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Litigation

Be careful what you wish for: The unintended effects of the Private Securities Litigation Reform Act of 1995

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ABSTRACT

KEYWORDS: Private Securities Litigation Reform Act of 1995, PSLRA, ERISA, institutional investors, corporate governance

Corporations lobbied for the passage of the Private Securities Litigation Reform Act of 1995 (PSLRA) to limit private enforcement of the US securities laws. While the PSLRA has achieved this goal to a certain extent, it has also impacted securities litigation, and related Employee Retirement Income Security Act (ERISA) and derivative litigation, in ways that its proponents never intended.

This paper discusses the impact of institutional investor participation in securities litigation, which increased significantly as a result of lead plaintiff provisions in the PSLRA that evince an intent to have institutional investors play a larger role in securities cases. Specifically, the paper focuses on the ability of institutional investors to obtain corporate governance reforms and the contribution of personal funds by outside directors, as components of securities litigation settlements.

The paper also provides an overview of ERISA actions that are often litigated in parallel with securities fraud actions. While these actions concern different legal theories, pleading standards and damages formulations to those of securities actions, there is an interplay between the two types of actions in at least two major areas — settlement and discovery. Indeed, the presence of parallel ERISA litigation in several high-profile securities actions has enabled the securities plaintiffs to obtain relief from the PSLRA's discovery stay allowing them to have early access to any materials that have been produced to the ERISA plaintiffs.

INTRODUCTION

The recently announced $2.7bn settlement of the Nortel Networks civil securities fraud

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class action also requires Nortel to implement certain corporate governance enhancements, including the yearly election of a non-executive Chairman of the Board of Directors.[1] Last year, the multi-billion dollar settlement of the WorldCom securities fraud class action was finalised[2] and earlier this year, the multi-billion dollar partial settlement of the Enron securities case received preliminary approval.[3] In both of these settlements, where the lead plaintiff was a large institutional investor,[4] outside directors were compelled to contribute personal assets to the settlements.[5] Also last year, the Employee Retirement Income Security Act (ERISA) action arising out of the alleged securities fraud involving Royal Dutch Shell was settled for $90m, reflecting a 78 per cent recovery of reasonable damages.[6] While the foregoing events may appear to be unrelated, there is a common thread running through them — apart from resolving cases that arose from the toxic business environment that was created in the late 1990s, they each evidence unintended effects of the passage of the Private Securities Litigation Reform Act of 1995 (PSLRA).

When corporations lobbied for the PSLRA, they hoped to limit the private enforcement of the securities laws through tort law. In many ways, they got their wish, as the PSLRA imposed a heightened pleading standard upon plaintiffs at the outset of a case,[7] a mandatory discovery stay[8] and a new procedure for selecting a lead plaintiff to guide the litigation,[9] with an emphasis on having institutional investors involved in securities litigation.[10] Those changes have had their desired effect, as the pleading stage of a typical securities case has been lengthened such that defendants can delay the commencement of discovery and the ultimate resolution or settlement of a case for years.[11] As stated by Chief Judge William Young of the US District Court for the District of Massachusetts: '[U]nder the Byzantine pleading code established in recent years by Congress and the courts for securities actions . . . the gamesmanship required to plead a successful securities claim has taken on a dimension reminiscent of pre-Federal Rules pleading.'[12]

The PSLRA, however, has also had several unintended profound effects upon corporations, and their senior management and directors, that have resulted from the lead plaintiff selection process and the increased involvement of institutional investors, and the increased expenditure of investigatory resources by the plaintiffs' bar to bolster their pleadings to satisfy the PSLRA's particularity requirements. These developments include more comprehensive settlements that involve higher settlement amounts, corporate governance reforms and contributions by individual defendants, and an increase in parallel litigation, including ERISA litigation. This paper is in two parts. The first part discusses the effects of institutional investor participation in private securities litigation, including the incorporation of corporate governance reforms into settlements and outside director contribution to settlements. The second part reviews parallel ERISA litigation and several of the relevant distinctions between ERISA and securities litigation.

THE IMPACT OF INSTITUTIONAL INVESTOR PARTICIPATION IN PRIVATE SECURITIES LITIGATION

The PSLRA's lead plaintiff provisions seek to encourage institutional investors to serve as lead plaintiffs in securities class actions by, among other things, containing a presumption that the most adequate lead plaintiff is the applicant that 'has the largest financial interest in the relief sought by the class'.[13] A study released in 2004 by Pricewaterhouse Coopers LLP demonstrates the increased role of institutional investors in securities litigation, as it noted that the number of securities cases where union and public pension funds served as lead plaintiffs had grown from 5 in

1996 to 49 in 2003.[14] While likely not intended by the drafters of the PSLRA, this new role has made institutional investors privy to the kinds of corporate misconduct that the plaintiffs' bar has always seen. Through the investigation and discovery efforts of plaintiffs' counsel, these institutions have been provided with an entirely new perspective on the value of and need for securities litigation.

Not only are institutions becoming involved at the inception of securities actions, once the institutions' management and counsel see the corporate malfeasance that is at the heart of these actions, they are putting increasing pressure on plaintiffs' lawyers to achieve higher settlements, to use these actions as vehicles to implement significant corporate governance reforms, and to seek personal contributions from individual defendants. A recently released Cornerstone Research study confirms the effect of institutional investors upon settlements, as it concludes that even after controlling for factors that affect settlement amounts (eg, case size, nature of allegations), 'the presence of an institutional investor as a lead plaintiff is associated with a statistically significant increase in settlement size'.[15] Thus, while the stated intent of the PSLRA was to eliminate purportedly meritless securities actions, what its supporters did not foresee were the personal reactions of institutional clients to corporate misconduct and the awakening of their awareness of their fiduciary responsibilities to protect pensioners' financial interests.

Corporate governance reforms

The involvement of institutional investors and the increased prevalence of parallel ERISA and derivative litigation[16] has led to global settlements that include not only significant monetary relief, but wide-ranging corporate governance reforms. In the post-Enron, WorldCom, Lucent, Nortel, Tyco etc. environment, courts have been increasingly receptive to corporate governance reforms as components of securities and derivative settlements. Prior to the wave of corporate fraud that garnered so much public attention and led to the passing of the Sarbanes–Oxley Act in 2002, courts were often reluctant to place any value on these reforms. In the current litigation environment, however, courts now routinely recognise the significant value of such reforms as components of settlements.[17] Recent examples include:

- *In re Oxford Health Plans, Inc. Sec. Litig.*[18] (lead plaintiff, among others, Public Employees' Retirement Association of Colorado): settlement with company and its auditors for $300m, plus corporate governance reforms, including requirements that the majority of the Board of Directors be independent and that the independent directors meet at least once a year without the CEO or other non-independent directors present.
- *In re Enterasys Networks, Inc. Sec. Litig.*[19] (lead plaintiff, Los Angeles County Employees Retirement Association): settlement for $50m, which also permits investors proxy access if they hold more than 5 per cent of the company's stock, which allows them to nominate alternative candidates to the board. The settlement also requires the company to expand its annual proxy statements to include information far exceeding regulatory requirements, including comparing the compensation of its CEO to that of CEOs of similar companies. In addition, a majority of the board must be independent, and all executive vice presidents and the chief financial officer must meet at least once per year with the company's independent directors.
- *In re Sprint Corp. Sec. Litig.*[20] (lead plaintiff, New England Health Care Employees Pension Fund): the settlement's governance reforms include:

1. establishing an independent board of directors;
2. banning insider selling during company stock buyback programmes; and
3. requiring independent directors to meet at least twice a year, without management present.

