

EXHIBIT 36

Davidson v. Cook
 D.C.Va.,1983.

West Headnotes

United States District Court,E.D. Virginia,
 Richmond Division..
 Robert J. DAVIDSON, Jr., Plaintiff,
 v.
 John L. COOK, et al., Defendants,
 v.
 AETNA LIFE & CASUALTY CO., et al., Third-
 Party Defendants.
Civ. A. No. 81-0913-R.

June 30, 1983.

Participant in health and welfare benefit trust fund established under Employee Retirement Income Security Act brought action against current and former trustees and plan administrator alleging breach of statutory duties in connection with administration of fund. In addition, current trustees cross-claimed against parties who were trustees at time loan in excess of \$1 million was made to interested party. The District Court, Merhige, J., held that: (1) plaintiff's claims with regard to original and supplemental loan were not time barred; (2) plaintiff's claims in connection with defendant's failure to diversify investment, failure to follow plan documents, engaging in party-in-interest transactions, transfer of assets to party in interest, and engaging in transaction involving conflict of interest were time barred; (3) lending trustees violated sections which require fiduciaries to exercise their duties for exclusive purpose of providing benefits to participants and their beneficiaries, to invest prudently and to avoid transactions which present conflicts of interest; (4) trustees' failure to divest fund of loan did not constitute violation of statute; (5) current trustees' failure to raise interest rates on loan and conduct in waiving penalties for late payment of interest did not constitute transfer of assets within meaning of statute; (6) administrator was fiduciary within meaning of statute and liable for breach of its fiduciary duty; (7) lending trustees and administrator were jointly and severally liable for losses.

Order accordingly.

[1] Labor and Employment 231H 475

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk475 k. Duties in General. Most Cited
Cases
 (Formerly 296k43.1, 296k43, 255k78.1(7) Master and Servant)

Under section of Employee Retirement Income Security Act governing fiduciary duties, fiduciary is required to discharge his duties for exclusive purpose of providing benefits to participants and their beneficiaries. Employee Retirement Income Security Act of 1974, § 404(a)(1)(A)(i), as amended, 29 U.S.C.A. § 1104(a)(1)(A)(i).

[2] Labor and Employment 231H 490

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk487 Investments and Expenditures
231Hk490 k. Diversification. Most Cited Cases
 (Formerly 296k48, 255k78.1(7) Master and Servant)

Fiduciaries of trust fund established under Employee Retirement Income Security Act must diversify plan's investments unless under circumstances it is clearly prudent not to do so. Employee Retirement Income Security Act of 1974, § 404(a)(1)(C), as amended, 29 U.S.C.A. § 1104(a)(1)(C).

[3] Labor and Employment 231H 497

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk495 Persons Liable
231Hk497 k. Co-Fiduciaries. Most Cited Cases
 (Formerly 296k49, 255k78.1(7) Master and Servant)

Under Employee Retirement Income Security Act, fiduciary is liable for cofiduciary's breach of fiduciary duties if he knowingly participates in or conceals such breach; furthermore, fiduciary is required to make reasonable efforts to remedy any known breach by cofiduciary. Employee Retirement Income Security Act of 1974, § 405(a)(1, 3), as amended, 29 U.S.C.A. § 1105(a)(1, 3).

[4] Labor and Employment 231H ⚡648

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties

231Hk648 k. Time to Sue and Limitations. Most Cited Cases

(Formerly 296k83.1, 296k83, 232Ak131.3 Labor Relations)

Where last action in regard to allegations involving original loan and supplemental loan made by collectively bargained for pension fund to interested party was in March of 1976, fund participant's action against current and former trustees in regards to loan filed in 1981 was not barred by six-year limitation provision of Employee Retirement Income Security Act. Employee Retirement Income Security Act of 1974, § 413, as amended, 29 U.S.C.A. § 1113.

[5] Labor and Employment 231H ⚡648

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties

231Hk648 k. Time to Sue and Limitations. Most Cited Cases

(Formerly 296k83.1, 296k83, 232Ak131.3 Labor Relations)

Where current trustees' cross claim against lending trustees was based almost entirely on granting of original loan and supplemental loan to interested party by pension fund trustees, and those loans took place in 1975, cross claim filed November 4, 1982 was clearly barred by six-year limitation provision; however, to extent cross claim concerned administration of loans after November 4, 1976, claim was not time barred. Employee Retirement Income Security Act of 1974, § 413, as amended, 29

U.S.C.A. § 1113.

[6] Labor and Employment 231H ⚡493

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk487 Investments and Expenditures

231Hk493 k. Prohibited Transactions; Parties in Interest. Most Cited Cases

(Formerly 296k48, 232Ak131.3 Labor Relations) Form filed by lending trustees which disclosed that pension fund had party-in-interest investment in mortgage which had increased from \$1,078,531 to \$1,413,803, that fund held loan which was in default or classified as uncollectible as of end of year, and that fund had engaged in transaction or series of transactions involving over 3% of fund's assets was sufficient to trigger three-year statute of limitations as of date of filing concerning trustees' failure to diversify investments, failure to follow plan documents, engaging in party-in-interest transaction, and transfer of assets to party in interest. Employee Retirement Income Security Act of 1974, §§ 404(a)(1)(B-D), 406(a)(1)(B, D), 413(a)(2)(A), as amended, 29 U.S.C.A. §§ 1104(a)(1)(B-D), 1106(a)(1)(B, D), 1113(a)(2)(A).

