OCTOBER 2019

ERISA Cases (That's Plural) To Watch During Supreme Court's 2019-2020 Term

This article was previously published by Law360 and can be accessed at: https://www.law360.com/articles/1203091/high-court-term-could-shape-future-of-erisa-litigation.

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The U.S. Supreme Court's current Term (2019-2020) has been described as a "big year" that is expected to have "more fireworks that the last few."[2] As is often the case, public commentary has focused on those cases that are seen as politically and socially controversial. The Court has agreed to consider three cases that raise the question whether Title VII's prohibition on sex discrimination includes discrimination on the basis of sexual orientation and gender identity.[3] In another trio of cases, it will consider the legality of the Administration's decision to end the Deferred Action for Childhood Arrivals ("DACA") program.[4] And it is slated to opine on

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[2] Adam Feldman, *Empirical SCOTUS: A new term with plenty of hype*, ScotusBlog, (Sept. 11, 2019, 12:18 p.m.), https://www.scotusblog.com/2019/09/empirical-scotus-a-new-term-with-plenty-of-hype/.
[3] *Bostock v. Clayton County, Georgia* No. 17-1618; *Altitude Express Inc. v. Zarda*, 17-1623; and *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, No. 18-107.
[4] Department of Homeland Security v. Regents of the Univ. of Cal., No. 18-587; Trump v. NAACP, No. 18-588; and McAleenan v. Batalla Vidal, No. 18-589.

contentious issues involving environmental law,[5] handgun rights,[6] and religion.[7]

What has not received as much attention is the Supreme Court's renewed interest in clarifying the notoriously complex requirements of the Employee Retirement Income Security Act ("ERISA"). Although ERISA is not generally viewed as a hot-button issue, the statute is incredibly important because it sets the standards for most retirement and health-care plans. It is therefore notable that the Court has already granted certiorari in three ERISA cases: *Sulyma v. Intel Corp. Investment Policy Committee* (No. 18-1116); *Jander v. Retirement Plans Committee of IBM* (No. 18-1165); and *United States Bank, National Association v. Thole* (No. 17-1712). In addition, last April the Court invited the Solicitor General to express his views on whether a fourth ERISA case should be reviewed: *Putnam Investments, LLC v. Brotherston* (No. 18-926). Especially if the Court grants review in *Brotherston*, it is almost certain that this Term will come to be seen as a recent high water mark for the Court's attention to this "reticulated," "enormously complex and detailed" statute.[8]

The three cases teed up for review pose threshold, pleadings-stage questions that have divided the lower courts:

- When does a plaintiff have the "actual knowledge" required to trigger ERISA's three-year limitations period for breach of fiduciary duty claims? (*Sulyma*)
- May an ERISA plaintiff satisfy the "more harm than good" pleading standard announced in *Fifth Third Bancorp v. Dudenhoeffer*[9] for breach of fiduciary duty cases based on inside information by pleading generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time? (*Jander*)
- Do plaintiffs have standing to sue for alleged breaches of fiduciary duty when a defined benefit plan is adequately funded and, as a result, plaintiffs have not suffered any individual financial injury? (*Thole*)

The fourth, potential case (*Brotherston*) involves a question that in many cases could be determinative on the merits of an ERISA claim for breach of fiduciary duty:

- Who bears the burden of proving or disproving loss causation in ERISA breach of fiduciary duty cases: the plaintiff or the defendant?

Definitive answers from the Supreme Court to these four questions—especially the last one—would shape the course of ERISA litigation for years to come.

Sulyma v. Intel Corp. Investment Policy Committee—When does ERISA's three-year statute of limitations for "actual knowledge" begin to run?

