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THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 AND UNION INFLUENCE IN PENSION FUND INVESTMENT DECISIONS

I. Introduction

Unions will eventually attempt to gain a voice in the direction of the investment of pension funds to which their members contribute. The Employee Retirement Income Security Act of 1974 (ERISA)\(^1\) contains provisions relating to fiduciary duty\(^2\) which may bar union influence over the investment decision-making process. This Note addresses the issue of whether a union-appointed fiduciary may influence investment decisions to incidentally benefit the union without violating the fiduciary duty provisions of ERISA.\(^3\) The focus is upon the decision-making process and the factors which influence it.\(^4\) Though the influence may be indirect, the fiduciary duty provisions of ERISA still apply.\(^5\) Unions will not attempt to 'control' pension funds for their own benefit, but rather will attempt to influence the large

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4. This Note is concerned solely with investment decisions which incidentally, or indirectly, benefit unions. Broader "social" goals are not considered.
5. This Note is not concerned with who ultimately "controls" the pension fund, but with the narrower issue of which factors may influence the investment decision-making process. The issue of ultimate "control" is impossible to resolve, considering the multiple sources of influence over pension funds, i.e., the corporation, the union, the bank, the investment advisor, etc. A recent survey of the federal law concerning union attempts to "control" pension funds may be found in Kaiser, Labor's New Weapon: Pension Fund Leverage, Can Labor Legally Beat Its Plowshares Into Swords?, 34 Rutgers L. Rev. 409 (1982).
6. The fiduciary duty provisions of ERISA are broad. See infra note 52.

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financial institutions which invest the funds to consider the question of whether a possible investment will provide job security for union members. An examination of the relevant legislative history, along with court interpretations of statutes with provisions similar to those contained in ERISA, leads to a conclusion that such indirect and limited influence is legal under ERISA. The 'pro-union' policy should be a factor, not a mandate. Such a moderate approach by unions will avoid ERISA fiduciary duty violations, and will not jeopardize the retirement income security of employees.

The resources commanded by private pension funds are vast. There are approximately 450,000 private pension plans in the United States. Pension funds, including both public and private, are the largest single source of funds for the New York Stock Exchange. Pension funds acquire almost two-thirds of the new stocks and bonds issued by corporations in capital markets. In 1982, public and private pension funds invested $36 billion in corporate stocks and bonds. The forecast is for a growth of total assets of private plans from the present amount of over $400 billion to $3 trillion by 1995. Pension funds in the private sector are concentrated: approximately

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6. See infra notes 102-103.
7. See infra notes 108, 114, 128, 132, 159 and 164, and accompanying text.
8. See infra notes 107, 124, 154 and 169, and accompanying text.
10. See infra 86, 117, 118 and 124 and accompanying text.
11. "Pension funds" here refers to the assets held by employee benefit plans, including both welfare plans and pension plans. "Welfare plans" are those plans, funds or programs which provide medical benefits, training programs, daycare centers, prepaid legal services, or insurance. 29 U.S.C. § 1002(1)(A) (1976).
12. Department of Labor, Preliminary Estimates of Participant and Financial Characteristics of Private Pension Plans, 1977 (Government Printing Office, 1981). This Note is not concerned with public pension plans, i.e., federal or state, since "governmental" plans are specifically excluded from coverage. See 29 U.S.C. § 1003(b).
14. Id.
15. USA Today, April 13, 1983, at B1. Private pension funds accounted for $15.7 billion. Id.
1600 of the largest corporations account for about 80 percent of all pension funds in the corporate market. Additionally, approximately one-half of the labor force participates in private pension plans subject to ERISA's coverage.

Investment decisions of private pension plans have great ramifications for the economic future of the nation and the retirement security of beneficiaries.

II. Types of Pension Funds and Their Financial Structure

A. Categorization of Pension Plans

Private pension plans can be broken down into four main types: corporate plans, single-employer Taft-Hartley plans, multi-employer Taft-Hartley plans, and union plans. Corporate plans are either sponsored by the employer unilaterally or established through collective bargaining with a union. The fact that a corporation has established a pension plan pursuant to a collective bargaining agreement does not necessarily lead to union involvement in the administration of the plan, or a union voice in the direction of pension funds. The vast majority of pension funds in the United States are corporate plans.

20. Lynn, supra note 17, at 277. Private pensions cover 96% of the workers in firms of 500 or more workers, 78% of the jobs in firms of between 100 and 500 workers, and 46% of the jobs in firms of under 100 workers. [July-Dec.] PENS. REP. (BNA) No. 315, at A-17 (Nov. 3, 1980) (statement by Thomas S. Boyd, Jr., legislative advisor on employee relations, Mobil Oil Company).
21. In the Findings and Declaration of Policy contained in 29 U.S.C. § 1001 (1976) Congress found a "national public interest" in employee benefit plans, and "that the continued well-being and security of millions of employees and their dependents are directly affected by these plans . . . ."

The actual benefits to beneficiaries has not risen dramatically. In real terms, the average annual benefit was $1,300 in 1950 and $1,550 in 1974. The costs to employers have, in contrast, risen from $300 per covered worker in 1950 to $720 in 1975, in constant dollars. D. LOGUE, LEGISLATIVE INFLUENCE ON CORPORATE PENSION PLANS 6 (1979).
23. For a discussion of corporate plans, see generally D. LOGUE, LEGISLATIVE INFLUENCE ON CORPORATE PENSION PLANS (1979).
24. P. HAR BRECHT, supra note 22, at 43.
25. Id. at 43-44.
in which the union does not have any input into the investment decision-making process, either through the selection of trustees\textsuperscript{26} or investment managers.\textsuperscript{27}

Unions have some input into the direction of pension funds when those funds are established pursuant to Section 302(c)(5) of the Taft-Hartley Act.\textsuperscript{28} Section 302(c)(5) provides for the establishment of trusts jointly administered by “representatives” of the employer and employees.\textsuperscript{29} The board of trustees in such a “Taft-Hartley plan” is comprised of one-half employer appointees and one-half union appointees.\textsuperscript{30} If a pension plan is established and the union is to participate in administering the plan, the pension plan must be established according to the rules of Taft-Hartley and the equal representation provisions apply.\textsuperscript{31} However, only a portion of private pension plan assets are in fact subject to joint administration—estimates range from 10% to 15%.\textsuperscript{32} One estimate is that there are 1,117 Taft-Hartley plans, with an aggregate total of $34 billion.\textsuperscript{33} Taft-Hartley plans themselves are of two types: single-employer plans and multi-employer plans.\textsuperscript{34} Single-employer Taft-Hartley plans are more common than multi-employer plans,\textsuperscript{35} although the latter are increasing in

\textsuperscript{26} 29 U.S.C. § 1103 (1976) provides that “all assets of an employee benefit plan shall be held in trust by one or more trustees.” See infra notes 29-30 and accompanying text.

