ERISA Stock Drop Cases Since *Dudenhoeffer*: The Pleading Standard Has Been Raised

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This article analyzes the Dudenhoeffer *pleading standard and "stock drop" cases.*

I. Introduction

Before 2014, most of the federal Courts of Appeals applied a "presumption of prudence" when evaluating a fiduciary's decision to include employer stock as a retirement plan investment alternative. These cases—often referred to as "stock drop" cases—arise when retirement plans suffer losses due to the drop in value of the employer stock offered through their retirement plans. In *Fifth Third Bancorp v. Dudenhoeffer* [134 S. Ct. 2459 (2014)], the US Supreme Court held that no such presumption exists, and modified the pleading standard that plaintiffs must satisfy in order to state a viable fiduciary breach claim relating to the inclusion of employer stock as an investment option.

With few exceptions, the lower federal courts have ruled in favor of defendants in the wake of *Dudenhoeffer*. As a result, the ongoing viability of so-called "stock drop" cases is uncertain.

Please note that this article addresses only cases involving challenges to the inclusion of publicly traded stock. Since *Dudenhoeffer*, several courts have addressed whether and to what extent *Dudenhoeffer* applies in the context of cases involving privately held companies. Those cases will be addressed in a separate article.

II. Background

A. ERISA "Stock Drop" Cases and the *Moench* Presumption

Although the Employee Retirement Income Security Act of 1974 (ERISA) generally requires fiduciaries to diversify the investments that plans offer to their participants, an exception to the general rule allows eligible individual account defined contribution plans (EIAPs), such as 401(k) plans and employee stock ownership plans (ESOPs), to offer stock of the plan sponsor as an investment option to plan participants. At the same time, ERISA also requires fiduciaries to act prudently and for the exclusive purpose of providing benefits to participants and beneficiaries.

Historically, courts faced with challenges to fiduciary decisions to offer employer stock as an investment option struggled with how to reconcile ERISA's express authorization to allow employer stock as a plan investment option (and corresponding exception to the diversification requirement) with the general duties of prudence and loyalty. In an attempt to harmonize (1) the general fiduciary duty to act prudently with (2) the exception applicable to investments in employer stock by EIAPs and ESOPs, a majority of the Courts of Appeals adopted a presumption of prudence for EIAP and ESOP fiduciaries, referred to as the *Moench* presumption. Under this doctrine, named after the holding in *Moench v. Robertson* [62 F.3d 553 (3d Cir.

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1995)], fiduciaries of plans requiring or encouraging investment in employer stock were presumed to have acted prudently in offering employer securities as plan investment options.

Generally, courts applying the *Moench* presumption required plaintiffs to allege facts demonstrating extraordinary circumstances in order for a claim to proceed. These extraordinary circumstances might include, for example, an allegation that the plan sponsor was facing dire circumstances or was on the brink of collapse when the decision to offer, or continue to offer, employer stock was made. The *Moench* presumption was generally viewed as a defendant-friendly rule. Not surprisingly, ERISA plaintiffs' attorneys generally welcomed the Supreme Court's decision to review the *Moench* presumption in *Dudenhoeffer.*

On June 25, 2014, the Supreme Court published its decision in *Dudenhoeffer*, holding that ERISA fiduciaries are not entitled to a presumption of prudence regarding the decision to offer or retain employer stock as an investment option in a company's retirement plan. Some ERISA commentators initially viewed *Dudenhoeffer's* overruling of the *Moench* presumption of prudence as a win for plaintiffs in ERISA stock drop cases. As the lower federal courts have applied *Dudenhoeffer's* revised pleading standards, however, it has become clear that this is not the case.

B. Pleading Standards Applicable in "Stock Drop" Cases Post *Dudenhoeffer*

While *Dudenhoeffer* eliminated the *Moench* "presumption of prudence," the balance of the opinion arguably made it even more difficult for plaintiffs in these "stock drop" cases to state a viable claim. The Court first addressed the two theories of liability on which "stock drop" cases involving publicly traded company stock are generally based:

> (1) Claims Based on "Public Information": Plaintiffs in some cases allege that fiduciaries should have known, on the basis of publicly available information, that the market had overvalued the company stock, and thus, that the fiduciaries should not have offered or continued to offer the company stock as an investment option; and
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> (2) Claims Based on "Insider" Information: In other instances, plaintiffs claim that plan fiduciaries were aware of insider information that, if known to the public, would negatively impact the value of the company stock, and that these fiduciaries should have acted upon this information to protect plan participants from the decline in value of the company stock, and resulting losses in their retirement plan account balances.

