UIC Law Review

Volume 38 | Issue 3 Article 5

Spring 2005

ERISA Stock Drop Cases: An Evolving Standard, 38 J. Marshall L. Rev. 889 (2005)

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ERISA STOCK DROP CASES: AN EVOLVING STANDARD

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I. INTRODUCTION

In 2000, after several years of record growth, the stock market bubble popped. A public that was used to seeing its investments grow wanted to hold someone responsible for their losses. Plaintiffs began to file suit against publicly traded companies that underwent significant declines in their stock prices under suspect (and sometimes non-suspect) circumstances. In addition to suits under federal securities laws, publicly traded companies that made their stock available to employees for retirement investment have also faced litigation from their employees under The Employee Retirement Income Security Act ("ERISA"). Companies that made stock available to their employees through any of a number of options, including Employee Stock Option Plans ("ESOPs"), matching programs under 401(k) plans, or simply allowed employees to choose employee stock as an investment option in the 401(k) plans all saw ERISA suits. In well-known bankruptcies such as Enron, the public companies, their Board of Directors, and relevant committee members have had to mount defenses to both securities and ERISA litigation. While the cases center around the facts leading up to a decline in a company's stock price, the two types of litigation have critical differences. While shareholders must prove scienter to recover in securities cases,[1] employees whose retirement funds were invested in company stock through an

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1. Aaron v. SEC, 446 U.S. 680, 691 (1980).

employer–sponsored retirement program need only show that a fiduciary duty has been breached to recover in ERISA cases.[2]

Part II of this Article will discuss the standards of liability for securities fraud under section 10 and Rule 10b-5 of the Securities Exchange Act of 1934. Part III of the Article will then discuss the standard of liability for parallel litigation under ERISA. Part IV of the Article will provide a general overview of the universe of cases that have alleged breach of fiduciary duty under ERISA when stock prices have dropped and will highlight several significant ERISA stock drop cases. Part V will discuss the significant differences between the two types of litigation. Next, Part VI of the Article will discuss the potential downfalls of the two different standards, particularly as litigation of both types increases. Finally, Part VII of the Article will outline potential solutions to the discrepancy in standards.

II. SECURITIES FRAUD LIABILITY UNDER SECTION 10 AND RULE 10B-5 OF THE SECURITIES AND EXCHANGE ACT OF 1934

A. History of the Exchange Act and Rule 10b-5 and Early 10b-5 Securities Fraud Cases

Before the stock market crash of 1929 and the resulting Depression, there was no federal regulation of the securities market.[3] In response to reports of widespread fraud and abuse in the securities industry leading up to the crash, Congress enacted the Securities Act of 1933[4] and the Securities Exchange Act of 1934.[5] The 1933 Act "was designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing."[6] The Act required that companies issuing securities to the public register with the federal government and disclose material information to prospective investors.[7] "The 1934 Act was intended principally to protect investors against manipulation of stock prices through

2. Pegram v. Herdrich, 530 U.S. 211, 226 (2000).

3. THOMAS EARL PATTON ET AL., SECURITIES FRAUD: LITIGATING UNDER RULE 10B-5 § 1.2 (2001).

4. Ch. 38, 73 Pub. L. No. 22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2000)).

5. Ch. 404, 73 Pub. L. No. 291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78jj).

6. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976).

7. 15 U.S.C. § 77e.

regulation of transactions upon securities exchanges and in over–the–counter markets, and to impose regular reporting requirements on companies whose stock is listed on national securities exchanges."[8] The 1934 Act created the Securities and Exchange Commission ("SEC"), authorized the Commission to promulgate a wide array of regulations, and mandated disclosures in the context of the purchase and sale of securities.[9] The 1934 Act specifically states that regulation is necessary to, among other things, "insure the maintenance of fair and honest markets."[10]

Section 10 of the 1934 Act prohibits any person from using any means of interstate commerce, national security exchanges, or the mail:

> in connection with the purchase or sale, of any security registered on a national securities exchange, . . . *any manipulative or deceptive device* or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[11]

While section 10 does not actually prohibit any specific conduct on its own, it gives the SEC broad power to promulgate rules relating to fraud in the securities markets. Eight years after the 1934 Act was enacted, in response to allegations that corporate executives were buying stock on inside information,[12] the SEC strengthened the anti-fraud and deception provisions of section 10 by promulgating Rule 10b-5, which provides:

> It 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 securities exchange,
>
> (a) To employ any device, scheme or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
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> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[13]

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8. *Ernst*, 425 U.S. at 195.
9. 15 U.S.C. §§ 78a–78jj.
10. 15 U.S.C § 78b.
11. 15 U.S.C. § 78j (emphasis added).
12. PATTON ET AL., *supra* note 3, § 1.4.
13. Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (2004).

Since its promulgation more than sixty years ago, Rule 10b-5 has provided the basis for a large number of securities fraud suits.

Within a decade after Rule 10b-5 was promulgated, courts began to hold that the rule created a private right of action for securities fraud,[14] a viewpoint that was later adopted by the Supreme Court.[15] Courts also held that controlling insiders have a duty to disclose to minority shareholders,[16] and that a plaintiff in a 10b-5 action must be a purchaser or seller of securities.[17] In 1971, the Supreme Court addressed its first piece of 10b-5 litigation in *Superintendent of Insurance v. Bankers Life & Casualty Co.*[18] In this case, the Court held that 10b-5 offers protections to corporate purchasers and sellers as well as individuals[19] and liberally construed section 10(b) of the 1934 Act to apply to fraud in securities transactions whether or not they took place in an organized market.[20]

Congress enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA")[21] in order to "discourage perceived abuses in private securities litigation."[22] The Act seeks to increase the participation of institutional investors by allowing any putative class member to seek to be the lead plaintiff,[23] creating a safe harbor for certain forward looking statements[24] and adding liability for aiding and abetting[25] and proportionate liability.[26] Over the past several years, fallout from corporate scandals has led to a large increase in the number of securities lawsuits filed.[27] While many of these lawsuits settle or get dismissed, a number remain in litigation, and additional suits continue to be filed.[28]

B. Essential Elements of a 10b-5 Claim

In order to make a successful fraud claim, a plaintiff must

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14. Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512, 513-15 (E.D. Pa. 1946).
15. Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983).
16. Speed v. Transamerica Corp., 99 F. Supp. 808, 828-29 (D. Del. 1951).
17. Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463 (2d Cir. 1952).
18. 404 U.S. 6, 11 (1971).
19. *Id.* at 10.
20. *Id.* at 12.
21. Pub. L. No. 104-67, 109 Stat. 737.
22. PATTON ET AL., supra note 3, § 1.11.
23. 15 U.S.C. § 77z-1(a)(3).
24. *Id.* § 77-z-2(c).
25. *Id.* § 78-t.
26. *Id.* § 78u-4(f)(2)(B).
27. *Markets: Securities Fraud Suits Hit Record in 2002*, L.A. TIMES, Jan. 8, 2003, Business 3, at 4.
28. Jonathan D. Glater, *From Investor Fury, a Legal Bandwagon*, N.Y. TIMES, Sept. 15, 2002, § 3, at 1.

prove that the alleged action meets all elements of Rule 10b-5. The plaintiff must show that: the act is a type of manipulative or deceptive device or contrivance that takes place through interstate commerce, mail, or the securities exchange;[29] the plaintiff made an actual purchase or sale of a "security";[30] the defendant acted with scienter;[31] the purchase or sale was in reliance on the fraud and that the information relied upon was material;[32] and finally that the misrepresentation actually caused the loss.[33]

First, the act in question must meet one of the three forms of "manipulative or deceptive device or contrivance[s]"[34] as defined in Rule 10b-5. Subparagraphs (a) and (c) of Rule 10b-5 deal with actual conduct, while subparagraph (b) deals with making or failing to make a statement.[35] However, in practice it is difficult to make distinctions between the different types of conduct and statements prohibited under Rule 10b-5.[36] Additionally, the 1934 Act requires that the deceptive or manipulative device or conduct giving rise to the claim must take place through an instrumentality of interstate commerce, the mails, or a national security exchange.[37]

Second, a plaintiff must make an actual purchase or sale of a security.[38] In *Blue Chip Stamps v. Manor Drug Stores*, the plaintiffs argued that an "overly pessimistic" prospectus was "materially misleading" and deterred them from purchasing securities that they had the right to purchase.[39] The Supreme Court noted that the risk of allowing a claim based on a plaintiff's failure to sell or purchase securities is that "the door will be open to recovery of substantial damages on the part of one who offers only his own testimony to prove that he ever consulted a prospectus of the issuer, that he paid any attention to it, or that the representations contained in it damaged him."[40] Therefore, only actual purchasers or sellers may seek relief under Rule 10b-

29. 15 U.S.C. § 78j.
30. *Id.*
31. Kurtis A. Kemper, Annotation, *What Constitutes Business Sufficient to Show Necessary Element of Scienter in Civil Action for Damages Under § 10(b) of Securities Exchange Act of 1934 (15 U.S.C.A. § 78(j)(b)) and Rule 10b-5 of the Securities and Exchange Commission*, 49 A.L.R. FED. 392 (2004).
32. Susman v. Lincoln Am. Corp., 578 F. Supp. 1041, 1057 (1984).
33. Wright v. Heizer Corp., 560 F.2d 236, 249 (1977).
34. 15 U.S.C. § 78j.
35. 17 C.F.R. § 240.10b-5(a)-(c); PATTON ET AL., *supra* note 3, § 1.4.
36. PATTON ET AL., *supra* note 3, § 1.4.
37. 15 U.S.C. § 78j.
38. *Id.*; Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 735 (1975).
39. 421 U.S. at 726-27.
40. *Id.* at 746.

5.[41]

Third, the purchase or sale must be of a "security."[42] The term "security" is defined in the 1934 Act to mean:

> any note, stock, treasury stock, security future, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting–trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relation to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance, which has a maturity at the time of issuance not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.[43]

In *SEC v. W.J. Howey Co.*, the Supreme Court held that a security is a flexible principle, "one that is capable of adaptation to meet the countless and variable schemes" to create profit out "of the money of others."[44] The Court has applied the following factors in deciding whether a transaction involves a security: (1) the motivations that would prompt a reasonable buyer and seller to enter into the sale; (2) whether or not there is common trading for speculation or investment; (3) the reasonable expectations of the investing public; and (4) whether or not other regulatory protections make the Securities Act unnecessary.[45]

Fourth, and perhaps most importantly, in order to make a successful 10b-5 claim, the plaintiff must show that the defendant acted with scienter.[46] "When a statute speaks so specifically in terms of manipulation and deception, and of implementing devices and contrivances—the commonly understood terminology of intentional wrongdoing—and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the

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41. *Id.* at 755.
42. 15 U.S.C. § 78j.
43. *Id.* § 78c(a)(10).
44. 328 U.S. 293, 299 (1946).
45. Reves v. Ernst & Young, 494 U.S. 56, 66-67 (1990).
46. *Ernst*, 425 U.S. at 214.

statute to negligent conduct."[47] The Court has defined scienter as the "intent to deceive, manipulate, or defraud."[48] Most courts have ruled that extreme recklessness is enough to meet the standard of scienter.[49] One district court has even ruled that knowledge that a statement is false, together with the knowledge that the plaintiffs or a third party would rely upon the information, has been held sufficient to meet the burden of scienter.[50]

Fifth, a plaintiff in a 10b-5 must also prove that he or she purchased or sold the security in *reliance* on defendant's fraud.[51] "Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury."[52] To prove reliance in the case of silence, "[a]ll that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision."[53] The Supreme Court has also supported a "fraud–on–the–market" rebuttable presumption theory of reliance: "Because most publicly available information is reflected in market price, an investor's reliance on any public material representations, therefore, may be presumed."[54]

Sixth, a plaintiff must prove that the information relied upon was material.[55] Information is "material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding" whether to buy, sell, or hold.[56] Finally, and closely related to reliance and materiality is the concept of causation. Section 10(b) of the 1934 Act and Rule 10b-5 both require that the actionable wrong be "in connection" with the sale or purchase of a security.[57] Plaintiff must therefore prove that the misrepresentation actually caused the loss.[58]

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47. *Id.* at 213.
48. *Id.* at 193.
49. PATTON ET AL., supra note 3, § 2.6.
50. *In re* N. Am. Acceptance Corp. Sec. Cases, 513 F. Supp. 608, 626 (N.D. Ga. 1981).
51. *Ernst*, 425 U.S. at 206.
52. Basic, Inc. v. Levinson, 485 U.S. 224, 243 (1988).
53. Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972).
54. *Basic*, 485 U.S. at 247.
55. 15 U.S.C. § 78j.
56. *Basic*, 485 U.S. at 231.
57. *Superintendent of Ins.*, 404 U.S. at 12.
58. *Id.* at 12-13.

