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Learning from Tibble About The Supreme Court's Take On ERISA

By Brian D. Netter and Nancy G. Ross[1]

The Supreme Court wields great authority, so when the Court expresses repeated interest in a particular statute, regulated entities pay attention.

Such is the case with ERISA.

In recent years, the Court has exhibited a healthy appetite for ERISA cases. No one aspect of ERISA has dominated the Court's docket, and the cases seem technical at first glance — this is ERISA, after all — but several of the Court's decisions have turned into blockbusters, reshaping the fundamental background principles that drive ERISA litigation.

So why ERISA and why now?

There is no cohesive ideological theme connecting the Court's recent ERISA jurisprudence. Some decisions have favored the interests of plan sponsors and fiduciaries; others have favored plan participants and beneficiaries. But considered as a whole, the Court's ERISA jurisprudence suggests that the Court acknowledges the importance of benefits-related issues — and does not routinely agree with the approaches employed by the lower federal courts.

For plan sponsors and fiduciaries trying to limit their exposure to ERISA-related liabilities, much can be learned from the Court's approach to ERISA. While some of the guidance makes its way directly into the Court's opinions, the Court's case selections and course of inquiry are equally enlightening.

This article will consider the Court's approach to ERISA through the lens of one case decided this term — *Tibble v. Edison International*.[2] Although much can be learned from the case's outcome, more can be taken from the case's history and the issues left unresolved.

THE BACKGROUND — THE SUPREME COURT'S RECENT ERISA JURISPRUDENCE

In the past five years, the Supreme Court has addressed ERISA issues nearly every term. By way of background, the highlights of the Court's decisions preceding its consideration of *Tibble* are as follows:

- ***CIGNA Corp. v. Amara* (2011) (Breyer, J.):**[3] After participants in CIGNA's pension plan claimed that they had been deceived by a summary plan description's misleading description of the conversion of a traditional defined-benefit pension plan to a cash-balance plan, the Supreme Court granted certiorari to address the sort of harm that a plaintiff must prove — likely harm or detrimental reliance. The Court skirted that question by holding that claims arising under a summary plan description are not claims for benefits under

[1] Brian Netter, Esq. is a partner in the Washington D.C. office of Mayer Brown's Supreme Court & Appellate practice. Mr. Netter briefs and argues high profile and legally complex cases. His experience covers a broad range of substantive areas, and he frequently litigates cases involving administrative law, constitutional law, and ERISA. Nancy G. Ross is a partner in Mayer Brown's Chicago office and a member of the Litigation & Dispute Resolution practice. She focuses her practice primarily on the area of employee benefits class action litigation and counseling under the Employee Retirement Income Security Act of 1974 (ERISA).

[2] 135 S. Ct. 1823 (2015).

[3] 131 S. Ct. 1866 (2011).

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ERISA §502(a)(1)(B). The Court then offered its views on the possible availability of remedies under ERISA §502(a)(3) and embraced equitable remedies that were previously thought to be unavailable under ERISA.

- ***US Airways, Inc. v. McCutchen* (2013) (Kagan, J.):**[4] A sharply divided Court held that an employer can invoke equitable defenses when seeking to recover plan overpayments only if those defenses are consistent with the plan document.
- ***Heimeshoff v. Hartford Life & Accident Ins. Co.* (2013) (Thomas, J.):**[5] Healing its *McCutchen* rift, the Court held unanimously that a reasonable limitations period prescribed by the plan document may shorten the statutory limitations period for participants to bring a claim in court, absent a contrary state-law prohibition, even if the plan's limitation period starts to run before a claim accrues.
- ***Fifth Third Bancorp v. Dudenhoeffer* (2014) (Breyer, J.):**[6] Asked to consider whether the *Moench* presumption[7] (i.e., the presumption that a fiduciary acts prudently in permitting employees to invest in their own employer's stock through an ESOP or EIAP) applies at the motion-to-dismiss stage, the Court rejected the *Moench* presumption at *any* stage of litigation, although it softened the blow by erecting other obstacles in *Moench*'s place.
- ***M&G Polymers USA v. Tackett* (2015) (Thomas, J.):**[8] Assessing changes to retiree medical benefits, the Court rejected the Sixth Circuit's influential *Yard-Man* inference[9] in favor of lifetime vesting, indicating instead that ordinary contract principles govern benefit vesting. A concurring opinion for four Justices suggested that there is a sharp divide on the Court as to what ordinary contract principles ordinarily will prescribe.[10]

Viewed collectively, these cases demonstrate an assertive Court unafraid to upset settled expectations and eager to issue expansive opinions — decisions that often veer beyond the scope of the question the Court has agreed to decide. ERISA practitioners thus must be prepared for major decisions that alter the landscape whenever the Court takes up a question under ERISA.

