No. 13–550

In The

Supreme Court of the United States

GLENN TIBBLE, et al.,

Petitioners,

v.

EDISON INTERNATIONAL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

JEROME J. SCHLICHTER
Counsel of Record
SCHLICHTER, BOGARD & DENTON, LLP
100 South Fourth Street, Suite 900
St. Louis, Missouri 63102
(314) 621-6115
jschlichter@uselaws.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

I. Respondents' interpretation of §1113(1) contradicts the "continuing duty" principle recognized in the Seventh and Second Circuits and the terms of the statute.

Martin v. Consultants & Administrators, Inc., 966 F.2d 1078 (7th Cir. 1992), and *Morrissey v. Curran*, 567 F.2d 546 (2d Cir. 1977), recognize the principle underlying ERISA that §1104(a)(1) imposes a "continuing fiduciary duty" "to review plan investments and eliminate imprudent ones", *Consultants*, 966 F.2d at 1087–88, and "to dispose of improper investments within a reasonable time", *Morrissey*, 567 F.2d at 548–49 and n.9. Section 1113(1) incorporates this principle of a continuing fiduciary duty by delaying the start of the limitations period until the last action constituting part of the breach or the latest date on which an omission could have been cured. Respondents' and the Ninth Circuit's interpretation to start the period from the first date imprudent funds were put into a plan is irreconcilable with the continuing duty principle recognized by the Second and Seventh Circuits and most other district courts and the Secretary of Labor.[1]

Neither *Consultants* nor *Morrissey* suggest, as the Ninth Circuit held and Respondents contend, that ongoing fiduciary duties apply only when there are

[1] Respondents dispute only whether *deference* to the Secretary's position was required, Opp. 14–15, but do not dispute that the decision below conflicts with the Secretary's interpretation of §1113(1) in this and other cases. Pet. 21–23.

"significant changes in conditions[.]" Opp. 7–8. The time-barred mutual funds were indisputably "improper" or "imprudent investments", as shown by the judgment for Petitioners on identical claims regarding the three more recently selected funds. Pet. App. 60–64. In the Seventh and Second Circuits, Respondents' failure to eliminate those improper investments within a reasonable time—i.e., at any time within the six years preceding the complaint—would be an actionable fiduciary breach. The decision below eviscerates the continuing fiduciary duty recognized by the Seventh and Second Circuits, and its conclusion that ongoing duties are triggered only in cases of "changed circumstances" has not been adopted by any other circuit decision.[2]

Respondents further contend that the Ninth Circuit's holding is consistent with other circuit decisions rejecting application of a "continuing violations theory" to ERISA claims. Opp. 7–8. Their cases do not even concern §1113. *Medical Mutual of Ohio v. k. Amalia Enterprises*, 548 F.3d 383, 391 & n.5 (6th Cir. 2008), addressed a contractual limitations period, not §1113. *Miller v. Fortis Benefits Insurance Co.*, 475 F.3d 516, 520 & n.2 (3d Cir. 2007), and *Adamson v. Armco, Inc.*, 44 F.3d 650, 653 (8th Cir. 1995), involved

[2] The Fourth Circuit expressly did not address "whether ERISA fiduciaries have an ongoing duty to remove imprudent investment options in the absence of a material change in circumstances[.]" *David v. Alphin*, 704 F.3d 327, 341–42 (4th Cir. 2013).

claims for benefits under 29 U.S.C. §1132(a)(1)(B), to which §1113 does not apply. *Heimeshoff v. Hartford Life & Accident Ins. Co*., 571 U.S. ___, 134 S. Ct. 604, 610, 616 (2013). Similarly, *Berger v. AXA Network LLC*, 459 F.3d 804, 808–09 (7th Cir. 2006), and *Edes v. Verizon Communications, Inc*., 417 F.3d 133, 139 (1st Cir. 2005), involved employee misclassification claims under 29 U.S.C. §1140, which also borrows a State limitations period.[3] *Pisciotta v. Teledyne Industries*, 91 F.3d 1326 (9th Cir. 1996) (per curiam), concerns a borrowed four-year State limitations statute, not §1113. *Id*. at 1332 (citing *Northern Retail Clerks Unions v. Jumbo Markets, Inc*., 906 F.2d 1371, 1372 (9th Cir. 1990)).

Because those cases involved State limitations statutes that are unlike §1113(1), their discussion of equitable tolling based on "continuing violations" does not support the Ninth Circuit's or Respondents' interpretation of §1113(1). Because §1113(1) expressly provides that the limitations period does not begin to run until the *last* action or omission that is part of the breach, there is no need to resort to equitable tolling doctrines to conclude that the subject claims were timely.

