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***Retirement Plans Committee of IBM v. Jander, No. 18-1165***

**Introduction:** Today, in a unanimous *per curiam* opinion, the Supreme Court decided not to reach the merits of a much-anticipated case about ERISA stock-drop litigation. Instead, the Court remanded the case to the U.S. Court of Appeals for the Second Circuit, so that that court can decide whether to address arguments developed in briefing before the Supreme Court.

**Background:** An Employee Stock Ownership Plan (ESOP) is a benefit plan that gives employees an opportunity to own a stake in their employer. For public companies, ESOPs are sometimes featured as investment options within employer-sponsored 401(k) plans. This lawsuit arises out of a 2014 transaction in which IBM paid GlobalFoundries Inc. \$1.5 billion to take IBM's microelectronics business. The transaction prompted two lawsuits, both based on the theory that IBM had misled investors to believe that the microelectronics business had been profitable. A class of plaintiffs brought a lawsuit for fraud under federal securities laws, but that lawsuit was dismissed in 2016. Respondents Larry Jander and Richard Waksman brought this second action under ERISA, alleging that the fiduciaries to IBM's retirement plan should have taken action to protect ESOP participants from suffering losses resulting from the alleged misstatements about the microelectronics division.

The district court dismissed the ERISA lawsuit, but the Second Circuit reinstated the case, accepting as sufficient the plaintiffs' allegations that the plan fiduciaries should have effected a disclosure of the true performance of the microelectronics unit.

**Issue:** Whether the plaintiffs' generic allegations that earlier disclosures by ERISA fiduciaries would have prevented securities losses were enough to survive a motion to dismiss.

**Court's Holding:** Rather than decide the question presented, the Court observed that the parties' briefs had strayed from what the Court had agreed to decide. The Court noted that IBM's merits brief had focused primarily on whether fiduciaries have an obligation to act on inside information. The Government, participating as an *amicus curiae*, had suggested that ERISA should not be interpreted to expand the securities laws beyond the laws that specifically regulate securities disclosures. The Court opted not to address those arguments in the first instance, instead inviting the Second Circuit to consider whether to address them on remand.

Justice Kagan authored a concurring opinion in which Justice Ginsburg joined. She suggested that the Second Circuit should just deem IBM's arguments forfeited. On the merits, she signaled that she read the Court's decision in *Fifth Third Bancorp v. Dudenhoeffer* to permit fiduciary-breach claims so long as they are not expressly foreclosed by the securities laws. Justice Gorsuch filed a concurrence in which he disagreed with Justice Kagan's approach. He suggested that the Second Circuit ought to consider the new arguments because they pertain to a pure question of law that will unavoidably require resolution. On the merits, he suggested that he does not view ERISA as requiring a fiduciary to take actions (like making SEC-regulated disclosures) that can be performed only in a non-fiduciary capacity.