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No. 13-550

In The
Supreme Court of the United States

GLENN TIBBLE, ET AL.,

Petitioners,

v.

EDISON INTERNATIONAL, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are legal scholars who write and teach about pension, employee benefits and trust law.[1] One of their primary areas of concern is retirement income security under defined contribution plans. The issues in this case are exceptionally important because they potentially affect the retirement income security of millions of plan participants. Unlike the situation in 1974, when ERISA was enacted, most private sector, non-unionized employers offer their employees only a defined contribution plan. These plans allow workers to make investment decisions among limited options made available by plan fiduciaries. Workers' retirement income security depends fundamentally on the performance of these investments.

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[1] The parties have filed with the Clerk of the Court blanket letters of consent to the filing of amicus briefs in support of any party. In fulfillment of the requirement of Rule 37.6, amici state that no counsel for either party has authored this brief in whole or in part, and that no person or entity, other than amici or their counsel, made a monetary contribution to the preparation or submission of this brief.

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Amici hope that their experience and expertise will assist the Court in its consideration of the important question this case presents.[2]

SUMMARY OF ARGUMENT

The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, requires a plan fiduciary to:

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[2] This brief represents the opinions of the named professors and is not made on behalf of the named institutions.

> discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

ERISA § 404(a)(1)(A), (B), 29 U.S.C. § 1104(a)(1)(A), (B).

ERISA includes a limitations period which states, in relevant part:

> No action may be commenced under this subchapter with respect to a fiduciary's breach . . . after the earlier of—
>
> **(1)** six years after
>
> **(A)** the date of the last action which constituted a part of the breach or violation, or
>
> **(B)** in the case of an omission the latest date on which the fiduciary could have cured the breach or violation. . . .

ERISA § 413, 29 U.S.C. § 1113.

This case concerns the application of those sections of ERISA to the selection and monitoring of the menu of investment choices offered to participants in a defined contribution plan.

The Court of Appeals for the Ninth Circuit held that, although fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants when identical lower-cost institutional-class mutual funds were available, the claim was barred by ERISA Section 413(1), 29 U.S.C. § 1113(1), because fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed. In reaching this decision, the Ninth Circuit appears to have confused two distinct requirements imposed by ERISA's duty of prudent investing: the duty to be prudent in the *selection* of plan investment options, and the duty thereafter prudently *to monitor* the selected investment options, to ensure that those options remain prudent choices. The court measured the limitations period from the date of the *initial* investment selection, rather than from the *last date* the imprudent investments could have been removed from the plan—the latter constituting the last date on which the fiduciary breach could have been corrected through diligent monitoring. Contrary to congressional intent, this interpretation of ERISA's six-year statute of limitations insulates fiduciaries from liability for imprudent behavior—namely, omitting to provide prudent monitoring—with regard to ongoing plan investment options, as long as that imprudent behavior occurs more than six years after the initial investment selection.

Petitioners' claims should not be barred by the statute of limitations. The law of trusts—upon which

ERISA is based—makes clear that fiduciaries have an *ongoing* duty to monitor investments, as frequently as is appropriate for the particular trust. Participants and beneficiaries are not precluded from bringing an action to challenge the prudence of an investment decision—either an act or an omission that breaches this ongoing duty—as long as the action is filed within the earlier of (1) six years after the date of the last action that constituted a breach or (2) in the event of an omission, within six years of the last date the fiduciary could have cured such a breach. That is, in the context of this case, (1) six years after the last decision to keep an imprudent investment in breach of the ongoing duty to monitor or (2) six years after the last date the fiduciary could have removed an imprudent investment.

ARGUMENT

I. The Claims Here

The Edison 401(k) Savings Plan (the "Plan") is a defined-contribution plan. The value of each participant's account at retirement depends on the extent of the participant's and employer's contributions, the investment options selected from the choices that are offered, the asset allocation, and the investment performance, minus costs.

The Edison Plan allows participants to choose from a variety of fund options selected by its Investment Committees. App. 13-14, 72-73, 78. The

Investment Committees meet quarterly to review plan investments, and at those meetings, they consider whether to keep, remove, replace, or add fund options. App. 74-75, 77, 94, 95 (stating that the subcommittees met to review "the funds for the Plan").

The Investment Committees selected retail class mutual fund options for six of approximately forty mutual funds made available to participants, even though identical institutional-class funds charged significantly lower fees. App. 68. As an institutional investor with approximately $3.8 billion in plan assets, the Plan was eligible to offer these lower-cost institutional funds to its plan participants, App. 13, 61 & n.24, 137-41; however, the Investment Committees chose not to do so. App. 68.

