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A Catalyst for Change: *Tatum v. RJR Pension Inv. Committee*, ERISA, and the Absence of a Uniform Loss Causation Standard

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In its August 4, 2014 decision in *Tatum v. RJR Pension Inv. Committee*, the Federal Court of Appeals for the Fourth Circuit, by a two-to-one majority, issued two rulings significantly impacting ERISA litigation in its jurisdiction.[1] First, the *Tatum* Court ruled that a breach of the duty of procedural prudence imposed on retirement account fiduciaries by the Employee Retirement Income Security Act of 1974 ("ERISA") shifts the burden of production from the plaintiff to the defendant fiduciary to show that the imprudent behavior did not cause loss to the retirement plan in question.[2] Second, the *Tatum* Court ruled that the standard for evaluating whether the fiduciary's breach of prudence caused loss to the plan is whether a reasonably prudent fiduciary *would* have made the same decision.[3] At the time, the United States Supreme Court had yet to weigh-in on either issue, making *Tatum* a prime catalyst for uniformity in an area of ERISA law either devoid of helpful precedent or marked by disagreement among the federal circuit courts of appeals.[4] While the Supreme Court denied *certiorari* to RJR Pension Inv. Committee on June 29, 2015,[5] several substantive problems with the *Tatum* rules suggest that the issues addressed by the *Tatum* Court are anything but conclusively resolved and could see intervention by the Supreme Court in a future case.[6]

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1. *See generally* Tatum v. RJR Pension Inv. Comm., 761 F.3d 346 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015) (mem.).
2. *Id.* at 363.
3. *Id.* at 365.
4. *See infra* Part III.
5. *See* RJR Pension Inv. Comm. v. Tatum, 135 S. Ct. 2887 (2015) (mem.).
6. *See infra* Part IV.

This note will present the relevant facts of the *Tatum* case,[7] and then summarize the state of the law impacting the Fourth Circuit Court of Appeals at the time of its decision.[8] After explaining the reasoning of the Court in assigning the burden of proving loss causation to defendant fiduciaries and adopting a "would have" standard for evaluating loss causation,[9] this note will elaborate on a couple of significant problems that suggest the *Tatum* rules could be subject to change in the future.[10] First, despite having no Fourth Circuit precedent guiding the decision,[11] the *Tatum* Court required the defendant to bear the burden of proof as to loss causation even though ERISA does not suggest departing from the default rule that this burden rests with the plaintiff.[12] Second, the Supreme Court's ruling in *Fifth Third Bancorp v. Dudenhoeffer* that fiduciaries are not required to out-guess the market suggests that the Court would not support the *Tatum* Court's "would have" standard for evaluating loss causation.[13]

I. The Case

On February 25, 2013, the Federal District Court for the Middle District of North Carolina held that retirement plan fiduciaries at R.J. Reynolds Tobacco Company ("RJR") breached their duty of procedural prudence under ERISA by selling Nabisco stock from the RJR Tobacco Capital Investment Plan ("the Plan") without undertaking a proper investigation.[14] However, the District Court also found that RJR was not liable to Plan participants because a reasonable and prudent fiduciary could have made the same investment decision, even after a proper investigation.[15]

The District Court's decision came 11 years after Mr. Tatum filed a certified class action on behalf of all participants in the Plan whose individual retirement accounts included Nabisco Group Holdings ("NGH") common stock and/or Nabisco ("NA") common stock any time between June 14, 1999 and January 31, 2000.[16] The presence of the two types of Nabisco stock in the Plan became an issue after 1999,

7. *See infra* Part I.
8. *See infra* Part II.
9. *See infra* Part III.
10. *See infra* Part IV.
11. *See* Plasterers' Local Union No. 96 Pension Plan v. Pepper, 663 F.3d 210, 218 (4th Cir. 2011) (finding that "while a failure to investigate is a breach of ERISA fiduciary duty under § 1104(a)(1)(B), causation of loss is not an axiomatic conclusion that flows from a breach of that duty," but not adopting a standard by which to evaluate causation); *id.* at 220 (declining to determine whether burden of proving causation falls on the plaintiff or defendant fiduciary).
12. *See infra* Part IV.A.
13. 134 S. Ct. 2459, 2471 (2014). *See infra* Part IV.B.
14. Tatum v. R.J. Reynolds Tobacco Co., 926 F. Supp. 2d 648, 651 (M.D.N.C. 2013), *aff'd in part, vacated in part, rev'd in part sub nom.* Tatum v. RJR Pension Inv. Comm., 761 F.3d 346 (4th Cir. 2014).
15. *Id.*
16. *Id.*

when RJR Nabisco's tobacco products subsidiary, RJR Tobacco, spun-off from its food products subsidiary, Nabisco.[17]

Corresponding to the spin-off, the original RJR Nabisco retirement plan was divided into separate plans for the respective employees of Nabisco and RJR Tobacco.[18] Consequently, plan participants who had previously invested in the RJR Nabisco Holdings stock now held both NGH and RJR Tobacco Holdings stock.[19] The RJR Tobacco Plan, which was the subject of contention in the District Court case, opened on June 14, 1999, and was intended as a long-term retirement savings plan including capital appreciation and dividend income.[20]

Once the spin-off was announced in March 2014, various employees—mostly from the human resources departments of RJR Nabisco Holdings and its two subsidiaries—held a series of meetings to determine, among other things, the future of the divided retirement plans.[21] These working groups did not have authority under the original RJR Nabisco Plan documents nor the later, separate Nabisco and RJR Tobacco Plan documents to make decisions about any of the three plans.[22] Concerned with the high risk of having single, non-employer Nabisco stock in the RJR Tobacco Plan, and believing that such stock would violate ERISA's diversification requirement,[23] the working group decided to freeze all Nabisco stock in the RJR Tobacco accounts at the time of the spin-off.[24] The working group also decided that the two Nabisco funds would be entirely eliminated six months after the spin-off, with an opportunity for participants to exit the two Nabisco funds any time before then.[25] The RJR Tobacco Employee Benefits Commission ("EBC") allegedly concurred with the decisions of the working group, but RJR did not provide evidence of a vote by the EBC in court.[26]

Plan documents for the new R.J. Reynolds Tobacco Company Capital Investment Plan froze Nabisco funds by amendment,[27] and the planned divestment of the Nabisco funds was promulgated to Plan participants through an official letter.[28] The working group that met in October 1999 to discuss the logistics of the divestment ultimately decided that the divestment must go forward because many

17. *Id.*

18. *Id.* at 653.

