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CHAPTER 4

Nonprofit Directors and Officers—Duties and Liabilities for Investment Decisions*

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§ 4.01 INTRODUCTION AND SCOPE

This article has three goals: (1) to review, briefly, the history of the legal rules governing investment of charitable assets; (2) to review the current status of the law on that issue; and (3) to ponder how best to advise nonprofit clients in light of the above. It is important to emphasize the last. There is substantial evidence that smaller nonprofit organizations manage their assets quite poorly. For example, a recent study of the investment performance of *foundations*, which has been referred to as "a milestone" and "[t]he first comprehensive study ever done of foundation investment performance,"¹ concludes in part as follows:

"While the overall rate of return on foundation assets exceeded the market averages, this was primarily because of the

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¹ L. SALAMON & K. VOYTEK, *MANAGING FOUNDATION ASSETS: AN ANALYSIS OF FOUNDATION INVESTMENT AND PAYOUT PROCEDURES AND PERFORMANCE* v (1989). The study covered the period from 1979 to 1983.

performance of the relative handful of larger foundations. In contrast, most foundations performed below the control portfolio.

"In fact, the rate of return the median foundation achieved was not sufficient to support a minimum 5-percent payout rate and still preserve the real, inflation-adjusted value of the asset base

. . . .

"In addition, only a fraction of the foundation universe made use of an active investment management approach Investment management for a significant portion of the foundations consisted of turning the assets over to outside managers to be invested in low-risk, fixed-income securities."²

This criticism is directed at the investments of grant-making foundations, which are among the most financially sophisticated members of the nonprofit universe. If the investment practices of smaller service-providing nonprofit organizations were scrutinized, the results would certainly be even more dismaying. Under these circumstances, it behooves an attorney to help guide clients towards more thoughtful financial management. Indeed, the clients often will not receive such advice from any other source. This is *not* to say that counsel should become an investment advisor—there are often strong reasons for resisting that role. But counsel can, and probably *should*, prod clients to think about, and get good advice about, their investments and investment strategies.

This article first considers the history of the development of the relevant legal standards. It then describes the current state of the law. It proceeds to analyze the cases imposing liability on directors, officers, or trustees of charities for failing to invest assets properly. Some concluding observations are provided at the end.

§ 4.02 HISTORICAL DEVELOPMENT OF THE "PRUDENT MAN RULE"

The leading case in the United States, from which the "prudent man" standard derives, is *Harvard College v. Amory*.³ It arose out

² *Id.* at 53-54. A later update, by one of the same authors, found that during the three-year period following the earlier study, foundations did much better. LESTER M. SALAMON, FOUNDATION INVESTMENT AND PAYOUT PERFORMANCE: AN UPDATE 9 (1991).

³ 26 Mass. (9 Pick.) 446 (1830).

of the death in 1823 of John McLean, who left what was then a substantial estate of about \$228,000.⁴ Among John McLean's holdings were over \$100,000 of stock of manufacturing companies, \$48,000 of stock of insurance companies, and almost \$25,000 of stock of banking companies. He left \$50,000 in trust, the income of which was for his wife during her life, and the remainder of which (after her death) was to go equally to Harvard College and to the Massachusetts General Hospital.

He named Jonathan and Francis Amory as his executors and as trustees of the trust, and in his Will directed them:

"to loan the same upon ample and sufficient security, or to invest the same in safe and productive stock, either in the public funds, bank shares or other stock, according to their best judgment and discretion . . ."⁵

The Amories thus owed fiduciary duties both to John McLean's wife, as income beneficiary, and to Harvard College and the Hospital, as remaindermen.

In early December of 1823, the executors wrote to the remaindermen suggesting that they choose a committee to consult with the executors on investments. The College and the Hospital rejected that proposal, suggesting instead that the entire \$50,000 be turned over to them, and that they would then pay the surviving spouse \$3,000 per year during her life (a fixed 6 percent return). On December 13, 1823, the executors wrote back, rejecting that proposal in turn, because (as they viewed it) John McLean had enjoined *them* to invest the trust assets. The executors proposed to invest in stocks according to the ratio of such holdings in the estate (they comprised about half of the estate's assets), believing that to be what John McLean would have wished. In the alternative, the executors offered to transfer the trust property to the Hospital and the College if they would pay Mrs. McLean the sum of (1) 6 percent interest on \$25,000 (representing half of the trust assets), and (2) an amount equal to the dividends paid from time on \$25,000 of stock of two named manufacturing companies.

⁴ That is equivalent to approximately \$3 million today.

⁵ *Id.* at 447. The Court later clarifies the then meaning of "public funds," when it refers to "stocks depending upon the promise of the government, or, as they are called, the public funds . . ."*Id.* at 460. The Amories were, respectively, the brother and the cousin of Mrs. McLean. *Id.* at 461.

On December 20, 1823, the remaindermen wrote back, rejecting this counter-proposal, and adding that they had confidence that the executors "will, in conformity to the testator's injunction, keep the capital entire," and—further—"that in their opinion, any investment of this capital in trade or manufactories cannot be considered by them as a safe and discreet investment." The battle lines were drawn! The executors proceeded to invest the entire \$50,000 fund in common stock, of which 1/6 was bank stock, just under 1/3 was insurance company stock, and the remainder (just over 1/2) was manufacturing company stock.

The executors then filed their accounting, and cited the College and Hospital to object to it (as the law required). Although there is no evidence that Harvard College objected, the Massachusetts General Hospital did. On February 9, 1824, after hearing all objections, the probate court approved the executors' actions, and disallowed the Hospital's objections. No appeal was taken from this decree. The fund, as thus invested, was turned over to the trustees (who were, of course, the same individuals).

Four years later, in October 1828, the surviving trustee, Francis Amory, presented his final account as trustee. By that time, the value of the stocks held by the trust had declined from \$50,000 to \$29,450 (although, in the interim, fairly substantial dividends—amounting to over \$20,000—had been paid by the corporations and turned over to Mrs. McLean). The College and the Hospital objected to the settlement of Amory's accounting on various grounds. The probate court nevertheless accepted it, on January 12, 1829, and Harvard College and the Hospital appealed.

The opinion of the Court, per Putnam, J., is widely regarded as enlightened, flexible, and well reasoned. In response to the argument that "the manufacturing and insurance stocks are not safe, because the principal is at hazard,"⁶ the Court replied:

"It will not do to reject those stocks as unsafe, which are in the management of directors, whose well or ill directed measures may involve a total loss. Do what you will, the capital is at hazard. If the public funds are resorted to, what becomes of the capital when the credit of the government shall be so much impaired as it was at the close of the last war?"⁷

⁶ *Id.* at 460.

