Bloomberg BNA

Pension & Benefits Daily™

The Impact of *Fifth Third Bancorp v. Dudenhoeffer*: Finally, a Court Gets it Right!

BY ERIN M. RILEY AND GRETCHEN S. OBRIST

ERISA company stock cases began in earnest with the spectacular collapses of companies such as Enron and WorldCom. Following the lead of these pioneering cases, numerous other company stock complaints were filed as accounting fraud and company mismanagement came to light in the early 2000s. A second big wave of company stock cases followed the disintegration in 2007 and 2008 of the business models of several large investment banking and other financial institutions, such as Bear Stearns, Washington Mutual, Merrill Lynch, and Countrywide, whose ''assets'' were linked to overvalued mortgage products. As these and other cases arising out of company mismanagement accompanied by breaches of fiduciary duty made their way through the courts, the ''presumption of prudence'' became the thorn in the side of company stock complaints, creating a barrier to relief for both what have been regarded as strong cases and weak ones.

This article discusses the background of company stock cases and the presumption of prudence. Then, it discusses the Supreme Court's holdings in *Fifth-Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 58 EBC 1405 (2014)(123 PBD, 6/26/14; 41 BPR 1360, 7/1/14), the first case in which the Supreme Court analyzed an Employee Retirement Income Security Act company stock case. Finally, the article discusses the impact of *Fifth-Third* on future company stock litigation.

Erin M. Riley (eriley@kellerrohrback.com) and Gretchen S. Obrist (gobrist@kellerrohrback.com) are attorneys in Keller Rohrback L.L.P.'s Complex Litigation Group in Seattle.

Presumption of Prudence under ERISA

This Labor Day marks the 40th anniversary of ERISA. The failure of the Studebaker automobile plant, and the accompanying termination of a pension plan that covered 11,000 autoworkers, is regarded as the impetus for the enactment of ERISA. The statute's overarching goal is the ''protection of employee retirement savings.'' ERISA provides: ''It is hereby declared to be the policy of this [Act] to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by . . . establishing standards of conduct, responsibility, and obligations for fiduciaries of employee benefits plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.''[1]

ERISA subjects fiduciaries to a duty of prudence. The statute provides that a fiduciary must ''discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries . . . (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.''[2] These are known as the fiduciary duties of loyalty and prudence, and they are regarded as ''the highest known to the law.''[3]

In order to state a claim for breach of the fiduciary duty of prudence, a participant must allege that (1) the fiduciary had a duty of prudence, (2) the fiduciary breached that duty; and (3) the participant suffered a loss as a result of that breach. In 1995, in *Moench v. Robertson*, 62 F.3d 553, 571, 19 EBC 1713 (3d Cir. 1995), the Court of Appeals for the Third Circuit judicially heightened this standard for employee stock ownership plan participants, holding that ''an ESOP fiduciary who invests the assets in employer stock is en-

[1] ERISA Section 2(b), 29 U.S.C. § 1001(b).

[2] ERISA Section 404(a), 29 U.S.C. § 1104(a).

[3] *Howard v. Shay*, 100 F.3d 1484, 1488, 20 EBC 2097 (9th Cir. 1996) (internal quotation omitted); *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8, 3 EBC 1417 (2d Cir. 1982).

titled to a presumption that it acted consistently with ERISA by virtue of that decision.'' The *Moench* court thus artificially imposed this requirement, which was found nowhere in the statute.

This ''presumption of prudence'' spread quickly throughout ERISA fiduciary-defendents' briefs and judicial opinions—well beyond the scope of *Moench* itself. For example, courts began to apply the presumption on motions to dismiss, even though *Moench* was decided on the merits.[4] Additionally, the *Moench* analysis concerned the balancing of tensions between ESOPs and encouragement of employee ownership of company stock on the one hand—and ERISA's purpose of protecting retirement savings on the other hand. Yet, many courts applied the presumption to *all* eligible individual account plans (''EIAPs''), not just ESOPs, including tax code Section 401(k) plans in which the primary purpose is retirement savings.

