

Yale, MIT and NYU Sued over Retirement Plan Fees

By Kerry Pechter Thu, Aug 11, 2016

The universities' retirement plans were the latest to be sued by the law firm of Jerome Schlichter (pictured at his office in St. Louis) for violations of fiduciary duty. The suits charge that the schools should have bargained for lower fund expenses and administrative fees.



To the countless American workers without access to a retirement plan at work, and to the millions with plans whose employers don't contribute to their accounts, participants in the retirement plans at Yale, MIT and New York University would surely be objects of envy.

After all, the faculty, staff, administrators who participate in these multi-billion-dollar plans receive pre-tax contributions from their universities of between 5% and 12.5% of salary if they themselves contribute at least five percent.

Brightscope, the compiler of retirement plan data and rater of plans, currently ranks the NYU plan in the top 15% of its peer group, with a rating of 80. MIT's plan also has a Brightscope rating of 80. Brightscope gives the Yale plan a rating of 87, the highest score in its peer group.

Yet all three prestigious universities were named as defendants in federal class action suits filed in New York, Connecticut and Massachusetts this week by the St. Louis law firm of Schlichter, Bogard and Denton, which has filed more than dozen lawsuits of this type against deep-pocketed plan sponsors and providers over the past decade.

Generally, the suits charge that the schools, as sponsors of so-called jumbo retirement plans, failed to use their plan size to bargain for lower fund expenses and administrative fees for the participants, thus breaching their fiduciary duties under the Employee Retirement Income Security Act of 1974.

Even though the expense ratios of the TIAA and Vanguard funds in the NYU and Yale plans were relatively low—mostly below 50 basis points a year—the suits assert that the plans could have negotiated much lower fees from the fund companies.

The suit against the MIT plan, unlike the other two, targets close ties between MIT and

Fidelity, including the presence of Abigail Johnson, the CEO of Fidelity, on MIT's board of trustees, as a reason why the MIT plan included scores of high-cost actively managed Fidelity funds until July 2015, when MIT cut its fund lineup to 37 from 340 and eliminated all but one of its Fidelity funds in favor of a lineup heavy on Vanguard index funds.

The suits, the first that Schlichter has filed against universities, may also reflect a generalized discontent within higher education today. One of the NYU plaintiffs is Mark Crispin Miller, a professor of Media, Culture and Communication and prominent author whose books explore the border between media and politics.

"As faculty members we find ourselves ripped off in a breathtaking range of ways," Miller told *RIJ* yesterday. "We've had our benefits slashed, we've had rent raised on university housing, and our pay raises have been below the cost of living. So we are not surprised by the law firm's demonstration of breach of fiduciary duty by the retirement plan."

Regarding the lawsuit, Miller said that a lawyer from Schlichter's firm had approached NYU's plan participants, not the other way around. "We were persuaded that the management of the plan was inadequate, that we were paying higher fees than we ought to be paying, and that the investments were not optimal," Miller said regarding the participants' decision to work with the law firm.

None of the complaints name TIAA, Vanguard, or Fidelity, as defendants. Since 2006, the Schlichter law firm has filed over a dozen such lawsuits against plan sponsors and plan providers, winning one suit in court, settling several others and in some cases winning awards as large as \$30 million.

The MIT 401(k) plan has over 23,300 active participants and over \$3.9 billion in plan assets, according to Brightscope. Until recently it offered 342 different investment options, according to Brightscope, which gives it a rating of 80 and places it in the top 15% of plans in its peer group.

The Yale University Retirement Account Plan, which has over 16,400 participants and \$3.6 in assets, has a Brightscope rating of 87, the highest in its peer group. It offers 114 investment options. A quarter of plan assets are in the TIAA Traditional Annuity, whose 2.5% surrender fee and 10-year minimum drawdown period—features that allow it to achieve higher yields—are criticized in Schlichter's suit as unfiduciary.

The NYU Retirement Plan for faculty, research staff and administrators has a Brightscope rating of 80, 16,400 active participants and \$2.4 billion in assets. It offers 103 investments,

and 27% of assets are in the TIAA-CREF Traditional Annuity and 21% in the TIAA-CREF Stock fund. The NYU School of Medicine's plan has over 7,700 active participants, over \$1.6 billion in assets and a Brightscope rating of 76.

The suit against NYU and the NYU Medical School charges, among other things, that:

- The plan offered too many mutual fund options, thereby causing "decision paralysis."
- Because there were so many funds, participants' contributions were fragmented so that so that they didn't enjoy the economies of scale they might have gained from putting larger amounts in fewer funds.
- The plan relied on two recordkeepers, TIAA and Vanguard, when using one would have been more efficient. "A reasonable recordkeeping fee for the Plans would be approximately \$840,000 in the aggregate for both Plans combined (or a flat fee based on \$35 per participant)... the Faculty Plan paid between \$3.1 and \$3.8 million (or approximately \$230 to \$270 per participant) per year from 2010 to 2014, over 670% higher than a reasonable fee for these services," the suit said.

The suit against Yale makes similar claims, while acknowledging that the school acted over a year ago to change its plan:

- Only in April 2015 did Defendants consolidate the Plan's recordkeeping and administrative services with a single recordkeeper, TIAA-CREF. Also for many years, the Plan had higher-cost share classes of mutual funds despite the Plan's tremendous size and bargaining power to demand low-cost investments.
- In April 2015, Defendants moved some of the Plan's investments to lower-cost share classes of the same investments. These lower-cost share classes, *identical in every respect except for lower fees*, had been available since 2010. Plan participants could have and should have been paying far less for the same investment since that time.

The suit against MIT also acknowledge changes in the plan:

- "Effective July 20, 2015, Defendants eliminated *hundreds* of investment options provided in the Plan, including over 180 *Fidelity* funds. Only the Fidelity Growth Fund remained. The new investment lineup includes 37 investment options, of which 19 were previously offered. The consolidated investment options include Vanguard collective trust target date funds, two custom funds (Bond Oriented Balanced Fund and Diversified Stock Fund), twelve Vanguard funds, and nine actively managed funds offered by non-Vanguard investment managers. The assets of the funds removed from the Plan were transferred or 'mapped' to low-cost Vanguard funds, and for some investments, to the Wellington High Yield Bond Fund."