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## Supreme Court Rules Plan Fiduciaries Owe a Fiduciary Duty to Periodically Review Plan Investments

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In a unanimous decision, the U.S. Supreme Court in *Tibble v. Edison International* held that plan fiduciaries owe an ongoing duty to review plan investments periodically to ensure compliance with their obligations under the Employee Retirement Income Security Act (ERISA). In doing so, the Court reversed the Ninth Circuit's holding that the statute of limitations for challenges to the continued offering of an investment option begins running only at the time the investment option is selected by an ERISA plan fiduciary (absent a change in circumstances), but stopped short of defining any specific obligations apart from a "continuing duty to monitor investments and remove imprudent ones."<sup>1</sup> The decision reinforces the importance of maintaining and documenting a formal program for review of all investment options under an individual account plan.

### Factual and Procedural Background

The respondent company sponsored and maintained a 401(k) savings plan ("the Plan"). The Plan held \$3.8 billion in assets for the approximately 20,000 participants in the Plan.<sup>2</sup> In 2007, several individual participants in the Plan brought a class-action suit, alleging that the Plan's fiduciaries violated their duty of prudence under ERISA by offering numerous mutual funds as investment options, because they had high hidden fees and expenses. Plaintiffs argued that the Plan would have been able to obtain virtually identical, but lower-priced, mutual funds.<sup>3</sup>

ERISA requires that plan fiduciaries discharge their duties

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 in the conduct of an enterprise of a like character and with like aims.<sup>4</sup>

1 *Tibble v. Edison Int'l*, 2015 U.S. LEXIS 3171, \*12 (May 18, 2015).

2 *See Tibble v. Edison Int'l*, 639 F. Supp. 2d 1074, 1080 (C.D. Cal. 2009).

3 Plaintiffs brought suit under ERISA § 502(a)(2); 29 U.S.C. § 1132(a)(2).

4 ERISA § 404(a)(1)(B); 29 U.S.C. § 1104(a)(1)(B).

But under a separate provision within ERISA, an action for breach of fiduciary duty must be brought within six years of:

- 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.<sup>5</sup>

In *Tibble*, the district court allowed the suit to proceed with respect to mutual funds that were added as investment options in 2002, since six years had not yet elapsed when the Plan participants filed their complaint in 2007.<sup>6</sup> Then, the district court later ruled in favor of the participants on the merits, holding that the defendants “had not offered any credible explanation for offering retail-class, *i.e.*, higher priced mutual funds that cost the Plan participants wholly unnecessary administrative fees.”<sup>7</sup> With respect to other mutual funds, however, the district court rejected the claims as time-barred, since more than six years had elapsed since those funds had been added to the Plan (as a result of collective bargaining negotiations with a union representing the company’s employees).<sup>8</sup>

Both the plaintiffs and the defendants appealed to the U.S. Court of Appeals for the Ninth Circuit, which affirmed the district court’s decision with respect to both the validity of the claims for the 2002 funds, and the dismissal of the claims related to the 1999 funds. The Ninth Circuit wrote that “[c]haracterizing the mere continued offering of a plan option, without more, as a subsequent breach would render section 413(1) (A) meaningless.”<sup>9</sup> Although the panel opinion was later amended in minor ways, the essential holdings remained, and were eventually appealed to the U.S. Supreme Court.

## What Duties Do Plan Fiduciaries Owe?

On several occasions, the Supreme Court has stated its view that ERISA jurisprudence is derived from the common law of trusts. And in the Court’s short eight-page opinion in *Tibble*, Justice Breyer faulted the Ninth Circuit for failing to adequately consider principles of trust law when it rejected the plaintiffs’ claim for breach of fiduciary duty with respect to the mutual funds added in 1999.<sup>10</sup> Not only is there a duty of “prudence” to select appropriate investment choices at the outset, but the Court held that there is a “continuing duty” to monitor those investment selections to “remove imprudent ones.”<sup>11</sup>

In other contexts, the Court has rejected a “continuing violation” theory under federal statutes protecting employee rights.<sup>12</sup> But in this context, the Court relied heavily on the fiduciary nature of the relationship between the Plan and the participants, which it repeated was based on trust principles. On that basis, the Court held that “so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely.”<sup>13</sup> As the Ninth Circuit alluded to in its earlier opinion, the effect of such a holding on ERISA § 413(1)(A) could greatly expand the number and type of breach of fiduciary duty claims that can be pursued under ERISA § 404. Going forward, plaintiffs will have significantly broader opportunities to assert claims based on decisions made long ago, so long as plans have failed to comply with their ongoing duties to review and monitor the investment selections contained in their plans.

## What Next?

The Court’s opinion does little more than remand the case for further consideration. It offered no opinion as to the frequency with which plan administrators must review investment portfolios, or any guidance as to the level of review that administrators must undertake.

5 ERISA § 413(1); 29 U.S.C. § 1113(1). The ERISA statute of limitations also contains a shorter provision, requiring suit to be filed within three years after the plaintiff has actual knowledge of the violation, but this provision was not at issue in this case.

6 *Tibble v. Edison Int’l*, 2010 U.S. Dist. LEXIS 69119, \*83-84 (C.D. Cal., Jul. 8, 2010)

7 *Tibble v. Edison Int’l*, 2015 U.S. LEXIS 3171, at \*12 (quoting *Tibble v. Edison Int’l*, 2010 U.S. Dist. LEXIS 69119 at \*83-84) (internal quotation marks and brackets omitted).

8 See *Tibble v. Edison Int’l*, 639 F. Supp. 2d 1074, 1092 (C.D. Cal. 2009) (“[T]o the extent that these transactions occurred before August 16, 2001, Plaintiffs’ claim are [sic] barred by the statute of limitations.”).

9 *Tibble v. Edison Int’l*, 729 F.3d 1110, 1117, 1120 (9th Cir. 2013).

10 *Tibble v. Edison Int’l*, 2015 U.S. LEXIS 3171 at\*8.

11 *Id.* at \*10.

12 See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), abrogated by the Lily Ledbetter Fair Pay Act of 2009, which amended 42 U.S.C. 2000e-5.

13 *Tibble v. Edison Int’l*, 2015 U.S. LEXIS 3171, at \*12.

The Court's primary directive to the Ninth Circuit was simply that it should do more to "recogniz[e] the importance of analogous trust law" when evaluating the case on remand. Given the ambiguous nature of this directive, it is difficult to determine whether the case will ultimately be resolved in favor of the plaintiffs with respect to the older offerings. But in any event, the decision could lead to additional litigation defining the specific nature of the fiduciary duty to monitor plan investment options.

## Practical Considerations

In light of the Supreme Court's ruling, many employers may wonder whether the investment options being offered under their plans are being adequately reviewed to comply with ERISA's fiduciary requirements. Employers may therefore want to consider the following steps:

- Assess the composition of investment review committees under ERISA plans, and the frequency of their meetings.
- Inform investment review committees (or other fiduciaries with such responsibilities) of their obligations to carefully—and regularly—review the soundness of the investment options offered to participants.
- Have investment fiduciaries maintain records that demonstrate their careful consideration of the available investments in company 401(k) portfolios.
- Maintain negotiation records when involved in collective bargaining relating to investment options under the plan subject to negotiations.
- Continue monitoring legal developments as they proceed and as case law addresses specific ongoing duties of plan fiduciaries.