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Stuck in Unfriendly Skies: How the Seventh Circuit's Decision in *Summers v. State Street Bank & Trust Company* Left United Airlines Employees with Nothing but Hot Air

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**STUCK IN UNFRIENDLY SKIES:
HOW THE SEVENTH CIRCUIT'S DECISION IN
*SUMMERS V. STATE STREET BANK & TRUST
COMPANY LEFT UNITED AIRLINES EMPLOYEES
WITH NOTHING BUT HOT AIR***

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INTRODUCTION

Imagine yourself as a man in his mid-forties. You and your wife of the past fifteen years have two children, and you have spent the past twelve years working as an employee for Blue Star Airlines.¹ As an employee of Blue Star, in addition to earning a salary you participate in the company's employee stock ownership plan, which provides you a small stake in the ownership of the airline. When the company is successful the stock price rises, so you are able to share in the company's success.

During the first ten years that you participated in the plan the share price of Blue Star stock rose rather consistently. However, recently the airline industry has fallen on difficult times: the price of fuel has risen, people are traveling less, and as a result, Blue Star has

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¹ Yes, this is a thinly veiled reference to Oliver Stone's masterpiece, *WALL STREET* (20th Century Fox 1987).

been losing money to the point where it appears that bankruptcy is a real possibility. To make matters worse, a rapid decrease in the share price of Blue Star stock has made your employee stock ownership plan practically worthless.

There are approximately ten million employees in the United States who participate in employee stock ownership plans.² At the end of 2004, these plans were estimated to own \$600 billion dollars in assets.³ It's very likely that you or someone you know participates in this type of employee benefit plan.⁴

The hypothetical above is not merely an unfortunate series of events conceived to make a point – these events actually happened to many United Airlines' ("United") employees only a few years ago. United suffered massive financial loss in the aftermath of the September 11, 2001 terrorist attacks, yet it continued to instruct the trustee managing its employee stock ownership plan to hold on to United stock.⁵ When the stock was finally sold, it was practically worthless.⁶ The employees who participated in the plan sought recourse in federal court; however, their claim against the trustee for breach of its fiduciary duty was ultimately rejected.⁷

This Comment focuses on the Court of Appeals for the Seventh Circuit's decision in *Summers v. State Street Bank & Trust Company*.⁸ Part I discusses the Employee Retirement Income Securities Act ("ERISA") and introduces the concepts of employee stock ownership

² THE ESOP ASSOCIATION

http://www.esopassociation.org/media/media_statistics.asp (last visited November 15, 2006). "The ESOP Association is the national association of companies with employee stock ownership plans (ESOPs) and service providers with a professional commitment to employee ownership through ESOPs."

³ *Id.*

⁴ Employee benefit plans and welfare benefit plans are the subject of the Employee Retirement Income Security Act of 1974 ("ERISA"), which is discussed *infra* at Part I.

⁵ See *Summers v. State St. Bank & Trust Co.*, 453 F.3d 404 (7th Cir. 2006).

⁶ *Id.* at 408.

⁷ *Id.* at 405-11.

⁸ 453 F.3d 404 (7th Cir. 2006).

plans and directed trustees. Part II focuses on the U.S. Department of Labor's Field Assistance Bulletin No. 2004-03 and its determination of the fiduciary duties of a directed trustee. Finally, Part III examines the Seventh Circuit's decision in *Summers* and concludes that the court erred when it denied relief to a class of current and former United employees who asserted an ERISA claim against the directed trustee of their employee stock ownership plan who had allegedly breached its fiduciary duty of prudence.

I. ERISA, ESOPs, AND DIRECTED TRUSTEES

A. *The Employee Retirement Income Security Act of 1974*

ERISA⁹ was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans."¹⁰ It was promulgated after Congress found "that there had been a rapid and substantial growth in the size, scope, and numbers of employee benefit plans and that the continued well-being and security of millions of employees and their dependents [were] directly affected by these plans."¹¹ Therefore, ERISA attempts to ensure that once an employee is guaranteed a certain benefit by his or her employer, that employee will receive the benefit.¹² The Act protects employees "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts."¹³ Although employers are not required to establish employee benefit plans, if they choose to create such plans then they must comply with ERISA.¹⁴

⁹ The Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (2004).

¹⁰ *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983).

¹¹ *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 569 (1985) (citations and internal quotation marks omitted).

¹² *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996).

¹³ 29 U.S.C. § 1001(b).

¹⁴ *Varity Corp. v. Howe*, 516 U.S. 489, 496-97 (1996).

B. *The Role of Fiduciaries*

Under ERISA, all assets of an employee benefit plan must be held in trust by one or more trustees.¹⁵ Additionally, employee benefit plans must name one or more fiduciaries, who “have authority to control and manage the operation and administration of the plan.”¹⁶ However, an individual or entity that is not a “named fiduciar[y],” yet still exercises some discretionary authority and control over the plan, may still be considered a fiduciary.¹⁷ Under ERISA, a person is a fiduciary of a plan where:

- (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets; (ii) he renders investment advice for a fee or other compensation . . . ,
- (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.¹⁸

Therefore, an individual or entity that is not a named fiduciary, but retains a certain level of control over an employee benefit plan, will have the same duties as a named fiduciary.¹⁹

ERISA fiduciaries have certain affirmative duties they must fulfill, the most basic of which is the duty of loyalty.²⁰ Under ERISA, fiduciaries are required to “discharge [their] duties with respect to a

¹⁵ 29 U.S.C. § 1103(a).

