Boston College Law Review

Volume 63
Issue 9 *Electronic Supplement*

Article 16

5-16-2022

Stuck Between a Fiduciary Rock and a Prudential Hard Place: The Eighth Circuit's Approach to Erisa's Duty of Prudence

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STUCK BETWEEN A FIDUCIARY ROCK AND A PRUDENTIAL HARD PLACE: THE EIGHTH CIRCUIT'S APPROACH TO ERISA'S DUTY OF PRUDENCE

Abstract: On July 27, 2020, in *Allen v. Wells Fargo & Co.*, the U.S. Court of Appeals for the Eighth Circuit held that plaintiffs who bring an imprudence claim under the Employment Retirement Income Security Act against a fiduciary of an employee stock ownership plan (ESOP) alleging that the fiduciary failed to act on negative inside information do not meet their pleading burden. In doing so, the Eighth Circuit agreed with three other federal circuit courts that an imprudence claim predicated on an ESOP fiduciary's failure to disclose negative information is insufficient to survive a motion to dismiss. Only the Second Circuit has held that plaintiffs can survive a motion to dismiss when offering early disclosure as a possible alternative action the fiduciary could have taken. This Comment argues that the Eighth Circuit's holding is correct because it best protects ESOP plan managers and takes account of ESOP's unique structure.

INTRODUCTION

For many Americans, retirement is the culmination of the American dream.[1] Millions of American workers participate in employer-supported retirement plans to secure that dream.[2] Many of those workers, participate in these plans through employer-supported 401(k)s.[3] Because so many Americans depend on their 401(k) plans, federal law imposes several duties on plan man-

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[1] *See* Kara M. Stein, Comm'r, U.S. Sec. & Exch. Comm'n, Remarks at the Brookings Institution: The New American Dream: Retirement Security (Oct. 16, 2018), https://www.sec.gov/news/speech/speech-stein-101618 (noting that everyone shares the dream to retire).

[2] *See* EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LAB., PRIVATE PENSION PLAN BULLETIN HISTORICAL TABLES AND GRAPHS, 1975–2018, at 9 (2021), https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf (providing the total number of active participants in pension plans in the United States in 2018). In 2018, there were over ninety-one million active participants in employer pension plans. *Id.* A pension plan is a retirement plan sponsored by an employer or employee association. *Retirement Plans Benefits and Savings*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/retirement#:~:text=Pension%20plans,of%20covered%20employment%20or%20beyond.

[3] *See* EMP. BENEFITS SEC. ADMIN., *supra* note 2, at 25 (noting that in 2018 more than 70,000,000 people actively participated in a 401(k) program). A 401(k) is a retirement plan in which employees can choose to invest a portion of their earnings into mutual funds. Miranda Marquit & Benjamin Curry, *Retirement Basics: What Is a 401(k) Plan?*, FORBES ADVISOR (Mar. 21, 2021), https://www.forbes.com/advisor/retirement/what-is-401k/. Employers often match those contributions up to a designated level. *Id.*

agers.[4] When these plans incur losses, participants frequently sue plan managers.[5] In 2016, Wells Fargo employees did just that after the company's stock price declined and their retirement plans suffered losses following the revelation by federal authorities that the bank had illegally opened up millions of fraudulent accounts. for its customers.[6]

Part I of this Comment discusses the Employment Retirement Income Security Act (ERISA), including the duties it imposes on plan managers, the pleading standard for imprudence claims, and the factual and procedural history of the U.S. Court of Appeals for the Eighth Circuit's 2020 decision in *Allen v. Wells Fargo & Co.*[7] Part II describes the approaches of the U.S. Courts of Appeals for the Second, Fifth, Seventh, Eighth, and Ninth Circuit Court of Appeals.[8] Finally, Part III argues that the Eighth Circuit's approach is correct because it recognizes that the U.S. Supreme Court's pleading standard for imprudence claims places an appropriately heavy burden on plaintiffs.[9]

I. THE LEGAL, FACTUAL, AND PROCEDURAL BACKGROUND OF *ALLEN V. WELLS FARGO & CO.*

In 2020, in *Allen v. Wells Fargo & Co.*, the U.S. Court of Appeals for the Eighth Circuit joined a majority of federal circuit courts in holding that plaintiffs fail to meet the pleading standard for a violation of the duty of prudence claim where they allege that an employee stock ownership plan (ESOP) manager failed to act on inside information.[10] Section A of this Part discusses the

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[4] *See* Monique Morrissey, *The State of American Retirement: How 401(k)s Have Failed Most American Workers*, ECON. POL'Y INST. (Mar. 3, 2016) https://www.epi.org/publication/retirement-in-america/ (observing that many Americans rely on 401(k)s to finance their retirement); 29 U.S.C. § 1104 (imposing certain duties on retirement plan managers).

[5] *See* Whitley v. BP, P.L.C., 838 F.3d 523, 526 (5th Cir. 2016) (stating that when an employer's stock price falls, employees invested in an employee stock ownership program (ESOP), a type of 401(k), are often sued in lawsuits known as "stock-drop" suits). An ESOP is a 401(k) designed to invest heavily in the employing company's stock. *See* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 412 (2014)(describing an ESOP as an employee retirement plan that invests significantly in an employer's stock).

[6] *See* Allen v. Wells Fargo & Co., 967 F.3d 767, 770–71 (8th Cir. 2020) (discussing the events leading up to the employees' lawsuit against Wells Fargo).

[7] *See infra* notes 10–39 and accompanying text.

[8] *See infra* notes 40–73 and accompanying text.

[9] *See infra* notes 74–87 and accompanying text.

[10] *Allen*, 967 F.3d at 775. Several other circuit courts have reached the same conclusion. *See, e.g.*, Laffen v. Hewlett-Packard Co., 721 F. App'x 642, 644 (9th Cir. 2018) (holding that plaintiff's had failed to propose valid alternative actions to survive a motion to dismiss by alleging a plan manager could publicly disclose negative information); Martone v. Robb, 902 F.3d 519, 529 (5th Cir. 2018) (same); Saumer v. Cliffs Nat. Res., Inc., 853 F.3d 855, 864 (6th Cir. 2017) (same); *Whitley*, 838 F.3d at 529 (5th Cir. 2016) (same). *But see* Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620, 631 (2d Cir. 2018), *vacated and remanded*, 140 S. Ct. 592, 595 (2020) (per curiam), *reinstated*, 962 F.3d 85, 86 (2d Cir. 2020) (holding that the plaintiff stated a sufficient claim for breach of the duty of prudence by alleging the fiduciary failed to promptly disclose information that could affect the stock's value). A

Employee Retirement Income Security Act of 1974 (ERISA) and the duties that it imposes on retirement plan managers, as well as the pleading standard for a a breach of the duty of prudence claim.[11] Section B of this Part discusses the factual and procedural history of *Allen*.[12]

A. ERISA and the Dudenhoeffer *Pleading Standard*

ERISA protects employees who maintain retirement benefit plans through their employer.[13] To protect plan participants, ERISA imposes fiduciary duties on plan managers.[14] Section 1104 of the Act lists the fiduciary duties imposed on employee benefit plan managers, including the duty to act prudently in the administration of an employee benefit plan.[15] A fiduciary who breaches the duty of prudence faces potential liability.[16]

ERISA regulates several types of employee benefit plans, including ESOPs.[17] An ESOP is an employee benefit plan that invests heavily in the em-

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fiduciary is someone tasked with managing another's property subject to a high standard of care. *Fiduciary*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[11] *See infra* notes 13–26 and accompanying text.

