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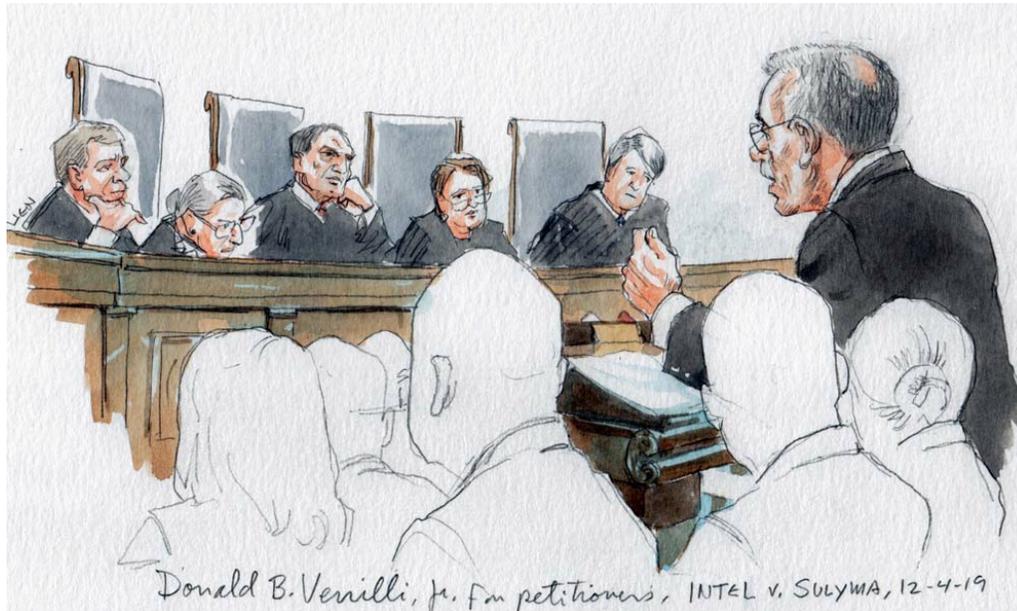
Argument analysis: Justices skeptical of claim that retirement-plan participants have “actual knowledge” of all facts included in disclosure documents

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December 6,
2019

The Supreme Court heard oral argument on Wednesday in *Intel Corp. Investment Policy Committee v. Sulyma*, a case that puts a spotlight on the disclosures that retirement plans provide to plan participants.

Under the Employee Retirement Income Security Act of 1974 (ERISA), participants in employer-sponsored retirement plans have the right to challenge the prudence of decisions that plan fiduciaries make about the investment options available through the plan. ERISA sets time limits for bringing such suits. Section 413(1) of ERISA gives plaintiffs six years after the end of the fiduciary breach, violation or omission. Section 413(2) imposes a shorter three-year limit when a plaintiff has “actual knowledge” of the breach or violation. In that case, the clock starts on the earliest date on which the plaintiff had “actual knowledge” of the breach or violation.



Donald B. Verrilli, Jr. for petitioners (Art Lien)

The question before the court was whether the three-year limit in ERISA Section 413(2) bars suit when the defendant – here the committees and individuals at Intel responsible for administering the retirement plans – disclosed the relevant plan information about the plan investments to the plaintiff more than three years before the plaintiff filed the complaint, but the plaintiff chose not to read or could not recall having read the information.

During the oral argument, several justices expressed sympathy for Christopher Sulyma, a former Intel engineer who participated in the company's retirement plans, and they drew on personal experiences to suggest that most people do not read retirement-plan disclosures. The justices challenged Intel to explain how individuals could have "actual knowledge" of materials that they had not read. The justices also expressed concern about relying on Intel's policy arguments to rewrite the standard chosen by Congress. At the same time, they pressed attorneys for Sulyma and the federal government on the application of Section 413(2) to plaintiffs who ignore or fail to comprehend the retirement plan disclosures. The justices also explored how reading Section 413(2) as requiring "actual awareness" by individual plaintiffs would affect class certification in class actions brought under the statute.

Arguing for Intel, Donald Verrilli Jr. asserted that plan participants "have actual knowledge of facts that are actually given to them in mandatory ERISA disclosures." According to Verrilli, when a participant receives the required disclosures, he "has in his possession ... the body of knowledge contained in the disclosures." That's the knowledge he "actually has" and that's the knowledge, according to Verrilli, that satisfies the "actual knowledge" requirement in Section 413(2).

The lower court's reading of "actual knowledge" as requiring "actual awareness" does not, according to Verrilli, make sense in the context of the statute as originally drafted in 1974. Furthermore, such an interpretation would double the time period over which plaintiffs can "exploit hindsight bias to second-guess investments," and would create "arbitrariness" as well as "intractable proof problems."

The first question came from Justice Brett Kavanaugh. He began with the observation that "most people don't read" the disclosures. How, he inquired, could someone have actual knowledge of something that he or she hadn't read? Justice Ruth Bader Ginsburg drew laughter from the audience by admitting that she doesn't read all the mailings that she receives about her investments. She suggested that it's hard to read the reference to "actual knowledge" as something other than "yes, I, in fact, know."

Chief Justice John Roberts observed that Intel's argument depends on the assumption that disclosure documents will be read, which he suggested is the opposite of "common personal experience." Roberts joked that he wouldn't ask for a show of hands of who had read their retirement-plan disclosures.

