

First Supplement to Memorandum 88-36

Subject: Study L-3010 - Fees of Corporate Trustees

Attached to this supplement is a letter and some additional material sent to the Commission by Antoinette Gump Amorteguy relating to her experience as a beneficiary of a trust. In her letter, Ms. Amorteguy proposes several matters for Commission study and makes several suggestions for changes in the law.

Respectfully submitted,

Stan G. Ulrich  
Staff Counsel

EXHIBIT 1

TO: LAW REVISION COMMITTEE

FEB 10, 1988

FROM: ANTOINETTE AMORTEGUY

FEB 18 1988

RECEIVED

SIR:

I AM CONCERNED THAT YOUR RECENT WORK ON "TRUST LAW REVISION" MIGHT BE OVERLOOKING SOME IMPORTANT AND BASIC ISSUES THAT YOU MIGHT LIKE TO HAVE ADDRESSED BY YOUR TRUST DIVISION. I BELIEVE FEES ARE ACTUALLY A SIDE ISSUE TO MORE BASIC PROBLEMS

- 1) ESTABLISH THAT BENEFICIARIES ARE A CONSUMER GROUP AND SET GUIDELINES FOR THAT GROUP INCLUDING THE PUBLICATION OF A BOOKLET FOR THEIR BENEFIT.
- 2) SET METHODS FOR NOTIFICATION TO BENEFICIARIES (FREEDOM OF INFORMATION) ON UPCOMING LAWS AND WHO IN GOVERNMENT THEY CAN CONTACT FOR HELP (AS WITH UTILITIES COMMISSION)
- 3) SET PROFESSIONAL STANDARDS FOR "TRUST OFFICERS" AND THEIR STAFF (INVESTMENT OFFICER, LEASE MANAGER, TAX ACCOUNTING DEPT, ETC) BASED ON THE STANDARDS NOW SET FOR OTHER PROFESSIONS SUCH AS PHYSICIANS, ACCOUNTANTS, REAL ESTATE BROKERS, ETC-AND INCLUDING A DEFINITION OF "GOOD BUSINESS PRACTICES")
- 4) SET ACCOUNTABILITY STANDARDS (LIKE THOSE IN OTHER PROFESSIONS) THAT INCLUDE WHO IN STATE GOVERNMENT IS REQUIRED TO OVERSEE ALL THE ACTIVITIES OF PROPERTIES HELD IN TRUST (USING THE METHODS NOW EMPLOYED FOR NON-PROFIT TRUSTS (THIS IMPLIES STRICT ENFORCEMENT AND STIFF PENALTIES)

OTHER AREAS THAT NEED TO BE ADDRESSED (AND THAT EFFECT FEES) ARE:

- 4) DEFINE THE ROLE OF AN ATTORNEY OR OTHER CONSULTANTS FOR A TRUST (WHO DO THEY WORK FOR? THE BENEFICIARY OR THE TRUSTEE? (HOW CAN YOU TELL?) WHO PAYS FOR WHAT/WHEN HOW? IN A DISPUTE? WHEN WIN/LOSE? BY INCOME OR PRINCIPLE? BENEFICIARY, REMAINDERMAN, TRUSTEE? HOW DETERMIN FEES? WHAT IS THE CRITERIA FOR HIRING, WHEN, WHO, HOW, WHY? AND ALL THE ETC?)
- 5) RESEARCH OTHER METHODS FOR DETERMINING FEES THAN "PRINCIPLE". (THIS EXISTING METHOD IS MISUSED FOR THE BENEFIT OF THE TRUSTEE WHO WITH HOLDS INCOME FOR "PRINCIPLE" AND THUS INCREASES FEES) IF THE TRUSTEE IS ACTING AS A PROFESSIONAL (ENOUGH TO RECOMMEND SUCH FEES AS FAIR PAYMENT FOR WORK COMMENSURATE WITH THE TASK- SHOULD HE NOT RECEIVE FAIR PAYMENT FOR HIS SERVICES? ON THE OTHER HAND IF HE IS JUST "CLIPPING COUPONS" OR HIRING OTHER PROFESSIONALS TO DO COMPLICATED WORK, SHOULD HIS FEES NOT BE ADJUSTED ACCORDINGLY?