Petitioners allege that respondent plan fiduciaries breached their duty of prudence by selecting *and maintaining* higher-fee retail-class mutual funds as plan investment choices when identical lower-fee institutional-class funds were available. JA 76 (¶ 73).

After a bench trial, the district court held that respondents breached their duty of prudence by offering the higher-cost retail mutual funds. App. 68-69, 84-92, 128-42. However, the court limited its holding to three retail mutual funds, finding claims involving three other retail mutual funds, which the Committees initially selected before the beginning of the six-year limitation period, to be time barred. App. 128-42. The Ninth Circuit affirmed the district court's decision. App. 1-64.

Although the limitation period for claims based on the *initial* selection of an investment option begins with that selection, the fiduciaries have an *ongoing duty* to monitor investments and to remove any investment that is or has become imprudent.[3] A cause of action based on a failure to monitor accrues on the date(s) of that failure, not on the date of initial selection of the fund option.

No interpretation of ERISA or trust law justifies the decision of the Ninth Circuit. The effect of the decision is to say that there generally can be no claim for imprudence in retaining a fund option if the fund option was selected more than six years earlier, effectively immunizing fiduciaries from liability for every breach of the duty to monitor that occurs more than six years after an initial selection decision, and eviscerating a core part of the ongoing duty of prudence.

II. Background

As the Court recognized in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), ERISA's "fiduciary duties draw much of their content from the common law of trusts,

[3] Amici use the term "ongoing duty," rather than "continuous duty," for two reasons. First, because the duty requires periodic monitoring, not constant monitoring. Second, we wish to avoid any implication that Petitioners' claim is based on a continuing violation of the duty of prudent investing.

the law that governed most benefit plans before ERISA's enactment." *Id*. at 496 (citations omitted).

The Court continued: "We also recognize, however, that trust law does not tell the entire story. After all, ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." *Id*. at 497 (citations omitted).

ERISA built upon and strengthened trust law provisions. Thus, for example, ERISA extended its trust-law-based fiduciary duties to all plan fiduciaries, including those who are not trustees.

When the Restatement (Third) of Trusts was being written in 1990, the reporters made changes to the Restatement to reflect the advances that ERISA had made. Restatement (Third) of Trusts at § 227 Reporter's Notes at 66-67 (1992). Under both ERISA and the Restatement, a fiduciary with investment discretion has a fiduciary duty to review plan investments to determine whether to sell off investments or to discontinue imprudent investment options.

Thus, it is appropriate to rely not only on the first and second editions of the Restatement, but also the third edition.

III. Fiduciaries Have Ongoing Duties That Are Part of the Duty of Prudence.

Trust law establishes that the *Tibble* fiduciaries have ongoing fiduciary duties, a breach of which violates the prudence rule. The principle that fiduciaries retain an ongoing duty to monitor investments for the entire period they act as fiduciaries has been a fixture of trust law through all three Restatements of Trust and is included in the Uniform Prudent Investor Act.

A. The Prudent Investor Rule Includes Managing and Monitoring Investments.

In *Tibble*, the Petitioners allege a failure to properly manage and monitor investment options.

The Restatement clarifies that "[t]he trustee has a duty to the beneficiaries to invest *and manage* the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust." Restatement (Third) of Trusts § 90 (2007) [hereinafter Third Restatement] (emphasis added). This "prudent investor rule" has deep roots, transcends ERISA, and has been adopted in "nearly all jurisdictions." *Id.* cmt. a.

The Restatement (Second) of Trusts, which was current when ERISA was enacted, provides:

> Except as otherwise provided by the terms of the trust, if the trustee holds property which when acquired by him was a proper investment,

> but which thereafter becomes an investment which would not be a proper investment for the trustee to make, it becomes the duty of the trustee to the beneficiary to dispose of the property within a reasonable time.

Restatement (Second) of Trusts § 231 (1959) [hereinafter Second Restatement].

Similarly, under the Uniform Prudent Investor Act, promulgated in 1994 and now in force in almost all states, the duty of prudent investing applies both to "investing and managing trust assets. . . ." Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Prudent Investor Act § 2(c) (1994). The official comment explains that "'[m]anaging' embraces monitoring, that is, the trustee's continuing responsibility for oversight of the suitability of investments already made as well as the trustee's decisions respecting new investments." *Id.* § 2 cmt.

