

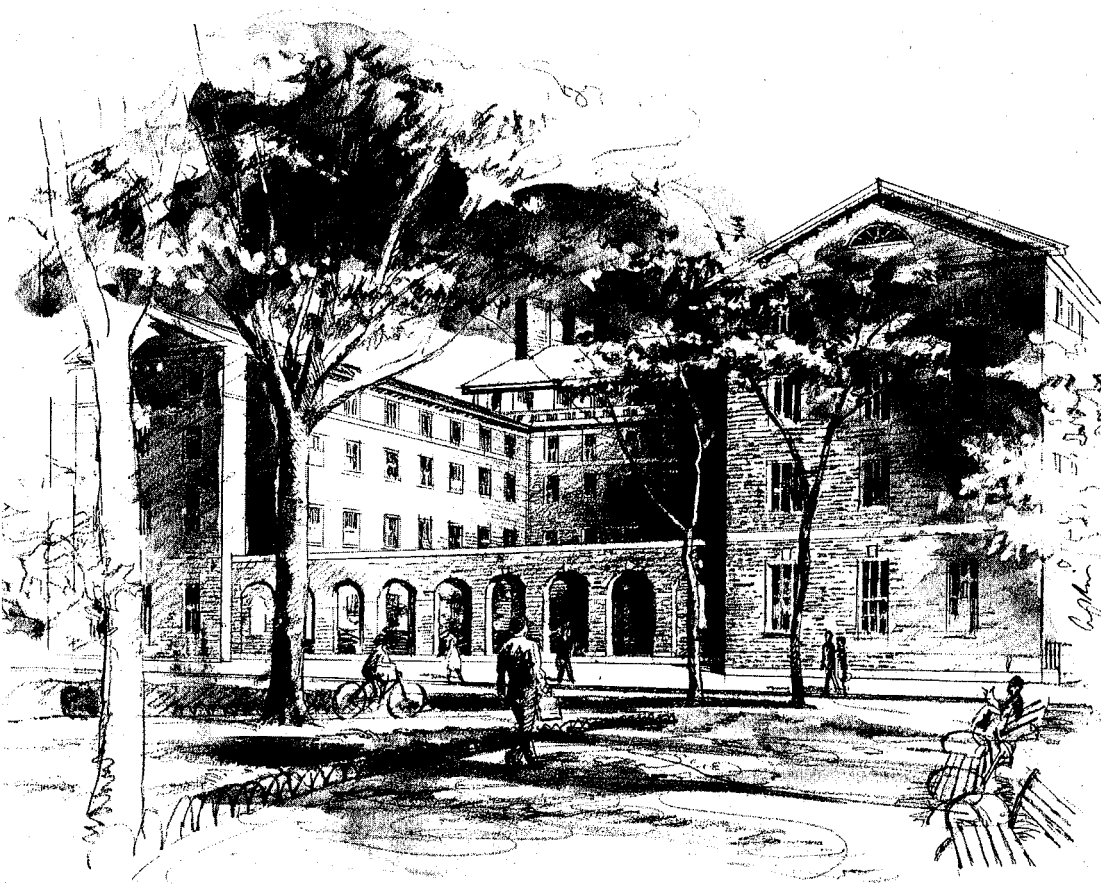
New York University
School of Law

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TOPICS IN PHILANTHROPY

Pledges to Non-Profit Organizations:
Are They Enforceable and
Must They Be Enforced?

The Program on
Philanthropy and the Law



Pledges to Non-Profit Organizations:

**Are They Enforceable and
Must They Be Enforced?***

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I) Introduction¹

I regret to inform you that I will not be able to pay the remaining amount of my pledge to Woodmere Academy during 1973.

Due to the unforeseen and unfortunate circumstances in the Middle East, I have found that Israel is in such severe and dire straits that it must take precedent in my mind and heart over any other commitments no matter how worthwhile. I therefore committed and paid a very large contribution to Israel, which was a very severe drain on my financial resources at this time and one that I had not planned on.

I will pay the remainder of my pledge . . . in 1974.²

So wrote Saul Steinberg on December 7, 1973. Mr. Steinberg's 1969 pledge was described in a carefully written 1972 letter in which Woodmere Academy agreed to extend the time for payment of the pledge and requested that Mr. Steinberg confirm the pledge by signing the letter. Mr. Steinberg complied with the request. That letter, dated December 12, 1972, provided in part as follows:

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² *Woodmere Academy v. Steinberg*, 385 N.Y.S.2d 549, 550 (App. Div. 1976) *aff'd*, 363 N.E.2d 1169. See also *Laventhol & Horwath v. Moet-Hennessy, U.S. Corp.*, 537 N.Y.S.2d 530 (App. Div. 1989) (recognizing the continuing authority of *Woodmere Academy* as well as the effect of conditioning a promise on performance of some action).

This will confirm the agreement reached between us concerning payment of your pledge of \$375,000. . . . We agree to extend the time for payment of the present balance . . . provided we receive payment by . . . December 31, 1973. . . . In recognition of your concern and interest in Woodmere Academy, our library, as you know, has been named 'The Barbara Steinberg Learning Center.' You have our unconditional and unqualified assurance that the building will continue to be so designated as long as it is a part of the school, and will be so referred to in any communication, writing or message over which we have control, inasmuch as we view our obligation in this respect in the nature of a trust.³

Mr. Steinberg paid \$125,000 of the pledge but failed to pay the balance of \$250,000. At this point the Board of Directors of Woodmere Academy had two questions to consider. First, whether Mr. Steinberg's pledge was a binding obligation enforceable in the courts and, secondly, whether Woodmere Academy had an affirmative obligation to take action, including the filing of a civil suit, to enforce the pledge.

This article will address the two questions faced by the Board of Directors of Woodmere Academy. Part I of this article will address the enforceability of charitable pledges. In the United States, over three hundred reported cases⁴ have been decided since 1800 that deal with the enforceability of charitable subscriptions.⁵ For the most part, these cases have struggled to apply the normative principles of contract law to charitable⁶ subscriptions⁷ and have stumbled continually on the

³ 385 N.Y.S.2d at 551.

⁴ The presentation regarding the enforceability of charitable subscriptions will be limited to the discussion of illustrative cases which have examined the various theories of enforceability. Although statutory enactments in various jurisdictions may interact with the application of contract principles, such statutes will not be discussed. However, statutory rules have not played a significant role in the cases in this area. *See, e.g.*, GA. CODE ANN. § 20-304 (Michie 1933), which provided: "A promise of another is a good consideration for a promise. In mutual subscriptions for a common object, the promise of the others is a good consideration for the promise of each."

⁵ See Appendix I for a comprehensive listing of cases by state since 1800.

