SUBPRIME MORTGAGE CRISIS IMPACTS ERISA PLAN INVESTMENT IN EMPLOYER STOCK

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Many publicly traded companies are the target of "Employer Stock Drop" class action lawsuits. Recently, these employer stock drop cases have emerged due to the subprime mortgage crisis, as well as suits against financial institutions offering the investments. Companies sponsoring 401(k) plans with an option to invest in employer stock have been sued claiming violations of ERISA. Despite the history of the billion dollar losses in retirement savings by participants in the Enron, Worldcom and Global Crossing plans, participants are still investing a large portion of their nest eggs in employer stock.[1]

The subprime mortgage crisis is derivative of the securitization process by which subprime mortgages are pooled and then mortgaged-backed securities are issued. This allows lenders to provide credit to more risky borrowers. However, combined with a sharp increase since 2004 in short-term interest rates and the housing bubble bust, these borrowers have been unable to meet their payments or refinance because their home value is less than their outstanding mortgage.[2] These types of securities have been sold to Wall Street investors, including pension funds. The end result is huge losses to companies,[3] with predictions from the Organization for Economic Co-operation and Development estimating ultimate losses at $300 billion.[4] As a result, ERISA suits have been filed, typically following a securities suit, claiming that it was an inappropriate investment for a retirement savings vehicle,[5] and investigations by plaintiff firms have also been announced.[6]

In the subprime mortgage ERISA lawsuits, the sponsoring companies, the individuals and entities responsible for the administration of the 401(k) plans, and, frequently, Directors and Officers ("D&Os"), have been sued by 401(k) participants under ERISA for breach of fiduciary duty. Some of these cases allege that: (1) D&O's knew or should have known of the company's failing financial prospects and breached their duty by making company matching contributions in company stock; and (2) defendants improperly restricted participants' ability to liquidate company stock. Other cases focus more heavily on purported misrepresentations. The allegations of many of these cases sound much like matters that would be alleged as violations of federal securities laws but for the fact that plaintiffs are participants in a plan covered by ERISA. In fact, many of the same plaintiffs have brought suits alleging securities law violations in addition to bringing ERISA lawsuits. The complaints claim there have been lack of controls and should the participants have been notified of such, they would have divested their interest in the employer stock. Allegations stem from stock

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drops due to announcements of charges to financials or investigations from federal agencies. [7]

In the advent of Enron,[8] and subsequent wave of employer stock drop suits, very few, if any, of these cases have been fully litigated and such cases are still settling in the millions of dollars.[9] Clearly, these cases are extremely expensive to plan sponsors, but also to insurance carriers. While the non-ERISA lawsuits due to the subprime mortgage crisis will inevitably tap into the D&O and E&O coverage, the ERISA fiduciary liability policies will be triggered as well due to these cases.

Courts examining fiduciary breach claims involving employer stock in retirement savings plans have held that defendants are entitled to a presumption of prudence. This presumption can be rebutted by plaintiffs by alleging that defendants knew of circumstances which made the investment in employer stock imprudent.[10] At times, the price of the stock is actually higher now than at the beginning of the class period in the suit. Plaintiffs nevertheless alleged plan investments in stock as the functional equivalent of investments in Enron or WorldCom stock. In the well-publicized *Enron* and *WorldCom* litigation, the courts held that the plan sponsors' imminent financial collapse was a sufficient reason to require fiduciaries to take extraordinary measures to override plan terms and discontinue investments in company stock.

Arguably the issues relating to a company's financials should be remedied under the securities action in which a pension plan may ultimately share.[11] ERISA is designed to accomplish many worthwhile objectives, but the regulation of "purely corporate behavior is not one of them."[12] ERISA should not be construed to afford plaintiffs a method of challenging purely corporate behavior having no legally-cognizable impact on a plan, or on the long-term retirement savings investments held therein.

I. ERISA REQUIREMENTS

An ERISA analysis begins with determining the fiduciary status of the parties involved. It is important to then analyze the actions performed by these fiduciaries and determine which are "settlor" in nature (which is a defense to liability).

The plans named in the employer stock drop cases typically involve individual account plans under ERISA section 3(34).[13] Generally, these plans permit employees to defer a percentage of their salary on a pre-tax basis and provide employer matching contributions. Participants bear the investment risk in such plans and typically may invest their contributions and employer matching contributions in several different investment options, including the employer's stock.

A. ERISA FIDUCIARIES

1. Statutory Definition

ERISA defines a "fiduciary" as any person:

> ... with respect to a plan to the extent (i) he 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, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan ... .[14]

2. Named Fiduciary and Functional Fiduciaries

ERISA requires that every plan document designate a "named fiduciary" who has the authority to control and manage the operations of the plan.[15] A "named fiduciary" is defined as "a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly."[16]

The Supreme Court has espoused a fiduciary status functional test—the focus being on a person's actions or authority, not on his or her formal designation.[17] Therefore, under ERISA, anyone may become a fiduciary if he or she exercises or has any discretionary authority or control over plan administration or assets. Because of this functional test, the determination of one's fiduciary status is fact-intensive[18] and is to be construed broadly.[19]

The power to appoint and remove plan fiduciaries is itself a fiduciary function.[20] If one's fiduciary function is to appoint administrators or other fiduciaries, he or she will generally be found to have a duty under ERISA to monitor any appointees.[21] An individual who has discretionary authority or control only to appoint other fiduciaries will only be a fiduciary with respect to those actions.[22] As such, D&Os whose only fiduciary authority is to appoint fiduciaries may not be liable for the actions of the fiduciaries they appoint, unless it can be established that a failure to monitor the appointees was the cause of a loss.[23]