The Supreme Court's Holdings in *Fifth Third*

By the time the Supreme Court accepted *certiorari* in *Fifth Third*, seven other federal appellate courts had adopted some permutation of the presumption.[5] These courts, however, were divided as to what a plaintiff had to allege to overcome the presumption, and whether the presumption applied on a motion to dismiss. Six circuit courts held that the company must have been facing a dire financial situation, or the company's viability as a going concern was threatened.[6] Five circuit courts held that the presumption applied at the motion-to-dismiss stage.[7]

The Sixth Circuit departed from its sister circuits on both issues, holding that '' 'an ESOP plaintiff could ''rebut this presumption of reasonableness by *showing* that a prudent fiduciary acting under similar circumstances would have made a different investment decision.''' ''[8] In a holding that previewed the Supreme Court's own decision, the Sixth Circuit said that ''this unembellished standard makes sense—not just because it closely tracks the statutory language of § 404(a)(1)(B)—but also because that language imposes identical standards of prudence and loyalty on *all* fiduciaries, including ESOP fiduciaries.'' Additionally, the Sixth Circuit reaffirmed its prior holding that the presumption was an evidentiary principle that concerned questions of fact, and did not apply on a motion to dismiss.

In light of the differences among the appeals courts, the Supreme Court granted the *Fifth Third* fiduciaries' petition for *certiorari* on Dec. 13, 2013.

On June 25, 2014, the Court issued its opinion, which is divided into two parts: (1) the rejection of the presumption and (2) guidelines for pleading claims.

To begin, the Court held that ERISA ''does not create a special presumption favoring ESOP fiduciaries.''[9] The Court continued, ''[r]ather, the same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries.'' The Court's holding is straightforward and grounded in the text of ERISA: ''because ESOP fiduciaries are ERISA fiduciaries and because § 1104(a)(1)(B)'s duty of prudence applies to all ERISA fiduciaries, ESOP fiduciaries are subject to the duty of prudence just as other ERISA fiduciaries are.'' Having cast aside the fiduciary-defendants' core argument for an extra-textual presumption in their favor, the Court addressed their specific arguments in turn, rejecting each of them.

First, the Court rejected the fiduciary-defendants' argument that the purpose of an ESOP is so different from ''ordinary'' plans in that ESOPs not only seek to maximize retirement savings and avoid excessive risk but also seek to ''promote employee ownership of employer stock.'' In dispensing with this logic, the Court rejected the fiduciary-defendants' reliance on plan documents that purport to alter ERISA's protective priorities and statutory duties. The ''enterprise'' of which ESOP fiduciaries are part is the same as all other ERISA fiduciaries: protecting retirement savings and defraying expenses. The Court was crystal clear on this critical point that fiduciary-defendants have been resisting for years: ''the duty of prudence trumps the instructions of a plan document.''[10]

Second, the Court rejected a related argument by the fiduciary-defendants—that under the common law of trusts, prudence standards can be relaxed or waived. ERISA, unlike the common law of trusts, cannot be waived by an ERISA plan settlor, because the ''common-law 'deviation doctrine' '' does not apply to statutory duties.

Third, the Court addressed the ''insider trading'' argument commonly advanced by fiduciary-defendants, holding that though this ''concern is a legitimate one,'' a presumption of prudence is ''an ill-fitting means of addressing it.'' Instead, the Court addressed this issue in its subsequent discussion about pleading meritorious company stock cases.

[4] *Moench*, 62 F.3d at 572 (reversing summary judgment for defendants on presumption issue, and remanding to trial court ''for further proceedings in which the record may be developed and the case may be judged on the basis of the principles we set forth'').

[5] *See In re Citigroup ERISA Litig.*, 662 F.3d 128, 51 EBC 1737 (2d Cir. 2011)(203 PBD, 10/20/11; 38 BPR 1961, 10/25/11); *Edgar v. Avaya, Inc.*, 503 F.3d 340, 41 EBC 2249 (3d Cir. 2007)(187 PBD, 9/27/07; 34 BPR 2365, 10/2/07); *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 43 EBC 2281 (5th Cir. 2008)(82 PBD, 4/29/08; 35 BPR 1034, 5/6/08); *Kuper v. Iovenko*, 66 F.3d 1447, 19 EBC 1969 (6th Cir. 1995); *White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 55 EBC 1918 (7th Cir. 2013)(77 PBD, 4/22/13; 40 BPR 1003, 4/23/13); *Quan v. Computer Scis. Corp.*, 632 F.3d 870, 49 EBC 2642 (9th Cir. 2010)(189 PBD, 10/1/10; 37 BPR 2187, 10/5/10); *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 53 EBC 1261 (11th Cir. 2012)(89 PBD, 5/9/12; 39 BPR 947, 5/15/12).

