NOTES

THE DUTY TO INFORM IN THE POST-*DUDENHOEFFER* WORLD OF ERISA

*Remy Grosbard**

The Supreme Court's 2014 decision in Fifth Third Bancorp v. Dudenhoeffer *rejected a long-held presumption in the U.S. circuit courts that fiduciaries of employee stock ownership plans (ESOPs) act prudently in investing in company stock. Instead, the Supreme Court held, ESOP fiduciaries should be subject to the same duty of prudence as all ERISA fiduciaries, leaving ESOP fiduciaries vulnerable to plaintiffs testing the new standard.*

To reduce the likelihood of suit from employees invested in employer stock, companies attempt to insulate themselves from liability by appointing independent fiduciaries. One way that plaintiffs, who may have suffered serious losses from downturns in their employer's stock, can still successfully assert breach-of-fiduciary-duty claims is by alleging that appointing fiduciaries have a duty to inform appointed fiduciaries of material nonpublic information that would adversely affect stock price.

This Note considers this claim and argues that courts should refrain from creating a per se rule against the duty to inform. Instead, courts should uphold such claims when securities laws would independently require disclosure. Principles of trust law, guidance from the Department of Labor, and the Supreme Court's holding in Dudenhoeffer *support this proposal.*

INTRODUCTION

In the wake of the Enron scandal, the vulnerabilities created by heavy investment in company stock received widespread criticism when employees lost both their jobs and their retirement savings as companies collapsed.[1] After the most recent financial downturn, precipitated by the

* J.D. Candidate 2017, Columbia Law School.

1. Enron-era plaintiffs invested in company stock through 401(k) plans that provided employer stock as one of several investment options and offered an employer match. Robert Rachal, Howard Shapiro & Nicole A. Eichberger, Fiduciary Duties Regarding 401(k) and ESOP Investments in Employer Stock, *in* ERISA Litigation 1259, 1260–61 (Jayne E. Zanglein, Lawrence A. Frolik & Susan J. Stabile eds., 5th ed. 2014) [hereinafter Rachal et al., Fiduciary Duties]. Prior to the 2006 Pension Protection Act, this match was often required to be invested in the employer-stock fund. Id. After tax changes effective in 2002, which allowed employers to deduct dividends paid on shares in employee stock ownership plans (ESOPs) when those dividends were paid to the ESOP

subprime mortgage crisis, American workers experienced similar losses.[2] In response to both downturns, employees invested in company stock brought claims alleging that their employers—who also served as administrators of their savings and investment plans—breached their fiduciary duties[3] under the Employee Retirement Income Security Act (ERISA)[4] by failing to disclose material nonpublic information to plan participants and declining to divest plans of company stock.[5] As Professor Susan Stabile noted in reference to the Enron-era suits, "In whatever formulation, the allegations sound very much like things that would be alleged as violations of the federal securities laws but for the fact that the plaintiffs are participants in a plan covered by ERISA."[6]

Employees invest in company stock through participant-directed eligible individual account plans (EIAPs), including employee stock ownership plans (ESOPs) and 401(k) plans.[7] Claims by employees invested in

---

and then reinvested in employer stock, many 401(k) plans designated the employer-stock fund as an ESOP. Id. at 1261 n.2; see also H. Douglas Hinson & Patrick C. DiCarlo, Fiduciary Duties and Investments in Employer Securities, J. Pension Plan. & Compliance, Spring 2003, at 22–23 (discussing ESOPs within 401(k) plans).

2. See, e.g., Rachal et al., Fiduciary Duties, supra note 1, at 1282 (discussing Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014)).

3. Cf. Mark Casciari & Ian Morrison, Should the Securities Exchange Act Be the Sole Federal Remedy for an ERISA Fiduciary Misrepresentation of the Value of Public Employer Stock?, 39 J. Marshall L. Rev. 637, 642 (2006) ("Once an employer establishes a retirement plan for its employees, the employer and various employees (potentially including directors and officers), become subject to [Employee Retirement Income Security Act] fiduciary obligations.").

4. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001–1461 (2012)).

5. Susan J. Stabile, I Believed My Employer and Didn't Sell My Company Stock: Is There an ERISA (or '34 Act) Remedy for Me?, 36 Conn. L. Rev. 385, 386–87 (2004) [hereinafter Stabile, I Believed My Employer] ("Although couched in various ways, the claims essentially allege that participants . . . failed to sell stock . . . because of a fiduciary's misrepresentation that the stock remained a good investment . . . ."); cf. Rachal et al., Fiduciary Duties, supra note 1, at 1261–62 (noting that "[s]uch losses often lead to lawsuits, which generally involve two types of claims regarding investments:" the prudent-investment claim and the failure-to-disclose claim (footnote omitted)).

6. Stabile, I Believed My Employer, supra note 5, at 387.

7. Clovis Trevino Bravo, ERISA Misrepresentation and Nondisclosure Claims: Securities Litigation Under the Guise of ERISA?, 26 Hofstra Lab. & Emp. L.J. 497, 500 (2009). In fact, employees frequently own stock through both vehicles, as many 401(k) plans also include ESOPs as subaccounts within the 401(k) plans. Hinson & DiCarlo, supra note 1, at 22–23 ("Many 401(k) plans provide that a matching contribution in employer stock will go into a subaccount that will itself constitute an ESOP."). Typically, 401(k) plans allow participants to manage their retirement savings by directing contributions among several investment options. Emp. Benefits Sec. Admin., U.S. Dep't of Labor, A Look at 401(k) Plan Fees 2 (2013), http://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/401kFeesEmployee.pdf [http://perma.cc/6HRC-LXXV]. The sponsoring company's stock is one of the options, and plan participants choose to invest heavily in their employers' securities. See Susan J. Stabile, Another Look at 401(k) Plan Investments in Employer Securities, 35 J. Marshall L. Rev. 539, 547–52 (2002) (considering

such plans pose the following questions: How do ERISA-based duties differ from disclosure requirements under securities laws?[8] What action must a prudent ERISA fiduciary take to protect plan participants against loss? How much can, and must, ERISA fiduciaries do without breaking securities laws?

These questions are further complicated by the nature and purpose of ESOPs. Unlike other plans governed by ERISA, Congress intended ESOPs not only to encourage and protect employee savings but also to promote employee ownership and to act as tools of corporate finance, both goals in their own right.[9] Courts considering ESOP participants' breach-of-fiduciary-duty claims have been wary of defeating Congress's purpose of encouraging such plans by creating liability for fiduciaries facing a volatile market and conflicting goals.[10] For many years, the prevailing standard in the U.S. circuits was to provide a presumption of prudence that assumed ESOP fiduciaries acted prudently unless a plaintiff could prove an abuse of discretion.[11]

In *Fifth Third Bancorp v. Dudenhoeffer*, the Supreme Court rejected the presumption in a 9-0 decision.[12] The Court held that "the law does not create a special presumption favoring ESOP fiduciaries. Rather, the same standard of prudence applies to all ERISA fiduciaries . . . ."[13] Justice Breyer, who authored the opinion, then provided several factors for lower courts to consider when evaluating claims that ESOP fiduciaries had breached their duties by failing to act on nonpublic information.[14] First, he reminded courts that ERISA-based duties cannot require fiduciaries to break securities laws.[15] Second, he asked courts to consider duties under ERISA in the context of securities laws.[16] And third, he instructed courts to evaluate whether a prudent fiduciary in the same circumstances

---

explanations for such heavy plan investments in employer stock). Many 401(k) plans have designated the employer-stock funds as ESOPs. Bravo, supra, at 500.

8. For a comprehensive analysis of the procedural and remedial differences between ERISA fiduciary-breach claims based on nondisclosure and securities laws claims pursued under Rule 10b-5, see Bravo, supra note 7, at 501–38.

9. See infra notes 95–96 and accompanying text (explaining Congress's multiple reasons for promoting ESOPs).

10. See infra notes 101–103 and accompanying text (noting the conflicting goals of ESOP fiduciaries).

11. See infra notes 108–116 and accompanying text (discussing the presumption of prudence).

12. 134 S. Ct. 2459, 2463 (2014) ("We hold that no such presumption applies.").

13. Id. at 2467.

14. Id. at 2472–73. The Court suggested alternative paths including refraining from purchasing more stock or disclosing material information. Id. at 2473 ("[L]ower courts . . . should also consider whether . . . 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 . . . .").

15. Id. at 2472.

16. Id. at 2473.

could have thought more harm than good would have been done by refraining from purchasing more stock or disclosing material information that would have caused a stock drop.[17]

While the Court's guidelines in *Dudenhoeffer* highlight many of the important issues that typically arise in ESOP suits, they also leave some questions unanswered and open for lower court and SEC development.[18] These unanswered questions expose fiduciaries to uncertain liability from plaintiffs testing the new standard.[19]

This Note focuses on one of the most common strategies adopted by corporate insiders seeking to avoid liability under ERISA: the appointment of independent third-party fiduciaries to manage and invest plan assets.[20] By giving control to independent fiduciaries, corporate insiders seek to absolve themselves of responsibility to plan participants. According to one federal district judge, this strategy is "the driving force behind the structure of ERISA plans."[21]

The success of this strategy depends on whether courts find that the duty to monitor, which is part of ERISA's duty of prudence, has an attendant duty to inform.[22] If so, corporations that appoint fiduciaries will not be able to escape liability by delegating their authority because they will still have a duty to inform the appointed fiduciaries of material

17. Id. In *Amgen Inc. v. Harris*, the Supreme Court reversed the Ninth Circuit on its interpretation of this factor, clarifying that plaintiffs must allege in the complaint that a "prudent fiduciary in the same position 'could not have concluded' that the alternative action 'would do more harm than good.'" 136 S. Ct. 758, 760 (2016) (quoting *Dudenhoeffer*, 134 S. Ct. at 2463).

18. *Dudenhoeffer*, 134 S. Ct. at 2473 ("The U.S. Securities and Exchange Commission has not advised us of its views on these matters, and we believe those views may well be relevant.").

19. See, e.g., Alan S. Miller et al., *Fifth Third Bancorp v. Dudenhoeffer*: Supreme Court Rejects "Presumption of Prudence" for Stock Drop Cases, Jones Day (June 2014), http://www.jonesday.com/fifth-third-bancorp-v-dudenhoeffer-supreme-court-rejects-presumption-of-prudence-for-stock-drop-cases-06-30-2014/ [http://perma.cc/JK4R-44ML] ("The Court's decision created a new battleground for litigants and new uncertainties for plan sponsors . . . ."); Michael A. Valerio & Ben V. Seessel, What *Fifth Third Bancorp v. Dudenhoeffer* May Mean for ERISA Stock-Drop Litigation, Am. Bar Ass'n (Aug. 28, 2014), http://apps.americanbar.org/litigation/committees/classactions/articles/summer2014-0814-fifth-third-bank-v-dudenhoeffer-erisa-stock-drop-litigation.html [http://perma.cc/5PF6-YFVK] (questioning the extent of liability created by *Dudenhoeffer*).

20. See infra notes 151–160 and accompanying text (describing the use of independent third-party fiduciaries).

21. In re BP P.L.C. Sec. Litig., Nos. 4:10–MD–2185, 4:10–cv–4214, 2015 WL 6674576, at *3 (S.D. Tex. Oct. 30, 2015).

22. See id. at *9 (dismissing a claim after concluding that "ERISA does not impose a duty on monitoring fiduciaries to keep their appointees apprised of material, non-public information"); In re Lehman Bros. Sec. & ERISA Litig., 113 F. Supp. 3d 745, 764–69 (S.D.N.Y. 2015) (dismissing a claim after concluding that "ERISA does not impose a duty on appointing fiduciaries to keep their appointees apprised of nonpublic information"), aff'd sub nom. Rinehart v. Lehman Bros. Holdings Inc., 817 F.3d 56 (2d Cir. 2016).

nonpublic information that could harm plan participants. This Note considers whether this duty exists and concludes that courts should uphold duty-to-inform claims only if defendants have been unable to dismiss securities law actions against them.

Part I provides a brief overview of ERISA and ERISA fiduciary duties, focusing on the duty of prudence and disclosure duties, which are most relevant to this Note. Part II takes a closer look at ESOPs and the presumption of prudence courts applied in evaluating claims before *Dudenhoeffer*. It then turns to *Dudenhoeffer* and lower court interpretations of that case. Also in Part II, this Note examines the strategy of appointing independent fiduciaries to avoid liability, as well as plaintiffs' attempts to overcome this strategy by alleging duty-to-inform claims. Part III discusses whether courts should find that ERISA requires appointing fiduciaries to inform appointed fiduciaries of nonpublic information, looking to principles from trust law, Department of Labor guidelines, and language from *Dudenhoeffer* itself for guidance. This Note proposes that courts should apply *Dudenhoeffer* to determine the viability of duty-to-inform claims and suggests that courts should uphold such claims only when appointing fiduciaries break securities laws.

