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Tibble v. Edison International: What Does It Mean for Fiduciaries and Their Insurers?

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For the second year in a row, the Supreme Court decided an ERISA breach-of-fiduciary duty case involving the management of retirement plan investments and left open several issues for the lower courts—and plan fiduciaries—to sort out going forward. Last year it was *Fifth Third Bancorp v. Dudenhoeffer*,[1] which eliminated the fiduciary-friendly "prudence presumption" that most courts had applied to investments in employer stock. This year it was *Tibble v. Edison International, et al.*, an excessive fees case.[2] In *Tibble,* the Court confirmed that an ERISA fiduciary has an ongoing duty to monitor plan investments, and held that ERISA's six-year statute of limitations would not bar a claim challenging investments in a plan that had been selected more than six years before the alleged fiduciary breach. The Court left open, however, the specific parameters of the fiduciary duty to monitor investments and remanded the case for further proceedings.

Backdrop to *Tibble*

Tibble is one of the "excessive fee" class action lawsuits filed in recent years against plan sponsors, fiduciaries and service providers of defined contribution retirement plans. Plaintiffs argue in these cases that the plan's payment of excessive fees has unnecessarily depleted the assets of the plan, thereby decreasing the eventual distributions to plan participants upon their retirement. Common allegations in these lawsuits have included fiduciary breach claims for (1) offering mutual funds instead of separate accounts as investment options; (2) offering actively-managed funds instead of index funds as investment options (on the theory that active management costs more and generally does not yield better net results); (3) offering retail class mutual funds instead of institutional class funds as investment options (on the theory that the latter are cheaper); (4) offering unitized employer stock funds (under the theory that a unitized fund's cash buffer and transaction fees deplete investment returns); (5) allowing service providers to retain "float" on plan investments; (6) selecting proprietary investment funds managed by an affiliate of the plan sponsor and/or fiduciaries rather than selecting allegedly lower-cost and better-performing funds from the marketplace; (7) paying asset-based service provider fees (*e.g.*, recordkeeping); (8) failing to appropriately offset revenue sharing against the plan; and (9) allowing the plan's fees to "subsidize" a service provider's provision of non-plan services.

In some instances, the initial selection of the challenged investments or services occurred many years before the complaint was filed. Under ERISA, a plaintiff generally must bring a claim for fiduciary violations within no more than six years after "the date of the last action which constituted a part of the breach or violation," in the absence of fraud or concealment.[3] This led several courts, including the United States Courts of Appeal for the Fourth, Ninth and Eleventh Circuits, to dismiss excessive fee claims as time-barred when the plaintiffs could point to no change in circumstances establishing a new or distinct breach within the six-year limitations period.[4] These courts also rejected the plaintiffs' "continuing violation" theory that a new fiduciary breach occurred within the limitations period every time the fiduciaries failed to "correct" the original (time-barred) breach.[5]

Tibble's Procedural History

The *Tibble* plaintiffs filed suit against Edison International and several other defendants in August 2007, claiming that fiduciaries of Edison's 401(k) plan breached their ERISA duties of prudence and loyalty by, among other things, investing in retail class mutual funds that charged high fees, when identical—but cheaper—institutional class funds were readily available.[6] The

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district court granted summary judgment in favor of the plan fiduciaries on the majority of plaintiffs' claims, and also ruled on "an independent basis" that ERISA's limitations period barred recovery for claims arising out of investments that had been selected for the plan more than six years before the plaintiffs had filed suit.[7] The court denied summary judgment with respect to six mutual funds.

Following a bench trial, the district court decided the plaintiffs' remaining claims. The court ruled in favor of the plan fiduciaries with the exception of three funds that had been selected for the plan in 2002. With respect to those funds, the court ruled that the plan fiduciaries breached their duties of prudence and loyalty by selecting retail-class mutual funds without adequately investigating the availability of lower-cost institutional class versions of the same funds.[8] The court awarded damages of $370,000.

On appeal, the Ninth Circuit agreed that offering mutual funds as plan investments was not a breach of ERISA's duty of prudence and rejected a bright-line rule that only institutional-class mutual funds are prudent. The court also ruled that the plan fiduciaries did not breach any ERISA duties in including a unitized stock fund or a short-term investment fund as plan investments or through the plan's revenue sharing practices.[9]

The Ninth Circuit also affirmed the district court's rulings with respect to the statute of limitations for plan investments that had been selected more than six years before the plaintiffs had filed suit. Like the district court, the Ninth Circuit viewed the act of "designating an investment for inclusion" to start the six-year limitations period and found that "[c]haracterizing the mere continued offering of a plan option, without more, as a subsequent breach" would render the limitations period meaningless and could even expose current fiduciaries to liability for decisions made decades ago.[10] The Ninth Circuit also found that the district court had properly allowed plaintiffs the opportunity at trial to prove that "changed circumstances" occurring within the limitations period would have prompted a full "due diligence" review and, in turn, led prudent fiduciaries to replace the existing mutual funds. Because the plaintiffs had failed to prove such changed circumstances, however, the Ninth Circuit affirmed the district court's ruling that the plaintiffs' claims were time-barred.[11] The *Tibble* plaintiffs thereafter filed a petition for *certiorari*, which the Supreme Court accepted.