[12] *See infra* notes 27–39 and accompanying text.

[13] *See* 29 U.S.C. § 1001(c) (stating ERISA's purpose). Congress enacted ERISA in response to the increase in employee benefit plans in the years leading up to 1974. *See id.* § 1001(a) (noting that the number of employee benefit plans had grown substantially in the preceding years). Congress determined that such plans and their respective benefits were financially at risk unless it established certain minimum standards. *Id.* The desire to establish and maintain minimum standards culminated in several new regulations of employee benefit plans. *See*, *e.g.*, § 1021 (requiring employee benefit plan administrators to make certain disclosures and reports); § 1082 (establishing "minimum funding standards" for benefit plans); § 1131 (instituting criminal penalties for ERISA violations). These provisions apply to all employee benefit plans as long as they were created or are maintained by the employer or a group representing employees. § 1003(a).

[14] *See* § 1102(a)(1) (requiring that every benefit plan be managed by a fiduciary); § 1104 (identifying the duties required of a plan fiduciary). ERISA requires that every employee benefit plan have a written document that identifies the individual or individuals who will serve as "named fiduciaries" tasked with managing the plan. § 1102(a)(1).Under ERISA, a fiduciary is anyone who (1) has discretion over the operation of the benefits plan; (2) advises on the plan's investments; or (3) exercises discretion in managing the plan. § 1002(21)(A). ERISA also permits a plan's named fiduciaries to select another person to serve as an "investment manager" for the plan. § 1102(c)(3); *see* § 1002(38) (defining an "investment manager" as any fiduciary authorized to buy or sell plan assets or advise the plan). A plan participant under ERISA is any employee that engages in or could engage with the benefit plan. § 1002(7).

[15] § 1104(a)(1)(B) (requiring that a fiduciary act with the same "care, skill, prudence, and diligence" as a prudent person in the same situation).

[16] § 1109(a) (imposing liability for breach of a fiduciary duty); § 1132(a)(1) (granting plan participants and beneficiaries the right to bring a civil action).

[17] *See* § 1003(a) (stating that ERISA covers any plan created or operated by an employer); § 1107(d)(3)(A) (defining an "eligible individual account plan" to include ESOPs). ERISA covers a large portion of employer provided retirement benefit plans including 401(k)s and employee pension plans. Ebony Howard, *Which Retirement Accounts Does ERISA Cover?*, INVESTOPEDIA, (Jan. 10, 2021) https://www.investopedia.com/ask/answers/09/erisa-coverage.asp. Under ERISA, an employee pension plan includes any employer-created program created that provides funding for employee

ployer's stock.[18] Although most ERISA-protected plans require the prudent fiduciary to diversify the plan's investments to minimize risk, ESOP plans are exempt from this diversification requirement.[19] That statutory exemption led a number of circuit courts to presume that ESOP fiduciaries acted prudently where they invested solely in the employer's stock.[20] Such a presumption of prudence makes it difficult for plaintiffs bringing imprudence claims to survive a motion to dismiss.[21]

In 2014, in *Fifth Third Bancorp v. Dudenhoeffer*, the U.S. Supreme Court considered whether ERISA contained a presumption of prudence for ESOP fiduciaries.[22] The Court held ERISA does not establish a presumption of prudence simply because a plan is an ESOP.[23] Instead, it established a detailed analysis for

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retirement or defers employee compensation until after they are no longer employed. 29 U.S.C. § 1002(2)(a).

[18] 29 U.S.C. § 1107(d)(6); *see* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 412 (2014) (explaining that an ESOP is a pension plan that principally buys shares in the company employing the participants). As of 2021, almost thirteen million workers invested in an ESOP. *How an Employee Stock Ownership Plan (ESOP) Works*, NAT'L CTR. FOR EMP. OWNERSHIP (Dec. 2021), https://www.nceo.org/articles/employee-ownership-by-the-numbers#1. ESOPs are widespread principally because federal and state tax policy encourages employee ownership of companies. Henry Hasmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy.*, 99 YALE L.J. 1749, 1752 & n.6 (1990).

[19] 29 U.S.C. § 1104(a)(2).

[20] *See Dudenhoeffer*, 573 U.S. 409 at 417 (noting that several circuit courts grant a presumption of prudence to ESOP fiduciaries); Moench v. Robertson, 62 F.3d 553, 571 (3d Cir. 1995) (granting a presumption of prudence for ESOP fiduciaries). The court in *Moench* explained that the presumption of prudence is warranted because ESOPs are designed to invest solely in employer securities. 62 F.3d at 568. It reasoned that plan managers should not be punished for failing to diversify the plan, even though ERISA requires non-ESOP plans to do so. *Id.* The so-called "*Moench* presumption" was later adopted by several other circuit courts. *See* Kuper v. Iovenko, 66 F.3d 1447, 1459 (6th Cir. 1995) (adopting the Third Circuit's presumption of prudence for a fiduciary who invests in employer securities); Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243, 254 (5th Cir. 2008) (same); Quan v. Comput. Scis. Corp., 623 F.3d 870, 881 (9th Cir. 2010) (same); *In re* Citigroup Litig., 662 F.3d 128, 138 (2d Cir. 2011) (same); Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1280 (11th Cir. 2012) (same); White v. Marshall & Ilsley Corp., 714 F.3d 980, 989 (7th Cir. 2013) (same).

[21] *See Dudenhoeffer*, 573 U.S. at 425 (noting that adopting a presumption of prudence would eliminate the potential for claimants to bring meritorious imprudence claims unless the company was suffering economically).

[22] *Id.* at 418. The *Dudenhoeffer* Court sought to resolve the circuit split on presumption of prudence. *Id.* at 414. In particular, the Court considered whether a presumption of prudence applies to motions to dismiss for failure to state a claim. *Id.* at 425.

