

**UNDERSTANDING UNIVERSITY FEE
LITIGATION: A FEW LESSONS ABOUT THE
PERILS OF IMPRUDENCE FOR HIGHER
ED PLAN SPONSORS**

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INTRODUCTION

Beginning in August 2016, a series of class action lawsuits were filed on behalf of participants and beneficiaries of 403(b) employee retirement plans sponsored by major American colleges and universities. These plans are regulated by the 1974 Employee Retirement Income Security Act (“ERISA”), which sets minimum

standards to protect the participants and beneficiaries of voluntarily established retirement and health plans. The allegations in the several lawsuits have centered primarily around breaches of fiduciary duties by those charged with administering the plan.

These cases are all class action lawsuits brought on behalf of the participants and beneficiaries of the plans in question. Generally, the class sizes are between 15,000 and 25,000, and the plaintiffs have not had difficulty getting their classes certified by the courts.

The defendants are 403(b) plan fiduciaries at prominent colleges and universities with large pools of assets held in ERISA covered plans. Each plan ranges in aggregate value from \$1.25 billion to \$4.7 billion.¹ The fiduciaries charged with breach of duty are those explicitly designated as such in plan documents, as well as functional fiduciaries, i.e., those whose ERISA duties arise because they (1) exercise discretionary authority/control over management of a plan, (2) exercise authority/control over management/disposition of plan's assets, (3) render investment advice for a fee (or has authority to do so), or (4) have any discretionary authority/responsibility in the of administration of plan.² Most defendants are functional fiduciaries, as plan creation documents usually only explicitly name one person or organizational role.

Apart from the case against MIT, each plan sponsor maintained between two and five recordkeepers. Some recordkeepers in this industry provide only recordkeeping and administrative services, while others provide both recordkeeping services and investment products. This latter type is the kind employed by the defendant institutions subject to these suits. The primary companies whose services/products are at issue in these cases are TIAA-CREF, Vanguard, and Fidelity. Having multiple

¹ Observers have noted (somewhat cynically) that the first batch of suits may have been chosen for the notoriety and deep pockets of the defendants rather than because their actions were especially egregious. See Rick Seltzer, *Retirement Plan Roulette*, INSIDE HIGHER ED (Aug. 18, 2016), <https://www.insidehighered.com/news/2016/08/18/retirement-plan-lawsuits-could-be-just-beginning> [<https://perma.cc/5RV9-ATSY>].

² See Employee Retirement Income Security Act, 29 U.S.C.A § 1002(21)(A) (West, Westlaw through PL 117-11 (excluding PL 116-283)).

recordkeepers raises the costs associated with administering the plans and has been alleged by plaintiffs to be de-facto imprudent.³

The MIT case is unique among these suits in that Fidelity was the sole recordkeeper and provider of investment options. In this case, the plaintiffs have also brought “prohibited transaction” claims based on the theory that Fidelity and MIT were both “parties in interest.” Plaintiffs assert that the philanthropic generosity showed to MIT by Fidelity, coupled with the presence on the MIT board of multiple Fidelity CEOs, created conflicts of interest and fell under the umbrella of prohibited transactions which create fiduciary conflicts, and which ERISA Section 406 was specifically designed to protect against.⁴

The fiduciary breaches most cited are the “duty of prudence” and “duty of loyalty,” as well as allegations of various prohibited transactions. In almost every instance, the only claims which have survived 12(b)(6) motions to dismiss have been those relating to prudence.

A. Breach of Duty of Loyalty Claims

Claims of breach of duty of loyalty were made in tandem with the breach of duty of prudence claims. This appears to have been part of a “pleading in the alternative” strategy, or at least the testing of two theories, not knowing which one would be accepted by the court. Several courts⁵ ultimately determined that if there was indeed a violation of ERISA, it was the result of the

³ Amended Complaint at 46, *Cates v. Trs. of Columbia Univ.*, No. 1:16-cv-06524-KBF (S.D.N.Y. Nov. 18, 2016), ECF No. 52 (asserting that “[t]he majority of plans use a single recordkeeper because a multi-recordkeeper platform is inefficient”) (internal quotations omitted).

⁴ Complaint—Class Action at 9, *Tracey v. Mass. Inst. Tech.*, No. 1:16-cv-11620-NMG, (D. Mass. Aug. 9, 2016). The complaint against MIT alleges:

[long] after [Fidelity] was selected . . . as the Plan’s recordkeeper, Fidelity . . . donated *hundreds of thousands of dollars* to MIT . . . for example, the Edward C. Johnson Fund contributed \$100,000 to MIT for ‘Conferences’ . . . \$220,000 for ‘Conservation-Arts & Sciences’ . . . \$25,000 for ‘Program Support.’

Id.

⁵ See, e.g., *Tracey v. Mass. Inst. Tech.*, No. 1:16-cv-11620-NMG, 2017 WL 4453541, at *18 (D. Mass. Aug. 31, 2017), *adopted in part and rejected in part* 2017 WL 4478239 (Oct. 4, 2017); *Vellali v. Yale Univ.*, 308 F. Supp. 3d 673, 688 (D. Conn. 2018) (“ . . . a theory of breach based on incidental benefit, without more, cannot support a breach of loyalty claim.”).

defendants' negligence and poor decision making, and not that the defendants had placed their own or a third party's interests ahead of the participants and beneficiaries. Most courts saw the loyalty claims as simply recasting of the prudence claims and dismissed them as without merit.⁶ As the cases have proceeded, most of the amended complaints dropped the loyalty claims and instead alleged a broader breach of fiduciary duty, focused on prudence.⁷

B. Prohibited Transaction Claims

The prohibited transactions claims were frequently dismissed as well. Those claims primarily focused on the assertion that fees paid to plan recordkeepers constituted plan assets which are prohibited from being transferred to a party in interest.⁸ The courts have largely been unpersuaded by this argument and dismissed those claims, holding that the payment of these fees does not constitute the transferring of plan assets, and noting that

⁶ See, e.g., *Cassell v. Vanderbilt Univ.*, 285 F. Supp. 3d 1056, 1062 (M.D. Tenn. 2018) (“Plaintiffs’ loyalty claims are characterizations that piggyback off their prudence claims. The facts alleged in the Amended Complaint assert that Defendants failed to manage and make decisions for the Plan in a prudent manner, not that Defendants engaged in self-dealing or acted for the purpose of benefitting a third party . . .”).

⁷ See, e.g., Amended Complaint, *supra* note 3, at 11 (dropping loyalty claims which were made in initial complaint). An interesting note is that this spate of cases may have been spurred by the new fiduciary rules proposed by the DOL under the Obama administration in April 2016. See GARY SHORTER & JOHN J. TOPOLESKI, CONG. RESEARCH SERV., DEPARTMENT OF LABOR’S 2016 FIDUCIARY RULE: BACKGROUND AND ISSUES 7-8 (July 3, 2017), <https://fas.org/sgp/crs/misc/R44884.pdf> [<https://perma.cc/78P3-62JS>]. While the implementation of those rules was first delayed by the Trump administration and subsequently vacated by the Fifth Circuit in March 2018 before ever going into effect, they brought the issue of fiduciary duty regarding retirement planning into the spotlight, especially the difference between “suitability” and “fiduciary” standards:

Under the prior regulation, securities brokers and dealers who provided services to retirement plans and who were not fiduciaries were not required to act in the sole interests of plan participants. Rather, their recommendations had to meet a suitability standard, which requires that recommendations be suitable for the plan participant, given factors such as an individual’s income, risk tolerance, and investment objectives. The suitability standard is a lower standard than a fiduciary standard. Under DOL’s 2016 regulation, brokers and dealers are generally considered to be fiduciaries when they provide recommendations to participants in retirement plans.

Id. at ii. See also *infra* note 201.

⁸ See generally 29 U.S.C.A. §§ 1106-08 (West, Westlaw through P.L. 116-259).

ERISA's rules carve out exceptions for these kinds of transactions.⁹

C. Breach of Duty of Prudence Claims

The surviving allegations have then been related to whether the fiduciaries breached their duty of prudence. This duty is measured objectively, and courts have noted that “a pure heart and an empty head are not enough.”¹⁰ The measure of prudence looks at process as well as substance, requiring that a fiduciary must obtain the relevant information necessary to make a prudent decision, and must then use that information to make prudent decisions in service of the best interests of the plan participants and beneficiaries.¹¹ While some courts dismissed those claims prior to discovery, most found that at least certain aspects of these claims were sufficiently pled to turn on issues of fact.

Plaintiffs' strategy shifted slightly over time as theories were tested, but the most frequently asserted allegations of imprudent actions/omissions taken by defendants fall into several, sometimes overlapping categories:

1. Imprudent maintenance of multiple recordkeepers.
2. Imprudent selection of investment options.
 - a. Too many options
 - b. Retail class shares
 - c. Poorly performing products
3. Imprudently allowing plan recordkeepers to charge unreasonably excessive fees.
4. Failure to properly monitor co-fiduciaries.

⁹ See, e.g., *Clark v. Duke Univ.*, 1:16-CV-1044, 2017 WL 4477002, at *2 (M.D.N.C. May 11, 2017) (“To the extent the plaintiffs are alleging that it was a prohibited transaction to invest in mutual funds because the entities providing the mutual funds are parties-in-interest by virtue of making mutual funds available for investment, the statute precludes that argument.”).

¹⁰ *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983).

¹¹ See *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009) (“In evaluating whether a fiduciary has acted prudently, we therefore focus on the process by which it makes its decisions rather than the results of those decisions.”)

I. EARLY CASES

The first round of cases were filed from dates spanning from August 9, 2016 to August 17, 2016 by the law firm Schlichter, Bogard & Denton LLP (SBD), against MIT, NYU, Yale, Duke, Penn, Vanderbilt, Emory, Johns Hopkins, Columbia, Cornell, Northwestern, and USC.¹² These were derogatorily described by some defendants as “cut-and-paste” lawsuits, and indeed the initial and amended complaints were all very similar from case to case.¹³

The plaintiffs’ litigation strategies center around the notion that these employers violated the spirit and letter of ERISA by essentially turning over decisions about their 403(b) plans to the companies which served dual roles as plan recordkeepers and investment product providers. Once arrangements were in place, SBD alleged that the educational institutions all but walked away and let TIAA-CREF, Vanguard, Fidelity, and a few other companies manage the plans with little or no oversight, especially regarding fees and other costs, and the selection of myriad investments available to plan participants.¹⁴

¹² See Complaint—Class Action at 1, 58, *Munro v. Univ. of S. Cal.*, No. 2:16-cv-06191 (C.D. Cal. Aug. 17, 2016), ECF No. 1; Class Action Complaint at 1, 54, *Vellali v. Yale Univ.*, 3:16-cv-01345 (D. Conn. Aug. 9, 2016), ECF No. 1; Complaint—Class Action at 1, 81, *Henderson v. Emory Univ.*, No. 1:16-cv-02920-MHC (N.D. Ga. Aug. 11, 2016), ECF No. 1; Complaint—Class Action at 1, 63, *Divane v. Northwestern Univ.*, No. 1:16-cv-08157 (N.D. Ill. Aug. 17, 2016), ECF No. 1; Complaint—Class Action, *supra* note 4, at 1, 86; Complaint—Class Action at 2, 79, *Kelly v. Johns Hopkins Univ.*, No. 1:16-cv-02835-GLR (D. Md. Aug. 11, 2016), ECF No. 1; Complaint—Class Action at 1, 81, *Clark v. Duke Univ.*, No. 1:16-cv-01044 (M.D.N.C. Aug. 10, 2016), ECF No. 1; Complaint—Class Action at 1, 56, *Cunningham v. Cornell Univ.*, No. 1:16-cv-06525 (S.D.N.Y. Aug. 17, 2016), ECF No. 1; Complaint—Class Action at 1, 54, *Cates v. Trs. of Columbia Univ.*, No. 1:16-cv-06524-KBF (S.D.N.Y. Aug. 17, 2016), ECF No. 1; Complaint—Class Action at 1, 57, *Sacerdote v. N.Y. Univ.*, No. 1:16-cv-06284-KBF (S.D.N.Y. Aug. 9, 2016), ECF No. 1; Complaint—Class Action at 1, *Sweda v. Univ. of Pa.*, No. 2:16-cv-04329-GEKP (E.D. Pa. Aug. 10, 2016), ECF No. 1; Complaint—Class Action at 1, 75, *Cassell v. Vanderbilt Univ.*, No. 3:16-cv-02086 (M.D. Tenn. Aug. 10, 2016), ECF No. 1.

¹³ Memorandum of Law in Support of Defendant’s Motion to Dismiss Plaintiffs’ Consolidated Amended Complaint at 1, *Cates v. Trs. of Columbia Univ.*, No. 1:16-cv-06524-KBF, 2017 WL 3724296 (S.D.N.Y. Aug. 28, 2017) (consolidated with *Doe v. Columbia Univ.*, No. 1:16-cv-06488 (S.D.N.Y. filed Aug. 16, 2017)).

¹⁴ See, e.g., Amended Complaint at 98, *Clark v. Duke Univ.*, No. 1:16-cv-01044-CCE-LPA, (M.D.N.C. Nov. 21, 2016), ECF No. 24 (“Defendants’ failure to conduct appropriate due diligence in selecting and monitoring the Plan’s investments resulted in options being retained in the Plan despite years of historical underperformance

A. *Defendants Maintained Multiple Recordkeepers*

In all cases (except for MIT),¹⁵ which had its own unique issues) the employers engaged at least two recordkeepers, one of them always TIAA-CREF. The reason, in part, was that once participants were invested in certain TIAA-CREF products, there was no easy way to drop TIAA-CREF recordkeeping, as there were (by design) ostensibly no other recordkeepers capable of managing these products, which participants had already purchased.¹⁶ This coupled with the fact that the contracts the universities concluded with TIAA-CREF required them to offer these immovable products, all but guaranteed TIAA-CREF a customer for life in the plan.¹⁷ Plaintiffs allege that entering such an agreement in the first place was imprudent on the part of plan fiduciaries. We discuss this *infra*.

Plaintiffs' principle argument however, is that maintaining multiple recordkeepers increases fees due to the breakup of the considerable aggregate of assets into smaller pools which cannot command the same discounts.¹⁸ The defendants counter that as certain popular products like the CREF Stock Account and the TIAA Real Estate Account (a unique kind of REIT) were only available through TIAA-CREF, they were offering the products that the plan participants wanted, while the addition of Vanguard or Fidelity served the participants' desire for a broad range of mutual fund products in various investment styles and industry sectors.

Two important events changed the landscape on this and other issues. First, in 2007, the United States Department of the Treasury issued revised guidelines on management of 403(b) plans which brought them into closer alignment with 401(k) plan

compared to superior lower-cost alternatives, [which caused] massive losses to the Plan compared to what those assets would have earned if invested in prudent alternatives.”)

¹⁵ See Complaint—Class Action, *supra* note 4, at 8-9, 11.

¹⁶ See Corrected Amended Complaint at 38-39, *Cunningham v. Cornell Univ.*, No. 1:16-cv-06525-PKC-JLC, (S.D.N.Y. Feb. 24, 2017), ECF No. 81.

¹⁷ *Id.* at 38, 96.

¹⁸ *Id.* at 63.

management; these new rules went into effect in 2009.¹⁹ Many organizations who sponsored these plans (but not all) made changes to better reflect these guidelines. Second, in 2015, the Obama administration introduced a new fiduciary rule, which would apply to all retirement investment advisors as of June 2016.²⁰ The announcement of these rules triggered an industrywide cleanup effort to bring plans in line with these policies, which is noted in many of the complaints, including some plans consolidating down to fewer recordkeepers.²¹ SBD argues however, that despite these remedial actions, the plan sponsors remained in breach of their fiduciary duty during the period proceeding such changes, and in most cases, remained in breach. Essentially, plaintiffs' argument is, "too little, too late."

