CHAPTER **20**

ERISA

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Church Plan Update: Supreme Court Upholds Exemptions

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ERISA Litigation Involving Target Date Funds

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Fifth Circuit Joins Other Courts and Holds Factual Determinations in ERISA Benefit Cases Do Not Receive Automatic Deference

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Returning Back to School: An Update on University Retirement Plan Litigation

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Defeat After Dudenhoeffer: The Continued Dismissal of ERISA Stock-Drop Lawsuits

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The Two Year Wait Continues: How USC's Attempt To Compel Arbitration Fails Before The Ninth Circuit, But Hope Remains For An Appeal To The Supreme Court

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The Supreme Court Returns to Applying Contract Law Principles to Collective Bargaining Agreements

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§ 20.1 Church Plan Update: Supreme Court Upholds Exemptions

Church plans are exempt from Title I of ERISA. They are also exempt from a number of significant Internal Revenue Code requirements such as the minimum funding standards, minimum vesting standards, and minimum participation standards. Because of the exemption from ERISA's minimum funding standards, a large number of church-sponsored defined benefit pension plans are substantially underfunded. Numerous lawsuits have challenged the church plan status of underfunded defined benefit plans affiliated with hospitals and universities. Loss of church plan status would have significant and potentially disastrous consequences for the health of the sponsors of these underfunded church affiliated pension plans.

Three cases, including ***Rollins v. Dignity Health***, were consolidated and reached the Supreme Court last year in a case captioned ***Advocate Health Care Network, et al. v. Stapleton*, 137 S.Ct. 1652 (2017)**. Despite having lost at both the federal district court and circuit court levels in the Third, Seventh, and Ninth Circuits, the three health care facilities (hospitals) in ***Advocate Health Care Network, et al. v. Rollins***,[1] did not give up. The hospitals had faith that ERISA's text meant something different than what employees, and the federal courts, said it did.

Employees of the hospitals had sued on grounds that the pension plans the hospitals offered are not "church plans." In response, the hospitals argued that they are church-affiliated organizations and that a 1980 modification of ERISA and 30 years of subsequent agency guidance make it clear that their plans are church plans. But the hospitals' position was rejected in six different venues. Confident that theirs was the correct interpretation of the law, the hospitals each petitioned the U.S. Supreme Court for review.

On June 5, 2017, their efforts were vindicated when the Supreme Court decided in favor of the hospitals. A unanimous[2] High Court ruled that ERISA's plain text provides that plans maintained by principal-purpose organizations

1. *Advocate Health Care Network, et al. v. Rollins*, 581 U.S. ____ (2017).
2. Justice Gorsuch did not participate in the decision. Justice Sotomayor filed a concurrence.

are church plans exempt from ERISA-regulation, even if the plans were not originally established by a church. The Court did not, however, decide whether or not the hospitals were, in fact, principal-purpose organizations. After finding that these hospital affiliated defined benefit pension plans were "established" by churches, the Supreme Court decided to remand the cases back to the trial courts for further proceedings. On remand, the question presented is—what is required for a principal-purpose church organization to "maintain" a pension plan?

The second shoe has now dropped. On September 6, 2018, the U.S. District Court for the Northern District of California in ***Rollins, et al. v. Dignity Health*, Case No. 13-cv-01450-JST**, denied Dignity Health's Motion to Dismiss. Again, the question presented was of whether the pension plan was "maintained" by a principal-purpose church related organization. The District Court found that plaintiffs had plausibly alleged the plan was not properly maintained as a church plan. The plaintiffs asserted that Dignity is neither a church, a convention of churches, or an association of churches, nor a church related organization whose principal purpose or function is the administration or funding of a retirement plan. Instead, plaintiffs alleged that Dignity's principal purpose was to provide healthcare services. The District Court found that the plaintiffs' interpretation of the word "maintain" was supported by ordinary principles of statutory constructions:

If Congress had not intended to attach any significance to the word "maintained," it could have simply required that a plan be "administered or funded" by a principal-purpose organization, and not also "maintained" by one. It did not make that choice. See ***Advocate Health Care Network*, 137 S. Ct. at 1659** (noting "when legislators did not adopt obvious alternative language, the natural implication is that they did not intend the alternative" (internal quotation marks and citations omitted)). And if the word "maintained" does have independent significance, then Defendants' interpretation violates another well-settled principle of statutory construction: "that legislative enactments should not be construed to render their provisions 'mere surplusage,'" ***Romero-Ruiz v. Mukasey*, 538 F.3d 1057, 1062-63 (9th Cir. 2008)** (quoting ***Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002)**). Defendants' interpretation simply reads the word "maintained" out entirely.

The trial court also agreed that the plaintiffs raised a viable argument as to whether an internal committee could "maintain" a plan under any circumstances. ERISA Section 3(33)(c)(i) states that an organization maintaining a church plan may be a "civil law corporation or otherwise." Dignity claimed that its committee qualified as an "or otherwise." The trial court disagreed. It concluded that the phrase "or otherwise" simply cannot encompass any possible entity or else the statutory distinction would lose all meaning. The trial court stated that what these words meant would be decided at trial or at summary judgment.

The plaintiffs also alleged that the application of ERISA's church plan exemption violates the Establishment Clause of the First Amendment. This provision states:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof…

The trial court declined to take up this question on a motion to dismiss. Instead, it said it would reach the constitutional question if and when it determines that the Dignity Plan qualifies as a church plan.

§ 20.2 Defeat After *Dudenhoeffer*: The Continued Dismissal of ERISA Stock-Drop Lawsuits

In 2014, the United States Supreme Court issued a unanimous ruling in ***Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. ___, 134 S. Ct. 2459 (2014)**. Under ***Dudenhoeffer***, fiduciaries of an Employee Stock Ownership Plan ("ESOP"), a qualified defined contribution retirement plan designed to invest primarily in the sponsoring employer's stock, are not afforded a "presumption of prudence" when a participant challenges a fiduciary's decision to acquire or hold employer stock. When first issued, the plaintiffs' bar celebrated, interpreting ***Dudenhoeffer*** as imposing a higher standard of conduct on plan fiduciaries. It appeared that plaintiffs could more easily challenge the stock-related decisions of plan fiduciaries, particularly when stock prices plunged but fiduciaries continued to offer ESOPs.

Four years after ***Dudenhoeffer***, the true impact of the decision has become more readily apparent, debunking initial expectations of plaintiff-side success. Lower federal courts routinely rule in favor of defendants, finding that plaintiffs have not met their burden to plead a plausible alternative course of action which fiduciaries could have taken. ***Dudenhoeffer***'s impact, however, has not been confined to the lower courts. At least three appellate courts have applied ***Dudenhoeffer*** demonstrating that ***Dudenhoeffer***'s alternative action standard poses a high bar for pleading that plaintiffs have little chance of overcoming.

§ 20.2.1 Pleading Standard for Stock Drop Cases Post–Dudenhoeffer

Although ERISA generally requires that employee retirement plan investments be diversified, ERISA includes an exception to the general rule allowing eligible individual account defined contribution plans, such as 401(k) plans and ESOPs, to offer plan sponsor stock as an alternative. ERISA, however, also imposes a duty on plan sponsors to act prudently. When stock prices plummet, plan participants often allege that plan fiduciaries, including the company, board of directors, and senior officers, breached their fiduciary duties by allowing employees to continue to invest in employer stock. Per Section 502(a)(2) of ERISA, plan participants may obtain relief from plan fiduciaries who breach their fiduciary duties. Plan participants have considered this fertile ground for class action lawsuits against plan fiduciaries.

Historically, ERISA stock drop cases presented significant challenges for employers. Pre-***Dudenhoeffer***, courts struggled to reconcile ERISA's express authorization allowing investment in ESOPs as an alternative investment option with ERISA's statutory duty of prudence. ***Dudenhoeffer***, however, shed further light on resolving the inevitable tension when applying these two ERISA provisions. Under ***Dudenhoeffer***, the Supreme Court ruled that there was no presumption of prudence for fiduciaries offering company stock as an investment option. To advance a successful stock drop claim under ***Dudenhoeffer***, plan participants must plausibly allege: (i) an alternative action that the defendant fiduciary could have taken that would have been consistent with securities laws and (ii) that a prudent fiduciary in the same circumstances "would not have concluded" that such alternative action would do more harm than good to plan participants. ***Dudenhoeffer*, 573 U.S. at 2473**.

§ 20.2.2 Pleading Around Dudenhoeffer: An Empty Exercise?

Despite initial predictions, plaintiffs continue to encounter a high bar when challenging the use of company stock as an investment option for defined contribution plans. In fact, most ERISA stock-drop lawsuits litigated since ***Dudenhoeffer*** have consistently been dismissed. In 2018 alone, three different appellate courts affirmed motions to dismiss class actions brought by plan participants, in part finding that plaintiffs had not pled a plausible alternative action available to fiduciaries. These three decisions serve as a testament to the trend that courts are unwilling to readily accept "alternative action" hypotheses articulated by plaintiffs.

(i) Sixth Circuit: Dudenhoeffer's Pleading Standard is Difficult to Meet

In the Sixth Circuit, four Eaton Corp. executives sidestepped liability in an ERISA stock drop case under ***Dudenhoeffer***'s alternative action standard. In ***Graham v. Fearon*, 721 Fed. Appx. 429 (6th Cir. 2018)**, plan participants alleged that Eaton stock was artificially inflated between 2013 and 2014 due to Eaton executives' false and misleading statements regarding divesting certain Eaton company businesses on a tax-free basis. Plan participants alleged that plan fiduciaries' purported inaction to protect retirement savings in light of the inflation violated the duty to prudently manage the plan's assets. In the alternative, plan participants pled that plan fiduciaries could have: (i) stopped new fund contributions, (ii) issued corrective disclosures to cure the fraud in a timely fashion, or (iii) diverted a portion of the fund's holdings into a low-cost hedging product to counterbalance losses. ***Id.* at 433 (citing *Fifth Third Bancorp. v. Dudenhoeffer*, 134 S. Ct. 2459, 189 L. Ed. 2d 457 (2014))**.

The Court of Appeals for the Sixth Circuit affirmed the district court's dismissal of the complaint for its failure to state a claim. The Sixth Circuit acknowledged that the pleading standard articulated in ***Dudenhoeffer*** is "difficult for plaintiffs to meet and that no court since Amgen has found sufficiently pled alternative actions." ***Id.* at 438**. Under the facts of ***Graham***, the court determined that plaintiffs failed to plead a plausible course of action that ESOP fiduciaries could have taken in the alternative. None of the plan participant's proposed alternatives was "so clearly beneficial" that a prudent fiduciary could not have determined that the alternatives would have been more likely to harm the fund than to help it. *Id.* at 435. Halting investment in a company fund would likely have caused the market to infer that insider fiduciaries viewed the employer's stock as a bad investment, causing stock prices to decline.

