Why the Supreme Court Should've Clarified ERISA's Breach of the Duty of Prudence Standard in *Hughes v. Northwestern University*

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I. INTRODUCTION 427
II. BACKGROUND 430
A. *Statutory Background* 430
B. *The* Dudenhoeffer *Test* 431
C. *The Circuit Split* 433
1. *The Fifth, Sixth, Eighth, and Ninth Circuits* 433
a. *The Fifth Circuit:* Martone v. Robb 433
b. *The Sixth Circuit:* Graham v. Fearon 434
c. *The Eighth Circuit:* Allen v. Wells Fargo & Company 434
d. *The Ninth Circuit:* Laffen v. Hewlett-Packard Company 435
2. *The Outlier: The Second Circuit:* Jander v. Retirement Plans Committee of IBM 436
3. *Looking Forward:* Hughes v. Northwestern University 438
a. *The Seventh Circuit:* Divane v. Northwestern University 439
III. ANALYSIS 440
A. *The Supreme Court Missed an Opportunity to Settle a Circuit Split in* Hughes v. Northwestern University 440
B. *The* Dudenhoeffer *Test is Too Restrictive, Thus Barring Potentially Legitimate Claims of the Breach of Duty of Prudence* 441
1. *The Second Circuit's Application of the* Dudenhoeffer *Test Was More Plaintiff-Friendly* 442
C. *Policy Implications of the* Dudenhoeffer *Standard* 444
IV. RECOMMENDATION 445
A. *The* Dudenhoeffer *Standard Needs to Be Revamped* 445
1. *Any Prudent Fiduciary or Just Those Similarly Situated?* 445
2. *An Objective Standard Needs to Be Set Defining How a Plan Fiduciary Acts "Imprudently"* 446
V. CONCLUSION 447

I. INTRODUCTION

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that implements the minimum necessary standards for many voluntarily established retirement

and health plans[1] (together, "plan" or "plans") in the private industry.[2] Its goal is to protect individuals who are enrolled in or are beneficiaries (collectively "participants") of such plans from, among other things, fiduciary misconduct.[3] ERISA defines a "fiduciary" as anyone who exerts a significant amount of authority or degree of control over the management of such plans; including, but not limited to, the "disposition of plan assets," providing investment advice in exchange for compensation, and/or the authority or responsibility in the administration of such plans.[4] Under ERISA, plan fiduciaries typically include plan administrators, officers, trustees, and custodians.[5]

Relevant to the topic of this Note, plan fiduciaries are also subject—under section 1104 of ERISA—to a duty of prudence.[6] This provision states that fiduciaries are required to "run the plan solely in the interest of participants and beneficiaries and for the exclusive

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1. The relevant type of plan implicated by the issue covered in this Note falls under the umbrella of defined contribution employee benefit plans. These are "retirement plan[s] in which the employee and/or the employer contribute to the employee's individual account under the plan. The amount in the account at distribution includes the contributions and investment gains or losses, minus any investment and administrative fees." *Definitions*, INTERNAL REVENUE SERV., https://www.irs.gov/retirement-plans/plan-participant-employee/definitions#:~:text=Defined%20Contribution%20Plan%20is%20a,any%20investment%20and%20administrative%20fees [https://perma.cc/E4FG-DZ8F]. The cases discussed in this Note relate specifically to ESOPs, or Employee Stock Ownership Plans—which is one form of a defined contribution plan. *Employee Stock Ownership Plans (ESOPs)*, BUTTERFIELD SCHECHTER LLP, https://www.bsllp.com/practiceareas/esop.html [https://perma.cc/AF4E-NKSF].

> An ESOP is a defined contribution employee benefit plan, with benefits based on how much stock the employee accumulates in their ESOP account over the course of their employment and how the company stock has performed. Shares may be allocated based on different formulas, but most commonly as a percentage of the employee's salary.
>
> . . .
>
> ESOP stock acquisitions are usually funded through a loan taken out by the company. The company then loans the money to an ESOP trust. Alternatively, the seller may take back a promissory note and is paid for its shares in installments. The company makes contributions to the trust and the trust uses that money to repay the loan. Shares in the company are allocated to employees' accounts as the loan is repaid. When an employee leaves the company or retires, the company or the ESOP distributes the value of the employee's vested shares, usually in cash.
>
> The price at which an ESOP purchases stock in the company is based on the stock's independently appraised fair market value. The value of a participant's interest is determined by an independent appraisal of the stock, valued at least once per year.
>
> In most cases, the company funds the ESOP, with employees paying nothing to participate in the company's ESOP. However, some companies may have other programs which offer employees stock in the company. This includes direct purchase plans and stock options.

Id.

2. *ERISA*, U.S. DEP'T LAB., https://www.dol.gov/general/topic/health-plans/erisa [https://perma.cc/74V7-2BHH].

3. *Id.*

4. Lisa Van Fleet & Randy Scherer, *An Overview of Fiduciary Responsibilities Under ERISA*, 2020 ST. LOUIS BAR J. 14, 14–15 (2020).

5. *ERISA*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/health-plans/erisa [https://perma.cc/74V7-2BHH].

6. 29 U.S.C. § 1104(a).

purpose of providing benefits and paying plan expenses."[7] They "must act prudently and must diversify the plan's investments in order to minimize the risk of large losses. In addition, they must follow the terms of plan documents to the extent that the plan terms are consistent with ERISA."[8] In addition to this duty of prudence, plan fiduciaries must also take care to avoid conflicts of interest.[9]

Before the 2014 Supreme Court case, *Fifth Third v. Dudenhoeffer*,[10] ERISA plaintiffs bringing a claim for breach of the duty of prudence against plan fiduciaries were generally required[11] to rebut a presumption of prudence—known as the *Moench* presumption.[12] The only way a plaintiff could overcome this presumption was to introduce evidence "that the ERISA fiduciary could not have believed reasonably that continued adherence to the [plan's] direction was in keeping with the settlor's expectations of how a prudent trustee would operate."[13] In other words, a fiduciary's investment choices were considered to be prudent unless the plaintiff could prove that the continued offering of such investment(s) was harmful to the plan or to themselves as participants in the plan.[14] Until it was struck down in *Dudenhoeffer*, the *Moench* presumption was considered to be a fiduciary-friendly standard and set the threshold quite high for ERISA plaintiffs bringing breach of duty of prudence claims, thus protecting plan fiduciaries from liability.[15] Though the Supreme Court reasoned that the *Dudenhoeffer* test was implemented as a means of being less fiduciary-friendly,[16] this Note will illustrate just the opposite: that the test is just as, if not

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7. *Fiduciary Responsibilities*, U.S. DEP'T LAB., https://www.dol.gov/general/topic/health-plans/fiduciaryresp [https://perma.cc/2ER8-WBSP].

8. *Id.*

9. *Id.*

10. Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014).

11. Although the *Moench* presumption was established in the Third Circuit, it was soon considered the preferred method of analysis by most federal circuit courts until the introduction of the *Dudenhoeffer* test. *See Dudenhoeffer Eschews Moench Presumption But Encourages Careful Scrutiny of Complaints: Future for ERISA Stock-Drop Litigation Is Unclear*, DECHERT LLP (June 30, 2014), https://www.dechert.com/knowledge/onpoint/2014/6/dudenhoeffer-eschews-moench-presumption-but-encourages-careful-s.html [https://perma.cc/N27B-522K] ("For nearly twenty years, the federal courts have recognized the so-called "*Moench* presumption" under [ERISA], in favor of decisions by ESOP fiduciaries to acquire and hold company stock.").

12. Moench v. Robertson, 62 F.3d 553, 571 (3d Cir. 1995). The *Moench* court held that "an ESOP fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision." *Id.* at 572.

