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Justices Grapple with Interplay between ERISA and Securities Laws at Oral Argument

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On November 6, the U.S. Supreme Court heard oral argument in *Jander v. Retirement Plans Committee of IBM* (No. 18-1165)—one of three Employee Retirement Income Security Act ("ERISA") cases set for review during its current Term. In our article previewing those cases, we noted that "[t]he number of important ERISA cases before the Supreme Court this Term . . . may [] 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."[1] If nothing else, oral argument in *Jander* forcefully drove home that point—with the Justices grappling with the intersection of ERISA and the federal securities laws in considering whether and when retirement plan fiduciaries have a duty to disclose inside information about publicly traded companies.

BACKGROUND

Jander asked the Supreme Court to revisit the pleading standard established for ERISA employer stock cases in *Fifth Third Bancorp v. Dudenhoeffer*, a unanimous decision issued just five years ago.[2] Under *Dudenhoeffer*, plaintiffs alleging imprudence based on a retirement plan fiduciary's failure to act on inside information that might affect the employer's publicly traded stock in the plan must plead an "alternative action" that "a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it."[3] Importantly, the "alternative action" must not require insider trading or otherwise conflict with the securities laws.[4] So while *Dudenhoeffer* recognized the "potential for conflict" that company insiders may face trying to square their ERISA obligations with the securities laws, it provided the lower courts with little guidance on how to separate the "plausible sheep from the meritless goats."[5] Other than *Amgen Inc. v. Harris,* which the Supreme Court summarily reversed in a per curium opinion in January 2016,[6] *Jander* is the

first court of appeals decision since *Dudenhoeffer* permitting one of these cases to proceed past a motion to dismiss.

The Second Circuit in *Jander* held that the plaintiffs had satisfied the *Dudenhoeffer* standard by alleging that the disclosure of negative information about IBM's business was inevitable and that delaying disclosure until it was required by the securities laws would cause more harm than good to IBM plan participants.[7] The Supreme Court granted *certiorari* to decide whether such allegations—and the "inevitable disclosure" theory on which they are premised—satisfy *Dudenhoeffer*. At oral argument, however, the Justices were prompted to go beyond that narrow question.

CAN AN ERISA DISCLOSURE DUTY CO-EXIST WITH THE SECURITIES LAWS?

During the argument, both IBM and the U.S. government urged the Justices to reject the inevitable disclosure theory, noting that it could be alleged in virtually every case and would cause an irreconcilable conflict between ERISA's fiduciary duties and the federal securities laws. Although IBM declined to join the Solicitor General's bright-line argument—that the securities laws always trump ERISA—IBM conceded that its argument also "ends up being close to a bright line" that would require virtually all cases of this type to proceed, if at all, under the securities laws.

At least four Justices (Ginsburg, Breyer, Sotomayor, and Kagan) expressed concern that these arguments went beyond the issue on which certiorari had been granted. Neither IBM nor the government disputed the point; instead, they focused on convincing the Justices that their arguments did not require the Court to "scrap *Dudenhoeffer*," as Justice Kagan colorfully put it in a question to the government.

By contrast, three Justices (Alito, Gorsuch, and Kavanaugh) appeared inclined to allow the securities laws to govern whether and when to disclose negative inside information. Justice Gorsuch asked the plaintiffs' counsel, "wouldn't the securities law be a really good place to start and maybe finish in assessing . . . the long-term overall health of the corporate interests" and "a really good proxy for the duties we'd expect a[n ERISA] fiduciary to abide?"

The two remaining Justices gave no indication how they might resolve the case. Neither Chief Justice Roberts nor Justice Thomas, as is his custom, asked any questions.

CAN THE COURT ACHIEVE CONSENSUS AROUND A NARROWER BASIS FOR ITS DECISION?

Even when oral argument focused on the narrow question on which *certiorari* was granted—did the alternative action pleaded in *Jander* pass *Dudenhoeffer's* "more harm than good" test—the Justices often returned to the broader issue of how an ERISA disclosure duty should interact with the federal securities laws.

Justices Sotomayor and Breyer gave the strongest signals that they view the allegations in Jander's complaint as enough to satisfy *Dudenhoeffer*. "I'm not sure what you think is missing from the specifics [of the complaint]", Justice Sotomayor asked IBM's counsel, "other than your answer that the economic principle [of inevitable disclosure] shouldn't exist at all." After noting that plaintiffs' complaint was based on "well-founded economic theory," Justice Sotomayor asked whether early disclosure of inside information would cause "more harm than good" was not "a matter of fact for the jury" in most cases, to be decided after "a battle of competing experts." Justice Breyer also pressed IBM's counsel to identify deficiencies in the plaintiffs' complaint, at one point noting that "[y]our argument now and the government[']s and most of the briefs here seem . . . to be addressing a different issue than what we granted cert on." If "we just stick to the question on which [the Court] granted cert," Justice Breyer suggested, and "we look at what [the plaintiffs] say here in the complaint," "I'm thinking it seems adequate."

But several Justices expressed deep concerns about the practical implications of *Dudenhoeffer*'s "more harm than good" test, pressing the parties to explain how such a duty could co-exist with the securities laws. At one point, Justice Alito pointedly asked the Solicitor General: "Do you think that it is workable, practical, to require an insider fiduciary to determine whether the disclosure of [] inside information to the public at a particular point in time will do more harm than good?"

WILL THE COURT PROVIDE ERISA FIDUCIARIES WITH PRACTICAL GUIDANCE?

In *Dudenhoeffer*, the Supreme Court acknowledged that the SEC's views concerning the interplay between ERISA and the securities laws "may well be relevant," but noted that the SEC had not advised the Court of its views.[8] During oral argument in *Jander,* Justice Breyer acknowledged "now we have the views of the government on that question," but he suggested that, by going beyond the issue presented, the government's stance that the securities laws should always trump ERISA created more heat than light: "But, in reading [the government's views] I realize, one, I don't know what the lower courts think about those views. I don't know what the securities community and all the others think about those views. Therefore, why don't we just stick to the question on which we granted cert?"

At least four Justices seemed to agree on that point (Ginsburg, Breyer, Sotomayor, and Kagan)—and two of those Justices (Breyer and Sotomayor) signaled that they were inclined to affirm the Second Circuit in *Jander* on those narrow grounds. But three Justices (Alito, Gorsuch, and Kavanaugh,) seemed interested in the broader issue presented in *Jander*—can an ERISA disclosure duty co-exist with the federal securities laws?

It is hard to predict how the Supreme Court will decide *Jander*. No consensus emerged from the arguments. *Jander* looks to be another case where the Chief Justice's view, and vote, will determine both the outcome and scope of the Supreme Court's decision.

[1] For an overview of the three ERISA cases teed up for review, and a fourth case that could also be heard this Term, *see* Ashley Parrish, David Tetrick, Darren Shuler, and Danielle Chattin, *High Court Term Could Shape Future of ERISA Litigation*, (September 26, 2019), https://www.kslaw.com/news-and-insights/high-court-term-could-shape-future-of-erisa-litigation
[2] 573 U.S. 409 (2014).
[3] *Id.* at 428-29.
[4] *Id.*
[5] *Id.* at 423, 425.
[6] 136 S. Ct. 758 (2016) (per curium).
[7] 910 F.3d 620, 622-23 (2d Cir. 2018).
[8] 573 U.S. at 429.