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EMPLOYEE BENEFITS

Supreme Court Reaffirms That Defined Contribution Retirement Plan Fiduciaries Must Continually Monitor Investment Options and Remove Imprudent Ones

By Melanie N. Aska l· February 1, 2022

On January 24, 2022, in *Hughes v. Northwestern University*, the U.S. Supreme Court unanimously affirmed its 2015 decision in *Tibble v. Edison International*, holding that fiduciaries of ERISA-subject defined contribution retirement plans have a continuing duty to prudently monitor a plan's investment options and to remove imprudent investments from the plan's investment line-up.

The plaintiffs in *Hughes* were three current or former employees of Northwestern University who participated in two of the University's ERISA-subject defined contribution retirement plans. In 2016, they sued the University, its Retirement Investment Committee, and the individual officials who administered the plans, alleging that they violated their ERISA duty of prudence in several ways, including by:

1. Failing to monitor and control recordkeeping fees, resulting in unreasonably high costs to plan participants;
2. Offering mutual funds and annuities in the form of "retail" share classes that carried higher fees than those charged by otherwise identical "institutional" share classes of the same investments; and
3. Offering investment options that were likely to confuse plan participants.

The U.S. District Court for the Northern District of Illinois dismissed the plaintiffs' complaint in 2017. The U.S. Court of Appeals for the Seventh Circuit affirmed the dismissal, and the U.S. Supreme Court granted *certiorari* in 2021.

In rejecting the plaintiffs' claims, the Seventh Circuit did not apply the guidance provided by the U.S. Supreme Court's *Tibble* decision. Instead, the Seventh Circuit focused on another component of ERISA's duty of prudence: a fiduciary's obligation to assemble a diverse menu of investment options. The Seventh Circuit determined that the University and the other defendants had provided an adequate array of investment choices, including "the types of funds plaintiffs wanted (low-cost index funds)." In the Seventh Circuit's view, those offerings "eliminat[ed] any claim that plan participants were forced to stomach an unappetizing menu."

The U.S. Supreme Court disagreed, vacated the Seventh Circuit's judgment, and remanded the case so that the Seventh Circuit could consider whether the plaintiffs had plausibly alleged a violation of the ERISA duty of prudence, as articulated in *Tibble*. The Supreme Court held that the Seventh Circuit erred in relying on the participants' ultimate choice over their investments to excuse allegedly imprudent decisions by the University and the other defendants. The Supreme Court further held that determining whether the plaintiffs stated plausible claims against plan fiduciaries for violations of ERISA's duty of prudence requires a context-specific inquiry of the fiduciaries' continuing duty to monitor investments and to remove imprudent ones, as articulated in *Tibble*. In *Tibble*, the Supreme Court had explained that, even in a defined contribution plan where participants choose their investments, plan fiduciaries are required to conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of investment options, and, if the fiduciaries fail to remove an imprudent investment from the plan within a reasonable time, they breach their ERISA fiduciary duty of prudence.

The Supreme Court's unanimous ruling in *Hughes*, fully supporting its *Tibble* analysis, drives home the point that ERISA plan fiduciaries must prudently select the plan's investment options, continuously monitor those options, and remove imprudent options within a reasonable time. The fact that a plan's investment line-up includes prudent investment options does not remove the risk of fiduciary liability for including imprudent investment options.

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