INDENTURE TRUSTEES' DUTIES UNDER THE TRUST INDENTURE ACT IN THE FIRST, SECOND, AND THIRD CIRCUITS

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I. INTRODUCTION

A trust indenture is a contract that corporations and governmental entities use to issue securities and borrow money from the general public or large institutional investors.[1] A necessary and important instrument in United States economics,[2] trust indentures typically provide terms and conditions of extending credit, govern activities of security issuers while the securities are outstanding, set forth remedies for security holders in case of issuer default, and contain provisions defining the rights, duties, and obligations of the parties to the agreement.[3]

This introduction will briefly discuss what an indenture trustee is and provide an overview of the history, purpose, and intent of the laws governing trust indentures. Finally, it will introduce the most litigated issues regarding indenture trustees. The rest of the note will display how the First, Second, and Third Circuit Courts of Appeals, as well as the states within their geographic areas, have decided such issues.

A. WHAT IS AN INDENTURE TRUSTEE?

Using a trust indenture, security issuers appoint a trustee to facilitate the working of the bond issue to a successful conclusion.[4] However, a "trustee" in this context differs fundamentally from the trustee in an ordinary personal trust. In an ordinary trust, the main characteristic of the trustee is that she possesses, holds, and administers the specific trust *res* for the benefit of a designated beneficiary.[5]

An indenture trustee, on the other hand, has no possession of or right to the mortgaged property until after a default has occurred, and has limited rights even at that point.[6] An indenture trustee is not in a close and intimate relationship with beneficiaries as in the case of an ordinary trustee. Rather, an indenture trustee is in the position of both a stakeholder and a trustee.[7] The trust's administration covers a long period of time, and the trustee is unable to consult security holders regularly. Most uniquely, while the trustee

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[1] ROBERT I. LANDAU & JOHN E. KRUEGER, CORPORATE TRUST ADMINISTRATION AND MANAGEMENT 22 (5th ed. 1998).
[2] *Id*. at 23.
[3] *Id*. at 22.
[4] JEFFREY J. POWELL, CORPORATE TRUST: A PARTNER IN FINANCE 1 (2018).
[5] LANDAU & KRUEGER, *supra* note 1, at 26.
[6] *Id*.
[7] *Id*. (citing Sklar, *infra* note 15).

of a personal trust has responsibilities to protect the trust solely in the interest of the beneficiaries, the indenture trustee, while having a primary responsibility to the security holders, owes to the *obligor* "important and practical fiduciary duties, and in the interest of all parties, it must be able to work cooperatively with the obligor."[8] Additionally, indenture trustee relationships are distinct from personal trusts because the primary governing law for indentures, the Trust Indenture Act of 1939 ("TIA"),[9] requires the trustee be a bank that meets specified eligibility criteria.[10] Market considerations and state laws governing municipal bonds are consistent with this rule for indentures not governed by the TIA, so all indenture trustees are financial institutions. Thus, trust indentures create contractual relationships similar to mortgages or ordinary trusts, but are not identical to those relationships.[11]

While the concept of mortgages and trusts were developed in an early period of common law, the corporate trust indenture is a relatively recent development.[12] For this reason, despite their importance to the economy, courts poorly understand trust indentures.[13]

B. HISTORY OF THE TRUST INDENTURE ACT OF 1939 ("TIA")

The first trustees were individuals appointed to oversee railroad bond issues in the early nineteenth century.[14] The railroads, which were the largest enterprises at the time, would issue debt secured by mortgages.[15] This was before the formal development of corporations, so the trustee was usually a well-respected individual, such as an officer of the issuer.[16] Trustees had very limited powers and responsibilities in these relationships, and there were no formal standards of conduct for trustees to follow under law or by custom.[17] Furthermore, issuers were not legally required to appoint trustees on bond issues, so it was common that bond issues most in need of a trustee did not have one.[18] Thus, a suboptimal situation existed in which no one was available to provide issuers with needed services or bondholders with needed protection.[19]

Leading up to the Great Depression, many municipalities and corporations were using bond issues to finance their capital needs.[20] By the 1920s, unsecured debentures came to replace bonds secured by mortgages and virtually all indenture trustees were corporations, not banks.[21] These

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[8] *Id*. at 27.

[9] Trust Indenture Act of 1939, 15 U.S.C.A. §§ 77aaa–77bbbb (2010). The Trust Indenture Act ("TIA") is discussed further *infra* Part I.B.

[10] *Id*. § 77jjj ("Eligibility and disqualification of trustee").

[11] LANDAU & KRUEGER, *supra* note 1, at 23.

[12] "It was first introduced around 1830, but until the latter part of the nineteenth century, the trust indenture was used infrequently." *Id*. at 22.

[13] *Id*. at 23.

[14] POWELL, *supra* note 4, at 6.

[15] Martin D. Sklar, *The Corporate Indenture Trustee: Genuine Fiduciary or Mere Stakeholder?*, 106 BANKING L.J. 42, 43–44 (1989).

[16] *Id*. at 44; POWELL, *supra* note 4, at 6.

[17] POWELL, *supra* note 4, at 6.

[18] *Id*. at 7.

[19] *Id*.

[20] *Id*.

[21] Sklar, *supra* note 15, at 44.

indentures contained broad exculpatory provisions limiting the trustee's liability to gross negligence, willful default, or bad faith.[22] The broad exculpatory clauses in the indentures circumscribed the responsibilities of trustees, granting them no authority to take actions to protect bondholders' interest in case of default.[23] As a result, when a large number of U.S. corporate bonds defaulted during the Depression, trustees had very limited powers and authority to act.[24] It became clear that security holders needed protection and assistance in pursuing their rights as creditors of these corporations.[25] To address the need for bondholder protection, Congress enacted the TIA as an amendment to the Securities Exchange Act of 1933.[26]

C. THE PURPOSE AND INTENT OF THE TIA

The Securities Act of 1933 was enacted not only to protect the investing public from fraud but also to restore investor confidence in the securities markets.[27] The TIA, as a mechanism to protect bondholders' interests, was mainly intended to require that a trustee be appointed for bond issues sold to the investing public.[28] Because publicly-issued corporate bond debt had been subject to the highest incidents of default, Congress determined that banks, as entities in the business of acting as trustee, should take the role of trustee to protect public investors.[29]

Section 302 of the Act states its purpose, which is to protect "the national public interest and the interest of investors in notes, bonds, debentures, evidences of indebtedness, and certificates of interest or participation therein, which are offered to the public" from adverse effects on such investors, enumerated in the TIA.[30] Congress explained that these interests are adversely affected when: (1) the obligor fails "to provide a trustee to protect and enforce the rights and to represent the interests of such investors"; (2) trustees' rights and powers, or duties and responsibilities, to protect and enforce such investors' rights are inadequate; (3) trustees do not have resources "commensurate with its responsibilities" or they have a conflict with the interests of such investors; (4) the obligor is not required to communicate adequate and current financial information to investors; (5) the indenture contains misleading or deceptive provisions; or (6) since trust indentures are commonly prepared by the obligor or underwriter "in advance of the public offering of the securities to be issued thereunder," such investors would be unable to cure defects in an indenture because they lack understanding of the situation or are unable to participate in the preparation of the indenture.[31] Thus, the TIA puts in place safeguards to protect investors' interests.

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[22] *See id*.
[23] POWELL, *supra* note 4, at 63.
[24] *Id*.
[25] *Id*.
[26] *See id*. at 7.
[27] *Id*. at 61.
[28] *Id*. at 63–64.
[29] *See id*. at 64.
[30] Trust Indenture Act of 1939, 15 U.S.C.A. § 302(a) (2010).
[31] *Id*.

The TIA requires an official trustee to be appointed for certain bond issues and establishes qualifications that banks and other entities must meet in order to serve as trustee.[32] It further gives trustees the authority to act to protect bondholders' interests.[33] By governing what must be in the indenture agreement for it to be qualified and enforceable under law, the TIA ultimately regulates the relationship between security holders, issuers, and trustees.

D. ISSUES

Section 315 of the TIA sets forth the duties of indenture trustees before, during, and after an issuer's or debtor's default.[34] The prudent-person standard, to which indenture trustees are held post-default, is a topic that has various interpretations across jurisdictions, especially when intertwined with bankruptcy issues, claims under distinct causes of action (i.e., breach of contract, negligence, breach of implied covenant of good faith and fair dealing), and breaches of state-imposed common law fiduciary duties.

Although courts mostly agree that trust indentures do not impose full fiduciary responsibilities on the trustee,[35] some argue that the TIA should impose such responsibilities. However, doing so risks impairing indentures' effectiveness, potentially removing certainty from a well-developed market and making it more difficult for trustee banks to accept appointments. Courts have swung back and forth between considering the indenture trustee a mere stakeholder, and imposing broader, fiduciary-like duties. The main public policy rationales involve a balance between adequately protecting the security holders' interests and ensuring that "banks and trust companies will be willing to assume the role of indenture trustee and to therefore ease the raising of capital."[36] Advocates of imposing broader duties argue that the imposition of such duties would not hinder the raising of capital.[37]

This note examines the facts of cases in different jurisdictions to determine when courts have found breaches of indenture trustees' duties under the TIA and, if applicable, under state common law. Specific attention is given to the Second Circuit and New York state and federal courts because most U.S. trust indentures are governed by New York law. The patterns in the cases' holdings provide guidance for understanding how the rules are interpreted for indentures subject to the TIA. Although indentures not governed by the TIA, such as municipal bonds, are beyond the scope of this note, it is worth noting that cases involving such exempt indentures tend to be consistent with and follow interpretations under the TIA.[38] Many courts are unfamiliar with debt issuances under indentures and the customary provisions and limitations on indenture trustees' duties. This note seeks to clarify both what the "prudent-person" standard under the TIA requires and what actions courts have held to be a breach of this standard.

