

## Supreme Court: Duty to Monitor ERISA Plan Investments and Remove Imprudent Ones Not Satisfied by Offering Low-Cost Investments as Plan Options (Securities Law Alert)

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On January 24, 2022, the Supreme Court unanimously vacated the Seventh Circuit’s judgment that was in favor of defendant plan fiduciaries in a lawsuit where ERISA plan participants alleged that defendants violated their duty of prudence by failing to remove imprudent investments from the plans’ offerings. [Hughes v. Northwestern](#), 142 S.Ct. 737 (2022) (Sotomayor, J.). The Court disagreed with the Seventh Circuit’s conclusion that defendants offering plaintiffs’ preferred type of low-cost investments as plan options eliminated any concern that other plan options were imprudent. The Court held that “[s]uch a categorical rule is inconsistent with the context-specific inquiry that ERISA requires and fails to take into account respondents’ duty to monitor all plan investments and remove any imprudent ones.”

### Background

Petitioners, participants in two employee retirement plans, commenced this litigation alleging that respondents, their plan administrators, violated their fiduciary duty of prudence under ERISA by: (i) offering too many investment options, which caused participant confusion and poor investment decisions; (ii) offering retail share classes of mutual funds and annuities rather than institutional share classes, which resulted in higher fees; and (iii) failing to monitor and control recordkeeping fees. The district court granted respondents’ motion to dismiss and denied leave to amend. The Seventh Circuit affirmed.

### The Court Examines the Duty of Prudence Under *Tibble v. Edison International*

The Court began its analysis by discussing *Tibble v. Edison International*, 575 U. S. 523 (2015), where the Court interpreted a plan fiduciary’s duty of prudence under ERISA. In *Tibble*, plaintiffs similarly alleged that the plan fiduciaries had offered higher priced retail-class mutual funds as plan investments when lower priced institutional-class mutual funds were available. The Court in *Tibble* concluded that plaintiffs had identified a potential violation because “a fiduciary is required to conduct a regular review of its investment.” The Court further determined that this duty is a “continuing” one and that “a plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones.”

**Failing to Remove an Imprudent Investment From a Plan Within a Reasonable Time Could Breach the Duty of Prudence**

Applying *Tibble*’s discussion of the duty to monitor plan investments, the Court determined that petitioners’ allegation—that respondents failed to remove imprudent investments from the plans’ offerings—“must be considered in light of the principles set forth in *Tibble* to determine whether petitioners have stated a plausible claim for relief.” The Court noted that the Seventh Circuit did not apply *Tibble*’s guidance and instead focused on “a fiduciary’s obligation to assemble a diverse menu of options.” The Seventh Circuit determined that the fiduciary’s provision of “an adequate array of choices,” including choices that petitioners wanted, precluded petitioners’ claims.

However, the Court found that “[t]he Seventh Circuit erred in relying on the participants’ ultimate choice over their investments to excuse allegedly imprudent decisions by respondents.” The Court observed that the Seventh Circuit’s exclusive focus on investor choice elided the duty to properly monitor investments and remove imprudent options. The Court held that fiduciaries could breach their duty if they “fail to remove an imprudent investment from the plan within a reasonable time[.]” The Court stated that on remand, “the Seventh Circuit should consider whether petitioners have plausibly alleged a violation of the duty of prudence as articulated in *Tibble*[.]”

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