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Ninth Circuit Clarifies "Actual Knowledge" for ERISA's Statute of Limitations

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The Employee Retirement Income Security Act of 1974 (ERISA) fiduciaries often assert statute of limitations as an affirmative defense to breach of fiduciary duty claims. Under ERISA, a plaintiff must bring a claim within three years from the earliest date the plaintiff has "actual knowledge" of the breach or violation. The US Court of Appeals for the Ninth Circuit's decision in *Sulyma v. Intel Corporation Investment Policy Committee,* No 17-15864 (Nov. 28, 2018) identifies a circuit split on what the plaintiff must have actual knowledge of, and whether constructive knowledge constitutes "actual knowledge" for purposes of the statute of limitations. The precise knowledge a plaintiff must have depends on the nature of the claim, but knowledge of illegality under ERISA is not required to trigger ERISA's three-year statute of limitation. In some instances, knowledge of a transaction alone can be sufficient if the claim is premised in the inherent breach by engaging in the transaction. However, if the transaction itself is not inherently a breach of fiduciary duty, the plaintiff must have actual knowledge of something more. The Ninth Circuit emphasized its view that "actual knowledge" means just that – actual, not constructive knowledge.

Courts have long struggled in applying ERISA's statute of limitations. Generally speaking, absent fraud or concealment, an ERISA breach of fiduciary duty claim must be brought before the earlier of: (1) within 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; or (2)three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation. 29 USC § 1113.

In *Suluyma*, the plaintiff had worked for Intel and invested in Intel's 401(k) plan (the Plan). When the Plan funds were established, they did not include "alternative investments," such as hedge funds. Intel decided to reduce risk by diversifying investments, including adding alternative investments. However, the reduction in investment risk came at the cost of higher fees and lower performance during periods of strong returns in the equity market. Intel disclosed these investment decisions to plaintiff and other participants through various documents, including on two websites for participants in 2010 and other years. The documents disclosed both the fact of the alternative investments and the basic strategy behind the decision to invest in them. While plaintiff admitted accessing "some" of the information on the websites, he claimed he was not actually aware that his Plan funds were invested in alternative accounts even though that fact was plainly disclosed in the materials. About

five years after disclosures were made to plaintiff and about three years after he left Intel, in 2015 plaintiff allegedly learned about the poor performance of his Plan funds. Plaintiff filed a complaint claiming that the Intel investment committee committed a fiduciary breach in violation of 29 USC § 1104 by imprudently investing in alternative investments. Intel filed a motion to dismiss, arguing that the Plan's disclosures gave plaintiff knowledge of underlying facts and thus the claim was barred by the three-year statute of limitations. The district court converted the motion to a motion for summary judgment and ruled that the action was time barred because plaintiff had actual knowledge of the alternative investments more than three years before he filed the complaint.

In reversing the district court, the Ninth Circuit explained the two-step test to determine whether a claim is barred by ERISA's three-year statute of limitations for fiduciary breaches. First, a court must "isolate and define the underlying violation upon which [the] plaintiff's claim is founded." Second, a court must "inquire when [the plaintiff] had 'actual knowledge' of the alleged breach or violation." The Ninth Circuit noted that, "knowledge of illegality under ERISA is not required to trigger [ERISA's] three year statute of limitations." Knowledge of the alleged breach also does "not merely mean that a plaintiff has knowledge that the underlying action occurred." The plaintiff must have actual knowledge of "something between bare knowledge of the underlying transaction, which may trigger the statute before a plaintiff was aware he or she had reason to sue, and actual legal knowledge, which only a lawyer would normally possess."

In attempting to describe the "extra something" that must be present, the Ninth Circuit stated "the defendant must show that the plaintiff was actually aware of the nature of the alleged breach more than three years before" the action was filed. The exact knowledge will change depending on the case. For a case involving a breach of ERISA's general duty of prudence under 29 USC § 1104, the plaintiff must be aware "that the defendant acted and that those acts were imprudent." The court did not, however, specify what it means to be aware that acts were imprudent. Conversely, in a 29 USC § 1106 prohibited-transaction case, the plaintiff need only be aware that the defendant engaged in a prohibited transaction, because the transaction itself is inherently illegal (unless exempted).

The Ninth Circuit further emphasized that actual knowledge, not constructive knowledge, is required. Defendants in these cases often rely on disclosures in Plan documents detailing the transactions at issues (such as types of investments, fees, *etc.*). The Ninth Circuit expressly rejected those disclosures as providing sufficient actual knowledge if the plaintiff denies actually reading them. The Ninth Circuit noted and rejected, for example, that the Sixth Circuit has held that "[when 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."

With regard to Sulyma's claims, the Ninth Circuit agreed with the defendant that the plaintiff "had sufficient information available to him to know about the allegedly imprudent investments" more than three years before filing the complaint. But plaintiff had testified that he "did not recall" reading any documents during his employment that alerted him to the fact that his monies were invested in the hedge funds or private equity and was unaware that the information was posted on the Plan websites. The Ninth Circuit ruled that this created an issue of material fact as to whether the plaintiff had "actual knowledge" of the breach three years before filing the lawsuit.

There are two important points to take-away from this case. The first relates to prohibited-transactions claims and when the statute of limitations begins to run. Some courts have held that knowledge of a prohibited transaction alone is not enough to start the statute of limitations even if the plaintiff brings a claim for violations of ERISA's prohibited-transaction provisions. The Ninth Circuit's holding on this point make sense; a prohibited-transaction claim can be brought based solely on

knowledge that a transaction occurred, thus the date a plaintiff learns of the transaction should start the three-year limitations period. But the Ninth Circuit's interpretation of "actual knowledge" is practically problematic. A defendant will have to prove that a plaintiff in fact *read* materials in order to show a plaintiff had knowledge of facts contained in those materials. In our experience, plaintiffs in ERISA cases do not always read information about their accounts and plans, despite repeated and fulsome attempts by the plans to educate participants. Plan fiduciaries should consider requiring participants to acknowledge receipt and review of materials to help avoid a factual dispute.

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