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# The Curse of Corporate Control: A Mutual Insurance Company

## A Brief on Behalf of Society†

*David Cowan Bayne, S.J.\**

The phenomenon of "control" is perhaps the most important single fact in the American corporate system. As the corporation increasingly is recognized as an institution of primary significance (even Mr. Justice Brandeis called it "a master instrument of the American economy"), the importance of control will grow in law as it has grown in economic and social fact.<sup>1</sup>

Mr. Berle was right. The core concept of the American corporation is corporate control. All other considerations are subsidiary or peripheral. The philosophy and law governing corporate control are pivotal to all else. If the mores, attitudes, and conduct of the top control hierarchy in the corporate society are shaped by high ideals and rigid strictures, the beneficence of the system will be assured. In turn, the inestimable impact of the corporation on Society will be equally beneficent. The importance, then, of a thoughtful study of corporate control is incalculable.

And what better subject for such a study than the mutual insurance company? The mutual company is archetypal. In it the

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† In his scholarly analysis of problems inherent in the mutual insurance company form, Father Bayne has produced an invaluable study of the strict-trust approach to the sale of corporate control, corporate opportunity, and conflict of interest. In this fascinating brief—written from the outset for publication—the author has added a significant commentary on *Borden v. Sinskey*, 530 F.2d 478 (3d Cir. 1976), a case previously neglected by the commentators but characterized by Father Bayne as "the most important single opinion in the field of corporate philosophy in decades."

This brief, submitted on behalf of the plaintiff-appellees, represents the scholarly fruit of years of litigation, culminating in an affirmance of a thorough and far-reaching remedy, including a \$2.5 million damages award, in *Rowen v. Le Mars Mut. Ins. Co. of Iowa*, 282 N.W.2d 639 (Iowa 1979).

To preserve the author's vivid style, the brief has been reproduced essentially verbatim, with only minor changes in format. Because the brief is considered a primary reference in its own right, the references to depositions, exhibits, etc. are printed exactly as they appear in the brief, and without further citation.

—The Editors

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1. Berle, *Control in Corporate Law*, 58 COLUM. L. REV. 1212, 1212 (1958).

power of control is virtually absolute. No stockholder investors intrude upon the *contrôleur's* uninhibited rule. The only owners are the policyholders. The annual meeting is a charade. Unassailable control passes from generation to generation, from insiders to insiders. All this is referable to the control of the proxy, and the wide dispersal of the owners. In the mutual company, this power of control is as absolute and unchecked as in any type of modern corporation.

Statutory protection of the policyholder owner is virtually nonexistent. No proxy rules. No quorum requirements. No disclosure regulation. No codified fiduciary duty. The entire burden is thrown on the court. The lone recourse: post-factum judicial recovery under the common law.

*The Le Mars Mutual*

Q. Do you recall, Mr. Vander Meer, any specific occasion during the ten to fifteen years when you were on the Board of Le Mars when you took exception to any policy or recommendation made by John Alesch?

A. No, I don't recall that I did.

—Peter Vander Meer, Le Mars Director,  
Deposition at 21.

A. John Alesch I knew since 1934. He and I were card-playing buddies.

Q. So you had a good close personal relationship since you moved into town?

A. About as close as you can get without sleeping together.

—John Vollmar, Le Mars Director,  
Deposition at 6.

And the Le Mars Mutual Insurance Company of Iowa is the perfect vehicle for the study of a mutual company. The bigger-than-life realities of this little company in Iowa lend themselves ideally to an application of the broad philosophy of corporate control. The lesson of Le Mars reaches far beyond an Iowa county, or even a state. Le Mars is a microcosm of the mutual-company world. The pertinency of its lesson is nationwide.

This is a Brief, therefore, written on behalf of Society. The solution of the manifold problems of Le Mars is the solution of the identical problems of thousands of other mutuals, to say nothing of cooperatives, fraternal organizations, savings-and-loan associations. The lesson of Le Mars could be a prophylaxis for the nation, a salutary warning for the future. Further, the curse of

corporate control afflicts the mutual company to a degree surpassed by no other kind of corporation. The burden of this Brief is great.

### *The Burden of the Brief*

It appears to me that everything is shaping up just as we anticipated and I am sure that this venture can and will be advantageous and profitable to all parties concerned.

—Burton Dull, Esq., Le Mars Counsel,  
to Raymond Brown, Esq., De Witt Counsel,  
Executive Committee,  
Exhibit 19A.

At the heart of every Le Mars dereliction was an abuse of corporate control. The story began with the *Illegitimate Sale of Control*. Next, *Looting*, toward recoupment of the premium-bribe dollars. Thence *Embezzlement*, to produce the wherewithal for the premium-bribe. *Theft of a Corporate Opportunity* was an expectable concomitant. *Disloyalty* was inherent in the whole. The lesson of these control abuses is complex, but eminently worthwhile.

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## PART ONE: THE FACTS

## I. THE PRINCIPAL MALEFACTORS

Ray[mond Brown]: Burt[on Dull] is working on the changes in the minutes and getting them lined up. I do wonder if you people have come up with the substitute for the automobiles. Too bad I don't have a subagent or two in Hawaii and perhaps a few other nice places that we could send you people to check out for us, but maybe as time goes on we can have the Alesch Agency promoted in all the states where De Witt is at and then we can all wheel and deal, can't we?

—John Alesch, Le Mars Contrôleur,  
to Raymond Brown, Exhibit 82.

The story of this lawsuit is really a tale of two cities. In the northwest Iowa town of Le Mars is headquartered the Le Mars Mutual Insurance Company of Iowa. For many years antedating this lawsuit, Le Mars was in the complete and unfettered control of old John Alesch (now some four years deceased). John Alesch held sway over Le Mars with the help of his family and a coterie of obedient directors, all together, the Alesch Group.

John Alesch was undoubtedly the central character in the Le Mars half of this story. But he was aided immeasurably by Burton Dull, Esq., longtime counsel to Le Mars. It was Burton Dull who guided John Alesch step by step through most of the machinations. It was Burton Dull who later carried on for De Witt as liaison man inside Le Mars. Burton Dull and John Alesch rank as two of the principal malefactors in this litigation.

*The Alesch Agency*

It would seem to me that this pup corporation [the Alesch Agency] could be used for perhaps some other things in the business between the two companies [Le Mars and De Witt].

—John Alesch to Raymond Brown,  
Exhibit 63.

Up in this town of Le Mars, John Alesch, his three daughters, and his wife had for many years owned, or seemingly so, a little insurance agency (interestingly, housed in the very headquarters of Le Mars). This Alesch Agency played only an unassuming part in this story, but nonetheless served well the purposes of Alesch and Dull. The role of the Five Alesches—father, daughters,

wife—as sole owners, or seemingly so, of the Alesch Agency was integral, albeit lesser, to the overall plot.

*De Witt*

Q. Are these [the Le Mars Executive Committee] substantially the same individuals who are on your Executive Committee at . . . De Witt?

A. That is right.

Q. How often did these meetings of the Executive Committee take place?

A. Almost daily. At De Witt.

—William Couch, Executive Committee,  
Deposition at 20-21.

My Dad started De Witt . . . . My Father was President. My brother was President. I was President and now my son is President.

—Carl Smith, Executive Committee,  
Deposition at 7, 18.

Across the state in another Iowa town was the Iowa Mutual Insurance Company of De Witt. De Witt is the unquestioned chief of all the malefactors. De Witt was bent on a headlong course of expansion, merger, bribery, looting, and embezzlement. De Witt, considerably larger than Le Mars, was the undoubted center of all the chicanery. But De Witt, as a corporate entity, must necessarily be guided by agents, and De Witt, for its part, had been for many years under the complete and untrammelled control of a select circle of five men—Carl Smith, Raymond Brown, William Couch, Carman Smith (President of De Witt, and Le Mars, at the grand old age of 33), George Howes—the omnipotent Executive Committee, *contrôleur*, and prime agent, and the unchallenged master of the subservient nine-man Board of De Witt.

Just as John Alesch had his Burton Dull, so too did the Executive Committee have Raymond Brown, Esq., house counsel and himself a prime member of the Executive Committee of De Witt. It was Raymond Brown who implemented the plan and carried out the negotiations with Burton Dull.

Thus Alesch and Dull at the one end and the Executive Committee and Brown at the other were major malefactors in the De Witt-Le Mars axis, with De Witt the chief of all. Many lesser parties—the Alesch Group, the Smith Group, the Five Alesches—moved in and out and around during the eight years—1970 through 1977—of this tale of two cities. Exhibit 522

lists the *Dramatis Personae*. But Alesch and Dull and the Executive Committee were the principals, behind De Witt itself.

## II. THE MALEFACTIONS

Q. So actually, getting the designated Board of Directors was part and parcel of this contract?

A. There isn't any question that the overall agreement was all a part of one overall transaction.

—Burton Dull, Deposition at 71.

I didn't know [Burton Dull] was mixed up in this deal like he is.

—Clyde Eastman, Le Mars Director, Deposition at 59.

From a legal and conceptual standpoint, the date of April 21, 1970—the day the control of Le Mars passed from the Alesch Group to De Witt—serves as an excellent point of demarcation between the major classes of malefaction in this lawsuit: *the Sale of Control*, *the Looting of Le Mars*, and *Embezzlement*. The principal elements of the Sale of Control and the Embezzlement occurred before April 21, 1970, and most of the Looting after. But there was not a perfect dichotomy. Some Sale-of-Control details and the Embezzlement did carry beyond April 21, 1970. But that date, nonetheless, remains the ideal break-off point for this factual presentation.

The fourth malefaction was *sui generis*—*the Twice-Stolen Agency*—and was the successive work of the Five Alesches and De Witt. This double usurpation of a Le Mars “corporate opportunity” requires distinct treatment, both factual and legal. The fifth—*Disloyalty*—was all-pervasive, everywhere, and always.

Every one of the substantive defendants played an active role of more or less importance in the Sale of Control, the Embezzlement, and the Looting. The Five Alesches and De Witt stole the Alesch Agency from Le Mars. Every defendant was consciously Disloyal, with varying degrees of culpability.

### A. *The Sale of Control*

Q. Well, as a normal thing, at your annual meeting, what percentage of your policyholders actually attend?

A. Very few.

Q. And there is no requirement for a quorum?

A. No.

—Raymond Brown, Deposition at 82.

I was kicked out of Le Mars by Alesch. They didn't want me to know [about the Sale of Control]. They pushed me out.

—Clyde Eastman, Le Mars Director,  
Deposition at 59, 61.

In the late 1960's old John Alesch was in his sixties, had congestive heart failure and knew he could no longer handle Le Mars. Further, no close relative was at hand to perpetuate the Alesch control. The prestige, the power, the perquisites, the salaries and bonuses, all would now be lost, unless a suitable successor was soon found. John Alesch knew full well the value of this control.

John Alesch also knew that the very nature of a mutual company guaranteed him absolute power to hand over this valuable control to whomever he chose. Le Mars had no shareholders. Each little policyholder had only one single vote. The annual election of directors was the merest formality. Unorganized, apathetic, the policyholder owners never even came to a meeting, let alone opposed the Alesch slate. The annual meeting was a family affair. A few intimates gathered to rubber-stamp the Alesch nominees, whoever they might be.

And the beauty was that old John Alesch, and the Alesch Group, were not risking one personal cent. Le Mars was owned completely by the policyholders. The Alesches were only custodians, never owners. Not one personal cent.

#### *Employers Mutual*

A. And it was understood that Le Mars Mutual would be merged into the Employers.

Q. Did that discussion that day have anything to do with Alesch, Incorporated, the insurance agency? That it was to be purchased by Employers Mutual?

A. Yes.

Q. Do you remember the amount of dollars that would be paid for the insurance agency?

A. It was \$450,000.

—Burton Dull, Deposition at 19-20.

Armed with this unassailable power to name a new Board, John Alesch began his hunt for a "suitable" successor. "Suitable" in the sense that it come forward with a suitable premium-bribe. If the Alesches were to relinquish the power, the prestige, and the perquisites, at least they would be handsomely rewarded for the relinquishment.



The first Alesch selection was Employers Mutual Insurance Company of Des Moines. Employers also understood full well the value of control of Le Mars. More to the point, Employers was prepared to pay a substantial premium-bribe for that control. Negotiation between briber and bribed went on apace, but in the end John Alesch decided to hunt for a "more suitable" successor. Henceforward: competitive Premium-Bribery.

(This term "premium-bribe" has gained currency in Sale-of-Control argot because a "premium" or gratuity is usually added to the true value of the contrôleur's stock, thus effecting the sale of corporate control for a price.)

At this point in late 1969 John Alesch and Burton Dull began the successful negotiations with De Witt, through its agent, the Executive Committee. When the dust settled, De Witt had agreed to a total premium-bribe of \$600,000.

### *The Guises of the Bribe*

I found out later [Burton Dull] was in back of all these contracts.

—Clyde Eastman, Le Mars Director,  
Deposition at 59.

Q. Did you prepare that [sales] contract, Mr. Dull, eventually?

A. Eventually, yes.

—Burton Dull, Deposition at 39.

This \$600,000 premium-bribe passed in three separate segments:

(1) The "Sale" of the Agency:	\$400,000
(2) The "Consultant's" Contract:	46,000
(3) The "Pension Plan":	154,000
<i>The Total Premium-Bribe:</i>	<u>\$600,000</u>

Throughout the lengthy De Witt-Alesch maneuvers, the wonder is not so much at the dishonesty and duplicity, but at the calloused candor of the details of the dishonesty, reduced to permanent record for all to read. The most notable record of all was a four-page letter—the *Bribery Letter*—from Burton Dull to Raymond Brown, November 19, 1969, spelling out precisely the exact terms of the Sale of Control. This damning document outlined (1) the Alesch "quid," (2) the De Witt "quo," and (3) tied the two together with a proximately causal "pro." The "quid pro quo" spelt Premium-Bribery.

In this single letter was a summary of all three segments of the total \$600,000 premium-bribe.

[T]he following will outline John's understanding of what will be expected from him and what in turn De Witt will do in consideration therefor:

[(1) *The "Sale" of the Agency:*] John will sell the Alesch Agency to De Witt for \$500,000.

[(2) *The "Pension Plan":*] It is understood also that the pension plan will be funded prior to the 1970 annual meeting: (1) a pension for John Alesch of \$600.00 per month for life and 10 years certain; (2) a pension for M. H. Tappan of \$400.00 per month for life and 10 years certain; and (3) a pension for all Directors of \$300.00 per year for life.

[(3) *The "Consultant's" Contract:*] Alesch will work for the Alesch Agency for a period of three years for \$1,000.00 per month. Also . . . either Le Mars or De Witt will furnish . . . an automobile and operating expenses therefor.

The above is all subject to the election of Directors approved by De Witt.

—The Dull-Brown Bribery Letter, Exhibit 4.

Pursuant to the unfailing urge to reduce all to permanent record, De Witt promptly answered the Bribery Letter: "Our Executive Committee are in complete agreement with the proposal as outlined in your letter." (Exhibit 3.) The deal was sealed.

Although the premium-bribe was hidden under various guises—sale price, fees, pensions—the overall purpose was the same: to induce the Alesch Group to hand over Le Mars to De Witt without the embarrassing knowledge or consent of the policyholder owners. An open and honest election would be dangerous. An open and honest election *plus* disclosure of the \$600,000 would be disastrous.

I have discussed with John the mechanics of the annual meeting and it is my suggestion that we hold the present annual meeting as though no change were being made and then, following this, calling a meeting of the Board and accepting the resignations of those we desire to accept [and] appoint the succeeding Directors in accordance with our hopes.

This, in my opinion, will cause less confusion and allow us to make the desired changes with the least amount of objections.

—Burton Dull to Raymond Brown, Exhibit 39.

1. *The "Sale" of the Agency: \$400,000*

A. There would have been no value in De Witt having any interest in the Alesch Agency . . . unless they were in control of the Le Mars Mutual.

—Lorne R. Worthington, Insurance Commissioner, Deposition at 42.

All the De Witt-Alesch attempts to camouflage the premium-bribe were childish primitive. But the Agency-sale gambit was the most artless.

The Five Alesches were the sole owners, or seemingly so, of the Alesch Agency, on its face absolutely unrelated to Le Mars, beyond the fortuity of its location in the Le Mars Home Office. This little "pup" Alesch and Dull chose as the secret vehicle for passing some \$400,000 of premium-bribe. The Agency was worthless to anyone except John Alesch, or someone else able to use it as a front for stealing Le Mars business. Why did Insurance Commissioner Worthington say the Alesch Agency was worthless?

*Alesch Agency: A Pawn*

This particular transaction cannot be viewed as a normal insurance agency acquisition.

—David Bakst, Insurance Expert,  
Transcript at 1464.

The Alesch Agency had been used for years by John Alesch to funnel Home Office business to himself personally. Exhibit 707 tells the tale. The total commission income generated by the Agency for 1969 was \$36,800. Of that, some \$17,800 represented income on business placed by the Agency with Le Mars itself. Another \$8,200 came from policies Le Mars itself carried on Le Mars' new building, automobiles, and employees. (Transcript at 623.) After all, John Alesch, Le Mars executive, would choose John Alesch, insurance agent, to write any insurance Le Mars itself needed.

No seer need predict what would happen to this \$26,000 in business (of the total \$36,800) when a competitor took over the Agency. Le Mars would throw the Agency out of its headquarters, direct customers to another agent, place its own coverage elsewhere. Never would Le Mars let commission income flow to competitor De Witt. Without a covenant not to compete by Le Mars—and there was no covenant—the Agency would be denuded overnight. With only \$10,000 in independent commissions left, what then?

*Alesch Agency: A Kept Woman*

The operation in Le Mars should have been a little less than 50 percent [of commission income] in terms of its expense.

—David Bakst, Insurance Expert,  
Transcript at 1526.

With income reduced overnight, with the Agency out on the street, whence the normal Operating Expenses? No longer will Le Mars supply free telephone, utilities, clerical help, office space, whatever. But even that is not all. John Alesch will be gone. Or if retained, retained at \$12,000 per annum. Whence the \$12,000? Worthington, Bakst—any expert—could only conclude: the Agency was worthless, under any normal conditions.

With a worthless Agency, the calculation of the premium-bribe is effortless. The Agency had \$100,000 in cash on hand, its total value. The Five Alesches got \$500,000. The differential: \$400,000.

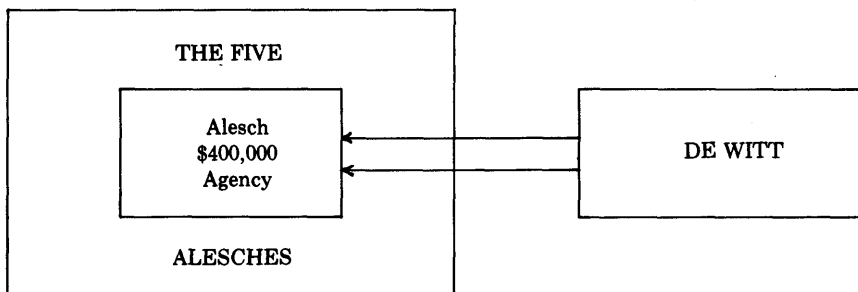
*The Quid Pro Quo*

Q. [T]he \$500,000 wouldn't be paid unless there was the replacement of the Board of Directors of Le Mars?

A. Well, the two transactions were tied together, all of them. There is no question about that.

—Burton Dull, Deposition at 40.

Again guilelessly, the *Agency-sale Agreement to Sell Stock*, drawn by Burton Dull, was not a simple contract of sale, but incorporated quite incredibly the baldest stipulation: "This agreement shall not become effective unless and until all of the present Directors of the Le Mars Mutual have submitted their resignations and qualified successors, as designated by [De Witt], have been qualified as Directors of the Le Mars Mutual." (Agreement to Sell Stock, Alesches and De Witt, Exhibit A, 3, 4.) Here again, conveniently, remarkably, was the proximate causal connection between the passage of the \$400,000 premium-bribe and the Sale of Control. The total absence of any other connection between the Agency sale and the Board election drew blatant attention to the Premium-Bribery.



### *The Denouement*

Burton [Dull] said it was your intent to have the meeting of the Alesch Agency on April 21, and turn the stock over to us at that time, so I will bring the certified check with me. [I]n turning over control of Le Mars Mutual on April 21, it would only naturally follow that the complete transaction including the Alesch Agency would have to be made on the same date.

—Raymond Brown to John Alesch,  
Exhibit 41.

Thus on April 21, 1970, the \$400,000 in premium-bribe passed, and De Witt took over the Le Mars Board, manned predictably by the omnipresent Executive Committee. Conveniently, John Alesch and Burton Dull also sat on the new Board. Thus did the first of the three segments pass. Note: This \$400,000 from De Witt went exclusively to the Five Alesches. The others were to receive theirs in more direct ways.

### *Epilogue*

In the early days after the De Witt takeover (before he was treated so shabbily) old John Alesch was most solicitous in his thoughtfulness of De Witt (and of himself, incidentally). He was justly concerned lest the Iowa Insurance Department uncover the premium-bribe. His fatherly suggestion: "You might want to give some thought to building up the value of the Alesch Agency and thus when you are audited by the Insurance Department in three years you would have a strong argument with the Department as to the value of Alesch Agency." (John Alesch to Raymond Brown, Exhibit 63.) John Alesch must have been gratified. De Witt heeded his word: "We will want to try to build up the value of this Agency to increase the market value as we will have to show it in our annual Statements." (Raymond Brown to John Alesch, Exhibit 64.)

2. The "Consultant's" Contract: \$46,000

Q. And it was the Executive Committee of Le Mars then that was working through the Alesch agency to manage Le Mars?

A. Well, the Executive Committee of De Witt, too.

Q. They were substantially the same people?

A. Yes.

—Raymond Brown, Deposition at 120.

For the second segment, De Witt decided that this time John Alesch would be the lone recipient. And the "pup corporation could be used" again as the conduit.

Remember that now the Alesch Agency was wholly owned by De Witt. The Alesch Agency was De Witt. This was post-April 21, 1970. With this setting, any unearned dollars passing to John Alesch from the Alesch Agency would in effect be extra bribe dollars from De Witt to John Alesch.

How, then, to use the "pup corporation" to pass the dollars? The answer was ready. The Alesch Agency was now owned completely by De Witt. So if old John Alesch was a "consultant *sine cura*," any dollars paid would be De Witt dollars and hence pure premium-bribe. The result was the "Consultant's" Contract.

WHEREAS the services and advice of John H. Alesch are needed for the Alesch Agency and the Le Mars Mutual:

John H. Alesch does hereby agree to act as a consultant and adviser to employees designated by De Witt to succeed him. Mr. Alesch's responsibilities will be only as consultant and adviser to these persons.

The Alesch Agency agrees to pay John H. Alesch \$1,000 per month for the services, advice and consultation, to furnish an automobile and to pay all the expenses for said automobile.

—John Alesch and Alesch Agency, Consultant's Contract, Exhibit A.

In the years before his death, \$36,000 for "advice" and a minimum \$10,000 in free automobile passed to John Alesch to augment the basic premium-bribe of \$400,000. The money was pleasant, but John Alesch was accustomed to work for his pay, and more to the point, to run the show. It hurt his pride deeply to be shunted out of his job. Perhaps the indignity was not worth the \$46,000.

I myself have felt this pressure to no end, and will advise that this was most of my trouble in my recent illness. [I]t does cause many heartaches to Alice and myself. Am sure that you

too would feel badly after so many years of hard work with De Witt if you were left in the cold as we have been treated.

I am at a loss as to know just what is expected of me, since I am not advised or asked of any changes.

—John Alesch to Raymond Brown, Exhibit 95.

The terms of the deal were clear: John Alesch was to do nothing to earn his \$46,000, except hand over Le Mars. Not even advise. Or be consulted.

[A]pparently you feel you are being put out of your office against your wish. We had no intent of forcing you out of your office if you wanted to keep it. We understood you only wanted a desk available when you occasionally would come to the office.

We want your services continued in an advisory capacity as before if your health permits. We felt that John Breese should assume full responsibility for the operation of the Company.

—De Witt to John Alesch, Exhibit 93.

And John Breese was a De Witt man, on a full salary of \$15,000, paid by Le Mars to De Witt. John Alesch had no duties, and he hated the whole deal.

Again conveniently and remarkably, the same deftless approach (1) tied the "Consultant's" Contract to the "Sale" of the Agency and (2) then connected both causally to the Sale of Control. The "Consultant's" Contract went on to emphasize that John Alesch's duties—"only as a consultant" to De Witt people—were "part of the consideration of: (1) this Consultant's Contract, and (2) the Sales Agreement between the owners of the stock of the Alesch Agency and De Witt." (John Alesch and Alesch Agency, Consultant's Contract, Exhibit A.) Thus did De Witt add \$46,000, to increase the Alesch bribe to \$446,000, all with the continuing blessing of all parties.

### 3. *The "Pension Plan": \$154,000*

I never knew retiring directors were to get a pension. I don't know who voted to get a pension. I wouldn't have voted to approve it. I have no recollection of a pension discussed at a board meeting.

—Clyde Eastman, Le Mars Director,  
Deposition at 40, 45.

For the third segment of the premium-bribe De Witt decided on a naive subterfuge, and this time each and every member of the Alesch Group was to be included, except the three Alesch daughters who had already gotten theirs.

Up until the pivotal April 21, 1970, the directors of Le Mars had never enjoyed any pension of any kind. But late in 1969 the Alesch search for guises for the premium-bribe produced a ready device. Why not fund a bountiful "pension plan" for all? How simple a way to pass premium-bribe dollars from De Witt to the "resigning" Board to assure the "resignations" with a minimum of fuss, and recalcitrancy.

In all, De Witt agreed to \$154,131.53 in a one-shot, single-premium payment to fund generous pensions all around: (1) Old John Alesch was to get \$600 a month for life or ten years certain; the cost—\$69,011; (2) the Le Mars president, Milton Tappan, long retired in Lauderdale, \$400 a month for life or ten years certain; the cost—\$51,004; (3) the ten "lesser parties" on the Board, \$300 annually; the cost—\$34,116.53. The total outlay: \$154,131.53, again with the continuing blessing of all parties. The testimony of J.D. Hattam, Insurance Auditor, Arthur Young & Company, details the names and numbers. (Transcript at 259-63.) Since none of this \$154,000 was a valid debt, since no pensions had hitherto ever been funded, the full amount was pure Premium-Bribery.

Thus De Witt bought assurance that the lesser members of the Alesch Group would not upset the applecart at the last minute.

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Under whatever guise, the total \$600,000 was a crass premium-bribe passing from De Witt to the Alesch Group for the illicit Sale of Control of Le Mars to De Witt, and always abetted by the Smith Group.

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—Burton Dull—

Q. Over these years since 1958 when Mr. Dull has been on a retainer, did he also charge for work not on retainer?

A. The agreement was that the only time there'd be an additional charge is if the Dull Law Firm represented us in a suit.

—Melvin Gearke, Le Mars Officer,  
Director, Transcript at 771.

Burton Dull's singular role throughout the Premium-Bribery negotiations—and afterwards—demands special attention. Burton Dull spanned the days of John Alesch, with the Premium-Bribery, the Looting, and the Embezzlement, on through the Twice-Stolen Agency and down to the very present. During all



this time, Burton Dull was on a set retainer as Le Mars counsel. After the De Witt takeover he was also a director. As counsel and director, Dull was the Le Mars liaison with De Witt in all the malefactions, and he was paid well for his work. "I found out later [Burton Dull] was in back of all these contracts." (Clyde Eastman, Le Mars Director, Deposition at 59.)

Burton Dull and John Alesch began the negotiations for the Sale-of-Control premium-bribe as early as mid-1969. The correspondence and meetings with the Employers Mutual were abortive. But the consummation meeting among Dull, Alesch, and Raymond Brown, De Witt counsel, firmed up the total \$600,000 premium-bribe per the Dull-Brown Bribery Letter.

What remuneration did Burton Dull receive for his years of "services," first to Alesch alone, then to Alesch and De Witt together, and finally to De Witt alone? The "remuneration" came from Le Mars, always from Le Mars, since Le Mars paid Burton Dull from beginning to end.

