Tibble v. Edison Affirmed, But Plaintiffs May Not Be Celebrating

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On March 21, 2013, the Ninth Circuit Court of Appeals affirmed *Tibble v. Edison International* in an opinion touching on many of the fiduciary issues germane to excess fee cases and the selection of investment alternatives for 401(k) plan menus.

The lower court in *Tibble* concluded that plan fiduciaries breached their fiduciary duties by selecting retail share classes (as opposed to institutional share classes) of three mutual funds that were added to the plan within ERISA's six-year statute of limitations, resulting in a modest award of damages and a denial of certain attorneys' fees. The Ninth Circuit rejected Edison's argument that it relied on its expert consultant, noting that ERISA's duty to investigate requires a fiduciary to review, assess and, where necessary, supplement the data a consultant gathers and that Edison failed to make any showing of the steps it took to evaluate the consultant's recommendations.

The plaintiffs (the nominal winners) and the DOL appealed because most of the prudence and prohibited transaction claims were held to be barred, given that the fiduciaries first selected the challenged investments more than six years before the suit was filed. Accordingly, the DOL's amicus brief asserted that the defendant fiduciaries violated a continuing duty to monitor and manage plan investments and eliminate imprudent investments in the process.

Perhaps the main interest of the new *Tibble* decision is the Ninth Circuit's rejection of the plaintiffs' continuing violation theory and its holding that the act of designating an investment for inclusion on the plan's menu starts the six-year statute of limitations period. In the Ninth Circuit's view, characterizing the continued offering of a plan investment option as the commission of a second breach would (in the absence of other circumstances, such as fraud or concealment) make the statute of limitations meaningless and expose the current plan fiduciaries to liability for decisions made by their predecessors, which may have occurred decades before and as to which institutional memory may have ceased. Responding to the DOL's argument that plan fiduciaries would be empowered to leave imprudent investment menus in place, the court noted that the plaintiffs were given the opportunity at trial to show that changed circumstances within the limitations period warranted a full due diligence review of the investment menu, but had been unable to establish that this resulted in a breach of fiduciary duty.

The Ninth Circuit's rejection of the continuing violation theory (which the DOL has asserted in numerous cases) is a significant victory for plan fiduciaries. It means more work for plaintiffs in establishing that there has been a change in conditions warranting review of an investment decision more than six years old. Although this is not an impossible task, there is no question that it will limit the ability of the plaintiffs' bar to bring class actions asserting imprudence in the design of a plan's investment menu.

The Ninth Circuit also addressed the issue of revenue sharing involving payments from mutual funds on the plan's investment menu to its administrative service provider which, in turn, granted Edison a credit on its bills. The plaintiffs argued that this arrangement not only violated the terms of a plan provision stating that the cost of the Plan's administration would be paid by Edison, but was also a prohibited transaction, because Edison, a plan fiduciary, received "consideration" for its personal account in violation of the statute. The court held that Edison had the discretion to interpret the plan provision whose natural interpretation, according to the court, was that "costs" were whatever bills were presented to Edison. As to the prohibited transaction issue, the court relied on the DOL's admission that discounts on invoices could constitute the reimbursement of direct expenses and that this would, by its nature, exclude revenue sharing payments from the definition of impermissible "consideration."

Later in the decision, when discussing whether Edison was imprudent in failing to select certain institutional investments, such as commingled pools and separate accounts, or in actually selecting investment alternatives with a range of fees that varied from .03 percent to 2.0 percent, the court noted that it did not wish to be understood as ruling out the possibility that liability might, on a different record, attach on the basis that plan fiduciaries had been driven to select funds because they offered the employer the financial benefit of revenue sharing. As to whether Edison had been prudent in its investment selections, other than the three funds for which it was held liable, the court observed that there was evidence that there had been consideration of the pros and cons of investment alternatives. Thus, the court refused to issue a broad ruling that retail mutual funds are categorically imprudent.

Other issues were tabled for development in future cases, such as Edison's challenge to class action certification based on recent Seventh Circuit precedent that the claims of the class representatives were not

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typical of the class because the representatives were not invested in the same funds as the class members. The Ninth Circuit refused to take up this issue, because it was raised in the lower court.

Finally, the Ninth Circuit also upheld the lower court's denial of attorneys' fees. Early on in its discussion of the benefits of affording an employer discretion in administering a plan, the court noted that this would help "keep administrative and litigation expenses under control." In a separate side memorandum specifically affirming the lower court's denial of the plaintiffs' request for fees and costs, it considered the "plaintiffs' tactic of submitting aggressive discovery requests and asserting numerous non meritorious claims" as a factor weighing against the award of such amounts. The main decision directed the parties to bear their own appeals costs. Because 401(k) fee cases are expensive to mount, the denial of fees will, as much as anything else, moderate the tactics of the plaintiffs' bar and limit its willingness to bring new cases. ❖

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