6) DEFINE, IN DETAIL, THE DIFFERENCE BETWEEN THE BENEFICIARY AND THE REMAINDERMAN. (THIS AREA IS ALSO MISUSED BY TRUSTEES WHO WITH HOLD FUNDS FOR REMAINDERMEN THAT SHOULD HAVE GONE TO A BENEFICIARY SINCE AN INCREASE IN "PRINCIPLE" INCREASES FEES).  
7) SET GUIDELINES FOR APPROPRIATE DIVISION OF ONE TRUST FOR VARIOUS BENEFICIARIES INTO PARTS(USED TO INCREASE FEES) OR COMMINGLE SUB-TRUSTS INTO ONE(USED TO MAKE IT DIFFICULT TO OVERSEE BY THE INDIVIDUAL BENEFICIARY)

AS BOTH A BENEFICIARY AND A TRUSTEE, I WOULD LIKE TO SEE THSES AREAS INVESTIGATED AND ADDRESSED.

SHOULD YOU WISH TO SPEAK TO ME FURTHER, I AM AT YOUR DISPOSAL AND CAN BE REACHED AT 969-5686.

THANK YOU FOR YOUR CONSIDERATION.

\*ENCLOSURES

IF YOU DO THIS, YOU WILL GIVE A VOICE TO A CONSUMER NOT NOW HEARD AND TAKE SOME OF THE BURDEN OFF THE COURTS.( PLEASE DO NOT BE MISLED THAT "BENEFICIARIES" ARE ALL RICH OR THAT THERE ARE ONLY A LIMITED FEW. THERE ARE MANY BENEFICIARIES WHO ARE ELDERLY OR UNDER AGE, AND HAVE INHERITED LIMITED FUNDS TO LIVE ON. THEY DO NOT HAVE THE EDUCATION OR FUNDS TO DEFEND THEMSELVES AGAINST IMPROPER OR INADEQUATE MANAGEMENT OF THEIR INCOMES **MANY DO NOT EVEN KNOW THEY HAVE ANY RIGHTS AT ALL.**)

SO FAR YOUR SURVEYS HAVE BEEN BIASED IN FAVOR OF BANK TRUSTEES AND ATTORNEYS (SINCE THAT IS WHOM YOU HAVE BEEN IN CONTACT, ) PROBATE ATTORNEYS ARE MORE LIKELY TO BE AFFILIATED WITH BANKS AND AS YOU KNOW, EVEN WHEN PAID FOR BY A BENEFICIARY(DISPUTES INCLUDED) ARE HIRED BY THE TRUSTEE(LAWS DIFFER IN OTHER STATES)MAKING A SEPERATE LEGAL FEE PROHIBITIVE.

TRUSTEE FEES ARE NOT THE PRIMARY ISSUE, **ACCOUNTABILITY IS.\***

I AM CONCERNED ABOUT BANKS THEIR MANAGEMENT AND POWER  
I AM ESPECIALLY CONCERNED WITH HOW THEY HANDLE TRUST ACCOUNTS

I BELIEVE GOOD BUSINESSES SHOULD MAKE MONEY. I DO NOT BELIEVE BAD BUSINESSES SHOULD BE PROTECTED. I BELIEVE A BANK TRUST DEPT SHOULD BE AS ANSWERABLE(OR MORE) AS ANY NON-PROFIT TRUSTEE. THEY SHOULD FULFILL ALL THE REQUIREMENTS FOR GOOD BUSINESS PRACTICES WITHIN EACH TRUST. THEY SHOULD BE ACCOUNTABLE FOR FOLLOWING THE ETHICS OF EACH SUB-INDUSTRY THEY REPRESENT TO THE BENEFICIARY(Accounting, REAL ESTATE, BROKERAGE,AUDIT,ECT)

I DO NOT SEE THIS IN THE BANK TRUST INDUSTRY. THE COURTS THAT OVERSEE THEM ARE OFTEN RUBBER STAMPS. THE LEGISLATORS ARE HEAVILY LOBBIED. THE HORROR STORIES ARE NEVER ENDING ON PROPERTY LOST BY TRUST DEPTS BECAUSE OF CARELESS ERROR AND OUT-RIGHT ERROR(TRY TO PROVE FRAUD WHEN A BANK SELLS A VALUABLE PEICE OF PROPERTY TO A FRIEND FOR LESS THAN VALUE, OR OTHER SUCH STORIES)

THERE ARE MANY AREAS THAT NEED ADDRESSING. PLEASE CALL ON ME IF YOU ARE INTERESTED

*Tommy* 805-969-5686

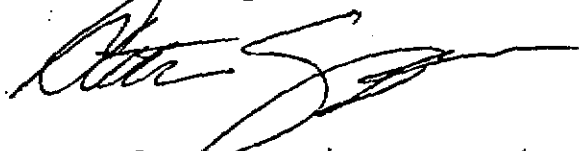
Mar '84

Dear Sir:

