

## Second Circuit Allows “Stock-Drop” Case Against IBM to Proceed

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In the recent case of *Jander v. Retirement Plans Committee of IBM*, the U.S. Circuit Court of Appeals for the Second Circuit ruled in favor of a group of IBM retirement plan participants who alleged that plan fiduciaries had breached their duty to prudently manage the assets of the IBM Company Stock Fund, an ESOP governed by ERISA. The case was filed after IBM’s stock price declined by more than \$12 per share in 2014, following an announcement that IBM would pay \$1.5 billion to offload its struggling microelectronics business. Plaintiffs alleged that IBM failed to publicly disclose enormous losses being incurred by the microelectronics business and had continued to report an inflated value for the business (which, in turn, resulted in an artificially high IBM stock price). The district court dismissed the suit, ruling that the plaintiffs had failed to state a duty-of-prudence claim under ERISA because a prudent fiduciary could have concluded that the alternative actions proposed in the plaintiffs’ complaint would do more harm than good to the ESOP. The Second Circuit reversed, holding that no prudent fiduciary could have determined that earlier corrective disclosure of the microelectronics business’s impairment would have caused more harm than good to the ESOP. *Jander* is noteworthy because it represents a rare victory for plaintiffs in so-called “stock-drop” cases filed after the Supreme Court’s 2014 decision in *Fifth Third Bancorp vs. Dudenhoeffer*, which set forth the “more harm than good” standard. In light of such post-*Dudenhoeffer* cases, including the Fifth Circuit’s 2016 decision in *Whitley v. BP, Plc*, it had appeared that it may be functionally impossible for plaintiffs to successfully plead a duty-of-prudence case against ESOP fiduciaries. While the broader impact of *Jander* remains to be seen, the decision could signal that additional stock-drop cases against ESOP fiduciaries will survive the pleading stage. [View a copy of \*Jander v. Retirement Plans Committee of IBM\*.](#)