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The Latest On Defending ERISA Fiduciary Breach Claims

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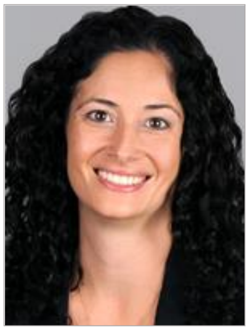
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The last few decades have seen a large number of class action suits brought by participants in Employee Retirement Income Security Act plans challenging the prudence and loyalty of fiduciaries overseeing their employer-sponsored retirement benefits. Although plaintiffs counsel focused initially on 401(k) plans, in recent years they have broadened their challenges to include 403(b) plans.

Notably, plaintiffs have targeted private universities with large retirement plans, including New York University, University of Pennsylvania and Duke University, among others. Plaintiffs in these suits seek to certify large classes of retirement plan participants, claiming they suffered harm to their retirement accounts stemming from alleged breaches by plan fiduciaries. ERISA's six- and three-year statutes of limitations had been key tools for defendants to bar or temporally narrow plaintiffs' claims. Recent cases have affected the ability of defendants to rely on either of these limitations periods, however.

With the U.S. Supreme Court's 2015 decision in Tibble v. Edison International,[1] and more recently, the U.S. Court of Appeals for the Ninth Circuit's Nov. 28, 2018, decision in Sulyma v. Intel Corp. Investment Policy Committee,[2] appellate courts are raising the bar on when a defendant may succeed on a statute of limitations defense.

ERISA's statute of limitations provides that "[n]o action may be commenced ... with respect to a fiduciary's breach of any responsibility, duty, or obligation ... after the earlier of — (1) six years after (A) the date of the last action which constitutes 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."[3]

In other words, the general rule is that any claim is barred if commenced more than six years after an alleged breach (or, in the case of an omission, more than six years after the last date the fiduciary could have cured the breach), but the limitations period can be shortened to three years if the plaintiff had "actual knowledge" of the breach or violation.

In Tibble, the Supreme Court addressed ERISA's six-year statute of limitations, explaining that a claim that fiduciaries retained imprudent investment options will not be untimely if the plaintiff can allege that a fiduciary "breach[ed] the continuing duty" to *monitor* plan investments "within six years of suit."[4] The court reasoned that "[u]nder trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones" and that this duty "exists separate and apart" from the duty to "exercise prudence in selecting investments at the outset."[5] Thus, "so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely," even if the fiduciary first selected the purportedly imprudent investments outside the six-year window.[6] This holding effectively creates a rolling six-year statute of limitations that is triggered whenever a plan fiduciary *should have* — or did — monitor allegedly imprudent investments.

Not only does the Tibble decision apply to claims regarding the selection and maintenance of imprudent investment options, at least one court has applied the Supreme Court's reasoning to other claims as well. In In re Northrop Grumman Corp. ERISA Litigation, the district court concluded that prohibited transactions claims challenging payments for administrative services stemming from contracts first executed outside the limitations period — but which were in force throughout the limitations period — were not time-barred.[7]

Applying the Tibble analysis, the court reasoned that because the contracts were reviewed and approved on a yearly basis, and because "[t]he duty not to engage in prohibited transactions derives from the general duty of loyalty recognized by the common law of trusts," which "continues throughout the administration of a trust," defendants had a continuing duty to ensure the contracts did not involve prohibited transactions that were triggered at each annual review.[8] This line of reasoning suggests that the Tibble analysis might well govern whenever fiduciaries had a duty to monitor service agreements or the performance of record-keepers, as well as the performance of investments.

As to ERISA's three-year limitations period, the Supreme Court has not yet weighed in on when a plaintiff has "actual knowledge" of a breach or violation. However, a recent decision by the Ninth Circuit may be the right vehicle for the court to address this issue.

In Sulyma, the Ninth Circuit held that a defendant can no longer eliminate or narrow claims by showing that it merely *provided* plan materials to plaintiffs that disclosed relevant facts (or that the materials were publicly available) more than three years before plaintiffs filed suit.[9] Under Sulyma, for a defendant to show that a plaintiff had "actual knowledge" sufficient to trigger the limitations period, the defendant must show that the plaintiff *actually reviewed* plan documents and disclosures.[10]

Thus, while the three-year limitations defense was previously available pre-discovery if defendants could cite to judicially noticeable materials — such as IRS filings and U.S. Department of Labor-mandated fee disclosures[11] — this is no longer the case. Now, if the face of the complaint does not reveal when plaintiffs first had knowledge of the facts underlying their claims, defendants must take discovery to get this information.

As the Ninth Circuit recognized in Sulyma, its "actual knowledge" standard conflicts with the Sixth Circuit's interpretation of that term. In Brown v. Owens Corning Investment Review Committee,[12] the Sixth Circuit held 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."[13] The Sixth Circuit's reasoning in Brown comports with that of district courts in the Second Circuit.

Most notably, in Young v. General Motors Investment Management Corporation, the court concluded that plaintiffs had "actual knowledge" from "quarterly performance summaries provided to Plan participants [that] clearly disclosed the fees and expenses associated" with certain funds.[14] After Sulyma, in the Ninth Circuit, these plaintiffs would only be considered to have constructive knowledge, which would not trigger the three-year limitations period. The Ninth Circuit's reasoning appears in line with that of the Fifth and Seventh Circuits, setting up a pronounced circuit split.[15]

The Tibble and Sulyma decisions erect significant hurdles — or at best dangerous speed bumps — for defendants in ERISA fiduciary breach cases. Critically, the door is opened for plaintiffs to plead around a statute of limitations defense. Allegations that defendants failed to properly monitor the performance of investments or record-keepers effectively preclude the six-year period from operating as a total bar to a claim, although it may still limit the damages period back to no more than six years from when suit was filed.

