

Economic Analysis in ERISA Class Actions Involving Employee Investments in Company Stock

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Recent years have witnessed an onslaught of class action suits brought under the Employee Retirement Income Security Act (ERISA) on behalf of employee participants who invest a portion of their retirement savings in company stock. These cases typically are preceded by a decline in the market price of company stock and allege that the company, its directors, auditor and/or the trustee of the retirement plan breached their fiduciary duties to plan participants by: (1) making material misstatements or omissions concerning the true value of company stock; (2) including company stock among the investment vehicles available to retirement plan participants when the stock was an "imprudent" investment. In this article, the author discusses the similarities and differences between such ERISA class actions and federal securities class actions alleging securities fraud. This article also covers economic methodologies that can be employed to analyze ERISA class action allegations.

There is a fundamental tension between modern portfolio theory (MPT) and certain provisions of ERISA that permit, and even encourage, investment in employer stock by employees.¹ This is because the idea of employees investing a portion of their retirement portfolios in the common stock of their employer can run counter to MPT, which teaches that the optimal portfolio of a risk-averse investor is well-diversified, whereby the portfolio has the highest possible expected return, given its risk (or, equivalently, the lowest possible risk, given its expected return). Moreover, the value of an employee's human capital also is tied to the performance of the employer and its stock, further exacerbating the potential diversification problem that stems from holding employer stock as part of a retirement portfolio.² Against this backdrop, many firms offer company stock funds³ as investment alternatives within their retirement plans, and many employees make discretionary investments in company stock by directing a

portion of their retirement plan investments to their employer's company stock fund.⁴ Indeed, Meulbroek (2002) reports that among firms that offer a company stock fund in connection with a defined contribution retirement plan, the proportion of total plan assets invested in company stock is 27%.⁵

Recently, several well-publicized bankruptcies (including those of Enron, WorldCom, U.S. Airways and UAL) resulted in the virtual elimination of employees' investments in company stock.⁶ These and other large stock price declines experienced by firms offering company stock funds to their employees have been associated with an onslaught of legal actions brought under ERISA law in recent years. The plaintiffs generally bring these actions on behalf of the retirement plan itself and/or a class made up of the participants in the firm's retirement plan who held or purchased investments in the company stock fund during the class period. The defendants typically comprise some combination of the firm and its di-

rectors, managers, auditor and the trustee of the company stock fund.

These ERISA class actions bear certain similarities to open-market securities class action cases claiming securities fraud stemming from alleged disclosure defects. For example, many ERISA cases entail an allegation that defendants made material misstatements or omissions and/or failed to communicate material information to participants concerning the value of company stock during the specified class period. However, there are also important differences between ERISA and securities class actions, in terms of the composition of the proposed class and the specification of the class period. In addition, ERISA class actions often involve allegations specific to ERISA that would not be found in securities class actions. In particular, many ERISA class actions allege that company stock was an "imprudent" investment, and therefore not suitable for inclusion among the investment choices offered in connection with the company's retire-

ment plan. Finally, the Second Circuit Court of Appeals decision in one notable ERISA case, *Raymond J. Donovan v. John C. Bierwirth et al.* (hereafter *Donovan v. Bierwirth*),⁷ suggests a measure of alleged damages in ERISA class actions that is notable for its explicit use of hindsight.

The purpose of this article is to provide a road map for economic analysis of various aspects of ERISA class actions. The author's principal conclusions are:

- In most instances, only shares of company stock acquired during the class period, and not shares of company stock held at the onset of the class period, have the potential to be damaged by alleged misstatements and omissions.
- The author has not found a “bright-line” test, either from economic theory or from the law, that can be used to identify whether or when a company's stock becomes an imprudent investment for a retirement plan, assuming that the company stock is correctly priced in an efficient market.
- Certain aspects of the methodology for calculating damages due to imprudence on the part of plan fiduciaries suggested by the Second Circuit Court of Appeals in *Donovan v. Bierwirth* are flawed from the standpoint of economics because this methodology relies on ex post information about the relative performance of “but for” investments.