13. *Id.*

14. Robert D. Rothacker, *Supreme Court Rejects Special Presumption of Prudence for ESOP Fiduciaries*, QUARLES (June 30, 2014), https://www.quarles.com/publications/supreme-court-rejects-special-presumption-of-prudence-for-esop-fiduciaries/ [https://perma.cc/2DMN-TMMS].

15. *Id.*; *see also* Jeffrey A. Herman, *Equitable Estoppel in ERISA: Reviving a Dead Remedy*, 31 ABA J. LAB. & EMP. L. 129, 147 (2015) ("This presumption was 'defense-friendly' and imposed a significant burden on ERISA plaintiffs.").

16. When striking down the *Moench* presumption, the Supreme Court stated the following:

> [W]e do not believe that the presumption at issue here is an appropriate way to weed out meritless lawsuits or to provide the requisite "balancing." The proposed presumption makes it impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious, unless the employer is in very bad economic circumstances. Such a rule does not readily divide the plausible sheep from the meritless goats.

Dudenhoeffer, 573 U.S. at 425; *see also* Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620, 628 (2d Cir. 2018),

more, restrictive than the *Moench* presumption.

In *Dudenhoeffer*, the Supreme Court struck down the *Moench* presumption and held that a claim for breach of the duty of prudence owed to plan participants is subject to a heightened pleading standard.[17] The Court held that a complaint must (1) offer some alternate legal course of action that the defendant could have taken and (2) that the alternative course of action must, from the perspective of a similarly situated "prudent fiduciary," be more likely to help the plan than the course of action that was actually taken.[18] Because of its subjective nature, the second prong of the *Dudenhoeffer* test has proven to be a sticking point in achieving uniform application of the rule throughout the federal circuits.

In its 2021 term, the Supreme Court had the opportunity—for the first time in over six years—to clarify the duty of prudence standard set out in *Dudenhoeffer*,[19] but failed to do so.[20] This Note will analyze the foregoing issue, its impact on ERISA plans and duty of prudence claims across different federal circuits, and, additionally, assess and evaluate the most effective ways to clarify the standard. This analysis will shed light on the varying interpretations and applications of the duty of prudence standard and underscore why the Supreme Court should have taken the opportunity to settle the issue by clarifying the *Dudenhoeffer* test's requirements.

II. BACKGROUND

A. Statutory Background

The rapid and substantial growth of employee benefit plans in the years surrounding 1974 prompted Congress to pass ERISA.[21] Because it was determined that such plans affect interstate commerce to a large extent, Congress found that ERISA was necessary to protect both interstate commerce and the employees engaged in such benefit plans.[22] ERISA does so "by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts."[23]

ERISA grants plan participants or beneficiaries a multitude of causes of action necessary for them to: recover for violations of the law; enforce terms of their plan; and

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vacated and remanded, 140 S. Ct. 592 (2020) ("According to Jander, imposing such a heavy burden at the motion-to-dismiss stage runs contrary to the Supreme Court's stated desire in Fifth Third to lower the barrier set by the presumption of prudence.").

17. *Dudenhoeffer*, 573 U.S. at 410.

18. *Id.*

19. *See generally* Hughes v. Nw. Univ., No. 19-1401, 2021 WL 2742780 (U.S. July 2, 2021).

20. Brian M. Pinheiro & G'Nece Jones, *U.S. Supreme Court Weighs in on ERISA Breach of Fiduciary Duty Claim in* Hughes v. Nw. Univ., BALLARD SPAHR (Jan. 26, 2022), https://www.ballardspahr.com/Insights/Alerts-and-Articles/2022/01/Supreme-Court-Weighs-In-on-ERISA-Breach-of-Fiduciary-Duty-Claim-in-Hughes-v-Northwestern-University [https://perma.cc/4RFA-Q7M3] (explaining the Court's failure of addressing the standard).

21. ERISA § 2(a) (1974), 29 U.S.C. § 1001(a) (1978).

22. 29 U.S.C. § 1001(b) (1978).

23. *Id.*

provide other forms of relief.[24] The most pervasive of these remedies include:

> (1) claims for the denial of benefits; (2) claims for breach of a fiduciary duty; (3) claims for appropriate equitable relief against non-fiduciaries to remedy violations of the act or a plan; (4) claims for interference with participants' or beneficiaries' exercise of ERISA rights; and (5) common law ERISA claims.[25]

ERISA also imposes various duties upon plan fiduciaries and allows participants or beneficiaries to bring civil actions for appropriate relief against fiduciaries who, pursuant to section 409 of ERISA, breach "any of the responsibilities, obligations, or duties imposed upon fiduciaries,"[26] and states that:

> [No person] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief . . . .[27]

Thus, in theory, ERISA affords plan participants and beneficiaries substantial legal protections from fiduciary misconduct.

Probably the greatest of these duties—and the subject matter of this Note—requires that plan fiduciaries be subject to a duty of prudence.[28] ERISA states that "a fiduciary shall discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan."[29] In satisfying this duty, a fiduciary is expected to operate "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . ."[30] The current threshold necessary to successfully plead a claim of breach of duty of prudence under ERISA was established in *Fifth Third Bancorp. v. Dudenhoeffer*.[31]

B. The Dudenhoeffer *Test*

In *Dudenhoeffer*, the plaintiffs, former Fifth Third Bancorp (Fifth Third) employees, were participants of an ERISA plan that their employer maintained.[32] The plan in question primarily invested its funds in the Fifth Third company stock.[33] The plaintiffs alleged a breach of the fiduciary duty of prudence and argued that Fifth Third "knew or should have

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24. *See* CRAIG C. MARTIN & AMANDA S. AMERT, ERISA BENEFITS LITIGATION ANSWER BOOK 2 (PLI Press, 2d ed., 2018) (outlining the goals and benefits of ERISA).
25. *Id.*
26. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2); ERISA § 409(a), 29 U.S.C. § 1109(a).
27. ERISA § 409(a), 29 U.S.C. § 1109(a).
28. ERISA § 404(a), 29 U.S.C. § 1104(a).
29. *Id.*
30. *Id.* (providing the prudent man standard of care).
31. Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014).
32. *Id.* at 409.
33. *Id.*

known that Fifth Third's stock was overvalued and excessively risky . . . ."[34] The plaintiffs posited that the defendants acted imprudently because similarly situated plan fiduciaries "would have responded to this information by selling off the [plan's] holdings of Fifth Third stock, refraining from purchasing more Fifth Third stock, or disclosing the negative inside information so that the market could correct the stock's price downward."[35]

The Court struck down the then-prevailing *Moench* presumption standard and instead held that plaintiffs must satisfy a two-prong test when bringing a claim for breach of the duty of prudence under ERISA:

> To state a claim for breach of the duty of prudence, a complaint must plausibly allege [1] an alternative action that the defendant could have taken, that would have been legal, and [2] *that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it*.[36]

One of the first cases to apply the *Dudenhoeffer* test (and demonstrate the difficulty of its application) was *Harris v. Amgen, Inc.*[37] The Supreme Court twice rejected the Ninth Circuit's determination that the plaintiffs properly stated a claim against the plan's fiduciaries,[38] and stated that the court failed to properly apply the *Dudenhoeffer* test.[39]

In *Amgen Inc. v. Harris*—the Supreme Court's second time hearing this case on appeal from the Ninth Circuit—clarified the test's second prong, and stated:

> The Ninth Circuit's proposition that removing the Amgen Common Stock Fund from the list of investment options was an alternative action that could plausibly have satisfied *Fifth Third*'s standards may be true. If so, the facts and allegations supporting that proposition should appear in the stockholders' complaint. Having examined the complaint, the Court has not found sufficient facts and allegations to state a claim for breach of the duty of prudence.[40]

Nonetheless, the *Dudenhoeffer* test has led to some strain in applying the test uniformly in the federal circuit courts, particularly because a determination of "what may lead to more harm than good?" is largely subjective. This has resulted in a circuit split, with sister circuits ruling differently in cases consisting of almost identical fact patterns.

