EB Flash: Supreme Court Vacates Second Circuit Stock Drop Decision

Employee Benefits Alert
01.14.2020

In a *per curiam* decision, the Supreme Court today vacated and remanded back to the Court of Appeals for the Second Circuit a case that centers on the duties of a retirement plan fiduciary to disclose inside information about company performance and what alternative actions the fiduciary could have taken that would not have caused more harm than good to a plan holding a fund invested in an employer stock fund.

In *Retirement Plans Committee of IBM v. Jander*, the plan participants argued that the IBM plan fiduciaries breached their duties under the Employee Retirement Income Security Act (ERISA) by concealing that one of the company's divisions was overvalued, artificially inflating the value of IBM stock, and that IBM's corrected disclosure triggered a seven percent drop in stock price. The participants argued that ERISA required the fiduciaries to disclose insider information.

The case turns on a standard set out by the Supreme Court's *Fifth Third Bancorp v. Dudenhoeffer* decision which directs that plaintiffs must allege that an alternative course of action could have been taken by a prudent fiduciary that would have been consistent with the securities laws and not have been more likely to harm the fund than help it. *IBM* is the first post-*Dudenhoeffer* case to survive a motion to dismiss at the circuit court level since *Amgen Inc. v. Harris* in the Ninth Circuit, which was reversed by the Supreme Court.

In *IBM*, the question presented to the Supreme Court was "whether *Dudenhoeffer*'s 'more harm than good' pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time." But the parties "focused their arguments primarily upon other matters." Specifically, the fiduciaries and the government argued that ERISA imposes no duty on fiduciaries to act on inside information and that any duty to disclose inside information could conflict with the securities laws. The Supreme Court chose not to wade into the analysis before the lower court had the opportunity to do so, and, instead, vacated and remanded the case back to the Second Circuit. In doing so, the Court offered, as guidance, its observation in *Dudenhoeffer* that the views of the SEC might be relevant "to discerning the content of ERISA's duty of prudence in this context." The Court of Appeals, accordingly, should "decide whether to entertain these arguments in the first instance," determine their merits, and take appropriate action.

The decision to vacate and remand is posted here.
