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U.S. SUPREME COURT ASKED TO RULE ON *REBALDO V. CUOMO*

The United Optical Workers Insurance Fund continues to insist on the right of self-insured funds to operate without state regulation, and without Blue Cross. Sebastian Rebaldo, chairman of the Fund, is asking the United States Supreme Court to decide one of the issues in *Rebaldo v. Cuomo.*

The case challenges New York State's attempt to forbid hospitals to negotiate discount rates with self-insured funds (see *The Fund Reporter,* Nov.-Dec. '83; Jan.-Feb., Mar.-Apr. '84). The District Court had ruled against the State on the grounds that the provisions of ERISA preempt the State law; on November 26 the Court of Appeals overturned that ruling. The Supreme Court is being asked to settle this issue. Three other issues have not yet been argued at the lower level: anti-trust, impairment of contract and equal protection of the law.

The Lombardi-Tallon Act of 1982, a complex law designed to regulate hospital charges, did not originally include this anti-competitive clause. New York Blue Cross, the largest health insurer in the country, lobbied hard for it. Blue Cross amicus briefs in *Rebaldo v. Cuomo* imply that discounts for self-insured funds, unlike those for Blue Cross, contribute to uncontrolled rises in hospital costs.

Self-insured funds have in fact led the way in cost control. They have pioneered with second opinion programs, coordination of benefits, negotiation with providers and hospital claim review. Many self-insured funds chose self-insurance only after Blue Cross failed to help them control hospital costs. In *Rebaldo v. Cuomo,* Blue Cross is spending tens of thousands of subscriber dollars to try to eliminate that freedom of choice for fund trustees.

Self-insured funds cover only a tiny fraction of hospital admissions. Losing their negotiated discounts would leave them no alternative to financial disaster but to pay Blue Cross to provide discount rates. Net hospital income would remain the same but Blue Cross would have new, captive clients. The State Health Department is now studying hospital charge differentials, including negotiated discounts, with public hearings scheduled in early 1985.

In letters to various union leaders and welfare funds, both Governor Cuomo and Health Commissioner Axelrod have agreed that no hospital will be bound by the law's requirement until all the legal issues in *Rebaldo v. Cuomo* are settled. The November 26 ruling did not settle them. Nevertheless, in a December 7 letter, Blue Cross informed member hospitals that the "statutory. . . prohibition is now restored and in full effect, and the hospitals are bound by its requirement for full payment of regular charges by the self-insured funds. . ."

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TEN TIPS FOR TAFT-HARTLEY FUND TRUSTEES

by Mark Edward Brossman and Neal S. Schelberg

Trustees of employee benefit plans have substantial responsibilities. The laws governing plan administration are complex, and constantly changing. Government regulation is increasing. The dollar amount of fund assets is more than one-half trillion dollars; this money must be invested wisely. The Employee Retirement Income Security Act of 1974 *as amended* ("ERISA") sets forth penalties, including personal liability, for the failure of fiduciaries to follow its provisions.

Trustees must take their position very seriously. The following ten tips should be helpful to trustees in meeting their fiduciary obligations:

1. Know ERISA. ERISA is the major federal statute regulating employee benefit plans. It was signed into law on September 2, 1974 and has been amended by various other laws.

ERISA is a detailed law and includes provisions concerning reporting to government agencies (the Department of Labor, the Internal Revenue, and the Pension Benefit Guaranty Corporation); disclosure to plan participants and beneficiaries; participation, vesting and benefit accrual requirements; plan funding requirements; fiduciary responsibility; administration and enforcement; and plan termination insurance.

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Tips for Trustees *(continued from p. 1)*

While a trustee should be familiar with all of these provisions of ERISA, he or she must be intimately aware of its fiduciary responsibility provisions. Those provisions govern the day-to-day activities of trustees. In fashioning the fiduciary requirements of ERISA, the legislators drew primarily from the common law of trusts.

ERISA Section 404 sets forth the general statement of fiduciary obligation and requires a fiduciary to act solely in the interest of plan participants and beneficiaries in providing benefits to participants and their beneficiaries. Trustees must act "with the care, skill, prudence and diligence under the circumstances that a prudent man acting in a like capacity and familiar with such matter would use." This requirement has been deemed the "prudent expert" rule. Trustees must also diversify plan investments to minimize the risk of large losses, unless it is clearly prudent not to do so. Finally, trustees must discharge their duties in accordance with the documents and instruments governing the plan.