In support of these claims, SBD points (in the amended complaints) to four Universities (Pepperdine, Loyola Marymount, Purdue, and Cal Tech) which changed their plans by consolidating recordkeeping and reducing the number of investment options, actions consistent with SBD's image of a prudent fiduciary.²² The defendants say these examples are cherry picked, and that a far greater number of institutions maintained a plan structure similar to those under attack.

B. Defendants Allowed the Plans to Offer a Selection of Investment Products Which Harmed Plan Participants.

1. Plaintiffs Claim There Were Far Too Many Investment Options in the Plans, Many of Them Duplicative, Creating

¹⁹ See Revised Regulations Concerning Section 403(b) Tax-Sheltered Annuity Contracts; Final Rule, 72 FR 41127, 41130 (July 26, 2007) (codified at 26 CFR 1, 26 CFR 31, 26 CFR 54, & 26 CFR 6020).

²⁰ Barack Obama, Remarks at AARP Headquarters, (Feb. 23, 2015), available at <https://www.govinfo.gov/content/pkg/DCPD-201500119/pdf/DCPD-201500119.pdf> [<https://perma.cc/WN6Y-VFUP>].

²¹ See, e.g., Amended Complaint at 23-28, Sweda v. Univ. of Pa., No. 2:16-cv-04329-GEKP (E.D. Pa. Nov. 21, 2016), ECF No. 27 (noting that Pepperdine, Loyola Marymount, Purdue and others made changes including consolidation of recordkeeping services).

²² See, e.g., *id.* at 23-28. See also Amended Complaint at 39-43, Sacerdote v. N.Y. Univ., No. 1:16-cv-06284-KBF (S.D.N.Y. Nov. 9, 2016), ECF No. 39.

Decision Paralysis Amongst Participants, Which in Turn Leads to Predictably Suboptimal Investment Choices ²³

The plans in the first batch of suits included between 78 and 440 investment products from which participants could choose. Plaintiffs' claim is that these numbers were imprudently high. First, they cite psychological studies about "analysis paralysis" which holds that when individuals are given too many options to choose from, they cannot make an informed choice, or often any choice at all.²⁴ This leads participants to be highly suggestible to blindly accept recommendations chosen for them by the recordkeepers/investment providers.²⁵ Second, these large pools of investments often included duplicative funds. SBD argues that it is patently imprudent to offer identical products following the same investment profile.²⁶

2. Including "Retail Class Shares" was Inappropriate when Cheaper "Institutional Class Shares" Were Available to These 403(b) Plans

SBD insists that it was imprudent for the plan sponsors to include "retail class shares" in the plans, describing them as being identical in every way to "institutional class" shares except for significantly higher costs.²⁷

The defendants dispute this claim, saying that retail class shares are more liquid and allow the participants to day-trade with their retirement accounts. At the motion to dismiss stage, courts have differed on this issue. Experts produced by both sides continue to argue about the validity of including these products

²³ See Amended Complaint, *supra* note 21, at 65 (citing MICHAEL LIERSCH, T. ROWE PRICE RETIREMENT RESEARCH, CHOICE IN RETIREMENT PLANS: HOW PARTICIPANT BEHAVIOR DIFFERS IN PLANS OFFERING ADVICE, MANAGED ACCOUNTS, AND TARGET-DATE INVESTMENTS, at 2 (Apr. 2009) ("Offering too many choices to consumers can lead to decision paralysis, preventing consumers from making decisions.")).

²⁴ *Id.*

²⁵ See *id.*

²⁶ *Id.* at 73 ("Had Defendants combined hundreds of millions of dollars in Plan assets from duplicative index funds into a single index fund, the Plan would have obtained lower fees and generated higher investment returns, net of fees, and participants would not have lost millions of dollars in retirement assets.").

²⁷ See Second Amended Complaint at 32, *Henderson v. Emory Univ.*, No. 1:16-cv-02920-CAP (N.D. Ga. Dec. 20, 2017), ECF No. 108.

side by side, as many of the plans have done (though some products were only available in retail share form). The court in *Sacerdote v. New York University*, for example (granting the defendant's 12(b)(6) motion to dismiss such a claim), cited decisions by the Third, Seventh, and Ninth Circuits dismissing claims that fiduciaries breached their duties by including retail class mutual funds among their investment options.²⁸

3. Plaintiffs Allege that Certain Products, Especially the CREF Stock Account and TIAA Real Estate Account, were Imprudent Investment Products that Should Either Never Have Been Included or Should Have Been Removed for Consistently Poor Performance

Regarding the CREF Stock Account, plaintiffs make a broader argument about the prudence of actively managed index funds in general. They cite numerous studies as well as Nobel Prize winning economists²⁹ who have argued that such products are an inherently bad investment choice, pointing out that because actively managed funds can only beat the market at the expense of other funds losing (zero-sum) any benefit of actively managed accounts can only be attributed to manager skill, or luck. The economists' statistical analysis has shown that manager skill is a negligible factor in fund performance, and that once the costs of actively managed funds are considered, the fees outstrip any appreciable benefits attributable to manager skill. The universities, predictably, point to the wide adoption and popularity of actively managed funds, and argue that "prudence" is measured objectively, that is, the plan sponsors were acting the way the typical, reasonable, prudent plan sponsor would act. This

²⁸ See *Sacerdote v. N.Y. Univ.*, 1:16-cv-06284-RWS, 2017 WL 3701482, at *11 (S.D.N.Y. Aug. 25, 2017). *But see* *Cunningham v. Cornell Univ.*, No. 1:16-cv-06525-PKC, 2017 WL 4358769, at *3 (S.D.N.Y. Sept. 29, 2017) (disagreeing with *Sacerdote* court's reading of precedent, and their ruling on this same issue).

²⁹ See Amended Complaint, *supra* note 14, at 105 ("Properly measured, the average actively managed dollar must underperform the average passively managed dollar, net of costs.") (quoting William F. Sharpe, *The Arithmetic of Active Management*, 47 FIN. ANALYSTS J. 7, 8 (1991)); See *id.* ("After costs . . . in terms of net returns to investors, active investment must be a negative sum game.") (quoting Eugene F. Fama & Kenneth R. French, *Luck Versus Skill in the Cross-Section of Mutual Fund Returns*, 65 J. FIN. 1915, 1915 (2010)).

amounts to an “if everyone else was jumping off a cliff . . .” argument.

Plaintiffs insist that a prudent fiduciary who closely monitored the plans would have determined that, despite their popularity in the market, the excessive fees and poor performance of the CREF Stock Account and TIAA Real Estate Account should have resulted in their removal, or, if removal was going to be contractually impossible later despite these factors, should have prevented these products from ever having been offered. Defendants however have vigorously challenged this characterization of those products and noted that participants were not required to purchase those products. These claims have generally not survived motions to dismiss.³⁰

C. Cost of Recordkeeping Services Was Inherently Imprudent

Each of the defendant universities paid for recordkeeping services with a “revenue sharing” model under which the investment management side of the companies would compensate the recordkeeping side of the company with a percentage of the fees collected on the investments. Defendants point out that courts have upheld the legitimacy of revenue sharing schemes.³¹ They note that flat-fee schemes might be beneficial for participants with larger balances, but for employees with small investment balances it would likely raise costs. Plaintiffs argue vehemently that a prudent fiduciary would either have entered a “flat rate” fee arrangement at a cost of \$30-\$35 per plan participant, or, if using a revenue sharing scheme, would have capped the fees to ensure they remained reasonable. In their motions to dismiss, defendants argue that the \$30-\$35 flat fee range is pulled from thin air, and that the plaintiff class has not shown evidence to back up that

³⁰ See, e.g., *Cunningham v. Cornell Univ.*, No. 1:16-cv-06525-PKC, 2017 WL 4358769, at *5 (S.D.N.Y. Sept. 29, 2017) (“ . . . the Plans’ contractual agreement with TIAA-CREF requiring it to place certain investment options in the Plans and use TIAA-CREF’s recordkeeping services does not, on its own, demonstrate imprudence.”).

³¹ See, e.g., Memorandum in Support of Defendants’ Motion to Dismiss for Failure to State a Claim at 19, *Sweda v. Univ. of Pa.*, No. 2:16-cv-04329-GEKP, 2017 WL 4179752 (E.D. Pa. May 2, 2019), ECF No. 25-2 (“revenue sharing’ — is common and ‘violates no statute or regulation.’”) (quoting *Hecker v. Deere & Co.*, 556 F.3d 575, 585 (7th Cir. 2009)).

benchmark.³² (The fees actually paid under the revenue sharing agreements were significantly higher than the “reasonable” range SBD cites.)³³

The thrust of SBD’s theory is that the economy of scale for recordkeeping services makes plans with more participants less expensive per participant the larger they grow. Conversely, if recordkeepers are paid through uncapped revenue sharing agreements with compensation based on a percentage of the assets under management, the profits to the recordkeeper continue to rise without any corresponding increase in recordkeeping responsibilities.

D. Defendants Failed to Monitor Their Co-Fiduciaries

While some of the allegations of imprudence relate to specific actions, e.g., locking in TIAA-CREF recordkeeping by including annuities and other products that could not be moved to another recordkeeper, most of the claims are based on the theory that plan fiduciaries were asleep at the wheel and failed to effectively monitor the plans to ensure they adequately reflected the best interests of the participants. Defendants argue that the various committees charged with monitoring the plans discharged their duties faithfully, and that the plaintiffs simply disagree with the choices they made. Most courts have dismissed this claim either as barred by the statute of limitations, or because the plaintiffs failed to present sufficient facts to back up the claim. Additionally, the judge in the *Cornell* litigation noted that the United States Supreme Court has “suggested that fiduciaries normally have a continuing duty ‘of some kind’ to ‘monitor investments and remove

³² See, e.g., Memorandum of Law in Support of Defendants’ Motion to Dismiss Plaintiffs’ Complaint at 20, *Cassell v. Vanderbilt Univ.*, No. 3:16-cv-02086 (M.D. Tenn. Oct. 11, 2016), ECF No. 31 (“Without a benchmark against which to compare the Plan’s fees, Plaintiffs have provided no well-pled allegation from which the Court can plausibly conclude that the recordkeeping fees were too high.”).

³³ See Amended Complaint, *supra* note 22, at 59 (paying \$230-\$270 per participant); see also Amended Complaint at 65-66, *Cassell v. Vanderbilt Univ.*, No. 3:16-cv-02086 (M.D. Tenn. Dec. 12, 2016), ECF No. 38 (paying \$100-\$145 per participant until negotiating flat fee of \$32 per participant in 2015).

imprudent ones,” but that the Court had specifically refused to define the scope of that duty.³⁴

To date, Plaintiffs have largely failed to present enough evidence to show that the universities failed to monitor the plans. Some plaintiffs have successfully argued, however, that their claims are “based on flaws in [defendant’s] process for selecting and monitoring the Plans’ fees and investments” and that discovery is needed because “[defendant] has ‘sole possession’ of that knowledge.”³⁵

II. SETTLEMENTS, APPEALS, AND ROUND II

Eight cases have resulted in settlement agreements. MIT, Duke, Vanderbilt, Emory, Johns Hopkins, University of Chicago, Princeton, and Brown settled their cases for amounts ranging from \$3.5 to \$18.1 million.³⁶

³⁴ *Cunningham v. Cornell Univ.*, No. 1:16-cv-06525-PKC, 2017 WL 4358769, at *8 (S.D.N.Y. Sept. 29, 2017) (citing *Tibble v. Edison Int’l*, 575 U.S. 523, 528-29(2015)).

³⁵ *See, e.g.*, Memorandum of Law in Opposition to Cornell Defendants’ Motion to Dismiss Plaintiffs’ Amended Complaint [Doc. 71] at 25, *Cunningham v. Cornell Univ.*, No. 1:16-cv-06525-PKC, 2017 WL 4358769 (S.D.N.Y. Sept. 29, 2017), ECF No. 87. Defendants’ motion to dismiss monitoring claim was denied insofar as it related to surviving underlying prudence claims.

³⁶ Plaintiffs’ Memorandum in Support of Unopposed Motion for Preliminary Approval of Class Settlement at 3, *Tracey v. Mass. Inst. Tech.*, No. 1:16-cv-11620-NMG (D. Mass. Oct. 28, 2019), ECF No. 291 (settled for \$18.1 million and other non-pecuniary relief); Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Settlement at 2, *Clark v. Duke Univ.*, No. 1:16-cv-01044-CCE-LPA (M.D.N.C. Jan. 16, 2019), ECF No. 149 (settled for \$10.65 million and other non-pecuniary relief); Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Settlement at 2, *Cassell v. Vanderbilt Univ.*, No. 3:16-cv-02086 (M.D. Tenn. Apr. 22, 2019), ECF No. 145 (settled for \$14.5 million and other non-pecuniary relief); Joint Motion for Preliminary Approval of Class Settlement at 2, *Henderson v. Emory Univ.*, No. 1:16-cv-02920-CAP (N.D. Ga. May 29, 2020), ECF No. 218 (settled for \$16.75 million and other non-pecuniary relief); Unopposed Motion for Preliminary Approval of Class Action Settlement at 2, *Kelly v. Johns Hopkins Univ.*, No. 1:16-cv-02835-GLR (D. Md. Aug. 6, 2019), ECF No. 84 (settled for \$14 million and other non-pecuniary relief); Plaintiffs’ Memorandum of Law in Support of Their Motion for Preliminary Approval of the Proposed Settlement and Related Matters at 2, *Daugherty v. Univ. of Chi.*, No. 1:17-cv-03736 (N.D. Ill. May 22, 2018), ECF No. 58 (settled for \$6.5 million and other non-pecuniary relief); *see* Final Approval Order and Final Judgment, *Nicolas v. Trs. of Princeton Univ.*, No. 3:17-cv-03695-DEA (D.N.J. Dec. 12, 2020), ECF No. 72 (settlement terms not disclosed); Plaintiffs’ Unopposed Motion for an Order: Providing Final Approval for Class Action Settlement and Approving the Plan of Allocation at 1,

The NYU case proceeded to a bench trial where it was dismissed, but that decision was appealed to the Second Circuit where it is currently under review.

In the Penn case, all claims were dismissed on the 12(b)(6) motion, and the case was appealed to the Third Circuit. The appeals court reversed in part, directing the lower court to allow the unreasonable and excessive fee prudence claims to proceed. Defendants petitioned to have that decision stayed, and for their case to be reheard by full Third Circuit. Defendants' argument for rehearing was that the Third Circuit had ignored its own precedent in *Renfro v. Unisys Corporation*,³⁷ specifically in the court's holding that having a wide range of investment options is "highly relevant."³⁸ The Third Circuit noted however that *Renfro* based its decision on *Hecker v. Deere & Company*,³⁹ which had held that having bad funds alongside good funds does not violate fiduciary duties, so long as there are a sufficient number of good choices. However, *Hecker* never addressed the issue of the fiduciary duties related to the process for selection of those investment options.⁴⁰ The petition for rehearing was denied, as was a petition for certiorari to the Supreme Court. The Penn case is now in the district court, headed to trial on the claims reinstated by the Third Circuit.

The Northwestern litigation⁴¹ was dismissed in full on the defendants 12(b)(6) motion. Plaintiffs appealed that decision to the Seventh Circuit, which rejected their appeal and finalized dismissal of the case. To date, this is the only one of these related cases that has ended in complete legal defeat for a plaintiff class.⁴²

Yale⁴³ is proceeding toward trial with the claims that survived defendants' 12(b)(6) motions, largely claims related to

Short v. Brown Univ., No. 1:17-cv-00318-WES-PAS (D.R.I. July 3, 2019), ECF No. 48 (settled for \$3.5 million and other non-pecuniary relief).

