

Precedent-Setting ERISA Decision: Incorporating SEC Filings by Reference Into SPDs May Have Adverse Consequences, Says the Sixth Circuit

No federal circuit court had ever decided the fiduciary duty implications of incorporating SEC filings into an ERISA-mandated SPD – until now. *Dudenhoefer v. Fifth Third Bancorp*, Case No. 11-3012 (6th Cir. Sept. 5, 2012).

Dudenhoefer involved a defined tax qualified contribution retirement plan (sponsored by Fifth Third) in which participants made voluntary contributions (commonly referred to as a 401(k) plan). Plan participants could elect to have their plan accounts invest in a variety of mutual funds and collective funds as well as a Fifth Third stock fund. The plan did not, therefore, invest solely in Fifth Third stock, and plan fiduciaries could remove Fifth Third stock as an investment option. Certain plan participants sued, claiming that plan fiduciaries breached their fiduciary duties by continuing to invest in and hold Fifth Third stock despite its decline in value – 74 percent from July 2007 through September 2009. According to the plaintiffs, Fifth Third transitioned to being a subprime lender, its loan portfolio became increasingly at risk due to defaults, and it either failed to disclose the resulting damage to the company (and its stock) or provided misleading disclosures.

The district court dismissed the lawsuit, holding that the plan's Fifth Third stock fund was an employee stock ownership plan and, therefore, plan fiduciaries were entitled to a presumption that the Fifth Third stock fund investment was reasonable. The Sixth Circuit reversed. Relying on its precedent-setting decision earlier this year in *Pfeil v. State Street Bank & Trust Co.* (see our [report on the case](#)), the Sixth Circuit held that the plaintiffs stated a plausible claim that plan fiduciaries breached their duties under ERISA by maintaining significant investment in Fifth Third stock and continuing to offer it as a plan investment option when they allegedly knew or should have known that it was imprudent to do so.

Focusing on certain SEC filings incorporated by reference into the plan's Summary Plan Description (SPD), distributed by Fifth Third to plan participants, the Sixth Circuit held that the plaintiffs also stated a plausible claim that plan fiduciaries breached their duties by failing to provide plan participants with accurate and complete information about Fifth Third and the risks of investing in Fifth Third stock:

The Amended Complaint plausibly alleges Defendants breached their fiduciary duties by intentionally incorporating Fifth Third's SEC filings into the Plan's SPD and thereby conveying misleading information to Plan participants. ERISA requires the issuance of an SPD, but does not require the incorporation of a company's SEC filings into the SPD.

Although the district court held that the disclosure claim failed because the alleged misstatements and omissions were not made in a fiduciary capacity, the Sixth Circuit disagreed, stating that the district court's "conclusion is broader than its reasoning, which focused on the filing of SEC documents with the SEC, not on the decision of Defendants to incorporate those filings into the plan documents." The SPD is a fiduciary communication, and selecting the information to convey through the SPD is a fiduciary activity, according to the Sixth Circuit.

Ramifications

The plaintiffs will still have to prove their allegations, because the Sixth Circuit's decision essentially provides that the district court prematurely dismissed the case. But "stock-drop" litigation can be time-consuming, distracting and expensive if plaintiffs withstand a motion to dismiss, which is one reason why an early dismissal is so important. *Dudenhoefer* will make dismissal more difficult in some cases and may encourage companies to consider settling meritless claims.

Given the Sixth Circuit's decision, routinely incorporating SEC filings into an SPD is no longer prudent. If misrepresentations are contained in SEC filings and SEC filings are expressly incorporated by reference, tax-qualified retirement plan participants may have a basis to assert a breach of duty claim against plan fiduciaries. At the very least, potential incorporation of SEC filings into an SPD needs to be assessed and risks weighed.

If you have any questions regarding *Dudenhoefer* or related issues, please contact your principal Squire Sanders lawyer or one of the lawyers listed in this publication.

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