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Case Update: Ninth Circuit Revisits *Tibble v. Edison International*

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As we previously reported, on May 18, 2015, the Supreme Court issued a unanimous decision in favor of the plan participants in *Tibble v. Edison International*, 135 S. Ct. 1823 (2015). In October 2014, the Supreme Court granted the plaintiffs' petition for writ of certiorari to solely address whether ERISA's six-year statute of limitation bars the plaintiffs' claim that plan fiduciaries breached their duty of prudence by offering retail class mutual funds, even though identical lower-cost institutional class mutual funds were available, more than six years before the lawsuit was filed. In its unanimous decision, the Supreme Court vacated the Ninth Circuit's decision and remanded the case back to the Ninth Circuit to determine what the fiduciary duty to monitor plan investments requires within the context of trust law. The Supreme Court explained that under trust law there is a "continuing duty to monitor" separate from the duty to exercise prudence in selecting an investment option and that this duty exists even absent a change in circumstances. The Supreme Court further stated, "so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely." For more information and discussion regarding this case, including the Ninth Circuit's decision in March 2013, see our March 2013 and July 2015 articles.

On April 13, 2016, on remand from the Supreme Court, the Ninth Circuit held that the plaintiffs forfeited their ongoing-duty-to-monitor argument by failing to raise it either before the district court or in their initial appeal. The Ninth Circuit rejected the plaintiffs' arguments that the district court's summary judgment order precluded them from presenting a duty to monitor argument. The Ninth Circuit explained that the plaintiffs only asserted that the Court "ought to read ERISA as excusing an otherwise time-barred lawsuit where the effects of a past breach continue into the future." Accordingly, the Ninth Circuit refused to allow the plaintiffs to have "a second bite at the apple on remand."

The Ninth Circuit's second decision in *Tibble* provides no plan guidance on the scope of the ERISA fiduciary duty to monitor plan investments but there are several steps that should be taken. Plan fiduciaries should review the plan's investment policy, and procedures for evaluating investments. Plan fiduciaries should also regularly review the investment options in their plans to determine whether to include or remove certain funds. This review should include determining which, if any, mutual funds, have revenue sharing, the amount of the revenue sharing, and the costs associated with these funds. Furthermore, plan fiduciaries should document the reasons for all decisions related to investments. If you have any questions on the *Tibble* decision or on fiduciary issues under ERISA, please contact us.

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