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The Silent Issue in *Intel v. Sulyma*: Does ERISA Section 413(2) Operate to Time-Bar Otherwise Timely Suits Challenging Subsequent Breaches of the Same Character?

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In its recent opinion in Intel v. Sulyma*, the U.S. Supreme Court clarified what qualifies as the "actual knowledge" required to trigger ERISA's three-year statutory period. The Court's opinion, however, left open whether establishing "actual knowledge" by a plaintiff in one case serves to time-bar otherwise timely suits that challenge subsequent breaches of the same character. This article argues that, under the continuing fiduciary duty analysis that the Court set forth in* Tibble v. Edison*, such suits should not be deemed untimely.*

The U.S. Supreme Court recently decided *Intel Corp. Investment Policy Committee v. Sulyma*, one of a number of closely watched ERISA cases on the Court's docket this term. *Sulyma* asked what constitutes "actual knowledge" of a breach of duty by fiduciaries of an

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employee benefit plan sufficient to trigger ERISA's three-year limitations period.

Petitioner Intel argued that a participant of a 401(k) plan acquires "actual knowledge" when he or she has access to disclosure documents provided by the plan that contain material facts relevant to a breach of fiduciary duty claim. That is so, Intel maintained, even if the participant never read the disclosure materials, or did not understand that the facts disclosed demonstrated a breach of fiduciary duty.

Respondent Christopher Sulyma, on the other hand, told the Court that actual knowledge means exactly what it says, i.e., that the plan participant must have an actual substantive awareness of the facts that constitute the breach, which cannot simply be inferred from information that has been provided to the participant even if those materials suggest that a fiduciary breach has occurred.

The Court unanimously sided with respondent Sulyma, holding that to meet Section 413(2)'s "actual knowledge" requirement, "more than evidence of disclosure alone" is necessary: It is not enough that the participant had access to the information; rather, the defendant must establish that "the plaintiff . . . in fact . . . become aware of" the information disclosed to him or her.[1]

The opinion was, however, not all roses for the plaintiffs in ERISA cases.

First, the Court left unaddressed "what exactly a plaintiff must actually know about a defendant's conduct and the relevant law in order for [ERISA § 413(2)] to apply," saying that question was not before the Court.[2]

Second, Justice Alito, who wrote for the unanimous Court, made it clear that "[no]thing in this opinion forecloses any of the "usual ways," to prove actual knowledge at any stage of the litigation."[3] The Court expressly noted that actual knowledge can be established "through inference from circumstantial evidence."[4]

While the *Sulyma* Court decided whether "actual knowledge" means what it says, its opinion did not address whether, if a fiduciary breach suit was not instituted within three years from the moment a plaintiff acquired "actual knowledge," any lawsuit arising from the disclosed conduct would be time barred. If it does, then a failure to sue within three years would also time bar a suit challenging a subsequent fiduciary breach, provided the subsequent breach is of the same character.

For example, a failure to timely file suit within three years of the plaintiff's acquiring actual knowledge of the fiduciary's selection of an imprudent investment option would, under this theory, bar a suit challenging the fiduciary's continuing to offer the same imprudent investment options. That proposition, however, seemingly runs headlong into what the Supreme Court said in *Tibble v. Edison International*, when construing ERISA's six-year limitation provision in Section 413(1). In *Tibble*, the Court held that ERISA fiduciaries have a continuing duty to monitor plan investments and to remove imprudent ones, and that the failure to discharge that duty gives rise to a new cause of action, which would not be time-barred if brought within six-years.

That same result would seemingly apply in cases where the defendant has raised the three-year provision as a time bar. But the U.S. Court of Appeals for the Ninth Circuit, at least, has reached a contrary result. Indeed, on remand in *Tibble*, the Ninth Circuit concluded that the three-year provision does, in fact, bar subsequent breaches of the same character.

This article examines whether the three-year provision of Section 413(2) operates in a fundamentally different way from its sister six-year provision and bars actions based upon subsequent fiduciary breaches of the same character as the conduct about which plan participants had acquired actual knowledge more than three years earlier.

Our conclusion is that it does not.

The upshot is that the three-year provision in ERISA does not, in our view, insulate fiduciaries from being held accountable for allowing breaches of their duties to continue to adversely affect participants.

ERISA SECTION 413

Section 413 of ERISA[5] sets forth two separate time periods during which actions for breach of fiduciary duty must be brought.

Under the six-year component, an action for breach of fiduciary duty is timely if it is filed no more than six years after the date of the last action that constituted the breach or violation of ERISA, or in the case of an "omission" – that is, a failure to act – "the last date on which the fiduciary could have cured the breach."

