Living with Defined Contribution Pensions

Remaking Responsibility for Retirement

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Chapter 9

Emerging Problems of Fiduciary Liability

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With the passage of the Employee Retirement Income Security Act of 1974 (ERISA), Congress included a provision—section 404(c)—designed to shift to participants the losses stemming from their exercise of control over their investments in defined contribution plans. Until recently, and notwithstanding the remarkable growth in the prevalence of these plans, there has not been any judicial guidance on the meaning of this crucial provision. Section 404(c), nestled among the general fiduciary prudence requirements, carves out defined contribution plans (or individual account plans) for special treatment:

> (c) Control over assets by participant or beneficiary.
>
> In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) —
>
> (1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and
>
> (2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.[1]

While bearing witness to the remarkable growth of such plans, fiduciaries have uneasily awaited the courts' rulings on the meaning and scope of this ERISA provision.

The decision of the United States Court of Appeals for the Third Circuit in *In re: Unisys Savings Plan Litigation*[2] represents the federal courts' first foray into the fiduciary responsibility issues surrounding the administration of these defined contribution pension plans. The Court in

Unisys has impressed upon fiduciaries a host of new obligations that may ultimately threaten the availability of this increasingly popular method of delivering retirement income.

The *Unisys* opinion adopted a stringent standard of review for determining the prudence of investment decisions, while ignoring both the discretion owed the fiduciaries in such circumstances and the causation requirements in ERISA. With the adoption of such a standard for determining the prudence of plan investments, the Court of Appeals will require a trial on the fiduciary breach claims every time an investment does not perform as anticipated. Further, and perhaps most troubling for plan sponsors, the opinion requires that fiduciaries rebroadcast public information on the status of plan investments, contrary to the explicit Department of Labor regulations excusing fiduciaries from any such obligation. Indeed, the *Unisys* opinion adopts a disclosure standard higher than that contemplated under federal securities law, which are similarly predicated upon the law of trusts.

Background of the Litigation

Defendants in the *Unisys* matter are the fiduciaries of the Unisys Savings Plan, the Unisys Retirement Investment Plan, and the Unisys Retirement Plan II (collectively the "Plan").[3] The Plan is an employee-directed defined contribution plan under ERISA sections 3(34) and 404(c), 29 U.S.C. §§ 1002(34), 1104(c). Of course, in a defined contribution plan (such as the Unisys Savings Plan), "employees are not promised any particular level of benefits, instead, they are promised only that they will receive the balances in their individual accounts."[4]

The employee-investors, participants in defined contribution plans, not the fiduciaries, bear the risk of loss. Two commentators described the risk allocation in these plans:

> Defined contribution and defined benefit plans allocate investment risk oppositely. Under a defined contribution plan, the employee bears the burden of disappointing investment results and pockets the gains from good results. Under a defined benefit plan, the employer bears the investment risk. Since the employer has promised to provide benefits at a certain level, the employer remains liable to pay the benefits even if the fund turns up short. (Fischel and Langbein 1988, 1112–13)

To facilitate the management of their investments, the Unisys Plan offered participants the opportunity to direct their money to any of six investment options and, further, subject to certain restrictions, to transfer their money monthly between these six funds. According to the Third Circuit:

Like its predecessors, the Unisys Savings Plan established an individual account for each participant and offered several fund alternatives into which a participant could direct contributions on a tax-deferred basis: the Diversified Fund; the Indexed Equity Fund; the Active Equity Fund; the Unisys Common Stock Fund; the Short Term Investment Fund; and the Insurance Contract Fund.[5]

In 1987 and 1988, Unisys purchased three five-year "guaranteed investment contracts" for inclusion in the Sperry Fixed Income Fund and the Unisys Insurance Contract Fund.[6] These contracts were issued by Executive Life Insurance Company of California and were then rated AAA and A+ by two nationally recognized insurance ratings services, Standard & Poor's and A. M. Best.[7] On April 11, 1991, California regulators imposed a conservatorship, the insurance equivalent of a Chapter 11 corporate reorganization, on Executive Life.[8] Immediately thereafter, plaintiffs in these consolidated proceedings filed twelve class action complaints in the district courts of Minnesota and Pennsylvania, alleging that their Executive Life investments were a total loss.

