

April 14, 2016

Being on the Plaintiffs' Side Is More Fun



SAMUEL BONDEROFF (INTERVIEWED BY ANDREA L. BEN-YOSEF)

BLOOMBERG BNA: How many years have you been an ERISA litigator?

Bonderoff: Three years ago I switched over the plaintiffs' side and started doing a lot more ERISA cases. For 11 years I was on the defense side doing more general commercial litigation. I made the switch because I needed a change. It's more fun to be the plaintiff, you're more of an underdog. Also, I like being at a smaller firm.

BLOOMBERG BNA: Is ERISA litigation what you expected it to be?

Bonderoff: About a year into my tenure here, the Supreme Court decided *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 58 EBC 1405 (U.S. 2014). This case radically changed the pleading standard for ERISA stock drop cases. The new standard, which the courts are still trying to make sense of, opened up a whole new world of cases. My firm has managed to be at the forefront of that, filing a lot of post-*Dudenhoeffer* cases. It's been a lot of fun.

BLOOMBERG BNA: Where is employer stock litigation heading?

Bonderoff: The big thing is to try and figure out what *Dudenhoeffer* meant—which kind of cases are still viable and which aren't. Cases based on insider information, where the plan fiduciary failed to act, is where we have filed most of our cases. Cases based on public in-

Samuel Bonderoff is an attorney at Zamansky LLC, where he manages the firm's securities, ERISA and other class action cases.

formation, such as stock price and imprudent investment, have had a lot more trouble gaining traction. That's unfortunate. The fiduciary duty is supposed to be the highest duty known to the law. Even though *Dudenhoeffer* seemed to state more reasonable pleading standards, we are seeing judges pushing back on that. Congress wrote this claim into the statute, and it shouldn't be impossible to do it.

I think there will be a long battle in the federal courts over what the right pleading standard is for private and public information cases, and the issue will find its way back to the Supreme Court in another *Dudenhoeffer*-type case.

BLOOMBERG BNA: Do you think the new fiduciary rule will impact your cases?

Bonderoff: The new fiduciary rule won't have a direct impact on ERISA stock drop cases. ERISA plan fiduciaries already have to act under ERISA's requirements. The fiduciary rule is not germane, but it's part of a pattern of the Labor Department taking a larger role. The DOL has shown a lot of vision in terms of setting forth the fiduciary standard regarding investments generally. For example, the DOL recently submitted an amicus brief where it came out with a strong and correct position as to what the standard would be under *Dudenhoeffer* regarding when a fiduciary should act on the basis of inside information to protect plan participants (*Whitley v. BP, P.L.C.*, 5th Cir., No. 15-20282, amicus briefs filed 3/11/16).

BLOOMBERG BNA: What are you focusing on in ERISA litigation?

Bonderoff: My firm focuses on cases where there is clear evidence of fraud by a company and fiduciaries who are senior insiders who have first hand knowledge of the fraud. The right thing for a fiduciary to do is the same under ERISA and securities law, and that is to dis-

close the fraud. We've seen a lot of push back from defendants arguing that even if there is a known fraud, something more has to be alleged. But common sense

tell you fraud isn't good for anyone. And where fraud is concerned, there is still an open issue as to where the duty of loyalty comes into play.

To request permission to reuse or share this document, please contact permissions@bna.com. In your request, be sure to include the following information: (1) your name, company, mailing address, email and telephone number; (2) name of the document and/or a link to the document PDF; (3) reason for request (what you want to do with the document); and (4) the approximate number of copies to be made or URL address (if posting to a website).