

***FocusOn* Conference Call:
The U.S. Supreme Court's Decision
in *Fifth Third Bancorp v. Dudenhoeffer****

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Agenda

- Background leading to Supreme Court review: the Circuit split
- Expectations from the oral argument
- The Court's decision and remand
- The significance of the decision
- Interesting tidbits from the Supreme Court episode

Background

- The issue presented
- *Moench* presumption
- The Sixth Circuit case
 - Facts in the case
 - District Court decision
 - Sixth Circuit decision
 - Divergence with the other Circuits

Background/Oral Argument

- The Supreme Court gets involved
 - Solicitor General's position on certiorari
- Oral argument
 - Tea leaves from the oral argument
 - Most active Justices
 - U.S.'s position on the merits
 - Predictions after the argument

The Decision

- Unanimous decision by Justice Breyer
- The presumption of prudence is rejected
 - Reasons for rejecting the presumption
- Court then instructs the Sixth Circuit to re-review the plausibility of the complaint
 - Cases known as Iqbal and Twombly establish higher bar for plaintiffs to overcome a motion to dismiss, and Court here expressly extends them to the ERISA world
- Court rejects various theories already presented by the plaintiffs

Aftermath in the Sixth Circuit

- Remand to the lower courts
- Anticipated subsequent proceedings
- Timing for resolution of the case

Significance of the Decision

- Ends the presumption of prudence, going forward
- Sets the parameters for evaluation of viability of future stock-drop complaints
- At first reported as a win for the plaintiffs' bar, but on second thought is at least as favorable for defendants
 - The Court “splits the baby”

Significance of the Decision

- Makes unviable in all but the most extraordinary cases some theories typically pursued in stock-drop cases
 - Highly dubious of “public information” theory
 - Equally dubious of assertion that fiduciary has obligation to trade on insider information
 - What theory will work in the future?

Significance of the Decision

- Important as a civil procedure case
 - *Iqbal* and *Twombly* reinforced in a new setting
- Extraordinary postscript aimed at stemming frivolous lawsuits
 - Policing effort by the Court
 - Cuts off case before massive discovery effort
- Part of a larger body of case law aimed at terminating implausible cases quickly

Interesting Tidbits

- Breyer strikes again!
 - Like *CIGNA v. Amara*, an unpredicted second part to the decision may end up being more important than the first part
 - This time the “musings” help the defense bar
 - No detractors this time from the “extra” in the decision
- Very late decision in Term, and it showed

Interesting Tidbits

- Death of the presumption
 - Not surprising
 - This Court dislikes “judge-made” doctrines
 - Court sticks to the statutory text
 - What about Congress’s expectation that the courts would fashion a “federal common law” of ERISA?
- Do fiduciaries end up in a better place now even without the presumption?

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