Verrilli disagreed but, turning to the importance of ERISA's disclosure regime, he posited that "the understanding that Congress is operating under here is that people do read these ... disclosures when they come." He noted that one of the emails sent to Sulyma in this case had the words "important information" in the heading and linked to materials that were not "some big giant document" but rather an eight- or 10-page document describing fund investments.

At this point, Justice Elena Kagan moved the discussion to the role that “willful blindness” plays in Intel’s argument. She asked Verrilli whether anyone who doesn’t read the disclosures is being willfully blind. Verrilli responded that he was not making that argument but rather reasoning by analogy to willful blindness. He argued that by taking into account both the particular context and the purpose of the statute “to protect the interests of the defendant,” the “actual knowledge” standard in Section 413(2) can be satisfied by “imputing knowledge.”

Ginsburg did not seem convinced. Verrilli’s interpretation, she suggested, was reading the word “actual” out of the statute. To Kavanaugh, Intel’s interpretation sounded like a “constructive” knowledge standard, which would apply to a plaintiff who either knew or should have known about the alleged breach.

The justices also expressed concern about relying on Intel’s policy justifications. Kavanaugh stated that although Intel has some “strong” policy arguments, he questioned why the court should deviate from the words of the statute. Justice Neil Gorsuch suggested that despite the “good policy arguments,” the province of shortening the statute of limitations belongs “across the street,” in Congress.

When pressed by Justice Sonia Sotomayor about why the language of the statute shouldn’t be used to conclude, for example, that a comatose person who received disclosures did not have the requisite actual knowledge, Verrilli raised the concern that plaintiffs could always say they didn’t read the materials and so didn’t actually have knowledge. To this, Justice Stephen Breyer retorted that “there’s always a possibility that a plaintiff under oath will tell the truth.” Breyer indicated that he did not see a problem with giving ordinary workers who don’t read everything the longer six-year period to bring their claims. In response, Verrilli returned to policy concerns about randomness, inadministrability and the risk that “excessive liability” would discourage plan formation. Notably, he also seemed to suggest that a shorter statute of limitations would benefit participants by encouraging interventions to “cure” the breach “sooner rather than later.”

Matthew Wessler, representing Sulyma, made the case that the ordinary definition of “actual knowledge” means that the plaintiff must have “real awareness.” While emphasizing that nothing beyond a plain reading of the statutory text is necessary to decide this case, he explained that Congress set a high bar for shortening the limitations period because ordinary workers are not poring over plan disclosures for possible “kernels of breach.” Instead, because ERISA fiduciaries owe “an unyielding duty to act in participants’ best interests,” participants trust that plan “fiduciaries are not breaching their obligations.” At the same time, Congress sought to protect the interests of plan fiduciaries by giving them the certainty of the six-year time limit.

Appearing for the government in support of Sulyma, Assistant to the Solicitor General Matthew Guarnieri asserted that the case “can begin and end with the plain language” of the statute. No one, according to Guarnieri, “would say that a person has actual knowledge of the contents of a document that the person has never read.”

In their exchanges with Wessler and Guarnieri, the justices questioned how far to extend the requirement of actual knowledge. Ginsburg expressed concern about how easy it would be for a plaintiff to claim not to have read the disclosures. Wessler responded that this issue would not be different from all sorts of fact-specific questions that come up in the context of statutes of limitations.

When asked if it matters whether plaintiffs understood the disclosures, Wessler and Guarnieri agreed that a plaintiff who read but did not understand the materials would not have “actual knowledge.” In response to questions from Kagan, Wessler argued that there is no statutory basis for importing “willful blindness” into the ERISA statute but suggested that it could be used as a “fact-finding tool” after the summary judgment stage.

The justices also pressed Wessler and Guarnieri about class certification when only some participants will have read the disclosures. Although he noted that such concerns do not bear on how to interpret the language in Section 413(2), Wessler pointed to Rule 23 “mechanisms that are designed precisely to assist courts in making those decisions.” Guarnieri added that the existence of a defense that might be applicable to some but not other members of their class would not necessarily preclude class certification.

Toward the end of the hour, Justice Samuel Alito acknowledged that Sulyma has a strong textual argument. He nevertheless pressed Guarnieri to explain why Congress didn’t adopt a uniform six-year limitation period on the understanding that most people don’t read the disclosures. Guarnieri responded that Congress would not have wanted plaintiffs who do have actual knowledge to delay bringing suit. Guarnieri also sought to reassure the justices that there are many reported decisions that apply the term “actual knowledge” in a manner consistent with Sulyma’s interpretation to find that a suit has been brought too late.

In his rebuttal, Verrilli urged the justices to consider the “actual knowledge” standard in its original context. He warned that if the court were to disagree with petitioner on the merits, it should be mindful of the “catastrophe” that the U.S. Court of Appeals for the 9th Circuit’s interpretation would cause in the class-action context.

We will know by June whether the justices – several of whom seemed to believe that most individual participants do not read retirement-plan disclosures – will find that such individuals nevertheless have “actual knowledge” of all the information included in the disclosure documents.

Editor’s note: Analysis based on transcript of oral argument.

Posted in *Intel Corp. Investment Policy Committee v. Sulyma*, Featured, Merits Cases

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