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WEB Chicago Chapter — ERISA Litigation Roundup

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Supreme Court – 2014 & 2015 Terms

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- Fifth Third Bancorp v. Dudenhoeffer
  - Presumption of Prudence in Employer Stock Funds
- Heimeshoff v. Hartford Life & Accident Ins. Co.
  - Contractual Limitations Periods in ERISA Plans
- Tibble v. Edison International
  - Accrual of ERISA Fiduciary Breach Statute of Limitations
- Tackett v. M&G Polymers USA, LLC
  - Presumptions of Vesting in Retiree Health Care

Fifth Third Bancorp v. Dudenhoeffer

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- Facts:
  - Claim of Imprudent Investment in Company Stock Fund
    - Fifth Third sponsored a 401(k) plan for employees, which permitted participants to select among 20 different investment options.
    - The plan required one of the investment funds to be invested primarily in Fifth Third publicly traded stock (employer stock fund).
    - The Company made a matching contribution in the form of Company stock - but once received, the participant could move it to any of the other funds.
    - Participant could move in and out of the Company stock fund at any time.

Fifth Third Bancorp v. Dudenhoeffer

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- Allegations:
  - Class action allegations that the plan fiduciary acted imprudently in maintaining the employer stock fund as 401(k) investment option:
    - The Company became engaged in subprime lending and the Company's loan portfolio became increasingly exposed to defaults, putting the Company at risk.
    - The Company's stock became “overvalued and excessively risky.”
    - Publicly available information provided “early warning signs” that subprime lending was heading toward a collapse.
    - Company insiders (also plan fiduciaries) made misrepresentations about the Company's financial future.
    - As the mortgage market collapsed, Fifth Third stock price declined 75% and 401(k) participants “lost” millions of dollars.
    - Under these circumstances, the Company’s fiduciaries breached their ERISA-based fiduciary duties by continuing to offer Fifth Third stock as a plan investment option when it was “imprudent to do so” and failing to provide participants with “accurate and complete information” about the stock prospects.

Fifth Third Bancorp v. Dudenhoeffer

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- Case Tested Presumption of Prudence in Holding Employer Stock In Employee Stock Ownership Plans (ESOP)
  - Since at least 1995, courts have held that there is a "presumption of prudence" in investing in employer securities. To overcome this presumption, plaintiffs had to plead and prove a significant downturn - *e.g.*, that a bankruptcy filing was imminent.
    - Congress specifically encouraged ERISA plans to invest in employer stock and exempted fiduciaries from the duty to diversify with regard to employer stock funds.
  - The District Court applied the presumption of prudence and granted defendants' motion to dismiss because plaintiffs did not plausibly allege that Fifth Third's viability as a going concern was in jeopardy.
  - The Sixth Circuit reversed – refused to apply the prudence presumption at motion to dismiss.
  - The Supreme Court granted certiorari to consider whether an ESOP fiduciary's decision to buy or hold the employer's stock is entitled to a presumption of prudence.

Fifth Third Bancorp v. Dudenhoeffer

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- Supreme Court Unanimously Rejects Presumption of Prudence, But Offers New Pleading Standard
  - There Is No Presumption of Prudence
    - ERISA makes no reference to a special presumption in favor of ESOP fiduciaries.
    - While ERISA exempts ESOP fiduciaries from the duty to diversify plan investments, “aside from that distinction” the duty of prudence applies to them.
  - Instead of applying a presumption of prudence, the Court instructed lower courts to apply better methods to “weed out” meritless claims:

Fifth Third Bancorp v. Dudenhoeffer

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- Principles to Apply Concerning Fiduciary Breach Allegations Based On Publicly Available Information:
  - Where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over or undervaluing a stock are implausible as a general rule absent "special circumstances."
  - ESOP fiduciary may generally "rely on a security's market price as an unbiased assessment of the security's value in light of all public information."
    - Efficient Markets Rule: Plaintiffs may not simply plead that publicly available information provided "early warning signs" that a stock investment was heading toward a collapse. Such a publicly known risk is already priced into the stock price.

