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News Concerning Professional Liability Issues

COZEN O'CONNOR

Supreme Court Expands Scope of Fiduciary Liability

In *Tibble v. Edison International*, the U.S. Supreme Court expanded the scope of the duty of prudence owed by ERISA fiduciaries. Although ostensibly a case about the statute of limitations, the Court ruled that trustees of ERISA plans owe a continuing duty to monitor trust investments on a regular basis and remove those that become imprudent.

Petitioners were a class of participants in a 401(k) plan (the Plan) who brought suit in 2007. The investments at issue were three mutual funds added to the Plan in 1999 and three added in 2002. The petitioners alleged that the trustees acted imprudently by offering the six higher priced retail-class mutual funds as plan investments when materially identical but lower priced institutional-class funds were available.

As to the funds added in 2002, the District Court held that the trustees did not offer a credible explanation for offering the retail-class funds with higher but unnecessary administrative costs thereby violating their duty of prudence. The District Court, however, held that the claims with respect to the funds added in 1999 were untimely because the mutual funds were added to the Plan more than six years before the action was filed.

The 9th Circuit affirmed noting that the petitioners had not established a change in circumstances that might trigger an obligation to review and to change investments within the 6-year limitations period. The Court of Appeals focused on the act of selecting the funds for inclusion in the Plan as the trigger for limitations purposes, but did not consider the role of a fiduciary's duty under the common law of trusts.

The Supreme Court held that the 9th Circuit erred in barring the claim as untimely without considering the nature of the fiduciary duty. The Court noted that section 1113 of ERISA provides that

> "[n]o action may be commenced with respect to a fiduciary's breach of any responsibility, duty, or obligation" after the earlier of "six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation."

Turning to the law of trusts, the Court stated that "a trustee has a continuing duty to monitor trust investments and remove imprudent ones. The continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset." The Court noted further that a trustee must systematically evaluate all of a plan's investments at regular intervals to ensure that they are appropriate. Accordingly, the Court held that it was error for the 9th Circuit to bar the claim based solely on the initial decision to include the funds in the plan.

The Court declined, however, to delineate the scope of the continuing duty of prudence. Instead, it remanded the case to the Court of Appeals for consideration of whether this duty required a review of the mutual funds here, and if so, what kind of review was required. The Court also left for the Circuit Court to decide whether petitioners waived their claim regarding breach of the continuing duty of prudence by failing to raise it below.

By holding that the duty of prudence imposes continuing obligations on trustees to monitor and alter the selection of investments in ERISA plans, the Court has greatly expanded the potential for claims against such trustees. Regardless of the performance of investments available in a plan, any investment decision or omission within the six-year limitations window that might arguably have resulted in higher administrative costs or inferior returns for plan members may now provide the basis of a claim. Moreover, given the Court's decision, that claim may be highly likely to survive a motion to dismiss thereby increasing its settlement value.

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A number of claims involving a trustee's alleged failure to reduce plan expenses have been brought in recent years. Some involving very large plans have resulted in settlements for tens of millions of dollars.

Given the brave new world created by *Edison International*, plan sponsors and fiduciaries should strongly consider the need for increasing the limits of their fiduciary liability insurance programs. Moreover, underwriters of such programs should evaluate whether they are receiving sufficient premium for this newly expanded risk.

To discuss any questions you may have regarding the issues discussed in this Alert, or how they may apply to your particular circumstances, please contact Angelo Savino at (212) 908-1248 or asavino@cozen.com.