\textsuperscript{27} See Ruttenberg, Union Involvement in Socially Responsible Investments, in Legal Issues in Pension Investment 345, 347 (H. Pianko ed. 1980).


\textsuperscript{29} 29 U.S.C. § 186(c)(5) (1976). Section 302 generally makes it illegal for an employer to make any payments to a union. Section 302(c)(5) provides that trust funds and welfare funds are exempt. See discussion infra notes 160-163 regarding the purpose of the provision.


\textsuperscript{31} N. LEVIN, ERISA AND LABOR-MANAGEMENT BENEFIT FUNDS 4 (1975).


\textsuperscript{33} See Schotland, Investing Pensions for Social or Union Purposes: Legal Analysis, in Employee Relations and Regulation in the ’80’s 429 (H. Northrup and R. Rowan eds. 1982).

\textsuperscript{34} See infra note 22 and accompanying text.

\textsuperscript{35} Multi-employer plans covered 22% of all private plan participants in 1980, and this percentage has been increasing steadily. A. MUNNEL, supra note 16, at 219. Multi-employer plans covered only 9% of private plan participants in 1950. Id.
importance. Multiemployer plans are sponsored by an association of employers, generally within a single industry, who contribute to the plan at a collectively-bargained rate. The contributions of the employers are pooled and the often massive trust fund is jointly administered by the employer and employee representatives.

The union often has de facto control over the decisions of the board of trustees of Taft-Hartley plans. Where employers are fragmented, as often occurs in multiemployer plans, the union-appointed trustees, voting as a bloc on the board of trustees, can influence the investment policy by choosing an investment manager.

The fourth type of plan, the union plan, is sponsored exclusively by a union. These plans were outlawed by Taft-Hartley and now comprise less than one-tenth of all private pension plan funds.

B. The Financial Structure of Pension Plans

Pension funds are invested in two basic ways: through group annuity contracts offered by life insurance companies or through trusts administered by a bank or trust company. Pension trusts held 63 percent of pension fund assets in 1980. A bank or insurance company

36. Id.
37. Id. "While multiemployer plans usually provide less generous benefits than single-employer plans, they offer workers retirement income security by allowing them to retain pension credits as they move among participating employers. Moreover, they protect a worker's benefit even [though] his employer may leave the plan". Id.
38. See P. Harbrecht, supra note 22, at 44.
40. See Blodgett, supra note 39, at 330 (fears erosion of distinction between funds and unions).
41. Id.
42. See P. Harbrecht, supra note 22, at 45.
43. An employer cannot pay money to a union unless the payments are held in trust and subject to joint administration. 29 U.S.C. § 186(c)(5) (1976). Any union plans in effect before the enactment of Taft-Hartley would be legal.
46. Id.
holding pension funds for a corporate plan not subject to Section 302(c)(5) of Taft-Hartley is a fiduciary of the plan and often the trustee of the pension fund. Outside firms often act as investment managers for the trustee and the sponsor company.

In the case of a Taft-Hartley plan, a bank or insurance company holding pension funds acts as an investment advisor or manager, not as a trustee. The trustees are the representatives of the employer and employees. The bank or insurance company holding pension funds is a fiduciary with regard to the plan.

A number of large companies manage their own pension funds 'in house', whereas smaller companies generally employ a commercial bank trust department to oversee the management of the fund. If a corporation does manage its pension fund 'in house', this may lead to conflicts with ERISA's mandates regarding fiduciary obligations.

The fiduciary duty problems of corporate pension fund officials are similar to those of union officials serving as trustees in a Taft-Hartley fund: that of dual loyalties. In many cases the fund trustees are

47. See infra note 52 for the definition of fiduciary.

48. An investment manager is defined in ERISA as any fiduciary "who has the power to manage, acquire, or dispose of any asset of a plan . . .", and either is "registered as an adviser under the Investment Adviser Act of 1940 . . .", or is a bank as defined in that Act or is an insurance company with managing powers under the laws of more than one state. The fiduciary status must be acknowledged in writing. 29 U.S.C. § 1002 (38) (1976). See also Questions and Answers Relating to Fiduciary Responsibility, 29 C.F.R. § 2509. 75-5 (1982) (Questions FR-6 and FR-7 further explicate 29 U.S.C. § 1002 (38) (1976)).

49. The onset of ERISA caused many corporate plan sponsors to hire consulting firms, although this trend is declining somewhat. Rohrer, Tough Times for the Consultants, INSTITUTIONAL INVESTOR, March 1983, at 103.

50. The trustees are appointed by both the union and management under Taft-Hartley. See supra notes 29-30 and accompanying text.

51. See supra note 29 and accompanying text.

52. ERISA defines a fiduciary as one who "exercises any discretionary authority or control" over a plan or its assets, gives investment advice for a fee, or has any discretionary authority in the plan's administration. 29 U.S.C. § 1002 (21) (A) (1976).

53. A. MUNNEL, supra note 16, at 217. There are administrative and investment advantages in establishing a large trust fund in a single bank for large corporations. In a "master trust", the plans of a corporation and its subsidiaries are consolidated. M. COSTA, supra note 44, at 25.

54. If a corporation does manage its pension fund 'in house', there may be improved investment performance although 'active management' may lead to conflicts with ERISA's mandates regarding fiduciary obligations. J. Klein, Structuring and Managing the Investment Process, in LEGAL ISSUES IN PENSION INVESTMENT 9, 31-40 (1981).