1. Public Information—Special Circumstances

With regard to claims based on publicly available information, the Supreme Court in *Dudenhoeffer* held that "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 the stock are implausible as a general rule, at least in the absence of special circumstances." [*Dudenhoeffer*, 134 S. Ct. at 2471] The Court reasoned that a fiduciary usually "is not imprudent to assume that a major stock market ... provides the best estimate of the value of the stocks traded on it that is available to him." [*Dudenhoeffer*, 134 S. Ct. at 2471] The Supreme Court, however, did not discuss what would amount to "special circumstances" under this theory of liability.

2. Insider Information—Alternative Actions

The *Dudenhoeffer* Court also addressed claims based on a plan fiduciary's alleged failure to act on insider information, which, if known to the public, would lower the value of the company stock. The Supreme Court held that, to state a claim in ERISA stock drop cases based on insider information, plaintiffs must "plausibly allege an alternative action that the ERISA fiduciary could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." [*Dudenhoeffer*, 134 S. Ct. at 2472]

The Court also instructed lower courts to "consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases ... or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." [*Dudenhoeffer*, 134 S. Ct. at 2473]

In other words, a plaintiff must plead *specific facts* supporting the proposition that no prudent fiduciary, facing the same situation, could conclude that the proposed alternative action would harm the plan to a greater degree than if the fiduciary did nothing at all. Conclusory statements to this effect will not suffice.

III. Cases Interpreting *Dudenhoeffer*

In the two and a half years since *Dudenhoeffer*, district and circuit courts across the nation have

interpreted the new pleading standard established by the Court. After some initial uncertainty, and a handful of decisions favorable to plaintiffs, it appears settled that *Dudenhoeffer's* legacy is to make it even more difficult to bring ERISA "stock drop" actions involving publicly traded company stock than it was when the *Moench* presumption applied.

A. Public Information—Special Circumstances

Gedek v. Perez

Gedek v. Perez involved seven cases filed by participants and beneficiaries of plans sponsored by Eastman Kodak Company. The plaintiffs claimed that the plans' fiduciaries breached their duty of prudence "by continuing to invest [plan] assets in Kodak stock even after it became obvious that Kodak was headed for bankruptcy and that its stock was going to plummet in value." [Gedek v. Perez, 66 F. Supp. 3d 368, 370-71 (W.D. N.Y. 2014)]

The court acknowledged *Dudenhoeffer*'s holding that, "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 the stock are implausible as a general rule, at least in the absence of special circumstances." [*Perez*, 66 F. Supp. 3d 368, 370-71] However, the court distinguished *Dudenhoeffer*, finding that the case did not "address the situation presented by the plaintiffs' factual allegations here, *i.e.*, allegations that a company's downward path was so obvious and unstoppable that, regardless of whether the market was 'correctly' valuing the stock, the fiduciaries should have halted or disallowed further investment in it." [*Perez*, 66 F. Supp. 3d at 375] That is, the issue was "whether at some point Kodak stock became such an obviously poor investment, not just in hindsight but prospectively, that continued investment in Kodak stock was rendered objectively imprudent." [*Perez*, 66 F. Supp. 3d at 376]

Plaintiffs pled detailed factual allegations regarding Kodak's fall, and the court held that "… particularly without the *Moench* presumption of prudence … plaintiffs have stated a facially valid claim against the Kodak defendants, with regard to the ESOP." [*Perez*, 66 F. Supp. 3d at 378] The court reasoned that, "[a]ccepting the truth of plaintiffs' allegations, a reasonable factfinder could conclude that at some point during the class period, the ESOP fiduciary should have stepped in and, rather than blindly following the plan directive to invest primarily in Kodak stock, shifted the plan's assets into more stable investments, as permitted by the plan document, and as consistent with the plan's and ERISA's purposes." [*Perez*, 66 F. Supp. 3d at 378] The defendants' motions to dismiss were denied.