¹⁶ 29 U.S.C. § 1102(a)(1). A “named fiduciary” is a “fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer of employee organization with respect to the plan or (B) by such an employee organization acting jointly.” 29 U.S.C. § 1102(a)(2).

¹⁷ 29 U.S.C. § 1002(21)(A).

¹⁸ *Id.*

¹⁹ *Id.* It follows, therefore, that a plan trustee who has authority and control over plan assets, will be, by definition, a “fiduciary” under ERISA.

²⁰ 29 U.S.C. § 1104(a)(1)(A).

plan solely in the interest of the participants and beneficiaries of the plan” for the exclusive purpose of providing benefits to those participants and their beneficiaries.²¹ According to the Court of Appeals for the Seventh Circuit, a fiduciary is in breach of this duty of loyalty if, for example, it misleads plan participants or misrepresents the terms or administration of a plan.²²

Coexistent with the duty of loyalty is the duty of care, which is also commonly referred to as a duty of prudence.²³ ERISA fiduciaries are required to act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”²⁴ The duty of prudence has been interpreted as “an unwavering duty on an ERISA [fiduciary] to make decisions with single-minded devotion to a plan’s

²¹ The duties of a fiduciary are found at 29 U.S.C. § 1104(a)(1), which states that:

[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; and
 (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA].”

²² *Tegtmeier v. Midwest Operating Eng’rs Pension Trust Fund*, 390 F.3d 1040, 1047 (7th Cir. 2004) (citing *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993)).

²³ 29 U.S.C. § 1104(a)(1)(B); *Summers v. State St. Bank & Co.*, 453 F.3d 404, 406 (7th Cir. 2006).

²⁴ 29 U.S.C. § 1104(a)(1)(B).

participants and beneficiaries and, in so doing, to act as a prudent person would act in a similar situation.”²⁵

ERISA not only describes the various duties that attach to fiduciaries,²⁶ but also holds fiduciaries liable for breach of those duties.²⁷ Thus, a participant or beneficiary may bring a civil action against a fiduciary that “breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this [title].”²⁸ A fiduciary that breaches his or her duty

shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other

²⁵ Craig C. Martin & Elizabeth L. Fine, *ERISA Stock Drop Cases: An Evolving Standard*, 38 J. MARSHALL L. REV. 889, 900 (2005) (quoting *Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984)); see also *Kuper v. Iovenko*, 66 F.3d 1447, 1458 (6th Cir. 1995).

²⁶ In addition to the duties of loyalty and prudence, ERISA requires fiduciaries to diversify “the investments of [a] plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.” 29 U.S.C. § 1104(a)(1)(C). As the Fifth Circuit described in *Metzler v. Graham*

[n]o statute or regulation specifies what constitutes ‘diversifying’ plan investments, but the legislative history provides this guidance: The degree of investment concentration that would violate this requirement to diversify cannot be stated as a fixed percentage, because a fiduciary must consider the facts and circumstances of each case. The factors to be considered include (1) the purposes of the plan; (2) the amount of the plan assets; (3) financial and industrial conditions; (4) the type of investment, whether mortgages, bonds or shares of stock or otherwise; (5) distribution as to geographical location; (6) distribution as to industries; (7) the dates of maturity.

112 F.3d 207, 209 (5th Cir. 1997) (citing H.R. Rep. No. 1280 (1974) as reprinted in 1974 U.S.C.C.A.N. 5038, 5084-85).

²⁷ 29 U.S.C. § 1109(a).

²⁸ *Id.*

equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.²⁹

C. *Employee Stock Ownership Plans*

The plan that was at issue in *Summers* was a very specific type of employee benefit plan known as an employee stock ownership plan (“ESOP” or “ESOPs”).³⁰ An ESOP is an employee benefit plan that is designed to invest primarily in securities issued by its sponsoring employer.³¹ A company that wants to establish an ESOP creates a trust to which it contributes shares of that employer’s stock, which are the allocated to individual employee accounts within the trust.³²

ESOPs are unique because the general duty to diversify³³ “is not violated by acquisition or holding of . . . qualifying employer securities.”³⁴ Because the purpose of an ESOP is to invest in a single stock – that of the sponsoring employer – the duty to diversify simply does not attach to such plans.³⁵

²⁹ *Id.*

³⁰ *Summers v. State St. Bank & Trust Co.*, 453 F.3d 404, 405 (7th Cir. 2006).

³¹ 29 U.S.C. § 1107(d)(6)(A). As ESOP is one example of a special ERISA plan known as “eligible independent account plans (“EIAPs”). An EIAP is an individual account plan which is also a profit sharing, stock bonus, thrift, or savings plan. 29 U.S.C. § 1107(d)(3)(A).

