

STATUTE OF NEW LIMITATIONS

In the wake of the *Intel* decision, recordkeepers that provide a cost-effective solution to the "actual knowledge" dilemma will likely see an increase in business activity. **By David Witz**

The U.S. Supreme Court unanimously affirmed the Ninth Circuit's opinion in the 2015 case *Intel Corporation Investment Policy Committee et al. v. Sulyma* in February. Now that the high court has rendered its decision, the case has been remanded back to the district court, where it will proceed on its merits. In the interim, the Supreme Court's decision has an immediate impact on plan sponsors that rely on the 3-year statute of limitations as a pivotal part of their risk mitigation strategy.

Let's look at the claim, review the definition of the statute and its application, review a plan sponsor's options, future expectations, and highlight a potential benefit for defense counsel.

THE CLAIM

Christopher Sulyma, a participant in retirement plans sponsored by Intel from 2010 to 2012, filed suit in 2015. Generally, he claimed the fiduciaries invested excessively in alternative assets, e.g., hedge funds, private equities and commodities, which resulted in the payment of excessive fees and sub-par performance. Intel sought early dismissal under a 3-year statute of limitations by claiming that Sulyma had "actual knowledge" of the investments during the time period in question. Intel's defense was based on factual evidence that Sulyma had actual knowledge because he had received:

1. Fund Fact Sheets from 2010, 2011, and 2012,
2. 2011 Qualified Default Investment Alternative Notice,

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3. 2012 Summary Plan Description,
4. 2012 Annual Disclosures, and
5. Access to additional disclosures available on the website which, it was documented, he visited some 68 times.

The district court ruled in Sulyma's favor, but the Ninth Circuit disagreed and the Supreme Court (SCOTUS) affirmed the Ninth Circuit's position that "actual knowledge" means "actual knowledge"—it is not imputed because he received a mailing or had access to disclosures online.

THE STATUTE

ERISA § 413(1) provides for a 6-year statute of limitations and ERISA § 413(2) provides for a 3-year statute of limitations. A plaintiff has up to 3 years to bring a lawsuit against a fiduciary for an alleged fiduciary breach or violation when he or she has "actual knowledge" of the breach (except in the case of fraud or concealment). If the plaintiff has no knowledge of the breach, the period is 6 years.

Unfortunately, there is a long history of debate regarding what constitutes actual knowledge because the determination is inherently subjective. That said, the Second, Third, Fifth, Sixth, Seventh and Eleventh Circuits have issued a plan-sponsor-friendly interpretation regarding actual knowledge. These courts have held that the mere delivery of the appropriate disclosures meets the actual knowledge requirement. Their position no longer holds water since SCOTUS affirmed the Ninth Circuit's position that "actual knowledge" means what it says. According to SCOTUS, ERISA's 3-year limitations provision:

> [R]equires more than evidence of disclosure alone. That all relevant information was disclosed to the plaintiff is no doubt relevant in judging whether he gained knowledge of that information. To meet § 1113(2)'s "actual knowledge" requirement, however, the plaintiff must in fact have become aware of that information.

If actual knowledge cannot be imputed based on timely receipt of various disclosures, then what is the standard a plan sponsor must meet to prove "actual knowledge"? For the plan sponsor relying on the 3-year statute of limitations this is the ultimate question in light of a statute that does not define "actual knowledge."

SCOTUS provided its perspective, but it leaves a plan sponsor with little consolation and much consternation. According to SCOTUS, actual knowledge requires that a plaintiff must be aware of the information, which a plan sponsor can demonstrate by:

1. A plaintiff's admission that he or she recalls reading the disclosure and was therefore aware of the information. Sulyma testified that he did not recall the disclosures and was unaware that the plan invested in alternative assets.
2. Circumstantial evidence which SCOTUS did not define but that is considered to be documented records that prove the plaintiff viewed the electronic information and took some action in response. While the evidence showed Sulyma accessed information 68 times in 2 years, SCOTUS believed this was sufficient to establish actual knowledge.
3. Providing evidence the plaintiff is "willfully blind" to the information—a standard not defined by SCOTUS despite evidence the plaintiff received numerous disclosures and visited the website many times.

Based on these hurdles, a plan sponsor will be subject to a 6-year statute for all future fiduciary breach cases unless the high standard established by SCOTUS can be met.