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- Principles to Apply for Fiduciary Breach Allegations Involving Non-Public Information
  - Plaintiff must plead and prove an “alternative action” that the fiduciaries could have taken that would have been consistent with the security laws and that a prudent fiduciary would not have viewed as more likely to harm the fund than help it.
  - Court identified three principles:
    - First, ERISA’s duty of prudence cannot require an ESOP fiduciary to perform an action - such as divesting a fund’s employer’s stock holdings on the basis of inside information - that would violate securities laws.
    - Second, courts must consider the extent to which an ERISA-based obligation either to refrain on the basis of inside information from making a planned trade or to disclose inside information to the public could conflict with SEC-imposed insider trading and corporate disclosure requirements.
    - Third, courts must consider whether a prudent fiduciary could have concluded that stopping stock purchases or disclosing negative stock information - which could be a sign that the employer stock is a bad investment - would cause a drop in the stock price and stock value for employer stock already held by the fund.

Fifth Third Bancorp v. Dudenhoeffer

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- Impact of *Dudenhoeffer* on Plan Administration:
  - Outcome a mixed bag: The Court eliminated presumption of prudence, but reset pleading standards focusing on stock market price reliability and the practical concerns of acting on insider information.
  - The Court now requires plaintiffs to plead “specific facts,” such as the legal alternative action the fiduciary should have taken that would not have damaged the stock or participants further.
  - For public companies, the new focus on efficient market theory may be a simpler defense than the old prudence presumption - but the “special circumstances” exception still exists.
  - The Court declined to address the “prudent process” defense - the fiduciary acted through reasoned and good faith decisions, even if another fiduciary might have reached a different result.

Fifth Third Bancorp v. Dudenhoeffer

Company Stock Funds – No Presumption of Prudence

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- Additional Thoughts on Plan Administration:
  - Going forward, employers should carefully analyze whether there is any continuing advantage to "hard-wire" company stock into a plan and consider allowing fiduciaries to have more discretion in selling company stock when sharp value decreases occur.
  - Determine whether to hire an independent third-party fiduciary to make decisions concerning the prudence of continued investment in a company stock fund.
    - Outsider with no insider information may help limit liability and avoid insider trading issues
    - Avoids conflict of interest claims.
    - Helps avoid creative pleading by plaintiffs as to what "alternative action" an insider should have taken in compliance with securities laws.
  - The outlook for non-public ESOPs is fuzzier because the Court's new rules are targeted to publicly traded stocks and relying on non-public information may be an insufficient substitute for the presumption of prudence

Heimeshoff v. Hartford Life & Accident Life Ins. Co.

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- Facts:
  - Plaintiff Sought Benefits Under a Long Term Disability Plan:
    - August 2005 - Plaintiff filed administrative claim for benefits.
    - November 2005 - Hartford notified Plaintiff that it could not make a determination because doctor failed to provide necessary documents.
    - October 2006 - Plaintiff submitted additional medical information.
    - November 2006 - Hartford denied benefit claim.
    - May 2007 - Hartford granted Plaintiffs request for extension of claim appeal deadline to September 30, 2007.
    - September 26, 2007 - Plaintiff submitted claim appeal along with additional medical information.
    - November 26, 2007 - Hartford affirmed initial claim denial on appeal.

Heimeshoff v. Hartford Life & Accident Life Ins. Co.

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- Plan's Contractual Limitations Provision
  - The LTD Plan contained a limitations provision, which required a plaintiff to initiate legal action against Hartford within "three years after the time written *proof of loss* is required to be furnished" according to the terms of the policy.
  - Plaintiff filed suit on November 18, 2010 - almost three years after the final claim determination but more than three years after the proof of loss was due under the Plan's terms.
  - District Court dismissed lawsuit applying the three-year limitations period.
  - Second Circuit affirmed the dismissal.
  - Supreme Court granted certiorari to resolve a split amongst the Circuits.

Heimeshoff v. Hartford Life & Accident Life Ins. Co.

