The Supreme Court holds that ERISA Trustees have a Continuing Duty to Monitor Retirement Plan Investments in *Tibble v. Edison*

In a win for employees and retirees, the Supreme Court issued a unanimous decision in *Tibble v. Edison* on May 18, 2015, holding that under the Employee Retirement Income Security Act ("ERISA"), trustees of a retirement plan have a continuing duty to monitor the plan's investments. This duty is separate and distinct from the trustee's duty to choose prudent investments at the outset, and requires trustees to conduct regular reviews of a plan's investments to ensure the investments remain appropriate. This decision is the second ruling from the Supreme Court in just under a year signaling a shift in the burden of monitoring retirement plans from employees to the employers sponsoring the plans.

Edison was initially filed in 2007, when petitioners, employees of Edison International, alleged that their employer's decision to invest its 401(k) plan (the "Plan") in a series of six mutual funds was a breach of its fiduciary duties because six materially identical lower priced mutual funds were available for investment. Edison's Plan is a defined contribution plan and the cost of expenses, such as administrative and management fees, are deducted from the overall value of the employee's account. In some instances, fees and expenses can significantly reduce an employee's overall account value.

Petitioners in *Edison* filed suit with respect to a series of three mutual funds added to the Plan in 1999 and another series of three mutual funds added to the Plan in 2002. The crux of petitioner's argument was that their employer could not have been acting prudently by choosing to invest in six higher priced mutual funds when it could have offered petitioners effectively the same six mutual funds at lower prices. The District Court agreed with petitioners as to the three funds added to the Plan in 2002. With regards to the claims relating to the funds added in 1999, however, the District Court held that the claims were untimely under ERISA's six year statute of limitations, which provides that "no action may be commenced with respect to a fiduciary's breach [of duty]" after the earlier of "six 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 of violation." The Ninth Circuit affirmed, holding petitioner's claims untimely because petitioner "had not established a change in circumstances that might trigger an obligation to review and to change investments within the 6-year statutory period."

The Supreme Court reversed, holding that trustees of retirement plans have "a continuing duty to monitor trust investments and remove imprudent ones." The Court explained that "[a] plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones. *In such a case, so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely*." The Supreme Court declined to define the contours of the

responsibilities encompassed by the duty to continually monitor, however, stating "[w]e express no view on the scope of respondent's fiduciary duty in this case." Instead, the Court remanded the case to the Ninth Circuit for reconsideration.

We consider the decision a victory for plan participants, as we believe that it will result in more prudently managed retirement plans, as well as investment strategies that will benefit employees (i.e., investing in funds that offer lower fees and expenses). Further, by holding that the duty to monitor is continual in nature, plan fiduciaries cannot hide behind a statute of limitations defense if a claim is asserted more than six years after the fiduciary made the initial plan investment.

The decision may also highlight a shift in how the Court views the roles of employers and employees when it comes to investing in retirement. In our September 2014 issue we highlighted the Court's decision in *Dudenhoeffer v. Fifth Third Bank* which held that employee stock option plan ("ESOP") fiduciaries are not entitled to a presumption of prudence, thereby subjecting them to liability for including risky company stock in defined benefit plans. The Court's decision in *Edison* dovetails nicely with *Dudenhoffer* which ratcheted up the obligations of fiduciaries in defined benefit plans by doing the same to fiduciaries of defined contribution plans.

We note, however, that there is still much to be developed on this point of law given that the *Edison* Court declined to define the scope of the duty of continual oversight. We will monitor the lower courts' application of *Edison* and provide updates as they develop.

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