[6] The Second, Third, Fifth, Seventh, Ninth and Eleventh Circuits had held that an ERISA company stock plaintiff must allege that the company faced a ''dire situation'' financially, *Edgar*, 503 F.3d at 348, or that the company's ''viability as a going concern was . . . threatened,'' or its ''stock was in danger of becoming essentially worthless,'' *Kirschbaum*, 526 F.3d at 256. Under that view, the ''presumption is very difficult to overcome.'' *Rinehart v. Akers*, 772 F.3d 137, 148, 57 EBC 1220 (2d Cir. 2013)(136 PBD, 7/16/13; 40 BPR 1777, 7/23/13).

[7] The Second, Third, Fifth, Seventh and Eleventh Circuits have applied the presumption on the pleadings.

[8] *Dudenhoeffer v. Fifth Third Bancorp*, 692 F.3d 410, 418, 53 EBC 2842 (6th Cir. 2012) (quoting *Pfeil v. State Street Bank & Trust Co.*, 671 F.3d 585, 592-93, 52 EBC 1641 (6th Cir. 2012)(35 PBD, 2/23/12; 39 BPR 411, 2/28/12)(quoting *Kuper*, 66 F.3d at 592-93) (emphasis added in *Pfeil*)).

[9] *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2467, slip op. at 8 (2014).

[10] *Id.* slip op. at 11.

Fourth, the oft-raised specter of the demise of retirement savings plans—a favorite of the defense bar in seeking to dismiss all manner of ERISA claims, not just company stock cases—was rejected by the Court as inadequate justification for a presumption: ''The proposed presumption makes it impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious, unless the employer is in very bad economic circumstances. Such a rule does not readily divide the plausible sheep from the meritless goats.'' Instead, the Court held that the facts and context of each individual complaint matter a great deal and they—not a made up standard that contradicts ERISA—should be the basis for determining plausibility.

The Court then went on to set out pleading guidelines for evaluating company stock complaints. For claims based on *public information* that the stock was over- (or under-) valued, the Court held that absent ''special circumstances affecting the reliability of the market price,'' there is no need for fiduciaries to second guess the market price of securities. Importantly, the Court's ''special circumstances'' discussion goes to whether a stock is properly valued, not to other considerations of whether it is prudent regardless of the price. As discussed below, overvaluation is only one way a stock can be imprudent, and the *Fifth Third* opinion unquestionably grew out of a case where overvaluation was the central allegation going to imprudence.

For claims based on *nonpublic information* that a fiduciary should have (1) sold overvalued stock, (2) refrained from future purchases, or (3) publicly disclosed inside information to allow continued purchases after a price correction, the Court held that the duty of prudence does not require a fiduciary to violate the securities laws (which is something plaintiffs have never advocated and have maintained was unnecessary to comply with ERISA). In addition, a court must consider whether the fiduciary could have stopped purchasing additional stock, or disclosed adverse nonpublic information without doing ''more harm than good'' to the company stock fund. It is notable that the Supreme Court said as part of its discussion of nonpublic information that it had not been advised of the position of the Securities and Exchange Commission on matters of compliance with securities laws. Yet, as discussed below, the federal government's position (which one would expect to encompass the SEC's position) was laid out in its amicus brief in *Fifth Third*. What's more, the Department of Labor had expressed specific and similar views 12 years before in the company stock case against Enron. In short, the federal government's view consistently has been that compliance with ERISA does not conflict with the securities laws and there are a range of actions that fiduciaries can take to comply with both.

The Impact of *Fifth Third*

Following *Fifth Third*, both prudence claims and loyalty claims remain not just viable, but robust. The facts will continue to drive what makes a good case in the ERISA company stock case landscape illuminated by *Fifth Third*.

Prudence Claims

Turning first to claims for breach of the fiduciary duty of prudence, we see three different ''strands'' after *Fifth-Third*.

What To Do with Publicly Available Information About Overvalued Stock. First, based on *publicly available information*, plaintiffs can allege that fiduciary-defendants breached their duties by failing to:

- halt the purchase of additional company stock in the plans; and/or
- divest the plans of company stock.