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34. *Id.* at 413.
35. *Id.* at 409.
36. *Dudenhoeffer*, 573 U.S. at 409 (emphasis added).
37. Harris v. Amgen, Inc., 717 F.3d 1042 (9th Cir. 2013), *withdrawn and superseded on denial of reh'g en banc*, 738 F.3d 1026 (9th Cir. 2013), *cert. granted, judgment vacated*, 573 U.S. 942 (2014).
38. Mitchell G. Blair, David T. Bules & Steven W. Day, *U.S. Supreme Court Issues Stinging Rebuke of Ninth Circuit's Handling of Amgen Stock Drop Case*, CALFEE, HALTER & GRISWOLD LLP (Feb. 5, 2016), https://www.calfee.com/newsroom-news-us-supreme-court-issues-stinging-rebuke-of-ninth-circuits-handling-of-amgen-stock-drop-case [https://perma.cc/2LZ8-5BZR].
39. Amgen Inc. v. Harris, 577 U.S. 308, 311 (2016).
40. *Id.*

C. The Circuit Split
1. The Fifth, Sixth, Eighth, and Ninth Circuits

The Fifth, Sixth, Eighth, and Ninth Circuits have all ruled on similar cases for breach of the duty of prudence claims and have applied the *Dudenhoeffer* test in much the same way.

a. The Fifth Circuit: Martone v. Robb

In *Martone v. Robb*, the named class plaintiff, a former Whole Foods employee, was a participant in the company's 401(k) plan, which ERISA governs.[41] The plaintiffs filed their complaint against the plan's fiduciaries—three members of Whole Foods' executive team—alleging:

> [The Whole Foods executives] breached their fiduciary duties to the Plan and its participants when they knew (or should have known) . . . that Whole Foods' stock price had become artificially inflated due to undisclosed misrepresentation and fraud, yet they took no action whatsoever to protect the Plan or Plan participants from foreseeable resulting harm.[42]

The plaintiffs posited three alternative legal actions that the plan's fiduciaries could have but failed to take. They argued that the defendants could have: (1) closed or frozen the company's stock until it became a prudent investment, (2) initiated a series of public disclosures to cure the fraud, and/or (3) "divert[ed] some of [the] Company Stock Fund's holdings into a low-cost hedging product that would behave in a countercyclical fashion vis-à-vis Whole Foods stock."[43]

Regarding the first two alternative actions, both of which were argued in the initial complaint, the Fifth Circuit adopted the district court's analysis, in which the court found that the probable outcome of such actions would result in a lowered stock price.[44] As for the third alternative action, which was incorporated in the plaintiffs' amended complaint, the court likewise adopted the district court's analysis, finding that:

> [T]he only reasonable inference from [Martone's] factual allegations regarding the hedging product is that a prudent fiduciary could reasonably conclude that investing in such a product would do more harm than good, either because it would lead to disclosure of the reason for the hedge—the alleged overpricing scheme—or, at the least, public knowledge that the Company faced a substantial risk, and in either case risk a stock price drop in the future.[45]

The Fifth Circuit affirmed the lower court's ruling.[46]

41. Martone v. Robb, 902 F.3d 519, 521 (5th Cir. 2018).
42. *Id.*
43. *Id.* at 525.
44. Martone v. Robb, No. 1:15-CV-877, 2017 WL 3326966, at *3 (W.D. Tex. Aug. 2, 2017), *aff'd*, 902 F.3d 519 (5th Cir. 2018).
45. *Robb*, 902 F.3d at 528.
46. *Id.* at 529.

b. The Sixth Circuit: Graham v. Fearon

In *Graham v. Fearon*, the plaintiffs, former Eaton employees, were participants in the company's defined-contribution plan, which allowed employees to "defer up to fifty percent of their compensation into the plan."[47] Participants could then direct their investments into a multitude of different investment options.[48] Identical to the plan in *Martone*, participants were given the option to invest in the Eaton company stock.[49] Following Eaton's acquisition of an Ireland-based company, "analysts speculated whether the transaction would 'prevent Eaton from engaging in a lucrative [tax-free] spin-off[s] of its vehicle business.'"[50] Although the company's executives adamantly stated that it would not, the opposite was true.[51] In an earnings call with investors, company executives stated they would be restricted from any business spin-offs for five years or else suffer a significant tax liability.[52]

The plaintiffs alleged a breach of duty of prudence, arguing that the defendants engaged in fraud and misrepresentation regarding the possibility of executing tax-free spin-offs, which resulted in its stock price trading at artificially inflated prices.[53] The plaintiffs further alleged that the defendants failed to prudently manage the plan and offered three alternative courses of action identical to those posited by the plaintiffs in *Martone*: "[p]laintiffs allege Defendants could have: (1) halted new contributions or investments in the Fund; (2) issued corrective disclosures to cure the fraud in a timely fashion; or (3) directed the Fund to divert a portion of its holdings into a low-cost hedging product to offset some of the losses."[54]

For much of the same reasoning as the district court's in *Martone*, the Sixth Circuit dismissed each of the proffered alternative courses of action, and affirmed the lower court's dismissal of the plaintiffs' claims.[55] The Sixth Circuit agreed with the district court's finding that the plaintiff did not sufficiently proffer an alternative course of action that a similarly situated, prudent fiduciary would have taken to avoid causing more harm than good.[56]

c. The Eighth Circuit: Allen v. Wells Fargo & Company

In *Allen v. Wells Fargo & Co.*, the plaintiffs were plan participants in a 401(k) plan sponsored by the defendants.[57] The plan in question, like the prior cases, allowed participants to invest their contributions in the Wells Fargo company stock.[58] The company engaged in widespread fraud that was highly publicized following its disclosure in 2016:

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47. Graham v. Fearon, 721 F. App'x 429, 431 (6th Cir. 2018).
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 435.
52. Graham v. Fearon, 721 F. App'x 429, 432 (6th Cir. 2018).
53. *Id.* at 433.
54. *Id.*
55. *See generally Fearon*, 721 F. App'x 429 (6th Cir. 2018).
56. *Id.* at 435.
57. Allen v. Wells Fargo & Co., 967 F.3d 767, 770 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2594 (2021).
58. *Id.*

> As early as 2004, Wells Fargo, at its senior management's direction, engaged in a practice of imposing unreasonably high sales quotas on its branch employees and then threatening those employees with termination if they failed to meet those unrealistic quotas. Through this aggressive sales program, Wells Fargo pressured and induced thousands of its employees to engage in widespread unlawful and unethical sales practices, including using confidential, personal financial information of Wells Fargo customers to open over 3.5 million unauthorized customer bank accounts and credit cards.[59]

After the public disclosure, the company's stock plummeted and resulted in a loss of more than $18 billion in capital which caused its plan participants significant losses.[60]

The plaintiffs sued the plan fiduciaries. Initially, the plaintiffs claimed a breach of the duty of prudence, but because the district court found that "their claim. . .did not satisfy the pleading requirements under [*Dudenhoeffer*]," the court dismissed the claim with prejudice.[61] Thus, the plaintiffs instead alleged that, by failing to (1) disclose the fraud, (2) freeze plan investments into the company stock, or (3) avoid conflicts of interest, the defendants failed to satisfy the duty of loyalty owed to the plan and its participants under ERISA.[62] The defendants moved to have the complaint dismissed, arguing that the plaintiffs failed to meet the standards set under the *Dudenhoeffer* test. "[A]lthough Dudenhoeffer does not apply to a claim of breach of the duty of loyalty," the lower court nonetheless granted the motion to dismiss, finding that the plaintiffs' claims were insufficient to plausibly plead that the defendants breached their duty of loyalty.[63]

