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Enron: The Final Straw & How to Build Pensions of Brick

Sharon Reece*

Laws grind the poor, and rich men rule the law. — Oliver Goldsmith

INTRODUCTION

A large corporation exposes itself to investigation into its financial irregularities, it finally goes bankrupt and fires most of its employees. During the chaos, hundreds of workers lose their retirement benefits and are left to seek government assistance.

Although it seems like another Wall Street Journal news report about Enron, it is actually a completely separate incident. In December 1963, the Studebaker Corporation announced it was closing its South Bend, Indiana plant.1 When Studebaker had its meltdown, almost 10,000 workers lost their jobs and almost 4,000 of those who were vested in their pensions, lost 85 percent of their pension benefits when their plan was terminated.2 Studebaker was pre-ERISA and ERISA was supposed to guard against such tragedy from ever striking Americans again.3 In fact, as Senator Jacob Javits stated just before ERISA passed Congress: “[T]his legislation will make better pension plans and undeniably, better pension plans will make a significant contribution to the economic

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2. See Private Pension Plans: Hearings Before the Subcomm. on Fiscal Policy of the Joint Economic Comm., 89th Cong., 2d Sess. 128 (1966); LANGBEIN & WOLK, supra note 1, at 54.

security of a large number of older people who need a much more realistic level of living in retirement."

Yet, Americans continue to have trouble keeping retirement amounts secure. One may sympathize with the Enron employees, mourn loss in one's own portfolio or grumble about the increased tax burden to cover government employees' pension losses, but one must not consider the Enron tragedy as an enigma for journalists to spotlight. Other companies' employees have experienced, or are at risk to experience exactly the same catastrophe, potentially creating a huge baby-boomer population unable to retire or left to rely on public assistance, social programs or support from relatives.

Statistics demonstrate retirees depend upon private pensions and savings, often over Social Security. The assets at risk are significant - an estimated $4 trillion is held in private pension plans with 100 or more participants. According to the most recent information, "Half of all private sector workers have no retirement plan other than Social Security, and of the 51 million

5. See discussion infra Part B.
6. See infra notes 300-308 and accompanying text. Companies experiencing similar or related Enron-type incidents: Color Tile, Inc.; Global Crossing; Polaroid; Lucent; IKON Office Solutions; Sunbeam; Cendant; Waste Management; Xerox; Equity Funding; and Morrison Knudson.
7. See infra Appendix 4 and note 267 for a list of companies who, like Enron, have a high percentage of 401(k) assets in their own stock. Like Enron, these pensions are not diversified along non-systemic risk.
9. Social Security is insufficient to maintain wealthier standards of living where it replaces only 25% of former earnings. Available at http://www.concordcoalition.org/entitlements/crs050198.html#benefit. As of 1998, social security provides only 71% of the minimum wage earners final year's earnings, while only providing for 42% of the average wage earners and only 25% of the maximum wage earner. Id.
workers with plans, 19 million, or roughly 37 percent, have 401(k)s as their only plan.\textsuperscript{11}

One might ask, why are our retirement savings at risk when they are so vital to a stable and financially secure retirement population? Why has ERISA not protected those benefits as promised? In an environment of severe risk, uncertainty, obvious past devastation and warning signals from other companies, why has no corrective legislation found its way into the books?

To understand the weaknesses in the pension system, Enron provides the capstone from which to view those gaps and lapses. Section I of this article introduces the current pension system and its pertinent intricacies. Section II examines the grotesque simplicity of Enron's collapse beneath what the media portrayed to be a complex accounting mess and details Enron's retirement plans to highlight the specific failures of it in the crisis. Section III explains the actual and potential employee litigation against Enron and demonstrates the significant gaps in the rights and remedies which are available through the limited state and federal avenues. Section IV highlights the warning signals from previous cases and questions how legislators and courts could let these gaps remain to allow Enron employees to suffer the same injustices. Section V discusses pending Congressional legislation offered to close those gaps and investigates the proponents and critics of each approach. Finally section VI offers a conclusion to what is and will continue to be a social concern vital to address.

I. THE PRIVATE RETIREMENT SYSTEM

A. ERISA

As discussed in the introduction, Congress passed the Employee Retirement Income Security Act of 1974, or "ERISA,"\textsuperscript{12} to prevent, inter alia, Studebaker-like incidences. Prior to Congressional regulation of the private pension system, many retirees' hopes were frustrated since employers designed plans as conditional


gifts \(^{13}\) and could deny even vested benefits. Additionally, company abuses of plan assets and failure to protect funds added to the probability that retirees would need to seek governmental assistance in old age. After the Studebaker crisis, Congress specifically intended ERISA to protect the employee's promised benefit and deter any abuse of plan assets.\(^{14}\)

ERISA protects plans through a combination of prohibitions, disclosures, and fiduciary responsibilities aimed at providing security for employees and recourse in the event the employer or other fiduciary violates the rules. The statute provides a series of rules for the employer regarding vesting,\(^{15}\) participation,\(^{16}\) funding,\(^{17}\) disclosure,\(^{18}\) fiduciary responsibilities\(^{19}\) and remedial provisions.\(^{20}\)

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13. Employers would revoke even vested benefits by defining plans as "voluntary gifts." This "gratuity theory of pensions" is now disregarded and pensions are viewed under the deferred wage theory. See William C. Greenough and Francis P. King, Pension Plans and Public Policy, 27-47 (1976). See also McNein v. Solvay Process Co., 53 N.Y. S. 98 (1898) (pension unenforceable as promise of a future gift.).

14. The purposes behind ERISA appear in §1001 of the act: The continued well-being and security of millions of employees and their dependents are directly affected by these plans; . . . [which] have become an important factor affecting the stability of employment and the successful development of industrial relations; . . . and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness. ERISA § 2(a), 29 U.S.C. § 1001(a). Requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts. ERISA §2(b), 29 U.S.C. § 1001(b). Improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.


19. ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114 (1994 & Supp. V 2000). Under §1102, a "named fiduciary" is an employer or employee organization who, under §1104 are required to manage funds for the benefit of the employees. This includes diversifying and investing the funds in a prudent, reasonable manner. Id.

20. ERISA §§ 501-511, 29 U.S.C. §§ 1131-1141 (1994 & Supp. V 2000). For example, §1131 proscribes criminal penalties for failure to administer the plan properly; §1132 provides the basis and standing for civil actions with §1133 providing means whereby an employee can receive review of claim denials. The Secretary is provided with investigatory
In concert with ERISA and in order to induce the establishment and participation in such plans, Congress amended the Internal Revenue Code ("IRC") to provide for tax deferral to the employee for contributions to qualifying plans. In fact, ERISA defines a "qualified plan" as one that receives certain tax benefits as a result of adhering to IRC §§401-416. Although the IRC overlaps with ERISA in many areas, it also has a number of its own special protections. ERISA's main contribution is in its fiduciary package comprised of disclosure requirements, fiduciary requirements and enforcement provisions. The IRC also provides for similar fiduciary duties.

These fiduciary provisions play an important role in protecting employees and ERISA provides a very broad function-sensitive definition of a fiduciary. Under ERISA, anyone who exercises discretionary control or authority over plan management or plan assets with discretionary authority or responsibility for the administration of a plan, or anyone who provides investment advice to a plan for compensation or has any authority or responsibility to do so...including plan trustees, plan administrators, and members of a plan's in-

powers and procedures under §1134 and the right to expand the law through regulation under §1135. Id.

23. For example, I.R.C. § 401 provides restrictions on alienation, for example, allowing only 10% alienation once in payment, Section 728 restricts loans against the plan funds. Section 410(a) provides standards for minimum participation; Section 411 provides minimum vesting standards; and Section 412 (1994) requires adequate funding. I.R.C. §§ 401, 410-412, 728 (2001).
24. Special rules relating only to tax qualified plans include, for example, I.R.C. §§ 401, 410 and 414 provide non-discrimination requirements allowing a plan to be deemed qualified only if the plan does not discriminate between highly paid and other employees. Sections 401 and 415 provide for limits on contributions. Section 401 provides distribution and contribution, including matching, requirements. Sections 410(b) & 401(a)(3) & 410(a)(4) provide rules relating to minimum coverage and nondiscrimination rules. Section 411(d)(3) provides rules relating to full vesting upon termination. I.R.C. §§ 401, 410-411, 414-415 (2001).
25. ERISA § 101 - 111.
26. ERISA §§ 404, 500.
27. Treas. Reg. § 1.401-1(b)(5) and Rev. Rul. 69-494, imposes fiduciary duties regarding the investment of plan assets which must be properly made if the plan is to remain qualified. Treas. Reg. § 1.401-1(b)(5) (2001).
vestment committee is a fiduciary. This deterition creates the possibility that a plan may have many fiduciaries.\(^{28}\)

In contrast, consider under trust law the narrow boundaries of a “fiduciary” as a “trustee” who “holds trust property. Trust law definition of a fiduciary was too confining for the purposes of ERISA.”\(^{29}\)

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[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.


Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities (1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.


(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan. (2) For purposes of this subchapter, the term "named fiduciary" means 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.

Id.

29. RESTATEMENT (THIRD) OF TRUSTS § 3 cmt. c (1996). Under the Restatement Third of Trusts, a “trust” is the fiduciary relationship “with respect to property, arising as a result of a manifestation of an intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons . . .” Id. § 2. The fiduciary relationship to another, under trust law, occurs “where the trustee is under a duty to act for the benefit of the other as to matters within the scope of the relationship.” Id. § 2, cmt. b. This parallel is explained in Varity Corp. v. Howe, 516 U.S. 489 (1996):

"In doing so, we recognize that these fiduciary duties draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA’s enactment.” (citing Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570 (1985)).[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 . . .; H.R. REP. No. 93-533, pp. 3-5, 11-13 (1973), 2 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (Committee Print compiled for the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare by the Library of Congress), Ser. No. 93-406, pp. 2350-52, 2358-60 (1976) [hereinafter
ERISA holds fiduciaries to the prudent person standard and requires diversification of investment as part of that standard. Specifically, ERISA generally imposes on fiduciaries the duties of loyalty, prudence, and prudent diversification of plan assets. Failure to invest prudently or diversify the plan's investments constitutes a breach of fiduciary duty under ERISA, for which the fiduciary may be held personally liable.

Employee control of the investments does not divest fiduciaries of their responsibility over the account, but does divest responsibility for those specific choices the employee makes. Fiduciaries found liable for breach of fiduciary duty are subject to personal liability for losses sustained by the plan. See, e.g., 29 U.S.C. § 1104 (1994 & Supp. V 2000).

**Appendix A:**

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can be subjected to numerous penalties including, but not limited to, payment of damages out of their own pensions to make the plan whole.  

B. Retirement Plans Explained

ERISA's articulated intention was to protect "employee pension benefit plans," which includes both defined benefit and defined contribution plans. The private pension system is divided gener-

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37. 29 U.S.C. § 1109(a) (1994 & Supp. v 2000), which provides in pertinent part:

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 to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

Id. But see infra notes 102-112 regarding 401(k).


39. ERISA defines "employee pension benefit plans" as

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—(i) provided retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating contributions made to the plan, the method of calculating benefits under the plan or the method of distributing benefits from the plan.


(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 account. (35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant.

ally along these two types of plans. Although many subtypes and hybrids exist along and between those two types, understanding the essential differences between the general categories provides clarification for the more complex varieties.

I. Defined Benefit Plans

A defined benefit plan promises a specified periodic payment at retirement, either as an exact dollar amount or as a calculated benefit through a service and salary formula. The employer's contribution to the plan is actuarially calculated based on the specific benefit promised to the employee. Employees can add to the pool for their benefit. Employers maintain the "general pool of pension assets rather than individual accounts" and the employer is the primary guarantor of the benefits. In the event the pension plan becomes underfunded, or for any reason the employer does not or cannot pay the promised benefit, the Pension Benefit Guaranty Corporation ("PBGC") pays minimum pension benefits. ERISA created PBGC "to guarantee private defined benefit pension plans that terminate without sufficient assets."

41. There are many types of retirement plans, including: profit sharing, 401(k), Employee Stock Ownership Plans (ESOPs), 403(b) Annuities, 457 plans, Simplified Employee Pension Plans (IRAs, individual retirement accounts or SEPs), SIMPLEs, ROTH IRAs, Money Purchase Plans, Profit Sharing and Stock Bonus Plans. For example, An SEP is a simplified retirement account for small employers, with 25 or fewer employees, where an employee sets up an IRA to accept pre-tax dollars and employer matching funds. http://www.dol.gov/pwba/pubs/youkno/knowl.htm#defined.

42. Also known as "final average pay" or "career average pay" plans. See Douglas E. Motzenbecker, Recent Case Law Developments Affecting Cash Balance Pension Plans, 17 LAB. L. 285, 287 (2001).

43. Treas. Reg. § 1.401-1(b)(ii)(2001); see also http://www.dol.gov/dol/topicretirement/types of plans.htm.


45. Motzenbecker, supra note 42, at 286.


47. Id. Pension Benefit Guarantee Corporation ("PBGC") also has recourse against the employer and its affiliates. PBGC pays terminated plan benefits up to a statutorily prescribed amount, seeking the remainder through action against the employer and the affiliates. Financing for PBGC comes "mainly from insurance premiums paid by companies whose plans [are] protect[ed], not from taxes." See PBGC website at http://www.pbgc.gov.

48. Statement of Steven A. Kandarian, Executive Director, Pension Benefit Guaranty Corporation before the Senate Committee on Finance (February 27, 2002), available at http://www.pbgc.gov/news/speeches/test_02_27_2002.htm. ("PBGC is one of the three so-called 'ERISA agencies' with jurisdiction over private pension plans. The other two agencies are the Department of the Treasury (including the Internal Revenue Service) and the Department of Labor's Pension and Welfare Benefits Administration (PWBA)."
Defined benefit plans require a guarantee of benefits irrespective of the plan investment performance\(^4\) and PBGC acts as guarantor of benefits in underfunded plans that terminate. PBGC represents employee advantages to a defined benefit plan including knowing one's future retirement benefit amount and knowing that the benefit is PBGC-insured.\(^5\) According to PBGC, employers benefit from offering defined benefit plans as well, since these types of plans "promote and retain worker loyalty."\(^6\) However, the PBGC does not provide cover for the employer, who remains liable to the PBGC for any amounts the PBGC pays employees.

2. Defined Contribution Plans

Defined contribution plans provide individual retirement accounts for employees and include 401(k) plans, \(^5\) profit-sharing plans, \(^5\) stock bonus plans, \(^5\) employee stock ownership plans (ESOPs), \(^5\) money purchase pension plans \(^5\) and 403b type plans. Employee, employer, or sometimes both (as in a matching agreement), contribute pre-tax dollars to the employee’s individual account under the plan (sometimes at a set rate) and the account is invested for the employee.\(^5\) At retirement, the defined contribution plan employee receives the value of these accounts, which of course fluctuate with contributions, forfeitures and investment gains and losses. The employee remains at full risk with this type of plan.

Since defined benefit plan retirement payouts are determined through calculations of years of service and long-term employment, the defined contribution plan is more attractive to the younger, more mobile employee who appreciates its portability.\(^5\)

\(^4\) Motzenbecker, \textit{supra} note 42, at 286.
\(^6\) Id.
\(^5\) These plans satisfy the requirements of I.R.C. §401(k) (2001).
\(^5\) Id.
\(^5\) The ESOP, for example, is a form of defined contribution plan in which the investments are primarily in employer stock.
\(^5\) A money purchase plan requires fixed annual employer contributions to individual employee accounts account and is subject to certain funding and other rules.
\(^5\) I.R.C. §403(b) (2001).
\(^5\) See Ann Perry, \textit{Authors Berate 401(k)s as a “Great Hoax"}, SAN DIEGO UNION & TRIB., June 16, 2002, at H1, available at 2002 WL 4608597. 401(k)s held promise for employees since they theoretically allowed workers to share in the wealth to be gained through investment – just like the upper class. This belief seemed reality in during the rising market, but will, according to some authors, turn out a “hoax.” Id. Employees also like the port-
Employers offer, or transition from, traditional defined benefit plans to defined contributions plans because of their reduced cost, ease in administration and reduced risk to the employer who no longer is responsible for management of the employee-invested plan. Once intended as a supplement to the traditional retirement plan, defined contribution plans, such as 401(k) plans, have become the standard. Whereas employers once used defined benefit plans as the standard component in compensation packages as a means to encourage employee loyalty, employers have found for themselves that the benefits of offering defined contribution plans outweigh those traditional concerns.

Both profit shar-
ing and stock bonus plans allow an employer with uncertain profits the ability to tailor contributions to the availability of funds.\textsuperscript{62}

Defined contribution plans do not promise a specific amount of retirement benefits, paying only what has accrued or remains in the account and therefore, "[b]y definition...can never [have] an insufficiency of funds...because each beneficiary is entitled to whatever assets are dedicated to his or her individual account."\textsuperscript{63}

Although ERISA regulates participation, funding, vesting, accrual, fiduciary duty and disclosure requirements for both defined benefit and defined contribution plans,\textsuperscript{64} the PBGC guarantees only relate to defined benefit plans and fail to protect benefits of defined contribution plans.\textsuperscript{65}

3. **Hybrids: Cash Balance and Floor Offset Plans**

"The only type of defined benefit plan that is increasing in number is the cash balance plan."\textsuperscript{66} "In 1985, Bank of America radically transformed its traditional retirement program...[which] was quickly dubbed a cash balance plan because it looks like—and more importantly, employees perceived it to be like—a profit sharing or thrift, savings capital accumulation plan."\textsuperscript{67} Cash balance plans, as defined benefit plans,\textsuperscript{68} are protected under the Pension

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\textsuperscript{62} 1 Michael J. Canan & David Rhett Baker, Qual. Retirement Plans § 3.111 (2002 ed.)

\textsuperscript{63} Motzenbecker, supra note 42, at 287 (quoting Eaton v. Onan Corp., 117 F. Supp. 2d 812, 817 (S.D. Ind. 2000)).


\textsuperscript{65} Id. See also Motzenbecker, supra note 42, at 287. This is the most important distinction between defined benefit and defined contribution plans for purposes of this paper. When defined benefit plan participants, for example, lose their pensions due to employer mismanagement, PBGC pays the floor insured amount of the participants' benefits and seeks the remaining amount from the employer. ERISA directly protects the employee in that case. The employee is also allowed to sue, through ERISA, in the name of the plan. When defined contribution plan participants lost their pension due to employer mismanagement, PBGC does not insure their benefits, so their only recourse is to sue through ERISA. Id.

\textsuperscript{66} Statement of Steven A. Kandarian, supra note 59.


\textsuperscript{68} Eaton, 117 F. Supp.2d at 817. See also IRS Notice 96-8 (Jan. 18, 1996), which states cash balance plans are not defined contribution plans but defined benefit plans. Hybrid Pension Plans: Hearing Before the Senate Comm. on Health, Educ., Labor, and Pensions, 106th Cong. 5 (1999) (statement of Sen. Leahy) (listing IBM, AT&T, CitiGroup, Bell Atlantic, SBC Communications, CIGNA Corp., AETNA, Eastman Kodak, and CBS among the most notable and controversial companies that have converted to cash balance plans.).
Benefit Guarantee Corporation, although whether or not such arrangements are entirely proper has been seriously questioned. Employees' accounts are credited with a portion of their salary and interest each year. However, the employee's "account" is accounted for separately from the pool of assets and the defined benefit is determined in a defined contribution method. Cash balance plans typically give beneficiaries the choice of receiving a lump sum disbursement (as if it was from their own account) or receiving annuities purchased with the account balance. Cash balance plans do not depend on employee contribution, where as defined contribution plans, like 401(k)s, are necessarily dependent upon employee contribution; and because they are considered defined benefit plans, cash balance plans are PBGC protected.

