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Supreme Court Takes Case About Company Stock Funds and Presumption of Prudence

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The Supreme Court of the United States granted certiorari in ***Fifth Third Bancorp v. Dudenhoeffer*,** suggesting that the Supreme Court will resolve the current division among U.S. circuit courts regarding the application of the "presumption of prudence" in employer stock cases.

On December 13, 2013, the Supreme Court of the United States granted *certiorari* in *Fifth Third Bancorp v. Dudenhoeffer*, No. 12-751, to decide a case about the "presumption of prudence" defense in class actions brought under the Employee Retirement Income Security Act of 1974 (ERISA) challenging plan investments in company stock funds. The Supreme Court will review a recent ruling by the U.S. Court of Appeals for the Sixth Circuit to determine (1) whether the decision by the fiduciaries of an employee stock ownership plan (ESOP) to remain invested in employer securities was entitled to a presumption of prudence when the district court decided a motion to dismiss, and (2) whether plaintiffs were required to plead plausible allegations that the employer was in a dire situation or that the employer's viability as a going concern was threatened to state a claim under ERISA against the plan fiduciaries. *Dudenhoeffer v. Fifth Third Bancorp*, 692 F.3d 410 (6th Cir. 2012). The Supreme Court's decision to grant *certiorari* suggests that the Supreme Court will resolve the current division among circuit courts regarding the application of the "presumption of prudence" in employer stock cases—in particular, whether the parties must engage in expensive discovery before plaintiffs' claims will be addressed by the courts.

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Fifth Third Bancorp petitioned the Supreme Court to review two questions:

- Whether the Sixth Circuit erred by holding that plaintiffs were not required to plausibly allege in their complaint that the fiduciaries of an ESOP abused their discretion by remaining invested in employer stock in order to overcome the presumption that their decision to invest in employer stock was prudent, as required by ERISA and every other circuit court that has addressed the issue
- Whether the Sixth Circuit erred by holding that U.S. Securities and Exchange Commission (SEC) filings become actionable ERISA fiduciary communications merely by virtue of their incorporation by reference into plan documents

In granting *certiorari*, the Supreme Court limited its review to the first question. Notably, although the Office of the Solicitor General urged the Supreme Court to reformulate the first question to consider **whether a presumption of prudence should ever apply in employer stock cases**, the Supreme Court declined to do so, opting instead to accept the question as presented by Fifth Third.

Fifth Third sponsored a defined contribution plan that had required one investment option to be a fund that invested primarily in Fifth Third stock. Plaintiffs' consolidated class action lawsuit alleged that defendants violated their fiduciary duties under ERISA by (1) continuing to offer Fifth Third stock as a plan investment option

when it was imprudent to do so during the 2008 financial crisis, and (2) making misrepresentations by incorporating by reference allegedly false and misleading SEC filings into plan documents. The district court granted defendants' motion to dismiss, holding that the ESOP fiduciaries' decision to invest in employer stock was entitled to a presumption of prudence at the pleading stage. Because plaintiffs' complaint did not plausibly allege that Fifth Third's viability as a going concern was in jeopardy, the district court also found that the presumption of prudence was not overcome. The district court further held that the mere incorporation by reference of SEC filings into plan documents did not sufficiently state a claim for breach of fiduciary duty based on allegedly misleading statements or omissions in the underlying filings.

The Sixth Circuit reversed the district court's ruling on each ground. First, while acknowledging that a presumption of prudence attached to the fiduciaries' decision to invest in Fifth Third stock, the Sixth Circuit held that this presumption did not apply at the pleading stage—a ruling that conflicts with decisions by the U.S. Courts of Appeals for the Second, Third, Seventh and Eleventh Circuits. Second, the Sixth Circuit held that, unlike other circuit courts, it had not adopted a specific test for overcoming the presumption that required allegations that an employer face a "dire situation" an "impending collapse," or be on "the brink of bankruptcy." Third, the Sixth Circuit held that the incorporation of SEC filings by reference constituted a fiduciary act under ERISA and therefore was sufficient to impose liability under ERISA (a debatable ruling that the Supreme Court will not be reviewing).

For more information regarding the circuit courts' application of the presumption of prudence in employer stock cases brought under ERISA, click here.