[5] County of Maui, Hawaii v. Hawaii Wildlife Fund, No. 18-260 and Atlantic Richfield Co. v. Christian, No. 17-1498.
[6] New York State Rifle & Pistol Association Inc. v. City of New York, New York, No. 18-280.
[7] Espinoza v. Montana Dept. of Revenue, No. 18-1195.
[8] Mertens v. Hewitt Assocs., 508 U.S. 248 (1993).
[9] 573 U.S. 409 (2014)

Sulyma presents an opportunity for the Court to resolve a circuit split over when ERISA's three-year statute of limitations begins to run for breach of fiduciary duty claims. The statute says that these claims must be brought within the earlier of (1) six years after the date of the last act constituting a breach, or (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach.[10] In *Sulyma*, the Court will consider the standard for demonstrating "actual knowledge" sufficient to trigger the three-year statute of limitations.

ERISA does not define "knowledge" or "actual knowledge." The circuits are splintered and apply different definitions. At least one circuit, the Sixth, has adopted a broad, defense-friendly definition, which requires only that a plaintiff had knowledge of the facts or transaction that constituted the alleged breach.[11] Other circuits, including the Third and Fifth, have applied more demanding, plaintiff-friendly interpretations, which require that a plaintiff know not only the underlying facts but also that those facts constitute a breach of duty under ERISA.[12]

In *Sulyma*, the Ninth Circuit tried to find a middle ground.[13] The plaintiff claimed that the fiduciaries of Intel's retirement plan had breached their duties by including "alternative investments" (such as hedge funds) in the plan's investment lineup that allegedly performed poorly and charged high fees.[14] The defendants countered that they had informed the plaintiff about the existence of the alternative investments and, in at least one instance, their subpar performance via documents available online (which the plaintiff accessed more than three years before filing suit).[15] The district court agreed with the defendants that the plaintiff's claims were therefore time-barred under ERISA's "actual knowledge" standard.[16]

On appeal, the Ninth Circuit reversed, concluding that a plaintiff "must be actually aware of the nature of the alleged breach" to trigger ERISA's three-year limitations period for breach of fiduciary duty claims.[17] Meaning, that in a breach of fiduciary duty case alleging imprudence, the plaintiff "must be aware that the defendant has acted and that the acts were imprudent."[18] As applied to Sulyma's claims, the court found that he did not obtain "actual knowledge" until he actually knew "both that those [alternative] investments occurred, and that they were imprudent."[19] Because the defendants could not prove that Sulyma "was actually aware that [they] had acted imprudently," the Ninth Circuit concluded that Sulyma's claims were not time-barred.

The Ninth Circuit acknowledged that Sulyma's claims would be time-barred under the Sixth Circuit's view that the receipt of disclosure documents is sufficient to trigger ERISA's three-year period. But, in the Ninth Circuit's

[10] 29 U.S.C. § 1113.
[11] *See Brown v. Owens Corning Inv. Review Comm.*, 622 F.3d 564 (6th Cir. 2010).
[12] *Maher v. Strachan Shipping Co.,* 68 F.3d 951, 954 (5th Cir. 1995); *Int'l Union v. Murata Erie N. Am., Inc.*, 980 F.2d 889, 900 (3d Cir. 1992).
[13] 909 F.3d 1069 (9th Cir. 2018).
[14] *Id.* at 1071.
[15] *Id.* at 1072.
[16] *Id.*
[17] *Id*. at 1075.
[18] Id.
[19] Id. at 1077.

view, the mere receipt of disclosure documents imparts "constructive knowledge only."[20] The Ninth Circuit held that "Section 1113 means what it says: to trigger the three-year limitations period, a plaintiff must have 'actual knowledge of the breach or violation.'"[21]

The last time the Supreme Court addressed ERISA's statute of limitations in a breach of fiduciary duty case was in *Tibble v. Edison International*,[22] which involved ERISA's six-year statute of limitations. In *Tibble*, the Court reiterated that "ERISA's fiduciary duty is 'derived from the common law of trusts'" and that "in determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts."[23] The Court reversed the Ninth Circuit because it had "appl[ied] a [six-year] statutory bar to a claim of a 'breach' . . . of a fiduciary duty without considering the nature of the fiduciary duty" under "analogous trust law."[24] In *Sulyma*, the Ninth Circuit considered neither the "nature of the fiduciary duty" nor "analogous trust law" in refusing to apply ERISA's three-year statutory bar to a claim of a breach of fiduciary duty. It stands to reason that the interplay between trust law and the statutory language will again be a central concern for the Supreme Court. But *Sulmya* also presents an opportunity for the Court to clarify how the myriad disclosures required by ERISA's disclosure regime effect the timing of when a participant attains "actual knowledge" that he or she has a breach of fiduciary duty claim under ERISA.