#### *Premium-Bribery Remuneration*

A. This \$10,000 was entirely for payment [by Le Mars] of past services.

Q. So by past services you mean the consultation with the Insurance Department and the preparation of the [Agency-sale] contract and other [premium-bribe] negotiations that took place?

A. Yes. The amount, as I recall, had been suggested originally by Mr. Alesch and then we did discuss it with Mr. Dull as to whether this amount was agreeable with him.

—Raymond Brown, Transcript at 397-98.

Burton Dull's regular retainer took care of most of his Premium-Bribery negotiations and the work on the Twice-Stolen Agency, but John Alesch had promised a bonus for drawing up the Premium-Bribery Agency-sale contract and the actual closing of the deal. This was the \$10,000 approved by Raymond Brown and noted in the Special Report of Arthur Young & Company (Exhibit 508, III).

But Burton Dull was to receive much more than a mere \$10,000 for the betrayal of Le Mars.

#### *Directorship and Retainer*

Q. Did you know that Mr. Dull was going to be named

a director of Le Mars at the time this transfer took place?

A. No, of course not. I didn't know anything about this Dull that I heard so much about. Except I found out later that he was the one that was in back of all these contracts and stuff. I hadn't even heard of him.

Q. Did you know that Mr. Dull was going to get his retainer increased from \$600 a month to \$1,000 a month as soon as the transfer took place?

A. I should say not. I should say not. I didn't know he was mixed up in this deal like he was, but it seems like he was.

—Clyde Eastman, Le Mars Director,  
Deposition at 58-59.

The intriguing Brown Doodle Notes (Exhibit 236(7)) confirmed in detail that Mr. Dull had in fact bargained with De Witt over his reward for his role in the Sale of Control, and for his liaison work inside Le Mars after the takeover. Brown's Doodle Notes indicated that Dull wanted \$1,500 a month. The \$1,000-a-month retainer—total \$87,000 to date—was the negotiated result. This \$87,000 covered all Dull's "services" to De Witt during and after the Sale of Control. Which Le Mars dutifully paid. The new \$1,000-per-month retainer began on the key date of April 21, 1970. The Special Report of Arthur Young & Company carries the statistics. (Exhibit 508, III.) What Burton Dull received in the years before the takeover remains to be calculated.

### *B. The Looting*

We don't intend to milk [Le Mars] for at least five years.

—Carl Smith, Executive Committee, to  
Russell W. Sandy, Le Mars Supervisor,  
Deposition at 48.

Burton Dull was correct in his remark at the outset to Raymond Brown that "this venture can and will be advantageous and profitable to all parties concerned." De Witt did not wait five years to prove him right.

On the crucial date, April 21, 1970, De Witt took control of Le Mars. From this point forward, with calculation and design, De Witt milked Le Mars systematically over the succeeding seven years. As with the Premium-Bribery, the direct Looting took on various guises: *The Management Contract*—\$190,000; *Fabricated*

*Expenses*—\$103,000; *Coerced Expenses*—\$449,000. (Exhibit 508.)

A warning is in order. Although the Looting was effected in two stages, first by "contract," second without contract, the pattern was continuous from April 21, 1970, to mid-1977, and was accomplished by the same stratagem: forcing Le Mars to purchase multifarious "services" from De Witt.

### *The Recoupment Letter*

I think a Director can adequately serve two different masters.

—William Couch, Executive Committee,  
Deposition at 67.

I see no problem in representing both sides.

—George Howes, Executive Committee,  
Deposition at 52.

I did not see anything inherently contradictory in my position of President of both [De Witt and Le Mars].

—Carman Smith, Executive Committee,  
Deposition at 50.

Perhaps the second most brazen De Witt-Alesch document was the celebrated Dull-Brown *Recoupment Letter*. First, in the Bribery Letter, Dull and Brown had spelled out for all to read the exact terms of the De Witt Premium-Bribery. Now, in a second gift to posterity, the coldly calculated intent of the parties was again reduced to permanent record for all to read. The Recoupment Letter obligingly combined (1) an avowed intent to loot with (2) an open admission of long-term planning and anxious anticipation of the spoils:

I have not and will not attempt to prepare the agreement between the Alesch Agency and Le Mars until after we have had an opportunity of discussing this matter further. The provisions of this contract, of course, will be the means of [De Witt's] method of recouping its payment to the owners of the stock of the Alesch Agency.

. . . It appears to me that everything is shaping up just as we anticipated and I am sure that this venture can and will be advantageous and profitable to all parties concerned.

—The Dull-Brown Recoupment Letter, Exhibit 19A.

Special attention should be paid to this Recoupment Letter of Burton Dull to Raymond Brown. These two had put the deal together for De Witt. A truism: A premium-bribe is never paid

without recoupment in mind. De Witt did not pass \$600,000 in premium-bribe money without larceny at heart. This Recoupment Letter identifies the brand of larceny: Management "Services."

1. *The Management Contract: \$190,000*

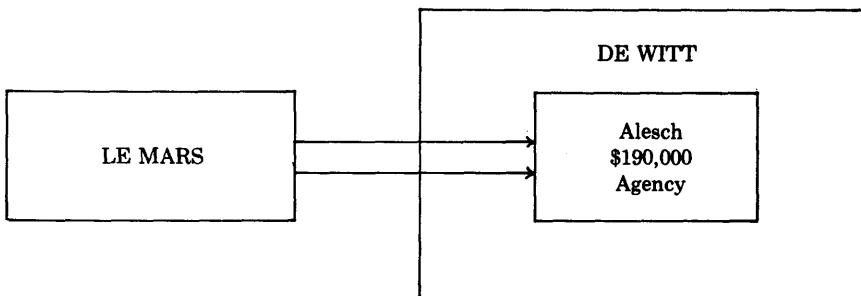
To my knowledge, nobody represented Le Mars in purchasing the Management Services from De Witt through the Alesch Agency.

—Carl Smith, Executive Committee,  
Deposition at 38.

When the Management Contract was negotiated, there wasn't anyone representing Le Mars.

—Carman Smith, Executive Committee,  
Deposition at 52.

On that same April 21, 1970, the little Alesch Agency became the wholly owned subsidiary of De Witt. Any monies flowing into the coffers of "this pup corporation" now flowed necessarily *into* the coffers of De Witt. This little pup therefore could now serve a third purpose. First, it had been the conduit for \$400,000 of the premium-bribe passing *from* De Witt to the Alesches. Next, it carried De Witt dollars in premium-bribe from De Witt to John Alesch for "Consultation" fees. Now, it was to be the conduit *into* De Witt for a long series of false management fees flowing from Le Mars. The flow was reversed. The total: \$190,000, under the "contract," April, 1970, to the end of 1973.



*Pooh Bah*

Q. And it was the Executive Committee of Le Mars then that was working through the Alesch Agency to manage Le Mars?

A. Well, the Executive Committee of De Witt too.

Q. They were substantially the same people?

A. Yes.

—Raymond Brown, Executive Committee,  
Deposition at 120.

Note well: after April 21, 1970, the Executive Committee controlled all three boards, De Witt, Le Mars, the Alesch Agency.

<i>De Witt</i>	<i>Le Mars</i>	<i>Alesch Agency</i>
Carl Smith	Carl Smith	Carl Smith
Raymond Brown	Raymond Brown	Raymond Brown
William Couch	William Couch	William Couch
Carman Smith	Carman Smith	Carman Smith
George Howes	George Howes	George Howes
John Wilkinson	John Wilkinson	John Alesch
J. Ray Judge	John Howes	John Breese
D. M. Molyneaux	John Alesch	
W. L. Rutenbeck	Burton Dull	
	Melvin Gearke	

—Exhibit 522.

The upshot: The Executive Committee (as De Witt) suggested to the Executive Committee (as Alesch Agency) that the Executive Committee (as Alesch Agency) suggest to the Executive Committee (as Le Mars) that perhaps Le Mars might retain Alesch Agency to manage Le Mars. No matter that Le Mars was already being ably managed by paid employees of Le Mars. No matter further that “substantially the same people” were already being amply compensated by Le Mars. If Pooh Bah could do it, why not the Executive Committee? The result? A *Management Contract* between Le Mars and the Alesch Agency:

WHEREAS Le Mars Mutual is in need of trained personnel to manage their complete operation: The Alesch Agency agrees to furnish such personnel and Le Mars Mutual agrees to pay the Alesch Agency \$2,500.00 per month for these services.

It is agreed that the Alesch Agency will furnish the services of John Alesch to carry out this management contract.

—Management Contract, Exhibit 20.

This Management Contract was signed for Le Mars by Raymond Brown of the Executive Committee, and for the Alesch Agency by William Couch of the Executive Committee who could “adequately serve two different masters.”

Throughout the entire term of this Management Contract, the Alesch Agency was a total sham. The Alesch Agency had no life of its own, but was staffed completely by Le Mars employees already fully paid by Le Mars. Here was double compensation.

Payment once by Le Mars to the individual employees. Payment twice by Le Mars to De Witt through the conduit of the Alesch Agency. John Alesch was right: "[T]his pup corporation could be used for some other things in the business between the two companies [Le Mars and De Witt]."

Through deposition after deposition of De Witt insider after De Witt insider, it became embarrassingly, and culpably, clear that Le Mars was the same after the takeover as before. The same people continued to man Le Mars. Le Mars was the same old Le Mars. But now suddenly on April 21, 1970, Le Mars needed all kinds of help—some \$190,000 in help under a Management Contract. (And \$552,000 worth later without it.)

There was no change in personnel of Le Mars after the 21st of April, 1970.

—William Couch, Executive Committee, Deposition at 47.

I don't recall any change in personnel of Le Mars on the 20th day of April, 1970, as compared to the personnel that were employed on April 21, 1970, or April 22, 1970.

—Carman Smith, Executive Committee, Deposition at 24, 29.

Q. [I]f on April 22, 1970, Le Mars has retained John Alesch as chief executive officer and chairman of the board, why would they pay the Alesch Agency for his services?

A. I don't know that I can adequately answer that question.

—Carman Smith, Executive Committee, Deposition at 29.

Q. And in your opinion, did John Breese [on full-time, \$15,000 Le Mars salary] assume shortly after April, 1970, the overall management of Le Mars?

A. He did, with the help of the Executive Committee.

—Carl Smith, Executive Committee, Deposition at 32.

### *The Clandestine Contract*

Q. I show you the Management Contract between Le Mars Mutual and the Alesch Agency.

A. I have never seen that before. I was not aware the Le Mars Mutual was paying [De Witt] considerable sums of money on a yearly basis when I resigned as a Director [on July 1, 1976]. I don't think I missed any Board meetings [in 14 years].

—J. Ray Judge, De Witt Director,  
Deposition at 13-14.

The Executive Committee did not want its looting known, even to some of its own Board. The Executive Committee felt guilty enough without facing the "outside" De Witt directors. J.

Ray Judge was associated with De Witt for fifty years, knew Carl Smith, his brother, his grandfather, was a director for 14 years, missed no Board meetings to July 1, 1976. Yet the entire deal was concealed from him.

Thus did De Witt "recoup" from the Le Mars treasury \$190,000 of the original premium-bribe paid "to the owners of the stock of Alesch, Inc."

## 2. *Fabricated Expenses: \$103,000*

Q. I think you've already testified you were an employee of Le Mars all those years, were you not?

A. Right.

Q. When the Le Mars Board of Directors decided to achieve a more favorable mix of business, would you tell the Court what personnel achieved the results, to your knowledge?

A. It would be the [Le Mars] in-house underwriters and fieldmen.

—Donald Coats, Transcript at 1905.

Q. [A]bout the only time you see the [De Witt] Board Members is at the annual meeting?

A. Yes.

—Donald Coats, Transcript at 990.

But in mid-1973 the Insurance Department unoblingly began to meddle in the matter. The result: The Department felt constrained to suggest (as Richard Baldwin of the Department put it (Deposition at 43)) "that Le Mars and Alesch abrogate this agreement."

(Dolorous Interjection: The end of the Management Contract saw the end of the personal fees collected by the Executive Committee. The cessation of false "services" meant the cessation of false fees. (Exhibit 426, Alesch, Inc. B.S., 12-31-74.))

With the mandated end of the Management Contract, what to do? The answer: a second gambit to "recoup" their "payment to the owners of the stock of Alesch, Inc." With this new ploy, the Executive Committee (as De Witt) whispered to the Executive Committee (as Le Mars) that Le Mars might now be interested in employing De Witt directly (and thus succeed the Alesch Agency) for those manifold "services" that Le Mars had hitherto successfully performed itself.

Again, expectably, the Executive Committee (as Le Mars) concurred completely with the Executive Committee (as De

Witt) and contract or no, De Witt milked Le Mars of an additional \$103,000.

Nothing thus far was quite so bald as this \$103,000. Recall: The Executive Committee itself never even graced the scene at Le Mars. All the management of Le Mars was done by Le Mars at Le Mars. Yet the Executive Committee of De Witt in De Witt billed Le Mars \$103,000 for "administration fees" *by the Executive Committee of De Witt itself*. De Witt admitted this openly in Interrogatory No. 11. And this \$103,000 only covered three years, 1974, 1975, 1976. How can a competitor charge a competitor for nonexistent "services"?

Thus during this entire period the very persons performing the De Witt "services" for Le Mars, and billed by De Witt against Le Mars, were fully paid employees of Le Mars. By this second gambit did De Witt "recoup" \$103,000 of their "payment to the owners of the stock of Alesch, Inc."

### 3. Coerced Expenses: \$449,000

Q. Who negotiated the contract between Le Mars and [De Witt] for the use of the computer?

A. There wasn't any contract provided.

—Raymond Brown, Executive Committee,  
Deposition at 116.

I see no problem in representing both sides as to how much is to be paid.

—George Howes, Executive Committee,  
Deposition at 52.

We never asked anyone at Le Mars whether they felt our charges were fair and reasonable.

—John Howes, De Witt Director,  
Deposition at 40.

But De Witt was not satisfied. De Witt's own Operating Expenses at home needed pruning. How better than forcing Le Mars to share the load? All across the board—stationery, computer, telephone—Le Mars could help bear the burden. And the thought was father to the deed: Some \$449,000 in "services"—coerced "services"—were imposed on Le Mars by De Witt, charged against Le Mars by De Witt, in the same three years, 1974, 1975, 1976, after the Insurance Department called a halt to the Management Contract. The Special Report of Arthur Young & Company (Exhibit 508, II) gives the breakdown through 1975. Le Mars Interrogatory No. 7 covers 1976.



And yet, all this time, as Melvin Gearke, longtime Le Mars general manager so bluntly put it:

A. The only thing [De Witt] does for us is furnish computers to kick out renewals that we used to do by manual typewriter.

They have nothing to do with underwriting at all.

Q. The complete and total underwriting is done in Le Mars?

A. Done in Le Mars, yes.

—Melvin Gearke, Le Mars Officer, Director,  
Deposition at 58.

In all, over seven years De Witt successfully extracted from Le Mars a total of \$742,000, without interest.

### C. *Embezzlement*

[T]he following will outline John's understanding of what will be expected from him and what in turn De Witt will do in consideration [for control].

—The Dull-Brown Bribery Letter,  
Exhibit 4.

At the end of the protracted bribe negotiations between De Witt and the Alesch Group, De Witt finally committed itself to pass \$600,000 to buy the Board of Le Mars. The exact terms of the bribery were detailed in the infamous November 19, 1969, Bribery Letter: Alesch would deliver the Board if, but only if, De Witt remitted \$600,000.

Once thus committed, the "bribed" Alesch had no trouble delivering the Board. All dutifully resigned. De Witt minions moved in. This was "what was expected from" Alesch.

But "briber" De Witt had pledged \$600,000. This was "what in turn" De Witt would do to buy the Board. And \$600,000 is a lot of money. Whence De Witt's "consideration" for the Sale of Control?

Now, in your ordinary garden-variety bribery, the briber usually reaches into his own pocket, takes out his own dollars, pays off the bribed, and takes over. Thus did De Witt, but only up to a point. When De Witt paid the Alesches the \$400,000 segment under the Agency-sale guise, and again with \$21,400 of the \$46,000 "Consultant" segment, the bribe dollars did come from the De Witt pocket. Thus far, garden-variety bribery.

But at that point De Witt either ran out of its own dollars, or became inspired, or whatever. In any event, the garden-variety bribery ended. Henceforth, De Witt would steal the bribe dollars directly from the Le Mars till, and then pass them on to the Alesches.

*Pension Payments.* Thus inspired, De Witt first embezzled from Le Mars \$154,000 in cash which it paid over for the sole benefit of the Alesch Group under the third, "Pension-Plan" segment of the bribe. This cash was readily traced by J.D. Hattam, Insurance Auditor, Arthur Young & Company, (Transcript at 260-61) to The Manufacturers Life Insurance Company of Toronto, Ontario, Canada: amount \$154,131.53, check #80337, dated April 20, 1970 (Exhibit 604). Thus, instead of paying this \$154,000 segment of the premium-bribe itself, De Witt stole the dollars from Le Mars and avoided the circuitry of later recoupment.

*"Consultant's" Contract.* In this segment of the premium-bribe agreement, De Witt had agreed to pass John Alesch \$36,000. After De Witt had paid only \$21,400 through its Alesch Agency, it decided to steal the rest from Le Mars. For the last years before his death, John Alesch got \$14,600 of his premium-bribe dollars from the Le Mars till. The Special Report of Arthur Young & Company carries the figures. (Exhibit 508, IV).

*The Automobile.* De Witt had included in the premium-bribe a free car, and upkeep. Here, too, De Witt decided to steal the \$10,000, or whatever, from Le Mars and thus satisfy its premium-bribe obligations. By a convenient oversight De Witt simply let the cost of the car and its daily upkeep come from the Le Mars treasury. (Exhibit, Le Mars Interrogatories.) To this day De Witt has never restored this outlay of \$10,000 or more, thus embezzled from Le Mars.

In all, therefore, De Witt embezzled \$178,600 from Le Mars, and used the dollars to bribe the Alesch Group. "Embezzled," because De Witt had full control of Le Mars and, more to the point, fully controlled and engineered the two transactions. Most importantly, both De Witt and the Alesch Group had long since negotiated to this \$178,600 in the "De Witt consideration" for buying the Le Mars Board. The Alesch Group delivered the Board, De Witt delivered the bribe dollars, of which \$178,600 was embezzled from Le Mars.

#### *D. The Twice-Stolen Agency*

I saw no conflict between John Alesch's personal interests and the corporate interests of Le Mars in having the Alesch Agency in the offices of Le Mars.

—Carman Smith, Executive Committee,  
Deposition at 21.

[De Witt] bought the Alesch Agency to increase our business in Northwest Iowa.

—Raymond Brown, Executive Committee,  
Deposition at 26.

That little "pup," the Alesch Agency, was the most maltreated being in this whole sordid tale, and its maltreatment was not only through Premium-Bribery and Looting. The history began with the Five Alesches and continued after April 21, 1970, with De Witt.

### 1. *The Five Alesches*

Q. Why was Alesch Agency given 700 square feet in the new building, utility-free space?

A. The Agency had always been with the Company. It always, even though it was separate, it had always been in the same building.

—Melvin Gearke, Le Mars Officer,  
Director, Deposition at 84.

The early history of the Alesch Agency tells the story well. From the day (and probably before) that John Alesch bought the Alesch Agency from the Le Mars founder sometime before 1950, every bit of the Agency, both *Assets* and *Income*, belonged wholly to Le Mars. From the outset the Alesch Agency never had a life of its own. Le Mars supplied its *Financing, Management, Overhead, Image and Goodwill*. Le Mars in truth owned the Alesch Agency, until the Five Alesches stole it, and all its income.

### *Financing*

We each paid \$50 a share for our stock in Alesch Agency.

—Alice Alesch, Deposition at 12.

In the years after its inception, and after John Alesch received it from the Le Mars founder, the Agency had been unincorporated. But in 1962 it became Alesch, Inc., and the Five Alesches purchased it for a grand total of \$15,000. (The very Agency for which they received \$516,000 some eight remarkable years later.) This \$15,000 valuation came more than a decade after John Alesch took over. And why was its capitalization so low? Because every cent of its *Financing* came from Le Mars. When a corporation does not need to pay for salaries, furniture, wages, utilities, overhead, or anything, self-financing is an effortless chore. Since John Alesch controlled Le Mars (as the founder had before him), Le Mars most graciously supplied John Alesch

(and the founder before him) with all the necessities of corporate life, free for the taking. From its first breath sometime before 1950, the Alesch Agency was the legitimate offspring of Le Mars. Every bit of its being belonged to Le Mars.

### *Management*

And Mr. Alesch ran his Agency and also managed the company.

—Melvin Gearke, Le Mars Officer,  
Director, Deposition at 84.

From the very first day that John Alesch took over the Agency he was a full-time employee of Le Mars, receiving a full-time salary. In 1970—the year the Five Alesches “sold” the Agency—John Alesch received \$17,400 as the chief executive officer of Le Mars. His sole obligation was to manage Le Mars. Yet at the same time, on Le Mars time, at Le Mars expense, as the top officer of Le Mars, John Alesch was managing and building an insurance agency. The Agency’s informative Federal Tax Return revealed that he was the while working 100 percent of his time for Alesch Agency—no mean feat—at a salary of \$9,000 in 1967, 1968 and \$12,000 in 1969. (Exhibit 509-11.)

Thus, over the formative years of its life, this offspring of Le Mars was being nurtured and protected, guided and guarded, by Le Mars itself, in the person of its chief executive officer, on company time, on company salary, at company expense.

### *Overhead*

Q. To your personal knowledge, who handled the State reports on accidents for the Alesch Agency?

A. The Claims Department of Le Mars, Le Mars Mutual.

—Donald Coats, Transcript at 981.

[T]here is reserved to John Alesch the right to use 700 square feet in the [Le Mars] building for the real estate and insurance business of John Alesch.

—Deed of Land to Le Mars by John Alesch.

Nothing went into the formation and growth of the Alesch Agency that did not come from Le Mars. For all the years the Five Alesches “owned” the Agency, it lived as the ward of Le Mars. With the lone exception of a monthly rental—at one period it was only \$100 a month—every bit of overhead, the heat, the light, the telephone, the desks, the typewriters, whatever, were contribu-

tions of Le Mars to the support of its offspring. These monthly, yearly, contributions enhanced the value of the Agency, and added appreciably to the monthly, yearly income. Le Mars owned the Alesch Agency. Add to this the invaluable clerical help, both direct and the incalculable indirect, and the result is the same. None of the Alesch Agency belonged to the Five Alesches.

*Image and Goodwill*

I knew the Alesch Agency would sell Le Mars policies. I knew John would naturally get commissions on those policies.

—Clyde Eastman, Le Mars Director,  
Deposition at 50.

John Alesch was probably one of our larger agents.

—Melvin Gearke, Le Mars Officer,  
Director, Deposition at 86.

Clairvoyance is not needed to discern the reason for housing the Alesch Agency in the Le Mars headquarters. Le Mars is the pride of the region. And the Home Office itself does not sell policies. The agents do. But the many regional customers of Le Mars did not know this. Where to buy a policy then? Who better than a Le Mars-approved agent, approved by none other than the top Le Mars executive? One step across the hall—a change of hat. John Alesch sold another policy.

Nor was that all. The prestige of the Le Mars headquarters, the aura of the Le Mars highest officer, would aid sales inestimably. Would not, moreover, other agents butter their bread by referrals when the problems of coverage were too recondite? Or outside the letter of the permissible underwriting coverage?

Not only was the Agency the legitimate progeny of Le Mars, but the Agency used this birthright to the utmost. And this too was the just property of Le Mars itself.

Thus, every bit of its being, the entire Alesch Agency, from its initial Financing long before John Alesch, to the notable dollars spent in Management and office Overhead, to its Goodwill itself, all belonged to Le Mars. Nothing belonged to the Five Alesches. In one sad word, the Alesch Agency, its total assets and its income, had been surreptitiously and slowly stolen from Le Mars.

Over the twenty-plus years, John Alesch took home uncounted undeserved dollars in full-time salary, while working full-time for Le Mars. Over the same twenty-plus years, the Five

Alesches skimmed off annual dividends in an untold amount.

However so much its true asset value, that value certainly belongs to Le Mars. An accounting of the undeserved salary, and the equally undeserved dividends, must be added to this value, because Le Mars has a right to all returns from the Agency as well.

## 2. *The Second Stealing*

[De Witt] bought the Alesch Agency to increase our business in Northwest Iowa.

—Raymond Brown, Executive Committee,  
Deposition at 26.

De Witt has abused the Alesch Agency in many ways over the years. The maltreatment of the “pup” continued from April, 1970, to the present, again in a second “usurpation of a corporate opportunity.” De Witt in its turn also proceeded to steal the Alesch Agency.

Although never theirs to sell, the Alesches nonetheless had “sold” the Agency to De Witt. Assume, arguendo, that De Witt now had a legitimate investment (an assumption grounded on a second assumption: that the Alesches disgorge the De Witt investment to Le Mars), what now? How is De Witt to recoup its investment?

The baneful effects of the De Witt takeover of the Alesch Agency were threefold, all illicit: (1) the marked *Diversion* of Le Mars business to De Witt, (2) the illegal *Conversion* of Alesch Agency annual Income—rightly Le Mars’—to De Witt, and (3) the unjust *Appropriation* of the increment in Alesch Agency Asset value—rightly Le Mars’—to De Witt. These three illicities coalesced into the Second Stealing.

### *In the Enemy Camp*

From 1970 forward, the Alesch Agency sold policies of Le Mars and also sold policies for De Witt. I do not see any conflict.

—Carman Smith, Executive Committee,  
Deposition at 68.

The weakest part of our business was in Northwest Iowa.

—George Howes, Executive Committee,  
Deposition at 18.

We wanted the business from the Alesch Agency itself, which a good deal of it had been going into other insurance companies. So, we was interested in getting that business in De Witt.

—Raymond Brown, Executive Committee,  
Deposition at 26.

The Executive Committee could "not see any conflict" in planting a De Witt-owned, De Witt-controlled outpost in the center of enemy headquarters. Before April 1970, the considerable regional business at the Le Mars Home Office was routed across the hall to old John Alesch's personal pocket. Now the diversion continued, but the pocket now was De Witt's. But this was a diversion with a difference. True, John Alesch personally pocketed commissions that belonged to Le Mars, but at least John Alesch placed his policies with Le Mars. Le Mars lost the Alesch commissions, but kept the underwriting. Not so now with De Witt. "They said it would give De Witt more outlet for our insurance. The purchase of the Alesch Agency would allow us to expand in Northwest Iowa." (J. Ray Judge, De Witt Director, Deposition at 9.) Mr. Judge was right. Henceforward, the customer still stepped across the same hall. And Le Mars still lost the commissions. But now Le Mars lost the underwriting business as well, "the business from the Alesch Agency itself, which had been going into other insurance companies. So, we was interested in getting that business in De Witt." And that they did.

So successful was De Witt "in getting that business in De Witt," that the marked results appeared shortly. In the year 1970 the Alesch Agency had placed exactly zero business with De Witt. Not one policy. But by 1974 the entire picture had changed. The Agency billed over \$60,000 in premiums alone for policies placed with De Witt. In this short time, De Witt ranked second only to Le Mars in business written by the Agency. De Witt received more than double any other underwriter. Meanwhile, the placements by the Agency with Le Mars remained stagnant. (Exhibit 425(3).) De Witt indeed did succeed "in getting that business in De Witt."

Somewhere, somehow, the exact figures on the extent of the De Witt depredation will emerge. All that is patent now: De Witt stole untold Le Mars business after the De Witt takeover. (Moreover, be assured that the De Witt incursions on Le Mars business were not reserved exclusively to the Alesch Agency.)

*The Income Conversion*

I remember that the Alesch Agency was producing an annual net profit of somewhere around \$35,000.

—Raymond Brown, Executive Committee,  
Deposition at 29.

John Alesch was probably one of our larger agents.