In connection with the settlement, Bruce Raynor, the chairman of plaintiff Amalgamated Bank, explained the important role that pension funds can play in accomplishing governance reform: 'Union pension funds as shareholders in the nation's largest corporations can continue to push for changes that open closed boardroom doors and make workers' retirement accounts more secure.'

- *In re Homestore.com, Inc. Sec. Litig.*[21] (lead plaintiff, California State Teachers' Retirement System (CalSTRS)): $63.6m stock and cash settlement, and governance reforms including limits on board terms, new shareholder-appointed director and minimum stock ownership requirements for directors. Jack Ehnes, CEO of CalSTRS, the lead plaintiff in the case, emphasised the importance of the governance reforms to CalSTRS: 'Our goals were to realize significant compensation for the class and to institute meaningful corporate governance protections, without jeopardizing the company's ability to conduct business going forward. The settlement announced today accomplishes those goals.'[22]
- *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Hanover Compressor Co.*[23] (lead plaintiff, Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust): $80m settlement, which provided shareholders with more than 1 per cent of shares the power to nominate two new independent directors. Additionally, two-thirds of Hanover's board must be comprised of independent directors. The settlement also imposes restrictions on the sale of insider stock and requires the rotation of the company's outside audit firm as well as heightened independence of the company's compensation, audit and nomination committees.
- *McCall v. Scott (HCA Inc.):*[24] the company agreed to overhaul its corporate governance as part of a settlement of derivative litigation with the New York State Common Retirement Fund and others. The reforms include:
  1. a more independent board of directors;
  2. an independent and more authoritative audit committee, with at least two members experienced in accounting or financial matters;
  3. more stringent internal controls and corporate compliance responsibilities; and
  4. rotation of the external auditing firm every seven years, unless the audit committee determines it is not in the company's best interest.
- *Scheiner v. i2 Techs., Inc.*[25] (lead plaintiff, Kansas Public Employees Retirement System): settlement of securities class action for $84.85m, plus extensive corporate governance reforms relating to director independence and qualification, officer compensation, insider trading, stock option and revenue recognition policies.
- *In re Honeywell Int'l, Inc. Sec. Litig.*[26] (lead plaintiffs, 1199 SEIU Greater New York Pension Fund of New York City, City of Monroe (Michigan) Employees Retirement System, and Jefferson Bank): $100m securities settlement, plus reforms relating to executive compensation, internal auditors and director and outside auditor independence.
- *In re Charter Commc'ns, Inc. Sec. Litig.*[27] (lead plaintiff, StoneRidge Investment Partners, LLC): securities settlement of $146.25m, plus corporate governance

reforms intended to avoid the recurrence of the wrongdoing that led to the lawsuit.

- *Unite Nat'l Ret. Fund v. Watts*:[28] derivative settlement for corporate governance reforms designed to prevent the recurrence of the alleged wrongdoing, including policies and standards related to board composition and qualifications, director independence, compensation of directors and senior management, and insider trading controls.
- *Schwartz v. TXU Corp.*[29] (lead plaintiff, among others, Plumbers and Pipefitters National Pension Fund): securities class action settlement for $149.75m, plus various corporate governance reforms, including the formation of a Lead Independent Director position, increasing the number of independent directors and the appointment of a corporate governance officer.

Objectors to securities settlements that include corporate governance reforms have attempted to argue that institutional investors who are lead plaintiffs in securities litigations and pursue these reforms outside of the derivative action context are in a conflicted position, as they often continue to hold significant amounts of a corporate-defendants' stock, which places their interests at odds with those of other class members who no longer own the defendants' stock and prefer a purely monetary recovery.[30] To successfully argue that corporate governance reforms are an improper component of a securities class action settlement, an objecting class member has to convince the court that the lead plaintiff and its counsel traded additional cash recovery for corporate governance reforms.[31] As a matter of practice, however, corporate governance provisions are not addressed in class action negotiations until the financial terms are agreed upon.

In affirming the *Cendant* settlement, the Third Circuit noted that the PSLRA's preference for institutional investors, in spite of Congress's presumed knowledge that an institutional investor was unlikely to divest its entire stake in a company even after an alleged securities fraud, meant that 'Congress must have thought that the situation present here does not inherently create an unacceptable conflict of interest'.[32]

Outside director liability

Last year, former outside directors of WorldCom and Enron agreed to contribute over $30m of personal funds in connection with those settlements. There can be no doubt that the large public institutional investors who served as lead plaintiffs in those cases played a critical role in obtaining these unprecedented personal contributions. In the WorldCom case, Alan Hevesi, Comptroller of the State of New York, Administrative Head of the New York State and Local Retirement Systems and sole trustee of the New York State Common Retirement Fund stated, 'The fact that we have achieved a settlement in which these former outside directors have agreed to pay 20 percent of their cumulative personal net worth sends a strong message to the directors of every publicly traded company that they must be vigilant guardians for the shareholders they represent. We will hold them personally liable if they allow management of the companies on whose boards they sit to commit fraud.[33]

Typically, outside director liability is only an issue when there is evidence of director wrongdoing, existing insurance is greatly exceeded by the amount of potential damages, the defendant company is unable to pay damages in excess of insurance coverage limits and the outside directors have significant assets. While it is likely the rare circumstance when all of these factors come together simultaneously, as long as the lead plaintiff can credibly threaten trial, outside directors will have to consider contributing personal assets to settlement, rather than face a large judgment.

