UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Glenn Tibble v. Edison International

843 F.3d 1187 (9th Cir. 2016) · No. Nos. 10-56406, 10-56415 · Decided December 16, 2016

SUMMARY

On remand from the Supreme Court and rehearing en banc, the Ninth Circuit vacated the district court's judgment concerning certain mutual funds in an ERISA-governed 401(k) plan. The court held that plan fiduciaries have a continuing duty to monitor investments and that claims under 29 U.S.C. § 1113(1) may be timely based on a failure to conduct required reviews or remove imprudent investments, even absent a significant change in circumstances. The court remanded for trial regarding whether Edison should have replaced retail-class mutual fund shares with materially identical, lower-cost institutional-class shares and directed reconsideration of fees and costs.

CASE DETAILS

COURT	United States Court of Appeals for the Ninth Circuit
WRITING FOR THE COURT	Milan D. Smith, Jr.; Sidney R. Thomas, Chief Judge; Stephen Reinhardt; Barry G. Silverman; M. Margaret McKeown; Richard A. Paez; Richard R. Clifton; Carlos T. Bea; Jacqueline H. Nguyen; Paul J. Watford; Michelle T. Friedland
JURISDICTION	Federal
DECIDED	December 16, 2016
DOCKET	Nos. 10-56406, 10-56415
DISPOSITION	vacated
PROCEDURAL POSTURE	En banc appeal from the Central District of California on remand from the Supreme Court concerning ERISA fiduciary-duty claims and the timeliness of claims involving mutual funds selected before the six-year limitations period.
STANDARD OF REVIEW	Summary judgment determinations are reviewed de novo.
PRECEDENTIAL VALUE	Published, en banc Ninth Circuit opinion; precedential
PARTIES	Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Suhadolc, Hugh Tinman, Jr., as representatives of a class of similarly situated persons and on behalf of the Plan v. Edison International, The Edison International Benefits Committee, Edison International Trust Investment Committee, Secretary of the Edison

	International Benefits Committee, Southern California Edison's Vice President of Human Resources, Manager of Southern California Edison's HR Service Center

TOPICS

erisa · employee benefits · trust administration · prudent investor rule · appellate procedure

PRACTICE AREAS

ERISA · employee benefits · trust administration · appellate procedure

QUESTIONS PRESENTED

1. Whether the beneficiaries forfeited their continuing-duty-to-monitor theory in the district court or on appeal.
2. Whether Phillips v. Alaska Hotel & Restaurant Employees Pension Fund barred the beneficiaries' continuing-duty claims under 29 U.S.C. § 1113(1).
3. Whether ERISA fiduciaries have a continuing duty to monitor plan investments and remove or replace imprudent investments without a significant change in circumstances.
4. What scope of fiduciary duty applies to Edison's monitoring of retail-class and institutional-class mutual-fund shares.
5. Whether the district court's rulings concerning funds added before 2001 and its attorneys' fee determination should be vacated and reconsidered.

HOLDINGS

1. The beneficiaries did not forfeit their failure-to-monitor argument in either the district court or on appeal, and Edison forfeited any forfeiture argument by failing to raise it in the initial appeal.
2. Phillips does not bar the continuing-duty claims governed by 29 U.S.C. § 1113(1). Under § 1113(1), only a breach or violation, such as a fiduciary's failure to conduct a required regular review of plan investments, must occur within the six-year limitations period; the initial investment decision need not occur within that period.
3. An ERISA fiduciary has a continuing duty to monitor plan investments and remove imprudent ones, separate from the duty to exercise prudence when initially selecting investments; the duty is not limited to situations involving a significant change in circumstances.
4. In fulfilling the continuing duty to monitor investments, an ERISA fiduciary cannot ignore the plan's ability to obtain favorable investment products, particularly when substantially identical products are available at lower cost.

KEY QUOTATIONS

> *"Under trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones . . . separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset."* (843

> F.3d at 1200)

> *"Pursuant to the aforementioned trust law principles, a trustee cannot ignore the power the trust wields to obtain favorable investment products, particularly when those products are substantially identical—other than their lower cost—to products the trustee has already selected."* (843 F.3d at 1201)

> *"Thus, we hold that Phillips is inapplicable to the continuing duty claims at issue here, namely to 29 U.S.C. § 1113(1)."* (843 F.3d at 1199)

FACTUAL BACKGROUND

Edison sponsored a defined-contribution 401(k) Savings Plan governed by ERISA. The beneficiaries challenged Edison's offering of higher-priced retail-class mutual funds when materially identical lower-priced institutional-class funds were available. At least three challenged funds were added more than six years before the complaint, and the beneficiaries contended that Edison had a continuing duty to monitor the investments and switch to lower-cost institutional shares during the limitations period.

PROCEDURAL HISTORY

Plan beneficiaries sued Edison and related fiduciaries under ERISA for offering higher-priced retail-class mutual funds when materially identical lower-priced institutional-class funds were available. The district court entered summary judgment barring claims based on funds selected outside the six-year limitations period absent significant changed circumstances, and after trial ruled for beneficiaries on some funds and for Edison on the pre-2001 funds. The Ninth Circuit initially affirmed in part, the Supreme Court vacated and remanded, and a Ninth Circuit panel subsequently concluded that the continuing-duty theory was forfeited. The en banc court vacated the panel decision and held that the beneficiaries had preserved the theory, then vacated the district court's rulings concerning the pre-2001 funds and remanded for trial on an open record.

DISPOSITION

vacated

REMAND INSTRUCTIONS

Vacate the district court's decisions concerning funds added to the Plan before 2001 and conduct a trial on an open record concerning whether Edison should have switched from retail-class fund shares to institutional-class fund shares during the limitations period, regardless of whether a significant change in circumstances occurred. The district court must also reevaluate its attorneys' fee and cost determination in light of the Supreme Court's and the en banc court's decisions.

CASES CITED

- Tibble v. Edison International, 135 S. Ct. 1823 (2015)
- Phillips v. Alaska Hotel & Restaurant Employees Pension Fund, 944 F.2d 509 (9th Cir. 1991)
- Tibble v. Edison International, 729 F.3d 1110 (9th Cir. 2013)
- Tibble v. Edison International, 820 F.3d 1041 (9th Cir. 2016)

- Tibble v. Edison International, 831 F.3d 1262 (9th Cir. 2016)
- Visendi v. Bank of America, N.A., 733 F.3d 863, 869 (9th Cir. 2013)
- In re Mercury Interactive Corp. Securities Litigation, 618 F.3d 988, 992 (9th Cir. 2010)
- Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983)
- Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996)
- Donahue v. Donahue, 182 Cal. App. 4th 259, 273 (2010)
- Lam v. University of Hawaii, 40 F.3d 1551, 1554-55, 1566-67 (9th Cir. 1994)
- Buccino v. Continental Assurance Co., 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983)
- Szajer v. City of Los Angeles, 632 F.3d 607, 610 (9th Cir. 2011)