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What You Don't Know, [Can Really Still] Hurt You – ERISA's Statute of Limitations Conundrum

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"We ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used [. . .] We do not inquire what the legislature meant; we ask only what the statutes mean."[1] This is exactly how the Supreme Court recently supported its holding in *Intel Corp. Inv. Policy Comm. v. Sulyma*,[2] that to have actual knowledge, one must in fact be aware of the information. The word "actual" means "existing in fact or reality."[3]

We recently wrote about *Intel Corporation Investment Policy Committee v. Sulyma*,[4] which at that time was pending before the United States Supreme Court. As we explained, the issue in the case was what constitutes "actual knowledge" for purposes of triggering the shorter statute of limitations period under the Employee Retirement Income Security Act (ERISA).[5] We now have the answer. And it is not a good one for plan sponsors and fiduciaries.

Under ERISA §413(1), the statute of limitations for a breach of fiduciary duty claim under ERISA is six years after the last action constituting the alleged breach, or, for alleged breaches by omission, from the last date that the fiduciary could have cured the alleged breach. However, that the statute of limitations is cut in half, to three years, if "the plaintiff had actual knowledge of the breach or violation."[6]

In *Sulyma*, the plaintiff worked at Intel and participated in two of its retirement plans from 2010 to 2012.[7] As a result of the Great Recession of 2008,[8] the committee managing the two plans decided to increase investment in alternative assets, which include hedge funds, private equity, and commodities.[9] Investments like these tend to have higher fees than stocks and bonds, and, when the stock market re-

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[1] Oliver W. Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 417-18 (1899).

[2] *Intel Corp. Inv. Policy Comm. v. Sulyma*, No. 18-1116, 2020 BL 69188, slip op. (Feb. 26, 2020).

[3] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 6.

[4] José Jara & Anthony M. Fassano, *What You Don't Know, [Can] Hurt You – ERISA's Statute of Limitations Conundrum*, 47 Tax Mgmt. Comp. Plan. J. No. 11, 161 (Nov. 1, 2019).

[5] Pub. Law. No. 93-406.

[6] ERISA §413(2).

[7] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 2.

[8] *See, e.g.*, Kate Rabinowitz & Youjin Shin, *The Great Recession's Great Hangover*, The Washington Post (Sept. 7, 2018), available at https://www.washingtonpost.com/graphics/2018/business/great-recession-10-years-out/.

[9] *Sulyma,* No. 18-1116, 2020 BL 69188, slip op. at 3.

bounded, Intel's[10] plans did not perform as well as other plans not as invested in alternative assets.[11]

All of this—the decision to invest in alternative assets, the fees associated with the assets, and the performance of the investments—was disclosed to the plaintiff, as well as all of the other plan participants.[12] These disclosures came in the form of emails, which both contained information about the plans and included directions for accessing more detailed information.[13] Intel's records showed that the plaintiff accessed the information to which he had been directed.[14] However, the plaintiff testified at his deposition that he did not recall seeing these disclosures and that he was unaware of the plans' investment in alternative assets, despite the fact that he had accessed the disclosures where this information was contained.[15]

The issue in *Sulyma* was whether Intel's provision of the many disclosures that the plaintiff indisputably received and accessed satisfied ERISA's "actual knowledge" requirement and thus triggered the three-year statute of limitations. The answer to this question was crucial in this case because the plaintiff filed his suit more than three years, but less than six years, after the alleged violation. Thus, whether the plaintiffs' claims were time-barred hinged on the answer to this question.

But more importantly, this case has implications for retirement plan sponsors and fiduciaries across the nation. Congress mandated that plan administrators make certain disclosures to plan participants to ensure that they are apprised of their investments. But aside from giving information to plan participants—which Intel indisputably did in this case—what can they do to ensure that the participants have actual knowledge about their investments? In other words, what steps can a plan sponsors or fiduciaries take to ensure that the three-year statute of limitations applies?

The answer, according to the Supreme Court, is not many. Writing for the unanimous Court, Justice Alito held that provision of investment disclosures to a plan participant does not necessarily mean that the plan participant has "actual knowledge" of the information in the disclosures.[16]

The Court began its analysis by analyzing the dictionary definitions of "actual" and "knowledge," and concluded that the term "actual knowledge," as used in ERISA,[17] refers to "a piece of information [that] one must in fact be aware of."[18]

The Court went on to distinguish "actual knowledge" from "constructive knowledge," which refers to knowledge that a reasonably diligent person would have learned, and pointed to other areas of ERISA where Congress made the distinction.[19] If Congress had intended to make the standard for the three-year limitations period "knew or should have known," according to the Court, it would have used that language.[20]

The Court's focus on the word "actual" went a long way in dismissing Intel's arguments. First, Intel made the textual argument that ERISA §413(2)'s use of the word "had" indicates that the participant's "actual knowledge" hinges on his or her possession (as through the disclosures) of the information.[21] But simply having the information in hand, as the plaintiff did in this case, is insufficient to demonstrate that he was "in fact aware of" it.[22] In addition, Intel's argument that, by providing the disclosures, they are complying with the purpose of ERISA's disclosure regime, which is intended to let the participants know where they stand regarding their investment plans, is equally undone by the word "actual."[23]

Finally, Intel argued that allowing plaintiffs to avoid the three-year limitations period by simply denying knowledge of the disclosures made to them would prevent plan administrators from ever realizing the benefit of the shorter limitations period that Congress wrote into the statute.[24] The Court acknowledged that, while that may be the case, Congress's use of "actual" precluded Intel's reading of the statute.[25] To read the statute the way Intel suggested would prevent plan participants from being able to utilize the longer six-year period and, to the extent that there has

[10] In this article, "Intel" will represent the various committees in charge of the plans.