⁶ Although it is important to keep in mind that it is "charitable" pledges which are being dealt with here, this article will not attempt to define precisely the term "charitable". An early case, cited in Thomas Billig, *The Problem of Consideration in Charitable Subscriptions*, 12 CORNELL L.Q. 467, 468 n. 1 (1927), states:

A charity in the legal sense may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds and hearts under the influence of education or religion, by relieving their bodies from disease, suffering or restraint, by assisting them to

requirement of consideration. Finding a strong public policy⁸ toward enforcing such subscriptions, the courts have been devising ways to eliminate the requirement for consideration, or at least weaken it. The result has been that charitable subscriptions have often been enforced since the early 1800's. Although courts will enforce mutual promises between charity and subscriber under general contract principles, when consideration is missing courts have enforced pledges by relying on various legal theories such as unilateral contract; mutuality of promises between subscribers; promissory estoppel; and, most recently, mere public policy without consideration or reliance.

This question leads to more complex issues. When it comes to enforcing pledges, charities have demonstrated a timidity not characteristic of their solicitation practices. Charities seem to fear the loss of subscribers if it became the practice to sue to enforce the subscriptions. Indeed, a review of the reported cases shows that the great majority of such actions were brought only after the death of the subscriber, when the charity was willing to dispute with the heirs over the assets in the

establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government.

Jackson v. Phillips, 96 Mass. 539, 556 (1867).

⁷ In this article, the terms "pledge" and "subscription" are used as synonyms; neither term indicates the existence of a written promise.

⁸ A typical statement of the effect of public policy is found in *Irwin v. Lombard Univ.*, 46 N.E. 63 (1897) in which the Ohio Supreme Court stated:

The general course of decisions is favorable to the binding obligation of such promises. They have been influenced, not only by such reasons as those already stated, but in some cases, at least, by state policy as indicated by constitutional and statutory provisions. The policy of this state, as so indicated, is promotive of education, religion and philanthropy. In addition to the declarations of the constitution upon the subject, the policy of the state is indicated by numerous legislative enactments providing for the incorporation of colleges, churches, and other institutions of philanthropy, which are intended to be perpetual, and which, not only for their establishment, but for their perpetual maintenance, are authorized to receive contributions Looking to the plainly declared purpose of the lawmaking department, promises made with a view . . . to establishing endowment funds to give them greater stability and efficiency, and whatever may be necessary or helpful to accomplish their purposes or secure their permanency, must be held valid. A view which omits considerations of this character is too narrow to be technically correct.

46 N.E. at 65.

A commentator in 1940, referring to the foregoing quotation, states "It is noteworthy that as early as 1897 an opinion should foretell so clearly what trend the decisions would take during the next four decades." Robert E. Taylor, *Charitable Subscription Contracts and the Kentucky Law*, 29 KY. L.J. 23, 37-38 (1940) [hereinafter "Taylor"].

subscriber's estate.⁹ Nevertheless, one may well question the source of a Board of Directors' authority to write off assets of the charity by refusing to enforce such pledges through legal proceedings. The existence and source of such authority, if any, is the subject of the second part of this article. It will be shown that fund-raising and financial and accounting practices of charities, which have become quite sophisticated in recent years, are forcing charities to deal more responsibly in pursuing pledges. For example, it is becoming common to view subscriptions as reportable assets of the charitable organization and to use subscriptions as collateral for working capital loans and other purposes. The article concludes that duties imposed on nonprofit directors will, in many circumstances, mandate them to enforce charitable pledges. Although further efforts at uniformity and clarity are needed, the duty of nonprofit directors to enforce charitable pledges is already substantial.

II) Enforceability of Charitable Pledges

The basic problem with the enforceability of charitable pledges is the tension between traditional contract doctrine which only enforces promises supported by consideration¹⁰ and a strong public policy favoring charitable activities and promises to fund them, regardless of consideration.

All courts will enforce promises if consideration is shown. Consideration, which is the "glue" that binds together the parties to a contract,¹¹ is described in a recent treatise on contract law¹² as consisting of three elements:

⁹ The testamentary character of many subscriptions does not impede the court's enforcement of such subscriptions when consideration or its substitute is found. *See, e.g., Floyd v. Christian Church Widows and Orphans Home*, 176 S.W.2d 125 (Ky. 1943). Although the court held that a subscription promise was found to be without consideration, and thus unenforceable, it stated that "if the considerations for their execution [of the subscription] had been valuable, the fact that they were made payable after death of the makers, and then conditionally, would not have prevented their enforcement when the deaths occurred and the conditions were fulfilled, notwithstanding the testamentary intent thus manifested." *Id.* at 131.

¹⁰ *See generally* MARVIN CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS*, 13-30 (1990).

¹¹ *In Matter of Deed of Trust of Owen*, 303 S.E.2d 351 (N.C. Ct. App. 1983).

¹² JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* (3d ed. 1987) [hereinafter CALAMARI].

(1) The promisee must suffer legal detriment or the promisor must receive legal benefit; that is, do or promise to do what he is not legally obligated to do; or refrain from doing or promise to refrain from doing what he is legally privileged to do.

(2) The detriment must induce the promise. In other words the promisor must have made the promise because he wishes to exchange it at least in part for the detriment to be suffered by the promisee.

(3) The promise must induce the detriment. This means in effect, as we have already seen, that the promisee must know of the offer and intend to accept.¹³

In a typical charitable pledge, conventional consideration is generally absent, because the charity suffers no detriment and the promisor seeks no benefit. Nevertheless, courts have strained to find a basis to enforce the subscription. In the second edition of his 1835 treatise on the law of contracts, William W. Story described the state of the law of gratuitous promises as follows:

Promises, which are wholly gratuitous, are void, for want of consideration; for, however obligatory they may be in morals or in honor, inasmuch as they are not founded upon an injury or deprivation to the promisee, or a benefit to the promisor, they are not regarded by the law as legal and valuable consideration. . . . So, also subscriptions to public works and charities, cannot be collected, if they be merely gratuitous, and have not operated to induce engagements and liabilities, within the knowledge of the subscriber. . . . Thus, the subscription of a particular person to a charity would not be obligatory, although it may have induced many subsequent subscriptions, because no injury is done to the other subscribers, by a breach of payment by one.¹⁴

Writing over one hundred and fifty years later, Calamari introduces the subject of consideration with substantially the same statement: "Under the doctrine of consideration gratuitous promises are

¹³ *Id.* at 187-88.

