Original Article

Protecting public pension funds from divestment-related lawsuits: Exploring the state laws of the United States

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ABSTRACT Imagine: You are a public pension fund trustee, employee or investment advisor. The legislature of your state passes a law that requires you to divest some or all of your stock holdings in companies that do business with a specific country. You seek the advice of an outside research firm that specializes in the identification of such companies. You also seek advice from an in-house or contracted counsel to determine the lawful course of action. You then proceed with the state-mandated divestments and sell your holdings. As a result, the fund's performance suffers. Should you, and those who helped you make the divestment decision, be held liable by the pensioners and other beneficiaries claiming that you have breached your fiduciary duty? This article argues not. The article finds that while most states that have divestment laws against companies that do business in Cuba, Iran, Sudan and Syria do provide some level of lawsuit protection for public fund employees, the degree of protection varies significantly. The study ranks the states' protection levels and proposes that the higher-ranked jurisdictions serve as models for the others.

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INTRODUCTION

Cuba, Iran, Sudan and Syria are currently listed as 'state sponsors of terrorism' (SST) by the US Department of State, and, as such, are subject to federally imposed sanctions.¹ Several states mandate their public funds to divest from companies that do business with one or more of these countries and/or forbid future investments. Using LexisNexis, Westlaw and other resources,

I searched the statutes, administrative codes and judicial documents of the 50 states in order to explore the prevalence of state divestment laws. As I analyzed the data, I noticed that a number of states explicitly provide for varying degrees of legal protection for the fund officials who execute the state mandates. Here, I explore how different states deal with the issues of the immunity and indemnification of their public fund officials as related to their divestment laws and rank the states according to the level of protection they provide to those who execute state-mandated divestment schemes.

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I then propose that the top-ranked states should become a model for the states that provide little or no protection to their fund officials. The major reason for the proposal are as follows: In the United States, private pension funds are governed by the standards highlighted in the Employee Retirement Income Security Act of 1974.² Public pension funds, on the other hand, must undertake their responsibilities in a manner that is consistent with their common law fiduciary duties.³ As such, absent clear statutory protection from their respective legislatures, public fund officials can become subject to lawsuits brought by beneficiaries claiming the violation of the officials' fiduciary duties if state-mandated divestment decisions lead to adverse fund performance.

In fact, in a study conducted by the US Government Accountability Office (GAO), 59 per cent of fund managers who had 'divested or frozen their Sudan-related assets, or planned to do so, said they were concerned to a moderate or large extent that "it would be difficult to divest while ensuring that fiduciary trust requirements were not breached and my office/state was not made vulnerable to law suits"'.⁴ The GAO study further found that the same concern existed among 61 per cent of fund managers who had not divested.⁵ Given these concerns, state legislatures should rethink their original legislation and provide public fund officials the necessary legal protection.

RANKING METHODOLOGY

Immunity and lawsuit prohibition against fund officials and others involved in divestment decisions are the highest level of protection that a jurisdiction could provide. An affirmative defense raised by a defendant pointing to the immunity/lawsuit prohibition statutes would likely lead to a timely dismissal of the case by the court. This study ranks the states that offer one of these protections, coupled with indemnification (the state or the fund paying for the litigation costs incurred by the defendant) under the 'strong protection' category.

The states that provide immunity or lawsuit prohibition but do not provide indemnification of fund officials are ranked under 'moderately strong protection'.

The states that provide indemnification of fund officials but lack other protective measures are ranked under 'moderate protection'.

The remaining states are ranked under 'weak or no protection'.

In addition to the criteria noted above (immunity, lawsuit prohibition and indemnification), the study also considers other factors such as statutory exemption from fiduciary responsibilities (which, while protective, can still leave the door open for potentially prolonged litigation against fund officials), as well as to whom the protective measures are extended: the fund itself, the board, trustees, officers, employees, agents, attorneys, custodians, research firms, investment managers and advisors, and former officials, employees and contractors.

While these factors did not play a role in the ranking process, I do include them in the overall analysis in order to provide a thorough review of the laws and highlight them in the examination of the specific strengths and flaws present in each jurisdiction's statutory scheme.

