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Public Safety Concerns and Meeting the *Dudenhoeffer* Pleading Standard

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PUBLIC SAFETY CONCERNS AND MEETING THE *DUDENHOEFFER* PLEADING STANDARD

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ABSTRACT

This Comment analyzes the recent Employee Retirement Income Security Act (ERISA) stock drop cases against The Boeing Company (Boeing) and reviews the underlying pleading standard in these cases that the Supreme Court set forth in *Fifth Third Bancorp v. Dudenhoeffer*. With the tremendous amount of assets in retirement plans—and specifically in employee stock ownership plans—litigation under ERISA can be extremely costly to employers, especially those in the airline industry that offer these plans. The current pleading standard for stock drop cases has become a practically insurmountable barrier to plaintiffs, even when their employers know they are negligently creating products that cause serious harm. When these stock drop cases are brought in court, plaintiffs must allege alternative actions that "no prudent fiduciary" could have decided would have done more harm than good for the employer.

However, this alternative action requirement does not consider the industry type or the underlying cause of harm the employer has potentially caused. This Comment asserts that courts undergo a context-specific analysis and factor in the public health considerations and devastating harm that some products can have on the broader community. While many employers may have concerns that this factor may be difficult to weigh, plaintiffs must still overcome a high bar to bring these cases. Plaintiffs must continue to allege that the employer acted negligently in violating the underlying industry's safety statutes or other standards. Additionally, among the contested duties of the employer is the scope of liability when it appoints a third-party investment fiduciary. This Comment then asserts that employers

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should be required to inform appointed investment fiduciaries as a part of their ongoing duty to monitor investments in their employee stock ownership plans.

This Comment takes these considerations and proposes weighing public safety in the alternative action pleading requirements outlined by the U.S. Supreme Court. First, the Boeing 737 Max crashes are summarized, and the subsequent ERISA litigation is analyzed. Next, this Comment discusses fiduciary duties under ERISA and the evolution of the pleading standards in stock drop cases, including how this standard has been applied in various circuits around the United States. Finally, the public safety factor is scrutinized and shown how it can be assessed: no prudent fiduciary could conclude that corrective disclosure would potentially do more harm than good when public safety is a major risk factor. This would prove to be a more equitable standard consistent with the U.S. Supreme Court's recent precedent requiring context-specific inquiries into ERISA claims, while still protecting employers from frivolous lawsuits.

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I. INTRODUCTION

> Let's just say . . . the market price is four times more than the actual value, and the fiduciaries know that because of inside information that they have. It just sort of defies language to say that . . . a prudent person would retain the investment in that kind of wildly overvalued stock, doesn't it? – Justice Elena Kagan[1]

Retirement plans account for a vast majority of wealth and investments in America, encompassing trillions of dollars.[2] Consequently, these plans are a prime source for litigation as the employers' deep pockets usually fund them. Of the Fortune 500 companies in 2019, 430 offered defined contribution plans, 57 offered hybrid pension plans, and 13 offered traditionally defined benefit plans.[3] A subset of this massive web of plans is the employee stock ownership plan (ESOP), where employees can invest (through their benefit plan) directly in their own employer's stock.[4] As of December 2021, 6,482 ESOPs were offered in the United States, covering just under 14 million participants and managing just over $1.67 trillion in assets.[5] Furthermore, defined contribution plans themselves can involve employer stock as an investment option.[6] Management is especially impor-

[1] Transcript of Oral Argument at 10, Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014) (No. 12-751), 2014 WL 1313775, at *10.

[2] Press Release, Willis Towers Watson, Global Top 20 Pension Fund Assets Rebound Strongly, (Sept. 8, 2020), https://www.wtwco.com/en-US/News/2020/09/global-top-20-pension-fund-assets-rebound-strongly [https://perma.cc/6BZK-4VG7] ("Assets under management (AUM) at the world's 300 largest pension funds increased in value by 8.0% to a total of $19.5 trillion in 2019 . . .").

[3] Brendan McFarland, *Retirement Offerings in the Fortune 500: 1998–2019*, Willis Towers Watson (June 25, 2020), https://www.wtwco.com/en-US/Insights/2020/06/retirement-offerings-in-the-fortune-500-1998-2019 [https://perma.cc/8C5K-4NSR].

[4] *How an Employee Stock Ownership Plan (ESOP) Works*, Nat'l Ctr. For Emp. Ownership (Aug. 24, 2020), https://www.nceo.org/articles/esop-employee-stock-ownership-plan [https://perma.cc/ABM6-VVZV].

[5] *Employee Ownership by the Numbers*, Nat'l Ctr. for Emp. Ownership (Mar. 2021), https://www.nceo.org/articles/employee-ownership-by-the-numbers [https://perma.cc/87EH-XMF4].

[6] Benefit plans can allow investment in employer stock through elective deferrals or directly as required in an ESOP plan. *See 401(k) Plans as Employee Ownership*

tant for airlines and aircraft manufacturers who generally have prominent positions and reputations at stake in their benefit plans: The Boeing Company's (Boeing) retirement plan included $10.8 billion of its common stock in 2018,[7] Airbus's ESOP offered 2.2 million shares in their ESOP in 2021,[8] Lockheed Martin had $6.04 billion in the ESOP fund in 2018,[9] and United Airlines had notable troubles with their ESOP offering after filing for bankruptcy in 2002.[10] Additionally, even smaller airlines offer ESOP plans for their employees.[11]

The Employee Retirement Income Security Act of 1974 (ERISA) regulates most employer plans.[12] ERISA has been described as a "comprehensive and reticulated statute"[13] and "an enormously complex and detailed statute that resolve[s] innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs."[14] Conflicting ERISA requirements with other laws regarding duties and responsibilities are typically interpreted by courts when Congress is unclear, but the Supreme Court has been reluctant to supplement ERISA with other remedies due to the thoroughness of ERISA's obliga-

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Vehicles, Alone and in Combination with ESOPs, NAT'L CTR. FOR EMP. OWNERSHIP (Nov. 22, 2016), https://www.nceo.org/articles/401k-plans-employee-ownership-esops [https://perma.cc/EAB8-AL5J].

[7] The Boeing Co. & Consol. Subsidiaries, Annual Return/Report of Employee Benefit Plan (Form 5500) (July 24, 2019) [hereinafter 2018 Boeing Co. Form 5500] (page ten of attachment to filing).

[8] Information Document from David Zakin, Head of Corporate Affairs, Airbus SE, to Employee Participants 2 (Mar. 18, 2021), https://www.airbus.com/sites/g/files/jlcbta136/files/2021-07/ESOP%202021%20-%20EU%20note%28English%29.pdf [https://perma.cc/S5ND-U28T]. Airbus is issued on United Kingdom (UK) stock exchanges and is governed by UK law. *See, e.g.*, *Airbus SE*, LONDON STOCK EXCH., https://www.londonstockexchange.com/market-stock/0KVV/airbus-se/overview [https://perma.cc/NWC7-WE9V]. However, it is illustrated here to show the usage of ESOP plans in the manufacturing and airline industries.

[9] Lockheed Martin Corp., Annual Reports of Employee Stock Purchase, Savings, and Similar Plans (Form 11-K) 2 (June 24, 2019).

[10] *See* Bill Fotsch & John Case, *United's Troubles Could Have Been Avoided*, FORBES (Apr. 17, 2017, 8:54 AM), https://www.forbes.com/sites/fotschcase/2017/04/17/uniteds-troubles-could-have-been-avoided/?sh=268a5f5cc06 [https://perma.cc/7QQ6-99J5].

[11] *See, e.g.*, *Benefits*, CAPE AIR (2020), https://www.capeairpilots.com/benefits [https://perma.cc/5N64-2BL3].

[12] *ERISA*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/health-plans/erisa [https://perma.cc/28AR-V4K6]; *see* 29 U.S.C. § 1003(a).

[13] Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980).

[14] Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54–56 (1987)).

tions.[15] Because ESOP plans are covered under ERISA, they are frequently subject to litigation concerning the broad fiduciary duties required by employers who offer qualified plans.[16] ERISA regulates any "pension plan" that "provides retirement income to employees" or "results in a deferral of income by employees for periods extending to the termination of covered employment or beyond."[17]

This Comment analyzes the current *Fifth Third Bancorp v. Dudenhoeffer* pleading standard in ERISA stock drop cases, showing how it immunizes employers from valid claims brought by plaintiffs who have been harmed by their employer's failure to oversee and make prudent investment decisions for plan participants. Under the *Dudenhoeffer* standard, "a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it."[18] In essence, these cases boil down to this: the employer knows that their stock is overvalued (due to lack of disclosure of some form of company information); the employer takes inappropriate actions to either conceal or mask the overvaluation; and then unwitting employees bear the brunt of the harm when that negative information comes to light. Because plan investments are limited in many benefit plans, employees trust their employers on investment options.

The *Dudenhoeffer* standard should be difficult to overcome because the policy considerations of Congress are clear that employer stock plans are meant to be promoted as a matter of policy.[19] However, serious tensions exist when companies—especially airlines, public utilities, and other public companies—knowingly or negligently endanger the public through their actions, and their stock price suffers because of failure to take corrective action.

