UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BONNIE FISH, et al., Plaintiffs vs. GREATBANC TRUST CO., et al., Defendants	Civil Action No. 09 CV 1668

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS' OPPOSITION
TO DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

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QUESTION PRESENTED

Section 413 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1113, generally gives plaintiffs six years from the date of a fiduciary breach to file an action to redress the breach. In cases where "the plaintiff" had "actual knowledge" of the breach, however, the statute shortens the period to three years beginning on "the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2). The defendants do not contend that any of the plaintiffs in this case had personal knowledge of the alleged breaches or that they slept on their rights for the requisite period of three years. Instead, the defendants move for summary judgment on the ground that a separate plan fiduciary, who is neither a plaintiff nor a defendant in this case, had actual knowledge of the breaches more than three years before the plaintiffs filed their action. The question addressed in this brief is whether plaintiffs can be time barred from bringing suit under 29 U.S.C. §§ 1132(a)(2) and (3), even if they were unaware of any breach, based upon the actual knowledge of a non-party fiduciary who did not himself file suit for the alleged fiduciary breaches.

INTEREST OF THE SECRETARY OF LABOR

The Secretary of Labor ("Secretary") has primary enforcement and regulatory authority for Title I of ERISA. See 29 U.S.C. §§ 1134, 1135; Sec. of Labor v. Fitzsimmons, 805 F.2d 682, 688-91 (7th Cir. 1986) (en banc). Given the large number of ERISA-covered employee benefit plans, civil actions brought by plan fiduciaries, participants, and beneficiaries under 29 U.S.C. § 1132(a) to remedy fiduciary breaches are essential means of enforcing Title I of ERISA. The Secretary therefore has a strong interest in the interpretation of ERISA's statute of limitations provisions as they apply in such private actions and could be applied to the Secretary's own actions.

STATEMENT OF FACTS

Plaintiffs in this action assert breaches of fiduciary duty in violation of ERISA concerning the Antioch Co. Employee Stock Ownership Plan ("ESOP" or "Plan"). Plaintiffs are four individual Plan participants and the Plan's current trustee (Evolve Bank & Trust) (collectively, "plaintiffs"). The plaintiffs pursue a representative action on behalf of the Plan to recover all alleged financial losses for restoration to the Plan. Mem. Order and Opinion of November 5, 2009 (Doc. 110 at 1, "Nov. 5 Order"). At a hearing held October 30, 2009, and in the Nov. 5 Order denying plaintiffs' motion to proceed in this action without a class action certified under Fed. R. Civ. P. 23, the Court made two statements pertinent to the issue presented here: first, it characterized plaintiffs' suit as "after all brought on behalf of the Plan as the real party in interest." Nov. 5 Order at 3 (original emphasis); see Transcript of Hearing of Oct. 30, 2009 ("Oct. 30 Transcript") at 5 ("it's really the Plan that in all of these cases is the real party in interest"). Second, on this premise, it suggested that it viewed the three-year time bar in section 413(2), which runs from "the earliest date on which the plaintiff had actual knowledge" (29 U.S.C. § 1113(2), emphasis added), as commencing when any "nonbreaching fiduciary or fiduciaries . . . had actual knowledge and could have taken action on behalf of a Plan." Oct. 30 Transcript at 5.

Citing the Court's statements quoted above, the defendants have moved for summary judgment, asserting that plaintiffs filed this action after the running of the three-year limitations period in ERISA section 413(2). Defendants contend that a non-defendant trustee for the Plan, Barry Hoskins, had actual knowledge of the alleged ERISA violations more than three years before this suit.[1] Doc. 137 at 8-20 (defendants' memorandum of law). Defendants assert that

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[1] As amicus curiae, the Secretary does not address whether or not defendants have established the absence of a genuine issue of material fact concerning Barry Hoskins' actual knowledge or

Hoskins' actual knowledge must be imputed to the Plan and, through the Plan, to each of its participants and to its current trustee: "[b]ecause the Plan – through Hoskins – had actual knowledge of every fact that Plaintiffs needed to assert their claims on behalf of the Plan more than three years prior to filing their Complaint, Plaintiffs' claims are barred by the statute of limitations." Id. at 6; see id. at 13, 16.

ARGUMENT

ERISA'S THREE-YEAR STATUTE OF LIMITATIONS IS TRIGGERED SOLELY BY THE PLAINTIFFS' ACTUAL KNOWLEDGE OF THE BREACH, NOT BY INFORMATION KNOWN TO NON-PARTY FIDUCIARIES

A. Because section 413(2) requires "the plaintiff" to have had actual knowledge of the breach, a non-party fiduciary's alleged knowledge of a breach is not imputed to the actual party-plaintiff.

