



2nd Circuit sends IBM stock-drop case back to district court

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The saga continues in the ERISA stock-drop litigation against the fiduciary committee for IBM's employee stock ownership plan (ESOP). The 2nd Circuit has reinstated its [2018 decision](#) to revive the case after the Supreme Court [vacated](#) that decision earlier this year (*Jander v. Retirement Plans Comm. of IBM*, No. 17-3518 (2nd Cir. June 22, 2020)). The case now heads back for reconsideration by the district court that originally dismissed the case in 2017.

Long and winding road

Participants in the ESOP case claimed the plan committee acted imprudently by not disclosing that the company's microelectronics division — which the company was trying to sell — was overvalued. The company eventually corrected the valuation when it sold the microelectronics division. But the plaintiffs argued that earlier disclosure in Securities and Exchange Commission (SEC) filings would have corrected the stock price and protected the company's reputation and long-term prospects as an investment.

The district court granted IBM's motion to dismiss the case, finding the plaintiffs failed to meet the high standard to bring stock-drop cases involving inside information that the Supreme Court set in *Fifth Third Bancorp v. Dudenhoeffer* (573 U.S. 409 (2014)). *Dudenhoeffer* requires plaintiffs in stock-drop cases to suggest an alternative course of action that plan fiduciaries could have taken without violating securities laws and plausibly allege that a prudent fiduciary could not have found that the alternative action would have caused more harm than good to the fund. The plaintiffs appealed, and in a surprise [decision](#) (910 F.3d 620 (2018)), the 2nd Circuit reversed the district court, finding the plaintiffs' pleadings were sufficient to survive a motion to dismiss.

IBM appealed to the Supreme Court. But in its briefings to the court, IBM didn't address what the Supreme Court said was the central issue — whether plaintiffs can satisfy the *Dudenhoeffer* pleading standard with "generalized allegations that the harm of an inevitable disclosure of an alleged fraud

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generally increases over time.” Instead, the company argued that ERISA fiduciaries aren’t required to act on inside information. In an amicus brief, the SEC and Department of Labor likewise focused on the interaction of ERISA’s fiduciary duties and federal insider trading and corporate disclosure rules. The Supreme Court declined to address these arguments since they weren’t presented to the 2nd Circuit and remanded the case so the 2nd Circuit could decide whether to consider them.

Case picks up where it left off

On remand, the 2nd Circuit accepted supplemental briefings from the parties and supplemental amicus briefs from the government. In a terse [opinion](#), the court concluded it would not consider the additional arguments since they were either previously raised or had been improperly presented. The 2nd Circuit reinstated its initial 2018 [decision](#) and remanded the case to the district court, giving the parties another chance to advance their positions.

In its initial decision, the 2nd Circuit found the plaintiffs “sufficiently pleaded that no prudent fiduciary in the Plan defendants’ position could have concluded that earlier disclosure would do more harm than good,” so the plaintiffs had stated a claim for a prudence violation. Reinstatement of this decision appears to signal a potential narrow path for future imprudence claims, possibly leading to more stock-drop litigation in the 2nd Circuit.

Related resources

Non-Mercer resources

- [Jander v. Retirement Plans Comm. of IBM](#), No. 17-3518 (2nd Cir. June 22, 2020)
- [Retirement Plans Comm. of IBM v. Jander](#), No. 18-1165 (U.S. Jan. 14, 2020)
- [Jander v. Retirement Plans Comm. of IBM](#), 910 F.3d 620 (2018)
- [Fifth Third Bancorp v. Dudenhoeffer](#), 573 U.S. 409 (2014)

Mercer Law & Policy resources

- [Supreme Court sends IBM stock-drop case back to 2nd Circuit](#) (Jan. 22, 2020)
- [Supreme Court will hear IBM stock-drop case](#) (June 4, 2019)
- [2nd Circuit revives IBM stock-drop case](#) (Jan. 29, 2019)

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