An excellent overview of these provisions, which we highly recommend, is *Guidelines for Fiduciaries of Taft-Hartley Trusts: An ERISA Manual* (International Foundation of Employee Benefit Plans 1980) written by our colleague, Noel Arnold Levin.

2. Attend Trustee Meetings. Trustees should make every effort to attend all trustee meetings. Fund developments occur rapidly, and new issues arise frequently. Meetings of the Board of Trustees typically should be held in a business-like setting. Minutes should be taken at the trustee meeting and they should be made a permanent part of the fund's records. Further, trustees should require service providers and fund employees such as the administrator to report on fund matters. For example, if the fund is involved in many litigation and arbitration matters, the trustees should consider directing counsel to prepare a litigation status report for the trustees. Investment manager reports and administrator reports should also be made and incorporated as part of the fund's official records. Other fund business should also be conducted at these meetings such as the disposition of benefit claims and reviewing of the fees of the fund's service providers.

3. Ask Questions. Many complicated and sophisticated issues arise at fund meetings. For example, lawyers discuss new legal developments; investment advisors report on the performance of the fund's investments; actuaries report on plan funding; *etc.* Many experts use terms of art; legal, actuarial and accounting terms can also be confusing. If a trustee does not fully understand something, he or she must ask! Not only will this help the trustee better understand the fund, it will also enable the trustee to discharge his or her fiduciary duty to monitor and supervise the fund's service providers. It must be remembered that the final decision on a matter is made by the trustees and, under the law, the trustees will be responsible for their decisions.

4. Know the Plan. As stated above, trustees must follow the documents governing the fund. Thus trustees should familiarize themselves with the provisions of the plan and trust documents. The specific terms of each plan are different. This may present a problem for trustees who sit on more than one fund. Such "multi-plan trustees" should take special care to be familiar with all of the plan provisions of each of the funds for which he or she serves as a trustee. A trustee may be asked to decide technical issues of benefit eligibility or make decisions concerning the operation or applicability of a plan provision. Further, participants may ask trustees questions concerning benefit options. Trustees should be able to provide reliable responses.

5. Attend Educational Seminars. Employee benefits is a rapidly developing and changing area of the law. Trustees should attend educational seminars to obtain continuing education. Many such seminars have expert and practical advice on myriad subjects affecting employee benefit plans including collections, investments, cost containment, *etc.* Also, there are various books and periodicals in the field. The International Foundation of Employee Benefit Plans, for example, sponsors programs for new trustees and continuing education seminars. It also publishes a number of books and periodicals which may cover specific topics of interest. Other groups, such as the Educational Conference, also have gatherings where trust field developments are discussed formally and informally.

6. Obtain Expert Advice. Funds should utilize experts for legal, accounting, actuarial, *etc.* advice. These experts will assist the fund in filing its reports with government agencies. Shop around for a fund's experts. Compare their experience, services and costs. Do not hire relatives or friends just because of relationship. Remember, trustees are governed by the "prudent expert" rule. Thus ask, would a prudent expert hire the individual or firm in question?

7. Monitor Fund Results. Trustees cannot be complacent. They must continuously monitor fund results, and consider the retention of an independent firm to analyze the professional's performance. For example, if investment returns consistently underperform comparative funds, trustees may wish to consider changing investment advisors and/or vehicles.

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The Fund Reporter is a publication of the Consumer Commission on the Accreditation of Health Services.

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DISSOLVING THE STONE

by Arthur A. Levin, M.P.H.

Until a few years ago, the treatment of troublesome gallstones almost always entailed major surgery. Now, however, advances in both diagnostic techniques and medical treatment allow for less invasive, less risky and less costly intervention.

The gallbladder collects the bile that is constantly produced by the adjoining liver. After a person eats, the gallbladder releases stored bile into the small intestine to help in the digestion of fat. It has been estimated that 10 per cent of all Americans and 30 per cent of those over age 65 have gallstone disease—much of it the so-called "silent" or asymptomatic variety. The great majority of stones found in Americans are composed of cholesterol. The other type, so-called pigment stones, comprise only 10 to 25 per cent of gallstones in the U.S., although their prevalence is much higher in Asian countries.

