"Actual Knowledge" and ERISA Statute of Limitations Issues in Proprietary Funds Litigation

A Lexis Practice Advisor® Practice Note by
Joshua A. Lichtenstein and Daniel V. Ward, Ropes & Gray LLP

Joshua A. Lichtenstein
Ropes & Gray LLP

Daniel V. Ward
Ropes & Gray LLP

This practice note addresses the "actual knowledge" prong of ERISA's statute of limitations for alleged fiduciary breach in a manner that may be particularly relevant to asset management companies. First, the note explores the differing approaches to actual knowledge currently existing among the federal circuits—a split that may soon be resolved by the Supreme Court of the United States, given the Court's recent grant of certiorari on the issue. This practice note then explores these statute of limitations issues in the more particular context of so-called "proprietary funds litigation," which involves retirement plan participants suing their plan sponsor(s) due to the inclusion of the sponsor's own proprietary fund offerings in the 401(k) lineup.

This practice note is organized as follows:

- Introduction to ERISA Statute of Limitations Issues
- "Actual Knowledge" in Proprietary Funds Litigation
- Proprietary-Funds-Specific Issues

For a further discussion of statute of limitations issues applied in ERISA litigation, see Moore's Federal Practice - Civil § 107.75, at paragraph [3].

For practical guidance on ERISA and fiduciary compliance, see the ERISA and Fiduciary Compliance practice notes page.

Introduction to ERISA Statute of Limitations Issues

The past few years have seen a wave of lawsuits brought by employees of asset management firms alleging that their employers have packed their firms' retirement plans with their own products—for the purpose of receiving additional fees—as opposed to selecting cheaper or better-performing market alternatives. In effect, these are claims that the plan fiduciaries are improperly considering potential fee streams to the employers when designing a 401(k)-investment menu, instead of focusing on what funds are best for plan participants. These so-called "proprietary funds" suits have resulted in contentious litigation involving years of discovery, settlements in the millions, and in at least one case, a hard-fought trial. A critical issue for any employer facing the prospect of such a lawsuit is the statute of limitations, and when it begins to run—a hotly litigated topic—and one headed to the U.S. Supreme Court.

Proprietary funds litigation arises under the Employee Retirement Income and Savings Act (ERISA), which imposes a fiduciary duty on retirement plan providers to act as a prudent expert would, and to act solely in the interests of plan participants. ERISA's fiduciary duties are generally regarded as among the highest under U.S. law. ERISA's statute of limitations for breach of fiduciary duty and related claims is set forth in ERISA § 413 (29 U.S.C. § 1113) (Section

1113). It provides that no action may be brought after the earliest of the following:

- Six years after the date of the last act or omission constituting a part of the breach or violation –or–
- Three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation

ERISA § 413 (29 U.S.C. § 1113).

Because a three-year statute of limitations, compared to a six-year one, significantly narrows the window for plaintiffs to bring actions under ERISA, claims that fall under the three-year rule are more likely to be found untimely, and dismissed.

To shorten the time in which plaintiffs should have filed a claim for relief, ERISA defendants often argue that plaintiffs had actual knowledge more than three years before filing their claims. See, e.g., In re M&T Bank Corp. Erisa Litig., 2018 U.S. Dist. LEXIS 154641, at *5 (W.D.N.Y. 2018) (citations omitted) (as an affirmative defense, defendants bear the burden of proving that plaintiffs had actual knowledge more than three years prior to bringing their lawsuit). In re M&T Bank Corp. ERISA Litig. is discussed further in Proprietary-Funds-Specific Issues below.

"Actual Knowledge" in Proprietary Funds Litigation

Determining the date plaintiffs had actual knowledge of an alleged breach or violation is of great importance in emerging areas of litigation such as proprietary funds suits, particularly where employers may update their practices in response to the changing litigation landscape while still facing risk based on prior practices.

While a motion that the statute of limitations has run out is a common defense across ERISA cases generally, asserting actual knowledge in the narrower context of proprietary funds litigation is currently a hotbed of newly filed ERISA complaints. Unsurprisingly, asset management defendants seeking an early victory often argue that the plaintiffs had actual knowledge of the alleged unlawful conduct more than three years prior to filing suit.

By leaving the term actual knowledge undefined in ERISA, Congress left it to courts to determine what that phrase means. Edes v. Verizon Communs., 417 F.3d 133, 141 (1st Cir. 2005) (the decision of applying actual knowledge, or not, has "vexed the circuits").