In re Citigroup ERISA Litigation

In *In re Citigroup ERISA Litigation*, the plaintiffs argued that the defendants acted imprudently by continuing to allow the plaintiffs to invest in Citigroup common stock at a time when Citigroup stock was falling drastically. [*In re* Citigroup ERISA Litigation, 112 F. Supp. 3d 156 (S.D.N.Y. 2015)]

The court focused on the Supreme Court's instruction that "public knowledge" stock drop cases are generally implausible, noting that, in such cases, "ESOP fiduciaries may find themselves between a rock and a hard place, because they will be second guessed if they sell the stock and the stock goes up, or if they fail to sell the stock and the stock continues to go down." [*In re* Citigroup ERISA Litigation, 112 F. Supp. 3d 156] On a motion for reconsideration of an earlier decision to dismiss plaintiff's claims, the court reaffirmed its prior holding dismissing the claims.

Coburn v. Evercore Trust Co., N.A.

Recently, in *Coburn v. Evercore Trust Co., N.A.*, the D.C. Circuit Court of Appeals affirmed an order by the district court dismissing a plaintiff's claims because she failed to plead "special circumstances" as required by *Dudenhoeffer*. The plaintiff in *Coburn* claimed that the defendant breached its duty of prudence by failing to prevent plan participants from purchasing or holding J.C. Penney Corporation, Inc. stock in their retirement plans after J.C. Penney's stock price "tumbled" between 2012 and 2013. [Coburn v. Evercore Trust Co., N.A., No. 16-7029, 2016 WL 7480257, at *1 (D.C. Cir. Dec. 30, 2016)]

The plaintiff claimed that, based on this publicly available information, the defendant (the ESOP fiduciary) knew that continued investment in J.C. Penney stock was imprudent. The Circuit Court of Appeals focused on the fact that the stock market itself is best equipped to value a company's stock on the basis of publicly available information:

> Indeed, according to the efficient capital market theory, a security price in an efficient market represents the market's most accurate estimate of the value of a particular security based on its riskiness and the future net income flows that investors holding that security are likely to

> receive … Echoing this theory, *Dudenhoeffer* agreed that a fiduciary's failure to outsmart a presumptively efficient market … is … not a sound basis for imposing liability.

[*Codburn*, 2016 WL 7480257, at *3 (internal citations omitted)] Plaintiff argued that *Dudenhoeffer's* "special circumstances" requirement was inapplicable because her claims challenged the defendant's failure to understand the *risk* of a continued investment in J.C. Penney stock, rather than a failure to properly value the stock price. The court, however, reasoned that "because a stock price on an efficient market reflects all publicly available information," the plaintiff must plead "additional allegations of 'special circumstances' when [she] brings a breach of the duty of prudence claim against a fiduciary based on that information," and that, accordingly, the plaintiff's "claim falls far short." [*Codburn*, 2016 WL 7480257, at *3] The court rejected the plaintiff's claim that "risk is attenuated from price such that risk-based allegations are totally free from *Dudenhoeffer's* constraints," and affirmed the judgment of the district court.

Saumer v. Cliffs Nat. Res. Inc.

In *Saumer v. Cliffs Nat. Res. Inc.*, the Northern District of Ohio considered a motion for reconsideration of a prior order dismissing the action. Citing *Dudenhoeffer*, the court found "that ERISA fiduciaries may prudently rely on the market price of a stock as an unbiased assessment of a security's value in light of all the public information and that, absent special circumstances affecting the reliability of the market price, a claim for breach of the duty to prudently manage the stock based solely on public information cannot stand." [Saumer v. Cliffs Nat. Res. Inc., No. 15-954, 2016 WL 3355323, at *1 (N.D. Ohio June 17, 2016)]

In support of reconsideration, the plaintiff argued that: (1) "its public-information claim [fell] outside the scope of *Dudenhoeffer*"; (2) the court incorrectly relied on *Rinehart v. Lehman Bros. Holdings, Inc.*, which found that the "mixed signals" in the marketplace that Lehman's stock was overvalued were not enough to find "special circumstances" under *Dudenhoeffer*; and (3) "factors other than 'market inefficiency'—such as lack of a reasoned decision making process—can meet [*Dudenhoeffer's*] special circumstances requirement." [*Saumer*, 2016 WL 3355323, at *1]

In language embraced by defense attorneys, the court stated "a literal construction of *Dudenhoeffer* nearly eviscerates any gains made for employee-plaintiffs by removing the presumption of prudence in favor of fiduciary-defendants." [*Saumer*, 2016 WL 3355323, at *2]

Generally speaking, absent "special circumstances," which most courts have not found to be present, ERISA fiduciary breach claims based solely on publicly available information will be extremely difficult to successfully plead.

