The Sale-of-Control Premium-Bribe: Recoupment In Advance:
A Case Study

DAVID COWAN BAYNE, S.J.*

The illegal sale of corporate control has continued unabated over the decades. As early as 1969 Father Bayne uncovered an esoteric variant on the bald bribery into corporate control. The would-be contrôleur, instead of using his own premium-bribe dollars, simply loots the target-company treasury and uses the victim's cash to premium-bribe the incumbent out of office. "Often, however, the new contrôleur avoids the circuity of a personal premium-bribe payment and later corporate recoupment by an immediate raid on the corporate till."

Now, some nineteen years after these words, Father Bayne presents his theoretical analysis applied in a dramatic account of a slightly recondite—but predictably popular—form of sale-of-control premium-bribery. This legal study should be valuable to client and counsel facing a sale of control or preparing for litigation, and to scholar and commentator as well.

—The Editors

* Professor Emeritus of Law, University of Iowa College of Law.


*** This article was written as Plaintiff's Brief in a state/federal litigation—but with this publication as the joint purpose and motivation—and is reproduced verbatim in its original format as an aid to the practitioner. Material in brackets are editorial additions which did not appear in the Brief filed by Father Bayne. The case was concluded with the final court approval of settlement in Wiener v. Roth, 791 F.2d 661 (8th Cir. 1986), and regrettably never reached the merits. The Brief, addressing the merits, is entitled: Bribery in a Corporate Guise: Roth, Noble and the Statesmen Group, and can be found in the pleadings in the federal case. This is the fourth Brief by Father Bayne that has been published as a lead article.
For the avoydinge of corrupçon . . . 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. . . . [E]verie suche bargaynes shalbe voide . . . .

—An Acte againste Buyinge and Sellinge of Offices, 1551, 5 Edward 6, ch. 16.

It shall be unlawful for any . . . officer . . . of a private corporation . . . in any business transaction, to receive, for his own use, directly or indirectly, any . . . bonus . . . connected with . . . such business transaction . . . .

—Act of April 5, 1907, ch. 183, § 1, 1907 Iowa Laws 183.

Bribery has always been a crime, from Edward in England in the 1500s and before, to Iowa in the present. And across the nation.

As the years passed, moreover, the crass bribe of the hoodlum became a sophisticated complexity, and moved imperceptibly even into the corporate boardroom. To this subtle invasion the criminal codes of jurisdiction after jurisdiction responded with an equally sophisticated, highly specialized crime: Commercial Bribery. Since 1907 Iowa has imposed a fine and imprisonment for plain old bribery, now decked out in corporate guise.

Then in 1979 came the landmark Rowen v. Le Mars Mutual Insurance Co., 282 N.W.2d 639 (Iowa). To the crime of Commercial Bribery was joined formally and expectably the common-law tort: The Illegal Sale of Corporate Control.

Le Mars and Corporate 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.


Although plaintiffs advance other theories . . . we depend, as did the trial court, on the illegal sale of control to set aside the transaction.

As Aughey v. Windrem proclaimed in the year 1908, the sale of office has always been illegal as against public policy. The appointment of a successor for third-party dollars by a trustee who is already amply remunerated has universally been deemed a breach of trust. But, again expectably, the sophisticated corporate mind entered the scene and camouflaged the garden variety bribery of the days of Aughey with convoluted corporate machinations involving stock sales, hidden premium-bribes, compliant directors, complex corporate maneuverings. And so it finally took Le Mars in 1979 to strip away the corporate complexities and reveal the simple primitive bribery of Aughey, standing stark and alone, shed of its corporate clothes.

Today, therefore, the circuit is complete. The old-fashioned crime of bribery has become Commercial Bribery as applied specifically to the corporate context, and the old-fashioned common-law tort outlawing the sale of office has become The Illegal Sale of Corporate Control. Today the incumbent contrôleur of a corporation may no longer—as in the past—accept with impunity illicit premium-bribe dollars for the appointment of his successor to the office of control, especially when that appointment is encompassed in the very duty for which he has already been adequately compensated in corporate salary and perquisites. Le Mars has indeed updated Iowa. To the minute. And been a clarion to the nation.

For many years prior to 1970, old John Alesch had been in complete and unfettered control of the Le Mars Mutual Insurance Company of northwest Iowa. This Alesch control over Le Mars was unassailable on both fronts: (1) The Directors: All were in his pocket. He nominated them all. He hired and fired the officer directors. (2) The Annual Meeting: All the proxies were always dutifully and unthinkingly voted for the Alesch directoral slate, year after year. But such sheepishness is the rule of the day in the widely held American corporation. With thousands of shareholders scattered across the land, the control of the proxy-solicitation mechanism is the guaranteed control of the board and, hence, the corporation. Mere-incumbency control is virtually unassailable. Le Mars was not at all unusual.

But in the late sixties, John Alesch was getting old and he knew that it was time to appoint a new contrôleur—that ultimate person
with final authority over the entity—to take over the helm. Old John also knew full well that the principal duty of his office—for which he received a full-time salary—was to install a suitable successor to chart the future of Le Mars.

But John Alesch turned from duty to temptation. The tempter? The Iowa Mutual Insurance Company of De Witt. The expansionist Iowa Mutual had long hoped to gobble up the smaller Le Mars. But latterly it had learned that rival Employers Mutual of Des Moines had suggested a fairly substantial premium-bribe to induce Alesch to hand over Le Mars to Employers. Inspired by this competition, Iowa Mutual countered with a competing premium-bribe of its own: $300,000 under the table.

The rest was history. John Alesch yielded to the temptation. Iowa Mutual paid over the $300,000 premium-bribe. The Le Mars board dutifully resigned en masse—all were docile to the end—in favor of equally docile Iowa Mutual minions. Predictably and inevitably, succeeding annual meetings of Le Mars saw the sheepish proxies rubber-stamp the Iowa Mutual nominees. Thus ended the illegal sale of control of Le Mars by John Alesch to Iowa Mutual.

Fortunately for legal history and the hapless Le Mars owners, the Supreme Court in 1979 “would not permit the sale of control. Mr. Alesch could not profit from the transaction . . . .” *(Rowen v. Le Mars Mut. Ins. Co., 282 N.W.2d at 649.)* The Court was unanimous and categorical in its condemnation:

> [T]hose holding fiduciary positions must act with a high degree of fidelity . . . .

>In *Aughey*, 137 Iowa 320 [in 1908 this Court said:] . . . An agreement for a valuable consideration to abandon the trust or to transfer it to another is void. He may voluntarily resign for reasons not mercenary in character, but has no right to traffic in or make merchandise of the confidence reposed in him. The sale of control . . . has been declared to be violative of public policy, for the “management of a corporation is not the subject of trade . . . .


Thus stripped of its complexities, The Illegal Sale of Control is really quite simple: (1) The payment of a $300,000 premium-bribe,
(2) To John Alesch the incumbent contrôleur of Le Mars, (3) By Iowa Mutual the would-be contrôleur, (4) To induce the appointment to the office of control, (5) With scienter. These were the five requisites of *Le Mars*.

And the sanctions imposed by the Supreme Court were equally simple. John Alesch, for the breach of his fiduciary duty to Le Mars, must disgorge the entire $300,000 premium-bribe to Le Mars, the injured company. The patent consequence: Iowa Mutual, the guilty premium-briber, forfeited its $300,000. Forevermore. And of course Iowa Mutual was ousted from control.

Enter The Statesman Group, Inc.

Edward Roth, 56, chairman and chief executive officer, is leaving the firm. . . . Roth said the transaction, in his opinion, "was mutually compatible and should result in an orderly transition and benefit the company and its stockholders."
The announcement said D.J. Noble, president and chief operating officer, likely will become chief executive officer. 

Again fortunately for the law—and Statesman Group—the parallel with LeMars is pat. For all the years prior to September 3, 1982 Edward W. Roth was the uncontested contrôleur of Statesman Group. But Mr. Edward Roth was “very much a family man and has other business interests,” as Mr. Noble explained the shift in control to the Wall Street Journal (Aug. 13, 1982, at 24, col. 5). And so, as did old John Alesch before him, Mr. Roth bethought himself of a possible premium-bribe, and began to shop around. The first response to Mr. Roth by an aspirant successor had twin effects, both understandable: The proffered premium-bribe (1) proved grossly insufficient in the Roth eyes and (2) immediately alerted David J. Noble—long-time Number Two at Statesman—to the disastrous effects of a sale of control of Statesman to an alien and unsympathetic third party.

Galvanized by the thought of walking the streets, the desperate Mr. Noble was inspired—as Iowa Mutual before him had been inspired—to counteroffer a premium-bribe—and a substantial one indeed of $6.8 million—to induce Roth to appoint him, Noble, his successor contrôleur.

And so it was. As with Le Mars, so with Statesman Group: (1) A $6.8-million premium-bribe passed (2) To the incumbent contrôleur Roth (3) From the would-be contrôleur Noble (4) To induce the appointment to the office of control (5) Made knowingly. Again all five requisites of Le Mars. The only difference: The $6.8 million dwarfed the $300,000. But then Statesman was a much bigger plum.
The Outline of This Brief

[In dealing with Iowa Mutual ... Mr. Alesch held out control of Le Mars as bait. His ability to deliver such control was a condition of the sale. Completion of the transaction, including payment to Alesch, ... awaited the resignation of Le Mars' directors and election of new ones designated by Iowa Mutual, a maneuver Mr. Alesch easily accomplished with no murmur of protest.


The summary thesis of this Brief: That Statesman Group conforms in all particulars to The Illegal Sale of Control reprobed in Le Mars and hence warrants the same sanctions of Le Mars, will be proven in four stages: I. The Statesman Story, II. The Sale-of-Control Illegality, III. The Embezzlement, IV. The Remedy, and a Conclusion.

I. The Statesman Story

All who conspired or cooperated with John H. Alesch to accomplish the illegal sale of control over Le Mars Mutual are equally liable with him.


In all essentials, the Statesman story was the Le Mars story all over again. But with just enough accidental variations to give the story its own peculiar personality and character. As the drama unfolds, therefore, and the dramatis personae walk across the stage, think of Le Mars in essence but note the peculiar nuances of Statesman.


(1) The Rise of Roth

For many years Le Mars Mutual was a successful mutual insurance company, operating principally in northwest Iowa. John H. Alesch, one of its directors, was the most influential single person in the management of its affairs and in determining its day-to-day policy.

Edward W. Roth—the principal 'devil in the piece'—was a small-town Dakota boy who graduated from a Dakota Teachers College and early in his business life became an insurance agent. By the year 1971 Roth, now a maturing 44, was able to combine his insurance-agency interests with a small Alabama life company to form what was to become the Statesman Life Insurance Company. On this fragile foundation, by the deft use of mergers, consolidations, power plays—and the astute counsel of David J. Noble, his soon-to-be subaltern—Edward W. Roth was able to construct, building block by building block, a modestly impressive empire: The Statesman Group, Inc.

This entity, in precision necessarily from its numerous subsidiaries and affiliates and in its indivisible totality, The Statesman Group, Inc., is the centerpiece of The Statesman Story.

The Statesman Empire in 1982

... The Statesman Group, Inc. ... include[s] three stock and two mutual property-casualty companies, four life-health carriers, two reciprocal exchanges and ... investment, premium financing and underwriting activities.


By the crucial date of September 3, 1982, the Statesman empire had spread across more than 39 states, had amassed assets in excess of $260 million. The four-million-plus shares of Statesman were over-the-counter, with prices and trades carried on NASDAQ terminals nationally, and were widely held by over 4,800 little shareholders scattered across the United States. The network of 16 subsidiaries and affiliates was headquartered in Des Moines with principal outposts in Indiana, Alabama and the Dakotas. Statesman has 1,400 employees.
But for present purposes the crucial consideration is the impregnable unity of the empire. Each of six insurance subsidiaries of The Statesman Group, Inc. was either wholly owned by Statesman or close to it. (One minor exception: Statesman Insurance Company, of which Statesman Group owns only 56 percent.) The noninsurance firms were all wholly owned.

