

# Publications

## Supreme Court Makes It Harder to Dismiss Plan Fee Litigation

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Jennifer Bibart Dunsizer

Christine M. Poth

Wendy M. Swary

Elizabeth Howard

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On January 24, 2022, the U.S. Supreme Court unanimously overturned the Seventh Circuit decision in *Hughes v. Northwestern University* ([see the decision here](#)), and required the lower court to reevaluate whether any of the disputed investments in the extensive plan investment line-up were imprudent based on the circumstances prevailing at the time.

The *Hughes* plaintiffs alleged that the plan fiduciaries acted imprudently by (1) failing to monitor and control the fees paid for recordkeeping services; (2) including retail class mutual funds where identically performing, lower cost institutional fund options were available; and (3) including too many investment fund options (more than 400 funds), leading to participant confusion and poor investment decisions. The district court dismissed the complaint for failure to adequately plead a breach of the fiduciary duty of prudence. The Seventh Circuit affirmed that decision, stating the existence of an adequate array of prudent investment options excused the inclusion of other fund options that may have been imprudent, because participants could avoid the imprudent options if they wished.

The Supreme Court vacated the Seventh Circuit's decision and ruled that the Seventh Circuit erred in relying on the participants' choice over their own investments to excuse allegedly imprudent fiduciary decisions. The Court explained that plan fiduciaries must conduct an independent evaluation of each of the plan's investment options and remove any imprudent investments within a reasonable period of time. "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." In other words, courts cannot simply dismiss breach of fiduciary duty actions because participants can pick from a wide array of investment options that include prudent options. Rather, courts will have to make "context-specific" inquiries to determine whether plaintiffs have met the pleading standard for a breach of fiduciary duty under ERISA.

Plan sponsors had hoped this decision would slow the flood of excessive plan fee litigation. That hope is dashed. Now, the individualized analysis required by the Supreme Court could make it more difficult to dismiss claims at the pleading stage. The longer litigation goes on, the higher the cost to defend and the more likely settlements become.

In preparation for the anticipated onslaught, plan fiduciaries should take action to re-examine their investment menu. Fiduciaries should be able to articulate the reason for inclusion of each investment option in its line-up. Fiduciaries may also want to consider additional participant education to mitigate participant confusion about their investment options. Contact your Vorys lawyer if you have questions.