B. Insider Information—Alternative Actions

Laffen v. Hewlett-Packard Co. (In re HP ERISA Litigation)

In *Laffen v. Hewlett-Packard Co.*, the plaintiff alleged that Hewlett Packard (HP) covered up information about accounting irregularities engaged in by a company that it acquired, Autonomy. HP's stock value declined when the irregularities came to light. The plaintiff claimed that HP could have taken two alternative actions that a prudent fiduciary would not have found to be more likely to do more harm than good: (1) restrict transactions or new investments by the plan in HP stock; and/or (2) publicly disclose its plans to hide or conceal Autonomy's accounting practices. [Laffen v. Hewlett-Packard Co., No. 12-cv-6199, 2015 WL 3749565 (N.D. Cal. June 15, 2015)]

The court took a pragmatic view of HP's options, focusing first on the fact that HP had a right, and an obligation, to do a thorough review of information regarding Autonomy's accounting practices: "… it is inconsistent with, or at least 'alters,' the disclosure regime of the securities laws to require HP to disclose in real time any suspicions or allegations about Autonomy that are yet uninvestigated." [*Laffen,* 2015 WL 3749565, at *7] The court noted that "[s]ecurities laws do not require a company 'to disclose immediately all information that might conceivably affect stock prices.'" [*Laffen,* 2015 WL 3749565, at *7] The court also noted that "the market impact of freezing the HP Fund as a result of concerns over Autonomy 'likely would have been dire,' and a prudent manager could have—likely, would have, under the circumstances here—waited to investigate the investigate the existence and extent of a third-party fraud before disclosing it to the market." [*Laffen,* 2015 WL 3749565 at *8]

Laffen, like most of the cases decided in the wake of *Dudenhoeffer,* recognizes how difficult it is for a plaintiff to plausibly allege alternative actions that an ESOP fiduciary could have taken that would not have been more likely to do more harm than good to the value of company stock.

In re SunTrust Banks, Inc. ERISA Litigation

In re SunTrust Banks, Inc. ERISA Litigation is one of the few post-*Dudenhoeffer* decisions in which courts have allowed claims based on inside information to proceed beyond a motion to dismiss. (However, the court dismissed claims alleging that the fiduciary defendants breached their duties that defendants should have taken action based on publicly available information.) The plaintiffs in *SunTrust* alleged the plan fiduciaries could have taken the following alternative actions: (1) invested more of the fund's assets in cash rather than SunTrust common stock, and closed the fund to further contributions; (2) made a complete and accurate disclosure of SunTrust's condition, which they claimed would have caused the stock to drop less; (3) required that matching contributions be made in cash instead of SunTrust stock; and (4) sought guidance from the DOL, resigned as plan fiduciaries, retained outside experts to serve as advisors or fiduciaries, or limited participants to a certain maximum percentage of their assets in the fund. [*In re* SunTrust Banks, Inc. ERISA Litigation, No. 8-cv-3384, 2015 WL 12724074 (N.D. Ga. June 18, 2015)]

The court held—without any analysis of the alternatives that plaintiffs claim defendants could have pursued—that "… it would be premature to dismiss Plaintiffs' Non-Public Information Claim at this stage in the proceedings, prior to fact and expert discovery. The Court is unwilling to find that Plaintiffs' alternative options fail as a matter of law without development of the factual record and the aid of expert testimony." [*In re* SunTrust Banks, 2015 WL 12724074, at *4]

SunTrust Banks, however, appears to be the exception to the general trend.

In re Pilgrim's Pride Stock Investment Plan Litigation

The plaintiffs in *In re Pilgrim's Pride Stock Investment Plan Litigation* essentially alleged identical alternative actions that the fiduciary defendants could have taken as those alleged in the *SunTrust Banks* case. The *Pilgrim's Pride* court, however, thoroughly analyzed the alternative approaches that the plaintiffs claimed the fiduciaries could have taken, and the outcome was directly contrary to that in *SunTrust Banks.* [*In re* Pilgrim's Pride Stock Investment Plan Litigation, No. 2:08-cv-472, slip op. at 1 (E.D. Texas Aug. 19, 2016)]