C. Who May Be Held Liable Under 10b-5 Litigation?

1. General Theories of Liability: Direct and Control

There are several different parties and types of parties that may be held liable under a 10b-5 claim. First, any defrauding party may be held liable.[59] Misinformation is enough to give rise to liability; the defendant does not need to be a buyer or seller.[60] The 1934 Act also creates liability for a "control person," as "[e]very person who, directly or indirectly, controls any person liable."[61] The PSLRA gave the SEC authority to prosecute individuals who aid and abet violators of the 1934 Act.[62] An aidor or abettor is "any person that knowingly provides substantial assistance to another person in violation of a provision of this title, or of any rule or regulation issued under this title."[63] An aidor or abettor is liable to the same extent as the primary violator.[64]

2. Specific Classes of Individuals that Have Been Held Liable

Directors, officers, and controlling shareholders have been held liable through both the direct violator and control person theories of 10b-5 liability.[65] Several circuits have held that the power to control the offender is enough to create control liability, while other circuits have held that the defendants must be "culpable participants" in the act.[66] Accountants and auditors that certify a company's financial statements have also been held liable.[67] Both the PSLRA and the Sarbanes–Oxley Act have increased an auditor's responsibility to design audit plans that detect fraud. Attorneys can be held directly liable for misrepresentations in legal opinions.[68] Brokers, investment advisers, underwriters, and banks all have also faced liability.[69]

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59. 17 C.F.R. § 240.10b-5.
60. SEC v. Tex. Gulf Sulphur, 401 F.2d 833, 854-55 (2d Cir. 1968).
61. 15 U.S.C. § 78t(a).
62. *Id.* § 78t(e).
63. *Id.*
64. *Id.*
65. *See* G.A. Thompson & Co. v. Partridge, 636 F.2d 945, 958 (5th Cir. 1981).
66. PATTON ET AL., *supra* note 3, § 3.501.
67. *Id.* § 3.502.
68. *See* Stevens v. Equidyne Extractive Indus. 1980, 694 F. Supp. 1057 (S.D.N.Y 1988); Excalibur Oil, Inc. v. Sullivan, 659 F. Supp. 1539 (N.D. Ill. 1987); Eisenberg v. Gagnon, 766 F.2d 770 (3d Cir. 1985).
69. PATTON ET AL., *supra* note 3, §§ 3.504-06.

III. FIDUCIARY LIABILITY FOR DECREASES IN STOCK VALUE IN ERISA CASES

A. *ERISA and Stock Drop Suits*

The Employee Retirement Income Security Act of 1974[70] ("ERISA") is the federal law regulating all employee benefit plans, including defined benefit pension plans. "Employers are not required to establish employee benefit plans, but if they choose to do so, they must abide by ERISA."[71] Since the stock market bubble burst, many of the breach of fiduciary duty cases have alleged that fiduciaries have mismanaged plan funds by investing imprudently in employer stock and/or that fiduciaries failed to disclose material information to plan participants.

B. *Who Is a Fiduciary Under ERISA?*

ERISA liability in stock drop cases arises from breach of fiduciary duty. While beneficiaries also have a claim under securities laws, they may be owed a heightened level of duty. Under ERISA:

> a person is a fiduciary 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. Such term includes any person designated under section 405(c)(1)(B) [29 U.S.C. § 1105(c)(1)(B)].[72]

It is commonly stated that a fiduciary may wear two hats and be an employer as well as a fiduciary.[73] Fiduciary status is not an all or nothing concept; a "party is a fiduciary only as to the activities which bring the person within the definition."[74] "[F]iduciary status under ERISA is to be construed liberally,

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70. 29 U.S.C. § 1001–1461 (2004).

71. *In re* WorldCom, Inc. ERISA Litig., 263 F. Supp. 2d 745, 757 (2003) [hereinafter *WorldCom I*].

72. 29 U.S.C. § 1002(21)(A).

73. *WorldCom I*, 263 F. Supp. 2d at 757.

74. Custer v. Sweeney, 89 F.3d 1156, 1162 (4th Cir. 1996).

consistent with ERISA's policies and objectives."[75] A fiduciary may be named in the plan, or be a functional fiduciary, meaning "that the defendant has become a fiduciary not because of the plan terms, but because the defendant has exercised fiduciary authority."[76]

Public companies, officers, directors, benefits and finance committee members, and directed trustees are among the groups that have been sued as fiduciaries under ERISA. The question of which of these groups may be ultimately held liable under ERISA depends largely on how a plan is structured. While risk to the company, officers, and directors can be minimized to delegating plan administration and investment duties to committees or trustees, the risk can never be eliminated if company stock is offered as an investment option. At a minimum, the board must retain the duty to oversee plan administration or investment committees.

C. Fiduciary Duties Under ERISA

Fiduciaries have five affirmative duties under ERISA. First, the fiduciary must act "solely in the interest of the participants and beneficiaries" and for the exclusive purpose of benefiting the plan's participants.[77] Second, the fiduciary must act "with the care, skill, prudence, and diligence" of a prudent person "acting in a like capacity."[78] Third, the fiduciary must diversify the plan's investments in order to decrease its risk of loss.[79] Fourth, the fiduciary must act in accordance with the provisions of the plan documents to the extent the documents comply with ERISA.[80] Fifth, the fiduciary must refrain from engaging in any transaction expressly prohibited under ERISA.[81]

1. The Duty of Loyalty

The most basic duty imposed by ERISA on fiduciaries is a duty of loyalty to their plan beneficiaries.[82] An ERISA fiduciary[83]

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75. *In re* Elec. Data Sys. Corp. "ERISA" Litig., 305 F. Supp. 2d 658, 665 (E.D. Tex. 2004) [hereinafter *In re Elec. Data Sys. I*] (quoting Tittle v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "Erisa" Litig.), 284 F. Supp. 2d 511, 543-44 (S.D. Tex. 2003)).

76. *Id.* at 668.

77. 29 U.S.C. § 1104(a)(1).

78. *Id.* § 1104(a)(1)(B).

79. *Id.* § 1104(a)(1)(C).

80. *Id.* § 1104(a)(1)(D).

81. *Id.*

82. *Id.* §§ 1104(a)(1), 1106.

83. *See supra* Part III.B.

must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries," and for the "exclusive purpose of... providing benefits to participants and their beneficiaries."[84] The duty of loyalty applies in situations where the fiduciary is faced with a potential conflict of interests, such as the situation where the trustee of a pension plan also has responsibilities to the entity (e.g., employer or union) sponsoring the plan. Thus, litigation of the duty of loyalty has arisen most often in the context of self-dealing transactions, such as where a plan's fiduciary uses plan assets to benefit non-beneficiaries.[85]

ERISA fiduciaries are not completely forbidden from engaging in transactions which incidentally benefit themselves or third parties; however, "their decisions must be made with an eye single to the interests of the participants and beneficiaries" they represent.[86] Fiduciaries violate the duty of loyalty when acting in a manner which does not place the interests of their beneficiaries ahead of all other interests, such as where a trustee issues a risky or low-interest loan to the employer corporation from a plan's assets.[87] Courts in such cases have broad discretion to award equitable relief such as ordering all unlawful loans to be repaid with a reasonable rate of interest, or removing the defendant as a fiduciary and prohibiting him from resuming fiduciary capacity until the plan receives all sums owed.[88]

2. *The Duty of Care*

In addition to the duty of loyalty, ERISA imposes a stringent duty of care, which requires that the fiduciary act with "the care, skill, prudence and diligence under the circumstances then

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84. 29 U.S.C. § 1104(a)(1)(A).

85. *See generally* Wesley Kobylak, Annotation, *"Dual Loyalty" Considerations in Determining Propriety, Under Employee Retirement Security Act, (29 USCS §§ 1001* et seq.*), of Actions of Officers of Sponsor Corporation Serving as Trustees of Employment Pension Plan*, 64 A.L.R. FED. 602 (1983).

86. *See* Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982). *See also* Krohn v. Huron Mem'l Hosp., 173 F.3d 542, 552 (6th Cir. 1999); Metzler v. Graham, 112 F.3d 207, 209-13 (5th Cir. 1997); Boyle v. Anderson, 68 F.3d 1093 (8th Cir. 1995).

87. *See, e.g.*, Donovan v. Mazzola, 716 F.2d 1226, 1232-33 (9th Cir. 1983) (holding breach of fiduciary duty when union pension fund issued a loan to union's convalescent fund because the administrators "should have known the loan presented an unreasonable risk of not being timely and fully paid"). *See also* Marshall v. Kelly, 465 F. Supp. 341, 350 (W.D. Okla. 1978) (finding breach of fiduciary duty when plan trustee renewed a loan in employer company "despite the declining financial condition of the Company" and the declining security on the loans).

88. *See Marshall*, 465 F. Supp. at 354.

prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[89] Courts consider this to be "an unwavering duty on an ERISA trustee to make decisions with single-minded devotion to a plan's participants and beneficiaries and, in so doing, to act as a prudent person would act in a similar situation."[90] The duty of prudence includes a duty to disclose to the beneficiaries material information a reasonable fiduciary would believe to be in the best interest of the beneficiaries to disclose.[91]

The "prudent person" test focuses on the process that the fiduciary undertakes in reaching a particular decision involving plan assets. Most courts begin this inquiry by determining what the plan trustees knew at the time the investment decision was made, and then deciding whether or not that decision was that of a "prudent person."[92] One district court has held that this duty only requires the trustee to "vigorously and independently investigate the wisdom of a contemplated investment; it matters not that the investment succeeds or fails."[93] Further, under Department of Labor regulations interpreting ERISA, a fiduciary may be subject to personal liability if it fails to investigate fully the terms and consequences of an investment, fails to investigate the qualifications of its advisors, or fails to acknowledge those facts and circumstances that, given the scope of its duties, it knows or should "know are relevant to the particular investment or investment course of action involved."[94] Conversely, courts have usually found that trustees have satisfied their duty of care when they hire independent consultants to perform studies regarding a proposed transaction and subject those studies to close scrutiny when making decisions regarding an investment.[95]

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89. 29 U.S.C. § 1104(a)(1)(B).

90. Morse v. Stanley, 732 F.2d 1139, 1145 (2d Cir. 1984).

91. Glaziers & Glassworkers Union Local No. 252 Annuity Fund. v. Newbridge Sec. Inc., 93 F.3d 1171, 1181 (3d Cir. 1996).

92. *See* Katsaros v. Cody, 744 F.2d 270, 279 (2d Cir. 1984); Am. Communications Ass'n, Local 10 I.B.T. v. Retirement Plan for Employees of RCA Corp. & Subsidiary Cos., 488 F. Supp. 479, 483 (S.D.N.Y. 1980).

93. Donovan v. Walton, 609 F. Supp. 1221, 1238 (S.D. Fla. 1985).

94. *See* Investment Duties, 29 C.F.R. § 2550.404a-1(b)(1)(i)(2004). *See also* Whitfield v. Cohen, 682 F. Supp. 188, 194-195 (S.D.N.Y. 1988).

95. *See Walton*, 609 F. Supp. at 1244.

D. Plaintiff's Relief if a Fiduciary Duty Is Breached

ERISA provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.[96]

A civil action may be brought by a participant or beneficiary to recover benefits or for injunctive or equitable relief.[97]

IV. ERISA STOCK DROP LITIGATION CASES

A. Universe of ERISA Stock Drop Cases

As of January 25, 2005, there have been approximately fifty court decisions in cases that allege breach of ERISA fiduciary duty after employer stock significantly declined. The outcome of these cases varies widely. Many of the reported decisions in ERISA cases arise from a defendant's motion to dismiss. In others, the courts make a summary judgment ruling. While many settle, if the defendants do not prevail at the summary judgment stage, in a few, courts have certified classes, and in a rare instance or two, the claims have actually gone to trial. A summary of these cases may be found in Tables A through L.