⁷ *Id.* at 461.

A few paragraphs later, after discussing the risks inherent even in mortgages and real estate investments, the Court wrote the words which are quoted below. They are quite famous, and are taken to be the genesis of what came to be called the "Prudent Man Rule."

"All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."⁸

Applying this standard, the Court held that the Amories had the right to invest in the stocks they purchased, "and that they acted in the premises according to their best skill and discretion."⁹

Several points should be noted about the quoted language:

- It contains what might be thought of as a substantive standard of proper investments—that they be suitable for "permanent disposition of their funds" rather than for "speculation." But the Court clearly recognized that absolute security was impossible, stating (as elsewhere quoted) "Do what you will, the capital is at hazard." Thus, the substantive standard requires a balancing of risks and rewards, or (as the quoted language has it) a consideration of "the probable income, as well as the probable safety of the capital to be invested."
- It contains what may be thought of as a procedural standard too. The trustees were "to observe how men of prudence, discretion and intelligence manage their own affairs." The prevailing standards or methods used by such men would then govern the trustees.¹⁰

The Court went on to discuss the earlier probate decree, of February 9, 1824, approving the accounts of the executors, from which no appeal was ever taken. It held that the earlier decree was

⁸ *Id.* at 461.

⁹ *Ibid.*

¹⁰ This analysis derives from Jeffrey N. Gordon, *The Puzzling Survival of the Constrained Prudent Man Rule*, in BEVIS LONGSTRETH, *MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE* 195-231 (1986), esp. at p. 197. That essay was also published, in substantially identical form, as Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U.L. REV. 52 (1987) [hereinafter cited as GORDON].

dispositive, and protected the trustees as successors to the executors.¹¹ Thus, the Court affirmed the decree of the probate judge. Given its reliance on the earlier (1824) probate decree, its justifiably famous discussion of the Prudent Man Rule is at best an alternative holding.

The College and Hospital in the *Harvard College* case had cited a U.K. decision¹² in support of their argument that trustees may not invest in stocks of any sort unless guaranteed by the government. The Massachusetts Court rejected that position, stating: "But no such rule has ever been recognized here."¹³ Thus, the Prudent Man Rule involved no classification of stocks (or any other form of investment) as *per se* imprudent, adopting instead (as we have seen) a flexible standard.

Nevertheless, as the Rule later developed and aged—in cases, through legislation, and in scholarly commentary—its arteries hardened. In 1869, for example, the New York Court of Appeals held that common stock investments were *per se* imprudent.¹⁴ Further, "[b]y 1900 both the majority of states and the great majority of trust funds were subject to ['legal list'] statutes."¹⁵ The first RESTATEMENT OF TRUSTS (in 1935) and the first edition of SCOTT ON TRUSTS (in 1939) rephrased and elaborated on the Prudent Man Rule. Because of the extraordinary influence of Scott's scholarship—he was the Reporter for the Restatement as well as the author of the Treatise—his words and examples had a force which is difficult to exaggerate. These were carried forward without any significant change into the second RESTATEMENT in 1959, and through two subsequent editions of his Treatise (the latter of which is dated 1967).

The Second RESTATEMENT directs a trustee:

"to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived."¹⁶

¹¹ *Id.* at 463–65.

¹² *Trafford v. Boehm*, 3 Atk. 444.

¹³ *Id.* at 459.

¹⁴ *King v. Talbot*, 40 N.Y. 76 (1869).

¹⁵ BEVIS LONGSTRETH, MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE 12 (1986) [hereinafter cited as LONGSTRETH].

¹⁶ RESTATEMENT (SECOND) OF TRUSTS § 227(a) (1959).

There are at least two important differences, both in language and in substance, between the above language and the *Harvard College* formulation: (1) the *Harvard College* language refers to the "permanent disposition" of funds, whereas the RESTATEMENT refers to "the preservation of the estate," and (2) the *Harvard College* language requires a balancing of "the probable income" against "the probable safety of the capital," but the RESTATEMENT, having already enjoined the trustee to preserve the estate, refers to "the amount and regularity of the income."

Most current commentators agree that Scott's formulation was less flexible than the original.¹⁷ Furthermore, in his Treatise, by comment and example, he made two further constraining decisions:

- He described the trustee's duties by suggesting that they look to the standards of "men who are safeguarding property for *others*."¹⁸
- He gave examples of types of investments which, rather than preserving capital, were viewed as "speculative," including certain types of stock, discount bonds, securities in start-up enterprises, and second mortgages.¹⁹

§ 4.03 CURRENT STATUS OF THE LAW

The law is in a state of flux. The 1986 landmark study, by Bevis Longstreth,²⁰ strongly recommended reconsideration of the old RESTATEMENT OF TRUSTS rule.²¹ This suggestion was accepted and led to the 1992 publication of a modern version: the RESTATEMENT (THIRD) OF TRUSTS (PRUDENT) INVESTOR RULE.²² The principal rule in the new RESTATEMENT (THIRD) is stated as follows:

¹⁷ See GORDON, cited at n. 10 *supra*. Also see Haskell, *The Prudent Person Rule for Trustee Investment and Modern Portfolio Theory*, 69 N.C.L. REV. 87 (1990).

¹⁸ E.g., 3 SCOTT ON TRUSTS § 227, at 1661, 1806 (3d ed. 1967) (emphasis added). See *In re Conservatorship of Estate of Martin*, 228 Neb. 103, 421 N.W.2d 463 (Neb. 1988), in which the Nebraska Supreme Court described this as "a different and higher standard of care."

¹⁹ 3 SCOTT ON TRUSTS § 227.6, at 1816-17 (3d ed. 1967).

²⁰ LONGSTRETH, cited at n. 15 *supra*.

²¹ LONGSTRETH, cited at n. 15 *supra*, at 158.

²² (ALI 1992) [hereinafter cited as RESTATEMENT THIRD]. Note that the rule is now gender neutral.

"The trustee is under a duty . . . to invest and manage the funds of the trust as a prudent investor would

"This standard requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust."²³

Note the emphasis on the portfolio as a whole, and the absence of any focus on particular types of investments as being "good" or "bad" in isolation.²⁴ Although some current statutes and regulations reflect, to a greater or lesser extent, the RESTATEMENT THIRD'S acceptance of modern portfolio theory and investment management,²⁵ much remains to be done to bring the law up to date.

