

Supreme Court holds “actual knowledge” in ERISA statute means “what it says”

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On February 26, 2020, the Supreme Court held that the term “actual knowledge” in the ERISA statute of limitations clause found in 29 U.S.C. §1113(2), ERISA §413 applicable to breach of fiduciary duty cases means “what it says”: “to have ‘actual knowledge’ of a piece of information, one must in fact be aware of it.”

The ruling came out of the case *Intel Corp. Investment Policy Committee v. Sulyma*, No. 18–1116, filed in 2015 by an ERISA plan participant on behalf of a putative class alleging that the Intel Corp. Investment Policy Committee (“Intel”) breached its fiduciary duties when it increased investments in “alternative” investments (e.g. hedge funds, private equity, and commodities) that generated sub-par returns in the post-recession market. Sulyma received disclosures from Intel regarding the Committee’s investment decisions in 2011 and 2012, but he testified that he did not remember viewing them.

After Sulyma filed suit in 2015, Intel moved for summary judgment, arguing that because he received the disclosures more than three years earlier, his claim was time barred under the three-year statute of limitations set forth in §1113(2). Rejecting Sulyma’s argument that his claim was instead subject to ERISA’s six-year statute of repose, the district court agreed with Intel and granted its motion for summary judgment. The Ninth Circuit reversed on the basis that “actual knowledge” required more than proof of sufficient disclosure, further widening a circuit split created by a 2010 Sixth Circuit opinion holding that actual knowledge required only such disclosure. See *Brown v.*

Owens Corning Investment Review Comm., 622 F.3d 564, 571 (6th Cir. 2010).

The Supreme Court affirmed the Ninth Circuit, thereby resolving the circuit split. To arrive at this holding, the Supreme Court relied on dictionary definitions, past

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precedent, and Congress's repeated "linguistic distinctions" in the ERISA statutory scheme regarding what a plaintiff should know or actually knows. Specifically, the Court placed great stock in the fact that in some parts of the ERISA statutory scheme, Congress created statutes of limitation based on "the earliest date on which the plaintiff acquired *or should have acquired* actual knowledge of the existence of such cause of action," while in others it specified only actual knowledge. *Compare* 29 U.S.C. §1303(e) (6), (f)(5) (emphasis added) *with* §1113(2). Because section 1113(2) provides only for "actual knowledge" without explicitly identifying any other forms of knowledge, the Court ruled that constructive knowledge was not enough to trigger the statute.

Although *Sulyma* involved a retirement plan, it has implications for employer-sponsored health plans that are also governed by ERISA. While the Court's ruling makes it harder for defendants to win summary judgment on ERISA's three-year "actual knowledge" statute of limitation, the Court did not entirely foreclose such relief. The Court stated defendants can still prove actual knowledge through inferences from circumstantial evidence, such as evidence of disclosure, electronic records showing receipt and reviews of those disclosures, and actions taken in response to the information contained within them. But such evidence may be disputed as a factual matter, making judgment on an early dispositive motion more difficult. Nevertheless, some plan sponsors may wish to consider implementing additional procedures associated with the distribution of plan documents and the disclosure of plan information to create a stronger evidentiary record of when participants become aware of a particular development.

In addition, the Court opened a potential window for defeating motions for class certification. Under the Federal Rules of Civil Procedure, a class may be certified only when plaintiffs present "common issues" of law and fact, and when their claims are "typical" of those of others in the class. Fed. R. Civ. P. 23. Whether a participant had "actual knowledge" of a particular communication or disclosure that might trigger the statute is inherently individual in nature, arguably precluding certification of a class. Thus, although *Sulyma* may provide ERISA plan participants with additional ammunition for defeating statute of limitation defenses in fiduciary misconduct cases, such claims may be more difficult to certify.

Finally, although the *Sulyma* Court did not address the subject, employers should be mindful of potential opportunities to manage ERISA risk by incorporating shorter limitation periods in plan documents. In *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99 (2013), the Supreme Court ruled that plans could impose shorter statutes of limitations on ERISA claims for benefits. Sponsors who choose to include such plan terms should be careful to ensure that these limits are consistent with updated case law and are properly communicated to participants and claimants. Although there is little case law providing that this same rule will apply to breach of fiduciary duty claims, *compare Hewitt v. W. & S. Fin. Group Flexible Benefits Plan*, 17-5862, 2018 WL 3064564, at *2 (6th Cir. Apr. 18, 2018) (enforcing plan provision for shorter statute of limitations to fiduciary claim) *with Chelf v. Prudential Ins. Co. of Am.*, 3:17-CV-00736-GNS, 2018 WL 4219424, at *7 (W.D. Ky. Sept. 5, 2018) (declining to enforce plan provision for shorter statute of limitations to fiduciary claim), courts may provide greater

clarity in future litigation.