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[15] *See* Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 447 (1999).

[16] *See* Joseph P. Yonadi, Jr., *ESOPs, Stock-Drop Litigation and Jander*, LABOR & EMP. NEWS, Summer 2020, at 7; 29 U.S.C. § 1104(a) (setting forth the numerous duties owed by fiduciaries under ERISA).

[17] 29 U.S.C. § 1002(2)(A).

[18] Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 428 (2014).

[19] Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520, 1590 (codified as amended in scattered sections of 26 U.S.C.) ("The Congress, in a series of laws [including ERISA] has made clear its interest in encouraging [ESOPs] as a bold and innovative method of strengthening the free private enterprise system . . .").

Certain industries whose actions fall below the prudent standard of care that have devastating effects on society should be held to a different standard when they mask these violations, and it leads to public harm—or in Boeing's case, the deaths of hundreds. In other words, if there are risks to public safety known by the employer, then corrective disclosure or remedial actions would generally *not* do more harm than good. Thus, in these contexts, the plaintiffs' alleged alternative actions should successfully meet the *Dudenhoeffer* standard at the motion to dismiss stage.

Part II of this Comment examines the 737 MAX crashes, background, and ensuing litigation, with an analysis of the district court's dismissal of the action. Next, Part III reviews the historical evolution of the *Dudenhoeffer* pleading standard, demonstrating how difficult the motion to dismiss barrier has become in these stock drop cases. Finally, Part IV suggests that public safety should be a heavily considered factor when requiring entities, especially airlines, to either provide corrective disclosures or face the consequences after a public disaster—even when utilizing an ERISA § 3(38) investment fiduciary.[20]

II. THE 737 MAX CRASHES AND SUBSEQUENT ERISA SUIT

One of the most recent stock drop cases[21] to affect these enormous employer stock investments is *Burke v. Boeing Company*.[22] There, investors in the Boeing employee stock ownership plan alleged a breach of duty of prudence through failure to make corrective disclosures, a breach of duty of prudence by failure to monitor investments, and a breach of co-fiduciary duty.[23] These

[20] 29 U.S.C. § 1002(38)(A).

[21] Stock drop cases are cases that allege that an ERISA fiduciary fell below their standard of care in offering their company stock in their retirement plans. *See* Yonadi, *supra* note 16, at 7–8.

[22] 500 F. Supp. 3d 717 (N.D. Ill. 2020).

[23] Second Amended Class Action Complaint at 67–72, Burke v. Boeing Co., 500 F. Supp. 3d 717 (N.D. Ill. 2020) (No. 1:19-CV-02203). Fiduciaries under ERISA can be held liable for co-fiduciary breach if they "participate[ ] knowingly in, or knowingly undertake[ ] to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach," 29 U.S.C. § 1105(a)(1); enable another fiduciary to breach their duties, *id.* § 1105(a)(2); or "if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach." *Id.* § 1105(a)(3).

allegations made headlines due to the sheer size of the potential liability—that is, if the court found breaches existed.[24]

A. The Crashes and Allegations

The Boeing 737 MAX model commercial jet was one of Boeing's best-selling aircraft before the crashes in 2018 and 2019.[25] In October 2018, Lion Air Flight JT 610 (a Boeing 737 MAX) crashed into the Java Sea after thirteen minutes in flight and killed all 189 passengers on board.[26] Subsequently, on March 10, 2019, Ethiopian Flight 302 crashed into a farm field six minutes after leaving Addis Ababa Airport and killed 157 passengers.[27]

Diane Burke, a Boeing ESOP participant, alleged that the defendants knew or should have known about issues related to the aircraft before the 2018 crash.[28] Ms. Burke included facts in her complaint which showed (1) rushed plans due to market competition,[29] (2) errors in moving the engine location on 737 MAX models,[30] (3) faulty and negligent application of the Maneuvering Characteristics Augmentation System (MCAS),[31] (4) expert testimony regarding design flaws,[32] and (5) allegations that Boeing had notice of the problem with the MCAS system.[33] Especially pertinent was a former engineer's testimony that the warning system involved with the engine repositioning and the

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[24] *See, e.g.*, Erin Shaak, *Boeing Facing ERISA Lawsuit in the Wake of 737 MAX Plane Crashes,* ClassAction.org, https://www.classaction.org/news/boeing-facing-erisa-lawsuit-in-the-wake-of-737-max-plane-crashes [https://perma.cc/5ELU-M6CG] (Apr. 7, 2021).

[25] *See* Second Amended Class Action Complaint, *supra* note 23, at 12.

[26] Sinéad Baker, *This Timeline Shows Exactly What Happened on Board the Lion Air Boeing 737 Max That Crashed in Less Than 13 Minutes, Killing 189 People*, Bus. Insider (Oct. 29, 2019, 12:11 PM), https://www.businessinsider.com/lion-air-crash-timeline-boeing-737-max-disaster-killed-189-2019-10 [https://perma.cc/9FKE-E6P4].

[27] Jeff Wise, *6 Minutes of Terror: What Passengers and Crew Experienced Aboard Ethiopian Airlines Flight 302,* N.Y. Mag.: Intelligencer (Apr. 9, 2019), https://nymag.com/intelligencer/2019/04/what-passengers-experienced-on-the-ethiopian-airlines-flight.html [https://perma.cc/SJC5-CKSD].

[28] Second Amended Class Action Complaint, *supra* note 23, at 12.

[29] *Id.* at 12–13.

[30] This movement significantly shifted the weight of the plane, leading to design issues. *Id.* at 13–14.

[31] *Id.* at 22–23.

[32] *Id.* at 18.

[33] *Id.* at 18.

MCAS caused other engineers to speculate as to the safety of the aircraft before product launch.[34]

After the crashes, Boeing's Company President and CEO, Dennis Muilenburg, was questioned in front of Congress, and evidence arose that "suggest[ed] the company did know enough to at least question the safety of continuing to fly the 737 Max [after the Lion Air crash]."[35] Boeing recognized the problems after the Lion Air disaster and began working on a software fix but "fail[ed] to inform the public."[36] Boeing continued to assert, even in the face of the erroneous software, that "[it was] confident in the safety of the 737 Max. Safety remain[ed] [its] top priority."[37] Boeing neither disclosed any safety problems nor made any safety corrections to its then available aircraft, which allegedly led to the Ethiopian Air crash the following year. The material facts imply that Boeing was negligent in its installation and continued usage of the MCAS software.

After the Ethiopian Air crash, Boeing stock spiraled from \$422.54 to \$375.41 in a matter of two business days—an 11% decrease in wealth for any investment in Boeing.[38] During that time, Muilenburg called former President Trump and assured him of the safety of the 737 MAX, urging the former President not to ground the planes.[39] Even when confronted with severe

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[34] *Id.* at 22; *see also* Peter Robison, Julie Johnsson, Ben Elgin, Margaret Newkirk & Anders Melin, *Former Boeing Engineers Say Relentless Cost-Cutting Sacrificed Safety*, Bloomberg: Businessweek (May 8, 2019, 11:01 PM), https://www.bloomberg.com/news/features/2019-05-09/former-boeing-engineers-say-relentless-cost-cutting-sacrificed-safety [https://perma.cc/UH39-ZJ7B].

[35] David Schaper, *3 Takeaways from 2 Days of Tense Boeing Congressional Hearings*, NPR (Nov. 2, 2019, 7:01 AM), https://www.npr.org/2019/11/02/775553377/3-takeaways-from-2-days-of-tense-boeing-congressional-hearings [https://perma.cc/L27S-XD3T].

[36] Second Amended Class Action Complaint, *supra* note 23, at 27.

[37] Dominic Gates, *U.S. Pilots Flying 737 MAX Weren't Told About New Automatic Systems Change Linked to Lion Air Crash*, SEATTLE TIMES, https://www.seattletimes.com/business/boeing-aerospace/u-s-pilots-flying-737-max-werent-told-about-new-automatic-systems-change-linked-to-lion-air-crash/ [https://perma.cc/CRB8-EWDR] (Nov. 13, 2018, 1:43 PM).

[38] *The Boeing Company (BA) Price at Close: Historical Data (Mar. 7, 2019 - Mar. 29, 2019)*, YAHOO! FIN., https://finance.yahoo.com/quote/BA/ [https://perma.cc/7RQW-WBT6] (choose "Historical Data" from menu; then click "Time Period"; set "Start Date" as "03/08/2019" and "End Date" as "03/30/2019"; then click "Done": then click "Apply").