19. *Id.*

20. *Id.*

21. *See id.* at 655.

22. *Id.*

23. *See* 29 U.S.C. § 1104(a)(1)(C) (2012) (requiring fiduciaries to discharge duties by "diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so").

24. *See Tatum*, 926 F. Supp. 2d at 656.

25. *Id.*

26. *Id.* at 657.

27. *Id.* at 657–58.

28. *See id.* at 657.

participants had already transferred out of the Nabisco funds at a loss based on the earlier Plan communications.[29] The working group also expressed concern that unfreezing the funds and not divesting as planned would appear to participants as encouragement to invest in the Nabisco funds, which were still falling in value at the time.[30] Group members worried that the Nabisco funds would never rebound, which also motivated divestment.[31] The fourth quarter report from 1999, issued just prior to the rescheduled January 2000 divestment date, showed quarterly losses of 7.7 percent for NA stock and losses of 27.3 percent for NGH stock.[32] Analysts were generally divided as to whether Nabisco stocks would continue to fall, hold constant, or eventually gain.[33] Since the June 1999 spin-off, NGH stock had fallen 60 percent and NA stock had fallen 28 percent.[34] Only two months later, a round of competitive bidding instigated by an unsolicited offer resulted in an infusion of $11 billion in liquid funds.[35] When that transaction closed on December 11, 2000, NGH stock had increased 247 percent and NA stock had increased 82 percent on their January 31, 2000 share prices.[36]

On January 27, 2000, just before divestment, Mr. Tatum emailed fiduciaries requesting cancellation of the proposed sale because he stood to lose 60 percent of his 401k account.[37] In a follow-up meeting, the same fiduciaries relayed that nobody could stop the divestment.[38] After several further communications, Mr. Tatum claimed on May 1, 2001 that he should receive $30 for each NGH share instead of the $8 to $9 he received after the January 31, 2000 divestment.[39] RJR denied the claim, citing that Mr. Tatum had the opportunity to individually sell the NGH funds any time before the divestment.[40]

With no relief coming from RJR, Mr. Tatum filed suit, claiming RJR breached its fiduciary duties under ERISA by failing to conduct a proper investigation before divesting the Plan of the Nabisco funds.[41] While the District Court found that RJR had acted imprudently, the Court also found that RJR's procedural imprudence did not cause loss to the Plan, thereby exempting RJR from liability.[42] Mr. Tatum

29. *See id.* at 661.
30. *Id.*
31. *Id.* at 662.
32. *Id.* at 665.
33. *See id.* at 662–63.
34. *Id.* at 666.
35. *See id.*
36. *Id.*
37. *Id.* at 667.
38. *Id.*
39. *Id.* at 668.
40. *See id.*
41. *See id.* at 669.
42. *See id.*

subsequently appealed the District Court's decision to the Fourth Circuit Court of Appeals.[43]

II. Legal Background

Though in several earlier cases the Fourth Circuit had addressed whether an ERISA fiduciary had breached the duty of procedural prudence, the issue of loss causation had not factored into any of those decisions.[44] The issues of assigning the burden of proof as to loss causation and evaluating whether procedural imprudence caused plan losses were both novel to the Fourth Circuit. Previously, the Fourth Circuit had only gone so far as to recognize that loss causation could prove a critical issue in future ERISA cases.[45] Moreover, the United States Supreme Court had only indirectly addressed the issue of loss causation in ERISA litigation, and that occurred in a decision preceding *Tatum* by only several months.[46] Thus, *Tatum* presented the Fourth Circuit Court of Appeals an opportunity to pick a side in the circuit split developing over the loss causation issue.[47]

A. ERISA's Duty of Procedural Prudence in the Fourth Circuit

In the 2007 *DiFelice v. U.S. Airways* case, the Fourth Circuit found that U.S. Airways had exercised prudence in managing employee retirement funds even after Chapter 11 Bankruptcy had eliminated all U.S. Airways stock from the funds without any distribution of money to plan participants.[48] To reach this decision, the Fourth Circuit grappled with the issue of outlining the duty of procedural prudence in ERISA litigation.[49] Looking to the ERISA statute, the *DiFelice* Court recognized the "requirement that fiduciaries act '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.'"[50] To determine whether a fiduciary has violated this duty, the Fourth Circuit found it must "examine the totality of the circumstances," including "plan structure and aims, the disclosures made to participants regarding the general and specific risks associated with investment in company stock, and the nature and extent of challenges facing the company that would have an effect on

43. Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 351 (4th Cir. 2014).

44. *See infra* Part II.A.

45. *See infra* Part II.B.

46. *See infra* Part II.C.

47. *See infra* Part II.D.

48. *See* DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 413–14 (4th Cir. 2007).

49. *Id.* at 419 (Appellant's employees contended that "the company's economic peril rendered its decision to offer the Company Fund to Plan participants a violation of its fiduciary duties to select and hold prudent investments and to monitor those investments prudently.").

50. *Id.* at 422–23 (quoting 29 U.S.C. § 1104(a)(1)(B) (2012)).

stock price and viability."[51] A court must also determine whether the trustee engaged in a transaction only after employing "appropriate methods to investigate the merits of the investment and to structure the investment."[52]

Though the *DiFelice* Court determined procedural prudence by considering the totality of the circumstances,[53] the Fourth Circuit has also recognized several actions that strongly indicate prudent decision-making by plan fiduciaries. The *DiFelice* Court found evidence of procedural prudence where the defendant fiduciary appointed an independent fiduciary to monitor company stock during a turbulent period.[54] Though not specifically required by ERISA, the Fourth Circuit also found, in *Plasterers v. Pepper*, that a "generally recognized duty of a Plan fiduciary under subsection (B) includes that of investigating and reviewing investment options for an ERISA plan's assets."[55]

