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Mark Casciari

Ian Morrison

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SHOULD THE SECURITIES EXCHANGE ACT BE THE SOLE FEDERAL REMEDY FOR AN ERISA FIDUCIARY MISREPRESENTATION OF THE VALUE OF PUBLIC EMPLOYER STOCK?

MARK CASCIARI AND IAN MORRISON*

I. INTRODUCTION

A falling stock market in the recent past has ushered in a number of ERISA breach of fiduciary duty claims asserted against fiduciaries of tax code section 401(k) plans and Employee Stock Ownership Plans (ESOP) pension plans in which a portion of the plan assets are invested in the stock of the sponsoring employer. In the context of publicly traded companies, these claims routinely follow on the heels of securities fraud lawsuits in which investors allege that company management lied or failed to disclose material information about company performance and thus offered overvalued stock to investors. These tag-along claims typically assert that retirement plan fiduciaries, who also serve as company managers, have imprudently allowed the ERISA plan or its participants to continue investing in the overvalued employer's stock. To this extent, the securities and ERISA claims overlap.

We argue that, to the extent of this overlap, ERISA does not provide an additional remedy. That is, for misrepresentation claims brought against fiduciaries of plans holding publicly traded employer stock, the exclusive and appropriate federal remedy for these claims should be the one provided by Congress under the federal Securities Exchange Act. In attempting to assert such claims under ERISA, the plaintiffs' bar is simply attempting to extract duplicative recovery and attorneys' fees, to the ultimate detriment of plan participants.¹

* The authors are partners at Seyfarth Shaw LLP, a national law firm. They specialize in the defense of claims brought under ERISA. The authors thank Brianne Gruszka, an associate at Seyfarth Shaw, for her considerable assistance in drafting this article.

1. This article does not address the separate issue of whether ERISA fiduciaries are liable for alleged imprudence in allowing continued investment in employer stock. *See, e.g.*, *Difelice v. US Airways, Inc.*, 397 F. Supp. 2d 758, 775 (E.D. Va. 2005). This article also does not address the viability of claims

Several legal and policy points support this conclusion. First, it is clear that ERISA employer stock litigation represents a problem of reconciliation of two federal statutes, which needs to be addressed by the judiciary. In 2005 alone, there were at least three publicly reported settlements of more than \$50 million in ERISA employer stock litigation:

1. *Chao v. Enron Corp.*, No. H-03-2257 (U.S. District Court/Southern District of Texas – September 10, 2005) (\$365.25 million settlement of class action alleging breaches of fiduciary duties under ERISA in connection with the company's 401(k) plan; the settlement is a general unsecured claim in Enron's bankruptcy, and the ultimate amount paid will depend on available assets from the bankruptcy estate).
2. *In Re Royal Dutch/Shell Transport ERISA Litig.*, No. 04-CV-1398 (U.S. District Court/District of New Jersey – July 11, 2005) (\$90 million settlement of consolidated class actions filed by plan participants alleging breaches of fiduciary duties under ERISA).
3. *In Re Enron Corp. Sec., Derivative & ERISA Litig.*, 228 F.R.D. 541 (U.S. District Court/Southern District of Texas – May 24, 2005) (\$85 million partial settlement of class action filed by participants in Enron's three retirement plans alleging various breaches of fiduciary duties by Enron's officers, directors, the plan trustees).

A continued pattern of such large settlements will discourage employers from establishing 401(k) plans and will increase the cost of fiduciary liability insurance or limit the coverage of such insurance, making it difficult for plan sponsors to persuade qualified personnel to serve as plan fiduciaries.

Second, in employer stock ERISA litigation where the stock is publicly traded, the plan participants who make up the class (and in some cases the plan itself) are directly or indirectly plaintiffs in the parallel securities action, and already stand to recover for losses to their stock holdings through a settlement or if they can prove a violation of federal securities law.

Third, in many cases, the plan itself mandates or at least presumes that assets will be invested in employer stock. This is certainly the case with an ESOP, the purpose of which is to hold employer stock, but this is also true with respect to many 401(k) plans. In these cases, the employer stock investment option may

under state securities law. See *Merrill Lynch v. Dabit*, 126 S. Ct. 1503 (2006). See generally Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1, 3 (1998).

be seen as a non-fiduciary plan design action that is not subject to challenge under ERISA. While some courts have held that a fiduciary should nonetheless divest employer stock holdings if the investment becomes imprudent, doing so may constitute unlawful insider trading or accelerate the company's demise by undermining investor confidence, thus inflicting harm upon the employee plan participants.

Fourth, for plans established under ERISA Section 404(c)'s safe harbor, which allows a plan by meeting certain conditions to shift to participants the responsibility for their investment decisions, employer stock cases will likely revolve around the question whether the fiduciary has disclosed sufficient information about company performance to the participant shareholders. Because ERISA does not supersede or undermine other federal statutes, courts should not construe it to require a greater disclosure than is required under securities law or to permit trading on undisclosed information, or to permit or require disclosures to plan participants that are not made to the investing public.

Fifth, in the case of an individual account plan, the remedy for an affirmative misrepresentation or material omission under ERISA should be limited to injunctive "or appropriate equitable relief" under ERISA Section 502(a)(3). This would preclude an award of money damages because that relief would not be "equitable." To the extent that a court is willing to construct an "equitable" remedy, it is unlikely a court would award participant shareholders additional relief beyond that available in a securities fraud case because to do so would be "inappropriate" and thus inconsistent with equitable principles.

Finally, corporate disclosure obligations under federal securities law are the product of a long-standing and well-developed body of regulatory and case law. Courts should be reluctant to develop a new and potentially inconsistent set of disclosure obligations under ERISA.

While the current trend in ERISA employer stock litigation seems to be to allow cases to proceed in some fashion, it is important to recognize that most of the court decisions in this area have been in the context of a motion to dismiss. Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court in deciding motions to dismiss must assume that the well-pleaded allegations of the complaint are true. In addition, the Federal Rules generally require only notice pleading, and many courts have rejected defense arguments to require pleading with particularity of ERISA fiduciary claims.² That is not true in federal securities cases.³ In

2. FED. R. CIV. P. 8(a). See *In re AEP ERISA Litig.*, 327 F. Supp. 2d at 821-22 (holding that the court would review the complaint and the defendant's

comparison to securities litigation, moreover, ERISA employer stock law is much less developed, making it comparatively more difficult for defendants to prevail on a motion to dismiss. It remains to be seen whether a significant portion of these cases will survive summary judgment (where the case is decided based upon a factual record developed in discovery and the complaint allegations are disregarded) or at trial (where the plaintiffs will bear the burden of proof).⁴

argument with liberal pleading standards in mind). *See also* Rankin v. Rots, 278 F. Supp. 2d 853, 866 (E.D. Mich. 2003) (ruling that the liberal pleading standards of Rule 8(a) applies for breach of fiduciary duty claims under ERISA); Cokenour v. Household Int'l, Inc., No. 02 C 7921, 2004 U.S. Dist. LEXIS 5286, at *14 (N.D. Ill. Mar. 31, 2004) (stating that the notice pleading standard, not the Rule 9(b) pleading standard for fraud claims, is to be applied in ERISA actions). *But see* Calpine Corp. ERISA Litig., No. C 03-1685 SBA, 2005 U.S. Dist. LEXIS 34452, at *19-20 (N.D. Cal. Dec. 5, 2005) (dismissing the plaintiffs' complaint based on breach of fiduciary duty because it failed to meet the heightened pleading requirements of Rule 9(b) in accordance with Ninth Circuit precedent).

3. In order to meet the pleading requirements under 17 C.F.R. § 240.10b-5 (2003), "plaintiffs must allege that the defendant (1) made a misstatement or omission of material fact (2) with scienter (3) in connection with the purchase or sale of a security (4) upon which the plaintiffs reasonably relied, and (5) that plaintiff's reliance was the proximate cause of their injury." *In re* Alpha Inc. Sec. Litig., 372 F.3d 137, 147 (3d Cir. 2004). Under the Private Securities Litigation Reform Act (PSLRA), enacted in 1995, plaintiffs must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C.S. § 78u-4(b)(1)(B) (2000).

4. Two district courts recently granted summary judgment for the defendants in employer stock cases. In *In re Reliant Energy ERISA Litig.*, the plaintiffs alleged that investments in common stock were an imprudent investment, based both on damaging public and non-public information. No. H-02-2051, 2006 U.S. Dist. LEXIS 3181, at *4 (S.D. Tex. Jan. 18, 2006). The district court ruled that, since the company savings plan required company stock to be offered as an investment and required employer funds to be invested in the fund, the defendants had no discretion or fiduciary duty to act otherwise. *Id.* at *10. Further, the court dismissed the plaintiffs' allegation that the defendants made negligent misrepresentations in company filings with the Securities Exchange Commission ("SEC"). *Id.* at *13. Rather, the court held that the employer was acting solely as an issuer of stock when it filed the Form S-8 and not in its fiduciary capacity. *Id.* at *13. The court noted that the defendant did not incorporate the SEC filings into the Summary Plan Description, did not encourage plan participants to rely on or read the SEC filings, and did not issue a press release regarding the SEC filings. *Id.* at *12-13.