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69. Motzenbecker, supra note 42, at 287.
70. John M. Vince & Robert S. Newman, Cash Balance Plan Litigation, Practicing Law Institute, 664 PLI/LIT 347 (Oct. 2001) (“The lawsuits challenging cash balance plans have raised age discrimination, benefit accrual, fiduciary duty, and advance notice claims. These suits have had mixed results.”). Because cash balance plans must comply with defined benefit rules under ERISA and the IRC, their defined contribution characteristics often clash with those requirements. For example, the retirement benefit must be able to be projected, and this is difficult with a cash balance plan without violating other contribution rules. See also Amoroso, supra note 67.
71. Statement of Steven A. Kandarian, supra note 59.
72. This appears confusing at first but is relatively clear. Visiting the Department of Labor website, in this case, would lead to devastating confusion for most employees and should be avoided by all except a few cerebral lawyers. The text reads:

In other words, a cash balance plan defines the promised benefit in terms of a stated account balance. In a typical cash balance plan, a participant's account is credited each year with a "pay credit" (such as 5 percent of compensation from his or her employer) and an "interest credit" (either a fixed rate or a variable rate that is linked to an index such as the one-year treasury bill rate). Increases and decreases in the value of the plan's investments do not directly affect the benefit amounts promised to participants. Thus, the investment risks and rewards on plan assets are borne solely by the employer. When a participant becomes entitled to receive benefits under a cash balance plan, the benefits that are received are defined in terms of an account balance. The benefits in most cash balance plans, as in most traditional defined benefit plans, are protected, within certain limitations, by federal insurance provided through the Pension Benefit Guaranty Corporation.

U.S. Department of Labor Retirement Plans, Benefits and Savings, available at http://www.dol.gov/dol/topic/retirement/typesofplans.htm. Obviously, the website editors are not familiar with the journalistic rule dictating newspaper readers – the average American – reads at a 6th Grade level. The irony is so obvious considering one of the main complaints critics have of the private pension system is that employee investors do not understand their options or the choices they are expected to make.
73. Motzenbecker, supra note 42, at 287.
4. The 401(k) Defined Contribution Plan

This article will address the 401k plan in greater detail since the losses in these plans was the focus of the emotional response to the Enron debacle. Most of the sensation concerning the unfortunate employees at Enron revolves around the losses they have experienced in their 401(k) plans. A 401(k) Plan - or qualified cash or deferred arrangement ("CODA") - is named after the Internal Revenue Code §401(k) requirements the plan must meet\(^{75}\) as a qualified plan for special tax treatment. After a long debate of whether or not to allow pre-tax contributions to a retirement plan, §401(k) was added to the Federal Tax Code by the Revenue Act of 1978.\(^{76}\) The Act also added §402(a)(8) to the Internal Revenue Code, which set forth the applicable rules.\(^{77}\) After multiple amendments and revisions, a comprehensive set of final regula-

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75. I.R.C. § 401(k) (1986). Section 401(k) of the Internal Revenue Code of 1986 provides:

(k) Cash or deferred arrangements.—(1) General rule.—A profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan shall not be considered as not satisfying the requirements of subsection (a) merely because the plan includes a qualified cash or deferred arrangement.

(2) Qualified cash or deferred arrangement.—A qualified cash or deferred arrangement is any arrangement which is part of a profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan which meets the requirements of subsection (a)—

(A) under which a covered employee may elect to have the employer make payments as contributions to a trust under the plan on behalf of the employee, or to the employee directly in cash;

(B) under which amounts held by the trust which are attributable to employer contributions made pursuant to the employee's election—

(i) may not be distributable to participants or other beneficiaries earlier than—

(I) severance from employment, death, or disability,

(II) an event described in paragraph (10),

(III) in the case of a profit-sharing or stock bonus plan, the attainment of age 59 1/2, or

(IV) in the case of contributions to a profit-sharing or stock bonus plan to which section 402(e)(3) applies, upon hardship of the employee, and

(ii) will not be distributable merely by reason of the completion of a stated period of participation or the lapse of a fixed number of years;

(C) which provides that an employee's right to his accrued benefit derived from employer contributions made to the trust pursuant to his election is nonforfeitable, and

(D) which does not require, as a condition of participation in the arrangement, that an employee complete a period of service with the employer (or employers) ...

76. Utz, supra note 35.

77. Id.
tions was issued in August 1991, 78 401k plans became very popular in the mid 1980s. 79

In a qualified 401(k), amounts are not subject to Federal or State taxes until paid (effectively, a deferred wage to a time when the employee's income will move to a lower bracket at retirement) 80 and are subject to non-discrimination rules in order to receive such treatment. 81 Employers receive an immediate deduction for contributions. 82

Employees prefer such arrangements because they feel more in control of their retirement funds and appreciate the portability of the accounts. 83 Employees have a portion of their pre-tax salary dollars, sometimes with an employer match, contributed on their behalf to the 401(k). 84 401(k) plans have a dollar limitation for the amount the employee can defer and often employees can direct the investment. 85 There is however no limitation on the amount the plan can accumulate over time. An employee can withdraw funds from his 401(k) plan as a loan or as a hardship withdrawal. 86 Employees who separate from a particular employer are given 60 days to roll their 401(k) amounts into another qualified retirement plan or IRA before the amounts are taxable. 87 Starting in 2002, contribution levels in 401(k) plans will increase $1,000 a year from the current $10,000, eventually capping out at $15,000 in 2006. 88 In addition, workers over the age of fifty will be allowed to make extra "catch-up" contributions to their retirement plans. 89

"During recent years, growing numbers of employees have changed -- or been shifted by their employers -- to defined-

79. See supra note 60.
83. See infra notes 52-65 and accompanying text regarding defined contribution plans.
85. Id. For a historical treatment of the plans, see Utz, supra note 35. 401(k) settled the long debate over salary reductions as deferred compensation set aside in such plans. Id.
contribution plans, such as 401(k) plans, whose payouts depend on how much an employee invests and the performance of those investments, which are more lightly regulated.\textsuperscript{90}

The controversy surrounding an employee investing in company stock in 401(k) plans centers on a plan sponsor's obligation to look out for the financial interests of participants. Although most experts say it's not prudent to put more than 10% or 20% of a portfolio in one stock, there are no rules limiting the amount of company stock in 401(k) plans.\textsuperscript{91}

There are two interesting caveats: this flexibility does not apply unless the investment in employer security is discretionary on the part of the employee and the plan is designated an SOP.\textsuperscript{92} "Traditional pension plans [i.e., (defined benefit plans)], on the other hand, are barred from investing more than 10% in company stock."\textsuperscript{93} At many companies, including Enron, matching contributions are available to 401(k) participants only in company stock.\textsuperscript{94} Most companies, including Enron, do not let employees sell that stock before they reach a certain age, usually 50.\textsuperscript{95} "According to a study of 401(k) plans by Fidelity Investments, only 4% of plans let participants immediately exchange matching contributions of company stock."\textsuperscript{96} No law prevents employers from imposing such restrictions.

As of 2001, the Profit Sharing/401(k) Council of America (PSCA) estimates that there are 700,000 defined-contribution plans in the United States,\textsuperscript{97} consisting of more than 37 million participants\textsuperscript{98}.


\textsuperscript{91} Christine Dugas, Energy giant's disaster devastates 401(k) Plans; Dabacle shows risk of loading up on employer's stock, USA TODAY, Nov. 30, 2001, at 1B, available at 2001 WL 5477587.


\textsuperscript{93} Dugas, supra note 91. It is curious that when employers are at risk, diversification is protected more vigilantly than when only the employee is at risk. This may be due to the fact that the employee is only at risk for his or her plan while the employer is at risk for all employee amounts. This, however, is more evidence for the need to impress the same standard upon the individual. The exclusion from the 10% limit will also not apply unless the fair market value of assets in the individual account plans do not exceed 10% of the assets in all the employer's plans, any elective deferral required to be invested in employer security cannot exceed 10% of employees compensation. Id.

\textsuperscript{94} Id.

\textsuperscript{95} Id. For a graphic representation of 401(k) assets, see Appendix 3.

\textsuperscript{96} Id.

\textsuperscript{97} http://www.psa.org/data/dcsstats3.asp. As of 2001, up from 1978, when there appeared to be only a little over 300,000 such plans. Id.
with combined assets totaling approximately $1.8 trillion.⁹⁹ 401(k) plans seem attractive to employees, but 401(k) plans do not guarantee anything.¹⁰⁰ A significant amount of those assets are held in employer stock:

Workers are proud to own the stock of the company that gives them a paycheck. According to Plansponsor, a magazine that discusses retirement issues, 24.6 percent of participant balances were invested in company stock. While that is significantly less than the stock ownership in the Enron 401(k) plan it is still a dangerously high level.¹⁰¹

Unlike defined benefit plans, no similar safety net under the Pension Benefit Guaranty Corporation exists for 401(k) plan, profit-sharing plans and employee stock-ownership plans of companies that fail. As stated earlier, these defined contribution plans are not covered under PBGC. Since employees solely bear the risk for these investments, employees who are victim of fraud or breach of fiduciary duties must seek restitution for plan losses under ERISA's fiduciary provisions or under applicable state laws.

C. ERISA'S Relationship to 401(k) – The 404(c) Rule

Although ERISA does not protect 401(k) plans from risk of loss, the trustee of the 401(k) is usually subject to the fiduciary and enforcement rules under ERISA.¹⁰²

ERISA includes a special rule for accounts like Enron’s, which “effectively enables defined contribution pension plans (such as profit sharing, 401(k), money purchase pension, and employee stock ownership plans) to permit plan participants to choose how the assets in their accounts are invested.”¹⁰³ Under this special

⁹⁹. Id.
¹⁰². ERISA §§ 404, 501.
¹⁰³. Uts, supra note 35, at 67. See also ERISA § 404(c), 29 U.S.C.A. § 1104: Fiduciary duties: (c) Control over assets by participant or beneficiary (1) 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 par-
rule, a plan participant (or beneficiary) who is permitted to direct
the investment of his or her account, in what is called a "partici-
pant-directed pension," will not be considered a fiduciary solely by
reason of his or her ability to make those investment decisions.104

Most notably, "the plan's fiduciaries are not liable for losses or
breaches of fiduciary duty, which result from the participant's or
beneficiary's investment decisions."105 However, "for fiduciaries of
a defined contribution plan to enjoy the protection afforded by
§404(c) of ERISA, participants and beneficiaries must be provided
with an opportunity (a) to exercise control over the assets in their
individual accounts, and (b) to choose from a broad range of in-
vestment options."106 Independence of investment decision and
accurate representation regarding potential investments are key
factors.107

Some commentators view §404(c) more as an insulation for em-
ployers than as a protection for employees.

Absent [the provision's] protection, were a participant permitted
to direct the investment of his or her account, and were that par-
ticipant to choose not to diversify the assets in his or her account,
the trustee or other plan fiduciaries might be held liable for the

\[
\text{participant or beneficiary exercises control over the assets in his account (as determined}
\]
\[
\text{under regulations of the Secretary)}
\]
\[
(A) \text{such participant or beneficiary shall not be deemed to be a fiduciary by rea-
son of such exercise, and (B) no person who is otherwise a fiduciary shall be li-
able under this part for any loss, or by reason of any breach, which results from}
\]
\[
\text{such participant's or beneficiary's exercise of control. (2) In the case of a simple}
\]
\[
\text{retirement account established pursuant to a qualified salary reduction ar-
rangement under section 408(p) of Title 26, a participant or beneficiary shall,}
\]
\[
\text{for purposes of paragraph (1), be treated as exercising control over the assets in}
\]
\[
\text{the account upon the earliest of—(A) an affirmative election among investment}
\]
\[
\text{options with respect to the initial investment of any contribution, (B) a rollover}
\]
\[
\text{to any other simple retirement account or individual retirement plan, or (C)}
\]
\[
\text{one year after the simple retirement account is established.}
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\text{Id.}
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104. Utz, supra note 35.
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105. Id. at 68.
\]
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106. Id. (quoting 29. C.F.R.$ 2550.404(c)-1(b)(1)).
\]
\[
107. 29 C.F.R. § 2550.404(c)-1(c)(2). The investment decision will not be under inde-
pendent control if:
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\[
\text{the participant or beneficiary is subjected to improper influence by a plan fiduciary or}
\]
\[
\text{the plan sponsor with respect to the transaction, (ii) a plan fiduciary has concealed}
\]
\[
\text{from the participant or beneficiary material non-public facts regarding the invest-
ment, unless disclosure would violate federal or state law, or (iii) the responsible plan}
\]
\[
\text{fiduciary takes instructions from a participant or beneficiary it knows is legally in-
competent.}
\]
\[
\text{CANAN & BAKER, supra note 62, § 16.3.}
\]
adverse consequences to the participant of his or her own failure to diversify.\textsuperscript{108}

Others disagree with this assessment and predict that employers are going to be sued regardless of 404(c)'s protection.\textsuperscript{109} It is clear that the employers or other fiduciaries remain at risk under 404(c) because the relevant regulations provide that: the participant must exercise independent control, meaning, for fiduciaries to enjoy Section 404(c) protection, participants or beneficiaries making investment elections must exercise independent control with respect to those decisions. Their exercise and control will not be considered independent if any of the following occurs:

a. Improper Influence. The participant or beneficiary is subject to improper influence by a plan fiduciary or the plan sponsor.

b. Concealment of Facts. A plan fiduciary has concealed material non-public facts regarding the investment decision, unless that disclosure to the participant or beneficiary would violate any provision of federal law or a provision of state law which is not preempted by ERISA.

c. Participant Incompetent. The participant or beneficiary is legally incompetent and a responsible plan fiduciary accepts investment instructions knowing the participant or beneficiary to be legally incompetent.\textsuperscript{110}

Under Regulation 404(c) the employer may offer company stock as an investment option. A study of the investment choices made by 401(k) plan participants indicates that when company stock is offered as an investment option, 32.7% of employees select it as one of their investments. Whether this is due to feelings of company loyalty or a drive for alignment with the employer it is an investment strategy fraught with risk.\textsuperscript{111}

\textsuperscript{108} Utz, supra note 35.
\textsuperscript{109} Medill, supra note 34, at 469.
\textsuperscript{110} Utz, supra note 35. See also 29 C.F.R. § 2550.404(c)-1(c)(2). Cases under 404(c) include: In re Unisys Sav. Plan Litigation, 74 F.3d 420 (3d Cir. 1996); Allison v. Bank One-Denver, 289 F.3d 1223 (10th Cir., 2002).
\textsuperscript{111} Medill, supra note 34, at 480 (citations omitted).
The tax breaks offered to employers for such private plans, when added to government and military plans, constitutes "the largest of all Federal tax subsidies."\textsuperscript{112} As long as plans remain qualified\textsuperscript{113} under the Internal Revenue Code, they provide tax benefits to employers and employees.\textsuperscript{114} For example, employees can contribute pre-tax dollars to a 401(k) and not be taxed on that deferred wage until retirement - when their tax liability hopefully will be significantly lower. However, if a plan becomes "disqualified," in most situations the employee is liable for tax on the income deemed earned while the employer maintains the identical deduction for wages.\textsuperscript{115}

One aspect of a 401(k) is the benefit to employers to use contributions as deductions on federal returns. "Company stock in retirement plans is generating billions of dollars in tax deductions each year for thousands of companies, including Sears, Roebuck & Co., Lockheed Martin Corp., McDonald's Corp., Bank of America Corp., Ford Motor Co., and Procter & Gamble Co."\textsuperscript{116} Additionally, companies are not normally allowed to deduct dividends they pay, but they may if the stock is held by an ESOP or a certain type of hybrid 401(k), called a KSOP. KSOPs are created when a company marries its 401(k) to its ESOP; this makes the company stock in the 401(k) eligible for the dividend deduction, too. Savings from additional tax deduction can be substantial. This fact was noted on an August 2001 newsletter that Towers Perrin, a benefits consulting firm, sent to clients:\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{112} Statement of Karen D. Friedman, \textit{supra} note 11.
\item \textsuperscript{113} A qualified plan is one that meets the criteria under I.R.C. § 401(a) (2001).
\item \textsuperscript{114} If at any time the plan becomes disqualified contributions from the employee and employer will not receive the beneficial tax treatment and disbursements at retirement are treated differently. \textit{See} I.R.C. Pub. 575, available at http://www.irs.gov/pub/irs-pdf/p575.pdf (2002 ed.). Of course, the employer still receives the deduction for wages paid while the employee needs to immediately pay income tax.
\item \textsuperscript{115} This seems particularly harsh when innocent employees are taxed when executives use bad judgment in plan administration or development. There is precedent for not holding the employee responsible for tax if the employer is responsible for the disqualification. I.R.C. § 402(b)(4)(2001).
\item \textsuperscript{117} \textit{Id.} ("Pfizer Inc., a drug maker, is also converting its 401(k) plan to a KSOP. Pfizer paid some $60 million in dividends to its retirement plans in 2000, which could bring Pfizer a tax deduction of $23.4 million.....With an annual dividend yield of 1.8%, the $2.3 billion in Anheuser-Busch stock in the ESOP and 401(k), which accounts for 83% of the plans'...
These big but little-noticed tax benefits are a reason that companies use their own stock in retirement plans and, in many cases, lock employees into them until age 50 or later.\textsuperscript{118} If employees are allowed more flexibility in diversifying the holdings in their retirement plans, it would probably lead to fewer company shares in many plans, cutting the tax deductions that employers enjoy.\textsuperscript{119}

Employer groups are lobbying against any major changes in laws governing retirement-savings plans. 'If providing stock to an employee no longer has any value to the employer, then of course the employer is going to stop doing it,' says Mark Ugoretz, president of the ERISA Industry Committee, which represents major employers.\textsuperscript{120}

E. What We Have Built: The Retirement-House of Straw

In summary, the modern-day employer, taking advantage of the tax benefits and recognizing the needs of the mobile workforce has gladly transitioned to the less burdensome and less risky defined contribution plans. With the defined contribution plans qualifying for the shift of risk to the employee and reduced fiduciary responsibility under ERISA 404(c), employers have no need to be concerned about the fiduciary duties normally ascribed to them for the traditional defined benefit plan. Of course, and most ironically, these plans to which the employee bears the sole risk is exactly the type of plan uninsured under PBGC.

II. THE COLLAPSE & THE BIG BAD WOLF

A. Enron's Pensions\textsuperscript{121}

1. Enron's Defined Benefit Pension – The Lesser Concern

"[T]here are at least three defined benefit plans insured by PBGC in the Enron corporate group – the underfunded Enron Corporation Plan ("Enron Plan"), currently named the Enron Cor-

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\textsuperscript{118} Id.

\textsuperscript{119} Id.

\textsuperscript{120} Id.

\textsuperscript{121} A detailed description of Enron's pension system is contained in the class action suit Tittle v. Enron, available at http://www.enronerisa.com/complaint.html.
poration Cash Balance Plan, and two others that are fully funded on a termination basis, based on the most recent actuarial information.”122 The failed energy company had an unusual arrangement that connected its defined benefit pensions in a “floor offset” arrangement tied to its defined contribution, employee stock ownership plan (“ESOP”).123 As discussed earlier, in these arrangements, the benefits employees earn in one plan can essentially erase benefits they earn in the other.124 Questions as to the legality of the particular plan arrangement and valuation remain with the Pension Benefit Guaranty Corporation reporting a possible $125 million exposure of the underfunded Enron pensions.126 However, the underfunding of Enron’s defined benefit plans are a less sensational concern for retirees since such benefits are protected to a certain extent through the Pension Benefit Guaranty Corporation.126

122. Statement of Steven A. Kandarian, supra note 48. (“The Enron Plan is currently a cash balance plan but has had a variety of benefit formulas in its history. The plan started out as a traditional final average pay plan, was substantially changed to an arrangement known as a “floor-offset Employee Stock Ownership Plan (ESOP),” which will be addressed in the latter portion of this article, and finally became a cash balance plan. The changes in benefit formula did not affect benefits earned in prior years. Thus, a person who worked for Enron under all three arrangements has a defined benefit pension consisting of three separate components.”).