[23] *Id.* at 418–19. The Court determined that the same standard of prudence applicable to non-ESOP, ERISA fiduciaries applies to ESOP fiduciaries as well, save for the duty to diversify stock. *Id.* at 419. In finding that no presumption of prudence applies to ESOP fiduciaries, the Court held that the pleading standard for duty of prudence claims is the same as in other civil actions. *See id.* at 426 (stating that federal courts should apply the *Twombly*-*Iqbal* pleading standard). In civil actions, a plaintiff must state factual allegations that, taken as true, establish a plausible claim for relief. *See* Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (stating that a court must assume the truth of factual allegations and consider whether the claim entitles the plaintiff to relief). *See generally* FED. R. CIV. P. 8(a)(2) (establishing the pleading standard for civil actions).

reviewing a motion to dismiss an imprudence claim.[24] Under *Dudenhoeffer*, an imprudence claim predicated on a plan manager's failure to act on inside information can only survive a motion to dismiss if it includes plausible alternative actions that a prudent fiduciary in that situation would consider less harmful to the fund.[25] The Court determined that the reviewing court must ask whether a prudent fiduciary in that position "could not have concluded" that the alternative action "would do more harm than good to the fund."[26]

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[24] *Dudenhoeffer*, 573 U.S. at 428–30. The plaintiff in Dudenhoeffer argued that the defendant fiduciary had breached their duty of prudence for two reasons. *Id.* at 413. First, publicly available information on the risk of subprime mortgages indicated that the bank's stock was at risk of losing value because subprime lending was a large part of its business. *Id.* Second, the fiduciary failed to act on inside information they possessed suggesting that the stock was overvalued. *Id.* The plaintiff argued that the fiduciary was imprudent for continuing to purchase the bank's stock while knowing it was overpriced. *See id.* (stating that it was imprudent for the plan managers to purchase stock for more than they knew it was worth).

[25] *Id.* at 428. The Court explained that such actions must comply with securities laws. *Id.*

[26] *Id.* at 430. In 2016, in *Amgen Inc. v. Harris*, the Court reiterated the *Dudenhoeffer* standard. 577 U.S. 308, 310(2016) (per curiam) The plaintiff in *Dudenhoeffer* proposed several actions that the defendant could have chosen rather than continuing to buy the employer's stock, including divesting the stocks currently held, opting not to make further purchases, or disclosing the information to the public to allow for a stock correction. 573 U.S. at 428. The Court noted that a fiduciary in a position to either disclose negative information or freeze stock purchases would have to consider whether those actions would lead to a decrease in stock prices that would negatively affect the plan. *Id.* at 430. The Court further explained that a fiduciary would have to balance legal concerns regarding the divestiture of stock and the disclosure of inside information, as well as the financial impact that such actions could have on the plan and its participants. *See id.* at 428–30 (discussing how courts should approach motions to dismiss imprudence claims). In particular, the Court raised concerns over potential securities law violations related to insider trading and corporate disclosure. *See id.* at 428 (noting that selling the company's stock because of non-public information would constitute a breach of securities laws); *see also Amgen*, 308 U.S. at 310 (noting that ESOP plan managers are in a difficult position when faced with an allegation of failing to act on non-public information). Prior to *Dudenhoeffer*, several circuit courts recognized that plaintiffs often proposed alternative actions that conflicted with securities laws. *See, e.g.*, Rinehart v. Akers, 722 F.3d 137, 147 (2d Cir. 2013), *cert. granted and judgment vacated*, 573 U.S. 956 (2014) (noting that divesting stock based on inside information is considered insider trading); White v. Marshall & Isley Corp., 714 F.3d 980, 992 (7th Cir. 2013) (same); Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1282 (11th Cir. 2012) (same). *See generally* United States v. O'Hagan, 521 U.S. 642, 651–52 (1997) (defining insider trading as trading in securities of one's employer predicated on material inside information). The plaintiff in *Dudenhoeffer* brought both a breach of prudence and a breach of loyalty claim. 573 U.S. at 413. The Court did not adjust the pleading standard for duty of loyalty claims. *Id.* As such, a court considering a motion to dismiss a breach of the duty of loyalty claim must apply the general pleading standard of plausibility applicable in nearly all civil actions. *See* Allen v. Wells Fargo & Co., 967 F.3d 767, 775 (8th Cir. 2020) (stating that the plausibility standard governs duty of loyalty claims); *supra* note 23 (explaining the *Twombly* and *Iqbal* civil pleading standard).

A. Factual History of Allen v. Wells Fargo & Co.

Wells Fargo offers employees a 401(k) program that invests part of their salaries in certain investment funds for retirement.[27] The program invests in a number of funds, including the Wells Fargo ESOP Fund.[28] Beginning in 2004, Wells Fargo engaged in an aggressive sales policy wherein upper management pressured branch workers to engage in unethical and illegal practices to fraudulently open bank accounts without customer permission.[29] As a result of these practices, Wells Fargo employees illegally opened more than 3.5 million accounts, prompting a federal government investigation.[30] The ESOP plan managers continued to invest in Wells Fargo stock throughout the federal investigation.[31] Federal authorities publicly revealed Wells Fargo's fraudulent sales practices in September 2016 when they fined the bank $185 million.[32] The disclosure resulted in a seismic drop in Wells Fargo's stock price, severely reducing the retirement savings of Wells Fargo ESOP participants.[33]

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[27] *Allen*, 967 F.3d at 770; Brief for Defendants-Appellees at 4, *Allen*, 967 F.3d 767 (No.18-2781). Wells Fargo is the fourth largest bank in the United States. Jack Kelly, *Wells Fargo Forced to Pay $3 Billion for the Bank's Fake Account Scandal*, FORBES (Feb. 24, 2020), https://www.forbes.com/sites/jackkelly/2020/02/24/wells-fargo-forced-to-pay-3-billion-for-the-banks-fake-account-scandal/?sh=1519f28c42d2. As part of its 401(k) program, Wells Fargo contributes a matching percentage of an employee's contributions up to a designated level. *Allen,* 967 F.3d at 770.

[28] *Allen*, 967 F.3d at 770. Like most ESOPs, the Wells Fargo ESOP invested largely in its own stock. *Id.* In addition to its ESOP fund, Wells Fargo invested in a fund referred to as the "Wells Fargo Non-ESOP Fund" that also primarily held Wells Fargo stock. *Id.* Wells Fargo's matching contributions to its employees 401(k)s are invested in these Wells Fargo funds by default. *Id.* As a result, a high percentage of Wells Fargo employees' 401(k) assets are Wells Fargo stock. *Id.*; Brief for Defendants-Appellees, *supra* note 27, at 5. During the period at issue in *Allen*, shares of Wells Fargo stock accounted for 34% of the 401(k) program's assets. Brief for Defendants-Appellees, *supra* note 27, at 5.