—Melvin Gearke, Le Mars Officer,  
Director, Deposition at 86.

The theft by De Witt of Alesch Agency income from Le Mars followed the same *modus furandi* of John Alesch. The pattern was virtually identical. The Overhead, Management, Goodwill, all were the “gift” of Le Mars to De Witt. Le Mars produced the Agency income, all to the profit of De Witt.

*Overhead.* In the Agency’s Federal Tax Return for 1971, the first year after the takeover, De Witt again obligingly laid it all out on the record. The Alesch Agency showed no expenses whatsoever for rent, office space, utilities, telephone, or maintenance. No overhead charges at all. Thanks to Le Mars. Just as they had been for John Alesch, these contributions were an excellent augmentation to the income of the Agency, and De Witt. (Exhibits 512, 513, 424(10).)

But then came the year 1975, after De Witt in a surge of prudence (induced no doubt by the instant litigation) decided to lodge the Alesch Agency outside the Le Mars Home Office. The comparative Overhead is revealing.

	<u>1974</u>	<u>1975</u>
Telephone:	-0-	\$ 899.00
Utilities:	-0-	\$ 305.00
Repairs:	\$31.00	\$3,254.00
Office Supplies:	-0-	\$1,515.00

—Exhibit 427, Alesch, Inc.  
B.S., 12-31-75

The De Witt Income Statement had been enhanced appreciably over those years.

The fascinating interlude over the then rent-free status of the Agency in Le Mars headquarters is instinct with insights into the mentality of the Executive Committee and the extent to which Conflict of Interest permeated its life. At one point the De Witt Board found out that the Agency was living rent-free in the Le Mars Home Office: “I first became aware that the Alesch Agency was not paying any rent for office space in Le Mars, that information came out after the lawsuit came into being [May, 1973].”



(John Wilkinson, Outside De Witt Director, Deposition at 44.) But even then the Executive Committee simply could not bring itself to make Le Mars whole with reasonable rent. In an uncontrollable spasm of magnanimity the rent was set at \$150 per month. And who set the rent? The answer came from Carman Smith of the Executive Committee who did "not see any conflict" in the situation:

Q. Were you aware that for a period of time after April, 1970 that the Alesch Agency was not paying rent in the home offices of Le Mars?

A. I'm not sure I was aware of it then. I am now [1976].

Q. And who decided the amount of rent should be paid by the Alesch Agency to Le Mars?

A. I think the Executive Committee of De Witt probably was the determining factor on that, who decided.

—Carman Smith, Executive Committee, Deposition at 40.

After that the Agency Tax Return showed the \$150 per month—but nil else in Overhead.

The prudent move out of Le Mars headquarters saw the Rent jump to \$4,000 per year. (Exhibit 427.) *Res ipsa loquitur*.

*Management.* As in the days of John Alesch, so too in the days of De Witt, the management of the Alesch Agency was supplied exclusively by Le Mars. In the three years before his death but after the De Witt takeover, John Alesch, on a Le Mars salary, managed the Agency. And if John Alesch happened to be absent, who took over at the Alesch Agency? Another full-time Le Mars executive, John Breese, on a full-time \$15,000 Le Mars salary.

Q. Who operated Alesch Agency when your husband was in the hospital?

A. John Breese.

—Alice Alesch, Deposition at 21.

Breese was working for the Le Mars. I know he helped Alesch Agency a lot.

—Carl Smith, Executive Committee, Deposition at 25.

Q. Did the Alesch Agency pay Mr. Breese anything for the services he rendered?

A. No.

—Carman Smith, Executive Committee, Deposition at 39.

*Goodwill.* The Alesch Agency continued to bask in the sun of the Le Mars Home Office. Again the regional public had no idea of the true state of affairs. If an agency is housed in Le Mars headquarters, it must be owned by Le Mars. If one wants to

support home industry, how better than at Le Mars? Could anyone even conceive that Le Mars' arch competitor, De Witt, could own an agency in the Le Mars headquarters? Everything already said of the Alesches' theft of the Agency income is also pat for De Witt.

### *The Agency Increment*

I was interested in getting the Agency because I thought it was a great opportunity for us to secure business. We had very little business in Northwest Iowa.

—Carl Smith, Executive Committee,  
Deposition at 9.

As the days passed, the "usurpation of corporate business opportunity" continued apace, and the combined fruits of all De Witt's marauding became manifest. Not only did De Witt cash in on "a great opportunity for us to secure business" (ironic that the word—and concept—should be used so opportunely), but the little "pup" grew, too. The Le Mars input in dollars, in dollars of Overhead, Management, and Goodwill, in added dollars of business from Le Mars' "largest agent," increasingly paid off. In the five years after the takeover De Witt reported in its official Annual Statement to the Insurance Department that the little pup had grown to a net asset value of \$414,000 by 1975. By mid-1977, query.

Yet all of this appreciable increment, all of it except \$150 per month, is referable to the input of Le Mars.

In the end, then, De Witt owes Le Mars calculable sums for *Diversion* of Le Mars business to De Witt, *Conversion* of Alesch Agency income to De Witt, in commissions, salaries, dividends, and *Appropriation* of the increment in Alesch Agency asset value, still "owned" by De Witt.

Only a thorough Accounting can uncover all these substantial sums.

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For the most part, then, thus ends the tale of two cities. The intrigue, deception, chicane, are truly worthy of a Dickensian plot. It indeed was the worst of times for poor hapless Le Mars. It was the best of times for De Witt, the Alesch Group, and the Smith Group.

## PART TWO: THE LAW

## I. THE SALE OF CORPORATE CONTROL

The principle that a contract to resign a public office or to exert influence to secure the appointment of another is void against public policy has been too long established to require the citation of authority for its support . . . .<sup>2</sup>

Q. So actually, getting the designated Board of Directors was part and parcel of this contract?

A. There isn't any question that the overall agreement was all a part of one overall transaction.

—Burton Dull, Deposition at 71.

Mr. Berle was indeed right when he said that the "phenomenon of 'control' is perhaps the most important single fact in the American corporate system."<sup>3</sup> Equally important, moreover, is the law, and the philosophy underlying the law, governing that "control."

Understandably, the overall law of corporate control encompasses a broad field. Every action of the *contrôleur*—that topmost person in the corporate hierarchy—is regulated by the law of corporate control. Necessarily these actions span the entire spectrum of corporate activity.

And within this spectrum of the *contrôleur*'s manifold activities—and his corresponding obligations—the sale of his office for a price poses the most arresting challenge to control law. Sale-of-Control Premium-Bribery calls into play all the major principles of the philosophy of corporate control. Further, the overall philosophy finds its most impressive expression at that charged instant when corporate control is sold for a price. Around the Sale of Control, therefore, coalesce all the major concerns of this Brief.

The Le Mars Sale of Control will be approached from two aspects: *Premium-Bribery* and *Commercial Bribery*.

A. *Premium-Bribery*

A trustee may not make use of his relations as such for personal emolument. An agreement for a valuable consideration to abandon the trust or to transfer it to another is void.<sup>4</sup>

2. *Aughey v. Windrem*, 137 Iowa 315, 320, 114 N.W. 1047, 1049 (1908).

3. Berle, *supra* note 1, at 1212.

4. *Aughey v. Windrem*, 137 Iowa 315, 320, 114 N.W. 1047, 1049 (1908).

Q. [T]he \$500,000 wouldn't be paid unless there was the replacement of the Board of Directors of Le Mars?

A. Well, the two transactions were tied together, all of them. There is no question about that.

—Burton Dull, Deposition at 40.

The thesis set for present proof is succinct: (1) The \$600,000 premium-bribe passing from De Witt to the Alesch Group (2) to buy control of Le Mars (3) is intrinsically illegitimate, (4) must be disgorged by the Alesch Group and (5) paid over to the injured entity, Le Mars. Proof will be laid out in three parts: *The Law of Strict Trust*, *The Intrinsic Illegitimacy of the Premium-Bribe*, and *Disgorgement*.

### 1. *The Law of Strict Trust*

The authorities are agreed that the officers and directors of a company are trustees . . . in the transaction of the business and care of property of the corporation . . . <sup>5</sup>

These mutual insurance companies arose on the back of their founders.

—Milton Tappan, Le Mars Director,  
Deposition at 29.

From the day of its foundation in 1901, the German-American Insurance Company was under the absolute and untrammelled domination of its founder. A half-century later, this same company, now Le Mars, passed into the absolute and untrammelled control of the founder's successor, John Alesch. No proxy solicitation. No disclosure. Not even a quorum. The annual meeting was a travesty.

John Alesch was the unquestioned contrôleur of Le Mars. The policyholder owners never voted. And those who did vote were office employees, malleable friends, or Alesch relatives. So too with the Directors: they were officers, officers' wives, or cronies of John Alesch. Certainly no director questioned the Alesch word.

Q. Do you recall, Mr. Vander Meer, any specific occasion during the ten to fifteen years when you were on the Board of Le Mars when you took exception to any policy or recommendation made by John Alesch?

A. No, I don't recall that I did.

—Peter Vander Meer, Le Mars Director, Deposition at 21.

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5. Dawson v. National Life Ins. Co., 176 Iowa 362, 369, 157 N.W. 929, 931 (1916).

Do not be misled, however. This unassailable control of John Alesch was not a phenomenon peculiar to Le Mars. Rather, the very genius of the mutual company encourages, even mandates, this abuse of control by an omnipotent *contrôleur*. This is the curse of the mutual system. It is inherently defective.

### *Confidence-Reliance-Dependence*

The very selection for service is an expression of confidence, and the employment, the bestowal of power. The shareholder selects the director to serve him in caring for the corporate property. . . . Is he not thereby expressing his confidence? . . . He trusts all with the managing officers, and naturally relies on them in all matters touching his interest in its business and property.<sup>6</sup>

Q. As President, do you recall any times when you objected and told John Alesch?

A. No. He was a competent and able executive.

—Milton Tappan, Le Mars President,  
Director, Deposition at 22-23.

The Supreme Court of Iowa—and the same must be said of most jurisdictions—truly understands this most fundamental of all corporate-control principles. The concise enunciation by the *Dawson* court showed a remarkable grasp of the ultimate basis of corporate Strict Trust. As the Iowa court intimated, in constructing the bottommost foundation for the law of corporate control, one can go no deeper, become no more basic, than this: the helpless entity is nakedly dependent—its assets, its structure, its personnel, its policy—on the raw power of the *contrôleur*. In the *contrôleur* the owners have placed unquestioning confidence. On the *contrôleur*, complete reliance, willy-nilly.

And so it was with Le Mars. Assets, policy, personnel, everything, were totally dependent on the will of John Alesch. On him alone the policyholder owner “naturally relied.” Their “very selection” of John Alesch was “an expression of confidence.”

Finally and most important, both *confidence* and *reliance* are reducible to *dependence*. It is interesting that Webster gives two direct synonyms for *dependence*: “reliance” and “trust.” The note of *dependence* is the element most expressive of the true status of one who reposes confidence in another. A dependent person is subject to, in the power of, another. This depend-

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6. *Id.* at 376, 157 N.W. at 933.

ence is coterminous with the orbit of reliance or confidence. The dependence in the one finds the correlative independence in the other. . . .

No more ultimate constituent of the trust lies beyond or beneath this dependence.<sup>7</sup>

The extent to which the Supreme Court of Iowa intuited this ultimate concept is arresting:

The fiduciary relation may exist wherever special confidence is reposed, whether the relationship be that of blood, business, friendship or association, by one person in another when they are in a position to have and exercise or do have and exercise influence over each other. *Curtis v. Armagast*, 158 Iowa 507.<sup>8</sup>

In the case of *Le Mars*, this confidence, reliance, dependence, was total. In a word, *Le Mars* was in the complete custody of John Alesch.

### *The Custodial Concept of Corporate Control*

[The *contrôleur*] has custody only, not ownership. The corporation is merely entrusted to an office, not given to an individual. The custodian must guard, guide and nurture the corporation as if it were his own, with full knowledge that it belongs to another.<sup>9</sup>

The directors have the custody and control of the assets of the corporation for the benefit of those to whom they belong . . . .<sup>10</sup>

The nexus is immediate between the confidence, reliance, dependence, and the next logical development of the law of Strict Trust. The human mind moves inexorably from the total dependence of the corporation to the Custodial Concept of Corporate Control. Herein lies the first major trust concept.

In the theoretical—but very real—beginning of every corporation the shareholder owners in a deliberate appropriation entrust the corporate assets to the untrammelled dominion of that necessary top-level authority, the *contrôleur*. In acquiescing to this appropriation the *contrôleur* thereby assumes custody of the entity, with all its duties and rights. Technically, therefore,

7. Bayne, *Corporate Control as a Strict Trustee*, 53 GEO. L.J. 543, 557 (1965).

8. *Dawson v. National Life Ins. Co.*, 176 Iowa 362, 376-77, 157 N.W. 929, 933 (1916).

9. Bayne, *A Philosophy of Corporate Control*, 112 U. PA. L. REV. 22, 32 (1963).

10. *Hoyt v. Hampe*, 206 Iowa 206, 208, 214 N.W. 718, 720 (1927).

corporate control is a relation of total custody subsisting between the subjective term, the office of control, and the objective term, the corporate entity itself.<sup>11</sup>

With continuing remarkable insight, the Supreme Court of Iowa expressed this custodial concept in similar words:

The ordinary stockholder gives little or no attention to the details or control of corporate affairs. He trusts all with the managing officers, and naturally relies on them in all matters touching his interest in its business and property. . . . [P]ower akin to that of an attorney, priest, agent or copartner is conferred on the directors and officers by those selecting them to manage corporate affairs.<sup>12</sup>

And again, with even greater directness:

The directors are primarily trustees for the corporation and its stockholders, and it is their duty to manage the affairs of the corporation and administer its assets in accordance with the law and legal rights of all persons interested. . . . The directors have the custody and control of the assets of the corporation for the benefit of those to whom they belong . . . .<sup>13</sup>

From this foundation concept of custody the Iowa court moved effortlessly to the inescapable conclusion:

The fiduciary obligation is to the stockholders in a body. . . .

. . . . Whether the corporation be treated as an enlarged and amplified form of partnership, and the director as managing partner, or whether he is called an agent or trustee, elected by the stockholders to represent them in the management of the concern, he occupies a fiduciary position.<sup>14</sup>

Thus far—and they persist to the end—John Alesch, *contrôleur*, and Le Mars, helpless beneficiary, verify every element of the Custodial Concept of Corporate Control outlined by the Iowa court.

### *Strict Trust*

Since the scope of [the *contrôleur*'s] responsibility is coterminous with the extent of the custody, it follows

11. Bayne, *The Noninvestment Value of Control Stock*, 45 IND. L.J. 317, 333 (1970).

12. Dawson v. National Life Ins. Co., 176 Iowa 362, 376, 157 N.W. 929, 933 (1916).

13. Hoyt v. Hampe, 206 Iowa 206, 208, 214 N.W. 718, 720 (1927).

14. Dawson v. National Life Ins. Co., 176 Iowa 362, 376, 381, 157 N.W. 929, 933, 935 (1916).

that the responsibility of [the *contrôleur*] is total because the entire corporate entity has been entrusted to [the *contrôleur*.]<sup>15</sup>

Equity holds them strictly accountable as trustees.<sup>16</sup>

Nor did the Iowa court stop short with a watered-down definition of the "fiduciary duty" incumbent on the *contrôleur*. To the Iowa court the logical consequences of custody were the rigid stringencies of the Strict Trust. (And these stringencies include notably the Benefit-to-Beneficiary and No-Inquiry Rules.)

"The fact that he is a trustee for all is not to be perverted into holding that he is under no obligation to each. . . . That he is primarily trustee for the corporation is not intended to make the artificial entity a fetich to be worshipped in the sacrifice of those who in the last analysis are the real parties at interest."<sup>17</sup>

For a correct understanding of the Iowa embrace of Strict Trust, note that the court draws the understandable dichotomy between the *contrôleur*'s Strict-Trust obligation to the corporation itself, and his quasi-trust duty to the shareholder in the course of individual *contrôleur*-shareholder transactions. Thus, although the *contrôleur* is a strict trustee to the entity, to the private shareholder he is "[n]ot a strict trustee, since [the *contrôleur*] does not hold title to the shares, not even a strict trustee who is practically prohibited from dealing with his *cestui que trust*, but a quasi trustee as to the shareholder's interest in the shares."<sup>18</sup> Thus, when the Iowa court injects the qualifications "quasi trustee" into its definition, it intends only to qualify the Strict-Trust duty of the *contrôleur* to the individual shareholder, but not to the entity itself and its assets.

The Iowa court was hesitant to apply "strict trustee" to the limited dealings with the shareholder because of the absence of that supposed Strict-Trust requisite: possession of title. "Undoubtedly, he is not a trustee of the stockholder in the strict sense, for he does not have title to the latter's stock. His relation is that often denominated quasi trustee."<sup>19</sup> Thus, only in direct

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15. Bayne, *supra* note 9, at 33.

16. Holden v. Construction Mach. Co., 202 N.W.2d 348, 358 (Iowa 1972).

17. Dawson v. National Life Ins. Co., 176 Iowa 362, 379-80, 157 N.W. 929, 935 (1916) (quoting Oliver v. Oliver, 118 Ga. 362, 367, 45 S.E. 232, 233 (1903)).

18. *Id.* at 380, 157 N.W. at 935 (quoting Oliver v. Oliver, 118 Ga. 362, 367, 45 S.E. 232, 233-34 (1903)).

19. *Id.* at 378, 157 N.W. at 934.



dealings with the entity and its assets does Iowa hold the *contrôleur* to the full strictures of Strict Trust.

In later years this valid distinction occasionally becomes blurred. Sometimes the Iowa court uses "quasi trustee" when it means "strict trustee," and vice versa. Throughout this Brief, however, the sole concern is the *contrôleur*'s custody of the corporation. His dealings with individual shareholders never surface. Hence the "possession of title" to the shareholder's shares is of no matter. As to the *contrôleur*'s title to corporate assets: "[F]rom the custodial aspect, the formal passage of title means nil. The property tenure of the corporate [*contrôleur*] is fully tantamount to actual possession of title and could scarcely be more complete."<sup>20</sup> Clearly, the unfettered domination of the *contrôleur* would not be any less fettered by formal possession of the title to the assets. From a practical standpoint, the *contrôleur* has tantamount to title to the entity.

Iowa, therefore, embraces fully the Strict-Trust tradition, from beginning to present. In the 1972 decision in *Holden*, quoting the 1953 decision in *Bechtel*, the court employs the traditional Strict-Trust rule: "[D]irectors of a corporation are the agents of and act for it, and indirectly for its stockholders, and they are trustees or quasi trustees, at least, of the property of the corporation for the company and its stockholders."<sup>21</sup> And this rule was later endorsed by the 1974 decision in *Holi-Rest, Inc. v. Treloar*.<sup>22</sup> The Iowa court, therefore, holds the *contrôleur* as a strict trustee of the corporation, and a "quasi trustee, at least," of its stockholders.

### *The Benefit-to-Beneficiary Rule*

"[Directors] impliedly undertake . . . to exercise the powers conferred solely in the interest of the corporation or the stockholders as a body or corporate entity, and not for their own personal interests."<sup>23</sup>

The Iowa court in *Schildberg* nudged its Strict-Trust reasoning to the next logical level, to the most important Strict-Trust

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20. Bayne, *supra* note 7, at 561.

21. *Holden v. Construction Mach. Co.*, 202 N.W.2d 348, 357 (Iowa 1972) (quoting *Des Moines Bank & Trust Co. v. George M. Bechtel & Co.*, 243 Iowa 1007, 1081, 51 N.W.2d 174, 216 (1952)).

22. 217 N.W.2d 517, 525 (Iowa 1974).

23. *Schildberg Rock Prods. Co. v. Brooks*, 258 Iowa 759, 767, 140 N.W.2d 132, 136 (1966) (quoting 19 AM. JUR. 2D *Corporations* § 1272 (1965)).

corollary. Necessarily, *Schildberg* began by laying the Strict-Trust base: "Our own and other decisions make it clear, and it is conceded, that officers and directors . . . are trustees or quasi-trustees of the corporate assets and occupy a fiduciary relation to the corporation and its stockholders . . . ." <sup>24</sup> From this point, one inevitable step leads to the Strict-Trust Benefit-to-Beneficiary Rule:

Because this dependence [of the beneficiary on the contrôleur] is total . . . the resultant responsibility is total. . . .

This total responsibility for the stewardship of another's assets is merely a collective noun describing a complexus of duties in regard to these assets. This complexus is the essence of the benefit-to-beneficiary rule. This in turn is only another way of saying that the custodian has a duty to care for the assets entrusted to him as if they were his own.

This reasoning coalesces into one simple unqualified rule enunciated in the *Restatement*: "The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary." <sup>25</sup>

Thus, to the Custodial Concept of Corporate Control must be added the second major Strict-Trust concept: All benefit must inure to the beneficiary.

And the *Schildberg* court did just that. Directors, as trustees, must act for the benefit of the corporation, and not

for their own personal interest. It is the policy of the law to put fiduciaries beyond the reach of temptation by making it unprofitable to yield to it. Accordingly an act by the fiduciary in which personal interest and duty conflict is voidable at the option of the beneficiary, regardless of good faith. <sup>26</sup>

To that, the court added a formal statement of the Rule: "[Directors] impliedly undertake . . . to exercise the powers conferred solely in the interest of the corporation or the stockholders as a body or corporate entity, and not for their own personal interests." <sup>27</sup> At another point the *Schildberg* court was even more blunt in its statement of the Rule: In the face of a conflict between contrôleur and corporation, if "the interests of the cor-

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24. *Id.* at 766, 140 N.W.2d 136.

25. Bayne, *supra* note 7, at 565-66 (quoting RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959)).

26. *Schildberg Rock Prods. Co. v. Brooks*, 258 Iowa 759, 766, 140 N.W.2d 132, 136 (1966).

27. *Id.* at 767, 140 N.W.2d at 136 (quoting 19 AM. JUR. 2D *Corporations* § 1272 (1965)).

poration are betrayed, the corporation may elect to claim all of the benefits of the transaction for itself, and the law will impress a trust in favor of the corporation upon the property, interests and profits so acquired.'"<sup>28</sup>

Which is to say that one who willingly assumes, as John Alesch did, the stewardship of millions of dollars of "other people's money" has thereby agreed "to administer the trust solely in the interest of the beneficiary."<sup>29</sup> As in fact John Alesch did agree formally, annually, with solemn signature, in the Le Mars "Annual Policy Statement on Conflicts of Interest":

Insurance is a business dependent upon public confidence; therefore the ethical and legal obligations of insurance company officers, directors and responsible employees to act solely for the benefit of the company cannot be overemphasized.

It is the policy of this company that no officer, director or responsible employee should use his position in such a manner that a conflict between the company's interests and his personal interest arises.

—Le Mars Policy Statement, April 21, 1970.

This Policy Statement, prepared by Burton Dull, was signed formally by John Alesch and the Board on April 21, 1970, the fateful day of the Sale of Control. It was, and had been, an annual rite. Clearly, John Alesch and his coterie of subservient directors knew full well what the Iowa court meant. Nor does one need to be a moral theologian to enunciate the Benefit-to-Beneficiary Rule. Human nature defines clearly the duties of the steward.

The implications of Strict Trust and the Benefit-to-Beneficiary Rule are pervasive. At every turn their cogency will carry the day. But at this moment a special emphasis is in order.

### Guth v. Loft, Inc.<sup>30</sup>

The doctrine . . . is but one phase of the cardinal rule of undivided loyalty on the part of fiduciaries. Our own consideration . . . is mainly in *Ontjes v. MacNider*, . . . 232 Iowa 562, . . . which quotes at length with approval from *Guth v. Loft, Inc.*, 23 Del. Ch. 255, . . . a leading case in this area of the law.<sup>31</sup>

28. *Id.* at 768, 140 N.W.2d at 137 (quoting *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 273, 5 A.2d 503, 511 (Sup. Ct. 1939)).

29. Bayne, *supra* note 7, at 565-66.

30. 23 Del. Ch. 255, 5 A.2d 503 (Sup. Ct. 1939).

31. *Schildberg Rock Prods. Co. v. Brooks*, 258 Iowa 759, 768, 140 N.W.2d 132, 137 (1966) (citations omitted).

*Guth v. Loft* is indeed "a leading case in this area of the law," an area concerned exclusively with "the cardinal rule of undivided loyalty on the part of fiduciaries." More pertinently, *Guth* has been (until the 1976 decision in *Borden v. Sinskey*<sup>32</sup> by the Third Circuit) the prototypal Strict-Trust case in the United States. *Guth* has been cited and quoted year after year across the nation, as well as in Iowa.

More to the point, Iowa has paraphrased and adopted the basic tenet of *Guth*, the Benefit-to-Beneficiary Rule: In a conflict-of-interest situation, all profits are disgorged to the corporation, all losses are borne by the trustee. The transaction is void.

"If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, at its election, while it denies to the betrayer all benefit and profit. The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation. Given the relation between the parties, a certain result follows; and a constructive trust is the remedial device through which precedence of self is compelled to give way to the stern demands of loyalty. . . . *Meinhard v. Salmon*, 249 N.Y. 458 . . . ." <sup>33</sup>

Note well: When *Guth* cites *Meinhard v. Salmon*, all the strictures of Partnership and Agency are in turn embodied into *Guth*, and thence into *Dawson*, *Hoyt*, *Ontjes*, *Schildberg*, *Holden*, *Holi-Rest*, and the long Iowa line. When then-Chief Judge Cardozo wrote *Meinhard v. Salmon*, he composed the finest statement of the loyalty of a fiduciary. Partnership, Restitution, and Agency law all impose Strict-Trust standards.

### *The Third Circuit's Borden*

[Applying the doctrine first announced in *Guth v. Loft*] the Court below . . . imposed a constructive trust

32. 530 F.2d 478 (3d Cir. 1976).

33. *Ontjes v. MacNider*, 232 Iowa 562, 578, 5 N.W.2d 860, 869 (1942) (citations omitted) (quoting *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 270-71, 5 A.2d 503, 510 (Sup. Ct. 1939)).

in favor of the plaintiff on Sinskey's stock . . . . In addition, plaintiff was awarded . . . the profit . . . as well as all salaries, director's fees and dividends received by him . . . .<sup>34</sup>

*Borden* is the crown to this entire Brief, and to the entire Iowa, and national, line begun by *Guth*. *Borden* is the capstone. *Borden* affirmed unanimously a federal district court. *Borden* denied a rehearing, en banc. The entire circuit, nine judges, approved.

And *Borden* applied Strict Trust with religious exactitude, totally true to the Benefit-to-Beneficiary Rule. The corporate trustee, in Conflict of Interest, disgorged every penny. Not only the stock but the profit, fees, and dividends. Even the salaries earned while working for the beneficiary.

However, even if we were now to order an accounting, we would not permit Sinsky to retain the reasonable value of his services. Although defendants may be able to distinguish the facts of *Guth* . . . they cannot distinguish away the rationale of that decision. . . . The [*Guth*] court refused to allow him to retain any of the profits or benefits derived from his misconduct in order to deter any disloyalty on the part of a corporate fiduciary.<sup>35</sup>

Here is the Strict Trust of *Guth* in both theory and application.

And so does Iowa follow: "We have quoted quite extensively from this [*Guth*] case, inasmuch as it is our conclusion that this late and well-reasoned expression of the Delaware court summarizes the general holdings of the various jurisdictions and the several texts and authorities which we have consulted."<sup>36</sup>

*Guth, Dawson, Hoyt, Ontjes, Schildberg, Holden, Holi-Rest, Meinhard, Borden*, all join forces in laying the most stable Strict-Trust foundation possible for Iowa, and everywhere.

(Further, the immediate corollary to the Benefit-to-Beneficiary Rule is the No-Inquiry Rule: When the interests of contrôleur and corporation conflict, no inquiry is made into the fairness of the transaction. The deed is voidable at the option of the beneficiary. The No-Inquiry Rule is another necessary derivative of Strict Trust. Again expectably the Supreme Court of Iowa has adopted the No-Inquiry Rule. But its applicability in this Brief is discussed later.)