[11] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 3.

[12] In this article, the term "participant" will also include "beneficiary."

[13] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 4.

[14] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 4.

[15] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 4.

[16] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 6.

[17] ERISA itself does not define the term.

[18] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 6.

[19] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 7. For sections of ERISA where Congress distinguished between "actual knowledge" and "Constructive knowledge," *see* ERISA §4003(e)(6), §4003(f)(5) (action by a corporation to conduct investigation); ERISA §4070(f)(1), §4070(f)(2) (action related to termination of single-employer plans); ERISA §4301(f)(1), §4301(f)(2) (action related to multiemployer plan).

[20] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 7-8.

[21] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 8.

[22] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 8-9.

[23] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 9.

[24] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 9.

[25] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 9.

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to be a policy decision chosen, the choice was Congress's, and not the Court's.[26]

The Supreme Court also did not address another important issue: what exactly a plaintiff must actually know about the defendant's conduct and the relevant law in order for the shorter limitations to apply.[27] Actual knowledge of what? The legal claim? The allegedly improper conduct? Without guidance from the Supreme Court, this question will have to be further developed by the lower courts.

Perhaps aware that its decision effectively prevents plan administrators from ever taking advantage of the three-year limitations period, the Court ended its opinion by noting that plan administrators can demonstrate "actual knowledge" in the "usual ways."[28] For example, if the plaintiff does recall reading the disclosures, he or she is bound to say so if asked during a deposition.[29] Of course, the plaintiff would have a strong incentive to not recall reading the disclosures if doing so means the difference between a viable and a time-barred claim. Moreover, a person may find it difficult to recall what he or she read several years earlier.

The Court also noted that "actual knowledge" can be proved through circumstantial evidence. While the Supreme Court does not define the term "circumstantial evidence," it includes examples such as records that the plaintiff viewed the electronic information and took some action in response.[30] In *Sulyma*, however, the plaintiff admitted that he viewed Intel's website containing information about the plans 68 times.[31] If a plaintiff can access the information 68 times in two years and not acquire "actual knowledge," it is difficult to see how "actual knowledge" can be inferred from circumstantial evidence.

That, of course, is the uncontradicted evidence that Intel presented. Thus, the provision of the information that Intel presented is a necessary, but not a sufficient, component to "actual knowledge," and the plan administrator would presumably have to present some additional evidence. What that evidence may be, however, is anyone's guess.

[26] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 10.

[27] *See Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 5, n.2 (noting that the lower "court also addressed the separate question of what exactly a plaintiff must actually know about a defendant's conduct and the relevant law in order for §1113(2) to apply," but stating that that question was not before the Supreme Court and would not be addressed).

[28] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 11.

[29] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 11.

[30] *Sulyma*, No. 18-1116, 2020 BL 69188, slip op. at 11. In addition, Black's Law Dictionary defines "circumstantial evidence" thus: "Evidence based on inference and not personal knowledge or observation." 8th Ed. (1999).

[31] *Sulyma v. Intel Corp. Policy Comm.*, 2017 BL 106910 at 3 (N.D. Cal. Mar. 31, 2017).

Finally, plan sponsors or fiduciaries could present evidence that the plaintiff was "willfully blind" to the information. Again, it is difficult to envision what other steps the plan administrator can do besides presenting the participants with the information and tracking whether they accessed the information.

The upshot of this decision is that many, if not all, cases involving imprudent-investor claims are going to have a six-year statute of limitations, as the three-year limitations period will be limited to instances where the participant admits that he or she read and understood the disclosures. And therein lies the rub: the applicability of the three-year period depends on circumstances out of the plan administrators' hands. Instead, the limitations period will depend on what the participants recall (or admit having recalled) and this will vary from participant to participant.

It is not in their best interest for participants to turn a blind eye to mandatory disclosures given to them. In participant-directed pension plans ". . .no person who is otherwise a fiduciary shall be liable . . . for any loss, or by reason of any breach, which results from such participant's exercise of control.[32] Prudence in the selection and or monitoring of the investments at question would have to be proven. Accordingly, reliance on a lawsuit would not be the most prudent route to take in managing retirement funds. Plan participants should review the mandatory disclosures and more importantly, if they do not understand them, they should seek clarification from plan sponsors and fiduciaries.

But the law is the law, and now that the United States Supreme Court has addressed the issue, plan sponsors and fiduciaries should expect that the six-year limitations period will apply to imprudent-investor claims. If the Supreme Court's decision is not consistent with Congress's intent in creating the three-year limitations period (and we suspect it may not), the ball is in Congress's court to amend the statute to make its intent clearer. Until then, plan sponsors and fiduciaries should plan accordingly.

So what should sponsors and fiduciaries do? As we stated in our previous article:

> [I]t would be worthwhile for fiduciaries to review their plans to ensure they are meeting their reporting and disclosure requirements. In addition, review of the level of participant education provided should be assessed to ensure participants are actively engaged and understand disclosures issued to them. Lastly, with the newly proposed electronic regulations, plan sponsors should submit comments on whether there should be a mechanism to track that the disclosures were

[32] ERISA §404.

opened, and have an efficient procedure to have participants acknowledge receipt and that they understand such disclosure.[33]

[33] *See* Jara & Fassano, Note 4, above at 166.

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