The author will review the types of allegations brought in ERISA class actions, along with questions that should be addressed in connection with economic analysis of these allegations. The author will discuss methodologies for estimating alleged damages, including a summary of the methodology suggested by the Second Circuit Court of Appeals decision in *Donovan v. Bierwirth*.

ERISA Class Action Allegations

ERISA class action complaints typically bring claims on behalf of participants who purchased or held investments in the company stock fund(s) during the class period.⁸ The claim on behalf of shares held by participants, in addition to shares purchased, differs from securities class action cases alleging 10b-5 violations, which are brought on behalf of purchases (sellers) of artificially inflated (underpriced) securities, but not on behalf of

those who only held securities during the class period.

Another difference between ERISA class actions and open-market securities class actions is that many ERISA class action complaints do not specify a termination date for the class period, but state that the class period extends to “the present.”⁹ ERISA class actions generally entail one or both of the following two allegations:

1. Defendants made material misstatements or omissions relevant to the value of company stock during the class period.
2. Defendants should have known that the company stock fund was an imprudent investment and, therefore, unsuitable for inclusion in the company's retirement plan.¹⁰

The first of these claims is similar to the claim of disclosure defects typically found in federal, open-market class action cases alleging securities fraud. The second is specific to ERISA class actions and relies on ERISA law requiring plan fiduciaries “to act with the care, skill, prudence and diligence under the prevailing circumstances that a prudent person acting in a like capacity and familiar with such matters would use.”¹¹ The following discussion considers these allegations and their economic implications in greater detail.

Allegation of Material Misstatements or Omissions Regarding the Value of Company Stock

Many ERISA class action complaints contain an allegation that the defendant company's stock price was artificially inflated as a result of disclosure defects, resulting in damage to employee participants who invested in the company stock fund during the class period.¹² Economic assessment of this claim entails similar analyses to those employed when evaluating disclosure claims made in securities class action cases, including consideration of the following questions.

- Did the company's stock price experience a statistically significant decline when allegedly corrective disclosures occurred?
- Were there other factors unrelated to plaintiffs' allegations that caused the stock price to decline?
- Could the allegedly corrective disclosures have been made at an earlier time?

- Would the allegedly corrective disclosures have materially affected stock price if they had been made earlier?
- Are defendants' actions, specifically their transactions in company stock during the class period, inconsistent with the allegation that they possessed material, nonpublic information about stock value?

Assuming for the moment that plaintiffs' claims of material misstatements and omissions are true, economic analysis of these questions would aid in the estimation of damages to participants who acquired shares in the company stock fund at artificially inflated prices during the class period. But if the company stock trades in an efficient market, such analysis generally would find no damages to shares in the company stock fund held by participants at the onset of the class period. This is because an earlier corrective disclosure by defendants would simply have caused the stock price to decline at that earlier time. Moreover, in an efficient market, this price decline would occur swiftly as the price of company stock adjusted to the corrective disclosure—i.e., before participants could have disposed of their holdings at the higher, predisclosure price.¹³ As a consequence, an earlier corrective disclosure would not have enabled participants to avoid losses on shares held at the beginning of the class period.

Allegation That the Company Stock Fund Was an Imprudent Investment for the Retirement Plan

ERISA class actions typically include an allegation that, as of the beginning of the class period, the company stock fund was an imprudent investment and, therefore, unsuitable for inclusion among the investment vehicles offered for investment of participants' retirement plan assets. In many cases, plaintiffs also allege that, as a consequence of its imprudence, the company stock fund should have been discontinued and liquidated, with the proceeds redirected to a prudent alternative investment vehicle.