In another case, the plaintiffs alleged that the employer and two members of the Board of Directors breached their fiduciary duty by offering company stock as an investment option despite the company's involvement in an international bribery scheme. *In re Syncor ERISA Litig.* No. CV 03-2446-RGK (RCx), 2006 U.S. Dist. LEXIS 976, at *4 (C.D. Cal. Jan. 10, 2006). The plaintiffs alleged that the defendants failed to investigate the prudence of

The current wave of ERISA employer stock litigation may ultimately have a negative impact upon plan participants. Given the limited (if any) potential for a recovery beyond that available in companion securities litigation, these cases may be motivated by a desire on the part of the plaintiffs' bar to recover statutory attorney's fees under ERISA and for non-securities litigators to claim a portion of the fees essentially generated by the securities litigation. The litigation increases the cost to employers of providing retirement benefits, both by causing them to incur additional attorney's fees and defense costs, and raising the cost of fiduciary liability insurance and indemnification agreements that a company provides to its employees who serve as fiduciaries. In addition, otherwise qualified individuals may be reluctant to serve as plan fiduciaries for fear of being embroiled in litigation regardless of whether there is adequate insurance or indemnification coverage. The frequency of those types of claims may also cause employers to disallow investment in employer securities, which would undermine the sense of employee ownership that results from those holdings. Given these negative consequences, courts should not be reluctant to find that the ERISA lawsuits are redundant of the securities suits.

II. DISCUSSION

A. *Background on ERISA and the Securities Exchange Act*

1. *The Employee Retirement Income Security Act of 1974*

Congress enacted ERISA⁵ to "assure the equitable character" and financial soundness of pension and other benefit plans.⁶ ERISA does not require employers to provide benefits for their employees; it does not mandate the establishment of any benefit plans.⁷ If an employer voluntarily chooses to establish a pension plan, however, ERISA requires the employer to meet specific obligations, including those imposed by Part 4 of ERISA, titled "Fiduciary Responsibility."

ERISA generally permits two types of retirement plans, defined contribution and defined benefit plans. A defined benefit

company stock and monitor the plan. *Id.* at *9. The court granted summary judgment for the defendants on both claims. *Id.* at *25. In regard to the prudence claim, the plaintiffs failed to provide sufficient evidence to overcome the *Moench* presumption afforded to the employer. *Id.* at *22. Moreover, "because the duty to monitor is derivative of the duty of prudence," the plaintiff's failure to monitor claim was moot. *Id.* at *24-25.

5. 29 U.S.C. § 1001 et seq. (2000).

6. *Rankin*, 278 F. Supp. 2d at 869.

7. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) ("ERISA does not mandate that employers provide any particular benefits.").

plan provides a pension benefit determined by using a formula, the variables of which are typically age, service, and compensation. A defined contribution plan provides a benefit derived from the amount of contributions made by or on behalf of an employee to an account during his or her employment. Two common types of defined contribution plans are Employee Stock Ownership Plans (ESOPs) and 401(k) plans. The primary purpose of an ESOP is to allow employees to invest in their company's own stock.⁸ In comparison, in a 401(k) plan, employees may select from a variety of investment vehicles, which often include bond funds, stock funds, money market or cash equivalents. Often, an employer will allow its employees to invest in employer stock as one option in the company's 401(k) plan. Employers may also choose to match a percentage of the employee's contributions in cash or with employer stock.

Once an employer establishes a retirement plan for its employees, the employer and various employees (potentially including directors and officers), become subject to ERISA fiduciary obligations. A person is an ERISA fiduciary only to the extent she:

- (i) 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) 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) has any discretionary authority or discretionary responsibility in the administration of such plan.⁹

Under ERISA, individuals are fiduciaries based on the extent of their actions towards the plan.¹⁰ A person's status as a director or officer, without more, will not make an individual a fiduciary. Furthermore, the mere act of signing or preparing an SEC filing also will not make an individual a fiduciary.¹¹ A fiduciary may wear "two hats" under ERISA, for example, as fiduciary and employer.¹²

8. 29 U.S.C. § 1107(d)(3)(A).

9. 29 U.S.C. § 1002(21).

10. See *Sprague v. Gen. Motors Co.*, 133 F.3d 388, 404 (6th Cir. 1998) ("[F]iduciary duties under ERISA attach not just to particular persons, but to particular persons performing particular functions."). See also *Gee v. Unum Provident Corp.*, No. 1:03-CV-147, 2005 U.S. Dist. LEXIS 3183, *49-53 (E.D. Tenn. Jan. 14, 2005) (ruling that the defendants acted in a fiduciary capacity when disseminating materially misleading to plan participants).

11. *Gee*, 2005 U.S. Dist. LEXIS at *50.

12. *In re Williams Cos. ERISA Litig.*, 271 F. Supp. 2d 1328, 1340-42 (2003)

In employer stock cases, plaintiffs' attorneys routinely name the following company personnel as defendants based upon allegations that they are ERISA fiduciaries: The board of directors and officers of the company,¹³ including the chief executive officer;¹⁴ the Plan Administrator;¹⁵ the plan's administrative and investment committee;¹⁶ and the finance committee.¹⁷ On the other hand, in securities actions, primarily in Section 10(b) claims, the affirmative duty to disclose has been traditionally imposed on corporate "insiders," including officers, directors, or controlling stockholders.¹⁸

2. *ERISA Fiduciary duties*

ERISA fiduciary duties, largely, arise from the common law of trusts.¹⁹ The basic fiduciary duties include:²⁰

- acting "solely in the interest of the participants and beneficiaries;"²¹
- focusing exclusively on paying benefits and defraying reasonable administrative expenses of the plan;²²
- acting with the "care, skill, prudence, and diligence under the circumstances then prevailing that a

(stating that the members of the Benefits and Investment Committees maintained fiduciary responsibility for their actions due to their discretionary authority in dealing with the plan).

13. *In re AEP ERISA Litig.*, 327 F. Supp. 2d at 817; *In re Sears, Roebuck & Co. ERISA Litig.*, No. 02 C 8324, 2004 U.S. Dist. LEXIS 3241, *2 (N.D. Ill. March 3, 2004); *Gee*, 2005 U.S. Dist. LEXIS 3183 at *5; *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d, 511, 532 (S.D. Tex. 2003).

14. *Cokenour*, 2004 U.S. Dist. LEXIS 5286 at *4; *Gee*, 2005 U.S. Dist. LEXIS 3181 at *6.

15. *Gee*, 2005 U.S. Dist. LEXIS at *5. Under ERISA, the employer/plan sponsor is the default Plan Administrator, but a different entity or individual may be identified. 29 U.S.C. § 1002(15) (2006).

16. *Cokenour*, 2004 U.S. Dist. LEXIS 5286 at *4; *In re Sears Roebuck & Co. ERISA Litig.*, 2004 U.S. Dist. LEXIS 3241 at *2.

17. *See Gee*, 2005 U.S. Dist. LEXIS 3183 at *6 (bringing suit against the Finance Committee, to whom the Board delegated its authority under the plan); *Hill v. BellSouth Corp.*, 313 F. Supp. 2d 1361, 1363 (N.D. Ga. 2004) (suing the Board of Directors Finance/Strategic Planning Committees).

18. *Chiarella v. United States*, 445 U.S. 222, 227 (1980).

19. *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) (stating that the common law of trusts "governed most benefit plans before ERISA's enactment").

20. 29 U.S.C. § 1104(a).

21. *See In re Enron Corp.*, 284 F. Supp. 2d at 546-47 (2003) (stating that "the most fundamental duty of ERISA plan fiduciaries is a duty of complete loyalty," which includes a responsibility to "exclude all selfish interest and all consideration of the interests of third persons").

22. *See Srein v. Soft Drink Workers Union, Local 812*, 93 F.3d 1088, 1098 (2d Cir. 1996) (holding that the defendant fiduciary's conflict of interest and self-dealing violated its fiduciary duty to provide benefits and defray reasonable administrative costs).

prudent man acting in a like capacity and familiar with such matters would use;²³

- diversifying the plan's investments "so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so;"²⁴ and
- following the written terms of the plan to the extent they are consistent with ERISA.²⁵

The first fiduciary duty, the duty of loyalty, means fiduciaries must make all decisions regarding ERISA plans "with an eye single to the interests of the participants and beneficiaries."²⁶ As the Supreme Court has held, "lying is inconsistent with the duty of loyalty."²⁷ "Fiduciaries also have a duty of prudence, defined as "an unwavering duty' to act both 'as a prudent person would act in a similar situation' and 'with single-minded devotion' to those same plan participants and beneficiaries."²⁸

However, as to certain qualifying 401(k) plans, ERISA states "no person who is otherwise a fiduciary shall be liable . . . for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control."²⁹ Under Section 404(c) of ERISA, if an individual account plan allows a participant to exercise control over his or her account assets, fiduciaries have a safe harbor that relieves them of liability for participant-controlled investment decisions.³⁰ Some courts have held that Section 404(c) relieves fiduciaries of liability even if they had acted imprudently in selecting an investment as long as the plan participant maintained independent control over the account.³¹ There are four general requirements for an individual account plan to meet the Section 404(c):

23. 29 U.S.C. § 1104 (a)(1)(B). See *Rankin*, 278 F. Supp. 2d at 870 (defining the prudent man standard as "an unwavering duty' to act both 'as a prudent person would act in a similar situation' and 'with single-minded devotion' to those same plan participants and beneficiaries").

24. See *In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 876, 896 (S.D. Tex. 2004) (dismissing the plaintiff's breach of fiduciary duty claim based on diversification).

25. 29 U.S.C. § 1104 (a)(1)(D). See *Hull v. Policy Mgmt. Systems Corp.*, C/A No. 3:00-778-17, 2001 U.S. Dist. LEXIS 22343, at *11 (D. S.C. Feb. 9, 2001) (stating that a fiduciary must also act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]").