(ii) Ninth Circuit: Alternative Actions as Mere 'Theory'

Likewise, the Court of Appeals for the Ninth Circuit also recently held that alternative actions articulated by plan participants did not constitute plausible alternatives for plan fiduciaries. In ***Laffen v. Hewlett-Packard Co.*, 721 Fed. Appx. 642 (9th Cir. 2018)**, plan participants in Hewlett-Packard's 401(k) plan sued after the failed acquisition of British software company, Autonomy Corp. PLC. Plan participants alleged that managers allowed company stock to remain an investment option for 401(k) participants when stock was "artificially inflated" and an "imprudent investment." ***Id.* at 643**. Plan participants further contended that plan executives breached their fiduciary duties by failing to prevent new plan investments in Hewlett-Packard stock. Specifically, plan participants pointed to a whistle-blower's allegation that Hewlett-Packard knowingly overpaid for Autonomy, even after learning of Autonomy's questionable accounting practices, which inflated company revenues.

The district court dismissed ***Laffen*** twice, relying on ***Dudenhoeffer***. The Ninth Circuit affirmed the dismissal. As an alternative action, plan participants alleged plan fiduciaries could have at least prevented new investments or made public disclosures about Hewlett-Packard stock's risks. Under the standard set forth by ***Dudenhoeffer***, however, the Ninth Circuit casually shelved this alternative action as mere "theory." The Ninth Circuit found it equally plausible that a prudent fiduciary might prefer to investigate a whistle-blower's claims before acting. To that end, the court held that plan participants failed to assert a plausible alternative action that a similarly situated prudent fiduciary "would not have viewed as more likely to cause more harm than good without first conducting the proper investigation." ***Id.* at 644 (citing *Amgen v. Harris*, 136 S. Ct. 758, 759-60, 193 L. Ed. 2d 696 (2016))**.

(iii) Fifth Circuit: More Harm than Good?

The Fifth Circuit also recently followed suit in ***Singh v. RadioShack Corp.*, 882 F.3d 137 (5th Cir. 2018)**. In Singh, plan participants in RadioShack's 401(k) plan sued after RadioShack's stock fund dropped from $29.6 million in 2012 to $7.63 million in 2014 as the company verged on Chapter 11 bankruptcy. Participants alleged that the plan's fiduciaries breached their ERSA fiduciary duties by allowing the plan to invest in RadioShack stock when it was "excessively risky." ***Id.* at 145-146**. Participants suggested several alternatives RadioShack's fiduciaries could have taken when it knew or should have known that its stock prices were inflated. For instance, plan fiduciaries could have: (i) frozen the plan's investment in company stock, (ii) disclosed inside information to the market to deflate stock price, or (iii) liquidated the company stock fund. ***Id.* at 148**.

The court, however, rejected plan participants' alternative actions as likely to cause more harm than good. Under the standard as articulated by the Fifth Circuit, the plan participants bear "the significant burden of proposing an alternative course of action so clearly beneficial that a prudent fiduciary could not conclude that it would be more likely to harm the fund than to help it." ***Id.* at 148 (citing *Whitley v. BP, PLC*, 838 F. 3d 523, 529 (5th Cir. 2016)) (emphasis in original)**. Contrary to the intended outcome, freezing stock plans or disclosing inside information would likely lower the stock price and only serve to harm the plan. Ultimately, the court agreed that no prudent fiduciary would have believed the alternatives proposed in the plan participants' complaint would result in more good than harm.

§ 20.2.3 Conclusion

As demonstrated by the Sixth, Ninth, and Fifth Circuits this past year, ***Dudenhoeffer*** has indisputably raised the pleading standard in ERISA "stock drop" cases. As plan participants face continued defeat at the pleading stage and appellate courts emphasize the flexibility and leniency of the "alternative action" standard, the ongoing viability of stock drop cases remains uncertain.

§ 20.3 ERISA Litigation Involving Target Date Funds

Target date funds (TDFs) play an important role in how investors save for retirement. These funds constitute approximately 20 percent of defined contribution assets and are the qualified default investment alternative (QDIA) in approximately 85 percent of 401(k) plans.[3] TDFs' rise in popularity has, inevitably, made them the subject of ERISA class action litigation involving their use in 401(k) plans. This section provides an overview of such litigation. Our discussion is organized into four parts: the first subsection provides relevant background information on target date funds; the second subsection discusses some of the complexities of evaluating target date funds; the third subsection provides an overview of recent litigation related to target date funds; and the last section provides a few concluding thoughts.

3. "Target-date assets continue to climb," Pensions & Investments, February 5, 2018; "2018 Defined Contribution Trends," Callan Institute, p. 24.

§ 20.3.1 Background on Target Date Funds

TDFs were introduced in the 1990s specifically for the retirement investment market with the goal of simplifying retirement investing.[4] TDFs offer a single diversified investment vehicle with an asset allocation mix that becomes more conservative, from a risk perspective, as the target year—typically one's anticipated retirement—approaches.

TDFs are integrated investment products. They provide investors with a dynamic asset allocation that adjusts over time, selection of investment funds to achieve this allocation, and management of the underlying investment funds. As explained by the U.S. Department of Labor, TDFs "can be attractive investment options for employees who do not want to actively manage their retirement savings."[5]

TDFs are typically structured as funds-of-funds, meaning that TDFs invest in other funds instead of investing directly in individual securities. TDFs are offered as series of funds (*e.g.*, target date 2020, target date 2025, target date 2030, etc.). Each fund in the TDF series offers an asset allocation mix that is designed to be appropriate for investors who will retire at or around the target year.

TDFs typically invest in a variety of asset classes, including domestic equity, international equity, and fixed income, and sometimes in real estate, commodities, and bank loans.[6] The schedule specifying how the TDF's asset allocation mix will change over time is called the fund's "glide path." Asset allocation decisions entail managing the trade-off between expected return and variability in returns (*i.e.*, risk). TDF glide paths typically specify that the asset allocation will change to reduce risk as the target retirement date approaches. Generally speaking, this means reducing the TDF's exposure to equity securities over time.

TDFs' simplified method of saving for retirement has been popular with investors. Retirement assets in TDFs have experienced substantial growth since the early 2000s. A key driver of this growth was the Pension Protection Act of 2006, which allowed qualified 401(k) plan fiduciaries to direct participants' retirement savings to TDFs as the plan's QDIA.[7] According to annual surveys of defined contribution plans conducted by Deloitte, between 2009 and 2017 the share of retirement plans that included TDFs in their investment lineup increased from 67 percent to 89 percent.[8] Similarly, the Callan Institute reported

4. "Target-Date Series Research Paper: 2010 Industry Survey," Morningstar, p. 5.

5. "Target Date Retirement Funds - Tips for ERISA Plan Fiduciaries," U.S. Department of Labor, February 2013, p. 1.

6. "Target Date Funds: Finding the Right Vehicle for the Road to Retirement," Callan Institute, September 2015, p. 6.

7. "2016 Target-Date Fund Landscape," Morningstar, p. 4.

8. "401(k) Benchmarking Survey," Deloitte, 2009; "Annual 401(k) Survey Retirement Readiness," Deloitte, 2010; "Annual 401(k) Benchmarking Survey," Deloitte, 2011; "Annual 401(k) Benchmarking Survey," Deloitte, 2012; "Annual Defined Contribution Benchmarking Survey," Deloitte, 2013-2014; "Annual Defined Contribution Benchmarking Survey: Ease of Use

that 85.2 percent of plans used TDFs as their QDIA in 2017.[9] Consistent with these trends, total assets in TDFs grew from $69.4 billion in 2005 to $1.11 trillion in 2017, a compound annual growth rate of approximately 26 percent per year.[10] The number of TDF series available in the marketplace has also grown substantially. As reported by Morningstar, only six TDF series existed in 2002. TDF series proliferated in the years leading up to and immediately following the passage of the Pension Protection Act of 2006, and there were close to 50 TDF series by 2008.[11]

While TDFs share a common basic structure, individual funds may vary substantially even when they have the same target year. The key distinguishing characteristics include:

- *How the baseline (or strategic) asset allocation specified by the glide path changes over time.* Glide paths differ across TDFs substantially. For example, **Figure 1** plots the glide path equity allocations across 59 different TDF series as of 2017, as reported by Morningstar.[12] The figure shows that TDF series' glide paths differ in terms of their starting point allocations to equity and the rate at which the allocation to equity securities decreases over time. Specifically, as of 2017, the glide path allocation to equity 30 years from the target date across these series varied from 53 percent to 97 percent.[13]

Drives Engagement in Saving for Retirement," Deloitte, 2015; "Defined Contribution Benchmark Survey," Deloitte, 2017.

9. "2018 Defined Contribution Trends," Callan Institute, p. 24.

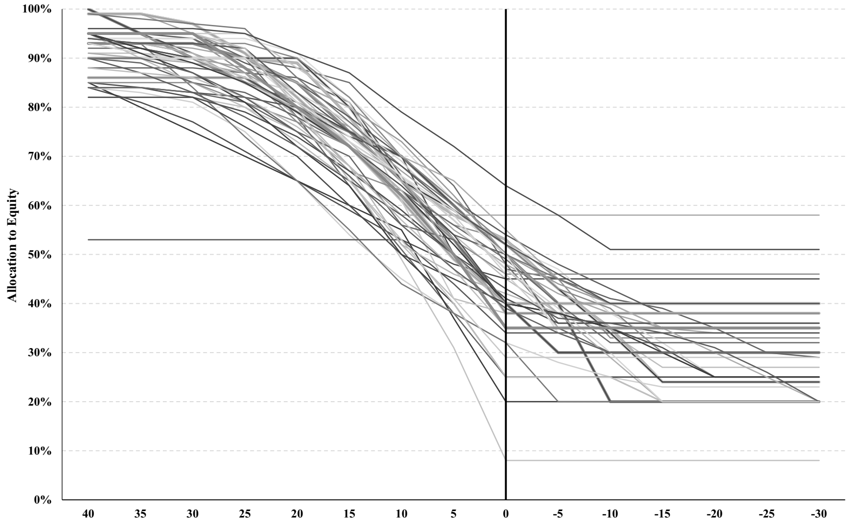
10. "Target-Date Series Research Paper: 2010 Industry Survey," Morningstar, p. 6; "2018 Target-Date Fund Landscape," Morningstar, p. 2.

11. "2017 Target-Date Fund Landscape," Morningstar, p. 14; "2018 Target-Date Fund Landscape," Morningstar, p. 12.

12. "2018 Target-Date Fund Landscape," Morningstar, pp. 59-60.

13. "2018 Target-Date Fund Landscape," Morningstar, pp. 59-60.

