ERISA

## U.S. SUPREME COURT DECISION ON ERISA FIDUCIARY DUTY STATUTE OF LIMITATIONS CASE PROVIDES BROAD PRINCIPLE BUT LITTLE PRACTICAL GUIDANCE

*by Jordan Schreier*

This week the U.S. Supreme Court issued its opinion in *Tibble v. Edison International*, a highly anticipated case involving whether ERISA's six year statute of limitations for breach of fiduciary duty claims prevented a claim when the initial challenged investment decisions were made more than six years prior to the lawsuit being filed. Unfortunately, the Court did not directly answer the question. Rather, most of the Court's opinion discussed the concept that under basic trust law a fiduciary has an on-going duty to monitor its investment decisions and remove imprudent investments – a concept that few questioned as a general principle in any event – and remanded the case to the lower court to decide whether a breach occurred.

### Background

ERISA's statute of limitations for breach of fiduciary duty prevents a lawsuit from being brought more than six years after either (A) the date of the last action which constituted part of the breach or violation or (B) for omissions, the latest date on which the fiduciary could have cured the breach or violation.

In *Tibble*, Edison International made available for participant investment through its 401(k) plan a series of mutual funds. In both 1999 and 2002, Edison added to the plan's investment line-up a group of retail share class mutual funds. Plaintiffs filed a lawsuit in 2007 alleging that in both 1999 and 2002, instead of choosing the higher fee retail share class mutual funds, Edison should have chosen the less expensive institutional share class mutual funds and that this failure to select a lower cost share class was a breach of fiduciary duty. The Ninth Circuit Court of Appeals ruled that the claims which related to the decision to add the retail share class funds in 1999 was barred by the six year statute of limitations. The appeals court said it was the initial act of designating the investment for inclusion in the plan that triggers the running of the statute of limitations unless there was evidence of significant changed circumstances giving rise to a new duty to do a full diligence review of the investments.

### On-Going Duty to Monitor and Act Prudently

The Supreme Court concluded that an ERISA fiduciary has a "continuing duty of some kind to monitor investments and remove imprudent ones" and that as long as the alleged breach of the continuing duty occurred within six years of the lawsuit being filed, the claim is timely. Importantly, the Court stated that this duty applies even in the absence of a significant change of circumstances. The Court looked to the common law of trusts and said this continuing duty existed separate and apart from the trustee's duty to act prudently in making its initial investment decision. Unfortunately, the Court said it would not provide any view on the scope of a fiduciary's duty in this context and remanded the case to the lower court to do so.

However, in its review of trust law, the Court did note certain general trust principles that would apply to an ERISA investment fiduciary. These include that:

- A regular review of investments is required with the nature and timing contingent on the circumstances
- A systematic review of investments must occur at regular intervals
- An investment review is to be done in a manner that is reasonable and appropriate to the particular investments, courses of action and strategies involved
- If investments are inappropriate, they must be disposed of within a reasonable time

### Implications of Decision

The concept that investment committees, trustees and others responsible for making investment decisions for benefit plans subject to ERISA have a duty to periodically monitor their decisions is generally well understood so in that sense, the ruling in *Tibble* is not very helpful. The Court even noted that the parties to the litigation agreed on this point. However, the Court did clarify that the duty to monitor would apply to an investment decision even if there has been no significant change in circumstances from the time the decision was made. This could mean that a fiduciary could be liable for an imprudent investment more than six years after the investment decision was made even if nothing relevant to the decision has changed, provided the decision remained imprudent. Of course, it will be a rare breach of fiduciary duty case in which a plaintiff will not also allege that changed circumstances (e.g., fund management turnover, fund performance history, fund fees and comparative fees in the market, market risk, participant demographics, etc.) make an investment imprudent.

So what lessons should a plan investment committee or other ERISA plan investment fiduciary learn from *Tibble?* Among others:

- If a plan is not using the lowest cost fund share class for an investment, it had better be doing so deliberately and have a compelling explanation of why.
- A plan should conduct a systematic review of plan investments at regular intervals. Systematic suggests needing to have formal review standards and guidelines (e.g., investment policy statement). While there are no specific legal standards on regularity, formal quarterly reviews are common with more frequent analysis done based on circumstances (e.g., fund management team changes mid-quarter).

- In deciding the frequency and scope of review, a fiduciary should consider the characteristics of a particular investment and the strategic reason the plan is using it (e.g., more frequent review of stable value funds with 12-month put requirements or other funds with trading restrictions).

- Revisit how long a fund that has been identified as no longer appropriate for the plan should remain in the plan's portfolio given the trust concept that an imprudent investment must be removed within a reasonable time period. This may make freezing unfavorable funds to new assets less prudent than eliminating the funds entirely.

- Carefully document investment advice and decision making. Detailed fiduciary meeting minutes or written reasons for investment decisions should be prepared with clear language. For example, fiduciaries should avoid using language suggesting that there is anything imprudent about placing a fund on a watch list if the watch list is not a conclusion of imprudence but rather is for funds undergoing a more intensive analysis. On the other hand, do not allow funds to remain on a "perpetual watch list." Fiduciaries should conduct their due diligence and make reasonably prompt decisions.

We will continue to monitor the various ERISA investment breach of fiduciary duty cases, including further developments in the lower court in the *Tibble* matter. In the meantime, establishing and complying with a rigorous fiduciary process using best practices is vital. Please contact the author of this Alert or any member of the Dickinson Wright employee benefits practice team if you would like assistance in preparing a fiduciary best practices program or would like your existing program reviewed.

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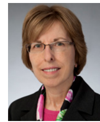

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