No.

IN THE

SUPREME COURT OF THE UNITED STATES

ANGELA BAKOS,

Petitioner,

v.

UNUM LIFE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Respondent UNUM was required under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et. seq., to provide Petitioner BAKOS with actual, as opposed to constructive, notice that there was in existence a three-year period of limitation within which suits for denial of benefits must be filed in court.

LIST OF PARTIES

Petitioner is Angela Bakos. Respondent is Unum Life Insurance Company of America. Respondent's parent company is Unum Group. BlackRock, Inc., a publicly held company, owns more than 10% of the common stock of Unum Group.

RELATED CASES

There are no related cases.

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Employer Retirement Income Security Act of 1974 ("ERISA")

IN THE
SUPREME COURT OF THE UNITED STATES

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Court of Appeals entered August 25, 2022 is not reported. (App., A, *infra.*)

The opinion of the district court entered March 14, 2022 is not reported. (App., B, *infra.*)

The opinion of the Court of Appeals denying Petitioner's Petition for Rehearing En Banc entered October 18, 2022 is not reported. (App., C, *infra.*)

JURISDICTION

The judgment of the Court of Appeals was entered on August 25, 2022. Bakos on September 7, 2022 filed a Petition for Rehearing En Banc. This Rehearing Petition was denied on October 18, 2022.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This is an action pursuant to the Employment Retirement Income Security Act of 1974. *29 U.S.C Section 1001 et seq.* Respondent Unum issued a disability policy to Petitioner Bakos through her employer. UNUM as authorized in *Heimeshoff v. Hartford Life and Accident Insurance Company*, 571 US 99, 134 S. Ct. 604, (2013) elected to shorten the applicable period of time for insured beneficiaries to file legal actions to three years. UNUM's disability plan documents provide that if a beneficiary is dissatisfied with UNUM's decision, UNUM will provide "a statement describing your right to bring a lawsuit under Section 502(a) of ERISA if you disagree with the decision." Prior to the applicable three-year period of limitation running, UNUM informed Bakos of her appeal rights without providing any time limitations whatsoever. Several years later, after obtaining a favorable Social Security disability decision following extended litigation and after Unum's three-year period of limitation had expired, BAKOS requested UNUM reopen its last denial and award her disability benefits. At this time and after the three-year period had run, UNUM for the first time specifically informed Bakos that there was a three-year period of limitation and that this period had run. Her request to reopen was denied.

BAKOS submits that the notice requirements enunciated in *Intel v. Sulyma, 140 S.Ct 768 (2020)* also apply to the facts in this case.

STATEMENT OF THE CASE

Respondent UNUM pursuant to *Heimeshoff v. Hartford Life & Accident Co., 571 U.S. 99, 134 S.Ct.604 (2013)* adopted a three-year period of limitation within which dissatisfied beneficiaries can file suits following disability benefits denials. BAKOS, a plan disability beneficiary, received initial benefits. Unum later determined that she was no longer disabled and terminated benefits. She appealed and was denied initially and also after requesting reconsideration. The two denial notices did not specifically state what the BAKO's appeal rights were other than UNUM providing summary language indicating she had the right to bring a civil suit under Section 502(a) of the ERISA of 1974. In a collateral and lengthy proceeding for Social Security disability benefits, BAKOS was ultimately awarded Social Security disability benefits. The final favorable award occurred after Unum's three-year period had run.[1] BAKOS was unaware there was a three period of limitation and asked UNUM to reopen her prior application. At that time UNUM, for the very first time, informed the BAKOS that there was in fact a

[1] Petitioner believed such a favorable ruling would be relevant and would support her Unum disability application.

three-year period of limitation and that it had run. UNUM refused to reopen its earlier denial.

UNUM's plan summary documents state as part of its contract with Bakos and her former employer that if a claim is denied the employee beneficiary will receive "a statement describing your right to bring a lawsuit under Section 502(a) of ERISA if you disagree with the decision."

In BAKOS' amended complaint she alleged that she did not have any knowledge or notice that there was in fact a three-year period of limitation. The three-year limitation period language is, however, located in UNUM's fifty-three (53) page plan document. The lower district court granted UNUM's Motion to Dismiss. On appeal, this judgment was affirmed by the lower circuit court.

