
401(k) Litigation Over Company Stock Fund Performance: It's Only Just Begun

Bill Boies, Nancy G. Ross, and Amy Doehring

THE NEW WAVE OF 401(K) LITIGATION

In defined contribution or "individual account" plans, also commonly referred to as 401(k) plans, a common investment option offered to participants is a company stock fund. These funds are composed mainly of plan sponsor common stock, with a small percentage of the fund invested in short-term investments for liquidity purposes. Company stock funds have proven popular with plan participants; as much as 20 percent of all 401(k) assets are invested in employer stock, and many large 401(k) plans hold at least half of their assets in employer stock. This concentration of investments carries with it opportunities and exposure tied to the business results of the plan sponsor. When the price of the company stock drops, the participants who have chosen these funds see their balances in these stock funds decline.

Just as public shareholders who suffer investment losses bring suits alleging violations of federal securities laws by directors, officers and others, so too participants in defined contribution plans are bringing lawsuits against plan fiduciaries (often the same individuals named in the securities suits) alleging breaches of fiduciary duty under ERISA. In the last year, with numerous large and small companies facing serious operating and financial reporting problems, these ERISA cases are becoming predictable occurrences after a public company bankruptcy or even a significant stock price swing.

This article will examine the claims asserted in some 18 of these new 401(k) complaints and discuss important issues presented by this new wave of litigation. (A schedule of the complaints we reviewed is attached.) The claims being filed share a common framework:

Bill Boies and Nancy G. Ross are partners and Amy Doehring is an associate in the Chicago office of McDermott, Will & Emery. Mr. Boies and Ms. Ross head the firm's Employee Benefits Litigation Group. They represent defendants in several of the cases referred to in this article.

- All allege that one of the investment options in the company's defined contribution plan was a company stock fund.
- All allege that the participants who invested in these company stock funds suffered losses because the company faced financial troubles and the stock price declined.
- All allege breaches of fiduciary duties under ERISA, usually charging that . . .
 1. the plan fiduciaries failed to provide adequate information about the company stock fund by not revealing adverse information about the company's business condition, and
 2. the fiduciaries were imprudent in not closing down the stock fund when faced with operating and financial reporting problems.
- Some of the complaints allege a breach of fiduciary duty in offering a company stock fund in the first place.
- Others allege that the plan's structure contributed to the fiduciaries' alleged breach and caused the losses, in that the company imposed blackout periods or restrictions regarding moving funds between investment options in the plan.
- In some cases, plaintiffs allege that plan fiduciaries violated their duties of loyalty because they had inside information about the company, but failed to warn or protect the participants.
- Some complaints allege that the plan fiduciaries had a conflict of interest and should have engaged independent fiduciaries to monitor the stock fund and determine whether it was a suitable investment option.

AN OPENING PROCEDURAL QUESTION: WHAT SORT OF LAWSUITS ARE THESE?

The complaints we reviewed are pled in great detail about the decline of the company and its stock, but often with far less detail about the nature of the lawsuit itself. Many of the complaints appear to be worded as both derivative actions, in which one or two participant plaintiffs purport to be suing "on behalf of the plan," and as class actions, in which the named plaintiffs claim to sue on behalf of a class of participants who suffered losses. This mixed pleading may be quite intentional and may offer at least three perceived advantages to plaintiffs' counsel.

First, suing “on behalf of the plan” sounds impressive—far better than suing for one or a few participants—and sets the stage for a story about innocent plan participants and supposedly derelict plan fiduciaries. Once the stage is set, aggressive plaintiffs’ counsel can then argue for accelerated discovery and appointment of new trustees or other interim relief “on behalf of the plan.” Defense counsel should be prepared to explain to the court that individual plaintiffs are just individual plaintiffs and that the plan has capable administration that should not be swept aside on the basis of complaint allegations.

A second reason for loosely described claims may be that the nature of the ERISA claims, when properly analyzed, will dictate the proper remedy and even determine standing to sue. ERISA Section 502 sets forth the types of civil actions that may be brought under ERISA. Section 502(a)(1) provides that a participant or beneficiary may bring suit to recover benefit due him or her under the terms of the plan, to clarify his or her right to benefits under the plan, or to enforce his or her rights under the plan.¹ Section 502(a)(2) provides that a participant or beneficiary may sue for relief under Section 409, which provides that a breaching fiduciary shall be personally liable to make good the losses to the plan.² Finally, Section 502(a)(3) acts as a catchall provision, providing a cause of action for individual participants to bring an action for breach of fiduciary duty seeking individual relief.³ The relief available to individuals bringing breach of fiduciary duty actions under ERISA Section 502(a)(3) is generally limited to equitable relief, namely restitution, injunction, or mandamus.⁴ Many courts have interpreted this to preclude any monetary relief. On the other hand, ERISA Section 409 provides that a fiduciary must make good to the plan all “losses to the plan,” and ERISA Section 502(a)(2) allows suits to enforce Section 409.⁵ This relief, however, must inure to the plan as a whole, and not solely to individual plan participants.⁶

Plaintiffs in some of these actions appear to be attempting to circumvent this limitation by pleading their individual claims “on behalf of the plan,” often without specific citations to ERISA provisions. Notably, these complaints typically do not affirmatively allege that every participant in the plan invested in the company stock fund (and that would typically not be true). In this context, simply pleading an action as a derivative claim on behalf of the plan does not mean that the relief sought actually inures to the plan as a whole and can successfully avoid the limitations of ERISA Sections 409 and 502(a)(2). Because participants have individual accounts, and not

every participant is affected by a company stock price move, the entire plan is not affected by a decline in value of this one investment option. Instead, these actions actually appear to be class actions brought on behalf of a subset of plan participants, i.e. those who chose to invest in the company stock option and suffered losses. Getting this point clarified should be useful to defendants, both by eliminating the “suing on behalf of the plan” rhetoric and because 502(a)(3) claims of plan participants will be open to different defenses, including a defense that plaintiffs have only equitable remedies that do not include dollar damages to replace investment losses. (This remedies issue is discussed later in this article.)