Putting aside securities whose claimed imprudence stems from being mispriced due to alleged disclosure defects, the author knows of no economic bright-line test to determine whether or when a correctly priced company stock is sufficiently risky, based on public information, as to

become imprudent. In addition, even if the company stock is relatively risky, it would be difficult to deem it imprudent in economic terms if it trades in an efficient market—if the security's market price reflects all available information.¹⁴

Supposing that an economic bright-line test of an investment's imprudence were available, it may be difficult, as a practical matter, for a fiduciary to make this determination in advance of significant adverse news about the company.¹⁵ Indeed, some fiduciaries have closed their firms' company stock fund to future contributions and transfers in, but only after a large decline in stock price already occurred, e.g., American Airlines.¹⁶ Moreover, closing a company stock fund to future contributions when the price of company stock is relatively low may have the unintended consequence of denying participants the opportunity to acquire units in the company stock fund at a low price and then experience subsequent appreciation, if any. In the case of American Airlines, the company stock fund was closed to additional contributions and transfers on January 29, 2003. However, this decision was implemented at a time when American Airlines's stock price had already declined by 87% over the preceding 12 months to close at \$3.16 that day. Since then, American Airlines's stock price has increased by more than 1000% to close at \$37.56 on January 12, 2007.

Another problematic economic issue regarding imprudence is that the fiduciaries' actions may signal information concerning the value of company stock. That is, a fiduciary that decides that a company stock fund is imprudent may find that communicating this determination to participants conveys negative information about stock price to the broad market, depending on the source of the imprudence. For example, if the fiduciary deems the company stock fund unacceptably risky based solely on publicly available information, disclosure of this news may have no permanent negative impact on the market price of company stock. However, if the fiduciary makes the determination of imprudence based on private information, then suspending additional contributions and/or liquidating the company stock fund may convey a negative signal to the market, thereby causing the price of the company's stock to decline. The fiduciary's position in this latter ex-

ample is further complicated by the fact that he or she has a legal obligation to abstain from trading on such information until it is disclosed to the market.¹⁷

The foregoing discussion highlights that ERISA class actions lack an economic definition of what constitutes an imprudent investment that can be consistently applied from case to case. Nonetheless, there are economic analyses that can be helpful in assessing the merits of such imprudence allegations, including consideration of the following questions:

- Did the risk of company stock increase significantly during the class period?
- How did the risk of company stock during the class period compare with the risk of other stocks within the broad market and within the company's industry?
- How does the risk of company stock compare with the risk of stocks of other firms offering company stock funds in connection with their retirement plans?
- Did the investment behavior of financial institutions and pension funds during the class period indicate that they had changed their opinions on the suitability of company stock for inclusion in their portfolios?
- To what extent have the named plaintiffs and other plan participants continued to make discretionary contributions to the company stock fund and/or hold divestible balances (thereby demonstrating that they believe company stock to be a prudent investment)?

It is important to reiterate that the author has found no concept in financial economics that would permit a correctly priced company stock to be deemed universally imprudent for inclusion in employees' retirement plan portfolios.¹⁸ Indeed, financial economics teaches that the prudence of including a particular security as part of a portfolio (again, assuming that security is correctly priced) is in the eye of the beholder; that is, participants with lower risk aversion may prefer to invest in securities that the more risk averse would view as imprudent.

Estimation of Alleged Damages

Several issues must be addressed in determining the appropriate methodology to use in the estimation of alleged

damages in ERISA class actions. First, allegations of material misstatements and omissions may entail a different damage estimation methodology from allegations of imprudence. Second, estimation of damages at the plan level (based on the trustee's purchases and sales of company stock) generally yields smaller amounts than estimation of damages at the individual participant level. This is because plan-level damages effectively net the gains experienced by some participant accounts against the losses experienced by those participant accounts that lost money during the class period.¹⁹ Both of these issues are addressed in the following discussion.