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[32] *See id*. at §§ 304–14; POWELL, *supra* note 4, at 64.

[33] POWELL, *supra* note 4, at 65.

[34] Trust Indenture Act of 1939, § 315. The TIA enumerates the duties of indenture trustees in § 315, delineating trustees' duties by subcategories: (a) prior to default, (b) when there is a notice of default, (c) in case of default, and (d) generally, the responsibilities of the trustee to security holders. *Id*.

[35] LANDAU & KRUEGER, *supra* note 1, at 23.

[36] Sklar, *supra* note 15, at 60.

[37] *See id*. at 61.

[38] *See* LANDAU & KRUEGER, *supra* note 1, at 68–69.

The following case review shows that, despite some anomalous cases, the majority position is that trustees owe no duties beyond the indenture agreement to bondholders prior to default. Further, in the event of default, trustees' duties rise to a prudent-person standard in handling the bondholders' affairs but do not necessarily rise to a "fiduciary" standard. New York common law imposes two extracontractual pre-default duties, which will be discussed below. Distinctly, the Third Circuit, holds that trustees have duties similar or equal to those of fiduciaries after an event of default.

II. CASES

A. UNITED STATES FIRST CIRCUIT COURT OF APPEALS

While the First Circuit Court of Appeals has no major decisions addressing the duties indenture trustees owe to bondholders, federal district courts within the First Circuit have touched on the question.

1. Massachusetts

In *Peterson v. National Bank Association*,[39] a district court in Massachusetts found that bondholders' claims against the indenture trustee were not precluded by collateral estoppel and that they had standing to sue.[40] The bondholders claimed that by failing to object in bankruptcy court to the sale of a property and business, which secured the bonds, the indenture trustee "breached [its] fiduciary duty."[41] The lien on the property and business was subordinate to the security interest of other creditors.[42] The opinion discusses the indenture trustee's arguments that the bondholders are precluded from making such claims, but does not decide whether the defendant breached its duties or whether the defendant had fiduciary duties. In addressing standing, however, the court notes that the relationship between bondholders and indenture trustees is one in which bondholders are entitled to bring suit where an indenture trustee "fail[s] faithfully to perform his fiduciary duties."[43] In conclusion, the court states that if the plaintiff's allegations were true, then the indenture trustee violated fiduciary duties by failing to object to the sale of the asset securing the bonds in bankruptcy, because that would favor "unsecured creditors over its own bondholders."[44]

Thus, without concluding whether indenture trustees owe the full store of fiduciary duties to bondholders, the Massachusetts District Court clarified what type of conduct would be a breach of an indenture trustee's duty to bondholders under the common law—namely, putting other parties' interests ahead of bondholders'.

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[39] Peterson v. U.S. Bank Nat'l Ass'n, 918 F. Supp. 2d 89 (D. Mass. 2013).
[40] *Id*. at 104.
[41] *Id*. at 91.
[42] *See id*. at 93–94.
[43] *Id*. at 103.
[44] *See id*. at 104.

2. Puerto Rico

In *Wells Fargo Bank Minn., N.A. v. El Comandante Capital Corp.*,[45] the issue before the Puerto Rico District Court was whether bondholders could replace an existing indenture trustee with another, more experienced and skillful one, after default.[46] The court held that bondholders may take such an action post-default.[47]

In so holding, the court noted that a trustee's skill and expertise in administrating securities on behalf of noteholders become critical following default.[48] A "prudent" indenture trustee "must make countless, discretionary decisions regarding how best to protect the interests of the beneficiaries of the trust."[49] The court then quotes from a secondary source that although "[i]t is impossible to prescribe the exact conduct to be followed in the event of default," it remains critical for bondholders to be able to appoint a competent trustee.[50] In this case, the original indenture trustee, Banco Popular, was not experienced in defaulted securities,[51] while the successor trustee, Wells Fargo, was.[52] In allowing the bondholders to replace their trustee, the court emphasized the importance of the trustee's conduct post-default. However, the court did not hold that an indenture trustee owes any duties higher than the prudent-person standard under the TIA.

B. UNITED STATES SECOND CIRCUIT COURT OF APPEALS

In the Second Circuit's seminal case, *Meckel v. Continental Resources Company*,[53] agents for bondholders alleged that the bondholders failed to take advantage of a favorable conversion option because they received "inadequate redemption notices."[54] The holders alleged that the redemption notices were inadequate because they were mailed.[55] However, the indenture and the debentures themselves provided for notice to be given by a mailing.[56]

Plaintiff-bondholders alleged that the indenture trustee, Citibank, should have gone beyond the indenture (for example, by follow-up mailings or registered, rather than first-class, mail), and that not doing so violated reasonable care and skill under the TIA.[57] The district court for the Southern District of New York had found that the indenture trustee made a proper mailing pursuant to the indenture.[58] The Second Circuit affirmed, finding that the indenture trustee fulfilled its duty under the indenture to give notice of the conversion opportunity.[59]

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[45] Wells Fargo Bank Minn., N.A. v. El Comandante Capital Corp., 332 F. Supp. 2d 448, 456 (D.P.R. 2004).
[46] *Id*. at 457.
[47] *Id*. at 456–57.
[48] *Id*. at 456.
[49] *Id*.456–57.
[50] *Id*. (quoting LANDAU & KRUEGER, *supra* note 1, at 171).
[51] *Id*. at 455.
[52] *Id*.
[53] Meckel v. Cont'l Resources Co., 758 F.2d 811, 813 (2d Cir. 1985).
[54] *Id*.
[55] *Id*.
[56] *Id*. at 813–14.
[57] *Id*.
[58] *Id*. at 815.
[59] *Id*.

The *Meckel* opinion quotes the text of the TIA, stating that a trustee's duties are limited to those set forth in the indenture.[60] The court supported the enforceability of a clause in the indenture that limited Citibank's duties to those set forth in the indenture.[61] The court went on to hold:

> An indenture trustee *is not subject to the ordinary trustee's duty of undivided loyalty*. Unlike the ordinary trustee, who has historic common-law duties imposed beyond those in the trust agreement, an indenture trustee is more like a stakeholder whose duties and obligations are *exclusively defined by the terms of the indenture agreement*.[62]

Thus, in the Second Circuit, an indenture trustee is bound only by what is in the indenture; no additional duties are implied.[63] *Meckel* reaches this conclusion by upholding a 1936 decision from a New York state trial court, *Hazzard*, which will be discussed below.[64]

The other crucial Second Circuit case is *Elliot Associates v. J. Henry Schroder Bank & Trust Co*.[65] In *Elliot*, an issuer wanted to redeem debentures that were convertible into stock.[66] The indenture trustee waived a notice requirement in the indenture that required fifty days' notice to the trustee if the issuer seeks to redeem the debentures,[67] accepting a single week's notice from the issuer instead.[68] Debenture holders were given notice forty-two days in advance of the redemption, and were advised to convert the debentures into stock.[69] The holders alleged that by waiving the fifty-day requirement without considering impact of that waiver on *debenture holders*, the indenture trustee breached fiduciary duties.[70]

The Second Circuit refused to find an implied pre-default duty of the indenture trustee to secure greater benefits for debenture holder "over and above" the duties and obligations it undertook in the indenture.[71] The court denied the existence of such an implied duty under the TIA as well as the TIA's legislative history.[72] The original draft of the TIA imposed a "prudent man" duty on the indenture trustee both before and after default.[73] The Second Circuit explained that getting rid of the prudent-man standard from the trustee's pre-default obligations under the Act, paired with Congress' subsequent enactment of the existing version of the Act (which limits the trustee's pre-default duties to the indenture), supported its conclusion that no

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[60] *Id*. at 815–16.
[61] *Id*. at 816.
[62] *Id*. (emphasis added).
[63] *Id*.
[64] *See id*.; Hazzard v. Chase Nat'l Bank, 159 Misc. 57, 287 N.Y.S. 541 (Sup. Ct. 1936).
[65] Elliott Assoc.'s v. J. Henry Schroder Bank & Tr. Co., 838 F.2d 66, 70 (2d Cir. 1988).
[66] *Id*. at 68–69.
[67] *Id*.
[68] *Id*. at 69.
[69] *Id*.
[70] *Id*. at 70.
[71] *Id*. at 70–71.
[72] *Id*.
[73] *Id*. at 71.

implicit duties are imposed on the trustee to limit its pre-default conduct[74] outside of refraining from "engaging in conflicts of interest."[75]

Next, in *LNC Investments v. National Westminster Bank*, the defendant was an indenture trustee on bonds secured by an aircraft.[76] The indenture trustee's post-default duties under the TIA were triggered when the bond issuer filed for bankruptcy.[77] Because of the automatic stay, the indenture trustee was prevented from taking possession of the aircraft, which was the collateral.[78] By the time the issuer released the collateral to the indenture trustee, its value had diminished.[79]

Bondholders brought suit against the indenture trustee for breach of contract, violation of the TIA, and breach of fiduciary duties under New York state law. They alleged that "indenture trustees, immediately upon [issuer]'s chapter 11 filing should have asked the bankruptcy court to lift the automatic stay or to issue an order that [issuer] provide 'adequate protection' of the collateral."[80]

The jury in the trial court found that the trustee in this case acted prudently.[81] The Second Circuit upheld the jury's verdict.[82] The court resolved a dispute over whether a jury instruction was proper by upholding the district court's use of a prudent-person standard to assess the trustee's post-default conduct.[83] The Second Circuit noted that "the question is not what appears to be prudent in light of our current understanding of the law, but rather what was prudent in light of what reasonably could have been known to Trustees at the time they allegedly should have made the motion."[84] Thus, the district court's standard was the proper one by which to judge the indenture trustee's prudence; the jury was instructed to take into consideration the unsettledness of the law regarding whether the trustee could have moved in bankruptcy court to lift the stay or receive adequate protection of the collateral.[85]

Only a few distinctions exist between New York state common law regarding the issue of indenture trustees' duties and the requirements of the TIA; these are discussed in the *Semi-Tech* cases.[86] In *Semi-Tech*, the Second Circuit affirmed all but one of the district court's conclusions and adopted them as law.[87] In this case, Bankers Trust ("BT") was the indenture trustee for a note offering by Semi-Tech.[88] Semi-Tech subsequently filed for bankruptcy.[89] Noteholders alleged that BT breached "statutory, contractual,

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[74] *Id*. at 70–71.

