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'What You Don't Know, [Can] Hurt You' — ERISA's Statute Of Limitations Conundrum

By José Jara and Anthony Fassano[*]

Many issues litigated under the Employee Retirement Income Security Act of 1974, as amended (ERISA) are determinative on the jurisdiction in which the claim is brought. These issues of late have caught the attention of the Supreme Court.[1] This article is focused on *Intel Corp. Inv. Policy Committee v. Sulyma,*[2] a case in which the Court will rule on what is actual knowledge under ERISA's statute of limitations. Is it actual knowledge of the underlying facts supporting a claim? Or is it not only the knowledge of these underlying facts, but in addition the understanding that there is a legally viable claim? Furthermore, the Court may rule on what responsibilities a plan participant[3] has in terms of reading and understanding mandated disclosures.

I. ERISA §413 (29 U.S.C. §1113)

Section 413 of ERISA 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 the following:

- 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
- three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation.[4]

Thus, the statute of limitations is six years, unless the plaintiff has ''actual knowledge'' of the breach, in which case the statute of limitations is shortened by half.[5]

ERISA does not define the term ''actual knowledge,''[6] which could raise questions about when a participant's claim accrues. Plan fiduciaries are required to make a number of disclosures, to the plan participants and to the U.S. Department of Labor, Employee Benefits Security Administration (EBSA). If

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[1] The Supreme Court has granted certiorari in the following cases: *Intel Corp. Inv. Policy Committee v. Sulyma*, 139 S. Ct. 2692 (2019) (statute of limitations), *Thole v. U.S. Bank, N.A.*, 139 S. Ct. 2771 (2019) (standing to sue for investment loss in an overfunded defined benefit plan); *Ret. Plans Comm. Of IBM v. Jander*, 139 S. Ct. 2667 (2019) (whether the pleading standard set forth in *Fifth Third Bancorp. v. Dudenhoeffer,* 573 U.S. 409, 429-30 (2014), that a plaintiff must ''plausibly allege[] that a prudent fiduciary in the defendant's position could not have concluded that [an alternative action] would do more harm than good to the fund,'' can be met by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time). Petitions awaiting a decision to grant or deny certiorari involve: *Brotherston v. Putnam Investments, LLC*, 907 F.3d 17 (1st Cir. 2018), *petition for cert. filed* (U.S. Jan 16, 2019) (No. 18-926) (who bears the burden of proof on loss causation); *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200 (10th Cir. 2019), *cert. filed* (U.S. Sept. 19, 2019) (No. 19-382) (whether a plan participant can seek disgorgement of unreasonable profits derived from a plan contract for a nonfiduciary party-in-interest).

[2] 139 S. Ct. 2692 (Mem.), 204 L.Ed.2d 1089 (June 10, 2019).

[3] Reference to participant throughout the article shall also include beneficiary.

[4] 29 U.S.C. §1113. ERISA's statute of limitations is tolled for six years in cases of fraud or concealment. However, this tolling provision is not relevant for the purposes of this article.

[5] *See, e.g., Wright v. Heyne*, 349 F.3d 321, 327 (6th Cir. 2003).

[6] *See* 29 U.S.C. §1002.

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participants later allege that the plan fiduciaries violated ERISA on the basis of an action described in these disclosures, what steps could the fiduciary have taken to establish that the participants had ''actual knowledge'' of the breach or violation? Is it sufficient to have mailed hard copies of the disclosures to the participants? Can the fiduciary simply post the information on a website? Send an email? And if the fiduciary does one or more of the above, does ''actual knowledge'' mean that the participants had to have actually read the materials? Or remember having read them, sometimes several years after they were sent?

These questions are important because, as described above, there is a three-year period (between the fourth and sixth years after an alleged violation) during which a participant can bring a claim for an ERISA violation if the participant didn't have ''actual knowledge'' of the alleged breach. The federal appellate courts have differed on what constitutes ''actual knowledge.'' A petition for certiorari was recently granted by the United States Supreme Court in a case that will require the Court to resolve this circuit split. For this reason, the Court should provide the country with a conclusive definition of the term.

