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What is "Actual Knowledge?" Analyzing the Circuit Split on ERISA's Statute of Limitations After Sulyma v. Intel Corporation Investment Policy Committee

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WHAT IS "ACTUAL KNOWLEDGE?" ANALYZING THE CIRCUIT SPLIT ON ERISA'S STATUTE OF LIMITATIONS AFTER *SULYMA V. INTEL CORPORATION INVESTMENT POLICY COMMITTEE*

Adam Ares

I. INTRODUCTION

For much of the twentieth century, employees had very few protections when it came to their benefit plans and retirement pensions.[1] This often resulted in unwelcome surprises for employees upon different milestones in their lives. For example, upon retirement, employees might discover that their pension plans had been mismanaged and their benefits that had been accrued for decades were gone.[2] In 1974 the Employee Retirement Security Act ("ERISA") was passed by Congress to set minimum standards for most retirement and health plans in private industry.[3] ERISA has brought about dramatic changes to employee benefit plans, but over the years unforeseen issues have arose.

In the past several decades, there has been much debate in the courts over how to interpret § 1113(2) of ERISA, which requires a plaintiff to file suit against an unlawful fiduciary within three years of having "actual knowledge" of an ERISA violation.[4] Recently, the Sixth and Ninth Circuits have reached different conclusions as to what type of evidence must be provided in order to show "actual knowledge." The Sixth Circuit holds that a plaintiff has "actual knowledge" if they have been provided with materials that include the alleged violation.[5] The Ninth Circuit, on the other hand, holds that the plaintiff must actually be aware of the facts that make up the breach.[6] This distinction on the definition of "actual knowledge" matters because it directly effects whether a future lawsuit might be barred by the statute of limitations presented by § 1113(2).

This Article argues that the Sixth Circuit's approach is correct and that the Ninth Circuit's approach has several flaws. Section II of this Article will provide a background of the relevant ERISA sections, as well as a history of how the courts have examined § 1113(2), before summarizing the Sixth and Ninth Circuit cases that lead to the current circuit split.

1. Rebecca J. Miller, Robert A. Lavenberg, & Ian A. Mackay, *ERISA: 40 Years Later*, JOURNAL OF ACCOUNTANCY (Sep. 1, 2014), https://www.journalofaccountancy.com/issues/2014/sep/erisa-20149881.html [https://perma.cc/CZN2-FCC3].

2. *Id.*

3. HEALTH PLANS & BENEFITS: ERISA (UNITED STATES DEPARTMENT OF LABOR), https://www.dol.gov/general/topic/health-plans/erisa (last visited Jan. 20, 2020).

4. 29 U.S.C. § 1113(2).

5. Brown v. Owens Corning Inv. Review Comm., 622 F.3d 564, 571 (6th Cir. 2010).

6. Sulyma v. Intel Corp. Inv. Policy Comm., 909 F.3d 1069, 1076 (9th Cir. 2018).

Section III will provide a three-part discussion outlining why the Sixth Circuit decision is the better approach of the two. Lastly, Section IV will conclude that the Sixth Circuit approach should be adopted by all jurisdictions for purposes of determining "actual knowledge" for ERISA's statute of limitations.

II. BACKGROUND

ERISA was passed with the goal of "protect[ing] the interests of participants and their beneficiaries in employment benefit plans."[7] This Section will first provide background information on the relevant provisions of ERISA. Then, it will discuss the case law concerning § 1113(2), including an overview of the historical interpretations of § 1113(2), as well as an in-depth look at the current circuit split among the federal courts, which consists of the Sixth Circuit's decision in *Brown v. Owens Corning Inv. Review Committee*[8] and the Ninth Circuit's decision in *Sulyma v. Intel Corp. Inv. Policy Committee.*[9]

A. The Employee Retirement Income Security Act

ERISA provides comprehensive regulation of employee benefit plans. It regulates retirement plans, welfare benefit plans, and health benefit plans.[10] At its base, ERISA requires "that sponsors of private employee benefit plans provide participants and beneficiaries with adequate information regarding their plans" and that managers of the plans meet "certain standards of conduct" to all participants.[11] Since 1974, there have been major amendments made to ERISA over the years, many of which were aimed at increasing enforcement and regulation to further protecting employees.[12]

The provisions at the heart of the recent circuit split are found within the Fiduciary Responsibility section of ERISA, 29 U.S.C. § 1101-1114. The section describes the required fiduciary duties: "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries[.]"[13] ERISA further provides that a fiduciary shall discharge their duties "for the exclusive purpose of: (i)

7. HISTORY OF EBSA AND ERISA (UNITED STATES DEPARTMENT OF LABOR), https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa [https://perma.cc/Y3FG-GLXC] (last visited Jan. 20, 2020).

