The Implications of the Supreme Court's Acceptance of Certiorari in IBM and Intel and What It Means for the Future of ERISA Litigation

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The U.S. Supreme Court has accepted certiorari petitions in two separate ERISA cases—both involving significant liability concerns for defined contribution plans. This is unprecedented, considering the relative frequency of ERISA cases to reach the confines of the Supreme Court and the Court's 3.4% civil litigation certiorari acceptance rate. No matter what the Court decides, one thing is for sure—the Court's decisions will fundamentally alter the ERISA litigation arena with billions of dollars at stake. The article provides is an overview of the two cases, the issues involved, and the potential outcomes.

The U.S. Supreme Court has a long track record of setting the boundaries of ERISA liability and in turn, shaping the confines of the ERISA litigation landscape. Take, for example, the last two significant Supreme Court ERISA decisions. On May 18, 2015, in *Tibble v. Edison,* the Supreme Court decided whether fiduciaries acted imprudently in offering six higher priced retail-class mutual funds as plan investments when materially lower priced institutional-class mutual funds were available. The Court answered in the affirmative—holding that in addition to selecting prudent investments at the outset, plan fiduciaries have "a continuing duty to monitor trust investments and remove imprudent ones."[1] This decision has not been interpreted in a vacuum. *Tibble* has had ripple effects on countless ERISA excessive fee and underperformance cases brought by plaintiffs across the country and has generally emboldened the ERISA plaintiffs' bar. In fact, according to the publication *MarketWatch,* over 100 new 401(k) complaints were filed in 2016–17—the year after *Tibble* was decided—the highest two-year total since 2008–09.[2]

On the opposite end of the spectrum, on June 25, 2014,

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in *Fifth Third v. Dudenhoeffer,* the Court dealt what many considered to be a final blow to plaintiffs seeking relief against fiduciaries of employee stock ownership plans (ESOPs) for imprudence. In *Dudenhoeffer*, the Court held that absent "special circumstances," plan fiduciaries should not be held liable for failure to predict the future performance of publicly traded employer stock, nor is a fiduciary required to act on any inside information that would place it at odds with securities law or if publicly disclosing negative information would do "more harm than good to the fund."[3] The *Dudenhoeffer* decision, the Court's later tag-along decision in *Amgen Inc. v. Harris,*[4] and lower courts of both *Dudenhoeffer* and *Amgen* all but foreclosed the ability for ERISA plaintiffs to have success in alleging imprudence by ESOP plain fiduciaries whether on claims of failure to act on public or private information.

Now in 2019, the Supreme Court has accepted certiorari petitions in *two* separate ERISA cases—both involving significant liability concerns for defined contribution plans. This is unprecedented considering the relative frequency of ERISA cases to reach the confines of the Supreme Court and the Court's 3.4% civil litigation certiorari acceptance rate.[5] No matter what the Court decides, one thing is for sure, the Court's decisions will fundamentally alter the ERISA litigation arena with billions of dollars at stake.[6]

Below is an overview of the two cases, the issues involved, and the potential outcomes.

Weeding the plausible sheep from the meritless goats to discern ESOP fiduciary liability for failure to act on nonpublic information. Famously, the Supreme Court stated in *Dudenhoeffer* that any rule governing ESOP plan fiduciary liability must "readily divide the plausible sheep from the meritless goats."[7] The *Dudenhoeffer* Court aimed to create two new standards based upon the context of allegations against the fiduciary.