The third reason for obscure pleading about the nature of the claims likely relates to class action procedural requirements under Rule 23. Federal court class actions must go through a formal class certification process (do common questions predominate, etc.) and are subject to notice requirements that present plaintiffs’ counsel with substantive and procedural barriers as well as significant additional costs.⁷ Unless challenged by defendants, suing “on behalf of the Plan” may be a simple way around these obstacles. Defendants should not let the important issues about class certification slip away.

THE PATTERN OF CLAIMS AND SOME THOUGHTS ON DEFENSES

In our experience, most claims fall into one or more of the following categories:

Failure to Diversify

The broadest allegation common to the 401(k) suits alleging breach of fiduciary duty in connection with a company stock fund investment option is failure to diversify plan investments. Under ERISA, plans must offer diversified investments and, in fact, the typical 401(k) plan offers a wide array of investment options. Nevertheless, in several of the recent actions, plaintiffs have alleged that, because the company stock funds within the plan are undiversified, fiduciaries actually owe a heightened duty to the participants as a result of the undiversified nature of the stock funds.⁸ For example, in a case against Duke Energy Corporation, plaintiffs have alleged that because the stock fund was undiversified, defendants had a heightened duty to disclose information.⁹ Participants who chose the company stock option in the defined contribution plans for Lucent

Technologies, Inc. and Nortel Networks Corporation have made similar allegations.¹⁰

The basic defense to this sort of attack is that there is nothing inherently illegal about the structure of 401(k) plans that include company stock funds. To begin with, when Congress enacted ERISA, it limited the percentage of a pension plan that may be invested in employer stock. Under ERISA Section 407(a), only 10 percent of pension plan assets may be invested in employer stock. However, Congress has not similarly limited what a participant may elect to invest in the employer stock option of his or her 401(k) plan. Instead, ERISA Sections 404(a)(2) and 407(d)(3) provide that 401(k) plans are not subject to ERISA diversification requirements as to company stock. Plan fiduciaries should not be liable for administering the plan consistent with a structure Congress has authorized.

Beyond that, the argument that operating a company stock fund is in and of itself a breach of fiduciary duty also ignores ERISA Section 404(c) and related Department of Labor regulations providing that an undiversified company stock fund may be offered as an investment option in an individual account plan if: (1) company stock is "qualifying employer securities;" (2) company stock is publicly traded on a national exchange; (3) company stock is traded with sufficient frequency and in sufficient volume to ensure that participants' directions to buy or sell can be effected promptly and efficiently,¹¹ and (4) participants in such funds are provided with the same information that is provided to company shareholders and have the same voting and tender rights as shareholders.¹²

As a general proposition, ERISA Section 404(c) provides a safe harbor in which fiduciaries of defined contributions plans that meet these requirements are not liable for losses that result from the participants' exercise of control over their plan investments.¹³ However, while Section 404(c) may easily rebut the argument that there is something inherently wrong or illegal about operating a company stock fund, that may not completely dispose of this claim. Among other problems, Department of Labor regulations suggest that a particular plan may not qualify for the Section 404(c) safe harbor if the plan does not properly warn participants about the plan's 404(c) status and about how plan fiduciaries may be relieved of liability for losses that are "the direct and necessary result" of participant investment instructions.¹⁴ Defendants will surely face arguments that their plan fails to satisfy the 404(c) notice, voting, and other requirements. Plan provisions and notices aside, plaintiffs will predictably argue that company stock losses were "the direct and necessary result" of

defendant misconduct, not the result of investment decisions by ignorant participants.

Finally, sophisticated plaintiffs may make the more technical argument that the original and continuing selections of plan investment alternatives remains a fiduciary function to which the Section 404(c) limitation of liability does not apply. This argument actually finds some support in the preamble to the DOL 404(c) regulations, which read as a creative effort to dilute the statute (but are not binding on the courts). The first line of defense to all of these arguments may be that Congress has created a safe harbor in Section 404(c), and the courts should not close the safe harbor during a financial storm.¹⁵

Failure to Warn/Failure to Act

Virtually every complaint alleging a breach of fiduciary duty in connection with a company stock fund includes charges that the fiduciaries failed to warn participants about the company's business problems—or failed to act by suspending new investments in the company stock fund or even liquidating the company stock fund before a price decline. Plaintiffs generally allege that this failure is a breach of fiduciary duty because fiduciaries in a defined contribution plan have the duty to select investment options prudently and to act loyally toward participants. The complaints allege that fiduciaries violated their duties by selecting or retaining company stock as an investment when the fiduciaries had access to information regarding the company's financial troubles (or failed to discover the problems), and allege that the fiduciaries should have realized that the stock fund was not a suitable investment option and should not have permitted participants' further investments.¹⁶

These claims are being asserted after plan sponsor bankruptcies, as in Enron, and also after significant plan sponsor share price declines. For example, plan participants in the defined contribution plan offered by Tyco International, Ltd. brought an ERISA class action alleging breach of fiduciary duty in connection with the Tyco stock investment option.¹⁷ Plaintiffs, like plaintiffs in other such suits, allege that the defendants breached their fiduciary duties to participants by withholding and concealing information during the class period regarding Tyco's business condition and earning prospects. Moreover, plaintiffs allege that by concealing this information and by continuing to offer Tyco stock as an investment option, defendants actively misled participants about the appropriateness of Tyco stock as an investment option for the 401(k) plan. Plaintiffs further allege

that individual defendants must have failed to investigate and monitor the stock fund, because if they had, they would have concluded that Tyco stock was an inappropriate investment option.

These claims essentially present the legal issue of whether the fiduciary duty of loyalty enacted in ERISA Section 404(a) includes a duty to disclose material information, and when that duty arises. Considerable case law suggests such a duty, but only in certain circumstances. [See Joseph D. Olivieri, *ERISA's Disclosure Requirements after Varsity*, 10 *Benefits Law Journal* No. 1 (Spring 1997).] Whether plaintiffs can plead, let alone prove, such circumstances in this setting will be a hotly contested issue. The contest over this issue will involve complex financial analyses, portfolio theory, and timing questions: when did company prospects and operating results supposedly become bad enough to create a special circumstance? These issues may play out differently in cases after bankruptcies versus cases following a stock price drop when the company is still operating outside of bankruptcy and arguably has positive prospects.