[75] *Id*. at 71. The opinion does not comment on the nature or extent of an indenture trustee's *post*-default duties.

[76] LNC Inv.'s, Inc. v. Nat'l Westminster Bank, 308 F.3d 169, 171 (2d Cir. 2002).

[77] *Id*.

[78] *Id*.

[79] *Id*.

[80] *Id*. at 172.

[81] *Id*. at 175.

[82] *Id*. at 176.

[83] *Id*. at 174–76.

[84] *Id*. at 176.

[85] *Id*. at 173.

[86] *See* Semi-Tech Litig., LLC v. Bankers Tr. Co., 450 F.3d 121 (2d Cir. 2006); Semi-Tech Litig., LLC v. Bankers Tr. Co., 353 F. Supp. 2d 460, 472 (S.D.N.Y. 2005).

[87] 450 F.3d at 123.

[88] *Semi-Tech Litig., LLC*, 353 F. Supp. 2d at 462.

[89] *Id*.

and fiduciary duties" by failing to examine certain documents and give certain notices, and that BT was "therefore liable for the losses allegedly suffered by the noteholders after Semi-Tech entered into transactions that are said to have diminished the value of the notes."[90]

The indenture provided that if an event of default occurs and certain notices have been given, the "Default Amount of the Notes," which is the issue price plus accrued interest, would immediately become due and payable.[91] The indenture required Semi-Tech to periodically deliver to BT several types of certificates stating that Semi-Tech was in compliance with its obligations under the indenture.[92] One provision in the indenture set forth the required content of the certificates which needed to include statements: (1) that anyone signing a certificate has read it and the definitions it contains; (2) speaking to the nature and scope of any examination or investigation which the statements or opinions in the certificate are based on; (3) that anyone signing the form has made investigations which enable expression of an informed opinion as to whether or not any conditions have been complied with; and (4) as to whether, "in the opinion of each such individual or firm, such condition or covenant has been complied with."[93] For five years, annual and quarterly non-default certificates did not contain the required language.[94]

The district court determined that the trustee's duties under the indenture, the TIA, and New York law were the same,[95] holding that the duties to provide such certificates under the indenture were the same as under § 314 of the TIA.[96] The court explained that the New York common law's imposition of "fiduciary" duties on indenture trustees involve the same exact requirements as the TIA,[97] as well as the additional pre-default duty to perform "basic non-discretionary ministerial tasks not specified in the indenture."[98] Here, the ministerial tasks BT was obligated to perform—namely, examining the certificates to ensure they conform to the indenture—were required by the indenture and the TIA.[99] Therefore, the court only considered BT's breach under the statute.[100] The parties also agreed that the duties under state and federal law were the same.[101]

In conclusion, the district court in *Semi-Tech* held that the indenture trustee had a duty, under TIA § 315(a), to examine the certificates and to ensure they conform with the indenture.[102] The district court held that "the plain language and the structure of the statute require the trustee to examine evidence submitted to it for conformity with the indenture independent of

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[90] *Id*.
[91] *Id*.
[92] *Id*. at 463–64.
[93] *Id*. at 464.
[94] *Id*. at 466.
[95] *Id*. at 472.
[96] *Id*. at 473; *see* Trust Indenture Act of 1939, 15 U.S.C.A. § 314 (2010) ("Reports by obligor; evidence of compliance with indenture provisions").
[97] *Semi-Tech Litig., LLC*, 353 F. Supp. 2d at 472 (citing Beck v. Mfr.'s Hanover Tr. Co., 632 N.Y.S.2d 520, 527–28 (1995)).
[98] *Id*. (citing LNC Inv.'s, Inc. v. First Fidelity Bank, Nat'l Ass'n, 935 F. Supp. 1333, 1347 (S.D.N.Y. 1996)).
[99] *Id*.
[100] *Id*.
[101] *Id*.
[102] *Id*. at 475.

whether it seeks to rely upon any statement or opinions set forth in that evidence."[103]

Another issue in the *Semi-Tech* cases was whether BT had a duty to be a prudent person and inquire into the matters asserted by the certificates.[104] Under the TIA, the prudent-person duty is triggered by the event of default.[105] Here, the district court held that BT had no duty to inquire into the matters stated by the certificate[106]: "Until the prudent person duties were triggered, the trustee's obligations were to comply with the indenture (which imposed no duty to inquire) and to insist that all documentation conform to it."[107]

The Second Circuit affirmed, and adopted "as the law of this circuit" that (1) BT failed to fulfill its duty under TIA § 315(a) to examine for conformity both the indenture and the officers' and accountants' certificates it received from Semi-Tech (pursuant to TIA § 314),[108] and (2) BT did not violate any prudent-person duties.[109] However, contrary to the district court, the Second Circuit held that BT failed to comply with TIA § 315(b), requiring BT to give notice to the noteholders "of all defaults known to trustee," with the option (except as to a default in payment) first to demand cure.[110] The district court reasoned that since BT failed to examine the certificates, the nonconformities were not "known to the trustee" and the trustee therefore did not violate § 315(b) by failing to give notice to the noteholders of those defaults.[111] The Second Circuit disagreed, holding that BT's failure to examine the certificates does not excuse it from having to give notice of the defaults.[112]

Regarding New York common law, the Second Circuit affirmed the Southern District's holding that defendant-trustee's contractual duties were identical to its statutory duties because "the indenture incorporates the TIA duties by reference."[113]

1. New York

New York state courts hold that New York common law imposes some extracontractual pre-default duties on indenture trustees. *Hazzard v. Chase National Bank*, which was decided before the TIA was enacted, is often cited to represent the original New York common law impositions on indenture trustees.[114] At issue in *Hazzard* was a series of debentures issued by utility holding companies.[115] As security, the holding companies deposited the stock of several operating utility companies with an indenture trustee.[116] The indenture trustee later substituted these shares with the stock of another

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[103] *Id*.
[104] *Id*. at 480–82.
[105] *See* Trust Indenture Act of 1939, 15 U.S.C.A. § 315(c) (2010).
[106] *Semi-Tech Litig., LLC*, 353 F. Supp. 2d at 482.
[107] *Id*.
[108] *Semi-Tech Litig., LLC*, 450 F.3d at 123.
[109] *Id*.
[110] *Id*. at 127.
[111] *Semi-Tech Litig., LLC*, 353 F. Supp. 2d at 479–80.
[112] *Semi-Tech Litig., LLC*, 450 F.3d at 127 (because "BT had a duty under § 315(a) to examine the certificates, its failure to do so cannot excuse its failure to comply with the duty under § 315(b) to take action with respect to known defaults").
[113] *Id*. at 123.; *Semi-Tech Litig., LLC*, 353 F. Supp. 2d at 472.
[114] *See* Hazzard v. Chase Nat. Bank of City of New York, 287 N.Y.S. 541 (N.Y. Sup. Ct. 1936).
[115] *Id*. at 544.
[116] *Id*. at 549–50.

holding company.[117] The security was still valuable, but both of the holding companies filed for bankruptcy.[118] Debenture holders brought suit, alleging that the indenture trustee either acted in bad faith or was grossly negligent in permitting the stock substitution.[119] The court entered judgment for the defendant, noting that the limitation of the indenture's liability for gross negligence in the indenture was valid.[120] The court described the indenture trustees' liability as measured by the express agreement between the trustee and "obligor of the trust mortgage."[121] It went on to hold that "where the terms of the indenture are clear, no obligations or duties in conflict with them will be implied."[122]

Hazzard was largely fundamental to the Second Circuit's seminal holding in *Meckel* that an indenture trustee is more like a stakeholder whose duties and obligations are exclusively defined by the terms of the indenture agreement, whereas ordinary trustees have historic common-law duties imposed beyond those in the trust agreement.[123]

Almost sixty years after *Hazzard*, a New York state appellate court defined the duties of indenture trustees under New York state law in *Beck v. Manufacturers Trust*.[124] In *Beck*, plaintiffs were holders of bonds issued by the National Railway Company of Mexico, a Utah corporation.[125] There were two series of bonds, which had both been in default since their due dates.[126] The defendant was the indenture trustee for those bonds.[127] The indenture trustee auctioned off collateral securing payment of the bonds at an upset price, assigning the bonds to the purchaser of the collateral, Mexrail.[128] The plaintiffs argued that the assignments Mexrail offered as payment for the collateral were not valid tender for the purchase because the bonds assigned to Mexrail were not outstanding.[129] The plaintiffs alleged that the trustee breached the trust indenture and its fiduciary duties by setting the upset price of the collateral and negotiating its sale.[130]

The Supreme Court of New York Appellate Division explained that if the matter at issue was whether the trustee acted in accordance with the terms of the trust indentures, it would affirm the dismissal of the plaintiff's complaint.[131] However, the court continued:

> [b]ecause we are of the view that the Trustee of the collateral securing payment of the defaulted bonds here at issue *had fiduciary responsibilities to the trust beneficiaries* and that those responsibilities were in some respects *broader than the obligations specified in the*

[117] *Id*.
[118] *Id*.
[119] *Id*. at 550.
[120] *Id*. at 566–67.
[121] *Id*.
[122] *Id*.
[123] Meckel v. Cont'l Resources Co., 758 F.2d 811, 816 (2d Cir. 1985).
[124] Beck v. Mfr.'s Hanover Tr. Co., 632 N.Y.S.2d 520, 522 (Sup. Ct. 1995).
[125] *Id*.
[126] *Id*.
[127] *Id*.
[128] *Id*. at 522–23.
[129] *Id*.
[130] *Id*. at 523–24.
[131] *Id*. at 526.