34. *Borden v. Sinskey*, 530 F.2d 478, 486-87 (3d Cir. 1976).

35. *Id.* at 497-98.

36. *Ontjes v. MacNider*, 232 Iowa 562, 579, 5 N.W.2d 860, 869 (1942).

But do not be confounded by terminology, or technicality. No mystery enshrouds Strict Trust. The concept is elemental. If someone entrusts his assets to another, the trustee must administer those assets as if his own, but for the exclusive benefit of the owner. It is as simple as that.

(A transitional interjection must be made: The reasoning thus far has produced the Custodial Concept of Corporate Control and its immediate corollary, the Strict-Trust Benefit-to-Beneficiary Rule. At the present juncture, Strict Trust forms the foundation for the Intrinsic Illegitimacy of the Premium-Bribe. Next, Looting. Later, for the Disloyalty of the *contrôleurs*. Then for the law of "Corporate Opportunity." And so throughout the Brief.)

## 2. *The Intrinsic Illegitimacy of the Premium-Bribe*

[T]he transaction would have been none the less reprehensible from a legal point of view, for, as aptly said by the trial court, "the office of guardian is not a matter of commerce," and "an agreement to resign was against public policy."<sup>37</sup>

This Agreement shall not become effective unless and until all of the present Directors of the Le Mars Mutual have submitted their resignations and qualified successors, as designated by [De Witt], have been qualified as Directors of the Le Mars Mutual.

—Agreement to Sell Stock, Alesches and De Witt, Exhibit A, 3, 4.

John Alesch and his minions breached the categorical Benefit-to-Beneficiary Rule in many respects, as will be analyzed *apropos*. But the control breach—the acceptance of a premium-bribe from De Witt for control of Le Mars—was the breach that triggered most of the others. This Sale of Control has two major facets: (a.) *the Premium-Bribe Itself*, and (b.) *the Triple Turpitude*. The former is simple. The latter, complex. But both produce far-reaching results.

### a. *The Premium-Bribe itself.*

The questions is . . . whether [the *contrôleur*] is bound to account for the money received from Levy for the transfer to him and his associates of the management

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37. Aughey v. Windrem, 137 Iowa 315, 320, 114 N.W. 1047, 1049 (1908).

and control of the Life Union [Mutual], together with its property and effects. The learned appellate division has treated this transaction as a bribe paid to the directors . . . . The election of directors, and the transfer of the management and property of the corporation, were official acts, and whatever money he received from such official acts were moneys derived by virtue of his office, for which we think he should account.<sup>38</sup>

The above is all subject to the election of Directors approved by De Witt.

—The Dull-Brown Bribery Letter,  
Exhibit 4.

New York's highest court was the first to characterize the price paid for corporate office as a plain old bribe, and bribe it is. The modern term "premium-bribe" has arisen as more apt because the corporate bribe is most often "hidden" in a "premium," an extra little bonus added somewhere, *e.g.*, in a sale of a stock block (most complex Sale-of-Control cases feature a "premium" over market for the *contrôleur's* personal shares), or perhaps in the collateral sale of an insurance agency, or wherever. But "bonus," or "premium," or "premium-bribe," no matter. The result is the same: Bribery.

De Witt and the Alesch Group left no necessary facts unstated in their methodical chronicle of all the requisite elements of Premium-Bribery. Premium-Bribery is contractual, and the terms of the De Witt-Alesch agreement were summarized with precision in one eye-opening document: the Dull-Brown Bribery Letter.

Absent, moreover, are the subtleties so irritatingly present in the usual Sale of Control of the complex stock company. With Le Mars not only were all the facts set down unabashedly in print, but no complicated stock ownership beclouded the issue. The Alesches owned no Le Mars stock to sell. In fact the Alesches owned nothing of Le Mars at all. So verification of Premium-Bribery is effortless.

From that one principal document, the brazen Bribery Letter, plus the several supporting records and myriad confirming facts, emerges the technical definition of Premium-Bribery:

Broken down into its five principal parts, the sale-of-control premium-bribe can thus be technically defined as (1) some form

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38. *McClure v. Law*, 161 N.Y. 78, 80, 55 N.E. 388, 389 (1899).

of consideration, monetary or otherwise, (2) flowing to the incumbent contrôleur, (3) from or on behalf of the prospective contrôleur, (4) to induce the appointment to the office of control, (5) paid knowingly, *scienter*.<sup>39</sup>

Each of these parts is realized in the Alesch Sale of Control to De Witt.

—Monetary Consideration—

Broken down . . . (1) some form of consideration, monetary or otherwise . . . .<sup>40</sup>

[T]he following will outline . . . what in turn De Witt will do in consideration therefor.

—The Dull-Brown Bribery Letter,  
Exhibit 4.

The first of many problems facing the fact-finder in the analysis of the premium-bribe is the ascertainment of some consideration. . . .

The chore for the fact finder is simple when the consideration is cash and the parties make no attempt to hide it.<sup>41</sup>

Undoubtedly, and justifiably, inspired by a deep distrust of each other, both the Alesch Group and De Witt insisted on lawyerlike exactness in the terms of the premium-bribe. Fortunately for present proof, the three segments of De Witt's "consideration therefor" were preserved with unlawfulerlike permanence in letter, contract, and memorandum.

*The "Sale" of the Agency*

Without the onerous, and sometimes impossible, chore of segregating the true investment value of accompanying shares, the [De Witt] premium stands stark, in the words of the Appellate Division, "as a bribe."<sup>42</sup>

Q. [T]he \$500,000 wouldn't be paid unless there was the replacement of the Board of Directors of Le Mars?

A. Well, the two transactions were tied together, all of them. There is no question about that.

—Burton Dull, Deposition at 40.

39. Bayne, *The Sale-of-Control Premium: The Definition*, 53 MINN. L. REV. 485, 497 (1969).

40. *Id.*

41. *Id.* at 498.

42. *Id.* at 492-93.



The sham sale of the Alesch Agency was the conduit for \$400,000 of the total premium-bribe. This final figure represents the premium paid by De Witt over the actual value of the Agency:

Contract Price Paid:	\$500,000
Liquid Assets:	<u>100,000</u>
Premium-Bribe:	\$400,000

The contract price paid by De Witt to the Alesches was first reached in protracted negotiations beginning some time before November 12, 1969, (about the time the Employers Mutual premium-bribe of \$450,000 was rejected) and culminating in the formal Agreement to Sell Stock of February 26, 1970, prepared by Burton Dull and signed by the Five Alesches, and Carman Smith and Raymond Brown of the Executive Committee of De Witt.

The going-concern value of the Agency, as estimated by expert and layman alike, was zero, beyond of course the \$100,000 in cash on hand. Faced with a certain cessation of Le Mars support (upon sale to competitor De Witt), loss of Le Mars policies, the inception of real-life overhead and management salaries, the Agency would be worthless. The liquid \$100,000 in the Agency till, therefore, was the Agency's total value. This amount, of course, was recognized by the various agreements and letters as deductible from the base price.

### *The "Consultant's" Contract*

As with the other facets of premium-bribe consideration, the only limit to the variety of corporate disbursement is human resourcefulness.<sup>43</sup>

Perhaps the most common method of corporate payment is the unearned-salary or consultation-fee device.<sup>44</sup>

We understood you only wanted a desk available when you occasionally would come to the office.

—De Witt to John Alesch, Exhibit 93.

The identification of the \$46,000 in unearned fees as premium-bribe dollars is airtight:

(1) The Bribery Letter specified "what in turn De Witt will do in consideration therefor." De Witt promised: "Alesch will

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43. *Id.* at 502.

44. *Id.*

work for Alesch Agency for a period of three years for \$1,000 per month," and Alesch will receive "the same type of automobile, and the operating expenses therefor." Thus, some \$36,000 over three years (April 1970 to Alesch's death in May 1973) passed to Alesch, pursuant to De Witt's word. Another \$10,000, minimum, passed in the free automobile. As a further fillip, the Consultant's Contract between De Witt and Alesch embodies the terms of the Bribery Letter in a formal contract.

(2) Lest there be any doubt that the dollars in unearned fees and free car were part of the premium-bribe, the Contract obligingly tied together "(1) this Consultant's Contract and (2) the Sales Agreement between the owners of the stock of the Alesch Agency and De Witt." This "Sales Agreement" of course bought the Board.

That John Alesch actually received \$46,000, minimum, is indisputable. That the \$46,000 was actually unearned is equally indisputable. The "consultation" was a mockery to begin with. But as the event had it, John Alesch was not even allowed to counsel, had he wished to do so (which occasionally he apparently did): "I am at a loss as to know just what is expected of me, since I am not advised or asked of any changes. [I am] left in the cold." Thus John Alesch to De Witt. (Exhibit 95.) To which, De Witt: "We understood you only wanted a desk available when you occasionally would come to the office."

### *The "Pension Plan"*

A sum in the amount of \$154,131.53 for Single-Premium Annuities payable to The Manufacturers Life Insurance Company of Toronto, Ontario, Canada.

—Check Number 80337, April 20, 1970,  
Exhibit 604.

The kinds of consideration are limited only by the ingenuity of human desire. Consider, for example, a cumulative pattern of Christmas gifts, a long-term low-interest loan, or perennial purchases below market.<sup>45</sup>

Or even better, a resignation-day farewell in the form of fully funded pensions for life, all around. The "human desire" was great indeed, but the "ingenuity" was not too ingenious, since the Alesch Group and De Witt again strewed the evidence of the single-premium payment all across their books of account, check-

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45. *Id.* at 499.

books, meeting minutes, Bribery Letter, and on and on. Nothing is more readily ascertainable than the \$154,131.53 in the lump-sum outlay for the new "Pension Plan" for the Alesch Group, instituted by De Witt on April 21, 1970.

In all, the three segments of the Bribery Letter totalled up to \$600,000 in monetary consideration:

(1) The "sale" of the Agency:	\$400,000
(2) The "Consultant's" Contract:	46,000
(3) The "Pension Plan":	154,000
<i>The Total Premium-Bribe:</i>	<u>\$600,000</u>

No technical niceties complicated or obscured the premium-bribe. It was spelled out in document after document.

—To the Incumbent Contrôleur—

Broken down . . . (2) flowing to the incumbent controleur [the Alesch Group] . . . .<sup>46</sup>

On April 20, 1970, Single-Premium Annuities were purchased for all of the "old" Directors of Le Mars.

—J.D. Hattam, Insurance Auditor,  
Arthur Young & Co., Transcript  
at 260-61; Exhibit 604.

On occasion, the premium-bribe consideration is not only visibly present but its path to a point of rest in the controleur is also unmistakable. More often, however, the path is more like a maze.<sup>47</sup>

But always obliging, the Alesch Group and De Witt eschewed the "maze," and tracked a highly traceable spoor along a straight "path to a point of rest in the contrôleur." But once arrived at the contrôleur, the task becomes moderately complicated.

The dollar amount of total premium-bribe has been clearly established at \$600,000. Once in the hands of the Alesch Group this was divided up exactly according to the share of each in the control of Le Mars. J.D. Hattam, Insurance Auditor, Arthur Young & Company (Transcript at 260-61) itemized every dollar received by each family member.

The broad analysis of the distribution of the \$600,000 splits the Alesch Group into three categories, arranged hierarchically according to their roles in the power structure:

46. *Id.* at 497.

47. *Id.* at 499.

(1) John Alesch was incontrovertibly the *contrôleur* of Le Mars. Any threat to his position was indiscernible. Hence he received the "lion's share": \$218,000, of which \$100,000 was "hidden" in the Agency "sale," \$46,000 was for silent "counsel," and \$72,600 was in a lump-sum "pension."

Even the share of the four Alesch women was proportioned to their control positions. Of the full \$400,000 from the Agency "sale," wife Alice, who was a director momentarily, received \$100,000. Add to this a "pension" of \$4,000 for her momentary service, "even though she has only been on the Board for two years, in view of her long and loyal service . . . and as wife of John Alesch" (as the Minutes of the fateful April 21, 1970, so considerably admitted). The three daughters received in all only \$200,000 for acceding to the Premium-Bribery. Some \$66,667 per filial signature.

The Five Alesches, father, daughters, wife, received a grand total of \$522,600 of the total premium-bribe.

(2) President Tappan and wife Wilhelmine, daughter of the Le Mars founder, alone composed the second category. Since 1967 Milton Tappan had been retired in Lauderdale (when he quit his \$38,000 a year longtime job as chief of Johnson Biscuit in Sioux City), but he and Wilhelmine had been powerful forces to reckon with (as his Deposition flavorfully attests: "[A]nd if you want to know why I went to Florida, because you're sticking your nose into so damned many impertinent things, I had an occluded artery in my leg." (Deposition at 12, 13.)) So powerful in fact were the Tappans that they alone commanded a total of \$58,000 in "Pension Plan" resignation-day, farewell dollars. And the Tappans were the most sophisticated—and hence most culpable—of the Alesch Group. Undoubtedly their sophistication enhanced their command of a premium-bribe. Further they had been more intimately privy to all five major malefactions.

(3) The "lesser parties" of the Alesch Group received their share of the \$600,000 premium-bribe in the lump-sum single-premium annuities granted the same day, April 21, 1970. The total: \$19,400. As Burton Dull said to Raymond Brown in another context, this permitted "us to make the desired changes with the least amount of objections." (Exhibit 39.)

—From the Prospective Contrôleur—

Broken down . . . (3) from or on behalf of the prospective contrôleur [De Witt]. . . .<sup>48</sup>

[T]he following will outline . . . what De Witt in turn will do in consideration therefor.

—The Dull-Brown Bribery Letter, Exhibit 4.

As with the identification of the consideration and its proven reference to the incumbent [Alesch Group], the verification of the third element is at worst not a greatly demanding assignment for the fact-finder.<sup>49</sup>

In his four-page Bribery Letter to De Witt, Burton Dull, "with the concurrence of John Alesch," detailed the exact terms of the premium-bribe. These terms have totalled \$600,000 and represented "what in turn De Witt will do." Thus far the spoor is unmistakable.

But at this turn in the tracking, the pattern of guilelessness disappears. And a recent admonition is pertinent in tracing the \$600,000 directly to (or better, "from") De Witt:

Whether there is a patent payment directly from the appointee himself [De Witt], or indirectly from some third party, or a complicated series of moves from the controlled corporation [Le Mars], one overriding principle prevails—the consideration must be the responsibility of the appointee [De Witt]. Regardless of appearances, all three sources must be reducibly the same.<sup>50</sup>

For the first time in this unfolding tale, the actors have, probably unwittingly, camouflaged their actions. Not fully, but somewhat. The premium-bribe totalled \$600,000. As to \$421,400 of this \$600,000, De Witt openly and deftly reached into its own pocket and paid the Alesch Group, first, \$400,000 via the sham "sale" of the Alesch Agency and, second, \$21,400 of the promised \$36,000 in "Consultation" fees. Thus far there was "a patent payment directly from the appointee," De Witt.

But with the remaining \$178,600 of the \$600,000 premium-bribe, the matter was entirely different. Perhaps it would be flattery to credit De Witt with "a complicated series of moves," but the fact remains that this \$178,600 was not "a patent payment directly from" De Witt. Rather, the \$178,600 came "from the

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48. *Id.* at 497.

49. *Id.* at 500.

50. *Id.* at 501.

controlled corporation" itself, Le Mars. But this gambit was not exactly a De Witt invention. The ploy was slightly devious, but far from original:

Although definitely begging a later question [which is so true here and now], nearly every successful premium-bribe is sooner or later recouped from the corporation [Le Mars]. Often, however, the new appointee [De Witt] avoids the circuitry of a personal payment and later recoupment by an immediate raid on the [Le Mars] corporate till.<sup>51</sup>

Which, of course, is exactly what appointee De Witt did. Putting the matter grossly, and tracing the circuitry move by move, one can see that De Witt simply stole the \$178,600 directly from Le Mars and paid it over to the Alesch Group, pursuant to agreement. Fortunately, as has been true thus far, De Witt and the Alesches left none of this complicated circuitry to conjecture. Every step was tracked:

(1) Complicated negotiations over several months finally crystallized the total premium-bribe at \$600,000, and reduced the terms to writing in the Bribery Letter. The repetition of the terms in several other documents left no doubt that the remaining \$178,600 unpaid balance of the total \$600,000 was integral to the premium-bribe. This \$178,600 balance was broken down into \$14,600 of Consultant fees, the \$10,000 in free automobile and the \$154,000 embedded in the "Pension Plan." The amount was highlighted as "what in turn De Witt will do in consideration." This was Burton Dull, "with the concurrence of John Alesch."

(2) To this specific inclusion of the \$178,600 in the terms of the premium-bribe, De Witt replied: "Our Executive Committee are in complete agreement with the proposal outlined in your" Bribery Letter. (Exhibit 3.) The deal was sealed.

(3) The formal commitment of De Witt (covenanted in the "Consultant's" Contract) to the full payment of the \$36,000 in "Consultation" fees and the \$10,000 in automobile was later confirmed and ratified over many months of actual payment. The remaining unpaid debt of \$24,600—of the total \$46,000—needed no further proof than the acknowledged part payment of the \$21,400 already made. (Exhibit 508, IV.) Once De Witt confirmed the total amount due of \$46,000 by actually paying John Alesch \$21,400, that partial remittance attested incontrovertibly to full commitment to the remainder, the \$24,600.

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51. *Id.* at 502.

(4) The facts surrounding De Witt's assumption of liability for the \$154,000 segment of the premium-bribe are equally confirmatory. This lump-sum, single-premium "Pension" fund was integral to the \$600,000 premium-bribe. The amount was itemized specifically in the Dull-Brown Bribery Letter. (Exhibit 4.)

Lest any doubt remain that the \$154,000 "consideration [was] the primary responsibility of the appointee [De Witt]," De Witt waited till after the takeover of Le Mars to do the deed personally. Make no mistake: This delay was no accidental happenstance. De Witt waited till after the takeover because the Alesch Group insisted that De Witt wait. Because De Witt had agreed to pay the full \$600,000. Because that was essential to the deal. Because the \$154,000 was part of the premium-bribe. Because the Alesch Group was not about to be guilty of looting Le Mars. Note this last point well.

Thus on the day the \$154,000 passed from De Witt to the Alesch Group, De Witt was in charge at Le Mars. The deed was done by De Witt: "BE IT RESOLVED that . . . in consideration of the long and continued service . . . as Director . . . commencing on the first day of May, 1970 . . . a Single Premium Annuity . . . ." (Minutes, Le Mars Annual Meeting, April 21, 1970.) The motion was made by Raymond Brown, seconded by George Howes, both of the Executive Committee. The Executive Committee was true to its word, and the terms of the Bribery Letter. De Witt did do the deed.

So in the end, the entire \$600,000 premium-bribe was "the primary responsibility of the appointee," De Witt. Of that, \$421,400 came in "a patent payment directly from the appointee," De Witt, and \$178,600 "in a complicated series of moves from the controlled corporation," Le Mars. But all were the responsibility of De Witt.

—To Induce the Appointment—

Broken down . . . (4) to induce the appointment to the office of control . . . .<sup>52</sup>

This Agreement shall not become effective unless and until successors, as designated by [De Witt], have been qualified as Directors of the Le Mars Mutual.

—Agreement to Sell Stock, Alesches and De Witt, Exhibit A, 3, 4.

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52. *Id.* at 497.

The innermost essence of bribery, and correspondingly of the premium-bribe, lies in its purpose. . . .

. . . If the goal is not the appointment to the office, the premium-bribe is absent. . . . To induce the incumbent [Alesches] to appoint must be, by definition, the sole purpose of the consideration.<sup>53</sup>

The De Witt intent to "induce the appointment[s]" to the directorate of Le Mars was reduced to formal writing at least twice. Once, explicitly, in the Agreement to Sell Stock. Twice, again explicitly, in the Bribery Letter: The three segments, totalling \$600,000, are "all subject to the election of Directors approved by De Witt."

To the same effect were references *passim* in various letters and depositions. Item: "There isn't any question that the overall agreement was all a part of one overall transaction." (Burton Dull, Deposition at 71.) Item: "I will bring the certified check with me. [I]n turning over control of Le Mars Mutual on April 21 . . . ." (Raymond Brown to John Alesch, Exhibit 41.) Item: "Well, the two transactions were tied together, all of them. There is no question about that." (Burton Dull, Deposition at 40.) And more and more.

—Paid Knowingly, *Scienter*—

Broken down . . . (5) paid knowingly, *scienter*.<sup>54</sup>

In accordance with the conversation which John and I had with you, enclosed are copies of what we feel is our understanding . . . .

—Burton Dull to Raymond Brown,  
Exhibit 19A.

Our Executive Committee are in complete agreement.

—Raymond Brown to Burton Dull,  
Exhibit 3.

The real question is not going to be the simple one of "scienter, paid knowingly," but rather "scienter, paid deliberately, callously, with long months of malice aforethought." The full extent of moral culpability—of assent of intellect and freedom of will—was reiterated in the countless instances of calculated planning that characterized the Sale-of-Control Premium-Bribery of De Witt and the Alesches.

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53. *Id.* at 503-04.

54. *Id.* at 497.



The fact of Premium-Bribery is simple. The law, complex.

b. *The triple turpitude.*

In the entire control spectrum, the legitimacy of the premium-bribe is probably the most basic, the most vexing, and certainly the most recurrent question.<sup>55</sup>

For the avoydinge of corrupcion, Be it therefore enacted by the Kinge . . . That yf any person bargayne or sell any Office . . . everie suche person . . . shall ymediatlye . . . be adjudged a disabled Person in the lawe. . . .

And be it also enacted . . . That all and everie suche Bargaynes . . . shalbe voide . . . .<sup>56</sup>

The fact of the premium-bribe has been established. The five essentials of the definition have been verified. With these factual necessities in hand, the positive argumentation resumes.

The painstaking study of Strict Trust has thus far progressed through the Custodial Concept of Corporate Control and its immediate corollary, the Benefit-to-Beneficiary Rule. The Alesch Group, in assuming complete dominion over Le Mars, correspondingly assumed complete responsibility for its well-being:

In one indivisible act the *contrôleur* accepts the absolute stewardship of the entity and thereby acknowledges, and accedes to, the mandatory norms of corporate excellence. At that moment he becomes a strict trustee, with all the demands of unswerving loyalty and devotion to corporation and shareholders. He assents unreservedly to every implication of the benefit-to-beneficiary rule.<sup>57</sup>

The applicability of the Benefit-to-Beneficiary Rule extends to every facet of the *contrôleur*'s conduct of corporate affairs. Necessarily the Rule is not limited solely to the context of the Sale of Control. In its broadest application, the Rule specifies three "major objectives: (1) the erection of the best possible corporate structure; (2) the employment of the most enlightened managerial policy; (3) the selection of the most competent personnel."<sup>58</sup> Of these three all-encompassing goals, the first has only limited impact on Le Mars. The second certainly governs much

55. Bayne, *The Sale-of-Control Premium: The Intrinsic Illegitimacy*, 47 TEX. L. REV. 215, 216 (1969).

56. An Acte againste buyinge and sellinge of Offices, 1551-52, 5 & 6 Edw. 6, c. 16.

57. Bayne, *supra* note 55, at 220 (footnote omitted).

58. Bayne, *The Sale-of-Control Quandary*, 51 CORNELL L.Q. 49, 59 (1965).

of the conduct of both the Alesch Group and De Witt. These two are for later.

But the third, the Selection of Competent Personnel, affects intimately the choice of a successor to John Alesch. Of all the acts of John Alesch, *contrôleur*, the most crucial by far was his appointment of De Witt as his successor. At this instant, the third subduty of the Benefit-to-Beneficiary Rule has preeminent applicability:

As important as is the chairman, the chief executive officer, the operating head, the board, nevertheless the role of the successor to the *contrôleur* is transcendent. Those norms of selection of personnel that governed the incumbent *contrôleur* during tenure, guide him as well in departing that tenure, in the proper and beneficial transfer of control. The choice of a successor is undeniably the crowning act of the *contrôleur's* career, as well as his last, and hence invites the commensurate scrutiny of the standards of a fiduciary.<sup>59</sup>

All this is an elemental deduction from the Benefit-to-Beneficiary Rule. The entire future of Le Mars rested with De Witt. Yet, to buy the appointment, De Witt passed a \$600,000 premium-bribe to the incumbent Alesch Group.

At this point the reasoning leads to the next major proposition: The premium-bribe is in its essence corrupt. "For the avoydinge of corrupcion, everie suche Bargaynes shalbe voidé." This proposition supports the remainder of the Brief.

[T]he legitimacy, or illegitimacy, of the premium-bribe is focal to every later sale-of-control analysis—the suitability of the prospective *contrôleur* [De Witt], the culpability of the incumbent [Alesch Group], possible damages, the disposition and role of the premium-bribe itself. . . .

. . . Here all the theories and principles push forward for concrete dollars-and-cents application in day-to-day interplay.<sup>60</sup>

This one statement would seem to encompass most of the pending issues.

### *The Suitability of the Successor*

From the aspect of either *contrôleur* or successor, therefore, the rule is clear: The benefit to beneficiary and the suitability of the appointee are the only legiti-

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59. Bayne, *The Sale of Corporate Control*, 33 FORDHAM L. REV. 583, 591-92 (1965).

60. Bayne, *supra* note 55, at 216-17.

mate considerations at the time of appointment. Suitability is the sole final cause that may flow legitimately into the selection of the new contrôleur.<sup>61</sup>

All these Defendants, Howes, Smith, the Defendants of De Witt, I said I never heard of these fellows, never even heard of them.

—Clyde Eastman, Le Mars Director,  
Deposition at 59.

When we submitted our resignations I had no idea who would replace us.

—John Vollmar, Le Mars Director,  
Deposition at 23.

The heart of the corruption inherent in the premium-bribe, therefore, is the appointment of a new contrôleur for any reason other than his suitability. With the Alesch Group, the "reason other" was premium-bribe dollars. The suitability of "these fellows" was far from the Alesch thoughts.

Interestingly, however, the blame lay equally on De Witt. The Alesch Group was bribed. But De Witt did the bribing. And De Witt had already agreed to the stewardship of Le Mars.

At that split conceptual second when the premium-bribe is changing hands the fiduciary duty of a strict trustee rests with exactly equal weight on the outgoing contrôleur and the incoming appointee. At this transitional moment corporate custody is being entrusted by the one and accepted by the other. The *bonum commune* of the entity rests in a delicate balance between incumbent and successor. Each consequently faces the identical custodial obligation defining the suitability of the successor-contrôleur.<sup>62</sup>

Henceforward, remember that De Witt and the Alesch Group had conspired together, over many months, to pass and receive the premium-bribe. Each had assumed the custody of Le Mars.

Wherein, therefore, lies the "corruption" inherent in the premium-bribe? "The totality of the turpitude of the premium-bribe consists of three conceptually distinct elements caused by separate breaches of fiduciary duty, each with its own peculiar contribution and coalescing into a distinctive moral unit."<sup>63</sup> Each of these three elements will apply separately to different divisions

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61. *Id.* at 221.

62. *Id.*

63. *Id.* at 221-22.

of the Brief, as will appear apropos. This triple turpitude of Premium-Bribery has been described as

(1) the perversion of the judgment of the incumbent contrôleur, engendered by an appointment of a successor induced by a cause other than suitability, (2) that is, for consideration illicit in itself, (3) resulting in the appointment of a candidate unsuitable by reason of his own active role in the inducement.<sup>64</sup>

Each of these distinct elements must now be pulled out and explored separately, because each is intertwined with each, and all three together comprise one indivisible act, Premium-Bribery. But only one, the second, applies directly to the instant problem: disgorgement of the premium-bribe dollars into the Le Mars treasury. The first and third will be picked up later.

*The Perversion, the Principal Illegitimacy*

Moral turpitude is the deviation from acknowledged norms of conduct. Any digression from the straight path to the goal of a suitable successor is culpable. . . .