Jander v. Retirement Plans Committee of IBM—What must be pleaded to satisfy the demanding "more harm than good" standard adopted in Dudenhoeffer?

The second ERISA case involves the "more harm than good" pleading standard the Supreme Court established in *Fifth Third Bancorp. v. Dudenhoeffer*.[25] Under this standard, plaintiffs alleging imprudence based on fiduciaries' failure to act on nonpublic information that might affect the employer's publicly traded stock fund in its retirement plan must plead "alternative actions" that "a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it" and, importantly, that would not conflict with the securities laws.[26] This pleading requirement acknowledges that ERISA fiduciaries are often company insiders who can find themselves between a rock and a hard place when they learn information that could adversely impact the value of employer stock in a retirement plan: the securities laws prohibit them from using material non-public information before it is disclosed to the market, but ERISA demands that they take action to protect the interests of plan participants.[27]

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[20] Id. at 1076.
[21] Id. at 1077.
[22] 135 S. Ct. 1823 (2015)
[23] Id. at 1825, 1828. (quoting Cent. States, Southeast & Southwest Areas Pension Fund v. Cent. Trans., Inc., 472 U.S. 559, 570 (1985).
[24] Id. at 1827, 1829.
[25] 573 U.S. at 429–30.
[26] *Id.* at 428.
[27] The Supreme Court has only applied the *Dudenhoeffer* standard once since it was adopted in 2014, and that decision did not elaborate on *Dudenhoeffer's* meaning. In 2016, the Court reversed the Ninth Circuit in *Amgen Inc. v. Harris*, 136 S. Ct. 758, 760 (2016) (per curium), holding that conclusory allegations that unspecified alternative actions were available is insufficient to state a viable claim under *Dudenhoeffer*.

In *Jander*, the Second Circuit broke ranks with most courts, which have dismissed employer stock cases over the last five years under *Dudenhoeffer's* demanding pleading standard.[28] The plaintiffs in *Jander* alleged that the fiduciaries of IBM's retirement plan had non-public information that the company's microelectronics business was overvalued and would be sold for a significant loss.[29] Plaintiffs claimed that the IBM fiduciaries breached their duties by failing to act before the inevitable disclosure of that information, which caused a sharp decline in IBM's stock price.[30] Attempting to satisfy *Dudenhoeffer*, the plaintiffs pleaded several alternative actions that, they maintained, would not have done "more harm than good"—including IBM making a corrective disclosure sooner that the securities laws required.[31] The district court, which simultaneously dismissed a securities fraud case against IBM based on the same underlying events, rejected this theory and granted the IBM fiduciaries' motion to dismiss.[32]

The Second Circuit reversed, holding that the plaintiffs had plausibly alleged that a prudent fiduciary "could not have concluded" that an earlier corrective disclosure would have done more harm than good to the IBM plan.[33] Because IBM's disclosure of negative information was inevitable, the Second Circuit reasoned that the plan fiduciaries knew a significant drop in IBM's stock price was forthcoming, and plaintiffs' allegations that delaying disclosure caused more harm than good to the plan stated a plausible claim under *Dudenhoeffer*.[34]

Other courts have rejected this "inevitable disclosure" theory as insufficient under *Dudenhoeffer* because, if adopted, it would cause ERISA to override federal securities laws. The Solicitor General, joined by the Department of Labor and the Securities and Exchange Commission, submitted an *amicus* brief in *Jander* urging the Supreme Court to reverse the Second Circuit and to hold that, absent extraordinary circumstances, fiduciaries have an ERISA-based duty only to disclose material, nonpublic information about a company's publicly traded stock when the securities laws would also require it. In *Dudenhoeffer*, the Supreme Court noted that the SEC's "views [concerning the potential conflict between ERISA and the securities laws] may well be relevant," but "[t]he U.S. Securities and Exchange Commission has not advised us of its views".[35] This time, the Court has the SEC's views and may see *Jander* as an appropriate vehicle to refine the "more harm than good" standard.

