Sulyma and its Aftermath: ERISA's Fiduciary Statute of Limitations and the Meaning of Knowledge

INTRODUCTION

A key component of employment are the benefits employees receive from their employer.[1] One of the main benefits an employer can provide its employees is a retirement savings plan.[2] These plans, which are administered and maintained by employers, help many people save for retirement.[3] To help ensure efficient, competent, and honest administration of retirement plans, the Employee Retirement Income Security Act of 1974 (ERISA), the federal statute regulating private-sector employee benefit plans, has created a legal system imposing fiduciary duties on persons and entities tasked with providing plans, investment advice, or discretionary authority over plan management and administration. [4] The statute refers to these persons and entities as fiduciaries.[5]

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[1] *See* Sara Hansard, *Workers Would Pay More for Better Retirement, Health Benefits*, BLOOMBERG LAW (April 19, 2022, 6:00 AM), https://news.bloomberglaw.com/employee-benefits/workers-would-pay-more-for-better-retirement-health-benefits ("While employees still look at pay as the most compelling reason to stay or leave a company, health and retirement benefits have become a much more significant factor in their decision-making process."); *Benefits Jump as a Reason to Join or Stay with an Employer*, SHRM (April 27, 2022), https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/benefits-jump-as-a-reason-to-join-or-stay-with-an-employer.aspx ("[I]n a 2022 Global Benefits Attitudes Survey of more than 9,600 U.S. employees at large and midsize companies . . . [n]early half said their company's retirement programs (47 percent) and health care benefits (48 percent) were important reasons why they joined their employers.").

[2] *See Benefits Jump as a Reason to Join or Stay with an Employer*, *supra* note 1 ("The most important benefit that employees want their employers to focus on is retirement . . ."); Kathryn Mayer, *Number of the Day: Retirement Benefits*, HUMAN RESOURCE EXECUTIVE (April 29, 2022), https://hrexecutive.com/number-of-the-day-retirement-benefits/ (stating 60% of employees stay with their employers because of their employers' retirement plan benefits).

[3] *See* Steve Parrish, *Why You Should Care About Your Employees' Retirement Plans*, FORBES (Apr. 17, 2013, 3:25 PM), https://www.forbes.com/sites/steveparrish/2013/04/17/why-you-should-care-about-your-employees-retirement-plans/?sh=4084e0f475f5 ("In decades past, workers built retirement savings by paying down the mortgage balance on their home, putting money in savings bonds and building up cash values in their life insurance policies. . . . [Today], a sizeable chunk of a family's retirement savings sits in their qualified plan at work. 401(k) features, such as automatic enrollment and employer match, make it increasingly easier to build up a retirement nest egg.").

[4] *See* Employee Retirement Income Security Act of 1974 (ERISA) §§ 2, 3(21)(A), 404(a), 409, 29 U.S.C. §§ 1001, 1002(21)(A), 1104(a), 1109.

[5] ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

When issues arise questioning an employer's fiduciary duty in making decisions regarding these plans, such as selecting investments,[6] plan participants, fiduciaries, or the Secretary of Labor may file civil action against employers under ERISA in federal court.[7] However, civil actions must be filed within a certain period of time, otherwise, participants will be prevented from bringing suit and seeking remedy for fiduciaries' improper acts.[8]

There are two competing time periods for bringing suit against plan fiduciaries for breach of fiduciary duties or plan coverage violations, which are three and six years.[9] Under section 413 of ERISA, a plaintiff must bring a lawsuit within three years from the date of the breach or violation when the plaintiff has actual knowledge of the breach or violation, or six years from date of the breach or violation, if the plaintiff did not have actual knowledge, whichever is earlier.[10] In some cases, employers will argue that the three-year period applies barring a lawsuit from going forward when the period has already run.[11]

ERISA's statute of limitations provision "reflect[s] a careful balancing between ensuring fair and prompt enforcement of rights under the plan and the encouragement of the creation of [employee benefit] plans."[12] On the one hand, employers prefer a shorter statute of limitations period because it will limit liability exposure and reduce costs of plan sponsorship.[13] Moreover, a longer limitations period provides employees with an advantage.[14] Employees can simply claim they did not have any knowledge to receive the benefit of the six year statute of limitations and employers have no way of proving that employees actually read plan documents and were aware

[6] *See* Brief for The National Association of Manufacturers et al. as Amici Curiae Supporting Petitioners at 26, Intel Corp. Inv. Policy Comm. v. Sulyma, 140 S. Ct. 768 (2020) (No. 18-1116) (internal quotation marks omitted).
[7] *See* ERISA §§ 404(a), 409, 502(a), 29 U.S.C. §§1104(a), 1109, 1132(a).
[8] *See* ERISA § 413; 29 U.S.C. § 1113.
[9] *See id.*
[10] ERISA § 413; 29 U.S.C. § 1113.
[11] *See infra* Part II.
[12] Brief for The National Association of Manufacturers et al., *supra* note 6, at 19 (internal quotation marks omitted).
[13] *Id.* at 19–20, 29.
[14] *See id.* at 22.

of the actions in question.[15] As a result, employees who receive retirement plan disclosures can claim they did not have knowledge and then wait to see if an investment underperforms within the following six years instead of having to bring a claim when an investment decision was initially made.[16] This gives the participants the benefit of a "wait-and-see" approach allowing participants to say nothing about investment decisions that perform well, and for investment decisions that do not perform well, they can simply sue plan fiduciaries.[17]

On the other hand, employees prefer a longer statute of limitations period because ERISA gives employees the opportunity to monitor their retirement plans and hold employers accountable for poor plan decisions.[18] Retirement plans are employees' future retirement income, and these assets are invested to increase in value.[19] As a result, compliance with strict duties of care is important to ensure positive investment performance and secure retirement savings.[20] It is very hard for participants to know when a breach occurs, even with some facts disclosed, because most participants lack financial expertise to known when an investment decision is imprudent.[21] Participants need time to evaluate whether a breach has occurred and seek professional assistance from a financial professional or ERISA attorney.[22] Finally, ERISA was enacted to remove barriers preventing participants from accessing the courts to enforce fiduciary responsibilities and protect retirement plan assets.[23]

This paper discusses the statute of limitations period for filing legal actions against fiduciaries for violations of their responsibilities and obligations under ERISA. Part I discusses

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[15] *Id.*
[16] *Id.* at 20, 26.
[17] *Id.* at 29.
[18] Brief for Pension Rights Center as Amici Curiae Supporting Respondent at 13, Intel Corp. Inv. Policy Comm. v. Sulyma, 140 S. Ct. 768 (2020) (No. 18-1116).
[19] *See id.*
[20] *Id.*
[21] *See id.* at 13-14.
[22] *See id.*
[23] *Id.* at 15–16.

