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At a recent conference on corporate governance sponsored by the American Law Institute, Professor Stanley A. Kaplan of the University of Chicago Law School stated that "fiduciary duty" was "a concept in search of content." This recalls Justice Frankfurter's celebrated remark that "[t]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge those obligations? And what are the consequences of his deviation from duty?"[1]

Concern with "fiduciary duty" is steadily expanding. Where the principal focus of this concern once was the trustee-beneficiary relationship in a conventional trust, the enhanced role of pension trusts, the growth of investment companies, the increased concern with corporations and their governance, and developments in the securities industry, have all combined to compel analyses of the term in the contexts of many relationships.

The concept has been steadily maturing and expanding under the aegis of both federal and state law, and although still amorphous in many settings, it has been steadily acquiring the elusive content to which Professor Kaplan adverts. Indicative of the broad relevance of the concept are the studies commissioned by the Twentieth Century Fund concerning the correlative of fiduciary duty, conflicts of interest. The seven booklets resulting from those investigations discuss conflicts of interest with respect to broker-dealer firms, investment banking, state and local pension fund asset management, nonprofit institutions, union pension fund asset management, commercial bank trust departments, and nonprofit institutions. While the fundamental concept is the same in each context, the manner in which fiduciary duty is tested in each has a uniqueness that justifies separate consideration.

As our institutions have become larger and more complex, so have grown the ramifications of fiduciary duty, the subtleties of conflicts of interest, the temptations to evade responsibilities, and the difficulties of perceiving clear answers in specific situations. In his pre-

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1. SEC v. Chenery Corp., 318 U.S. 80, 85-86 (1943).

face to the essays, Professor Roy A. Schotland, chairman of the steering committee of the Twentieth Century Fund Study, has suggested the problems that occur in a single type of institution, a commercial bank. He asks, "How does the trust department vote proxies, especially if the stock is in a corporation which is a significant customer of the bank's commercial department? How does a bank regulate the flow of information it secures, in its capacity as creditor, about customers whose stock may be held in the trust department? How does a trust department allocate its information and attention among its hundreds or even thousands of accounts, some vastly larger and belonging to more 'important' clients than others?"[2]

Problems of fiduciary responsibility are nowhere more evident or complex than in the areas of securities and corporations. In these fields the implications of these duties are being arduously, and sometimes painfully, worked out. Hence, it is well that this symposium focuses in this direction. With respect to the responsibility of the individual trustee, the law is reasonably well articulated, understood, and applied. However, where we have institutional frameworks with multiple functions and activities—the commercial bank combining trust and banking functions, the investment banker combining underwriting functions with agency activity—the problems multiply and trouble both the principals and their advisers.

The renewed sensitivity to fiduciary standards is the consequence of many factors, the most pressing of which has been the growth of managed wealth. More and more of the capital resources of the nation are being managed by persons other than those entitled to the benefits of the wealth. This has been true of the wealth clustered in corporations for some time; this phenomenon was well described forty-five years ago in the classic work of Berle and Means, *The Modern Corporation and Private Property*.[3] In recent years, the fastest accretion of wealth under professional management has probably been in pension funds; this has been so significant that Peter Drucker asserts that these pension funds are well on their way to controlling American corporations.[4]

Adherence to and enforcement of fiduciary responsibilities is critical to a society such as ours in which private accumulation and private commitment of resources is essential. Not everyone with

2. J. BROOKS, CONFLICTS OF INTEREST: CORPORATE PENSION FUND ASSET MANAGEMENT xiii (1975).

3. A. BERLE, JR. & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (Rev. ed. 1967).

4. P. DRUCKER, THE UNSEEN REVOLUTION (1976).

investable resources is able to manage them directly; recent experience in the stock market has demonstrated this to increasing numbers of people. However, without the expectation, based upon experience and the enforceability of fiduciary mandates, that fiduciaries may be relied upon to put their beneficiaries ahead of themselves, the possessors of wealth would be unwilling to commit it to others for management. Such reticence would lead to a relatively inefficient allocation of those resources, with resulting detriments to society as a whole. Consequently, the refinement, the articulation and the development of the concepts of fiduciary responsibility, and confidence in those concepts, are critical for our society. Thus this law journal, by focusing upon that problem in our society, is indeed in a mainstream of current concern. It is fitting that this symposium focuses mainly upon the area in which statutory change has most recently compelled concern with the problem of fiduciaries and the area to which the most attention is now being paid, albeit without any new legislation.