THE FOREGROUND — *TIBBLE V. EDISON INT'L*

In the past 10 years, there has been a surge of litigation against fiduciaries of large §401(k) retirement plans. On claims of breach of the duty of prudence, fiduciaries have been challenged for a wide range of acts, such as (1) failing adequately to monitor indirect compensation that service providers receive from other service providers; (2) structuring participant investment options in a manner that dilutes returns; or (3) causing participant accounts to incur unnecessary fees.

In *Tibble*, a group of plaintiffs who participated in Edison International's §401(k) plan sued Edison and various plan fiduciaries. The plaintiffs alleged that their plan's fiduciaries had offered as investment options six retail-class mutual funds that also offered lower-cost institutional share classes. In plaintiffs' view, it was imprudent for plan fiduciaries not to offer the institutional share classes, which had lower expense ratios.

Mutual fund companies often offer more than one share class of a particular fund. Although the underlying investment strategy is common to the share classes, the fee structures may differ. A §401(k) plan that wants to offer a mutual-fund investment to plan participants must decide whether to offer the retail-class fund (for which the plan may be entitled to 12b-1 fee rebates to account for the plan's provision of recordkeeping services) or an institutional-class option (which will not provide the 12b-1 rebates but that may offer a lower base fee, so long as the fund can guarantee a minimum investment amount).

In *Tibble*, the district court divided the mutual fund offerings into two groups, based on when the funds had initially been added to the investment lineup. When the complaint was filed in 2007, three of the mutual funds had been in the lineup for more than six years, and three had been in the lineup for less than six years. The six-year mark is significant because ERISA provides, for a breach-of-fiduciary-duty claim, that "[n]o action may be commenced . . . after . . . six years after . . . the date of the last action which constituted a part of the breach or violation."[11]

After a bench trial, the district court granted judgment to the plaintiffs and found a breach of duty by the fiduciaries with respect to the newer funds. Although Edison did not satisfy the minimum investment amounts that would have guaranteed access to the institutional share class, the district court found that a reasonable fiduciary would have asked for a waiver of the investment minimum and that the waiver would have been granted.

On the older funds, conversely, the district court ruled for Edison. The court ruled that the plaintiffs had waited too long to challenge the *initial* selection

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[4] 133 S. Ct. 1537 (2013).

[5] 134 S. Ct. 604 (2013).

[6] 134 S. Ct. 2459 (2014).

[7] *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995).

[8] 135 S. Ct. 926 (2015).

[9] *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983).

[10] *Compare* 135 S. Ct. at 926, 935–37 (opinion of the Court), *with* 135 S. Ct. at 937–38 (Ginsburg, J., joined by Breyer, Sotomayor, and Kagan, JJ., concurring).

[11] ERISA §413.

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of the mutual funds and had not proven that there had been a change of circumstances warranting reevaluation at a *later* date.

After the Ninth Circuit affirmed, the plaintiffs petitioned the Supreme Court for certiorari, framing the question as whether the 6-year period ''immunize[s] §401(k) plan fiduciaries for retaining imprudent investments'' that had been selected more than six years ago.[12] The Supreme Court solicited the views of the United States.[13] The federal government sided with the plaintiffs, and the Court granted the petition, rephrasing the question to be addressed:

> Whether a claim that ERISA plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical lower-cost institution-class mutual funds were available, is barred by 29 U. S. C. §1113(1) when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed.[14]

In the briefing, it became clear that there was no dispute on the question posed by the Court. The parties and their *amici*[15] agreed that fiduciaries have a duty to monitor their plan; if concerns about a share class (or any other prior decision) should have triggered a fiduciary to do something after the initial selection, but within the previous six years, then ERISA permits a claim. With that issue resolved, the parties disputed case-specific issues — What are the contours of the ''duty to monitor''? What, exactly, did the lower court decide?

From time to time, the Supreme Court will agree to decide a question that will ultimately prove to be uncontested or unresolvable within the context of the case. In those contexts, the Court will sometimes decide to dismiss the writ of certiorari as improvidently granted and will sometimes decide to answer a different question. How the Court chooses to proceed is a commentary on the Court's perceptions of the importance of the case and the contribution it can make with the legal issues that remain.