[39] Natalie Kitroeff & David Gelles, *Trump Called Boeing C.E.O. About Potential Shutdown of 737 Max*, N.Y. TIMES, https://www.nytimes.com/2019/12/18/business/trump-boeing-dennis-muilenburg.html [https://perma.cc/7VFZ-9Z9R] (Dec. 23, 2019).

safety concerns, expert speculation about unsafe design, and almost two hundred dead after the first Lion Air disaster, Boeing maintained that the 737 MAX was safe.[40] Unsatisfied with Boeing's efforts to assure the public, the plaintiffs asserted Boeing's safety mishaps would inevitably be disclosed to the public due to Boeing's duty to disclose safety issues with the 737 MAX.[41] "The crashes have drawn intense scrutiny of the plane maker's engineering culture, damaged the company's relationships with suppliers and customers, and led to the ouster of its chief executive last month."[42]

B. The Boeing Retirement Plan

Boeing's retirement plan had approximately $58.7 billion in total assets as of the end of 2018.[43] Boeing offered a defined contribution plan, which allowed for employee deferrals and investments in Boeing's stock—thus making it an ESOP[44]—and had $10.8 billion invested in Boeing stock as of the end of 2018.[45] As of the end of 2019, this number had decreased to just over $10 billion,[46] presumably due to some decrease in stock value and other factors. As of late January 2022, Boeing stock was trading at just over $205.[47] Investors who may have invested

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40 *See, e.g.*, Second Amended Class Action Complaint, *supra* note 23, at 47–49.

41 *Id.* at 57.

42 Doug Cameron & Andrew Tangel, *Boeing Posts Full-Year Loss Amid 737 MAX Setbacks*, Wall St. J., https://www.wsj.com/articles/boeing-falls-to-full-year-loss-11580302091 [https://perma.cc/FFR4-Z8LT] (Jan. 29, 2020, 6:07 PM).

43 2018 Boeing Co. Form 5500, *supra* note 7 (page 1 of Schedule H "Financial Information" attachment).

44 Employers are required to include on Form 5500s a variety of codes to show the features of defined contribution pension plans, including "2O" and "2P" which indicate whether the plan includes an ESOP feature. *See Form 5500 Codes and Legends*, FreeERISA.com, https://freeerisa.benefitspro.com/static/popups/legends.aspx#BenefitPension09 [https://perma.cc/48Z9-UK3G]; 2018 Boeing Co. Form 5500, *supra* note 7 (section 8a of main form).

45 2018 Boeing Co. Form 5500, *supra* note 7 (page ten of attachment to filing).

46 The Boeing Co. & Consol. Subsidiaries, Annual Return/Report of Employee Benefit Plan (Form 5500) (July 13, 2020) [hereinafter 2019 Boeing Co. Form 5500] (page ten of attachment to filing).

47 *The Boeing Company (BA) Price at Close (Jan. 23, 2022)*, Yahoo! Fin., https://finance.yahoo.com/quote/BA/ [https://perma.cc/QVR9-R9NF]. The COVID-19 pandemic also likely had an impact on the stock's value. The stock price dropped from $422.54 prior to the MAX crashes to $330.22—a 22% drop—just before the pandemic began. *See The Boeing Company (BA) Price at Close: Historical Data (Mar. 7, 2019 - Jan. 13, 2020)*, Yahoo! Fin., https://finance.yahoo.com/quote/BA/ [https://perma.cc/G7MD-YWGR] (choose "Historical Data" from menu; then click "Time Period"; set "Start Date" as "03/08/2019" and "End Date" as "01/14/2020"; then click "Done": then click "Apply").

in the employer stock at the peak before the crashes would have experienced a loss of nearly 50% of their wealth since then.

Boeing had an Employee Benefit Plans Committee (EBPC),[48] an Employee Benefit Investment Committee (EBIC), and multiple individual committee members involved with the retirement benefit plan.[49] Of note, on August 9, 2017, Boeing, the EBIC, and Evercore Trust Company, N.A. (Evercore), agreed to fiduciary responsibility over investments of the plan assets.[50] ERISA designates as plan fiduciaries anyone who "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets."[51] Thus, employing an investment manager as a fiduciary to the plan removes discretionary control of a retirement plan's assets when a Section 3(38) advisor is utilized.[52]

C. THE CURRENT ERISA STOCK DROP CASE

The plaintiffs alleged there was a significant breach of fiduciary duty, including (1) breach of duty of prudence, (2) failure to monitor investments, and (3) breach of co-fiduciary duty.[53] The plaintiffs alleged that Boeing knew or should have known about the safety issues with the 737 MAX,[54] which led Boeing to know its stock was overvalued, and the market correction harmed the unwary investors in the Boeing retirement plan.[55] The defendants—including Boeing, the EBPC, the EBIC, and the individual defendants—moved to dismiss the case, arguing that (1) they were not fiduciaries with respect to the decision to include Boeing stock in the retirement plan, (2) the plaintiffs did not meet the alternative action standard emphasized in

48 2019 Boeing Co. Form 5500, *supra* note 46 (section 3a of main form). The EBPC was the plan administrator pursuant to 29 U.S.C. § 1002(16)(A).

49 Typically, committees are set up to run various aspects of retirement plans. For instance, plan administrative committees may oversee the administration and plan design, while retirement committees may be set up to review investment options in the plan. *See What Is a Retirement Plan Committee and Why Is it Important?*, SC&H GRP. (Apr. 2, 2019), https://www.schgroup.com/resource/blog-post/retirement-plan-committee-important/ [https://perma.cc/QEH3-ELAV].

50 Burke v. Boeing Co., 500 F. Supp. 3d 717, 724–25 (N.D. Ill. 2020).

51 29 U.S.C. § 1002(21)(A).

52 *See id.* § 1002(38)(A).

53 *Burke*, 500 F. Supp. 3d at 723.

54 *See supra* Section II.A.

55 *See supra* Section II.B.

Dudenhoeffer, and (3) the second and third causes of action fail as a matter of law.[56]

In November 2020, the district court ruled that the plaintiffs failed to allege that a fiduciary duty existed for all defendants.[57] The assignment of investment management responsibility to Evercore (referred to in the court opinion as Newport) relieved the fiduciary responsibility from all Boeing defendants, as they no longer had discretionary authority over the plan investments—most importantly, the Boeing stock fund.[58] However, the court took its analysis a step further and ruled that, even assuming the defendants were fiduciaries, the plaintiffs failed to meet the *Dudenhoeffer* pleading standard for stock drop cases and that their pleadings were insufficient as a matter of law.[59] This additional step illustrates how difficult it is for plaintiffs to meet the pleading standard in ERISA stock drop cases, even with plausible allegations of irresponsible corporate boards. However, the district court did take a context-specific analysis and neglected to consider other factors such as public safety when reviewing the pleading standard set forth in *Dudenhoeffer*. The court's extended analysis and the aforementioned stance serve as the basis for review in Part IV.

On December 9, 2020, the plaintiffs appealed to the Seventh Circuit.[60] At the time this Comment went to print, the Seventh Circuit had not yet issued its opinion. The Seventh Circuit appeared to acknowledge the severity of the *Burke* case, with one Judge on the panel stating during oral argument that "we hope most of [these cases] are not as bad as this news," illustrating that not all alternative actions alleged in stock drop cases are alike.[61] Furthermore, the U.S. Supreme Court recently reaffirmed the requirement that claims of breach of the fiduciary duty of prudence "turns on 'the circumstances . . . prevailing' at the time [of] the fiduciary acts" and that "the appropriate inquiry will necessarily be context specific."[62] This holding directly requires courts to consider the entirety of the circumstances

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[56] *Burke*, 500 F. Supp. 3d at 723.

[57] *Id.* at 725.

[58] *See id.*

[59] *Id.* at 725–27.

[60] Burke v. Boeing Co., No. 20-3389 (7th Cir. filed Dec. 9, 2020).

[61] Oral Argument at 8:37, Burke v. Boeing Co., No. 20-3389 (7th Cir. May 21, 2021), https://www.courtlistener.com/audio/76762/diane-burke-v-the-boeing-company/.

[62] Hughes v. Nw. Univ., 142 S. Ct. 737, 742 (2022) (quoting Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 425 (2014)).

that fiduciaries faced at the time of the breach. Public safety is a circumstance that must be considered because deaths due to negligent design always will do more harm than not to shareholder value.[63]

III. EXPLAINING THE *DUDENHOEFFER* STANDARD AND THE EVOLUTION OF ERISA STOCK DROP CASES

While ESOPs were first promulgated in the Regional Rail Reorganization Act of 1973,[64] they only gained popularity after the passage of ERISA in 1974 (which explicitly governs ESOPs).[65] These plans were initially meant to increase employee stock ownership and benefit those employees who remained with the employer for long periods.[66] As employers are typically fiduciaries with respect to ESOP plans, they are held to the highest standards when offering these benefit plans.[67]

When the tech bubble burst in the 2000s, employees in hard-hit tech industries experienced a significant decline in their retirement savings and began to allege breach of fiduciary duties against their employers who offered these plans.[68] These cases became so popular that they were deemed "stock drop" cases and have evolved in a wide array of industries.[69] However, stock drop cases have been notoriously difficult to pursue in the face of the Supreme Court's decisions regarding pleading standards in these cases.[70] The practically insurmountable barriers erected by the Supreme Court leave unsophisticated employees without protection when their employers know that they are offering investment options that are overvalued and inappropriate for retirement income.

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63 *See infra* Section IV.A.

64 *See* Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 102(5), 87 Stat. 985, 987 (1974) (codified as amended at 45 U.S.C. § 16) (repealed 1994).

