Understanding Fiduciary Responsibilities, Duties and Best Practices for Non-ERISA Church Plans

A LEGAL BRIEF

By **Larry Hansen,** Locke Lord LLP

Overview

In order to avoid excessive entanglement with religion, church retirement plans were exempted from the Employee Retirement Income Security Act of 1974 (ERISA). While this means that church plans are not required to follow the federal ERISA fiduciary guidelines, it does not mean they are completely exempt from fiduciary duties and obligations, as state requirements still apply.

The following paper outlines the fiduciary responsibilities, duties and best practices for church plans in order to assist churches and other faith-based organizations that are either considering or are currently utilizing a church plan to better understand their status. This review of the law provides insight for church plan employers that wish to align their retirement benefits with their values and mission.

What is a church plan?

A church plan is a plan established and maintained by a church or a convention or an association of churches for employees working for or deemed to work for the church. Churches and religiously affiliated employers, such as hospitals, universities or schools, may use church plans to provide retirement benefits for their employees.

Who are church plan fiduciaries?

Plan fiduciaries are typically those individuals and entities who have any discretionary control regarding the management of a plan or its assets. However, in light of recent litigation, many church plan sponsors and officials have begun to question their duties as a fiduciary.

What are the duties of church plan fiduciaries?

A fiduciary's obligations under state law with respect to plan investments are the duties of:

Loyalty – To act in the best interest of plan participants and beneficiaries.

Prudence – To offer a range of investment options to plan participants that meet their investment objectives, needs and preferences.

To follow plan documents – To abide by the terms of the plan documents.

What are key best practices of church plans?

In order to act as an effective fiduciary, one should:

Confirm your plan's status as a church plan and consider having it maintained by a principal purpose organization.

Document any faith-based requirements for investments in your plan and understand your First Amendment rights.

Establish, document and follow procedures regarding investments, including regularly reviewing the menu of available funds and their fees.

Introduction

A person charged with a fiduciary duty is obligated to act on behalf of someone else without seeking any personal benefit. Fiduciary obligations are prominent features of many financial services relationships, including that between an employer and employees covered under a retirement plan sponsored by the employer. ERISA codifies these duties for plan sponsors and the organizations and individuals responsible for the administration of ERISA-covered plans.

But when Congress passed ERISA in 1974, it exempted church plans in order to avoid excessive government entanglement with religion.[1] This means that plan sponsors offering employee retirement church plans are not subject to ERISA's fiduciary requirements, but may be subject to the fiduciary requirements under applicable state law.

Religious employers, in pursuing their mission and ministries, generally operate according to values dictated by and consistent with their religious convictions. This often means that these employers view providing employee benefit programs, including retirement benefit programs, as an extension of their faith-based traditions. Consistent with both federal and state employment law, many religious employers use faith-based principles when recruiting, hiring and developing employees — as well as when offering employee benefits.

The purpose of this paper is to examine the legal protections available to religious employers that sponsor and operate retirement plans consistent with faith-based principles. Since most modern retirement plans generally are defined contribution plans, this paper will summarize the duties of church plan sponsors offering retirement benefits under a defined contribution plan as well as examine the legal protections available to religious employers administering retirement plans consistent with a plan sponsor's religious convictions.

What is a church plan?

ERISA and the Internal Revenue Code (Code) both define a church plan as a plan established and maintained by a church or a convention or an association of churches for employees working for or deemed to work for the church.

A church plan also includes a plan "maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches."[2]

Churches and religiously affiliated employers may use church plans to provide retirement benefits for their employees. Additionally, religiously affiliated employers such as hospitals, universities or schools that are not churches[3] themselves but want to qualify their retirement plans as church plans typically do so by having their plans administered by an organization whose principal purpose is the administration of one or more church plans.

Often the principal purpose organization is an internal committee established for that specific purpose. The IRS has issued hundreds of private letter rulings confirming that plans administered by such committees are church plans.[4] Several courts have agreed.[5]

In some cases, the principal purpose organization is a denominational benefit board established by a church. Such a board is uniquely situated to be a principal purpose organization, as it is typically controlled by the church, with the church having the right to appoint and remove the members of the board's governing body. Also, the board clearly shares common religious bonds and convictions with the church.

Who are church plan fiduciaries?