55. For a discussion of 'dual loyalties', see notes 156-171 infra and accompanying text.
company managers,\textsuperscript{56} raising the possibility of self-dealing. It is quite
common, for example, for corporate pension funds to invest in the
corporation's own real estate.\textsuperscript{57} Many corporate pension funds, how-
ever, maintain a policy of not investing in the sponsor corporation.\textsuperscript{58}

III. The Activities Proposed by Organized Labor

Only a fraction of private pension plan assets are subject to joint
administration as trusts established pursuant to Section 302(c)(5) of
Taft-Hartley.\textsuperscript{59} In the case of a Taft-Hartley plan,\textsuperscript{60} the employees
and the employer are represented equally in the administration of the
trust.\textsuperscript{61} A union could attempt to attain joint administration of the
fund with the employer through collective bargaining.\textsuperscript{62} If unable to
obtain full joint administration, a union could attempt to participate
in crucial decisions concerning the pension fund, such as the selection
of fund trustees, the choice of investment managers and advisers, and
the determination of the general investment policy of the fund.\textsuperscript{63} The
method of gaining a voice in these decisions is an agreement with the

\textsuperscript{56} J. Brooks, Conflicts of Interest: Corporate Pension Fund Asset Manage-
ment 16 (1975).
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 15.
\textsuperscript{59} See supra note 32 and accompanying text.
\textsuperscript{60} See supra note 29 and accompanying text.
\textsuperscript{61} A trust fund's trustees are bound by the provisions of the document creating
the trust. Under Sinai Hospital of Baltimore Inc. v. National Benefit Fund for
Hospital and Health Care Employees, 697 F.2d 562 (4th Cir. 1982), the trustees are
governed by provisions of the trust agreement and could not be bound by contract
provisions of a subsequent collective bargaining agreement. The trustees of the multi-
employer Taft-Hartley fund in Sinai Hospital decided to increase benefits on a
nationwide basis, despite the fact that the union had negotiated a freeze on benefits.
It is noteworthy that an “intimate relationship existed between the Union and the
Fund . . . .” 697 F.2d at 569 (Russell, J., dissenting). The employers in Sinai Hospi-
tal should have required the trust fund to bind itself contractually to the terms of the
collective bargaining agreement, in order to protect themselves against the trustees’
disregard of the agreement.
\textsuperscript{62} See AFL-CIO Report on Investment Policies, supra note 32, at R-8; Commit-
tee on Investment of Union Pension Funds, Recommendations to AFL-CIO Execu-
tive Council on New Pension Fund Investment Initiatives, reprinted in [July-Dec.]
\textsuperscript{63} Committee on Investment of Union Pension Funds, supra note 62, at R-17.
Another option is the utilization of share-ownership voting rights. Id. See generally
Kaiser, supra note 4, at 414-15 (discussion of various types of “pension fund lever-
age”).
employer reached through the process of collective bargaining. In any of the above types of union participation, the union's representative would become a fiduciary with respect to the plan.

Pension funds normally are invested in either group annuity contracts offered by life insurance companies or trusts administered by a bank or trust company. These firms will be referred to as "money managers". Unions are attempting to direct the money managers to consider "pro-union" factors in certain circumstances when making investment decisions. The thrust of organized labor's proposals is that union participation in pension fund management will benefit union members. Benefits will be achieved through "reindustrialization" of crucial sectors of the nation's economy, such as the manufacturing, construction, transportation, and maritime areas. These areas are highly unionized and contain the largest percentage of workers covered by private pension plans. Benefits will include improved housing for workers. Most importantly, investment decisions will be influenced in order to preserve jobs for union members. This in-

64. AFL-CIO Report on Investment Policies, supra note 32, at R-8 ("[U]nions must obtain some formal measure of control over investment-related decisions. Collective bargaining is peculiarly well suited to this end"). The trend towards union participation is a nascent one. Consider the following colloquy between Senator Metzenbaum and William Winpisinger, President, International Association of Machinists and Aerospace Workers:
Senator Metzenbaum: Do you see the whole question of bargaining for pension rights, the question of the management of pension funds, and the question of giving direction to the money managers becoming more and more an issue of collective bargaining not only in the Machinists Union but in other labor organizations as well? Mr. Winpisinger: I think it is absolutely inevitable at this stage of the game.
Hearings, supra note 39, at 133.
65. ERISA's definition of a fiduciary is broad. See supra note 52.
66. See supra note 45 and accompanying text.
67. See supra notes 62-63 and accompanying text.
68. Id.
69. See Committee on Investment of Union Pension Funds, supra note 62, at R-16. A. Munnel, supra note 16, at 199. The lowest percentage of covered workers is in the largely non-union service and retail industries. Id. Most non-covered workers are employed by small businesses. Id. at 200.
70. Id.
71. See Committee on Investment of Union Pension Funds, supra note 62, at R-16. The AFL-CIO Building and Construction Trades Department has the backing of mortgage bankers and real estate investment advisors in the investment of pooled, nationally invested pension funds. The plan's goal is to generate jobs in the construction industry. The fifteen member trade unions participate in the management of approximately $60 billion in pension funds. PENS. REP. (BNA) No. 404, at 1409 (Aug. 2, 1982).
72. See Hearings, supra note 39, at 142 (Statement of Jacob Sheinkman, Secretary-Treasurer, Amalgamated Clothing and Textile Workers Union).
volves inhibiting the flow of capital from the heavily unionized northern parts of the country to mostly non-unionized southern firms. Jobs also will be preserved by investing in firms that "create or foster domestic employment", rather than firms which invest overseas.

The collective bargaining process may give unions influence over the investment decision-making process by, for example, the negotiation of a joint employer-employee committee to either select trustees or investment managers. More importantly, a union may bargain for a joint employer-employee committee to determine investment policy. Since pension funds are most often turned over to money managers, the union essentially is bargaining over the right to make recommendations to the firm holding those funds regarding the direction of the investments. If the plan is a Taft-Hartley plan, the employees, in the form of the union, already have such influence because one-half of the trustees are employee representatives. Assuming that the money manager accepts the directives, the unresolved issue is whether the union-appointed trustee (of a Taft-Hartley plan) or a union-appointed fiduciary of the plan (e.g., a member of a bargained-for committee on

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73. See Axelrod, Common Obstacles to Organizing Under the NLRA: Combatting the Southern Strategy, 59 N.C. L. Rev. 147 (1980); See also Bluestone, Harrison, and Baker, Corporate Flight: The Causes and Consequences of Economic Dislocation 15 (1981) (Southern manufacturing stock grew almost twice as fast as did that of the Northeast, and two-thirds faster than the North Central region, from 1960 to 1976).