In *Pilgrim's Pride,* the plaintiffs alleged four alternative actions that the fiduciary defendants could have taken. First, they claimed that the defendants could have publicly disclosed all of the adverse financial information that the plaintiffs claimed caused Pilgrim's Pride stock to be seriously inflated. The court rejected the allegation: "… a reasonable fiduciary could clearly have concluded that the bankruptcy of the company was not inevitable" whereas "[p]ublicizing all of the negative insider information alleged by Plaintiffs would guarantee the collapse of the company stock." [*In re* Pilgrim's Pride, No. 2:08-cv-472, slip op. at *5] The court found it "simply implausible to say that a reasonable fiduciary could *not* have concluded that accelerating a stock collapse would cause more harm than good." [*In re* Pilgrim's Pride, No. 2:08-cv-472, slip op. at *6]

Second, the plaintiffs claimed that the defendants could have transferred the company stock into other plan investments or into cash and suspended further investments in company stock. But they failed to allege how this was any different from a sale of the stock, and simply terminating the plaintiffs' option to invest in company stock would likely have signaled the market, and caused the very decline that the plaintiffs claimed was inevitable. (In fact, when the company finally suspended employees' ability to invest in company stock, the stock price immediately dropped an additional 23.5 percent, which debunked the plaintiff's claim that a reasonable fiduciary could not have believed that the proposed action would not do more harm than good.)

Third, the plaintiffs claimed the defendants could have resigned as fiduciaries and appointed outside experts who could have sold the company stock held by the plan. But the plaintiffs failed to allege why those hypothetical outsiders would have sold the company stock if all they knew was the information that was generally available to the public. So, the suggested alternative would have accomplished nothing.

Finally, the plaintiffs alleged the defendants could have sought guidance from the DOL or the SEC, who would have advised the defendants to resign and implement the third alternative. The court concluded that option suffered from the same flaws as the third alternative.

In other words, what the court in *SunTrust Banks* found sufficient to overcome a motion to dismiss were insufficient in the eyes of the *Pilgrim's Pride* court.

Murray v. Invacare Corp.

In *Murray v. Invacare Corp*., the defendants' motion to dismiss was denied, where the district court found that the plaintiff plausibly pled an alternative action that the plan fiduciaries could have taken under the

circumstances. The plaintiff alleged that the defendants breached their fiduciary duties when they allowed plan participants to acquire more shares of Invacare stock, even though the defendants were aware that Invacare had a history of noncompliance with the Food and Drug Administration (FDA) safety and manufacturing regulations. [*Murray v. Invacare Corp*., 125 F. Supp. 3d 660, 663 (N.D. Ohio 2015)]

The district court addressed whether a prudent fiduciary in the defendant's position could not have concluded that stopping purchases of the company stock or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price. The court concluded that the plaintiffs met the *Dudenhoeffer* pleading standard. The plaintiffs alleged that (1) the defendants knew that Invacare was not complying with FDA safety and compliance standards; (2) Invacare was not sufficiently addressing its FDA compliance issues; and (3) these continued deficiencies would likely result in harsh penalties to the company.

Based on these allegations, the court held "a prudent fiduciary in Defendants' position could have concluded that stopping Plan participants from further investment in Company stock before the fall occurred would not have caused the Plan more harm than good." [*Murray,* 125 F. Supp. 3d at 669] Although the court recognized that "closing the stock fund is a fairly extreme action with significant consequences," it found that, under the circumstances "a prudent fiduciary in defendant's position could have concluded that such an action would not cause more harm than good," and that "*Dudenhoeffer* does not foreclose such an action." [*Murray,* 125 F. Supp. 3d at 669]

In re JPMorgan Chase & Co. ERISA Litigation

In *In re JPMorgan*, the plaintiffs alleged that JPMorgan concealed risk-escalating trades made by its Chief Investment Office (CIO), which resulted in losses of over $6 billion. [*In re* JPMorgan Chase & Co. ERISA Litig., No. 12-4027, 2016 WL 110521 at *1 (S.D.N.Y. Jan. 8, 2016)]

Addressing the proposed alternative actions pled by the plaintiffs, the court noted that the parties were in agreement that both of the proposed alternative actions—a freezing of further purchases of JPMorgan stock or a public disclosure—would have required the defendants to make JPMorgan's purported misconduct public. [*In re* JPMorgan Chase, 2016 WL 110521 at *1] The court then focused on whether the plaintiffs plausibly alleged that a prudent fiduciary would not have viewed such public disclosures as more likely to harm than help the fund. [*In re* JPMorgan Chase, 2016 WL 110521 at *4]