65 26 U.S.C. § 4975(e)(7).

66 *E.g.*, David R. Johanson & Rachel J. Markun, *Description and Purpose of an ESOP*, HAWKINS PARNELL & YOUNG, LLP (2016), https://www.hpylaw.com/publications/description-and-purpose-of-an-esop/ [https://perma.cc/UWG2-6V89].

67 *See* 29 U.S.C. § 1104(a)(1).

68 *See* Craig C. Martin & Elizabeth L. Fine, *ERISA Stock Drop Cases: An Evolving Standard*, 38 J. MARSHALL L. REV. 889, 897 (2005).

69 *See* Yonadi, *supra* note 16, at 7.

70 *See* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 428 (2014); Ret. Plans Comm. of IBM v. Jander, 140 S. Ct. 592, 594 (2020) (per curiam).

A. ERISA Fiduciary Standards

An analysis of the fiduciary duties in employee benefit plans must first be reviewed to understand these obstacles. Section 1104 of ERISA outlines the duties of loyalty and prudence for ERISA fiduciaries: (1) discharging their duties for the sole purpose of the beneficiaries (duty of loyalty),[71] (2) defraying reasonable expenses of the plan (also encompassed in the duty of loyalty),[72] (3) discharging their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man 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" (duty of prudence),[73] and (4) diversifying assets of the plan to minimize the risk of large losses for participants.[74] Fiduciaries can either be named fiduciaries, such as those named in plan documents, or functional fiduciaries, who do not need to be outlined in plan documents.[75] When analyzing fiduciary duties, courts first ask a threshold question: "[W]hether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint."[76] Thus, looking to named and functional fiduciaries, fiduciary duty extends to "anyone else who exercises discretionary control or authority over the plan's management, administration, or assets."[77]

An additional provision applies to ESOPs, and it removes the duty of diversification for the eligible individual account plans.[78] This is because while promoting retirement savings and minimizing risks of losses for employees, these plans also involve special interests in "promot[ing] employee ownership of employer stock."[79] The Supreme Court has been clear that this exempts ESOP providers from the duty of prudence, "but '*only to the extent that it requires diversification.*'"[80] This distinction is essential as employers must abide by other duty of prudence requirements

71 29 U.S.C. § 1104(a)(1)(A)(i).
72 *Id.* § 1104(a)(1)(A)(ii).
73 *Id.* § 1104(a)(1)(B).
74 *Id.* § 1104(a)(1)(C).
75 Remy Grosbard, Note, *The Duty to Inform In the Post-Dudenhoeffer World of ERISA*, 117 Colum. L. Rev. 79, 84 (2017).
76 Pegram v. Herdrich, 530 U.S. 211, 226 (2000).
77 Mertens v. Hewitt Assocs., 508 U.S. 248, 251 (1993).
78 29 U.S.C. §§ 1104(a)(2), 1107(d)(3)(A)(ii).
79 Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 420 (2014).
80 *Id.* at 419.

regarding continual investment selection monitoring and removing inappropriate investment choices.[81] Fiduciaries of these plans typically may be fiduciaries in many capacities, but ERISA requires that "the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions."[82] This becomes a struggle in some instances where a corporate officer must juggle the duty of prudence with complex securities laws.[83]

Over time, in order for plaintiffs to allege a plausible claim for a fiduciary breach, the bar has become an almost insuperable barrier to even proceed past the motion to dismiss stages of litigation. Courts have continued to analyze the fiduciary duty standards imposed by ERISA, and the standard for pleading a violation of fiduciary responsibility in stock drop cases has significantly changed over time. However, the analysis remains limited to blanket assumptions instead of context specific inquiries.

B. The Pre-*Dudenhoeffer* Era and the Presumption of Prudence

When stock drop cases proliferated following the tech bust in the 2000s, circuit courts generally gave employers deference in these claims by granting them a "presumption of prudence," which generally required plaintiffs to plausibly allege a breach of fiduciary duty by showing some sort of impending bankruptcy or collapse.[84] However, the Sixth Circuit took this one step further in favor of plaintiffs. It ruled that the brink of collapse was not necessary, but only that the plaintiffs needed to allege "a prudent fiduciary acting under similar circumstances would

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[81] Tibble v. Edison Int'l, 575 U.S. 523, 530 (2015).

[82] Pegram v. Herdrich, 530 U.S. 211, 225 (2000) (citing Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 443–44 (1999); Varity Corp. v. Howe, 516 U.S. 489, 497 (1996)).

[83] *See Dudenhoeffer*, 573 U.S. at 428 (noting that fiduciaries must act consistently with securities laws).

[84] This was the method used by the Third, Sixth, Seventh, and Ninth Circuits in some capacity prior to the Supreme Court's decision in *Dudenhoeffer*, which abrogated or vacated each of these decisions. *See* Moench v. Robertson, 62 F.3d 553, 571 (3d Cir. 1995), *abrogated by* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014); Dudenhoeffer v. Fifth Third Bancorp, 692 F.3d 410, 418 (6th Cir. 2012), *vacated*, 573 U.S. 409 (2014); White v. Marshall & Ilsley Corp., 714 F.3d 980, 988–89 (7th Cir. 2013), *abrogated by* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014); Quan v. Comput. Scis. Corp., 623 F.3d 870, 879–82 (9th Cir. 2010), *abrogated by* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014).

have made a different investment decision."[85] Other courts took a similar stance, stating that good faith is not a defense as "a pure heart and an empty head are not enough."[86]

One early example of this application—and a clear showing of how unlikely it is for plaintiffs to succeed in this context—is *DiFelice v. U.S. Airways, Inc.*[87] There, an ESOP plan participant brought an action under 29 U.S.C. § 1132(a)(2),[88] claiming that U.S. Airways was considering filing bankruptcy while still offering its employer stock to plan participants.[89] The court noted that "[a]lthough all airlines struggled [even before the September 11 attacks], U.S. Airways faced particular challenges."[90] However, the court strongly rebuked a backward-looking approach, stating it was not appropriate when evaluating stock drop fiduciary duty breach claims.[91] Based on U.S. Airways' actions in assessing the plan investments on a consistent and regular basis and inference of Congress's creation of a per se rule in favor of employer stock, U.S. Airways had not breached a fiduciary duty.[92]

Courts continued to utilize some form of this "per se" rule of prudence in cases, which effectively bars any stock drop cases from proceeding past the motion to dismiss stage.[93] Many observers believed that the Supreme Court review of the presumption of prudence standard, first expounded by the Third Circuit

[85] *Dudenhoeffer*, 692 F.3d at 418 (quoting Kuper v. Iovenko, 66 F.3d 1447, 1459 (6th Cir. 1995)).

[86] Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983).

[87] 497 F.3d 410 (4th Cir. 2007).

[88] This provides a civil cause of action for any plan participant who alleges a breach of fiduciary duty. 29 U.S.C. §§ 1132(a)(2), 1109(a).

[89] DiFelice v. U.S. Airways, Inc., 397 F. Supp. 2d 735, 737–38 (E.D. Va. 2005).

[90] *DiFelice*, 497 F.3d at 415.

[91] *See id.* at 424–25.

[92] *See id.* at 421, 424–25 ("Congress has explicitly provided that qualifying concentrated investment in *employer* stock does not violate the 'prudent man' standard per se.").

[93] *See supra* note 84 and accompanying text.

in *Moench v. Robertson*,[94] would prove to be more plaintiff-friendly.[95] However, this has shown to be quite the opposite.[96]

C. *DUDENHOEFFER* AND THE ALTERNATIVE ACTION PLEADING STANDARD

The Supreme Court took up the *Dudenhoeffer* case in 2014 when the plaintiffs alleged a breach of fiduciary duty after Fifth Third Bancorp's (Fifth Third) stock plummeted due to risky investments in subprime lending markets.[97] Fifth Third offered twenty investment funds and its stock in its retirement plan.[98] Employees who filed suit alleged that Fifth Third knew about the risky investment profile of the company, failed to disclose it, continued to offer stock in the retirement plan, and then "Fifth Third's stock price fell by 74% between July 2007 and September 2009."[99]

1. *Current Supreme Court Interpretation*

The Supreme Court undertook a close analysis of the presumption of prudence that previous circuit courts employed in their opinions.[100] The Supreme Court concluded that due to the congressional intent and specific language of ERISA in its allocation of fiduciary duties,[101] the presumption of prudence is improper for ERISA fiduciaries.[102] This statement would make one think that the Supreme Court meant to soften the strict pre-

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[94] The Third Circuit held in *Moench* 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. However, the plaintiff may overcome that presumption by establishing that the fiduciary abused its discretion by investing in employer securities." 62 F.3d 553, 571 (3d Cir. 1995), *abrogated by* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 418–19 (2014) (finding no such presumption exists as to ERISA ESOP fiduciaries).

[95] *See* Joseph C. Faucher & Dylan D. Rudolph, *ERISA Stock Drop Cases Since* Dudenhoeffer*: The Pleading Standard Has Been Raised*, 24 J. PENSION BENEFITS 3, 4 (2017), https://www.truckerhuss.com/wp-content/uploads/2017/12/JPB_Spring17.PDF-Adobe-Acrobat.pdf [https://perma.cc/C7P7-QSEH].

