Published on *The National Law Review* https://natlawreview.com

Once Again, the Supreme Court Upsets Precedent in Fourth and Eleventh Circuit

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The Eleventh and Fourth Circuit Court of Appeals definitively rejected the "continuing breach" theory in recent disputes involving statute of limitations deadlines in ERISA cases alleging fiduciary breach claims. This precedent was short-lived.

As way of background, plan fiduciaries have been under fire in recent years for their role in the selection and retention of underperforming or fee-heavy funds offered as investment options in 401(k) plans. Under ERISA, a lawsuit premised upon a breach of fiduciary duty must be filed by the earlier of: (1) three years after the participant had actual knowledge of the breach; or (2) six years after the breach occurred. As to the latter, the trigger date is: "(A) the date of the last action which constituted a part of the 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.

The focus of these recent cases has been on the second prong: When participants of a defined contribution plan allege that plan fiduciaries breached their duties by failing to remove poor performing funds from 401(k) investment options, is the date of the breach when the funds were initially selected? Or is there a continuing breach for each day that the funds remained in the investment lineup, assuming no substantial change of circumstance has occurred?

In 2013, the Court in ***David v. Alphin*****, 704 F. 3d 327, 341 (4th Cir. 2013**), addressed this issue when plaintiffs alleged, *inter alia,* that plan fiduciaries failed to remove underperforming and fee-heavy funds from their 401(k) investment options. The Fourth Circuit Court of Appeals affirmed the District Court's dismissal of the claim as untimely. Finding that the complaint's allegations were "based on attributes of the funds that existed at the time of their initial selection," the Court held that, "at its core," plaintiff's complaint was "simply another challenge to the initial selection of the funds to begin with." *Id.* at 341. A year later, in ***Fuller v. SunTrust Banks, Inc.,*** **744 F. 3d 685 (11th Cir. 2014),** the Court held, under a similar fact scenario, that the accrual date for purposes of ERISA § 413 of an alleged breach was the date of the initial selection, unless there existed circumstances or distinct conduct separate from the initial fund selection. The Eleventh Circuit Court of Appeals affirmed the District Court's dismissal of plaintiffs' claims as untimely.

In ***Tibble v. Edison Int'l****.,* 2015 WL 2340845 (May 18, 2015), the United States Supreme Court came to the opposite conclusion. The Court emphasized that, under trust law, "a trustee has a continuing duty to monitor trust investments and remove imprudent ones. This continuing duty exists separate and apart from the trustees' duty to exercise prudence in selecting investments at the outset." The Court held that "as long as the alleged breach of the continuing duty [to monitor] occurred within six years of suit, the claim is timely." In doing so, the Supreme Court reversed the Ninth Circuit's decision, upon which the Court in *Fuller* had heavily relied.

The Supreme Court did agree with the Fourth and the Eleventh Circuit on one thing: It explicitly declined to define what a fiduciary's continuing duty to monitor was supposed to look like: "We express no view on the scope of [defendants'] fiduciary duty." *Id.* at. *5 (In both *Fuller* and *David*, the Courts were careful to decline to decide "whether a fiduciary had an ongoing duty to remove imprudent investment options from a Plan in the absence of a material change in circumstances." *Fuller*, 744 F. 3d at 702; *see also*, *David,* 704 F. 3d at 341.) Instead, the *Tibble* Court remanded to the court below to consider whether the defendants did in fact "conduct the sort of review that a prudent fiduciary would have conducted absent a significant change in circumstances." *Id.* at *5.

National Law Review, Volume V, Number 161