In the end, then, the Statesman empire is in truth a single, indivisible entity, owned, it is true, by 4,800 widely dispersed shareholders but nonetheless in the untrammeled control of Edward W. Roth.

(2) The Roth Control Structure

Alesch owed Le Mars complete loyalty, honesty, and good faith. . . . His virtual dictatorship over the affairs of Le Mars heightened his duty to give it loyal and faithful service.


Edward Roth had a keen sense of the control mechanics of the widely held corporation. He understood vividly the two basic facts of corporate life: (1) That the proxy-solicitation mechanism—naming directorial nominees, drafting the proxy, the mailing—is the infallible key to the uncontested election of the directorate. (2) That personal domination of the incumbent board—through financial leverage, social enticements or outright extortion—completes the vicious circle. This domination gives the contrôleur dictatorial sway over the very proxy solicitation that automatically elects the successor board. This interreacting twin control is virtually unbeatable.

Over the many years, beginning with the first merger in 1971 which produced the incipient Statesman Group, Edward W. Roth, contrôleur, maneuvered deftly with each succeeding acquisition to
assure himself with certainty of these twin essentials to an invulnerable control structure: (1) Unchallenged manipulation of the proxy solicitation for the annual meeting, and (2) Personal domination of the incumbent directors.

The Roth Control of the Annual Meeting

In December, 1971 control . . . of the company [Statesman Life] was obtained by chairman of the board and former president Edward W. Roth . . . . With the change in control, management was completely revised . . . .


The Statesman Group, thus assembled, became the perfect paradigm of the widely held corporation: Defenseless and voiceless. The annual meeting of Statesman was a charade.

The use of the shareholders list, the composition and wording of the proxy statement, the printing, stamping and mailing of the proxy, all were orchestrated by Edward W. Roth. No other single shareholder owned over one percent of the common. Unorganized, with no independent information about company affairs, limited only to the Roth proxy statement, the 4,800 sheepish shareholders had no other choice than to rubber-stamp Mr. Roth's hand-picked slate of directors. And so it went, year in and out, for every year of the Roth eleven-year incumbency.

Two further factors buttressed the Roth position. For the years immediately prior to September 3, 1982 Mr. Roth and family owned a small but helpful 12-percent block of Statesman. To this was joined another obedient 37 percent held by the trustee of the Statesman Employees' Stock Ownership Plan. Both blocks invariably voted for Roth, every year without fail.

Mr. Roth, therefore, had no concern about the annual meeting. This left only the second requisite for the total success of the Roth Control Structure.

The Kept Board

. . . Le Mars is the real complaining party, the one victimized by the wrong. It had a right to expect its directors to be more vigilant in protecting it. . . . We find these directors failed to discharge their duties as directors when even the most ordinary diligence on their part would have prevented the surrender of their corporation to Iowa Mutual.

In the case of each of the six directors—Roth was the chairman of the seven-man board—Roth invariably saw to it that every one, to a man, was variously but inextricably beholden to Roth. A dignified bondage. Stated more exactly, the loyalty of every director was unswervingly directed to dollars, prestige, social standing, or elemental livelihood. And Roth had a taut string on the dollars, the prestige, the standing, the fees or the salaries. The result invariably was unanimous directoral approval of any directors, old or new, nominated by Roth. With the consequent domination of the annual proxy statement for the annual meeting, the rest was perfunctory.

A cursory review of the frailty of each board member fleshes out the Roth Control Structure:

George D. O'Neill, 56: In O'Neill, Roth had the perfect pawn. A prototypal Eastern investment banker. Harvard College. A trustee of Vassar and the Colonial Williamsburg Foundation. Home in Oyster Bay. Office in Rockefeller Center (and a director of the Center to boot). For over eleven years O'Neill had counselled Statesman on the disposition of its extensive portfolio—mortgages, bonds, equities—reaching a value over $132 million. The annual fees and commissions flowing to O'Neill would alone excite sufficient loyalty to Roth to produce instant obeisance. Add to this the distance to New York City and a palpable lack of interest in Statesman—O'Neill missed more meetings by far than any other director—and O'Neill became the ideal Roth sycophant.

Simon W. Casady, 68: United Central Bank has long been Statesman's primary banker. Simon Casady is Chairman of the Executive Committee of UCB. Thus Casady, Statesman director, places Statesman's business with UCB. Of which Casady is a director. And Casady, UCB director, approves the loans to Statesman. Of which Casady is a director. Add to this conflict of interest the bolstering presence of Edward W. Roth seated next to Casady on both boards. This double interlock made mutual backscratching a simple matter. But more to the present point, if Simon Casady wanted a steady flow of Statesman banking, he had best make sure that he did the Roth bidding or he would be off the Statesman board and a new bank would be ensconced. And that was exactly the formula over the years. Casady got the business. And Roth got constant compliance.

J. P. Ashton, 73: The subservience of Ashton was far more straightforward. Ashton had retired from his little real-estate business. Beyond his retirement income, his major source of funds was a salaried sinecure with American Life, a major Statesman subsidiary. This steady income, plus the prestige of the positions, kept J. P. Ashton safely in the Roth camp.
David J. Noble, 51: In 1975 Roth hired Noble away from General United Group and installed him in various management jobs throughout the Statesman empire. Noble was undoubtedly more dependent on Roth than was any other board member. His was a substantial salary as the head operating officer of Statesman. He enjoyed directoral fees from all six major subsidiaries. In a word, if David J. Noble were ever to cross swords with Roth he would find himself unemployed, and in a correspondingly parlous financial position.

W. O. Conyers, 52: As with Ashton, Conyers enjoyed the prestige of the Statesman board, the annual stipend and the additional income of the Advisory Committee of a Statesman subsidiary.

H. E. Clendenen, 59: As with Noble, Clendenen owed his total livelihood to the pleasure of Roth. He had been a middle-management employee for the entire Roth tenure. He held moderately lucrative positions—vice-president, secretary, director—in six different Statesman subsidiaries. Clendenen ranked with Noble as the epitome of Roth dependence.

The personal domination of these six was the focal point of the Roth Control Structure. This ability to dictate to the incumbent board gave Roth the unchallenged domination of the proxy-solicitation mechanism. The result was a self-perpetuating incumbency. By controlling the incumbent board, Roth was able to ensure the election of the succeeding board at each successive annual meeting.

This was the soothing tranquility which Edward W. Roth enjoyed in the years prior to that key date, September 3, 1982.

(3) The Alien Premium-Bribe

"It is established beyond question under New York law that it is illegal to sell corporate office or management control . . . . 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."

But the idyll was about to end. In the early months of 1982, storm clouds—at least for long-time Number Two, David J. Noble—began to lower over Statesman. An insurance syndicate headed by a group whose names need not now be named had for some years been casting covetous eyes on The Statesman Group. Now in mid-1982 the syndicate made its move, and approached Edward W. Roth, contrôleur, with a proposal for a Statesman takeover. (Shades of the Employers Mutual overture to John Alesch prior to his sell-out of Le Mars to Iowa Mutual.)

The syndicate proposal was simplicity itself: For a price to be negotiated—say $5 million—Edward W. Roth was to turn over control of Statesman by the tried-and-true device of the seriatim resignation of the board. The implementation of the plan could be effected in a matter of weeks. The weakest member of the board—perhaps H. E. Clendenen, aged 59, with middle-management vulnerability—could be forthwith replaced by a syndicate nominee. The mere threat of lost salaries would produce an immediate resignation from the board. J. P. Ashton would undoubtedly be next, followed by Willard O. Conyers, and, lo, the syndicate would have displaced the ‘former’ board 4-3, should any questions arise. Under such a procedure the final housecleaning, should one be necessary, could await the annual meeting when Roth and the three syndicate nominees could propose successfully an all-new directoral slate, named of course by the syndicate. Such would be the sale of control.

This was the temptation that faced Edward W. Roth, just as it had faced old John Alesch in Le Mars. The question: Should Mr. Roth yield, as John Alesch had yielded, and hand over control of Statesman for a $5-million premium-bribe?

(4) The Noble Counteroffer

All parties agree that directorships in a corporation are not for sale and that a contract for that purpose is illegal and unenforceable.


When the word of this impending cataclysm reached him, Noble was frantic. He, among all, had the most to lose. He was young, 51. He had long been Number Two, and had long had his eyes on the office of control. With an alien and unsympathetic group in control—and insurance men to boot—his job was definitely in jeopardy, to say nothing of his many directorships and lesser offices. What to do?

Perhaps, he thought, he could take a leaf out of Iowa Mutual’s book. Recall that Employers Mutual had been about to steal the prize
with a tempting premium-bribe to John Alesch for control of Le Mars. Remember, too, that John Alesch was commendably impartial. He cared not a whit whence premium-bribe dollars, as long as they reached his pocket.

And the thought was the father of the deed. Convinced that Edward W. Roth possessed the same commendable impartiality, David J. Noble approached Mr. Roth—as Iowa Mutual had approached John Alesch—with a counteroffer, a substantial premium-bribe in the amount of $6.8 million. Since Mr. Roth was in fact impartial, and since the $6.8 million was sufficiently more substantial than the syndicate’s $5-million offer, the deal was sealed. Roth committed himself to hand over the board to Noble. Noble committed himself to pass the requisite $6.8 million. The parallel with Le Mars was perfect, even down to the alien offer and the counteroffer. All that remained: The resignation of Roth and the succession of Noble and his minions.

But hold, all was not yet sunny and bright. Storm clouds still lowered over David J. Noble. In fact, his problems were just beginning, the sealed deal notwithstanding. Poor David J. Noble did not have the Iowa Mutual treasury at his disposal. When Iowa Mutual had decided that it would premium-bribe John Alesch, all it did—as most respectable premium-bribers usually do—was reach into its own pocket, take out its own premium-bribe dollars, and hand them over to old John Alesch. But how could David J. Noble, with only minimum dollars in his pocket, ever think of producing the Roth-mandated $6.8 million? Here was an absolutely excruciating predicament. Noble neared the dream of his career at last. Roth had agreed to resign, to hand over Statesman to Noble. Noble had agreed to pass the dollars. With just one last step, the sale of control would be achieved. But the horrible truth remained: David J. Noble was, for all practical purposes, penniless. Far from $6.8 million.

(5) The Noble Embezzlement

We have already pointed out [that] all who assist or cooperate in the breach of fiduciary duties—whether directors or not—are liable for the resulting damage.


Only one major obstacle blocked the Noble path: Whence the $6.8 million? Noble knew that Roth had a ‘foolproof’ offer from the syndicate. He also knew that Roth was ‘impartial,’ and would yield to the highest premium-briber. From Roth’s standpoint, therefore,
Noble's counteroffer must be impeccable and leave Roth risk-free, or at least as free of risk as he would be were he to deal with the syndicate. Now what?

Noble had studied *Le Mars* assiduously. He knew that premium-briber Iowa Mutual used its own dollars from its own treasury, passed them to premium-bribed John Alesch, and actually did get control of Le Mars. But he also recalled, even more vividly, that Iowa Mutual and John Alesch got caught. That the Supreme Court forced John Alesch to disgorge every penny of the $300,000 premium-bribe over to Le Mars. And that of course—more to the point for Noble—Iowa Mutual consequently forfeited every penny of its $300,000 premium-bribe. These were sobering thoughts for David J. Noble. Failed premium-bribery could hurt.

Noble also remembered another facet to the Iowa Mutual premium-bribery. Although Iowa Mutual actually used—and hence actually lost—its own premium-bribe dollars, Iowa Mutual had never *planned* to be out of pocket, forevermore, those $300,000. From the outset, later looting of Le Mars would recoup the outlay. (Foolishly, these looting thoughts were even reduced to writing in the ill-starred 'Recoupment Letter' that was Iowa Mutual’s eventual downfall.)

This thought of later looting had great appeal to Mr. Noble. But one needs time for looting, and Edward W. Roth wanted his $6.8 million immediately. But, nonetheless, this 'recoupment' tactic fascinated David J. Noble. Could not some variant of the Iowa Mutual scenario—first payment with one's own dollars and later recoupment by looting—achieve the same result? But a variant that would still put the $6.8 million into Noble's hands *immediately*, since later looting was just too long for Roth to wait?