I am sending the enclosed article because I am concerned about HOW trusts actually effect the loved ones they were set up to portect. As this article shows, and many people whose money is tied up in trust will attest, banks hold a tremendous power over trust assets. The day to day lives of the beneficiaries are made to feel powerless and extrememly frustrating. Legal battles are expensive (and in Calif. - see article- prohibitive, except to the most tenacious and wealthy) Most beneficiaries do not even know their legal rights! And as this article shows are intimidated into false beliefs of the inability to affect any changes in trustee decisions.

Our family did fight, because we could - as a group- afford to, not just for ourselves but for all those others who did not know or could not afford the long and expensive court fights. How many minors and elderly (inexperienced) are hurt or frustrated by a bank's controll of their income and assets? I hope this will help them too. This article only scratches the surface. There are other issues that need to be addressed. How can we educate the public? What will you do to help? What legislation can we effect? Please help!

Sincerely,

A handwritten signature in dark ink, appearing to be 'Peter J. ...', written over the word 'Sincerely,'.

I would be happy to help supply names of others "in trust" (note the irony)As well as issues, I think, need research

1962 East Valley Road  
Santa Barbara, Calif  
November 6, 1984

Michael Taylor  
San Fransisco Chronicle  
San Fransisco

Dear Michael,

My correspondence gives evidence that Phleger has been knowledgable about the case against Wells Fargo while he sits on the board of Wells Fargo. I do not know if he has given them a "letter of disclosure" as is required. I think this is another conflict. Do you?

Have you found any answers to if or why the California Banking Commision has no jurisdiction over Wells Fargo? Don't they have to follow the laws of the state? What can I do?

In all of this my main purpose is to effect legislation (and Banks) to protect all the little trusts who can't afford to fight or who don't know their rights under the law. You'd be suprised at how easily people are intimidated by their trust officers. Your journalism could effect this too! You would also be suprised at some of the people who have mentioned their similar problems. For some it is too late to do anything; for others, education and legislation can help them. You can help. You could do articles on other peoples experiences and how they couldn't fight back because the law in Calif-ornia makes it prohibitive to do anything - having to pay out of priciple and income to fight for what is rightfully theirs. You could discuss common banking practices that are intimidating and for which beneficiaries do have rights and can make demands. I would love, of course, to see you do something to help these people- would ypu discuss it with me sometime?

*Phleger was  
"visited" by "BANK"  
to stop stories*

1962 EAST VALLEY  
SANTA BARBARA, CA  
AUGUST 17, 1985

*Stone*  
V.P. IN CHARGE  
TRUST DEPARTMENT  
UNION BANK  
LOS ANGELES

DEAR SIR:

AS THE ENCLOSED LETTER SHOWS AND AS IT NOW STANDS, THE BANK EMPLOYEES THAT WE HAVE BEEN DEALING WITH ARE NOT REALLY COMPETENT TO HANDLE THE MATTERS OF OUR TRUST (AS IT WAS PREVIOUSLY SET FORTH\* IN OUR CORRESPONDENCE AND BY THE COURT) I AM, HOWEVER, MOST GRATEFUL THAT THEY, AT LEAST, ARE AWARE OF THEIR LACK OF EXPERTIZE. BUT, THEN, WHY SHOULD WE HAVE TO PAY INCREASED FEES WHEN WE MUST ALSO HIRE OUTSIDE EXPERTS TO PROTECT OUR TRUST ASSETS?

ONLY A FEW YEARS BACK, PART OF OUR FEES AS WELL AS OUR TRUST LEGAL FEES INCLUDED COURT APPEARANCES. SINCE THIS IS NO LONGER THE CASE, YOUR FEES IN ESSENCE HAVE ALREADY BEEN RAISED.

AN EXAMPLE OF YOUR DESIRE TO REDUCE SERVICES IS YOUR RECENT POSITION TO SELL OUR INCOME PRODUCING PROPERTY AND TURN IT INTO NON-TAXABLE BONDS. THIS IS A TRUSTEES DREAM BECAUSE IT ONLY REQUIRES CLIPPING COUPONS. WE PAY FOR MORE THAN THIS - AND WE EXPECT MORE - OR A REDUCTION IN FEES AND MORE DIRECT ACCESS TO PERSONS IN AUTHORITY WITH EXPERTIZE IN THE MATTERS OF OUR TRUST AS PER OUR AGREEMENTS.

