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Sixth Circuit Distinguishes Itself and Rules That Presumption of Prudence Should Not Be Applied on a Motion to Dismiss

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The Sixth Circuit issued a ruling on February 22, 2012 in *Pfeil v. State Street Bank and Trust Co.*, No. 10-2302, 2012 WL 555481 (6th Cir. Feb. 22, 2012) that distinguishes itself from other Circuit Courts concerning the application of the presumption of prudence that applies to an ERISA plan fiduciary's decision to invest in an employer stock fund.

First espoused by the Third Circuit and since followed by the Second, Fifth, Sixth, Seventh and Ninth Circuits, courts have routinely reviewed a plan fiduciary's decision to invest in an employer stock fund for an abuse of discretion. Three of these Circuits and a myriad of district courts have applied this presumption of prudence at the motion to dismiss stage. In so ruling, these courts have generally reasoned that the presumption of prudence is not an evidentiary standard, but rather a standard of review by which a plan fiduciary's conduct must be evaluated and, if plaintiffs are unable to plead a plausible set of facts to overcome that presumption of prudence by, for example, pleading that the company was in a dire situation or facing impending collapse, a plan fiduciary should not be subjected to further defending the merits of his decision to invest in an employer stock fund.

In *Pfeil*, the Sixth Circuit ruled, however, that the presumption of prudence should not be applied on a motion to dismiss. The Court reasoned that the presumption of prudence is an evidentiary standard that concerns questions of fact and thus not appropriately evaluated on a motion to dismiss. Recognizing, as it must, that several Circuits have reached the opposite conclusion, the Sixth Circuit distinguished those authorities on the grounds that those Circuits adopted "more narrowly-defined tests for rebutting the presumption than the test this Court announced in [*Kuper v. Iovenko*, 66 F.3d 1447, 1458 (6th Cir.1995).]" In particular, the Sixth Circuit observed that the rebuttal standard adopted in *Kuper* requires plaintiffs to prove that "'a prudent fiduciary acting under similar circumstances would have made a different investment decision.'"

This issue will be examined in more detail along with the reasoning behind the Sixth Circuit's decision to reverse the district court’s decision granting State Street’s motion to dismiss in an upcoming edition of Proskauer's ERISA Litigation Newsletter.

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- **Russell L. Hirschhorn**
  Partner