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 OF THE ESOP ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS


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## BRIEF OF THE ESOP ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

## INTEREST OF THE *AMICUS CURIAE**

The ESOP Association is a national 501(c)(6) trade association dedicated to supporting the creation and maintenance of employee stock ownership plans ("ESOPs"). ESOPs provide employees with an ownership stake in their employer on tax-preferred terms. According to the most recent Department of Labor analysis of the annual disclosures filed by sponsors of tax-qualified deferred compensation plans—known as Form 5500—more than 10.5 million U.S. employees work in a corporation that provides shared ownership through the ESOP model. As with all qualified employee retirement savings plans, ESOPs and their fiduciaries are governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*.

Since its creation in 1978, the Association has served the interests of companies with ESOPs, professionals with a commitment to ESOPs, and companies considering the implementation of an ESOP. The Association's primary members are 1600 corporations that sponsor ESOPs, 98% of which are privately held and 80% of which are "small" businesses with fewer than 500 employees. A major mission of the Association is to educate its members and their

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* Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

employee-owners—not just about the best practices for managing an enterprise with shared ownership but also about their duties and obligations under the laws and regulations that govern ESOPs. In 2014, over 11,000 people attended the Association's educational programs.

The Association participates as *amicus curiae* in cases where there is a potential for far reaching effects on ESOP administration, creation, or design. The Association's participation is warranted in this case because petitioners have proposed a standard of fiduciary conduct liable to affect all ERISA-governed plans, including ESOPs.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about everything or nothing at all.

In terms of the question presented, there is no dispute—even if ERISA's six-year statute of repose bars a challenge to a fiduciary decision, it does not bar a claim that a fiduciary breached a duty to monitor that decision during the preceding six years.

But on a tangentially related question—the scope of the duty to monitor—the parties appear to take widely differing positions. Petitioners assert, essentially, that an investment either is prudent or not, and that the failure to detect imprudence is a breach of the duty to monitor. By implication, petitioners' position means that a fiduciary must undertake the same due-diligence analysis to monitor a decision as it does to make the decision in the first instance. Respondents disagree, contending that the duty to monitor is a distinct duty that was not, as a factual matter, breached in this case.

The ESOP Association takes no position on the parties' factual dispute, nor on whether the seeming irrelevance of the question presented warrants dismissal of the writ. Rather, this brief is submitted to underscore the serious deleterious consequences that would result from petitioners' position as to the scope of the duty to monitor.

Nothing in the text of ERISA identifies or delimits the duty to monitor. Rather, that duty is an application of the general duty of prudence. The duty of prudence, in turn, requires fiduciaries to act in a manner consistent with industry norms. So the scope of the duty to monitor is informed by what is done, as a factual matter, by ERISA fiduciaries. As a matter of practice, fiduciaries do not spend their days constantly reevaluating all of their past decisions. There are circumstances where reevaluation is warranted—such as when there has been a material change of circumstances—but, as common sense confirms, monitoring a decision looks very different from making the decision in the first place.

Adopting petitioners' rule would be costly, inefficient, and ultimately counterproductive. Requiring fiduciaries to engage in a tail-chasing exercise of continual reevaluation would increase monitoring costs exponentially. Fiduciaries fearing personal liability would lose the ability to focus on the matters of greatest importance to plan participants. Plan participants would ultimately pay the price, through added costs, decreased benefits, and less ambitious plan offerings.

Accordingly, if this Court reaches the parties' dispute regarding the scope of the duty to monitor, it should adopt respondents' position.

## ARGUMENT

### A. ERISA's Duty Of Prudence Does Not Require Fiduciaries To Use The Same Process For Making And Monitoring Decisions.

When a fiduciary makes a decision on behalf of an ERISA-governed plan, she is duty-bound to investigate options as warranted under the circumstances. Depending on the nature of the decision, the investigation may be extensive and time-consuming.

Once the decision is made, a reasonable fiduciary will trust her conclusions. Instead of starting the same process over again, she therefore turns her focus to other matters that serve the interests of plan participants.

These observations seem obvious, but they go to the heart of the parties' dispute. ERISA's fundamental requirement is for fiduciaries to act reasonably given the circumstances. No part of ERISA imposes on fiduciaries an absolute duty to second-guess by repeating due diligence and endlessly reconsidering decisions.