I. ERISA AND ERISA FIDUCIARY DUTIES

Section I.A of this Part begins by examining the history and purpose of ERISA, paying close attention to Congress's intent in enacting this comprehensive regulatory framework. It then offers an overview of who qualifies as a fiduciary under ERISA, whether fiduciaries may delegate their responsibilities, and what fiduciary duties the statute imposes. This section focuses on whether ERISA fiduciary duties entail disclosure duties distinct from the requirements made explicit elsewhere in ERISA.

A. *ERISA*

Congress enacted ERISA in 1974, recognizing the expansion of private pension funds in the United States. ERISA was the culmination of a decade-long study finding that the "growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial" and that "the continued well-being and security of millions of employees and their dependents are directly affected by these plans."[23]

A primary motivation for enacting ERISA was the inadequacy of pre-ERISA standards in ensuring the payment of promised benefits.[24] Through

23. 29 U.S.C. § 1001(a) (2012); see also Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 569 (1985) (citing 29 U.S.C. § 1001(a)); Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361–62 (1980) (same).

24. 29 U.S.C. § 1001(a) ("[O]wing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered."). The private pension system began in the mid-1940s. H.R.

this new legislation, Congress sought to "correct this condition by making sure that if a worker has been promised a defined pension benefit . . . he actually will receive it."[25] To accomplish this task, Congress designed ERISA to establish "minimum standards" of fiduciary conduct for those administering retirement plans and to require "adequate public disclosure of the plan's administrative and financial affairs."[26]

1. *Who Are ERISA Fiduciaries?* — Before turning to consider what is required of an ERISA fiduciary, one must determine who qualifies as a fiduciary under the statute. Accordingly, in any claim alleging breach of ERISA fiduciary duties, the "threshold question" is always whether the defendant was in fact "acting as a fiduciary . . . when taking the action subject to complaint."[27] Two types of fiduciaries exist under ERISA: "named fiduciaries" and "functional fiduciaries."[28] Named fiduciaries refer to persons or entities who are "named in the plan instrument, or who, pursuant to a procedure specified in the plan" are given express "authority to control and manage the operation . . . of the plan."[29] Functional fiduciaries "need not be named as fiduciaries in the governing plan document."[30] Under 29 U.S.C. § 1002(21)(A), a fiduciary is defined as:

Rep. No. 93-533, at 2073 (1973). At the time, Americans were dissatisfied with the government plans in place, including the Railroad Retirement Act and Social Security Act. Id. By the time of ERISA's enactment in 1974, three federal statutes—the Welfare and Pension Plans Disclosure Act, the Labor Management Relations Act, and the Internal Revenue Code—were the primary federal regulations affecting the administration of private pension plans. Id. at 2074. This framework's inadequacy left participants to rely on "the traditional equitable remedies of the common law of trusts." Id. at 2075. Courts "strictly interpret[ed] the plan indenture and [were] reluctant to apply concepts of equitable relief or to disregard technical document wording." Id. at 2076. This left participants vulnerable to frequent losses not "because of some violation of federal law, but rather because of the manner in which the plan [was] executed with respect to its contractual requirements of vesting or funding." Id. ERISA was proposed to "establish minimum standards of vesting, funding, and fiduciary [sic] and a system of compulsory benefit insurance to protect the security of pension rights." Id.

25. *Cent. Transp., Inc.*, 472 U.S. at 569 (internal quotation marks omitted) (quoting *Nachman Corp.*, 446 U.S. at 375). For a discussion of defined benefits plans, see infra notes 92–94 and accompanying text.

26. H.R. Rep. No. 93-533, at 2088; see also id. at 2078 ("Of particular interest has been the course of conduct in fund transactions, the degree of responsibility required of the fiduciaries, the types of persons who should be deemed pension 'fiduciaries,' and the standards of accountability they shall be governed by in the management and disposition of the pension funds.").

27. Pegram v. Herdrich, 530 U.S. 211, 226 (2000).

28. See Mertens v. Hewitt Assocs., 508 U.S. 248, 251 (1993) ("The statute provides that not only the persons named as fiduciaries by a benefit plan, see 29 U.S.C. § 1102(a), but also anyone else who exercises discretionary control or authority over the plan's management, administration, or assets, see § 1002(21)(A), is an ERISA 'fiduciary.'").

29. 29 U.S.C. § 1102(a).

30. In re BP P.L.C. Sec. Litig., Nos. 4:10-MD-2185, 4:10–cv–4214, 2015 WL 6674576, at *2 (S.D. Tex. Oct. 30, 2015). Entities or individuals are considered functional fiduciaries when courts find that they exercise decisionmaking authority. Id.

> [A] person . . . with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.[31]

This statutory framework has been "construed liberally" by the Supreme Court, which has not required a person to have exclusive decisionmaking authority over a plan, so long as that person has some discretionary control.[32] However, courts have interpreted the statute's "to the extent" language to mean that one is a fiduciary only with respect to the particular actions over which one actually has control.[33]

2. *Who Else Can Be an ERISA Fiduciary: How Do ERISA Fiduciaries Delegate Duties?* — In addition to named and functional fiduciaries, fiduciary status may be created by appointment under ERISA. Corporate employers who are named fiduciaries under the plan may designate an individual, committee, or professional plan administrator to administer their sponsored plans.[34] The allocation of *nontrustee* fiduciary respon-

---

31. 29 U.S.C. § 1002(21)(A). In April 2016, the Department of Labor issued new rules that expand the definition of investment advice for fiduciary purposes but that do not affect the issues covered in this Note. See Fact Sheet: Department of Labor Finalizes Rule to Address Conflicts of Interest in Retirement Advice, Saving Middle Class Families Billions of Dollars Every Year, Emp. Benefits Sec. Admin., U.S. Dep't of Labor, http://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/dol-final-rule-to-address-conflicts-of-interest [http://perma.cc/7CTU-VXTT] (last visited Sept. 3, 2016).

32. José Martin Jara, What Is the Correct Standard of Prudence in Employer Stock Cases?, 45 J. Marshall L. Rev. 541, 554 (2012) (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989)). The Supreme Court has also clarified that when officers and actors act in a "settlor" role, they are not acting as ERISA fiduciaries. Dana M. Muir & Cindy A. Schipani, New Standards of Director Loyalty and Care in the Post-Enron Era: Are Some Shareholders More Equal than Others?, 8 N.Y.U. J. Legis. & Pub. Pol'y 279, 321–22 (2005) ("A trilogy of Supreme Court decisions clarifies the category of actions in which benefit plan actors, including officers and directors, do not act as ERISA fiduciaries."). Actions taken to "establish, amend, or terminate an employee benefit plan are not fiduciary actions and do not create fiduciary obligations." Id. at 321; see also Dana Muir & Norman Stein, Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction, 93 N.C. L. Rev. 459, 519–21 (2015) (explaining that ERISA plans are drafted to exploit how courts consider settlor–fiduciary distinctions to avoid fiduciary duties).

33. Sommers Drug Stores Co. Emp. Profit Sharing Tr. v. Corrigan Enters., 793 F.2d 1456, 1459–60 (5th Cir. 1986); see also *In re BP P.L.C. Sec. Litig.*, 2015 WL 6674576, at *2 ("[A] person is a fiduciary only *to the extent* he has or exercises specified authority and control over a plan or its assets.").

34. See 29 U.S.C. § 1002(16).

sibilities is articulated at 29 U.S.C. § 1105.[35] It explains that plan documents "may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan."[36] Still, "the delegating fiduciary has a duty to monitor the performance of the fiduciary to whom fiduciary responsibilities are delegated."[37]

Under 29 U.S.C. § 1103, fiduciaries may delegate *trustee* responsibilities.[38] A plan's assets are to be held in trust by one or more trustees, who "shall be either named in the trust instrument or in the plan instrument . . . or appointed by a person who is a named fiduciary."[39] Once a trustee accepts appointment, she has

> exclusive authority and discretion to manage and control the assets of the plan, except to the extent that (1) the plan expressly provides that [she] [is] subject to the direction of a named fiduciary who is not a trustee . . . or (2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers.[40]

Though fiduciaries may delegate different degrees of responsibility,[41] one type of appointment, outsourcing, permits fiduciaries to allocate near complete responsibility to professional, independent third-party firms. In a 2014 report, the ERISA Advisory Council (the Council) noted that this practice has grown in "prevalence and scope."[42] The Council attributed the popularity of outsourcing to its ability to permit "plan sponsors [to] gain access to expertise and technology, achieve

35. 29 U.S.C. § 1105(c)(1); Advisory Council on Emp. Welfare & Pension Benefit Plans, Outsourcing Employee Benefit Plan Services 9 (2014), http://www.dol.gov/sites/default/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2014ACreport3.pdf [http://perma.cc/KX7Q-SHSY].

36. 29 U.S.C. § 1105(c)(1).

37. Advisory Council on Emp. Welfare & Pension Benefit Plans, supra note 35, at 9.

38. 29 U.S.C. § 1103; Advisory Council on Emp. Welfare & Pension Benefit Plans, supra note 35, at 9–10.

39. 29 U.S.C. § 1103(a). Several exceptions to this are listed in 29 U.S.C. § 1103(b). Under § 1102(c)(3), employee benefit plans may provide "that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan." 29 U.S.C. § 1102(c)(3).

40. Id. § 1103(a).

41. See In re BP P.L.C. Sec. Litig., Nos. 4:10–MD–2185, 4:10–cv–4214, 2015 WL 6674576, at *3 (S.D. Tex. Oct. 30, 2015) (noting that fiduciaries are able to delegate varying levels of responsibility).

42. See Advisory Council on Emp. Welfare & Pension Benefit Plans, supra note 35, at 4.

economies of scale, and reduce costs," as well as "focus on [their] core business rather than managing [their] employee benefit plans."[43]

3. *What Are the Duties of an ERISA Fiduciary?* — ERISA fiduciary duties arise out of 29 U.S.C. § 1104, which prescribes four duties owed by fiduciaries,[44] including (1) the duty of loyalty,[45] (2) the duty of prudence,[46] (3) the duty to diversify plan assets,[47] and (4) the duty to follow the plan's terms.[48] To define the general scope of ERISA fiduciaries' authority and responsibility, Congress intended courts to turn to the common law of trusts.[49] Additionally, because these duties serve the purpose of protecting the administration of retirement plans, courts have recognized ERISA fiduciary duties as "the highest known to the law."[50] When fiduciaries breach these duties, the statute imposes personal liability for resulting losses and/or illicit profits.[51]

The duty of prudence, under which duties to monitor and investigate—the focus of this Note—are found,[52] requires fiduciaries to act "with

---

43. Id. at 1.

44. 29 U.S.C. § 1104(a); see also Jara, supra note 32, at 561 (listing duties).

45. 29 U.S.C. § 1104(a)(1) (creating a duty requiring fiduciaries to act solely in the interest of plan participants and beneficiaries). The duty of loyalty requires "complete loyalty to participants," separate from the duty of care and prudence. Joel R. Hurt, Defined Benefit Plan Investments, *in* ERISA Litigation, supra note 1, at 969, 973. Breach may be predicated on finding that a fiduciary invested plan assets to benefit herself or a third party, rather than plan participants. Id. at 973–75 (providing examples of breach).

46. 29 U.S.C. § 1104(a)(1)(B); see infra notes 53–59 and accompanying text (explaining the duty of prudence in greater depth).

47. See 29 U.S.C. § 1104(a)(1)(C) (requiring fiduciaries to diversify "investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so"). See generally Hurt, supra note 45, at 982–84 (discussing the duty to diversify). However, Congress has exempted ESOP fiduciaries from this duty. 29 U.S.C. § 1104(a)(2); Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 356 (4th Cir. 2014) ("[T]he diversification duty does not apply to investments that fall within the exemption for employer stocks provided for in § 1104(a)(2)."). Plan trustees may also hold "single-stock investments as an option in a plan that includes a portfolio of diversified funds." Id.

48. See 29 U.S.C. § 1104(a)(1)(D) (requiring fiduciaries to act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter"). Thus the duty to act in accordance with plan documents may not be followed at the expense of complying with other requirements of ERISA. Hurt, supra note 45, at 984–85 ("[T]he fiduciary has a superior duty to adhere to the ERISA prescriptions."); see also Hinson & DiCarlo, supra note 1, at 25–27 (discussing the duty to override plan documents).