THE *TIBBLE* ARGUMENT

At argument, the justices struggled to identify the contours of the parties' dispute. After Justice Alito pressed the plaintiffs (''on what point of law do you disagree?''), they claimed a dispute concerning whether the 6-year look-back period depends on the existence of ''significant changed circumstances since the initial investment.''[16] Justice Alito asked the same question to the defendants (''on what point of law do you and [the plaintiffs] now disagree?''), who insisted that there was no disagreement on the question presented.[17]

The parties agreed on the basic approach to the question presented but differed on a few subsidiary points. First and foremost, they disagreed about what the lower courts had decided. In Edison's view, the lower courts had ruled (as a matter of law) that the plaintiffs could not challenge the initial decision to invest in the first set of retail-class mutual funds because of the 6-year look-back period and had rejected (as a matter of fact) plaintiffs' theory that changed circumstances subsequent to the initial decision required reevaluation. In the plaintiffs' view, the district court had required them to prove that there had been a material change of circumstances in order to start a new 6-year clock. The parties also disagreed about the nature of the duty to monitor. In plaintiffs' view, the duty to monitor was similar to the duty to make a prudent initial decision. When asked by Justice Kagan whether there were any circumstances in which ''it's possible that a decision to buy one of these funds with high expenses would be imprudent in the first place, and yet, it might be prudent not to switch midstream,'' the plaintiffs responded that such a circumstance could arise only in the world of Supreme Court hypotheticals.[18] Edison, in contrast, suggested that monitoring is less extensive than a full course of due diligence.

Given the parties' agreement, the Justices were mostly disinterested in the question they had asked the parties to address. But they were interested in the duty to monitor — how it should be defined generally and how it applied to the facts of the particular case.

Their questioning on the duty to monitor revealed two distinct approaches to ERISA's fiduciary duty. Justices Kagan and Scalia appeared to view the fiduciary duty as something that could be defined by the Court — perhaps by consulting trust-law treatises or making judicial assessments as to reasonableness and appropriateness. Justice Scalia was sympathetic to Edison's position and skeptical of a rule that would require judges to review claims based on deficient monitoring. He cautioned the plaintiffs that ''life is too short'' to ''ask every Federal district court not only to determine whether a particular purchase was sensible or not, but to say year by year whether you've done a careful enough review.''[19] Justice Kagan seemed also to believe that the Court was capable of characterizing the duty to monitor but viewed it

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[12] Petition for Writ of Certiorari, *Tibble v. Edison Int'l*, No. 13-550 (U.S. filed Oct. 30, 2013). The petition also posed an additional question regarding *Firestone* deference. The Court's ultimate grant of certiorari did not encompass the *Firestone* question, which is not addressed herein.

[13] *Tibble v. Edison Int'l*, 134 S. Ct. 1573 (2014) (mem.).

[14] *Tibble v. Edison Int'l*, 135 S. Ct. 43 (2014) (mem.).

[15] The authors of this article filed an *amicus curiae* brief in support of Edison on behalf of the ESOP Association.

[16] Transcript of Oral Argument at 8, *Tibble v. Edison Int'l*, No. 13-550 (U.S., *argued* Feb. 24, 2015).

[17] *Id.* at 30.

[18] *Id.* at 11–12.

[19] *Id.* at 15.

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more expansively, pressing Edison on its justifications for failing to change the share class.[20]

Justices Sotomayor and Kennedy, however, appeared to view the issue as evidentiary. At the beginning of the argument, Justice Sotomayor said that she had searched the *record* for ''some evidence as to what exactly [the duty of] monitoring entails.''[21] Justice Kennedy, for his part, quipped that fiduciaries must do ''what a prudent trustee would do,'' whatever that may be.[22]

THE DECISION

On May 18, 2015, the Supreme Court issued its ruling. In a unanimous opinion written by Justice Breyer, the Court vacated the Ninth Circuit's ruling in favor of Edison and remanded the case for further proceedings.[23]

The Court did not dismiss the appeal, nor did it issue a sweeping opinion that reshapes the expectations of fiduciaries. Rather, the Court mostly confined its analysis to points on which the parties agreed. The Court determined that the Ninth Circuit had erred by ''applying a statutory bar to a claim of a 'breach or violation' of a fiduciary duty without considering the nature of the fiduciary duty.''[24] Stated differently, the Court held that, to assess the timeliness of a claim, a court must understand the nature of the plaintiffs' allegations. Because the plaintiffs in *Tibble* complained of a breach in the fiduciaries' monitoring obligations, the 6-year clock began to run at the time of the alleged monitoring failure — not from the date of the original decision that was to be monitored.