ERISA's purpose, fiduciary duties, and statute of limitations provision. Part II examines the Supreme Court case, *Intel Corporation Investment Policy Committee v. Sulyma*, in which the Court held that actual knowledge or willful blindness, but not constructive knowledge, may trigger the three-year statute of limitations period. Part II also considers lower courts opinions before and after *Sulyma* and explores the willful blindness doctrine and what it means to have actual knowledge of a breach or violation, an issue not addressed by the Court in *Sulyma*. Part III discusses fiduciaries' response to *Sulyma* and the competing policy reasons influencing the Supreme Court's decision. This paper concludes that the Supreme Court's decision in *Sulyma* was correct in establishing a basic framework in analyzing the three-year limitations period under ERISA, but future cases will have to determine when willful blindness applies and what it means to have actual knowledge of a breach or violation.

I. BACKGROUND: ERISA STATUTE OF LIMITATIONS

Congress enacted the Employee Retirement Income Security Act of 1974 to provide a federal regulatory framework to improve the equitable character of employee benefit plans.[24] ERISA established reporting and disclosure requirements, minimum vesting and funding standards, plan termination insurance for defined benefit plans, and federal jurisdiction and remedies for plan violations.[25] The centerpiece of ERISA, at least arguably, is its fiduciary provisions, which creates a legal identity, the ERISA fiduciary, and subjects individuals and entities who fit that identity, to specific obligations and duties.[26]

A fiduciary is a person who has discretionary authority or control over management of the plan and its assets, renders investment advice to the plan, or has discretionary authority over

[24] MICHAEL S. GORDON, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 8–9 (1984); ERISA § 2(b), 29 U.S.C. § 1001(b).
[25] ERISA § 2(b)–(c), 29 U.S.C. §§ 1001(b)–(c).
[26] *See infra* notes 4–7 and accompanying text.

administration of the plan,[27] including "any administrator, officer, trustee, or custodian" of the plan.[28] "Accordingly, employers, plan trustees, fund managers, and all other individuals who provide investment advice for profit are ERISA fiduciaries."[29] Fiduciaries are required to act in the sole interest of plan participants and beneficiaries[30] (known as the "duty of loyalty")[31] and act with the "care, skill, prudence, and diligence" of a reasonably prudent man in a similar situation (known as the "duty of prudence").[32] Section 404(a) also requires a fiduciary to diversify plan investments "to minimize the risk of large losses" (known as the "duty to diversify") [33] and act in accordance with plan documents and instruments governing the plan so long as the documents are consistent with ERISA (known as the "duty to follow plan documents").[34] If a fiduciary fails to comply with these standards, it may face legal action brought by the Department of Labor, plan participants, another fiduciary, or the plan sponsor.[35]

ERISA section 413 provides the time period for which a plan participant may bring a lawsuit against a plan fiduciary for breach of fiduciary duties or plan coverage violations.[36] A participant must bring a lawsuit within six years after the last date of breach or violation, or, when a fiduciary fails to act, the last date the fiduciary could have cured the breach or violation.[37] Alternatively, when a participant has "actual knowledge" of the alleged breach or violation, then the participant must bring a lawsuit "three years after the earliest date on which

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[27] ERISA § 3(21)(A); 29 U.S.C. § 1002(21)(A).
[28] ERISA § 3(14)(A), 29 U.S.C. § 1002(14)(A); *see also* ERISA §§ 402(a)(1), (c); 29 U.S.C. §§ 1102(a)(1), (c).
[29] Regina T. Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 4 FLA. TAX REV. 607, 610–11, 628 (2000).
[30] ERISA § 404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A).
[31] HOWARD PIANKO, ERISA FIDUCIARY DUTIES: OVERVIEW 11 (2022).
[32] ERISA § 404(a)(1)(B), 29 U.S.C. §1104; PIANKO, *supra* note 31, at 12.
[33] ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C); PIANKO, *supra* note 31, at 11, 15.
[34] ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D); PIANKO, *supra* note 31, at 16. In addition to section 404(a) fiduciary duties, fiduciaries must also not enter into prohibited transactions under section 406 of ERISA.
[35] ERISA §§ 409, 504(a), 29 U.S.C. §§ 1109, 1132(a). Participants are employees of an employer and receive the benefits of the employee benefit plan. *See* ERISA § 3(7), 29 U.S.C. § 1002(7).
[36] ERISA § 413; 29 U.S.C. § 1113.
[37] ERISA § 413(1); 29 U.S.C. § 1113(1).

the plaintiff had actual knowledge of the breach or violation."[38] However, when there is fraud or concealment present, then the participant may bring suit within six years after the date in which the breach or violation was discovered.[39]

Until the Supreme Court's decision in *Intel Corporation Investment Policy Committee v. Sulyma*,[40] there was confusion amongst the lower courts over the meaning of "actual knowledge" under section 413(2) of ERISA.[41] Originally, section 413(2) allowed for actual knowledge or constructive knowledge to invoke the three-year statute of limitations period.[42] Constructive knowledge was defined as information a participant "could reasonably be expected to have obtained [regarding a] breach or violation [that] was *filed with the secretary* under this title."[43] Congress later amended section 413 and removed the constructive knowledge provision, leaving only the actual knowledge provision.[44] Fiduciaries have argued that the repealed provision was regarding information sent to the secretary of the Department of Labor and not information that was sent to participants.[45] Under this reasoning, section 413's "actual knowledge" provision would encompass constructive knowledge of plan participants regarding information sent to participants enforcing the three year statute of limitations.[46] However, Congress completely removed any mention of constructive knowledge from section 413.[47] As a result, participants argue that "actual knowledge" is only information the participants are aware of and not information that fiduciaries believe participants *should have* known,[48] which is subject to the six

[38] ERISA § 413(2); 29 U.S.C. § 1113(2).
[39] ERISA § 413; 29 U.S.C. § 1113.
[40] Intel Corp. Inv. Policy Comm. v. Sulyma, 140 S. Ct. 768 (2020).
[41] Sulyma v. Intel Corp. Inv. Policy Comm., 909 F.3d 1069, 1072 (9th Cir. 2018).
[42] *Id.* at 1073.
[43] *Id.* (emphasis added).
[44] *Id.* (citing Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 9342(b), 101 Stat. 1330.)
[45] *Intel Corp. Inv. Policy Comm.*, 140 S. Ct. at 778.
[46] *See id.*
[47] *Id.* at 779.
[48] *See Sulyma*, 909 F.3d at 1078. *But see Intel Corp. Inv. Policy Comm.*, 140 S. Ct. at 777.