Estimation of Alleged Damages Due to Material Misstatements or Omissions

Estimation of damages due to material misstatements or omissions in an ERISA class action involving company stock employs similar methods to those used in 10b-5 cases to assess materiality and causation. That is, a thorough event study analysis, including assessment of broad market movements and the behavior of other similarly situated stocks, would yield an estimate of the artificial inflation, if any, in company stock during the class period. Estimated damages may then be based either on plan-level purchases and sales of company stock by the trustee, or participant-level acquisitions and dispositions of holdings in the company stock fund during the class period, depending on which is appropriate. Damages to shares held at the onset of the class period under the claim of material misstatements and omissions typically would be zero, as these shares would have been acquired at a time when artificial inflation was zero and the shares were correctly priced.

Estimation of Alleged Damages Due to Imprudence

A common methodology for estimating damages due to imprudence considers what investments the plan and/or its participants would have invested in, other than company stock, in the "but for" world. The Second Circuit Court of Appeals addressed the question of calculating damages due to breach of fiduciary duty in *Donovan v. Bierwirth*, which alleged that plan fiduciaries imprudently

invested plan assets, but that did not include a claim of disclosure defects:

[w]e hold that the measure of loss requires a comparison of what the plan actually earned on the Gruman investment with what the plan would have earned had the funds been available for other plan purposes. If the latter amount is greater than the former, the loss is the difference between the two; if the former is greater, no loss was sustained.²⁰

Regarding the determination of how the plan would have invested the funds in the “but for” world, the Second Circuit Court of Appeals further stated:

[t]he district court should presume that the funds would have been treated like other funds being invested during the same period in proper transactions. Where several alternative investment strategies were equally plausible, the court should presume that the funds would have been used in the most profitable of these. The burden of proving that the funds would have earned less than that amount is on the fiduciaries found to be in breach of their duty. Any doubt or ambiguity should be resolved against them.²¹

This decision in *Donovan v. Bierwirth* sometimes is interpreted to mean that damages should be calculated by conducting the following simulation:

1. Invest the dollar value of the company stock fund as of the beginning of the class period in an alternative investment.
2. Conduct acquisitions and dispositions in the alternative investment that are identical to the acquisitions and dispositions that occurred in the company stock fund during the class period.²²
3. Observe the values of the company stock fund and the hypothetical alternative investment as of the end of the class period.
4. Estimate damages as the excess of the end-of-class period value of the hypothetical alternative investment over the end-of-the-class period value of the company stock fund.
5. Repeat these steps for each of the alternative investments offered by the company’s retirement plan and

choose the largest of the resulting damages.

The Second Circuit Court of Appeals mentioned the possibility that there may be several equally plausible investment alternatives to consider in this calculation. One such alternative that is economically plausible would be a portfolio of all of the retirement plan’s investment vehicles other than company stock, with portfolio weights determined by participants’ actual investment behavior. Another plausible alternative might be a portfolio of stocks from the company’s industry, where the issuers are not currently facing similar allegations of imprudence from their retirement plan participants.²³

From an economic standpoint, the most troubling aspect of the *Donovan v. Bierwirth* methodology is that it bestows perfect hindsight on participants by enabling them to turn back the clock on their investment decisions and select the one that performed the best, ex post. In addition, the amount of estimated damages using this methodology will almost certainly be related to factors that have nothing to do with plaintiffs’ allegations of imprudence. For example, during periods in which the stock market is rising, the best-performing alternative investment may be a fund that invests in risky growth stocks. But during periods when the stock market is falling, the best-performing alternative may be a money market or fixed income fund. That is, the ex post benchmark of prudent investment behavior will change from period to period, under the *Donovan v. Bierwirth* methodology. In cases where the end of the class period is not specified i.e., the class period extends to the present), the best-performing and therefore most prudent alternative investment may change as time passes and the damages analysis is recalculated at successively later end-of-class period dates.

As with estimated damages stemming from alleged material misstatements and omissions, the *Donovan v. Bierwirth* methodology can be calculated at the plan level (based on the trustee’s purchases and sales of company stock in the market) or at the participant level (based on participants acquisitions and dispositions of units in the company stock fund), depending on which is appropriate. Generally, damages calculated at the participant level will exceed damages at the plan level.