However, if a plaintiff had "actual knowledge" of the alleged breach, the three-year clement specifies that suit must be filed no more than three years from the earliest date on which the plaintiff first obtained actual knowledge of the breach.[6]

Tibble v. Edison

ERISA's six-year limitations provision was the subject of the Supreme Court's scrutiny in *Tibble v. Edison International*.[7] The *Tibble* plaintiffs – participants of Edison International's 401(k) defined contribution retirement plan – brought suit in 2007 alleging that the plan's fiduciaries breached their duty of prudence by "offering six higher priced retail-class mutual funds as Plan investments when materially identical lower priced institutional-class mutual funds were available."[8] Of these six funds, three had been first added by the plan in 1999, and the other three had been added in 2002.[9]

Not surprisingly, the defendants, citing to the six-year limitations period of Section 413(1), asserted that the fiduciary breach claims concerning the mutual funds added in 1999 were time-barred.

Plaintiffs answered that the challenges to all six funds were timely despite the fact that three of these funds had been added to the plan more than six years before they filed suit. As to those three funds, plaintiffs argued that the fiduciaries were subject to a "continuing obligation" to act prudently.[10]

On summary judgment, the district court held that the beneficiaries' claims regarding the three mutual funds that had been added to the plan in 1999 were not timely under ERISA's six-year limitations provision. The court rejected the suggestion that there is a "'continuing violation' theory to claims subject to ERISA's statute of limitations," for "although the trustee's conduct [i.e., the failure to remove the challenged 1999 funds] could be viewed as a series of breaches, the statute of limitations did not begin anew because each breach was of the same character."[11] The court thus concluded that a challenge to these funds would be timely only if there had been "a change in circumstances that might trigger an obligation to review and to change investments within the 6-year statutory period."[12] But as there had not been any such change, the court granted summary judgment to the defendants with respect to the three 1999-funds.[13] Plaintiffs' challenge to the three funds that had been added in 2002 survived summary judgment, and, following a bench trial, the court found that the fiduciaries had breached their duty of prudence, and awarded damages.[14]

On appeal, the Ninth Circuit affirmed the district court's interpretation of the six-year provision, and thus agreed that the challenges to the funds added in 1999 were untimely.[15] The court held that permitting beneficiaries to bring suit for a failure to remove an investment option from a plan that had been added more than six years prior to filing of suit "would make hash out of ERISA's limitation period and lead to an unworkable result."[16] The court also noted that it was "unpersuaded" by the suggestion that the rejection of a "continuing violation" theory "will give ERISA fiduciaries carte blanche to leave imprudent plan menus in place," because participants could still over the time-bar by showing that a "full due diligence review" of an investment option was warranted but not carried out by the plan's fiduciaries.[17]

The Supreme Court, however, unanimously reversed and vacated the Ninth Circuit's opinion. Writing for the Court, Justice Breyer explained that "the Ninth Circuit erred by applying a statutory time-bar to a claim of a 'breach or violation' of a fiduciary duty without considering the nature of the fiduciary duty."[18] The Court held that the duties imposed on fiduciaries by ERISA are "derived from the common law of trusts," and "under trust law a fiduciary is required to conduct a regular review of its investment with the nature and timing of the review contingent on the circumstances."[19]

More specifically, "a trustee," the Court said, "has a continuing duty to monitor trust investments and remove imprudent ones," and "[t]his continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset."[20]

Accordingly, the Court concluded that (1) a "plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones," and (2) "[i]n such a case, so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely."[21]

On remand, the Ninth Circuit initially found that the issue of whether the plan fiduciaries had committed any new breaches during the statutory period had been forfeited by the plan participants.[22]

However, on an *en banc* rehearing of the case, the Ninth Circuit reversed course, and remanded the case to the district court for a trial "on the claim that, regardless of whether there was a significant change in circumstances, Edison should have switched from retail-class fund shares to institutional-class fund shares."[23]

Finally, in 2017, some 10 years after it had been brought, the district court concluded that Edison was liable for breaching its fiduciary obligations with respect to the challenged investment options added in 1999.[24]

Intel v. Sulyma

The next chapter in the Section 413 story addresses the statute's three-year from "actual knowledge" provision.

Christopher Sulyma, the respondent before the Supreme Court, filed the underlying suit against the fiduciaries of the Intel 401(k) and retirement plans, alleging that the fiduciaries had imprudently over-allocated [plan assets] to hedge funds and private equity investments," and thereby "breached their fiduciary duties by investing in such funds, which presented unconventional, significant and undue risk of unduly high fees and costs."[25] According to Mr. Sulyma, "[t]hese allocations departed dramatically from prevailing industry standards," and the defendants' "investment decisions caused massive losses and enormous excess fees to the plans and their participants."[26]

The Intel fiduciaries moved to dismiss Sulyma's fiduciary breach claims as untimely under ERISA's three-year provision.