49. Varity Corp. v. Howe, 516 U.S. 489, 496 (1996) (citing H.R. Rep. No. 93-533, at 3–5, 11–13 (1973)); Shelby D. Green, To Disclose or Not to Disclose? That Is the Question for the Corporate Fiduciary Who Is Also a Pension Plan Fiduciary Under ERISA: Resolving the Conflict of Duty, 9 U. Pa. J. Lab. & Emp. L. 831, 849 (2007).

50. Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982); see also *Tatum*, 761 F.3d at 356 (quoting *Donovan*).

51. 29 U.S.C. § 1109(a).

52. See Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828–29 (2015).

the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[53] Courts consider the test for prudence to be procedural, or one of conduct, rather than one of results.[54]

As mentioned above, monitoring and investigating duties are subsumed under the duty of prudence.[55] For fiduciaries investing in company stock, a duty to investigate only arises when there is a "'red flag' of misconduct" that would alert a fiduciary to the imprudence of investing in company stock.[56] Reasonable fiduciaries—those who "appropriately investigate the merits of an investment decision prior to acting"—clearly fulfill their duties.[57] A more controversial question is whether the duty to monitor includes an attendant duty to disclose to plan participants adverse, material nonpublic information.[58] Courts have not provided a uniform answer to this question.[59]

Despite the resistance of some circuits to find such a duty,[60] plaintiffs who have participated in plans governed by appointed, independent fiduciaries have attempted to extend this duty: They claim that fiduciaries have a duty not only to inform plan participants but also to inform appointed fiduciaries.[61] Whether this duty exists is the focus of this Note.

4. *What Disclosure Requirements Does ERISA Impose?* — Because ERISA includes express disclosure requirements,[62] some courts have been reluctant to find that disclosure duties arise under the statute's fiduciary requirements.[63] Courts are particularly wary of intervening because they fear interfering in judgments made by businesses in their capacity as

---

53. 29 U.S.C. § 1104(a)(1)(B).

54. Jara, supra note 32, at 565–66 ("Courts have held that the test of prudence . . . is one of conduct . . . not whether his investment succeeded or failed." (internal quotation marks omitted) (quoting Smith v. Snydor, No. 98–CV–241, 2000 WL 33687953, at *16 (E.D. Va. Aug. 25, 2000))).

55. See supra note 52 and accompanying text.

56. Pugh v. Tribune Co., 521 F.3d 686, 700 (7th Cir. 2008).

57. Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 358 (4th Cir. 2014).

58. See infra notes 68–70 and accompanying text.

59. See infra notes 71–81 and accompanying text.

60. See infra notes 71–77 and accompanying text (explaining why the Second, Fifth, and Eleventh Circuits have rejected this duty).

61. See infra notes 161–164 and accompanying text (discussing the theory behind duty-to-inform-appointed-fiduciary claims).

62. See 29 U.S.C. § 1021(a) (2012) (describing the information required to be included in summary plan descriptions).

63. See Bravo, supra note 7, at 511. Some courts have suggested that plan administrators in compliance with the statute's standard for disclosure "cannot be said to have breached the fiduciary duty by not providing earlier disclosure." Porto v. Armco, Inc., 825 F.2d 1274, 1276 (8th Cir. 1987); see also Watson v. Deaconess Waltham Hosp., 298 F.3d 102, 105 (1st Cir. 2002) ("When ERISA itself has specified a duty and a corresponding remedy, we will impose a further duty on fiduciaries only in very narrow circumstances.").

such, rather than in their fiduciary capacities.[64] Whether ERISA's fiduciary duties encompass a duty to disclose has been called an "area of developing and controversial law."[65]

ERISA's express disclosure requirements are articulated at 29 U.S.C. §§ 1021–1025. Affirmative disclosure obligations have been recognized regarding "plan terms and requirements, matters of plan administration, or tax or other legal issues affecting participant plan elections."[66] To obtain information about their plans, employees may also consult investment communications, disclosed in summary plan descriptions (SPDs) required by ERISA.[67]

As noted, fiduciary-imposed disclosure requirements are less settled.[68] In *Varity Corp. v. Howe*, the Supreme Court clarified that when a fiduciary speaks in that capacity, there is a duty to speak truthfully and completely even if ERISA did not require those communications.[69] However, the Court did not "reach the question whether ERISA fiduciar-

---

64. See infra note 102 and accompanying text (discussing the "two hats" of employer fiduciaries and the limitations on fiduciary duties when a business makes business judgments); see also Green, supra note 49, at 853 ("The extent to which a plan administrator must make disclosure to plan participants apart from the formal disclosures expressly required by ERISA is an unsettled issue, but is generally viewed as being informed by the common law." (footnote omitted)). The Second, Fifth, and Eleventh Circuits have held that information released through a company's SEC filings that ESOP participants receive as investors is not considered to have been provided by the company in a fiduciary capacity. Rachal et al., Fiduciary Duties, supra note 1, at 1288 (noting that "these filings are disseminated by the company in its role as the issuer of the stock" and listing circuits). However, when such information gets disseminated through summary plan descriptions (SPDs), some courts have found it may trigger ERISA-based duties. Id. at 1289 ("[P]laintiffs have successfully argued that the dissemination of these SEC filings to plan participants triggers ERISA fiduciary duties.").

65. In re Enron Corp. Sec., Derivative & "ERISA" Litig., 284 F. Supp. 2d. 511, 555 (S.D. Tex. 2003). For a comprehensive overview of case law considering claims alleging fiduciaries violated their duty to inform plan participants, see Robert Rachal, Howard Shapiro & Kara Lincoln, Violation of Fiduciary Duty by Misrepresentation and Nondisclosure, *in* ERISA Litigation, supra note 1, at 1187, 1202–09 (summarizing cases in list form).

66. Stabile, I Believed My Employer, supra note 5, at 400.

67. 29 U.S.C. § 1022. SPDs must provide a comprehensive description of a participant's and beneficiary's rights and obligations under the plan, including information as to the plan's sources of financing and the names and addresses of the people who control the plan. Bravo, supra note 7, at 513. Additionally, SPDs must be "written in a manner calculated to be understood by the average plan participant" and contain information about the plan's governance that is "sufficiently accurate and comprehensive to reasonably appraise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a). For a critique of employer communications, see generally Jennifer O'Hare, Misleading Employer Communications and the Securities Fraud Implications of the Employee as Investor, 48 Vill. L. Rev. 1217, 1237–41 (2003) (lamenting the vulnerability of employee investors and arguing for employer-communications disclosure to the SEC).

68. See supra section I.A.3.

69. 516 U.S. 489, 506 (1996).

ies have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries."[70]

The Second, Fifth, and Eleventh Circuits have refused to impose affirmative duties to disclose material nonpublic information to plan participants when plaintiffs allege that fiduciaries failed to properly report the risks associated with company stock.[71] The Second Circuit has drawn a clear line between disclosure requirements relating to administrative matters and those relating to investment matters, refusing to find disclosure duties for the latter.[72] The Eleventh Circuit has also declined to "create a rule that converts fiduciaries into investment advisors."[73] The circuit feared that such a duty would require fiduciaries to disclose adverse nonpublic information to plan participants upon a "guess" that the information would negatively affect the fund.[74] In *Kujanek v. Houston Poly Bag I, Ltd.*, the Fifth Circuit noted that "trust principles impose a duty of disclosure upon an ERISA fiduciary when there are material facts affecting the interest of the beneficiary which the fiduciary knows the beneficiary does not know but needs to know for his protection."[75] However, *Kujanek* "involved the withholding of *Plan-related* documents likely covered by ERISA's detailed disclosure and reporting scheme."[76] In interpreting *Kujanek*, a district court has thus concluded that a specific violation of the disclosure requirements is required to allege a disclosure claim.[77]

In contrast, the Third Circuit has been willing to find affirmative disclosure duties related to discussions of plan benefits. In one case, the circuit held it is "a breach of fiduciary duty for an employer to knowingly make materially misleading statements about the stability of a benefits

70. Id.

71. Other courts have been more willing to find disclosure duties. See infra notes 78–81 and accompanying text (discussing the Third and Fourth Circuits' willingness to find disclosure duties).

72. In re Citigroup ERISA Litig., 662 F.3d 128, 142–43 (2d Cir. 2011) (noting that the plaintiffs had cited only to cases that related to "administrative, not investment, matters such as participants' eligibility for defined benefits or the calculation of such benefits"). The Second Circuit rejected the plaintiffs' argument that defendants had violated ERISA's general duty of loyalty by failing to disclose information related to the expected future performance of Citigroup stock, holding that the duty of loyalty does not "create a duty to provide participants with nonpublic information pertaining to specific investment options." Id.

73. Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1285–86 (11th Cir. 2012).

74. Id.

75. 658 F.3d 483, 488 (5th Cir. 2011) (internal quotation marks omitted) (quoting Martinez v. Schlumberger, Ltd., 338 F.3d 407, 412 (5th Cir. 2003)).

76. In re BP P.L.C. Sec. Litig., Nos. 10–md–2185, 4:10–cv–4214, 2015 WL 1781727, at *7 (S.D. Tex. Mar. 4, 2015), rev'd on other grounds sub nom. Whitley v. BP, P.L.C., No. 15–20282, 2016 WL 5387678 (5th Cir. Sept. 26, 2016).

77. Id.

plan."[78] In another case, the circuit noted that the "duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful."[79] Similarly, the Fourth Circuit has acknowledged that ERISA administrators have a fiduciary duty "not to misinform employees through material misrepresentations and incomplete, inconsistent or contradictory disclosures."[80] At times, the circuit held, a fiduciary is "obligated to affirmatively provide information to the beneficiary . . . [including] 'facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection.'"[81]

In the context of ESOPs, the Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer* suggests that ERISA fiduciary duties require disclosure to plan participants under certain circumstances.[82] By acknowledging that ESOP fiduciaries may be liable for failing to disclose material nonpublic information when doing so would have been consistent with securities laws and would not have done more harm than good,[83] the Court implicitly recognized that ERISA's duty of prudence imposes disclosure duties when those conditions are met.

II. ESOPs and the Current State of the Law

With this background on ERISA and the statute's disclosure duties established, Part II takes a closer look at ESOPs and the holding and consequences of *Dudenhoeffer*. Section II.A first explains what ESOPs are and how they function and then considers some of the conflicting goals Congress sought to achieve when establishing this form of investment vehicle. Section II.B discusses the presumption of prudence, which was once the predominant standard of review for breach-of-fiduciary-duty claims by ESOP participants, and examines the current state of the law, focusing on *Dudenhoeffer*. Following this, section II.C considers how corporate-insider fiduciaries have tried to avoid liability after *Dudenhoeffer* by seeking to rid themselves of their fiduciary status and responsibilities through the appointment of independent third-party fiduciaries. Because

78. Adams v. Freedom Forge Corp., 204 F.3d 475, 480 (3d Cir. 2000).

79. Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993).

80. Griggs v. E.I. Dupont De Nemours & Co., 237 F.3d 371, 380 (4th Cir. 2001) (internal quotation marks omitted) (quoting Harte v. Bethlehem Steel Corp., 214 F.3d 446, 452 (3d Cir. 2000)).

81. Id. (quoting Restatement (Second) of Trusts § 173 cmt. d (Am. Law Inst. (1959)).

82. 134 S. Ct. 2459, 2472–73 (2014) (listing conditions lower courts should consider when hearing such claims).

83. Id.; see also Amgen Inc. v. Harris, 136 S. Ct. 758, 760 (2016), rev'g 788 F.3d 916 (9th Cir. 2014) (clarifying that the standard is for a fiduciary in the same position to have been unable to conclude that the alternative action would do more harm than good).

the success of this strategy depends on whether courts find that ERISA imposes a duty to inform appointed fiduciaries of material nonpublic information, this section ends by examining courts' disagreement over the existence of such a duty and considering the different rationales put forth by courts deciding duty-to-inform cases.

A. *ESOPs*

ESOPs are currently the most common mechanism through which employees own company stock.[84] Statistics made available by the National Center for Employee Ownership (NCEO) suggest that there are currently 9,323 ESOP and ESOP-like plans in the United States with total assets worth $1.3 trillion.[85] The NCEO estimates that 32 million Americans own employer stock through ESOPs, options, stock purchase plans, and 401(k) plans.[86] Thus the rules regulating ESOPs have massive consequences, affecting the many Americans invested in employer stock.

