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The Duty of Impartiality

By Barry L. Salkin

In this article, the author examines the duty of impartiality, observing that although it is infrequently discussed in the case law, it is an important element of the common law of trusts of which practitioners should be aware.

In *Central States Southeast and Southwest Areas Pension Fund v. Central Transportation, Inc.*,[1] the U.S. Supreme Court stated that "rather than explicitly enumerating all of the powers and duties of trustees, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."[2] While the Employee Retirement Income Security Act of 1974 (ERISA) may have been enacted in part because the common law of trusts did not provide enough protections for benefit plan participants,[3] it is clear that the common law of trusts has been imported into ERISA.[4] One such duty under the common law of trusts not explicitly referenced under ERISA[5] was the duty of impartiality, referenced by Chief Justice Roberts in *Varity v. Howe*, in stating that "the common law of trusts recognizes the need to preserve assets to satisfy future as well as present claims and requires a trustee to take impartial account of the interests of all beneficiaries."[6] The U.S. Court of Appeals for the

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Second Circuit made a similar observation in *Morse v. Stanley*, commenting that "trustees have a duty to deal impartially with plan participants and retired beneficiaries and/or their families [and] [t]he trustee must deal even-handedly among them, doing his best for the entire trust looked at as a whole."[7] The Second Circuit further elaborated, stating that "a trustee's duty is not to prefer the present interest of one group, e.g., here the departing plan participants, but also not to unduly delay payment of benefits to such participants, to their detriment."[8] Since those two seminal decisions, "Federal courts have repeatedly allowed plaintiffs to argue that their claims were not handled impartially."[9] At common law, the duty of impartiality applied most often to protect the interests of successive beneficiaries.[10] However, the duty of impartiality also applies where a trustee is required to act impartially vis-à-vis beneficiaries with present interests.[11] As one commentator has noted, "The duty of impartiality accepts that there could be irreconcilable tensions and conflicts among several trust beneficiaries who in all other respects stand in equal footing vis-à-vis the trustee."

DISCRETION

The duty of impartiality does not demand equal treatment of trust beneficiaries[12] and frequently the settlor of a trust will indicate that there are different objectives for succeeding classes of beneficiaries.[13] A trustee's duty of impartiality ordinarily gives him considerable discretion in deciding the balance between successive beneficiaries.[14] For example, in Field Assistance Bulletin 2003-3, in discussing formulas for allocating expenses among plan participants in defined contribution plans, when the plan document was silent on the issue, the U.S. Department of Labor ("DOL") wrote that "A plan fiduciary must be prudent in the selection of a method of allocation. Prudence in such instances would, at a minimum, require a process by which the fiduciary weighs the competing interests of various classes of the plan's participants and the effects of the various allocation methods on such interests. In addition to a deliberative process, a fiduciary's decision must satisfy the solely in the interest of participants' standard. In this regard, a method of allocating expenses would not fail to be 'solely in the interest of participants' merely because the selected method disfavors one class of participants, provided that a rational basis exists for the selected method."[15]

The trustee's duty of impartiality, while important, has been described as having "lean substantive content,"[16] and probably not unrelated to that lack of substantive content," cases holding fiduciaries to account for breaching the duty of impartiality are rare."[17]

IMPARTIALITY

Wiinpisinger v. Aurora Corp.[18] is sometimes cited as a case decided upon duty of impartiality grounds, although the Court did not rely upon that terminology. The issue in that case was which group of employees should be affected by a permitted cancellation of past service credits undertaken for the purpose of protecting the fund. The plan trustees decided to cancel the past service credit of one group of employees but not another. The district court concluded that this act was discriminatory and held that the fiduciary duty of the trustees required that the trustees exercise discretion in dealing with different classes of employees in a nondiscriminatory manner.[19] However, consistent with balancing the interests of different classes of employees, in *Siskind v. Sperry Retirement Program,*[20] the Second Circuit Court of Appeals concluded that "It was reasonable for the plan fiduciary to approve an amendment that would provide increased benefits to those employees whose jobs were at greater risk of elimination [because] employees at overstaffed plants and employees at lean plans are not similarly situated."

