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EXPERT ANALYSIS

The 'Duty to Monitor' and ERISA's Statute of Limitations After *Tibble*

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In *Tibble v. Edison International*, 135 S. Ct. 1823 (2015), the U.S. Supreme Court issued a unanimous decision that embraced a universally recognized proposition of law: Under the Employee Retirement Income Security Act, fiduciaries have a duty to monitor their investments in a 401(k) plan.

But that decision raises a question that cuts across many types of employee benefit plans and a wide variety of litigation scenarios: whether the "duty to monitor" that the Supreme Court embraced in *Tibble* opens fiduciaries to litigation claims that would otherwise be outside the statute of limitations.

The statute of limitations in ERISA generally bars claims of breach of fiduciary duty that result from "acts" or "omissions" that occurred more than six years earlier. So, if the investment decision first arose more than six years earlier, does ERISA's statute of limitations bar the claim? Or does the "duty to monitor" embraced by the Supreme Court in *Tibble* eviscerate ERISA's statute of limitations and create a rolling, six-year claim window?

Tibble and its forthcoming progeny therefore are likely to have a profound impact on many types of ERISA litigation and on whether a statute-of-limitations defense will apply in those cases.

A BRIEF HISTORY OF 401(K) FEE LITIGATION

In 2006, numerous class-action lawsuits were filed against the fiduciaries of large public-company 401(k) plans, alleging that the fees being incurred by the plans and borne by plan participants were excessive and undisclosed, in violation of ERISA. Initial lawsuits were filed against companies such as Lockheed Martin, Deere & Co., ABB and Exelon.[1]

Later lawsuits have been filed against companies such as Wal-Mart, Ameriprise Financial and Fidelity. Those cases have focused on different aspects of the investments and expenses within a 401(k) plan, including the amount of "revenue sharing" charged to plan participants and shared by a plan's mutual-fund providers with the plan's other service providers, the appropriate disclosure of the fees to be incurred by participants and the ownership of interest earned on plan investments as various funds are bought and sold.[2]

Tibble focused on another aspect of the investments within a 401(k) plan: the share class of the mutual funds available in Edison International's plan. Within each mutual fund are various classes, or subgroups, available to different investors. Those categories are referred to as "share classes."

Retail share classes are the classes offered to "retail" investors, such as investors who buy mutual funds through an individual retirement account or with post-tax funds outside a retirement plan. In contrast, "institutional" share classes are the classes offered to large institutional investors such as corporations and pension funds that invest large sums.

Costs vary among share classes. Retail share classes typically have higher costs than institutional share classes, usually because the "retail" investors require more administrative costs and services per dollar of invested funds than institutional investors.[3]

At trial, one of the issues in *Tibble* was the cost difference between the retail share classes offered to Edison International plan participants and the costs if plan participants had been offered institutional share classes for the same mutual funds.

The Los Angeles federal court concluded following trial that the fiduciaries of the Edison plan breached their duty of prudence by failing to evaluate or consider the different share classes within three mutual funds offered to plan participants beginning in 2002.[4] Edison's fiduciaries considered the total fees to be incurred by plan participants but never explored the differences among share classes for those three funds.

However, three other mutual funds were also included in the Edison plan with retail share classes rather than institutional share classes. Those funds had been first selected in 1999, not 2002. The *Tibble* complaint was filed in August 2007. As discussed below, the trial court and the 9th U.S. Circuit Court of Appeals held that ERISA's statute of limitations permitted the claims regarding the funds first selected in 2002, but not regarding the funds first selected in 1999 — because the 1999 funds fell outside ERISA's six-year limitations period.

Tibble ***and its forthcoming progeny are likely to have a profound impact on many types of ERISA litigation and on whether a statute-of-limitations defense will apply in those cases.***

ERISA'S STATUTE OF LIMITATIONS

ERISA's statute of limitations, 29 U.S.C. § 1113, applies with "respect to a fiduciary's breach of any responsibility, duty, or obligation" or violation of "this part" of the law — Part 4 of ERISA, which includes 29 U.S.C. §§1101-1114, and the "liability for breach of fiduciary duty" provision at Section 1109.

The general rule is that any claim is barred if commenced more than six years after "the date of the last action which constituted a part of the breach or violation," or "in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." .

