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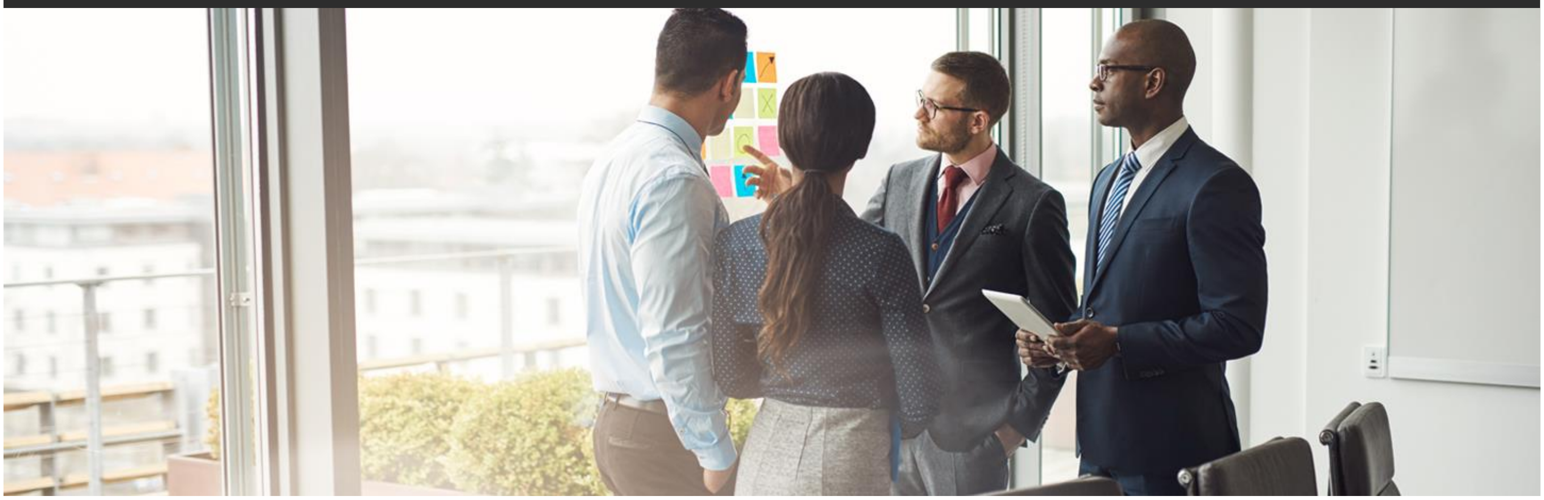

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Supreme Court Holds ERISA Requires Plaintiffs to Allege Context-Specific Breaches of Fiduciary Duty to Monitor

The U.S. Supreme Court ruled Jan. 24 in *Hughes et al. v Northwestern University et al.* that in litigation challenging fiduciaries of benefit plans that allegedly have imprudent investment options, determining whether plan fiduciaries meet ERISA's duty of prudence requires a context-specific analysis.[1] Plan fiduciaries must conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options, the Supreme Court said, and if the fiduciaries fail to remove an imprudent investment from the plan within a reasonable time, they breach their ERISA fiduciary duty.

In its unanimous opinion, discussing ERISA pleading requirements, the Supreme Court relied heavily on its prior decision in *Tibble et al. v. Edison Int'l et al.*[2] that plan fiduciaries have a continuing duty to monitor investments and remove imprudent ones. The court went back to "ERISA basics" in emphasizing that the statutory definition of prudence,[3] which depends on "the circumstances then prevailing" at the time the fiduciary acts, requires a context-specific inquiry.

[1] U.S. No. 19-1401, Jan. 24, 2022.
[2] 575 U.S. 523.
[3] *See* ERISA §404(a)(1)(B).

Consequently, the Supreme Court held in considering whether plaintiffs have plausibly alleged a fiduciary violation as articulated in *Tibble*, courts should apply context-specific pleading standards. A plaintiff must allege facts from which the court can draw a reasonable inference the defendant is liable for the misconduct alleged.

The Supreme Court was asked to consider a 2020 Seventh Circuit decision granting a motion to dismiss a complaint that challenged Northwestern University's retirement plan fees and investment lineup.[4] The Seventh Circuit's order suggested a plan fiduciary is not liable under ERISA for offering bad or expensive funds if the plan also offers prudent, inexpensive options. The Supreme Court held that at the pleading stage, the Seventh Circuit erred in relying on participants' ultimate choice over their investment options to excuse Northwestern's allegedly imprudent decisions. Accordingly, the Supreme Court vacated the judgment below and remanded the matter so the Seventh Circuit could reevaluate the allegations as a whole and consider whether the participants have plausibly alleged a violation of the duty of prudence.