On appeal, the plaintiffs argued that the district court erred in finding that they failed to plausibly plead claims for the breach of the duty of prudence and proposed two alternative actions which the defendants could have taken: defendants could have either (1) publicly disclosed the company's fraudulent practices sooner, or (2) frozen further plan investments into the company stock.[64] Finding that the defendants could not have frozen continued investments into the company without initiating a public disclosure of the unethical sales practices, the court disposed of the second alternative action and instead focused its analysis on the first proposed action.[65] The court found that the plaintiffs "have failed to plausibly allege that a prudent fiduciary in Appellees' position could not have concluded that earlier disclosure would do more harm than good" and thus held that they failed to properly state a claim for breach of the duty of prudence.[66]

d. The Ninth Circuit: Laffen v. Hewlett-Packard Company

In *Laffen v. Hewlett-Packard Co.*, the plaintiffs were all current or former employees

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59. *Id.* at 770–71.
60. *Id.* at 771.
61. *Id.*
62. Allen v. Wells Fargo & Co., 967 F.3d 767, 770 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2594 (2021).
63. *Id.* at 772.
64. *Id.* at 773.
65. *Id.*
66. *Id.* at 774.

and participants in Hewlett-Packard's (HP) 401(k) plan.[67] Like the preceding three cases, the plan allowed participants to divert some of their compensation into the HP company stock.[68] In arguing that the defendants breached their duty of prudence, the plaintiffs posited that the defendants encouraged an imprudent investment for the plan by allowing them to invest in artificially inflated stock.[69] According to the plaintiffs, the defendants intended not to disclose the artificially inflated stock price until a whistleblower threatened to divulge the information.[70] The plaintiffs further argued that HP's concerns about a whistleblower revealing the scandal forced it to investigate and disclose the discrepancies in the stock's price.[71] The Ninth Circuit disagreed with the plaintiffs' assertions, finding that HP did not know of the fraud that was plaguing the company's stock and stated that:

> HP had no reason to investigate issues it was not aware of, or to disclose fraud that it had not yet discovered. That HP launched a full investigation after the whistleblower emerged further renders any claim that HP attempted to conceal problems at Autonomy implausible, as HP acted diligently when it gained actual knowledge of fraud.[72]

The plaintiffs alleged that the defendants breached their duty of prudence because HP had several alternative courses of action available: (1) preventing the plan from making new investments in the company stock and (2) making earlier public disclosures following the whistleblower's threats.[73] The court held that "a prudent fiduciary in the same circumstances as Defendants–Appellees could view Laffen's proposed alternative course of action as likely to cause more harm than good without first conducting a proper investigation."[74] Furthermore, the Ninth Circuit stated that the plaintiffs' suggested alternatives effectively fault the defendants for first initiating an investigation before acting, but argued that "a prudent fiduciary must first investigate problems before acting."[75] In finding that Laffen failed to properly plead a claim of breach of the duty of prudence, the court held that the plaintiffs failed to plausibly allege any alternative action in which the defendants could have engaged and affirmed the lower court's ruling.[76]

2. The Outlier: *The Second Circuit:* Jander v. Retirement Plans Committee of IBM

In *Jander v. Retirement Plans Committee of IBM*, the plaintiffs were IBM employees who were participants in the company's retirement plan.[77] The plan allowed participants

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67. Laffen v. Hewlett-Packard Co., 721 F. App'x 642, 643 (9th Cir. 2018).
68. *Id.*
69. *Id.*
70. *Id.* at 644.
71. *Id.*
72. *Laffen*, 721 F. App'x at 644.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620, 622 (2d Cir. 2018), *vacated*, 140 S. Ct. 592 (2020), *remanded to* 962 F.3d 85 (2d Cir. 2020).

to invest in IBM's stock.[78] The plaintiffs alleged that, when they were investing in the stock, the plan's fiduciaries were aware that a separate division of the company was overvalued but intentionally failed to disclose such information.[79] Specifically, the plaintiffs posited that "IBM began trying to find buyers for its microelectronics business in 2013, at which time that business was on track to incur annual losses of $700 million . . . [and] IBM failed to publicly disclose these losses and continued to value the business at approximately $2 billion."[80] In 2014, IBM announced that they would be paying GlobalFoundries an estimated $1.5 billion to take the microelectronics business from them, resulting in a $4.7 billion pre-tax charge.[81] Shortly thereafter, the company's stock price dropped significantly,[82] and this, the plaintiffs argued, resulted in direct harm to the plan and, thus, its participants. The plaintiffs brought their claim against IBM for violating its duty of prudence, reasoning that the defendants knew or should have known of these undisclosed issues and their potential for harm.[83]

Like the plaintiffs in *Graham*, the plaintiffs in *Jander* proposed three alternative courses of action that the defendants could have taken to prevent bringing "more harm than good" to the plan and its participants, as required under the *Dudenhoeffer* test: they could have (1) disclosed the company losses earlier; (2) frozen continued investments by participants into the company stock; or (3) purchased a hedging product.[84] The lower court held that the plaintiffs "failed to state a duty-of-prudence claim . . . because a prudent fiduciary could have concluded that the three alternative actions proposed in the complaint . . . do more harm than good to the fund."[85] On appeal, the plaintiffs amended their complaint to offer just one alternative course of action that the defendants could have taken: early disclosure of the company's losses.[86]

Unlike the Fifth, Sixth, Eighth, and Ninth Circuits, the Second Circuit *disagreed* with the district court, and found that "[s]everal allegations in the amended complaint . . . plausibly establish that a prudent fiduciary in the Plan defendants' position could not have concluded that corrective disclosure would do more harm than good."[87] First, the court argued that the plaintiffs plausibly pled that IBM's microelectronics division was in dire straits and that the defendants were indeed aware of this fact.[88] Second, the defendants were in the position to properly disclose the truth of the situation and thus correct the stock's artificially inflated price.[89] Third, the plaintiffs provided sufficient economic evidence to support their assertion that "reputational harm is a common result of fraud and grows the longer the fraud is concealed, translating into larger stock drops."[90]

Next, the court found that the plaintiffs "plausibly allege[d] that a prudent fiduciary

78. *Id.* at 623.
79. *Id.* at 622.
80. *Id.* at 623.
81. *Id.*
82. *Jander*, 910 F.3d at 623.
83. *Id.*
84. *Id.* at 628.
85. *Id.*
86. *Id.* at 629.
87. *Jander*, 910 F.3d at 628.
88. *Id.*
89. *Id.* at 628–29.
90. *Id.* at 629.

need not fear an irrational overreaction to the disclosure of fraud" because a timely disclosure would result in a reduction to the company stock by the amount by which it was artificially inflated, but not more.[91] Finally, the court argued that the defendants' disclosure of the company's losses resulting from its microelectronics division was inevitable because it was likely that they would sell the business and would, at that point, be unable to keep its overvaluation from the public.[92]

Ultimately, the Second Circuit held that a prudent fiduciary, similarly situated to the defendants, could not have concluded that early public disclosure would have done more harm than good to the plan, and reversed and remanded the case back to the district court.[93] In January 2020, the Supreme Court issued a *per curiam* order in the case, vacating the Second Circuit's decision and remanding it for further proceedings.[94] The Court, however, denied a petition for certiorari, thereby refusing to address the question of "[w]hether *Fifth Third Bancorp v. Dudenhoeffer*'s 'more harm than good' standard can be satisfied by general allegations that the harm of inevitable disclosure of an alleged fraud generally increases over time and, accordingly, plan fiduciaries should have made earlier disclosures through regular securities-law filings."[95] The Supreme Court vacated and remanded the case, not because of the Second Circuit's determination that the plaintiffs stated a proper claim for breach of the duty of prudence per se, but instead to instruct the circuit court to consider addressing additional arguments concerning the interaction between securities laws and ERISA before making a new ruling on the case.[96] The Court did not, however, address the Second Circuit's differing application of the *Dudenhoeffer* test—leaving the *Dudenhoeffer* test in limbo, and resulting in an unanswered circuit split.

