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Important Reminder from the U.S. Supreme Court - Just Giving Plan Participants Options Is Not Enough to Satisfy the Duty of Prudence

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KEY TAKEAWAYS

- Plan fiduciaries have a duty of prudence to independently evaluate on an ongoing basis investments offered in a plan's menu of options and remove any imprudent ones.
- Plan participants' ultimate choice of their investment of their defined contribution plan accounts does not excuse plan fiduciaries' duty of prudence.
- Whether plan fiduciaries act prudently is context-specific, but their reasonable judgment based on experience and expertise is given due regard.

On January 24, 2022, the United States Supreme Court issued its opinion in *Hughes, et al. v. Northwestern University, et al.*, No. 19-1401, __ U.S. __ (2022). The plaintiffs in *Hughes* are participants in the employer's defined contribution retirement plans, which are governed by the Employee Retirement Income Security Act (ERISA). The participants maintain individual investment accounts funded by pre-tax salary contributions and employer's matching contributions (if applicable). Each participant chooses how to invest their funds from the menu of investment options selected by the plan administrators – the defendants. The amount a participant ultimately saves for retirement is determined by the performance of the chosen investments and deduction of any associated fees, including investment management fees and recordkeeping fees.

The plaintiffs alleged that the defendants violated their statutory duty of prudence by (1) failing to monitor and control the recordkeeping fees, causing plan participants to pay unreasonably high costs, (2) offering investments in the form of "retail" share classes with higher fees; and (3) offering too many investment options, which were alleged to confuse participants and cause poor investment decisions. The district court granted defendants' motion to dismiss, and the Seventh Circuit affirmed, concluding that the plaintiffs failed to allege a breach of fiduciary duty as a matter of law.

The Supreme Court unanimously vacated the Seventh Circuit's decision. The Court emphasized that in *Tibble v. Edison International*, 575 U.S. 523 (2015), it determined that "a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones." In rejecting the plaintiffs' allegations, the Seventh Circuit did not apply the principles in *Tibble* but instead exclusively relied on the participants' ultimate choice of their investments to excuse the defendants' allegedly imprudent decisions. The Court highlighted that even in a defined contribution plan where the participants choose their investments, plan fiduciaries still must independently evaluate which investments may be prudently included in the plan's menu of options and will breach their duty if failing to remove any imprudent investments. The Seventh Circuit consequently erred when it ruled that the plaintiffs could not complain about the flaws in the investment options offered by the plan merely the plan offered them a menu of options that included the types of investment preferred by the plaintiffs and for which they could control the amount of fees paid.

The Supreme Court remanded the case to the lower court to reevaluate whether the plaintiff's allegations plausibly allege a violation of the duty of prudence as articulated in *Tibble*. The Court indicated that the inquiry into the duty of prudence is context-specific as it turns on "the circumstances… prevailing" at the time the fiduciary acts. However, the

court also reminded lower courts that "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."

What does this mean for employers, plan sponsors, and plan administrators? *Hughes* provides a reminder that plan administrators and plan sponsors of defined contribution plans must do more than merely offer investment options to plan participants. Instead, plan administrators and plan sponsors must actively and on an ongoing basis review investment options and weed out the imprudent investments offered through the plan's investment option menu.

As always, please feel free to contact authors or your Miller Canfield attorneys if you have any questions.