Thole v. United States Bank, National Association—Do plaintiffs lack standing to sue for fiduciary breaches when a defined benefit plan is adequately funded?

In *Thole*, the Supreme Court will address whether a defined benefit plan participant has standing to sue for alleged breaches of fiduciary duty when the plan is adequately funded. The plaintiffs in *Thole*, participants in a defined benefit plan sponsored by U.S. Bank, alleged that defendants breached their fiduciary duties under ERISA by investing all the plan's assets in equity funds, many of which were managed by a U.S. Bank

[28] 910 F.3d 620 (2d Cir. 2018).

[29] *Id*. at 622–23.
[30] *Id.*
[31] *Id.* at 623, 628.
[32] *Id.* at 624.
[33] *Id.* at 628.
[34] *Id.* at 630.
[35] 573 U.S. at 429.

subsidiary.[36] Plaintiffs claimed that these breaches resulted in a $1.1 billion loss to the plan, which went from being overfunded—meaning there was more money in the plan than was needed to meet its future obligations—in 2007 to being 84% underfunded in 2008.[37]

The plan remained underfunded when plaintiffs filed the case in 2013.[38] During the litigation, however, the plan returned to being overfunded, at least in part because of a large contribution by U.S. Bank.[39] The defendants then moved to dismiss for lack of Article III standing, arguing that because the plan had adequate funds to pay benefits, plaintiffs had suffered no injury-in-fact.[40] The district court dismissed on mootness grounds, concluding that because the plan was overfunded, the plaintiffs lacked a concrete interest in any monetary relief even if they prevailed.[41]

The Eight Circuit affirmed, but on alternative grounds. It held that plaintiffs lacked "statutory standing" under ERISA because, as participants in an overfunded plan, they did not suffer an "injury-in-fact" or fall within the class of plaintiffs authorized to sue under ERISA.[42] The Eighth Circuit reached its decision without addressing whether the plaintiffs had standing under Article III.

The government has weighed in on this case, too. In a brief submitted at the certiorari stage, the Solicitor General and the Department of Labor described *Thole* as a "plainly incorrect decision" that the Supreme Court should review.[43] In its order granting certiorari the Supreme Court followed the government's recommendation and directed the parties to brief the statutory questions raised in the petition plus one more: whether plaintiffs demonstrated Article III standing.

Putnam Investments, LLC v. Brotherston—Who bears the evidentiary burden of proving loss causation in ERISA cases?

The Supreme Court is also considering whether to grant certiorari in *Brotherston*, where the First Circuit joined the Fourth, Fifth, and Eighth Circuits to hold that once a plaintiff has proven a loss following a breach of fiduciary duty under ERISA, the burden shifts to the fiduciary to prove that the loss was not caused by breach.[44] In doing so, the First Circuit departed from the Sixth, Ninth, Tenth, and Eleventh Circuits, which have all held that ERISA plaintiffs must establish a causal link between the breaches of duty alleged and the losses purportedly incurred.

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[36] 873 F.3d 617, 621 (8th Cir. 2017).

[37] *Id.* at 624.
[38] *Id.*
[39] *Id.* at 622.
[40] *Id.* at 624–25.
[41] *Id.* at 626.
[42] *Id.* at 628–30.
[43] Brief for The United States as Amicus Curiae, filed May 21, 2019, at 17.
[44] 907 F.3d 17 (1st Cir. 2018).

The government has yet to weigh in on the case. Because *Brotherston* presents a deep and even split of authority on a foundational issue of statutory interpretation, with high stakes for employers and fiduciaries accused of breaching their fiduciary duties, many observers predict that the Court will agree to hear the case.

