Continuing Violation?

Supreme Court to review ERISA's six-year limitations period

ON FEBRUARY 24, the Supreme Court is scheduled to hear oral arguments in *Tibble v. Edison International*, involving the application of the Employee Retirement Income Security Act (ERISA)'s six-year statute of limitations. ERISA limits the period during which a participant may bring a lawsuit for a breach of fiduciary duty to the six years after the last act that constitutes a part of the fiduciary breach. Over the years, federal courts have struggled with the interpretation and application of ERISA's statute of limitations, the *Tibble* case being the latest example.

Tibble involved six retail class mutual funds selected by plan fiduciaries as plan investment options; three of these funds were added to Southern California Edison's 401(k) plan in 1999 and three more in 2002. The original lawsuit claiming that selection of the funds was imprudent was not filed by the plaintiff participants until 2007. By that time, the three funds that were added in 1999 had been on the plan menu for more than six years, and the defendants argued that ERISA's statute of limitations barred the participants' claim.

The 9th Circuit Court of Appeals rejected the plaintiffs' so-called "continuing violation" theory under which the continued offering of an imprudent plan investment option can constitute the commission of a second breach that occurs within the six-year limitations period. This second breach arguably consists of a failure to adequately monitor the investment. In *Tibble*, the plaintiffs argued first that retail class funds should have been weeded out of the investment lineup because they are more expensive than institutional class funds; second, they claimed that the failure to do so was a breach that occurred within the limitations period, even if the investment had originally been selected in 1999. The Department of Labor (DOL) concurs with this position because, in its view, plan fiduciaries would otherwise have free rein to leave imprudent investment options in place.

In the opinion of the 9th Circuit, the act of designating an investment for inclusion on the plan's menu starts the six-year statute of limitations period, and the plaintiffs' continuing violation theory would make the statute meaningless. According to the 9th Circuit, the plaintiffs' position would expose current plan fiduciaries to liability for decisions their predecessors made, some of which may have occurred decades before. Other federal courts, including the 11th and 4th Circuits, have made similar rulings—*Fuller v. SunTrust Banks* and *David v. Alphin*, respectively.

Responding to the DOL's argument that plan fiduciaries would be empowered to leave imprudent investment menus in place, the 9th Circuit also noted that the plaintiffs had been given the opportunity at trial to show that changed circumstances within the limitations period warranted a full due diligence review of the investment menu. However, the plaintiffs were unable to establish facts that would have required this review.

The plaintiffs' recently filed brief with the Supreme Court urges the court to reverse the 9th Circuit's holding. The new brief argues that this was not a case involving a *continuing* violation, but rather one in which there were *new* violations consisting of a failure by the current plan fiduciaries to re-examine and remove imprudent investments. The brief mentions several times that the plan fiduciaries met quarterly to consider investment matters but gave no consideration at these meetings to switching from retail class investments to cheaper institutional class investments. The 9th Circuit's concern for the plight of current trustees was dismissed as misguided, because it is the current trustees who conducted these allegedly imprudent reviews.

The plaintiffs' Supreme Court brief not only focuses on these fact-based arguments but also makes general legal claims. For instance, it asserts that under common law, successor plan fiduciaries would have had a duty to periodically review investments and that ERISA's statute of limitations has done nothing to change this. Further, the plaintiffs argue that the 9th Circuit made a mistake by ignoring language of the ERISA limitations statute itself. They cite a prong of the statute that causes the six-year statutory period to begin running only after the latest date on which a breach or violation consisting of an omission could have been cured.

Tibble has important implications for retirement plan sponsors. The statute of limitations question is a close one in which both sides can marshal cogent arguments. If the Supreme Court agrees with the participants that there is a continuing or new violation, plan fiduciaries could face additional liability. If, on the other hand, the Supreme Court upholds the 9th Circuit, plan participants will be limited when bringing claims that challenge investment decisions.

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