IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION,	§ § §	MDL 1446

PAMELA M. TITTLE, THOMAS O. PADGETT, GARY S. DREADIN, JANICE FARMER, LINDA BRYAN, JOHN L. MOORE, BETTY J. CLARK, SHELLY FARIAS, PATRICK CAMPBELL, FANETTE PERRY, CHARLES PRESTWOOD, ROY RINARD, STEVE LACEY, CATHERINE STEVENS, ROGER W. BOYCE, WAYNE M. STEVENS, NORMAN L. AND PAULA H. YOUNG, MICHAEL L. MCCOWN, AND DAN SCHULTZ, on behalf of themselves and a class of persons similarly situated, and on behalf of the Enron Corp. Savings Plan, the Enron Corp. Employee Stock Ownership Plan, and the Enron Corp. Cash Balance Plan,	§	
Plaintiffs	§	
VS.	§	CIVIL ACTION NO. H-01-3913 CONSOLIDATED CASES
ENRON CORP., an Oregon Corporation, ENRON CORP. SAVINGS PLAN ADMINISTRATIVE COMMITTEE, ENRON EMPLOYEE STOCK OWNERSHIP PLAN ADMINISTRATIVE COMMITTEE, CINDY K. OLSON, MIKIE RATH, JAMES S. PRESTON, MARY K. JOYCE, SHEILA KNUDSEN, ROD HAYSLETT, PAULA RIEKER, WILLIAM D. GATHMANN, TOD A. LINDHOLM, PHILIP BAZELIDES, JAMES G. BARNHART, KEITH CRANE, WILLIAM J. GULYASSY, DAVID SHIELDS, JOHN DOES NOS. 1-100, UNKNOWN FIDUCIARIES OF THE ENRON CORP. SAVINGS PLAN OR THE ESOP, THE NORTHERN TRUST CO., KENNETH L. LAY, JEFFREY SKILLING, ANDREW S. FASTOW,	§	

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MICHAEL KOPPER, RICHARD CAUSEY, §
JAMES V. DERRICK, JR., THE §
ESTATE OF J. CLIFFORD BAXTER, §

MARK A. FREVERT, STANLEY C. §
HORTON, KENNETH RICE, RICHARD §
B. BUY, LOU L. PAI, ROBERT A. §
BELFER, NORMAN P. BLAKE, JR., §
RONNIE C. CHAN, JOHN H. DUNCAN, §
WENDY L. GRAMM, ROBERT K. §
JAEDICKE, CHARLES A. LEMAISTRE, §
JOE H. FOY, JOSEPH M. HIRKO, §
KEN L. HARRISON, MARK E. §
KOENIG, STEVEN J. KEAN, REBECCA §
P. MARK-JUSBASCHE, MICHAEL S. §
MCCONNELL, JEFFREY MCMAHON, §
J. MARK METTS, JOSEPH W. §
SUTTON, ARTHUR ANDERSEN & CO. §
WORLDWIDE SOCIETE COOPERATIVE, §
ARTHUR ANDERSEN LLP, ARTHUR §
ANDERSEN UNITED KINGDOM, DAVID §
B. DUNCAN, THOMAS H. BAUER, §
DEBRA A. CASH, ROGER D. WILLARD §
D. STEPHEN GODDARD, JR., §
MICHAEL M. LOWTHER, GARY B. §
GOOLSBY, MICHAEL C. ODOM, §
MICHAEL D. JONES, WILLIAM §
SWANSON, JOHN STEWART, NANCY A. §
TEMPLE, DONALD DREYFUSS, JAMES §
A. FRIEDLIEB, JOSEPH F. §
BERARDINO, ANDERSEN DOES 2 §
THROUGH 1800 UNKNOWN PARTNERS §
IN ANDERSEN LLP, MERRILL LYNCH& §
CO., INC., J.P. MORGAN CHASE & §
CO., CREDIT SUISSE FIRST BOSTON §
CORPORATION, CITIGROUP, INC., §
SALOMON SMITH BARNEY INC., §
VINSON & ELKINS, LLP, RONALD T. §
ASTIN, JOSEPH DILG, MICHAEL §
FINCH, AND MAX HENDRICK, III, §
§
Defendants. §