[7] Limitation of Actions 241 ⚡95(3)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

241k95 Ignorance of Cause of Action

241k95(3) k. Nature of Harm or Damage, in General. Most Cited Cases

(Formerly 241k95(1))

Where member of pension fund admitted in his deposition that as of time he wrote letter dated May 31, 1977, he knew that two trustees of pension fund established under Employee Retirement Income Security Act were at same time also directors of corporation to which fund had made greater than \$1 million loan, fund member had actual knowledge of conflict of interest in violation of Employee Retirement Income Security Act more than three years before he filed his action, and therefore, allegation was time-barred. Employee Retirement Income Security Act of 1974, §§ 406(b)(2), 413(a)(2)(A), as amended, 29 U.S.C.A. §§

1106(b)(2), 1113(a)(2)(A).

[8] Trusts 390 ↪ 217.3(1)

390 Trusts

390IV Management and Disposal of Trust Property

390k216 Investments

390k217.3 Nature of Investment or Security in General

390k217.3(1) k. In General. Most Cited

Cases

Undercollateralization of a loan does not, by itself, establish breach of fiduciary duty to invest prudently.

[9] Labor and Employment 231H ↪ 648

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties

231Hk648 k. Time to Sue and Limitations. Most Cited Cases

(Formerly 296k48, 232Ak131.3 Labor Relations)

Although member of pension fund admitted in his deposition that he knew in 1977 the appraised value of property which was value for loan, where he did not recall whether at that time he also knew principal amount of loan, trustees of pension fund did not establish that member had actual knowledge more than three years prior to suit of trustees' alleged breach of their statutorily established fiduciary duty to invest prudently required to invoke three-year limitation period. Employee Retirement Income Security Act of 1974, §§ 404(a)(1)(B), 413(a)(2)(A), as amended, 29 U.S.C.A. §§ 1104(a)(1)(B), 1113(a)(2)(A).

[10] Labor and Employment 231H ↪ 488

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk487 Investments and Expenditures

231Hk488 k. In General. Most Cited

Cases

(Formerly 296k48, 232Ak131.3 Labor Relations)

Where lending trustees and fund's administrator did not hold union local's proposal for loan at arm's

length and compare it to other available investments, but instead did their best to accommodate local's needs, lending trustees and administrator did not perform their fiduciary duties for exclusive purpose of providing benefits to pension fund participants and their beneficiaries as required by Employee Retirement Income Security Act. Employee Retirement Income Security Act of 1974, § 404(a)(1)(A)(i), as amended, 29 U.S.C.A. § 1104(a)(1)(A)(i).

[11] Labor and Employment 231H ↪ 489

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk487 Investments and Expenditures

231Hk489 k. Prudent Person Standard.

Most Cited Cases

(Formerly 296k48, 232Ak131.3 Labor Relations)

Where lending trustees in making both original and supplemental loans failed to properly appraise proposed building for which loan was made to investigate borrower's financial resources, to evaluate likely rental income to be derived from building, to take assessment of rents, to require sureties on loan, or to require principal repayment schedule, lending trustees and pension administrator did not exercise prudence required by Employee Retirement Income Security Act. Employee Retirement Income Security Act of 1974, § 404(a)(1)(B), as amended, 29 U.S.C.A. § 1104(a)(1)(B).

[12] Labor and Employment 231H ↪ 493

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk487 Investments and Expenditures

231Hk493 k. Prohibited Transactions;

Parties in Interest. Most Cited Cases

(Formerly 296k48, 232Ak131.3 Labor Relations)

In serving as trustees and administrator of pension fund while also serving as directors of corporation to which fund lent \$1 million, directors and administrator violated section of Employee Retirement Income Security Act prohibiting fiduciary from engaging in transaction which he knows or should know constitutes loan with party in interest. Employee Retirement Income Security Act of 1974, § 406(b)(2), as amended, 29 U.S.C.A. § 1106(b)(2).

[13] Labor and Employment 231H 497

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk495 Persons Liable

231Hk497 k. Co-Fiduciaries. Most

Cited Cases

(Formerly 296k49, 232Ak131.3 Labor Relations)

Where member of health and welfare benefit fund established under Employee Retirement Income Security Act failed to establish that either lending trustees or administrator of fund ever knew cofiduciary had committed breach of fiduciary duties in relationship to fund, neither administrator nor any trustees could be found liable under section of Act which makes fiduciary liable if he participates knowingly in, or knowingly undertakes to conceal cofiduciary's breach or if he knows of cofiduciary's breach and fails to remedy it. Employee Retirement Income Security Act of 1974, § 405(a)(1, 3), as amended, 29 U.S.C.A. § 1105(a)(1, 3).

