

U.S. Supreme Court Decision Potentially Opens Floodgates for ERISA Breach of Fiduciary Duty Claims

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On January 24, the U.S. Supreme Court, in a unanimous opinion, ruled in *Hughes v. Northwestern University* that offering an array of allegedly prudent investment choices within the plan does not serve as a categorical defense against claims that other investment options were imprudent or that the plan paid excessive fees. According to *Bloomberg Law*, at the time of the Supreme Court's decision, around 150 lawsuits have been filed in federal court over the past two years and more than a dozen cases had been stayed pending the outcome of this case.^[1]

At issue was whether the plaintiffs had stated a plausible claim for breach of fiduciary duty that should survive a motion to dismiss by alleging that defendants offered needlessly expensive investment choices and paid excessive recordkeeping fees under the plan. The district court granted a motion to dismiss for failure to state an appropriate claim, and the Seventh Circuit affirmed, reasoning in large part, in the Supreme Court's view, that by offering a wide array of diverse investment options within the plan, including the plaintiff's preferred low-cost alternatives, the plan was protected against any claim that other investment options within the plan were imprudent. While not ruling on the merits of the underlying claims, the Supreme Court held that the Seventh Circuit focused on the incorrect standard for deciding a motion to dismiss and remanded the case for a determination whether the plaintiffs plausibly alleged a violation of prudence using the standards set forth in *Tibble v. Edison Int'l*, 575 U.S. 523 (2015), and applying the pleading standards discussed in *Ashcroft v. Iqbal*, 556 U. S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544 (2007).

The Supreme Court's opinion provides and/or reinforces a number of key takeaways:

- In order to survive a motion to dismiss, plaintiffs need only show that it is "plausible" that the fiduciary had breached its duty of prudence. This low bar is likely to embolden continued litigation and/or increase settlement costs because of the defendant's reduced likelihood of success at the motion to dismiss stage. In fact, the U.S. District Court for the Middle District of Georgia declined to dismiss claims against Georgia's Columbus Regional Healthcare System, Inc., alleging the plan offered underperforming, actively managed, and retail share class mutual funds based on this Supreme Court precedent just one day following the ruling.
- ERISA fiduciaries have a continuing duty to monitor each investment within the plan and remove imprudent ones. The fact that the participants directed the investment of their accounts and could have selected better investment options does not serve as a defense that the plan fiduciary also offered certain allegedly imprudent investments.

- ERISA fiduciaries are not insulated from claims merely by providing a wide range of investment options among which participants may direct their investments. Fiduciaries must “conduct their own independent evaluation to determine which investments may be prudently included in the plan’s menu of options.” Moreover, in this case, offering a wide array of investment options (over 400 in the aggregate) has resulted in a claim that offering so many investment options caused participant confusion and poor investment decisions.
- Assessing whether an ERISA fiduciary’s conduct was prudent is judged based on the circumstances prevailing at the time the fiduciary acts and is a “context-specific inquiry.” The Supreme Court acknowledged that “[a]t 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 will be important in future decisions, as the Supreme Court seems to be acknowledging that it is not per se imprudent just because there might have been a less expensive choice or a better-performing investment. Context matters. There may be a reason why maintaining a more expensive investment option is prudent.

Plan fiduciaries need to be prepared to prove a prudent process is in place when selecting plan investments and service providers. Cases like *Hughes v. Northwestern University* might be avoided or possibly won on summary judgment if the plan is:

- Monitored on a regular basis, with under-performing investments removed from the plan menu. This should be a constant process. Plans should be treated like gardens and given consistent attention and pruning, as needed.
- Selecting less-expensive investment choices where possible, especially where there are no substantive differences between more expensive and less expensive choices. Using expensive retail class shares where less expensive investment class shares are available simply by asking is a recipe for disaster. Fiduciaries should monitor investment performance no less than quarterly; review fees, such as recordkeeping, etc., no less frequently than annually; and hire and re-evaluate plan advisors as is prudent.
- Not offering an excessive or unwieldy number of investment options. Plans with excessive investment choices may lead to more litigation and overall scrutiny, as too many options may confuse participants. This is something that might cause fiduciaries to reconsider adding or maintaining brokerage windows in plans that permit participants to invest in unlimited types of investments. There is no categorical fiduciary protection from giving the participants unfettered discretion with respect to their own investments.
- Benchmarking fees of recordkeepers, investment managers, and other providers to help ensure competitive market fees. Fiduciaries should consider RFPs, engaging consultants or relying on peer resources and published information to help support competitive market fees given the level of services provided.

Fiduciary training and following best practices illustrated by other lawsuits provide a valuable defense against costly and unnecessary fiduciary lawsuits. Fiduciary liability insurance is another way to help mitigate fiduciary exposure.^[2]

At Troutman Pepper, we offer extensive assistance establishing fiduciary committees, developing best practices, providing fiduciary training, implementing good governance practices, and exploring other ways to help mitigate fiduciary exposure. Fiduciary cases, unfortunately, will continue to proliferate.

[1] See *Bloomberg Law*, Jacklyn Wille and Lydia Wheeler, “Burst of 401(k) Fee Litigation Gets Boost From Supreme Court (2),” available at https://www.bloomberglaw.com/bloomberglawnews/class-action/XF4SMIEK000000?bna_news_filter=class-action#jcite, Updated: Jan. 24, 2022, 2:56 p.m.

[2] For a more in-depth look into additional ways to mitigate fiduciary exposure, please see our related article titled, “10 ERISA Fiduciary Lessons from Game of Thrones,” located [here](#).

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