The district court agreed. Although noting that it would proceed on the assumption that "[Sulyma] never looked at [the] documents" that had been made available to him by the plan, the court nonetheless held that Sulyma had "actual knowledge" of their contents for purposes of Section 413(2) more than three years prior to the filing of his suit, and granted summary judgment in favor of Intel on that basis.[27]

A panel of the Ninth Circuit unanimously reversed the district court.[28] The court held that the statutory text – "actual knowledge of the breach or violation" – has its ordinary meaning, and thus requires the plaintiff to be "actually aware of the facts constituting the breach."[29]

Specifically, the court took this to mean that in order to prevail on a motion for summary judgment on the basis of the three-year provision, the defendant "must show that [Sulyma] was actually aware that [the petitioners] acted imprudently," not just that certain "facts were available to the plaintiff."[30] Applying this standard, the court found that Intel was not entitled to summary judgment: "Because Sulyma brought [an imprudent-investment claim], he was required to have actual knowledge both that those investments occurred, and that they were imprudent."[31]

In its petition for a writ of certiorari, Intel sought review on the question whether the "actual knowledge" requirement of Section 413(2) was satisfied when the relevant information regarding the breach was disclosed to a plaintiff, but the plaintiff either did not read the material or did not recall doing so.[32] The Supreme Court granted Intel's petition on that question.[33]

Intel sought to persuade the Court that it should not apply a simple dictionary reading, and instead urged that "the phrase 'had actual knowledge' in [Section 413(2)] must be construed in light of ERISA's disclosure provisions, which require plan administrators to 'disclose' . . . critical plan information to plan participants, and to ensure that they actually have that knowledge in their possession."[34]

In that regard, Intel told the Court that, "[w]hen read in its proper context, [Section 413(2)'s] actual knowledge requirement is satisfied when a plaintiff receives mandatory disclosures that apprise the plaintiff of the facts that form the basis of his claim."[35]

In response, Sulyma insisted that the "ordinary understanding of actual knowledge is all that is needed to resolve the question presented."[36] Specifically, Sulyma offered a two-part argument: (a) "[t]he ordinary meaning of 'actual' is 'existing in fact or reality,'" and (b)"'knowledge' means 'the state or fact of knowing,' or 'familiarity, awareness, or understanding gained through experience or study.'"[37] Putting these two interpretative strands together, it follows, said Sulyma, that "[t]o have 'actual knowledge' of something . . . is to have real awareness of it."[38] And under this reading of "actual knowledge," a plan participant cannot be said to have actual knowledge of the contents of disclosures made to him when he has not in fact read or accessed those disclosures, or does not remember their contents.[39]

Sulyma's amici – which include the U.S. Department of Labor – directed the Court's attention to the history of the statute, including the initial enactment and subsequent removal of a clause concerning "constructive knowledge," and the policy considerations that support a reading of the three-year provision in a way that raises the bar for a statute of limitations-defense for plan fiduciaries.[40]

Not surprisingly, the Court held that "actual knowledge," in fact, means what it says: to have actual knowledge of information a plaintiff "must in fact be aware of the information."[41] In other words, "actual knowledge" means, as the Court emphasized, "[real] knowledge as distinguished from presumed knowledge or knowledge imputed to one."[42] The addition of the word "actual," the Court said, signals that the "plaintiffs' knowledge" must be more than potential, possible virtual, conceivable, theoretical, hypothetical, or nominal."[43] The Court rejected what it characterized as Intel's "puzzling" "implied knowledge" position, that "[o]nce a plaintiff receives a disclosure . . ., he ha[s] the knowledge that [Section 413(2)] requires because he effectively holds it in his hands," and could "acquire [that knowledge] with reasonable effort."[44] That reading, the Court found, "turns [Section 413(2)] into what it is plainly not: a constructive knowledge requirement."[45] Thus, "if a plaintiff is not aware of a fact, he does not have 'actual knowledge' of that fact however close at hand the fact might be."[46]

In short, the Court held that Section 413(2) "requires more than evidence of disclosure alone," and that to satisfy Section 413(2), the plaintiff must have in fact "become aware" of that information.[47] The Court side-stepped the "separate question" of "exactly what a plaintiff "must actually know about a defendant's conduct and the relevant law" in order to trigger Section 413(2), although it noted that the Ninth Circuit had addressed the question.[48]

