

Supreme Court and Circuit Court Decisions Addressing the ERISA Pleading Standards of *Fifth Third Bancorp v. Dudenhoeffer*

12.19.16



(Article from *Securities Law Alert*, December 2016)

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Supreme Court: Courts Must Apply the ERISA Pleading Standards of *Fifth Third*

In *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), the Supreme Court outlined the standards for pleading an ERISA breach of the duty of prudence claim against the fiduciary of an employee stock ownership plan (“ESOP”).

In *Amgen v. Harris*, 136 S. Ct. 758 (2016) (per curiam), the Supreme Court explained that in evaluating a duty of prudence claim based on inside information under the *Fifth Third* standard, courts must “consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant’s position could not have concluded that stopping purchases—which the market might take as a sign that insider fiduciaries viewed that employer’s stock as a bad investment—or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund” (quoting *Fifth Third*, 134 S. Ct. 2459).

Applying this standard, the Supreme Court held the Ninth Circuit had “failed to properly evaluate” an ERISA complaint brought by participants in Amgen-sponsored plans. The Ninth Circuit had found it “quite plausible” that removing the Amgen Common Stock Fund as an investment option under the Amgen Plans would not have resulted in “undue harm to plan participants” (quoting *Harris v. Amgen*, 788 F.3d 916 (9th Cir.2014)). The Supreme Court conducted its own review of the complaint and determined the complaint “lacked sufficient facts and allegations” to satisfy *Fifth Third*’s standards.

Second Circuit: Lehman ERISA Suit Dismissed Under Pleading Standards of *Fifth Third*

In *Fifth Third*, the Supreme Court held that “where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances.” 134 S. Ct. 2459.

On March 18, 2016, the Second Circuit relied on *Fifth Third* to affirm dismissal of an ERISA action brought by former participants in an ESOP

that invested exclusively in shares of Lehman Brothers Holdings. *Rinehart v. Lehman Bros. Holdings*, 817 F.3d 56 (2d Cir. 2016) (per curiam). [1] The Second Circuit held *Fifth Third*’s pleading standard applies to ERISA claims based upon public information suggesting “excessive risk” as well as to claims based on “market value.” The court further ruled that the SEC’s July 2008 orders prohibiting short-sales of certain financial firms’ securities, including Lehman stock, did not constitute “special circumstances” within the meaning of *Fifth Third*.

In addition, the Second Circuit held that a plaintiff alleging ERISA claims based on a fiduciary’s failure to investigate inside information must allege (1) facts showing *how* that investigation would have uncovered relevant nonpublic information, and (2) an alternative action that the fiduciary could have taken that “a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it” (quoting *Fifth Third*, 134 S. Ct. 2459).

Fifth Circuit: *Fifth Third* Mandates a “More Harm Than Good” Standard for ERISA Breach of Duty of Prudence Claims Based on Inside Information, Not a “More Good Than Harm” Standard

On September 26, 2016, the Fifth Circuit stated that “[u]nder the Supreme Court’s formulation” in *Fifth Third*, a plaintiff asserting an ERISA breach of the duty of prudence claim based on inside information “bears 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.” *Whitley v. BP*, 838 F.3d 523 (5th Cir. 2016) (Clement, J.). In the case before it, the Fifth Circuit determined the district court had instead erroneously considered whether “no prudent fiduciary would have concluded that” the alternative actions “would do more good than harm.”

[1] Simpson Thacher represents the former members of the Lehman Brothers Employee Benefit Plans Committee in this action.

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