Figure 1
Target Date Fund Glide Path Equity Allocations: 2017



Source:
Graph constructed using data from "2018 Target-Date Fund Lanscape," Morningstar, pp. 59-60.

Glide paths also vary with respect to when the terminal asset allocation is reached (also known as the landing point). As depicted in **Figure 2**, "to retirement" glide paths reach their terminal asset allocation at the target year (*i.e.*, the landing point is the target date), whereas the asset allocation of a "through retirement" glide path continues to adjust for some years after the target year (*i.e.*, the landing point is beyond the target date).

Figure 2
Comparison of Glide Path Equity Allocations for
"To Retirement" and "Through Retirement" Target Date Funds

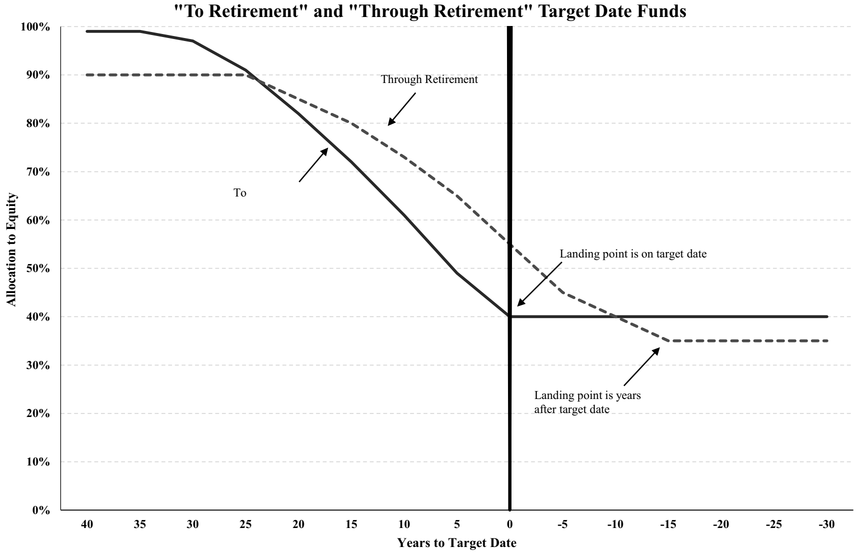
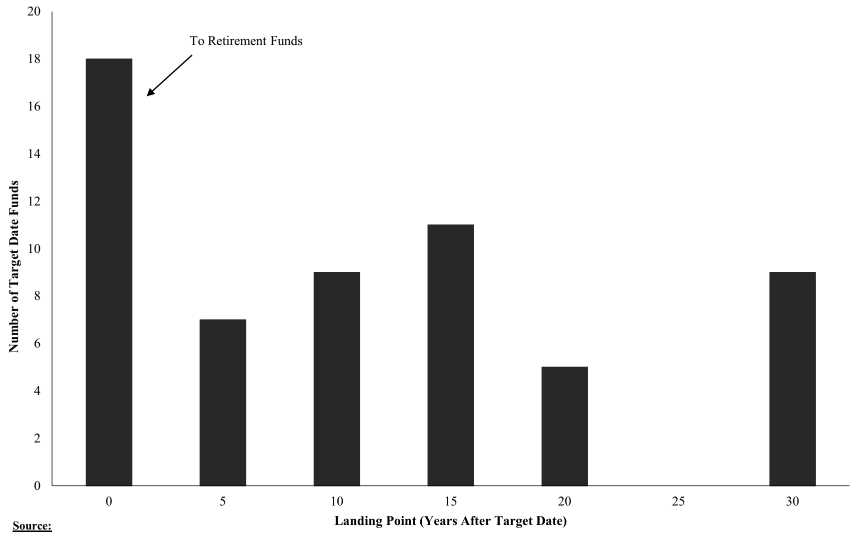


Figure 3 plots the variation in landing points across the 59 different TDF series covered by Morningstar as of 2017.

Figure 3
Distribution of Landing Points (Years After Target Date) Across Target Date Fund Series
As Reported by Morningstar: 2017



Source:
Graph constructed using data from "2018 Target-Date Fund Lanscape," Morningstar, pp. 59-60.

- *Asset classes of the underlying investments.* For example, all 51 of the TDF series for which Morningstar reported asset allocation data for 2017, invested in U.S. equities. However, 49 TDF series invested in international equity, whereas 2 did not; 16 TDF series invested in commodities, whereas 35 did not; and 8 TDF series invested in alternatives, whereas 43 did not.[14]
- *The extent to which the TDF manager deviates from the glide path asset allocation.* Some TDF investment managers maintain an asset allocation that is close to the specified glide paths at all times, whereas others deviate from the baseline allocation to take advantage of temporary market conditions.
- *Whether the TDF invests only in funds sponsored by the TDF provider, or whether the TDF partially or completely invests in funds sponsored by other investment managers.*

14. "2018 Target-Date Fund Landscape," Morningstar, p. 37. Morningstar reported asset data by broad categories for the 51 target date series that invested more than 90 percent of their assets in mutual funds or exchange-traded funds as of year-end 2017. For the Manning & Napier Target Date Series, Morningstar reported that 100 percent of assets are in "Allocation" funds; based on a review of the Manning & Napier Target Date Series fund fact sheets, the funds invest in U.S. equities and international equity (*see*, *e.g.*, Manning & Napier Fund Target 2015 Series Class I Fund Fact Sheet).

- *Whether the TDF invests in actively-managed or passively-managed underlying funds exclusively, or a combination of both.*
- *Whether the TDF is an "off-the-shelf" product, or a customized fund designed for one or a small number of retirement plans.* A custom fund structure may allow for plan fiduciary involvement in designing certain features of the TDF, including, for example, the selection and monitoring of the underlying investments.

§ 20.3.2 Variation Among TDFs Complicates Evaluating Historical Performance

The characteristics that distinguish TDFs mean that TDFs have different risk/return profiles, adding complexity to a fiduciary's evaluation of TDFs for a given plan's lineup. Differences in glide paths, asset allocations, and the proportion of TDF assets in actively-managed versus passively-managed strategies, among other differences discussed above, make it challenging to identify an appropriate peer group of similar funds to be used in evaluating a TDF's performance.

Similarly, the variation in the risk/return profiles among TDFs complicates the identification of a suitable benchmark index against which a TDF's performance can be evaluated. Any benchmark index will inevitably embrace some glide path, and that glide path may differ from the TDF's glide path, such that performance differences may be attributable to the glide path differences alone, rather than to manager skill or other factors. For example, the S&P Target Date Indexes—a common benchmark among TDF providers[15]—are created based on a survey of the asset allocations of a subset of fund sponsors, which may not adequately represent the asset allocation of the TDF being evaluated. The "eligible" asset classes considered by the S&P Target Date Indexes do not include certain asset classes in which TDFs commonly invest, such as international bonds and bank loans.[16] In addition, S&P utilizes its own proprietary broad market indexes to estimate the performance of each asset class held by surveyed funds, and these S&P indices may not reflect the investment strategies of the underlying investments in each asset class held by the surveyed funds and/or the TDF being evaluated.[17]

Custom composite indexes that blend multiple indexes, with weights to reflect the asset allocation of the TDF being evaluated, are also commonly used as benchmarks. A benefit of such composite indexes is that they provide a benchmark return that closely reflects risk associated with the asset allocation of the TDF being studied. However, when the allocation of a composite index

15. "2018 Target-Date Fund Landscape," Morningstar, p. 32.

16. "S&P Target Date Index Series Methodology," S&P Dow Jones Indices, June 2018, p. 4; "Target Date Funds: Finding the Right Vehicle for the Road to Retirement," Callan Institute, September 2015, p. 6.

17. "S&P Target Date Index Series Methodology," S&P Dow Jones Indices, June 2018, p. 4.

is based on a TDF's asset allocation, performance relative to a benchmark will not provide information on how the choice of the asset allocation affected portfolio returns, and may not allow for a comparison of risk/return relative to other TDFs available in the marketplace.

§ 20.3.3 Recent ERISA Cases Involving Target Date Funds

TDFs have attracted a variety of legal challenges under ERISA. Often, TDFs are challenged for the same reasons as other investments—because the fiduciaries allegedly selected the funds over alternatives for disloyal reasons, for example, or because the funds allegedly bore excessive fees or performed poorly.[18] Similarly, some suits challenge the inclusion of multiple TDF series in a plan investment option lineup as part of a broader challenge to the multiplicity of allegedly confusing choices in the lineup.[19]

Other suits question features that are unique to the selected TDFs. For example, several recent suits challenge the choice of underlying funds in which the TDFs at issue invest pursuant to their fund-of-funds structure. These challenges can themselves come in different forms, attacking the use of proprietary underlying funds and/or alleging that the underlying funds were otherwise selected over lower-cost or better-performing alternatives.[20] Some actions challenge the fiduciaries' selection of TDFs that rely on actively-managed underlying funds, arguing that passive structures are less costly and will promise market-level returns over the long term.[21] Still other suits challenge the prudence

18. *See, e.g.*, Plaintiff's First Amended Complaint, *McCorvey v. Nordstrom, Inc.*, No. 2:17-cv-08108 (C.D. Cal. Jan. 2, 2018), ECF No. 24 ¶ 47 (challenging plan's failure to use lower-cost target date fund option, such as Vanguard Target Date Funds); Amended Complaint Class Action, *McGinnes v. FirstGroup Am., Inc.*, No. 1:18-cv-00326 (S.D. Ohio Aug. 3, 2018), ECF No. 35 ¶¶ 2, 6, 25-26 (challenging replacement of target date funds managed by T. Rowe Price with newly launched products launched by Hewitt, which also allegedly served as the plan's investment consultant); *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 821 (8th Cir. 2018) (affirming dismissal of challenge to Wells Fargo's retention of proprietary target date funds in plan that "were allegedly more expensive (due to higher fees) than comparable Vanguard and Fidelity funds and also underperformed the Vanguard funds").

19. *See, e.g.*, Second Amended Complaint Class Action, *Cassell v. Vanderbilt University*, No. 3:16-cv-02086 (M.D. Tenn. June 6, 2018), ECF No. 102 ¶ 189 (challenging the inclusion of three target date "fund families" in plan lineup).

20. *See, e.g.*, Complaint Class Action, *Nelsen v. Principal Global Inv'rs Tr. Co.*, No. 4:18-cv-001115 (S.D. Iowa April 16, 2018), ECF No. 1 ¶ 12 (challenging Principal's alleged decision to invest target date CITs "exclusively in Principal's proprietary index funds, despite fees that were 5 to 15 times higher than marketplace alternatives that tracked the *exact same index*" and the fact that "[c]ompared to marketplace alternatives," the funds "deviated further from the benchmark index, and consistently had the worst performance even on a pre-fee basis" (emphasis in original)).