3. Looking Forward: Hughes v. Northwestern University

In July 2021, the Supreme Court granted a petition for a writ of certiorari in the decision of *Divane v. Northwestern University*—a case decided by the Seventh Circuit.[97] Divane, a plaintiff in the lower court proceedings, did not participate in the case before the Supreme Court,[98] hence why the case heard by the Court was titled *Hughes v. Northwestern University* (Hughes being another plaintiff who was party to the lower court proceedings, and agreed to participate in the Supreme Court proceeding). The issue before the Court was the following: "Whether allegations that a defined-contribution retirement plan paid or charged its participants fees that substantially exceeded fees for alternative available

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91. *Id.* at 630.

92. *Jander*, 910 F.3d at 630.

93. *Id.* at 632.

94. Client Memorandum from Paul Weiss, U.S. Supreme Court Vacates and Remands ERISA Stock-Drop Suit 3 (Jan. 23, 2020), https://www.paulweiss.com/media/3979276/23jan20-jander.pdf [https://perma.cc/HB3G-UX35].

95. *SCOTUS Once Again Decides Not to Provide Guidance Regarding "More Harm Than Good" Standard Presented in* Retirement Plans Committee of IBM v. Jander, ZAMANSKY LLC: BLOG (Nov. 12, 2020), https://www.zamansky.com/scotus-once-again-decides-not-to-provide-guidance-regarding-more-harm-than-good-standard-presented-in-jander-v-ibm [https://perma.cc/CX9U-D474].

96. Client Memorandum from Paul Weiss, *supra* note 94.

97. Paul J. Ondrasik, Jr., Melanie Nussdorf & Eric G. Serron, *SCOTUS Agrees to Hear ERISA 'Excessive Fee' Case*, STEPTOE & JOHNSON (July 2, 2021), https://www.steptoe.com/en/news-publications/scotus-agrees-to-hear-erisa-excessive-fee-case.html [https://perma.cc/DDC2-JHGL].

98. Petition for Writ of Certiorari at ii, Hughes v. Nw. Univ., 142 S. Ct. 737 (2022) (No. 19-1401).

investment products or services are sufficient to state a claim against plan fiduciaries for breach of the duty of prudence under ERISA, 29 U.S.C. § 1104(a)(1)(B)."[99]

a. The Seventh Circuit: Divane v. Northwestern University

The plaintiffs brought suit against the defendants as beneficiaries of two of the employee investment plans offered by Northwestern: the Northwestern University Retirement Plan and the Northwestern University Voluntary Savings Plan.[100] One of the options offered by the defendant's plans gave participants and beneficiaries the choice to invest through the Teachers Insurance and Annuity Association of America and College Retirement Equities Fund (TIAA-CREF).[101] TIAA-CREF made various investment options available to plan participants, such as the TIAA-CREF Traditional Annuity,[102] "a fixed annuity contract that returns a guaranteed, contractually specified minimum interest rate."[103]

The TIAA-CREF Traditional Annuity imposed significant restrictions and penalties for early withdrawal from the fund and also required that "if the Traditional Annuity is offered as part of an investment plan, that plan must also offer the TIAA-CREF Stock Account fund and use TIAA as the recordkeeper for all TIAA offerings."[104] The plaintiffs alleged that Northwestern breached the duty of prudence it owed to its plan participants and beneficiaries in the following ways: "[I]t included the Stock Account as a plan investment offering and allowed TIAA-CREF to serve as a recordkeeper for its funds []; [it] created a multi-entity recordkeeping arrangement []; and [it] provided investment options that were too numerous, too expensive, and underperforming . . . ."[105]

The Seventh Circuit evaluated these allegations and found them to be based primarily on the plaintiffs' opinions and strategies they thought to be appropriate.[106] But the court, quoting *Lockheed Corp.*,[107] determined that "[n]othing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind[s] of benefits employers must provide if they choose to have such a plan."[108] Ultimately, the court held that the complaint failed to allege a breach of fiduciary duty under ERISA.[109]

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99. *Id.* at i.
100. Divane v. Nw. Univ., 953 F.3d 980, 983 (7th Cir. 2020), *cert. granted sub nom*. Hughes v. Nw. Univ., 141 S. Ct. 2882 (2021).
101. *Id.*
102. *Id.* at 984.
103. *Id.*
104. *Id.*
105. Divane v. Nw. Univ., 953 F.3d 980, 988 (7th Cir. 2020), *cert. granted sub nom.* Hughes v. Nw. Univ., 141 S. Ct. 2882 (2021).
106. *Id.* at 993.
107. Lockheed Corp. v. Spink, 517 U.S. 882 (1996).
108. Divane v. Nw. Univ., 953 F.3d 980, 989 (7th Cir. 2020), *cert. granted sub nom.*, Hughes v. Nw. Univ., 141 S. Ct. 2882 (2021).
109. *Id.* at 993.

III. Analysis

A. The Supreme Court Missed an Opportunity to Settle a Circuit Split in Hughes v. Northwestern University

On January 24, 2022, the Supreme Court ruled on the highly-anticipated case of *Hughes v. Northwestern University*,[110] but the outcome failed to impress.[111] When news of the Court's granting of certiorari in the case made headlines back in July 2021, legal scholars and practitioners noted the case's potential significance in settling the circuit split regarding the application of *Dudenhoeffer* to breach of the duty of prudence claims.[112] By taking on this issue, the Court had the opportunity—for the first time in over six years—to address and bring further clarity to the pleading standard and its requirements as set out in *Dudenhoeffer*.[113] Unfortunately, they failed to address the issue entirely.[114]

Instead, the Court focused its ruling on the duty to monitor investments.[115] The Court previously ruled on this duty in *Tibble v. Edison International*[116], a 2015 case that involved allegations that the plan fiduciaries had been offering higher-priced investment options to plan participants when lower-cost options were available.[117] In *Tibble*, the Court ruled that "a fiduciary is required to conduct a regular review of its investment" to ensure that plan participants are being offered the most cost-effective investment options available to the plan.[118] In reversing and remanding the Seventh Circuit's decision in *Hughes*, the Court essentially held that the circuit court failed to apply the *Tibble* standard.[119] Not much else

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110. Hughes v. Nw. Univ., No. 19-1401, 2022 WL 199351, at *1 (U.S. Jan. 24, 2022).

111. John Manganaro, *Detailed Analysis of the Supreme Court's Northwestern University Ruling*, PLANSPONSOR (Jan. 25, 2022), https://www.plansponsor.com/in-depth/detailed-analysis-supreme-courts-northwestern-university-ruling/ [https://perma.cc/47EV-MNXB] ("Nancy Ross, a Chicago-based partner in and co-chair of Mayer Brown's ERISA litigation practice, says it is not what she would call a groundbreaking or major ruling.").

112. *Solving a Circuit Split? Supreme Court to Hear Fiduciary Breach Excessive Fee Case*, HALL BENEFITS LAW (Aug. 4, 2021), https://hallbenefitslaw.com/solving-a-circuit-split-supreme-court-to-hear-fiduciary-breach-excessive-fee-case/ [https://perma.cc/6QKH-CZJR] ("[T]he government's amicus brief stated that, 'resolving the question presented would establish general principles of application for ERISA's duty of prudence that would have implications beyond this particular case. The case presents an opportunity for this Court to clarify that ERISA requires fiduciaries to work actively to limit a plan's expenses and remove imprudent investments, and that fiduciaries will not be excused from those responsibilities on the ground that they selected some (or even many) other prudent investments for a plan.'").