Though a fiduciary's adherence to its duty of procedural prudence may be determined by considering its actions and the relevant circumstances, the Fourth Circuit carefully noted in *DiFelice* that the prudence of a fiduciary's actions cannot be measured by hindsight, "whether this hindsight would accrue to the fiduciary's detriment or benefit."[56] Consequently, "the prudent person standard is not concerned with results," but tests the fiduciary's actions in light of the circumstances at the time of the challenged decision.[57] Because the end result is irrelevant in finding a decision imprudent, a loss of monetary value in a fund is "neither necessary, nor sufficient, to demonstrate a violation of a fiduciary's ERISA duties."[58] The *DiFelice* Court followed this reasoning in holding that employees could not demonstrate an imprudent decision simply by showing that U.S. Airways continued to offer stock during a shaky season for the company that ultimately led to bankruptcy, regardless of the extent of employees' financial losses.[59] Several years later in *Plasterers*, the Fourth Circuit required that "the courts measure section 1104(a)(1)(B)'s 'prudence' requirement according to an objective standard, focusing on a fiduciary's conduct in arriving at an investment decision, not on its results, and asking whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment."[60] Thus, the Fourth

51. *DiFelice*, 497 F.3d at 418.

52. *Id.* at 420 (quoting Flanigan v. Gen. Elec. Co., 242 F.3d 78, 86 (2d Cir. 2001)).

53. *See DiFelice*, 497 F.3d at 418.

54. *See id.* at 421.

55. Plasterers' Local Union No. 96 Pension Plan v. Pepper, 663 F.3d 210, 216 (4th Cir. 2011).

56. *DiFelice*, 497 F.3d at 424.

57. *Id.* (alteration omitted) (quoting Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 917–18 (8th Cir.1994)).

58. *DiFelice*, 497 F.3d at 424.

59. *Id.* at 425.

60. *Plasterers*, 663 F.3d at 216 (alteration omitted) (quoting *In re* Unisys Sav. Plan Litig., 74 F.3d 420, 434 (3d Cir. 1996)).

Circuit cemented its method for evaluating procedural prudence, but had yet to address the method for evaluating loss resulting from procedural imprudence.

B. The Fourth Circuit's Cognizance of the Loss Causation Issue

Though the Fourth Circuit gave ample consideration to which actions satisfy the duties of procedural prudence when it decided cases like *DiFelice*, it did not recognize causation as part of the equation until the 2011 *Plasterers* decision.[61] In *Plasterers*, the Fourth Circuit identified the "noticeable gap" between finding a failure to investigate and/or diversify, and concluding that a trustee is therefore "liable in damages for the difference between the Plan's actual and hypothetical investment values."[62] Ruling that "simply finding a failure to investigate or diversify does not automatically equate to causation of loss and therefore liability," the Fourth Circuit determined that the lower court in *Plasterers* failed in not considering whether the breaches of fiduciary duty actually caused loss to the plan in question.[63]

By looking to the statute, the *Plasterers* Court concluded that loss causation must form part of any claim for damages under ERISA.[64] Section 1109(a) dictates that "a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach."[65] The Court emphasized the language of "resulting from each such breach," as evidence that courts must consider whether a breach actually caused any losses alleged.[66] Affirming that an absence of procedural prudence does not necessarily equate to causation of loss, the *Plasterers* Court agreed with the Eighth Circuit's *Roth v. Sawyer-Cleator Lumber Co.* ruling that a trustee who makes an investment decision without an investigation is "insulated from liability [under § 1109(a)] if a hypothetical prudent fiduciary would have made the same decision anyway."[67]

Though *Plasterers* introduced the standard for evaluating causation which would ultimately be at issue in *Tatum*,[68] the Court specifically declined to rule on which

61. *See Plasterers*, 663 F.3d at 215–16 (trustees arguing that the district court wrongly found them liable for breach of fiduciary duty because the court failed to determine the trustees had made objectively imprudent investments).

62. *Id.* at 217.

63. *Id.*

64. *See id.* ("Thus, while certain conduct may be a breach of an ERISA fiduciary's duties under § 1104, that fiduciary can only be held liable upon a finding that the breach actually caused a loss to the plan.").

65. 29 U.S.C. § 1109 (2012).

66. *Plasterers*, 663 F.3d at 217 (quoting 29 U.S.C. § 1109 (2012)).

67. *Plasterers*, 663 F.3d at 218 (alteration in original) (quoting Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 919 (8th Cir.1994)).

68. *Compare* Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 356–57 (4th Cir. 2014) ("When the fiduciary's conduct fails to meet this standard, and the plaintiff has made a prima facie case of loss, we next inquire whether the fiduciary's imprudent conduct caused the loss. For '[e]ven if a trustee failed to conduct an

party should bear the burden of proving causation.[69] Otherwise, in the *Brink v. DaLesio* decision, the Fourth Circuit placed the burden of proof on the violator of a fiduciary duty, but not in the specific context of an ERISA suit.[70] This served as the *Tatum* Court's most relevant precedent on the issue.

C. The United States Supreme Court Considers Loss Causation

Two months prior to the *Tatum* decision, the Supreme Court issued its opinion in *Fifth Third Bancorp v. Dudenhoeffer*, in which it held that a fiduciary of an employee stock ownership plan ("ESOP") is governed by the same duty of prudence required of all other ERISA fiduciaries.[71] In discussing the duty of prudence, the Court came close to addressing the issue of loss causation in *Tatum*, offering some guidance applicable to the Fourth Circuit. Though it did not directly address the questions of who should bear the burden of persuasion for causation and which standard courts should use to evaluate loss causation, the Court did specify that the duty of prudence does not require an ERISA fiduciary to predict the future performance of a company's stock when making investment decisions.[72] Similar to the Fourth Circuit's ruling in *DiFelice*, the Court found that a "fiduciary's 'fail[ure] to outsmart a presumptively efficient market . . . is . . . not a sound basis for imposing liability.'"[73]

The Court particularly stressed the practical effects of judging the prudence of a fiduciary's decision by the outcome of any particular investment, noting that such a fiduciary "finds himself between a rock and a hard place: If he keeps investing and the stock goes down he may be sued for acting imprudently in violation of § 1104(a)(1)(B), but if he stops investing and the stock goes up he may be sued for disobeying the plan documents in violation of § 1104(a)(1)(D)."[74] Consequently, the Court directed that lower courts must consider several factors when interpreting an ERISA fiduciary's duties, including "'competing congressional purposes, such as

investigation before making a decision,' and a loss occurred, the trustee 'is insulated from liability . . . if a hypothetical prudent fiduciary would have made the same decision anyway.'" (quoting *Plasterers*, 663 F.3d at 218)), *with Tatum*, 761 F.3d at 374 (Wilkinson, J., dissenting) ("Nothing—no combination of phrases, words, or syllables—in Plasterers' amounts to an adoption of a 'would have' standard. The quotation the majority treats as a holding was used merely to demonstrate that 'causation of loss is not an axiomatic conclusion that flows from a breach' of a procedural duty." (quoting *Plasterers*, 663 F.3d at 218)).