[29] *Allen*, 967 F.3d at 770–71. Wells Fargo management pressured workers to engage in fraudulent practices by implementing sales targets and quotas that, if not reached in a given day, were added to the next day's targets. Brian Tayan, *The Wells Fargo Cross Selling Scandal*, STAN. CLOSER LOOK SERIES, Jan. 28, 2019, at 2, http://resources.gabankers.com/PD%20Dept.%20Links/2019%20Schools%20Mobile%20Website/Third%20Year%20Materials/308-3%20of%203%20-Ethics-Pagnattaro%20-Wells%20Fargo%20Cross-Selling%20Scandal%20Stanford%20Closer%20Look%20Series.pdf. The implementation of sales targets and quotas stemmed from Wells Fargo's "Gr-eight" initiative, wherein the company pushed employees to get a customer to purchase eight financial products. Matt Egan, *Wells Fargo Dumps Toxic 'Cross-Selling' Metric*, CNN (Jan. 13, 2017), https://money.cnn.com/2017/01/13/investing/wells-fargo-cross-selling-fake-accounts/index.html. Wells Fargo leadership praised this "cross-selling" program, the goal of which was to make it more difficult for customers to switch banks. *Id.*; Brief of Plaintiffs-Appellants at 6, *Allen* F.3d 767 (No. 18-2781).

[30] *Allen*, 967 F.3d at 771. Plaintiffs alleged that the federal investigation began in 2013. *Id.*

[31] Brief of Plaintiffs-Appellants, *supra* note 29, at 11.

[32] *Allen*, 967 F.3d at 771.

[33] *Id.* The account opening scandal damaged Wells Fargo's reputation as well as its stock value. *See* Todd Haugh, *The Power Few of Corporate Compliance*, 53 U. GA. L. REV. 129, 132–33 (2018) (describing the scandal's impact to Wells Fargo's reputation). As of 2020, the bank's market value sunk by over $200 billion as a result of the scandal and subsequent federal penalties. Hannah Levitt, *Wells Fargo Has Lost $220 Billion in Market Value Under Fed Cap*, BLOOMBERG (May 15, 2020), https://www.bloomberg.com/news/articles/2020-05-15/wells-fargo-has-lost-220-billion-in-market-

Current and former employee participants in the ESOP subsequently brought suit against Wells Fargo as the plan manager.[34] In particular, the employees alleged that Wells Fargo violated its duty of prudence when it failed to act on inside information about the account opening scandal.[35] The employees argued that the ESOP fiduciaries could have better protected the program's participants by either freezing Wells Fargo stock purchases, hedging their investments with the purchase of other securities, or publicly disclosing the scandal prior to September 2016.[36]

The district court granted Wells Fargo's motion to dismiss, holding that the employee plaintiffs failed to meet the *Dudenhoeffer* pleading standard.[37] On appeal, the employees limited their alternative action arguments to earlier disclosure or freezing Wells Fargo stock purchases.[38] The Eighth Circuit affirmed the lower court's opinion that the employees had failed to state a valid imprudence claim.[39]

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value-under-fed-cap#:~:text=%2D%2D%20or%20at%20least%20its,to%20add%20customers%20and%20loans. In February 2020, Wells Fargo agreed to a $3 billion dollar settlement with the U.S. Department of Justice and Securities and Exchange Commission relating to the scandal. Renae Merle, *Wells Fargo Reaches $3 Billion Settlement with DOJ, SEC Over Fake-Accounts Scandal*, WASH. POST (Feb. 21, 2020), https://www.washingtonpost.com/business/2020/02/21/wells-fargo-fake-accounts-settlement/.

[34] *In re* Wells Fargo ERISA 401(k) Litig., 331 F. Supp. 3d 868, 871 (D. Minn. 2018), *aff'd sub nom., Allen*, 967 F.3d 767.

[35] *Id*. In particular, the employees alleged that the plan managers knew about the illegal sales practices up to eleven years before the scandal went public and knew about the federal investigations into those practices as early as three years prior. *Allen*, 967 F.3d at 771. The plaintiffs argued that the failure to act on the information inflated Wells Fargo's stock price and subsequently hurt plan participants when its value plummeted. *Id.*

[36] *Id.* A security is a financial device that represents some underlying monetary value. Will Kenton, *Security*, INVESTOPEDIA (Mar. 20, 2021), https://www.investopedia.com/terms/s/security.asp. A stock is one example of a security. *Id.*

[37] *In re Wells Fargo Litig*., 331 F. Supp. 3d at 879. The district court initially dismissed the employees' duty of prudence claim with prejudice and their duty of loyalty claim without prejudice with the opportunity to amend that claim. *In re* Wells Fargo ERISA 401(k) Litig., No. 16-CV-3405, 2017 WL 4220439, at *7 (Sept. 21, 2017). The employees filed an amended complaint and Wells Fargo again moved to dismiss. *In re Wells Fargo*, 331 F. Supp. 3d at 871. This time, the district court dismissed the claim with prejudice. *Id.* at 879.

[38] *Allen*, 967 F.3d at 773. The Eighth Circuit only analyzed the alternative action of public disclosure because it reasoned that the fiduciary could not have frozen stock purchases without disclosing the scandal. *Id.* The employees argued that releasing information about the federal investigation when the plan managers became aware of it was the appropriate prudent action because it was inevitable that the fraud would become public once the government's investigation became public. *Id.*; Brief of Plaintiffs-Appellants, *supra* note 29, at 8. As such, the employees argued that a prudent fiduciary would conclude that the earlier the fraud was revealed, the lesser effect it would have on the stock price. *Allen*, 967 F.3d at 773. The employees also argued that the fiduciaries violated their duty of loyalty because they (1) failed to release material information to the public about the sales account scandal and (2) were conflicted between their corporate position at Wells Fargo and their position as ESOP plan managers. Brief of Plaintiffs-Appellants, *supra* note 29, at 22.