[14] Labor and Employment 231H 490

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk487 Investments and Expenditures

231Hk490 k. Diversification. Most

Cited Cases

(Formerly 296k48, 232Ak131.3 Labor Relations)

Where only way current trustees could have diversified health and welfare benefits plan's investments would have been to divest plan of loan of over \$1 million made to interested party, and plan would have suffered greater loss through such divestiture than by retaining loan and persuading debtor to make such repayments as were possible, trustees' failure to divest fund of loan did not violate section of Employee Retirement Income Security Act requiring trustees to act prudently. Employee Retirement Income Security Act of 1974, §§ 404(a)(1)(C, D), 406(a)(1)(D), as amended, 29 U.S.C.A. §§ 1104(a)(1)(C, D), 1106(a)(1)(D); Va.Code 1950, § 26-45.1.

[15] Labor and Employment 231H 493

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk487 Investments and Expenditures

231Hk493 k. Prohibited Transactions;

Parties in Interest. Most Cited Cases

(Formerly 296k48, 232Ak131.3 Labor Relations)

Failure of current trustees of health and welfare benefit fund established under Employee Retirement Income Security Act to raise interest rates on loans to party in interest and their waiver of penalties assessed for prior failure to make interest payments did not constitute "transfer of assets" within meaning of section which proscribes transfer of assets to party in interest. Employee Retirement Income Security Act of 1974, § 406(a)(1)(D), as amended, 29 U.S.C.A. § 1106(a)(1)(D).

[16] Labor and Employment 231H 488

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk487 Investments and Expenditures

231Hk488 k. In General. Most Cited

Cases

(Formerly 296k49, 232Ak131.3 Labor Relations)

Where trustees had no reason to suspect that interested party to whom it had made over \$1 million loan was not making required interest payments, no basis under Employee Retirement Income Security Act existed for finding trustees liable for manner in which delinquent interest built up. Employee Retirement Income Security Act of 1974, § 2 et seq., as amended, 29 U.S.C.A. § 1001 et seq.

[17] Labor and Employment 231H 461

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk460 Who Are Fiduciaries

231Hk461 k. In General. Most Cited

Cases

(Formerly 296k44, 232Ak131.3 Labor Relations)

Administrator of health and welfare fund established under Employee Retirement Income Security Act was fiduciary within meaning of Act, where administrator exercised discretion in such functions as receiving and recording loan repayments and reporting to trustees of plan any difficulties which

arose therefrom. Employee Retirement Income Security Act of 1974, §§ 3(21), 404(a)(1)(B), as amended, 29 U.S.C.A. §§ 1002(21), 1104(a)(1)(B).

[18] Labor and Employment 231H ↪489

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk487 Investments and Expenditures

231Hk489 k. Prudent Person Standard.

Most Cited Cases

(Formerly 296k43.1, 296k43, 232Ak131.3 Labor Relations)

Where interested party to whom fund established under Employee Retirement Income Security Act had made loan completely failed to make interest payments and administrator did not inform trustees of such failure, administrator permitted delinquencies to build up over much longer period of time and to much greater level than prudent person in his position would have had and therefore breached his fiduciary duties within meaning of Act. Employee Retirement Income Security Act of 1974, §§ 3(21), 404(a)(1)(B), as amended, 29 U.S.C.A. §§ 1002(21), 1104(a)(1)(B).

[19] Labor and Employment 231H ↪651

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties

231Hk651 k. Standard and Scope of Review. Most Cited Cases

(Formerly 296k84, 255k78.1(7) Master and Servant)

Labor and Employment 231H ↪687

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)5 Actions to Recover Benefits

231Hk684 Standard and Scope of Review

231Hk687 k. Arbitrary and Capricious. Most Cited Cases

(Formerly 296k84, 255k78.1(7) Master and

Servant)

Standard of review which states that court is not to overturn decisions of trustees of funds set up under Employee Retirement Income Security Act unless it finds that decisions have been arbitrary or capricious applies only to reviews of determinations as to eligibility for benefits and not to review of fiduciaries' performance of their duties. Employee Retirement Income Security Act of 1974, § 404, as amended, 29 U.S.C.A. § 1104.

[20] Labor and Employment 231H ↪493

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk487 Investments and Expenditures

231Hk493 k. Prohibited Transactions;

Parties in Interest. Most Cited Cases

(Formerly 296k48, 232Ak131.3 Labor Relations)
Original loan made to party in interest was not exempt from prohibited transaction coverage by section of Employee Retirement Income Security Act which provided that such transaction would be exempt if binding contract was in effect on July 1, 1974, where, as of that date, all that parties had agreed to do was negotiate concerning loan. Employee Retirement Income Security Act of 1974, §§ 406, 414(c)(1), as amended, 29 U.S.C.A. §§ 1106, 1114(c)(1).

[21] Labor and Employment 231H ↪492

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk487 Investments and Expenditures

231Hk492 k. Advisors and Experts.

Most Cited Cases

(Formerly 296k49, 232Ak131.3 Labor Relations)
Reliance by trustees and administrator of health and welfare benefit fund established under Employee Retirement Income Security Act on advice of counsel that loan to interest party would not violate federal law was simply one of factors relevant to determining whether they acted with prudence in advancing loan and did not constitute complete defense to fund member's action alleging breach of fiduciary duty for failure to act in prudent manner. Employee Retirement Income Security Act of 1974, § 404, as amended, 29 U.S.C.A. § 1104.