For example, the 1972 tax regulations, defining a private foundation's jeopardizing investments,²⁶ are schizophrenic. They read:

"In the exercise of the requisite standard of care and prudence the foundation managers may take into account the expected return (including both income and appreciation of capital), the risks of rising and falling price levels, and the need for

²³ RESTATEMENT (THIRD), cited at n. 22 *supra*, § 227(a).

²⁴ As the Reporter's Comments clarify, "[s]pecific investments or techniques are not per se prudent or imprudent." RESTATEMENT THIRD, cited at n. 22 *supra*, Comment to § 227(f)(2), at p. 24. Thus, the following are all permissible and potentially quite prudent, in the context of an overall portfolio strategy: trading in options, investing in domestic and foreign equities, buying real estate or second mortgages, engaging in venture capital transactions, holding oil or gas interests, investing in commodities and foreign currency, and writing puts, calls, or other options. The Official Comments state that "there is no arbitrary barrier to the competent use, in proper roles and circumstances, of options and futures transactions or of programs for investing in foreign markets, real estate, or unestablished enterprises." RESTATEMENT THIRD, cited at n. 22 *supra*, at 42-43.

²⁵ It is strange, from one point of view, that this outline does not contain any detailed description of the findings and practice of modern portfolio theory. Time and space constraints, and the author's lack of expertise, are to blame. Probably the best short introduction to the field is Edwin J. Elton & Martin J. Gruber, *The Lessons of Modern Portfolio Theory*, Appendix A to LONGSTRETH, cited at n. 15 *supra*, at 161. Interested readers can find other useful expositions, not only in some of the writings cited elsewhere herein, but in JONATHAN R. MACEY, AN INTRODUCTION TO MODERN FINANCIAL THEORY (1991); EDWIN J. ELTON & MARTIN J. GRUBER, MODERN PORTFOLIO THEORY AND INVESTMENT ANALYSIS (4th ed. 1991); and R.A. BREALEY, AN INTRODUCTION TO RISK AND RETURN FROM COMMON STOCKS (2d ed. 1983).

²⁶ Treas. Reg. § 53.4944-1(a)(2)(i).

diversification within the investment portfolio (for example, with respect to type of security, type of industry, maturity of company, degree of risk and potential for return). The determination whether the investment of a particular amount jeopardizes the carrying out of the exempt purposes of a foundation shall be made on an investment by investment basis, in each case taking into account the foundation's portfolio as a whole. No category of investments shall be treated as a *per se* violation . . . However, the following are examples of types or methods of investment which will be closely scrutinized to determine whether the foundation managers have met the requisite standard of care and prudence: Trading in securities on margin, trading in commodity futures, investments in working interests in oil and gas wells, the purchase of 'puts,' and 'calls,' and 'straddles,' the purchase of warrants, and selling short."

The good news includes: measuring performance by total return, linking risk with reward, acceptance of focus on the portfolio as a whole, and refusal to treat any particular investment as a *per se* violation. The bad news includes applying the standard "on an investment by investment basis," and identifying certain specific types of investment as requiring close scrutiny.²⁷

More recent and more enlightened is the standard adopted by the relevant ERISA regulations, allowing the trustee to make:

"a determination . . . that the particular investment or investment course of action is reasonably designed, as part of the portfolio . . . to further the purposes of the plan, taking into

²⁷ I.R.C. § 4944 has no application to any charity other than a private foundation. Even as to private foundations, it has rarely been invoked. There is only one published ruling discussing it. Rev. Rul. 80-133, 1980-1 C.B. 258, involved a gift to a private foundation of a life insurance policy subject to an outstanding policy loan to the donor/insured, whose life expectancy was ten years at the time of the gift. The foundation did not surrender the policy for cash, but rather continued to hold it and to pay interest on the loan and premiums on the policy. The IRS noted that the total premiums plus interest paid over only eight years would exceed the net insurance proceeds on death, said that the managers thus did not exercise "ordinary business care and prudence" in holding the policy, and held it to be a jeopardizing investment.

In *Thorne v. Commissioner*, 99 T.C. 67 (1992), despite an egregious fact pattern, the Court refused to apply second-tier sanctions against the trustee, under I.R.C. § 4944(b)(2), because the Service had not clearly requested the trustee to remove the investment in question from jeopardy. See also *Kline v. Feinblatt*, 403 F. Supp. 974 (D. Md. 1975) (I.R.C. § 4944 tax was a "penalty" for bankruptcy purposes), a case with which the IRS does not agree.

consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action"²⁸

Here there is no investment-by-investment judgment; the portfolio is always appraised as a whole. Furthermore, no particular type of investment is singled out for greater concern than any other.

In another area, the Internal Revenue Service has quite recently taken an enlightened view of the tax treatment of more unusual investments by tax-exempt organizations. In the Internal Revenue Code, unrelated business taxable income²⁹ is first defined³⁰ and then made subject to various exceptions. In particular, dividends and interest are specifically excluded,³¹ as are gains from the sale or exchange of capital assets and from trading in securities options.³² The Code does not contain, however, any clear exception from UBTI for income from investments in interest-rate or currency swap contracts, or many other types of notional principal contracts.³³

²⁸ 29 C.F.R. §§ 2550.404a-1(b)(2)(i). These regulations are promulgated under 29 U.S.C. § 1104(a)(1), entitled "Fiduciary duties."

²⁹ Hereinafter referred to as "UBTI."

³⁰ In I.R.C. § 512(a)(1), which in turn cross-references I.R.C. § 513.

³¹ I.R.C. § 512(b)(1).

³² I.R.C. § 512(b)(5).