1. Defendant's Motion to Dismiss

Most of the reported ERISA stock drop decisions come from a defendant's motion to dismiss. Defendants that the court determines are not fiduciaries (or that the court determines that the plaintiff has not pled adequate facts to support an allegation that the defendants are fiduciaries) frequently win on motions to dismiss.[98] However, at times, the courts have ruled that the determination of whether an individual or entity is an ERISA

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96. 29 U.S.C. § 1109(a).

97. *Id.* § 1132(a).

98. *See, e.g.*, Crowley v. Corning, Inc., No. 02-CV-6172 CJS, 2004 U.S. Dist. LEXIS 758 (W.D.N.Y Jan. 14, 2004); *In re* La.-Pac. Corp., ERISA Litig., No. 02-1023-KI, 2003 U.S. Dist. LEXIS 7645 (D. Or. Apr. 24, 2003); *Worldcom I*, 263 F. Supp. 2d 745.

fiduciary is a question of fact not properly resolved on a motion to dismiss.[99]

Courts have held that in the motion to dismiss context, simply signing an SEC filing or incorporating an SEC filing into a summary plan description does not create a fiduciary duty,[100] and that ministerial employee members of the plan committee were not fiduciaries.[101] However, ERISA courts have also ruled that fiduciaries cannot forget information that they learned in other capacities,[102] and plaintiffs' allegations that the fiduciaries knew there were misrepresentations in SEC filings and encouraged plan participants to read those filings, are sufficient to overcome a motion to dismiss.[103]

Courts have granted a directed trustee defendant's motion to dismiss when the plaintiff has not made allegations that the directed trustee knew of the directing fiduciary's malfeasance.[104] Courts have also held that a directed trustee has a "duty to distinguish between proper and improper instructions," and a plaintiff's allegations that the directed trustee knew or should have known about the directing fiduciary's breach can overcome a defendant's motion to dismiss.[105] When a plaintiff did not state a claim for plan-wide relief under ERISA section 1132(a), the court granted the defendant's motion for summary judgment.[106] A defendant's motion was also granted when a plaintiff failed to state a claim for breach of ERISA's exclusive purpose requirement.[107]

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99. *See, e.g.*, *In re* Sears, Roebuck & Co. ERISA Litig., No. 02 C 8324, 2004 U.S. Dist. LEXIS 3241 (N.D. Ill. Mar. 3, 2004); In re Xcel Energy, Inc., Sec., Derivative & ERISA Litig., 312 F. Supp. 2d 1165 (D. Minn. 2004); Nelson v. Ipalco Enters., No. IP02-0477-C-H/K, 2003 U.S. Dist. LEXIS 2431 (S.D. Ind. Feb. 13, 2003).

100. *See, e.g.*, *In re* Tyco Int'l, Ltd., Multidistrict Litig., No. 02-1335-PB, 2004 U.S. Dist. LEXIS 24272 (D.N.H. Dec. 2, 2004); *Worldcom I*, 263 F. Supp. 2d at 766.

101. *See, e.g.*, *In re Tyco*, 2004 U.S. Dist. LEXIS 24272, at *13-14.

102. *See, e.g.*, *Worldcom I*, 263 F. Supp. 2d at 765.

103. Schied v. Dynegy, Inc. (*In re* Dynegy, Inc. "ERISA" Litig.), 309 F. Supp. 2d 861 (S.D. Tex. 2004); *In re* Sprint Corp. ERISA Litig., No. 03-2202-JWL, 2004 U.S. Dist. LEXIS 19125 (D. Kan. Sept. 24, 2004).

104. *See, e.g.*, Wright v. Or. Metallurgical Corp., 360 F.3d 1090 (9th Cir. 2004); Lalonde v. Textron, Inc., 369 F.3d 1 (1st Cir. 2004).

105. Kling v. Fidelity Mgmt. Trust Co., 323 F. Supp. 2d 132, 150-51 (D. Mass. 2004); Tittle v. Enron, 284 F. Supp. 2d at 562.

106. *In re* Schering-Plough Corp. ERISA Litig., No. 03-1204, 2004 U.S. Dist. LEXIS 16265, at *45 (D.N.J. June 28, 2004).

107. Pa. Fed'n, Bhd. of Maint. of Way Employees v. Norfolk S. Corp. Thoroughbred Ret. Inv. Plan, No 02-9049, 2004 U.S. Dist. LEXIS 1987, at *37-38 (E.D. Pa. Feb. 4, 2004).

In several cases the courts have ruled that it is inappropriate to determine whether an ESOP fiduciary has breached his or her duties at the motion to dismiss stage of the proceeding and that additional facts are needed to determine whether a plaintiff can overcome the presumption of reasonableness for an ESOP fiduciary to invest in employer stock[108] or failure to diversify ESOP holdings out of employer stock.[109] Keeping that in mind, courts have granted motions to dismiss when plaintiffs do not allege facts that overcome the presumption that an ESOP fiduciary's decision to remain invested in company stock is reasonable.[110]

In at least one case, the plaintiffs alleged adequate facts to establish a claim that the defendants breached their fiduciary duty by failing to prudently manage the plan, failing to disclose facts regarding the company, failing to avoid a conflict of interest, and failing to monitor plan investments.[111] Courts have also held that companies and members of the pension committee have a fiduciary duty to monitor appointed fiduciaries.[112] A plaintiff's allegations that a defendant with a fiduciary duty to monitor and evaluate the performance of company stock as an option breached that duty, because he knew or should have known of the problems with the company, are sufficient to withstand a motion for summary judgment.[113] Allegations that a corporation knew that a benefit committee, for which the corporation had the duty to appoint and remove, breached its fiduciary duty are enough to withstand a motion to dismiss.[114]

Courts have also held that the heightened pleading requirements under Federal Rule of Civil Procedure 9(b) do not apply to breach of fiduciary duty claims not based on fraud.[115]

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108. *Lalonde*, 369 F.3d at 4; *Tittle v. Enron*, 284 F. Supp. 2d at 511; *In re* ADC Telecommunications, Inc. ERISA Litig., No. 03-2989 ADM/FLN, 2004 U.S. Dist. LEXIS 14383 (D. Minn. July 26, 2004).

109. Canale v. Yegen, 782 F. Supp. 963 (D.N.J. 1992).

110. *Wright v. Or. Metallurgical Corp.*, 360 F.3d at 1090; Landgraff v. Columbia/HCA Healthcare Corp., 230 Fed. Appx. 366 (6th Cir. 2002); *In re* Duke Energy ERISA Litig., 281 F. Supp. 2d 786 (W.D.N.C. 2003).

111. Hill v. BellSouth Corp., 313 F. Supp. 2d 1361 (N.D. Ga. 2004).

112. *Kling*, 323 F. Supp. 2d at 142-43; Howell v. Motorola, Inc., 337 F. Supp. 2d 1079, 1097 (N.D. Ill. 2004); *In re Sprint*, 2004 U.S. Dist. LEXIS 19125, at *23.

113. Stein v. Smith, 270 F. Supp. 2d 157, 167 (D. Mass. 2003); *Tittle v. Enron*, 284 F. Supp. 2d at 562-63; *In re* CMS Energy ERISA Litig., 312 F. Supp. 2d 898, 916-17 (E.D. Mich. 2004); *In re Sears*, 2004 U.S. Dist. LEXIS 3241, at *22-23.

114. *In re Dynegy,*, 309 F. Supp. 2d at 904; *In re Elec. Data. Sys. I*, 305 F. Supp. 2d at 661.

115. *In re* AEP ERISA Litig., 327 F. Supp. 2d 812, 821-22 (S.D. Ohio 2004);

Finally, some courts have held that respondeat superior is a viable theory of liability under ERISA.[116]

2. Summary Judgment

Courts have refused to grant summary judgment when a material issue of fact on fiduciary status or duty remains.[117] Although a court granted a plaintiff's motion for summary judgment as to the issue of whether directors were fiduciaries, it was not appropriate as to the issue of whether their duty was breached.[118] Where the directed trustee had no discretion, it could not be a fiduciary and therefore could not breach a fiduciary duty.[119] Summary judgment was granted in favor of the defendants because the purchase of a corporation[120] and the decision to transfer funds from one trust to another during a merger[121] was a business decision and did not trigger an ERISA fiduciary duty.

An appellate court overturned an order granting summary judgment on the grounds that though an ESOP fiduciary is entitled to a presumption of acting consistently with ERISA, the presumption may be overcome if the plaintiff can establish that the fiduciary abused its discretion. Another appellate court affirmed summary judgment on the grounds that the defendants did not act improperly in failing to distribute stock under an ESOP or in failing to diversify ESOP funds, and that "purely business decisions by an ERISA employer are not governed by" the fiduciary standards.[122]

One court entered summary judgment on behalf of the plaintiffs because the fiduciaries "did not engage in a good faith determination of the fair market value" of the stock.[123] Another

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In re Elec. Data Sys. I, 305 F. Supp. 2d at 658; *In re Xcel Energy*, 312 F. Supp. 2d at 1165; *In re La.-Pac. Corp.*, 2003 U.S. Dist. LEXIS 7645; Nelson, 2003 U.S. Dist. LEXIS 4580, at *12-14; Rankin v. Rots, 278 F. Supp. 2d 853, 865 (E.D. Mich. 2003).

116. *In re* Reliant Energy ERISA Litig., 336 F. Supp. 2d 646, 658 (S.D. Tex. 2004); *Howell v. Motorola*, 337 F. Supp. 2d at 1095.

117. Beam v. HSBC Bank USA, No. 02-CV-0682E(F), 2003 U.S. Dist. LEXIS 15744, at *11-12 (W.D.N.Y. Aug. 19, 2003); *Glaziers & Glassworkers*, 93 F.3d at 1182.

118. Keach v. U.S. Trust Co., N.A., 234 F. Supp. 2d 872, 884 (C.D. Ill. 2002).

119. Maniace v. Commerce Bank of Kan. City, N.A., 40 F.3d 264, 267 (8th Cir. 1994).

120. Armstrong v. Amsted Indus., Inc., No. 01 C 2963, MDL 1417, 2004 U.S. Dist. LEXIS 14776, at *5-6 (N.D. Ill. July 30, 2004).

121. Steinman v. Hicks, 352 F.3d. 1101, 1105 (7th Cir. 2003).

122. Kuper v. Iovenko, 66 F.3d 1447, 1456 (6th Cir. 1995).

123. Chao v. Hall Holding Co., 285 F.3d 415, 437 (6th Cir. 2002).

court ruled that summary judgment on behalf of the defendant plan administrator was appropriate, since the plan trustee "had the sole responsibility for diversifying Plan investments under ERISA" and the trust agreement also assigned responsibility to the trustee for diversification.[124]

3. Class Certification and Settlement

Classes have been certified in at least three cases.[125] After the class was certified in *In re IKON Office Solutions, Inc.*, the parties settled, permitting plan participants to direct the employer to match any of the plan's investment options.[126] In *In re WorldCom, Inc. ERISA Litigation*, the class was certified after the parties reached a settlement agreement, but before the court approved that agreement.[127] It seems that in cases where there are serious allegations of corporate malfeasance, including simultaneously pending criminal and securities fraud cases, settlement is more likely.[128]

4. Trial

Very few ERISA stock drop cases have gone to trial. In one case that went to trial, the court entered judgment on behalf of the defendant because the plaintiffs (after surviving several motions to dismiss) "failed to prove that any of the Defendants breached their fiduciary duties."[129] In another case, the court entered judgment after a bench trial holding that the defendants did not "attempt to conceal material information or knowingly [make] anything less than full disclosure," and the ESOP did not pay more than adequate consideration for employer stock.[130]

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124. Hunter v. Caliber Sys., Inc., 220 F.3d 702, 722-23 (6th Cir. 2000).

125. *In re* WorldCom, Inc. ERISA Litig., No. 02 Civ. 4816 (DLC), 2004 U.S. Dist. LEXIS 20671, at *7 (S.D.N.Y. Oct. 18, 2004) [hereinafter *WorldCom II*]; *In re* Elec. Data Sys. Corp. "ERISA" Litig., 224 F.R.D. 613, 634 (E.D. Tex. 2004) [hereinafter *In re Elec. Data Sys. II*]; *In re* IKON Office Solutions, Inc. Sec. Litig., 191 F.R.D. 457, 468 (E.D. Pa. 2000) (settled by Whetman v. IKON Office Solutions, Inc. (*In re* IKON Office Solutions Sec. Litig.), 209 F.R.D. 94 (E.D. Pa. 2002)).