REASONS FOR GRANTING THE WRIT

Pursuant to *Heimeshoff, supra*, ERISA plans can modify and adopt reasonable periods of limitation for aggrieved beneficiaries to file suit. In the absence of such language, state statutes of limitation generally apply for breach of contract. In Georgia the limitation period is six years. *Ga. Code Ann Section 9-3-24.*[2]

[2] If applicable, Petitioner's suit would have been timely.

The lower district court and the court of appeals both acknowledged that the Petitioner asserted she did not have actual notice of UNUM's three-year period of limitation.[3] Notwithstanding, both courts determined that the notice requirements of *Intel v. Sulyma, 140S.Ct.768, 206 L.Ed.2d103 (2020),* while precedent, were not applicable to the facts in this case. The courts' reasoned that in this case there was a lack of specificity authorizing a finding that the BAKOS was entitled to actual notice. The denial by both the district and circuit court of appeals stated in relevant part that since the Supreme Court in *Intel* only addressed the limitation period under Section 1113(2) of ERISA, which related to a claim for breach of fiduciary duty, *Intel* therefore did not apply. The lower circuit court distinguished the facts indicating that Section 1113(2) is unlike other ERISA limitations periods. Therefore, *Intel, supra*, and its actual notice requirements were inapplicable.

Federal courts do apply standard contract interpretation rules to ERISA contracts. In *Webb v Liberty Mutual,* an unpublished decision of the Eleventh Circuit, this circuit court stated:

> This Court interprets ERISA contracts, like the Policy, according to federal common law. *Alexandra H. v. Oxford Health Ins. Inc. Freedom Access Plan, 833 F.3d 1299, 1306-07 (11th Cir. 2016).* "We

[3] In her amended pleadings Petitioner alleged that she did not have any actual knowledge or notice that there was a three-year period of limitation. This allegation must be deemed as true since the case was before the lower courts on a Motion to Dismiss.

> first look to the plain and ordinary meaning of the policy terms to interpret the contract." *Id. at 1307*. When a term is ambiguous—that is, it is "susceptible to two or more reasonable interpretations that can be fairly made"—we "construe any ambiguities against the drafter." *Id.*
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> *Webb* (Circuit Court Doc. 11-3, p.7)

Clearly, UNUM is the drafter. A review of all the correspondence from UNUM to BAKOS concludes with summary language that if BAKOS is dissatisfied, she has the right to file suit in federal court as an ERISA appeal. The plan's terms state that UNUM is required to inform BAKOS of her appeal rights. It is ironical that nowhere in the initial and reconsideration notices was there any reference to any time limitation. Only after the three years had run and after BAKOS had diligently pursued her Social Security appeal did UNUM for the first time indicate that there was a three-year period of limitation. Pursuant to *Heimeshoff, supra*, UNUM was permitted to reduce the limitation period in the contract to three years. BAKOS, however, was not signatory to the contract – only a beneficiary of this disability contract. Although this issue was not specifically addressed in *Heimeshoff* or its subsequent cases, BAKOS submits that for UNUM to get the benefit of selecting a reduced time period it should at the very least be required to provide adequate notice to prospective beneficiaries to include BAKOS.

The holding as to actual notice set out in *Intel v. Sulyma, 140 S.Ct. 768 (2020)* should be applicable to BAKOS. In *Intel*, this Court held that even though there was a three-year period of limitation pursuant to 29 U.S.C Sec. 1113 (2) of ERISA, this limitation would not apply in the absence of actual notice. [4]

The facts in *Intel* involved Sulyma who had worked at Intel Corporation from 2010 to 2012. He had participated in several ERISA covered retirement plans. He later learned that the plan fiduciary had invested retirement funds in risky hedge fund investments and he sought to sue the fiduciary for breach of duties as set out in *Intel.* The plan fiduciary had defended on the basis that there was a three-year statute of limitation and that the suit was filed beyond the three-year limitation. Sulyma maintained that although he had checked the plan periodically and possibly frequently over this time frame, he was unaware there was an applicable three-year period of limitation. *Intel, supra, at 140 S.Ct. p. 774-774.*

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[4] There is no similar statutory provision for claims similar to the one BAKOS filed pursuant to 29 U.S.C. Sec.1132(a)(1)(B). Her claim is based on a disability insurance contract and does not involve fiduciaries' breach of duty.