Ordinarily, plan fiduciaries are those individuals and entities who have any discretionary control regarding the management of a plan or its assets.

It would typically include the trustee of any trust funding a plan, as well as any individual (including a member of a committee) responsible for selecting investment alternatives under a plan. It would also include the sponsor of the plan and its board of directors or trustees to the extent that they are responsible for appointing, monitoring and removing any trustee or individual responsible for plan investments.

In the last few years, after the wave of litigation by plan participants against for-profit corporations, a number of lawsuits were brought against large tax-exempt organizations, alleging that the persons responsible for the organizations' retirement plans violated their fiduciary obligations. Those cases were all brought under ERISA except for cases brought against Portico Benefit Services, an affiliate of the Evangelical Lutheran Church in America (ELCA). The claims asserted against Portico were brought under state law and involved plans that covered ELCA ministers and employees of ELCA organizations. (The ELCA cases are discussed below.)

The potential litigation risk arising from offering employee retirement plans in the current litigation environment has understandably confused church plan sponsors and led them to question the extent of their fiduciary duties under such plans.

What are the duties of church plan fiduciaries?

The obligations of fiduciaries of non-ERISA church plans are found under state law, namely under the common law of trusts as well as statutory laws, particularly the Uniform Prudent Investor Act (UPIA), which has been adopted with some variations in 44 states, the District of Columbia and the U.S. Virgin Islands.[6]

Based on the UPIA and the common law of trusts, as reflected in the Restatement (Third) of Trusts, a fiduciary's obligations under state law are generally the duty of loyalty, the duty of prudence and the duty to follow plan documents.[7]

Each duty is examined below, and the obligations under ERISA plans will be contrasted with those under state law for non-ERISA plans.

Duty of Loyalty

ERISA Plans	Non-ERISA Plans
"A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —	"A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries."
(A) for the exclusive purpose of:	UPIA § 5
(i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan."	"**Except as otherwise provided in the terms of the trust,** a trustee has a duty to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose."
ERISA § 404(a)(1); 29 U.S.C. § 1003(a)(1)	Restatement (Third) of Trusts § 78 (2007) (emphasis added)

The duty of loyalty — or its Code counterpart, the exclusive benefit rule[8] — requires that plan fiduciaries administer a plan for the exclusive benefit of plan participants and beneficiaries.

The duty of loyalty is not limited to situations involving self-dealing or conflicts of interest. It also precludes a fiduciary from acting for the benefit of a third party.

Thus, fiduciaries of ERISA-covered plans may not consider social goals in selecting plan investments other than as a tiebreaker between alternative funds with identical investment returns and risks.[9]

The result is generally the same under the UPIA, which explicitly indicates that a trustee[10] may not sacrifice the interests of trust beneficiaries in order to accomplish a broader societal goal. Specifically, the commentary to Section 5 of the UPIA provides:

> No form of so-called "social investing" is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries — for example, by accepting below-market returns — in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause.

However, as discussed below, the duty of loyalty with respect to plan investment options does not override a plan sponsor's constitutional, and often statutorily recognized, right to the free exercise of religion.

Restricting plan investment options to those that are consistent with the organization's religious convictions should be a constitutionally protected prerogative of a religious employer, just as is the prerogative to offer an employee benefit plan in the first instance.

Duty of Prudence

ERISA Plans

"A fiduciary shall discharge his duties with respect to a plan . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;"

ERISA § 404(a)(1) & (1)(B); 29 U.S.C. § 1003(a)(1) & (1)(B)

Non-ERISA Plans

"(a) **Except as otherwise provided in subsection (b),** a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this [Act].

(b) **The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust.** A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust."

UPIA § 1 (emphasis added)

"The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.

* * *

(d) **The trustee's duties under this Section are subject to the rule of § 91, dealing primarily with contrary investment provisions of a trust or statute."**

Restatement (Third) of Trusts § 90 (2007) (emphasis added)

While church plans are exempt from ERISA, given the very limited number of cases involving church plan investments, we must look primarily to recent cases involving ERISA plans where plan fiduciaries were alleged to have acted imprudently.