126. *In re IKON*, 191 F.R.D. at 457.

127. *WorldCom II*, 2004 U.S. Dist. LEXIS 20671, at *42.

128. *See infra* Section IV.B.3, 5 (providing a discussion of the *WorldCom* and *Enron* settlements).

129. Thompson v. Avondale Indus., Inc., No. 99-3439, 2003 U.S. Dist. LEXIS 2318, at *18 (E.D. La. Feb. 14, 2003).

130. Keach v. U.S. Trust Co., 313 F. Supp. 2d 818 (C.D. Ill. 2004).

B. *Significant ERISA Stock Drop Cases*

Over the past decade, there has been an increase in the number of ERISA cases used as a litigation tool when a public company's stock faces a serious decline. As a result, federal courts have begun to develop common law for ERISA fiduciary duty. This section will highlight some of the most significant ERISA stock drop cases.

1. Varity Corp. v. Howe:[131] *The Mother of Present Day Stock Drop Cases*

In *Varity Corp.*, a group of beneficiaries of a firm's employee welfare benefit plan sued the plan's administrator, who was also their employer, claiming that the administrator misled them into withdrawing from the plan which caused them to forfeit benefits.[132] In the mid-1980s the employer became concerned that some of its business "divisions were losing too much money."[133] To remedy the problem, the employer transferred all of its money losing divisions to a newly incorporated subsidiary with the plan that along with transferring the divisions, they would transfer the debt.[134] One of the debts that they were hoping to eliminate was the obligation to pay benefits to employees of the money losing divisions.[135] The employer convinced the employees of these failing divisions of the company to switch employers to the new subsidiary, which would therefore release the parent employer from obligation to pay benefits.[136] To persuade the employees to make the move to the new division, the management convened a meeting and reassured the employees that their benefits would be secure after the switch.[137] However, the employer knew from its inception that the newly created subsidiary would be unable to pay the transferring employees' benefits.[138]

The Supreme Court noted that the law of trusts will often inform an effort to interpret ERISA fiduciary duties.[139] Courts should be required to balance the competing interests of protecting employees' benefits and avoiding a system that is so complex that

131. Varity Corp. v. Howe, 516 U.S. 489 (1996).
132. *Id.* at 491.
133. *Id.* at 492-93.
134. *Id.* at 493.
135. *Id.*
136. *Id.*
137. *Id.* at 493-94.
138. *Id.* at 494.
139. *Id.* at 497.

it discourages employers from offering benefits in the first place.[140] The Court affirmed the district court's finding that the employer "was wearing its 'fiduciary,' as well as its 'employer,' hat" when it made misrepresentations regarding employee benefits.[141] The employer was acting as a fiduciary "when it significantly and deliberately misled" the employees,[142] and that to "participate knowingly and significantly" in deceiving beneficiaries is to act against the interest of the participants and is therefore a breach of a plan administrator's fiduciary duty.[143] Furthermore, the Court held that ERISA authorizes lawsuits for individualized equitable relief for breach of fiduciary duties.[144]

2. Moench v. Robertson:[145] *Employers May Be Held Liable for Imprudent Investments in ESOPs*

In *Moench*, a former employee sued the ESOP under ERISA for breach of fiduciary duty based on the investment committee's decision to continue to invest in employer stock when the financial state of the employer was deteriorating.[146] From the period of July 1989 through May 1991, the employer's stock declined in price from $18.25 per share to less than twenty-five cents per share.[147] During this period, federal regulators repeatedly expressed concern to the board of directors regarding the employer's financial condition.[148] As part of its benefits plan, beginning in 1986, the employer provided employees with the opportunity to invest in the company ESOP.[149] The employer would "match up to 50% of an employee's voluntary contribution" to the ESOP.[150] Duringt the relevant time period, and despite the drop in price, the plan investment committee continued to invest in employer stock.[151] In 1992, a former employee and ESOP plan participant brought suit against the administrator of the plan, the ESOP committee.[152]

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140. *Id.*
141. *Id.* at 498.
142. *Id.* at 492, 505.
143. *Id.* at 506.
144. *Id.* at 515.
145. Moench v. Robertson, 62 F.3d 553, 556 (3d Cir. 1995).
146. *Id.* at 557.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 558.
151. *Id.*
152. *Id.* at 559.

The court recognized that the primary purpose of an ESOP is to give the employees the opportunity to invest in their employer's stock.[153] They are not intended to guarantee retirement benefits and inherently place "retirement assets at [a] much greater risk than does" a typically diversified retirement plan.[154] However, an ESOP is still subject to ERISA's stringent requirements, and "ESOP fiduciaries must act in accordance with the duties of loyalty and care."[155] The Court held that "an ESOP fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision. However, the plaintiff may overcome that presumption by establishing that the fiduciary abused its discretion by investing in employer securities."[156] If a "fiduciary cannot show that he or she impartially investigated the options, courts should be willing to find" that the ESOP fiduciary breached its duty.[157]

3. In re WorldCom:[158] *Outlining Liability for Corporate Parties*

In mid-2002, WorldCom announced that it had improperly reported earnings and expenses and issued a massive restatement of its financial reports.[159] Approximately a month later, WorldCom filed for bankruptcy,[160] and WorldCom executives ultimately pled guilty to violations of securities laws.[161] WorldCom was the sponsor and administrator of several retirement plans that offered, as an option, employees the opportunity to invest in employer stock.[162] The WorldCom ERISA litigation was brought on behalf of plan participants "whose individual accounts held shares of WorldCom stock from September 14, 1998, until the date of filing of the Complaint," alleging that defendants knew or should have known by this point that continued investment in WorldCom was imprudent.[163] Plaintiffs alleged that WorldCom officers, directors, employees, auditors, and the plan trustee breached their fiduciary duty to plan participants by continuing to allow employees to imprudently invest in employer stock.[164]

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153. *Id.* at 568.
154. *Id.*
155. *Id.* at 569.
156. *Id.* at 571.
157. *Id.* at 572.
158. *WorldCom I*, 263 F. Supp. 2d. at 745.
159. *Id.* at 752.
160. *Id.*
161. *Id.*
162. *Id.* at 753.
163. *Id.* at 754.
164. *Id.* at 754–56.

When the defendants moved to dismiss the case in 2003, the court held that a fiduciary under ERISA is a functional status.[165] Individuals are fiduciaries to the extent that they have control over the plan.[166] An ERISA fiduciary must act "with 'an eye single' to the interests of plan beneficiaries and participants."[167] The court held that the WorldCom officers that neither acted as fiduciaries, nor were appointed ERISA fiduciaries, could not be held liable for breach of fiduciary duty, and therefore the court dismissed the claims against those officers.[168] Additionally, the court held that only the Employee Benefits Director was alleged to have had and exercised discretionary control over the plan and dismissed the claims against the other employees.[169] It also held that incorporation of SEC filings into the summary plan description was insufficient to establish fiduciary liability.[170] However, "[w]hen a corporate insider puts on his ERISA hat, he is not assumed to have forgotten adverse information he may have acquired while acting in his corporate capacity."[171] An ERISA fiduciary may not knowingly present false information regarding a plan investment option to plan participants, and "[t]here is no exception to the obligation to speak truthfully when the disclosure concerns the employer's stock."[172] An individual does not become an ERISA fiduciary by signing an SEC filing; however, ERISA fiduciaries who disseminate false information in those filings to plan participants breach their fiduciary obligations.[173]

The claims surviving the defendant's motion to dismiss, including breaches of the fiduciary duty of prudence, duty to provide complete and accurate information, and duty to monitor, were brought against WorldCom (as the plan sponsor and administrator), Merrill Lynch (as the plan trustee), and WorldCom's Chief Executive Officer, Chief Financial Officer, and Employee Benefits Director in January 2003.[174] At the end of June 2004, all defendants except Merrill Lynch and Sullivan, as well as the issuers of certain WorldCom insurance policies, executed a settlement agreement.[175] The agreement created a settlement fund

165. *Id.* at 757.
166. *Id.*
167. *Id.* at 758 (citing *Donovan v. Bierwirth*, 680 F.2d at 271).
168. *Id.* at 759-61.
169. *Id.* at 759.
170. *Id.* at 760.
171. *Id.* at 765.
172. *Id.* at 766.
173. *Id.*
174. *WorldCom II*, 2004 U.S. Dist. LEXIS 20671, at *7-8.
175. *Id.* at *11.

of $47.15 million to be allocated to class members proportionately to their losses.[176] On October 18, 2004, the court approved the settlement agreement.[177]

4. Wright v. Oregon Metallurgical Corp.:[178] *A Case Unusually Favorable to the Defendants*

In 1987, The Oregon Metallurgical Corporation ("Oremet") created a stock bonus pension plan (the "Plan") that required a minimum percentage of each participant's portfolio be invested in employer stock as part of an Eligible Individual Account Plan ("EIAP").[179] "The Plan originally allowed participants to sell up to 40% of the Oremet shares in their individual stock accounts" while employed by Oremet.[180] During the mid-90s, the stock price steadily rose, and plan participants wanted a greater ability to sell their Oremet stock.[181] Management became concerned that employees would terminate their employment in order to exercise their options to sell additional stock, and so the plan was amended to allow participants to sell increasing amounts during the course of 1996.[182] The Union opposed this diversification and made a side agreement with management that prohibited further amendment of the plan that would permit any additional diversification through 2000.[183] In 1997, Oremet merged with another company, and the plaintiffs wished to amend the benefit plan to allow participants to sell a higher percentage of employer stock than permitted by the original plan, so that they could take advantage of the higher stock price resulting from the merger; but because of the side agreement with the Union, the plan administrators refused to enact a plan amendment.[184]

In March 2001, the plaintiffs filed suit alleging that Oremet violated ERISA's exclusive purpose provision by deferring to the Union's judgment and by failing to make prudent investment decisions regarding continued investment in employer stock.[185] Despite the fact that EIAPs are exempt from ERISA's diversification requirements and percentage limitations in an employer's securities, ERISA's prudence requirement applies to

176. *Id.* at *11-13.
177. *Id.* at *43.
178. *Wright v. Or. Metallurgical Corp.*, 360 F.3d at 1090.
179. *Id.* at 1093.
180. *Id.* at 1094.
181. *Id.* at 1095.
182. *Id.*
183. *Id.*
184. *Id.* at 1095-96.
185. *Id.* at 1099-1100.

EIAPs.[186] However, stock fluctuations alone are insufficient to establish the imprudence required to rebut the *Moench* presumption.[187] The defendants, therefore, did not violate ERISA's prudence requirement.[188] While the plaintiffs argued that the defendants violated ERISA's exclusive purpose provision,[189] ERISA does not create a sole duty to maximize benefits for plan participants.[190] ERISA requires a fiduciary to comply with a plan as written, unless it is inconsistent with ERISA, and because the defendants complied with the plan's lawful terms and were under no legal obligation to deviate from those terms, they did not violate their fiduciary obligation.[191]

5. *Enron: Moving ERISA Common Law Forward*

"The rapid collapse of Enron Corporation ('Enron') and the resulting scope, variety, and severity of losses are unprecedented in American corporate history."[192] In late 2001, plaintiffs filed a class action lawsuit against Enron and Arthur Andersen in the Southern District of Texas.[193] The complaint alleged that the defendants engaged in insider trading while making false and misleading statements about the company's financial performance.[194] Employees who were participants in three employee benefit plans filed additional allegations that defendants breached their fiduciary duties under ERISA.[195]

On the defendants' motion to dismiss, the court addressed several major ERISA fiduciary duty questions. First, the court held that an ESOP fiduciary does not escape ERISA duties of loyalty, prudence, and care;[196] however, "an ESOP trustee is entitled to a presumption that it acted consistently with ERISA" in investing in employer stock.[197] Second, "[t]he most fundamental duty of ERISA plan fiduciaries is a duty of complete loyalty."[198]

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186. *Id.* at 1097.
187. *Id.* at 1099.
188. *Id.*
189. *Id.* at 1100.
190. *Id.*
191. *Id.*
192. Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 235 F. Supp. 2d 549, 565 (S.D. Tex. 2002).
193. Press Release, University of California, University of California Joins Class Action Suit Against Senior Enron Management and Arthur Andersen LLP (Dec. 21, 2001), http://www.ucop.edu/news/archives/2001/dec21art1.htm.
194. *Id.*
195. *Tittle v. Enron*, 284 F. Supp. 2d at 530.
196. *Id.* at 534.
197. *Id.*
198. *Id.* at 546.