8. *Brown*, 622 F.3d at 564.

9. *Sulyma*, 909 F.3d at 1069.

10. HISTORY OF EBSA AND ERISA (UNITED STATES DEPARTMENT OF LABOR).

11. *Id.*

12. *Id.*

13. 29 U.S.C. § 1104(a)(1).

providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan[.]"[14] The fiduciary must do this with "the care, skill, prudence, and diligence" that a prudent man under similar circumstances would use[15] and must diversify "the investments of the plan so as to minimize the risk of large losses[.]"[16]

As described, ERISA goes a long way to protect the interests of plan participants. However, the Act also provides a statute of limitations barring claims for violations of fiduciary duty after a specified time that protects the interests of plan administrators. The Act states that

> [n]o action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of – (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or *(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation*[.][17]

There has not been any issue among the courts regarding § 1113(1), the six-year requirement. However, the "actual knowledge" requirement for plaintiffs under § 1113(2) has proven problematic for the courts.

B. Prior Judicial Interpretations of 29 U.S.C. § 1113(2)

Courts have interpreted the "actual knowledge" requirement of § 1113(2) in a variety of ways over the years. There remains no clear consensus as to what "actual knowledge" by the plaintiff means for § 1113(2) purposes (*i.e.*, the statute of limitation on fiduciary duty violations). *Blanton v. Anzalone*[18] from 1985 and *Int'l Union of Elec. v. Murata Erie N. Am.*[19] from 1992 were two cases that helped to define the "actual knowledge" requirement that is recognized in the majority of the circuits today. These early cases provide an insight into the basic understanding of the "actual knowledge" requirement from § 1113(2) and are therefore critical to discuss.

The Ninth Circuit in *Blanton v. Anzalone* was one of the earliest courts to rule on § 1113(2)'s "actual knowledge" requirement and was one of the last courts to rule on the issue before the 1987 amendments to ERISA

14. 29 U.S.C. § 1104(a)(1)(A).
15. 29 U.S.C. § 1104(a)(1)(B).
16. 29 U.S.C. § 1104(a)(1)(C).
17. 29 U.S.C. § 1113 (emphasis added).
18. Blanton v. Anzalone, 760 F.2d 989 (9th Cir. 1985).
19. Int'l Union of Elec. v. Murata Erie N. Am., 980 F.2d 889 (3rd Cir. 1992).

completely changed the provision.[20] In *Blanton*, the plaintiff brought suit under ERISA for breach of fiduciary duty.[21] The defendants filed a counter suit, but the Court ruled that it was barred by the statute of limitations because the defendants did have "actual knowledge," providing that "[t]he statute of limitations is triggered by the defendants' knowledge of the transaction that constituted the alleged violation, not by their knowledge of the law."[22] This resulted in a definition of "actual knowledge" that was adverse to plan participants due to the ease by which "actual knowledge" could be satisfied.

In 1987, Congress made a fairly significant change to the § 1113(2) "actual knowledge" requirement. After the phrase "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation[,]" the following was removed: "or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title[.]"[23]

Int'l Union was decided not long after the amendment and, interpreting the statute with the amendment, the Third Circuit took a new position on the "actual knowledge" requirement. In *Int'l Union*, the Plaintiff, the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, filed suit against Murata Erie North America, Inc., alleging that Murata breached its fiduciary duty to the plaintiffs.[24] The Court specifically rejected the test for "actual knowledge" articulated in *Blanton*[25] and instead held that in order to satisfy "actual knowledge," it must be shown that "plaintiffs actually knew not only of the events that occurred which constitute the breach or violation but also that those events supported a claim of breach of fiduciary duty or violation under ERISA."[26] This definition of "actual knowledge" goes beyond *Blanton*, requiring the plaintiffs to have knowledge of both (1) the transaction that constituted the breach and (2) that an ERISA claim existed. This more expansive definition is a more plan participant friendly definition that extends the statute of limitations further than the definition under *Blanton*.