Congress enacted ERISA "to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b) (congressional findings and declaration of policy). ERISA imposes stringent duties of loyalty, diligence, and prudence on plan fiduciaries, as means of ensuring that plans are wisely managed and that participants can count on receiving promised benefits. 29 U.S.C. §§ 1104 and 1106. To enforce these statutory responsibilities and to remedy violations, ERISA contains several "carefully integrated" enforcement provisions, which authorize plan participants and beneficiaries, plan fiduciaries, and the Secretary of Labor to bring suit when fiduciaries fail to adhere to ERISA's important

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whether he was in fact a "non-breaching fiduciary." Nor do we address whether or when the plaintiffs may have independently acquired actual knowledge of the alleged breaches or violations.

standards. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985). See, e.g., 29 U.S.C. § 502(a)(2)-(5) (conferring rights to sue and specifying eligible plaintiffs).[2]

Consistent with its goal of providing ready means to redress fiduciary breaches, ERISA generally gives ample time for affected parties to bring suit and recover losses to the plan. ERISA section 413 sets forth the applicable time limits:

> No action may be commenced under this subchapter 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
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or action.

29 U.S.C. § 1113.

Thus, section 413 makes six years the general limitations period in Title I of ERISA, and "[this] six-year time period reflects Congress' determination to impress upon those vested with the control of pension funds the importance of the trust they hold." Brock v. Nellis, 809 F.2d 753, 754 (11th Cir. 1987). The shorter three-year time bar states an "exception[] to the six-year limitations period." Id. at 754-55. Through the "stringent requirement imposed by [§ 413(2)]" in its actual knowledge standard, "[§ 413(2)] sets a high standard for barring claims against

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[2] In ERISA section 502(a)(2) (under which plaintiffs bring this action, Doc. 110 at 1), the entities authorized to bring suit for relief to the plan are "(2) . . . the Secretary [of Labor], a participant, beneficiary, or fiduciary." 29 U.S.C. § 1132(a)(2). Under ERISA section 502(a)(3), "a participant, beneficiary, or fiduciary" also may bring suit "to obtain appropriate equitable relief" for violations of Title I of ERISA. 29 U.S.C. § 1132(a)(3). In a parallel provision, ERISA section 502(a)(5), ERISA similarly authorizes the Secretary to sue for appropriate equitable relief. 29 U.S.C. § 1132(a)(5).

fiduciaries prior to the expiration of the six-year limitations period." Gluck v. Unisys Corp., 960 F.2d 1168, 1176 (3rd Cir. 1992). In light of the relative length of the basic six-year limitations period and the "scant" legislative history of ERISA section 413, "Congress evidently did not desire that those who violate that [fiduciary] trust could easily find refuge in a time bar." Nellis, 809 F.2d at 754; see Wright v. Heyne, 349 F.3d 321, 327 (6th Cir. 2003) ("[t] he basic ERISA limitation period of six years begins on the date of the breach or violation"). By its terms, the six-year limitations period is not tied to the plaintiff's knowledge, but rather to the date of "the last action" or the last curable "omission" of the breaching fiduciary. 29 U.S.C. § 1113(1).

The exceptional three-year statute of limitations, however, expressly requires that "the plaintiff" had "actual knowledge of the breach or violation."[3] Id. § 1113(2) (emphasis added). In this manner, the statute prevents a plaintiff who actually knows about a violation from sleeping on his rights rather than pursuing breaches that should be promptly remedied. Because the three-year period requires that "the plaintiff" – not "the plan" or some person other than the party actually bringing the case – had the triggering "actual knowledge," a plaintiff cannot be charged with sleeping on claims that he never knew he had. Accordingly, the Act does not senselessly start the clock ticking based on the state of mind of a plan fiduciary who failed to pursue the claim or even to alert the innocent plan participant to its existence.

Consistent with the express requirement that the plaintiff had "actual knowledge," the Seventh Circuit and other circuits limit application of the three-year period in section 413(2) to cases in which the plaintiff had "specific knowledge of the actual breach of duty upon which he

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[3] This statute of limitations expires "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2) (emphasis added). Therefore, the defendants mischaracterize the law (and miscite George v. Kraft Foods Global, Inc., 674 F.Supp.2d 1031, 1041-42 (N. D. Ill. 2009)), in stating: "[t]o trigger this three year statute of limitations, the plan must have 'actual knowledge' of the alleged breaches of fiduciary duties." Doc. 137 at 3-4 (emphasis added).