³³ See generally Treas. Reg. § 1.863-7 and Prop. Treas. Reg. §§ 1.446-3 and 1.446-4 for a description of notional principal contracts and a discussion of some of the tax rules affecting them. For useful writings on the UBTI/notional principal contracts issues, see ANDREA S. KRAMER, *FINANCIAL PRODUCTS: TAXATION, REGULATION & DESIGN* (Rev. ed. 1991); Steven D. Conlon, Vincent M. Aquilino & Dale S. Collinson, *Tax Law Fundamentals of Tax-Exempt Derivatives*, 55 *TAX NOTES* 381 (1992); David W. Ellis, *Final Regulations Under Section 512—Swap Income and Tax-Qualified Pension Plans*, 20 *J. CORP. TAX'N* 178 (1993); Robert H.M. Ferguson & Susan D. Brown, *More Investment Options Are Available for Tax-Exempt Organizations*, *J. TAX'N EXEMPT ORG'S*, Jan.-Feb. 1993, at 22-29; Henry T.C. Hu, *Swaps, the Modern Process of Financial Innovation and the Vulnerability of a Regulatory Paradigm*, 138 *U. PA. L. REV.* 333 (1989); Edward D. Kleinbard, *Equity Derivative Products: Financial Innovation's Newest Challenge to the Tax System*, 69 *TEXAS L. REV.* 1319 (1991); Note, *Tax-Exempt Entities, Notional Principal Contracts, and the Unrelated Business Income Tax*, 105 *HARV. L. REV.* 1265 (1992); Note, *Tax Treatment of Notional Principal Contracts*, 103 *HARV. L. REV.* 1951 (1990); Richard L. Reinhold, *Tax Issues in Equity Swap Transactions*, 57 *TAX NOTES* 1185 (1992); Amer. Bar Ass'n Tax Section, Comm. on Financial Transactions, Task Force of Subcomm. on Interest Rate Agreements, *Report on Selected Aspects of Interest Rate Caps, Floors, and Collars*, 44 *TAX LAW.* 1075 (1991).

The issue was first addressed in LTR 9042038 (July 23, 1990), in which the IRS ruled that no UBTI arose from an interest rate swap. But then in LTR 9046066 (Nov. 16, 1990), the Service announced that it was reconsidering LTR 9042038. A storm of concern followed. Among others, the New York State Bar Association Tax Section Committee on Tax Exempt Entities filed a report urging that the Service adopt regulations clarifying the issue by permitting such transactions to go forward without generating UBTI.³⁴

The IRS responded favorably. In LTR 9136037 (Aug. 28, 1991), it withdrew LTR 9046066, thus in effect reinstating the no-problem conclusion of the first private letter ruling. It also issued Announcement 90-134,³⁵ indicating that it would promulgate regulations on the subject. Prop. Treas. Reg. § 1.512(b)-1(a), filed with the Federal Register on Sept. 3, 1991, would have exempted from UBTI, in addition to interest, dividends, and annuities, "substantially similar income from ordinary and routine investments in connection with a securities portfolio" but only "to the extent determined by the Commissioner in a revenue ruling." The IRS simultaneously indicated that, upon final adoption of the proposed regulation, it would issue a ruling that interest-rate swaps do *not* give rise to UBTI.

However, the final regulations³⁶ take a different approach. They do not depend upon the issuance of any revenue rulings. Rather, they explicitly exempt from UBTI:

"income from notional principal contracts (as defined in Treasury Regulations 26 CFR 1.863-7 or regulations issued under section 446), [and] other substantially similar income from ordinary and routine investments to the extent determined by the Commissioner . . ."

Four observations are in order:

- (1) The preamble to the final regulations, and the regulations themselves,³⁷ make clear that this language does *not* apply

³⁴ The Report (written by the author and other members of the Committee of which the author is co-chair) relied heavily on modern portfolio theory and the RESTATEMENT (THIRD).

³⁵ 1990-50 I.R.B. 18 (Dec. 10, 1990).

³⁶ Treas. Reg. § 1.512(b)-1(a)(1), adopted by T.D. 8423, 57 Fed. Reg. 33442 (July 29, 1992), but effective for amounts received after August 30, 1991 (and electively even before then, per Treas. Reg. § 1.512(b)-1(a)(3)).

³⁷ Treas. Reg. § 1.512(b)-1(a)(2).

to "gain or loss from the extinguishment, assignment, or other disposition of any swap position." The preamble goes on, however, to state: "Generally, a non-dealer exempt organization's gain or loss from sales or other dispositions of non-inventory property would be excluded from UBTI under section 512(b)(5)."

- (2) The exclusion from UBTI does not apply to income derived from debt-financed property.³⁸
- (3) The "ordinary and routine" language in the final regulations does not require that the exempt organization *itself* routinely invest in notional principal contracts. As the preamble to the final regulations makes clear, that language requires only that such investments are routinely and ordinarily made by investors generally.
- (4) Finally, the preamble says: "The fact that these regulations exclude certain income from UBTI is not intended to affect determinations under any relevant fiduciary standards of state or federal law."

A few states have responded to the modern view of prudent investing, but in many states there will be need for changes in statutes to accomplish this result fully.³⁹ California, Delaware, Georgia, Illinois, Minnesota, Tennessee, Virginia, and Washington are leaders here.⁴⁰ New York State is studying the issue; an advisory committee has recommended the adoption of the modern Rule by legislation.⁴¹ Professor John Langbein, of the Yale Law School, is working on a Uniform Prudent Investor Act under the auspices of the National Conference of Commissioners on Uniform State

³⁸ Treas. Reg. § 1.512(b)-1(a)(2). Debt-financed property is defined in I.R.C. § 514(b).

³⁹ Much can be done in *all* states, even without legislation, by the Attorneys General. A statement of practice by the appropriate Attorney General's office, sympathetic to the modern prudent investor rule, would be of great help in creating a climate in which more efficient and flexible investment processes could flourish.

⁴⁰ Calif. Prob. Code § 16040 (b); Delaware Code Ann., title 12, § 3302; Georgia Code Ann. § 53-8-2; Tennessee Code Ann. § 35-3-117; Minnesota Stat. § 501B.10(1); Washington Rev. Code §§ 11.100.020, 11.100.023, and 11.100.035. Illinois adopted the new Prudent Investor Rule in September 1991, effective January 1, 1992. Illinois P.A. 87-715 (1991), codified at 17 Ill. Rev. Stat. 1675, 1675.1, and 2103. Virginia also enacted it in 1992. Va. Code Ann. § 26-45.1. Florida adopted such legislation in 1993. Florida Laws, ch. 93-257, amending Florida Stat. § 518.11 and adding § 518.112.

⁴¹ EPTL-SCPA LEGISLATIVE ADVISORY COMMITTEE, THIRD REPORT: THE PROPOSED PRUDENT INVESTOR ACT IN NEW YORK (March 22, 1993).

Laws.⁴² The draft Act has gone through its first reading, is scheduled for its second and final reading in 1994, and—if then approved—may be promulgated in early 1995. Section 2 of a recent draft⁴³ reads in part as follows:

“(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

“(b) A trustee’s investment decisions must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy that identifies risk and return objectives reasonable suited to the trust.

* * *

“(e) Subject to the standards of this [Act], a trustee may invest in any kind of property or type of investment.”