The Supreme Court has recently accepted a cert. petition in Intel Corp. Investment Policy Committee et al. v. Sulyma (No. 18-1116). This case will likely resolve the actual knowledge standard going forward. Sulyma v. Intel Corp. Inv. Policy Comm., 909 F.3d 1069 (9th Cir. 2018), ***cert. granted***, Intel Corp. Inv. Policy Comm. v. Sulyma, 2019 U.S. LEXIS 3991 (2019). If the Court decides that the statute of limitations has not expired and the suit is allowed to proceed, the case may also have significant ramifications for retirement plan sponsors, including whether offering private funds (which are alleged to carry more risk) in their investment menu, in itself, constitutes a breach of fiduciary duty. In its last decision examining ERISA's statute of limitations for fiduciary breach, the Supreme Court interpreted a different portion of the statute and found in favor of the plaintiff on the question of whether the duty to monitor under ERISA can keep the statute of limitations open. Tibble v. Edison Int'l, 135 S. Ct. 1823 (2015).

Differing Interpretations of "Actual Knowledge"

The circuit courts require differing levels of specificity when it comes to whether plaintiffs possess actual knowledge of an alleged fiduciary breach or related claim. Their views are discussed in terms of whether their views favor plaintiffs, defendants, or a bit of both.

- **Plaintiff-friendly.** The Third and Fifth Circuits interpret actual knowledge narrowly, to the advantage of plaintiffs. Under this more stringent approach, defendants need to show that plaintiffs not only knew of the underlying conduct giving rise to the alleged fiduciary breach (such as the selection of the proprietary funds), but also that that conduct supported a claim under ERISA. See Gluck v. Unisys Corp., 960 F.2d 1168, 1177 (3d Cir. 1992); Int'l Union v. Murata Erie N. Am, Inc., 980 F.2d 889, 900 (3d Cir. 1992); Maher v. Strachan Shipping Co., 68 F.3d 951, 954 (5th Cir. 1995).
- **Defendant-friendly.** The Sixth, Seventh, and Eleventh Circuits have taken a more defendant-friendly approach that requires defendants to show only that plaintiffs had sufficient knowledge of the "facts or transaction" that formed the basis of the alleged breach or violation.
- **Hybrid approach.** Other circuits, including the Ninth Circuit from which Sulyma above, was appealed, have either adopted a hybrid approach, or have yet to take sides on the issue. These approaches all exist against the backdrop of an ongoing push by the Department of Labor to improve participant-level fee disclosure for 401(k) plans, including efforts to make those disclosures simpler to understand.

The Plaintiff-Friendly "Claims" Approach

The following cases describe the plaintiff-friendly "claims" approach. The name derives from its focus on when the plaintiff has sufficient knowledge to be alerted to the particular claim against the defendant.

Gluck v. Unisys Corp (Third Circuit)

The Third Circuit articulated its "stringent" approach to actual knowledge in Gluck v. Unisys Corp., 960 F.2d 1168 (3d Cir. 1992). There, plaintiffs were participants of a contributory retirement plan, entitling contributing members to receive additional retirement benefits once their age or contribution reached certain thresholds. The defendants eliminated this plan provision, and the plaintiffs sued, alleging that the amendment constituted a fiduciary breach under ERISA. Gluck, 960 F.2d at 1172. In their successful motion to dismiss in the district court, the defendants argued that the plaintiffs' claims were time-barred because more than three years had elapsed since plaintiffs were notified of the change to their 401(k) plan via an amendment notice circulated to plan participants.

The Third Circuit reversed, holding that "'actual knowledge' . . . requires that a plaintiff have actual knowledge of all material facts necessary to understand that some claim exists." Gluck, 960 F.2d at 1177. The Gluck court specifically rejected the more defendant-friendly interpretation that the defendant proposed, under which a defendant had to prove only that plaintiffs have "knowledge of the transaction that constituted the alleged violation, not . . . knowledge of the law." Gluck, 960 F.2d at 1178 (quoting Blanton v. Anzalone, 760 F.2d 989, 992 (9th Cir. 1985)). The court reasoned that, while the plaintiffs were informed of the underlying transaction by the amendments and company literature distributed prior to the change to the plan, they could not have discerned a cause of action . . . given that the amendments "disguise[d] a failure to vest" and the company literature distributed at the time "described [the amendments] as improving participants' benefit packages." Gluck, 960 F.2d at 1178. See also Int'l Union v. Murata Erie N. Am., Inc., 980 F.2d 889, 900 (3d Cir. 1992) ("Gluck therefore requires a showing that plaintiffs actually knew not only of the events that occurred which constitute the breach or violation but also that those events supported a claim of breach of fiduciary duty or violation under ERISA.")

