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In ERISA Excessive Fee Cases, Will the Supreme Court Issue Guidance for Dividing the Plausible Sheep From the Meritless Goats?

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Litigation over excessive fees in defined contribution plans under the Employee Retirement Income Security Act of 1974 (ERISA)[1] is on top of mind of every employer sponsoring one of these types of plans. As ERISA fee case filings continue to dramatically increase,[2] courts must remain mindful that in enacting ERISA, Congress wanted to protect benefits employees were promised, while at the same time Congress sought to avoid fostering a system that became so costly that it unduly discouraged employers from offering ERISA plans in the first place.[3] These concerns have recently come to bear before the Supreme Court in *Hughes v. Northwestern*, after it decided to review the Seventh Circuit's holding affirming dismissal of the plaintiffs' excessive fee case.[4] This article will examine the arguments on appeal and the broader influence the *Hughes* decision will have on the pleading standard in fiduciary litigation as the Supreme Court attempts to walk a tightrope in balancing the competing Congressional aims of ERISA.

ERISA FIDUCIARY DUTIES

To protect retirement plan participants, ERISA: (1) requires disclosure and reporting to participants; (2) establishes standards of conduct, responsibility, and obligations for fiduciaries; and (3) provides remedies, sanctions, and ready access to the federal courts.[5] It ''represents a careful balancing'' of Congress's dual objectives to prevent employers offering retirement plans from engaging in self-dealing at their employees' expense, while simultaneously ensuring that it ''create[s] a system that is [not] so complex that administrative costs, or litigation expenses, unduly dis-

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[1] 29 USC §1001, *et seq.*; 29 C.F.R. Part 2509, *et seq.*

[2] *See* Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg Law (Oct. 18, 2021); Kevin LaCroix, *A New Wave of Excessive Fee Fiduciary Liability Litigation*, The D&O Diary (Aug. 15, 2021).

[3] *Conkright v. Frommert*, 559 U.S. 506, 516–17 (2010).

[4] The U.S. Supreme Court granted certiorari in *Hughes v. Northwestern Univ.*, No. 19-1401, on July 2, 2021, after the Seventh Circuit affirmed the dismissal of the lawsuit on a motion to dismiss in *Divane v. Northwestern Univ.*, 953 F.3d 980 (7th Cir. 2020). Plaintiff Laura L. Divane is not participating in the Supreme Court proceeding thus named plaintiff in the caption has changed from ''Divane'' to ''Hughes.''

[5] *See* ERISA §2, 29 U.S.C. §1001; *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985) (discussing ERISA's legislative history).

courage employers from offering [ERISA] plans in the first place.''[6]

Employers appoint fiduciaries and delegate to them the discretionary authority or control over the administration or management of the assets of a plan.[7] These fiduciaries are required to: (1) act solely in the interest of the participants . . . and . . . for the exclusive purpose of providing benefits to participants; (2) act with ''prudence;'' (3) diversify plan investments to minimize large losses; and (4) act in accordance with the terms of the plan.[8] In other words, fiduciary actions ''must be made with an eye single to the interests of the participants''[9] and made with the ''care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in like capacity and familiar with such matters would use in the conduct of an enterprise of like character with like aims.''[10]

Along with these duties, the statute also prohibits certain transactions[11] between a plan and others (known as a parties in interest).[12] One prohibited transaction includes contracting with service providers to provide services to a plan.[13] This is considered a prohibited transaction unless the fiduciary can show that: (1) the contract with the service provider as a whole is reasonable; (2) the services are necessary for the operations of the plan; and, (3) the fees are reasonable.[14] Furthermore, fiduciaries must avoid conflicts.[15]

In the event a fiduciary breaches their duty, ERISA §409(a) provides that a fiduciary is personally liable to make the plan whole for any losses sustained as a result.[16] ERISA empowers only participants, fiduciaries, or the Secretary of Labor to sue fiduciaries for these breaches.[17]

[6] *Conkright*, 559 U.S. 506, 517.

[7] ERISA §3(21)(A)(i), 29 U.S.C. §1002(21); 29 C.F.R. §2510.3-21(c).