II. LEGISLATIVE HISTORY OF ERISA §413

When enacted in 1974, ERISA §413 had ''actual knowledge'' and ''constructive knowledge'' requirements.[7] Under the ''constructive knowledge'' requirement, there was a three-year statute of limitations from ''the earliest date on which a report from which the plaintiff could reasonably be expected to have obtained knowledge of such breach or violation was filed with the secretary'' as required by ERISA.[8] The ''constructive knowledge'' requirement was repealed in 1987, leaving only the ''actual knowledge'' provision, which is still part of the statute.[9]

ERISA imposes a robust set of disclosure requirements on plan fiduciaries.[10] With the repeal of the ''constructive knowledge'' requirement of ERISA §413, plan participants were no longer charged with knowledge of information required to be disclosed to the Secretary of Labor, who is charged with enforcement of ERISA. However, this provision says nothing about the *separate* disclosure requirements that plan fiduciaries have vis-à-vis plan participants.

III. ERISA REPORTING AND DISCLOSURE REQUIREMENTS

ERISA mandates certain reporting to EBSA and disclosure to plan participants. Filing of the Form 5500s would be considered actual knowledge to EBSA.[11] Some of the disclosure requirements that plan fiduciaries must provide participants are: Summary Plan Description,[12] Summary of Material Modification,[13] Summary Annual Report,[14] COBRA notice,[15] and, upon request of a participant, the Form 5500.[16]

In addition, under ERISA §404(c), in a participant-directed pension plan, ''. . . no person who is otherwise a fiduciary shall be liable . . . for any loss, or by reason of any breach, which results from such participant's exercise of control.''[17] The DOL issued regulations under ERISA §404(c), which required numerous amounts of disclosure to plan participants.[18] In general, the regulation provides:

> in order for a participant . . . to exercise control over the assets in his account, the participant . . . must have the opportunity, under the plan, to: (1) Choose from a broad range of investment alternatives, which consist of at least three diversified investment alternatives, each of which has materially different risk and return characteristics; (2) give investment instruction with a frequency which is appropriate in light of the market volatility of the investment alternatives, but not less frequently than once within any three month period; (3) diversify investments within and among investment alternatives; and (4) obtain sufficient

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[7] *Sulyma v. Intel Corp. Inv. Policy Comm.*, 909 F.3d 1069, 1071 (9th Cir. 2018); 29 U.S.C. §1113(a)(2) (1976).

[8] 909 F.3d at 1073 (internal quotation and citation omitted).

[9] 909 F.3d at 1073.

[10] *See, e.g.,* 29 U.S.C. §1021-§1031,

[11] *Acosta v. Chimes District of Columbia*, 2018 BL 430419, 2018 EBC 430419, at *6-7 (D. Md. Nov. 21, 2018) (summary judgement granted to defendants on statute of limitations issue – actual knowledge based on the filing of the Form 5500).

[12] ERISA §102, §104.

[13] *Id.*

[14] ERISA §104(b)(3).

[15] In the group health plan context, to satisfy COBRA notice requirements, pursuant to Department of Labor regulations, ''a required notice generally should be considered 'furnished' by a plan administrator as of the date of mailing, if mailed by first class mail. . .'' *See* 69 Fed. Reg. 30,091 (May 26, 2004). While the plan administrator has the burden of proving that a COBRA notice was properly sent to the qualified beneficiary, the plan administrator needs to only prove that it mailed the notice in a manner such that it is presumed to have been received or was reasonably calculated to be received by the qualified beneficiary, not that the qualified beneficiary actually received the notice. *See Hearst v. Progressive Foam Techs.*, 641 F.3d 276, 281 (8th Cir. 2011), *Corrigan v. Local 6, Bakery, Confectionary & Tobacco Workers*, 91 F. Supp. 3d 618, 628 (E.D. Pa. 2015).

[16] ERISA §103, §104.

[17] ERISA §404, 29 USC §1104.

[18] 29 CFR §2550.404c-1.

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information to make informed investment decisions with respect to investment alternatives available under the plan.[19]

The preamble to the final regulations clearly mandates certain disclosures for the benefit of participants to make informed decisions:

> With respect to the disclosure of investment information, the Department noted in the preamble to the proposal that the requirement that sufficient information be available to permit informed investment decisions applies not only to the initial investment decision but also to subsequent decisions with regard to that investment. The Department also noted that a participant must be given sufficient information to make informed decisions with regard to rights incident to the holding of an ownership interest in that investment in order for an investment to be taken into account for purposes of the broad range requirement.[20]
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> . . .the Department has concluded that changes in the disclosure requirements contained in the 1991 proposal are necessary to ensure that participants and beneficiaries in ERISA section 404(c) plans have sufficient information to make informed investment decisions.[21]

Thus, a participant has a duty here to review such disclosures and not blindly ignore them. Just as a fiduciary can remain liable even when having a ''pure heart and an empty head,''[22] so too a plan participant should take ownership in properly analyzing and understanding the disclosures.