69. *Plasterers*, 663 F.3d at 220 ("We express no opinion as to which approach is appropriate, and leave to the district court to consider the parties' arguments upon remand to determine the method most consistent with the relevant statutory provisions.").

70. Brink v. DaLesio, 667 F.2d 420, 426 (4th Cir. 1981), *opinion modified and superseded on denial of reh'g*, 81-1085, 1982 WL 913725 (4th Cir. 1982) ("It is generally recognized that one who acts in violation of his fiduciary duty bears the burden of showing that he acted fairly and reasonably.").

71. Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2463 (2014).

72. *Id.* at 2471–72 (citing Quan v. Computer Sciences Corp., 623 F.3d 870, 881 (9th Cir. 2010)).

73. *Dudenhoeffer*, 134 S. Ct. at 2472 (alteration in original) (quoting White v. Marshall & Ilsley Corp., 714 F.3d 980, 992 (7th Cir. 2013)).

74. *Dudenhoeffer*, 134 S. Ct. at 2470.

Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans.'"[75] While the *Dudenhoeffer* Court rejected the argument that fiduciaries should thus enjoy a presumption of prudence, it simultaneously rejected the notion that mere loss to an investment account indicates imprudence on the part of account fiduciaries.[76]

D. The Circuit Split over Assigning the Burden of Proving Loss Causation

In *Schaffer ex rel. Schaffer v. Weast*, the Supreme Court affirmed that, where the statute governing a particular question is silent, it is the "ordinary default rule that plaintiffs bear the risk of failing to prove their claims."[77] The Court further explained that it specifically applied the burden to the plaintiff in securities fraud cases, equal protection cases, and First Amendment case, among others.[78] Yet, the Court also noted that it had shifted the burden partially or entirely to the defendant in other cases.[79] However, ERISA litigation has not fallen into either category.

Lack of specific precedent from the highest court has resulted in varying rules among the circuit courts of appeals. The Fifth Circuit uses a three-step process in any suit for breach of ERISA duties, and in the final step, the "'burden of persuasion shifts to the fiduciary to prove that the loss was not caused by . . . the breach of duty.'"[80] In cases where a breach of fiduciary duty has been demonstrated, the Second and Sixth Circuits have shifted the burden to the defendant to prove that the breach did not cause loss.[81] On the other hand, the Second Circuit left the burden of proof on the plaintiff to show that loss resulted from an account manager's failure to make "reasonable efforts to remedy the trustees' breach" where the trustee allegedly embezzled funds,[82] and the Eleventh Circuit placed the burden of proof as to causation on the plaintiff where a primary fiduciary either participated in or failed to cure a breach of duty by a delegated fiduciary.[83] In *Tatum* then, the Fourth Circuit had no clear, consistent precedent from its sister circuits

75. *Id.* (citing Varity Corp. v. Howe, 516 U.S. 489, 497 (1996)).

76. *Dudenhoeffer*, 134 S. Ct. at 2470–71.

77. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 56 (2005).

78. *See id.* at 57.

79. *See id.* (citing FTC v. Morton Salt Co., 334 U.S. 37, 44–45 (1948) (placing burden of proof on a defendant seeking the benefit of a statutory exception); Alaska Dept. of Environmental Conservation v. EPA, 540 U.S. 461, 494 (2004) (assigning burdens of production and persuasion entirely to defendant where a plaintiff sued to challenge a federal agency's order)).

80. McDonald v. Provident Indem. Life Ins. Co., 60 F.3d 234, 237 (5th Cir. 1995) (quoting Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 917 (8th Cir. 1994)).

81. *See* N.Y. State Teamsters Council Health & Hosp. Fund v. Estate of DePerno, 18 F.3d 179, 183 (2d Cir. 1994); Sec'y of U.S. Dep't of Labor v. Gilley, 290 F.3d 827, 830 (6th Cir. 2002).

82. *See* Silverman v. Mut. Ben. Life Ins. Co., 138 F.3d 98, 104 (2d Cir. 1998).

83. *See* Willett v. Blue Cross & Blue Shield of Ala., 953 F.2d 1335, 1341, 1343 (11th Cir. 1992).

about how to determine whether the defendant fiduciary caused plan losses, requiring it to look to general trust law for guidance.[84]

III. The Court's Reasoning

In *Tatum v. RJR Pension Inv. Committee*, the Fourth Circuit Court of Appeals affirmed the District Court's holding that RJR breached its duty of procedural prudence, but vacated the judgment in favor of RJR and remanded the case after finding the District Court used the wrong standard to evaluate whether RJR's imprudent behavior caused loss to the Plan.[85] To reach this decision, the Fourth Circuit resolved two issues in Tatum's favor: first, "whether the fiduciary engaged in a reasoned decision[-]making process, consistent with that of a prudent man acting in [a] like capacity,"[86] and, second, "whether the fiduciary's imprudent conduct caused the loss."[87] Tatum had argued on appeal that the District Court used the wrong standard to find that RJR's breach of its duty of procedural prudence had not caused the loss.[88] RJR contended this point, and raised another issue by challenging the District Court's holding that the breaching fiduciary bears the burden of proving that its breach did not cause plan losses.[89]

The Fourth Circuit first considered the District Court's finding that RJR breached its duty of procedural prudence to plan participants.[90] Noting the extensive factual findings supporting the lower court's holding, the Fourth Circuit affirmed a breach had occurred.[91] In support, it noted the March 1999 working group's decision to remove the funds after failing to conduct any research or investigation into alternatives that might minimize the potential immediate loss to participants.[92] Similarly, the Court affirmed the District Court's condemnation of RJR's lack of research in setting the arbitrary six month timeline, thereby causing divestment of Nabisco stocks at their lowest value, even though the entire purpose of the spin-off was to "allow the Nabisco stock a chance to recover from the tobacco taint."[93] RJR's failure to conduct sufficient investigation was again highlighted by the October 1999 meeting, in which RJR executives focused solely on potential

84. *See* Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 363 (4th Cir. 2014) ("In sum, the long-recognized trust law principle—that once a fiduciary is shown to have breached his fiduciary duty and a loss is established, he bears the burden of proof on loss causation—applies here.").

