Tibble v. Edison International

An Ekon Explains Segment

On May 18, 2015, Supreme Court Justice, Stephen Breyer, delivered the Opinion of the United States Supreme Court in Tibble v. Edison International[1], a unanimous decision overturning the Ninth Circuit Court of Appeals in the first 401(k) excessive fee case heard at the Supreme Court level.

Glenn Tibble, et al., Petitioners v. Edison International et al.

In 2007, beneficiaries of the Edison 401(k) Savings Plan filed a lawsuit against the Plan Sponsor, Edison International, asserting that the company had breached their fiduciary duty with respect to six mutual funds added between 1999 and 2002, citing excessive fund fees.

For three funds added in 2002, the District Court agreed that the Plan Sponsor had breached their fiduciary duty by exposing participants to unnecessary fees without offering a credible explanation as to why. However, with regard to the funds in question added in 1999, the District Court determined that the six year statute of limitations under ERISA had ended, barring the plaintiffs from pursuing litigation regarding these investments. The decision was appealed by the plaintiff group but upheld in the Ninth Circuit Court of Appeals. A petition for certiorari was filed, asking the Supreme Court to review the lower courts' decision.

The Opinion of the Supreme Court of the United States

The Opinion of the Supreme Court, delivered by Justice Breyer, resolves that the Ninth Circuit erred by viewing the *addition* of the mutual funds as the only breach. Instead, the full scope of fiduciary duty must be considered, including the obligation to monitor and review investments on an ongoing basis. "In short, under trust law, a Fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones. A plaintiff may allege that a Fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones. In such a case, so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely." The Supreme Court vacated the decision of the lower courts and sent the case back to the Ninth Circuit Court of Appeals for further deliberation of the plaintiff's claims based on this order.

Who is a Fiduciary?

Under ERISA, anyone who has discretionary authority over the Plan and its assets is a Fiduciary. Fiduciaries are required to act solely in the best interest of the Plan, its participants, and beneficiaries. All fiduciary duties must be carried out with prudence and

[1] Opinion of the Court. Supreme Court of the United States. No. 13-550. Glenn Tibble, et al., Petitioners v. Edison International et al. 18 May 2015. Full text at http://www.supremecourt.gov/opinions/14pdf/13-550_97be.pdf.

diligence. Fiduciaries must strictly follow plan document terms. With regard to investments, they must select providers & investment alternatives, allow only reasonable expenses, ensure a wide range of risk/reward characteristics, and continually monitor fees & performance.[2]

The Potential Effect of the U.S. Supreme Court's Decision

While this case has received a lot of media coverage, it is not particularly groundbreaking. The Supreme Court affirmed the duties of a Fiduciary under ERISA. In effect, it is not surprising the Justices voted unanimously that the Plan Sponsor, as a Fiduciary, is legally obligated to review and monitor investments in the Plan. With the looming re-definition of Fiduciary and increased scrutiny over investment fees and performance, ongoing review of investment alternatives is not a new topic. This case does not change ERISA to eliminate the six year statutory limitation; it affirms the ongoing responsibility of Fiduciaries and the obligation to consistently monitor funds and make changes when warranted.

Increased Litigation Surrounding Excessive Fees

This is the first case regarding excessive fees in a 401(k) Plan to make its way to the Supreme Court. With the scrutiny placed on Fiduciaries regarding fees, it may not be the last. For Plan Sponsors, this should speak volumes to the need for vigilance in meeting fiduciary responsibilities and maintaining due diligence records. An Investment Policy Statement (IPS) may be worth consideration. To understand the pros and cons, read "Is an Investment Policy Statement right for you?" on our website.

Fewer Employer-Sponsored Plans

While this case did not bring about any big changes, its impact could be significant. A potential consequence is that the decision will alarm employers and fewer will want to sponsor retirement plans for their workers. However, rest assured that nothing has changed with regards to fiduciary responsibility. Plan Sponsors who have been diligently meeting their fiduciary standards should continue to do so without concern. For those who have not, now is the time to start. Plan Sponsors can choose to lessen the scope of their fiduciary duty by delegating a portion of their responsibility to a Fiduciary Advisor.

A Demand for Fiduciary Advisors

Another potential effect of this case is an increased demand for 3(21) Investment Advisors and 3(38) Investment Managers in the marketplace. Plan Sponsors can solicit the assistance of a 3(21) Investment Advisor to make recommendations regarding investments in the plan. With a 3(21) Advisor, the Plan Sponsor retains ultimate authority over investment decisions, but liability is shared. To further delegate responsibility and liability regarding investments, Plan Sponsors can hire a 3(38) Investment Manager to

[2] United States Department of Labor. "FAQ's About Retirement Plans And ERISA". 26 September 2013. http://www.dol.gov/ebsa/faqs/faq_consumer_pension.html.

take discretionary authority over plan assets. With the impending redefinition of Fiduciary, an increasing number of plans will likely have a Fiduciary Advisor.

A Balancing Act with Fees and Performance

Some industry professionals feel that increasing cost pressures will drive Plan Sponsors to place full focus on fees and disregard performance. However, the fiduciary duty to monitor investment alternatives for reasonability includes a review of both fees and performance. One should not outweigh the other. Often, low fees are directly correlated with strong performance, however this is not always the case. Ultimately, a balance between low fees and good performance is best for the participant and a best practice for the Fiduciary.

Additional Guidance

While the Supreme Court made it very clear that a Fiduciary is responsible for ongoing review of investment alternatives in the Plan, questions are left unanswered as to how often this monitoring should take place. Justice Breyer quotes the (Third) Restatement of Trusts which states that monitoring should be done "in a manner that is reasonable and appropriate to the particular investments, courses of action, and strategies involved". From this, Plan Sponsors can interpret the duty to monitor as both ongoing as well as situational in nature, based on the Plan and portfolio. More guidance can be expected as the case is reexamined by the Ninth Circuit Court of Appeals.[3]

The Bottom Line

This case makes no changes to ERISA or the duties of Plan Fiduciaries, it instead illuminates the magnitude and significance of these duties. Choosing investment alternatives for a Plan's fund lineup is not a one-and-done task and never has been. Investment alternatives must be regularly monitored with attention paid to both performance and cost.

Read the full text of the U.S. Supreme Court's Opinion in Tibble v. Edison International, written by Justice Stephen Breyer, here.

[3] Restatement of the Law Third, Trusts. §90, Comment b, p. 295 (2007).