The Solution: Embezzle Now!

The most damaging single bit of evidence . . . is the hotly disputed "recoupment" letter . . . .

. . . Thus Le Mars, not Iowa Mutual, would really be paying [the premium-bribe].


Would that David J. Noble had been wealthy. Then he could have used his own dollars for the premium-bribe. Or, were his mother rich, perhaps that would have been the solution. Willie Sutton would simply have robbed his friendly neighborhood bank and paid the $6.8 million directly over to Roth. But that, obviously, would be messy.
So in the end, David J. Noble, penniless, decided to reverse the Iowa Mutual procedure and skip the two-step process altogether. He would simply embezzle immediately, forego the circuitous route of Iowa Mutual and use Statesman money now. The result would be the same: “Thus [Statesman], not [Noble], would really be paying” the premium-bribe, as the Supreme Court put it.

Nonetheless Noble went in with his eyes open. He was painfully aware that Iowa Mutual got caught looting. He knew that John Alesch had to disgorge the $300,000 premium-bribe to Le Mars. That Iowa Mutual also had to restore the looted $300,000 to Le Mars. But Noble was desperate. Roth demanded and Noble promised $6.8 million. But Noble was penniless. All the conjectures in the world were otiose. Only one path lay open: Loot Statesman now. But how?

Again Mr. Noble seemed blocked at the pass. Statesman simply did not have $6.8 million in lootable cash. A much more devious device would have to be devised.

The Solution: The Bank Loan

We agree with the trial court that punitive damages are proper against the . . . individual defendants. Each was guilty of violating his fiduciary duty or of cooperating with those who did. Their conduct was deliberately designed to wrongfully obtain control of Le Mars.


Mr. Noble reasoned that sufficient liquid dollars in the Statesman treasury would offer a reasonable opportunity of looting at a very early date. But Mr. Noble also knew that he could not pull off a devious deal all by himself. He equally well knew that Edward W. Roth would not expose himself to any collateral chicanery of his own. Roth made it clear: He would sell control, but beyond that Noble was on his own. Noble must rely exclusively on himself, and the cooperation of the Statesman board.

With Roth thus aloof, David J. Noble had only five directors to bring into line. The entire five, however, must be privy to the sale of control. Otherwise, an immediate and disastrous lawsuit by any dissident would scotch the plan.

But the board’s cooperation was assured. All five already knew that the $6.8 million was settled. That Roth had agreed to appoint Noble. That now each board member was in Noble’s pocket, just as he had been in Roth’s. And for exactly the same reasons. Now Noble, not Roth, was calling the shots. Salaries, brokerage commissions,
banking business, social prestige, all were now in the power of Noble. In a word, business as usual, simply a new contrôleur.

So David J. Noble detailed the stratagem. He stressed his inability to get the $6.8 million. He reviewed the offer by the alien and unsympathetic syndicate and the resultant loss of salaries, prestige and financial benefits. The result was ready agreement by all. The American Fletcher National Bank had long been Trustee for the Statesman Employee Stock Ownership Plan, and appreciated the business. And wanted to keep the business. And, yes, would happily oblige with a loan, even a $10-million loan. The rest was a formality. With few, or no, questions asked. So far, so good.

But the machinations had far from ended. True, Statesman now had substantial lootable dollars in the treasury. But a major chore yet remained: To get those dollars out of the Statesman till into Noble’s hands. Only then could Noble pass them on to Roth. The denouement of The Statesman Story was at last at hand.

(6) *The Passing of the Premium-Bribe*

[T]he evidence confirms the trial court’s finding that Iowa Mutual paid a [substantial] sum . . . as a premium in return for Mr. Alesch’s delivery of control of the board of directors of Le Mars Mutual.


Perhaps once again Noble could take a leaf from the Iowa Mutual book. When Iowa Mutual wanted to hide the premium-bribe—undoubtedly ‘hide’ is too complimentary, so clumsy was the ploy—it decided to bury the $300,000 in an innocuous purchase of John Alesch’s little insurance agency, worth at most $100,000. The ruse—unsuccessful in the event, since Iowa Mutual again got caught—called for a sham value of $400,000 for the $100,000 agency. Clumsy as the ploy may have been, it did successfully pass the $300,000 premium-bribe to John Alesch. (In fact, Iowa Mutual would have gotten away with it, were it not for the purchase contract with all the details of the illegal sale of control spelt out for all to see.) Again, David J. Noble bethought himself of a possible variant on this pellucidly patent camouflage.

If Iowa Mutual purchased an egregiously overvalued agency from Alesch, what could Noble purchase from Roth and correspondingly egregiously overvalue? The very question engendered the ideal answer. Edward W. Roth owned a small block of Statesman common worth roughly $3.1 million on the NASDAQ market. Even hypothesizing
astute sales by Roth, paced over months to keep the market down, Roth would nonetheless be able to net little more than $3.1 million for his stock. Here, thought Noble, is the vehicle for carrying the stipulated $6.8 million from Noble to Roth. Merely tack on the $6.8 million to the actual value of the stock, and who would know? Noble could almost taste control.

To Noble’s relief, Mr. Roth approved the plan. He was, after all, ‘impartial’ and cared not a whit whence the premium-bribe dollars. Furthermore, Mr. Roth had decided that he would just as lief make a clean break with Statesman—exhibiting less than wholehearted confidence in a Statesman under Noble—and divest himself of all his shares when appointing Noble contrôleur in his stead.

The Noble Premium-Bribe

We find these directors failed to discharge their duties as directors when even the most ordinary diligence on their part would have prevented the surrender of their corporation to Iowa Mutual.


David J. Noble was particularly fascinated by this one-step approach to the premium-bribery. Why, after all, wait until years have passed to recoup his own premium-bribe dollars? And further, the risk is no greater in embezzling at the outset—‘recoupment in advance,’ as it were—vis-à-vis the Iowa Mutual two-step approach of first using its own dollars and later recouping them.

But beyond the elimination of one unneeded step, Noble was further intrigued by this direct route to the Statesman till. By ‘cloaking’ the premium-bribery in the purchase of Roth’s shares, and by using Statesman dollars directly, an untutored eye might not even see that these were in fact embezzled dollars, Noble dollars. Further, all Roth demanded was personal absolution of all responsibility. And Noble had fully convinced Roth that the full responsibility for the $6.8 million would rest with Noble and never be imputed to Roth himself.

Roth understood the reality of the situation vividly. The most important single fact in this entire Statesman Story, bar none, was poignantly apparent to Roth. He not only tasted it, he savored it. Noble had incontrovertibly accepted full responsibility, both legal and moral, for the embezzled dollars in this one notable fact: Noble did not initiate immediately a Statesman lawsuit against Roth for the illegitimate $6.8 million over market. By that act—or better, failure
to act—Noble took over, as his own, the passing of the $6.8 million to Roth.

(For eleven long months—September, 1982 to the present—Roth has been gone. Noble has been contrôleur, "Chairman and chief executive officer," as the news releases said. More than any other factor, Noble's acquiescence, as he watched the $6.8 million leave the Statesman treasury, convinced Roth beyond any fear. By this acquiescence Noble told the world that these were his embezzled dollars premium-bribing Roth for control of Statesman. So Roth went forward willingly, satisfied beyond cavil that all would hold Noble responsible. In no way implicate him in the embezzlement. After all, he was long gone.)

The Deed Done

Mr. Noble said the Statesman board deemed $10 million "an appropriate figure" because of the size of Mr. Roth's holdings. "We looked at this the same way we'd look at buying a large block of shares of any company," Mr. Noble said. Large blocks of stock often command a premium over market value, he added.


As the event would have it, all went well. The camouflage was perfect, or at least so it seemed. Mr. Noble issued corporate news releases that rang with pious platitudes:

Mr. Roth, 55 years old, intends to resign before Sept. 15 to pursue other business interests, the insurance holding company said. D.J. Noble, president, will become chairman and chief executive upon Mr. Roth's resignation. Mr. Roth wasn't available for comment.

"It was a friendly negotiation. He's very much a family man and has other business interests," Mr. Noble said. The purchase of Mr. Roth's 509,994 shares, or 12% of the common outstanding, will be financed with a bank loan, he added.


Everything went according to script. Mr. Noble never even needed to put his hands physically on the premium-bribe dollars. They left the Statesman treasury and passed directly to Edward W. Roth at the
time of the share purchase, that fateful September 3, 1982. The deal had all the external habiliments of a normal repurchase arrangement. Except, of course, for the fact, as the Wall Street Journal trumpeted: *Statesman to Buy Its Chairman’s Stake at Triple Market Rate.* Perhaps the public was truly deceived, or at least so it seemed. But to any but a casual observer, the passing of control of Statesman from Roth to Noble had no connection whatsoever, except tangentially, with the purchase of Roth’s stock by Statesman.

The Aftermath

All parties agree that directorships in a corporation are not for sale and that a contract for that purpose is illegal and unenforceable.


And thus it all transpired exactly according to plan. Mr. Roth duly retired to pursue his other business interests, and Mr. Noble indeed did become chairman and chief executive officer of Statesman.

With each succeeding month the tranquillity of the Roth days became the tranquillity of the Noble days. The transition was made with nary a ripple. Mr. Roth’s old board seat was taken in course by Mr. R. G. Dickinson, who headed up an investment firm latterly acquired by Statesman. Beyond this, nothing changed. Messrs. Cassidy, Conyers, Clendenen, Ashton and O’Neill now became beholden to David J. Noble. Now these men looked to Mr. Noble for their salaries, perquisites, prestige and financial handouts.

In due order came the first annual meeting after the Roth exodus, but nothing changed but the office of contrôleur. Now the annual report and the proxy statement read: David J. Noble, Chairman of the Board and Chief Executive Officer. As under Roth, so under Noble. The subservient board dutifully approved all the Noble nominees for the upcoming board and, in predictable course, the sheepish shareholders scattered across the nation rubber-stamped the Noble nominees. The Roth sale of control to Noble was duly consummated with the formalism of the May, 1983 annual meeting. Here finally was the proof of the pudding. Mr. Noble’s subtle plan was too abstruse for the obtuse minds of the public shareholders of Statesman.

Or was it? Or was the Statesman Story just beginning?

II. *The Sale-of-Control Illegality*

The principle that a contract to resign a public office or to exert influence to secure the appointment of another is void
as against public policy has been too long established to require the citation of authority for its support, but see cases collected . . . .


The transaction gives Mr. Roth about triple the market value for his Statesman stock.

Mr. Roth, 55 years old, intends to resign . . . . D.J. Noble, president, will become chairman and chief executive upon Mr. Roth’s resignation.


With the facts of this lawsuit so laboriously spelt out in The Statesman Story, the law must be applied to these facts with the same diligence, and thus move forward toward the proof of the thesis of this Brief: “That Statesman Group conforms in all particulars to The Illegal Sale of Control reprobated in Le Mars, and hence warrants the same sanctions of Le Mars.”

The law underlying The Sale-of-Control Illegality can be laid out most logically in three major divisions: (1) The Premium-Bribe Itself, (2) The Intrinsic Illegitimacy of the Premium-Bribe, and (3) The Disgorgement. All three produce far-reaching results.

(1) The Premium-Bribe Itself

[The contrôleur] is bound to account for the money received from Levy for the transfer to him and his associates of the management and control of the Life Union, together with its property and effects. The learned appellate division has treated this transaction as a bribe paid to the directors . . . .


Mr. Noble . . . deemed $10 million “an appropriate figure” because of the size of Mr. Roth’s holdings. “We looked at this the same way we’d look at buying a large block of shares of any company,” Mr. Noble said. Large blocks of stock often command a premium over market value, he added.


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—the transparent subterfuge in Le Mars—or wherever. But ‘bonus’ or ‘premium,’ or ‘premium-bribe,’ no matter. The result is the same: Bribery.