113. Paul J. Ondrasik, Jr., Melanie Nussdorf & Eric G. Serron, *SCOTUS Agrees to Hear ERISA 'Excessive Fee' Case*, STEPTOE & JOHNSON (July 2, 2021), https://www.steptoe.com/en/news-publications/scotus-agrees-to-hear-erisa-excessive-fee-case.html [https://perma.cc/U6PC-PZHP].

114. Douglas Hallward-Driemeier et al., Hughes v. Northwestern University*: Key Takeaways for 401(k) and 403(b) Plan Sponsors and Fiduciaries*, ROPES & GRAY (Feb. 3, 2022), https://www.ropesgray.com/en/newsroom/alerts/2022/February/Hughes-v-Northwestern-University-Key-Takeaways-for-401k-and-403b-Plan-Sponsors-and-Fiduciaries [https://perma.cc/NWF7-VMYB] ("[T]he Court passed on the opportunity to elaborate on what the applicable pleading standard should be for bringing a claim of fiduciary imprudence in violation of ERISA in connection with the management of a defined contribution plan.").

115. Manganaro, *supra* note 111.

116. Tibble v. Edison Int'l, 575 U.S. 523, 528 (2015).

117. *Id.* at 525–26; Manganaro, *supra* note 111.

118. *Tibble*, 575 U.S. at 528.

119. Hughes v. Nw. Univ., 142 S. Ct. 737, 741–42 (U.S. 2022).

was provided by the Supreme Court in their ruling on *Hughes*.[120]

For the reasons outlined below, the Supreme Court missed an opportunity by not taking the chance to clarify the *Dudenhoeffer* standard. Not only is there an ongoing circuit split with regards to the test's interpretation and application that the Court could have resolved, but the *Dudenhoeffer* test, as this Note will argue, is unfair and inequitable—it is past time that it be reworked and reimagined into a more practical framework.

B. The Dudenhoeffer *Test is Too Restrictive, Thus Barring Potentially Legitimate Claims of the Breach of Duty of Prudence*

1. The Dudenhoeffer *Standard is at Least as Restrictive as the* Moench *Presumption*

Prior to its implementation, it was suspected that application of the *Dudenhoeffer* analysis would produce largely unchanged results in terms of producing successful claims for breach of the duty of prudence.[121] This has proven to be precisely the case.[122] While it was difficult to prevail on duty of prudence claims under the *Moench* presumption, it was still rebuttable, at least, and thus created a pathway (however narrow) for plaintiffs to succeed.[123] By contrast, the *Dudenhoeffer* test implements a presumption of an efficiently operating public market and requires plaintiffs to prove that plan fiduciaries were or should have been aware "of a special circumstance which would lead to the conclusion that the most efficient market in the history of mankind was not operating efficiently with respect to the value of the company's stock"—needless to say, this presumption is effectively irrebuttable.[124]

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120. Manganaro, *supra* note 111 (statement of Nancy Ross, partner at Mayer Brown regarding the *Hughes v. Northwestern University* ruling) ("[T]he new ruling can be interpreted as 'modestly expanding *Tibble*.' . . . [*Hughes*] . . . has reaffirmed that fiduciaries have an obligation to continuously monitor all the investments on their menu, regardless of the menu's size, and to remove any that become imprudent.").

121. *See* Marcia S. Wagner, *Plumbing the End of Presumption of Prudence*, BENEFITS PRO (Nov. 10, 2014), https://www.benefitspro.com/2014/11/10/plumbing-the-end-of-presumption-of-prudence/?slreturn=20210923215833 [https://perma.cc/6TAY-A5DN] ("Even though the Supreme Court specifically rejected the application of the *Moench* presumption, plaintiffs still face a high burden as they must plead specific facts in order to survive a motion to dismiss.").

122. *See* Corey Rosen, *How Has Supreme Court Decision in* Fifth Third Bancorp v. Dudenhoeffer *Affected Litigation over Company Stock in Retirement Plans?*, 6 NAT'L L. REV. 1, 2 (2016), https://www.natlawreview.com/article/how-has-supreme-court-decision-fifth-third-bancorp-v-dudenhoeffer-affected#google_vignette [https://perma.cc/DT6F-F4CM] ("A number of cases have been remanded to lower courts after the Supreme Court eliminated the presumption of prudence . . . . In most of the remands, plaintiffs continued to be unsuccessful.").

123. Jeffrey S. Russell, *The* Moench *Presumption is Dead – Long Live the* Dudenhoeffer *Presumption*, BRYAN CAVE LEIGHTON PAISNER (July 17, 2014), https://www.bclplaw.com/en-US/insights/blogs/benefits-bclp/the-moench-presumption-is-dead-long-live-the-dudenhoeffer-presumption.html [https://perma.cc/9L22-HW6Y].

124. *Id.*

C. *How* Jander v. Retirement Plans Committee of IBM *Was Different from All the Others. . .Or Was It?*

At face value, it appears that the facts in *Jander*[125] are strikingly similar to those of the cases heard in the Fifth, Sixth, Eighth, and Ninth Circuits.[126] Commenting on the surprise ruling in *Jander*, Nicholas Wamsley—an attorney in Washington, D.C.—noted that "[t]he strength of the underlying facts does little to explain the plaintiffs' success; the facts are unremarkable and generally track those of prior stock drop cases."[127] Ironically enough, if the facts could at all be distinguished from the prior discussed cases, it would be regarding the amount by which IBM's stock suffered in *Jander*—just over seven percent, which is considered to be a relatively minimal decline—whereas in *Martone*, by contrast, the Whole Foods stock dropped eleven percent.[128]

1. *The Second Circuit's Application of the* Dudenhoeffer *Test Was More Plaintiff-Friendly*

The Second Circuit's ruling in *Jander* departed from rulings that other circuits have made in similar cases. This begs the question, then: Why did the Second Circuit find that the plaintiffs in *Jander* successfully pled claims for the breach of duty of prudence against their plan's fiduciaries? The answer, this Note argues, lies in the fact that the Second Circuit implicitly recognized an important factor that must be employed: it considered the plaintiffs' limited access to the crucial information necessary to have satisfied the *Dudenhoeffer* standard. Thus—although the Second Circuit noted (in seemingly disapproving fashion) that the lower court assessed the plaintiffs' allegations in light of "whether any prudent fiduciary could have considered the action to be more harmful than helpful"[129]—they appear themselves to have engaged in that very same course of analysis.

To illustrate, one of the proposed alternatives in *Jander* under which the plan's fiduciaries could taken was present in nearly all of the prior discussed cases: they could have disclosed the company losses earlier than they did.[130] In dismissing this allegation, the district court argued that it "rests on hindsight,"[131] alluding to the argument that the plaintiffs' claim fails in satisfying the first prong of the *Dudenhoeffer* test—that the alternative actions(s) posited was one which the fiduciaries could have taken at the time,

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125. Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620, 628 (2d Cir. 2018), *vacated and remanded*, 140 S. Ct. 592 (2020).

126. *See* discussion *supra* Part II.C.1 (explaining the circuit split between the Fifth, Sixth, Eighth, and Ninth Circuits).

127. Nicholas Wamsley, *Second Circuit Throws Potential Lifeline to ERISA Stock-Drop Lawsuits*, 26 INV. LAW. 1, 2 (2019), https://www.millerchevalier.com/sites/default/files/resources/Reprints/Investment-Lawyer_04-19_Wamsley.pdf [https://perma.cc/4PE2-F55F].

