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Delegating Fiduciary Responsibilities Related to ESOP Results in Dismissal of ERISA Stock-Drop Claims

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Among the many lawsuits Boeing confronted following the disclosure of problems with the 737 Max was a class action brought by participants in the Boeing Voluntary Investment Plan who invested in the Boeing ESOP. The plaintiffs alleged that the Boeing defendants breached their ERISA fiduciary duties by concealing problems with the 737 Max, which allegedly caused Boeing's stock price to be artificially inflated and ultimately to decline once the problems with the 737 Max were made public.

The Boeing defendants succeeded in their motion to dismiss the participant's claims. *Burke v. The Boeing Company*, No. 19-cv-2203, 2020 WL 6681338 (N.D. Ill. Nov. 12, 2020). The district court first concluded that the defendants had no fiduciary responsibility over the ESOP. In so ruling, the court determined that the investment committee had delegated all fiduciary responsibilities related to the ESOP to an independent fiduciary and that no defendant in the action had fiduciary responsibilities related to the ESOP.

The court next concluded that, even if defendants were ESOP fiduciaries, the plaintiffs failed to satisfy the rigorous pleading standard set forth in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014). The court determined that the plaintiffs failed to plausibly plead that a prudent fiduciary could not conclude that public disclosure of the problems with the 737 Max would do more harm than good to the ESOP. Given the fact that the 737 Max was subject to "ongoing, fast-paced, and highly publicized investigations" during the class period, a prudent fiduciary could plausibly believe that public disclosure of the problems would do more harm than good. The court also criticized the Second Circuit's decision in *Jander v. Retirement Plans Committee of IBM*, 910 F.3d 620 (2d Cir. 2018) because it was "neither the best application of the *Dudenhoeffer* pleading standard nor the generally accepted approach."

Proskauer's Perspective: The Boeing decision is notable for at least two reasons. First, the district court's conclusion confirms that a plan sponsor or fiduciary ought to be able to effectively delegate all fiduciary responsibilities concerning a company stock fund to an independent fiduciary so they will not be responsible for alleged fiduciary-breach claims following a stock drop. Second, the district court's express criticism of the Second Circuit's decision against IBM could help limit exposure from claims based on a new proliferation of company stock fund suits.

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