> *indentures*, we cannot agree that the relevant inquiry was exhausted simply by measuring the Trustee's performance against the requirements of the indentures.[132]

The court reinstated the plaintiffs' causes of action alleging that the "Trustee's failure to obtain a competent, independent valuation of the sold collateral constituted a breach of the fiduciary duty owed by the Trustee to the trust beneficiaries."[133] The plaintiffs' allegation that this breach resulted in undervaluation of the auctioned trust assets moved forward.[134]

The court held that despite the holding in *Hazzard* the Trustee owed the trust beneficiaries the fiduciary obligation of undivided loyalty, free from any conflicting personal interest.[135] The court noted that this fiduciary obligation has been "nowhere more jealously and rigidly enforced than in New York where these indentures were executed."[136] Further, loyalty was not alone "among the constellation of fiduciary attributes" that was required of the present trustee.[137] After a default, "it is clear that the indenture trustee's obligations come more closely to resemble those of an ordinary fiduciary, regardless of any limitations or exculpatory provisions contained in the indenture."[138]

The court reasoned that after a default the trustee is usually best able to act swiftly to assure to its best ability that bondholders will recover what they are owed.[139] The opinion describes the post-default prudent-person duty:

> The trustee must in the post-default context act prudently, but only in the exercise of those rights and powers granted in the indenture. The scope of the trustee's obligation then is still circumscribed by the indenture, albeit less narrowly. The trustee is not required to act beyond his contractually conferred rights and powers, but must, as prudence dictates, exercise those singularly conferred prerogatives in order to secure the basic purpose of any trust indenture, the repayment of the underlying obligation.[140]

On these bases, the court concluded that the trustee should have a post-default duty to "act prudently," preserve and manage the trust assets in the event of default, and provide some reasonable assurance that the bondholders will eventually receive their due.[141]

The court in *Beck* explained that *Hazzard* was adopted into New York's real estate statute.[142] The text of that statute's prudent-person standard is identical to the text of TIA § 315(c) requiring trustees to "use the same degree of care and skill in their exercise as a prudent man would exercise or use

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[132] *Id*. (emphasis added).
[133] *Id*.
[134] *Id*.
[135] *Id*. at 526–27.
[136] *Id*.
[137] *Id*. at 527.
[138] *Id*.
[139] *Id*.
[140] *Id*.
[141] *Id*.
[142] *Id*. at 528.

under the circumstances in the conduct of his own affairs."[143] The court suggested that the common law should impose a similar requirement upon indenture trustees in the event of default.[144]

The *Beck* court came to three conclusions. First, the trustee in *Beck* acted within its "limited fiduciary capacity" with respect to the bond acquisition.[145] Second, the trustee imprudently set the sale price for the collateral by relying on unverified valuations that were not independent.[146] This constituted a "clear breach" of the trustee's fiduciary obligations, and "a decidedly imprudent exercise of the powers which the trustee certainly possessed to ensure the fairness of the 'auction.'"[147] Finally, an indenture trustee could not enforce broad exculpatory provisions to excuse the trustee's failure to exercise powers under the indenture.[148]

In *LNC Investments, Inc. v. First Fidelity Bank, National Association*, First Fidelity Bank was the "Collateral Trustee" under an indenture.[149] Eastern Airlines and First Fidelity established a trust to issue bonds in order to buy airplanes, which were leased to an airline.[150] Eastern filed for bankruptcy, triggering the automatic stay that prevented the trust from recovering the airplanes.[151] Prior to the bankruptcy, the planes were appraised at $682 million and Eastern was cautioned that their value would decline rapidly in the near future.[152] By the time First Fidelity successfully moved to lift the stay,[153] the "value of the collateral had plummeted, leaving the certificate holders undersecured."[154] Such under-collateralization resulted in second-series certificate holders receiving only part of their principal and no interest, and third-series certificate holders receiving neither principal nor interest.[155]

Plaintiff-bondholders contended that these losses could have been prevented if the trustees had requested that the court lift the stay when bankruptcy was first declared.[156] They claimed that the trustees' failure to do so breached the "prudent-man" requirement of the TIA, and the agreement, as well as "fiduciary duties under the indenture and New York common law."[157]

The Southern District of New York explained that pre-default, New York common law imposes two extracontractual duties on indenture trustees.[158] First, the indenture trustee must avoid conflicts of interest.[159] Second, the

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[143] *See id*.; Trust Indenture Act of 1939, 15 U.S.C.A. § 315(c) (2010); N.Y. Real Prop. Law § 126 (Consol., LEXIS through 2019 Chapters 1–187 (except for 96, 106)).

[144] *Beck,* 632 N.Y.S.2d at 528.

[145] *Id*. at 529

[146] *Id*. at 529–30.

[147] *Id*. at 530.

[148] *Id*. at 527.

[149] LNC Inv.'s, Inc. v. First Fid. Bank, Nat'l Ass'n, 935 F. Supp. 1333, 1336 (S.D.N.Y. 1996).

[150] *Id*.

[151] *Id*.

[152] *Id*.

[153] *Id*. On November 14th, 1990, First Fidelity moved to lift the stay, and on January 18, 1991, the stay was lifted.

[154] *Id*. at 1336–37.

[155] *Id*. at 1337.

[156] *Id*.

[157] *Id*.

[158] *Id*. at 1347.

[159] *Id*.

indenture trustee must perform all basic, non-discretionary, ministerial tasks.[160] Regarding the former, the court stated that the indenture trustee "must discharge its obligations with absolute singleness of purpose because of the inability of dispersed investors to enforce their rights."[161] The TIA does not "abrogate an indenture trustee's common law fiduciary duty of loyalty."[162] The court noted that fiduciary duties are not activated until a conflict arises "where it is evident that the indenture trustee may be sacrificing the interests of the beneficiaries in favor of its own financial position."[163]

The opinion engages in an interpretation of New York law as stated by *Beck*.[164] *First Fidelity* interprets *Beck* to say that the trustee has a duty to act prudently only in exercise of those rights and powers granted in the indenture. This duty is imposed by operation of New York common law.[165]

First Fidelity offers two alternative interpretations of the holding in *Beck*.[166] A narrow interpretation provides that a trustee must exercise the powers and duties enumerated in the indenture with the care of a prudent person.[167] The court explains that under the narrow reading, First Fidelity would be liable for breach of common law fiduciary duty *only* if the power to seek a lifting of the Eastern bankruptcy stay were specifically listed in the indenture.[168] That reading, however, offers very limited protection to the investors and may require the parties to anticipate every contingency at the time of contract formation.[169] The SDNY thus held that an indenture trustee must perform prudently "even the more general obligations in the indenture."[170] This applies to any conduct not specifically prohibited by the indenture that would enable the investors to secure repayment of the trust certificates.[171] The trustee should not take actions specifically prohibited by the contract, and when the indenture imposes general duties on the trustee, the trustee must take "any authorized action necessary to protect the investors."[172]

Thus, the SDNY held that the broad reading is "more faithful to *Beck*, more faithful to the purposes underlying the fiduciary duty, and *imposes a duty of care congruent with the duty imposed by the TIA*."[173] In *First Fidelity*, the indenture empowered First Fidelity to act alone when it saw fit, and did

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[160] *Id*.
[161] *Id*.
[162] *Id*.
[163] *Id*. (quoting In re E.F. Hutton Southwest Prop.'s II, Ltd., 953 F.2d 963, 969–72 (5th Cir. 1992)).
[164] *Id*. at 1348.
[165] *Id*. The SDNY discusses the meaning and implications of the language in *Beck*, quoted above and reproduced below:

> The trustee must in the postdefault context act prudently, but only in the exercise of those rights and powers granted in the indenture. The scope of the trustee's obligation then is still circumscribed by the indenture, albeit less narrowly. The trustee is not required to act beyond his contractually conferred rights and powers, but must, as prudence dictates, exercise those singularly conferred prerogatives in order to secure the basic purpose of any trust indenture, the repayment of the underlying obligation. Beck v. Mfr.'s Hanover Tr. Co., 632 N.Y.S.2d 520, 528 (Sup. Ct. 1995).