After the *Int'l Union* decision, many other circuits began to reject the Third Circuit's position on the "actual knowledge" requirement. The Seventh, Eleventh, and Sixth Circuits joined the Ninth Circuit's holding in *Blanton*, finding that "'actual knowledge' requires only knowledge of all the relevant facts, not the knowledge that the facts establish a

20. Sulyma v. Intel Corp. Inv. Policy Comm., 909 F.3d 1069, 1073 (9th Cir. 2018).

21. *Blanton*, 760 F.2d at 990-91.

22. *Id.* at 992.

23. 29 U.S.C. § 1113 (notes).

24. *Int'l Union*, 980 F.2d at 893-94.

25. *Id.* at 900.

26. *Id.*

cognizable legal claim under ERISA."[27] Currently, both the Sixth and Ninth Circuits follow the standard outlined in *Blanton*, stating that "actual knowledge" only requires that the individual was aware of the alleged violation.[28] However, what type of evidence is required to prove "actual knowledge" of an alleged violation became the focal point of the recent circuit split created by the Sixth and Ninth Circuits.

C. Brown v. Owens Corning Inv. Review Comm.

The Sixth Circuit again approached the issue of what is "actual knowledge" under § 1113(2) in 2010 in *Brown v. Owens Corning Inv. Review Comm.*[29] In *Brown*, former employees of Owens Corning brought a class-action lawsuit against the fiduciaries of the employees' retirement plans, alleging that "the fiduciaries failed to protect plan participants by not divesting the plans of [Owens Corning] stock before the shares became virtually worthless when the company filed for bankruptcy."[30] Owens Corning had multiple retirement plans for its employees, and plan participants could participate in a variety of investment funds, including the Owens Corning Stock Fund.[31] Owens Corning, prior to 1972, had been a manufacturer of insulating material containing asbestos.[32] Due to increased pressure from lawsuits, Owens Corning's stock price fell in the late 1990s and the company was preparing to file for bankruptcy during that time before ultimately filing for bankruptcy in 2000.[33]

The plaintiffs brought suit under two sections: § 1104 for failure of the fiduciaries to exercise a "prudent standard of care" in administering the plans and § 1105, which "imposes liability on a fiduciary for breaches by a cofiduciary."[34] In district court, the plan administrators filed for motion to dismiss, claiming that the plaintiffs' claims were barred by the three-year statute of limitations under ERISA § 1132.[35] In response, the plaintiffs claimed that they did not have "actual knowledge" until many years after the alleged violations, claiming that it was not until 2006 or 2007 that they know the plans had fiduciaries and that the fiduciaries were responsible for managing the Owens Corning Stock Fund.[36]

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27. *See* Wright v. Heyne, 349 F.3d 321, 328 (6th Cir. 2003); *see also* Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1086 (7th Cir. 1992).

28. Blanton v. Anzalone, 760 F.2d 989, 992 (9th Cir. 1985).

29. 622 F.3d 564.

30. *Id.* at 566.

31. *Id.* at 567.

32. *Id.*

33. *Id.*

34. *Id.* at 568.

35. *Id.*

36. *Id.* at 569.

In response, the plan administrators noted that participants in Owens Corning retirement plans received quarterly account statements, titled Summary Plan Descriptions ("SPDs"), which included printed statements that read "Message from the Plan Administrator" and provided plan updates.[37] The SPDs also "informed participants that the OC Investment Review Committee 'is a Named Fiduciary' of the Plan"[38] and provided that "'[u]nder ERISA, the people responsible for operating the Plan are called 'fiduciaries.' These individuals have an obligation to administer the Plan prudently and to act in the interest of Plan participants and beneficiaries.'"[39] At the time that the company filed for bankruptcy, Owens Corning's Compensation Committee decided to close the Owens Corning Stock Fund to new investments "and to permit participants to immediately transfer all prior OC contributions into other investment funds."[40] Plan participants were notified of this change on their next SPDs account statement.[41] Based on the evidence presented, the Sixth Circuit held that the plaintiffs did have sufficient knowledge to trigger the statute of limitations, thus baring their claims under ERISA.[42]