26. *Rankin*, 278 F. Supp. 2d at 870 (quoting *Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1162 (6th Cir. 1988)).

27. *Varity Corp.*, 516 U.S. at 506.

28. *Rankin*, 278 F. Supp. 2d at 870 (quoting *Berlin*, 858 F.2d at 1162).

29. 29 U.S.C. § 1104(c)(1)(B).

30. 29 U.S.C. § 1104(c)(1)(B).

31. *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 445 (3d Cir. 1996), *aff'd*, 173 F.3d 145 (3d Cir. 1999); *Wiseman v. First Citizens Bank & Trust Co.*, 212 F.R.D. 482, 486-87 (W.D.N.C. Jan. 8, 2003), *reaff'd*, 215 F.R.D. 507 (W.D. N.C. May 27, 2003).

- (1) The participant must be able to choose how his or her account is invested, from among a broad range of investment alternatives;
- (2) If employer stock is offered as an investment option, special requirements must be met;
- (3) The plan must give the participant the opportunity to exercise control over the assets in his account; and
- (4) The participant must actually exercise independent control over the investment of his account.³²

The fiduciary defendant has the burden of demonstrating that the participant exercised control, and of demonstrating compliance with each of the many specific components of a Section 404(c) defense.³³

Overall, the law remains relatively undeveloped regarding the Section 404(c) defense. Many courts have rejected ERISA Section 404(c) defenses at the pleadings stage.³⁴ At least one court has found that ERISA Section 404(c) is not applicable to the selection of investment options in a plan and therefore offers no defense to fiduciaries sued for failing to remove allegedly imprudent employer stock as an investment option.³⁵ In *Difelice v. US Airways*, the defendant argued that it was shielded from fiduciary liability by Section 404(c), specifically because the plan participants were in sole control of whether they invested in employer stock or other investment options.³⁶ The district court rejected the defendant's argument, ruling that Section 404(c) was not intended to protect fiduciaries who failed "to exercise prudence in selecting [p]lan investment options."³⁷ The court noted that the employer's decision to continue providing company stock as an

32. 29 C.F.R. § 2550.404 c-1.

33. *Unisys*, 74 F.3d at 446; *Allison v. Bank One-Denver*, 289 F.3d 1223, 1238 (10th Cir. 2002); *See generally In re Unisys Sav. Plan Litig.*, No. 91-3067, 1995 U.S. Dist. LEXIS 843 (E.D. Pa. Jan. 26, 1995), *vacated*, 74 F.3d 420 (3d Cir. 1996), *aff'd*, 173 F.3d 145 (3d Cir. 1999) (discussing the application of ERISA § 404(c) and holding that employer was not liable for participant investments through a retirement plan in GICs because the employer had satisfied all the elements of a § 404(c) defense; therefore, the participants' investment decisions were the cause-in-fact of their losses).

34. *See, e.g., In re Tyco*, No. MDL 02-1335-PB, 2004 WL 2903889, at *7-8 (D. N.H. Dec. 2, 2004); *In re Sprint Corp. ERISA Litig.*, 388 F. Supp. 2d 1207, 1234-35 (D. Kan. 2004); *In re AEP*, 327 F. Supp. 2d at 829-30; *In re Enron Corp.*, 284 F. Supp. 2d at 578; *Rankin*, 278 F. Supp. 2d at 872; *In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745, 764 n.12 (S.D. N.Y. 2003); *Vivien v. WorldCom, Inc.*, No. C 02-01329 WHA, 2002 WL 31640557, at *6 (N.D. Cal. July 26, 2002); *Woods v. Southern Co.*, 396 F. Supp. 2d 1351, at 1367 (N.D. Ga. 2005).

35. *Difelice*, 397 F.Supp.2d 758 (E.D. Va. 2005).

36. *Id.* at 754-55.

37. *Id.* at 777.

investment option, and the resulting loss, could not “plausibly be viewed as ‘resulting from [any] participant’s or beneficiary’s exercise of control.’”³⁸

The *Difelice* court noted, however, that in appropriate instances, Section 404(c) could shield a fiduciary from liability, “even when the fiduciary arguably may have breached its duties.”³⁹ Citing Department of Labor Regulations, the court stated that fiduciaries would be shielded from liability under Section 404(c) when:

a participant, exercising control permitted by the plan, directed the fiduciary to engage in a transaction with a party in interest. In this situation, the fiduciary would not be liable under ERISA § 406 as it normally would because the fiduciary’s breach in this instance was the result of a participant’s exercise of control.⁴⁰

Moreover, the court noted the congruence between liability under Section 409(a) and the shielding provisions of Section 404(c).⁴¹ Under Section 409(a), fiduciaries would not be liable for losses to a plan that occurred due to a participant’s exercise of control because the loss would not “result from” the fiduciary’s breach, similar to the protections afforded to fiduciaries under Section 404(c).⁴²

In contrast, in *Jenkins v. Yager*,⁴³ the Seventh Circuit ruled that even if a plan does not meet the requirements for Section 404(c)’s safe harbor, “there is an ‘implied exception’ to Sections 403 and 405 for participant directed plans, allowing plan participants to direct the investment of their own plan funds.”⁴⁴ The court ruled that a plan does not automatically violate ERISA if it fails to meet the requirements of Section 404(c).⁴⁵ Rather, “the actions of the plan trustee, when delegating decision-making authority to plan participants, must be evaluated to see if they violate the trustee’s fiduciary duty.”⁴⁶

a. An ERISA Fiduciary’s Duty To Disclose

“The law of disclosure under ERISA is both controversial and evolving.”⁴⁷ A plan administrator may act in a fiduciary capacity when he explains plan benefits, even potential future benefits, to

38. *Id.* at 776.

39. *Id.* at 775.

40. *Id.* at 777.

41. *Id.* at 778.

42. *Id.*

43. 444 F.3d 916 (7th Cir. 2006).

44. *Id.*

45. *Id.*

46. *Id.*

47. *In re Xcel Energy, Inc.*, 312 F. Supp. 2d 1165, 1182 (D. Minn. 2004).

its participants.⁴⁸ ERISA outlines several situations in which a plan administrator must disclose information to plan participants, including providing participants with summary plan descriptions (SPDs), annual reports, and statements outlining accrued benefits.⁴⁹ The Supreme Court has declined to answer the question whether fiduciaries have an affirmative obligation to disclose material information on their own initiative, or whether they are only obligated to respond truthfully to employees' inquiries.⁵⁰ However, lower courts have found that the distinction between employer and fiduciary "hats" may blur when business circumstances affect the administration of retirement plans.⁵¹

In ERISA employer stock cases, plaintiffs typically assert that fiduciaries violated an affirmative duty to disclose information by failing to provide complete and accurate information about company financial performance or other factors that are alleged to have affected the participants' ability to evaluate their investment options. Plaintiffs often argue that the employer withheld material information concerning the financial problems or improprieties of the company that affected the true value of company stock.⁵² Further, plaintiffs assert that the defendants breached their duty

48. See *In re Enron Corp.*, 284 F. Supp. 2d at 555 (ruling that the plaintiffs successfully stated a claim for breach of fiduciary duty based on the defendant's representations to employees). See also *Varity Corp.*, 516 U.S. at 503 (holding that based on "the factual context in which the statements were made, combined with the plan-related nature of the activity, engaged in by those who had plan-related authority to do so," the employer was a fiduciary); *McCall v. Burlington N./Santa Fe Co.*, 237 F.3d 506, 510 (5th Cir. 2001) ("Providing information to beneficiaries about likely future plan benefits falls within ERISA's statutory definition of a fiduciary act.").

49. *Hill*, 313 F. Supp. 2d at 1368.

50. *Varity Corp.*, 516 U.S. at 506.

51. See *Hill*, 313 F. Supp. 2d at 1368 (denying the motion to dismiss based on the plaintiffs' allegations that the defendants misrepresented the suitability of employer stock for investment).

52. See *Gee*, 2005 U.S. Dist. LEXIS 3183, at *17 (alleging that the defendants "failed to provide complete and accurate information about [the employer's] business improprieties, misrepresentations, and material accounting irregularities and the consequential artificial inflation of" employer stock). See also *In re Xcel Energy, Inc.*, 312 F. Supp. 2d at 1174 (arguing that defendants should have disclosed the significant risks of investing in employer stock due to the result of SEC investigations and its cross default provisions in a financially troubled subsidiary); *In re McKesson HBOC, Inc. ERISA Litig.*, No. C00-20030 RMW, 2002 U.S. Dist. LEXIS 19473, at *8 (N.D. Cal. Sept. 30, 2002) (alleging that the defendants breached their fiduciary duty to disclose by failing to inform plan participants that the employer was engaged in improper accounting practices); *In re Westar Energy, Inc.*, No. 03-4032-JAR, 2005 U.S. Dist. LEXIS 28585, at *95-98 (D. Kan. Sept. 29, 2005) (arguing that the defendants failed to disclose information regarding business and accounting improprieties).

to disclose by misrepresentations in the company's SEC filings that were incorporated by reference into plan disclosures.⁵³

Some courts are willing to find an affirmative fiduciary duty to disclose material information beyond what is explicitly required in the disclosure rules of ERISA.⁵⁴ According to some courts, the duty to disclose information "entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful."⁵⁵ Some courts have held that fiduciaries who know of company wrongdoing that could harm the value of the plan may have an obligation to warn participants.⁵⁶ However, such an affirmative duty to disclose has been limited to situations when the fiduciary possesses actual knowledge of material information that should be disclosed to the plan participants in order to protect their investments.⁵⁷

Despite the ongoing evolution of the duty of disclosure for fiduciaries, courts also note that a new affirmative duty to disclose only arises in "special circumstances with a potentially extreme impact on a plan as a whole, where plan participants could be materially and negatively affected."⁵⁸ As the court in *Hill v. BellSouth Corp.* stated:

In noting the changes in fiduciary obligations, however, the court must emphasize that the mere fact that an ERISA plan consists, at least in part, in employer stock does not mean that the ERISA fiduciary duty to disclose plan-related information to beneficiaries is transformed into a general duty to disclose the financial details of

53. See *In re Uniphase Corp. ERISA Litig.*, C 03-04743 CW (WWS), 2005 U.S. Dist. LEXIS 17503, at *37-39 (N.D. Cal. July 14, 2005) (ruling that the plaintiffs stated a claim for breach of fiduciary duty based on misrepresentations in prospectuses and other financial information provided to plan participants).

