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Statute of Limitations

High Court to Address Statute of Limitations For Suits Challenging Retirement Plan Fees

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BNA Snapshot

Tibble v. Edison Int'l, U.S., No. 13-550, *cert. granted* 10/2/14

Key Development: U.S. Supreme Court will address statute of limitations applicable to lawsuits challenging retirement plan investment options.

Key Takeaway: High court to take up issue that has pitted three federal circuit courts against Department of Labor.

By Jacklyn Wille

Oct. 2 — The U.S. Supreme Court announced that it will wade into the world of ERISA plan fee litigation, when it granted review of a case asking whether plan fiduciaries breach their duties by offering higher-cost, retail-class mutual funds when identical lower-cost, institutional-class funds are available (*Tibble v. Edison Int'l,* U.S., No. 13-550, *cert. granted* 10/2/14).

The case presents the question: whether participants in retirement plans can hold plan fiduciaries liable for including higher-cost investment funds in the plan when those funds were initially chosen more than six years before the lawsuit, or whether these types of claims are barred by the six-year statute of limitations found in the Employee Retirement Income Security Act.

This six-year limitation has become a huge roadblock for retirement plan participants challenging higher-cost funds, because many funds remain in retirement plans for years after their initial selection. The high court made its announcement Oct. 2.

In the past two years, three federal appellate courts—including the U.S. Court of Appeals for the Ninth Circuit in the instant case—have refused to hold plan fiduciaries liable on these types of claims, finding them time-barred by ERISA (56 PBD, 3/22/13; 150 PBD, 8/5/13; 40 BPR 772, 3/26/13; 40 BPR 1914, 8/6/13; 56 EBC 1245).

In ruling for the plan fiduciaries, these courts have characterized the participants' claims as challenging the initial selection of the funds–which typically occurs outside of the six-year period—rather than challenging to the fiduciaries' failure to monitor and replace the funds during the six-year window. In particular, the courts have focused on the lack of any allegations that intervening circumstances caused the complained-of funds to become imprudent during the six-year window.

The Department of Labor has repeatedly attacked these rulings in amicus briefs, including the brief it filed with the U.S. solicitor general advising the high court to hear this case. In the DOL's view, these court rulings give ERISA fiduciaries “no incentive to monitor and update plan investments” once they have been available for more than six years (173 PBD, 9/8/14; 41 BPR 1842, 9/9/14).

Andrew L. Oringer, a partner with Dechert LLP in New York, called this “an extremely high-profile case,” adding that “any pronouncement by the Court on the case may well be anxiously awaited by the market.”

Attorneys See Chance for Reversal

Several attorneys who spoke with Bloomberg BNA indicated that the Supreme Court may be inclined to reverse course from the Ninth Circuit's statute of limitations analysis.

Jim Moore, a participant-side attorney with McTigue Law LLP in Washington, told Bloomberg BNA Oct. 2 that his firm was “cautiously optimistic” that the Supreme Court would “set aside” the pro-fiduciary trend running through *Tibble* and two other recent circuit court decisions.

“Those decisions, by effectively insulating plan fiduciaries from liability, encourage employers to choose investments for their employees' retirement plans based upon the financial benefit to the employer, rather than the benefit of plan participants,” Moore said.

“This is the type of self-dealing Congress enacted ERISA to prevent,” he added.

Moore wasn't the only practitioner who saw the possibility for a Supreme Court decision rejecting *Tibble*‘s statute of limitations analysis.

Scott Macey, president and chief executive officer of the ERISA Industry Committee in Washington, told Bloomberg BNA in an Oct. 2 e-mail that it “would not surprise” him if the court overturned the Ninth Circuit on the statute of limitations issue, since it already took the step of granting review in the case.

However, Macey pointed out that plan sponsors and fiduciaries oppose the “endless litigation overhang and uncertainty” that such a ruling by the Supreme Court would bring.

“Our perspective is that six years is enough time to learn about an alleged breach and bring a lawsuit (unless there has been a major intervening change that should re-open the limitations period),” Macey said. “I am not saying that participants should not have the right to sue, only that there should be some reasonable limit within which to do so and ERISA sets that limit.”

“The counter argument is, in this case, that it was a continuing violation and thus the time limit never runs,” he added. “That seems pretty harsh and causes much uncertainty (unless, as I previously mentioned, there have been major changes that should give rise to a new or differing fiduciary analysis).”

Gregory Y. Porter, a participant-side attorney and a partner with Bailey & Glasser LLP in Washington, told Bloomberg BNA in an Oct. 2 e-mail that the Supreme Court's ultimate ruling in *Tibble* was likely to be influenced by two recent statute of limitations cases that the court decided outside of the context of ERISA.