However, Justice Alito did not end his opinion there, stating that: "Nothing in this opinion forecloses any of the 'usual ways' to prove actual knowledge."[49] For example, actual knowledge, the Court noted, can be proved through "inference from circumstantial evidence," such as "electronic records showing that the plaintiff viewed the relevant disclosures," and "took action in response to the information contained [therein]."[50]

Among other things, the Court said that, although "not determinative," the fact that disclosures were made would be relevant on the issue, "as would electronic records showing that a plaintiff reviewed the relevant disclosures," and whether a plaintiff "took action in response to the information contained in [the disclosures]."[51] And if a plaintiff's denial is "blatantly contradicted by the record," the Court "should not adopt" the plaintiff's version at the summary judgement stage.[52]

Finally, the Court cautioned that its opinion "does not preclude defendants from contending that evidence of 'willful blindness' supports a finding it actual knowledge."[53]

TIBBLE'S CONTINUING FIDUCIARY DUTY ANALYSIS OPERATES EQUALLY WITH RESPECT TO SECTION 413(2) AS IT DOES WITH RESPECT TO SECTION 413(1), AND THUS DOES NOT BAR OTHERWISE TIMELY SUITS CHALLENGING SUBSEQUENT FIDUCIARY BREACHES

While it is fully understandable that the focus of attention in the *Sulyma* case was on the meaning of "actual knowledge," a perhaps more important question in the long-run may be whether the three-year limitation period of Section 413(2), unlike its six-year counterpart in Section 413(1), cuts off subsequent claims regarding fiduciary breaches of the same character as the fiduciary conduct that the plan participants had obtained actual knowledge of more than three years before.

This question is at least as pressing as the one the Court addressed in *Sulyma*, as illustrated by the Ninth Circuit's decision on remand in *Tibble*. There, the Ninth Circuit concluded that satisfying Section 413(2)'s three-year provision provides an absolute bar to suit, even if there are subsequent breaches of the same character. The Ninth Circuit's position would in many instances effectively render ERISA's six-year provision irrelevant, despite the Court's holding in *Sulyma*: By providing all plan participants with detailed information regarding the costs, performance and composition of the plan's portfolio of investment options, fiduciaries may be able to persuade the courts that all participants receiving the information should, at least as an evidentiary matter, be presumptively charged with knowledge of that information. Acceptance by the courts of that sort of cascading time-bar might well immunize fiduciaries from being held accountable for their continuing to offer imprudent investment options to plan participants.

But providing that detailed information through periodic disclosures to participants may have blowback consequences on plan fiduciaries. If the information disclosed suffices to impart "actual knowledge" of a fiduciary breach to participants, then that same information should also be sufficient to trigger the "continuing duty" of fiduciaries not only to monitor plan investments, but also to remove and replace imprudent investments.

As discussed in detail below, why this should – and, in fact, must – be the case, consider, first, that to trigger the three-year limitations period, plan disclosures would at a minimum need to align with the pleading standard for a claim in federal court – that is, the disclosure would have to contain facts sufficient to allow a reasonable participant to draft a pleading establishing a plausible inference that a fiduciary breach had occurred.[54] Anything less, such as facts that may require further investigation into whether a fiduciary breach had occurred, would not provide the "actual knowledge" necessary to trigger the running of the three-year limitation period.

And, second, if the facts in the disclosure do provide a plausible basis to believe a fiduciary breach has occurred – for example, if they establish that various investment options offered by the plan had chronically underperformed the benchmarks chosen by the plan's fiduciaries – then those same facts would necessarily trigger the fiduciaries' duty to review the continued prudence of offering those investments, and to remove them from the plan if appropriate, which is exactly what the Supreme Court held in *Tibble*.[55] In those circumstances, the participant could reasonably rely in the first instance upon the duty of the fiduciaries to take appropriate action to correct or cure the breach. The failure by the fiduciaries to do so by the next disclosure period would create a new cause of action.[56]

To Trigger ERISA's Three-Year Limitations Period, Disclosures Would Need to Contain Information Sufficient to Allow Participants to Plausibly Infer that a Fiduciary Breach Had Occurred

In *Sulyma*, the Court did not explore what information plan disclosures need to contain, if these disclosures are to be sufficient to provide those participants who have read them with actual knowledge of a fiduciary breach. Intel had, however, pointed out that Congress contemplated that the information it required to be disclosed would "enable employees to police the plans," by bringing suit under Section 502(a) to enjoin ongoing fiduciary breaches, and/or to restore plan and participant losses due to fiduciary mal or misfeasance.[57]

Accordingly, in order to put participants in a position to effectively do so, the facts disclosed would have to plausibly show that the plan's fiduciaries have breached their fiduciary obligations, for only then would participations be "armed with enough information" – that is, the "actual knowledge" – "to enforce their own rights"[58] in court.