54. *In re Enron Corp.*, 284 F. Supp. 2d at 555. See *In re Uniphase*, 2005 U.S. Dist. LEXIS 17503, at *35-36 (noting an additional affirmative duty to disclose).

55. *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993); *Hill*, 313 F. Supp. 2d at 1368; *In re Dynegy, Inc.*, 309 F. Supp. 2d at 888-89.

56. See, e.g., *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1402-04 (9th Cir. 1995) (holding that the defendant breached his fiduciary duty of prudence by failing to investigate his suspicions regarding plan mismanagement); *Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1175-1182 (3d Cir. 1996) (stating that if the district court found the defendant to be a fiduciary upon remand, the defendant would be held liable for failing to disclose its suspicions of wrongdoing); *Ream v. Frey*, 107 F.3d 147, 156-57 (3d Cir. 1997) (affirming the district court's decision that the defendant breached its fiduciary duty when it failed to inform plan participants about severe cash flow problems).

57. *In re Dynegy, Inc.*, 309 F. Supp. 2d at 889.

58. *Hill*, 313 F. Supp. 2d at 1369.

the business: some sort of 'special circumstance' will be required to trigger these heightened obligations.⁵⁹

Furthermore, in *Difelice v. US Airways*, the court held that besides correcting material misunderstandings created by a fiduciary's own communications, a fiduciary's disclosure obligations are limited to making the disclosures specifically required in ERISA and responding to information requests from plan participants.⁶⁰

In the event of a fiduciary breach, ERISA provides two avenues of recovery. First, under ERISA Section 502(a)(2),⁶¹ a participant, beneficiary, or fiduciary may sue for relief under Section 409.⁶² Section 409 makes plan fiduciaries "personally liable to make good to such plan any losses to the plan resulting from each [fiduciary] breach" and allows other equitable or remedial relief as the court may deem appropriate.⁶³ Second, under ERISA Section 502(a)(3),⁶⁴ a participant, beneficiary, or fiduciary may sue for injunctive or other appropriate equitable relief to enforce a provision of ERISA or of the plan. However, under Supreme Court precedent, the relief available under this section is limited to relief that was typically available in equity.⁶⁵

3. *Summary of Applicable Federal Securities Law*

Under the Securities Exchange Act of 1934 (1934 Act), any individual who makes a statement in a filing with the Securities Exchange Commission (SEC) which, at the time, is false and misleading as to any material fact will be liable to any person who, in reliance upon the statement and not knowing it to be false or misleading, purchased or sold a security at a price which was affected by the statement.⁶⁶ Section 10(b) of the 1934 Act⁶⁷ prohibits the use "in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device or in contrivance of such rules and regulations as the commission may prescribe."⁶⁸

Pursuant to Section 10(b) of the 1934 Act, the SEC promulgated Rule 10b-5, which states:

59. *Id.*

60. 397 F. Supp. 2d at 781.

61. 29 U.S.C. § 1132(a)(2).

62. 29 U.S.C. § 1109.

63. 29 U.S.C. § 1109(a).

64. 29 U.S.C. § 1132(a)(3).

65. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002).

66. Securities and Exchange Act of 1934, Section 18(a); 15 U.S.C. § 78a to 7811.

67. 15 U.S.C. § 78j.

68. *Chiarella*, 445 U.S. at 225.

[I]t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national exchange to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading.⁶⁹

Rule 10b-5 is also the source for insider trading rules, which state that corporate insiders, because they owe fiduciary duties to shareholders, must “either disclose material non-public information publicly or abstain from trading [their] own shares for personal gain.”⁷⁰ The obligation to disclose material information or abstain from trading arises from “an affirmative duty to disclose material information which has been traditionally imposed on corporate ‘insiders,’ particularly officers, directors, or controlling stockholders.”⁷¹ The Supreme Court has consistently held that corporate insiders who have material non-public information must disclose the information or abstain from trading based upon the information.⁷² The duty to disclose before trading assures that corporate insiders “will not benefit personally through fraudulent use of material, nonpublic information.”⁷³

Over the years, the Supreme Court has limited the scope of Section 10b-5 suits, including a requirement that a plaintiff must prove that the defendant acted with “severe recklessness”⁷⁴ defined as:

those highly unreasonable omissions or misrepresentations that involve not merely simply or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it.⁷⁵

The Supreme Court has also held that Section 10b-5 claims are available only to actual purchasers or sellers; individuals who did not purchase or sell a security due to the fraudulent statement cannot bring a 10b-5 action.⁷⁶

To decide whether an employee’s interest in a retirement plan constitutes a security under federal securities law, courts look to

69. 17 C.F.R. § 240.10b-5.

70. *In re Enron Corp.*, 284 F. Supp. 2d at 564.

71. *Chiarella*, 445 U.S. at 227.

72. *Id.* at 230.

73. *Id.*

74. Muir, Dana and Cindy Schipani, *New Standards of Director Loyalty and Care in the Post-Enron Era: Are Some Shareholders More Equal Than Others?*, 8 N.Y.U. J. LEGIS. & PUB. POL’Y. 279, 285 (2004/2005).

75. *In re Enron Corp.*, 284 F. Supp. 2d at 643.

76. *Id.* at 639 (citing to *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731-33 (1975)).

whether the plan is “voluntary” and “contributory.”⁷⁷ A voluntary plan is “one in which employees may elect whether or not to participate,” and a contributory plan is “one in which employees make direct payments, usually in the form of cash or payroll deductions, to the plan.”⁷⁸ Retirement plan investments will only be considered securities if employees voluntarily participate and personally contribute to the plan.⁷⁹ Conversely, “the Securities Acts do not apply to a noncontributory, compulsory plan.”⁸⁰

For example, in *Hood v. Smith’s Transfer Corp.*, the court held that an ESOP fell within the Securities Acts’ definition of “security” because the employees chose whether to participate in the ESOP and contributed by giving up a certain percent of their wages.⁸¹ In the Supreme Court case of *Int’l Brotherhood of Teamsters v. Daniel*, the Court held that securities law did not apply to a noncontributory, compulsory pension plan in which employees were automatically enrolled upon employment.⁸²

The Securities and Exchange Commission applies the insider trading rules to fiduciary plan investment decisions,⁸³ and courts generally agree that fiduciaries cannot engage in insider trading in order to prevent losses to a plan.⁸⁴ As discussed in section I(A)(2), however, courts disagree whether ERISA requires fiduciaries to disclose material, non-public information beyond that required by federal securities law.

Investors may recover monetary damages for their losses in actions under the securities law. There is no set of bright-line rules for damages in actions under Section 10b-5, and one commentator has noted that it is “a confused area of the law where the courts, forced to rely on their own wits, have created a myriad

77. *Id.*

78. *Id.*

79. *Id.* at 640.

80. *Id.*

81. *Hood v. Smith’s Transfer Corp.*, 762 F. Supp. 1274, 1289-90 (W.D. Ky. 1991).

82. *Int’l Bhd. of Teamsters v. Daniel*, 439 U.S. at 551 (1979).

83. See Selective Disclosure and Insider Trading, Exchange Act Release Nos. 33-7881, 34-43154, IC-24599 (Oct. 23, 2000), available at <http://www.sec.gov/rules/final/33-7881.htm> (noting that one cannot influence the buying or selling of shares by a plan while in the possession of material, non-public information).

84. *Hull*, 2001 WL 1836286 at *9; See *Cokenour*, 2004 WL 725973 at *5 (recognizing that defendants were prohibited under securities law from trading based on non-public information but denying motion to dismiss as premature); *Thompson v. Avondale Indus.*, No. Civ. A. 99-3439, 2003 WL 359932, at *15 n.29 (E.D. La. 2003) (holding that in an ESOP divestment case the ESOP must be treated as any other third-party shareholder and that selective disclosures would have prohibited the fiduciaries from selling shares).

of approaches.⁸⁵ This confusion arises because Section 10(b) and Section 10(b)(5) both fail to outline specific measurements for damages.⁸⁶ Section 28(a) of the Securities Exchange Act and 21D(e) of the Private Securities Litigation Reform Act (PSLRA) attempt to provide definitions regarding damages, but the law remains “open-ended” in regards to recovery.⁸⁷

Section 28(a) of the Securities Exchange Act states “no person permitted to maintain a suit for damages . . . shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of.”⁸⁸ Further, Section 21D(e) of the PSLRA states:

[I]n any private action arising under [Section 28(a) of the Securities Exchange Act] in which the plaintiff seeks to establish damages by reference to the market price of a security, the award of damages to the plaintiff shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market.⁸⁹

The “mean trading price” is defined as the average of the daily trading price of the security, determined at the close of market each day during the 90-day period.⁹⁰

The Supreme Court in *Affiliated Ute Citizens of Utah v. United States*,⁹¹ outlined the traditional “out-of-pocket” theory for damages in 10b-5 claims. The Court stated that damages would be measured by the difference between the value of what the seller received for the shares and the fair market value of the shares at the time of the sale.⁹² When the defendant received more than the seller’s actual loss, damages are the amount of the defendant’s profit.⁹³ Lower courts, however, have used other measures of damages, including “windfall, rescissory, benefit-of-the-bargain,

85. Ann Morales Olazabal, *Analyst and Broker-Dealer Liability Under 10(b) for Biased Stock Recommendations*, 1 N.Y.U. J. L. & BUS. 1, 76 (2004).