B. ERISA Incorporated the Trust Origins of the Prudent Investor Rule.

In 1979, the Department of Labor promulgated regulations that expanded on the ERISA duty of prudence with respect to investment decisions. Final Regulation, Investment of Plan Assets Under the "Prudence" Rule, 44 Fed. Reg. 37,221 (June 26, 1979) (codified at 29 C.F.R. 2550.404a-1). The proposed regulations mentioned only the duty of prudence with respect to "*making* an investment decision." Preamble to Proposed Regulation, 43 Fed. Reg. 17,481 (Apr. 25,

1978). The Department of Labor received comments questioning "*whether, under the regulation as originally proposed, a fiduciary might be deemed to be immunized once he had given such consideration notwithstanding the nature of his subsequent acts*." Preamble to Final Regulation, Investment of Plan Assets Under the "Prudence" Rule, 44 Fed. Reg. 37,221, 37,223 (June 26, 1979) (codified at 29 C.F.R. 2550.404a-1) (emphasis added).

In response, the Department of Labor revised the regulation to clarify that a fiduciary's duties do not end when the investment is made. 44 Fed. Reg. at 37,223 (stating "that the fiduciary's acts do not satisfy the 'prudence' rule solely because the fiduciary had given consideration to relevant facts and circumstances.").[4]

Thus, the Department of Labor has recognized that a fiduciary's duties are not static: trustees must monitor investment options to determine when they should add new options or discontinue current options.

[4] The Department revised the proposed regulation to omit the reference to "making an investment decision" and broadened the language to clarify that the fiduciary duty continues during the entire "investment or investment course of action." 29 C.F.R. 2550.404a-1(b)(1) (Final Regulation); 44 Fed. Reg. at 37,223 (explaining revision to (b)(1)). The Department also clarified that the investment course of action includes "any series or program of investments or actions related to a fiduciary's performance of his investment duties." *Id*. at (c)(2). This would include the duty to monitor the investment option to ensure that it remains prudent.

29 C.F.R. 2550.404a-1(b)(2). In the absence of adequate monitoring and periodic reevaluation, a fiduciary cannot assess whether the investment remains prudent.[5]

C. Fiduciary Duties to Monitor, Review, and Manage Investments Are Necessarily Ongoing and Do Not Expire.

In carrying out the prudent investor rule, a fiduciary cannot simply make an investment decision and then ignore it. The fiduciary has an obligation to periodically revisit prior decisions, to determine whether they continue to serve the best interest of participants and beneficiaries.

A fiduciary's ongoing duties to monitor, review, and manage investments are separate from, and in addition to, the duty to make prudent investments in the first instance. These duties arise from the constantly changing market and investment conditions that affect the trust corpus and its value, and whether

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[5] *See, e.g.*, George Gleason Bogert, George Taylor Bogert & Amy Morris Hess, *The Law of Trusts and Trustees* § 744 (3d ed. 2000) ("As in the case of all powers and duties, a trustee who has a power of sale has an underlying obligation to use the care and skill of a reasonably prudent person who is managing property under similar conditions. In order to decide whether to use a discretionary power of sale, and when and how to exercise it, a trustee must become familiar with the property in question, the market and customs of the community with regard to such property, the objects of the trust, and the effect on the beneficiaries of use or lack of use of the power and of the exercise of the power in various ways.").

once-prudent decisions remain so. As summarized in the Third Restatement:

> Changes in a company's circumstances, adaptation to trust- and capital-market developments, fine-tuning, and the like may, of course, justify the selling and buying of properties as an aspect of a prudent plan of asset allocation and diversification (see Comment *g*, below). This is consistent with the trustee's *ongoing duty to monitor investments and to make portfolio adjustments if and as appropriate*, with attention to all relevant considerations, including tax consequences and other costs associated with such transactions.

Third Restatement § 90 cmt. e(1) (emphasis added). Further,

> [a]sset allocation decisions are a fundamental aspect of an investment strategy, and are a starting point in formulating a plan of diversification (as well as an expression of judgments concerning suitable risk-return objectives). . . . These decisions are subject to *adjustment* from time to time as changes occur in the portfolio, in economic conditions or expectations, or in the needs or investment objectives of the trust.

Id. cmt. g (emphasis added).

The Restatement also provides that "[t]he trustee's duties apply not only in making investments *but also in monitoring and reviewing investments*, which

is to be done in a manner that is reasonable and appropriate to the particular investments, courses of action, and strategies involved." *Id*. cmt. b (emphasis added).

Bogert discusses this duty at length:

> If a trustee makes a lawful and prudent investment for his trust, or receives such an investment from the settlor or a predecessor trustee, he cannot assume that it will continue indefinitely to be a lawful and prudent investment. He cannot place it in his safety deposit box and ignore its status henceforth. *He has a duty to examine all his trust investments at reasonable intervals* in order to learn the condition of the obligor on bonds and mortgages, the condition of the property in which he holds a security interest, and the status of the corporations whose stock he holds.

