CIRCUIT COURT UPHOLDS STOCK DROP DECISION

Hodgson Russ Newsletter
February 28, 2017

Practices & Industries

Employee Benefits

While an employee worked for J.C. Penney, she participated in the J.C. Penney Savings Profit-Sharing and Stock Ownership Plan (the Plan) and she was able to allocate contributions among a variety of investment options, including the Penney Stock Fund. That Fund was an ESOP that consisted largely of J.C. Penney common stock. Evercore was the designated fiduciary and investment manager of the Penney Stock Fund. Between 2012 and 2013, there was a dramatic drop in the value of J.C. Penney common stock. In 2015, the employee, on behalf of herself and all others similarly situated, sued Evercore alleging that Evercore was liable for substantial Plan losses because it breached its ERISA fiduciary duty by deciding to neither eliminate the Penney Stock Fund as an investment option in the Plan nor sell shares held by the Fund.

In response to a motion filed by Evercore, a federal district court dismissed the complaint for failure to state a claim. Because the employee failed to plead the "special circumstances" needed to sustain a claim under the standards of the Supreme Court's decision in in *Fifth Third Bancorp v. Dudenhoeffer*, the district court held that the employee's complaint must be dismissed. The district court also rejected the employee's alternative argument that, pursuant to *Tibble v. Edison International*, Evercore violated its fiduciary "duty to monitor" investments and remove imprudent ones.

On appeal, the D.C. Circuit Court of Appeals affirmed the district court's decision. The D.C. Circuit held that the employee's complaint disregarded "the Supreme Court's instruction that claims of imprudence based on publicly available information must be accompanied by allegations of 'special circumstances'." Indeed, the employee acknowledged that she "did not allege the market on which J.C. Penney stock traded was inefficient . . ."

The D.C. Circuit also rejected the employee's argument that the additional pleading requirements under *Dudenhoeffer* are inapplicable to her allegations. The employee argued that her claim was not that Evercore over- or undervalued J.C. Penney stock. Instead, she argued that Evercore exposed her to unnecessary and excessive investment risk by failing to act as J.C. Penney stock value continued to drop. The D.C. Circuit disagreed with the employee's assertion, noting that similar arguments had been made and rejected by the Supreme Court in the *Dudenhoeffer* case. The

Second and Sixth Circuits reached similar conclusions when confronted with similar risk-exposure arguments. *Coburn v. Evercore Trust Company (D.C. Cir. 2016)*