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Statute of Limitations

Groups Debate Effects of Plan Fee Litigation In Competing Supreme Court Amicus Briefs

The effect of plan fee litigation on workers' retirement savings has sharply divided various industry groups, which filed competing amicus briefs with the U.S. Supreme Court in an upcoming case involving Section 401(k) plan fees (*Tibble v. Edison Int'l*, U.S., No. 13-550, arguments scheduled 2/24/15).

Groups taking an expansive view of workers' ability to challenge high-cost investments alleged that such litigation increased workers' retirement savings by driving mutual fund providers to compete with each other by lowering fees.

Groups on the other side of the dispute argued that these plan fee lawsuits should be limited, because they imposed unclear burdens and substantial costs on plan fiduciaries.

The case at the heart of this dispute asks whether 401(k) participants can hold fiduciaries liable for including higher-cost investment funds in the plan when those funds were initially chosen more than six years before the lawsuit. In recent years, three federal appellate courts have ruled in favor of plan fiduciaries in these disputes, finding that the participants' claims were barred by the six-year limitations period 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 selections.

The high court is scheduled to hear oral arguments on this issue Feb. 24 (41 BPR 2083, 10/7/14).

Not So Costly. Many of the amicus briefs supporting the plan participants disputed the idea that allowing participants to challenge older funds would increase the cost of plan administration or burden fiduciaries in any significant way.

In particular, the AARP argued that requiring fiduciaries to prudently monitor existing investments mirrors industry standards and "merely embraces the procedures that plan sponsors and their fiduciaries should already be following." The AARP quoted from a client advisory prepared by law firm Bryan Cave advising plan fiduciaries to meet at least quarterly to "consider information regarding performance, selection, and oversight of plan investments."

Further, rather than being "earth shattering," such a requirement likely would be an "Insignificant Undertaking" for plan administrators, as decisions about the

suitability of a particular investment class "can be made using information readily available in the fund prospectus," the AARP maintained.

In a similar vein, fiduciary consultant Cambridge Fiduciary Services LLC argued that because "many, if not most," fiduciaries of large plans "already follow good monitoring practices," allowing lawsuits like that of the *Tibble* participants wouldn't result in any significant increase in costs for these fiduciaries or employers.

Moreover, for those fiduciaries "who do not currently follow best practices," Cambridge said it isn't asking much that they "spend a little more time every year minding their plans' fees and expenses—especially since they pass on much of the cost of such monitoring to their plans in any event."

Along those lines, a group of law professors also filed an amicus brief in support of the *Tibble* participants, emphasizing that ERISA fiduciaries have an "ongoing" duty to monitor plan investments and that lawsuits like *Tibble* are valid attempts to hold fiduciaries accountable under this duty.

Litigation Boosts Retirement Savings. Cambridge also argued that the increase in litigation over excessive plan fees has been a good thing for workers, because it helped lower retirement plan fees by more than 20 percent since 2006, while fees charged by mutual funds generally have declined by nearly 15 percent in the past five years.

This argument—that plan fee litigation decreases 401(k) costs and increases employees' retirement savings—also was advanced by the Pension Rights Center, which said that insulating fiduciaries from lawsuits based on funds selected outside the six-year window "will reduce competition over fees and raise the cost of mutual fund investments in 401(k) plans."

According to the Pension Rights Center, the possibility of lawsuits like *Tibble* provides an incentive for mutual fund providers to "compete" by reducing the fees charged to retirement plans.

This competition, which results in increased retirement savings for workers, "depends on fiduciaries actively comparing the cost and performance of alternative funds and substituting funds when cheaper or better-performing alternatives are available," the Pension Rights Center contended.

Confusion of Duties. On the other side of the debate, the ESOP Association filed an amicus brief in support of the Edison International plan fiduciaries. According to the association, the participants' attempt to hold fiduciaries liable improperly confuses the fiduciary duty to prudently invest plan assets with the fiduciary duty to monitor those assets.

Plan fiduciaries “do not spend their days constantly reevaluating all of their past decisions,” the association asserted. While re-evaluation is warranted in situations involving a “material change of circumstances,” the *Tibble* participants’ “costly, inefficient, and ultimately counterproductive” proposed rule would result in a “tail-chasing exercise of continual reevaluation” that would “increase monitoring costs exponentially,” the association argued.

A similar argument was raised in a joint amicus brief filed by the National Association of Manufacturers, the U.S. Chamber of Commerce, the ERISA Industry Committee, the American Benefits Council and the Business Roundtable.

In the view of these groups, the *Tibble* participants “conflate two different aspects of fiduciary decision-making—the initial selection of investment options and the ongoing monitoring of investment performance—in an unprecedented effort to encumber plan fiduciaries with a constant duty to reevaluate the entirety of a portfolio on some unstated periodic basis.”