As it will do throughout this Brief, Le Mars sets the precedent. Stripped of its complexities, the premium-bribe in The Illegal Sale of Control as outlined in Le Mars carried five requisites: (1) The payment of a $400,000 premium-bribe, (2) To John Alesch the incumbent contrôleur of Le Mars, (3) By Iowa Mutual the would-be contrôleur, (4) To induce the appointment to the office of control (5) With scienter.

Understandably the principal malefactors in Statesman did not—since one could conjecture that they had closely read Le Mars—reduce to writing forthright admissions of these five Le Mars requisites. But if ever ‘actions spoke louder than words,’ the detailed events of the Statesman Story were not reticent in painting a vivid picture of Bribery in a Corporate Guise. From all these undeniable events, a logical mind is impelled inexorably, willy-nilly, to the conclusion of premium-bribery. The indisputable facts permit no other rational result.

From the central events of the Statesman Story, 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 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.


Each of these parts is realized in the Roth Sale of Control to Noble.

Monetary Consideration

Broken down . . .: (1) Some form of consideration, monetary or otherwise.

The transaction gives Mr. Roth about triple the market value for his Statesman stock.

It is not uncommon for the malefactors in a sale of control to attempt to camouflage the consideration that is the heart of the premium-bribe. A five-year consulting contract is a favorite method. Or secret ‘gifts’ to deserving relatives. Or to the incumbent contrôleur himself. But the Roth/Noble transaction indulged in no such subtleties. The amount of the consideration was stated in a forthright manner. More than that, it was proclaimed a ‘premium’ openly in the public press.

This first of the *Le Mars* essentials requires the positive identification of some object of value, otherwise unidentified or unexplained. If, however, the consideration can be linked to any of numerous legitimate transactions—for example, the true value of a stock purchase—clearly the first *Le Mars* requisite is missing. And the proof of premium-bribery fails at the outset. Each of the five requisites is essential.

The present task, therefore, is to segregate some ‘monetary consideration’ from any legitimate value that could pass to the contrôleur at the time of the transfer of control.

(Note: The consideration stipulated in *Le Mars* need not necessarily be ‘monetary.’ An incumbent could well be premium-bribed by various nonmonetary favors, e.g., membership in an exclusive club, appointment to public office, admission into a social enclave. But again, Statesman posed no such subtleties and thus limits the proof to countable dollars.)

Furthermore, this task of the isolation of the illegitimate from the legitimate was obligingly performed by the principal malefactors themselves. Loudly, even blatantly, in their own public press pronouncements. Mr. Noble began this process of isolation in his first corporate news release, with an exact statement of the total amount of consideration passing to the incumbent contrôleur, Roth. At this point Mr. Noble made no attempt to separate any legitimate payment from the illegitimate. Just the grand total:

Statesman Group Inc. said it will pay $10 million for the shares, share options and employment contract of Edward W. Roth, chairman and chief executive officer.
But then Mr. Noble took this $10 million and conveniently divided it into its two constituent parts. Noble began this breakdown with a detailed computation of the value of Mr. Roth’s shares and share options, the true value on the impartial public market:

The [Roth] interests acquired included 509,994 shares of the Company’s Common Stock [and] presently exercisable options to purchase 68,520 shares . . . .

On the day prior to the Agreement with the Roth family, the mean between the bid and ask prices for the Common Stock of the Company was $5.06.


Elementary arithmetic translates these 624,174 shares (including the options), at $5.06 each, into a total market value of $3,158,320.40.

Clearly, this calculation of $3.15 million poses no particular problem for the fact finder. The market in Statesman was an admittedly reliable norm of true value. Statesman is widely traded nationally in the over-the-counter market, flashed on thousands of NASDAQ terminals and listed daily in all major newspapers of the country. With four-million-plus shares in the hands of 4,800 shareholders, the market in Statesman, moreover, could scarcely be characterized as ‘thin,’ and hence is a truly dependable gauge of the actual worth of the Roth interests.

Further, this $3.15-million evaluation is generous. To unload the not inconsiderable 624,174 shares onto the open market would undeniably have a depressive effect on the price of Statesman. Thus, even conceding paced sales, with anonymous brokers in various cities, over an extended period of time, nonetheless Mr. Roth would not net a figure over $3.15 million.

But the other side of the coin is even more revealing. Why Mr. Roth’s shares? What intrinsic allure enhanced his shares? Would not 600,000 identical public shares have been just as good as Mr. Roth’s? (This assumes the preposterous premise that Statesman needed to buy any shares, Mr. Roth’s included.) Why not a purchase at $5.06 per share, in paced sales, through anonymous brokers, and thus keep the market down? No need to pay “about triple the shares’ current market value.” Some 6-million shares in the hands of 4,800 shareholders stood ready for purchase at $5.06. And Mr. Roth received $15. Need more be said to prove that only $3.15 million of the $10 million may be justly attributed to the Roth shares? The rest was
'monetary consideration,' unidentified and unexplained. And certainly unrelated to the share purchase.

Using the Noble-supplied figures, therefore, one would simply subtract the $3.15 million from the admitted $10-million total to reach an unaccounted-for $6.8 million.

(In this unexplained $6.8 million, Mr. Roth included $500,000, the amount stipulated to buy up his employment contract. Obviously, no such $500,000 cancellation would have occurred had not Noble premium-bribed Roth out of office.)

To call this $6.8 million 'unidentified' is, however, not exactly accurate. Again Mr. Noble most obligingly called a spade a spade, and admitted a 'premium' had been passed. And for no stated reason.

Mr. Noble said the Statesman board deemed $10 million "an appropriate figure" because of the size of Mr. Roth's holdings. "We looked at this the same way we'd look at buying a large block of shares of any company," Mr. Noble said. Large blocks of stock often command a premium over market value, he added.


What Mr. Noble failed to add, however, was an adversion to the amount of the premium. Were one to concede, strictly arguendo, that a large block does "often command a premium"—and in the Roth/Noble sale of control no 'premium' of any kind would be justifiable—even 30 percent over market would be unconscionable. But 300 percent defies even uncontrolled fantasy.

Note well, this first of the Le Mars essentials requires no proof of the purpose or of the nature of this monetary consideration. All that is mandated now is the actual existence of some monetary consideration otherwise unexplained and unidentified. No attempt is made, furthermore, to specify the source or to trace the destination of this consideration. The mere fact, without more, was all that the Le Mars Court stipulated.

Thanks to the forthright—even naive, considering the illegality of his scheme—admissions of Mr. Noble, therefore, the legitimate consideration—the $3.15-million market value of the Roth interests—was prominently segregated from the illegitimate—the $6.3-million "premium over market value" plus the $0.5 million for the contract—attributable even by the malefactors to no licit cause. This proof of the first Le Mars essential encountered no serious obstacle. Res ipsa loquitur.
To the Incumbent Contrôleur

Broken down . . .: (2) flowing to the incumbent contrôleur [Roth] . . .

Statesman will pay Mr. Roth about $15 for each of those shares . . ., Mr. Noble said. That’s . . . about triple the shares’ current market value. Statesman common traded over the counter yesterday, at $5 . . .

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

But always obliging, Messrs. Roth and Noble eschewed the ‘maze,’ and tracked a highly traceable spoor along a straight “path to a point of rest in the contrôleur.” The proof of this second of the *Le Mars* essentials is therefore as effortless as was the first. Neither Roth nor Noble made any attempt to conceal that Mr. Roth, the incumbent contrôleur, was the ultimate destination of the $6.8 million in ‘monetary consideration.’

Indeed, so forthright were these admissions—admissions? Boasts—that Mr. Roth was the recipient, that a psychoanalyst would be hard-pressed to interpret them:

The transaction gives Mr. Roth about triple the market value for his Statesman stock . . . $10 million for the shares, share options and employment contract . . .

. . .

Mr. Noble . . . deemed $10 million “an appropriate figure” . . .

Was this “triple the market value,” $6.3 million, a brazen affront to the Statesman shareholders? Did Mr. Roth reason that he was above the law? Invulnerable to claims of premium-bribery? That he could ride roughshod over minority rights?
Or was it callow naivete? Did Mr. Roth believe that no one would question $6.8 million for the appointment of his successor? Such ingenuousness ill becomes a hardened contrôleur. Especially one who has kept a stranglehold on Statesman from its earliest days. Ingenue Mr. Roth was not.

Perhaps the correct analysis would attribute all these blatant news releases, not to Edward W. Roth, but to David J. Noble. Perhaps Mr. Noble was so exultant at donning the mantle that he rushed thoughtlessly to the press to boast of his ascendancy. And in the process admitted openly, even unwittingly, that Mr. Roth was receiving such an unconscionable sum for the relinquishment of his office. Perhaps the word should rather read 'wroth.' With Mr. Noble, that is.

But whatever conjecture best explains the facts, no matter. The sole point for present proof is that Edward W. Roth, then-incumbent contrôleur, received $6.8 million in ‘monetary consideration.’ Thus the second of the two *Le Mars* requisites is as easily established as was the first.

*From the Prospective Contrôleur*

Broken down . . . : (3) From or on behalf of the prospective contrôleur [Noble].

D.J. Noble, president, will become chairman and chief executive upon Mr. Roth’s resignation.

As with the identification of the consideration and its proven reference to the incumbent [Roth], the verification of the third element is at worst not a greatly demanding assignment for the fact finder.

The isolation of the $6.8 million in ‘monetary consideration’ was readily accomplished. So, too, was the indisputable identification of Edward W. Roth as the recipient of that $6.8 million. Thus far, the spoor is unmistakable.

But at this turn in the tracking, the pattern of guilelessness disappears. And an admonition of some 14 years ago is pertinent in tracing the $6.8 million directly to (or better, ‘from’) David J. Noble:
Whether there is a patent payment directly from the appointee himself [Noble], or indirectly from some third party, or a complicated series of moves from the controlled corporation [Statesman], one overriding principle prevails—the consideration must be the primary responsibility of the appointee [Noble]. Regardless of appearances, all three sources must be reducibly the same.


For the first time in this unfolding tale, the actors have, arguably by design, camouflaged their actions. Not fully, but somewhat. At any event, some modicum of perspicacity will penetrate the camouflage and point to David J. Noble as the sole source of the $6.8 million in 'monetary consideration' passing to Edward W. Roth.

Perhaps it would be flattery to credit David J. Noble with "a complicated series of moves," but the fact remains that the $6.8 million was not "a patent payment directly from" Noble. Rather, the $6.8 million came from "the controlled corporation" itself, Statesman. But this gambit was not exactly a Noble invention. The ploy was slightly devious but far from original:

Although definitely begging a later question, nearly every successful premium-bribe is sooner or later recouped from the corporation [Statesman]. Often, however, the new appointee [Noble] avoids the circuity of a personal payment and later . . . recoupment by an immediate raid on the [Statesman] corporate till.


Which, of course, is exactly what appointee Noble did. Putting the matter grossly, and tracing the circuity move by move, one can see that Noble simply stole the $6.8 million directly from Statesman and paid it over to Roth, pursuant to agreement. At this point, however, this complicated circuity must not be left to conjecture. Every step must be analyzed and proven beyond doubt.

At this stage of the argumentation, some slight summary will give the correct perspective for this third *Le Mars* requisite: The "consideration must be the primary responsibility of the appointee" David J. Noble. That is the ultimate goal for the proof. Noble must
be responsible for the $6.8 million. Toward this goal, two arresting truths have already been established incontestably:

(1) Roth passed control to Noble.
(2) Someone passed $6.8 million to Roth.

These two indisputables occurred simultaneously. At the same hour of the same day, in total interrelation. And in the face of an alien third party ready to pass a competing premium-bribe. One passably well-versed in business rudiments—he need be neither a cynic nor an expert—would make a ready deduction from the mere conjunction—without more—of these two truths that the $6.8 million “consideration [is in truth] the primary responsibility of” David J. Noble.