To establish an ESOP, a company contributes shares of its stock into a trust fund or uses cash to buy existing shares of its stock.[87] ESOPs are defined contribution plans, one of two types of pension plans governed by ERISA.[88] Defined contribution plans, which are more popular today,[89] place the investment risk on participants.[90] Amounts are based on contributions, income, expenses, and investment gains or losses.[91] Defined

---

84. How an Employee Stock Ownership Plan (ESOP) Works, Nat'l Ctr. for Emp. Ownership, http://www.nceo.org/articles/esop-employee-stock-ownership-plan [http://perma.cc/52TT-SEHJ] [hereinafter Nat'l Ctr. for Emp. Ownership, How an ESOP Works] (last visited Aug. 10, 2016).

85. A Statistical Profile of Employee Ownership, Nat'l Ctr. for Emp. Ownership, http://www.nceo.org/articles/statistical-profile-employee-ownership [http://perma.cc/GFM3-UY6V] (last updated Dec. 2015).

86. Id.

87. Nat'l Ctr. for Emp. Ownership, How an ESOP Works, supra note 84 (describing how ESOPs are set up and funded).

88. Types of Retirement Plans, U.S. Dep't of Labor, http://www.dol.gov/general/topic/retirement/typesofplans [http://perma.cc/7DXK-XJUN] [hereinafter U.S. Dep't of Labor, Types of Retirement Plans] (last visited Sept. 18, 2016).

89. See Ultimate Guide to Retirement, What's the Difference Between a Defined Benefit Plan and a Defined Contribution Plan?, CNN Money, http://money.cnn.com/retirement/guide/pensions_basics.moneymag/index3.htm [http://perma.cc/5ANE-9X3H] (last visited Sept. 18, 2016) (noting employers have "scaled back dramatically or eliminated [defined benefit plans] altogether in recent years").

90. Cf. U.S. Dep't of Labor, Types of Retirement Plans, supra note 88 ("A defined contribution plan . . . does not promise a specific amount of benefits at retirement.").

91. Employee Benefit Plans, Securities Act Release No. 33-6281, 46 Fed. Reg. 8446, 8447 n.8 (Jan. 27, 1981) (codified at 17 C.F.R. pt. 231) (contrasting "defined contribution plans, which pay benefits that vary, depending on the amount of plan contributions, the investment success of the plan, and allocations made of benefits forfeited by non-vested participants who terminate employment" with defined benefit plans); see also 29 U.S.C. § 1002(34) (2012) (describing the benefits of defined contribution plans as due to the income, expenses, gains, losses, and forfeitures associated with an individual's account).

benefit plans place the investment risk on employers, who must fund the promised benefits.[92] Contributions are determined by a formula that contemplates compensation, age, and the fund's investment performance.[93] Participation in ESOPs is voluntary, but Congress has created tax benefits and other incentives for participating employers and employees.[94]

ESOPs were originally introduced in 1974 and have been continuously endorsed and expanded by Congress. ESOPs were designed to promote employee ownership and to enable companies to use their stock as a "technique of corporate finance."[95] Congress believed employee stock ownership would inspire "motivation, commitment, and dedication of our work force," which would "improve[] productivity."[96]

In the Tax Reform Act of 1976,[97] Congress created tax benefits and other financial incentives for employers to offer company stock for retirement plans and for employees to accept that offer.[98] The Act makes available to employers tax breaks on profit sharing, matching contributions, and compensation made in the form of company stock.[99] The tax exemptions also encourage employees to invest in company stock because employers often use company stock to match contributions or do so at a higher rate than for other retirement investments.[100]

Because ESOPs are, and are meant to be, beneficial to employers in addition to employees, conflicts can arise from these competing goals. Employers, who often also act as fiduciaries, may be placed in a position where they must choose between their interests and those of their employees.[101] Moreover, the line between the employer's roles as fiduciary and businessperson blurs when the employer wears both "hats," leaving

92. 46 Fed. Reg. at 8447 n.8 (contrasting "defined benefit plan[s] [that] pay[] fixed or determinable benefits" with defined contribution plans); see also 29 U.S.C. § 1002(35) (describing the benefits of defined benefits plans as "derived from employer contributions which [are] based partly on the balance of the separate account of a participant").

93. Jara, supra note 32, at 547.

94. See infra notes 98–100 and accompanying text (discussing employee and employer benefits).

95. 129 Cong. Rec. 33,820 (1983) (statement of Sen. Long).

96. Id. at 33,813.

97. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1590 (codified as amended in scattered titles of the U.S.C.).

98. Meredith L. Gray, Comment, A Presumption Without Prudence: Replacing *Moench v. Robertson* with a Prudent "When in Doubt, Don't" Standard for ESOP and 401(k) Company Stock Fund Fiduciaries, 2010 Wis. L. Rev. 907, 922–23.

99. See Alicia H. Munnell & Annika Sundén, Coming up Short: The Challenge of 401(k) Plans 98–99 (2004) (explaining how ESOPs reduce the total taxes employers must pay).

100. Dana M. Muir, The U.S. Culture of Employee Ownership and 401(k) Plans, 14 Elder L.J. 1, 11–12 (2006).

101. Muir & Stein, supra note 32, at 501.

courts torn when considering employer conduct.[102] As the Fifth Circuit explained in *Donovan v. Cunningham*:

> Congress has repeatedly expressed its intent to encourage the formation of ESOPs by passing legislation granting such plans favorable treatment, and has warned against judicial and administrative action that would thwart that goal. Competing with Congress' expressed policy to foster the formation of ESOPs is the policy expressed in equally forceful terms in ERISA: that of safeguarding the interests of participants in employee benefit plans by vigorously enforcing standards of fiduciary responsibility.[103]

Courts considering these competing goals often hear two types of claims: the prudent-investment claim and the failure-to-disclose claim.[104] These suits are typically brought as companion cases to securities class actions alleging the same failures to disclose material nonpublic information to stockholders.[105] The prudent-investment claim argues that the "fiduciaries knew or should have known that the employer stock was not a prudent investment option for the plan"; the failure-to-disclose claim alleges that the "fiduciar[y] made misrepresentations about or failed to disclose material adverse information affecting the value of the employer stock."[106] In such cases, company personnel, including board

102. Casciari & Morrison, supra note 3, at 647 ("[L]ower courts have found that the distinction between employer and fiduciary 'hats' may blur when business circumstances affect the administration of retirement plans."); cf. Pegram v. Herdrich, 530 U.S. 211, 225 (2000) (noting the permissibility of a person acting adversely to a plan so long as that person is making business decisions and not acting in a fiduciary capacity). For a detailed discussion of the conflicts of interest created by ESOPs, see Sean M. Anderson, Risky Retirement Business: How ESOPs Harm the Workers They Are Supposed to Help, 41 Loy. U. Chi. L.J. 1 (2009).

103. 716 F.2d 1455, 1466 (5th Cir. 1983) (footnotes omitted); see also Hinson & DiCarlo, supra note 1, at 20 (noting the multiple intentions of Congress).

104. Rachal et al., Fiduciary Duties, supra note 1, at 1261–62 ("[L]osses often lead to lawsuits, which generally involve two types of claims regarding investments: . . . [t]he prudent investment claim . . . [and] [t]he failure to disclose claim . . . ." (emphasis omitted)); Hinson & DiCarlo, supra note 1, at 20 ("Such suits generally allege both that the employer securities were an imprudent investment and that there was inadequate disclosure concerning the value of the stock.").

105. Bravo, supra note 7, at 497; Casciari & Morrison, supra note 3, at 637; Hinson & DiCarlo, supra note 1, at 20.

106. Rachal et al., Fiduciary Duties, supra note 1, at 1261–62; see also Stabile, I Believed My Employer, supra note 5, at 389 ("[N]ondisclosure allegations in 401(k) plan participant lawsuits are based on the premise that the presence of an employer securities stock fund as a plan investment option creates an affirmative obligation on the part of plan fiduciaries to make disclosures to plan participants regarding the financial condition of the company."). Professor Stabile provides an example of such claims by including an excerpt of the WorldCom plan participants' complaint, which alleges that defendants "failed to provide plaintiff and other Plan Participants with adequate information about the Company's true financial condition despite offering WorldCom's stock as a prudent Plan investment. Defendants knew, yet failed to disclose . . . serious problems . . . ." Id. at 390 (quoting Class Action Complaint for Breach of Fiduciary Duty & Violation of ERISA

members, company officers, plan administrators, members of the plan's administrative and investment committee, and members of the finance committee, are routinely named as defendants based on their alleged status as ERISA fiduciaries.[107]

B. *Judicial Review of Claims Alleging Breach of Fiduciary Duties*

Beginning in 1995, courts considering these ESOP breach-of-fiduciary-duty claims applied a "presumption of prudence," a standard articulated by the Third Circuit in *Moench v. Robertson*.[108] In *Moench*, the Third Circuit offered several reasons for adopting such a deferential standard and favoring the goals of ESOPs over the "stringent fiduciary duties" of ERISA.[109] The *Moench* court feared that subjecting fiduciaries to stricter judicial scrutiny would "risk transforming ESOPs into ordinary pension benefit plans," thus frustrating Congress's purpose.[110] The court, noting that the very existence of ESOPs demonstrates the per se value in employee ownership despite the risks to participants' financial gains, concluded that "the policies behind ERISA's rules governing pension benefit plans cannot simply override the goals of ESOPs, and courts must find a way for the competing concerns to coexist."[111] Ultimately, the Third Circuit decided that ESOP fiduciaries should be entitled to an abuse of discretion standard through the presumption of prudence.[112]

Disclosure Requirements, Brown v. Ebbers, No. 5:02-CV-01270 (W.D. Okla. Sept. 11, 2002)).

107. Casciari & Morrison, supra note 3, at 643 (listing the personnel that are typically named as defendants).

108. 62 F.3d 553, 571 (3d Cir. 1995) (holding that "an ESOP fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision"), abrogated by Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014).

109. Id. at 569.

110. Id. at 570.

111. Id.

112. Id. at 571–72. Plaintiffs could attempt to rebut the presumption by introducing evidence that "owing to circumstances not known to the settlor and not anticipated by him [the making of such investment] would defeat or substantially impair the accomplishment of the purposes of the trust." Id. at 572 (alteration in original) (quoting Restatement (Second) of Trusts § 227 cmt. q (Am. Law Inst. 1959)). In such cases, "plaintiff[s] must show that the ERISA fiduciary could not have reasonably believed that continued adherence to the ESOP's direction was in keeping with the settlor's expectations of how a prudent trustee would operate." Id. Further, the Third Circuit warned of ESOP fiduciaries who are also corporate directors in times of financial deterioration. Id. at 572 ("[C]ourts should be cognizant that as the financial state of the company deteriorates, ESOP fiduciaries who double as directors of the corporation often begin to serve two masters."). In such cases, courts must ensure that fiduciaries undertake "careful and impartial investigation[s] of all investment decisions." Id. (quoting Martin v. Feilen, 965 F.2d 660, 670 (8th Cir. 1992)). Specifically, courts should "look closely at whether the fiduciaries investigated alternative actions and relied on outside advisors before implementing a challenged transaction." *Martin*, 965 F.2d at 671.

After the Third Circuit established the *Moench* presumption, the Second, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits adopted this standard.[113] The *Moench* presumption was "very difficult to overcome . . . ."[114] Though courts did not require "'[p]roof of the employer's impending collapse,' . . . mere stock fluctuations [were] insufficient to show that fiduciaries acted imprudently by adhering to the terms of an ESOP."[115] One court found that a seventy-five percent decrease in stock price was not in itself a fact that could overcome the *Moench* presumption.[116]

1. Fifth Third Bancorp v. Dudenhoeffer. — In 2014, the Supreme Court decided *Fifth Third Bancorp v. Dudenhoeffer*, abrogating the *Moench* presumption and articulating a new test for lower courts.[117] The case arose out of the financial crisis that led to the Great Recession.[118] The plaintiffs were employees and participants in the ESOP of Fifth Third Bancorp, the defendant bank.[119] They alleged that the bank's investment in employer stock had become "overvalued and excessively risky."[120]

According to the plaintiffs, the ESOP fiduciaries, who were officers for the bank, made material misstatements about the company's financial prospects and breached their fiduciary duties by failing to act on non-public information.[121] Rather than continuing to invest in Fifth Third

113. See, e.g., White v. Marshall & Isley Corp., 714 F.3d 980, 989–91 (7th Cir. 2013); Dudenhoeffer v. Fifth Third Bancorp, 692 F.3d 410, 417 (6th Cir. 2012), rev'd, 134 S. Ct. 2459 (2014); Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1280 (11th Cir. 2012); In re Citigroup ERISA Litig., 662 F.3d 128, 139 (2d Cir. 2011); Quan v. Comp. Scis. Corp., 623 F.3d 870, 882 (9th Cir. 2010); Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243, 254 (5th Cir. 2008); see also Jara, supra note 32, at 561 (listing circuits that adopted the presumption).