sues." Radiology Center, S.C. v. Stifel, Nicolaus & Co., 919 F.2d 1216, 1222 (7th Cir. 1990); see Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1086-94 (7th Cir. 1992) (same).[4] "'[A]ctual knowledge' in section 1113 means actual knowledge; it does not also mean constructive knowledge, or inquiry notice." Wolin v. Smith Barney, Inc., 83 F.3d 847, 853 (7th Cir. 1996) (actual knowledge means facts discovered, not merely facts that could have been learned); accord, Radiology Center, 919 F.2d at 1222 ("§1113[2] speaks solely in terms of actual, not constructive, knowledge" (original emphasis)); Brieger v.Tellabs, Inc., 629 F.Supp.2d 848, 868 (N.D. Ill. 2009). Constructive knowledge is "[n]otice of facts which in the exercise of reasonable diligence would lead to actual knowledge." Radiology Center, 919 F.2d at 1222; see, e.g., Wolin, 83 F.3d at 853 (same). By definition, then, constructive knowledge cannot constitute actual knowledge.

Because the section 413(2) actual knowledge standard cannot include constructive knowledge, it necessarily follows that knowledge imputed from one actor to another – which is, at most, a form of constructive knowledge – also cannot trigger an ERISA plaintiff's three-year limitations period under section 413(2). Significantly, this conclusion fully comports with the law of trusts, which is the background for many of ERISA's principles. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989) (trust law informs the interpretation of ERISA's fiduciary duties and the remedial provisions designed to enforce those duties). Under trust law, "in direct dealings between a trustee and his beneficiaries there is no imputation of the knowledge of the trustee to the beneficiary." Bogert, Bogert, & Harris, The Law of Trusts and

[4] Other circuits likewise limit the meaning of "actual knowledge" in section 413(2). E.g., Caputo v. Pfizer, 267 F.3d 181, 193 (2d Cir. 2001); Gluck, 960 F.2d at 1176; Nellis, 809 F.2d at 755. See Wright, 349 F.3d at 328, 331 (agreeing with Seventh Circuit precedents on section 413(2) actual knowledge).

Trustees § 912 (2d ed. rev. 1983 and 2009 Update).[5] Likewise, no such imputation can be inferred under ERISA for limitations purposes.

Not surprisingly, therefore, the only federal circuit to have directly ruled on the point has explicitly rejected the argument that the three-year "statute of limitations should begin running on the first day that any plan fiduciary or other agent of the plan had actual knowledge of the violation." Landwehr v. Dupree, 72 F.3d 726, 732 (9th Cir. 1992) (emphasis added). Instead, the Ninth Circuit concluded, this limitations period is "measure[d] . . . from the date the person bringing suit, and not the plan itself through one of its agents, learned of the violation." Id.[6] Emphasizing the "unfairness that would result from adopting [a] rule that [allows imputation of actual knowledge to the plan]," the court reasoned that any such result "would obviously defeat the purpose" of the actual knowledge standard and thereby would "undermine one of the primary purposes of ERISA: to protect pension plans from looting by unscrupulous employers and their

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[5] Whether knowledge can be imputed from fiduciary to plan is a different question from whether it can be imputed from fiduciary to beneficiary. It is also a different question from whether the plan can sue on its own behalf and be considered a fiduciary when it does so. The Seventh Circuit holds that "ERISA confers on pension plans standing to sue for breach of fiduciary obligations under ERISA." Peoria Union Stock Yards Co. Retirement Plan v. Penn. Mut. Life Ins. Co., 698 F.2d 320, 326 (7th Cir. 1983) (citing ERISA section 502(d)(1), 29 U.S.C. § 1132(d)(1), which in relevant part states that "[a]n employee benefit plan may sue or be sued under this subchapter as an entity"). Because a plan (or trust) can act only through a fiduciary acting on its behalf, the Seventh Circuit further holds that "a plan is a fiduciary for the purposes of section 1132 (enforcing section [4]09)." Line Const. Ben. Fund v. Allied Elec. Contractors, Inc., 591 F.3d 576, 580 (7th Cir. 2010). Neither Peoria Union nor Line Construction, however, suggests that ERISA section 413(2) permits a fiduciary's actual knowledge of an ERISA violation to be imputed to the plan's participants and beneficiaries or to another fiduciary. Respecting a plan's status as a party to a lawsuit, neither decision considered any issue of actual knowledge under ERISA section 413(2).

[6] See Gluck, 960 F.2d at 1176; Radiology Center, 919 F.2d at 1222 (both holding that constructive knowledge cannot be actual knowledge, which Landwehr found supportive of its holding); see also CB Richard Ellis Investors, L.L.C. v. Sonnenblick, 45 Fed.Appx. 680, 681 (9th Cir. 2002) (The plaintiff in an action under ERISA for engaging in prohibited transactions is the "fiduciary, beneficiary, or participant bringing suit. That other fiduciaries knew of the violations does not set the limitations period running.").

agents." Id. at 733. Accordingly, it held: "[t]hus, the statute of limitations started to run on the first date that either [plaintiff] Landwehr or Cole had actual knowledge of the alleged violation, regardless of whether any Plan fiduciary or service provider knew of the violation before that date." In Landwehr, therefore, the Ninth Circuit correctly rejected any construction of section 413(2) that would allow imputation to the plan from "any fiduciary or other agent of the plan."

