



## Breach of Fiduciary Duties in Administering Defined Contribution Plans

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**Editor's note:** Nancy G. Ross and Richard E. Nowak are partners, and Jed W. Glickstein is an associate at Mayer Brown LLP. This post is based on their Mayer Brown memorandum.

On July 2, 2021, the US Supreme Court granted certiorari in *Hughes v. Northwestern University*, No. 19-1401, to address the pleading standard that applies to breach of fiduciary duty claims under the Employee Retirement Income Security Act of 1974 (ERISA). *Hughes* is one of now hundreds of cases filed in recent years against the company sponsors and fiduciaries of defined contribution 401(k) and 403(b) plans alleging breaches of fiduciary duties for purportedly failing to adequately control the plan's administrative costs or monitor the plan's investments.

The plaintiffs in *Hughes* contended that the Northwestern University retirement plan paid too much for recordkeeping services by using multiple recordkeeping vendors, not soliciting bids for recordkeeping and not negotiating for fee reductions. The plaintiffs also alleged that the plan offered retail share classes of various mutual funds instead of less expensive institutional shares. The complaint mentioned various other potential theories of imprudence, including the number and type of investments offered to participants and those funds' historical performance, but the plaintiffs did not discuss those theories in their certiorari petition.

The Seventh Circuit affirmed the dismissal of the lawsuit on a motion to dismiss, determining that the complaint showed that Northwestern's choice to use multiple recordkeepers (a characteristic unique to educational institutions offering TIAA investments) was prudent and that the plaintiffs' allegations about retail share classes were insufficient given the wide range of investment options offered in the plan. See *Divane v. Northwestern Univ.*, 953 F.3d 980 (7th Cir. 2020). Courts in other circuits have reached differing conclusions on the plausibility of similar claims at the pleading stage, with the Third Circuit allowing recordkeeping and investment claims to proceed against the University of Pennsylvania and the Eighth Circuit dismissing some of the plaintiffs' investment claims against Washington University in St. Louis while allowing other claims to go forward.

*Hughes* provides the Supreme Court an opportunity to flesh out the "careful, context-sensitive scrutiny of a complaint's allegations" required in assessing prudence claims under ERISA. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). While the Court's opinion will bear directly on the myriad cases filed against private universities challenging the administration of their 403(b) plans, given the nature of the complaint allegations in *Hughes*, and the common legal principles applicable to both university and corporate ERISA governed plans, the opinion will

undoubtedly provide further guidance, if not instruction, to sponsors and fiduciaries of all defined contribution plans as to best practices in administering such plans.