Supreme Court's Actual Knowledge Decision Underscores Importance of Plan Administrator Best Practices

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Courts across the country have wrestled with the meaning of "actual knowledge" in the context of an ERISA fiduciary breach claim for decades. The definition was solidified in Intel Investment Policy Committee v. Sulyma, and the case will have significant practical implications for ERISA plan administrators in how they distribute plan disclosures to participants particularly considering the increased use of electronic transmissions.

On February 26, 2020, the U.S. Supreme Court settled the debate over what constitutes "actual knowledge" in the context of an Employee Retirement Income Security Act of 1974 (ERISA) fiduciary breach claim. The unanimous decision applied dictionary definitions of the term "actual" to find that the fiduciary breach knowledge requirement means that "the plaintiff must in fact have become aware of that information." As courts across the country have wrestled with the meaning of "actual knowledge" for decades, the definition solidified in *Intel Investment Policy Committee v. Sulyma*[1] will have significant practical implications for ERISA plan administrators in how they distribute plan disclosures to participants particularly considering the increased use of electronic transmissions.

The dispute centered on whether a participant in Intel's retirement plans, Christopher M. Sulyma, possessed actual knowledge of changes made to two investment options in the plans—a "2045 Target Date Fund" and a "Global Diversified Fund"—that allegedly were imprudent in over allocating assets to alternative investments such as private equity and hedge fund investments.

The case, filed on October 29, 2015, would have been untimely if the Supreme Court found Sulyma possessed actual knowledge of the investment changes before October 29, 2012, because if an ERISA defendant can show a plaintiff possessed actual knowledge of his claims for more than three years, those claims will be dismissed. Since the term "actual knowledge" is not defined in ERISA, courts have attempted to define its meaning and have arrived at differing interpretations. This has been particularly the case where plan administrator disclosures

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inform participants of the performance, fees, strategy, and other characteristics of a plan investment option and that investment option is challenged as imprudent because it is overly expensive or has underperformed.

In the context of the *Sulyma* case, Intel claimed the actual knowledge provision was triggered as early as 2010 through several plan disclosures made to Sulyma, including: Fund Fact Sheets from 2010, 2011, and 2012; a 2011 Qualified Default Investment Alternative Notice; a 2012 Summary Plan Description; 2012 Annual Disclosures; and several disclosures on Intel's "NetBenefits" Website. Sulyma testified in his deposition that he simply could not remember reviewing any of these disclosures and was not aware of the change in the funds' asset allocation.

Could Sulyma have "actual knowledge" of the investment changes through receiving disclosures electronically, but supposedly not reviewing them? The first court to answer this question, the U.S. District Court for the Northern District of California, answered in the affirmative. It ruled that Sulyma possessed actual knowledge of the alternative investment exposure and as a result, his claims were barred. But the Ninth Circuit disagreed. The Ninth Circuit reasoned that a plaintiff must not just have access to, or received, plan disclosures; the plaintiff must have knowledge of the nature of the alleged fiduciary breach and laid out its actual knowledge test as: the defendant must show that the plaintiff was actually aware of the nature of the alleged breach more than three years before the plaintiff's action was filed.

The Supreme Court agreed with the Ninth Circuit's approach with important caveats. The core of the Court's decision applied layperson and legal dictionaries and ERISA legislative intent to find that: "as presently written, therefore, § 1113(2) requires more than evidence of disclosure alone . . . to meet § 1113(2)'s 'actual knowledge' requirement, however, the plaintiff must in fact have become aware of that information."

