March 29, 2013

U.S. Supreme Court Invites Solicitor General's Views on Whether to Grant Review of Case Addressing Two Key Issues in ERISA Fiduciary Duty Claims

By Paul Flum and Raymond M. Hasu

On March 25, 2013, the U.S. Supreme Court invited the U.S. Solicitor General to express its views on whether the Court should grant a *certiorari* petition in *Dudenhoeffer v. Fifth Third Bancorp*, et al., No. 12-751. Although the Court did not grant review at this time, the Court's order signaled a significant interest in the case. If the Court grants the petition, it will consider two key issues that regularly arise in lawsuits based on the fiduciary duty provisions of the Employee Retirement Income Security Act ("ERISA"): (1) whether, in assessing the pleading sufficiency of a complaint, fiduciaries of an employee stock ownership plan ("ESOP") that permits investment in company stock are entitled to a presumption that they have acted lawfully; and (2) whether a plaintiff may sue under ERISA for alleged misrepresentations in SEC filings that have been incorporated by reference into communications with plan participants.

The Court's resolution of the petition for *certiorari*—and its potential consideration of the issues presented—bears watching by officers, directors, and employees whose responsibilities regarding a company retirement plan may expose them to a fiduciary duty claim under ERISA.

THE PRESUMPTION OF REASONABLENESS

ERISA imposes a "prudent person" standard of care on plan fiduciaries. To comply with that standard, a fiduciary must act "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."

In applying the "prudent person" standard to cases involving investment in employer stock, courts have increasingly applied a deferential presumption of reasonableness (or presumption of prudence, as it is sometimes called). To rebut this presumption, a plaintiff must establish that the decision to allow such investment was an abuse of discretion. Courts have set forth various guidelines for how this standard may be met. In the Ninth Circuit, for example, a plaintiff must show that the company's viability was in jeopardy or was subject to serious mismanagement. In the Third Circuit, a plaintiff must show that the company faced a dire situation. The presumption of reasonableness is intended to strike a balance between ensuring responsible management of company retirement plans, on the one hand, and encouraging the adoption of plans that link employee compensation to the company's success, on the other.

The presumption of reasonableness was first articulated by the Third Circuit in *Moench v. Robertson*, which applied the presumption to a motion for summary judgment. Since then, numerous courts—including the district court in *Fifth Third Bancorp*—have applied the presumption at the pleading stage, requiring plaintiffs to allege

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facts that, if proven, would establish that investment in company stock was an abuse of discretion. As a result, the presumption has become a valuable defense for parties facing ERISA fiduciary duty claims based on such investments.

ALLEGED MISREPRESENTATIONS IN SEC FILINGS

A threshold issue in ERISA fiduciary duty cases is the fiduciary status of the defendant. Where a defendant allegedly breached his fiduciary duty by making false or misleading statements to plan participants, the plaintiff must show that the statements reflected the exercise of discretionary authority over the plan.

SEC filings, by themselves, are not actionable under ERISA because they are made by corporate officers and directors acting in their corporate—rather than fiduciary—capacities and are directed to the investing public as a whole, not plan participants. But sometimes SEC filings will be wholly or partially incorporated by reference into communications with plan participants, such as summary plan descriptions (“SPDs”). In this scenario, plaintiffs will frequently argue that representations in the SEC filings, to the extent incorporated by reference into the plan communications, are fiduciary acts subject to ERISA.

Many courts have rejected this argument, holding that SEC filings remain corporate acts even when incorporated into plan communications. And, because this issue is typically not fact-sensitive, it has frequently been raised with success by defendants at the pleading stage.