¹⁴ WILLIAM A. STORY, *A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL*, § 453 (2d ed. 1847) (citations omitted). The quote continues as follows: "Yet if the subscribers had not agreed to pay a definite sum, but only their proportion in order to raise a particular sum for a specified object, and such sum had been thereto applied, so that a non-payment by one would extend the liability of the others, the promise of each could be enforced."

not enforced."¹⁵ Professor Williston candidly notes: "The very term 'charitable subscription' indicates that the subscriber's promise is made as a gift and not in return for consideration."¹⁶

After stating the general rule, both Story and Calamari address the exceptions to the rule which are viewed as necessary to avoid particular hardships which would result from a strict application of the general rule. For example, when reliance on a gratuitous promise results in detriment to the promisee or when the very existence of a public charity is threatened because a subscription is not paid, courts will attempt to mitigate the hardship by enforcing the subscription. Story comments, however, that the mutual promises of other subscribers do not "constitute sufficient consideration."¹⁷

A typical early case is the 1854 decision in *Barnes v. Perine*.¹⁸ The defendant, a member of a religious society, attended a meeting at which it was decided to accept subscriptions to finance the demolition of an existing church building and the construction of a new one on the same site. The defendant, along with several others, pledged funds sufficient to complete the project. Throughout the construction stage the defendant attended meetings and was aware of the society's activities

¹⁵ See CALAMARI, *supra* note 11, at 185 (citing Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 6 (1979)). CALAMARI states:

The end result is that an informal unrelieved-upon gratuitous promise generally will not be enforced. Professor Eisenberg argues that this is a tenable position. He advances both substantive and administrative reasons to support the conclusion. In addition to difficulties of proof he points out that the injury in this type of case is relatively slight; there are not significant costs on the part of the promisee and no enrichment on the part of the promisor at the expense of the promisee. There is in addition an ideological concept that economic activity and commercial activity in particular are to be encouraged and that this is best done by encouraging, and giving legal protection to, "trade", that is, exchanges, and not gratuitous unrelieved-upon promises. Furthermore a gratuitous promise may be made without sufficient deliberation and, even if not, there might be reason not to enforce it if it was made improvidently or if the promisee showed ingratitude.

CALAMARI, *supra* note 11, at 186. Calamari further explains "Under [the writ of covenant] a gratuitous promise under seal could be enforced because the form would encourage deliberateness and because the writing was deemed trustworthy evidence of the terms of the contract." *Id.*

¹⁶ SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, VOLUME 1 § 116, 473 (William H.E. Jaeger, ed. 1957) [Hereinafter WILLISTON].

¹⁷ The problem, according to the orthodox common law view, is that the promise would not ripen into a contract until performance of the work, if any were requested. WILLISTON, *supra* note 15, at 476.

¹⁸ 12 N.Y. 18 (1854) *aff'g*, 15 Barb. 249 (1852).

which were taking place in reliance on the subscriptions.¹⁹ When the building was completed, the defendant refused to pay his subscription and the society brought suit. The defendant argued that the subscription was void for want of consideration and, being void, could not ripen into a valid contract by the act of the religious society in erecting the building.²⁰

The New York Court of Appeals acknowledged that an attempt to reconcile all the decisions dealing with the enforceability of charitable subscriptions would be fruitless. It further noted the general principle that is recognized in every case, that all simple contracts, whether in writing or

¹⁹ As early as 1817 it was recognized that persons could not withdraw their pledge after they stood by silently watching the charity incur liability without objecting. In *Trustees of Farmington Academy v. Allen*, 14 Mass. 172, it was stated:

In the case alluded to, the trustees, after being incorporated, and becoming seized in trust of the land which the legislature had granted on the faith of the private funds raised by subscription, proceeded to erect a building for the use of the institution. Flint being one of the trustees, never having dissented from any of their acts, and having, when called upon for payment, sent a man, who was a debtor of his, to work out a part of his subscription; it was thought that the recognition of his promise, accompanied by a knowledge on his part that the expense was going on, authorized a recovery against him to the amount of his subscription, on the ground of money paid, laid out and expended to his use and at his request. It was also thought to be like the case of a man working upon the house of another, who had knowledge of his proceedings, in which case, although he could prove no express request or promise, he would undoubtedly recover for his labor.

[The defendant] was an inhabitant of the town, and must have known of the erection of the building; and he actually advanced some part of the materials, excusing himself from paying the whole subscription only on the ground of his inability at the time. This was sufficient to justify the trustees in proceeding to incur expense, on the faith of the defendant's subscription: and having so done, they have expended money for him on his implied request: and so the case is brought with the principles of the decision of *Homes & Al. Admrs. vs. Dana* [12 Mass. 192], referred to at the bar.

14 Mass. at 175-76 (emphasis added).

²⁰ Several early cases, such as *First Religious Soc'y v. Stone*, 7 Johns. 112 (N.Y. Sup. Ct. 1810), and *Hopkins v. Upshur*, 20 Tex. 89 (1857), considered and rejected the argument that subscriptions taken prior to the charity receiving a charter from the state were invalid. Such cases addressed the argument that there was no legitimate payee for the pledge.

In one early case the defendant argued that there was no promisee to receive the promise. That case involved a subscription by various citizens of a certain township to provide funds for the hiring of substitutes for the township's military draft quota during the Civil War. *McClure v. Wilson*, 43 Ill. 356 (1867). The court rejected the argument. The court's syllabus read:

Where several persons signed a subscription paper, whereby each one agreed to pay the sum set opposite his name, for the purpose of procuring substitutes for the relief of the drafted men of a certain township, and such substitutes were furnished by one of the subscribers by means of money advanced and borrowed by him upon faith of such subscriptions, such person so advancing the money may maintain his action against any subscriber who neglects or refuses to pay his subscriptions.

verbal, must be founded upon a good consideration; and that the want of a legally adequate consideration²¹ will void every executory contract. The court then discussed the influence of public policy on enforcing charitable subscriptions, stating:

[S]till, the objection of a want of consideration for promises like the one before the court has not always been regarded with favor; and judges, considering defenses of that character as breaches of faith towards the public, and especially towards those engaged in the same enterprise, and an unwarrantable disappointment of the reasonable expectations of those interested, have been willing, *nay apparently anxious*, to discover a consideration which would uphold the undertaking as a valid contract; and it is not unlikely that some of the cases, in which subscriptions have been enforced at law, have been border cases, distinguished by slight circumstances from agreements held void for a want of consideration. . . .²²

In reaching a decision, the *Barnes* court considered the analogous situation in which several members of a congregation came to the trustees and requested that the building be removed and a new one constructed with funds to be provided by the members. The court stated it would have no problem finding consideration if a specific request were present. Therefore, since the pledge in the case at bar was equivalent to a request for action by the trustees, the court felt justified in finding an "implied" request. The request made the subscription binding when the trustees took action and tore the building down.

In *Barnes v. Perine* the court dealt with its apparently contradictory holding of six years earlier, *Trustees of Hamilton College v. Stewart*,²³ on the basis that the earlier case did not contain an "implied"

²¹ The court restated the general rule requiring sufficient consideration as follows:

A consideration for an undertaking may consist in a benefit or advantage to the promisor, or any obligation, harm, inconvenience or disadvantage incurred by the promisee upon the faith of the promise; and, in the absence of fraud or other undue influence, the validity of the promise does not ordinarily depend upon the amount or value of the considerations as an equivalent for the thing promised.

Barnes, *supra* note 17, at 25. Nevertheless, Orville C. Snyder, *Promissory Estoppel in New York*, 15 BROOKLYN L. REV. 27, 34 (1948) notes that New York courts discarded the notion of predicated liability on any benefit to the subscriber at an early date. See *infra* note 23 rejecting "public advantage" from the charitable work as sufficient consideration.

²² *Barnes*, 12 N.Y. at 24 (emphasis added).