First, for allegations the plan fiduciary was over or undervaluing a stock based on *public information*, the Supreme Court held that a plaintiff would have to point to "special circumstances" affecting the reliability of the market price as an "unbiased assessment" of the value of the security that would render the investment imprudent.[8]

Second, for allegations the plan fiduciary behaved imprudently by failing to act on the basis of *nonpublic information* as a corporate insider, the Court focused its analysis on ensuring fiduciaries do not act to violate any securities laws (such as insider trading) and set the standard as whether a "fiduciary in the defendant's position could not have concluded that stopping purchases—which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment—or publicly disclosing negative information *would do more harm than good* to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund."[9]

The Supreme Court later solidified the "more harm than good" standard in *Amgen* where it stated a complaint alleging failure to act on the basis of nonpublic information must plausibly allege that a prudent fiduciary in the same position "could not have concluded that the alternative action would do more harm than good."[10]

Courts since *Amgen* interpreted it and *Dudenhoeffer*'s "more harm than good" standard as a nearly insurmountable obstacle to clear and perceived both cases as standing for weeding out supposed meritless complaints against ESOP plan fiduciaries. In fact, no court had allowed a claim to proceed against ESOP plan

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fiduciaries based on a failure to act on inside information after *Amgen.* This was until the Second Circuit's decision in *Jander v. Retirement Plan Committee of IBM.*[11]

Is *Jander* a meritless goat or a plausible sheep under *Dudenhoeffer*? The *Jander* decision rocked the ERISA litigation arena considering it was the first court since *Amgen* to find that the plaintiffs had plausibly alleged a breach of fiduciary duty claim against ESOP defendants based upon a failure to act on inside information. In *Jander,* the plaintiffs, participants in the company's ESOP, alleged that the plan's fiduciaries, including IBM's Chief Accounting Officer, Chief Financial Officer, and General Counsel, possessed information that the microelectronics division of the company was overvalued by hundreds of millions of dollars but took no remedial action, did not disclose the accounting misconduct to the market and instead, engaged in GAAP violations by continuing to overvalue the microelectronics unit. The *Jander* plaintiffs specifically alleged IBM was on track to incur annual losses of $700 million on its microelectronics business in 2013 but failed to publicly disclose these losses and continued to value the business at approximately $2 billion, even though it has corrected the accounting fraud and disclosed it to the public well before that time.

On October 20, 2014, IBM announced the sale of the microelectronics business to GlobalFoundries Inc. and revealed that it would pay $1.5 billion to GlobalFoundries for the flailing business and that IBM would take a $4.7 billion pre-tax charge because of accounting impairments in the stated value of its microelectronics business. IBM's stock price, upon the disclosure of the announcement, declined by more than $12.00 per share.[12]

Contrary to the many decisions before it that alleged very similar facts, the *Jander* court noted five separate reasons why *Jander* sufficiently pleaded a breach of fiduciary duty and its decision was distinguishable—and should have a different outcome— from every other case to interpret the non-public inside information standard espoused in *Dudenhoeffer* and *Amgen*:

1. According to the *Jander* court, the plan defendants allegedly knew that IBM stock was artificially inflated through accounting violations and therefore, knew that the company was impaired. The court hinted that because of the lower pleading standard for ERISA cases this knowledge could be shown.[13]
2. The court explained that affirmative disclosures relating to the impaired accounting could have been included within IBM's quarterly SEC filings and disclosed to the ESOP's beneficiaries at the same time in the plan defendants' fiduciary capacity.[14]
3. Based on the plaintiffs' allegations, a reasonable business executive could have plausibly foreseen that the inevitable disclosure of longstanding corporate fraud would reflect badly on the company and undermine faith in its future pronouncements, and reputational harm to IBM would grow longer the fraud is concealed, translating into larger stock drop.[15]
4. The plaintiffs plausibly alleged that a prudent fiduciary need not fear an irrational overreaction to the disclosure of fraud because the IBM stock traded in an efficient market.[16]
5. Finally, and most importantly, the court emphasized that the plan defendants allegedly knew that disclosure of the truth re-

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garding IBM's microelectronics business was inevitable because IBM was likely to sell the business and would be unable to hide its overvaluation from the public at that point. In applying the "more harm than good" standard, the court concluded that a prudent fiduciary, in comparing the benefits and costs of earlier disclosure to those of later disclosure, would find that "non-disclosure is no longer a realistic point of comparison."[17]

