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# Fiduciary Liability Ledger

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**This has certainly been a year unlike any other. Despite the upheaval, parts of our world remain strangely consistent. One such place is the U.S. Supreme Court, which is still hearing arguments (albeit via conference and not in-person) and has a full docket, including a large number of ERISA cases.**

**Our guest authors are Jamie Fleckner and George Schneider of the law firm Goodwin Proctor, who in this article discuss those ERISA cases, and their ramifications for our customers.**

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## Supreme Court: The Term of ERISA

ERISA is normally not a hot topic for the Supreme Court. The 2019-2020 term is different, with the Supreme Court granting certiorari in three ERISA cases in June 2019. The cases are each very different, and plan sponsors should pay attention, as the cases may significantly affect the duties that ERISA fiduciaries owe to plan participants.

First, on June 3, 2019, the Supreme Court granted certiorari in *Retirement Plans Committee of IBM v. Jander* (No. 18-1165). The *Jander* case concerns the fiduciary duty owed to participants when a company offers investment in its own publicly-traded stock. The question before the Court addressed the fiduciary duty owed to such participants when the fiduciary is aware of non-public information that could, if disclosed, negatively impact the value of plan participants' stock. The Supreme Court previously considered that issue in *Fifth Third Bank v. Dudenhoeffer* (573 U.S. 409 (2014)), and had held in that case that participants must allege that ESOP fiduciaries could have taken some alternative action that: (1) would not violate securities laws; and (2) would not do "more harm than good."

Since the *Dudenhoeffer* decision, courts have dismissed "stock drop" cases at an early stage, finding that participants have failed to plausibly allege an alternative action the fiduciary could have taken. In *Jander*, however, the Second Circuit held that the plaintiff *did* plead such an alternative action, by alleging that the fiduciaries should have disclosed non-public information that would inevitably have been disclosed, and that the earlier a disclosure is made, the less harmful it is to company stock prices. On January 14, 2020, the Supreme Court issued its opinion, remanding the case back to the Second Circuit without opining on the Second Circuit's reasoning. Rather, the Supreme Court held that the petitioner and the U.S. Government raised arguments for the first time at the Supreme Court level—*i.e.*, whether ERISA requires fiduciaries to act on inside information, and the extent to which ERISA fiduciary duties might conflict with federal securities laws—and sent the case back to the Second Circuit to consider those arguments for the first time. The Second Circuit has asked for the parties' briefs on the issue by June 1, 2020. The *Jander* case is still one to watch, because the case may be back before the Supreme Court, once the Second Circuit weighs in on those arguments. Further, while numerous courts had dismissed "stock drop" complaints in the wake of *Dudenhoeffer*, *Jander* is one of the very few cases after *Dudenhoeffer* that had allowed such a case to proceed with litigation.

Given the extreme volatility of the stock market in the wake of COVID-19, some in the plaintiffs' bar may look for opportunities, such as those afforded by *Jander* as it currently stands, to bring such litigation—though it will be interesting to see how the "inevitability" exception to Dudenhoeffer would play out in courts in the context of the COVID-19 crisis.

Second, on February 26, 2020, the Supreme Court issued its decision in *Intel Corp. Invest. Policy Comm. v. Sulyma* (No. 18-1116). In the *Sulyma* case, originally decided by the 9th Circuit Court of Appeals in favor of plaintiffs, the Supreme Court addressed a question about ERISA's statute of limitations, which is the time-frame applicable to when certain litigation may be brought under ERISA. Specifically, under the statute, where a plan participant has "actual knowledge" of certain ERISA violations, such as a breach of fiduciary duty or a prohibited transaction, the participant has three years to file a complaint. In *Sulyma*, a 401(k) plan participant filed suit, alleging that certain alternative funds offered by his 401(k) plan were excessively costly and underperformed index funds. The plan fiduciaries claimed that the participant's claims were time-barred because he received disclosures about the complained-of funds—and therefore had actual knowledge of the facts underlying his claim—more than three years before filing suit.

*The Supreme Court agreed with the Ninth Circuit and ruled that the claims were not time-barred because, although the participant received the disclosures, he did not read the disclosures and therefore did not have "actual knowledge" of the underlying facts.*

The Court held that to bar a suit under the three-year limitations provision, a plaintiff "must in fact have become aware of [the] information" that would support the claim. While the Supreme Court decision will make it more difficult for plan sponsors and other fiduciary defendants to argue that ERISA claims are time-barred under the three year "actual knowledge" standard, the Supreme Court explained that sometimes such a defense could prove meritorious, such as when a plaintiff is shown to have reviewed records electronically (by, for example, clicking on a link), or that the plaintiff took some action in response to the disclosure. Further, the Court's decision does not address ERISA's alternative statute of repose, which bars all claims six years after "the date of the last action which constituted a part of the breach or violation" or in the case of fraud or concealment. 29 U.S.C. § 1113(1).

Finally, on June 28, 2019, the Supreme Court granted certiorari in *Thole v. U.S. Bank, N.A.* (No. 17-1712). In *Thole*, the plaintiffs, who participated in a defined benefit pension plan, alleged that the plan fiduciaries breached their fiduciary duty by investing the plan exclusively in equities, including some that were managed by the sponsor or its affiliates, causing the plan to lose hundreds of millions of dollars. Although the plan sponsor subsequently contributed enough money to bring the plan back into compliance with ERISA's minimum funding requirements—thereby guaranteeing that all participants would receive their pension payouts—the participants alleged that the plan remained millions short of where it should have been, but for the breach of fiduciary duty. The Eighth Circuit affirmed the district court's dismissal, holding that, because the plan met minimum ERISA funding standards, the participants did not suffer a financial loss, and therefore lacked standing to sue for breach of fiduciary duty. The parties argued before the Supreme Court on January 13, 2020, but the Court has yet to issue its opinion.

The Supreme Court's decision could be limited to the circumstances as to when a participant in a defined benefit pension plan can sue for alleged under-funding, or it could touch more widely upon the circumstances under which any ERISA plan participant may sue to enforce the statute, which causes this to be a case worth watching. A decision is expected by June 2020.

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Mr. Fleckner's success in litigating cutting edge legal issues has been profiled in The American Lawyer's Big Suits and Litigator of the Week features. According to Chambers USA: America's Leading Lawyers for Business where Mr. Fleckner has been selected for inclusion since 2014, Mr. Fleckner is "at the top of his game," and is "a rare thought leader" on ERISA litigation. Since 2015, he has been recognized as a leading lawyer in the list of Who's Who Legal: Pensions and Benefits.

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