Another important issue on these claims of breach of fiduciary duty by failure to disclose or act is a very basic question: who is a fiduciary or, more simply, who can be sued under ERISA in this sort of case? Many of the new complaints sue everybody in sight, including plan sponsor companies, the plan itself, company officers and directors, individual committee members and plan administrators, and corporate trustees and investment advisors. This laundry-list approach to naming defendants may reflect uncertainty as to plan administration or a focus on deep pockets and insurance coverage. Each category of defendants will have distinct defenses to be asserted based on their status.

As to the plans, these cases plainly are not garden-variety suits for benefits by a participant seeking a court order requiring the plan itself to pay the benefits, and there are serious questions as to whether the plans are properly defendants at all. Plan sponsor defenses and exposure may vary widely, depending upon the other roles the plan sponsor has assumed. For example, one widely accepted ERISA defense is that the plan sponsor, in designing the plan, is not acting in a fiduciary capacity but rather in a settlor capacity.¹⁸ This defense may be expanded to preclude fiduciary breach claims over the selection of investment options. Corporate officers and directors who have no direct role in plan operations and administration may have a defense that they have no fiduciary duties and therefore no fiduciary liability.¹⁹ One predictable line of attack, however, against senior corporate officers and company directors will be

that persons who appoint and remove ERISA fiduciaries are themselves fiduciaries who have discretionary authority over the plan under ERISA Section 3(21)(A). These management “fiduciaries” may face claims that they imprudently selected as fiduciaries either employees or outsiders who were not capable of running the plan, and then failed to monitor the performance of the fiduciaries they appointed to keep track of such issues as plan investments.²⁰

All these important considerations about who can properly be sued are, of course, only a first step toward any determination on the merits. It remains to be seen whether the courts will take the first step very carefully and confine the roster of defendants to real players who had a specific role in plan administration and supervision.

Investment Action as a Breach

Proving that “damned if you do, damned if you don’t” applies to 401(k) plan litigation, two recent complaints allege breach of fiduciary duty under ERISA in connection with a defined contribution plan that *eliminated* a company stock fund investment option. These cases use the same general language of breach of fiduciary duty but differ factually from the others. Instead of alleging that the defendants breached their duties by doing nothing or failing to recognize that the stock fund was an unsuitable option, plaintiffs in these cases allege that defendants breached their duties by closing the stock fund investment option before the company stock increased in value.

In *Gottlieb v. SBC Communications, Inc.*, one of the investment options in the savings plan was the Air Touch stock fund, in which all company matching funds were invested.²¹ After a series of acquisitions and spin-offs, defendants froze contributions to the Air Touch stock fund and liquidated all participants’ holdings. Defendants closed the fund because, as a result of the acquisitions and spin-offs, Air Touch now competed with SBC in the wireless communication market. After the stock fund was closed, Air Touch stock tripled in value. Plaintiffs allege that defendants breached their fiduciary duties by closing the fund and exercising unauthorized control over their investments.

Similarly, in *Tatum v. R.J.R. Pension Investment Committee*,²² plaintiffs allege that defendants breached ERISA fiduciary duties by liquidating participants’ investments in Nabisco stock. When R.J. Reynolds split its tobacco and food operations, the plan was amended and participants’ holdings in Nabisco stock were frozen.

Six months later, Nabisco stock was eliminated as an investment option in the plan, and participants' holdings in the fund were liquidated. Plaintiffs allege that defendants failed to consider the possibility that Nabisco stock would rise in value, which it did. Plaintiffs allege that elimination of the Nabisco stock fund as an investment option was a breach of fiduciary duty under ERISA.

Needless to say, the complaints in these cases do not express the same desire for diversification as in the cases discussed above. Indeed, these cases suggest that creative plaintiffs' lawyers can put together a claim based on any significant positive or negative market development, and illustrate why defendants must remind the courts what some courts already recognize: that plan fiduciaries are not guarantors of stock investment results.²³

Structural Problems

The widely publicized Enron 401(k) lawsuits highlight yet another category of claims common to many of these suits: allegations that the structure of the plan contributed to a breach of fiduciary duty. These structural issues include the imposition of blackout periods (*i.e.* time periods in which participants cannot change the allocation of their plan investments), rules for company matching, and other rules specific to the company stock fund.

In the Enron lawsuits, plaintiffs allege that the defendants instituted a "lockdown" or a blackout period during the time when news of the Enron scandal was breaking and Enron's stock was plummeting.²⁴ Enron savings plan participants also allege that all matching contributions provided by Enron were made, with a limited exception, in Enron stock, and that these contributions could not be reallocated to other investment options until participants reached age 50. Plaintiffs allege that these structural issues contributed to the losses experienced by plan participants as Enron's stock price fell, while the blackout prevented participants from reallocating their contributions to other options, and, similarly, the plan requirement that a participant reach age 50 before reallocating company matching prevented them from moving those investments out of company stock as the price decline continued.

Other complaints make similar allegations with respect to requirements about the company matching contribution and limitations on reallocating investments in company stock.²⁵ Most of these complaints allege that the company limited the investment of matching contributions to the company stock fund, and that this practice

denied participants the rights to invest in a diversified fund and resulted in participants' investment in an imprudent investment option.

In one action with a specific twist on these more general allegations, plaintiffs have alleged that the defined contribution plan contributed to the injury by merely offering company stock as an investment option inside the plan, because changing investments in a defined contribution plan takes more time than selling securities in the market.²⁶ Plaintiffs allege that defendants furthered their alleged scheme to artificially inflate the company's stock price because plan participants could not immediately sell their holdings upon learning bad news. The delay or lag when compared to sales in the open market, plaintiffs claim, acted to bolster the stock price even in the face of bad news, in furtherance of the alleged scheme.

Defenses against these claims will be found at many levels, but should focus on the central points that the plan structures are legal and proper and the investment losses were caused by the stock market, not the misconduct of plan fiduciaries.

Trustee and Fiduciary Inside Information

In many actions, plaintiffs allege that the plan fiduciaries were company insiders who had access to adverse information regarding the company's business condition and earnings prospects but, in breach of their fiduciary duties to the plan and its participants, failed to disclose such information.²⁷ Plaintiffs usually allege that these fiduciaries were in a conflict of interest and thereby breached their duty to act solely in the interest of the plan participants.

