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9TH CIRCUIT REWARDS IGNORANCE IN ERISA FIDUCIARY BREACH STATUTE-OF-LIMITATIONS CASE

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A recent decision by the 9th US Circuit Court of Appeals could make it difficult for employers to raise a statute-of-limitations defense in ERISA fiduciary breach cases ([Sulyma v. Intel Corp. Inv. Policy Comm.](#), 909 F.3d 1069 (9th Cir. 2018)). The court held that Intel's disclosure of allegedly imprudent investment decisions for its retirement plans was insufficient to start ERISA's three-year statute of limitations if the plaintiff didn't read the disclosures. Intel plans to appeal to the Supreme Court.

ALTERNATIVE INVESTMENTS CHALLENGED

A former employee and participant in two of Intel's retirement plans brought the lawsuit. His accounts were invested in two custom funds managed by Intel's investment committee. The committee increased those funds' holdings in alternative investments, such as hedge funds and private equity, to reduce investment risk through diversification. But the alternative investments had higher fees and, during periods of strong equity-market returns, underperformed relative to index funds and comparable portfolios.

Intel disclosed its investment decisions to participants in several documents — including summary plan descriptions, qualified default investment alternative notices and “fund fact sheets” — posted on two websites. The participant testified that he didn't know about these disclosures of alternative investments, despite admitting he might have accessed the benefits website 68 times while still working for Intel.

FIDUCIARY BREACH CLAIM UNTIMELY FILED?

Plaintiff's Imprudence Claim

Challenging the asset-allocation strategy and alternative investments as unduly risky, the participant argued that the investment committee violated ERISA's fiduciary duty of prudence by “disregarding those risks or by insufficiently considering them.” He also claimed fiduciary breaches by Intel's administrative committee for inadequately disclosing the investment strategy, finance committee for failing to monitor the investment and administrative committees, and all defendants for not remedying any breaches.

Intel's Statute-of-Limitations Defense

Under ERISA, a fiduciary breach claim is untimely if made more than “three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation.” ERISA does not define “actual knowledge” for this purpose, and the Supreme Court has yet to provide an authoritative interpretation.

Intel argued ERISA's statute of limitations barred the participant's claim because disclosures about the alternative investments were available for more than three years before he filed his complaint. The

availability of these disclosures, according to the company, gave the plaintiff actual knowledge of the alleged breach. The district court agreed and granted summary judgment for the company. (A court grants summary judgment when it finds the facts of a case are undisputed and, based on those facts, the law requires judgment in favor of one of the parties.)

DISCLOSURE ISN'T ENOUGH

The 9th Circuit disagreed, finding that merely making the disclosures available is insufficient to start ERISA's statute of limitations. The plaintiff's assertion that he never read the plans' disclosures and didn't know about the alternative investments created a factual dispute as to his actual knowledge of the alleged breach. This factual dispute precluded summary judgment based on the statute of limitations.

The 9th Circuit's opinion creates a split in the circuit courts. In 2010, the 6th Circuit held that "[w]hen a plan participant is given specific instructions on how to access plan documents, their (*sic*) failure to read the documents will not shield them (*sic*) from having actual knowledge of the documents' terms." ([Brown v. Owens Corning Inv. Review Comm.](#), 622 F.3d 564 (6th Cir. 2010)). The 9th Circuit disagreed, saying having access to plan documents amounts to constructive knowledge, rather than actual knowledge as required by ERISA.

IMPACT OF DECISION

The 9th Circuit's decision gives plaintiff lawyers a very friendly forum for digging up old ERISA fiduciary breach claims. Under the court's reasoning, even employers that have fully complied with plan disclosure obligations might find it extremely difficult to assert a statute-of-limitations defense against ERISA fiduciary claims, since plaintiffs can simply assert they never read information provided to them.

RELATED RESOURCES

- [Sulyma v. Intel Corp. Inv. Policy Comm.](#), 909 F.3d 1069 (9th Cir. 2018)
- [Brown v. Owens Corning Inv. Review Comm.](#), 622 F.3d 564 (6th Cir. 2010)

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