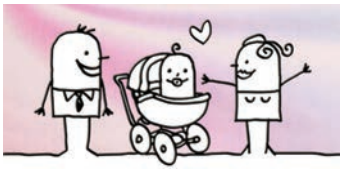
Wrestling & the Fiduciary

Jack Davidson

My first job after graduation from law school was as a tax writer at Prentiss Hall. The acceptance process was a forgone conclusion. The salary for a lawyer was "extraordinarily" low and anyone with a law degree was pre-accepted. Once installed in a cubicle, I discovered that this was not the best choice to avoid working in a law firm. My cubicle incarceration became a temporary plan when newly married. My wife informed me that I was going to have a family and her occupation and compensation would be on hold. My income projections suggested financial stress, so I turned to her brother, who was a rising star as an investment manager at Chase Manhattan Bank. I asked if he could get me a job. His response was "How about the Trust Department?" and mine was "What is a Trust Department?" I said yes, and fortunately Chase said yes as well.



Chase was still considering lawyers in the Trust Department if it became clear that the lawyer would not use Chase as a stepping stone to a prestigious law firm specializing in estate planning. My plan of not going to a law firm was patently evident. What I did not know at the time was that leaving New York City was my career plan if I wanted to raise children. A year and a half later I left for the Trust Department at the Vermont National Bank.

Understanding cultures takes time. Understanding the complex world of Wall Street was beyond my limited level of comprehension. Not so in Vermont, or so I thought. I was wrong.

In retrospect, I often think about my behavior and the impact of surviving in the "banking culture" as a trust officer governed by fiduciary rules. Having wrestled in high school, I was drawn to John Irving's *The World According to Garp*, followed by the movie. The main character became a wrestling coach. Little did I know that both the book and the banking culture were far more complex than simply becoming a wrestler or a respectable trust officer in Vermont.

Wrestling and Fiduciary Law

I did not understand banking. I did not understand the lawyer's world. I had some understanding of the trust world and I was also familiar with wrestling. Wrestling is not a team sport, and my combat training may have saved me.

It did not take long for me to discover that I was not a banker. I often think of banks as housing three cultures. The loan officer and the teller (the banker), the trust officer (the fiduciary), and securities sales staff (brokers). All have a few things in common. Sometimes it's a branch which houses all of us or the Christmas party. The banker and the broker have one

thing in common that stands out. They sell products. The fiduciary sells services. Were it only that simple. It is not. "Fiduciary" means more than service, and my career took an unusual turn. One that involved trust donors and beneficiaries who come first, even at the expense of the Bank.....whether its reputation, or its bottom line, or both. Judge Benjamin Cardoza, who served as an Associate Justice of the Supreme Court of the United States, eloquently described the duties of the fiduciary in Meinhard v. Salmon:

> "Many forms of conduct permissible in a workday 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 marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior....."

I became head of the Trust Department in 1975. I was too young, but so was the Trust Department. Just a few staff, no computers, stocks and bonds housed in the vault, and electronic calculators that cost the equivalent of 10% of my annual salary. In those days banks simply looked at trust services as a loss-leader to their more profitable business lines. My world of slowly moving towards a more sustainable and profitable department gave me some comfort. Then the wrestling began.

We were sued!

If your local broker gets sued, you never hear about it. Check their agreements. The industry promotes private arbitration agreements. Not so in the trust world that is governed by fiduciary rules where trust beneficiaries are not part of the agreement. The higher standard of a fiduciary may be vulnerable to reputation risk, as well as the bottom line.

I spent most of an entire year defending a law suit.

Vermont National Bank, as part of a plan to become a state-wide bank, purchased another bank. This bank had a trust department and my job was to consolidate the two departments.

The Bank's Trust Officer helped to set up a trust account primarily for tax reasons, and the Trust Officer agreed to a 50% reduction of the standard fee, with the understanding that he would not manage the assets, but simply advise the individual donor when asked. Shortly after the donor's death, his widow decided to move the trust to the bank that managed her assets. It appeared that both the competing bank's trust officer, and the attorney on its board, were actively involved in a lawsuit against us.

The market had recently experienced a drop in certain types of securities prior to our merger. The widow sued us, although the account had moved to the competing bank before the merger. I spent an entire year responding to the plaintiff's requests, such as my trust committee meetings and the minutes concerning the purchase of the merged bank. Most requests were denied by the court. Finally, we reached the stage of discovery through depositions, when all parties, under oath, present the facts. This stage of the wrestling match allows all parties to avoid going to court when

the facts, under oath, may reveal who will win the wrestling match. The trust officer of the competing bank, under oath, testified to facts that did not match the paper trail, but the written version redacted this part of his testimony. During the deposition of the widow, she was asked why she decided to sue. She mentioned the security that plummeted the most. Well, it turns out that the competing bank held that

security and not the bank we had purchased. Case closed. We won the match. Or did we?