85. *Id.* at 368, 372.

86. *Id.* at 356 (alteration in original).

87. *Id.* at 357.

88. *Id.* ("[Tatum] contends that the court incorrectly considered whether a reasonable fiduciary, after conducting a proper investigation, *could* have sold the Nabisco Funds at the same time and in the same manner, as opposed to whether a reasonable fiduciary *would* have done so.").

89. *Id.*

90. *See id.*

91. *See id.* at 358, 361.

92. *Id.* at 358.

93. *Id.* at 359.

liability without exploring alternatives to the divestment timeline or seeking outside counsel to analyze the merits of the divestment schedule.[94] Finally, the Circuit Court found that RJR should not have considered its potential liability to plan participants as a factor in deciding to divest the funds.[95]

The Fourth Circuit categorically rejected RJR's contention that it did not breach its duty, citing RJR's failure to "present evidence of '*any* process by which fiduciaries investigated, analyzed, or considered the circumstances regarding the Nabisco stocks and whether it was appropriate to divest.'"[96] RJR's argument that non-employer, single-stock funds are *per se* imprudent, and therefore require divestment, fared no better.[97] The Fourth Circuit ruled that no ERISA-governed investments are *per se* prudent or imprudent, but that a totality-of-the-circumstances inquiry must be employed to assess whether plan fiduciaries exercised prudence in making the investment decision.[98] Applying that standard, the Fourth Circuit asserted that RJR "blink[ed] at reality" in maintaining that it acted to protect participants and minimize loss when it set an arbitrary timeline for divestment without investigating prevailing circumstances, thereby ensuring immediate, permanent losses to plan beneficiaries.[99]

The *Tatum* Court next addressed which party in a breach of fiduciary duty action bears the burden of proof as to loss causation.[100] The Fourth Circuit noted its previous finding in *Plasterers v. Pepper* that such a breach does not "automatically equate to causation of loss and therefore liability,"[101] but also recognized that imprudent conduct will usually result in such a loss.[102] However, the *Plasterers* Court did not need to decide which party bore the burden of proof as to causation, making this an issue of first impression for the Fourth Circuit in the context of ERISA litigation.[103]

The *Tatum* Court began its analysis by recognizing the default rule that burden of proof rests with the plaintiff when a statute is silent.[104] To affirm the District Court's placement of the burden on RJR, the Fourth Circuit ruled that the law of trusts provides an exception to the default rule: "[W]hen a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss

94. *Id.*
95. *Id.* at 360.
96. *Id.* (quoting Tatum v. R.J. Reynolds Tobacco, 926 F. Supp. 2d 648, 681 (M.D.N.C. 2013).
97. *See Tatum*, 761 F.3d at 360.
98. *Id.*
99. *Id.* at 361.
100. *See id.*
101. *Id.* (quoting Plasterers' Local Union No. 96 Pension Plan v. Pepper, 663 F.3d 210, 217 (4th Cir. 2011)).
102. *Tatum*, 761 F.3d at 361 (citing *Plasterers*, 663 F.3d at 218).
103. *See Tatum*, 761 F.3d at 361.
104. *Id.* at 362.

would have occurred in the absence of the breach."[105] The Fourth Circuit found analogous support in its *Brink v. DaLesio* decision, where a district court mistakenly assigned to the plaintiff the burden of attributing damages to the defendant fiduciary's breach in a Labor-Management Reporting and Disclosure Act case.[106] The Court also cited *amicus* Secretary of Labor's argument that any other approach would unfairly advantage a defendant "who has already been shown to have engaged in wrongful conduct, minimizing the fiduciary provisions' deterrent effect."[107]

For a defendant to carry the burden of proving that its imprudent decision-making process did not cause loss, the *Tatum* Court ruled that the defendant must show that its ultimate decision was objectively prudent—meaning, the defendant must show, by a preponderance of the evidence, that a "hypothetical prudent fiduciary would have made the same decision anyway."[108] In other words, the Court found the "inquiry is whether the loss would have occurred regardless of the fiduciary's imprudence."[109] By such a showing, a fiduciary like RJR may escape liability even though it failed to conduct a proper investigation before making an investment decision.[110]

Based on this rule, the *Tatum* Court found that the District Court had used the wrong standard when it required RJR to prove that a "hypothetical prudent fiduciary *could* have decided to eliminate the Nabisco Funds,"[111] and ultimately held that a prudent investor could have inferred the sale was prudent because "evidence did not 'compel a decision to maintain the Nabisco Funds in the Plan.'"[112] Instead, the District Court should have considered whether the evidence proved, more likely than not, that a prudent fiduciary *would have* divested the Nabisco Funds in the same time period and manner as RJR.[113] Citing the Supreme Court, the Fourth Circuit found the distinction in language critical because "'could' describes what is merely possible, while 'would' describes what is probable."[114] While use of "would" involves prediction based on custom or common occurrence, the word "could" encompasses the most remote possibilities."[115]

RJR argued that even under the "would have" standard, it should escape liability because a prudent fiduciary would have eliminated the Nabisco Funds from the

105. *Id.* (quoting RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. f (2012)).
106. *Tatum*, 761 F.3d at 362–63.
107. *Id.* at 363.
108. *Id.* at 363–64.
109. *Id.* at 366.
110. *Id.* at 364.
111. *Id.* (quoting Tatum v. R.J. Reynolds Tobacco Co., 926 F. Supp. 2d 648, 690 (M.D.N.C. 2013)).
112. *Tatum*, 761 F.3d at 364 (quoting *Tatum*, 926 F. Supp. 2d at 686).
113. *See Tatum*, 761 F.3d at 364.
114. *Id.* at 365 (citing Knight v. Comm'r, 552 U.S. 181, 187–88 (2008)).
115. *Tatum*, 761 F.3d at 365.

