

NYU VICTORIOUS IN EXCESSIVE FEE CASE

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NYU is one of several universities that have been named in ERISA lawsuits that allege breaches of fiduciary duties relating to excessive service provider fees and imprudent investment fund options in a 403(b) plan sponsored by the university. A federal trial court considered the merits of the ERISA claims in a case brought against NYU, and the federal judge ruled in favor of NYU on all claims.

The plaintiffs in the case were NYU employees who alleged that NYU's Retirement Plan Committee (the "Committee") failed to fulfill its ERISA fiduciary duties, which resulted in losses of more than \$358 million that were suffered in two different 403(b) retirement plans for which the Committee served as an ERISA fiduciary. The plaintiffs' first claim was that the Committee imprudently managed the selection and monitoring of recordkeeping vendors, which resulted in excessively high fees. The plaintiffs' second claim was that the Committee imprudently failed to remove two investment fund options which underperformed and resulted in significant plan investment losses.

While the court acknowledged that there were deficiencies in the Committee's processes, including Committee members who "displayed a concerning lack of knowledge relevant to the Committee's mandate," the court still found that the plaintiffs had not adequately proven that the Committee acted imprudently or that the losses were the result of any such deficiencies. Significant findings by the court in this case include the following:

- Certain Committee members were under-prepared or relied too heavily on the Committee-appointed investment advisor, but there were other more well-equipped Committee members who, together with the investment advisor, allowed the Committee to perform its duties adequately.
- The evidence presented supported a finding that the Committee prudently managed its recordkeepers by running prudent RFP processes, by obtaining lower fees for one of the 403(b) plans when plan consolidation was impractical, and by consolidating recordkeepers for the other 403(b) plan.
- Plaintiffs did not meet their burden of proof as to the damages (i.e., plan losses) for excessive recordkeeping fees because the plaintiffs failed to demonstrate by a preponderance of the evidence that the recordkeeping fee ranges asserted by the plaintiffs' to be prudent were the only plausible or prudent ones – "or, indeed, that any comparable Plan has ever charged within that range."

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- The evidence also demonstrated that the Committee closely monitored the performance of the investment fund options; that evidence included testimony that the Committee:
 - Received and reviewed detailed reports analyzing the investment options;
 - Discussed investment performance at numerous Committee meetings, and asked questions of the investment advisor regarding his analysis; and
 - Compiled a watch list to monitor certain funds.
- The plaintiffs did not demonstrate that the real estate fund and the stock fund, which the plaintiffs alleged to be imprudent, did not underperform significantly enough to find the Committee breached its duties by failing to remove the funds, or that the plans suffered losses due to their inclusion.

This case reminds us of the importance of having a prudent process for selecting and monitoring service providers and plan investments, and then documenting that process. Even in the face of potentially damaging gaps in the composition and involvement of the Committee members, the judge in this case found sufficient documentation of a fiduciary process that ultimately worked in favor of NYU. *Sacerdote v. New York University* S.D.N.Y 2018.