Interestingly enough, a person can live very well without a gallbladder. That may be one of the reasons why surgical removal is performed on at least half of the 500,000 people who are hospitalized with gallbladder problems each year. The criteria for gallbladder surgery are difficult to define, and there are inexplicable variations in surgery rates both within and between different countries. This may be one more procedure that is performed with greater frequency than is medically necessary.

Risk Factors for Gallstones

There used to be a common medical saying that the risk factors for gallbladder disease were "the three F's—female, fat and forty." It is true that women have three times the incidence of the disease that men do. Recent studies, however, provide a more enlightened view of the natural history of the disease.

Obesity has always been high on the list of risk factors, but a recent study found that it may be significant only for women under fifty. This one study cannot be said to rule out all association between body weight and gallstones for women over fifty or for men. Other studies have at least confirmed the relationship for younger women.

Dietary risk factors have been studied for more than 100 years. However, the only dietary factor for which there is sufficient data to generate confidence in a cause and effect relationship is our favorite refined carbohydrate—sugar. It seems plausible that formation of cholesterol stones would be encouraged by a diet high in saturated fats, but the evidence to date does not confirm a relationship. What is understood is that dietary cholesterol is probably only a minor source of biliary cholesterol.

Several studies have shown that a diet high in fiber from wheat bran can reduce the cholesterol saturation of bile. However, other research has been unable to demonstrate any difference in fiber intake between those subjects with gallstone disease and their matched controls. It is too soon to dismiss the possibility that fiber may confer some protection.

In summary, a protective diet is one which avoids overweight, disavows refined sugar and, for extra insurance, has adequate amounts of dietary fiber. It is comforting that this advice is in complete harmony with dietary recommendations to reduce the risks of heart disease and some cancers. Moderate consumption of alcohol also seems to confer some protection, which may help many to endure a sugarless diet of prudent proportions.

Diagnosing Gallstones

People usually consult health practitioners because they have symptoms of disease. They report those symptoms and provide a history that, coupled with physical examination, at least suggests a diagnosis. The problem is that many different diseases produce similar symptoms. That is why medicine strives to develop diagnostic methods that are sophisticated enough to pinpoint a particular disease.

There are several imaging methods used to detect gallstones:

► X-rays of the abdomen without use of contrast dye. These will detect only 15 per cent of gallstones.

► X-rays of the abdomen with use of contrast dye—known as an "oral cholecystogram." Accuracy is much

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Gallstones *(continued from p. 3)*

higher, but repetition is often required because of inadequate contrasting.

► X-rays after injection of contrast dye directly into the bile duct. Most commonly used when the bile duct is believed to be obstructed.

Note: All of the above involve medium levels of exposure to low-level ionizing radiation. Experts in the field have yet to agree upon the potential health risks.

► Ultrasonography. This latest technique uses sound waves reflected from organs to form an image, much as sonar is used to chart the ocean bottom. Ultrasonic imaging is pleasanter for the patient, avoids the risks of radiation and allergic reaction to contrast dyes and can be less expensive. Its main drawback is the necessity for a highly skilled operator. Its accuracy has been demonstrated to be as good or better than oral cholecystograms, and recent studies suggest that this should be the imaging technique of first choice.

Dissolving the Stones

Effective non-surgical management of gallstones was first reported in 1972. Only in the last two years has the FDA granted other than experimental approval for the two drugs employed, chenodiol and ursodeoxycholic acid. Large clinical studies in the U.S. and Europe have shown that chemical dissolution works in about 14 per cent of people with gallstones. Certain subgroups have the best response to drug treatment —women, patients close to their ideal weight, those with stones less than 1.5 centimeters, and those with "high-normal" levels of serum cholesterol.

The greatest amount of clinical experience has been with the drug chenodiol. Chenodiol therapy requires constant monitoring for both safety and effectiveness. Ursodeoxycholic acid (ursodiol) appears to have fewer side effects and therefore may be the preferred drug. One-quarter of people taking these drugs have a recurrence of gallstones within eight to ten years after stopping treatment. These recurring stones are readily dissolved by drug therapy. Studies continue to see if a modified drug regimen after two years will prevent or reduce recurrence rates. No improved results have been shown by combining dissolving drugs and dietary restrictions.

