

State Board of Administration, lead plaintiff

Number: INFORMAL

Date: July 22, 1999

Mr. Tom Herndon
Executive Director
State Board of Administration
Post Office Box 13300
Tallahassee, Florida 32317-3300

Dear Mr. Herndon:

On behalf of the State Board of Administration, you ask whether the board has the authority under state law to pursue federal securities law claims arising out of the purchase of securities on behalf of the Florida Retirement System. The board is currently seeking to be appointed lead plaintiff in a federal class action against Telxon Corporation. The designation of the board as lead plaintiff has been challenged by other competing movants in the lawsuit.

While this office will not comment on matters before a court, the following comments are offered in an effort to be of assistance.

The Florida State Board of Administration (FSBA), established pursuant to Article XII, section 9, of the Florida Constitution, consists of the Treasurer, the Comptroller and the Governor, who serves as chairperson. The FSBA manages the assets of the Florida Retirement System on behalf of the thousands of governmental employees and retirees in the system. Not only are state funds contributed to the system trust fund as provided in section 121.061, Florida Statutes, but various units of local government contribute funds to the trust fund for investment by the State Board of Administration pursuant to sections 215.44-215.53, Florida Statutes. Moneys in the Florida Retirement System Trust Fund are derived from a variety of state and local governmental services as well as from individual contributions when the retirement system was contributory.[1]

The FSBA is responsible for investing the trust fund's assets.[2] This office has previously concluded that the Florida Retirement System, and the establishment of the Florida Retirement System Trust Fund for the purposes set forth in Chapter 121, Florida Statutes, is in the nature of a trust established by the state to provide retirement benefits to qualified persons. While this office in Attorney General Opinion 86-99 recognized the difficulties in determining who "owns" the trust fund assets, the State Board of Administration, for purposes of investment of available moneys in the system trust fund, acts as a trustee of the Florida System Trust Fund. Based upon the principles of law governing trusts, this office stated that it is proper that the name registered on the retirement system trust fund securities should be the FSBA. This office has been advised that the securities in question are registered in the name of the FSBA.

Under general trust law, the powers of a trustee embrace both express powers and implied powers; such powers include those specifically conferred as well as those necessary or

appropriate to carry out the purposes of the trust.[3] As a general rule, the trustee is the party in whom the trust fund is vested and it is the responsibility and duty of the trustee to defend and maintain the trust against wrongful attacks or injuries tending to impair the trust in safety or amount.[4] An action seeking damages for injuries suffered by the trust fund for securities violations would appear to fall within the responsibilities of the FSBA.

Moreover, the executive director is authorized by administrative rule to bring to the attention of the FSBA any proposed legal action to be taken on behalf of the board and, "where the emergent nature of a matter requires immediate action," is empowered to take appropriate legal action.[5]

Consistent with these powers, the FSBA has historically maintained class actions arising out of Florida Retirement System Trust Fund investments on behalf of the retirement system trust fund. You have advised this office that the FSBA has been appointed lead plaintiff or co-lead plaintiff in several recent actions.[6]

In light of the above, it appears the FSBA has the authority under state law to pursue federal securities law claims arising out of the purchase of securities on behalf of the Florida Retirement System and to represent the interests of the beneficiaries of that system.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tgk

[1] Originally, funding of the system trust fund was on a matching contribution basis between the members and their employers. See s. 7, Ch. 70-112, Laws of Florida. Effective January 1, 1975, the retirement system was made noncontributory. The system is presently funded by a payroll contribution rate and is paid for by all participating employers on behalf of their employees. See s. 121.071, Fla. Stat.

[2] See s. 215.44(1), Fla. Stat. *And* see s. 215.44(2), Fla. Stat., setting forth the powers of the FSBA, including "the power to make purchases, sales, exchanges, investments, and reinvestments for and on behalf of the funds referred to in subsection (1), and it shall be the duty of the board to see that moneys invested under the provisions of ss. 215.44-215.53 are at all times handled in the best interests of the state."

[3] See 56 Fla. Jur. 2d *Trusts* s. 43; 90 C.J.S. *Trusts* s. 246, p. 219.

[4] 90 C.J.S. *Trusts* s. 361. *Cf. West Coast Hospital Association v. Florida National Bank of Jacksonville*, 100 So. 2d 807 (Fla. 1958), recognizing that counsel fees may be allowed a faithful trustee in litigation relating to the trust where the trustee incurs legal expense in connection with the trustee's duties and responsibilities as trustee.

[5] See Rule 19-3.016(11), F.A.C.; and s. 215.22, Fla. Stat., authorizing the FSBA to adopt rules implementing its powers.

[6] See, e.g., *Berger v. Vesta Insurance Group, Inc.*, Case No. CA 98-AR-1407-S; *Fanni v. Northrop Grumman Corp.*, Case No. CV-98-6197-DT (AIJx); *In re Samsonite Corp.*, Case No. 98-K-1878; *In re UCAR International, Inc.*, Case No. 98-CV-0600-JB; and *In re Parametric Technologies Corp.*, Case No. 98-11328 GAO.