³² THE ESOP ASSOCIATION.

http://www.esopassociation.org/about/about_work.asp (last visited November 16, 2006). A number of different formulas may be used for allocation. The most common is allocation in proportion to compensation, but formulas allocating stock according to years of service, some combination of compensation and years of service, and equally, have all been used.

³³ *See supra* note 26.

³⁴ 29 U.S.C. § 1104(a)(2).

³⁵ *Summers*, 453 F.3d at 406. Had the duty to diversify attached to State Street, the directed Trustee in *Summers*, plaintiffs could have easily argued a breach of that duty. However, because the plan at issue was an ESOP, the duty did not attach.

D. “Directed” Trustees

State Street Bank & Trust Company, the defendant-appellees in *Summers*, was what is commonly referred to as a “directed trustee” of United’s plan.³⁶ The term “directed trustee” is not found within the language of ERISA; however, it is often used to describe plan trustees that “are subject to the direction of a named fiduciary who is not a trustee.”³⁷ Courts have relied on this language to determine that ERISA permits directed trustees.³⁸

However, the provisions of ERISA that govern the conduct of directed trustees are, in some ways, difficult to reconcile. Clearly a directed trustee is deprived of discretion to manage and control plan assets – by definition, it must follow the direction of a named fiduciary.³⁹ However, a directed trustee does have responsibility over assets held in an ERISA plan, which would seem to make such a trustee a fiduciary.⁴⁰ Moreover, a directed trustee is obliged to follow only those directions of a named fiduciary “which are made in accordance with the terms of the plan and which are not contrary to [ERISA].”⁴¹

This language has created some confusion regarding the existence and precise scope of a directed trustee’s duty of prudence. Some federal courts have held that a directed trustee is simply not a plan

³⁶ *Id.*

³⁷ 29 U.S.C. § 1103(a)(1).

³⁸ *See e.g., Summers*, 453 F.3d at 406. 29 U.S.C. 29 U.S.C. § 1103(a)(1) provides that if a “plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee ... [that trustee] shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to [ERISA].”

³⁹ 29 U.S.C. § 1103(a)(1). Furthermore, under 29 U.S.C. § 1105(b)(3)(B), a directed trustee cannot be held liable for “following instructions referred to in section [1103(a)(1)].”

⁴⁰ *See* 29 U.S.C. § 1002(21)(A).

⁴¹ 29 U.S.C. § 1103(a)(1); *Summers*, 453 F.3d at 406 (“An imprudent direction cannot be a proper direction since the trustee has an express statutory duty of prudence.”).

fiduciary and therefore does not have a duty of prudence.⁴² For example, in *Maniace v. Commerce Bank of Kansas City*,⁴³ the Eighth Circuit held that a directed trustee was not a fiduciary, and that therefore “no fiduciary duties were [owed]” to the plan or its participants.⁴⁴ The court reasoned that because the directed trustee could act only at the direction of a named fiduciary, the directed trustee had no discretion, and therefore could not be a fiduciary under the plan.⁴⁵ The Eleventh Circuit reached a similar conclusion in *Herman v. NationsBank Trust Company*,⁴⁶ where it held that “insofar as a trustee acts at the direction of a named fiduciary in accordance with the terms of the plan and ERISA’s requirements, he is not subject to the fiduciary requirement . . . to act prudently.”⁴⁷

However, other courts have held a directed trustee is a fiduciary, and therefore is subject to the duty of prudence.⁴⁸ Prior to its decision in *Maniace*, the Eighth Circuit held in *FirsTier Bank, N.A. v. Zeller*⁴⁹ that simply because a trustee is subject to direction; *i.e.*, is a directed trustee, the trustee’s fiduciary duties are not eliminated.⁵⁰ In *In re Worldcom, Inc. ERISA Litigation*,⁵¹ the district court for the Southern District of New York held that although section 1103(a)(1) may limit

⁴² *Maniace v. Commerce Bank of Kansas City*, 40 F.3d 264 (8th Cir. 1994); *Herman v. NationsBank Trust Co.*, 126 F.3d 1354 (11th Cir. 1997).

⁴³ 40 F.3d at 267.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 126 F.3d at 1361.

⁴⁷ *Id.* The court does seem to hedge a little here by including the language “in accordance with . . . ERISA’s requirements.” This suggests that when the directions are improper under ERISA, a directed trustee may have a duty to take some action.

⁴⁸ *FirsTier Bank, N.A. v. Zeller*, 16 F.3d 907 (8th Cir. 1994); *In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745 (S.D.N.Y. 2003).

⁴⁹ *Zeller*, 16 F.3d at 911. The *Maniace* court distinguished *FirsTier* by arguing that the trustee in *FirsTier* did in fact have “general fiduciary responsibility for management of all plan assets,” and thus was not truly a directed trustee. *Maniace*, 40 F.3d at 268.