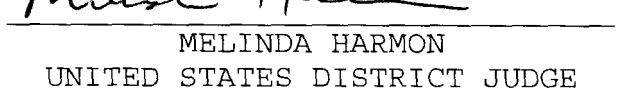
ORDER NUNC PRO TUNC

A representative from Westlaw has called to the Court's attention that certain lines in its memorandum and order of September 30, 2003 (#635) were missing on pages 35-37, apparently

because of a scanning problem. Accordingly, the Court hereby provides those pages and the pages on either side (34 and 38) and

ORDERS that they shall be substituted for those of the same page numbers in #635.

SIGNED at Houston, Texas, this 16th day of October, 2003.



MELINDA HARMON
UNITED STATES DISTRICT JUDGE

American Benefit Adm'rs, Inc., 925 F. Supp. 1424, 1429 (D. Minn. 1996).[49]

Such a distinction between authority and control over plan management versus over plan assets in requiring discretion only with regard to the former before fiduciary obligations are triggered appears to have roots in the fiduciary's traditional duties. "At common law, fiduciary duties characteristically attach to decisions about managing assets and distributing property to beneficiaries" and "the common law trustee's most defining concern historically has been the payment of money in the interest of the

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[49] The Fifth Circuit has not expressly addressed the structure of the statute and the verbal "discretion" distinction between control over plan management and control over plan assets. Although the district court in *Tower Loan of Mississippi v. Hospital Benefits, Inc.*, 200 F. Supp. 2d 642, 648-49 (S.D. Miss. 2001) concluded that the Fifth Circuit has rejected the rule that control over plan assets, without discretion, makes a plan manager a fiduciary, this Court finds that the judge's determination is improperly imposed on statements by the appellate court that do not focus on the statutory language and structure. The court cites *Reich v. Lancaster*, 55 F.3d 1034, 1047 (5th Cir. 1995) in which the Fifth Circuit, *citing American Federation of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Society of the United States*, 841 F.2d 658, 663 (5th Cir. 1988) ("Holden's authority to grant or deny claims, to manage and disburse assets, and to maintain claims files clearly qualifies as discretionary control of a plan or its assets within the meaning of § 1002(21)(A)."), as holding that "a plan administrator, who possessed authority to grant or deny claims, to manage and disburse fund assets, and to maintain claim files, clearly has discretionary authority respecting management of a plan or its assets within the meaning of § 1002(21)(A) and therefor was an ERISA fiduciary." The Fifth Circuit merely viewed these duties together generally and conclusorily pronounced that they made the administrator a fiduciary; it did not examine the issue of control over plan assets alone and conclude that such control made the administrator a fiduciary, nor did examine the question of control over plan assets without discretion. In other words, a review of *Reich* and the underlying *American Federation* demonstrates that the Fifth Circuit looked at the authority granted by the contract to the plan administrator as a whole, without separate analysis of each duty.

beneficiary." *Pegram*, 530 U.S. at 231. Moreover, "when Congress took up the subject of fiduciary responsibility under ERISA, it concentrated on fiduciaries' financial decisions, focusing on pension plans, the difficulty many retirees faced in getting the payments they expected, and the financial mismanagement that had too often deprived employees of their benefits." *Id.* at 232, *citing as examples*, S.Rep. No. 93-127, p. 5 (1973); S. Rep. No. 93-383, pp. 17, 95 (1973).

In contrast to the functional definition of fiduciary in § 1002(21)(A), § 402(a)(2) of ERISA, 29 U.S.C. § 1102(a)(2), defines a formally "named fiduciary" as "a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly."

