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District Court Decision in Enron Case

On September 30 a United States District Court issued the first substantive decision in the Enron ERISA litigation. *Tittle v. Enron Corp.*, 2003 WL 22245394 (S.D. Tex. Sept. 30, 2003). Companies that offer employer stock through their retirement savings plans have followed the Enron litigation closely out of concern that it will expand the boundaries of fiduciary liability for these plans. The Enron suit has already become the blueprint for hundreds of lawsuits that seek to hold the officers and directors of public companies, as well as the individuals who are involved in plan administration, liable under ERISA when the company's stock price falls.

When Enron collapsed, its employees lost the retirement savings they had invested in the employer stock fund in Enron's 401(k) plan and ESOP. The employees sued the trustee, the administrative committee, various corporate officers, and the outside directors of Enron, alleging that they had breached their fiduciary duties under ERISA by failing to disclose the company's true financial condition and by continuing to invest plan assets in Enron stock. The Department of Labor filed an *amicus* brief supporting the employees' position and setting forth expansive theories of fiduciary liability.

The court ruled that most of the fiduciary claims against Enron's officers, directors, and plan administrators could proceed. Although the decision does not resolve these claims, it adopts many of the theories of fiduciary liability that the Department of Labor had advanced in its brief. The chart below summarizes the more significant issues addressed in the court's decision.

Issue	Defendants' Position	Labor Department's Brief	Court's Decision
Whether outside directors and corporate officers who are not individually designated as plan fiduciaries can be held liable as fiduciaries when they act in a corporate capacity on the company's behalf.	The company is the "named fiduciary" of the plan. Directors and officers who act on behalf of the company, but who are not individually designated as fiduciaries, cannot be held liable for breach of fiduciary duty.	When the officers and directors of a company carry out the company's fiduciary duties (such as appointing and removing other fiduciaries), the officers and directors become "functional fiduciaries": they are exercising discretionary responsibility for plan administration, and they are liable for breach of fiduciary duty if they fail to carry out this responsibility in accordance with ERISA.	The court agreed with the DOL's "functional fiduciary" analysis. Where a plan assigns administrative responsibilities to "the Company," the individual officers and directors who carry out the company's fiduciary duties can be liable under ERISA. If it is not clear which individuals are authorized to act for the company, that authority is presumed to reside with the Board of Directors.

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Whether corporate officers have a duty to disclose material non-public information to the plan's administrative committee.	Corporate officers are potentially liable only to the extent they function as fiduciaries. Even if officers act as fiduciaries when they appoint the administrative committee, they do not have a duty under ERISA to disclose business information to the committee.	Officers who have the power to appoint and remove plan administrators have a duty to monitor the administrators' performance. The duty to monitor includes a duty to ensure that the administrators have sufficient information to be able to discharge their responsibilities properly.	The court adopted the DOL's view, holding that the employees had stated a claim for breach of fiduciary duty against the officer defendants for "fail[ing] to provide material information or correct misleading information essential to prudent administration of the plans."
Whether corporate officers can be held liable for co-fiduciary breach if they fail to disclose material information to the plan's administrative committee.	Corporate officers should not be liable for participating in a fiduciary breach solely because they fail to disclose material business information to the plan's administrative committee.	Corporate officers knowingly participated in a fiduciary breach by withholding material information from the administrative committee and by allowing them to continue to purchase employer stock when the officers knew such purchases were imprudent.	The court adopted the DOL's position. Corporate officers may be liable for co-fiduciary breach, as well as direct fiduciary breach, if they withhold material investment information from the administrative committee and do not take steps to prevent the administrative committee from continuing to make imprudent investments.
Whether fiduciaries have a duty to correct misleading statements made by others.	Fiduciaries have a duty to be accurate in their own communications, but they do not have a duty to correct inaccuracies in communications made by others. The administrative committee did not have a duty to correct misleading statements allegedly made by corporate officers.	Fiduciaries' duty of loyalty includes a duty to protect plan participants from misleading information. Fiduciaries must not only refrain from misleading plan participants in their own communications, they must also correct misleading information provided by others in order to prevent plan participants from being injured by it.	The court agreed with the DOL that the plan fiduciaries could be held liable not only for making materially misleading statements themselves, but also for "failure . . . to correct any material misinformation."

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Whether fiduciaries have an affirmative duty to disclose material non-public information to plan participants.	Fiduciaries have a duty to speak truthfully when they communicate with participants, but they do not have a duty to volunteer information.	Fiduciaries have an affirmative duty to inform participants of circumstances that severely threaten plan assets. (This does not mean, however, that fiduciaries must inform participants "of every transitory corporate event that might have an impact on the stock's price.")	The court agreed with the DOL's position. It held that the defendants could be liable for breaching their fiduciary duty to protect the plan participants and beneficiaries through the fiduciaries' failure to disclose a threat to their retirement security.
Whether fiduciaries have a duty to investigate when they learn of possible adverse circumstances affecting plan investments.	Even if plan fiduciaries have a duty to act on the information they have, they are not required to conduct investigations or to seek out information.	Fiduciaries' duty of prudence includes a duty to investigate when they learn of circumstances that might jeopardize plan participants.	The court agreed with the DOL's position. It stated that members of the plan administrative committee could be liable for "fail[ing] not only to conduct, but even to consider conducting, a prudent investigation of Enron's financial situation and of Enron stock as an investment option for retirement assets until Enron was on the very edge of bankruptcy."
Whether outside directors and corporate officers have a duty to disclose material non-public information to plan fiduciaries or participants when disclosure is not required (and might even be prohibited) by the securities laws.	Fiduciaries should not be exposed to inconsistent duties of disclosure under the securities laws and under ERISA. ERISA should not impose affirmative disclosure obligations beyond those already imposed by the securities laws.	The securities laws do not relieve corporate officers and directors of their fiduciary obligation under ERISA to disclose material information. Officers and directors can satisfy the requirements of both laws by disclosing material information to all shareholders, including plan participants.	The court agreed with the DOL position. ERISA and the securities laws should be construed together to require disclosure of material non-public information to all investors, including plan participants, whether "impractical" or not.