Approximately 18 years later, EBSA issued further regulations requiring broader disclosures in participant directed individual account plans than in the 404(c) regulations. EBSA rationalized the need for these regulations in stating:

> With the proliferation of these plans, which afford participants . . . the opportunity to direct the investment of all or a portion of the assets held in their individual plan accounts, participants . . . are increasingly responsible for making their own retirement savings decisions. This increased responsibility has led to a growing concern that participants . . . may not have access to or, if accessible, may not be considering, information critical to making informed decisions about the management of their accounts, particularly information on investment choices, including attendant fees and expenses.
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> When a plan assigns investment responsibilities to the plan's participants . . ., it is the view of [EBSA] that plan fiduciaries must take steps to ensure that participants . . . are made aware of their rights and responsibilities with respect to managing their individual plan accounts and are provided sufficient information regarding the plan, including its fees and expenses and designated investment alternatives, to make informed decisions about the management of their individual accounts.[23]
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> . . . [EBSA] evaluated the benefits and costs of the final regulation, and conclude[d] that the net present value of the rule's benefits is estimated at nearly $12.3 billion. [EBSA] estimates that the regulation will affect 72 million participants in 483,000 participant- directed individual account plans containing assets valued at nearly $3.0 trillion. Over the ten-year period 2012–2021, [EBSA] estimates that the present value of the benefits provided by the final rule will be approximately $14.9 billion and the present value of the costs will be approximately $2.7 billion.[24]
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> [EBSA] believes that the investment-related disclosure requirements . . . strike an appropriate balance between accommodating, on one hand, the increasing innovation and complexity of the types of investments that are available to plan participants . . . and, on the other hand, participants' . . . need for complete, but concise and user-friendly, information about their plan investment alternatives.

In fact, the regulation allowed for certain disclosure to be made via a website, which the participant would have to proactively log onto to get investment related information:

> . . . [EBSA] has decided to retain the Web site approach to disclosing investment-related information.. . . [EBSA] believes . . . that the availability of information via a Web site reduces the amount of information required to be directly provided to

[19] 57 Fed. Reg. 46,906-01 (Oct. 13, 1992).

[20] 57 Fed. Reg. 46,906-01, 46909 (Oct. 13, 1992).

[21] *Id.*, 46909-46910.

[22] *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983).

[23] 75 Fed. Reg. 64,910 (Oct. 20, 2010).

[24] *Id.*, 64,911.

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> participants . . ., without compromising a participant's . . . access to the additional information.[25]

Finally, EBSA's justification for the need of these robust investment disclosures was because it:

> . . . will help a large number of plan participants by placing investment-related information in a format that facilitates comparison of investment alternatives. This simplified format will make it easier and less time consuming for participants to find and compare investment-related information. As a result, plan participants should make better investment decisions which will enhance their retirement income security.[26]

Recently, EBSA proposed a regulation - ''Default Electronic Disclosure by Employee Benefit Pension Benefit Plans Under ERISA,''[27] which would allow for all retirement plan disclosures to be posted to a website and notify participants of this website, with the option for participants to opt out and request paper copies of the disclosures. EBSA stated in the proposal:

> [Pursuant to an] Executive Order . . . . to make retirement plan disclosures required under ERISA and the Internal Revenue Code of 1986 more understandable and useful for participants . . ., while also reducing the costs and burdens they impose on employers and other plan fiduciaries responsible for their production and distribution[,] . . . the Department decided to publish a proposed regulation on electronic disclosure that it believes will reduce the costs and burdens imposed on employers and other plan fiduciaries, while at the same time creating the opportunity for disclosures that are more useful to participants and beneficiaries.[28]

Clearly, the federal government is operating under an assumption that plan participants do their part in managing their retirement. Accordingly, based on all these required disclosures by the federal government, ''actual knowledge'' should be imputed upon plan participants of disclosures sent or made available to them.

[25] *Id.*, 64,918.