[22] Labor and Employment 231H 496

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk495 Persons Liable

231Hk496 k. In General. Most Cited

Cases

(Formerly 296k49, 232Ak131.3 Labor Relations)
Trustees and administrator of health and welfare fund established under Employee Retirement Income Security Act were jointly and severally liable for losses plan suffered due to their breach of fiduciary duty. Employee Retirement Income Security Act of 1974, § 409(a), as amended, 29 U.S.C.A. § 1109(a).

[23] Labor and Employment 231H 662

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties

231Hk658 Judgment and Relief

231Hk662 k. Damages. Most Cited

Cases

(Formerly 296k87, 232Ak131.3 Labor Relations)
Difference between value of health and welfare fund established under Employee Retirement Income Security Act and value that prudent investment would bear represented damage fund suffered due to breach of fiduciary duties of trustee and administrator for which they were jointly and severally liable. Employee Retirement Income Security Act of 1974, § 409(a), as amended, 29 U.S.C.A. § 1109(a).

[24] Labor and Employment 231H 715

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)7 Costs and Attorney Fees

231Hk713 Particular Cases

231Hk715 k. Actions to Enforce

Statutory or Fiduciary Duties. Most Cited Cases

(Formerly 296k88, 232Ak131.3 Labor Relations)

Labor and Employment 231H 720

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)7 Costs and Attorney Fees

231Hk719 Amount

231Hk720 k. In General. Most Cited

Cases

(Formerly 296k88, 232Ak131.3 Labor Relations)
Where member of health and welfare fund established under Employee Retirement Income Security Act successfully demonstrated that lending trustees and administrator of fund were culpable in causing significant loss to fund, member sought to benefit fund as whole, and member was entitled to prevail on merits, member was entitled to recover reasonable attorney fees from lending trustees and administrator; however, member was not entitled to recover counsel fees for any duplicate work performed by various teams of lawyers or for work performed in pursuit of its unsuccessful claims. Employee Retirement Income Security Act of 1974, § 502(g), as amended, 29 U.S.C.A. § 1132(g).

[25] Labor and Employment 231H 715

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)7 Costs and Attorney Fees

231Hk713 Particular Cases

231Hk715 k. Actions to Enforce

Statutory or Fiduciary Duties. Most Cited Cases

(Formerly 296k88, 232Ak131.3 Labor Relations)
Where current trustees did not so much prevail as elude liability in connection with health and welfare fund member's unsuccessful claim against them for breach of fiduciary duties, and failed to establish right to any relief and conferred no benefit upon pension fund in their cross claim against prior trustees who lent over \$1 million to interested party, current trustees would not be awarded counsel fees. Employee Retirement Income Security Act of 1974, § 502(g), as amended, 29 U.S.C.A. § 1132(g).

*228 William N. Pollard, C. Allen Riggins, Parker, Pollard & Brown, Richmond, Va., Richard J. Clair, Nat. Right to Work Legal Defense Foundation, Inc., Springfield, Va., for plaintiff.

*229 Robert E. Paul, Paul & Thompson, Arlington, Va., Gerald M. Feder, Timothy St. C. Smith, Feder & Edes, Washington, D.C., for defendants Wilson,

Jernigan, Parker, Singer and Gifford.
Archibald Wallace, G. Edgar Dawson, Richmond, Va., for Shirley A. Zahn.
Jay J. Levit, Levit & Mann, Richmond, Va., for John L. Cook, et al.
Louis A. Mezzullo, James F. Stutts, Jack W. Burtch, Jr., McSweeney, Stutts & Burtch, Richmond, Va., for Joseph Accardi and Reginald E. Baker.
Anthony F. Troy, John M. Gray, Mays, Valentine, Davenport & Moore, Richmond, Va., for Mark I. Singer.
Hullihen W. Moore and James W. Tredway, III, Christian, Barton, Epps, Brent & Chappell, Richmond, Va., for Joseph R. Jernigan and Charles P. Wilson.
Francis T. Eck, Hooker & Eck, Richmond, Va., for Robert N. Parker III.
John G. Conlan, Wells, Axselle, Hundley & Johnson, Roy M. Terry, Jr., Richmond, Va., for William Frank Gifford, Sr.
Joseph C. Kearfott, Hunton & Williams, Richmond, Va., for non-parties re: Subpoenaes Duces Tecum.
Thomas M. Hogan, Mahoney, Hogan, Heffler & Heald, McLean, Va., for third party defendants.
Gregory S. Hooe, Cohen, Abeloff & Staples, Richmond, Va., for John A. Koch.

MEMORANDUM

MERHIGE, District Judge.