[39] *Allen*, 967 F.3d at 775. The Court of Appeals also upheld the dismissal of the plaintiffs' duty of loyalty claim. *Id.* at 777. The court reasoned that the plaintiffs' argument in support of a breach of the

II. THE CIRCUIT SPLIT ON DUTY OF PRUDENCE CLAIMS

The U.S. Court of Appeals for the Second, Fifth, Seventh, Eighth, and Ninth Circuits have all interpreted *Fifth Third Bancorp v. Dudenhoeffer* in cases where plan managers failed to act on material, non-public information and continued to invest ESOP funds in employer securities.[40] Section A of this Part discusses the majority approach of the federal circuit courts.[41] Section B summarizes the Second Circuit's minority approach.[42] Section C explains the Eighth Circuit's holding in *Allen v. Wells Fargo & Co.*, which endorsed the majority view.[43]

A. The Circuit Courts' Majority Approach

The majority of federal circuit courts to consider a motion to dismiss a duty of prudence claim predicated on actions related to inside information have held that the plaintiffs failed to meet the pleading standard.[44] In 2016, in *Whitley v. BP, P.L.C.*, the Fifth Circuit examined whether proposed alternative actions based on negative inside information, including freezing company stock trades or publicly disclosing the information, satisfied the *Dudenhoeffer* standard.[45] The employees alleged that BP's stock was overpriced because of non-

duty of loyalty was simply a reframing of their breach of the duty of prudence argument. *Id.* The court stated that this reframing sought to circumvent the more difficult *Dudenhoeffer* pleading standard and refused to accept it. *Id.*

[40] *See* Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620, 631 (2d Cir. 2018), *vacated and remanded*, 140 S. Ct. 592, 595 (2020) (per curiam), *reinstated*, 962 F.3d 85, 86 (2d Cir. 2020) (holding that the plaintiffs had a sufficient claim to survive a motion to dismiss by alleging alternative actions related to non-public information); Whitley v. BP, P.L.C., 838 F.3d 523, 529 (5th Cir. 2016) (stating that the plaintiffs' claim was insufficient when they proposed alternative actions of stock freezes and public disclosure as a result of inside information); Martone v. Robb, 902 F.3d 519, 529 (5th Cir. 2018) (finding that alleged alternative action of earlier public disclosure of fraud was not sufficient under the pleading standard); Saumer v. Cliffs Nat. Res., Inc., 853 F.3d 855, 864 (6th Cir. 2017) (holding that the plaintiffs alternative actions related to non-public information were insufficient to meet the pleading standard); *Allen*, 967 F.3d at 775 (same), Laffen v. Hewlett-Packard Co., 721 F. App'x 642, 644) (9th Cir. 2018) (same).

[41] *See infra* notes 44–55 and accompanying text.

[42] *See infra* notes 56–67 and accompanying text.

[43] *See infra* notes *68*–73 and accompanying text.

[44] *See Whitley*, 838 F.3d at 529 (ruling that the plaintiffs failed to satisfy the *Dudenhoeffer* pleading standard); *Martone*, 902 F.3d at 526–27 (holding that the early disclosure of negative non-public information is not a valid alternative action under *Dudenhoeffer*); *Saumer*; 853 F.3d at 864 (rejecting plaintiff's inside information claim); *Laffen*, 721 F. App'x at 644 (concluding that the plaintiffs did not meet their burden to survive a motion to dismiss).

[45] 838 F.3d at 526. The plaintiffs in *Whitley* were employees of BP, a petroleum company that maintained an ESOP. *Id.* at 525. The employees sued following the *Deepwater Horizon* oil spill in the Gulf of Mexico in 2010. *Id.* A federal investigation into the spill determined that BP was at fault because it cut corners on safety measures. John M. Broder, *BP Shortcuts Led to Gulf Oil Spill, Report Says*, N.Y. TIMES (Sept. 14, 2011), https://www.nytimes.com/2011/09/15/science/earth/15spill.html. The incident caused BP's stock price to drop to its lowest point in over a decade. Giovanny Moreano, *A Year Later: BP Down $49 Billion in Market Cap*, CNBC (Apr. 20, 2011), https://www.cnbc.com/id/42677477.

public information related to safety protocol violations.[46] The plaintiffs argued that a prudent fiduciary of BP's ESOP would have either disclosed the safety violations to the public or frozen company stock trades.[47]

The Fifth Circuit rejected this argument.[48] It held that the plaintiffs failed to show that a plan manager in that position "could not have concluded" that disclosing the safety violations "would do more harm than good."[49] Rather, the court reasoned that a plan manager in that position could have viewed such actions as doing more damage to the fund by depressing the value of the stock and thereby harming the plan participants currently invested in the fund.[50] In 2017 and in 2018 the U.S. Courts of Appeals for the Sixth and Ninth Circuits reached the same conclusion.[51]

In 2018, in *Martone v. Robb*, the Fifth Circuit considered a case in which the plaintiffs proposed identical alternative actions to those presented in *Whitley*.[52] The plaintiff in *Martone*, however, argued that the plan managers should have known that early disclosure of fraud was a valid alternative action because of basic economic data.[53] The plaintiff alleged that failing to preemptive-

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[46] *Whitley*, 838 F.3d at 529. The plaintiffs argued that these safety violations increased BP's susceptibility to potential accidents and therefore artificially inflated the company's stock price. *Id.*

[47] *Id.* at 526.

[48] *Id.* at 529. The court stated that plaintiffs have a difficult burden to meet for breach of the duty of prudence claims. *Id.*

[49] *Id.* (quoting Amgen v. Harris, 577 U.S. 308, 311 (2016) (per curiam) (citation omitted)). The court also noted that the plaintiffs provided no facts to support their conclusions that the alternative actions were viable. *Id.*

[50] *Id.*

[51] *See* Saumer v. Cliffs Nat. Res., Inc., 853 F.3d 855, 865 (6th Cir. 2017) (rejecting plaintiffs alternative actions argument based on non-public information); Laffen v. Hewlett-Packard Co., 721 F. App'x 642, 644 (9th Cir. 2018) (holding that the plaintiff did not state a claim for a breach of the duty of prudence based on failure to disclose non-public information). In *Saumer*, for example, the Sixth Circuit concluded that disclosing negative information would have depreciated the value of the company's stock and harmed the fund's current investments. 853 F.3d at 864. It further reasoned that choosing to stop buying the company's stock or shutting down the fund, as the plaintiffs proposed, would have indicated to the market that something was wrong with the company, potentially causing greater harm to its stock price. *Id.*

[52] *See* Martone v. Robb, 902 F.3d 519, 525 (5th Cir. 2018) (providing plaintiffs' argument that freezing stock purchases and public disclosure were valid alternative actions); *Whitley*, 838 F.3d at 526 (same). In *Martone*, the plaintiff alleged that the employer defendant, WholeFoods, a grocery store chain, overcharged customers on food products. 902 F.3d at 521. Plaintiff alleged that numerous city governments in California and New York investigated this overcharging behavior. *Id.* at 522. New York investigators found that eighty different types of food products did not have proper weights listed and that 89% of packages were noncompliant with federal standards. Chris Isidore, *Whole Foods Accused of Massive Overcharging*, CNN BUS. (June 25, 2015), https://money.cnn.com/2015/06/25/news/companies/whole-foods-overcharging/index.html. Whole Foods ultimately paid 800,000 dollars in fines to cities in California after an investigation into these violations. *Id.* The plaintiffs in *Martone* argued that disclosing the overcharging allegations and investigations earlier would have minimized the company's reputational hit and ultimately resulted in a faster stock price recovery. 902 F.3d at 526.

