

## Ninth Circuit Overturns Presumption of Prudence in Stock Drop Case

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Employees of a drug pharmaceutical company participated in the company's two 401(k) plans, each of which included an employer stock fund. Over a period of years, the company used improper marketing tactics which concealed the potentially adverse effects of its drugs. Once the company's tactics were exposed, the Food and Drug Administration issued a black box warning for off-label use of the drugs, while subcommittees of the U.S. House of Representatives investigated the drugs and voted to restrict their use and to expand warnings related to their use. As a result, the employer's stock lost significant value. Employees who participated in the 401(k) plans filed a lawsuit claiming several fiduciary violations under ERISA. The U.S. federal district court dismissed all of the claims. On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed the decision of the district court and remanded. The first ERISA claim was that the defendants had acted imprudently in offering employer stock to plan participants at an artificially inflated price. The employees also claimed that the defendants violated the ERISA fiduciary duty of loyalty by failing to provide material information to the participants. The employees further claimed that the company engaged in a prohibited transaction under ERISA by concealing material information in order to sell its stock to the plan at artificially inflated prices. The Court of Appeals held that the plan fiduciaries were not entitled to a presumption of prudence because the plan permitted, but did not require, employer stock to be an investment option. Additionally, the Court of Appeals determined that the employer was a proper defendant because it was not clear whether the employer was a fiduciary. This case serves as a reminder that a 401(k) plan offering an employer stock fund should be drafted to require employer stock to be an investment option under the plan and that the plan fiduciaries should be properly identified. *Harris v. Amgen, Inc.*, No. 10-65104 (9th Cir. June 4, 2013).