The limitations period could be shortened to three years — if the "plaintiff had actual knowledge of the breach or violation" alleged. And the limitations period could be extended beyond the general six-year period if fraud or concealment is sufficiently alleged. But the general rule, at Section 1113(1), provides for six years.

The primary statute-of-limitations defense was that ERISA Section 1113 barred any fund that was initially selected for inclusion within the Edison 401(k) plan before August 2001 — more than six years before the filing of the initial complaint.

ERISA's statute of limitations

No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—

(1) 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, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

Except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

— 29 U.S.C. § 1113

The District Court rejected before trial the argument that ERISA permits a "continuing violation" theory.[5] Instead, the District Court permitted the plaintiffs to try to prove that there had been a change in circumstances within the six-year period that should have resulted in a change in share class; this argument was consistent with the 9th Circuit's decision *in Phillips v. Alaska Hotel & Rest. Emps. Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991)). .

After trial, the District Court rejected the plaintiffs' argument that certain "triggering events" should have resulted in a full due-diligence review of the funds after August 2001 that would have resulted in a changed share class.

The 9th Circuit affirmed on this issue, holding that "the act of designating an investment for inclusion starts the six-year period" under ERISA Section 1113.[6]

The only proper exception was the demonstration of "significant changes in conditions" that should have trigged a full due-diligence review, a burden the plaintiffs could not meet, the 9th Circuit said. Any other standard — such as a continuing-violation theory, upon the continued offering of imprudent investments — would render Section 1113 "meaningless" and could expose plan fiduciaries to liability made by their predecessors in violation of ERISA.

This tension came to the Supreme Court in *Tibble* — whether ERISA's statute of limitations provides finality for claims that arose more than six years earlier, despite the ongoing nature of the fiduciary duty to act prudently. But as discussed below, the justices sidestepped most of this tension in their decision.

Rather than resolving the key issue — the extent to which the finality of a statutory six-year bar can be overcome by subsequent acts or omissions — the Supreme Court essentially punted.

THE SUPREME COURT'S *TIBBLE* DECISION

The Supreme Court accepted the following question for review: "Is 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, 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?"

It is surprising that there was no disagreement on that point of law. The plaintiffs answered the question by focusing on the duty to monitor: that is, that the duties of an ERISA fiduciary included an ongoing duty to monitor plan investments. And the defendants agreed that there was an ongoing duty to monitor plan investments.

What the parties disagreed about was how the duty to monitor applied to *Tibble*. The defendants suggested that because there was no disagreement about the duty to monitor, the case should be dismissed or the 9th Circuit's decision should be affirmed. The plaintiffs urged the high court to instead vacate the appellate opinion regarding a "substantial change in circumstances," as well as the 9th Circuit's prior case law rejecting a "continuing violation" theory as an exception to ERISA's statute of limitations.

The framing of the issue by the plaintiffs as a duty-to-monitor issue — and the defendants' agreement — created an odd circumstance in the briefs and at oral argument. It also sidestepped the real issue before the court: the interplay between a finite statute of limitations and the standard (if any) to overcome ERISA's general six-year rule.

At oral argument, Justice Stephen Breyer asked counsel for Edison if the decision in *Tibble* could be "two paragraphs" long: "The parties agree that there is this ongoing monitoring, et cetera. The 9th Circuit did say changed circumstances. It's wrong about that."

The Supreme Court's unanimous decision, authored by Justice Breyer, was longer than "two paragraphs" but almost precisely tracked his articulation of the issues at oral argument. The decision accepted the parties' agreement that the "duty of prudence involves a continuing duty to monitor investments and remove impudent ones under trust law." And it rejected the 9th Circuit's "changed circumstances" test because it applied a "statutory bar" to a claim "without considering the nature of the fiduciary duty" being challenged under ordinary principles of trust law.

The 9th Circuit's opinion was therefore vacated and the case remanded to consider whether the fiduciaries "breached their duties within the relevant six-year period under Section 1113, recognizing the importance of analogous trust law." But the Supreme Court expressed "no view on the scope" of the fiduciary duty that may apply, leaving that decision to lower courts.

GOING FORWARD

Rather than resolving the key issue — the extent to which the finality of a statutory six-year bar can be overcome by subsequent acts or omissions — the Supreme Court essentially punted. And the court did so in a manner that is likely to lead to more litigation, at least in the near term.