plan due to their high-risk nature, thereby making application of the District Court's "could have" standard harmless.[116] Rejecting this argument, the *Tatum* Court found the risk of an investment insufficient to label it *per se* prudent or imprudent.[117] Instead, a court must consider the "character and aim of the particular plan and decision at issue and the circumstances prevailing at the time."[118] Under that standard, the Fourth Circuit found that RJR's failure to follow governing plan documents, as mandated by ERISA, would be more compelling in determining causation than the high-risk nature of the funds.[119] Thus, the District Court's application of the "could have" standard was not harmless, and the Fourth Circuit remanded the case to the District Court to determine whether RJR could present additional evidence to meet its burden of proof as to causation under the "would have" standard.[120]

In the lone dissenting opinion, Judge Wilkinson disagreed with the majority ruling on both issues: assigning burden of proof as to loss causation and the standard by which to assess loss causation.[121] First, Judge Wilkinson argued that, in *Plasterers*, the Fourth Circuit had already "noted that 'simply finding a failure to investigate or diversify does not automatically equate to causation of loss and therefore liability.'"[122] Further, he noted the *Plasterers* rule's conformity to ERISA itself, which requires that "the losses 'result from' the breach of fiduciary duty."[123] This and other language in ERISA, Judge Wilkinson argued, provides no indication that Congress intended to shift the burden of proof for loss causation to potential defendants.[124] Finally, he contended that the precedent relied upon by the majority to shift the burden could be distinguished as either cases of self-dealing or cases focusing on a different step of ERISA litigation, such as the extent of liability rather than the existence of loss causation.[125]

Second, Judge Wilkinson disagreed with the majority's decision to assess loss causation from ERISA investment decisions through the lens of what a reasonably prudent investor *would* have done.[126] He contended that the definition of the "would have" standard—whether or not a reasonably prudent fiduciary would, more likely than not, have made the safe decision[127]—inherently shifts the evaluative

116. *Id.* at 366.
117. *Id.* at 366–67.
118. *Id.* at 367 (quoting DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 420 (4th Cir. 2007)).
119. *See Tatum*, 761 F.3d at 367.
120. *Id.* at 368.
121. *See id.* at 372–73 (Wilkinson, J., dissenting).
122. *Id.* at 374 (quoting Plasterers' Local Union No. 96 Pension Plan v. Pepper, 663 F.3d 210, 217 (4th Cir. 2011)).
123. *Tatum*, 761 F.3d at 375 (alteration omitted) (citing 29 U.S.C. § 1109(a) (2012)).
124. *Tatum*, 761 F.3d at 375.
125. *Id.*
126. *Id.* at 377.
127. *Id.*

standard from objective prudence to relative prudence.[128] Judge Wilkinson assessed that such a standard unfairly requires a fiduciary to always make the "best possible decision,"[129] when meeting such a strict standard is not required by ERISA and when investing is "as much art as science" because there are always many investment options with many unknowable outcomes.[130]

IV. Analysis

RJR appealed the Fourth Circuit's decision to the United States Supreme Court, but the Supreme Court denied *certiorari* on June 29, 2015.[131] Because there is no indication that RJR refiled its petition, the Fourth Circuit's rulings in *Tatum* remain untouched, though future litigation may well threaten their longevity. This prediction rests on two observations: first, that requiring a defendant fiduciary to bear the burden of proof as to loss causation does not comport with the congressional intent of ERISA, as evidenced in the plain language of that statute; and, second, that the "would have" standard for assessing causation does not align with the Supreme Court's decision in *Dudenhoeffer*.

A. The Fourth Circuit's Burden Shifting Framework Regarding Loss Causation does not Comport with ERISA

Due to the circuit split over which party bears the burden of proof as to loss causation in ERISA litigation, a future Supreme Court decision on the issue would have wider impact than solely affirming or overruling the *Tatum* case.[132] Should the issue ever come before the Supreme Court, that Court will likely overrule *Tatum* because, based on both the Supreme Court and Fourth Circuit's default rules for assigning burden of proof regarding loss causation to plaintiffs,[133] and the statutory language of ERISA in 29 U.S.C. § 1109(a),[134] the *Tatum* Court should not have ruled that this burden of proof rests with the defendant fiduciary.

128. *Id.* at 378.

129. *Id.* (emphasis omitted).

130. *Id.* at 377–78.

131. *See* RJR Pension Inv. Comm. v. Tatum, 135 S. Ct. 2887 (2015) (mem.).

132. *See supra* notes 80–83 and accompanying text.

133. *See* Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 56–57 (2005); Weast v. Schaffer *ex rel.* Schaffer, 377 F.3d 449, 452 (4th Cir. 2004), *aff'd*, Schaffer *ex rel.* Schaffer v. Weast 546 U.S. 49 (2005) ("When a statute is silent, the burden of proof is normally allocated to the party initiating the proceeding and seeking relief.").

134. *See* 29 U.S.C. § 1109 (2012) ("(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter 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 as the court may deem appropriate, including removal of such fiduciary.").

As the *Tatum* Court recognized,[135] the default rule is that "plaintiffs bear the burden of persuasion regarding the essential aspects of their claims," and therefore "bear the risk of failing to prove their claims."[136] Though the Supreme Court noted the "ordinary default rule, of course, admits of exceptions,"[137] the *Tatum* Court erred when it found that the law of trusts provides one such exception for claims of breach of fiduciary duty under ERISA.[138] The Supreme Court found that the exceptions are "extremely rare," and that the general default rule will be applied absent a "reason to believe that Congress intended otherwise."[139] The Fourth Circuit provided no justification as to why Congress would intend the *Tatum* rule, cited from the Restatement (Third) of Trusts,[140] to provide an exception in this type of case.[141] Moreover, the Supreme Court's recognition that "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection,"[142] meant that the *Tatum* Court could not blindly assume, as it did, that the Restatement of Trusts should govern.

