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High Court Affirms Duty to Monitor Plan Investments; Says Little on Scope of that Duty

In a unanimous decision, the Supreme Court underscored ERISA's duty to monitor existing plan investments and ruled that a claim is not barred solely based on the date of the initial investment. The decision relied heavily on the trust-law principle that a fiduciary must regularly review the suitability of investments and remove those that are no longer prudent. The Court did not define the scope of the monitoring duty, however; it sent the case back to the appellate level to decide whether and what type of a review of the investments in question was appropriate. In light of this decision, plan fiduciaries should ensure systematic procedures for monitoring plan investments.

Background

ERISA requires fiduciaries to administer plans prudently according to their terms and for the exclusive benefit of participants and beneficiaries. ERISA's statute of limitations on breach of fiduciary duty claims generally requires a plaintiff to bring legal action within six years of the date of the last act constituting part of the alleged breach. In the case of an alleged fiduciary omission, a plaintiff must file suit within six years of the latest date on which the fiduciary could have cured the claimed breach.

In *Tibble v. Edison*, plan participants alleged that their defined contribution plan's fiduciaries violated ERISA by including six retail-class mutual fund shares in the plan's investment menu when otherwise identical institutional-class mutual fund shares were available at a lower cost. The fiduciaries had selected three of those funds within the six-year limitations period, but the other three had been plan investment options for more than six years. Upholding a district court decision, the US Court of Appeals for the Ninth Circuit found the statute of limitations barred the participants' claims on the funds that had been in the plan for more than six years. Specifically, the Ninth Circuit held that the participants failed to show a change in circumstances that could trigger the duty to review and change investments within the six-year limitations period.

On the recommendation of the US solicitor general and in light of a split in the circuit courts of appeal on this issue, the US Supreme Court agreed to hear the statute of limitations question. For more procedural background and information on similar cases in other appeals courts, please see our November 24, 2014 *For Your Information*.

At oral argument, the parties agreed that fiduciaries must monitor ongoing plan investments and remove imprudent ones — but they disagreed on the scope of that duty.

Claim Not Barred Solely Due to Initial Timing of Investment

A unanimous Supreme Court rejected the Ninth Circuit's application of the limitations period "based solely on the initial selection of the three funds without considering the contours of the alleged breach of fiduciary duty." The Court did not define the scope of the duty to review existing plan investments, opting instead to send the case back to the Ninth Circuit to determine what that duty requires and whether the fiduciaries fulfilled such requirements.

Looking to Trust Law

The decision relied heavily on the trust-law principle that a fiduciary must "conduct a regular review of its investment with the nature and timing of the review contingent on the circumstances." Under trust law, which courts frequently look to in analyzing ERISA's fiduciary duties, a trustee has a continuing duty to monitor investments and remove imprudent ones — and this duty exists separately from the duty of prudence in initially selecting those investments. Quoting trust-law sources, the Court remarked that the trustee must systematically monitor investments, ensure that they remain appropriate, and take action once deciding that an investment is no longer prudent.

The Court acknowledged the Ninth Circuit's point that "characterizing the mere continued offering of a plan option, without more, as a subsequent breach would render the statute of limitations meaningless." Thus, according to the Court, there exists an as yet unspecified threshold lower than the Ninth Circuit's "significant change in circumstances" for bringing a breach of fiduciary duty claim concerning investments selected prior to the six-year window.

> **Comment.** ERISA's limitations period has stymied efforts to challenge the prudence of investments that have long been part of a plan's line up. This ruling may pry open the door for many such challenges.

Scope of Monitoring Duty Still Unclear

While holding that the Ninth Circuit erred in applying the limitations period, the Court did not determine the scope of the fiduciaries' monitoring responsibilities. Thus, it remains unclear whether the fiduciaries' review of the three funds in question was sufficient. Indeed, the Court carefully avoided expressing any view on the merits of the participants' claims, and explicitly recognized the possibility that, after the Ninth Circuit considers trust-law principles, it could conclude that the fiduciaries appropriately reviewed existing investment options.

In Closing

It is now up to the Ninth Circuit to decide when and whether the funds in question should have been examined and ultimately removed from the plan's investment line-up. Fiduciaries aiming to avert challenges to their own decisions should ensure processes for periodically reviewing the continued appropriateness of each ongoing plan investment are in place and duly documented.

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