These claims raise questions as to the corporate insider's duty to disclose or act on material nonpublic information. Is there an inherent conflict among the securities laws about disclosing material information (and not trading on nonpublic information), the business duties of a corporate officer, and the insider's role as a plan fiduciary? Is the insider precluded from revealing adverse information to plan participants or acting for them by selling stock without revealing such information to the market? Can the insider take steps to close the company stock fund or freeze contributions on the basis of adverse information unless it is revealed to the public? Is the insider-fiduciary caught in a catch-22: either violate federal securities laws or breach fiduciary duty to plan participants?

Plaintiffs in these actions have proposed one possible solution for insiders in their complaints: engaging independent fiduciaries. In fact, in several of these actions, plaintiffs allege that the defendants'

failure to hire independent fiduciaries to assess the appropriateness of the stock account and to cure any conflict of interest is itself a breach of the defendants' fiduciary duties under ERISA.²⁸ This simple solution fails, of course, to address such hard questions as: at what point is an independent fiduciary needed because of company problems, and what does the company tell (or not tell) the newly retained trustee? Furthermore, such a solution may only be prospective; that is, by passing the torch to an independent fiduciary, the former fiduciary is still not relieved of any injury which resulted from a stock decline during his or her tenure.

The Department of Labor (DOL), appearing as a friend of the court in the Enron ERISA litigation, has suggested other solutions to the dilemma. Specifically, the DOL position is that insiders can avoid securities trading violations by *not* trading but rather disclosing adverse information (or "forcing" the company to do so); by eliminating company stock as a participant option or an employer match; or by alerting regulatory agencies.²⁹ However, public announcements or closing company stock accounts may present a catch-22: actions that send a signal to the public that the company is in trouble may cause the stock to decline even further, leaving plan participants in even worse shape. Solutions that may be technically correct about the scope of 10(b)(5) liability and may sound workable in the aftermath of the Enron collapse beg the most important questions: what information is adverse enough to warrant such unusual steps, and what steps are prudent in administering the plan in adverse situations?

LOOMING QUESTIONS ABOUT REMEDIES

In the majority of these cases, plaintiffs claim to seek relief on behalf of the plan and on behalf of the class of participants who suffered losses as a result of the alleged breach of fiduciary duty. Most of the actions ask the court to have the defendants restore investment losses to the plan. Although such a request for relief mimics the language of ERISA Section 409, these claims do not actually fit under Section 409. Section 409 provides that a breaching fiduciary is personally responsible for restoring plan losses to the *plan*.³⁰ Under ERISA Section 502(a)(2), an individual participant may bring an action for relief under Section 409. The U.S. Supreme Court held in *Massachusetts Mutual Life Insurance Co. v. Russell* that claims for relief under Section 409 must be brought on behalf of the plan as a whole and must seek planwide, as opposed to individual, relief. Applying the *Russell* test, it appears that the plaintiffs in these actions

are not actually seeking derivative relief on behalf of the plan, despite their request for such relief. In reality, plaintiffs seek relief only for the individual participants who were invested in the company stock fund options. Relief for individual participants is not planwide relief, and plaintiffs' claims under Sections 409 and 502(a)(2) are procedurally wrong.

Some plaintiffs bring their actions under ERISA Section 502(a)(3), which presents other issues about remedies. Under Section 502(a)(3), an individual participant or beneficiary may seek individual relief for loss of benefits. However, recovery under this section is limited to "appropriate equitable relief."³¹ In *Mertens v. Hewitt Associates*, the U.S. Supreme Court first addressed what constitutes appropriate equitable relief under ERISA.³² The Court considered the issue of whether extra-contractual damages were available from a nonfiduciary under Section 502(a)(3) and concluded that they were not. The court reasoned that money damages are not equitable relief. Myriad courts have expanded the *Mertens* holding and interpreted Section 502(a)(3) as not allowing monetary damages, even from fiduciaries.³³

Some courts have been willing to award monetary relief under Section 502(a)(3) under the guise of "restitution." Recognizing these cases, the plaintiffs bringing these lawsuits may attempt to label their requested relief as "restitution." However, the likelihood of plaintiffs' success in doing so has been significantly curtailed by the Supreme Court's recent decision in *Great-West Life & Annuity Insurance Co. v. Knudson*. In that case, the United States Supreme Court, addressing a claim for subrogation by a plan against a plan participant who recovered from a third party, restated what constitutes restitution under ERISA Section 502(a)(3).³⁴ The Court held that the plan was not seeking restitution as it claimed, but rather, was seeking a payback of money damages from the plan participant, which was not relief available under Section 502(a)(3).³⁵

In another recent case claiming restitution, the plaintiff sued under ERISA Section 502(a)(3), seeking damages due to the defendant's failure to invest his assets as he directed.³⁶ Defendant had invested plaintiff's assets in a money market instead of the mutual fund he selected. In his claim for relief, the plaintiff labeled his request for damages as "restitution," stating that he sought to be made whole for his losses and restored to the place he would have had if the breach had not occurred. The court held that the plaintiff's measure of damages was the "hallmark of money damages," and concluded that money damages are not available under ERISA absent an allegation (and proof) that the defendant profited from the breach.

In reality, the plaintiffs in each of these 401(k) cases seek to impose personal liability upon the defendants and seek the payment of money to the individual participants and beneficiaries who suffered losses as a result of their investment in the company stock fund. Plaintiffs in these circumstances will face the obstacle of demonstrating that the plaintiffs' losses are in the possession of the defendants—a key element for a restitution claim. (The same defense exists in fiduciary claims brought under Section 502(a)(2); since the individual defendants in these cases arguably did not profit from the participants' losses, there are no profits to be disgorged under Section 409.)

Another obstacle for the plaintiffs in these cases is that the damages that they seek can be attacked as speculative. To the extent that the plaintiffs' damages theory is premised upon plaintiffs' contentions about how they would have invested their contributions had the company stock funds not been available, the structural restrictions on the stock funds not been present, or complete information about the stock funds been made available, demonstrating whether or how they would have actually acted differently could be virtually impossible. Typically, claims based on this sort of speculation have been rejected.³⁷

Equally speculative is proof that the defendant's breach caused the plaintiff's losses, a required element of a fiduciary breach claim.³⁸ In order to show that the defendants' actions caused their damages, plaintiffs must demonstrate that but for the alleged breaches they would have invested their money such that they would have avoided the losses. This is particularly difficult to prove given the downswing of the overall market. The same concerns regarding speculation discussed above apply here, and plaintiffs will have difficulty proving that they would have made comparable investment choices that fared better in a generally declining stock market.