The district court granted Unisys's motion for summary judgment and dismissed plaintiffs' claims, holding that the fiduciaries selection of Executive Life GICs was based upon "solid, respectable and typical grounds."[9] Moreover, because the participants had adequate information from which to make informed choices regarding their investments, the district court ruled that, pursuant to ERISA section 404(c), 29 U.S.C. § 1104(c), the fiduciaries could not be liable for the alleged losses.[10]

The Third Circuit reversed the district court's ruling and remanded the matter for trial. As to the initial investment, that Court held that the prudence of the Unisys decision to purchase the Executive Life GICs could not be determined without a trial.[11] More specifically, the Court held that the prudence of the fiduciaries' primary reliance on the insurance ratings services, in selecting the Executive Life GICs, could not be resolved on summary judgment.[12] While the Third Circuit described the general prudence standards to guide the district court on remand, the Court failed to address squarely the causation prong of the analysis, required by ERISA, which looks to whether the fiduciaries' actions caused the alleged losses.

Moreover, while the Third Circuit held that Unisys may rely on ERISA section 404(c), 29 U.S.C. § 1104(c), in defense of the participants' claims, the Court ruled further that Unisys' disclosures to participants on the status of their investments could not be examined in the larger context of publicly available information then available on Executive Life.[13] Section 404(c) recognizes that participants in such plans enjoy the right to direct their investments as they see fit and, further, excuses fiduciaries from losses associated with those investment instructions. To determine whether Unisys gave participants adequate information regarding their

investments, the Court of Appeals rejected Unisys' argument, grounded in both the practical aspects of defined contribution plan administration and the explicit Department of Labor regulations, that the fiduciaries need not republish public information on these investments. In other words, and equally troubling for plan administrators, the Third Circuit's ruling requires defined contribution plan fiduciaries to somehow collect, assess, and then republish public information on each of the many hundreds of investments that may comprise a typical 401(k) plan portfolio.

Fiduciary Discretion

The Third Circuit's ruling on the investment decision squarely raises the issue left open in the Supreme Court's ruling in *Firestone Tire and Rubber Co. v. Bruch,*[14] that is, whether fiduciary decisions should be scrutinized under the "arbitrary and capricious standard," particularly when plan documents afford the fiduciaries discretion in such matters (and the statutory scheme impresses investment risk on participants). However, to the extent the *Unisys* Court announced an exacting standard of review of investment decisions, that portion of the Third Circuit's ruling has arguably been overruled in the Supreme Court's recent decision in *Varity Corp. v. Howe.*[15]

The *Unisys* opinion is also at odds with then Judge, and now Justice, Scalia's opinion in *Fink v. National Savings and Trust Co.,*[16] and its Circuit Court progeny, recognizing that ERISA's causation requirements compel the dismissal of fiduciary breach claims where there is indisputable objective evidence of the prudence of the fiduciary's actions. Adoption of either the *Firestone/Varity* or *Fink* approach works to avoid a full trial on the prudence of fiduciary investment decisions each time any plan investment falls short of expectations. The *Unisys* ruling presents such a nightmare for fiduciaries (Schultz 1996).

Moreover, and as more fully discussed below, the Court in *Unisys* impressed upon fiduciaries disclosure obligations inconsistent with ERISA. The Third Circuit held that Unisys' disclosures to participants on the status of their investments could not be read in the context of the variety of publicly available information on Executive Life. In so holding, the Court refused to follow the Department of Labor's regulations on the issue, some 18 years in the making. Further, the Third Circuit's ruling runs counter to the uniform standard on disclosures necessary under the federal securities laws.

Given the relationship between 401(k) plans and securities markets, the Third Circuit's ruling may have untoward consequences for the nation's economy (Williams 1996). To impress additional costs on defined contribution plan sponsors and fiduciaries may result in the curtailment

of the availability of such plans, to the detriment of both workers and financial markets.[17]

Although the Unisys Plan documents granted the fiduciaries discretion in making the initial investment choice, and ERISA recognizes that discretion is the hallmark of fiduciary activity, the Third Circuit, on remand, ordered the district court to apply strict scrutiny to the prudence question.[18] Examining a decision of another administrative body or lower judicial tribunal, a court will, at the threshold, select an appropriate "standard of review." The level of scrutiny employed by that reviewing court will often determine the outcome of a dispute.