In recent years, attorneys have filed complaints alleging that fiduciaries of ERISA-covered defined contribution plans breached their fiduciary duty by, among other things, selecting particular funds as investment options when there were less expensive funds available.[11] In many of these cases, fiduciaries were alleged to have breached their fiduciary duties by selecting actively managed funds instead of index funds or retail funds instead of institutional funds.[12] In the early cases, plaintiffs were able to avoid a dismissal of the suits in the early stages of litigation, thereby encouraging many defendants to settle. More recently, defendants have succeeded in having these cases dismissed at an early stage.

The first case perhaps to signal a change was *White v. Chevron*,[13] recently affirmed by the Ninth Circuit.[14] The district judge in that case dismissed the complaint with prejudice, noting with respect to the inclusion of retail funds that:

> [M]erely alleging that a Plan offers retail-class rather than institutional-class funds is insufficient to state a claim for breach of the duty of prudence, as fiduciaries have latitude to value investment features other than price, and indeed are required to do so, and ERISA does not require fiduciaries to "scour the market to find and offer the cheapest possible funds.[15]

Courts found similar complaints without merit in *Sweda v. University of Pennsylvania*[16] (plan fiduciaries need not maintain "a myopic focus on the singular goal of lower fees") and *Divane v. Northwestern University*[17] ("The mere fact that plaintiffs believe index funds are a better long-term investment than the CREF Stock Account does not a fiduciary breach make.").

If participants are given a sufficient number of low-cost funds as investment options, it should not be a breach of fiduciary duty to offer a number of actively managed or retail funds with higher fees if participants have the ability to select from among the available funds.[18]

Duty to Follow Plan Documents

Finally, church plan fiduciaries have the obligation to follow the terms of the plan documents.

ERISA Plans	Non-ERISA Plans
"A fiduciary shall discharge his duties with respect to a plan . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV."	"The trustee has a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law."
ERISA §§ 404(a)(1) and (1)(B); 29 U.S.C. §§ 1003(a)(1) and (1)(B)	UPIA § 76(1) and Restatement (Third) of Trusts § 76(1) (2007)

At a basic level, a retirement plan is a contract between the plan sponsor and each participant. As such, failure to follow the terms of a plan lead to a breach of contract claim. Thus, the terms of a plan should be drafted carefully so as not to impose obligations on plan fiduciaries beyond those required by whatever law governs the plan sponsor.

Sometimes well-meaning church plan sponsors draft their plan documents to incorporate ERISA's fiduciary standards into their plans when no law requires them to do so. Inclusion of ERISA's fiduciary obligations within a church plan document could expose plan fiduciaries to standards more stringent than those required by law, the violation of which could lead to a breach of contract claim if not also a breach of fiduciary duty claim.

On the other hand, the duty to follow plan provisions can provide a shield for church plan fiduciaries. In particular, plan provisions may provide a fiduciary with a defense to a breach of fiduciary duty claim in connection with the selection of investment funds based on religious beliefs.

The duty of loyalty found in section 78 of the Restatement of Trusts is prefaced, "[e]xcept as otherwise provided in the terms of the trust," thus making clear that a plan fiduciary need not permit plan investments that are precluded by the terms of the plan. Similarly, the prudent investor rule, otherwise applicable to plan fiduciaries, is a default provision that may be restricted by the terms of a plan.[19]

Two cases involving plans sponsored by the ELCA demonstrate that plan provisions may provide a fiduciary with a constitutional defense to a breach of fiduciary duty claim in connection with the selection of investment funds based upon religious beliefs.

Basich v. Board of Pensions

The first case, *Basich v. Board of Pensions, Evangelical Lutheran Church in America*,[20] involved a divestment policy for companies that invested in South Africa while that country's apartheid policy was in effect. The Lutheran World Federation had declared "that apartheid was so contrary to the Lutheran understanding of believers in Christ that it must be rejected as a matter of faith itself."[21]

The ELCA then expressed opposition to apartheid and passed a resolution declaring that none of the ELCA pension funds would be invested in companies doing business in South Africa.[22] In response, the ELCA Board of Pensions — the organization sponsoring and administering the plan, now known as Portico Benefits Services — adopted an "equivalency policy" whereby the Board agreed to divest and refrain from making new investments in companies with South African holdings whenever the conditions of risk and return were equal between stocks and bonds held by the Board.