Respondents insist that §1113(1) is a pure "statute of repose" that "categorically precludes" any

[3] The plaintiffs in *Berger* and *Edes* had not even alleged any continuing wrongs. *Berger*, 459 F.3d at 816 n.16; *Edes*, 417 F.3d at 139.

challenge to an investment fund six years after it is selected for inclusion in a retirement plan. Opp. 1, 11. Because §1113(1) measures timeliness from the last action constituting part of the breach, it provides "repose" only to a limited extent. In contrast to the "last action" feature of §1113(1), a true "statute of repose" starts from the date of a single event. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359–60 and nn. 5–7 (1991) (securities fraud repose periods); 28 U.S.C. §1658(b)(2).[4] A pure statute of repose would commence the limitations period from the *first* action constituting a part of the breach, assuring fiduciaries they could no longer be liable so long as their course of fiduciary misconduct continued past six years without action.[5] Instead, §1113(1) recognizes that ERISA's fiduciary duties are of a continuing nature and thus starts the limitation period on the *last* of the actions or omissions that are part of the breach. Because ERISA is a

---

[4] "Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934, may be brought not later than the earlier of—

(1) 2 years after the discovery of the facts constituting the violation; or

(2) 5 years after such violation."

[5] That is what §1113(2) does in cases of actual knowledge of a fiduciary breach, providing only "3 years after the *earliest date* on which the plaintiff had actual knowledge of the breach or violation[.]" 29 U.S.C. §1113(2) (emphasis added); see Pet. 3–4.

reticulated statute and "the product of a decade of congressional study", courts should be "especially 'reluctant to tamper with [its] enforcement scheme[.]'" *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (citations omitted). Respondents and the Ninth Circuit tamper with ERISA's enforcement scheme by excising the plain continuing duty principle incorporated in §1113(1) in their attempts to contort §1113(1) into a statute of repose.

The cases Respondents cite in support of their repose theory are inapposite. *Radford v. Gen. Dynamics Corp.* addressed only whether the actual knowledge, three-year limitation period is tolled pending the exhaustion of administrative remedies. 151 F.3d 396, 400 (5th Cir. 1998). *Ranke v. Sanofi-Synthelabo Inc.* addressed only whether actual knowledge of a breach was required to trigger the six-year limitations period. 436 F.3d 197, 201–05 (3d Cir. 2006). In *Larson v. Northrop Corp.*, an employer purchased an annuity upon the termination of a pension plan, which a participant claimed was a breach of fiduciary duty. 21 F.3d 1164, 1165, 1169 (D.C. Cir. 1994). The participant had six years from the termination of the plan to bring his action because all fiduciary duties ended with the termination of the plan. The last fiduciary action constituting part of the breach was the last date any fiduciary duties were owed—the plan termination date. *Id*. Thus, the foundation for the holding was the absence of any ongoing fiduciary duty—the exact *opposite* of what this case presents. Here, Respondents owed continuing fiduciary duties

to review the Plan's investments, and were not entitled to shirk those ongoing duties merely because the funds were first selected over six years earlier.

Respondents also rely on the mistaken premise that Petitioners challenge only "the act of designating" the mutual funds for inclusion in the Plan in 1999, and mischaracterize Petitioners' argument as seeking to challenge that decision "in perpetuity[.]" Opp. 1, 11.[6] The initial decision to use the higher cost shares is certainly a breach, as found by the district court. However, the ongoing actions of rejecting use of a lower cost share class and repeated omissions to even evaluate how using higher-cost shares of the exact same investment could possibly be prudent are further breaches that occurred within the six-year period. Respondents contend that it would be unfair to treat their "inaction" during the limitations period in "fail[ing] to remedy" the 1999 breach as the relevant "action" or "omission" under §1113(1). Opp. 12–13. But the basis of Respondents' liability at trial for the mutual funds added within the limitations period *was* inaction or omission—"fail[ing] to investigate the possibility of institutional share-class alternatives." App. 60–61. Respondents' breach was not limited merely to the act of including retail-class shares.

[6] In fact, the only thing that may occur "in perpetuity" if the decision below stands is that plan fiduciaries will receive perpetual immunity for unquestionably imprudent funds that remain in this plan and others so long as the funds were first selected over six years earlier. Pet. i, 20, 23.

Id. Indeed, under the plain language of the statute, a breach of the duty of prudence invariably involves some form of "inaction" or "omission", i.e., a failure to act with the requisite "care, skill, prudence, and diligence", see 29 U.S.C. §1104(a)(1)(B).