The Supreme Court in *Intel* granted certiorari to resolve a conflict among the circuits as what was meant by "actual" notice or knowledge. This Court held that actual notice meant exactly that, implying that a plan fiduciary could not adroitly hide words or phrases and not bring them to the attention of the plan beneficiaries. The Supreme Court stated:

> "We must enforce plain and unambiguous statutory language" in ERISA, as in any statute, "according to its terms." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251, 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010). Although ERISA does not define the phrase "actual knowledge," its meaning is plain. Dictionaries are hardly necessary to confirm the point, but they do. When Congress passed ERISA, the word "actual" meant what it means today: "existing in fact or reality." Webster's Seventh New Collegiate Dictionary 10 (1967); accord, Merriam-Webster's Collegiate Dictionary 13 (11th ed. 2005) (same); see also American Heritage Dictionary 14 (1973) ("In existence; real; factual"); *id.*, at 18 (5th ed. 2011) ("Existing in reality and not potential, possible, simulated, or false"). So did the word "knowledge," which meant and still means "the fact or condition of being aware of something." Webster's Seventh New Collegiate Dictionary 469 (1967); accord, Merriam-Webster's Collegiate Dictionary 691 (2005) (same); see also American Heritage Dictionary 725 (1973) ("Familiarity, awareness, or understanding gained through experience or study"); *id* ., at 973 (2011) (same). Thus, to have "actual knowledge" of a piece of information, one must in fact be aware of it.
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> *Intel, supra, at 140 S.Ct., p. 776.*

Additionally, in *Intel* the Supreme Court addressed several of the plan fiduciary's arguments wherein it again specifically stated "actual" meant actual:

> This is the reason for ERISA's requirements that disclosures be written for a lay audience. See, *e.g.*, 29 U.S.C. § 1022(a). Once plan administrators satisfy their obligations to impart knowledge, petitioners say, § 1113(2)'s knowledge requirement is satisfied too. But that is simply not what § 1113(2) says. Unlike other ERISA limitations periods—which also form § 1113(2)'s context— § 1113(2) begins only when a plaintiff actually is aware of the relevant facts, not when he should be. And a given plaintiff will not necessarily be aware of all facts disclosed to him; even a reasonably diligent plaintiff would not know those facts immediately upon receiving the disclosure. Although "the words of a statute must be read in their context," *Davis v. Michigan Dept. of Treasury* , 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), petitioners' argument again gives the word "actual" little meaning at all.

Intel, supra, 140 S.Ct, p.778.

Finally, in *Intel* the Supreme Court addressed the relationship between the plan fiduciaries and plan participants.

> Petitioners may well be correct that heeding the plain meaning of § 1113(2) substantially diminishes the protection that it provides for ERISA fiduciaries, but by the same token, petitioners' interpretation would greatly reduce § 1113(1)'s value for beneficiaries, given the disclosure regime that petitioners themselves emphasize. Choosing between these alternatives is a task for Congress, and we must assume that the language of § 1113(2) reflects Congress's choice. If policy considerations suggest that the current scheme should be altered, Congress must be the one to do it. See, *e.g.* , *Azar* v. *Allina Health Services* , 587 U.S. ——, ——, 139 S.Ct. 1804, 1813, 204 L.Ed.2d 139 (2019).

Intel, supra, at 140 S.Ct. p. 778.

The plan beneficiary in *Intel* was an astute individual—much more so that Petitioner Bakos. Both cases are ERISA cases. The notice issue is essentially the same—albeit different ERISA causes of action. One falls on a statutory clause (Section 1113(2))) and the other falls on a contract clause -- both requiring notice. Petitioner submits she should have received more than the cursory constructive notice provided. The only difference between the two is whether it is statute based or contract based. The underlying cases are both ERISA cases. To deny Bakos's claim and to allow the petitioner in *Intel* to proceed creates a disparity and inequality. The notice criteria in *Intel* should be extended and apply to BAKOS and those who may be similarly situated.

While this case was concluded in the courts below on a motion to dismiss and without any discovery, BAKOS submits that she is one of many similar situated individuals who have been adversely affected by UNUM's and other similar insurer's lack of fair and adequate notice. Disability providers handling and administering ERISA claims should be required to provide adequate notice to the respective plan beneficiaries. In this case the notice provided to BAKOS was tantamount to providing no notice at all. Under ERISA, if the lack of notice is

material, plan administrators and others similarly situated should be required to provide actual or at the very least more specific notice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.,

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January 12, 2023