Following the *Jander* decision, the IBM defendants appealed to the Supreme Court in a petition for certiorari on March 4, 2019. The thrust of the petition was that it the *Jander* opinion would open the floodgates to ERISA litigation that piggyback securities claims that allege an undisclosed fraud that grows over time, therefore increasing the costs of eventual disclosure.[18]

The IBM defendants' petition highlighted that "[b]y alleging that the costs of undisclosed fraud grow over time and that revelation of the fraud is inevitable, ERISA plaintiffs will routinely satisfy a pleading standard designed to be rigorous, context-specific and protective of fiduciaries of companies who have responded to Congress's policy preferences by establishing ESOP plans." The Supreme Court accepted the plan defendant's petition for certiorari on June 3, 2019.

The issues before the Supreme Court in deciding *Jander*. Put most generally, the question before the Supreme Court is whether *Jander* is an aberration (that will be reversed) or an acceptable interpretation of *Dudenhoeffer's* and *Amgen's* "more harm than good" standard. In answering this question, the Supreme Court might do two things.

First, in accepting certiorari, the Court has the opportunity to distill the appropriate standard for courts to use in weighing claims against ESOP fiduciaries. As the *Jander* court noted two tests were set forth in *Dudenhoeffer*: (i) whether "a prudent fiduciary in the same circumstances would not have viewed [an alternative action] as more likely to harm the fund than to help it," and (ii) whether a prudent fiduciary "could not have concluded" that the action would do more harm than good by dropping the stock price. The latter formulation appears to ask, not whether the average prudent fiduciary would have thought the alternative action would do more harm than good, but rather whether any prudent fiduciary could have considered the action to be more harmful than helpful.[19] And, in comparison, the first formulation suggests that the standard for evaluating fiduciaries' actions is based upon what the average prudent fiduciary would have done. The second formulation, which the *Jander* court found plaintiff met, is a much more restrictive test.

In deciding which test should apply or if they can be combined, the Court will have to build upon its opinion in *Amgen,* where its stated the test is whether the complaint "has plausibly alleged" that a prudent fiduciary in the same position "could not have concluded" that the alternative action "would do more harm than good.

Second, the Supreme Court may finally conduct a factual analysis of what conduct might be necessary to pass the "more harm than good" standard. Keep in mind that in *Amgen,* the Court did not dip into any factual analysis as to whether the plaintiffs could adequately plead a claim for breach of fiduciary duty and instead, left such analysis to the district court. Here, however, because of the confusion raised by *Jander* and dissension among the Second, Fifth and Sixth Circuits, it could feel compelled to do so. In any such analysis, the weight of

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authority appears to be against plaintiff Jander, considering the long history and application of the presumption of prudence in favor of ESOP fiduciaries, lower court interpretations of *Dudenhoeffer* and *Amgen* favoring defendant ESOP fiduciaries, and the policy implications in opening the door to a barrage of new ERISA claims that will seek to mimic the tact and allegations made in *Jander.*

Adding more fuel to the defendants' argument—because of the similarity between the allegations in *Jander* and securities cases that also allege failure to disclose inside information of wrongdoing—the Court could feel pushed to raise the pleading standard in ESOP inside information cases to comport with securities law and specifically avoid plaintiffs from skirting the requirements of the Public Securities Litigation Reform Act. The Justices might simply ask themselves if the securities case against the same company and the defendants could not state a claim for relief, how could the ERISA case?

Reconciling the differences between a securities fraud claim and a claim for breach of fiduciary duty against virtually the same defendants might be a key function of the *Jander* decision. Based upon any such analysis, the Court might not be comfortable with any broad and fast rules that will provide any wiggle room for ERISA plaintiffs to bring causes of action that would otherwise be rejected under securities law.

