

Posner's Read of Congressional Intent Not Wrong

As irritating as Judge Richard Posner's diatribe against ESOPs is in *Summers et al v. STATE STREET BANK & TRUST COMPANY*, the fact is he does not miss the mark to any significant degree when he states what he thinks Congressional intent was, and is, with regard to current ESOP policies.

Judge Posner states that Congressional intent in authorizing and promoting ESOPs is to provide retirement income security, to create better companies, and to therefore further a social good.

There is nothing out of place with what Judge Posner implies—which is ESOPs are both savings and ownership plans.

The written, permanent Congressional record consistently references the positive goals of ESOPs as providing retirement savings, and creating better performing companies because employees will be more productive when they are owners of the companies where they work.

As interesting side bar to whether Judge Posner was correct in setting forth what he perceived as the reason Congress authorized and promotes ESOPs is he does not cite Congressional intent that ESOPs are excellent tools for corporate finance. The Congressional documents of the period 1975 until 1987 often cite ESOPs as a tool of corporate finance.

This view of ESOPs as a technique of corporate finance is not just embedded in the Congressional record, but is stated clearly in a law that has never been repealed, or amended. [90 Stat. 1590, P.L. 94-455].

It is hard to fault Judge Posner for not addressing this aspect of the Congressional intent behind ESOPs because seldom do ESOP advocates, whether paid lobbyists, or citizen lobbyists, cite to members of Congress, the media, or the public any reasons for ESOPs except that they create excellent retirement savings for average pay employees, and that they in many instances result in high performing companies that are good for the American economy.

[While many ESOP advocates will also cite the fact that a well managed ESOP company can weather difficult times better than conventionally-owned companies, and can reward employees with a better psychological experience at work than is possible in a conventionally-owned company, one does not find any significant Congressional documents that cites these two reasons for Congressional policies authorizing and promoting ESOPs. So while these arguments can be substantiated as a reason for ESOPs to be favored in Federal law, one cannot fault Judge Posner for not specifically addressing these arguments for ESOPs.]

Unfortunately, Judge Posner's view of ESOPs is gaining momentum in the media, and it appears in government policy circles.

The ESOP community will not beat back the attacks on ESOPs as evidenced by Judge Posner's diatribe by claiming he does not understand why Congress authorized and still supports ESOP creation and operation. ESOP advocates will overcome his attacks, and those by other ESOP

critics, by proving his beliefs about ESOPs are wrong, and that ESOPs are in sync with Congressional intent.