21. *See, e.g.*, *Terraza v. Safeway Inc.*, 241 F. Supp. 3d 1057 (N.D. Cal. March 13, 2017) (discussing challenge to TDFs allegedly relying in part on actively-managed strategies).

of the fiduciaries' selection of particular target date suites based on the design of their glide path or their use of a tactical asset allocation model.[22]

Plaintiffs in multiple recent actions have also brought claims raising concerns about the asset classes selected and the associated risks to which TDF investors are exposed. For example, in a recent action in the Southern District of New York challenging the customized TDFs used in the Verizon 401(k) plan, the plaintiffs alleged that the managers' decision to invest in a commodities fund, infrastructure fund, and high yield bond fund added unnecessary risk and complexity to the funds.[23] Similarly, in a recent action against Intel in the Northern District of California, the plaintiffs argued that the plan's custom TDFs "grossly over-weighted [their] allocations to hedge funds, commodities, and international equities" and improperly invested in private equity vehicles.[24]

§ 20.3.4 Concluding Thoughts

The marketplace has supported broad variation among TDFs as 401(k) plan fiduciaries embrace an array of TDF profiles. Fiduciaries evaluating the right TDF series for their investment menus grapple with the factors that differentiate TDFs (*e.g.*, exposure to certain diversifying asset classes, glide path variations, presence or absence of tactical asset allocation), as well as with unique challenges in identifying appropriate peer groups and benchmarks for the funds. Court decisions to date have not constrained the range of prudent choices or methods available to fiduciaries, but litigation focused on these fiduciary judgments has the potential to shape the fiduciary landscape, and the future design of TDFs.

22. *See, e.g.*, Plaintiffs' Opposition to the Reliance Defendants' Motion for Summary Judgment, *Pledger v. Reliance Tr. Co.*, No. 1:15-cv-04444 (N.D. Ga. Aug. 6, 2018), ECF No. 159.

23. Class Action Complaint, *Jacobs v. Verizon Communications, Inc.*, No.1:16-cv-01082 (S.D.N.Y. Feb. 11, 2016), ECF No. 1 ¶¶ 17-18.

24. Complaint Class Action, *Sulyma v. Intel Corp. Inv. Comm.*, No. 5:15-cv-04977 (N.D. Cal. Oct. 29, 2015), ECF No. 1 ¶¶ 115, 128. *See also, e.g.*, Amended Class Action Complaint for Damages, Injunctive Relief, and Equitable Relief, *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, No. 5:16-cv-03698 (N.D. Cal. Nov. 7, 2016), ECF No. 68 ¶ 11 (alleging that "the asset allocations" of the target date funds made available in the Fujitsu plan "were fundamentally flawed, allocating a wildly excessive percentage of assets to speculative asset classes such as natural resources, emerging market stocks, emerging market bonds, and private equity real estate limited partnerships").

§ 20.4 The Two Year Wait Continues: How USC's Attempt to Compel Arbitration Fails Before the Ninth Circuit, but Hope Remains for An Appeal to the Supreme Court

Two years after plaintiffs' complaint was filed, ***Munro v. University of Southern California*** remains at a standstill at the initial stages of litigation. The long delay stems from the parties' disagreement over the gateway issue of whether or not civil court or arbitration is the proper place to resolve their underlying dispute.

In August 2016, Allen Munro and other current or former employees of USC ("USC Plaintiffs") brought a putative class action lawsuit under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The USC Plaintiffs sued individually and as representatives of participants and beneficiaries of the USC Retirement Savings Program and the USC Tax-Deferred Annuity Plan (the "USC Plans"). The lawsuit, which was brought on behalf of the USC Plans, alleges multiple breaches of fiduciary duty under ERISA against Defendants USC, the USC Retirement Plan Oversight Committee ("USC Committee"), and Committee chair Lisa Mazzocco (collectively, "USC Defendants").

The USC Defendants did not answer the USC Plaintiffs' complaint. Instead they moved to compel individual arbitration and dismiss for improper venue. The USC Defendants argued that the USC Plaintiffs had signed arbitration agreements when they began working at USC and that those agreements require that any claims the employee and USC have against one another, including claims for violations of federal law, be resolved through final and binding arbitration. The USC Defendants also argued that because the arbitration agreements do not expressly apply to class arbitration, the USC Plaintiffs' claims must be arbitrated on an individual basis. The District Court denied the motion, holding that "participants cannot sign an arbitration agreement, without the consent of a plan, that prevents the participants from bringing a § 502(a)(2) claim on behalf of the plan. Thus, the Plaintiffs' arbitration agreements do not prevent them from filing their § 502(a)(2) claims in court on behalf of the Plans …."[25] In other words, the arbitration agreements did not stand as a barrier to the USC Plaintiffs suing in federal court.

The USC Defendants appealed the District Court's decision to the Ninth Circuit Court of Appeals for a decision on whether the arbitration agreements encompass the claims in the lawsuit. The Ninth Circuit upheld the District Court's decision, ruling that "[b]ecause the parties consented only

25. *Munro v. Univ. of S. California*, No. CV-16-6191-VAP(CFEx), 2017 WL 1654075, at *7 (C.D. Cal. Mar. 23, 2017).

to arbitrate claims brought on their own behalf, and because the Employees' present claims are brought on behalf of the Plans, we conclude that the present dispute falls outside the scope of the agreements."[26]

In determining that the arbitration agreements failed to extend to the USC Plaintiffs' claims, the Ninth Circuit looked to a recent decision, ***Welch v. My Left Foot Children's Therapy, LLC***,[27] which considered whether an arbitration agreement encompassed *qui tam* claims brought under the False Claims Act ("FCA"). Welch involved a lawsuit brought by a speech therapist against her employer, My Left Foot Children's Therapy, LLC (MLF). When she applied for employment, Welch entered into an arbitration agreement with MLF that provided, in relevant part, for arbitration of claims that the employee may have against the Company and vice versa. Welch later filed a lawsuit alleging that MLF and its co-owners violated both the FCA and its Nevada state equivalent. Defendants moved to compel arbitration and the District Court denied the motion. Defendants appealed and the Ninth Circuit ruled that the arbitration agreement did not encompass Welch's FCA claims. With respect to the language that provides that the employee and MLF must arbitrate claims they have against one another, the Ninth Circuit explained that the underlying fraud claims asserted in an FCA case belong to the government and not to the employee-relator. Because the FCA claims Welch brought were not ones she had against MLF, the Court ruled that they fell outside the scope of the parties' agreement to arbitrate.

The Ninth Circuit determined that the ***Munro*** arbitration language was comparable to that in ***Welch*** and ruled that "there is no principled distinction to be drawn" between the breach of fiduciary duty claim the USC Plaintiffs brought under ERISA and Welch's *qui tam* claim brought under the FCA. The Ninth Circuit noted that plaintiffs in both circumstances are not seeking relief for themselves, *i.e.*, a *qui tam* claim brought under the FCA seeks recovery for injury to the government and an ERISA Section 502(a)(2) claim seeks recovery for injury to the plan. The court also pointed out that neither a *qui tam* relator nor an ERISA plaintiff alleging breach of fiduciary duty can settle a claim of their own accord, noting that under ***Bowels v. Reade*, 198 F.3d 752, 760 (9th Cir. 1999)**, plaintiffs seeking relief under ERISA Section 409(a) must have plan consent to settle on behalf of the plan.

The USC Plaintiffs also raised the argument that claims for breach of fiduciary duty where plaintiffs seek a remedy under ERISA Section 409(a) cannot be arbitrated and cited to the Ninth Circuit's decision in ***Amaro v. Continental Can Co.***[28] for its holding that arbitration does not satisfy ERISA's "minimum standards [for] assuring the equitable character of [ERISA] plans." The Ninth Circuit found that it was unnecessary to decide the issue because it had determined that Plaintiffs' claims fell outside the arbitration agreements, but noted that ***Amaro*** is binding unless "clearly irreconcilable" with subsequent binding

26. *Munro v. Univ. of S. California*, 896 F.3d 1088, 1092 (9th Cir. 2018).
27. 871 F. 3d 791, 796 (9th Cir. 2017).
28. 724 F.2d 747 (9th Cir. 1984).

authority. However, the Ninth Circuit also stated in *dicta* that "[a]lthough the Supreme Court has never expressly held that ERISA claims are arbitrable, there is considerable force to [the USC Defendant's] position" that ***Amaro*** should be overruled as "clearly irreconcilable."[29]

USC subsequently filed a petition for panel rehearing or rehearing *en banc* of the panel's decision, which was denied. On October 22, 2018, at a scheduling conference before the district court, counsel for USC stated that USC anticipates filing a *Writ of Certorari* to the U.S. Supreme Court. The district court then continued the stay of the case pending the outcome of the writ.

For the USC Plaintiffs, and those following the development of ***Munro***, the two year wait continues. While we wait, plan sponsors in the Ninth Circuit who intend to rely upon standard employment agreements to keep ERISA lawsuits brought on behalf of the Plan out of federal court are now on notice that their reliance may not be as secure as they may have previously thought.

§ 20.5 Fifth Circuit Joins Other Courts and Holds Factual Determinations in ERISA Benefit Cases do not Receive Automatic Deference

The standard of review to be applied to ERISA plan benefit determinations can be outcome-determinative. Although ERISA's statutory provisions are silent as to what standard of review a court should apply when considering the appeal of a benefit claim denial, the United States Supreme Court addressed the issue in its seminal decision, ***Firestone Tire & Rubber Company v. Bruch***. In ***Firestone***, the Supreme Court held that when an ERISA benefit plan grants authority to the administrator to interpret plan terms and determine claims under the plan, the reviewing court must give deference to the administrator's determinations and apply an abuse of discretion standard of review. As explained here, such a standard is deferential to the plan administrator. The Supreme Court further held that if the ERISA plan fails to delegate authority to the administrator, the court reviewing the denial of benefits must do so employing a *de novo* standard of review. Such a standard allows the reviewing court to substitute its own judgment, without affording deference to the plan administrator, and to review the matter on a "clean slate."

However, for nearly twenty-seven years, the United States Court of Appeals for the Fifth Circuit has applied an interpretation of ***Firestone*** that differentiated between a plan administrator's factual and legal conclusions. According to the Fifth Circuit's prior precedent, a reviewing court was required to apply an abuse

29. *Munro v. Univ. of S. California*, 896 F.3d at 1094, n. 1.

of discretion standard of review to factual determinations even in cases when the plan's terms did not grant deference to the administrator.

On March 1, 2018, the Fifth Circuit issued its opinion in ***Ariana M. v. Humana Health Plan of Texas, Inc. (Ariana III)***, and held that ***Firestone's*** ruling requiring *de novo* review when there is no plan provision granting deference to the administrator applies to both factual and legal determinations. **884 F.3d 246 (5th Cir. 2018)**. In reversing its own precedent, the Fifth Circuit joined the eight other circuit courts that have addressed the issue. With ***Ariana III***, there is now a uniform rule throughout the United States in determining the applicable standard of review for ERISA benefit cases.