SINCE WE HAVE BEEN APPROACHED BY OTHER BANKS TO MOVE OUR TRUST AND SINCE DE-REGULATION HAS CHANGED THE FEE STRUCTURE, PERHAPS IT IS TIME TO GO SHOPPING FOR THE BEST SERVICES FOR THE MONEY?

SINCERELY,

  
ANTOINETTE GUMP

## Financial Institution Directors

### [¶ 61,721] Guidelines for Financial Institution Directors

Federal Deposit Insurance Corporation. Guidelines approved at Agency Meeting on October 6, 1987.

#### *Guidelines for Financial Institution Directors*

A financial institution's board of directors oversees the conduct of the institution's business. The board of directors should:

- select competent management;
- establish with management the institution's long and short term business objectives and adopt operating policies designed to achieve these objectives in a manner consistent with law and safe and sound practices;
- monitor operations to ensure they are controlled adequately and are in compliance with laws and policies;
- oversee the institution's business performance; and
- ensure the institution helps to meet its community's credit needs.

These responsibilities are governed by a complex framework of federal and state law and regulation. These guidelines do not modify the legal framework in any way and are not intended to cover every conceivable situation that may confront an insured institution. Rather, they are intended only to offer general assistance to directors in meeting their responsibilities. Underlying these guidelines is the assumption that directors are making an honest effort to comply with all applicable laws, regulations, and safe and sound practices.

In meeting the board's responsibilities, the board and its members should:

1. *Maintain the independence of the board of directors.* Effective corporate governance requires a high level of cooperation between an institution's board and its management. Nevertheless, a director's duty to oversee the conduct of the institution's business necessitates that each director exercise independent judgment in evaluating management's actions and competence. Critical evaluation of issues before the board is essential. Directors who routinely approve management decisions without exercising their own informed judgment are not serving their institutions, their stockholders, or their communities adequately.

2. *Keep informed.* Directors must keep themselves informed of the activities and condition of their institution and of the environment in which it operates. They should attend board and any assigned committee meetings regularly and should be careful to review closely all meeting materials, auditor's findings and recommendations, and supervisory communications. Directors also should stay abreast of general industry trends and any statutory and regulatory developments pertinent to their institution's operations. Directors should work with management to develop a program to keep members informed. Periodic briefings by management, counsel, auditors or other consultants might be helpful and more formal director education seminars should be considered.

The pace of change in the nature of the business of financial institutions today makes it particularly important that directors commit adequate time in order to be informed participants in the affairs of their institution.

*Act to ensure qualified management.* The board of directors is responsible for ensuring that the day-to-day operations of their institution are in the hands of qualified management. If the board becomes dissatisfied with the performance of the chief executive officer or senior management, it should address the matter directly. If hiring a new chief executive officer is necessary, the board should act quickly to find a qualified replacement. Ability, integrity, and experience are the most important qualifications for a chief executive officer.

*Supervise management adequately.* Supervision is the broadest of the board's duties and the most difficult to describe, as its scope varies according to the facts and circumstances of each case. Consequently, the following suggestions should be viewed as general.

a. *Establish Policies.* The board of directors should ensure that all significant activities are covered by written policies that are clearly communicated so that the policies can be readily understood by affected parties, including all employees. All policies should be monitored to ensure all employees. All policies should be monitored to ensure that they conform with changes in laws and regulations, economic conditions, and the institution's circumstances. Specific policies should cover at a minimum:

- loans, including internal loan review procedures
- investments
- asset-liability/funds management
- profit planning and budget
- capital planning
- internal controls
- compliance activities
- audit program \*
- conflicts of interest \*
- code of ethics \*

These policies should be formulated to further the institution's business plan in a manner consistent with safe and sound practices. They should contain procedures, including a system of internal controls, designed to foster sound practices, to comply with relevant laws and regulations, and to protect the institution against external crimes and internal fraud and abuse.

b. *Monitor implementation.* The board's policies should establish mechanisms for providing the board the information needed to monitor the institution's operations. In most cases, these mechanisms will include management reports to the board. These reports should be carefully framed to present information in a form meaningful to the board. The

TRUSTS

NO PARTIAL LAW



Mr. Thomas Hayes  
Auditor General  
660 J Street, Suite 300  
Sacramento, CA 95814

Antoinette Amorteguy  
1962 E. Valley Road  
Santa Barbara, Calif  
93108

June 12, 1987

Dear Mr. Hayes:

Would you please tell me what your specific definitions are for fiduciary responsibility and performance and how a fiduciary should audit funds and the processes thereof? What guidelines are used for prudent business practices and acceptable accounting principles? Could you list specific sources and how may I obtain copies?

