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Harter Secrest & Emery LLP

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EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

THE SUPREME COURT'S *SULYMA* DECISION AND THE STATUTE OF LIMITATIONS FOR CLAIMS AGAINST ERISA FIDUCIARIES

The Employee Retirement Income Security Act of 1974 ("ERISA") requires fiduciaries responsible for administering and investing retirement plans to act (i) in accordance with plan documents (to the extent the plan documents comply with ERISA), (ii) in the best interests of plan participants and beneficiaries, and (iii) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person familiar with such matters would use in carrying out an enterprise of a like character and with like aims. Fiduciaries who breach ERISA's standard of care are liable for any losses that result from the breach. The Supreme Court's decision in *Intel Corporation Investment Policy Committee, et al., v. Sulyma* resolved a disagreement among the federal courts on how to calculate the deadline for filing a lawsuit alleging a breach.

In the absence of fraud or concealment by the fiduciary, a lawsuit alleging a breach of fiduciary duty cannot be filed after the earlier of:

- Six years after the date of the last action which constituted part of the breach or violation (or in the case of a claim alleging that a failure to act constituted a breach or violation, after the last date that the fiduciary could have cured the breach or violation), or
- Three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation.

In *Sulyma*, the Supreme Court addressed the question of when a plaintiff should be considered to have "actual knowledge" for purposes of measuring the three-year deadline for filing suit. In that case, the company's Investment Policy Committee had the fiduciary responsibility for managing certain investment funds available to its retirement plan participants. The funds held primarily stocks and bonds until the 2008 financial crisis. The committee then increased the portion of the funds' assets allocated to alternative investments such as hedge funds, private equity, and commodities, in order to reduce investment risk through greater diversification. As equity performance improved over the subsequent years, these alternative investments caused the funds' overall performance to lag compared to the return that would have been generated by less expensive index funds.

Plan participants, including Mr. Sulyma, were provided with disclosures, via email and a dedicated website, that revealed the presence of alternative investments within the plans' investment funds, the reasons for including those asset classes and the expenses of the funds. Although computer records demonstrated that Mr. Sulyma had visited the relevant website many times, he stated that he did not remember reviewing the disclosures and was unaware while working at Intel that his retirement accounts held hedge funds and private equity investments.

Practice Group Leader
Paul W. Holloway

Health and Welfare
Thomas J. Hurley
John W. Brill

Retirement
Mark R. Wilson

Executive Compensation
Christopher M. Potash

Counsel
Leslie E. DesMarteau
Lisa G. Pelta
Joseph E. Simpson

Associates
Amanda M. Karpovich
Paige N. Monachino
Crosby A. Sommers

Benefits Litigation Counsel
Megan K. Dorritie
Erika N. D. Stanat

Mr. Sulyma brought legal action against the Investment Policy Committee more than three years after disclosures had been made available to him but within six years of the alleged breaches. He alleged that the relative performance of the alternative investments, the higher expenses associated with them, and an alleged failure to monitor the funds amounted to a breach of ERISA's standard of fiduciary conduct. The defendants asserted that Mr. Sulyma's action was untimely, since it was filed more than three years after the Committee had "disclosed their investment decisions to him."

In deciding in favor of Mr. Sulyma, the Court stated that, "to have 'actual knowledge' of a piece of information, one must in fact be aware of it." It went on to say, citing *Black's Law Dictionary*, that "The addition of 'actual' in [the statute] signals that the plaintiff's knowledge must be more than 'potential, possible, virtual, conceivable, theoretical, hypothetical, or nominal." Accordingly, a fiduciary alleging that a claim was brought more than three years after a plaintiff had "actual knowledge" of the alleged breach will need to prove that the plaintiff was indeed aware of the complained-of acts or omissions.

In that regard, the Court addressed concerns that this standard would make it more difficult for defendants to defend against investment claims, noting that Congress had to balance the interests of fiduciaries against those of plan participants and the Secretary of Labor. The Court also observed that participants who do in fact recall reading plan disclosures are required to admit as much under oath when giving a deposition. In addition, the Court remarked that in proving "actual knowledge," "Evidence of disclosure would no doubt be relevant, as would electronic records showing that a plaintiff viewed the relevant disclosures and evidence that the plaintiff took action in response to the information contained in them." The Court also offered one potential softening of its formulation of actual knowledge, commenting that, "Today's opinion also does not preclude defendants from contending that evidence of 'willful blindness' supports a finding of 'actual knowledge'." Presumably the Intel defendants will attempt to establish that Mr. Sulyma did in fact have the requisite knowledge as the case proceeds.

In the wake of the Court's decision, fiduciaries and plan sponsors should consider the following:

- Fiduciaries must provide mandated participant disclosures in a timely fashion, and be sure they are clear and easy to understand. Keep copies of the disclosures and of the dates on, and methods by which, they were provided.
- Supplement mandatory disclosures as appropriate to ensure that participants have access to all the information a prudent investor would typically want to review when making investment decisions. Once again, keep copies of materials provided and records of how and when those materials were made available.
- If the plan's computer system keeps track of whether a particular participant has logged on and visited the disclosure page, retain those records.
- Some commentators have suggested using a "click-through" button to require participants to confirm that they have read and understood disclosures, but this approach can be problematic. Fiduciaries should discuss the risks and advantages with their counsel before making a decision.
- When a live presentation is made available to participants, whether in person or online, keep a record of who attended and of the content of the presentation.

- Consider taking advantage of the Supreme Court's confirmation in an earlier decision (Heimeshoff v. Hartford Life & Accident Ins. Co. et al.) that plans are permitted to impose contractual deadlines on legal actions.
  - Plan sponsors should consider adding plan provisions that create a contractual statute of limitations based on when information is made available to participants, or when participants, in the exercise of reasonable diligence, should have known about the facts underlying an allegation of a breach of fiduciary duty.
  - Plan sponsors whose plans already contain contractual deadlines should review the language of those provisions to determine whether clarifications or adjustments are advisable in the wake of the Sulyma case, and to confirm that the deadlines apply to fiduciary breach claims and not just to claims for benefits.
  - Plan administrators need to be sure that contractual statutes of limitations are properly disclosed in the plan's summary plan description and included in claim denial communications.
- One bright spot for defendants is that the highly individualized nature of the Supreme Court's "actual knowledge" formulation may complicate class action certification requests. However, plan sponsors may wish to consider other defensive measures, such as anti-class-action arbitration clauses. While adding a clause of this type means that the plan sponsor and fiduciaries need to be prepared for multiple arbitration proceedings, the presence of a bar on class actions can be an obstacle to lawsuits aimed at pressuring sponsors into large settlements.

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