§ 20.5.1 Case Posture in Ariana M. v. Humana Health Plan of Texas

Plaintiff Ariana M. was a minor dependent covered by an Eyesys Vision Inc. group health plan. **884 F.3d at 248**. Humana Health Plan of Texas, Inc. ("Humana") administered Eyesys Visions' benefits plan (the "Plan") and made benefit determinations for the plan. ***Id.*** Ariana suffered from eating disorders and had a history of self-harm. ***Id.*** On April 15, 2013, she was admitted to Avalon Hills, a treatment facility that provides treatment and assistances for eating disorders. ***Ariana M. v. Humana Health Plan of Tex., Inc. (Ariana I)***, **163 F. Supp. 3d 432, 436 (S.D. Tex. 2016)**.

After Ariana was admitted to Avalon Hills, Humana was tasked to determine whether and for how long Ariana's partial hospitalization would be covered. ***Id.*** The Plan specified that partial hospitalization included comprehensive treatment that was more intensive than outpatient care and required a minimum of five hours of treatment per day, five days per week. ***Id.*** However, to be eligible for partial hospitalization for mental health services, the Plan mandated that the treatment be "medically necessary." ***Id.*** To qualify, the services would need to be those "a health care practitioner exercising prudent clinical judgment would provide to his or her patient for the purpose of preventing, evaluating, diagnosing or treating an illness or bodily injury, or its symptoms." ***Id.***

Ariana remained in Avalon Hills for about six months, from April to September 2013. ***Id.*** Humana ultimately authorized 49 days of partial hospitalization. ***Id.* at 438**. As part of the benefits claims process, a doctor acting on Humana's behalf evaluated Ariana's medical records and determined she did not pose an imminent danger to herself or others, and did not show medical instability or functional impairments. ***Id.*** Because it determined that partial hospitalization was no longer medically necessary, Humana concluded she no longer qualified for treatment and refused to authorize partial hospitalization beyond June 5th. ***Id.*** Avalon Hills appealed Humana's decision. Ariana's claim was reviewed by a second doctor who upheld the denial because she was not a danger to herself and she was medically stable and not aggressive. ***Id.***

On November 7, 2014, Ariana initiated a lawsuit in the Southern District of Texas for the cost of her treatment from June 5 to September 18, 2013. ***Ariana I***, 163 F. Supp. 3d 432. The district court applied the then-controlling precedent as set out in the Fifth Circuit's ***Pierre v. Conn. Gen. Life Ins. Co.*** decision, and applied an abuse of discretion standard of review to Humana's denial of the benefits claim and its factual determinations thereunder. ***Id.* at 442**. In upholding Humana's decision, the district court determined that Humana's decision was "somewhere on the continuum of reasonableness—even if on the low end," such that Humana did not abuse its discretion in finding continued partial hospitalization was not medically necessary. ***Ariana I*, 163 F. Supp. 3d 432 at 439**.

On March 17, 2016, Ariana appealed to the Fifth Circuit. On appeal, among other arguments, she argued that the lower court incorrectly applied an abuse of discretion standard of review and a *de novo* standard should have been applied. On April 21, 2017, a panel of the Fifth Circuit affirmed the district court and concluded that the abuse of discretion standard was the appropriate standard of review. Nevertheless, the entire panel also joined a concurring panel that questioned Pierre's validity as every other circuit who has considered the issue applied a *de novo* standard.

Subsequently, the Fifth Circuit granted Ariana's request for *en banc* reconsideration of **Pierre**.

§ 20.5.2 Determining the Applicable Standard of Review

After a plan participant has exhausted his or her administrative remedies under the terms of the plan, ERISA allows the participant to file a lawsuit in federal court under ERISA § 502(a), 29 U.S.C. § 1132(a) seeking review of the administrator's benefit determination. Once a lawsuit has been filed, one of the more significant issues for the court to determine is the applicable standard of review it should apply when examining the participant's claim. Indeed, whether the administrator's determinations are ultimately affirmed or overturned could very well hinge on if the reviewing court applies an abuse of discretion or a *de novo* standard of review.

An examination of the two standards illustrates their impact on the court's review. When employing an abuse of discretion standard of review, the court must give deference to the plan administrator's interpretation of plan terms and benefit determinations. As such, a court will not reverse the plan administrator's decision unless it is deemed to be arbitrary and capricious. ***Burtch v. Hartford Life & Accident Ins. Co.*, 314 Fed. App'x. 750, 754 (5th Cir. 2009)** (internal citations omitted). The Fifth Circuit has explained that "[a] decision is arbitrary when made without a rational connection between the known facts and the decision or between the found facts and the evidence." ***Id.*** (internal quotation marks and citation omitted). Under this standard, a plan administrator's decision will be affirmed so long as it "fall[s] somewhere on a continuum of reasonableness—even if on the low end." ***Cook Children's Med. Ctr. v. New Eng. PPO Plan of Gen. Consol. Mgmt.*, 491 F.3d 266, 272 (5th Cir. 2007)** (internal quotation marks and citations omitted).

However, if the plan documents do not grant the plan administrator the ability to interpret the plan and determine eligibility for benefits, the reviewing court must review the benefits determination under a *de novo* standard of review. As articulated by the ***Ariana I*** district court, "[d]e novo review requires that the court apply the same standard as the plan administrator in deciding whether the benefits were owed under the plan's terms." ***Ariana M. v. Humana Health Plan of Texas, Inc.*, 2018 U.S. Dist. LEXIS 156917, at *33 (S.D. Tex., Sept. 14, 2018)** (citing ***Hightower v. Tex. Hosp. Ass'n*, 65 F.3d 443, 447 (5th Cir. 1995)**). With this, the court does not give any deference to the administrator's decision. Moreover, under the *de novo* standard, the reviewing court is allowed to construe and interpret the plan terms with no deference to the administrator's decision. ***Ariana III*, 884 F.3d at 250-56**.

Despite the significance of determining the applicable standard of review, ERISA's statutory provisions do not provide instruction for resolving the issue. As the Supreme Court has acknowledged, "[a]lthough it is a 'comprehensive and reticulated statute,' ERISA does not set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations." ***Firestone***, 489 U.S. at 109 (internal citations omitted).

The Supreme Court, however, addressed the issue in its ***Firestone*** decision and established the applicable rules for determining what standard of review governs ERISA claims for benefits in federal court. The Supreme Court held that "[c]onsistent with established principles of trust law, we hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." ***Id.* at 109, 115**. If the plan grants the administrator discretionary authority, the reviewing court will apply an abuse of discretion standard of review. ***Id.* at 115**.

§ 20.5.3 The Fifth Circuit's *En Banc* Holding

On March 1, 2018, the Fifth Circuit issued its opinion in ***Ariana III***, and overturned its own prior precedent governing the circumstances in which courts apply the *de novo* standard and abuse of discretion standard of review to cases challenging ERISA benefit determinations. **884 F.3d 246**.

Before the ***Ariana III*** decision, the law in the Fifth Circuit was governed by the court's decision in ***Pierre v. Connecticut General Life Insurance Company*, 932 F.2d 1552 (5th Cir. 1991)**. In ***Pierre***, the court applied an interpretation of the Supreme Court's ***Firestone*** decision that allowed the reviewing court to differentiate between a plan administrator's factual and legal conclusions. Under ***Pierre***, the standard of review was not automatically *de novo* simply because the applicable plan terms failed to grant the administrator the power to interpret the plan and decide claims for benefits. Instead, a court was required to apply an abuse of discretion standard of review to factual determinations even in cases when the plan's terms did not grant deference to the administrator. For legal determinations, the *de novo* standard was still applied in circumstances where the plan's terms did not grant deference to the administrator.

The *en banc* Fifth Circuit overturned ***Pierre*** and held that in cases where the plan does not grant discretionary authority to the administrator, ***Firestone*** requires *de novo* review of the administrator's determinations, irrespective as to whether they are factual or legal determinations.

In reversing ***Pierre***, the ***Ariana III*** majority detailed its reasoning as to why ***Pierre*** was not good law. The Fifth Circuit first acknowledged that "[n]o other circuit agrees that ***Firestone's*** default *de novo* standard is limited to the construing of plan terms." **884 F.3d at 250**. The Fifth Circuit further recognized that "[a]ll but one of those courts of appeals had the opportunity to consider ***Pierre***, and all that did so rejected its reasoning." ***Id.* at 251**.

In ***Pierre***, the Fifth Circuit applied an abuse of discretion standard of review for factual determinations because it predicted that *de novo* review of factual determinations would "increase litigation," which "reduce the size of the fund from which benefits are paid." **932 F.2d at 1559**. However, according to the court this prediction turned out to be incorrect.

In ***Ariana III***, the Fifth Circuit observed "[t]here is no indication that ERISA trials have depleted plan funds or overrun courts in those circuits, which are still able to grant summary judgment when the record warrants it." **884 F.3d at 254**. Furthermore, the majority pointed to the fact that because the Fifth Circuit was the only circuit that followed ***Pierre***, "ERISA denials involving nondiscretionary plans are reviewed with more deference in Texas, Louisiana, and Mississippi than they are in the rest of the country," which means that "employees working for the same company with the same health or retirement plan may suffer different fates in court depending on the circuit where they reside." ***Id.* at 255**. The Fifth Circuit also noted that other circuits have critiqued **Pierre's** conclusion that trust law supports the factual/legal dichotomy. For example, the majority pointed to a Seventh Circuit decision that explained it did not find any trust law principles that supported ***Pierre's*** conclusion. ***Id.* at 253** (citing ***Ramsey v. Hercules, Inc.*, 77 F.3d 199, 203-05 (7th Cir. 1996)**). Accordingly, the Fifth Circuit held that in this case, there was "no virtue in being a lonely voice in the wilderness," and overruled Pierre. ***Id.* at 256**.

Six of the fourteen judges dissented from the majority opinions and three separate dissenting opinions were issued. Senior Judge E. Grady Jolly, who authored the ***Pierre*** decision, dissented in ***Ariana III***, criticizing the majority for taking "an impractical view of the administrative process." ***Id.* at 257**. Judge Jolly argued that "a holistic reading of ***Firestone*** makes clear that its *de novo* standard of review only applies to legal questions." ***Id.*** The dissents also argued that trust law principles dictate that the applicable standard should be abuse of discretion, and in their view, affirming ***Pierre*** would still be consistent with ***Firestone***. ***Id.* at 260-66**.

Nevertheless, after ***Ariana III***, the Fifth Circuit will no longer differentiate between factual and legal conclusions in determining which standard to apply. ***Id.* at 256**. Instead, all challenges to a plan administrator's determinations will be subject to the same standard of review across the country.