Similarly, other federal courts consistently have cited ERISA's remedial purposes and the appellate courts' resulting narrow construction of section 413(2) as precluding the imputation of actual knowledge from one plan fiduciary to another plan fiduciary. See Bona v. Barasch, No. 01 Civ. 2289, 2003 WL 1395932, at *15 (S.D.N.Y. Mar. 20, 2003) (under the § 413(2) actual knowledge standard, one trustee "cannot be charged with [another trustee's] disqualifying knowledge of the alleged breaches of fiduciary duty"); Mason Tenders Dist. Council Pension Fund v. Messera, 958 F.Supp. 869, 882-83 (S.D.N.Y. 1997) ("[a]ctual knowledge cannot be attributed to [plaintiff trustees] by the knowledge of prior trustees or other current trustees"); Dist. 65 Retirement Trust v. Prudential Secs., Inc., 925 F.Supp. 1551, 1560-61 and n.10 (N.D. Ga. 1996) (section 413(2) forbids imputation of actual knowledge from former trustees to successor trustees); Crimi v. PAS Indus., Inc., 1995 WL 272580, at *3 (S.D.N.Y. Mar. 9, 1995) ("[m]ost consonant with the language of the statute and the purposes of ERISA is the interpretation that any trustee who sues as plaintiff and does not have actual knowledge of the relevant facts sufficient to make an ERISA claim may avail himself of the six year limitations period"); New York State Teamsters Council Health and Hosp. Fund v. Estate of DePerno, 816 F.Supp. 138, 144 (N.D.N.Y. 1993) ("[i]n view of the strict standard of the statute [(§ 413(2)], the knowledge of . . . [fiduciary] Executive Administrator of the Fund, or other employees of the Fund, . . . cannot be read to impart 'actual' knowledge of a fiduciary breach to the Trustees"); Useden v. Acker, 734 F.Supp. 978, 980 (S.D. Fla.1989), aff'd, 947 F.2d 1563 (11th Cir. 1991) (rejecting imputation of trustee's knowledge to plaintiff successor trustee).[7]

As the District 65 court observed, "[h]ad Congress wished to impute the knowledge of former fiduciaries to successor trustees, Congress certainly could have done so." 925 F.Supp. at 1559.[8] The same is true for imputing the knowledge of former (or current) fiduciaries to participants and beneficiaries. "[T]his [(non-imputation)] is in keeping with the policy of ERISA evidenced by § 1113 to prevent fiduciaries who have breached their duties to the plan and the participants from escaping liability." Id. at 1561 n.10.

B. Imputing a plan fiduciary's actual knowledge to plan participants would effectively nullify the basic six-year limitations period in ERISA § 413(1) for private plaintiffs and replace it with the shorter three-year period commencing on a date that plaintiffs could seldom determine prior to bringing suit.

Defendants' novel idea that any non-breaching fiduciary's actual knowledge of the basic facts relating to a breach or violation triggers the three-year statute of limitations for all participants, beneficiaries, and fiduciaries of the plan is both far-reaching and unsupportable.[9]

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[7] Two reported decisions have held that, under ERISA section 413(2), knowledge can be imputed from one trustee to another trustee. New Orleans Employers Int'l Longshoremen's Ass'n v. Mercer Investment Consultants, 635 F.Supp.2d 1351, 1380-81 (N.D. Ga. 2009); Breed v. Dawson, No. 93-111, 1994 WL 129770, *3 (D. Me. Feb. 14, 1994). Neither of these decisions reconciled its holding to the judicially-settled narrow construction of actual knowledge in section 413(2) or to the six-year time bar that, as the basic limitations period, embodies the remedial purpose of the ERISA fiduciary standards. See 635 F.Supp.2d at 1380-81; 1994 WL 129770 at *3. Of course, here, the defendants seek to go far beyond merely imputing the knowledge of one trustee to other trustees, by asking the court to impute the trustee's alleged knowledge to plan participants. For good reason, the defendants can cite to no case that remotely endorses this proposition. See Defendants' Joint Memorandum of Law in Support of Their Joint Motion for Summary Judgment, Doc. 137.

[8] Cf. Gluck, 960 F.2d at 1176 (in light of constructive knowledge language in other ERISA limitations periods, 29 U.S.C. §§ 1303 and 1370, "[w]e do not think that Congress' failure to call for it in § 1113 was accidental").

