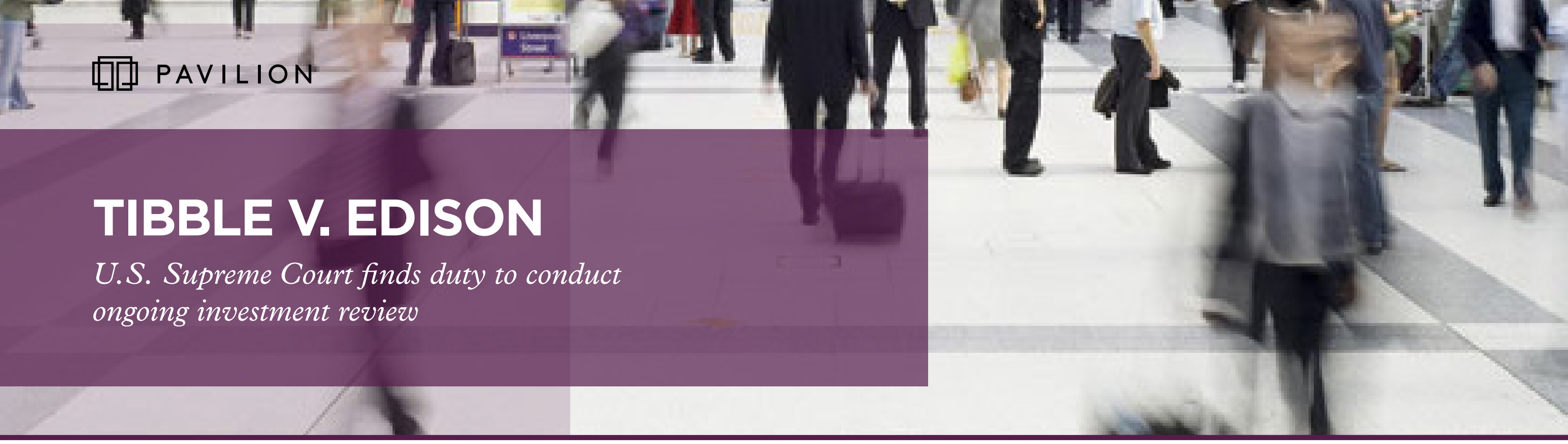

PAVILION

TIBBLE V. EDISON

U.S. Supreme Court finds duty to conduct ongoing investment review

by Thomas H. Dodd, CFA
Executive Director

In a case followed with much interest by plan sponsors and ERISA practitioners, the U.S. Supreme Court recently ruled on whether ERISA's six-year statute of limitations period applied to investment decisions made more than six years prior to the filing of the action.

The Court remanded the decision to the Ninth Circuit, ruling that the Ninth had not given adequate consideration under trust law to conduct a regular review of investments. The decision's most salient outcome is a clear requirement for ongoing monitoring of all ERISA-related investments.

Background

In 2007, several participants of the Edison International 401(k) Savings Plan filed a lawsuit against Edison. They sought to recover alleged damages suffered as a result of Edison's violation of their fiduciary duties.

Edison added three new mutual funds to its Plan in 1999 and three more in 2002. Edison used retail share classes for the six funds instead of lower-priced institutional share classes. Petitioners argued that Edison acted imprudently by offering the retail share classes when identical, lower-priced institutional shares were available.

The District Court agreed with the petitioners on the three funds added in 2002. The Court stated that Edison had failed to exercise "the care, skill, prudence and diligence under the circumstances" that ERISA requires. However, for the three funds added in 1999, the Court found against the petitioners because the six-year statute of limitations on ERISA claims had lapsed by the time the action was filed.

In order to prevail over the statutory six-year limitation period, the petitioners had to show that the three 1999 funds underwent significant changes that would have prompted Edison to complete a share class review. The District Court ruled that the petitioners had not established that the funds significantly changed during the six-year period.

On appeal to the Ninth Circuit, the Appellant Court affirmed the District Court. With respect to the three 1999 funds, the petitioners' action was outside the statute of limitations because petitioners had not established a change of circumstances that would have prompted a review of the share classes. The petitioner filed with the Supreme Court challenging this ruling.

Decision

The Supreme Court held, in a unanimous decision, that the Ninth Appellant Court erred in applying the ERISA statute of limitations, and sent the case back to the Ninth Circuit to consider the petitioners' claims that the respondent breached its fiduciary duties in selecting the higher-priced retail shares.

> *"The Court stated that Edison had failed to exercise "the care, skill, prudence and diligence under the circumstances" that ERISA requires."*

The Supreme Court went a different direction in deciding the case, not dwelling on the statute of limitations issue. Rather, the Supreme Court found that the Ninth Circuit ignored a basic trust law principle that a fiduciary is required to conduct a regular review of its investments, stating: "a trustee has a continuing duty to monitor trust investments and remove imprudent ones" and "this duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset."

The Supreme Court found much to support their ruling, quoting from several sources. The Restatement (Third) of Trusts states: "a trustee's duties apply not only in making investments but also in monitoring and reviewing investments..." The Uniform Prudent Investor Act states that there is a "continuing responsibility for oversight of the suitability of the investments already made."

ANALYSIS

The Court's decision in Tibble v. Edison was unusual for its conciseness (only 10 pages) and narrowness of application. The Court ignored applying the "continuing violation" doctrine to find in favor of the petitioners. This had been proposed in the Department of Labor amicus curiae brief filed in the Ninth Circuit.

The continuing violation doctrine overrides any applicable statute of limitations as long as the violation continues throughout the limitations period. The DOL argued that as long as the three retail funds were held in the plan, a new violation occurred every day. Significantly, the Court refused to recognize the continuing violation doctrine. Many legal analysts believe that had the Court recognized the continuing violation doctrine, it would have rendered the ERISA statute of limitations meaningless.

Another important conclusion is that the Court declined to address the scope of the "continuing duty to monitor investments and remove imprudent ones." The Supreme Court intends for the Ninth Circuit to clarify the scope.

Although the decision was narrow, there are several takeaways for plan sponsors:

- There is a clear requirement for ongoing monitoring but it is unclear what that consists of;
- For those plan sponsors that have not engaged in a continuous monitoring of plan investments, they should start immediately;
- For all plan sponsors, this would be a good time to review existing monitoring processes and procedures to assure alignment with reasonable measures of prudence; and
- Statute of limitations is not an iron-clad guarantee of immunity for past actions judged to be imprudent.

Inquiries or comments concerning this article may be addressed to:

Thomas H. Dodd, CFA
Executive Direcctor
Pavilion Advisory Group
tdodd@pavilioncorp.com