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ERISA's Three-Year Statute of Limitations for Breach of Fiduciary Duty Claims Post-*Intel*: What Protections for Plan Fiduciaries Remain?

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The key policies underlying the enactment of the Employee Retirement Income and Security Act ("ERISA") included the establishment of clear and consistent rules for the processing of benefit claims, along with insuring participants had appropriate remedies and ready access to the federal courts.[1] A related principle was the establishment of statutes of limitations to insure the prompt resolution of disputes. Such provisions serve equally important purposes. As one court has observed, limitations periods "promote fairness concerns."[2] They also minimize the difficulties that may arise in courts having to "resolve disputes long after the key events took place."[3]

ERISA claims are subject to varying limitations periods, depending on the type of claim. 29 U.S.C. § 1113 (i.e., ERISA § 413) sets forth the statute of limitations applicable to breach of fiduciary duty claims. Section 1113 limits actions to those filed six years "after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation."[4] This is effectively a statute of repose.[5]

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Alternatively, if "the plaintiff had *actual knowledge* of the breach or violation," the plaintiff must file his or her action within three years of the "earliest date" on which the plaintiff gained that knowledge.[6]

This shorter limitations period is this column's focus in light of the U.S. Supreme Court's recent decision in *Intel Corp. Investment Policy Committee et al. v. Sulyma* ("*Intel*"). As discussed below, *Intel* likely expands the time period under which certain claims may be brought. But *Intel*'s holding regarding "actual knowledge" may also have other unintended implications for the type of benefit claims plans and plan administrators may face.

Background

Notwithstanding the obvious intended benefit of limitations periods, the actual knowledge requirement in Section 1113 – which the U.S. Court of Appeals for the Second Circuit has described as "enigmatic – almost chimerical,"[7] has led to confusion and inconsistent interpretation, "vex[ing] the circuits."[8] Obviously, the existence of "enigmatic" standards is not exactly an outcome that helps plan sponsors and participants understand the rules that govern their rights and obligations.

Specifically, courts have struggled with two interpretative questions.

First, courts differ on what a plaintiff must know to have "actual knowledge *of the breach or violation*." In particular, courts divide on whether a plaintiff must only be aware of the transaction or facts giving rise to the breach,[9] or must know that those facts constitute a fiduciary breach or ERISA violation;[10] others seek to adopt a middle ground approach.[11]

Second, courts split on what level of awareness is required to establish "*actual* knowledge," and whether this includes facts made available to, but not actually reviewed by, a plaintiff.

This second question is what the Supreme Court addressed in *Intel*.

Circuit Split Leading to Intel

In the decades preceding *Intel*, a majority of circuits construed "actual knowledge" in Section 1113(2) as requiring something more than access to information. In *Brock v. Nellis*, for example, the U.S. Court of Appeals for the Eleventh Circuit held that for the purposes of actual knowledge, "knowledge of facts sufficient to prompt an inquiry which, if properly carried out, would have revealed [the defendants'] misdeed," was not "actual knowledge."[12] The court explained that it is "not enough that [the plaintiff] had notice that something was awry." Instead, "specific knowledge" was required.[13]

The U.S. Court of Appeals for the Seventh Circuit, in *Radiology Center,* adopted the Eleventh Circuit's view.[14] At issue in *Radiology Center* was

a fiduciary's unauthorized trades. Plaintiffs had been made aware of these trades through confirmation slips, some of which they signed and returned to defendants, as well as monthly account statements.[15]

The Seventh Circuit held that the district court erred in applying Section 1113(2) to bar the claim because the district court applied a constructive – as opposed to actual – knowledge standard. In particular, the district court held that these disclosures were "storm warnings" that should have caused a "reasonably diligent" plaintiff to investigate, and thus were sufficient to trigger Section 1113(2).[16] The Seventh Circuit remanded for the application of an "actual knowledge" standard.[17] Other circuits followed suit.[18]

In contrast, however, the U.S. Court of Appeals for the Sixth Circuit held that actual knowledge could be satisfied by showing the plaintiff had access to relevant information.[19] At issue in *Brown* was on what date plaintiffs gained actual knowledge that the ERISA plans had fiduciaries responsible for managing the funds.[20] The Sixth Circuit reasoned that plaintiffs obtained this knowledge when they were "*provided*" with the plans' SPDs and other plan communications, and disagreed with plaintiffs that actual knowledge required "proof that the individual Plaintiffs actually saw or read the documents."[21]

This Sixth Circuit further reasoned that "[w]hen a plan participant is given specific instructions on how to access plan documents, their failure to read the documents will not shield them from having actual knowledge of the documents' terms."[22] This divergence of analytical approaches created a split of authority needing Supreme Court intervention.