Maher v. Strachan Shipping Co. (Fifth Circuit)

The Fifth Circuit soon followed the Third Circuit in adopting the claims approach to actual knowledge. In Maher v. Strachan Shipping Co., 68 F.3d 951, 954 (5th Cir. 1995), former retirement plan participants sued the plan sponsor for fiduciary breach after the plan terminated. Termination followed the sponsor's having relinquished plan liability by purchasing an annuity contract with a disfavored company. Rejecting the plan sponsor's motion to dismiss, the court noted that while certain evidence demonstrated plan participants' uneasiness with the decision to transfer plan assets, the evidence did not show that plaintiffs had "actual knowledge of the facts necessary to understand that some claim existed, knowledge of the harmful effect [of the] purchase . . . , or knowledge of any actual harm . . . ." Maher, 68 F.3d at 955.

The Defendant-Friendly "Facts or Transaction" Approach

In contrast to the plaintiff-friendly claims approach adopted by the Third and Fifth Circuits, the Fourth, Sixth, Seventh, and Eleventh Circuits have adopted a more defendant-friendly interpretation of actual knowledge.

These courts require only a showing that plaintiffs had "knowledge of the facts or transaction that constituted the alleged violation." See, e.g., Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1086 (7th Cir. 1992). Applying this standard, defendants are not required to demonstrate "that the plaintiff also ha[d] actual knowledge that the facts establish a cognizable legal claim under ERISA to trigger the running of the statute." Browning v. Tiger's Eye Benefits Consulting, Inc., 313 Fed. Appx. 656, 660–61 (4th Cir. 2009). This interpretation of Section 1113 helps defendants dismiss complaints early at the summary judgment stage.

Wright v. Heyne (Sixth Circuit)

The Sixth Circuit, for example, adopted the same defendant-friendly interpretation as did the majority of the other circuits. In Wright v. Heyne, 349 F.3d 321 (6th Cir. 2003), retirement plan trustees sued the plan's advisors for having breached their fiduciary duties and engaged in prohibited transactions. The trustees alleged that the advisor's investment decisions were improperly influenced by their collection of commissions and their affiliations with another financial entity. At summary judgment, the defendants successfully argued that plaintiffs' claims were time-barred under Section 1113(2).

After reviewing circuit opinions on both sides of the divide—the claims approach versus the facts or transaction approach—the Sixth Circuit settled on the latter as the "better view" (The decision accorded with underlying statutes of limitations policies seeking to prevent plaintiffs from sleeping on their rights and prohibits prosecution of stale claims.). The court explained that such policies would be frustrated if actual knowledge could only be obtained when plaintiffs actually learned that they had an ERISA claim—after consulting with an attorney—even though they had actual knowledge years earlier of all the facts and alleged misdeeds. Wright, 349 F.3d at 330–31. Applying the

facts or transaction approach to the plaintiffs' claims, the Sixth Circuit concluded that plaintiffs' claims were indeed time-barred. More than three years had passed since the plaintiffs had consulted with several investment professionals regarding the retirement plan's management. Plaintiffs were "specifically and unequivocally" informed at that time of the harmful consequences of the advisors' improper acts. Wright, 349 F.3d at 331–32.

Martin v. Consultants & Adm'rs (Seventh Circuit)

The Seventh Circuit likewise held in Martin v. Consultants & Adm'rs, Inc., that "the relevant knowledge for triggering the statute of limitations is knowledge of the facts or transaction that constituted the alleged violation. Consequently, it is not necessary for a potential plaintiff to have knowledge of every last detail of a transaction, or knowledge of its illegality." Martin, 966 F.2d at 1086.

As for what exactly constitutes "knowledge of the facts or transaction," the Martin court explained that it lies "somewhere between 'every last detail' and 'something was awry' . . . " Martin, 966 F.2d at 1086. The court indicated that the proper characterization usually turns on three factors:

- The complexity of the underlying factual transaction
- The complexity of the legal claim –and–
- The egregiousness of the alleged violation

Martin, 966 F.2d at 1086.