I ask as both a new trustee for the  
at Santa Barbara and as a beneficiary of a trust.  
I wish to be responsible in my new role and to ask for  
answerability in my on-going position as beneficiary.

Are banks required to follow these procedures and principles as well? Do you ever over-see bank trust funds? Is there a difference in the role of a paid trustee and a volunteer trustee? I would be most grateful for your guidance.

Sincerely yours,

Antoinette Amorteguy

## Personal Points

□ **Lifestyle changes** are the primary factor in reducing the nation's heart disease mortality rate. *Less important:* Improved medical treatments or hospital technology. *Bottom line:* By modifying your behavior in regard to diet, exercise and smoking, you can reduce the risk of a fatal heart attack by well over 50%.

*Annals of Internal Medicine*, 4200 Pine St., Philadelphia 19104, monthly, \$50/yr.

□ **Getting through to too-busy** people. When you call, ask for them by their first names or nicknames. (If you're asked the subject of your call, just say it's personal.) Call before or after normal business hours. (Executives often come in early or stay late, without a secretary to screen the phone.) Call the president's office first. (After being routed down, you'll get higher priority by noting that the president's office referred you.)

*Time Management Made Easy* by Peter Turla, E.P. Dutton, Inc., 2 Park Ave., New York 10016, \$10.95.

□ **Petting or holding an animal** lowers your blood pressure. *Theory:* As humans evolved, they relied on their animals' keen sense to warn them of danger. When the animals were quiet, it was safe—and less stressful.

Dr. Aaron Katcher, University of Pennsylvania, Philadelphia 19104.

□ **Tired feet** benefit most from a warm foot bath for 10 minutes, followed by a short cold bath. *Also:* When sitting, put your feet up—onto a phone book or briefcase. *Aim:* To raise your knees higher than your hips. This will keep blood from pooling in your lower legs (and also help your lower back).

*Business Traveler's Fitness Handbook* by Sheldon Liebman, Tilden Press, 1737 DeSales St. NW, Washington, DC 20036, \$2.25.

## In this issue

- |  |   |
|--|---|
| □ The fast-growing OTC market is very attractive now ..... 2 | □ High- & low-end imported-car greases .... 8   |
| □ Year-end giving has never been more important ..... 3      | □ All about the fine art of touching ..... 9    |
| □ The new world of gold ..... 5                              | □ Trap and skeet shooting ..... 10              |
| □ How to hire a foreign live-in domestic legally ..... 6     | □ What to do if the doctor says cancer ..... 11 |
| □ New tax-deferred investment—single-premium whole life... 7 | □ New-era appliances ..... 12                   |
|  | □ Food tricks: What you see—what you get ... 13 |
|  | □ Steven Stern's favorite resorts ..... 14      |

## Why Not to Trust Bank Trust Departments

Michael Stolper

(WHAT TO DO INSTEAD)

The horrors at bank trust departments are much worse than most people imagine. We monitor more than 600 investment firms for our clients who are looking for investment managers, and we don't even bother with the banks.

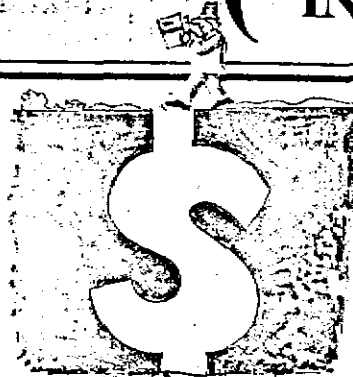
I have found, through years of experience, that managing money effectively is an intuitive skill. It's not accomplished successfully in an institutional environment.

Anyone in banking who has that talent will eventually leave, because you have to be greedy to be good at this business. He or she will decide to make more money on the outside.

The horror stories that we see involve people who are locked into irrevocable trusts. Many are trying to sue their way out of them. But it's virtually impossible to do that even if you can produce documents showing that the bank has been earning a compound annual average of only 3% a year for 20 years. Usually these trusts prohibit switching to any other manager.

My advice to people who are considering a trust is to create one that has the ability to substitute other investment managers. Have the bank act in a custodial capacity instead.

