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*403b-plan-could-affect-401k-fiduciaries/*

How the Supreme Court ruling on Northwestern's

403(b) plan could affect 401(k) fiduciaries

The ruling on Northwestern's 403(b) plan will a ect cases challenging imprudent duciary actions with 401(k) plans as well.

By C.J. Marwitz, editor, BenefitsPRO | February 01, 2022



[**(//images.benefitspro.com/contrib/content/uploads/sites/412/2022/01/Supreme-Court-building-Scotus-**](https://images.benefitspro.com/contrib/content/uploads/sites/412/2022/01/Supreme-Court-building-Scotus-black-and-white-stairs.jpg) **black-and-white-stairs.jpg) (Photo: Shutterstock)**

In the recent Supreme Court decision on Hughes v. Northwestern University, retirement plan participants alleged plan duciaries breached their duties. The fact that the case went as high as the Supreme Court meant it attracted much attention from the retirement industry. To get a clearer picture on the implications of the Supreme Court’s ruling, we turned to attorney Emily Seymour Costin, Partner, Alston & Bird LLP for help. Alston & Bird associate Ellie Studdard also contributed to the responses.

**Bene tsPRO: Could you explain the case and the ruling)?**

**Costin et al:** The original complaint was brought in 2016 by participants in Northwestern’s two ERISA 403(b) de ned-contribution plans. The participants alleged that the plans’ duciaries breached their duty of prudence under ERISA by: (1) incurring excessive recordkeeping fees through the use of two recordkeepers instead of one and failing to take steps to negotiate lower fees, and (2) causing participants to pay excessive investment fees by o ering too many investment options and o ering retail share classes when less expensive share classes for otherwise-identical investments were available.

The district court dismissed the complaint nding that the participants failed to adequately allege a breach of duciary duty.

A rming the decision, the Seventh Circuit characterized the allegations as expressing merely the named plainti s’ investment preferences. The Seventh Circuit emphasized that plan participants had the choice to select any of the lower-cost, conservative options the named plainti s favored out of the plans’ variety of investment options on the menu. The Seventh Circuit suggested that, because the plan duciaries provided a diverse menu of options including the participants’ preferred types of low-cost investment options, this eliminated any concerns that other plan options were imprudent.

The Supreme Court rejected the notion that a duciary could be excused from o ering an imprudent investment option as long as there were other prudent options available. The Supreme Court reiterated its prior holding in Tibble that duciaries have a duty to monitor “all” plan investments.

The Court did not rule on the issue of whether the participants had su ciently stated a claim against the Northwestern duciaries, but instead vacated the decision and remanded the case directing the lower court to reevaluate the participants’ claims in light of prior Supreme Court precedent establishing guidance for plausibly stating such claims.

**The case involved 403(b) plans — how is this important to the 401(k) industry?**

The primary factual di erence between 401(k) and 403(b) plans is that 403(b) plans historically have involved multiple recordkeeping platforms. The allegations in the Northwestern case claimed that too many investment options and recordkeeping platforms resulted in a dilution of the assets and, consequently, higher fees for the participants. While 401(k) plans usually do not have multiple recordkeeping platforms,

the legal principles for stating a claim of duciary prudence are the same. So, this decision is important to, and will a ect, cases challenging duciary imprudence in connection with 401(k) plans as well.

**What might the implications be for plan advisors, plan sponsors, participants?**

The Court plainly rejected the idea that a duciary can escape legal challenge of having imprudent

investment options in the plan, as long as there are other, prudent options. Rather, the Court reinforced the notion that plan duciaries must monitor “all” plan investments and remove “any” imprudent ones.

The Court’s decision does not a ect or discourage o ering a diverse menu of investment options. In fact, comments made by the justices at the oral argument suggested that diversi cation of investment options is just ne. But the Court reiterated that duciaries must consistently monitor “all” investment options and remove “any” imprudent ones. As a practical matter, this may result in duciaries choosing to reduce the number of investment options o ered, so there is less to monitor. In doing so, that could impact participants who prefer greater choice.

**Any particular things to watch in future or to be wary of?**

The Court noted that duciaries still must monitor all investment options and remove imprudent ones within a “reasonable time.” The Court said something similar in Tibble – that duciaries must consider all the investments “at regular intervals” to ensure that they are appropriate.

Fiduciaries are likely to struggle with what that means. What is a reasonable time? What is a regular interval? How quickly do duciaries need to act in order to remove an imprudent investment option? Fiduciaries will want to act swiftly, but also don’t want to make rash decisions either.

**What might the implications be for any pending or future lawsuits or court decisions?**

This decision does not change the existing pleadings standards for asserting claims of duciary imprudence regarding investments and fees in 401(k) and 403(b) plans. The Court reiterated that claims of duciary imprudence should still be assessed in light of their prior holdings in Iqbal and Twombly.

That is, in order to state a claim that duciaries breached their duty of prudence, participants must assert more than “conclusions” and “speculation” that the duciaries failed to monitor the investment options. They must allege su cient facts to support their claims – the mere possibility that duciaries did something wrong is not su cient.

Whether a complaint has met this pleading standard is a case-by case inquiry, and will vary from judge to judge, and jurisdiction to jurisdiction. Two judges could look at the same complaint and come to di erent opinions on whether a participant has su ciently stated a claim.

However, the Court’s opinion closes with a reminder that ERISA duciaries must make di cult tradeo s, and “courts must give due regard to the range of reasonable judgments a duciary may make based on her experience and expertise.” This is favorable language to duciaries and will likely lead to courts taking a stricter approach in analyzing the plausibility of claims of imprudence.

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