The Supreme Court in *Firestone* held that, in certain instances, an ERISA fiduciary's actions will be evaluated pursuant to the deferential "arbitrary and capricious" standard of review. In other words, the Supreme Court recognized that judicial scrutiny of a fiduciary's decision on a participant's claim for plan benefits need not be exacting. The Third Circuit's opinion raises the question whether such a deferential standard of review is appropriate in addressing fiduciary breach claims under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2), like imprudent selection of investments and failure to disclose material information, as well as benefits claims under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).[19] The Courts of Appeals have not uniformly resolved this question.

As the Supreme Court held in *Firestone,* "ERISA's legislative history confirms that the Act's fiduciary responsibility provisions . . . 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.' "[20] Further, and particularly important to the determination of the appropriate standard of review:

> Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers. *See* Restatement (Second) of Trusts § 187 (1959) ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion").
>
> * * *
>
> Hence, over a century ago we recited that "When trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of discretion vested in them by the instrument under which they act."[21]

Indeed, the Supreme Court's very recent opinion in *Varity* holds that the standard applied to benefits claims should also govern the resolution of fiduciary breach claims:

> [C]haracterizing a denial of benefits as a breach of fiduciary duty does not necessarily change the standard a court would apply when reviewing the administra-

tor's decision to deny benefits. *After all, Firestone, which authorized deferential court review when the plan itself gives the administrator discretionary authority, based its decision upon the same common-law trust doctrines that govern standards of fiduciary conduct.*[22]

Although *Varity* seemingly compels the adoption of a deferential standard of review of the fiduciary breach claims at issue in *Unisys,* the final resolution of that question must await a ruling from the Supreme Court. Unisys' *certiorari* petition, however, was denied on October 7, 1996.[23]

Prior to *Varity,* the Courts of Appeals disagreed on whether discretionary review is appropriate in resolving fiduciary breach claims under ERISA section 502(a)(2). According to the Third Circuit:

> [W]e believe that after *Firestone,* trust law should guide the standard of review over claims, such as those here, not only under section 1132(a)(1)(B) but also claims filed pursuant to 29 U.S.C. § 1132(a)(2) based on violations of the fiduciary duties set forth in section 1104(a). After all, section 1104(a) also abounds with the language of trust law, and the Supreme Court previously has noted that "Congress invoked the common law of trusts to define the general scope of [fiduciaries'] authority and responsibility."[24]

The Second Circuit, on the other hand, has limited *Firestone's* reach to the review of benefits claims under ERISA section 502(a)(1)(B):

> We reject the argument that *Firestone*'s arbitrary and capricious standard applies to [defendants'] conduct in this matter. *Firestone* involved the denial of benefits, and the Court stated that if the terms of the plan accorded the administrator discretion in such matters, the decision should be upheld unless arbitrary and capricious. However, we decline to apply the arbitrary and capricious standard to the fiduciary conduct at issue because this case does not involve a simple denial of benefits, over which the plan administrators have discretion.[25]

As Unisys explained to the Court of Appeals, both the Department of Labor and the Pension Benefit Guaranty Corporation (PBGC), during the relevant time period, established a flexible standard for the purchase of insurance annuities upon the termination of a defined benefit pension plan, pursuant to ERISA section 4041(b)(3)(A)(i), 29 U.S.C. § 1341(b)(3)(A)(i). In other words, to satisfy an individual's pension benefit from one insurance company for his or her lifetime, both of these regulatory agencies required only that the insurance company selected by state licensed.[26] This standard applies notwithstanding the fact that the fiduciaries typically labor under a conflict of interest in such circumstances; that is, they stand to recoup any available defined benefit pension plan surplus.[27]

Aside from the fact that Executive Life was licensed by the State of California, it had, at the time of Unisys' purchase, an AAA rating from Standard and Poor's and an A+ rating from A. M. Best.[28] Moreover, it is

undisputed that no conflict of interest arose with the purchase of the Executive Life GICs, and Executive Life was but one of the many insurers in the Plan's portfolio. Mindful of the abundance of proof suggesting the reasonableness of the selection of Executive Life, proper application of the *Firestone/Varity* "arbitrary and capricious" standard would likely have absolved Unisys from plaintiffs' claim to damages, without the need for a trial.