123. See infra notes 127-142 and accompanying text for ESOP description. One should note, ESOPs are more vehicles of corporate finance than of employee benefit plans. See infra notes 127-142.

124. This may be most true in Enron’s case since its offset, thorough clever valuing, essentially reduced benefits – possibly in violation of ERISA § 203. See also Ellen E. Shultz, U.S. Taxpayers May Have to Pay Enron Workers’ Pension Benefits, WALL ST. J., Feb. 27, 2002, at C1, available at 2002 WL-WSJ 3387156; Ellen E. Schultz, Questioning the Books: Pension Practices Used by Enron Come Under Fire, WALL ST. J., Mar. 1, 2002, at A4, available at 2002 WL-WSJ 3387404. (“Enron calculated the ESOP offsets in an unusual way. It based the offsets on the price of Enron stock from 1996 to 2000, when it was trading between $37.75 and $43.44. It then used the higher locked-in values of the ESOP accounts to permanently cut the value of pensions that employees had earned between January 1987 and January 1995....There is now some question as to whether this practice -- which permanently erased some of the pension benefits -- constituted an illegal reduction in pension benefits under federal pension law...."What was promised originally was that the employees would get the greater of the two benefits -- the pension or the ESOP," says William K. Carr, a Denver pension attorney. "Then Enron changed the deal by fixing the amount of the offset even if the value of the stock went down." Now that the stock has become worthless, the employees get nothing from the ESOP, but their pensions are still permanently reduced by the past value of the stock...."That could be a cutback in benefits, because before the change, the employees were protected if the ESOP went down, but afterward they were not," says Mr. Carr, who isn’t involved in any Enron litigation.”)


126. Id. See discussion infra notes 46-51 and accompanying text for role and duties of the PBGC. The PBGC limited protection, as discussed, pays a floor of the promised benefit and seeks the remaining amount from the employer.
2. Enron's 401(k) Defined Contribution Plan – The Greater Concern

"Most of the public focus has been on Enron's 401(k) and employee stock ownership plans."127 These plans are not defined benefit plans, they are defined contribution plans and as such, are not insured by the PBGC.128 Therefore, Enron employees are "taking it on the chin" when it comes to losses in their 401(k) plans. The Enron Corporation Savings Plan, 401(k), is an "employee pension benefit plan" within the meaning of ERISA § 3(2)(A).129 Further, it is an "eligible individual account plan" within the meaning of ERISA § 407(d)(3)130 and also a "qualified cash or deferred arrangement" within the meaning of I.R.C. § 401(k).131

Enron is the sponsor of the Plan.132 The participants of the Plan were permitted to contribute from 1% to 15% of their eligible base pay to the Plan.133 Participants directed the investment of their contributions, in 1% increments, to the various investment options available to the Plan. Most of these options were diversified mutual funds.134 However, the options also included the Enron Corporation Stock Fund and the Enron Oil & Gas Stock Fund (without distinction, the "Company Stock Funds").135 The Company Stock Funds invested solely in company stock (and a small portion in cash equivalents for liquidity).136 Enron matched participants' contributions, at certain specified percentages, by making contributions to the participants' account into the Company Stock

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127. Statement of Steven A. Kandarian, supra note 48
128. Id.
129. 29 U.S.C. § 1002(2)(A) (1988 Supp.). For ERISA purposes, an employee welfare benefit plan is:

Any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries . . . .

134. Id.
135. Id.
136. Id.
These investments were frozen in the Company Stock Funds in most cases until the participant reached age fifty.\textsuperscript{138} As with most of these companies, Enron matched contributions to their 401(k) with shares of Enron stock, and also offered Enron stock as an investment choice, in addition to a variety of about twenty investment options.\textsuperscript{139} According to Enron, the company provided a 50\% match on employees’ 401(k) contributions of up to six percent of their base pay. Stock holdings from the company match could not be transferred into other investment options until the employee reached age fifty.\textsuperscript{140} “Enron employees had always been able to transfer their own contributions in the 401(k), at any time.”\textsuperscript{141} These provisions are apparently in compliance with ERISA diversification of investment provisions. At the end of last year, $1.3 billion of the plan’s $2.1 billion in assets, or 67\% of the assets in Enron 401(k) retirement plans, was invested in Enron stock.\textsuperscript{142} When the value of the Enron stock soared, employees were understandably pleased with their 401k plan choices and no doubt made grand preparations for retirement.

\begin{footnotes}
\item[137] Id.
\item[140] Id.
\item[141] Id.
\item[142] Theo Francis & Ellen Schultz, Enron Faces Suits Over Pension Plan—Participants Suffered Losses Because of Company's Plunging Stock, ASIAN WALL ST. J., Nov. 26, 2001, at M1, available at 2001 WL-WSJA 29657796. According to the SEEC suit, 54\% of the assets were in Enron stock. See also: CNN, A Reaction to Enron Pension Meltdown, Bill Calls for More Diversification, CNN MONEY, Dec. 18, 2001; Grace Shim, Retirees Gasping at Enron, OMAHA WORLD-HERALD, Dec. 16, 2001, at 1D, available at 2001 WL 9593443. Frank Rathbun, an Omaha retiree, said Enron had several retirement plans. Some had pension payments taken care of by an insurance company. Overall, the pensions were based on a percentage of the top salary received over the final five years of employment, he said.”). Management of the plans included Prudential Insurance Company of America. See Shim, supra. Northern Trust Company was also responsible, as were the auditors, Arthur Andersen LLP. See Ellen E. Shultz & Theo Francis, Enron Isn't the Only Retirement Tale That Leads to Hard Lesson: ‘Diversify', WALL ST. J., Jan. 21, 2002, at C1, available at 2002 WLWSJ 3383473. Northern Trust, too, says it was a directed trustee without investment authority. “We held the assets and we kept the records,” spokeswoman Sue Rageas said. Andersen declined to comment.”)
\end{footnotes}
B. And I’ll Huff, and I’ll Puff... Enron Comes Down

The issues surrounding Enron, its accountants and its employees consumed the media for several months, with Enron coverage second only to the 9-11 tragedy and the corresponding war on terrorism. Enron was our domestic discussion, overshadowing last years’ Patients’ Bill of Rights, Education Reform and even Chandra Levy’s disappearance. As a quick refresher of the issue, the following will serve as a sketch of the facts relevant to the pension discussion.144

“Enron marketed electricity and natural gas, delivered energy and other physical commodities, and provided financial and risk management services to customers around the world.”145 “Goldman Sachs analyst David Fleischer stated: ‘Enron has built unique and, in our view, extraordinary franchises in several business units in very large markets.”146 “In 1990 around 80% of its revenues came from the regulated gas-pipeline business, but by 2000, 95% of its revenues and more than 80% of its operating profits came from ‘wholesale energy operations and services.’ This business, which Enron pioneered, is usually described in vague, grandiose terms like the ‘financialization of energy’--but also, more simply, as ‘buying and selling gas and electricity.’”147

What was Enron, really? In essence, it was an insurance company. Some would say a hedge fund. It wasn’t just selling gas and megawatts, coal and bandwidth. It was selling protection, stability and peace-of-mind. For a price, with the click of a mouse, you could lock-in reportable up-front profits, or limit potential losses, on a myriad of commodities, for a myriad of volumes, time periods and delivery terms. And, at every turn, Enron would book a profit.148

144. The class action suit reveals the entire detailed account of the rise and fall of Enron. See Enron Complaint, available at http://www.enronerisa.com/complaint.html.
147. Id.
Enron’s future looked bright.\textsuperscript{149} Offstage, away from the limelight and fancy special effects, some financial and media experts were quick to admit that the company remains largely impenetrable to outsiders . . . How exactly does Enron make its money? Details are hard to come by because Enron keeps many of the specifics confidential for what it terms ‘competitive reasons.’ And the numbers that Enron does present are often extremely complicated. Even quantitatively minded “Wall Streeters” who scrutinize companies for a living thought so. ‘If you figure it out, let me know,’ laughs credit analyst Todd Shipman at S&P. ‘Do you have a year?’ asks Ralph Pellecchia, Fitch’s credit analyst, in response to the same question.\textsuperscript{150} Enron pointed to proprietary rights to keep its books secret. “We don’t want to tell anyone where we’re making money.”\textsuperscript{151}

Thanks to insider Sherron Watkins, the world now knows that Enron hid billions of dollars in debts and operating losses inside private partnerships, with attractive names like “Condor” and “Raptor.”\textsuperscript{152} The corrected financial statements reported a $1,165,000,000 overstatement of earnings for the year 2000 alone.\textsuperscript{153}

\begin{footnotes}
\footnotetext[149]{Financial statements from that time demonstrate a solid organization, and insertion here would normally be appropriate. However, the statements, since discovered to misrepresent the company’s finances are virtually meaningless.}
\footnotetext[150]{Id. supra note 146.}
\footnotetext[151]{Id. According to Platts Global Energy, Platts Energy Economist Jan 30, available at http://www.platts.com/features/enron/timeline.shtml: The upward earnings, from barely $100-mil in 1997 to almost $1-bil in 2000, gave its story an air of unquestionable inevitability. If you didn’t exactly catch where those great numbers were coming from, well, you were just stupid. And since no one on Wall Street will ever admit they don’t understand something, everyone just nodded and went on building the Enron myth. Privately, most analysts would admit they didn’t have a clue how the bullish numbers were generated. Enron had gone from being a solid gas pipeline company with a weird name to an impenetrable ‘black box’ of rocket-science sleight of hand, impervious to outside analysis.}
\footnotetext[152]{Michael Duffy, et.al., What Did They Know And...When Did They Know It? Meet Sherron Watkins, who sounded the alarm on Enron long before its collapse, TIME, Jan. 28, 2002, available at 2002 WL 8385615. (“We also learned, Enron’s supposed “auditor” – Anderson – fretted over the accounting, considered dropping Enron as a client, but ultimately chose to keep its head down and collect its $50 million dollar yearly auditing and consulting fees. Enron later fired Anderson for destroying documents in what is symbolic irony.”)}
\footnotetext[154]{Id.}
\end{footnotes}
C. **Sticks and Straw – A Result of the Lockout**

As the world began to discover the ether that was Enron, additional suspicious activities directly affected employees' pensions.\(^{155}\) The most devastating occurrence affecting employees' stock occurred during the aptly named "lock out" period. Claims of fiduciary breach, fraud or both, or at the very least, unethical conduct, swirl around the lockout timeline:

A transaction lockout period is a period of time during a change in recordkeepers, who also may be fund managers, in which no participant financial transactions such as transfers, withdrawals, loans, or distributions, are allowed.\(^{156}\) "Employers switch recordkeepers to lower costs and improve plan features for participants, such as adding online features, adding more or different investment options, and shortening the interval in which a participant may change investment or contribution decisions from quarterly or monthly to daily."\(^{157}\)

The justification for this practice is to ensure proper bookkeeping during the change of the guard: "When companies change the administrator of a 401(k) program, the temporary shutdown, typically lasting several weeks, is required to allow employee account information to be accurately and completely transferred to the new administrator."\(^{158}\)

The old recordkeeper suspends financial transactions during the transition period to allow adequate time to (1) perform a final reconciliation of participant records and plan assets, and (2) provide the participant records to the new recordkeeper. The new recordkeeper imposes a suspension to allow adequate time to build participant accounts on its system and verify their accuracy.\(^{159}\)

Financial transactions are suspended so the transition of participant accounts and assets is not a "moving target." For example, the new recordkeeper needs information about outstanding participant loans to properly establish participants' accounts. If a participant is allowed to take a new loan after that information is

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155. See Appendix 1 for a complete Timeline.
156. Investments: Enron Section 401(k) Lock Out Raises Many Questions, PSCA Says, Pens. & Ben. Rep (BNA) Vol. 29, No. 5, at 306 (Jan. 29, 2002). (Neither the IRC nor ERISA regulate lockouts directly as it is an administrative device.)
157. Id.
159. Investments, supra note 156.
conveyed to the new recordkeeper, the participant's account will be inaccurate when established by the new recordkeeper.\textsuperscript{160}

The suspension period can last from a few days to more than a month.\textsuperscript{161} Assets in participant directed plans usually remain invested throughout the transition period in accordance with participant directions given before the transition period begins. On occasion, plan assets are transferred into a money market or other "safe" fund during the transition.\textsuperscript{162} Throughout the transition period new contributions are invested in accordance with the participant's investment selection.\textsuperscript{163} Approximately 24,000 plans converted to new recordkeepers in 2001 according to the Society of Professional Administrators and Recordkeepers. This figure represents 6.8 percent of all plans. Based on this 2001 data, any one plan would on average change recordkeepers once every 14.7 years.\textsuperscript{164}

"In February of 2001, ostensibly in order to improve its 401(k) plan, Enron requested proposals from third-party benefits firms to take over administration of its plan."\textsuperscript{165} "After selecting a new 401(k) administrator, Enron notified all affected employees in a mailing to their homes on October 4, stating that a transition period would begin on October 29. Between the first notification and the first day of the transition period, the company sent several reminders to employees through the internal e-mail system."\textsuperscript{166}

"The transition period during which employees were unable to change investments in their 401(k) accounts lasted just 10 total trading days, beginning on October 29 and ending on November 12, 2001. This transition applied to all plan participants, including senior executives."\textsuperscript{167}

Enron's stock fell 35 percent during the freezing of retirement holdings.\textsuperscript{168} From October 29, the first day of the temporary shut-down, through November 13, while participants were blocked by the lockout from making investment changes,\textsuperscript{169} the Enron share

\begin{itemize}
\item\textsuperscript{160} \textit{Id.}
\item\textsuperscript{161} \textit{Id.}
\item\textsuperscript{162} \textit{id.}
\item\textsuperscript{163} \textit{id.}
\item\textsuperscript{164} \textit{Investments, supra note 156.}
\item\textsuperscript{165} \textit{Enron Press Release, Dec. 14, 2001, supra note 132.}
\item\textsuperscript{166} \textit{Id.}
\item\textsuperscript{167} \textit{id.}
\item\textsuperscript{168} \textit{CNN, Fed In Enron Probe: U.S. labor department to probe crippled energy trader’s handling of pension plans, CNN MONEY, Dec. 5, 2001, at http://money.cnn.com/2001/12/05/companies/enron/index.htm.}
\item\textsuperscript{169} \textit{Shim, supra note 142.}
\end{itemize}
price went from $13.81 to $9.98 - a drop of $3.83. On five of those trading days, Enron's share price closed below $9.98.\textsuperscript{170}

Enron stressed employee notice of the lockout, yet "company executives managed to shed much of their holdings before the fall, while thousands of employees were locked into company stock-laden retirement accounts that soon amounted to nothing."\textsuperscript{171} There "seemed to be different rules for Enron executives, who reaped huge financial rewards from sales of company stock, and lower-level workers, who were prevented from unloading similar shares in their personal pension funds."\textsuperscript{172}

Suspictions remain considering the pre-lockout plan administrator was Charles Schwab, a reputable, well-respected firm that handles a significant number of pension plans.\textsuperscript{173} One author pointed out that the lockout occurred during a particularly suspect time – providing more evidence of a "pump and dump" type operation\textsuperscript{174} – since "Schwab runs a very good 401(k) administration plan, one that thousands of companies use. It seems more than coincidental that suddenly a switch needed to be made."\textsuperscript{175}

Those charged with policing the company, such as Arthur Andersen, responsible for audit of the company's financials, and the law firm of Vinson & Elkins, responsible for reporting on the legality of the questionable partnerships in response to internal concerns, were subject to conflicts of interest. Faced with approximately $15 billion in debt, Enron and a number of its subsidiaries filed for Chapter 11 bankruptcy protection in U.S. Bankruptcy Court for the Southern District of New York\textsuperscript{176} in December,

\textsuperscript{171} Ritterpusch, \textit{supra} note 138.
\textsuperscript{172} Ron Scherer & David R. Francis, \textit{Flameout: Enron Disaster Will Provide Lessons For Years to Come}, DESERET NEWS, Jan. 20, 2002, at AA02, available at 2002 WL 3185732; \textit{see Fed In Enron Probe, \textit{supra} note 168.}
\textsuperscript{173} \textit{See supra} notes 155-179 and accompanying text under Lockout Section.
\textsuperscript{174} \textit{See supra} notes 248-257 and accompanying text.
\textsuperscript{175} James J. Cramer, \textit{The Bottom Line, Pumping Enron}, NY METRO ONLINE (Feb. 6, 2002), at http://www.newyorkmetro.com/nymetro/news/bizfinance/columns/bottomline/5645/index.html. "The Enron scandal isn't half as complicated as the press is making it out to be -- in fact, it's one of Wall Street's oldest and most venerable scams." \textit{Id.}
\textsuperscript{176} Press Release, Mark Palmer & Karen Denne, Enron Corp., \textit{Enron Files Voluntary Petitions for Chapter 11 Reorganization; Sues Dynegy for Breach of Contract, Seeing Damages of at Least $10 Billion} (Dec. 2, 2001), available at http://www.enron.com/corp/pressroom/releases/2001/ene/PressRelease11-12-0201letterhead.html ("Filings for Chapter 11 reorganization have been made for a total of 14 affiliated entities, including Enron Corp.; Enron North America Corp., the company's wholesale energy trading business; Enron Energy Services, the company's retail energy
after Dynegy Inc. withdrew its bid to buy the Houston energy trader.\textsuperscript{177} At the time of filing, Enron was officially the largest bankruptcy court filing in U.S. history.\textsuperscript{178} "When the seventh-largest corporation crashes and burns, the wreckage is diverse and scatters in many directions," says Robert Reischauer, president of the Urban Institute in Washington.\textsuperscript{179}

In short, Enron employees were heavily invested in Enron stock and restricted from selling when the price crashed while high-ranking executives were able to divest themselves and avoid losses. Employees, obviously, want retirement funds to be made whole. In an environment of misstated and possibly fraudulent financials, questionable business structures, obvious conflicts of interest between legal and accounting (auditing) services, the retirement plans' questionable lack of diversification, holding and lockout periods, while executives were arguably able to benefit at the expense of employees' limited rights and knowledge, lends strong evidence for claims of fiduciary breach and fraud.

marketing operations; Enron Transportation Services, the holding company for Enron's pipeline operations; Enron Broadband Services, the company's bandwidth trading operation; and Enron Metals & Commodity Corp. Enron-related entities not included in the Chapter 11 filing are not affected by the filing. These non-filing entities include Northern Natural Gas Pipeline, Transwestern Pipeline, Florida Gas Transmission, EOTT, Portland General Electric & other Enron international entities.

\textsuperscript{177} Shim, \textit{supra} note 142. \textit{See also} Enron Press Release, Dec. 2, 2001, \textit{supra} note 176. ("As part of the reorganization process, Enron also filed suit against Dynegy Inc. (NYSE: DYN) in the same court, alleging breach of contract in connection with Dynegy's wrongful termination of its proposed merger with Enron and seeking damages of at least $10 billion. Enron's lawsuit also seeks the court's declaration that Dynegy is not entitled to exercise its option to acquire an Enron subsidiary that indirectly owns Northern Natural Gas Pipeline. Proceeds from the lawsuit would benefit Enron's creditors."). Enron and Dynegy since settled. Press Release, Karen Denne, Enron Corp. & John Sousa, Dynegy, \textit{Enron and Dynegy Announce Settlement of Merger-Related Litigation}(Aug.15,2002),available at http://www.enron.com/corp/pressroom/releases/2002/ene/28-081502ReleaseLtr.html.(Dynegy will pay Enron $25 million to settle the lawsuit Enron had filed alleging breach of contract for wrongful termination of the merger. Enron has agreed to release Dynegy from any and all claims relating to the terminated merger and to dismiss such litigation.).