The groups also criticized the Department of Labor—which filed its own brief in the case (41 BPR 2528, 12/16/14)—of “attempting to engage in regulation via amicus brief.” The groups urged the high court to afford no deference to the department’s stated position.

Retail Class Funds. Employing another tactic, the Securities Industry and Financial Markets Association (SIFMA) filed an amicus brief that largely avoided the statute-of-limitations dispute and instead focused on the *Tibble* participants’ underlying claim—that plan fiduciaries breach their duties by including higher-cost, retail-class mutual funds in the plan when identical lower-cost, institutional class funds were available.

According to SIFMA, “The choice between retail share classes and institutional share classes is not, as petitioners suggest, a narrow, black-and-white choice between a more expensive and a less expensive investment option.”

“Rather, it is a decision that must be made in the context of the total costs, interests, and objectives of the plan,” SIFMA continued, arguing that the selection of retail-class funds could benefit plans by allowing them to pay for administrative expenses through the use of revenue sharing.

Given this, SIFMA urged the high court to rule against the participants and to avoid finding retail-class funds to be categorically imprudent.

Benefit Claims Distinct. DRI—The Voice of the Defense Bar used its amicus brief to express concerns that a high court decision finding the *Tibble* participants’ lawsuit timely could have unanticipated consequences for lawsuits seeking benefits under ERISA Section 502(a)(1)(B).

DRI urged the court to “preserve ERISA’s purposeful division between benefit claims and other types of fiduciary duty claims” by issuing a “narrowly tailored” ruling that couldn’t be used by enterprising participants’ attorneys to extend the time frame for bringing lawsuits seeking benefits.

The AARP’s brief was filed by Jay E. Sushelsky of AARP Foundation Litigation, Washington.

Cambridge’s brief was filed by Roger L. Levy of Cambridge, Scottsdale, Ariz., and Brian Glasser and Gregory Y. Porter of Bailey & Glasser LLP, Washington.

The law professors’ brief was filed by David Pratt of Albany Law School, Albany, N.Y., and Lynn L. Sarko, Erin M. Riley and Gretchen S. Obrist of Keller Rohrbach LLP, Seattle.

The Pension Rights Center’s brief was filed by Karen W. Ferguson of the Pension Rights Center, Washington, and Karen L. Handorf, Michelle C. Yau and Matthew A. Smith of Cohen Milstein Sellers & Toll PLLC, Washington.

The ESOP Association’s brief was filed by Nancy G. Ross, Samuel P. Myler and Brian D. Netter of Mayer Brown LLP, Chicago and Washington.

The brief filed by the National Association of Manufacturers and other groups was filed by Mark A. Perry, William J. Kilberg, Jason Mendro and Paul Blankenstein of Gibson, Dunn & Crutcher LLP, Washington; Linda E. Kelly and Patrick N. Forrest of the Manufacturers’ Center for Legal Action, Washington; Kate C. Todd and Steven P. Lehotsky of U.S. Chamber Litigation Center Inc., Washington; Annette G. Fildes and Scott J. Macey of the ERISA Industry Committee, Washington; Janet M. Jacobson of the American Benefits Council, Washington; and Maria Ghazal of the Business Roundtable, Washington.

SIFMA’s brief was filed by William M. Jay, Abigail K. Hemani, James O. Fleckner, Alison V. Douglass and Jaime A. Santos of Goodwin Procter LLP, Washington and Boston, and Kevin Carroll of SIFMA, Washington.

The DRI’s brief was filed by John P. Sweeney, Edmund S. Sauer, Scott B. Smith and Mary Ann Couch of Bradley Arant Boult Cummings LLP, Washington, Nashville, Tenn., Huntsville, Ala., and Birmingham, Ala.

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Text of the AARP’s brief is at <http://op.bna.com/pen.nsf/r?Open=jwie-9rvs3c>.

Text of Cambridge’s brief is at <http://op.bna.com/pen.nsf/r?Open=jwie-9rvs22>.

Text of the law professors’ brief is at <http://op.bna.com/pen.nsf/r?Open=jwie-9rvs2l>.

Text of the Pension Rights Center’s brief is at <http://op.bna.com/pen.nsf/r?Open=jwie-9rvs32>.

Text of the ESOP Association’s brief is at <http://op.bna.com/pen.nsf/r?Open=jwie-9ttkdu>.

Text of the brief filed by the National Association of Manufacturers and other groups is at <http://op.bna.com/pen.nsf/r?Open=jwie-9ttkey>.

Text of the brief filed by SIFMA is at <http://op.bna.com/pen.nsf/r?Open=jwie-9ttkg6>.

Text of the brief filed by DRI is at <http://op.bna.com/pen.nsf/r?Open=jwie-9ttkgz>.