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- <u>Supreme Court Analysis</u>:
  - Court upheld application of three-year limitations period commencing on proof of loss.
    - In the absence of a controlling statute to the contrary, an ERISA plan's limitations provision may validly limit the time for bringing a lawsuit to a period shorter than that prescribed in the general statute of limitations provided the shorter period is reasonable,
    - Court held that parties are permitted to contract around a default statute of limitations both in its length and accrual date.
  - Court upheld reasonableness of three-year limitations period.
    - DOL's claims regulations generally require claims to be decided within one year.
    - After claim exhaustion, plaintiffs generally would have two years to file suit.
    - Even in this case, Plaintiff had over a year to file suit - but didn't - and Court found that a one-year limitations period was reasonable.
    - In extreme cases, *e.g.*, when undue delay or bad faith in reviewing claim occurs, courts may apply traditional equitable doctrines to allow a claim to proceed.

Tibble v. Edison International

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- Facts:
  - Edison International sponsored a 401(k) retirement plan for its employees.
  - The Plan's investment committee selected a variety of funds for the investment of Plan assets.
  - The funds selected by the investment committee were retail-class funds, which charged higher fees than comparable institutional-class funds available in the retrain market.
  - Plan participants objected to the funds selected by the investment committee and filed suit, alleging that the investment committee members were ERISA fiduciaries who breached their fiduciary duties by offering higher costs retail-class mutual funds to plan participants even though identical lower-cost mutual funds were available.
  - Defendants argued that the fiduciary breach claims were time-barred by ERISA's 6-year statute of limitations for fiduciary breach actions in ERISA Section 413.

Tibble v. Edison International

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- Analysis in District Court:
  - The U.S. District Court for the Central District of California dismissed the case on the basis that the funds were selected by the Plan's investment committee more than six years before the lawsuit was filed.
  - ERISA provides a six-year statute of limitations period within which a participant or beneficiary must sue based on allegations of a breach of ERISA fiduciary duties.
  - Generally, the ERISA statute of limitations begins to run on the date of the last act that constitutes a fiduciary breach owed to the beneficiaries.
  - The Plan's investment committee selected the funds at issue in 1999. The plaintiffs filed their lawsuit against Defendants in 2007.
  - The Central District of California dismissed several claims in the plaintiffs' complaint, concluding that these claims were statutorily barred because the plaintiffs filed them after the expiration of the six-year statute of limitations period.
  - The District Court also ruled that it must defer to the investment committee's selection of the higher-cost mutual fund by application of the deferential standard set forth previously by the Supreme Court in *Firestone Tire & Rubber Co. v. Bruch*.

Tibble v. Edison International

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- Court of Appeals Decision and Analysis:
  - The Ninth Circuit affirmed the District Court's holding that claims arising more than six years prior to the lawsuit's filing were barred by ERISA Section 413's statute of limitations.
  - The court of appeals rejected plaintiffs' attempt to extend the limitations period by treating the alleged fiduciary breaches as continuing violations, holding that the "act of the designating the investment for inclusion" in the investment portfolio triggers the limitations period absent evidence that "changed circumstances" gave rise to a new duty to conduct a "full diligence review" of the existing funds.
  - The court of appeals also declined to adopt the defendants' argument that it should apply the shorter three-year statute of limitations for actual knowledge of the alleged breach.
  - The Ninth Circuit held that mere awareness that a challenged investment is a plan investment option does not confer "actual knowledge" of a fiduciary breach absent "knowledge of how the fiduciary selected the investment."

Tibble v. Edison International

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- Questions Raised in Petition for Writ of Certiorari:
  - The Plaintiffs filed a request for review in the Supreme Court.
  - The question raised is whether ERISA's six-year limitations period begins on the date that the investment committee initially selected the higher cost mutual fund options for the Plan's investment portfolio or whether the on-going offering of such funds constitutes a "continuing" fiduciary breach, thereby extending the limitations period.
  - The Supreme Court elected not to address whether the *Firestone* deference applies to fiduciary breach actions with respect to whether a fiduciary failed to follow plan terms in selecting investment options.
  - The Supreme Court requested a brief on the question from the Solicitor General's office, which sided with Plaintiffs' continuing violation theory.
  - The case is set for oral argument on February 24, 2015, with a decision due by June 30, 2015.