75. United States tax-exempt institutions had $10.9 billion invested in international markets, as of January 1, 1983. Pensions and Investment Age, May 30, 1983 at 21, col. 2.

76. A recent Chrysler-United Auto Workers agreement provided for a joint committee to recommend "socially responsible investments" and to advise against investments in up to five firms doing business in South Africa. (Jan.-June) PENS. REP. (BNA) No. 374, at R-9 (Jan. 4, 1982).

77. See supra note 45 and accompanying text.

78. See supra notes 28-31 and accompanying text.

79. Investment managers may not always follow instructions. See Crawford, Prudent Investments for Plan Fiduciaries and Plan Administrators, 40 Inst. On Fed. Tax. § 5.01, § 5.04, at 5-33 (ERISA Supp., 1982) ("investment managers would generally adopt the approach that investments are made on the basis of their financial merit and that other factors such as social or political considerations or a strong inclination on the part of the client toward particular types of investments would not play a role in the decision-making process"); Hearings, supra note 39, at 171 (Statement of Harrison V. Smith, Executive Vice-President, Morgan Guaranty Trust Company); Bowers, Social Investing—Practicable or Not?, PENSION WORLD, June 1980, at 22.
investments) may influence investment decisions so as to incidentally benefit union members, without violating ERISA’s provisions on fiduciary duty.

IV. Arguments Against Union Influence

There are a number of arguments against the union bid for influence over the investment decision-making process. Some commentators conclude that under the present law, unions would be violating ERISA’s fiduciary duty provisions. These analyses include the union bid as falling under the rubric of “social investing”. Many of the arguments for and against union influence over the investment decision-making process contain non-legal, value-laden approaches. One of these arguments is that unions will attempt to “control” pension funds for their own benefit and subsidize union objectives with pension funds. Other commentators argue that “social” investing is mandatory.

81. See supra note 3.
82. For example, one commentator has suggested that advocates of “social investing” should be labelled “anti-retiree”, since “the advocates who anoint themselves with the more affirmative labels usually simply ignore retirement income security, sometimes assign it a new, low priority, and always recommend courses of action that are likely (to say the least) to impair retirement security.” Schotland, *Investing Pensions for Social or Union Purposes: A Legal Analysis*, in *EMPLOYEE RELATIONS AND REGULATION IN THE ’80’s* 411 (H. Northrop and R. Rowan eds. 1982).
84. See M. Leibig, infra note 123. Secretary of Labor Raymond Donovan has recently stated: “We will not allow increased risk or decreased returns by so-called social investments, even those which may have the noblest of purposes”. Donovan, *Effective Administration of ERISA*, 33 *LAB. L.J.* 131, 132 (1982).
A different approach would be to focus upon limited union involvement and purely legal issues. Senator Williams, who was a central figure in the establishment of ERISA's rules on fiduciary duties, stated in 1979 that collateral benefits are permissible under ERISA as it is written. His remarks are noteworthy: “[M]y understanding of ERISA's fiduciary provisions and the intent of the Congress that enacted ERISA leads me to conclude that there is no need to amend ERISA's rules to permit fiduciaries ... to consider the social desirability of investments—the present rules permit such consideration ... .”

V. The Pension Plan Law of Fiduciary Duty

A. The Governing Law

The field of private pensions is imbricated with federal statutes applicable to specific areas. Congress' most extensive effort to date in this field has been the enactment of ERISA, which preempted all state regulation of private pension plans. ERISA is an unprecedented, comprehensive statute and the fiduciary duty provisions discussed in

85. Moral or policy issues, concerning whether unions should have any influence over the investment decision-making process, are beyond the scope of this Note. Some of the non-legal arguments against such influence are worthy of mention. It has been stated that "the most publicized, and perhaps the most flagrant, fiduciary scandals of recent years have occurred in connection" with multi-employer Taft-Hartley funds. J. Brooks, supra note 56, at 5. There is also the question of what have the unions accomplished where they already have a voice, as in Taft-Hartley funds. See Professor Schotland's trenchant critique in Schotland, supra note 82, at 428-29.

86. 125 CONG. REC. 932-33 (1974).

87. Id.

"[T]he framework of ERISA's present fiduciary responsibility rules ... permits taking non-economic issues into consideration when investment decisions are being made." A fiduciary might, "in order to implement a non-economic policy that is in the interest of the plan participants ... exclude investments of a certain type, or in a particular company ... while not adversely affecting in any measurable way the plan's actual investment alternatives and available investment returns." ... ERISA's fiduciary rules were deliberately made flexible enough to accommodate the almost infinite variety of types and sizes of plans, and offer ample opportunities ... to accommodate social purpose objectives of participants and beneficiaries.”

Id.

88. These include Taft-Hartley, supra note 28, and the Internal Revenue Code.

this Note are only a portion of the Act. The Internal Revenue Code also contains numerous provisions applicable to private pension plans. The most recent changes are contained in the Tax Equity and Fiscal Responsibility Act.

**B. ERISA and Fiduciary Duties**

ERISA's provisions regarding fiduciary duties can be summarized as three rules. First, the fiduciary must act for the "exclusive purpose" of providing benefits to participants and beneficiaries. In addition, the fiduciary is held to a standard of prudence, considered in the light of "the circumstances then prevailing," as one acting in a similar capacity and "familiar with such matters." Finally, the fiduciary

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93. The pertinent provisions are as follows:

[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries;

and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man 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;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.


95. 29 U.S.C. § 1104 (a) (1) (B) (1976).
must minimize the risk of large losses by diversifying the plan's investments, unless it is clearly prudent not to do so under the circumstances. Each of these rules must be followed "solely in the interest of the participants and beneficiaries".