year limitations period.[49] The Supreme Court resolved this dispute in *Intel Corporation Investment Policy Committee v. Sulyma* regarding constructive knowledge but left open two issues: (1) when does willful blindness apply and (2) does the plaintiff need to know the alleged action violated ERISA or just known the facts of the action in question.[50]

II. *SULYMA* AND ERISA STATUTE OF LIMITATIONS

The question presented to the Court in *Sulyma* was "whether a plaintiff necessarily has 'actual knowledge' of the information contained in disclosures that he receives but does not read or cannot recall reading."[51] The Court held a plaintiff would not have actual knowledge in such a situation and distinguished actual knowledge from constructive knowledge but did not address what kind of actual knowledge a plaintiff must have of the breach or violation.[52]

In *Intel Corporation Investment Policy Committee v. Sulyma*, Sulyma, an employee at Intel Corporation, filed a class action lawsuit against Intel for breaching its fiduciary duty when Intel's Investment Policy Committee invested assets in the company's two retirement plans in securities that were considered high risk and maintained high fees, "such as hedge funds, private equity, and commodities."[53] Intel had a Retirement Contribution Plan and a 401(k) Savings Plan, which were managed by Intel's Investment Policy Committee.[54] Payments into these plans were invested in two funds originally comprised of stocks and bonds.[55] After the stock market crash in 2008, the Committee began investing the funds in high risk assets.[56] When the stock market later recovered, Intel's two funds did not recover as quickly as other index funds.[57]

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[49] See ERISA § 413; 29 U.S.C. § 1113.
[50] *See Intel Corp. Inv. Policy Comm.*, 140 S. Ct. 768.
[51] *Id.* at 773.
[52] *Intel Corp. Inv. Policy Comm.*, 140 S. Ct. 768.
[53] *Id.* at 774.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*

Intel claimed it sent Sulyma numerous electronic disclosures about the plans' investments, such as a Qualified Default Investment Alternative (QDIA) notice, Summary Plan Description, fund facts sheets, and annual disclosures.[58] These documents explained the plans' asset allocation, investments' rates of return, and directed Sulyma to the investment manager's website for further information.[59] Sulyma claimed that he did not remember receiving these disclosures and was unaware of the plans' investments.[60] The "disclosures" sent to Sulyma were general emails informing him that he could find plan disclosures and information by visiting the plans' website.[61] The emails themselves did not contain investment information.[62]

The Supreme Court held that Sulyma did not have "actual knowledge" of his plans' investments since he did not read the disclosures sent to him.[63] The Court stated "to have 'actual knowledge' of a piece of information, one must in fact be aware of it."[64] "Actual knowledge" means "knowledge [that is] more than 'potential, possible, virtual, conceivable, theoretical, hypothetical, or nominal.'"[65] Therefore, actual knowledge does not include "constructive knowledge," which is knowledge an individual *should have acquired* given the facts and surrounding circumstances.[66] As a result, the Court concluded that disclosure of information alone is not evidence of actual knowledge; the participant must actually be aware of the information disclosed.[67]

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[58] *Id.* at 774–75.
[59] *Id.*
[60] *Id.* at 775.
[61] *Id.* at 774–75.
[62] *Id.*
[63] *Id.* at 777–79.
[64] *Id.* at 776.
[65] *Id.* (citing Black's Law Dictionary 53 (4th ed. 1951)).
[66] *Id.* at 777.
[67] *Id.*

The Supreme Court further stated that actual knowledge can be proven through "usual ways," such as depositions under oath, and "through inference from circumstantial evidence."[68] The Court also created an exception to its definition of actual knowledge.[69] The Court stated, "[t]oday's opinion also does not preclude defendants from contending that evidence of 'willful blindness' supports a finding of 'actual knowledge.'"[70] This exception allows fiduciaries to argue that participants intentionally ignored disclosures to avoid obtaining actual knowledge,[71] and, therefore, the three year statute of limitations should apply instead of six.[72]

The doctrine of willful blindness is commonly used in criminal law for proving criminal intent.[73] All federal circuit courts have accepted the willful blindness doctrine.[74] Willful blindness can be considered a form of actual knowledge or a substitute for actual knowledge.[75] As a form of actual knowledge, willful blindness is present "when knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence."[76] Under the substitute approach, willful blindness is an alternative basis to actual knowledge, and is present when (1) "the defendant was aware of a high probability of the fact in question;" (2) "the defendant took deliberate action to avoid learning more about that fact;" and (3) "the defendant did not hold an actual belief the fact did not

[68] *Id.* at 779 (internal quotation marks omitted).
[69] *Id.*; *see also* Elizabeth G. Doolin, Julie F. Wall, and Joseph R. Jeffery, *Recent Developments in Health Insurance, Life Insurance, and Disability Insurance Law*, 56 TORT & INS. L.J. 401 (2021).
[70] *Intel Corp. Inv. Policy Comm.*, 140 S. Ct. at 779.
[71] *See* Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 769 (2011).
[72] *See id.*; ERISA §§ 413(1)–(2); 29 U.S.C. §§ 1113(1)–(2).
[73] *Global-Tech Appliances, Inc.*, 563 U.S. at 755; Gregory M. Gilchrist, *Willful Blindness as Mere Evidence*, 54 LOY. L.A. L. REV. 405, 411 (2021).
[74] Jonathan L. Marcus, *Symposium: Economic Competitiveness and the Law: Note: Model Penal Code Section 2.02(7) and Willful Blindness*, 102 YALE L.J. 2231, 2231 (1993).
[75] Gilchrist, *supra* note 73, at 417.
[76] *Id.*

exist."[77] The substitute approach has been most commonly adopted by courts,[78] and was implicitly endorsed by the Supreme Court in *Sulyma*.[79]

In declaring an exception to actual knowledge, the Supreme Court in *Sulyma* cited its prior opinion, *Global-Tech Appliances, Inc. v. SEB S.A*,[80] in which the Court articulated the standard for the willful blindness doctrine.[81] In *Global-Tech Appliances, Inc. v. SEB S.A*, the Supreme Court extended the willful blindness doctrine to patent infringement cases.[82] The Court stated, the willful blindness doctrine has two requirements: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact."[83] Therefore, "a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts."[84] Lower courts, both before and after the Court's *Sulyma* decision, have considered the willful blindness doctrine in ERISA cases.[85]