[8] ERISA §404(a), 29 U.S.C. §1104(a).

[9] *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982).

[10] ERISA §404(a)(1)(B), 29 U.S.C. §1104(a)(1)(B).

[11] *See* ERISA §3(14) and ERISA §406, 29 U.S.C. §1002(14) and §1106(a).

[12] ERISA §3(14), 29 U.S.C. §1002(14) (certain parties in interest include: a fiduciary, a service provider, and an employer).

[13] ERISA §406(a)(1)(C), 29 U.S.C. §1106(a)(1)(C).

[14] ERISA §408(b)(2), 29 U.S.C. §1108(b)(2).

[15] ERISA §406(b), 29 U.S.C. §1106(b) (fiduciary cannot deal with the assets of the plan for his own interest, may not participate on behalf of a party in a transaction whose interests are adverse to the interests of the plan or the plan's participants, and cannot receive any kick-backs).

[16] 29 U.S.C. §1109(a).

[17] ERISA §502(a)(2), 29 U.S.C. §1132(a)(2).

COMMON CLAIMS IN EXCESSIVE FEE CASES

In excessive fee cases, breach of fiduciary duty claims under ERISA relating to I.R.C. §401(k) or I.R.C. §403(b) plans generally include the following allegations:

- failure to monitor service providers and fees in the plans;[18]
- recordkeeping fees are too high or paid through revenue sharing;[19]
- share of classes used are more expensive than others (retail v. institutional);[20]
- offering mutual funds instead of lower cost separate accounts;[21]
- offering more actively managed funds instead of index funds;[22]
- failure to use the plan's size as bargaining power to negotiate lower fees;[23]
- conflicts of interest and prohibited transactions;[24] or
- failure to conduct request for proposals (RFPs) to ensure service provider fees are reasonable.[25]

Furthermore, all types of investments have exposed fiduciaries to liability, such as: annuities, money mar-

[18] *Tussey v. Abb, Inc.*, 746 F.3d 327, 340 (8th Cir. 2014) (held that defendants failed to monitor record-keeper fees); *Rogers v. Baxter International Inc.*, 710 F. Supp. 2d 722, 740 (N.D. Ill. 2010) (a failure to monitor a service provider is derivative in nature and therefore there must be an underlying fiduciary breach of duty).

[19] *Braden v. Wal-Mart Stores*, 588 F.3d 585, 596 (8th Cir. 2009) (plaintiffs allege that revenue sharing payments were made to trustee); *Martin v. CareerBuilder, LLC*, No. 19-cv-6463 at *3, 2020 BL 244914 (N.D. Ill. July 1, 2020) (plaintiff claimed that a reasonable fee for recordkeeping was $40 per participant).

[20] *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1823 (2015) (challenging institutional class shares v. retail class shares); *White v. Chevron Corp.*, No. 16-cv-0793, at *20, 2017 BL 183229 (N.D. Cal. May 31, 2017), *aff'd*, 752 Fed. App'x 453 (9th Cir. 2018) (same); *Loomis v. Exelon Corp.*, 658 F.3d 667, 670 (7th Cir. 2011) (same); *Marks v. Trader Joe's Co.*, No. CV 19-10942 PA (JEMx) at *7-8, 2020 BL 167366 (C.D. Cal. Apr. 24, 2020) (same).

[21] *Spano v. Boeing Co.*, 125 F. Supp. 3d 848, 861 (S.D. Ill. 2014).

[22] *Smith v. CommonSpirit Health*, No. 20-95-DLB-EBA, at *1, 2021 BL 339537 (E.D. Ky. Sept. 8, 2021).

[23] *In re Omnicom ERISA Litig.*, No. 20-cv-4141 (CM), at *1, 2021 BL 29013 (S.D.N.Y. Aug. 2, 2021).

[24] *Cassell v. Vanderbilt Univ.*, 285 F. Supp. 3d 1056, 1070 (M.D. Tenn. 2018).