PLAN CLAIMS AND SECURITIES LITIGATION

Many of the new complaints cite ERISA but read as though they are claims for violations of federal securities laws under section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. Participants allege that material misstatements and omissions concerning the company stock, accounting improprieties, and other schemes artificially inflated the stock price.³⁹ Other complaints also allege insider trading by plan fiduciaries.⁴⁰ The complaints focus on restated company financials and on stock price drops after bad news

becomes public. In the highly publicized situations of company failures that have attracted multiple 10(b)(5) cases and multiple 401(k) cases, the securities complaints and the ERISA complaints often cover exactly the same ground.

Tactical Advantages of 401(k) Lawsuits

There are important reasons why plaintiffs want to dress up what are really securities claims in ERISA clothing. Significant limitations and requirements for bringing an action under federal securities laws do not apply to ERISA actions for breach of fiduciary duty; in particular, by bringing claims under ERISA, plaintiffs avoid the new and tough procedural requirements of the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. Section 78u-4. Under the PSLRA, plaintiffs must plead their claims with particularity by specifying each statement alleged to have been misleading and the reason or reasons why the statement is misleading. Moreover, plaintiffs must allege with particularity the facts giving rise to a strong inference of defendant scienter. While ERISA plaintiffs face the usual pleading requirements as to allegations of fraudulent behavior by fiduciaries, no such special statutory pleading requirements apply in an ERISA action.

Another procedural advantage for ERISA plaintiffs is that the PSLRA provides an automatic stay of discovery while a motion to dismiss is pending. This new and unusual procedural device was adopted by Congress to protect public companies from the punishing cost of early broad discovery in cases that lack legal merit. No such special statutory provision limits early ERISA discovery.

Many of the 401(k) complaints we reviewed are filed against defendants who are already defending one or many 10(b)(5) cases about the same stock price decline. From a defense perspective, it is important to be sure that there is coordination of parallel securities cases and ERISA cases about stock price declines. Because securities cases typically begin with extended briefing on motions to dismiss and a statutory stay of discovery, there is an opening for plaintiffs' counsel to push ahead in 401(k) cases. Defendants will have to show the court that a coordinated discovery schedule can avoid duplication of efforts, repeated depositions, and the like. Defense counsel may find that plaintiffs' counsel in the securities cases will join in the effort to get an agreement or court order for a common discovery schedule and common case administration.

Finally, while it is far too early to predict the outcome of this new wave of 401(k) lawsuits crashing into a sea of 10(b)(5) cases, it is

already clear that aggressive plaintiffs' counsel filing 401(k) cases will try to claim that benefit plan plaintiffs enjoy some special status in battles with ERISA defendants, and even with public market securities class action plaintiffs. The emerging argument is that ERISA claims based on a special federal statute protecting employees and a fiduciary relationship are somehow "worth more" than ordinary open market securities claims, especially in any settlement, or deserve special treatment by the courts during litigation, or entitle the ERISA plaintiffs to attorneys' fees in excess of those received by plaintiffs' securities counsel in any settlement (arguably because of ERISA's discretionary fee provision).⁴¹ These arguments may lack logic but must be anticipated and can cause concern among securities litigators—and even judges—who know much about 10(b)5 litigation but relatively little about ERISA.

Settlement Overlaps and Issues

The similarities between the ERISA claims concerning a company stock fund as an investment option and open market securities claims have already led to issues in some cases concerning the effect a securities class action settlement involving company stock will have on plan participants who invested in the company stock fund. For instance, the stock plan plaintiffs filed an objection to the settlement of the IKON securities litigation in *Whetman v. IKON Office Solutions*.⁴²⁻⁴³ The proposed settlement, which included a release of all claims, applied to the settlement class, which consisted of all persons who purchased or otherwise acquired IKON securities during a specified period. In objecting to the settlement, the ERISA plaintiffs sought clarification regarding the scope of the release language. Specifically, the objectors asked the court to determine whether the settlement included a release of all ERISA claims. The court refused to change or clarify the release language and refused to decide whether and which of the ERISA plaintiffs would be released by the settlement. The court concluded that the ERISA plaintiffs were effectively seeking a premature ruling on the res judicata effect of the settlement.⁴⁴

While the settlement was pending, the ERISA plaintiffs moved for class certification in the ERISA action.⁴⁵ The court certified the ERISA class. However, at plaintiffs' suggestion, the class definition stated that, if the settlement of the securities action is approved, the losses of the ERISA plaintiffs who are also members and did not opt out of the securities class shall exclude the losses of ERISA plaintiffs that are

due to acquisitions during the securities class period. Although the court did not reach the issue of whether the release in the securities litigation barred the claims of any of the ERISA plaintiffs, the decision appears to recognize that the settlement could release the ERISA claims of plaintiffs who were members of the securities class and did not choose to opt out.⁴⁶ In this murky situation, defense attorneys should attempt to obtain clear ERISA releases in securities settlements in order to eliminate the possibility of subsequent ERISA litigation emanating from the same set of facts.⁴⁷

A related issue concerns who has the authority to settle ERISA claims about plan sponsor stock, whether in an ERISA action or in a related securities action. One 401(k) complaint we reviewed claims that, by accepting a securities class action settlement on behalf of the plan and its participants holding company stock, the plan fiduciaries engaged in a prohibited transaction under ERISA because the settlement was a transaction between the plan and a party-in-interest. While this theory has not been widely embraced (even among plaintiffs' counsel) and would astonish corporate trustees who see filing claims in securities class action as "found money" for plan participants, it points up the need for care as to fiduciary or plan trustee authority to settle securities claims (or "opt out" or object) on behalf of the plan and investor participants. Indeed, cautious trustees may choose to pass these decisions on to participants simply to avoid any second-guessing or criticism about conflicts.

