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Client Alert: The U.S. Supreme Court Declines Again To Address a Circuit Court Split Concerning the Standard for Pleading Breach of Fiduciary Duty Claims

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On November 9, 2020, the Supreme Court announced that it would not reconsider the case of *Retirement Plans Committee of IBM v. Jander*, which the Court remanded to the Second Circuit in its last term. On January 14, 2020, the U.S. Supreme Court elected, in this stock drop case, not to consider whether a participant met the pleading standards to state a breach of duty of prudence claim based on “generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time.” Instead, the Supreme Court vacated the Second Circuit’s decision and remanded the case, finding that the fiduciary and the federal government had raised issues not raised in the lower courts.

Standard for Pleading Breach of Fiduciary Duty Claims

Prior to 2014, federal district courts presumed that fiduciaries acted prudently when they invested in company stock. The Supreme Court erased this presumption in 2014 with its decision in *Fifth Third Bancorp v. Dudenhoeffer*, where the Court established a new pleading standard for breach of fiduciary duty claims based on insider information. The *Dudenhoeffer* standard, which has become known as the “more harm than good” standard, requires courts to determine whether the complaint plausibly alleges that a prudent fiduciary could not have concluded that taking alternative actions, such as ceasing to purchase employer stock or publicly disclosing negative information, would cause more harm than good. For more detailed information on the Supreme Court’s *Dudenhoeffer* decision, see this [Labor and Employment Alert](#).

Case Background and Lower Court Decisions

Participants who invested in the company stock fund in IBM’s retirement plan alleged that the individual fiduciaries serving on the Retirement Plans Committee (Committee) (who were also IBM senior executives), breached their fiduciary duty of prudence by failing to

disclose publicly the losses in its microelectronics business. The losses were eventually revealed when IBM announced the sale of the business which, in turn, caused IBM's stock price to fall. Applying *Dudenhoeffer*, the district court twice dismissed the participants' complaint/amended complaint, finding that the participants' allegations did not meet the "more harm than good" standard.

The Second Circuit, however, persuaded in part by the claim that disclosure of the losses was inevitable given the sale of the business, reversed the district court's decision to dismiss the case, concluding that the participants "sufficiently pleaded that no prudent fiduciary in the Plan defendants' position could have concluded that earlier disclosure would do more harm than good".

Supreme Court Decision and Second Circuit Decision on Remand

On appeal to the Supreme Court, the Committee introduced two new arguments: (1) the Court should adopt a bright-line rule that insider fiduciaries have no obligation to act on insider information under ERISA; and (2) insider fiduciaries should have no specific duty under ERISA to make any disclosures not required by securities laws. The U.S. Department of Labor and U.S. Securities and Exchange Commission weighed in and likewise argued that an ESOP fiduciary has only the duty to disclose inside information that federal securities laws require. Nevertheless, because these arguments were not raised in the lower courts and because the Court found that the "views of the U.S. Securities and Exchange Commission might well be relevant to discerning the context of ERISA's duty of prudence", the Court remanded the case to allow the Second Circuit "an opportunity to decide whether to entertain" the new arguments. Notably, in their concurring opinion, Justices Kagan and Ginsburg stated that if the arguments were not properly preserved, "sound judicial practice points toward declining to address them...".

After remand to the Second Circuit, several organizations filed amicus briefs supporting the Committee's position and the parties and government submitted supplemental briefs addressing whether the Second Circuit should consider arguments not previously raised before it. Notwithstanding, on June 22, 2020, following Justices Kagan and Ginsburg's lead, the Second Circuit reinstated its original judgment in the case, declining to consider arguments not previously raised below. The Second Circuit then remanded the case to the District Court for further proceedings consistent with its judgment.

Subsequent Circuit Court Decisions

This summer, the Eighth Circuit Court of Appeals decided two back-to-back cases - *Allen et al v. Wells Fargo & Company et al.* and *Dormani v. Target Corp.* on July 27 and July 28, 2020, respectively. In both cases, the Eighth Circuit affirmed the district court's decision to dismiss the complaint, finding "allegations based on general economic principles" do not meet the requisite pleading standard under *Dudenhoeffer*.

Second Petition for Certiorari

On September 1, 2020, the Committee filed a second petition with the Supreme Court, arguing that the Court should resolve the circuit split, which was recreated when the Second Circuit reinstated its decision on remand. On November 9, 2020, the Supreme Court announced its decision to deny the Committee's petition.

What does this mean for plan sponsors and fiduciaries?

Following *Dudenhoeffer*, a breach of fiduciary duty claim in a stock drop case was unlikely to survive a motion to dismiss. After *Jander* survived this hurdle, plan sponsors and fiduciaries anxiously awaited the Supreme Court's opinion but were left without answers. After the pair of Eighth Circuit decisions this summer, fiduciaries took some comfort that, in most jurisdictions, such claims are still unlikely to survive a motion to dismiss. Now that the Supreme Court has decided not to reconsider the case, plan sponsors and fiduciaries are again left wondering whether other courts will join the Second Circuit or whether a new bright-line rule based on the arguments raised by the Committee, but not considered by the Second Circuit, will emerge.

If you have questions, please contact Dan Clark, Kent Britt, Dawne McKenna Parrish, Jessica Tarantine or your Vorys attorney.

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This is Part 3 of our three-part series reviewing ERISA cases decided by the U.S. Supreme Court in the past year. Part 1 of the series reviewed *Thole v. U.S. Bank*. That ruling held that participants in defined benefit pension plans cannot bring breach of fiduciary duty claims under ERISA unless and until their own benefit has actually been impacted. [Click here to read that alert.](#) Part 2 of the series reviewed *Intel Corp. Invest Policy Comm. v. Sulyma*. That ruling held that a participant must actually be aware of the information contained in disclosures received to have actual knowledge of such disclosures in order to trigger a shortened three-year statute of limitations period to breach of fiduciary duty claims. [Click here to read that alert.](#)