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Supreme Court Sides with ERISA Participants in Fiduciary Suit, Rejects "Opening the Door" Exception to Sixth Amendment's Confrontation Clause: SCOTUS Today

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The pension trustees of Northwestern University, and those elsewhere, will need to take close note of the Court's unanimous decision (Barrett, J., not participating) in *Hughes v. Northwestern University* in which the Court returns yet again to interpreting the Employee Retirement Income Security Act (ERISA), this time in the context of determining the extent of ERISA fiduciaries' duty to monitor investments and remove imprudent ones. *See Tibble v. Edison International*, 575 U.S. 523 (2015).

The underlying suit concerned Northwestern's defined-contribution plan, under which each participant chooses from a mix of investment options selected by the plan administrators. The petitioners here claimed that the trustees who administer the plan violated ERISA's duty of prudence by failing to monitor and control record-keeping fees, resulting in unreasonable costs to participants, and by offering confusing options and mutual funds and annuities in the form of "retail" share classes that required higher fees than comparable funds that offered the same investments. Affirming a district court ruling, the Seventh Circuit had ruled against the petitioners on the grounds that their ultimate choice as to investments negated respondents' allegedly imprudent investments.

The unanimous Supreme Court disagreed, strongly reaffirming *Tibble*, and holding that the fact of investor choice cannot, of itself, eliminate consideration of the overall duty of fiduciaries. Thus, the Court holds that the satisfaction of that duty depends upon a context-specific evaluation of the totality of circumstances obtaining at the time the fiduciary acts or fails to act. The world of pension trustees, of which this writer is one, are duly cautioned.

Hemphill v. New York, is a criminal case of a sort that this blog usually doesn't take much notice.

However, for two reasons, I think it deserves more than passing consideration. The case concerns a trial court's admission in the trial of Darrell Hemphill of the transcript of the plea allocution of Nicholas Morris in a separate case. Hemphill and Morris were defendants in cases stemming from the killing of a two-year-old child by a stray bullet discharged in a Bronx, New York, street fight. Long after Morris's conviction, Hemphill was indicted for murder on the basis of DNA evidence. When Hemphill was tried, Morris was outside of the U.S., and hence unavailable to testify. In Morris's absence, Hemphill elicited testimony that the police had recovered nine-millimeter ammunition from Morris's apartment, thus showing Morris to be the shooter. However, the trial court allowed the introduction of

portions of Morris's plea allocution to a gun possession charge to rebut Hemphill's claim. The trial court reasoned that, although Morris could not be cross-examined concerning his out-of-court statement, Hemphill had "opened the door" to evidence that was reasonably necessary to correct Hemphill's misleading testimony.

Illustrating that we are in something of a season of Court harmony (but just wait for abortion and other controversies soon to come), Justice Sotomayor is the author of the opinions both in the *Hughes* and *Hemphill* cases.

In *Hemphill*, writing for all of the Justices, save for Thomas, J., who dissented on procedural grounds alone (and with Alito and Kavanaugh, J.J., writing additional concurrences), Justice Sotomayor sets forth a very narrow view of the scope of the "opening the door" doctrine and held that the trial court's admission of the Morris transcript violated Hemphill's Sixth Amendment right to confront a witness against him.

In doing so, the trial court was held to have erred in making an initial evaluation of the reliability and credibility of the defendant's testimony as the predicate for admitting the hearsay transcript in evidence. In holding essentially that, whatever the reach of a prosecutor's ability to introduce testimonial hearsay, it wasn't justifiable in Hemphill's case. Thus, the Court rejected a reliability test and also held that it wasn't for the trial court to decide that evidence was reasonably necessary to correct the misleading impression created by the defendant's testimony.

So, why mention *Hemphill?*

First, it is unsurprising, but significant, that both liberal and conservative Justices join in a strict insistence upon the literal interpretation of the Sixth Amendment. Justice Sotomayor, perhaps the most liberal of the Justices, rarely uses the tools of originalism, but she has here, dissecting the Sixth Amendment's confrontation clause based upon the meaning and intentions of the Framers. Indeed, her opinion could have been written by the late Justice Antonin Scalia, the dean of originalists. In sum, the decision likely says something notable about conservatives, who often are erroneously accused of biases when they are just applying the law in a manner in which they believe it was literally written. But it also shows that, with respect to the rights actually stated in the first 10 amendments, there is substantial agreement among the Justices concerning their application. Implied rights are another matter, but we'll save that discussion for later in the term.

There is a second reason why I suggest the issue of confrontation should be kept in mind. If, one assumes, that various former government officials are ever charged and brought to trial concerning the seditious events of January 6, 2021, and that is far from certain, there will be various witnesses who likely will not be available to testify, or who refuse to do so. At least some of these have made out-of-court statements that will not have been subject to confrontation but which might be seen to have substantial evidentiary value, especially if putative defendants "open the door" with self-serving versions of their participation, or lack of it, in the events of the day.

One awaits with interest how this all will go down.

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