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Plan Fiduciaries Beware: Your Ongoing Duty to Monitor Investments Allows Beneficiaries To Claim Breach Within Six-Year Statute of Limitations

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In a ruling that will likely raise the anxiety level of plan fiduciaries, the U.S. Supreme Court unanimously ruled today that beneficiaries of a 401(k) plan could pursue their claim against the plan's fiduciaries related to mutual funds that were added to the plan eight years before the complaint was filed, despite the six-year statute of limitations normally applying to ERISA breach of fiduciary duty claims. The Court concluded that because fiduciaries have a continuing duty to monitor investments and remove those that are imprudent, a claim for breach of that duty is timely so long as the alleged failure to monitor occurred within six years of the filing of the complaint. *Tibble v. Edison Int'l*, 575 U.S. ____ (2015).

Higher Administrative Fees Prompted Lawsuit

In 2007, several beneficiaries of the Edison International 401(k) Savings Plan (Plan) filed a class action lawsuit against the Plan fiduciaries to recover alleged losses incurred as a result of excessive mutual fund fees. According to the beneficiaries, in selecting the investment choices available to Plan participants, the Plan fiduciaries had chosen six “retail-class” mutual funds, instead of identical “institutional class” funds. The retail-class funds carried higher administrative and management fees than the institutional-class offerings. Three of the funds were chosen in 1999, and the others in 2002.

As to the funds selected in 2002, the lower courts found that the Plan fiduciaries offered “no credible explanation” for selecting the higher-cost retail funds. However, as to the 1999 funds, the Plan fiduciaries argued that the ERISA statute of limitations applicable to fiduciary breaches would bar the beneficiaries' claims involving the 1999 funds, because they were selected more than six years before the lawsuit was commenced. The statute, 29 U.S.C. § 1113, bars a fiduciary breach claim brought more than six years “after the date of the last **action** which constituted part of the breach or violation,” or “in the case of an **omission** the latest date on which the fiduciary could have cured the breach or violation” (emphasis added). The Ninth Circuit Court of Appeals agreed with the fiduciaries, and dismissed all claims relating to the 1999 funds.

A unanimous Supreme Court, however, reinstated the beneficiaries' claims

pertaining to the 1999 funds. The Court found that, although the funds may have been chosen previous to the fiduciaries' **action** in selecting the 1999 funds, the statute did not bar claims relating to the fiduciaries' alleged **omissions** since that time. Specifically, the Court held that ERISA fiduciaries have a "continuing duty to monitor trust investments and remove imprudent ones." This duty imposes a "continuing responsibility for oversight of the suitability of the investments already made." Since such continuing reviews by the Plan fiduciaries might have been required within the six-year limitation period, a claim that the fiduciaries breached their oversight and review responsibilities could not be summarily dismissed.

No Guidance on Oversight Duty

Having held that Plan fiduciaries have a duty to oversee and monitor investment decisions previously made, the Court provided little guidance as to what that duty entails. The Court articulated the fiduciaries' oversight and monitoring responsibilities only in a broad, theoretical way, holding that "a fiduciary normally has a continuing duty of **some kind** to monitor investments, and that "the nature and timing of the review [are] **contingent on the circumstances**." Because these circumstances had not been fully developed by the lower courts, the Supreme Court remanded the case for further consideration, noting that it did not necessarily find that the Plan fiduciaries had violated any of their duties.

Lesson for Fiduciaries

The Supreme Court has made clear that benefit plan fiduciaries have a continuing responsibility to monitor the suitability and prudence of a plan's investment choices, and that the six-year statute of limitations runs from the alleged breach of this ongoing responsibility, not from the date a particular investment was initially selected. However, the Court provided essentially no guidance concerning how fiduciaries can fulfill this ongoing responsibility. The parameters of a fiduciaries' ongoing responsibility to monitor and evaluate investment choices will, in all likelihood, be developed only by extensive future litigation.

Because the Court provided little specific guidance concerning the ongoing duty to monitor investment choices, plan fiduciaries will need to increase their focus on what little regulatory guidance is provided by the U.S. Department of Labor, and many fiduciaries will likely increase their reliance on objective, professional investment advisors. Of course, the choice of an investment advisor is, itself, a fiduciary act, and under the guidance of the *Tibble* decision, it is likely the fiduciaries' ongoing responsibility to monitor the suitability and performance of advisors as well. In short, the *Tibble* decision expands the potential for fiduciary liability without providing much guidance on how that liability might be minimized.

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