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BLOG

Reverse Stock Drop Case Another Log on Fiduciary Fire

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The single hottest topic in benefits right now is fiduciary liability, and we here at Winston & Strawn LLP know the plaintiff attorneys are paying attention. Last week, we blasted yet again about the recent Supreme Court case, *Fifth Third Bancorp. v. Dudenhoeffer*, which rejected the widely accepted presumption of prudence favoring fiduciaries of qualified retirement plans that are designed to invest primarily in employer stock.

If the Dudenhoeffer case were not news enough, last week the Fourth Circuit in *Tatum v. RJR Investment Committee, No. 13-1360 (4th Cir. Aug. 4, 2014)* ruled against a plan sponsor in a "reverse stock drop" case (that is, a case in which the plan sponsored is sued for eliminating a company stock fund when the value of the stock is low, thereby depriving participants of enjoying the stock's recovery in value). The plaintiffs alleged that RJR breached its fiduciary duties by liquidating two company stock funds held by the plan on an arbitrary timeline without conducting a thorough investigation, thereby causing a substantial loss to the plan. The district court had ruled in favor of RJR despite its cursory review of the timing because a reasonable and prudent fiduciary *could* have made the same decision after performing a proper investigation. The Fourth Circuit reversed and remanded the case back to the District Court "to review the evidence to determine whether RJR met its burden of proving by a preponderance of the evidence that a prudent fiduciary *would* have made the same decision (Emphasis added.)."

In the majority's view (and that of the Department of Labor), the *could* standard "would diminish ERISA's enforcement provision to an empty shell if we permitted a breaching fiduciary to escape liability by showing nothing more than the mere possibility that a prudent fiduciary 'could have' made the same decision. As the Secretary of Labor notes, this approach would 'create too low a bar, allowing breaching fiduciaries to avoid financial liability based on even remote possibilities.'" But in a strongly worded dissent, Fourth Circuit Judge Wilkinson argued that the *would* standard, instead of safeguarding ERISA participants, will only contribute to a climate of second-guessing that will drive up plan administration and insurance costs.

We will continue to monitor these issues, and in the meantime we are happy to discuss the strategies we use with fiduciaries to comply with their duties under ERISA and to avoid unnecessary litigation.

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