The Fifth Circuit clarified that the district court's review of an administrator's findings is limited to the administrative record, even if facts are disputed. ***Id.* at**

256. Thus, a circuit split still exists on regarding the scope of the record in such cases. See, *e.g.*, ***Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 970 (9th Cir. 2006)** (holding that the judicial record should not be limited to the record before the plan administrator in *de novo* cases). Despite conflicting rulings in other circuits, the ***Ariana III*** majority held that a limited record "encourag[es] parties to resolve their dispute at the administrative stage" and "allows for speedier resolution." ***Ariana III*, 884 F.3d at 256**.

The Fifth Circuit explained that a *de novo* standard, limited to the administrative record, "serves the two ERISA goals of allowing for efficient yet meaningful judicial review." ***Id.* at 257**.

§ 20.5.4 Conclusion

In the realm of ERISA benefits litigation, the standard of review can significantly influence the reviewing court's ultimate holding. If an abuse of discretion standard is employed, the company and/or the plan administrator face a far easier task in convincing the court to affirm the underlying administrator's determinations. If the *de novo* standard is applied, however, plaintiff claimants receive a clean slate and the court gives no deference to the administrator's determinations.

While plan administrators in the Fifth Circuit previously received deference for their factual determinations regardless of whether or not the applicable plan terms granted them discretionary authority, the ***Ariana III*** decision invalidated that rule. Now, if the plan does not expressly grant authority to the administrator to interpret plan terms and determine benefit claims, the *de novo* standard will be applied, allowing the reviewing court to "second guess" both the administrator's factual and legal determinations.

Given this change, and the impact of litigating under the deferential abuse of discretion standard of review as compared to the *de novo* standard, it is more important than ever for plans that operate within the Fifth Circuit to ensure that their terms expressly grant discretionary authority to the administrator to interpret plan terms and decide claims for benefits. Indeed, the United States Supreme Court recognized in ***Firestone*** that "the validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue." ***Firestone*, 489 U.S. at 115**. Companies would be well advised to grant their plan administrators the power to do just that—interpret and construe the terms of the plan, determine eligibility, and decide claims for plan benefits. By doing so, the administrator's determinations should be subject to an abuse of discretion standard of review if challenged in court, thereby improving the likelihood they will be affirmed.

§ 20.6 The Supreme Court Returns to Applying Contract Law Principles to Collective Bargaining Agreements

In a 2018 case, the U.S. Supreme Court again emphasized that collective bargaining agreements must be interpreted according to ordinary principles of contract law. In ***CNH Industrial N.V. v. Reese*, 138 S.Ct. 761 (2018)**, the Court reaffirmed its recent precedent that traditional rules for contract interpretation apply to collective bargaining agreements, and in particular, to the question of whether an agreement is ambiguous. This decision built on its previous decision in ***M&G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926 (2015)**, which rejected the Sixth Circuit's "***Yard-Man*** inferences" that tended to favor the vesting of health care benefits.

The ***Reese*** case, as with ***Tackett***, involved "a dispute between retirees and their former employer about whether an expired collective-bargaining agreement created a vested right to lifetime health care benefits." ***Reese*, 138 S.Ct. at 764**. There, two companies agreed to a collective bargaining agreement in 1998 that provided health care benefits under a group benefit plan to "certain employees who retire under the . . . Pension Plan." ***Id.*** (internal citations omitted). Under the agreement, all other coverages, such as life insurance, ended upon retirement. The group benefit plan was made part of the collective bargaining agreement. The collective bargaining agreement, in turn, contained a "general durational clause" stating that it would terminate in May 2004.

When the 1998 agreement terminated in May 2004, a group of retirees brought suit to obtain a declaration that their health care benefits vested for life. Applying the Court's recent decision in ***Tackett***, the District Court, and later, the Sixth Circuit, concluded that the agreement was ambiguous. First, the 1998 agreement carved out certain benefits like life insurance and stated that these coverages ended at times that were different than other coverages. Second, the 1998 agreement tied health care benefits to pension eligibility. Having found an ambiguity, the Sixth Circuit applied traditional contract principles and looked outside the contract to extrinsic evidence, which supported lifetime vesting. The ***Reese*** case contained a strong dissent from Judge Sutton, who concluded that there was no ambiguity because "the company never promised to provide healthcare benefits for life, and the agreement contained a durational clause that limited all of the benefits." ***Id.* at 765 (citing 854 F.3d 877, 882)**.

The Supreme Court granted certiorari, and in a *per curiam* decision, reversed the Sixth Circuit on the ground that the decision "does not comport with ***Tackett's*** direction to apply ordinary contract principles." ***Id.*** In particular, the Court took issue with the Sixth Circuit's holding that the collective bargaining agreement was ambiguous. According to the Court, the Sixth Circuit found ambiguity by "applying several ***Yard-Man*** inferences" rather than traditional contract principles, namely declining to apply the general durational class and then by inferring vesting. The Court concluded that when a collective bargaining agreement is "merely silent on the question of vesting," other Courts of Appeal would conclude that it does not vest benefits, not that there is ambiguity. ***Id.* at 766**. With this in mind, the Court held that "the only reasonable interpretation of the 1998 agreement is that the health care benefits expired when the collective-bargaining agreement expired in May 2004." ***Id.***

This case, combined with the Court's previous opinion in ***Tackett***, make it abundantly clear that the Court expects traditional contract principles to control all aspects of interpreting collective bargaining agreements. Recent decisions from the lower federal courts have cited ***Reese*** for the proposition that traditional contract principles are controlling. *See*, *e.g.*, ***American Federation of Musicians of the U.S.A. and Canada v. Paramount Pictures Corp.*, 903 F.3d 968, 977 (9th Cir. 2018)** (quoting ***Reese***); ***Beale v. Kraft Heinz Foods Co.*, No. 3:16-CV-00119-SMR-HCA, 2018 WL 2085277, at *7 (S.D. Iowa Mar. 27, 2018)** (quoting ***Reese***). Taking a somewhat cynical view, one Sixth Circuit panel characterized the rejection of the ***Yard-Man*** inferences as consistent with "a growing line of cases that refuses to put much legal weight on oral and written promises, employer custom and practice and even arguments about reliance in light of the enormous (and sometimes unexpected burden) retiree healthcare costs present for employers." ***IUE-CWA v. General Electric Co.*, No. 17-3885, 2018 WL 3949188**, at *8 (6th Cir. Aug. 16, 2018) (quoting Maria O'Brien Hylton, ***After Tackett: Incomplete Contracts for Post-Employment Healthcare*, 36 Pace L. Rev. 317, 322-23 (2016)**).

§ 20.7 Returning Back to School: An Update on University Retirement Plan Litigation

In last year's *Recent Developments*,[30] we described the wave of ERISA class action complaints that made claims related to defined contribution plans (primarily 403(b) plans[31]) sponsored by private universities. This wave started with the filing of cases in August 2016, with additional suits following in 2017. These University Plan lawsuits included allegations of imprudent selection and retention of investments and plan recordkeepers, which in turn allegedly caused the plans to pay excessive fees and suffer poor investment performance. In making these allegations, the complaints explicitly or implicitly referenced

30. D. Lee Heavner & Lisa Brogan, *Back to School: A Primer on University 403(b) Plan Litigation, in* Recent Developments in Business and Corporate Litigation §§ 22.8 (Vol. 2, 2018 ed.).

31. The plans at issue in these cases are primarily 403(b) plans; however, the plan at issue in the MIT case is a 401(k) plan.

corporate 401(k) plans. We explained the historical evolution of the 401(k) and 403(b) plans and their different evolutionary paths.

At press time last year, six district courts had addressed eight cases, but only at the motion to dismiss stage.[32] There were no rulings on the merits. Only one lawsuit, the one against the University of Pennsylvania, had been dismissed in its entirety.

The questions posed in our analysis last year included whether the courts would measure plan fiduciaries' duties of loyalty and prudence against a backdrop specific to 403(b) plans, or, rather, treat them as 401(k) plans, ignoring or dispensing with the historical differences between these plans.

We also asked whether the Court would allow the plaintiffs to "collapse" the separate duties of loyalty and prudence under ERISA or, as the Court found in the Princeton University case on which we reported, allow the breach of loyalty claims to piggyback on to the prudence claims.

A year later, two additional cases, against Northwestern University and Washington University in St. Louis, have been dismissed in their entirety.[33] One case, against New York University, has proceeded to trial and to a defense verdict, and is on appeal.[34] Two cases, against the University of Chicago and Duke, have settled.[35] Additional cases have been filed, bringing the total to twenty; more cases have proceeded beyond the motion to dismiss stage, and trials are scheduled for 2019 in the cases against Vanderbilt and MIT.

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32. *Clark v. Duke University* ("*Duke*"), No. 1:16-cv-01044-CLE-LPA, 2017 U.S. Dist. LEXIS 164370 (M.D.N.C. May 11, 2017); *Henderson v. Emory University* ("*Emory*"), 252 F. Supp. 3d 1344 (N.D. Ga. May 10, 2017); *Cates v. The Trustees of Columbia University in the City of N.Y.* ("*Columbia*"), No. 16-cv-6524, 2017 U.S. Dist. LEXIS 138330 (S.D.N.Y. August 28, 2017) (motion to reconsider denied by *Cates v. The Trustees of Columbia University in the City of N.Y.*, 2017 U.S. Dist. LEXIS 175387 (S.D.N.Y. October 20, 2017)); *Sacerdote v. New York University* ("*Sacerdote*" or "*NYU*"), No. 16-cv-06284, 2017 U.S. Dist. LEXIS 173599, (S.D.N.Y. August 25, 2017); *Cunningham v. Cornell University* ("*Cornell*"), No. 16-cv-6525(PKC), 2017 U.S. Dist. LEXIS 162420 (S.D.N.Y. September 29, 2017); *Tracey v. Mass. Inst. of Tech.* ("*MIT*"), No. 16-cv-11620-NMG, 2017 U.S. Dist. LEXIS 165070 (D. Mass. October 4, 2017), *Memorandum and Order Adopting in Part Report and Recommendation*, 2017 U.S. Dist. LEXIS 162806 (D. Mass. Aug. 31, 2017); *Nicolas v. Trs. of Princeton University* ("*Princeton*"), No. 17-3965, 2017 U.S. Dist. LEXIS 151775 (D.N.J. Sept. 25, 2017); *Sweda v. University of Pennsylvania* ("*Penn*"), No. 16cv4329, 2017 U.S. Dist. LEXIS 153958, (E.D. Pa. Sept. 21, 2017).

33. Both the Penn and Northwestern dismissal orders have been appealed.

34. *Sacerdote v. New York University*, No. 16-06284 (S.D.N.Y., Amended Complaint filed November 9, 2016).