Causation Requirements

The Third Circuit's *Unisys* opinion also ignores the express command of ERISA section 409, 29 U.S.C. § 1109, and other Circuit opinions, requiring that plaintiffs bringing fiduciary breach claims prove that the fiduciary's actions caused loss. Following then Judge Scalia's lead in *Fink v. National Savings and Trust Co.*,[29] other federal judges have adopted the "hypothetical prudent fiduciary" analysis to summarily resolve fiduciary breach claims. These courts, properly accounting for the deference owed fiduciaries and the statute's explicit causation requirements, recognize that, if some objective proof of the prudence of a fiduciary's actions can be mustered, no finding of liability is proper.[30] Similarly, the *Firestone/Varity* analysis—application of the "hypothetical prudent fiduciary" test, required by a close reading of ERISA—would curtail the number of fiduciary breach claims to the benefit of *both* fiduciaries and participants.[31]

After describing the general prudence standard, then Judge Scalia observed that a second step is needed. ERISA's causation requirement, contained in section 409, compels an inquiry into whether there is objective evidence of prudence. In such circumstances, a fiduciary cannot be held liable in damages:

> I know of no case in which a trustee who had happened—through prayer, astrology or just blind luck—to make (or hold) objectively prudent investments (e.g., an investment in a highly regarded "blue chip" stock) has been held liable for losses from those investments because of his failure to investigate and evaluate beforehand.[32]

The Eighth Circuit, building on Judge Scalia's opinion in *Fink*, explained further: "Even if a trustee failed to conduct an investigation before making a decision, he is insulated from liability if a hypothetical prudent fiduciary would have made the same decision anyway."[33]

Although the Third circuit cited both *Fink* and *Roth* on the general prudence standard, the *Unisys* opinion makes no mention of the causation requirement and requires a trial, despite Unisys's proffer of an abundance of indisputable objective evidence showing the prudence of the fiduciaries' actions.

Fiduciary Disclosures

The Third Circuit's opinion also requires defined contribution plan fiduciaries to retransmit publicly available information on the status of participants' investments, contrary to the Department of Labor's explicit regulatory command excusing fiduciaries from such an obligation. Indeed, by tying this obligation to ERISA section 404(a), the Third Circuit has unwittingly supplanted the Department's detailed regulatory scheme for such plans, spanning, along with its "preamble," some thirty-one pages of the *Federal Register*.[34] In effect, the *Unisys* opinion requires defined contribution plan fiduciaries to run a "clipping service" for participants, collating and rebroadcasting the multitude of public information on plan investments, cobbled only from ERISA's general fiduciary obligation to act prudently.[35]

The Third Circuit properly held that, on remand, Unisys may seek to prove, pursuant to ERISA section 404(c), 29 U.S.C. § 1104(c), that the participants in this "individual account plan" caused the alleged losses. In other words, the Court recognized that the Plan fiduciaries cannot be held liable if the alleged losses "result[ed] from such participant's or beneficiary's exercise of control."[36] Consistent with the design of many 401(k) plans, featuring varied investment options and participant transfer rights, ERISA section 404(c) works to circumscribe fiduciary liability upon a showing that the participant's personal investment decisions gave rise to the claimed losses.

Nevertheless, the Court went beyond section 404(c), to the general prudence obligations of section 404(a), to define the fiduciary's disclosure obligations in administering plans governed by 404(c). Building upon a line of unrelated Third Circuit fiduciary disclosure cases, construing the prudence standard of section 404(a), the Court reached the alarming conclusion that Unisys was obligated to broadcast to participants public information on the status of their investments, limited only by the materiality standard apparently borrowed from federal securities law:

> In our view, while Unisys was not obligated to share with participants everything it knew about GICS and Executive Life, it was obligated to impart to participants material information of which it had knowledge that was sufficient to apprise the average plan participant of the risks associated with investing in the Fixed Income and Insurance Contract Funds in view of the purchase of the Executive Life GICs and the financial condition Executive Life presented in 1990. *Moreover, in this regard, we do not, as Unisys urges, distinguish between "public" and "non-public" information nor do we limit Unisys' duty to disclose to the latter.*[37]