Tibble v. Edison International

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- Potential Impacts of Supreme Court Decision:
  - Question: When does ERISA's limitations period begin to run for fiduciary breach claims.
  - If the Supreme Court agrees with plaintiffs and finds that a fiduciary violation is ongoing, fiduciaries may be open to larger classes in class action cases and potentially increased liability for a successful fiduciary breach claims.
  - If the Supreme Court agrees with defendants, then plan participants will be limited when challenging investment decisions that occurred prior to ERISA's six-year statute unless intervening circumstances require a review of the investment options offered.

Tackett v. M&G Polymers USA, LLC

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- Facts:
  - In *Tackett*, retirees of M&G Polymers USA brought suit to recover healthcare benefits they were allegedly entitled to receive, without contributions, under the provisions of multiple collective bargaining agreements.
  - Between 1991 and 2005, M&G and its union entered into various CBAs. Typically, the CBAs would be effective for three years and then renegotiated.
  - Often, the CBAs included a side letter, known as a "cap letter," that addressed the required accrual accounting of healthcare benefits, which adversely impacted a company's balance sheet if the company had no cap on its healthcare cost. To avoid this negative effect, the company would cap its healthcare costs.
  - Plaintiffs argued that their healthcare benefits vested due the CBA's language because the healthcare provisions did not contain explicit language terminating the benefit at the end of each CBA.
  - Plaintiffs alleged M&G violated the CBAs by unilaterally modifying their healthcare benefits by shifting a substantial part of the costs to the class members.

Tackett v. M&G Polymers USA, LLC

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- District Court:
- The Questions Raised:
  - 1. Whether plaintiffs had a “vested right to lifetime, uncapped (or contribution-free) medical benefits? And, if so,
  - 2. Whether specific plans or plan details were within the scope of what benefits vested?
- The District Court’s Ruling:
  - Originally, the District Court dismissed the case finding there was no vesting, but the Sixth Circuit reversed, finding that under its *UAW v. Yard-Man* analysis, there was sufficient evidence to conclude that the cap letters were not part of the CBAs.
  - The District Court ultimately held that the cap letters were not part of the CBA for 4 of the 5 subclasses, and that vesting had occurred for all 5 subclasses under *Yard-Man*

Tackett v. M&G Polymers USA, LLC

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- Sixth Circuit:
  - The *Yard-Man* Inference: The Sixth Circuit held that “retiree benefits are in a sense ‘status’ benefits which, as such carry with them an inference … that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree. Benefits are to vest “only if the context and other available evidence indicate an intent to vest.”
  - Plaintiffs argued that they had a vested right to contribution-free healthcare because benefits were guaranteed to them in the 2007 CBA. Defendants argued that there had been no vesting of contribution-free healthcare because the cap letters were part of the CBA.
  - The Sixth Circuit upheld the District Court’s holding that the cap letters were not part of the four subclasses CBA, finding that it was unlikely that the union would have agreed to a full company contribution if the company could change it later unilaterally.
  - The court of appeals then applied what it considered “traditional rules of contract interpretation” to hold that plaintiffs had a vested right to contribution-free healthcare.
  - The court of appeals determined that, applying *Yard-Man*, to the extent that vesting was presumed, it was based on the CBA’s language that the company would pay the full cost of coverage and the linkage of healthcare benefits to pension benefits.

Tackett v. M&G Polymers USA, LLC

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- Petition for Certiorari:
  - A 30-year split in the Circuits has existed on union retiree healthcare vesting. The Third Circuit requires explicit language for vesting; the Sixth Circuit applies *Yard-Man* and the Seventh and Second Circuits requiring some language for vesting.
  - Question Presented: When a CBA is silent as to the duration of retiree healthcare benefits do the original terms continue indefinitely or is explicit language supporting indefinite continuation of benefits required?
  - Oral argument heard on November 10, 2014. Case decided on January 26, 2015.

