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High Court Ruling Leaves Confusion Over 401(k) Monitoring

By **Aaron Vehling**

Law360, New York (May 18, 2015, 9:07 PM ET) -- The U.S. Supreme Court's decision in a case accusing Edison International of imprudently investing its workers' 401(k) funds has made clear that plan fiduciaries have to monitor plans continuously, but attorneys say the court wasn't specific enough about what that obligation actually entails.

The high court's eight-page decision Monday unanimously vacated a Ninth Circuit ruling that Edison workers' $373 million Employee Retirement Income Security Act claims were time barred. The justices said the appeals court incorrectly applied the statutory bar based solely on the initial selection of the mutual funds at issue without considering the specifics of the alleged breach of fiduciary duty in the case.

The case raised a question about whether a claim for breach of fiduciary duty could be pursued under ERISA even if an allegedly imprudent investment that continued to cause losses was initially chosen outside the six-year statute of limitations period. However, during the case the justices largely focused on whether fiduciaries have an ongoing duty to monitor plans to determine if they continue to be prudent.

In the decision penned by Justice Stephen Breyer, the justices said the common law of trust provides that a trustee has a continuing duty to monitor trust investments and remove those deemed imprudent. That duty is separate from the duty to exercise prudence in selecting the investments at the outset. So long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely, the justices' decision says.

The problem, said Tiffany Downs, a partner at Ford & Harrison LLP, is that "there are no details of how to satisfy the duty, just reminder that there is an obligation."

The employees and Edison, an electric utility, had agreed during briefing and arguments at the high court that the duty of prudence involves a continuing duty to monitor investments and remove imprudent ones under trust law.

They disagreed as to the scope of that responsibility, however, and the justices declined to weigh in on that issue, saying that was better left for the lower courts to decide while they took trust law into account.

The decision leaves a lot of open questions about the frequency and scope of review, according to Mike

Graham, co-chair of the ERISA litigation affinity group at McDermott Will & Emery LLP.

Any questions of whether a fiduciary should examine a plan every month or every quarter, for example, or look at the plan upon a change in ownership or leadership of a mutual fund were remanded for consideration, which aligns with Justice Sonia Sotomayor's emphasis that these questions are for lower courts to handle first, he said.

Downs said that other considerations, like depth of review, fees, investment managers and the value of assets were also not touched upon in the decision.

"It would have been nice for [the justices] to provide general guidelines," she said.

Going forward, fiduciaries have a lot to consider.

"Now it's left for fiduciaries to hash out what that means for their side … what processes and benchmarks should be put in place to document continuous monitoring," Graham said.

Fiduciaries must be able to show a prudent process in the course of administering the plan, Ross said, noting that "the process has never been more important than it is today."

Even with a documentation of good-faith efforts to administer a plan, whatever the depth and breadth of those efforts may be, "floodgates" of plaintiffs have a window for bringing claims against fiduciaries stemming from these processes, Downs said.

If there really is no statute of limitations because of a continued duty, fiduciaries could see more claims based on the fees of plans because of the absence of more stringent guidelines in the decision, she said.

In a hypothetical instance, a specific fund for a plan could have been picked one year and then 10 years later a claim could be brought over a fee hike, but under ERISA plans don't necessarily have to be the cheapest, if compared to certain other factors, such the type of investment, Downs said.

However, where the justices didn't give litigants much to work with, they did offer a faint roadmap for the courts, according to Mayer Brown LLP partner Nancy G. Ross.

The decision says that courts need to look at these claims more broadly than they did in the instant case and determine whether or not the nature of a claim is a duty of prudence in monitoring of plans or selecting those plans from the outset, she said.

The justices' decision will allow courts in duty-to-monitor cases to have a grasp on a substantive, decisional point, said Tim McDonald, a partner in the labor and employment practice group at Thompson Hine.

The duty to monitor not only informs what the statute of limitations are here, he said, but it also helps courts know what the standard is of the claim itself once the limitations hurdle is cleared.

Furthermore, that duty-to-monitor language could be applied to merits cases as well as statute-of-limitations cases, McDonald said, which is among the most interesting outcomes of the decision.

Overall, Ross said that the decision might have opened up a lot of questions for lower courts when

deciding what constitutes implementation of a proper duty to monitor, but that might not be a bad thing.

Plan administration and operation is not a "one-size fits all" process and "how plans are run varies so greatly that what may be prudent for one reasonable fiduciary might not be reasonable for another fiduciary," she said.

--Additional reporting by Keith Goldberg. Editing by John Quinn and Emily Kokoll.

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