Intel Corp. Investment Policy Committee et al. v. Sulyma

The Supreme Court granted certiorari in *Intel* to answer the question of "whether a plaintiff necessarily has 'actual knowledge' of the information contained in disclosures that he receives but does not read or cannot recall reading."[23]

Respondent Sulyma worked for Intel from 2010 to 2012, and was a participant in two Intel retirement plans.[24] The payments into these plans were invested in two funds managed by the Intel Investment Policy Committee.[25] Following the 2008 stock market crash, the Committee increased the percentage of the funds' investments in "alternative assets" including hedge funds, private equity, and commodities.[26] These assets carried higher fees, and as the stock market recovered, they underperformed as compared to more traditional investments.[27]

In October 2015, within six years of the alleged breaches, Sulyma brought suit on behalf of a putative class, alleging that the committee and other plan administrators breached their fiduciary duties by over-investing in the alternative assets.[28] Defendants moved for summary judgment on Sulyma's claims, arguing that Sulyma had the "actual knowledge" required by Section 1113(2) more than three years before he brought suit.[29]

Defendants claimed that this knowledge was gained through disclosures Sulyma received while working at Intel, including e-mails directing Sulyma to a benefits website that hosted notices breaking down the investment structure of his accounts, and summary plan descriptions which mentioned the alternative investments and referred to documents showing the investments in graphical form.[30] Records showed Sulyma frequently visited the benefits website during his employment.[31]

Despite the foregoing, Sulyma testified during his deposition that he did not "remember reviewing" these disclosures, and that he was "'unaware' while working at Intel 'that the monies that [he] had invested through the Intel retirement plans had been invested in hedge funds or private equity.'"[32] He also pointed to inconsistencies in the documents made available to him.[33]

The U.S. District Court for the Northern District of California held that these disclosures were sufficient to give Sulyma "actual knowledge" as required by Section 1113, and granted summary judgment for defendants.[34] It reasoned that while there were some "inconsistencies" in the documents, "most of the documents reflected the high percentage of investments in hedge funds, private equity, and commodities" and "[i]t would be improper to allow Sulyma's claims to survive merely because he did not look further into the disclosures made to him."[35]

The U.S. Court of Appeals for the Ninth Circuit reversed, holding that "'actual knowledge' means the plaintiff is actually aware of the facts constituting the breach, not merely that those facts were available to the plaintiff."[36] Accordingly, while Sulyma had "sufficient information available to him," this was "insufficient" given Sulyma's testimony that he did not recall reviewing that information. The court concluded that there was a disputed issue of fact over whether Sulyma had the requisite "actual knowledge" that "only a fact-finder could have determined."[37]

In a unanimous opinion, the Supreme Court affirmed, holding that the meaning of "actual knowledge" is "plain."[38] According to the Court, actual knowledge begins when the "plaintiff actually is aware of the relevant facts, not when he should be."[39] In support of that holding, the Court cited dictionary definitions of "actual," emphasizing that "actual" meant "existing in fact" as opposed to "presumed" or "imputed."[40] It further noted that other ERISA limitations provisions contain an explicit constructive knowledge clause,[41] and that an earlier version of Section 1113 also contained a constructive knowledge clause, but that Congress later removed it.[42] The Court presumed that Congress acted intentionally in its drafting of, and amendments to, these provisions.[43]

The Court rejected defendants' argument that "[o]nce plan administrators satisfy their obligations to impart knowledge . . . § 1113(2)'s knowledge requirement is satisfied" as giving the word "actual" little meaning.[44] And while it acknowledged that its reading of Section 1113(2) may "substantially diminish[] the protection that it provides for ERISA fiduciaries," it explained that Congress, not the Court, must decide whether to amend the statute.[45]

At the end of the opinion, however, the Court attempted to demonstrate how Section 1113(2) can still provide some protection to fiduciaries. It explained that "[n]othing in this opinion forecloses any of the 'usual ways' to prove actual knowledge."[46] Most obviously, plaintiffs are required to testify that they read a particular disclosure, if they indeed did.[47]

Moreover, the Court further explained that "actual knowledge can be proved through inference from circumstantial evidence."[48] This includes evidence of disclosures and any evidence that a plaintiff viewed or took action in response to them.[49] This evidence could support summary judgment "[i]f a plaintiff's denial of knowledge is 'blatantly contradicted by the record.'"[50] Moreover, evidence of "willful blindness" will also support a finding of "actual knowledge."[51]

Implications

Assessing *Intel*'s aftermath can best be organized into the old good news/bad news framework. And in order to end this article on a positive note, we address the "bad news" first.