The grossest error banks make is that they just aren't good managers. It's incompetence but not



malice. And it's virtually impossible to litigate incompetence successfully as long as portfolios are diversified.

One of banks' sins is that they sometimes keep ridiculously high cash balances in pass-

book savings accounts instead of in higher-earning money-market accounts. And instead of sweeping the accounts daily or weekly into a money-market fund, they do it monthly.

If people know how to read their bank balances, they can figure this out. But bank reports are so complex, relative to mutual funds' or brokerage firms' statements, that few people can figure them out.

A typical bank report has a principal and an income statement. Look at the income statement, find the line item marked *cash balances* and annualize one month's income. If the return doesn't seem the same as a money-market return, you'll know that you're being had.

In my opinion the other problem associated with banks is that the typical trust officer has investment responsibility for 200-300 time-intensive accounts. And a much too heavy



*Bottom Line/Personal* interviewed Michael Stolper, president, Stolper & Co., Inc., 770 B St., San Diego, CA 92101. The firm performs investment manager evaluations and helps more than 300 individual and small institutional accounts select investment managers.

# Bottom Line

## PERSONAL

**Editor and Publisher,** Martin Edelston  
**Executive Editors,** Kenneth Glickman, Sharon Reier  
**Tax and Law Editors,** David Ellis, James Glass,  
 Ann M. McNulty  
**Contributing Editors,** Jeff Coplon, David Freeman,  
 Karl Friese, Carol Gaskin, Erica Manfred, Judith McQuown,  
 Edward P. Stevenson, John van Hartz, Anise Wallace,  
 Betty Yarnon  
**Staff Editors,** Carolyn Hoyt, Abe Dene  
**Editorial Assistant,** Trisha A. Arlow  
**Production Editor,** Mara Slatkin  
**Type Manager,** Frank Sicoli; **Associate,** Lella Cordero  
**Art Director,** Lydia Gail Hassan, **Artist,** Karen J. Wright  
**Controller,** Judith Roshka  
**Circulation Manager,** Eric Bernhard

BOTTOM LINE/PERSONAL (ISSN 0274-4805) is published 24 times a year, twice monthly, by Boardroom Reports, Inc., at 330 W. 42 St., New York 10036. \$39/yr. \$3/issue (U.S. funds). Domestic first class \$20/yr. extra; foreign air mail, \$45/yr. extra. Second-class postage paid at New York, New York, and at additional mailing offices. Copyright © 1985 by Boardroom Reports, Inc. Quotation not permitted. Material may not be reproduced in whole or in part in any form whatsoever. Postmaster: Send change of address to Bottom Line/Personal, P.O. Box 1027, Millburn, NJ 07041.

### PURPOSE:

To help those who are so busy with their careers and businesses that they don't have time to handle their personal lives effectively. To bring to them the best information from the most knowledgeable sources. To select and generate that information free from the influence of advertising. And to give them access to the information they need quickly, accurately, and efficiently.

### PANEL OF EXPERTS

#### CAREERS

John C. Crystal: John C. Crystal Center  
 E. Donald Davis: The Thinc Consulting Group

#### COMPUTERS

Charles Lecht: Lecht Sciences

#### ECONOMICS

Dr. Barbara J. Stevens: Ecodata, Inc.

#### EDUCATION

Dr. James Cass

#### ESTATE PLANNING

Dr. Robert Holzman

#### INSURANCE

Marvin I. Sameth: Kurtis Sameth & Ill, Inc.  
 Arthur Schechner: Schechner & Co.

#### INVESTMENTS

Peter De Haas: Shearson Lehman Brothers  
 Martin Messinger: Neuberger & Berman

#### LAW

Mark N. Kaplan: Skadden, Arps, Slate, Meagher & Flom  
 David Schechner: Schechner & Targan

#### MEDICAL

Dr. Gerald Friedman  
 Dr. Bruce Yaffe

#### MONEY MANAGEMENT

Dr. Roger Klein: Interest Rate Futures Research

#### PSYCHOLOGY

Dr. Martin Groder

#### REAL ESTATE

Stephen Blank: Kidder Peabody

#### TAXES

Sidney Kess: Main Hurdman

load ultimately conspires against good performance.

To get better results, be a royal pain in the neck. Go to the bank and ask to see the results of all the *commingled funds*. Invariably the performance on those monies is better than that on trust monies. Find out who is responsible for managing those funds and then insist on having that manager for your account.

One thing that can be said about bureaucracy is that it responds to harassment. If you call and make people's lives miserable long enough, they'll eventually give in.