Several Lutheran pastors, a lay employee and an ELCA congregation disagreed with the divestment policy and filed a lawsuit against the Board, alleging that it breached a contract and violated its fiduciary duties "by investing and divesting pursuant to social concerns rather than solely in the economic best interests of the plan participants."[23]

The trial court denied the Board's motion for summary judgment and the Board appealed. On appeal the Minnesota Court of Appeals held that the trial court erred in refusing to grant the summary judgment motion. Accordingly, the Court of Appeals dismissed the case, holding that the trial court's review of the plan's investment policy would entangle the court in reviewing issues of church doctrine and organization, which such entanglement was prohibited by the First Amendment:

> The Pastors [plaintiffs] also contend that this case can be resolved on neutral principles of contract and trust law. We disagree. The flaw in this contention is illustrated by the Pastors' admission that the ELCA could properly prohibit investments by the Board of Pensions in morally obnoxious commercial activity such as prostitution or pornography. There are no neutral principles of law that would enable a district court to distinguish between investments that Lutheran doctrine should find to be morally acceptable and those that it should find to be morally unacceptable. We conclude that the Establishment Clause of the First Amendment deprives the district court of subject matter jurisdiction in this dispute because review of this issue would require the district court to look beyond neutral principles of contract and trust law and entangle itself in issues of church doctrine.[24]

Bacon v. Board of Pensions

The result in *Basich* was reiterated in *Bacon v. Board of Pensions of the ELCA*,[25] which involved a lawsuit against the ELCA Board of Pensions alleging breach of fiduciary duty, breach of trust, and fraud and concealment. The plan at issue in that case had 20 fund options, eight of which were "social purpose funds" that were invested in a manner that reflected the ELCA's social teachings and policies.[26]

The trial court dismissed the case for lack of subject matter jurisdiction on the basis of the Minnesota Freedom of Conscience Clause, citing *Basich*.[27] The Minnesota Court of Appeals reversed on a procedural basis, noting that except for a challenge to the "social purpose funds", a court could resolve the claims by relying on the plan documents, the UPIA as adopted by Minnesota and the common law of Minnesota without entangling itself with church doctrine.[28]

The case was remanded to the trial court, where it is still pending. However, the Court of Appeals noted that whether there are alternative "social purpose" investments that would comply with the ELCA's social teachings and policies "would excessively entangle Minnesota courts with religion, and therefore, violate the Establishment Clause [of the First Amendment]."[29]

While the case law involving investments in non-ERISA church plans is limited, the decisions in *Basich* and *Bacon* provide a rare insight into how a court might evaluate a church plan fiduciary's constitutional right to provide retirement plan investment options in a manner consistent with the church's doctrine and faith-based values, even as those values are challenged by a breach of fiduciary duty claim.

- **Based on this limited precedent, church plan sponsors should be able to offer retirement plan investment options that align with the organization's mission without the fear that doing so could expose the plan sponsor or other plan fiduciaries to liability, provided the correct steps are followed to support those investment options.**

What are key best practices for church plans?

Confirm Your Plan's Status as a Church Plan

A plan sponsor that is "associated with" a church but not a church itself should clarify that the plan is maintained by a so-called "principal purpose organization" so that the plan will be a church plan. The issue of what it takes for a principal purpose organization to "maintain" a retirement plan is unclear, as the term is not defined in ERISA. It should not be necessary for the organization to have the power to amend or terminate a plan; those are powers typically reserved for a plan sponsor. However, the more administrative functions assigned to the organization, the more likely it will be deemed to "maintain" the plan. Cases finding that an internal committee maintained a plan have cited the breadth of duties assigned to the committee as evidence that the committee maintained a plan.[30]

Document Any Faith-based Requirements for Investments in Your Plan

Some faith-based employers believe that their religious beliefs prevent them from including investment choices in their retirement plans that permit direct or indirect investments in companies engaged in certain activities the employers deem contrary to their religious beliefs. These employers may fear that including funds that invest in such companies would make the employers complicit in the violation of their religious beliefs.

The First Amendment should permit faith-based organizations to limit investment funds under their plans to funds that are screened to exclude companies engaged in activities that violate their religious beliefs.

The issue of whether merely offering problematic funds for investment violates a plan sponsor's religious beliefs is a religious issue. Therefore, courts should decline to question a plan sponsor's decision on this matter because it would entangle them with religion and therefore violate the First Amendment.

