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Tibble v. Edison: Implications of the Supreme Court's First ERISA Fee Case

Webinar Presentation

Jamie Fleckner

Scott Webster

Goodwin Procter LLP

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Tibble v. Edison Int'l, 2010 WL 2757153 (C.D. Ca. July 8, 2010)

- Many claims dismissed pre-trial; bench trial on remaining claims held on October 20-22, 2009

Central Trial Holdings	
	Imprudent to select retail share class mutual funds, as opposed to institutional share classes, where (i) defendants did not evaluate or consider alternative share classes and (ii) "institutional share classes offered the exact same investment at a lower cost to the Plan participants"
	Plan sponsor reliance on investment consultant was not a defense to imprudence
	Money market fees of 8 to 18 basis points not imprudent

Tibble v. Edison, 729 F.3d 1110 (9th Cir. 2013)

- 404(c) defense is not available as to claims for the selection or monitoring of investment options
- Upholds decision to award attorneys' fees to neither party
- Court agrees that claims as to investments brought six years before suit commenced barred absent changed circumstances due to lack of "continuing violation theory": to do otherwise "would make hash out of ERISA's limitation period and lead to an unworkable result."
- On rehearing, holds that *Firestone* deference (arbitrary and capricious standard) applies to claims under Section 404(a)(1)(D), but leaves open whether deference applies to other breaches of duty under Sections 404(a)(1)(A) and (B)

At the Supreme Court

Question Accepted for Review

- "Whether 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, is 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."
  - DOL and Solicitor General critical of approach adopted by Ninth, Fourth, and Eleventh Circuits
  - Supreme Court declined to accept the second question presented by petitioners: "Does *Firestone* deference apply to fiduciary breach actions under 29 U.S.C. §1132(a)(2), where the fiduciary allegedly violated the terms of the governing plan document in a manner that favors the financial interests of the plan sponsor at the expense of plan participants?"

Tibble v. Edison Oral Argument (Feb. 24, 2015)

- Parties agree that answer to question presented is "no," given the duty to monitor, and there was significant debate as to who waived what argument when.
  - Alito, J.: "on what point of law do you and [Edison] now disagree?"
- Question debated by Justices is what is the scope of the duty to monitor and when is it triggered:
  - Triggered only by changed circumstances?
  - Is scope of the duty to monitor identical to the duty to prudently select funds or something less; if less, what is it? Scalia, J.: "life is too short"
  - Government argues that there is no "checklist."
- Justices veered into discussing fees:
  - Roberts, C.J.: "How was there investor confusion? It seems to me one sentence saying, well, we have been paying .3 percent, this is .2 percent, that's why we're changing. They're not going to, you know, running out in the halls screaming that there's confusion about that. (Laughter.)"

Tibble v. Edison Decision (May 18, 2015)

- 9-0 decision, vacating and remanding case
- ERISA duty of prudence includes trust law obligation to monitor available investments and remove imprudent ones: "managing embraces monitoring"
  - Duty to monitor exists "separate and apart from" the duty to prudently select investments
- The Supreme Court "express[ed] no view on the scope of [the fiduciary's] duty"
- Although the lower courts did not consider the "contours" of the separate duty to monitor, they may hold on remand that defendants "did indeed conduct the sort of review that a prudent fiduciary would have conducted"
- Also left open procedural question of waiver

Implications

- Ongoing duty to monitor
- Understand fees and revenue sharing
- Understand whose obligation to pay plan expenses
- Reliance on consultants is not a complete defense, but it can be an effective tool
  - The value of benchmarking; the limitations of benchmarking

Contact

For further information, including to subscribe to Goodwin Procter's ERISA Litigation Update:

Jamie Fleckner – (617) 570-1153, jfleckner@goodwinprocter.com

Scott Webster – (617) 570-8229, swebster@goodwinprocter.com