PREDICTIONS AND CONCLUSION

While the new wave of 401(k) ERISA litigation is still rising, a few predictions and conclusions can already be offered. First, the genie will not go back into the bottle. Plan administrators and plan fiduciaries should expect ERISA litigation about abnormal declines in company stock prices, just as public company directors and officers have come to expect such litigation under the securities laws. Second, there are major battles still to be fought in these cases about proper claims, proper parties, and proper remedies, as well as the core question of the proper standard for fiduciary conduct in the context of business problems and stock price declines. These issues predictably will be resolved different ways in different cases about different companies, leading to conflicts in the case law. Third, aggressive plaintiffs' counsel will use the context of highly publicized collapses like Enron and Global Crossing to push for favorable early court decisions and settlements. Defendants and their counsel will need to

remind the courts that ERISA does not require fiduciaries to have a crystal ball,⁴⁸ and that employer stock price declines will happen (especially in a severe general market decline) and are simply not enough of a basis to justify an award of damages to company stock fund participants.

NOTES

1. 29 U.S.C. § 1132(a)(1).
2. 29 U.S.C. § 1132(a)(2).
3. 29 U.S.C. § 1132(a)(3).
4. 29 U.S.C. § 1132(a)(3); *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256-57 (1993).
5. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985).
6. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985) (“[T]he entire text of § 409 persuades us that Congress did not intend that section to authorize any relief except for the plan itself.”).
7. Boies & Ross, An Introduction to Class Action Benefits Litigation: Basic Answers to Common Questions, 11 *Benefits Law Journal*, No. 3 (Autumn 1998).
8. See, e.g., *Matthews v. Duke Energy Corp.*, No. 02-CV-291, W.D.N.C.; *Reinhart v. Lucent Techs., Inc.*, No. 01-CV-3491, D.N.J.; *Zafarano v. Nortel Networks Corp.*, No. 3:01cv1593, M.D. Tenn.
9. *Matthews v. Duke Energy Corp.*, No. 02-CV-291, W.D.N.C.
10. *Reinhart v. Lucent Techs., Inc.*, No. 01-CV-3491, D.N.J. and *Zafarano v. Nortel Networks Corp.*, No. 3:01cv1593, M.D. Tenn.
11. 29 C.F.R. § 404c-1(d)(2)(E)(4)(i)-(iv) .
12. 29 C.F.R. § 404c-1(d)(2)(E)(4)(v)-(vii).
13. 29 U.S.C. § 1104(c).
14. 29 CFR § 2550.404c-1(b)(2)(B)(1)(i).
15. Claims alleging breach of fiduciary duty by failure to diversify also arise in the context of the Employer Stock Ownership Plan (ESOP). Those claims have met with judicial skepticism because of the special purpose of ESOPs. See the leading case of *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995), which created a presumption in favor of ESOP concentration in company stock and an arbitrary and capricious standard of review for ESOP committee decisions, *cert. denied*, 516 U.S. 1115 (1996). The United States District Court for the District of Oregon recently dismissed breach of fiduciary duty claims brought against an ESOP administrator after the employer’s stock declined in value. *Wright v. Oregon Metallurgical Corp.*, No. CV 01-325-BR, 2002 U.S. Dist. LEXIS 16853 (D. Or. Aug. 6, 2002). In that case, plaintiffs alleged that the administrator’s failure to investigate the ESOP’s continued investment in employer securities was a breach of fiduciary duty because it was a violation of ERISA’s diversification requirements and because the plan failed to qualify under the exception from the

diversification rules for individual account plans. The court dismissed the claim because the company was not in such a poor financial condition that the continued investment in company stock amounted to a breach of fiduciary duty.

16. *Matthews v. Duke Energy Corp.*, No. 02-CV-291, W.D.N.C.; *Enron Corp. Sav. Plan v. Enron Corp. Sav. Plan Admin. Comm.*, No. H-01-4108, S.D. Tex.; *Ramkisson v. Winnick*, No. 2:02cv1478, C.D. Cal.; *Whetman v. IKON (In re IKON Office Solutions Secs. Litig.)*, 209 F.R.D. 94 (E.D. Pa. 2002); *Nelson v. IPALCO Enterprises*, No. 02-0477C-H/K; *Reinhart v. Lucent Tech.*, No. 01-CV-3491, D.N.J.; *Zafarano v. Nortel Networks Corp.*, No. 3:01cv1593, M.D. Tenn.; *In re Providian Fin. Corp. ERISA Litig.*, No. 3:01cv5027, N.D. Cal.; *Brooks v. Qwest Communications Int'l Inc.*, No. 1:02cv464, D. Colo.; *Stein v. Smith*, No. 01-10500 RCL, D. Mass.; *Jepson v. Tyco Int'l, Ltd.*, No. 1:02cv5947, S.D.N.Y.; *VanNes v. Williams Co.*, No. 4:02-CV-159, N.D. Okla.; *Rambo v. Worldcom Inc.*, No. 02-CV-1088, S.D. Miss.; *Patti v. Xerox Corp.*, No. 02 CV 1138, D. Conn.

17. *Jepson v. Tyco Int'l, Ltd.*, No. 1:02cv5947, S.D.N.Y.

18. *See Lockheed Corp. v. Spink*, 517 U.S. 882 (1996).

19. *Compare Hull v. Policy Management Systems Corporation*, 2001 U.S. Dist. LEXIS 22343 (S.C. 2001) (claims against employer and CEO dismissed on grounds that they were not acting in fiduciary capacity) and *Confer v. Custom Engineering*, 952 F.2d 34 (3d Cir. 1991) (company officers of plan sponsor who have no individual discretionary role in plan not liable for breach of fiduciary duty), with *Yeseter v. Bainor*, 837 F.2d 380 (9th Cir. 1988) (corporate officer of plan sponsor who has discretionary authority over plan is fiduciary).

20. *See* 29 CFR § 2509.75-8 at FR-17; *see also Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732 (7th Cir.) (fiduciary duty to monitor administrators they select), *cert. denied*, 482 U.S. 915 (1987); *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1325 (9th Cir. 1985) (once board appointed administrators, board was only liable with respect to the selection of administrators); *Leigh v. Engle*, 727 F.2d 113, 135 (7th Cir. 1984) (fiduciaries who retain plan administrators are obligated to act with prudence in overseeing the appointees management of the plan).

21. *Gottlieb v. SBC Communications, Inc.*, Nos. CV-00-4136 & CV-00-0758, C.D. Cal.