Third, to determine whether a fiduciary acted with prudence, the court must look at how the fiduciary acted with respect to the selection of the investment, not the ultimate outcome.[199] Fourth, if there is a conflict between the plan documents and ERISA, ERISA policies prevail.[200] Fifth, the court held that corporate directors have a duty to monitor plan fiduciaries.[201] Sixth, fiduciaries have a duty to communicate material information to the beneficiary,[202] and while a fiduciary has no duty to violate securities laws, there is nothing to stop a fiduciary from disclosing material information to all stockholders.[203] Seventh, a directed trustee of an ESOP has a duty to "keep apprized of the company's financial condition to the extent that a trustee can determine whether its stock is an appropriate, i.e., prudent, investment," and therefore may only be liable when the trustee knows or should have known about the directing fiduciary's breach.[204]

Based on these principles of fiduciary liability, the court denied the defendants' motion to dismiss on the ERISA complaints. In mid-2004, the parties reached a settlement agreement which was preliminarily approved by the court.[205] A hearing was held on the settlement agreement in August 2004, and the court has not yet issued a decision.[206]

V. MOST SIGNIFICANT DIFFERENCES BETWEEN ERISA AND SECURITIES LAW LIABILITY: COMPLIANCE WITH SECURITIES LAW DOES NOT GUARANTEE PROTECTION FROM ERISA LIABILITY

To make a successful securities fraud claim, a plaintiff must prove that the defendant, acting with scienter, used a manipulative or deceptive device or contrivance in interstate commerce, the mail, or a securities exchange, and that the plaintiff relied upon this information, which was material, in his or her purchase of a security, and suffered a loss as a result of that

199. *Id.* at 547-48.
200. *Id.* at 549.
201. *Id.* at 555.
202. *Id.*
203. *Id.* at 566.
204. *Id.* at 591.
205. *Tittle v. Enron Corp.*, No. H-01-3913, Order Preliminarily Approving Partial Settlement Conditionally Certifying Class for Purposes of Settlement, Approving Form and Manner of Notice, & Scheduling Hearing on Fairness of Settlement Pursuant to Fed. R. Civ. P. 23(E) (S.D. Tex. June 3, 2004).
206. Keller Rohrback L.L.P., Enronerisa.com: 401(k) Litigation: Settlement, *available at* http://www.enronerisa.com/settlement.html (last visited Mar. 17, 2005). Keller Rohrback will post the court's decision on this website immediately.

reliance.[207] In order to make a successful ERISA claim, a plaintiff must show that the defendant was a fiduciary, breached his fiduciary duty to act solely in the interest of plan participants, failed to act as a prudent person in like capacity, failed to diversify the plan's investments in order to decrease the risk of loss, failed to act in accordance with plan documents, or engaged in any transaction expressly prohibited by ERISA.[208] Since ERISA liability arises from a fiduciary duty to plan participants, there are potential situations in which actors comply with all relevant securities law, yet still face liability under ERISA.

A. ERISA Duty to Disclose Is More Restrictive than Securities Law Disclosure Requirements

Under ERISA, some courts have arguably held that fiduciaries have an affirmative duty to disclose any information that a plan participant would find useful in making investment decisions,[209] while securities law limits the information that a corporation must disclose in certain periodic reports and requires that other individuals with inside information simply refrain from trading based on that information before it is disclosed to the market.[210]

"The duty of disclosure under ERISA has been described as 'an area of developing and controversial law.'"[211] One circuit held that the duty of ERISA fiduciaries to inform is "not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful."[212] However, the standard for disclosure is not yet clear. In 1995, the Norfolk Southern Corporation established a 401(k) retirement plan known as "TRIP" (Thoroughbred Retirement Investment Plan).[213] The plan created two accounts for each employee, one holding individual contributions, and the other holding the employer's matching contributions.[214] Employees could invest their contributions in a number of different funds, including a fund consisting of Norfolk Southern stock, while the employer's matching funds were placed into the Norfolk Southern stock

207. 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5.
208. 29 U.S.C. § 1104.
209. *Glaziers & Glassworkers*, 93 F.3d at 1180 (quoting Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1994)).
210. 17 C.F.R. § 240.10b5-1.
211. *In re Xcel Energy*, 312 F. Supp. 2d at 1176 (quoting *Tittle v. Enron*, 284 F. Supp. 2d at 555).
212. *Glaziers & Glassworkers*, 93 F.3d at 1180.
213. *Pa. Fed'n*, 2004 U.S. Dist. LEXIS 1987, at *2.
214. *Id.* at *3.

fund.[215] Prior to 2002, employees were not given the option to transfer the matching funds to another investment option.[216] By October 2000, Norfolk Southern stock had dropped from its 1998 high of forty dollars a share to twelve dollars a share.[217] Throughout the time period that the stock value dropped, Norfolk Southern continued to make its matching contributions in Norfolk Southern stock, and continued to offer the Norfolk Southern fund as an investment option for employees.[218] The district court ruled that the standard for disclosure was not clear, and in January 2005, the court certified to the Third Circuit the question:

> Does ERISA require the fiduciaries of a 401(k) plan that offers employment stock as an investment option to disclose to plan participants non-public information, acquired by the fiduciaries in their capacities as directors and officers of the employer, about the employer's business operations and present and future weaknesses in the value of its stock that do not threaten the continued viability of the business?[219]

Other courts have also struggled to establish the level of affirmative disclosure required by fiduciaries. In the Enron ERISA litigation, the court held that while the question of a fiduciary's duty to disclose information was a developing area of law, the plaintiffs were able to state a claim that the fiduciaries had a duty to disclose information to the plan participants.[220] The Seventh Circuit has held that fiduciaries are not required to "continuously gather and disclose nonpublic information bearing some relation to the plan sponsor's financial condition."[221] The Northern District of Georgia held that just because part of the ERISA plan is invested "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 the business: some sort of 'special circumstance' will be required to trigger these heightened obligations."[222] While the exact level of disclosure required of ERISA is still unclear, it is known that ERISA fiduciaries have a greater affirmative duty of

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215. *Id.*
216. *Id.* at *4.
217. *Id.*
218. *Id.* at *5.
219. Pa. Fed'n, Bhd. of Maint. of Way Employees v. Norfolk S. Corp. Thoroughbred Ret. Inv. Plan, No. 02-9049, 2005 U.S. Dist. LEXIS 296, at *9-10 (E.D. Pa. Jan. 11, 2005).
220. *Tittle v. Enron*, 284 F. Supp. 2d. at 557.
221. Cokenour v. Household Int'l, Inc., No. 02 C 7921, 2004 U.S. Dist. LEXIS 5286, at *24 (N.D. Ill. Mar. 31, 2004).
222. *Hill v. BellSouth*, 313 F. Supp. 2d at 1369.

disclosure than defendants generally have in securities fraud cases.

B. Scienter Required in Securities Fraud Cases, but Not ERISA

Securities law liability requires an element of scienter, while ERISA liability arises from a breach of fiduciary duty and does not require intent. As discussed above, in order for a plaintiff to successfully make a securities fraud claim under Rule 10b-5, the plaintiff must show that the defendant acted with scienter.[223] Scienter has been defined by the U.S. Supreme Court as the "intent to deceive, manipulate, or defraud."[224] While liability in securities fraud cases requires an element of intent, liability in ERISA stock drop cases arises from a breach of fiduciary duty, and does not require that the fiduciary act with scienter in order to be held personally liable.[225] This different standard can result in different outcomes for defendants who are sued under both statutes for the same conduct. An individual who did not act with the intent to deceive, manipulate, or defraud could not be held personally liable under Rule 10b-5. But if that same action was not that of a "prudent" person, he could be held liable for breach of ERISA fiduciary duty.

C. Securities Liability Is Tied to the Purchase or Sale of a Security, While ERISA Liability Is Not Necessarily Tied to a Transaction

Liability under Rule 10b-5 must be in connection with the purchase or sale of a security,[226] while arguably, some courts have held that ERISA liability can arise from the failure to disclose information that a reasonable person would have wanted in making plan investment decisions.[227] As with the element of scienter, this could lead to split results in some situations. For example, if a plan fiduciary knew that the company was facing financial troubles, yet encouraged plan participants to continue to leave their ERISA plan investments in company stock, they could be held liable even if the plan participants never bought or sold any shares.[228] However, in the same situation, the fiduciary would not be liable to shareholders that were not plan participants

223. *Ernst*, 425 U.S. at 193.
224. *Id.*
225. 29 U.S.C. § 1109(a).
226. *Blue Chip Stamps*, 421 U.S. at 731; 15 U.S.C. § 78j.
227. *Glaziers & Glassworkers*, 93 F.3d at 1180 (quoting *Bixler*, 12 F.3d at 1299).
228. *Varity Corp.*, 516 U.S. at 489.

unless the shareholder actually bought or sold shares based on the fiduciaries fraudulent statements.[229]

D. Only Fiduciaries Can Be Liable Under ERISA

Only fiduciaries can be liable under ERISA, while there is no fiduciary requirement for securities law. Any individual who violates the elements of Rule 10b-5 can be held accountable for securities fraud.[230] In addition, board members cannot completely delegate away the duty—even by appointing an outside body or committee to administer the plan. Under ERISA, a person is a fiduciary to the extent that he or she exercises any discretionary authority or control over the management of the plan or the management of its assets or has any discretionary authority or responsibility for the administration of the plan.[231] In *Kling v. Fidelity Management Trust Co.*, the court held that the power to appoint fiduciaries is a fiduciary function and implicit in the power to appoint is the duty to monitor.[232] Other courts have also held that officers and directors have a duty to monitor fiduciaries appointed to administer an ERISA plan.[233] Even if board members delegate away the responsibilities for administering and managing the plan, they still have a duty to monitor those that they have appointed.

E. Duty of Loyalty Held by ERISA Fiduciaries Is Extremely High

Fiduciaries (including corporate board members) of ERISA plans have a duty of loyalty and duty of care. Board members also have a fiduciary duty of loyalty and care to their shareholders. However, the standard for those duties differs significantly.

The duty of loyalty requires an ERISA fiduciary to discharge his duties solely in the interest of the plan participants[234] and "with an eye single to" the beneficiary.[235] Most states have created either a statutory or common law duty of loyalty for corporate board members to their shareholders. However, the duty of loyalty for directors is "to refrain from engaging in his personal activities in such a manner as to injure or take advantage of his corporation."[236]The duty of care under ERISA requires that the

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229. *Blue Chip Stamps*, 421 U.S. at 754-55.
230. 17 C.F.R. § 240.10b–5.
231. 29 U.S.C. § 1002(21)(A).
232. *Kling*, 323 F. Supp. 2d at 142.
233. *See, e.g., In re Elec. Data Sys. I*, 305 F. Supp. 2d at 671.
234. 29 U.S.C. § 1104(a)(1)(a).
235. *See Donovan v. Bierwirth*, 680 F.2d at 271.
236. WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE

fiduciary act "with care, skill, prudence and diligence that a prudent man would use"[237] and "to make decisions with a single-minded devotion to a plan's participants."[238] Directors have a duty of care to shareholders, which is measured by the business judgment rule. They must act "on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[239] These differing standards of care require that a director or officer exercise great concern when taking action in a fiduciary status to ERISA beneficiaries. A director does not receive the same deference under ERISA law that he does while exercising his general business duties.

