



# **Tibble v. Edison**

***No. 13-550 (U.S. Supreme Court, May 18, 2015)***

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# Actions to Take After an Investment is Made

- Returns are down or market has shifted
  - Obligation to re-evaluate to whether to retain, modify or liquidate the investment
- Change in ownership involving manager
  - Obligation to investigate retaining the manager
- New Conflict of Interest
  - Determine if the conflict is real

# ***Tibble v. Edison***

**No. 13-550, U.S. Supreme Court, May 18, 2015**

- The U.S. Supreme Court has rendered a unanimous opinion in the *Tibble* case involving ERISA's six-year statute of limitations for fiduciary violations.
- The alleged violation involves the nature of the investment itself, specifically retail-class mutual funds that are usually, but not always, more expensive than comparable institutional-class funds.

## ***Tibble v. Edison*** (Continued)

No. 13-550, U.S. Supreme Court, May 18, 2015

- Plan fiduciaries in Tibble selected three retail-class funds as plan investment options in 1999, more than six years before plan participants filed a lawsuit claiming this was imprudent.

## ***Tibble v. Edison (Continued)***

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- In a brief opinion by Justice Breyer, the Supreme Court found that plan fiduciaries are required to conduct regular reviews of plan investments.
- As applied to ERISA fiduciaries, there is nothing new in the proposition that fiduciaries have a continuing duty to monitor investments.

## ***Tibble v. Edison*** (Continued)

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- New ground broken by the Tibble decision is to be found in the Supreme Court's view that the nature and timing of this review are contingent on the circumstances.
- The case was remanded to the Ninth Circuit to determine how often and how deep fiduciaries must look at plan investments in order to satisfy their monitoring duty.

## ***Tibble v. Edison*** (Continued)

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- While the level and intensity of review subsequent to initial selection required to avoid a fiduciary breach is yet to be determined, the Tibble decision is a clear victory for plaintiffs, because the Supreme Court has confirmed that the six-year statute of limitations is not an absolute bar to a legal action for fiduciary breach with respect to the selection of investment options.

# Imprudent Past Decisions

- A new fiduciary has a duty to look into prior bad decisions made by co-fiduciaries
- Obligation to investigate and rectify proper breaches



# Questions to Ask



- Is the Investment firm registered with the SEC or the State?
- Have you asked the investment firm for a copy of its last deficiency letter with the SEC?
- Is the investment firm reputable?
- Is the investment firm in any lawsuits?
- Has the investment firm followed the PERAC placement agent policy?
- Does the investment firm receive bad press?
- Have you voiced any of these concerns with PERAC?

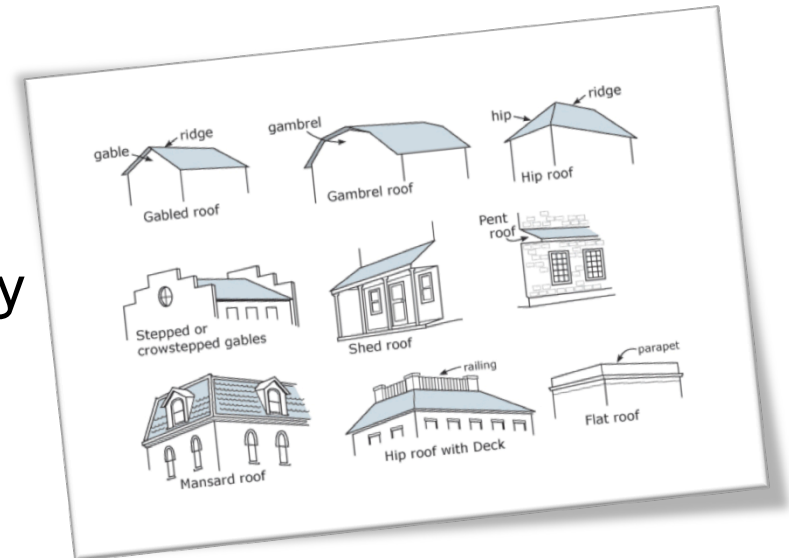


# **Paul Conway v. PERAC**

***CR-11-195 (DALA, February 20, 2015)***

# Facts

- Paul Conway (“Conway”) was a City of Medford Firefighter who owned 50% of a roofing and construction company with his wife’s cousin.
- In March 2000, he applied for accidental disability retirement due to a knee injury.
- Within the same month, Conway transferred his 50% ownership in the business to his wife.
- In 2001, the Medford Retirement Board (“MRB”) granted his accidental disability retirement.