²³ 1 N.Y. (1 Comst.) 581 (1848), *aff'd* 2 Denio 403 (N.Y. 1845).

request. The court in *Hamilton College* refused to enforce a conditional subscription to an endorsement for the salaries of college officers. In finding for the defendants, the court in *Hamilton College* could not find either an express or implied request that the college do anything, and this failure was fatal to the enforcement of the pledge. The *Barnes* court, finding an implied request in its case, distinguished *Hamilton College*.²⁴ As will be seen, the requirement of an implied request continues to be the law of New York.

These two nineteenth-century New York cases demonstrate the struggle of American courts with the issue of consideration for nearly two centuries. Some courts have fashioned creative ways to enforce charitable subscriptions, and others have adamantly refused to follow the innovators. The following list identifies the more common theories under which charitable subscriptions have been enforced:

1. Mutual promises between charity and subscriber;
2. Mutual promises between subscribers;
3. Unilateral promise enforceable when accepted;
4. Promissory estoppel;
5. Enforceability without consideration or reliance.

²⁴ The court in *Hamilton College* stated:

There certainly is no express request to the plaintiffs, or the trustees as their representatives, to procure subscriptions or contributions. Nor can a request be implied from the agreement. The endowment of the college was, in legal contemplation, no benefit to the subscribers. *The public advantage arising from the diffusion of knowledge and the advancement of science, however important in themselves, have not been held a sufficient consideration alone to uphold an agreement of this character.* We cannot therefore imply a request from the beneficial nature of the services to the subscribers. Nor is it to be inferred from the object to be obtained by the subscribers. The purpose as stated by the plaintiffs in their declaration, "was to endow the institution, by providing a fund for the payment of its officers."

1 N.Y. (1 Comst.) at 583 (emphasis added).

If . . . we find that the defendant agreed to pay \$800 provided the plaintiffs would procure subscriptions and *should* afterwards invest the money, etc., this, according to the cases, would amount to a request to perform those services, and the defendant would be liable. With all our anxiety to sustain this contract, we do not think it susceptible of that construction.

Id. at 585-586 (emphases added). Snyder, *supra* note 20, at 36 notes that New York courts have never had too much difficulty finding an implied request from the facts and in calling such requested reliance "consideration".

To the extent one can perceive a trend, it would be toward enforceability without consideration or reliance.²⁵ This theory represents the "modern" approach which was adopted by section 90 of the Restatement (Second) of Contracts in 1979. On the other hand, looking simply at results, a commentator wrote over sixty years ago:

The consideration found may be fictional, the estoppel may be a mere "statement of a result" which the court wishes to reach, but *under modern decisions the charity is bound to win every time.*²⁶

Each of the five theories will be discussed in the context of a typical case. A state-by-state list of cases is set forth in Appendix II to assist those interested in the development of the issue in a particular state.

²⁵ Speaking specifically of *Allegheny College v. Nat. Chautauqua County Bank*, 159 N.E. 173 (N.Y. 1927) and the enforcement of charitable subscriptions in general, in Alfred S. Konefsky, *How to Read, Or at Least Not Misread, Cardozo in the Allegheny College Case*, 36 BUFFALO L. REV. 645 (1987) the author states:

Doctrinally the case [*Allegheny College*] is a dead end in the late twentieth century. Few are the occasions when these disputes [charitable subscriptions] are likely to find their way into litigation, and even when litigated, section 90(2) of the [Restatement (Second) of Contracts] puts the problem to rest. Charitable subscriptions are accepted as enforceable without requiring that the facts fit within the parameters of promissory estoppel (or consideration for that matter). Courts, I suppose, are free to disagree, but few will. So, the case now rarely appears in Contracts casebooks, and when not reprinted, it is rarely cited. Most books just ignore it.

²⁶ See Billig, *supra* note 5, at 467, 479 (1927). Billig suggests that the real inquiry is not how to reach the decision using basic contract doctrine but how to harmonize contract doctrine to accommodate the predetermined holding. *Id.* at 479-80. Perceptively, he suggests that we have reached the end of the bargain cycle of promise enforcement, stating:

Is it not possible that in types of cases, such as these, we are reaching the end of the "bargain cycle" of promise enforcement which came into the law with the birth of consideration, that commercial-age offspring of dubious parentage? The charitable subscription situation emphasizes that the now despised sealed instrument, or some substitute for it, is needed to render enforceable certain kinds of "non-bargain" promises.

Id. at 483-84. Finally, Billig argues forcefully for enforcement without consideration or reliance. *Id.* at 484-86.

A) Theories of Enforceability

1) Mutual Promises Between Charity and Subscriber

Express, bargained-for promises between a charitable organization and its contributors are enforceable.²⁷ It is, therefore, appropriate to begin the discussion of the enforceability of charitable subscriptions with an examination of them as bilateral contracts and the courts' use of basic contract doctrine.

A classic traditional contract case dealing with a pledge (and perhaps the best-known case in the area of charitable subscriptions) is the 1927 decision, *Allegheny College v. National Chautauqua County Bank of Jamestown*,²⁸ in which the majority opinion was written by Chief Judge Cardozo of the New York Court of Appeals.²⁹ In *Allegheny College*, Mary Yates Johnston, of Jamestown, New York, had signed and delivered the following writing to the college on June 15, 1921:

In consideration of my interest in Christian education, and in consideration of others subscribing, I hereby subscribe and will pay to the order of the treasurer of Allegheny College, Meadville, Pennsylvania, the sum of five thousand dollars: \$5,000.

This obligation shall become due thirty days after my death, and I hereby instruct my executor, or administrator, to pay the same out of my estate. This pledge shall bear interest at the rate of ____ percent. per annum, payable annually, from ____ till paid. The proceeds of this obligation shall be added to the Endowment of said Institution, or expended in accordance with instructions on reverse side of this pledge.³⁰

The reverse side of the writing contained the following endorsement:

In loving memory this gift shall be known as the Mary Yates Johnston memorial fund, the proceeds from which shall be used to educate students preparing for the ministry, either in the United States or in the Foreign Field.

²⁷ See CALAMARI, *supra* note 11, at 278-279. A variation of this theme is the refusal to enforce promises made to charitable organizations before they were formally chartered by the state.

²⁸ 159 N.E. 173 (1927).

²⁹ See *supra* note 24.

³⁰ 159 N.E. at 174.

This pledge shall be valid only on the condition that the provisions of my will, now extant, shall be first met.