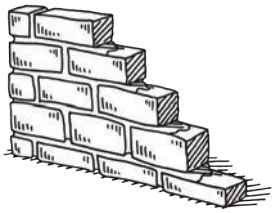
Wasting my first year as head of the Trust Department, consumed by a law suit, was unsettling. Unfamiliar with the practice of law in Vermont, I thought in retrospect that John Irving was writing the script. Before the deposition, the lawyer who served on the board of the competing bank, either by design or happenstance, facilitated a newspaper article about the pending lawsuit that stated Vermont National Bank was grossly negligent in managing the assets and charged excessive fees. The article did not disclose that

we were not the trustee, nor did the lawyer inform the publisher. He won the match. Our ability to attract trust clients in this section of northern Vermont simply disappeared. In the broker's world, both the good and the bad and the ugly are not in the news. Not so with fiduciaries.

Wrestling Once Again

Sharing information between the Bank and the Trust Department was initially viewed as being a positive influence for both sides at the table. If the Bank loans money to GE, well, that makes it easier for the Trust Department to invest in GE. But the regulatory environment started to change and the world became more complicated. The regulatory examiners of Vermont National Bank referred to the "Chinese Wall" to prevent the sharing of information between the Bank and the Trust Department. Fortunately, and appropriately, the name has now changed to simply the "Wall" or the "Ethics Wall".

The definition of Walls can be complex. Of late, I have been thinking of Hadrian's Wall that marked



the boundary of the Roman empire in Britain. The question is, which side of the Wall am I on?

All hell broke loose once again. I sued.

Windham College closed in 1978. Vermont National Bank had loaned money to the college, secured by liens on the personal property. The Department of Housing and Urban Development (*HUD)* and the United States Department of Health, Education, and Welfare (HEW) had loaned money to the college using a Trustee. Vermont National Bank was the trustee (the fiduciary) for both HUD and HEW. As the trust officer, I enabled a law suit against Vermont National Bank to stop the auction of the personal property as part of the strategy of trying to sell the College intact rather than in bits and pieces.

The focus of the banker is on the bottom line. In Vermont, bankers focused on the investors much

like Wall Street? Well, no! Those who owned stock in the local banks were most often neighbors and friends. The depositors, neighbors as well, need to be protected if a bank fails. So the banker felt the need to exit with their loan repaid, and let HUD and HEW deal with the poor decision of allowing an expansion unsuited for Putney, Vermont.

Windham was founded in 1951. Student enrollment grew from 160 to a peak of 935, and then started to decline. The enrollment in 1978 was 248, bolstered by 75 international students invited from Middle Eastern countries. The closing occurred in a cold Vermont winter, and the international students were forced to leave the school premises by the order of the local sheriff, and the dormitories were closed and locked.

Both HUD and HEW were unable to provide the funds to allow me to retain the President, and the security staff, until I submitted an accounting. They said it would take a year. I found another bank to facilitate about 3 months of expenses. I struggled just to find money for the security staff after the 3 month period.

The court allowed Vermont National to start the auction. I asked the banker "Would you stop the auction once your loan of approximately $250,000 has been repaid?" The answer was "no". Once the auction started, Vermont National Bank sold personal property in the library, which was secured by lien with HEW. So I threatened a $30,000 law suit if they did not stop at $250,000. They agreed. On the third day of the auction, one of my trust officers[1] kept tabs on the amount auctioned, and when the tab exceeded $250,000, she gestured to the auctioneer and he stopped the auction. Many in the large auditorium were very upset.

There are many other stories about what transpired over the years until Landmark College bought the campus. But the person[2] who both edits and designs this newsletter has restricted my storytelling space. She graduated in 1976 from Windham College.

So the purpose of this article was to reflect, and to enlighten others who may not understand the complicated role when an institution becomes a fiduciary.

And there may be another reason, perhaps stirred by the actress Glenn Close who recently received the Museum of the Moving Image's annual salute at a gala in New York City. From my perspective, Glenn started and defined her career in the movie *The World According to Garp*. Trying to understand the banking culture is one thing. Trying to understand the world according to Garp is more complex. On the second day of the Windham College auction, the person bidding on the wrestling mats was a Windham College professor, and coach who started the wrestling program at Windham College. It was John Irving.

[1] Jane Waysville, Employee-owner of TCV

[2] Ellen Lowery, Employee-owner of TCV