Oddly enough, and further clouding the fiduciaries' obligations, the Third Circuit's opinion does not resolve "whether Unisys had a duty

under section 1104(a) to communicate anything at all to the Plans' participants about these matters in the first place."[38]

The Third Circuit now seemingly requires that fiduciaries comport their disclosures with an amorphous standard derived from a mixed bag of decisions involving everything but defined contribution pension plans. Indeed, to look to the general fiduciary obligations of section 404(a), to define the disclosures needed under 404(c), runs counter to the limited nature of ERISA's explicit disclosure requirements, spelled out in ERISA sections 101, 102, 103 and 104, 29 U.S.C. §§ 1021–24.[39]

In that regard, the Supreme Court's holding in *International Brotherhood of Teamsters, Chauffeurs, Warehousers and Helpers v. Daniel,*[40] underscores the Third Circuit's error. *Daniel* emphasized the particularized nature of the disclosures required under ERISA, as opposed to federal securities laws:

> Unlike the Securities Acts, ERISA deals expressly and in detail with pension plans. ERISA requires pension plans to disclose specified information to employees in a specified manner, . . . in contrast to the indefinite and uncertain disclosure obligations imposed by the antifraud provisions of the Securities Acts.[41]

Cast adrift from ERISA's statutory moorings, the Third Circuit, contrary to *Daniel,* has fashioned a new "rule" threatening the very existence of defined contribution plans.

More specifically, the Third Circuit's opinion is directly at odds with the Department of Labor's 404(c) regulations. To keep defined contribution plan administrative costs down, the regulations explicitly relieve fiduciaries of the disclosure obligation announced in *Unisys.* Under the regulations, a participant's exercise of control under ERISA section 404(c) will not be deemed "independent" if:

> (ii) *A plan fiduciary has concealed material non-public facts regarding the investment from the participant or beneficiary,* unless the disclosure of such information by the plan fiduciary or beneficiary would violate any provision of federal law or any provision of state law which is not preempted by [ERISA].[42]

Admittedly, the 404(c) regulation, by its terms, did not directly apply to the *Unisys* dispute.[43]

Nevertheless, that fact only further highlights the problems facing fiduciaries in the wake of the *Unisys* opinion. By grounding the disclosure obligation in section 404(a), as opposed to 404(c), the *Unisys* holding applies equally to fiduciary conduct arising before and after the effective date of the regulations. In other words, fiduciaries must now harmonize the Third Circuit's opinion, based on section 404(a), and the Department's 404(c) regulation. Because the two approaches are irreconcilable, the fiduciaries must either adhere to the *Unisys* ruling (at tremendous cost), or terminate the plan.

Moreover, and despite this Court's warning in *Daniels*, the *Unisys* opinion's disclosure requirements *surpass* that required under the federal securities laws. It is a basic principle of corporate law that a corporation's directors owe fiduciary duties to the corporation's stockholders.[44] Despite this fiduciary relationship, the federal securities laws do not require the dissemination of public information regarding a corporation's securities.[45] While corporate law and ERISA share the same fiduciary underpinnings, the Third Circuit has, without any basis in law or logic, announced a more stringent standard governing disclosures on investments held on behalf of participants in ERISA plans.

The 404(c) Regulations

The Department of Labor, in 1992, issued the regulations called for in ERISA section 404(c). Although the regulations themselves are exceptionally intricate and defy ready characterization, a couple of highlights bear mention. To bring itself within the "safe harbor" contemplated by ERISA section 404(c), the defined contribution plan must offer participants at least three investment alternatives, each of which is diversified and "has materially different risk and return characteristics."[46] Participants must also be able to transfer their money between these investment vehicles, or funds, "with a frequency which is appropriate in light of the market volatility to which the alternative may reasonably be expected to be subject."[47]

While the regulations include a laundry list of required information to be disclosed to participants, so that the participants can exercise the "control" contemplated by the statute, the plan sponsor need not distribute publicly available information on the status of plan investments.[48] As noted above, however, the Third Circuit's *Unisys* ruling is to the contrary.

