

Open Questions In The Wake Of Tibble V. Edison

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The Supreme Court's decision in *Tibble v. Edison International* leaves open several important questions concerning a fiduciary's duty to monitor investment options and statute of limitations defenses in ERISA litigation. Although the court's unanimous decision generally has been praised by both the plaintiff bar and defense bar, sharp disagreements remain as to the decision's meaning and impact on future cases.

In *Tibble*, the court held that there is a "continuing duty of some kind to monitor investments and remove imprudent ones." The court also concluded that monitoring claims are not time-barred, so long as they fall within ERISA's statute of limitations. For most employers and administrators charged with fiduciary oversight of employee benefit plans, these holdings should not be especially controversial. Since well before the *Tibble* decision, fiduciaries have recognized a duty to monitor investments and many have adopted sophisticated monitoring processes.



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Left unresolved are issues that we expect will be actively litigated in the wake of *Tibble*: what is required to satisfy a duty to monitor in a particular case and the applicability of a "continuing violation" theory.

Case Background

Tibble's background offers useful context for understanding the implications of the court's decision. In *Tibble*, the fiduciaries of a 401(k) plan selected certain retail-class mutual funds as plan investment options. More than six years later, participants filed suit, claiming that the selected investment options violated the fiduciaries' duty of prudence because substantially identical institutional-class funds were available at a lower cost.

Tibble's fortunes in the lower courts and its eventual fate at Supreme Court turned on the framing of the issue. The lower courts focused on the timing of the initial fund selection. The district court dismissed the claim because the challenged selection of the retail funds fell outside of ERISA's six-year statute of limitations. The district court held that plaintiffs had not alleged any event within the limitations period that would have triggered a fiduciary duty to seek alternatives to these funds. Affirming, the Ninth Circuit rejected plaintiffs' argument that the limitations period should be measured from the last date on which the investments remained in the plan. The Ninth Circuit held that ERISA does not recognize a "continuing violation" theory, which would permit an otherwise untimely claim to survive if the

challenged decision remained in effect during the limitations period.

In Supreme Court briefing and oral argument, plaintiffs distanced themselves from the continuing violation theory, insisting they were not contesting the fund *selection* — but rather the allegedly imprudent *management* of the plan's existing investment lineup during the limitations period.

Although defendants acknowledged that fiduciaries have an ongoing duty to monitor investments, they argued that the duty to monitor was not implicated because, as the Ninth Circuit had concluded, plaintiffs had not shown a material change in circumstances that would lead a reasonable fiduciary to investigate other share classes available in the marketplace.

In short, before the Supreme Court, the crux of the dispute was the scope of the duty to monitor. Plaintiffs contended that the duty required a full diligence review of each fund in the investment lineup, including a comprehensive evaluation of alternatives in the marketplace, as if each fund were a new fund being added to the plan. Defendants argued for a narrower duty to assess changes in circumstances and to perform limited reviews of areas relevant to the changed circumstances.

The Supreme Court reversed, unanimously holding that the claim was timely simply based on the allegation that fiduciaries failed to monitor the plan's investment lineup prudently. The court declined, however, to address the scope of the duty to monitor or whether the alleged facts satisfied the duty.

Lessons for Employers and Plan Fiduciaries

1. Employers and fiduciaries might wish to review their processes for monitoring investments.

The *Tibble* decision has sparked a renewed interest in the fiduciary duty to monitor plan investment options, one that commentators have predicted will spur an uptick in litigation concerning plan investments. Although many plan fiduciaries already take significant steps to meet their duty to monitor, this decision might present an opportunity to revisit investment monitoring practices and confirm that reviews of existing fund options are sufficiently in-depth and frequent to satisfy the duty of prudence. For example, plan fiduciaries could conduct a review of the monitoring procedures of similar plans and apply best practices based on the unique needs of their plan.

Additionally, the facts in *Tibble* offer a reminder that monitoring practices should address not only whether existing funds are performing as expected but also whether the plan is offering a competitive fee structure. For example, plan fiduciaries might define what circumstances would trigger a future inquiry into whether existing investment options are available in lower-cost share classes.

Finally, employers and plan fiduciaries should follow developments in the law closely. While *Tibble* neither embraced nor rejected either party's view of the scope of a fiduciary's monitoring duty, future decisions could adopt a more stringent view of this duty.

2. Case law defining the scope of the duty to monitor is in flux.

At less than eight pages, the court's opinion provides little detail about what is required to satisfy a fiduciary's monitoring duty in any particular case. While we expect that the contours of this duty will be actively litigated in the years to come, we offer two overarching comments:

a) Courts typically analyze prudence as a procedural requirement. That is, whether a duty to monitor is satisfied will depend on the steps and processes that the fiduciary used to meet its obligations — and not on their outcome. A fiduciary that employs a prudent process to monitor investment options should not be in breach, even if, in hindsight, the fiduciary could have chosen more desirable investment options.

b) Language in *Tibble* that potentially suggests a different analysis should be understood in the context of that case. The court’s opinion refers several times to “prudent” and “imprudent” investments. This should not be read to suggest that prudence is an objective standard and that an investment can be objectively imprudent in a manner that would give rise to a *per se* fiduciary breach.

Rather, this language was used in the context of an unusual case where participants were offered a higher priced investment option when a materially identical fund with lower fees was available. To the extent that the court intended to suggest that the investment option at issue could be objectively imprudent, we expect that this observation would be limited to the facts presented. Given the multitude of factors that must be analyzed in the context of investment fund review, few duty-to-monitor cases will involve such a stark choice between identical funds with different fees.

Moreover, the court’s holding recognizes the centrality of process in duty of prudence analysis. Rather than declaring that the retention of the investment option constituted a fiduciary breach, the court ultimately remanded to the lower courts to consider whether the *process* used to monitor investments fulfilled defendants’ duty of prudence.

3. The decision does not support expansion of a “continuing violation” theory.

The *Tibble* decision should not lend support for a “continuing violation” theory, by which otherwise untimely claims can be sustained if the challenged decision remains in effect during the limitations period. Notably, the court held that there is a continuous duty to monitor and that such claims are timely “so long as the alleged breach ... occurred within six years of suit.” Under the court’s reasoning, each failure to prudently monitor within the limitations period can support a fiduciary breach claim, but fiduciary breach claims premised on inadequate monitoring or fund selection outside of ERISA’s statute of limitations would remain barred.

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