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PARALLEL ERISA ACTIONS

The ERISA actions that proceed in circumstances where securities fraud has been alleged primarily concern defined contribution retirement plans, such as 401(k) plans, that offer company stock as an investment option. Participant directed eligible individual account plans (EIAP), which are profit sharing, stock bonus, thrift, or savings employee stock ownership plans (ESOP) explicitly allow for acquisition and holding of stock issued by the plan sponsor.[34] Unlike other ERISA plans, an EIAP is permitted to acquire and hold large amounts of company stock and is not subject to any diversification requirements.[35]

In the typical ERISA action that is filed in connection with a securities fraud class action, participants in a company's defined contribution retirement plan bring a class action on behalf of all plan participants, and on behalf of the plan, against the fiduciaries responsible for managing the plan. The complaint, which generally arises from the same facts as the securities class action, asserts claims for

1. negligently permitting the plan to hold shares of the company's stock when it was imprudent to do so; and
2. breach of fiduciary duty due to negligent misrepresentations and omissions, which prevented participants from making informed decisions concerning the plan, including the appropriateness of investing in the company's stock inside the plan.

The imprudent investment/holding claims

Fiduciaries have affirmative obligations to investigate the prudence of an investment in company stock, and negligence on the part of the fiduciary is sufficient to establish a fiduciary breach.[36] The duty to remain apprised of the merits of an investment does not end once the decision to invest has been made.[37] Rather, 'there may come a time when [the] investments no longer serve the purpose of the' plan.[38] Thus, if circumstances make an investment imprudent after it has been made, a fiduciary may be held to have abused his discretion by continuing to hold it.[39]

While defendants often argue that plan language requiring investment in company stock absolves them of liability, this argument has been rejected frequently, as '[a] fiduciary cannot escape liability merely by pointing to the Plan as requiring it to act as it did'.[40] 'Even where a fiduciary acts consistent with the plan's directives, the fiduciary may be liable if the actions were not in the participants' best interests (e.g., if they were found to have been imprudent).'[41]

Omission and false statement claims

Omission claims allege that the fiduciary had a duty to disclose certain material information[42] related to plan investments.[43] False statement claims allege that the fiduciary made, in a fiduciary capacity, affirmative misrepresentations regarding plan investments.[44]

In WorldCom, the courts indicated that there may be an ERISA fiduciary duty triggered by the dissemination of SEC filings.[45] Subsequent cases have upheld this dissemination theory in the face of motion to dismiss challenges under the theory that anything included or incorporated in this prospectus/summary plan description (SPD) may be a fiduciary communication.[46]

In *In re Dynegy, Inc. ERISA Litigation*,[47] the court concluded that a statement in the prospectus/SPD encouraging employees to 'carefully review' the company's SEC filings (which filings ultimately were determined to contain material misrepresentations that were subsequently restated) stated a claim for a fiduciary breach against the plan committee responsible as plan administrator for the SPD. The *Dynegy* court held that the statement in the prospectus/SPD 'encourag[ing]'

a careful review was discretionary, and hence fiduciary, and that by including it 'the [committee members] were bound by fiduciary duties of loyalty and prudence not to communicate information that materially misrepresented Dynegy's financial condition'.[48]

The ERISA motion to dismiss pleading standard

While the factual predicate of the ERISA and securities actions are typically similar, the applicable law is not. First and foremost, while securities fraud actions are subject to Fed. R. Civ. P. 9(b) and the pleading requirements of the PSLRA, ERISA actions, which focus on breaches of fiduciary duties, are not subject to those heightened pleading standards.[49] While motions to dismiss securities fraud actions centre on whether plaintiffs have pled sufficient facts to meet their pleading burden, the issues raised by most motions to dismiss ERISA complaints is whether the named defendants are ERISA fiduciaries.

Fiduciary status under ERISA

ERISA defines a fiduciary with respect to a plan as follows:

> '[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 . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.'[50]

Thus, ERISA defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan, 'thus expanding the universe of persons subject to fiduciary duties — and to damages — under § 409(a)'.[51]

Courts broadly construe whether particular entities and/or individuals are considered fiduciaries under ERISA.[52] Congress's intent to give broad scope to the term 'fiduciary' is clearly set out in the legislative history of ERISA:

> 'The term "fiduciary" . . . includes persons to whom "discretionary" duties have been delegated by named fiduciaries. While the ordinary functions of consultants and advisors to employee benefit plans . . . may not be considered as fiduciary functions, it must be recognized that there will be situations where such consultants and advisors may, because of their special expertise, in effect, be exercising discretionary authority or control with respect to the management or administration of such plan or some authority regarding its assets. In such cases, they are to be regarded as having assumed fiduciary obligations within the meaning of the applicable definition.'[53]

Defendants often argue that they are not fiduciaries of ERISA plans because they are neither designated as such, nor named as plan sponsors, nor named as the plan administrators. While named fiduciaries such as an 'Administrator' of a plan undoubtedly owe fiduciary duties to the plan and its participants, the scope of persons and entities who might also owe such fiduciary duties is not delimited by the contents of the plan documents.

Thus, the definition of 'fiduciary' is not limited to those who bear certain appellations, but rather is a matter of the actual function served by the individual or entity with respect to the plan.[54] 'In determining whether a defendant was "performing a fiduciary function," the [Supreme] Court instructs us to consider [ ] whether the acts in question were like traditional fiduciary decisions, which are typically "decisions about managing assets and distributing property to beneficiaries. . . ."'[55] In applying the broad definition of 'fiduciary' to various

circumstances, courts have held persons and entities not named in plan documents to be de facto fiduciaries for purposes of ERISA.[56]

Generally, issues concerning both the existence and extent of 'control' exercised by each defendant are not properly resolved on a motion to dismiss, as they are often highly fact-intensive and case-specific. For example, in *Kayes*, the Ninth Circuit held that:

> 'Viewed in the light most favorable to the nonmoving party, the district court did not err in finding that a genuine issue of fact exists. While PLC is correct that fiduciary status rests on an objective evaluation of functions performed, and not on an individual's state of mind, such an objective evaluation will be based on questions of fact regarding discretionary duty and control that must be determined at trial.'[57]

As a result, courts typically do not make a determination concerning the fiduciary status of a person or entity even at the summary judgment stage of an ERISA action.[58]

Other issues that are not often resolved on a motion to dismiss concern:

1. the scope of a particular fiduciary's discretionary authority;[59]
2. whether a defendant is a fiduciary concerning individual, distinct duties with respect to a plan;[60]
3. whether the statements made by a defendant were affirmative misrepresentations in breach of defendant's fiduciary duties owed to plaintiffs;[61] and
4. whether such statements were material.[62]

Vicarious liability

Most of the courts that consider whether the agency principle of respondeat superior applies to ERISA actions have determined that it does.[63] Thus, the ongoing responsibilities of a fiduciary who has appointed fiduciaries requires that '[a]t reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan'.[64] Appointing fiduciaries have a duty of oversight to monitor and promote compliance with ERISA's fiduciary obligations and to prevent misconduct or injury.[65] Implicit in the 'power to select the Plans' named fiduciaries is the duty to monitor the fiduciaries' actions, including their investment of Plan assets'.[66]