Plaintiff brings this action pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub.L. No. 93-406, 88 Stat. 829 (codified as amended in 5 U.S.C. § 5108(f), scattered sections of 26 U.S.C., and 29 U.S.C. § 1001 *et seq.*). Jurisdiction is conferred upon the Court by ERISA § 502(e), (f), 29 U.S.C. § 1132(e), (f). Following massive discovery and seemingly infinite motions, some of which were necessary, the parties stipulated to the pertinent facts ^{FN1} and argued the case to the Court. Several hundred pages of briefing later, the matter is ripe for decision. This memorandum constitutes the Court's findings of fact and conclusions of law for purposes of Fed.R.Civ.P. 52(a).

^{FN1}. The stipulations do not apply to the third-party action and do not extend to the relevance of any fact or document included.

Plaintiff is a participant in the Local 666 Benefit

Trust Fund ("the Fund"), which provides health and welfare benefits to certain electrical workers and their families; he brings this action "as a participant in, and for and on behalf of," the Fund. Plaintiff is a former member of Local Union 666, International Brotherhood of Electrical Workers of Richmond, Virginia, AFL-CIO ("the Local"), one of the parties that established the Fund in 1968.^{FN2} The Fund is an "employee welfare benefit plan" and an "employee benefit plan" within the meaning of ERISA § 3(1), (3), 29 U.S.C. § 1002(1), (3), and accordingly is covered by ERISA's provisions as to fiduciary responsibility and as to reporting and disclosure. Defendants Accardi, Baker, Cook, Koch, Nash, and Van Fossen ^{FN3} were Trustees of the Fund from at least 1974 until at least June of 1976. Because of their initial involvement with a loan that is the subject of this action, they are hereinafter referred to as the "lending Trustees." Defendants Gifford, Jernigan, Parker, Singer, and Wilson are the current Trustees.^{FN4} Defendants Bowles and Noonan served as Trustees following the terms of two lending Trustees, but are no longer Trustees. All of these defendants have been named "personally and as Trustees and former Trustees" of *230 the Fund.^{FN5} Defendant Shirley A. Zahn is the administratrix of the estate of Willie M. Zahn, who served as administrator of the Fund from some time before its official inception in 1968 until 1980. For convenience and simplicity, the Court hereinafter refers to Willie M. Zahn as if he were the named defendant.

^{FN2}. The other party to the agreement establishing the Fund is the Capitol Division, Virginia Chapter, National Electrical Contractors Association ("NECA"). The Fund covers the employees of NECA contractors. NECA appoints three Trustees, and the Local appoints the other three.

^{FN3}. Defendant Van Fossen ceased to serve as a Trustee in August 1976, then served again as Trustee from June 1981 until October 1981.

^{FN4}. One of the six Trustee positions is currently vacant.

^{FN5}. At no time has any party suggested

any theory under which any Trustee could be liable for any actions other than those taken in his capacity as Trustee. Nonetheless, the majority of the Trustee defendants have employed separate counsel to represent them in their individual capacities. These attorneys have merely further developed the defenses available to the defendants as Trustees. Of course, parties are free to hire as much legal representation as they deem appropriate, but they may, as in the instant case, anticipate problems if they subsequently seek to have the opposing parties pay for such representation.

I. Factual Background

In 1971, the Local set up a Building Committee to investigate purchasing land and constructing a building thereon to serve as headquarters for the Local. Pursuant to official policy of the International Brotherhood of Electrical Workers, the Local incorporated a subsidiary to hold title to the property and building; the Local intended to insulate itself from responsibility for the building corporation's debts. Thus, on September 22, 1972, Richmond Electricians Building Corporation ("REBCOR"), wholly owned by the Local, was chartered under the laws of Virginia. The President, Vice President, Treasurer, and Recording Secretary of the Local hold corresponding offices in REBCOR; together with three individuals elected at large by the Local, they constitute REBCOR's Board of Directors.

In March 1973, REBCOR agreed to, and subsequently did, purchase a parcel of land at 1701 East Parham Road, Richmond, Virginia, for \$137,500. Some time during the spring of 1974, Zahn and the president of REBCOR inquired about a construction loan from a commercial lender, but did not receive one. On May 23, 1974, the president of REBCOR executed a \$1,757,500 contract for the construction of the REBCOR building on the Parham Road property. By August 1974, construction had begun.

As early as November 2, 1972, the Trustees had discussed lending money to REBCOR on a first mortgage note and had agreed to negotiate with REBCOR in that regard. The minutes of the Local's

meeting of February 1, 1974 show that Zahn reported that the cost of building was rising and, contrary to earlier reports, there was anticipated to be enough rental space to support the building "but not to pay the mortgage. Hopefully the Benefit Trust Fund will lend us the money." On June 7, 1974, a non-quorum group of the Trustees ^{FN6} adopted a motion to negotiate the financing subject to the following conditions:

FN6. The Declaration of Trust required at least two Trustees appointed by the Local and two appointed by NECA to be present to constitute a quorum at a Trustees' meeting. Only one Trustee appointed by NECA was present at the June 7, 1974 meeting, along with Zahn and the three Trustees appointed by the Local.

Our attorney should draw up the loan document on a first-mortgage basis, and when this is complete a committee of three, namely the administrator, the chairman, and the secretary of the Trust Fund meet with the attorney to review the loan document in order that a complete understanding may be had of its terms and conditions. After this is done, if the loan meets the approval of the committee of three, the entire trustees at a meeting would be presented copies for their final approval.

