



ERISA: Contemporary Supreme Court Decisions (Litigator Series)

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THIS CASEBOOK contains a selection of 21 U. S. Supreme Court decisions that analyze and interpret provisions of the ERISA statute. The selection of decisions spans from January 2000 to the date of publication.

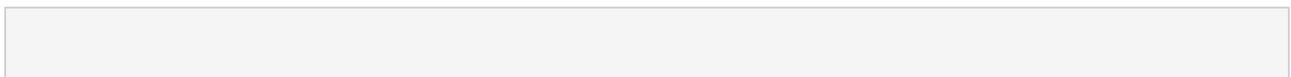
The Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. § 1001 et seq., requires the fiduciary of a pension plan to act prudently in managing the plan's assets. § 1104(a)(1)(B). *Fifth Third Bancorp v. Dudenhoeffer* focuses upon that duty of prudence as applied to the fiduciary of an "employee stock ownership plan" (ESOP), a type of pension plan that invests primarily in the stock of the company that employs the plan participants. 134 S. Ct. 2459 (2014)

In *Fifth Third Bancorp*, the Supreme Court considers whether the fiduciary is entitled to a defense-friendly standard, that the lower courts have called a "presumption of prudence," when an ESOP fiduciary's decision to buy or hold the employer's stock is challenged in court. Courts of Appeals have held that such a presumption does apply, with the presumption generally defined as a requirement that the plaintiff make a showing that would not be required in an ordinary duty-of-prudence case, such as that the employer was on the brink of collapse. No such presumption applies. *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014).

In [the Supreme Court's] view, [ERISA] does not create a special presumption favoring ESOP fiduciaries. Rather, the same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries, except that an ESOP fiduciary is under no duty to diversify the ESOP's holdings. This conclusion follows from the pertinent provisions of ERISA. *Fifth Third Bancorp v. Dudenhoeffer*, *ibid*.

Section 1104(a)(1)(B) "imposes a 'prudent person' standard by which to measure fiduciaries' investment decisions and disposition of assets." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 143, n. 10, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985). Section 1104(a)(1)(C) requires ERISA fiduciaries to diversify plan assets. And § 1104(a)(2) establishes the extent to which those duties are loosened in the ESOP context to ensure that employers are permitted and encouraged to offer ESOPs. Section 1104(a)(2) makes no reference to a special "presumption" in favor of ESOP fiduciaries. It does not require plaintiffs to allege that the employer was on the "brink of collapse," under "extraordinary circumstances," or the like. Instead, § 1104(a)(2) simply modifies the duties imposed by § 1104(a)(1) in a precisely delineated way: It provides that an ESOP fiduciary is exempt from § 1104(a)(1)(C)'s diversification requirement and also from § 1104(a)(1)(B)'s duty of prudence, but "only to the extent that it requires diversification." § 1104(a)(2) (emphasis added). *Fifth Third Bancorp v. Dudenhoeffer*, *ibid*.

Thus, ESOP fiduciaries, unlike ERISA fiduciaries generally, are not liable for losses that result from a failure to diversify. But aside from that distinction, because ESOP fiduciaries are ERISA fiduciaries and because § 1104(a)(1)(B)'s duty of prudence applies to all ERISA fiduciaries, ESOP fiduciaries are subject to the duty of prudence just as other ERISA fiduciaries are. *Fifth Third Bancorp v. Dudenhoeffer*, *ibid*.



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