Congress intended that a federal common law of fiduciary duty develop on the basis of ERISA's provisions. Some of the principles of the common law of trusts were codified and made applicable to fiduciaries by ERISA. Analogously, Section 302(c)(5) of the Taft-Hartley Act was intended by Congress "to cast employee benefit plans in traditional trust form precisely because fiduciary standards long established in equity would best protect employee beneficiaries." The standards were set forth to prevent self-interested manipulations of the fund by fiduciaries. It is apparent from the legislative history that Congress was concerned about manipulations of the fund by "insiders." A union which obtains some influence over the investment decision-making process becomes an "insider." Manipulation

96. 29 U.S.C. § 1104 (a) (1) (C) (1976).
100. NLRB v. Amax Coal Co., 453 U.S. 322, 331 (1981). Some commentators have rejected this dependence upon the common law of trusts as inadequate. See generally Herbert, Investment Regulation and Conflicts of Interest in Employer-Managerial Pension Plans, 17 B.C. Ind. & Com. L. Rev. 127, 157 (1976) (state courts have never been able to specify which investments are appropriate); Note, Fiduciary Standards and the Prudent Man Rule Under the Employment (sic) Retirement Income Security Act of 1974, 88 Harv. L. Rev. 960, 967-69 (1975) (Congress did not intend for courts to rely only upon the common law since common law trusts differ in nature from pension trusts).
102. See statement of Senator Bentsen supra note 101.
103. Id.
of the fund for the benefit of a union or an individual is therefore the type of egregious activity which the fiduciary duty provisions were designed to prevent. However, a union which has bargained for a joint employer-employee committee to determine investment policy will have obtained merely the ability to recommend that the money managers take "pro-union" factors into account when alternative investments are approximately equal in economic terms. Such indirect influence over the investment process is very different from the manipulative activity which the fiduciary duty provisions were designed to prevent.

1. The Exclusive Benefit Rule

If a union-appointed trustee or fiduciary were to follow, or direct a bank to follow, a policy of investing only in unionized companies, this policy would not be for the sole and exclusive benefit of the plan's participants. An investment policy must be narrowly formulated if it is to survive scrutiny by a court under the exclusive benefit rule. The "invest union" instruction should only be one factor to be considered by the investment decisionmakers. Investment decisions are made on the basis of items of information which increase the probability that an investment will perform in a certain manner. The "invest union" variable would be one of many, and should not be considered if an investment's performance would be poorer as a result.

104. In the recent unreported case of Donovan v. Wheeler, No. C82-640L (D.C. N.H. 1983), a pension fund violated the exclusive benefit rule where a contractor was loaned money by the fund on condition that only union members be employed. Wheeler is discussed in 10 Pens. Rep. (BNA) No. 455, at 1257 (Aug. 1, 1983).

105. See Hutchinson and Cole, supra note 3, at 1368 n. 143 ("union officials may have difficulty proving . . . that a policy of investing only in unionized companies is intended to benefit the participants as workers rather than the union itself"). Such a formulation would probably result in a violation of the duty to diversify assets under 29 U.S.C. § 1104 (a)(1)(C). See generally Langbein and Posner, supra note 3, at 89 (such a policy would produce a regional bias in the investment portfolio, since unionized companies are concentrated in the northeast and midwest).

106. See supra note 8 and accompanying text.

The fact that a fiduciary's actions ultimately result in an incidental benefit to a third party does not violate the exclusive benefit rule per se. The Internal Revenue Service has ruled that (1) the provision is not violated where the primary purpose of benefiting participants is met, and that (2) the rule allows others to derive some benefit from a transaction with the trust. The rule is not violated where the following requisites are met: 1) The cost of the investment does not exceed the fair market value at the time of purchase; 2) A fair return commensurate with the prevailing rate is provided; 3) Sufficient liquidity is maintained to allow for disbursements; and 4) Prudent safeguards and diversity levels are maintained.

The I.R.S. has also ruled that “[l]ow risk investments that produce income and also serve a social purpose will not be considered a diversion of the corpus or income from the trust’s purposes even though such investments yield a rate of return lower than that in the current market.” The United States Tax Court has stated that incidental benefits may accrue to persons other than participants in the plan as a

108. See Donovan v. Bierwirth, 680 F.2d 263 (2d Cir. 1982). In Donovan, corporate officers and directors, who were also trustees of the pension fund, breached their fiduciary duties by not resigning during a takeover bid and by buying their own corporation’s stock with pension plan assets to ward off the bid. The court noted that “[a]lthough officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants and beneficiaries simply because it incidentally benefits the corporation . . . their decisions must be made with an eye single to the interests of the participants and beneficiaries.” Id. at 271 (citations omitted); Schwartz, The Use of Employee Benefit Plans in Corporate Take-Overs After Grumman, in ERISA Litigation 169 (1982).

The Department of Labor is planning a crackdown on the misuse of pension funds in corporate takeovers. Pensions and Investment Age, May 30, 1983, at 1, col. 1.

109. See I.R.C. § 401(a) (1976). Compliance with the rule is a requirement for a pension plan to enjoy tax-exempt status.


111. Id.

112. Id. It is possible that the exclusive benefit rule is preempted by the standards of prudence, discussed infra. In the legislative history of ERISA, it is stated that Congress intended that to the extent a fiduciary meets the prudent man standard, “he will be deemed to meet these aspects of the exclusive benefit requirements under the Internal Revenue Code”. H.R. REP. No. 1280, 93d Cong., 2d Sess. 301, reprinted in 3 ERISA LEGISLATIVE HISTORY, supra note 98, at 4569.

result of a pension fund investment. The proposition has been stated only in cases involving a corporation or its shareholders. The language of ERISA itself appears to prevent assets of a pension plan from being used for the benefit of an employer, and not for a union. The policies behind the fiduciary duty provisions of ERISA apply equally to union fiduciaries.

While incidental benefits may accrue to persons other than participants in the plan, the paramount objective must remain the protection of retirement income. If an investment incidentally benefits a union or its members by providing job security and meets objective criteria “appropriate to the goals of the portfolio,” it may be given the same consideration as alternative investments meeting those objective criteria. Such criteria include the requisites for establishing that an

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114. See Feroleo Steel Co. v. Comm'r, 69 T.C. 97 (1977). In this case, the Tax Court held that a major loan from a pension plan to a corporation's majority shareholder (who in turn lent it to the corporation at almost twice the interest rate) violated the exclusive benefit rule of I.R.C. § 401(a). The Court stated that by so holding “we do not mean to imply that the exclusive benefit rule is contravened whenever a benefit inures to someone other than the employees or their beneficiaries as the result of an investment of the funds of an employee trust. However, under the facts of this case the benefit to the third party is not merely an incidental side effect of an investment of trust assets, but is rather a major purpose of the investment.” Id. at 113. Following Feroleo Steel, the Tax Court held in Shelby U.S. Distributors, Inc. v. Comm'r that although “the employers, their officers, and the trustees may all have derived some indirect benefit from the use of the trust funds, it appears that the trust was also allowed to earn a reasonable return on its investments and that there was no channeling of trust profits into the hands of individuals.” 71 T.C. 874, 885 (1979). See also Time Oil Co. v. Comm'r, 258 F.2d 237, 238 (9th Cir. 1958) (Internal Revenue Code's use of word “exclusive” allows substantial indirect benefits to accrue to an employer, “so long as the direct pecuniary benefits still run to the employee”).


