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Long-Anticipated Supreme Court Decision on Excessive Fee Pleadings Standards Sends Case Back to the Seventh Circuit — *Hughes v. Northwestern University*

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With 401(k) plan excessive fee litigation sweeping the nation, the wait is finally over: The Supreme Court has issued a decision which plan fiduciaries anticipated might revolutionize excessive fee case pleading standards — *Hughes v. Northwestern University*.[1] On January 24, 2022, the Supreme Court held that the fiduciaries of Northwestern University's retirement plans cannot rely on the availability of a variety of investment options or participants' choices in investment options to avoid liability for offering imprudent funds or having high recordkeeping expenses.

The Supreme Court's decision arose from the Seventh Circuit's affirmation of a district court's dismissal in *Divane v. Northwestern University*, where former and current participants of two of Northwestern University's defined contribution plans brought an action against the plans' fiduciaries.[2] The plaintiffs alleged that the defendants breached the fiduciary duty of prudence by (1) failing to monitor and control recordkeeping fees; (2) failing to offer otherwise identical lower-cost institutional share class options; and (3) offering too many investment options (over 400) which caused participant confusion. The district court dismissed the complaint, and the Seventh Circuit affirmed, on the basis that as long as the participants had a choice of investment options — and those choices included lower-cost index fund options — the fiduciaries were not imprudent in offering alleged high-cost retail class funds as alternative options in the plans' investment lineup. The Seventh Circuit held that the plaintiffs' allegations failed as a matter of law because the plaintiffs' preferred low-cost investments were available among the plans' options, and the inclusion of these low-cost investments "eliminated any concerns that other plan options were imprudent."[3]

The Supreme Court disagreed. It stated that "[t]he Seventh Circuit erred in relying on the participants' ultimate choice over their investments to excuse allegedly imprudent decisions by respondents."[4] Furthermore, the Supreme Court found that "[s]uch a categorical rule is inconsistent with the context-specific inquiry that ERISA requires and fails to take into account respondents' duty to monitor all plan investments and remove any imprudent ones."[5] With a focus on its prior decision in *Tibble v. Edison International*,[6] the Supreme Court reminded plan fiduciaries that they have a continuing duty to monitor plan investments and must carry out their own independent evaluation to determine whether a certain investment should be included in the plan's investment menu. Further, they stated that failure to remove an imprudent investment from the plan within a reasonable time would constitute a breach of fiduciary duty. The Supreme Court also rejected the argument that, because the plaintiffs could choose funds that offered lower recordkeeping fee expense ratios, the "amount of fees paid were within the participant's control."[7] It then directed the Seventh Circuit to re-evaluate the plaintiffs' allegations through a "context-specific" inquiry while recognizing that there may be times when a fiduciary will be faced with "difficult tradeoffs" and that "courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise."[8]

Essentially, this Supreme Court decision confirms that plan fiduciaries cannot rely on the availability of a variety of options or plan participants' choice in investment options to avoid liability for offering imprudent funds or having high recordkeeping expenses. This has been the law of the land since *Tibble*, and litigants in excessive fee litigation have already been following this rule. Therefore, the reach of this decision may be quite limited.

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1. *Hughes v. Northwestern University*, No. 19-1401, 2022 WL 199351 (S. Ct. Jan. 24, 2022).

2. *Divane v. Northwestern University*, No. 16 C 8157, 2018 WL 2388118 (N.D. Ill. May 25, 2018), *aff'd*, 953 F.3d 980 (7th Cir. 2020), *rev'd*, 2022 WL 199351 (S. Ct. Jan. 24, 2022).

3. *Hughes*, 2022 WL 199351, at *1; *see also*, *Divane v. Northwestern University*, No. 18-2569, 953 F.3d 980, 992-93 (2020), *rev'd*, 2022 WL 199351 (S. Ct. Jan. 24, 2022) ("Not only did Northwestern provide the plans with a wide range of investment options, it also provided prudent explanations for the challenged fiduciary decisions involving alleged losses or underperformance. ...Ultimately, defendants cannot be faulted for leaving choice to the people who have the most interest in the outcome." (internal quotations, citations omitted)).

4. *Hughes*, 2022 WL 199351, at *5.

5. *Id.* at *2 (citing *Tibble*, 575 U. S. at 530).

6. *Tibble v. Edison Int'l*, 575 U. S. 523, 530 (2015)

7. 2022 WL 199351, at *6.

8. *Id.*

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