Brock v. Nellis (Eleventh Circuit)

The Eleventh Circuit similarly adopted this facts or transaction approach. Brock v. Nellis, 809 F.2d 753, 755 (11th Cir. 1987) (once the plaintiff learns of the facts that support his allegation of illegality, he has no more than three years in which to bring his suit.)

Other Circuits (Hybrid Approaches to Determining When "Actual Knowledge" Occurs)

Still other circuits have either yet to adopt one of the two approaches or have settled on a definition somewhere between the two.

Caputo v. Pfizer (Second Circuit)

For example, the Second Circuit has adopted a hybrid view of actual knowledge that melds the claims approach and the facts or transaction approach. Under this interpretation, a plaintiff has actual knowledge under Section 1113 "when he has knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated the Act . . . While a plaintiff need not have knowledge of the relevant law . . . he must have knowledge of all facts necessary to constitute a claim. Such material facts 'could include necessary opinions of experts, knowledge of a transaction's harmful consequences, or even actual harm.'" Caputo v. Pfizer, Inc., 267 F.3d 181, 193 (2d Cir. 2001).

In ***Caputo***, former Pfizer employees sued the company under ERISA, alleging that it had improperly persuaded them to retire before the company announced more generous severance packages for existing employees. The district court held that the plaintiffs' claims were time-barred because they obtained "actual knowledge of the breach or violation" when Pfizer announced the severance package after the plaintiff-retirees had left the company. The Second Circuit reversed, reasoning that while the announcement of the severance package itself "gave plaintiffs reason to suspect that Pfizer had lied to them" (when it persuaded them to retire before the announcement), that was not enough to constitute actual knowledge. Rather, plaintiffs' ERISA claim hinged on a showing that Pfizer had misrepresented present facts to the plaintiffs about their retirement options. It was not until several years after the announcement that the plaintiffs learned that Pfizer was already anticipating issuing the severance package when it had persuaded the plaintiffs to retire. Caputo, 267 F.3d at 193–94.

Sulyma v. Intel Corp. Inv. Policy Comm. (Ninth Circuit)

The Ninth Circuit adopted a similar, middle-ground approach in Sulyma v. Intel Corp. Inv. Policy Comm., 909 F.3d 1069 (9th Cir. 2018), ***cert. granted,*** Intel Corp. Inv. Policy Comm. v. Sulyma, 2019 U.S. LEXIS 3991 (2019). There, the court held that actual knowledge means "something between bare knowledge of the underlying transaction, which would trigger the limitations period before a plaintiff was aware, he or she had reason to sue, and actual legal knowledge, which only a lawyer would normally possess." Sulyma, 909 F.3d at 1075. To demonstrate that a claim is time-barred under Section 1113(2), the court decided, "the defendant must show that the plaintiff was actually aware of the nature of the alleged breach more than three years before the plaintiff's action is filed." Sulyma, 909 F.3d at 1075. This is necessarily a claim-specific inquiry, the court stated, contrasting a claim for fiduciary breach and one alleging a prohibited transaction under ERISA § 406 (29 U.S.C. § 1106). In a fiduciary breach case, the plaintiff must be aware that the defendant has acted and that those acts were imprudent. In a prohibited transaction case, the plaintiff need only be aware that the defendant engaged in a prohibited transaction. Thus, knowledge of the transaction is all that is necessary to know

that a prohibited transaction has occurred. Sulyma, 909 F.3d at 1075, and see discussion at Proprietary-Funds-Specific Issues below.

The U.S. Supreme Court recently granted the petition for certiorari filed by the Intel Corp. Investment Policy Committee, raising the possibility that the court will decide, once and for all, what actual knowledge entails. Intel Corp. Inv. Policy Comm. v. Sulyma, 2019 U.S. LEXIS 3991 (2019). Until then, however, plan sponsors should continue to note the differing and evolving standards in different circuits on what actual knowledge looks like. Sulyma, 909 F.3d at 1077 (as actual knowledge is required to trigger ERISA's limitations period, there were disputed material facts as to whether the participant had the requisite actual knowledge, thus precluding summary judgment on the claims). If Sulyma is allowed to proceed, it will be remanded to the lower courts for further proceedings, where one of the key issues to be litigated is the question of whether including private funds in the investment menu for retirement plans constitutes a breach of fiduciary duty—which itself is a critical question of broad relevance for plan sponsors, not limited to the sphere of proprietary funds litigation.