⁵⁰ *Id.*

⁵¹ 263 F. Supp. 2d at 762.

the scope of a directed trustee's duty, it does not "eliminate the fiduciary status or duties that normally adhere to a trustee with responsibility over ERISA assets."⁵² More recently, the district court for the Southern District of Texas held in *In re Enron Corporation Securities, Derivative & ERISA Litigation*⁵³ that although the scope of a directed trustee's authority and discretion over plan assets is limited, "[a]t least some fiduciary status and duties of a directed trustee are preserved."⁵⁴

II. U.S. DEPARTMENT OF LABOR FIELD ASSISTANCE BULLETIN NO. 2004-03

The United States Department of Labor ("DOL") "promotes the welfare of the job seekers, wage earners, and retirees of the United States" in part by "protecting their retirement and health care benefits."⁵⁵ The DOL's Employee Benefits Security Administration is responsible for administering and enforcing the provisions of ERISA that protect participants of employee benefit plans and their beneficiaries.⁵⁶ Acting under that responsibility, the DOL issued Field Assistance Bulletin No. 2004-03 on December 17, 2004 (the "Bulletin"),⁵⁷ which attempted to clarify the scope of a directed trustee's fiduciary duties.⁵⁸

The Bulletin provides general guidance on the Department of Labor's "views on the responsibilities of directed trustees under ERISA, particularly with respect to directions involving employer

⁵² *Id.*

⁵³ 284 F. Supp. 2d 511 (S.D. Tex. 2003).

⁵⁴ *Id.* at 601.

⁵⁵ U.S. Department of Labor in the 21st Century.

<http://www.dol.gov/opa/aboutdol/mission.htm> (last visited November 23, 2006).

⁵⁶ <http://www.dol.gov/dol/topic/health-plans/index.htm> (last visited November 23, 2006).

⁵⁷ "Fiduciary Responsibilities of Directed Trustees" (U.S. Department of Labor Field Assistance Bulletin No. 2004-03, Dec. 17, 2004).

⁵⁸ *Id.*

securities.”⁵⁹ After briefly examining the relevant ERISA provisions, the Bulletin discusses the extent to which a directed trustee is obligated to question the named fiduciary’s instructions and determine whether those instructions are prudent and thus acceptable under ERISA.⁶⁰

The Bulletin first recognizes that the fiduciary duties of a directed trustee are “significantly narrower” than the duties ascribed to other fiduciaries.⁶¹ In reaching its conclusion, the DOL acknowledges that it is a plan’s named fiduciary who determines whether a particular transaction is prudent, and not the directed trustee.⁶² Therefore the scope of a directed trustee’s responsibility is necessarily limited.⁶³ Thus, according to the DOL, a “directed trustee does not have an obligation to duplicate or second-guess the work of plan fiduciaries.”⁶⁴ But, relying primarily on the *Enron* and *WorldCom* decisions discussed above, the Bulletin does suggest that directed trustees do maintain some limited duty of prudence.⁶⁵

According to the DOL – and consistent with ERISA – this limited duty of prudence is violated “when a directed trustee knows or should know that a direction from a named fiduciary . . . is contrary to ERISA.”⁶⁶ As noted above, a directed trustee is not obliged to second-guess the decisions made by named fiduciaries.⁶⁷ However, the Bulletin announced two specific situations where the duty of prudence may obligate a directed trustee to act.⁶⁸ This could occur when a directed trustee knows of: (1) “material non-public information

⁵⁹ *Id.* at 1.

⁶⁰ *Id.* at 1-6.

⁶¹ *Id.* at 2.

⁶² *Id.* at 4.

⁶³ *Id.* at 2, 4.

⁶⁴ *Id.* (citing *Herman v. NationsBank Trust Co.*, 126 F.3d 1354, 1361-62 (11th Cir. 1997)).

⁶⁵ Field Assistance Bulletin No. 2004-03 at 2.

⁶⁶ *Id.*

⁶⁷ *Id.* at 4.

⁶⁸ *Id.* at 4-6.

regarding a security”⁶⁹ or (2) material public information regarding a security⁷⁰ that suggests a direction is imprudent.

A. Directed Trustees’ Duty To Act on Private Information

A directed trustee must inquire about the named fiduciary’s knowledge and consideration of “material non public information that is necessary for a prudent decision,” before following any direction by the named fiduciary “that would be affected by such information.”⁷¹ The Department provides an example:

[I]f a directed trustee has non-public information indicating that a company’s public financial statements contain material misrepresentations that significantly inflate the company’s earnings, the trustee could not simply follow a direction to purchase that company’s stock at an artificially inflated price . . . the directed trustee, prior to following [that] direction . . . has a duty . . . to inquire about the named fiduciary’s knowledge and consideration of the information with respect to the direction.⁷²

This suggests that if a directed trustee fails to question the named fiduciary and simply follows a direction despite having knowledge of pertinent non-public information, that trustee would likely be in breach of its fiduciary duty of prudence under ERISA.

B. Directed Trustees Duty To Act On Public Information

The DOL views the directed trustees’ duty to question the named fiduciary’s direction in light of public information in a different

⁶⁹ *Id.* at 4.

⁷⁰ *Id.* at 5.

⁷¹ *Id.* at 4.