114. Rinehart v. Akers, 722 F.3d 137, 148 (2d Cir. 2013), vacated, 134 S. Ct. 2900 (2014).

115. Id. (quoting *In re Citigroup ERISA Litig.*, 662 F.3d at 140).

116. *Kirschbaum*, 526 F.3d at 255 n.12 (citing Wright v. Or. Metallurgical Corp., 360 F.3d 1096, 1098 (9th Cir. 2004)).

117. 134 S. Ct. 2459, 2471–73 (2014).

118. Rachal et al., Fiduciary Duties, supra note 1, at 1282.

119. *Dudenhoeffer*, 134 S. Ct. at 2464.

120. Id.

121. Id. The plaintiffs also made claims based on public information. Id. Such claims are beyond the scope of this Note, but subsequent decisions by lower courts, which apply a special circumstance test, have addressed these claims. See, e.g., Pfeil v. State St. Bank & Tr. Co., 806 F.3d 377, 386 (6th Cir. 2015) (finding that the plaintiff failed to show a special circumstance making it inappropriate for the defendant to rely on market pricing); In re Lehman Bros. Sec. & ERISA Litig., 113 F. Supp. 3d 745, 754 (S.D.N.Y. 2015) (rejecting the argument that SEC orders constituted "special circumstances" as contemplated by *Dudenhoeffer*), aff'd sub nom. Rinehart v. Lehman Bros. Holdings Inc., 817 F.3d 56 (2d Cir. 2016); In re BP P.L.C. Sec. Litig., Nos. 10–md–2185, 4:10–cv–4214, 2015 WL 1781727, at *9 (S.D. Tex. Mar. 4, 2015) (rejecting the plaintiffs' arguments that their claim fit into *Dudenhoeffer*'s "special circumstance" loophole), rev'd on other grounds sub nom. Whitley v. BP, P.L.C., No. 15–20282, 2016 WL 5387678 (5th Cir. Sept. 26, 2016). Scholars have called the success of such a claim "highly implausible," particularly in light of the Court's citation to Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014), a case

stock, they asserted, the fiduciaries should have (1) sold off the ESOP's holdings of company stock, (2) refrained from purchasing more stock, (3) cancelled the plan's ESOP option, or (4) disclosed the negative inside information to engender market correction.[122] Instead, the fiduciaries continued to hold and buy Fifth Third securities; after the market crashed, the stock price fell by seventy-four percent between July 2007 and September 2009.[123]

In considering the plaintiffs' claim, the Supreme Court decided that 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."[124] The Court explained that "[t]he proposed presumption makes it impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious, unless the employer is in very bad economic circumstances."[125] According to Justice Breyer, "Such a rule does not readily divide the plausible sheep from the meritless goats."[126] Instead, the Court proposed accomplishing "[t]hat important task . . . through careful, context-sensitive scrutiny of a complaint's allegations"[127] and replaced the presumption of prudence with a new test:

> To state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant 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.[128]

The Court then provided guidelines for lower courts to follow when evaluating such claims. First, courts should recognize that "the duty of prudence . . . does not require a fiduciary to break the law."[129] Essentially, this articulates the commonsense notion that fiduciaries cannot be required, and are in fact prohibited, from engaging in insider trading to

decided just three days before *Dudenhoeffer*. Rachal et al., Fiduciary Duties, supra note 1, at 1283 & n.127. In *Halliburton*, the Court rejected challenges to the "'efficient market' theory underlying the Court's presumption of reliance on market prices in securities fraud cases." Id. at 1283 n.127.

122. *Dudenhoeffer*, 134 S. Ct. at 2464.

123. Id.

124. Id. at 2467. The exception for ESOPs from the duty to diversify is statutory. See supra note 47 (discussing the exception).

125. *Dudenhoeffer*, 134 S. Ct. at 2470.

126. Id.

127. Id.

128. Id. at 2472.

129. Id.; see also Hinson & DiCarlo, supra note 1, at 30–33. The Department of Labor articulates this proposition in its disclose-or-abstain rule, found in the preamble to its § 404(c) regulation. Final Regulation Regarding Participant Directed Individual Account Plans, 57 Fed. Reg. 46,906, 46,923 (Oct. 13, 1992) (codified at 29 C.F.R. pt. 2550).

fulfill their fiduciary duties. Second, courts should bear in mind the extent to which ERISA-based obligations "could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws."[130] With this factor, the Court questioned whether ERISA can impose additional requirements on fiduciaries that exceed those that the SEC enforces through securities laws.[131] As brought to light in later lower court opinions, this is ultimately a question of whether ERISA fiduciaries privy to inside information must disclose such information to fulfill their fiduciary duties, even though such disclosure would not be mandated by federal securities laws.[132]

And third, courts must determine whether the complaint, as held to *Iqbal* and *Twombly* standards,[133] plausibly alleges that "a prudent fiduciary

---

130. *Dudenhoeffer*, 134 S. Ct. at 2473. A related question, whether the standard for ERISA-based liability should be parallel to that of the securities laws, was addressed in the aftermath of Enron. Professor Stabile questioned whether a separate cause of action for omission and misrepresentation claims under ERISA should even be allowed and considered theoretical, practical, and policy concerns of an overlapping standard. Stabile, I Believed My Employer, supra note 5, at 387–88, 406–23 ("The fact that the allegations in [ERISA] lawsuits raise what are essentially securities law claims raises the question whether ERISA is the appropriate vehicle for addressing such causes of action."). Concluding that ERISA-based duties may require fiduciaries to make affirmative disclosures even when securities laws would not, Professor Stabile relies on the SEC's "historic distinction between offerings made to employees primarily for compensatory and incentive purposes and offerings made by registrants for capital-raising purposes." Id. at 410 (internal quotation marks omitted) (quoting Regulation and Reporting Requirements for Employee Benefit Plans, 55 Fed. Reg. 23,909, 23,910 (June 13, 1990) (codified at 17 C.F.R. pts. 229, 230, 239, 240, 249)). Professor Stabile also supports her argument by pointing to the particular vulnerability of employees vis-à-vis their employers, along with the very fact that ERISA imposes a fiduciary duty that exceeds that which is required by a corporation to its shareholders. See id. at 409–11.

131. The Securities Act of 1933 (1933 Act) and the Securities Exchange Act of 1934 (1934 Act) are the primary laws that require companies to make formal disclosures. Green, supra note 49, at 834. The 1933 Act prohibits the sale or offer for sale of any security that has not been registered with the SEC or accompanied by a prospectus. 15 U.S.C. §§ 77a–77b, 77e (2012). The 1933 Act also "prohibits false and misleading statements under penalty of fine or imprisonment, [but] it does not preclude the sale of stocks in risky or poorly managed or unprofitable companies . . . ." Green, supra note 49, at 834–35. The 1934 Act "requires periodic and continuous disclosure by certain companies," but these reports "are not written to be comprehended by the average lay investor, because of their factual density and quantitative nature." Id.

132. See infra notes 140–143 and accompanying text (debating the breadth of ERISA-based duties).

133. In *Ashcroft v. Iqbal*, the Supreme Court held that complaints must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The plausibility standard announced in *Twombly* does not require a showing of probability but asks for more than a sheer possibility that the defendant acted unlawfully. *Twombly*, 550 U.S. at 570. In *Twombly*, the Court held that pleadings need not contain detailed factual allegations but should set forth more than "labels and conclusions [or] a formulaic recitation of the elements of a cause of action." Id. at 555.

in the defendant's position could not have concluded that stopping purchases—which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment—or publicly disclosing negative information would do more harm than good to the fund" due to a resulting stock drop, which would cause a "concomitant drop in the value of . . . the fund."[134]

2. *Interpreting* Dudenhoeffer*:* Harris v. Amgen Inc. — In *Harris v. Amgen Inc.*,[135] the Ninth Circuit applied the *Dudenhoeffer* test to a claim that fiduciaries of a global biotechnology company had breached their duties by continuing to purchase Amgen stock even though they knew or should have known "about material omissions and misrepresentations . . . that artificially inflated the price of the stock."[136]

In applying the first factor of *Dudenhoeffer,* the Ninth Circuit panel rejected Amgen's argument that removal or disclosure could have violated securities laws.[137] The court posited that "if defendants had revealed material information in a timely fashion to the general public . . . , they would have simultaneously satisfied their duties under both the securities laws and ERISA."[138] Alternatively, if Amgen had removed the fund as an investment option, Amgen would not have broken securities laws because "there is no violation absent purchase or sale of stock."[139]

When considering the second factor of *Dudenhoeffer*—the extent to which ERISA-based obligations conflict with securities laws—the Ninth Circuit made clear that it predicated its holding on the companion case, *Connecticut Retirement Plans*,[140] in which the court denied Amgen's motion to dismiss the claim alleging the company violated federal securities laws:

> If the alleged misrepresentations and omissions, scienter, and resulting decline in share price in *Connecticut Retirement Plans* were sufficient to state a claim that defendants violated their duties under Section 10(b), the alleged misrepresentations and omissions, scienter, and resulting decline in share price in this

134. *Dudenhoeffer*, 134 S. Ct. at 2473.

135. 788 F.3d 916, 935 (9th Cir. 2014), rev'd, 136 S. Ct. 758 (2016). The Supreme Court reversed the Ninth Circuit on its interpretation of *Dudenhoeffer*'s third factor. Amgen Inc. v. Harris, 136 S. Ct. 758, 759–60 (2016); see also infra notes 144–147 and accompanying text. The Amgen plan participants were stockholders in plans that qualified as EIAPs that, like ESOPs, offer ownership in employer stock as an option to employees. *Amgen,* 136 S. Ct. at 758. *Dudenhoeffer* was thus fully applicable to *Amgen.* Id.

136. *Amgen,* 788 F.3d at 935.

137. See id. at 939 (rejecting defendants' argument that "they could not have removed the Amgen Stock Fund based on undisclosed alleged material information—a potentially *illegal* course of action" (internal quotation marks omitted)).

138. Id.

139. Id.

140. Conn. Ret. Plans & Tr. Funds v. Amgen Inc. (*Conn. Ret. Plans*), 660 F.3d 1170 (9th Cir. 2011), aff'd, 133 S. Ct. 1184 (2013).

case are sufficient to state a claim that defendants violated their duty of care under ERISA.[141]

Notably, the panel's decision did not explicitly decide whether ERISA could require fiduciaries to freeze a stock plan or disclose nonpublic information in the absence of a securities law violation.[142] However, subsequent cases have pointed to the *Amgen* court's recognition of the existence of a viable securities companion case and found that the existence of such a case may be grounds for satisfying *Dudenhoeffer*'s second factor.[143]

Finally, the Ninth Circuit applied the Supreme Court's third directive in *Dudenhoeffer*—to consider whether a prudent fiduciary may have concluded that removal or disclosure would do more harm than good—and found that the complaint satisfied the standard because it was "quite plausible" that removing the fund would not have caused "undue harm to plan participants."[144] When the Supreme Court granted certiorari to the *Amgen* defendants in January 2016 to decide whether the third factor was properly applied, the Court made clear that the Ninth Circuit had misapplied this factor of the *Dudenhoeffer* test and reversed the panel's decision.[145] The Supreme Court clarified that complaints may only survive a motion to dismiss when they plausibly allege that "a prudent fiduciary in the same position 'could not have concluded' that the alternative action 'would do more harm than good.'"[146] The Court then remanded the case to the district court to determine whether the stockholders should be granted leave to amend their complaint to comply with the newly clarified standard.[147]

---

141. *Amgen*, 788 F.3d at 936.

142. In fact, the Ninth Circuit contemplated the advantages of removing the investment option before securities laws required removal. The court suggested that if fiduciaries without securities law disclosure obligations removed the investment option as soon as they realized the stock price was artificially inflated, fiduciaries with disclosure obligations would likely comply with their securities laws obligations. Id. at 937–38. This would prevent a prolonged artificial increase in the share price, which would be harmful to plan participants if they continued to invest in the company stock at inflated prices. Id. at 938.

143. See, e.g., Murray v. Invacare Corp., 125 F. Supp. 3d 660, 669–70 (N.D. Ohio 2015).

144. *Amgen*, 788 F.3d at 938.

145. See supra note 17 (explaining the Court's reasoning behind reversing the Ninth Circuit on *Dudenhoeffer*'s third factor).

146. Amgen Inc. v. Harris, 136 S. Ct. 758, 760 (2016) (quoting Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2463 (2014)).

