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## ERISA AND RETIREMENT PLAN LITIGATION

In recent years, roughly two-thirds of American retirement assets have resided in employer-sponsored retirement plans. During the financial crisis, these plans lost nearly \$4 trillion in value – a decline of more than 20 percent.

The substantial drop in the value of retirement plan assets has coincided with an increase in litigation over the causes of investment losses. Emerging ERISA and retirement plan lawsuits have been complicated by the intricacy of the securities in which plan assets have been invested. Expert economic and financial analysis plays a critical role in helping firms and counsel address the complex issues underlying these matters.

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Analysis Group has worked on some of the largest ERISA and pension-related litigations in recent years.

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**INVESTMENT PRUDENCE** In ERISA litigation, questions of investment prudence frequently focus on whether plan fiduciaries acted prudently when selecting service providers such as investment managers, and on whether the service providers made prudent decisions.

Analysis Group works with some of the foremost experts in portfolio management, derivative securities, asset securitization, and securities lending to provide analyses and support testimony related to the prudence of particular investments.

Investment prudence disputes frequently involve large, complex datasets containing financial information going back several years. Our work with such data ranges from assisting counsel with pretrial discovery through the development of

detailed analyses that may form the basis of expert opinions. These analyses often are instrumental in determining the appropriateness of class certification, estimating potential damages, and analyzing investment suitability.

Analysis Group staff and affiliates have extensive experience assessing the economic, financial, and accounting issues related to ERISA and retirement plans. Our litigation experience includes providing expert testimony and consulting services related to class certification, liability, and damages.

**Florida State Board of Administration v. Alliance Capital Management**

A portfolio that Alliance Capital managed for the Florida State Board of Administration (FSBA) incurred losses as a result of investments in Enron stock. The FSBA sued Alliance Capital for allegedly failing to research Enron sufficiently, and for not following an agreed-upon investment strategy. The FSBA sought more than \$1 billion in damages.

Counsel for Alliance Capital retained Analysis Group. Over a two-year period, we supported six experts who provided consulting and testimony on portfolio management, accounting, compliance and controls, corporate governance, and damages. The case culminated in a seven-week trial, in which the jury found Alliance Capital not liable on all counts. The jury also ruled that Alliance Capital was entitled to recover advisory fees from the FSBA.

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**COMPANY STOCK** When the value of company stock in a retirement or Employee Stock Ownership Plan (ESOP) declines, it is not unusual for plan participants to file suit alleging that it was imprudent for plan fiduciaries to allow plan participants to invest in the company's stock. Consequently, many investment prudence cases focus on company stock holdings.

Analysis Group has provided consulting and expert witness services in numerous ERISA company stock cases. Our work in these matters has included:

- Assessing the prudence of company stock as an investment by observing the decisions of unrelated, sophisticated market participants such as institutional investors and financial analysts
- Analyzing data on participants' transactions to evaluate the issues of commonality and typicality among members of a proposed class
- Investigating whether the presence of company stock in a retirement or ESOP plan harmed plan participants
- Evaluating whether plan participants were harmed by alleged misrepresentations and omissions in the sponsor company's disclosures

Allegations in ERISA company stock and securities fraud cases often overlap substantially. Analysis Group's considerable expertise in analyzing issues related to securities fraud litigation further enhances our service to clients involved in ERISA company stock drop litigation.

**Whetman v. IKON Office Solutions, Inc.**

Counsel for IKON retained Analysis Group to provide analytical support in a class action brought by participants in IKON's retirement savings plan (RSP). Plaintiffs alleged that IKON breached its fiduciary duty by encouraging IKON RSP participants to invest in the company's stock fund. Plaintiffs claimed that IKON was liable for participants' losses after the stock price declined.

We estimated damages from the alleged wrongdoing, taking into account such factors as IKON's spinoff of Unisource. Using a dataset containing more than 15 million transactions of nearly 90,000 RSP participants, we tracked participants' transfers out of individual stock funds into different investment options, and analyzed the impact of those transfers on potential damages.

An Analysis Group expert submitted a report that compared the plan features, including investment options and vesting schedules, to the features of plans offered by other large companies. Our expert also performed analyses that showed that the plaintiffs' expert had substantially overstated purported damages. IKON settled the lawsuit without admitting liability or making any monetary payment to the plaintiff class.

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**EXCESSIVE FEES** A common allegation in recent ERISA litigation has been that plan fiduciaries allowed service providers to charge “excessive” fees. Such assertions often are accompanied by claims that the parties imprudently selected service providers and did not disclose fees or revenue sharing agreements properly.

Sponsors of, and service providers to, defined contribution retirement plans with billions of dollars in assets have retained Analysis Group in disputes over whether services fees were excessive. We also have been retained to analyze allegations of excessive fees by some of the largest service providers to retirement plans with fewer than 1,000 participants.

In the context of excessive fee litigation, we have supported experts in preparation of reports and testimony related to the evaluations of fees and services relative to appropriate benchmarks, the suitability of different investment vehicles, competition among providers of plan services, effects of revenue sharing on fees, the appropriateness of class certification, and the quantification of damages.

Our expertise in ERISA excessive fee litigation is complemented by substantial experience in litigation related to mutual fund fees and revenue sharing between mutual funds and unaffiliated service providers such as financial advisors. Our mutual fund experience includes work on such high-profile cases as *Baker v. American Century* and *Jones v. Harris*.

#### **Disproving Allegations of Excessive 401(k) Plan Management Fees**

Analysis Group supported defendants’ experts in two excessive fee litigations involving multibillion dollar defined contribution retirement plans. The plaintiffs in these cases alleged, among other things, that the defendants’ selection of imprudent investment options and inadequate disclosure of revenue sharing arrangements contributed to the allegedly excessive fees.

Our affiliated experts submitted reports explaining the economics of revenue sharing, constructed benchmarks for the services provided to the plans, showed that the plans’ fees were economically reasonable, and critiqued plaintiff’s expert’s purported damages analysis. Our client won summary judgment on most claims in one case, and the court dismissed the other case.

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**DEFINED BENEFIT PLANS** Analysis Group has consulted on several matters specific to defined benefit pension plans. We have measured a defined benefit plan's liabilities, evaluated whether cash balance plans were discriminatory, and assessed the fees and benefits offered under employee welfare plans.

We also have performed actuarial analyses of benefit accruals to determine whether a cash balance pension plan discriminated on the basis of age. And we have analyzed whether plan notifications adequately informed plan participants about changes to a retirement plan.

In a matter involving the conversion of a company's defined benefit pension plan to a pure cash-balance formula that was based in part on hypothetical contributions consistent with 401(k) defined contribution plans, Analysis Group was

retained to estimate the impact of those changes. Historically, plan participants had been entitled to the sum of benefits under the old plan plus the future benefits of the new plan at the time of plan conversion. However, a subsequent change to the plan limited participants to either their frozen benefits or their cash balance benefits. Our analysis included calculating the effects of "wear-away," the period during which the new plan's cash balance benefits catch up to the old plan's grandfathered benefits.

We expect ERISA litigation involving complex economic issues to remain prevalent into the foreseeable future.

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*For more information, including staff and expert biographies, visit our website: [www.analysisgroup.com](http://www.analysisgroup.com).*

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### **A LEADING PROVIDER OF ECONOMIC ANALYSIS**

Analysis Group provides economic, financial, and business strategy consulting to leading law firms, Fortune 500 companies, and government agencies.

Founded in 1981, with over 500 professional staff, we assist law firms with all aspects of litigation and advise corporations and government clients on business issues that require expert analysis and interpretation of economic and financial data.

We help organizations create strategies for innovation and growth.



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