Jander v. IBM: Spotlight on the Fed’s Amicus Brief

In June, the U.S. Supreme Court granted cert to hear Jander, a case about the legal standard for pleading a claim for breach of fiduciary duties under ERISA following a drop in the value of employer stock. In August, the U.S. Solicitor General weighed in on the case in an amicus brief taking the position that “[a]bsent extraordinary circumstances, ERISA’s duty of prudence requires an ESOP fiduciary to publicly disclose inside information only when the securities laws require such a disclosure.”

Background

In Jander, ESOP plan participants claimed that the plan fiduciaries knew but failed to disclosure that IBM’s microelectronics division was overvalued. According to the complaint, the failure to disclose left IBM’s stock price artificially inflated and harmed participants when the irregularities were eventually disclosed and the price of the stock declined by more than $12 per share.

The district court dismissed the participants’ claim twice based on its finding that the complaint lacked context-specific allegations as to why a prudent fiduciary could not have concluded that plaintiff’s proposed alternatives were more likely to do harm than good and therefore failed to satisfy the Dudenhoeffer pleading standard.

On appeal, the Second Circuit reversed and held that where a plaintiff sufficiently pleads that disclosure of negative information (and the accompanying drop in stock price) was “inevitable,” and an earlier disclosure would have caused less loss than a later disclosure, the Dudenhoeffer requirement that the disclosure not “do more harm than good” is met.

The Fed’s Position

On August 13, 2019, the U.S. Solicitor General filed an amicus brief on behalf of the DOL and SEC advocating that the Supreme Court adopt narrower interpretation than the Second Circuit. Although the brief does not explicitly support either the petitioners or the respondents, the Solicitor’s position favors the plan fiduciaries because it seeks reversal of a Jander decision that allowed claims against the fiduciaries to proceed.

In particular, the Solicitor argues that the Court should hold that ESOP fiduciaries are required to disclose non-public information only when required by federal securities laws. The Solicitor asserts that unless there are “extraordinary circumstances,” a fiduciary of an ESOP only has an ERISA duty to disclose nonpublic company information when the fiduciary also has to do so under federal securities law. In other words, the Solicitor’s position is that ERISA does
not require ESOP fiduciaries to determine what disclosure would “do more harm than good.” Instead, fiduciaries should simply comply with the disclosure requirements mandated by federal securities laws. If the federal securities laws mandate disclosure, then the disclosure could not do more harm than good, and failure to disclose could give rise to a claim for fiduciary breach under *Dudenhoeffer*. Conversely, absent “extraordinary circumstances,” where federal securities laws do not mandate disclosure, then the disclosure presumptively would do more harm than good, and a failure to act on such adverse non-public information should not give rise to a claim of fiduciary breach under *Dudenhoeffer*.

The Solicitor argues that “[t]he federal securities laws provide a comprehensive scheme of public disclosure rules designed to protect investors” and, as such, “[t]here is no sound reason to adopt a different set of disclosure rules to protect those investors who are participants in an ESOP.”

The Solicitor also noted that participants in the same retirement plan can have competing economic interests, which makes it unwise to expect that plan fiduciaries can make an “ad hoc cost-benefit analysis” of when disclosure would benefit them. “The better course is to recognize that Congress and the SEC have already made a judgment about when a public disclosure would do more harm than good, and prudent fiduciaries should generally not second-guess that judgment.”

The fed’s brief was one of four amicus briefs filed in August. The IBM plan committee also received support from various groups, including the Securities Industry and Financial Markets Association, U.S. Chamber of Commerce, Business Roundtable, DRI-The Voice of the Defense Bar, ERISA Industry Committee and American Benefits Council.

**Implications of the Fed’s Position if Accepted**

If the Supreme Court accepts the fed’s view, plaintiffs will face a high bar to plead a fiduciary breach in ESOP stock-drop cases where they cannot plausibly allege a violation of the securities laws. In addition, acceptance of the fed’s position would likely result in more of a bright-line test for fiduciary breach in ESOP stock-drop cases.

The justices will hear arguments in the case on November 6.