[166] *First Fid. Bank, Nat'l Ass'n*, 935 F. Supp. at 1347–48.
[167] *Id*. at 1348.
[168] *Id*.
[169] *Id*.
[170] *Id*.
[171] *Id*.
[172] *Id*.
[173] *Id*. (emphasis added).

not prohibit First Fidelity from taking action to protect the investors absent instruction.[174] Thus, "First Fidelity could be held liable alone for its failure to discharge [its independent] obligations."[175]

In *AG Capital v. State Street*, an indenture trustee, State Street, and issuer, Loewen, were parties to an indenture.[176] In June of 1999, Loewen filed for bankruptcy protection.[177] The plaintiff-bondholders accepted a discounted value for the debt securities and agreed to release and indemnify the indenture trustee from any liability. This release did not release or indemnify the indenture trustee as to any claim based on its negligence.[178] When Loewen's bankruptcy came around, this failure created uncertainty about whether the instrument holders had secured-creditor status.[179] These allegations gave rise to the plaintiffs' claims against State Street for breach of contract, breach of the TIA, and negligence in breaching New York's common law fiduciary duties.[180]

On these facts, the court concluded that the plaintiffs' breach of contract and TIA claims were barred by the release mentioned above, and that "no fiduciary duties exist."[181] The court reinstated the plaintiffs' cause of action relating to the indenture trustee's negligence due to a factual dispute as to whether State Street owed a duty of care to the plaintiffs and, if so, whether State Street violated that duty.[182]

The court explained that New York state and federal case law are consistent with TIA § 315(a)(1).[183] The court cites *Hazzard* to show that New York law treats the indenture trustee's duties as not "[defined by] the fiduciary relationship."[184] New York courts have held that, prior to default, indenture trustees "owe note holders an extracontractual duty to perform basic, nondiscretionary, ministerial functions redressable in tort if such duty is breached."[185] As a result,

> an indenture trustee owes a duty to perform its ministerial functions with due care, and if this duty is breached the trustee will be subjected to tort liability. However, . . . the alleged breach of such duty neither gives rise to *fiduciary* duties nor supports the reinstatement of plaintiff's [breach of fiduciary duty] causes of action.[186]

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[174] *Id*. at 1353.
[175] *Id*.
[176] AG Capital Funding Partners, L.P. v. State St. Bank & Tr. Co., 866 N.Y.S.2d 578, 579 (Sup. Ct. 2008).
[177] *Id*.
[178] *Id*.
[179] *Id*.
[180] *Id*.
[181] *Id*.
[182] *Id*. at 580.
[183] *Id*. at 583.
[184] *Id*.
[185] *Id*. at 584.
[186] *Id*.

Further, "fiduciary duties are wholly different from the performance of ministerial functions with due care."[187] Notably, however, the court's holdings in this case only speak to pre-default duties.

Ellington Credit Fund v. Select Portfolio Servicing displays the extent of any extracontractual duties of corporate trustees by explaining differences between ordinary trustees and corporate trustees under New York law.[188] Indenture trustees' duties under the TIA were not at issue in *Ellington Credit Fund* because a pooling and servicing agreement (rather than a bond indenture) was the subject of the case and the defendant was a securitization trustee.[189] While an ordinary trustee generally owes a fiduciary duty to act with undivided loyalty and administer the trust solely in the interests of the beneficiaries, "much of the common law of trusts, and its corresponding fiduciary obligations, are not applicable to commercial trusts. Rather, the duties of an indenture trustee are generally strictly defined and limited to the terms of the indenture."[190] In New York, an indenture trustee owes bondholders limited extracontractual duties that expand after the occurrence of a default.[191]

The court goes on to reiterate the two state-imposed pre-default obligations: "a trustee must (1) avoid conflicts of interest, and (2) perform all basic, non-discretionary, ministerial tasks with due care.[192] The opinion explains that the two pre-default obligations are not "fiduciary duties" but rather obligations whose breach may subject the trustee to "tort liability."[193] Post-default, an indenture trustee's duties to noteholders "come more closely to resemble those of an ordinary fiduciary, regardless of any limitations or exculpatory provisions contained in the indenture."[194] The court points out the similarity between bond indentures and pooling and servicing agreements in order to apply these common law rules to securitization trustees.[195]

In *Dresner v. First Fidelity*, the plaintiffs survived a motion to dismiss their allegation that the defendant, an indenture trustee, did not promptly seek to have a bankruptcy automatic stay lifted or move for protection, during which time the value of collateral diminished.[196] Noting that no settled authority establishing that adequate protection was available, the defendant argued that because the plaintiff sought to hold them liable for their conduct during the course of litigation, the court should apply the standard for attorney malpractice, which would prevent the defendant from being liable for errors in judgment or reasonable litigation strategy.[197]

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[187] *Id*.

[188] Ellington Credit Fund, LTD. v. Select Portfolio Servicing, Inc., 837 F. Supp. 2d 162, 175 (S.D.N.Y. 2011).

[189] *Id*.

[190] *Id*. at 191 (citations omitted) (internal quotations omitted).

[191] *Id*.

[192] *Id*. at 192.

[193] *Id*.

[194] *Id*. (citing Beck v. Mfr.'s Hanover Tr. Co., 632 N.Y.S.2d 520, 527 (Sup. Ct. 1995)).

[195] *Id*.

[196] Dresner Co. Profit Sharing Plan v. First Fid. Bank, N.A., No. 95 Civ. 1924 (MBM), 1996 U.S. Dist. LEXIS 17913, at *1–3 (S.D.N.Y. Dec. 3, 1996).

[197] *Id*. at *17.

The court held the applicable standard to be the prudent-person standard.[198] The court stated that a reasonably prudent person in the same situation may have chosen to act faster to obtain an order of adequate protection, "particularly considering that such an order can include a cash payment, or periodic cash payments, additional or replacement liens, or such other relief 'as will result in the realization . . . of the indubitable equivalent of such entity's interest in such property.'"[199] The court held that a prudent person may have felt it wise to move to lift the stay, even if his attorney thought the argument ill-founded.[200] On this basis, the court allowed the case to move forward on the factual issue of whether the defendant was imprudent in failing to move to lift the automatic stay.[201]

In *Morris v. Cantor*, bondholders brought suit against indenture trustees for violating the TIA and breaching common law fiduciary duties to the bondholders; the indenture trustee moved to dismiss the claims.[202] The complaint alleged that Bankers Trust, the indenture trustee, became a "preferred secured creditor" of the issuer by entering into a loan agreement that granted priority over the bondholders in the event of bankruptcy.[203] However, the loan was not consummated until after Bankers Trust resigned as trustee and it was not negotiated within four months prior to any default in payment of principal or interest.[204] The plaintiffs contended that Bankers Trust's actions constituted "willful misconduct" within the meaning of § 315(d) of the TIA.[205] The court's opinion discusses the TIA's legislative history to explain the type of conduct it was enacted to regulate.[206] The court held that the TIA creates "substantive liabilities in those areas it specifically addresses" in § 315(d).[207] The TIA prescribes minimum standards for the conduct of the trustee and the issuer, and the legislative history shows that the TIA is intended to act upon the indenture agreement, rather than upon the trustees.[208] In other words, the TIA was enacted to regulate indenture agreements and what parties may agree to, rather than the behavior of the parties to the agreement or the trustee directly. According to the court, the TIA corrects deficiencies in the indenture when needed—at the time the indenture is being drafted by and between the parties, before the bonds are offered.[209] Commissions should police and enforce the trustee and issuers' conduct, while the TIA regulates the terms of indentures.[210]

Thus, the court concludes that the legislative history suggests that Congress considered existing common law sufficient to protect investors "so

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[198] *Id*. at *18.
[199] *Id*. (citing 11 U.S.C. § 361 (1994)).
[200] *Id*. at *8.
[201] *Id*. at *25–26.
[202] Morris v. Cantor, 390 F. Supp. 817, 818 (S.D.N.Y. 1975).
[203] *Id*.
[204] *Id*.
[205] *Id*.; Trust Indenture Act of 1939, 15 U.S.C.A. § 315(d) (2010) ("Responsibility of the Trustee"). This section provides, in relevant part, "The indenture to be qualified shall not contain any provisions relieving the indenture trustee from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct," and then lists a set of exceptions. Trust Indenture Act of 1939, § 315(d).
[206] *Morris*, 390 F. Supp. at 819–23.
[207] *Id*. at 820.
[208] *Id*. at 820–21.
[209] *Id*. at 821.
[210] *Id*.

long as the trustee was precluded from contractually limiting the duties it imposed upon fiduciaries, and so long as he explicitly assumed particular duties."[211] The TIA was intended to create liability for both breach of the indenture provisions and "breach of fiduciary obligations which it expressly preserved from limitation by contract."[212]

Merely making a loan to the company is protected under § 311 of the TIA.[213] The court here held that the mere existence of a dual relationship—as trustee under the indenture and as preferred creditor of the obligor on the bonds—does not, by itself, constitute a violation of the duties under TIA § 315(d), despite a potential conflict of interest.[214] Congress permitted this inherent conflict when drafting the TIA, enacting protections for the interests of the bondholders.

Additionally, the court concluded that willful misconduct encompasses "knowing, intentional action in flagrant disregard of the interests of the bondholders."[215] Making a loan to the company does not fall under this category, but the court denied the indenture trustee's motion to dismiss because of the possibility that under the circumstances known to the indenture trustee, negotiating such a deal constituted a knowing, intentional action in flagrant disregard of the interests of the bondholders.[216]

In conclusion, New York common law imposes two extracontractual pre-default duties on indenture trustees,[217] and New York courts have interpreted *Beck* to impose fiduciary-like obligations on indenture trustees.[218] Courts in other circuits recognize these specificities about New York law.[219] To the extent that state law differs from the TIA, the Second Circuit has noted that the TIA governs indentures.[220] The Second Circuit further agrees with the Third Circuit[221] that since Congress enacted the TIA to uniformly govern indentures, federal law controls trust indentures.[222]

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[211] *Id*. at 822 (referring to the duties stated in TIA § 315(d)).

[212] *Id*. at 823.

[213] *Id*. at 824; *see* Trust Indenture Act of 1939, 15 U.S.C.A. § 311 (2010) ("Preferential collection of claims against obligor").

[214] *Morris*, 390 F. Supp. at 823–24.

[215] *Id*. at 824.

[216] *Id*.

[217] LNC Inv.'s, Inc. v. First Fid. Bank, Nat'l Ass'n, 935 F. Supp. 1333, 1347 (S.D.N.Y. 1996).

[218] *Id*.; *see* Beck v. Mfr.'s Hanover Tr. Co., 632 N.Y.S.2d 520, 528 (Sup. Ct. 1995).