[26] *Id.*, 64,928.

[27] 84 Fed. Reg. 56,894 (Oct. 23, 2019).

[28] *Id.*, 56,896-97.

IV. INTEL CORP. INV. POLICY COMM. v. SULYMA

The plaintiff in *Sulyma* worked for Intel and participated in two of its retirement plans.[29] At one point during his employment, the plan fiduciaries decided to increase the plans' use of alternative investments, such as hedge funds, with the hope of decreasing risk and increasing diversification.[30] In hindsight, this decision may have been a mistake, as the plans did not perform as well as comparable portfolios that were not as invested in hedge funds, a fact that the fiduciaries made available through their websites.[31] But fiduciaries' actions are not viewed in hindsight.[32] The plaintiff admitted that he had accessed some information through these websites, but, nonetheless, he claimed that he was unaware of the plans' involvement in alternative investments.[33]

Five years after these disclosures, the plaintiff brought a putative class action on the basis of the plans' poor performance.[34] The district court determined that the plaintiff had ''actual knowledge'' of the alleged breach when the fiduciaries made the information available on their websites, thus triggering the three-year statute of limitations, which meant that the claim was time-barred.[35]

On appeal, the plaintiff argued that he did not have ''actual knowledge'' of the contents of the disclosures because he was not in fact aware of the plans' involvement in the alternative investments.[36] The Ninth Circuit analyzed its prior case law on the question of ''actual knowledge,'' and concluded that it was more than ''bare knowledge of the underlying transaction,'' and less than ''actual legal knowledge, which only a lawyer would normally possess.''[37]

According to the Ninth Circuit, in determining what this ''goldilocks'' level of knowledge is, the court must consider the nature of the alleged breach.[38] For an imprudent-investor claim under 29 U.S.C. §1104, ''the plaintiff must be aware that the defendant

[29] 909 F.3d at 1071.

[30] *Id.*

[31] *Id.*

[32] ''. . . ERISA does not require clairvoyance on the part of plan fiduciaries, nor does it countenance opportunistic Monday-morning quarter-backing on the part of lawyers and plan participants who, with the benefit of hindsight, have zeroed in on the underperformance of certain investment options.'' *Patterson v. Morgan Stanley*, Docket 1:16-cv-06568-RJS, 2019 BL 384508, at *22 (S.D.N.Y. Oct. 7, 2019).

[33] 909 F.3d at 1071.

[34] *Id.*

[35] 909 F.3d at 1072.

[36] 909 F.3d at 1071.

[37] 909 F.3d at 1075.

[38] *Id.*

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has acted, and that those acts were imprudent.''[39] The court emphasized that ''actual knowledge'' is not ''constructive knowledge,'' citing Congress's decision to repeal that provision from ERISA §413.[40]

In applying this standard to the plaintiff's claims, the Ninth Circuit held that the district court erred in granting summary judgment to the defendants.[41] While the court agreed that, by supplying the plaintiff with information regarding the plans' mix of investments, the plaintiff had sufficient knowledge *available* to him to establish knowledge of the allegedly imprudent investments more than three years before he filed his lawsuit.[42] But, according to the Ninth Circuit, more was required to establish ''actual knowledge.'' At his deposition, the plaintiff testified that he was unaware that the plans' funds had been invested in alternative funds, and that he did not recall seeing the documents (which the fiduciaries indisputably provided) disclosing these investments.[43] According to the Ninth Circuit, this testimony was sufficient to create a genuine issue of material fact regarding the plaintiff's ''actual knowledge'' of the allegedly imprudent transaction, thus making summary judgment improper.[44]

V. ANALYSIS OF CIRCUIT AND DISTRICT COURT SPLIT ON THE ISSUE

The *Sulyma* court expressly acknowledged that its decision was squarely at odds with the Sixth Circuit Court of Appeals,[45] which addressed the same issue in *Brown v. Owens Corning Investment Review Committee*.[46] In *Brown*, former employees of Owens Corning brought a putative class action on behalf of the company's retirement plan beneficiaries.[47] Owens Corning had produced several products containing asbestos.[48] When asbestos litigation began to increase, the company had massive potential exposure for personal injuries and, as a result, filed for Chapter 11 bankruptcy protection in 2000.[49]

Up to about a month before the bankruptcy, the company's retirement plans included options that invested heavily in the company's common stock.[50] By the time the company declared bankruptcy, the stock had lost almost all of its value.[51]