Moreover, the regulations mandate that the operative documents specifically warn participants that the fiduciaries may be relieved from any losses associated with the plan's investments. In other words, the fiduciaries may not invoke the 404(c) defense unless the participants are given:

> [A]n explanation that the plan is intended to constitute a plan described in section 404(c) of the Employee Retirement Security Act, and Title 29 of the *Code of Federal Regulations* Section 2550.404c-1, and that the fiduciaries of the plan may be relieved of liability for any losses which are the direct and necessary result of investment instructions given by such participant or beneficiary.[49]

Lastly, and as should be clear by now, because the Third Circuit in *Unisys* grounded its disclosure obligations in the statute, rather than the DOL regulation, it remains to be seen whether, in the future, a fiduciary's

compliance with the regulations alone will effectively cut off liability for investment losses.

Conclusion

In sum, the Third Circuit's *Unisys* opinion: (1) adopts a standard of review for determining the prudence of an investment that ignores the discretion owed fiduciaries in such circumstances; (2) fails to analyze the explicit causation requirements in ERISA; and (3) dictates disclosure standards higher than those adopted by the Department of Labor (and required under federal securities law). The practical effect of the ruling is to require fiduciaries to keep participants abreast of the status of the hundreds, if not thousands, of investments in a typical 401(k) plan, at a time when regulatory burdens already threaten the availability of such plans. To so engraft on section 404(c) duties derived from section 404(a) will, contrary to the legislative intent, dramatically drive up the costs of administering such a plan while circumscribing the availability of the congressionally mandated affirmative defense. All told, fiduciaries can expect to see an increase in fiduciary breach claims, whenever defined contribution plan investments do not perform as anticipated.

It should be noted that the author and his firm have represented the Unisys defendants since the inception of this dispute.

Notes

1. 29 U.S.C. § 1104(c). The corresponding definitional section, 1002(34), limits the application of this defense to certain enumerated plans:

> (34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's accounts.

29 U.S.C. § 1002(34). Although ERISA was passed in 1974, the regulations called for in section 404(c) were not issued until 1992.

2. 74 F.3d 420 (3d Cir. 1996).

3. The three plans were "identical" and, as such, will be together described as a singular plan (*In re: Unisys Savings Plan Litig.*, 74 F.3d 420, 426–27 [3d Cir. 1996]).

4. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 637 n.1 (1990). Such plans have enjoyed phenomenal growth in the last ten years, eclipsing the use of defined benefit plans to deliver income to retirees:

> Since the mid 1970s, the private pension system in the United States has undergone considerable change. The most notable development has been the increasing reliance on defined contribution plans over the traditional defined benefit plans. Between 1980 and 1985 alone, the number of primary defined contribution plans increased by 71 percent and the number of participants rose by 83 percent; in contrast, primary defined benefit coverage showed virtually no growth.

(Clark and McDermed 1990).

5. *Unisys,* 74 F.3d at 426.

6. A guaranteed investment contract (GIC) is a contract, issued by an insurance company, "under which the issuer is obligated to repay the principal deposit at a designated future date and to pay interest at a specified rate over the duration of the contracts" (ibid., 426). The Unisys Savings Plan emerged from the merger of the Sperry Retirement Program—Part B and the Burroughs Employees Savings Thrift Plan (id.). Following the merger of the two plans, the Sperry fund ceased to accept new contributions, but proceeds from contracts in that fund were reinvested in the Unisys Insurance Contract Fund (id.).

7. Ibid., 427.

8. Ibid., 431.

9. *In re: Unisys Savings Plan Litig.,* No. 91-3067, 1995 WL 29048, at *4 (E.D. Pa. Jan. 26, 1995). Summary judgment is a means by which a court may, in the absence of a dispute over a fact in a civil lawsuit, summarily grant a judgment in favor of a party to that suit (without the need for a trial).

10. Ibid., *3.

11. *Unisys,* 74 F.3d at 434–37.

12. Ibid., 435–36.

13. Ibid., 443.

14. 489 U.S. 101 (1989).

15. No. 94-1471, 1996 U.S. LEXIS 1954 (U.S. March 19, 1996).

16. 772 F.2d 951, 961–65 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part).