*A. Pre-*Sulyma *Court Opinions*

Prior to *Sulyma*, the Circuit Courts had differing applications of the willful blindness doctrine in ERISA cases.[86] The First and Sixth Circuits acknowledged that willful blindness applies to actual knowledge but did not examine willful blindness for the cases at hand.[87] The Seventh Circuit avoided addressing willful blindness completely and rendered it was unsuitable

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[77] *Id.* at 420.
[78] *Id.* at 419.
[79] *See infra* notes 80–85 and accompanying text.
[80] Intel Corp. Inv. Policy Comm. v. Sulyma, 140 S. Ct. 768, 779 (2020).
[81] Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 769 (2011).
[82] *Id.* at 768.
[83] *Id.* at 769.
[84] Scalia v. Heritage, Civ. No. 18-00155, 2020 U.S. Dist. LEXIS 252621, *15 (D. Haw.Sept. 16, 2020) (quoting Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 769 (2011)).
[85] *See e.g.*, *id.* (quoting Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 769 (2011)); Stewart v. Saakvitne, Civ. No. 18-00155, 2021 U.S. Dist. LEXIS 46647, *39 (D. Haw. March 12, 2021); Bouvy v. Analog Devices, Inc., No. 19-cv-881, 2020 U.S. Dist. LEXIS 110747, at *9 (S.D. Cal. June 23, 2020).
[86] *See infra* pp. 10–13.
[87] *See infra* pp. 11–12.

for examination at the summary judgment phase.[88] It appears that lower courts, prior to *Sulyma*, recognized the willful blindness doctrine, but did not apply it, finding that there was a showing or lack of actual knowledge or constructive knowledge.[89]

The First Circuit interpreted actual knowledge similar to the Supreme Court in *Sulyma*.[90] In *Edes v. Verizon Communications Inc.*, Verizon employees sued Verizon for breach of fiduciary duties under ERISA.[91] The First Circuit discussed the meaning of "actual knowledge" and stated it did not believe that "Congress intended the actual knowledge requirement to excuse willful blindness by a plaintiff."[92] The court did not apply the willful blindness doctrine to the case because it found that plaintiffs had actual knowledge of Verizon's breach when Verizon hired the participants and failed to include them in the company's retirement plan.[93] As a result, the three year statute of limitations applied and plaintiffs were barred from bringing suit.[94]

The Sixth Circuit also indicated that willful blindness would be sufficient to trigger the three-year statute of limitations, but held, contrary to the subsequent *Sulyma* decision, that constructive knowledge was itself sufficient.[95] In *Brown v. Owens Corning Investment Review Committee*, plan participants sued plan fiduciaries for failing to divest the plan of Owens Corning stock after the company's liability for its industrial insulating product containing asbestos became apparent causing the company to go bankrupt and its stock value worthless.[96] The Sixth Circuit held that plan participants had actual knowledge of the harmful investments

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[88] *See infra* p. 12–13.
[89] *See infra* pp. 11–13.
[90] *See* Edes v. Verizon Comms. Inc., 417 F.3d 133, 142 (1st Cir. 2005); Intel Corp. Inv. Policy Comm. v. Sulyma, 140 S. Ct. 768, 776–77 (2020).
[91] *Edes*, 417 F.3d at 140.
[92] *Id.* at 142.
[93] *Id.*
[94] *Id.*
[95] Brown v. Owens Corning Inv. Review Comm., 622 F.3d 564, 571 (6th Cir. 2010); *Intel Corp. Inv. Policy Comm.*, 140 S. Ct. at 777–79.
[96] *Brown*, 622 F.3d at 566–68.

through summary plan descriptions that were sent to participants regardless of whether participants actually read the plan documents.[97] The court reasoned that

> [a]ctual knowledge does not 'require proof that the individual Plaintiffs actually saw or read the documents that disclosed' the allegedly harmful investments . . . When a plan participant is given specific instructions on how to access plan documents, their failure to read the documents will not shield them from having actual knowledge of the documents' terms.[98]

As a result, plan fiduciaries could be free from liability under ERISA by sending general letters or emails to participants informing them of new plan information and where to find further details regardless of whether plan participants actually reviewed the additional information.[99] This holding was later overruled by the Supreme Court's decision in *Sulyma*.[100] Nevertheless, the Sixth Circuit endorsed the use of the willful blindness doctrine for ERISA cases but used the doctrine as a form of actual knowledge rather than a substitute.[101]

The Seventh Circuit did not determine whether the willful blindness doctrine applied to actual knowledge but rendered it unsuitable for summary judgment decisions.[102] In *Fish v. Greatbanc Trust Company*, employees of Antioch, a scrapbook company, were plan participants in Antioch's Employee Stock Ownership Plan (ESOP).[103] The participants sued the plan trustee, Greatbanc Trust Company, for breaching its fiduciary duty when evaluating a buy-out of the company's stock, which resulted in the company going bankrupt and the ESOP worthless.[104] The Seventh Circuit stated that it would not decide whether willful blindness applied to actual knowledge, but even if it did and had Greatbanc provided sufficient evidence, the willful

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[97] *Id.* at 571.
[98] *Id.*
[99] *See id.*
[100] *Brown*, 622 F.3d 564, *overruled by Intel Corp. Inv. Policy Comm.*, 140 S. Ct. 768.
[101] *See Brown*, 662 F.3d at 571; *see supra* pp. 9–10.
[102] Fish v. Greatbanc Trust Co., 749 F.3d 671, 684–85 (7th Cir. 2014).
[103] *Id.* at 674.
[104] *Id.* at 673, 675, 677–78.

blindness doctrine is not "a sufficient basis for summary judgment."[105] The court held that plaintiffs did not have actual knowledge of the defendant's breach of fiduciary duties because the proxy materials did not provide sufficient information about the method used and risks associated with the buy-out.[106]

In conclusion, pre-*Sulyma* lower court decisions did not seem to have much guidance on when and how the willful blindness doctrine applies to ERISA cases.[107] The courts acknowledged the doctrine's existence and relevance to actual knowledge but avoided applying it to the cases at hand.[108] Post-*Sulyma* lower court opinions have taken a different approach, applying a two-step analysis by first examining actual knowledge and then willful blindness.[109]

B. Post-Sulyma *Court Opinions*

While *Sulyma* was only decided two years ago, a few courts have already applied *Sulyma's* willful blindness exception. The District Court of Hawaii considered whether the *Department of Labor* had actual knowledge or was willfully blind to a fiduciaries' actions.[110] The District Court of Southern California considered whether *plan participants* had actual knowledge or were willfully blind to a fiduciaries' actions.[111] Because of the different plaintiffs (one the Department of Labor, the other plan participants), the examination of facts differs between these two cases.[112] Nevertheless, both courts apply a similar analysis examining both actual knowledge and willful blindness as potential standards to trigger the three year statute of limitations.[113]

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[105] *Id.* at 685.
[106] *Id.* at 683.
[107] *See supra* pp. 10–13.
[108] *See supra* pp. 10–13.
[109] *See infra* Part II, Section B.
[110] *See infra* pp. 14–15.
[111] *See infra* pp. 15–18.
[112] *See infra* pp. 14–18.
[113] *See infra* pp. 14–18.