Similarly, with respect to employer health and welfare plans, courts have defended the rights of plan sponsors to exclude coverage of objectionable contraceptives from their plans, even though the ultimate decision of whether to use such contraceptives rested with plan participants. Although those cases were decided under the federal Religious Freedom Restoration Act, the same result should occur under the First Amendment.

Other faith-based employers may believe that it is not a violation of their religious beliefs to offer plan participants a core of low-cost index funds among the available investment choices so long as there are a sufficient number of religiously screened funds available as alternative investments. The First Amendment should preclude a court challenge of the screened funds, but not the index funds. As noted by the Court of Appeals in *Bacon*, a review of whether there are alternative screened funds that would comply with the employer's religious beliefs would excessively entangle a trial court with religion and, therefore, violate the First Amendment.

If a plan's investments are to be limited in any way based on religious beliefs, the plan document should contain appropriate directives limiting investments based on religious beliefs. Those directives should be clear and stated in mandatory, not permissive, terms within the plan documents, including any investment policy statement (IPS), meaning the plan sponsor **must or must not** provide certain investment options instead of **may** provide certain investment options.

Establish, Follow and Document Procedures Regarding Investments

Plan fiduciaries can best defend themselves against allegations of improper plan investments by documenting their process for selecting and monitoring plan investments. The committee or other fiduciaries responsible for plan investments should hold regular meetings. The minutes of those meetings should show that in considering which investments to make available under a plan, they considered church doctrine and beliefs and any plan restrictions reflecting such doctrines and beliefs. **This means that the fiduciaries should regularly review the menu of available funds and their fees.**

Lessons Learned from the NYU 403(b) Plans

New York University was recently able to get a lawsuit dismissed in large part because it was able to demonstrate that its Retirement Plan Committee, the internal committee responsible for the administration of its retirement plans, followed a prudent, though not perfect, process in selecting plan investments. The following elements contributed to the court's finding of overall procedural prudence:

- The Committee had in place an IPS that it used in connection with determining fund options. The IPS set forth the criteria for evaluating funds and how often funds were to be reviewed. The Committee reviewed the IPS at least annually.
- The Committee met on a quarterly basis.
- In advance of Committee meetings, the investment consultant for the plans prepared and distributed reports on the plans' investment funds, which included detailed benchmarking information, market analysis, information about the plans' asset allocations, and other types of investment fund information. The consultant's report included recommendations as to when the performance of a fund was sufficiently concerning that it became a candidate for placement on a so-called "watch list" and thereby subject to additional scrutiny and monitoring.

- When the Committee decided not to follow the investment consultant's recommendations on a particular item, the Committee documented its consideration of the investment advisor's recommendations and its rationale for taking a different approach than the one recommended by the investment advisor.
- The Committee meeting minutes reflected discussion of fund performance, including discussion of the watch list, at almost all meetings.[31]

A church plan sponsor, either through its investment committee or by other fiduciaries, should create and follow a similar process for choosing and monitoring plan investment options.

Summary

Based on current law, an employer sponsoring a non-ERISA church plan should be able to provide retirement benefits in a way that complies with applicable law while reflecting its religious values. In contrast to a sponsor of an ERISA plan, a plan sponsor of a non-ERISA church plan has more leeway to structure the investment options offered under its plan so as to reflect its religious beliefs, so long as the correct steps are taken to support the structure, including documenting the basis for the investments in the plan document.

[1] *See* 124 Cong. Rec. 12,106 (1978) (statement of Rep. Conable) (explaining that Congress "exempted church plans from the provisions of [ERISA] to avoid excessive Government entanglement with religion in violation of the first amendment to the Constitution").

[2] 29 U.S.C. § 1002(33)(c)(i). An organization is "associated" with a church or convention or association of churches if it "shares common religious bonds and convictions with that church or convention or association of churches." 29 U.S.C. §1002(33)(c)(iv).

[3] For convenience, the term "church" throughout this paper includes a convention or association or churches.

[4] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 201826009 (June 29, 2018), I.R.S. Priv. Ltr. Rul. 201811008 (Mar. 16, 2018), and I.R.S. Priv. Ltr. Rul. 201803007 (Jan. 19, 2018).