\textsuperscript{178} That was until recent events, i.e. WorldCom's "potential" filing took center stage. Mitchell Tacelle & Carrick Mollenkamp, \textit{Leading the News: SEC Files Civil Suit Against WorldCom --- If Banks Call In Loan Now, Forcing Bankruptcy Filing, $30 Billion in Bonds Default}, \textit{Wall St. J.}, June 27, 2002, at A3, available at 2002 WL-WSJ 3399075. ("If WorldCom eventually seeks legal protection from creditors, it would be one of the largest bankruptcies in history. As recently as March, it reported assets of $92 billion. By comparison, when Enron Corp. and 13 subsidiaries filed for bankruptcy protection last December, they listed assets of just under $50 billion."). WorldCom has since filed. \textit{See} http://www.elaw4enron.com/Worldcomdefault.asp.

\textsuperscript{179} Scherer & Francis, \textit{supra} note 172.
D. Aftermath

1. The Individual Employees' Plight

"Enron's employees, 15,000 of whom hold Enron stock in their 401(k) retirement plans, stood to be among the biggest losers in the company's collapse."180

Moluf, the wife of a deceased Enron retiree who may no longer be receiving medical or pension benefits, said that when she learned the news about Enron, "It hit me like the Trade Center."181

"Enron stock in employees' 401(k) accounts that was worth $90 a share 11/2 years ago is worth less than a $1 a share today."182

"Many Enron employees lost 70 to 90 percent of their retirement assets after the company indicated that it would restate profit reports."183 Charles Prestwood, a retired Enron attorney lost $1.3 million dollars, "I'm a very broke person. I lost everything I had."184

After retiring as an Enron natural-gas plant manager in 1992, when his eyesight failed, Mr. Maddox, now 68 years old, kept his retirement-plan money invested entirely in Enron stock. ‘I lost $1,244,000,’ says Mr. Maddox, who has other retirement income but postponed plans to build a new house because of the loss.185

Most employees seemingly choose not to diversify – whether due to lack of information, education about risk or employee loyalty.186 One article suggests investors choose company stock as a way of following sound advice in buying a company they know.187

181. Shim, supra note 142.
182. Id.
183. Fed In Enron Probe, supra note168.
184. A Reaction to Enron Pension Meltdown, supra note 142.
186. Id.
187. Id.
2. The Wolves: Discriminatory Treatment

Enron executives were not as unfortunate as their employees.\textsuperscript{188} Enron executives, not only sidestepped the lock out, but enjoyed "elite arrangements" popular in many companies for executives to shield assets in partnerships and trusts, shelter large amounts of compensation from taxes and pass amounts largely tax-free to heirs.\textsuperscript{189}

To be sure, many Enron executives lost millions of dollars they had saved in deferred compensation plans, which are special savings plans that function much like outsize 401(k) plans for executives, when the company filed for bankruptcy-court protection on December 2. These executives will join other unsecured creditors in seeking to recover from Enron.

However, executive agreements filed with the Securities and Exchange Commission over the years disclose that the most senior executives, who enjoyed more elite arrangements, were also able to shield their special pension packages from bankruptcy and protect them from creditors by sheltering them within private partnerships.\textsuperscript{190}

As is common in these types of arrangements, and dissimilar to ERISA pensions, executives can withdraw funds from, or borrow against, the policy's cash value.\textsuperscript{191}

These special pension plans are called "split-dollar life insurance policies," in which companies pay the vast majority of the premiums on lucrative insurance policies that benefit top executives or their families.\textsuperscript{192} These policies are typically used to shel-


\textsuperscript{189} Theo Francis & Ellen E. Schultz, Top Executives At Enron Shield Pension Benefits, \textit{WALL ST. J.}, Feb. 7, 2002, at A3, available at 2002 WL-WSJ 3385283. "Last month, the deals got a big boost when the Internal Revenue Service, at the urging of the Bush administration, employer groups and the insurance industry, backed off a proposal introduced under the last administration to tax the insurance arrangements more heavily." \textit{Id.}

\textsuperscript{190} \textit{Id.}

\textsuperscript{191} \textit{Id.}

\textsuperscript{192} For an example of a split-dollar life insurance policy of J. Skilling, former CEO of Enron, who resigned in August 2001 see http://contracts.corporate.findlaw.com/agreements/enron/skilling.ins.1997.05.23.html.
In a typical split-dollar arrangement the company pays most of the premium -- costs it ultimately would recoup. At the same time the executive could borrow against this policy for a variety of uses, or leave the funds until the executive's death for his or her heirs to recoup, largely tax-free. Such policies have been a popular tool for funding retirement benefits for top executives, because under the most common arrangements, executives would pay -- and be taxed on -- only a sliver of the total premiums for the policy. The rest of the premium is paid by the employer, which later recoups its costs when the benefits are paid out.

3. How to Get Some Mortar?

The resulting picture demonstrates that the stone and mortar financial planning to which wealthy executives are privy is unknown to most average employees, who look to the federal government through ERISA for protection. Little do they know, the protection is not applicable in certain situations. The average Enron employee, possibly misled by those executives who were fully protected from damage to their own retirement funds, has a sticks and straw pension which blew down once the wolf came blowing. That wolf is big business and a capitalistic market most average Americans fail to understand. That wolf is non-standard accounting practices, conflicted auditing and legal firms charged with the duty of oversight, greedy executives with insight to inconsistencies and potential collapse proselytizing the sacredness of investment in the company. That wolf is real and although Congress once, in

193. Francis & Schultz, supra note 190.
194. Id.
195. Id. The article also explains executives can shelter retirement money other ways. While regular employees are often loaded up with company stock in their retirement plans, and can't diversify out of it, executives can protect themselves without selling the shares and triggering taxes by using various hedging techniques. These include "swap" funds, which let them swap the returns on their employers' stock for the return on a diversified pool of securities.

Representative Richard Neal of Massachusetts, introduced a bill to rein in the use of swap funds -- also called exchange funds -- and characterized them as a tax-avoidance scheme. The bill went nowhere...Now, citing recent events at Enron, Mr. Neal is seeking new co-sponsors for the bill, noting recent disclosures in The Wall Street Journal that top Enron executives used swap arrangements to protect themselves from exposure to Enron stock. "While the employees of Enron looked on helplessly, one director was able to use exchange funds to hedge his bets, diversify his portfolio, and postpone taxes," Mr. Neal wrote in a letter to his colleagues. Theo Francis & Ellen Schultz, Shelters for Executive Pensions Appear to Get Support Under Bush, WALL ST. J., Feb. 25, 2002, at A2, available at 2002 VWSJ 3386886.
the rush and fury of the Studebaker aftermath, attempted to pro-
vide mortar to American retirees, Congress did not provide bricks
to seal the deal. Employees who participate in defined contribu-
tion plans remain at risk — uninsured through the PBGC and un-
protected by ERISA’s fiduciary provisions if the §404(c) release
applies. Neither the IRC nor ERISA prohibited investing 100% of
401(k) in employer stock. The law failed to prohibit many devices
such as the lock out period. Furthermore, it did not prevent the
freezing of employer stock in the 401(k) for many years.

III. THE LITIGATION: EMPLOYEES’ CLAIMS AND REMEDIES
AVAILABLE

Without the protection of PBGC, the only hope employees have
of recovering their losses is under ERISA’s fiduciary rules. Of
course, as previously discussed, defined contribution plan holders
may have a hard time arguing fiduciary duty in light of 404(c),
and even if employees have a valid claim, they will not be made
whole because ERISA remedies are so limited. These examina-
tions are probably moot once the company slides into bankruptcy —
as Morrison Knudsen did,196 and Enron has — because the bank-
rupency proceedings ultimately could lead a trial court to dismiss
the claim.197 Logically, employees would then seek to sue execu-
tives directly — but even if executives are found to have committed
some breach duty external to ERISA, their pensions cannot be
used to offset the losses. Under ERISA §206(d) antialienation
provisions, pension benefits may not be assigned or alienated un-
less the executives are found criminally liable or liable as plan
fiduciaries.198

196. See supra notes 282-286 and accompanying text for Morrison discussion.
197. Ellen E. Shultz & Theo Francis, Enron Isn’t the Only Retirement Tale That Leads
3383473.
(d) Assignment or alienation of plan benefits. (1) Each pension plan shall provide that
benefits provided under the plan may not be assigned or alienated...(4) Paragraph (1)
shall not apply to any offset of a participant’s benefits provided under an employee
pension benefit plan against an amount that the participant is ordered or required to
pay to the plan if, — (A) the order or requirement to pay arises, — (i) under a judgment
of conviction for a crime involving such plan, (ii) under a civil judgment ...entered by
a court in an action brought in connection with a violation...of part 4 of this subtitle...
Id. See also Sharon Reece, The Gilded Gates of Pension Protection: Amending the An-
tialienation Provision of ERISA §206(d), 80 OR. L. REV. 379 (2001) (a brilliant paper discuss-
ing the antialienation provision and its limited exceptions)
A. Civil Suits:  

1. Statutory Breach Under ERISA §1109

Campbell Harrison & Wright LLP, a Houston law firm filed the first case on November 13, 2001, entitled Tittle, et al v. Enron Corp., et al. A class action ERISA case, it was filed on behalf of plan participants “who were participants in or beneficiaries of the Enron Corporation Savings Plan, 401(k), from November 1, 2000, to the present (the Class Period) and who made or maintained investments in Enron stock.” On April 8, 2002, the suit was consolidated with the multitudes of complaints into one class action, representing 24,000 Enron employees, and argues that the defendants breached their fiduciary duties in vio-

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203. The suit by the Severed Enron Employees Coalition (SEEC) is included. SEEC is an independent, volunteer organization representing over 5000 Enron employees (severed and not). See http://www.theseec.org/full_who.shtml.

204. See http://www.enronerisa.com/complaint/html. Includes Enron executives, plan manager Northern Trust, plan administrators and administrative committees. According to the filing, Northern Trust was a fiduciary defined under ERISA 403(a)(1) – which means subject to the direction of Enron Administrative Committee and other fiduciaries. Administrator of the plan, according to SEC filings, was Mary K Joyce. According to the original SEC filing, the fiduciaries include:

1) The Northern Trust Company, subsidiary of Northern Trust Corp, as trustee of plan;
2) Northern Trust Retirement Consulting, LLC, subsidiary Northern Trust Corp, as recordkeeper of the plan;
3) Philip J. Bazelides, Chairmen of the Administrative Committee of the Plan in SEC filings;
4) Robert A. Belfer, Director of the Company, served on Exec and Finance Committee and Board of Directors. Received $51 million from the sale of his Enron Shares;
5) Norman P. Blake, Jr., Director of the Company, served on Finance and Compensation Committees; received $1.7 million from sale of his Enron Shares;
6) Ronnie C. Chan, Director of the Company, served on Audit and Finance Committees; received $337,000 from sale of Enron shares;
lation of ERISA § 1109 in a variety of ways, especially in connection with the Plan's holdings of company stock, when Enron and

7) John H. Duncan, Director of the Company, served on Compensation committee; received $2 million from sale of Enron shares;
8) Lou Pai, Chairman of Enron Subsidiary; received $353,000 from sale;
9) Ken Rice, former President and CEO Enron Broadband; rec. $72 million;
10) Mark Frevert, Chairman Enron North America; $50 million;
11) Joseph Sutton, former Vice Chair Enron; $40 million;
12) Clifford Baxter, former vice Chair of Enron; $35.2 million;
13) Joseph M. Hirko, former Chief Exec. Enron Broadband; $35.1 million;
14) Richard A. Causey, former CAO; $13.3 million;
15) James V. Derrick is or was General Counsel; $12.6 million;
16) Mark E. Koenig, is or was VP and $9.1 million;
17) Cindy K Olson, VP, $6.5 million. Confirming Tuesday's congressional testimony by Cindy Olson, a top Enron human-resources executive who also served as a 401(k) plan trustee, Mr. Prentice said Ms. Olson didn't share information with the other trustees about allegations she had heard about the company's financial practices;
18) Steven J. Kean, is or was Director; $5.1 million;
19) Richard B. Buy, is or was Chief Risk Officer; $4.3 million;
20) Michael S. McConnell is or was President Enron Global Markets; $2.3 million;
21) Joe H. Fuy, Director; $1.6 million;
22) J. Mark Metts, is or was VP and Director; $1.4 million;
23) Stan Horton; former Chairman and CEO of Enron Transportation Services; $45 million;
24) Wendy L. Gramm; Director; Chair Commodities Futures Trading Commission; $276,000 stock;
25) Ken L. Harrison; Director; $79 million;
26) Robert K. Jaedicke; Director; served on Compensation and Audit Committees; $841,000;
27) Mary K. Joyce; Plan Administrator (no amount on sale of stock mentioned);
28) Kenneth L. Lay; Director and COB; CEO; $101 million;
29) Andrew Fastow; former CFO; $30.4 million;
30) Jeff McMahon; former CFO; $2.7 million;
31) Charles A. LeMaistre; Director; alleged to have served as a Chair of Compensation and Management Development Committee responsible for monitoring Company's benefit programs; $841,000;
32) Rebecca P. Mark-Jusbasche; Director; $79 million;
33) John Mendelsohn; Director; Member Board's Audit and Compliance Committee and Nominating and Corporate Governance Committee;
34) Jerome J. Meyer; Director;
35) Paulo V. Ferraz Pereira; Director; served on Audit and Compliance Committee;
36) James S. Prentice; Chair Administrative Committee of Plan;
37) Frank Savage; Director; served on the Compensation and Management Development Committee and responsible for monitoring Company's benefit programs;
38) Jeffery K. Skiling; Director; served as Company's President and COO; CEO; $67 million;
39) John A. Urquhart; Director; paid substantial consulting fees by Enron;
40) John Wakeham; Director; substantial consulting fees;
41) Herbert S. Winokur; Director;
42) Arthur Anderson, LLP;
43) Plan Administrative Committee Members;


executive officers were made aware of numerous practices that made Enron's stock an inappropriate Plan investment. The fiduciaries failed in their duty to disclose and inform the 401(k) participants regarding this information. Instead they encouraged participants and beneficiaries of the Plan to continue to make and maintain substantial investments in the Company Stock Funds in the Plan.\textsuperscript{206}

Other actions include misleading employees into purchasing and retaining company stock, creating entities which benefited insiders; insider trading of company stock; poor policing, inadequate auditing practices and failure to ensure adequate diversification or oversight of investment of the funds.\textsuperscript{209}

Arthur Andersen is also named in the class action to answer to allegations of fraud, breach of fiduciary duty, and breach of implied and express warranties and seeks at least $600 million in damages.\textsuperscript{210} Law firm Vinson & Elkins also joins the list of defendants, which also includes Wall Street investment banks Merrill Lynch, JP Morgan Chase & Company, Credit Suisse First Boston, and Citigroup (including Soloman Smith Barney).\textsuperscript{211}

The complaint refutes any §404(c) employer defense by stating the plans never qualified under §404(c) treatment because Enron failed to satisfy the conditions for such treatment, including range of diversified investments, ability to transfer freely and sufficiency of information to make such choices.\textsuperscript{212} Generally, to prove that the plan's administrators breached their fiduciary duties, employees must show that the trustees knew the stock was a bad investment. This presents a high hurdle, so it is not surprising that prior lawsuits over losses in company stock in 401(k) plans have generally come in the wake of allegations of accounting irregularities.\textsuperscript{213}

For example, prior 401(k) lawsuits, under 404(c) limitations, have found employer liability where the employer intentionally

\textsuperscript{209} http://www.enronerisa.com/complaint.html, at Claim 39. The complaint also makes RICO claims. See Enron Complaint, supra note 144, at Count 5.
http://www.enronerisa.com/complaint.html
\textsuperscript{210} Id.
\textsuperscript{211} Id.
misleads employees.\textsuperscript{214} Importantly for the plaintiffs, once they demonstrate 404(a) fiduciary duties owed by the defendants, 404(c) is merely a defense to such duties – and one in which the defendants carry the burden to prove plaintiffs’ control was the cause of the loss (the essential 404(c) control provisions).\textsuperscript{215} Incidentally, 404(c) will not apply if the employer materially misrepresented plan participants.\textsuperscript{216} Material misrepresentation requires knowledge – meaning employers can still attempt to demonstrate they did not know the stock was spiraling. Additionally, Courts have concluded that a business with an ESOP can be liable for breach of its fiduciary duty if it abuses its discretion by concealing its financial instability and continuing to invest plan assets in company stock, even though the business is failing.\textsuperscript{217}

2. **ERISA Restrictions: No Effective Sanction for Egregious Breach of Fiduciary Duty Under ERISA**

Plan beneficiaries sue under §1132(a)(2) (allowing for "appropriate relief" in suits brought pursuant to §1109).\textsuperscript{218} Through this provision, the first suit claims defendants are obliged to make good to the Plan the loss it has suffered as a result of their fiduciary breaches.\textsuperscript{219} The Plan is not a party to particular actions.\textsuperscript{220} Pursuant to ERISA, however, the relief requested in this action is for the benefit of the Plan\textsuperscript{221} allowing damages to make the plan whole, including making good to the plan for "any losses" “restor-
ing to such plan any profits” and “other equitable or remedial relief as the court may deem appropriate." 222

Other equitable relief has repeatedly been deemed remedies equitable and not legal in nature 223 necessarily ruling out compensatory and punitive damages. The Supreme Court has determined that the statutory language of section 1109 does not allow beneficiaries “...extracontractual damages, or ...the right of action for compensatory or punitive relief....” 224 However, the Court specifically did not hold that such relief would not be available to the plan. 225

Courts have reasoned that the purpose of section 1109 is to “undo harm” to the plan and not to penalize. 226 A possible reason for this limit to a contractual remedy could be that extensive exposure to liability would discourage employers from offering plans at all. 227 This is an example of the age-old tension where it is thought that over-regulation may lead to under coverage.

Because the remedy must be to the plan, valuation of the amount of money damages is necessarily impossible, and therefore, leaves no adequate remedy at law. Left with only equitable remedies, the plaintiffs will have just as difficult a time valuing

223. In re Unisys Corp. Retiree Medical Ben. ERISA Litigation, 57 F.3d 1255 (3rd Cir. 1995); Novak v. Andersen Corp., 962 F.2d 757 (8th Cir. 1992), rehearing denied, certiorari denied, 508 U.S. 959 (1993); Lee v. Burkhardt, 991 F.2d 1004 (2d Cir. 1993) (See 7th Circuit treatment at 1992 WL 336376 at FN 4 as a reference as well as 140 F.3d 1190, 1194.).
225. Id.
226. Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, (2d Cir. 1992). The standard measure for equitable relief is always to put the plaintiff in the position prior to the breach or tortuous act – never to penalize. As noted in the Supreme Court decision, Sheldon v. Metro-Goldwyn Pictures Corp., 309 US 390, 399 (1939), equitable relief in “accordance with the principles governing equity jurisdiction [is] not to inflict punishment but to prevent an unjust enrichment by allowing injured complainants to claim ‘that which, ex aequo et bono, is theirs, and nothing beyond this.” (C. J. Hughes quoting Justice Daniel’s opinion in Livingston v. Woodworth, 15 How. 546, 560).
227. See Varity v. Howe, 516 U.S. 489 (1996), where the Supreme Court, while comparing the common law and ERISA’s proscription of fiduciary duties required in a trust relationship, determined that ERISA’s fiduciary provisions may allow for other than traditional treatment, quoting Congress,

in doing so, courts may have to take account of competing congressional purposes, such as Congress’ desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place. Cf. ERISA § 2 with Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78-81, 115 S.Ct. 1223, 1228-1229, 131 L.Ed.2d 94 (1995), and Mertens v. Hewitt Associates, 508 U.S. 248, 262-263, 113 S.Ct. 2063, 2071-2072, 124 L.Ed.2d 161 (1993).

Id. at 497.
the amount of restitution (or placing amounts under a constructive trust) considering the loss to the plan is questionable and based on so many arbitrary economic factors, that restoring the plans to where each would have been but for the breach is impossible.

