ERISA's Fiduciary Duty Includes Continuing Duty to Monitor Trust Investments

On May 18, 2015, in *Tibble* v. *Edison International*,[1] the Supreme Court of the United States held that a fiduciary's duty under the Employee Retirement Income Security Act of 1974 ("ERISA") includes a continuing obligation to monitor trust investments and remove imprudent investments. In so ruling, the Court held that a plaintiff may timely allege a breach of fiduciary duty for investments originally made outside ERISA's six-year statute of limitations, provided the breach of the continuing duty to monitor occurred within six years of the lawsuit.

I. Background and procedural history

In 2007, several current and former employees and participants ("Petitioners") in Edison's 401(k) Savings Plan ("Plan") filed a lawsuit on behalf of the Plan and all similarly situated beneficiaries against Edison and other Plan fiduciaries ("Respondents"). Petitioners claimed that Respondents "violated their fiduciary duties with respect to three mutual funds added to the Plan in 1999 and three mutual funds added to the Plan in 2002" that were higher priced, in terms of administrative costs, than "materially identical lower priced institutional-class mutual funds" that were also available.[2] Petitioners argued that in unjustifiably selecting the higher priced mutual funds, the Respondents did not act prudently and with the exclusive purpose of providing benefits to the Plan's beneficiaries, violating their fiduciary duty imposed by ERISA.[3]

The United States District Court for the Central District of California considered whether Petitioners' claims were timely under ERISA's six-year statute of limitations for breach of fiduciary duty claims.[4] In applying ERISA § 1113, the District Court ruled that Petitioners' claims would be "limited to those that accrued within six years of the filing of this suit," and therefore barred Petitioners' claims with respect to the higher priced mutual funds added to the Plan in 1999.[5] On appeal, the Ninth Circuit affirmed the District Court's ruling with respect to the statute of limitations, holding that "the act of designating an investment for inclusion starts the six-year period under [ERISA § 1113] for claims asserting imprudence in the design of the plan menu."[6] The Supreme Court granted certiorari to decide "whether a fiduciary's allegedly imprudent retention of an investment is an 'action' or 'omission' that triggers the running of the 6-year limitations period."[7]

---

[1] *Tibble* v. *Edison International*, No. 13-550 slip op. (May 18, 2015) ("*Tibble*"), *available at* http://www.supremecourt.gov/opinions/14pdf/13-550_97be.pdf.

[2] *Tibble*, slip op. at 2.

[3] Under ERISA, a fiduciary is required to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and – (A) for the exclusive purpose of: (i) providing benefits to the participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1). The fiduciary must also act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use . . . ." 29 U.S.C. § 1104(a)(1)(B).

[4] Section 1113 of ERISA, in relevant part, states that all actions "with respect to a fiduciary's breach of any responsibility, duty, or obligation" must be commenced "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." 29 U.S.C. § 1113(1).

[5] *Tibble* v. *Edison International*, 639 F. Supp. 2d 1074, 1086 (C.D. Cal. 2009).

[6] *Tibble* v. *Edison International*, 729 F.3d 1110, 1119 (9th Cir. 2013).

[7] *Tibble*, slip op. at 1.

II. SCOTUS rules ERISA's fiduciary duty requires fiduciaries to monitor trust investments and remove imprudent investments.

The Supreme Court, in a unanimous opinion by Justice Breyer, vacated the Ninth Circuit's ruling and remanded the case. The Court ruled that "an ERISA fiduciary's duty is 'derived from the common law of trusts.'"[8] The Court found that ERISA fiduciaries, as trustees, have a "continuing duty of some kind to monitor trust investments and remove imprudent ones[,]" and that a breach of fiduciary duty claim could be timely "so long as the alleged breach of the continuing duty occurred within six years of the suit."[9]

The Court readily identified that the law of trusts determines "the contours of an ERISA fiduciary's duty."[10] To define the exact nature of that duty, the Court surveyed several trust law authorities, noting that a "trustee must 'systematic[ally] conside[r] all the investments of the trust at regular intervals' to ensure they are appropriate."[11] As part of this continuing duty to monitor, the Court opined "that if an investment is determined to be imprudent, the trustee 'must dispose of it within a reasonable time[.]'"[12] Thus, the Court surmised that a trustee, including an ERISA fiduciary, "has a continuing duty to monitor trust investments and remove imprudent ones . . . [that] exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset."[13]

With the contours of a trustee's duty identified, the Court found that the "Ninth Circuit erred by applying a 6-year statutory bar based solely on the initial selection of the three [1999] funds[.]" The Court ruled that Petitioners "may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones."[14] Notably, the Court refrained from defining what proper investment monitoring might entail.[15] Rather, the Court remanded the case to the Ninth Circuit to consider whether Respondent breached the ill-defined duty to monitor "within the relevant 6-year period under § 1113."[16]

III. Significance of the Decision

The *Tibble* decision defines an ERISA fiduciary's duty to include not only prudent selection of investments, but also a continuing duty to monitor the trust and remove imprudent investments, leaving to the lower courts to explain how that duty may be satisfied. As a result, beneficiaries may timely argue that investments made beyond ERISA's six-year statute of limitations constitute a breach of a fiduciary duty, if the underlying continuing duty to monitor was violated within the six-year period.

---

[8] *Id.* at 5 (quoting *Central States,* Southeast *and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570 (1985)).

[9] *Id*. at 6-7.

[10] *Id*. at 5.

[11] *Id.* (quoting Amy Hess, George Bogert & George Bogert, The Law of Trusts and Trustees § 684, at 147 – 148 (3d ed. 2009)).

[12] *Id*. at 6 (citation omitted).

[13] *Id*. at 5.

[14] *Id.* at 6-7.

[15] *Id*. at 7 ("We express no view on the scope of respondents' fiduciary duty in this case.").

[16] *Id*.

*   *   *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com.; Glenn Waldrip at 212.701.3110 or gwaldrip@cahill.com; Alex Corey at 212.701.3232 or acorey@cahill.com.

This memorandum is for general information purposes only and is not intended to advertise our services, solicit clients or represent our legal advice.