3. Fiduciary status can be limited in scope

Participants cannot invoke ERISA's fiduciary standards to challenge activities related to the running of a business.[24] While an employee of a plan sponsor may serve as a fiduciary, only the employee's fiduciary conduct can be challenged under ERISA. This principle, known as the "two hats" doctrine, teaches that when individuals act in a corporate capacity, ERISA's fiduciary rules do not apply.[25] Therefore, to state a claim for breach of fiduciary duty it must be alleged that each defendant acted as a fiduciary when they allegedly took action (or omitted to take action) contrary to their ERISA duties.[26] Under the "two hats" doctrine,[27] a D&O may function in both fiduciary and corporate/non-fiduciary capacities—but not at the same time.[28]

4. D&Os as Fiduciaries

Typically, D&Os only have the authority to appoint and remove others who perform the administrative functions of the plan. In such cases, D&Os would be found to be an ERISA fiduciary only with respect to such appointments.[29]

U.S. Department of Labor ("DOL") regulations (Interpretive Bulletin 75-8) expressly provides that D&Os are ERISA fiduciaries to the extent that they have responsibility for the selection and retention of other plan fiduciaries. This regulation states:

> [D&Os] ... will be fiduciaries only to the extent that they have responsibility for the functions described in section 3(21)(A) of the Act. For example, the [D&Os] may be responsible for the selection and retention of plan fiduciaries. In such a case, [the D&Os] exercise "discretionary authority or discretionary control respecting management of such plan" and are, therefore, fiduciaries... . However, their responsibility, and, consequently, their liability, is limited to the selection and retention of fiduciaries... . In addition, if the [D&Os] are made named fiduciaries of the plan, their liability may be limited pursuant to a procedure provided for in the plan instrument for the allocation of fiduciary responsibilities among named fiduciaries or for the designation of persons other than named fiduciaries to carry out fiduciary responsibilities, as provided in section 405(c)(2)....[30]

B. ERISA FIDUCIARY DUTIES

ERISA mandates four intertwined duties: exclusive purpose (the duty of loyalty), prudence (the duty of care), the duty to diversify plan assets, and the duty to follow the terms of the plan.[31]

1. Exclusive Purpose

ERISA's exclusive purpose rule, embodying the common law duty of loyalty, limits the use of plan assets: (i) to pay plan benefits; and (ii) to pay plan expenses that are reasonable and relate only to plan activities.[32] This rule is generally combined with the prohibited transaction provisions of ERISA, which codify several conflict of interest situations. [33]

Courts have mandated resignation or removal of fiduciaries only when particular conflicts arise that is qualitatively different from the types of conflicts inherent when the fiduciary is. the employer or its employees.[34] An example of such an inherent conflict is when a sponsor's employees serve as fiduciaries to a plan that holds employer stock. However, D&Os and employees of a company—as well as plan participants who invest in employer stock—almost always benefit when the price of company stock rises. Thus, there should be no violation of the exclusive purpose rule where fiduciaries follow the express terms of the plan, provided those terms comport with ERISA.[35]

2. Prudence

A fiduciary must act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of like character with like aims."[36] The prudence standard looks to what the hypothetical comparable fiduciary would do under comparable circumstances.[37] With respect to plan investments, courts have interpreted the prudence requirement as a "prudent expert" standard—i.e., the fiduciary must act "as a prudent investment manager under modern portfolio theory."[38]

3. Diversification

A fiduciary must diversify 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.[39] The duty to diversify assets is limited in three ways. Investments need not be diversified when: (1) it is clearly prudent not to do so, (2) when ownership of employer stock is a principal purpose of the plan, and (3) when participants direct the investment of their own accounts.[40]

The Pension Protection Act amended ERISA to allow participants to divest their share in employer stock into other investment options.[41] With respect to employee contributions, this can be done in any plan beginning after December 31, 2006. However, with respect to employer contributions, the participant must: (1) have completed at least 3 years of service, and (2) any securities acquired before the beginning of this year, may only be divested: in the first year - 33%, the second year - 66%, and 100% thereafter.[42] Currently, plan sponsors are required to provide notice to participants describing these new diversification requirements.[43]

4. Terms of the Plan

ERISA expressly commands that fiduciaries shall discharge their duty "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA]."[44] In other words a fiduciary's adherence to the terms of an ERISA controlled plan "cannot constitute a breach of its fiduciary duties."[45]

When plan documents require assets to be invested in employer stock, the courts have recognized the conflict between the duty to comply with the terms of the plan and the duty to diversify investments or act prudently. The courts have typically resolved this conflict by holding that, in certain circumstances, the fiduciary must ignore the terms of the plan regarding investments if the investments are not prudent.[46] However, where the plan requires that all assets be invested in employer stock, at least one court has determined that the terms of the plan must be followed and that fiduciaries would not be liable for doing so.[47]

C. ERISA BREACH OF FIDUCIARY DUTY

ERISA Section 409(a) of ERISA specifically provides for personal liability in the case of a breach of fiduciary duty:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries ... shall be personally liable to make good to such plan any losses to the plan resulting from each such breach.... [48]

Under ERISA sections 404 and 409, to plead a breach of fiduciary duty, a plaintiff must allege that: (1) defendant was a fiduciary to the plan; (2) defendant was acting within his or her capacity as a fiduciary; and (3) defendant engaged in conduct constituting a breach of fiduciary duty.[49]