. . . This is perfectly true of the premium-bribe perversion. No part of the illicit cash has any relation whatsoever to the suitability of the successor.<sup>65</sup>

Q. [T]he \$500,000 wouldn't be paid unless there was the replacement of the Board of Directors of Le Mars?

A. Well, the two transactions were tied together, all of them. There is no question about that.

—Burton Dull, Deposition at 40.

Both the Alesch Group and De Witt had agreed to act in all things for the benefit of Le Mars. Both recognized that the appointment of the all-powerful contrôleur entailed the maximum potential of benefit—or of evil—for Le Mars. If ever they were bound “to act solely for the benefit of the company”—as they swore in the Le Mars Policy Statement—it was then.

Yet this sole objective was pushed aside. No longer was the welfare of Le Mars the consideration. Rather, premium-bribe dollars supplanted suitability as the final cause motivating the parties. Both the Alesch Group and De Witt turned away from their sworn promise.

64. *Id.* at 222.

65. *Id.* at 224.

This forcible turning away is the perversion. Syllogistically:

- (1) The suitability of the successor is the sole final cause that may flow legitimately into the selection of the new *contrôleur*. (2) The consideration of the premium-bribe is totally irrelevant, foreign, antagonistic to suitability. (3) Yet the premium-bribe consideration does flow as a final cause into the selection of a successor.

Here is the quintessence of the perversion.<sup>66</sup>

In so far as premium-bribe dollars supplant suitability, thus far are the parties perverted. Not a single premium-bribe dollar is legitimate. The premium-bribe is wholly illegitimate.

The prefix "per" carries the important concept of completeness into the meaning of perversion. "Per" is the intensive, not the prepositional, prefix and correctly expresses the idea of thoroughness, totality, as in "*perfervid*," "*pellucid*" and more aptly in "*perfect*"—unsullied by any foreign substance, integral. This is perfectly true of the premium-bribe perversion. No part of the illicit cash has any relation whatsoever to the suitability of the successor. It is totally foreign, unrelated, antagonistic to suitability. It is totally "other." As antagonistic, this cause enters into the formation of the *contrôleur*'s judgment of selection. As completely foreign, with no admixture of suitability as a cause, this illegitimate cause perforce supplants, to the total extent of its influx, the legitimate one. As totally supersessive, therefore, this causal influx is totally perverse—a perfect perversion.<sup>67</sup>

This, then, is the principal element of the turpitude of the premium-bribe. Principal, yes, but not sole.

### *The Illicit Consideration*

The perversion of the *contrôleur*'s judgment may be the core of the premium-bribe illegitimacy, but what of cold cash that constituted the consideration? After all, as the New York court said in *Caplan-Lionel*, the "price . . . being paid for . . . control . . . [is] the all important emolument of the transaction." Does this all-important emolument add anything to the turpitude?<sup>68</sup>

[T]he following will outline John's understanding of what will be expected from him and what in turn De Witt will do in consideration therefor.

—The Dull-Brown Bribery Letter,  
Exhibit 4.

66. *Id.* at 223.

67. *Id.* at 224.

68. *Id.* at 233.

Before, during, and after the extensive premium-bribe negotiations, every single party to the malefaction was being amply and fully compensated for performing their respective duties. Among their most obvious duties was the selection and appointment of a successor contrôleur for Le Mars. Yet, at this very moment, De Witt was passing \$600,000 to John Alesch, to this

top corporate executive, as a corporate official, because of his official position, and pocketed personally, even though every minute of time and ounce of energy had been dedicated to the exclusive benefit of the beneficiary-shareholder. Most important . . . the money was paid for the performance of an official corporate act, even though concededly that act was seriously harmful to the corporate well-being.<sup>69</sup>

In a word, none of this \$600,000 belonged to John Alesch. Every penny was accepted "in compensation for corporate acts, performed pursuant to a corporate program, in fulfillment of a corporate duty, in the course of official business, during the regular workweek, for which he was already amply remunerated."<sup>70</sup> Herein lay the second indivisible element of the triple turpitude: disloyalty in personally pocketing dollars rightfully belonging to Le Mars. "The chief illegitimacy of the [\$600,000] rests in the disloyalty inherent in the repudiation of the contrôleur's unqualified dedication of all of his endeavors to the general welfare of the firm."<sup>71</sup>

Yet the perfidy in taking the \$600,000 had no intrinsic connection with the perversion of contrôleur judgment. Either could have been effected without the other. Each is a separate constituent of the total turpitude.

(Interjection: The disloyalty of a steward is not the only charge of turpitude levelled at the Alesch Group:

Completely apart from custody and the loyalty strictures of a trustee, no employee from contrôleur to janitor can licitly be paid twice for doing his job. The turpitude consequent on the breach of the simple contractual quid pro quo is generally characterized as dishonesty, or in less refined circles as plain old stealing. This particular aspect of the intrinsic illegitimacy of the premium-bribe, stemming from the violation of commuta-

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69. Bayne, *The Sale-of-Control Premium: The Disposition*, 57 CALIF. L. REV. 615, 637 (1969).

70. Bayne, *supra* note 55, at 235.

71. *Id.* at 237.

tive justice, is completely nonfiducial and unrelated, at least in its primary sense, to the custodial concept of corporate control.<sup>72</sup>

This violation of commutative justice will serve as yet another imperative for the disgorgement of the premium-bribe.)

### *The Unsuitability of a Premium-Briber*

The turpitude engendered by successor unsuitability stems from the uncomplicated fact that the corporation is therewith burdened with all the potential damage and present disadvantages of an incompetent in the most important position in the firm.<sup>73</sup>

This Agreement shall not become effective unless and until all of the present Directors of the Le Mars Mutual have submitted their resignations and qualified successors, as designated by [De Witt], have been qualified as Directors of the Le Mars Mutual.

—Agreement to Sell Stock, Alesches and De Witt, Exhibit A, 3, 4.

The third constituent of the triple turpitude has its peculiar applicability later in the Brief. For now, however, it must round out the total turpitude of the single indivisible act of Premium-Bribery.

This third turpitude is simple: The Alesch Group and De Witt conspired together to foist a known premium-briber on the firm. John Alesch consciously and deliberately selected a new *contrôleur* who was ready (1) to pass \$600,000 in premium-bribe and (2) to divert that \$600,000 from the Le Mars treasury into the personal pocket of its chief executive.

This joint imposition of a premium-briber on Le Mars is the capstone of the illegitimacy:

In strict practicality, the crucial distinction for future sale-of-control litigation lies in the built-in nature of the premium-bribe-induced unsuitability. No true premium-bribe under any conditions whatsoever can be passed without engendering the triple blemish of the perversion, the illicit consideration, and the resultant unsuitability. To the extent, therefore, that an appointee is prepared to twist the judgment and to divert the corporate dollars, thus far is he already an unsuitable custodian. As thus unsuitable he caps it off by imposing a premium-briber

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72. *Id.* at 237-38.

73. *Id.* at 240.

[himself] on the firm. Whatever further deficiencies he may possess do not affect this ever-present built-in disability.<sup>74</sup>

Note well: This premium-bribe-induced unsuitability of De Witt says nothing about De Witt's propensity to loot, to embezzle, to steal the Alesch Agency. Those unsuitabilities are for another time.

### *The Coalesced Turpitude*

Being so long so close to the trees one forgets that the forest is an integral moral unit, the single act of premium-bribery. Correspondingly, the tripartite turpitude is only conceptually divisible. True, each of its indispensable coconstituents—the perversion, the illicit consideration, the premium-bribe-engendered unsuitability—can be individually isolated in the abstract. Indeed, the illicit consideration can even have an independent existence of its own. Each certainly is a distinct turpitude, with its own individuating notes and amendable to specific definition. In losing its identity in the new entity, moreover, each does not fully disappear but remains theoretically identifiable.<sup>75</sup>

As “theoretically identifiable,” each will henceforth serve as the foundation for successive sections of the Brief. For now, the second constituent: the Illicit Consideration.

### 3. *Disgorgement*

[A]ny bonus received for such transfer of their office [must] be returned to the corporation.<sup>76</sup>

“[T]he law will impress a trust in favor of the corporation upon the property, interests and profits so acquired.”<sup>77</sup>

Once the reasoning has progressed thus far, the law of the land has been unanimous: disgorgement over to the injured entity of the proven premium-bribe. The collected cases, the commentators, cold logic, have all concluded that the unearned recompense, the stolen emolument, the \$600,000 in premium-bribe, belongs in law and justice to Le Mars.

74. *Id.* at 243.

75. *Id.*

76. *In re Lionel Corp.*, N.Y.L.J., Feb. 4, 1964, at 14, col. 3 (Sup. Ct.), *aff'd sub nom.*, *Caplan v. Lionel Corp.*, 20 App. Div. 2d 301, 246 N.Y.S.2d 913, *aff'd mem.*, 14 N.Y.2d 679, 198 N.E.2d 908, 249 N.Y.S.2d 877 (1964).

77. *Schildberg Rock Prods. Co. v. Brooks*, 258 Iowa 759, 768, 140 N.W.2d 132, 137 (1966) (quoting *Guth v. Loft, Inc.*, 23 Del Ch. 255, 273, 5 A.2d 503, 511 (Sup. Ct. 1939)).



*The Illicit Consideration*

Although the total tort has a triple turpitude, only the specific turpitude of the illicit consideration is referable to the [\$600,000]. Here is the sole rationale of the disposition.<sup>78</sup>

Now the importance of the triple breakdown of the turpitude is manifest. The perversion of the *contrôleur's* judgment, the appointment of a premium-briber successor, both have later applicability. But for now, the unearned dollars are "the all-important emolument of the transaction."

Here, standing isolated, is one element common to the premium-bribe, unearned recompense, without the perversion of the officer's judgment or any question of an unsuitable successor. The malefaction is a clear case of illicit emolument, without more. The chief executive officer . . . accepted [\$600,000] in compensation for corporate acts, performed pursuant to a corporate program, in fulfillment of a corporate duty, in the course of official business, during the regular workweek, for which he was already amply remunerated.<sup>79</sup>

Cold logic mandates, therefore, that the \$600,000 in unjust recompense be disgorged to Le Mars. This is the only tenable disposition of the premium-bribe dollars.

Recall, moreover, that the strictures of Strict Trust were not alone in issuing this mandate of disgorgement:

Completely apart from custody and the loyalty strictures of a trustee, no employee from *contrôleur* to janitor can licitly be paid twice for doing his job. The turpitude consequent on the breach of the simple contractual *quid pro quo* is generally characterized as dishonesty, or in less refined circles as plain old stealing.<sup>80</sup>

Commutative justice issues a much more earthy mandate: return stolen property.

*The Law of Restitution*

Thus a principal is entitled to a bribe received by his agent from a third person, although the principal's profit from the transaction, aside from the bribe, was

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78. Bayne, *supra* note 69, at 637.

79. Bayne, *supra* note 55, at 235.

80. *Id.* at 237.

the same as it would have been if no bribe had been given (see Restatement of Agency, §403).<sup>81</sup>

Predictably, the labors of the *Restatement* reduced this reasoning to succinct pronouncements. The *Restatements of Trusts*, *Agency*, *Restitution*, all have similar mandates.<sup>82</sup>

The most sophisticated and exacting rationale is the deft blending of restitution with trust, and the conjunction in turn of this blend with the basic tort action [of Premium-Bribery]. The law of restitution has a long and reliable history and complements admirably the benefit-to-beneficiary rule of trusts:

*Where a fiduciary in violation of his duty to the beneficiary receives or retains a bonus or commission or other profit, he holds what he receives upon a constructive trust for the beneficiary.*<sup>83</sup>

The Comment to the *Restatement* singled out the Alesch Group and De Witt:

*Bribes and Commissions.* The rule stated in this Section is applicable not only where the fiduciary receives something in the nature of a bribe given him by a third person in order to induce him to violate his duties as a fiduciary, but also where something is given to him and received by him in good faith, if it was received for an act done by him in connection with the performance of his duties as fiduciary.<sup>84</sup>

With De Witt and the Alesches, the matter was a fortiori, since certainly "good faith" never entered the machinations. To the contrary, calloused months of competitive Premium-Bribery characterized the De Witt-Alesch conspiracy.

### *The Collected Cases*

I am also of the opinion that [the Directors] are trustees for the plaintiff and the shareholders [of the London Mutual] on whose behalf he sues. There is a clear admission that 571*l.*, 8*s.*, 7*d.* has been paid [for the Sale of Control] . . . .<sup>85</sup>

Again predictably, neither cold logic nor the commentators

81. RESTATEMENT OF RESTITUTION § 128, Comment f at 531 (1937).

82. See RESTATEMENT (SECOND) OF AGENCY § 403 (1958); RESTATEMENT OF RESTITUTION § 197 (1937); RESTATEMENT (SECOND) OF TRUSTS § 206, Comment k (1959).

83. Bayne, *supra* note 69, at 638-39 (quoting RESTATEMENT OF RESTITUTION § 197 (1937)).

84. RESTATEMENT OF RESTITUTION § 197, Comment a at 808 (1937).

85. Gaskell v. Chambers, 122 Rev. R. 138, 140 (Ch. 1858).

of the *Restatements* are divorced from the long line of judicial and legislative pronouncements beginning in the earliest England and reaching to the American 1970's. An exhaustive litany of cases would be a vulgar exhibition. Pertinent samples over the years and from various jurisdictions should buttress the logic and the *Restatements*:

[T]he trustee derived the profit . . . from the [sale of the] office itself. I shall therefore direct that the £75. be repaid by Horsfield and dealt with as part of the assets [of the trust].<sup>86</sup>

The election of directors and the transfer of the management and property of the corporation were official acts, and whatever money he received from such official acts were moneys derived by virtue of his office for which we think he should account [to the Life Union Mutual].<sup>87</sup>

[T]he moneys or other secret profit which Marshall received by selling out his trust, belonged, "not to him, but to the insurance company," . . . .<sup>88</sup>

If the succession was worth \$125,000 in the market, the sale (if it were lawful) should have been made by the directors for the benefit of the owners of the [Mutual Life], not of Gray. For Gray had nothing legally saleable. . . . So the arrangement . . . was a betrayal of trust.<sup>89</sup>

[H]is official position is not his individual property in any sense, and he has no right, either directly or indirectly, to use it for his own selfish ends; . . . all money thus made belongs either to the corporation, or . . . in common to its shareholders.<sup>90</sup>

A secret profit realized by a director from an undertaking to deliver the corporate control of a company inures to the corporation. Fletcher, *Cyclopedia*, "Corporations," vol. 4, §2321; 2 Thompson on Corporations, §1237.<sup>91</sup>

[I]t indisputably was a condition of the sale that all the officers and directors then in office should forthwith resign . . . and elect a new directorate chosen wholly by the purchaser of the stock . . . .

. . . .

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86. *Sugden v. Crossland*, 65 Eng. Rep. 620, 621 (V.C. 1856).

87. *McClure v. Law*, 161 N.Y. 78, 81, 55 N.E. 388, 389 (1899).

88. *Heineman v. Marshall*, 117 Mo. App. 546, 556, 92 S.W. 1131, 1134 (1905).

89. *Moulton v. Field*, 179 F. 673, 675 (7th Cir.), *cert. denied*, 219 U.S. 586 (1910).

90. *Porter v. Healy*, 244 Pa. 427, 437, 91 A. 428, 432 (1914).

91. *Keely v. Black*, 90 N.J. Eq. 439, 443, 107 A. 825, 827 (Ch. 1919), *rev'd on other grounds*, 91 N.J. Eq. 520, 111 A. 22 (1920).

. . . [O]rdinarily . . . these officers and directors must account to the corporation . . . for the sum and for . . . damages.<sup>92</sup>

Hence to the extent that the price received by Feldmann and his codefendants included such a bonus [for the Sale of Control], he is accountable to the minority shareholders . . . .<sup>93</sup>

The rationale of the rule is undisputable: persons enjoying management control hold it on behalf of the corporation's stockholders, and therefore may not regard it as their own personal property to dispose of as they wish.<sup>94</sup>

[A]ny bonus received for such transfer of their office [must] be returned to the corporation.<sup>95</sup>

Even ratification by the beneficiaries would not save a fiduciary from accountability for any amounts realized in dictating or influencing the choice of a successor unless this was secured with notice that the beneficiaries were entitled to the profit if they wished . . . .<sup>96</sup>

The sole appropriate remedy is a declaration that the consideration paid to the trustees by Lytton Financial Corporation allocable to a transfer of control of the Association is an asset held for its benefit in the hands of the trustees.<sup>97</sup>

The theory is not that all the shareholders are entitled to share in the bribe but rather that one who sells an asset he does not own must turn over the proceeds to the true owner. The true owner is the corporation. The malefactor, according to *Rosenfeld*, is the selling shareholder. He owes that part of the proceeds which is the premium to the corporation that owned the asset. As in the case of corporate opportunity, the opportunity diverted must be recompensed to the corporation, not to its shareholders.<sup>98</sup>

Yet further support for disgorgement over to Le Mars of the \$600,000 premium-bribe will be found in the tort/crime analysis.

92. *Gerdes v. Reynolds*, 28 N.Y.S.2d 622, 651, 659 (Sup. Ct. 1941).

93. *Perlman v. Feldmann*, 219 F.2d 173, 178 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955).

94. *Essex Universal Corp. v. Yates*, 305 F.2d 572, 575 (2d Cir. 1962).

95. *In re Lionel Corp.*, N.Y.L.J., Feb. 4, 1964, at 14, col. 3 (Sup. Ct.), *aff'd sub nom.*, *Caplan v. Lionel Corp.*, 20 App. Div. 2d 301, 246 N.Y.S.2d 913, *aff'd mem.*, 14 N.Y.2d 679, 198 N.E.2d 908, 249 N.Y.S.2d 877 (1964).

96. *Rosenfeld v. Black*, 445 F.2d 1337, 1343 (2d Cir. 1971).

97. *Beverly Hills Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 371 F. Supp. 306, 319 (C.D. Cal. 1973).

98. *Gordon v. Fundamental Investors, Inc.*, 362 F. Supp. 41, 45 (S.D.N.Y. 1973).

*B. Commercial Bribery*

The criminal interdiction of modern state codes confirms the public-policy abhorrence of the sale of office, expressed as early as 1388 (if not earlier), with the statute of 12 Richard 2, c. 2,<sup>99</sup> and reiterated in 1551 in 5 & 6 Edward 6, c. 16.<sup>100</sup> The present-day statutes add nothing new, but simply restate a truism: Premium-Bribery is inherently corrupt:

[*Briber*:] Every person who shall . . . give to any officer, agent, or trustee . . . any money . . . with intent to influence his . . . judgment . . . shall, on conviction, be imprisoned in the penitentiary not more than ten years, or fined not more than one thousand dollars, or both.<sup>101</sup>

[*Commercial Bribing*:] A person is guilty of commercial bribing . . . when he . . . agrees to confer any benefit upon any . . . fiduciary . . . to influence his conduct . . . .<sup>102</sup>

[*Gratuities and Tips*:] It shall be unlawful for any . . . officer . . . of a private corporation . . . to receive, for his own use . . . any . . . bonus, or gratuity . . . connected with . . . [a] business transaction.<sup>103</sup>

And so in Colorado, Connecticut, Illinois, etc., etc. The punishment for the crime of Commercial Bribery varies from state to state, but the rationale is the same everywhere. Every criminal code, moreover, condemns both briber and bribed equally.

The transition from crime to tort is effortless, and part of the common law of every jurisdiction. The crime-derived tort may be per se, prima facie, or inferential, but acknowledged tort it is.<sup>104</sup>

**II. LOOTING**

The provisions of this contract, of course, will be the means of [De Witt's] method of recouping its payment to the owners of the stock of the Alesch Agency.

—The Dull-Brown Recoupment Letter,  
Exhibit 19A.

99. No Officers shall be appointed for Gifts, & C., 12 Rich. 2, c. 2 (1388).

100. An Acte againste buyinge and sellinge of Offices, 1551-52, 5 & 6 Edw. 6, c. 16.

101. MISS. CODE ANN. § 97-11-11 (1972).

102. N.Y. PENAL LAW § 180.00 (McKinney 1975).

103. IOWA CODE § 741.1 (1975).

104. See Hall v. Montgomery Ward & Co., 252 N.W.2d 421 (Iowa 1977).

We don't intend to milk [Le Mars] for at least five years.

—Carl Smith, Executive Committee, to  
Russell W. Sandy, Le Mars Supervisor,  
Deposition at 48.

Both orally and in writing, De Witt stated its calculated intent to loot Le Mars. This admitted intent was supported by an admitted motive: to "[recoup] its payment to the [Alesch Group]" of the \$600,000 in premium-bribe.

De Witt thus "milked" Le Mars in two stages. (1) From the takeover of Le Mars, April 21, 1970, to mid-1973, De Witt coerced Le Mars under the Management Contract to purchase fabricated "services" from De Witt's wholly owned Alesch Agency. This totalled \$190,000. (2) When the Insurance Department outlawed this patent ploy, De Witt simply shifted the "services" from the Agency to De Witt itself. For the next four years, 1973-1977, De Witt forced Le Mars to accept \$552,000 in multifarious "services" from De Witt. Grand total: \$742,000.

—Strict Trust—

The corporate entity and the stockholders . . . are not required to be ever on their guard and watchful lest those trustees misapply, destroy, embezzle, steal the corporate assets, or defraud them.<sup>105</sup>

Equity holds them strictly accountable as trustees.<sup>106</sup>

However, even if we were now to order an accounting, we would not permit Sinskey to retain the reasonable value of his services.<sup>107</sup>

This Brief has labored long to lay out the Doctrine of Strict Trust: "The authorities are agreed that the officers and directors of a company are trustees . . . in the transaction of the business and care of property of the corporation . . ."<sup>108</sup> Onto this broad Strict-Trust base, established by *Guth, Dawson, Hoyt, Ontjes, Schildberg, Holden, Holi-Rest, Meinhard, Borden*, the courts have erected the Custodial Concept of Corporate Control: "The directors have the custody and control of the assets of the corpo-

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105. *Des Moines Bank & Trust Co. v. George M. Bechtel & Co.*, 243 Iowa 1007, 1081, 51 N.W.2d 174, 216 (1952).

106. *Holden v. Construction Mach. Co.*, 202 N.W.2d 348, 358 (Iowa 1972).

107. *Borden v. Sinskey*, 530 F.2d 478, 497 (3d Cir. 1976).

108. *Dawson v. National Life Ins. Co.*, 176 Iowa 362, 369, 157 N.W. 929, 931 (1916).

ration for the benefit of those to whom they belong . . . ."<sup>109</sup> The Custodial Concept flows inexorably into the Benefit-to-Beneficiary Rule: "They [directors and officers] . . . impliedly undertake . . . to exercise the powers conferred solely in the interest of the corporation or the stockholders as a body or corporate entity, and not for their own personal interests."<sup>110</sup>

These elemental principles have specific applicability to the Looting of Le Mars.

### *Conflict of Interest*

I think a director can adequately serve two different masters.

—William Couch, Executive Committee,  
Deposition at 67.

I see no problem in representing both sides.

—George Howes, Executive Committee,  
Deposition at 52.

I did not see anything inherently contradictory in my position of president of both [De Witt and Le Mars].

—Carman Smith, Executive Committee,  
Deposition at 50.

Perhaps the core concept of the law of Looting is the universal reprobation of Conflict of Interest. "One of the most familiar doctrines of the law of trusts is that a trustee cannot purchase from himself, or at his own sale. He cannot lawfully be the seller and the buyer in the same transaction. . . . This doctrine rests upon the ground of public policy."<sup>111</sup> The legal consequences of directoral Conflict of Interest are radical and pervasive. Impartial directors in arm's-length dealings may resort to all manner of defenses: good faith, business judgment, fairness, negligence, good motives. But when a director deals with himself, sits on both sides of a bargain, the law speaks categorically and undeviatingly.

Yet, throughout the seven years of enforced "services," the Executive Committee dealt only with the Executive Committee:

To my knowledge, nobody represented Le Mars in purchasing

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109. Hoyt v. Hampe, 206 Iowa 206, 208, 214 N.W. 718, 720 (1927).

110. Schildberg Rock Prods. Co. v. Brooks, 258 Iowa 759, 767, 140 N.W.2d 132, 136 (1966) (quoting 19 AM. JUR. 2d *Corporations* § 1272 (1965)).

111. In re Estate of Holley, 211 Iowa 77, 81-82, 232 N.W. 807, 809 (1930) (citations omitted).

the Management Services from De Witt through the Alesch Agency.

—Carl Smith, Executive Committee, Deposition at 18.

When the Management Contract was negotiated, there wasn't anyone representing Le Mars.

—Carman Smith, Executive Committee, Deposition at 52.

We never asked anyone at Le Mars whether they felt our charges were fair and reasonable.

—John Howes, De Witt Director, Deposition at 40.

Q. And it was the Executive Committee of Le Mars then . . . ?

A. Well, the Executive Committee of De Witt, too.

Q. They were substantially the same people?

A. Yes.

—Raymond Brown, Executive Committee, Deposition at 120.

Both the flagrant Conflict of Interest and the governing law are equally patent. So, too, are the succeeding steps in the argumentation.

### *The No-Inquiry Rule*

This doctrine [of Conflict of Interest] rests upon the ground of public policy. The law does not stop to inquire into the fairness of the sale, or the adequacy of price, but stamps its disapproval upon a transaction which creates a conflict between the self-interest and integrity of the trustee. The trustee is clearly disabled from becoming a purchaser of the trust estate, whether the *cestui que trust* be an infant or an adult, and whether the sale be public or private.<sup>112</sup>

As with so many basic moral concepts, the ultimate rationale of the No-Inquiry Rule has historically been left unstated. So universally embraced, yet so rarely explained:

Now it is clear why the courts—without perhaps full aversion—added the no-inquiry prescription. It is not a question of good faith or fairness because there is never good faith or fairness when a trustee stands on both sides of a bargain. There is no question of damages because there are always damages when an employee performs service for one while in the pay of another. There is no question of fraud since the disloyalty is wrong at the outset. There need be no inquiry because the proof of the

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112. *Id.* at 82, 232 N.W. at 809.



very act of divided allegiance ends the matter. Whatever follows belongs to the fund.<sup>113</sup>

One of the more perspicacious insights into the No-Inquiry rationale comes from England's highest court:

So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is or may be impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the *cestui que trust* which it was impossible to obtain.<sup>114</sup>

This primitive Rule, moreover, is imposed pervasively, in every Conflict context: "The doctrine applies, though the purchaser be one of several cotrustees. . . . It matters not whether the sale be made with or without the sanction of judicial authority. . . ." <sup>115</sup> This pervasive applicability is understandable:

The prohibition that a trustee cannot be the seller and buyer in the same transaction acts, not on the possibility that, in some cases, the sense of duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence and supersede that of duty.<sup>116</sup>

Lest one might conclude that a different rule would obtain in the case of directors, the law painstakingly confronts the issue. In the specific context of a Conflict-of-Interest contract "[t]he court will not inquire into its profitableness to the trustee or prejudice to the beneficiary. This rule is applicable to the acts of boards of directors."<sup>117</sup> To which the court appended a long line of authority.

Precautionary Note: Not only was De Witt in bald Conflict of Interest throughout the entire seven years of the imposed "services," but at no time did De Witt mitigate its culpability by even the slightest exculpatory disclosure. Secrecy emphasizes liability.

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113. Bayne, *supra* note 7, at 583.

114. Aberdeen Ry. v. Blaikie Bros., 23 L.T.R. (n.s.) 315, 316 (H.L. 1854).

115. *In re Estate of Holley*, 211 Iowa 77, 82, 232 N.W. 807, 810 (1930) (citations omitted).

116. *Id.*

117. *Hoyt v. Hampe*, 206 Iowa 206, 220, 214 N.W. 718, 725 (1927).