In conclusion, non-surgical treatment of gallstones has been shown to be effective, particularly in certain groups of people. When it is employed and is effective, patients are treated at much less risk and cost than when surgery is performed.

Arthur A. Levin is director of The Center for Medical Consumers and Health Care Information, Inc.

Tips for Trustees *(continued from p. 2)*

Similarly, if administrative expenses are extremely high, trustees should determine why and take remedial action. Further, trustees generally should not and, in certain circumstances, may not enter into long-term arrangements with service providers. Trustees should be able to terminate the relationship on short notice when they deem it advisable to do so.

8. Watch Co-Fiduciaries. ERISA provides that a trustee is liable if he or she does not take appropriate action to remedy the fiduciary breaches of co-fiduciaries. ERISA Section 405 provides that a fiduciary is liable for a co-fiduciary's breach of duty in the following circumstances:

> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if by his failure to adhere to the general fiduciary obligations of ERISA, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary and has not made reasonable efforts under the circumstances to remedy the breach.

It is not enough if only one trustee is diligent—all trustees must take their duties seriously. Do not permit co-trustees to take advantage of their position of power. If they are imprudent, take action. Such action may require a trustee to file a lawsuit or report the action to the Department of Labor or other appropriate government agencies or to take such steps as are necessary to remedy the breach under the circumstances. ERISA requires trustees to be aware of the conduct of other fiduciaries involved in the administration of their plan.

9. Avoid Improprieties or the Appearance Thereof. A trustee must not use his or her position for personal advantage. ERISA sets forth detailed prohibited transaction provisions. These are transactions which are *per se* illegal unless they are exempted by statute or administratively by the Department of Labor. Good faith is not a legally valid defense to a prohibited transaction. For example, Section 406 of ERISA prohibits a fiduciary from causing a plan to engage in transactions with a "party-in-interest" such as sales or leases of property, lending of money, furnishing of goods, services and facilities, transfer of assets, *etc.* Further, ERISA prohibits a fiduciary from engaging in "self-dealing." Anytime a question is a close call, trustees should avoid even the appearance of improprieties.

10. Wear the Trustee Hat. Trustees of joint Taft-Hartley plans typically have a managerial or union background. It is extremely difficult to separate this background from the decisions that must be made as a trustee—but the trustee must! The United States Supreme Court stated in *NLRB v. Amax Coal Co.,* "in short the fiduciary provisions of ERISA were designed to prevent a trustee from being put into a position where he has dual loyalties and therefore he cannot act exclusively for the benefit of a plan's participants and beneficiaries."

A trustee's decision must be solely in the interest of participants and beneficiaries. Even if the decision is not favorable for the union or a particular contributing employer, a trustee must transcend his or her background. Remember, a trustee owes a fiduciary obligation to plan participants and their beneficiaries. This duty must guide the trustee's actions.

The above tips are guides to help a trustee comply with his or her responsibilities. If tips 1-10 are followed, a trustee should exercise his or her duties in an impartial manner. A trustee's fiduciary duty requires fairness and justness. The bottom line is that a trustee performs a public service: helping workers receive retirement and/or welfare benefits.

Rebaldo *(continued from p. 1)*

The same letter pressured hospitals to cancel all discount contracts with self-insured groups, including those not affected by *Rebaldo v. Cuomo,* stating that "...even the lower court decision back in May did not obligate hospitals to negotiate with such groups." At least one hospital has yielded to this pressure and attempted to cancel contracts in effect for more than ten years.

While the legal battle continues, another simpler solution is being pursued. The Lombardi-Tallon Act made possible New York State's current waiver from federal Medicare and Medicaid regulations. It expires December 31, 1985 and must be extended or revised during the upcoming legislative session. A coalition of ERISA welfare funds is forming to lobby for an amendment permitting hospitals to negotiate discount rates with self-insured funds.

NEW JERSEY APPEALS: Write to this new address to appeal a New Jersey hospital bill:

Health Economics Service
New Jersey Department of Health
John Fitch Plaza
CN 360
Trenton, NJ 08625

Detailed information on the appeal process is in the March-April 1984 issue of *The Fund Reporter.*

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