PLAN SPONSOR OPTIONS

For the conscientious plan sponsor that is focused on meeting the 3-year statute as a risk mitigation strategy, now is the time to reevaluate the reporting and disclosure support provided by their covered service provider. The focus of their inquiry should be on solutions that:

1. Address required sign-ins with a description of the material covered for all participant enrollment, communication and education meetings.

"ON ITS FACE, THE SCOTUS DECISION IS A BIG WIN FOR PLAINTIFFS. HOWEVER, IT DOES PROVIDE A SILVER LINING FOR DEFENDANTS AGAINST PLAINTIFFS SEEKING CLASS CERTIFICATION."

2. Address participant surveys to confirm comprehension of the materials covered.
3. Address required disclosures on enrollment forms that acknowledge receipt of all necessary disclosures and the participant's understanding of the risks associated with the investments selected.
4. Require a participant to accept a "Terms of Use" that acknowledges they read, understand and acknowledge responsibility for their investment decisions before accessing account information electronically.
5. Require that participants attend online education, i.e., a Learning Management System that includes a quiz to confirm comprehension to support actual knowledge before investing.

Absent these solutions, a plan sponsor can mitigate this risk by not offering alternatives as core offerings and prohibiting a target date fund that contains alternatives such as a Qualified Default Investment Alternative (QDIA). While SCOTUS did not address the extent to which a plan sponsor would be protected if the participant is auto-enrolled and auto-allocated to a QDIA that holds alternative investments, it is important to remember that the intent of the QDIA is a reduction in plan sponsor liability for the asset allocation decision made by the participant, not the elimination of fiduciary liability associated with the selection and monitoring of investments—which was the primary basis for Sulyma's claim.

WHAT THE FUTURE HOLDS

Based on past history, recordkeepers will be expected to provide a solution to support the 3-year statute. In fact, I think it is fair to assume that advisors will include questions in their Requests for Proposal (RFPs) to identify recordkeepers that have a solution for the 3-year statute. These questions might include:

1. What support do you provide to secure the 3-year statute of limitations?
   a. Can you provide a legal opinion that supports your claim?
   b. Do you provide indemnification should a court declare your efforts to provide the 3-year statute fail? If Yes, please provide that indemnification.
2. Is your technology mobile ready for participants to access plan information and investments by cellphone?
3. Do you require participants to electronically sign a "Terms of Use" before accessing their account information?
   a. If Yes, please provide a copy of the "Terms of Use."
4. Do your "Terms of Use" include the risks associated with the specific investments offered by the plan?
   a. If Yes, please provide a sample.
   b. If No, are you able to include a description of the risks associated with a plan's investments?
5. Who writes the risk descriptions and what are their credentials?
   a. Will you permit us to edit your descriptions?
6. Do you date stamp, record, and store the participant's acknowledgement to the "Terms of Use"?
   a. If Yes, for how long?
7. What other steps do you take to assist with securing the benefits of the 3-year statute of limitations?

This is just a sampling of potential RFP questions that a recordkeeper may need to answer.

PROS AND CONS FOR DEFENDANT'S COUNSEL

On its face, the SCOTUS decision is a big win for plaintiffs. However, it does provide a silver lining for defendants against plaintiffs seeking class certification in that "actual knowledge" is determined by evidence specific to a particular participant. In the future, to secure class certification, plaintiff's counsel may be forced to prove that every participant had no "actual knowledge." If this cannot be proven, then litigation may need to proceed on a participant-by-participant basis—which would involve significantly more time and expense for the plaintiff's litigator. This risk may be sufficient to dissuade plaintiff's counsel from filing a class-based claim.

On the other hand, the SCOTUS decision imposes on a plan sponsor the obligation to implement what could be time-consuming and costly strategies to secure the 3-year statute.

CONCLUSION

The courts should be watched closely as consultants and plan sponsors consider their risk mitigation strategies. In light of the *Intel* decision, "actual knowledge" will require a coordinated effort with the recordkeeper. Recordkeepers that provide a cost-effective solution will likely see an increase in business activity as risk-adverse plan sponsors seek to implement risk mitigation strategies that intend to make use of the 3-year statute of limitations. **PC**