In *Scalia v. Heritage*, the Secretary of the Department of Labor, Eugene Scalia, brought suit against a consulting company's President, Vice President, and the trustee of the company's ESOP for breaching their fiduciary duties under ERISA when the President and Vice President created the ESOP to divest themselves of their company stock ownership and sold the shares at an overvalued price.[114] The District Court of Hawaii granted a discovery request for documents that would show that the Secretary either had "actual knowledge or willful blindness regarding the ESOP transaction at issue."[115] The court limited the voluminous discovery request reasoning that "unrelated transactions and unrelated investigations can[not] be used to demonstrate the Secretary's actual knowledge or willful blindness of ERISA violations."[116] The District Court of Hawaii acknowledged both actual knowledge and willful blindness as ways to satisfy the three year statute of limitations requirement.[117]

Subsequently, the case moved to summary judgment in *Stewart v. Saakvitne*, in which the fiduciaries argued that evidence provided in discovery showed that the Department of Labor had actual knowledge or was willfully blind to the plan trustee's actions.[118] First, the fiduciaries argue that the Department of Labor had actual knowledge of the alleged violations from a form containing the annual return and report of the employee benefit plan, which was submitted to the Department of Labor through an automated system.[119] The court found that the Department of Labor did not have actual knowledge of the trustee's violations for two reasons.[120] First, the court found that when forms are submitted to the Department, officials do not automatically read

[114] Scalia v. Heritage, Civ. No. 18-00155, 2020 U.S. Dist. LEXIS 252621, at *3 (D. Hawaii, Sept. 16, 2020).
[115] *Id.* at *16.
[116] *Id.* at *17.
[117] *Id.* at *14–17.
[118] Stewart v. Saakvitne, Civ. No. 18-00155, 2021 U.S. Dist. LEXIS 46647, *38, *40–42 (D. Haw. March 12, 2021).
[119] *Id.* at *40.
[120] *Id.* at *42.

the forms, thus, amounting to only disclosure and not actual knowledge.[121] Second, the form only showed a decrease in value of the company stock rather than the sale of stock above company value, and without knowledge of the latter fact, the Department could not have had knowledge of the breach.[122]

The fiduciaries also argued that the Department willfully ignored the trustee's actions when provided a tip of the alleged misconduct and failure to investigate the trustee's actions regarding other ESOPs.[123] The court disagreed, stating, "[w]hat an investigator might want to know about other ESOPs is not actual knowledge [of the alleged violations] for purposes of § 1113(2)."[124] The court held that the fiduciaries "fail[ed] to establish that other investigations were red flags to which the Government was willfully blind."[125] The court reasoned "[i]t might be that it would have been a good practice for [the Government] to have considered [the plan trustee's] involvement with other ESOPs, but willful blindness requires more than a failure to do what is best."[126] In sum, the District Court of Hawaii used the willful blindness doctrine as an alternative to actual knowledge and further defined when the willful blindness doctrine applies.[127]

The District Court of Southern California in *Bouvy v. Analog Devices, Inc.* took a similar approach to the court in *Scalia v. Heritage* treating actual knowledge and willful blindness as alternative ways to trigger the three-year statute of limitations.[128] In *Bouvy v. Analog Devices,*

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[121] *Id.*
[122] *Id.* at *40–41.
[123] *Id.* at *41–42.
[124] *Id.* at *42.
[125] *Id.* at *43.
[126] *Id.*
[127] *See supra* pp. 14–15.
[128] *See* Scalia v. Heritage, Civ. No. 18-00155, 2020 U.S. Dist. LEXIS 252621, at *16–17 (D. Hawaii, Sept. 16, 2020); Bouvy v. Analog Devices, Inc., No. 19-cv-881, 2020 U.S. Dist. LEXIS 110747, at *8–9 (S.D. Cal. June 23, 2020).

Inc., plan participants sued the plan sponsor and other fiduciaries alleging that Defendants violated ERISA by:

> (1) breaching their duties of prudence and loyalty by selecting investment options with excessive fees when identical, lower-cost options were available and retaining expensive funds with poor performance histories; (2) breaching their duties of prudence and loyalty by compensating Transamerica with excessive recordkeeping fees; (3) failing to provide disclosures to participants regarding investment and administrative fees; (4) engaging in prohibited transactions with a party in interest; and (5) failing to monitor fiduciaries. [129]

The defendants claimed that all five claims were time-barred under section 413 of ERISA because the plaintiffs had actual knowledge of the alleged violations for more than three years prior the filing of the complaint.[130] The court accessed each claim under the actual knowledge standard and willful blindness standard established in *Sulyma*.[131]

Under Count I, the court found that the availability of fees and expense ratios on Transamerica's website did not provide plan participants with actual knowledge because no evidence indicated that participants actually viewed the information; and even if plan participants did, the information did not provide participants with actual knowledge of how the defendants selected the investments offered.[132] In addition, the court found the a plan statement showing expense ratios and fees of funds being transferred in and out of the plan did not indicate that participants had actual knowledge or were willfully blind.[133] The court reasoned that

> [t]he information is similar to that available on Transamerica's website; at best, it shows the ratios were disclosed to Plaintiff, but evidence of disclosure alone is insufficient to prove "actual knowledge" because 'a given plaintiff will not necessarily be aware of all facts disclosed to him; even a reasonably diligent

[129] *Bouvy*, 2020 U.S. Dist. LEXIS 110747, at *1–2, *5–6.
[130] *Id.* at *8–9.
[131] *Id.* at *9–14.
[132] *Id.* at *9–11 (quoting Tibble v. Edison Int'l, 729 F.3d 1110, 1121 (9th Cir. 2013), *vacated on other grounds*, 575 U.S. 523 (2015)) ("When beneficiaries claim the fiduciary made an imprudent investment, actual knowledge of the breach will usually require some knowledge of how the fiduciary selected the investment.").
[133] *Id.* at *11.