86. *Id.*

87. Olazabal, *supra* note 82, at 76; U.S.C. § 78bb(a) (2000); 15 U.S.C. § 78u-4(e) (2000). See Robert B. Thompson, *The Measure of Recovery Under Rule 10b-5: A Restitution Alternative to Tort Damages*, 37 VAND. L. REV. 349, 355 (1984) (“Because the rule 10b-5 cause of action is implied, courts have no express guidance in determining the appropriate measure of recovery for a violation of a rule.”).

88. 15 U.S.C. § 78bb(a) (2000).

89. 15 U.S.C. § 78u-4(e)(1) (2000).

90. 15 U.S.C. § 78u-4(e)(3) (2000).

91. 406 U.S. 128, 155 (1972).

92. *Id.*

93. *Id.*

disgorgement/unjust enrichment/constructive trust, [and] consequential damages. . . .”⁹⁴

B. ERISA Employer Stock Litigation

In a typical ERISA employer stock case, an employer maintains a 401(k) plan for its employees that offers the employer’s own publicly traded stock as an investment option. The stock drops in value, sometimes due to company mismanagement. Public investors sue alleging that violations of federal securities law caused the value of the stock to be artificially inflated when they bought shares of stock. If the value of the employer’s stock declines, the value of the 401(k) plan participant accounts also declines. As a result, plan participants often sue the plan’s fiduciaries in an attempt to recoup their losses under ERISA. The plan participants assert a variety of theories, including breach of the fiduciary duty to disclose. Plaintiffs generally allege that fiduciaries, who wear “two hats” (i.e., manage the company and administer the plan), failed to disclose to or affirmatively concealed material information from the plan participants regarding the value of company stock.⁹⁵ Plaintiffs rely on plan-specific communications, such as SPDs, and on general communications to the investing public, such as press releases or SEC filings.⁹⁶

94. Olazabal, *supra* note 82, at 77.

95. See *Hill*, 313 F. Supp. 2d at 1365-366 (alleging that the defendant failed to inform plan participants about the high-risk nature of certain Latin American investments). See also *Rankin*, 278 F. Supp. 2d at 862-65 (arguing that the defendants failed to disclose material information about the company’s true financial condition).

96. Plaintiffs often bring employer stock cases as class actions. Plaintiffs usually seek to certify a class in an employer stock case under FED. R. CIV. P. 23(b)(1) or (2). 23(b)(1) of the Federal Rules of Civil Procedure requires either showing that separate lawsuits by “individual members of the class would create the risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct” for the defendants, or that “adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.” FED. R. CIV. P. 23(b)(1). 23(b)(2) of the Federal Rules of Civil Procedure requires that the defendants “acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole.” FED. R. CIV. P. 23(b)(2). Some courts have held that where plaintiffs allege a misrepresentation, class certification may be inappropriate because each individual must prove reliance on the misrepresentation. See, e.g., *Thomas v. Aris Corp. of Am.*, 219 F.R.D. 338, 342 (M.D. Pa. 2003) (declining to certify a class asserting ERISA breach of fiduciary duty claims regarding employer stock in a 401(k) plan because plaintiff, “and every other member of the putative class, is required to establish additional elements, such as reliance, in order to establish any viable

In response, defendants often argue that disclosure would have violated the federal securities law.⁹⁷ Defendants also argue that if they had disclosed information regarding the company stock or taken other actions urged by the ERISA plaintiffs, the company's stock price would have declined sooner or more rapidly, causing further damage to the participants' investments.⁹⁸ Finally, defendants argue that the public disclosures were made in a corporate, not a fiduciary capacity, thus removing the actions from the purview of ERISA.⁹⁹

Recent settlements of employer stock cases by the following companies indicate the magnitude of these claims: Enron (\$365.25 million settlement and \$85 million partial settlement); Lucent Technologies (approx. \$69 million settlement); WorldCom (\$78.9 million and \$47.15 million settlement); Household International (\$46.5 million settlement); Dynegy, Inc. (\$30.75 million settlement); and Royal Dutch/Shell Transport (\$85 million partial settlement).¹⁰⁰

In the Enron case, the plaintiffs alleged, among other arguments, that the defendant failed to provide participants with accurate information regarding Enron stock and wrongfully induced participants to direct their retirement savings into Enron stock.¹⁰¹ The U.S. District Court in Houston granted final approval for an \$85 million partial settlement on behalf of all participants in Enron's ESOP, Savings Plan and Cash Balance Plan on May 24, 2005.¹⁰² Similarly, in the Lucent case, the plaintiffs alleged that the defendants violated ERISA by misrepresenting the financial status of Lucent and the true value of Lucent stock, which led to a settlement of approximately \$69 million.¹⁰³

claim"). If a claim is brought under ERISA § 502(a)(2), there may be no need for class certification because relief in such cases flows to the plan as a whole. See *infra* notes 109, 113-115.

97. See *In re AEP ERISA Litig.*, 327 F. Supp. 2d at 822 (noting defendant's argument that it "would be subject to conflicting bodies of law, namely federal securities law and ERISA"). See also *In re Williams Cos. ERISA Litig.*, 271 F. Supp. 2d at 1340 (noting that "in any event, any such disclosure would have constituted a violation of federal securities law . . .").

98. *Hill*, 313 F. Supp. 2d at 1366.

99. *Vivien*, 2002 U.S. Dist. LEXIS 27666 at *20.

100. *Chao v. Enron Corp.*, No. H-03-2257 (S.D. Tex. Sept. 10, 2005); *Tittle v. Enron Corp.*, 228 F.R.D. 541 (S.D. Tex. 2005); *Reinhart v. Lucent Techs., Inc.*, 327 F. Supp. 2d 426 (D.N.J. 2003); *Suntrust Bank v. Ebbers*, 2006 U.S. Dist. Lexis 3715 (S.D. N.Y. 2006); *In re Worldcom, Inc. ERISA Litig.*, No. 02 Civ. 4816 (DLC) (S.D. N.Y. 2005); *In re Household Int'l, Inc. ERISA Litig.*, No. 02 C 7921, 2004 U.S. Dist. LEXIS 5286 (N.D. Ill. Nov. 22, 2004); *Schied v. Dynegy, Inc.*, 309 F. Supp. 2d 861 (S.D. Tex. 2004); *In re Royal Dutch/Shell Transport ERISA Litig.*, 404 F. Supp. 2d 605 (D. N.J. July 11, 2005).

101. *Tittle*, 228 F.R.D. at 544 n1.

102. *Id.* at 567.

103. *Reinhart*, 327 F. Supp. 2d at 434, 446.

The trend of significant claims and settlements does not appear likely to abate any time in the future. In addition, a number of well-financed plaintiffs' law firms with experience in the securities litigation area have moved into ERISA litigation. This means that employers and their retirement plan administrators can expect these claims to continue.

Fiduciary liability insurance costs and coverage have skyrocketed over the past few years due, at least in part due to the increase of employer stock litigation settlements. These cases are the fiduciary liability equivalent of a major hurricane and have a similar impact on insurers. For example, the partial settlement of \$85 million in the Enron case represented the policy limits of two Enron fiduciary insurance policies.¹⁰⁴ Fortune 500 companies have begun purchasing fiduciary liability coverage limits of \$100 million or more, three or four times the level of such insurance a few years ago.¹⁰⁵ Renewal premiums for fiduciary liability insurance have increased up to 500% in some cases.¹⁰⁶ The cost of director and officer liability insurance, which is often implicated in ERISA claims, has also escalated, with premiums increasing as much as 200%.¹⁰⁷

Like any type of insurance, the cost of fiduciary liability insurance is determined in part by claims trends. As discussed above, given the pattern of high settlements, employers have seen and can expect to see continued increases in fiduciary liability insurance premiums.¹⁰⁸ Insured or not, ERISA employer stock litigation is expensive. Legal fees for defense of these claims can run into the millions of dollars. While these costs may not be chargeable to the plan as an administrative expense, employers certainly view them as a cost associated with administering a retirement plan.¹⁰⁹ Thus, while those bringing ERISA employer

104. *Tittle*, 228 F.R.D. at 546 n.12.

105. Len Strazewski, *Fiduciary Risk: a Sleeper Awakes*, RISK AND INSURANCE, August 2004, available at http://www.findarticles.com/p/articles/mi_m0BJK/is_9_15/ai_n6156493.

106. *Survey Finds Massive Cost Increases for Pension Fund Liability Insurance*, 30 BNA PENSION & BENEFITS RPTR. 1691 (Aug. 5, 2003) (ISSN 1522-5976).