[9] It is not clear whether defendants' imputation theory is limited to non-breaching fiduciaries with actual knowledge of a breach or extends equally to breaching fiduciaries (who necessarily have such knowledge). As a matter of agency law, a fiduciary is an agent of the plan, having the actual or apparent authority, for instance, to bind the plan to pay benefits or enter contracts and

Before filing suit and conducting discovery, a typical plan participant likely has no way to know what plan fiduciaries knew or did not know; has few if any means to ascertain when the fiduciaries knew what they knew; and little or no basis even for determining precisely who all the fiduciaries of the plan were in light of ERISA's broad functional test of fiduciary status. In the normal case, some or all of the plan's fiduciaries would have known the facts relating to the breach well before the participants, given the fiduciaries' superior access to plan-related information, their possible participation in the breach, and their lack of incentive voluntarily to disclose information bearing on a breach because of their own potential liability; but the participants would have no sure way of obtaining equivalent knowledge.

Yet, the defendants propose to make the three-year statute of limitations turn on plan fiduciaries' state of mind, which private plaintiffs usually cannot ascertain outside litigation discovery, rather than on the plaintiffs' actual knowledge that the statute expressly requires. A plaintiff could not be sure of when he had to bring suit, unless he first somehow acquired knowledge of numerous plan fiduciaries' state of knowledge, regardless of whether the fiduciaries had disclosed their knowledge of the breach (or even the bare fact of their fiduciary status) to the plaintiffs. Even if the fiduciaries never disclosed their knowledge to the plaintiffs,

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to cause it to sue or be sued. Generally, "notice is imputed to a principal of a fact that an agent knows or has reason to know if knowledge of the fact is material to the agent's duties to the principal and to the principal's legal relations with third parties." Restatement (Third) of Agency § 5.04 (2006), comment b; see id. § 5.03. An "adverse interest" exception to the general rule, however, states that, with exceptions not herein relevant, there is no imputation if an agent acts adversely to the principal in dealing with third parties. Id. § 5.04 & comment b. Furthermore, "imputation does not furnish a basis on which an agent may defend against a claim by the principal." Id. § 5.03, comment b; see id. § 5.04, comment b (same). Since the premise of a fiduciary breach case alleging losses to the plan is that a fiduciary has acted adversely to the interests of the plan, and a fiduciary breach claim is in essence a claim on behalf of the principal (the plan) against the agent (the breaching fiduciary), these common law principles lead to the conclusion that defendants' imputation theory should not encompass breaching fiduciaries, at least in a section 502(a)(2) suit seeking recovery of plan losses.

the defendants here would cut the limitations period in half based on non-party fiduciaries' knowledge of a breach.

Under defendants' imputation theory, the plaintiffs' task would be additionally complicated by the fact that under ERISA, fiduciary status is not merely based upon one's title, such as "trustee," but on a person's authority and actions with respect to a plan or its assets. ERISA's definition of "fiduciary" makes fiduciary responsibility a function of "the extent" to which a person exercises discretionary authority or control over a plan's management or administration or assets, or renders investment advice with respect to plan monies or property. 29 U.S.C. § 1002(21)(A). See, e.g., Leigh v. Engle, 727 F.2d 113, 133 (7th Cir. 1984) ("ERISA ties fiduciary responsibilities to a person's actual authority"). This broad, functional definition is not limited to the few designated trustees under the terms of the plan's trust documents, but potentially encompasses a large number of individuals with administrative or management authority over aspects of the plan. There is no reason to believe that a typical plaintiff would even be able to determine who all of a plan's fiduciaries were during the relevant period, much less what they knew about particular transactions or plan decisions and when they knew it.

Consequently, imputation of the fiduciary's knowledge to the plan would impermissibly substitute, as the norm, the three-year time bar in section 413(2) for the six years given by section 413(1) in fiduciary breach cases, absent a claim for fraud or concealment.[10] Any one of a plan's functional fiduciaries is capable of committing a breach of duty that could be remedied through an action under sections 502(a)(2) or (3), subject to the three-year statute of limitations if the plaintiffs bringing the action had actual knowledge of the breach or the six-year statue of

[10] Fraud or concealment cases are not subject to the three-year statute of limitations. 29 U.S.C. § 1113. They are, however, subject to a heightened pleading standard under Fed. R. Civ. P. 9(b). The statutory exception for cases involving fraud or concealment recognizes that fiduciary breach claims are not generally fraud or concealment cases.

limitations if they did not. Any time a fiduciary commits a breach, it is also quite possible that another fiduciary (in addition to the breaching fiduciary) has actual knowledge of the facts constituting the breach, even if that fiduciary did not participate in the breach.[11] Under the defendants' imputation theory, however, if any one of these fiduciaries has actual knowledge of another fiduciary's breach and neither brings an action based on that knowledge nor communicates knowledge of the breach to other potential plaintiffs (participants and beneficiaries, other fiduciaries, or the Secretary[12]), the result will be to bar all such private actions unless brought within three years of when the knowing fiduciary gained such knowledge, regardless of when, if ever, the putative private plaintiffs acquired their own actual knowledge of the breach.