Reflect momentarily on these two truths. Roth handed over to Noble a valuable asset: Control of Statesman. (Roth could have handed Statesman over to the aliens.) Someone handed over to Roth a valuable asset—$6.8 million—at the very time and in connection with Roth’s beneficence to Noble. No ‘someone’—other than David J. Noble—would have the slightest motivation in the world to shower, suddenly and gratuitously, such an unthinkable sum of money on Edward W. Roth. Grade-school logic would add one and one together, and conclude unhesitatingly to David J. Noble as the only plausible source of the $6.8 million. Why? To pay Roth for Noble’s control.

Were no other facts deducible, these two truths—this juxtaposition—unaided would satisfy the requirement that “the consideration must be the responsibility of the appointee” Noble. But one more fact—
far and away the most important single fact in this entire Brief—can be adduced with minimum rationalization.

The Unthinkable Lawsuit

One of the oldest financial services companies for the garment trade, the William Iselin Company, yesterday said that it had sued its former chief executive and two former employees, charging them with conspiring with a large apparel group to defraud Iselin of more than $15 million from 1978 through 1982.

—C.I.T.'s Factoring Unit Sues Ex-Chief, Others, N.Y. Times, Aug. 24, 1983, at D1, col. 3.

Consider reflectively for a moment the only alternative. Before September 3, 1982 Edward W. Roth was in unchallenged control of Statesman. After that date, David J. Noble was in unchallenged control of Statesman. The $6.8 million left the Statesman till on September 3, 1982. Who of the two was responsible? If the dollars are attributable to Noble, a credible sale of control transpired. But what if the responsibility lay rather with Roth?

Suppose that Mr. Roth, as the all-powerful contrôleur, decided simply to loot the Statesman treasury as a farewell memento? Suppose David J. Noble was not, in fact, directly a party to a Roth looting? Suppose then that an honest and conscientious David J. Noble ascends in due course to the control of Statesman, and Mr. Roth hies himself hence to his "other business interests," $6.8 million in pocket. What then?

An honest and conscientious Mr. Noble, bearing no direct responsibility for the $6.8 million, would survey the scene and see a disturbing sight. Here was his predecessor in office absconding in his closing days with an unexplained $6.8 million in Statesman funds, with nary an intimation of a justifiable reason. The $6.8 million was certainly not deferred compensation. A 'farewell present' would be laughable. Even 30 percent over market for the small stock block would be open to court attack. But a 300-percent markup is looting, pure and simple.

Even the layman Noble would not need an opinion of corporate counsel that Statesman had an open-and-shut case against Edward W. Roth. And being an honest and conscientious contrôleur, David J. Noble would immediately initiate litigation on behalf of Statesman to recover the $6.8 million. Would not Noble, with the doors of the Statesman safe ajar, the $6.8 million missing, have pursued the thief? Assuming, of course, the untenable assumption that the astute Roth
would be so gauche as to steal. Especially when he had a secure and alien premium-bribe in the wings.

Were Mr. Roth in truth responsible for these millions, and were David J. Noble in truth conscientious and honest, a direct Statesman lawsuit against Roth would have long since been begun. But such conjecture is fanciful. Mr. Roth was not responsible, at least directly, for the $6.8 million. Mr. Noble was, in fact, neither conscientious nor honest. And in one overarching fact lies the proof of this Brief: By his refusal to have Statesman pursue the $6.8 million, by his acquiescence in the transmission of these dollars to Mr. Roth, David J. Noble assumed incontrovertibly the full responsibility for passing premium-bribe dollars to Roth. The safe doors were not in fact ajar. Nor was Mr. Roth a thief. The dollars came from Noble. Here, then, is the key to all the machinations.

Add this salient fact—the refusal of Noble to retake the $6.8 million—to the conjunction of the two truths—already sufficient to place responsibility on Mr. Noble—and the argumentation is complete. In truth, Edward Roth did not abscond with Statesman dollars. In truth, those dollars were stolen by David J. Noble—true, with the knowledge and connivance of Roth—and his was the primary responsibility. Those words of so long ago were a presage:

Often, however, the new appointee [Noble] avoids the circuitry of a personal payment and later . . . recoupment by an immediate raid on the [Statesman] corporate till.

The conjunction of the two truths and the Noble refusal to pursue Roth, left Noble clearly responsible:

Whether there is a patent payment directly from the appointee himself [Noble], or indirectly from some third party, or a complicated series of moves from the controlled corporation [Statesman], one overriding principle prevails—the consideration must be the primary responsibility of the appointee [Noble]. Regardless of appearances, all three sources must be reducibly the same.

So, in the end, the $6.8-million premium-bribe was in fact “the primary responsibility of the appointee,” David J. Noble. And it must be said, perhaps too flatteringly, that the dollars did come “in a complicated series of moves from the controlled corporation,”
Statesman. Noble, in effect, had embezzled the $6.8 million.

To this point, therefore, the argumentation has seen (1) $6.8 million in monetary consideration (2) Flowing to the incumbent contrôleur, Edward W. Roth, (3) From or on behalf of the prospective contrôleur, David J. Noble. The remaining proof of the presence of a premium-bribe is equally effortless.

To Induce the Appointment

Broken down . . .[:] (4) to induce the appointment to the office of control . . .


*When some consideration, clearly identified, has passed to the incumbent contrôleur from the prospective appointee under circumstances reasonably related to the control transfer, a rebuttable presumption arises that the purpose of such consideration is to induce the appointment.*


Had Messrs. Roth and Noble a legitimate reason for passing the $6.8 million, they undoubtedly would have ‘proclaimed it from the housetops.’ But no such proclamation ever issued, in spite of the news releases that discussed the transfer of control so openly.

The fact may be that the parties are readily able to prove a purpose totally unrelated to a premium-bribe. The consideration flowing at the time of the transfer may in truth be a genuine quid for a legitimate quo, a long-due debt, deferred salary, or even a gracious gift. But these alien purposes must be flushed out, and the burden lies on the payor and payee to do the flushing.


But clearly Messrs. Roth and Noble made no attempt “to do the flushing,” and this in spite of the fact that they did attempt to explain publicly the $6.8 million passing to Mr. Roth. No mention was made of “a genuine quid for a legitimate quo.” Had Mr. Roth held “a long-due debt,” certainly that debt would receive prominent attention. So, too, with “deferred salary.” As for “a gracious gift,” such a gift would hardly be appropriate for an outgoing contrôleur relinquishing his control of the company.
The reason for the silence is clear. Messrs. Roth and Noble were simply not "able to prove a purpose totally unrelated to a premium-bribe." The only explanation—"Large blocks of stock often command a premium"—was so specious as to be no explanation at all. A premium of 300 percent, passing "to the incumbent contrôleur [Roth] from the prospective appointee [Noble] under circumstances reasonably related to the control transfer" leads to one inescapable conclusion: The 'premium' dollars were passed "to induce the appointment." This $6.8-million premium passed from Noble to Roth at the very instant of the transfer of control from Roth to Noble. In short, this 'monetary consideration' could not be more intimately related to the transfer of control.

These reflections complete the analysis . . . . The parties to a transfer of control are faced with two governing principles: (1) Any consideration passing at the time of transfer must be explained. (2) Any unexplained consideration is presumed to have been passed to induce appointment.


This leaves only the fifth and last of the *Le Mars* essentials.

*Paid Knowingly, Scienter*

Broken down . . . : (5) Paid knowingly, scienter.


There is no rule better established respecting the disposition of every office in which the public are concerned than this, *detur digniori* [let it be given to the more suitable]: on principles of public policy no money-consideration ought to influence the appointment to such offices.


The real question is not 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 Edward W. Roth and David J. Noble. "The conduct . . . was so intentional, malicious, reckless and indifferent as to require the award of punitive damages . . . ." *(Rowen v.*
(2) The Intrinsic Illegitimacy of the Premium-Bribe

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.


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 . . . .


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 than that the overall philosophy finds its most impressive expression at that charged instant when corporate control is sold for a price.

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

The all-pervading fact of Statesman has been the absolute and uninterrupted domination by Edward W. Roth.

In December, 1971 control . . . of the company [Statesman Life] was obtained by chairman of the board and former president Edward W. Roth . . . .


And so it went through all the years, up to the present. Mr. Roth maintained unfailingly his personal domination of the directors and the proxy-solicitation mechanism. This interreacting twin control proved unbeatable.
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.


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 commendable 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, without more.

And so it was with Statesman. Assets, policy, personnel, everything, were totally dependent on the will of Edward W. Roth. On him alone the shareholder owner 'naturally relied.' Their 'very selection' of Edward W. Roth 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 dependence is coterminous with the orbit of reliance[/]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.


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 who are in a position to have and exercise or do have and exercise influence over each other. *Curtis v. Armagast*, 158 Iowa 507.


In the case of Statesman, this confidence, reliance, dependence, was total. Statesman was in the complete custody of Edward W. Roth.

**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.


The directors have the custody and control of the assets of the corporation for the benefit of those to whom they belong.


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 untrammeled 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, 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.

With continuing commendable 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 co-partner is conferred on the directors and officers by those selecting them to manage corporate affairs.


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 . . . .


On this foundation of custody the Iowa Court moved effortlessly to the inescapable conclusion:

The fiduciary obligation is owing 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 . . . ."


Thus far—and it is so to the end—Edward W. Roth, contrôleur, and Statesman, 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 that
the responsibility of the [contrôleur] is total because the entire corporate entity has been entrusted to [the contrôleur].


Equity holds them strictly accountable as trustees.


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 Strict Trust. (And these stringencies include notably the Beneficiary-Rule.)

"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."


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.


Thus, when the Iowa Court injects the qualification ‘quasi-trustee’ into its definition, it intends only to qualify the Strict Trust duty of the contrôleur to the individual shareholder directly, but not to the entity itself and its assets.
The Iowa Court refused to apply 'strict trustee' to the limited dealings with the shareholder because of the absence of custody over the shares. Custody over the entity, yes, but not over the shares.

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.


Thus, only in direct 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:

[From 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.


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. The Court in the 1972 Holden, quoting the 1953 Bechtel, 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.


And this rule was later endorsed by the 1973 Holi-Rest v. Treloar (217 N.W.2d 517 (Iowa)). The Iowa Court, therefore, holds the contrôleur as a strict trustee of the corporation, and a 'quasi trustee, at least,' of its stockholders.
We have never wavered from our insistence that those holding fiduciary positions must act with a high degree of fidelity.

... Those charged with corporate management hold control on behalf of the shareholders.


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."


The Iowa Court in Schildberg nudged its Strict Trust reasoning to the next logical level, to the most important Strict Trust 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 of a corporation are trustees or quasi-trustees of the corporate assets and occupy a fiduciary relation to the corporation and its stockholders.


From this point, one inevitable step leads to the Strict Trust Benefito-Beneficiary Rule:

Because this dependence [of the corporation 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.” [*Restatement (Second), Trusts §170(l) (1959).]


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.


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.”

—*Schildberg Rock Products Co. v. Brooks*, 258 Iowa 759, 767, 140 N.W.2d 132, 136 (1966) (quoting 19 AM. JUR. 2D Corporations §1272 (1965) [(current version of this principle is found in 18B AM. JUR. 2D Corporations § 1714 (1985))].

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 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.”

—*Schildberg Rock Products Co. v. Brooks*, 258 Iowa 759, 768, 140 N.W.2d 132, 137 (1966) (quoting *Guth*
v. Loft, Inc., 23 Del. Ch. 255, 270, 5 A.2d 503, 511 (1939)).

Which is to say that one who willingly assumes, as Edward W. Roth did, the stewardship of millions of dollars of ‘other people’s money’—other little neighborhood people’s money—he has thereby agreed "to administer the trust solely in the interest of the beneficiary." 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_

The doctrine . . . is but one phase of the cardinal rule of undivided loyalty on the part of fiduciaries. [Citations.] 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.


_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 Borden v. Sinskey by the Third Circuit) the prototypical 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, 164 N.E. 545. ..."


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, Le Mars*, 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 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 ....


*Borden* is an ideal buttress to the specific holding of *Le Mars* and to the entire Iowa, and national, line begun by *Guth*. *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, dividends. Even the salaries earned while working for the beneficiary.

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* ... 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.