According to Porter, these rulings suggested that the high court may be inclined to reject the Ninth Circuit's statute of limitations analysis.

“The Supreme Court has decided two important statute of limitations cases that should drive the outcome of this case,” Porter said.

“In *Lewis v. City of Chi.*, 560 U.S. 205 (2010), the Court held that the plaintiffs could challenge the administration of a firefighters entrance exam within the limitations period of Title VII even though the test had first been adopted and applied outside the limitations period. Virtually every rationale advanced by defendants in *Tibble* (and the 11th Circuit in *Fuller v. SunTrust*) was rejected by the Court in the *Lewis* case."

"More recently, in *CTS Corp. v. Waldberger*, 134 S.Ct. 2175 (2014), the Court distinguished between statutes of limitations and statutes of repose," Porter added.

"It held that statutes of repose do not have exceptions; ERISA Section 413 has an exception for fraudulent concealment, suggesting it is a statute of limitations. This demolishes the last rationale of *Tibble* and *Fuller*, namely that liability should end because section 413 is a statute of repose."

Attorney: 'High-Profile' Case

Oringer, who represents plan sponsors and fiduciaries, told Bloomberg BNA in an Oct. 2 e-mail that he was somewhat surprised by the Supreme Court's recent willingness to wade into the waters of "high-profile ERISA issues."

"The Supreme Court is exhibiting what to me is a surprising willingness to address high-profile ERISA issues that have been percolating in the lower courts for years," Oringer said, noting that the court's decision to review *Tibble* comes one term after it "braved the stock-drop controversy" in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459, 58 EBC 1405 (U.S. 6/25/14) (123 PBD, 6/26/14; 41 BPR 1360, 7/1/14).

However, Oringer emphasized that the Supreme Court granted review only on the statute of limitations question presented in *Tibble*, declining to review "the broader standard-of-review issue." While the limitations question is a "big one" that could have "broad implications," Oringer noted that the "substantive questions" presented by the *Tibble* case "would seem to be put off until another day."

"It will be interesting to see if the Court, either during the pendency of the *Tibble* case or in a follow-on case that may come in the near future, becomes willing to take on the difficult substantive issues presented by 401(k)/fee litigation," Oringer said.

In a joint e-mail to Bloomberg BNA, Erin M. Riley and Gretchen Obrist, two participant-side attorneys with Keller Rohrback LLP in Seattle, praised the Supreme Court's decision to grant review in *Tibble*, given the importance of the statute of limitations in ERISA cases.

"ERISA imposes *continuing* duties of prudence and loyalty on plan fiduciaries," they said. "Thus, a prudent fiduciary must evaluate and monitor a plan's funds and costs not just at the time the initial choice of funds is made, but continually, throughout the lifetime of the plan."

"Under the Ninth Circuit's decision, there is arguably little incentive for fiduciaries to assess a fund's prudence after the investment option has been available for more than six years. ERISA contains no expiration date for fiduciary duties, and to pardon ongoing breaches that easily could be avoided is simply inconsistent with ERISA's central goal of protecting employee retirement savings," Riley and Obrist said.

Pro-Plan Circuit Court Trend

The *Tibble* case was one of three recent circuit court rulings to reject the "continuing violation" theory of claim accrual for purposes of challenges to plan investments.

The Supreme Court's grant of review may indicate the court's interest in reviving the theory, which provides that ERISA fiduciaries are continuously liable for any imprudent investment options that remain in their plans, regardless of whether those investments were selected outside of ERISA's six-year statute of limitations.

In addition to the Ninth Circuit in *Tibble*, the U.S. Courts of Appeals for the Fourth and Eleventh Circuits have recently rejected the continuing violation theory in the course of ruling for plan fiduciaries in challenges to plan investment options that were selected outside of the relevant six-year period (*David v. Alphin*, 704 F.3d 327, 54 EBC 2437 (4th Cir. 2013) (11 PBD, 1/16/13; 40 BPR 189, 1/22/13); *Fuller v. SunTrust Banks, Inc.*, 744 F.3d 685, 57 EBC 2089 (11th Cir. 2014) (40 PBD, 2/28/14; 41 BPR 496, 3/4/14)).

In each of these cases, the courts have focused on the absence of any allegations that the complained-of funds became imprudent after their initial selection for inclusion in the plan.

At this time, neither *Fuller* nor *David* has been appealed to the Supreme Court.

DOL Argues Against Trend

While the trend among federal circuit courts has been to reject these plan fee challenges as untimely, the DOL has argued against this trend at both the circuit and Supreme Court level.

In the brief it filed encouraging the high court to hear *Tibble*, the DOL argued that the Ninth Circuit mischaracterized the claims at issue by treating them as challenges to the initial selection of higher-cost retail funds, rather than as challenges to the fiduciaries' failure to switch from retail class shares to lower-cost institutional shares during the preceding six years.

