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From the Editor

The Trouble with *Tibbles*¹: US Supreme Court Stretches Statute of Limitations for Imprudent Investments

ERISA fiduciaries are required to prudently select and manage plan investments, dumping those that are performing unsatisfactorily. If a fiduciary doesn't meet these obligations, participants and the US Department of Labor have six years to sue. But six years starting when?

The three US circuit courts of appeal that previously considered the issue—Fourth, Ninth, and Eleventh—ruled that the clock starts ticking as soon as an investment is made. Under this approach, fiduciaries were not held liable for a decade-old mistake that they continued to ride, creating a perverse incentive for fiduciaries to hold their losers. The six-years-to-safety approach also flew in the face of established common law and ERISA notions that fiduciaries also must periodically monitor plan investments.

In *Tibble v. Edison International*, a unanimous US Supreme Court corrected this aberration. The Justices held that although ERISA's statute of limitations for suing a fiduciary for an imprudent investment begins on the date the investment was made, the period of liability resets if at any time during that period the fiduciary should have reviewed its portfolio and replaced the investment or reallocated the funds.² The Court's decision is not altogether surprising, however, *Tibble* unfortunately will make it easier for slumbering plaintiffs to sue and, significantly, could be misinterpreted by an aggressive court to lengthen the period over which the plan's loss is measured.

The facts of *Tibble* couldn't be more suitable to judicial rule-making. Edison International added three "retail" mutual funds to its self-directed 401(k) plan in 1999 and three more retail funds in 2002. In 2007, Glenn Tibble and other plan participants filed a class action suit alleging that Edison breached its fiduciary duty in offering six retail mutual funds when the plan, with "billions" of dollars, should have used essentially identical but lower-cost 'institutionally priced' funds." The participants claimed they were damaged by paying unreasonably higher fees for the six funds. [Note, as did the Supreme Court, I assume, without knowledge, that the fees were excessive.]

As *Benefits Law Journal* readers know, ERISA Section 404(a) imposes a fiduciary duty of prudence when investing pension plan money. Absent fraud, ERISA Section 413 sets the statute of limitations for bringing an action for breach of a fiduciary duty at six years from "the breach or violation," or three years after the plaintiff had actual notice. Because plaintiffs claimed the investments were imprudent from day one and did not have actual notice, the federal district court and the US Court of Appeals for the Ninth Circuit reasoned that the six-year clock had run out on the funds added in 1999, dismissing that part of the case. Following the reasoning of the Fourth and Eleventh Circuits, the Ninth Circuit ruled that the statute of limitation begins at the time of the violation "unless there is a significant change in circumstances that could engender a new breach..." Although not enumerated by the lower court, poor long-term performance, a change in investment managers, or not following the stated investment policy all could be considered a change in circumstances that, presumably, would reset the clock.

The irony of the Ninth Circuit's approach is that, after six years, a fiduciary could retain a horrible investment fund indefinitely, without liability, as long as nothing "changed." Even if Bozo the Clown was appointed fund manager in 1976, the fiduciaries would be scot free from any liability for his investment decisions starting in 1982. Obviously, that doesn't make sense.

The Supreme Court, drawing heavily from the common law of trusts, stated that a fiduciary "has a continuing duty to monitor trust investments and remove imprudent ones." There are two separate duties: to choose prudent investments and to "systematically consider all the investments... at regular intervals to ensure that they are appropriate." Therefore, the Court directed the lower court to examine whether and when Edison had a fiduciary duty to review the three retail funds selected in 1999. Any time the funds should have been reviewed would restart the six-year clock. Thus, ERISA's statute of limitations on a continuing investment should never fully run out, assuming the fiduciaries have a duty to monitor the investment at

least once every six years. For Mr. Tibble and friends, the district court must first determine whether a duty to monitor rebooted the statue of limitations so that its 2007 lawsuit was timely.

Tibble confirmed that an investment fiduciary has a duty to monitor its investments; however, the Supreme Court didn't define either "monitoring" or "regular interval." That lack of a bright line makes sense because the scope of the duty to monitor will necessarily depend on multiple factors including the type and amount of the investment, market conditions, a plan's cash-flow needs, and current events. Clearly, *Tibble* has the potential to be a great marketing tool for investment consultants who can track and provide investors with clear and relevant information on performance, market events, comparatives, and alternatives investments. Consultants also can confirm that investment fees are reasonable, investment guidelines are being followed, and no changes are warranted—confirmations that are not legally required but certainly would be useful evidence in any lawsuit.

One point in the Supreme Court's opinion—which could have used greater clarity—is the period for measuring damages. Is it limited to the period left open by the statute, or the entire time the bad investment is held? Pre-*Tibble*, the federal courts held that the period for measuring damages cannot exceed the open statutory period. The courts were concerned about open-ended liability and a fiduciary potentially being penalized for a predecessor's poor choices—either of which could have a chilling effect on the willingness of professional money managers to replace an incumbent. Time limitations were developed under common law precisely to address the need for closure. Otherwise, every new fiduciary would feel obligated to liquidate the entire portfolio and begin anew, thereby triggering the six-year clock for liability for the previous investments to expire.

The correct view of *Tibble* is that each "regular interval"—at which time a fiduciary should review and discard any imprudent investment—constitutes a distinct ERISA violation, each with its own six-year clock and its own six-year period for measuring damages. At the end of the six-year period following the original investment or any interval, those periods are statutorily removed from the damage calculus. In Edison's case, if the 1999 funds had unreasonably high fees from the beginning that violated the fiduciary's ERISA duty to prudently monitor the funds, damages should be limited to six years from the date the lawsuit was filed. Otherwise, under *Tibble*, investment fiduciaries could face open-ended liability for any investment, with closure only possible six years after the investment was removed (or rehabilitated). Clearly, this would wrongly dismember ERISA's statute of limitations.

The window of time for calculating damages should not, and cannot, be longer than the period for bringing suit.

David E. Morse
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NOTES

1. For those who had a more productive youth than I, “The Trouble with Tribbles” is a second season Star Trek episode in which a tribble—a purring, fuzzy, and adorable creature with exponential reproductive abilities and a hate-hate relationship with the bad guy Klingons—is taken on the Enterprise by Lieutenant Uhura as a pet. While threatening to overwhelm the Enterprise with their reproductive zeal, the tribbles inadvertently reveal a Klingon plot to poison the food supply. The plot is foiled (of course) and, in punishment, the entire tribble population is transported to the Klingon battle cruiser.
2. 575 U.S. ____ (2015).

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