



Curtain falls on IBM stock-drop case

By Margaret Berger and Brian J. Kearney
April 30, 2021

After more than five years of litigation and a trip to the Supreme Court, the ERISA stock-drop litigation against fiduciaries for IBM's employee stock ownership plan (ESOP) has ended with a modest \$4.75 million settlement ([Jander v. Ret. Plans Comm. of IBM](#), No. 1:15-cv-03781 (S.D.N.Y. April 2, 2021)). The opinion of the 2nd US Circuit Court of Appeals in the case — which found plaintiffs' pleadings sufficient to survive a motion to dismiss — still stands, possibly leaving a narrow path for future stock-drop litigation.

Case tested *Dudenhoeffer* pleading standard

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

The district court dismissed the case, finding that the plaintiffs failed to meet the Supreme Court's pleading standard set in [Fifth Third Bancorp vs. Dudenhoeffer](#) (573 U.S. 409 (2014)) for imprudence claims involving inside information. That decision requires plaintiffs to propose an alternative action that doesn't violate securities laws and plausibly allege that no prudent fiduciary in the defendant's position could have concluded that action would have done more harm than good. This standard has proved very difficult to meet, and most similar stock-drop lawsuits since *Dudenhoeffer* have been dismissed.

But on appeal in *Jander*, the 2nd Circuit found the plaintiffs had met the *Dudenhoeffer* pleading standard. The case then went to the Supreme Court, which viewed the central issue as whether general allegations of harm due to a delay of an inevitable disclosure were sufficient under the *Dudenhoeffer* standard. The justices declined to rule on the issue for procedural reasons and sent the case back to the 2nd Circuit, which reinstated its earlier decision for the plaintiffs. The parties then settled, leaving the 2nd Circuit's ruling intact.

2nd Circuit's opinion may be an outlier

The 2nd Circuit's decision appeared to signal a possible path for stock-drop cases involving inside information that eventually would become public, but that path appears to be very narrow for now. Several courts have declined to follow *Jander* when plaintiffs claimed a disclosure was inevitable, including in cases against plan fiduciaries for Target and Wells Fargo in the 8th Circuit and against Johnson & Johnson in a New Jersey district court.

Even the 2nd Circuit distinguished *Jander* from a similar case against fiduciaries for General Electric's ESOP (*Varga v. Gen. Elec. Co.*, No. 20-1144-cv (2nd Cir. Feb. 4, 2021)). In that case, plaintiffs claimed the fiduciaries should have disclosed sooner that the company's insurance subsidiaries had insufficient reserves to cover their liabilities — information that would eventually become public. But the 2nd Circuit disagreed, finding no triggering event made that disclosure a certainty. This differs from *Jander*, where the sale of the microelectronics division ensured disclosure of the overvaluation.

These cases suggest that general allegations that a disclosure is inevitable or that a delayed disclosure causes more harm than good are likely insufficient to satisfy the *Dudenhoeffer* standard. Plaintiffs apparently need to point out specific facts that made disclosure of the inside information a certainty and show that delaying the disclosure caused more harm than good to the plan. Whether courts continue to apply this narrow reading of *Jander* remains to be seen.

Related resources

Non-Mercer resources

- [Settlement in *Jander v. IBM*](#) (S.D.N.Y., April 2, 2021)
- [Jander v. Ret. Plans Comm. of IBM](#), 962 F. 3d 85 (2020)
- [Ret. Plans Comm. of IBM v. Jander](#), 140 S. Ct. 592 (2020)
- [Jander v. Ret. Plans Comm. of IBM](#), 910 F.3d 620 (2018)
- [Fifth Third Bancorp v. Dudenhoeffer](#), 573 U.S. 409 (2014)

Mercer Law & Policy resources

- [2nd Circuit sends IBM stock drop case back to district court](#) (July 22, 2020)
- [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)

Note: Mercer is not engaged in the practice of law, accounting or medicine. Any commentary in this article does not constitute and is not a substitute for legal, tax or medical advice. Readers of this article should consult a legal, tax or medical expert for advice on those matters.