ERISA has opened up many frightening vistas. It has swept many into the statutorily defined category of "fiduciary"; more than that, it has created a whole host of new interpretive problems and has exposed those within this newly defined term to liabilities enforceable in federal courts. The problem of the "directed trustee," of which Messrs. Heald and Mulhern write, is by no means the central one in this area, although the perils are indeed real for those described by that term. As one peruses the article of Messrs. Heald and Mulhern, one cannot help but be bewildered by the shortcomings, ambiguities, and sheer ineptness of legislation that was some eleven years aborning. One might have expected these problems in legislation conceived in an emotional storm and hastily adopted; one would not expect it in legislation that was considered with such ostensible thoroughness and care for so long a time. The experience with ERISA suggests that perhaps such legislation should provide for a mandatory reexamination of operations under it within, for example, three years after its effective date. Given such a safeguard, poor judgment and drafting errors more likely would be discovered and corrected. Fortunately, the scope and importance of ERISA have been such that reexamination is now being conducted. Hopefully the problem of the "directed trustee," as well as other problems, will be solved in the course of this review.

The renewed cries for greater corporate accountability and enhanced corporate responsibility, which were mounting in urgency even before the disclosure of illegal political contributions and improper payments overseas, have risen to a shrill level as a result of these disclosures. These problems are clearly high on the priority list of the SEC; in a single week three of the five Commissioners were reported as having addressed the problem in public utterances.[5] At the heart of these discussions are the responsibilities of directors. The Council of the American Bar Association Section on Corporation, Banking and Business Law recently approved a *Guidebook for Corporate Directors*[6] which deals extensively with directors' fiduciary responsibilities. The Business Roundtable, a prestigous group of businessmen, also has spoken on this question recently.[7]

Two of the main articles in this symposium deal frontally with the problems of directors as fiduciaries, a third somewhat peripherally by considering the use of investment company assets to pay for marketing expenses.

Mr. Hahn's and Ms. Manzoni's discussion of a "monitoring committee" of the board of directors which would have unique responsibilities for compliance with federal securities laws is interesting. It seems to be based on a belief that outside directors often have been the victims of SEC assault and that something must be done to deflect the fire. The fact is that, although the rhetoric from the Commission has been abundant, the Commission has not dealt harshly with outside directors. One recalls the actions against three outside directors of the Penn Central Company[8] and the action against outside directors in *SEC v. Shiell.*[9] There have been settlements including section 21(a) statements in matters involving Stirling Homex Corporation,[10] Gould, Inc.,[11] and, most recently, National Telephone Company, Inc.[12] These exhaust the memory of

5. Address by John Evans entitled "Corporate Checks and Balances" before the Middle Atlantic Region, American Society of Corporate Secretaries (Jan. 11, 1978); address by Roberta Karmel entitled "Politics of Change in the Composition and Structure of Corporate Boards" before the Middle Atlantic Region, American Society of Corporate Secretaries (Jan. 11, 1978); address by Harold Williams entitled "Corporate Accountability" before the Fifth Annual Securities Regulation Institute (Jan. 18, 1978).

6. An earlier version of this guidebook appeared as the product of the Subcommittee on Functions and Responsibilities of Directors, of the Committee on Corporate Laws, Section of Corporation, Banking and Business Law—American Bar Association, *Corporate Director's Guidebook,* 32 BUS. LAW. 5 (1976).

7. Statement of the Business Roundtable: The Role and Composition of the Board of Directors of the Large Publicly Owned Corporation (1978).

8. SEC v. Penn Central Co., [1973-1974 Transfer Binder] FED. SEC. L. REP (CCH) ¶ 94,527 (complaint filed May 2, 1974).

9. [1976] SEC. REG. & L. REP. (BNA) No. 383, A-8 (Dec. 22, 1976).

10. Report of Investigation in the Matter of Stirling Homex Corporation Relating to Activities of the Board of Directors of Stirling Homex Corporation, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,219.

11. In the Matter of Gould, Inc., reported in connection with SEC v. Gould, Inc. (D.D.C. 1977), [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,077 (June 9, 1977).

12. SEC Release No. 34-14380, [1978] SEC. REG. & L. REP. (BNA) No. 439, A-6 (Feb. 8, 1978).

cases in which the Commission has moved against outside directors as such with any vigor. True, many settlements in cases alleging mismanagement and misconduct involve the imposition of additional responsibilities on outside directors, but they have not involved charges that the outside directors previously had been guilty of misconduct.

A device such as a monitoring committee which, according to the authors, might at once lessen the exposure of inside directors, increase that of some outside members—the monitoring committee—and lessen that of the other outside directors, is a dubious solution to a difficult problem. It is questionable whether currently inside directors are truly quasi-guarantors of the accuracy of SEC-filed documents; the delegation of a prime responsibility for such documents to outside directors is also highly questionable. Given the litigiousness of the times, persuading outside directors to assume the responsibility the authors outline for members of the "monitoring" committee would require the forensic skills of a Billy Graham. Heaven knows outside directors are nervous enough now about their responsibilities, particularly when they serve on the audit committee; a request that some of them take on a burden such as membership on the monitoring committee would unquestionably meet with sharp rebuff.