107. *Id.*

108. ERISA permits a plan or plan sponsor to purchase insurance for individuals performing fiduciary functions in connection with a plan. Section 410(b)(1) of ERISA, 29 U.S.C. § 1110(b)(1), states that a plan may purchase insurance "for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a fiduciary, if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary."

109. Consistent with ERISA's fiduciary duties, an ERISA plan may cover the costs of defending claims brought against the plan. However, the Department of Labor takes the position (in its regulations and in two relevant advisory

stock claims undoubtedly believe they are attempting to bring a benefit to plan participants, these suits increase the cost of providing benefits and thus may discourage employers from continuing to offer retirement plans or as generous retirement plans.

C. In The Majority of ERISA Employer Stock Cases, Relief For Affirmative Misrepresentations and Material Omissions Will be Limited to Equitable Relief, Unlike in Companion Securities Cases, Where Damages May be Available

While the courts continue to grapple with the question of what type of relief is permitted in ERISA employer stock cases, the view most consistent with the structure of ERISA, the applicable Supreme Court precedent, and the nature of individual account retirement plans is that relief for misrepresentation claims is extremely limited. The remedy for an affirmative misrepresentation or material omission under ERISA will be limited to injunctive "or other appropriate equitable relief." This will preclude an award of money damages because that relief would not be "equitable" in the context of ERISA. Moreover, to the extent that a court is willing to construct an "equitable" remedy to fill this perceived remedial gap, it is unlikely a court would award participant shareholders an additional remedy beyond that available in the companion securities fraud case. Doing so would not be "appropriate" as the Supreme Court has defined that term in ERISA, and awarding a double recovery would presumably be inconsistent with general principles of equity.

As noted previously, ERISA provides two avenues of relief for a breach of fiduciary duty. First, ERISA Section 502(a)(2) provides that "a civil action may be brought . . . by a participant, beneficiary or fiduciary for appropriate relief under section 409" of ERISA.¹¹⁰ Section 409 holds fiduciaries personally liable for losses caused to the plan by breaches of their duties.¹¹¹ It is well established that relief under Section 502(a)(2) must inure to the plan, and not to

opinion letters) that a plan may not reimburse the fiduciary for his or her attorneys' fees where the fiduciary is found liable for a fiduciary breach. Doing so is improper and invalid under ERISA Section 410(a) and constitutes a prohibited transaction under ERISA Section 406; DOL Information Letter to J. Erlenborn (Mar. 13, 1986); DOL Information Letter to K. Maldonado (Mar. 2, 1987). In discussing Section 410(b)(1), the *Enron* court explained "[i]t is noteworthy that the statute declares as void against public policy any agreement or provision in an ERISA plan that tries to relieve a fiduciary from liability other than those allowing him to delegate responsibilities to others, who then become fiduciaries as to those duties and obligations." 228 F.R.D. at 550.

110. 29 U.S.C. § 1132(a)(2).

111. 29 U.S.C. § 1109(a).

the individual participants.¹¹² Second, ERISA Section 502(a)(3) authorizes suits by participants, beneficiaries or fiduciaries to recover “appropriate equitable relief.”¹¹³ In the wake of the Supreme Court’s decision in *Great-West Life & Annuity Ins. Co. v. Knudson*,¹¹⁴ courts have struggled to distinguish between equitable relief and legal relief (i.e., money damages) in the context of employer stock claims.¹¹⁵ Defendants continue to argue that *Great-West* does not permit an award of money under Section 502(a)(3).¹¹⁶

As the current litigation has shown, this issue is not as clearly defined as it might appear. In the context of employer stock cases, the plan holds the stock, but it is held in the form of participant accounts. Some plans buy and sell stock on an aggregate or net basis. For example, if on a given day one participant places an order to buy 100 shares of employer stock and another participant places an order to sell 100 shares, the plan would not have to purchase shares on the open market – it would simply move 100 shares from one account to the other. Arguably, under this scenario, the individual participant may have lost money by buying shares, but the plan as a whole has not suffered a loss.

In addition, courts have on occasion analyzed this issue as a question of standing rather than the availability of relief. Some hold that plaintiffs do not have standing to bring a breach of

112. See *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985), (remanded to 778 F.2d 542 (9th Cir. 1985) (“[R]ecover for a violation of Section 409 inures to the benefit of the plan as a whole . . .”).

113. 29 U.S.C. § 1132(a)(3)(B).

114. See *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 221 (distinguishing between equitable relief, which is available under § 502(a)(3), and legal relief, which is not).

115. See, e.g., *Sereboff v. Mid. Atl. Med. Servs.*, 164 L. Ed. 2d 612 (2006); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 945 (8th Cir. 1999) (finding lost opportunity costs are not recoverable as “appropriate equitable relief” under ERISA section 1132(a)(3)); *In re Xcel Energy, Inc.*, 312 F. Supp. 2d at 1180 (noting *Section 1132(a)(3)* permits a plan participant to seek injunctive or equitable relief for violations of the subchapter or of a plan directive).

116. This remains a valid argument even after the Supreme Court’s recent decision in *Sereboff v. Mid. Atl. Med. Servs.*, 164 L. Ed. 2d 612 (2006). In *Sereboff*, the defendant insurance company sought restitution from the plaintiffs’ tort recovery under ERISA Section 502(a)(3). The Court ruled that the defendant’s claim constituted a claim for equitable relief because it sought “specifically identifiable” funds that were “within the possession and control” of the plaintiffs. *Id.* at 619. Furthermore, the Court distinguished the defendant’s claim from *Knudson*, where the defendant attempted to “impose personal liability . . . for a contractual obligation to pay money.” *Id.* at 620. Unlike *Sereboff*, participant shareholders cannot bring an equitable claim for restitution under ERISA Section 502(a)(3) because there is no specifically identifiable fund from which the plaintiffs can seek relief. Rather, as in *Knudson*, participant shareholders would merely be attempting to impose personal liability for money damages, which the Court has held ERISA Section 502(a)(3) does not permit.

fiduciary duty claim because only the plan, not the individuals, can recover losses for the alleged breach.¹¹⁷ Other courts have held that individual participants do have standing because if each individual recovers, then the plan as a whole recovers for the alleged losses.¹¹⁸ Other courts have framed the issue as whether the plaintiffs can state a claim upon which relief can be granted,¹¹⁹ but the analysis is essentially the same: whether Section 502(a)(2) affords relief to the individual participants.

It is also important to note that whether or not monetary relief is available to the participant plaintiffs, it will be limited. ERISA does not permit punitive or other types of “extra-contractual” relief.¹²⁰ As noted, the Supreme Court in *Varity* held that relief under ERISA Section 502(a)(3) (if allowed) would be limited to situations where it is “appropriate,” that is, where it cannot be obtained elsewhere. Because ERISA employer stock plaintiffs have another avenue of relief (either individually or by way of a claim brought on behalf of the plan as a shareholder), their claims for ERISA relief are inappropriate under *Varity*.

117. See *Milofsky v. Am. Airlines, Inc.*, 404 F.3d 338, 347 (5th Cir. 2005) *reh'g granted en banc*, 418 F.3d 429 (5th Cir. 2005) (finding no standing to bring such claims under Section 502(a)(2) because the ultimate relief sought is reimbursement to the individual accounts of those who suffered losses and not to the plan as a whole); *Fisher v. J.P. Morgan Chase & Co.*, 230 F.R.D. 370, 375 (S.D.N.Y. 2005) (stating that plaintiffs did not have standing because they sought relief for a “specific subclass of participants” and not on behalf of the Plan itself).

118. See *In re Syncor ERISA Litig.*, 351 F. Supp. 2d 970, 990 (C.D. Cal. 2004) (declining to conclude that “a request to allocate relief among the Participants’ individual accounts in proportion to the accounts’ losses constitute[d] individual relief”); *Kling v. Fid. Mgmt. Trust Co.*, 270 F. Supp. 2d 121, 126-27 (D. Mass. 2003) (holding that a claim alleging mismanagement of 401(k) plan assets arises under Section 502(a)(2)); *In re Amsted Indus. ERISA Litig.*, 263 F. Supp. 2d 1126, 1129 (N.D. Ill. 2003) (concluding that Section 502(a)(2) authorizes plaintiffs to bring a class action “to prevent or remedy any breach of fiduciary duty owed to the plan”); *In re CMS Energy ERISA Litig.*, 312 F. Supp. 2d 898, 912-13 (E.D. Mich. 2004) (allowing claim to be brought under Section 502(a)(2) because it was brought as a class action, and the plaintiffs therefore would “represent the Plan as a whole to the extent the Plan was constituted of CMS stock”).

119. See, e.g., *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 235, 242 (3d Cir. 2005) (reversing district court and holding that plaintiffs stated a claim for breach of fiduciary duty because the “Plan held Schering-Plough stock as an asset and that asset was greatly reduced in value allegedly because of breaches of fiduciary duty”).

120. See *Cowden v. Montgomery County Soc. for Cancer Control*, 591 F. Supp. 740, 753 (S.D. Ohio 1984) (holding that punitive damages were not available to ERISA plan beneficiary who sought to recover under 29 USCS § 1132(a)(3) and 29 U.S.C.S. § 1132(a)(1)(B) for defendants’ alleged failures to comply with information reporting and disclosure requirements of ERISA and pension plan).

