Bloomberg BNA Pension & Benefits Daily™

ESOPs

9th Cir. Opinion in *Amgen* Unsurprising, But Has Unexpected Effects, Experts Say

By Matthew Loughran

Oct. 31 — The decision by the U.S. Court of Appeals for the Ninth Circuit to reverse and remand the Amgen stock-drop case was a win for plan participants but not a surprising one, according to some experts on the topic.

In a published Oct. 30 opinion, the appellate court ruled that the participants in the Amgen Inc. eligible individual account plans had sufficiently pleaded that the fiduciaries of those plans breached their duties of care and loyalty in allowing the plans to continue to offer company stock despite a financial downturn at the company (*Harris v. Amgen, Inc.*, 2014 BL 306929, 9th Cir., No. 10-56014, 10/30/14)(211 PBD, 10/31/14).

According to attorneys and experts in the realm of EIAP litigation, this victory for plan participants wasn't surprising, but it does offer somewhat unexpected implications for fiduciaries of those plans, particularly in its ruling that the U.S. Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 58 EBC 1405 (U.S. 2014) didn't create a higher pleading standard for plan participants trying to bring suit against those fiduciaries.

BNA Snapshot

Reaction to Amgen Decision

Key Development: The Ninth Circuit reversed and remanded the Amgen stock-drop case, finding that the U.S. Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer* didn't change its original determination of the case.

Key Takeaway: Experts in the realm of ESOP litigation not surprised by most of the court's opinion, but agree that it has some unexpected long-ranging effects.

Victory for Participants

"*Amgen* is a victory for plan participants," Joel Hurt, a partner at Feinstein Doyle Payne & Kravec in Pittsburgh, told Bloomberg BNA. "The Ninth Circuit held that *Fifth Third* did not introduce more stringent pleading requirements for employer stock claims, and reaffirmed its prior decisions holding that plan fiduciaries can protect participants without violating federal securities laws or causing additional harm to the plan."

Corey Rosen, founder and senior staff member at the National Center for Employee Ownership, agreed with Hurt's assessment.

"This is not a surprising finding," he told Bloomberg BNA. "It seemed a stretch to say that the Amgen plan fell under the presumption of prudence in the first place because the plan just allowed employees to buy stock in Amgen; it was not required of the fiduciaries that they offer it."

Rosen said that "the presumption was created for the purpose of providing protection to fiduciaries of plans that are intended be invested in company stock. Where a company contributes shares in a plan that requires the plan to be invested primarily in employer stock, it seems to me the presumption is reasonable; where it is a plan that offers company stock to buy, it seems to me the standard for prudence should be much higher."

According to Rosen, "There also seems to a pretty compelling argument that it should not have been kept as an option given Amgen's situation. I think Amgen was an example of a case where courts had gone too far in protecting fiduciaries."

Pleading Standards

Gregory K. Brown, a partner at Holland & Knight LLP in Chicago, was surprised by the court's language regarding whether plan participants face a higher pleading standard. "Reading that passage where the court dismissed the higher pleading standard was kind of amazing," he told Bloomberg BNA.

"The court quotes the language from the Supreme Court and then turns around and says, 'no, the Supreme Court didn't mean that.' " he said.

According to Brown, the language from *Dudenhoeffer* that is quoted by the Ninth Circuit actually did articulate a higher pleading standard.

"I find it quite confusing," he said. "Here we have this language in *Dudenhoeffer* where we are trying to find a mechanism to weed out meritless claims. And if the Ninth Circuit had articulated a standard and said that the plaintiffs had met it, I would have understood that."

But, Brown said, "the court just kind of ignores this language. Instead it said that, since *Iqbal* and *Twombly* had already been decided, there is no new heightened pleading standard. It's kind of a disappointing articulation."

Effects of Decision

According to Hurt, the long-term effects of the decision would be very beneficial to plan participants. "Among other things, fiduciaries can protect participants by removing a stock fund as an investment option without liquidating the fund," he said.

“As long as the market is efficient—as the law presumes—any negative impact on the share price cannot be more than the amount the share price was inflated and will likely be much less. The decision should make employer stock claims more viable in the Ninth Circuit,” Hurt added.

In assessing the implications of the Ninth Circuit's decision, Rosen emphasized the difference between the Amgen plans and “statutory ESOPs.”

“For public companies that want to offer stock as an investment, this makes it clear that you have to look at offering company stock the same way you should any other option,” he said. “I agree with that. These plans are really 401(k) plans, whatever they designate them to be, and should be treated as such.”

However, he added, “The vast majority of statutory ESOPs are in closely held companies where employees do not and cannot buy stock.”

“They are very different animals,” Rosen said. “These plans are funded by company contributions, usually largely in addition to what they would have gotten in their retirement plans anyway. This case will have no impact on fiduciaries in these plans.”

In fact, Rosen said, the *Dudenhoeffer* case itself hasn't had any real impact on these types of fiduciaries.

Brown focused on the opinion's expected effect on the language of the summary plan description. Specifically, he pointed to the court's finding that the incorporation of securities filings into summary plan descriptions make those securities filings fiduciary communications that could create liability under the Employee Retirement Income Security Act.

“Everyone is going to be rethinking the incorporation by reference of securities law filings into their summary plan descriptions,” he said.

“This case also points out the limitations that you have having inside fiduciaries for these plans,” Brown continued. “Here if you had an outside fiduciary and if they didn't have the information about the drug testing, that's more of a problem for the plan sponsor,” he said.

To contact the reporter on this story: Matthew Loughran in Washington at mloughran@bna.com

To contact the editor responsible for this story: Sue Doyle at sdoyle@bna.com

For More Information

Text of the Ninth Circuit's opinion is at http://www.bloomberglaw.com/public/document/AKA_Dennis_Ramos_DONALD_HANKS_JORGE_TORRES_ALBERT_CAPPA_On_Behalf.

ISSN 1523-5718