Here, Respondents failed to investigate the availability of institutional shares in 1999. While that breach was beyond the six-year limitation (and hence not "subject to challenge in perpetuity" as Respondents contend), it was Respondents' conduct within the limitations period in failing to review and replace the higher cost shares which constituted further breaches. See *Lewis v. City of Chicago*, 560 U.S. 205, 214–17 (2010) (Title VII claim based on "present violation" within limitations period was timely even though initial decision to adopt unlawful policy occurred before limitations period). Respondents could have cured their breach at any time during the limitations period of August 16, 2001 through August 16, 2007 simply by reviewing a prospectus and calling the fund managers.[7] See Pet. App. 137, 139–41; cf. *id*.

---

[7] Respondents erroneously suggest that no circuit authority would "treat the conduct alleged here as an omission" under §1113(1)(B). Opp. 13 n.4. In *Librizzi v. Children's Memorial Medical Center*, 134 F.3d 1302, 1307 (7th Cir. 1998), the court noted that an omission could be "cure[d]" within the meaning of §1113(1)(B) if it could be "fix[ed]", as distinguished from a "'remedy' in the sense of 'damages for what can no longer be fixed[.]'" Respondents could have "cured" or "fixed" their omission in failing to investigate the availability of institutional shares by doing so within the statutory period and replacing the

131–32 (discussing instance when Respondents did so as to a later-selected fund and transferred to institutional shares).

But whether the breach is more properly characterized as one of commission or omission is ultimately beside the point. Congress provided that under *either* scenario, a participant may bring an action within six years of the "last" or "latest" relevant date. 29 U.S.C. §1113(1). The proper interpretation of that statute is critical to the ability of American workers to protect their retirement security.[8] Pet. 5–6. The petition should be granted.

---

higher cost options. That is "fixing" their omission as opposed to merely providing a "remedy" for their omission. *Id.*

[8] Although Respondents attempt to belittle this case as a "motley collection" of claims and "cookie-cutter" litigation, Opp. 4 & n.1, industry experts have recognized that this and similar cases have caused plan fiduciaries to "focus attention on costs", resulting in significant reductions in the fees that workers are charged to participate in 401(k) plans. Tara Siegel Bernard, *Limiting the 401(k) Finder's Fee*, N.Y. TIMES, June 21, 2013, at B1 (http://www.nytimes.com/2013/06/22/your-money/driving-down-the-cost-of-investing-for-retirement.html); Linda Stern, *Stern Advice—How 401(k) Lawsuits are Bolstering Your Retirement Plan*, REUTERS, Nov. 5, 2013 ("fees have been coming down for years" and "are likely to keep falling" as a result of 401(k) plan litigation) (http://www.reuters.com/article/2013/11/05/column-stern-advice-idUSL2N0IP18G20131105).

II. The deference question is properly presented and the circuit conflict well-defined.

Respondents do not seriously dispute the existence of a circuit split as to whether *Firestone* deference applies to fiduciary breach actions under 29 U.S.C. §1132(a)(2). Instead, Respondents contend that the issue is irrelevant because the district court found that Respondents correctly interpreted the Plan even under a *de novo* standard. Opp. 16–19. Respondents also rely on the fiction that causing Plan participants to pay $8 million in administrative costs did not "harm" them. *Id*. 19–21. Neither argument has merit.

As to the district court's *de novo* interpretation, the Ninth Circuit did not address that conclusion, as Respondents concede. Opp. 18. Had the Ninth Circuit agreed with the district court's *de novo* interpretation, it would not have even needed to reach the deference question or to stretch *Firestone* beyond its limits to apply to a fiduciary breach action. Given that the Ninth Circuit explicitly created a conflict with the Second Circuit on the deference issue (711 F.3d 1061, 1077–78), and then went so far as to amend its opinion on that point after Petitioners pointed out the errors in its analysis (Pet. App. 6–12), the Ninth Circuit evidently found the district court's *de novo* interpretation not worthy of affirmance. Thus, the legal question of whether *Firestone* deference applies

to fiduciary breach actions is properly presented,[9] and the Court can leave the issue of the district court's *de novo* interpretation for the Ninth Circuit to resolve on remand. *Zivotofsky v. Clinton*, 566 U.S. ___, 132 S. Ct. 1421, 1430–31 (2012) (when the Court "reverse[s] on a threshold question, [it] typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing") (citing *Bond v. United States*, 564 U.S. ___, 131 S. Ct. 2355, 2360 (2011)).