George Gleason Bogert, *Handbook of the Law of Trusts* § 107 at 439-40 (3d ed. 1952) [hereinafter Bogert, *Trusts*] (emphasis added); *see also* Third Restatement § 92 ("The trustee has a duty, within a reasonable time after the creation of the trust, to review the contents of the trust estate and to make and implement decisions concerning the retention and disposition of original investments in order to conform to the requirements of §§ 90 and 91."); *id*. § 76 Reporter's Note to cmt. d (2007) ("a cursory review of the portfolio that skims over the predecessor's acts

and omissions will not suffice to insulate the successor fiduciary from liability").

After performing such a review, the trustee must then *decide* whether the investment continues to be prudent.[6] If the investment is imprudent, it must be sold:

> When an investment is at the beginning of the trust, or becomes later, an investment not permitted under the terms of the trust and the law of the state in question, the trustee has a duty to sell it as soon as he reasonably can and reinvest the proceeds.

Bogert, *Trusts* § 108 at 440. Moreover, "[t]his *same duty to convert or sell investments arises* when the trustee discovers that an investment originally legal, *whether made by him or by a predecessor in title*, has now become illegal or imprudent." *Id.* at 441 (emphasis added).[7]

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[6] The decision is made on the basis of all relevant facts and circumstances that exist on the date of the decision. The decision that an investment is imprudent does not depend on a finding that there have been changes, material or otherwise, since the investment was originally acquired.

[7] *See also* the Comment to Section 4 of the Uniform Prudent Investor Act: "Section 4, requiring the trustee to dispose of unsuitable assets within a reasonable time, is old law, codified in Restatement of Trusts 3d: Prudent Investor Rule § 229 (1992), lightly revising Restatement of Trusts 2d § 230 (1959). The duty extends as well to investments that were proper when purchased but subsequently become improper. Restatement of Trusts 2d § 231 (1959). The same standards apply to successor trustees, see

(Continued on following page)

Bogert states that the "so-called 'prudent investor statutes', which have been adopted in many states in recent years, apply that rule to the *retention* and sale of securities, as well as to their purchase." *Id.* at 442 (emphasis added).

Thus, *each* decision—to "make, retain, or sell an investment"—is subject to the prudent investor rule. Third Restatement § 90 cmt. b. To *retain* an investment is an act of trust management as much as a decision to make the investment.

IV. Both Acts and Omissions Are Actionable Breaches.

Both acts and omissions are actionable under ERISA and trust law. A decision to retain an asset (an act) is essentially the equivalent of an omission (failing to dispose of an asset that should be sold). Therefore, however these decisions are framed, they are potentially actionable as breaches of the fiduciary's duty of prudent management.

Although the statute of limitations for omissions in ERISA is expressed differently than for actions, *compare* ERISA § 413(1)(A) *with* (B), 29 U.S.C. § 1113(1), neither can bar a claim for any breaches of the *ongoing* trust duties, described here, that

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Restatement of Trusts 2d § 196 (1959)." Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Prudent Investor Act § 4 cmt. (1994).

occurred within the limitations period. Nothing in trust law or ERISA allows the immunization of ongoing breaches, regardless of when—or at whose hands (a current or predecessor trustee)—a particular investment was selected.

The Ninth Circuit rejected the Petitioners' arguments because it mistakenly concluded that to accept those arguments would leave the Respondents liable indefinitely for their *original* decision to include the funds in the Plan's investment menu. That is incorrect. The Petitioners' position is not that the fiduciaries remain on the hook indefinitely for the initial imprudent decision. Rather, the liability is for the imprudence (breach of duty) that occurred each time the Committees met, discussed the Plan's investment options, and failed to remove the imprudent options. The Plan's Investment Committees met quarterly, and thus had numerous opportunities to remove the improper fund options. Had they done so, the period of limitations for their previous inaction would immediately have commenced to run.

V. Application of the Statute of Limitations as in *Tibble* Eviscerates the Substantive Duties That Bind Fiduciaries.

Because a fiduciary has an *ongoing* duty to be prudent, including in the management and monitoring of investments, the ERISA fiduciary duty to be prudent is not limited to the first six years an investment option is offered under the plan.

To hold otherwise would mean that plan participants who join a plan more than six years after an investment option is placed into a plan's investment menu would *never* be able to bring a breach of fiduciary duty claim regarding that investment option. Similarly, a fiduciary who is appointed to an investment committee more than six years after an investment option is placed into a plan would have no duty to monitor—or remove—such an investment option, no matter how imprudent.

CONCLUSION

Fiduciaries have the ongoing duty to monitor investment options throughout the lifetime of the investment, not just for the first six years. The statute of limitations in ERISA cannot be read to exonerate fiduciaries from liability for breaches of that duty. Such a conclusion would contravene the fundamental purpose of ERISA—to provide retirement security to workers.

For the above stated reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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