[5] *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1226 (10th Cir. 2017), *Sanzone v. Mercy Health*, 326 F. Supp. 3d 795, 804 (E.D. Mo. 2018), *appeal docketed*, No. 18-3574 (8th Cir. Dec. 4, 2018), and *Smith v. OSF Health Care System*, No. 16-467, 2018 WL 4680671, at *5 (N.D. Ill. Sept. 28, 2018), *appeal docketed,* No. 18-3325 (7th Cir. Oct. 29, 2018). In *Rollins v. Dignity Health*, 338 F. Supp. 3d 1025, 1036-37 (N.D. Cal. 2018), a federal district court denied the plan sponsor's motion to dismiss an ERISA-based complaint on the basis that the plan was a church plan and therefore exempt from ERISA. In denying the motion to dismiss, the court noted its skepticism that an internal committee can constitute a "principal purpose organization." If the district court in *Rollins* ultimately decides that an internal committee cannot constitute a principal purpose organization and that decision is upheld on appeal, this would create a conflict among the federal Circuit Courts. In that event, the United States Supreme Court may ultimately resolve this issue.

[6] *See* Uniform Prudent Investor Act, 7B U.L.A. 19 et. seq. (2018)

[7] The laws of any particular state may vary from the UPIA or the Restatements (Third) of Trusts.

[8] Although most retirement plans are designed to be tax-qualified under Code section 401(a), many defined contribution church plans are designed to qualify under Code section 403(b)(7) (mutual funds) or 403(b)(9) (retirement income accounts). The exclusive benefit rule applies to plans qualified under Code section 401(a) through Code section 401(a)(2), which provides that in order for a plan to be qualified, its funds must be used "for the exclusive benefit of … employees or their beneficiaries." The exclusive benefit rule has been expanded by regulation to 403(b)(7) and 403(b)(9) plans. 26 C.F.R. §§ 1.403(b)-8(d)(2)(iii), 1.403(b)-9(a)(2)(i)(C). There is little guidance, however, on the extent of the application of the exclusive benefit rule to church plans. We are aware of only one instance in which the IRS disqualified a church plan on the basis of a violation of the exclusive benefit rule. *See* Chief Coun. Memo. 2017-42-022 (Sept. 22, 2017) (advising that the exclusive benefit rule of 26 C.F.R. § 1.403(b) 9(a)(2)(i)(C) was violated where optional investment fund in a church plan provided indirect loans to the church).

[9] DOL Field Assistance Bulletin No. 2018-01 (Apr. 23, 2018).

[10] While the UPIA by its terms applies to trustees, the standards of that Act can be expected to inform the investment responsibilities of plan fiduciaries. *See, e.g.*, Restatement (Third) of Trusts § 2 (2003) ("A trust…is a fiduciary relationship with respect to property…held…for…one or more persons.")

[11] Many of these complaints frequently included allegations of selecting and failing to remove underperforming investment options and authorizing excessive payments for recordkeeping and other administrative services. Those issues are beyond the scope of this paper.

[12] In contrast to shares in retail funds, institutional shares are a class of mutual funds shares available for institutional investors. Institutional mutual fund share classes typically have the lowest expense ratios among all of a mutual fund's share classes. They usually require a minimum investment and may require other specifications for investment.

[13] *White v. Chevron*, No. 16-0793, 2017 WL 2352137 (N.D. Cal. May 31, 2017).

[14] *White v. Chevron*, No. 17-16208, 2018 WL 5919670 (9th Cir. Nov. 13, 2018).

[15] *White v. Chevron*, No. 16-0793, 2017 WL 2352137, at *14 (N.D. Cal. May 31, 2017).

[16] *Sweda v. Univ. of Penn.*, No. 16-4329, 2017 WL 4179752, at *9 (E.D. Pa. Sept. 21, 2017), *appeal docketed*, No. 17-3244 (3d Cir. Oct. 13, 2017).

[17] *Divane v. Northwestern Univ.*, No. 16-8157, 2018 WL 2388118, at *6 (N.D. Ill. May 25, 2018), *appeal docketed*, No. 18-2569 (7th Cir. July 18, 2018).