The Local held a membership meeting that night and announced that the Trustees had agreed to negotiate with REBCOR as to a loan.

As per the June 7, 1974 motion, the committee of three sought legal counsel as to the propriety of making the loan. ^{FN7} At the *231 Trustees' meeting on December 13, 1974, chairman Accardi reported that according to their legal counsel, making the loan "was not contrary to the Pension Reform Act." All six Trustees (Accardi, Baker, Cook, Koch, Nash, and Van Fossen) then voted to lend REBCOR one million dollars at 10% annual interest, the interest to be paid monthly, and to consider lending further funds later if they were needed. At the same meeting, the Trustees received a report showing that the Fund's total cash assets were \$1,479,738.29. At that time, Fund administrator Zahn and Trustees Nash and Van Fossen were also directors of REBCOR.

FN7. Zahn received the following letter dated October 31, 1974 from the Fund's

legal counsel:

Dear Mr. Zahn:

This is in further response to your inquiry regarding the proposed loan from the trust to the Richmond Electrician's Building Corporation, a wholly-owned subsidiary of the local. You indicate that as evidenced by minutes of the trustees of the trust, the trust had committed to make the loan before July 1, 1974, which commitment had been relied on by Richmond Electrician's Building Corporation and by the local in its construction of the building.

Section 414(c)(1) of the Employee Retirement Income Security Act of 1974, relating to the effective date of the new prohibited transaction rules, provides as follows:

....

While there are no regulations or other administrative interpretations under the above quoted provision, the phrase "binding contract" may be interpreted to include a situation such as that existing as the result of the action of the trustees of the trust before July 1, 1974, in reliance on which action has been taken by the Richmond Electrician's Building Corporation. If this interpretation is finally adopted, then the making of the loan would not constitute a prohibited transaction under the new rules until June 30, 1984, provided the other requirements of Section 414(c)(1) of the Act are met.

It should be noted that Section 414(c)(1) requires that the transaction not violate the prohibited transaction rules of existing law (Section 503(b) of the Internal Revenue Code of 1954) as well as that the transaction must be on terms as favorable as an arm's-length transaction. For your guidance in structuring the transaction, I am enclosing a copy of Section 503(b) of the Internal Revenue Code of 1954. However, I am not sure that Section 503(b) of the Code adds anything to the arms-length requirement and it might be argued that the corporation is not so related to the trust as to give rise to the application of Section 503(b).

With best regards,

On January 23, 1975, the president of REBCOR executed a Deed of Trust on the property and a Deed of Trust note for \$1,000,000. The note provided that interest at 10% per annum was to be paid monthly beginning March 1, 1975. The Deed of Trust reflected the parties' intention that the interest rate be adjusted from time to time, though it provided no mechanism for doing so. In the event of a late interest payment, REBCOR was to pay a penalty of 5% of the

payment. The principal was due on demand, and in any event was to be paid by June 30, 1984.

At the August 25, 1975 Trustees' meeting, it was concluded that REBCOR needed to borrow approximately \$400,000 more to complete construction of the building. The five Trustees present (Baker was unable to attend) voted to increase the loan to \$1,400,000. At this meeting, the Trustees received a report indicating the Fund's total cash assets were \$1,467,133.33. As of this time, REBCOR had made only two of the seven interest payments that had come due; it owed over \$10,000 in interest and penalties. There is nothing to warrant a conclusion that the Trustees knew of these delinquencies, although administrator Zahn, who had responsibility for recording the interest payments, obviously knew.

On October 20, 1975, REBCOR officers executed a Supplemental Deed of Trust and a Supplemental Deed of Trust note. The note increased the indebtedness to \$1,500,000, rather than the \$1,400,000 agreed to at the August 24, 1975 Trustees' meeting. The note did not require REBCOR to reimburse the Fund for the interest on any borrowing the Fund might have to undertake as a result of having so much of its assets tied up in the REBCOR loan; at the August 24, 1975 Trustees' meeting, the Trustees had made the loan increase conditional on that requirement being imposed on REBCOR. Through March 1976, a total of at least \$1,411,075.25 was disbursed under the loan, as supplemented.

REBCOR made no further interest payments from October 1975 through December 1976. On January 17, 1977, the Trustees held a meeting at which they learned that the interest payments were delinquent, and they directed Zahn to provide them an *232 up-to-date accounting of the loan status. By that time, REBCOR had accrued at least \$151,937.09 in interest and \$9,227.39 in penalties. There followed various correspondence among the Trustees and Zahn, meetings, an appraisal of the property, and, on February 28, 1977, a meeting of the Trustees ^{FNS} and the president of REBCOR. At that meeting, the REBCOR president proposed a solution to the delinquency problem. Further discussions, correspondence, and meetings ensued, and at their June 16, 1977 meeting, the Trustees agreed to the

following “cure”: \$86,196.81 of the unpaid interest was converted to principal, to make the total principal \$1,500,000, as authorized by the Supplemental Deed of Trust note; the remaining \$42,266.39 in unpaid interest was due; collection of the \$7,874.72 in penalties was postponed for three years and would be waived altogether if the interest payments were kept current throughout that period.

