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# 403(b) University Cases Move Forward: Cassell v. Vanderbilt University

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A lawsuit against Vanderbilt University is moving forward based on allegations that the university and its fiduciaries mismanaged its retirement plan by paying excessive fees and maintaining poor investment options.

In that lawsuit, *Cassell v. Vanderbilt et al.*, plaintiffs filed a 160-page complaint alleging multiple violations of ERISA. *Cassell v. Vanderbilt*, No. 3:16-cv-02086 (M.D. Tenn. Jan. 5, 2018). *Cassell* is one of numerous class action lawsuits that have been filed against prominent universities based on similar allegations. The lawsuits allege that Internal Revenue Code Section 403(b) plan fiduciaries breached duties of prudence and loyalty, and engaged in prohibited transactions. Vanderbilt University, like other schools, filed a motion to dismiss the claims. The court granted part of its motion, but allowed the rest of the lawsuit to proceed.

In its opinion, the court outright rejected the breach of loyalty claims, explaining that they simply “piggyback off [plaintiffs’] prudence claims.” This ruling is consistent with the decisions of several courts that have dismissed breach of loyalty claims in university 403(b) cases.

With respect to plaintiffs’ prudence claims, the court handed Vanderbilt a mixed bag. The court dismissed the claim that defendants impermissibly “locked in” record keepers and investment options as time-barred to the extent that claims arose from the initial agreement with the record keeper. The court also dismissed plaintiffs’ claim that the plan offered “too many options.”

However, the court allowed plaintiffs’ claim that defendants failed to solicit competitive bids for record keepers to proceed, in so far as those claims arose within the statute of limitations. The court also allowed plaintiffs’ claims alleging a failure to adequately monitor “revenue sharing” agreements and use of multiple record keepers to proceed. Defendants argued that having multiple record keepers does not mean it paid unreasonable administrative fees because each record keeper was paid a reasonable fee. In response, the court explained that it could not assess the defendants’ factual claim at this stage of the litigation.

Notably, with respect to the prohibited transactions claims, the court held that “a decision to continue certain investments, or a defendant’s failure to act, cannot constitute a ‘transaction’ for purposes of the ‘prohibited transactions’ in 29 U.S.C. § 1106” and dismissed plaintiffs’ prohibited transactions claims with respect to maintaining certain investments in the plan. On the other hand, however, the court allowed to proceed the prohibited transaction claims regarding multiple record keepers who allegedly were “parties in interest” under ERISA.

The *Vanderbilt* decision is the latest in a series of “mixed bag” rulings. These rulings permit a significant amount of the plaintiffs’ claims to proceed beyond a motion to dismiss, which often results in significant discovery and litigation costs. It will be very interesting to see how courts rule on motions for summary judgment in these cases. Summary judgment motions, which usually proceed after some discovery has been undertaken, allow courts to weigh facts and consider the merits of the arguments in a way that cannot be done on a motion to dismiss. Undoubtedly, these cases will shape and define how litigants look at fiduciary standards and prohibited transactions issues going forward.