*"Voidable from the Outset"*

"The policy of the law is to put fiduciaries beyond the reach of temptation, by making it unprofitable for them to yield to it. To that end an act by the fiduciary in which personal interest and duty conflict is voidable at the mere option of the beneficiary, regardless of good faith or results. The court will not inquire into its profitability to the trustee or prejudice to the beneficiary. This rule is applicable to the acts of boards of directors."<sup>118</sup>

Thus does the 1972 decision in *Holden* express the long tradition of voidability in the face of a Conflict-of-Interest contract. Whether the "contract" between the Executive Committee and the Executive Committee was oral or written, no matter. The agreement "is voidable at the mere option of the beneficiary, regardless of good faith." *Holden* is firm: "The court will not inquire into its profitability to the trustee or prejudice to the beneficiary." To which, numerous citations.

One of the better statements of the Rule comes from *Hoyt*:

The directors have the custody and control of the assets of the corporation for the benefit of those to whom they belong . . . . A fiduciary may not, directly or indirectly, appropriate the trust fund to himself without the concurrence of the cestuis with full knowledge of the facts. . . . Such an appropriation would be voidable at the option of the cestuis, without any showing of fraud, negligence, or prejudice.<sup>119</sup>

These statements are reflective of the "voidable" rule across the country. The classic expression of the rule comes from the highest court of New York:

He stood in the attitude of selling as owner and purchasing as trustee. The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them as far as may be impossible, knowing that real motives

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118. *Holden v. Construction Mach. Co.*, 202 N.W.2d 348, 357 (Iowa 1972) (quoting *Hoyt v. Hampe*, 206 Iowa 206, 220, 214 N.W. 718, 724-25 (1927)).

119. *Hoyt v. Hampe*, 206 Iowa 206, 208-09, 214 N.W. 718, 720 (1927) (citations omitted).

often elude the most searching inquiry, and it leaves neither to judge nor jury the right to determine upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall.<sup>120</sup>

With this, the Court of Appeals of New York proceeded to explain its position, again consistently with the universal rule:

The law cannot accurately measure the influence of a trustee with his associates, nor will it enter into the inquiry, in an action by the trustee in his private capacity, to enforce the contract in the making of which he participated. The value of the rule of equity, to which we have adverted, lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of trustees, by vitiating, without attempt at discrimination, all transactions in which they assume the dual character of principal and representative.<sup>121</sup>

This early statement of the American tradition carries on through the decades and finds a succinct expression of the rule in *Pepper v. Litton* by the Supreme Court of the United States: "The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside."<sup>122</sup> This uniform rule has found frequent reiteration in the federal courts. In 1954 the Sixth Circuit in *Seagrave* expatiated on the reason for the "voidability":

Although good faith on the part of the Directors and the disclosure of the material facts eliminate the question of actual fraud, equity will still act to enforce the fiduciary obligation under circumstances amounting to constructive fraud. Constructive fraud refers to acts which may have been done in good faith, with no purpose to harm the corporation, but which are done by one who has placed himself in a position of conflict between a fiduciary obligation and his own private interests. In such a situation, by reason of the strict rule applicable to fiduciaries, equity will take appropriate action to prevent the harm resulting from such actions, regardless of the good intentions of the fiduciary.<sup>123</sup>

The judicial tradition moves forward with a restatement of

120. *Munson v. Syracuse, G. & C.R.R.*, 102 N.Y. 59, 73-74, 8 N.E. 355, 358 (1886).

121. *Id.* at 74, 8 N.E. at 358.

122. *Pepper v. Litton*, 308 U.S. 295, 306-07 (1939).

123. *Seagrave Corp. v. Mount*, 212 F.2d 389, 397 (6th Cir. 1954) (citations omitted).

the "voidability" rule by the Sixth Circuit in the 1974 decision in *Ohio Drill*.<sup>124</sup> Note that the Sixth Circuit has recourse to the distinguished Learned Hand in the knowledgeable Second Circuit:

In *Marcus v. Otis* . . . Judge Learned Hand observed:  
. . . The wrong is much simpler and more fundamental—the misappropriation of funds—and it is neither an excuse that they later repaid what they had taken . . . . The bargain was voidable from the outset, no matter how favorable the terms might be, and "Automatic" can follow and reclaim the abstracted funds in any form they may take, however enhanced in value.<sup>125</sup>

Here succinctly is the solution for *Le Mars*: "The bargain was voidable from the outset, no matter how favorable the terms may be." So says the Sixth Circuit, quoting Learned Hand of the Second Circuit. And finally: *Le Mars* "can follow and reclaim the abstracted funds in any form they may take, however enhanced in value." (How poignant that Learned Hand should anticipate *De Witt*'s self-condemning return of some \$48,000 of the looted sums. No matter. The return merely branded the unreturned remainder with one large word: "Looted." This \$48,000 refund was scarcely founded on any moral compulsion. The Deposition of William Couch, Executive Committee (of "two different masters" fame) immediately antedated the disgorgement. (Transcript at 1286.))

The culmination of the tradition comes in the 1976 decision of *Borden v. Sinskey* by a unanimous Third Circuit. *Borden* followed *Guth v. Loft* exactly, applied Strict Trust and the Benefit-to-Beneficiary Rule precisely. "[Applying the doctrine first announced in *Guth v. Loft*, the court below] imposed a constructive trust in favor of the plaintiff on Sinskey's stock . . . . In addition, plaintiff was awarded . . . the profit . . . as well as all salaries, director's fees and dividends received by him . . . ." <sup>126</sup> But most important, *Borden* is on all fours with the Looting in *Le Mars*. Mr. Sinskey was in Conflict of Interest. Over the years he performed valuable services—not questionable "services"—as president and director. Not only were all profits disgorged by Sinskey, but even his hard-earned salaries:

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124. *Ohio Drill & Tool Co. v. Johnson*, 498 F.2d 186 (6th Cir. 1974).

125. *Id.* at 191 (quoting *Marcus v. Otis*, 168 F.2d 649, 654 (2d Cir.), *modified*, 169 F.2d 148 (2d Cir. 1948)).

126. *Borden v. Sinskey*, 530 F.2d 478, 486-87 (3d Cir. 1976).

However, even if we were now to order an accounting, we would not permit Sinskey to retain the reasonable value of his services. Although defendants may be able to distinguish the facts of *Guth* from those of the instant case, they cannot distinguish away the rationale of that decision. . . . [A]ll the salaries he received from Pepsi-Cola while serving as Loft's chief Executive . . . were stripped away because Guth had gained them . . . in violation of his fiduciary duties. The court refused to allow him to retain any of the profits or benefits derived from his misconduct in order to deter any disloyalty on the part of a corporate fiduciary.<sup>127</sup>

Sinskey was denied even a quantum-meruit recovery, so inveterate and firm is the Rule.

In terms of dollar-and-cents recovery, therefore, De Witt must disgorge to Le Mars every dollar thus extracted: \$742,000, without interest. Not only was every non-"contract" voidable, but the court may not permit De Witt "to retain the reasonable value of [its] services." Thus the nine-judge Third Circuit in 1976 summarizes the long tradition of *Guth*, *Dawson*, *Hoyt*, *Ontjes*, *Schildberg*, *Holden*, *Holi-Rest*, and *Meinhard*.

(Interjectory Note: The philosophy and law of the line of cases culminating with the 1976 *American Timber* (which now follow) are integral to this Looting study and are to be incorporated herein.)

———*Burton Dull and Friends*———

However, even if we were now to order an accounting, we would not permit Sinskey to retain the reasonable value of his services.<sup>128</sup>

[A]ll the salaries he received . . . were stripped away because Guth had gained them . . . in violation of his fiduciary duties.<sup>129</sup>

But many ramifications of the law yet remain. Not only must De Witt disgorge even "the reasonable value of [its] services" but all the coconspirators who were privy to the years of Looting must forfeit every penny received during the perpetration. No elaborate syllogism is needed to conclude that thieves should never receive a salary during the theft.

(Note: The legal principles here applicable to Looting have

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127. *Id.* at 497-98.

128. *Id.* at 497.

129. *Id.* at 497-98.

dollar-and-cents pertinency to the periods of Premium-Bribery, Embezzlement, the Twice-Stolen Agency, and Disloyalty, and will not be repeated apropos. A malefactor can scarce expect remuneration during the malefaction.)

The work of Arthur Young & Company, auditors, uncovered at least some of the illicit compensation received by the conspirators over the years of the Looting. (Exhibit 508, IV.) As a beginning, Arthur Young & Company totalled \$163,691 in wages and directors' fees for the period 1970-1975. This sum went to defendants on both ends of the Le Mars-De Witt axis, and seemingly spanned exactly the days of the Looting, at least until October 1975. Listed in this survey are all the principals, the ubiquitous Executive Committee, Burton Dull (as director), John Alesch, the Alesch Group, the Smith Group. The years 1976 and 1977 remain to be computed.

During this same 1970-1977 period—and for thirteen years before under John Alesch—Burton Dull wore a second fiduciary hat: general counsel of Le Mars. (What Burton Dull received before 1970—beyond the “bonus” of \$10,000 for “services” in effecting the Premium-Bribery—has not been fully explored.) But certainly Burton Dull did receive \$87,000 as counsel for his role as the Le Mars liaison for De Witt. This minimum of \$97,000 places Burton Dull among the conspirators wearing his second hat.

Certainly the *Guth, Schildberg, Holden, Borden* tradition would deal summarily with Burton Dull and Friends: “[W]e would not permit Sinskey to retain the reasonable value of his services. . . . [A]ll the salaries [Guth] received . . . were stripped away because [he] had gained them . . . in violation of his fiduciary duties. . . . In order to deter any disloyalty on the part of a corporate fiduciary.”<sup>130</sup> The general principles of this tradition would alone dispose of the Le Mars claim to Restitution. But a subspecies of this tradition has expectably grown up in specific response to the question of salaries and fees of faithless fiduciaries. Both state and federal courts would require Burton Dull and Friends to disgorge all monies, in any form, received over the entire span of the Disloyalty. Thus the Southern District in 1971, interpreting New York law: “Under New York law, a disloyal employee forfeits his right to compensation for services ‘and if he is paid without knowledge of his disloyalty he may be

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130. *Id.*

compelled to return what he has improperly received. . . .'<sup>131</sup>  
 Le Mars, therefore, may follow the funds wherever necessary.

The rule, moreover, is also expectably exacting and encompasses all compensation, even dollars otherwise justly earned. Not even a quantum meruit. The "compensation" rule is clearly a corollary of the *Guth*, *Schildberg*, *Holden*, *Borden* line. The federal treatment of the law has been synthesized in *Riffe*<sup>132</sup> by the Tenth Circuit. The *Riffe* Court, as do most of the courts, has resort to the *Restatement of Agency*.

When a corporate officer engaged in activities which constitute a breach of his duty of loyalty, or if it is a wilful breach of his contract of employment, he is not entitled to compensation for services during such a period of time although part of his services may have been properly performed. In the *Restatement* (Second), *Agency* § 469 the above doctrine is set forth, and this is followed by the comment which states in part:

"An agent, who, without the acquiescence of his principal, acts for his own benefit or for the benefit of another in antagonism to or in competition with the principal in a transaction is not entitled to compensation which otherwise be due him."<sup>133</sup>

The Tenth Circuit then expatiates on the all-pervasive rigor of the rule:

The [Restatement] comment continues and states that the agent is not entitled to compensation although the acts may not actually harm his principal and even if he thinks his actions will benefit the principal or he is otherwise "justified" in "so acting." See also *Fletcher, Corporations* (Perm. Ed.) § 2145; *J. C. Peacock, Inc. v. Hasko*, 196 Cal.App.2d 353, 16 Cal.Rptr. 518, 88 A.L.R.2d 1430; *United States v. Bowen*, 290 F.2d 40 (5th Cir.).<sup>134</sup>

The rule is so generally accepted that most courts, as did *Riffe*, cite *Fletcher on Corporations* in support. The rationale of the rule, of course, is embedded in the *Guth*, *Schildberg*, *Holden*, *Borden* philosophy.

The most recent application of the rule, *American Timber & Trading Co. v. Niedermeyer*,<sup>135</sup> is also the most rewarding from

131. *Frederick Chusid & Co. v. Marshall Leeman & Co.*, 326 F. Supp. 1043, 1061 (S.D.N.Y. 1971) (citations omitted).

132. *Wilshire Oil Co. of Texas v. Riffe*, 406 F.2d 1061 (10th Cir. 1969).

133. *Id.* at 1062.

134. *Id.*

135. 276 Or. 1135, 558 P.2d 1211 (1976).

the standpoint of ad hoc pertinence to Le Mars. Ben Niedermeyer played the same role as Burton Dull and Friends. Ben was contrôleur of American Timber, in clear conflict of interest, and over a span of ten years was disloyal to his firm. Furthermore the stakes were high. In one four-year period alone, "Ben received a total of \$226,798 in salaries from"<sup>136</sup> American Timber. Even more to the point:

[T]he evidence is also clear that the board knew that these salaries, as well as those of the other officers, were being paid, and the amount of these salaries is reflected on the books of the corporation. We agree with the trial court's findings that these salaries were reasonable, that the corporation has ratified them through its acquiescence in the face of full knowledge of these payments, and that it is now estopped from seeking their recovery on those grounds.<sup>137</sup>

"Reasonableness," therefore, is not the issue. The reasonableness of the "services" of Burton Dull and Friends is equally not the issue. (Just as the reasonableness of the \$742,000 in multifarious "services" enforced on Le Mars was not the issue.)

The Supreme Court of Oregon in late 1976 faced the issue squarely:

However, a more difficult question is posed by AT&T's contention that Ben should be required to refund his salaries to the corporation as a matter of equity because of his numerous breaches of his fiduciary obligations which resulted in a serious diminution of the assets of the corporation. This is a separate and independent basis for recovery of executive salaries.<sup>138</sup>

Manifestly the Oregon court is not considering the question on a quantum-meruit basis. The philosophy is founded in "equity because of his numerous breaches of his fiduciary obligations."

In this context of equity and fiduciary duty, a unanimous Oregon court aligns itself with the general rule:

The general rule . . . is that a corporate officer who engages in activities which constitute either a breach of his duty of loyalty or a wilful breach of his contract of employment is not entitled to any compensation for services rendered during that period of time even though part of those services may have been properly performed.<sup>139</sup>

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136. *Id.* at 1154, 558 P.2d at 1222.

137. *Id.* at 1154-55, 558 P.2d at 1223.

138. *Id.* at 1155, 558 P.2d at 1223.

139. *Id.* (citations omitted).



The *American Timber* court then specifies the "continuing series of deliberate diversions of corporate funds, secret accounting manipulations, and other wilful breaches of Ben's fiduciary duties, which culminated in the looting of corporate assets."<sup>140</sup>

The proof of the pudding—for Ben and for Burton Dull and Friends—came in the practicalities of the adjudication. (Remember Ben's four-year salaries.) "Therefore, we concluded that Ben should be ordered to return to the corporation all compensation, whether in the form of salaries or bonuses, which he received from AT&T after August 15, 1966, with interest."<sup>141</sup> With that the Oregon court "remanded for an additional accounting in accordance with this opinion."<sup>142</sup> This meant ten years of salaries.

This Brief is a "seamless web." The 1976 *American Timber* must spread its philosophy throughout.

### III. EMBEZZLEMENT

Whether there is a patent payment directly from the appointee [De Witt] . . . or a complicated series of moves from the controlled corporation [Le Mars], one overriding principle prevails—the consideration must be the primary responsibility of the appointee [De Witt].<sup>143</sup>

Here, perhaps, is the only area where the facts need painstaking reemphasis. The scene must be exactly set.

De Witt wanted desperately to buy control of Le Mars. Employers Mutual had offered the Alesches a premium-bribe of \$450,000. De Witt had to top this offer. Protracted negotiations culminated in the Executive Committee response: "[C]omplete agreement with . . . your letter." And that Bribery Letter detailed De Witt's bribe. This is of consuming importance. By agreeing to this Bribery Letter, De Witt agreed to pass \$600,000 to the Alesches, in the Agency "sale," "Consultation" fees, free auto, "pensions." Unless De Witt gave the Alesches this \$600,000, no Sale of Control. By its firm agreement, therefore, De Witt openly and irrevocably stamped the \$600,000 as premium-bribe dollars *passing from De Witt* to the Alesch Group. Proof has already been established that these premium-bribe dollars must be disgorged by the Alesch Group to Le Mars.

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140. *Id.* at 1156, 558 P.2d at 1223.

141. *Id.*

142. *Id.* at 1158, 558 P.2d at 1224.

143. Bayne, *supra* note 39, at 501.

*The Garden-Variety Bribery*

[T]he following will outline . . . what in turn De Witt will do in consideration [for control].

—The Dull-Brown Bribery Letter,  
Exhibit 4.

If De Witt had had this \$600,000 in its own till, De Witt would have reached into the till, paid the \$600,000 to the Alesch Group, and taken over Le Mars. If that had happened, this lawsuit would be simpler. Under the Strict-Trust law of Sale of Control, the Alesch Group would then disgorge the premium-bribe to Le Mars, and go home. De Witt, as it should have expected had it thought the matter through, would then be out-of-till the entire \$600,000. That is the just dessert for “bribers” and “bribeds.” The “bribed” disgorges dollars to the corporation. The “briber” never sees the bribe dollars again.

*The De Witt Variety*

Our Executive Committee are in complete agreement with the proposal as outlined in your letter.

—Letter, Brown to Dull, Exhibit 3.

The Alesch Group remains irrevocably liable to Le Mars for the disgorgement of the full \$600,000 in premium-bribe. But when De Witt agreed to pay the Alesch Group the \$600,000, De Witt did not have the premium-bribe dollars in the till. Or at least not all of them. True, part of the \$600,000 came from De Witt's own till. But some \$178,600 did not. Either De Witt did not have the money, or was afraid to use it, or was simply greedy and larcenous. No matter. The fact is that De Witt decided to steal \$178,600 of the total \$600,000 premium-bribe that it had promised the Alesch Group in the Bribery Letter.

De Witt could have stolen the \$178,600 from the local bank (and thus made this explanation simpler), but it chose an approach not uncommon in Premium-Bribery: De Witt first stole the \$178,600 from Le Mars itself, and then handed over the stolen money to the Alesch Group according to promise. “[N]early every successful premium-bribe is sooner or later recouped from the corporation. Often, however, the new appointee avoids the circuity of a personal payment and later corporate recoupment by an immediate raid on the corporate till.”<sup>144</sup> The De Witt raid on

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144. *Id.* at 502.

the Le Mars till netted: (1) some \$10,000 in free car for John Alesch, (2) "Pensions" of \$154,000, (3) "Consultation" fees to John Alesch of \$14,600. So now De Witt must restore the \$178,600 to Le Mars. Otherwise De Witt will get off scot-free without losing its premium-bribe money, which it stole from Le Mars.

Note well: If De Witt had not accepted responsibility for full payment of the premium-bribe, the Alesch Group would never have delivered the Board. Translated into other words: The Alesch Group was not prepared to accept the same old Employers Mutual offer and be forced to loot Le Mars personally before leaving office (and be liable for looting). The Alesch Group insisted that De Witt premium-bribe them in the full amount of \$600,000. Where De Witt got the dollars did not matter to the Alesch Group. If Le Mars later sued De Witt, no matter to the Alesch Group. And so, to beat out Employers Mutual, De Witt agreed to the full \$600,000 bribe—and stole the difference, \$178,600, directly from Le Mars, without the circuitry of later recoupment, as was necessary with the remainder.

Le Mars now has a right to the stolen \$178,600—which is not to be confused with the \$600,000 premium-bribe to be disgorged by the Alesch Group as trustees of Le Mars, under the law of Restitution.

#### IV. THE TWICE-STOLEN AGENCY

And Mr. Alesch ran his Agency and also managed [Le Mars].

—Melvin Gearke, Le Mars Officer,  
Director, Deposition at 84.

Q. Why was Alesch Agency given 700 square feet in the new building, utility-free space?

A. The Agency had always been with the Company. It always, even though it was separate, it had always been in the same building.

—Melvin Gearke, Le Mars Officer,  
Director, Deposition at 84.

We wanted the business from the Alesch Agency itself, which a good deal of it had been going into other insurance companies. So, we was interested in getting that business in De Witt.

—Raymond Brown, Executive Committee,  
Deposition at 26.

That little "pup," the Alesch Agency, was stolen from Le Mars: (1) by John Alesch over the period from 1950(?) to April

21, 1970, and (2) by De Witt from April 21, 1970, to mid-1977.

Voluminous facts detail the grossest Conflict of Interest between: (1) Alesch as Le Mars and Alesch as Alesch Agency, and (2) De Witt as Le Mars and De Witt as Alesch Agency. Both malefactors had total control and custody of both Le Mars and the Agency. At no time did either Le Mars or the Agency have a viable life of their own.

Throughout this entire period, first John Alesch and then De Witt successfully stole: (1) all the Agency Assets, (2) Insurance Commissions, (3) Salaries, (4) Dividends and (5) in the case of De Witt, Profits diverted from Le Mars Home Office business.

Fortunately the law of Corporate Opportunity is clear, categorical, and uniform. This law will be applied in *Corporate Opportunity*, *Strict Trust*, and *Benefit to Beneficiary*.

#### A. Corporate Opportunity

"[I]f there is presented to a corporate officer or director a business opportunity which . . . is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself."<sup>145</sup>

The Doctrine of Corporate Opportunity has been explained and applied with undeviating regularity since the days of *Guth v. Loft* and before. Every norm of *Schildberg* is verified in the Alesch and De Witt usurpations. Certainly the ownership of the Agency was within Le Mars' "line of business." De Witt conceded as much by "buying" the Agency from John Alesch. That Le Mars had "an interest or a reasonable expectancy" in notable benefits from the Agency is beyond cavil.

By any test, that little "pup" was indeed the "Twice-Stolen Agency." To dilate would be supererogatory.

#### B. Strict Trust

The directors have the custody and control of the assets

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145. *Schildberg Rock Prods. Co. v. Brooks*, 258 Iowa 759, 768, 140 N.W.2d 132, 137 (1966) (quoting *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 272-73, 5 A.2d 503, 511 (Sup. Ct. 1939)).

of the corporation for the benefit of those to whom they belong . . . .<sup>146</sup>

"[Directors] impliedly undertake . . . to exercise the powers conferred solely in the interest of the corporation or the stockholders as a body or corporate entity, and not for their own personal interest."<sup>147</sup>

The law of Corporate Opportunity is simply a species of the overall law of Strict Trust. Most courts have acknowledged that the doctrine is nothing other than a specific application of Strict Trust in a special context. Thus the painstaking construction thus far of the Strict-Trust foundation may now be used for the superstructure of Corporate Opportunity.

The doctrine of "corporate opportunity" is not new to the law and is but one phase of the cardinal rule of undivided loyalty on the part of fiduciaries . . . . Our own consideration . . . is mainly in *Ontjes v. MacNider*, . . . 232 Iowa 562. . . , which quotes at length with approval from *Guth v. Loft, Inc.*, 23 Del. Ch. 255. . . , a leading case in this area of the law.<sup>148</sup>

At this juncture, recall the early argumentation and go forward to the Twice-Stolen Agency.

### C. *Benefit to Beneficiary*

"And, if, in such circumstances [Conflict of Interest], the interests of the corporation are betrayed, the corporation may elect to claim all of the benefits of the transaction for itself, and the law will impress a trust in favor of the corporation upon the property, interests and profits so acquired."<sup>149</sup>

The age-old and ever-fresh Strict-Trust doctrine—with its implicit corollaries, the Custodial Concept of Corporate Control, Conflict of Interest, the Benefit-to-Beneficiary and No-Inquiry Rules—now finds application to the Twice-Stolen Agency.

(Note: The application of Strict Trust to Corporate Opportunity should enhance the other divisions of this Brief. Here Strict Trust has never been bedeviled by the "disintegrating erosion" occasionally found elsewhere in corporate law.)

146. *Hoyt v. Hampe*, 206 Iowa 206, 208, 214 N.W. 718, 720 (1927).

147. *Schildberg Rock Prods. Co. v. Brooks*, 258 Iowa 759, 767, 140 N.W.2d 132, 136 (1966) (quoting 19 AM. JUR. 2d *Corporations* § 1272 (1965)).

148. *Id.* at 768, 140 N.W.2d at 137 (citations omitted).

149. *Id.* (quoting *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 273, 5 A.2d 503, 511 (Sup. Ct. 1939)).

### *The Inveterate Rule*

"The general rule is that a director or other corporate officer cannot acquire an interest adverse to that of the corporation . . . . [S]uch acquisition will be taken to be for the benefit of the corporation. \* \* \*. 'They cannot have or acquire any personal or pecuniary interest in conflict with their duty as trustees.'"<sup>150</sup>

*Schildberg* has stated the universal Corporate-Opportunity Rule: Any act, transaction or contract performed under a Conflict-of-Interest disability is voidable by the beneficiary, regardless of good faith. Countless courts over the decades have buttressed the Rule by resort to Cardozo's *Meinhard*:

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions.<sup>151</sup>

This "tradition that is unbending and inveterate" has never been undermined by "the 'disintegrating erosion' of particular exceptions."

### *State Law*

It is the policy of the law to put fiduciaries beyond the reach of temptation by making it unprofitable to yield to it. Accordingly an act by the fiduciary in which personal interest and duty conflict is voidable at the option of the beneficiary, regardless of good faith.<sup>152</sup>

The Rule is all-embracing. Nothing is excused. The total value of the assets stolen, dividends, salaries, commissions, prof-

150. *Id.* at 767, 140 N.W.2d at 137 (quoting 3 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 861 (rev. perm. ed. 1965)).

151. *Meinhard v. Salmon*, 249 N.Y. 458, 463-64, 164 N.E. 545, 546 (1928).

152. *Schildberg Rock Prods. Co. v. Brooks*, 258 Iowa 759, 766, 140 N.W.2d 132, 136 (1966).

its, whatever, all without exception must be disgorged to the injured beneficiary. The Rule is categorical:

The doctrine of "corporate opportunity" is not new to the law and is but one phase of the cardinal rule of undivided loyalty on the part of fiduciaries. . . . Our own consideration of the quoted term as such is mainly in *Ontjes v. MacNider*, . . . 232 Iowa 562, 579. . . , which quotes at length with approval from *Guth v. Loft, Inc.*, . . . a leading case in this area of the law. ". . . And, if, in such circumstances [Conflict of Interest], the interests of the corporation are betrayed, the corporation may elect to claim all of the benefits of the transaction for itself, and the law will impress a trust in favor of the corporation upon the property, interests and profits so acquired."<sup>153</sup>

Here is the culmination: "[T]he law will impress a trust in favor of the corporation." The law first voids the transaction and then sequesters all "the property, interests and profits so acquired" for the benefit of the entity. The uniformity of the Rule is referable to the almost universal reliance on the prototypal *Guth v. Loft*.

The statements set forth in the case of *Guth v. Loft* . . . disclose the general principles that apply to a corporate officer and director in connection with their duties and relations to the corporation of which they are an officer. . . .

We have quoted quite extensively from this case inasmuch as it is our conclusion that this late and well-reasoned expression of the Delaware court summarizes the general holdings of the various jurisdictions and the several texts and authorities which we have consulted.<sup>154</sup>

Among the most modern state applications of the Rule, the 1971 *Monaco*<sup>155</sup> from the Supreme Court of Pennsylvania, is aptly illustrative. All of the prerequisites were met. Identical parties on both sides of the deal, patent injury to the helpless beneficiary, with only the law for protection. Pennsylvania (using Cardozo's *Meinhard* and citing *Guth v. Loft*) quotes from an earlier Pennsylvania case to state the standard rigid rule:

"[Officers and directors] . . . cannot, either directly or indirectly, utilize their position to obtain any personal profit or advantage . . . . [I]f he does so, the corporation may elect to claim all the benefits of the transaction. Nor is it material that

153. *Id.* at 768, 140 N.W.2d at 137 (citations omitted).

154. *Ontjes v. MacNider*, 232 Iowa 562, 577, 579, 5 N.W.2d 860, 868-69 (1942).

155. *Seaboard Indus., Inc. v. Monaco*, 442 Pa. 256, 276 A.2d 305 (1971).

his dealings may not have caused a loss or been harmful to the corporation . . . ."<sup>156</sup>

Every opinion, whether state or federal, adds further insights into the genius of Strict Trust.