The Sixth Circuit began its analysis by citing its holding in *Wright v. Heyne* that "actual knowledge means 'knowledge of the facts or transaction that constituted the alleged violation.'"[43] The Court found that because the plaintiffs were provided with SPDs and other information which clearly identified that someone had authority over, and was managing their retirement plans, the plaintiffs had "actual knowledge."[44] The plaintiffs argued that "this, at most, would amount to constructive knowledge of the terms contained therein, not actual knowledge."[45] However, the Sixth Circuit disagreed, and found that "[w]hen 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."[46] Therefore, because the plan participants were found to have "actual knowledge" by October 2000, yet did not file their lawsuit until 2006, the claim was deemed barred by ERISA's §1132 statute of limitations.[47] The Sixth Circuit analysis in *Brown* furthered the "actual knowledge" analysis

37. *Id.* at 567.
38. *Id.*
39. *Id.* (quoting Summary Plan Descriptions).
40. *Id.*
41. *Id.*
42. *Id.* at 573.
43. *Id.* at 570 (quoting Wright v. Heyne, 349 F.3d 321, 330 (6th Cir. 2003)).
44. *Id.* at 571.
45. *Id.* (emphasis omitted).
46. *Id.*
47. *Id.* at 573.

by identifying that SPDs that identified the plan fiduciaries could trigger "actual knowledge" for the statute of limitations.[48] However, the Ninth Circuit in *Sulyma* disagreed with this holding and questioned whether "specific instructions" within SPDs about fiduciaries really does qualify as "actual knowledge."[49]

D. Sulyma v. Intel Corp. Inv. Policy Comm.

In late 2018, the Ninth Circuit, in *Sulyma v. Intel Corp. Inv. Policy Comm.*, redefined the "actual knowledge" requirement within its circuit and broke from the Sixth Circuit on how to determine if "actual knowledge" exists.[50] In *Sulyma*, the Plaintiff, Christopher Sulyma, worked at Intel for two years and participated in two of Intel's offered retirement plans.[51] The plaintiff's account performance "depended in part on investment decisions controlled by Intel, through the performance of different Intel 'funds.'"[52] Over time, Intel increased the funds alternative investments to include investments such as hedge funds, in order to provide greater diversification and reduce risk to the funds.[53] However, this decision resulted in "higher fees and lower performance during periods of strong returns in the equity market" and the funds' performance began to lag.[54] Intel disclosed "both the fact of the alternative investments and the basic strategy behind the decision to invest in them" on various documents found on two Intel websites created in 2010.[55] The plaintiff accessed this information, but testified he was not aware that his retirement accounts were tied to the provided information.[56] Sulyma filed his lawsuit in 2015 after learning of the poor performance, claiming, in part, that the defendants violated § 1104 of ERISA by "imprudently investing in alternative investments."[57] Intel filed a motion to dismiss the claims under the § 1113(2) statute of limitations provision.[58] The district court ruled for Intel and Sulyma appealed.[59]

The Ninth Circuit also sided with Sulyma and found that his ERISA

48. *Id.* at 572.
49. Sulyma v. Intel Corp. Inv. Policy Comm., 909 F.3d 1069, 1076 (9th Cir. 2018).
50. *Id.*
51. *Id.* at 1071.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 1072.
59. *Id.*

claims were not barred by the statute of limitations.[60] The Court, in an attempt to clarify the "actual knowledge" requirement for lower courts after years of confusion, explained that "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."[61] Furthermore, the Court explained that "[t]he exact knowledge required will thus vary depending on the plaintiff's claim."[62] The key to an analysis of "actual knowledge," according to the Ninth Circuit, is "whatever the underlying ERISA claim, the limitations period begins to run once the plaintiff has sufficient knowledge to be alerted to the particular claim."[63] The Ninth Circuit put particular emphasis on the requirement that the plaintiff must have *actual* knowledge, rather than *constructive* knowledge.[64] The Court relied primarily upon the 1987 amendments to ERISA, in which Congress removed the constructive knowledge provision from § 1113(2), as evidence that mere constructive knowledge will not satisfy the requirement.[65] The Ninth Circuit further elaborated upon this difference between constructive knowledge and actual knowledge by holding "that the phrase 'actual knowledge' means the plaintiff is actually aware of the facts constituting the breach, not merely that those facts were available to the plaintiff."[66]