Proprietary-Funds-Specific Issues

Recent lower court decisions in the proprietary-funds litigation space offer further guidance to plan sponsors and fiduciaries, revealing how those courts are applying the circuits' varying definitions of actual knowledge to a new wave of ERISA complaints. These cases raise their own set of unique factual and legal issues when it comes to evaluating actual knowledge under Section 1113(2).

Attributes of Benchmark Funds

The vast majority of recent proprietary funds complaints center on allegations that the proprietary funds in question underperformed and/or have charged excessive fees. To prove these points, plaintiffs typically point to benchmark funds—comparable alternatives to the proprietary funds, based on fund structure and investment strategy—alleging that the proprietary funds failed to match their counterparts' performance and fees. See, e.g., Meiners v. Wells Fargo & Co., 2017 U.S. Dist. LEXIS 80606 (D. Minn. 2017), aff'd, Meiners v. Wells Fargo & Co., 898 F.3d 820 (8th Cir. 2018); Patterson v. Capital Grp. Cos., 2018 U.S. Dist. LEXIS 24237 (C.D. Cal. 2018). In such cases, district courts applying the Second Circuit's hybrid approach to actual knowledge typically require defendants, to show that plaintiffs had knowledge regarding fees and performance of the proprietary funds, and of the associated benchmark funds, to dismiss on statute of limitations grounds.

Leber v. Citigroup 401(k) Plan Inv. Comm.

For example, in Leber v. Citigroup 401(k) Plan Inv. Comm., 2014 U.S. Dist. LEXIS 139001 (S.D.N.Y. 2014), plaintiffs alleged that their Citigroup-sponsored 401(k) plan invested in Citigroup-affiliated funds that charged higher fees than comparable Vanguard funds. Defendants argued that plaintiffs acquired actual knowledge of the funds' costs through plan documents that listed their fees and expenses. The district court rejected the argument, because the Vanguard funds' fees were "essential to the plausibility of plaintiffs' claims," and defendants "presented no evidence . . . that plaintiffs knew that the Affiliated Funds' fees were higher than alternatives with comparable performance." Leber, 2014 U.S. Dist. LEXIS 139001, at *3. To prove actual knowledge in this context, the Leber court required defendants to show either that plaintiffs:

- Possessed, through plan communications or otherwise, comparisons of the proprietary funds to the alternatives – or–
- Knew in some other way that the fees were excessive

Leber, 2014 U.S. Dist. LEXIS 139001, at *4.

Moreover, when plaintiffs' claims are based on both excessive fees and poor fund performance, defendants may have to demonstrate that plaintiffs knew of both the fees and performance of the benchmark funds (in addition to the fees and performance of the proprietary funds) to successfully raise a statute of limitations defense.

In re M&T Bank Corp. ERISA Litig.

In In re M&T Bank Corp. Erisa Litig., 2018 U.S. Dist. LEXIS 154641 (W.D.N.Y. 2018), plan participants alleged that the M&T defendants breached their fiduciary duties to the plan by including proprietary funds that were both more expensive and worse performing than benchmark alternatives. Moving to dismiss under ERISA § 413(2), the defendants argued that plaintiffs had actual knowledge of the proprietary funds' performance and costs from plan documents provided to participants and disclosing the selected funds' performance history, expense ratios, and their relationship with M&T Bank. In re M&T Bank Corp. ERISA Litig., 2018 U.S. Dist. LEXIS 154641, at *5. Defendant provided the plan documents to participants in January 2013. However, the plaintiffs didn't file their ERISA action until May 2016 (more than three years' later) applying Caputo, the district court held that knowledge of the performance and expenses of the proprietary funds at issue was not sufficient to time-bar the complaint: "Plaintiffs do not just argue that proprietary funds were expensive and did not perform well—they argue that they were more expensive and performed worse than other alternatives that Defendants could have chosen for the Plan. Therefore, Plaintiffs would have to know the data for these

comparator funds' fees and performance to possess actual knowledge of Defendants' violation." In re M&T Bank Corp. ERISA Litig., 2018 U.S. Dist. LEXIS 154641, at *5.