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Whether fiduciaries can be liable for allowing investments in employer stock when the plan itself is designed to offer employer stock as an investment option.	Plan design is a settlor function. Plan fiduciaries cannot be held liable for allowing the plan to operate in accordance with its design.	Fiduciaries have a duty to override the terms of the plan when the plan requires them to act imprudently. In addition, under the Enron plans, fiduciaries had authority to eliminate employer stock as an investment option, at least for future contributions.	The court agreed with the DOL's position. It acknowledged that the fiduciaries could not be held liable for "settlor" decisions establishing the plans' design. Nevertheless, the fiduciaries could be liable for permitting (and even encouraging) employees to purchase employer stock, and by continuing to purchase employer stock with company contributions, when they knew or should have known it was an imprudent investment.
Whether fiduciaries can be liable for proceeding with a previously-planned transition to a new service provider that resulted in a "blackout" of participants' investment control.	The plan's administrators and trustee did not function as fiduciaries with respect to the transition between service providers, and thus cannot be held liable for investment losses that resulted from the administrative blackout.	The plan's administrators and trustee had the ability to prevent the administrative blackout from occurring, or to shorten its duration. They had a fiduciary duty to take these steps when it became clear that participants would be injured if they were denied the ability to diversify their accounts.	The court agreed with the DOL's position. Plan fiduciaries can be held liable for proceeding with a previously-planned administrative blackout if circumstances indicate that the blackout presents "an extreme threat to the participants' interests in their employee benefit plans."
Whether fiduciaries can be liable for failing to diversify plan investments in an eligible individual account plan.	ERISA § 404(a)(2) provides that an eligible individual account plan is exempt from the diversification requirement. Accordingly, plan fiduciaries cannot be held liable for investing too large a proportion of the plans' total assets in employer stock.	[Not addressed.]	The court observed that the plan and trust documents included boilerplate language directing the fiduciaries to diversify plan assets to the extent it was prudent to do so. The court concluded that these diversification provisions in the governing documents imposed a duty of diversification on the fiduciaries even where no such duty existed under ERISA.

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Whether ERISA § 404(c) shields fiduciaries from liability for participants' decisions to invest in employer stock.	The savings plan was a § 404(c) plan. Accordingly, the fiduciaries cannot be held liable for losses that result from the participants' decision to purchase and hold employer stock.	It isn't clear that the savings plan qualified as a § 404(c) plan, or that participants had adequate information to make informed investment decisions. In addition, even if § 404(c) applies, it does not relieve fiduciaries of liability for offering imprudent investment options.	The court adopted the DOL's view. Plaintiffs have adequately alleged that the plan failed to satisfy the requirements of § 404(c); the burden is on defendants to show, later in the proceedings, that they were entitled to § 404(c) protection. In addition, § 404(c) will not protect the defendants from a claim that the employer stock fund was an inappropriate investment option.
Whether a directed trustee can be liable for following directions that are contrary to the fiduciary requirements of ERISA.	A directed trustee does not act as a fiduciary when it follows the directions of another fiduciary. As long as the directions were properly issued, the trustee should not have fiduciary liability for any harm that results from following them.	A directed trustee retains residual fiduciary responsibility. It may be held liable for following directions that it should know are contrary to the terms of the plan or ERISA. [The DOL later filed suit against the other Enron defendants, but chose not to sue the directed trustee.]	The court agreed with the DOL's position. A directed trustee "still retains a degree of discretion, authority, and responsibility that may expose him to liability . . . ."
Whether a non-fiduciary party in interest can be liable under ERISA for participating in a breach of fiduciary duty.	There is no cause of action under ERISA for a non-fiduciary's participation in a breach of fiduciary duty. The Supreme Court's decision in *Harris Trust* related only to a non-fiduciary's participation in a prohibited transaction.	A non-fiduciary party in interest is liable under ERISA for knowing participation in a breach of fiduciary duty, regardless of whether the breach is also a prohibited transaction.	The court adopted the DOL's position. Plaintiffs may obtain equitable relief under ERISA § 502(a)(3) against a non-fiduciary service provider (in this case, Enron's accounting firm) that knowingly participates in a breach of fiduciary duty by actively concealing material financial information from plan fiduciaries.

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Whether "make-whole" relief is available to plaintiffs under § 502(a)(3) of ERISA.	The Supreme Court has held that § 502(a)(3) of ERISA should be construed to allow monetary relief only when it is equitable rather than legal in nature. Plaintiffs do not seek restitution of money in defendants' possession: instead, they seek money damages that are not available under ERISA § 502(a)(3).	"Monetary relief against breaching fiduciaries is equitable relief within the meaning of § 502(a)(3) of ERISA."	In one of the few pieces of positive news for plan sponsors, the court held that ERISA § 502(a)(3) does not allow "make whole" relief. A different provision of ERISA, § 502(a)(2), permits plaintiffs to recover losses resulting from a breach of fiduciary duty; but this provision allows recovery only on behalf of the plan, and not on behalf of individual participants. It is not clear to what extent this distinction will limit plaintiffs' ability to recover losses related to investment in an employer stock fund.