128. *Id.*

129. *Jander*, 910 F.3d at 620.

130. *See* Wamsley, *supra* note 127, at 2 ("[T]he plaintiffs did not support their early disclosure alternative with details or facts that were noticeably stronger than those pleaded in prior stock-drop cases. In fact, the allegations that the *Jander* panel found convincing had each been explicitly rejected by other courts. For example, the *Jander* panel held that a reasonable business executive could have determined that the harm would only increase the longer that the fraud continued, but the Fifth Circuit had dismissed that reasoning as a 'generalized allegation.'") (quoting Martone v. Robb, 902 F.3d 519, 526 (5th Cir. 2018)).

131. *Jander*, 910 F.3d at 620.

not one that they recognized later. In disposing of the lower court's reasoning for dismissing this claim, the court evaluated the allegation from the perspective of "a reasonable business executive" and found that it was plausible to foresee that delayed reporting of company losses would result in more harm than good.[132]

Additionally, in *Jander* the Second Circuit also accepted, as support for their claims, the plaintiffs' evidence of economic analyses "that show that reputational harm is a common result of fraud and grows the longer the fraud is concealed, translating into larger stock drops."[133] The *Martone* court dismissed similar evidence of economic analysis as "widely-known and generally-applicable," thus lacking the specificity necessary to meet the *Dudenhoeffer* standard.[134]

In each of these instances, the Second Circuit effectively lowered the threshold for recovery, thus paving the way for its favorable outcome for the plaintiffs. However, it also seemingly failed to adhere to the second prong of the *Dudenhoeffer* test. Recall that the test requires that the alternative actions posited by the plaintiff be evaluated against "a prudent fiduciary in the same circumstances."[135] Although the court focused its analysis on the actions of a prudent fiduciary, it did not focus on similarly situated fiduciaries. Instead, it focused on what is expected of a prudent fiduciary *in general*.[136] While the question of why the Supreme Court did not address the Second Circuit's failure to properly apply *Dudenhoeffer* remains, it alludes to an even more illuminating point: the *Dudenhoeffer* test is unworkable.

This mode of analysis for breach of duty of prudence claims is not a new one. Because the *Moench* presumption was—like the *Dudenhoeffer* test—a restrictive, fiduciary-friendly standard, other courts realized that it had to be interpreted such that plaintiffs with legitimate claims could recover. In 2009, the Eighth Circuit recognized this in *Braden v. Wal-Mart Stores, Inc.*, when they stated that:

> [W]e must be cognizant of the practical context of ERISA litigation. No matter how clever or diligent, ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences. Thus, while a plaintiff must offer sufficient factual allegations to show that he or she is not merely engaged in a fishing expedition or strike suit, we must also take account of their limited access to crucial information. If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the statute will

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132. *Id.*

133. *Id.*

134. Martone v. Robb, 902 F.3d 519, 527 (5th Cir. 2018); *see also* Wamsley, *supra* note 127, at 2 ("The *Jander* panel also found that plaintiffs' citations to economic studies supported early disclosure as a viable alternative action, [although they failed] to support a specific allegation.").

135. Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 410 (2014).

136. "A *reasonable business executive* could plausibly foresee that the inevitable disclosure of longstanding corporate fraud would reflect badly on the company and undermine faith in its future pronouncements." Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620, 629 (2d Cir. 2018) (emphasis added). Additionally, the *Jander* court accepted the plaintiffs' use of surveys based on "general market experience" as plausible evidence that "reputational harm is a common result of fraud and grows the longer the fraud is concealed . . . ." *Id.* The Second Circuit likewise disagreed with the district court's rejection of the surveys, reasoning that "[a]ssertions grounded in economic studies of general market experience cannot be dismissed as merely 'theoretical,' and the fact that they are 'untested' at this early stage of the litigation does not necessarily render them implausible." *Id.*

> fail, and the crucial rights secured by ERISA will suffer. These considerations counsel careful and holistic evaluation of an ERISA complaint's factual allegations before concluding that they do not support a plausible inference that the plaintiff is entitled to relief.[137]

The difference between the Second Circuit's application of the *Braden* court's view in *Jander* and the *Braden* holding itself is that such an interpretation was permissible under a *Moench* presumption standard, but fails to fit properly into the mold of the *Dudenhoeffer* test. All the *Moench* presumption required was that plaintiffs rebut the presumption that the fiduciary in question acted prudently—it was still fiduciary-friendly, but at least allowed for evidence of how prudent fiduciaries operate in a general sense. In sum, the application of the *Braden* court view in the *Dudenhoeffer* era cannot work, as it expressly conflicts with the language in *Dudenhoeffer* that the actions proposed be compared against the actions of similarly situated, prudent fiduciaries.

That being said, it warrants reemphasizing a line from the *Braden* opinion: "If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, *the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer*."[138] Such leeway in plaintiff filings is precisely the kind of activity that is currently forbidden under the *Dudenhoeffer* test, thus making the recovery of legitimate claims improbable, if not impossible. The result of the *Dudenhoeffer* test is exactly what the *Braden* court feared would happen to ERISA plaintiffs under too narrow an interpretation of the *Moench* presumption.

The only plausible conclusion after analyzing the *Jander* opinion is that the Second Circuit, in its attempt to fit its analysis within the *Dudenhoeffer* standard, did just the opposite because there is no equitable manner in which to apply the *Dudenhoeffer* test to viable claims of the breach of duty of prudence. Whether the court's analysis was intentionally meant to go against the *Dudenhoeffer* test or whether they acted subconsciously in their pursuit for a fair outcome is a mystery, but it is interesting to note that the Second Circuit applied the *Braden* court view in a previous case[139] just five years prior to *Jander*.

C. Policy Implications of the Dudenhoeffer Standard

ERISA is a wide-reaching piece of legislation that impacts not only employee retirement plans, but employer-sponsored employee health plans as well.[140] Therefore, the

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137. Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 598 (8th Cir. 2009); *see also* Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 385 (2016) (statement supporting the mode of analysis articulated in *Braden*) ("Courts should be sensitive to how much detail is required when describing the events underlying the plaintiff's claim, but it is not inconsistent with notice pleading to require allegations that, assuming they are proven true, would make out a viable claim for relief." (footnote omitted)).

138. *Braden*, 588 F.3d at 598 (emphasis added).

139. Pension Benefit Guar. Corp. *ex rel.* v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 718 (2d Cir. 2013) (adopting the *Braden* court's view when stating that "a claim alleging a breach of fiduciary duty may still survive a motion to dismiss if the court, based on circumstantial factual allegations, may reasonably infer from what is alleged that the process was flawed").

140. Eric D. Altholz, *Establish an Administrative Committee for Your ERISA Health and Welfare Benefits Plans*, VERRILL (Mar. 15, 2021), https://www.verrill-law.com/benefits-law-update/establish-an-administrative-committee-for-your-erisa-health-and-welfare-benefit-plans [https://perma.cc/ZQP9-3XPG].

duty of prudence is an obligation of plan fiduciaries that applies equally to both such plans.[141] In 2013, ERISA encompassed nearly five million welfare and retirement plans, roughly 140 million American workers, or 54% of the American workforce's retirement plans and 59% of their health plans.[142]

If the *Dudenhoeffer* test remains unchanged—restrictive as it is and subject to varying interpretations by the federal circuit courts—an overwhelming majority of American workers will be barred from bringing legitimate claims against imprudent fiduciaries that oversee the financial well-being of their retirement and health plans.[143] Not only does the *Dudenhoeffer* standard require clarification, but it must be revamped entirely so as to allow plaintiffs' legitimate claims to be heard.