[25] *George v. Kraft Foods Glob., Inc.*, 641 F.3d 786, 798-99 (7th Cir. 2011) (plaintiffs allege that defendants should have solicited bids for recordkeepers every three years); *Henderson v. Emory Univ.*, 252 F. Supp. 3d 1344, 1353 (N.D. Ga. 2017) (same); *Ramos v. Banner Health*, 1 F.4th 769, 775 (10th Cir. 2021) (similar);

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ket funds, mutual funds, stable value funds, collective investment trusts, and even target date funds.[26] In one case, plaintiffs alleged that a stable value fund was not appropriate for the plan's investment lineup [27] yet, in another case, plaintiffs claim a fiduciary breach for not having a stable value fund or a collective investment trust as an investment option.[28] Concerning mutual funds, fiduciaries have been required to defend their decisions to offer actively managed mutual funds over passively managed mutual funds.[29] Passively managed funds often track index funds, such as the S&P 500 and are therefore often less expensive than actively managed funds that use investment managers endeavor to outperform the market. Moreover, even target date funds have been the subject of class action lawsuits where plaintiffs allege that actively managed target date funds underperformed passively managed target date funds.[30]

In these complaints, plaintiffs consistently cite to various sections of the DOL's brochure, ''A look at 401(k) plan fees,''[31] such as, employers having to: ''establish a prudent process for selecting investment options and service providers;'' and ''monitor investment options and service providers once selected to make sure they continue to be appropriate choices.''[32] But, oddly, plaintiffs consistently fail to cite the DOL's conclusion in the brochure, which is:

> . . .remember that all services have costs[,]. . . . Remember, too, that higher investment management fees do not necessarily mean better performance. Nor is cheaper necessarily better. Compare the net returns relative to the risks among available investment options. And, finally, don't consider fees in a vacuum. They are only one part of the bigger picture, including investment risks and returns and the extent and quality of services provided. . . .[33]

The Seventh Circuit has found that ''[t]he fact that . . . some other funds might have had even lower ratios is beside the point; nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems).[34] The Seventh Circuit further, in *Hughes*, found that in selecting investment funds, fiduciaries must consider them following current practices and ''against the backdrop of the mix and range of available investment options'' as a whole.[35]

THE PLEADING STANDARD

Under Rule 12(b)(6), a federal cause of action may be dismissed when the complaint fails to state a claim upon which relief can be granted.[36] A complaint must meet two criteria to survive a motion to dismiss under Rule 12(b)(6): (1) it must assert a plausible claim; and (2) it must set forth sufficient factual allegations to support the claim.[37] In *Bell Atlantic, Corp. v. Twombly*,[38] the Supreme Court specifically rejected the previous Rule 12(b)(6) standard ''that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.''[39] Thus, pleadings are no longer satisfied by ''an unadorned the-defendant-unlawfully-harmed me accusation.''[40] Now, neither a ''formulaic recitation of the elements of a cause of action'' nor

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Cassell v. Vanderbilt Univ., 285 F. Supp. 3d 1056, 1064-66 (M.D. Tenn. 2018) (similar); *Marks v. Trader Joe's Co.*, 2020 BL 167366 (''[N]othing in ERISA requires competitive bidding.''); *White v. Chevron Corp.,* 2017 BL 183229, at *27 (ERISA does not require competitive bidding); *Kelly v. Johns Hopkins Univ.*, No. GLR-16-2835, 2017 BL 348010 (D. Md. Sept. 28, 2017) (as part of the settlement agreement, defendants were also required to hire an independent plan consultant and issue RFPs to retirement plan recordkeepers and administrators).

