

## Seventh Circuit Court of Appeals Rejects Department of Labor's Position on Standard of Review for Trustee's Decisions

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In a very important decision for ESOP trustees and other ERISA fiduciaries in a case involving an allegation of an erroneous valuation of employer securities held by an ESOP, the Seventh Circuit Court of Appeals has held that the standard of judicial review of the decisions of an ERISA trustee is deferential unless there is a conflict of interest. *Armstrong v. LaSalle Bank National Association*, Case No. 05-3417 (7th Cir. 2006). In so holding, the court rejected the Department of Labor's contention that trustees' decisions should be reviewed by courts de novo, rather than for an abuse of discretion. The plaintiffs had argued that the actions of an independent ESOP trustee, like the actions of an inside trustee, should be subjected to a de novo review with "strict scrutiny" by the courts.

The Secretary of Labor filed a brief as amicus curiae, urging the court not to apply an abuse-of-discretion standard of review in cases involving claims that a trustee has breached its fiduciary duty but where the trustee has no conflict of interest and has not engaged in self-dealing.

Judge Posner, writing for the appellate panel, held that "in general, judicial review of the decisions of an ERISA trustee as of other trustees is deferential unless there is a conflict of interest, which there is not here." Judge Posner went on to state that "a decision that involves a balancing of competing interests under conditions of uncertainty requires an exercise of discretion, and the standard of judicial review of discretionary judgments is abuse of discretion."

Morgan Lewis, representing LaSalle Bank as the trustee of the Amsted Industries, Inc. ESOP in this case, advocated a deferential standard of review of LaSalle's valuation of Amsted's stock. We pointed out that the Secretary of Labor was seeking to alter fundamentally the role of the courts in overseeing the conduct of ESOP fiduciaries. The court acknowledged that LaSalle, as ESOP trustee, had no conflict of interest and went on to state that LaSalle had a balancing act to perform in valuing Amsted's stock. Judge Posner, rejecting the de novo "strict scrutiny" standard of review advocated by the plaintiffs and the Secretary of Labor, stated: "We must not seat ESOP trustees on a razor's edge. We agree therefore with those courts that review the ESOP trustee's balancing decision deferentially."

The court of appeals remanded the case to the district court to apply the deferential standard of review and to determine whether LaSalle prudently exercised its discretion.

This case presents other issues, yet to be resolved, regarding the way in which an ESOP company's repurchase obligation should be projected and factored into valuations of employer securities held by ESOPs, and whether, and under what circumstances, marketability discounts should be applied in valuing employer securities held by ESOPs. The very significant issue that has now been resolved is

whether courts should give deference to the discretionary decisions of independent trustees. The court held that where the trustee is independent, its discretionary decisions should be overturned only if the trustee has abused its discretion.

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