

# One Minute Memo®



## Continuing Duty to Monitor Means a Rolling Statute of Limitations

By Hannah B. Widlus

Recently, the U.S. Supreme Court in *Tibble v. Edison International* unanimously concluded that an ERISA fiduciary has a continuing duty to monitor investments made in an ERISA-governed savings plan. Because the duty is continuous, claims related to the duty to monitor are not barred by ERISA's six year statute of limitations, even if the initial selection of the allegedly imprudent fund took place outside of that period.

By way of background, in 2007, beneficiaries of the Edison 401(k) Savings Plan sued the Plan's fiduciaries to recover damages for alleged losses suffered because of the alleged breach of the fiduciary duty to monitor the investments in the 401(k) Plan, among other claims. The district court and the Ninth Circuit concluded that ERISA's six year statute of limitations was triggered when the investment in the allegedly offending funds initially was made, and that the beneficiaries had not established a change in circumstances that might trigger an obligation to conduct a full due diligence review of the funds within the six-year period.

A unanimous Supreme Court vacated the Ninth Circuit's judgment. The Court noted that ERISA's fiduciary duty is derived from the common law of trusts. The common law of trusts, in turn, provides that a trustee has a continuing duty to monitor investments made on behalf of beneficiaries, and that this duty is separate and distinct from the duty to act prudently when making an initial investment or selecting an investment on behalf of beneficiaries. Thus, according to the Supreme Court, so long as a claim alleging a breach of the duty to monitor occurred within six years of suit, that claim is timely.

So, while claims related to initial investment fund offerings likely will not survive a statute of limitations claim, plan fiduciaries should be sure to engage in an established monitoring process as those claims will survive.

What the Court did not decide is the scope of the duty to monitor. That will wait for another day.

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