147. Id.

C. *How Defendants Have Avoided Liability After* Dudenhoeffer

In light of *Dudenhoeffer* and subsequent case law,[148] it has become clear that, under certain circumstances, ERISA may impose a duty to disclose material nonpublic information to plan participants, thus exposing fiduciaries to liability when they fail to do so.[149] This potential for liability puts fiduciaries at risk when their companies face downturns.[150]

1. *Appointing Third-Party Fiduciaries.* — To avoid situations that would expose themselves to ERISA liability, corporate directors have widely adopted the practice of appointing independent third-party fiduciaries to manage company ESOPs.[151] These independent fiduciaries are not affiliated with the plan sponsor and make autonomous investment decisions.[152] This strategy—in which plan documents are written to transfer authority and control from employers to independent fiduciaries—is widespread in ERISA plan management.[153] By delegating control over plans to independent third-party fiduciaries, insiders may renounce their status as ERISA fiduciaries, and their accompanying duties.[154]

As the Supreme Court has made clear:

> In every case charging breach of ERISA fiduciary duty . . . the threshold question is not whether the actions of some person

148. See, e.g., *Murray*, 125 F. Supp. 3d at 669–70 (denying defendant Invacare's motion to dismiss after looking to the *Amgen* panel's reading of *Dudenhoeffer* for guidance).

149. See supra text accompanying notes 82–83 (concluding that *Dudenhoeffer* provided an affirmative answer to the question among courts of whether fiduciaries may ever have a fiduciary duty to disclose under ERISA). But see Emily Seymour Costin, Declaration of Independence: Preserving the Role of the Independent Fiduciary Post-*Dudenhoeffer*, 28 Benefits L.J. 62, 65 (2015) (denying that *Dudenhoeffer* changes the analysis regarding disclosure duties to plan participants).

150. See supra note 19 and accompanying text (recognizing uncertainties related to fiduciary liability). The uncertainty may also cause fiduciaries attempting to abide by confusing lower court precedent to take the Court's "alternative paths" when doing so is unwise and even harmful to plan participants and the company at large. See In re HP ERISA Litig., No. 3:12–cv–06199–CRB, 2015 WL 3749565, at *7 (N.D. Cal. June 15, 2015) (holding that immediate disclosure before attempting to manage the problem internally would have harmed stock price and thus plan participants), appeal filed, No. 15–16360 (9th Cir. July 7, 2015).

151. For an example, see supra text accompanying notes 42–43 (referencing the ERISA Advisory Council's observation that outsourcing fiduciary responsibilities has grown more popular); infra note 153 and accompanying text (noting a district judge who called this strategy "the driving force" behind how ERISA plans are structured); see also Costin, supra note 149, at 63 ("Appointment of an independent fiduciary is particularly appropriate when company employees acting as fiduciaries are making decisions about a plan's investment in employer stock."); Jara, supra note 32, at 579 (noting the strategy of appointing independent third-party fiduciaries); Gray, supra note 98, at 919 (same).

152. Costin, supra note 149, at 63–64.

153. In re BP P.L.C. Sec. Litig., Nos. 4:10–MD–2185, 4:10–cv–4214, 2015 WL 6674576, at *3 (S.D. Tex. Oct. 30, 2015) (noting the prominence of this strategy).

154. See infra notes 174–188 and accompanying text (discussing court decisions finding successful delegation of authority).

> employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.[155]

Accordingly, before a court contemplates *any* ERISA breach-of-fiduciary-duty claim, it must find that the alleged fiduciaries were in fact fiduciaries under ERISA.[156] To make this determination, courts must consider whether an entity or individual "exercises any discretionary authority or discretionary control" over plan asset management or administration.[157] If a court finds a person's "authority to appoint plan fiduciaries . . . does not mean that he has a fiduciary obligation to prudently manage and invest the plan's assets,"[158] companies may successfully rid themselves of their fiduciary status, effectively exculpating themselves from liability.[159] Because courts may grant a motion to dismiss before reaching the merits of the underlying claim, such an approach can be highly effective.[160]

2. *Duty-to-Monitor Claims that Allege an Attendant Duty to Inform.* — While the successful delegation of authority to independent third-party fiduciaries may prevent courts from finding that employers were fiduciaries with respect to managing plan investments, plaintiffs have tried to get around this by alleging novel duty-to-monitor claims.[161] The theory,

155. Pegram v. Herdich, 530 U.S. 211, 226 (2000).

156. See supra notes 27–33 and accompanying text (explaining who qualifies as a fiduciary under ERISA).

157. 29 U.S.C. § 1002(21)(A) (2012).

158. See *In re BP*, 2015 WL 6674576, at *3.

159. In re Lehman Bros. Sec. & ERISA Litig., 113 F. Supp. 3d 745, 769 (S.D.N.Y. 2015), aff'd sub nom. Rinehart v. Lehman Bros. Holdings Inc., 817 F.3d 56 (2d Cir. 2016); cf. Advisory Council on Emp. Welfare & Pension Benefit Plans, supra note 35, at 10 (noting that there is disagreement on whether designating a fiduciary as a named fiduciary in a plan document is a fiduciary act and thus subject to selecting and monitoring duties of 29 U.S.C. § 1105 and calling for guidance from the Department of Labor "on this critical foundational issue").

160. This strategy was successfully advanced by the defendants in *In re BP*. The court found that the complaint failed to state a duty-to-monitor claim because the plaintiffs did not allege that the independent fiduciary, State Street, had committed an underlying breach of fiduciary duty. *In re BP*, 2015 WL 6674576, at *9. The corporate-insider and board-member defendants appointed a committee, which in turn appointed an independent third-party fiduciary—State Street—to manage the savings plan. Id. at *1, *9. Because the court found there is no duty to inform, the defendants' appointment of State Street insulated them from liability for failing to disclose material nonpublic information that adversely affected the stock price. Id. For examples of independent fiduciary cases alleging claims based on failures to act on public information, see, e.g., Pfeil v. State St. Bank & Tr. Co., 806 F.3d 377 (6th Cir. 2015) (rejecting the plaintiff's claim that an independent fiduciary had breached its duty of prudence for failure to adequately plead special circumstances); Coburn v. Evercore Tr. Co., 160 F. Supp. 3d 361 (D.D.C. 2016) (same), appeal filed, No. 16-7029 (D.C. Cir. Mar. 22, 2016).

161. See Costin, supra note 149, at 62. Duty-to-monitor claims also include a traditional claim alleging that the defendant failed to monitor and prevent the imprudent

which courts have dubbed "duty-to-inform" claims,[162] proposes that defendants with nonpublic information may be liable for breaching their fiduciary duties if they fail to inform appointed third parties of material information they possess.[163] Because this could extinguish the utility of appointing third-party fiduciaries for purposes of avoiding ERISA-based liability,[164] the courts' acceptance of this theory is of consequence.

Given the confusion and inconsistency regarding the extent of the disclosure duties that ERISA fiduciaries owe plan participants,[165] it is not surprising that courts disagree over whether appointing fiduciaries have a duty to inform appointed fiduciaries.[166] One court has noted: "[T]he duty to keep appointees informed has gained reasonably wide acceptance as an inherent facet of the more general 'duty to monitor.'"[167]

---

acts of the third-party fiduciary. See *In re BP*, 2015 WL 6674576, at *9 ("According to Plaintiffs, the duty to monitor is composed of two fiduciary obligations: (1) a duty to inform appointees of material, non-public information that is within the possession of the monitoring fiduciary . . . ; and (2) a duty to ensure that the monitored fiduciaries are performing their fiduciary obligations."); *In re Lehman Bros.*, 113 F. Supp. 3d at 764 (noting "two quite different conceptions of [defendant's] fiduciary duty," including "a traditional duty to monitor claim" and a second theory in the form of a "duty to inform claim"). Claims based on the first theory must be predicated on a primary breach of fiduciary duty. Id. ("This kind of claim is derivative of a primary breach of fiduciary duty in the sense that a monitoring fiduciary's liability arises from a failure to respond properly to the wrongdoing of others."). This would require plaintiffs to prove that the third-party fiduciary had somehow breached her fiduciary duties, a claim that plaintiffs are unlikely to even allege in the context of these suits. "Nothing in *Dudenhoeffer* changes this analysis." Id. Courts that require primary breaches may refuse to accept duty-to-inform claims as attendant to the duty to monitor. For example, the Eastern District of Texas dismissed a duty-to-inform-independent-fiduciaries claim because it was pled as part of a duty-to-monitor claim. Ramirez v. J.C. Penney Corp., No. 6:14-CV-601-MHS-KNM, 2015 WL 5766498, at *4 (E.D. Tex. Sept. 29, 2015). The court gave plaintiffs leave to amend, however, to assert the same theory for breaching the "duty to provide truthful and accurate information." Id.

162. See, e.g., *In re BP*, 2015 WL 6674576, at *9 (calling it a "so-called 'duty to inform'"); *In re Lehman Bros.*, 113 F. Supp. 3d at 764 (noting that plaintiffs' second theory was a "duty to inform" claim).

163. See Costin, supra note 149, at 65; see also *In re BP*, 2015 WL 6674576, at *9 (explaining plaintiffs' duty-to-inform claim); *In re Lehman Bros.*, 113 F. Supp. 3d at 764 (same).

164. Costin, supra note 149, at 62 (calling the appointment of independent fiduciaries a "fatal flaw" for participants of ESOPs alleging breach).

165. See supra notes 68–81 and accompanying text (discussing the conflicting precedent on disclosure requirements under ERISA fiduciary duties).

166. Cf. Jara, supra note 32, at 579 (noting that one court found that appointing a third-party fiduciary may show some evidence of procedural prudence but could not "whitewash" the prior fiduciary's actions); Gray, supra note 98, at 919 ("While . . . designating a third-party fiduciary may [sometimes] absolve the fiduciaries of some liability for imprudence, designating fiduciary duties to third-parties does not relieve the named fiduciaries of all ERISA obligations: named fiduciaries must . . . closely monitor and oversee designated plan fiduciaries to ensure they comply with ERISA." (footnote omitted)).

167. Woods v. S. Co., 396 F. Supp. 2d 1351, 1373 (N.D. Ga. 2005).

According to the court, even those courts that "seemed less inclined to unequivocally endorse the duty to inform have found it inappropriate to dismiss such a claim on a Rule 12(b)(6) motion."[168] "[*A*]*s a matter of law*," the court refused to hold "that the duty encompasses no obligation to keep appointees reasonably informed of non-public, material information within the appointing fiduciary's knowledge."[169]

In *Ramirez v. J.C. Penney Corp.*, the Eastern District of Texas recognized the possibility of a "duty to provide truthful and accurate information."[170] Acknowledging that ERISA does not itself create a duty to disclose "all adverse inside information to the public," the court also noted that ERISA cannot eliminate disclosure duties imposed by other laws.[171] Because the plaintiffs pointed to the defendants' material misrepresentations or omissions that caused the stock price to be artificially inflated, the appointed fiduciary could not "effectively discharge its obligations while being kept in the dark."[172] Thus, the plaintiffs were found to have alleged facts sufficient to support a duty-of-prudence claim.[173]

However, other courts have decided that "ERISA does not impose a duty on appointing fiduciaries to keep their appointees apprised of nonpublic information."[174] In *Rinehart v. Lehman Bros. Holdings Inc.*, the Second Circuit affirmed the Southern District of New York's grant of defendants' motion to dismiss on plaintiffs' duty-to-inform claim.[175] The Southern District noted that "nothing in ERISA itself or in traditional principles of trust law creates such a duty."[176] The court relied on the

---

168. Id. at 1374.

169. Id.

170. No. 6:14-CV-601-MHS-KNM, 2015 WL 5766498, at *4 (E.D. Tex. Sept. 29, 2015); see supra note 161 (explaining that the *Ramirez* judge accepted this theory, but only if the plaintiffs amended their complaint to allege it as distinct from the duty to monitor).

171. Id. at *3.

172. Id.

173. Id.

174. In re Lehman Bros. Sec. & ERISA Litig., 113 F. Supp. 3d 745, 765 (S.D.N.Y. 2015); see also In re BP P.L.C. Sec. Litig., Nos. 4:10–MD–2185, 4:10–cv–4214, 2015 WL 6674576, at *9 (S.D. Tex. Oct. 30, 2015).

175. 817 F.3d 56, 68 (2d Cir. 2016), aff'g *In re Lehman Bros.*, 113 F. Supp. 3d 745. Though *In re Lehman Bros.* did not deal with the appointment of a completely independent firm, like State Street in *In re BP*, the court's discussion of the duty to inform is still relevant to this Note because the case considers in depth the (non)existence of this duty when corporate insiders have appointed a committee that does not have insider knowledge of company affairs and is expected to manage the savings plan with only public knowledge. *In re Lehman Bros.*, 113 F. Supp. 3d at 764. In fact, the court's rejection of the duty-to-inform claim in this context makes it only more likely that it would find no such claim exists when appointing fiduciaries further remove themselves by appointing independent fiduciary firms.