In other words, to trigger the three-year limitations period under Section 413(2), the facts disclosed would need to be sufficient to meet the pleading standard for stating a fiduciary breach claim under ERISA § 404(a),[59] or a prohibited transaction claim under Section 406.[60] A disclosure that did not provide facts that met that standard would not give a potential plaintiff "actual knowledge" of the breach sufficient to seek a remedy in court.

An interpretation of the "actual knowledge" standard in Section 413(2) that equates it with the pleading standard for an action for fiduciary breach is well-supported by the "express purpose" of ERISA's disclosure provisions, *i.e.,* that participants "have sufficient information and data to enable them to know whether the plan is . . . being administered as intended," and "to avail themselves of ERISA's remedies if the plan was being mal and/or mis administrated."[61]

The method for "policing a plan" that ERISA makes available to participants is set out in ERISA § 502,[62] which empowers plan participants to bring civil actions to enforce the statute's various provisions, including, of course, its provisions regarding the duties of plan fiduciaries. And plan participants can effectively avail themselves of ERISA's remedies by way of a civil action for fiduciary breach only when armed with factual knowledge sufficient to file a complaint that would, at minimum, survive a motion to dismiss. In other words, when armed with knowledge of facts that support a "plausible" inference of imprudent or self-serving conduct by the plan's fiduciaries.[63] If the facts disclosed do not support a plausible inference that a fiduciary breach or prohibited transaction had occurred, then plan participants would have not acquired "actual knowledge" of the fiduciary breach, and the three-year limitations period of Section 413(2) is not triggered.

If Disclosures Give Participants Actual Knowledge of Imprudent Behavior, Fiduciaries Are Likewise Put on Notice, Triggering their Continuing Duties under Tibble

While ERISA's disclosure regime is seemingly designed to afford plan participants the opportunity to "police the plan," ERISA undeniably imposes an obligation on plan *fiduciaries* to discharge their duties with the "care, skill, prudence and diligence" of a reasonable person.[64] If the facts disclosed are sufficient to provide participants with "actual knowledge" of a "breach or violation" of ERISA, certainly those same facts must suffice to ascribe that same knowledge to the fiduciaries, who caused the disclosures to be furnished to the participants in the first place.

Given that plan fiduciaries are under a "continuing duty" to "monitor investments and remove imprudent ones," each disclosure that imparts "actual knowledge" to plan participants of a new breach, or the failure of the fiduciary to cure or correct an existing breach must, of necessity, simultaneously create a new cause of action for imprudence under Section 404(a).[65]

The Supreme Court made that much plain in *Tibble,* when it held that a "plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor and remove imprudent ones," and that such a claim would be timely under ERISA § 413(1) "so long as the alleged breach . . . occurred within six years of suit," because the duty of prudence imposed by 29 U.S.C. § 1104 is "continuing."[66] It follows that the same is true under the three-year provision, as the "continuing" fiduciary duty does not disappear simply because a defendant invokes Section 413(2)'s three-year limitations period, and, as the Supreme Court held in *Tibble*, the Section 413 time-bar must be applied in the context of the nature of the fiduciary duty at issue.[67]

If periodic disclosures are sufficient to put plan participants on "actual notice" of a fiduciary's "breach or violation," then plan fiduciaries cannot seriously deny that the same information would put them on notice of the same breach.

Accordingly, if a specific disclosure imparts information sufficient to impose a duty on the plan participants to "police their plan" by instituting a civil action, the plan's fiduciaries certainly have at least a parallel duty to take action to remove those imprudent investments before the next disclosure period, or at least to explain to participants why the fiduciaries decided to retain those previously identified "imprudent" investment options in the plan. And given that a fiduciary's "continuing obligation" to monitor the soundness of their investment decisions is independent of which statute of limitations period applies, a failure by the fiduciary to take appropriate action to fix or correct the breach before the next disclosure period would create a new cause of action – not just for purposes of Section 413(1)'s six-year limitations period, but also for Section 413(2)'s three-year period.

