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SEPT. 16, 2022

- *Hughes, et al. v. Northwestern Univ., et al.*, 142 S. Ct. 737 (2022)
- Arbitration of ERISA claims
- Actuarial equivalence cases
- Preemption (if we have time)

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Hughes, et al. v. Northwestern Univ., et al., 142 S. Ct. 737 (2022)

- Putative class action brought by three current or former employees of Northwestern University who were participants in two defined contribution plans
- Plaintiffs challenged the plans' investment management fees and recordkeeping fees as excessive (breach of fiduciary duty)

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- Defendants "allegedly failed to monitor and control [recordkeeping fees], resulting in unreasonably high costs to plan participants."
- Defendants "allegedly offered a number of mutual funds and annuities in the form of 'retail' share classes that carried higher fees than those charged by otherwise identical 'institutional' share classes of the same investments, which are available to certain large investors."
- Defendants "allegedly offered too many investment options—over 400 in total for much of the relevant period—and thereby caused participant confusion and poor investment decisions."

Hughes, et al. v. Northwestern Univ., et al., 142 S. Ct. 737 (2022)

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HUGHES V. NORTHWESTERN, CONT'D

District court dismissed; Seventh Circuit affirmed; SCOTUS reversed, drawing heavily on ***Tibble v. Edison Int'l***, 575 U.S. 523 (2015):

- "Like petitioners, the plaintiffs in Tibble alleged that their plan fiduciaries had offered 'higher priced retail-class mutual funds as Plan investments when materially identical lower priced institutional-class mutual funds were available.'"
- Tibble involved potential SOL problem: "Three of the higher priced investments, however, had been added to the plan outside of the 6-year statute of limitations."
- But "plaintiffs nevertheless had identified a potential violation with respect to these funds because a fiduciary is required to conduct a regular review of its investment. [And] a plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." (cleaned up)

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HUGHES V. NORTHWESTERN, CONT'D

- "*Tibble*'s discussion of the duty to monitor plan investments applies here."
- Remanded with instructions to "reevaluate the allegations as a whole," in light of *Tibble* and the appropriate pleading standard (*Twombly* and *Iqbal*).
- Important note – "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."

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HUGHES V. NORTHWESTERN – TAKEAWAY?

Existence of participant choice can't excuse imprudent investment option(s)

- SCOTUS said that the Seventh Circuit relied too much on the existence of "an adequate array of choices, including 'the types of funds plaintiffs wanted (low-cost index funds).'"
- "The Seventh Circuit erred in relying on the participants' ultimate choice over their investments to excuse allegedly imprudent decisions by respondents."
- "[P]lan fiduciaries are required to conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options. . . . If the fiduciaries fail to remove an imprudent investment from the plan within a reasonable time, they breach their duty."

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CASES WITH IDENTICAL ALLEGATIONS TO *HUGHES* ARE LIKELY TO SURVIVE DISMISSAL

- *Kong v. Trader Joe's Co.*, No. 20-56415, 2022 WL 1125667, at *1 (9th Cir. Apr. 15, 2022) (memorandum disposition) -- reversed district court's dismissal of lawsuit with allegations similar to those in *Hughes v. Northwestern*
  - Plaintiffs alleged that fiduciaries "failed to monitor and control the offering of a number of mutual funds in the form of 'retail' share classes that carried higher fees than those charged by otherwise identical 'institutional' share classes of the same investments. Except for the extra fees, the share classes were identical. That choice resulted in more than $30,464,538 in extra fees."
  - Defendants' explanation not relevant at MTD stage
- *Forman v. TriHealth, Inc.*, 40 F.4th 443 (6th Cir. 2022) – similar to *Kong*

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ALBERT V. OSHKOSH CORP.,
No. 21-2789, 2022 WL 3714638 (7th Cir. Aug. 29, 2022)

- Plaintiff pointed to 9 other similar plans with lower recordkeeping fees. "These comparator plans have similar numbers of participants (between around 10,000 and 16,000) and total assets (between $355 million and $2.1 billion) as the Plan. Between 2014 and 2018, the comparator plans paid an average annual recordkeeping fee of $32 to $45 per plan participant. By contrast, during the same period, the Oshkosh Plan paid an average annual recordkeeping fee of $87 per participant."
- Allegations don't state a plausible claim for relief. "This court has repeatedly emphasized that the cheapest investment option is not necessarily the one a prudent fiduciary would select." *Hughes* doesn't suggest otherwise, and *Hughes* doesn't require fiduciaries "to regularly solicit bids from service providers."
- "*Hughes* merely rejected this court's assumption that the availability of a mix of high-cost and low-cost investment options in a plan insulated fiduciaries from liability."