Respondents' contention that participants were not harmed in any way by paying $8 million in fees that the Plan required Edison to pay is absurd. Cf. Opp. 19–20. Again, Respondents rely on the district court's conclusion to that effect, another point not addressed by the Ninth Circuit. *Id*. 19. It is irrelevant that a mutual fund is obligated to charge the same fee to all investors. Cf. *id*. 18. As shown in the judgment against Respondents in this case, Respondents could and should have chosen institutional share

[9] Respondents' attempt to bolster the district court's *de novo* interpretation is thus irrelevant. Cf. Opp. 17–18. It also is erroneous. There was no need to resort to extrinsic evidence because the meaning of §19.02 was unambiguous and clearly obligated Edison, not the participants, to pay the costs of plan administration. *Tanadgusix Corp. v. Huber*, 404 F.3d 1201, 1205 (9th Cir. 2005) ("The terms of the contract control, regardless of the parties' subjective intentions shown by extrinsic evidence."). And the "seventeen" disclosures in summary plan descriptions and similar documents (Pet. App. 45, 215), cannot trump the actual terms of the Plan. *CIGNA Corp. v. Amara*, 563 U.S. ___, 131 S. Ct. 1866, 1877–78 (2011).

classes that were identical in all respects except for lower costs.[10] This would have reduced the cost to participants for investing in the same mutual fund, albeit at a higher cost to Edison for costs of administration.

Moreover, even for funds that paid revenue sharing, Respondents could have demanded that Hewitt rebate those amounts to the Plan while Edison paid the full cost of administration as the Plan document required. Respondents cannot explain how their interpretation of the Plan and decision to accept the offsets—thereby benefiting themselves—was in the interest of the participants, as opposed to Edison. Cf. 29 U.S.C. §1104(a)(1) (fiduciaries must act "solely in the interest of the participants"). Thus, regardless of whether revenue sharing of mutual fund fees is a "plan asset", the economic reality is that Respondents' interpretation of Plan §19.02 caused participants to pay $8 million that Edison was obligated to pay.[11]

---

[10] Seemingly small differences in fees will have a dramatic impact on retirement assets over the course of a worker's career. See, e.g., Matthew O'Brien, *The Crushingly Expensive Mistake Killing Your Retirement*, THE ATLANTIC, Feb. 15, 2014 (illustrating how unnecessary fees reduce average 401(k) participant's lifetime savings by $159,000) (http://www.theatlantic.com/business/archive/2014/02/the-crushingly-expensive-mistake-killing-your-retirement/283866/).

[11] As the DOL recently noted, "[r]egardless of whether the revenue sharing payments are plan assets", ERISA fiduciaries must still account for the payments in order to assess the reasonableness of a service provider's compensation. DOL Advisory

Respondents' use of certain mutual fund share classes to reduce Edison's cost of administration at the expense of participants is indefensible.

Respondents erroneously claim several circuits have "expressly recognized that *Firestone* deference is not limited to benefits cases" and thereby suggest that circuits other than the Ninth have extended *Firestone* to fiduciary breach actions. Opp. 21. *Hunter v. Caliber Systems, Inc.,* concerned ERISA's anti-cutback provision (29 U.S.C. §1054(g)),[12] which is not part of ERISA's "Fiduciary Responsibility" provisions. 220 F.3d 702, 710–11 (6th Cir. 2000). As *Hunter* recognized, that §1054(g) claim "was brought under § 1132(a)(1)(B)" and thus "*is* about benefits[.]" *Id.* at 711. The cases it cites as "prior decisions applying the arbitrary and capricious standard outside of the benefits denial context" (*id.*) were in fact benefits claims, albeit arising under 29 U.S.C. §1053(a) (*Whisman v. Robbins*, 55 F.3d 1140 (6th Cir. 1995)), or a claimed wrongful "denial of his benefits . . . based upon an impermissible amendment to the Plan" (*Leahy v. Trans Jones, Inc.*, 996 F.2d 136, 140 (6th Cir. 1993)). *Mahoney v. Board of Trustees*, concerned a multi-employer plan and the limited question presented by the appellants of whether the fact that union-selected trustees benefited from the trustees' distribution of a plan surplus merited "an especially strict standard of

---

Opinion 2013-03A (July 3, 2013) (available at: http://www.dol.gov/ebsa/pdf/AO2013-03A.pdf).

[12] ERISA §204(g).

review" instead of what appellants conceded should be deferential review. 973 F.2d 968, 970 (1st Cir. 1982). Therefore, Respondents' and the Ninth Circuit's application of *Firestone* to the facts of this case is novel, conflicts with the Second and Third Circuits, and has very damaging consequences to the retirement security of tens of millions of employees, which compels this Court's attention as Petitioners have requested.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME J. SCHLICHTER
SCHLICHTER, BOGARD & DENTON, LLP
100 South Fourth Street, Suite 900
St. Louis, Missouri 63102
(314) 621-6115
jschlichter@uselaws.com

Attorneys for Petitioners