II. DISCLOSURE OBLIGATIONS

The question that is raised in these cases is whether a corporate insider has a greater duty to disclose material information under ERISA than that under the federal securities laws. The Supreme Court has opined that ERISA eliminated the need for coverage under the securities laws:

> Congress believed that it was fulfilling a regulatory void when it enacted ERISA, a belief which the SEC actively encouraged. Not only is the extension of the Securities Act ... not supported by the language and the history of those Acts, but in light of ERISA it serves no general purpose... . Whatever benefits employees might derive from the effects of the Securities Acts are now provided in more definite form through ERISA.[50]

There is, however, inconsistent case law attempting to reconcile ERISA's implied duty to disclose and the insider trading and disclosure rules under securities laws. The Supreme Court has expressly declined to address the issue of whether ERISA imposes an affirmative duty of disclosure that is beyond what is required to be disclosed to the general public, but has recognized that fiduciaries are bound by more than just the specific disclosure provisions of ERISA and plan documents.[51] Some courts have held that ERISA fiduciaries should not be required to violate federal securities laws.[52] Other decisions generally hold that ERISA's duty of disclosure can "co-exist" with federal securities laws because: (1) nothing in the securities law would have prohibited the fiduciaries from disclosing financial information from other shareholders or the public at large; and (2) securities laws would not have prevented elimination of employer stock funds from plans.[53]

Moreover, most courts that have considered the overlap between ERISA and securities laws have done so in the context of motions to dismiss and have refused to dismiss ERISA claims simply because there may be some tension with securities laws.[54]

A. SECURITIES LAW—DISCLOSURE REQUIREMENTS

A participant's interest in a plan constitutes a security within the meaning of the Securities Act of 1933.[55] The Supreme Court has held that an investment contract is created when there is "an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."[56] The Securities and Exchange Commission has indicated that an employee's interest in a plan constitutes a security only if it is both voluntary and contributory.[57] Accordingly, a 401(k) plan interests will be treated as securities and registration is required thereby being subject to the federal securities laws.[58]

That being said the securities laws are premised on disclosure of adequate and truthful information. Under the securities laws, insiders must either disclose material nonpublic information in their possession prior to trading or refrain from such trading.[59]

B. ERISA—DISCLOSURE REQUIREMENTS

Although an ERISA fiduciary duty to disclose is not specifically enumerated in the statutory disclosure requirements, some courts construe an affirmative duty to disclose material facts to participants under the general ERISA fiduciary provisions. Courts that have recognized this duty have generally done so based on the fiduciary duty of loyalty.[60] The question raised is whether fiduciaries have a greater duty to disclose under ERISA than under the securities laws.

An ERISA fiduciary cannot violate securities laws by disclosing inside information to plan participants.[61] ERISA cannot "alter, amend, modify, invalidate, impair, or supercede any law of the United States… ."[62] i.e. securities law disclosure requirements.

The Supreme Court held in *Varity Corp. v. Howe* that an ERISA fiduciary has a duty not to mislead participants.[63] In *Varity*, the employer/plan sponsor distributed materials and called a meeting where it persuaded employees to transfer voluntarily to a new subsidiary by intentionally misrepresenting that the subsidiary was financially stable and that their employee benefits would be secure.

Other courts have required that a fiduciary who knows certain material facts must affirmatively disclose them to participants.[64] This duty to affirmatively disclose includes the duty not to provide incomplete information.[65] Information is considered "material" if it would induce reasonable reliance on the information by the participant,[66] or if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision.[67] Courts also borrow from Rule 10b-5 case law to determine whether information is "material."[68]

Over a decade ago, the Second Circuit[69] held that fiduciaries do not "have a duty to volunteer information regarding proposed changes" to a plan. The Court stated that "[i]nsisting on voluntary disclosure … would, we think, increase the likelihood of confusion on the part of beneficiaries and, at the same time, unduly burden management, which would be faced with continuing uncertainty as to what to disclose and when to disclose it."[70] If an ERISA fiduciary has no affirmative ERISA duty to disclose prospective information relating directly to an ERISA plan, then no such duty exists where the information at issue relates to the employer's general finances, and not to the plan.[71]

The DOL, in its Enron *amicus* brief, stated that a duty arises only when plan assets are "seriously at risk."[72] In the DOL's view, the Enron fiduciaries had a "duty to warn" participants because they knew or should have known that inaction "gravely threatened the integrity of Enron's retirement promises."[73] In other words, ERISA's fiduciary standards "do not permit fiduciaries to ignore grave risks to plan assets [and] stand idly by while participants' retirement security is destroyed."[74] The DOL concedes that there can be any number of events in the life of a corporation that will affect the corporation's stock price, perhaps even dramatically so, but will not trigger a disclosure obligation. In DOL's words, it is only "potentially ruinous facts" that trigger a fiduciary duty to warn: "This is not to say that fiduciaries must inform plan participants of every transitory corporate event that might have an impact on the stock's price, but it does mean that fiduciaries must take action when they know or should know of potential ruinous facts as alleged [in *Enron*]."[75]

In *McKesson*,[76] the court concluded that the plan would have experienced the alleged losses before any sale could have occurred at the inflated price, if the defendant disclosed the accounting irregularities before divesting the plan of employer stock.[77] The court further explained that "under the efficient capital market hypothesis" the disclosure of such information would have caused the market price of the company to swiftly adjust, in this case drop precipitously.[78] Thus, the court decided that the plan could not have sold the stock at the "artificially high price," and there was no way for fiduciaries to lawfully sell the stock, noting that "[n]ot even a fiduciary ... is permitted to engage in insider trading."[79] However, once the information does become public and the market adjusts the price of the employer stock, the fiduciaries must assess the risk of continuing to hold the employer stock in the plans.[80]

IV. WHAT CAN YOU DO?

These employer stock drop cases are costly from a defense and settlement standpoint. Plan sponsors should be reviewing their procedures with respect to their stock fund in the event of such crisis as the subprime mortgage, in order to meet their ERISA obligations.