Knowledge of Decision Process

In another set of proprietary funds cases, plaintiffs base their breach of fiduciary duty claim on the "process," rather than the "outcome," of the investment decisions. This form of claim has a long history under ERISA, as documentation of following the appropriate process is generally key for ERISA fiduciaries to demonstrate that they have discharged their duties. See ERISA Fiduciary Duties. Accordingly, courts have found actual knowledge only where plaintiffs have specific knowledge regarding a defendant's process for selecting, evaluating, and retaining the proprietary investment options. Information concerning the proprietary funds alone, such as performance history, fees and expenses, and affiliated status, has been deemed insufficient.

Schapker v. Waddell & Reed Financial, Inc.

For example, in Schapker v. Waddell & Reed Fin., Inc., 2018 U.S. Dist. LEXIS 28458 (D. Kan. 2018), the district court found that "under either definition of 'actual knowledge,'"—both the facts or transaction approach and the claims approach—"a plaintiff who pleads a process-based fiduciary duty claim must be aware of the process utilized by the fiduciary to have actual knowledge of her claim." Schapker, 2018 U.S. Dist. LEXIS 28458, at *4.

The Schapker court rejected the defendants' argument that the plaintiff acquired actual knowledge when the plan documents disclosed the fees associated with the proprietary funds and the fact that the plan consisted almost entirely of such funds. Schapker, 2018 U.S. Dist. LEXIS 28458, at *4.

Patterson v. Capital Group Companies, Inc.

Likewise, in Patterson v. Capital Grp. Cos., 2018 U.S. Dist. LEXIS 24237 (C.D. Cal. 2018), the district court found that the plaintiff lacked actual knowledge even though she "received regular fee disclosure statements that made her aware of the [plan's investments'] allegedly expensive fees." Patterson, 2018 U.S. Dist. LEXIS 24237, at *3. Despite knowledge of those high fees, the Patterson court concluded, the plaintiff nonetheless lacked "actual knowledge of Defendant's process for selecting and retaining the investment options" which was the focus of the plaintiff's fiduciary breach claim. Patterson, 2018 U.S. Dist. LEXIS 24237, at *3.

Breach of Fiduciary Duty versus Prohibited Transactions

Proprietary funds litigation plaintiffs allege typically that the same general conduct—including and maintaining proprietary funds as part of a 401(k)-plan lineup—constitutes two distinct ERISA claims: (1) a fiduciary breach under ERISA § 404 (29 U.S.C. § 1104) and (2) a prohibited transaction(s) under ERISA § 406 (29 U.S.C. § 1106). When it comes to actual knowledge under ERISA § 413(2), however, the analysis depends on whether a defendant is moving to dismiss one claim versus the other.

Actual Knowledge Relates to the Occurrence of the Prohibited Transaction

In other words, as the Ninth Circuit recently observed in Sulyma (discussed above), "[t]he exact knowledge required will . . . vary depending on the plaintiff's claim." Sulyma, 909 F.3d at 1075. Because the crux of a prohibited transaction claim is the transaction itself, courts generally look to knowledge of that fact alone when evaluating actual knowledge for that claim. More is required when it comes to actual knowledge of a fiduciary breach claim, as that claim usually encompasses a broader array of conduct apart from the underlying transaction that led to a proprietary fund's inclusion in the 401(k) plan. For instance, the Sulyma court indicates that, " . . . in an ERISA [Section 404] case, the plaintiff must be aware that the defendant has acted and that those acts were imprudent." Sulyma, 909 F.3d at 1075.

This contrasts with a prohibited transaction case regarding ERISA § 406 (29 U.S.C. § 1106). There " . . . the plaintiff need only be aware that the defendant has engaged in a prohibited transaction, because knowledge of a transaction is all that is necessary to know that a prohibited transaction has occurred." Sulyma, 909 F.3d at 1075.

Different Conclusions regarding When "Actual Knowledge" Occurs

Also, as previously mentioned, the Patterson court, discussed above, refused to dismiss the plaintiff's fiduciary breach claim, because defendants had failed to demonstrate that the plaintiff had actual knowledge of the defendant's process for selecting and maintaining plan investments. Patterson, 2018 U.S. Dist. LEXIS 24237, at *2. The court reached a different conclusion, however, about plaintiff's prohibited transaction claims, which alleged the improper collection of fees from certain proprietary investments. With respect to those allegations, the plaintiff knew more than three years prior that the plan had made those proprietary investments

and knew that those investments generated fees—such that the plaintiff's prohibited transaction claims were time-barred under ERISA § 413(2). Patterson, 2018 U.S. Dist. LEXIS 24237, at *2. The court also rejected the plaintiff's argument that "each new collection of fees started a new limitations period": "when there is a series of discrete but related breaches . . . the § 1113(2) limitations period does not begin anew with each related breach." Patterson, 2018 U.S. Dist. LEXIS 24237, at *2, quoting Tibble v. Edison Int'l, 843 F.3d 1187, 1196 (9th Cir. 2016).