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- Circuit courts of appeals have generally held ERISA claims to be arbitrable.
- However, plans are having less luck with arbitration clauses that attempt to limit plan-wide remedies.
- 7th and 6th Circuits both affirmed denials of motions to compel arbitration. Appeals pending in 2nd, 3rd & 10th Cirs. Cert petition recently filed.

MANDATORY ARBITRATION OF ERISA CLAIMS

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MANDATORY ARBITRATION OF ERISA CLAIMS

Agreements to arbitrate statutory claims stand on more or less the same footing as agreements to arbitrate non-statutory claims.

- *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985): The FAA "provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability."

"[C]ontrary congressional command" can override FAA's mandate. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012)

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MANDATORY ARBITRATION OF ERISA CLAIMS

Congress arguably didn't intend ERISA claims to be arbitrable at all. However, no federal appellate court has accepted this argument and a number have rejected it.

- *Smith v. Bd. of Directors of Triad Mfg., Inc.*, 13 F.4th 613, 620 (7th Cir. 2021): "Joining every other circuit to consider the issue, we recognize that ERISA claims are generally arbitrable." The court in *Smith* cited cases from six other circuits.

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ARBITRATION OF ERISA CLAIMS

A litigant must be permitted to "effectively vindicate" her statutory rights in arbitration.

If an arbitration agreement includes a "prospective waiver of a party's right to pursue statutory remedies," then it will be unenforceable.

- *American Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235-236 (2013) (citing and quoting footnote 19 of Mitsubishi Motors, where the Court stated: "We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.").

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ARBITRATION OF ERISA CLAIMS

Plans are invoking arbitration provisions that require arbitration of ERISA claims "in the [beneficiary's] individual capacity and not in a representative capacity or on a class, collective, or group basis" and which prohibit "any remedy which has the purpose or effect of providing additional benefits or monetary or other relief to any Eligible Employee, Participant or Beneficiary [("Participant"]) other than the Claimant." Smith v. Greatbanc Tr. Co., 2020 WL 4926560, at *2 (N.D. Ill. Aug. 21, 2020).

- Defendants refer to this as a "class action waiver" but it goes further.

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29 USC §§ 1132(a)(2) & 1109

ERISA authorizes participants, etc. to bring claims of fiduciary breach on behalf of the plan and to seek "plan-wide" remedies

- 1109(a): Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

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Smith v. Bd. of Directors of Triad Mfg., Inc.,
13 F.4th 613, 620 (7th Cir. 2021)

- "Smith invokes § 1132(a)(2)'s cause of action to seek relief for (alleged) fiduciary breaches under § 1109(a). That relief, by statute, includes 'such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.' 29 U.S.C. § 1109(a). Yet the plan's arbitration provision, which also contains a class action waiver, precludes a participant from seeking or receiving relief that 'has the purpose or effect of providing additional benefits or monetary or other relief to any Eligible Employee, Participant or Beneficiary other than the Claimant.' Removal of a fiduciary—a remedy expressly contemplated by § 1109(a)—would go beyond just Smith and extend to the entire plan, falling exactly within the ambit of relief forbidden under the plan."
- Non-severability clause, so entire arbitration provision invalidated.

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Hawkins v. Cintas Corp., 32 F.4th 625, 627 (6th Cir. 2022)

- As in *Smith*, plaintiff asserted § 1132(a)(2) claim and sought plan-wide relief.
- District court denied motion to compel arbitration, and Sixth Circuit affirmed, but not on basis of prospective waiver / effective vindication doctrine:
  - "The weight of authority and the nature of § 502(a)(2) claims suggest that these claims belong to the plan, not to individual plaintiffs. Therefore, the arbitration provisions in these individual employment agreements—which only establish the Plaintiffs' consent to arbitration, not the plan's—do not mandate that these claims be arbitrated. Further, the actions of Cintas and the other defendants do not support a conclusion that the plan has consented to arbitration."