F. Level of Pleadings for Security Fraud Is Much More Difficult

Pleadings for fraud under securities law are fact–specific and must meet the heightened fraud pleading requirements, while ERISA claims based on breach of fiduciary duty do not necessarily trigger heightened levels of pleading. Under the Federal Rules of Civil Procedure, when making a fraud claim, "the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."[240] This heightened level of pleading can make it difficult for plaintiffs in securities cases to withstand a motion to dismiss. However, several courts have held that a plaintiff alleging a breach of ERISA fiduciary duty does not have to meet the heightened fraud pleading requirements if their claim alleges a breach not based on fraud.[241]

G. The PSLRA Can Stay Discovery While a Motion to Dismiss Is Pending

Private securities fraud actions must meet the stringent PSLRA requirements. One way in which Congress tried to minimize the impact of meritless securities lawsuits was to stay

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OFFICERS AND DIRECTORS § 1.05 (7th ed. 2004).

237. *Morse*, 732 F.2d at 1145; 29 U.S.C. § 1104(a)(1)(A).

238. *Morse*, 732 F.2d at 1145.

239. KNEPPER & BAILEY, *supra* note 236, § 1.06.

240. FED. R. CIV. P. 9(b).

241. *See In re Elec. Data. Sys. I*, 305 F. Supp. 2d at 671 (stating the plaintiff needs to meet Rule 9(b) requirements when the claim was based on a duty to disclose); *Nelson*, 2003 U.S. Dist. LEXIS 2431 (holding allegations of alleged breach of duties of loyalty and prudence, as well as alleged failures to disclose information to ERISA are not subject to Rule 9(b)); *Rankin*, 278 F. Supp. 2d at 865 (Rule 9(b) is not applicable to ERISA cases where the plaintiff alleges breach of fiduciary duty and not fraud). *See also In re Xcel Energy*, 312 F. Supp. 2d at 1165; *In re La.-Pac. Corp.*, 2003 U.S. Dist. LEXIS 7645.

discovery while any motions to dismiss were pending.[242] Under ERISA, as in most other civil litigation, discovery may proceed immediately. These different discovery standards can cause conflict in situations where both shareholders and plan beneficiaries have filed a civil suit. If the defendant files a motion to dismiss, discovery should theoretically be stayed in the securities fraud suit, but may continue in the ERISA suit. This dual standard raises the possibility that defendants will file a parallel ERISA suit in order to get discovery during a stage in the proceedings that they would not be allowed discovery during a typical shareholder fraud suit.

VI. DIFFERENT STANDARDS COULD LEAD TO THE DOWNFALL OF ERISA PLANS

No employer is required to offer his or her employees a retirement savings plan; yet if they do offer a plan, it must comply with ERISA.[243] ERISA was enacted with good motives; the government wanted to protect employees from potential abuse at the hands of employers. However, the recent rash of ERISA stock drop cases could end up harming employees in a significant way. Employers who provide ERISA plans face a high level of fiduciary duty when managing the plan, higher than the company's duty to its shareholders. If it becomes too expensive for employers to provide employees with the retirement benefits, both because of the costs of litigation and because of the cost of complying with two different sets of legal standards, employers may choose to simply stop providing their employees with retirement benefits.

242. 15 U.S.C. § 77z-1(b).

243. A retirement plan must only comply with ERISA if the employer wants it to be eligible for tax benefits. *See, e.g.*, Morton Mintz, *Beware of Pension Eligibility Rules*, WASH. POST, Nov. 15, 1987, at R26.

TABLE A: FIRST CIRCUIT

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
Lalonde v. Textron, Inc.[244]		Defendant ESOP's motion to dismiss overturned. Defendant directed trustee's motion to dismiss affirmed.	With respect to ESOP, the court held that additional record needed to be developed to determine if this was a case where the presumption of reasonableness of ESOP fiduciary may be overcome.[245] With respect to the directed trustee, the plaintiff did not allege any facts that the directed trustee had knowledge of the defendant's malfeasance, and therefore could not be held liable.[246]
In re Tyco International, Ltd. Multidistrict Litigation.[247]		Defendants' motions to dismiss were granted in part and denied in part.	The ministerial employees on the plan committee were not fiduciaries.[248] The employer was not a fiduciary due to its plan administration.[249] Although the employer's board members were fiduciaries, the parent was not a fiduciary

244. 369 F.3d 1 (1st Cir. 2004).
245. *Id.* at 4-6.
246. *Id.* at 7.
247. No. 02-1335-PB, 2004 U.S. Dist. LEXIS 24272 (D.N.H. Dec. 2, 2004).
248. *Id.* at *13.
249. *Id.*

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
			based on its securities filings.[250] The complaint did not contain enough facts to show that the parent should be held liable as an alter ego.[251] The court did not dismiss the claims against the parent based on misstatements by its former CEO to determine if the employer had respondeat superior liability for its employees' acts related to the plan committee;[252] if the defendants could use the defense under 29 U.S.C. § 1104(c);[253] or if the misstatements and failures to disclose were actionable.[254] The complaint sufficiently stated a cause of action for negligence based on an imprudent investment.[255]
Kling v. Fidelity Management Trust Co.[256]		Defendant's motion to dismiss granted in part and denied in part.	The company and members of the pension committee had a fiduciary duty to monitor appointed fiduciaries and a co-fiduciary duty to

250. *Id.* at *11.
251. *Id.* at *25.
252. *Id.* at *26.
253. *Id.* at *27.
254. *Id.* at *28.
255. *Id.* at *32-33.
256. 323 F. Supp. 2d 132 (D. Mass. 2004).

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
			provide accurate information about investments.[257] The allegations against the savings plan were dismissed because the plan could "not be both a plaintiff and defendant in the same" case.[258] The directed trustee had a fiduciary duty to "distinguish between proper and improper instructions."[259]
Lalonde v. Textron, Inc.[260]		Defendant's motion to dismiss granted. Overturned in part on appeal.	The directed trustee was not a fiduciary with respect to its purchases of employer stock.[261] The drop in the employer's stock was not enough to rebut the presumption that the ESOP acted reasonably in continuing to hold the employer's stock.[262]
Stein v. Smith.[263]	Yes	Defendant's motion to dismiss granted in part and denied in part.	The plaintiffs alleged facts sufficient to withstand a motion to dismiss because they "claimed that any defendant with a fiduciary duty to monitor and evaluate the performance of

257. *Id.* at 144.
258. *Id.* at 147.
259. *Id.* at 150.
260. 270 F. Supp. 2d 272 (D.R.I. 2003).
261. *Id.* at 282.
262. *Id.* at 280.
263. 270 F. Supp. 2d 157 (D. Mass. 2003).

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
			[company] stock as an investment option for one or both of the plans breached that duty because he or she allegedly knew or should have known of problems within the [c]ompany."[264] The plaintiffs' claims based on co-fiduciary liability were dismissed as "inadequately pleaded," and the claims against the officer were dismissed because he was not a fiduciary.[265]

264. *Id.* at 167.
265. *Id.* at 175.

TABLE B: SECOND CIRCUIT

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
Henry v. Champlain Enterprises, Inc.[266]		Complaint dismissed against certain defendants. Judgment against remaining defendants.	"U.S. Trust . . . failed to demonstrate entitlement to the adequate consideration exception. The sale of convertible preferred stock to the ESOP, accordingly, was a prohibited transaction under ERISA."[267]
Crowley v. Corning, Inc.[268]		Plaintiff's motions to amend his complaint and alter judgment denied.	Neither the company nor the board of directors was a fiduciary under the plan.[269] While the benefit committee was a fiduciary, the plan itself directed that one investment option must be investor stock, and the committee did not breach its duty by continuing to offer the stock.[270]
In re WorldCom, Inc. ERISA Litigation.[271]		Settlement approved.	Plaintiffs and all defendants except Merrill Lynch and Sullivan reached a $47.15 million cash settlement that was

266. 334 F. Supp. 2d 252 (N.D.N.Y. 2004).
267. *Id.* at 274.
268. No. 02-CV-6172 CJS, 2004 U.S. Dist. LEXIS 758 (W.D.N.Y. Jan. 14, 2004).
269. *Id.* at *13.
270. *Id.* at *18-20.
271. No. 02 Civ. 4816(DLC), 2004 U.S. Dist. LEXIS 20671 (S.D.N.Y. Oct. 18, 2004).

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
			approved by the court on October 18, 2004.[272]
In re WorldCom, Inc. ERISA Litigation.[273]	Yes	Defendant's motion to dismiss granted in part and denied in part.	A fiduciary under ERISA is a functional status. Officers that did not act as nor were appointed as fiduciaries could not be held liable. Incorporation of SEC filings into summary plan descriptions is not enough to create fiduciary status.[274] However, a fiduciary cannot "forget" information he has learned in his corporate capacity, and an ERISA fiduciary may not knowingly disseminate false information to plan participants.[275]
Beam v. HSBC Bank USA.[276]		Defendant's motion for summary judgment denied. Plaintiff's motion for partial summary judgment is granted.	Factual issues precluded summary judgment for the trustee and outside directors.[277] The outside directors were fiduciaries under ERISA.[278]

272. *Id.* at *11-13.
273. 263 F. Supp. 2d 745 (S.D.N.Y. 2003) (settlement approved by *WorldCom II*, 2004 U.S. Dist. LEXIS 20671).
274. *Id.* at 760.
275. *Id.* at 765.
276. No. 02-CV-0682E(F), 2003 U.S. Dist. LEXIS 15744 (W.D.N.Y. Aug. 19, 2003).
277. *Id.* at *11-12.
278. *Id.* at *11.

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
Crowley v. Corning, Inc.[279]		Defendant's motion to dismiss granted.	The plan sponsor did not act as a fiduciary.[280]
Koch v. Dwyer.[281]		Defendant's motion to dismiss denied.	The motion to dismiss was denied because the action was not time barred, the successor trustee was a fiduciary, and the earlier litigation did not bar the plaintiff's action against the chairman and officer.[282]

279. 234 F. Supp. 2d 222 (W.D.N.Y. 2002).
280. *Id.* at 231.
281. No. 98 Civ. 55519 (RPP), 1999 U.S. Dist. LEXIS 11101 (S.D.N.Y. July 22, 1999) (class certified by Koch v. Dwyer, No. 98 Civ. 55519, 2001 U.S. Dist. LEXIS 4085 (S.D.N.Y. Mar. 23, 2001)).
282. *Id.* at *11-39.

TABLE C: THIRD CIRCUIT

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc.[283]		Grant of summary judgment for defendant on ERISA claims overturned and remanded.	Material issue of fact on fiduciary duty remained.[284]
Moench v. Robertson.[285]		District court's order granting defendant's motion for summary judgment vacated and case remanded for further proceedings.	ESOP fiduciaries who invest in employer stock are entitled to a presumption that it acted consistently with ERISA; however, the presumption may be overcome if the plaintiff can establish that the fiduciary abused its discretion.[286]
Pennsylvania Federation, Brotherhood of Maintenance of Way Employees v. Norfolk South Corp. Thoroughbred Retirement Investment Plan.[287]		Court granted parties' cross motions to certify controlling questions of law.	The court granted the motions because there were substantial grounds for difference of opinion as to (a) the specificity that is required in pleading facts; (b) whether an exclusive duty was breached when a fiduciary only took actions that were dictated; (c) whether a claim that officers and directors had superior

283. 93 F.3d 1171 (3d Cir. 1996).
284. *Id.* at 1182.
285. 62 F.3d 553 (3d Cir. 1995).
286. *Id.* at 571-72.
287. No. 02-9049, 2005 U.S. Dist. LEXIS 296 (E.D. Pa. Jan. 11, 2005).

