

Recent Developments in ERISA Litigation

A growing number of plaintiffs are claiming that the fiduciaries of their pension plans mismanaged plan funds through investments in subprime mortgage-backed securities. In doing so, they often rely on the Employee Retirement Income Security Act of 1974 (ERISA), a federal law that establishes minimum requirements for pension and health plans, mandates that plan administrators provide beneficiaries with certain information, and describes responsibilities of plan fiduciaries.¹ One obvious reason for the growth of these lawsuits is that ERISA claims for breach of fiduciary duty are easier to prove than comparable claims for securities fraud, which require “cogent and compelling” evidence of an intent to defraud.²

While some of these ERISA lawsuits are class actions by employees who invested in their employers’ stock, others have been brought on behalf of the pension plans themselves against outside investment managers.³ Complaints in both types of cases typically allege that the defendants breached their fiduciary duties and failed to provide investors with complete and accurate information. In addition, employee plaintiffs often seek monetary relief from those individual directors with the power to appoint and oversee the plan’s investment fiduciary under either a breach of fiduciary duty theory, a failure to monitor theory, or under ERISA’s co-fiduciary liability provision that generally imposes liability on fiduciaries who knew of a breach of duty and failed to act.⁴ Plaintiffs have sought millions of dollars to recover losses to plans and the disgorgement of profits a fiduciary made through the misuse of plan assets.⁵ State Street Corporation, which faces several ERISA lawsuits, recently announced that it would reserve \$618 million for subprime-related claims.⁶ In the days following the collapse of Bear Stearns, at least two ERISA class action lawsuits were filed against the company and certain of its directors.⁷

Recent Complaints brought by employees against plan fiduciaries based on investments in subprime-mortgage backed securities, listed by filing date, include:

November 29, 2007:

Alexander v. Washington Mutual Inc. et al., Docket No.: 2:07-cv-01906-RSM (W.D. Wa.): Participants in Washington Mutual’s savings plan have filed a class action alleging that the company, its board of directors, and members of the human resources, investment and plan administration committees breached their fiduciary duties to investors.

¹ <http://www.dol.gov/dol/topic/health-plans/fiduciaryresp.htm>.

² Vikas Bajaj, *State Street Corp. Is Sued Over Pension Fund Losses*, N.Y. TIMES, Jan. 4, 2008, at C1.

³ See, e.g., See, e.g., *In re Morgan Stanley ERISA Litig.*, Docket No.: 1:07-cv-11285-RWS (S.D.N.Y. Filed Dec. 14, 2007); *Nashua Corp. Pension Plan Committee et al. v. State Street Bank and Trust Co. et al.*, Docket No.: 1:08-cv-00265-RJH (S.D.N.Y. Filed Jan. 14, 2008).

⁴ See, e.g., *Alexander v. Washington Mutual Inc. et al.*, Docket No.: 2:07-cv-01906-RSM (W.D. Wa. Filed Nov. 29, 2007).

⁵ See *In re State Street Bank and Co. ERISA Litig.*, Docket No.: 1:07-cv-08488-RJH (S.D.N.Y. Filed Oct. 1, 2007).

⁶ Vikas Bajaj, *supra* note 2.

⁷ See *Weber v. The Bear Stearns Cos., Inc., et al.*, Docket No.: 1:08-cv-02870-UA (S.D.N.Y. Filed March 18, 2008); *Howard v. The Bear Stearns Cos., Inc., et al.*, Docket No. 1:08-cv-02804-VM (S.D.N.Y. Filed March 17, 2008).

According to the Complaint, Washington Mutual continued to offer company stock as an investment option even after investing in it was no longer prudent, failed to warn investors of a potential decrease in stock price, and exposed investors to additional risk by increasing the volume of its subprime loans and participating in fraudulent appraisal schemes. The plaintiffs allege that the directors failed to monitor the performance of co-fiduciaries, and made misleading statements to inflate the value of Washington Mutual's stock while they sold thousands of their own shares. According to the complaint, the savings plan included \$341,404,922 of company stock, which lost 60% of its value during the class period.

December 14, 2007:

In re Morgan Stanley ERISA Litig., Docket No.: 1:07-cv-11285-RWS (S.D.N.Y.): Carolyn Egan, a named class action plaintiff in one of several consolidated cases against Morgan Stanley, has brought claims against Morgan Stanley, a Morgan Stanley subsidiary, the plan administrator, the plan's investment committee, seven individual directors, and 30 potential "John Doe Defendants."

Egan claims that the defendants breached their fiduciary duties by not taking steps to protect investors when ownership of company stock was no longer prudent, and not disclosing the risks of investing in Morgan Stanley. She claims that Morgan Stanley directors and officers made reassuring statements in press releases and conference calls even though they "anticipated carnage" from the subprime investments. Although Egan does not allege a specific amount of damage, she claims that \$4.036 billion of the plan's assets were at one time invested in Morgan Stanley stock, which lost 35% of its value during the class period.⁸

An example of a recent Complaint brought on behalf of a pension plan against an investment manager is:

October 1, 2007:

In re State Street Bank and Co. ERISA Litig., Docket No.: 1:07-cv-08488-RJH (S.D.N.Y.): Prudential Retirement Insurance and Annuity Company (PRIAC) is one of several plaintiffs that have asserted ERISA claims against State Street Bank. PRIAC alleges that State Street was an investment manager and fiduciary of assets in certain bond funds, which sought "stable, predictable returns." While representing that its investment strategy was "risk-controlled" and provided protection from unpredictable events, State Street took highly-leveraged positions in mortgage-backed financial instruments. PRIAC alleges that State Street then provided misleading information about the nature of the bond investments.

State Street has filed a motion to dismiss or, in the alternative, for summary judgment. State Street claims that it has already given most of the plans that invested in funds "Total Make Whole" payments for their alleged losses and that the funds would not benefit from any additional recovery. As a result, State Street claims that PRIAC lacks

⁸ Citigroup faces a similar suit, which alleges a loss of more than \$1.3 billion in retirement savings. See *Gray v. Citigroup Inc. et al.*, Docket No. 1:07-cv-09790-SHS (S.D.N.Y. Filed Nov. 5, 2007).

standing to pursue claims on behalf of the plans. State Street also claims that PRIAC is impermissibly seeking monetary damages under ERISA, which only permits it to pursue claims for equitable relief.