116. The definition of a fiduciary contained in ERISA includes any person exercising “discretionary authority or control” over a plan or its assets. See supra note 52.

117. See Lanoff, supra note 3, at 389.

118. Id. at 390.
investment decision was made for the primary purpose of benefiting plan participants, as set forth by the Internal Revenue Service.\footnote{See supra notes 110-12 and accompanying text.}

Some commentators theorize that if two investments are equal in economic terms, “social” criteria may be taken into account.\footnote{Courts have developed objective criteria at common law, which are summarized as follows: the investment's marketability; the length of the term of the investment; the probable condition of the market as concerns reinvestment at the time the specific investment matures; the aggregate value of the trust and the nature of other investments; the income requirements of the beneficiaries; earning capacities or other assets of the beneficiaries; and inflation. \textit{Restatement (Second) of Trusts}, Sec. 227, Comment 0, at 535. The Restatement lists other factors inapplicable to pension funds.} The application of this theory is difficult in practice, however, because few investments can be considered equal based upon economic criteria.\footnote{See Langbein and Posner, \textit{supra} note 3, at 92-95; Hutchinson and Cole, \textit{supra} note 3, at 1367; Lanoff, \textit{supra} note 3, at 390. \textit{See also} 9 PENS. REP. (BNA) No. 417, at 1550-51 (Nov. 1, 1982) (Department of Labor Opinion Letter).}

If investments are not actually equal, a money manager would have to take “pro-union” factors into account, if at all, when two potential investments were approximately equal. For example, a bank could invest in a project employing unionized workers if economic analysis of both projects revealed approximately equal investment status. The “approximately equal” concept allows money managers limited flexibility in deciding when to apply noneconomic factors\footnote{Bowers, \textit{supra} note 3, at 20; “Investment selections are not made in tangibly measurable, 'all else being equal' settings, but rather with judgment calls and predictions as well as hard data.” \textit{Schotland, supra} note 82, at 412.} and realistically takes into account the unequal choices facing money managers.\footnote{Non-economic factors frequently enter into investment decisions. \textit{See Dym, supra} note 107, at 48 (prior to the point of investment decision making, “the tendency is to sweep into the decision process all the information that is available”).}

For example, the Dreyfus Third Century Fund applies “social” criteria to its investment choices, such as the equal employment opportunity record of a particular company.\footnote{This “approximately equal” standard, providing for limited flexibility in the choice of investments, is a moderate approach, as compared with the “mandatory social investment” approach taken in \textit{M. Leibig, Social Investments and the Law} (Studies in Pension Fund Investments No. 3, 1980).} Traditional economic criteria are applied after the list of “eligible companies” is established.\footnote{\textit{Hearings, supra} note 39, at 111-15 (statement of Jeffrey F. Friedman, Vice President).}
One commentator has argued that the "benefits" to a participant in a pension plan could be interpreted as more than mere payments upon retirement. Rather, "benefits" such as job security could be included. This concept has been criticized as inaccurate because the term "benefits" is used throughout ERISA in the narrow sense of cash benefits. However, it could be argued that if an economically worthy investment were to provide job-security, this investment would insure the viability of the fund and therefore be for the sole and exclusive benefit of the plan's participants. This view supports the Congressional policy behind ERISA of assuring the "financial soundness" of employee benefit plans. Ensuring the viability of a pension fund by providing job-security to those still contributing to the fund could also satisfy the basic duty of a trustee at common law: the duty of loyalty. If, for example, the union-appointed trustees of a Taft-Hartley plan were to instruct money managers to consider job security as a possible factor in their considerations as to where to invest, the pension fund itself would benefit through increased revenues.

126. See Ravikoff and Curzan, Social Responsibility in Investment Policy and the Prudent Man Rule, 68 CALIF. L. REV. 518, 532-33 (1980). Some union officials have argued for a broad concept of "benefits". See Hearings, supra note 39, at 131 ("an employee can enjoy the exclusive benefit of his pension fund only if he has a job secure enough and long enough to collect his deferred income pension") (statement of William Winpisinger, President, International Association of Machinists and Aerospace Workers); Id. at 142 ("preservation of jobs for union members, economic stability and growth in the community they live in, and even the recognition of workers' rights in other parts of our nation, may well create significant economic benefits for beneficiaries of pension funds") (statement of Jacob Sheinkman, Secretary-Treasurer, Amalgamated Clothing and Textile Workers Union).

127. See Hutchinson and Cole, supra note 3, at 1368-69; Langbein and Posner, supra note 3, at 102-03. Hutchinson and Cole note that the Department of Labor initially applied the exclusive benefit rule to challenge allocations of pension funds for administrative fees, expenses, and payments not in accordance with the plan. They conclude that "there is little compelling need for the courts to apply the exclusive purpose rule to investment issue." Id. at 1370, 1371.

128. Cf. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 111 v. Douglas, 646 F.2d 1211, 1215 (7th Cir. 1981) (trustees' decision regarding payment of benefits, which insured fund's viability, was for sole and exclusive benefit of beneficiaries).


131. The increased revenues would derive from additional union member contributions.
this way the trustees would be assuring the financial soundness of the plan, thereby satisfying the common law duty of loyalty which was essentially codified by ERISA.132

2. The Rule of Prudence

Under the common law, trustees were bound to invest with the diligence and care which prudent persons "of discretion and intelligence in such matters, employ in their own like affairs."133 If the trustee claimed to have greater skills, a higher standard was applied.134 Under ERISA, the standard of prudence is one under which a person "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."135 Some commentators believe that this divergence from the

132. It is possible that the exclusive benefit rule does not differ from the common law duty of loyalty. See Section of Corporation, Banking, and Business Law, American Bar Association, ERISA and the Investment Management and Brokerage Industries: Five Years Later, 35 Bus. Law. 189, 232 (1979) ("all indications are that the 'solely in the interest' and the 'exclusive purpose' requirements together equal the trustee's common law duty of loyalty, and that each term has been used interchangeably to represent the same concept"). See also Langbein and Posner, supra note 3, at 97 (ERISA codified the duty of loyalty).