Public information can therefore be the basis for both significant purchaser and holder damages. The remedy flows from comparing the stock price at the time the purchase halts or divesting sales should have occurred (the beginning of the damages period) and the time those actions did occur, if at all (the end of the damages period). The ''special circumstances'' that the Supreme Court envisioned for such cases remain undefined, and undoubtedly will be subject to a facts and circumstances test that will have to be sorted out by the lower courts. Examples of ''special circumstances'' that may suffice to render a market ''inefficient'' will be tested in ongoing litigation and new cases—such as business models that are entrenched in alarming and known high-risk activities or that have a track record of relying on inflated asset values that translate into overvalued stock. Other examples will likely involve catastrophes at a particular company that—though they may not stir the market to correct an inflated stock price—would concern a prudent investment fiduciary.[11]

What To Do with Nonpublic Information About Overvalued Stock. Second, based on *nonpublic information*, plaintiffs can allege that fiduciary-defendants breached their duties by failing to:

- make appropriate disclosures to co-fiduciaries, plan participants, and the public; and/or
- halt the purchase of additional company stock in the plans; and/or
- divest the plans of company stock after making public disclosures (*i.e.*, converting nonpublic information into publicly available information, after which no risk of insider trading exists).

None of these actions will violate securities laws.

Regarding the first option, a *disclosure* that converts nonpublic information into publicly available information is not going to violate the securities laws. Further, to the extent securities laws are relevant to disclosure timing, and for purposes of determining when disclosures should have occurred, such disclosures can be synchronized with the timing and content of SEC-mandated disclosures that should have or did occur. Special disclosures—via press releases or other mechanisms outside of SEC-mandated/timed disclosures—are

[11] One commentator has asserted that '' 'special circumstances' cannot be found from public information.'' James P. Baker, *Dude, Where's My ERISA Presumption of Prudence?* (147 PBD, 7/31/14; 41 BPR 1616, 8/5/14). This conflates two ideas and overstates the Supreme Court's holding. What the Supreme Court said was that alleging that the *market price was wrong* cannot be supported by public information alone. But the Court did not say that *special circumstances* themselves—which would require a fiduciary to act despite the fact that public information is incorporated into the market price—cannot be found from public information. Where these circumstances can be found or what they can be based upon has yet to be determined by any court.

also an option. As the government argued in its *amicus* brief to the Supreme Court in *Fifth Third*, fiduciaries can ''publicly disclose the information to the market that brings the price of the employer stock in line with its value, cease further purchases of the stock, or both.''[12] The government explained that the ''fiduciary can also alert the proper regulatory agencies, such as the Securities and Exchange Commission (SEC) or the Department of Labor, to any alleged misstatements in securities filings. Those courses do not violate the securities laws,'' the brief said.

As for the second option, *halting purchases* will not violate securities laws either, even where a sale or purchase would do so. Indeed, the federal government's longstanding position has been that *abstaining* from purchases or sales by an ERISA fiduciary is entirely consistent with the ban on insider trading.[13] This is because the ''securities rules do not require an individual never to make any decision based on insider information,'' the brief said. Courts have already recognized these permissible courses of action.[14]

Regarding the third option (divesting the plans of company stock), once the relevant nonpublic information is *made public, divesting* a plan of company stock is no different than doing so because of other publicly available information, as discussed above. Fiduciaries are at no risk of insider trading if they first disclose.

It seems that two intertwined principles inform the Supreme Court's concern with what can be done with nonpublic information: (1) a fiduciary should do less harm than good and (2) a fiduciary cannot function if conflicted. Both can be resolved through compliance with ERISA and without violating securities laws.

Nonpublic Information: Do Less Harm Than Good. The Supreme Court held in *Fifth Third* that disclosures and purchase halts are only required if a prudent fiduciary in like circumstances would not have viewed that action as ''more likely to harm the fund than to help it.'' One concern expressed by the Supreme Court with both disclosures and purchase halts is signaling to the market information that will cause a stock drop (or more aptly described, a price correction). However, it is difficult to see how a correction to a true (or ''efficient'') stock price is ''harm''—because no one is entitled to the benefit of overpriced stock. Further, as the government pointed out in its amicus brief, the correction of inflated stock to an appropriate price is likely to be the same *or less severe* than a delayed correction—''potentially months or years later, after even more of the employees' retirement saving have been invested in the overpriced assets.''[15] The same concern applies not just to purchasers but also to holders whose losses could be mitigated by an earlier disclosure. An appropriately timed disclosure or purchase halt by a prudent fiduciary—even one that signals loud and clear a problem to the market—will cause less harm than the alternative, and therefore will do *less* harm than good, by mitigating the inevitable (and greater if later) ''loss'' in an inflated stock price.