In order to protect your company and the D&Os from these lawsuits, fiduciaries need to review their 401(k) plans and implement special procedures for managing an employer stock fund. In the first instance, the administration and management of a stock fund should be removed from any insider fiduciaries and handed over to a third party independent fiduciary.[81] This process of course must past fiduciary muster with respect to the selection of a service provider.

The independent fiduciary should then adopt and use objective processes such as a volatility index, which provides the fiduciary pertinent information on the continued viability of employer stock as a plan investment. The appointment of an independent fiduciary, coupled with an objective independent process such as a volatility index, enables the plan sponsor and its fiduciaries to avoid conflicts of interest and to prudently identify and address corporate event that may affect the value of employer stock such as a merger or acquisition, or the issuance of a defective product.

The next step is to transform any fiduciary actions taken into plain English and notify the participants of what is being done and the conclusions being made. Essentially, the independent fiduciary's methodology will be disclosed to the participants, thereby avoiding settlor/fiduciary conflicts that may lead to litigation. ■

NOTES

1. See, Jack VanDerhei, "401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2006," EBRI Issue Brief No. 308 (Aug. 2007); Bruce Meyerson, "401(k) Savers Still hold too Much Stock in Employers," The State (6/21/04).
2. See, Horowitz and Galeoto, "The Subprime Meltdown—A Perfect Storm", Andrews Litigation Reporter. Vol 13, Issue 14 (Nov. 14, 2007).
3. "Subprime Mess May Last Into 2009," 2007 WLNR 23186771 (11/23/07) (Subprime mortgage crisis "has claimed the jobs of three chief executive and prompted more than $45 billion in write downs at the world's largest banks.").
4. Dolan, "Mortgage losses could hit $300-billion: OECD Organization estimates the worst is yet to come for US financial institutions as markets struggle to restructure," Globe & Mail (Toronto Can.) 2007 WLNR 23175823 (11/23/07).
5. Employer Stock Drop Actions: *Esposito v. Merrill lynch & Co., Inc., et al,* U.S.D. Ct., S.D. New York, 07 CV 10687, 11/29/2007; *Bushansky v. Washington Mutual, Inc. et al.,* U.S.D. Ct., W.D. Washington, 007-1874, 11/20/2007, *Gray v. Citigroup, Inc., et al.,* U.S.D. Ct., S.D. New York, 1:07-cv-09790-SHS, 11/5/2007; *In re Fremont General Corp. Lit.,* U.S.D. Ct., Central D. Cal., cv07-02693 FMC (FMMx), 10/25/2007; *Cruz v. Countrywide,* U.S.D.Ct, Central D. Cal., SAV07-1050, 9/11/2007; *Brockmeyer v. Countrywide,* U.S.D. Ct., Central D. Cal., 07-cv-05906, 09/11/2007; *Denning v. Beazer Homes USA Inc, et al,* U.S.D. Ct., N.D. Ga, 1:07-cv-01401-JTC, 06/15//2007; Imprudent Investment Actions: *Prudential Retirement Insurance and Annuity Co. v. State Street,* U.S.D.Ct., SD New York, 1:07-cv-08488, 11/19/2007; Nashua Corp v. State Street, U.S.D. Ct., Mass., 1:07-cv-12021-RWZ, 10/24/2007; *UniSystems v. State Street,* U.S.D. Ct. SD New York, 07 Civ. 9319, 10/17/2007; *Nashua Corp v. State Street,* U.S.D. Ct., Mass., 1:07-cv-12021-RWZ, 10/24/2007; *Prudential Retirement Insurance and Annuity Co. v. State Street,* U.S.D.Ct., SD New York, 1:07-cv-08488, 11/19/2007; *Chatman v. Countrywide,* U.S.D.Ct., Central D. Cal., 07-cv-06695, 10/16/2007.
6. See, · www.erisafraud.com (Keller Rohrback plaintiff firm announcing ERISA investigations against the following plan sponsors, such as First American).
7. See, *Denning v. Beazer Homes USA Inc, et al,* U.S.D. Ct., N.D. Ga, 1:07-cv-01401-JTC, 06/15//2007; *In re Fremont General Corp. Lit.,* U.S.D. Ct., Central D. Cal., cv07-02693 FMC (FMMx), 10/25/2007; *Gray v. Citigroup, Inc., et al.,* U.S.D. Ct., S.D. New York, 1:07-cv-09790-SHS, 11/5/2007
8. *In re Enron Corp. Securities, Derivative & ERISA Litigation,* 284 F. Supp. 2d 511, 544-445, 31 Employee Benefits Cas. (BNA) 2281, R.I.C.O. Bus. Disp. Guide (CCH) P 10543 (S.D Tex. 2003).
9. *In re ADC ERISA Litigation* $3.25 million (Sept. 2006); *In Re Allegheny Securities Litigation* $4 million (Dec. 2006); *In re AOL Time Warner Inc. ERISA litigation* $100 million (Sept. 2006); *In re Broadwing ERISA Litigation* $ 11 million (Oct. 2006); *In re CMS Energy ERISA Litigation* $28 million (June 2006), *Harnischfeger Industries* $10.85 million (June 2006); *In re HealthSouth Corp. ERISA Litigation* $28.75 (June 2006); Kmart $11.75 (June 2006); *Krispy Kreme Doughnut Corp.,* $8.57 million (Sept. 2006); *In re Polaroid ERISA Litigation* $15 million (June 2006).
10. See, *Moench v. Robertson,* 62 F.3d 553 (3d Cir. 1995); *Kuper v. Iovenko,* 66 F.3d 1447 (6th Cir., 1995); *Wright v. Oregon Metallurgical Corp.,* 360 F.3d 1090 (9th Cir. 2004). Recently, in *Edgar v. Avaya,* 503 F.3d 340 (3rd Cir. 2007), the 3rd Circuit upheld the *Moench* presumption and concluded that it not only apples to ESOPs, but also to 'Eligible Individual Accounts Plans" (e.g. 401(k) plans) because these type of plans are similar in that they put employee retirement assets at much greater risk than traditional ERISA plans.
11. Cf. *Hull v. Policy Management Sys.,* 2001 WL 1836286, at * 8 (D.S.C. Feb. 9, 2001) ("If the allegations of wrongdoing, including allegations of providing misinformation and failing to provide accurate information, ultimately prove true, the plan's remedy will be the same as for the plaintiff class in the related securities action.").
12. *Akers v. Palmer,* 71 F.3d 226, 229, 19 Employee Benefits Cas. (BNA) 2351, 1995 FED App. 0355P (6th Cir. 1995).
13. ERISA section 3(34) defines an "individual account plan" as "a pension plan which provides for an individual account for each participant and for benefits based

solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses." 29 U.S.C.A. § 1002(34).

[14] 29 U.S.C.A. § 1002(21)(A).

[15] 29 U.S.C.A. § 1102(a)(1).

[16] 29 U.S.C.A. § 1102(a)(2).

[17] *Mertens v. Hewitt Associates*, 508 U.S. 248, 262, 113 S. Ct. 2063, 124 L. Ed. 2d 161, 16 Employee Benefits Cas. (BNA) 2169 (1993).

[18] See, *Pennsylvania Federation v. Norfolk Southern Corp. Thoroughbred Retirement Investment Plan of Norfolk Southern Corp.*, 32 Employee Benefits Cas. (BNA) 2267, 2004 WL 228685 (E.D. Pa. 2004) ("Determining a party's fiduciary status under ERISA is a highly fact intensive inquiry that cannot be properly decided on a motion to dismiss."); *LaLonde v. Textron, Inc.*, 270 F. Supp. 2d 272, 30 Employee Benefits Cas. (BNA) 2358 (D.R.I. 2003), aff'd in part, vacated in part, 369 F.3d 1, 32 Employee Benefits Cas. (BNA) 2217 (1st Cir. 2004) and (rejected by, In re Sprint Corp. ERISA Litigation, 388 F. Supp. 2d 1207, 33 Employee Benefits Cas. (BNA) 1287 (D. Kan. 2004)) (court refused to rule on the fiduciary status of defendants on motion to dismiss, stating it was too fact specific of an inquiry); *In re Sears, Roebuck & Co. ERISA Litigation*, 32 Employee Benefits Cas. (BNA) 1699, 2004 WL 407007 (N.D. Ill. 2004) (although the determination is fact intensive, court suggests that merely alleging that defendant functioned as a fiduciary is sufficient to avoid a motion to dismiss).

[19] *Mertens v. Hewitt Associates*, 508 U.S. 248, 262, 113 S. Ct. 2063, 124 L. Ed. 2d 161, 16 Employee Benefits Cas. (BNA) 2169 (1993); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 96, 114 S. Ct. 517, 126 L. Ed. 2d 524, 17 Employee Benefits Cas. (BNA) 1657 (1993).

[20] *Keach v. U.S. Trust Co. N.A.*, 313 F. Supp. 2d 818, 864, 32 Employee Benefits Cas. (BNA) 2398 (C.D. Ill. 2004), judgment aff'd, 419 F.3d 626, 35 Employee Benefits Cas. (BNA) 1818 (7th Cir. 2005); *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465, 20 Employee Benefits Cas. (BNA) 2136 (4th Cir. 1996) ("[T]he power … to appoint, retain and remove plan fiduciaries constitutes 'discretionary authority' over the management or administration of a plan…"); *Hickman v. Tosco Corp.*, 840 F.2d 564, 566, 9 Employee Benefits Cas. (BNA) 1736 (8th Cir. 1988); *Liss v. Smith*, 991 F. Supp. 278, 310 (S.D. N.Y. 1998) ("It is by now well-established that the power to appoint plan trustees confers fiduciary status.").

[21] *Martin v. Feilen*, 965 F.2d 660, 669-670, 15 Employee Benefits Cas. (BNA) 1545 (8th Cir. 1992) (corporate directors' power to appoint ESOP trustee includes duty to monitor trustee); *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 284 F. Supp. 2d 511, 31 Employee Benefits Cas. (BNA) 2281, R.I.C.O. Bus. Disp. Guide (CCH) P 10543 (S.D Tex. 2003); *In re Electronic Data Systems Corp.* ""ERISA" Litigation, 305 F. Supp. 2d 658 (E.D. Tex. 2004) ("holds that some duty to monitor does exist and that Plaintiffs have sufficiently pled a possible cause of action sufficient to allow them access to discovery.").