It held 9-0 that the "substantially changed circumstances" test articulated by the trial court and the 9th Circuit — which was founded in "continuing violation" case law from the 9th Circuit — was incorrect. But the Supreme Court never even mentioned the continuing-violation theory in its opinion.

The Supreme Court left it to lower courts to determine the extent to which the duty to monitor plan investments could overcome the statutory limit.

The Supreme Court created a new test instead: whether the plaintiffs' claim of imprudence, consistent with trust law, fell within the six-year limitations period. And the court left it to lower courts to determine the extent to which that duty to monitor plan investments could overcome the statutory limit.

For ERISA lawyers who have been following recent ERISA cases before the Supreme Court, this outcome looks a lot like *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). In *Dudenhoeffer*, the court also unanimously rejected the standard the lower courts were using (on the issue of pleading requirements for ERISA cases about the buying and holding of employer stock) and remanded the case for lower courts to develop a new standard.

Dudenhoeffer has already resulted in a sharp division over the standard to be applied going forward. The first federal appeals court to squarely address *Dudenhoeffer* is the same one that was overruled in *Tibble*. In response to *Dudenhoeffer*, the 9th Circuit articulated a very plaintiff-friendly interpretation that sparked a sharply worded dissent to the denial of *en banc* review.[7]

A similarly contentious dispute is likely to occur after *Tibble* regarding the application of ERISA's statute of limitations. Although the continuing-violation theory has not been overruled, it essentially no longer applies. Instead, plaintiffs are now very likely to take a broad view of the duty to monitor plan investments and argue that the facts and circumstances of an alleged breach of duty satisfy a claim within the six years prior to the date the complaint was filed. If accepted by courts, that argument would create a "rolling" six-year statute of limitations.

This possibility does not suggest that every 401(k) plan has a potential litigation issue or will be sued. However, it does suggest that ERISA fiduciaries should ensure that their diligence is extensive and well documented. It is not simply fund performance, cost or share classes that should be subject to review, but all aspects of the plan's investment performance and the total mix of costs and fees. The problem in *Tibble* was not that "retail" funds are *never* appropriate, but that retail funds were not appropriate *in the Edison plan* or (more problematic under ERISA) not properly considered by the Edison plan's fiduciaries.

The other likely issue to emerge from *Tibble* is that plaintiffs will probably try to expand *Tibble*'s "duty to monitor" far beyond simply the duty to monitor plan investments for purposes of avoiding ERISA's statute of limitations. That argument could have a broad application across a wide variety of ERISA claims.

If there is a broad "duty to monitor," then not only 401(k) plans but also employee stock- ownership plans, self-funded health plans and many other ERISA plans could be subject to claims that fall within the "rolling" six-year period. This is another reason why increased diligence by ERISA plan fiduciaries is advisable following *Tibble* and why more litigation is likely until the scope of the duty to monitor and the statute of limitations exception is better defined.

NOTES

[1] *See Abbott v. Lockheed Martin Corp.*, No. 06–cv–0701, 2009 WL 839099 (S.D. Ill. Mar. 31, 2009); *Hecker v. Deere & Co.,* 556 F.3d 575 (7th Cir. 2009); *Tussey v. ABB Inc.,* 746 F.3d 327 (8th Cir. 2014); *Loomis v. Exelon Corp.,* 658 F.3d 667 (7th Cir. 2011).

[2] *See Braden v. Wal-Mart Stores,* 588 F.3d 585 (8th Cir. 2009); *Deere & Co.,* 556 F.3d 575; *ABB Inc.,* 746 F.3d 327.

[3] For an overview of the difference between institutional and retail share classes, *see Braden*, 588 F.3d at 595 & n.5.

[4] *Tibble v. Edison Int'l,* No. CV 07-5359, 2010 WL 2757153 (C.D. Cal. July 8, 2010).

[5] *Tibble v. Edison Int'l,* 639 F. Supp. 2d 1074, 1086 (C.D. Cal. 2009) (*citing Phillips v. Alaska Hotel & Rest. Emps. Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991)).

[6] *Tibble v. Edison Int'l*, 729 F.3d 1110, 1119 (9th Cir. 2013).

[7] *Harris v. Amgen Inc.,* No. 10–56014, 2015 WL 3372373 (9th Cir. May 26, 2015).

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