries, including disclosure of fee and revenue sharing arrangements.

The decisions in these two cases highlight the ERISA fiduciary standards applicable to the administration of defined contribution plans and the importance of not-for-profit plan sponsors having procedures in place to oversee the operation of their plans, including review of fees and the performance of investment options.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] No. 1:16-cv-02920-CAP (N.D. Ga. May 10, 2017).

[2] No. 1:16-cv-01044 (M.D.N.C. May 11, 2017).

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