In *WorldCom*, plaintiffs alleged that a corporate director with fiduciary appointment power under the plan breached his fiduciary duty by failing to monitor the plan's other fiduciaries in connection with the investment of the plan's assets and by failing to disclose material facts to the investment fiduciaries. Upholding plaintiffs' claims, the court observed that '[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'.[67] Accordingly, an allegation that the appointing fiduciary failed to properly appoint and supervise plan fiduciaries and 'failed to disclose to the Investment Fiduciary and the other investing fiduciaries material information he had regarding the prudence of investing in [Company] stock is sufficient to state a claim'.[68]

The impact of ERISA proceedings on the PSLRA discovery stay

The PSLRA provides for an automatic stay of discovery pending the resolution of a motion to dismiss. The statute provides that the stay can be lifted upon a motion by a party that 'particularized discovery is

necessary to preserve evidence or to prevent undue prejudice to that party'.[69]

Recently, the existence of parallel proceedings, including ERISA actions (and government and derivative actions) that are not subject to the PSLRA's discovery stay, has enabled securities plaintiffs to obtain pre-motion to dismiss relief from the stay. This has occurred in several high-profile securities litigations, where courts have reasoned that it would be prejudicial to securities plaintiffs if they were denied access to discovery materials, while all others pursuing the defendants (both public and private) would have such access. The rationale for these holdings was set out by the Court in *In re Tyco Int'l Ltd. Multidistrict Litig.*:[70]

> 'A more difficult question [than whether to stay the ERISA and Derivative Actions, given a possible indirect benefit to the Securities Actions plaintiffs] is presented by plaintiffs' request in the Securities Actions for access to documents produced in the ERISA and Derivative Actions. The stay provision permits ''particularized discovery'' in an action subject to the stay to avoid ''undue prejudice.'' 15 U.S.C. § 78u-4(b)(3)(B). Other courts have invoked this exception to give plaintiffs in securities cases access to information that has been made available to investigative agencies and plaintiffs in other actions. *See WorldCom*, [234 F. Supp. 2d at 305-6,] 2002 WL 31628566, at *4-5; *In re Enron Corp. Sec. Derivative and ERISA Litig.*, [2002 U.S. Dist. LEXIS 26261, at **29-32,] 2002 WL 31845114, at **1-2 (S.D. Tex. 2002). These courts reason that such discovery is ''particularized'' because it is limited to the discovery documents that have already been produced to others and that it prevents ''undue prejudice'' by placing all potential claimants on an equal footing with respect to discovery. *See id.* This approach makes sense in a case like this where (1) the Securities Action plaintiffs would be at a serious disadvantage if they are denied access to documents that are produced to the other plaintiffs and government investigators; (2) the defendants will not incur any additional costs if the Securities Actions plaintiffs are given access to the documents; (3) keeping all parties on an equal footing with respect to discovery serves important case management interests in this complex litigation; and (4) none of the claims at issue are frivolous.'[71]

Not surprisingly, securities fraud defendants have reacted to the weakening of the automatic stay by the increased presence of parallel litigation. Recently, defendants have made motions to stay discovery in derivative and ERISA cases, as a pre-emptory strike against plaintiffs' anticipated argument that they should be entitled to relief from the stay to obtain all discovery produced in parallel cases. This argument has not been successful, as courts have declined to apply the PSLRA to non-securities cases.[72]

Damages

Recovery in securities fraud actions is limited to those who purchased during the class period,[73] which does not include those who held the stock 'because of an unduly rosy representation or a failure to disclose unfavorable material'.[74] In contrast, in ERISA actions, plaintiffs' damage theories are not limited by the purchase requirement. Instead, plaintiffs seek to recover all of the plan participants' losses that occurred as a result of the plan continuing to hold company stock.

Damages for a breach of fiduciary duty under ERISA are computed by 'comparing the return on the improper investment [ie, company stock] with that of a reasonably prudent alternative investment'.[75] While the case law is clear as to the measure of damages, there is no clear definition of where

to look to find the appropriate 'reasonably prudent alternative investment'.[76]

Settlements

Often, while an ERISA case is pending, a related securities fraud class action will be settled. These settlements are often ''global'' settlements whereby the securities fraud and ERISA cases are settled simultaneously.[77] Recent cases where the ERISA settlement release does not cover the class action fraud claims include *Royal Dutch Shell* ($90m),[78] *Williams Companies, Inc.* ($55m),[79] *WorldCom* ($47.15m),[80] and *Kmart Corp.* ($11.75m).[81] In that circumstance, if there is a settlement of the securities class action, the ERISA plan can recover from the securities action settlement fund in the same manner as other class members. Many ERISA plans allow the individual participants to acquire stock within the plan, which is not reflected in the open market purchases by the plan (eg, where the plan allocates shares of company stock to employees' accounts). In that circumstance, the trustees of the plan are permitted to file a proof of claim in the securities settlement based upon the losses of the participants, as opposed to just the losses of the plan as a whole.[82]

CONCLUSION

In short, while the PSLRA has had many of the effects that its proponents hoped it would, the unintended consequences have changed the landscape of securities fraud and other litigation, such as ERISA and derivative litigation. As a result, with the increasing activism of institutional investors, corporations are likely to continue to face larger settlements[83] that also seek sweeping governance changes and individual accountability. Additionally, the effects of parallel litigation will not only be monetary, but will continue to include the erosion of the PSLRA discovery stay and the exposure to claims that are not subject to the PSLRA's heightened pleading standard.

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7 15 U.S.C. § 78u-4(b).

8 15 U.S.C. § 78u-4(b)(3)(B).

9 15 U.S.C. § 78u-4(a)(3).

10 See *Schulman v. Lumenis, Ltd.*, No. 02-1989, 2003 U.S. Dist. LEXIS 10348, at *10 (S.D.N.Y. 17th June, 2003) (holding that institutional investors are in the best position to prosecute securities fraud claims and to negotiate with and supervise counsel).

11 Pre-PSLRA, 48 per cent of cases settled within 3 years, while 63 per cent settled within 6 years. Since the enactment of the PSLRA, 31 per cent of cases have settled within 3 years and 48 per cent have settled within 5 years. See Buckberg, E. (2005) 'Recent trends in shareholder class action litigation: Bear market cases bring big settlements', NERA Economic Consulting, February, at 4.

12 *In re Allaire Corp. Sec. Litig.*, 224 F. Supp. 2d 319, 325 n.2 (D. Mass. 2002) (citing *In re Number Nine Visual Tech. Corp. Sec. Litig.*, 51 F. Supp. 2d, 1, 27-28, n.22) (D. Mass. 1999). Prior to the enactment of the Federal Rules of Civil Procedure in 1938, a party needed to plead the source of law for his or her claim and then explain why the facts alleged in the complaint stated a claim for violation of that law. This so-called 'code pleading' was replaced by notice pleading, where a party need not specify a source of law. *Int'l Armor & Limousine Co. v. Moloney Coachbuilders, Inc.*, 272 F.3d 912, 915 (7th Cir. 2001).

