UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Perrone v. Johnson & Johnson

No. No. 21-1885, United States Court of Appeals for the Third Circuit (September 7, 2022)

SUMMARY

The Third Circuit affirmed dismissal of ERISA duty-of-prudence claims against ESOP fiduciaries, holding that plaintiffs failed to plausibly allege under *Dudenhoeffer* that a prudent fiduciary could not have concluded that earlier corrective disclosures or redirecting contributions to a cash buffer would do more harm than good. The court rejected reliance on general economic theory, requiring context-specific allegations showing the proposed alternative actions were so clearly beneficial that no prudent fiduciary could have chosen otherwise. Distinguishing *Jander v. IBM*, the court noted uncertainty whether disclosure was inevitable given ongoing products liability litigation and J&J's continued denial of talc contamination. The cash-buffer theory also failed because predicting stock movements was speculative and fiduciaries could reasonably fear "investment drag" from holding cash.

CASE DETAILS

COURT	United States Court of Appeals for the Third Circuit
WRITING FOR THE COURT	Jordan; Restrepo; Smith
JURISDICTION	Federal
DECIDED	September 7, 2022
DOCKET	No. 21-1885
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the United States District Court for the District of New Jersey dismissal of ERISA complaint.
STANDARD OF REVIEW	De novo review of dismissal under Rule 12(b)(6)
PRECEDENTIAL VALUE	Published
PARTIES	Michael Perrone; Tom Tarantino; Rochelle Rosen, as participants in and on behalf of the Johnson & Johnson Savings Plan, and on behalf of a class of all others who are similarly situated v. Johnson & Johnson; Peter Fasolo; Dominic J. Caruso; John Does 1-20

TOPICS

erisa | breach of fiduciary duty | securities fraud | motions to dismiss | standard of review | appellate procedure

PRACTICE AREAS

ERISA | Employee Benefits | Fiduciary Duty | Securities Litigation | Appellate Practice

QUESTIONS PRESENTED

1. Whether the Plaintiffs plausibly alleged that the Defendants should have made corrective public disclosures as an alternative action under the Dudenhoeffer standard.
2. Whether the Plaintiffs plausibly alleged that redirecting new ESOP contributions to the cash buffer instead of buying J&J stock was a viable alternative action under Dudenhoeffer.

HOLDINGS

1. The Plaintiffs failed to plausibly allege that corrective disclosures were so clearly beneficial that no prudent fiduciary could have concluded they would do more harm than good.
2. The Plaintiffs failed to plausibly allege that redirecting contributions to the cash buffer was so clearly beneficial that no prudent fiduciary could have concluded it would do more harm than good.

KEY QUOTATIONS

> *“To state a claim for breach of the duty of prudence 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.”* (11-12)

> *“That standard places on the plaintiff 'the significant burden of proposing an alternative course of action so clearly beneficial that a prudent fiduciary could not conclude that it would be more likely to harm the fund than to help it.'”* (14)

> *“Where general economic principles are alleged, the complaint must also include context-specific allegations explaining why an earlier disclosure was so clearly beneficial.”* (15)

> *“The option of redirecting funds to an ESOP's cash buffer 'leaves a fiduciary between a rock and a hard place and likely to be sued for imprudence either way if he guesses wrong about where the stock is headed.'”* (20-21)

FACTUAL BACKGROUND

Johnson & Johnson (J&J) offers an Employee Stock Ownership Plan (ESOP) as an investment option within its retirement savings plans. The ESOP invests solely in J&J stock. In December 2018, Reuters published an investigative report accusing J&J of concealing that its baby powder was contaminated with asbestos. J&J denied the allegations, but its stock price declined more than 10% following the report. Plaintiffs, J&J employees who participated in the ESOP, allege that the ESOP's administrators (senior officers of J&J) violated their fiduciary duties under ERISA by failing to protect the ESOP's beneficiaries from the stock price drop. According to Plaintiffs, the fiduciaries, being corporate insiders, should have known about the baby powder controversy and taken alternative actions to mitigate losses.

PROCEDURAL HISTORY

The District Court granted Defendants' motion to dismiss the ERISA claims, holding that Plaintiffs failed to plead a viable alternative action under Dudenhoeffer. The court dismissed without prejudice initially, then after amendment, dismissed with prejudice. Plaintiffs appealed.

DISPOSITION

affirmed

CASES CITED

- Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014)
- Amgen Inc. v. Harris, 577 U.S. 308 (2016)
- Ret. Plans Comm. of IBM v. Jander, 140 S. Ct. 592 (2020)
- Jander v. Retirement Plans Committee of IBM, 910 F.3d 620 (2d Cir. 2018)
- Whitley v. BP, P.L.C., 838 F.3d 523 (5th Cir. 2016)
- Wilson v. Craver, 994 F.3d 1085 (9th Cir. 2021)
- Dormani v. Target Corp., 970 F.3d 910 (8th Cir. 2020)
- Allen v. Wells Fargo & Co., 967 F.3d 767 (8th Cir. 2020)
- Martone v. Robb, 902 F.3d 519 (5th Cir. 2018)
- Singh v. RadioShack Corp., 882 F.3d 137 (5th Cir. 2018)
- Saumer v. Cliffs Nat. Res., Inc., 853 F.3d 855 (6th Cir. 2017)
- Rinehart v. Lehman Bros. Holdings Inc., 817 F.3d 56 (2d Cir. 2016)
- Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995)
- George v. Kraft Foods Glob., Inc., 641 F.3d 786 (7th Cir. 2011)
- Hughes v. Nw. Univ., 142 S. Ct. 737 (2022)
- Hall v. Johnson & Johnson, 2019 WL 7207491 (D.N.J. Dec. 27, 2019)
- In re Johnson & Johnson Talcum Powder Prod. Mktg., Sales Pracs. & Prod. Liab. Litig., 220 F. Supp. 3d 1356 (J.P.M.L. 2016)
- Geness v. Admin. Off. of Pa. Cts., 974 F.3d 263 (3d Cir. 2020)