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Supreme Court Affirms Fiduciaries' Responsibility for Each Investment Option

by R. Sterling Perkinson

The Supreme Court today issued a succinct, unanimous opinion in *Hughes v. Northwestern University*. The Court affirmed that fiduciaries of retirement plans (including university 403(b) plans like Northwestern's as well as the universe of 401(k) plans) have an ongoing duty to monitor each investment option and to remove any imprudent investment options.

The Court found that the Seventh Circuit failed to follow the Court's earlier decision in *Tibble v. Edison International* (2015) by dismissing plaintiffs claims, at least in part, because it had improperly reasoned that the plan offered a sufficiently diverse investment lineup so that participants could construct an appropriate investment portfolio with fees and expenses to their liking. As a result, *Hughes* reaffirms that offering a large, diverse group of investment options is no defense to allegations that some investment options are imprudent.

Because the Supreme Court in *Hughes* viewed the Seventh Circuit's reasoning as contradictory to *Tibble*, it did not weigh in on other issues raised, such as whether:

- Fiduciaries failed to monitor and control fees paid for recordkeeping, resulting in unreasonably high costs to plan participants.
- Fiduciaries offered "retail" share class investment options when cheaper and otherwise identical "institutional" share classes were available.
- Fiduciaries offered too many investment options and thereby caused participant confusion and poor investment decisions.

The Court remanded the case back to the 7th Circuit for a reconsideration of these issues.

However, in closing, the Court did provide some guidance that could potentially offer some deference to fiduciaries in selecting investment options:

> At 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.

The extent to which this acknowledgement of deference by the Court will help fiduciaries to defend against excess fee claims remains to be seen.