Securities Regulation Daily Wrap Up, TOP STORY—U.S.: Jander ESOP fiduciary duty question remanded to Second Circuit, (Jan. 14, 2020)

Securities Regulation Daily Wrap Up

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By Rodney F. Tonkovic, J.D.

The Court vacated and remanded for the Second Circuit to consider arguments raised for the first time during merits briefing.

In a per curiam opinion, the Supreme Court has vacated and remanded a petition asking to clarify *Fifth Third v. Dudenhoeffer's* "more harm than good" pleading standard. According to the Court, the merits briefing was occupied by two arguments that were not addressed by the lower courts. The case was accordingly remanded, leaving it to the Second Circuit to determine the merits of the arguments raised in the briefs. Justice Kagan, joined by Justice Ginsburg issued a concurring opinion, as did Justice Gorsuch (*Retirement Plans Committee of IBM v. Jander*, January 14, 2020, per curiam).

New arguments raised. The petition, brought by employee stock ownership plan (ESOP) fiduciaries, asked the Court to resolve a circuit split over the pleading requirements to state a claim for breach of the duty of prudence as set forth in *Fifth Third Bancorp v. Dudenhoeffer*. Specifically, the petition asked whether *Dudenhoeffer's* "more harm than good" pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time. The opinion says that in their briefing on the merits, however, both the petitioners and the government (the SEC and Department of Labor) focused on other matters.

According to the court, the petitioners argued that ESOP fiduciaries have no duty under ERISA to act on inside information. The government, for its part, maintained that an ERISA-based duty to disclose inside information not otherwise required to be disclosed by the securities laws would conflict with the objectives of the insider trading and corporate disclosure requirements imposed by the federal securities laws. Because these arguments had not been raised before the Second Circuit, the court declined to address them, believing that the lower court should be given the chance to entertain the arguments in the first instance. To that end, the judgment below was vacated and the case remanded to the Second Circuit to determine the merits of the arguments and take "such action as it deems appropriate."

Concurrences. Justice Kagan, joined by Justice Ginsburg concurred, adding two notes. She first pointed out that the appellate court could, under its rules of waiver or forfeiture, not consider the new arguments at all. Second, if the court addresses the merits of the arguments, Justice Kagan is unable to see how either is consistent with *Dudenhoeffer*. According to Justice Kagan, contrary to the petitioner's argument, *Dudenhoeffer* clearly states that an ESOP at times has a duty to act on inside information and sets out exactly what a plaintiff must allege to state a claim for breach of this duty. She also takes issue with the government's position, explaining that a fiduciary may be obligated to take an action not required by the securities laws if that action is "more likely to help than to harm the fund." The government's approach would wipe out this central aspect of the *Dudenhoeffer* standard, she says.

In his concurrence, Justice Gorsuch says that he agrees that remand is the best way to allow the appellate court to address promising arguments that would "prove unavoidable later." As Justice Gorsuch characterized it, the respondents claim is that certain ERISA fiduciaries should have made SEC-regulated disclosures in their capacities as corporate officers. But, he said, to find such a duty would impose an even higher duty on fiduciaries who are also corporate officers.

Gorsuch also does not read *Dudenhoeffer* as broadly as does Justice Kagan and does not believe that remand is a "wasted gesture." According to him, *Dudenhoeffer* does not address the argument presented here: whether

ERISA plaintiffs may hold fiduciaries liable for alternative actions they could have taken only in a non-fiduciary capacity. Simply put, the *Dudenhoeffer* court was not asked to rule on this question, so there is no precedent. Justice Kagan, in a footnote, disagrees, stating that absent a conflict with the securities laws, there is no categorical exclusion from the duty to disclose.

The case is No. 18-1165.

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Companies: IBM

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