

### **U.S. District Court Finds Trustee's Sale of Stock from Plan to be Prudent**

**June 2, 2008**

Plan participants have made claims in the past against plan fiduciaries when the value of the stock held by a plan drops, alleging that the plan fiduciary should not have acquired the stock or should have sold the stock before the stock decreased in value. In *Bunch v. W.R. Grace & Co.*, 532 F. Supp. 2d 283 (D. Mass. Jan. 30, 2008), plan participants made the opposite argument, claiming that State Street Bank & Trust Company breached its duty by selling stock that subsequently increased in value. In *Bunch*, the plaintiffs alleged that State Street should have known that its analysis of the value of the stock was suspect given that the market placed a higher value on the stock. The U.S. District Court for the District of Massachusetts rejected the plaintiffs' claims and exonerated State Street.

The plaintiffs were participants in the 401(k) plan sponsored by W.R. Grace. As participants in the 401(k) plan, the plaintiffs were allowed to direct their accounts among 28 investment alternatives. The investment alternatives were monitored by the W.R. Grace Investment and Benefits Committee. One of the investment options was the W.R. Grace stock fund. Although the stock fund comprised only approximately 4% of plan assets, when the company began to experience financial difficulties the Investment and Benefits Committee retained State Street to serve as independent fiduciary for management of the W.R. Grace stock fund. State Street was charged with ensuring that retention of plan assets in W.R. Grace company stock was appropriate.

State Street retained an independent financial advisor and legal advisor. It reviewed the market price of the stock, information about the 401(k) plan, the bankruptcy proceedings of the company, the financial outlook of the company, and the asbestos liability the company faced. Upon review of all of these factors, and upon advice of its advisors, State Street determined that it would not be prudent for the plan to retain its investment in W.R. Grace stock. The stock was sold to a third party for \$3.50 per share, which was higher than its publicly traded price at the time.

The plaintiffs filed a class action lawsuit against W.R. Grace, certain members of the W.R. Grace Investment and Benefits Committee, and State Street. The plaintiffs alleged that State Street should have relied more heavily on the market prediction of the stock's value and should have retained the W.R. Grace stock absent evidence of an imminent collapse of the stock price. In essence, the plaintiffs alleged that State Street breached its fiduciary duty by "second guessing" the market.

The court rejected the plaintiffs' claims, stating that the efficient market is not the standard by which State Street's actions were to be measured. In reaching its decision, the court found that ERISA does

not require that a fiduciary guarantee value or maximum profit. Instead, ERISA requires that a fiduciary conduct a thorough investigation into all relevant information regarding the merits of a transaction. The court concluded that a number of facts evidenced that State Street conducted a thorough investigation, including its reliance on its financial advisors and its consideration of various factors including the stock's market price and the company's bankruptcy proceedings, financial outlook, and asbestos liability, in addition to the fact that State Street monitored the trend of W.R. Grace stock.

The court emphasized that a fiduciary decision cannot be viewed in hindsight. Despite the fact that W.R. Grace stock rose in value after the divestment, *at the time of the transaction* all evidence pointed to a significant future decline in the stock's value. In the court's opinion, the record was clear that State Street's thorough analysis led it to believe that keeping the W.R. Grace stock would be imprudent.

In issuing its ruling, the court reaffirmed the analysis that has been used in stock drop cases: it is not the final result that is important as much as the process that the fiduciaries use to get to that result. The *Bunch* case reaffirms that where a fiduciary consults with outside advisors, looks at different market factors, and is engaged in the monitoring process, its investigation will be deemed thorough and not in violation of ERISA.

For more information regarding the subject discussed in this LawFlash, please contact one of the following Morgan Lewis attorneys:

**Chicago**

David Ackerman	312.324.1170	<a href="mailto:dackerman@morganlewis.com">dackerman@morganlewis.com</a>
Theodore M. Becker	312.324.1190	<a href="mailto:tbecker@morganlewis.com">tbecker@morganlewis.com</a>
Brian D. Hector	312.324.1160	<a href="mailto:bhector@morganlewis.com">bhector@morganlewis.com</a>
Elizabeth S. Perdue	312.324.1180	<a href="mailto:eperdue@morganlewis.com">eperdue@morganlewis.com</a>
Louis L. Joseph	312.324.1726	<a href="mailto:louis.joseph@morganlewis.com">louis.joseph@morganlewis.com</a>

**Dallas**

Riva T. Johnson	214.466.4107	<a href="mailto:riva.johnson@morganlewis.com">riva.johnson@morganlewis.com</a>
John A. Kober	214.466.4105	<a href="mailto:jkober@morganlewis.com">jkober@morganlewis.com</a>
Erin Turley	214.466.4108	<a href="mailto:eturley@morganlewis.com">eturley@morganlewis.com</a>

**Los Angeles**

Scott E. Adamson	213.612.7365	<a href="mailto:sadamson@morganlewis.com">sadamson@morganlewis.com</a>
------------------	--------------	--

**San Francisco**

Marc R. Baluda	415.442.1399	<a href="mailto:mbaluda@morganlewis.com">mbaluda@morganlewis.com</a>
Nicole Diller	415.422.1312	<a href="mailto:ndiller@morganlewis.com">ndiller@morganlewis.com</a>
D. Ward Kallstrom	415.422.1308	<a href="mailto:dwkallstrom@morganlewis.com">dwkallstrom@morganlewis.com</a>

**Washington, D.C.**

Gregory C. Braden	202.739.5217	<a href="mailto:gbraden@morganlewis.com">gbraden@morganlewis.com</a>
Daniel L. Hogans	202.739.5510	<a href="mailto:dhogans@morganlewis.com">dhogans@morganlewis.com</a>
Gary B. Wilcox	202.739.5509	<a href="mailto:gwilcox@morganlewis.com">gwilcox@morganlewis.com</a>

### **IRS Circular 230 Disclosure**

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. For information about why we are required to include this legend in emails, please see

<http://www.morganlewis.com/circular230>.

### **About Morgan, Lewis & Bockius LLP**

Morgan Lewis is a global law firm with more than 1,400 lawyers in 22 offices located in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis or its practices, please visit us online at [www.morganlewis.com](http://www.morganlewis.com).

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes.

**© 2008 Morgan, Lewis & Bockius LLP. All Rights Reserved.**