One Second Circuit case deals with valuation of damages resulting from a fiduciary breach to a plan.\textsuperscript{228} Using the common law of trusts as a guide, the court determines the damage using examples of other like investments to determine but for the breach, what the plan would have been worth.\textsuperscript{229} In other words, damages are equal to measurement by the rate of return which prior investments made by the plan fiduciary would have realized absent the breach.\textsuperscript{230}

Additionally, according to ERISA §1132, the Civil Enforcement provision, \textsuperscript{231} the Secretary can enforce penalty on the breaching party equal to 20% of an applicable recovery amount for breach of fiduciary duties. This penalty is likely in the accounting fiasco environment and considering the public outcry to skin the wolves.

\textsuperscript{228} Donovan v. Bierwirth, 754 F.2d 1049, (2d Cir. 1985), 78 A.L.R. FED. 110 (1986).
\textsuperscript{229} Id.
\textsuperscript{230} Id.

Civil penalties on violations by fiduciaries: (1) In the case of—
(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or (B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term “applicable recovery amount” means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—
(A) pursuant to any settlement agreement with the Secretary, or (B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary’s sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—
(A) the fiduciary or other person acted reasonably and in good faith, or—(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

Id.
However, plaintiffs would unlikely collect attorney fees through ERISA since the statute limits such relief.\textsuperscript{232} Plaintiffs can be more certain of the likelihood of a supportive judicial atmosphere and the odds that courts will find for them through whatever the statute does provide. For example, in \textit{Varity v. Howe},\textsuperscript{233} the Supreme Court, considering the employer’s “intended communication about the security of benefits was rendered materially misleading,” held “that making intentional representations about the future of plan benefits in that context is an act of plan administration.”\textsuperscript{234}

In \textit{Varity}, the employer shifted employees to a new plan under a new employer, with the promise of security to those funds, all the while knowing the shift would relieve the employer from an expensive responsibility to the employees and lead to extreme loss to the beneficiary-employees.\textsuperscript{235} As a result of the employer’s fraudulent and misleading claims, the plaintiffs lost significant benefits.\textsuperscript{236} Although the case dealt with a welfare benefit plan,\textsuperscript{237} the Court’s determination that the employer’s misleading or fraudulent statements which damaged the plan were considered a breach of fiduciary duty as “administrator”\textsuperscript{238} lends support to the Enron employees’ argument where executives touted Enron stock as a wise and fiscally responsible investment, to benefit personally from employee investment, all the while knowing it was a rotten egg.\textsuperscript{239} The Court stated: “To participate knowingly and significantly in deceiving a plan’s beneficiaries in order to save the employer money at the beneficiaries’ expense is not to act ‘solely in the interest of the participants and beneficiaries’ under ERISA 404(a).”\textsuperscript{240}

\begin{itemize}
\item \textsuperscript{233} 516 U.S. 489 (1996).
\item \textsuperscript{234} Id.
\item \textsuperscript{235} Id.
\item \textsuperscript{236} Id.
\item \textsuperscript{237} Id. See infra note 129 for explanation of “welfare benefit plan.” ERISA covers such plans, which include medical and vacation funds.
\item \textsuperscript{238} \textit{Varity}, 516 U.S. at 494. In \textit{Varity}, the Supreme Court noted that the District Court held that \textit{Varity} and Massy-Ferguson “violated an ERISA imposed fiduciary obligation to administer Massey-Ferguson’s benefit plan ‘solely in the interest of the participants and beneficiaries’ of the plan. ERISA §404(a).” Id.
\item \textsuperscript{239} See infra notes 122-153 and accompanying text and timeline in Appendix 1.
\item \textsuperscript{240} \textit{Varity}, 516 U.S. at 506. See also Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co., 698 F.2d 320, 326 (7th Cir. 1983) ([l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA.); Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S., 559, 570-571 (1985) (ERISA fiduciary duty includes common-law duty of loyalty); \textsc{Bogert & Bogert, Law}
B. Criminal Charges: Remedies and Evidence of Wrongdoing

The criminal investigations may lead to not only penalties against plan fiduciaries, but may bring more evidence of a breach of duty for the civil cases. Successful criminal prosecutions of some executives can provide relief from the anti-alienation rules that shield plan accounts.

Under ERISA §1131, fiduciaries may be subject, in light of what the harm is, to light criminal penalties:

Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.\(^{241}\)

Of course, other Federal and State statutes cover other criminal charges, however, the SEC does not “always bring criminal charges against a corporation’s highest officials . . . because criminal violation of securities laws requires proof that a person acted ‘willfully and knowingly’ to make false representations to regulators or the public.”\(^{242}\)

Possible criminal charges exist for what the SEC terms “the pump and dump,” where a company, “knowingly creating or promulgating a series of untrue statements designed to juice a stock to a higher level than it normally would go (the pump) with the intention of selling shares in the ensuing frenzy (the dump).”\(^{243}\) Investigators may view the lockout as suspect and circumstantial

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\(^{241}\) ERISA §1131. Since amended by The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, H.R. 3763, 107th Cong. (2002). See infra note 344-45: increasing ERISA § 501 criminal penalties from one year imprisonment and/or a $5,000 individual ($100,000 corporate entity) fine to a ten year imprisonment and/or a $100,000 individual ($500,000 corporate entity) fine; and prevention of audit accounting firm non-audit services. Id.


\(^{243}\) Cramer, supra note 175.
evidence of such a pump and dump because of the suspicious timing.244

More evidence of wrongdoing was discovered in March, as financial statements, memoranda and other business papers became open to public scrutiny. In 2000, "the very time, investigators now say, when corporate officials were improperly inflating the company's profits by as much as a billion dollars," Enron paid its executives huge bonuses245 for hitting stock price targets.246 According to Stephen Meagher, a former federal prosecutor who handled white-collar cases and who now represents whistle-blowers, "[a] strong financial motive is probably the best evidence a prosecutor can get to promote or to establish criminal intent.... The levels of compensation that we are talking about here would certainly seem to be a powerful incentive for anyone to do anything."247

Currently, investigators have little or "no evidence that anyone in government did anything improper as the firm spiraled downward."248 Investigators are also unsure if Enron did anything inherently illegal.249

That's partly because nobody can be sure that those dodges were inherently illegal. Many companies maintain similar arrangements, usually intended to avoid taxes--a benefit of interest to Enron too. Enron avoided paying federal income tax for four out of the last five years and instead received millions of dollars in federal-tax refunds.250

However, even if Enron is deemed on the proper side of the law in its accounting practices and corporate structure, other activities affecting shareholders -- especially employee-shareholders - are likely to provide plenty of firepower to support causes of action for misrepresentation, fraud, statutory and common law breach of fiduciary duty, negligence, insider trading and others under a number of Federal statutes -- including, and most importantly for discussion here, ERISA.

244. See infra notes 155-179 and accompanying text.
246. Id.
247. Id.
248. Scherer & Francis, supra note 172.
250. Duffy, et.al., supra note 152.
C. State Law Remedies & Sanctions for Breach of Fiduciary Duty

Generally, ERISA preempts state law regulation of pensions and retirement plans.\(^\text{251}\) State claims of breach of fiduciary duty, intentional and negligent misrepresentation and breach of implied covenant of good faith and fair dealing will likely be seen as “related to” the plan and therefore preempted by ERISA.\(^\text{252}\)

However, state law claims against corporate executives for breach of corporate fiduciary duties, and auditing / accounting firms and legal firms (like Vinkins & Elkins) for breach of non-fiduciary duties will arguably not be preempted as not related to ERISA.\(^\text{253}\) Although these particular defendants could avoid ERISA fiduciary breach claims, they may be exposed to legal malpractice and other state law claims.

D. The Effects of the Bankruptcy on the Suits and Remedies

One must remember, although the class actions are seeking relief under ERISA §1109 for money damages, it is very unlikely any money will be available from which to pay damages. “By law, workers' claims against Enron are secondary to its obligations to banks and other secured creditors.”\(^\text{254}\) The bankruptcy filing assures that the employees' claim will be limited to whatever money may be available.\(^\text{255}\) Realistically, it looks as if nothing will be available. Furthermore, according to Michael McConnell, a former U.S. bankruptcy judge and current shareholder at Winstead, Sechrest & Minick, “[t]he question of whether there will be assets to distribute and, if so, how they will be distributed, won't be de-

\(^{251}\) 29 U.S.C.A. §1144 (1994 & Supp. V. 2000), provides in pertinent part: a) Supersedure; effective date Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

\(^{252}\) Id.


cided for some time.\textsuperscript{256} Once available, if at all, legal experts expect the fight for these small amounts of assets will be vicious.\textsuperscript{257}

In the bankruptcy pecking order, secured creditors – such as banks holding collateral on loans – are essentially first in line. Next come unsecured creditors whose claims are arranged in order of priority. U.S. law gives a high priority to employees’ claims for up to $4,300 in wages and benefits, for example. The sum offers little consolation to employees who have lost their jobs and watched hundreds of thousands of dollars in company stock evaporate from retirement accounts, experts said. ‘Employees are just like every other shareholder - at the back of a very long line,’ said Corey Rosen, executive director at the National Center for Employee Ownership in Burbank, Calif. ‘They are common stockholders in the position of any other common stockholder, which ain’t good.’\textsuperscript{258}

As of May 2002, Enron Corporation’s Chief Executive Stephen F. Cooper, estimated the company may be able to recover 40% of the over $50 billion owed to creditors.\textsuperscript{259}

The bankruptcy will provide a stay against the employees seeking immediate remedy against Enron over lost pensions.\textsuperscript{260} However, lawsuits by Enron employees that challenge the fiduciaries’ treatment of 401(k) accounts by executives, will go forward even if Enron is in bankruptcy, said attorney Lynn Sarko of Keller Rohrback, a Seattle law firm bringing one of the suits on behalf of employees.\textsuperscript{261} According to Sarko, “[t]here is still liability faced by fiduciaries, officials who were administrators of the savings plan and by the companies that insured it.”\textsuperscript{262} These employees received a boost when an “official committee to focus on the issues relating to (Enron) employees” was appointed by U.S. Bankruptcy Court Trustee Carolyn Schwartz.\textsuperscript{263}

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\textsuperscript{256} Charlene Oldham, Enron’s fall promises a legal mess; 'There is nothing to compare it with,' says ex-bankruptcy judge, \textit{THE DALLAS MORNING NEWS}, 2d. ed., Business, Dec. 5, 2001, at 1D.
\textsuperscript{257} Id.
\textsuperscript{258} Id.
\textsuperscript{260} See Enron Complaint, \textit{supra} note 144, at count 43.
\textsuperscript{261} Flanigan & Kraul, \textit{supra} note 180.
\textsuperscript{262} Id.
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In the interest of maximizing the bankruptcy estate, lawyers searching for assets are "locking onto $435 million of insurance meant to protect the company and top officials during lawsuits." One of which is fiduciary liability coverage worth $85 million and "is supposed to settle claims arising from the alleged mismanagement of benefit programs--in this case, the 401(k) plan that destroyed the savings of many Enron employees." Unfortunately for the former employees, insiders claim most of those proceeds, if payable at all, will be paid to Enron's defense attorneys. Furthermore, considering the current charges of misrepresentations in seeking coverage many insurers are considering refusing to pay anything at all. Plaintiffs suing over the 401(k) damages, asked the bankruptcy court to set that $85 million aside to help make them whole. Enron requested $30 million of that plan be advanced to them to cover defense costs for directors and managers, but litigants are not having that. To prevent such a distribution, states and litigants petitioned the bankruptcy court. These claimants were likely pleased when the bankruptcy court denied Enron access to the funds.

As a result of the bankruptcy, the Labor Department ensured in an agreement with Enron, the appointment of an independent fiduciary to manage the retirement plans. Enron has since agreed to payment for the new fiduciary manager.

265. Id.
266. Id.
267. Id.
268. Id.
"At this time, the (pension) plans are ongoing under (Enron) company sponsorship," a spokesman for the Pension Benefit Guaranty Corp., a federal agency that insures pensions, said Thursday.\textsuperscript{273} In conjunction with petitions for Chapter 11 reorganization, Enron asked the Bankruptcy Court to consider a variety of "first day motions" to support its employees, vendors, trading counterparties, customers and other constituents. These included motions seeking court permission to continue payments for employee payroll and health benefits.\textsuperscript{274} The bankruptcy court approved all first day, including:

Payment of pre-petition and post-petition employee wages, salaries, business expenses and benefits, including medical, for current employees, during the company's voluntary restructuring under Chapter 11; and approval for immediate use of the first $250 million of the proceeds of the debtor-in-possession (DIP) funds to continue operations, pay employee salaries and wages, and fulfill post-petition vendor obligations. The Court also approved an initial payment of $4,500 for each employee who might become severed.\textsuperscript{275}

In a related development aimed at preserving value in its North American wholesale energy trading business, Enron said that it is in active discussions with various leading financial institutions to provide credit support for, recapitalize and revitalize that business under a new ownership structure. It is anticipated that Enron would provide the new entity with traders, back office capabilities and technology from Enron's North American wholesale energy business, and that the new entity would conduct counterparty transactions through EnronOnline, the company's existing energy trading platform. Any such arrangement would be subject to the approval of the Bankruptcy Court.\textsuperscript{276}

\textsuperscript{273} Shim, supra note 142.
\textsuperscript{274} Enron Press Release, supra note 173.
\textsuperscript{276} Enron Press Release, supra note 173.
IV. WARNING SIGNS

A. Earlier Incidents of Pension Loss

Equity Funding, an insurance firm based in Los Angeles that went bankrupt in 1973; Cendant Corporation went bankrupt and cost investors billions. Lucent, Waste Management, Xerox—all had devastating stock declines which "hammered" employees' 401k plans. Other companies have 401k assets similarly invested in a high percentage of company stock. Causes of action via ERISA were hardly successful.

"Morrison Knudsen, a Boise, Idaho engineering and construction company filed for bankruptcy protection in June 1996." During the court battle, "the Morrison Knudsen employees have received no compensation for company stock-related losses in their retirement and employee stock-ownership plans." Morrison Knudsen stock suffered an Enron-type loss in 1994 and slid over $22 to $2 on the day it announced its bankruptcy filing. The 401(k) and ESOP at Morrison Knudsen, like Enron, matched with company stock and required holding shares until employees were in their fifties. In 1997, employees began to file against the company alleging breach of fiduciary duty to plan participants for failure to inform about true financial straits.

In November 1999, the federal district court in Boise ruled that Morrison Knudsen's 1996 bankruptcy reorganization plan had released the company's officers and directors from any obligations to the employees, and also had discharged the company's obligations to the plan.... The court didn't dismiss claims against the trustees in the pending case, because they weren't debtors.

277. Scherer & Francis, supra note 169.
278. Id.
279. Kadlec, supra note 98.
280. This includes: Coke - 81%; McDonald's, Procter & Gamble, and Texas Instruments - over 70% See Appendix 4 for a list of companies with high percentage of employer stock in plans.
281. Shultz & Francis, supra note 197.
282. Id.
283. Id.
284. Id.
285. Id.
Color Tile, a national retail chain, also went bankrupt after pressuring employees to increase investment in company stock. ColorTile Inc. employees lost their 401(k) savings in 1996, because the Fort Worth, Texas, company invested 82% of the money in stores that held ColorTile leases. The employees sued and obtained a settlement of $4 million – $3.1 million from plan trustee Texas Commerce Bank NA and $950,000 from Texas Pacific Indemnity Co., under a fiduciary liability insurance policy. That was a pittance compared with a total of $34 million in the plan.

In 1999, Cendant employees brought suit claiming fiduciary breach and securities fraud. They were unable to carry a securities fraud claim because they lacked standing. The fiduciary breach claim failed because the plan, a stock-bonus plan, was not ERISA-qualified.

Employees continue to file even in light of the struggle to substantiate claims. More recently, Lucent and Ikon Office Solutions "allege that then-current plan trustees kept offering company stock in the plan despite knowing of serious business problems that would hurt the stock price. Representatives for Ikon and Lucent say their companies didn't require employees to invest in the company stock, and educated employees about the need for diversification."

Lucent employees reported that during their 15-day lockdown in October of 2000 the company's stock took a 32% "nosedive."

Employees are suing in what is considered the "landmark" case for

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286. Shultz & Francis, supra note 197. History: How Enron workers will fare is anyone's guess. Employees sometimes prevail in such suits – to a degree. ColorTile Inc. employees lost their 401(k) savings in 1996, because the Fort Worth, Texas, company invested 82% of the money in stores that held ColorTile leases. The employees sued and obtained a settlement of $4 million – $3.1 million from plan trustee Texas Commerce Bank NA and $950,000 from Texas Pacific Indemnity Co., under a fiduciary liability insurance policy. That was a pittance compared with a total of $34 million in the plan. Id.

287. Ritterpusch, supra note 138.

288. Shultz & Francis, supra note 197.


290. Id.

291. Id. Participants should be able to sue under state fraud or fiduciary law as ERISA's preemption will not apply. Id.

292. Francis & Shultz, supra note 213.

executives misleading employees to invest in employer's stock, claiming executives continued to push sale and matching contributions in company shares while knowing serious business problems would decimate the worth. One employee reports his 401(k) once worth over $800,000 is now worth $58,000. Keeler Rohrback LLP, one of the firms representing Enron employees, is lead counsel for Lucent employees in the New Jersey suit which alleges: “that Lucent breached its fiduciary duties of loyalty, prudence, and prudent diversification [of retiree] assets by failing to disclose to plan participants and beneficiaries information indicating that Lucent stock was not a prudent stock...”

IKON is facing employee suit in Pennsylvania. Also recently, Xerox employees claimed in their June 2002 class action suit, Patti v. Xerox, “Xerox” as a fiduciary, failed to make appropriate disclosures, failed to ensure prudent investment and, “knew or should have known about the numerous questionable and potentially unlawful practices that made Xerox’s stock an inappropriate plan investment.”

Other 401(k) plan holders have filed similar breach of fiduciary duty lawsuits: Zafarano v. Nortel Networks, In re Providian, Zeigler v. Williams Companies, and Rambo v. Worldcom Inc. Global Crossing, who also under SEC investigation and filed for bankruptcy protection in January, made similar poor representations to employees while caring for executive’s salaries and pensions. The employees’ fiduciary breach suit alleges: “that the
defendants may have withheld and concealed material information, thereby encouraging participants and beneficiaries to continue to make and maintain substantial investments in company stock and the Plans.”

**B. A Synopsis – Pinpointing Where to Trowel Mortar**

Critics point to a number of problems with 401(k) defined contribution plans as cause for alarm about the future of American retirement. Most concerns support the contention that “they are just too risky for use in retirement planning.” These risks are exacerbated since most 401(k) investors cannot afford to invest a percentage of their incomes into the plans and do not have the experience or knowledge to manage the assets once they are shifted into the plan.

In brief, employee investors: 1) do not invest the recommended amount; 2) do not understand how to manage their investments; 3) do not diversify and often blindly invest too heavily in employer stock; 4) overestimate the return at retirement; 5) tend to spend accrued amounts when changing jobs instead of rolling amounts over into IRAs or such plans. Additionally, payout of 401(k) at retirement is often in a lump sum that can be squandered unlike amounts paid from a defined benefit plan through an annuity or other such controlled plan.

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**supra** note 294. (“We were lied to all along,” says James Welch, a 55-year-old switching technician for a Global Crossing unit sold last summer. Mr. Welch’s 401(k) account then held 6,200 Global Crossing shares valued at about $190,000. Last week, those shares were valued at $336. “I was always brought up to look up to upper management. But there’s no more trust,” he fumes.”).

305. Ramkisson v. Winnick, is a class action suit that was filed in the United States District Court for the Central District of California, Western Division, on behalf of participants and beneficiaries.


308. Statement of Karen D. Friedman, Director of Policy Strategies, Pension Rights Center, supra note 11.

309. Statement of Jonathan Skinner, Ph.D Economics, supra note 58. According to experts, one half of 401(k) plans, even during the bull market, had less than $12,000 accrued. Statement of Karen D. Friedman, Director of Policy Strategies, Pension Rights Center, supra note 11.