#### *1. ERISA's Duty Of Prudence Incorporates Industry Standards.*

In some circumstances, ERISA is aptly described as "enormously complex and detailed." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 262 (1993). But when it comes to fiduciary duties, ERISA speaks in general terms. The basic duties of an ERISA fiduciary (*i.e.*, anybody who exercises discretion over plan investments or plan administration, see ERISA § 3(16), 29 U.S.C. § 1002(16)) are to be loyal and prudent, to diversify assets (except in an ESOP, which is undiversified by design), and to comply with plan documents (*id.* § 404(a), 29 U.S.C. § 1104(a)).

For the duty of prudence, which is at issue here, Congress did not provide an exhaustive list of requirements. Instead, Congress specified a general standard: A fiduciary must act as would "a prudent man acting in a like capacity and familiar with such matters." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). That relative standard is "profoundly protective of trustees who have followed common investment-industry standards." John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 657 (1995). After all, "[i]t would be both unreasonable and inexpedient to make a trustee responsible for not being more prudent than ordinary men of business are." George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 541, at 169 (rev. 2d ed. 1993) (quoting *Speight* v. *Gaunt*, [1883] 9 App. Cas. 1 (H.L.) 20 (Lord Blackburn) (appeal taken from Eng.)).

The duty of prudence is therefore best understood as a relative standard that incorporates industry practices. See *id.* at 167 ("[A] court does not examine the conduct of the trustee and determine in each case whether he acted reasonably, but rather compares his action with the external standard of the ordinarily prudent and skillful [person].") And, crucially, the duty is satisfied by the *procedure* a fiduciary employs, rather than the *result* she achieves. See U.S. Dep't of Labor, Meeting Your Fiduciary Responsibilities, http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html ("Prudence focuses on the *process* for making fiduciary decisions."); Restatement (Third) of Trusts § 77 cmt. a (2007) ("The test of prudence is one of conduct not of performance.").

In the context of an investment selection, that means that a fiduciary should ask the questions that fiduciaries usually ask and make a decision based on the answers. According to the Secretary of Labor's regulations, a fiduciary satisfies the duty of prudence if she:

> (i) Has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and
>
> (ii) Has acted accordingly.

29 C.F.R. § 2550.404a–1(b). That standard applies outside the context of investment decisions, as well: A fiduciary generally must identify and pursue a process that is appropriately tailored to the circumstances.

In the case of a consequential decision with implications for plan assets, following the appropriate decisional process can be a time-consuming ordeal. To cite a common example, suppose that a large company wanted to hire a new recordkeeper to administer its defined-contribution retirement plan. Such a project might consist of the following steps:

- *First*, hire a consultant (unless an existing employee has the necessary expertise).

- *Second*, establish a working group to survey industry trends.
- *Third*, identify the plan's recordkeeping requirements, and formulate a request for proposal tailored to those requirements.
- *Fourth*, identify candidates and solicit bids.
- *Fifth*, evaluate the bids by balancing competing considerations.
- *Sixth*, negotiate with bidders.
- *Seventh*, execute a contract.

See generally U.S. Dep't of Labor, Meeting Your Fiduciary Responsibilities, *supra*.

When all those steps are complete, the plan can transition to the new recordkeeper and develop and send required disclosures to plan participants. That process might well take a year or longer and require substantial investments of time and resources.

On a more individualized scale, suppose a single participant sought a determination as to eligibility for certain monthly plan benefits. A fiduciary, in those circumstances, would need to evaluate the facts, assess the plan's requirements, determine whether similar issues had been resolved in the past, and make a determination.

These decisions are expected to have lasting effects. Absent a change in circumstances, the fiduciary determining monthly benefits would not reinvent the wheel every month to determine who was entitled to benefits. And the fiduciary assessing recordkeepers would not undertake an exhaustive search process each month, because a recordkeeper is expected to serve out a contractual term.

### 2. *Industry Standards Also Govern The Duty To Monitor.*

Given the costs of a complete analysis, once a fiduciary completes the process to make a decision, she will rely on that decision unless and until there is a basis for further review.

To be sure, it is frequently *possible* for ERISA fiduciaries to undo past decisions. If a fiduciary issues a plan disclosure, she can undo that decision by issuing a new disclosure. Likewise, a denial of benefits could be reconsidered and reversed, or a vendor hired to perform a certain function could be fired and replaced.

But the fact that fiduciaries *could* revisit past decisions does not mean that other similarly situated individuals *would* undertake the sort of comprehensive review that led them to their original decision. After all, the list of past decisions that could theoretically be subject to ongoing review is ever-growing. If a fiduciary is not focused on the matters that merit reevaluation—generally speaking, matters as to which there is new information—forward progress is impossible.

