Press Release

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

FOR IMMEDIATE RELEASE October 6, 2015

Media Contact: Mark Chenoweth | mchenoweth@wlf.org | 202-588-0302

WLF Asks High Court to Save Employee Stock Ownership Plans from Ninth Circuit's Flawed Liability Standard for ERISA Fiduciaries

(Amgen, Inc. v. Harris)

"Unless courts dismiss ERISA complaints that fail to satisfy the Supreme Court's stringent pleading requirements … , Employee Stock Ownership Plans will become a thing of the past."—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation (WLF) late yesterday called on the U.S. Supreme Court to review (and ultimately reverse) a deeply flawed Ninth Circuit opinion in *Amgen, Inc. v. Harris* that creates sweeping new rules for fiduciaries under the Employee Retirement Income Security Act (ERISA)—contrary to the standard established by Congress and recognized by the Court. WLF's brief argues that the holding below, if allowed to stand, will severely undermine the ability of ERISA fiduciaries to determine their legal duties with respect to company stock funds.

WLF's brief contends that the Ninth Circuit misapplied the Supreme Court's recent mandate in *Fifth Third Bancorp v. Dudenhoeffer* by holding that it was "quite plausible" for petitioners to remove Amgen stock from the list of investment options without causing undue harm to plan participants. Contrary to the Ninth Circuit, WLF points out, an allegation that a prudent fiduciary *might* have reached a contrary conclusion from petitioners is legally insufficient to state a claim. To avoid dismissal, a plaintiff must plausibly allege that *no* prudent fiduciary could have concluded that the proposed alternative action would have caused more harm than good to the fund as a whole.

WLF also argues that the Court should grant review to ensure that the plaintiffs' bar does not seize on the Ninth Circuit's relaxed pleading standard as another reason to bring securities claims under the guise of ERISA claims. Plaintiffs have increasingly come to view ERISA as a way to bypass the important protections of the Private Securities Litigation Reform Act (PSLRA), which imposes heightened pleading standards and an automatic discovery stay on securities actions. By improperly conflating liability under ERISA with liability under the securities laws, the decision below exacerbates the problem of plaintiffs using ERISA as a means to circumvent the important procedural safeguards that the PSLRA affords to defendants.

Upon filing its brief, WLF issued the following statement by Senior Litigation Counsel Cory Andrews: "Unless courts dismiss ERISA complaints that fail to satisfy the Supreme Court's stringent pleading requirements established in *Fifth Third*, Employee Stock Ownership Plans will become a thing of the past. Burdensome litigation costs will drive defendants to settle even the most insubstantial of ERISA lawsuits for substantial sums—and then end their ESOPs once and for all."

WLF is a national, public-interest law firm and policy center that devotes a substantial portion of its resources to promoting civil justice reform and reining in excessive litigation.

###