311. Id.

312. Perry, supra note 58.; Statement of Jonathan Skinner, Ph.D Economics, supra note 58.

313. Statement of Jonathan Skinner, Ph.D Economics, supra note 58.

314. Id.
However, an economic study presented to Congress found defined contribution plans will not definitively provide less adequate retirement than defined benefit plans, and in fact, synthetic analysis demonstrates higher yields from defined contribution plans.\textsuperscript{315} If this finding is true, defined contribution plans should not be eliminated but better tailored to correct the inherent problems within them.\textsuperscript{316}

C. A Collapse Heard Around the World

As stated, the problems with defined contribution are not new but have not been definitively addressed. With all the many earlier incidents, one wonders whether any change will be affected even now. Unlike earlier incidents post-Studebaker, however, Enron has captured the world's attention. This is the level of attention in which change may be required. This time, individual employees lost but many sophisticated entities also fell prey. "In total, the New York City pension funds claim a loss of $109 million from Enron-related investments, while the Florida State Board claims losses of $334 million."\textsuperscript{317}

A class action was filed on October 22, 2002 against Enron and its officers on behalf of all persons or entities who purchased shares of Enron common stock. Plaintiffs include the Florida State Board of Administration, New York City Pension Funds, The State Retirement Systems Group, the Archdiocese of Milwaukee Supporting Fund Inc., and Amalgamated Bank of New York, which manages pension funds that hold Enron stock.\textsuperscript{318}

The Commonwealth of Pennsylvania lost $16.8 million on Enron stock Investments.\textsuperscript{319} These losses represent about 0.17% of the investments made by the department with money from the general fund, the tax stabilization fund, motor license fund, the tuition account program and the short term investment pool. . . . Enron's collapse cost the Pennsylvania Public School Employees' $59 million in investment losses. The Pennsylvania State Em-

\textsuperscript{315} Id.
\textsuperscript{316} Very possibly, defined contribution plans should fulfill their intended purpose – as supplementary to defined benefit plans. See infra notes 75-101 and accompanying text.
\textsuperscript{317} Kathy Chu, Enron Internal Probe Report May Be Released Next Week, DOW JONES ENERGY SERVICE, Jan. 30, 2002.
ployees' Retirement System lost $10 million when Enron stock fell from a high of more than $90 a share to less than 50 cents a share. 

Additionally, Attorney General Mike Fisher said he would consider suing Enron on behalf of the pension funds. 

The "Attorneys General in Georgia, Ohio and Washington have asked a federal court in Texas to make them the lead plaintiffs in existing investors' securities fraud litigation." 

Agencies overseeing pension funds in Florida, New York City and the university pension fund in California have also sought to lead the action. New Jersey will join in the class action since its public employees' pension fund lost $61 million in 2001 after Enron's stock plummeted from more than $80 per share to $1 per share. Some state representatives are hopeful that the loss would not prompt the state to seek taxpayers' assistance to supplement the pension fund, as the Pennsylvania school employees' pension fund and other states pension funds have done. Compared to Florida's loss

320. Id. However, "Pennsylvania's losses were smaller than those of Florida, which lost $335 million, and New York, which lost $115 million. New Jersey's pension system lost an estimated $61 million." Amy Worden, Pennsylvania Treasury examines Enron investment: A hearing was held to determine how safeguards didn't prevent a $90 million loss of taxpayers' cash, PHIL. INQUIRER, Feb. 20, 2002, at C2 available at 2002 WL 4560969. 


Citing high diversification and a fully funded state, Pennsylvania sources maintain that "the public employee pension funds of the state of Pennsylvania . . . remain healthy" as of May 2002. See Jeffrey Cohen, State, Count, City Pensions in Good Shape Despite Slump, PITT. POST-GAZETTE, May 28, 2002, at B3, available at 2002 WL 21872710 (citing high diversification and fully funded state). 


323. Id. 

The money lost varies widely--$300 million in Florida retirement funds, $127 million in Georgia, $35 million in Arizona. Rhode Island lost only $4.7 million after wisely—or luckily—selling all of its Enron stock in early August, said Treasurer Paul J. Tavares, the Chairman of the state's retirement system. The lost money, like the $103 million gone in Washington state, needs to be seen in perspective, said James Parker, director of Washington's investment board, where the fund total $54 billion. 

Id. 


325. Id.
of more than $320 million and New York City’s loss of more than $100 million, New Jersey was relatively fortunate.\textsuperscript{326}

The prognosis for the success of these claims is not optimistic considering recent Third and Tenth Circuit decisions which indicating that claims for fraud in order to recover pension assets from a bankrupt company will probably “go nowhere.”\textsuperscript{327} Under Section 510(b) of the Bankruptcy Code, claims such as these are subordinated to other creditors claims, as equity always is subordinated to debt.\textsuperscript{328} However, the states, unlike individual employees, have their taxing authority to assist in making up the difference. This may not be the most politically expedient solution, but may bring more attention even from those whose plans were not at all affected. The possibility is real that the incredible number of baby-boomers about to retire with less than sufficient pensions will affect tax payers by creating a new welfare-retiree population.

In any event, the shockwaves from the Enron collapse brought the media running, and although the extensive damage resulting from the collapse is nothing to celebrate, perhaps the vast amount of those affected has finally brought some needed attention to the pension gaps.

\textsuperscript{326} Id.

\textsuperscript{327} Kenneth W. Irvin & William McCarron, Proving fraud may not be much solace for investors: Shareholders’ efforts to recover from Enron, Global Crossing, PENSIONS & INV., May 27, 2002, at 14, available at 2002 WL 9530901 See Baroda Hill Investments Ltd. vs. Telegroup Inc., 281 F.3d 133 (3rd Cir. 2002); Allen v. Geneva Steel Co., 281 F.3d 1173 (10th Cir. 2002).

Both the Baroda Hill Investments and the Allen decisions follow the reasoning of the U.S. Bankruptcy Court for the Southern District of New York, which is presiding over those bankruptcies. In its decision in In re Granite Partners LP, the bankruptcy court noted that 20 years earlier, the Second Circuit Court of Appeals had “counseled suspicion with good reason whenever an investor in an insolvent entity attempts to step up to the level of creditor,” and warned that in such instances, the “investor disregards the absolute priority rule.” Based on that reasoning, the court subordinated investor claims based on fraudulent misrepresentations that induced them to retain their investments.

Irvin & McCarron, supra note 327.

\textsuperscript{328} Irvin & McCarron, supra note 327.
A. Investigation

A poll conducted by Harris Interactive Inc. and Business Week on January 24, 2002, reflected:

Almost three fourths of all Americans . . . believe that the government should regulate companies' retirement plans more closely to prevent "future Enron-like debacles. . . ." Seventy-three percent of respondents said the government should regulate company retirement plans, and 79 percent said they think executives at large companies put their own personal interests ahead of workers and shareholders.\textsuperscript{329}

Some experts, such as David Certner, director of economic issues at AARP have expressed the view that Congress should enact legislation to prevent employees from jeopardizing their retirement futures by stockpiling company stock in 401(k) accounts.\textsuperscript{330} According to Certner, "It's clear that many people don't fully understand the risk of employer stock."\textsuperscript{331} Others, such as Ted Benna, author of Tips for Successfully Managing Your 401(k), feel that is unlikely to occur.\textsuperscript{332} Benna cites Congress' "reluctance to tamper with the rights of individuals to do what they want with their investments," as the prime reason for this opinion.\textsuperscript{333} He also points out that since matching contributions are voluntary, moves to limit company stock could make some employers decide to reduce or eliminate matching contributions.\textsuperscript{334}

As a result of the Enron collapse, President Bush directed the Treasury, Labor, and Commerce departments to analyze current pension rules and regulations and "come up with recommendations of how to reform the system to make sure that people are not exposed to losing their life savings as the result of a bankruptcy."\textsuperscript{335} In response, Secretary of Labor Elaine L. Chao re-

\textsuperscript{329} Enforcement: Most Americans Support More Regulation of Retirement Plans After Enron's Collapse, Pens. & Ben. Rep. (BNA) No. 29, No. 5, at 299 (Jan. 29, 2002). The poll had a margin of error of plus or minus three percentage points. \textit{Id.}

\textsuperscript{330} Dugas, \textit{supra} note 91.

\textsuperscript{331} \textit{Id.}

\textsuperscript{332} \textit{Id.}

\textsuperscript{333} \textit{Id.}

\textsuperscript{334} \textit{Id.}

\textsuperscript{335} Ritterpusch, \textit{supra} note 138.
ported that task force on retirement security will present a package of regulatory reforms to the president.\textsuperscript{336}

According to senior Treasury officials, the Treasury Department task force's main objective will be to review "pension laws governing diversification, education, and lockouts, and trying to equate the level of investment risk that management and employees have to ensure there is no excessive risk borne by employees."\textsuperscript{337} The U.S. Labor Department's Pension and Welfare Benefits Administration will investigate to determine if "the company broke any federal laws in freezing employee 401(k) accounts even as company stock prices plummeted."\textsuperscript{338} "The Labor Department investigation is being closely coordinated with the Securities and Exchange Commission's inquiry into Enron."\textsuperscript{339}

According to Chao, "[t]he Labor Department's review of pension rules will focus on the lockout period during which employees are unable to reallocate tax code Section 401(k) plans."\textsuperscript{340} Although the Employee Retirement Income Security Act does not cover lockouts, Ann L. Combs, assistant secretary of labor for the department's Pension and Welfare Benefits Administration has stated that, "the agency will investigate the issue under ERISA's fiduciary responsibility provisions."\textsuperscript{341} According to Combs, "if a plan sponsor used the lockout to 'mask some other event' it would be possible that the lockout period was a breach of ERISA."\textsuperscript{342}

\textbf{B. A Motley Array of Proposed Legislation: the Politicization of Retirement Savings Plans}

Enron-related reform legislation bills flooded Congress post-Enron, and although members acted upon some, bipartisanship, corporate lobbying and other more imminent concerns relating to

\textsuperscript{337} Id.
\textsuperscript{339} Id.
\textsuperscript{340} Fiduciary Responsibility, supra note 336.
\textsuperscript{341} Id.
\textsuperscript{342} Id.
September 11th forced members from further action. Recent legislation signed by President Bush on July 30, 2002 that regulates corporate accounting will directly affect pension plans by requiring a 30-day notice to investors of lockout periods; banning executive trading during lockout periods; increasing ERISA §501 criminal penalties from one year imprisonment and/or a $5,000 individual ($100,000 corporate entity) fine to a ten year imprisonment and/or a $100,000 individual ($500,000 corporate entity) fine; and preventing audit accounting firms from performing non-audit services.

While Americans wait, they can peruse the Senate Investigatory Report and scrutinize proposals which have watered down to one engrossed House bill awaiting review in the Senate and one Senate bill waiting for its own consideration. Thus far, solutions to the Enron pension debacle are directed at a number of issues including restrictions on stock trading during lockouts and related concerns, diversification requirements to prevent unreasonably high exposure in employer stock either through diversification restrictions or no limits on employer stock holdings, the offering of advice or education programs for all investors while preserving 402(c); and an amendment to the ERISA remedies for fiduciary breach provisions.

1. The Forerunners: The President and the House - What the Republicans Offer

Responding swiftly to the Enron pension mess, President Bush drafted legislative proposals ultimately embraced under the Re-
publican-controlled House bill. The president’s proposal included allowing employees to sell company-contributed stock after three years and a restriction on sale of executive stock during lockouts. The president’s plan is more limited than the approach advocated by some Democrats in Congress but was applauded by business groups, which have been pressing the administration not to impose expensive new regulatory burdens on employees. “However, retirement-plan experts say any significant change will be an uphill battle, as employer groups, Republicans, and the Bush administration oppose an overhaul – in particular, any limits on company stock in retirement plans.

Tax consultants say the Bush administration has softened proposed new rules, which will allow top executives to continue sheltering billions of dollars in pension savings. Many employers now lock workers into such shares until age 50 or later. On this issue, there may be more opportunity for compromise, since so far, all proposals still leave employers with the freedom to lock employees into company stock for long periods. Mr. Bush’s proposal has the weakest diversification provisions, as it exempts many defined contribution savings plans from proposed diversification rules, particularly ESOPs, which hundreds of large employers use. Consequently, employers could continue to lock workers into company stock in many plans until age 55 and later.

The Republican-sponsored House bill, largely recommended and supported by President Bush, represents the merger of bills sponsored by Education and Workforce Committee Chairman, Representatives John Boehner and Rob Portman. This bill principally tracks Mr. Boehner’s original bill, and includes a hotly contested measure that would let pension-plan managers offer investment advice to plan participants. Entitled the Pension Security Act of


351. Id. “This seems to be a very measured and encouraging response,” said R. Bruce Josten, executive Vice President of Government Affairs at the U.S. Chamber of Commerce.


354. Chen & Francis, supra note 355.
it amends the IRC and ERISA to provide for a 30-day lockout notice, prohibition of executive trading of employer stock during lockouts, amendment to restrictions on divestiture of employer stock to allow sale three years after receipt (instead of requiring holding of employer stock until retirement), and the aforementioned removal of restrictions in ERISA and IRC for investment advice from fiduciaries. In contrast to that offered by the President, the House bill would give a range of restrictions, depending on how the company stock was acquired. The bill passed the House with a vote of 255-163 on April 11, 2002 and was referred to the Senate on April 15, 2002.

Consumer groups and Democrats sharply criticized the bill. California Representative George Miller, senior Democrat on the Education and Workforce Committee, said the House bill "actually weakens even existing protections employees have for their retirement savings." Mark Iwry, a chief pension regulator at the Treasury Department during the Clinton and first Bush administrations, expressed concern that the House bill would weaken antidiscrimination rules. "Some workers could get less or could be excluded from a plan."

2. The Senate – The Democrats’ Response

The Democrat version is embraced in the Senate bill, sponsored by Rep. Kennedy, and entitled the “Protecting America’s Pensions Act of 2002.” The bill, now in committee, provides for 30-day lockdown notice; restriction of lockdown time to that of “reasonable,” and includes stricter diversification requirements and stronger legal protections for workers than the House-Boehner bill. Importantly, the bill allows employers to offer employer stock as an investment option or a matching contribution to plans – but not both. The bill would require executives to notify employees when they are “dumping company stock” and impose stiffer penalties for violation of pension rights. “Both business groups and
Republicans have opposed many of Kennedy's measures, saying they are too extreme and would discourage companies from offering 401(k) plans.\textsuperscript{361}

3. \textit{Specific Advice & Additional Bills} \textsuperscript{362}

The most hotly-contested areas between the Republican-controlled House and Democrat-controlled Senate, include provisions for diversification requirements and offering of investment education or advice.

4. \textit{Addressing Diversification Requirements}

"During the late 1990s, many people scoffed at being diversified, because the idea of investing in a mix of stocks, bonds and other financial assets meant missing out on some of the soaring gains of tech stocks."\textsuperscript{363} Post-Enron, people may be more realistic.

The diversification requirements offered address two areas. First, they seek to limit the amount of employer stock held. Second, they seek to allow or require divesture of employer stock before the standard age fifty. The major concern is diversification requirements will either restrict or deter employers from offering defined contribution plans – especially 401(k)s and ESOPs.

The President and the Republican House agree that diversification should be required, but preclude ESOPs from the requirements and only allow divesture after 3 years, as stated above. However, the Democrats are determined in both the House and Senate to pass a bill providing a cap on employer stock with divesture requirements attached.

The Democratic Boxer-Corzine Bill,\textsuperscript{364} prior to Senator Kennedy's submission, believed the clear forerunner, provides for amendments to ERISA and the IRC that require a 20\% cap on employer stock to satisfy the diversification requirement\textsuperscript{365} (not ESOPs) and provide a restriction on forced employer stock holdings until only thirty-five years of age and a reduction on the


\textsuperscript{362} For a discussion on expert recommendations, \textit{see:} Statement of Karen D. Friedman, Director of Policy Strategies, Pension Rights Center, \textit{supra} note 11; Statement of Ron Gebhardtssbauer, Senior Pension Fellow, American Academy of Actuaries, \textit{supra}, note 44.

\textsuperscript{363} Lucchetti & Francis, \textit{supra} note 185.

\textsuperscript{364} S. 1838, 107th Cong. (2001); \textit{See} H.R. 3692, 107th Cong. (2002).

\textsuperscript{365} \textit{Reaction to Enron Pension Meltdown, Bill Calls for More Diversification, CNN Money, Dec. 18, 2001;} Ritterpusch, \textit{supra} note 138.
amount of deduction on employer stock matches in an effort to reduce the tax deduction moral hazard. The proposal also calls for limiting to ninety days the time an employer can force an employee to hold a matching employer stock contribution in the employee's individual account plan and reduces the employer's moral hazard by urging a reduction to 50 percent from 100 percent the tax deduction an employer can take on a matching contribution to an individual if that contribution is made in company stock.

Consumer groups endorse the bill now in committee. The business community is alarmed, however. The manufacturers trade group is working with lobbyists.

Many companies are concerned that legislation could impose too many restrictions on the way they set up and administer their pension plans. General Electric Co., for one, says it imposes few restrictions on investment choices for employee 401(k) plans, yet workers still have chosen to put 75% of their 401(k) assets in GE stock. That is because "returns have been 20% a year in the last five years," GE spokesman David Frail says. "We'd be concerned if, in an effort to shield employees from risk, that legislation would go too far."

The idea should be to educate employees on the risk of under-diversification rather than use a paternalistic approach of raw prohibition.

PSCA's Ferrigno noted that there would likely be grassroots opposition to telling people they cannot buy a certain amount of company stock with Section 401(k) plan money. ERIC's Ugoretz agreed, and recalled participant opposition to a 1996 Boxer-sponsored bill that was very similar to her recent offering. Ugoretz

366. A Reaction to Enron Pension Meltdown, supra note 368; Ritterpusch, supra note 138.
367. A Reaction to Enron Pension Meltdown, supra note 368; Ritterpusch, supra note 138.
368. The Pension Rights Center, for instance, says it will push the bill, sponsored by Democratic Sens. Barbara Boxer of California and Jon Corzine of New Jersey, and may even seek stricter requirements for employers. The center is planning a grass-roots campaign, teaming up retirees' and women's groups with Enron employees and International Business Machines Corp. workers who are disgruntled about changes to their pension plan, says Karen Friedman, the center's director of policy and communications. See: Chen, supra note 90.
369. Chen, supra note 90.
370. Id.
said one factor is that, for many employees, their own company’s stock is that with which they are most familiar and comfortable.\textsuperscript{371}

The Senate Republicans are making additional offerings: Senator Charles Grassley, ranking member of the Committee on Finance, promises to look into whether companies should be able to restrict participants in a plan from selling a matching contribution received as company stock through an employee stock ownership plan.\textsuperscript{372} The Iowa Republican also says he is researching whether employees should be able to sell that stock prior to an arbitrary age set by the company - a common feature of such plans or similar 401(k) plans where company stock is contributed.\textsuperscript{373} Employees should be allowed to sell company-contributed stock after ninety days, says Robert Schuwerk, a law professor at the University of Houston. Legislation has been introduced, too, to mandate diversification of stock in retirement plans.\textsuperscript{374}

In December, House Representative Democrat Robert Andrews, among others, introduced the Retirement Enhancement Act of 2001 currently in subcommittee, which includes requirements for diversification in defined contribution plan investments, the allowance of investment advice without fiduciary entanglements, a provision to cap at ten percent employee pension assets in employer stock and a three-year divestment rule.

At the same time, other House Democrats, Representatives Peter Deutsch and Gene Green proposed a similar bill.\textsuperscript{376} Referred to the Committee on Ways and Means and entitled Pension Protection Act,\textsuperscript{377} the bill provides for revision of §401(k) to preclude assets in employer’s stock to exceed a 10% floor and a three-year divesture of such stock post acquisition.

The bill places no caps on holdings of other types of securities, and includes the same three-year holding period as suggested by the president.\textsuperscript{378} Beyond diversification, this “next level of legislation...would mandate a statutory limit on the amount invested in

\textsuperscript{371} Ritterpusch, \textit{supra} note 138. Of course, after Enron, employees are likely wiser on this issue.

