U.S. Supreme Court Clarifies Fiduciary Responsibilities for Excessive-Fee Claims against Retirement Plan Administrators

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***Hughes v. Northwestern University*, 142 S. Ct. 737 (January 24, 2022)**

In *Hughes v. Northwestern University*, the Supreme Court clarified that under the Employee Retirement Income Security Act (ERISA), retirement plan administrators have a wholistic duty to avoid excessive fees and to facilitate wise investment decisions for plan participants.

Northwestern University employees had alleged that administrators of the University's retirement plan breached their duty of prudence under ERISA. *See* 29 U.S.C. § 1104(a)(1)(B). Specifically, the employees alleged that plan administrators had failed to monitor and control recordkeeping fees, offered investments with higher-priced "retail" shares, and confused participants by offering too many options (over 400). The district court dismissed the employee's complaint and the Seventh Circuit affirmed. The court of appeals reasoned that the employees' claims were precluded because the array of investment choices included the low-cost index funds the employees allegedly desired.

In a unanimous opinion authored by Justice Sonia Sotomayor, the Supreme Court reversed. Under ERISA, "plan fiduciaries must discharge their duties with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use . . . ." (Internal quotation marks omitted). The Supreme Court explained that simply including low-cost alternatives does not eliminate an administrator's duty to independently evaluate which investment options should be included in the first place. Failure to remove an imprudent option, within a reasonable time, thus constitutes a breach of an administrator's duty of prudence under the statute. The Court concluded that the lower courts should have evaluated

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the complaint more wholistically, considering whether the employees plausibly alleged that plan administrators violated their duty.

Key Takeaways:

- Technically speaking, *Hughes v. Northwestern University's* holding was limited to the pleading standard for alleging ERISA breach-of-prudence, excessive fee claims. But its reasoning suggests that plan administrators should take extra care to review investment options and ensure that every alternative—including its fees—is a prudent one. Notably, offering retail shares where institutional pricing is available may be especially risky, absent a substantive justification.
- Although the Court did not elaborate on what constitutes too many options, administrators should organize and limit investment choices to make the process as accessible and sensible as possible. For context, the administrators in *Hughes* offered over 400 options. In contrast, Fidelity Investments recently shared in its third-quarter 2021 report that large employers now offer an average of 15.4 investment options. Offering fewer choices, within reason, may be a wise strategy moving forward. After all, fewer options make it easier for administrators to oversee each investment plan and satisfy ERISA's standard of prudence.

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