> plaintiff would not know those facts immediately upon receiving the disclosure.'[134]

The court also found that defendants failed to meet the willful blindness standard since the plan statement regarding the fund transfers did not show that plan participants "subjectively believe that there [was] a high probability that a fact exists" and took "deliberate actions to avoid learning of that fact."[135]

Under Counts II and IV, the court found the participants did not have actual knowledge and were not willfully blind to the excessive recordkeeping fees and prohibited transactions to Transamerica.[136] The fee disclosures on Transamerica's website and plan statement did not show participants' awareness of the facts disclosed or that participants had actual knowledge of the breach, which required knowledge of the defendant's decision making process and procedures used to retain Transamerica and pay it as a recordkeeper.[137]

Under Count III, the court found that plan participants did not have actual knowledge and were not willfully blind to inadequate disclosures, which would require participants to have actual knowledge of missing or distorted information.[138] The court reasoned that while *some* of the relevant facts were disclosed, actual knowledge requires participant to know *the* relevant facts of the breach.[139] Finally, Count V was not time barred as it was a derivative claim to the prior counts.[140] Thus, while the court recognized that a three-year statute would apply if there had been either actual knowledge or willful blindness, it found that neither was applicable in the facts before it.[141]

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[134] *Id.* at *11–12.
[135] *Id.* at *12.
[136] *Id.* at *12–13.
[137] *Id.*
[138] *Id.* at *13–14.
[139] *Id.* (emphasis added).
[140] *Id.* at *14.
[141] *See id.* at *8–14.

In sum, lower courts have interpreted the Supreme Court's statement in *Sulyma* regarding willful blindness as creating a two-step analysis to determine actual knowledge.[142] First, the courts determine whether participants had actual knowledge of the alleged breach or violation.[143] This includes inferences from circumstantial evidence such as evaluating the ways in which participants obtain plan information and the content of that information, but does not include constructive knowledge or disclosure.[144] Second, courts examine whether participants were willfully blind to the information provided to them, using the two-step analysis in *Global-Tech* to determine whether a participant was willfully blind.[145] These two standards are evaluated independently, so that a fiduciaries may prove either actual knowledge *or* willful blindness to enforce the three year statute of limitations requirement under section 413 of ERISA.[146]

C. Actual Knowledge of the Breach or Violation

A question the Supreme Court did not address in *Sulyma* was "what does it mean to have actual knowledge *of [a] breach or violation*."[147] There are two competing interpretations that the circuit courts have adopted.[148] First, a majority of circuit courts have interpreted "actual knowledge of the breach or violation" to mean that a plaintiff must have knowledge of the underlying facts or transaction constituting the breach.[149] Second, a few circuit courts interpret

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[142] *See supa* pp. 14–18.
[143] *See* Scalia v. Heritage, Civ. No. 18-00155, 2020 U.S. Dist. LEXIS 252621, at *16–17 (D. Hawaii, Sept. 16, 2020); Stewart v. Saakvitne, Civ. No. 18-00155, 2021 U.S. Dist. LEXIS 46647, *40–44 (D. Haw. March 12, 2021); *Bouvy*, 2020 U.S. Dist. LEXIS 110747, at *9–14.
[144] *See supra* pp. 14–18 (discussing *Stewart v. Saakvitne* and *Bouvy v. Analog Devices, Inc.*); *see also supra* pp. 7–10 (discussing *Sulyma*).
[145] *See Scalia*, 2020 U.S. Dist. LEXIS 252621, at *15; *Stewart*, 2021 U.S. Dist. LEXIS 46647, *39; *Bouvy*, 2020 U.S. Dist. LEXIS 110747, at *9.
[146] *See supra* pp. 14–18.
[147] Transcript of Oral Argument at 40, Intel Corp. Inv. Policy Comm. v. Sulyma, 140 S. Ct. 768 (2020) (No. 18-1116); *see also* Intel Corp. Inv. Policy Comm. v. Sulyma, 140 S. Ct. 768, 773 (2020) (emphasis added).
[148] *See infra* notes 149–50 and accompanying text.
[149] *See, e.g.*, Edes v. Verizon Comms. Inc., 417 F.3d 133, 141–42 (1st Cir. 2005); L.I. Head Start Child Dev. Servs. v. Econ. Opportunity Council of Suffolk, Inc., 710 F.3d 57, 67 (2d Cir. 2013); David v. Alphin, 704 F.3d 327, 339 (4th Cir. 2013); Wright v. Heyne, 349 F.3d 321, 330 (6th Cir. 2003); Martin v. Consultants & Admrs., 966 F.2d 1078, 1086 (7th Cir. 1992); Brock v. Nellis, 809 F.2d 753, 755 (11th Cir. 1987).

the phrase to mean that the plaintiff must have knowledge that the underlying facts or transaction violated ERISA.[150] The Ninth Circuit, in its original *Sulyma* decision, used a new approach that sometimes applies the majority approach and sometimes applies an approach closer to the minority approach depending on the nature of the claim at hand.[151]

In *Sulyma v. Intel Corporation Investment Policy Committee*, the Ninth Circuit held that "actual knowledge *of the breach* does not mean that a plaintiff has knowledge that the underlying action violated ERISA . . . [nor does it] mean that a plaintiff has knowledge that the underlying action occurred."[152] Instead, "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 was filed."[153] The nature of the underlying action or breach depends on the type of claim presented.[154] For example, a breach of fiduciary duty claim requires a plaintiff to have knowledge of the underlying transaction and also that the action was imprudent but not that such action violated ERISA.[155] On the other hand, in a prohibited transaction claim, the defendant need only show that a plaintiff had knowledge of the transaction itself, since the transaction is absolutely prohibited.[156] Therefore, actual knowledge is something in between knowledge of the underlying action and legal knowledge of a valid claim.[157] The Ninth Circuits reasoning seems to be a practical approach.

