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SUPREME COURT RESTATES DUTY TO MONITOR RETIREMENT PLAN COSTS AND OPTIONS IN HUGHES V. NORTHWESTERN UNIVERSITY

On Jan. 24, 2022, the U.S. Supreme Court, in an 8-0 decision*, reaffirmed and extended its holding in the 2015 *Tibble v. Edison* case, such that ERISA retirement plan fiduciaries, as part of their duty of prudence, must undertake an independent and ongoing assessment of the plan menu options offered to participants to avoid costly or imprudent investment options. The Court made clear that merely offering a diverse menu of investment options is insufficient to obtain dismissal of a claim for breach of fiduciary duty for including one or more allegedly imprudent investment option(s). The case is *Hughes v. Northwestern University*, No. 1401.

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HISTORY OF THE CASE

The case came to the Supreme Court after the Seventh Circuit Court of Appeals affirmed dismissal of the claims against Northwestern on the basis that the plan provided participants the ultimate and final choice over their investments and offered a diverse menu of investment options. That amount of individual control, the Seventh Circuit held, sufficiently insulated the plan fiduciaries from liability for failure to monitor and revise the plan's menu options. The Supreme Court disagreed.

HOLDING

On review, the Supreme Court reversed and remanded, holding that ERISA plan fiduciaries must conduct their own independent evaluation to determine which investments are prudent for inclusion in the plan's menu of options. The Supreme Court reiterated that the duty to monitor is ongoing. A fund that is prudent when added to the investment option menu may become imprudent over time. It was error for the Seventh Circuit to rely on the participants' ultimate choice over their investments to excuse allegedly imprudent decision-making by plan fiduciaries. Instead, the Court extended the test from its 2015 *Tibble v. Edison* opinion to cases charging breach of fiduciary duty by including

funds alleged to support excessive recordkeeping fees. Fiduciaries must perform an individualized and ongoing assessment of plan menu options, and this includes consideration of recordkeeping fees. That duty may also extend to ensuring an appropriate number of plan options. Accordingly, the Court reversed and remanded the case to the Seventh Circuit to reevaluate the sufficiency of the allegations in light of the Court's decision.

TAKEAWAYS: WHAT THIS MEANS FOR PLAN FIDUCIARIES AND ERISA EXCESSIVE FEES LITIGATION

Some 150 pending cases had been stayed throughout the federal courts, awaiting the outcome of this case. Early returns suggest that courts that were awaiting this decision are denying motions to dismiss like the motion that had been granted by the trial court in the *Hughes* case. *See, e.g.,* Goodman, et al. v. Columbus Reg. Healthcare System, Case No. 4:21-cv-15; Johnson, et al. v. Duke Energy Corp., Duke Energy Benefits Cmte., and John and Jane Does 1-30, Case No. 3:20-cv-00528. The ruling provides some clarity on what is expected of fiduciaries with respect to selection and monitoring of investment options, but leaves to trial courts to decide whether a particular decision was prudent under "the circumstances … prevailing" at the time of decision. Fiduciaries should actively monitor, assess and replace costly and imprudent investment options, documenting the circumstances of, and reasons for, their decisions. Periodic fiduciary training, focused on best practices and recent updates, including decisions from the U.S. Supreme Court, should be a regular part of the annual or more frequent meetings of plan fiduciaries.

Please contact Armstrong Teasdale LLP's experienced team of employee benefits attorneys for additional information or assistance on this update, fiduciary training or other litigation avoidance best practices.

* Justice Amy Coney Barrett did not participate in this case.