Even if an “equitable” remedy exists for plaintiffs in certain ERISA employer stock cases, general principles of equity hold that a plaintiff may not receive a double recovery of damages.¹²¹ For example, in *Anweiler v. American Elec. Power Serv. Corp.*, the court found that the defendant breached its fiduciary duties by not adequately informing the plaintiff’s deceased husband about the terms of a reimbursement agreement he executed.¹²² The plaintiff sought a constructive trust over the proceeds of her deceased husband’s insurance policy as equitable relief under ERISA Section 502(a)(3).¹²³ The Seventh Circuit denied the plaintiff’s request, noting that her husband erroneously received disability benefits from both social security and the defendant, and owed the defendant approximately \$46,000 at the time of his death due to overpayment.¹²⁴ Even though the defendant received \$37,000 from the deceased husband’s life insurance proceeds because of the reimbursement agreement, the deceased husband still owed the defendant \$9,000.¹²⁵ The court stated, “the plaintiff could not escape these facts,” and held that she was not entitled to equitable relief, despite the fact that the defendant breached its fiduciary duty.¹²⁶ There may be a complete identity of damages claimed in ERISA employer stock cases and companion securities cases, or at the least a significant overlap. The overlap is pronounced in the case of disclosure claims being asserted in ERISA claims, greatly reducing the potential for recovery under ERISA.

D. ERISA Section 514 Precludes Construction of ERISA that Conflicts With Other Federal Law

ERISA Section 514(d)¹²⁷ states “nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law.”¹²⁸ Courts have held that this section is a “strong, comprehensive, express statement that ERISA is not to be

121. See *Conoco Inc. v. Dep’t of Energy*, 99 F.3d 387, 396 (Fed. Cir. 1996) (noting that both parties agreed that equity forbids double recovery); *United States v. Job Resources for the Disabled*, No. 97 C 3904, 2000 U.S. Dist. LEXIS 12616, at *13 (N.D. Ill. Aug. 24, 2000) (stating that a claim for unjust enrichment could only proceed if the False Claims Act failed because “equity does not allow double recovery”); *Montgomery County v. Jaffe*, 897 F. Supp. 233, 240 (D. Md. 1995) (holding that equity prohibits double recovery where the plaintiff had already received money for a claim but refused to give credit to defendants for payment).

122. *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993).

123. *Id.* at 993.

124. *Id.*

125. *Id.*

126. *Id.*

127. 29 U.S.C. § 1144(d).

128. *Id.*

read as displacing by implication any pre-existing federal legislation.¹²⁹ Therefore, ERISA does not supplant federal securities law.¹³⁰

The difficulty in analyzing the interplay between ERISA and federal securities law in ERISA employer stock litigation is that the vast majority of decisions concerning this issue have been decided at the motion to dismiss stage, accepting the plaintiffs' (lawyers) well pled allegations as true, regardless of the facts. Two cases, *Hull v. Policy Mgmt. Systems Corp.*,¹³¹ and *In re McKesson HBOC, Inc.*,¹³² have suggested that there is discord between plaintiffs bringing both ERISA and securities suits. Other courts have criticized these cases.¹³³

In *Hull*, the 401(k) plan participants alleged that defendants who were members of the company's plan investment committee breached their fiduciary duties by failing to discover and disclose the truth about the employer's stock value, which dropped significantly in value after negative information was released to the public.¹³⁴ A separate securities class action initiated by shareholders alleged that company insiders provided false information or failed to provide correct information regarding the value of company stock.¹³⁵ In the ERISA action, the court noted that the plaintiffs failed to allege that the committee defendants possessed any knowledge of the alleged misinformation of stock value by the corporation.¹³⁶ Moreover, the plaintiffs failed to allege that the committee defendants did not act independently of the corporate defendants or that the committee defendants made any purchases of company stock above market price.¹³⁷

The court ruled that the plaintiffs were attempting to hold the committee defendants liable for the wrongs of others, thus creating a different standard of care for the committee purchase of company stock compared to other types of stock.¹³⁸ The court reasoned:

129. *Air Line Pilots Ass'n. Int'l v. Northwest Airlines, Inc.*, 627 F.2d 272, 276 (D.C. Cir. 1980); *De La Rosa Sanchez v. E. Airlines, Inc.*, 574 F.2d 29, 33 (1st Cir. 1978); *Bonin v. Am. Airlines, Inc.*, 621 F.2d 635, 638 (5th Cir. 1980).

130. *Ventimiglia v. Gruntal & Co.*, No. 88 Civ. 1675 (RJW), 1989 U.S. Dist. LEXIS 12910, at *10 (S.D.N.Y. Nov. 1, 1989).

131. C/A No: 3:00-778-17, 2001 U.S. Dist. LEXIS 22343 (D. S.C. Feb. 9, 2001).

132. No. C00-20030 RMW, 2002 U.S. Dist. LEXIS 19473 (N.D. Cal. Sept. 30, 2002).

133. *Kling*, 323 F. Supp. 2d at 143 (D.C. Mass. 2004); *Gee*, 2005 U.S. Dist. LEXIS 3183 at *30-43.

134. *Hull*, 2001 U.S. Dist. LEXIS 22343 at *24.

135. *Id.* at *6.

136. *Id.* at *25.

137. *Id.*

138. *Id.* at *26.

In many respects, this standard would put the Committee in the untenable position of choosing one of three unacceptable (and in some instances illegal) courses of action: (1) obtain “inside information and then make stock purchase and retention decisions based on this “inside information”; (2) make the disclosures of “inside” information itself before acting on the discovered information, overstepping its role and, in any case, likely causing the stock price to drop; or (3) breach its fiduciary duty by not obtaining and acting on “inside” information.¹³⁹

The court also rejected the plaintiffs’ argument that the committee defendants could have refrained from purchasing additional shares of the stock, thus avoiding liability under the insider trading rules.¹⁴⁰ According to the court, this would “violate the spirit of these rules, and, at the least, impose a higher standard on ERISA fiduciaries as to Plan purchases of employer stock than would be applied to other stock purchases.”¹⁴¹ The court noted that the plaintiffs did not provide any authority for this dual standard.¹⁴²

In *In re McKesson HBOC, Inc.*, the plaintiffs alleged that the defendants violated ERISA by failing to divest the plan of company stock that the defendants allegedly knew was impaired due to financially irregularities.¹⁴³ The defendants, who included the employer and former and current directors and officers, argued that if they had sold the company stock and disclosed the alleged financial improprieties, they would have both violated insider-trading laws and caused the stock to decline in value due to the disclosures.¹⁴⁴ Citing to the “efficient capital markets hypotheses,”¹⁴⁵ the defendants noted that the disclosures “would have swiftly resulted in a market adjustment,”¹⁴⁶ that is, a drop in the company’s stock price, which would have actually harmed plan participants. The court granted the defendants’ motion to dismiss, holding that fiduciaries are not required to violate securities law “merely to protect the interests of Plan participants.”¹⁴⁷ The court noted: “[N]ot even a fiduciary acting in its fiduciary capacity is permitted to engage in insider trading.”¹⁴⁸

139. *Id.*

140. *Id.*

141. *Id.* at *26-7.

142. *Id.* at *27.

143. *In re McKesson HBOC, Inc.*, 2002 U.S. Dist. LEXIS 19473 at *20.

144. *Id.*

145. The “efficient capital market theory” states that “because of the large number of skilled profit-motivated investors continuously analyzing all publicly available information concerning liquid publicly traded securities, the prices of those securities in the market fairly reflects the value of the securities.” *Viacom Int’l, Inc. v. Icahn*, 946 F.2d 998, 1000 (2d Cir. 1991).

146. *In re McKesson HBOC, Inc.*, 2002 U.S. Dist. LEXIS 19473 at *20

147. *Id.* at *24.

148. *Id.* at *21.

To date, however, the majority of cases have rejected defendants' arguments that disclosing information regarding company stock would violate insider-trading laws.¹⁴⁹ In 2005, one court stated that there is "an evolving consensus in the district courts that there is no conflict between the requirements of ERISA and federal securities law."¹⁵⁰ Courts have noted that if they accepted defendants' arguments, plan participants and beneficiaries would have no ERISA cause of action against plan fiduciaries who possess information about questionable plan investments, but fail to share the information due to a fear that the investment value would drop because of disclosure.¹⁵¹ This result, most courts hold, would go against ERISA's fundamental purpose: to encourage employers to offer as generous retirement benefits as possible, while protecting participants and beneficiaries.¹⁵²

Courts note that ERISA and federal securities law share the same goal of disclosure of material information, and the fact that defendants are subject to both disclosure requirements should not excuse their failure to comply with both.¹⁵³ Some courts also state that defendants could comply with both ERISA and the federal securities law by informing the plan participants and the investing public about the investments or discontinuing further plan purchases of the stock.¹⁵⁴ Moreover, as courts have noted, "it is impossible to rule out as a matter of law any and all ERISA recovery at the pleadings stage simply because federal securities law may provide overlapping relief."¹⁵⁵

It is clear, however, that there is at least the potential for conflict between the two regulatory schemes. Even the U.S.

149. *Gee*, 2005 U.S. Dist. LEXIS 3183 at *43; *Kling v. Fidelity Mgmt. Trust Co.*, 323 F. Supp. 2d 132 (D.C. Mass. 2004); *In re Uniphase Corp. ERISA Litig.*, Master File C 03-04743 CW (WWS), 2005 U.S. Dist. LEXIS 17503 (N.D. Cal. 2005); *Rankin v. Rots*, 278 F. Supp. 2d 853 (E.D. Mich. 2003); *In re Williams Cos. ERISA Litig.*, 271 F. Supp. 2d 1328 (N.D. Ok. 2003); *In re Xcel Energy, Inc.*, 312 F. Supp. 2d 1165 (D.C. Minn. 2004); *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812 (2004); *Vivien v. WorldCom, Inc.*, No. C 02-01329, 2002 U.S. Dist. LEXIS 27666 (N.D. Cal. 2002); *In re Enron Corp. Secs., Deriv. & ERISA Litig.*, 284 F. Supp. 2d 511 (S.D. Tex. 2003).