The Ninth Circuit's interpretation of actual knowledge of a breach or violation is sensible because there are four different fiduciary duties under section 404(a) and each duty has a

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[150] *See, e.g.*, Fiorentino v. Bricklayers & Allied Craftworkers Local 4 Pension Plan, 696 F. App'x 594, 598 (3d 2017); Babcock v. Hartmarx Corp., 182 F.3d 336, 339 (5th Cir. 1999).
[151] *See* Sulyma v. Intel Corp. Inv. Policy Comm., 909 F.3d 1069, 1073–75 (9th Cir. 2018).
[152] *Id.* at 1075 (internal quotation marks omitted) (emphasis added).
[153] *Id.* (emphasis added).
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*

different underlying nature to its claim.[158] As stated by the Ninth Circuit, the duty of prudence requires the participant to know about the underlying transaction and that the transaction was imprudent, which is a mix of legal and factual inquiry.[159] The majority of participants will not know when a legal violation has occurred, which usually requires knowledge an attorney possess, but participants can determine when an investment decision is imprudent if given enough time to evaluate the situation and consult an attorney.[160] Most plan participants are not investment experts and will not know that an initial investment is imprudent until the value of the retirement account declines, is stagnant, slowly increases in value or other common sense affects that would make the average person concerned about his or her retirement investments.[161] As a result, more knowledge is needed in addition to the underlying transaction, which will require additional time for participants to acquire such knowledge, thus, justifying a longer statute of limitations period.[162] The other three basic ERISA fiduciary duties similarly require a particularized determination of the nature of each duty.[163]

Additionally, a shorter limitations period could paradoxically result in more meritless suits being filed if plaintiffs must rush to file a claim under the three year period without carefully examining the facts of the case, while the six year period would give plaintiffs time to develop facts and weed out weak cases.[164] In conclusion, the Ninth Circuit's nature of the claim approach properly determines when actual knowledge of the breach applies and is consistent

[158] *See* ERISA § 404(a), 29 U.S.C. §1104(a).
[159] *See supra* text accompanying note 155.
[160] *See infra* p. 23–24. Most participants are not aware of the various provisions of ERISA and would need legal knowledge, which an attorney possesses, to know a violation of ERISA has occurred. *Sulyma*, 909 F.3d at 1075.
[161] *See infra* p. 23–24; *see also* Brief for Pension Rights Center, *supra* note 17, at 14 ("Study after study has shown that most Americans lack even basic financial literacy, much less an understanding of more exotic investment vehicles, such as the hedge funds and private equity investments . . . .").
[162] *See* Edes v. Verizon Comms. Inc., 417 F.3d 133, 142 (1st Cir. 2005) (recognizing that "determining the meaning of complex transactions may take some time.").
[163] *See* ERISA § 404(a), 29 U.S.C. §1104(a).
[164] *See id.*

with ERISA's purpose of allowing participants to seek legal remedy for poor plan management.[165]

III. *SULYMA'S* IMPACT ON FIDUCIARIES AND FUTURE ERISA LAWSUITS

In response to *Sulyma*, law firms have advised ERISA fiduciaries to improve recordkeeping strategies tracking when plan participants open online disclosures.[166] One proposed solution is for plan fiduciaries to track "participant's engagement with certain disclosures, including the number of times a plan participant visited said disclosure and the amount of time spent on the disclosure."[167] In addition, fiduciaries could consider incorporating a "scroll wrap" feature to online disclosures, which would require plan participants to scroll through the entire document before certifying that they have read and understand the terms of the disclosure.[168] Other recommendations include maintaining records of electronic read receipts, participant responses or request for information, the level of detail contained in mailed disclosures, and Department of Labor notification of filings on behalf of plan participants.[169]

However, these proposed solutions may not be enough to prove that participants had actual knowledge.[170] During oral argument, the Supreme Court questioned Intel's attorney on whether a participant who read a disclosure but did not understand it was enough to create actual

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[165] *See supra* Part I.
[166] James E. Earle, Christopher Stock & Mamta K. Shah, *Planning Opportunities After the Supreme Court's Decision in Intel Corp. Investment Policy Committee et al. v. Sulyma*, TROUTMAN PEPPER (Mar. 12, 2020), https://www.troutman.com/insights/planning-opportunities-after-the-supreme-courts-decision-in-intel-corp-investment-policy-committee-et-al-v-sulyma.html [hereinafter TROUTMAN PEPPER]; Kimberly Couch, *Recent Court Decisions Extend the Statute of Limitations for Breach of Fiduciary Duty Lawsuits under ERISA*, JD SUPRA (Sept. 30, 2021), https://www.jdsupra.com/legalnews/recent-court-decisions-extend-the-8001937/; Reena R. Bajowala, Gary Blachman, & Austin Anderson, *U.S. Supreme Court Rules "Actual Knowledge" under ERISA's Three-Year Statute of Limitations "Means What It Says"*, ICEMILLER (July 7, 2020), https://www.icemiller.com/ice-on-fire-insights/publications/u-s-supreme-court-rules-actual-knowledge-under/ [hereinafter ICEMILLER].
[167] TROUTMAN PEPPER, *supra* note 166.
[168] *Id.*
[169] Couch, *supra* note 166; ICEMILLER, *supra* note 166.
[170] *See* Transcript of Oral Argument, *supra* note 147, at 27–28. *But see* sources cited *supra* note 166.

knowledge.[171] Intel's attorney responded saying that such a situation would not constitute actual knowledge.[172] Sulyma's attorney was proposed the same question and agreed with Intel stating that a participant must understand what the words in a disclosure mean.[173] This type of situation can be implicitly read into the Court's opinion when it stated, "to have 'actual knowledge' . . . one must in fact be aware of it" and disclosure alone is not enough.[174] The Court cited to American Heritage Dictionary which defined "knowledge" as having an understanding of something by experience or study, inferring that a person must understand what he or she is reading to have knowledge of the content.[175] Therefore, while fiduciaries may and probably should improve recordkeeping of participant interaction with disclosures, there are likely to be cases when these additional procedures will not be enough to find that participants' had actual knowledge.[176]

As a result, it is more likely that a six-year statute of limitations period will apply instead of the three-year period.[177] A six-year statute of limitations imposes four potential repercussions on plan fiduciaries by: (1) creating additional undue burdens, (2) imposing a significant increase in cost, (3) indirectly harming plan participants, and (4) creating an element of unfairness.[178] Additional undue burdens are created because "ERISA's substantive fiduciary duties, broad remedies for participants and beneficiaries, and 'extensive' disclosure requirements impose significant costs on plan administrators and employers" and are mitigated by narrower exposure

[171] Transcript of Oral Argument, *supra* note 147, at 27–28.
[172] *Id.*
[173] *Id.* at 39–41.
[174] *See* Intel Corp. Inv. Policy Comm. v. Sulyma, 140 S. Ct. 768, 776–77 (2020).
[175] *See id.* at 776.
[176] *See supra* notes 171–175 and accompanying text.
[177] *See* ICEMILLER, *supra* note 166 ("*Sulyma* creates a risk that the three-year statute of limitations period is neutralized unless a plan participant admits to actual knowledge, which is unlikely in a litigation setting. Effectively, that means most plan participant claims may instead be subject to the six-year statute of limitations under ERISA § 413(2).").
[178] Brief for Petitioner at 59–69, Intel Corp. Inv. Policy Comm. v. Sulyma, 140 S. Ct. 768 (2020) (No. 18-1116).