RESULTS & ANALYSIS

Strong protection

Immunity and lawsuit prohibition against fund officials and others involved in divestment decisions are the highest level of protection that a jurisdiction could provide. The states under this category offer one of these protections and combine them with indemnification (the state or the fund paying for the litigation costs incurred by the defendant).

Arizona

Arizona explicitly targets companies that do business in Iran and Sudan and requires its public funds to divest from them.⁶ The state provides more legal protection to its public fund officials and contractors than most states in potential cases of divestment-related lawsuits brought by beneficiaries. As such, the state can serve as a model for other jurisdictions.

The state provides, for instance, that in their compliance with the state's Sudan divestment laws, 'a public fund, its board of directors and

individual board members, agents, attorneys, trustees, officers, employees, custodians, fiduciaries, research firms and investment managers under contract with the public fund are exempt from any conflicting statutory or common law obligations',⁷ that is, their traditional fiduciary duties.

Furthermore, the state provides that '[w]ith respect to all actions taken in good faith compliance with [the Sudan divestment law], a public fund, its board of directors and individual board members, agents, attorneys, trustees, officers, employees, custodians, fiduciaries, research firms and investment managers under contract with the public fund are immune from any liability ... [and] indemnified from the state general fund and held harmless by this state from all claims, demands, suits, actions, damages, judgments, costs, charges and expenses, including costs and attorney fees, and against all liability, losses and damages of any nature that the public fund, board of directors and individual board members, agents, attorneys, trustees, officers, employees, custodians, fiduciaries, research firms and investment managers under contract with the public fund may at any time sustain by reason of any decision to restrict, reduce or eliminate investments made in good faith compliance with this article'.⁷

Despite its strengths, the law does have one major shortcoming: the legal protections noted above are not granted to former fund officials. In other words, if a fund employee makes a state-mandated divestment decision that adversely impacts the fund's performance, he/she can still be subject to a lawsuit upon leaving the job and would not receive any assistance from the state.

Another weakness in the Arizona system is that the above protections are only granted to public fund officials who make divestment decisions based on the statutory requirements of the laws specifically targeting Iran and Sudan. No protection is granted to fund officials who divest based on a different state law requiring divestment of public funds from companies that do business with countries that have been designated as SST by the federal government.⁸

(The US Department of State's SST list currently includes Cuba, Iran, Sudan and Syria.)⁹

Accordingly, a public fund official whose state-mandated divestments from companies that do business in Cuba and Syria lead to adverse performance would get no legal protection from the state if he/she is named as a defendant for breach of fiduciary duty, while the same or another fund official who divests from companies that do business in Iran or Sudan would receive substantial legal protection.

Indiana

Indiana has two sets of divestment laws, one requiring divestment from companies that do business with countries that are listed by the federal government as SST and the other explicitly targeting companies that do business with Sudan.¹⁰ The level of protection given to public fund officials is similar in both sets of laws, combining immunity and indemnification.

The state exempts its public funds from any fiduciary duty responsibilities, statutory or otherwise, when it comes to compliance with Indiana's divestment laws, so long as the divestment decisions have been made in 'good faith'.¹¹ Furthermore, the state grants immunity from civil liability to the public funds and their board members, executive director, officers, agents and employees for 'any act or omission related to the removal of an asset from the fund under [the divestment law]' and also entitles these individuals to 'indemnification from the fund for all losses, costs and expenses, including reasonable attorney's fees, associated with defending against any claim or suit relating to an act authorized under the [divestment law]'.¹²

The law does have room for improvement, however: Indiana statutes do not protect the funds' contractors, that is attorneys, research firms and consultants who, in good faith, may help the fund reach the decision to divest. Second, Indiana does not afford former officials any immunity or indemnification from suit. As in Arizona's case discussed above, the absence of legal protection for former fund officials makes them vulnerable to suit upon change of career or retirement.

