CARLTON FIELDS

Supreme Court Clarifies Scope of Fiduciary Duty Under ERISA

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On May 18, the Supreme Court held that an ERISA fiduciary "has a continuing duty to monitor trust investments and remove imprudent ones. This continuing duty exists separate and apart from the [fiduciary's] duty to exercise prudence in selecting investments at the outset." *Tibble v. Edison International* involved ERISA's six-year statute of limitations and questions regarding the scope of a fiduciary's duty to monitor plan investments. ERISA's statute of limitations provides, in relevant part, that:

> [no]action may be commenced with respect to a fiduciary's breach of any responsibility, duty, or obligation [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 or violation.

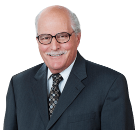
In *Tibble*, three mutual funds were added to the Edison 401(k) plan in 1999. More than six years later, the petitioners - past and present plan participants - argued that the plan fiduciaries acted imprudently by offering higher-priced retail-class mutual funds when materially identical lower-priced institutional-class funds were available. The petitioners also argued that the funds had undergone significant changes within the six-year statute of limitations period as to warrant a full due diligence review by the plan fiduciaries. The U.S. District Court for the Central District of California held that "petitioners' claims were untimely because . . .these mutual funds were included

in the Plan more than six-years before the complaint was filed in 2007" and that "circumstances had not changed enough to place respondents under an obligation to review the mutual funds and to convert them to lower priced institutional-class mutual funds." The Ninth Circuit affirmed the district court opinion, holding that "petitioners' claims were untimely because petitioners 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:

> The Ninth Circuit stated that "[c]haracterizing the mere continued offering of a plan option, without more, as a subsequent breach would render "the statute meaningless and could even expose present fiduciaries to liability for decisions made decades ago. But the Ninth Circuit jumped . . . to the conclusion that only a significant change in circumstances could engender a new breach of a fiduciary duty . . . . In determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts. . . . Under trust law, a fiduciary is required to conduct a regular review of the investment **with the nature and timing of the review contingent on the circumstances.** This continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset. . . [S]o long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely. (Emphasis supplied)

The case, though, is not over. The Supreme Court remanded the case back to the Ninth Circuit "to consider petitioners' claims that respondents breached their duties within the relevant six-year period . . . recognizing the importance of analogous trust law." The court's decision may well encourage the filing of claims for breach of fiduciary duty with respect to any continuing plan investment prompted by 20/20 hindsight. The importance of monitoring the performance of investments and related fees has been further highlighted, but what will need to be sorted out by the lower courts is both the "due diligence" plan fiduciaries must undertake on a facts and circumstance basis and the need to properly document their satisfaction of the continuing duty. For more information on this case, or to learn more about the ERISA counseling and litigation practice of Carlton Fields, and our experience assisting clients in satisfying their fiduciary investment obligations, including the application of those obligations on an on-going basis, as well as defending litigation alleging breaches of fiduciary duty, contact: James F. Jorden, Wally Pflepsen, Steve Kraus, or Michael Valerio. *Image source: Lending Memo*

Authored By



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