

Employee Ownership Report

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ESOPs, the Presumption of Prudence, and the Supreme Court

The Supreme Court has agreed to review the so-called presumption of prudence rule. That rule has provided that trustees of ESOPs and other defined contribution plans that are specifically designed to be invested in employer stock protection against lawsuits when stock prices in the plans drop dramatically. The presumption states that fiduciaries are presumed to be prudent in holding or offering employer stock unless there is reason to believe the company's survival is in doubt. It has been adopted in some form by the Second, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuit Courts, and no circuit has specifically rejected it, although some have placed some limits on it. For instance, some courts have aggressively applied it as grounds for dismissal at the pleadings stage, while others have allowed plaintiffs to make a factual case against fiduciary decisions. Courts are also divided on whether plans must mandate investment in company stock or simply allow it to qualify for the presumption.

The Supreme Court will be reviewing the Sixth Circuit's decision in *Fifth Third Bancorp v. Dudenhoeffer*, a case involving employer stock that was one investment option in a non-ESOP retirement plan. The stock dropped precipitously, and employees sued. The lower court said fiduciaries were entitled to a presumption of prudence in continuing to offer the shares and dismissed the case. Upon review, the Sixth Circuit applied a stronger test for the presumption and

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IDEA MANAGEMENT: Translating Goals into Metrics

By Dean M. Schroeder, PhD



Not long ago we were working with the managing director of a medium-sized company who was frustrated with his employee idea system. He was having to deal with ideas that he thought were totally irrelevant. The latest one: *Have five different types of peanut butter available in the employee canteen.* "What does this have to do with improving the company?" he complained. "I didn't

even know there were five different types of peanut butter." Ideas should focus on the company's key strategic goals. But these goals also need to be translated into terms that employees can drive forward with their ideas.

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Employee Ownership Conference 2014

Atlanta, Georgia
April 8-10, 2014

Preconference sessions: April 7

Early Registration Ends March 17!

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