\textsuperscript{372} Scherer &Francis, \textit{supra} note 172.

\textsuperscript{373} \textit{Id.}

\textsuperscript{374} \textit{Id.}


\textsuperscript{376} H.R.3463, 107th Cong. (2001).

\textsuperscript{377} \textit{Id.}

\textsuperscript{378} Stevenson & Labaton, \textit{supra} note 350.
corporate stock, which is more contentious from a policy standpoint and perhaps farther than Republicans are willing to go.\footnote{Ritterpusch, supra note 138.}

Additional House offerings include Democratic Representative Jackson-Lee’s bill, the Pension Protection and Diversification Act of 2002,\footnote{H.R. 3692, 107th Cong. (2001); See S.1838, 107th Cong. (2001).} which proposed to amend ERISA §407 to require a 20% cap on employer stock to satisfy the diversification requirement (not ESOPs) and to restrict forced employer stock holdings until only 35 years of age. The bill also included a reduction on the amount of deduction on employer stock matches in an effort to reduce the tax deduction moral hazard. Democratic Representative Bill Pascrell offered the Pension Protection and Diversification Act of 2002,\footnote{H.R. 3640, 107th Cong. (2001).} which provides amendment to ERISA §407 to cap employer stock at 20% employee pension assets and a 90-day limit for restriction of divesture. Additionally, it minimizes the moral hazard on employer tax deductions for matching stock contributions by reducing the percentage on the deduction.

Critics’ main concern over diversification proposals involve restrictions on matching with employer stock, which would have the effect of discouraging or eliminating employer contribution to plans.\footnote{Ellen E. Shultz & Theo Francis, Employers Say They May Cut 401(k) Rations, \textit{WALL ST. J.}, Mar. 5, 2002, at C1, \textit{available at} 2002 WL-WSJ 3387674.} However, others rebut that this concern is illusory by pointing out that failure to contribute to employee’s plans would necessitate not contributing to executive plans under “discrimination tests” meant to ensure equality in all retirement plans.\footnote{Id.} “Any bill is unlikely to force employees to sell shares purchased with their own funds, experts say, and will instead concentrate on company contributions.”\footnote{Kathy Chen, Pension Plans Are Adjusted After Enron ---Workers, Firms Shy Away From Owning Too Much of 1 Thing, \textit{WALL ST. J.}, Jan. 29, 2002, at A2, \textit{available at} 2002 WL-WSJ 3384310.}

5. Investment Advice & Education

“Where retirement fund disasters have occurred, employees have generally been found to own more company stock than necessary.” In other words, their uninformed practices, combined with the limited and poor advice, creates a situation where they not only hold the required employer contributed shares, but choose to
purchase an additional percentage, believing their company is the best place to invest. Some investment advisors advise investors to hold as little of their company's stock as possible or required — since the boss already holds the future of one's job security and career advancement.

While employers have been anxious to offer workers the tools to save for their futures, there has been a hesitancy to offer investment advice. Under ERISA, a person who renders "investment advice" for a fee or other compensation, direct or indirect, with respect to plan monies is considered a fiduciary. To quell this concern, the Department of Labor issued draft guidance on December 8, 1995, in the form of an interpretative bulletin, indicating circumstances in which general participant education will not cause the party providing the education to become a fiduciary.

As mentioned, the provision to allow advice is the most hotly debated in forerunning House-Republican bill. The concern was and is the liability of providing investment guidance if that guidance turns sour. Currently, only 18 percent of 423 plans surveyed by Hewitt Associates offer investment advice and another 18 percent are preparing to offer the service to their employees.

Those numbers could change dramatically if the Republican-House forerunner or its partner the "Retirement Security Advice Act," becomes law. The Retirement Security Advice Act is in concert with the forerunner passed in the House, allows employers and 401(k) plan providers to offer specific advice as long as they give full disclosure of fees and any conflicts of interest. The bill would require qualified investment advisers to disclose relevant information regarding fees and potential conflicts of interest. "The House approved the bill by a strong 280-144 vote on November 15, 2001, amid lingering Democratic concerns

385. Kadlec, supra note 98, at 27; See also: Lucchetti & Francis, supra note 185.
386. Kadlec, supra note 98, at 26; See also: Lucchetti & Francis, supra note 185 (Take advantage and search for independent audits (like those from Moody's, Standard & Poor's, and Value Line).
388. ERISA § 3(21)(A)(ii).
393. Ritterpusch, supra note 138.
that participants, who may be inclined to act on any advice provided to them, would not be adequately protected by safeguards in the bill. The proposed legislation would create an exemption under the Employee Retirement Income Security Act to give investors greater access to the information they need to make informed decisions about their retirement assets. The National Association of Manufacturers, which is leading a coalition to oppose major pension changes, and other industry groups have voiced support for Mr. Boehner's bill.

As stated, ERISA prohibits mutual funds, banks or insurance companies from providing investment advice to workers in retirement plans that such firms handle. Employers, however, can make arrangements for employees to get investment advice—it just has to come from an independent third party. Of course, how does one determine the independence of that third party which the employer arranges? “There is great potential for conflict of interest,” says John Hotz, deputy director of the Washington-based Pension Rights Center Obviously, investment houses support the lifting of the proscription against advice since their “profits depend on which investment options you choose. Managers have a huge incentive to steer workers toward those funds with high fees to maximize profits.

The Republicans made similar offerings in the Senate where The Retirement Security Advice Act of 2002, offered by Republican Senator Hutchinson, would allow advice to workers. Consumer groups disagree with the Republican approach, touting The Independent Investment Advice Act of 2001 introduced on November 13, 2001 by Democratic Senator Jeff Bingaman and Republican Senator Susan Collins, as the better offering. The Democratic bill would stop at exempting employers from liability

394. Id.
395. Singletary, supra note 392.
for specific advice and "would serve employees better." The act "creates a safe harbor for retirement plan sponsors in the designation and monitoring of investment advisers for workers managing their retirement income assets." Yet, the furnishing of advice to participants by the financial institution that administers the plan would remain a prohibited transaction under ERISA.

Unlike Boehner's bill, the Democratic bill would not lift the restrictions on financial companies offering 401(k) participants advice on their own funds. Both bills would not hold employers liable for the actions of the qualified investment advisers. Many companies have opted not to provide such services to employees because they are concerned about being sued.

Still, if employers truly want to provide avenues [to] advice for their employees, they can do that now. They can hire an independent company to provide advice at arm's length. They can give employees a certain amount of money each year to go out and hire their own financial planners.

Some portray the Boehner and Bingaman bills as rivals, while others feel that that relationship is inappropriate given the fact that the two are very different and portray two schools of thought on improving the quantity and quality of investment advice. Proponents of Boehner's bill say allowing financial institutions that administer plans to offer advice to plan participants cuts costs for employers, yet opponents of the bill say the advisers provided by such institutions could potentially steer the assets of often novice investors into their own pockets. Those who advocate simply exempting employers from liability, as Bingaman's bill would do, say participants would be amply protected, though opponents say advice would still be of significant cost to employers if financial institutions are left out of the picture.

Clearly from this discussion, legislating conduct is not enough. Employees must pay attention to their investment choices and understand those choices require thorough education. Olivia Mitchell, professor of insurance and risk manage-
ment at the Wharton School of Business said she would like to see more discussion on alternative approaches outside of a simple cap on employer stock. She said the broader question raised by the situation is the need for more investor education and financial literature to afford participants a better understanding of concepts like risk and return and the power of compounding.

6. Additional Senate Offerings

Senator Wellstone presented the Retirement Security Protection Act of 2002 which provides for a 20% cap on employer stock holdings (excludes, obviously ESOPs), a release of requirement for investment in employer stock as matching contribution, a 30 day notice prior to and a limit on lockdowns to 10 days, prohibition of executive trading of employer stock during such lockdown, and most importantly, monetary relief – including punitive damages – for violations of ERISA.

Senator Hutchinson introduced the Pension Plan Protection Act in February. Her bill provides for a release of requirement for investment in employer stock as matching contribution and allowance after 100 days of divestiture of any employer stock. It also includes a requirement that the plan trustee provide notice and education regarding diversification if employee’s assets are 25% or more in employer stock, amendment to IRC §4975 and ERISA to allow for certain investment advice from a fiduciary, a 30 day notice prior to a lockdown under IRC §401(a) and ERISA §404(a), exception to protection from fiduciary responsibility in employee directed plans during lockout periods, and prohibition to executive trading of employer stock during such lockdown. The Pension Security Act of 2002, which Senator Hutchinson offered in February, would amend ERISA and the IRC to restrict investment in employer securities and allow investment advice, as well as amend the Securities Exchange Act to prohibit any insider trading during lockout-like periods.

Senator Durbin’s “Investor-Employees Need Financial Facts and Options for Responsible Retirement Plan Management Act of 2002” or the “INFORM Act of 2002” provides for improved dis-

409. Id.
closure, diversification, account access, and accountability under individual account plans by requiring a 60-day lockdown notice with a restricted 10-day lockdown window and employer liability for plan losses during the lockdown. The bill also provides an expansion of the equitable remedies for fiduciary breach to “such additional relief as a court of equity might have awarded in a case involving the enforcement or administration of a trust.” Another interesting addition to the rank and file includes provision for a new Department of Labor office entitled “Office of Pension Participant Advocacy” responsible for researching, evaluating and making recommendations about private pension system.

Senator Cleland’s bill, 413 provides strictly for education to investors while Senator Kerry’s bill ‘Worker Investment and Retirement Education Act of 2002’ or the ‘WIRE Act’ 414 provides not only for education but new diversification rights and limitation on blackout periods. Senator Kerry’s bill includes a provision for independent non-fiduciary investment advisor and requires the choice of no employer stock participation (with ESOP exception), although it does require holding certain employer securities for seven years – or until age fifty-five.

7. Additional House Offerings

The Retirement Opportunity Expansion Act of 2001, 415 which Representative Coyne offered in December 2001, is reported to aim at amending the IRC protections. The Retirement Account Protection Act of 2001, 416 introduced by Representative Bentsen, is “to amend ERISA to provide additional fiduciary protections for participants and beneficiaries under employee stock ownership plans with respect to lockdowns placed on plan assets.” 417 Representative Bentsen also introduced the Employee Savings Protection Act of 2002 418 which will “prohibit knowing misrepresentations by fiduciaries of 401(k) plans which may induce participants and beneficiaries to act contrary to their own best interest in controlling the assets in their own accounts, and to amend title 11 of the United States Code to protect claims based on such misrepre-

418. Id.
419. H.R. 3623, 107th Cong. (2002); See also: Fiduciary Responsibility, supra note 336.
sentations. Under the Act, fiduciaries that engage in such misrepresentations would not be covered under the ERISA §(404)(c)(2)(B) provision that exempts fiduciaries from financial liability for any loss resulting from a participant or beneficiary's exercise of control. The bill would create new protection in bankruptcy for employee claims arising from breaches of fiduciary duty based on misrepresentations, giving such claims "priority" status over unsecured creditors. Another important reform would be to prevent companies from setting restrictions on when and how much company stock employees can sell from their retirement plans. In Enron's case, employees could not sell until they were fifty.

The House Ways and Means Committee ranking Democrat Charles Rangel formally introduced legislation that would extend the golden parachute excise tax to sales of corporate stock by corporate insiders during periods when rank-and-file employees of the company are subject to lockouts.

Representative David Bonior's 401(k) Pension Right to Know Act of 2002 requires amendment to ERISA for both educational and notice requirements for investors while the Employee Pension Freedom Act of 2002, introduced by Representative Miller and a list of others, imposes diversification and disclosure requirements. The Miller bill is similar to the Boxer-Corzine proposal, where workers vested in a retirement plan would be entitled to diversify their employer contributions and would not be forced to hold employer stock. Employers would be required to provide adequate notice to employees before access to funds could be locked down, and lockdowns would be limited to no more than ten business days.

420. Fiduciary Responsibility, supra note 336.
421. Id.
422. Id.
424. Golden parachute payment is "an employment-contract provision that grants an upper-level executive lucrative severance benefits – including long-term salary guarantees or bonuses – if control of the company changes hands." BLACK'S LAW DICTIONARY 712 (7th ed. 1999).
427. Ritterpusch, supra note 138.
430. Id.
In February, Representative English introduced Safeguarding America's Retirement Act of 2002 to the House. The bill will amend the IRC and ERISA to disallow protection from fiduciary duties to employers in Enron-like situations — like a lockdown and provide for criminal and civil penalties under ERISA.

Representative Miller's bill, Inside Stock Sales Employee Notification Act of 2002, specifically aims at amending ERISA "to provide for timely notification of plan participants and beneficiaries whose individual accounts hold employer securities of insider trading in employer securities.

8. Stalled

Experts seriously doubt Congress will pass any serious reform before November, since both Republicans and Democrats are likely to use the issue as campaign platforms at that time.

Smith, the Pittsburgh-based consultant, said that the deadlock is rooted in the Senate's skepticism over Boehner's provision that would relax current restrictions on fund companies from providing investment advice to 401(k) investors. Some, including the AARP, based in Washington D.C., have opposed that provision because they say it would allow fund companies to steer investors toward funds that yield higher fees.

American Society of Pension Actuaries Executive Director Brian Graff said, "For pension legislation to pass, it has to be bipartisan." Republican offerings, which business, especially the manufacturers, support, allow limits to diversification but not diversification requirements. The business-friendly bills also allow investment advice, generally, without the risk of exposure to fiduciary liability. Consumers find the Democratic offerings more palatable since they offer strict diversification requirements — a legislative protection basically making education unnecessary since

432. Neikirk, supra note 343. Reform bill resurgence is expected. (Patrick Basham, senior fellow at the Cato Institute, a libertarian think tank, said he doubted serious reform legislation will be passed by Congress this year. Republicans and Democrats are using the issue to play to their political bases with an eye to the November elections, he said.)
433. Lystra, supra note 434.
434. Ritterpusch, supra note 138.
435. See Testimony of Elaine L. Chao, supra note 352.
investors will be precluded from making Enron-like, all-eggs-in-one-basket mistakes.

Republicans and President Bush obviously favor allowing employee investors the most freedom to invest, with little diversification requirements, while insisting upon education to allow informed choices. Democrats may be more realistic and agree with other experts who realize that educating the average American employee about investments is an uphill battle, to say the least. Some experts call for the simplification of plans themselves—not just more confusing information piled on what is already too complex for the average person. Ideally, any proposal will offer diversification cap recommendations with the ability for immediate divesture, backed by limitations on tax deductions for employer stock contributions to limit the moral hazard to employers.

As to the education component of the proffered advice: Education is priceless, but must begin far sooner than in an employee's prospectus at hiring. Financial education must begin in grammar school and continue through the upper grades so even the least educated American can understand the risks and benefits to investment. Education at this point is too little too late. Today's employees need more protection from the wolves managing their money—maybe tomorrow's employees will be more informed and be able to spot wolves from the sheep.

Additionally, exposing employers to serious risk under the fiduciary provisions—even with 404(c) protections—is too harsh a duty to proscribe. What legislation would require is an employer—who has no or little control for what the under-educated employee might decide to do—to be responsible for what, effectively, it did not cause. That pushes liability too far over towards legislating morality and forcing employers to baby-sit employees finances.

VI. CONCLUSION

According to Ugoretz, people need some space between the time hearings are held and when the Enron collapse took place. The more time people have to consider facts of not only of what hap-
pened in Enron, but also what’s going on in other companies and other plans, the more rational the discussion will be. There is room for a more rational and reasonable discussion.\textsuperscript{437}

The U.S. Chamber of Commerce warned lawmakers to proceed with caution in considering sweeping new mandates on employer-sponsored tax code Section 401(k) plans. The chamber expressed concern about over-regulation and restrictions on investment options resulting in fewer employers offering Section 401(k) plans, employee stock ownership plans, and other retirement benefits.\textsuperscript{438} "Congress needs to gather all the facts first," Thomas Donohue, chamber president and CEO, said in a news release. "Acting swiftly for the sake of appearing engaged may be good politics, but it’s bad policy."\textsuperscript{439}

The Profit Sharing/401(k) Council of America (PSCA) is vehemently lobbying against what it deems rash legislation, noting the popularity and success of defined-contribution plans, the ability to invest in employer-stock as an essential characteristic of such plans, and the general freedom employee investors enjoy with such plans as reason to take slow and careful any legislation.\textsuperscript{440}

According to the Chamber of Commerce news release, employers voluntarily provide retirement benefits to 90 million U.S. workers over and above their Social Security contributions. By rushing to pile more mandates on employers in the name of protecting employees, Congress risks making the system more complicated, more expensive, and less available, it warned.\textsuperscript{441}

The Coalition of Employee Retirement Benefits, in concert with over 500 companies and organizations, urged Congress to take it slowly.\textsuperscript{442}

American Benefits Council Vice President for Retirement Policy James Delaplane said Bush's directive cast the net very widely, stopping short of any prejudgment of where the review should go. He said that while participant disclosure, education, and advice may be scrutinized as part of the review, a comprehensive review

\begin{footnotes}
\item[437] \textsuperscript{437} Ritterpusch, supra note 138.
\item[438] \textsuperscript{438} Fiduciary Responsibility, supra note 336.
\item[439] \textsuperscript{439} Id.
\item[440] \textsuperscript{440} See http://news.findlaw.com/hdocs/docs/enron/usmulgrew62702aff.pdf.
\item[441] \textsuperscript{441} Fiduciary Responsibility, supra note 336.
\end{footnotes}
of laws governing Section 401(k) plans is unlikely given the enormous success of the plans.\textsuperscript{443}

Yet, quick and decisive action may be exactly the cure since the debacle the Enron employees now suffer will not be a thing of the past if the status quo remains. The lack of stock diversification and heavy employer stock investment is not unusual and is more widespread than one would care to believe.\textsuperscript{444} Although employers are embracing the "diversification message" and attempting to make positive changes in plans or educate employees, not every employee is so protected.\textsuperscript{445}

The Federal government took a long and careful pause before choosing to regulate the private pension system after Studebaker. Taking too long to correct gaps in the protective legislation now is just as severe a breach of duty as lifting a drowning man from the water only to drop him back in again. Congress must act as it now has an affirmative – even common law – duty to continue to do so.\textsuperscript{446}

\textsuperscript{443} Ritterpusch, \textit{ supra} note 138.

\textsuperscript{444} Chen, \textit{ supra} note 387.

\textsuperscript{445} \textit{Id.}

\textsuperscript{446} One must pause to ask why does the Federal government choose to walk this paternalistic path? Cannot legislators choose to criminalize Enron accounting and fraudulent reporting activities as enough protection and leave the investment determination to the employees? Providing for adequate investment education could be enough, in the long run. Education critics often point to the dearth of economics, banking, finance and accounting courses in the public school system. Is this not the true source of the problem? Like states with contributory negligence statutes, why do the pension protectors not adopt such a view of causation? "Victims" of the Enron and other such pension disasters cannot stand to the side of the crash, pointing at the drivers of the other vehicles and deflecting the responsibility for the damage they helped cause by failing to have their breaks examined. The investors must take responsibility. \textit{See: Kadlec, supra} note 98, at 27. \textit{See for investment advice to pension holders: Lucchetti \\& Francis, supra} note 185; Brigid McMenamin, \textit{In Myself I Trust; Coaxing out your inner financial planner}, \textit{FORBES}, June 10, 2002, at 170, \textit{available at 2002 WL 2214532}; Perry, \textit{ supra} note 58.
APPENDIX 1: TIMELINE

Pre-2001:

Employees and others invested heavily in Enron Stock

2001:

Feb. 5: In a meeting and subsequent e-mail, some senior Andersen officials discuss dropping Enron as a client.

Feb. 12: Jeffrey Skilling becomes Enron's CEO. Kenneth Lay stays as chairman

May: Vice-Chair Clifford Baxter complains of the "inappropriateness" of Enron's partnership deals, one of three executives to do so. He later resigns.

June: Enron announces high third quarter earnings. Stock averages $44.

August: Stock hit all-time high of $90.

