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EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

JANUARY 2020: ERISA AT THE SUPREME COURT

The Supreme Court has taken a number of actions related to the Employee Retirement Income Security Act of 1974 ("ERISA") during the first few weeks of January 2020.

Retirement Plans Comm. of IBM v. Jander

On January 14, 2020, the Supreme Court sent *Retirement Plans Comm. of IBM v. Jander* back to the Second Circuit for further review. The plaintiffs are seeking to hold IBM fiduciaries liable for a drop in the price of IBM stock held under the company's 401(k) plan when the market became aware of losses generated by the company's microelectronics division. IBM paid a buyer $1.5 billion to take the microelectronics business and supply IBM with semiconductors, and took a pre-tax charge of $4.7 billion in connection with the microelectronic division's impaired value. Before the transaction, IBM had been valuing the microelectronics business on its books at approximately $2 billion. The plaintiffs alleged that the plan's fiduciaries knew of the difficulties faced by the microelectronics division and that those difficulties were bound to come to light because IBM was attempting to sell the division.

In December 2018, the Second Circuit reviewed the case under the pleading standards established by the Supreme Court's previous holdings in *Fifth Third Bancorp v. Dudenhoeffer* and *Amgen Inc. v. Harris*, which prevent plaintiffs from pursuing a claim against fiduciaries unless the plaintiffs can allege protective action that the fiduciaries could have taken without violating securities laws, and that "a prudent fiduciary could [or "would"] not have concluded" that the relevant action "would cause more harm than good." The Second Circuit decided that the plaintiffs had plausibly alleged that the IBM fiduciaries could have protected the plan against at least some of the losses it experienced by disclosing the financial situation that, when eventually (and inevitably) discovered, caused IBM's stock to drop. The Second Circuit also concluded that the fiduciaries could have done so without violating securities laws and without concluding that disclosure would cause more harm than good to the plan in light of its existing holdings. The defendant fiduciaries and the government as amicus curiae argued to the Supreme Court that the Second Circuit's conclusion about the possibility of disclosure as a way to mitigate plan losses impermissibly obligated fiduciaries to provide disclosures in excess of the securities laws' requirements on account of insider information.

The Supreme Court decided that since the question of whether ERISA fiduciaries had a duty to go beyond securities laws requirements in their disclosures had not been addressed in the lower courts, the question should be remanded to the Second Circuit. Justice Kagan and Justice Ginsburg wrote separately to indicate their support for the proposition that ERISA might, in fact, require fiduciaries to take action not mandated by the securities laws in some cases, noting that *Dudenhoeffer* specifically allowed for the possibility. However, Justice Gorsuch wrote separately to indicate skepticism regarding the plaintiffs' theory.

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Since *Dudenhoeffer* and *Amgen*, courts have almost uniformly dismissed "stock drop" claims. The Second Circuit's decision in *Jander* is an outlier, and its opinion made it clear that the holding was specific to the particular facts of the IBM situation. Indeed, the Second Circuit dismissed a stock-drop case against SunEdison shortly after issuing its *Jander* decision, indicating that *Jander* was not the start of a new trend. When the Supreme Court agreed to review *Jander*, plaintiffs hoped that the Court would conclude that the *Dudenhoeffer/Amgen* pleading standard, which has almost universally prevented ERISA plan participants from suing fiduciaries for company stock losses, ought to be altered. Defendants, naturally, hoped that the Court would reverse the Second Circuit and further buttress fiduciaries' defenses. The Court's decision to remand the case for analysis of the interplay of the securities laws and ERISA fiduciary duties means that the Court provided no further guidance on the proper pleading standard for stock drop cases.

It is now up to the Second Circuit to decide whether it (or the district court) should address the merits of the defendants' claims that they cannot be obligated to make disclosures of what would otherwise be insider information in excess of disclosures required by the securities law, or whether the defendants waived that argument by not asserting it earlier in the case. If the Second Circuit does rule on the question, the ruling will have potentially widespread implications for the popular plaintiffs' allegation that fiduciaries of a plan with company stock should have taken action to inform the market (and plan participants) of the plan sponsor's problems. If, instead, the Second Circuit considers the issue to have been waived, the case remains a factually unusual outlier and may have limited impact on future stock drop claims.

Thole v. U.S. Bank

The parties in this case are disputing whether participants in a defined benefit plan can sue in connection with allegedly imprudent plan investments if the plan is sufficiently funded that its ability to pay participants' benefits in full is not in question. The key inquiry is whether participants in this situation have "standing" (i.e., have suffered an actual "injury in fact" sufficiently "concrete and particularized" to justify a lawsuit). The Court heard oral arguments in this case on January 13, 2020, and Justice Kavanaugh characterized the case as "close." He and Justice Alito seemed concerned about allowing lawsuits by participants whose benefits are not really at risk. However, Justice Kagan noted that a plan's funded status is vulnerable to market changes, noting the adverse impact of the 2008 market downturn on previously healthy plans.

While the circuit courts are split on the issue, the federal government supports standing to sue, stating that a plan fiduciary's breach of duty is an "invasion of a private legal right held by the fiduciary."

Putnam Investments, LLC v. Brotherston

The Supreme Court has decided not to hear a case regarding whether plaintiffs or defendants bear the burden of demonstrating a causal link between plan losses and related fiduciary conduct. In *Putnam*, the company is accused of using allegedly expensive, underperforming mutual funds as investment options in Putnam's 401(k) plan, allowing the company to profit at the plan's expense in violation of ERISA.

The circuit courts disagree on whether a plaintiff must both show that a plan suffered a loss *and* that the defendant fiduciary's misconduct caused the loss, or whether a plaintiff need only show that the plan suffered a loss linked to a fiduciary's conduct, leaving the fiduciary to prove that the loss was *not* caused by

wrongful conduct. The Fifth Circuit took the latter approach, indicating that Putnam must demonstrate that its affiliated funds were prudent choices rather than leaving it to plaintiffs to demonstrate that they were imprudent. Putnam requested Supreme Court review. Putnam also asked the Court to weigh in on whether plaintiffs can use comparisons between more expensive actively managed funds and cheaper passively managed funds to demonstrate plan losses. The Court denied the petition on both counts.

The Court seems to be interested in addressing the causation issue at some point, but the U.S. Solicitor General had advised the Court that this case (which is still in progress) would be a poor vehicle to do so and that the Fifth Circuit's decision was correct.

Rutledge v. Pharmaceutical Care Management Association

The Pharmaceutical Care Management Association successfully challenged an Arkansas law regulating pharmacy benefit managers, asserting that this type of law is preempted by ERISA. At least 38 states have similar laws. The Court has agreed to hear the case.

Affordable Care Act

The Supreme Court has agreed to review two cases connected to the contraceptive coverage mandate under the Affordable Care Act. Pennsylvania and New Jersey have challenged the Trump Administration's rules allowing a broad exemption for employers and universities with religious or moral objections, while the Little Sisters of the Poor have asserted a right to a broad religious exemption.

The Court has also received a number of amicus briefs urging it to accept review of a Fifth Circuit case challenging the constitutionality of the Affordable Care Act.

University of Pennsylvania v. Sweda

TIAA-CREF has filed an amicus brief urging the Court to review *University of Pennsylvania v. Sweda*. That case involves a challenge to the prudence of investment and recordkeeping arrangements under the University of Pennsylvania's retirement plan. The University has asked the Court to opine on the degree of specificity that plaintiffs must include in their allegations of fiduciary misconduct in order to avoid dismissal of their claims.

For More Information

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