22. *Tatum v. R.J.R. Pension Inv. Committee of R.J. Reynolds Tobacco Co. Inv. Plan.*, No. 1:02cv373, M.D.N.C.

23. *Laborers Nat'l Pension Fund v. Northern Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 317 (5th Cir.) (ERISA's test of prudent "is one of conduct and not a test of the result of the performance of the investment. The focus of the inquiry is how the fiduciary acted in his selection of the investment, and not whether his investment succeeded or failed."), *cert. denied*, 528 U.S. 967; *see also Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *Lanka v. O'Higgins*, 810 F. Supp. 379, 389 (N.D.N.Y. 1992) (holding that fiduciaries are not liable for losses due to a change in the market because fiduciaries are not expected to predict with certainty the market's economic cycles).

24. *Enron Corp. Sav. Plan v. Enron Corp. Sav. Plan Admin. Comm.*, No. H-01-4108, S.D. Tex.

25. *See, e.g., Jepson v. Tyco Int'l, Ltd.*, No. 1:02cv5947, S.D.N.Y. (investment of company's matching only in Tyco stock); *Matthews v. Duke Energy Corp.*, No. 02-CV-

291, W.D.N.C. (investment of company's matching only in Duke Energy stock); *Ramkissoon v. Winnick*, No. 2:02cv1478, C.D. Cal. (investment of company's matching only in Global Crossing stock); *Brooks v. Qwest Communications Int'l, Inc.*, No. 1:02cv464, D. Colo. (investment of company's matching only in Qwest stock and participants were prohibited from changing these investments before reaching age 55); *In re Providian Fin. Corp. ERISA Litig.*, No. 3:01cv5027, N.D. Cal. (investment of company's matching only in Providian stock and participants could not change these investments until the employee was vested); *Stein v. Smith*, No. 01-10500RCL, D. Mass. (investment of company's matching only in Stone & Webster stock); *Whetman v. IKON Office Solutions*, No. 00-87, E.D. Pa. (investment of company's matching only in IKON stock).

26. *In re Providian Fin. Corp. ERISA Litig.*, No. 3:01cv5027, N.D. Cal.

27. *Matthews v. Duke Energy Corp.*, No. 02-CV-291, W.D.N.C.; *Enron Corp. Sav. Plan v. Enron Corp. Sav. Plan Admin. Committee*, No. H-01-4108; *Zafarano v. Nortel Networks Corp.*, No. 3:01cv1593, M.D. Tenn.; *In re Providian Fin. Corp. ERISA Litig.*, No. 3:01cv5027, N.D. Cal.; *Jepson v. Tyco Int'l, Ltd.*, No. 1:02cv5947, S.D.N.Y.

28. *Matthews v. Duke Energy Corp.*, No. 02-CV-291, W.D.N.C.; *Enron Corp. Sav. Plan v. Enron Corp. Sav. Plan Admin. Committee*, No. H-01-4108; *Zafarano v. Nortel Networks Corp.*, No. 3:01cv1593, M.D. Tenn.; *Jepson v. Tyco Int'l, Ltd.*, No. 1:02cv5947, S.D.N.Y.

29. Amended Brief of Secretary of Labor in *Tittle v. Enron*.

30. ERISA § 409 provides in pertinent part: "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 . . ." 29 U.S.C. § 1109(a) (emphasis added).

31. 29 U.S.C. § 1132(a)(3).

32. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260 (1993).

33. *Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F.3d 477 (6th Cir. 2001) (recognizing that the *Mertens* Court disallowed monetary damages), *cert. denied*, 122 S.Ct. 1298 (2002); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938 (8th Cir. 1999) (relief under § 502(a)(3) does not include compensatory damages); *Farr v. U.S. West Communications, Inc.*, 151 F.3d 908 (9th Cir. 1998) (holding that the losses suffered by the plaintiff were not "appropriate equitable relief" under ERISA).

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

35. Ross & Graham, *Great-West v. Knudson: The Impact on Subrogation and Reimbursement Rights and Section 502(a)(3) Remedies*, 15 *Benefits Law Journal* No. 2 (Summer 2002).

36. *Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F.3d 477 (6th Cir. 2001).

37. Dunn, *Recovery for Lost Profits*, § 1.3 (4th ed. 1992) (concluding that if the court cannot determine whether the plaintiff would have made profits and avoided the losses, the plaintiff cannot recover). *See also, Abel v. United States*, No. 98-536-KI, 2000 U.S. Dist. LEXIS 1237 (D. Or. Feb. 10, 2000) (concluding that the determination of the plaintiff's claim that but for the government's lien on his investment accounts, he would

have managed the account and not lost money required the court to engage in impermissible speculation); *Friko Corp. v. IRS*, 872 F. Supp. 966 (S.D. Fla. 1994) (rejecting the plaintiff's claim that the defendant's unauthorized collection action prevented it from switching its funds from a low to a high yield account because whether the action caused any actual injury was highly speculative).

38. 29 U.S.C. § 1109(a); *Friend v. Sanwa Bank Calif. Pension Plan*, 35 F.3d 466 (9th Cir. 1994) (affirming summary judgment to the defendant because the plaintiff failed to prove the causal connection required under § 409 between the alleged breach of fiduciary duty and the losses to the plan).

39. *Matthews v. Duke Energy Corp.*, No. 02-CV-291, W.D.N.C. (alleging that the company concealed material information, made material misrepresentations, and failed to correct the materially misleading statements concerning the company stock); *Nelson v. IPALCO Enterprises*, No. 02-0477C-H/K, S.D. Ind. (alleging that defendants misrepresented the impact that a merger would have on company stock); *Reinhart v. Lucent Tech., Inc.*, No. 01-CV-3491, D.N.J. (alleging that defendants concealed material information and actively misled participants about company's earnings and business condition); *Zafarano v. Nortel Networks Corp.*, No. 3:01cv1593, M.D. Tenn. (alleging that defendants withheld and concealed material information and actively misled participants regarding company stock); *In re Providian Fin. Corp. ERISA Litig.*, No. 3:01cv5027, N.D. Cal. (alleging that defendants engaged in accounting improprieties, failed to disclose their scheme to artificially inflate the stock price, and made insider trades); *Jepson v. Tyco Int'l, Ltd.*, No. 1:02cv5947, S.D.N.Y. (alleging that Tyco's SEC filings were misleading because they resulted from improper accounting practices and that defendants actively misled participants about the company's earnings and business condition).