When should a plan participant be charged with "actual knowledge" of an ERISA breach of fiduciary duty claim? ERISA's statute of limitations provides for both three-year and six-year time periods during which a plaintiff may bring suit. The general rule is that no ERISA action can be commenced six years after "the date of the last action which constituted a part of the breach or violation, or in the case of an omission the latest date on which the fiduciary could have cured the breach or violation."[20] But if it can be shown that the plaintiff possessed "*actual knowledge*" of the breach or violation, the limitations time period shortens to three years. So even though an ERISA plaintiff alleging a breach of fiduciary duty generally has six years in which to file suit, this period may be shortened to three years when the plaintiff possesses actual knowledge of the breach or violation.

Because actual knowledge significantly shortens the limitations period, it is a common defense employed by defendants seeking to dismiss ERISA breach of fiduciary cases brought under ERISA § 404. Currently, however, the relative success of such an affirmative defense would be based upon the location of where the case would be decided, because there are intense and drastic differences between the circuit courts in deciding what constitutes "actual knowledge" of an ERISA plan participants' breach of fiduciary duty claim under ERISA § 404.

In the Sixth Circuit, for example, a plan participant might have "actual knowledge" of a breach of fiduciary claim, and the statute of limitations affirmative defense could be invoked when the participant was provided documents or was given instructions on how to access documents that provided information that formed the basis of their claims.[21]

But the idea that plan documents can provide actual knowledge of ERISA excessive fee and performance claims—merely by relaying the performance and fee data to an ERISA claimant—is a premise that is outright rejected elsewhere. This was made abundantly clear in the Ninth Circuit's decision in accepted in *Sulyma v. Intel Corporation Investment Policy Committee*.[22]

In *Sulyma,* the plaintiff al-

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leged that Intel's increase in plan investment option exposure to alternative investments resulted in higher fees and poor performance, and as a result, performance lagged compared to index funds and comparable portfolios. In response, Intel employed the statute of limitations defense, arguing that it expressly disclosed the exposure to alternative investments in communications and disclosures to plan participants—specifically, in plan investment "Fund Fact Sheets" that the plaintiff could have accessed more than three years before bringing the litigation. These disclosures would have showed that the alleged funds invested more in hedge funds than comparable portfolios, and that the alleged imprudent investments were expensive and not performing as well as a result. While the plaintiff admitted accessing some of this information, he testified that he was not actually aware that his retirement accounts were invested in alternative investments while working at Intel.

In deciding whether the statute of limitations defense was applicable, the *Sulyma* court found that even though the plaintiff was provided plan documents showing the exposure to alternative investments and fees and expenses, actual knowledge could only be established where it could be shown the plaintiff was "aware of the nature of the alleged breach more than three years before the plaintiff's action is filed."

The court took a nuanced approach and noted that the knowledge required to meet the standard of ERISA § 413 will vary depending upon the complaint (for example, a plaintiff bringing a § 404 breach of fiduciary duty claim must be aware that the defendant had acted, and those acts were imprudent). In reaching this conclusion, the Ninth Circuit squarely addressed the circuit split with the Sixth Circuit indicating "We recognize that this understanding of actual knowledge conflicts with the Sixth Circuit's reasoning in Brown v. Owens Corning Investment Review Committee, 622 F.3d 564, 571 (6th Cir. 2010) . . . ***We respectfully disagree with that analysis***."[23]

The defendants in the *Sulyma* case petitioned the Supreme Court for certiorari on February 26, 2019. The certiorari petition focused on the Ninth Circuit's express disagreement with the Sixth Circuit explaining that "the limitations defense would have barred this suit if it had been brought there . . . the conflict between the two decisions is undeniable."[24]

Interestingly, the defendants' petition also emphasized the *Sulyma* decision was "incorrect" for four distinct reasons any of which it hopes the Supreme Court will latch on to:

(i) plaintiffs should not be allowed to "sleep" on their rights when they possess knowledge that would allow them to bring their claims;

(ii) plan administrators are compelled to provide, under ERISA, extensive disclosure requirements that Congress designed to give each participant the requisite knowledge to enforce their own rights;