On the "bad news" front, *Intel* clearly sets a high bar defendants must clear in attempting to show the existence of "actual knowledge." Indeed, given the evidence the *Intel* court found insufficient to prove actual knowledge – receipt of documentation and accessing relevant websites – it is difficult to envision a circumstance, other than where the plaintiff unequivocally admits he or she received, read and understood the relevant documentation, where a claim on summary judgment will be found time-barred based on the actual knowledge standard.

The few cases that have already applied *Intel* seem to bear this out. For example, in *Bouvy v. Analog Devices, Inc.*, the U.S. District Court for the Southern District of California provided a straightforward application of *Intel*'s actual knowledge standard.[52] Plaintiffs brought claims for breach of fiduciary duties related to 401(k) investment selections and management fees.[53] The court denied defendants' motion to dismiss on the ground that the claim was time-barred under Section 1113(2) because there was an unresolved factual question on the issue of actual knowledge.[54] It was not sufficient that the relevant information was available in an "'easily understood' [online] format," especially when "Defendants do not contend that Plaintiffs accessed the information."[55] Evidence that plaintiff transferred money in and out of the funds was also insufficient.[56]

Similarly, in *Toomey v. DeMoulas Super Markets, Inc.*, the U.S. District Court for the District of Massachusetts refused to dismiss based on the statute of limitations where the complaint contained an allegation asserting plaintiff did not obtain actual knowledge of the material facts until right before filing suit.[57]

As noted above, the Supreme Court did state that actual knowledge may still be established by producing circumstantial evidence or proving

willful blindness. But, again, such fact-bound inquiries are unlikely in most cases to be resolved on summary judgment. Thus, the actual knowledge standard set by *Intel* may lead to at least prolonged litigation. But this may simply be the consequence of Congress' decision to set an actual knowledge standard for the shorter limitations period.

Nonetheless, on the "good news" front, plan sponsors are not without steps they can take to mitigate the impact of *Intel*'s actual knowledge standard. *First*, plans can take advantage of the DOL's electronic disclosure rules,[58] to better track the information participants are provided, as well as when such information is reviewed by a participant. However, given that mere receipt of information is insufficient to meet *Intel*'s actual knowledge standard, plans should combine electronic delivery with use of "click through" or "clickwrap" agreements. Such an approach should require the participant to acknowledge he or she read, understood and agreed to the terms of the applicable disclosures.

However, even this approach still requires plan disclosures to use clear and concise language that highlights the key provisions for which consent is critical. Asking a plan participant to click through a bunch of dense, fine print may lead to the same conclusion reached in *Intel*.

Finally, whatever impact *Intel* may have on efforts to demonstrate a claim is time-barred, the standards it sets may have some unintended consequences for plaintiffs' efforts to pursue class actions. Like other causes of action, claimed ERISA violations may not be pursued as a class action where there are individualized issues that prevent resolution of the case on a classwide basis.[59] To the extent plaintiffs must show they were aware of, read and understand the disclosures upon which they base their claim, such inquires may pose barriers to class certification. As was noted during the *Intel* oral argument, seeking a high bar for proving actual knowledge may be a classic case of "be careful what you wish for."[60]

Whether such a consequence comes to pass in future ERISA class actions claims remains to be seen. But plans should closely watch for such developments and consider how the actual knowledge standard may affect their defense of future benefit claim disputes.

Notes

1. S. Rep. No. 117 (1993).

2. *Winnett v. Caterpillar Inc.,* 609 F.3d 404, 414 (6th Cir. 2010).

3. *Id.*

4. Section 1113(1).

5. *Intel Corp. Investment Policy Committee et al. v. Sulyma*, 140 S. Ct. 768, 774 (2020).

6. Section 1113(2) (emphasis added). In the "case of fraud or concealment," a plaintiff may commence a claim "not later than six years after the date of discovery of such breach or violation." *Id.*

7. *Caputo v. Pfizer, Inc*., 267 F.3d 181, 184 (2d Cir. 2001).

8. *Edes v. Verizon Commc'ns, Inc*., 417 F.3d 133, 141 (1st Cir. 2005).