[18] S*ee id.*, at *5-6 ("No plan participant was required to invest in the CREF Stock fund or any other TIAA-CREF product. Thus, any Plan participant could avoid what plaintiffs consider to be the problems with those products…simply by choosing other options.") and *Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273, 314 n.114 (S.D.N.Y. 2018), *appeal docketed*, 18-2707 (2nd Cir., Sept. 12, 2018) ("The Plans here offered participants both actively and passively managed index funds, including the passively managed Vanguard funds Plaintiffs use as comparisons to the CREF Stock Account. Thus, NYU 'left choice to the people who have the most interest in the outcome, and it cannot be faulted for doing this.'").

Using ERISA as a guide, if a participant is given the opportunity to direct the investment of his or her plan interest among at least three investment choices, under ERISA section 404(c) fiduciaries will not be responsible for the individual investment decisions made by participants. See 29 C.F.R. § 2550.404c-1. Plan fiduciaries will, however, remain responsible for selecting and thereafter monitoring the performance of the investment funds available under the plan.

[19] UPIA § 1(b) ("The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust."); Restatement (Third) of Trusts § 90(d) (2007) ("The trustee's duties under this Section are subject to the rule of § 91, dealing primarily with contrary investment provisions of a trust or statute.").

[20] *Basich v. Bd. of Pensions*, 540 N.W. 2d 82 (Minn. Ct. App. 1995).

[21] *Id.* at 84.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 86.

[25] *Bacon v. Bd. of Pensions*, No. 15-1999, 2016 WL 3961960 (July 25, 2016).

[26] For a summary of the screens currently applied by Portico Benefit Services, *see https://www.porticobenefits.org/Overview/ReponsibleInvesting/InvestingForSocialImpact.*

[27] *Bacon v. Bd. of Pensions*, No. 27-15-3425, 2015 WL 9916669 (Oct. 13, 2015).

[28] *Bacon v. Bd. of Pensions*, No. 15-1999, 2016 WL 3961960, at *5 (July 25, 2016).

[29] *Id.*, at *7.

[30] In *Sanzone v. Mercy Health*, supra, for example, the complaint alleged that the committee had "sole responsibility for administration of the plan" and "all discretionary powers and authority necessary to carry out the provisions of the Plan." 326 F. Supp. 3d at 804. In addition, the plan at issue in that case directed the committee to:

> engage in claims administration and communicate with members about plan coverage; approve and/or provide claims forms and election forms for participants; comply with all reporting and disclosure requirements; provide consent regarding who shall become participating employers; determine the effective date of the Plan with respect to employees, the classification of employees, and specify rules regarding years of service; and inspect and audit the Trustee's records.

Id., at 804-05.

Notably, the plan also provided that the committee's decisions were final, conclusive, and binding on all parties—including the plan sponsor. Id., at 805. Similarly, in concluding that the plans in *Smith v. OSF Healthcare*, *supra*, were maintained by their respective committees, the court noted:

> Both Plans entrust decisions about participant claims, eligibility and benefits to their respective Plan Committee, including the eligibility of an employee, beneficiary or other person to receive Plan benefits, as well as the interpretation of Plan provisions and the administration of claims procedures. The St. Francis Plan specifically states that "Benefits under the Plan shall not be paid unless the [St. Francis Committee], in its discretion, determines that the Claimant is entitled to them."

Id. 2018 WL 4680671, at *10 (additional authorities omitted).

[31] *Sacerdote*, *supra*, 328 F. Supp. 3d at 307-08.

Larry Hansen, Locke Lord LLP

Larry Hansen is an attorney in the Chicago office of Locke Lord LLP where he focuses on employee benefits, executive compensation, and tax-exempt organizations. He serves as counsel to retirement and medical plans covering thousands of employees of religious organizations throughout the United States. In that capacity he was co-counsel to church plans in two class action cases challenging the requirement under the Affordable Care Act for religious employers to provide contraception coverage under their employee health plans, *Little Sisters of the Poor v. Burwell* and *Reaching Souls Int'l Inc. v. Burwell*, which were consolidated before the United States Supreme Court in *Zubik v. Burwell* (2016). He also co-authored a number of amicus briefs on behalf of the Church Alliance in cases involving the scope of the exemption for "church plans" under the Employee Retirement Income Security Act of 1974 (ERISA), including the 2017 Supreme Court case, *Advocate Health Care v. Stapleton*. The Church Alliance is a coalition of the chief executive officers of 37 church benefits organizations, which are affiliated with mainline and evangelical Protestant denominations, three Jewish groups, and Catholic schools and institutions.

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