Fast Fact

Supreme Court Ruling: Failure to monitor lawsuits still timely years after investments' initial selection

The *Tibble et al v. Edison International et al* case casts the six-year statute of limitations for fiduciary breach claims in a whole new light and causes plan fiduciaries to re-evaluate their record retention policies. Plan sponsors, and the plan fiduciaries they appoint to assume the obligation, have an unequivocal responsibility under the Employee Retirement Security Act of 1974 (ERISA) to prudently select the investment options for the qualified retirement plans they serve. The U.S. Supreme Court's ruling in *Tibble* 1) makes clear the equally important fiduciary duty to monitor and replace plan investments on an ongoing basis; 2) recognizes plan participants' ability to commence fiduciary actions relating to a failure to monitor long after the initial selection of investments; and 3) underscores the importance of maintaining fiduciary documentation longer than the standard five to seven year industry standard for record retention.

Who is affected?

Plan fiduciaries with investment responsibility for the plan (e.g., plan sponsors, investment managers and certain discretionary financial advisors) have a duty to not only prudently select the initial line up of investment options for the qualified retirement plan, but also to monitor and remove imprudent plan investments on an ongoing basis.

It is incumbent upon these same plan fiduciaries to maintain records that document the fulfillment of their obligations under ERISA.

What do I need to know?

An ERISA fiduciary must discharge his responsibility "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use [ERISA §1104(a)(1)(B)].

An ERISA fiduciary's duty is derived from the common law of trusts. Under trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones. This continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset (*Central States, Southeast & Southwest Areas Pension Fund v. Central Transport*, Inc., 472 U. S. 559, 570).

The Uniform Prudent Investor Act confirms that a trustee has a "continuing responsibility for oversight of the suitability of the investments already made."

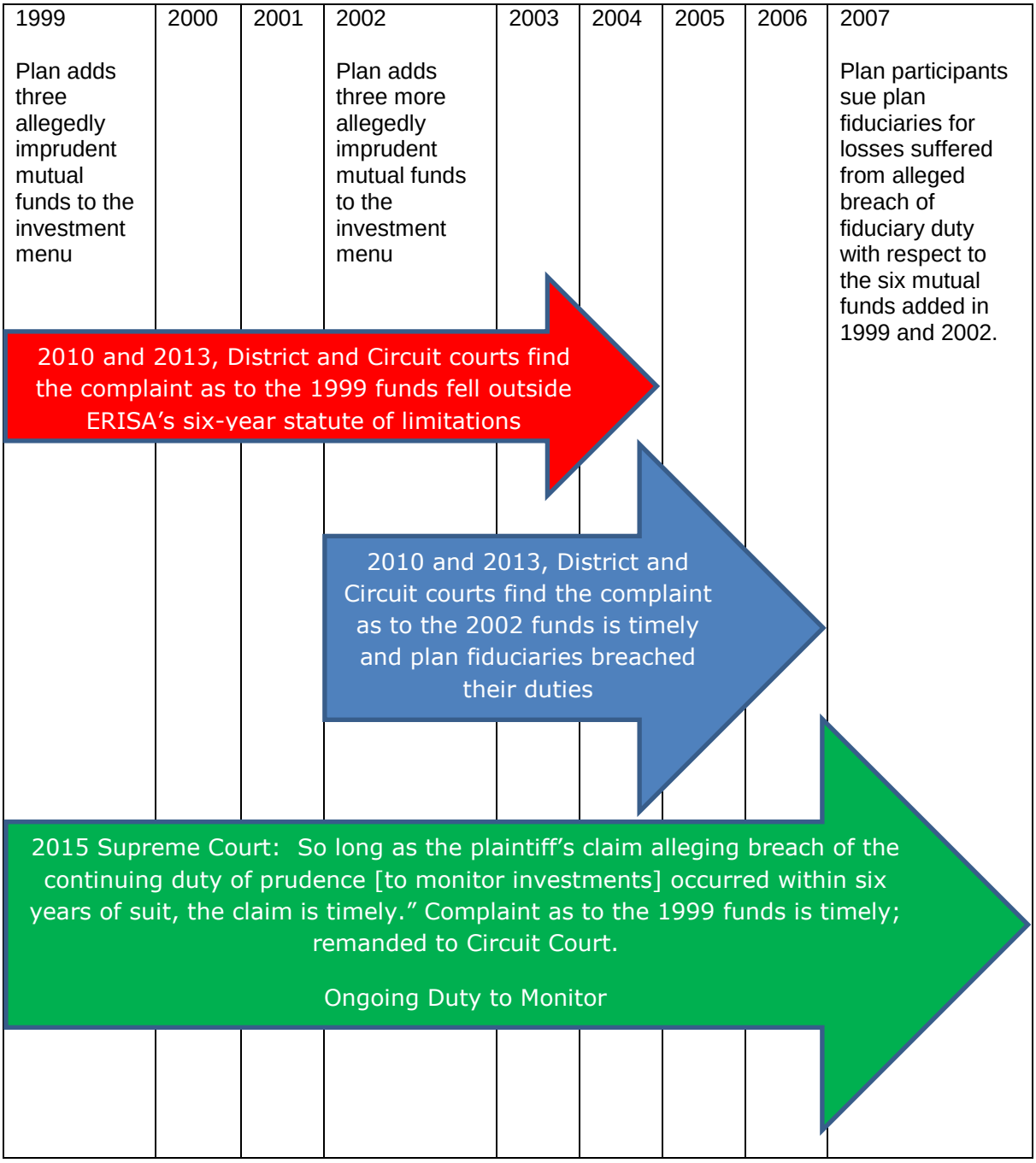
ERISA imposes a six–year statute of limitations period for filing fiduciary claims. In order for a plan participant or beneficiary to file a lawsuit alleging a plan fiduciary's breach of duty, he or she must do so within six years from the date of the last action that constitutes a breach or, in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation (ERISA §1113).

In the case *Tibble et al v. Edison International et al*, decided May 18, 2015, the Supreme Court concluded the six-year statute of limitation period as it relates to the duty to monitor and remove imprudent plan investments *is not* measured from the initial selection of the investments but, rather, is measured from the date of the last action of failing to monitor and remove imprudent investments. Therefore, so long as a

plaintiff's claim alleging breach of the continuing duty of prudence occurred within six years of filing the suit, the claim is timely.

Example

Tibble et al v Edison International et al



Additional details

In *Tibble,* the Court remanded the case back to the Ninth Circuit in order for it to reconsider the petitioners' claims that the fiduciary breach with respect to the 1999 funds had occurred within the relevant six-year period.

The standard for record-retention in the industry is five to seven years, depending on the type of record. One clear implication from this case for sponsors of ERISA-governed plans is the need to maintain fiduciary documentation longer than established record-keeping standards should their investment monitoring prudence come under question.

Fiduciary documentation should reflect a sponsor's well established fiduciary process.

It is possible that, in its re-evaluation of the *Tibble* case, the Ninth Circuit will provide the industry with guidelines for the monitoring and replacement of investment options within ERISA-governed retirement plans.

What action should I take?

Plan sponsors and other plan investment fiduciaries should evaluate their fiduciary processes, documentation and record-retention practices.

Financial advisors who assist plan sponsors with investment selection and monitoring would be well advised to discuss the *Tibble* case with their clients.