

18-1165 RETIREMENT PLANS COMMITTEE OF IBM V. JANDER

DECISION BELOW: 910 F.3d 620

LOWER COURT CASE NUMBER: 17-3518

QUESTION PRESENTED:

In *Fifth Third Bancorp v. Dudenhoeffer*, this Court unanimously held that to state a claim under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, for breach of the fiduciary duty of prudence based on inside information, a plaintiff must "plausibly allege[] that a prudent fiduciary in the defendant's position could not have concluded that [an alternative action] would do more harm than good to the fund." 573 U.S. 409, 429-30 (2014); *accord Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016). The Court designed this "context specific" standard to deter the kind of meritless suits lower courts had eliminated through a presumption of prudence (which the Court rejected) and to "readily divide the plausible sheep from the meritless goats" at the pleading stage. 573 U.S. at 425.

In the decision below, the Court of Appeals subverted that pleading standard and opened a circuit split by relying on boilerplate allegations that the harm of an eventual disclosure of an alleged fraud typically increases the longer the fraud continues. Those allegations "always" can be, and routinely are, pleaded in support of a *Fifth Third* claim. Other courts of appeals have rejected the same allegations as insufficient as a matter of law, in order to avoid undermining the pleading standard imposed by *Fifth Third* and *Amgen* and to deter meritless ERISA suits. The question presented is:

Whether *Fifth Third'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.

CERT. GRANTED 6/3/2019