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Cross-selling gaining prominence in retirement-plan lawsuits

The issue of marketing non-retirement-plan services by record keepers has cropped up in multiple recent lawsuits



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By **Greg Iacurci**

Cross-selling by record keepers has become a hot-button issue in retirement-plan lawsuits, raising broader awareness and questions around how service providers can use participant data.

Consider Johns Hopkins University, which **agreed last week** to settle a lawsuit alleging that it mismanaged its 403(b) plan. The settlement stipulated that the school will solicit competitive bids for record-keeping and administrative services and that the firm it selects

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participants for the purpose of cross-selling proprietary non-plan products and services."

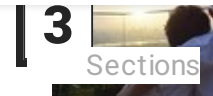
Those services include, but aren't

limited to, individual retirement accounts, non-plan managed account services, life or disability insurance, investment products and wealth management services. The record keeper would only be allowed to cross-sell if a participant requests that it do so.

This settlement agreement followed closely on **a similar one reached in April** by Vanderbilt University in a separate lawsuit involving its retirement plan. The defendant agreed to tell its record keeper, **Fidelity Investments**, not to use participant data — such as contact information, account size, investment choices and retirement date — to sell products unrelated to the 403(b) plan.

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When the Vanderbilt settlement was reported, attorneys said it was first time they'd seen such a cross-selling provision in a settlement. Cross-selling had **previously cropped up** in a lawsuit against Northwestern University in which plaintiffs said record keeper TIAA had inappropriately used participant data



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The use of participant data to market services outside the retirement plan appears to be "an emerging issue" in retirement litigation, said Andrew Oringer, a partner and co-chair of the employee benefits and executive compensation group at Dechert.

Jerome Schlichter, the plaintiff's attorney who led the aforementioned 403(b) litigation, said participant data has value.

"It could be sold," said Mr. Schlichter, managing partner at the law firm Schlichter Bogard & Denton. "It's analogous to medical records. Would anyone ever say a doctor could take all the information collected through the doctor-patient privilege and sell that?"

Marie Ellen Monaco, a plaintiff in a retirement plan lawsuit led by Mr. Schlichter against New York University, testified at trial that a TIAA representative solicited her to take roughly \$300,000 from her 403(b) plan and invest it in an outside managed account that charged around 0.80% annually in addition to investment fees. The representative also tried selling life insurance to Ms. Monaco, a 59-year-old associate professor at the NYU School of Medicine, according to her testimony. NYU **won its case**, but Mr. Schlichter is appealing the decision.

Retirement plan advisers like Jason Kolinsky, a partner at Kolinsky Wealth Management, believe record keepers are engaging in cross-selling to participants partly to make up for declining margins resulting from fee compression.

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said of cross-selling. "They're trying to scale. Just like any business, they're trying to create as many profit centers as they can."

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The primary legal issue at stake, attorneys said, is whether participant data is considered a "plan asset." Mr. Schlichter claims that it is.

If plan data were deemed a plan asset, cross-selling could give rise to a prohibited transaction under the Employee Retirement Income Security Act of 1974, said Marcia Wagner, principal at The Wagner Law Group. However, that's not the case under current law, she said.

"That's an interesting point of view, and Jerry is a creative man," Ms. Wagner said in reference to Mr. Schlichter. "Until a court rules that data and data mining are plan assets, that's not the law of the land."

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