If Your Retirement Plan Holds Employer Securities Keep an Eye on the Jander Case, Part II

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In March 2020, I posted a blog reviewing the evolution of the legal analysis applied to a retirement plan's holding of "employer securities" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). See "If Your Retirement Plan Holds Employer Securities, Keep an Eye on the Jander Case." In that blog, I reviewed the "Moench presumption" and the Supreme Court's rejection of the "Moench presumption" in Fifth Third Bancorp v. Dudenhoeffer, 134 S.C. 2459 (2014).

In Dudenhoeffer, the Supreme Court announced a three-factor standard for determining whether ERISA fiduciaries behaved imprudently by failing to act on the basis of nonpublic information. The three factors are: (1) the duty of prudence "does not require a fiduciary to break the law" (such as violating securities laws); (2) "the courts should consider the extent to which the ERISA-based obligation to refrain on the basis of inside information from making a planned trade or to disclose inside information to the public could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws;" and (3) whether the complaint has alleged that a prudent fiduciary in a defendant's position could not have concluded that an alternative action that the defendant could have taken would do more harm than good to the investment of employer securities in the retirement plan.

After 2014, the Dudenhoeffer standard has foreclosed the argument that a fiduciary should have used "inside information" in support of an action to purchase or sell "employer securities." Thus, subsequent litigation has generally been limited to whether ERISA fiduciaries may be required to disclose inside information that may impact the value of the "employer securities" or may have to refrain from making additional purchases of "employer securities" (i.e., suspend the investment option).

Jander v. Retirement Plan Committee of IBM, 310 F.3d 620 (2nd Cir. 2018) implicates these issues. In Jander, the plaintiffs (participants in the IBM retirement plan) alleged that: (1) in 2013, IBM began trying to sell its microelectronics business (the "Business"); (2) IBM failed to disclose certain losses and other liabilities at the Business; (3) members of the retirement committee knew or should have known about the undisclosed issues at the Business; (4) in connection with the sale of the Business, IBM had to take a $4.7 billion pre-tax charge (which resulted in a price decline in excess of $12 per share in the value of the "employer securities"); and (5) that once the members of the retirement committee learned that IBM's stock price was artificially inflated, they should have either disclosed the truth about the Business' value or "issued new investment guidelines that would temporarily freeze further investments in IBM stock".

The trial court dismissed the case holding that the alternative actions that the plaintiff alleged were available to the plan fiduciaries might have caused more harm than good to the plan's assets (i.e., failed to satisfy the third Dudenhoeffer factor).

Upon appeal, the Second Circuit Court of Appeals reversed and remanded, holding that Jander had sufficiently plead that no prudent fiduciary could have concluded that the disclosure of the Business' undisclosed issues would do more harm than good. Significantly, the Court of Appeals did not rule on the potential conflict between the ERISA's prudence requirements and the federal securities law's corporate disclosure requirements (i.e., the second Dudenhoeffer factor).

Upon appeal to the U.S. Supreme Court, the Supreme Court vacated and remanded the case back to the Court of Appeals. The Supreme Court held (1) that the Court of Appeals did not address whether ERISA's duty to disclose conflicted with the corporate disclosure requirements imposed by federal securities laws; and (2) that the Court of Appeals should have an opportunity to decide whether to entertain arguments on whether to obtain SEC guidance and rule on the second Dudenhoeffer factor. See Retirement Plans Committee of IBM v. Larry Jander, 2020 WC 201024 (2020).

On June 22, 2020, the Second Circuit Court of Appeals reinstated its original holding (which as described above was reversed by the U.S. Supreme Court). See Jander v. Retirement Plans Committee of IBM, 962 F.3d 85 (2nd Cir. 2020). In its opinion, the Court of Appeals noted that it invited parties to submit supplemental briefs and determined that the "arguments raised in the supplemental briefs either were previously considered by [the Court of Appeals] or were not properly raised." As such, the Court of Appeals remanded the case back to the District Court for further proceedings consistent with the Court of Appeal's original opinion.

The release of the June 2020 Court of Appeals' opinion raises an interesting question as to the appropriate next step to the litigation: (a) appeal the Court of Appeals decision back to the Supreme Court; or (b) try the case on the merits at the district court level. From the development of the law perspective, the most efficient approach is an appeal to the Supreme Court which would result in a clarification of the applicable law.

On September 1, 2020, the attorneys for the IBM retirement plan requested a writ of certiorari from the Supreme Court. Significantly, the attorneys presented the following questions:

"1. Whether Dudenhoeffer's "more harm than good" standard can be satisfied by generalized allegations that the harm of inevitable disclosure of an alleged fraud generally increases over time and the plan fiduciaries should have made earlier disclosure through regular securities law filings."

"2. Whether ERISA imposes a duty on a plan fiduciary who is also a corporate officer to use inside information for the benefit of plan participants."

While the first question addresses a relatively technical form of pleading issue, the second question implicates a common issue raised when fiduciaries are also corporate officers of the retirement plan sponsor. Hopefully, the Supreme Court will grant certiorari and address these two questions. In any event, fiduciaries of plans holding "employer securities" should be prepared to re-examine their plan's investment in "employer securities" upon release of subsequent opinions.

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