The court found that the plaintiffs' complaint made only conclusory allegations that a prudent fiduciary in the defendants' circumstances would not have concluded that making public disclosures would do more harm than good. [*In re* JPMorgan Chase, 2016 WL 110521 at *4] The plaintiffs argued that, although a drop in the stock price would have occurred once JPMorgan's alleged misconduct was made public, "the longer a fraud goes on, the more painful the correction will be." [*In re* JPMorgan Chase, 2016 WL 110521 at *4 (internal citations omitted)] The court noted that "[t]hese assertions are not particular to the facts of this case and could be made by plaintiffs in any case asserting a breach of ERISA's duty of prudence." [*In re* JPMorgan Chase, 2016 WL 110521 at *4] The court reasoned that the plaintiffs "must plead enough facts to plausibly allege that a prudent fiduciary in Defendants' circumstances would not have believed that public disclosures of JPMorgan's purported misconduct were more likely to harm than help the fund." [*In re* JPMorgan Chase, 2016 WL 110521 at *4] The court concluded that the plaintiffs failed to meet this standard, and granted the defendants' motion to dismiss. [*In re* JPMorgan Chase, 2016 WL 110521 at *4]

In re Radioshack 2014 ERISA Litigation

The plaintiffs in this case alleged that the defendants breached their fiduciary duties by keeping their ESOP invested in Radioshack stock despite its decline into bankruptcy. [*In re* Radioshack 2014 ERISA Litigation*,* No. 14-cv-959, slip op. at 1 (N.D. Tex., Sept. 28, 2016)] The plaintiffs alleged that the defendants withheld material information about the company's health from the market, and that the company's CEO made misleading, unrealistic statements regarding the company's ability to turn around. They claimed that the company could have taken prudent alternative actions, such as freezing contributions to the company stock fund or providing full disclosure of material nonpublic information.

The court found that the plaintiffs failed to meet the *Dudenhoeffer* standard of pleading an alternative action that the defendants could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the plan than to help it. [*In re* Radioshack, slip op. at 25]

It also viewed the company's optimistic statements regarding its likely turn around as "immaterial puffery." [*In re* Radioshack, slip op. at 20]

Martone v. Whole Foods Mkt., Inc.

In *Martone v. Whole Foods Mkt., Inc.*, the Western District of Texas dismissed claims that Whole Foods Market, Inc., and members of its Board of Directors, breached their fiduciary duties by allowing Whole Foods employees to invest in the company stock while it was artificially inflated due to an alleged overpricing scheme. The plaintiff alleged that Whole Foods had a systemic practice of illegally overcharging customers for prepackaged foods. [Martone v. Whole Foods Mkt., Inc., No. 15-877, 2016 WL 5416543, at *1 (W.D. Tex. Sept. 28, 2016)]

The plaintiff alleged that the defendants could have disclosed the alleged overcharging scheme to the public or refrained from making misleading representations to investors. [*Martone*, 2016 WL 5416543, at *7] The court concluded that the plaintiff "failed to plausibly allege an alternative action that 'a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than help it.'" [*Martone*, 2016 WL 5416543, at *7 (quoting *Dudenhoeffer*, 134 S. Ct. at 2472)] The court further found allegations that "'Defendants cannot excuse their failure to tell the truth,' or disclose the alleged overpricing scheme, 'by claiming that, at the time, they could have reasonably thought it would have done more harm than good to do so'" conclusory, and insufficient to meet the *Dudenhoeffer* standard. [*Martone*, 2016 WL 5416543, at *7]

The court held that the plaintiff failed to "specifically allege, for each proposed alternative, that a prudent fiduciary could not have concluded that the alternative would do more harm than good." [*Martone*, 2016 WL 5416543, at *7] Notably, the court found what was "[m]ost problematic for Plaintiff's argument," was that both "alternatives proposed would make the stock price drop," and, as was the case in *Dudenhoeffer*, a "prudent fiduciary could very easily conclude that such action would do more harm than good." [*Martone*, 2016 WL 5416543, at *8]

IV. Conclusion

Dudenhoeffer has indisputably raised the bar in the standard of pleading ERISA "stock drop" cases. The requirement that the plaintiffs "plausibly" plead that *no* other prudent fiduciary would find that a proposed alternative action would do more harm to a plan than if that fiduciary took no action at all has proven to be very difficult for plaintiffs to overcome. Nevertheless, these cases continue to be filed, and the plaintiffs' bar continues to attempt to find new ways to satisfy the substantial hurdles presented by *Dudenhoeffer*. ■