40. *Nelson v. IPALCO Enterprises*, No. 02-0477CH/k, S.D. Ind. (alleging that defendants sold more than \$9 million worth of company stock before the close of the merger, which negatively affected the value of company stock).

41. 29 U.S.C. § 1132(g). ("In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.")

42. No. 00-87, E.D. Pa.

43. *In re IKON Office Solutions Sec. Litig.*, 194 F.R.D. 166 (E.D. Pa. 2000), *summ. judgment granted*, 131 F. Supp. 2d 680, *aff'd*, 277 F.3d 658 (3d Cir. 2002).

44. *In re IKON Office Solutions Sec. Litig.*, 194 F.R.D. at 185-86.

45. *In re IKON Office Solutions Secs. Litig.*, 191 F.R.D. 457 (E.D. Pa. 2000).

46. In *Judson v. Tyco International, Ltd.*, No. 1:02cv5947, S.D.N.Y., plaintiffs recognized the overlap between the securities suit and the ERISA claims by stating that a securities class action is currently pending, but that the action does not include the claims of the plan participants.

47. The *Whetman* 401(k) action recently settled. *See* 209 F.R.D. 94 (E.D. Pa. 2002). The settlement reached by the parties did not include a monetary award. Instead, IKON agreed to modify the plan to permit participants who have worked at IKON for over two years to move their investments of company matching into funds other than the IKON stock fund. Before the settlement, all company matching was invested in the

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IKON stock fund and could not be moved to another investment until the participant reached age 55. The court, in a lengthy opinion, found that this change provided substantial value to the participants.

48. *See Lanka v. O'Higgins*, 810 F. Supp. 379, 389 (N.D.N.Y. 1992) (holding that loss due to a change in the market is not a breach of fiduciary duty because fiduciaries do not have a "crystal ball" and "economic cycles are not predictable with any degree of certainty").

Select 401(k) Cases Reviewed

Company	Case Name and Number	Court
Duke Energy Corporation	<i>Matthews v. Duke Energy Corp.</i> , No. 2-CV-291	Western District of North Carolina
Enron Corporation (consolidated)	<i>Tittle v. Enron Corp.</i> , No. H 01-3913	Southern District of Texas
	<i>Kemper v. Enron Corp.</i> , No. H 01-4089	Southern District of Texas
	<i>Rinard v. Enron Corp.</i> , No. H 01-4060	Southern District of Texas
Global Crossing (consolidated)	<i>Ramkissoo v. Winnick</i> , No. 2:02cv1478	Central District of California
	<i>Johnson v. Winnick</i> , No. 02-CV-2070	Central District of California
	<i>McAllister v. Winnick</i> , No. 02-01323	Central District of California
Harnischfeger Corporation	<i>Anderson v. Harnischfeger Corp.</i> , No. 98 C 1263	Eastern District of Wisconsin
IKON Office Solutions, Inc.	<i>Whetman v. IKON (In re IKON Office Secs. Litig.)</i> , No. 00-87	Eastern District of Pennsylvania
Indianapolis Power & Light Co.	<i>Nelson v. IPALCO Enterprises</i> , No. 02-0477C-H/K	Southern District of Indiana
Lucent Technologies	<i>Reinhart v. Lucent Technologies</i> , No. 01-CV-3491	District of New Jersey
Nortel Networks Corp. (consolidated)	<i>Zafarano v. Nortel Networks Corp.</i> , No. 3:01cv1593	Middle District of Tennessee
	<i>Kaufmann v. Nortel Networks Corp.</i> , No. 3:02cv253	Middle District of Tennessee
Providian Financial Corp. (consolidated)	<i>In re Providian Financial Corp. ERISA Litig.</i> , No. 3:01cv5027	Northern District of California
	<i>Holmes v. William M Mercer Inv. Consulting, Inc.</i> , No. 3:01cv5027	Northern District of California
	<i>Lowery v. William M Mercer Inv. Consulting, Inc.</i> , No. 3:02cv491	Northern District of California

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Company	Case Name and Number	Court
Providian Financial Corp. (consolidated) <i>(continued)</i>	<i>Williams v. William M Mercer Inv. Consulting, Inc.</i> , No. 3:02cv7	Northern District of California
Qwest Communications International Inc.	<i>Brooks v. Qwest Communications Int'l, Inc.</i> , No. 1:02cv464	District of Colorado
RJ Reynolds	<i>Tatum v. RJR Pensions Investment Committee</i> , No. 1:02cv373	Middle District of North California
SBC Communications	<i>Gottlieb v. SBC Communications, Inc.</i> , Nos. CV-00-4139 and CV-00-0758	Central District of California
Stone & Webster Inc.	<i>Stein v. Smith</i> , No. 01-10500 RCL	District of Massachusetts
Tyco International, Inc.	<i>Jepson v. Tyco Int'l, Ltd.</i> , No. 1:02cv5947	Southern District of New York
	<i>Gordon v. Tyco Int'l, Ltd.</i> , No. 9:02cv80621	Southern District of Florida
	<i>Konyn v. Tyco Int'l, Ltd.</i> , No. 9:02cv80635	Southern District of Florida
	<i>Johnson v. Tyco Int'l Ltd.</i> , No. 9:02cv80636	Southern District of Florida
Waste Management	<i>Harris v. Koenig</i> , No. 02 CV 618 (GK)	District of Columbia
Williams Companies, Inc.	<i>VanNes v. Williams Co.</i> , No. 4:02-CV-159	Northern District of Oklahoma
	<i>Zeigler v. Williams Co.</i> , No. 4:02cv285	Northern District of Oklahoma
Worldcom Inc.	<i>Bracey v. Worldcom, Inc.</i> , No. 9:02cv80561	Southern District of Florida
	<i>Hobson v. Worldcom, Inc.</i> , No. 9:02cv80602	Southern District of Florida
	<i>Rambo v. Worldcom, Inc.</i> , No. 02-CV-1088	Southern District of Mississippi
	<i>Singleton v. Worldcom, Inc.</i> , No. 9:02cv80613	Southern District of Florida
Xerox Corporation	<i>Patti v. Xerox Corp.</i> , No. 02 CV 1138	District of Connecticut

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