³⁷ *Renfro v. Unisys Corp.*, 671 F.3d 314, 320 (3d Cir. 2011).

³⁸ *Id.* at 327.

³⁹ *Id.*

⁴⁰ *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) ("[E]ven if, as plaintiffs urge, there is a fiduciary duty on the part of a company offering a plan to furnish an acceptable array of investment vehicles, no rational trier of fact could find, on the basis of the facts alleged in this Complaint, that Deere failed to satisfy that duty.").

⁴¹ *Divane v. Northwestern Univ.*, No. 1:16-cv-08157 (N.D. Ill. filed Aug. 17, 2016).

⁴² *See generally id.*

⁴³ *Vellali v. Yale Univ.*, 308 F. Supp. 3d 673, 684, 691 (D. Conn. 2018).

excessive administrative fees and costs, and failure to monitor the plans.

The Columbia⁴⁴ and Cornell⁴⁵ cases are also both headed to trial after failures by both defendants to prevail on motions for summary judgment. The Cornell case is running on fumes, however, with all but a small sliver of the original claims dismissed. Given the situation facing the courts due to COVID-19, the Judge has strongly urged the parties to settle, noting that it will likely be a long time before a trial can be held. The Cornell case also happens to be the only in which the plaintiff class was able to successfully demand a jury trial, which is a further complication during the COVID-19 pandemic. The case against Columbia University is also headed for trial, but the core fiduciary breach claims remain intact in that suit.

The USC⁴⁶ litigants await a ruling on the 12(b)(6) motion, because one has not yet been filed by the defendants in response to the amended complaint. The proceedings were delayed significantly when USC attempted to get the court to force the defendants into binding arbitration.⁴⁷ The district court refused, and the Ninth Circuit upheld that decision on appeal.⁴⁸ USC then further appealed to the U.S. Supreme Court, which declined to grant certiorari.⁴⁹ Discovery has been bifurcated into two sections, dealing first only with discovery related to class certification. The class was certified in December of 2019, and the case proceeds toward trial.

A. Round II: New Lawyers, New Cases

It does not appear that any plan fee cases were filed between August 18, 2016 and May 18, 2017, when Schneider, Wallace,

⁴⁴ Cates v. Trs. of Columbia Univ., No. 1:16-cv-06524 (S.D.N.Y. filed Aug. 17, 2016) (consolidated with Doe v. Columbia Univ., No. 1:16-cv-06488 (S.D.N.Y. filed Aug 16, 2016)).

⁴⁵ Cunningham v. Cornell Univ., No. 1:16-cv-06525 (S.D.N.Y. filed Aug. 17, 2016).

⁴⁶ Munro v. Univ. of S. Cal., No. 2:16-cv-06191 (C.D. Cal. filed Aug. 17, 2016).

⁴⁷ See generally *id.*

⁴⁸ Munro v. Univ. of S. Cal., 896 F.3d 1088, 1094 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1239 (2019).

⁴⁹ Univ. of S. Cal. v. Munro, 139 S. Ct. 1239 (2019), *denying cert to* 896 F.3d 1088 (9th Cir. 2018).

Cottrell, Konecky, & Wotkyns LLP (SWC)⁵⁰ filed their first case in a series of similar cases, the first on behalf of a class representing participants and beneficiaries of a 403(b) plan sponsored by the University of Chicago.⁵¹

The University of Chicago's 12(b)(6) motion to dismiss the amended complaint was denied in its entirety.⁵² The claims focused solely on breach of the duty of prudence, specifically related to excessive and unreasonable fees and expenses, and failure to prudently monitor investment choices, specifically regarding the CREF Stock Account and TIAA Real Estate Account. Following this order, the parties entered mediation.⁵³

Claims against Brown University⁵⁴ followed. Filed in July of 2017, the court denied Brown's motion to dismiss the prudence claims relating to excessive fees and bad investment offerings, and the parties also entered mediation. On September 12, 2018, a settlement was agreed in the University of Chicago case for \$6,500,000, making it one of the first of these cases to settle.⁵⁵ Then, on April 15, 2019, a preliminary settlement was reached for \$3,500,000.⁵⁶ Both settlements require that the plan sponsors reform their plans to bring down administrative costs and fees and implement structural changes to plan monitoring.⁵⁷

⁵⁰ SWC is a national plaintiffs' litigation law firm focused primarily on "class action, mass tort, and other complex commercial cases." *See Our Firm*, SCHNEIDER, WALLACE, COTTRELL & KONECKY, <https://www.schneiderwallace.com/our-firm/> [<https://perma.cc/AFJ6-U4JL>] (last visited Mar. 6, 2021).

⁵¹ *See* Daugherty v. Univ. Chi., No. 1:17-cv-03736 (N.D. Ill. filed May 18, 2017).

⁵² Daugherty v. Univ. of Chi., No. 1:17-cv-03736, 2018 U.S. Dist. LEXIS 6965, at *1-2 (N.D. Ill. Jan. 10, 2018).

⁵³ *See* Notification of Docket Entry, Daugherty v. Univ. of Chi., No. 1:17-cv-03736 (N.D. Ill. Jan. 31, 2018), ECF No. 54.

⁵⁴ Short v. Brown Univ., No. 1:17-cv-00318-WES-PAS (D.R.I. filed July 6, 2017).

⁵⁵ Notification of Docket Entry, Daugherty v. Univ. of Chi., No. 1:17-cv-03736 (N.D. Ill. Sept. 12, 2018), ECF No. 76.

⁵⁶ *See* Order Preliminarily Approving Settlement at 2, Short v. Brown Univ., No. 1:17-cv-00318-WES-PAS (D.R.I. Apr. 15, 2019), ECF No. 47.

⁵⁷ In each case the attorneys were awarded 30% of the settlement funds with the remaining portion of the settlement funds to be distributed on a pro-rata basis to qualified class members. *See* Memorandum of Law in Support of Plaintiffs' Motion for an Order: Finally Approving Class Action Settlement; Approving the Plan of Allocation; Approving Case Contribution Awards to Plaintiffs; and Awarding Attorneys' Fees and Costs at 22, Daugherty v. Univ. of Chi., No. 1:17-cv-03736 (N.D. Ill. Aug. 15, 2018), ECF No. 67; Final Approval Order and Final Judgment at 5, Short v. Brown Univ., No. 1:17-cv-00318-WES-PAS (D.R.I. Aug. 2, 2019), ECF No. 55.

Washington University⁵⁸ was also a defendant. The complaint was dismissed in its entirety and was appealed to the Eighth Circuit which reversed in part and affirmed in part, sending the case back to the District Court with the excessive fee claims revived.⁵⁹

The litigation against Georgetown University⁶⁰ seems to have been bungled by plaintiff's counsel, as they missed a deadline to file an amended complaint, and the court refused to allow them permission to extend, then granted the defendants' motion to dismiss on all counts.⁶¹ The plaintiffs have appealed to the D.C. Circuit where the case awaits review. Rochester University⁶² plaintiffs withdrew their case before defendants filed their response to the initial complaint.⁶³

The Princeton⁶⁴ litigation was temporarily delayed pending a ruling in the Penn case on whether the Third Circuit would reverse the dismissal of all claims. The Third Circuit revitalized two of claims from the complaint, allowing them to proceed, and on that basis, litigation in the Princeton case recommenced, entered mediation, and settled.⁶⁵

The tug-of-war that has gone on in the financial sector and in Congress,⁶⁶ over the identity and scope of fiduciaries and their

⁵⁸ Davis v. Wash. Univ. in St. Louis, No. 4:17-cv-01641 (E.D. Mo. filed Jun. 8, 2017).

⁵⁹ See Judgment, Davis v. Wash. Univ. in St. Louis, No. 4:17-cv-01641-RLW (E.D. Mo. Sept. 28, 2018), ECF No. 51; Notice of Appeal, Davis v. Wash. Univ. in St. Louis, No. 4:17-cv-01641-RLW (E.D. Mo. Oct. 25, 2018), ECF No. 52.

⁶⁰ Wilcox v. Georgetown Univ., No. 1:18-cv-00422-RMC (D.D.C. filed Feb. 23, 2018).

⁶¹ See Order at 1, Wilcox v. Georgetown Univ., No. 1:18-cv-00422-RMC (D.D.C. Jan. 8, 2019), ECF. No. 36.

⁶² D'Amore v. Univ. of Rochester, No. 6:18-cv-06357 (W.D.N.Y. filed May 11, 2018).

⁶³ See Emily Brill, *Rochester Univ. Talks Workers Out of Litigating ERISA Suit*, LAW360 (Jan. 22, 2019, 8:20 PM) ("The university did not change anything about the way it handles its retirement plan as a result of the negotiations . . . the attorney, Nancy Ross of Mayer Brown LLP, . . . attributed the voluntary dismissal to the workers' acknowledgement of 'substantial mistakes' in their complaint.").

⁶⁴ Nicolas v. Trs. of Princeton Univ., No. 3:17-cv-03695-DEA (D.N.J. filed May 23, 2017).

⁶⁵ Text Order, Nicolas v. Trs. of Princeton Univ., No. 3:17-cv-03695-DEA (D.N.J. Dec. 10, 2020), ECF No. 69; Final Approval Order and Final Judgment, Nicolas v. Trs. of Princeton Univ., No. 3:17-cv-03695-DEA (D.N.J. Dec. 22, 2020), ECF No. 72.

⁶⁶ See *Oversight Hearing on Mutual Funds: Hidden Fees, Misgovernance and Other Practices that Harm Investors: Hearing Before the Subcomm. On Fin. Mgmt., the Budget, and Int'l Sec. of the S. Comm. on Governmental Affairs*, 108th Cong. 3 (2004)

attendant responsibilities, is on full display in each of these cases. While defendants have disputed whether certain investment products and compensation schemes are as undesirable as plaintiffs allege, it is clear that if all parties involved had been subject to and adhered to a clearer fiduciary standard, the plans would have looked quite different.

All defendant universities voluntarily created 403(b) plans as a benefit for their employees, and in doing so were subject to the rules laid out in ERISA. Each university had at least one named fiduciary, but in most cases the number of functional fiduciaries was much larger. Every person, committee, or board that had discretionary control or authority over the plans was obligated to act only in the best interests of plan participants and beneficiaries. Plaintiffs argue that they failed to live up to that obligation.⁶⁷ Defendants insist they met it.

B. Could the Whole Industry Be Imprudent?

While the standards of prudence are measured objectively, it is at least theoretically possible for an entire industry to be acting negligently or unreasonably. Under these circumstances, evaluating prudence by looking to peer conduct would not result in an accurate assessment of objective prudence. The plaintiffs' principal argument hinges on the fact that there was widespread failure of these higher educational institutions to put their plan participants first, and a general acceptance of the products and services offered by TIAA-CREF, Vanguard, Fidelity, and others without the initial and continuing due diligence required by ERISA. In hindsight, this costs plan participants significant sums of money relative to alternative actions that plan fiduciaries could have taken. The question then for the courts to answer is, "were

[hereinafter "*Fitzgerald Hearings*"], <https://www.govinfo.gov/content/pkg/CHRG-108shrg92686/html/CHRG-108shrg92686.htm> [<https://perma.cc/7KUN-GLZ7>] (Statement of Sen. Peter Fitzgerald, Chairman, Subcomm. on Financial Management, The Budget, and International Security) ("The mutual fund industry is indeed the world's largest skimming operation. . .").

⁶⁷ See Corrected Amended Complaint, *supra* note 16, at 132 ("Defendants therefore failed to discharge its duties with respect to the Plans solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plans. This was a breach of fiduciary duties.").

plan fiduciaries legally required to make different choices than they did?”

The only case so far that has examined all the facts at a bench trial, *Sacerdote v. New York University*, concluded defendants violated no duty, though that decision has been appealed.⁶⁸

Eight cases have settled for amounts between \$18.1 million and \$3.5 million, as well as guarantees that the plans would be subject to stricter fiduciary supervision.⁶⁹

The remaining cases are in ongoing litigation. The cases share many factual similarities, but there are some noteworthy differences as well. Appeals are currently pending before the United States Court of Appeals for the Second, Third, Fourth, Seventh and Eighth circuits regarding the proper interpretation of the fiduciary rules under ERISA. If the circuits split however, this may be an issue ripe for certiorari by the Supreme Court, which has so far declined to intervene when petitioned in these cases.⁷⁰

III. FOUR CASES WORTH A CLOSER LOOK: DUKE, U. PENN, NYU, AND MIT

As of this writing, more than twenty-one class action lawsuits have been filed by 403(b) plan participants and beneficiaries against the private, not-for-profit universities which sponsored those plans.⁷¹ All allege plan sponsors violated their fiduciary

⁶⁸ Docketing Notice, *Sacerdote v. New York Univ.*, No.16-cv-6284 (S.D.N.Y. Sept. 12, 2018) ECF No. 1.

⁶⁹ See *supra* note 36.

⁷⁰ See, e.g., *Univ. of Pa. v. Sweda*, 140 S. Ct. 2565 (2020) *denying cert. to* 923 F.3d 320 (3d Cir. 2019).

⁷¹ See *Mulligan v. Long Island Univ.*, No. 1:18-cv-02885 (E.D.N.Y. filed May 15, 2018) (voluntarily dismissed by plaintiffs); *D'Amore v. Univ. of Rochester*, No. 6:18-cv-06357 (W.D.N.Y. filed May 11, 2018) (voluntarily dismissed by plaintiffs); *Stanley v. George Washington Univ.*, No. 1:18-cv-00878 (D.D.C. filed Apr. 13, 2018), *dismissed by* 394 F. Supp. 3d 97 (D.D.C. 2019) (dismissed for lack of subject matter jurisdiction); *Wilcox v. Georgetown Univ.*, No. 1:18-cv-00422 (D.D.C. filed Feb. 23, 2018); *Short v. Brown Univ.*, No. 1:17-cv-00318 (D.R.I. filed July 6, 2017); *Davis v. Washington Univ. in St. Louis*, No. 4:17-cv-01641 (E.D. Mo. filed June 8, 2017); *Nicolas v. Trs. of Princeton Univ.*, No. 3:17-cv-03695 (D.N.J. filed May 23, 2017); *Daugherty v. Univ. of Chi.*, No. 1:17-cv-03736 (N.D. Ill. filed May 18, 2017); *Cates v. Trs. of Columbia Univ.*, No. 1:16-cv-06524 (S.D.N.Y. filed Aug. 17, 2016) (consolidated with *Doe v. Columbia Univ.*, No. 1:16-cv-06488 (S.D.N.Y. filed Aug 16, 2016)); *Cunningham v. Cornell Univ.*, No. 1:16-cv-06525 (S.D.N.Y. filed Aug. 17, 2016); *Divane v. Northwestern Univ.*, No.

responsibilities under ERISA. The several lawsuits have much in common, and the sometimes-divergent treatment by the district courts⁷² and the courts of appeal⁷³ indicates a lack of clarity in the federal courts over the legal status of these claims. We selected the following four cases (and present them in case study format) for special focus as each presents unique issues as courts struggle to determine the scope of fiduciary duty of prudence with respect to 403(b) plans.