Looking to the language of 29 U.S.C. § 1109, which establishes the claim for liability, there is nothing to suggest that Congress intended for the defendant to bear the burden of proof as to causation. While the prerequisite of any § 1109 claim is breach of the "responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter," there is only liability for "losses to the plan *resulting* from each such breach."[143] Shifting the burden of causation to the defendant, therefore, not only violates the default rule that a plaintiff bear the burden of proving essential aspects of its claim,[144] but exempts the plaintiff from having to prove the only requirement for liability under the statute.

The *Tatum* rule, then, goes further than the *Plasterers* observation that "imprudent conduct will usually result in a loss."[145] The *Tatum* Court's rule as to the burden of proving loss causation grants a default victory to any plaintiff that can show imprudent conduct by a fiduciary, regardless of whether there is an

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135. *See Tatum*, 761 F.3d at 362 (majority opinion) ("Generally, of course, when a statute is silent, the default rule provides that the burden of proof rests with the plaintiff.").

136. *Schaffer*, 546 U.S. at 56–57.

137. *Id.* at 57.

138. *Tatum*, 761 F.3d at 362.

139. *Schaffer*, 546 U.S. at 57.

140. *See Tatum*, 761 F.3d at 362 (quoting Restatement (Third) of Trusts § 100 cmt. f (2012) ("[W]hen a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach.")).

141. *See Tatum*, 761 F.3d at 362 (claiming only that "one such exception arises under the common law of trusts").

142. *Id.* at 357 (quoting Varity Corp. v. Howe, 516 U.S. 489, 497 (1996)).

143. 29 U.S.C. § 1109 (2012) (emphasis added).

144. *See Schaffer*, 546 U.S. at 56–57.

145. Plasterers' Local Union No. 96 Pension Plan v. Pepper, 663 F.3d 210, 218 (4th Cir. 2011).

accompanying harm. As the dissent argued, default monetary liability does not comport with the statute's separate offering of "other equitable or remedial relief, including removal of such fiduciary,"[146] which is predicated solely on showing a breach of "responsibilities, obligations, or duties."[147] Causation of loss is the essential element of a claim for damages under § 1109.[148] The Court should not have assigned the burden of proof to the defendant—essentially giving default damages to the plaintiff—absent compelling Congressional justification.

Practically, this rule makes the Fourth Circuit more plaintiff-friendly in suits for breach of fiduciary duty under ERISA. Per *Tatum*, the Fourth Circuit requires nothing more from plaintiffs than showing imprudent decision-making processes on the part of a defendant and a *prima facie* showing of loss.[149] Alternatively, the legal landscape has become more difficult for ERISA fiduciaries in the Fourth Circuit who now face monetary liability if they cannot disprove that their decisions caused losses to the plan.[150] The dissent noted the likely increase in the amount of ERISA claims in the Fourth Circuit, due to the relaxed burden of proof on plaintiffs.[151] Compounded by the loss causation standard adopted by the Fourth Circuit, this rule will require ERISA fiduciaries seeking to avoid costly settlements or judgments to exercise extreme caution in making plan decisions, likely inhibiting fiduciary willingness to make some investment decisions actually beneficial to plan participants.[152] Such circumstances create an imbalance of what the Supreme Court recognized as the "competing congressional purposes" of ERISA; namely, "Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place."[153] Thus, should the Supreme Court ever find that the Fourth Circuit's burden of proof assignment disproportionately increases legal and administrative costs for plan fiduciaries, it will have even more reason to overturn the *Tatum* rule.

146. *See Tatum*, 761 F.3d at 376 (alteration omitted) (Wilkinson, J., dissenting) (quoting 29 U.S.C. § 1109).

147. 29 U.S.C. § 1109.

148. *See* 29 U.S.C. § 1109.

149. *See Tatum*, 761 F.3d at 363 (majority opinion).

150. *See id.*

151. *See id.* at 381 (Wilkinson, J., dissenting) ("[T]he majority's approach will wreak havoc . . . , encouraging opportunistic litigation to challenge even the most sensible financial decisions.").

152. *See id.* at 383 ("[F]ar from safeguarding the assets of ERISA-plan participants, the litigation spawned by the majority will simply drive up plan-administration and insurance costs. It will discourage plan fiduciaries from fully diversifying plan assets. It will contribute to a climate of second-guessing prudent decisions at the point of market shift. It will disserve those whom ERISA was intended to serve when fiduciaries are hauled into court for seeking, sensibly, to safeguard retirement savings.").

153. Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2470 (2014) (citing Varity Corp. v. Howe, 516 U.S. 489, 497 (1996)).

B. *The Supreme Court's Decision in* Dudenhoeffer *Indicates Disagreement with the "Would Have" Standard for Evaluating Loss Causation*

In *Dudenhoeffer*, the Supreme Court did not specifically address the standard for evaluating loss causation in cases of procedural imprudence when it concluded that the law does not create a special presumption of prudence for ESOP fiduciaries.[154] However, the Court's reasoning in *Dudenhoeffer* suggests it would likely overrule the "would have" standard of the *Tatum* decision if the issue is ever brought before the Court.[155] Not only would this reverse the Fourth Circuit standard, but it would provide guidance to lower courts on an issue that currently lacks clear precedent.[156]

In *Dudenhoeffer*, the respondent based its claim on a reasoning of causation similar to the "would have" standard adopted by the *Tatum* Court.[157] The respondent argued that the petitioner's decision to allow "investment in Fifth Third Stock even during the time that the stock price was declining in value as a result of the collapse of the housing market" was imprudent because "a prudent fiduciary facing similar circumstances would not have stood idly by as the Plan's assets were decimated."[158] The Court found this appeal to a "would have" standard of causation did not comport with an objective reliance on market prices, where ERISA fiduciaries, or any other investors who can "reasonably see 'little hope of outperforming the market . . . based solely on their analysis of publicly available information,' may, as a general matter, likewise prudently rely on the market price."[159] Where a stock is publicly traded, like the various Nabisco stocks at issue in *Tatum*,[160] the Supreme Court found that "allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstance."[161]

The Fourth Circuit found RJR fiduciaries liable for causing plan losses by divesting the Nabisco stocks without showing that, more likely than not, a prudent fiduciary would have done the same.[162] While the RJR fiduciaries may not have exercised procedural prudence,[163] their decision to divest was certainly founded on publicly available information about the market price of the stocks.[164] Noting the