In so holding, the Court acknowledged a ''continuing duty to monitor'' that ''exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset.''[25] But the Court took pains to ''express no view on the scope of respondents' fiduciary duty in this case.'' And it likewise declined to rule on Edison's claim that the plaintiffs had switched their legal theory mid-course, leaving it for the Ninth Circuit to address ''questions of forfeiture'' on remand.

WHAT IT MEANS

Through its decision in *Tibble*, the Supreme Court has shined a light on fiduciary monitoring practices. Although diligent fiduciaries were already aware of this obligation, the Court's express recognition will cause fiduciaries to assess and systematize their monitoring practices. Plaintiffs' attorneys can be expected to accept the Court's invitation to develop the law of fiduciary monitoring, and plan fiduciaries would obviously prefer to be on the sidelines for that litigation.

It is rare for the Court to decide a substantive question that may, for reasons of forfeiture, prove irrelevant to the case. The Court's willingness to reach the merits in *Tibble* signals its discomfort with the language in the Ninth Circuit's opinion, which — regardless of what the Ninth Circuit intended to communicate — created the prospects for a body of wrong-headed limitations law.

The Court's opinion also leaves for future resolution the method for evaluating the nature of a fiduciary's responsibilities. The Court cites trust law at various points in its opinion, noting, for example, that ''[i]n determining the contours of an ERISA fiduciary's duty, courts *often* must look to the law of trusts.''[26] But the Court did not indicate how ''often'' historical texts will answer questions of fiduciary practice, leaving unresolved the tension between historical texts and present-day evidence in delimiting the contours of the fiduciary duty.

Nor did the Court decide whether ERISA's monitoring duty requires a *process* or an *outcome*. In the briefing, plaintiffs' position was fiduciaries are obligated to ''remove imprudent investments,'' thereby suggesting that an investment exists in the binary state of prudent-or-imprudent.[27] Under that view of the world, a fiduciary must take all possible steps to ferret out ''imprudence'' and faces liability for failing to correct past missteps. Edison's position, in contrast, suggested that a fiduciary has an obligation to undertake a prudent monitoring process, which might, in some circumstances, mean retaining an investment that should not have been selected in the first instance.

There are indications in the Court's opinion that it favors Edison's approach. For example, the mere fact that the Court declined to rule on the prudence of Edison's monitoring practices — even though it was found liable for including other retail-class mutual funds in its plan — suggests that the Court expects a different analytical approach. Moreover, the Court was express in characterizing the duty to monitor as ''distinct,'' which, in Plaintiffs' view, it would not be. Nevertheless, this issue will be litigated on remand and in other related cases.

LOOKING AHEAD

Trust law has often proved influential when interpreting ERISA. *Tibble* suggests that, at least for some Justices, a fiduciary duty should be defined not by traditional trustee duties but instead by contemporaneous expectations established by evidence — as might be dictated by ERISA's mandate that fiduciaries act as would a ''prudent man acting in a like capacity and familiar with such matters.''[28]

The influence of trust law will remain at the forefront of the Court's ERISA docket. In addition to a

[20] *Id.* at 34–35, 43, 50.

[21] *Id.* at 3.

[22] *Id.* at 44.

[23] 135 S. Ct. 1823 (2015).

[24] *Id.* at 1827.

[25] *Id.* at 1828.

[26] *Id.* at 1828 (emphasis added).

[27] Brief for Petitioners at 24, *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015).

[28] ERISA §404(a)(1)(B).

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case about preemption of state laws under ERISA,[29] the Court has agreed to decide in its October 2015 term whether "appropriate equitable relief" is available to a plan fiduciary that wants to recover an overpayment, but cannot identify the particular fund that constitutes the overpayment — a question that practically begs the Justices to pull out their dusty trust-law treatises.[30] Like many of its predecessors, *Montanile* appears to present a specific question bearing on only a small category of ERISA claims. But given the Court's evident interest in providing commentary on ERISA cases, that case — and all future cases — will be followed closely by the ERISA bar.

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[29] *Gobeille v. Liberty Mut. Ins.*, No. 14-181 (U.S. June 29, 2015) (mem.), *granting review of* 746 F.3d 497 (2d Cir. 2014).

[30] *Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan*, 135 S. Ct. 1700 (2015) (mem.), *granting review of* 593 F. App'x 903 (11th Cir. 2014).

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