[22] *In re Williams Companies ERISA Litigation*, 271 F. Supp. 2d 1328, 1339, 30 Employee Benefits Cas. (BNA) 2529 (N.D. Okla. 2003); *Crowley ex rel. Corning, Inc, Inv. Plan v. Corning, Inc.*, 234 F. Supp. 2d 222, 229, 29 Employee Benefits Cas. (BNA) 2406 (W.D. N.Y. 2002) (dismissing board members because the "only power the Board had under the plan was to appoint, retain or remove members of the Committee"); *In re Sprint Corp. ERISA Litigation*, 388 F. Supp. 2d 1207, 33 Employee Benefits Cas. (BNA) 1287 (D. Kan. 2004).

[23] *Kuper v. Quantum Chemical Corp.*, 838 F. Supp. 342 (S.D. Ohio 1993) (court granted summary judgment dismissing board members because their fiduciary duties were limited to the board's "appoint and remove" powers and because there was no showing that the board influenced the investment decisions of the committee it appointed or knew of any wrongdoing by the committee).

[24] *Husvar v. Rapoport*, 430 F.3d 777, 782 (6th Cir. 2005) (Court noted that business decisions may affect the value of company stock in a plan, but this alone does not implicate the protections afforded under ERISA.).

[25] *Amato v. Western Union Intern., Inc.*, 773 F.2d 1402, 1416-1417, 6 Employee Benefits Cas. (BNA) 2226 (2d Cir. 1985) (abrogated by, Mead Corp. v. Tilley, 490 U.S. 714, 109 S. Ct. 2156, 104 L. Ed. 2d 796, 10 Employee Benefits Cas. (BNA) 2569 (1989)) ("ERISA permits employers to wear 'two hats,' and . . they assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA.") (quoting *Amato v. Western Union Int'l*, 596 F. Supp. 963, 968 (S.D.N.Y. 1984).

[26] *Sasso v. Cervoni*, 985 F.2d 49, 50, 16 Employee Benefits Cas. (BNA) 1377 (2d Cir. 1993) ("[A]n individual cannot be liable as an ERISA fiduciary solely by virtue of her position as a corporate officer, shareholder or manager.").

[27] The "two hat doctrine" has been defined as follows: [W]here an administrator of a plan decides matters required in plan administration or involving obligations imposed upon the administrator by the plan, the fiduciary duties imposed by ERISA attach. Where, however, employees conduct business and make business decisions not regulated by ERISA, no fiduciary duties apply. And, when employers wear "two hats" as employers and as administrators ' … they assume fiduciary status "only when and to the extent" that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA. *Varity Corp. v. Howe*, 516 U.S. 489, 116 S. Ct. 1065, 134 L. Ed. 2d 130, 19 Employee Benefits Cas. (BNA) 2761 (1996); *Siskind v. Sperry Retirement Prog.*, 47 F.3d 498 (2nd Cir. 1995); *Akers v. Palmer*, 71 F.3d 226, 230 (6th Cir. 1995); DOL Adv. Op. 81-30A (1981 WL 17751 E.R.I.S.A.).

[28] *Varity Corp. v. Howe*, 516 U.S. 489, 116 S. Ct. 1065, 134 L. Ed. 2d 130, 19 Employee Benefits Cas. (BNA) 2761 (1996); Siskind v. Sperry Retirement Program, Unisys, 47 F.3d 498, 28 Employee Benefits Cas. (BNA) 1114 (2d Cir. 1995); *Akers v. Palmer*, 71 F.3d 226, 230, 19 Employee Benefits Cas. (BNA) 2351, 1995 FED App. 0355P (6th Cir. 1995); DOL Adv. Op. 81-30A.(1981 WL 17751 E.R.I.S.A.).

[29] *Leigh v. Engle*, 727 F.2d 113, 133-134, 4 Employee Benefits Cas. (BNA) 2702 (7th Cir. 1984); *Crowley ex rel. Corning, Inc, Inv. Plan v. Corning, Inc.*, 234 F. Supp. 2d 222, 229, 29 Employee Benefits Cas. (BNA) 2406 (W.D. N.Y. 2002); *Beam v. HSBC Bank USA*, 31 Employee Benefits Cas. (BNA) 1257, 2003 WL 22087589 (W.D. N.Y. 2003).

[30] 29 C.F.R. 2509.75-8 (2007).

[31] 29 U.S.C.A. §. 1104(a).

[32] 29 U.S.C.A. §. 1104(a).

[33] 29 U.S.C.A. § 1106 (ERISA Section 406 prohibits certain transactions between the plan and parties in interest as well as among fiduciaries).

[34] See, *Donovan v. Bierwirth*, 680 F.2d 263, 268-269, Employee Benefits Cas. (BNA) 1417, 64 A.L.R. Fed. 580 (2d Cir. 1982) (plan trustees increased plan holdings of company stock in response to hostile tender offer).

[35] See, *In re WorldCom, Inc.*, 263 F. Supp. 2d 745, 768, 30 Employee Benefits Cas. (BNA) 2035 (S.D. N.Y. 2003) ("Plaintiffs' allegations that [an alleged fiduciary defendant's] holding of WorldCom stock and participation in its compensation program created a conflict of interest are insufficient by themselves to state a claim under ERISA.").

[36] 29 U.S.C.A. § 1104(a)(1)(B).