[26] *See Pinnell v. Teva Pharm. U.S.A., Inc.*, No. 19-5738, 2020 BL 119313 (E.D. Pa. Mar. 31, 2020) (challenging use of T. Rowe Price target date funds); *Brown-Davis v. Walgreen Co.*, No. 1:19-cv-05392, 2020 BL 529723 (N.D. Ill. Mar. 16, 2020) (challenging use of Northern Trust collective trust target date funds); *Wehner v. Genentech, Inc.*, No. 20-cv-06894-WHO, at *13, 2021 BL 221499 (N.D. Cal. June 14, 2021) (challenging use of custom-designed target date funds); *Wilcox v. Georgetown Univ.*, No. 18-422 (RMC), at *1, 2019 BL 5946 (D.D.C. Jan. 8, 2019) (''If a cat were a dog, it could bark. If a retirement plan were not based on long-term investments in annuities, its assets would be more immediately accessed by . . . participants. These two truisms can be summarized: cats don't bark and annuities don't pay out immediately.''); *White v. Chevron Corp.*, No. 16-cv-0793-PJH, at *5, 2016 BL 281396 (N.D. Cal. Aug. 29, 2016) (allegations of breach of fiduciary duty by not offering a stable value fund and by instead offering lower-cost Vanguard funds and a Vanguard money market fund).

[27] *Ellis v. Fid. Mgmt. Trust Co.*, 883 F.3d 1 (1st Cir. 2018).

[28] *White*, 2017 BL 183229 at *9; *In re M&T Bank Corp. ERISA Litig.*, No.16-CV-375 FPG at *8, 2018 BL 326330 (W.D.N.Y. Sept. 11, 2018).

[29] *Loomis*, 658 F.3d 667, 670.

[30] *Dearing v. IQVIA, Inc.*, No. 1:20CV574, at *1, 2021 BL 357658 (M.D.N.C. Sept. 21, 2021).

[31] *A Look at 401(k) Plan Fees* (Sept. 2019).

[32] *A Look at 401(k) Plan Fees* at 2.

[33] *A Look at 401(k) Plan Fees* at 9.

[34] *Hecker v. Deere Co.*, 556 F.3d 575, 586.

[35] *Divane v. Northwestern. Univ.*, 953 F.3d 980, 992 (7th Cir. 2020).

[36] Fed. R. Civ. P. 12(b)(6).

[37] *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949-50 (2009) (citing *Bell Atlantic, Corp. v. Twombly*, 550 U.S. 554 (2007)).

[38] 550 U.S. 554 (2007).

[39] *Twombly*, 550 U.S. 554, 560-61 (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

[40] *Iqbal*, 129 S. Ct. 1937, 1949 (citing *Twombly*, 550 U.S. 554,

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"naked assertions devoid of further factual enhancement" are sufficient to withstand dismissal.[41] Instead, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[42] Claims contain facial plausibility when pled with enough factual content that allows the court to draw the reasonable inference that the defendant is liable under the alleged claim.[43]

In the ERISA context, where plans offer the employer's common stock as an investment option, participants have alleged that fiduciaries knew that the share price of the company's stock was artificially inflated and therefore had a duty to disclose the underlying information that was driving the share price.[44] In the past, fiduciaries had the *Moench* presumption or the presumption that they acted prudently by having employer stock as an option unless the company was on the brink of collapse.[45] The Supreme Court threw out the *Moench* presumption and set forth a new pleading standard that presented a significant challenge for plaintiffs to survive dismissal. Under the new standard, plaintiffs must demonstrate that fiduciaries by failing to take an alternative course of action have done more harm than good to the value of the employer's stock.[46] Defendants in excessive fee cases have cited to *Dudenhoeffer* in their pleadings [47] to emphasize the importance of the motion to dismiss stage in weeding out meritless claims.[48]

555).

[41] *Iqbal*, 129 S. Ct. 1937, 1949.

[42] *Twombly*, 550 U.S. 554, 570.

[43] *Twombly*, 550 U.S.554, 556.

[44] *Jander v. IBM*, 910 F.3d 620 (2d Cir. 2018) (plaintiffs alleged that IBM should have disclosed to the plan's participants that its share price was artificially inflated).

[45] See José M. Jara, *What Is the Correct Standard of Prudence in Employer Stock Cases*, 45 J. Marshall L. Rev. 541, 588 (2012) ("Given the presumption of prudence to which ERISA fiduciaries are entitled, plaintiffs must plead facts sufficient to show what 'circumstances not known to the settlor and not anticipated by him' should have caused the [defined contribution plan] fiduciary to determine that employer stock was not a prudent investment. In other words, plaintiffs must, at a minimum, allege what caused the stock to become an imprudent investment.").

