Supreme Court Issues *Tibble* Decision, but the Case Drags On

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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. *Tibble* is not a case where a poorly performing investment was allowed to remain on a plan investment menu; rather, 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.

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. This raised the issue of whether the initial selection of the investment triggered the running of the limitations period or whether retention of the investment by plan fiduciaries was the action from which the limitations period should be measured. Like the current deflate-gate controversy in the football world, the principles are more significant than the underlying offense, and the controversy is destined to continue.

Tibble was one of the first 401(k) excess fee cases that actually went to trial. While barring claims based on the retail class funds included on the plan's menu in 1999, the trial court awarded plaintiffs $370,732 in damages relating to excessive fees and lost investment earnings with respect to three other retail class funds that had been selected within the six-year limitations period before the legal action was filed. While this was a considerable sum, it paled in comparison with the multimillion dollar settlements in other excess fee cases brought against large employers, such as Southern California Edison, the *Tibble* plan's sponsor.

The *Tibble* participants argued to the Supreme Court that plan sponsors need to constantly reevaluate the decision to offer funds selected for a plan's investment menu. Industry groups supporting the plan sponsor asserted that rehashing these old decisions was a waste of resources that, in the long-run, would take money out of participants' pockets. There are good reasons why a sponsor might select a retail-class fund. For example, revenue sharing generated by these funds can support a higher level of services that otherwise would have to be paid for directly by participants or the plan sponsor.

In applying the statute of limitations and barring the participants' claim, the Ninth Circuit Court of Appeals held that only a significant change in circumstances within the six-year limitations period would have allowed the suit to move forward with respect to the funds selected in 1999. According to the Ninth Circuit, if such significant changes had occurred, the plan sponsor would have been required to perform a full due diligence review of the relevant investments. But absent such circumstantial changes, the plan could stand pat.

In a brief opinion by Justice Breyer, the Supreme Court found fault with this standard of review, because it was not sufficiently grounded in the common law of trusts on which ERISA is based. Among other things, this means 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, and by the end of the oral arguments in *Tibble*, it was plain that the parties agreed that the statute of limitations did not trump this duty.

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. However, Justice Breyer offered no view on whether a review should have taken place in *Tibble* or what kind of review would have been required if, in fact, a review had been needed. 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. To continue the football analogy started above, the Supreme Court punted, and resolution of *Tibble's* most critical issues has been postponed.

That the Supreme Court has decided *Tibble* on the narrowest possible grounds should not be surprising, since this was essentially the position advocated by the U.S. Solicitor General during oral argument. Jumping ahead, there is at least a possibility that the Ninth Circuit could take a similar approach by deciding the case on procedural grounds. As directed by the Supreme Court, the lower court also will consider the defendant's argument that the plaintiffs had failed to raise the argument that the failure to monitor was a new breach before they got to the Supreme Court. Thus, it is possible, albeit somewhat unlikely, that there may never be guidance from *Tibble* on the scope of the duty to monitor.

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.

Plan advisers should keep abreast of further developments in *Tibble* and determine the practical steps their plan sponsor clients will need to undertake in order to ensure that the duty to continually monitor plan investments is met. Plan sponsors should seek input from their advisers and conduct, as well as document, investment reviews in accordance with standards that are now set to evolve.

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