EXPERIENTIAL WEALTH
—FIDUCIA PERPETUA—

Participant Data - Plan Asset vs. Participant Asset

Philip Chao, Experiential Wealth, 2019 November

The Vanderbilt University Settlement

On August 10, 2016, a class of participants and beneficiaries (collectively the "Plaintiffs") of the Vanderbilt University Retirement Plan and the Vanderbilt University New Faculty Plan (collectively the "Plan"), filed civil action on behalf of the Plan against Vanderbilt University, the Vanderbilt Retirement Plan Oversight Committee, and individual fiduciaries (collectively the "Defendants"). This is yet another breach of fiduciary duty complaint regarding excessive administrative and investment fees and poor performing investment options.

The Plan's investment options were offered by four separate recordkeepers to the Plan. These recordkeepers included Fidelity Investments Institutional Operations Company ("Fidelity"), the Vanguard Group, Inc. ("Vanguard"), Teachers Insurance and Annuity Association of America and College Retirement Equities Fund ("TIAA"), and the Variable Life Insurance Company ("VALIC"). Overall, the Plaintiffs alleged that the Defendents failed to undertake procedural prudence in controlling expenses and to prudently monitor investment choices and options. Finally, the Complaint listed the following allegations:

1. duty of prudence breach [29 U.S.C. § 1104(a)(1)(A) and (B)] by retaining or failing to remove the CREF Stock Account
2. duty of prudence breach [under 29 U.S.C. §1104(a)(1)(A) and (B)] by allowing the Plan's vendors to charge excessive recordkeeping and administrative fees and failing to monitor those fees, allowing the vendors to place their expensive proprietary investments into the Plan, and **failing to account for the value of the vendors' access to Plan participants and their data for marketing purposes**;
3. duty of prudence breach [under 29 U.S.C.§ 1104(a)(1)(A) and (B)] by allowing Plan participants to be charged unreasonable investment management fees and unnecessary 12b-1 and mortality and expense risk fees, selecting and retaining among the Plan's investment options poorly performing and expensive mutual funds and variable annuities, failing to engage in a prudent process for monitoring Plan investments and removing imprudent investments within a reasonable period;
4. duties of loyalty and prudence breach [under 29 U.S.C.§1104(a)(1)(A) and (B)] by allowing TIAA to use its position as the Plan's recordkeeper to obtain access to participants and their private information, and to profit from that access; and
5. engaging in transactions prohibited under 29 U.S.C. §1106(a)(1) by **allowing TIAA to use its position as the Plan's recordkeeper to obtain access to participants and their private information, and to profit from that access**.

8460 Tyco Road, Suite E, Vienna, Virginia 22182
T: 703.847.4380 F: 703.847.4384
pchao@ExperientialWealth.com
www.ExperientialWealth.com

In April 2019, the Defendants entered into a settlement agreement with the Defendents and agreed to pay $14.5 million to settle the Complaint. Moreover, as a condition for settlement, "Vanderbilt University shall inform Fidelity, the Plan's current recordkeeper, that when communicating with current Plan participants, Fidelity must refrain from using information about Plan participants acquired in the course of providing recordkeeping services 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."(section 10.9 of the Class Action Settlement Agreement, Case 3:16-cv-02086)

The Northwestern University Dismissal

On August 17, 2016, a class of participants and beneficiaries (collectively the "Plaintiffs") in the Northwestern University Retirement Plan and the Northwestern University Voluntary Savings Plan (collectively the "Plan") filed civil action on behalf of the Plan against Northwestern University, the Northwestern University Retirement Investment Committee, and individual fiduciaries (collectively the "Defendants"). This is also a breach of fiduciary duty complaint regarding excessive administrative and investment fees and poor performing investment options. TIAA and Fidelity served as co-recordkeepers to the Plan and the Plan offered the proprietary investments from both recordkeepers.

On May 25, 2018, Judge Jorge L. Alonso of the U.S. District Court for the Northern District of Illinois Eastern District wrote in his Memorandum Opinion and Order to dismiss the case in all counts and in favor of the Defendants that:

Plaintiffs seek to hold defendants liable for allowing TIAA-CREF to market products to them. Plaintiffs allege that the plans allowed TIAA, as record keeper, to obtain access to participants' contact information, their choices of investments, the asset size of their accounts, their employment status, age, and proximity to retirement. Plaintiffs allege that the information about participants constitutes a plan asset and that defendants breached their fiduciary duties: (1) by not preventing TIAA from using that information to market products to plaintiffs; and (2) by engaging in a prohibited transaction.

Judge Alonso agrees with defendants that it would be futile to allow plaintiffs to add these claims, which have a number of problems.

(1) It is in no way imprudent for defendants to allow TIAA, who is alleged to be a recordkeeper, to have access to participants' contact information, their choice of investments, their employment status, their age and their proximity to retirement. TIAA needed that information in order to serve as recordkeeper.
(2) The disclosure of information does not implicate ERISA fiduciary functions, and "that the plans betrayed their trust by disclosing personal information" was not preempted by ERISA because the claim was "distinct from any available under ERISA". Plaintiff failed to cite a single case in which a court has held that releasing confidential information or allowing

someone to use confidential information constitutes a breach of fiduciary duty under ERISA.

(3) Information referenced is not a plan asset. Plaintiffs cite no case in which a court has held that such information is a plan asset for purposes of ERISA. The Court has no doubt that a compilation of the information TIAA has on participants has some value (to TIAA, at least), but the Court cannot conclude that it is a plan asset under ordinary notions of property rights. The information the plans gave TIAA on each participant who joined one of the plans is not, for example, property the plan could sell or lease in order to fund retirement benefits. It does not appear that courts have recognized a property right in such information.

Judge Alonso also cited Sexton v. Runyon, Case No. 03-cv-291, 2005, 0WL 2030865 at *8 (N.D. Ind. Aug. 23, 2005) that "[t]hough the law has considered various privacy interests in personal information, . . . the law does not frame these protections as property rights."

Observations

In the case of Northwestern University, the decision in favor of the Defendents rested on the issue of participant information not deemed as plan asset. There is no issue pertaining to prohibitive transaction or self-dealing.

In the case of Vanderbilt the decision was not framed from the standpoint of Plan Asset. Rather, it was viewed from the frame that participant information should be treated with care and should only be allowed to be used for marketing or sales purpose if participants grant their permission for such use. Regardless, if participant information should be deemed Plan Asset or not, there is no question participant information are participant assets.

With a rapidly digitizing world and with constant threats on cyber security with information theft, ownership of data and data permissioning will increasingly become a topic of focus, and evolving and new regulations are needed. For now, it is the role of the plan fiduciary to take prudent steps in addressing the level and type of use of such data by service providers.