[96] *See id.*

[97] *See Dudenhoeffer*, 573 U.S. at 413–14.

[98] *Id.* at 412.

[99] *Id.* at 413–14.

[100] *Id.* at 428 (noting that fiduciaries must act consistently with securities laws); *id.* at 417–18.

[101] *Id.* at 418–19 (noting that the same standard of prudence applies to all ERISA fiduciaries and that the only difference is the relief from the need to diversify investments pursuant to 29 U.S.C. § 1104(a)(2)).

[102] *Id.* at 418 ("[T]he law does not create a special presumption favoring ESOP fiduciaries.").

sumption of prudence; however, further analysis shows it does not.[103]

Justice Breyer put forth three key points that govern the pleading standard for stock drop cases: (1) fiduciaries of ERISA-governed plans are not compelled to break securities laws,[104] (2) courts must "consider duties under ERISA in the context of securities laws,"[105] and (3) when alleging a fiduciary acted imprudently by failing to act based on nonpublic information,[106] plaintiffs must plausibly allege an alternative action "that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it."[107] In other terms, a plaintiff must put forth an alternative action that any prudent fiduciary could not have decided that the harm from such action might outweigh the benefits.

The plaintiffs in *Dudenhoeffer* alleged many alternative actions:

> (1) selling the ESOP's holdings of Fifth Third stock; (2) refraining from future stock purchases (including by removing the Plan's ESOP option altogether); or (3) publicly disclosing the inside information so that the market would correct the stock price downward, with the result that the ESOP could continue to buy Fifth Third stock without paying an inflated price for it.[108]

However, the Court found that each of these alternative actions failed to meet the new pleading standard.[109] First, "[f]ederal securities laws 'are violated when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information.'"[110] Next, the Court noted that discontinuing purchases of the stock or publicly disclosing negative information may do more harm than good[111]—effectively barring the second two claims on remand.[112] While the Court has

103 *In re* Lehman Bros. Sec. & ERISA Litig., 113 F. Supp. 3d 745, 755 (S.D.N.Y. 2015) ("Moreover, *Dudenhoeffer* appears to have '*raised* the bar for plaintiffs seeking to bring a claim based on a breach of the duty of prudence.'").

104 *Dudenhoeffer*, 573 U.S. at 428.

105 Grosbard, *supra* note 75, at 81 (citing *Dudenhoeffer*, 573 U.S. at 429).

106 The standards for pleading that the fiduciary should have acted on public material information are different and easily defeated due to efficient market theory. *See* White v. Marshall & Ilsley Corp., 714 F.3d 980, 992 (7th Cir. 2013). However, the focus of this Comment is on nonpublic information.

107 *Dudenhoeffer*, 573 U.S. at 428.

108 *Id.*

109 *See id.* at 428–30.

110 *Id.* at 428 (quoting United States v. O'Hagan, 521 U.S. 642, 651–52 (1997)).

111 *Id.* at 429–30.

112 The class action against Fifth Third eventually settled on July 11, 2016, and thus the test was not fully applied in this case by the district court. Dudenhoeffer

previously considered the duty to disclose truthful information, they have declined to resolve the question.[113]

The Supreme Court ruled again on ERISA stock drop cases in *Retirement Plans Committee of IBM v. Jander* but left many questions unanswered.[114] Many observers hoped that the Supreme Court would clarify the alternative action standard. But the Court left open the decision instead by ruling that the lower court did not adequately address the question of plausible allegations of an alternative action.[115] In *Jander*, the plaintiffs alleged that IBM attempted to conceal an incorrect valuation of a microelectronic business unit, and when that unit was finally sold, IBM stock declined.[116] However, the Supreme Court punted the question, stating that the Second Circuit did not analyze the alternative actions alleged because the Second Circuit incorrectly focused the ruling on the duties imposed by ERISA.[117]

2. *Post-*Dudenhoeffer *Circuit Rulings*

After the *Dudenhoeffer* ruling, courts continued to dismiss cases under the new alternative action standard. Because "[t]here is no specific definition of a prudent process under ERISA[,]"[118] courts have been reluctant to find companies in violation of their fiduciary duty regarding employer stock offerings.

The Ninth Circuit undertook an examination of the Hewlett-Packard Company (HP) ESOP after a bungled acquisition that had included the target firm's improper accounting practices, which subsequently led to a decline in HP's stock value post-merger.[119] After HP was alerted to a whistleblower action and began an investigation, the court found that a prudent fiduciary

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v. Fifth Third Bancorp, No. 08-CV-538, 2016 WL 8135394, at *1 (S.D. Ohio July 11, 2016).

113 *See* Varity Corp. v. Howe, 516 U.S. 489, 506 (1996); Grosbard, *supra* note 75, at 89–90.

114 *See* Ret. Plans Comm. of IBM v. Jander, 140 S. Ct. 592, 594–95 (2020) (per curiam).

115 *Id.* at 595.

116 Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620, 623 (2d Cir. 2018), *vacated*, 140 S. Ct. 592 (2020) (per curiam).

117 *See Jander*, 140 S. Ct. at 595 ("The Second Circuit 'did not address the[se] argument[s], and, for that reason, neither shall we.'") (alteration in original).

118 Allen Buckley, *A Means of Meeting the* Dudenhoeffer *Standard*, 23 J. PENSION BENEFITS 10, 11 (2015), http://www.allenbuckleylaw.com/wp-content/uploads/2013/10/Article-A-Means-of-Meeting-the-Dudenhoeffer-Standard1.pdf [https://perma.cc/LKF5-J6LG].

119 *See* Laffen v. Hewlett-Packard Co., 721 F. App'x 642, 643–44 (9th Cir. 2018).

could have concluded that finishing an investigation was more beneficial prior to issuing public disclosures of accounting problems.[120] There was no clear evidence that HP corporate was aware of the material misrepresentations.[121] Thus, the plaintiffs' claim failed.[122] However, this case involved accounting fraud, and the court noted that the plaintiffs erred in faulting HP "for first investigating the whistleblower's allegations before taking action, [because] a prudent fiduciary must first investigate problems before acting."[123] HP did not comment further during the investigation.[124] Here, accounting fraud has a low impact on public health, whereas major cases, including Boeing, may (and did) have disastrous consequences for continuing to assert the safety of their airplanes. The Ninth Circuit correctly decided this case by viewing the *Dudenhoeffer* requirements in the context of the underlying industry.

The Second Circuit also found similar problems with the plaintiff allegations in *Loeza v. John Does 1–10*, where employees of JPMorgan Chase & Co. (JPMorgan) alleged that risky investments by JPMorgan led to a 16% drop in share price in one day.[125] The plaintiffs' claims were based on a commonly rejected economic theory of *reputational* damage through delayed disclosure.[126] Without particularizing the factors that "[d]efendants might have considered when deciding whether to make public disclosures[,]" the plaintiffs' claims that corrective disclosure would be prudent failed.[127] Furthermore, even fraud in terms of investments was insufficient to satisfy the alternative action prong set forth in *Dudenhoeffer*.[128] The court rejected the plaintiffs' argument that "the longer a fraud goes on, the more painful the [stock price] correction would be, as experienced finance executives . . . reasonably should have known."[129] Again, fraud is more difficult to value, and entities in this area are more likely to second-guess decisions before disclosure or completion

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120 *See id.* at 644.

121 *See In re* HP ERISA Litig., No. 3:12-CV-06199, 2015 WL 3749565, at *6 (N.D. Cal. June 15, 2015), *aff'd*, 721 F. App'x 642 (9th Cir. 2018).

122 *Laffen*, 721 F. App'x at 644.

123 *Id.* (citing Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996)).

124 *See In re HP Erisa Litig.*, 2015 WL 3749565, at *5.

125 659 F. App'x 44, 45 (2d Cir. 2016).

126 *See In re* JPMorgan Chase & Co. ERISA Litig., No. 12 Civ. 04027, 2016 WL 110521, at *4 (S.D.N.Y. Jan. 8, 2016).

127 *Id.*

128 *Id.*

129 *Loeza*, 659 F. App'x at 45–46.

of investigations. However, when danger to the public exists through promoting a dangerous product, this is more easily calculated.[130] It should be clear to any prudent fiduciary that failure to act or make a corrective disclosure would do more harm than good.

One case that denied a defendant's motion to dismiss in stock drop cases was *Murray v. Invacare Corp.*, in which the plaintiffs alleged breaches of fiduciary duty by Invacare (a long-term and home medical equipment manufacturer and distributor).[131] In *Murray*, the plaintiffs alleged that the defendants violated numerous U.S. Food and Drug Administration (FDA) safety and manufacturing regulations and took actions to conceal or delay disclosure of the violations.[132] The announcement of an FDA consent decree caused a 29% decrease in share price because of the violations.[133] Prior to the mandatory disclosure, Invacare continued to offer their employer stock in their retirement plan even with the knowledge of the FDA safety violations.[134] While limiting the class certification dates, the court ruled that the plaintiffs had met their burden with respect to the *Dudenhoeffer* requirements when the defendants did not limit employee investment in Invacare stock because they had a clear knowledge of violating safety regulations.[135]

These cases illustrate different stock drop claims that can arise under ERISA. Coupled with *Burke*, courts should be more willing to look at alleged alternative actions and how corrective disclosure or restriction plays out in diverse industrial contexts. In particular, when companies like the one in *Murray* are committing safety violations, the scales should tip in favor of the plaintiffs because public health and safety are at risk. And this factor should also weigh more heavily when evaluating an employer's decision to continue offering employer stock.