⁷² *Id.*

manner.⁷³ Only in “limited, extraordinary circumstances, where there are clear and compelling public indicators” might a directed trustee have to inquire about the named fiduciary’s direction before acting.⁷⁴ According to the Bulletin, examples of such extraordinary circumstances are “an 8-K filing⁷⁵ with the Securities and Exchange Commission, a bankruptcy filing, or a similar public indicator that call[s] into serious question a company’s viability.”⁷⁶

Thus, with respect to public information, the Bulletin suggests that in the face of these extraordinary circumstances, a directed trustee would be in breach of its fiduciary duty of prudence were it to follow through on a direction from a named fiduciary without further inquiry into the situation.⁷⁷

As the district court for the Eastern District of Virginia recently stated in *DiFelice v. U.S. Airways*,⁷⁸ in the context of ERISA, “the DOL’s interpretation is especially worthy of deference.”⁷⁹

⁷³ *Id.* at 5. The DOL gives three reasons to support the distinction between public and non-public information. First, it assumes that markets are efficient and that stock prices reflect publicly available information and known risks. Second, with respect to employer securities, securities law places obligations on the company, along with its officers and accountants to accurately report their financial records. Third, ERISA § 404 requires that the named fiduciary adheres to a stringent standard of care when directing trustees. *Id.* at 5.

⁷⁴ *Id.* at 5-6.

⁷⁵ See *infra* note 99. Public companies file 8-K reports “to announce major events that shareholders should know about.”

⁷⁶ Field Assistance Bulletin No. 2004-03 at 5-6.

⁷⁷ *Id.* at 6. This suggests that blindly following directions which, in the face of such circumstances, appear imprudent, is a breach of the directed trustees duty of prudence.

⁷⁸ 397 F. Supp. 2d 735 (E.D. Va. 2005).

⁷⁹ *Id.* at 752 n.25. The court stated that

The DOL’s interpretation of ERISA . . . is nonetheless entitled to deference depending upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if lacking power to control . . . deference is especially appropriate where the regulatory scheme is highly detailed and the agency can bring the benefit of specialized

Unfortunately for the plaintiffs in *Summers*, the Seventh Circuit chose to limit its application of the Bulletin, leading to what was ultimately an inequitable result.⁸⁰

III. THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT'S DECISION IN *SUMMERS V. STATE STREET BANK & TRUST CO.*

When United filed for bankruptcy at the end of 2002, its employees – both current and former – owned more than half of the company's common stock through their participation in United's ESOP (the "Plan").⁸¹ Plaintiffs in *Summers* were a class of those employees who participated in that Plan.⁸² By August of 2002, the Plan held close to 58 million shares of United common stock.⁸³

Plaintiffs brought suit against State Street Bank and Trust Company, the Plan's directed trustee, alleging imprudent management.⁸⁴ Specifically, Plaintiffs argued that State Street breached its fiduciary duty or prudence under ERISA by maintaining all of the Plan's assets in United stock when it knew that the Company faced extreme financial problems and a potential bankruptcy.⁸⁵

experience to bear on the subtle questions in a particular case . . .
In the case of ERISA, the DOL's interpretation is especially
worthy of deference.

(internal quotations and citations omitted).

⁸⁰ See *Summers v. State St. Bank & Trust Co.*, 453 F.3d 404 (7th Cir. 2006).

⁸¹ *Id.* at 405. Plaintiffs were participants in the Plan from November 17, 2001 through June 30, 2003.

⁸² *Id.*

⁸³ Plaintiffs-Appellants', Cross-Appellees' Brief and Short Appendix in Case No. 05-4005, 2005 WL 3749800 (7th Cir. 2006).

⁸⁴ *Summers*, 453 F.3d at 405-06.

⁸⁵ Brief for 2005 WL 3749800 at 3

A. *The Plan*

The Plan named the UAL Corporation ESOP Committee (the “Committee”) as the only named fiduciary.⁸⁶ According to the Plan, it was the Committee’s job “to establish an investment policy and objective for the Plan.”⁸⁷ However, “it [was] understood that the Plan [was] designed to invest exclusively in [United] stock.”⁸⁸ The Committee established a policy that did just that.⁸⁹

Pursuant to the Plan, the Committee retained the ability to “delegat[e] the power to manage or control the assets of the Trust Fund,” and thus appointed the State Street Bank & Trust Company (“State Street”) as the Plan’s trustee.⁹⁰ Consistent with the Plan’s language, State Street was instructed to invest exclusively in United Stock, making State Street a directed trustee.⁹¹

B. *United Airlines’ Stock Price Tumbles*

United was in serious financial trouble by the summer of 2001.⁹² According to documents that United filed with the SEC in the year 2000, the airlines’ financial outlook for the following year was

⁸⁶ *Summers*, 453 F.3d at 405. The Committee was made up of six members: three were appointed by the Air Line Pilots Association, two were appointed by the International Association of Machinists, and one was appointed by United. Plaintiffs-Appellants’, Cross-Appellees’ Brief and Short Appendix in Case No. 05-4005, 2005 WL 3749800, at *9 (7th Cir. 2006).

⁸⁷ *Summers*, 453 F.3d at 405.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*; Plaintiffs-Appellants’, Cross-Appellees’ Brief and Short Appendix in Case No. 05-4005, 2005 WL 3749800, at *9 (7th Cir. 2006).