A. *Clark v. Duke University*

This federal class action lawsuit was filed August 10, 2016 in the Middle District of North Carolina, located within the jurisdiction of the Fourth Circuit.⁷⁴

The Duke Faculty and Staff Retirement Plan (the Plan) offered over 400 investment products from four companies who also served as recordkeepers for those investments.⁷⁵ “As of

1:16-cv-08157 (N.D. Ill. filed Aug. 17, 2016); *Munro v. Univ. of S. Cal.*, No. 2:16-cv-06191, (C.D. Cal. filed Aug. 17, 2016); *Henderson v. Emory Univ.*, No. 1:16-cv-02920 (N.D. Ga. filed Aug. 11, 2016); *Kelly v. Johns Hopkins Univ.*, No. 1:16-cv-02835 (D. Md. filed Aug. 11, 2016); *Cassell v. Vanderbilt Univ.*, No. 3:16-cv-02086 (M.D. Tenn. filed Aug. 10, 2016); *Clark v. Duke Univ.*, No. 1:16-cv-01044-CCE-LPA (M.D.N.C. filed Aug. 10, 2016); *Sacerdote v. N.Y. Univ.*, No. 1:16-cv-06284 (S.D.N.Y. filed Aug. 9, 2016); *Sweda v. Univ. of Pa.*, No. 2:16-cv-04329 (E.D. Pa. filed Aug. 9, 2016); *Tracey v. Mass. Inst. of Tech.*, No. 1:16-cv-11620 (D. Mass. filed Aug. 9, 2016); *Vellali v. Yale Univ.*, No. 3:16-cv-01345 (D. Conn. filed Aug. 9, 2016).

⁷² Two cases filed by the same legal team with nearly identical relevant facts came to different conclusions on whether the “prohibited transaction” claim related to unreasonably high fees had been sufficiently pled. *See Clark v. Duke Univ.*, No. 1:16-cv-01044-CCE-LPA, 2017 WL 4477002, at *2 (M.D.N.C. May 11, 2017) (claim survived motion to dismiss). *But see Sacerdote v. N.Y. Univ.*, 1:16-cv-06284-KBF, 2017 WL 3701482, at *14 (S.D.N.Y. Aug. 25, 2017) (claim dismissed saying “allegations that the Plans paid too much for those services—do not, without more, state a claim.”).

⁷³ There has been disagreement about the application of the pleading standard, specifically whether the *Twombly* standard applies to ERISA fiduciary breach claims. Under *Twombly*, to survive a 12(b)(6) motion, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). *See Sacerdote v. N. Y. Univ.*, No. 1:16-cv-06284-KBF, 2017 WL 3701482, at *3 (S.D.N.Y. Aug. 25, 2017) (stating, “to the extent one or more allegations plausibly enable the Court to infer that plaintiffs have stated a claim under a particular count, the Court need not assess whether the remaining allegations in such a count could independently support that claim”).

⁷⁴ *Clark v. Duke Univ.*, No. 1:16-cv-01044-CCE-LPA (M.D.N.C. filed Aug. 10, 2016).

⁷⁵ Amended Complaint, *supra* note 14, at 50.

December 31, 2014, the Plan held \$4.7 billion in net assets” in 37,939 accounts.⁷⁶ “TIAA-CREF funds accounted for \$1.3 billion, Vanguard . . . \$887 million, Fidelity . . . \$1.6 billion, and VALIC . . . \$903 million.”⁷⁷ When plan participants invest in mutual funds or other retirement products, these companies charge a variety of fees, typically measured in “basis points.” One basis point is equal to 1/100 of a percent of the purchase price, and low cost, passively managed index funds might charge as little as one basis point, while some actively managed funds with a similar profile may charge fees as high as 150 basis points.⁷⁸ Additional fees may also be charged for other services including those related to marketing and distribution expenses.⁷⁹ On top of that, some companies provided recordkeeping services which were paid through a somewhat opaque system of “revenue sharing” agreements, by which underlying funds charge a higher expense ratio, and then pay a portion of that fee to the recordkeeper, often (including in the Duke case study) the same parent company that provides the fund.⁸⁰

It is the fees, alleged to be excessive and unreasonable, that precipitated these lawsuits. It is widely accepted that even a small increase in fees and expenses over the life of a plan can have huge consequences for an individual’s retirement income.⁸¹ By sanctioning these excessive costs, plaintiffs allege Duke breached its fiduciary duty, and caused them significant financial harm.

The complaint against Duke is typical of the other university ERISA class action suits in some respects. Plaintiffs allege: fiduciary breaches of loyalty to the plan, imprudent administration of the plan, and violations of the prohibited transactions rules, and failure to sufficiently monitor the plan and its fiduciaries.⁸² In almost every suit the loyalty claims have been dismissed for failure to state a claim. The Duke litigation is typical in this respect. Loyalty is a fundamental principle of trust

⁷⁶ *Id.* at 7.

⁷⁷ *Id.* at 54.

⁷⁸ *See, e.g.*, Amended Complaint at 43, Tracey v. Mass. Inst. of Tech., No. 1:16-cv-11620-NMG, (D. Mass. Nov. 16, 2016), ECF No. 32.

⁷⁹ *Cf.* Amended Complaint, *supra* note 14, at 140.

⁸⁰ *See id.* at 21.

⁸¹ KATHRYN L. MOORE, UNDERSTANDING EMPLOYEE BENEFITS LAW 235 (2015).

⁸² *See generally* Amended Complaint, *supra* note 14.

law—the foundation upon which fiduciary duty is built.⁸³ In instances of clear theft or malfeasance it would be clear when the duty of loyalty has been breached. However, ERISA, unlike trust law, allows conflicted fiduciaries; it is much more difficult to determine when such a breach of loyalty has occurred.⁸⁴ Universities, for example, must balance their duty to act in the interest of plan participants against the interests of the university, interests which may not always be in tandem. Here, plaintiffs could not prevail on their claim that Duke breached the duty of loyalty.

Plaintiffs had more success with allegations that the actions and omissions of Duke violated the duty of prudence by allowing the service provider(s) to charge unreasonable and excessive fees for their products and management:

Instead of using the Plan's bargaining power to reduce expenses and exercising independent judgment to determine what investments to include in the Plan, Defendants squandered that leverage by allowing the Plan's conflicted third party service providers . . . to dictate the Plan's investment lineup, to link their recordkeeping services to the placement of their investment products in the Plan, and to collect unlimited asset-based compensation from their own proprietary products.⁸⁵

They also allege that plan fiduciaries engaged in certain transactions prohibited under ERISA:

. . . even though TIAA's recordkeeping fees were unreasonable for the services provided, Defendants caused the Plan to engage in transactions that it knew or should have known constituted an exchange of property between the Plan and TIAA-CREF . . . a direct or indirect furnishing of services between the Plan and TIAA-CREF . . . and a transfer of Plan assets to TIAA-CREF These transactions occurred each time the Plan paid fees to TIAA-CREF in connection with the Plan's investments in the CREF Stock Account and other

⁸³ MOORE, *supra* note 81, at 203.

⁸⁴ *Id.*

⁸⁵ Amended Complaint, *supra* note 14, at 3.

proprietary options that paid revenue sharing to TIAA.⁸⁶

While many courts have allowed the excessive and “unreasonable fee” claims to survive a 12(b)(6) motion to dismiss, most have dismissed the “prohibited transactions” claims as failing to state a claim, noting that ERISA lays out a broad suite of exemptions to the general prohibition of transactions between “parties at interest,” including the transactions cited.⁸⁷ While the district court did not elaborate on its reasoning for allowing the prohibited transaction claim to proceed, it may well have been because the “reasonableness” (or not) of the fees paid for various investment products and recordkeeping services remained a question of determinative material fact at the heart of the complaint.

The Duke plaintiffs also alleged that plan fiduciaries failed to adequately monitor co-fiduciaries. This claim survived a motion to dismiss in several similar cases, but the court found the plaintiffs had not alleged sufficient facts to support this claim, finding the allegation “hypothetical and conclusory.”⁸⁸

The parties entered mediation on November 29, 2018 and reached a settlement agreement on January 16, 2019.⁸⁹ The settlement received its final approval from the court on June 24, 2019.⁹⁰ The settlement includes \$10,650,000 to be paid to the class and stipulates changes that must be made to the administration of the Plan.⁹¹ These requirements included: disclosure to Plan participants of existing investment options, their fees, and their performance history; the hiring of an independent consultant to

⁸⁶ *Id.* at 135.

⁸⁷ The prohibited transactions in question, relating to the furnishing of goods/services and the transfer of plan assets. 29 U.S.C.A. § 1106(a)(1)(C)-(D) (West, Westlaw through PL 117-14). There are explicit exceptions to these prohibitions in 29 U.S.C.A. § 1108(b), but the Code specifies that to qualify for the exemption the party in interest is not to receive more compensation “than is reasonable.” *Id.*

⁸⁸ *See* Clark v. Duke Univ., No. 1:16-cv-01044, 2017 WL 4477002, at *2 (M.D.N.C. May 11, 2017).

⁸⁹ Plaintiffs’ Memorandum in Support of Unopposed Motion for Final Approval of Class Settlement at 3, Clark v. Duke Univ., No. 1:16-cv-01044, (M.D.N.C. June 4, 2019), ECF No. 163.

⁹⁰ *See id.* at 10.

⁹¹ *Id.* at 3.

review the plan and recommend appropriate requests for proposals to ensure administrative and recordkeeping costs are kept competitive; and a mandate that when considering the inclusion of Plan investment options, fiduciaries will consider “(a) the cost of different share classes available for any particular mutual fund considered . . . and (b) the availability of revenue sharing rebates on any share class available for any investment option considered for inclusion in the Plan.”⁹²

B. *Sweda v. University of Pennsylvania*

Filed on August 10, 2016⁹³ in the United States District Court for the District of Eastern Pennsylvania on the same day as the case against Duke University, the University of Pennsylvania (Penn) suit has been far more tumultuous, and its conclusion remains uncertain.

The facts in the Penn case are roughly similar to those in the Duke litigation. As of December 31, 2014, the Penn plan held \$3.8 billion in assets for 21,412 plan participants,⁹⁴ invested in 78 TIAA-CREF and Vanguard products.⁹⁵ The Duke and Penn plans included many of the same allegedly imprudent investment products and fee arrangements with plan administrators and investment recordkeepers.⁹⁶

The amended complaint also repeats many of the same allegations. Penn is accused of causing plan participants financial harm by failing to exercise prudence, by engaging in transactions prohibited under ERISA, and failing to sufficiently monitor the fiduciaries responsible for administering the plan.⁹⁷ The district court in the Penn case dismissed all counts.

⁹² *Id.* at 3-4.

⁹³ Complaint—Class Action, *supra* note 12.

⁹⁴ Amended Complaint, *supra* note 21, at 6.

⁹⁵ *Id.* at 34.

⁹⁶ *See id.* at 37. (“TIAA-CREF provided its 403(b) plan services exclusively on a bundled basis. If a plan wished to offer the fixed TIAA Traditional Annuity, TIAA-CREF required that the CREF Stock Account and Money Market Account also be put in the plan, and required the plan to use TIAA as recordkeeper for its proprietary products.”). Almost identical language is found in the Duke complaint. *See* Amended Complaint, *supra* note 14, at 37.

⁹⁷ Amended Complaint, *supra* note 21, at 2-3.

As suggested by the University in a brief supporting its motion to dismiss, the *Penn* court relied heavily on the Third Circuit's opinion in *Renfro v. Unisys Corporation*.⁹⁸ The breach of fiduciary duty in *Renfro* was similar in many ways to that alleged in the *Penn* case, albeit in relation to a 401(k) plan rather than a 403(b) plan.⁹⁹ The court, quoting *Renfro*, held that ERISA's standards

. . . [require] plaintiffs to show more than just a single sub-optimality in a given mutual fund. Instead, they must show systemic mismanagement such that individuals are presented with a Hobson's choice between a poorly-performing § 401(k) portfolio or no § 401(k) at all.¹⁰⁰

The court further noted that, though 401(k) and 403(b) plans had historically been treated somewhat differently, "those differences have largely eroded over time. Today the obligation of beneficiaries and fiduciaries in § 401(k) and § 403(b) plans are nearly identical."¹⁰¹

The court ultimately did not find that any of the claims met the "plausibility" pleading standard as defined in *Bell Atl. Corp. v. Twombly*.¹⁰² Particularly regarding the breach of fiduciary duty claims, which allege imprudence by allowing unreasonable recordkeeping fees, the court held:

⁹⁸ *Sweda v. Univ. of Pa.*, No. 2:16-cv-04329, 2017 WL 4179752, at*4-10 (E.D. Pa. Sept. 21, 2017), *aff'd in part, rev'd in part*, 923 F.3d 320 (3rd Cir. 2019); *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011).

⁹⁹ *See* 29 C.F.R. § 2530.201-2 (2021) (The principal difference between 401(k) and 403(b) plans is the identity of the plan sponsor. 401(k) plans can be sponsored by any employer while 403(b) plans must be sponsored by not for profits, educational institutions, religious organizations and/or some subdivisions of government. 403(b) plans are also more restricted in what investment products they can offer. Assets in a 403(b) plan can only be placed in: an annuity contract provided through an insurance company; a custodial account invested in mutual funds; or a retirement income account set up for church employees.). *See also Retirement Plans FAQs Regarding 403(b) Tax-Sheltered Annuity Plans*, INTERNAL REVENUE SERV., <https://www.irs.gov/retirement-plans/retirement-plans-faqs-regarding-403b-tax-sheltered-annuity-plans#participation> [<https://perma.cc/FTF6-JHJA>] (last visited Mar. 6, 2021).

¹⁰⁰ *Sweda v. Univ. of Pa.*, No. 2:16-cv-04329, 2017 WL 4179752, at *10 (E.D. Pa. Sept. 21, 2017).

¹⁰¹ *Id.*

¹⁰² *Id.* at *11. *Cf. Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009) (citing to *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-60 (2007), for that case's implementation of a heightened pleading standard).

With such low fees [in comparison to those noted in *Renfro*], it is not inevitable to say that recordkeeping fees were unnecessarily high, especially when there are rational bundling reasons to allow separate recordkeepers. Even if there were cheaper options available for recordkeeping fees, ERISA mandates that fiduciaries consider options besides cost. Fiduciaries must balance “providing benefits to participants and their beneficiaries” and “defraying reasonable expenses of administering the plan.”¹⁰³

The district court likewise applied this reasoning in support of its conclusion that it was prudent to offer retail class shares alongside cheaper institutional class shares,¹⁰⁴ to employ multiple recordkeepers (as opposed to just one),¹⁰⁵ to offer duplicative mutual fund options,¹⁰⁶ and to maintain poorly performing investment options within the plan.¹⁰⁷ *Renfro*, the court held, stood for the proposition that dismissal was appropriate when a plan “offered a sufficient mix of investments . . . [such] that no rational trier of fact could find, on the basis of the facts alleged in the operative complaint, that the . . . defendants breached an ERISA fiduciary duty by offering [that] particular array of investment vehicles.”¹⁰⁸ Possibly the most important conclusion in the *Renfro* decision was an inference that “affording a reasonable mix of plan options to participants was sufficient to meet the fiduciary standard.”¹⁰⁹

Plaintiffs appealed this decision to the Third Circuit, and after reviewing the case *de novo*, a three-judge panel reversed the district court in part, reviving claims relating to violations of the duty of prudence in allowing unreasonable fees to be charged.¹¹⁰ The Third Circuit panel which heard the case was divided

¹⁰³ *Sweda*, 2017 WL 4179752, at *8.

¹⁰⁴ *Id.* at *9.

¹⁰⁵ *Id.* at *8.

¹⁰⁶ *Id.* at *9-10.

¹⁰⁷ *Id.* at *10.

¹⁰⁸ *Renfro v. Unisys Corp.*, 671 F.3d 314, 320 (3d Cir. 2011).

¹⁰⁹ *See Sweda*, 2017 WL 4179752, at *8.