IV. SAFETY VIOLATIONS SHOULD SATISFY THE *DUDENHOEFFER* PLEADING STANDARD IN ERISA STOCK DROP CASES

One key difference between many circuit court rulings is the public's interest in safety. While corrective disclosure is not gen-

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130 *See infra* Section IV.A.
131 125 F. Supp. 3d 660, 663 (N.D. Ohio 2015).
132 *Id.* at 669–70.
133 *Id.* at 670.
134 *See id.* at 669.
135 *See id.* at 669 & n.3.

erally required,[136] when a company is so entrenched in the public space and has defects in their products, manufacturing, or other goods, the failure to make corrective disclosures should be a breach of fiduciary duty under ERISA if a plaintiff alleges that the employer knows or should have known of a strong potential of tangible, real harm its products could cause. Courts should look to the type of industry the entity is engaged in and allow discovery to determine the boundaries of the duty to monitor investments under ERISA.

A. Implication of Public Safety, Alleging Alternative Actions, and a Duty to Disclose

While studies on a defective product's effects on long-term firm value are relatively slim, there is empirical evidence on the mitigating impact of voluntary recall initiations and post-recall remedial efforts.[137] Products liability may inform the effects of voluntary disclosure and its impact on stock price, as accounting fraud and misrepresentations are intangible harms that are difficult to measure. For example, product recalls are typical in the automobile space, as "the auto industry experienced an average of 122 recalls per firm between 1997 and 2010."[138]

Although short-term returns are negatively affected as consumer preferences and future sales decrease, by voluntarily instead of mandatorily recalling products, "cash flow losses anticipated over the long term can be significantly mitigated, reducing the likelihood of investor devaluation of the firm."[139] One study found "the stock market punishes recall delays. Thus, voluntary recall initiation has a favorable impact on the investors in the long run."[140] This finding mirrors another automotive industry report that found recall delays resulted in shareholder losses of $103 million and concluded "that regulators may need to be proactive in nudging diverse brands to respond to safety investigations in a timely manner."[141] However, a study in toy defects found that a more extended recall period is beneficial to

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136 *See, e.g.*, Varity Corp. v. Howe, 516 U.S. 489, 506 (1996).

137 Yan Liu, Venkatesh Shankar & Wonjoo Yun, *Crisis Management Strategies and the Long-Term Effects of Product Recalls on Firm Value*, 81 J. Mktg. 30, 30 (2017).

138 *Id.*

139 *Id.* at 33, 35.

140 *Id.* at 44.

141 Meike Eilert, Satish Jayachandran, Kartik Kalaignanam & Tracey A. Swartz, *Does It Pay to Recall Your Product Early? An Empirical Investigation in the Automobile Industry*, 81 J. Mktg. 111, 126 (2017).

avoid the drastic response from loss-averse investors, but the study notes that this strategy would be inapplicable "in response to deaths or as part of a government-mandated recall."[142] This same study also found that the business effects may depend on other industrial contexts.[143]

A single 737 MAX jet is estimated to cost around $125 million.[144] These are not lower-cost toys that can be discarded easily; they are massive investments intended to last twenty-five years or more.[145] Additionally, the airline industry's range of consumers is broader than the toy industry. The number of passengers on U.S. and foreign airlines totaled over one billion people in 2018.[146] Domestic airlines carried 778 million passengers in 2018—an increase of 4.9% from the previous year.[147] And airline crashes are typically subject to extensive media attention due to the larger scale of consequences.[148]

With such large investments and the public interest at stake, it is difficult to infer that a corrective disclosure would do more harm than good in certain industries. Companies whose boards are comprised of sophisticated businesspeople have empirical evidence about the benefits of early disclosure and should have a duty to make corrective market disclosures to meet their fiduciary responsibilities.[149] Plaintiffs should be able to allege correc-

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142 Lincoln C. Wood, Jason X. Wang, Karin Olesen & Torsten Reiners, *The Effect of Slack, Diversification, and Time to Recall on Stock Market Reaction to Toy Recalls*, 193 INT'L J. PROD. ECON. 244, 255 (2017).

143 *See id.* at 256.

144 *E.g.*, Jon Sindreu, *The Boeing 737 MAX Question Is About Price, Not Sales*, WALL ST. J. (Dec. 3, 2020, 2:01 PM), https://www.wsj.com/articles/the-boeing-737-max-question-is-about-price-not-sales-11607022092 [https://perma.cc/3S5Z-Q3NZ].

145 *See, e.g.*, Oliver Smith, *Revealed: The Oldest Passenger Planes Still in Service – Have You Flown on Any of Them?*, TELEGRAPH (Sept. 24, 2019, 1:00 PM), https://www.telegraph.co.uk/travel/travel-truths/oldest-passenger-plane-still-in-service/ [https://perma.cc/A9DU-8MEF] (stating aircraft are built to last almost indefinitely and are typically in service for twenty-five years or more).

146 Bureau of Transp. Stat., *2018 Traffic Data for U.S Airlines and Foreign Airlines U.S. Flights*, U.S. DEP'T TRANSP. (Apr. 30, 2020), https://www.bts.gov/newsroom/2018-traffic-data-us-airlines-and-foreign-airlines-us-flights [https://perma.cc/M4FM-6KUQ].

147 *Id.*

148 *See* ROGER W. COBB & DAVID M. PRIMO, THE PLANE TRUTH: AIRLINE CRASHES, THE MEDIA, AND TRANSPORTATION POLICY 1 (2003) ("[P]lane crashes receive media coverage disproportionate to their death toll.").

149 This disclosure should be required under ERISA "even though such disclosure would not be mandated by federal securities laws." Grosbard, *supra* note 75, at 98.

tive disclosures are required to meet the duty of prudence when public safety is at stake, as it is clear that delayed corrections have a negative impact on long-term stock value. Applying this to *Burke*, corporate officers knew or should have known about the aircraft safety defects, which, without earlier disclosure, led to larger losses and greater decreases in long-term shareholder value. Courts must look to the underlying business and the safety implications from the ordinary course of business to weigh the factors in favor of or against corrective disclosures.

This method aligns with the policy findings of Congress that "continued well-being and security of millions of employees and their dependents are directly affected by these [benefit] plans,"[150] and Congress has "establish[ed] standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans."[151] While some courts have been reluctant to impose a duty to disclose on employers,[152] these courts did not address all of the potential contexts and industries that ESOP stock drop cases may confront. There is no "guess[ing] whether . . . adverse nonpublic information" would decrease the stock price in contexts of selling a dangerous product[153] because it undoubtedly always does in certain industries like airlines.

Some may argue that deciding how much to disclose is a difficult line to draw and forces an ERISA fiduciary to guess how much to disclose in certain circumstances. Such arguments directly tie to a prudent fiduciary standard based on the industry involved. Many courts have found that while a company is conducting an investigation, it may be absolved from some fiduciary responsibility.[154] Theoretically, however, this could always absolve companies from liability when they extend their internal investigation procedures. By not setting boundaries for courts to analyze what is prudent in certain contexts, appellate courts have effectively limited fiduciary duties and put discretion directly in the hands of the employer. Public safety concerns in-

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150 29 U.S.C. § 1001(a).

151 *Id.* § 1001(b).

152 *See, e.g.*, Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1285 (11th Cir. 2012) ("Such a rule would force them to guess whether . . . adverse nonpublic information will affect the price of employer stock, and then would require them to disclose . . . [even] if they believe that the information will have a materially adverse effect on the value of the investment fund.").

153 *See id.*

154 *See, e.g.*, *In re* HP ERISA Litig., No. 3:12-CV-06199, 2015 WL 3749565, at *7–8 (N.D. Cal. June 15, 2015).

herently raise different considerations in ERISA cases, and "the appropriate inquiry will necessarily be context specific."[155]

By dismissing cases before discovery, plaintiffs are left unable to examine the proposed investigation and see how it affected the plausibility of alternative actions alleged by the plaintiffs in these cases. ERISA is meant to set "minimum standards" on employer conduct,[156] yet current court decisions allow employers to choose their own rules even in light of egregious violations. The *Dudenhoeffer* alternative pleading standard must align with the Court's context-specific directive and consider how different industries are accountable for disregarding clear threats to public safety that may cause significant stock drops that harm employees.

