February 2, 2016

The Supreme Court Reaffirms That Plaintiffs in ERISA Stock Drop Cases Have Two Big Hurdles

By Sheila Ninneman

In a second reversal of *Amgen Inc., et al. v. Steve Harris, et al.* out of the Ninth Circuit Court of Appeals, the United States Supreme Court echoed its decision in *Fifth Third v. Dudenhoeffer*, 134 S.Ct. 2459 (2014) regarding the standard for an allegation of the breach of the duty of prudence in stock drop cases. In *Fifth Third*, which involved an ESOP, the Court held that in order to successfully allege a breach of fiduciary duty by employer-fiduciaries, employee-stockholders must set forth facts in their complaint that (1) "plausibly allege an alternative action that the [employer-fiduciaries] could have taken that would have been consistent with the securities laws" and (2) that "a prudent fiduciary in the same circumstances would not have viewed [the alternative] as more likely to do harm than good" to the employer stock fund. It is no longer enough to allege that because the value of employer stock dropped, the employer-fiduciaries automatically breached their duty of prudence by continuing to invest in that stock.

(1) "plausibly allege an alternative action that the [employer-fiduciaries] could have taken that would have been consistent with the securities laws" and (2) that "a prudent fiduciary in the same circumstances would not have viewed [the alternative] as more likely to do harm than good" to the employer stock fund.

The *Amgen* case first arose in 2013 when the Ninth Circuit reversed the district court's decision to grant a motion to dismiss filed by the employer-fiduciaries. The fiduciaries had relied on the *Moench* presumption of prudence in connection with their continuing investment of plan assets in an employer stock fund. The Amgen employer-fiduciaries filed a petition for a writ of certiorari, which was granted by the Court in consideration of its 2014 decision in *Fifth Third*, which held that employer-fiduciaries are not entitled to the *Moench* presumption, but are subject to the same ERISA duty of prudence as any other ERISA fiduciary, apart from the duty to diversify. On remand for the second time, the Ninth Circuit reversed the district court's decision again, ultimately explaining that the *Amgen* plaintiffs' complaint satisfied the Court's holding in *Fifth Third*. The Ninth Circuit stated that because applicable securities laws require disclosure of material information impacting stock value, it was "plausible" that removing the employer stock fund as an investment option would not cause undue harm to plan participants. The *Amgen* employer-fiduciaries filed a second petition for writ of certiorari, and the Court granted it.

In reversing the Ninth Circuit's second decision, the Court held that the complaint of the *Amgen* employee-stockholders was not subjected to assessment under the second part of the standard announced in *Fifth Third*. The Court stated that the Ninth Circuit failed to consider whether the complaint plausibly alleged that a prudent fiduciary in the same circumstances would have concluded that the alternative action of removing the employer stock fund from the plan's investment options would not do more harm than good.

The Takeaway

Although employer-fiduciaries can no longer rely on the *Moench* presumption of prudence to weed out meritless claims, in *Amgen*, the United States Supreme Court has made it clear that it is not backing away from the high standard it set in *Fifth Third*. Employee-stockholders who allege that continuing to invest in employer stock that is losing significant value is a breach of the duty of prudence must allege facts that speak to both prongs of the new standard: an alternative to continuing to invest that will not violate securities laws, and that a prudent fiduciary in the same position would conclude that the alternative would at least break even on the harm versus good scale. The result may be that employer-fiduciaries will not need a tool like the *Moench* presumption, because they will never be brought to court where claims for a breach of the duty of prudence in stock drop cases is now much more difficult to successfully allege.