This conclusion is reinforced by the fact that plan participants can reasonably expect the fiduciaries of their plan to take corrective action when it becomes plain that certain investment options in the plan are, for example, chronically underperforming or otherwise imprudent. This expectation flows from the very nature of the duties imposed on fiduciaries by ERISA,[68] as these duties are "the highest known to the law."[69] As former Justice (then-Judge) Cardozo famously observed: "A [fiduciary] is held to something stricter than the moral of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[70] Consequently, the fiduciary is plainly not free to ignore the breach revealed by his or her own disclosures. And the failure to take corrective action constitutes a separate breach.[71] In other words, if the facts revealed in the plan's periodic disclosures evidence a fiduciary breach, participants can reasonably rely on the understanding that fiduciaries will cure – or at least address – the breach before the next disclosure period. If the fiduciaries fail to act appropriately, a new cause of action accrues.

Contrary to what the Ninth Circuit held on remand, extending *Tibble*'s holding from the six-year period with respect to Section 413(1) to the three-year period in Section 413(2) would not somehow "read the 'actual knowledge' standard out of § 1113(2)."[72] Just as the Supreme Court did not eliminate ERISA's six-year limitations period when it held that fiduciaries are subject to a continuing obligation to manage the plan's assets in a prudent manner, determining that each periodic disclosure may give rise to a new claim would not somehow erase the three-year limitations period from the statute.

A simple example illustrates this point: If fiduciaries disclose the chronic underperformance of certain investment options to plan participants in year 1, then the participants' putative claim for fiduciary breach for year 1 would be barred by the three-year limitations period by year 4, even if the investment options in question are still part of the plan by then. However, participants could still bring suit in year 4 for the failure to remove the options in year 2, because they only acquired "actual knowledge" of the fiduciaries' failure to correct the imprudence in year 2, through the year 2 disclosures. This result would be no different than the outcome that the Court's decision in *Tibble* would direct with respect to the six-year provision.

Furthermore, and again contrary to what the Ninth Circuit concluded in *Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, extending *Tibble*'s approach to ERISA's three-year limitations period does not "founder[] on the plain language of § 1113[(2)]."[73] While Section 1113(2) provides that "[n]o action may be commenced . . . three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation," the statute plainly does not immunize fiduciaries from being held accountable in court for subsequent breaches even of the same character.[74] It is therefore entirely beside the point to note, as the Ninth Circuit did in *Philips*, that "[w]hile" a breach of the duty of prudence such as the one at issue here "may be viewed as a series of breaches, all were of the same character."[75] The mere fact that the serial conduct involves breaches that are "of the same character" does not mean that there was only a single breach for purposes of assessing whether the limitations period has run.

The Supreme Court made that clear in *Tibble*, when it held that the failure of a fiduciary to periodically monitor plan investments and remove imprudent investment options constituted a new breach each time the fiduciary engaged in that monitoring function and failed to remove an imprudent investment.[76] The same result should obtain when the fiduciary discloses to participants facts that provide "actual knowledge" of a fiduciary breach and subsequently fails to remedy the disclosed breach.[77] The initial disclosure reveals the existence of the breach due to a past act, and the subsequent disclosure reveals the fiduciary's failure to remedy the breach – which the Court said in *Tibble* is a separate breach of fiduciary duty. A suit filed within three years of the subsequent disclosure would thus not be barred.

CONCLUSION

Had the Supreme Court sided with Petitioner Intel in *Sulyma*, it would effectively have cut the statutory period for actions for fiduciary breach to three instead of six years. By instead siding with Sulyma's reading of "actual knowledge," defendants in ERISA cases continue to be subject to a meaningful evidentiary burden if they seek to cut the statutory period to three years.

What the Court left open in *Sulyma* is what the effect is of meeting that evidentiary burden, as it did not address whether Section 413(2), when it applies, bars otherwise timely suits for later separate breaches of the same character that happened more than three years after actual knowledge of the prior breach was acquired.

As courts weigh this question, it is of vital importance that they recognize that the three-year statutory period, just like the six-year period, must be interpreted by considering "the nature of the fiduciary dut[ies]" imposed by ERISA.[78] Once the underlying fiduciary doctrine is taken into account, then, much as in *Tibble*, it follows that the three-year statute of limitations does not bar an otherwise timely suit for later breaches of fiduciary duty, even if the subsequent breach is of the "same character" as a prior breach that occurred more than three years earlier.

NOTES

1. *Intel Corp. Inv. Policy Comm. v. Sulyma*, No. 18-116, 589 U.S. ____ (2020), slip op. at 5 (Feb. 26, 2020) (*Sulyma I*).

2. *Id.* at 5 n.2.

3. *Id.* at 11 (internal marks and citation omitted).

4. *Id.* (citation omitted).

5. 29 U.S.C. § 1113.

