Supreme Court's *Tibble* Decision Provides Little Guidance

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The Supreme Court has issued a unanimous opinion in favor of plan participants in *Tibble v. Edison International,* 135 S. Ct. 1823 (2015), a case that raised an issue on the amount of time a plan participant has to bring a claim for breach of fiduciary duty under ERISA. The Court's decision, which reverses the earlier Ninth Circuit ruling from March 2013, found that plan fiduciaries have a "continuing duty — separate and apart from the duty to exercise prudence in selecting investments at the outset — to monitor, and remove imprudent, trust investments." Essentially, the Supreme Court's decision means that a valid claim for a continuing violation of the fiduciary duty to monitor plan investments creates a rolling six-year statute of limitations for bringing a breach of fiduciary duty claim under ERISA Section 413. (The Court did not discuss the possibly shorter three-year statute of limitations under ERISA based on actual knowledge of a fiduciary breach.)

The Ninth Circuit's *Tibble* decision had held, in part, that a breach of fiduciary duty claim based on the selection of higher-cost retail-class mutual funds, when identical lower-cost institution-class mutual funds were available, over six years prior to the filing of the suit would be barred by the six-year statute of limitations under ERISA Section 413, unless a plaintiff could show that a significant change in circumstances had occurred, which would cause a fiduciary to reexamine the fund's inclusion in the plan. (See our March 2013 Special Alert for further discussion.) In October 2014, the Supreme Court granted the plaintiffs' petition for writ of certiorari in *Tibble* to solely address whether such a claim is barred by ERISA Section 413, when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed.

In addressing this question, the Supreme Court relied on trust law principles to determine that the Ninth Circuit erred in applying a statutory bar to the claim for breach of fiduciary duty without considering the nature of the particular duty at issue. The Supreme Court found that, instead of focusing exclusively on the act of selecting an investment, the Ninth Circuit also needed to consider a fiduciary's continuing duty to monitor investments to determine if and when a breach occurred. The Court noted that under trust law, a fiduciary is required to conduct a regular review of its investments, with the nature and the timing of the review contingent on the circumstances. The Supreme Court therefore remanded the case back to the Ninth Circuit to decide what the fiduciary duty to monitor plan investments requires within the context of trust law, but it did not provide the Ninth Circuit with any guidance for making this determination. This lack of guidance on what the duty to monitor entails may result in conflicting opinions from the lower courts.

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While the *Tibble* decision sheds little light on the scope of the ERISA fiduciary duty to monitor plan investments, fiduciaries should examine their plan procedures for reviewing investments to ensure that a regular review (optimally on a quarterly basis) is in place. This review process should include matters such as investment performance, investment expenses, compliance with any investment policy statements and any significant changes as to the investment vehicles. The review should be thoroughly documented as well. If you have any questions on the *Tibble* decision or on fiduciary issues under ERISA, please contact us.

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