More than six years later, the plaintiffs brought a purported class action on behalf of the plans' beneficiaries on the ground that the plans' fiduciaries acted imprudently by continuing to offer the company's stock as an investment option when they knew it would lose its value, and by failing to file a proof of claim in the company's bankruptcy.[52] The district court ruled that the plaintiffs' claims were barred by ERISA's three-year statute of limitations.[53]

On appeal, the plaintiffs argued that they were unaware that the plans had fiduciaries, and that fiduciaries were responsible for managing the plans' funds.[54] However, the participants were aware of the company's bankruptcy.[55] In addition, the participants were aware, as a result of materials provided to them, that some entity exercised discretionary authority over plan investments.[56] While the plaintiffs argued that this fact, at best, establishes ''constructive knowledge,'' the court rejected this argument, holding that ''[a]ctual knowledge does not require proof that the individual Plaintiffs actually saw or read the documents that disclosed the allegedly harmful investments.''[57] This is also the view of the majority of district courts that have addressed the issue.[58]

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39 *Id.*

40 909 F.3d at 1076.

41 909 F.3d at 1077.

42 *Id.*

43 909 F.3d 1077.

44 909 F.3d at 1077-78.

45 909 F.3d at 1076.

46 622 F.3d 564 (6th Cir. 2010).

47 622 F.3d at 568.

48 622 F.3d at 567.

49 622 F.3d at 567-68.

50 622 F.3d at 567.

51 622 F.3d at 568.

52 *Id.*

53 622 F.3d at 569.

54 622 F.3d at 570.

55 *Id.*

56 *Id.*

57 622 F.3d at 571.

58 *See Young v. Gen. Motors Inv. Mgmt. Corp.*, 550 F. Supp. 2d 416, 419 n.3 (S.D.N.Y. 2008), *aff'd on other grounds*, 325 F. App'x 31 (2d Cir. 2009) (''[E]stablishing ''actual knowledge'' for the purposes of ERISA §413, 29 U.S.C. 1113(2), does not, as Plaintiffs contend, require proof that the individual Plaintiffs actually saw or read the documents that disclosed that the Single Equity Funds were undiversified investments.''); *Enneking v. Schmidt Builders Supply Inc.*, 875 F. Supp. 2d 1274, 1284 (D. Kan. 2012) (''Actual knowledge does not require proof that the Plaintiffs actually read (let alone understood) the documents that disclose allegedly harmful investments.''); *Shirk v. Fifth Third Bancorp*, 2009 BL 209735, 47 EBC 2523, at *3 (S.D. Ohio Sept. 30, 2009) (''In making this actual knowledge determination, courts have focused on whether documents provided to plan participants sufficiently disclosed the alleged breach of fiduciary duty, not whether the individual plaintiffs actually saw or read the documents.'') (internal quotation and citation omitted); *Reeves v. Airlite Plastics, Co.*, 2005 BL 35377, 36 EBC 1244, at *6 (D. Neb. Sept. 26, 2005) (rejecting the argument that the plaintiff has to actually read the documents to prevent ''a plaintiff from benefitting from his own 'willful blindness' at another party's expense''); *but see Harris v. Finch, Pruyn & Co.*, 2008 BL 101689, 44 EBC

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VI. ARGUMENTS IN THE SUPREME COURT

In their briefing before the Supreme Court, the petitioners and several industry groups as amici for the petitioners advance arguments that largely follow the arguments developed below. First, the petitioners advance an argument based on the plain text and purpose of ERISA. On the text, the petitioners point out the distinction between the three- and six-year statute of limitations.[59] As explained above, the statute of limitations runs for three years from the ''date on which the plaintiff had actual knowledge of the breach or violation.''[60] Otherwise, the statute of limitations is six years.[61] This distinction vanishes under the Ninth Circuit's reasoning because the participants can simply state that they did not read (or cannot recall reading) the plan disclosures sent to them. In addition, the disclosure requirements required by ERISA's text and the ERISA regulations promulgated by the Secretary of Labor are extensive, and the purpose of these disclosure requirements is to provide knowledge to the participants.[62]