17. Indeed, the mischief of the *Unisys* opinion will extend beyond the borders of the Third Circuit. ERISA's expansive jurisdictional provision allows for suit wherever a defendant "may be found" or where the "breach took place" (29 U.S.C. § 1132[e][2]). Hence, future plaintiffs, by suing in the Third Circuit, may readily circumvent unfavorable circuit authority elsewhere, so long as the defendant is found to have minimum contacts with the Third Circuit (an easy task given the number of Delaware corporations) or the plaintiff resides there (e.g., *Varsic v. United States District Court,* 607 F.2d 245, 248 [9th Cir. 1979] ["Congress' choice of this term ['found'] for inclusion in the ERISA venue provision further supports our conclusion that the provision is intended to expand, rather than restrict, the range of permissible venue locations"]).

18. *Unisys,* 74 F.3d at 433–37.

19. The Supreme Court's opinion in *Firestone* was limited to the standard governing judicial review of benefits claims under ERISA section 502(a)(1)(B). According to Justice O'Connor:

> The discussion which follows is limited to the appropriate standard of review in § 1132(a)(1)(B) actions challenging denials of benefits based on plan inter-

pretations. We express no view as to the appropriate standard of review for actions under other remedial provisions of ERISA.

(*Firestone,* 489 U.S. at 101).

20. Ibid., 110.

21. Ibid., 111. The commentary to section 187 of the Second Restatement of Trusts, the section relied on in *Firestone,* extends this discretionary authority to investment decisions. See Restatement (Second) of Trusts § 187, comment c (1959) (the discretionary authority "is applicable not only to powers to lease, sell or mortgage the trust property or to invest trust funds, but also to powers to allocate the beneficial interest among various beneficiaries, to determine the amount necessary for a beneficiary's support, or to terminate the trust").

22. *Varity,* 1996 U.S. LEXIS 1954, at * 45 (emphasis added).

23. A trial in this matter was concluded in the fall of 1997.

24. *Moench v. Robertson,* 62 F.3d 553, 565 (3d Cir. 1995) (quoting *Central States, Southeast and Southwest Areas Pension Fund v. Central Transp., Inc.,* 472 U.S. 559, 570 [1985]). *See also Mahoney v. Board of Trustees,* 973 F.2d 968, 971–73 (1st Cir. 1992) (rejecting "strict standard of review" because " 'Where discretion is conferred upon the trustee with respect to the exercise of a power . . . the trust's 'exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion' ") (quoting Restatement [Second] of Trusts § 186).

25. *John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan,* 26 F.3d 360, 369 (2d Cir. 1994).

26. See 29 C.F.R. § 2617.2, 2617.4, 2617.22(d)(8) (Pension Benefit Guaranty Corporation standard); 29 C.F.R. § 2510.3–3(d)(2)(ii)(A)(1) (Department of Labor standard).

27. E.g., *Riley v. Murdock,* 890 F. Supp. 444, 458–59 (E.D.N.C. 1995) (purchase of Executive Life annuities ancillary to termination of defined benefit pension plan not a breach of fiduciary obligation, even if selection of annuity maximizes reversion of plan surplus).

28. *Unisys,* 74 F.3d at 427.

29. 772 F.2d 951, 961–61 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part).

30. *Kuper v. Quantum Chemicals Corp.,* 852 F. Supp. 1389, 1397–98 (S.D. Ohio 1994) ("Indeed, evidence that independent, professional observers of market trends differed in their projections of future Quantum stock performance merely underscores the fact that circumstances then existing would not have compelled reasonable persons to a singular conclusion about the stock's future prospects. . . . Defendants cannot be said to have been objectively imprudent for having acted in the same manner as impartial observers had recommended").

31. Cf. H.R. Rep. No. 533, 93d Cong. 2d Sess. (1974), reprinted in 1994 U.S. Code Cong. & Admin. News 4639, 4640 (ERISA designed to "promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits"). See also *Mertens v. Hewitt Assocs.,* 113 S. Ct. 2063, 2071 (1993) ("ERISA [is] an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests — not all in favor of potential plaintiffs").

32. *Fink,* 772 F.2d at 962.