Tackett v. M&G Polymers USA, LLC

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- Supreme Court's Decision Reversing and Remanding Case:
  - The Court held that "[w]e interpret collective-bargaining agreements, including those establishing ERISA plans, according to principles of contract law, at least when those principles are not inconsistent with federal labor policy."
  - The Court disagreed with the Sixth Circuit's belief that its *Yard-Man* inferences are drawn from contract law are incorrect -- the Court stated that "*Yard-Man* violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective bargaining agreements."
  - "*Yard-Man*'s assessment of likely behavior in collective bargaining is too speculative and too far removed from the context of any particular contract to be useful in discerning the parties' intention."
  - Although a court may look to known customs or usages in a particular industry to determine meaning within a contract, the parties must prove those customs using evidence, not court-created inference.
  - *Yard-Man*'s premise that retiree medical benefits are a form of deferred compensation is contrary to Congress' determination otherwise.
  - Sixth Circuit's refusal to apply general durational clauses to provisions governing retiree benefits and requiring specific durational language for retiree medical benefits to defeat an inference of vesting distorts the text of a collective bargaining agreement and conflicts with the principle of contract law that a contract must be read as a whole – the Sixth Circuit "failed to consider the traditional principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement."

Tackett v. M&G Polymers USA, LLC

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- What Will Be the Impact?
  - The Supreme Court's rejection of the *Yard-Man* Inference will likely result in the question of vesting becoming more settled across the Circuits, as the prior conflict resulted confusion on whether a particular CBA would be read to vest benefits depending upon where an employee lived.
  - It is unclear how the Sixth Circuit will interpret a collective bargaining contract without the inference of vesting from *Yard-Man.*
  - CBA negotiators will be well-advised to remove any ambiguity regarding vesting from future CBAs, otherwise in litigation evidence may being permitted to clear up the ambiguity and prove vesting was intended.

Smith v. AEGON Cos. Pension Plan

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- DOL had argued in two lawsuits – but never in formal guidance – that forum selection clauses are incompatible with ERISA.
- The position taken by the DOL in litigation was nothing more than “an expression of a mood” and therefore not entitled to *Skidmore* deference.
- The case deals a significant blow to the DOL’s amicus brief program, through which it arguably attempts to regulate via litigation

Tolbert v. RBC Capital Markets Corp

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- RBC established a deferred compensation plan (the Wealth Accumulation Plan) by which employees could defer a portion of their annual pay and by which financial advisors were paid annual productivity bonuses.
- The Plan's purpose was to promote long-term savings and permit employees to share in the company's growth and profitability.
  - If the plan was found to be an ERISA plan, it would be a "top hat" plan which is exempt from vesting, funding and fiduciary duty requirements of ERISA.
- Plaintiffs were former employees who forfeited some of their benefits under the plan when they terminated employment.
- The US District Court for the Southern District of Texas granted summary judgment in favor of RBC finding that nothing in the Plan's terms reflected a primary purpose to provide retirement or deferred post-termination income

Tolbert v. RBC Capital Markets Corp

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- On appeal, the 5th Circuit Court reversed the decision of the Circuit Court
- Two-pronged analysis of the definition of employee benefit plan
  - "Words 'provides retirement income'" in the first prong of ERISA's definition of employee pension benefit plan "patently refer only to plans designed for the purpose of paying retirement income whether as a result of their express terms or surrounding circumstances"
    - The RBC Plan did not meet this prong
  - The relevant inquiry under the second prong is *not* the plan's overarching purpose, but "whether the plan 'results in a deferral of income by employees for periods extending to the termination of employment or beyond.'"
    - The RBC Plan did result in the deferral of income to the termination of employment or beyond
- Court remanded the case to the district court to determine if the plan was, in fact, a top hat plan
- Plan sponsors need to assess deferred compensation arrangements and properly delineate top hat groups in top hat plans

Tussey v. ABB, Inc.

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- Before plan assets are allocated to proper investments based on participant directions, they may be "parked" in interest earning accounts for short periods of time
  - In *Tussey v. ABB*, Fidelity used float income to pay bank expenses to maintain the float accounts
    - The retention of the float income was not disclosed to the plan sponsor
    - Court held since float income was generated from assets of the plans, float income was itself an asset of the plan
      - Because Fidelity decided how to use float income, the court held they were fiduciaries to the plan

Tussey v. ABB, Inc.