The petitioners and amici also advance several policy arguments in favor of reversal. Foremost among these is the incentive that it provides to plan participants to simply ignore the plan disclosures with which they are provided (or, at the very least, claim that they cannot recall whether they read them).[63] The ability to advance this argument places the defendants at an unfair advantage because of the difficulty in disproving this claim.[64] It also allows the participants to easily create a disputed issue of fact (whether the participants read the disclosure), which in turn essentially eliminates the statute-of-limitations defense and guarantees that these cases will be much more expensive to defend.[65]

In short, the Ninth Circuit's decision upsets the delicate balance struck by Congress between protecting employees and severely burdening employers.[66] Allowing participants to skirt the three-year statute of limitations would allow them to seek damages for six years of violations, rather than three.[67] Damages in these cases can and often do reach eight figures, so the potential costs of virtually eliminating the three-year statute of limitations is staggering.[68] It would also make ''hindsight'' litigation possible whenever an investment decision made by a plan underperforms expectations, regardless of the reason for the underperformance.[69] This, in turn, could disincentivize employers from making certain types of investments, or even offering retirement plans at all.[70]

The respondents also begin their brief with a textual argument. Their primary point is that ''actual knowledge'' means exactly what it says: the subject has to actually know whatever it was that was disclosed to them.[71] To attribute any other degree of knowledge would be to effectively read the word ''actual'' out of the statute.[72] Moreover, the respondents point out that, in other sections of ERISA, the text includes the ''should have'' language that the petitioners attempt to read into the statute.[73]

On the policy level, the petitioners apparently presume that participants are going to lie under oath during their depositions and claim not to have read or recall reading the disclosures.[74] In addition, the respondents point out that, in many cases, there is no dispute of the actual knowledge of the participants, thus undercutting the petitioners' and amici's slippery slope argument about the consequences of adopting the Ninth Circuit's reasoning.[75]

VII. CONCLUSION

At some point, liability has to end. As Justice Cardozo once stated, albeit in a tort context,

> [E]xpos[sure] . . . to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the

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2195, at *4 (N.D.N.Y. May 13, 2008) ('' 'Actual knowledge' requires that the plaintiff read and understand the terms listed in the plan or SPD.'').

59 Br. for Pet'rs at 18.

60 29 U.S.C. §1113(2).

61 29 U.S.C. §1113(1).

62 The petitioners and amici also point out that the 1987 repeal of the ''constructive knowledge'' provision does not affect this case. The ''constructive knowledge'' formerly attributed to beneficiaries involved disclosures made to a third party (the Secretary of Labor); it did not involve disclosures made directly to the beneficiaries, as was the case here. Br. for Pet'rs. At 39; Br. for Nat'l Assoc. of Mfrs., et al. (''Br. for Amici'') at 18-19.

63 Br. for Pet'rs at 21; Br. for Amici at 7.

64 Br. for Pet'rs at 44; Br. for Amici at 9.

65 Br. for Pet'rs at 29; Br. for Amici at 8.

66 Br. for Pet'rs at 19; Br. for Amici at 7.

67 Br. for Pet'rs at 44; Br. for Amici at 29.

68 Br. for Pet'rs at 44-45; Br. for Amici at 28.

69 Br. for Amici at 26.

70 Br. for Pet'rs at 41, quoting *Variety Corp. v. Howe*, 516 U.S. 489, 497 (1996).

71 Br. for Resp't at 16.

72 Br. for Resp't at 14.

73 Br. for Resp't at 13, citing 29 U.S.C. §§1303(e)(6), 1370(f)(2)(A), 1451(f).

74 Br. for Resp't at 38.

75 Br. for Resp't at 40.

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implication of a duty that exposes to these consequences.[76]

From a judicial economic standpoint, the ERISA's three-year statute of limitations should be triggered upon learning of the underlying facts that would support an ERISA claim. Otherwise, it would leave the door open for uncertainty and potential manipulation to avoid the three-year statute.

In the meantime, it would be worthwhile for fiduciaries to review their plans to ensure they are meeting their reporting and disclosure requirements. In addition, review of the level of participant education provided should be assessed to ensure participants are actively engaged and understand disclosures issued to them. Lastly, with the newly proposed electronic regulations, plan sponsors should submit comments on whether there should be a mechanism to track that the disclosures were opened, and have an efficient procedure to have participants acknowledge receipt and that they understand such disclosure.

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[76] *Ultramares Corporation v. Touche*, 255 N.Y. 170, 179-180 (1931)

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