⁹¹ *Summers*, 453 F.3d at 405-06. “State Street is what is called a ‘directed’ trustee, because the Committee (the fiduciary named in the Plan), in accordance with the plan language . . . directed State Street to invest the ESOP’s assets exclusively in stock of United Air Lines.” *Id.*

⁹² *Id.* at 407.

“poor.”⁹³ This bleak projection was based in part on an increase fuel costs and an overall decrease in travel.⁹⁴ As a result, United reported operational losses of nearly \$900 million in the first six months of 2001.⁹⁵ Shares of United Stock dropped from \$50 per share to \$30.82 by September 10, 2001.⁹⁶

The terrorist attacks of September 11, 2001 accelerated the dramatic drop in the share price of United stock.⁹⁷ On September 17, the first day that the New York Stock Exchange resumed trading after the attacks, the stock closed at \$17.50.⁹⁸

On October 17, 2001, Jim Goodwin, then CEO of United, wrote a letter to the company’s employees.⁹⁹ The letter articulated the dire financial situation that United was facing:

In the wake of [the September 11th terrorist attacks], we are in nothing less than a fight for our life. Never in our 75-year history have we faced an economic challenge of this magnitude, where the drop-off in air travel has been so unexpected and prolonged. Our number one priority now is to get United into a financial position that will allow us to continue operating . . . In the past, we struggled to make a profit. Now we’re in a struggle just to survive . . . Today, we are literally hemorrhaging money. Clearly, this bleeding has to be stopped – and soon – or United will perish sometime next year.¹⁰⁰

⁹³ Plaintiffs-Appellants’, Cross-Appellees’ Brief and Short Appendix in Case No. 05-4005, 2005 WL 3749800, at *11 (7th Cir. 2006).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* The letter, which was addressed to all company employees, was filed with the Securities Exchange Commission as an “8-K report.” Public companies file 8-K reports to announce major events that are of interest to shareholders.

¹⁰⁰ *Id.* at *12.

The stock price fell an additional twenty percent in the days immediately following the publication of the letter.¹⁰¹ In light of these events, *Business Week* reported that bankruptcy was likely UAL's "only hope."¹⁰²

C. *State Street Bank & Trust Company's Response*

As the Plan's directed trustee, State Street was in charge of managing the Plan's assets.¹⁰³ As the price of United stock continued to fall, and the financial press began to speculate as to United's potential bankruptcy, State Street became concerned.¹⁰⁴ Therefore State Street employed CitiStreet, an employee benefits service provider, to monitor United stock.¹⁰⁵

CitiStreet put United stock on its "watch list"¹⁰⁶ in December of 2001, where it remained through September of 2002.¹⁰⁷ On August 15, 2002, more than eight months after United stock was first placed on CitiStreet's watchlist, and almost an entire year after Goodwin's letter, State Street informed the Committee that it may be imprudent for the Plan to continue to maintain its exclusive holdings of UAL stock.¹⁰⁸

In response to this warning, the Committee appointed State Street as the plan's investment manager, which authorized State Street to

¹⁰¹ *Summers v. State St. Bank & Trust Co.*, 453 F.3d 404, 407-08 (7th Cir. 2006).

¹⁰² Plaintiffs-Appellants', Cross-Appellees' Brief and Short Appendix in Case No. 05-4005, 2005 WL 3749800, at *13 (7th Cir. 2006).

¹⁰³ *Summers*, 453 F.3d at 405.

¹⁰⁴ *Id.* at 408.

¹⁰⁵ Plaintiffs-Appellants', Cross-Appellees' Brief and Short Appendix in Case No. 05-4005, 2005 WL 3749800, at *16 (7th Cir. 2006).

¹⁰⁶ This allowed CitiStreet to closely monitor the stock's performance.

¹⁰⁷ Plaintiffs-Appellants', Cross-Appellees' Brief and Short Appendix in Case No. 05-4005, 2005 WL 3749800, at *16 (7th Cir. 2006).

¹⁰⁸ *Summers*, 453 F.3d at 408.

divest the Plan of its United stock and diversify its holdings.¹⁰⁹ After determining that continuing with the Plan's policy of exclusively holding and investing in United stock was inconsistent with ERISA under the circumstances, State Street began to sell shares of United stock on September 27, 2002.¹¹⁰ That afternoon, the stock closed at \$2.36 per share.¹¹¹ Based on the September 10, 2001 closing price, the roughly 58 million shares of United stock that were being held in the plan lost more than \$1.5 billion between the attacks of September 11th and sell-off date over a year later.¹¹²

D. Judge Posner's Decision

In *Summers*, the Seventh Circuit¹¹³ first had to determine whether, as a directed trustee, State Street had a "fiduciary duty with respect to the trust assets, specifically any duty ever to replace the employer's stock . . . with some other security."¹¹⁴ Essentially, the court had to decide whether a directed trustee has a duty of prudence; *i.e.*, whether there can ever be a situation where a directed trustee is not required to follow a direction from a named fiduciary because the direction is improper under ERISA.¹¹⁵

As discussed above in part I.D, while some federal courts have held that a directed trustee is simply not a plan fiduciary and therefore does not have a duty of prudence,¹¹⁶ others have reached an opposite conclusion, holding that ERISA does impose a duty of prudence –

¹⁰⁹ *Id.*; Plaintiffs-Appellants', Cross-Appellees' Brief and Short Appendix in Case No. 05-4005, 2005 WL 3749800, at *18 (7th Cir. 2006).