In the DOL's view, ERISA fiduciaries have a continuing duty to review the prudence of plan investments, which they breach by failing to periodically evaluate the performance and fees of plan investments, by failing to investigate alternative investments and by failing to remove funds that “shortchange participants by charging excessive fees.”

The DOL also addressed what it considered undesirable outcomes of these circuit court rulings and said, “A participant who invested in the Plan more than six years after the initial investment decision could never sue, even if the investment was an obviously imprudent one.”

The Department made similar arguments in briefs filed with the Fourth and Ninth Circuits, and it made a related argument to the Eleventh Circuit.

Parties Spar in Briefs

In their petition for Supreme Court review, the Edison International plan participants argued that ERISA Section 413‘s statute of limitations—which bars actions commenced more than six years after “the date of the last action which constituted a part of the breach or violation”—implicitly recognizes the idea that “a plan fiduciary's duty is a continuing duty that does not expire and immunize fiduciaries after six years.”

Arguing against the need for Supreme Court review, the Edison fiduciaries maintained that “Every circuit to have considered the issue has rejected the ‘continuing violation' theory petitioners assert.”

In Edison's view, ERISA fiduciaries have a duty to monitor for “*material changes in circumstances* that require revisiting decisions implemented before the limitations period.” Absent such material changes, no fiduciary duty to take action arises, they alleged, noting that the participants in the instant case failed to identify any such circumstances.

The participants countered this contention in their reply brief, which cited two older cases from the Second and Seventh Circuits as imposing a “continuing fiduciary duty” to review plan investments and eliminate those found to be imprudent (*Morrissey v. Curran*, 567 F.2d 546, 1 EBC 1659 (2d Cir. 1977); *Martin v. Consultants & Admins., Inc.*, 966 F.2d 1078, 15 EBC 1601 (7th Cir. 1992)).

Further, the participants alleged, no circuit court has adopted Edison's “changed circumstances” analysis.

Other Question: *Firestone*

Although the high court agreed to weigh in on the statute of limitations issue, it followed the solicitor's recommendation and declined to review the other question presented by the case, which asked about the standard of judicial review applicable to an ERISA fiduciary's actions when it defends allegations that it failed to follow plan terms.

The issue is rooted in the Supreme Court's 1989 decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 10 EBC 1873 (U.S. 1989), which established a bedrock principle of ERISA litigation—namely, that a plan fiduciary's decision denying benefits is to be reviewed de novo, unless plan terms give the administrator discretionary authority to determine benefit eligibility or interpret plan terms, in which case the appropriate standard of review is for an abuse of discretion.

In *Tibble*, the Ninth Circuit extended this grant of judicial deference beyond the world of benefit denials and applied it to claims that plan fiduciaries failed to follow the terms of the plan, a move that surprised some practitioners (29 PBD, 2/12/14; 41 BPR 366, 2/18/14).

The circuit courts are divided on this issue, with the Third, Sixth, Seventh and Eighth circuits taking a similar approach to the Ninth's in deferring to plan fiduciaries.

Earlier this year, the Eighth Circuit handed down a widely anticipated decision ruling that *Firestone* deference applied to fiduciary breach claims against ABB Inc. (*Tussey v. ABB, Inc.*, 746 F.3d 327, 58 EBC 1085 (8th Cir. 2014) (54 PBD, 3/20/14; 41 BPR 684, 3/25/14)).

Tussey has been appealed to the Supreme Court, which hasn't yet announced whether it will grant review.

The Second and Fifth Circuits have taken the opposite approach, with the Fifth Circuit ruling earlier this year that *Firestone* applied only to benefit denials and didn't govern suits for fiduciary breach (*Futral v. Chastant*, 564 Fed.Appx. 117, 58 EBC 2071 (5th Cir. *unpublished* 2014) (77 PBD, 4/22/14; 41 BPR 928, 4/29/14)).

In its brief to the high court in *Tibble*, the DOL approved of the Ninth Circuit's decision extending deference to the Edison fiduciaries. It also took the position that *Tibble* presented a “poor vehicle” for the high court to address the standard of review question, because the parties didn't focus on it in their briefs.

The participants are represented by Jerome J. Schlichter of Schlichter, Bogard & Denton LLP, St. Louis. Edison is represented by Jonathan D. Hacker and Anna-Rose Mathieson of O'Melveny & Myers LLP, Washington and San Francisco.

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For More Information

Text of the Ninth Circuit's ruling is at http://www.bloomberglaw.com/public/document/Tibble_v_Edison_Intl_711_F3d_1061_56_EBC_1245_9th_Cir_2013_Court_/1.