

Supreme Court: Vacates Second Circuit Decision Holding That Plaintiffs Satisfied *Fifth Third*'s "More Harm Than Good" Pleading Standard by Alleging That Delaying an Inevitable Disclosure Results in Greater Stock Price Harm

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On January 14, 2020, the Supreme Court vacated a Second Circuit decision holding that plaintiffs satisfied *Fifth Third*'s "more harm than good" pleading standard for an inside-information-based ERISA claim against the fiduciaries of an employee stock ownership plan ("ESOP") by alleging that delaying an inevitable disclosure of an alleged fraud results in greater stock price harm. [Ret. Plans Comm. of IBM v. Jander, 2020 WL 201024 \(2020\) \(per curiam\)](#).^[1] The Court noted that in *Fifth Third*, it previously recognized that "additional considerations arise" regarding the interplay between ERISA and the federal securities laws when a complaint "faults fiduciaries for failing to decide, on the basis of the inside information, to refrain from making additional stock purchases or for failing to disclose that information to the public so that the stock would no longer be overvalued." *Id.* (quoting *Fifth Third*). The Court instructed that the Second Circuit should have an opportunity to consider, in the first instance, whether ERISA claims for failure to disclose inside information are compatible with the federal securities laws.

The Court noted that in their merits briefings, petitioners went beyond the scope of the Second Circuit's decision and "argued that ERISA imposes no duty on an ESOP fiduciary to act on inside information." Counsel for the United States, as amicus curiae supporting neither party, went even further and "argued that an ERISA-based duty to disclose inside information that is not otherwise required to be disclosed by the securities laws would conflict at least with objectives of the complex insider trading and corporate disclosure requirements imposed by the federal securities laws." The Court stated that it would not reach these arguments because they were not raised before, or addressed by, the Second Circuit. The Court noted that in *Fifth Third*, it recognized that the view of the SEC "may well be relevant" to the question of whether an ERISA-based duty to disclose might "conflict" with federal securities laws. *Id.* (quoting *Fifth Third*). The Court stated that the Second Circuit "should have an opportunity to decide whether to entertain these arguments in the first instance" and then "tak[e] such action as it deems appropriate."

In a concurring opinion joined by Justice Ginsburg, Justice Kagan expressed her view that *Fifth Third* "makes clear that an ESOP fiduciary at times has" a duty to "act on insider information." She stated that there is a "conflict-free zone" in which an ESOP fiduciary might be able to disclose inside information without running afoul of the securities laws. She explained that under *Fifth Third*, "[t]he question in that conflict-free zone is whether a prudent fiduciary would think the action more likely to help than to harm the fund." She stated that adopting the

Government’s position “would mostly wipe out [this] central aspect of the [*Fifth Third*] standard” and would therefore “not accord” with *Fifth Third*.

In a separate concurring opinion, Justice Gorsuch stated that requiring ESOP fiduciaries to disclose inside information under any circumstances would require fiduciaries to “act[] in their capacities as corporate officers, not ERISA fiduciaries.” He observed that “[b]ecause ERISA fiduciaries are liable only for actions taken while acting as a fiduciary, it would be odd to hold the same fiduciaries liable for alternative actions they could have taken *only* in some other capacity.” Justice Gorsuch recognized that *Fifth Third* “made plain that suits requiring fiduciaries to violate the securities laws cannot proceed.” However, he did not read *Fifth Third* as “guaranteeing that all other suits may” proceed. In Justice Gorsuch’s view, *Fifth Third* is “silent” on this issue because “[n]o one in that case asked the Court to decide whether ERISA plaintiffs may hold fiduciaries liable for alternative actions they could have taken only in a nonfiduciary capacity.”

[1] In *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), the Supreme Court held that in order “[t]o state a claim for breach of the duty of prudence” against ESOP fiduciaries “on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.” Please [click here](#) to read our discussion of *Fifth Third*.

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