Defendants' strikingly broad imputation theory thus turns section 413 upside down, making the six-year limitations period the unattainable exception to the three-year period in virtually all private cases, contrary to congressional intent and the statutory text.[13] Where the non-breaching fiduciary learns of the facts constituting a breach at the time it occurs, private plaintiffs without their own actual knowledge nonetheless would face a three-year deadline, even

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[11] In most courts, including the Seventh Circuit, actual knowledge is "knowledge of the 'essential facts of the transaction or conduct constituting the violation,' and . . . it is 'not necessary for a potential plaintiff to have knowledge of every last detail of a transaction, or knowledge of its illegality.'" Rush v. Martin Peterson Co., 83 F.3d 894, 896 (7th Cir. 1990 (citing Martin, 966 F.2d at 1086)).

[12] We assume, however, that even the defendants in this case would not contend that the fiduciary's knowledge is imputed to the Secretary of Labor, whom the statute also empowers to bring actions for fiduciary breach on behalf of the plan and to thereby recover plan losses caused by such breach. Cf. Fitzsimmons, 805 F.2d at 692-94 (Secretary is not bound by private settlement; no privity between Secretary and private plaintiffs).

[13] Cf. Corley v. U.S., 129 S.Ct. 1558, 1566-67 (2009) ("[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant") (citation and internal quotation marks omitted).

if they did not discover the breach until more than three years (but less than six years) after its occurrence. ERISA, however, nowhere suggests – much less specifies – that the timeliness of fiduciary breach suits brought by private ERISA plaintiffs is determined by the knowledge of third parties. Not only does such a rule, as previously indicated, have no anchor in the words of the statute – "actual knowledge" comes into play only when "the plaintiff" has such knowledge – but such a rule is unworkable insofar as, in most cases, the plaintiffs (typically, participants representing the participant class) have no way of discovering the "actual knowledge" of a non-plaintiff fiduciary (or absent participant) until after filing suit and instituting discovery. The courts should not dismiss such cases based on an after-the-fact determination that a non-breaching fiduciary had actual knowledge more than three years before the participant-plaintiffs brought suit and based on a legal fiction that the fiduciary's actual knowledge is imputable to participants who, but for the imputation, would be entitled to bring suit within the six-year limitations period.

Put differently, defendants' imputation theory would – assuming the plaintiffs were aware of the risk – force private plaintiffs (especially plan participants) to assume that they have only three years after the breach in which to file any suit. Plan participants rarely if ever can find out – short of litigation discovery – whether or when any fiduciary had "actual knowledge" of a breach (much less whether any fiduciary is truly "non-breaching"). Prospective plaintiffs, therefore, would be compelled to assume a three-year deadline even though their own lack of actual knowledge would otherwise entitle them to expect that the six-year deadline applies. Assuming, on the other hand, the more likely scenario that the plaintiffs were wholly unaware of the risk of such imputation, prospective plaintiffs would very likely not sue until after the three-year limitations period has run, setting them up for dismissal of the suit as untimely. Either result would undermine Congress' declared policy to protect plans and plan participants in part through "ready access to the Federal courts," 29 U.S.C. § 1001(b), and in part through adoption of the basic six-year statute of limitations.

There is simply nothing in section 413 or anywhere else in ERISA to suggest that, among potential plaintiffs, only the Secretary – and not a plan's fiduciaries, participants, and beneficiaries – is, absent her own "actual knowledge," entitled to the basic six-year limitations deadline stated in section 413(1). The "actual knowledge" line, which lies somewhere between knowing "something was awry" and knowing "every last detail" (see Martin, 966 F.2d at 1086), is difficult enough to navigate without placing plaintiffs in the untenable position of thinking they are operating under the six-year statute of limitations based on their own lack of actual knowledge, only to find out later (and quite possibly too late) that the actual knowledge of a third party, with whom they have no relationship and over whom they have no control, has been attributed to them by operation of law.

C. Defendants' theory of imputed knowledge is inconsistent with ERISA's structure of fiduciary responsibility and accountability.