[37] The ERISA duty of care includes procedural prudence which entails a fiduciary prudently investigating and evaluating a course of action. *Fink v. National Sav. and Trust Co.*, 772 F.2d 951, 6 Employee Benefits Cas. (BNA) 2269, 3 Fed. R. Serv. 3d 934 (D.C. Cir. 1985) ("A fiduciary's independent investigation of the merits of a particular investment is at the heart of the prudent person standard.") (citing *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983); *Donovan v. Bierwirth*, 538 F.Supp. 463, 470 (E.D.N.Y. 1981).

[38] *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 284 F. Supp. 2d 511,

31 Employee Benefits Cas. (BNA) 2281, R.I.C.O. Bus. Disp. Guide (CCH) P 10543 (S.D Tex. 2003).

39. 29 U.S.C.A.§ 1104(a)(1)(C).
40. *In re Xcel Energy Inc., Securities, Derivative & ERISA Lit.*, 312 F.Supp.2d 1165 (D. Minn. 2004).
41. Pension Protection Act Section 901(b), adding Internal Revenue Code Section 401(a)(35) and ERISA 204(j).
42. Pension Protection Act Section 901(b), adding Internal Revenue Code Section 401(a)(35) and ERISA 204(j).
43. IRS Notice 2006-107 (Nov. 30, 2006) and DOL Field Assistance Bulletin No. 2006-03.
44. 29 U.S.C.A. § 1104(a)(1)(D).
45. See, *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 225, 21 Employee Benefits Cas. (BNA) 2439 (4th Cir. 1998) ("[A]dherence to an ERISA controlled plan is not a breach of fiduciary duty.").
46. See, *Moench v. Robertson*, 62 F.3d 553, 19 Employee Benefits Cas. (BNA) 1713 (3d Cir. 1995); *In re Ikon Office Solutions, Inc. Securities Litigation*, 86 F. Supp. 2d 481, R.I.C.O. Bus. Disp. Guide (CCH) P 9848 (E.D. Pa. 2000).
47. *Nelson v. Ipalco Enterprises, Inc.*, 29 Employee Benefits Cas. (BNA) 2665, 2003 WL 402253 (S.D. Ind. 2003).
48. 29 U.S.C.A. § 1109(a).
49. See, e.g., *Stein v. Smith*, 270 F. Supp. 2d 157, 166, Employee Benefits Cas. (BNA) 2421 (D. Mass. 2003); *In re Xcel Energy, Inc., Securities, Derivative & ""ERISA" Litigation*, 312 F. Supp. 2d 1165, 1175 (D. Minn. 2004).
50. *Int'l Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 569-570 (1971).
51. *Varity Corp. v. Howe*, 516 U.S. 489, 504, 116 S. Ct. 1065, 134 L. Ed. 2d 130, 19 Employee Benefits Cas. (BNA) 2761 (1996).
52. See, *Hull v. Policy Management Sys. Corp.*, 2001 WL 1836286 (D.S.C. 2001)(dismissing a breach of fiduciary duty claim grounded on allegations that the fiduciaries did not provide plan participants with sufficient information regarding the company's financial condition because of perceived conflicts with securities laws); *In re McKesson HBOC, Inc.*, ERISA Lit., 2002 WL 31431588, *6-7 (N.D. Cal. 2002) (dismissing breach claims because "fiduciaries are not obligated to violate securities laws in order to satisfy [ERISA's] fiduciary duties.").
53. See, *Rankin v. Rots*, 278 F.Supp.2d 853 (E.D. Mich. 2003); *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 284 F. Supp. 2d 511, 31 Employee Benefits Cas. (BNA) 2281, R.I.C.O. Bus. Disp. Guide (CCH) P 10543 (S.D Tex. 2003); see also Department of Labor Amicus Brief in In re Enron.
54. See, *In re Dynegy, Inc. ERISA Litig.*, 309 F.Supp.2d 861, 882 (S.D. Tex. 2004) (rejecting defendant's argument for dismissal that plaintiff's claim "is nothing more than a securities claim in ERISA clothing"); *Vivien v. Worldcom, Inc.*, 2002 WL 31640557, *5 (N.D. Cal. Jul. 26, 2002) (despite noting that "defendants raise some legitimate issues which might place federal securities laws and ERISA in tension in the event that recovery eventually occurs in this case," court reasoned that "this case is not at the summary-judgment stage. On its face, the complaint alleges violations of ERISA. It is impossible to rule out as a matter of law any and all ERISA recovery at the pleading stage simply because federal securities law may provide overlapping relief.").
55. 15 USC Section 77b(2007)(Securities Act Section 2(1) defining broadly a security to include, among other things, a note, stock, bond option, and participation interest in an investment contract).
56. *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298, 66 S. Ct. 1100, 90 L. Ed. 1244, 163 A.L.R. 1043 (1946).
57. SEC Release No. 33-6188(1980 WL 29482); SEC Release No. 33-6281 (1981 WL 36298).
58. Horowitz and Galeoto, "The Subprime Meltdown—A Perfect Storm, Andrews Litigation Reporter. Vol 13, Issue 14 (Nov. 14, 2007)(discussing in detail federal securities law requirements).
59. SEC Release No. 8-3925(1961 WL 60638).
60. 29 U.S.C. 1104(a)(2007). However, note that is the center issue in which is in conflict among the federal courts regarding 401(k) fees and expenses. See, Mamorsky and Jara, "Plan Sponsors Impacted by Hidden 401(k) Fee Litigation." 23 NO. 5 JCAB 8 (Sept./Oct. 2007).
61. *Harzewski v. Guidant Corp.*, 489 F.3d 799, 40 Employee Benefits Cas. (BNA) 2409 (7th Cir. 2007) (Court mentioned that it would be unlawful for a company to sell stock in a pension plan on the basis of inside knowledge of the company's problems. "[A] ... fiduciary's duty of loyalty does not extend to violating the law." (citing to *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090 (9th Cir. 2004).
62. 29 U.S.C.A. § 1144(d).
63. *Varity Corp. v. Howe*, 516 U.S. 489, 116 S. Ct. 1065, 134 L. Ed. 2d 130, 19 Employee Benefits Cas. (BNA) 2761 (1996).
64. See, *Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc.*, 93 F.3d 1171, 20 Employee Benefits Cas. (BNA) 1697 (3d Cir. 1996); *Bins v. Exxon Co. USA*, 189 F.3d 929 (9th Cir. 1999) ("We believe that once an ERISA fiduciary has material information relevant to a plan participant or beneficiary, it must provide that information whether or not it is asked a question.").
65. See, *Griggs v. E.E. Dupont de Nemours & Co.*, 237 F.3d 371 (4th Cir. 2001); *Schmidt v. Sheet Metal Workers' Nat'l Pension Fund*, 128 F.3d 541 (7th Cir. 1997) ("A plan fiduciary may violate its duties ... either by affirmatively misleading plan participants about the operations of the plan, or by remaining silent in circumstances where silence could be misleading.").
66. See *Ballone v. Eastman Kodak Co.*, 109 F.2d 117 (2d Cir. 1997).
67. See *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439 (6th Cir. 2002); *In re Unisys Savings Plan Litig.*, 74 F.3d 420, 442 (3d Cir. 1996) (noting that, in the ERISA context, a misrepresentation is material if there is "a substantial likelihood that it would have misled a reasonable participant in making an adequately informed decision about whether to place or maintain monies" in a particular investment option).
68. *Savage v. Federated Dep't Stores, Inc. Retirement Income & Thrift Incentive Plan*, 1989 WL 146298, at *8 (D.N.J. 1989) ("[T]he Court determines that it is reasonable to analyze allegations of failure to disclose, as a fiduciary duty required by ERISA, under the same framework [as Rule 10b-5].").
69. *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278, 20 Employee Benefits Cas. (BNA) 1175 (2d Cir. 1996).
70. *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278, 20 Employee Benefits Cas. (BNA) 1175 (2d Cir. 1996).
71. See *Ervast v. Flexible Prod.*, 346 F.3d 1007, 1016 (11th Cir. 2003) (claims of misrepresentations concerning a company rather than the plan it sponsored are not within the scope of ERISA, even if the misrepresentations directly affect the value of stock held in an ESOP).
72. See, DOL Enron Amicus Brief at 19. http://www.dol.gov/sol/media/briefs/enronbrief-8-30-02.pdf
73. DOL Enron Amicus Brief at 19. http://www.dol.gov/sol/media/briefs/enronbrief-8-30-02.pdf, at 1.
74. DOL Enron Amicus Brief at 19. http://www.dol.gov/sol/media/briefs/enronbrief-8-30-02.pdf, at 2.
75. DOL Enron Amicus Brief at 19. http://www.dol.gov/sol/media/briefs/enronbrief-8-30-02.pdf, at 20.
76. *In re McKesson HBOC, Inc. ERISA Litigation*, 29 Employee Benefits Cas. (BNA) 1229, 2002 WL 31431588 (N.D. Cal. 2002) (rejected by, In re Sprint Corp. ERISA Litigation, 388 F. Supp. 2d 1207, 33 Employee Benefits Cas. (BNA) 1287 (D. Kan. 2004)).
77. *In re McKesson HBOC, Inc. ERISA Litigation*, 29 Employee Benefits Cas. (BNA) 1229, 2002 WL 31431588 at 5 (N.D. Cal. 2002) (rejected by, In re Sprint Corp. ERISA Litigation, 388 F. Supp. 2d 1207, 33 Employee Benefits Cas. (BNA) 1287 (D. Kan. 2004)).
78. *In re McKesson HBOC, Inc. ERISA Litigation*, 29 Employee Benefits Cas. (BNA) 1229, 2002 WL 31431588 at 5