—Borden v. Sinskey, 530 F.2d 478, 497-98 (3d Cir. 1976).

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.


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

"[P]ersons enjoying management control hold it on behalf of the corporation's stockholders . . . . Any other rule would violate the most fundamental principle . . . that management must represent . . . those who own the corporation."


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.

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. Edward W. Roth, in assuming complete dominion over Statesman, 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.


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 into 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.


Of these three all-encompassing goals, only the third, the selection of competent personnel, affects intimately the present study, namely the choice of a successor to Edward W. Roth. Of all the acts of Mr. Roth’s tenure, the most crucial was appointing David J. Noble. 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.


All this is an elemental deduction from the Benefit-to-Beneficiary Rule. The entire future of Statesman rested with Noble. Yet, to buy the appointment, Noble passed a $6.8-million premium-bribe to the incumbent Edward W. Roth.

At this point the reasoning leads to the next major proposition: The premium-bribe is in its essence corrupt. “For the avoydinge of corruptcon, everie suche bargaynes shalbe voide.”

Although plaintiffs advance other theories attacking the sale of Alesch, Inc. to Iowa Mutual, we depend, as did
the trial court, on the illegal sale of control to set aside the
transaction. 

The sale of control of a corporation has been declared
to be violative of public policy.


That 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 [Noble], the culpability of the incumbent [Roth], 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.


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 legitimate considerations at the time of appointment. Suitability is the sole final cause that may flow legitimately into the selection of the new contrôleur.


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 Edward W. Roth, the ‘reason other’ was premium-bribe dollars. The suitability of David J. Noble was far from the thoughts of Edward W. Roth. (A cynic might even conjecture that Roth’s sale of all his stock was actually a bail-out and a recognition of the unsuitability of Mr. Noble.)

Interestingly, however, the blame lay equally on Mr. Noble. Mr. Roth was bribed. But Noble did the bribing. And Noble had already agreed to assume the stewardship of Statesman.
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.


Henceforward remember that Noble and Roth had conspired together, over many days, to pass and receive the premium-bribe. Each had assumed the custody of Statesman. 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.


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.


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 the second—illicit consideration—is at the heart of the instant problem: Disgorgement of the premium-bribe dollars into the Statesman treasury.

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.


Both Edward W. Roth and David J. Noble had agreed to act in all things for the benefit of Statesman. Both recognized that the appointment of the all-powerful contrôleur entailed the maximum potential of benefit—or of evil—for Statesman. If ever they were bound “to act solely for the benefit of the company,” it was then.

Yet this sole objective was pushed aside. No longer was the welfare of Statesman the consideration. Rather, premium-bribe dollars supplanted suitability as the final cause motivating the parties. Both Roth and Noble turned away from their sworn promise.

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.


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.


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 the 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?


The transaction gives Mr. Roth about triple the market value for his Statesman stock.


Before, during and after the extensive premium-bribe negotiations, Edward W. Roth—a principal party to the malefaction—was being amply and fully compensated for performing his various duties. Among the most obvious duties were the selection and appointment of a successor contrôleur for Statesman. Yet, at this very moment, David J. Noble was passing $6.8 million to Edward W. Roth, 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.


In a word, none of this $6.8 million belonged to Mr. Roth. 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.


Herein lay the second indivisible element of the triple turpitude: Disloyalty in personally pocketing dollars rightfully belonging to Statesman:

The chief illegitimacy of the [6.8 million] 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.


Yet the perfidy in taking the 6.8 million 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 Edward W. Roth:

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 commutative justice, is completely nonfiducial and unrelated, at least in its primary sense, to the custodial concept of corporate control.


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.


The third coconstituent 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: Messrs. Roth and Noble conspired to foist a known premium-briber on the firm. Edward W. Roth consciously and deliberately selected a new contrôleur who was ready, not only (1) to pass $6.8 million in premium-bribe, but brazenly (2) to embezzle the very $6.8 million from the Statesman treasury. This joint imposition by Roth and Noble of a premium-briber on Statesman 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 (1) to twist the judgment and (2) 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.


Note well: This premium-bribe-induced unsuitability of David J. Noble says nothing about his other possible unsuitabilities. One might opine that anyone who would first embezzle $6.8 million, and then premium-bribe his way into control, would have a propensity to other malefactions. The present consideration, however, concerns only the premium-bribe-induced unsuitability.

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 co-constituents—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 amenable to specific definition. In losing its identity in the new entity, moreover, each does not fully disappear but remains theoretically identifiable.


As “theoretically identifiable,” each will henceforth serve as the foundation for successive sections of the Brief. For now, consider only the second coconstituent: The Illicit Consideration, which lies at the heart of the third section of the law of this Brief applicable to the facts.

(3) The Disgorgement

[Any bonus received for such transfer of their office [must] be returned to the corporation.

—In re Lionel Corp., N.Y.L.J., Feb. 4, 1964, at 14, col. 4 (S. Ct.).

"[T]he law will impress a trust in favor of the corporation upon the property, interests and profits so acquired."


Le Mars is entitled to reimbursement for the . . . premium . . . which we have fixed in the amount of $307,500.


Once the reasoning has progressed thus far, the law of the land has been unanimous: Disgorgement of the proven premium-bribe over to the injured entity. The collected cases, the commentators, cold logic, have all concluded that the unearned recompense, the $6.8 million in premium-bribe, belongs in law and justice to Statesman.

The Illicit Consideration

Although the total tort has a triple turpitude, only the specific turpitude of the illicit [consideration] is referable to the [$6.8 million]. Here is the sole rationale of the disposition.

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 [6.8 million] 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.


Cold logic mandates, therefore, that the 6.8 million in unjust recompense be disgorged to Statesman. 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.


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 the same as it
would have been if no bribe had been given [see Restatement of Agency §403].
—Restatement of Restitution § 128 comment f, 531 (1937).

Predictably, the labors of the Restatement reduced this reasoning to succinct pronouncements. The Restatements of Trusts, Agency, Restitution, all have similar mandates.

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. [Restatement of Restitution, § 197 (1937).]

The Comment to the Restatement singled out Messrs. Roth and Noble:

*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 a fiduciary.
—Restatement of Restitution § 197 comment a (1937).

With Noble and Roth, the matter was a fortiori, since certainly 'good faith' never entered the machinations. To the contrary, calloused months of competitive Premium-Bribery characterized the Noble/Roth conspiracy:

The Collected Cases

I am also of 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£, 8s. 7d. has been paid [for the Sale of Control].
Again predictably, neither cold logic nor the commentators of the Restatements are divorced from the long line of judicial and legislative pronouncements beginning in the earliest England and reaching to the American 1980s. 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 a part of the assets [of the trust].


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].


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


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.


[H]is official position is not his individual property [to be dealt with as he pleases, and to be sold for such a price as he may be able to get for it] . . . . [A]ll money thus made belongs either to the corporation, or . . . in common to its shareholders. . . .


The subject of the negotiations was . . . transferring . . . one company to the other . . . . [T]he National Life Insur-
ance Company, through its officers . . . entered into a secret arrangement . . . to appropriate the benefits of the transfer to their own advantage, to the exclusion of the other shareholders [of Des Moines Life].


A secret profit realized by a director from an undertaking to deliver the corporate control of his company inures to the corporation. Fletcher, Cyclopedia, "Corporations," vol. 4, §2321; 2 Thompson on Corporations, §1237 [citations].

—*Keely v. Black*, 107 A. 825, 827 (N.J. Ch. 1919) [rev'd, 91 N.J. Eq. 520, 111 A. 22 (1920)].

It indisputably was a condition of the sale that all the officers and directors then in office should forthwith resign and . . . elect an entirely new directorate chosen wholly by the purchaser of the stock . . . .

. . . .

These officers and directors must account to the corporation . . . for the sum . . . .


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 stockholders . . . .


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.

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

Any bonus received for such transfer of their office [must] be returned to the corporation.

—*In re Lionel Corp.*, N.Y.L.J., Feb. 4, 1964, at 14, col. 4 (N.Y. Sup. Ct.).
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 . . . .

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

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.


The theory is not that all the shareholders are entitled to share in the bribe but rather that one who sells an asset (control) 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.


Where the president and director of a corporation was paid money by outside parties upon the condition that he procure their election as directors of the corporation with powers of control and management, such money was received by virtue of his office and from official acts and he must account to the corporation for it.


It is these amounts which were paid or diverted from LeMars Mutual by reason of the illegal agreement, and such amounts are returnable to Le Mars Mutual in full.

This is the amount for which Le Mars must be reim-
bursed. Rosenfeld v. Black, 445 F.2d at 1350; Moulton v. 
Field, 179 F. 673, 675 (7th Cir. 1910); Gordon v. Funda-
mental Investors, Inc., 362 F. Supp. 41, 45 (S.D.N.Y. 1973); 
Perlman v. Feldmann, 219 F.2d at 178; Porter v. Healy, 
244 Pa. 427, 91 A. 428, 431 (1914); McClure v. Law, 55 
N.E. at 389.
—Rowen v. Le Mars Mut. Ins. Co., 282 N.W.2d 639, 
659 (Iowa 1979).

(In this one excellent summary, the Supreme Court of Iowa incorpo-
rated into its sale-of-control philosophy some 80 years of sound 
reasoning, highlighted in Rosenfeld v. Black, Moulton v. Field, 
v. Healy, McClure v. Law, all quoted above.)

Yet further support for disgorgement over to Statesman of the 
$6.8-million will be found in the tort/crime analysis.

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 II, ch. 2, and 
reiterated in 1551 in 5 Edward VI, ch. 16. The present-day statutes 
add nothing new, but simply restate a truism: Premium-Bribery is 
inherently corrupt:

**Bribery:** 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.

**Commercial Bribery:** A person is guilty of commercial 
bribing when he ... agrees to confer, any benefit upon any 
... fiduciary ... to influence his conduct.
—N.Y. Penal Law § 180.00 (McKinney 1963).

**Commercial Bribery:** It is unlawful for a [prospective con-
trôleur] to offer ... for the personal benefit of a [contrô-
leur] acting on behalf of his [corporation] in a business 
transaction ... with the [prospective contrôleur] a gratuity 
in consideration of an act ... in conflict with the ... duties 
of the [contrôleur] to the [corporation].
[Likewise re the premium-bribed.]
—Iowa Code § 722.10(2) (1983) (narrowed to this context).

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

III. Embezzlement

Often, however, the new appointee [Noble] avoids the circuity of a personal payment and later corporate recoupment by an immediate raid on the [Statesman] corporate till.

Thus [Statesman], not [Noble], would really be paying [the premium-bribe].

The Roth/Noble Premium-Bribery and the Noble Embezzlement are two totally distinct malefactions, yet in the Statesman Story the facts have so intertwined them as to require special concentration to extricate the one from the other. Yet each is a separate malefaction and each malefaction has its own appropriate sanctions. Only by a childlike attention to the factual context can one isolate the Embezzlement from the Premium-Bribery. This isolation can best be effected by a close analysis successively of (1) The Outline of the Premium-Bribery, and (2) The Proof of the Embezzlement Confirmed.

(1) The Outline of the Premium-Bribery

[T]he evidence confirms the trial court’s finding that Iowa Mutual paid a [substantial] sum . . . as a premium in return for Mr. Alesch’s delivery of control of the board of directors of Le Mars Mutual.
Le Mars is entitled to reimbursement for the . . . premium . . . which we have fixed in the amount of $307,500.

An exact reliance on Le Mars yields two benefits, and both are important, the one essential, the other gratifyingly helpful. Le Mars is not only an all-fours legal precedent for Statesman—strictly Le Mars controls without more—but Le Mars is also the perfect embarkation point toward the isolation of the Premium-Bribery from the Embezzlement. Understand the Premium-Bribery/Looting in Le Mars, and the Premium-Bribery/Embezzlement in Statesman is simplicity itself.

From the Premium-Bribery aspect alone—in contradistinction to the Embezzlement—of Le Mars and hence of Statesman, two distinct legal stages stand out: (1) The passing of the $300,000 premium-bribe from Iowa Mutual to John Alesch for the transfer of control of Le Mars from Alesch to Iowa Mutual, and (2) The Court-ordered disgorgement of the $300,000 to Le Mars from John Alesch.