Moreover, we must assume that the truth eventually will come out. When that happens, an overpriced stock *will* drop. That means that the fiduciary has to act, sooner rather than later. Neither the law of ERISA nor the larger system of justice in which it is applied can tolerate the notion that a fiduciary with knowledge about an investment's imprudence should hide it or keep it to him- or herself in a cover-up effort that essentially allows the fiduciary to stand idly by and pretend he or she knows nothing pertinent while investments for which the fiduciary is responsible are at risk and the fiduciary continues on in a conflicted role. Once a fiduciary *knows* something, he or she must *do* something: investigate, tell the other fiduciaries, step down if conflicted, and/or act to prevent a future calamity that will be much worse than perceived ''harm'' to the monetary value of the fund at the time action must be taken to comply with ERISA. Of course the fiduciary cannot do anything that will violate insider trading laws in taking action, but as the government has made clear, while the securities laws may restrict ''the range of options that an ESOP fiduciary who is also a corporate insider may have available'' to fulfill his or her obligations under ERISA, the securities laws do not leave the fiduciary ''without options''—as noted above, the fiduciary ''can publicly disclose information to the market that brings the price of the employer stock in line with its value, cease further purchase of the stock, or both. . . . [as well as] alert the proper regulatory agencies, such as the [SEC or DOL], to any alleged misstatements in securities filings. Those courses do not violate the securities laws.''[16] The fiduciary can also divest the plan of company stock after making such disclosures. To ignore their fiduciary duties when they can fulfill them while also complying with securities laws is to do *more* harm than good.

Of course, the ''more harm than good'' standard will be a fact-specific inquiry, and its ability to be resolved at the motion to dismiss stage is dubious. One thing is clear though: it will be in the best interests of participants to mitigate a stock drop or correction where a small drop today will be less than a worse drop if breaching fiduciaries do nothing at all. To do less harm than good, the fiduciaries must do something, not nothing.

---

[12] Brief for the United States as Amicus Curiae Supporting Respondents, *Fifth Third v. Dudenhoeffer*, No. 12-751, at 28 (U.S. March 2014).

[13] Amended Brief of the Secretary of Labor as Amicus Curiae Opposing the Motions to Dismiss, *Tittle v. Enron Corp.*, No. 01-3913, at 24-26 (S.D. Tex. Aug. 30, 2002).

[14] *See, e.g.*, *Harris v. Amgen, Inc.*, 738 F.3d 1026, 1041-42 (9th Cir. 2013), *cert. granted, judgment vacated sub nom. Amgen Inc. v. Harris*, 134 S. Ct. 2870 (U.S. 2014) (''If defendants had revealed material information in a timely fashion to the general public (including plan participants), thereby allowing informed plan participants to decide whether to invest in the Amgen Common Stock Fund, they would have simultaneously satisfied their duties under both the securities laws and ERISA. . . . Alternatively, if defendants had made no disclosures but had simply not allowed additional investments in the Fund while the price of Amgen stock was artificially inflated, they would not thereby have violated the prohibition against insider trading, for there is no violation absent purchase or sale of stock.'') (internal citations omitted); *Kopp v. Klein*, 722 F.3d 327, 340, 56 EBC 2757 (5th Cir. 2013), *cert. granted, judgment vacated*, 134 S. Ct. 2900 (U.S. 2014) (133 PBD, 7/11/13; 40 BPR 1733, 7/16/13) (''While individuals with access to inside information may not trade on that information, ceasing making new investments in stock because of access to inside information is not barred by insider trading laws.'').

[15] Br. for United States, *Fifth Third*, at 29; *accord* Br. of Dep't of Labor, *Tittle*, at 27-28.

[16] Br. for United States, *Fifth Third*, at 28 (internal citations omitted).

Nonpublic Information: Eliminate Conflicts of Interest. Many times a fiduciary is also a corporate insider with loyalties running in different directions. The solution to this dilemma is not to exalt securities laws above ERISA by allowing the person occupying a conflicted fiduciary role to make matters worse by obeying one set of obligations to the detriment of the other. The conflict must be eliminated if it cannot be resolved.