(N.D. Cal. 2002) (rejected by, In re Sprint Corp. ERISA Litigation, 388 F. Supp. 2d 1207, 33 Employee Benefits Cas. (BNA) 1287 (D. Kan. 2004)).

79. *In re McKesson HBOC, Inc. ERISA Litigation,* 29 Employee Benefits Cas. (BNA) 1229, 2002 WL 31431588 at 5 (N.D. Cal. 2002) (rejected by, In re Sprint Corp. ERISA Litigation, 388 F. Supp. 2d 1207, 33 Employee Benefits Cas. (BNA) 1287 (D. Kan. 2004)); *Edgar v. Avaya,* 503 F.3d 340 (3rd Cir. 2007) (Court noted that had the defendants divested the employer stock in the plans based on non-public information, they would be potentially liable for insider trading under the securities laws).

80. *Harzewski v. Guidant,* 489 F.3d 799, 807 (7th Cir. 2007) (the Court in explaining *Summers v. State Street Bank & Trust,* 453 F.3d 404 (7th Cir. 2006), stated that a trustee cannot be faulted for second-guessing the market, however, a trustee can be faulted for failing to determine at which point to sell employer stock in order to protect participants against excessive risk)

81. See, Halpern, "The Role of the Independent Fiduciary." 22 NO. 5 Journal of Compensation and Benefits 10 (Sept/Oct 2006).