Or, alternatively, you can push them to put you in a bulletproof posture by continuously investing your assets in Treasury bills. You're not going to optimize your investments that way, but you can be sure they're not going to devastate you in the event that the market goes down.

The best way to protect yourself is to avoid being in a position in which you have no options. But if that sin has been committed against you by someone who set up an irrevocable trust, then conduct a well-organized campaign of terror against the bank. If it is a serious amount of money, I would document the sins and then hire a lawyer and a public relations firm to humiliate the bank into a posture of submission. Maybe that way you can move the money out. ■

## Van Kasper The Fast-Growing OTC Market Is Very Attractive Now

The stock market has been sluggish for months. We are going through a time in which it is very difficult to buy stocks. It's a quiet period and Wall Street has vanished from the front pages. But the values are there, and you can wisely use this time to build a position in stocks you can feel comfortable with for the long run. The market is telling us now that the over-the-counter, emerging growth universe is as cheap as it has been since 1980—just before its last major bull

move. If an investor is willing to take any risk at all, I believe a good time to be an aggressive risk taker is at these prices.

**Volume growth:** In examining the OTC market and the spectacular growth it has had in terms of volume, we can no longer consider it a second cousin to the listed exchanges. It has become a very strong force in its own right. Because of the growing breadth of that market, it's difficult to say that the whole OTC market moves in a mass, or any differently from the New York Stock Exchange. The OTC market moves in segments also.

### PREMIUM FOR GROWTH

**Investment philosophy:** You are better off owning small, faster-growing companies that give greater returns on equity and greater earnings growth than you are owning a well-established company that grows only 5%-10% a year. To get premium growth, you have to be willing to pay a premium multiple. What we do is take the relative price/earnings ratio (p/e) of a universe of these smaller growth stocks and compare it to the bigger market, either the Standard and Poor's 500 or the Dow Jones industrials. That ratio in its heyday, at the top of the market in June 1983, for example, was 2.5 to 1. In the real depths of things that have occurred in the last decade, there was no premium, and the p/e was closer to 1 to 1.

### OTC STOCKS ARE CHEAP

We believe a reasonable premium is 1.5-1.6 times the general market. The situation now is that the smaller growth stocks are selling at the low end of their premium to the larger market... close to 1.25. On a strict basis of valuation, the stocks are cheap.

**Translating theory into stock picks:** There are many ways we look at companies. We want to see ones that are growing a minimum of 20% a year or have the potential to grow 20% annually. We want the company to be selling at the lower end of the premium to the general market—in other words, a company that is either unknown or unloved. We also like companies that have a significant percentage of ownership by management, at least 20%. When

Van Kasper is president of Van Kasper & Co., 50 California St., San Francisco 94111.

# Wells Fargo Must Pay \$1 Million to Gump Heirs

By Michael Taylor

A San Francisco judge has found Wells Fargo Bank guilty of fraud and ordered it to pay \$1 million in punitive damages to heirs of the Gump's store fortune.

In a stinging indictment of California's oldest bank, Superior Court Judge Frank Shaw said the bank's officers had engaged in "outrageous conduct" in their handling of the complex multi-million-dollar Gump trusts.

The judge also found the bank had engaged in "malicious and oppressive" behavior by threatening heiress Antoinette Gump with additional fees if she kept on asking the bank questions about how they were handling her money.

Shaw wrote, in explaining his decision, that the bank's use of pressure against the Gump heirs in an attempt to "terminate their opposition" to the way the bank was administering the trust "constituted fraud" under California law.

"A trustee," the judge said, "is under a continuing obligation to its beneficiaries to disclose the truth." Wells Fargo, he found, failed to do this in its administration of the Gump trusts.

The decision by Shaw to award the Gump heirs \$1 million was highly unusual because the judge, as he said in court, is "not a great fan of the law pertaining to punitive damages." Actual damages in the case were less than \$24,000.

Betty Lattie, a Wells Fargo official, said the bank has asked for a new trial. If that is denied, she said the state's fifth-largest bank will appeal Shaw's ruling. While the bank "does not agree with Shaw's decision," Lattie said Wells Fargo did not want to discuss publicly the issues raised in the case.

The ruling was handed down December 19 after an unpublicized four-month trial in Shaw's San Francisco courtroom. The trial, which was conducted without a jury, gave a rare glimpse into two of San Francisco's most venerable institutions, both more than a century old.

The lawsuit was filed in June 1978, nearly nine years after Wells Fargo was appointed trustee of the estate of Abraham Livingston Gump, who died in 1947.