[219] *See*, *e.g*., Williams v. Cont'l Stock Transfer & Tr. Co., 1 F. Supp. 2d 836 (N.D. Ill. 1998):

An indenture trustee's fiduciary duties are more limited in scope than the duties of an ordinary trustee. Under New York law, the duties of an indenture trustee prior to default, with two exceptions, "are strictly defined and limited to the terms of the indenture." New York courts have placed two extra-contractual duties on an indenture trustee prior to the occurrence of default. First, the indenture trustee must avoid conflicts of interest, and second, the indenture trustee must perform all basic, non-discretionary, ministerial tasks. The indenture trustee owes no other duties, fiduciary or otherwise, to the debenture holders prior to a default. *Id*. at 840 (citations omitted).

[220] Bluebird Partners, L.P. v. First Fid. Bank, N.A., 85 F.3d 970, 974 (2d Cir. 1996).

[221] *See id*.:

It is hard to believe that Congress would have established uniform standards to govern indentures and then paradoxically have allowed the application of those standards to depend on the law of the state of the suit. The interpretation of the indenture provisions mandated by the Act does not depend on ordinary contract principles--the intent of the parties--but depends on an interpretation of the legislation. It would be contrary to the purposes of the [Trust Indenture] Act to have the trustee held to certain standards in one state court and potentially different standards in another. *Id*. (quoting Zeffiro v. First Pa. Banking & Tr. Co., 623 F.2d 290, 299 (3d Cir. 1980)).

[222] LNC Inv.'s, Inc. v. First Fid. Bank, Nat'l Ass'n, 935 F. Supp. 1333, 1345 (S.D.N.Y. 1996) ("Federal courts may recognize implied federal law, and may recognize also a need for uniform federal

C. UNITED STATES THIRD CIRCUIT COURT OF APPEALS

In *Lorenz v. CSX*, the plaintiffs held debentures in the B&O Railroad.[223] The debentures were convertible into B&O common stock at any time before maturing in 2010.[224] B&O segregated its rail and non-rail assets to avoid Interstate Commerce Commission regulations. Mid Allegheny Corporation ("MAC") held the non-rail assets, and MAC common stock was distributed as a dividend to B&O shareholders.[225] B&O believed the SEC would issue a "no-action" letter excusing registration of the MAC stock given the few number of shareholders.[226] Since this plan would fail if large numbers of B&O debenture holders exercised their option to convert their debenture into stock, B&O transferred its non-rail assets to MAC and declared the dividend in MAC stock the same date and without prior notice, which resulted in the debenture holders not being able to convert their shares in time to receive the MAC dividend.[227]

Some of the debenture holders, who were not the plaintiffs in *Lorenz*, brought actions against B&O[228] and are herein referred to as the *PTC/Guttmann* plaintiffs.[229] Chase Manhattan Bank, the indenture trustee, entered into a series of letter agreements whereby B&O agreed that if the *PTC/Guttmann* plaintiffs prevailed or obtained a settlement, debenture holders would be allowed to participate equally in that judgment or settlement regardless of whether they had converted their debentures.[230] The district court offered these plaintiffs the opportunity to convert their debentures and receive the MAC dividend, as well as dividend income accruing since December 13, 1977.[231]

The plaintiffs in *Lorenz* were outside the scope of the *PTC/Guttmann* remedy. They held debentures on December 13, 1977 but subsequently sold them without converting them into stock.[232] They brought breach of the covenant of good faith and fair dealing claims against Chase based on Chase's failure to inform the *Lorenz* plaintiffs of the MAC dividend, the letter agreements with B&O, and the *PTC/Guttmann* judgment.[233] The Pennsylvania district court dismissed the plaintiffs' claims.[234]

The Third Circuit applied New York law in assessing whether a duty of good faith and fair dealing was breached.[235] First, the Third Circuit held that the duties of an indenture trustee are defined exclusively by the terms of the indenture.[236] The sole exception to this rule is that indenture trustees "must

law with respect to certain features of a statute, but simultaneously may recognize that other parts of the regulatory framework neither imply nor authorize a preemptive federal rule.").

[223] Lorenz v. CSX Corp., 1 F.3d 1406, 1409 (3d Cir. 1993).
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *See id.*
[230] *Id.*
[231] *Id.* at 1410.
[232] *Id.*
[233] *Id.* at 1414.
[234] *Id.*
[235] *Id.*
[236] *Id.* at 1415.

avoid conflicts of interest with the debenture holders."[237] Under New York law, the covenant of good faith and fair dealing—which prohibits either party from "doing anything which would prevent the other party from receiving the fruits of the contract"—is inherent in every contract.[238] However, the covenant cannot be used to insert new terms that were not bargained for, as "a covenant is implied only when it is consistent with the express terms of the contract."[239] Therefore, the court considered whether the indentures in this case contained provisions which entitled debenture holders to receive notice of the MAC dividend, the letter agreements with B&O, or any of the remedies in the *PTC/Guttmann* action.

The court found that the indenture at issue contained no provisions explicitly requiring the trustee to provide such notice to the holders.[240] The court also found that the letter agreements did not affect the plaintiffs' rights under the indenture and cannot be characterized as supplemental indentures.[241] Thus, the court concluded that although it would have been advantageous for the plaintiffs to have been informed of the letter agreements, "so long as an indenture trustee fulfills its obligations under the express terms of the indenture, it owes the debenture holders no additional, implicit duties or obligations, except to avoid conflicts of interest."[242] In affirming the Pennsylvania district court, the Third Circuit held that Chase could not have breached the implied covenant of good faith and fair dealing because it did not deprive the plaintiff of any right under the indenture.[243]

In *Peak Partners v. Republic Bank*,[244] Keystone Owner Trust issued mortgage-backed securities to plaintiff hedge fund Peak Partners ("Peak"); US Bank Trust National Association ("US Bank") was the indenture trustee.[245] Pursuant to the indenture, US Bank was responsible for making monthly distributions to the noteholders from the funds in the collection account operated by Republic Bank ("Republic"), the servicer (and codefendant of US Bank).[246] In May 2000, US Bank discovered there were insufficient funds in the collection account to make the required monthly distribution, and that it had overpaid principal payments to noteholders every month since Keystone's first distribution in 1998.[247] US Bank used Republic's servicer certificates to calculate the amount available for distribution. These documents failed to reflect the servicing fee that Republic was deducting every month before entering received mortgage payments into the collection account, which indicated that US Bank had been making overpayments over the course of a nineteen-month period.[248] US Bank notified noteholders of this error on June 13, 2000.[249]

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[237] *Id*.
[238] *Id*.
[239] *Id*.
[240] *Id*.
[241] *Id*. at 1416.
[242] *Id*.
[243] *Id*. at 1418.
[244] Peak Partners, LP v. Republic Bank, 191 F. App'x 118 (3d Cir. 2006).
[245] *Id*. at 119–20.
[246] *Id*. at 120.
[247] *Id*.
[248] *Id*. at 120–21.
[249] *Id*.

The noteholders' brokerage, Bear Sterns, sent a letter to US Bank on behalf of the noteholders, pointing out that the error caused an overstatement of Keystone's collateralization amount and that as that figure declined, so did the market value of the notes.[250] Bear Sterns proposed that either US Bank or Republic post a letter of credit until the collection account was replenished. US Bank and Republic rejected this proposal.[251]

Peak sold all of its notes "due in part to the now reduced overcollateralization amount in the Trust"[252] Peak asserted that but for the defendants' errors its notes would have been worth $700,000 more and claimed that US Bank and Republic negligently breached duties owed to Peak by their failure to properly account for the trust's financial condition.[253] Peak claimed that the defendants breached both their indenture and common law duties.

The opinion begins its discussion by acknowledging that it is "hornbook law" that a trustee owes a strict fiduciary duty of undivided loyalty to the beneficiaries of the trust, but an indenture trustee is a "a different legal animal,"[254] more akin to "a stake holder whose duties and obligations are exclusively defined by the terms of the indenture agreement."[255] The court explained that only after an "event of default" occurs, as that term is defined in the indenture, does an indenture trustee's duty to noteholders become more like a traditional trustee's duty.[256]

The Third Circuit explains that an indenture trustee's duty to noteholders becomes more like a traditional trustee's duty only after an "event of default" occurs, as defined in the indenture.[257] The court cited *Beck*, which clarified that an indenture trustee is not required to act outside of its rights and powers under the indenture, but still must, "as prudence dictates, exercise those singularly conferred prerogatives in order to secure the basic purpose of any trust indenture, the repayment of the underlying obligation."[258]

The Third Circuit first considered whether an event of default occurred under the terms of the indenture,[259] and agreed with the district court that it had not because the pre-payments "did not jeopardize future payments of principal."[260] Thus, US Bank's only duties to Peak were those defined in the indenture, "together with those pre-default duties imposed by New York common law: the performance of ministerial tasks, and the avoidance of conflicts of interest."[261] On this basis, the court analyzed US Bank's actions under the pre-default standard. Regarding the breach of indenture claim, the court held that US Bank was not negligent in its reliance on Republic's

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[250] *Id*. at 121.
[251] *Id*.
[252] *Id*.
[253] *Id*. at 121–22.
[254] *Id*. at 122.
[255] *Id*. (citing *Meckel* and *Hazzard* and reiterating the two extracontractual duties imposed by New York to void conflicts of interest with beneficiaries and perform non-discretionary ministerial tasks).
[256] *Id*.
[257] *Id*.
[258] *Id*. (quoting *Beck*, 632 N.Y.S.2d at 528).
[259] *Id*.
[260] *Id*. at 123.
[261] *Id*. at 124.

servicer certificates.[262] Further, Peak alleged that US Bank violated its common law duty to perform basic non-discretionary ministerial tasks by "blindly basing its distribution calculation upon the undefined 'net interest' figure reported by Republic and by failing to reconcile that amount and the amount that was actually available for distribution."[263] With regard to this claim, the court explained that a trustee could be held liable for failing to perform its basic administrative obligations if its indenture exposed it to negligence claims, and that this implied duty can be limited by the provisions of the indenture.[264]

In affirming the district court's granting of US Bank's motion for summary judgment, the Third Circuit held that Peak failed to demonstrate that US Bank owed it a pre-default duty, much less that it breached such a duty.[265]

> The District Court found that reconciling the collection account balance was not ministerial because it 'requires the Indenture Trustee to look beyond the numbers, and make numerous calculations.' But the District Court need not have gone that far. As it correctly observed, '[i]n essence, Plaintiff is attempting to impose a duty on U.S. Bank that would nullify its right to rely on the Servicer Certificate.' Thus, wholly aside from whether this task is 'ministerial' or 'inherent in the very nature of an indenture trustee's service,' the Indenture unequivocally 'reliev[es] the trustee of this duty,' a point that Peak has conceded.[266]

1. Pennsylvania

Lorenz and *Peak Partners* evince the Third Circuit's attitude toward the issue of indenture trustees' duties. *Lorenz* originated in Pennsylvania district courts. Indeed, Pennsylvania state and federal cases have interpreted and applied the Third Circuit's precedent in varying ways.