Conclusion

The preceding discussion of ERISA class actions centering on employee investments in company stock highlights certain key issues concerning economic analysis of these cases. First, it seems clear that, in most instances, shares of company stock held at the onset of the class period cannot be damaged by misstatements and omissions when company stock is traded in an efficient market. As in open-market class actions claiming securities fraud stemming from alleged disclosure defects, only transactions occurring during the class period can potentially sustain damages. Second, the author has found no concrete guidance, either from economic theory or from the law, which can be used to identify whether or when a company’s stock becomes an imprudent investment for inclusion among employees’ retirement plan assets, assuming that the company stock trades in an efficient market and is correctly priced. Third, certain aspects of the methodology for calculating damages due to imprudence on the part of plan fiduciaries suggested in *Donovan v. Bierwirth* are flawed from the standpoint of economics because this methodology relies on ex post information about investment performance, and because different time periods and market conditions—factors that are typically unrelated to the case at hand—would yield different damages amounts and different conclusions as to the best-performing, and therefore prudent, alternative investment.

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Endnotes

1. See ERISA Sections 407(b)(1) and 404(a)(2); see also ERISA Section 407(d)(6)(A), which defines an *ESOP* as a plan designed to invest primarily in employer securities.

2. While removal of the company stock fund from the investment vehicles offered by a retirement plan and even forced diversification of existing participant investments in company stock may seem like good ideas to some commentators, modern portfolio theory also presumes that investors rationally determine the composition of their portfolios based on their preferences, and that they cannot be made better off by the removal of an investment opportunity.

3. A *company stock fund* is a fund offered among the investment alternatives available to employees in connection with the employer's retirement fund that typically is composed primarily of equity securities of the employer plus sufficient cash to facilitate transactions by the fund. Many company stock funds are *unitized*, whereby a trustee holds a portfolio of company stock and a small amount of cash, and participants hold "units" of this portfolio. For ease of exposition, references to shares in the company stock fund should be generalized to mean either shares or units.

4. One of the potential benefits to companies from employees' investments in company stock may be improved incentive alignment between employees and stockholders. Employee ownership of company stock also may benefit management by establishing a large block of company stock in friendly hands, in the event of a threat of hostile takeover. Many companies also make matching contributions to their employees' retirement plans in the form of company stock. Such matching contributions often are restricted from being diversified for a specified period of time.

5. See Lisa Meulbroek, "Company Stock in Pension Funds: How Costly Is It?" Harvard Business School Working Paper 02-058, at 24. Meulbroek also reports that the lack of diversification from holding company stock results in lower portfolio values than would be obtained in a diversified portfolio. According to Meulbroek, this gap stems from diversifiable risk borne by employees who hold company stock—risk for which there is no expectation of receiving an incremental reward. See *ibid.*, at 2.

6. E.g., as of December 31, 2000, the Enron Corp. Savings Plan held over \$1.3 billion in En-

ron common and preferred stock, or over 60% of plan assets. Each of the other investment alternatives offered by the plan composed less than 5% of plan assets. See Enron Corp. Form 11-K, December 31, 2000, Statements of Net Assets Available for Benefits and Note 3.

7. *Donovan v. Bierwirth*, 754 F.2d 1049 (1985 U.S. App.).

8. See, e.g., CMS Energy ERISA Litigation, Second Amended Complaint, ¶4; *Roderick Russell et al. v. Conesco Services LLC et al.*, Amended Complaint for Violation of the Employee Retirement Income Security Act of 1974, ¶4; Dinegy ERISA Litigation, Third Amended Complaint for Violations of the Employee Retirement Income Security Act, ¶1; and *David Cooper et al. v. Ford Motor Company et al.*, Class Action Complaint for Violations of the Employee Retirement Income Security Act of 1974, ¶233.