Lastly, unlike Arizona and other states discussed below, the cost of indemnification in Indiana falls to the individual funds rather than the state's general fund, an unfair mechanism. What the Indiana indemnification scheme in effect entails is this: Mrs Beneficiary (Mrs B) sues Mr Public Fund Employee (Mr PFE), claiming breach of fiduciary duty because of Mr PFE's decision to divest from companies that do business in Sudan. The public fund spends US\$50 000 defending Mr PFE in court, an amount that could have been reinvested for the benefit of the fund's beneficiaries. Since divestment laws are political acts of the states, all associated costs, including the indemnification of public fund officials, should fall to the entire tax base rather than present or former public employees only.

Texas

Texas requires divestment from companies that do business in Sudan.¹³ The classes of people to whom the state grants divestment-related protection is one of the most thorough in the country, and the state uses the strong combination of lawsuit prohibition against public fund officials and indemnification to protect them in cases of such suits.

Somewhat uniquely (Florida is the only other state that takes a similar approach), Texas explicitly forbids beneficiaries, retirees and others affected by the pension fund to sue government and private persons in charge of divestment compliance for any breach of fiduciary duty or other potential causes of action.

The specific statute reads that '[a] person, including a member, retiree, and beneficiary of a retirement system to which [the divestment law] applies, an association, a research firm, a company, or any other person may not sue or pursue a private cause of action against the state, a state governmental entity, an employee, a member of the governing body, or any other officer of a state governmental entity, or a contractor of a state governmental entity, for any claim or cause of action, including breach of fiduciary duty, or for violation of any constitutional, statutory or regulatory requirement in connection with any action, inaction, decision,

divestment, investment, company communication, report or other determination made or taken in connection with this [law]'.¹⁴

And, just in case someone still has the audacity to bring suit, in spite of the prohibition noted in the clause above, Texas makes him or her pay for all of the defendant's legal fees:

[a] person who files suit against the state, a state governmental entity, an employee, a member of the governing body, or any other officer of a state governmental entity, or a contractor of a state governmental entity, is liable for paying the costs and attorney's fees of a person sued in violation of [the lawsuit prohibition] section.¹⁴

As for the state's indemnification mechanism, it is paid by the state itself (rather than the fund), and covers current and former employees and contractors, positing that '[i]n a cause of action based on an action, inaction, decision, divestment, investment, company communication, report or other determination made or taken in connection with [the divestment law], the state shall, without regard to whether the person performed services for compensation, indemnify and hold harmless for actual damages, court costs, and attorney's fees adjudged against, and defend ... an employee, a member of the governing body, or any other officer of a state governmental entity ... a contractor of a state governmental entity ... a former employee, former member of the governing body or any other former officer of a state governmental entity who was an employee or officer when the act or omission on which the damages are based occurred; and ... a former contractor of a state governmental entity who was a contractor when the act or omission on which the damages are based occurred'.¹⁵

Despite its strengths, the Texas law does have some weaknesses: first, while the law protects individuals, the protections are not extended to the fund itself as an entity, and second, even though the indemnification clause applies to former employees and contractors, the lawsuit prohibition provision does not, rendering retired or former officials still vulnerable to suit.

Moderately strong protection

The states in this category provide immunity or lawsuit prohibition but do not indemnify the individuals named as defendants.

Colorado

Colorado requires the state public funds to divest from Sudan and also encourages local governments 'to take voluntary action to divest from [Sudan-related] companies ...'.¹⁶

The state grants its public funds an exemption from statutory or common law fiduciary duty obligations with respect to their divestment decisions and provides immunity to the funds, the affiliated board of directors as well as 'agents, trustees, officers, employees, custodians and fiduciaries ...'.¹⁷

The major weaknesses of the Colorado model are that the state does not specify an indemnification mechanism and that it does not cover former employees of the funds.

