

New Trends in the U. S. Law of Pension Trust Investment: Interaction with Financial Institutions Law and Corporate Governance

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The fiduciary duty of ERISA (Employee Retirement Income Security Act of 1974) is the most important rule for corporate pension plan investment in America. Recently, it has become clear that ERISA is intertwined with securities, banking, and insurance regulations (*e.g.* John Hancock Mut. Life Ins. Co. v. Harris Trust, 114S. Ct. 517 (1993)). This essay has chosen insurance law as an example to uncover ERISA's interaction and tension with other financial institutions law by analyzing some ERISA cases in detail.

Theoretically, ERISA's prudent investor rule has been a forerunner for Restatement (Third) of Trusts: Prudent Investor Rule (1992) and Uniform Prudent Investor Act (1994), since it adopted the whole portfolio approach in assessment of fiduciary's prudence in accordance with modern portfolio theory. However, the standard of ERISA's prudent investor rule is dependent on the overall context of investment community. So it reinforces passivity which prevails in corporate governance in the U.S.

ERISA's exclusive benefit rule (duty of loyalty) is more problematic. In-house fiduciaries of a pension plan are the plan sponsor's managers and their investment decisions are biased in favor of their own interests in the context of takeover defense and proxy voting. Money managers appointed by in-house fiduciaries are also indebted to the plan sponsor so their decisions are not necessarily in line with the benefit of the plan participants and beneficiaries.

The interest in ERISA's prudent investor rule is growing in Japan, as Japanese corporate pension funds are rapidly increasing in volume and number. However, these practical and theoretical problems of ERISA's fiduciary duty should be tackled, when legislation of pension fund investment comes on agenda.