¹¹⁰ *Sweda v. Univ. of Pa.*, 923 F.3d 320, 340 (3d Cir. 2019) *aff'g in part, rev'g in part*, 2017 WL 4179752 (E.D. Pa. Sept. 21, 2017).

however, with Judge Roth, dissenting in part and concurring in part.¹¹¹

The majority felt that the district court judge had, as counsel for Penn admitted in oral arguments, “painted outside the lines,”¹¹² noting that the Eighth Circuit in *Braden v. Wal-Mart Stores, Inc.*,¹¹³ had declined to fully extend the heightened pleading standard of *Twombly*¹¹⁴ (an anti-trust case) to fiduciary breach claims under ERISA. As the court noted approvingly as noted in *Braden*, “[r]equiring a plaintiff to rule out every possible lawful explanation for the conduct he challenges would invert the principle that the complaint is construed most favorably to the nonmoving party.”¹¹⁵ Quoting *Renfro*, the majority emphasized: “[W]e must examine the context of a claim, including the underlying substantive law, in order to assess its plausibility.”¹¹⁶ The majority did not believe that the decision to uphold dismissal in *Renfro* controlled in the present case. The Third Circuit rejected the lower court’s interpretation of *Renfro* insofar as they read it to hold that offering a “sufficient mix” of investment options was all that was required to ensure compliance with ERISA’s fiduciary standards, stating:

[A] fiduciary breach claim must be examined against the backdrop of the mix and range of available investment options. We did not hold, however, [in *Renfro*] that a meaningful mix and range of investment options insulates plan fiduciaries from liability for breach of fiduciary duty. Such a standard would allow a fiduciary to avoid liability by

¹¹¹ *Id.*

¹¹² Oral Argument at 36:25, *Sweda v. Univ. of Pa.*, 923 F.3d 320, 340 (3d Cir 2019) http://player.piksel.com/v/refid/3CA/prefid/17_3244 [<https://perma.cc/2VZ8-87BZ>].

¹¹³ *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009).

¹¹⁴ *See supra* note 73 (*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007), which created an elevated pleading standard for anti-trust cases, and that standard was extended to other kinds of civil suits by the Supreme Court’s decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A consequence of this has been to make it significantly harder for plaintiffs to survive 12(b)(6) motions to dismiss if the evidence needed to prove their case is in the sole possession of the defendants.).

¹¹⁵ *Sweda*, 923 F.3d at 326 (citing *Braden*, 588 F.3d at 585).

¹¹⁶ *Id.* (citing *Renfro v. Unisys Corp.*, 671 F.3d 314, 321 (3d Cir. 2011)).

stocking a plan with hundreds of options, even if the majority were overpriced or underperforming.¹¹⁷

In her dissent, Judge Roth argued that the case was almost identical to *Renfro*, and that following its precedent should result in dismissal of all claims.¹¹⁸ Finding that *Renfro* held an “ERISA plan fiduciary acting in good faith, under the prudent person standard, [does not] have a duty to do more than provide a wide, reasonable, and low-cost variety of investment options for individual plan beneficiaries”¹¹⁹ Judge Roth seemed to indicate that part of the justification for the elevated pleading standard in *Twombly* would apply in the *Penn* case; and that “the threat of discovery expense will push cost-conscious defendants to settle”¹²⁰ Judge Roth casted the district court’s initial decision, and her dissent on appeal, in the role of defending not-for-profit universities against purported frivolous “attorney-driven litigation.”¹²¹

The majority, however, felt the defendants were required to do more under ERISA than the defense’s reading of *Renfro* seemed to indicate.¹²² The rationale for reviving the excessive and unreasonable fee claims, the majority said was, “. . . if we were to interpret *Renfro* to bar a complaint as detailed and specific as the complaint here, we would insulate from liability every fiduciary who, although imprudent, initially selected a ‘mix and range’ of investment options. Neither the statute nor our precedent justifies such a rule.”¹²³

After an attempt by Penn to obtain an *en banc* rehearing of the case in the Third Circuit, the petition for the rehearing was ultimately denied on July 19, 2019.¹²⁴ As a result, the case has officially been remanded back to the district court, with counts III

¹¹⁷ *Id.* at 330 (citation omitted).

¹¹⁸ *See id.* at 341-42 (Roth, J., concurring in part & dissenting in part).

¹¹⁹ *See id.* at 341 (Roth, J., concurring in part & dissenting in part).

¹²⁰ *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

¹²¹ *Sweda*, 923 F.3d at 344 (Roth, J., concurring in part & dissenting in part).

¹²² *See id.* at 326-27.

¹²³ *Id.* at 334.

¹²⁴ Order Denying Petition for Panel and En Banc Rehearing at 2, 923 F.3d 320, 340 (3d Cir. 2019) (No. 17-3244).

and V revived.¹²⁵ The case will soon resume in the U.S. District Court for the Eastern District of Pennsylvania with the reinstated counts, and plaintiff's class counsel in similar suits will certainly point to this decision as they seek to progress toward a favorable judgment for their clients.

C. Sacerdote. v. New York University

This class action suit was brought against fiduciaries of ERISA covered 403(b) retirement benefit plans¹²⁶ sponsored by New York University (NYU) on August 9, 2016, and shares many qualities with the other university ERISA cases filed in federal courts that same month.¹²⁷ As in the other cases, plaintiffs claimed violations of ERISA standards including: breach of duty of prudence by allowing investment providers and recordkeepers to charge excessive and unreasonable fees,¹²⁸ engaging in transactions prohibited under ERISA,¹²⁹ and failing to monitor the plans and the co-fiduciaries charged with administering those plans.¹³⁰

Sacerdote presents a troubling issue that gets to the heart of arguments in favor of strict enforcement of ERISA fiduciary standards as crucial to meaningful protection of plan participants and beneficiaries: potentially conflicted fiduciaries.¹³¹

The case was heard in the United States District Court for the Southern District of New York in front of Judge Katherine B. Forrest.¹³² In contrast to the Penn case described above, at the pleading stage, the court found plaintiffs had met their burden to proceed with their claims of breach of prudence relating to

¹²⁵ Breach of fiduciary duties for unreasonable administrative fees, in violation of 29 U.S.C. § 1104 (a)(1) (Count III), and breach of fiduciary duties for unreasonable fees in violation of 29 U.S.C. § 1104(a)(1) (Count V). *See also* Amended Complaint, *supra* note 21.

¹²⁶ NYU maintained two separate plans, one for the faculty and staff of its medical school, and another for the rest of the university. *See* Amended Complaint, *supra* note 22, at 8-9.

¹²⁷ *See* Complaint—Class Action, *supra* note 12, at 6.

¹²⁸ Amended Complaint, *supra* note 22, at 56-78.

¹²⁹ *Id.* at 106-07.

¹³⁰ *Id.* at 112-14.

¹³¹ *See id.* at 2-3.

¹³² *See Sacerdote v. N.Y. Univ.*, 1:16-cv-06284-KBF, 2017 WL 3701482 (S.D.N.Y. Aug. 25, 2017).

excessive fees as alleged in the amended complaint.¹³³ The court cited *Braden v. Wal-Mart Stores, Inc.*¹³⁴ in its discussion of the pleading standard, noting that ERISA cases are given some leeway with the *Twombly*¹³⁵ standard, “because plaintiffs ‘generally lack the inside information necessary to make out their claims in detail unless and until discovery commences.’”¹³⁶ The plaintiffs’ claims that the university defendants breached its duty of loyalty were dismissed, however, once again citing *Braden*.¹³⁷ In that case, breach of loyalty claims had survived because plaintiffs had alleged that Wal-Mart Stores had deliberately concealed conflicts and malfeasance, but no such claim was made in the NYU case.¹³⁸

The case then proceeded to a bench trial, and it remains the only one of the ERISA university cases to be fully tried on the merits.¹³⁹ At the conclusion of the trial, Judge Forrest dismissed the remaining claims in their entirety.¹⁴⁰ During the eight-day bench trial, investment experts presented testimony from both sides to evaluate the processes employed by NYU to administer the plans.¹⁴¹ The NYU litigation demonstrates why the validity of the excessive and unreasonable fee claims could not be determined at the pleading stage. The arguments were highly fact intensive, and the result may ultimately have been determined by whose version of the “facts” Judge Forrest found more convincing.

Testimony by Margaret Meagher, one of the co-chairs of the Retirement Plan Committee (Committee) since its inception, did not impress Judge Forrest:

Meagher’s testimony was concerning. She made it clear that she viewed her role as primarily concerned with scheduling, paper movement, and logistics; she displayed a surprising lack of in-depth knowledge concerning the financial aspects of managing a multi-billion-dollar pension portfolio and a lack of

¹³³ Amended Complaint, *supra* note 22, at 56-78. at 104-05.

¹³⁴ *See generally* *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009).

¹³⁵ *See generally* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

¹³⁶ *Sacerdote*, 2017 WL 3701482, at *3 (citation omitted).

¹³⁷ *Id.* at *6.

¹³⁸ *Id.*

¹³⁹ *See Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273, 281 (S.D.N.Y. 2018).

¹⁴⁰ *Id.* at 317.

¹⁴¹ *See id.* at 281-83.

true appreciation for the significance of her role as a fiduciary For instance, she testified that it was entirely appropriate for her, as well as the other Committee members, to rely upon Cammack [an independent investment advisor hired by the plan] to determine the reasonableness of fees and that she did not do anything to test the reliability of their information. She bluntly testified that “[i]t’s not my job to determine whether the fees are appropriate” for the Plans.¹⁴²

Judge Forrest was likewise unimpressed by the testimony of Nancy Sanchez, Meagher’s direct supervisor, and a fellow Committee member:

Sanchez . . . was similarly unfamiliar with basic concepts relating to the Plans [w]hen asked about her inability to remember Plan details, Sanchez responded that she has a “big job” (referring to her human resources role, not her Committee membership) and that her role on the Committee is one of many responsibilities she has. This suggested that Sanchez does not view herself as having adequate time to serve effectively on the Committee.

Sanchez further testified that she did not “know enough about variable annuities to be able to comment on whether they should be in these plans,” and she could not recall whether there were “specific underperformance metrics or thresholds that have to be triggered for a fund to be put on the watch list.” When asked who the plan administrator was, she responded, “I don’t review the plan documents. That’s what I have staff for.” Specifically, she noted that Meagher is the “one that reviews the plan documents for [her].”¹⁴³

The duty of prudence under ERISA requires a fiduciary to act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”¹⁴⁴ The “‘prudent person’ standard asks whether ‘the individual trustees, at the time they engaged in the challenged transactions, employed

¹⁴² *Id.* at 291 (citation omitted).

¹⁴³ *Id.*

¹⁴⁴ 29 U.S.C.A. § 1104(a)(1)(B) (West, Westlaw through P.L. 116-259).

the appropriate methods to investigate the merits of the investment and to structure the investment.”¹⁴⁵ Judge Forrest later noted in a separate opinion that, “[f]iduciaries’ prudence is measured against an objective standard, and their own ‘lack of familiarity with investments is no excuse’ for failing to act with the care, skill, prudence and diligence required under the circumstances then prevailing.”¹⁴⁶

Nevertheless, Judge Forrest noted that, while “the level of involvement and seriousness with which several Committee members treated their fiduciary duty [was] troubling, [the court] does not find that this rose to a level of failure to fulfill fiduciary obligations.”¹⁴⁷ Evidence presented at trial showed that the Committee considered and rejected consolidation to a single recordkeeper but determined this action would be imprudent at the time after a cost/benefit analysis taking into account the disruption it would cause to the plans.¹⁴⁸ Judge Forrest also pointed to testimony which indicated that the plan had actually reduced recordkeeping costs per participant over several years, even while the number of participants was increasing.¹⁴⁹

There was a “battle of the experts” over the merits of plaintiffs’ proposition that plan fiduciaries had failed to reduce plan recordkeeping costs to a reasonable level.¹⁵⁰ Judge Forrest stated in her decision that she did not find either of Plaintiffs’ expert witnesses to be “reliable expert[s]” and that the court “[did] not rely on [their] testimony” discussing the merits of flat fee recordkeeping arrangements compared to revenue sharing models¹⁵¹ or on whether certain products underperformed.¹⁵² This rejection of the expert testimony proved fatal to plaintiffs’ key claim that the recordkeeping fees paid by the plan were unreasonable and excessive.

¹⁴⁵ *Sacerdote v. N.Y. Univ.*, 1:16-cv-06284-KBF, 2017 WL 3701482, at *4 (S.D.N.Y. Aug. 25, 2017) (quoting *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984)).

¹⁴⁶ *Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273, 284 (S.D.N.Y. 2018) (citing *Katsaros*, 744 F.2d at 279).

¹⁴⁷ *Id.* at 293.

¹⁴⁸ *Id.* at 298.

¹⁴⁹ *Id.* at 300.

¹⁵⁰ *Id.* at 305-06.

¹⁵¹ *Id.* at 305.

¹⁵² *Id.* at 312 n.112.

Judge Forrest likewise rejected as without sufficient evidence plaintiffs' claims that certain products included in the plan (e.g., the CREF Stock Account and TIAA Real Estate Separate Account) were imprudent investments.¹⁵³ She cited the wide adoption of the challenged products in the market as evidence that they were not objectively imprudent.¹⁵⁴ Ultimately, Judge Forrest did not find sufficient evidence that plaintiffs had suffered any loss related to a fiduciary breach by NYU, and the case was dismissed on July 31, 2018.¹⁵⁵

Following this decision, Judge Forrest's objectivity was brought into question. On September 12, 2018 (less than two months after rendering judgment on the NYU claims), Judge Forrest announced that she was leaving the bench for a partnership at Cravath, Swaine & Moore LLC, where she had been a partner prior to her nomination to the court.¹⁵⁶ The potential significance of this event involved one Evan Chesler.¹⁵⁷ Mr. Chesler, Cravath's chairman and Judge Forrest's mentor during her earlier career at the firm, was on the NYU board of trustees during the period in question in the lawsuit.¹⁵⁸ He is known as a passionate advocate for the University.¹⁵⁹ As a board member, "Mr. Chesler is a Principal of NYU."¹⁶⁰ The timing of Judge Forrest's return to Cravath suggests she may have been considering this career shift while presiding over the lawsuit, the outcome of which would be of significance to her longtime mentor and potential employer.¹⁶¹

Plaintiffs filed a motion for a rehearing of the case, alleging, "Judge Forrest was disqualified from presiding over this case once she decided to leave the bench because she was considering as her

¹⁵³ *Id.* at 312.

¹⁵⁴ *Id.* ("It is notable that TIAA Real Estate account is also widely accepted as an appropriate and desirable investment by other market participants.")

¹⁵⁵ *Id.* at 316-17 (" . . . that exhibit supports Fischel's conclusion regarding the market acceptance of the CREF Stock Account").

¹⁵⁶ Memorandum in Support of Plaintiffs' Motion to Vacate Judgment and for New Trial at 2, *Sacerdote v. N.Y. Univ.*, 1:16-cv-06284-RWS (S.D.N.Y. Oct. 1, 2018), ECF No. 358.

¹⁵⁷ *Id.* at 1.

¹⁵⁸ *Id.* at 1, 22.

¹⁵⁹ *Id.* at 22.

¹⁶⁰ *Id.* at 4 (referring to NYU's Charter).