[46] *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014).

[47] *Ferguson v. Ruane Cunniff & Goldfarb Inc.*, No. 17-cv-6685 (ALC) at *6 (S.D.N.Y. Sept. 1, 2017) (citing to *Dudenhoeffer* in support of its motion to dismiss plaintiffs' claims for excessive investment management fees); *Brown-Davis*, No. 1:19-cv-05392, 2020 BL 529723 (citing to *Dudenhoeffer* in its motion to dismiss plaintiffs' claims alleging that the plan invested in underperforming target-date funds that were less expensive than comparable investments).

[48] *Dudenhoeffer,* 573 U.S. 409, 425 ("[W]e do not believe that the presumption at issue here is an appropriate way to weed out meritless lawsuits or to provide the requisite 'balancing.' The proposed presumption makes it impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious, unless the employer is in very bad economic circumstances. Such a rule does not readily divide the plausible sheep from the meritless goats").

DIVANE v. NORTHWESTERN UNIVERSITY

As is common in breach of fiduciary duty suits, the plaintiffs in *Hughes*, participants in the Northwestern University Retirement Plan, brought suit against Northwestern University, the University's Investment Committee, and certain university employees tasked with investment oversight and administration of the plans at issue alleging violations of their fiduciary duties under ERISA §404(a)(1)(A), ERISA §404(a)(1)(B) and ERISA §404(a)(1)(D).[49] Particularly, plaintiffs alleged that the defendants breached their fiduciary duties by: (1) offering an overly broad range of investment options; (2) allowing a financial services provider to serve as recordkeeper for certain investment funds; and (3) offering certain investment options that charged purportedly excessive fees by charging retail-rate expense ratios to cover recordkeeping rather than institutional-rate expense ratios.[50]

The district court, however, granted the defendants' motion to dismiss[51] and held that, as to the issue of allowing a financial services provider to serve as recordkeeper for investment funds it offered, "no plan participant was required to invest in the [] fund" so "any plan participant could avoid what plaintiffs consider to be the problems with these products . . . simply by choosing other options."[52] Simply stated, the plan participants had other options if they had any objection to the recordkeeper of the funds at issue.[53]

As to alleged "excessive" fees, the court held "there is nothing wrong, for ERISA purposes, with the fact that the plan participants paid the recordkeeper expenses via . . . expense ratios[,]" that the rate charged was reasonable, and that participants had options to choose investments with lower expenses.[54] Lastly, the court found that the defendants had not acted improperly by offering a broad range of investment options since the plaintiffs did not argue that the defendants had failed to make available the low-cost index funds preferred by the plaintiffs, but rather, included allegations describing the freedom they had under the plans to invest in the fund options they wanted.[55]

On appeal, the plaintiffs proposed alternative recordkeeping arrangements they would have preferred,

[49] *Divane v. Northwestern Univ.*, No. 16 C 8157, at *1, 2018 BL 186065 (N.D. Ill. May 25, 2018).

[50] *Divane*, at *1-4.

[51] *Divane*, at *7-11.

[52] *Divane*, at *6.

[53] *Divane*, at *6.

[54] *Divane*, at *8.

[55] *Divane*, at *8–9.

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including either a negotiated flat rate recordkeeping fee, instead of a fee based on revenue sharing or soliciting competitive bids for a fixed per-capita fee, instead of using two separate record keepers.[56] The Seventh Circuit, in affirming the district court's decision,[57] held that ERISA does not require such a fee structure, a sole record keeper, nor mandate any specific recordkeeping arrangement at all.[58] In holding that the defendants did not breach their fiduciary duties by offering a large number of investment options, the circuit court cited to binding precedent[59] that plans may generally offer a wide range of investment options and fees without breaching any fiduciary duty.[60]

The Seventh Circuit also held that the fiduciaries did not engage in prohibited transactions when allegedly unreasonable recordkeeping fees were collected from plan participants.[61] Just as the district court, the Seventh Circuit found that the plan did offer lower fee options thereby ''eliminating any claim that participants were forced to stomach an unappetizing menu.''[62]

