

Publications

Supreme Court to Weigh-In on Presumption of Prudence

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Since the collapse of Enron, many fiduciaries of defined contribution retirement plans subject to the Employee Retirement Income Security Act of 1974, (ERISA) that offer company stock as part of the plan's investment line-up have faced so-called stock drop law suits. In these suits, the plan participants allege that plan fiduciaries were imprudent in permitting plan participants to continue to invest in company stock despite the stock losing significant value. In these cases, the courts attempt to balance the need to protect ERISA plan participants from imprudent investment of plan assets and from investments of plan assets in violation of a fiduciary's duty of loyalty against the fact that, by definition, Congress has afforded an employee stock ownership plan (ESOP) special treatment under the law. Unlike most retirement plans, which are subject to investment diversification requirements and restrictions on investments in employer securities, ESOPs are designed to primarily invest in employer securities.

Until recently, many courts and advisors considered the issue somewhat settled by the 1995 decision of *Moench v. Robertson*, which provides generally that fiduciaries are presumed prudent when offering company stock under an ESOP when the plan's governing documents require that employer stock be offered as an investment option. This has led ERISA's many plan committees and their advisors to take a hands-off approach when it comes to employer stock and to only intervene in the plan's offering of employer stock in very limited circumstances. However, plan fiduciaries and their advisors may have to revisit this strategy in light of the recent oral arguments heard by the U.S. Supreme Court in *Fifth Third Bancorp v. Dudenhoeffer* and the Court's pending decision in that case. While attempting to read into how the Supreme Court may decide a case based on the oral arguments is normally a challenging endeavor at best, plan fiduciaries and their advisors should take heed of the Court's comments during oral arguments and closely follow the outcome of the Court's deliberations. In the event that the Court agrees with the reasoning in *Dudenhoeffer*, ESOP fiduciaries

and sponsors will need to reconsider the risks involved in offering employer stock as an investment option under their plans. Please see the attached article for further information.