In re G.E. ERISA Litig.

Likewise, even between prohibited transaction claims, courts may interpret actual knowledge differently depending on the factual or legal underpinnings of the claim. For example, in In re G.E. ERISA Litig., 2018 U.S. Dist. LEXIS 211106 (D. Mass. 2018), the plaintiffs alleged two different prohibited transaction claims:

- The first claim was based on defendants' offering certain General Electric (GE) funds as the sole actively managed investment option.
- The second claim alleged more specifically that the only reason defendants offered those GE funds was to boost profits prior to the sale of its subsidiary.

While the court dismissed the former, on the ground that plaintiffs knew of the GE funds' proprietary status the day they made their plan elections, it declined to dismiss the latter: "There are no facts in the [complaint] to suggest that Plaintiffs had actual knowledge that their funds were performing poorer and their fees cost higher compared to other funds." In re G.E. ERISA Litig., 2018 U.S. Dist. LEXIS 211106, at *3. The court also rejected the plaintiff's argument that "each new collection of fees started a new limitations period": "when there is a series of discrete but related breaches . . . the § 1113(2) limitations period does not begin anew with each related breach." In re G.E. ERISA Litig., 2018 U.S. Dist. LEXIS 211106, at *3, quoting Tibble v. Edison Int'l, 843 F.3d 1187, 1196 (9th Cir. 2016).

Schapker v. Waddell & Reed Financial, Inc.

Similarly, what constitutes actual knowledge for purposes of a prohibited transaction claim may also depend on whether the defendant previously represented that the transaction at issue was exempt from the list of prohibited transactions, as set forth in ERISA § 408 (29 U.S.C. § 1108). Such was the case in Schapker. There, the defendants moved to dismiss the plaintiff's prohibited transactions claim on the grounds that the plaintiff knew of the transaction through the company's public filings. The court agreed with the plaintiff that this did not constitute actual knowledge, as the public filings listed the transaction as exempt. Schapker, 2018 U.S. Dist. LEXIS 28458, at *6. Citing Seventh Circuit precedent, the Schapker court noted that "[i]n the case of an ERISA plan that invokes a § 1108 exception to a § 1106 prohibition, the plaintiff does not have actual knowledge of an alleged violation until she knows that the exception does not apply." Schapker, 2018 U.S. Dist. LEXIS 28458, at *6, quoting Fish v. Greatbanc Trust Co., 749 F.3d 671, 687–88 (7th Cir. 2014).

Joshua A. Lichtenstein, Partner, Ropes & Gray LLP

Josh Lichtenstein is an ERISA and benefits partner in New York who helps asset managers and employee benefit plans to find creative solutions to issues involving the investment of plan assets in a constantly evolving asset management landscape. Josh advises banks, asset managers, private wealth platforms, large pension plans and other institutions on the ERISA issues that have emerged or found prominence in recent years.

Josh partners with hedge, private equity, real estate and infrastructure funds, banks and their private wealth units to help them operate as ERISA fiduciaries and to comply with the prohibited transaction rules and related exemptions, or to structure investments to comply with the Venture Capital Operating Company (VCOC) or Real Estate Operating Company (REOC) exemptions or the so-called ERISA "25% test." Josh regularly helps clients to develop new product offerings and to implement practical compliance programs for managing plan assets. He also works with asset managers on all benefits aspects of mergers and acquisitions, executive compensation matters and qualified and nonqualified benefits plans.

Josh was seconded to the ERISA legal group of a leading financial institution from October, 2015 to May, 2016, where he assisted in all aspects of ERISA compliance and on formulating approaches to compliance with the DOL's most recent fiduciary rule.

Daniel V. Ward, Partner, Ropes & Gray LLP

Dan Ward has a wide range of experience in complex commercial disputes and securities litigation, including trials and appeals, investigations and international arbitration. His clients include public and private companies, investment advisers (including private equity sponsors, hedge funds and mutual funds) and individual officers and directors.