Today's world of corporate enterprise, with all its variations and complexities of control, management and finance, and the public's extensive participation in corporate ventures, renders it more imperative than ever before that corporate directors and officers adhere to the highest standards of responsible fiduciary conduct. If our competitive market economy is to operate in the best interests of shareholders and society in general, we can condone no intentional violations of corporate fiduciary duties. Only in this way can the necessary confidence in corporate institutions so essential to the vitality of our economic and social way of life be maintained.<sup>157</sup>

*Monaco* affirmed the lower court. The fiduciaries "were ordered to file accountings and to return to the corporation all monies received."<sup>158</sup>

The 1972 *Holden* decision trod the same ground: "Therefore, Warren must be held strictly accountable to CMC for the Chamberlain stock or its fair market value, and for all increases, income, proceeds or dividends realized therefrom."<sup>159</sup>

In Illinois in 1973 the court (quoting without citation from *Schildberg*?) highlighted the universality of the Rule:

The doctrine of corporate opportunity is not new to our law. It is only one phase of the cardinal rule that requires undivided loyalty from corporate fiduciaries. In other words, one who is a fiduciary to a corporation may not acquire, in opposition to it, any property or tangible expectancy in which it has an interest . . . .<sup>160</sup>

Citing a line of Illinois cases, the court stated the Benefit-to-Beneficiary Rule:

Directors and officers of a corporation are fiduciaries. They are the trustees of its business and property. In this capacity, they are subject to the general rule of trusts and trustees that

156. *Id.* at 261-62, 276 A.2d at 309 (quoting *Lutherland, Inc. v. Dahlen*, 357 Pa. 143, 151, 53 A.2d 143, 147 (1947)) (citations omitted).

157. *Id.* at 264, 276 A.2d at 310.

158. *Id.* at 257, 276 A.2d at 306.

159. *Holden v. Construction Mach. Co.*, 202 N.W.2d 348, 358 (Iowa 1972).

160. *Kerrigan v. Unity Sav. Ass'n*, 11 Ill. App. 3d 766, 773-74, 297 N.E.2d 699, 704-05 (1973), *aff'd in part, rev'd on other grounds in part*, 58 Ill. 2d 20, 317 N.E.2d 39 (1974).



they cannot, in their dealings with the business or property of the corporation, use their relation to it for their own personal gain.<sup>161</sup>

Interestingly, *Kerrigan* dealt with the appropriation of the insurance business of the plaintiff.

In the 1974 *Miller*,<sup>162</sup> the Supreme Court of Minnesota aligned itself with the "inveterate rule": "If such a business opportunity is usurped for personal gain, it is equally well recognized that the opportunity and any property or profit acquired becomes subject to a constructive trust for the benefit of the corporation. *Guth v. Loft, Inc.* . . ." <sup>163</sup>

This Brief has already adverted to the identity of the law of Agency, Strict Trust, Restitution:

This principle, usually referred to as the doctrine of corporate opportunity, is derived essentially from fundamental rules of agency concerning the duty of utmost good faith and loyalty owed by a fiduciary to his principal and also from the law of constructive trusts embodying equitable principles of unjust enrichment.<sup>164</sup>

#### *Borden and the Federal Cases*

Consequently, [the district court] imposed a constructive trust in favor of the plaintiff on Sinskey's stock in the . . . bank. In addition plaintiff was awarded a money judgment encompassing, among other things, the profit Sinskey derived on his disposition of the Edgewater stock as well as all salaries, director's fees and dividends received by him in connection with the above banks.<sup>165</sup>

The best and most authoritative federal applications of Corporate Opportunity come from *Redmont*,<sup>166</sup> handed down by the Second Circuit in 1973, and *Borden* by the Third Circuit in 1976. Both are on all fours with *Le Mars* and both enunciated the unvarying Rule. Thus, the Second Circuit in *Redmont*:

"Corporate officers and directors are not permitted to use their position of trust and confidence to further their private inter-

161. *Id.* at 774, 297 N.E.2d at 705.

162. *Miller v. Miller*, 301 Minn. 207, 222 N.W.2d 71 (1974).

163. *Id.* at 219-20, 222 N.W.2d at 78.

164. *Id.* at 220, 222 N.W.2d at 78.

165. *Borden v. Sinskey*, 530 F.2d 478, 486-87 (3d Cir. 1976).

166. *Abbott Redmont Thinlite Corp. v. Redmont*, 475 F.2d 85 (2d Cir. 1973).

ests. . . . The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest. . . .

If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, at its election, while it denies to the betrayer all benefit and profit . . . ."<sup>167</sup>

• Again the Second Circuit has resort to *Guth* and *Meinhard*, among others.

But the apex has been reached in *Borden v. Sinskey*. It is herewith stated for the record that *Borden* will prove to be the most important single opinion in the field of corporate philosophy in decades, surpassing *Perlman v. Feldmann*, *Diamond v. Oreamuno*, and even *Guth v. Loft*. *Borden* not only enunciates and applies the traditional Rule with unabashed thoroughness, but supports its decision with invaluable commentary and insight.

So important is *Borden*, so pat with *Le Mars*, that the parallel would without more solve most problems posed by this Brief.

Sinskey was John Alesch, and of course, later, De Witt. Sinskey controlled Corpamerica, just as John Alesch and De Witt had total custody of *Le Mars*. Corpamerica, as *Le Mars*, was owned by the public.

Corpamerica was a bank holding company. Its business was to acquire banks. Three choice little Jersey bank opportunities appeared on the horizon. All three banks, Carteret, Edgewater, and Perth Amboy, would fit perfectly into Corpamerica's plans, just as the Alesch Agency would have been an excellent augment to *Le Mars*.

But Sinskey, as did John Alesch and De Witt, had his own designs. In a word, Sinskey himself, personally, took over the three little Jersey banks, while the Sinskey-dominated Corpamerica stood mute on the sidelines. Corpamerica was as helpless as *Le Mars*.

Corpamerica's champion was not a policyholder-owner, but rather a chapter X trustee under the Bankruptcy Act. In a direct action, trustee Borden sought a disgorgement of (1) all stock in the three banks, (2) all profits earned, (3) all salaries, (4) all director's fees, and finally (5) all dividends received by Sinskey

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167. *Id.* at 88 n.3 (quoting *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 270-71, 5 A.2d 503, 510 (Sup. Ct. 1939)).

throughout the entire period. The Third Circuit in 1976 spoke with a loud voice on behalf of Le Mars:

The above events led the district court to the conclusion that fiduciary obligations had been violated to "an extraordinary degree" and it therefore entered judgment for the plaintiff on his state law claims. More specifically, the court below held that Carteret, Edgewater, and Perth Amboy were corporate opportunities rightfully belonging to Corpamerica. Consequently, it imposed a constructive trust in favor of the plaintiff on Sinskey's stock in the [banks]. In addition, plaintiff was awarded a money judgment encompassing, among other things, the profit Sinskey derived on his disposition of the [banks'] stock as well as all salaries, director's fees and dividends received by him in connection with the above banks.<sup>168</sup>

That was the New Jersey District Court. The Third Circuit, on appeal, affirmed unanimously. More than that, the Third Circuit first denied a rehearing, and then denied a second request for a rehearing, this time en banc. Nine circuit judges in all.

The Third Circuit introduced its affirmance in *Borden* with a solidifying nexus with the past: "Applying the doctrine first announced in *Guth v. Loft*, . . . the court below held that the Carteret, Edgewater, and Perth Amboy banks constituted 'corporate opportunities' that belonged in all fairness to Corpamerica."<sup>169</sup> With this the *Borden* court stated the Corporate-Opportunity Rule exactly as did *Schildberg*. The court then treated the specific holdings below and approved each in turn.

But the most insightful commentary in *Borden* centers on the thoroughness of the Third Circuit's application of Strict Trust and the Benefit-to-Beneficiary and No-Inquiry Rules. The parallel to Le Mars (not only regarding the Twice-Stolen Agency, but also the Premium-Bribery, Restitution for coerced "services," Disloyalty) is parlously close to inspired.

Once the court ordered Sinskey to disgorge all assets, profits, personal salaries, personal director's fees, dividends, everything, Sinskey begged for at least a quantum-meruit allowance for all the work he had expended over the many years as president and director of each of the banks. Sinskey had actually worked hard for Carteret, Edgewater, and Perth Amboy. To the contrary, his work was minimal for Corpamerica. (In this, John Alesch differed

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168. *Borden v. Sinskey*, 530 F.2d 478, 486-87 (3d Cir. 1976).

169. *Id.* at 489 (citation omitted).

from Sinskey, since John Alesch did work for Le Mars.) Sinskey argued:

[T]hat even if Sinskey could not retain those salaries, he should have been awarded the reasonable value of the services rendered. . . . Consequently, [Sinskey asserts] that it is inequitable to require Sinskey to turn over the full amount of his salaries without offering him any compensation for the valuable services he performed. [Sinskey] then ask[s] this Court to order an accounting to determine the reasonable value of such services.<sup>170</sup>

With this, the Third Circuit applies with traditional logic the exacting norms of the Strict-Trust Corporate-Opportunity Doctrine: "Since [Sinskey's] claim is, in essence, one for credits, we might find that [the] failure to offer evidence on this issue at trial is fatal. However, even if we were now to order an accounting, we would not permit Sinskey to retain the reasonable value of his services."<sup>171</sup>

The Third Circuit next explains the rationale of the Rule and dissects *Guth v. Loft*. The Third Circuit noted that Guth had had to pay over all his Pepsi Cola salaries, earned while serving as Loft's chief executive officer. Guth personally had stolen Pepsi Cola out from under Loft, the public company Guth controlled. *Borden* emphasized that Guth was forced to disgorge his Pepsi Cola salaries (as Sinskey his bank salaries and as John Alesch and De Witt all benefits from the Alesch Agency) *not* because Loft (that is, Corpamerica and Le Mars)

had fairly compensated him during that period. Rather, they were stripped away because Guth had gained them through his usurpation of the Pepsi-Cola opportunity in violation of his fiduciary duties. The court refused to allow him to retain any of the profits or benefits derived from his misconduct in order to deter any disloyalty on the part of a corporate fiduciary. As the court stated:

If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, . . . while *it denies to the betrayer all benefit and profit*. The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation

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170. *Id.* at 497.

171. *Id.*

resulting from a betrayal of confidence, *but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.* 5 A.2d at 510 (*emphasis added*).<sup>172</sup>

With this, the Third Circuit in *Borden* capped off its opinion by affirming the lower court: "We, therefore, find no error in the order of the District Court directing Sinskey to pay Corpamerica all salaries received from Carteret, Perth Amboy and Edgewater."<sup>173</sup>

If any point could be characterized as the climax of this Brief, certainly this analysis and adjudication in 1976 of the Third Circuit in *Borden* would be that climax. Here was a unanimous court supporting a federal district court, denying en banc a rehearing. The philosophy and rationale of *Borden* could well form the basis for the instant court's adjudication of all the major questions of this Brief: Premium-Bribery, Looting, Corporate Opportunity, the Twice-Stolen Agency. And now Disloyalty.

(Recall, moreover, the powerful support of the 1976 *American Timber* decision, handed down by a unanimous Supreme Court of Oregon.)

## V. DISLOYALTY

The doctrine . . . is not new to the law and is but one phase of the cardinal rule of undivided loyalty on the part of fiduciaries.<sup>174</sup>

[It] follows, then, that the chiefest breach of loyalty would be the faithlessness of the steward. . . . There is a fundamental repugnance in serving two masters. . . . Without more, just being on the other side is [a breach of loyalty]. . . .<sup>175</sup>

As for Disloyalty, all defendants are divided into: (1) the Alesch Group, with custody of Le Mars from the beginning to April 21, 1970, and (2) De Witt and the Smith Group, the custodians thereafter. At no time whatsoever did Le Mars breathe a breath of its own. One Group or the other always controlled its

172. *Id.* at 497-98.

173. *Id.* at 498.

174. *Schildberg Rock Prods. Co. v. Brooks*, 258 Iowa 759, 768, 140 N.W.2d 132, 137 (1966).

175. Bayne, *supra* note 7, at 577-78.

breathing. Both Groups were trustees of Le Mars's well-being.

At that split conceptual second when the premium-bribe is changing hands the fiduciary duty of a strict trustee rests with exactly equal weight on the outgoing contrôleur and the incoming appointee. At this transitional moment corporate custody is being entrusted by the one and accepted by the other. The *bonum commune* of the entity rests in a delicate balance between incumbent and successor. Each consequently faces the identical custodial obligation defining the suitability of the successor-contrôleur.<sup>176</sup>

As such trustees, every member of both Groups betrayed their trust and were false to their signatures of loyalty on the Le Mars Policy Statement of April 21, 1970.

With this comes a subtle point. Each defendant has been guilty of Premium-Bribery, Embezzlement, Looting, Stealing the Twice-Stolen Agency. For these Torts and Crimes each defendant will accordingly be mulcted in specific Damages, both Compensatory and Punitive. But beyond these detailed derelictions, each defendant was guilty, deliberately, thoughtfully, over months and years, of another distinct malefaction: Each breached his Trust, eroded the fabric of the entity entrusted to his custody and care.

The results of this erosion are incalculable, or better, are calculable only with thoughtful meditation on the manifold, baneful effects of years of subversion, conflict of interest and betrayal. Disloyalty itself might well be the worst sin of all.

It follows, then, that the chiefest breach of loyalty would be the faithlessness of the steward. . . . There is a fundamental repugnance in serving two masters. This is what Christ meant when he said, "He who is not with me is against me." . . . It is not a question . . . of illicit gain, but of simply being "against me." Sworn allegiance has been broken by the very act of serving a second master. Basic loyalty is an elemental virtue and goes to the heart of human nature. Without more, just being on the other side is inconsistent with true honor and devotion.<sup>177</sup>

The key concept here is the harm done to Le Mars by the Disloyalty *itself*, irrespective of the other injuries inflicted independently by a disloyal person.

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176. Bayne, *supra* note 55, at 221.

177. Bayne, *supra* note 7, at 577-78 (footnotes omitted).

Basic loyalty becomes vividly realistic when reduced to two simple human participants, father and son, priest and penitent, attorney and client, husband and wife. The anguish and shock of a son, a penitent, a client, a wife, at the slightest intimation of infidelity are most forceful expressions of the innermost essence of the virtue of loyalty. Merely, moreover, because the innocent and trusting party happens to be the millions-plus shareholders of A.T. & T. does not diminish an iota the natural-law demands of the utmost in loyalty. Here the requirement is "not honesty alone, but the punctilio of an honor the most sensitive."<sup>178</sup>

This is what *Schildberg* meant when it referred to "the cardinal rule of undivided loyalty on the part of fiduciaries."<sup>179</sup>

### *Disloyalty, the Wrong Itself*

[A]n allegation of damages [for fiduciary breaches] is not a prerequisite to a recovery.<sup>180</sup>

The astute Second Circuit in *Schein v. Chasen* was analyzing with approval the famous *Diamond v. Oreamuno*.<sup>181</sup> Handed down in 1969 by New York's highest court, *Diamond* has the finest judicial exposition (with the possible exception of the Third Circuit's *Borden v. Sinskey*) of the rationale of the Disloyalty Damages.

*Diamond* was a case of first impression and dealt specifically with the use of inside information to the detriment of the corporate beneficiary. But, as the New York court said: "This, in turn is merely a corollary of the broader principle, inherent in the nature of the fiduciary relationship, that prohibits a trustee or agent from extracting secret profits from his position of trust."<sup>182</sup> *Diamond* had all the prerequisites for Strict Trust. Here again is the quintessence of Disloyalty:

It is true that the complaint before us does not contain any allegation of damages to the corporation but this has never been considered to be an essential requirement for a cause of action founded on a breach of fiduciary duty. . . . This is because the function of such an action, unlike an ordinary tort or contract

178. *Id.* at 578 (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928)).

179. *Schildberg Rock Prods. Co. v. Brooks*, 258 Iowa 759, 768, 140 N.W.2d 132, 137 (1966).

180. *Schein v. Chasen*, 478 F.2d 817, 824 n.9 (2d Cir. 1973). See *id.* at 823-24.

181. *Diamond v. Oreamuno*, 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969).

182. *Id.* at 497-98, 248 N.E.2d at 912, 301 N.Y.S.2d at 80.

case, is not merely to *compensate* the plaintiff for wrongs committed by the defendant but, as this court declared many years ago (*Dutton v. Willner*, 52 N.Y. 312, 319 . . .), "to *prevent* them, by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates."<sup>183</sup>

One must, however, read *Diamond* closely. In strict exactitude, Disloyalty always and everywhere inflicts very real injury on the beneficiary. Disloyalty itself (over and above the Premium-Bribery, the Embezzlement, the Looting, the Stealing of the Twice-Stolen Agency, malefactions unrelated to Disloyalty itself beyond the fortuity of being the handiwork of an otherwise disloyal steward) inflicts double damages on the helpless entity.

First, the Disloyalty wounds the beneficiary through the very infidelity itself. "Without more, just being on the other side" is an actionable wrong. How calculate the extent of injury? How estimate the damages suffered in the betrayal itself? These calculations are difficult, but "mere difficulty in ascertaining and measuring damages does not alone constitute a cause for denial of recovery."<sup>184</sup> These intangible, difficult-to-evaluate Damages were in mind when *Diamond* said: Damages have "never been considered an essential requirement" in a breach of trust. Consider the anguish of a son, a wife.

Second and more readily discernible, Disloyalty does produce very visible scars. This the *Diamond* court also knew, and ticked off some of the scars from Disloyalty's wounds:

In addition, it is pertinent to observe that, despite the lack of any specific allegation of damage, it may well be inferred that the defendants' actions might have caused some harm to the enterprise. Although the corporation may have little concern with the day-to-day transactions in its shares, it has a great interest in maintaining a reputation of integrity, an image of probity, for its management and in insuring the continued public acceptance and marketability of its stock. When officers and directors abuse their position in order to gain personal profits, the effect may be to cast a cloud on the corporation's name, injure stockholder relations and undermine public regard for the corporation's securities. As presiding Justice Botein aptly put it, in the course of his opinion for the Appellate Division, "[t]he

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183. *Id.* at 498, 248 N.E.2d at 912, 301 N.Y.S.2d at 81 (citations omitted).

184. *Holden v. Construction Mach. Co.*, 202 N.W.2d 348, 364 (Iowa 1972).



prestige and good will of a corporation, so vital to its prosperity, may be undermined by the revelation that its chief officers had been making personal profits out of corporate events which they had not disclosed to the community of stockholders."<sup>185</sup>

New York's highest court might well be summarizing the calculable harm inflicted by all defendants on hapless Le Mars.

The most recent and equally apt expression of the subtle (or, in the case of Le Mars, are they really subtle?) nuances of Disloyalty Damages has come from the Third Circuit in the predictably timeless *Borden v. Sinskey*. The familiar facts of *Borden* again carry all prerequisites of Strict Trust. The Third Circuit superimposed its own explanation on that of *Guth v. Loft*:

The court refused to allow him to retain any of the profits or benefits derived from his misconduct in order to deter any disloyalty on the part of a corporate fiduciary. As the [*Guth*] court stated:

"If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation . . . while it denies to the betrayer all benefit and profit. The rule, inveterate and uncompromising in its rigidity, *does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence*, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation."<sup>186</sup>

The key words are italicized: Damages do "not rest upon the narrow ground of injury or damage to the corporation resulting from" Disloyalty.

### PART THREE: THE SANCTIONS

#### I. DAMAGES

We are aware that our conclusions may result in very serious consequences to defendants, notwithstanding their freedom from evil motives. To sustain, however, their dealings with the company would be subversive of elementary principles governing fiduciary relationships

185. *Diamond v. Oreamuno*, 24 N.Y.2d 494, 499, 248 N.E.2d 910, 912-13, 301 N.Y.S.2d 78, 81-82 (1969).

186. *Borden v. Sinskey*, 530 F.2d 478, 498 (3d Cir. 1976) (emphasis altered).

in general and the management of corporations in particular, and would open the door to the grossest frauds by corporate managers.<sup>187</sup>

Since dissimilarities exceed similarities, Damages must be considered separately: *Compensatory Damages* and *Punitive Damages*.

#### A. *Compensatory Damages*

The corporate entity and the stockholders, in particular, may presume that these trustees will perform their duties with the diligence, honesty and the utmost good faith, inherent and implicit in their functions. They are not required to be ever on their guard and watchful lest those trustees misapply, destroy, embezzle, steal the corporate assets, or defraud them.<sup>188</sup>

New York's highest court in *Bosworth v. Allen*, in a Sale-of-Control case on all fours with *Le Mars*, sets the tone:

[T]he directors of a corporation are charged with the duties of trustees and bound to care for its property and manage its affairs in good faith, and for a violation of that duty resulting in waste of its assets, injury to its property, or unlawful gain to themselves, they are liable to account in equity the same as ordinary trustees. The corporation has the right to call upon them to account, not only for all the property intrusted to their care, but also for all moneys furtively made by them at its expense. It is the peculiar province of courts of equity to supervise the execution of trusts and to call trustees to an accounting for their management of trust estates, and especially for every violation of their primary duty not to deal with trust property for their own advantage. . . . Equitable jurisdiction extends to all culpable acts and omissions of the directors, by which the pecuniary interests of the corporation are or may be injured. If they are treacherous to its interests and appropriate its property, or intentionally waste its assets, or take money for official action, or "sell out" by resigning and thus giving control to others, they are liable to account in equity to the corporation

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187. *Hoyt v. Hampe*, 206 Iowa 206, 221-22, 214 N.W. 718, 725 (1927).

188. *Des Moines Bank & Trust Co. v. George M. Bechtel & Co.*, 243 Iowa 1007, 1081, 51 N.W.2d 174, 216 (1952).

189. *Bosworth v. Allen*, 168 N.Y. 157, 165-66, 61 N.E. 163, 165 (1901) (citations omitted).

At varying times and circumstances, every single defendant was a Trustee of the assets and interests of Le Mars.

### *Joint and Several Liability*

All persons conspiring or co-operating with or aiding and abetting the officers or directors of a corporation in defrauding the corporation are equally liable with them.<sup>190</sup>

Every defendant, from beginning to end, was on notice that De Witt was passing a substantial premium-bribe to the Alesch Group to buy control of Le Mars as part of an indivisible conspiracy to loot, embezzle, and steal. "In a single equitable action the court may go to the bottom of the wrong, and work out, in such form as the facts require, all the relief called for by the conspiracy of the defendants against the corporation towards which they stood as trustees."<sup>191</sup> The rule has long been indisputably clear: Directors and their abettors are subject to joint and several liability for every act integral to the conspiracy. As *Bechtel* put it: "Conspiracy may be established by circumstantial evidence and may be inferred from concert of action, declarations and conduct."<sup>192</sup> *Bechtel* added several opinions in support. The law has never been controverted:

It is axiomatic that directors and officers of a corporation are jointly as well as severally liable for mismanagement, willful neglect or misconduct of corporate affairs if they jointly participate in the breach of fiduciary duty or approve of, acquiesce in, or conceal a breach by a fellow officer or director.<sup>193</sup>

Thus the Supreme Court of Pennsylvania. So, too, the corporate-wise Second Circuit in 1973 in *Schein*: "Indeed, the general rule has always been that 'one who knowingly participates in or joins in an enterprise whereby a violation of a fiduciary obligation is effected is liable jointly and severally with the recreant fiduciary.'"<sup>194</sup> In the most recent 1976 *Gould* decision the Third Circuit reiterated the rule:

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190. *Des Moines Bank & Trust Co. v. George M. Bechtel & Co.*, 243 Iowa 1007, 1082, 51 N.W.2d 174, 217 (1952).

191. *Bosworth v. Allen*, 168 N.Y. 157, 168, 61 N.E. 163, 166 (1901).

192. *Des Moines Bank & Trust Co. v. George M. Bechtel & Co.*, 243 Iowa 1007, 1082, 51 N.W.2d 174, 217 (1952).

193. *Seaboard Indus., Inc. v. Monaco*, 442 Pa. 256, 263, 276 A.2d 305, 309 (1971) (citations omitted).

194. *Schein v. Chasen*, 478 F.2d 817, 822 (2d Cir. 1973) (quoting *Oil & Gas Ventures—First 1958 Fund Ltd. v. Kung*, 250 F. Supp. 744 (D.D.C. 1966)) (citations omitted).

This duty they negligently fail to perform. Where two or more persons fail to perform a common duty each is liable for the entire harm resulting from the breach. *Restatement of Torts* § 878 (1939). As joint tortfeasors they are jointly and severally liable for the plaintiffs' entire damage which they have inflicted. *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 132, 32 S. Ct. 641, 644, 56 L. Ed. 1009, 1023 (1912); Prosser, *Law of Torts*, 314-315 (4th ed. 1971).<sup>195</sup>

Joint and several liability is patent. Only appropriate apportionment of Damages remains.

### *Liability Without Sharing*

One who knowingly and intentionally participates in effecting a fraud is liable even though he did not share in the fruits of the wrongdoing.<sup>196</sup>

The gravamen is the infliction of injury, not a share of the spoils. Thus, De Witt, the briber, is equally responsible with the Alesch Group, the bribed, for the disgorgement over to Le Mars of the premium-bribe dollars. Thus also, the Board of De Witt is equally liable with De Witt for the Restitution of the tainted dollars extracted from Le Mars for years of coerced "services." In neither of these examples did any of the defendants pocket any dollars personally.

Casey points out that he received no part of the premium received by the favored defendants . . . and he contends that it was error to hold him liable to the plaintiffs for their share of the premium . . . . This is, however, not an action for accounting for premium received but rather a suit to recover the damages suffered by the plaintiffs as the result of the defendants' wrongful acts. The fact that the plaintiffs' damages may be measured by a proportion of the premium received by the favored defendants does not make the judgment recovered any the less an award to compensate the plaintiffs for the loss which they suffered from the wrongful conduct of Casey and any other defendants who may be found liable.<sup>197</sup>

With this background the Third Circuit in the 1976 *Gould* decision went on in specific answer to the present Damages question:

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195. *Gould v. American-Hawaiian S.S. Co.*, 535 F.2d 761, 778 (3d Cir. 1976).

196. *Des Moines Bank & Trust Co. v. George M. Bechtel & Co.*, 243 Iowa 1007, 1082, 51 N.W.2d 174, 217 (1952).

197. *Gould v. American-Hawaiian S.S. Co.*, 535 F.2d 761, 778 (3d Cir. 1976).

This duty they negligently failed to perform. Where two or more persons fail to perform a common duty each is liable for the entire harm resulting from the breach. *Restatement of Torts* § 878 (1939). As joint tortfeasors they are jointly and severally liable for the plaintiffs' entire damage which they have inflicted. . . . [A]nd this is true even though one of the tortfeasors held liable has received no benefit from his wrongdoing. . . . It follows that Casey is liable in damages, both severally and jointly with any other defendants held liable, for the loss suffered by the plaintiffs.<sup>198</sup>

This universal rule, stated by the Third Circuit in the 1976 *Gould*, is consonant with *Bechtel* and the numerous opinions in support.

In specific reference to most defendants, the court must heed the Sixth Circuit in the 1974 *Ohio Drill* decision. When directors place themselves in a conflict of interest, all question of good faith and good motives evanesces.

In *Seagrave Corp. v. Mount*, 212 F.2d 389, 397 (6th Cir. 1954), this Court in considering the extent to which equity will go in upholding a fiduciary obligation stated:

Although good faith on the part of the directors and the disclosure of the material facts eliminate the question of actual fraud, equity will still act to enforce the fiduciary obligation under circumstances amounting to constructive fraud. Constructive fraud refers to acts which may have been done in good faith, with no purpose to harm the corporation, but which are done by one who has placed himself in a position of conflict between a fiduciary obligation and his own private interest. In such a situation, by reason of the strict rule applicable to fiduciaries, equity will take appropriate action to prevent the harm resulting from such actions, regardless of the good intentions of the fiduciary.<sup>199</sup>

Thus all defendants face joint and several liability irrespective of a share in the Premium-Bribery, the Looting, the Embezzlement, the Twice-Stolen Agency, and regardless of good motives or good faith.