One action that employers can take that would eliminate the risk of acting on inside information is to hire an outside independent fiduciary to be an ESOP's investment fiduciary, who is then monitored by a fiduciary in the company who is ''not likely to know material inside information'' but who can keep the independent fiduciary up to date on pertinent information needed to make sound investment decisions in the participants' best interests.[17] As long as fiduciaries do not use such a mechanism to hide information or engage in a cover-up—which would be a conflict of interest and breach of loyalty—this structure ensures a variety of fiduciaries will have their eyes on the prudence of investments and can take appropriate action, including communicating with each other.

Further, there is a fiduciary duty to stay vigilant and take appropriate steps at all times. If fiduciaries are conflicted because they have inside information that makes clear to them that an investment is imprudent, yet they do not disclose it because of their corporate obligations, they must step down as fiduciaries and simply cannot continue in that role. It is well understood that a fiduciary can often wear two ''hats''—but not at the same time. If the nonfiduciary hat will not yield, the fiduciary hat must go to a fiduciary who can wear it and keep it on when the wind picks up in whatever corporate storm is brewing. ERISA applies no matter the weather.

Available Relief for Prudence Violations Based on Inside Information. We see two different types of relief arising from the purchase halts and disclosures the Supreme Court recognized as a viable path for fiduciaries who have inside information, the latter of which convert nonpublic information into publicly available information and pave the way for divesting as well. First, similar to a securities fraud case, plaintiffs can seek the losses to the plan's company stock fund between when the disclosures or purchase halts should have been made and when they actually were made, if at all. Damages for belated (or nonexistent) disclosures will flow both to holders (the savings on the smaller drop they would have faced had fiduciaries acted at the right time) and purchasers (the savings on purchases they shouldn't have made). Second, disclosures may not be enough. Where a prudent fiduciary would have divested the plans of company stock right after a properly-timed disclosure, additional damages will be available. Where the fiduciaries should have made disclosures and then divested the plans of company stock, plaintiffs can seek losses for the difference between the price when the disclosure/sale should have occurred and the price when these actions actually occurred, if at all.

What To Do with Other Prudence Concerns About Arguably Properly Priced Stock. The third ''strand'' of cases after *Fifth Third* involves facts that were not before the Supreme Court: a stock that has not been alleged to be overpriced, yet is risky or imprudent in some other way. Accordingly, practitioners should bear in mind that the focus of *Fifth Third* was *overvalued* stock—not other independent factors that may equate to imprudence. A properly valued stock (*i.e.*, one that may be at an ''efficient'' market price) can still be so risky that it is imprudent and must be divested. Consider a company that is so thinly traded that divesting for any reason would be difficult. A prudent fiduciary would not invest in a stock that could not be easily sold, even if the price was correct. Consider as well a company (*e.g.*, Enron) that makes a disclosure about accounting fraud that causes a correction, yet the company still harbors so many unknowns that it is impossible to verify its true value and its risk as an investment is too high.

Many of the cases litigated in this realm have involved incremental corrections; even with full corrections, the stock in these companies would not have been a sound investment. The fact that a stock is traded on the exchanges—or that the market has set it at a reasonable or ''efficient'' price—does not necessarily mean that a prudent fiduciary would buy or hold it. If it is a gamble, it is a gamble, and fiduciaries are not supposed to gamble.

The Future of Prudence Claims and Compliance. In this post-*Fifth Third* landscape, the ''best'' cases will have strong allegations of fraud or a misleading characterization of the company's business model and/or accounting practices, which lead to artificial inflation of stock, such that the market price is not correct. These cases would be strong for both purchaser and holder damages. It is important to note that holder damages are still available after *Fifth Third* and will flow from a fact and context-specific analysis of the timing and type of actions that would have been taken by a prudent unconflicted fiduciary. As before, plaintiffs should not bring claims for small stock drops with immediate rebounds, because they suggest there was only a market fluctuation without real fraud or undue stock price inflation.

Other strong prudence cases will involve situations where the company stock is so risky that it is imprudent, regardless of whether the stock is accurately priced by the market. Here too, both purchaser and holder damages will be available.

Aside from the litigation impact, a plan administration change is likely—at least where fiduciaries are paying adequate attention to their fiduciary duties before they do something that will expose them to litigation risk. For example, fiduciaries may focus more on procedural prudence—*i.e.*, monitoring of the stock fund—by comparing it to benchmarks and analyzing the fund as an investment, as well as hiring independent fiduciaries, investment advisors and law firms to ensure compliance with ERISA.