In so holding, the Ninth Circuit "recognize[d] that this understanding of actual knowledge conflicts with the Sixth Circuit's reasoning in *Brown v. Owens Corning Investment Review Committee*[.]"[67] The Ninth Circuit disagreed with the analysis under *Brown* and characterized the plaintiff in *Brown* as having only constructive knowledge.[68] In regards to its own case, the Ninth Circuit found that because Sulyma testified that he was unaware of Intel's management over his retirement plans, there was sufficient evidence to find a dispute of material fact such that summary judgment should be precluded.[69]

III. DISCUSSION

The Sixth Circuit's holding in *Brown* correctly interprets the "actual knowledge" requirement of § 1113(2) of ERISA. The "actual knowledge"

60. *Id.* at 1077.
61. *Id.* at 1075.
62. *Id.*
63. *Id.* at 1076.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 1077.

required for a plaintiff to begin the statute of limitations period should follow the test outlined in *Brown* because: (1) *Brown* provides a more bright-line rule that informs and assists parties in making decisions; (2) the test outlined in *Sulyma* makes it unreasonably difficult for defendants to prove that the plaintiff had "actual knowledge;" and (3) the *Brown* analysis does fall within the realm of "actual knowledge," as opposed to "constructive knowledge" as is alleged by the Ninth Circuit in *Sulyma*. This Section will explain why the *Brown* rule is better for all parties involved before discussing the unreasonableness of the *Sulyma* holding. Lastly, this Section will argue that the *Brown* test does satisfy "actual knowledge" and is not a test of "constructive knowledge."

A. The Bright-Line Rule Outlined in Brown Provides Greater Assistance to Parties

The Court in *Brown* provided that "[w]hen 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."[70] While not every legal issue warrants the use of bright-line rules, such standards should be implemented in situations where the parties themselves may benefit from the direction provided by a bright-line rule. The Supreme Court has recognized that "[b]right-line rules upon which the parties' expectations may be firmly established are preferable to … protracted litigation[.]"[71] Under the *Brown* method, fiduciaries of employee benefit plans are provided with very clear guidance that they should provide their employees with material that contains sufficient information about benefit plans[72] in order to put employees on notice and avoid surprise lawsuits filed years after the events. Additionally, employees in a *Brown* jurisdiction are also put on notice that they should look at all information provided to them regarding their benefit plans if they suspect that their plan is being improperly managed. The cumulative effect of these requirements is that fiduciaries and employees are both better educated, gain a greater understanding of what is required of them, and can make more informed decisions based on that understanding.

Unlike the *Brown* test, the *Sulyma* analysis provides very little guidance on what actions fiduciaries and plaintiffs can take in order to

70. Brown v. Owens Corning Inv. Review Comm., 622 F.3d 564, 571 (6th Cir. 2010).

71. Bowsher v. Merck & Co., 460 U.S. 824, 841 n.18 (1983).

72. In *Brown*, the court identified Summary Plan Descriptions (SPDs) that identified the plan administrator and the fiduciary, as well as messages from the Plan Administrator on participants' quarterly account statements, as specific materials that alerted the Plaintiffs "that someone was acting to manage [their] investments." *Brown*, 622 F.3d at 570-73.

satisfy the knowledge requirement of § 1113(2). The Ninth Circuit in *Sulyma* stated that the statute of limitations will begin when "the plaintiff has sufficient knowledge to be alerted to the particular claim."[73] However, the Court does not go on to define what "sufficient knowledge" means. Furthermore, the Court provides that the amount of knowledge may vary depending on the claim.[74] Under this method, fiduciaries of employee benefit plans do not have a clear understanding of what actions they can take to put their employees on notice. This test exposes fiduciaries to litigation, potentially many years after the events at issue. The *Sulyma* holding only serves to create uncertainty in fiduciaries, while permitting plaintiffs to file lawsuits many years after the alleged ERISA violation. The end effect of such a standard is that fiduciaries and plan administrators will find ways to protect their interests, ways that could harm participants in the long run.

