

HICKS NOTES

NH **HICKS** Experience Counts
Legal and Pension Consultants
(800) 310-4975 | www.nhhicks.com

June 2015

By Tom Hicks, Attorney At Law

LESSONS LEARNED FROM TIBBLE

The recent Supreme Court Ruling in *Tibble v. Edison International* is a warning and guidance for all 401(k) plan fiduciaries. In that case, the court held that all parties were in agreement that, “the duty of prudence involves a continuing duty to monitor” and that the lower court had failed to take that into account when deciding the plaintiff’s fiduciary claim. The court expressed no view on the scope of the additional duties, only that there is a general duty to monitor investments over time.

This argument makes perfect sense. A “set it and forget it” mentality flies in the face of the general duty of “diligence”. The lower court now needs to decide further the facts of this particular case while taking into consideration the fiduciaries actions regarding this, and their additional duties of care.

This begs the question, Monitors What? The simple answer is EVERYTHING. This includes not only the fund performance and managers, but the investment advisors, and other service providers. They should continually be diligent in asking about reasonable services for reasonable fees. For a link on the various advisors roles, [click here](#).

The role of a fiduciary is an active, not passive role. In the *Donovan v. Cunningham*, case, the court held that a “pure heart, but empty head are not good enough”. They are required to ask reasonable questions and get reasonable answers. They do not need to be experts in the field; but must make independent evaluations of other fiduciaries as well. “I relied on his expertise”, is not a defense to this duty.

A fiduciary should set up procedures for monitoring investment and plan providers. They need to ask the tough questions, document their findings and make prudent decisions. Discuss the monitoring practices of your advisors. Are they monitoring their own recommendations? What process do they have in place? As an advisor, make sure you are protecting your clients as well as yourselves.

In the field, I am seeing that most professional advisors are tackling this problem head on. I have been in these meetings and am proud of the work some advisors are doing. I encourage any advisor who works in this market to understand these issues and address them with their clients.

As always, we are here to help. Any questions or comments, [contact us](#) today.

NEW PLAN OPPORTUNITIES

Now is the perfect time to set up new 401(k) Safe Harbor plans for 2015. By starting now, you give employees more time to contribute into a new plan. Call your clients and get some sense of how 2015 is going. If they are doing well, a 401(k) Safe Harbor plan may benefit them and their potential tax situation. In need of a larger deduction, a defined benefit or combination design may be the answer.

We can prepare a proposal showing the best plan design. [Click here](#) for our proposal request form.

Now is the time to talk to clients before this opportunity is lost.