The Supreme Court's Opinion

The Supreme Court framed the question as "whether a fiduciary's allegedly imprudent retention of an investment is an 'action' or 'omission' that triggers the running of [ERISA's] 6-year limitations period."[12] In answering this question, the Court found that the Ninth Circuit had erred in failing to consider that under trust law, "a fiduciary is required to conduct a regular review of its investment with the nature and timing of the review contingent on the circumstances."[13] The Court observed that "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."[14]

Thus, the Court held that a plaintiff may allege a separate breach of fiduciary duty claim under ERISA for the failure "to properly monitor investments and remove imprudent ones" and that such a claim would be timely so long as the alleged breach of this duty occurred within six years before filing suit.[15] The Court expressly declined to opine on the scope of the duty to monitor, noting that the parties "disagree[d]" as to "the scope" of that duty. The Court remanded the case to the Ninth Circuit to consider whether the plan fiduciaries had "breached their duties within the relevant 6-year period under § 1113, recognizing the importance of analogous trust law."

Implications for Fiduciaries and Their Insurers

Certain aspects of *Tibble* are unremarkable from a fiduciary perspective. Most fiduciaries would have agreed pre-*Tibble* that they have a duty to periodically monitor a plan's investment options. The scope of what that duty entails remains an open issue, though the Supreme Court did observe rather broadly that a trustee "must systematically consider all the investments of the trust at regular intervals to ensure they are appropriate," and that if a trust includes assets that are inappropriate investments, "the trustee is ordinarily under a duty to dispose of them within a reasonable time."[16]

From a litigation perspective, *Tibble* will undoubtedly make it more difficult to dispose of imprudent investment claims on timeliness grounds in cases where the plan selection decision was outside the limitations period. Plaintiffs will frame these claims in terms of a breach of the duty to monitor plan investments rather than as traditional imprudence claims. Further, while *Tibble* was limited to claims involving investments, the plaintiffs' bar will likely view the Court's decision as opening the door to a broader universe of "failure to monitor" claims against fiduciaries. As such, fiduciaries, plan sponsors and their insurers can expect an increase in litigation costs in these cases. The ultimate viability and value of these failure-to-monitor claims, however, is still uncertain at this point. The Ninth Circuit's decision on remand should provide further guidance on the exact contours of such a claim and whether the "changed circumstances" or red flag analysis becomes part of the threshold elements of such a claim.

While the courts grapple with *Tibble*, now may be a good time for plan

sponsors and fiduciaries to revisit their existing processes and procedures for monitoring the continued prudence of ERISA plan investments and other plan-related decisions. While courts have agreed that fiduciaries are not obligated to "scour the market" for the cheapest possible investments (and presumably the same holds true for other plan-related decisions),[17] a well-documented decision-making and review process for *all* plan decisions, including decisions *not* to implement a particular course of action, can go a long way in demonstrating that plan fiduciaries have fulfilled their ERISA obligations. In this respect, *Tibble* is a good illustration. The fiduciaries prevailed on the vast majority of plaintiffs' claims based on a solid record demonstrating a prudent process with respect to the plan's investments. On the other hand, with respect to the three retail class mutual funds for which the court found liability, the district court and Ninth Circuit both found the record lacking with respect to the fiduciaries' process.[18]

Endnotes

1 134 S. Ct. 2459 (2014).

2 135 S. Ct. 1823 (2015).

3 *See* 29 U.S.C. § 1113.

4 *See, e.g., Fuller v. SunTrust Banks, Inc.*, 744 F.3d 685, 697-702 (11th Cir. 2014); *Tibble v. Edison, Int'l*, 729 F.3d 1110, 1119 (9th Cir. 2013); *David v. Alpin*, 704 F.3d 327, 340-43 (4th Cir. 2013).

5 *See Fuller,* 744 F.3d at 702; *Tibble*, 729 F.3d at 1120; *David*, 704 F.3d at 340-43.

6 The plaintiffs also challenged the practice of revenue sharing associated with the plan's funds and claimed that offering a unitized stock fund, money market-style investments and mutual funds, had been imprudent.

7 *Tibble v. Edison Int'l, et al.*, 639 F. Supp. 2d 1074, 1086, 1116-20 (C.D. Cal. 2009), *supplemental opinion at* 639 F. Supp. 2d 1122 (C.D. Cal. 2009).

8 *Tibble v. Edison Int'l,* No. CV 07–5359, 2010 WL 2757153, at *30 (C.D. Cal. July 8, 2010).

9 729 F.3d at 1130-37.

10 *Id.* at 1120.

11 *Id.*

12 135 S. Ct. at 1826.

13 *Id.* at 1828.

14 *Id.*

15 *Id.* at 1829.

16 *Id.* (citations omitted).

17 *See Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir.), *pet. for reh'g and reh'g en banc denied*, 569 F.3d 708 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1141 (2010); *Tibble*, 729 F.3d at 1135; *cf. Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009) (acknowledging that a fiduciary might "have chosen funds with higher fees for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility").

18 For example, the fact that fiduciaries secured independent advice from a consultant was some evidence of a thorough investigation, but did not offer any evidence regarding the specific recommendations made by the consultant or the basis for the consultant's advice. The court also rejected the fiduciaries' argument that mandatory investment minimums precluded them from selecting institutional share classes for these funds, finding that the fiduciaries should at least have inquired whether the fund managers would waive those minimums in light of substantial evidence (including testimony from the fiduciaries' expert witness at trial) that such waiver requests would have been granted. *See Tibble*, 729 F.3d at 1137-39.