ARGUMENTS BEFORE SCOTUS

Plaintiffs, in petitioning the U.S. Supreme Court for certiorari, argued that the Seventh Circuit's decision conflicted with both the Third Circuit[63] and the Eighth Circuit,[64] which had allowed similar complaints to survive motions to dismiss.[65] This split, the petitioners argued, exists because *Hughes*, *Sweda,* and *Davis* each involved essentially the same allegations against fiduciaries of large retirement plans: paying excessive recordkeeping fees by retaining multiple recordkeepers, failing to solicit competitive bids or negotiate lower fees, and offering mutual funds with excessive investment management fees (including high-cost retail-class shares of mutual funds when lower-cost institutional-class shares of the same mutual funds were available).[66] Yet, according to the petitioners, the Seventh Circuit affirmed the dismissal of their claims based on the same substantive allegations that the Third and Eighth Circuits determined to be sufficient to survive dismissal.[67]

In opposing the petition for writ of certiorari, the respondents vehemently argued there is no circuit split. First, the respondents argued that the Seventh Circuit applied the correct standard on dismissal by holding that ''[w]hen claiming an ERISA violation, the plaintiff must plausibly allege action that was objectively unreasonable.''[68] Second, the respondents argued that the plaintiffs improperly concluded ''that the Seventh Circuit held 'that offering a meaningful mix and range of investment options insulates plan fiduciaries from liability.' ''[69] The respondents further argued that the Seventh Court looked instead at ''the fiduciary's overall performance'' and considered the range of investment options against this backdrop as part of a holistic approach.[70] Lastly, as to *Sweda* and *Davis*, the respondents argued that simply because the plaintiffs prevailed in those cases does not mean those decisions are ''irreconcilable with the decision below'' since [d]ifferent outcomes do not evidence a 'circuit split[.]' ''[71]

The Justices were persuaded to grant certiorari and agreed to consider whether allegations that a defined contribution plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services are sufficient to state a claim against fiduciaries for breach of ERISA's duty of prudence.

Petitioners and several industry groups as *amici* for the petitioners[72] argue that ERISA's prudence requirement is derived from trust law, which requires fiduciaries to act prudently to ensure they only incur reasonable expenses and not that they are not excessive. They further argue that to achieve this, fiduciaries need to compare costs and need to do so on an ongoing basis.

In addition, petitioners argue that they have met the pleading requirements by alleging: (1) the respondents offered retail share mutual funds when they

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[56] *Divane*, 953 F.3d 980, 989-990 (7th Cir. 2020).

[57] *Divane*, 953 F.3d 980, 994.

[58] *Divane*, 953 F.3d 980, 990.

[59] *Loomis*, 658 F.3d 667, 673-74; *Hecker*, 556 F.3d 575 (finding no breach of fiduciary duty where 401(k) plan participants could choose to invest in 26 investment options and more than 2,500 mutual funds through a brokerage window).

[60] *Divane*, 953 F.3d 980, 992.

[61] *Divane*, 953 F.3d 980, 991.

[62] *Divane*, 953 F.3d 980, 991.

[63] *Sweda v. Univ. of Pa.*, 923 F.3d 320 (3d Cir. 2019)

[64] *Davis v. Washington University in St. Louis*, 960 F.3d 478 (8th Cir. 2020).

[65] *See* Pet. App. at pp. 1-2.

[66] Pet. App. at p. 1.

[67] Pet. App. at p. 1.

[68] *See* Resp. Brief pp. 11-12 (citing *Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016)).

[69] Resp. Brief at p. 12 (citing Pet. App. at p. 12).

[70] Resp. Brief at p. 12.

[71] Resp. Brief at pp. 19-20.

[72] Amicus briefs were submitted by the Acting Solicitor General expressing the views of the United States, AARP/AARP Foundation, Service Employees International Union, Investment Law Scholars, American Association for Justice, and several individuals.