THE *FIFTH THIRD BANCORP* CASE

The plaintiffs in this case were participants in a defined contribution retirement plan offered by Fifth Third Bancorp, a financial services company. The plan offered 20 investment options, including a fund invested in company stock. The plaintiffs alleged that, beginning in July 2007, Fifth Third Bancorp faced growing risks due to its participation in the subprime loan market and, because of these risks, company stock was not a prudent investment. They further alleged that the defendants—most of whom were members of the company’s Pension, Profit Sharing, and Medical Plan Committee—knew of the risks to the company’s operations. The plaintiffs contended that these defendants breached their fiduciary duties under ERISA by continuing to allow plan participants to invest in company stock, and by issuing SPDs to plan participants that incorporated by reference SEC filings that failed to accurately disclose the risks faced by the company.

The district court dismissed the complaint. With respect to the prudence claim, the court held the defendants were entitled to a presumption of reasonableness under Sixth Circuit precedent. With respect to the disclosure claim, the court held that incorporation by reference of SEC filings into plan documents does not transform the filings into fiduciary acts.

On appeal, the Sixth Circuit reversed, holding that the presumption of reasonableness does not apply at the pleading stage. The Sixth Circuit acknowledged that other circuits had reached an opposite conclusion but distinguished those cases on the ground that they set forth “narrowly defined” standards for rebutting the presumption, such as a showing of “impending collapse” of the company. Applying the “normal rules of notice” under Rule 8, the Sixth Circuit held that the plaintiffs’ prudence allegations were sufficient. Regarding the disclosure claim, the Sixth Circuit held that the proper focus was on the decision to incorporate the SEC filings into the plan documents, not on the preparation and signing of the SEC filings. The Sixth Circuit found that the former was an act of plan administration and therefore a fiduciary act subject to ERISA.

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THE *CERTIORARI* PETITION AND INVITATION TO THE SOLICITOR GENERAL

The defendants in *Fifth Third Bancorp* filed a petition for writ of certiorari, asking the Supreme Court to review the Sixth Circuit's decision. They presented the following two questions: whether the plaintiffs should have been required to rebut the presumption of reasonableness by plausibly alleging facts showing that the defendants abused their discretion in allowing investment in company stock; and whether statements in SEC filings incorporated by reference into plan documents can be the basis of ERISA fiduciary duty liability. The defendants argued that the Sixth Circuit's holdings on both points conflicted with rulings from other circuits.

The Supreme Court has not ruled on the *certiorari* petition yet. The Court, however, is interested in the case, as the Court issued an "Invitation" to the Solicitor General ("SG") to submit a brief discussing whether review should be granted. When issued such an Invitation—also known as a "CVSG" (because it **C**alls for the **V**iews of the **S**olicitor **G**eneral)—the SG always files a brief in response with a recommendation as to whether the Court should grant review.

The Supreme Court issues such Invitations only a dozen or so times each year. The Court does so in cases where it wants to be informed by the expertise of the United States even though the federal government is not a party. Generally, Invitations are issued where the federal government has a significant interest in the underlying federal law because of related federal programs or enforcement efforts. In this case, for example, as the SG formulates its position, it likely will solicit the views of the Department of Labor and perhaps other interested agencies. The Court's Invitation indicates the Court's interest in hearing whether the United States believes that *Fifth Third Bancorp* presents a question of ERISA jurisprudence sufficiently important to warrant review.

An Invitation by the Supreme Court to the SG cannot be read as a determination that the Court ultimately will grant review. More often than not, the SG recommends that the Court deny the petition, and the Court usually follows that recommendation. But an Invitation does indicate that the odds of *certiorari* being granted in the case are significantly higher than for a typical *certiorari* petition. Assuming the SG files its Invitation brief within the expected time frame (often 60 to 90 days, but sometimes much longer) and the Court grants *certiorari*, the briefing on the merits likely will take place this fall, with oral argument to follow.

THE BOTTOM LINE FOR PLAN FIDUCIARIES

If the Supreme Court grants review of *Fifth Third Bancorp*, it could solidify—or eviscerate—two important early lines of defense in ERISA fiduciary duty cases: the presumption that investment in company stock is reasonable and the principle that statements in SEC filings are not actionable under ERISA.

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