

HIGH COURT'S *AMGEN* RULING REAFFIRMS HEIGHTENED PLEADING STANDARD FOR ERISA STOCK-DROP SUITS

By
Michael A. Valerio

In *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. ___, 134 S. Ct. 2459 (2014), the United States Supreme Court specified rigorous pleading requirements for so-called stock-drop suits brought against employee stock-ownership plan fiduciaries under the Employee Retirement Income Security Act of 1974 (ERISA). In a recent *per curiam* opinion, the Court confirmed in no uncertain terms that it expects lower courts to fastidiously apply the *Dudenhoeffer* pleading standards. *Amgen Inc. v. Harris*, 577 U.S. ___, No. 15-278 (Jan. 25, 2016). The Court's brief opinion is noteworthy for stock-drop defendants, who should still have a meaningful opportunity to challenge questionable fiduciary-breach claims at the pleading stage.

The Supreme Court's unanimous ruling in *Amgen* marks the second time it rejected a Ninth Circuit ruling reviving the *Amgen* plaintiffs' putative class-action complaint against plan fiduciaries responsible for overseeing the Amgen employee stock fund. In *Amgen*, the plan-participant plaintiffs claimed that the fiduciary defendants improperly allowed participants to continue to purchase and hold Amgen stock while knowing as company insiders that the stock price was artificially inflated.

In June 2014, the Supreme Court vacated the Ninth Circuit's reversal of a district court order that had dismissed the complaint based in part on the so-called presumption of prudence (or "*Moench* presumption") that most federal courts had afforded stock-plan fiduciaries for nearly two decades. *Dudenhoeffer* had eliminated the presumption. The Court then remanded the case to the Ninth Circuit with instructions to revisit the allegations of the plaintiffs' complaint in light of the new pleading guidance set out in *Dudenhoeffer*, which had just been decided. On remand, the Ninth Circuit again upheld the viability of the complaint. In doing so, the Ninth Circuit explained that its original opinion "had already assumed" the standards for pleading ERISA fiduciary liability that the Supreme Court subsequently announced in *Dudenhoeffer*.

In its most recent *Amgen* ruling, the Supreme Court again granted the fiduciary defendants' petition for certiorari and reversed the Ninth Circuit. The Supreme Court first held that "the Ninth Circuit failed to properly evaluate the complaint," which the Court found did *not* contain "sufficient facts and allegations" to state a claim against the plan fiduciaries. The Court emphasized that, in cases alleging "insider" fiduciary-breach claims based on nonpublic information, the lower courts must evaluate whether the complaint has plausibly alleged that a prudent fiduciary in the same position

could *not* have concluded that the plaintiffs' proposed alternative action (here, removing the Amgen stock fund as an available plan investment option) "would do more harm than good."

The Supreme Court ultimately left it to the district court to decide in the first instance whether the *Amgen* plaintiffs should get another opportunity to sufficiently plead their stock-drop claim through an amended complaint. Regardless, the takeaway from the Court's *Amgen* decision is unambiguous: the lower federal courts must faithfully perform their gatekeeping function and rigorously apply the *Dudenhoeffer* pleading standards when considering a stock-drop defendant's motion to dismiss.

Michael A. Valerio is a Shareholder in the Financial Services and Insurance Litigation Practice Group at Carlton Fields Jordan Burt, P.A. in its Hartford, CT office. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm or its clients.

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