GIBSON DUNN

Supreme Court Holds That Investor Choice Does Not Categorically Preclude ERISA Claims For Breach Of Fiduciary Duty

***April Hughes, et al. v. Northwestern University, et al.*, No. 19-1401**

Decided January 24, 2022

Today, the Supreme Court held 8-0 that offering inexpensive investment options, together with other allegedly high-cost options, in a defined-contribution retirement plan does not itself categorically foreclose a claim for breach of ERISA's duty of prudence.

Background:

The Employee Retirement Income Security Act ("ERISA") imposes a duty of prudence on fiduciaries' management of employees' retirement plans. See 29 U.S.C. § 1104(a)(1)(B). Administrators of defined-contribution plans, which feature a "menu" of investment options into which employees may direct their contributions, are subject to the fiduciary duties set forth in ERISA. Petitioners, who are former and current employees of respondent Northwestern University, alleged that Northwestern violated its duty of prudence by providing employees with a menu of investment options that caused employees to incur excessive fees, both because too many options were offered and because of the high fees associated with a number of the available options. The Seventh Circuit affirmed the dismissal of petitioners' claims for failure to plausibly allege a breach of fiduciary duty. It held in relevant part that Northwestern had complied with its duty of prudence by offering a menu of investment options that

> *"[E]ven in a defined-contribution plan where participants choose their investments, plan fiduciaries are required to conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options."*
>
> Justice Sotomayor, writing for the Court

Gibson Dunn Named **Appellate Firm of the Year**

included petitioners' preferred type of low-cost investments, along with other higher-cost options.

Issue:

Whether participants in a defined-contribution retirement plan may state a claim for breach of ERISA's fiduciary duty of prudence on the theory that investment options offered in the plan were too numerous and that many of the options were too costly, notwithstanding that the plan's fiduciaries offered low-cost investment options in the plan as well.

Court's Holding:

Relying on *Tibble v. Edison Int'l*, 575 U.S. 523 (2015), the Supreme Court held that the Seventh Circuit erred in dismissing the plaintiffs' claims without making a "context-specific inquiry" that "take[s] into account [a fiduciary's] duty to monitor all plan investments and remove any imprudent ones."

What It Means:

- The Court's short, unanimous decision (with Justice Barrett recused) requires the Seventh Circuit to reevaluate the plaintiffs' claims under *Tibble*. The decision does not purport to break new legal ground, does not decide whether plaintiffs stated a viable claim, and does not address what allegations would be sufficient to plead a viable claim under plaintiffs' theories (including theories focused on recordkeeping fees).
- Citing *Tibble*, the Court stated that the mere availability of adequate investment options does not categorically prevent ERISA plaintiffs from stating a plausible claim for breach of the duty of prudence, and that "[i]f the fiduciaries fail to remove an imprudent investment from the plan within a reasonable time, they breach their duty."
- In evaluating whether the plan participants' allegations were sufficient to survive a motion to dismiss, the Court applied well-settled pleading rules and did not adopt an ERISA-specific standard.
- In concluding its opinion, the Court emphasized that "[a]t 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."

The Court's opinion is available here.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

Appellate and Constitutional Law Practice

Allyson N. Ho
+1 214.698.3233
aho@gibsondunn.com

Mark A. Perry
+1 202.887.3667
mperry@gibsondunn.com

Lucas C. Townsend
+1 202.887.3731
ltownsend@gibsondunn.com

Bradley J. Hamburger
+1 213.229.7658
bhamburger@gibsondunn.com

Related Practice: Executive Compensation and Employee Benefits

Stephen W. Fackler
+1 650.849.5385
sfackler@gibsondunn.com

Sean C. Feller
+1 310.551.8746
sfeller@gibsondunn.com

Krista P. Hanvey
+1 214.698.3425
khanvey@gibsondunn.com

Related Practice: Labor and Employment

Jason C. Schwartz
+1 202.955.8242
jschwartz@gibsondunn.com

Katherine V.A. Smith
+1 213.229.7107
ksmith@gibsondunn.com