Supreme Court Recognizes ERISA Fiduciary Duty to Monitor Plan Investments

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On May 18, 2015, a unanimous U.S. Supreme Court held in *Tibble v. Edison International*[1] that fiduciaries who select investment options for 401(k) plans have a continuing duty under the Employee Retirement Income Security Act of 1974 (ERISA) to monitor their selections and remove imprudent investment options. The Court vacated a ruling by the U.S. Court of Appeals for the Ninth Circuit that dismissed certain claims brought against fiduciaries of the Edison 401(k) Savings Plan (Plan) as untimely because they related to investment options that were selected for the Plan more than six years before the complaint was filed. Although the Supreme Court declined to define the precise contours of the duty to monitor, the ruling opens the door to claims challenging the prudence of plan fiduciaries' retention of investment options within 401(k) plans, including options that were selected outside the limitations period established under ERISA.

ERISA imposes on a fiduciary of an employee benefit plan — including any person responsible for selecting or removing investment options offered under a 401(k) plan — a duty of prudence that requires the fiduciary to "discharge his duties with respect to a plan ... with the care, skill, prudence, and diligence" that a prudent person would use under similar circumstances.[2] A plan fiduciary that breaches this duty of prudence may be held liable to the plan for any resulting losses.[3] ERISA authorizes the Department of Labor, plan participants and beneficiaries, and other plan fiduciaries to bring a civil action against a fiduciary that has acted imprudently, in order to recover such losses on behalf of the plan.[4] Civil actions generally must be brought within six years after "the date of the last action [by the fiduciary] which constituted a part of the breach" or, if earlier, within three years after the earliest date on which the plaintiff had actual knowledge of the breach.[5]

Participants in the Plan filed suit in August 2007 against Edison International and other plan officials, alleging that the defendants had breached their duty of prudence by offering retail classes of mutual fund shares as investment options when lower cost institutional share classes could have been made available to Plan participants. The U.S. District Court for the Central District of California dismissed the plaintiff's claims with respect to three mutual funds that had been added as investment options under the Plan more than six years before the complaint was filed. The District Court ruled that the claims were time barred because the plaintiffs had failed to establish that the circumstances relating to those investments had changed to such an extent that a prudent fiduciary would undertake a full-scale due diligence review of the investments within the six-year limitations period. On appeal, the plaintiffs argued that the claims remained timely because the defendants committed a continuing breach of fiduciary duty for so long as the challenged investments remained as options within the Plan. The Court of Appeals rejected this argument and affirmed the ruling of the District Court.

The Supreme Court vacated the decision and remanded the case back to the Court of Appeals for further consideration in light of trust-law principles. Justice Stephen Breyer, writing for the Court, noted that the Court of Appeals had erred by failing to recognize that under the law of trusts, from which ERISA's duty of prudence is derived, "a trustee has a continuing duty to monitor trust investments and remove imprudent ones," and that this duty exists "separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset." Accordingly, even though the challenged investments

[1] 575 U.S. ___ (2015), *available at* http://www.supremecourt.gov/opinions/14pdf/13-550_97be.pdf.

[2] 29 U.S.C. § 1104(a)(1)(B).

[3] 29 U.S.C. § 1109.

[4] 29 U.S.C. § 1132(a)(2).

[5] 29 U.S.C. § 1113.

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were selected more than six years prior to commencement of the plaintiffs' action, a claim alleging that the defendants failed to prudently monitor and remove the investments still could be deemed timely as long as the alleged failure to monitor occurred within the limitations period.

Although the Supreme Court recognized that ERISA imposes on fiduciaries who select investment options for 401(k) plans a continuing duty to monitor the selections and remove imprudent investment options, it declined to provide any guidance as to the scope of this duty. Among the issues the Court of Appeals will need to address on remand are (i) what special circumstances would trigger a fiduciary's obligation to review the prudence of an investment after its selection, (ii) how frequently a fiduciary must review the prudence of an investment absent special circumstances, and (iii) whether a fiduciary is required to apply the same level of scrutiny in connection with a periodic review of an investment as is required in connection with the initial selection of the investment.

The *Tibble* decision, though largely favorable to plaintiffs, contains one silver lining for defendants. By recognizing that a fiduciary's duty to monitor investments exists separate and apart from the duty to exercise prudence in selecting investments, the Supreme Court implicitly rejected "continuing breach" theories of recovery that would treat the decision to acquire an investment and the decision to retain the investment as a single, continuous act and allow recovery of all investment losses incurred from the date of selection, even if that date is outside the limitations period. Instead, under the rationale of *Tibble*, as to investment options first made available to Plan participants outside the limitations period, any recovery would be limited to losses incurred as a result of a fiduciary's failure to properly monitor and remove imprudent investments within the six-year period preceding the filing of the claim.

We anticipate an increase in claims alleging that fiduciaries imprudently retained investment options, particularly where the original decision to offer the challenged investment options under the plan was made more than six years before the filing of the suit. Lower court decisions defining the scope of the continuing duty to monitor plan investments will be closely watched in the coming months. In the meantime, fiduciaries of 401(k) plans should evaluate establishing protocols to document that they are regularly monitoring and evaluating the continued prudence of the investment options available under their plans.