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The Supreme Court Rules for Participants in *Hughes v. Northwestern*

February 2, 2022

On January 24, the United States Supreme Court issued a unanimous decision in favor of plan participants in *Hughes v. Northwestern*. The decision is a win for class action plaintiffs and stands to bolster the growing wave of lawsuits brought under the Employee Retirement Income Security Act of 1974 ("ERISA"). The ultimate outcome for *Northwestern* is yet to be seen, but plan fiduciaries should take note of the decision and its potential consequences.

The Case

The case was originally brought in 2018 when participants in Northwestern University's 403(b) plan alleged that the plan fiduciaries breached their fiduciary duties by

- causing the plan to pay excessive recordkeeping fees;
- providing too many investment options; and
- including expensive investment options where identical, but cheaper options were available.

Lower courts dismissed the case, concluding that the participants failed to assert plausible ERISA violations. The Supreme Court agreed to hear the case and address the question of what pleadings are sufficient to state an ERISA fiduciary breach claim where participants allege the plan paid excessive fees for investment products or services.

The Decision

The Supreme Court focused on the circuit court's reliance on the availability within the Northwestern plan of low-cost investment choices in addition to the investments in question. The opinion concludes that the lower court erred by suggesting that having some good investments within a menu of other investments satisfies the duty of prudence. Courts must conduct a context-specific inquiry to determine whether sufficient facts have been presented to show that a plan fiduciary failed to monitor investments and remove imprudent ones. The Supreme Court did not address the plausibility of the participant claims against *Northwestern* and instead directed the Seventh Circuit to reevaluate the claims with this context-specific inquiry. The narrow *Northwestern* decision does not provide any specific direction about how little or how much participants must assert to avoid the claim being dismissed. However, the Supreme Court does conclude its opinion by emphasizing that circumstances matter, fiduciaries need to make trade-offs, and there is not one reasonable fiduciary decision but a range of them.

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Looking Ahead

We are already beginning to see the effects of *Northwestern*. Just a few days after the ruling, a Georgia federal district court, relying heavily on the *Northwestern* opinion, declined to dismiss participants' allegations of excess fees and fiduciary imprudence. And while we cannot be certain of the *Northwestern* opinion's actual impact on ERISA litigation until more courts begin to take action in pending and future cases, a unanimous decision in favor of participants will likely be seen by the plaintiffs' bar as a big win and encourage further ERISA claims. The number of ERISA cases filed has grown steadily since 2015 when the Supreme Court held that ERISA fiduciaries have a duty to monitor plan investments. Since 2015, over 300 ERISA related cases have been filed, with 97 complaints filed in 2020 alone.

Most ERISA complaints generally follow the same pattern of allegations as those in the *Northwestern* case with little variation, making copy-cat cases plentiful. The ease of ERISA litigation has also drawn more plaintiffs' firms into a field where one firm is responsible for over 40 ERISA cases. Without a clear and consistent standard for how much or how little a participant must assert to avoid their claim being dismissed, it is difficult to predict how successful any one claim may be.

Increasingly, ERISA litigation is targeting plans of all types and sizes. Early litigation predominantly targeted large, billion-dollar plans, but recently plaintiffs' attorneys have targeted plans with less than $100 million in assets. Finally, it is not just the plaintiffs' bar raising questions about plans. In 2021, the Employee Benefits Security Administration (EBSA), the Department of Labor agency responsible for enforcing ERISA, received and resolved more than 175,000 participant complaints resulting in almost $500 million recovered. While a plan sponsor may not be able to predict whether they will be the target of an ERISA suit or an EBSA investigation, an increase in litigation and EBSA enforcement means plan sponsors can expect to see more stringent insurance requirements as fiduciary liability insurance carriers try to assess ERISA litigation risks.

Plan sponsors can take some actions to mitigate risk. For instance:

- Regularly review and benchmark investment fund performance, investment expenses and service provider's services and fees. In situations where the plan does not utilize the cheapest investment or service provider, document the rationale for the decision.
- Regularly review and follow the plan's Investment Policy Statement and take action with respect to funds that fail to meet its criteria.
- Regularly review the plan's investment menu and make adjustments as needed. Plan sponsors have an obligation to offer a diverse menu of investment options but, as *Northwestern affirmed*, plan sponsors cannot simply offer prudent investment options alongside imprudent options and satisfy their fiduciary duties. Likewise, plan sponsors cannot rely on a brokerage window alone to satisfy their duties.

If you have questions about the *Northwestern* case or other plan fiduciary matters, do not hesitate to reach out to a member of Kutak Rock's Employee Benefits Practice Group.