But in footnote two of the decision, Judge Alito noted that the Court would take no position on the Ninth Circuit's analysis of the question of what exactly a plaintiff must actually know about a defendant's conduct and the relevant law in order for Section 1113(2) to apply. Arguably this was the bigger issue to decide, considering the Ninth Circuit's analysis—that the plaintiff must have sufficient knowledge to be alerted to the particular claim—conflicted with the Sixth Circuit's decision in *Brown v. Owens Corning Inv. Review Committee*[2] that a plaintiff must only have actual knowledge of the "relevant facts" of the specific claim. Specifically, the Sixth Circuit in *Brown* concluded that a plan participant might have "actual knowledge" of a breach of fiduciary claim when the participant was provided documents or was given instructions on how to access documents that provided information that formed the basis of the claims. That decision was squarely at odds with the Ninth Circuit's decision in *Sulyma* that plan documents might not provide actual knowledge of the substance of an ERISA excessive fee and performance claim—merely by relaying the performance and fee data to an ERISA claimant. Because Judge Alito did not settle this dispute, district and appellate courts might apply footnote two and still arrive at differing conclusions in determining what information is necessary to confer actual knowledge of the substance of a fiduciary breach claim to a participant.

Setting the implications of footnote two aside, towards the end of his opinion, Justice Alito extended a life raft to plan administrators with important practical advice on how to sat-

isfy the actual knowledge requirement. In specifically emphasizing that "nothing in this opinion forecloses any of the 'usual ways' to prove actual knowledge," Justice Alito referred to the importance of electronic records that could show a plaintiff viewed the relevant disclosures and other evidence suggesting that the plaintiff took action in response to the information contained in them. Justice Alito made clear that future plaintiffs could not feign knowledge of such disclosures through "willful blindness" or deposition testimony that might not be accurate.

The *Sulyma* opinion smartly relayed, in plain and practical terms, what plan administrators must do to obtain participant knowledge of plan disclosures. Particularly relevant, as more disclosures become digital, is obtaining electronic records that demonstrate a participant has viewed and is aware of the plan disclosure. This evidence could be obtained through a participant clicking to a specific plan disclosure only after indicating they were aware of the type of disclosure they are viewing and the information conveyed to them in the disclosure. This aspect of the decision—seemingly recommending plan administrators to employ electronic records to prove actual knowledge—dovetails with the Department of Labor's (DOL) 2019 proposed rulemaking that attempts to provide a voluntary safe harbor for plan administrators that elect to provide electronic delivery as the default method of communication.

The proposed DOL rule supports the "notice" and "access" form of electronic delivery that would include: (1) a "notice of Internet availability" that includes a brief description of the document being posted online; (2) a Website address where the document is posted; (3) instructions for requesting a free paper copy or electing paper delivery in the future; and (4) a notice of Internet availability that would be sent each time a retirement plan disclosure is posted electronically.

While it is unclear as of the present date whether this proposed DOL rule will be adopted, plan sponsors that wish to sidestep any issues with participant knowledge of their disclosures might want to adopt the DOL's proposed guidance specifically with an eye to obtaining electronic records and other evidence that would satisfy the "usual ways" the Supreme Court suggested actual knowledge could be proven under 29 U.S.C.A. § 1113(2).

Indeed, to ensure plan participants are aware of investment changes and other revisions to the plan, plan administrators should ensure they have prudent procedures in place to relay plan disclosures and, if electronic disclosures are offered, that those disclosures satisfy the DOL's proposed rule that could become law this year. Such prudent procedures could not only protect against a potential breach of fiduciary claim, they could save plan administrators excessive costs in making mandatory plan disclosures by mail.

Like other components of ERISA fiduciary responsibilities, setting a thoughtful prudent process to ensure participants possess the requisite knowledge solidified in *Sulyma* is critical and could make a difference between defending an expensive fiduciary lawsuit beyond the three-year window or protecting plan fiduciaries from such a claim.

NOTES:

[1]Intel Corporation Investment Policy Committee v. Sulyma, 140 S. Ct. 768, 2020 Employee Benefits Cas. (BNA) 69188 (2020).

[2]Brown v. Owens Corning Inv. Review Committee, 622 F.3d 564, 49 Employee Benefits Cas. (BNA) 2505 (6th Cir. 2010) (abrogated by, Intel Corporation Investment Policy Committee v. Sulyma, 140 S. Ct. 768, 2020 Employee Benefits Cas. (BNA) 69188 (2020)).