In Blankenship v. Boyle, 329 F. Supp. 1089 (D.D.C. 1971), trustees, who were also officials of the United Mineworkers Union, (Boyle was President), were found to have violated the common law duty of loyalty. The trustees had deposited the pension funds in a UMW-owned bank, including some funds in an interest-free account. The bank then bought stock in electric utility companies, in a bid to force them (by the exercise of shareholders voting rights) to burn union-mined coal. The court held that "the Fund was acting primarily for the collateral benefit of the Union and the signatory operators in making most of its utility stock acquisitions." Id. at 1106. The court also said that Boyle "considers the Fund in effect the property of the Union to be used in whatever manner the immediate and long-term objectives of the Union warrant." Id at 1109. This case represents an extreme example of union-appointed trustees controlling pension funds primarily to benefit the union. If decided under ERISA, such actions by trustees would be clearly illegal as a violation of fiduciary duty. See notes 101-104 and accompanying text. This Note is concerned with the factors influencing the investment decision-making process, and whether incidental benefits may be taken into consideration which benefit the union. There is no doubt that such decisions cannot be made to primarily benefit the union.


common law standard results in a standard which assumes expertise in
the area of investments. The prudence of an investment decision, the outcome is not determinative of the court's conclusion. Rather, courts look to the "circumstances prevailing" when the decision was made and the alternatives available. Therefore, as a practical matter, professional money managers rely on records of the factors influencing the decision-making process.

The Department of Labor has issued regulations pertaining to investment duties under the prudence rule. The prudence of an investment will be judged with regard to the role the investment plays within the portfolio as a whole. At common law the investment decision was judged individually. Prior to ERISA, courts did not allow a fiduciary to offset losses from one investment against the gains of another investment. This divergence from the common law allows money managers somewhat greater flexibility in making investment decisions. Once it is established that the investment is economically competitive, the prudence of an individual investment decision that has taken "pro-union" factors into account will be judged in relation to the role it plays in the portfolio.


137. This language is used in ERISA itself. 29 U.S.C. § 1104 (a)(1)(B) (1976).

138. Marshall v. Glass/Metal Ass'n, Glaziers and Glassworkers Pension Plan, 507 F. Supp. 378, 384 (D. Haw. 1980) (risky real estate investment). See also Kniep, 40 Inst. on Fed. Tax'n § 11.01, § 11.04, at 11-20. (ERISA Supp. 1982) ("ERISA does not require a fiduciary to be omniscient or infallible. Its main requisite is that, in making each investment, the fiduciary act on the basis of awareness, inquiry, consideration and effective monitoring").

139. Lamon, supra note 99, at 522.

140. 29 C.F.R. § 2550. 404(a) (1979).


143. See Committee on Investments by Fiduciaries, Probate and Trust Division, A.B.A. Section on Real Property, Probate and Trust Law, supra note 136, at 293.

144. Diversification of plan assets, mandated by ERISA, is beyond the scope of this Note. It should be noted, however, that diversification, aside from providing security for pension funds, can also be profitable. For example, the "World Market Portfolio," which includes "a weighted combination of equities, bonds, cash, U.S. real estate and the monetary metals" and "covers the capital markets of the United States, . . . Europe, Japan, Hong Kong, Singapore, Canada and Australia" was worth $2 trillion in 1959 and $11 trillion by 1980. Bernstein, Winning Big by Playing It Safe, Institutional Investor, Jan. 1983, at 241.
The Department of Labor regulations do not specifically prohibit "pro-union" factors from being considered by a fiduciary. If a broad investment policy were formulated that arbitrarily excluded all non-union corporations from consideration, it clearly would be imprudent. If, on the other hand, the investment policy allowed for the exclusion of certain corporations from possible investment after individual examination on the merits, the exclusion may be prudent. It should be noted, however, that money managers have been swayed toward a conservative investment posture by ERISA's prudence requirements and may not be willing to follow all instructions given to them. The broad definition of fiduciary contained in ERISA, the fact that fiduciaries are held personally liable in the case of a breach of fiduciary duty, the possibility of liability for a breach by a co-fiduciary, combine with the possibility of punitive damages, to encourage a conservative investment posture.

As in the case of the exclusive purpose rule, if two investments, theoretically equal in economic terms, are available and one of the investments incidentally benefits a union by providing job security for its members, the latter investment may be made on the basis of the job-security feature. While the job-security enhancement aspect of the

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146. Lanoff, supra note 3, at 391. Consider the following statement of Michael Locker, president, Corporate Data Exchange, Inc.: "Clearly, without violating the ERISA prudence rule, a committee of employees, acting in an advisory capacity and not actually responsible for buying and selling stocks, could carve out broad areas in which they could choose not to have their pension fund assets invested." Hearings, supra note 39, at 110.
147. Lamon, supra note 99, at 527. As mentioned earlier, pension funds are invested mostly through group annuity contracts offered by life insurance companies or trusts administered by a bank or trust company. See supra note 45 and accompanying text.
148. See supra note 79 and accompanying text for a discussion of the possible refusal by money managers to consider such instructions.
149. See supra note 52 and accompanying text for a discussion of the definition.
153. See supra note 120 and accompanying text.
investment cannot substitute for objective criteria,\textsuperscript{154} it is difficult to find two investments which are equal based upon economic criteria.\textsuperscript{155}

C. The Problem of Dual Loyalties

Fiduciaries may also serve as union officers or representatives under ERISA.\textsuperscript{156} The potential for a conflict of loyalties is apparent. This conflict is not new: the Taft-Hartley Act, providing for jointly administered trusts,\textsuperscript{157} also contained a "sole and exclusive benefit" rule,\textsuperscript{158} leading to cases considering the problem of dual loyalties of trustees.\textsuperscript{159}

The congressional purpose in providing for joint employer-union representation was to combat bribery of union officials, extortion by union officials and the potential for abuse of pension funds if they were left solely in the control of union officers.\textsuperscript{160} Congress did not intend that pension funds would be used as a "war chest" for organized labor,\textsuperscript{161} as would be the case if unions used funds for their own benefit, while employees who have contributed would have "no legal rights and [would] not receive the kind of benefits to which they are entitled."\textsuperscript{162} Clearly, Congress did not intend that pension funds

\textsuperscript{154} Lanoff, supra note 3, at 389. For a discussion of the requisite objective criteria, see supra note 119.