Florida

Florida requires divestments from companies that do business in Cuba, Iran and Sudan.¹⁸

The state prohibits lawsuits against municipal police pensions' and municipal fire fighter pensions' boards, officers and advisors for implementing the state divestment requirements from Iran and Sudan, noting that 'the board and its named officers or investment advisors may not be deemed to have breached their fiduciary duty in any action taken to [divest], and the board shall have satisfactorily discharged the fiduciary duties of loyalty, prudence and sole and exclusive benefit to the participants of the pension fund and their beneficiaries if the actions it takes are consistent with the duties imposed by [the divestment law], and the manner of the disposition, if any, is reasonable as to the means chosen No person may bring any civil, criminal or administrative action against the board of trustees or any employee, officer, director or advisor of such pension fund based upon the divestiture of any security pursuant to this subsection'.¹⁹

In addition, Florida requires its retirement board to offer at least one 'terror-free' investment

vehicle.²⁰ To protect the designers of such products, the state forbids lawsuits against them: 'No person may bring a civil, criminal or administrative action against an approved provider; the state board; or any employee, officer, director or trustee of such provider based upon the divestiture of any security or the offering of a terror-free investment product ...'.²⁰

The major flaws in the Florida laws are that they provide for no indemnification and that the protections do not apply to former employees. In addition, the protections noted above do not extend to Cuba-related divestments.

Maryland

Maryland requires divesting from Iran and Sudan, and it grants the retirement board and any other fiduciary of the pension systems legal immunity for their good faith divestment related actions.²¹ The state defines a fiduciary as a member of the retirement Board of Trustees, an Investment Committee member; or a State Retirement Agency employee who 'exercises any discretionary authority or control over the management or administration of the several systems or the management or disposition of the assets of the several systems'.²²

Maryland law does not cover agents, attorneys, outside research firms or contractors, nor does it extent legal protection to former employees. The state provides no indemnification clause for divestment-related litigation.

Michigan

Michigan has enacted a divestment law against companies that do business with the federally designated SST as well as other laws addressing divestments from companies that do business in Iran and Sudan.²³

The state provides that the fiduciary 'shall be exempt from any conflicting statutory or common law obligations' and that the investment advisory committee members or others with decision-making authority 'shall not be held liable for any action undertaken for the purpose of complying with or executing the [divestment] mandates ...'.²⁴ The word 'fiduciary' is defined as the boards of trustees and directors of the affected funds as well

as the state treasurer in his/her connection with the public funds.²⁵

The scope of the individuals given legal protection under Michigan law is rather narrow and former employees are not covered. Also lacking in the Michigan system is the absence of an indemnification clause.

Moderate protection

The states under this category provide indemnification but no immunity or lawsuit prohibition.

California

California requires Iran and Sudan divestments.²⁶ The state demands that the public funds' divestments must be 'consistent with the [retirement] board's fiduciary responsibilities as described in Section 17 of Article XVI of the California Constitution'.²⁷ This section of the California Constitution partly provides that 'the members of the retirement board ... shall diversify the investments of the system so as to minimize the risk of loss and to maximize the rate of return, unless under the circumstances it is clearly not prudent to do so'.²⁸

As such, the state provides little protection to fund officials, except for indemnification, which, to the state's credit, extends to former employees and contractors. California statute reads that 'present, future and former board members of the Public Employees' Retirement System or the State Teachers' Retirement System, jointly and individually, state officers and employees, research firms [...], and investment managers under contract with the Public Employees' Retirement System or the State Teachers' Retirement System shall be indemnified from the General Fund and held harmless by the State of California from all claims, demands, suits, actions, damages, judgments, costs, charges and expenses, including court costs and attorney's fees, and against all liability, losses and damages of any nature whatsoever that these present, future or former [officials] shall or may at any time sustain by reason of any decision to restrict, reduce or eliminate investments pursuant to [the state's Iran and Sudan divestment statutes]'.²⁹

Kansas & South Carolina

Both of the states have divestment laws against Sudan. The level of legal protection the states grant to the public funds and the language used is nearly identical to those granted by California and is likewise extended to former fund officials.³⁰

New Jersey

New Jersey requires Iran and Sudan divestments. The state provides indemnification for Iran-related divestments but not for Sudan-related ones.³¹ The state does not extend indemnification to former employees. The state indemnifies 'State Investment Council members, jointly and individually, and State officers and employees involved therewith'.³¹

Pennsylvania

Pennsylvania requires Iran and Sudan divestments.³² While the state does not provide divestment-related immunity, lawsuit prohibition or a fiduciary duty exemption for the relevant decision makers, it has a rather thorough indemnification mechanism: the state indemnifies current and former board members, officers, employees, agents, research firms and investment managers of the public funds and provides advance payments to the eligible indemnitees who are party to a lawsuit.