13 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).

14 Pricewaterhouse Coopers (2005) *2004 Pricewaterhouse Coopers LLP Securities Litigation Study*.

15 Simmons, L. E. and Ryan, E. M. (2006) *Post-Reform Act Securities Settlements: 2005 Review and Analysis*, Cornerstone Research, at 9.

16 The typical allegations of a derivative action are that the company's management and board failed to discharge its fiduciary duties to the company's stockholders by engaging in and/or permitting the improper practices that are the subject of the securities action.

17 See, eg, *In re DPL Inc., Sec. Litig.*, 307 F. Supp. 2d 947, 951 n.8 (S.D. Ohio 2004) ('In addition to monetary relief, the Settlement Agreement benefits the members of the class through certain changes in DPL's corporate governance structure.').

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20 *In re Sprint Corp. Sec. Litig.*, No. 01-CV-4080 (D. Kan.). See Press Release, 'Settlement in Sprint cases produces unprecedented corporate governance reforms and $50 million payment to investors', *PR Newswire* (19th March, 2003).

21 *In re Homestore.com, Inc. Sec. Litig.*, No. 01-CV-11115-RSWL (CWx) (C.D. Cal.). Homestore, Inc., Quarterly Report (Form 10-Q), at 21 (14th August, 2003).

22 Evans, B. (2003) 'Homestore settles class action suit', *Reality Times*, 14th August.

23 *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Hanover Compressor Co.*, No. 02-CV-00410 (S.D. Tex.). Press Release, 'Hanover Compressor Company announces settlement of securities litigation' (13th May, 2003) and 'Hanover Compressor announces court approval of global shareholder litigation settlement' (9th February, 2004).

24 *McCall v. Scott (HCA Inc.),* No. 97-CV-0838 (M.D. Tenn.). DeValerio, G. *Securities Litigation: An Investor's Best Tool for Boardroom Reform*, National Association of State Retirement Administrators, available at www.nasra.org/resources.

25 *Scheiner v. i2 Techs., Inc.*, 2004 U.S. Dist. LEXIS 28979, at *21 (No. 01-CV-00418-H, N.D. Tex., 1st October, 2004).

26 Notice of Pendency and Settlement of Class Action, Exhibit A-1, *In re Honeywell Int'l, Inc. Sec. Litig.*, No. 00-CV-03605 (D.N.J., 8th June, 2004); *In re Honeywell Int'l, Inc. Sec. Litig.*, 2004 U.S. Dist. LEXIS 28177 (D.N.J., 14th October, 2004).

27 *In re Charter Commc'ns, Inc. Sec. Litig.*, 2005 U.S. Dist. LEXIS 14772, at **6-7 (E.D. Mo., 30th June, 2005).

28 *Unite Nat'l Ret. Fund. v. Watts*, 2005 U.S. Dist. LEXIS 26246, at **5-6 (D.N.J., 28th October, 2005).

29 *Schwartz v. TXU Corp.*, 2005 U.S. Dist. LEXIS 27077, at **30-35 (N.D. Tex., 8th November, 2005).

30 *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 235, 251-52 (D.N.J. 2000).

31 See, eg, *Cendant*, 109 F. Supp. 2d at 252 (approving securities settlement that included corporate governance reforms where, '[t]here has not been the slightest indication that the cash portion of the settlement was related to, dependant upon, or intertwined with the governance proposals'). Lead plaintiffs in *Cendant* were the California Public Employees' Retirement System, the New York State Common Retirement Fund, and the New York City Pension Funds.

32 *In re Cendant Corp. Litig.*, 264 F.3d 201, 244 (3rd Cir. 2001).

33 Press Release, Office of the New York State Comptroller, 'Hevesi announces historic settlement, former WorldCom directors to pay from own pockets' (7th January, 2005), available at http://www.osc.state.ny.us/press/release/jan05/010705.htm. At press time, two former directors were still negotiating with the plaintiffs.

34 29 U.S.C. § 1107(d)(3).

35 Because employer matches are often invested in the employer stock fund, this fund often constitutes a substantial part of the investments of the 401(k) or like plan, eg, for plans that offer such funds, various surveys suggest that the fund constitutes on average 30 per cent of a typical 401(k) plan's investments. See Purcell, P. J. (2003) 'Employer stock in retirement plans', *Benefits Quarterly* (2nd Quarter) 51, at 54, Table 1 (collecting survey data).

36 See, eg, *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917-18 (8th Cir. 1994) (explaining that 'Section 404's prudent person standard is an objective standard . . . asking whether trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment') (internal quotations omitted); *In re Enron Corp. Sec. Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 548-50 (S.D. Tex. 2003) ('In determining compliance with ERISA's prudent man standard, courts objectively assess whether the fiduciary, at the time of the transaction, utilized proper methods to investigate, evaluate and structure the investment; acted in a manner as would others familiar with such matters; and exercised independent judgment when making investment decisions.'); *Laborers Nat'l Pension Fund v. N. Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 317 (5th Cir. 1999).

37 *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995). While several courts have called into question *Moench's* reasoning (see *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1097 (9th Cir. 2004) — 'Interpreting ERISA's prudence requirement to subject EIAPs to an albeit tempered duty to diversify arguably threatens to eviscerate congressional intent and the guiding rationale behind EIAPs themselves.'); *In re McKesson HBOC, Inc. ERISA Litig.*, 2002 WL 31431588, at *5 (N.D. Cal., 30th September, 2002) ('If there is no duty to diversify ESOP plan assets under the statute, it logically follows that there can be no claim for breach of fiduciary duty arising out of a failure to diversify, or in other words, arising out of allowing the plan to become heavily weighted in company stock.'); but see *Steinman v. Hicks*, 352 F.3d 1101, 1106 (7th Cir. 2003) (Posner, J., citing *Moench* — general duty of prudence could trigger a duty to diversify in extreme circumstances), to date *Moench* remains the prevailing view.

38 *Moench*, 62 F.3d at 571.