¹¹⁰ Plaintiffs-Appellants', Cross-Appellees' Brief and Short Appendix in Case No. 05-4005, 2005 WL 3749800, at *18 (7th Cir. 2006).

¹¹¹ *Summers*, 453 F.3d at 408.

¹¹² 58,000,000 shares, multiplied by a loss of \$28.46 per share, works out to a total loss of \$1,650,680,000.

¹¹³ A 3-judge panel of Judge Posner, Judge Wood, and Judge Evans heard the case; Judge Posner wrote the unanimous opinion.

¹¹⁴ *Summers*, 453 F.3d at 406.

¹¹⁵ *Id.* at 406-07.

¹¹⁶ *See supra* note 42.

although possibly a somewhat limited duty – on directed trustees.¹¹⁷ The *Summers* court recognized this, and after blaming the confusion on the “confusing statutory picture” that ERISA creates, the court turned to the DOL Bulletin.¹¹⁸

On this issue, the court followed the Bulletin’s guidance. According to Judge Posner, the Bulletin affirmed that a directed trustee does in fact have a duty of prudence.¹¹⁹ The court reasoned that a directed trustee controls the trust assets, and therefore if the trustee were to follow an instruction whereby it is knowingly investing the assets imprudently or allowing them to remain imprudently invested, it would be a breach of that duty.¹²⁰ Therefore, the court held that ERISA “expressly imposes the duty of prudence on directed trustees and forbids them to comply with directions that are not ‘proper.’”¹²¹

This determination is consistent with the language of ERISA, which requires directed trustees to follow “proper directions” which are consistent with the Act.¹²² However, it is in the application of this determination that the *Summers* decision appears to part from both the DOL Bulletin and ERISA.

As noted above, the plaintiffs in *Summers* argued that as a directed trustee, State Street violated its fiduciary duty of prudence by failing to sell the United stock held by the ESOP until just before United filed for bankruptcy.¹²³ According to the plaintiffs, both former-CEO Goodwin’s letter and the falling stock price should have indicated to State Street that “United was going into the tank.”¹²⁴ That, plaintiffs argued, should have been enough to cause State Street

¹¹⁷ See *supra* note 48

¹¹⁸ *Summers*, 453 F.3d at 406-07.

¹¹⁹ *Id.* at 406.

¹²⁰ *Id.* at 407.

¹²¹ *Id.* Interestingly, the decision does not reflect any argument on behalf of State Street that such a duty of prudence does not or should not attach.

¹²² 29 U.S.C. § 1103(a)(1).

¹²³ *Summers*, 453 F.3d at 405.

¹²⁴ *Id.* at 408.

to begin to divest the Plan of United stock.¹²⁵ Judge Posner, however, disagreed. In his opinion, the market – shares of United stock were traded on the New York Stock Exchange – provided the best indicator of value, and even after the Goodwin letter was made public, United stock was still trading at \$15.05 per share.¹²⁶ Therefore, according to Judge Posner, it was not imprudent for State Street to assume that the market was correct,¹²⁷ and State Street was thus not required to act based on an assumption that the market was overvaluing United.¹²⁸

Ultimately, according to Judge Posner, plaintiffs claim failed because of what he referred to as “a failure of proof.”¹²⁹ However, he urged the plaintiffs to take comfort in knowing “that determining the ‘right’ point, or even range of ‘right’ points, for an ESOP fiduciary to break the plan and start diversifying may be beyond the practical capacity of the courts to determine.”¹³⁰ Here, it appears that Judge Posner may be incorrect, as it seems that DOL Bulletin established the point where a directed trustee should “break the plan” and start diversifying.¹³¹

Recall from above that according to the DOL’s interpretation of ERISA, there may come a time when a directed trustee has a duty, based on public information, not to follow the named fiduciary’s direction.¹³² According to the DOL Bulletin, examples of such “extraordinary circumstances” which, in Posner’s words, would be the “right point . . . for an ESOP fiduciary to break the plan and start

¹²⁵ *Id.* at 407-08.

¹²⁶ *Id.* at 408.

¹²⁷ *Id.* In fact, according to Judge Posner, “it would be *hubris* for a trust company like state street to think it could predict United’s future more accurately than the market could.” *Id.* (emphasis in original).

¹²⁸ *Id.*

¹²⁹ *Id.* at 411.

¹³⁰ *Id.*

¹³¹ See Field Assistance Bulletin No. 2004-03 at 4-6.