As a general rule, the state posits that 'each indemnitee shall be indemnified and held harmless by the Commonwealth for all good faith actions taken by the indemnitee and for all good faith failures to take action, regardless of the date of any such action or failure to take action, in connection with attempts to comply with any investment limitations imposed by statute against all expense, liability and loss, including, without limitation, attorney fees, judgments, fines, taxes, penalties and amounts paid or to be paid in settlements reasonably incurred or suffered by the indemnitee in connection with any proceeding' and that the indemnitee has a right to have any related expenses be paid in advance.³³ Indemnification continues 'as to an indemnitee who has ceased to be a board member, designee of a board member, officer or employee of a

public fund and shall inure to the benefit of such person's legal representatives, heirs, executors and administrators'.³³

The state defines an 'indemnitee' as 'each current or former board member, duly appointed designee of a board member, officer, employee, including, without limitation, the attorneys in the Office of Chief Counsel that serve a public fund, agent, research firm or investment manager of a public fund who was or is a party to, or is threatened to be made a party to or is otherwise involved in any proceeding by reason of the fact that the person is or was a board member, designee of a board member, officer, employee, agent, research firm or investment manager of a public fund'.³⁴

Weak or no protection

The states under this category do not provide any of the major protective measures needed by fund officials: immunity, lawsuit prohibition and indemnification.

Hawaii, Illinois, Iowa, Minnesota and North Carolina

Hawaii, Iowa and North Carolina require Sudan divestments. Illinois and Minnesota require Iran and Sudan divestments.³⁵

The five states have adopted the following language, or a version nearly identical, in their divestment protection laws, void of immunity, lawsuit prohibition and indemnification, with narrow application and no legal defense granted to former employees:

With respect to actions taken in compliance with this Act, including all good faith determinations regarding companies as required by this Act, the public fund shall be exempt from any conflicting statutory or common law obligations, including any obligations in respect to choice of asset managers, investment funds, or investments for the public fund's securities portfolios.³⁶

Interestingly, Illinois has adopted the above language for Iran-related divestments but not for Sudan-related ones.

Louisiana

Louisiana does not require but permits its public funds to divest from Iran, North Korea, Syria and Sudan.³⁷ In case the public funds do decide to divest, the state provides them minimal protection and no indemnification: '[i]t shall not be a breach of fiduciary duty for a board of trustees or any member of such a board to take action to divest the system of any holding in a company having facilities or employees or both located in a prohibited nation'³⁸ so long as the divestment decision complies with the 'prudent man rule'.³⁹ The rule, as defined by statute, requires that 'each fiduciary of a retirement system and each board of trustees acting collectively on behalf of each system to act with the care, skill, prudence and diligence under the circumstances prevailing that a prudent institutional investor acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims'.⁴⁰

Oregon

Oregon requires Sudan divestments.⁴¹ The state provides no explicit indemnification, immunity or other legal protection for fund officials who make divestment decisions.

CONCLUSION

In order to protect current and former public fund officials, employees and their consultants from breach of fiduciary duty-related lawsuits that may arise out of state mandated divestment obligations, states must grant these individuals immunity or prohibit lawsuits against them. These measures would be of little use, however, if the individuals are not indemnified by the state. The ideal method of indemnification is one that is paid from the state's general fund rather than by the pension funds themselves, and one that provides a clear payment mechanism and furnishes advance payments to those eligible. Until these basic standards are adopted, pension fund boards, trustees, employees, advisors and consultants will continue to operate in an utterly unfair system that asks them to perform two (potentially) mutually exclusive tasks: honoring their fiduciary responsibilities and also divesting

from assets that could lead to adverse fund performance. State legislatures should thus rethink their original legislation and provide current and former public fund officials the legal protection they deserve.

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