In *Summers v. State Street Bank,*[21] the U.S. Court of Appeals for the Seventh Circuit explained that "as employees retire, the participants come to consist of both active and retired employees, and to favor the former would violate the trustees' duty to the latter. It would be picking and choosing among beneficiaries, in violation of the traditional duty imposed by trust law of impartiality among beneficiaries."

In *Jackson v. Truck Drivers Union Local 42 Health & Welfare Fund,*[22] a plan beneficiary who had sustained substantial medical bills sued the trustee of the fund for payment of medical bills under a terminated plan. The trustees had made a collective decision to terminate the fund, but in such a fashion as to "cut off a group of the most vulnerable participants—the ones who had been ill and previously filed claims."[23] By favoring one group of employees over another, the court concluded that the trustees had violated a fiduciary duty of impartiality. In *Cooke v. Lynn Sand & Stone Co.*,[24] the Massachusetts district court denied defendant's motion to dismiss plaintiff's allegations that the duty of impartiality had been breached when different interest rates were used in determining lump sum distributions prior to and after plan termination.

In Field Assistance Bulletin 2002-1,[25] dealing with employee stock ownership ("ESOP") refinancing, the DOL discussed the duty of impartiality in connection with ESOP refinancing: "Further, we note that the fiduciary has a duty of impartiality to all of the plan's participants, and may appropriately balance the interests of different classes of participants in evaluating a proposed refinancing, including the potentially

varying interests of present and future participants. . . . In our view, however, the fiduciary cannot satisfy the duty of impartiality solely by considering the asserted benefits of the refinancing to future participants (e.g., more generous benefits in later years than the employer would otherwise provide), but must also consider the interests of current participants and beneficiaries. Although a refinancing does not remove shares from the ESOP, those current participants who terminate employment before the full repayment of a refinanced loan may receive fewer shares of stock than they would have received absent the refinancing, and current participants who remain employed by the sponsor must work more years to receive the same number of shares that they would have received absent the refinancing. Accordingly, a fiduciary cannot reasonably assess the costs and benefits conferred upon an ESOP without giving due consideration to the interests of current participants."

CONCLUSION

While the duty of impartiality is infrequently discussed in the case law, it is an important element of the common law of trusts of which practitioners should be aware.

NOTES

1. 472 U.S. 559 (1985)

2. Id. at 85.

3. James B. Schein, "A Limit on Downsizing: *Varity Corp. v. Howe*," 24 Pepperdine Law Review 1, 25 (1997).

4. Rosina Barker and Kevin O'Brien, "Consistency under the Claim Process: ERISA Duty or Regulatory Hobgoblin," 14 Benefits Law Journal No. 2, (Sept. 2001), p. 4. (Hereinafter, Barker and O'Brien, "Consistency.").

5. The duty of impartiality is sometimes characterized as a subset of the duty of loyalty. See, for example, *Endris v. Board of Directors of the Motion Picture Industry Health Plan*, 2020 WL 6253320 (C.D .Cal. October 7, 2020) ("duty of loyalty with its included duty of impartiality.") Cf. *Crowhurst v. California Institute of Technology*, 1999 WL 1027033 (C.D. Cal. July 10, 1999) (The duty of loyalty "applies to the plan's beneficiaries and participants equally.") and Restatement (Third) of Trusts, Section 79, Cmt.b ("Conduct in administering a trust cannot be influenced by a trustee's personal favoritism."). In an important article concerning the duty of loyalty, Daniel Fischel and John Langbein, "ERISA's Fundamental Contradiction: The Exclusive Benefit Rule," 55 University of Chicago Law Review 1159–1160 (1988), the authors explained "The duty of loyalty arises in the sense that self-dealing is equally forbidden when there is one beneficiary or many. But the duty of loyalty is owed to all the beneficiaries. Thus, the law of trusts recognizes that the concept of 'exclusive benefit' makes no sense when

the interests of some beneficiaries conflict with the interest of others. In ERISA, by contrast, there is no express analogue to the duty of impartiality. The statute speaks of the exclusive benefit of the employees. Nevertheless, the duty of impartiality inheres in the logic of pension trusts. The duty should be spelled out, ideally as a matter of legislative amendment, but more practically-in the course of fiduciary administration and litigation as an implied component of ERISA fiduciary law."