150. *Gee*, 2005 U.S. Dist. LEXIS 3183 at *36; *Rankin*, 278 F. Supp. 2d at 874-875 (holding "the duties under ERISA and duties under securities law can exist concomitantly").

151. *Gee*, 2005 U.S. Dist. LEXIS 3183 at *42-6. *But see Cokenour*, 2004 U.S. Dist. LEXIS 5286 at *24 (stating "a public disclosure of the wrongdoing or a notification of others that might leak the information to the public would have caused the stock price to fall and the losses would result to the Plan regardless").

152. *Gee*, 2005 U.S. Dist. LEXIS 3183 at *43.

153. *Id.*

154. *Id.* at *44; *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 823 (2004).

155. *Vivien*, 2002 U.S. Dist. LEXIS 27666 at *25.

Department of Labor, in an amicus brief submitted in the *Enron* litigation, acknowledged that there is at least the potential for a conflict or inconsistency between the two regulatory schemes.¹⁵⁶

Defendants' duty to "disclose or abstain" under the securities laws does not immunize them from a claim that they failed in their conduct as ERISA fiduciaries. To the contrary, while their Securities Act and ERISA duties may conflict in some respects, they are congruent in others, and there are certain steps that could have been taken that would have satisfied both duties to the benefit of the plans. First and foremost, nothing in the securities laws would have prohibited them from disclosing the information to other shareholders and the public at large, or from forcing [the company] to do so.¹⁵⁷

While the Department of Labor was willing to concede only a limited potential for conflict existed by stating "[w]hile the Administrative Committee arguably could not have sold the plan's Enron stock without full market disclosure, they were neither allowed under ERISA nor required under securities law to do nothing,"¹⁵⁸ the concession nonetheless is telling.

It is worth repeating that the majority of the cases have been decided at the motion to dismiss stage. This means that "the allegations of the complaint are generally taken as true," limiting courts to deciding whether it would be impossible for the plaintiffs to recover.¹⁵⁹ Because they were deciding cases based upon the well pled allegations which of course were written by sophisticated plaintiffs' counsel, the question confronted by these courts was not whether the ERISA disclosure proposed by the plaintiffs actually was inconsistent with securities law disclosure requirements but simply whether there existed the potential for some set of facts under which the two were not inconsistent. The courts could only dismiss the claim if, under all possible fact scenarios, there still would have been a conflict between the ERISA and the securities law disclosure obligations. If there is a reasonable possibility that there would be no inconsistency, then the court would feel bound by procedural rules to reject the defendants' motions to dismiss. Indeed, despite the fact that many district courts have rejected defendants' arguments regarding the discord between ERISA and securities law, most district courts note that this argument is best

156. Brief of Amicus Curiae Secretary of Labor at *26, *Tittle v. Enron Corp.*, 284 F. Supp. 2d 511 (No. H-01-3913), 2002 U.S. Dist. Ct. Briefs LEXIS 5, at *26.

157. *Kling*, 323 F. Supp. 2d at 143 (citing *In re Enron Corp.*, 284 F. Supp. 2d at 566).

158. Brief of Amicus Curiae, *supra* note 151, at *29.

159. *Hughes v. Rowe*, 449 U.S. 5, 10 (1980); *Cruz v. Beto*, 405 U.S. 319, 322 (1972).

reserved for a later stage of the litigation when the record can be more fully developed.¹⁶⁰

E. Compelling Policy Reasons Show That ERISA Plaintiffs Should Not Receive a Remedy Greater Than Similarly Situated, Non-participant Who are Plaintiffs in a Companion Securities Case

In addition to the purely legal reasons already discussed, the limitations on relief under ERISA and the statutory mandate that ERISA not interfere with other federal statutes, several other factors support the conclusion that ERISA should not allow additional relief in disclosure cases.

While the plaintiffs in ERISA employer stock cases may be able to make compelling policy arguments for some claims, there is a subset of these claims in which the ERISA action appears to be nothing more than a redundancy. This is true for cases where an employer that makes its own publicly traded stock available as an investment option in its 401(k) plan, and is alleged to have made inaccurate (or failed to make) disclosures regarding company performance or finances, and is the target of an ongoing securities fraud action based upon the same false or insufficient disclosure. In these types of cases, there should be no separate ERISA remedy.

1. Requiring Employers to Divest Company Stock Would Likely Constitute Insider Trading Or Accelerate The Company's Demise

Courts have generally been unwilling to accept, at the motion to dismiss stage, the defense offered by fiduciaries that, as a matter of law, their hands were tied, that there was nothing they could have done to divest the plan of its employer stock holdings, or warn participants of problems with the stock that would not have either hastened the demise of the company or constituted unlawful insider trading. The court decisions do not, however, suggest what plan fiduciaries should have done consistent with their fiduciary and security law obligations. Considering the facts of the cases that have been filed thus far, as a practical matter, it is logical that if fiduciaries had engaged in a sell-off of employer securities or had publicly announced their alleged concerns about the company's "true" condition, bad things would have happened. Clearly, dumping large quantities of stock on the market would depress the price. It would alarm investors, likely prompting a further sell-off. It is a fact of modern corporate life that plummeting stock prices lead to layoffs and other "performance enhancing" measures, which would hardly benefit plan participants.

160. *In re AEP ERISA Litig.*, 327 F. Supp. 2d at 823.

2. *The Plan Should Not be Allowed a Double Recovery Under Both A Securities Action and a “Derivative” ERISA Claim*

To the extent the plan itself is a shareholder and has allegedly been harmed by the investment in employer stock, the plan may recover in the securities case to the same extent as any other shareholder, and it should not be allowed a double recovery by virtue of a “derivative” ERISA claim.

3. *ERISA Section 404(c) Demonstrates That Congress Did Not Intend For ERISA Fiduciaries To Bear Responsibility For All Plan Investment Decisions*

Despite uncertainty regarding the precise scope of the Section 404(c) safe harbor, Section 404(c) demonstrates an important policy choice. To the extent plan participants are charged with making their own investment decisions, they, and not the plan’s fiduciaries, should be responsible for those decisions. Moreover, this section demonstrates Congress’s intent to treat participants the same as individual investors in particular investment funds offered through the plan. There is no valid reason to assume that just because one such option is employer stock, a wholly different set of rules should apply.

4. *Plans Holding Employer Stock Often Are Designed To Do So.*

ERISA plan design is a matter not subject to challenge under ERISA’s fiduciary rules. All ESOPs and many 401(k) plans are specifically designed to hold employer stock. In the case of a 401(k) plan, the plan may require employer stock as one investment option or that company matching contributions be made in company stock.¹⁶¹ Some 401(k) plans now contain mini-ESOPs to hold employer stock and take advantage of the so-called “ESOP presumption.” Allowing recovery for breach of fiduciary duty for permitting investment in employer stock simply permits plaintiffs to avoid the well-settled law that plan design choices cannot be challenged under ERISA’s fiduciary rules.¹⁶²

161. See, e.g., *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, MDL Docket No. 1500, 02 Civ. 8853, 2005 U.S. Dist. LEXIS 3715, at *18 (S.D.N.Y. Mar. 10, 2005) (showing the defendants arguing that they should not be held liable for failing to divest company stock holdings because the plan mandated the availability of a company stock fund). The court denied the defendants’ motion to dismiss, holding that further factual development was required. *Id.* at *16-17.

162. See, e.g., *Smith v. Delta Air Lines, Inc.*, 422 F. Supp. 2d 1310, at *52-3 (N.D. Ga. 2006) (dismissing claims of fiduciary breach where plan mandated employer stock investment options; where such options are required, fiduciary does not breach diversification and prudence requirements by allowing investment in qualifying employer securities).

5. Securities Law Has Developed Over Decades And There Are Well Settled Rules on How To Proceed – Not So With ERISA.

The recent spate of ERISA employer stock cases reveals the peril of attempting to establish the rules to govern nationwide ERISA plans through a process of disparate nationwide litigation that often is the product of facts that suggest criminal behavior, and yet rules are being established for the much broader type of cases that do not suggest a crime. It is hardly surprising that the developing case law on the issues presented by stock drop cases is diverse, inconsistent, and inconclusive. There thus is even more of a reason to defer to a well-developed and time-tested body of federal securities law. Adopting the view that at least a subset of ERISA employer stock cases are entirely supplanted by the existing, well-developed securities regulation scheme makes sense and does not risk leaving participants without a remedy or defendants without a fair day in court.

III. CONCLUSION

For all of the legal and policy reasons discussed in this article, courts should refuse to entertain efforts at double recovery that are represented by ERISA employer stock claims based on inaccurate or non-existent disclosures about company performance. Allowing plaintiffs to pursue these claims and to recover damages is inconsistent with ERISA's clear dictate that the statute not interfere with existing federal regulatory systems, such as the securities regulation system that governs such disclosures. ERISA provides limited, if any, meaningful remedy for participants in these types of cases, and it would be inconsistent with ERISA and general principles of equity to allow a recovery beyond that already allowed under securities law. Finally, a variety of policy reasons show that this outcome, far from being to the detriment of participants, is consistent with the federal policies reflected in ERISA and federal securities law. A further benefit from limiting claims and recoveries is to help control the cost to employers of providing retirement benefits, which is consistent with the purposes of ERISA.