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- Court of Appeals: float income was not a plan asset "under the circumstances of the case." It agreed with Fidelity's argument that ""[o]nce the Plan became the owner of the shares, it was no longer also owner of the money used to purchase them," which flowed to the investment options through the depository account held for their benefit.
- Dissent: Float constituted plan assets and Fidelity breached its fiduciary duty.
  - First, assets of a plan include amounts that are withheld from an employee's pay as of the earliest date on which they can be segregated from employer's general assets.
  - Second, Fidelity didn't openly negotiate its handling of the float income

Tatum v. RJR Pension Inv. Committee

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- Upon the breakup of RJR Nabisco into RJR (tobacco) and Nabisco (foods), RJR decided to eliminate funds holding Nabisco stock from the RJR 401(k) plan.
- The decision was made – somewhat arbitrarily – to divest the RJR plan of the Nabisco funds about six months after the spin-off. There was no evidence that the Benefits Committee "met, discussed, or voted on the issue of eliminating the Nabisco funds," or signed a required consent in lieu of a meeting authorizing an amendment to divest the plan of the funds.
- In the months following the spin-off, the Nabisco fund share prices dropped sharply due to the "tobacco taint" that ongoing tobacco litigation had on the Nabisco funds. Analysts, however, viewed Nabisco stock positively, particularly after the spin-off.

Tatum v. RJR Pension Inv. Committee

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- Bad facts:
  - RJR falsely told employees that applicable regulations did not allow the plan to offer ongoing investments in individual stocks other than company stock. Testimony at trial showed the HR manager who drafted the letter knew this was a false statement, and the statement was never corrected, even after responsible RJR officials were informed it was wrong.
  - Plaintiff asked RJR not to go through with the forced sale of the Nabisco funds, because it would result in a 60% loss to his account; he wanted to wait to sell when the price rebounded, and company communications were optimistic that it would do so after the spin-off.
  - Plaintiff was aware that previously spun-off companies still owed Nabisco funds, which was inconsistent with the company's statements that the plan could not hold individual stocks other than stock of the sponsor.
  - Nabisco funds dropped 60% from the in the six month period following the spin-off leading up to the divestment.

Tatum v. RJR Pension Inv. Committee

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- District Court:
  - RJR breached its fiduciary duties when it decided to remove the Nabisco stock from the plan without undertaking a proper investigation into the prudence of doing so;
  - RJR had the burden of providing that is breach did not cause the alleged losses;
  - RJR met its burden because its decision to eliminate the funds was one a reasonable and prudent fiduciary ***could have*** made after performing such an investigation.
  - Plaintiff alleged the court applied the wrong standard, and should have questioned whether a reasonable and prudent fiduciary ***would have*** (not ***could have***) sold the Nabisco funds at the same time and in the same manner.
- Court of Appeals:
  - Agreed that RJR breached its fiduciary duties (on the basis of the inadequate consideration of the issues). RJR also had the burden of proving that its breach caused no losses.
  - To prove that, RJR had to prove that a reasonable fiduciary ***would have*** made the same decision.

Harris v. Amgen

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- Amgen sponsored an individual account plan that included an investment in Amgen common stock
- Participants filed suit after the value of Amgen's stock dropped
- The district court dismissed the suit, relying on the *Moench* presumption of prudence
- The 9th Circuit initially reversed the district court, holding the presumption of prudence did not apply because the plans did not mandate or require investment in company stock
- The Supreme Court granted certiorari and vacated and remanded the case in light of the *Dudenhoeffer* decision

Harris v. Amgen

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- The 9th Circuit again reversed the district court
  - No presumption of prudence under *Dudenhoeffer*
  - Plaintiffs did not have to satisfy criteria under prior law to show the presumption of prudence was inapplicable
  - Plaintiffs properly stated a claim and defendants violated their fiduciary duties by continuing to offer Amgen stock as an invested option when they knew or should have known the stock was being sold at inflated prices
  - If defendants had disclosed adverse safety results of their drug products, they would have *concurrently* satisfied duties under Securities law and ERISA.

Fiduciary Process Agreement

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- Department of Labor and GreatBanc Trust Company entered into an “Agreement Concerning Fiduciary Engagements and Process Requirements for Employer Stock Transactions”
- The Agreement relates to ESOP transactions involving non-publicly traded stock
- The Agreement tracks ERISA, its regulations, and the DOL’s Proposed Adequate Consideration Regulations
- The Agreement sets forth the steps that the DOL expects a fiduciary to take to establish a prudent process for the approval of ESOP transactions