Mary Yates Johnston.³¹

The question before the court was whether the promise was supported by consideration. The court found a benefit to Mrs. Johnston in her "implied" request that the gift be known as the "Mary Yates Johnston memorial fund." It held that the desire to be remembered is sufficient to support a contract. Even assuming Mary Yates Johnston requested the action taken by the college, it was pointed out by the dissenting opinion, at the time of her death the college had not yet issued any advertising to the effect that her scholarship was available. In other words, the college had not performed or otherwise taken a position in furtherance of accepting the offer.³² This failure to act would be fatal to a unilateral contract. However, the majority of the court found a bilateral contract.³³

We think the duty assumed by the plaintiff to perpetuate the name of the founder of the memorial is sufficient in itself to give validity to the subscription within the rules that define consideration for a promise of that order. When the promisee subjected itself to such a duty at the *implied request* of the promisor, the result was the creation of a bilateral agreement.³⁴

Citing Professor Williston's contracts treatise, the court elaborated its position:

A bilateral agreement may exist though one of the mutual promises be a promise 'implied in fact,' an inference from

³¹ *Id.*

³² Konefsky, *supra* note 24, at note 32 quotes from Allegheny College's brief at page 50 as follows:

Whether the attempted revocation was made by the importunities of residuary legatees who are undoubtedly responsible for the refusal of the executor to voluntarily settle the claim we cannot say.

How much more proper, however, it is that Allegheny College, which has incurred responsibilities and performed labors in reliance upon receiving this gift, should now be paid the sum called for by the subscription than that residuary legatees whose rights might have been cut off at any time by the whim of defendant's testatrix should receive something for which they have done nothing to obtain it.

³³ See the pre-*Allegheny College* criticism of the view that acceptance by the charity carries with it an implied counter-promise in Billig, *supra* note 5, at 476.

³⁴ 159 N.E. at 176 (emphasis added).

conduct as opposed to an inference from words. We think the fair inference to be drawn from the acceptance of a payment on account of the subscription is a promise by the college to do what may be necessary on its part to make the scholarship effective.³⁵

The result: an inferred acceptance in response to an implied request yields a bilateral agreement.³⁶

2) Mutual Promises Between Subscribers

Charitable subscriptions often recite that they are given in consideration of similar subscriptions of other persons. That such recitation³⁷ is inadequate in New York is clear from early New York

³⁵ *Id.* (citations omitted).

³⁶ See the extensive discussion of cases relating to charitable pledges in *Jordan v. Mount Sinai Hosp. of Greater Miami, Inc.*, 276 So.2d 102 (Fla. Dist. Ct. App. 1973), *aff'd*, 290 So.2d 484 (Fla. 1974), in which the court stated: "In such state neither a request in a unilateral contract nor a return promise in a bilateral contract need be expressed, because implication will suffice." 276 So.2d at 107.

See the discussion of the *Allegheny College* opinion in Murray, *infra* note 73, at 240 n. 94, in which the author states:

... There is more than a suspicion that Judge Cardozo recognized a problem in the application of the detrimental reliance device to the facts of the case, i.e., that no particular reliance by the College could be shown. This may be said to have forced him to find consideration which he discovers in typical Cardozo fashion, by creatively circumventing any lack of bargained-for-exchange and discovering an implied promise by activating the Cardozo implication machine.

See also the conclusion of Konefsky, *supra* note 24, at 686, in which the author concludes that Cardozo's opinion bordered on the inspired, stating:

At the same time, one should notice that as a judge with a mission . . . Cardozo faced difficult conceptual problems and made substantial advances. *Hamer [v. Sidway]* was hardly a secure precedent around which a great edifice had been erected. Indeed, it was more of a lighthouse than a castle. And promissory estoppel was hardly developed beyond the most classic of charitable subscription cases. With facts as weak as in *Allegheny College*, it would have been difficult for most judges to move the doctrine along in the direction that Cardozo wished. Normally, strong facts drag the doctrine with them. Yet, here again Cardozo's craft shows how much can be done with just a few raw materials, for he manages to push forward simultaneously on both doctrinal fronts. Simply by using *Hamer*, drawing a few inferences about the nature of reasonable conduct, and turning a piece of Holmes's objective theory on its head to create liability rather than limit it, Cardozo was able both to reinforce *Hamer* as a precedent and suggest a new and at the same time familiar way of thinking about what might be consideration. *In so doing, Cardozo demonstrated that a formal exchange requirement might be "implied" or met in the most attenuated way.* (citations omitted, emphasis added)

³⁷ As noted in *Jordan v. Mount Sinai Hospital*, 276 So. 2d at 108, "... two or more persons may contract in an undertaking on behalf of a charitable institution so as to bind themselves to the beneficiary"

decisions.³⁸ Other courts have taken the view that mutual promises between subscribers provide sufficient consideration to enforce the promises.³⁹ For example, in the Michigan case *Congregation B'nai Sholom v. Martin*,⁴⁰ Congregation B'nai Sholom hired a professional fundraiser to raise funds for building a new synagogue. The fundraiser suggested that a large pledge by the chairman of the fund-raising committee would be an inducement and inspiration to others to give generously. The chairman, Morris Martin, agreed; he and several members of his family (the "Martin family") announced that they would pledge \$25,000 to the building project. Before the congregation entered into a building contract, borrowed money, or took any action in reliance

³⁸ See, e.g., the concurring opinion in *Barnes v. Perine*, in which the court said:

The paper does not purport to contain any undertaking or promise, on the part of the church or the trustees, to do or to forbear to do anything which might serve to support the promise of the defendant, on the ground of mutuality; nor since the case of *Hamilton College v. Stewart* (1 Comst., 581), are we at liberty to consider whether the ground taken by the chancellor in the same case (in 2 Denio, 403) that the promise of one subscriber might serve as a consideration to sustain the promise of another, was good law; for the judgment, given by this court in that case, could not have been rendered without determining that ground to be unsatisfactory.

12 N.Y. at 30. To the same effect the court said in *I. & I. Holding Corp. v. Gainsburg*, 12 N.E. 2d 532 (N.Y. 1938): "It is unquestioned that the request that other subscribers make contributions in reliance on appellant's contribution, stated as a consideration in the subscription agreement, is not consideration which will support appellant's promise." 12 N.E.2d at 533.

See also the extensive summary of cases supporting or discarding the theory of mutual promises between subscribers in *Jordan v. Mount Sinai Hospital*, *supra* note 35.

Also note STORY, *supra* note 13, at 373, who states: "Thus, the subscription of a particular person to a charity would not be obligatory, although it may have induced many subsequent subscriptions, because no injury is done to the other subscribers, by a breach of payment by one."

³⁹ Professor Williston describes the problem with the theory of mutual promises between subscribers as follows:

The difficulty with this view is its lack of conformity to the facts. It is doubtless possible for two or more persons to make mutual promises that each will give a specified amount to a charity or other object, but in the case of ordinary charitable subscriptions, the promise of each subscriber is made without any reference to the subscriptions of others. If induced at all by previous or expected subscriptions, this inducement only affects the motive of the subscriber; it cannot be said that the previous subscriptions were given in exchange for the later one. . . .

On no reasonable interpretation of the facts can it be said that a subscriber in an ordinary charitable subscription makes his promise in exchange for the promisee's inducing others to subscribe.

WILLISTON, *supra* note 15, at 477-78.

⁴⁰ 160 N.W.2d 784 (Mich. Ct. App. 1968), *rev'd* 173 N.W.2d 504 (Mich. 1969).

on the Martin family pledge, strains developed between the Martin family and the congregation, and the Martin family withdrew its support.