9. See, e.g., CMS Energy ERISA Litigation, Second Amended Complaint, ¶4 (class period "August 2, 2000, to the present"); and *David Cooper et al. v. Ford Motor Company et al.*, Class Action Complaint for Violations of the Employee Retirement Income Security Act of 1974, ¶233 (class period "April 15, 2000 [to] the present").

10. Allegations of disclosure defects and imprudence of the company stock fund as a suitable retirement plan investment may not be independent of each other. In some cases, the alleged imprudence of the stock fund may stem from its being allegedly artificially inflated in price due to the claimed disclosure defects. Some ERISA cases also bring other allegations, such as a claim that the defendants failed to monitor outside plan fiduciaries adequately. See, e.g., *David Cooper et al. v. Ford Motor Company et al.*, Class Action Complaint for Violations of the Employee Retirement Income Security Act of 1974, ¶6.

11. U.S. Department of Labor, 29 CFR 2509.95-1, "Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA When Selecting an Annuity Provider," March 6, 1995 (describing ERISA Section 404(a)(1), 29 U.S.C. 1104(a)(1)).

12. See, e.g., Household International ERISA Litigation, Class Action Complaint, ¶¶131-133.

13. In 10b-5 securities class action cases, the Supreme Court has determined that holders have no cause of action because their claims are not "in connection with the purchase or sale of any security." Andrew Edison, Esq., "Holding Claims: An Emerging Cause of Action for Securities Fraud," *Securities Litigation & Regulation*, Volume 10, Issue 11 (October 6, 2004), at 2, citing *Blue Chip Stamps v. Manor Drug Stores* 421 U.S. 723 (1975). There are examples of holder claims brought in state courts where holders were found to have a cause of action. One such case is *Small v. Fritz Companies Inc.*, 65 P.3d 1255 (Cal. 2003), a class action of holders alleging common law fraud and negligent misrepresentation, where the California Supreme Court found that holders may have a cause of action, but were required to specify, on an individual basis, "specific reliance on the defendants' representations: for example, that if the plaintiff had read a truthful account of the corporation's financial status the plaintiff would have sold the stock, how many shares the plaintiff would have sold, and when the sale would have taken place." See Andrew Edison, Esq., *ibid.*, at 2, citing *Small v. Fritz Companies Inc.*, 65 P.3d 1255 (Cal. 2003).

A related issue is the hypothetical fiduciary that allegedly knows that the price of company stock is artificially inflated to an alleged disclosure defect. Holders of shares in the company stock fund who acquired their shares at uninflated prices prior to the onset of the class period may claim that the fiduciary, knowing that com-

pany stock is allegedly overpriced, should have locked in the allegedly inflated class period stock price by diversifying the company stock fund out of company stock and into an alternative investment. But in this hypothetical scenario where the fiduciary has private information indicating that the price of company stock is artificially inflated, he or she has a legal obligation not to trade on such private information. According to Rachal, Shapiro and Eichberger (2005), "[t]his is known as the securities laws' 'disclose or abstain' rules, which prohibit a fiduciary or participant from trading prior to disclosure of this information to the market." See Robert Rachal, Howard Shapiro and Nicole Eichberger, "ERISA Fiduciary Duties Regarding 401(k) & ESOP Investments in Employer Stock," *ERISA Litigation*, ed. Jayne E. Zanglein and Susan J. Stabile, (Washington, DC: BNA, 2005), at 627-628. In an efficient market, the price of company stock would adjust quickly to public disclosure of the hypothetical private information, making it impossible for the fiduciary to lock in the higher predisclosure price for holders.

14. In *Summers v. State Street Bank & Trust Co.*, 453 F.3d 404 (7th Cir. 2006), Judge Posner discusses the relation between stock price level and risk in that, as the price of company stock declines, the company's leverage increases, as does the risk of company stock. Judge Posner reasons that the increased leverage and riskiness that result from a declining price of company stock may have the capacity to make company stock an identifiably imprudent retirement investment. But Judge Posner also points out that "determining the 'right' point, or even range of 'right' points [of riskiness]," for an ESOP fiduciary to break the plan and start diversifying may be beyond the practical capacity of the courts to determine.