There is no special provision in ERISA that requires fiduciaries to reevaluate past decisions. Instead, the same general standard applies—whether "a prudent man acting in a like capacity and familiar with such matters" would reevaluate the decision. Thus, as with other aspects of ERISA, the nature of ongoing review will be dictated by circumstances, as the Secretary of Labor recognized in a regulatory question-and-answer:

> Q: What are the ongoing responsibilities of a fiduciary who has appointed trustees or

> other fiduciaries with respect to these appointments?
>
> A: At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan. *No single procedure will be appropriate in all cases; the procedure adopted may vary in accordance with the nature of the plan and other facts and circumstances relevant to the choice of the procedure.*

29 C.F.R. § 2509.75–8, at FR–17 (emphasis added); see also Restatement (Third) of Trusts § 77 cmt. b ("The duty of *care* * * * involve[s] investigation appropriate to the particular action under consideration."); *id.* cmt. b(1) ("What constitutes due diligence, satisfying the duty of prudence, is inevitably affected by the nature of the transaction or activity and the market(s) involved."). Common sense dictates that the review process after a decision is made will look very different from a process in which the decisionmaker begins with a blank slate.

By way of illustration, the initial decision to purchase a new car looks very different from the monitoring of an existing car purchase. A potential car buyer must identify her budget and the features that she requires and prefers. From those criteria, she can narrow the universe of potential cars to a smaller list of candidates worthy of a test drive. The test drive will inform her preference for final selection and she will begin to negotiate with a car dealership.

If she and the dealership can arrive upon a deal with satisfactory terms, she buys the car.

After the purchase is complete, the new car owner is expected to monitor her car. (Is it performing as expected? Has it been recalled? Does it need routine maintenance? Are there new technological advances that would warrant a trade-in?) Although a car owner theoretically gets to decide, on any given day, whether to drive her existing car or to purchase another one, no reasonable person looks at it that way. Making a change is costly—there are transaction costs and opportunity costs. Even though past decisions can be reopened, a car buyer reasonably anticipates that her car will have a certain useful life and that she can delay another exhaustive car search until 5, 7, or 10 years have elapsed.

ERISA fiduciaries operate in a similar fashion. An initial fiduciary decision will be accompanied by the activities described above—research, analysis, interviews, deliberations, and discussions. The fiduciary's decision is expected to have a certain useful life. In the interim, there will be monitoring. (Is performance as expected? Have market conditions changed? Have key employees left the vendor? Are there new innovations that warrant new attention?) Further investigation might be prompted by a change in circumstances. But in the ordinary course, it would be unreasonable and atypical for a plan fiduciary to conduct a complete analysis or to reassess her findings from a previous analysis.

Petitioners' brief suggests a fundamentally different approach to fiduciary obligations. They claim that this case involves a duty "to monitor and remove imprudent investments." Pet. Br. 29; accord *id.* at 25–26 (fiduciary must "monitor investments * * * to determine whether existing investments are prudent"); *id.* at 27 (fiduciary breaches duty through "retention of an imprudent investment").

There is a duty to monitor, to be sure. But that duty is defined by (1) procedures (rather than outcomes); and (2) industry conventions (rather than absolute rules). ERISA thus does not focus on whether an *investment* is "prudent" or not. That question, after all, will depend on a host of considerations that are not specifically about the investment at all. (What other investment options are offered in the plan? What role does the investment serve in a hypothetical portfolio? Are the benefits and costs of the investment explained to plan participants? Would it be unnecessarily confusing to change the investment option? How much would it cost to transition? Cf. *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459, 2472 (2014) (prudence of fiduciary conduct depends on nature of alternative actions)).

Thus, to satisfy the duty to monitor, a fiduciary must determine what issues to evaluate and what approach is dictated by the analysis. It may well be true that, given infinite time and resources, certain refinements could be made. But that is irrelevant for purposes of ERISA's duty of prudence, which is designed to hold fiduciaries accountable for following industry norms. "The fiduciary duty of care * * * requires prudence, not prescience" (*DeBruyne* v. *Equitable Life Assurance Soc'y*, 920 F.2d 457, 465 (7th Cir. 1990) (internal quotation marks omitted)), so the relevant question is whether a similarly situated fiduciary following industry conventions would have undertaken the reevaluation in question. See also *In re Westfield Trust Co.*, 176 A. 101, 103 (N.J. 1935) ("However loudly it may now be said that people should have foreseen, most men of that degree of prudence and caution that we call ordinary did not foresee. Wisdom after the event is not the test of responsibility.”).

