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The Supreme Court Rules that Fiduciaries Have an Ongoing Duty to Monitor Plan Investments

In a unanimous decision, on May 18, 2015, the Supreme Court found in *Tibble v. Edison International* that plan fiduciaries have an ongoing fiduciary duty under ERISA to monitor plan investments, a duty separate and apart from the fiduciary's duty to be prudent when first selecting plan investments. The Court's decision vacates a Ninth Circuit ruling that barred a claim against fiduciaries who had continued to offer certain mutual funds that had been selected outside of ERISA's six-year limitations period. The Court remanded the matter to the Ninth Circuit to determine whether the plan's fiduciary breached its duty to monitor within the six-year limitations period. In doing so, the Court opened the door in *Tibble* and in other cases for plaintiffs to allege a continuing fiduciary violation based on a failure to monitor plan investments and remove imprudent ones.

Background

The plaintiffs are current or former employees of Defendant Edison International and participants in the Edison 401(k) Savings Plan. In 2007, these participants sued Edison and other entities in the U.S. District Court for the Central District of California for alleged breaches of fiduciary duty and prohibited transactions with respect to availability of certain mutual funds as investment options under the Plan.

Among other claims, the participants alleged that Edison had improperly selected six mutual funds for the Plan—three in 1999 and three in 2002—that were so-called "retail-class" mutual funds. The participants objected to the selection of these retail mutual funds because "institution-class" mutual funds were available, which allegedly would have provided the same returns for significantly lower fees.

Edison moved for summary judgment. Among other things, Edison argued that the participants' claims relating to the availability of retail-class mutual fund investment options that were selected in 1999 were barred by ERISA's statute of limitations, since the funds were selected more than six years before the participants filed their lawsuit. In support of its argument, Edison cited to section 413 of ERISA, which provides that:

> No action may be commenced . . . with respect to a fiduciary's breach of any responsibility, duty, or obligation . . . after the earlier of--
>
> > **(1)** six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

The participants responded that their claims were timely brought because the retail-class investment options selected in 1999 continued to be *available* for investment for a period within six years from when they filed their complaint. The participants argued that Edison had a continuing fiduciary duty to monitor the propriety of the mutual funds as investment options under the Plan. The district court rejected this argument, citing the Ninth Circuit's finding that there is "no 'continuing violation' theory" under ERISA. *Tibble v. Edison Int'l*, 639 F. Supp. 2d 1074, 1086 (C.D. Cal. 2009) (citing *Phillips v. Alaska Hotel & Rest. Emp. Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991)). Consequently, the court granted Edison's motion on this issue, holding that the claims related to the mutual funds selected in 1999 were barred by ERISA's six-year statute of limitations.

The Ninth Circuit affirmed the district court. *Tibble v. Edison Int'l*, 729 F.3d 1110 (9th Cir. 2013). The Ninth Circuit rejected the argument that Edison had engaged in continuing violation of ERISA by failing to monitor the appropriateness of the plan investments selected in 1999. The Ninth Circuit reasoned that the participants' argument "would make hash out of ERISA's limitation period and lead to an unworkable result." *Id.* at 1119. Ultimately, the court held "that the act of designating an investment for inclusion starts the six-year period under section 413(1)(A) for claims asserting imprudence in the design of the plan menu." *Id.*

Supreme Court Decision

The participants appealed, and the Supreme Court unanimously reversed the Ninth Circuit's decision. The Supreme Court observed that the Ninth Circuit reached its holding "without considering the role of the fiduciary's duty of prudence under trust law." *Tibble v. Edison Int'l*, No. 13-550, slip op. at 4 (U.S. May 18, 2015). This, the Court found, was a critical error, given that "under trust law[,] a fiduciary is <u>required</u> to conduct *a regular review of its investment* with the nature and timing of the review contingent on the circumstances." *Id.* at 5 (emphasis added).

In reaching its conclusion, the Court relied on principles from the common law of trusts and cited treatises, historical cases, and uniform acts of trust law. These authorities led the court to conclude that "a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones." *Id.* at 6. The Court added: "so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely. The Ninth Circuit erred by applying a 6-year statutory bar based solely on the initial selection of the three funds without considering the contours of the alleged breach of fiduciary duty." *Id.* at 7.

The Court did not opine as to the whether Edison actually breached its fiduciary duties with regard to the continuing availability of the mutual funds that were initially selected as investment options in 1999. Instead, the Court vacated the Ninth Circuit's opinion and remanded with instructions for the appellate court "to consider petitioners' claims that respondents breached their duties within the relevant 6-year period under § 1113, recognizing the importance of analogous trust law." *Id.*

Key Takeaways

There are a number of significant takeaways from the Supreme Court's decision:

- The Supreme Court has made clear that plan fiduciaries have an *ongoing* duty to monitor the propriety of initial plan investment selections. Plan fiduciaries should not treat the decision to select a plan investment as an isolated event that is subject to a discrete 6-year statute of limitations under ERISA.

- Fiduciaries should be prepared for the plaintiffs' bar to assert—and the courts to possibly recognize—"continuing violations" under a theory based upon a fiduciary's failure to monitor the appropriateness of plan investments, thereby allowing claims to reach back well beyond the 6-year statute of limitations period for an alleged fiduciary breach or violation.

- To mitigate risk associated with plan investment decisions, plan fiduciaries should establish procedures for periodic review of plan investment choices. These periodic reviews should document the empirical reasons why plan investment options have been retained or removed from a plan's fund lineup.