35. *Daugherty et al. v. The University of Chicago* ("*U. of Chicago*"), No. 1:17-cv-0376 (N.D. Ill.), Final Approval Order and Judgment dated 9/12/18; *Duke*, Motion for Preliminary Approval of Class Settlement granted 2/7/19.

The following table summarizes the current status of all of these cases.

Status of ERISA Class Action Lawsuits Related to University Retirement Plans

Trial Completed			
Case Name	**District Court**	**Initial Complaint Date**	**Notes**
Sacerdote v. New York Univ.	S.D.N.Y.	8/9/2016	Trial in April 2018. Opinion and Order entered on 7/31/2018 in favor of defendants on all counts. Appeal is pending.
Motion to Dismiss Granted in Full			
Case Name	**District Court**	**Initial Complaint Date**	**Notes**
Sweda v. Univ. of Pennsylvania	E.D. Pa.	8/10/2016	Notice of Appeal filed.
Divane v. Northwestern Univ.	N.D. Ill.	8/17/2016	Notice of Appeal filed.
Davis v. Washington Univ. in St. Louis; Sims-King v. Washington Univ. in St. Louis	E.D. Mo.	6/8/2017 6/23/2017	Notice of Appeal filed.
Settled			
Case Name	**District Court**	**Initial Complaint Date**	
Clark v. Duke Univ.	M.D.N.C.	8/10/2016	Motion for preliminary approval of settlement granted, 2/7/2019.
Daugherty v. Univ. of Chicago	N.D. Ill.	5/18/2017	Settled.
Motion to Dismiss Granted in Part and Denied in Part			
Case Name(s)	**District Court**	**Initial Complaint Date**	
Tracey v. MIT	D. Mass.	8/9/2016	Trial scheduled for 2019.
Vellali v. Yale Univ.	D. Conn.	8/9/2016	
Cassell v. Vanderbilt Univ.	M.D. Tenn.	8/10/2016	Trial scheduled for 2019.
Henderson v. Emory Univ.	N.D. Ga.	8/11/2016	
Kelly v. Johns Hopkins Univ.	D. Md.	8/11/2016	Notice of Appeal filed.
Doe v. Columbia Univ.; Cates v. Trustees of Columbia Univ.	S.D.N.Y.	8/16/2016 8/17/2016	
Cunningham v. Cornell Univ.	S.D.N.Y.	8/17/2016	
Nicholas v. Princeton Univ.	D.N.J.	5/23/2017	
Short v. Brown Univ.	D.R.I.	7/6/2017	
Other			
Case Name	**District Court**	**Initial Complaint Date**	**Status**
Munro v. Univ. of Southern California	C.D. Cal.	8/17/2016	District court denied defendants' motion to compel arbitration. Ninth Circuit upheld.
Wilcox v. Georgetown Univ.	D.D.C.	2/23/2018	Motion to dismiss is pending.
Stanley v. George Washington Univ.	D.D.C.	4/13/2018	Motion to dismiss is pending.
D'Amore v. Univ. of Rochester	W.D.N.Y.	5/11/2018	Voluntarily dismissed with prejudice on 1/24/2019.
Mulligan v. Long Island Univ.	E.D.N.Y.	5/15/2018	Defendants have not yet responded to the complaint.

VICTORIES

FOR THE PLAINTIFFS: The fact that all but three of the original University cases survived a motion to dismiss is a success for the plaintiffs' bar.

FOR THE DEFENSE: Courts have ruled that alleging that plans paid excessive fees is not sufficient to sustain a lawsuit for breach of fiduciary duties. To sustain a breach of loyalty claim, plaintiffs must plead facts sufficient to raise a plausible inference that a defendant took actions for the purpose of benefiting themselves or a connected third party or that they acted under a conflict of interest.[36] To sustain a claim for breach of the duty of prudence, plaintiffs must allege that the process in choosing investment options was flawed, or other evidence of a violation of a breach of duty beyond the bare allegation that fees were excessive.[37] Courts have found that "20/20 hindsight" is not enough for the cases to survive.

§ 20.7.1 Anatomy of a University Retirement Plan Decision

In what was perhaps the most notable development in these cases during the past year, the ***Sacerdote*** case culminated in a trial and Opinion and Order.

The ***Sacerdote*** plaintiffs represented a class of approximately 20,000 participants and beneficiaries in two defined contribution plans sponsored by NYU ("NYU Plans"). Collectively, the NYU Plans held more than $4.6 billion in assets as of the end of 2016,[38] and each plan ranked among the largest 0.06 percent of defined contribution plans in terms of assets.[39]

Plaintiffs' first complaint contained seven counts and allegations of a variety of breaches of fiduciary duties and prohibited transactions.[40] Prior to the trial, the court disposed of all of claims except the following two: the NYU Retirement Plan Committee ("NYU Committee") failed to prudently select and monitor the plans' recordkeeping vendors, which resulted in excessive fees, and the NYU Committee imprudently failed to remove two investment options (TIAA

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36. *See*, *e.g.*, *Davis et al. v. Washington University in St. Louis*, No. 4:17-cv-01641, 2018 U.S. Dist. LEXIS 167594 (September 28, 2018) at *9.

37. For example, one district court stated that "a mere inference of wrongdoing" in choosing investment options was not enough to withstand a motion to dismiss and that "the diverse selection of funds available to plan participants negates any claim that defendants breached their duties of prudence simply because cheaper funds were available." *Id*. at *9.

38. Opinion and Order, *Sacerdote v. New York Univ.*, No. 16-cv-6284 (S.D.N.Y. Jul. 31, 2018), pp. 16-17.

39. Opinion and Order (regarding Motion to Dismiss), *Sacerdote et al. v. New York University*, No. 16-cv-6284 (S.D.N.Y. Aug. 25, 2017), p. 4.

40. Opinion and Order, *Sacerdote v. New York Univ.*, No. 16-cv-6284 (S.D.N.Y. Jul. 31, 2018), p. 4.

Real Estate Account and the CREF Stock Account, collectively "At-Issue Investments") from the NYU Plans.[41]

Judge Katherine B. Forrest presided over an eight-day bench trial in April 2018. On July 31, 2018, Judge Forrest issued a 78-page Opinion and Order finding for the defendants on all claims. Plaintiffs have appealed to the Second Circuit.

The detailed Order is noteworthy for many reasons in addition to the finding of no liability. The order references expert testimony frequently, and it noted that Court found Defendants' experts credible but did not find Plaintiffs' experts persuasive. We list some key aspects of the decision below; however, because of space limitations, we omit important elements of the decision, and we encourage the reader to read the decision in its entirety.

- *Focus on fiduciary process*: The Order discussed the Committee's fiduciary process at great length and delved into details of the Committee's process, including quarterly meetings, request for proposal ("RFP") process, fee structure and negotiations, performance monitoring, and advice from their investment advisor. This focus on process illustrates the important role that process plays in ERISA litigation.
- *Deficiencies in the process did not condemn the entire process*: The Court found the testimony of several Committee members concerning.[42] While the Court ultimately found that these individuals' lapses did not compromise the entire process, it is an instructive read about the Court's concerns with the fiduciaries' behavior.
- *Requests for proposals ("RFPs") are not required in order to ensure that recordkeeping fees are reasonable:* The Court dismissed Plaintiffs' recordkeeping claims, and it rejected Plaintiffs' claim that the Committee should have issued RFPs more frequently.[43] The Court also held that regardless of the frequency of RFPs, the NYU Plans consistently obtained rate reductions,[44] and the Court noted that "competitive bidding is not *per se* required under ERISA, but it can be an example of an action taken to ensure fees are appropriate."[45]
- *Relying on an advisor does not relieve fiduciaries of their responsibilities; deviating from an advisor's recommendation does not necessarily indicate imprudence:* The Court found that while the Committee relied on the advisor's reports and advice, they did not do so blindly. Committee members asked questions of the advisor regarding its advice, including questioning the viability of a metric used to evaluate

41. *Id.*, pp. 2-3; *see also*, Order Denying Motion for Reconsideration, 2017 U.S. Dist. LEXIS 173599 (S.D.N.Y. October 19, 2017).

42. *Id.* at 24-27.

43. *Id.* at 40.

44. *Id.*

45. *Id.* at 14.

the funds. Although the Committee's decisions were generally consistent with the advisor's advice, there was at least one occasion in which the Committee deviated from the advisor's recommendation. The Court found that acting in a manner consistent with a recommendation "does not mean the Committee improperly deferred to [the advisor]; it could just as easily mean (and the Court views it as such) that [the advisor's] recommendations also happened to be appropriate,"[46] and that deviating from recommendations can "demonstrate Committee decisionmaking independent of [the advisor]."[47]

- *Substantive proof:* The Court found that Plaintiffs failed to demonstrate that either of the At-Issue Investments was objectively imprudent. The Court noted that both of the At-Issue Investments were "widely accepted as an appropriate and desirable investment by other market participants."[48] Additionally, while Plaintiffs' experts opined that both of the At-Issue Investments exhibited historical underperformance, the Court agreed with Defendants that when the appropriate benchmarks are used the At-Issue Investments "performed as well as would have been expected[.]"[49]
- *Multiple recordkeepers does not necessarily demonstrate imprudence:* The Court rejected Plaintiffs' arguments that the Committee's failure to consolidate to a single recordkeeper for each of the Plans resulted in higher fees.[50] The Court found that the evidence did not support Plaintiffs' assumption that having one recordkeeper would necessarily reduce the Plans' fees and states that "even assuming that a single record-keeper might have resulted in lower fees, the Court is not persuaded that the Committee was imprudent for failing to consolidate the Plans sooner."[51] The Court notes other factors such as significant challenges to consolidation and that the majority of TIAA's largest clients use multiple recordkeepers.[52]
- *Burden of proof regarding damages:* The Court found that Plaintiffs had the burden to show that Defendants did not follow a prudent process and that the alleged breaches caused the Plans to suffer a loss. The Court stated, "While loss is not required to show that a breach of the duty of prudence occurred, the lack of loss does suggest that there

46. *Id.* at 60-61.
47. *Id.* at 34.
48. *Id.* at 68.
49. *Id.* at 74.
50. In 2009 each Plan had two recordkeepers. One of the Plans consolidated to a single recordkeeper in 2013, and the other Plan consolidated in 2018.
51. Opinion and Order, *Sacerdote v. New York Univ.*, No. 16-cv-6284 (S.D.N.Y. Jul. 31, 2018), pp. 32.
52. *Id.* at fn. 45.

was not some obvious danger to the Plans that the Committee failed to recognize, and therefore no recovery is appropriate."[53]