6. When Congress first enacted ERISA in 1974, the three-year provision in Section 413 contained both an actual knowledge and a constructive knowledge provision. *See* 29 U.S.C. § 1113(a)(2) (1976). The actual knowledge component in the original version of the statute was identical to what is currently codified as Section 413(2), 29 U.S.C § 1113(2). The constructive knowledge element said that an action could not be commenced more than three years after 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 under this title." 29 U.S.C. § 1113(a)(2)(B) (1976). Congress repealed the constructive knowledge portion of ERISA's three-year provision in 1987. *See* Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, Section 9342(b), 101 Stat. 1330. As a result of the repeal, defendants in a breach of fiduciary duty suit can only avail themselves of the three-year provision if they can establish that a plaintiff had "actual knowledge" of the fiduciary breach at issue.

7. *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015) (*Tibble I*).

8. *Id.* at 1825.

9. *Id.*

10. *Tibble v. Edison Int'l*, 639 F. Supp. 2d 1074, 1086 (C.D. Cal. 2009) (*Tibble II*). The plaintiffs also argued that all claims were timely because the six-year limitations period should be tolled because the plan fiduciaries had allegedly concealed evidence of their imprudent conduct. The court rejected this argument for lack of evidence. *Id.*

11. *Id.* (citation and internal marks omitted).

12. *Id.*

13. *Tibble I*, 135 S. Ct. at 1827.

14. *Tibble v. Edison Int'l*, No. 07-cv-5359, 2010 WL 2757153 (C.D. Cal. July 8, 2010) (*Tibble III*).

15. *Tibble v. Edison Int'l*, 729 F.3d 1110 (2013) (*Tibble IV*).

16. *Id.* at 1119.

17. *Id.* at 1120.

18. *Tibble I*, 135 S. Ct. at 1827.

19. *Id.* at 1827-28.

20. *Id.* at 1828.

21. *Id.* at 1829.

22. *Tibble v. Edison Int'l*, 820 F.3d 1041, 1048 (9th Cir. 2016) (*Tibble V*).

23. *Tibble v. Edison Int'l*, 843 F.3d 1187, 1192-93 (9th Cir. 2016) (*Tibble VI*).

24. *Tibble v. Edison Int'l*, No. 07-cv-5359, 2017 WL 3523737 (C.D. Cal. Aug. 16, 2017) (*Tibble VII*).

25. *Sulyma v. Intel Corp. Inv. Policy Comm.*, No. 15-cv-04977, 2017 WL 1217185, at *1 (N.D. Cal. Mar. 31, 2017) (internal marks omitted) (*Sulyma II*).

26. *Id.*

27. *Id.* at *12.

28. *Sulyma v. Intel Corp. Inv. Policy Comm.*, 909 F.3d 1069, 1078 (9th Cir. 2018) (*Sulyma III*).

29. *Id.* at 1076.

30. *Id.*

31. *Id.* at 1077.

32. *Sulyma I*, Br. for Petitioner, at i.

33. 139 S. Ct. 2692 (2019).

34. *Sulyma I*, Br. for Petitioner, at 3.

35. *Id.*

36. *Sulyma I*, Br. for Respondent, at 1.

37. *Id.*

38. *Id.*

39. *Id.*

40. *See Sulyma I*, Amicus Br. for the United States, at 7–10; *Sulyma I*, Amicus Br. for AARP, at 2–5.

41. *Sulyma I*, slip op. at 8.

42. *Id.* at 6 (internal marks, modifications, and citation omitted).

43. *Id.* at 7 (internal marks, modifications, and citation omitted).

44. *Id.* at 8-9.

45. *Id.* at 9.

46. *Id.* at 8.

47. *Id.* at 8.

48. *Id.* at 5 n.2. After reviewing a series of its opinions construing Section 413(2) that provided a less than fully harmonious understanding, the Ninth Circuit in the opinion below drew a two-fold conclusion from those cases: "First, 'actual knowledge of the breach' does not mean that a plaintiff has knowledge that the underlying action violate ERISA"; and second, that "actual knowledge of the breach does not merely mean that a plaintiff has knowledge that the underlying transaction occurred." *Sulyma III*, 909 F.3d at 1075 (citations omitted). In other words, the Ninth Circuit found that the "actual knowledge" must mean something between bare knowledge of the underlying transaction . . . and actual legal knowledge, which only a lawyer would normally possess." *Id.* Meshing the two principles extracted from its cases, the Court concluded that to trigger Section 413(2), 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." *Id.* The exact knowledge required, the court observed, will vary depending on the plaintiff's claim:

> For instance, in a section [404 breach of fiduciary duty] case, the plaintiff must be aware that the defendant has acted and that those acts were imprudent. . . . But in, for example, a section [406 prohibitmmmmmed transaction] case, the plaintiff need only be aware that the defendant has engaged in a prohibited transaction, because knowledge of the transaction is all that is necessary to know that a prohibited transaction has occurred. *Id.*

49. *Sulyma I*, slip op. at 11 (internal marks and citation omitted).

