

SCOTUS ERISA Fee Litigation Update: *Hughes et al. v. Northwestern University*

Overview

On January 24, 2022, in a rare, unanimous 8-0 decision (Justice Barrett recused herself from the case), the Supreme Court of the United States (the "Supreme Court") vacated a Seventh Circuit affirmation of the dismissal of *Hughes et al. v. Northwestern University*, one of the more high-profile cases in the current litany of defined contribution plan fee litigations. 142 S. Ct. 737 (2022). Although, on its face, the Supreme Court's decision to remand the case back to the lower court for further consideration appears to be a victory for fee litigation plaintiffs across the country, many fee litigation defendants are also finding reason to be pleased with the Supreme Court's brief ruling. Furthermore, the case serves as an important reminder to plan fiduciaries of the steps they should continue to take to meet their responsibilities with respect to monitoring plan investments, recordkeepers, and associated fees.

Background

The *Hughes* petitioners are current and former employees of Northwestern University and participants in the University's two defined contribution retirement plans. The petitioners alleged, among other things, that the respondents (including the University, its Retirement Investment Committee, which manages the defined contribution plans in question, and individual officials who administer the plans) had violated their duty of prudence by (1) failing to monitor and control recordkeeping fees, (2) offering the 'retail share class' of certain investments rather than the lower fee 'institutional share class' of such investments, and (3) offering too many investment options, causing participants to be confused and make poor investment decisions.

The lower courts dismissed the case finding that the plans provided an adequate array of investment choices, including the lower cost funds desired by the plaintiffs. However, the Supreme Court held that the Seventh Circuit neglected to apply the Supreme Court's prior holding in *Tibble v. Edison Int'l*. 575 U.S. 523 (2015). The Supreme Court indicated that *Tibble* interpreted ERISA to impose a continuing duty to monitor all plan investments and remove any imprudent ones. Therefore, the lower courts were required to look beyond the fact that the participants had the ability to choose investments that met their requirements to see if the plan fiduciaries had conducted their own independent evaluation to determine which investments were prudently included in the menu of available investment options under the plans. The case was remanded so that the Seventh Circuit could reevaluate the case under the legal standard articulated in *Tibble*.

Analysis

The most obvious outcome of *Hughes* is that it upholds the proposition that, although important in its own right, providing a diverse menu of investment options is not sufficient to satisfy fiduciary duties with respect to the investment options offered in a defined contribution plan. Several courts have already denied motions to dismiss similar cases, citing *Hughes* as a precedent on this issue. The precedent is likely to encourage additional fee litigation lawsuits, and is certainly cause for celebration among plaintiffs involved in current fee litigation.

However, an interesting counterpoint in the decision (although in dicta) also provides a positive outlook for plan fiduciaries and sponsors. Justice Sotomayor, who authored the opinion for the court, concludes the decision by stating: "At times, the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise."

This language appears to recognize that a single factor, such as cost, may not be dispositive when evaluating available investment options. It also may place even greater focus on the fiduciary decision-making *process*, rather than the outcome, recognizing the many (and often competing) considerations facing plan fiduciaries.

Application

Other than the reaffirmation that offering a broad array of investments under a defined contribution plan does not discharge a plan fiduciary from any additional fiduciary responsibility, this short Supreme Court opinion does not provide any specific guidelines for plan fiduciaries with respect to satisfactorily fulfilling their fiduciary duties. However, it does serve as an important reminder of several continuing best practices:

- Plan fiduciaries should regularly and thoroughly review their plan investment options, recordkeepers, and other service providers, along with all associated fees. The services of outside advisors (who should be prudently selected and monitored by the plan fiduciary) can assist where the plan fiduciary lacks technical expertise to conduct such reviews.
- Investment funds should be evaluated with respect to their adherence to their stated targets and their relative performance in relation to applicable benchmarks, and fund managers should be vetted and reviewed.
- Plan fiduciaries should ensure that, for each investment option, the plan has the lowest cost share class possible under the circumstances.
- Compliance with investment policy statements, if any, should be regularly reviewed.
- Benchmarking of fees should be performed, RFPs should be periodically conducted, and fees to be paid to plan service providers should be negotiated.
- Underperforming investment options should be flagged and, if appropriate, removed from available investment option menus.
- All such practices should be carefully documented, and the records should be maintained.

Although following these steps is advisable and consistent with a plan fiduciary's obligations under the law, there is still no guarantee that the plan fiduciaries will not at some point be embroiled in a fee litigation. However, following these and other best practices could help manage the litigation risk and provide a basis for the plan fiduciary to demonstrate that it prudently monitored the plan's costs and expenses if litigation were to occur.

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