FN8. By this time, defendant Bowles had replaced defendant Cook as Trustee; Noonan had replaced Nash; Jernigan had replaced Van Fossen; Wilson had replaced Koch; and Baker had resigned as Trustee, but had not been replaced.

In June 1980, the Trustees waived the late payment penalties, finding that REBCOR had kept up its interest payments over the three years since the cure.^{FN9} In the time since the cure, the building has again been appraised. Some negotiations have taken place concerning the possible sale of the building, but it has not been sold. Though requested to do so, REBCOR has never provided a schedule for the repayment of the loan principal; REBCOR has, however, made a total of \$200,000 in payments on the \$1,500,000 principal.

FN9. Plaintiff disputes that the payments were in fact timely made. Defendants contend that at least some of the payments appear on the books to have been late only because Zahn was late in recording them. Plaintiff has not satisfied the Court by a preponderance of the evidence that REBCOR violated the terms of the cure in such a way that the Trustees should not have waived the penalties.

II. Allegations

It is not surprising that the contentions in plaintiff's trial brief do not perfectly correspond to those he had set forth in his complaint 15 months and many reams of pleadings earlier. Thus, plaintiff has moved pursuant to Fed.R.Civ.P. 15(b) to amend the pleadings to conform to the evidence. The Court assumes that the contentions set forth in the trial brief are those plaintiff avers he has proved.

A. Fiduciary duties: ERISA § 404, 29 U.S.C. § 1104.

[1] Under 29 U.S.C. § 1104(a)(1)(A)(i), a fiduciary is required to discharge his duties for the exclusive purpose of providing benefits to participants and their beneficiaries. Plaintiff alleges each of the Trustees and Zahn violated this provision by providing a “sweetheart” loan to REBCOR and the Local, following their wishes rather than acting in the interest of the participants and beneficiaries.

Plaintiff alleges each of the Trustees and Zahn violated 29 U.S.C. § 1104(a)(1)(B), which requires a fiduciary to discharge his duties in the same manner as a “prudent man acting in a like capacity and familiar with such matters” would act. Plaintiff alleges that the lending Trustees and Zahn failed to investigate REBCOR and the proposed building and failed to require assurances of payment as a prudent real estate lender would have done with regard to the original \$1 million loan and the later supplemental loan of up to \$500,000. He alleges that Zahn and the Trustees in office at the time of the cure^{FN10} similarly failed to get proper documentation and guarantees. And he alleges that Zahn and the current Trustees have continued to violate this provision by failing to increase the interest rate, obtain a principal repayment schedule, seek sureties for the loan, etc.

FN10. By the June 16, 1977 meeting at which the Trustees agreed to the cure, defendant Parker had taken the Trustee position defendant Baker had vacated, so the Board consisted of Accardi, Bowles, Jernigan, Noonan, Parker, and Wilson.

[2] Pursuant to 29 U.S.C. § 1104(a)(1)(C), the fiduciaries must diversify the plan's investments “unless under the *233 circumstances it is clearly prudent not to do so.” The original loan committed over 67% of the Fund's assets to the REBCOR loan, and the supplemental loan and cure brought the level to something on the order of 95%. Plaintiff seeks to hold liable Zahn and the Trustees in office as of each of these times.

The final allegations with respect to fiduciary duties flow from 29 U.S.C. § 1104(a)(1)(D), which requires fiduciaries to discharge their duties in accordance with the documents and instruments governing the plan. The Declaration of Trust for the instant Fund requires the Trustees to invest “in

accordance with the Prudent Man Statute of the State of Virginia (new Virginia Code Section 26-45.1).” The plaintiff alleges that the original loan, the supplemental loan, and the cure violated this fiduciary standard, as well as that directly set forth in ERISA, by concentrating the Fund’s assets in one investment.

B. Liability for breach of co-fiduciary: ERISA § 405, 29 U.S.C. § 1105.

[3] Pursuant to 29 U.S.C. § 1105(a)(1), a fiduciary is liable for a co-fiduciary’s breach of fiduciary duties if he knowingly participates in or conceals such a breach. Plaintiff alleges that throughout the history of the loans, the fiduciaries have engaged in such concealment. This allegation rests largely on the Trustees’ failure to take action against Zahn once they learned that he had allowed the interest payments to become delinquent.

Similarly, 29 U.S.C. § 1105(a)(3) requires a fiduciary to make reasonable efforts to remedy any known breach by a co-fiduciary. Plaintiff contends that the fiduciaries had the responsibility to learn of any breaches and then, pursuant to this provision, the duty to remedy them. Plaintiff seeks to attach liability under this section to each of the fiduciaries.

C. Prohibited transactions: ERISA § 406, 29 U.S.C. § 1106.

Plaintiff alleges that the original loan, supplemental loan, and cure all violated 29 U.S.C. § 1106(a)(1)(B), which forbids a fiduciary to cause the fund to engage in a transaction which he knows or should know constitutes a loan with a party in interest. There is apparently no dispute that REBCOR constituted a “party in interest” within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14).

