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BENEFITS REPORT

Special Alert

Supreme Court Gives Plaintiffs Cover to Beat ERISA's 3-Year Statute of Limitations

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On February 26, 2020, the Supreme Court settled a split among federal circuit courts of appeal regarding what it means to have actual knowledge of an alleged breach of fiduciary duty sufficient to begin the running of a three-year period to file suit on the breach. In *Intel Corporation Investment Policy Committee v. Sulyma*, 589 U.S.___(2020), the Supreme Court answered the question of whether an employee benefit plan participant gains actual knowledge of information contained in disclosures made by plan fiduciaries that the participant claims he or she may have received but does not recall reading. The Court held that such a plaintiff-participant does *not* possess actual knowledge because, while evidence of disclosure is relevant to this determination, a plaintiff does not have actual knowledge unless he is aware of this information.

Under the Employment Retirement Income Security Act of 1974, as amended (ERISA), plaintiffs must file lawsuits within six years of an alleged breach or violation, or within three years of the date on which they gained "actual knowledge" of an alleged breach or violation, except in a case of fraud or concealment.[1] Federal courts and litigants have long debated what constitutes "actual knowledge" under ERISA's three-year limitations provision because determining whether and when a claimant gained actual knowledge of an alleged breach is an inherently subjective undertaking.

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During the time Christopher Sulyma worked at Intel Corporation, he participated in two Intel retirement plans. When equity markets declined in 2008, the plans' Investment Policy Committee invested the plans' funds in certain alternative investments (hedge funds, private equity, and commodities) to increase diversification and thereby reduce the investment risk to the funds. These investments carried relatively high fees, and once markets rebounded following the Great Recession, strong returns in the equity market caused the funds' performance to lag as compared to index funds. Sulyma sued the Intel Committee and other plan decision-makers ("Intel"), alleging they had overinvested in these alternative assets and caused loss to the retirement plans.

In its defense, Intel provided evidence of various ERISA-mandated disclosures, which it claimed Sulyma received during the time he worked at the company, that contained information about the plans' alternative investments. Intel argued that, through these disclosures, Sulyma gained actual knowledge of the plans' alternative investments; and if Sulyma alleged that Intel breached its fiduciary duties by making these investments, he had to file his lawsuit within three years of receiving this information. Sulyma, however, testified at his deposition that he did not "remember reviewing" these disclosures. Nevertheless, the district court granted summary judgment in Intel's favor on the basis that Sulyma's claims should not be allowed to survive simply because he did not look further into the disclosures.

The Ninth Circuit reversed this decision on the basis that "actual knowledge" under ERISA means what it says: that Sulyma would need to *actually know* the facts underlying his claims to be subject to the three-year statute of limitations. And although "bare" knowledge of an underlying transaction, alone, does not constitute actual knowledge, plaintiffs only obtain actual knowledge when they become aware of "something more" — the *nature* of the alleged breach. This decision conflicted with a decision from the Sixth Circuit Court of Appeals, which had previously held that actual knowledge did not require that plaintiffs actually read documents with information about the alleged breach, just that the disclosures were made available to them.[2]

Focusing on the meaning of "actual knowledge" in Webster's and legal dictionaries, the Supreme Court unanimously affirmed the Ninth Circuit's decision and held that a plaintiff, like Sulyma, must actually know information about the alleged breach (i.e., read the disclosures). At oral argument, Justice Ginsberg even noted that she too did not always read disclosures about her investments. The Court held that ERISA's three-year limitations provision:

> [R]equires more than evidence of disclosure alone. That all relevant information was disclosed to the plaintiff is no doubt *relevant* in judging whether he gained knowledge of that information. To meet § 1113(2)'s "actual knowledge" requirement, however, the plaintiff must in fact have become aware of that information.

Sulyma testified that he did not "remember reviewing" the disclosures about his investments in the Intel retirement plans, despite records showing that he received certain disclosures and repeatedly visited the website where many other disclosures were located. He stated in a written declaration that he was "unaware" that the plans were invested in the alternative investments. On this record, the Court concluded that it was improper for the district court to grant summary judgment in Intel's favor based on evidence of the disclosures alone. It mattered not that a reasonably diligent plaintiff would have presumably had knowledge of the plans' investment in alternative investments or that Sulyma should have been aware of the disclosures.

Notably, the Court cautioned that its holding does not prevent plan fiduciaries from proving "actual knowledge" in the "usual ways," such as when plaintiffs provide testimony that they had in fact read the plan disclosures, or through circumstantial evidence, such as when a plaintiff is shown to have received disclosures and "took action" in response. The Court acknowledged that summary judgment on the basis of ERISA's three-year "actual knowledge" statute of limitations may still be appropriate under these circumstances. With these statements, the Court appeared to provide a roadmap for plan fiduciaries seeking to protect themselves against untimely lawsuits. For instance, plan administrators may consider adding some type of "click wrap" to their electronic disclosures that would require plan participants to confirm that they have read and understood the information within the disclosure. While the facts of each case will ultimately determine whether plaintiffs actually have read and understood disclosed information, this type of requirement would put plan fiduciaries in a better position to present evidence of actual knowledge.

Nevertheless, despite the Court's acknowledgement that actual knowledge is still provable "at any stage in the litigation," and its optimism that plaintiffs will heed their deposition oath and admit that they gained knowledge of an alleged breach outside of the limitations period, this decision makes it more difficult for defendants to succeed on a three-year statute of limitations defense. Claims for fiduciary breach in instances where the plaintiff does not have actual knowledge are subject to the six-year limitations period. To avoid the shorter three-year statute of limitations, plaintiffs can simply testify that they do not recall whether or not they read certain disclosures and, absent further evidence that they gained knowledge of the alleged breach, will be in a strong position to defeat a statute of limitations defense.

Ultimately, the Court's decision was narrow, focusing only on this disclosure issue and leaving open existing debate about what constitutes actual knowledge in other circumstances. As a result, while the circuit split on this issue may be resolved, the definition of actual knowledge in other circumstances may remain elusive and subjective in fiduciary breach cases.

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1 *See* ERISA § 413, 29 U.S.C. § 1113, which further provides that the three-year period will be extended to six years where a plaintiff can show the defendant hid the underlying breach through fraud or concealment.

2 *See Brown v. Owens Corning Investment Review Comm.*, 622 F. 3d 564, 571 (6th Cir. 2010).

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