

Circuit Court Decisions Addressing ERISA Claims

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Fifth Circuit: (1) *Fifth Third* Applies to Claims of Excessive Riskiness, and (2) Failure to Disclose Inside Information Does Not Constitute a “Special Circumstance” Under *Fifth Third*

On February 6, 2018, the Fifth Circuit held that the Supreme Court’s decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), applies to ERISA claims alleging that company stock was excessively risky in addition to claims that the stock was overvalued.^[1] *Singh v. RadioShack Corp.*, 882 F.3d 137 (5th Cir. 2018) (per curiam). The Fifth Circuit found “illusory” the “distinction between” these two types of ERISA claims. The court reasoned that “[i]n an efficient market, market price accounts for risk.” The Second, Sixth and D.C. Circuits have also held that *Fifth Third* applies to ERISA claims alleging claims based on allegedly excessive risk.^[2]

The Fifth Circuit further held that plaintiffs cannot satisfy *Fifth Third*’s “special circumstances” exception for claims based on publicly available information by alleging that defendants “withheld material information from the market, skewing the stock price.” The court found that failure to disclose inside information does not constitute a “special circumstance” because *Fifth Third* established a separate standard for analyzing insider-information claims, pursuant to which “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.” *Id.* (quoting *Fifth Third*, 134 S. Ct. 2459).

^[1] In *Fifth Third*, the Court outlined the standards for pleading an ERISA breach of the duty of prudence claim against the fiduciary of an employee stock ownership plan. Please [click here](#) to read our discussion of the Supreme Court’s decision in *Fifth Third*.

^[2] See *Pfeil v. State Street Bank and Trust Co.*, 806 F.3d 377 (6th Cir. 2015); *Rinehart v. Lehman Bros. Holdings*, 817 F.3d 56 (2d Cir. 2016); *Coburn v. Evercore Trust Co.*, 844 F.3d 965 (D.C. Cir. 2016).

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