[53] *Martone*, 902 F.3d at 526.

ly disclose fraud to the public would cause a longer decrease in the company's stock price because of the company's reputational damage.[54] The Fifth Circuit rejected this economic argument and again held that early disclosure of negative information is an insufficient alternative action under *Dudenhoeffer*.[55]

B. The Second Circuit's Alternative Approach

In 2018, in *Jander v. Retirement Plans Committee of IBM*, the Second Circuit became the only federal circuit to hold that plaintiffs meet their pleading burden under *Dudenhoeffer* by offering early disclosure of negative information as an alternative action.[56] The defendant, IBM, sustained undisclosed substantial losses in its microelectronics business and sought buyers to take over that business while continuing to make IBM stock purchases through its ESOP.[57] A buyer eventually bought the microelectronics business for $1.5 billion at which point the public was alerted to the overvaluation.[58] The sale of the microelectronics business and subsequent disclosures caused IBM's stock price to fall and its ESOP fund to drop in value.[59] IBM employees subsequently sued the ESOP managers.[60]

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[54] *Id.* The company responded that a plan manager in that position could have found early disclosure more harmful because it would lower the stock price before the company completed an internal investigation. *Id.* at 526–27.

[55] *Id.* at 527. According to the court, if the economic principles cited by the plaintiffs were so obvious to plan managers, they would have been applicable in *Whitley*. *Id.* As such, the court held that the economic arguments were insufficient to overcome *Whitley*. *Id.* In 2021, in *Wilson v. Craver*, the Ninth Circuit agreed with the Fifth Circuit that arguments predicated on overarching economic principles are insufficient to meet the pleading standard for duty of prudence claims. 994 F.3d 1085, 1093 (9th Cir. 2021).

[56] 910 F.3d 620, 631 (2d Cir. 2018), *vacated and remanded*, 140 S. Ct. 592 (2020), *reinstated*, 962 F.3d 85 (2d Cir. 2020); *see* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 430 (2014) (establishing the pleading standard for ERISA imprudence claims). The Second Circuit is the only federal appellate court to reach that conclusion. *See* Allen v. Wells Fargo & Co., 967 F.3d 767, 774 (8th Cir. 2020) (stating that *Jander* is the only time that a circuit court has held that a plaintiff met their pleading burden by providing early disclosure as an alternative action).

[57] *Jander*, 910 F.3d at 623. The plaintiffs alleged that IBM kept from the public annual losses of $700 million from its microelectronics business through skilled accounting practices. *Id.* The plaintiffs alleged that, despite such losses, the company continued to falsely value the microelectronics business at roughly $2 billion. *Id.*

[58] *Id.* The court in *Jander* also noted that IBM paid a $4.7 billion penalty for falsifying the value of its microelectronics business. *Id.*

[59] *See id.* (stating that IBM's stock price dropped $12 per share following the sale, during which time the ESOP managers continued to purchase IBM stock).

[60] *Id.* The plaintiffs argued that IBM's ESOP plan managers acted imprudently by continuing to buy IBM stock despite knowledge of the microelectronic business's financial troubles. *Id.* They further argued that the plan managers acted imprudently by failing to disclose the financial issues related to the microelectronics business. *Id.* The microelectronics business was sold to GlobalFoundries. *Id.* As part of the transaction, GlobalFoundries agreed to supply certain computer parts to IBM for ten years. Patricia Hurtado & Jackie Davalos, *GlobalFoundries Says IBM Demanding $2.5 Billion as IPO Nears*, BLOOMBERG (June 7, 2021) https://www.bloomberg.com/news/articles/2021-06-07/global

The only alternative action put forward on appeal in *Jander* was early disclosure of the improper valuation of the microelectronics business.[61] The plaintiffs argued that disclosure in this instance was a valid alternative action because disclosure of the negative information was inevitable.[62] Moreover, the plaintiffs used economic data to argue that disclosing the fraud sooner rather than later was the more economically prudent action.[63]

Unlike the majority of circuits, the Second Circuit held that the plaintiffs had met the *Dudenhoeffer* standard.[64] The court found the inevitability of disclosure especially significant.[65] Although the court noted that in most instances a fiduciary would have to weigh the pros and cons of disclosure versus non-disclosure, the court reasoned that those considerations were no longer necessary when the information would be inevitably disclosed.[66] As a result, the court reasoned that because IBM stock was inevitably going to drop, a prudent fiduciary would choose to disclose the negative information preemptively to limit the drop in value.[67]

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foundries-says-ibm-demanding-2-5-billion-over-2014-deal. IBM later threatened to sue GlobalFoundries for allegedly breaking that agreement, prompting GlobalFoundries to seek a declaratory judgement confirming its compliance with the terms of the agreement. *Id.*

[61] *Jander*, 910 F.3d at 628.

[62] *Id.* at 630. The plaintiffs argued that disclosure was inevitable because IBM knew the true valuation of its microelectronics business prior to selling it to GlobalFoundries. *Id*. The plaintiffs reasoned that because IBM knew the business was for sale, its overvaluation of the microelectronics division would become public knowledge upon completion of any sale at a discounted price. *Id.*

[63] *Id.* at 629. Plaintiffs further argued that economic patterns demonstrate that failing to disclose ongoing corporate fraud leads to outsized drops in stock prices because of damage to the company's reputation. *Id.* The economic theory arguments for preemptive disclosure in *Jander* reflected those presented by the plaintiffs in *Martone. See* Martone v. Robb, 902 F.3d 519, 526 (5th Cir. 2018) (explaining that the plaintiff's economic argument is predicated on economic principles related to the damage to a company's image from failing to disclose negative information earlier).

[64] *Jander*, 910 F.3d at 631; *see* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 430 (2014) (establishing the "could not have concluded" pleading standard). The court noted that the standard for pleading is plausibility, "not likelihood or certainty." *Jander*, 910 F.3d at 631.

[65] *Jander*, 910 F.3d at 630.

[66] *Id.*

[67] *Id.* This rationale was further supported by the Second Circuit's acceptance at the pleading stage of the plaintiff's economic arguments. *See id.* (stating that the economic studies by themselves were not enough to meet the standard but could be considered alongside other arguments). The court reasoned that a savvy businessperson could see the reputational harm resulting from withholding information related to fraud. *Id.* at 629. As such, the court determined that arguments related to the relationship between disclosure and harm cannot be labeled as "theoretical." *Id.* The Second Circuit's acceptance of economic arguments contrasts directly with the Fifth Circuit's rejection of those arguments in *Martone*. *Compare Martone*, 902 F.3d at 526–27 (finding the plaintiff's economic pattern argument too general to offer support for the alternative action of early disclosure), *with Jander*, 910 F.3d at 629 (stating that at the motion to dismiss stage, economic arguments should be considered as potentially plausible). The Second Circuit explicitly rejected the defendant's argument that disclosure would harm the current investors in the plan because the disclosure was inevitable. *Jander*, 910 F.3d at 631.

