# BP, RADIOSHACK, IBM, AND WHOLE FOODS BEAT STOCK DROP LAWSUITS IN POST-DUDENHOEFFER ERA

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In *Fifth Third Bancorp v. Dudenhoeffer*, the Supreme Court held that, where an employer's stock is publicly traded, allegations that a fiduciary of a retirement plan holding the company's stock as an investment should have recognized from publicly available information that the market was overvaluing or undervaluing the company's stock are implausible, unless special circumstances exist. The Supreme Court did not elaborate on what might constitute special circumstances. The Supreme Court further held in *Dudenhoeffer* that, 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 fiduciary 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 plan than to help it. In *Amgen Inc. v. Harris*, the Supreme Court clarified that the complaint itself must plausibly allege that a prudent fiduciary in the same position could not have concluded that the alternative action would do more harm than good.

BP, IBM, and Whole Foods Cases

BP, IBM and Whole Foods recently prevailed in lawsuits alleging breach of their fiduciary duty of prudence by continuing to allow purchases of overvalued company stock under retirement plans sponsored by the companies. The plaintiffs in the lawsuits alleged that BP, IBM, and Whole Foods were in possession of inside information that the stock was overvalued, and that companies could have prevented the plans from paying too much for company stock by either (i) disclosing the nonpublic information, or (ii) freezing company stock purchases. While either alternative would not have violated the securities laws, the courts noted that, because each alternative could easily result in the stock price dropping, a prudent fiduciary could conclude that such actions would do more harm than good. Since the plaintiffs in each case failed to plausibly allege specific supporting facts that freezing contributions to the stock fund or disclosing nonpublic information would not have done more harm than good, the plaintiffs' lawsuits were dismissed.

RadioShack Case

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## Practices & Industries

Employee Benefits

RadioShack also recently prevailed in a stock drop lawsuit against it. The RadioShack lawsuit was different than the BP, IBM, and Whole Foods cases, in that plaintiffs alleged a breach of fiduciary duty based on both inside information and the existence of special circumstances.

Plaintiffs argued that the special circumstances included that (i) the derivative and equity markets predicted the company would default on its debt, (ii) the company was highly leveraged, and (iii) the plan fiduciaries failed to properly investigate the continued prudence of the company stock or employ a reasoned decision-making process in evaluating the stock. The court rejected plaintiffs' argument that special circumstances existed, suggesting that special circumstances may be akin to accounting irregularities, misappropriation of inside information, or another action that affects the market's reliability of a stock's market price.

With respect to their inside information claim, the plaintiffs alleged that (i) defendants made false and misleading statements regarding the company's prospects that should have been corrected as part of a subsequent disclosure, (ii) contributions to the company stock fund should have been frozen, or (iii) the company should have provided full disclosure of material nonpublic information. The court first held that the alleged false and misleading statements identified by plaintiffs amounted to mere puffery that was immaterial and did not require a corrective disclosure. The court then held that plaintiffs' claim otherwise failed because their complaint did not plausibly allege that insider information was withheld from the public. Even assuming material information was withheld from the public, the court held that plaintiffs' complaint did not plausibly allege that freezing contributions to the stock fund or disclosing nonpublic information would not do more harm than good. Accordingly, the court dismissed plaintiffs' complaint.