Although the law generally imposes different (and higher) duties of care and loyalty upon trustees of charitable trusts than upon directors of charitable corporations,⁴⁴ it appears that this difference has not generally mattered in cases applying the prudent investor rule.⁴⁵ Thus, the RESTATEMENT THIRD takes the view that, even though the rule is phrased as applicable to trustees, “funds held for investment by a charitable corporation . . . are to be invested in accordance with the prudent investor rule of § .227.”⁴⁶

⁴² Although the Act “is centrally concerned with the investment responsibilities arising under the private gratuitous trust, . . . the prudent investor rule applies, *mutatis mutandis*, to the world of the charitable trust . . .” *Id.*, Prefatory Note, at 2 (Aug. 23, 1993, Revision).

⁴³ *Ibid.*

⁴⁴ See, e.g., DANIEL L. KURTZ, BOARD LIABILITY: GUIDE FOR NONPROFIT DIRECTORS 22-24 (1988).

⁴⁵ There is language to the contrary in *Lynch v. Redfield*, 9 Cal. App. 3d 293, 88 Cal. Rptr. 86 (1970), discussed below, which applies a trust standard. As one author correctly observed, however, “[g]iven the facts of that case . . . it is unlikely that any different result would have been reached whatever standard was employed.” DANIEL L. KURTZ, BOARD LIABILITY: GUIDE FOR NONPROFIT DIRECTORS 24 (1988) (footnote omitted).

⁴⁶ RESTATEMENT THIRD, cited at n. 22 *supra*, § 389, Comment b. Another leading commentator has stated that “[t]he modern paradigm of prudence applies to all fiduciaries who are subject to some version of the prudent man rule, whether under ERISA, the private foundation provisions of the Code, UMIFA, other state statutes, or the common law.” LONGSTRETH, cited at n. 15 *supra*, at 7.

§ 4.04 CASES IMPOSING LIABILITY FOR IMPRUDENT INVESTMENT OF CHARITABLE FUNDS

Implicit in the above is not only that the prudent-investor rule imposes a standard of duty on trustees and directors of charities, but that they may be legally liable for failure to meet that standard. There are, however, very few decided cases holding a trustee or director liable.

In *Stern v. Lucy Webb Hayes National Training School for Deaconesses & Missionaries*,⁴⁷ some of the directors of the hospital, who were also directors of local banks, were found to have caused the hospital to maintain funds in non-interest-bearing accounts in those banks, the balances in which sometimes exceeded \$1 million. The court first adopted a corporate, rather than a trust, standard of care for directors.⁴⁸ It said "[D]irectors of charitable corporations are required to exercise ordinary and reasonable care in the performance of their duties, exhibiting honesty and good faith."⁴⁹ It went on to require directors to supervise investment policy, and said: "A director who fails to acquire the information necessary to supervise investment policy or consistently fails even to attend the meetings at which such policies are considered has violated his fiduciary duty to the corporation."⁵⁰ The judge also noted "that all of the defendant trustees have, at one time or another, affirmatively approved self-dealing transactions."⁵¹ The court held that "each of the defendant trustees⁵² has breached his fiduciary duty to supervise the management of Sibley's investments."⁵³ Despite these holdings, the court imposed no sanctions on any of the defendants. It awarded no damages. It merely required the

⁴⁷ 381 F. Supp. 1003 (D.D.C. 1974). Because the defendant institution principally ran the Sibley Memorial Hospital, the court referred to it as "Sibley" throughout the opinion, see 381 F. Supp. at 1007, a practice which is followed in the text of this article.

⁴⁸ As noted above (see text accompanying nn. 44-46), it is quite unlikely that this holding affected the outcome of the case.

⁴⁹ 381 F. Supp. at 1013.

⁵⁰ 381 F. Supp. at 1014.

⁵¹ 381 F. Supp. at 1016. See also 381 F. Supp. at 1009-12 discussing various "interlocking duties and interests" because several of the trustees also held positions of responsibility at financial institutions with which Sibley conducted business.

⁵² Although called "trustees," the defendants in fact were directors, and the court so treated them. 381 F. Supp. at 1007 n. 1.

⁵³ 381 F. Supp. at 1015.

hospital to adopt certain procedures to prevent recurrence of the problem.

*Lynch v. John H. Redfield Foundation*⁵⁴ involved facts quite similar to those in Sibley Hospital. The California Attorney General alleged that the directors of the charity had mismanaged the Foundation's assets by allowing cash to accumulate in an interest-free checking account for five years. This resulted from an ongoing bitter dispute among the three directors, one of whom purported to replace the other two, thus creating two competing alleged boards of directors. The deposit bank, once notified of the conflict, advised the directors that it would not honor checks unless either all putative directors concurred or a court order was issued. For approximately five years, neither occurred. During this period, whenever the deposit bank received income on the Foundation's investments, it deposited it in the Foundation's non-interest-bearing checking account. The court, unlike the Sibley Hospital court, held that the directors should be judged by a trust (*not* a corporate) standard of care.⁵⁵ After discussing California cases, it said, "We are satisfied . . . that the directors failed to meet the standards of the prudent man investment rule⁵⁶ . . . and that none of the circumstances exonerate them from liability."⁵⁷ It also held that it didn't matter that the directors had served without compensation,⁵⁸ or had acted in good faith.⁵⁹ It imposed damages on the directors, requiring them to pay simple interest at 7 percent per annum, and it affirmed the lower court's decision removing the principal director⁶⁰ (but not the other two).

*Johnson v. Johnson*⁶¹ was one part of the extended litigation involving the multi-million-dollar estate of J. Seward Johnson, a principal stockholder of Johnson & Johnson.⁶² The action was

⁵⁴ 9 Cal. App. 3d 293, 88 Cal. Rep. 86 (1970).

⁵⁵ 9 Cal. App. 3d at 298. See again the text accompanying nn. 44-46, *supra*.

⁵⁶ The court measured the standard of care by reference to the California statutory version of the prudent man investment rule. 9 Cal. App. 3d at 298.

⁵⁷ 9 Cal. App. 3d at 301.

⁵⁸ 9 Cal. App. 3d at 301.

⁵⁹ 9 Cal. App. 3d at 301-02.

⁶⁰ She had died after the trial and pending the appeal in the case. 9 Cal. App. 3d at 297.

⁶¹ 212 N.J. Super. 368, 515 A.2d 255 (1986).

