THOMPSON HINE

ERISA Litigation Update

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Perpetual Exposure? The Supreme Court's *Tibble* Decision

On May 18, 2015, the Supreme Court of the United States unanimously vacated the Ninth Circuit Court of Appeals' decision in *Tibble v. Edison International*, holding that applying ERISA's breach-of-fiduciary duty statute of limitations to a breach of fiduciary duty claim requires consideration of the "contours of the alleged breach of fiduciary duty." The Court remanded the case to the Ninth Circuit to consider the statute of limitations as it relates to a plan's ongoing duty to monitor selected investments and service providers.

Tibble v. Edison International

Edison International, a holding company for various electric utilities and other energy interests (collectively, Edison), sponsors the Edison 401(k) Savings Plan (Plan). In 2007, several Plan participants and beneficiaries (Participants) brought suit against Edison, alleging numerous violations of ERISA including a claim that Edison breached its fiduciary duty to the Plan by failing to investigate the availability of institutional-class alternatives to retail-class mutual funds offered as investment options within the Plan. The District Court granted summary judgment to Edison with respect to claims related to those retail-class mutual funds added to the plan more than six years before the lawsuit was filed on the grounds that the claims were time-barred under 29 U.S.C. §1113. This statute provides, in pertinent part, that no action may be commenced later than:

> [S]ix 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.

Ninth Circuit Affirms

The Ninth Circuit affirmed the District Court's ruling after the Participants argued on appeal that the District Court improperly measured the timeliness of the claims by measuring the six-year period from the initial decision to invest in the retail-class mutual funds. Because fiduciary duties are ongoing and because 29 U.S.C. §1113(1)(A) speaks of the "last action" that constitutes the breach, the Participants argued that as long as the underlying investments remain in the Plan, the claims were timely asserted.

Rejecting this "continuing violation theory," the Ninth Circuit first noted that reading the statute in this manner would render certain of the provisions surplusage. Second, the court noted that the Participants apparently confused the failure to remedy the breach of an obligation with the commission of a second breach, which would begin a fresh limitations period:

> Characterizing the mere continued offering of a plan option, without more, as a subsequent breach would render section [1113(1)(A)] "meaningless and [could even] expose present Plan fiduciaries to liability for decisions made by their predecessors – decisions which may have been made decades before and as to which institutional memory may no longer exist."

Finally, the Ninth Circuit noted that the District Court gave the Participants an opportunity to put on evidence that significant changes in conditions occurred within the limitations period that should have prompted a full due diligence review of the funds, equivalent to the diligence review Edison conducts when adding new funds to the Plan.

Because they could not establish changed circumstances constituting a new breach, their claims were time-barred.

On October 2, 2014, the Supreme Court granted the Participants' petition for a writ of certiorari on the following question:

> Whether a claim that ERISA plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical lower-cost institution-class mutual funds were available, is barred by 29 U.S.C. §1113(1) when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed.

Supreme Court Remands

The Court's decision devotes considerable time to discussing the common law of trusts upon which ERISA's fiduciary structure is based. The Court outlined an ERISA fiduciary's duties regarding investment decisions:

- An ERISA fiduciary must discharge his responsibility with the care, skill, prudence and diligence that a prudent person acting in a like capacity and familiar with such matters would use.
- Under trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones, and this duty is distinct from the fiduciary's duty of prudence regarding the initial investment selection.

The Court held that the Ninth Circuit erred by failing to consider the nature of the specific fiduciary breach alleged in deciding the statute of limitations question.

The Court remanded the case to the Ninth Circuit to consider the contours of the duty to monitor to decide when the statute of limitations should begin to run. The Court also left to the Ninth Circuit Edison's argument that the participants had waived this theory and, accordingly, forfeited their right to raise the issue on appeal.

Unresolved Issues

While the Court spent much time restating the basic contours of an ERISA fiduciary's duties with respect to investment decisions, it did **not** address whether Edison's failure to consider institutional shares during its monitoring of Plan investments constituted a breach:

> We express no view on the scope of the respondents' [Edison's] fiduciary duty in this case. We remand for the Ninth Circuit to consider petitioners' claims that respondents breached their duties within the 6-year period under §1113, recognizing the importance of analogous trust law.

The Court, therefore, did not delve into when, after the initial selection of such a fund, a prudent fiduciary would next be expected to revisit the selection with respect to the share-class issue. Accordingly, the issue of whether the specific circumstances involved would, under the common law of trusts, have required a review of the relevant funds that would have identified the alleged deficiency (i.e., the availability of institutional-class funds at lower cost), and if so, when, will be left to the Ninth Circuit on remand.

Takeaways

ERISA plan fiduciaries should reevaluate their processes and procedures relevant to the selection and monitoring of plan investments. Among other things, they should consider:

- Adopting and periodically reviewing an investment policy statement, with particular attention to the initial selection of investments for the plan and consideration of institutional-class shares when available.
- Retaining an investment adviser to assist in evaluating plan investments offered, if prudent to do so.
- Documenting the basis for the fiduciary's initial selection and periodic evaluation of investment options selected.
- If retail-class shares are selected despite the availability of institutional-class shares, documenting the basis for the selection and periodically reevaluating the selection.

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