C. The Eighth Circuit Joins the Majority

In 2020, in *Allen v. Wells Fargo & Co.*, the U.S. Court of Appeals for the Eighth Circuit joined the majority of federal circuits in holding that early disclosure of negative information is an insufficient alternative action under the *Dudenhoeffer* standard.[68] The plaintiffs argued that their case was distinguishable from other cases because the disclosure of the negative information in their case was inevitable.[69] Furthermore, the plaintiffs argued that the plan managers acted imprudently because economic principles demonstrate that the reputational harm for failing to preemptively disclose fraudulent activity leads to a larger decrease in stock price.[70]

Unlike the Second Circuit in *Jander*, the Eighth Circuit rejected the plaintiffs' inevitability and economic impact arguments, holding that a prudent fiduciary in Wells Fargo's position could have found that early disclosure would do more harm than good to the plan.[71] The court agreed with the Fifth Circuit's reasoning in *Martone* that the allegations regarding the economic impact of non-disclosure were too broad to meet the *Dudenhoeffer* pleading standard.[72] Although the Eighth Circuit acknowledged that earlier disclosure could have possibly reduced losses to the fund, it concluded that the alternative action was not so obviously beneficial to definitively say that a prudent fiduciary "could not conclude" that it was more likely to damage the fund than help it.[73]

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[68] 967 F.3d 767, 773–74 (8th Cir. 2020); *see Dudenhoeffer*, 573 U.S. at 430 (stating the pleading standard for imprudence claims).

[69] *Allen*, 967 F.3d at 773. The plaintiffs argued that disclosure of the cross-selling scandal was inevitable because the federal government was investigating. *Id.* at 771. Plaintiffs alleged that because the plan managers were aware of the illegal sales practices, they knew that the market price for Wells Fargo stock was too high. *Id.* Therefore, plaintiffs argued that the plan managers knew that the inevitable disclosure would eventually cause the stock price to sink to a greater extent than if they disclosed earlier. *Id.* at 773. The inevitability of disclosure argument mirrors the plaintiffs' argument in *Jander*. *Compare id.* (stating that the plaintiffs argue that Wells Fargo should have known that disclosure of the fraud was inevitable), *with Jander*, 910 F.3d at 630 (noting that the plaintiffs argued that disclosure of the undervaluation of the company was inevitable).

[70] *Allen*, 967 F.3d at 773. The plaintiffs' economic argument was that concealing negative information that would inevitably be released to the public does more damage to share price the longer it is concealed because of the negative impact to the company's reputation. *Id.* This argument is very similar to the argument that the plaintiffs in *Martone* and *Jander* made. *See Martone*, 902 F.3d at 526 (noting that the plaintiffs argued that the more time that passes with fraud, the greater the harm to investor); *Jander*, 910 F.3d at 629 (stating that the plaintiffs argue that the harm to a company's image grows as more time passes with the fraud).

[71] *Allen*, 967 F.3d at 774–75.

[72] *Id.* at 774. The court explained that even if it included plaintiffs' economic arguments as the Second Circuit had in *Jander*, it still would have dismissed the plaintiffs' claim. *Id.*

[73] *Allen*, 967 F.3d at 775 (quoting Graham v. Fearon, 721 F. App'x 429, 437 (6th Cir. 2018)). The court also noted that even if the plan managers knew disclosure of the illegal sales practices was inevitable, they could have viewed preemptive disclosure during the government investigation as more detrimental to the fund than awaiting its later disclosure by investigators. *Id.* at 774–75. The court went on to explain that a plan manager in the defendant's position could have determined that disclo-

III. The Unique Nature of ESOPs and Difficult Position of Plan Managers Justifies the Eight Circuit's Holding

Although the Supreme Court in 2014, in *Fifth Third Bancorp v. Dudenhoeffer,* believed it was making it easier for ESOP litigants to survive motions to dismiss, the Court's "could not have concluded" pleading standard did little to alter the pre-*Dudenhoeffer* status quo.[74] The Supreme Court in *Dudenhoeffer* correctly noted that an ESOP fiduciary often finds themselves "between a rock and a hard place" in determining the correct course of action as it relates to purchasing stock in the company and avoiding litigation.[75] As such, a high pleading standard better protects plan managers in light of the unique nature of ESOPs and is therefore preferable to a more lax pleading standard.[76]

ERISA recognizes that ESOPs differ from other ERISA plans in that ESOPs have an overarching goal of employee ownership.[77] The statute explicitly empowers ESOP plan managers to invest solely in the employer's stock, an act that would otherwise be considered imprudent for any other ERISA plan fiduciary.[78] This lack of diversification leads ESOPs to be riskier than other

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sure at an odd time would have scared the market and lead to an even larger drop in Wells Fargo's stock price. *Id.* at 775.

[74] *See* 573 U.S. 409, 425 (2014) (observing that the previously applied presumption of prudence made it "impossible" for plaintiffs to survive motions to dismiss); *Allen*, 967 F.3d at 774 (noting that only the Second Circuit has found that the *Dudenhoeffer* standard has been met). Some district courts have even suggested that *Dudenhoeffer* imposed a greater burden on plaintiffs bringing duty of prudence claims. *See In re.* Lehman, Bros. Sec. & ERISA Litig., 113 F. Supp. 3d 745, 755 (S.D.N.Y. 2015) (stating that *Dudenhoeffer* may have "raised the bar" for the pleading standard).

[75] *Dudenhoeffer*, 573 U.S. at 424. The Court explained that an ESOP fiduciary could be sued for both choosing to buy stock in the company and choosing not to. *Id.* First, the fiduciary could be sued by claiming imprudence for continuing to buy stock in the company when the stock falls as a breach of the fiduciary duty. *Id.* Second, the fiduciary could be sued by refraining from purchasing stock in the company when the stock increases in value for violating the provisions of the plan document. 29 U.S.C. § 1104(a)(1)(D); *Dudenhoeffer*, 573 U.S. at 424. This uncomfortable position led the employer in *Dudenhoeffer* to argue for maintaining the presumption of prudence when the ESOP fiduciary continued to make purchases in company stock. 573 U.S. at 424. This presumption, the company argued, would protect plan managers from one side of the litigation dichotomy. *Id.*

[76] *See Dudenhoeffer*, 573 U.S. at 420 (noting the differences between ESOPs and other ERISA retirement programs).

