VANDERBILT SETTLES 403(B) ERISA CASE, INCLUDING CLAIMS REGARDING USE OF PARTICIPANT INFORMATION/DATA

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A group of 40,000 participants covered by 403(b) retirement plans sponsored by Vanderbilt University filed a lawsuit against the University and a plan oversight committee, among others, for a variety of ERISA fiduciary breach claims, including payment of unreasonable administrative and investment management fees and maintenance of underperforming investment options. Interestingly, the lawsuit also included a claim for failing to protect confidential participant information and data from being used by the third party provider/recordkeeper to market various other unrelated financial products sold by the provider/recordkeeper.

The parties recently reached a substantial, court-approved monetary settlement of $14.5 million after lengthy negotiations that were aided by a mediator. The settlement agreement also imposed a number of non-monetary conditions on the future administration of the University's 403(b) retirement plans, including the obligations to:

- Disclose to currently employed participants information regarding investment fees and performance for both current investment options as well as any frozen annuity accounts, and to provide contact information to facilitate fund transfers.
- Conduct a request for proposals (RFP) for plan recordkeeping, administrative and investment service provider(s) following which the University may assess the reasonableness of the proposed fees and expenses (including consideration of the cost of different share classes available for the plans' current investment options), and then decide whether retain or replace the current providers.
- Maintain a relationship with the plans' current investment consultant (or select a new investment consultant that provides comparable or greater levels of information and services) and, in evaluating the plan investment options, the plan fiduciaries must consider information provided by the investment consultant.

On the matter of protecting confidential participant information and data against cross-selling practices, the settlement agreement specifically requires the plan fiduciaries to contractually prohibit the provider/recordkeeper selected following the RFP from using information about plan participants to market or sell products or

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services unrelated to the plans to participants, unless a request for such products or services is initiated by a participant. Until the RFP process can be completed, the plans' current provider/recordkeeper also must be informed that it is to similarly refrain from using plan participant information to market various other financial products sold by the recordkeeper, unless a request for such products or services is initiated by a participant.

This case obviously was resolved before the court could render a formal decision on whether ERISA offers participants any protection from the unwanted use of their personal plan data. But the issue of data privacy is a hot topic these days, and it certainly is reasonable to expect that we will see this type of claim regarding the protection of confidential participant information and data arise in other cases. It remains to be seen, however, the extent to which courts will afford ERISA protection to participants against the unwanted use of that personal plan information. *Cassell v. Vanderbilt Univ.* (M.D. Tenn. 2019).

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