As a related matter, 29 U.S.C. § 1106(a)(1)(D) forbids a fiduciary to cause the fund to transfer assets to a party in interest. Plaintiff contends that the 1980 waiver of late payment penalties pursuant to the 1977 cure constituted such a transfer of assets; he seeks to hold the 1977 Trustees, the 1980 Trustees, and Zahn liable under this provision. Plaintiff also seeks to hold the current Trustees and Bowles liable under this section for failing to adjust the interest rate on the loans.

Finally, plaintiff alleges violations of 29 U.S.C. § 1106(b)(2), which prohibits a fiduciary from acting on behalf of a party whose interests are adverse to those of the plan, in a transaction involving the plan. Plaintiff alleges that lending Trustees Nash and Van Fossen and administrator Zahn violated this subsection in transacting the original loan and the supplemental loan because all of them were also on the REBCOR board of directors at the time. Plaintiff also alleges a conflict of interest in the cure: Trustees Bowles and Noonan were also REBCOR directors at the time, and Trustee Jernigan was on the Local’s executive board.

D. Current Trustees’ cross-claim.

The current Trustees’ cross-claim against the lending Trustees is based largely on the same allegations plaintiff makes. Thus, the current Trustees allege that the lending Trustees breached their fiduciary duties set forth in 29 U.S.C. § 1104(a)(1)(A), (B), and (C) by failing to exercise the required prudence and failing to diversify the investments. They allege that Zahn acted on behalf of an adverse party in violation of 29 U.S.C. § 1106(b)(2). Further, they allege that each cross-claim defendant violated 29 U.S.C. § 1105(a)(2) by allowing fellow fiduciaries to commit breaches.

***234 III. Statute of Limitations**

The lending Trustees contend that all claims against them are barred by ERISA § 413, 29 U.S.C. § 1113,^{FN11} the statute of limitations. Under that section, the basic limitation period of six years runs from the date of the breach or violation, except in case of fraud or concealment, when it runs from the date of discovery of the breach or violation. If there is no fraud or concealment, the six-year period can be reduced to three years if the defendant can show the plaintiff had either actual or constructive knowledge of the breach or violation; the three-year period runs from the time the plaintiff gained such knowledge. The kind of constructive knowledge that can reduce the period is that supplied by a report, filed with the Secretary of Labor, from which the plaintiff “could reasonably be expected to have obtained knowledge of such breach or violation.”

FN11. § 1113. Limitation of actions

(a) No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of-

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this subchapter;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

The defendants seek to take plaintiff at his word when he asserts, "The time is long overdue that these violations should be corrected."

[4] The basic six-year period runs from the date of the "last action which constituted part of the breach or violation." With regard to the allegations involving the original loan and the supplemental loan, the last action was the last disbursement of funds pursuant to the loans, in March 1976. Plaintiff's action filed October 19, 1981 clearly is not barred by the basic six-year limitation provision.

[5] Nearly all of the current Trustees' cross-claim filed November 4, 1982 equally clearly *is* barred by the six-year provision. The cross-claim is based almost entirely on the granting of the original loan and the supplemental loan. To the extent the cross-claim concerns the administration of the loans after November 4, 1976,^{FN12} it is not barred by the six-year provision. The remainder of the cross-claim, however, will be dismissed.^{FN13}

FN12. The cross-claim allegations concerning administration of the loans involve acts and omissions through January 17, 1977, when Zahn first told the Trustees of the delinquent interest.

FN13. The Court finds no merit in the current Trustees' arguments for equitable

tolling of the six-year period. The current Trustees attempt to apply the date of the original complaint to toll the statute of limitations, as in American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), where members of a class were able to apply the date on which the named plaintiff first filed for class certification. If the current Trustees' theory were adopted, the statute of limitations would never bar a cross-claim where the original complaint was timely filed, since a cross-claim must arise from the same transaction or occurrence, see Fed.R.Civ.P. 13(g). The instant cross-claim does not present the kind of equitable considerations that justified tolling the limitation period in American Pipe. Nothing in Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 103 S.Ct. 2392, 75 L.Ed.2d ---- (U.S.1983), changes the Court's conclusion as to this issue.

On the other hand, the cross-claim defendants have not established actual or constructive knowledge on the part of the current Trustees so as to reduce the limitations period to three years. *See* note 14 *infra* and accompanying text.

The lending Trustees seek to reduce the limitation period to three years by showing both actual and constructive knowledge on the part of the plaintiff. In an effort to come under the constructive knowledge provision of ERISA § 413(a)(2)(B), *see* note 11 *supra* and accompanying text, the lending Trustees rely on the Form 5500 for calendar year 1976 which the Fund filed with the Department of Labor in August 1977. That *235 form disclosed that the Fund held a party-in-interest investment in a mortgage which had increased from \$1,078,531 to \$1,413,803 during 1976, that the Fund held a loan which was in default or classified as uncollectable as of the end of the year, and that the Fund had engaged in a transaction or series of transactions involving over 3% of the Fund's assets.^{FN14} Attached to the Form was a schedule which provided certain information about the loan and which incorporated the attached Deed of Trust note and letter setting forth the cure.

FN14. It is not clear to the Court what transaction was being reported here. The