B. Delegated Fiduciary Duties and an Ongoing Duty to Monitor

A more difficult problem in *Burke*—and the primary reason for its dismissal—was that Boeing had designated its fiduciary responsibility to an independent third party.[157] ERISA allows a transfer of investment liability either under ERISA §§ 3(21) or 3(38) investment fiduciaries,[158] as it is a practical option for plan sponsors who may not be investment experts but "are still held to ERISA's prudent expert standard."[159] Additionally, regarding investment selection in retirement plans, the Supreme Court has utilized trust law to decide that ERISA fiduciaries have an ongoing responsibility to monitor investments in the benefit plan even after the initial security selection.[160] Boeing appeared

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155 Hughes v. Nw. Univ., 142 S. Ct. 737, 742 (2022).

156 29 U.S.C. § 1001(a).

157 *See* Burke v. Boeing Co., 500 F. Supp. 3d 717, 725 (N.D. Ill. 2020).

158 A § 3(21) investment fiduciary is anyone who "renders investment advice for a fee or other compensation" but does not have any discretionary control over the plan assets, thus leaving the plan sponsor with some fiduciary liabilities. 29 U.S.C. § 1002(21)(A). A § 3(38) investment fiduciary has full "power to manage, acquire, or dispose of any asset of a plan," and this may absolve plan sponsors of fiduciary liability. *Id.* § 1002(38)(A); Mark J. Grushkin, *Understanding Your Fiduciary Liability: 3(21) vs. 3(38) Services*, Morgan Stanley 4 (May 2019), https://graystone.morganstanley.com/graystone-consulting-portland-or/documents/field/g/gr/graystone-consulting—-portland—or/understanding-fiduciary-liability-3-21-v-3-38.pdf [https://perma.cc/8DP8-T9VA].

159 Grushkin, *supra* note 158, at 1.

160 "We have often noted that an ERISA fiduciary's duty is 'derived from the common law of trusts.'" Tibble v. Edison Int'l, 575 U.S. 523, 528 (2015) (quoting Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985)).

to have taken the Section 3(38) investment approach when it assigned Evercore the "exclusive fiduciary authority and responsibility, in its sole discretion, to determine whether the continuing investment in the [Boeing stock was] prudent under ERISA."[161]

Many consultants and advisors advocate for Section 3(38) fiduciary liability relief as a way to reduce legal action against investment committees that may not be as financially savvy as other sophisticated companies.[162] However, electing to have a Section 3(38) investment fiduciary should not absolve employers of the ongoing duty to appoint and monitor the investment managers.[163] The Section 3(38) fiduciary only accepts liability for the fiduciary decisions regarding investments, but they must be adequately informed of employer stock price risks, particularly when the initial employer stock option choice originated from an informed executive board.[164]

Indeed, this presents a much stickier situation for harmed plaintiffs to plead around. But fiduciaries should not be absolved from responsibility in respect to offering employer stock simply because they pass the buck on their investment responsibilities to a third party. Courts typically find that when an investment manager is appointed, usually in a Section 3(38) aspect, this removes any discretionary control of plan assets from the plan sponsor, and, thus, the plan sponsor is not a fiduciary—neither in a named or functional aspect.[165] One federal court held that " 'nothing in ERISA itself or in traditional principles of

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161 *Burke*, 500 F. Supp. 3d at 725.

162 *See, e.g.*, Grushkin, *supra* note 158, at 7; *cf.* David Griffin, *3(16), 3(21) and 3(38) Fiduciaries: What's the Difference?*, LINKEDIN (June 13, 2019), https://www.linkedin.com/pulse/316-321-338-fiduciaries-whats-difference-david-griffin-aif-c-k-p-/ [https://perma.cc/84MT-KBWM] ("Unlike a 3(21), a 3(38) bears the investment risk. Therefore, this arrangement alleviates much of your liability pertaining to the plan's investments.").

163 *Compare* 29 U.S.C. § 1102(c)(3) (noting that any employee benefit plan may provide for a named fiduciary who may, in turn, appoint an investment manager), *with* Griffin, *supra* note 162 (noting the employer's liability is narrowed to the selection and monitoring of the fiduciary).

164 *See, e.g.*, *In re* SunTrust Banks, Inc. ERISA Litig., 749 F. Supp. 2d 1365, 1379–80 (N.D. Ga. 2010).

165 *See generally, e.g.*, *In re* BP p.l.c. Sec. Litig., No. 4:10-CV-4214, 2015 WL 6674576, at *4–5 (S.D. Tex. Oct. 30, 2015).

trust law' imposes . . . a duty [to keep appointees apprised of material, nonpublic information]."[166]

Plaintiffs have attempted to get around the obstacle of plan sponsors delegating their authority to independent third-party fiduciaries by "alleging novel duty-to-monitor claims."[167] Remy Grosbard points out in her Note that one court has found that "[t]he duty to keep appointees informed has gained reasonably wide acceptance as an inherent facet of the more general 'duty to monitor.'"[168] The Supreme Court strengthened the duty to monitor to an ongoing duty to monitor investment selection in *Tibble v. Edison International*.[169] This conflict between courts shows the differences in how far a duty to inform will go and is likely to persist until further judicial or congressional intervention.

It appears to be contrary to the stated purpose of Congress in promulgating ERISA—to promote the stability of employment and provide for the general welfare[170]—that companies could (1) know or should know the company is committing safety violations; (2) know that due to these issues, the company stock is overvalued; (3) continue to promote that stock as a prudent investment option to employees; (4) fail to provide any disclosure about the danger to the public; (5) cause harm to the public and have a stock decline; and (6) fail to face any repercussions as a prudent monitor of their investment appointees.[171] This approach puts employees at a disadvantage when they are more likely (due to limited investment options in benefit plans)[172] or required (as in some ESOPs)[173] to invest in employer stock.

The initial decision to offer company stock starts with the employer, and indeed in the *Burke* case, the executive team cannot

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166 *Id.* at *9 (quoting *In re* Lehman Bros. Sec. & ERISA Litig., 113 F. Supp. 3d 745, 765 (S.D.N.Y. 2015)); *see* 29 C.F.R. § 2509.75–8 (outlining the ongoing fiduciary duties of a fiduciary who has appointed trustees or other fiduciaries).

167 Grosbard, *supra* note 75, at 102.

168 *Id.* at 103 (quoting Woods. v. S. Co., 396 F. Supp. 2d 1351, 1373 (N.D. Ga. 2005)).

169 575 U.S. 523, 530 (2015).

170 *See* 29 U.S.C. § 1001(a).

171 *See, e.g.*, Burke v. Boeing Co., 500 F. Supp. 3d 717 (N.D. Ill. 2020).

172 *E.g.*, Kailey Hagen, *Can You Invest Your 401(k) in Individual Stocks?*, THE MOTLEY FOOL (May 17, 2019, 5:48 PM), https://www.fool.com/retirement/2019/05/17/can-you-invest-your-401k-in-individual-stocks.aspx [https://perma.cc/882J-8W4A].

173 *E.g.*, *Are ESOP Accounts Required to Be Fully Invested in Company Stock?*, SES ESOP STRATEGIES, https://sesesop.com/esop-accounts-required-fully-invested-company-stock/ [https://perma.cc/2AGE-QF3A].

"pass the buck" by appointing a Section 3(38) advisor when its team made the original decision to include employer stock. Many advisors proclaim that single name stocks are a particularly risky investment unsuited for retirement plans,[174] and informed executives typically participate in decisions to include company stock.[175] As noted, Congress has explicitly stated that it wants to promote employee ownership of employer stock,[176] but this only relieves fiduciaries of the duty to diversify. And this policy initiative surely cannot override the public's interest in safety.

In essence, if an employer knows that it is committing egregious violations that could result in deaths of citizens, impending lawsuits, and numerous civil settlements or criminal sanctions,[177] no prudent employer could decide that taking alternative actions such as corrective disclosure would do more harm than good to firm value. Tort litigation in certain areas is certainly a high risk to investors and a high risk to employer stock value, along with other U.S. Security and Exchange Commission Rule 10b-5 damages.[178] Congressional intent to increase stock ownership must be balanced with its desire to secure retirement income and stability for employees. It is absurd to absolve employers of their duty to monitor their appointed investment advisors when they know a stock choice is inherently overvalued and runs serious risks to public safety—and therefore risks massive declines in the wealth of its employees. Employers have a continuing duty to monitor and ensure their

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174 *See, e.g.*, Dennis Hartman, *Can I Choose Individual Stocks in My 401(k)?*, ZACKS, https://finance.zacks.com/can-choose-individual-stocks-401k-1308.html [https://perma.cc/25AF-4TKF] (Jan. 28, 2019).

175 *See, e.g.*, SAM ASPINWALL, EXECUTIVE CONSULTING OF RAYMOND JAMES, CONCENTRATIONS IN EMPLOYER STOCK 2, https://www.raymondjames.com/-/media/rj/advisor-sites/sites/e/x/executiveconsulting/files/concentrated_equity_discussion_paper_ecofrj.pdf [https://perma.cc/CJL3-YC8C] ("Often times, a corporate executive's financial well-being is tied to their employer. This link is typically best seen through a concentration in employer stock. . . Executives need to thoroughly understand this risk and incorporate their employer concentration into their broader, long-term financial plan.").

176 Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 420 (2014).