⁶² The main fight was between the decedent's children and his last wife, who had also been a maid at the family residence. For more of the titillating details, see DAVID MARGOLICK, *UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE* (1993).

commenced by his surviving spouse against his son by a prior marriage, alleging that the son was negligent in managing the investments (aggregating about \$100 million) of two charitable foundations created by the decedent. The Attorney General intervened. The Court first dismissed the claims of Mrs. Seward, finding that she had "unclean hands" and was not entitled to be heard in equity.⁶³ It went on, however:

"In order to protect the public interest, the court will analyze the evidence to determine whether there were any improprieties in the management of the foundations' assets. It is the Attorney General, rather than Mrs. Johnson, that the court considers to be the plaintiff."⁶⁴

The court chose a corporate, rather than a trust, standard of care, characterizing it as less strict and as involving "ordinary care," "good faith," and "business judgment."⁶⁵ It added that this standard "means nothing more than the terms of [the New Jersey statute] requiring comparison to the ordinary prudent person in similar circumstances."⁶⁶ It then applied that standard to the actions of the son, in his role as chairman of the foundations' finance committees.

The Court's opinion contains the most detailed analysis, in all of the decided cases, of portfolio management strategies. After describing the particular investment system which had been used, the Court said that it was only one among many, and that it was not negligent to adopt it.⁶⁷ Furthermore, the Court refused to find negligence in the use of only one broker (rather than many), the failure to hire a financial professional, or the submission of insufficient information about the portfolio to the Board of the foundation.⁶⁸ It noted, several times, that the foundation pay-out requirements, under the Internal Revenue Code,⁶⁹ caused these

⁶³ 212 N.J. Super. at 384. While serving as co-executrix of the estate and as a member and trustee of one of the foundations, Mrs. Johnson concealed her written agreement not to exercise a power of appointment given to her in her late husband's will but rather to allow the assets subject to that power to pass to the foundation. 212 N.J. Super. at 382-83.

⁶⁴ 212 N.J. Super. at 384-85.

⁶⁵ 212 N.J. Super. at 385-86.

⁶⁶ 212 N.J. Super. at 386.

⁶⁷ 212 N.J. Super. at 387-88.

⁶⁸ 212 N.J. Super. at 388.

⁶⁹ See I.R.C. § 4942.

foundations to choose to maintain between 40 percent and 45 percent of their assets in cash and cash equivalents, which led to lower returns on the portfolio.⁷⁰

It emphasized that defendant's use of expert witnesses was "very imaginative" and "most helpful."⁷¹ It concluded:

"The evidence in this case does not prove that any one theory [of investment strategy] constitutes the standard against which negligence is to be measured. Rather, it proves that it was necessary for the trustees, the finance committee and [the son] . . . to choose an investment system which would satisfy their objectives while subject to their perceived constraints. It was prudent to design a mechanical system, based on a recognized theory of investment, which routinized the identification of investment targets reflecting the goal of buying strength. It would have been a bad decision and imprudent to have a system based on fundamental security analysis, if that system had to be operated by [the son], because of his lack of formal training."⁷²

The Court proceeded to dismiss the complaint "for lack of proof of negligence,"⁷³ but did require that "the reporting methodology"—both from outside managers to the finance committee and from that committee to the full Board—be improved.⁷⁴

*George Pepperdine Foundation v. Pepperdine*⁷⁵ was an action by the Foundation created by George Pepperdine's gifts and long dominated and operated by him. It alleged that he mismanaged the endowment, causing losses of over \$3 million.⁷⁶ The court's opinion is confused and angry. At points, it seems to concede that George Pepperdine behaved negligently.⁷⁷ The court nonetheless declined to impose any liability. Its position was that George

⁷⁰ 212 N.J. Super. at 379, 389, 391-92.

⁷¹ 212 N.J. Super. at 390-91.

⁷² 212 N.J. Super. at 395 (footnote omitted).

⁷³ 212 N.J. Super. at 398.

⁷⁴ 212 N.J. Super. at 398.

⁷⁵ 126 Cal. App. 2d 154, 271 P.2d 600 (1954).

⁷⁶ 126 Cal. App. 2d at 155. It further alleged that he caused the Foundation to borrow over \$500,000 in violation of California law, which required a permit to issue before a charity could incur debt. *Ibid.*

⁷⁷ E.g., it refers to "ill-conceived plans, unwisely pondered and hastily executed" (126 Cal. App. 2d at 159), to "nonfeasance and neglect" (*ibid.*), and to "negligence" (126 Cal. App. 2d at 160).

Pepperdine had been generous and philanthropic in creating the Foundation, and should not be held accountable for later losing what—but for his original gifts—would never have been owned by the Foundation in the first place. The following quotations are typical, but not exhaustive:

“A regrettable situation! But is it one that requires a burnt offering or that demands the swinging of human forms from the gibbet to gratify the rancor of intimate observers? The instant action is a new demonstration of a familiar social phenomenon: when a tragic loss occurs, find a victim to throw to the lions.”⁷⁸

“If any of such misfortunes encompassed him and deprived him of his erstwhile powers, should he and his patriotic associates now be plundered of their personal possessions to fill the never-to-be-gratified maw of charity?”⁷⁹

In any event, the case is of dubious precedential value, having been expressly disapproved, in part, by a later decision of the Supreme Court of California.⁸⁰

In *United States v. Mount Vernon Mortgage Corp.*,⁸¹ the Court found that several directors⁸² of a charitable foundation had sold its assets “for a grossly inadequate consideration”⁸³ had “failed to inform themselves of the value of the stock,”⁸⁴ and had “failed to exercise the caution, care and skill which a man of ordinary prudence would exercise in dealing with his property.”⁸⁵ It concluded that “they thereby breached their trust.”⁸⁶ It nevertheless awarded no damages against them, requiring, instead, that the corporate purchaser of the stock, which “had notice of the breach

⁷⁸ 126 Cal. App. 2d at 158.

⁷⁹ 126 Cal. App. 2d at 160.

⁸⁰ *Holt v. College of Osteopathic Physicians and Surgeons*, 61 Cal. 2d 750, 757, 394 P.2d 932, 937, 40 Cal. Rptr. 244, 249 (1964) (disapproving of *Pepperdine's* discussion of standing).

⁸¹ 128 F. Supp. 629 (D.D.C. 1954), *aff'd*, 236 F.2d 724 (D.C. Cir. 1956).

⁸² The directors were titled “trustees,” but the Court made nothing of this in its opinion.

⁸³ 128 F. Supp. at 635. The Court later referred to it as “a shockingly inadequate consideration.” 128 F. Supp. at 636.

