

The Supreme Court recently released a decision of great importance in relation to tax-qualified retirement plans commonly known as employee stock ownership plans (ESOPs). The case is *Fifth Third Bancorp et al v. Dudenhoeffer et al.*, No. 12-571, June 25, 2014. The following are some highlights.

The main holding in this case relates to the mechanics of litigation. If an ERISA breach of fiduciary claim is filed against an ESOP trustee (or other plan fiduciary), the fiduciary does not have a "special presumption" that the holding of, or purchase of, employer securities is or was prudent. This will make it much harder for a fiduciary to get that type of claim dismissed quickly (i.e., based solely on the pleadings). Thus, this ruling is somewhat burdensome because it will most likely lead to lengthier, more costly litigation in regard to these types of claims.

Nevertheless, subsequent parts of the Supreme Court's ruling could be viewed as a bit more favorable for ESOP fiduciaries. In an attempt to provide a framework for the early dismissal of meritless fiduciary claims against ESOP fiduciaries, the Court stated that a complainant must plausibly allege an alternative action that the fiduciary could have taken, that would have been legal, and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the ESOP than help it. To that end, the Court gave the following guidance:

- If a stock is publicly traded, allegations that a fiduciary should have recognized on the basis of publicly available information that the market was overvaluing or undervaluing the stock are generally implausible, and thus insufficient to state a valid claim against the fiduciary.
- If a fiduciary is in possession of nonpublic information, the fiduciary is never required to act on, or to otherwise disclose, that information in a manner that would violate insider trading or other securities laws.
- A fiduciary also may have to consider whether any actions it may take in relation to ceasing employer stock purchases of and/or selling employer stock, might actually harm the ESOP via market adjustments.

At this time, it is not clear how the foregoing statements by the Court will affect the future of ESOP breach of fiduciary claim litigation. It is quite possible that in many cases, the foregoing statements of the Court will be beneficial to ESOP fiduciaries who seek a quick exit from stock-drop lawsuits.

Finally, while this case would appear to have a negative impact in regard to litigation matters where the employer stock in an ESOP is publicly traded, it is not clear what impact, if any, the foregoing statements of the Court may have on cases related to non-publicly traded employer stock.

For more information please consult a Squire Patton Boggs adviser listed below.

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