39 See, eg, *In re Xcel Energy, Inc. Sec., Derivative & 'ERISA' Litig.*, 312 F. Supp. 2d 1165, 1180 n.6 (D. Minn. 2004) (holding that 'continued investment' in company stock may constitute an abuse of discretion in light of the circumstances); *Keach v. U.S. Trust Co., N.A.*, 240 F. Supp. 2d 840, 845 (C.D. Ill. 2002). In *Keach*, participants in an ESOP sued members of the ESOP's administrative committee for breaching their fiduciary duties under ERISA. *Ibid*. The

committee members, who were the 'named fiduciaries' for the plan, moved for summary judgment, arguing that they could not be held liable for breaching their fiduciary duties because they lacked actual knowledge of the corporate wrongdoing alleged in the complaint. *Ibid.* at 845. In support of the motion, the committee members submitted affidavits attesting to their lack of knowledge. *Ibid.* The court rejected the committee members' argument, explaining that actual knowledge was not required and the plaintiffs could prevail if they showed that the committee members were negligent in performing their fiduciary duties: '[T]his is not a search for subjective good faith — a pure heart and an empty head are not enough.' *Ibid.* (quotation omitted). The court went on: 'ERISA's prudent person standard is objective, focusing on the conduct of the particular fiduciary. In other words, whether any given fiduciary acted prudently is generally a question of fact, and this case presents no exception to the general rule.' *Ibid.*; see also *Enron*, 284 F. Supp. 2d at 548 ('[T]he standard of the prudent man is an objective standard, and good faith is not a defense to a claim of imprudence.'). The court concluded that the committee members could not escape liability by asserting an 'ostrich defense', claiming that they 'buried their heads in the sand'. *Ibid.*

40 *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 828 (S.D. Ohio 2004).

41 *Ibid.* Several courts have held that a plan fiduciary may not 'blindly follow plan directives to the obvious detriment of the beneficiary'. See *Xcel*, 312 F. Supp. 2d at 1181; see also *In re Sears, Roebuck & Co. ERISA Litig.*, 2004 U.S. Dist. LEXIS 3241, at **10-13 (N.D. Ill., 2nd March, 2004) (holding that defendants could not defeat a motion to dismiss by pointing to plan documents); *Enron*, 284 F. Supp. 2d at 549 ('[T]he plan fiduciary must follow the documents and instruments governing the plan to the extent they are consistent with ERISA. In case of a conflict, the provisions of the ERISA policies as set forth in the statute and regulations prevail over those of the [plan].') (internal quotations omitted); *Herman v. NationsBank Trust Co.*, 126 F.3d 1354, 1369 (11th Cir. 1997) (holding that fiduciary was required to ignore plan provision that would lead to imprudent result); *U.S. Dept. of Labor*, Op. Ltr. No. 90-05A, 1990 WL 172964, at *3 (Mar. 29, 1990) (despite plan provision to the contrary, it is the responsibility of fiduciaries to determine, based on all the relevant facts and circumstances, the prudence of investing a large percentage of plan assets in qualifying employer securities). See also *Cent. States, Se. & Sw. Area Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 568 (1985) ('[T]rust documents cannot excuse [fiduciaries] from their duties under ERISA') *aff'd without opinion*, 779 F.2d 49 (6th Cir. 1985); *Moench*, 62 F.3d at 567 (where the plan language 'constrains the [fiduciaries'] ability to act in the best interest of the beneficiaries', it must not be followed).

42 The standard of materiality for ERISA investment decisions is the same as the one used under the federal securities laws — ie, is there a substantial likelihood that a reasonable investor would have made a different investment decision had she or he had the information at issue. Cf. *In re Duke Energy ERISA Litig.*, 281 F. Supp. 2d 786, 791-92 (W.D.N.C. 2003) (round trip trades accounting for less than one-third of one percent of overall revenue are immaterial as a matter of law — claimed qualitative control problems and the alleged masking of lack of revenue growth not negate).

43 See *Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1181-82 (3d Cir. 1996) (fiduciary had obligation to disclose material adverse information known to the fiduciary but not known to funds' trustees).

44 *Varity Corp. v. Howe*, 516 U.S. 489, 529-31 (1996).

45 See *Vivien v. WorldCom, Inc.*, U.S. Dist. LEXIS 27666, at **16-26 (N.D. Cal., 26th July, 2002) (incorporating SEC filings in SPD may trigger ERISA fiduciary duties because ERISA triggers duty to distribute SPD to plan participants); *In re WorldCom,*

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Inc. ERISA Litig., 263 F. Supp. 2d 745, 766 (S.D.N.Y. 2003) (same).

46 See, eg, *In re Sprint Corp. ERISA Litig.*, 388 F. Supp. 2d 1207, 1226 (D. Kan., 27th May, 2004) ('Plaintiffs point out that their complaint alleges these SEC filings were incorporated by reference into the SPDs and prospectuses and that defendants were therefore acting in their ERISA fiduciary capacities when they made those representations. The court agrees.') (citations omitted). See also *In re CMS Energy ERISA Litig.*, 312 F. Supp. 2d 898, 904 (E.D. Mich. 2004) (statement in SPD that incorporated SEC filings that allegedly conveyed misleading information stated a claim for breach of fiduciary duty); cf. *Sears ERISA*, 2004 U.S. Dist. LEXIS 3241, at **17-19 (holding misrepresentations in SEC filings could form the basis for ERISA breach of fiduciary duty claims); *Rankin v. Rots*, 278 F. Supp. 2d 853, 875-78 (E.D. Mich. 2003) (same).

47 309 F. Supp. 2d 861, 878-79 (S.D. Tex. 2004).

48 *Ibid.* at 879–80.

49 See, eg, *Enron*, 284 F. Supp. 2d at 652 ('ERISA does not have heightened pleading requirements, but is subject to the notice pleading standard . . .') (citation omitted). See also *AEP*, 327 F. Supp. 2d at 822 ('[T]his Court can discern no reason why, generally, ERISA plaintiffs should have to meet heightened pleading requirements, as opposed to the simplified notice pleading standard [that] relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims') (internal quotations and citation omitted). However, some courts have held that Rule 9(b) applies to ERISA claims arising out of the failure to disclose material adverse facts, as those claims 'sound in fraud.' See eg, *In re IKON Office Solutions, Inc. Sec. Litig.*, 86 F. Supp. 481, 488-89 (E.D. Pa. 2000) (claims that fiduciaries 'misled' plan participants sounded in fraud); *Sears ERISA*, 2004 U.S. Dist. LEXIS 3241, at *16 (N.D. Ill., 2nd March, 2004) (Rule 9(b) applies to ERISA claims that are based upon misrepresentations).

50 29 U.S.C. § 1002(21)(A) (2006).

51 *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993).