⁸⁴ 128 F. Supp. at 636.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

of trust,"⁸⁷ return the stock, plus dividends on it, to the foundation.⁸⁸ The directors, who had long since in fact ceased to act, were not otherwise sanctioned, but the Court retained jurisdiction to appoint successors.⁸⁹

There is only a handful of other relevant cases.⁹⁰ In almost all, no liability was found, or no meaningful remedy was decreed. The state of the law is aptly captured in the following quotation:

"[L]iability for imprudent investments is relatively rare in the personal trust area. In the law governing fiduciaries of educational and foundation endowments and other similar charitable corporations, it is practically nonexistent."⁹¹

§ 4.05 CONCLUDING COMMENTS

There is both good news and bad news in the more modern prudent-investor standard. The good news is the freeing of portfolio from outmoded and irrational constraints, thus allowing a much more flexible approach to investment management, with (hopefully) increased opportunities for prudent improvement of yields. The bad news is that no particular investment's "prudence" is to be judged in isolation, so the trustees (or directors, etc.) are compelled to examine and think about the overall portfolio, rather than finding

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* The Court allowed the corporate purchaser to retain the amount it had paid for the shares, thus in effect ordering rescission of the original transaction, but without interest to the purchaser.

⁸⁹ *Ibid.*

⁹⁰ See, e.g., *Graham Bros. Co. v. Galloway Woman's College*, 190 Ark. 692, 81 S.W.2d 837 (1935); *Eurich & Matthews v. Korean Fdn., Inc.*, 31 Ill. App. 2d 474, 176 N.E.2d 692 (1961); *S.H. and Helen R. Scheuer Family Fdn., Inc. v. 61 Associates*, 179 A.D.2d 65, 582 N.Y.S.2d 662 (1st Dep't 1992).

⁹¹ LONGSTRETH, cited at n. 15 *supra*, at 22. See also *id.* at 16: "[R]eported decisions testing the prudence of novel investment strategies or even discussing the basic precepts of modern portfolio theory that give rise to those strategies are virtually nonexistent." Longstreth also quotes from an article written by the then-Assistant Attorney General of New York responsible for the supervision of charities. The article comments on an earlier author's observation that "a search for cases in which the directors [of business corporations] have been held liable . . . for negligence uncomplicated by self-dealing is a search for a very small number of needles in a very large haystack" by stating that "[i]n the nonprofit area . . . there would be no needles in the haystack (although it is a considerably smaller haystack)." *Id.* at 22, quoting from Daniel Kurtz, *Non-Traditional Revenue Ventures of Tax Exempt Organizations: The Role of Trustees*, 39 REC. A.B. CTRY N.Y. 127, 137 (1984).

safety in simplistic selection of specific *types* of investments with little or no strategic thought or later supervision. Thus:

"The key to this approach is process. Prudence is to be found principally in the process by which investment strategies are developed, adopted, implemented, and monitored in light of the purposes for which funds are held, invested, and deployed. Prudence is demonstrated by the process through which risk is managed, rather than by the definition of specific risks that are imprudent."⁹²

It should be emphasized that, under the new Prudent Investor Rule, directors and trustees cannot find protection merely by putting all of the charity's assets into certificates of deposit or U.S. Treasury obligations. Not only is no investment, taken alone, *per se imprudent*, but no investment, taken alone, is *per se prudent*!⁹³ It will be important for attorneys and advisors to counsel nonprofit organizations about both sides of these developments.

There is a further item of good news: although the older view also constrained trustees, etc., from delegating their responsibilities, there has also been a growth in the flexibility of that standard. The Uniform Management of Institutional Funds Act of 1972⁹⁴ authorized such delegation. UMIFA has been adopted in some form in many states.⁹⁵ As a result of the widespread adoption of UMIFA, a broad survey of fiduciaries concluded:

"Delegation of investment authority, a major legal stumbling block before statutory and regulatory reforms over the last fifteen years, is both widespread and apparently unproblematic

⁹² LONGSTRETH, cited at n. 15 *supra*, at 7.

⁹³ As the Official Comments to the RESTATEMENT THIRD point out, "All investments, even the nominally excepted short-term U.S. Treasury securities, and all investment strategies involve some risk in the comprehensive sense of possible loss of real, inflation-adjusted value." RESTATEMENT THIRD, cited at n. 22 *supra*, at 18. Bevis Longstreth, emphasizing the critical role of process, says: "Even the most aggressive and unconventional investment should meet that standard [of prudence], if arrived at through a sound process, while the most conservative and traditional one may not measure up if a sound process is lacking." LONGSTRETH, cited at n. 15 *supra*, at 7.

⁹⁴ Hereinafter cited as "UMIFA."

⁹⁵ In New York, for example, UMIFA § 5 was adopted, almost but not quite word for word, as N-PCL § 514(a). That subsection requires, however, that any such investment contract be terminable at the will of the "governing board at any time, without penalty, upon not more than sixty days' notice."

for the great majority of fiduciaries A significant proportion of those . . . fiduciaries have retained consultants to assist in selecting investment managers.”⁹⁶

The RESTATEMENT THIRD carries this flexibility forward.⁹⁷ In many cases, the best—and perhaps the only—way to fulfill the trustees’ and directors’ duties will be via prudent delegation to sophisticated investment counsel.⁹⁸ It will sometimes be wise to get advice about how best to choose such counsel, and it will always be wise to consider carefully the impact of the fees and costs of such counsel on the total investment return of the charity.

One way to deal with investment decision-making is to “pool” investments under common and highly-skilled management. A tax issue arises: will the common fund itself be tax exempt?⁹⁹ A specific exemption for such a fund, but only for *educational* organizations, already exists.¹⁰⁰ Similar legislation, but for a common fund for *foundations*, has been introduced in recent years,

⁹⁶ LONGSTRETH, cited at n. 15 *supra*, at 154.

⁹⁷ See RESTATEMENT THIRD, cited at n. 22 *supra*, § 171.

⁹⁸ Trustees have great flexibility in delegation, subject to the duty of prudence. RESTATEMENT THIRD, cited at n. 22 *supra*, § 171. The official comments add that “[a] trustee’s discretionary authority in the matter of delegation may be abused by imprudent *failure* to delegate as well as by making an imprudent decision to delegate.” *Id.* at 141 (emphasis added). They state, further, that “the trustee has power, and may sometimes have a duty, to delegate . . .” *Id.* at 38 (emphasis added). See also *id.* at 6, 16. In *Johnson v. Johnson*, 212 N.J. Super. 368, 515 A.2d 255 (1986), the Attorney General asserted, and the court seriously analyzed, the claim that the trustees of a \$100 million charitable foundation should be surcharged for failing to appoint proper investment advisors. The court ultimately held that no such liability should accrue because of other facts, including the receipt of sophisticated investment advice from a large broker-dealer.