¹⁶¹ *Id.* at 2.

only choice the possibility of an employment relationship at a firm chaired by a NYU Trustee with direct responsibility for monitoring the fiduciary conduct at issue at the same time she was deciding a case against NYU.”¹⁶² They do not specifically allege that Judge Forrest acted in an unethical manner, but rather that the law required her recusal because the circumstances raised questions of impartiality. Quoting 28 U.S.C. Section 455(a), the motion for rehearing stated, “[a] judge ‘shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.’”¹⁶³

When Judge Forrest retired, the case was reassigned to Judge Sweet, who heard the motion for rehearing.¹⁶⁴ However, before issuing an opinion, Judge Sweet died.¹⁶⁵ The case was then reassigned once more to Judge Torres, who ultimately ruled against vacating the judgment and ordering a new trial.¹⁶⁶ Judge Torres, in her conclusion, stated, “The Court agrees with Defendant that ‘no well-informed observer would have any reason to believe that Judge Forrest had any incentive to rule for NYU in this case in order to advance her legal career or ingratiate herself with Cravath to allow her to return to Cravath as a partner.’”¹⁶⁷

The final decision of the district court has now been appealed by plaintiffs and is awaiting adjudication in the Second Circuit.¹⁶⁸

While the allegations of impropriety on behalf of Judge Forrest do not appear to have gained traction, they do highlight one of major issues which lurk in the background of these cases. While the defendant universities are not-for-profit organizations, they are also massive institutions managed by boards, whose members often have divided loyalties. The universities owe a fiduciary duty to the participants in their retirement plans;

¹⁶² *Id.* at 19.

¹⁶³ *Id.* at 16.

¹⁶⁴ *Sacerdote v. N.Y. Univ.*, 1:16-cv-06284-RWS, 2019 WL 2763922, at *1 (S.D.N.Y. July 1, 2019).

¹⁶⁵ See Joseph P. Fried, *Robert W. Sweet, Mayor's Deputy Turned Federal Judge, Is Dead at 96*, N.Y. TIMES (Mar. 25, 2019), <https://www.nytimes.com/2019/03/25/obituaries/robert-w-sweet-dead.html> [<https://perma.cc/8NLC-UELP>].

¹⁶⁶ See *Sacerdote*, 2019 WL 2763922, at *1.

¹⁶⁷ *Id.* at *7.

¹⁶⁸ Notice of Appeal at 1, *Sacerdote v. N.Y. Univ.*, 1:16-cv-06284-KBF (S.D.N.Y. Sept. 11, 2018), ECF No. 355.

however, in a very real sense, the board of trustees “is” the university. Board members often come from the upper echelons of the private sector, and the interests of the university as an institution, along with private interests of the board members can create additional problems, as the final case study— *Tracey v. Massachusetts Institute of Technology* —amply demonstrates.

D. Tracey v. Massachusetts Institute of Technology

Filed on August 9, 2016,¹⁶⁹ the same day as the case against NYU, the suit against the Massachusetts Institute of Technology (MIT) is in many respects similar to the other three case studies discussed above. As of December 31, 2014, the MIT retirement plan managed \$3.6 billion in assets for 18,268 participants, spread across some 340 financial products.¹⁷⁰ The plaintiff class accused the defendants of causing them financial harm by allowing the plan to be charged excessive and unreasonable fees through engaging in prohibited transactions with parties in interest and failing to monitor their co-fiduciaries.¹⁷¹

The *MIT* case also presents some unique characteristics. First, of all the cases we examined, MIT is the only defendant university which employed a single recordkeeper to manage its 403(b) plan assets.¹⁷² This is important because one of the consistent features of the other class action suits are the assertions that employing multiple recordkeepers was an impermissibly imprudent decision which caused plans to pay duplicative fees, and prevented plans from leveraging their massive, aggregated assets into a better deal.¹⁷³ MIT’s only recordkeeper during the time in question was Fidelity.¹⁷⁴ The amended complaint aptly summarized the accusation as thus: “. . . instead of acting solely in the interest of participants, Defendants

¹⁶⁹ Complaint—Class Action, *supra* note 4.

¹⁷⁰ Amended Complaint, *supra* note 78, at 5, 27.

¹⁷¹ *Id.* at 2, 27.

¹⁷² *See id.* at 2.

¹⁷³ *See* Amended Complaint, *supra* note 14, at 38.; Amended Complaint, *supra* note 22, at 37; Amended Complaint, *supra* note 21 at 38.

¹⁷⁴ Amended Complaint, *supra* note 74, at 2.

allowed Fidelity's financial interests to dictate the Plan's investment selections."¹⁷⁵

Prior to a reformation of the plan in July of 2015, MIT's retirement plan included over 340 investment products, most of them mutual funds.¹⁷⁶ Included amongst these were 180 proprietary Fidelity funds, which the Amended Complaint states were "nearly every mutual fund that Fidelity offered."¹⁷⁷ While MIT argues that they were merely offering a wide range of investment options, the Plaintiffs alleged:

The Plan's 340-fund lineup included an overwhelming array of duplicative funds in the same investment styles, which diluted the Plan's ability to obtain significantly lower fees by offering a single option in each investment style, and provided a confusing menu of options that impaired participants' ability to make investment decisions.¹⁷⁸

Plaintiffs noted that, during the class period (prior to the 2015 plan reorganization), the plan was rife with actively managed funds which charged fees up to 15,000% higher than comparable passive funds which were available on the market.¹⁷⁹ Plaintiffs cited statements made by MIT during the 2015 reorganization of the plan in which MIT said that the "revised investment lineup allowed the Plan to 'leverage MIT's institutional purchasing power to offer both passively and actively managed options at the best possible cost for participants,' and in some cases, provide funds 'in a better share class with lower fees.'"¹⁸⁰

If these changes were prudent in 2015, the Amended Complaint asserts, they were prudent long before that, and failure to take these considerations into account during the period at issue in the suit cost plan participants millions of dollars in excessive fees, which by their calculations was \$8 million in 2014 alone.¹⁸¹ Behind this assertion lurks a more insidious attack. The

¹⁷⁵ Amended Complaint, *supra* note 78, at 34.

¹⁷⁶ *Id.* at 33-34.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 34.

¹⁷⁹ *Id.* at 40.

¹⁸⁰ *Id.* at 68 (citation omitted).

¹⁸¹ Amended Complaint, *supra* note 74, at 64.

Plaintiffs seemed to stop *just* short of alleging that it was a violation of ERISA to offer actively managed mutual funds in the plan at all. Citing the research of Nobel Prize winning economists whose research shows “virtually no investment manager consistently beats the market over time after fees are taken into account,”¹⁸² Plaintiffs concluded:

. . . investment costs are of paramount importance to prudent investment selection, and a prudent investor will not select higher-cost actively managed funds without a documented process to realistically conclude that the fund is likely to be that extremely rare exception, if one even exists, that will outperform its benchmark index over time, net of investment expenses.¹⁸³

These assertions fly in the face of the popular narrative of savvy brokers beating the market for investors, but that does not make them inaccurate. Prudence, however, is ostensibly measured objectively under ERISA. That is, actions are judged based on how a “prudent man acting in a like capacity and familiar with such matters’ would act under the circumstances.”¹⁸⁴ With such widespread inclusion of relatively expensive actively managed funds in 401(k) and 403(b) plans, the allegation that they are objectively imprudent has been hard to make.

The allegations against MIT highlight what plaintiffs consider to be an uncomfortably close relationship between Fidelity and MIT. The complaint cited several examples including:

- a. Since Fidelity was selected as the Plan’s recordkeeper, Fidelity Foundation has donated hundreds of thousands of dollars to MIT.
- b. . . . [S]ince 2001, Fidelity Non-Profit Management Foundation has donated over \$18 million to MIT.
- c. . . . [A] Fidelity-related entity for which former CEO Edward C. Johnson III and current CEO Abigail Johnson

¹⁸² *Id.* at 19.

¹⁸³ *Id.* at 21.

¹⁸⁴ MOORE, *supra* note 81, at 206.

serve as trustees, the Edward C. Johnson Fund, has made additional donations. . . .

d. In 2010, the Edward C. Johnson Fund contributed \$220,000 for “Conservation-Arts & Sciences” and \$25,000 for “Program Support” to MIT.¹⁸⁵

The plaintiffs also cite to a news report from the period in which Fidelity was selected to manage the plan in which an MIT spokesperson said Fidelity was chosen because they wanted to select a provider who “did business” with MIT.¹⁸⁶

The magistrate judge who issued the order on the motion to dismiss was not convinced that this amounted to fiduciary breach, saying:

Defendants . . . correctly assert that, “Mere officer or director status does not create an imputed breach of the duty of loyalty simply because an officer or director has an understandable interest in positive performance of company stock’ . . . [in the case cited] the court found no evidence . . . that ‘high-ranking company officials sold company stock while using the Company Fund to purchase more shares, or that the Company Fund was being used for the purpose of propping up the stock price in the market.’”¹⁸⁷

The case proceeded toward trial with only the excessive fee and duty of prudence breach claims intact (and failure to monitor fiduciaries, as relating to those claims),¹⁸⁸ but the relationship between Fidelity and MIT still highlights one of the fundamental issues in each of these suits: the sponsoring employers “put the foxes in charge of the henhouse” by turning the whole process of managing the 403(b) plan over to a company whose primary goal is to maximize their own profits from administration of the plan. In October 2019, the parties reached a preliminary settlement of

¹⁸⁵ Amended Complaint, *supra* note 74, at 31.

¹⁸⁶ *Id.* (citing *Fidelity Chosen to Manage MIT Supplemental 401(k) Plan as of April 1*, MIT NEWS (Dec. 16, 1998), <http://news.mit.edu/1998/401k-1216> [<https://perma.cc/8RKN-S49V>]).

¹⁸⁷ *Tracey v. Mass. Inst. of Tech.*, 1:16-11620-NMG, 2017 WL 4453541, at *12 (D. Mass. Aug. 31, 2017).

¹⁸⁸ *Id.* at 19.

\$18.1 million, the largest in this large group of class actions.¹⁸⁹ The MIT case exposes the uneasy tripartite relationship of university/plan sponsors, recordkeepers (Fidelity) and major donors (Fidelity leadership). One could be forgiven for concluding that, in exchange for selecting Fidelity, MIT leadership was rewarded with generous capital gifts to its major fundraising initiatives. The price of this arrangement was ostensibly paid for by plan participants in the form of higher fees over many years.

IV. EXCESSIVE FEE CLAIMS—SHOULD ACTIVELY MANAGED FUNDS ALWAYS BE EXCLUDED FROM § 403(B) PLANS?

To answer the question of what role, if any, actively managed funds should play in 403(b) plans, it is critical to consider the so-called Fiduciary Rule, scholarly work on the justification for fees associated with actively managed funds, the large menu defense, and the *Gartenberg* precedent. We consider each in turn.

A. *A Short History of the Short-Lived Fiduciary Rule*

“Fiduciary duties are duties enforced by law and imposed on persons in certain relationships requiring them to act entirely in the interest of another . . . and not in their own interest.”¹⁹⁰ The 1975 Employee Retirement Income Security Act (ERISA) included those who “render[] investment advice for a fee or other compensation” amongst the relationships which created a fiduciary duty.¹⁹¹ The law includes a five-factor test, applying fiduciary duty to one who: (1) provide[s] advice as to the value of securities or other property, (2) on a regular basis, (3) pursuant to a mutual agreement or understanding with the plan or plan fiduciary that (4) the advice will serve as a primary basis for investment decisions and (5) the advice is individualized to the particular needs of the plan or IRA.¹⁹² This rigid text left many

¹⁸⁹ See Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Settlement, *supra* note 36, at 2.

¹⁹⁰ David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. REV. 1011, 1011 (2011).

¹⁹¹ 29 U.S.C.A. § 1002(21)(A)(ii) (West, Westlaw through P.L. 116-259).

¹⁹² 29 C.F.R. § 2510-3-21(e)(1)(ii)(B) (2021).

investment professionals, consultants, and broker-dealer “advisers” without any fiduciary duty to their clients.¹⁹³

In the wake of the 2008 recession, the United States Congress passed the financial reform legislation “Dodd-Frank Wall Street Reform and Consumer Protection Act” (Dodd-Frank), which included a requirement that the SEC create a report within six months that would detail the professional standards brokers, dealers, and investment advisors were currently employed, and make recommendations for reforms.¹⁹⁴ A 2011 SEC report recommended the implementation of a uniform fiduciary standard of conduct for all brokers, dealers, and investment advisors, when providing personalized investment advice about securities to retail customers, to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.¹⁹⁵

On April 8, 2016, the Department of Labor (DOL) issued a rule that expanded the definition of investment advice within employer-sponsored private-sector pension plans and Individual Retirement Accounts.¹⁹⁶ The effective date of the rule was June 7, 2016, with applicability slated for April 10, 2017.¹⁹⁷ The final rule

¹⁹³ Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016) (vacated Mar. 15, 2018).

¹⁹⁴ Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, sec. 913(b), 124 Stat. 1376, 1824.

¹⁹⁵ U.S. SEC. & EXCH. COMM’N, STUDY ON INVESTMENT ADVISORS AND BROKER-DEALERS: AS REQUIRED BY SECTION 913 OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT ii (2011), https://www.sec.gov/news/studies/2011/913s_tudyfinal.pdf [<https://perma.cc/3AT2-X5MB>].

¹⁹⁶ See Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016) (vacated Mar. 15, 2018). Phyllis Borzi, an assistant labor secretary during the Obama administration, devoted significant resources to promoting a fiduciary standard which would require ERISA fiduciaries to put clients’ financial interests ahead of their own. She became familiar with the issue “in the 1970s when, as a law student, she got a part-time job at a consulting firm helping clients understand [ERISA], which was new at the time.” As a congressional staffer, she composed a large section of the 1985 COBRA legislation, and once in the DOL she fought tooth and nail against entrenched resistance from those allied with the financial services industry in pursuit of stricter fiduciary rules to protect retiree nest eggs. Yuka Hayashi, *Financial-Advice Rule Has an Unlikely Champion*, WALL ST. J. (Apr. 5, 2016), <https://www.rebalance360.com/news/financial-advice-rule-has-an-unlikely-champion/> [<https://perma.cc/6CGR-5675>].

¹⁹⁷ Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016) (vacated Mar. 15, 2018).

eliminated the five-factor test which had determined when “investment advice” had been provided (thus triggering fiduciary status) and replaced it with a broader definition that would capture more activity. Two important criteria were dropped: the advice had to be on a “regular basis” and be the “primary basis” for investment choices. The rule would have applied fiduciary duty to “virtually all financial and insurance professionals who do business with ERISA and IRA” plans.¹⁹⁸

On February 3, 2017, President Trump issued a memorandum instructing the DOL to review the rule and revise or rescind it based on its findings.¹⁹⁹ Then, on April 7, 2017, the DOL issued a 60-day delay of the rule’s applicability.²⁰⁰ Before the rule could go into effect, it was vacated by a decision of the Fifth Circuit.²⁰¹

DOL Secretary Alexander Acosta, who had been working on a revised fiduciary rule, resigned from his post effective July 19, 2019. His replacement, Eugene Scalia, who was lead counsel for the trade group which was instrumental in the defeat of the 2016 rule, appeared unlikely to push the DOL to resurrect efforts to expand fiduciary duties beyond those designated under the 1975 ERISA legislation.²⁰²

On June 5, 2019, the SEC announced new “regulation best interest” rules governing the relationship between financial professionals and consumers:

[D]esigned to enhance and clarify the standards of conduct applicable to broker-dealers and investment advisers, help retail investors better understand and compare the services offered and make an informed choice of the relationship best suited to their needs and circumstances, and foster greater

¹⁹⁸ *Chamber of Commerce v. U.S. Dep’t. of Labor*, 885 F.3d 360, 366 (5th Cir. 2018) (vacating 2016 fiduciary rule).

¹⁹⁹ Presidential Memorandum on Fiduciary Duty Rule, 2017 DAILY COMP. PRES. DOC. 95 (Feb. 3, 2017), <https://www.govinfo.gov/content/pkg/DCPD-201700095/pdf/DCPD-201700095.pdf> [<https://perma.cc/J4SZ-FBFW>].

²⁰⁰ Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 82 Fed. Reg. 16,902, 16,905 (Apr. 7, 2017).

²⁰¹ *Chamber of Commerce*, 885 F.3d at 388.