The defendants' argument that a fiduciary's knowledge should be imputed to plaintiffs who were unaware of wrongdoing is diametrically opposed to ERISA's fiduciary structure, which seeks to hold fiduciaries accountable for their misconduct and requires them to take reasonable steps to remedy other fiduciaries' breaches. When a fiduciary fails to take appropriate measures to remedy known fiduciary misconduct, the consequence under ERISA is that the fiduciary may be held liable for a breach. Instead, however, the defendants propose that the consequence of a fiduciary's failure to bring an action or to notify plan participants of the breach should be to cut short or eliminate the period for other plan fiduciaries and plan participants to remedy the misconduct. The defendants' argument finds no support in ERISA's fiduciary structure, which emphasizes fiduciary accountability, rather than the easy evasion of liability through fiduciary neglect and non-disclosure.

ERISA's fiduciary standards militate against imputing actual knowledge of a violation from one fiduciary to the plan as a means of restricting the time in which a suit for fiduciary breach can be brought by other fiduciaries (much less by participants) on behalf of the plan. A fiduciary's responsibilities extend to bringing fiduciary breach claims on behalf of the plan, including against co-fiduciaries that the fiduciary knows or has reason to believe committed such breaches. See 29 U.S.C. §§ 1132(a)(2), (a)(3) (giving fiduciary standing to bring such actions). With exceptions not relevant here, ERISA section 405(a), 29 U.S.C. § 1105(a), makes a fiduciary liable for a co-fiduciary's breach of duty where a fiduciary either (1) participates in the co-fiduciary's breach, knowing that a breach occurred, or (2) by his own fiduciary breach enables such other fiduciary to commit a breach, or (3) knows of the co-fiduciary's breach but does not make reasonable efforts to remedy it.[14]

Under section 405(a)(3), knowledge of a co-fiduciary's breach obligates a fiduciary to take reasonable steps to remedy that breach and, if indicated, inform plan participants and other plan fiduciaries of that breach. Willett v. Blue Cross and Blue Shield of Ala., 953 F.2d 1335,

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[14] ERISA § 405(a) states:

> In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
>> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>>
>> (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>>
>> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1105(a).

1341-42 (11th Cir. 1992) (if plan's fiduciary insurer knew that responsible fiduciary had failed its duty to notify plan participants, "then [fiduciary insurer] incurred a duty [under § 405(a)(3)] to take reasonable steps to remedy the breach"); Morrissey v. Curran, 567 F.2d 546, 550 (2d Cir. 1977) ("reasonable efforts" under § 405(a)(3) to remedy a known breach may include "'notify[ing] the plan sponsor of the breach or proceed[ing] to an appropriate Federal court for instructions") (quoting Conference Report on ERISA). "Since each trustee has an obligation to protect the plan assets, each has an obligation to seek enforcement and to be such a plaintiff where necessary." Messera, 958 F.Supp. at 869, 882 (S.D.N.Y. 1997) (quoting Crimi, 1995 WL 272580 at *3).[15]

The fiduciary duty to take reasonable steps to remedy another fiduciary's known breach precludes, under section 413(2), imputing one fiduciary's actual knowledge of a violation to a second fiduciary. See, e.g., CB Richard Ellis Investors, L.L.C. v. Sonnenblick, 45 Fed.Appx. 680, 681 (9th Cir. 2002) (where an ERISA plan fiduciary or plan participant sues to remedy a fiduciary breach, "imputing to [a successor fiduciary] the knowledge of [. . . another fiduciary] would permit the purported wrongdoing to defeat the cure"). Failure to bring such suit in a timely manner or at all may itself constitute a fiduciary breach, but it should have no effect on the capacity of other fiduciaries to bring their own actions and have the timeliness of those suits judged by the presence or absence of their own actual knowledge (and when they acquired it). If section 413(2) allowed such imputation and the suing fiduciaries did not learn of that violation's facts until more than three years after their imputed actual knowledge but fewer than six years

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[15] In the analogous context of a plan fiduciary's failure to collect contributions due the plan, the Department of Labor has explained that, under section 405(a)(3), "[e]fforts to remedy" may include "seeking a court order mandating a proper allocation of fiduciary responsibility over contributions." Field Assistance Bulletin No. 2008-01, Fiduciary Responsibility for Collection of Delinquent Contributions at 3 (U.S. Dept. of Labor Feb. 1, 2008) (http://www.dol.gov/ebsa/regs/fab2008-1.html) (viewed June 2, 2010).

after the violation, they would be time-barred by section 413(2) from commencing an otherwise timely suit. In that circumstance, a breaching fiduciary simply by his silence or inaction could thwart his presumably diligent co-fiduciaries from suing to remedy a breach that was unknown to them when it occurred. An initially non-breaching fiduciary with actual knowledge of the same violation would cause the same result by similarly failing to communicate the facts to any co-fiduciaries and failing to undertake his own reasonable efforts to remedy that violation.