Further, it is highly uncertain whether such a committee would afford much protection to the other members of the board, especially with respect to 1933 Act registration statements. At a recent institute sponsored by the University of California at San Diego, a group of experienced securities practitioners agreed that delegation to a committee of responsibility to review a registration statement would not relieve the other directors of their due diligence responsibilities.

The current dialogue concerning directors and their duties has focused almost entirely on outside directors. This almost seems to suggest that inside directors cannot be expected to satisfy their fiduciary responsibilities as directors in any meaningful way. I would suggest that this may be visiting a distinct injustice upon a large number of such people. It must be remembered that inside directors are subject to the same standards, such as duties of care and loyalty, as outside directors; in some contexts, notably 1933 Act registration statements, the degree of diligence imposed upon them may be heavier. It may well be that more investigation of the manner in which inside directors perform is warranted; they may be better than they are given credit for.

Mr. Goldberg's discussion of the possibility of replacing some of the regulatory restraints on investment companies with greater reliance on "independent directors" is an interesting and timely one. There has been a growing impatience with the minutiae of regulation of investment companies. Recently, SEC Chairman Roderick M. Hills indicated a hope that the burden of regulation perhaps could be reduced. Former Director of the Investment Management Division, Anne Jones, voiced a similar hope. To date little seems to have followed except a trifling relaxation of the restrictions on advertising.[13]

It is indeed time to explore the possibility that disclosure combined with a heightened sense of responsibility on the part of outside directors might be effective enough to replace some of the regulatory restraints. *Tannenbaum v. Zeller*[14] and *Lasker v. Burks*[15] indicate that the crucial factor in assessing the validity of action by independent directors is not what such directors are called, but the reality of their independence. If these cases result in modes of selection and patterns of conduct that truly evidence independence, then it finally may be possible to cut through the regulatory maze that surrounds investment companies.

The Reporter of the American Law Institute Federal Securities Code tried to do precisely that with respect to transactions under section 17 of the 1940 Act, which presently requires prior Commission approval. His consultants and advisers were so split on the issue, however, that the current draft, which presumably will be the one finally approved by the membership of the Institute, retains the section 17 requirement virtually unchanged.

This is regrettable. When the 1940 Act was formulated and adopted there were many questionable practices among investment company advisers. Judging by some recent cases, these practices continue, although at this time they seem subtler and less blatant, and mostly cluster around commission problems. Still, the temper of the times is different, and it may well be that at least the need for prior administrative sanction for many transactions that are routine and unexceptionable should be reexamined. Reliance upon truly independent directors just may be the answer.

Related to this, of course, is the problem Professor Freeman discusses so well—the use of fund assets to pay marketing expenses. His analysis is probing and perceptive. It is interesting to juxtapose the proposal of Mr. Goldberg with respect to greater reliance on the outside directors of investment companies with the problem dis-

13. SEC Release No. 33-5899; IC-10096, [1978] SEC. REG. & L. REP. (BNA) No. 437, E-1 (Jan. 25, 1978).

14. 552 F.2d 402 (2d Cir.), *cert. denied*, 98 S. Ct. 421 (1977).

15. No. 77-7060, 46 U.S.L.W. 2388 (2d Cir., decided Jan. 11, 1978).

cussed by Professor Freeman. This may well be an area in which the Commission might forego attempts at regulation (thus far, as Professor Freeman pointedly indicates, this effort has been characterized by uncertainty and confusion) and leave it to the judgment of independent directors who hopefully would decide it in the light of business judgment and their perception of their fiduciary responsibility to fund shareholders.

"Fiduciary responsibility" is something of a half-way house between a legal requirement and an ethical standard. It resembles the former since a violation of it entails legal penalties and consequences; it resembles the latter because it is articulated in general terms, embraces a wide variety of conduct, and defies efforts at specification. An example of the difficulty of definition was seen when the SEC unsuccessfully tried to delineate the responsibilities of directors under the federal securities laws.[16] It is seen further in the generality of the language in which directors' duties are typically expressed in corporation laws, *e.g.*, section 35 of the Model Business Corporation Act.

The ways in which one may place his interests before the interests of those to whom he owes a fiduciary responsibility are all but limitless; hence, an effort to delineate with particularity the specifics of that duty would truly be, in the words of Stanley Sporkin, Director of the SEC's Division of Enforcement, a "roadmap for fraud." The shadowy limits of this responsibility may be frustrating, especially in our complex financial society with its multiplying relationships. Yet it is only fitting that the concept be constantly searching for content; the alternative would be an ossification that would destroy its value. Its very flexibility, the recurring need to infuse it anew with content, is its strength and the source of its relevance.

The articles in this symposium advance understanding of this important concept. They do not exhaust the inquiries that might cluster around it, but they do contribute to the understanding of it.

16. Address by Ray Garrett entitled "Corporate Directors and the Federal Securities Laws," 13th Annual Corporate Counsel Institute, Northwestern University School of Law (October 3, 1974).