²⁰² See Editorial Board, *Gene Scalia’s Winning Record*, WALL ST. J., (July 19, 2019), <https://www.wsj.com/articles/gene-scalias-winning-record-11563575256> [<https://perma.cc/THP4-ZCYZ>].

consistency in the level of protections provided by each regime, particularly at the point in time that a recommendation is made.²⁰³

There is concern however that while the SEC regulation requires broker-dealers to act in the “best interests” of their customers and make new disclosures which they had not previously been required to make, there is no definition of what “best interest” means, and the standard is still different from that applied to investment advisors, a difference which creates confusion amongst retail investors about their rights.²⁰⁴

Since the demise of the DOL’s original fiduciary rule, several states have moved to enact their own rules expanding fiduciary duty to licensed finance professionals in their states who are marketing and selling their own company’s products.²⁰⁵ The financial services sector is, reportedly, working to thwart these efforts alleging that it will raise costs and “limit access” to investment opportunities.²⁰⁶

Finally, in June of 2020 the DOL announced a new proposed rule change which would grant an exception allowing financial firms which provide investment products to ERISA qualified plans to receive “reasonable compensation.”²⁰⁷ The DOL portrays this

²⁰³ Press Release, Sec. and Exch. Comm’n, SEC Adopts Rules and Interpretations to Enhance Protections and Preserve Choice for Retail Investors in Their Relationships with Financial Professionals (June 5, 2019), <https://www.sec.gov/news/press-release/2019-89> [<https://perma.cc/FJT5-6SB5>].

²⁰⁴ See Bob Pisani, *A Breakdown of Whether Investors Are Safer After the SEC Passes Financial Protection Rule*, CNBC: TRADER TALK (June 6, 2019, 4:44 PM) <https://www.cnbc.com/2019/06/06/a-breakdown-of-whether-investors-are-safer-after-the-sec-passes-financial-protection-rule.html> [<https://perma.cc/X2K7-RNNW>].

²⁰⁵ See 2017 Nev. Stat. 1795 (Nevada rule “imposing a fiduciary duty on broker-dealers, sales representatives and investment advisers who for compensation advise other persons concerning the investment of money”); 2019 Mass. Regulation Text 11392, (Massachusetts rule deeming it an unethical or dishonest conduct or practice for a broker-dealer, agent, investment adviser, or investment adviser representative registered or required to be registered in Massachusetts to fail to act in accordance with a fiduciary duty to a customer or client); 2018-31 N.Y. Reg. 19 (Aug. 1, 2018), (New York rule applying suitability/best interest standard to sales of annuities and life insurance).

²⁰⁶ See Kenneth E. Bentsen, Jr., *State Fiduciary Rules Will Raise Costs, Limit Access*, SIFMA (Jan. 8, 2020), <https://www.sifma.org/resources/news/state-fiduciary-rules-will-raise-costs-limit-access> [<https://perma.cc/FK5L-4MAP>].

²⁰⁷ See *infra* note 211.

rule change as good for investors. In a press release announcing the rule, Secretary Scalia said, “Today’s proposed exemption would give Americans more choices for investment advice arrangements, while protecting the retirement savings of American workers [t]he exemption would add to the tools individuals need to make the right decisions for their financial future.”²⁰⁸ There are several troubling aspects to this latest proposed rule, however. First, as has been mentioned, the purpose of ERISA is to protect investors from those who would seek to abuse their confidence, not to provide more “choice.”²⁰⁹ Second, requiring financial advisors to disclose their conflicts of interest is not a valid substitute for prohibiting those conflicts. Jacob Russell has noted that not only do disclosures fail to mitigate the potential harms brought about by conflicted advisors, but disclosures can *worsen* advisor behavior by creating a safe harbor for conflicted behavior.²¹⁰

While this proposed rule is couched as a “replacement” for the Obama administration’s universal fiduciary rule which was defeated in the Fifth Circuit,²¹¹ it is viewed by many consumer advocates as a gift to the financial services industry. Senator Patty Murray from Washington, a ranking member of the Senate Health, Education, Labor and Pensions Committee, criticized the proposed exemption saying, “[i]nstead of moving ahead with this proposal that will leave people across the country vulnerable, the Department should go back to the drawing board and come up with one that actually protects them and meets the high standard that Congress mandated in ERISA.”²¹² In contrast, Kenneth

²⁰⁸ News Release, U.S. Dep’t of Labor, U.S. Department of Labor Proposes to Improve Investment Advice and Enhance Financial Choices for Workers and Retirees (June 29, 2020), <https://www.dol.gov/newsroom/releases/ebsa/ebsa20200629> [<https://perma.cc/7UDA-T6UK>].

²⁰⁹ See *infra* note 227.

²¹⁰ Jacob Hale Russell, *The Separation of Intelligence and Control: Retirement Savings and the Limits of Soft Paternalism*, 6 WM. & MARY BUS. L. REV. 35, 78-79 (2015) (citing to Daylian Cain, George Loewenstein & Don Moore, *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 1 (2005)).

²¹¹ See *supra* note 198 and accompanying text.

²¹² Warren Rojas, *Consumer Groups Gear Up to Fight Trump’s Retirement Advice Rule*, BLOOMBERG LAW (July 1, 2020, 4:45 AM), <https://news.bloomberglaw.com/employee-benefits/consumer-groups-gear-up-to-fight-trumps-retirement-advice-rule> [<https://perma.cc/SL3A-ZCCZ>].

Bentsen, Jr., president and CEO of SIFMA, praised the rule, stating, “We applaud the Department of Labor’s work to preserve investor choice.”²¹³

B. Fees and § 403(b) Plans

More than a few scholars have noted the persistence of high fee options in mutual funds and defined contribution 401(k) and 403(b) plans.²¹⁴ Morrissey,²¹⁵ Ayres,²¹⁶ Schwartz and Herman,²¹⁷

²¹³ *Id.*

²¹⁴ *Cf.* 29 C.F.R. § 2530 (2021). The primary difference between 401(k) and 403(b) plans is who sponsors them. 401(k) plans can be sponsored by any employer while 403(b) plans are only able to be sponsored by not for profits, educational institutions, religious organizations, and some subdivisions of government. 403(b) plans are also more restricted in what investment products they can offer, primarily mutual funds and annuities.

²¹⁵ Daniel J. Morrissey, *Reforming Wall Street’s Biggest Gravy Train: Making Mutual Funds Fiduciaries for Retirement Savers*, 47 SECURITIES REG. L. J. 1 (2019) (arguing that given the political climate, we are unlikely to see additional regulation of mutual funds; however, litigation appears to be a promising vehicle to remedy some of the more egregious issues with excessive fees). The biggest barrier for litigation plaintiffs will be the Supreme Court’s decision in *Jones v. Harris Assoc.*, 559 U.S. 335 (2010), which seems to suggest that it is impossible to prove *excessive* fees if the entire industry is charging at the same (high) level. *Id.* See also Daniel J. Morrissey, *Are Mutual Funds Robbing Retirement Savings?*, 14 N.Y.U. J.L. & BUS. 143, 175 (2017) (“[O]ver their lifetimes a typical dual-income couple will pay more than \$150,000 in fees on their 401(k) plans.”). As for disclosures, “one observer said about the ‘farcical’ nature of those [mutual fund fee] disclosures, ‘[the prospectuses run] a hundred pages in length, bloated with regurgitated boilerplate. They are often squirreled away on obscure websites visited by only a handful of investors and understood by fewer.’” *Id.* at 177.

²¹⁶ See Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and “Dominated Funds” in 401(k) Plans*, 124 YALE L.J. 1476. (2015) (a comprehensive account of the regulatory failures in the retirement plan area). Ayres notes that “naïve diversification” causes investors to spread their investment across a wide range of investment options, including those with extremely high fees. *Id.* at 1481. This is especially troubling as there is no evidence which suggests that actively managed, high fee options produce better returns over time than low cost options. In short, the evidence suggests that holding funds with high fees has a “significant, persistent and negative effect on investor/[retiree] returns.” *Id.* at 1489. See also, Ian Ayres & Edward Fox, *Alpha Duties: The Search for Excess Returns and Appropriate Fiduciary Duties*, 97 TEX. L. REV. 445, 448 (2017). The authors say that absent some compelling opportunity to beat the index, there is a general consensus that investors “should invest in vehicles. . . that are (1) well-diversified, (2) low-cost, and (3) expose [an investor’s] portfolio to age-appropriate stock market risk[s].” *Id.*

²¹⁷ Daniel J. Schwartz and Jeffrey A. Herman, *Funds, Fees, and Annuities—A Guide to 403(b) Investment Options*, 29 TAXATION OF EXEMPTS 23, 24 (2018) (“In 2015,

Belenky,²¹⁸ and Morley and Curtis²¹⁹ have all noted the prevalence and persistence of inordinately high fees and the simultaneous absence of data which suggests that actively managed funds outperform their lower cost passively managed counterparts. To be sure, some have also offered questionable defenses of the socially valuable role high fees play.²²⁰

The central issues are well identified and there is significant data to support a conclusion that actively managed funds do not perform better over time than low cost, passively managed funds.²²¹ In academic communities, it is simply inconceivable that this information has escaped the notice of university administrators and fiduciaries. Despite this, the more than twenty lawsuits that have been filed against prominent academic institutions alleging, variously, multiple failures with respect to the duties of prudence and loyalty as well as allegations of various

403(b) plans averaged 25 investment options On average, colleges and universities have the most options, compared to plans sponsored by other types of employers.”)

Actively managed funds are the most expensive overall, with an asset-weighted average expense ratio of about 0.80% In contrast, the asset-weighted average for index equity mutual funds (which are passively managed) was a scant 0.09% [i]ndex funds increased from just 7.5% of net assets invested in mutual funds in 2000, to 19.3% in 2016.

Id. at 27.

²¹⁸ Matt Belenky, *The DOL's Fiduciary Duty Role in Universities*, INSIDE BASIS, Winter 2018, at 11. (noting that in *Tibble v. Edison International*, 135 S. Ct. 1823 (2015), *vacated and remanded on other grounds*, 135 S. Ct. 1823 (2015), the United States Supreme Court found that fiduciaries have an ongoing duty to monitor plans and to eliminate imprudent investments). Without clear guidance on the scope of the duty to monitor, it is hard to know what a failure to monitor looks like. Belenky argues in favor of “[h]olding fiduciaries to a higher standard about the investment products [they sell, which] will save companies millions in potential class action suits and protect employees from losing money on their retirement plans.”)

²¹⁹ Quinn Curtis & John Morley, *Flawed Mechanics of Mutual Fund Fee Litigation*, 32 YALE J. REG. 1, 3 (2015). Focusing on mutual funds as a whole not just in relation to 403(b) plans, the authors argue that, “mutual funds are the elephants in the room of American finance.” *Id.* They propose the development of a mechanical, easy to apply test that would allow class action plaintiffs to show that fees are substantially above market norms and permit an award of penalties *in addition to* actual damages. *Id.* at 43-44.

²²⁰ See, e.g., Michael A. Habib & D. Bruce Johnsen, *The Quality-Assuring Role of Mutual Fund Advisory Fees*, 46 INT'L REV. L. & ECON. 1, 13 (2016) (noting mutual fund managers need to earn fees to incentivize them to perform effective research).

²²¹ See Morrissey, *supra* note 215, at 180; see also Ayres & Quinn, *Beyond Diversification*, *supra* note 216, 1517-18.

prohibited transactions suggest otherwise. Almost invariably, only claims relating to prudence have survived.

C. *The “Large Menu” Defense*

At the heart of the university fee litigation cases is a philosophical question about whether and how participants should be in control of their investment choices. Most of the defendant universities have rationalized the large range of options offered to participants (both low and high fees) as placing the participant in control of his investment decisions.²²² There is some judicial support for this view. For example, both the Seventh Circuit in *Hecker v. Deere*²²³ and *Renfro v. Unisys*²²⁴ from the Third Circuit adopt the view that choice is an unqualified benefit for participants.

As Professor Bullard has noted,²²⁵ federal courts have repeatedly and erroneously affirmed the idea that a wide choice set in the pension context is inherently virtuous. He notes:

The [so called] large menu defense effectively substitutes judicial economic theories for statutory fiduciary duties, based primarily on the court’s ideological view . . . that participants’ choices should be regulated by free market principles rather than under ERISA’s fiduciary duties. The courts’ view, consistent with widely accepted rational choice theory, is that offering the largest range of choices will maximize workers’ wealth. Indeed, they view increasing choice, in and of itself, as the central purpose of ERISA.²²⁶

²²² See, e.g., Memorandum of Law in Support of Defendant’s Motion to Dismiss Plaintiffs’ Consolidated Amended Complaint at 14, *Cates v. Trs. of Columbia Univ.*, No. 1:16-cv-06524-KBF, 2017 WL 3724296 (S.D.N.Y. Aug. 28, 2017) (consolidated with *Doe v. Columbia Univ.*, No. 1:16-cv-06488 (S.D.N.Y. filed Aug 16, 2017) (“Because participant choice is the centerpiece of what ERISA envisions for defined-contribution plans, these sorts of paternalistic arguments have had little traction in the courts.”) (quoting *Tibble v. Edison Int’l*, 729 F.3d 1110, 1134-35 (9th Cir. 2013), *vacated and remanded on other grounds*, 135 S. Ct. 1823 (2015)).

²²³ *Hecker v. Deere & Co.*, 556 F.3d 575, 585 (7th Cir. 2009).

²²⁴ *Renfro v. Unisys Corp.*, 671 F.3d 314, 320 (3d Cir. 2011).

²²⁵ See generally Mercer Bullard, *The Social Cost of Choice, Free Market Ideology and the Empirical Consequences of the 401(k) Plan Large Menu Defense*, 20 CONN. INS. L.J. 335 (2014).

²²⁶ *Id.* at 337.

There is, however, little in the statute itself to support the views expressed in *Renfro* or *Hecker*.

The statute is emphatically not focused on participant choice, but on participant future retirement income security.²²⁷ The two goals are not synonymous. As Bullard points out, “[n]otwithstanding the courts’ views on rational choice theory, ‘a fully informed and fully rational investor would prefer a smaller menu.’”²²⁸

In addition, and given that “[e]mpirical research shows that larger menus are inversely correlated with workers’ wealth,”²²⁹ it seems clear that ERISA’s fiduciary duties should be interpreted in a manner designed to maximize employee wealth and not employee choice. The DOL has expressed strong reservations about this judicially created doctrine that finds no support in the statute. It has noted that under this doctrine, “. . . the court’s decision [] provide[s] a defense for a fiduciary’s imprudent selection of investment options if the fiduciary simply selected a large number of options.”²³⁰ This runs counter to the spirit of ERISA.

Hecker seemed to suggest that ERISA’s “broad range” requirement,²³¹ designed to promote and require the opportunity

²²⁷ See *History of EBSA and ERISA*, US DEPT LABOR, <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa> [https://perma.cc/4T39-FJES] (last visited Feb. 12, 2021) (“The provisions of Title I of ERISA . . . were enacted to address public concern that funds of private pension plans were being mismanaged and abused.”).

²²⁸ Bullard, *supra* note 225, at 337.

²²⁹ *Id.*

²³⁰ *Id.* at 344-345. (citing Amended Brief of the Sec’y of Labor, Elaine Chao, as Amicus Curiae in Support of Plaintiffs-Appellants, *Hecker v. Deere & Co.*, 2008 WL 5731147 (7th Cir. Apr. 4, 2008) (No. 08-1224).