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
			knowledge of weak stock prices was enough to allege a breach; and (d) when the presumption should have been applied.[288]
In re Schering-Plough Corp. ERISA Litigation.[289]		Defendant's motion to dismiss granted.	Plaintiffs did not state a claim under § 1132(a) for plan-wide relief since each participant had the option to invest in company stock, and they are looking only for individualized relief.[290]
Pennsylvania Federation, Brotherhood of Maintenance of Way Employees v. Norfolk South Corp. Thoroughbred Retirement Investment Plan.[291]		Defendant's motion to dismiss granted in part and denied in part.	Plaintiffs did not adequately state a claim for violation of ERISA's exclusive purpose requirement.[292] Plaintiffs stated a sufficient claim for a breach of ERISA's "duty to provide clear, accurate, and understandable information to the Plan participants";[293] and ERISA's duty of prudence. They alleged that the employer, plan, officers, plan managers, and plan trustee "knew or should have known

288. *Id.* at *5-6.
289. No. Civ.A. 03-1204, 2004 U.S. Dist. LEXIS 16265 (D.N.J. June 28, 2004).
290. *Id.* at *30-31.
291. No 02-9049, 2004 U.S. Dist. LEXIS 1987 (E.D. Pa. Feb. 4, 2004) (court later certified controlling questions of law to the Third Circuit).
292. *Id.* at *12.
293. *Id.*

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
			of some information that would lead a reasonable person to question the prudence of further investment" in the employer's stock fund. [294]
In re IKON Office Solutions Inc. Securities Litigation.[295]	Yes	Plaintiff's motion for class certification granted. Case settled August 2002.	The settlement amended the plan "permitting each Plan participant who ha[d] at least two years of service to direct his employer [to] match contributions to any of the Plan's investment options," and not just in company stock.[296] The court approved the settlement.
Canale v. Yegen.[297]		Defendant's motion to dismiss granted in part and denied in part.	Plaintiff's allegations concerning defendants' failure to diversify ESOP assets does state a claim for breach of ERISA fiduciary duties.[298]

294. *Id.* at *23-24.

295. 191 F.R.D. 457 (E.D. Pa. 2000) (settled by Whetman v. IKON Office Solutions, Inc. (*In re* IKON Office Solutions Sec. Litig.), 209 F.R.D. 94 (E.D. Pa. 2002)).

296. *Whetman v. IKON*, 209 F.R.D. at 97.

297. 782 F. Supp. 963 (D.N.J. 1992).

298. *Id.* at 967-68.

TABLE D: FOURTH CIRCUIT

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
Tatum v. R.J. Reynolds Tobacco Co.[299]		Reversed district court's order granting defendant's motion to dismiss and remanded for further proceedings.	The plaintiff stated a valid claim for a potential breach of fiduciary obligations according to 29 U.S.C. § 1104(a)(1). The plan's amendments did not strip the plan fiduciaries of "discretion to redesignate" the funds at issue as investment options, and did not require the elimination or sale of the stocks from the plan.[300]
In re Duke Energy ERISA Litigation.[301]		Defendant's motion to dismiss granted.	The ESOP Fiduciaries were "entitled to a presumption that [their] decision to remain invested in employer stock [was] a reasonable one."[302] Misrepresentation of revenues representing less than one-third of one percent of company's revenue is "immaterial as a matter of law."[303]
Tatum v. R.J. Reynolds Tobacco Co.[304]		Defendant's motion to dismiss	Defendants' actions were not subject to ERISA's fiduciary duty

299. 392 F.3d 636 (4th Cir. 2004).
300. *Id.* at 640.
301. 281 F. Supp. 2d 786 (W.D.N.C. 2003).
302. *Id.* at 794.
303. *Id.* at 792.
304. 294 F. Supp. 2d 776 (M.D.N.C. 2003), *rev'd*, 392 F.3d 636 (2004).

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
		granted.	provisions because those "actions were performed as part of settlor functions."[305] The court held that the plan amendment documents did not give the defendants as fiduciaries any authority to prevent the sale.[306]
Hull v. Policy Management Systems Corp.[307]	Yes	Defendant's motion to dismiss granted.	The plaintiff's allegations that the corporation failed to provide accurate information were not based on duties owed by an ERISA fiduciary. Rather, they were based on the "general duties of disclosure" owed by an officer of corporation.[308] A committee with the authority to make investment decisions for a plan does not have a higher standard of care with respect to purchases of company stock than other stock purchase, and a committee cannot be held liable for failing to uncover

305. *Id.* at 783.
306. *Id.* at 784.
307. No. 3:00-778-17, 2001 U.S. Dist. LEXIS 22343 (D.S.C. Feb. 9, 2001).
308. *Id.* at *23-24.

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
			misrepresentations of other fiduciaries.[309]

309. *Id.* at *26-27.

TABLE E: FIFTH CIRCUIT

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
Schied v. Dynegy, Inc. (In re Dynegy, Inc. "ERISA" Litigation).[310]		Defendant's motion to dismiss granted in part and denied in part.	Allegations that the fiduciaries knew there were misrepresentations in SEC filings and then encouraged plan members who were interested in investing in the corporation to read those filings, and that the corporation breached a fiduciary duty by knowing about and failing to remedy alleged fiduciary breaches by benefit plan committee were sufficient to state a claim for breach of fiduciary duty.[311] The fiduciaries did not breach a fiduciary duty by accepting the corporation's tender of matching shares for the retirement plan[312] or for failure to diversify the corporation's contribution of its own stock.[313]
In re Electronic Data Systems		The court granted in part and	Since the claims were pursued on behalf of the plan instead of as

310. 309 F. Supp. 2d 861 (S.D. Tex. 2004).
311. *Id.* at 881-82.
312. *Id.* at 892.
313. *Id.* at 896.

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
Corp. "ERISA" Litigation.[314]		denied in part the plaintiffs' motion for class certification.	individuals, the claims satisfied the commonality requirement for class certification.[315] The releases that the participants signed could not defeat the typicality requirement.[316] As a separate entity, ERISA section 404(c) did not apply. This provision could only apply to particular participants and particular transactions.[317]
In re Electronic Data Systems Corp. "ERISA" Litigation.[318]		Defendant's motion to dismiss denied.	The plaintiff's claim that the corporation and its officers failed to monitor the plan administrator and investment committee, and allegations that the defendants concealed information that would have allowed them to discover that the investment was unsound was adequately pleaded.[319] The heightened pleading requirements under Federal Rule of Civil Procedure 9(b) were not applicable,

314. 224 F.R.D. 613 (E.D. Tex. 2004).
315. *Id.* at 622.
316. *Id.* at 623.
317. *Id.* at 625.
318. 305 F. Supp. 2d 658 (E.D. Tex. 2004).
319. *Id.* at 682.

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
			because the alleged breach of a fiduciary duty to inform were not necessarily fraud allegations.[320]
In re Reliant Energy ERISA Litigation.[321]		Defendant's motion to dismiss granted in part and denied in part.	The plaintiff did not have standing to sue the defendant subsidiary, since the plaintiff never worked for the subsidiary and never participated in any of the subsidiary's benefits plan.[322] The district court found that even though the defendant parent had power to appoint and remove its benefits committee members, this did not make the parent a fiduciary. The plaintiff had properly alleged that the parent's benefits committee members were ERISA fiduciaries.[323] "Respondeat superior . . . [was] a viable theory of liability under ERISA."[324]
Tittle v. Enron Corp. (In re Enron Corp. Securities,	Yes	Defendant's motion to dismiss on ERISA claims	An ESOP fiduciary is entitled to a presumption of reasonableness when

320. *Id.* at 672.
321. 336 F. Supp. 2d 646 (S.D. Tex. 2004).
322. *Id.* at 654.
323. *Id.* at 658.
324. *Id.*

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
Derivative & "ERISA" Litigation).[325]		denied. Settlement pending.	investing in employer stock. Corporate directors have a duty to monitor plan fiduciaries, and fiduciaries have a duty to communicate material information to employees. A directed trustee duty may be held liable when the trustee knows or should have known about the directing fiduciary's breach.[326]
Thompson v. Avondale Industries, Inc.[327]		Judgment in favor of defendants; plaintiff's claims dismissed.	Plaintiffs failed to prove that any of the defendants breached their fiduciary duty, because the plan allowed the administrative committee to diversify, and certain "sales were prudent means of diversification."[328]

325. 284 F. Supp. 2d 511 (S.D. Tex. 2003).
326. *Id.* at 560-82.
327. No. 99-3439, 2003 U.S. Dist. LEXIS 2318 (E.D. La. Feb. 14, 2003).
328. *Id.* at *18.

TABLE F: SIXTH CIRCUIT

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
Chao v. Hall Holding Co.[329]		District court decision granting plaintiff's motion for summary judgment.	Because the fiduciaries did not engage in a good faith determination of the fair market value of the stock, the definition of "adequate consideration" required by ERISA was not satisfied.[330] The fiduciaries "had provided no authority to show that the district court erred in awarding money damages to compensate the participants" in the employee stock ownership plan.[331]
Landgraff v. Columbia/ HCA Healthcare Corp. of America.[332]		Dismissal of plaintiff's claim affirmed.	The plaintiffs failed to establish that a reasonable fiduciary would have determined that investment in company stock was imprudent, and as such failed to rebut a presumption of reasonableness.[333]
Hunter v. Caliber Systems.[334]		Summary judgment in favor of defendant affirmed.	The administrator of an ERISA plan could not be liable for failing to diversify the plan assets, since the plan

329. 285 F.3d 415 (6th Cir. 2002).
330. *Id.* at 437.
331. *Id.* at 444.
332. 230 Fed. Appx. 366 (6th Cir. 2002).
333. *Id.* at 368.
334. 220 F.3d 702 (6th Cir. 2000).

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
			trustee had sole responsibility for diversifying plan investments under ERISA, and the Trust Agreement also assigned responsibility to trustee for diversification.[335]
Kuper v. Iovenko.[336]		Judgment for defendants affirmed.	The defendants did not act improperly in failing to distribute stock under an ESOP, or in failing to diversify ESOP funds. Purely business decisions by an ERISA employer are not governed by the fiduciary standards.[337]
In re AEP ERISA Litigation.[338]		Defendant's motion to dismiss denied.	Plaintiffs do not need to meet heightened Federa; Rule of Civil Procedure 9(b) pleading rules. Material information regarding stocks could be disclosed without violating federal securities laws. Exercised authority over an employee benefit is enough to be held liable as an ERISA fiduciary. Other issues raised by the defendants were best

335. *Id.* at 722-23.
336. 66 F.3d 1447 (6th Cir. 1995).
337. *Id.* at 1456-58.
338. 327 F. Supp. 2d 812 (S.D. Ohio 2004).

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
			decided at a later stage of litigation.[339]
In re CMS Energy ERISA Litigation.[340]	Yes	Defendant's motion to dismiss granted in part and denied in part.	The failure of officers and directors to eliminate employer stock as an investment option did not breach fiduciary duties.[341] Allegations that employer's officers and directors were aware of improper trading practices but took no action to prevent other fiduciaries from continuing to invest in employer stock; that administrators of a plan conveyed misleading information; and allegations that employers and directors failed to monitor plan fiduciaries were sufficient to state a claim for breach of fiduciary duty.[342]
Rankin v. Rots.[343]		Defendant's motion to dismiss denied.	Defendant's motions were "a veiled attempt" to get summary judgment at the pleadings stage.[344] Federal Rule of Civil Procedure 9(b) is not applicable to ERISA

339. *Id.* at 821, 825.
340. 312 F. Supp. 2d 898 (E.D. Mich. 2004).
341. *Id.* at 907.
342. *Id.* at 902-04.
343. 278 F. Supp. 2d 853 (E.D. Mich. 2003) (K-Mart ERISA Litigation).
344. *Id.* at 879.

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
			cases where plaintiff alleges breach of fiduciary duty and not fraud.[345] ESOP fiduciaries are "expected to administer ESOP investments consistent with the provisions of both a specific employee benefits plan and ERISA."[346]

345. *Id.* at 865.
346. *Id.* at 878-79 (quoting *Moench*, 62 F.3d at 569).

TABLE G: SEVENTH CIRCUIT

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
Keach v. U.S. Trust Co.[347]		Judgment entered in favor of defendants and against plaintiffs.	The chairman and executives did not attempt to conceal material information or knowingly make less than a full disclosure of such information to the trustee and the due diligence team. In addition, "the ESOP did not pay more than adequate consideration."[348]
Howell v. Motorola, Inc.[349]		Defendant's motion to dismiss granted in part and dismissed in part.	Nothing suggested that the committee had any reason to investigate the company's allegedly imprudent transactions, and a co-fiduciary theory did not apply. Therefore, claims against the committee and its members were dismissed.[350] Prior to a more fully developed factual record, claims against the employer based on a respondeat superior theory were not dismissed.[351] The plaintiff's claim that the defendants failed to monitor the committee

347. 313 F. Supp. 2d 818 (C.D. Ill. 2004) (defendants' motion for fees denied by Keach v. U.S. Trust Co., N.A., 338 F. Supp. 2d 931 (C.D. Ill. 2004)).
348. *Id. at 823.*
349. 337 F. Supp. 2d 1079 (N.D. Ill. 2004).
350. *Id.* at 1085-86.
351. *Id.* at 1095.