In short, the *Brown* test clearly establishes the expectations for both fiduciaries and employees, while *Sulyma* gives great deference to employees but leaves fiduciaries without any instruction or recourse.

B. Sulyma Makes it Unreasonably Difficult for Defendants to Show "Actual Knowledge"

The holding in *Sulyma* makes it difficult for the defendants to show "actual knowledge" because the Court declines to define what will satisfy "actual knowledge." The Ninth Circuit provided that

> the phrase "actual knowledge" means the plaintiff is actually aware of the facts constituting the breach, not merely that those facts were available to the plaintiff. To prevail on a statute of limitations defense on a section 1104 claim, as here, therefore, the defendant must show that there is no dispute of material fact that the plaintiff was actually aware that the defendant acted imprudently.[75]

The definition that the Court gives for "actual knowledge" is that the defendant must be "actually aware" of the facts making up the breach.[76] This explanation simply serves as a sort of circular definition[77], where the word "actual" is used to describe what qualifies as "actual knowledge." Therefore, the plan administrator is left in the difficult position of establishing that the plaintiff was "actually aware" of the facts without relying on evidence that those facts were available to the plaintiff. In an

73. *Sulyma*, 909 F.3d at 1076.

74. *Id.* at 1075.

75. *Id.* at 1076.

76. *Id.*

77. *See Circular Definition*, DICTIONARY.COM, https://www.dictionary.com/browse/circular-definition?s=t (last visited Jan. 20, 2020).

article examining the tort liability for third-party breaches of fiduciary duty, author Alison Gurr noted the difficulty in proving "actual knowledge." She found that there are "significant difficulties in proving 'actual knowledge,' as it requires proof of the subjective state of mind[.]"[78] The Ninth Circuit is essentially requiring that defendants prove the state of mind of the plaintiffs in order to fulfill the "actual knowledge" requirement by not providing any detailed insight into what may qualify as "actual knowledge." Under *Sulyma*, plaintiffs can simply claim that they didn't read any materials provided to them by an employer or didn't understand the materials and they will likely succeed in the battle over the "actual knowledge" requirement. This version of "actual knowledge" serves as a very high hurdle for defendants to overcome.

Furthermore, in other contexts outside of ERISA, courts have often found "actual knowledge" to be a less burdensome standard than that outlined in *Sulyma*. For example, the Eleventh Circuit in *Amegy Bank Nat'l Ass'n v. Deutsche Bank Alex.Brown* discussed the "actual knowledge" standard required for a securities broker to be found liable for unlawful conversion of property.[79] The Court found that the test for "actual knowledge" for collusion under tort law "is whether a jury reasonably could infer from the record that Alex Brown had actual knowledge[.]"[80] The Eleventh Circuit lowered the bar for showing "actual knowledge" further by providing that "circumstantial evidence . . . can support an inference of actual knowledge."[81] Similarly, the Court for the Central District of California outlined an "actual knowledge" standard in *SEC v. City of Victorville*.[82] In deciding whether "actual knowledge" existed for a claim of aiding and abetting under § 10(b) of the Exchange Act, the Court held that "the SEC must set forth facts to support a plausible inference of actual knowledge[.]"[83] The holdings of both the Eleventh Circuit and the Central District of California supports the *Brown* analysis by allowing evidence that could assist in establishing "actual knowledge." Comparatively, the *Sulyma* test serves as a much more difficult and unreasonable bar to defendants.

78. *See* Alison Gurr, *Three's a Crowd or a Charm? Third Party Liability for Participating in Breaches of Fiduciary Duty*, 53 SAN DIEGO L. REV. 609, 642-43 (2016).

79. Amegy Bank Nat'l Ass'n v. Deutsche Bank Alex.Brown, 619 Fed. Appx. 923, 924 (11th Cir. 2015).

80. *Id.* at 929.

81. *Id.* at 930.

82. SEC v. City of Victorville, 2013 U.S. Dist. LEXIS 164530, at *32 (C.D. Cal. Nov. 14, 2013).

83. *Id.* at *35.