²³¹ 29 C.F.R. § 2550.404c-1(b)(3)(i) (“A plan offers a broad range of investment alternatives only if the available investment alternatives are sufficient to provide the participant or beneficiary with a reasonable opportunity to: (A) Materially affect the potential return on amounts . . . and the degree of risk to which such amounts are subject; (B) Choose from at least three investment alternatives: (1) Each of which is diversified; (2) Each of which has materially different risk and return characteristics; (3) Which in the aggregate enable . . . them to achieve a portfolio with aggregate risk and return characteristics at any point within the range normally appropriate . . . (4) Each of which when combined with investments in the other alternatives tends to minimize through diversification the overall risk of a participant’s or beneficiary’s portfolio; (C) Diversify the investment of that portion of his individual account with respect to which he is permitted to exercise control . . .”).

for diversification, can be satisfied simply by providing large menus from which participants may choose.²³² The large menu defense is rooted in a mistaken view that the choices of a free market are always superior to the exercise of fiduciary responsibility to “nudge” people in the direction of more optimal choices.²³³ Of this Jacob Hale Russell says:

Grand libertarian rhetoric notwithstanding, there is absolutely nothing obvious or inevitable about the merits of autonomy in 401(k) allocation. In fact, our private retirement savings scheme is already deeply paternalistic and coercive—in the form of the tax advantage provided for defined-contribution savings. . . . Those who would say it serves a primarily societal function—creating a retirement safety net and preventing individuals from becoming wards of the state—should not be so hesitant about stating the obvious: we need to tell [investors] how to invest their money.²³⁴

The large menu fallacy is, in turn, buttressed by the notion that choice is valuable for its own sake, even if it consistently results in sub optimal choices by the very individuals the statute is expressly designed to protect.²³⁵ While the finer points of the economic theories underpinning these views are not disputed here, their applicability to legislation crafted for the express purpose of protecting workers is.

Observations of reality clearly show why plentiful investment offerings should not be a substitute for fiduciary oversight. One study found that overly expensive and often poorly performing funds known as “dominated funds” are present in 52% of plans and, within plans that contained at least one, they averaged 15%

²³² See *Hecker v. Deere & Co.*, 556 F.3d 575, 581 (7th Cir. 2009). (“It is untenable to suggest that all of the more than 2500 publicly available investment options had excessive expense ratios. The only possible conclusion is that to the extent participants incurred excessive expenses, those losses were the result of participants exercising control over their investments . . .”).

²³³ Jacob Hale Russell, *The Separation of Intelligence and Control: Retirement Savings and the Limits of Soft Paternalism*, 6 WM. & MARY BUS. L. REV. 35, 48 (2015) (Nudging “refers to policy strategies that recognize the degree to which framing, defaults, and ‘choice architecture’ affect decision making because of cognitive biases like anchoring, availability, or the herd mentality.”).

²³⁴ *Id.* at 77.

²³⁵ See Ayres, *supra* note 216, at 1510.

of funds offered.²³⁶ Participants are not forced to choose these funds, but because of naïve diversification strategies “chosen” by many investors, they will tend to allocate their portfolios into these low-quality products. Put another way, including a bad fund alongside good funds is not a benign or neutral act. Because many uneducated investors will spread their allocations amongst all available funds, the inclusion of a dominated fund leads to predictably worse outcomes for investors.²³⁷

In the 2013 case *Tibble v. Edison*,²³⁸ the Ninth Circuit promoted what seems a clearly superior view of the large menu defense: “As compared to the beneficiary, the fiduciary is better situated to prevent the losses that would stem from the inclusion of unsound investment options. It can design a prudent menu of options.”²³⁹ Combined with decades of data which demonstrate that participant wealth is reduced by the presence of both too many choices²⁴⁰ and the presence of high fee options,²⁴¹ participants would benefit from the elimination of the large menu defense as an option for plan sponsors who have been either too lazy or too conflicted to exercise their fiduciary responsibilities in the manner the statute contemplates.

D. *The Gartenberg Precedent*

Quinn Curtis and John Morley described mutual funds and their fees as “the elephants in the room of American finance.”²⁴² With almost a quarter of all household wealth invested in mutual funds, they have steadily grown in influence to become a massive player in American retirement saving.²⁴³ To combat the proliferation of excessive fees in the mutual fund market brought on by the lack of daylight between the funds and their advisors,

²³⁶ *Id.* at 1506.

²³⁷ *See id.* at 1511 (arguing that large menus do not evidence prudence, saying “[h]igh fees—and particularly the inclusion of dominated funds—are strong evidence that a fiduciary has not prudently constructed the menu”).

²³⁸ *Tibble v. Edison Int’l*, 729 F.3d 1110 (9th Cir. 2013), *vacated and remanded on other grounds*, 575 U.S. 523 (2015).

²³⁹ *Id.* at 1125.

²⁴⁰ *See Ayres, supra* note 216, at 1505-06.

²⁴¹ *See id.*

²⁴² Curtis & Morley, *supra* note 219, at 3.

²⁴³ Morrissey, *supra* note 220, at 4.

Congress passed legislation in the 1970s attempting to provide a civil cause of action for excessive fees.²⁴⁴ What teeth this legislation had were removed by the Second Circuit's decision in *Gartenberg v. Merrill Lynch Asset Management, Inc.*²⁴⁵ What is left is a precedent holding that, in order for a plaintiff to prevail in an excessive fee suit, they must convince the court that the "[a]dviser-manager . . . charge[d] a fee . . . so disproportionately large that [it bears] no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining."²⁴⁶ Needless to say, that bar is nigh impossible to clear. Professor Quinn Curtis of the University of Virginia School of Law asserts that "section 36(b) has never resulted in a verdict for plaintiffs."²⁴⁷ It seems unlikely that this is because the mutual fund industry began acting with benevolence.

With *Gartenberg* blocking any chance of successfully litigating an excessive fee case against the funds or advisors under 36(b) and with the balancing scales of the free market covered in greasy thumb prints, the only defense retirement investors have against excessively high fees is the prudent investment selection and aggregated negotiating power of the institutions sponsoring their plans.

E. Are High Fee Options Per Se ERISA violations?

A careful review of the university fee litigation cases raises the direct question: why are high fee options permitted in 403(b) plans when almost invariably there are comparable low fee options for plan participants? The literature clearly establishes that low fee indexed investments do no worse over time than comparable high fee actively managed options.²⁴⁸ In addition, high fee options, at least in some cases, significantly erode the ability of

²⁴⁴ See 15 U.S.C.A. § 80a-35(b) (West, Westlaw through P.L. 116-259) (the section of the Investment Company Act of 1970 which purports to prohibit mutual funds from charging excessive fees).

²⁴⁵ 694 F.2d 923 (2d Cir. 1982).

²⁴⁶ *Id.* at 928.

²⁴⁷ Quinn Curtis, *The Past and Present of Mutual Fund Fee Litigation Under Section 36(b)*, in RESEARCH HANDBOOK ON THE REGULATION OF MUTUAL FUNDS 164, 164 (William A. Birdthistle & John Morley eds., 2018).

²⁴⁸ Ayres, *supra* note 216, at 467-68 (citing to numerous studies which show actively managed funds with higher fees consistently fail to outperform the market over time).

participants to save for retirement and enjoy the tax benefits Congress intends.²⁴⁹ This problem is especially prevalent in the largest plans. One study found (albeit in the 401(k) context) that while on average plans were paying .63% in excess fees, the top 5% of plans paid 2.05% extra.²⁵⁰

The persistence of high fee choices seems clearly linked to a failure of oversight and/or the cozy relationships, as seen in the MIT case, between plan sponsors and their record keeper/investment managers.²⁵¹ Both of these scenarios are problematic, although the MIT story is most troubling as it reveals, like the ongoing “Varsity Blues” prosecutions,²⁵² an ugly and yet seemingly inescapable feature of modern day higher ed: the need to cultivate relationships with wealthy and powerful donors. These relationships require that something of benefit flows to each party. In the case of MIT, it appears the university enjoyed years of donations and largesse from the Johnson family; Fidelity, the family’s signature business venture, enjoyed near-exclusive access to MIT plan participants’ investment dollars. Naturally, the only losers in this arrangement were the faculty, staff, and administrators who overpaid.

The unreasonably high fee claim is essentially the only one to survive across all of the higher ed cases we have reviewed. The courts have consistently rejected the duty of loyalty claims²⁵³ and repeatedly expressed doubts about the legal theories presented

²⁴⁹ See *id.* at 454 (“Paying excessive fees can be an investment mistake because these fees eat away at the net return. For example, paying an excess fee of 2% over time can halve your retirement savings.”).

²⁵⁰ *Id.*

²⁵¹ See generally Complaint—Class Action, *supra* note 4.

²⁵² See, e.g., Jennifer Medina, Katie Benner & Kate Taylor, *Actresses, Business Leaders and Other Wealthy Parents Charged in U.S. College Entry Fraud*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/college-admissions-cheating-scandal.html> [<https://perma.cc/FK7H-VTVJ>] (The so called “Varsity Blues” scandal, so named for the F.B.I. code name for its investigation, involved wealthy parents using fraud and bribery to get their children admitted to top undergraduate programs through falsifying test scores and athletic achievements. At least 50 people have been charged in the scandal, and at least 12 of them with racketeering. Parents paid between \$15,000 and \$6.5 million to secure admission for their children.).

²⁵³ See, e.g., Tracey v. Mass. Inst. Tech., No. 16-cv-11620-NMG, 2017 WL 4478239, at *2 (D. Mass. Oct. 04, 2017) (“... conduct regarding the excessive management fees did not plausibly state a claim of violation of the duty of loyalty because plaintiffs’ theory was speculative.”).

with respect to the prohibited transaction claims.²⁵⁴ This suggests that, at least for now, fees are the most likely arena for reform. The simplest mechanism for ensuring that participants maximize the return on their investment is to prohibit outright the inclusion of high fee options in 403(b) plans, at least where comparable low-cost options are available.

Objections to regulation in this area from the financial services industry are to be expected.²⁵⁵ In spite of the testimony provided at the Fitzgerald hearings²⁵⁶ and numerous commentators who have called for fee reform over many years,²⁵⁷ SIFMA, the financial services sector's lobbying arm, spends vast amounts of money to influence policy,²⁵⁸ and it appears that litigation and not legislation offers the best prospect for meaningful reform. Eight cases have settled so far for a total of over \$85 million.²⁵⁹ These settlements have surely changed the environment against which future high fee claims will be made. Going forward it will be harder for similarly situated defendants to assert that their peer institutions' failure to weed out imprudent investment options should protect them.²⁶⁰ Critically,

²⁵⁴ See, e.g., *id.* at *3 ("Plaintiffs do not plausibly allege that the 'kickback scheme' was more than a coincidence or innocuous activity. To the extent that the claims of breach of the duty of loyalty in Counts I and II are implausible, so too is the subjective intent element of the prohibited transaction claim.").

²⁵⁵ See Bentsen, *supra* note 206.

²⁵⁶ See generally *Fitzgerald Hearings*, *supra* note 66.

²⁵⁷ See *supra* notes 215-219 and accompanying text.

²⁵⁸ See *Securities Industry & Financial Mkt Assn*, OPENSECRETS, <http://www.opensecrets.org/orgs//summary?id=D000000229> [<https://perma.cc/DEU7-FAFV>] (last visited Feb. 20, 2021) (showing that SIFMA, spent over \$6.6 million on lobbying efforts in 2019); see also Jeffrey H. Birnbaum, *Lobby's Co-CEO Quit After Probe*, WASH. POST (May 17, 2007), https://www.washingtonpost.com/wp-dyn/content/article/2007/05/16/AR2007051602427_2.html [<https://perma.cc/Q837-MEYP>] (discussing campaign contributions, stating "[t]he financial-services industry is the biggest corporate player in national politics. Only organized labor donates more money to candidates for federal offices.").

²⁵⁹ See *supra* note 36 (Settlements include \$18.1 million at the Massachusetts Institute of Technology, \$14.5 million at Vanderbilt University, \$14 million at Johns Hopkins University, \$3.5 million at Brown University, \$6.5 million at the University of Chicago, \$10.65 million at Duke University, \$17 million at Emory (pending), and an undisclosed amount at Princeton.).

²⁶⁰ Memorandum of Law in Support of Defendant's Motion to Dismiss the Complaint for Failure to State a Claim and/or Motion for Summary Judgment at 19, *Nicolas v. Trs. of Princeton Univ.*, No. 3:17-cv-03695, 2017 WL 44455897 (D.N.J. Sept. 25, 2017) ("Indeed, the fact that so many other university-sponsored 403(b) plans, with

all settlements have required serious reforms in the way the plans are managed.²⁶¹

Should MIT and other defendants land squarely in an all or nearly all low fee set of investment options, other universities will almost certainly need to follow suit. Over time, the remaining high fee plan sponsors would surely struggle to explain and justify the ongoing presence of options that are so costly to participants.

A presumption that high fee vehicles are generally inappropriate for 403(b) retirement plans would no doubt spread quickly to the larger (and more lucrative) 401(k) market.²⁶² This would be an unqualified win for participants in both the for-profit and not-for-profit sectors of the economy. Financial services providers would, in response, have to search for profits elsewhere or figure out how to provide consistently higher returns to justify the fees associated with their managed funds.

CONCLUSION

The recent spate of university fee litigation cases has uncovered and targeted a feature common to many 403(b) plans sponsored by institutions of higher education: a failure to

similar annuity products, have been accused of paying excessive recordkeeping fees, measured against the same \$35 dollar benchmark, suggests that this is not the norm for these unique plans with their unique annuity products.”)

²⁶¹ See, e.g., Plaintiff’s Memorandum in Support of Unopposed Motion for Preliminary Approval of Class Settlement, at 3-4, Tracey v. Mass. Inst. Tech., No. 16-cv-11620-NMG (D. Mass. Oct. 28, 2019), ECF No. 291 (In addition to the \$18.1 million, MIT agreed to address the conditions that had caused participant losses including annual training of fiduciaries in their duties, regularly putting recordkeeping services out to competitive bid, and evaluating all plan offerings for prudence).

²⁶² See Christine Benz, *100 Must-Know Statistics About 401(k) Plans*, MORNINGSTAR (Sept. 4, 2020), www.morningstar.com/articles/1000743/100-must-know-statistics-about-401k-plans [<https://perma.cc/SX4S-N4AT>]. Benz notes that in 2019, \$6.4 trillion in assets were held in 401(k) plans as compared to \$2.7 trillion in other DC plans including 403(b) plans. *Id.* She also notes that the average cost for a 401(k) participant is 0.58%. *Id.* And although the focus here is on the 403(b) market and claims of high fees, the 401(k) market has not been spared similar scrutiny. On the contrary, three dozen lawsuits against 401(k) providers have been filed—most since the onset of the COVID-19 pandemic—and, like the university fee litigation detailed here, the suits have focused on allegations of unreasonably high fees and breaches of plan duties owed to participants under ERISA. Ilana Polyak, *401(k) Lawsuits on the Rise as Participants Target Fees, Conflicts of Interest and Data Privacy*, BENEFITSPRO (Jan. 21, 2021, 8:31 AM), <https://www.benefitspro.com/2021/01/21/401k-lawsuits-on-the-rise-as-participants-target-fees-conflicts-of-interest-and-data-privacy/> [<https://perma.cc/TV6B-LNK3>].

aggressively police choices available to participants for excessive fees, duplication and the presence of actively managed funds of dubious value. ERISA litigation to address these concerns has produced mixed results. Duty of prudence claims have tended to generate the most support from a variety of federal courts when confronted by a pattern of indifferent and/or self-interested decision making by plan sponsors. All too often, universities appear to have selected multiple record keepers without regard to cost; sometimes these selections appear to be based on the enhancement of donor relationships which raises serious doubts about the prudence and loyalty expected by ERISA fiduciaries. We anticipate that many more of these cases will settle and that some of the excess expenses will be returned to participants. If policymakers adopted rules which rejected the approach in *Gartenberg* and the large menu defense, future participants could save in 403(b) vehicles without waiting for class action law firms to step in and force broad changes in the way these plans are managed.