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
			was sufficiently pled, as were allegations that the vice president and director of benefits knew about, and should have prevented, the distribution of inaccurate information.[352] The allegations that the chief financial officer exercised discretionary authority or control respecting management of the plan or management or disposition of its assets "stated a colorable claim" that he was a fiduciary.[353]
Armstrong v. Amsted Industries, Inc.[354]		Summary Judgment granted in favor of defendants.	The purchase of a corporation was a business decision that did not trigger ERISA's fiduciary duty.[355]
Cokenour v. Household International, Inc.[356]		Defendant's motion to dismiss granted in part and denied in part.	Plaintiffs failed to meet heightened pleading requirements regarding their claim of intentional misrepresentation.[357] The plaintiffs' claims regarding the plan committee's, its members', the

352. *Id.* at 1084.
353. *Id.* at 1101.
354. No. 01 C 2963, 2004 U.S. Dist. LEXIS 14776 (N.D. Ill. July 30, 2004).
355. *Id.* at *19.
356. No. 02 C 7921, 2004 U.S. Dist. LEXIS 5286 (N.D. Ill. Mar. 31, 2004).
357. *Id.* at *21.

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
			employers', and its executive's alleged omission to disclose nonpublic information was passive behavior too broad to fall under ERISA's disclosure provisions.[358] The allegations based on co-fiduciary liability were not sufficient to state a claim.[359] Plaintiff's duty of prudence allegations were sufficient to survive a motion to dismiss.[360]
In re Sears, Roebuck & Co. ERISA Litigation.[361]		Defendant's motion to dismiss granted in part and denied in part.	The determination of whether Sears is an ERISA fiduciary, issues of loss causation, and the fiduciary duty to monitor are factual matters "not properly resolved on a motion to dismiss."[362] Plaintiffs stated a claim against the investment committee "for causing the plan to continue to acquire and invest . . . in matching contributions of Sears' stock."[363] Plaintiffs did not sufficiently make allegations to "put [d]efendants on notice

358. *Id.* at *24.
359. *Id.* at *30.
360. *Id.* at *29.
361. No. 02 C 8324, 2004 U.S. Dist. LEXIS 3241 (N.D. Ill. Mar. 3, 2004).
362. *Id.* at *10-11.
363. *Id.* at *13.

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
			of the particular charges against each Defendant" regarding co-fiduciary liability.[364]
Steinman v. Hicks.[365]		Judgment for defendants affirmed.	The decision to transfer trust funds from one trust to another, which typically occurred pursuant to a corporate merger or reorganization, was not a fiduciary act.[366]
Nelson v. Ipalco Enterprises.[367]		Defendant's motion to dismiss denied.	"The question of fiduciary capacity for such statements" made by individuals holding a dual role "cannot be resolved as a matter of law on the pleadings."[368] Allegations of alleged breaches of duties of loyalty and prudence, as well as alleged failures to disclose information to ERISA are not subject to Rule 9(b).[369]
Keach v. U.S. Trust Co., N.A.[370]		Plaintiff's motion for summary judgment granted in	The directors were ERISA fiduciaries, as the directors, in appointing ESOP trustees "exercised de

364. *Id.* at *24.
365. 352 F.3d. 1101 (7th Cir. 2003).
366. *Id.* at 1105.
367. IP02-0477-C-H/K, 2003 U.S. Dist. LEXIS 2431 (S.D. Ind. Feb. 13, 2003).
368. *Id.* at *11.
369. *Id.* at *11-13.
370. 234 F. Supp. 2d 872 (C.D. Ill. 2002) (case tried and decided in favor of defendants, 313 F. Supp. 2d 818 (C.D. Ill. 2004)).

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
		part and denied in part.	facto control over the plan assets."[371] Summary judgment was not granted on the issue of whether the duty was breached, because the simple fact that the directors admitted they failed to adequately disclose their knowledge of the investigation did not show what they did know sufficiently to grant summary judgment.[372]

371. *Id.* at 881.
372. *Id.* at 883-84.

TABLE H: EIGHTH CIRCUIT

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
Maniace v. Commerce Bank of Kansas City, N.A.[373]		Summary judgment for defendant affirmed.	The directed trustee had no discretion, and therefore "could not be a fiduciary (nor breach fiduciary duties) with respect to the . . . [company] stock" in the plan.[374] Plaintiffs "failed to establish that . . . [the trustee's] handling of the . . . [Plan] was contrary to Plan directives or contrary to ERISA" and that any of the committee's actions actually rose to the level of being a breach of fiduciary duty.[375]
In re ADC Telecommunications, Inc., ERISA Litigation.[376]		Defendant's motion to dismiss denied.	The *Moench* presumption of prudence does not require imminent financial collapse of the company, and it would be premature to invoke the presumption at the procedural stage of the action.[377] Pleadings of other breaches of duty were sufficient to carry the action past the procedural stage.[378]

373. 40 F.3d 264 (8th Cir. 1994).
374. *Id.* at 267.
375. *Id.* at 267-69.
376. No. 03-2989 ADM/FLN, 2004 U.S. Dist. LEXIS 14383 (D. Minn. July 26, 2004).
377. *Id.* at *19-21.
378. *Id.* at *22.

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litigation.[379]	Yes	Defendant's motion to dismiss granted in part and denied in part.	Plaintiffs do not have to satisfy heightened Rule 9(b) fraud requirements.[380] It is "premature to determine . . . fiduciary status" and ERISA disclosure requirements "at the motion to dismiss stage of proceedings."[381] A plan fiduciary cannot follow the plan "to the obvious detriment of the beneficiary."[382] The defendant's motion was granted with respect to duplicative allegations.[383]

379. 312 F. Supp. 2d 1165 (D. Minn. 2004).
380. *Id.* at 1179.
381. *Id.* at 1181.
382. *Id.*
383. *Id.* at 1177.

TABLE I: NINTH CIRCUIT

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
Wright v. Oregon Metallurgical Corp.[384]		Defendants' motion to dismiss affirmed.	The court held that with respect to the ESOP, there was no cause of action for failure to diversify.[385] Since the company was not on the verge of bankruptcy, the presumption in favor of an ESOP investing in company stock was not overcome.[386] With respect to the directed trustee, the court held that a directed trustee could not have breached its fiduciary duty by following the directions of another fiduciary that had not breached its duties.[387]
In re Louisiana-Pacific Corp., ERISA Litigation.[388]		Defendant's motion to dismiss granted in part.	Louisiana-Pacific is not a plan fiduciary.[389] Allegations that other defendants permitted plan assets to be imprudently invested "sufficiently state a claim for breach of fiduciary duty."[390] These types of claims do not have to meet Rule

384. 360 F.3d 1090 (9th Cir. 2004).
385. *Id.* at 1098.
386. *Id.*
387. *Id.* at 1103.
388. No. 02-1023-KI, 2003 U.S. Dist. LEXIS 7645 (D. Or. Apr. 24, 2003).
389. *Id.* at *18.
390. *Id.* at *21-22.

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
			9(b) pleadings standards.[391]
In re McKesson HBOC, Inc. ERISA Litigation.[392]		Defendant's motion to dismiss granted with leave to amend.	Plaintiffs did not assert facts showing that the "fiduciaries abused their discretion in continuing to hold . . . a high percentage of company stock . . . prior to and in anticipation of the merger."[393] Employer did not have duty under ERISA to "harm its public shareholders" by acquiring company stock "at greater than its fair value."[394] Members of an employer's board were ERISA fiduciaries.[395] The directed trustee could not be held liable under ERISA for plan losses.[396]

391. *Id.* at *21.
392. No. C00-20030 RMW, 2002 U.S. Dist. LEXIS 19473 (N.D. Cal. Sept. 30, 2002).
393. *In re* McKesson HBOC, Inc. ERISA Litig., No. C00-20030 RMW, 2002 U.S. Dist. LEXIS 19473, at *19 (N.D. Cal. Sept. 30, 2002).
394. *Id.* at *23.
395. *Id.* at *31.
396. *Id.* at *55.

TABLE J: TENTH CIRCUIT

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
In re Sprint Corp. ERISA Litigation.[397]		Defendant's motion to dismiss granted in part and dismissed in part.	Plaintiffs alleged facts which, if true, allow a reasonable inference that defendants abused their discretion by allowing the plan to continue to invest in company stock.[398] The SEC filings were incorporated by reference into the summary plan descriptions distributed by defendants, and were required by ERISA to be truthful.[399] Furthermore, even though the directors were not responsible for managing the plan, their authority to appoint administrators created fiduciary duties to make proper appointments and monitor the appointees' performance.[400] Imprudent investment claims and disclosure claims against director defendants and co-fiduciary duty claims against director

397 No. 03-2202-JWL, 2004 U.S. Dist. LEXIS 9622 (D. Kan. May 27, 2004).
398. *Id.* at *39.
399. *Id.* at *44-45.
400. *Id.* at *61-62.

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
			defendants and trustee were dismissed.[401] Imprudent investment claim alleging that defendants should have amended the plans was dismissed.[402]
In re Williams Cos., ERISA Litigation.[403]		Defendant Williams Companies and Board of Directors' motion to dismiss granted. Defendant Investment and Benefit Committee's motion to dismiss denied.	Since the responsibility to administer the plan belonged to the committee defendants, the employer, who was the settlor or sponsor of the plan, did not act as a fiduciary.[404] Claims against the employer were dismissed.[405] The only abilities that the director defendants had under the plan was to appoint, retain, or remove committee members.[406] Since the plaintiff did not allege that any director breached a fiduciary duty that arose out of the appointment of the committee defendants, the court dismissed the action against the director defendants.[407] Allegations that the

401. *Id.* at *1-2.
402. *Id.*
403. 271 F. Supp. 2d 1328 (N.D. Okla. 2003) (plaintiffs' motion for reconsideration and alternatively, for leave to amend the complaint denied, No 02-CV-153-H(M), 2003 U.S. Dist. LEXIS 25042 (N.D. Okla. Oct. 27, 2003).
404. *Id.* at 1338.
405. *Id.*
406. *Id.* at 1339.
407. *Id.* at 1343.

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
			benefit and investment committees breached their fiduciary duty with respect to the financial interests of plan participants are sufficient to survive a motion to dismiss.[408]
In re Qwest Savings & Retirement Plan ERISA Litigation.[409]	Yes	The court denied class certification "pending approval of an appropriately defined class."[410]	The class definition should only include the people who were harmed by the breach of fiduciary duty.[411]

408. *Id.* at 1342.
409. No. 02-RB-464 (CBS), 2004 U.S. Dist. LEXIS 24693 (D. Colo. Sept. 24, 2004).
410. *Id.* at *21-22.
411. *Id.* at *21.

TABLE K: ELEVENTH CIRCUIT

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
Hill v. BellSouth Corp.[412]		Defendant's motion to dismiss denied.	Plaintiffs alleged adequate facts to establish a claim that defendants breached their fiduciary duty by failing to prudently manage the plan, disclose facts regarding the company, failing to avoid a conflict of interest, and failing to monitor plan investments.[413]

412. 313 F. Supp. 2d 1361 (N.D. Ga. 2004).
413. *Id.* at 1370.

TABLE L: SUPREME COURT AND MISCELLANEOUS CASES

Case Name/ Jurisdiction	Parallel Securities Case	Outcome	Reasoning
Computer Associates International, Inc.	Yes	Settled December 2003.[414]	
Varity Corp. v. Howe.[415]		Affirmed the appellate court's judgment against the defendant.	Employer was acting in its capacity as fiduciary when it misled employees.[416] Therefore the employer violated its fiduciary obligations. ERISA authorizes lawsuits for individualized equitable relief for breach of fiduciary duties.[417]

414. COMPUTER ASSOCS. INT'L, INC., SEC QUARTERLY FORM 10-Q/A FOR QUARTER ENDING DECEMBER 31, 2003 15, http://www.sec.gov/Archives/edgar/data/356028/000095012304007361/y98170qae10vqza.htm (June 14, 2004); Charles Forelle, *Leading the News: Settlement to End Suits by Computer Associates Holders*, WALL ST. J., Aug. 26, 2003, at A3.

415. 516 U.S. 489 (1996).

416. *Id.* at 531.

417. *Id.* at 512.