176. *In re Lehman Bros.*, 113 F. Supp. 3d at 765. The court also considered the Second Circuit's *In re Citigroup* and *Rinehart* decisions. Id. at 767. In *In re Citigroup*, the Second Circuit rejected a duty to inform plan beneficiaries of material nonpublic information. 662 F.3d 128, 143 (2d Cir. 2011). In *Rinehart*, the circuit stated that it "would be unlikely to

language of the ERISA statute that defines persons as fiduciaries only to the *extent* that person "exercises any discretionary authority or discretionary control respecting management" of an ERISA plan or "has any discretionary authority or discretionary responsibility in the administration" of such plan.[177] Having deemed the defendant a fiduciary only in his appointment of the third party, the court declined to find a continuing duty.[178] To do otherwise, the court explained, would interfere with the defendant's business conduct, which "would stretch the concept of fiduciary duty far beyond what ERISA contemplates" and "create endless conflicts of interest between duties of corporate employees to act in the best interests of their employers, often by keeping information confidential, and newly imposed duties to disclose confidential employer information to plan fiduciaries."[179]

Noting that the *Third Restatement of Trusts* gives appointing fiduciaries a "duty to act with prudence in supervising or monitoring the agent's performance and compliance with the terms of the delegation" and to "provid[e] the agent with substantive direction and guidance consistent with the terms and purposes of the trust,"[180] the court explained that an "initial obligation to provide direction is hardly the same thing as an ongoing obligation to share inside information."[181] The court also considered a treatise stating: "'[I]f a trustee is negligent in selecting, instructing or supervising an agent or employee, he will be held liable to the beneficiary for any resulting loss.'"[182] Admitting that "instructing" may sound like it gives rise to a duty to inform, the court went on to explain that the term is "congruent with the requirements of the Uniform Trust Code § 807(a)(2), which states only that a trustee 'shall exercise reasonable care, skill, and caution in . . . establishing the scope

---

conclude that the Director Defendants had [such] a duty." *Rinehart v. Akers*, 722 F.3d 137, 154 (2d Cir. 2013). The *In re Lehman Bros.* plaintiffs also claimed that *Dudenhoeffer* acknowledged the existence of such a duty to inform, but the court disagreed, holding:

> The fact that *Dudenhoeffer* contemplated that the duty of prudence might be breached based on nonpublic information, so long as plaintiffs allege an alternative action that the defendant could have taken that would have been consistent with the securities laws is not dispositive of whether an appointing fiduciary has a duty to disclose inside information.

In re Lehman Bros., 113 F. Supp. 3d at 768 (footnote omitted) (internal quotation marks omitted) (quoting Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2472 (2014)).

177. *In re Lehman Bros.*, 113 F. Supp. 3d at 753 (citing 29 U.S.C. § 1002(21)(A) (2012)).

178. Id. at 766.

179. Id.

180. Id. (internal quotation marks omitted) (quoting Restatement (Third) of Trusts § 80 cmt. d(2) (Am. Law. Inst. 2007)).

181. Id.

182. Id. (quoting A. Hess, G. Bogert & G. Bogert, Law of Trusts and Trustees § 557 (3d ed. 2009)).

and terms of the delegation . . . .'"[183] This duty, the court concluded, is "very different" than a duty to provide appointees with information.[184]

When the Southern District of Texas rejected the *In re BP* plaintiffs' duty-to-inform claim, the court relied on the holding of *In re Lehman Bros.*,[185] as well as on guidance from the Department of Labor in the Code of Federal Regulations.[186] The court found that "a 'duty to inform' appointed fiduciaries is nowhere to be found" in the Code of Federal Regulations.[187]

In jurisdictions that reject a duty-to-inform requirement under ERISA, plaintiffs will not be able to successfully bring ERISA breach-of-fiduciary-duty claims if the defendant appointed and delegated authority to a third-party fiduciary. Because the appointment of third parties is a common practice company insiders use to avoid liability,[188] the existence of a duty-to-inform claim is essential for plaintiffs seeking to get past motions to dismiss.

III. FINDING A DUTY TO INFORM AND APPLYING *DUDENHOEFFER* TO SUCH CLAIMS

The conflicting precedent regarding the duty of appointing fiduciaries to disclose material nonpublic information to their appointed third parties needs to be resolved. Despite the important considerations highlighted by courts rejecting such claims, it is inappropriate to assert a per se rule against duty-to-inform claims. Instead, courts should apply *Dudenhoeffer* to determine whether such claims may withstand a motion to dismiss.

Section III.A explains why creating a per se rule against duty-to-inform claims should be abandoned. Section III.B suggests that courts should consider the factors laid out in *Dudenhoeffer* when deciding whether an appointing fiduciary violated a duty to inform third parties of material nonpublic information. The section concludes that courts

183. Id. (first alteration in original) (quoting A. Hess, G. Bogert & G. Bogert, Law of Trusts and Trustees § 557 (3d ed. 2009)).

184. Id.

185. In re BP P.L.C. Sec. Litig., Nos. 4:10-MD-2185, 4:10–cv–4214, 2015 WL 6674576, at *9 (S.D. Tex. Oct. 30, 2015) ("[A]s Judge Kaplan recently discussed . . . in *In re Lehman Brothers*, 'nothing in ERISA itself or in traditional principles of trust law' imposes [a duty to inform]." (quoting *In re Lehman Bros.*, 113 F. Supp. 3d at 765)).

186. See id. ("The Department of Labor has specifically laid out the 'ongoing responsibilities of a fiduciary who has appointed trustees or other fiduciaries' in the Code of Federal Regulations, and a 'duty to inform' appointed fiduciaries is nowhere to be found." (quoting 29 C.F.R. § 2509.75–8 (2007)).

187. Id. at *9 & n.86; see also infra notes 204–206 and accompanying text (discussing and laying out the text referred to by the court).

188. See supra note 153 and accompanying text (noting that the delegation of duties is widespread in ERISA plan structures).

should uphold such claims when they are alleged against defendants who have been unable to dismiss companion securities law claims.

A. *Considering a Per Se Rule Against Duty-to-Inform Claims*

A strict rule prohibiting duty-to-inform claims is in conflict with principles of trust law, guidance provided by the Department of Labor, and the holding of *Dudenhoeffer*. This section considers each of these sources to support the conclusion that duty-to-inform claims should withstand a motion to dismiss if they meet the *Dudenhoeffer* conditions.

1. *Trust Law Principles.* — Principles of trust law do not support a rule against duty-to-inform claims. In *Tibble v. Edison International*,[189] a recent Supreme Court case considering the statute of limitations under ERISA in the context of duty-to-monitor claims, Justice Breyer reminded lower courts that an "ERISA fiduciary's duty is 'derived from the common law of trusts'" and that in "determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts."[190] Because the lower court had applied a statutory bar to the breach-of-fiduciary-duty claim and had not considered the changing circumstances in light of trust law principles, the Court remanded the case.[191] Thus, strict rules that absolve defendants from their ERISA fiduciary duties seem at odds with the type of construction the Supreme Court has recently advanced.

In *Tibble*, the Supreme Court relied on *Law of Trusts and Trustees* and *Scott and Ascher on Trusts* when considering applicable trust law.[192] These sources also shed light on why ERISA duty-to-inform claims should be permitted. At common law, a trustee was prohibited from delegating any duty unless permitted by a clause in the governing instrument.[193] This rule was first relaxed to allow delegation of ministerial tasks, but delegation for discretionary decisions was still forbidden.[194] Early

189. 135 S. Ct. 1823, 1828 (2015). This case considered ERISA's duty to monitor, noting that under principles of trust law, "a trustee has a continuing duty to monitor trust investments and remove imprudent ones." Id. Because the lower court failed to consider this principle of trust law in denying plaintiffs' claim, the Supreme Court remanded. See id. at 1829. The duty-to-monitor claim at issue in *Tibble* can be distinguished from the claims addressed in this Note because the *Tibble* claim alleged the type of traditional duty-to-monitor claim discussed in note 161.

190. Id. at 1828 (quoting Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985)).

191. Id. at 1827–28.

192. See id. at 1828 (citing A. Hess, G. Bogert & G. Bogert, Law of Trusts and Trustees (3d ed. 2009); Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, Scott and Ascher on Trusts (5th ed. 2007)).

193. See Amy Morris Hess, George Gleason Bogert & George Taylor Bogert, Law of Trusts and Trustees § 555 (3d ed. Update 2016) [hereinafter Bogert on Trusts, 3d ed. Update 2016].

194. See id.

decisions reflected courts' reluctance to construe delegations in trust instruments broadly, fearing that providing broad immunity to trustees was "undesirable as a matter of policy."[195] Today, there is "nearly universal consensus . . . permit[ting] a trustee to delegate investment and management functions so long as a prudent trustee, comparably skilled in like circumstances, would find such a delegation to be reasonable."[196]

While a "duty to inform" is not made explicit in Bogert's treatise nor in *Scott and Ascher on Trusts*, the prudence requirements and policy concerns suggest that appointing fiduciaries are not permitted complete dereliction of duty post appointment. The trustee must still exercise "reasonable care, skill and caution . . . in the establishment of the agency's scope, and in the periodic review of the agent's work."[197] And only when a "prudent person" would delegate investment duties is it "clearly permissible for a trustee" to do so.[198] Further, the development of the delegation doctrine in trust law makes clear that delegation has been permitted to best serve the interests of the trust beneficiaries[199] because the focus is on protecting the beneficiary, not the trustee.[200] A per se rule against duty-to-inform claims, even when appointing fiduciaries have violated securities laws, does not protect the interests of ESOP participants. Additionally, the protections put in place for the trustee who has delegated authority ensure that she is not held responsible for unforeseeable bad acts or poor decisions of the *delegee*; they do not protect the trustee from bad acts for which *she herself* is responsible in a fiduciary capacity.[201]

Though the *In re Lehman Bros.* court did touch on the law of trusts, the court's analysis does not so much draw on the law of trusts as it does distinguish the opinion's holding from seemingly contradictory trust law principles.[202] The opinion does not point to a single trust law principle that prohibits or explicitly exempts appointing fiduciaries from keeping

---

195. Id.

196. Id.

197. Id.

198. Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, Scott and Ascher on Trusts § 17.3.2 (5th ed. 2007) [hereinafter Scott on Trusts].

199. See supra notes 193–196 and accompanying text (discussing the history of the delegation doctrine).

200. In fact, trustees may even have a duty to delegate that which they cannot "prudently undertake personally." Scott on Trusts, supra note 198, § 17.3.

201. See supra note 199 and accompanying text (noting what a trustee must do to make sure delegation is, and continues to be, appropriate); see also Bogert on Trusts, 3d ed. Update 2016, supra note 193, § 557 (noting that "[g]enerally . . . a trustee who uses reasonable care in" selecting, instructing, and supervising an agent or employee "is not held liable to the beneficiary for the negligence or inefficiency or criminal conduct of the agent or employee").

202. See supra notes 180–184 and accompanying text (explaining the *In re Lehman Bros.* court's evaluation of trust law principles).

appointed fiduciaries reasonably informed.[203] Although the absence of language affirmatively creating a duty to inform may caution against adopting a liberal construction of such a duty, it also does not require the implementation of a per se ban.

2. *Guidance from the Department of Labor.* — A per se rule prohibiting duty-to-inform claims also conflicts with guidance from the Department of Labor in the Code of Federal Regulations. In response to the question, "What are the ongoing responsibilities of a fiduciary who has appointed trustees or other fiduciaries with respect to these appointments?," the Department of Labor provides the following answer:

> At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan. No single procedure will be appropriate in all cases; the procedure adopted may vary in accordance with the nature of the plan and other facts and circumstances relevant to the choice of the procedure.[204]

While, as the *In re BP* court points out, this directive does not explicitly establish a duty to inform, the directive does explain that "[n]o single procedure will be appropriate in all cases" and that appointing fiduciaries should act to ensure compliance and to account for relevant circumstances.[205] Rather than promoting a strict rule that prohibits courts from finding a duty to inform, the Department of Labor supports consideration of the relevant facts and circumstances. It does not seem a stretch to suggest that appointing fiduciaries who have material nonpublic information would, under certain circumstances, consider disclosure to the appointed fiduciary "reasonably expected to ensure that their performance . . . satisfies the needs of the plan."[206]

3. Dudenhoeffer. — *Dudenhoeffer* acknowledges that ERISA fiduciary duties may include a duty to disclose material nonpublic information to plan participants.[207] This affirmative answer to the longstanding question of whether ERISA fiduciary duties include a duty to disclose[208] suggests

---

203. In re Lehman Bros. Sec. & ERISA Litig., 113 F. Supp. 3d 745, 765–66 (S.D.N.Y. 2015).

204. 29 C.F.R. § 2509.75–8 (2007). This language was cited by the *In re BP* court without analysis. See In re BP P.L.C. Sec. Litig., Nos. 4:10–MD–2185, 4:10–cv–4214, 2015 WL 6674576, at *9 n.86 (S.D. Tex. Oct. 30, 2015).