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could have offered less expensive institutional shares; (2) the participants' lost investment opportunity cost in these higher cost investments; (3) imprudently incurred excessive recordkeeping fees, including consolidating services to one recordkeeper; and (4) that the large investment line up was duplicative and confusing when the plan could have negotiated better fees with a smaller investment line up.[73]

Respondents claim the petitioners' position is ''paternalistic'' and that in participant directed defined contribution plans, participants have control over their investment choices. Fiduciaries are required to provide a diverse menu of investments options and provide participants with robust disclosures[74] to arm participants with the knowledge they need to make their own investment decisions. Respondents further highlight that the petitioners in relying on trust law fail to see that fiduciaries under trusts make the actual decisions for their beneficiaries.

Moreover, respondents argue that participants' excessive fee claims failed to allege a viable claim under ERISA, since they did not allege an '' 'alternative action that the defendant could have taken' – i.e., an alternative action that was *actually* available to the fiduciary.''[75]And that plaintiffs' complaint did not meet the ''more harm than good'' standard set forth in*Dudenhoeffer*. Respondents note that the complaint did not reference a single recordkeeper that would agree to a $35 flat fee for each participant. Respondents also argue that the complaint failed to consider the surrender charge that would have been levied against any investment fund that was invested in TIAA's Annuity as a result of removing TIAA as the plan's recordkeeper.

Regarding the investments, respondents point out that the complaint claims that the fiduciaries should have chosen the institutional share classes rather than the retail classes, but the complaint does not address the minimum amount required to be invested to obtain such share class. Respondents are asking the Court to extend its holding in *Dudenhoeffer* to excessive fee cases, which could limit plaintiffs' chances of surviving a motion to dismiss. Plaintiffs would then have the burden of showing viable alternatives that fiduciaries should have considered when selecting investments and/or service providers, which they may be unable to overcome without first engaging in discovery.[76]

Lastly, in support of the respondents' position, Euclid Fiduciary argues that the petitioners' proposal of merely benchmarking substantially similar investment options is flawed as that approach fails to consider material dis-similarities. The comparison should be more than ''apples to apples,'' it should be ''McIntosh to McIntosh'' and ''Red Delicious to Red Delicious.''[77]

CONCLUSION

The Supreme Court's opinion in *Hughes* will unquestionably carry broader influence over cases filed against universities and corporate ERISA defined contribution plans challenging the management of those plans. The optimistic view is that the Court will issue guidance as to the appropriate pleading standard for ERISA fiduciary claims and the extent to which a plan that offers a meaningful mix and range of investment options with low-fee options will serve to insulate plan fiduciaries from liability relating to excessive fee claims. That is, will the Supreme Court side with the Seventh Circuit in finding that a plan with a broad range of options, including lower fee funds, thereby ''eliminat[es] any claim that plan participants were forced to stomach an unappetizing menu''?[78]

In the meantime, fiduciaries may want to consider the following actions to mitigate their risks:

- conduct a fee audit, analyzing the investment options' performance and fees charged;
- review plan service providers and compare the quality of services provided with the fees being charged;
- conduct RFPs of the various service providers, if not done so in more than three to five years; and
- analyze the fiduciary liability policy and limits and review to ensure there are adequate limits.

As with any action fiduciaries take, any deliberations among the fiduciaries should be documented and stored for at least six years.

[73] Pet. Brief at p. 17.

[74] 29 C.F.R. §2550.404a-5; 75 Fed. Reg. 64,910 (Oct. 20, 2010) (When a plan assigns investment responsibilities o the plan's participants . . . , it is the view of [EBSA] that plan fiduciaries must take steps to ensure that participants . . . are made aware of their rights and responsibilities with respect to managing their individual plan accounts and are provided sufficient information regarding the plan, including its fees and expenses and designated investment alternatives, to make informed decisions about the management of their individual accounts).

[75] *Dudenhoeffer*, 573 U.S. at 428.

[76] *See* Resp. Brief (Oct. 21, 2021).

[77] Brief for Euclid Fiduciary as Amicus Curiae Supporting Respondents, at p. 5.

[78] *Divane*, 953 F.3d 980, 992.

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