33. *Roth v. Sawyer-Cleator Lumber Co.,* 16 F.3d 915, 919 (8th Cir. 1994). See also *Kuper v. Iovenko,* 66 F.3d 1447, 1459 (6th Cir. 1995) ("[A] fiduciary's failure to investigate an investment decision *alone* is not sufficient to show that the decision

was not reasonable") (emphasis in original); *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 279 (2d Cir. 1992) ("Proof of a causal connection . . . is required between a breach of fiduciary duty and the loss alleged").

34. *See* 57 Fed. Reg. 46906–37.

35. Unisys collected for the Court of Appeals a sample of the public materials then available on Executive Life, from such sources as the *Wall Street Journal, Forbes*, the *New York Times*, the *Los Angeles Times*, the *San Francisco Chronicle*, the United Press International, and the Associated Press. According to the Court of Appeals, "[d]uring this time, Executive Life's condition was widely reported in the financial press" (*Unisys*, 74 F.3d at 431).

36. 29 U.S.C. § 1104(c)(2).

37. *Unisys*, 74 F.3d at 443 (emphasis added). The opinions from which the Third Circuit's new disclosure rule was derived speak nothing of the circumstances unique to the administration of defined contribution pension plans (*Unisys*, 74 F.3d at 440–41). See *Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 57 F.3d 1255 (3d Cir. 1995) (modifications to retirement medical plan), *petition for cert. filed*, 64 U.S.L.W. 3167 (U.S. Sept. 8, 1995); *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226 (3d Cir. 1994) (claims for life insurance and accidental death and dismemberment benefits); *Bixler v. Central PA Teamsters Health and Welfare Plan*, 12 F.3d 1292 (3d Cir. 1993) (participant inquiries regarding medical benefits); *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130 (3d Cir.) (early retirement "window" afforded defined benefit pension plan participants), *cert. denied*, 114 S. Ct. 622 (1993).

38. *Unisys*, 74 F.3d at 442–43.

39. In so holding, the *Unisys* opinion also runs afoul of the Supreme Court's repeated admonition that ERISA cannot be construed to create new rights and obligations, absent an explicit congressional directive. E.g., *Mertens v. Hewitt Assoc.*, 113 S. Ct. 2063, 2071 (1993) ("[V]ague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration"). Prior to *Unisys*, all assumed that a 404(c) plan fiduciary need not look beyond that section to discern its responsibilities in administering such a plan. (Sacher et al. 1991).

40. 439 U.S. 551 (1979).

41. *Daniel*, 439 U.S. at 569. See also *Curtiss-Wright Corp. v. Schoonegjongen*, 115 S. Ct. 1223, 1231 (1995) (regarding ERISA's statutory disclosure requirements—"This may not be a foolproof informational scheme, although it is quite thorough. Either way, it is the scheme that Congress devised").

42. 29 C.F.R. § 2550.404c-1(c)(2)(ii) (emphasis added).

43. 29 C.F.R. § 2550.404c-1(g)(1) ("[T]his section is effective with respect to transactions occurring on or after the first day of the second plan year beginning on or after the first day of the second plan year beginning on or after October 13, 1992").

44. "A director is a fiduciary" (*Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587, 588 [1875]). So is a dominant or controlling stockholder or group of stockholders (*Southern Pacific Co. v. Bogert*, 250 U.S. 483, 492 [1919]). Their powers are powers in trust. See *Jackson v. Ludeling*, [88 U.S. 616,] 21 Wall. 616, 624 [1874] ("[The] standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders").

45. *Sailors v. Northern States Power Co.*, 4 F.3d 610, 613 (8th Cir. 1993) ("The securities laws require disclosure of information that is not otherwise in the public domain") (quoting *Acme Propane, Inc. v. Tenexco, Inc.*, 844 F.2d 1317, 1323

[7th Cir. 1988]); *Hillson Partners Ltd. Partnership v. Adage, Inc.,* 42 F.3d 204, 212 (4th Cir. 1994) (same).

46. 29 C.F.R. § 2550.404c-1(b)(3)(B).
47. 29 C.F.R. § 2550.404c-1(b)(2)(B)(2)(ii)(C).
48. 29 C.F.R. § 2550.404c-1(c)(2)(ii).
49. 29 C.F.R. § 2550.404c-1(b)(2)(B)(1)(i).

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