(iii) actual knowledge should mean and encompass situations in which a plaintiff has from plan disclosures "all the knowledge he needs to protect himself"; and

(iv) under the Ninth Circuit's reading of actual knowledge, no amount of disclosure by plan fiduciaries can ensure that plan participants will possess actual knowledge of the facts disclosed by the plan.[25]

The Supreme Court accepted the certiorari petition on

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June 10, 2019, and the anticipation is that the Court will focus on the split amongst the circuit courts to provide clarity. The circuit split extends not only to the conflict between the Ninth Circuit and the Sixth Circuit, but other longstanding circuit splits including the Third Circuit and Fifth Circuit that have held that "actual knowledge" requires a plaintiff to know not only the facts concerning the conduct or transaction that constitutes the breach, but also that these are actionable under ERISA. The Court may attempt to resolve this circuit split to avoid forum shopping by plaintiffs to jurisdictions that would favor them on any statute of limitations defense.

The Court might also seek to reconcile the meaning of actual knowledge and constructive knowledge under ERISA and determine to what extent they can be deemed to be different or one in the same. Constructive knowledge, in fact, was once defined in ERISA § 413. The constructive knowledge provision stated that an action could not be commenced more than three years after the earliest date "on which a report from which [the plaintiff] could reasonably be expected to have obtained knowledge of such breach or violation was filed with the secretary under this title."[26] Congress repealed the constructive knowledge provision in 1987, leaving only the actual knowledge requirement. Even though it has had the opportunity to do so, the Supreme Court has failed to provide clarity on the actual knowledge standard and the interplay with constructive knowledge. This could obviously present such an opportunity.

In determining how to go about adopting an actual knowledge standard that, on the one hand is not so unjustifiably generous to plaintiffs that would render all the extensive plan sponsor disclosure requirements irrelevant and therefore, prevent complaint fiduciaries from invoking the limitations defense, and on the other hand, is also not unduly harsh to plaintiffs who might lack the sophistication to understand the merits of their claims under ERISA, a middle ground might be possible.

The Ninth Circuit in *Sulyma* did say that the "exact knowledge required will thus vary depending on the plaintiff's claim."[27] And there is a consensus among some courts that the actual knowledge required should be tied to the type of claim brought, rather than formulating a general hard and fast rule that might prejudice either side. As a pertinent example, where ERISA plaintiffs have alleged imprudence based upon a deficient selection process or fees that are excessive in comparison to a stated benchmark, courts in multiple jurisdictions have decided plan disclosures are not enough to meet the actual knowledge requirement[28] In comparison, where the material facts necessary to understand that an ERISA fiduciary has breached his or her duty are disclosed to the participant, courts have found the limitations defense to foreclose such an action.[29]

While ERISA litigators hope, for clarity purposes, that the Supreme Court does address the underlying circuit court split and apply a definitive standard for future courts to follow, it could just as easily abdicate that responsibility and merely reject the Ninth Circuit standard for policy reasons, considering that if the Ninth Circuit's view is accepted, it would be almost impossible to dismiss a claim on statute of limitations grounds at the motion to dismiss stage.

Either way, the stakes are high. Depending upon the Court's direction in *Sulyma,* plaintiff cases that are not brought within three years could be foreclosed or the Court could allow for new pathways to bring tardy ERISA suits and in the process put even

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more pressure on plan fiduciaries. Whatever the Court does decide, one thing is clear—the opinion will shape the outcomes of ERISA complaints for years to come.

NOTES:

[1]Tibble v. Edison Intern., 135 S. Ct. 1823, 1828, 191 L. Ed. 2d 795, 59 Employee Benefits Cas. (BNA) 2461 (2015).

[2] https://www.marketwatch.com/story/401k-lawsuits-are-surging-heres-what-it-means-for-you-2018-05-09.

[3]Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 426, 134 S. Ct. 2459, 189 L. Ed. 2d 457, 58 Employee Benefits Cas. (BNA) 1405 (2014).