177 *See, e.g.*, David Schaper, *Boeing to Pay $2.5 Billion Settlement Over Deadly 737 Max Crashes*, NPR (Jan. 8, 2021, 5:00 AM), https://www.npr.org/2021/01/08/954782512/boeing-to-pay-2-5-billion-settlement-over-deadly-737-max-crashes [https://perma.cc/R56C-LBF9].

178 *See, e.g.*, Baruch Lev & Meiring de Villiers, *Stock Price Crashes and 10b-5 Damages: A Legal, Economic, and Policy Analysis*, 47 STAN. L. REV. 7, 8 (1994).

investment advisors are informed of material information that could affect their investment decisions.[179]

In *Burke*, Boeing appointed the third-party investment fiduciary was on August 9, 2017.[180] But Boeing has offered employer stock since at least 1996,[181] and designing a plane takes years.[182] Boeing was alleged to have been on notice of 737 MAX issues since at least 2009[183] and had performed flights of the 737 MAX since January 2016.[184] This demonstrates that Boeing should have been aware that its defective design would adversely affect stock price before a third-party investment fiduciary appointment. Under the continuing duty to monitor investments,[185] courts should look to the context of the investment decisions made and reconcile whether the continual duty to monitor ends *at the very moment* a third-party investment fiduciary is appointed. Because the context here differs from other stock drop cases, so too should the duty to monitor investment fiduciaries for entities involving public safety.

Courts have been split on how to treat this duty to inform (or "monitor") appointed fiduciaries. Some have found that employers can be liable when they "issue false and misleading statements regarding [product] safety, efficacy, and profitability, in order to artificially inflate the value of [the Company's] stock."[186] Other courts have been more hesitant "to unequivocally endorse the duty to inform [but] have found it inappropriate to dismiss such a claim on a Rule 12(b)(6) motion."[187] And finally, some courts have completely found that "ERISA does not impose a duty on appointing fiduciaries to keep their appoin-

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179 *See* Tibble v. Edison Int'l, 575 U.S. 523, 530 (2015).

180 Burke v. Boeing Co., 500 F. Supp. 3d 717, 724 (N.D. Ill. 2020).

181 *Boeing Setting Up Employee Stock Fund*, L.A. TIMES (July 12, 1996, 12:00 AM), https://www.latimes.com/archives/la-xpm-1996-07-12-fi-23307-story.html [https://perma.cc/58E4-EQ55].

182 Yuvraj Domun, *Aircraft Design Process Overview*, ENGINEERING CLICKS (Nov. 24, 2016), https://www.engineeringclicks.com/aircraft-design-process/ [https://perma.cc/GZN5-55EL].

183 *See* Second Amended Class Action Complaint, *supra* note 23, at 15.

184 *See id.* at 19.

185 *See* Tibble v. Edison Int'l, 575 U.S. 523, 529 (2015).

186 *In re* Pfizer Inc. ERISA Litig., No. 04 Civ. 10071, 2009 WL 749545, at *9 (S.D.N.Y. Mar. 20, 2009).

187 Woods v. S. Co., 396 F. Supp. 2d 1351, 1374 (N.D. Ga. 2005) (noting that other courts have found that some duty to monitor exists but will not decide how far the duty extends without a developed factual record).

tees apprised of nonpublic information."[188] The Supreme Court should intervene to define this duty to monitor clearly. In doing so, it should require courts to look at the underlying harm alleged and the effects on the broader community that a prudent fiduciary would have been confronted with.

At the very least, employers who affect public safety, like those in *Murray* and *Burke*, should be required to make corrective disclosures to ensure their duty of prudence is being met. The presence of this factor must be considered and pleaded during an alternative action claim so long as the employer is not violating securities laws.[189] Employers who deal in public goods and services should be held to this higher standard of duty to inform as a matter of public policy.

C. Fiduciary Protections Available to Plan Providers

One wrinkle in the analysis is time—or how long employers should be allowed to wait before making disclosures once they find their good or service threatens public safety. The critical issue is determining *when* an entity should be required to make disclosures or restrict stock purchases in employer benefit plans during the investigation. The answer is a bit unclear and needs to be addressed by professional standards of conduct. Boeing currently outlines its safety standards and processes, which the Federal Aviation Administration regulates.[190] This is similar to the case in *Murray*, where the FDA set safety standards of conduct through its regulation of medical devices.[191] These decisions on timing should be reviewed by professional standards and how reasonable it was for the company to conclude it was prudent not to make disclosures.

In *Burke*, numerous engineers had significant safety concerns even before the launch of the 737 MAX line.[192] While courts have rejected the economic theory that a delayed report causes more monetary damages,[193] the impact of hazards to public

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188 *In re* Lehman Bros. Sec. & ERISA Litig., 113 F. Supp. 3d 745, 765 (S.D.N.Y. 2015).

189 Grosbard focuses on when the duty to inform complies with existing disclosure rules in securities laws and advises courts to refrain from making a "per se rule against the duty to inform." Grosbard, *supra* note 75, at 113–14.

190 *See FAA Updates on Boeing 737 MAX: FAA Statement on Updates to the FSB Report and MMEL*, Fed. Aviation Admin. (Jan. 25, 2021), https://www.faa.gov/news/updates/?newsId=93206 [https://perma.cc/GG84-VHWJ].

191 Murray v. Invacare Corp., 125 F. Supp. 3d 660, 663–64 (N.D. Ohio 2015).

192 *See supra* note 34 and accompanying text.

193 *E.g.*, Loeza v. John Does 1–10, 659 F. App'x 44, 45–46 (2d Cir. 2016).

health is unique and should be reviewed at a level of how egregious the violation was and how reasonable it was to conceal.

Courts should conduct the alternative action requirement under *Dudenhoeffer* through this lens, holding the employer to prudence specific to the underlying context and not applying the same analysis to every employer in every industry. Regardless of the presence of an appointed investment fiduciary, employers have a duty to ensure that their investments are prudent, and they must monitor their actions when appointing and keeping these fiduciaries informed. Employers should be required to make corrective disclosures in special circumstances when there are clear health and safety implications for the public at large.

Employers may be concerned about meeting this standard, such as how much and when to disclose or inform. However, executives should understand the intricacies of their businesses and be informed by their technical knowledge of the entity's operations, including safety risks and their impacts on the overall business. In some jurisdictions and contexts, courts "recognize[ ] that the nature and extent of reasonable care depend[s] upon the type of corporation, its size and financial resources."[194] District courts analyzing stock drop cases should employ this similar requirement when looking at the prudence of an employer's actions when that employer fails to take any action and causes stock price harm.

This standard would apply differently to various industries and review how executives of entities convey information to the public. By tying this standard in with a duty to inform, employers would have adequate notice that they must inform their appointed fiduciaries of major health risks and be required to protect their employees from taking the brunt of their questionable management decisions. Because of the risks to public health, limited investments in retirement plans, and the purposes outlined in ERISA,[195] employees of airlines and other manufacturing industries should have more protections when they allege severe negligence by their employers.

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194 Francis v. United Jersey Bank, 432 A.2d 814, 821–22 (N.J. 1981) (referring to the requirement of being knowledgeable of firm financial statements as a member of the Board).

195 *See* 29 U.S.C. § 1001(a).

V. CONCLUSION

Ultimately, courts should consider more factors in their alternative action analysis under the *Dudenhoeffer* standard. Where the potential harm is more unclear—as in cases regarding accounting fraud, risky investing, or uncertain improper activities—plaintiffs must carefully craft their pleadings to make a plausible claim that a prudent fiduciary would find restricting stock purchases or making a corrective disclosure would not do more harm than good. However, certain industries, like aviation, demand a different, context-specific *Dudenhoeffer* lens because public safety is a major factor, and both public interest in health and congressional interests in employee stability should tip the scales in favor of plaintiffs who can show that the employer knew or should have known about potential hazards to public well-being. When these perils are present, it becomes more difficult for defendants to assert that it would have "done more harm than good" to long-term stock value not to issue corrective disclosures or recall their defective products.

Employers could continue to be more proactive in monitoring discretionary investment advisors and decisions to include company stock. By no means is this Comment meant to discourage companies from offering employee stock—it should be construed as cautious advice to those industries that are more deeply entrenched in the public realm and who are negligent in their approaches to correcting issues harming their employees' long-term retirement stability. Based on *Dudenhoeffer*, courts should not create blanket rules for all industries, as a duty to disclose or inform appointed investment managers is in the public interest. ERISA protects employees when their employers act imprudently. As average Americans are now falling severely short of retirement security,[196] it is imperative to ensure some employees who have invested in employer stock are not being left without retirement savings.

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196 *Retirement Throughout the Ages: Expectations and Preparations of American Workers*, TRANSAMERICA CTR. FOR RET. STUD. 46 (May 2015), https://www.transamericacenter.org/docs/default-source/resources/center-research/16th-annual/tcrs2015_sr_retirement_throughout_the_ages.pdf [https://perma.cc/Z6WJ-VK9W] (noting that only nineteen percent of those surveyed in their sixties or older were "very confident" they would be able to fully retire with a comfortable lifestyle).