205. 29 C.F.R. § 2509.75–8.

206. Id.

207. See Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2472–73 (2014) (identifying disclosure and refraining from purchasing more stock as two alternative paths for which fiduciaries may be liable for forgoing).

208. See supra notes 166–184 and accompanying text (examining the split among courts in answering this question).

that fiduciaries who have delegated their control may also be subject to the disclosure duties the *Dudenhoeffer* Court finds present in the statute. Participants in plans run by fiduciaries who have appointed third parties are no less deserving of protection than their peers who are invested in plans in which control has not been delegated. It is therefore consistent with *Dudenhoeffer* to recognize a duty to inform when plaintiffs allege their third-party fiduciaries should have been informed of material nonpublic information.

B. *The* Dudenhoeffer *Factors in Reviewing Duty-to-Inform Claims*

Assuming a court has made the preliminary determination that an appointing fiduciary has fully delegated control to an appointed, independent fiduciary,[209] courts would turn to the factors proposed in *Dudenhoeffer*—the standard test now used for claims by ESOP participants alleging fiduciaries failed to act on nonpublic information[210]—to decide whether to entertain duty-to-inform claims from ESOP participants. Or, put more simply, courts should affirm the existence of a duty to inform and apply *Dudenhoeffer* to test whether plaintiffs have stated a claim that the duty has been violated sufficient to withstand a motion to dismiss. The following sections walk through considerations courts should undertake when applying *Dudenhoeffer* to duty-to-inform claims.

1. *Factor One of* Dudenhoeffer. — Courts should not find a duty to inform when appointing fiduciaries would have violated securities laws by providing appointed fiduciaries with material nonpublic information.[211] In other words, corporate insiders should not be liable for withholding material information from their appointed fiduciaries in order to comply with insider-trading and selective-disclosure laws.[212] As long as plaintiffs allege that securities laws require appointing fiduciaries to disclose to the market as a whole, plaintiffs would not be asserting that fiduciaries had to disclose in violation of Rule 10b-5, which prohibits trading on inside information,[213] or Regulation FD, which bans selective disclosure.[214]

---

209. See supra section II.C.1 (discussing how courts review the delegation of control to independent fiduciaries).

210. See supra section II.B.1.

211. See *Dudenhoeffer*, 134 S. Ct. at 2472.

212. See Hinson & DiCarlo, supra note 1, at 30 ("Because the securities laws prohibit trading company stock on the basis of inside information (or selectively disclosing such information), a strong argument exists that ERISA's fiduciary provisions should not be read as requiring sponsors, plans, or fiduciaries to engage in such illegal acts."); see also Casciari & Morrison, supra note 3, at 659–64 (providing an overview of opinions dismissing claims that would require fiduciaries to breach insider-trading and selective-disclosure laws).

213. 17 C.F.R. § 240.10b–5 (2007). The SEC adopted Rule 10b–5 pursuant to § 10(b) of the Securities Exchange Act of 1934. See Green, supra note 49, at 836–37 ("The statute and regulation are interpreted to make 'insider trading' fraudulent.").

2. *Factor Two of* Dudenhoeffer. — Prior to *Dudenhoeffer*, courts were wary of finding disclosure duties under ERISA that would mandate disclosure beyond that which the securities laws either required or permitted.[215] Since *Dudenhoeffer*, courts have clarified that ERISA does not impose liability for failure to disclose to plan participants unless securities laws would require disclosure to the market.[216]

When courts apply *Dudenhoeffer* to duty-to-inform claims, they should only uphold such claims when the appointing fiduciary has been unable to dismiss a claim alleging violation of securities laws for omitting or misrepresenting material nonpublic information.[217] This qualification would prevent ERISA from expanding disclosure duties that other laws do not not already require.[218] For legal purposes, interpreting ERISA to be coextensive with, but not broader than, securities laws follows 29 U.S.C § 1144(d), which states that "nothing in [ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law."[219] And turning to practical concerns, this limitation would save ERISA from disrupting the complex statutory framework established by the SEC and subsequent jurisprudence.[220]

---

214. 17 C.F.R. § 243 (2011). Regulation FD prohibits selective disclosure of material nonpublic information. Id. § 243.100 ("Whenever an issuer . . . discloses any material nonpublic information regarding that issuer or its securities to any [broker, dealer or person associated with a broker or dealer], the issuer shall make public disclosure of that information . . . .").

215. Casciari & Morrison, supra note 3, at 660 (noting the disagreement among courts in deciding such cases); Green, supra note 49, at 833 ("The courts considering an apparently irreconcilable conflict of duty have taken conflicting views.").

216. See, e.g., supra notes 140–141 and accompanying text (noting that the *Amgen* court relied on the securities companion case to uphold the ERISA claim); cf. In re HP ERISA Litig., No. 3:12–cv–06199–CRB, 2015 WL 3749565, at *6 (N.D. Cal. June 15, 2015) (finding that HP was not required to disclose investigations into newly acquired company's accounting fraud under securities laws, and so should not be liable under ERISA), appeal filed, No. 15-16360 (9th Cir. July 7, 2015).

217. For an opposing point of view, see Casciari & Morrison, supra note 3, at 664–65 (arguing that plaintiffs in ERISA misrepresentation cases are attempting to make a double recovery and should be limited to monetary relief from securities litigation).

218. Ramirez v. J.C. Penney Corp., No. 6:14-CV-601-MHS-KNM, 2015 WL 5766498, at *3 (E.D. Tex. Sept. 29, 2015) ("ERISA does not impose a newly-created duty on plan administrators to disclose all adverse inside information to the public, but where a duty to disclose already exists outside of ERISA, ERISA does not vitiate that pre-existing duty either.").

219. 29 U.S.C. § 1144(d) (2012); see also Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2473 (2014) (citing this language); Casciari & Morrison, supra note 3, at 660 (suggesting that this statute implies "ERISA does not supplant federal securities laws"); Hinson & DiCarlo, supra note 1, at 31 ("[I]t is clear that ERISA was not intended to displace other federal laws.").

220. See H. Douglas Hinson & Emily S. Costin, Determining ERISA Duties Post-*Dudenhoeffer*, Law360 (Mar. 26, 2015, 12:01 PM), http://www.law360.com/articles/635383/determining-erisa-duties-post-dudenhoeffer [http://perma.cc/6E87-9HPR] ("Given the

Additionally, it is important to reiterate that the argument here is only to uphold duty-to-inform claims against a motion to dismiss and does not suggest that such claims should lead to automatic recovery. The law forbids double recovery for the same injury, even when different legal theories support the same claim.[221] This limitation ensures that plaintiffs who have already recovered under a settlement or damages award in connection with their securities law claim would not be entitled to recover under a breach-of-fiduciary-duty claim[222] unless the ERISA-based claim provided for damages in excess of those provided by the securities action.[223] Damages under ERISA may exceed those under securities claims when plans have other sources of recovery, like fiduciary liability insurance, a fidelity bond, and personal assets of defendants, including their own employee-benefit-plan accounts.[224] In other words, the ERISA claim would only function as a backstop in case the securities claim did not settle or lead to (adequate) damages.[225]

3. *Factor Three of* Dudenhoeffer. — The final factor courts should consider when deciding whether appointing fiduciaries had a duty to inform independent third-party fiduciaries of material nonpublic information is whether a "prudent fiduciary" could "not have concluded that" disclosure to the appointed fiduciary "would do more harm than good."[226] This language lends itself to fact-specific inquiries in which courts consider "the facts and allegations supporting [the] proposition" that

comprehensive nature of the securities laws and regulations, the existence of the U.S. Securities and Exchange Commission and over 80 years of jurisprudence . . . , there is simply no role for ERISA or the U.S. Department of Labor in this area.").

221. Saumer v. Cliffs Nat. Res. Inc., No. 1:15 CV 954, 2016 WL 3355323, at *3 (N.D. Ohio June 17, 2016) (citing Midfield Concession Enter. v. Areas USA, Inc., 130 F. Supp. 3d 1122 (E.D. Mich. 2015)).

222. This was the case in *Saumer*, in which the court refused to uphold the ERISA claim based on nonpublic information because there was already a proposed $84 million settlement from the companion securities case. Id. at *2.

223. See Bravo, supra note 7, at 508–10 ("Whereas recovery under the securities law is limited to actual damages, the scope of remedies under ERISA is broader than under Rule 10b-5.").

224. Class Exemption for the Release of Claims and Extensions of Credit in Connection with Litigation, 68 Fed. Reg. 75,632, 75,638 (Dec. 31, 2003).

225. For an explanation of why securities law claims may fail when ERISA-based claims may not, see Bravo, supra note 7, at 508–10. In securities actions, the Private Securities Litigation Reform Act governs discovery and calls for an automatic stay in discovery when defendants file a motion to dismiss. Id. at 507. The more liberal discovery rule, Federal Rule of Civil Procedure Rule 26(b), applies to suits brought under ERISA and permits parties "to 'obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party.'" Id. (quoting Fed. R. Civ. P. 26(b)(3)).

226. Amgen Inc. v. Harris, 136 S. Ct. 758, 760 (2016) (citing Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2473 (2014)).

more harm than good would have been the result of disclosure.[227] These facts and allegations "should appear in the shareholders' complaint."[228]

Notably, this factor may only sound like it would precipitate case-by-case analysis. In practice, when coupled with the requirement that securities laws must be breached, this final factor may do little work. Looking at the decisions applying *Dudenhoeffer*, courts have decided that a prudent fiduciary could not have concluded more harm than good would be done by disclosure if the defendant had also been unable to defeat securities claims against it.[229] As one district court explained, assuming the defendants had withheld material information from appointed fiduciaries that they were also required to disclose by securities laws, "Defendants cannot claim that complying with the law would have caused the company harm and thus compliance is not necessary under *Dudenhoeffer*."[230] While the Supreme Court made clear in *Amgen* that it is not enough for a court to assume that it is "quite plausible" that more harm than good would have resulted from disclosure, the Court also suggested that plaintiffs similarly situated to the *Amgen* shareholders are "masters of their complaint," able to plead a claim that satisfies the requirements of *Dudenhoeffer*.[231]

This observation suggests that ERISA duty-to-inform claims should *always* be permitted when there is a viable securities claim and the complaint is properly pleaded and may *never* be permitted when such a companion case is absent or has been dismissed. If this is true, then ERISA disclosure duties are parallel to those established by securities laws.

CONCLUSION

The Supreme Court's decision in *Dudenhoeffer* has left ESOP fiduciaries more vulnerable to ERISA-based suits than they were during the era of the *Moench* presumption. As a result, companies are more likely than ever to appoint independent fiduciaries to reduce the likelihood of suit from employees invested in company stock. One way plaintiffs, who may have suffered serious losses from downturns in their employer's stock, can still successfully assert breach-of-fiduciary-duty claims is by alleging that appointing fiduciaries have a duty to inform appointed fiduciaries of material nonpublic information that would adversely affect stock price.

227 . Id.

228. Id.

229. See supra notes 170–173 and accompanying text (explaining a district court's decision to uphold a duty-of-prudence claim).

230. Ramirez v. J.C. Penney Corp., No. 6:14-CV-601-MHS-KNM, 2015 WL 5766498, at *4 (E.D. Tex. Sept. 29, 2015).

231. *Amgen*, 136 S. Ct. at 760.

Courts should be willing to consider such claims and refrain from creating a per se rule against the duty to inform. Principles of trust law support this proposal. Delegation of trustee responsibilities was originally designed to protect and better serve beneficiaries, and trust law requires appointing trustees to act as reasonable and prudent trustees would when appointing and monitoring delegees. Additionally, the guidance from the Department of Labor and the Supreme Court's holding in *Dudenhoeffer* affirm the existence of this duty.

Lower courts should look to the concerns the Supreme Court highlighted in *Dudenhoeffer* and uphold duty-to-inform claims when securities laws would independently require disclosure. If ERISA-based duties match and backstop those mandated by securities laws, duty-to-inform claims will not upset the complex disclosure regime established by the SEC but will instead complement and reinforce it. Further, this solution appeals to simple logic: ERISA's duty of prudence requires fiduciaries to comply with law.