### *Consequential Damages*

The loss of money by the corporation subsequent to the conspiracy, [the Sale of Control,] and in consequence

198. *Id.* (citations omitted).

199. *Ohio Drill & Tool Co. v. Johnson*, 498 F.2d 186, 192 n.12 (6th Cir. 1974) (citations omitted).

thereof through the wrongful acts of the defendants' successors, placed in office by treachery, was the natural, and therefore the expected, result of the conspiracy itself.<sup>200</sup>

The law of "Proximate Causality" is elemental. When directors set in motion known and dangerous forces, those directors are held to an obvious liability for all foreseeable consequences of their conspiracy.

The value of the assets wasted and the amount of expense incurred as the direct and natural result of the [Sale of Control] conspiracy must be accounted for by the defendants, because those assets were intrusted to their care and protection as trustees, and, having broken their trust they are liable for all the proximate consequences. Through an action for an accounting a court of equity has power to discover and fix the value of all assets improperly withheld pursuant to the conspiracy, and of all property lost and damages caused by the wrongful acts of the defendants, and to compel them jointly and severally to pay the aggregate amount over to the plaintiff. Through the conspiracy and the overt acts in execution thereof, the defendants violated their duty as trustees, and equity will award complete relief in a single action for all the consequences of such violation . . . .<sup>201</sup>

Thus spoke New York's highest court. In another specific Sale-of-Control litigation, a federal court trod the same ground:

[I]t may be said that the owners of control are under a duty not to transfer it to outsiders if the circumstances surrounding the proposed transfer are such as to awaken suspicion and put a prudent man on his guard—unless a reasonably adequate investigation discloses such facts as would convince a reasonable person that no fraud is intended or likely to result. Thus, whatever the extent of the primary duty may be, circumstances may be sufficient to call into being the duty of active vigilance and inquiry.<sup>202</sup>

This rule is nothing other than the logical application of Tort "Proximate Causality" to the recondite area of Sale of Control. Schoolboy acumen would tell any director that every premium-bribe is scheduled for early recoupment. The most outrageous naivete could never exonerate any of the defendants from the ready conclusion that Le Mars was about to be "milked" to a very appreciable degree.

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200. *Bosworth v. Allen*, 168 N.Y. 157, 167, 61 N.E. 163, 165 (1901).

201. *Id.* at 167, 61 N.E. 165-66.

202. *Insuranshares Corp. v. Northern Fiscal Corp.*, 35 F. Supp. 22, 25 (E.D. Pa. 1940).

From a careful reading of the voluminous evidence in this case, I have become convinced that facts and circumstances leading up to the [Sale of Control] . . . were sufficient to indicate to any reasonable man in his position that the Boston group were acquiring the control of the corporation by improper means and for an improper purpose.<sup>203</sup>

In a third, equally cogent, Sale-of-Control case, again on all fours with *Le Mars*, a New York court reiterated the accepted rule. As with *Le Mars*, *Gerdes* is a primitive Sale of Control for a substantial premium-bribe:

These defendants contend however that these losses to the corporation should not be charged against them because they represent a consequence "not reasonably foreseeable by them"; that they should not be held accountable because they could not anticipate the looting which occurred. Even the premise on which this argument proceeds may be questioned. It is certainly arguable that these defendants should have foreseen, as at least a possible result of their surrender of possession of the corporation's assets, that a conversion might follow. However, under the law as it stands they must be held responsible for the damages which naturally flow from their wrongdoing, even though the precise result could not have been foreseen.<sup>204</sup>

*Bosworth*, *Insuranshares*, and *Gerdes* are classic Sale-of-Control cases, cited by most courts faced with Premium-Bribery. A study of these three cases alone could provide an adequate analysis of the philosophy and implications of the Sale of Control.

To hold a trustee liable only for the profit he has received from the surrender of his trust and relieve him from all responsibility for the ensuing loss would establish a principle permitting trustees to gamble on the outcome of their acts of malfeasance with nothing to lose but the gain received. The dissipation of the corporate assets can be traced directly to the wrongdoing against the corporation by [De Witt and the Alesch Group], and hence they must be held liable for the resulting damage.<sup>205</sup>

The *Insuranshares* court asked a question clearly directed to the defendants in *Le Mars*:

Why were the purchasers willing to pay so much for control? I should think this question might well have occurred to one who was selling it. . . .

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203. *Id.*

204. *Gerdes v. Reynolds*, 30 N.Y.S.2d 755, 772 (Sup. Ct. 1941).

205. *Id.* at 773.

. . . There was simply too much of the sort of thing described for this transaction to pass as a perfectly normal stock sale. I think that the circumstances were such as to indicate to any reasonable person . . . that there was more than a possibility of fraud and consequent injury to the corporation in the sale. That being so, there plainly was a duty upon the sellers to make a genuine effort to obtain and verify such information as they reasonably could get about . . . the character, aims and responsibility of the purchasers, or, in the absence of adequate information, to refrain from making the sale.<sup>206</sup>

In one pregnant sentence, New York's highest court in *Bosworth* sums up the solution to the instant question of Damages: "In a single equitable action the Court may go to the bottom of the wrong, and work out, in such form as the facts require, all the relief called for by the [Sale-of-Control] conspiracy of the defendants against the corporation toward which they stood as trustees."<sup>207</sup> This mandate leaves the court with the pedestrian chore of attributing and apportioning the Damages among the defendants. The joint and several liability has been established. That liability must be imposed without regard for good motives or good faith, and irrespective of a share in the loot.

### *The Apportionment of Damages*

This duty they negligently failed to perform. Where two or more persons fail to perform a common duty each is liable for the entire harm resulting from the breach. . . . As joint tortfeasors they are jointly and severally liable for the plaintiff's entire damage which they have inflicted. . . . [A]nd this is true even though one of the tortfeasors held liable has received no benefit from his wrongdoing. . . . It follows that Casey is liable in damages, both severally and jointly with any other defendants held liable, for the loss suffered by the plaintiffs.<sup>208</sup>

The norms for Damages attributable to each defendant must now be applied to the five major malefactions.

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206. *Insuranshares Corp. v. Northern Fiscal Corp.*, 35 F. Supp. 22, 26-27 (E.D. Pa. 1940).

207. *Bosworth v. Allen*, 168 N.Y. 157, 168, 61 N.E. 163, 166 (1901).

208. *Gould v. American-Hawaiian S.S. Co.*, 535 F.2d 761, 778 (3d Cir. 1976) (citations omitted).



### 1. *Premium-Bribery*

This money they could not lawfully receive for themselves. They received it as the price of the transfer of all the corporate assets to the custody of irresponsible third parties, and the law, in order to protect the corporation, treats it as its property, and therefore, money which it is entitled to recover from all the defendants. . . . The loss of money by the corporation subsequent to the conspiracy, and in consequence thereof, through the wrongful acts of the defendants' successors placed in office by their treachery, was the natural, and, therefore, the expected result of the conspiracy itself.

The value of the assets wasted and the amount of expense incurred as the direct and natural result of the conspiracy must be accounted for by the defendants, because those assets were intrusted to their care and protection as trustees, and having broken their trust they are liable for all the proximate consequences.<sup>209</sup>

The malefaction, Premium-Bribery, has induced two distinct categories of liability: (1) Restitution of the premium-bribe itself, and (2) Damages directly consequent on the Premium-Bribery.

*Restitution.* The various members of the Alesch Group are liable for the disgorgement to Le Mars of the total \$600,000 premium-bribe. This liability is founded on the law of Restitution and Unjust Enrichment. The disgorgement is totally unrelated to any other Damages, but is solely the result of Strict Trust applied to Conflict of Interest. Moreover, De Witt and the Smith Group are also jointly and severally liable for the full disgorgement.

*Damages.* The Tort of Sale-of-Control Premium-Bribery is a distinct malefaction. Apart completely from the premium-bribe dollars themselves, this malefaction inflicted palpable harm on Le Mars. For many years, policyholders and prospective policyholders of Le Mars have become increasingly aware that both incumbent and predecessor management of Le Mars were guilty of flagrant Premium-Bribery. Bribery is not a recondite or esoteric crime. The man on the street can taste and touch it. The harm to the reputation, prestige, good will, business, of Le Mars has been very real indeed. Defendants' liability, therefore, is equally real.

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209. *Bosworth v. Allen*, 168 N.Y. 157, 167, 61 N.E. 163, 165 (1901).

## 2. *Looting*

However, even if we were now to order an accounting, we would not permit Sinskey to retain the reasonable value of his services . . . . "The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence . . . ." <sup>210</sup>

De Witt looted Le Mars in two stages: (1) Under a Management Contract Le Mars paid \$190,000 to De Witt via De Witt's wholly-owned Alesch Agency. (2) Without a contract, De Witt charged Le Mars directly for \$552,000 in coerced "services."

*Restitution.* At the time of these contracts, both written and oral, De Witt sat on both sides of the "negotiations." In this Conflict-of-Interest situation, the law of Restitution, Unjust Enrichment, Strict Trust, Agency, all univocally mandate a disgorgement of all monies. The "contracts" were voidable at the option of Le Mars. De Witt may not even "retain the reasonable value of" its "services." In addition to De Witt's liability, all other defendants are jointly and severally liable as well. The Alesch Group as Trustees are liable for all proximate and foreseeable consequences of their Sale of Control to premium-briber successors. So, too, the Smith Group as coconspirators.

*Damages.* Over and above the mere restoration of illicit monies, De Witt, the Alesch Group and the Smith Group are all jointly and severally liable for the harm inflicted on Le Mars resultant on the Looting: disruption of business, lowering of employee morale, injury to reputation, et cetera, et cetera.

## 3. *Embezzlement*

Often, however, the new appointee [De Witt] avoids the circuity of a personal payment and later corporate recoupment by an immediate raid on the corporate till [of Le Mars]. <sup>211</sup>

In order to pay to the Alesch Group the total premium-bribe dollars, De Witt was forced to steal (1) \$154,000 directly from Le Mars for the "pensions," (2) \$14,600 for part of John Alesch's "Consultant's" Contract, (3) \$10,000, at least, for the free auto for John Alesch. These three items were integral parts of "what

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210. *Borden v. Sinskey*, 530 F.2d 478, 497-98 (3d Cir. 1976) (quoting *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 270, 5 A.2d 503, 510 (Sup. Ct. 1939)).

211. Bayne, *supra* note 39, at 502.

in turn De Witt will do in consideration" for getting control of the Le Mars Board.

As with Premium-Bribery and Looting, so too with Embezzlement. *Restitution* is mandated. De Witt must return \$178,600 directly to the Le Mars treasury. Over and above the restoration of this amount, all parties are jointly and severally liable for Damages to the integrity of Le Mars.

#### 4. *The Twice-Stolen Agency*

[Sinskey] assert[s] that it is inequitable to require [him] to turn over the full amount of his salaries without offering him any compensation for the valuable services he performed. . . .

. . . [W]e [do] not permit Sinskey to retain the reasonable value of his services. . . . "The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence. . . ." <sup>212</sup>

*The Alesch Theft.* Beginning sometime in the early 1950's, the Five Alesches systematically stole the assets, commissions, salaries, and profits of its captive Alesch Agency. Under the law of Restitution, all these monies, plus interest, must be returned to Le Mars. Further, all directors and especially Milton Tappan, longtime president of Le Mars, and Burton Dull, counsel, are jointly and severally liable as trustees of Le Mars. As with the Premium-Bribery, Looting, Embezzlement, all parties are liable for Damages over and above the restoration to Le Mars of all the fruits of the Usurpation of a Corporate Opportunity.

*The De Witt Theft.* From the date of the takeover of Le Mars, April 21, 1970, De Witt in its turn systematically stole the assets, commissions, salaries, profits (and, in addition, the Le Mars Home Office business) of the Alesch Agency. The liability of all De Witt defendants tracks exactly the liability of the Alesch Group, both as to Restitution and independent Damages.

#### 5. *Disloyalty*

[A]n allegation of damages for fiduciary breaches is not a prerequisite to a recovery.<sup>213</sup>

212. *Borden v. Sinskey*, 530 F.2d 478, 497-98 (3d Cir. 1976) (quoting *Guth v. Loft, Inc.*, 23 Del Ch. 255, 270, 5 A.2d 503, 510 (Sup. Ct. 1939)).

213. *Schein v. Chasen*, 478 F.2d 817, 824 n.9 (2d Cir. 1973). See *id.* at 823-24.

[It] follows, then, that the chiefest breach of loyalty would be the faithlessness of the steward. . . . There is a fundamental repugnance in serving two masters. This is what Christ meant when he said, "He who is not with me is against me." . . . It is not a question . . . of illicit gain, but of simply being "against me." Sworn allegiance has been broken by the very act of serving a second master. Basic loyalty is an elemental virtue and goes to the heart of human nature. Without more, just being on the other side is [harmful] . . . .<sup>214</sup>

The Damages inflicted by every single defendant, irrespective of Premium-Bribery, Looting, Embezzlement, the Twice-Stolen Agency, are ponderable and calculable by a court deeply familiar with the myriad instances of Disloyalty strewn across the voluminous record. No one better than the court, after assimilating the details, weighing the testimony, can conclude to the great harm inflicted on Le Mars by some twenty years of betrayal, infidelity, and disloyalty. Where would Le Mars be today—even assuming the mandated Restitution for Premium-Bribery, Looting, Embezzlement, Usurpation of Corporate Opportunity—had, first the Alesch Group and then De Witt and the Smith Group, been loyal and steadfast in the constant prosecution of Le Mars' best interests and welfare?

In specific reference to the estimation of the Damages peculiar to Disloyalty (a most delicate, and perhaps most important, chore), and in general reference to the overall Damages assessment, this court must be fearlessly true to the tradition of all conscientious courts:

We are aware that our conclusions may result in very serious consequences to defendants, notwithstanding their freedom from evil motives. To sustain, however, their dealings with the company would be subversive of elementary principles governing fiduciary relationships in general and the management of corporations in particular, and would open the door to the grossest frauds by corporate managers.<sup>215</sup>

### *B. Punitive Damages*

It appears to me that everything is shaping up just as we anticipated and I am sure that this venture can and

214. Bayne, *supra* note 7, at 577-78 (footnotes omitted).

215. Hoyt v. Hampe, 206 Iowa 206, 221-22, 214 N.W. 718, 725 (1927).

will be advantageous and profitable to all parties concerned.

—Burton Dull, Esq., Le Mars Counsel,  
to Raymond Brown, Esq., De Witt  
Counsel, Executive Committee, Exhibit 19A.

It would seem to me that this pup corporation [the Alesch Agency] could be used for perhaps some other things in the business between the two companies [Le Mars and De Witt].

—John Alesch to Raymond Brown, Exhibit 63.

Little controversy surrounds the question of Exemplary Damages. Some few references will aid the court.

#### *Individual Liability*

Q. Would you tell the Court whether or not you have been threatened by any Officer or Director of Le Mars Mutual with loss of your employment because of your testimony in this case?

A. Yes.

—Donald Coats, Transcript at 1908.

Every defendant is personally liable for Punitive Damages, irrespective of possible corporate liability: "[A] director, officer or agent of a corporation . . . cannot escape liability on the ground that in committing the tort he acted as a director, officer, or agent of the corporation, or on the ground that the corporation may also be liable."<sup>216</sup> Thus, each member of the Smith Group is subject to Punitive Damages, as is also De Witt itself.

#### *Corporate Liability*

The fund raising for Westmar College started . . . [T]he Agency has written [Westmar] business with the understanding that the Agency donate [sic] at least 50 percent of the commissions back to the College. I took the liberty of continuing the [rebate] donations of the Agency and Le Mars as in the past. This amounted to \$1,250 from each, the Agency and Le Mars.

—John Breese, Le Mars Officer and  
Director, to the Executive Committee,  
Exhibit 331.

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216. *American Universal Ins. Co. v. Scherfe Ins. Agency*, 135 F. Supp. 407, 415 (S.D. Iowa 1954) (quoting 19 C.J.S. *Corporations* § 845 (1940)).

Every requisite of Exemplary Damages is verified in the case of De Witt. Every malefaction was carefully thought out, discussed, approved by the Board through its Executive Committee. Every malefaction was directly related to De Witt's business and was "subsequently ratified and confirmed with full knowledge of the facts."<sup>217</sup> De Witt's ratification was both formal, by explicit approval of the Board, and informal, by the acceptance of the spoils.

### *Culpability*

Q. What did Mr. Gearke tell you?

A. He told me that he had no choice but to let me go.

Q. Did he give you a reason?

A. Yes. He said that I had been discussing the litigation then in prospect, and in fact, [against] the Le Mars Mutual Insurance Company.

Q. And is that the sole and only reason he gave for your termination?

A. Yes, it was.

—William Downs, Transcript at 567.

The judicial thinking on Punitive Damages has coalesced in the now-famous 1973 *Holi-Rest*:

In Holden, supra, 202 N.W.2d at 359 we said:

"[I]n a stockholder's derivative action an equity court may, in its discretion, award exemplary damages upon a showing that some legally protected right has been invaded, such as an intentional act of fraud or other wrongful conduct. . . .

. . . [A]n intentional act of fraud in a court of equity includes all acts, omissions and concealments which involve a breach of either legal or equitable duties, trust or confidence, justly reposed, which are injurious to another or by which an undue or unconscionable advantage is taken."<sup>218</sup>

The horror stories spread over these pages go far beyond the demands of *Holi-Rest*, *Holden*, and *Epperson*. Further dilation would be offensive.

One comment, however, should be particularly cogent. Even a cursory reading of the concise facts in *Holi-Rest* will immedi-

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217. *Ashland v. Lapiner Motor Co.*, 247 Iowa 596, 601, 75 N.W.2d 357, 360 (1956).

218. *Holi-Rest, Inc. v. Treloar*, 217 N.W.2d 517, 525-26 (Iowa 1974).

ately convince that "Treloar's flagrantly wrongful acts" were child's play compared to the protracted, deliberate, and calloused machinations of the Alesch Group, De Witt, and the Smith Group.

Treloar's flagrantly wrongful acts, omissions and concealments have been injurious to the corporation and its stockholders. Without question, his self-dealing has caused the corporation losses not only in the sums above specified but in undetermined amounts which under this record cannot be ascertained. We hold Holi-Rest is entitled to exemplary damages from Treloar in the amount of \$25,000.<sup>219</sup>

Note further that the 1973 *Holi-Rest*, for acts best described as innocent compared to the depredations against Le Mars, exacted Punitive Damages against a single officer in an amount in excess of 25 percent of the Compensatory Damages. This most modern application of Exemplary Damages should be a minimum in the case of Le Mars.

#### *The Rationale*

After considerable discussion by all [9] Policyholders in attendance . . . a Management Contract . . . for the operation of Le Mars by Alesch, Inc. [was approved].

—Recessed Meeting of Le Mars Policyholders,  
April 21, 1970, Exhibit 601 B.

I [John Alesch] have been elected Chairman of the Board, and Chief Executive Officer, and will continue as General Manager of Le Mars, the same as I have in the past.

—De Witt Newsletter, July 1970, (to  
Le Mars Agents and Employees),  
Exhibit 503(2).

The fourfold purpose of Exemplary Damages is aimed directly at each defendant in this case, from John Alesch (through his estate) and his cohorts in Le Mars on to Raymond Brown, Esq., and his in De Witt. Punitive Damages are awarded: (1) "as a punishment for the particular party involved," (2) "as a warning and example . . . to all other who may offend in like manner," (3) "[as] a salutary protection to society and the public in general," (4) "[as] adding to the complainant's award."<sup>220</sup> The

219. *Id.* at 526.

220. *Sebastian v. Wood*, 246 Iowa 94, 100-01, 66 N.W.2d 841, 844-45 (1954).

imposition of Exemplary Damages on every single defendant will justly achieve each of these four objectives.

## II. COUNSEL FEES

The question of indemnification by the corporations for officer and director attorney fees is governed by § 469A.4(19), The Code, and ultimately depends upon the outcome of the suit.<sup>221</sup>

Fortunately, the Supreme Court of Iowa has already ruled on the liability for any disbursement of any kind by Le Mars to any attorneys defending any of the defendants in this action. The court so ruled pursuant to a motion in this litigation. This ruling includes all attorneys' fees, expenses, any sums spent by the defendants in aid of their cause against the Le Mars they maltreated.

The court in the earlier Le Mars was acting pursuant to the explicit Iowa Code: "[N]o indemnification shall be made in respect of any claim, issue, or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation . . . ." <sup>222</sup> At least the most innocent defendant is guilty of Negligence in the performance of his directoral duties. Every single defendant, therefore, must support his own defense. All monies disbursed must be fully restored.

## III. REMOVAL OF THE BOARD

In strict practicality, the crucial distinction for future sale-of-control litigation lies in the built-in nature of the premium-bribe-induced unsuitability. No true premium-bribe under any conditions whatsoever can be passed without engendering the triple blemish of the perversion, the illicit consideration, and the resultant unsuitability. To the extent, therefore, that an appointee is prepared to twist the judgment and to divert the corporate dollars, thus far is he already an unsuitable custodian. As thus unsuitable he caps it off by imposing a premium-briber [himself] on the firm. Whatever further deficiencies he may possess do not affect this ever-present built-in disability.<sup>223</sup>

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221. *Rowen v. Le Mars Mut. Ins. Co. of Iowa*, 230 N.W.2d 905, 916 (Iowa 1975).

222. IOWA CODE § 496A.4(19)(6) (1977).

223. Bayne, *supra* note 55, at 243.



De Witt and the Smith Group are calculating premium-bribers. "Whatever further deficiencies [they] may possess do not affect this ever-present built-in disability." Never will De Witt or the Smith Group successfully gainsay this blemish of Premium-Bribery.

But De Witt and the Smith Group do "possess" many "further deficiencies," over and above the Premium-Bribery. The other four major malefactions were deliberate, consciously excogitated, over months and years. The Looting, the Embezzlement, the Usurpation of Corporate Opportunity, the Disloyalty, all were further forceful proof of Successor Unsuitability. Under no conditions could the court continue to entrust Le Mars to such malefactors. The only question is how to assure the total removal of De Witt and the Smith Group.

### *The Court-Supervised Election*

ORDERED that this Court shall appoint a new interim independent Board of Directors for Equity Funding Corporation of America.<sup>224</sup>

Federal Judge Charles E. Stewart Jr. Friday signed a consent order providing for court appointment of a new board of directors . . . .<sup>225</sup>

Mr. Waszkowski has been approved by the court as chief executive officer . . . .<sup>226</sup>

The all-encompassing powers of the equity court—so vividly implemented by *Holi-Rest*—mandate a court-fashioned remedy to meet the peculiar exigencies surrounding Le Mars. Here is an insistent need for a watchful court in prosecuting the entrustment of Le Mars to a wholly new and honorable group of Directors. Indefinite retention of jurisdiction is a necessary concomitant of a court-supervised election. *Holden* stated the underlying philosophy: "Wherever a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the

224. *SEC v. Equity Funding Corp. of America*, [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,917 (C.D. Cal. 1973).

225. *International Controls Reaches an Accord with SEC; Court Will Appoint a New Board*, Wall St. Journal, Mar. 19, 1973, at 10, col. 1.

226. *SEC Taps Waszkowski To Head Clinton Oil—In Partial Settlement of Suit He's Designated as President; Four Others Named for Board*, Wall St. Journal, Mar. 22, 1973, at 28, col. 1.

situation, though no similar relief has been given before."<sup>227</sup> Examples after examples, especially in recent days, have stumbled one over the other in which courts have ousted malefactors and then, toward future protection, devised foolproof machinery to guarantee a brand new, impartial Board. Among the most recent and appropriate is *Phillips*.

### Phillips Petroleum

The conduct of the individual defendants constituted a breach of fiduciary duty, fraud, theft and looting.<sup>228</sup>

As with *Equity Funding* and *Le Mars* the federal court was faced with an essentially corrupt Board. As did the court in *Equity Funding*, Federal Judge Curtis handled the turnover of control in two stages. First the *Phillips* court personally named six nationally known persons (among them Harold Williams, now Chairman of the SEC) to fill the vacuum created by the ousted malefactors.

After this preliminary stage, the court provided surety for the future:

The newly elected Board of Directors shall at its first meeting appoint a Nominating Committee, consisting of at least three members and composed entirely of independent outside directors, which shall have sole authority to recommend to the Board of Directors the nominees to be presented to the voting security holders.<sup>229</sup>

With this the court closed its order with a sage precedent for *Le Mars*—a two-year retention of jurisdiction: "Phillips may, after March 31, 1978, petition the Court for an order terminating jurisdiction, and the Court may, pursuant to such petition, make such an order if it finds Phillips has fully complied with the Final Judgment."<sup>230</sup> Minor differences with *Le Mars* cannot blunt the efficacy of *Phillips* as an approach consonant with *Holden*: "[A] court of equity will devise a remedy to meet the situation."

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227. *Holden v. Construction Mach. Co.*, 202 N.W.2d 348, 363-64 (Iowa 1972) (citations omitted).

228. *Notice to Stockholders of Phillips Petroleum Co. Concerning Hearing on Confirmation of Settlement*, Wall St. Journal, Feb. 23, 1976, at 13, col. 1 (involving a settlement approved without opinion in *Gilbar v. Keeler*, No. 75-611-EAC (C.D. Cal. Feb. 18, 1976)).

229. *Id.*

230. *Id.*

## IV. THE SPECIAL MASTER

[T]he court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, a commissioner, and an assessor.<sup>231</sup>

Iowa has not adopted Rule 53 of the Federal Rules. This is probably just as well, since the court is thereby spared any technical limitations and has a free, equitable hand to "devise a remedy to meet the situation."

No divination is needed to conclude that the intricacies of this litigation have yet to be fully untangled. In several areas the court, sitting as a special master, or aided by a special master of particular expertise, must now implement the court's forthcoming conclusions of law. Some holdings will not require any specialized enforcement. But many aspects of the five major malefactions do demand detailed study and exact implementation.

The special master, guided by the court's directives and the findings of fact, may now effectuate the conclusions of law through intensive investigation, hearings if necessary, and whatever remains to give full force and effect to the court's adjudication. This tandem effort by court and special master will effectively tie all the loose ends together.

Detailed suggestions to the court would seem to be out of order. A cursory review of the pages of this Brief gives ample indication of the work of a special master. The apportionment of Restitution, joint-and-several liability, the manifold accounting problems, the computation of interest, the complexities of the Twice-Stolen Agency. Even more onerous will be the separation of Le Mars from De Witt. Untangling the interrelated operations alone will be a considerable task. The conclusion of the Oregon court in the 1976 *American Timber* decision is pat: "[R]emanded for an additional accounting in accordance with this opinion."<sup>232</sup>

The same special master might conceivably monitor the selection of independent directors. The required competence here, however, is markedly different from the accounting-oriented tasks elsewhere, and might well require a person of peculiar talents.

231. FED. R. CIV. P. 53.

232. *American Timber & Trading Co. v. Niedermeyer*, 276 Or. 1135, 1158, 558 P.2d 1211, 1224 (1976).

## CONCLUSION

My Dad started De Witt. My Father was President. My brother was President. I was President and now my son is President.

—Carl Smith, Executive Committee,  
Deposition at 7, 18.

Q. Well, as a normal thing, at your annual meeting, what percentage of your policyholders actually attend?

A. Very few.

Q. And there is no requirement for a quorum?

A. No.

—Raymond Brown, Deposition at 84.

These mutual insurance companies arose on the back of their founders.

—Milton Tappan, Le Mars Director,  
Deposition at 29.

The Custodial Concept of Corporate Control, the salutary power of the *Guth, Holden, Borden* tradition, the thoroughness of *American Timber*, have all had long acceptance in the overall field of corporation law. Now it falls to this court to confirm their efficacy by specific application to the narrow area of the mutual insurance company. Here will be a sign to the nation, and a first step toward the removal of that curse of corporate control so long afflicting the mutual company.