9. *See Brock v. Nellis*, 809 F.2d 753, 755 (11th Cir. 1987*)*; *Radiology Ctr., S.C. v. Stifel, Nicolaus & Co*., 919 F.2d 1216, 1222 (7th Cir. 1990); *Martin v. Consultants & Administrators, Inc*., 966 F.2d 1078, 1086 (7th Cir. 1992).

10. *Gluck v. Unisys Corp*., 960 F.2d 1168, 1177-78 (3d Cir. 1992) ("We disagree that mere knowledge of a transaction is always enough. 'Actual knowledge of a breach or violation' requires knowledge of all relevant facts at least sufficient to give the plaintiff knowledge that a fiduciary duty has been breached or ERISA provision violated."); *Reich v. Lancaster,* 55 F.3d 1034, 1057 (5th Cir. 1995) (requiring knowledge enough to understand that "some claim exists") (quoting *Gluck*, 960 F.2d at 1177).

11. *Sulyma v. Intel Corp. Inv. Policy Comm*., 909 F.3d 1069, 1075 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2692, *aff'd*, 140 S. Ct. 768 (2020).

12. 809 F.2d at 754.

13. *Id*. at 755.

14. 919 F.2d at 1222.

15. *Id*. at 1218.

16. *Id*. at 1223.

17. *Id*. On remand, the district court held that there was a genuine dispute as to when plaintiffs acquired actual knowledge and denied defendant's motion for summary judgment on this ground. *Radiology Ctr., S.C. v. Stifel, Nicolaus & Co*., No. 86 C 10166, 1991 WL 237809, at *2 (N.D. Ill. Nov. 4, 1991).

18. *Gluck*, 960 F.2d at 1177; *Caputo*, 267 F.3d at 193; *Browning*, 313 F. App'x at 661 & n.3.

19. *Brown v. Owens Corning Inv. Review Comm*., 622 F.3d 564, 570 (6th Cir. 2010).

20. *Brown*, 622 F.3d at 570.

21. *Id*. at 571.

22. *Id*.

23. *Intel*, 140 S. Ct. at 773.

24. *Id*. at 774.

25. *Id*.

26. *Id*.

27. *Id*.

28. *Id*.

29. *Id*. at 774-75; *see also Sulyma v. Intel Corp. Investment Policy Committee et al*., Case No. 15-cv-04977 NC, 2017 WL 1217185, at *2 (N.D. Cal. Mar. 31, 2017).

30. *Intel*, 140 S. Ct. at 774-75. *See also* 2017 WL 1217185, at *6-7 (describing the disclosures).

31. *Intel*, 140 S. Ct at 775. Indeed, he testified that it was possible he visited the website 68 times during his two-year employment. *Sulyma,* 2017 WL 1217185, at *2.

32. *Intel*, 140 S. Ct. at 775.

33. *Sulyma,* 2017 WL 1217185, at *8.

34. *Id.* at *12.

35. *Id.* at *9.

36. *Sulyma*, 909 F.3d at 1076.

37. *Id.* at 1077-78.

38. 140 S. Ct. at 776. Justice Alito wrote the opinion.

39. *Id.* at 778.

40. *Id.* at 776.

41. *Id.* at 777 (citing 29 U.S.C. §§ 1303(e)(6), (f)(5); §§ 1370(f)(1)-(2); §§ 1451(f)(1)-(2); § 1085(e)(9)(I)(iv)).

42. *Id.* at 778-79.

43. *Id.*

44. *Id.* at 777-78.

45. *Id.* at 778.

46. *Id.* at 779 (citations omitted).

47. *Id.*

48. *Id* (citations omitted).

49. *Id.*

50. *Id* (citations omitted).

51. *Id.* The court cited *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011) which sets forth the following requirements for willful blindness: "(1) The [party] must subjectively believe that there is a high probability that a fact exists and (2) the [party] must take deliberate actions to avoid learning of that fact."

52. *Bouvy v. Analog Devices, Inc.*, No. 19-CV-881 DMS (BLM), 2020 WL 3448385 (S.D. Cal. June 24, 2020).

53. *Id.* at *2.

54. *Id.* at *4.

55. *Id.*

56. *Id.* at *4.

57. No. CV 19-11633-LTS, 2020 WL 3412747, at *4 (D. Mass. Apr. 16, 2020).

58. Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, 85 Fed. Reg. 31884 (May 27, 2020).

59. *See, e.g., Fitzwater v. CONSOL Energy Inc.*, 2019 WL 5191245, *13 (S.D. W.Va. 2019) (citations omitted).

60. Tr. of Oral Arg. 44.