Courts have drawn similar distinctions between the duties of loyalty, and its attendant strict standards, and the duty of impartiality, under which actions of plan fiduciaries are judged under an arbitrary and capricious standard. In *Mahoney v. Board of Trustees*, 973 F. 2d 968(1st Cir. 1992), the U.S. Court of Appeals for the First Circuit distinguished between the duty of loyalty, in which the relevant interests are those of beneficiaries and nonbeneficiaries, and the duty of impartiality, which deals with the interests of different beneficiaries and classes of beneficiaries. In *Struble v. New Jersey Brewery Employee Welfare Benefit Fund*, 732 F. 2d 325,333-34 (3d Cir. 1984), the Court of Appeals for the Third Circuit wrote that "Although the courts have described the applicability of the arbitrary and capricious standard in rather overbroad language, they nonetheless have limited the use of the standard to cases involving personal claims for benefits. In other cases, they have consistently applied the standards set forth explicitly in ERISA. The use of different fiduciary standards in these cases is justified by the different challenges to fiduciary loyalty that each type of action presents. In actions by individual claimants challenging the trustees' denial of benefits, the issue is not whether the trustees have sacrificed the interests of the beneficiaries as a class in favor of some third party's interests, but whether the trustees have correctly balanced the interests of present claimants against the interests of future claimants. As the court explained in *Elser v. IAM National Pension Fund*, 684 F. 2d 648 (9th Cir. 1982), cert. den. 464 U.S. 813 (1983)], "the purpose of the Fund is to provide benefits to as many intended employees as economically possible while protecting the financial stability of the Fund." 684 F. 2d at 656. In such circumstances it is appropriate to apply the more deferential 'arbitrary and capricious' standard to the trustees' decisions. In the latter type of action, the gravamen of the plaintiff's complaint is not that the trustees have incorrectly balanced valid interests, but rather that they have sacrificed valid interests to advance the interest of nonbeneficiaries."

6. 516 U.S. 489 (1996), citing Restatement (Second) of Trusts, Section 232 (1959). Section 6 of the Uniform Prudent Investor Act and Section 7 of the Uniform Management of Public Employees Retirement Systems Act also contain an explicit duty to exercise fiduciary duties, impartially. Section 79 of Restatement (Third) of Trusts states that "The duty of impartiality requires that fiduciaries identify and impartially balance conflicting interests of different trust fund groups, including current and future beneficiaries," and further commenting that fiduciaries cannot ignore the interests of some beneficiaries as a result of oversight or neglect. Section 79, comment b. Of course, the duty of impartiality does not apply to a decision that is a settlor function. Thus, there is no breach of the duty of impartiality when excess assets are not transferred from a fully funded defined benefit plan when a plan is spun off. *Bigger v. American Commercial Airlines, Inc.*, 677 F. Supp. 626 (W.D. Mo. 1988) and *Foster Medical Corp. Employees Pension Plan v. Healthco, Inc.*, 753 F. 2d 194 (1st Cir. 1985). The duty of impartiality is also not breached when payments are made by a defendant to other non-ERISA related investors in an unrelated law suit, because settlement of that unrelated lawsuit was not a fiduciary activity. *Bauer-Ramazani v. TIAA-CREF*, 58 EBC 1487, 2013 WL 6189802 (D. Vt. Nov. 27, 2013).

7. *Morse v. Stanley*, 732 F. 2d. 1139 (2d. Cir. 1984). See also *John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan*, 26 F. 3d 260 (2d Cir. 1994).

8. Id.

9. *Haigh v. Construction Industry and Laborers Joint Pension Trust*, 2015 WL 3938386 (D. Ariz. June 26, 2015).

10. *Jackson v. Truck Drivers Union Local 42 Health and Welfare Fund*, 1998 WL 448049 (D. Mass. Aug. 7, 1996). See also *Devins v. Rhode Island Hospital Trust National Bank*, 744 F. 2d 893, 896 (1st Cir. 1984) (Settled law requires trustees to act impartially with due regard to the respective interests of both the life tenant and the remainderman.); *Collins v. Teamsters Benefits Trust*, 2013 WL 1402843, fn. 9 (N.D. Cal. April 5, 2013). William A. Fratcher, Scott on Trusts, Section 183, p. 558–559 (4th Ed.) ("Ordinarily, the question of the duty of impartiality arises where there are successive beneficiaries.")

