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Supreme Court Ruling Heightens Pressure on Fiduciaries to Monitor 401(k) Plan Investments

By Amber Ward, Christine Richardson and Susan Serota

On May 18th, the U.S. Supreme Court unanimously held in Tibble et al. v. Edison International et al., No. 13-550 (S. Ct. May 18, 2015) *that ordinary principles of trust law impose on ERISA fiduciaries a duty to continually monitor and remove imprudent plan investments. This duty is separate and apart from the duty to select plan investments prudently. In so holding, the Court vacated the Ninth Circuit's decision that applied the commencement of ERISA's six-year statute of limitations period for fiduciary duty claims only to the initial selection of a plan's investments. The Court remanded the case to the Ninth Circuit to consider the petitioner's breach of fiduciary duty allegations in conformance with ordinary principles of trust law. While* Tibble *serves as an important warning to ERISA fiduciaries to monitor plan investments continuously, the ruling leaves plan fiduciaries with uncertainty as to the level of monitoring required to fulfill their ERISA fiduciary obligations.*

Background

The petitioners in *Tibble* are current and former employees of a subsidiary of Edison International ("Edison") and participants in the Edison 401(k) Savings Plan ("Plan"), of which Edison is the plan sponsor. The Plan is a participant-directed individual account plan. The petitioners argued that Edison breached its fiduciary duties with respect to six mutual funds added to the Plan's investment line-up in 1999 and 2002. The Plan participants argued that Edison acted imprudently by offering higher-priced retail-class mutual funds as Plan investments and that Edison should have leveraged the Plan's status as a large institutional investor to make materially identical, lower-priced, institutional-class mutual funds available as Plan investments.

The district court agreed with the petitioners regarding the funds added in 2002, finding that Edison had no credible explanation for offering higher-priced retail class funds that cost participants increased administrative fees and, thus, breached its fiduciary duties under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). As to the funds added in 1999, however, the district court held that the petitioners’ claims were time-barred because the funds were added to the Plan’s investment line-up more than six years before the complaint was filed in 2007 and, thus, outside of ERISA’s six-year statute of limitations period for fiduciary duty claims. (See below for more information on ERISA’s six-year statute of limitations period.) The U.S. Court of Appeals for the Ninth Circuit affirmed the district court’s decision, holding that the petitioner’s claims regarding the three mutual funds added in 1999 were untimely because there had not been a significant change in circumstance that would have triggered an obligation to review and change the investments within the six-year statute of limitations period. The Supreme Court agreed to review the case in 2014.

Duty of Prudence under ERISA

The central fiduciary duty at issue in *Tibble* is ERISA’s fiduciary duty of prudence. The petitioners claimed that Edison breached its fiduciary duty of prudence by selecting retail share classes rather than institutional share classes of six mutual funds offered under the 401(k) plan investment line-up. The duty of prudence requires an ERISA fiduciary to act “with the care, skill, prudence, and diligence” that a prudent person “acting in a like capacity and familiar with such matters” would use in a similar situation and with similar goals (ERISA § 404(a)(1)(B)).

Statute of Limitations Period for Claims for Breaches of Fiduciary Duty under ERISA

ERISA requires a breach of fiduciary duty complaint to be filed no more than six years after “the date of the last action which constitutes a part of the breach of violation” or “in the case of an omission the latest date on which the fiduciary could have cured the breach or violation.” ERISA § 413. At issue here is whether the petitioner’s claim of breach of fiduciary duty with respect to the retail class mutual funds added by Edison to the Plan in 1999 is time-barred or whether Edison had a continuing duty of prudence to monitor the funds such that the petitioner’s claim is not time-barred.

Supreme Court’s Decision

In *Tibble*, the Supreme Court rejected the Ninth Circuit’s application of the ERISA statute of limitations period based on the initial selection of the retail-class mutual funds in 1999, holding that this conclusion is incompatible with general principles of trust law. The Supreme Court explained that ERISA’s fiduciary duty is “derived from the common law of trusts,” under which a trustee has a continuing duty to monitor, and remove imprudent, trust investments. This duty is separate from the trustee’s duty of prudence at the outset when selecting plan investments.

The Supreme Court held, therefore, that a plaintiff may allege that a fiduciary breached a duty of prudence by failing to properly monitor investments and remove imprudent ones. As long as the alleged breach of the continuing duty occurred within six years of a plaintiff’s lawsuit was filed, the claim is timely.

The Supreme Court did not, however, express an opinion as to whether Edison breached its fiduciary duty in *Tibble*, instead remanded the case to the Ninth Circuit to review the petitioner’s claims that Edison breached its fiduciary duties within the relevant statute of limitations period while considering general principles of trust law.

Implications of *Tibble*

In its holding, the Supreme Court states that a fiduciary has a continuing duty "of some kind" to monitor investments and remove imprudent ones, but "express[ed] no view" as to the scope of Edison's fiduciary duty in *Tibble*. The Supreme Court instead remanded the case to the Ninth Circuit to make the determination of whether there was a breach of this continuing duty to monitor plan investments, and provides no guidance as to the scope of a fiduciary's duty to continually monitor plan investments.

While future litigation will likely shape the scope of a fiduciary's duty to continually monitor investments, fiduciaries of ERISA plans should not wait for the outcome of future litigation to review their investment policies and practices. Fiduciaries should consider undertaking the following:

- Adopt, review and, as appropriate, update any investment and funding policies under the plan to ensure that it specifies procedures for both the initial selection of investment funds and the on-going monitoring/replacement of such funds—noting, however, that once a policy is put into effect, the policy will need to be followed or modified accordingly,
- Consider retaining a registered investment advisor ("RIA") to provide guidance on both the selection and monitoring of investment funds[1],
- Periodically review the investment funds held under the plan, in accordance with the applicable investment policy, and
- Document investment fund review in the form of minutes, and retain the underlying data and the analysis performed as part of that review, including the related expense ratios for such funds.

If you have any questions, please contact the Pillsbury attorney with whom you regularly work or one of the following members of the Executive Compensation & Benefits practice section:

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[1] See "Take Two: DOL Reproposes Changes to Definition of Fiduciary for ERISA Plans and IRAs", Pillsbury Advisory, May 8, 2015 which discusses the expansion of the definition of who is a considered a "fiduciary" to an ERISA-covered plan.

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