⁹⁹ It seems clear that a *partnership* of charities, formed to invest their funds, could be utilized. See, e.g., LTR 9342022 (July 22, 1993) and LTR 9342023 (July 22, 1993), both confirming also that being a partner in such a partnership will not (a) adversely affect the tax-exempt status of the partners, (b) cause the partners to become private foundations, or (c) give rise to unrelated business income within the meaning of I.R.C. § 512. Such a partnership generally should not be treated, for federal income tax purposes, as a corporation, even if it was “publicly traded,” per I.R.C. § 7704(c). Furthermore, for partnership years beginning after December 31, 1993, the income of such publicly-traded partnerships generally will no longer be unrelated business income. Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, § 13145(a), repealing prior I.R.C. § 512(c)(2)(A).

¹⁰⁰ I.R.C. § 501(f), effective after 1973, added by § 3 of Pub. L. No. 93-310.

with impressive sponsors (both members of Congress and supporting major private foundations), but has never been adopted.¹⁰¹

Even if the fund itself is tax exempt, the prudent-investor question remains. Given the flexibility now permitted for delegating investment discretion, this may not be too big an issue. For example, the common fund for educational institutions had over \$12 billion in assets as of end-1989. But the question would have to be researched in any particular case.

Large foundations, and perhaps also a few large universities, appear to be doing a fairly good job of investment management. With those exceptions, most nonprofit organizations—whether smaller foundations or non-grantmaking entities of *any* size—seem to be doing a mediocre or poor job. This mismanagement (or undermanagement) loses funds which otherwise could be used to promote the missions of the nonprofit institutions. The more modern and more flexible prudent-man standards will increase the flexibility of and options for prudent management of institutional funds. They will *also* increase the duties of those charged with responsibility for investing.

It may be “prudent” for certain nonprofit organizations to consider matters other than immediate investment return. For example, it is possible, in at least some states, that charities may decide not to invest in certain types of “socially-undesirable” securities, e.g., stock of tobacco companies, liquor companies, or companies doing business in South Africa.¹⁰² The cases are mixed, however, and it has been said that “[w]hat little case law there is involving the propriety of fiduciaries engaging in what has come to be called “social investing” is not illuminating.”¹⁰³ Even if there is some flexibility for charitable trustees generally, it may *not* be available to *all* nonprofit entities. Thus, the Service has said that an ESOP could not validly permit its trustees to consider, in a

¹⁰¹ It actually passed both houses of Congress on March 20, 1992, as § 4652 of the Tax Fairness and Economic Growth Bill of 1992, H.R. 4210. That section was added in Conference, and had not appeared in either the House or the Senate version of the bill. There is no language in any of the Committee reports dealing with it. For political reasons completely unrelated to that provision, however, the President vetoed the bill within hours of its passage.

¹⁰² See, e.g., Troyer, Slocombe & Boisture, *Divestment of South Africa Investments: The Legal Implications for Foundations, Other Charitable Institutions, and Pension Funds*, 74 GEO. L.J. 127 (1985).

¹⁰³ RESTATEMENT THIRD, cited at n. 22 *supra*, Reporter's Comment c to § 227.

tender-offer situation, non-financial factors such as "the continuing job security of . . . employees of the Company."¹⁰⁴ There has been a fair amount written on the subject of social investing, and counsel will be well advised to dip into it when advising clients on the subject.¹⁰⁵

¹⁰⁴ G.C.M. 39870 (April 7, 1992). The G.C.M. also expressed doubt about whether a supplemental unemployment benefit trust, under 501(c)(17), could consider such non-financial factors, and questioned "the continued viability of Rev. Rul. 70-536, 1970-2 C.B. 120" to the contrary.

¹⁰⁵ See, e.g., Ann-Catherine Blank, Comment, *The South African Divestment Debate: Factoring "Political Risk" Into the Prudent Investor Rule*, 55 U. CIN. L. REV. 201 (1986); Joel C. Dobris, *Arguments in Favor of Fiduciary Divestment of "South African" Securities*, 65 NEB. L. REV. 209 (1986); Richard M. Ennis & Roberta L. Parkhill, *South African Divestment: Social Responsibility or Fiduciary Folly?*, 42 FIN. ANALYSTS J. 30 (July-Aug. 1986); Stephen P. Ferris & Karl P. Rykaczewski, *Social Investment and the Management of Pension Portfolios*, 40 J. AM. SOC'Y. C.L.U. 60 (1986); Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105 (1988); Nathan Gilbert, *Social Investing: Using Capital to Promote Foundation Goals*, 8 PHILANTHROPIST, No. 2, at 32 (1989); Blake R. Grossman & William F. Sharpe, *Financial Implications of South African Divestment*, 42 FIN. ANALYSTS J. 15 (July-Aug. 1986); Gary A. Hengstler, *To Divest or Not? South Africa Strife Strain's Trustees' Moral, Fiduciary Duties*, 73 A.B.A.J. 41 (1987); James D. Hutchinson & Charles G. Cole, *Legal Standards Governing Investment of Pension Assets for Social and Political Goals*, 128 U. PA. L. REV. 1340 (1980); Robert H. Jerry, II & O. Maurice Joy, *Social Investing and the Lessons of South Africa Divestment: Rethinking the Limitations on Fiduciary Discretion*, 66 OR. L. REV. 685 (1987); John H. Langbein & Richard A. Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72 (1980); Ian D. Lanoff, *The Social Investment of Private Pension Plans Assets: May It Be Done Lawfully Under ERISA?*, 31 LAB. L.J. 387 (1980); Robert J. Lynn, *Investing Pension Funds for Social Goals Requires Changing the Law*, 53 U. COLO. L. REV. 101 (1981); Anthony C. Paddock, *Does Trend to Financial Supermarkets Provide an Omen of Days to Come?* 188 N.Y. L.J. 30 (1982); Richard A. Posner, *Law and the Theory of Finance: Some Intersections*, 54 GEO. WASH. L. REV. 159 (1986); Ronald B. Ravikoff & Myron P. Curzan, *Social Responsibility in Investment Policy and the Prudent Man Rule*, 68 CAL. L. REV. 518 (1980); Wayne H. Wagner, Allen Emkin & Richard L. Dixon, *South African Divestment: The Investment Issues*, 40 FIN. ANALYSTS J. 14 (Nov.-Dec. 1984).