[4]Amgen Inc. v. Harris, 136 S. Ct. 758, 193 L. Ed. 2d 696, 61 Employee Benefits Cas. (BNA) 1109 (2016).

[5] https://supremecourtpress.com/chance_of_success.html.

[6]According to the *Workplace Class Action Litigation Report* published by the law firm Seyfarth Shaw, the top 10 ERISA settlements totaled $807.4 million in 2016, $927.8 in 2017, and $313.4 in 2018.

[7]Dudenhoeffer, 573 U.S. at 425.

[8]Dudenhoeffer, 573 U.S. at 427.

[9]Dudenhoeffer, 573 U.S.at 429–30 (emphasis added).

[10]Amgen Inc. v. Harris, 136 S. Ct. 758, 193 L. Ed. 2d 696, 61 Employee Benefits Cas. (BNA) 1109 (2016).

[11]Jander v. Retirement Plans Committee of IBM, 910 F.3d 620, 2018 Employee Benefits Cas. (BNA) 455190 (2d Cir. 2018), cert. granted, 2019 WL 1100213 (U.S. 2019).

[12]Jander, 910 F.3d at 623.

[13]Jander, 910 F.3d at 628.

[14]Jander, 910 F.3d at 629.

[15]Jander, 910 F.3d at 629.

[16]Jander, 910 F.3d at 630.

[17]Jander, 910 F.3d at 630.

[18] https://www.supremecourt.gov/DocketPDF/18/18-1165/90623/20190304194440700_18-%20Petition%20for%20Writ.pdf.

[19]Jander, 910 F.3d at 626–627.

[20]29 U.S.C.A. § 1113.

[21]Brown v. Owens Corning Inv. Review Committee, 622 F.3d 564, 571, 49 Employee Benefits Cas. (BNA) 2505 (6th Cir. 2010).

[22]Sulyma v. Intel Corporation Investment Policy Committee, 909 F.3d 1069, 2018 Employee Benefits Cas. (BNA) 437021 (9th Cir. 2018), cert. granted, 2019 WL 936242 (U.S. 2019).

[23]Sulyma, 909 F.3d at 1076 (emphasis added).

[24] https://www.supremecourt.gov/DocketPDF/18/18-1116/89668/20190226140447323_No.%2018-_PetitionForAWritofCertiorari.pdf.

[25] https://www.supremecourt.gov/DocketPDF/18/18-1116/89668/20190226140447323_No.%2018-__PetitionForAWritofCertiorari.pdf.

[26]29 U.S.C.A. § 1113(a)(2)(B), formerly.

[27]Sulyma, 909 F.3d at 1075.

[28]See, for example, Wildman v. American Century Services, LLC, 237 F. Supp. 3d 902, 63 Employee Benefits Cas. (BNA) 1320 (W.D. Mo. 2017); Moreno v. Deutsche Bank Americas Holding Corp., 62 Employee Benefits Cas. (BNA) 1855, 2016 WL 5957307 (S.D. N.Y. 2016); Krueger v. Ameriprise Financial, Inc., 58 Employee Benefits Cas. (BNA) 1130, 2014 WL 1117018 (D. Minn. 2014).

[29]Young v. General Motors Inv. Management Corp., 550 F. Supp. 2d 416, 420, 43 Employee Benefits Cas. (BNA) 3000 (S.D. N.Y. 2008), judgment aff'd, 325 Fed. Appx. 31, 46 Employee Benefits Cas. (BNA) 2278 (2d Cir. 2009) ("It is undisputed that Plaintiffs had actual knowledge that the Plans offered the Fidelity Funds as investment options[4] and the quarterly performance summaries provided to Plan participants clearly disclosed the fees and expenses associated with the Fidelity Funds, including the fact that the expense ratios for some of the Fidelity Funds were higher than those for alternative investment options"); In re Northrop Grumman Corporation Erisa Litigation, 2015 WL 10433713, at *4 (C.D. Cal. 2015) (same).

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