\textsuperscript{155} See supra note 121 and accompanying text.

\textsuperscript{156} 29 U.S.C. § 1108(c)(3) (1976).

\textsuperscript{157} See supra note 29 and accompanying text.

\textsuperscript{158} Section 302(c)(5) provides in part that payments may be made from employees to employee representatives paid to a trust fund established "for the sole and exclusive benefit" of the employees, their families and dependents. See 29 U.S.C. § 186(c)(5)(1976).

\textsuperscript{159} See, e.g., Toensing v. Brown, 374 F.Supp. 191 (N.D. Cal. 1974), aff'd 528 F.2d 69 (9th Cir. 1975).


\textsuperscript{161} Id.

\textsuperscript{162} 93 CONG. REC. 4877 (statement of Sen. Taft), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1312 (1948).
would be used for the direct benefit of unions or union officials.\footnote{163} This however, does not preclude the accrual of indirect benefits to a union or its members.\footnote{164}

A union-appointed trustee may not have dual loyalties; the trustee’s fiduciary duties with respect to the trust must be paramount.\footnote{165} Recommendations of an appointing party may be taken, but these recommendations are neither binding nor obligatory.\footnote{166} The trustees must exercise “independent judgment.”\footnote{167} In fact, in the vast majority of cases, bloc voting occurs,\footnote{168} implying that the respective interests\footnote{169} of

\footnotetext[163]{Without the joint-administration provision, pension funds would “become a racket.” \textit{Id.}}

\footnotetext[164]{\textit{Culinary Workers and Bartenders Union, Local 596, Health and Welfare Trust v. Gateway Cafe, Inc.}, 91 Wash. 2d 353, 588 P.2d 1334 (1979). In \textit{Culinary Workers}, the Supreme Court of Washington held that a trustee may have some degree of collateral union interest, under the exclusive benefit provision of Taft-Hartley. \textit{Id.} at 361, 588 P.2d at 1340. The court also stated that “some degree of collateral interest is permissible” under ERISA, because of the inclusion of Section 408(c)(3), allowing a union official to be a fiduciary. \textit{Id.} at 362, 588 P.2d at 1341. The court noted that no breach of fiduciary obligations would be found “where there is no showing that the fiduciary’s collateral interest impaired a trust fund’s operation or a beneficiary’s interest.” \textit{Id.} at 363, 588 P.2d at 1341. See also Gilliam v. Edwards, 492 F.Supp. 1255 (D.N.J. 1980) (trustee of fund was also business manager of union local); Lugo v. Employees Retirement Fund, 388 F.Supp. 997 (E.D.N.Y. 1975) (pension plan does not violate sole and exclusive benefit rule where it indirectly furthers economic interests of employer), \textit{aff’d} 529 F.2d 251 (2d Cir.), \textit{cert. denied}, 429 U.S. 826 (1976).}

\footnotetext[165]{NLRB v. Amax Coal Co., 453 U.S. 322 (1981). “The language and legislative history of Sec. 302(c)(5) and ERISA ... demonstrate that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him.” \textit{Id.} at 334. See NLRB v. Constr. and Gen. Laborers’ Local 1140, 577 F.2d 16, 21 (8th Cir. 1978), \textit{cert. denied} 439 U.S. 1070 (1979); Morgan v. Laborers Pension Trust Fund, 433 F.Supp. 518, 530 (N.D. Cal. 1977).}

\footnotetext[166]{Toensing v. Brown, 528 F.2d 69, 72 (9th Cir. 1975).}

\footnotetext[167]{\textit{Id. Accord Sheet Metal Workers’ Int’l Ass’n}, 234 NLRB 1238 (1978), \textit{aff’d sub nom.} Cent. Fla. Sheet Metal Contractors Ass’n v. NLRB, 664 F.2d 489 (5th Cir. 1981).}

\footnotetext[168]{J. Brooks, \textit{supra} note 56, at 6 (union members tend to dominate multi-employer boards of trustees).}

\footnotetext[169]{Pension funds seem to have escaped the common law formula that no person can “serve two masters”. If the rule were followed literally, neither management personnel nor union officials could serve as trustees. This comports neither with ERISA, which allows a union member, as a “party in interest”, to be a fiduciary, 29 U.S.C. § 1108(c)(3), nor with common practice, \textit{see supra} note 39 and accompanying text.}
a union and an employer are taken into account when trustees make decisions. This is not necessarily inconsistent with fiduciary duties.

VI. Conclusion

Organized labor would like to influence the decision-making process involving pension fund investments. At the present time, this input is minimal, considering the vast pension funds over whose investment policies unions have no input whatsoever. Unions will attempt in the future to preserve jobs through bargaining over the right to recommend investment policies to money managers. The fiduciary status of money managers conservatively influences their investment posture and thus discourages their support for such a program by organized labor. It is submitted that any recommendations made must be narrowly formulated. One proposal, for example, could be to recommend that pension funds be used to “invest in unionized companies where such investments are economically competitive.” If the persons making such recommendations do not make their interest in job preservation the paramount interest, they will not have violated their fiduciary duties under ERISA. The test of whether fiduciary duties have been violated can never be whether the investments were equal, because such absolute equality is rarely found. Courts should apply a materiality standard when interpreting the fiduciary duty provision of ERISA. The issue should be whether the investment decision was materially affected by the “pro-union” factors. Some flexibility in the decision-making process should be allowed as long as the paramount interest of all fiduciaries remains the retirement income security of employees, past and present.

Gerald P. Cunningham

171. NLRB v. Amax Coal Co., 453 U.S. 322, 344 (1981) (Stevens, J., dissenting). Justice Stevens stated "(n)othing in the statute or the legislative history suggests that differences along labor-management lines are in any way inconsistent with the trustees' fiduciary duty to the trust beneficiaries." Id.