More generally, ERISA was carefully crafted to ensure that those responsible for plan activities are individually charged with fiduciary duties and can each be held liable for failure to adhere to their stringent obligations as plan fiduciaries. Thus, ERISA obligates a fiduciary to act with undivided loyalty, prudence and diligence in plan matters independently of whether the plan's other fiduciaries comply with their fiduciary duties.[16] See Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982) ("[fiduciary] decision[s] must be made with an eye single to the interests of the participants and beneficiaries"). Accordingly, when fiduciaries breach their obligations under ERISA, their liability is "joint and several." Donovan v. Robbins, 752 F.2d 1170, 1185 (7th Cir. 1985) (Coffey, J., concurring) ("[a]ccording to the Senate Report, '[a]ny fiduciary who breaches his trust is personally liable for losses resulting from such breach, and co-fiduciaries are jointly and severally liable'") (citation omitted). Cf. 29 U.S.C. § 1110 (prohibiting fiduciaries from limiting their personal liability through exculpatory arrangements). It was Congress' clear

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[16] ERISA section 404(a)(1)(A) creates a duty of fiduciary loyalty by requiring a fiduciary to discharge plan-related duties "(A) for the exclusive purpose of: (i) providing benefits . . .; and (ii) defraying reasonable expenses of administering the plan; . . . ." 29 U.S.C. § 1104(a)(1)(A); Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570-71 (1985). ERISA section 404(a)(1)(B) separately imposes fiduciary duties of diligence and prudence: "a fiduciary shall discharge his duties with respect to a plan . . . (B) with the care, skill, prudence, and diligence under the circumstances" of a "prudent man." 29 U.S.C. § 1104(a)(1)(B). ERISA section 404(a)(1)(D) further requires a fiduciary to follow the terms set forth in plan documents "insofar as such documents and instruments are consistent with the provisions of [ERISA]." 29 U.S.C. § 1104(a)(1)(D).

intent that fiduciaries retain accountability for fiduciary misconduct, and that they have every incentive to correct fiduciary misconduct. Thus, directly contrary to the defendants' argument, plan fiduciaries cannot effectively impair the ability of other fiduciaries to bring suit merely by keeping quiet about facts known only to them while the limitations period silently runs out.

There is even less cause to impute a fiduciary's knowledge to a participant or beneficiary than to a fellow fiduciary. ERISA's conferral of standing on any participant or beneficiary to bring suit on behalf of a plan for losses caused to the plan by a fiduciary's breach strongly indicates that Congress did not entrust enforcement of the Act solely to fiduciaries and the Secretary. Fiduciaries may be reluctant to sue co-fiduciaries, while the Secretary can litigate only a relatively few ERISA cases involving credible claim of fiduciary breach. Given the important role participants and beneficiaries play in enforcing ERISA so as to preserve trust assets and to assure proper plan management, imputing any fiduciary's actual knowledge to plan participants and beneficiaries would uniquely inflict a burden on their ability to obtain the statute's judicial remedies. Employees of the plan's sponsor are participants in the plan and may even direct investments in their own individual accounts, but otherwise such employees play no role in the plan's day-to-day management, and they cannot be expected to have a sophisticated understanding of the investments and financial services contracts that make up much of the plan's affairs. Furthermore, in distinct contrast to the plan's fiduciaries, even a financially savvy plan participant lacks ready access to the details and evidence of transactions involving plan assets and the conduct of its fiduciaries.

As a practical result, imputation of a fiduciary's actual knowledge to plan participants and beneficiaries would frustrate the protection provided by the six-year limitations period. "[ERISA] recognizes that when a transaction does not affect employees' day-to-day working conditions, it is less likely that employees will immediately become aware of a grievance.

"Gluck, 60 F.2d at 1177. "[A] fiduciary has a virtual monopoly of information concerning the [plan's] transaction in question." Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209 1215 (2d Cir. 1987); see Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 588 (8th Cir. 2009) ("[i]t would be perverse to require plaintiffs bringing [fiduciary breach] claims to plead facts that remain in the sole control of the parties who stand accused of wrongdoing)." Indeed, imputation may not only wrongly cut short the participants' time to bring suit by three years, but it also may, as the defendants urge in this case, result in dismissal if the actual knowledge of a non-plaintiff (presumably a non-breaching fiduciary) does not come to light until after the participants' suit is filed more than three years after the alleged breach or violation occurred.

CONCLUSION

For the foregoing reasons, the Court should deny defendants' joint motion for partial summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on _June 25, 2010_, I filed a copy of the foregoing

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS' OPPOSITION
TO DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

electronically by operation of the Court's electronic case filing system ("ECF"). Through the Court's ECF system, all parties to this action will receive service of this filing.

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