[77] *Id.* The Supreme Court noted that ESOPs differ from other retirement investment funds in their goals. *Id*. Typical retirement benefits plans aim to increase the earnings of their beneficiaries while reducing the risk associated with investing. *Id.* ERISA dictates that the fiduciary ensures the reduction of risk by diversifying those investments. 29 U.S.C. § 1104(a)(1)(C). ESOPs, however, have an additional goal of employee ownership. *Dudenhoeffer*, 573 U.S. at 420. To meet this goal, Congress exempted ESOP fiduciaries from the diversification requirement. *See* 29 U.S.C. § 1104(a)(2) (exempting "eligible individual account plan[s]" from the diversification requirement for prudent fiduciaries); § 1107 (d)(3)(A) (defining an "eligible individual account plan" to include ESOPs).

[78] *See* 29 U.S.C. § 1104(a)(1)(C) (requiring most ERISA retirement plans to diversify as part of the duty of prudence); *supra* note 77 (discussing the exemption of ESOPs from the diversification requirement).

retirement plans.[79] ESOP plan managers, like those in *Allen*, thus face an impossible decision when presented with negative inside information.[80] On the one hand, they could choose to disclose the non-public information and immediately harm the plan participants' investments in the fund.[81] This option, of course, could lead to a lawsuit for taking an arguably imprudent action.[82] On the other hand, the ESOP plan manager could choose to forego disclosure.[83] Here, again, the plan manager risks a lawsuit for imprudence, but that risk is delayed until the information becomes public and the employer's stock sinks, giving employers time to investigate that information.[84] With either action, the employer's stock prices almost assuredly will decrease in value, but the decision to continue to invest in employer securities is consistent with ERISA's ESOP goal of promoting employee ownership.[85]

The majority approach is preferable to the Second Circuit's more lenient interpretation of *Dudenhoeffer* because it protects plan managers forced to make a difficult decision over which action, disclosure or nondisclosure, would

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[79] *See* Sean M. Anderson, *Risky Retirement Business: How ESOPs Harm the Workers They Are Supposed to Help*, 41 LOY. U. CHI. L.J. 1, 4 (2009) (discussing how under-diversified ESOPs are at higher risk of losing value compared to other retirement plans).

[80] *See Allen*, 967 F.3d at 775 (identifying different conclusions a prudent fiduciary could arrive at when evaluating a decision to disclose negative inside information); Whitley v. BP, P.L.C., 838 F.3d 523, 529 (5th Cir. 2016) (noting the potential conclusions that a fiduciary could make regarding disclosure); Saumer v. Cliffs Nat. Res., Inc., 853 F.3d 855, 864 (6th Cir. 2017) (noting the potential outcomes the fiduciary must consider when determining whether to disclose information); Laffen v. Hewlett-Packard Co., 721 F. App'x 642, 644 (9th Cir. 2018) (discussing the uncertain outcomes that a plan manager faces when considering disclosure).

[81] *See Saumer*, 853 F.3d at 864 (noting that a plan manager could conclude that early disclosure would harm plan participants currently invested in the fund); *Allen*, 967 F.3d at 775 (stating that a fiduciary could consider earlier disclosure but determine that such an action could do more harm than good to the fund).

[82] *See* 29 U.S.C. §§ 1104(a)(1)(B), 1109(a) (defining the duty of prudence and providing a cause of action for a breach of the duty of prudence). ERISA defines the duty of prudence to only require a person to act in a way that the prudent person in that situation would act. *Id.* § 1004(a)(1)(B). Theoretically then, a plaintiff could claim that the prudent person with negative inside information would not disclose the information so as not to harm plan participants' investments if not required to do so. *Id.*

[83] *See Allen*, 967 F.3d at 775 (stating that the alternative to disclosure is nondisclosure).

[84] *See* 29 U.S.C. § 1104(a)(1)(B) (establishing the duty of prudence standard). This is exactly what happened in *Allen*. *See* 967 F.3d at 771 (delaying a lawsuit at least three years from when defendants allegedly became aware of the federal investigation).

[85] *See Dudenhoeffer*, 573 U.S. at 420 (stating the goals of ESOPs under ERISA); Brian Beers, *How the News Affects Stock Prices*, INVESTOPEDIA (Jan. 8, 2020), https://www.investopedia.com/ask/answers/155.asp (discussing how negative information impacts stock value). When negative company information is shared publicly, it often causes shareholders to sell company holdings, driving the price of the stock down. *Id.* Wells Fargo's stock value in 2016 fell to its lowest price in over two years following the disclosure of the cross-selling scandal. Matt Egan, *Wells Fargo Stock Sinks to 2-1/2 Year Low*, CNN BUS. (Sept. 26, 2016), https://money.cnn.com/2016/09/26/investing/wells-fargo-stock-fake-account-scandal/index.html.

do less harm to the fund.[86] Simply put, the Eighth Circuit's holding correctly declines to punish a plan manager for engaging in the very activity—buying employer stock—that they are empowered and incentivized to engage in.[87]

CONCLUSION

In 2020, in *Allen v. Wells Fargo & Co.*, the U.S. Court of Appeals for the Eighth Circuit held that plaintiffs bringing ERISA imprudence claims against ESOP fiduciaries do not meet their pleading standard by offering early disclosure of negative information as an alternative action. In joining the majority approach of the Fifth, Sixth, and Ninth Circuits, the Eighth Circuit chose the approach that better protects ESOP plan managers. ESOPs are not diversified by design, which in turn raises the risk that losses will occur because of their dependence on the employer's stock. Plan managers, facing litigation for these losses, face an impossible choice then when presented with negative inside information. Without a heightened pleading standard, a plan manager's choice to disclose or not risks costly litigation, regardless of the decision. The Eighth Circuit's holding, therefore, provides a desirable and necessary protection for those managers who make the difficult choice of nondisclosure.

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[86] *See Allen*, 967 F.3d at 775 (holding that plan managers do not act imprudently by choosing to not disclose negative, non-public information). The stricter approach to the duty of prudence is also reflective of the generally high level of deference granted to corporate managers in other corporate law contexts. *See, e.g.* Gagliardi v. Trifoods Int'l, Inc., 683 A.2d 1049, 1052–53 (Del. Ch. 1996) (stating that a director of a corporation is not liable for a loss unless a plaintiff shows that no person in that position "could possibly" commit to that action in good faith); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled sub nom.* Brehm v. Eisner, 746 A.2d 244 (Del. 2000) (noting that under the business judgement rule a presumption is granted to directors of a corporation in their management of the company); *see also* Thomas Lee Hazen, *Corporate and Securities Law Impact on Social Responsibility and Corporate Purpose*, 62 B.C. L. REV. 851, 882 (2021) (noting that without a conflict of interest, a court is likely to defer to the board's judgement under the business judgement rule).

[87] *See* 29 U.S.C. § 1107(d)(6) (stating that an ESOP is designed to invest primarily in the employing company's stock); *id.* § 1104(a)(2) (waiving the diversification requirement for ESOPs); Hasmann, *supra* note 18, at 1752 & n.6 (identifying the tax incentives for operating an ESOP).