Likewise, for the three-year limitations period, plaintiffs will undoubtedly attempt to fashion complaints so as not to reveal whether they reviewed plan documents or disclosures, requiring defendants to take discovery to uncover this information. This, in turn, drives up litigation costs, and may compel defendants to settle even meritless suits to avoid costly discovery.

In addition to these practical concerns, there are compelling policy reasons to reject the Sulyma "actual knowledge" standard. For instance, a standard that ties the statute of limitations to when plaintiffs have actually read plan disclosures rewards plaintiffs who choose not to read (or who claim not to have read) information that plan fiduciaries and record-keepers make available to them pursuant to ERISA's disclosure requirements. Proof the plaintiffs did review the relevant materials may be difficult to amass, as whether or not any plaintiff did so will most often turn on the plaintiff's credibility to the court.

The Sulyma holding thus puts a premium on participants not reviewing — or at least claiming not to have reviewed — plan communications. Such a disincentive undermines the purpose of disclosures (including, most notably, those imposed by DOL regulation under ERISA Section 408(b)(2)), which are intended to provide plan participants with information and data sufficient to make informed investment decisions, as well as to know whether their plans are being prudently administered, thereby enabling plan participants to police their plans.[16]

As one court succinctly stated, "[u]nder a strict interpretation of the 'actual knowledge' standard, if an error were made in the allocation of a participant's money among investment funds, ... the participant could simply disavow knowledge of the error and wait indefinitely to see whether it worked to his benefit before 'crying foul' and asserting his rights under ERISA."[17] This interpretation of the term "actual knowledge" allows plan participants to disregard information clearly provided to them and "effectively provide[s] an end run around ERISA's limitations requirement."[18]

So, what is next for defendants hoping to eliminate or narrow untimely fiduciary breach claims? Tibble appears to be settled law. Courts around the country have relied on Tibble to reject statute of limitations defenses where plaintiffs argue fiduciaries had an ongoing duty to monitor.[19] With respect to what constitutes "actual knowledge" under Section 1113(2), Sulyma may be the appropriate vehicle for the Supreme Court to weigh in and provide guidance to litigants and resolve the split among the circuits on this issue, thereby furthering ERISA's goal to provide a level of certainty to employees and employers.

This makes Sulyma a decision to watch. In the meantime, however, defendants in the Ninth Circuit should be aware of this change in the evidentiary standard to satisfy ERISA's three-year statute of limitations, and should brace for more costly discovery going forward.

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Disclosure: The author represents defendants in Munro, et al. v. University of Southern California.

[1] 135 S. Ct. 1823 (2015).

[2] 909 F.3d 1069 (9th Cir. 2018).

[3] 29 U.S.C. §1113. Section 1113 also provides that a plaintiff must bring suit "in the case of fraud or concealment" no later than "six years after the date of discovery of such breach or violation."

[4] Tibble, 135 S. Ct. at 1829.

[5] Id. at 1828.

[6] Id. at 1829.

[7] 2015 WL 10433713, at *26 (C.D. Cal. Nov. 24, 2015).

[8] Id. (quoting G. Bogert, G Bogert & A. Hess, The Law of Trusts and Trustees §543 (3d ed. 2015)).

[9] Sulyma, 909 F.3d at 1075–76.

[10] Id.

[11] See 29 CFR §2550.404a–5.

[12] 622 F.3d 564 (6th Cir. 2010).

[13] Id. at 571; see also id. (reasoning that actual knowledge does not "'require proof that the individual Plaintiffs actually saw or read the documents that disclosed' the allegedly harmful investments" (quoting Young v. Gen. Motors Inv. Mgmt. Corp, 550 F. Supp. 2d 416, 419 n.3 (S.D.N.Y. 2008), aff'd, 325 F. App'x 31 (2d Cir. 2009))).

[14] Young, 550 F. Supp. 2d at 420. See also In re Citigroup ERISA Litig., 104 F. Supp. 3d 599, 610–11 (S.D.N.Y. 2015), aff'd sub nom. Muehlgay v. Citigroup Inc., 649 F. App'x 110 (2d Cir. 2016); Leber v. Citigroup 401(k) Plan Inv. Comm., 2014 WL 4851816, at *3 n.4 (S.D.N.Y. Sept. 30, 2014) (noting that "courts have largely rejected" a rule requiring plaintiff "read and understand" plan disclosures because "it would reward participants' willful blindness to important information").

[15] See Fish v. GreatBanc Tr. Co., 749 F.3d 671, 682 (7th Cir. 2014); see also id. ("[A] court applying §1113(2) must take care to resist the temptation to slide toward reliance upon constructive knowledge or imputed knowledge, neither of which is actual knowledge." (original emphasis)); Reich v. Lancaster,

55 F.3d 1034, 1058 (5th Cir. 1995) (“[T]he record does not disclose that anyone at DOL actually read the documents prior to 1987, when the investigation of the Fund commenced”).

[16] See Blau v. Del Monte Corp., 748 F.2d 1348, 1354 (9th Cir. 1984); see also Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 720 (2d Cir. 2013) (“ERISA imposes extensive disclosure requirements on plan administrators, thus giving plan beneficiaries (i.e., prospective plaintiffs) the opportunity to find out how the fiduciary invested the plan’s assets.”).

[17] Reeves v. Airlite Plastics Co., 2005 WL 2347242, at *5 (D. Neb. Sept. 26, 2005).

[18] Young, 550 F. Supp. 2d at 419 n.3.

[19] See, e.g., supra note 7.