After the synagogue was completed, the congregation brought suit to enforce the Martin family pledge, which read "In consideration of the gift of others, I/we welcome the privilege of subscribing \$___ ..." The Martin family argued that the appropriate theory to use in enforcing charitable subscriptions was promissory estoppel, which requires a showing of reliance by the charity, rather than consideration based on the mutual promises between subscribers. The defendants claimed the charity would not be able to show reliance because it had taken no action prior to the time the Martin family withdrew its pledge.

The trial court found for the congregation, basing its holding on *Petition of Upper Peninsula Development Bureau*,⁴¹ a case that recognized the rule that mutual promises between subscribers constitute sufficient consideration to enforce a subscription. In its opinion, the trial court stated that "the subscription of defendant Morris Martin was used as 'bait' to secure substantial donations from other contributors. The obligation to secure the services of a fund-raiser had already been incurred by plaintiff and the subject matter had been discussed with the bank."⁴²

On appeal,⁴³ the Martin family sought to discredit the doctrine of mutual promises among donors as a fiction and "an undesirable one at that."⁴⁴ Nevertheless, the Michigan Court of Appeals found little reason to deviate from established Michigan case law built on the doctrine of

⁴¹ 110 N.W.2d 709 (Mich. 1961). *Upper Peninsula Development Bureau* involved a proceeding for the dissolution of a nonprofit corporation. There a creditor asserted that certain

pledges constituted assets of the corporation, that they might have been enforced accordingly, that they inured to the benefit of creditors, and that a receiver should be appointed for the purpose of bringing action thereon. . . . [The court held that a] judgment creditor should be given an opportunity to enforce its judgment, presumably rendered in its favor for work performed by it, and to that end the order should be amended by including therein a provision that said order should not be construed as barring the right of appellant to attempt collection of its judgment, or the balance due thereon, by garnishment proceedings instituted against the parties claimed to be liable on said pledges.

⁴² 110 N.W. 2d at 710, 714.

⁴³ 160 N.W. 2d at 786 (quoting from the trial court's pretrial conference memorandum).

⁴⁴ See *supra* note 39.

⁴⁵ 160 N.W.2d at 788.

mutual promises among donors,⁴⁵ and it affirmed the judgment for the charity.⁴⁶ It also confirmed prior cases holding that, in subscription agreements, the mutual promises between subscribers of pledges for a lawful purpose will constitute a sufficient consideration. On further appeal, the Michigan Supreme Court affirmed that mutual promises among subscribers was an acceptable basis for enforcing subscriptions in Michigan,⁴⁷ but it reversed *Congregation B'nai Sholom* to permit the Martin family to amend its answer and raise the defense that Jewish law prohibited the use of the civil courts in matters between Jews.⁴⁸

In many cases the subscription agreement fails to recite that the mutual promises of other subscribers are the consideration for the promise. In such situations the charitable organization may attempt to show a mutual reliance on the promises by various donors. As noted in a recent treatise, "if the consideration is actually bargained for and actually occurs, consideration exists. This is hardly what occurs in large fundraising campaigns."⁴⁹ The charity still faces the difficult problem of how to show mutual reliance on the promises of various donors, especially when solicitations are charged with high emotions.

In *Maryland National Bank v. United Jewish Appeal Federation of Greater Washington, Inc.*,⁵⁰ an attempt was made to establish consideration by demonstrating that others had made a pledge based on

⁴⁵ For an early case upholding this theory see *Franklin College v. Hurlburt*, 28 Ind. 344 (1867). In that case a number of persons subscribed an instrument, whereby they agreed to pay certain sums of money, severally, to be expended in the erection of a college building; their mutual promises constituted a sufficient consideration for the promise of each. See also *Scottish Rite Temple Association v. Lucksinger*, 101 S.W.2d 511 (Mo. Ct. App. 1937).

⁴⁶ The court affirmed an award of interest from the approximate date the contract was in default. 160 N.W.2d at 788. Where no date is specified in a subscription, the normal contract rule has been held to apply that a reasonable time would be implied. See *Waters v. Union Trust Co.*, 89 N.W. 687 (Mich. 1902), finding consideration in the mutual promises between subscribers and raising a jury question as to whether the condition precedent of the charity's obtaining \$30,000 in total pledges had been complied within a "reasonable" time. The reasonable time requirement is implied in the subscription agreement.

⁴⁷ In a subsequent case, *Estate of Timko v. Oral Roberts Evangelistic Ass'n*, 215 N.W.2d 750 (Mich. Ct. App. 1974), the Michigan Court of Appeals recognized that "public policy demands that voluntary promises to make charitable contributions be enforced." *Id.* at 752. It went on to state that there was no reason to find that promissory estoppel was an inappropriate doctrine for the enforcement of charitable subscriptions in Michigan.

⁴⁸ The procedure is known as Beth Din.

⁴⁹ CALAMARI, *supra* note 11, at 279.

⁵⁰ 407 A.2d 1130 (Md. Ct. App. 1979).

the promise of a deceased subscriber. The decedent, Milton Polinger, had attended a two-week tour of Israel with a group of community leaders. At the conclusion of the tour, an elaborate and high-pressure fund-raising meeting was held to solicit contributions from the group to aid Israel. Prior to the meeting, Polinger had agreed to announce a large "sacrificial" gift during the meeting for the purpose of influencing others to make similar sacrificial gifts. Polinger pledged \$200,000 to the United Jewish Appeal Federation of Greater Washington, Inc. ("UJA") and requested that others pledge as much as they could.⁵¹

⁵¹ The process of fund raising is graphically described as in the following excerpt from *Maryland National Bank v. United Jewish Appeal Federation of Greater Washington, Inc.*:

Pre-solicitation is a process whereby it is determined who can be expected to make large pledges and specifically who will likely substantially increase their pledges of previous years. Pre-solicitation is part of a well conceived plan to obtain large contributions. It leads to a "high-pressure meeting" at which, according to Brissman, . . .

The idea is that "if somebody thought it was important enough to give more than he gave before, (others would think) that they ought to give more, and they (give) more money. . . . (W)e get together and discuss reactions to what they have seen, what the needs are, and people sometimes make a speech before they decided what they are going to say about the money, and it is a free-flowing thing, and nobody knows in advance what anybody is going to say, but some of the people are talked to one by one privately to condition them to make some kind of a special response to influence the group. The whole purpose of fund raising is to get an example."

Polinger was selected to be an example on the Israel mission. He had pledged \$65,000 for 1973. He had "participated willingly" in such a meeting in connection with the 1974 fund raising campaign and had pledged \$150,000. He was one of those it was "felt was ready to do something unusual. . . ." He was pre-solicited by three or four individuals and went up to two hundred thousand dollars for 1975. It was agreed that his pledge would be made in a caucus at the King David Hotel in Jerusalem. The caucus was held and Polinger came into the caucus as Brissman said, "so we could announce all the gifts and influence other people of different levels." Polinger was to be a "pacesetter."