Conclusion

The number of important ERISA cases before the Supreme Court this Term reflects the continuing proliferation of litigation over retirement plans and increasing divisions among the Courts of Appeals over the proper interpretation of the statutory requirements. It may also reflect a recognition that, even 45 years after ERISA's enactment, regulatory guidance is thin, and the statute's requirements remain uncertain and difficult to apply. While the Court has by some counts decided more than 125 ERISA cases since 1975, its "prior decisions have not succeeded in bringing clarity to the law."[45] Instead, the reality remains that, while often described as comprehensive and reticulated, ERISA has long depended on the judiciary to fill in its many gaps and to clarify its requirements. In this current Term, no matter how the cases are resolved, the Supreme Court will add to this important body of law.

November and December 2019 Filing and Notice Deadlines for Qualified Retirement and Health and Welfare Plans

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Employers and plan sponsors must comply with numerous filing and notice deadlines for their retirement and health and welfare plans. Failure to comply with these deadlines can result in costly penalties. To avoid such penalties, employers should remain informed with respect to the filing and notice deadlines associated with their plans.

The filing and notice deadline table below provides key filing and notice deadlines common to calendar year plans for November through December. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is usually delayed until the next business day. Please note that the deadlines will generally be different if your plan year is not the calendar year. Please also note that the table is not a complete list of all applicable filing and notice deadlines (including any available exceptions and/or extensions), just the most common ones. King & Spalding is happy to assist you with any questions you may have regarding compliance with the filing and notice requirements for your employee benefit plans.

[45] *California Division of Labor Standards Enforcement v. Dillingham Constr., Inc.,* 519 U.S. 316, 335 (1997) (Scalia, J., concurring).

Deadline	Item	Action	Affected Plans
November 1 (by the first day of open enrollment)	Summary of Benefits and Coverage for Health Plans that Require Reapplication	Deadline for group health plan administrator (for self-insured plans) or group health plan administrator or insurer (for fully insured plans) to provide a Summary of Benefits Coverage (SBC) if written application materials are required for renewal.	Group Health Plans and Health Insurance Issuers
November 14 (within 45 days after the close of the third quarter)	Benefit Statements for Participant-Directed Plans	Deadline for plan administrator to send benefit statement for the third quarter of the plan year to participants in participant-directed defined contribution plans.	Defined Contribution Plans with participant-directed investments
	Quarterly Fee Disclosure	Deadline for plan administrator to disclose fees and administrative expenses deducted from participant accounts during the third quarter of the plan year. Note that the quarterly fee disclosure may be included in the quarterly benefit statement or as a stand-alone document.	
November 15 (the 15th day of the 11th month after the end of the plan year)	IRS Forms 990 and 990-EZ	Deadline for tax-exempt trusts associated with qualified retirement plans and voluntary employee beneficiary associations (VEBAs) to file Forms 990 or 990-EZ with the IRS for prior year if the trustee obtained a second 3-month extension by filing a Form 8868.	Qualified Retirement Plans Voluntary Employee Beneficiary Associations
December 1 (at least 30 but no more than 90 days before the beginning of the plan	Safe Harbor Notice	Deadline for plan administrator to distribute a notice of intent to use a safe harbor employer contribution formula to participants. This notice must be provided within a reasonable period of time before the beginning of the plan year. The regulations provide a safe harbor period of not less than 30 days but not more than 90 days before the	401(k) and 401(m) Plans