The Supreme Court of Pennsylvania assessed the duties of indenture trustees in the pre-TIA case, *Gouley v. Land Title Bank and Trust*.[267] The statements of law in this case were interpreted and expanded in *Becker v. BNY Mellon Trust*, below, which brought attention to similarities and differences between the Pennsylvania common law and the Third Circuit ruling in *Peak Partners*.

In *Gouley*, plaintiff bondholders brought claims in equity against the indenture trustee seeking: removal of the trustee, appointment of a successor trustee, an accounting of all moneys the trustee received, and a decree ordering the trustee to pay damages to the successor in a sum equal to the loss and damage suffered by the bondholders as a result of the indenture

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[262] *Id*. at 125 (uncontested by plaintiffs at the district court level).
[263] *Id*. (internal citations omitted).
[264] *Id*.
[265] *Id*. at 125–26.
[266] *Id*. at 126 (internal citations omitted).
[267] Gouley v. Land Title Bank & Tr. Co., 329 Pa. 465 (1938).

trustee's alleged misconduct.[268] The trial court dismissed the plaintiffs' claim and the Supreme Court of Pennsylvania sustained the dismissal.[269]

The bonds in this case were secured by mortgages that had gone into default; the trustee's failure to notify the bondholders of each default led to the plaintiffs' allegations that the trustee willfully breached its duty.[270] However, the trustee did give notice to the bondholders' agent, the mortgage guarantor company.[271] The defendants argued that by the terms of the mortgage, they were not required to send notices to the bondholders individually and that they performed their duties by giving notice to the guarantor.[272]

The Supreme Court of Pennsylvania began its discussion by stating that the nature and extent of a indenture trustee's duties are primarily to be ascertained from the trust instrument, and that such duties are "those assumed under the terms and conditions of the contract itself, rather than inherent in the general law governing trust relationships."[273] In this case, the terms of the trust and the trustee's duties were set forth in the mortgage, to which each bond referred.[274] Under the mortgage's terms, the trustee was not required to take any action unless requested by the bondholders.[275] The mortgage also included exculpatory provisions, which relieved "the defendant of any duty to notify the individual bondholders of defaults by the mortgagor, or to recognize the same for any purpose under the mortgage, unless requested in writing by twenty-five percent of the bondholders to take action."[276] The court noted that such exculpatory provisions are not given effect if they are illegal, are opposed to public policy, or permit trustees to act in bad faith.[277] The court affirmed the defendant's motion to dismiss, holding that the provisions in the mortgage were enforceable.[278]

The Western District of Pennsylvania encountered the issue of indenture trustee's duties in a 1946 reorganization proceeding, *In re Pittsburgh Terminal Warehouse & Transfer*.[279] In *Pittsburgh Terminal*, Buchanan, the president of the debtor company, was also an "officer or director" of the indenture trustee company.[280] Buchanan caused misleading reports of the results of the operations of the debtor to be issued and published.[281] The reports concealed from bondholders that although the company had paid dividends to stockholders, there were no earnings available for payment of such dividends by reason of failure of the debtor to make charges for depreciation, obsolescence, and repairs against operating income.[282] The indenture trustee and its officers had no notice of the debtor's accounting

[268] *Id*. at 466.
[269] *Id*. at 471.
[270] *Id*. at 468.
[271] *Id*.
[272] *Id*.
[273] *Id*. at 468–69.
[274] *Id*. at 469.
[275] *Id*.
[276] *Id*. at 469–470.
[277] *Id*. at 470–71.
[278] *Id*.
[279] In re Pittsburgh Terminal Warehouse & Transfer Co., 69 F. Supp. 289 (W.D. Pa. 1946).
[280] *Id*. at 290.
[281] *Id*.
[282] *Id*.

methods in 1931 when the president died.[283] Further, none of the officers of the indenture trustee owned stock of the debtor company in 1931,[284] and stockholders knew that no depreciation was taken until 1931 and did not object.[285]

In the reorganization proceeding, the debtor objected to paying the indenture trustee because the indenture trustee allegedly failed in the performance of its duties under the indenture.[286] The court concluded that the indenture trustee was not negligent and had not defaulted in its performance of its duties under the indenture, but that the indenture trustee was in breach of trust for not filing suits against the directors of the debtor in bankruptcy.[287] The objections were dismissed and judgement was entered in favor of the indenture trustee;[288] the fact that two of the members of the bondholders' committee were officers of the indenture trustee does not of itself make the indenture trustee liable for payments that the debtor made.[289]

In *Becker*, bondholders brought suit against indenture trustees, alleging that they were negligent and breached their fiduciary and contractual duties to bondholders by failing to maintain "perfected" security interests in the property securing the bonds.[290] The bondholders alleged that they were awarded less in bankruptcy than they would have been if security interests had been perfected.[291] Defendant-trustees cited *Peak Partners* to disclaim any duty, whether contractual or common law, to maintain security interests, and argued they are only responsible for losses caused by gross negligence or willful misconduct.[292] In 1992, Lower Bucks Hospital ("LBH") entered into a bond financing transaction. The Borough of Langhorne Manor Higher Education and Health Authority ("Authority") agreed to issue bonds and loan LBH the proceeds from sales of the bonds, and LBH agreed to pay principal and interest on the bond debt.[293] The indenture was between the original indenture trustee and the Authority. On January 13, 2010, LBH filed for Chapter 11 relief, which constituted an event of default under the transaction agreements.[294] The indenture trustee, BNYM, chose to act as the bondholders' sole representative in the bankruptcy case.[295]

On August 12, 2010, BNYM filed a proof of claim for the bondholders against LBH for the outstanding bond debt.[296] LBH sued BNYM to avoid its claims of liens and security interests against the hospital's gross revenues and reserve accounts.[297] LBH and BNYM entered into a settlement in which BNYM released LBH from indemnification obligations and negotiated a reduced recovery for the bondholders.[298] The bondholders released all claims

[283] *Id*.
[284] *Id*.
[285] *Id*.
[286] *Id*.
[287] *Id*.
[288] *Id*. at 291.
[289] *Id*. at 290.
[290] Becker v. Bank of N.Y. Mellon Tr. Co., N.A., 172 F. Supp. 3d 777, 781 (E.D. Pa. 2016).
[291] *Id*.
[292] *Id*.
[293] *Id*. at 782.
[294] *Id*. at 783–84.
[295] *Id*. at 784.
[296] *Id*.
[297] *Id*.
[298] *Id*. at 784–85.

against the trustee, including those for damages resulting from conduct that caused the security interests and liens to become unperfected and voidable.[299]

On September 14, 2011, the bankruptcy court approved the stipulated settlement as "fair to the bankruptcy estate."[300] On September 29, plaintiff Becker, representing the bondholders, moved for reconsideration and vacation of the approval order.[301] The motion asserted that the indenture trustee lacked authority to release or discharge the bondholders' claims against the indenture trustee, and that the bondholders were not provided with notice of the stipulation before it was signed, or the approval order before it was entered.[302] It further asserted that the bondholders were not adequately represented in the settlement process because there was a "clear" and "actual conflict of interest between the bond trustee and the bondholders resulting from the alleged failure to perfect the liens required under the indenture."[303]

The plaintiffs claimed that the trustee breached fiduciary duties it owed to the bondholders by not maintaining perfected security interests in the property securing the bonds. The trustee responded that as trustee it had "no duties to ensure lien perfection under the Indenture and Loan Agreement" and "no duties to bondholders other than those specifically set forth in the Indenture,"[304] and contended that it could be held liable only for gross negligence or willful misconduct, which had not been alleged.[305]

The court held that the defendants were fiduciaries of the bondholders' interests in LBH's unrestricted gross revenues, as well as the security interests, liens, and reserve funds created by the transaction agreements.[306] Under those agreements, the defendants were required to manage the entrusted assets for the benefit of the bondholders.[307] Generally, the "standard of care imposed upon a trustee is that which a man of ordinary prudence would practice in the care of his own estate."[308] It is a precept of Pennsylvania law "that where a trust instrument is explicit as to the duty owed, it, as evidencing the settlor's . . . intent, should govern."[309] The court then cites *Gouley*'s premises that the nature and extent of an indenture trustee's duties are to be ascertained primarily from the trust instrument and that trustee duties are not inherent in the general law governing trust relationships.[310] The *Gouley* rule allows the standard for a trustee's care and skill to be relaxed or modified, and it permits an instrument to prescribe powers, duties, and liabilities of the trustee. However, "it does not exempt a corporate or an indenture trustee from all common-law fiduciary duties, as Defendants