Loyalty Claims

Some types of claims typically raised in company stock litigation remain unchanged after *Fifth Third*. For example, affirmative misrepresentation claims are routinely included in ERISA complaints involving allegations that a stock's price was artificially inflated. If fiduciaries—who are often high level executives—mislead participants by touting the company's stock as a good investment when they know that it is not, that is

[17] *See* Br. for United States, *Fifth Third*, at 30-31.

a breach of ERISA's duty of loyalty. As the Supreme Court held in *Varity Corp. v. Howe*, 516 U.S. 489, 506, 19 EBC 2761 (1996), ''[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA.'' (alteration in original) (internal quotations omitted). The concerns articulated by the Supreme Court in *Fifth Third* regarding use of insider information have no bearing on fiduciaries' independent duty *not to lie* to participants and beneficiaries about the health of the company—which implicates the value of company stock. It cannot be a violation of the securities laws to *refrain from misleading* plan participants about the propriety of investing in company stock.

The duty of loyalty also includes an affirmative duty to provide information that a plan participant ought to have in order to make informed decisions. Circuit courts have held that this duty exists regardless of whether a participant asks questions and it includes a duty to provide necessary information when the fiduciary knows or should know that silence may be harmful.[18] It is essentially this disclosure duty that the Supreme Court in *Fifth Third* addressed when it considered when such a voluntary disclosure would not be required because it would violate the securities laws or cause ''more harm than good.'' Just as it is not ever going to be a violation of the securities laws to *refrain* from purchasing stock or to *disclose* to the SEC or DOL, it is not ever going to be a violation of the securities laws to *refrain* from touting stock as prudent when it is just the opposite—risky and overvalued—or to *disclose* to participants and the market important information about a company's stock. Volunteering the truth is an ERISA duty that can be met in compliance with the securities laws.

Finally, where a conflicted fiduciary fails to take proper action once it has knowledge that a stock is imprudent, including continuing on in a conflicted role, that is a breach of loyalty actionable under ERISA. For example, if a fiduciary can make a disclosure that complies with the securities laws and protects the participants and beneficiaries from investing in or holding imprudent stock, but does not do so because of competing corporate loyalties, the fiduciary has put his or her own interests and/or those of the company above the interests of the participants and beneficiaries to whom he or she owes fiduciary loyalty. Such claims were available before *Fifth Third* and they still are.

Conclusion

The Supreme Court got it right about the ''presumption of prudence''—once and for all doing away with this judicial creation and bringing the focus back to the text and purpose of ERISA. With this new guidance, lower courts will be able to assess the plausibility of ERISA company stock claims through a lens that has been cleared of the notion that ESOP fiduciaries are any different than other ERISA fiduciaries and they can instead assess the facts alleged as they relate to the statute itself—and its enduring core duties of prudence and loyalty.

---

[18] *E.g.*, *Kalda v. Sioux Valley Physician Partners, Inc.*, 481 F.3d 639, 644, 40 EBC 1573 (8th Cir. 2007)(61 PBD, 3/30/07; 34 BPR 808, 4/3/07) (finding ''duty to inform when [fiduciary] knows that silence may be harmful . . . [A fiduciary] cannot remain silent if it knows or should know'' participant ''is laboring under a material misunderstanding of plan benefits.''); *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300-01, 17 EBC 1934 (3d Cir. 1993) (same); *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1403, 19 EBC 2051 (9th Cir. 1995) (''A fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance, even when a beneficiary has not specifically asked for the information.''); *Wayne v. Pac. Bell*, 238 F.3d 1048, 1055 (9th Cir. 2001) (''The fiduciary duty not to deceive plan participants and beneficiaries exists at all times . . . .''); *Killian v. Concert Health Plan*, 742 F.3d 651, 57 EBC 1763 (7th Cir. 2013)(217 PBD, 11/8/13; 40 BPR 2626, 11/12/13) (quoting *Kenseth v. Dean Health Plan, Inc.*, 610 F.3d 452, 466, 49 EBC 1652 (7th Cir. 2010)(124 PBD, 6/30/10; (37 BPR 1541, 7/6/10) (holding in case involving oral misrepresentations, ''once an ERISA beneficiary has requested information from an ERISA fiduciary who is aware of the beneficiary's status and situation,'' this duty attaches, applying even to ''*information about which the beneficiary did not specifically inquire.*'')).