11. *Jackson v. Truck Drivers Union Local 42 Health and Welfare Fund*, supra, n. 10. See also William A. Frachter, Scott on Trusts, supra, n. 10. at 559. ("The question of the duty of impartiality of the trustee may arise, however, with respect to simultaneous as well as successive beneficiaries, that is, with respect to beneficiaries who are entitled to share in the same interest").

12. Two different answers to the same questions at different times does not violate the duty of impartiality. *Reimering v. The Retirement Pension Plan of the Cal. State Automobile Association*, 2001 WL 114442 (N.D. Cal. Feb. 1, 2001). Originally, the trustees obligation to treat beneficiaries impartially and fairly as part of his duty of impartiality was understood to imply equal treatment. See Amir N. Licht, "Shareholder Impartiality: A new classic approach for the objectives of the Corporation." Working Paper N, 4762019. P 19-20 (Hereinafter Licht, "Shareholder Approval.") Citing to Chartrel Stebbings, "The Private Trusts in Victorian England," (2002), Licht indicated that equating the duty of impartiality with equality would have been in accordance with the maxim, 'Equality is equity,' and with the very foundation of equitable jurisprudence in concepts of fairness and even-handedness," p. 67.

13. Licht, "Shareholder Impartiality," p. 4.

14. See *Mahoney v. Board of Trustees*, 973 F. 2d. 968 (1st Cir. 1998) (Trustees permissibly exercised clearly granted discretion to benefit one group of beneficiaries more than another, and the trustees benefited from that action as members of the much larger favored group.).

15. See also Eric D. Chasen, "Redressing All ERISA Fiduciary Breaches under Section 409(a)," Faculty Publications (2020), p. 154 ("In a traditional trust, distribution decisions are regulated by the duty of prudence and the duty of impartiality.").

16. Licht, "Shareholder Impartiality," p. 26. In connection with the revised prudence and loyalty regulations, the DOL was asked to provide additional guidance on the duties of diversification and the duty of impartiality, but declined to do so because such guidance would be "beyond the scope of the regulatory initiative." Preamble to the final regulations on "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," 87 Fed. Reg. #230, p. 73821. For example, some comments with respect to the regulations noted that younger and older participants are likely to have differing investment risk alternatives, income generation needs, and long-term capital expectations. This distinction was of particular relevance in the ESG context, because many of the ESG factors could have material long-term financial consequences. The argument was that the proposed ESG regulations of the Trump administration focused on short-term growth to the detriment of long term returns.

17. Id.

18. 456 F. Supp. 559 (N.D. Ohio 1978).

19. Id. at 569. Commenting upon *Winpisinger*, Fischel and Langbein stated that "[t]he fundamental principle of the case—that trustees cannot act to benefit one group of beneficiaries at the expense of another—is essentially the duty of impartiality that requires the multiplicity of interests to be kept in constant consideration. See also Barker and O'Brien, "Consistency," supra n. 4.Cf. *In Mahoney v. Board of Trustees*, 973 F. 2d 968 (1st Cir. 1992), the Court of Appeals for the First Circuit questioned the holding in *Winpisinger*, in part because the basis for the holding was not clear: it may have been because that the action of the trustees served nonbeneficiary interests, or the Court may have thought the trustees actions violated ERISA's vesting rules, or may have been based upon a misunderstanding of ERISA's provisions, and in any case was inconsistent with later Circuit Court authority.

20. 47 F. 3d 498 (2d Cir. 1995). Siskind's specific holding that an amendment in the multiemployer plan context was made in a fiduciary capacity was abrogated in *Janes v. Fay*, 692 F. 3d. 221 (2d Cir. 2012).

21. 104 F. 3d 105 (7th Cir. 1997).

22. 933 F. Supp. 1124 (D. Mass. 1996).

23. Id. at 1144.

24. 673 F. Supp. 14 (D. Mass. 1986).

25. Sept. 2, 2002.

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