under the three year limitations period.[179] Fiduciaries may face an increase in damages based on six years of investment performance instead of three years.[180] In addition, litigation costs will increase because most ERISA lawsuits are brought by a class of participants and plan fiduciaries would have to examine each participant to determine whether each individual had actual knowledge.[181] Plan participants may be harmed because plans will be subject to higher damages, which are costs to the plan and could deter fiduciaries from creating plans to avoid excessive liability.[182] Lastly, participants who disregard plan disclosures will be rewarded while plan fiduciaries who follow ERISA disclosure requirements will be punished for participants' ignorance.[183]

While it may be inequitable for plan fiduciaries to be held to a six-year statute of limitations based solely on the fact that participants' did not read or did not understand what they read in plan disclosures, plan participants do not have a legal obligation to read all plan disclosures sent to them.[184] In fact, many participants do not read plan disclosures.[185] Many plan participants are "[p]eople with busy lives and with little or no financial investment experience or training [and] are not poring over [dense plan] disclosures . . . ."[186] Justice Ginsberg even admitted to not reading all her mail regarding her investments.[187] Many electronic notices to plan participants will state "important information about your retirement plan" and provide a link to

[179] *Id.* at 60.
[180] *Id.* at 63.
[181] *Id.* at 64–66.
[182] *Id.* at 67.
[183] *See id.* at 68.
[184] Transcript of Oral Argument, *supra* note 147, at 16–17.
[185] *Id.* at 3, 4, 22–23. Justice Roberts stated "the more and more disclosures that are required, the less and less likely it is that people are going to look at them . . . [petitioner's] argument depends upon the assumption that these are actually going to be read. . . And I just don't think that's an accurate assumption." *Id.* at 5–6.
[186] *Id.* at 23.
[187] *Id.* at 4.

click on, which provides the plan document containing the disclosure.[188] Even if such disclosures are short documents, the contents may be unfamiliar to the participant and difficult to understand.[189] The six year limitations period provides participant with time to determine whether an issue exists and whether that issue is a breach or violation of ERISA applicable for bringing suit.[190] As a result, the Supreme Court in *Sulyma* seemed to find the equitable reasons for ruling in favor of employees' rights outweigh fiduciary protections for only possible repercussions.[191]

While there is concern that the actual knowledge and willful blindness doctrine will prevent summary judgment, dismissal through summary judgment is still possible under the actual knowledge standard and willful blindness doctrine.[192] Prior to *Sulyma*, the 7th Circuit refused to address whether willful blindness was a part of actual knowledge because it did not believe willful blindness was appropriate for summary judgment.[193] In *Sulyma*, Intel argued that "[p]laintiffs can simply retreat behind the veil of ignorance, asserting that they did not read or do not specifically remember the relevant disclosures" creating a dispute of material fact not suitable for summary judgment.[194] The Justices questioned both petitioner and respondent on the implications of actual knowledge and willful blindness at the summary judgment stage, but the potential difficulty of dismissing a case on summary judgment did not dissuade the Justices from ruling in favor of Sulyma.[195]

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[188] *See id.* at 6–7.
[189] *See id.* at 7, 22–23.
[190] *See id.* at 42–43.
[191] *See* Intel Corp. Inv. Policy Comm. v. Sulyma, 140 S. Ct. 768, 778 (2020).
[192] *See infra* notes 196–97 and accompanying text.
[193] Fish v. Greatbanc Trust Co., 749 F.3d 671, 685 (7th Cir. 2014).
[194] Brief for Petitioner, *supra* note 178, at 43; *see also* FED. R. CIV. P. 56(a).
[195] *See* Transcript of Oral Argument, *supra* note 147, at 17–18, 24–27, 37–38, 45–46; *Intel Corp. Inv. Policy Comm.*, 140 S. Ct. at 779 ("If a plaintiff 's denial of knowledge is 'blatantly contradicted by the record,' 'a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.'").

While actual knowledge and willful blindness by their nature require a factual inquiry into plan participants' subjective intent, it is still possible through depositions, examination of disclosures, and records of participant engagement with online disclosures to determine that a participant had actual knowledge or was willfully blind to the disclosure.[196] For example, if a plan participant consults a financial advisor about his or her retirement plan and the financial advisor tells the participant that the retirement plan investments are imprudent, then the participant has actual knowledge of the alleged breach of imprudent investments.[197] As a result, it seems unlikely the actual knowledge or willful blindness requirement of section 413 will completely prevent summary judgment dismissal on limitations grounds when there is no dispute of material fact.[198]

CONCLUSION

While it may seem unfair that *Sulyma* increased the chances of a six-year statute of limitations period rather than three-years simply because participants fail to read plan disclosures, many participants do not understand the contents of disclosures and will still need to go through the litigation process and prove that a fiduciary violated provisions of ERISA.[199] The willful blindness doctrine fixes this inequity by not letting participants abuse the protection of actual knowledge in order to bring frivolous lawsuits.[200] The Supreme Court's holding in *Sulyma* ultimately followed Congress's original intent when creating ERISA, which was to create a law to protect participants from abusive retirement plan management leaving employees with little or no benefits.[201] In addition, courts should follow the Ninth Circuit's approach when determining

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[196] *See Intel Corp. Inv. Policy Comm.*, 140 S. Ct. at 779. *But see* Transcript of Oral Argument, *supra* note 147, at 24, 37–38.
[197] Transcript of Oral Argument, *supra* note 147, at 45–46.
[198] *See supra* notes 194–97 and accompanying text; FED. R. CIV. P. 56(a).
[199] *See supra* pp. 22–24.
[200] *See supra* pp. 9–10.
[201] *See supra* pp. 4–5, 7–10.

actual knowledge of a breach or violation to ensure a proper statute of limitations analysis.[202] However, other circuit courts are not bound by this approach and the Supreme Court may have to address this inconsistency in the future.[203] As more time passes, it will be interesting to see how lower court's apply *Sulyma* and the impact it will have on future ERISA cases. Until then, it seems that the Court's opinion was reasonable and justified in favoring the average person over employers with financial expertise.

[202] See Part II, Section C.
[203] See *supra* p. 18–19.