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BLOG

eLunch/Webcast – Another Liability Risk for Officers and Directors

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As my colleagues, Mike Melbinger and Steve Flores, recently blogged and blasted (respectively), the U.S. Supreme Court, in *Fifth Third Bank Corp. v. Dudenhoeffer*, rejected a widely accepted presumption of prudence favoring fiduciaries of qualified retirement plans that are designed to invest primarily in employer stock. As you may recall, the *Dudenhoeffer* plaintiffs alleged that, in 2007, Fifth Third and several officers breached their fiduciary duties to the Fifth Third employee stock ownership plan, or “ESOP,” because they knew or should have known that Fifth Third’s stock was overvalued and excessively risky. The plaintiffs alleged that Fifth Third and the ESOP fiduciaries should have taken a number of steps to prevent the ESOP from overpaying for employer stock that eventually lost 74% of its value between 2007 and 2009. Before *Dudenhoeffer*, all but one Federal Court of Appeals had adopted the so-called “Moench presumption” (a presumption of prudence) in favor of the fiduciaries, and nearly all of these plaintiffs’ cases failed. *Dudenhoeffer* expressly rejects the Moench presumption, **opening the door for a new wave of class action lawsuits (and for some plaintiffs to restart their earlier rejected cases)**.

This decision has led to some rethinking about the monitoring policies and procedures in place for ESOPs and plans with company stock funds. Now, it is more important than ever that plan sponsors and fiduciaries follow the administration and participant communication best practices and plan design strategies that we have described in the past. Moreover, *Dudenhoeffer* has liability implications for officers and directors at every company that makes company stock available as an investment option in its 401(k) Plan or that maintains an ESOP.

A little over a decade ago, when most public companies included a company stock fund investment option in their 401(k) plans or sponsored an ESOP, the plaintiffs’ class action bar began suing ERISA plan fiduciaries, which almost always included officers and directors, for breaches of their fiduciary duties of prudence and loyalty when the company’s stock price declined. There are specific steps that companies sponsoring ESOPs or that have company stock funds in their 401(k) plans should take to revise their plan documents and procedures in light of *Dudenhoeffer*. Some of the strategies we had devised before the *Dudenhoeffer* decision are still valid today (and many companies have yet to take these steps). On August 14, 2014, we will be hosting a webcast on action items that companies can take to reduce the risk of these lawsuits – or at least the risk that these lawsuits will target officers and directors. Click here for the invitation you can use to sign up for this webcast. We hope you’ll join us!

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