

High-Court Spotlight Put on 401(k) Plans

Supreme Court to hear arguments in case that could have broad implications for the way people save for retirement

By
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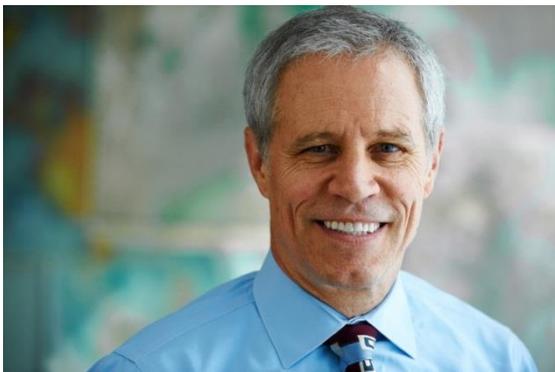
The Supreme Court will hear arguments in a case that could impact the way millions of Americans save for retirement. WSJ's Liz Moyer reports.

The U.S. Supreme Court is scheduled to hear arguments Tuesday in a case that could have broad implications for the way millions of Americans save for retirement.

The court will focus on a narrow issue concerning the statute of limitations in the case, called *Tibble v. Edison International*. A ruling against Edison could trigger a wave of lawsuits against companies over the way they set up and manage 401(k) retirement accounts and similar plans, according to lawyers not involved with the case.

Tibble is one of 13 class-action lawsuits filed in the past eight years that have accused U.S. companies, including Boeing Co. and Massachusetts Mutual Life Insurance Co., of failing to act in the best interest of employees who participate in their 401(k) plans. The issues include failing to monitor excessive fees, favoring some high-cost retail mutual funds over lower-cost options and funneling employee savings into investment products managed by affiliate companies.

The case comes as the Obama administration is placing heightened scrutiny on retirement plans, the fees they charge and the potential for adviser conflicts.



Plaintiffs attorney Jerome Schlichter has used the lawsuits to push large U.S. companies to cut 401(k) plan costs and improve fee disclosures.

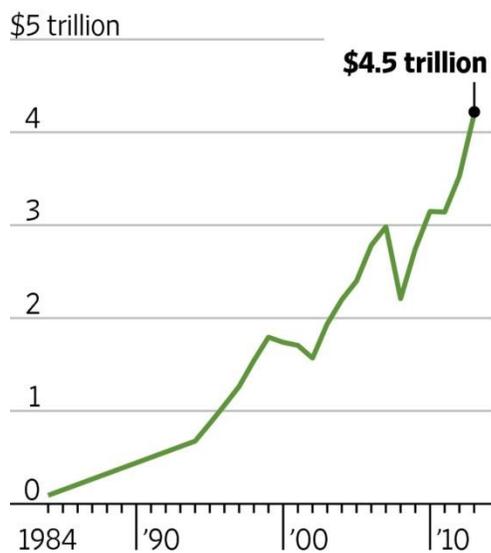
PHOTO: SCHLICHTER BOGARD & DENTON

The Labor Department is devising new fiduciary rules that force financial advisers to act in the best interest of customers when steering them into retirement products such as 401(k)s. The Securities and Exchange Commission is also at work defining new fiduciary standards.

Employees use 401(k) plans to save pretax dollars for retirement, and many companies offer matching contributions for part of those savings. By the end of September, the most recent data available, the plans had \$4.5 trillion in assets, making up 18% of all retirement assets, according to the Investment Company Institute, a trade group.

Socking It Away

Assets in 401(k)
retirement-savings plans



Note: Data as of end of year. For 2014, data is as of Sept. 30.

Source: Investment Company Institute

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All of the 401(k) lawsuits, including *Tibble*, are led by one lawyer: Jerome Schlichter of the St. Louis firm Schlichter Bogard & Denton LLP. Mr. Schlichter has used the cases to push large U.S. companies to cut plan costs and improve fee disclosures.

“These issues have been off in a dark closet for 40 years without scrutiny of any significant amount,” said the 66-year-old Mr. Schlichter, a labor and personal-injury lawyer. “Whenever you have a situation like that, some people are going to act in their self-interest.”

He has settled seven suits with companies such as Kraft Foods Group Inc. and Lockheed Martin Corp. for a collective \$187 million. On Friday, the details of Lockheed’s \$62 million settlement were disclosed. The Bethesda, Md.-based defense firm was accused of failing to monitor its \$26

billion plan for excessive fees and failing to properly disclose fees and expenses to its 100,000 plan participants.

Lockheed said “the settlement—which is less than 5 percent of the plaintiffs’ claimed damages—is not an admission of liability or wrongdoing.”

Once the settlements are approved by a judge, the money paid goes to plan participants, with Mr. Schlichter’s firm typically taking a 30% cut.

The string of lawsuits has put a spotlight on 401(k) plans, which had been largely ignored until now, said Fred Reish, a lawyer at Drinker Biddle & Reath LLP, a law firm based in Philadelphia, who specializes in issues related to the Employee Retirement Income Security Act, or Erisa, which governs 401(k) plans.

“They highlight the responsibility of plan sponsors not just to use reasonably priced investments, but to use their purchasing power to get the lowest-cost ones,” he said.

All of the companies that have settled have also agreed to make changes to the plans and lower costs for employees and retirees. Some agreed to drop certain types of investments from their offerings.

A MassMutual spokesman said the company is waiting on a judge’s ruling on its motion to dismiss the case. “We strongly believe the plaintiffs’ complaint is without merit,” he said. Kraft and Boeing declined to comment.

Edison’s lawyers have argued in court filings that stricter fiduciary requirements “would impose extraordinary administrative costs on plans, sponsors, and participants, contrary to Erisa’s objectives.”

Originally filed in 2007, the Tibble lawsuit accused the Rosemead, Calif., utility of breaching its duty to offer “prudent” investments because its selections included retail shares of mutual funds rather than the lower-cost institutional shares of the same mutual funds. Glenn Tibble was an employee of Edison and a participant in its retirement plan, according to court documents.

The suit also accuses Edison’s plan of failing to use its discretion to review and change fund selections periodically in the interest of participants. It said the plan could have changed investment selections even years after they were chosen but failed to do so.

Five groups filed briefs supporting that argument, including AARP, the advocacy group Pension Rights Center and the U.S. solicitor general.

Edison International has received support from trade groups such as the Securities Industry and Financial Markets Association and the National Association of Manufacturers, which said the outcome could put a chilling effect on 401(k) plan sponsors.

“It would burden plan fiduciaries with new and continuing duties that would increase the likelihood of litigation,” the manufacturers group wrote in its friend-of-the-court brief.

One possible outcome, regardless of which way the court rules, could be that plans move away from mutual funds and take on lower-cost ways of investing, such as collective trusts or separately managed accounts, said some observers.

Corrections & Amplifications:

Fred Reish is a lawyer at Drinker Biddle & Reath LLP, a law firm based in Philadelphia. An earlier version of this article misspelled his name as Fred Reich. (Feb. 23, 2015)