LOCKE LORD
LEGAL ISSUE Q&A Series

Heather Merton
Communications Manager
T: 617-239-0508
heather.merton@lockelord.com
www.lockelord.com

OCTOBER 2015

"So if participants of a plan do not complain about the selection of investment options within 6 years, their claim could be barred as untimely."

Vincent J. Hess
Of Counsel
Dallas
214-740-8732
vhess@lockelord.com

Vincent J. Hess has experience in a wide range of complex commercial litigation and arbitration. He represents large and mid-size companies in software, class actions, managed care and employee benefits, contract, trade secrets, health care, non-competes, securities, commercial real estate, debt collection, franchise, leasing, construction, and environmental issues. Vince is also a frequently requested speaker and presenter on topics such as limitations on contractual liability, other contractual provisions, ERP warranties and ERISA litigation. His experience also includes issues arising under the Affordable Care Act, including the Sunshine Act and advising clients about records retention policies and e-discovery practices.

Supreme Court Ruling Emphasizes Need for Plan Monitoring

Editor's Note: This is one in a continuing series of Q&As with Locke Lord lawyers on key legal issues confronting companies engaged in industries that have national and global impact.

It appears court decisions frequently impact retirement plans. Starting with the U.S. Supreme Court, what impact will its recent ruling — confirming the ability of 401(k) participants to challenge high-cost investment options — have on retirement plans?

VH: The Court ruled in *Tibble v. Edison Int'l* that the duty to monitor investments in a 401(k) plan is ongoing and distinct from the duty to exercise prudence in selecting investments. The ERISA statute establishes a 6-year limitation period to file suit for breach of fiduciary duty. So if participants of a plan do not complain about the selection of investment options within 6 years, their claim could be barred as untimely.

However, the Court confirmed that participants could allege a breach of fiduciary duty in the monitoring of investment options within the prior 6 years. In recent years, several employers have settled claims that investment options had excessively high fees, sometimes for sums in excess of $25 million. The recent Court ruling should not slow down this trend.

The Court's ruling highlights the need to ensure that monitoring efforts are documented and regularly carried out and include fund performance, expenses, performance of service providers and changes in personnel at a fund.

How does the Supreme Court's ruling on a retirement plan that did not disclose a time period for medical benefits coverage impact plans and individuals?

VH: The Supreme Court ruled in *M&G Polymers USA LLC v. Tackett* that where a retirement plan was silent on how long retirees, their spouses and dependents would receive medical coverage without a requirement to pay, a court should not presume lifetime coverage. The decision as to how long retirees get full medical coverage is to be treated like an ambiguous contract — a court should consider the circumstances and other language in retirement plan documentation to ascertain the parties' intent.

Previously, some court decisions relied on a presumption of lifetime coverage. Given the rising costs of medical treatment, that presumption was costly for plans.

Some Justices on the Court noted that the ruling was not an automatic victory for efforts to set a termination date for lifetime medical coverage for retirees. Instead, the Justices noted potential facts that could point toward the parties' intent of lifetime coverage. This controversy reminds us that it is important to make sure plan terms are clearly and expressly stated.

What impact will these Court decisions — as well as the Fifth Circuit Court of Appeals' ruling on the standing of a manager of a medical benefits plan to pursue litigation — have on benefits plans for employers and employees?

VH: The Fifth Circuit ruled that the district court needed to conduct a factual examination to determine whether a plan manager could pursue litigation to recover monies for the benefit of the plan — *Humana Health Plan, Inc. v. Nguyen*. There, the plan manager wanted to recover from a beneficiary monies received in a settlement for an auto accident, so as to reimburse the plan for medical expenses paid out to the beneficiary. The employer decided not to pursue reimbursement. The Fifth Circuit directed the district court to review the facts to determine whether the plan manager had fiduciary standing to pursue litigation.

Litigation can be expensive and time-consuming. What the parties thought was clearly stated might be found ambiguous in light of events. So employers need to continue to focus on making plan terms as clear as possible.