NYU's Victory In ERISA Battle Hinged On Expert Witnesses

By **Emily Brill**

Law360 (August 1, 2018, 10:37 PM EDT) -- New York University can credit its recent win in a closely watched Employee Retirement Income Security Act class action largely to the performance of its expert witnesses, who struck the judge overseeing the case as "highly credible" and who attorneys say came off as more qualified and experienced than the plaintiffs' experts.

U.S. District Judge Katherine Forrest laid out her thoughts on the experts' credibility in a series of footnotes to her **decision**, writing that she found NYU's three experts experienced, knowledgeable and credible, while she considered the two experts for the class inexperienced and unpersuasive.

Attorneys said it was likely this perception that swung the pendulum in favor of NYU in the bench trial, which saw NYU facing allegations that its retirement committee was asleep at the wheel, failing to provide proper oversight of its two 403(b) employee retirement plans in violation of ERISA.

"It really came down to a battle of the experts," said plaintiffs' attorney Mark Boyko of Bailey & Glasser LLP. "That's an area where I think the plaintiffs could reorganize for other cases. An expert with more experience [with 403(b) plans] might bring more success for them."

Expert witnesses play a key role in ERISA cases, analyzing complicated financial information and breaking it down in an easy-to-understand way for the court. The side whose expert presents more compelling information and boasts sturdier credentials tends to win the day, attorneys said.

In this case, experts testified about the investment performance of two funds on the 403(b) plans' lineups and NYU's processes relating to recordkeeping fees. The university was accused of allowing its plan administrators to charge excessive recordkeeping fees and keep two underperforming funds as investment options.

NYU retained three experts in the case, Marcia Wagner, Daniel Fischel and Dr. Lassaad Adel Turki, while the class called two experts, Michael Geist and Gerald Buetow. Judge Forrest was particularly impressed by Wagner's testimony, she wrote in Tuesday's opinion and order.

"The court found her experience with 403(b) plans impressive and her testimony consistent, reasonable, logical, and ultimately highly credible," Judge Forrest wrote.

Boyko said that Wagner, an attorney, is "one of the most experienced people in the field" of benefits law, having founded the ERISA-focused law firm The Wagner Law Group in 1996 and expanded it into a behemoth with offices in five states and Washington, D.C.

Judge Forrest also approved of Fischel, writing that she found his testimony on the investment performance of the CREF Stock Account and TIAA Real Estate Account "knowledgeable, reasonable, and consistent" and she gave "great weight to his testimony."

Likewise, she praised Turki's performance as a damages rebuttal expert, saying he has "a wealth of experience in this area" and she relied on his opinions.

Judge Forrest's reaction to the class' experts was starkly different, containing none of the praise she reserved for NYU's.

Of Geist, the recordkeeping fee expert for the class, she wrote, "He has virtually no experience with the type of plans at issue here." She went on to say that she "does not believe he is a true 'expert'" on the investment products he analyzed for the class because his investment management firm did not deal with those products.

"He did not demonstrate to the court that he possesses the requisite qualifications to present reliable opinions on whether NYU's participants paid reasonable recordkeeping fees," Judge Forrest wrote.

Judge Forrest had even stronger words for Buetow, saying his testimony on the allegedly underperforming investment funds was so unreliable that she was discounting it entirely.

"Buetow does not use reliable economic methods to analyze damages … or appropriate benchmarks against which to measure damages," Judge Forrest wrote. "Buetow incorrectly used [a] benchmark … that was not in place until mid-2011 to cover a period prior to mid-2011. In fact, the benchmark Buetow used was his own creation."

Defense attorney Joseph Faucher of Trucker Huss APC said that if plaintiffs want to win 403(b) plan cases, they'll have to get better experts.

"The decision exposes some flaws in the plaintiffs' expert witnesses and the criteria they use in deciding when and why investments should be removed from a plan's investment platform," Faucher said. "I think, going forward, plaintiffs' attorneys are going to have to be very thoughtful about the experts they choose and the theories the experts advance, because these cases hinge largely on expert testimony."

He said the fact that Judge Forrest so unequivocally rejected the class' expert witnesses' opinions will make it difficult for the class to prevail on appeal.

"When a judge makes a credibility determination, it's very difficult to attack that on appeal," Faucher said. "To the extent she based her opinions on her credibility determinations regarding experts, it's going to be hard to overturn [her verdict]."

--Editing by Jill Coffey and Kelly Duncan.