Background

Northwestern administers defined-contribution plans under which each participant chooses an individual investment mix from a menu of options selected by plan administrators.

Plan participants in both the Retirement and Savings Plans sued Northwestern, its Retirement Investment Committee, and the individual officials who administer the Plans (collectively, the Northwestern fiduciaries), claiming the Northwestern fiduciaries violated their statutory duty of prudence in a number of ways. First, the Northwestern fiduciaries allegedly failed to monitor and control the fees they paid for recordkeeping, resulting in unreasonably high costs to plan participants. Second, the Northwestern fiduciaries allegedly offered a number of mutual funds and annuities in the form of "retail" share classes that carried higher fees than those charged by otherwise identical "institutional" share classes of the same investments, which are available to certain large investors. Finally, the Northwestern fiduciaries allegedly offered too many investment options, over 400 in total for much of the relevant period, and thereby allegedly caused participant confusion and poor investment decisions. The Northwestern fiduciaries moved to dismiss the amended complaint. The district court granted the motion, and plaintiff appealed.[5]

The Seventh Circuit affirmed, holding the participants' allegations failed as a matter of law, in part based on the determination that the participants' preferred type of low-cost investments were available as plan investment options. In the Seventh Circuit's view, this eliminated any concerns regardless of whether other plan options were imprudent.[6] The Supreme Court granted certiorari.[7]

The Supreme Court Decision

In rejecting the participants' allegations, the Supreme Court said the Seventh Circuit did not apply *Tibble*'s guidance but instead erroneously focused on another component of the duty of prudence: a fiduciary's obligation to assemble a diverse menu of investment options. In short, Northwestern's provision of an array of investment choices, including lower cost investment options plaintiffs wanted, did not necessarily excuse their allegedly imprudent decisions. The Supreme Court emphasized that even in a defined-contribution plan where participants choose their investments, *Tibble* instructs that plan

[4] *Divane v. Northwestern Univ*., 953 F. 3d 980 (7th Cir. 2020).
[5] *Divane v. Northwestern Univ*., No. 16–C– 8157, 2018 WL 2388118, *14 (ND Ill., May 25, 2018).
[6] *Divane v. Northwestern Univ*., 953 F. 3d 980, 983 (2020).
[7] 594 U. S. (2021).

fiduciaries must conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of investment options.[8]

Given the Seventh Circuit's repeated reliance on this reasoning, the Supreme Court vacated the judgment and asked the Seventh Circuit to consider whether the participants have plausibly alleged a violation of the duty of prudence as articulated in *Tibble*, applying the pleading standard discussed in *Ashcroft v. Iqbal*,[9] and *Bell Atlantic Corp. v. Twombly*.[10] "Because the content of the duty of prudence turns on 'the circumstances . . . prevailing' at the time the fiduciary acts,[11] the appropriate inquiry will necessarily be context specific."[12] At times, the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, the Supreme Court said, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on experience and expertise.

Iqbal and *Twombly* hold that a plaintiff must allege some facts to make a claim, in this instance for fiduciary breach, plausible. By emphasizing that at the pleading stage this standard applies with full force to plaintiffs in ERISA excessive fee cases, and underscoring that the viability of such a claim depends on a fact specific inquiry, the Supreme Court's unanimous opinion suggests cookie cutter allegations of fiduciary breach drawn from other cases may not suffice. Rather, going forward, courts may require plaintiffs to plead facts showing that the specific decisions fiduciaries have made, under the then-existing circumstances, plausibly amount to a violation of ERISA's fiduciary standard of care.

Conclusion

Northwestern provides important guidance on what fact-based allegations retirement plan participants must include in their complaints when challenging Plan fees and imprudent investment options. In *Iqbal* the Supreme Court said that "[w]hile a complaint attacked by a Rule 12 (b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." It is this standard to which the *Northwestern* plaintiffs will henceforth be held.

Authors

This GT Alert was prepared by:

- Jeffrey D. Mamorsky | +1 212.801.9336 | mamorskyj@gtlaw.com
- Jonathan L. Sulds | +1 212.801.6882 | suldsj@gtlaw.com

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[8] *See id.*, at 529–530.
[9] 556 U. S. 662 (2009).
[10] 550 U. S. 544 (2007).
[11] ERISA §404.
[12] *Fifth Third Bancorp v. Dudenhoeffer*, 573 U. S. 409, 425 (2014).