154. *Dudenhoeffer*, 134 S. Ct. at 2471.
155. *See id.*
156. *See supra* Part II.
157. *See Tatum*, 761 F.3d at 364 (majority opinion).
158. *Dudenhoeffer*, 134 S. Ct. at 2471.
159. *Id.* (citations omitted) (quoting Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, 133 S. Ct. 1184, 1192 (2013)).
160. Tatum v. R.J. Reynolds Tobacco Co., 926 F. Supp. 2d 648, 665 (M.D.N.C. 2013).
161. *Dudenhoeffer*, 134 S. Ct. at 2471.
162. *Tatum*, 761 F.3d at 364.
163. *See id.* at 358.
164. *See Tatum*, 926 F. Supp. 2d at 666.

low price of the Nabisco stocks, RJR fiduciaries worried that they would never rebound.[165] RJR chose to divest the Nabisco funds because the value of the stocks was still falling,[166] essentially relying on what the *Dudenhoeffer* Court described as the "security's market price as an unbiased assessment of the security's value in light of all public information."[167] In other words, RJR relied on publicly available market information to make the divestment decision, meaning that the Supreme Court would find Tatum's claim "implausible as a general rule, at least in the absence of special circumstances"[168]—an exception the Court did not develop further.[169]

In terms of the "could have" versus "would have" debate, the Supreme Court's objective test of reliance on market pricing suggests the Court is far more in-line with a "could have" standard for evaluating loss causation. If "a fiduciary usually 'is not imprudent to assume that a major stock market . . . provides the best estimate of the value of the stocks traded on it that is available to him,'" then the only imprudent investment decision is one based on something other than market pricing.[170] Thus, the emphasis is not on the decision reached, but on the means of reaching the decision. This takes into account the variety of investment options different security fiduciaries could make based on the same information, as evidenced by the Fourth Circuit's observation that analysts were generally divided as to whether Nabisco stock would continue to fall, hold constant, or eventually gain.[171] Consequently, if the burden is on RJR to show that its procedural imprudence did not cause loss, RJR would need to show that a procedurally prudent fiduciary could reach the same decision on the same publicly available market information. Alternatively, if the burden rests on Tatum to show that RJR's procedural imprudence caused plan loss, Tatum would need to show that a procedurally prudent fiduciary could not reach the same decision from the same publicly available market information. As the dissent in *Tatum* noted, the Fourth Circuit "seeks to shift the standard of objective prudence to one of relative prudence."[172]

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165. *Id.* at 662.

166. *Id.* at 661.

167. Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2471 (2014) (quoting Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2411 (2014)).

168. *Dudenhoeffer*, 134 S. Ct. at 2471.

169. *Id.* at 2472 ("We do not here consider whether a plaintiff could nonetheless plausibly allege imprudence on the basis of publicly available information by pointing to a special circumstance affecting the reliability of the market price as 'an unbiased assessment of the security's value in light of all public information,' that would make reliance on the market's valuation imprudent." (quoting *Halliburton*, 134 S. Ct. at 2411)).

170. *Dudenhoeffer*, 134 S. Ct. at 2471–72 (quoting Summers v. State Street Bank & Trust Co., 453 F.3d 404, 408 (7th Cir. 2006)).

171. *See Tatum*, 926 F. Supp. 2d at 662–63.

172. Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 378 (4th Cir. 2014) (Wilkinson, J., dissenting).

The *Dudenhoeffer* Court further supported the preeminence of relying on publicly available market information when it rejected any requirement for fiduciaries to use insider information.[173] Thus, any inside knowledge about pending competitive bidding or the unsolicited offer to purchase the company, regardless of the positive effect either might have on the Nabisco stock, would be irrelevant in assessing RJR's liability.[174] So, based on *Dudenhoeffer*, to justify divestment, RJR only needed to look at the consistent devaluing of the Nabisco stock, and the fact that others analyzing the market could conclude that the stock might fall further.[175]

The Supreme Court would also likely overrule the Fourth Circuit's "would have" standard due to inconsistency with the ERISA statute. In espousing a "would have" standard for assessing causation, the Fourth Circuit mischaracterizes the "could have" standard as providing little protection to plan participants by justifying a fiduciary's decision upon showing that at least one other fiduciary could arrive at the same decision.[176] ERISA requires fiduciaries to act "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."[177] As the *Tatum* dissent noted, the District Court's "could have" standard "would not be satisfied merely by imagining any single hypothetical fiduciary that might have come to the same decision. Rather, it asks whether hypothetical *prudent* fiduciaries consider the path chosen to have been a reasonable one."[178] Therefore, the Supreme Court is likely to eventually reject the "would have" standard per its reasoning in *Dudenhoeffer*, without contradicting ERISA's stated purpose to protect beneficiaries by "assuring the equitable character of [employee benefit plans] and their financial soundness."[179]

V. Conclusion

The Fourth Circuit's *Tatum* decision could have served as a catalyst for the Supreme Court to not only correct bad case law, but to resolve a circuit split and provide needed guidance on rules that significantly impact ERISA's application to litigation over alleged instances of procedural imprudence. The Fourth Circuit's decision to depart from the default rule and assign burden of proof regarding loss causation to the defendant instead of the plaintiff does not align with the substance of the ERISA statute, nor with the typical assignment of that burden in both Supreme Court and

173. *See Dudenhoeffer*, 134 S. Ct. at 2472.

174. *See Tatum*, 926 F. Supp. 2d at 666.

175. *See id.* (noting that since the spin-off of the preceding June, NGH had fallen 60 percent and NA had fallen 28 percent).

176. *Tatum*, 761 F.3d at 365 (majority opinion).

177. 29 U.S.C. § 1104 (2012).

178. *Tatum*, 761 F.3d at 377 (Wilkinson, J., dissenting).

179. 29 U.S.C. § 1001(a) (2012).

Fourth Circuit precedent.[180] Furthermore, the *Tatum* Court's adoption of a "would have" standard for evaluating whether procedural imprudence caused loss to a retirement plan does not fit with the Supreme Court's objective, market price-based analysis in *Dudenhoeffer*.[181] Consequently, interested parties could justifiably expect the Supreme Court to overrule the Fourth Circuit on both points should the issues ever reach the Supreme Court in a future case.

180. *See supra* Part IV.A.
181. *See supra* Part IV.B.