Aug. 14: Jeff Skilling, who served as CEO for six months, abruptly steps down for personal reasons. Ken Lay assumes the role of CEO. Enron's stock closes at $42.93, off from a 52-week high of around $85. As Enron's Broadband division reports losses of $137 million, Lay tries to calm investors. Unappeased, analysts lower Enron's rating.


Aug. 20-21: Lay sells 93,000 shares, earns $2 million. Four Andersen officials, including lead partner David Duncan, meet to discuss Watkins' concerns. Through August 2001, Lay cashes out $16.1 million in stock. Skilling gets $15.5 million from selling his shares.

Sept. 26: Stock drops to $25 Lay urges employees to buy stock and reassures Enron employees that "our financial liquidity has never been stronger."

October: Begins a period where even selling was impossible. For three weeks, starting in late October, the company's 401(k)
plan was frozen while it changed plan administrators. Company officials say the change had been in the works for over a year and could not be postponed. During the freeze, Enron's stock went from $15 a share to $9 a share. Washington, DC, attorney Eli Gottesdiener has also filed a class-action suit on behalf of Enron employees. Andersen ordered the destruction of documents.

Oct. 15: As a result of the Watkins letter, Enron commissions a report from law firm Vinson & Elkins. The firm, incidentally, assisted in formation of the retile partnerships. Vinson & Elkins issued a nine-page report stating that Andersen approved of the Condor and Raptor deals and that Enron had done nothing wrong.

MID-OCTOBER: A White House study, led by top economic adviser and former Enron consultant Lawrence Lindsey, looks at the possible economic consequences of an Enron failure.

Oct. 16: Enron reports a $638 million third-quarter loss and discloses a $1.2 billion reduction in shareholder equity, partly related to losses by partnerships run by Chief Financial Officer Andrew Fastow.

Oct. 22: Enron acknowledges Securities and Exchange Commission inquiry into a possible conflict of interest related to the company's dealings with those partnerships.


Oct. 24: Andrew Fastow is replaced as chief financial officer by Jeff McMahon.

Oct. 25: Enron draws on $1 billion credit line

Oct. 31: The Securities and Exchange Commission announces it has begun a formal investigation, allowing it to subpoena evidence. Enron adds William Powers Jr., dean of the University of Texas School of Law, to the board to chair a special committee dealing with the investigation. US Security & Exchange Commission (SEC) opened a formal investigation into Enron's transactions. Enron said it had formed a committee to carry out its own investigation.

LATE OCTOBER-EARLY NOVEMBER: Lay phones various Administration officials to warn of Enron's dire straits. Treasury officials conclude Enron's collapse won't hurt markets. Lindsey's White House study concurs.

Nov. 6: Enron's stock price drops below $10 a share after reports that Enron was seeking additional financing to shore up confidence.
Nov. 8: Enron revises its financial statements for the past five years to account for $586 million in losses. The losses are related to a number of complex partnerships, including several under investigation by the Securities and Exchange Commission. Andersen receives a subpoena from the SEC. Enron admits inflating income almost $600 million since 1997.

Signs that Enron was withdrawing from its market-making activities in the gas and power markets became clearly visible as the company posted significantly fewer bids and offers on EnronOnline (EOL), the company's online trading platform. Trading also shifted from EOL to IntercontinentalExchange (ICE), whose online trading system was "indeed experiencing increased volumes this week," a spokeswoman said.

Nov. 9: Dynegy announces an agreement to buy its much-larger cross-town rival for more than $8 billion in stock. It promises investments to stabilize Enron. Duncan's assistant e-mails other secretaries to "stop the shredding."

Enron-Dynegy unveiled their $7.8-billion merger agreement late Nov 9, forming a new company, Dynegy Corp, in which Dynegy would own 64% and Enron 36%. According to the deal Dynegy would exchange 0.2685 of a Dynegy share for each share of Enron. Chairman and CEO of Dynegy, Chuck Watson, would retain his position in the new company.

Nov. 10: S&P lowered its long-term credit rating on Enron from BBB to BBB-, while it placed Dynegy on credit watch following the announcement of a pending merger with Enron.

Nov. 13: The first class action 401(k) suit was filed by plaintiff Pamela Tittle, a participant in the 401(k) plan. The suit alleges that the trustees of the Enron 401(k) plan violated their fiduciary duties by not informing plan participants that the company stock was in peril. The suit was filed by the Houston law firm of Campbell, Harrison & Dagley LLP, the Seattle law firm of Keller Rohrback LLP and the Phoenix law firm of Dalton Gotto Samson & Kilgard PLC.

Nov. 14: After criticism by employees, Lay says he will not take a $61 million severance payment he would be due if the merger closes. Enron says it planned sell business units valued around $8 billion over the next year.

Nov. 20: Shares drop 23 percent to $6.99 after news the company had to restate its third-quarter earnings and would need to pay off or renegotiate a $690 million debt after stock was down-
graded on Nov. 12. Officials from both Enron and Dynegy say the merger is not in trouble.

Nov. 21: Enron reaches critical agreement to extend the $690 million debt obligation.

Nov. 23: The Wall Street Journal reports two lawsuits by Enron employees claiming "trustees breached their fiduciary duties by continuing to offer company stock, even after they became aware of serious business problems that would hurt the stock price" and seeking class action certification. One suit asserts failure to warn and misrepresentation of financial statements.

Nov. 28: Dynergy pulls out of deal to buy Enron, citing "breaches of representations" by Enron and exercises its option to buy Enron's 16,500 mile-long Northern Natural Gas pipeline. Dynergy announced it had terminated merger talks with Enron claiming Enron's "breaches of representations, warranties, covenants and agreements in the merger agreement, including the material adverse change provision" as reasons for calling off the deal. Trading in Enron shares were halted for a short while as they fell below $3. S&P downgraded Enron to a single B-minus. Enron's debt is downgraded to junk status, leading to a temporary halt in the company's EnronOnline platform, which handles about 60 percent of its trading business or $2.8 billion daily.

Enron's shares plunge to below $1 amid the heaviest single-day trading volume ever for a New York Stock Exchange or Nasdaq-listed stock.

Nov. 29: Dynergy CEO Chuck Watson announced that the deal was off. Enron stops sending cash to its overseas operations, forcing its Enron Europe operations to file for creditor protection and lay off 1,100 employees.

The New Power Co., an Enron Corp. spin-off entering the deregulated Texas electric market, reminds consumers it is an "independent and separately held company from Enron" with its own board, financial resources and management team.

A congressional panel launches an investigation into Enron's business practices.

Nov. 30: Stock falls to 26 cents. Enron announced almost all of its 1,400 employees at its European head office in London were being made laid-off. A small number of staff were asked to stay to wind things up together with the administrators for its European operations, PriceWaterhouseCoopers.

Dec. 2: Enron files for bankruptcy protection, the largest in U.S. history. Enron sues Dynegy for terminating the planned
merger, seeking damages of at least $10 billion. The suit asks the
court to block Dynegy from taking possession of the Northern
Natural Gas pipeline.

Dec. 3: Dynegy countersued Enron over the right to acquire the
pipeline.

Enron starts cutting 6,000 employees in Houston and elsewhere.
The company arranges up to $1.5 billion of debtor-in-possession
financing.

The 401(k) retirement savings plan at Enron had assets of $2.1
billion at the end of 2000. According to documents filed with gov-
ernment regulators, 62 percent of those assets were invested in
the stock of the energy trading company.

Enron announced the redundancy of 4,000 employees, most of
them from the company's Houston office. The company announced
Nov 30 redundancies in both its European and Asian operations.

Dec. 6: An employee revealed all of Enron India's 200 staff ear-
lier in the week had received their termination notices and that
Dec 7 was their last day as Enron employees.

Dec. 10: Enron made its first lay-offs in its core power and gas
trading operations at its Houston, Texas office, a spokesperson
confirmed. Two hundred people, including traders, back-office and
support personnel were let go.

Dec. 11: Enron Japan and its three subsidiaries -- Enron Japan
Marketing, Enron Japan Funding, and E Power Holdings -- filed
for bankruptcy in Tokyo in accordance with the Japanese bank-
ruptcy law. The court will open a trial to investigate if the case
meets the country's guidelines for bankruptcy.

2002

January: Enron stock closed at 36 cents. That means that
stock worth $ 1 million in August 2000 was worth $ 4,000.

Jan. 9: The US Department of Justice opened a criminal inves-
tigation into Enron's collapse. The Justice Department late Jan 9
formed a task force which included prosecutors from Houston,
New York and San Francisco.

Jan. 10: Andersen admits destroying documents.

Jan. 14: U.S. Internal Revenue Service opened its own investi-
gation of Enron, senior government investigators said. The tax
service could bring civil or criminal charges if it found that En-
ron's accounting snafus was reflected in its tax returns

Jan. 15: Enron suspended from New York Stock Exchange.
Andersen fires Duncan for shredding documents. N.Y.S.E. takes
Enron off the board, saying "the company's securities are no longer suitable for trading on the N.Y.S.E."

Jan. 16: Duncan tells congressional investigators that Andersen officials talked about Enron last February and says he was aware that the account posed a "significant risk."


Jan. 18: White House confirms that Vice President Cheney met in June with a politician from India about an Enron project.

Jan. 25: The Severed Enron Employees Coalition, a coalition of more than 400 current and former Enron employees, filed a class action suit in a bid to recoup "staggering" losses suffered by participants in the bankrupt company's 401k retirement plan. The coalition named Kenneth Lay, Jeffrey Skilling, Andrew Fastow, Arthur Andersen and Northern Trust Co, the trustee of the 401k plan, as defendants.

Feb. 4: President Bush's proposals to change pension rules drew fire from consumer and business groups, but some lawmakers began using his ideas as a blueprint for their own plans.

Feb. 6: A top Enron human-resources executive who also served as a trustee of the company's 401(k) plan said she became aware of serious allegations about the company's financial practices in August, but did nothing to protect retirement-plan members. Ms. Olson testified that the plan trustees felt that they didn't have the ability to change the plan design without approval from the board of directors.

Feb. 7: Some current and former employees of Enron's retail energy unit say the company asked them to pose as busy electricity and natural-gas sales representatives one day in 1998 so the unit could impress Wall Street analysts visiting its Houston headquarters.

Labor Secretary Elaine Chao pushed President Bush's proposal to give workers greater flexibility to diversify retirement savings, but warned Congress against setting "arbitrary limits" on the amount of employer-company stock that could be held in 401(k) plans.

Enron's bankruptcy may have wiped out most of the retirement savings of most of its workers. But one thing it didn't take away were the pensions of its most senior executives. Financial filings disclose that former Enron Chairman Kenneth Lay, for one, used a private partnership to protect millions of dollars worth of executive pension benefits.
Feb. 8: The top trustee of Enron's 401(k) plan sold nearly $1 million in company stock in June, but said he didn't violate his fiduciary duties by leaving the company's stock on a list of investment choices for employees.

Feb. 11: The US Labor Department said it wants to oust Enron officials overseeing the company's retirement plans and replace them with independent trustees. The government would go to court if necessary to force out the administrative committee overseeing the plan, the agency said.

Feb. 13: The Labor Department reached an agreement with Enron to replace the trustees of its three pension plans with an independent oversight group, after thousands of plan participants lost their holdings in the wake of the company's collapse.

Feb. 19: Scoring a first-round victory in court, Enron employees are allowed to form their own creditors' committee to represent their interests in the energy-trading company's bankruptcy-court proceedings.

APPENDIX 2: ENRON SHARES GRAPHIC HISTORY

Source: Platt's Global Energy:
http://www.platts.com/features/enron/timeline.shtml

Enron share price weekly close
Week of Nov 6, 2000 - Week of Feb 11, 2002
(Note: Enron has been delisted from NYSE w.e.f Jan 15, 2002, and is currently traded as OTC:ENRNQ)
APPENDIX 3: 401(k) ASSETS

Source: Wall Street Journal Online:

DESPITE MANY OPTIONS, NOT MANY DIVERSIFY

Most 401(k) plans offer multiple investment options...
Percentage of 401(k) plans offering each number of investment options

But not all investors take advantage of all their options
Most investors tend to concentrate their funds in fewer investments

<table>
<thead>
<tr>
<th>INVESTMENT OPTION</th>
<th>PERCENTAGE OF PLAN ASSETS INVESTED IN EACH INVESTMENT</th>
<th>401(k) PLANS OFFERING EACH INVESTMENT OPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employer stock</td>
<td>30%</td>
<td>55%</td>
</tr>
<tr>
<td>Large-capitalization stock</td>
<td>19%</td>
<td>85%</td>
</tr>
<tr>
<td>Stable value1</td>
<td>16%</td>
<td>69%</td>
</tr>
<tr>
<td>Stock index</td>
<td>11%</td>
<td>70%</td>
</tr>
<tr>
<td>Balanced</td>
<td>4%</td>
<td>72%</td>
</tr>
<tr>
<td>Small-capitalization stock</td>
<td>3%</td>
<td>70%</td>
</tr>
<tr>
<td>Money market</td>
<td>2%</td>
<td>53%</td>
</tr>
<tr>
<td>Intermediate/long-term bond</td>
<td>2%</td>
<td>45%</td>
</tr>
<tr>
<td>Global stock2</td>
<td>2%</td>
<td>42%</td>
</tr>
<tr>
<td>Emerging markets</td>
<td>Less than 1%</td>
<td>15%</td>
</tr>
</tbody>
</table>

1Includes guaranteed-income contracts, or GICs, synthetics
2Global stock includes non-U.S. and U.S. stocks

Source: Hewitt Associates 2001 survey of 428 employers
NOTE: “Several companies recently eased restrictions on selling company stock in 401(k) plans, though some say they had nothing to do with Enron. They include International Paper, Mellon Financial and Gannett, which owns USA TODAY.”

<table>
<thead>
<tr>
<th>LOTS OF COMPANY STOCK</th>
<th>Percent of total assets in company stock in defined-contribution plans*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procter &amp; Gamble</td>
<td>94.7%</td>
</tr>
<tr>
<td>Sherwin-Williams</td>
<td>91.6</td>
</tr>
<tr>
<td>Abbott Laboratories</td>
<td>90.2</td>
</tr>
<tr>
<td>Pfizer</td>
<td>85.5</td>
</tr>
<tr>
<td>BB&amp;T</td>
<td>81.7</td>
</tr>
<tr>
<td>Anheuser-Busch</td>
<td>81.6</td>
</tr>
<tr>
<td>Coca-Cola</td>
<td>81.5</td>
</tr>
<tr>
<td>General Electric</td>
<td>77.4</td>
</tr>
<tr>
<td>Texas Instruments</td>
<td>75.7</td>
</tr>
<tr>
<td>William Wrigley, Jr.</td>
<td>75.6</td>
</tr>
<tr>
<td>Williams</td>
<td>75.0</td>
</tr>
<tr>
<td>McDonalds</td>
<td>74.3</td>
</tr>
<tr>
<td>Home Depot</td>
<td>72.0</td>
</tr>
<tr>
<td>Mckesson HBOC</td>
<td>72.0</td>
</tr>
<tr>
<td>Marsh &amp; McLennan</td>
<td>72.0</td>
</tr>
<tr>
<td>Duke Energy</td>
<td>71.3</td>
</tr>
<tr>
<td>Textron</td>
<td>70.0</td>
</tr>
<tr>
<td>Kroger</td>
<td>65.3</td>
</tr>
<tr>
<td>Target</td>
<td>64.0</td>
</tr>
<tr>
<td>Household Int I.</td>
<td>63.7</td>
</tr>
</tbody>
</table>

Note: Based on most recent data available
*Includes employee-stock-ownership plans, profit-sharing plans, and 401(k)
Source: DC Plan Investing

APPENDIX 5: PAYMENTS TO EXECUTIVES FOR STOCK PRICE

**Big Payments**

The following is a list of Enron executives and the bonuses and other payments they received in 2001. Many were for hitting profit and stock price targets during a period when, investigators say, the company inflated profits. Only amounts over $50,000 are shown.

<table>
<thead>
<tr>
<th>NAME</th>
<th>CHECK AMOUNT</th>
<th>DATE (2001)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kenneth L.</td>
<td>$3,600,000</td>
<td>Jan. 11</td>
</tr>
<tr>
<td>Lay</td>
<td>7,000,000</td>
<td>Feb. 5</td>
</tr>
<tr>
<td>Jeffrey K.</td>
<td>1,920,000</td>
<td>Jan. 11</td>
</tr>
<tr>
<td>Skilling</td>
<td>5,600,000</td>
<td>Feb. 5</td>
</tr>
<tr>
<td>Kenneth</td>
<td>1,750,000</td>
<td>Feb. 5</td>
</tr>
<tr>
<td>Rice</td>
<td>1,487,500</td>
<td>Feb. 5</td>
</tr>
<tr>
<td></td>
<td>262,500</td>
<td>Feb. 5</td>
</tr>
<tr>
<td></td>
<td>1,617,011</td>
<td>Feb. 7</td>
</tr>
<tr>
<td>Jeffrey</td>
<td>1,100,000</td>
<td>Feb. 5</td>
</tr>
<tr>
<td>McMahon</td>
<td>694,862</td>
<td>Feb. 6</td>
</tr>
<tr>
<td></td>
<td>1,500,000</td>
<td>Nov. 29</td>
</tr>
<tr>
<td>John Clifford</td>
<td>200,000</td>
<td>Jan. 11</td>
</tr>
<tr>
<td>Baxter</td>
<td>1,200,000</td>
<td>Feb. 5</td>
</tr>
<tr>
<td></td>
<td>1,388,055</td>
<td>Feb. 7</td>
</tr>
<tr>
<td>Andrew S.</td>
<td>350,000</td>
<td>Jan. 11</td>
</tr>
<tr>
<td>Fastow</td>
<td>1,300,000</td>
<td>Feb. 5</td>
</tr>
<tr>
<td></td>
<td>1,388,055</td>
<td>Feb. 7</td>
</tr>
<tr>
<td>Richard A.</td>
<td>350,000</td>
<td>Jan. 11</td>
</tr>
<tr>
<td>Causey</td>
<td>1,000,000</td>
<td>Feb. 5</td>
</tr>
<tr>
<td></td>
<td>200,000</td>
<td>Feb. 5</td>
</tr>
<tr>
<td>Michael J.</td>
<td>800,000</td>
<td>Feb. 5</td>
</tr>
<tr>
<td>Kopper</td>
<td>602,671</td>
<td>Feb. 6</td>
</tr>
<tr>
<td></td>
<td>905,000</td>
<td>Aug. 10</td>
</tr>
<tr>
<td>Richard B.</td>
<td>75,000</td>
<td>Jan. 11*</td>
</tr>
<tr>
<td>Buy</td>
<td>900,000</td>
<td>Feb. 5*</td>
</tr>
<tr>
<td></td>
<td>694,862</td>
<td>Feb. 7*</td>
</tr>
<tr>
<td>Mark</td>
<td>175,000</td>
<td>Jan. 11*</td>
</tr>
<tr>
<td>Haedicke</td>
<td>400,000</td>
<td>Feb. 5*</td>
</tr>
<tr>
<td></td>
<td>809,946</td>
<td>Feb. 6</td>
</tr>
<tr>
<td></td>
<td>141,451</td>
<td>Feb. 6*</td>
</tr>
<tr>
<td></td>
<td>750,000</td>
<td>Nov. 29</td>
</tr>
<tr>
<td>James V.</td>
<td>484,000</td>
<td>Jan. 11*</td>
</tr>
<tr>
<td>Derrick Jr.</td>
<td>800,000</td>
<td>Feb. 5*</td>
</tr>
<tr>
<td>Ben F.</td>
<td>600,000</td>
<td>Feb. 5</td>
</tr>
<tr>
<td>Glisan Jr.</td>
<td>69,223</td>
<td>Feb. 6</td>
</tr>
</tbody>
</table>

*Documents show that another check was issued in the same amount on the same day. Enron executives said that such multiple appearances indicated separate checks were issued, but because that could not be confirmed, only one check is listed here.*