Benefits Brief

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Supreme Court Vacates & Remands Plaintiff-Friendly Ruling in IBM "Stock Drop" Litigation

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AUTHORS: David Ashner, Allison Itami, David Kaleda, David Levine, Arsalan Malik, Kevin Walsh

Brief Takeaway: Plan sponsors that offer employer stock in their benefit plans can breathe a sigh of relief, as the Supreme Court vacated one of the only plaintiff-friendly rulings in ERISA "stock drop" litigation. While plaintiffs have largely struggled to succeed in such litigation, the Second Circuit issued a rare ruling in favor of plaintiffs in December 2018 that greenlit the theory of "inevitable disclosure" as a potential avenue for plaintiffs. Indeed, new litigation following the Second Circuit's roadmap was quickly filed in the wake of its decision.

While it is now up to the Second Circuit to determine whether "inevitable disclosure" will be a viable theory for plaintiffs, for now, the Supreme Court's decision provides some repose on concerns that the theory could be the basis for the next wave of litigation.

I. Introduction

On January 14, 2020, the Supreme Court issued its much-anticipated decision in *IBM v. Jander*, 589 U.S. __ (2020), a case considering the standard for bringing a "stock drop" claim under ERISA based on non-public, "inside" information. Notably, despite some expectations that the Supreme Court might take the opportunity to revisit its 2014 decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), the Supreme Court did not address the merits of the case, and instead vacated and remanded the Second Circuit's earlier plaintiff-friendly ruling on procedural grounds.

The case concerned the failure of IBM's in-house plan fiduciaries to disclose non-public information about significant financial problems at one of IBM's business units. In a surprising decision in December 2018, the Second Circuit concluded that disclosure of such problems 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 light of the inevitable disclosure, the Second Circuit found that the plaintiffs had demonstrated that a prudent fiduciary would have made earlier disclosures. *Jander v. IBM*, No. 17-

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3518 (2d Cir. December 10, 2018). [Groom Alert: Second Circuit Opens Potential ERISA Avenue for Plaintiffs in "Stock Drop" Lawsuits].

In a legal landscape that has been overwhelmingly defendant-friendly, the Second Circuit's decision was a rare victory for plaintiffs in ERISA stock drop litigation, opening the door to several new lawsuits alleging "inevitable disclosure" theories, including litigation against Johnson & Johnson, ExxonMobil, and Boeing. Thus, while the Supreme Court's brief, *per curiam* opinion may appear somewhat underwhelming, its unanimous decision to *vacate* the Second Circuit's ruling is consequential, as it holds the potential to curtail additional "inevitable disclosure" litigation.

II. Disconnect Between Question Presented & Arguments Raised

The Supreme Court was asked to consider *Dudenhoeffer*'s requirement that plaintiffs demonstrate that a prudent fiduciary could not have concluded that an alleged alternative action, such as public disclosure of negative inside information, would do "more harm than good" to the plan. The specific question presented was whether this requirement "can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time."

Significantly, the Supreme Court did not decide the question presented because it found that in their briefings, IBM and the Government (which filed an amicus brief to present the views of the Securities and Exchange Commission and Department of Labor) "focused their arguments primarily upon other matters" that had previously not been raised. IBM contended that "ERISA imposes no duty on an ESOP fiduciary to act on inside information," while the Government argued that "an ERISA-based duty to disclose inside information that is not otherwise required to be disclosed by the securities laws would 'conflict' at least with 'objectives of' the 'complex insider trading and corporate disclosure requirements imposed by the federal securities laws.'" The Supreme Court held that neither argument had been previously raised below, and accordingly remanded the case for the Second Circuit to address these arguments.

III. Concurring Opinions

In a concurring opinion, Justice Kagan (joined by Justice Ginsburg) suggested that IBM's argument that ERISA "imposes no duty on an ESOP fiduciary to act on insider information" cannot be squared with the Court's opinion in *Dudenhoeffer*, which "makes clear that an ESOP fiduciary at times has such a duty." Justice Kagan similarly observed that the Government was incorrect in its argument that "(absent extraordinary circumstances) an ESOP fiduciary has only the duty to disclose inside information that the federal securities laws already impose." In this regard, Justice Kagan noted that *Dudenhoeffer* "explains that when an action does not [conflict with the federal securities laws], it might fall within an ESOP fiduciary's duty—even if the securities laws do not require it."

On the other hand, Justice Gorsuch filed a concurring opinion focused on the threshold question of distinguishing "settlor" and fiduciary capacities. Noting that *Dudenhoeffer* did not consider "whether

ERISA plaintiffs may hold fiduciaries liable for alternative actions they could have taken only in a nonfiduciary capacity," Justice Gorsuch reasoned that because ERISA fiduciary liability is limited to action taken in a fiduciary capacity, "it would be odd to hold the same fiduciaries liable for 'alternative action[s they] could have taken' only in some other capacity."

IV. Implications & Expectations

It remains to be seen how the Second Circuit will address the case upon remand. In particular, one open question is whether the Second Circuit will take up the Supreme Court's invitation to solicit the views of the Securities and Exchange Commission regarding the intersection of ERISA duties and the requirements of the federal securities laws.

In this regard, the Supreme Court noted that *Dudenhoeffer* had explained that the views of the Securities and Exchange Commission may be relevant to courts when considering potential conflicts between the requirements or "objectives" of the federal securities laws with ERISA-based duties, in the context of a fiduciary's decision to publicly disclose (or not publicly disclose) inside information. The Supreme Court noted that it had not received such views when deciding *Dudenhoeffer* but suggested that the Second Circuit may wish to consider them since they may be relevant "to discerning the content of ERISA's duty of prudence in this context."

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