¹³² *Id.* at 5-6.

diversifying”¹³³ are an 8-K filing with the SEC, or a “similar public indicator that [calls] into serious question a company’s viability.”¹³⁴

Former-CEO Goodwin’s October 2001 letter acted as an example of both. Not only was the letter filed with the SEC as an 8-K, the language of letter specifically called into question United’s future.¹³⁵ Goodwin ended the letter by stating “this bleeding has to be stopped – and soon – or United will perish sometime next year.”¹³⁶ Such language, especially considering that it was coming from United’s CEO would appear to call “into serious question [the] company’s viability.”¹³⁷ Judge Posner, however, disagreed; he relied on the idea that the market, and not Goodwin’s letter, should be the measure by which United’s viability was determined.¹³⁸

While economically this may be a sound argument, its result is simply inequitable. Judge Posner is willing to wait for the market to indicate that United is doomed to a fate of bankruptcy while the participating employees watch the value of their retirement income steadily and consistently decrease.¹³⁹ The DOL Bulletin’s interpretation of the relevant ERISA provisions provides a route to an adequate remedy, and the court should have provided it.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Plaintiffs-Appellants’, Cross-Appellees’ Brief and Short Appendix in Case No. 05-4005, 2005 WL 3749800, at *11-12 (7th Cir. 2006).

¹³⁶ *Id.* at *12.

¹³⁷ Field Assistance Bulletin No. 2004-03 at 6. In a footnote, the Bulletin indicates that “[a] directed trustee’s actual knowledge of media or other public reports or analyses that merely speculate on the continued viability of a company does not, in and of itself, constitute knowledge of clear and compelling evidence concerning the company sufficient to give rise to a directed trustee’s duty to act.” However, the indicators in *Summers* were more than mere speculation.

¹³⁸ *Summers v. State St. Bank & Trust Co.*, 453 F.3d 404, 408 (7th Cir. 2006).

¹³⁹ Judge Posner does, however, make an interesting and rather persuasive argument based on risk and how the decrease in the price of United stock increased the risk in plaintiffs participation in the plan. *Id.* at 408-11. However, this is a different argument for a different article.

Judge Posner reasons that the use of the word “may” by the DOL creates a standard that is not administrable.¹⁴⁰ This, however, amounts to nothing more than placing form over substance. Notwithstanding the use of “may” as opposed to “should” or “must,” the DOL Bulletin is clear in its intent. In certain limited, “extraordinary circumstances,” a directed trustee needs to do more than blindly follow instructions.¹⁴¹ When such circumstances are present, continued compliance is imprudent, and therefore in violation of ERISA’s requirement that directed trustees only follow instructions that are proper under the Act.

State Street’s continued compliance with the Committee’s direction in the year after September 11, 2001 amounted to a breach of its fiduciary duty of prudence. As the price of United stock continued to fall, State Street had a duty under ERISA to take act before continuing to follow the Committee’s directions. By failing to do so, and by holding onto United stock, State Street breached that duty, and therefore it should have been held liable in *Summers*.

IV. CONCLUSION

Near the end of his opinion Judge Posner suggests that perhaps the time has come for Congress to rethink the concept of ESOPs.¹⁴² An ESOP is, he argues, a “seemingly inefficient method of wealth accumulation by employees,” mostly because it inherently lacks diversification.¹⁴³ Moreover, the evidence “that having a stake in one’s employer will induce one to be more productive” is “weak and makes no theoretical sense.”¹⁴⁴

¹⁴⁰ *Id.* at 411.

¹⁴¹ Field Assistance Bulletin No. 2004-03 at 5-6.

¹⁴² *Summers*, 453 F.3d at 411.

¹⁴³ *Id.*

¹⁴⁴ *Id.* (citing “Motivating Employees with Stock and Involvement,” NBER Website, <http://www.nber.org/digest/may04/w10177.html>; Joseph Blasi, Michael Conte & Douglas Kruse, Employee Stock Ownership and Corporate Performance Among Public Companies, 50 INDUS. & LAB. REL. REV. 60 (1996)).

However, whether ESOPs may or may not be a good idea for either employers or employees, they continue to exist.¹⁴⁵ And, as long as ESOPs continue to exist, it is the duty of the federal courts to interpret the provisions that regulate them in a manner that is consistent with ERISA. In *Summers*, the Seventh Circuit failed to fulfill that duty.

Congress enacted ERISA to ensure that when an employee participating in an employee benefit plan was promised a benefit, the employee would receive that benefit.¹⁴⁶ That goal was not achieved in *Summers*. The plaintiffs participated in United's ESOP expecting that they would receive a benefit, yet that benefit was ultimately never received.¹⁴⁷ Consistent with ERISA, in this type of situation, it is the role of the courts to protect employees like the plaintiffs in *Summers*. However, the Seventh Circuit failed to protect thousands of current and former United employees from the State Street's inaction, inaction that was imprudent and contrary to its fiduciary duty under ERISA.

This result could have been avoided had the Seventh Circuit properly applied the standard expressed in the DOL Bulletin. In the face of specific, public indications of the types of "extraordinary circumstances" that the Bulletin outlined, the court should have held that State Street violated its fiduciary duty of prudence by continuing to follow the Committee's improper directions and failing to take action. Diversification of the Plan's assets was the only prudent course of action.

¹⁴⁵ And, as noted above, participation in ESOPs does not appear to be slowing down. See *supra* note 2.

¹⁴⁶ See *supra* note 25.

¹⁴⁷ *Summers*, 453 F.3d at 411.