## Facts *(Continued)*

- In 2007, the roofing business dissolved contentiously and litigiously.
- In 2010, Conway's business partner contacted Fraud Unit and claimed Mrs. Conway did no work for the roofing company and the transfer of ownership was done to avoid § 91A's earning limitation.
- PERAC determined excess earnings for years 2004 - 2007 of \$948,680.01 with a refund due of \$154,237.44, the amount of the retirement allowance paid to Conway during this period.



# Reported Earnings

Conway's reported earnings	His wife's reported earnings
2004 - \$3,200	2004 - \$311,103
2005 - \$6,600	2005 - \$240,738
2006 - \$15,600	2006 - \$203,203
2007 - \$15,600	2007 - \$244,670



# MRB's Hearing

- MRB held an extensive evidentiary hearing on February 9, 2011, with its counsel as the hearing officer and determined Conway had no excess earnings.
- PERAC rejected MRB's decision and MRB appealed PERAC's decision on this particular issue to the Division of Administrative Law Appeals ("DALA"). PERAC won this appeal on all grounds.
- After losing its appeal, MRB removed itself from the case and Conway continued the appeal on the excess earnings issues.



## **MRB v. PERAC, *CR-11-161 (DALA 2013)***

- The Medford Retirement Board filed a motion for summary decision requesting that DALA determine that PERAC's failure to file an appeal of MRB's G.L. c. 32, § 91A excess earnings determination makes the MRB's decision final and binding on the parties.
- After MRB issued a decision finding that Paul Conway had no excess earnings pursuant to G.L. c. 32, § 91A, PERAC informed MRB that its determination was based upon an error of law and then directed MRB to adopt a decision consistent with the law and PERAC regulations.

## **MRB v. PERAC, CR-11-161 (DALA 2013)**

*(Continued)*

- On September 27, 2013, DALA issued a decision denying MRB's motion for summary judgment and found that PERAC is not required to file any appeal of MRB's decision, as it has supervisory authority over local retirement boards. DALA found PERAC's supervisory authority to be "comprehensive and pervasive." Further, DALA explained that PERAC's authority to reverse a retirement board's G.L. c. 32, § 91A excess earnings determination was specifically upheld by the Supreme Judicial Court in Boston Ret. Bd. v. CRAB, 803 N.E. 2d 325, 330-331 (Mass. 2004).



# Analysis

- On February 20, 2015, the DALA Magistrate determined that:
  - Conway had a significant role that substantially contributed to the company's profits;
  - the wages he was paid did not reflect his business contributions;
  - Mrs. Conway's role was limited to minimal administrative errands; and
  - her work did not substantially contribute to the company's profits by looking at the "fair value" of labor rather than just the wages paid.

## Analysis *(Continued)*

- DALA relied greatly on Conway's sworn testimony during the business dissolution proceeding, where he described his extensive role in the business. See Conway v. Swansburg and A.C.S. Roofing & Construction Co., Inc., No. 2008-00989 (Middlesex Super. Ct. (2008)).
- DALA held that income from a spouse's ownership in a business may be attributed to a retiree for purposes of calculating excess earnings under § 91A where the retiree's labor, management, or supervision contributed to that income citing Steere v. Dukes County Ret. Bd. and PERAC, CR 09 312 (2010).

# Conclusion

- Income from a spouse's ownership in a business may be attributed to a retiree for purposes of calculating excess earnings under § 91A where the retiree's labor, management, or supervision contributed to that income.
- As a result of this decision, PERAC correctly determined excess earnings for years 2004 - 2007 of \$948,680.01 with a repayment due of \$154,237.44 that must be enforced by the MRB.
- Conway has appealed this case to CRAB.