[299] *Id*. at 785.
[300] *Id*.
[301] *Id*. at 786.
[302] *Id*.
[303] *Id*.
[304] *Id*. at 788.
[305] *Id*.
[306] *Id*.
[307] *Id*.
[308] *Id*. at 788–89.
[309] *Id*. at 789 (citations omitted).
[310] *Id*. (citing Gouley v. Land Title Bank & Tr. Co., 329 Pa. 465, 466–70 (1938)).

propose."[311] Thus, Pennsylvania law imposes upon trustees common law duties arising from the nature of the fiduciary relationship. These fundamental common law duties apply to indenture trustees, as well. Under Pennsylvania law, an indenture trustee "stood in a fiduciary relation to the bondholders," and as their trustee "it was bound to exercise the utmost good faith in dealing with them and with the property of the trust; its first obligation was to safeguard their interests."[312]

Finally, the court found that the defendants misread the holding in *Peak Partners* to argue that as indenture trustee they owed no duties whatsoever to the bondholders other than those specifically set forth in the indenture. [313] The court rejected this argument, stating that *Peak Partners* held that after a default an indenture trustee's duty to beneficiaries becomes more like that of a traditional trustee, and that New York common law imposes a duty to avoid conflicts of interest and a duty to perform ministerial tasks.[314] Thus, even considering this case under New York law, which does not control:

> Peak Partners would support a ruling that at least as early as January 13, 2010, when LBH petitioned for bankruptcy protection, which filing was a defined event of default under the Indenture, Defendants owed the bondholders the *complete panoply of fiduciary duties of a traditional trustee*. That case also persuasively supports a ruling that at all pertinent times on the facts presented here, Defendants had a duty to act in good faith with undivided loyalty toward the bondholders' interests. Defendants have not cited any case law that would relieve them of their duties under Pennsylvania's general law governing fiduciary relationships.[315]

Thus, in denying the defendants' motion for summary judgment, the *Becker* court held that the defendants owed actionable fiduciary duties to the bondholders.[316] The common law, as well as the transaction agreements required the defendants to act prudently, in good faith, and with undivided loyalty—using reasonable care under the circumstances. Therefore, the defendants were liable for their negligent "failure to use reasonable care to assure that the bondholders' rights and interests were protected and preserved."[317]

2. Delaware

In *In re Worldwide Direct*, an indenture trustee brought claims against a debtor company in a bankruptcy case to collect "administrative expenses."[318] The bankruptcy court held that the indenture trustee was entitled to certain fees as a result of its services to bondholders, and ordered the fees to be

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[311] *Id*.
[312] *Id*.
[313] *Id*. at 790.
[314] *Id*.
[315] *Id*. (emphasis added).
[316] *Id*. at 791.
[317] *Id*.
[318] In re Worldwide Direct, Inc., 334 B.R. 112, 118 (Bankr. D. Del. 2005).

paid.[319] However, the court did not approve all the trustee's administrative expenses: the trustee was not entitled to expenses it incurred to "fulfill its fiduciary duties to the Noteholders as the Indenture Trustee or to the creditors as a member of the [Creditors' Committee]."[320] In denying such recovery, the court noted that indenture trustees have a fiduciary duty to noteholders and are required to act with the same care as if it owned the investment.[321] The indenture in this case required the trustee's services be performed with "the same degree of care and skill in their exercise as a prudent Person would exercise or use under the circumstances in the conduct of his own affairs."[322]

Two years later, the Delaware Bankruptcy Court applied *Worldwide Direct* in *Miller v. Greenwich Capital Financial Products* to conclude that indenture trustees owe fiduciary duties to securities holders, not bankruptcy estates, and that indenture trustees must act in the best interests of those holders.[323] On this basis, the court in *Miller* dismissed a bankruptcy estate's breach of fiduciary duty claim, concluding that an indenture trustee owes no fiduciary duties to a bankruptcy estate.[324]

In *In re Nortel Networks*, noteholders objected to fees an indenture trustee claimed in an issuer's bankruptcy matter.[325] The bankruptcy court discussed whether the indenture trustee acted prudently in assigning work to and supervising its lawyers, as well as whether the fees charged were reasonable.[326] Pursuant to the indenture, the trustee was authorized in performing its duties "to act through agents or attorneys," and to "consult with counsel of its selection."[327] The indenture required disputes over its terms to be governed by New York law.[328] The court explained that under New York law, "the fiduciary duties of an indenture trustee are governed by a 'prudent person' standard."[329] As such, the court looked at whether the indenture trustee acted prudently in assigning the lawyers to their tasks and whether the lawyers' work was reasonable. Solus Alternative Asset Management ("Solus"), which asserted that it owned a majority of the notes, instructed the trustee to replace the attorneys with a firm it chose.[330] The indenture trustee did not do so since Solus failed to provide the indenture trustee with proof of its majority ownership of the notes.[331] The court found that, with one sole exception, the indenture trustee acted prudently throughout the bankruptcy case and performed its duties appropriately.[332]

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[319] *Id*. at 135.
[320] *Id*. at 127.
[321] *Id*. at 129 (citing TIA §§ 301–315(c)).
[322] *Id*.
[323] Miller v. Greenwich Capital Fin. Prod.'s (In re Am. Bus. Fin. Serv.'s), 362 B.R. 135, 140–41 (Bankr. D. Del. 2007).
[324] *Id*. at 144–45.
[325] In re Nortel Networks Inc., No. 09-10138(KG), 2017 WL 932947, at *1 (Bankr. D. Del. Mar. 8, 2017).
[326] *Id*.
[327] *Id*.
[328] *Id*. at *3.
[329] *Id*. (citing *Beck*, 632 N.Y.S.2d at 528).
[330] *Id*.
[331] *Id*. at *4.
[332] *Id*. Actions taken by the indenture trustee included:

(1) having its lawyers review pleadings in pending cases; (2) having its lawyers research the unique features of the notes at issue; (3) filing and amending proofs of claim; (4) defend against the issuer's objection to post-payment interest; (5) participate in 4 rounds of mediation; (6) learn the intricacies of the

Noteholders objected to the legal fees and the number of lawyers representing the Creditors' Committee.[333] The court found it was not prudent for the indenture trustee or reasonable for the lawyers to have more than one attorney preparing for or attending committee meetings,[334] and so limited the committee meeting fees to one lawyer.[335]

III. CONCLUSION

Despite some ambiguity, the majority of the opinions discussed above indicate a clear pattern. The Second Circuit views indenture trustees' pre-default duties as only those explicitly set forth in the indenture, with the exception of the duty to avoid conflicts of interest. New York courts have held that any "fiduciary" duties implied by New York common law are identical to trustees' duties under the TIA.[336] However, New York cases still enumerate two extracontractual pre-default duties: (1) to avoid conflicts of interest; and (2) to perform basic nondiscretionary ministerial tasks.[337] The duty to avoid conflicts, however, does not prevent indenture trustees from becoming creditors of an issuer, despite the inherent conflict of interest.[338] Indenture trustees' post-default duties in New York more closely resemble those of a fiduciary, but courts continue to disagree about whether those duties reflect the full panoply of fiduciary duties.[339]

For its part, the Third Circuit generally agrees that trustees' duties prior to default are defined exclusively by the express terms of the indenture agreement and that there are no additional duties except to avoid conflicts of interest.[340] It also recognizes that the trustee is more like a stakeholder in its relation to the bond issue,[341]and like New York, has held that trustees have an extracontractual duty to perform basic nondiscretionary ministerial tasks.[342]

Pennsylvania views indenture trustees' duties as higher, finding that they have fiduciary obligations to safeguard the interests of holders after an event of default has occurred.[343] Unlike New York, the Pennsylvania district court supported a ruling that indenture trustees owed actionable fiduciary duties to bondholders.[344] Delaware deviates from the Second Circuit as well, holding that, after default, bondholders should have the same care as if they owned the investment.[345]

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unique notes; and (7) retain and rely on the lawyers who represented and advised the indenture trustee. *Id*.

[333] *Id*. at *5.

[334] *Id*. at *7.

[335] *Id*.

[336] Semi-Tech Litig., LLC v. Bankers Tr. Co., 353 F. Supp. 2d 460, 472 (S.D.N.Y. 2005).

[337] Steven Wolowitz & Christopher J. Houpt, *Commercial Litigation in New York State Courts* § 19:31, *in* N.Y. PRAC. SERIES (4th ed. 2015); *see* LNC Inv.'s, Inc. v. First Fid. Bank, Nat'l Ass'n, 935 F. Supp. 1333, 1347 (S.D.N.Y. 1996).

[338] Morris v. Cantor, 390 F. Supp. 817, 818 (S.D.N.Y. 1975).

[339] *See* Wolowitz & Houpt, *supra* note 337, at § 91:31.

[340] Lorenz v. CSX Corp., 1 F.3d 1406, 1415 (3d Cir. 1993).

[341] Peak Partners, LP v. Republic Bank, 191 F. App'x 118, 120–22 (3d Cir. 2006).

[342] *Id*.

[343] Becker v. Bank of N.Y. Mellon Tr. Co., N.A., 172 F. Supp. 3d 777, 788 (E.D. Pa. 2016).

[344] *Id*.

[345] In re Worldwide Direct, Inc., 334 B.R. 112, 129 (Bankr. D. Del. 2005).

In conclusion, various types of actions have been held to be a breach or misconduct by indenture trustees under the TIA. With the exception of a few outliers, courts have applied similar standards in spelling out the law when it comes to defining indenture trustees' duties.