* * *

"It is just a dynamics of an involvement where after two weeks of being together night and day in a setting of that kind after a major war, meeting with individuals who lived through three or four such wars, that everybody is strung out and you are like a family, and in the process of interchange, speeches are made, and maybe somebody made a gift of \$5,000.00 influenced people just as much as the man who gave \$200,000 because of what the money meant in their view of this person's ability to give.

"It is just not the biggest number, but it is the concept of response to a need that these people are reacting to. And I don't know that you verbalize it in that way necessarily, but it does come out that one influences another in the interchange, because you are going around a room and everybody is talking about how they were moved by what they were into. So there is no question one influences another.

"There is no question about it. I cannot tell you this one increased his gift only because of that one's response, but it is part of a package. That is how you raise money."

The pledge card signed by Polinger read, "In consideration of the obligation incurred based upon this pledge, I hereby promise to pay" After Polinger's death the UJA sought unsuccessfully to enforce the subscription, based in part on the reliance of other donors on Polinger's pledge. At the trial, however, the relevant witness testified that no one knew whether anyone had been specifically influenced by Polinger's statement at the fund-raising meeting. The Maryland court refused to find consideration in the mutual actions of other subscribers, especially where such consideration was not expressed.⁵² There was no evidence that others had actually made pledges in consideration of Polinger's pledge. Such a conclusion seems strange where the thrust of the high-pressure meeting had been to influence the decisions of others in making "sacrificial" pledges. Nevertheless, the court noted:

When the facts concerning the charitable subscription of Polinger are viewed in light of the Maryland law, it is manifest that his promise was not legally enforceable. There was no consideration as required by contract law. . . . The consideration recited by the pledge card was "the obligation incurred based upon this pledge. . . ." But there was no legal obligation incurred in the circumstances. . . . Polinger's pledge was utilized as a means to obtain substantial pledges from others. But this was a technique employed to raise money. It did not supply a legal consideration to Polinger's pledge. On the facts of this case, it does not appear that injustice can be avoided only by enforcement of the promise.⁵³

407 A.2d at 1132-34.

⁵² In general, Maryland law has adopted RESTATEMENT OF CONTRACTS § 90 (1932) as the basis for enforcing charitable subscriptions. *But see Jordan v. Mount Sinai Hosp.* 276 So. 2d 102 (Fla. Dist. Ct. App. 1973), *aff'd*, 290 So. 2d 484 (Fla. 1974) which identifies Maryland as enforcing charitable subscriptions based on mutual promises of other subscribers.

⁵³ 407 A.2d at 1138. The court also failed to find reliance on the part of the UJA, as indicated in the following excerpt:

Polinger's pledge was not made in consideration of the pledges of others, and there was no evidence that others in fact made pledges in consideration of Polinger's pledge. No release was given or binding agreement made by UJA on the strength of Polinger's pledge. The pledge was not for a specific enterprise; it was to the UJA generally and to the Israel Emergency Fund. With respect to the former, no allocation by UJA to its beneficiary organization was threatened or thwarted by the failure to collect the Polinger pledge in its entirety, and, with respect to the latter, UJA practice was to pay over to the Fund only what it actually collected, not what was pledged. UJA borrowed no money on the faith and credit of the pledgee. The pledge prompted no "action or forbearance of a definite and substantial character" on the part of UJA.

In a 1988 decision, *Arrowsmith v. Mercantile-Safe Deposit and Trust Company*,⁵⁴ the Maryland court reaffirmed its adherence to Restatement of Contracts section 90 (adopted in 1932), requiring reliance of a substantial and definite character before the subscription would be enforced. *Arrowsmith* involved an attempt to have the Maryland court reverse its decision in *Maryland National Bank* for the following two reasons: (1) the change would be beneficial in the administration of decedents' estates in Maryland and (2) the Maryland court had misperceived the state of the common law generally in *Maryland National Bank*.

The first reason was based on the Internal Revenue Service's position that charitable subscriptions in Maryland were not proper deductions on the Federal Estate Tax Return⁵⁵ since, under *Maryland National Bank*, such subscriptions were unenforceable and therefore not proper debts of the estate. The court held that protection of the assets for the stated beneficiaries was more important than preserving an estate tax deduction.⁵⁶ With respect to the second reason, the court stated that, in *Maryland National Bank*, it had fully recognized that some states had enforced charitable subscriptions on a purely public policy ground. The Maryland court affirmed its prior holding and refused to accept the position that charitable subscriptions should be enforced even without a

No action was taken by UJA on the strength of the pledge that could reasonably be termed "definite and substantial" from which it should be held harmless. There was no change shown in the position of UJA made in reliance on the subscription which resulted in an economic loss, and, in fact, there was no such loss demonstrated. UJA was able to fulfill all of its allocations.

407 A.2d at 1138.

⁵⁴ 545 A.2d 674 (Md. 1988).

⁵⁵ The court cited the federal estate tax regulations 26 C.F.R. § 20.2053-5 (1987) as follows:

A pledge or a subscription, evidenced by a promissory note or otherwise, even though enforceable against the estate, is deductible [from the decedent's gross estate] only to the extent that--

(a) Liability therefore was contracted bona fide and for an adequate and full consideration in cash or its equivalent, or

(b) It would have constituted an allowable deduction under section 2055 (relating to charitable, etc., deductions) if it had been a bequest.

⁵⁶ 545 A.2d at 685.

showing of consideration or reliance of a definite and substantial character. The court left it to the legislature to change the Maryland law.⁵⁷

3) Unilateral Promise Enforceable When Accepted

Without a bargained-for exchange of promises (even if only the fictional exchange between mutual subscribers), the search for consideration has led courts to imply a request by the subscriber, a request that becomes binding when accepted by the charity.⁵⁸ In *I. & I. Holding Corp. v. Gainsburg*,⁵⁹ the New York Court of Appeals considered a subscription agreement which read as follows:

To aid and assist the Beth Israel Hospital Association in its humanitarian work, and in consideration of the promises of others contributing for the same purposes, the undersigned does hereby promise to pay to the order of the Beth Israel Hospital Association The undersigned further requests each and every other contributor to make his contribution in reliance upon the contribution of the undersigned herewith made.⁶⁰

Based on established precedent, the court summarily dismissed the consideration identified in the subscription with the statement that "it is unquestioned that the request that other subscribers make contributions in reliance on appellant's contribution, stated as a consideration in the subscription agreement, is not consideration which will support

⁵⁷ The Maryland court's refusal to expand the law in this regard seems somewhat of a retreat from its acknowledgement of the advancing state of the law 100 years ago in *Gittings v. Mayhew*, 6 Md. 113 (1854), in which the court said:

In whatever uncertainty the law concerning voluntary subscriptions of this character may be at this time, in consequence of the numerous decisions pronounced upon the subject, it appears to be settled, that where advances have been made, or expenses or liabilities incurred by others, in consequence of such subscriptions, before notice of withdrawal, this should, on general principles, be deemed sufficient to make them obligatory, provided the advances were authorized by a fair and reasonable dependence on the subscriptions. 1 Parsons on Contracts 378. Story on Contracts, sec. 453. The decisions have certainly gone to this extent - many of them much further - in sustaining actions on such agreements, as the cases cited in the argument show. *The doctrine is not only reasonable, and just, but consistent with the analogies of the law.*

Id. at 131-132 (emphasis added).