There is, thus, no abstract answer to whether a certain attribute of an investment—in this case, the expense ratio for the share class—should be reassessed at some particular frequency. Nothing in historical treatises answers that question, either. And that is because ERISA requires fiduciaries to consider how other reasonable persons in their position perform the same functions and to discharge their duties accordingly.

**B. Expanding The Duty To Monitor Would Exact Unnecessary Costs On Fiduciaries And Plan Participants.**

The rule envisioned by petitioners is worrisome. ERISA fiduciaries know how to follow industry customs. They speak with colleagues, attend conferences, read industry publications, and follow the analytical procedures dictated by the collective judgment of fellow professionals.

Petitioners’ rule would effectively hold fiduciaries to a standard of prescience without any benefit of repose. Their approach suggests fiduciaries are expected continuously to scour their plans for “imprudence” at the risk of personal liability.

ERISA’s statute of repose suggests a different approach. In most statutes, Congress includes a statute of limitations, which can be tolled pursuant to principles of equity. See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991). But ERISA contains both a 3-year statute of limitations and a 6-year period of repose. See ERISA

§ 413, 29 U.S.C. § 1113. Absent fraud or concealment, the 6-year window on filing suit is absolute. *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2182–83 (2014); cf. *Lampf, Pleva, Lipkind, Prupis & Petigrow*, 501 U.S. at 363. So given that claims to challenge an initial decision are extinguished after 6 years, there can be a claim outside that window only if a separate fiduciary duty was breached at a later date.

Petitioners suggest that the later-arising duty is a duty to detect "imprudence" within a plan, but discharging such a duty would be effectively impossible. Common sense dictates that, after a fiduciary completes due diligence and makes a decision, she should trust her judgment. If, instead, she has a duty to reconsider the decision she just made, it would increase her workload by orders of magnitude.

It is difficult enough for most companies to satisfy ERISA's labyrinthine regulations. See, *e.g.*, Scott Wooldridge, *DOL Cracks Down On Employer 401(k) Issues*, BENEFITSPRO, Mar. 31, 2014 ("Retirement plans, including 401(k) plans, are probably more regulated than anything in American economic life short of nuclear power plants.") (internal quotation marks omitted). To add mandatory reviews of fiduciary decisions—above and beyond the processes dictated by industry custom—would add to the workload of plan fiduciaries. The costs of plan fiduciaries are ultimately borne by plan participants (through increased expenses, reduced benefits, or, in the case of an ESOP, reduced corporate value). Moreover, adding inefficient review processes would increase expenses for third parties who do business with ERISA-governed plans. Those third parties would also be expected to pass along their burden to plan participants (unless they dropped out of the market for ERISA services entirely).

These costs are difficult to quantify. But ERISA was designed to avoid becoming "so complex that administrative costs, or litigation expenses, unduly discourage employers from offering * * * benefit plans in the first place." *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996); see also *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010) (recognizing ERISA's "careful balanc[e]" between "'ensuring fair and prompt enforcement of rights'" of plan participants and "'the encouragement of the creation of such plans'") (quoting *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 215 (2004)). A rule that replaces industry norms with fiduciary-duty landmines dishonors that objective.

* * *

To resolve the question presented in this case, the Court need not resolve any disagreement. The parties agree that there is a duty to monitor and that, if a plaintiff alleges that the monitoring duty was breached, he has (at most) six years from the date of the monitoring failure to pursue a civil action.

To resolve the parties' actual dispute—concerning the scope of the duty to monitor—*amicus* urges this Court to reaffirm the basic standard articulated by Congress in its definition of the duty of prudence. An ERISA fiduciary is expected to act as would "a prudent man acting in a like capacity and familiar with such matters." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). In some circumstances, a fiduciary honoring that standard will reasonably review past decisions—or, to be more precise, certain aspects of past decisions. But because ERISA incorporates by reference the conduct of other fiduciaries, there can be no one-size-fits-all standard for monitoring. Petitioners' insinuation is that there must have been a duty to monitor because cost savings may have been possible. But that sort of regulation-by-hindsight disserves the text of ERISA and its purpose: to balance the legitimate rights of plan participants to reasonable diligence with an incentive structure that encourages the voluntary provision of retirement and benefit plans.

If it reaches the question, this Court should therefore hold that the duty to monitor does not compel an investigation that is coextensive with the due diligence that accompanies an initial investigation. Rather, as with other applications of the duty of prudence, the duty to monitor is a function of circumstances and the appropriate exercises of judgment by professional fiduciaries.

## CONCLUSION

Unless the petition is dismissed, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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