IV. Recommendation

A. The Dudenhoeffer *Standard Needs to Be Revamped*

This Part of the Note will provide a recommendation of the most effective way to revamp the *Dudenhoeffer* standard to provide duty of prudence plaintiffs with legitimate claims a higher likelihood of success.

1. Any Prudent Fiduciary or Just Those Similarly Situated?

When applying the *Dudenhoeffer* test to breach of duty of prudence claims, courts must compare the actions of the plan fiduciary against those of similarly situated, prudent fiduciaries.[144] This language, "similarly situated," operates as a qualifier, and effectively lowers the bar for plan fiduciaries while correspondingly raising it for plaintiffs. Instead of being required to act as any prudent fiduciary would have at any time, they need only to have acted as similarly situated, prudent fiduciaries would have. This severely limits their liability. Many breach of duty of prudence claims center around some form of alleged fraud or misrepresentation by the plan's fiduciaries[145] themselves, so how is it exactly that they can be evaluated by the standard of a similarly situated, prudent fiduciary? A prudent plan fiduciary could never be similarly situated if the imprudent handling of the plan resulted from alleged illegal acts by those same fiduciaries.

Thus, the first step in revamping the *Dudenhoeffer* test would be to follow in the

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141. *Id.*

142. *Fact Sheet: What Is ERISA*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/what-is-erisa [https://perma.cc/V9T4-9MRZ].

143. In its current form, every circuit court, besides the Second Circuit, has rejected and affirmed the dismissal of breach of duty of prudence cases under the *Dudenhoeffer* test. This indicates an inherent issue in the *Dudenhoeffer* standard. *See* Wamsley, *supra* note 127, at 1 ("Participants in dozens of suits strove mightily to articulate the alternative actions that fiduciaries could take that, under this standard, would not have done more harm than good. Every circuit court rejected those efforts.").

144. Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 410 (2014).

145. *See generally* Martone v. Robb, 902 F.3d 519 (5th Cir. 2018) (plaintiffs alleging the company stock was artificially inflated due to undisclosed misrepresentations and fraud); Graham v. Fearon, 721 F. App'x 429 (6th Cir. 2018) (plaintiffs alleging that the defendant's deliberate misrepresentations resulted in the company's stock to drop); Allen v. Wells Fargo Co., 967 F.3d 767 (8th Cir. 2020) (plaintiffs alleging that the company engaged in widespread fraud which resulted in direct harm to the plan); Laffen v. Hewlett-Packard Co., 721 F. App'x 642 (9th Cir. 2018) (plaintiffs alleging that the company stock was artificially inflated and was thus an imprudent investment for the plan).

footsteps of the Second Circuit in *Jander* and apply the standard in a manner that assesses the actions of defendant plan fiduciaries in light of how *any* prudent fiduciary would have acted,[146] not just those who are similarly situated to the defendant(s) in question. Not only would such a clarification of the standard widen liability for imprudent fiduciaries, and thus result in fiduciaries managing plans with more care, but it would also ease the burden on plaintiffs by allowing the opportunity for viable claims to succeed.

Additionally, the second prong of the *Dudenhoeffer* test requires plaintiffs to plead alternative actions which similarly situated prudent fiduciaries would have taken.[147] This process, however, requires that plaintiffs, at the pleading phase, know key information that is only available to those particular fiduciaries in question and cannot be uncovered until discovery commences. This creates a larger problem: a plaintiff cannot make it to the discovery phase without first making it past the pleading stage, and if plaintiffs do not have the requisite information necessary to satisfy *Dudenhoeffer*'s pleading standard, then their claims will seldom survive a motion to dismiss.[148] Therefore, by amending the second prong of the *Dudenhoeffer* test to require that plaintiffs plead alternative actions that *any* prudent fiduciary would have taken, the threshold becomes far more feasible for plaintiffs with legitimate claims to meet without having to do away with the *Dudenhoeffer* standard altogether.

2. *An Objective Standard Needs to Be Set Defining How a Plan Fiduciary Acts "Imprudently"*

Courts applying the *Dudenhoeffer* standard have little to no guidance when it comes to determining "when and why [a plan fiduciary] becomes imprudent."[149] While it seems intuitive not to restrictively define imprudence because every case is different, the result from this lack of a clear and objective standard in defining imprudence is part of the issue that this Note is grappling with: courts in different jurisdictions have held different interpretations of what sort of conduct constitutes imprudent behavior.

The best way to strike a balance is to implement a baseline guide as to what can be considered imprudent behavior. Past ERISA claims alleging breaches of the duty of prudence have shown that there are particular situations that are almost always implicated in such claims: stock-drop cases, cases involving conduct resulting from fraudulent misrepresentation, etc. This is the ideal place to start defining what is and what is not imprudent behavior by a plan fiduciary. By utilizing the cases discussed in this Note, courts can objectively evaluate the primary ways in which plan fiduciaries act imprudently in

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146. Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620, 626 (2d Cir. 2018), *vacated and remanded*, 140 S. Ct. 592 (2020).

147. *Dudenhoeffer*, 573 U.S. at 410.

148. *See* Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 598 (8th Cir. 2009) (discussing the difficulty with the Moench presumption in evaluating breach of duty of prudence claims) ("If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer."). This same reasoning can be applied equally to the *Dudenhoeffer* standard.

149. Michael J. Voves & Andrew Holly, *Supreme Court Rejection of Duty of Prudence Presumption—What Does It Mean for Retirement Plans?*, DORSEY & WHITNEY (June 27, 2014), https://www.dorsey.com/newsresources/publications/2014/06/supreme-court-rejection-of-duty-of-prudence-pres__ [https://perma.cc/L9UH-3UP4].

these situations. Although it is possible for there to be cases in the future that pose allegations of imprudent conduct never before seen, these baseline standards will at least provide the courts with a starting point in their evaluations, and perhaps lead to a more uniform application of the *Dudenhoeffer* test.

Implementing these two proposed changes to the *Dudenhoeffer* standard could finally afford the equity and consideration that should be given to breach of duty of prudence claims. This Note has highlighted how the evaluation of fiduciary defendants' conduct against that of any prudent fiduciary, and not just those similarly situated, has led to success for plaintiffs, such as in *Jander*. Couple this with devising an objective standard to defining imprudent fiduciary behavior, and the *Dudenhoeffer* test will have the potential to be a far more workable standard—one that is fair to both plan participants and fiduciaries, rather than a standard so high that it bars plaintiffs' legitimate claims.

V. Conclusion

The *Dudenhoeffer* standard has proven to be a difficult test, not only for plaintiffs to overcome, but also for the courts to ensure that it is applied uniformly across the United States. The unworkability of this test has spurred a need for reform; thus, the standard needs to be overhauled to make it more (1) plaintiff-friendly and (2) feasible for uniform application. This Note discussed many of the duty of prudence cases heard by circuit courts, and illustrates how differing interpretations of the *Dudenhoeffer* standard have resulted in a circuit split. In analyzing why the circuit split occurred, it is clear that the Second Circuit in *Jander* applied *Dudenhoeffer* in a much less restrictive fashion by evaluating the defendants' conduct against that of any prudent fiduciary.

The *Dudenhoeffer* standard needs to be revamped to measure a fiduciary's conduct in terms of what *any* prudent fiduciary would have done—not just those similarly situated. Unfortunately, the Supreme Court missed an opportunity to clarify the *Dudenhoeffer* test in the case of *Hughes v. Northwestern University*,[150] but that does not negate the fact that the test has proven to be an uphill climb for both plaintiffs and courts. Clarification of the *Dudenhoeffer* test is imperative if plaintiffs' legitimate claims for breach of the duty of prudence are to ever be granted the relief that they rightfully deserve.

150. Hughes v. Nw. Univ., No. 19-1401, 2021 WL 2742780 (U.S. July 2, 2021).