52 *In re Unisys Corp. Retiree Med. Benefit 'ERISA' Litig.,* 57 F.3d 1255, 1261 n.10 (3d Cir. 1995) ('ERISA broadly defines a fiduciary'); *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 233 (3d Cir. 1994) ('We start from the standpoint that we have previously held that ERISA broadly defines a fiduciary'); *Smith v. Hartford Ins. Group*, 6 F.3d 131, 141 (3d Cir. 1993) (broad interpretation for fiduciary furthers 'the interests of participants in employee benefit plans and their beneficiaries'); *Colarusso v. Transcapital Fiscal Sys., Inc. Top Hat Value Added Plan*, 227 F. Supp. 2d 243, 255 (D.N.J. 2002) ('the term ''fiduciary'' is to be liberally interpreted to effect the remedial purposes of ERISA, and courts have taken a broad view in deciding whether a particular person should be considered a fiduciary'); see also *LoPresti v. Terwilliger*, 126 F.3d 34, 40 (2d Cir. 1997); *Chi. Bd. Options Exch., Inc. v. Conn. Gen. Life Ins. Co.*, 713 F.2d 254, 260 (7th Cir. 1983); *Lowen v. Tower Asset Mgmt., Inc.*, 653 F. Supp. 1542, 1550 (S.D.N.Y. 1987), *aff'd*, 829 F.2d 1209 (2d Cir. 1987); *Brock v. Self*, 632 F. Supp. 1509, 1520 (W.D. La. 1986); *Brink v. DaLesio*, 496 F. Supp. 1350, 1375 (D. Md. 1980), *aff'd in part and rev'd in part on other grounds*, 667 F.2d 420 (4th Cir. 1981).

53 *Lowen*, 653 F. Supp. at 1550 (quoting 1974 U.S. Code Cong. & Admin. News 5103).

54 See *Darcangelo v. Verizon Commc'ns, Inc.*, 292 F.3d 181, 192 (4th Cir. 2002) ('Generally speaking, an ERISA fiduciary is ''any individual who *de facto* performs specified discretionary functions with respect to the management, assets, or administration of a plan.'' ') (quoting *Custer v. Sweeney*, 89 F.3d 1156, 1161 (4th Cir. 1996)); *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1461 (9th Cir. 1995) (noting 'broadly based liability policy underpinning ERISA and its functional definition of ''fiduciary'' '); *Mason Tenders Dist. Council Pension Fund v.*

Messera, 958 F. Supp. 869, 881 (S.D.N.Y. 1997) (citing, *inter alia, Mertens,* 508 U.S. at 262).

55 *Darcangelo*, 292 F.3d at 193 (quoting *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000)); see also *Musmeci v. Schwegmann Giant Super Mkts., Inc.*, 332 F.3d 339, 350–51 (5th Cir. 2003) (In conducting functional analysis courts should consider 'the authority which a particular person has or exercises over an employee benefit plan') (quoting *Donovan v. Mercer*, 747 F.2d 304, 308 (5th Cir. 1984)), *cert. denied*, 124 S. Ct. 1078 (2004).

56 See, eg, *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465 (4th Cir. 1996) (holding sponsor/company unnamed in plan to be fiduciary to extent it had duty to monitor appointees, which power of appointment stemmed from power to amend plan); *Plumb v. Fluid Pump Serv., Inc.*, 124 F.3d 849, 855 (7th Cir. 1997) ('[A] person can become a fiduciary with respect to a particular activity even if there is no formal written allocation of the duty.').

57 51 F.3d at 1461.

58 See, eg, *Ikon Office Solutions*, 86 F. Supp. 2d at 491 n.15 ('The court believes that at the pleading stage, it would be premature to say that Ikon could not have been, in any circumstances, a fiduciary, given both the lack of information regarding its formal role in the plans and the plaintiffs' allegations that Ikon affirmatively involved itself by providing information about the plans to participants.'). See also *Lalonde v. Textron, Inc.*, 270 F. Supp. 2d 272, 277 n.4 (D.R.I. 2003) ('The fiduciary status of an entity in the ERISA context is highly fact specific. As a result, this Court cannot reach this fact intensive issue on a motion to dismiss.') (citing *Bd. of Trs. of Bricklayers & Allied Craftsmen Local 6 of New Jersey Welfare Fund v. Wettlin Assocs., Inc.*, 237 F.3d 270, 275 (3d Cir. 2001) — fiduciary status is mixed question of law and fact — and *Kayes*, 51 F.3d at 1461 — fiduciary status is 'based on questions of fact regarding discretionary duty and control that must be determined at trial'), *aff'd in part and vacated in part*, 369 F.3d 1 (1st Cir. 2004); *In re Fruehauf Trailer Corp.*, 250 B.R. 168, 204 (D. Del. 2000) ('Determining whether someone is a fiduciary is a very fact specific inquiry which is difficult to resolve on a motion to dismiss.'); *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 241 (2d Cir. 2002); *WorldCom*, 263 F. Supp. 2d at 759.

59 *CMS*, 312 F. Supp. 2d at 909 ('[i]t is premature to dismiss inside directors of the Employers as non-fiduciaries absent specific findings on what responsibilities were actually assumed by them'); see also *Beam v. HSBC Bank USA*, 2003 U.S. Dist. LEXIS 15744, at *13 (W.D.N.Y., 19th August, 2003) ('the Court finds it premature — to wit, before any discovery has been taken — to make a determination as to the *scope* of the Outside Directors' fiduciary status').

60 See, eg, *Sears ERISA,* 2004 U.S. Dist. LEXIS 3241, at **10–11 ('[T]he determination of whether Sears was a fiduciary with respect to investment decisions is a question of fact that is not properly resolved by a motion to dismiss').

61 *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994) ('[t]he content of alleged statements attributable to [defendant], as well as whether they constituted affirmative misrepresentations, are questions for the trier of fact').

62 *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 443 (3d Cir. 1996) ('Whether the communications constituted misrepresentations and whether they were material . . . are questions of fact that are properly left for trial').

63 See *Kling v. Fid. Mgmt. Trust Co.,* 323 F. Supp. 2d 132, 147 ('a claim may be stated [against corporation] under ERISA for respondeat superior liability'); *Bannistor v. Ullman*, 287 F.3d 394, 408 (5th Cir. 2002) (clarifying that under ERISA, '[i]n the context of respondeat superior liability, the issue is whether the principal, by virtue of its *de facto* control over the agent, had control over the disposition of plan assets'); *Nat'l Football Scouting, Inc. v. Cont'l Assurance Co.*, 931 F.2d 646, 649–50 (10th Cir. 1991) (applying respondeat superior and finding that question of fact concerning agency relationship precluded defendants' motion for summary judgment on

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Plaintiff's ERISA claim); *modified* 1991 U.S. App. LEXIS 11019 (10th Cir. May 30, 1991); *Hamilton v. Carell*, 243 F.3d 992, 1002 (6th Cir. 2001) (agreeing with Seventh Circuit that common law doctrine of respondeat superior under ERISA does not require a principal's active and knowing participation in the breach).

64 29 C.F.R. § 2509.75-8 at FR-17; see also *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 736 (7th Cir. 1986) (fiduciaries have a duty to monitor those they have appointed).