Deadline	Item	Action	Affected Plans
year)		beginning of the plan year.	
	Contingent Safe Harbor Notice	Deadline for plan administrator to distribute a notice to participants and beneficiaries specifying that the plan may be amended during the following plan year to include a 3% employer non-elective safe harbor contribution.	
	Auto-Enrollment Notice	Deadline for plan administrator to provide annual auto-enrollment notice for plans with qualified automatic contribution arrangements (QACA) or eligible automatic contribution arrangements (EACA). This notice must be provided sufficiently early so that the employee has a reasonable period of time after receipt to make QACA or EACA elections. The preamble to the regulations notes that this timing requirement is deemed to be satisfied if the notice is given at least 30 days but not more than 90 days before the beginning of each plan year.	401(k) Plans with QACA or EACA
December 1 (at least 30 days before the end of the plan year)	Qualified Default Investment Alternative (QDIA) Annual Notice	Deadline for plan administrator to provide annual QDIA notice to participants or beneficiaries.	Defined Contribution Plans with participant-directed investments
	Safe Harbor Follow-Up Notice	Deadline for plan administrator to distribute a notice to participants and beneficiaries informing them that the 3% employer non-elective safe harbor contribution will be made for the current plan year. This notice may be combined with the Contingent Safe Harbor Notice for the following plan year.	401(k) and 401(m) Plans
December 1 (at least 30 days prior to the first day of the new plan or	Summary of Benefits and Coverage for Health Plans that Automatically	Deadline for group health plan administrator (for self-insured plans) or group health plan administrator or insurer (for fully insured plans) to provide a Summary of Benefits Coverage (SBC) if coverage automatically renews each year.	Group Health Plans and Health Insurance Issuers

Deadline	Item	Action	Affected Plans
policy year)	Renew Coverage		
December 1 (no later than 30 days before participant becomes eligible to diversify employer stock)	Diversification Notice	Deadline for plan administrator to provide diversification notice to participants who will first be eligible to divest employer securities on January 1.	Defined Contribution Plans with participant-directed investments in employer stock
December 15 (2 months after the extension for filing Form 5500)	Summary Annual Report (SAR)	Deadline for plan administrator to distribute SAR for prior year to participants and beneficiaries, if the IRS granted a 2-month extension for Form 5500 on or before the original Form 5500 deadline.	Defined Contribution Plans
December 31 (last day of plan year following plan year for which contributions were made)	Correction of Excess Contributions & Excess Aggregate Contributions	Deadline for plan administrator to make corrective employer contributions or distribute excess contributions (ADP test failure) and excess aggregate contributions (ACP test failure) for the prior year.	401(k) and 401(m) Plans
December 31 (last day of plan year)	Discretionary Amendments	Deadline for plan sponsor to adopt discretionary plan amendments for calendar-year plans.	Qualified Retirement Plans

Deadline	Item	Action	Affected Plans
	Adjusted Funding Target Attainment Percentage (AFTAP) Certification	Deadline for actuary to certify a specific AFTAP if a range certification was previously issued.	Defined Benefit Plans
December 31 (at least annually)	ERISA §404(c) Disclosures	Deadline for plan administrator to distribute notices to participants and beneficiaries if the employer wants to limit fiduciary liability for participant-directed investment decisions.	Defined Contribution Plans with participant-directed investments
	Annual Fee Disclosure to Participants	Deadline for plan administrator to make annual disclosure of certain fees for participant directed individual account plans to be provided to participants and beneficiaries.	
	Pension Benefit Statements	Deadline for plan administrator of a defined benefit plan using alternative notice for pension benefit statements to notify participants of availability of a pension benefit statement and instructions on how to obtain it.	Defined Benefit Plans
December 31 (at least annually as a part of any yearly informational packet)	WHCRA Notice	Deadline for group health plans to distribute Women's Health and Cancer Rights Act (WHCRA) notice for new plan year to all participants and beneficiaries advising them of available mastectomy benefits under WHCRA and any deductibles and co-insurance limits applicable to such benefits.	Health and Welfare Plans
	Children's Health Insurance Program Reauthorization Act (CHIPRA) Notice	Deadline for employer to notify employees of potential opportunities for premium assistance from the state in which the employee resides.	Group Health Plans in states that provide premium assistance under Medicaid or CHIP

Deadline	Item	Action	Affected Plans
	Wellness Program Notice	Although no specific deadline is provided, the notice must be provided before employees provide any health information for the program and with enough time to decide whether to participate in the program.	Group Health Plans offering wellness programs
December 31	Required Minimum Distributions	Deadline for plan administrator to distribute current year's required minimum distributions under IRC §401(a)(9).	Qualified Retirement Plans