

# Supreme Court Won't Review Key ERISA Case: A Boost for Index Funds?

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In January, the U.S. Supreme Court denied review of a case in which Putnam Investments is alleged by plan participants to have breached its fiduciary duty under ERISA by automatically including higher-cost, actively managed Putnam mutual funds as investment options for the company's 401(k) plan and then not monitoring the performance of those funds.

This leaves intact the First Circuit's holding in *Brotherston v. Putnam Investments LLC* that comparisons of investment performance against low-cost, passively managed benchmark or index funds can support a finding of loss in cases alleging the imprudent selection of actively managed mutual funds as plan investment options. It also lets stand the Fifth Circuit's ruling on which party bears the burden of proof on causation, notwithstanding a split of authority in the circuit courts. In *Brotherston*, the First Circuit had joined the Fourth, Fifth, and Eighth Circuits in holding that "once an ERISA plaintiff has shown a breach of fiduciary duty and loss to the plan, the burden shifts to the fiduciary to prove that such loss was not caused by its breach."

In its petition for certiorari, Putnam argued that the First Circuit's holding on the use of index fund comparisons to show loss effectively "makes loss a foregone conclusion in every case challenging the funds offered in a 401(k) or 403(b) plan line-up" and that this would foment litigation and force a universal shift to index funds by plan sponsors. This could be, but remains to be seen. In remanding to the district court, the First Circuit made clear not only that the district court had yet to definitively decide whether Putnam breached its duty of prudence, but also that Putnam could still rebut the legal sufficiency of the plaintiffs' evidence of loss as a factual matter. So Putnam may yet prevail at trial or on further appeal.

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