The will set up trusts for A. L. Gump's son, Robert L., who died in 1981, and daughter Marcella (now Mrs. Lenn Curley), as well as A. L. Gump's grandchildren — Suzanne Gump Mallory, Marilyn Gump and Antoinette Gump — and stepgrandchild, Melanie Eve Arens. They are the heirs who sued Wells Fargo.

The store, located at 250 Post



By Susan Gilbert

Marcella Gump Curley, one of the heirs who sued

Street just off Union Square, opened in 1861 and become a symbol of San Francisco sophistication. In 1969, it was sold to the New York publishing firm now known as Macmillan, Inc.

Although the sale price was not publicly disclosed, a purchase agreement made available to The Chronicle shows the price was more than \$7 million.

According to Gump family attorneys Charles Wisch and Suzanne Farley, who successfully pressed the lawsuit, Macmillan signed a 25-year lease, agreeing to pay the Gump heirs a minimum annual rental fee of \$350,000.

Macmillan also agreed to a complicated formula that provides the Gump heirs with additional income from a small percentage of the store's gross sales.

After the store was sold to Macmillan, Wells Fargo, under the terms of the will, became the trustee of Abraham Gump's trusts.

In an interview, Curley said her father had chosen Wells Fargo because 40 years ago, when San Francisco was a smaller town, "he knew the owners and they were the family and business bank." At the time, there seemed to be no prospect of disharmony.

In the early 1970s, Wells Fargo decided to create something called a "depreciation reserve" for the trust funds. In simplest terms, this means that the bank wanted to reduce by nearly 36 percent the Gump trusts' annual income and put it aside for grandchildren who might be impoverished should the store, as Wells Fargo suggested, be worthless in 1994 when the lease expires.

Wells Fargo had retained San Francisco real estate appraiser Richard M. Robbins to evaluate the 250 Post Street property. In April 1970, Robbins put the total value of the building and land at \$3.4 million.

In his report of July 1975, Robbins said the value of Gump's had increased to \$3.96 million. But he also said that when the lease expires in April 1994, "the building will have no value" because it will be 84 years old, 29 years beyond what he said is the average life expectancy of a similar building.

However, Miottel, Chamberlain & Co., an appraiser hired by the Gump family lawyers, said that the building with its improvements would not wither away in value, "but should continue indefinitely into the next century." Besides, the appraiser said, the "substantial and ongoing appreciation of the land . . . would serve to offset any possible devaluation of the building."

The family appraiser added, in its report, that the depreciation reserve set up by Wells Fargo might be of "little or no" benefit to Gump descendants, many of whom are children who could use the money now for their education.

Judge Shaw found the bank was "guilty of actual fraud" because bank officers did not tell the Gump heirs about the depreciation reserve for approximately one year.

After the family made enough complaints, the bank agreed to reduce the reserve from \$1.3 million to \$300,000. Attorney Farley said the family gave in to the \$300,000 figure because "they didn't want to spend any more money on trustee's and legal fees."

During the course of last year's trial, the Gump lawyers discovered what they called the "smoking gun" letter, written on Sept. 7, 1976, by Vice President and Trust Officer William A. Stimson II.

In the letter, Stimson told another Wells Fargo officer that billing the heirs nearly \$20,000 in attorneys' and banking fees, "in addition to normal trustee's fees, would indi-

## Wells Fargo Ordered To Pay Gump Heirs

From Page 33

cate to (the heirs) the costs of this litigation to be paid from their pockets." This, Stimson added, would "apply some pressure to them to bring this matter to a prompt conclusion. . . ."

California law says the beneficiaries of a trust have to pay attorneys fees on both sides of a squabble.

From 1969 to 1977, Farley said, the Gump heirs paid their own attorneys \$100,000 in legal fees to deal with Wells Fargo. In addition, they had to pay approximately \$120,000 for lawyers hired by the bank to fight their own lawyers.

During that period, Farley said, Wells Fargo also got \$230,000 in trustee's fees.

Near the end of the trial, as he was about to tell the assembled lawyers of the \$1 million in damages, Judge Shaw said of the bank's officers:

"I think they lost sight of the fact that they were supposed to be working for the beneficiaries rather than for the bank. They thought it was their money is the way it looks."

Wells Fargo resigned as trustee of the Gump trusts in 1979 and was succeeded by the Chartered Bank of London.

*Wells Fargo turned on technical because came before court in 1974 acct with info*