§ 20.7.2 Two Additional Complaints Dismissed in Their Entirety

As we explained in last year's article, the U.S. District Court for the Eastern District of Pennsylvania dismissed all of the claims against Penn on September 21, 2017. That case is now on appeal to the Court of Appeals for the Third Circuit and was argued on October 2, 2018.[54] Briefs have been filed by *amici curiae* highlighting the differences between 403(b) and 401(k) plans.[55]

Since that time, two additional complaints have been dismissed in their entirety. The case against Northwestern University claimed that the University breached its fiduciary duties by having participants in two retirement plans pay excessive fees for recordkeeping and investment management.[56] The U.S. District Court for the Northern District of Illinois dismissed all seven counts with prejudice.[57] It noted that the amended complaint at issue (141 pages) and the proposed second amended complaint were "massive" but that most of the allegations were not specific to the plans and defendants in the case, but rather "a description of plaintiffs' opinions both on ERISA law and on a proper long-term investment strategy for average people. . . ."[58] In its ruling, the Court referenced the historical differences between 403(b) plans and 401(k) plans. For example, the Court pointed out that 403(b) plans were originally required to offer only annuities, and that the plans had good reasons to offer the TIAA-CREF Traditional Annuity.[59]

The Court rejected plaintiffs' claims that there were too many investment options,[60] that the University inappropriately offered retail-share class investment funds when share classes were available with lower fees,[61] and that recordkeeping was too expensive.[62] The Court found many of plaintiffs' theories to be "paternalistic," finding, for example, that the fact that plaintiffs believe that participants would prefer captive funds does not mean that participants should

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53. *Id.* at fn. 43.
54. *Sweda v. University of Pennsylvania*, No. 2:16cv04329, 2017 U.S. Dist. LEXIS 153958 (E.D. Penn. Sept. 21, 2017), appeal pending, No. 17-3244 (3rd Cir.).
55. *Id.*
56. *Divane et al. v. Northwestern University et al.*, No. 16 C 8157, 2018 U.S. Dist. LEXIS 87645 (N.D. Ill. May 25, 2018).
57. *Id.*
58. *Id.* at *5.
59. *Id.* at *19.
60. *Id.* at *26-29.
61. *Id.* at *27
62. *Id.* at *23.

not be left to make their own choices, and that the plans cannot be faulted for allowing participant choice.[63]

Finally, the Court found that the defendants had sufficiently pleaded that fees paid for services were reasonable and therefore dismissed the prohibited transactions counts.[64]

The case against Washington University in St. Louis was also dismissed in its entirety, with prejudice, by the U.S. District Court for the Eastern District of Missouri.[65] The plaintiffs alleged that the University violated its fiduciary duties by paying excessive fees for recordkeeping and administrative and investment management.[66] Plaintiffs also alleged that fiduciaries failed to address fund underperformance and engaged in prohibited transactions.[67]

The Court rejected the "false premise" that just because the plan's fees could have been lower, the defendants necessarily breached their fiduciary duties.[68] The Court found that the plaintiffs failed to allege that the process of choosing the investment options was flawed, other than a mere inference of fiduciary wrongdoing.[69] These allegations were insufficient to allege a breach of fiduciary duties based upon excessive fees.[70]

The Court also rejected a claim that the defendants imprudently retained three investments in the plan. The investments challenged by the plaintiffs included the TIAA Traditional Annuity.[71] The Court found that it should give deference to plan administrators in their investment decisions, and that even if certain funds underperformed, that did not establish whether they were impudent choices at the outset.[72]

Finally, plaintiffs contended that the transfer of plan assets to the TIAA Traditional Annuity Option "as security for repayment of a plan loan" violated ERISA because it benefited a party in interest.[73] The Court found no allegation of any plausible violation of ERISA and dismissed these counts.[74]

§ 20.7.3 Trends Seen in Rulings to Date

Last year, we reported on five cases in which district courts had granted motions to dismiss in part—that is, allowing certain claims to survive but dismissing others. Since that time, additional "mixed" rulings on motions to dismiss have

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63. *Id*. at *20-21, *citing Loomis v. Exelon*, 658 F.3d 667 (7th Cir. 2011).
64. *Id*. at 28-33.
65. *Davis et al. v. Washington University in St. Louis*, No. 4:17-cv-01641, 2018 U.S. Dist. LEXIS 167594 (September 28, 2018).
66. *Id*.
67. *Id*.
68. *Id*. at *8-10.
69. *Id*. at *9.
70. *Id*.
71. *Id*. at *12-15.
72. *Id*. at *13-14.
73. *Id*. at *15-16.
74. *Id*. at *16-17.

been reached in cases against Yale, Vanderbilt, Johns Hopkins, and Brown Universities.[75] As observed last year, the continuing trend of courts has been to dismiss the loyalty claims but to allow the duty of prudence claims related to monitoring or investigating investment options, administrative fees, and costs to survive. The recent rulings followed this pattern, for the most part.

- *"Decision Paralysis" / Too Many Funds:* This theory has generally failed, as courts have noted that no particular plaintiff is alleged to have been confused or damaged, and there is no duty to limit the number of options even if it would result in cost savings.[76]
- *Duty of Loyalty / Prohibited Transactions:* Courts have dismissed claims that revenue-sharing from a mutual fund is a prohibited transaction under ERISA.[77] Courts have found that simply alleging that a fiduciary put his own, or a connected third party's, interests ahead of plan participants is insufficient to establish a breach of the duty of loyalty.[78]

  Several courts have dismissed claims that fiduciaries' actions violated the "party in interest" prohibited transaction provisions in ERISA. Some courts have concluded that there was no transfer of plan property to a party in interest because the funds from which the plan received revenue-sharing payments were not the assets or property of the plan,[79] or that a "transaction" did not occur under Section 406(a)(1) every time compensation was paid to a party-in-interest.[80] Some courts have allowed certain prohibited transaction claims to survive.[81]
- *Too Many Recordkeepers / Bundled Products:* Some allegations survived a motion to dismiss when it was alleged that multiple recordkeepers increased costs.[82] While certain earlier decisions found that "bundling" is a common practice that is not on its own imprudent,[83] the Court in

75. *Vellali et al. v. Yale*, 308 F. Supp. 3d 673 (D.C. Conn. March 30, 2018); *Cassell et al. v. Vanderbilt*, 205 F. Supp. 3d 1056 (M.D. Tenn. January 5, 2018); *Kelly et al. v. The Johns Hopkins University*, No. GLR-16-2835, 2017 U.S. Dist. LEXIS 161547 (September 28, 2017); *Short et al. v. Brown University*, 320 F. Supp. 3d 363 (D.R.I. July 11, 2018).

76. *See*, *e.g.*, *Penn*, at *27-29; *see also Johns Hopkins*, 2018 U.S. Dist. LEXIS 161517 at *3, *citing NYU*, *Emory*, and *Penn*.

77. *See*, *e.g.*, *Johns Hopkins*, 2018 U.S. Dist. LEXIS 16157 at *4-5, *citing Emory*, *NYU*, *Duke*.

78. *See*, *e.g.*, *Cornell*, 2017 U.S. Dist. LEXIS 162420 at *13-14; *NYU*, 2017 U.S. Dist. LEXIS 137115 at *5-6; *Columbia*, 2017 U.S. Dist. LEXIS 138330 at *6.

79. *See*, *e.g.*, *Emory*, 252 F. Supp. 3d at 1356-1357; *NYU*, 2017 U.S. Dist. LEXIS 137115 at *37-38.

80. *See*, *e.g.*, *Vanderbilt*, 285 F. Supp. 3d at 1069; *NYU*, 2017 U.S. Dist. LEXIS 13715 at *37-38.

81. *See*, *e.g.*, *Emory*, 252 F. Supp. 3d at 1356; *Johns Hopkins*, 2018 U.S. Dist. LEXIS 161517 at *6.

82. *Emory*, 252 F. Supp. 3d 1344 at 1353.

83. *See*, *e.g.*, *Penn,* 2017 U.S. Dist. LEXIS at *21-22.

the ***Yale*** action found that just because bundling arrangements generally benefit participants that does not mean that the defendants in that case prudently concluded that bundling would benefit the participants.[84]

- *Excessive Administrative Fees / Wrong Share Class:* Some courts found that allegations that fees were higher than similar plans, that fiduciaries did not engage in a bidding process, or that fiduciaries did not consider different share classes to be enough to survive dismissal.[85] Other courts dismissed claims that certain practices such as layering of fees were *per se* violations of ERISA.[86]
- *Duty of Prudence / Underperforming Funds:* If plaintiffs pled specific benchmarks for performance and expenses, claims have generally survived.[87] If not, mere allegations have generally been dismissed.[88]

§ 20.7.4 Lessons Learned

The landscape regarding University retirement plans continues to evolve, and it is too early to predict how this wave of cases will develop. Nevertheless, the district court rulings to date are instructive on the issues that these courts view as important. These issues include the following.

- *Understanding fiduciary duties:* Do plan committees understand their responsibilities and that these responsibilities cannot be delegated away? Did the plan committee members receive adequate training on their fiduciary obligations?
- *Role of outside consultants:* Did the plan committee consult with experts when appropriate? Did the plan committee remain engaged and continue to exercise independent judgment after the retention of a consultant?
- *Monitoring recordkeeping fees*: Did the plan committee conduct RFPs or use other processes regularly to select and review plan recordkeepers?
- *Monitoring*: Did the plan committee meet regularly? Did the committee have an investment policy statement and review it at least annually? Did the plan committee establish and follow processes for selecting and monitoring investments? Did the plan committee document decisions?

At this relatively early point in the University plan excessive fee litigation, we do not yet have the benefit of much appellate guidance.

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84. *Yale*, 308 F. Supp. 3d at 683-684.

85. *See, e.g.*, *Johns Hopkins*, 2018 U.S. Dist. LEXIS 161517 at *4-5, *citing Emory*, *NYU*, *Duke*; *Yale*, 308 F. Supp. 3d at 685.

86. *See*, *e.g.*, *Brown*, 320 F. Supp. at 369.

87. *See, e.g., Brown*, 320 F. Supp. 3d at 372, *citing NYU*.

88. *See, e.g., Johns Hopkins*, 2018 U.S. Dist. LEXIS 16157 at *3-4, *citing Emory*, *Duke*, and *NYU*.

As noted, only one case has gone to trial on the merits. Several rulings on the pleadings are on appeal. Thus far, the only excessive fee case to reach the Supreme Court has been ***Tibble v. Edison***, discussed in last year's *Recent Developments*, which was significant in establishing that there is an ongoing fiduciary duty to monitor plan investments in 401(k) plans.[89] The United States Supreme Court has also spoken on pleading standards in 401(k) fiduciary litigation,[90] but not on 403(b) plans. There will be much to learn as these cases move forward on the merits, and through the appellate courts.

89. *Tibble v. Edison International*, 135 S. Ct. 1823 (2015).
90. *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014).