Title

The U.S. Supreme Court has determined that ERISA negated in its sphere of pre-emption a traditional protection afforded property rights incident to the trust relationship

Text

The U.S. Supreme Court in *Thole v. U.S. Bank*, 140 S. Ct. 1615 (2020), determined that when it comes to the beneficiaries of a trust that is associated with an *adequately-funded defined-benefit plan*, as opposed to a defined-contribution plan, the rights of the beneficiaries are more contractual in nature than equitable. (But see §9.9.1 of *Loring and Rounds: A Trustee's Handbook* (a trust is not a contract)). Thus, the beneficiaries lack the requisite standing to bring an action *in the federal courts* against the trustee for mismanaging the trust's portfolio. And this is the situation even in the face of serious allegations of unauthorized fiduciary self-dealing. The common law as enhanced by equity does not subscribe to such an absence of nexus between the beneficiary of a trust and its corpus. The dissent endeavored to bring to the Court's attention that when it comes to applicable trust doctrine, ERISA's purpose is to reinforce the fiduciary principle, not to water it down. Under general principles of equity a trust beneficiary's suffering of measurable economic harm at the hands of the trustee is not a *sine qua non* of the beneficiary being granted standing to seek judicial remedies for breaches of trust. The subject of trustee liability in the absence of economic injury to the beneficiary is taken up in in §7.2.8 of *Loring and Rounds: A Trustee's handbook*, which sub-section is reproduced below in the appendix hereto.

Appendix

§7.2.8 *Trustee Liability in the Absence of Economic Injury to the Beneficiary* [from *Loring and Rounds: A Trustee's Handbook* (2021)].

A trustee is liable for intentional breaches of trust, whether or not the breach caused economic injury to the trust. This is particularly the case when it comes to breaches of the duty of loyalty. Lack of economic injury is no more a defense to a trustee's breach of the duty of loyalty than is the failure to steal a defense to the crime of breaking and entering. While money damages may not be an available remedy in the absence of economic harm, there is always injunction, removal, and assessment of costs—and possibly even criminal sanction.[649] Under the UTC, a trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.[650] "A typical example of a profit is receipt by the trustee of a commission or bonus from a third party for actions relating to the trust's administration."[651]

Negligent breaches also can bring liability without economic injury. One court, for example, has held a trustee liable for the legal costs that a beneficiary incurred in getting the trustee to properly account.[652] The Restatement (Third) of Trusts is generally in accord.[653] Another court has held a former trustee personally liable for the attorney fees of a beneficiary that were attributable to the beneficiary's successful

[649] *But see* Bogert §861 n.57 and accompanying text. *See generally* §7.2.3.7 of this handbook (the equitable relief of reduction or denial of compensation and/or assessment of attorneys' fees and other costs against the trustee personally).

[650] UTC §1003(a).

[651] UTC §1003 cmt.

[652] James v. Newington & ors, [2004] JRC 059 (R.C. Jersey (Samedi Division)). *See also* McHenry v. McHenry, 2017 Ohio 1534 (Ct. App. 2017).

[653] Restatement (Third) of Trusts §83 cmt. a(1) and §100, cmt. b(2).

efforts to have the trustee judicially removed.[654]

The beneficiary's costs of getting a trustee to prudently invest the trust property also should be absorbed by the trustee personally. Take, for example, the trustee who negligently concentrates the trust estate in only one stock. Last year the stock's performance was well below the market average; this year its performance is, and continues to be, well above the market average. The beneficiary, concerned that the portfolio is at an unacceptable level of risk, retains counsel who finally manages either by litigation or negotiation to get the trustee to diversify. While ultimately the trust suffered no resulting economic injury, the trustee nonetheless was in breach of the duty to diversify. Thus, while money damages may be inappropriate, it would be appropriate for the trustee personally to bear the burden of all legal fees and associated costs incurred by the beneficiary and others in getting the trustee to prudently diversify.[655] Had the trustee sold when the stock was down, there would have been realized losses that could have formed the basis for an assessment of damages.[656] There is some irony here. Had the stock been sold in a down market in a conscientious—albeit belated—effort to carry out the duty to diversify, the trustee's liability could well be keyed to those losses.[657]

[654]McHenry v. McHenry, 2017 Ohio 1534 (Ct. App. 2017). Trustee removal is taken up generally in §7.2.3.6 of this handbook.

[655]*Cf.* McHenry v. McHenry, 2017 Ohio 1534, ¶59 (Ct. App. 2017) ("Likewise, a rule of proportionality in trust cases would make it difficult for beneficiaries with meritorious claims against the trustee, but with relatively small potential damage claims, to seek redress in court."); *see generally* §8.13 of this handbook (in litigation pertaining to a trust, when the beneficiary is entitled to reimbursement from the trust estate for legal fees).

[656]*See* Restatement (Third) of Trusts: Prudent Investor Rule §205.

[657]In one case, a bank trustee was held liable for the failure to diversify even though "the value of the trust principal increased and 'substantial income' was earned throughout the bank's tenure as trustee." First Ala. Bank of Huntsville, N.A. v. Spragins, 515 So. 2d 962 (Ala. 1987). Liability was based on the difference between the actual increase and the increase that might have been achieved with a diversified portfolio. *See also* Restatement (Third) of Trusts §§209–211.