TIBBLE TROUBLE FOR ERISA FIDUCIARIES

BY ROB YELLEN, EXECUTIVE VICE PRESIDENT, FINEX NORTH AMERICA, DIRECTORS AND OFFICERS LIABILITY AND FIDUCIARY LIABILITY PRODUCTS

On May 19, 2015, the U.S. Supreme Court announced a much-anticipated ERISA plan decision in the case of Tibble v. Edison International.

ISSUE
Whether ERISA’s six-year statute of limitations period barred imprudent investment claims where the initial investment decision was more than six years prior to suit.

DECISION
The Court held that the Ninth Circuit erred by applying 29 U. S. C §1113’s six-year limitation to “a breach of fiduciary duty claim based on the initial selection of the investments without considering the contours of the alleged breach of fiduciary duty.”

Rationale: ERISA’s fiduciary duty includes a continuing duty – separate and apart from the duty to exercise prudence in selecting investments at the outset – to monitor and remove imprudent trust investments. So long as the basis for plaintiff’s claim alleging breach of the continuing duty of prudence occurred within six years of suit, the claim is timely.

Expressly not decided: The scope of respondents’ fiduciary duty in this case. It will be up to the lower courts to decide what constitutes an ERISA fiduciary “duty to monitor” investments in an employer-sponsored defined contribution plan.

BACKGROUND
Plan beneficiaries (plaintiffs/petitioners) claim respondents breached the duty of prudence by offering higher priced retail-class mutual funds when the same investments were available as lower priced institutional-class mutual funds. Both lower courts held that, for funds that were first offered more than six years prior to the filing of the plan beneficiaries’ complaint, the six-year limitation period barred the ERISA breach of fiduciary duty claims as untimely. Plan beneficiaries appealed.
IMPACT
Since today’s fiduciaries typically periodically review existing investments, this decision is not likely to be a game-changer; however, the Tibble decision heightens the value of having a clearly established process in place for each element of plan administration. Unfortunately, rather than providing a road map for fiduciary compliance or deciding subsidiary issues, such as whether ERISA recognizes a “continuing violation” theory, the Tibble decision provides narrow guidance leaving much to the lower courts to decide. This makes the impact of the decision or the specific scope of ERISA fiduciary duties hard to predict – either for the parties in the case or for the retirement planning industry more generally. For example, we do not know what the duty to monitor will look like: Will Tibble give plaintiffs a new or expanded route to challenge decades-old investment decisions? We will have to wait and see.

While Tibble, on its own, may not be a game changer, the ERISA Fiduciary exposure game is changing. When considered along with other recent developments, like Fifth Third Bancorp v. Dudenhoeffer (which eliminated the “Moench presumption” defense – a presumption of prudence for ERISA Fiduciaries), excessive fee, stock drop, defined benefit and welfare plan class claims, and the impact of the Affordable Care Act, it is becoming a brave new world for ERISA fiduciaries.

ACTION POINTS
1. Periodically review your process for each element of plan administration. Make sure your process compares fund fee structures with market alternatives taking into account returns.
2. Fiduciary Liability insurance has never been more valuable as a tool for helping to manage the risks and uncertainties around ERISA fiduciary duties. Carrier appetite for fiduciary risk remains robust, and competitive terms and pricing with enhanced features are readily available. If you have not done so recently, at renewal, talk to your broker about your Fiduciary Liability coverage and today’s compelling opportunities.

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Willis North America Inc.

Brookfield Place
200 Liberty Street, 7th Floor
New York, New York 10281-1003
United States
Tel: +1 212 915 8888

www.willis.com

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