Conflict of Interest

Charles Ferguson’s 2011 Oscar-winning documentary, Inside Job, analyzes how experts routinely fail to disclose conflicts of interest in the financial sector. One conflict in the forensic film is the prevalence of the “revolving door” during the global financial crisis of 2008, whereby financial regulators can make a mint after leaving their government jobs for positions in the private sector.

The devil’s in the details, but it’s safe to say that conflicts of interest can arise in a multitude of situations—many of which are not properly disclosed. This reality is borne out by recent research in the United States that highlights potential conflicts and other due diligence concerns in the context of 155 pension consultants that also have a broker affiliate. The research—conducted by New York-based Diligence Review Corp., a provider of specialty audit and consulting services to institutional and private investors—found that consultants who say they have one or more conflicts of interest manage US$707 billion of regulatory assets under management. (That figure can be contrasted with US$498.2 billion in assets managed by consultants who are free of conflicts of interest.)

A prominent example in our own backyard is the conflict of interest in Sun Indalex Finance, LLC v. United Steelworkers (see page 20), in which an employer has the responsibility of being both plan sponsor and administrator of a DB pension plan.

I am inclined to agree with the Supreme Court’s point of view that, in this case, how a fiduciary duty is satisfied varies. However, the role of the administrator should have been given to an independent person when Indalex, an aluminum extrusions manufacturer, applied for bankruptcy protection under the Companies’ Creditors Arrangement Act. As a plan sponsor on the brink of insolvency, Indalex ought to have been clear about its fiduciary duties and informed pension plan members of its intentions so they, too, could have the chance to present their arguments.

All is not lost for pensioners. A deluge of post-mortems on the case suggests that although a constructive trust remedy was not based on the facts of this case, the findings have not closed the path to a more palatable outcome for plan members in future.

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