

## Loschiavo et al. v. Fidelity Management Trust Co. et al.

**A** federal district court judge in Manhattan dismissed an unusual case brought on behalf of investors in the Lehman Brothers Savings Plan, a 401(k) plan for Lehman Brothers Inc. employees that collapsed in value during the financial crisis.

In a ruling on December 3, U.S. District Judge Lewis Kaplan dismissed claims that Fidelity Management Trust Co., the plan's trustee, improperly failed to sue Lehman auditor Ernst & Young LLP for malpractice. The next day, Kaplan dismissed derivative claims over the plan's decision not to bring its own malpractice case against E&Y. The rulings are a win for **Nicholas Pappas** of Weil, Gotshal & Manges, who led the defense of the Lehman Savings Plan fund.

Lawyers for the plan's investors brought suit in 2008, soon after Lehman collapsed. Because the plan was heavily invested in Lehman stock, its holdings' value plummeted when Lehman went belly-up. Plan investors accused Fidelity of breaching its fiduciary duties by not suing E&Y over its failures to spot trouble at Lehman. They also brought state law derivative claims against E&Y for professional negligence and malpractice on the plans's behalf, with the plan itself as a nominal defendant.

Weil, joined by E&Y's lawyers at Latham & Watkins, moved for dismissal, arguing that the claims were preempted by the Employee Retirement Income Security Act (ERISA). Meanwhile, Fidelity's lawyers at Goodwin Procter moved to dismiss the fiduciary duty suit against it, asserting that the company had no obligation to sue E&Y in its role as trustee. That duty fell on the committee overseeing the fund, Goodwin argued.

Kaplan accepted both arguments. Except in a few specific circumstances, he concluded, a retirement plan's trustee does not owe a fiduciary duty to the plan's investors. The plaintiffs hadn't met the "heavy burden" of showing that those circumstances existed, Kaplan ruled. As for the derivative claims, he held that

ERISA does not confer on plan participants the authority to bring state law claims derivatively and that there were no cases in the record in which they had been permitted to do so.

### FOR PLAINTIFF PLAN INVESTORS

**Gilman and Pastor:** David Pastor. (He is in Boston.)

**Rigrodsky & Long:** Timothy MacFall and associate Olga Pettigrew. (They are in Garden City, New York.)

**Egleston Law Firm:** Gregory Egleston. (He is in New York.) None of the plaintiff firms returned requests for comments.

### FOR DEFENDANT FIDELITY MANAGEMENT TRUST CO. (BOSTON)

**Goodwin Procter:** James Dittmar, Alison Douglass, James Fleckner, and associate Chelsea Teachout. (They are in Boston.) The firm won a favorable ruling for Fidelity entities in a whistle-blower case last February.

### FOR DEFENDANT ERNST & YOUNG LLP (NEW YORK)

**In-House:** Deputy general counsel Ronald Hauben and associate general counsel William Barrett.

**Latham & Watkins:** Miles Ruthberg, Peter Wald, Jamie Wine, counsel Christopher Turner, and associates Sarah Greenfield and Kevin McDonough. (Wald is in San Francisco; Turner and Greenfield are in Washington, D.C.; and the rest are in New York.) Ernst & Young is a longtime client.

### FOR DEFENDANT LEHMAN SAVINGS PLAN FUND (NEW YORK)

**In-House:** At Lehman Brothers Holdings Inc.: managing director, co-general counsel Thomas Hommel.

**Weil, Gotshal & Manges:** Nicholas Pappas, counsel Lawrence Baer, Ardith Bronson, and associate Allison "Millie" Warner. (Bronson is in Miami; the rest are in New York.) Weil has represented Lehman in other employment-related matters arising from its bankruptcy.

—Jan Wolfe, with Tom Coster



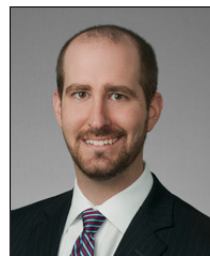
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