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ACTUARIAL EQUIVALENCE LITIGATION

- Qualified joint and survivor annuity (and qualified optional survivor annuity) must be "the actuarial equivalent of a single annuity for the life of the participant." 29 U.S.C. 1055(d)(1)(B) (and (d)(2)(A)(ii))
- "In other words, the total value of payments made over the expected life of the participant and his or her spouse as part of the JSA pension must be equal to the total value of payments that would have been made over the expected life of the participant had he or she selected a single-life annuity (SLA)." *Urlaub v. CITGO* (next page)

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Urlaub & Pelligrini v. CITGO Petroleum Corp. et al., 2022 WL 523129 (N.D. Ill. Feb. 22, 2022)

- "For participants who began receiving benefits prior to January 1, 2018, the defendants used the following assumptions to convert their SLAs to qualified JSAs: (1) an eight percent annual investment return, compounded annually, and (2) mortality rates from the 1971 Group Annuity Mortality Table projected to 1975 (GAMT)."
- Putative class action based on lack of actuarial equivalence (and failure to use actuarial assumptions that are reasonable)
- District court denied motion to dismiss.

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Urlaub & Pelligrini v. CITGO Petroleum Corp. et al., 2022 WL 523129 (N.D. Ill. Feb. 22, 2022)

- "[I]t cannot possibly be the case that ERISA's actuarial equivalence requirements allow the use of unreasonable mortality assumptions. Taken to the extreme, the defendants' argument suggests that they could have used any mortality table—presumably, even one from the sixteenth century—to calculate the plaintiffs' JSAs. If this were true, the actuarial equivalence requirement would be rendered meaningless."
- (Court addressed other arguments as well.)

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Belknap v. Partners Healthcare Sys., Inc., 2022 WL 658653 (D. Mass. Mar. 4, 2022)

- "Partners uses (1) an interest rate of 7.5% and (2) a "1951 Group Annuity Mortality Table projected to the 1960 Mortality Table, set back two years for participants, and set back three years for beneficiaries" ("the 1951 Adjusted Mortality Table")."
- Putative class action based on lack of actuarial equivalence (and failure to use actuarial assumptions that are reasonable)
- District court granted motion to dismiss.

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Belknap v. Partners Healthcare Sys., Inc., 2022 WL 658653 (D. Mass. Mar. 4, 2022)

- "There does not appear to be any dispute that Partners followed the requirements of the Plan—specifically, by using an interest rate of 7.5% and the 1951 Adjusted Mortality Tables—when calculating the benefit owed to plaintiff. Nor is it disputed that the language of the Plan states that the use of those assumptions produces a result that is "actuarially equivalent" to the benefit that would have been paid to plaintiff as an SLA. The question is whether ERISA requires that those assumptions be "reasonable"—more precisely, whether the statutory requirement that such benefits be "actuarially equivalent" necessarily implies the use of reasonable assumptions."
- ERISA does not require use of "reasonable" actuarial assumptions.

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PREEMPTION

- *Howard Jarvis Taxpayers Association v. CalSavers (California Secure Choice Retirement Savings Program)*, 997 F.3d 848 (9th Circ. 2021)
  - auto-IRA set up by CA for private sector employers was challenged as preempted by ERISA; 9th Cir. held not preempted
- Supreme Court denied cert petition Feb. 2022

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HJTA v. Calsavers, 997 F.3d 848 (9th Cir. 2021)

- California Secure Choice Retirement Savings Program (CalSavers) = auto-IRA for private sector employers that have at least 5 California employees and don't offer tax-favored retirement plan
- Employers must register with program, identify eligible employees, and establish system of automatic payroll deductions deposited in CalSavers Trust (for employees' IRAs)
- Employers cannot endorse or discourage participation; can't advise employees on contribution rates or investment decisions
- Employee participation is voluntary; can adjust % of deduction

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PREEMPTION

***ERIC v. City of Seattle*, 840 Fed. Appx. 248 (9th Cir. 2021)**

- Seattle city ordinance (Municipal Code § 14.28) requires large hotel employers and hotel business to make monthly payments for certain employees ("healthcare expenditures") – directly to employees OR to insurers / self-funded plans.
- 9th Cir held no preemption: doesn't "relate to" ERISA plan. Controlled by prior decision: Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco, 546 F.3d 639 (9th Cir. 2008).
- Petition for certiorari pending in SCOTUS. Court CVSG'd (called for the views of the Solicitor General). U.S. has not yet filed its brief.

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