65 See, eg, *Leigh v. Engle*, 727 F.2d 113, 134-35 (7th Cir. 1984), *aff'd*, 858 F.2d 361 (7th Cir. 1988); *Coyne & Delany*, 98 F.3d at 1465 (power to appoint and remove comes with duty to monitor appointee); *Martin v. Feilen*, 965 F.2d 660, 669-70 (8th Cir. 1992) (duty to monitor appointees may impose duty to prevent wrongful conduct).

66 *Mehling v. N.Y. Life Ins. Co.*, 163 F. Supp. 2d 502, 510 (E.D. Pa. 2001). See also *Liss v. Smith*, 991 F. Supp. 278, 311 (S.D.N.Y. 1998).

67 *In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d at 765.

68 *Ibid.* See also *Enron*, 284 F. Supp. 2d at 553 (Defendants 'could not abdicate their duties under ERISA merely through the device of giving their lieutenants primary responsibility for the day to day management of the trust. [Defendants] were obliged to operate with appropriate prudence and reasonableness in overseeing their appointees' management of the trust.') (quoting *Leigh*, 727 F.2d at 134-35); see also *Enron*, 284 F. Supp. 2d at 661 (appointing fiduciaries were 'charged by the plans to perform the selection, and therefore the monitoring, of the Administrative Committee with respect to its control over Plan investment and the prudence of investing in Enron stock as one of the Savings Plan's investment options').

69 15 U.S.C. § 77z-1(b)(1); 15 U.S.C. § 78u-4(b)(3)(B).

70 MDL No. 02-1335-3, slip op. at 10-11 (D.N.H., 28th January, 2003).

71 See also *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 220 F.R.D. 246, 250-52 (D. Md. 2004) (partially lifting the discovery stay as to defendants Royal Ahold, N.V. and U.S. FoodService, Inc. for documents already produced in connection with governmental and self-regulatory organisation investigations, because the request was clearly defined, the burden on the defendants of producing already-collected documents was 'slight', the securities plaintiffs' claims were 'far from frivolous', the necessity to preserve evidence against Royal Ahold appeared 'substantial' given its 'wide-ranging corporate reorganization', and withholding documents from the securities plaintiffs would cause them to suffer a 'severe disadvantage in formulating their litigation and settlement strategy') (citing *In re Comdisco Sec. Litig.*, 166 F. Supp. 2d 1260, 1263 (N.D. Ill. 2001) — lifting the discovery stay for the production of directors' and officers' insurance policies because their production would not impact the viability of the action and presented no substantial burden for the defendants); *In re Enron Corp. Sec., Derivative & 'ERISA' Litig.*, 2002 U.S. Dist. LEXIS 26261 (S.D. Tex., 15th August, 2002) (granting an order for the limited production of documents previously produced to the government in light of the policies underlying the PSLRA and the slight burden on the defendants); *In re WorldCom, Inc. Sec. Litig.*, 234 F. Supp. 2d 301 (partially lifting the PSLRA stay for documents and materials the defendants had produced in connection with governmental and internal investigations based on the rationale for the PSLRA stay, the potential prejudice to the plaintiff and the lack of a burden on the defendant); *In re Spiegel, Inc. Sec. Litig.*, 382 F. Supp. 2d 989 (N.D. Ill., 8th July, 2004) (court modified discovery stay to allow plaintiffs to obtain information already provided to the Office of the Comptroller of Currency).

72 See, eg, *In re FirstEnergy S'holder Derivative Litig.*, 219 F.R.D. 584, 586 (N.D. Ohio 2004) (denying defendants' motion to stay discovery in derivative action because, '[a]lthough the securities fraud claims and the shareholder derivative claims include similar facts, this is insufficient to bring the

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state law derivative claims within the ambit of the PSLRA'); *In re AOL Time Warner, Inc. Sec. & 'ERISA' Litig.*, 2003 U.S. Dist. LEXIS 16895 (S.D.N.Y., 23rd September, 2003) (PSLRA discovery stay does not apply to ERISA actions); *In re First BanCorp Derivative Litig.*, 407 F. Supp. 2d 585 (S.D.N.Y., 8th January, 2006) (state law derivative claims are not subject to PSLRA's stay of discovery).

73 *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

74 421 U.S. at 737–38.

75 *Chao v. Moore*, 2001 U.S. Dist. LEXIS 9012, at **23-24 (D. Md., 15th June, 2001) (quoting *Leigh v. Engle*, 858 F.2d 361, 367 (7th Cir. 1988)). See also *Chao v. Trust Fund Advisors*, 2004 U.S. Dist. LEXIS 4026, at *19 (D.D.C., 20th January, 2004); *Meyer v. Berkshire Life Ins. Co.*, 250 F. Supp. 2d 544, 572 (D. Md. 2003); *Harley v. Minn. Mining & Mfg. Co.*, 42 F. Supp. 2d 898 (D. Minn. 1999); *Donovan v. Bierwirth*, 754 F.2d 1049, 1057 (2d Cir. 1985).

76 *Leigh v. Engle*, 858 F.2d at 367.

77 See, eg, *In re Lucent Techs. Inc. Sec. Litig.*, No. 00-CV-621 (JAP) (D.N.J.); *Reinhart et al. v. Lucent Techs., Inc. et al.*, No. 01-CV-3491 (JAP) (D.N.J.). Agreement Regarding Global Settlement of Lucent Litigations, *In re Lucent Techs., Inc. Sec. Litig.*, No. 00-0621 (D.N.J., 19th September, 2003).

78 Press Release, The Shell Group, 'ERISA settlement' (12th July, 2005). This action was settled while the motion to dismiss the securities fraud action was still pending.

79 Motion for Final Approval of Settlement and Memorandum in Support, *In re Williams Cos. ERISA Litig.*, No. 02-0153 (N.D. Okla., 11th November, 2005); Order and Final Judgment, *In re Williams Cos. ERISA Litig.*, No. 02-153 (N.D. Okla., 16th November, 2005).

80 Notice of Proposed Class Action Settlement of Remaining ERISA Claims and Settlements Fairness Hearing, *In re WorldCom, Inc. ERISA Litig.*, No. 02-4816 (S.D.N.Y., 2nd September, 2005).

81 Notice of Class Action Settlement, *Rankin v. Rots (KMart)*, No. 02-71045 (E.D. Mich., 9th February, 2006).

82 See, eg, *Kurzweil v. Philip Morris Cos., Inc.*, 2001 U.S. Dist. LEXIS 83 (S.D.N.Y., 10th January, 2001).

83 There have been at least 10 post-PSLRA settlements in excess of $500m. See Stanford Law School Securities Class Action Clearinghouse, *Top Ten List of Post-Reform Act Securities Case Settlements*, available at http://securities.stanford.edu/top.ten.list.html.