50. *Id.*

51. *Id.*

52. *Id.* (internal marks and citation omitted).

53. *Id.* at 11-12 (internal marks and citation omitted).

54. *See Ashcroft v. Iqbal*, 556 U.S. 662, 680-81 (2009) (explaining that an actionable complaint must state a "plausible" claim for relief); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (same).

55. *Tibble I*, 135 S. Ct. at 1828-29.

56. *Id.* at 1829.

57. *Sulyma I*, Br. for Petitioner, at 24 (internal marks and citation omitted).

58. *Id.* at 2 (internal marks and citation omitted).

59. 29 U.S.C. § 1104(a).

60. 29 U.S.C. § 1106.

61. *Id.* at 24-25 (internal marks, modifications, and citations omitted).

62. 29 U.S.C. § 1132.

63. *See Iqbal*, 556 U.S. at 680-81; *Twombly*, 550 U.S. at 555.

64. *Tibble I*, 135 S. Ct. at 1828 (citing 29 U.S.C. § 1104(a)(1)); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 419 (2014) (same).

65. *Tibble I*, 135 S. Ct. at 1828-29.

66. *Tibble*, 135 S. Ct. at 1829.

67. *Id.* at 1827-28.

68. 29 U.S.C. Part 4.

69. *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

70. *Meinander v. Salmon*, 249 N.Y. 458, 464 (1928).

71. ERISA § 413(1) provides that the six-year period begins to run when the fiduciary "could have," but failed to cure a breach. *See* 29 U.S.C. § 1113(1). This expectation finds further support in Section 4975 of the Internal Revenue Code, which imposes an additional tax of 15 percent of the amount involved on prohibited transactions, but increases the tax rate to 100 percent of the amount involved if the transaction "is not corrected within the taxable period." *See* 26 U.S.C. § 4975(b).

72. *Tibble VI*, 843 F.3d at 1196 (citing *Phillips v. Alaska Hotel & Rest. Emps. Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991), *as amended on denial of reh'g* (Dec. 6, 1991) (internal modifications omitted)).

73. *Philips*, 944 F.2d at 520.

74. *See Tibble I*, 135 S. Ct. at 1829.

75. *Philips*, 944 F.2d at 520.

76. *Tibble I*, 135 S. Ct. at 1829.

77. As noted in its opinion in *Sulyma III*, the Ninth Circuit held that knowledge of a transaction between, for example, a plan, the employer, or an affiliated entity constitutes the "actual knowledge" that triggers the three-year limitations period of Section 413(2) when the claim involves a Section 406 prohibited transaction, as "knowledge of the transaction is all that is necessary to know that a prohibited transaction has occurred. Although the focus in *Tibble* was on an alleged fiduciary breach, the result should be no different when the claim at issue involves a prohibited transaction. In both instances, the fiduciary has an ongoing duty to take corrective action.

First, many prohibited transactions – particularly those involving self-dealing by fiduciaries, *see* ERISA § 406(b), 29 U.S.C. § 1106(b) – are also breaches of the fiduciary duty of loyalty. *See, e.g., Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241-42 (2000) (explaining that ERISA's prohibited transaction provisions were enacted to "supplement[] the fiduciary's general duty of loyalty"). There is no good reason why a fiduciary's failure to remedy a prohibited transaction should not constitute a separate breach of fiduciary duty that would run the three-year provision anew from the date the plaintiff learned of the fiduciary's failure to act.

Second, parallel prohibited transaction provisions of the Internal Revenue Code penalize a fiduciary who fails to remedy a fiduciary breach. A first-level tax of 15 percent is imposed upon a fiduciary who allowed the transaction to occur in the first place. I.R.C. § 4975(a). A second-level tax of 100 percent is imposed for each subsequent "taxable period" in which the prohibited is not corrected. *Id.* at Section 4975(b). As expressed on the tax side of ERISA, Congress has made plain that fiduciaries are not permitted to allow a prohibited transaction to continue without paying a significant penalty. The failure to correct a prohibited transaction constitutes a separate violation of the prohibited transaction provisions of the IRS code. That same failure to remedy the prohibited transaction should similarly establish a separate violation of ERISA § 406 prohibited transaction provisions, resulting in a separate triggering of a new three-year limitations period under Section 413(2), when plan participants become aware of the fiduciary's failure to remedy.

78. *Id.* at 1827.