In the first of these two stages, the Le Mars Court relied on the five essentials of Premium-Bribery: (1) The payment of a $300,000 premium-bribe, (2) To John Alesch the incumbent contrôleur of Le Mars, (3) By Iowa Mutual the would-be contrôleur, (4) To induce the appointment to the office of control, (5) With scienter.

In the second of the two stages the Le Mars Court ordered John Alesch, for breach of his fiduciary duty to Le Mars, to disgorge the entire $300,000 premium-bribe to Le Mars, the injured company. Why? Because Mr. Alesch was performing a corporate act, on corporate time, as part of his job—he was appointing his successor—for which he was already being paid—he was receiving a substantial premium.

[Diagram of the transaction]
salary—by Le Mars. Any double pay belonged to Le Mars. This was no windfall. Simply Le Mars dollars disgorged to Le Mars.

And the clear result of this, of course, was that Iowa Mutual, the guilty premium-briber, thereby forfeited its $300,000, forever. (At the same time, of course, Iowa Mutual was ousted from control of Le Mars.)

Again limited only to Premium-Bribery, Statesman tracked *Le Mars* exactly: (1) A $6.8-million premium-bribe passed (2) To the incumbent contrôleur Roth (3) From the would-be contrôleur Noble (4) To induce the appointment to the office of control (5) Made knowingly. Again all five *Le Mars* requisites.

Comes now a major point of emphasis: The Court in Statesman, pursuant to *Le Mars*, must order Edward W. Roth, for the breach of his fiduciary duty to Statesman, to disgorge the entire $6.8-million premium-bribe to Statesman, the injured company. Why? Because no employer, be he janitor or contrôleur, is paid twice for doing his work. (Or take a DuPont chemist. Any new products, discovered on company time, during the regular company work, for which the
chemist is fully paid, inure to the benefit of his company.) Thus this was no windfall. Simply Statesman dollars that belong to Statesman.

Again, as in *Le Mars*, the patent consequence: David J. Noble, the guilty premium-briber, will thereby forfeit his entire $6.8 million. Forevermore. (And, of course, David J. Noble must be ousted from control.)

This brief summary has isolated completely Premium-Bribery from Embezzlement. The all-important legal fact in this summation: The Disgorgement of the $6.8-million premium-bribe is the application of the law of Strict Trust—as applied in the context of The Illegal Sale of Control—to a premium-briber, Roth, the former contrôleur of Statesman. More important, this Disgorgement has absolutely nothing to do with the source of the dollars, or Mr. Noble’s responsibility for those dollars. Noble, as did Iowa Mutual, has lost his $6.8 million. Forevermore.

Moreover, this Disgorgement of the $6.8 million has only an accidental connection at most with the second, distinct malefaction, Embezzlement.

(2) The Proof of the Embezzlement Confirmed

Although definitely begging a later question, nearly every successful premium-bribe is sooner or later recouped from the corporation [Statesman].


Often, however, the new appointee [Noble] avoids the circuity of a personal payment and later recoupment by an immediate raid on the [Statesman] corporate till.


Again the parallel with *Le Mars* persists. Now, however, a variation—albeit only an inconsequential one—injects itself into the
parallel. In both cases, true, Looting was the ultimate source of the premium-bribe dollars passing to Roth and Alesch, incumbent contrôleurs. The only difference lay in the timing. Noble looted immediately. Iowa Mutual looted later.

In *Le Mars*, when Iowa Mutual determined to premium-bribe John Alesch, it followed the normal pattern of Premium-Bribery, reached into its own pocket, took out its own premium-bribe dollars, and handed them over to John Alesch. The result: The premium-bribe dollars were in John Alesch's hands irrevocably, and poor old Iowa Mutual never saw them again.

Faced with this grim reality, the out-of-pocket Iowa Mutual, now settled into control of Le Mars, conceived a plan that would recoup the very dollars that it had lost forevermore. The only rub? The entire looting plan was reduced to writing for all, including the Court, to read:

The most damaging single bit of evidence . . . is the hotly disputed "recoupment" letter . . .

. . . Thus Le Mars, not Iowa Mutual, would really be paying [the premium-bribe].


At this point in the *Le Mars* drama two things stand out: First, Iowa Mutual lost its $300,000 premium-bribe, forevermore. But, second, for the moment at least, the entire $300,000 has been 'recouped' by Iowa Mutual, by the simple expedient of looting Le Mars. "Thus Le Mars, not Iowa Mutual, would really be paying [the premium-bribe]."

But the "recoupment letter" had laid the matter bare. No collateral facts confused the Court. These recouped dollars had simply been looted some two years later and stood out stark and clear. The Supreme Court had no trouble in ordering Restitution. (Nor was there any danger of confusing these Restitution dollars with the Disgorge-

The most damaging single bit of evidence . . . is the hotly disputed "recoupment" letter . . . [T]hat letter . . . referred to the management contract under which Le Mars was to pay . . . $2,500.00 per month (later one per cent of Le Mars' gross) as "management fees" as the means by which Iowa Mutual would "recoup" [the premium-bribe dollars].

These "management fees"—and they were only one of several such instances of looting—the Court ordered restored by Iowa Mutual to Le Mars. (An obiter note: The looted dollars totalled far more than the $300,000 premium-bribe, but for present purposes emphasize that the Restitution included at least the original $300,000. This it was that caused the Court to say: "Thus Le Mars, not Iowa Mutual, would really be paying for the [premium-bribe dollars].")

The Noble Recoupment-in-Advance

Although definitely begging a later question, nearly every successful premium-bribe is sooner or later recouped from the corporation [Statesman]. Often, however, the new appointee [Noble] avoids the circuity of a personal payment and later recoupment by an immediate raid on the [Statesman] corporate till.


In essence David J. Noble faced exactly the same problem at the outset of his plot as Iowa Mutual faced in its determination to premium-bribe John Alesch. Both Noble and Iowa Mutual needed premium-bribe dollars with which to do the deed. And in the end, both Noble and Iowa Mutual chose the same solution in their quest for premium-bribe dollars. Both looted the target companies, Statesman and Le Mars. But each took a different route to the same goal.

Iowa Mutual employed a two-step approach to the Premium-Bribery. First, it used its own premium-bribe dollars and then, some months after the takeover, recouped those dollars by looting the Le Mars till. David J. Noble, however, driven by the exigencies of his situation—Roth’s impatience, his poverty—reduced the two steps to one, and avoided “the circuity of a personal payment and later recoupment by an immediate raid on the [Statesman] corporate till.” In the end, Noble reasoned, much could be gained by this Recoup-
The immediate use of embezzled dollars might even obfuscate the situation sufficiently to confuse the shareholder owners and even, God forbid, the Court, into thinking nothing had been stolen. (Or that Roth had restored the embezzled $6.8 million rather than disgorged the premium-bribe.)

The parallel of the Noble Recoupment-in-Advance with the Iowa Mutual later Recoupment demands parallel sanctions. Mr. Noble is as fully responsible to Statesman for the looted $6.8 million as Iowa Mutual was to Le Mars for the looted $300,000.

The Legal Implications

Thus Le Mars, not Iowa Mutual, would really be paying [the premium-bribe].


Perhaps some hilltop reflections could put the Noble Restitution in proper perspective. A few useful hypotheticals might well highlight the reality of the Noble Embezzlement that warrants the Noble Restitution.

The Burgled Bank: Suppose Mr. Noble had in fact followed the expectable counsel of a Willie Sutton. A nocturnal visit to a neighborhood bank would have netted Mr. Noble the necessary $6.8 million demanded by Edward W. Roth. (This approach to the looting would also both obviate the unpleasantness of looting Statesman—after all, Noble would not even know the bankers, and, more to the point, they would not know him—and also preclude any discovery down the road by irate Statesman shareholders.)

To continue the hypothetical, had Mr. Noble been caught, as bank robbers are wont to be, the result would need no divination to predict. Irrespective of prison term, the bank would of course immediately sue for Restitution of the $6.8 million. The result would be equally predictable: Full restitution by Mr. Noble to the bank.
The obvious question: Should Statesman fare less well than the burgled bank?

One? or 4,800? View the matter yet another way. As between Mr. Noble and the looted shareholder owners of Statesman, who is on the high ground? Are the owners of Statesman any the less looted, any the less out of pocket, because they are many rather than one?

Were Mr. Noble to have embezzled the $6.8 million from, say, nine ten-percent owners, would those nine hear Noble say that he did not owe Restitution? As between a proven looter and equally proven innocent victims, who is to prevail?

Premium-Bribery at GUG: Add another valid hypothetical. Suppose Mr. Noble had long coveted control of his old company, General United Group. But, true to form, he had no money, and GUG's contrôleur, Jack Schroeder, demanded $6.8 million. Whence the $6.8 million? Statesman's till, of course. (Noble was not 'inside' GUG.) The looting of Statesman is done. Control of GUG passes. Noble is ensconced in GUG. Schroeder has his premium-bribe dollars. Now what?

Caught in the act, Schroeder is ordered by the Court to disgorge the $6.8 million over to the injured GUG, for Premium-Bribery. But now what of Noble, and Statesman's looted dollars?

Clearly Mr. Noble would argue—as he now argues—that (1) He, Noble, no longer has the $6.8 million, which is true, and (2) Mr. Schroeder has already disgorged the dollars to GUG, which is true, and (3) Hence, Noble would conclude, Statesman has no complaint. Statesman's dollars are already repaid. To GUG, of course. Which, of course, is not true. Statesman would readily recover the dollars looted by Noble. Simply because the injured GUG recovered premium-bribe dollars has absolutely nothing to do with Statesman's right to
recover Noble-embezzled dollars. Baldly put: Two malefactions and two sets of dollars are involved.

Therefore, if Statesman may recover in the hypothetical, why not Statesman in the reality of the present? Did not Statesman in the present lose the $6.8 million as painfully as the hypothetical Statesman? The Statesman treasury is equally bereft.

Or could one argue that GUG had no right to the premium-bribe $6.8 million? And that Statesman somehow had a claim to the premium-bribe dollars Schroeder disgorged to GUG? Is there only one wrong? Clearly, in the hypothetical—and in the Statesman Story in the present—two wrongs, Premium-Bribery and Embezzlement, marched hand in hand.

A Fail-Safe Blueprint: Consider further the legal consequences were Statesman denied the Restitution of its looted dollars. Envisage the precedent for Iowa, and for later looters who forgo the circuity of the Iowa Mutual two-step, and opt for Recoupment-in-Advance. What message would the Court send to all such future sale-of-control premium-bribers?

What incipient premium-briber would be such a fool as to use his own premium-bribe dollars? Here, indeed, would be a Court-inspired fail-safe blueprint. Consider the delicious alternatives for such a premium-briber. If he is undetected, all would be well and not a dollar lost. If, however, he was caught in the act, still no matter. The premium-bribed—an Edward W. Roth—would be forced to disgorge, and the premium-briber—a David J. Noble—would be unscathed. All would be well and not a dollar lost. No need for Restitution. Or, as the Le Mars Court commented with such deep insight: “Thus Le Mars, not [premium-briber] Iowa Mutual, would really be paying [the premium-bribe dollars].” Premium-bribed John Alesch—and premium-bribed Edward W. Roth—would be the only losers. Such a holding would indeed reward Recoupment-in-Advance. Such a premium-briber would have absolutely nothing to lose. (Iowa Mutual was a bungler.)

‘Loot immediately and avoid detection.’ The thought would be irresistible. Later looting is too visible, too open to scrutiny. But simultaneous looting gets lost in the maze of facts around the Premium-Bribery itself. Somehow, such a Looter-in-Advance would reason, a court cannot see two separate malefactions, two sums: (1) The $6.8 million Mr. Roth must disgorge for Sale-of-Control Premium-Bribery and (2) The $6.8 million Mr. Noble must restore, because of old-fashioned Embezzlement.

