FIFTH THIRD LAWSUIT

Employee stock losses under high court consideration

BY PAULA CHRISTIAN

The U.S. Supreme Court will hear a case in April that could decide when employees can sue to recover losses in their company stock plans.

The case began as a lawsuit filed in federal court in Cincinnati by Fifth Third Bank employees who suffered devastating losses to their company stock during the 2008 financial crisis. They claim bank executives knew the stock was artificially inflated because the bank had switched from being a conservative lender to a risky subprime lender but failed to disclose that to investors.

Fifth Third argues that its fiduciaries acted prudently and while the company stock fund did drop during the economic crisis, as did stock from many other companies, it rebounded shortly after. Because federal law encourages employer stock funds, the bank argues that as long as a company is viable, it should be protected from lawsuits over stock price fluctuations.

How the Supreme Court decides this case could have big implications for hundreds of companies that offer similarly structured retirement plans.

"It's one of the biggest cases of its type in years," said Jim Schuck, a lawyer specializing in Employee Retirement Income Security Act (ERISA) cases at Bricker & Eckler LLP in Columbus.

"This will go a long way toward deciding whether large companies even offer employee stock option plans anymore," he said.

The case has drawn widespread attention because it could influence how many future cases get filed by unhappy employee investors and how they will fare in court.

KeyCorp, Delta Air Lines, the U.S. Chamber of Commerce, the Securities Industry and Financial Markets Association and others have filed briefs in support of Fifth Third.

The U.S. Solicitor General and Department of Labor have filed a brief in support of Fifth Third employees.

Fifth Third employees claim the bank violated federal law by investing 401(k) contributions into company stock that was too risky. Under the plan, the bank matched employees' contributions up to 4 percent of their salaries into the company stock plan, which employees later could move to a different fund.

Representatives for Fifth Third and the plaintiffs declined to comment.

▸ CLOSER LOOK

FIFTH THIRD BANCORP V. DUDENHOEFFER

Petitioners (Defendants): Fifth Third Bancorp, CEO Kevin Kabat and members of the Fifth Third Bank pension, profit sharing and medical plan committee.

Respondents (Plaintiffs): John Dudenhoeffer, Alireza Partovipanah

Filed: Originally filed in 2008 in U.S. District Court in Cincinnati, judge dismissed the case; 6th Circuit Court of Appeals reversed that ruling in 2012; U.S. Supreme Court agreed to hear the case in December.

Court date: Oral arguments before U.S. Supreme Court set for April 2.

Docket number: 12-751

Markets go up – and down

Some Columbus lawyers say employers should not be blamed when company stock drops.

"Markets go up and markets go down. When they go down, fiduciaries don't want to feel forced to jump in front of a train and stop people from investing," said Jennifer Dunsizer, a labor and ERISA lawyer at Vorys Sater Seymour and Pease.

If company stock drops sharply and plan trustees liquidate it, when the stock rebounds, employees may want to sue over lost revenue that could have been earned on the upswing, lawyers said.

"There's almost a damned if you do and damned if you don't scenario," Schuck said.

Tom Sigmund, a director and ERISA specialist at Kegler Brown Hill and Ritter in Columbus, believes the Supreme Court should side with Fifth Third. But he said the bank could have done a better job protecting itself from lawsuits if it had used independent trustees to oversee its employee stock plan instead of bank executives.

If the high court sides with Fifth Third employees, some lawyers believe it will cause a surge in lawsuits that may force companies to stop offering the plans.

In theory, companies offer stock to employees because it helps to bond workers to the company.

"There are lots of individuals, that this is really the only way they will be able to invest in their employer's stock, and that stock is a valuable investment," Dunsizer said.

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