15. Commenting on whether a directed, third-party fiduciary would be obligated to override its directions and diversify a company stock fund, DOL states "[i]n limited, extraordinary circumstances, where there are clear and compelling public indicators, as evidenced by an 8-K filing with the Securities and Exchange Commission (SEC), a bankruptcy filing or similar public indicator, that call into serious question a company's viability as a going concern, a directed trustee may not have a duty to follow the named fiduciary's instruction without further inquiry." DOL Field Assistance Bulletin 2004-03 (hereafter "FAB"), December 17, 2004, at 5-6. In granting Fidelity's motion to dismiss in *DiFelice v. US Airways Inc.*, Case No. 1:04cv889 (E.D. VA. June 26, 2006), the Court stated that the FAB "sensibly recognizes [a formal bankruptcy filing] as the proper trigger for a duty of inquiry by a directed trustee." However, neither the FAB nor the Court's decision in *DeFelice v. US Airways Inc.* provides specific guidance as to when a fiduciary (other than a directed fiduciary) should deem an investment "imprudent." Moreover, in *Summers v. State Street Bank & Trust Co.*, 453 F.3d 404 (7th Cir. 2006), Judge Posner acknowledged that "selling when bankruptcy is declared will almost certainly be too late."

16. As of January 29, 2003, the American Airlines company stock fund was closed to additional contributions and transfers in, and participants holding balances were allowed to redirect their investments in the company stock fund to other investment vehicles. American Airlines 11-K, December 31, 2002, n.4.

17. See Robert Rachal, Howard Shapiro and Nicole Eichberger, "ERISA Fiduciary Duties Regarding 401(k) & ESOP Investments in Employer Stock," *ERISA Litigation*, ed. Jayne E. Zanglein

and Susan J. Stabile, (Washington, DC: BNA, 2005), at 627-628. Note that while the suspension of additional purchases of company stock, by itself, may not run afoul of the “disclose or abstain” rule (since the suspension does not constitute “trading”), Section 306 of the Sarbanes-Oxley Act of 2002 may require a prompt blackout notice when this suspension occurs.

18. See fn. 14.

19. There may be legal significance to the question of whether claims should be brought on behalf of the plan or on behalf of individual participants. Section 502(a)(3) “authorizes a plan participant, beneficiary, or fiduciary to bring claim in federal court to obtain injunctive or ‘other appropriate equitable relief’ to remedy any violation of title I of ERISA, or to enforce the terms of an employee benefit plan.” See Colleen E. Medill, “Resolving the Judicial Paradox of ‘Equitable’ Relief Under ERISA Section 502(A)(3),” *The John Marshall Law Review* 39, No. 3 (2006), pp. 827-967, hereafter “Medill,” at 834 quoting 502(a)(3). However, I understand that such “equitable” relief may not include the monetary recovery of investment losses. See Medill, at 839. Plaintiffs may bring suit for monetary recovery of investment losses under ERISA Section 502(a)(2), but the relief sought by plaintiffs must flow to the plan as a whole, and not to a subset of individual participants. See Medill, at 887-888.

20. *Donovan v. Bierwirth*, 754 F.2d 1049 (1985 U.S. App.).

21. *Ibid.*

22. A realistic “but for” world probably would not entail the same dollar acquisitions and dispositions in the investment alternative as were made in the company stock fund. This is because the dollar amounts of dispositions actually made in the company stock fund likely depended on the price of company stock at the times of these transactions. Where plaintiffs claim that the price of company stock was artificially inflated, the alleged “but for” price of company stock would have been lower, likely making the amounts available to sell during the class period correspondingly smaller.

23. In cases where plaintiffs claim the company stock fund should have been liquidated and the proceeds directed to other investments, the damages methodology may also need to consider the impact on the price of company stock of selling the plan’s block of company stock, and simulate selling the block piecemeal over time so as to minimize the impact of the sales on market price.

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