Carry these legal reflections yet one step further. How would Iowa Mutual, today, recalling that it had been held to a $300,000 Restitution, react to the news that Mr. Noble, by the simple variant
of Recoupment-in-Advance, had gotten off scot free? Would not an immediate Rehearing be the only equitable course? Should Iowa Mutual be penalized for using its own premium-bribe dollars? While David J. Noble is rewarded for prudently using Statesman's money?

On the other hand, when the Court does order Restitution, then Noble and Iowa Mutual are treated equally. And the precedent of *Le Mars* is preserved:

*The Premium-Bribery The Looting Restitution Disgorgement*

![Diagram]

**IV. The Remedy**

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.


The Remedy is sixfold: (1) *Disgorgement*, (2) *Restitution*, (3) *Joint and Several Liability*, (4) *Punitive Damages*, (5) *The Ouster of the Board*, and (6) *The Court-Supervised Election*.

(1) *Disgorgement*

Their conduct was deliberately designed towrongfully obtain control of Le Mars. . .
. . . . Le Mars is entitled to reimbursement for the . . . premium . . . in the amount of $307,500.

Edward W. Roth, as contrôleur of Statesman, received a $6.8-million premium-bribe to induce him to hand over control of Statesman to David J. Noble. This act of Sale-of-Control Premium-Bribery, reprobed by Le Mars as against public policy, was a breach of Mr. Roth's fiduciary duty to Statesman and violated the age-old principles of Strict Trust laid out over the decades by the Iowa courts.

The legal consequences of Sale-of-Control Premium-Bribery have been universally accepted:

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 the same as it would have been if no bribe had been given [see Restatement of Agency, §403].
—Restatement of Restitution, §128 comment f (1937).

Edward W. Roth remains to this day in possession of this illicit $6.8 million. His is patently the primary liability.

(2) Restitution

Often, however, the new appointee [Noble] avoids the circuity of a personal payment and later recoupment by an immediate raid on the [Statesman] corporate till.

Had David J. Noble used his own dollars to premium-bribe Mr. Roth, he would now simply be out of pocket that $6.8 million, forevermore. Had Mr. Noble borrowed the $6.8 million, he would now be indebted to his creditor for those $6.8 million. Had he stolen the $6.8 million, he would be liable for the full amount, and undoubtedly be in jail as well. But Mr. Noble decided to steal the $6.8 million directly from Statesman and then pay it over to Mr. Roth as a premium-bribe. As with the burgled bank, so now with Statesman. David J. Noble is liable for Restitution in the amount of $6.8 million. No recondite law is needed to mandate this restoration of Statesman to its position before the Premium-Bribery. And irrespective of the Premium-Bribery.
(A Contrary-to-Fact Interjection: Bear forcefully in mind throughout: Had Mr. Roth (1) refused the $6.8 million, and (2) had he forced Mr. Noble to return the dollars to the till before any deed was done, two results would have ensued: (1) Roth would not have been culpable, would not have been premium-bribed, and would not be liable for the $6.8-million Disgorgement, and (2) Noble would not have been culpable (except in desire), would not have been an embezzler, and would not be liable for the $6.8-million Restitution. But none of these did occur. Roth was in fact guilty of consummated Premium-Bribery, and Noble of consummated Embezzlement. Hence both Roth and Noble are subject to the full sanctions of the respective malefactions, which they irrevocably and irreversibly committed. And the respective sanctions are equally irrevocable and irreversible.)

(3) Joint and Several Liability

We have already pointed out [that] all who assist or cooperate in the breach of fiduciary duties—whether directors or not—are liable for the resulting damage.


Every Defendant, from beginning to end, was on notice that David J. Noble was passing a substantial premium-bribe to Edward W. Roth to buy control of Statesman. Every Defendant was equally on notice that David J. Noble was looting Statesman in order to obtain the $6.8 million with which to bribe Roth.

In the first place Le Mars is the real complaining party, the one victimized by the wrong. It had a right to expect its directors to be more vigilant in protecting it. . . . [T]hese men were faced with questionable conduct directly affecting their own corporation. There were circumstances which should have clearly signalled a duty to inquire and investigate.


The rule has long been indisputably clear: Directors and their abettors are subject to joint and several liability for every act integral to any conspiracy. As Bechtel put it:

Conspiracy may be established by circumstantial evidence
and may be inferred from concert of action, declarations and conduct.

Bechtel added several cases 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. [Citations.]

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.” [Citations.]

In the recent 1976 Gould the Third Circuit reiterated the rule:

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 (1912); Prosser, Law of Torts, 314-315 (4th ed. 1971). . .

Joint and several liability is patent. The Le Mars Court repeatedly held all parties jointly and severally liable.

Although Roth is primarily liable for the Disgorgement of the $6.8 million to Statesman, David J. Noble was equally liable. (After all, he was the premium-briber, even though he no longer has the money.) And the remaining five members of the board, O'Neill,
Ashton, Conyers, Clendenen and Casady, joined in the conspiracy and certainly would be described as aiders and abettors.

Although David J. Noble embezzled the $6.8 million from Statesman, and hence is primarily liable for its Restitution, Edward W. Roth was nonetheless a member of the board, and he and the other five would also be jointly and severally liable for their part in the conspiracy, and would undoubtedly be aiders and abettors.

Corroboration of this directoral liability lies also in a damning fact: To this day none of the seven has mounted a Director's Derivative Suit—much as this Shareholder's Derivative Suit—to vindicate Statesman's rights against the malefactors.

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.


The gravamen is the infliction of injury, not a share of the spoils. Thus, (1) David J. Noble, the premium-briber, is equally responsible with Edward W. Roth, the premium-bribed, for the Disgorgement over to the injured Statesman of the premium-bribed dollars. So also is the board of directors, for its full participation. Thus also (2) the board of Statesman is equally liable—Mr. Roth included—with Mr. Noble for the Restitution of the dollars looted from Statesman. In neither of these depredations did any of the Defendants—except, of course, the primary malefactors, Roth and Noble—pocket any dollars personally. Or so at least it seems.

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 an 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.

With this background the Third Circuit in the 1976 Gould went on in specific answer to the present Damages question:

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. [Citations], and this is true even though one of the tortfeasors held liable has received no benefit from his wrongdoing. [Citations.] 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.


Thus all Defendants face joint and several liability irrespective of a share in the Premium-Bribery, or the Embezzlement.

(4) Punitive Damages

[T]his court has repeatedly sanctioned allowance of exemplary damages, where appropriate, by way of punishment to the actor and as a deterrent to others.

—Young v. City of Des Moines, 262 N.W.2d 612, 620 (Iowa 1978).

Little controversy surrounds the question of Exemplary Damages. Every requisite is verified in the case of the seven Statesman Defendants.

The judicial thinking on Punitive Damages has coalesced in the now-famous 1974 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.

See also Charles v. Epperson & Company. . . .

—Holi-Rest, Inc. v. Treloar, 217 N.W.2d 517, 525-26 (Iowa 1974).
The facts of the Statesman Story 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 immediately convince that "Treloar's flagrantly wrongful acts" were child's play compared to the protracted, deliberate and calloused machinations of Roth, Noble and the other five directors.

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.

—Holi-Rest, Inc. v. Treloar, 217 N.W.2d 517, 526 (Iowa 1974).

Note further that the 1974 Holi-Rest, for acts best described as innocent compared to the double depredation against Statesman, exacted Punitive Damages against a single officer in an amount in excess of 25 percent of the Compensatory Damages. This modern application of Exemplary Damages should be a minimum in the case of Statesman.

The Rationale

In the same vein it is understood the allowance of smart money rests with the fact finder . . . . More to the point, this court has repeatedly sanctioned allowance of exemplary damages, where appropriate, by way of punishment to the actor and as a deterrent to others.

—Young v. City of Des Moines, 262 N.W.2d 612, 620 (Iowa 1978).

The fourfold purpose of Exemplary Damages is aimed directly at each Defendant in this case, from Messrs. Roth and Noble, the principal malefactors, on down to the remaining five members of the board. Punitive Damages are awarded as: (1) "[A] punishment for the particular party involved." (2) "[A] warning and example . . . to all others who may offend in like manner." (3) "[A] salutary protection to society and the public in general." (4) "[A]dding to the complainant's award." (Sebastian v. Wood, 66 N.W.2d 841, 844
(Iowa 1954).) The imposition of Exemplary Damages on every single Defendant will justly achieve each of these four objectives.

Consonant with *Holi-Rest, Holden* and *Epperson*, and the admonition in *Hoyt*, the Court must now consider closely the pertinent elements constituting the norm for Punitive Damages—the culpability, sophistication, wealth, malice, intent—and award damages appropriate in amount. One further adversion could aid the Court.

### A Smart to the Wealthy

[A]n intentional act of fraud [for Punitive Damages purposes] 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.


The objective in Punitive Damages must be a weighing of (1) ability to pay and (2) culpability. A certain percentage of one's Net Worth recognizes the ability to pay. The amount of the percentage recognizes the culpability. Thus the more guilty should pay a higher percentage, but all should pay a percentage, not an unrelated fixed amount.

### (5) *The Ouster 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 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.


David J. Noble is a calculating premium-briber. "Whatever further deficiencies he may possess do not affect this ever-present
built-in disability." Never will David J. Noble successfully gainsay this blemish of Premium-Bribery. In this Premium-Bribery, the five incumbent directors were willing aiders and abettors.

But Mr. Noble does possess a prominent 'further deficiency,' over and above the Premium-Bribery. A further major malefaction, the Embezzlement of $6.8 million, was deliberate, consciously excogitated, over several weeks. This deliberate Looting was further forceful proof of Successor Unsuitability. Again, to this malefaction the five board members were willing participants. Under no conditions could the Court continue to entrust Statesman to such malefactors. The only question remains: How assure the total removal of David J. Noble and the five participant board members?

(6) The Court-Supervised Election

ORDERED that this Court shall appoint a new interim independent board of directors for Equity Funding Corporation of America.


Federal Judge Charles E. Stewart Jr. Friday signed a consent order providing for court appointment of a new board of directors . . . .


We affirm that part of the decree . . . providing for the appointment of interim directors until the election of directors under supervision of the trial court.


The all-encompassing powers of the Equity Court—so vividly implemented by Holi-Rest and Le Mars—mandate a Court-fashioned remedy to meet the peculiar exigencies surrounding Statesman. Here is an insistent need for a watchful Court in prosecuting the entrustment of Statesman 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 situation, though no similar relief has been given before." [Citations.]

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 are Phillips and Le Mars. (Since Le Mars is still in the process of implementation, it can aid only partially.)

**Phillips Petroleum**

The conduct of the individual defendants constituted a breach of fiduciary duty, fraud, theft and looting.

As with Equity Funding, Le Mars and Statesman, the Federal Court was faced with an essentially corrupt board. As did the Court in both Equity Funding and Le Mars, Federal Judge Curtis in Phillips handled the turnover of control in two stages. First the Phillips Court personally named six nationally known persons (among them Harold Williams, recently Chairman of the SEC) to fill the vacuum created by the ousted malefactors. (To the present day, the Court-appointed board in Le Mars continues to manage the company.)

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.

With this the Court closed its Order with a sage precedent for Statesman: 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 that Phillips has fully complied with the Final Judgment.


Minor differences with Statesman cannot blunt the efficacy of Phillips as an approach consonant with Holden: "[A] Court of Equity will devise a remedy to meet the situation." [Holden v. Constr. Machinery Co., 202 N.W.2d 348, 363-64 (Iowa 1972)].

The District Court in Le Mars did ‘devise a remedy,’ which would seem to meet the needs of Statesman exactly:

As soon as practicable, the Court shall also order and supervise the election of a new Board of Directors for Le Mars Mutual. Interim directors shall be eligible to succeed themselves. The successor board shall not be elected until the interim board has had full opportunity to assess the present status of Le Mars Mutual, consult with the Iowa Insurance Commissioner, retain competent management for the company, and establish and implement a plan for the careful separation of Le Mars Mutual and Iowa Mutual.


**Conclusion**

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.