A Survey of ERISA Stock Drop Case Law Since January 2008

By

Waldemar J. Pflepsen, Jr.
Jorden Burt LLP
Washington, D.C.

Daniel T. Crisp
Jorden Burt LLP
Simsbury, Connecticut
TABLE OF CONTENTS

I. BACKGROUND .................................................................................................................. 1
II. OVERVIEW OF ERISA PROVISIONS APPLICABLE TO STOCK DROP LITIGATION .................................................................................................................. 1
III. SUMMARY OF ERISA STOCK DROP CASE LAW: 2000 – 2007 .............................................. 2
   A. Intersection of Securities Fraud and ERISA Stock Drop Litigation:
      Pleading and Discovery ................................................................................................. 2
   B. Named and Functional Fiduciaries ............................................................................ 3
   C. Section 404(c) Defense ............................................................................................... 4
   D. Duty of Care: Imprudent Investment Claims .............................................................. 5
      1. Plan Mandates Investment in Company Stock ...................................................... 5
      2. Plan Encourages Investment in Company Stock .................................................. 5
         a. Overcoming the Moench Presumption ......................................................... 6
         b. Application of Moench on a Motion to Dismiss ............................................ 6
      3. Plan Simply Permits Investment in Company Stock ............................................ 6
      4. Other Presumptions and Approaches .................................................................... 6
   E. Duty of Loyalty: Misrepresentation and Nondisclosure Claims .................................. 7
      1. Misrepresentation Claims ..................................................................................... 7
      2. Nondisclosure Claims ............................................................................................ 9
   F. Duty to Monitor ........................................................................................................... 9
IV. LA RUE v. DE WOLFF, BOBERG & ASSOC., INC. .................................................................... 10
V. NOTABLE ERISA STOCK DROP DECISIONS SINCE JANUARY 2008 ................... 10
   A. Class Certifications .................................................................................................... 10
      1. Standing ................................................................................................................ 10
      2. Commonality .......................................................................................................... 11
      3. Typicality ............................................................................................................... 11
      4. Adequacy .............................................................................................................. 13
      5. Rule 23(b) Certification ......................................................................................... 13
   B. Other Procedural Decisions – Motions for Consolidation ........................................ 14
# TABLE OF CONTENTS
(continued)

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>C. Merits Decisions</td>
<td></td>
</tr>
<tr>
<td>1. Motions to Dismiss</td>
<td>14</td>
</tr>
<tr>
<td>a. Duty of Care: Imprudent Investment Claims</td>
<td></td>
</tr>
<tr>
<td>(1) Applicability of a Presumption of Prudence on a Motion to Dismiss</td>
<td>15</td>
</tr>
<tr>
<td>(2) Presumptions Overcome</td>
<td>16</td>
</tr>
<tr>
<td>(3) Presumptions not Overcome</td>
<td>17</td>
</tr>
<tr>
<td>b. Duty of Loyalty: Misrepresentation and Nondisclosure Claims</td>
<td>18</td>
</tr>
<tr>
<td>(1) General Rulings</td>
<td>18</td>
</tr>
<tr>
<td>(2) Loss Causation</td>
<td>19</td>
</tr>
<tr>
<td>(3) Reliance</td>
<td>20</td>
</tr>
<tr>
<td>(4) Affirmative Duty to Disclose</td>
<td>20</td>
</tr>
<tr>
<td>c. Duty to Monitor</td>
<td>20</td>
</tr>
<tr>
<td>d. Other Rulings on Motions to Dismiss</td>
<td>21</td>
</tr>
<tr>
<td>2. Motions for Judgment on the Pleadings</td>
<td>23</td>
</tr>
<tr>
<td>3. Motions for Summary Judgment</td>
<td>23</td>
</tr>
<tr>
<td>4. Trials</td>
<td>25</td>
</tr>
<tr>
<td>VI. RECENT FILINGS OF STOCK DROP COMPLAINTS AND CONCLUSION</td>
<td>25</td>
</tr>
</tbody>
</table>
I. BACKGROUND

Earlier this decade, after the implosion of technology stocks and the corporate scandals at Enron and WorldCom, plaintiffs who might normally have brought securities fraud claims began to bring parallel “stock drop” actions alleging breaches of fiduciary duties against various corporate defendants under the Employee Retirement Income Security Act of 1974, as amended, (“ERISA”). Many corporations had offered company stock as an investment option in their defined contribution plans, known as Eligible Individual Account Plans (“EIAPs”), and, after a decline in stock price due to adverse corporate developments, plaintiffs began to assert numerous claims against their employers relating to the offering of company stock as a plan investment option. This paper focuses on three of the most common claims: (1) alleged breach of the duty of care, also referred to as the duty of prudence, for offering company stock as an investment option when it was imprudent to do so; (2) alleged breach of the duty of loyalty, in the context of disclosure obligations, through either misrepresenting or failing to disclose material information necessary for plan participants to make informed decisions about investing in company stock, and; (3) alleged breach of the duty to monitor, which is also part of the duty of care, against entities, directors, and officers through failing to monitor the conduct of plan fiduciaries.

This article has five sections. The first provides a basic overview of the specific ERISA provisions that gave rise to stock drop litigation, while the second recounts stock drop case law from 2000 to 2007, organizing the law according to the three most common claims. In the third section, this article reviews the Supreme Court case of LaRue v. DeWolff, Boberg & Assocs., Inc. and describes its potential effect on stock drop litigation. The fourth section profiles stock drop decisions from January 2008 to the present, organizing them by class certifications, other procedural decisions, and merits decisions. The final section notes several recently-filed stock drop complaints.

II. OVERVIEW OF ERISA PROVISIONS APPLICABLE TO STOCK DROP LITIGATION

ERISA defines an EIAP as an individual account plan which is a profit-sharing, stock bonus, thrift or savings plan, or an employee stock ownership plan (“ESOP”). A plan will be treated as an EIAP only if the EIAP explicitly provides for the holding of qualified employer securities, which includes company stock. Congress sought to encourage employee ownership in their company and granted EIAPs three exemptions from ERISA’s rules regarding pension plans. Two of these exemptions are applicable to this article, which are EIAPs not being subject to the ten-percent cap on employer securities and the fiduciary being exempted from the duty to diversify investments. Congress also intended EIAPs to function as retirement plans, and, thus, pursuant to ERISA, imposed several duties on EIAP fiduciaries, two of which are relevant for the purposes of this article.

The first duty is the duty of prudence, or duty of care, which is defined as a fiduciary discharging his duties “with the care, skill, prudence, and diligence under the circumstances then

---