Section 409(a) of ERISA, 29 U.S.C. § 1109(a), provides, "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable." It makes no distinction between the functional definition of a trustee and the formal designation of a fiduciary named by the plan documents or by following the procedure in those documents for designating a fiduciary and thus applies to both.

b. Fiduciary Duties

The common law of trusts "offers a 'starting point for analysis of [ERISA] . . . [unless] it is inconsistent with the language of the statute, its structure, or its purposes.'" *Harris*

Trust, 530 U.S. at 249, *quoting Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999). "[R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility.'" *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996), *quoting Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 427 U.S. 559, 570 (1985). Thus a federal common law based on the traditional common law of trusts has developed and is applied to define the powers and duties of ERISA plan fiduciaries, at least in part, with modifications appropriate in light of the unique nature of the statutory employee benefit plans. *See, e.g.*, *Pegram*, 530 U.S. at 224; *Varity Corp.*, 516 U.S. at 497 ("We also recognize . . . that trust law does not tell the entire story."); *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 294 (5th Cir. 2000)("Although ERISA's duties gain definition from the law of trusts, the usefulness of trust law to decide cases brought under ERISA is constrained by the statute's provisions."); *Donovan v. Cunningham*, 716 F.2d 1455, 1464 and n.15 (5th Cir. 1983)("ERISA's modifications of existing trust law include imposition of duties upon a broader class of fiduciaries, 29 U.S.C. § 1003(21)(1976), prohibition of exculpatory clauses, *id.* § 1110(a), broad disclosure and reporting requirements, *id.* §§ 1021-31, and nationwide uniformity of rules," and § 406's "detailed list" of *per se* illegal types of transactions), *cert. denied*, 467 U.S. 1251 (1984). For example, the traditional four overlapping fiduciary duties (of loyalty, care, diversification of plan assets, and adherence to plan documents, where prudent), cited in footnote 9 of this memorandum

and order and discussed in detail *infra*, are derived from the common law of trusts and are imposed upon ERISA fiduciaries. At the same time, in contrast to the common law of trusts, under ERISA the plan fiduciary may have multiple roles and wear many hats; he may serve as an employer and as a plan fiduciary.[50] The scope of the incorporation of the common law of trusts is not clearly defined, however, and different courts have frequently come to different conclusions about the extent of its application.

The most fundamental duty of ERISA plan fiduciaries is a duty of complete loyalty, under 29 U.S.C. § 1104(a)(1)(B), to insure that they discharge their duty "solely in the interests of the participants and beneficiaries," and to "exclude all selfish interest and all consideration of the interests of third persons." *Id.* Fiduciaries must discharge their duties with respect to the plan "solely in the interest of the participants and the beneficiaries," i.e., "for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." 29

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[50] *See Variety Corp.*, 516 U.S. at 497: "In some instances, trust law will offer only a starting point, after which courts must go on to as whether, or to what extent, the language of the statute, its structure, or its purpose require departing from common-law trust requirements." The high court explained that Congress enacted ERISA to provide extra protections for both employers establishing ERISA benefit plans and for plan participants and beneficiaries that the law of trusts lacked. Thus, for example, ERISA permits an employer to serve as a plan administrator under 29 U.S.C. § 1002(1), unlike trust law. *See Varity Corp.*, 516 U.S. 489 (allowing employees to sue employer company for breach of fiduciary duty).

U.S.C. § 1104(a)(1)(A). Thus among the responsibilities and duties imposed on fiduciaries by ERISA is avoidance of conflicts of interest. *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 251-52 (1993).

Second, the fiduciary must meet a "prudent man" standard under 29 U.S.C. § 1104(a)(1)(B), to act "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use" and "with single-minded devotion" to these plan participants and beneficiaries. According to the Department of Labor, 29 C.F.R. § 2550.404a-1(b), these requirements are satisfied if the fiduciary

> (i) Has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and
>
> (ii) Has acted accordingly.

"Appropriate consideration" for purposes of this regulation includes but is not limited to

> (i) A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action, and
>
> (ii) Consideration of the following factors as they relate to such portion of the portfolio: