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Fiduciary breach issue gets Supreme Court hearing

Key argument in Tibble vs. Edison is a matter of time

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Bradford Campbell disagrees with Labor Department arguments, saying Congress put in the limit 'for a purpose.'

Updated with correction

The U.S. Supreme Court is scheduled to hear arguments next month in an ERISA case that could greatly expand guidelines for defined contribution plan executives' fiduciary responsibilities.

In the case of Tibble et al vs. Edison International et al, the court is being asked to decide how to apply an ERISA statute that limits fiduciary breach lawsuits to a six-year period. When that period starts and ends, and whether DC plans have a continuing fiduciary duty to take action against so-called imprudent investments, are the crucial issues.

"We need to clarify how the six-year statute runs," said Stephen D. Rosenberg, of counsel at the Wagner Law Group, Boston. "The linchpin issue is whether a sponsor has a continuing duty. Do you have a continuing duty after six years?"

If the Supreme Court supports arguments by Edison 401(k) plan participants that fiduciaries can be held responsible beyond the six-year time limit, the ruling could encourage more fiduciary breach lawsuits, he said. Mr. Rosenberg, who has represented plans in ERISA lawsuits, isn't involved in the Tibble case.

The plan participants say a 2013 federal appellate court ruling on the scope of the time limit harms participants and weakens ERISA's protection against imprudent investments.

That ruling upheld a U.S. District Court's rejection of participants' complaint that Edison plan executives breached their fiduciary duty by choosing retail-price rather than institutional-price versions of three mutual funds. The District Court dismissed the claim because plaintiffs sued more than six years after the funds were added to the Edison plan.

The appeals court ruling" "immunizes fiduciaries from ERISA liability — and deprives plan participants of any relief — for their failure to manage plan assets prudently once the initial investment selection is more than six years old," said the plaintiffs' petition filed by lead attorney Jerome J. Schlichter, founding and managing partner of Schlichter, Bogard & Denton LLP, St. Louis.

The Department of Labor filed a friend-of-the-court brief, supporting the participants in the 401(k) plan offered by Southern California Edison, which is owned by Edison International. In asking the Supreme Court to overturn the appellate ruling, the DOL said that decision "would seriously jeopardize the investments" of participants and beneficiaries.

"The trustee has an ongoing duty to systematically review (investments) and to remove imprudent investments from the trust," said the brief filed by Solicitor General Donald B. Verrilli Jr. on behalf of the Labor Department. The plan's "ongoing duty of prudence" includes "a duty to revisit the plan investments and remove the imprudent ones."

Limit is necessary

Edison International's attorneys maintain the six-year limit is necessary to guard against "staggering costs, undermining a core ERISA objective of promoting plan formation by minimizing plan expenses," according their Jan. 16 filing with the Supreme Court.

"All agree that a fiduciary has an ongoing duty to monitor trust investments to ensure that they remain prudent," they added. "There is certainly nothing requiring ERISA fiduciaries to conduct a full-scale, stem-to-stern due diligence review of all investment options on a frequently recurring periodic basis."

They also wrote that the Supreme Court shouldn't hear the case, arguing that its initial decision was "improvidently granted" because the trial record doesn't justify the Supreme Court's reasoning for review. The court has occasionally dismissed a case that it had originally agreed to review.

In the Tibble case, participants sued in U.S. District Court in August 2007, alleging multiple fiduciary breaches.

In 2009, the District Court dismissed the plaintiffs' arguments on the retail-vs.-institutional shares issue on three mutual funds that had been added to the Edison lineup in 1999, more than six years before participants sued.

But in 2010, after a trial, the District Court ruled Edison plan executives had breached their fiduciary duties regarding three other mutual funds that were added in 2002 - within ERISA's six-year limit. The court said plan executives should have examined using institutional-priced funds instead of retail-priced funds, and it awarded damages of $370,000 to participants.

The 9th U.S. Circuit Court of Appeals upheld both decisions by the District Court.

The plaintiffs asked the Supreme Court to hear the case; the court agreed Oct. 2, subsequently setting a Feb. 24 oral argument date.

"The core issue is: What is the scope of the ongoing duty to monitor?" said Bradford Campbell, a Washington-based counsel at Drinker Biddle & Reath LLP and a former DOL assistant secretary for the Employee Benefits Security Administration "The ERISA remedies are fairly narrow and constrained. Congress put this (six-year) statute in for a purpose."

Disagrees with DOL

Mr. Campbell, who isn't involved in the Tibble case, disagrees with the Labor Department's arguments. He said the Supreme Court might take three possible approaches:

nendorse the position that the six-year period starts when the plan chooses an investment option, thus supporting Edison;

naccept arguments by the plaintiffs and the Labor Department that the six-year limit in ERISA "periodically refreshes, meaning there's basically no limit," he said, because this period could be re-set based on alleged fiduciary breaches; or nreach some middle ground in which the six-year limit is retained, but the clock could be restarted if there were some material change in the plan. “This middle ground would be a difficult standard to articulate” Mr. Campbell said.

Attorney Jeremy Blumenfeld, who represents plans in ERISA breach lawsuits, said a Supreme Court ruling could clarify a broader scope for the right to sue under ERISA. “I expect this will not be limited to retail shares vs. institutional shares,” said Mr. Blumenfeld, a Philadelphia-based partner at Morgan Lewis & Bockius LLP. “This could affect company-stock suits as well.”

A pro-plaintiff decision could lead to more lawsuits and to higher DC plan costs, Mr. Blumenfeld predicted. He isn't involved in the Tibble case.

Organizations representing consumers — the AARP and the Pension Rights Center — have filed amicus briefs with the Supreme Court supporting the Edison plaintiffs. “The obligation of a fiduciary is a dynamic responsibility,” Karen Ferguson, director of the Pension Rights Center, said in an interview. “Prudence is an active obligation. It's not a passive one-time thing.” n

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