

The Supreme Court's Northwestern Decision – A Win for Plaintiffs but a Possible Turn In the Tide?

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On January 24, 2022, in a unanimous decision, the Supreme Court in *Hughes v. Northwestern* reinstated the long-running case against Northwestern University by sending the case back to the lower courts for further review. While on its face, this decision might appear to be a “win” for the plaintiffs, the Supreme Court did not go nearly as far as plaintiffs had hoped. And the decision could ultimately signal a harder hill to climb for plaintiffs’ claims in the world of 401(k) fee lawsuits. In the meantime, plan fiduciaries should take note of the court’s opinion and consider ways to document a record on fees and expenses that is in line with the Court’s decision.

The Decision

The Supreme Court vacated the Seventh Circuit’s decision affirming the district court’s grant of a motion to dismiss to Northwestern. The Supreme Court remanded the case back to the Seventh Circuit for additional consideration about whether the district court’s dismissal was correct. In doing so, the Supreme Court held that the Seventh Circuit erred by holding that a plaintiff cannot state a plausible claim against plan fiduciaries based on the inclusion of a few imprudent investment options if the investment lineup offered to plan participants is diverse and contains prudent investment options.

The Supreme Court held that when considering a motion to dismiss, ERISA requires a “context-specific inquiry”. In doing this, the Supreme Court held that courts should consider whether plaintiffs have plausibly alleged a violation of the duty of prudence as articulated in the Supreme Court’s decision in *Tibble v. Edison*. Specifically, the Supreme Court held that courts should ask whether a plaintiff has

If you have any questions, please do not hesitate to contact your regular Groom attorney or the authors listed below:

William Delany

wdelany@groom.com

(202) 861-6643

Lars Golumbic

lgolumbic@groom.com

(202) 861-6615

David Levine

dlevine@groom.com

(202) 861-5436

Kevin Walsh

kwash@groom.com

(202) 861-6645

alleged facts that would show that a plan fiduciary failed to satisfy its duty to monitor by failing to regularly review plan investments or recordkeeping expenses and to remove imprudent investments or recordkeepers within a reasonable time frame. This inquiry is specific to the investment option rather than a plan's lineup as a whole.

Significantly, in its decision in *Northwestern*, the Supreme Court also looked to its prior decision in *Fifth Third Bancorp v. Dudenhoeffer* involving the holding of company stock in 401(k) plans and, citing language in *Dudenhoeffer*, concluded that, "Because the content of the duty of prudence turns on the circumstances . . . prevailing at the time the fiduciary acts, the appropriate inquiry will necessarily be context specific." This language, in itself, could be read to incorporate the standard of inquiry that has served as a high bar and significantly reduced the number of new 401(k) "stock drop" lawsuits. The Supreme Court also emphasized 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." Read alongside *Dudenhoeffer*, a court might apply a closer and more "context specific" review of plaintiffs' claims in future fee lawsuits.

Potential Takeaways

Even though the decision itself is only six pages, there are a range of potential takeaways to consider:

First, the *Northwestern* decision is a short, narrow opinion that offers very little in the way of clear cut guidance for 401k plan fiduciaries. Indeed, the only guidance provided is the fact that a plan offering a variety of investment options, including low-cost options, does not provide, by itself, a sufficient basis to dismiss claims for (1) failing to include the lowest-cost share class of a fund; (2) including too many investment options in a plan thereby causing participant confusion; or (3) allowing plan recordkeepers to charge excessive fees.

Second, there is positive language for plan sponsors and fiduciaries in the unanimous decision that recognizes that fiduciary conduct must be judge in a context specific fashion at the time the challenged conduct occurred and with recognition of what are often competing considerations faced by fiduciaries. However, because the Court remanded to the Seventh Circuit for further consideration of those issues, the Court's ruling is not likely to have an immediate impact on the ongoing wave of new filings challenging the prudence of fiduciary oversight of defined contribution plans.

Third, the *Northwestern* decision may make plan-wide class certification more difficult. Here, the Supreme Court focused on specific investment options as being imprudent rather than the lineup as a whole. Under recent standing decisions, courts have focused on whether each individual seeking relief suffered personal harm. The combination of these two trends could make it tougher for plaintiffs to bring claims on behalf of plan participants who did not invest in the specific investment alternatives being challenged.

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