

Corporate & Financial Weekly Digest

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Fiduciaries Did Not Breach Duty of Prudence by Failing to Divest Investments in Company Shares

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Plaintiffs, former employees of two energy providers, brought a consolidated class action, alleging that the fiduciaries of the companies' employee savings plans breached their fiduciary duties under the Employee Retirement Income Security Act by maintaining the savings plans' significant investment in stock of one of the companies, Constellation Energy Group, Inc. Plaintiffs asserted that defendants knew or should have known that the investment was imprudent because Constellation was engaging in risky business practices, such as the trading of large amounts of energy in unregulated markets.

Defendants moved to dismiss the complaint on the grounds that they did not have the discretion to divest the stock, and thus could not be held accountable for the poor plan performance as a result of the decrease in the stock's value. Defendants further argued that, in any event, they were entitled as fiduciaries to a presumption that they acted prudently by investing the assets in employer stock. Plaintiffs opposed defendants' motion to dismiss the breach of prudence claim, arguing (1) that the fiduciaries had discretion to divest the Plans of the Stock, and (2) that Fourth Circuit precedent rejected the presumption of prudence that defendants were seeking.

The court granted defendants' motion to dismiss the breach of prudence claim, holding that, even assuming the fiduciaries had the discretion to divest the stock and that no presumption of prudence was warranted, the plaintiffs' complaint would still fail to state a cause of action because it lacked any allegation concerning the purported events that allegedly should have triggered the duty of divest. The court pointed out that the alleged risky business practices that plaintiffs argued warranted divestiture had been pursued since 2001, with highly profitable results, and that plaintiffs failed to point to any change in Constellation's practices at the start of the class period. In so holding, the court noted that investment in high-risk companies cannot be deemed to be "prudent when they succeed and imprudent when they fail." (*In re Constellation Energy Group, Inc. Erisa Litigation*, No. CCB-08-2662, 2010 WL 3221821 (D. Md. Aug. 13, 2010))