Statute-of-limitations is flexible for ERISA suits: Supreme Court

By Thomas E. Clark, Jr. *Thu, May 21, 2015*

This article, which comments on the Supreme Court's ruling this week on the ERISA excessive fee case of Tibble v. Edison, is excerpted from the Wagner Law Firm's Fiduciary Matters Blog. It was written by one of the firm's attorneys, Tom Clark.

On May 18, 2015, the Supreme Court unanimously ruled in favor of the plaintiff plan participants in Tibble v. Edison. The decision reversed an earlier 9th Circuit ruling that under ERISA's six year statute of limitations, a claim involving a plan investment that was initially chosen outside the 6-year window from when a lawsuit is brought could only be viable if there was a change in circumstances that would cause a fiduciary to reexamine the fund's inclusion in the plan.

The Supreme Court rejected this interpretation, finding that under ERISA, there is a continuing duty to monitor and remove imprudent investments. Today's decision also effectively reversed rulings in the 4th and 11th Circuits that were similar to the 9th Circuit's.

The decision

Different Justices of the Supreme Court showed during oral arguments that they struggled with the question of exactly what this continuing duty to monitor looks like. Rather than resolve the question, they have remanded the case back to the 9th Circuit to decide what the duty to monitor requires and whether the plaintiffs here met that burden to have viable claims.

The decision then summarized its holding as follows:

> 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 Ninth Circuit erred by applying a 6-year statutory bar based solely on the initial selection of the three funds without considering the contours of the alleged breach of fiduciary duty.

Finally, the Supreme Court made clear that it was not ruling on the scope of the duty to monitor:

> We express no view on the scope of respondents' fiduciary duty in this case. We remand for the Ninth Circuit to consider petitioners' claims that respondents breached their duties within the relevant 6-year period under §1113, recognizing the importance of analogous trust law.

Our thoughts

This is obviously a significant victory for the plaintiffs in this case and plan participant lawsuits generally, as many lawsuits in the last 5 years had been dismissed citing the overly restrictive interpretation of ERISA's six year statute of limitations.

In plain English, what this decision holds is that if a plaintiff can make a valid claim for a violation of the continuing duty to monitor, there is a effectively now a rolling 6-year window of liability. But of course, now the question is: what exactly is that duty and did the defendants violate it here?

The panel of three 9th Circuit judges that previously rules in favor of the defendants will get the first chance to answer those questions. Additionally here for these plaintiffs, the defendants have raised an argument that amounts to a technicality that the plaintiffs failed to raise a duty to monitor claim in the lower courts. The Supreme Court again stated that they had no opinion on the matter and would let the 9th Circuit decide.

So what does this decision mean for the (quite probably) millions of ERISA fiduciaries out there? There is no longer any dispute that a fiduciary must have a process to monitor a plan's investments. We think it is also fair to say that this duty to monitor extends to all other areas of plan administration and responsibility (e.g. fees paid to providers, quality of providers, whether services are necessary, etc…) However, the duty does depend on the circumstances as the Supreme Court pointed out by citing to ERISA's statutory language.

But we suggest that if a fiduciary does not have a robust monitoring process in place, they do not wait for any further court decisions. Develop a process, document why you think it's a prudent process, and execute that process.