C. The Brown Test is a "Actual Knowledge" Standard Not a "Constructive Knowledge"

The Ninth Circuit in *Sulyma* characterized the rationale used by the Sixth Circuit in *Brown* as insufficient to establish "actual knowledge" because it is more akin to "constructive knowledge," which fails to meet the level of knowledge required by § 1132, ERISA's statute of limitations.[84] However, the holding in *Brown* does fit within "actual knowledge" and is not an example of "constructive knowledge." Similar to the Ninth Circuit, the plaintiffs in *Brown* argued that the analysis adopted by the Court was sufficient only for "constructive knowledge." The Sixth Circuit rejected that argument by citing to *Young v. Gen. Motors Inv. Mgmt. Corp.*, and stated that "[a]ctual knowledge does not 'require proof that the individual Plaintiffs actually saw or read the documents that disclosed' the allegedly harmful investments."[85] The court in *Young* further provided that "[a]ny interpretation of the term 'actual knowledge' that would allow a participant to disregard information clearly provided to him/her would effectively provide an end run around ERISA's limitations requirement."[86] Several other courts have also held that a plaintiff provided with materials that contain the facts that give rise to the claim do have "actual knowledge" for purposes of § 1113(2) statute of limitations.[87]

Furthermore, if the *Brown* test were found to satisfy only "constructive knowledge," it would lead to an abuse of ERISA's statute of limitations. Plaintiffs would need only feign ignorance to the relevant information on the documents in order to extend the statute of limitations because the defendants would not be able to use the presence of those documents themselves to establish "actual knowledge." Courts have been aware of the possibility that the statute of limitations may be taken advantage of by plaintiffs.[88] The First Circuit in *Edes v. Verizon Communications* acknowledged that it "do[es] not think Congress intended the actual knowledge requirement to excuse willful blindness by a plaintiff."[89] The

84. Sulyma v. Intel Corp. Inv. Policy Comm., 909 F.3d 1069, 1076 (9th Cir. 2018).

85. Brown v. Owens Corning Inv. Review Comm., 622 F.3d 564, 571 (6th Cir. 2010) (quoting Young v. Gen. Motors Inv. Mgmt. Corp., 550 F. Supp. 2d 416, 419 n.3 (S.D.N.Y. 2008)).

86. *Young*, 550 F. Supp 2d. at 419 n.3.

87. *See* Castillo v. Cmty. Child Care Council of Santa Clara Cty., Inc., 2018 U.S. Dist. LEXIS 88061 at *23 (N.D. Cal. May 24, 2018) (plaintiffs had actual knowledge when they initialed annuity applications that contained the ERISA violations); *see also* Ruppert v. Principle Life Ins. Co., 813 F. Supp. 2d 1089, 1102 (S.D. Iowa 2010) (plaintiff had actual knowledge when defendant included the information alleged to violate ERISA in 2004 contract agreement).

88. *See* New Orleans Emlrs. Int'l Longshoremen's Ass'n v. Mercer Inv. Consultants, 635 F. Supp. 2d 1351, 1380 (N.D. Ga. 2009) ("courts addressing the ERISA statute of limitations period have made clear that manipulation of the statute of limitations should not be tolerated").

89. Edes v. Verizon Communs., 417 F.3d 133, 142 (1st Cir. 2005).

Sulyma test for "actual knowledge" would encourage the abuse and manipulation of the "actual knowledge" requirement, thereby allowing plaintiffs to file suits much later than they would otherwise have been able to by the statute. Therefore, because the *Brown* version of "actual knowledge" is supported by other courts and because of the potential abuse by plaintiffs that would follow if such evidence were deemed proof of "constructive knowledge," the Sixth Circuit requirements do not fall within "constructive knowledge" and does indeed satisfy the "actual knowledge" requirement of § 1132.

IV. CONCLUSION

The rationale used in Brown to determine what evidence is sufficient to establish "actual knowledge" is the correct approach because (1) it provides more of a bright-line rule that will be of greater assistance to parties than the Sulyma holding; (2) the Ninth Circuit standard in Sulyma makes it too difficult for defendants to show "actual knowledge;" and (3) the Sixth Circuit method in Brown does satisfy the "actual knowledge" requirement and is not merely a standard for "constructive knowledge." The Brown approach for determining "actual knowledge" should be adopted by all jurisdictions as it comes the closest to fulfilling the stated goal of ERISA by both protecting the interest of benefit plan participants, while also not limiting the ability of defendants to invoke the statute of limitations as an affirmative defense.