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ERISA Advisory

‘Much Ado About Nothing’: Supreme Court Holds ERISA Fiduciaries Have a Continuing Duty to Monitor Plan Investments

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In a decision that was widely forecast after last February’s oral argument, the US Supreme Court unanimously held that ERISA requires plan fiduciaries to monitor the prudence of investments on an ongoing basis, rather than only in the event of a significant change in circumstances. *Tibble v. Edison International*, 2015 U.S. LEXIS 3171 (May 18, 2015). Overruling the US Court of Appeals for the Ninth Circuit, the Court further held that the six-year statute of limitations on breach of fiduciary duty actions set forth in ERISA § 413(1) did not bar the plaintiffs from challenging an alleged failure to monitor an investment option that was selected more than six years before they filed their lawsuit.

Although the fiduciary issues raised in the lower courts are vital to thousands of 401(k) plans allowing participant-directed investments, the Court’s decision broke no new legal ground. Drawing from traditional trust law principles, the Court concluded that a fiduciary under trust law “normally has a continuing duty *of some kind* to monitor investments and remove imprudent ones.” (Emphasis added). The Court noted that all of the parties in fact agreed that such a continuing duty to monitor existed, but disagreed concerning the scope of that duty: “Did it require a review of the contested mutual funds here, and if so, just what kind of review did it require?” The Court ultimately expressed “no view” on the scope of the *Tibble* defendants’ continuing duty to monitor, and instead remanded for the Ninth Circuit to consider the plaintiffs’ claim that the defendants breached that duty during the six year limitations period, while “recognizing the importance of analogous trust law.”

The case arose from a challenge to the prudence of six retail-class mutual funds that were included in the investment menu of Edison International’s 401(k) plan. The six retail-class funds had higher expense charges, the plaintiffs alleged, than identical institutional-class funds that were available to the plan. Selecting the more expensive retail-class funds was, they asserted, an imprudent investment decision.

The district court held that the defendants acted imprudently in selecting three of the six retail-class funds, but dismissed the claims regarding the three others on the ground that the statute of limitations had run before the action commenced, since those funds had been added to the plan’s investment menu more than six years earlier. As the district court saw it, it was too late to question the prudence of that decision, and the fiduciaries had done nothing since then that could be characterized as a new breach that might start the statute running again.

The Ninth Circuit affirmed the district court’s decision. With respect to the three funds that were selected more than six years before the suit was filed, it held that the plaintiffs’ claims were untimely because they had not established a change in circumstances that might trigger an obligation to conduct a full due-diligence review and change investments within the limitations period. As the court of appeals explained, this holding would not “give ERISA fiduciaries carte blanche to leave imprudent plan menus in place” because:

> The district court allowed beneficiaries 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 Defendants conduct when adding new funds to the Plan.” These particular beneficiaries could not establish

> changed circumstances engendering a new breach, but the district court was entirely correct to have entertained that possibility. . . . The potential for future beneficiaries to succeed in making that showing illustrates why our interpretation of section 413(1)(A) will not alter the duty of fiduciaries to exercise prudence on an ongoing basis.

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

The Court concluded that the Ninth Circuit erred by focusing the statute of limitations analysis on the initial selection of the three funds without considering the nature of the fiduciary's duty of prudence under trust law. In requiring the *Tibble* plaintiffs to prove a "significant change in circumstances," the court of appeals failed to recognize that a trustee has a "continuing duty" under trust law "to monitor trust investments and remove imprudent ones." As the Court explained, "[t]his continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset." The Court also quoted a standard treatise for the proposition that trustees must "systematic[ally] conside[r] all the investments of the trust at regular intervals." The Court did not, however, go any further in resolving the controversy, leaving all of the substance of the fiduciary's duty to be filled in upon remand.

Although the Court declined to address the scope of an ERISA fiduciary's duty to monitor investment options offered to participants, the duty to monitor recognized under trust law clearly requires something less than the "full due-diligence review" that is typically conducted in making initial investment selection decisions. The Solicitor General of the United States conceded as much at oral argument, stating that "the duty for ongoing monitoring is not the same as what you would do when initially putting the funds in place." Indeed, requiring plan fiduciaries to repeat the full-scale initial due-diligence review for each investment on a regular basis would be completely impractical. In the wake of *Tibble*, however, the precise scope of the duty to monitor undoubtedly will be a subject of future litigation.

Whether the *Tibble* plaintiffs actually will be allowed to pursue a duty to monitor claim on remand remains to be seen. The defendants argued in the Supreme Court that the plaintiffs had waived any such duty to monitor claim by failing to raise it in the district court, and the Court left it to the Ninth Circuit to determine on remand whether the plaintiffs had forfeited any such claim by not raising it in a timely manner.

In sum, the decision really breaks no new ground and, in the end, appears to be "much ado about nothing." That there is some duty to monitor was widely recognized before the decision and indeed ultimately uncontested by the parties. Given that the Court left open both the scope of that duty and whether the question even properly remained in the case, one can only question why the Court decided to hear it in the first instance.