⁵⁸ See *I. & I. Holding Corp. v. Gainsburg*, 12 N.E.2d 532 (N.Y. 1938).

⁵⁹ *Id.*

⁶⁰ *Id.* at 533.

appellant's promise."⁶¹ The court nevertheless enforced the subscription agreement, because New York law was clear⁶² that:

The subscription agreement is not a contract, but an offer to contract, which, when acted upon by incurring liability, becomes a binding obligation. . . . Our courts have definitely ruled that such subscriptions are enforceable on the ground that they constitute an offer of a unilateral contract which, when accepted by the charity by incurring liability in reliance thereon, becomes a binding obligation.⁶³

The court found the significant offer in the language of the subscription agreement "to aid and assist the . . . Hospital . . . in its humanitarian work" This statement gave rise to the implied request by the subscriber that the hospital "carry on" its charitable work. The hospital accepted this request when it altered its position, with the knowledge of the subscriber and in the reasonable belief that the promised payment would be made.⁶⁴ The court held that it was not necessary that the agreement require the hospital to do or refrain from doing any particular thing.⁶⁵

⁶¹ *Id.*

⁶² For an extensive summary of New York charitable subscription cases from 1810 to 1948 see Snyder, *supra* note 20, 34-44, in which the author categorizes the cases into bilateral contract cases, unilateral contract cases and cases in which the subscription was not enforced. The author concludes:

The unilateral contract is the more common. Ordinarily the subscription itself is an offer which ripens into a contract when the promisee acts in reliance thereon. Where the subscriptions have been enforced, the reliances were requested. Where no request was discerned, the courts refused to enforce the subscription. But they have never had too much trouble in discerning an implied request from the facts.

The New York courts have invariably called these return promises and requested reliances, consideration. . . .

Id. at 36 (citations omitted).

⁶³ 12 N.E.2d at 533-34 (citations omitted). Billig, *supra* note 5, at 472-73 criticizes the above-quoted reasoning.

⁶⁴ The court also relied on RESTATEMENT OF CONTRACTS § 45 (1932), which provided as follows:

If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.

12 N.E.2d at 534.

⁶⁵ *Id.* at 533.

Does an implied request to "carry on"⁶⁶ charitable work provide a more desirable basis upon which to enforce a subscription than the mutual promises of other subscribers? One commentator criticizes the unilateral contract theory as a "rationalization because there is nothing to indicate a contract making state of mind upon the part of the promisor and therefore there is no offer."⁶⁷ Furthermore, the reliance factor would seem to be eliminated, since an instant after the subscription is made, the charity's continued operation would constitute an immediate acceptance.⁶⁸

It is instructive to contrast *I. & I. Holding Corp.* with a 1925 Nebraska case, *Nebraska Wesleyan Univ. v. Griswold's Estate*,⁶⁹ which used the charity's obligation to continue operations to infer a return promise by the charity to the subscriber, thereby forming a bilateral contract. The court found the consideration in the institution's promise to apply the funds to its charitable purpose. This promise was found, in turn, in the institution's obligation under its charter and in the laws of the state requiring charities to fulfill their charitable purpose.⁷⁰ The court stated that

while the evidence does not show that the college did any specific act in reliance upon the instrument in question, this was rightly said to be unnecessary . . . [in] *Irwin v. Lombard University*⁷¹ . . .

⁶⁶ See discussion of the extent of the charity's duty to "carry on" in Snyder, *supra* note 20, at 39-42.

⁶⁷ CALAMARI, *supra* note 11, at 280.

⁶⁸ A serious problem with unilateral contract theory is its one-sided nature. While part performance may bind the promisor, it does not bind the promisee and thus the promisee is put in a highly advantageous position by part performance. And such part performance is not even required to be substantial. See Michael Gibson, *Promissory Estoppel, Article 2 of the U.C.C., and the Restatement (Third) of Contracts*, 73 IOWA L. REV. 659, 686 (1988), in which the author observes:

In a sense, reliance doctrine bound only one side, leaving the other side free to play the market. Section 90's substantial detriment element required a considerable investment by the offeree before the offeror was bound, an investment which the offeree would have to sacrifice in order to play the market. For the analogous situation presented by unilateral contracts, however, section 45 merely required part performance, and did not require that such performance be significant.

⁶⁹ 202 N.W. 609 (Neb. 1925).

⁷⁰ *Collier v. Baptist Education Sec'y*, 47 Ky. (8 B. Mon.) 68 (1847) is an early case holding that a charity's obligation to use its funds to carry on the charitable purpose specified in its charter was sufficient consideration to support a promise to pay when coupled with the charity's incurring a liability in reliance on the subscription.

⁷¹ 46 N.E. 63 (Ohio 1897). See *supra* note 7. In *Irwin v. Lombard Univ.* the court stated:

Furthermore, there is no direct evidence of the expenditure of any moneys by the college in such reliance, but it appears that since the date of the instrument, December 21, 1921, to May 2, 1923, when Homer Griswold died, the institution carried on its functions, keeping its endowment fund intact, and we think the circumstances justify and require the inference that expenses were incurred during that period in reliance upon the large endowment fund⁷²

That a charity's mere continuation of its activity can form the basis of a unilateral contract in New York and the basis of a bilateral contract in Nebraska demonstrates how far courts have stretched to support enforcement of pledges. In the former case an implied request was accepted based on reliant action by the charity in continuing to do what it was already doing. The latter case found mutual promises between the subscriber and the charity with the charity's promise to fulfill its obligations under its charter (i.e., to continue to do what it was already doing).⁷³

A promise to give money to one to be used by him according to his inclination and for his personal ends is prompted only by motive. But a promise to pay money to such an institution to be used for such defined and public purposes rests upon consideration. The general course of decisions is favorable to the binding obligation of such promises. . . . The requirements of the law are satisfied, the objects of the parties secured, and the perpetration of frauds prevented by the conclusion that the consideration for the promise in question is the accomplishment through the university of the purposes for which it was incorporated and in whose aid the promise was made.

Id. at 65-66. See *Hirsch v. Hirsch*, 289 N.E.2d 386 (Ohio Ct. App. 1972), an Ohio case following *Irwin v. Lombard Univ.* and stating:

While *Irwin* involved a promissory note and an incorporated college, we conclude that the same principle applies to pledges made to institutions or organizations. . . . Accordingly, the consideration for a pledge to an eleemosynary institution or organization is the accomplishment of the purposes for which such institution or organization was organized and created and in whose aid the pledge is made, and such consideration is sufficient. We therefore conclude that pledges made in writing to eleemosynary institutions and organizations are enforceable debts supported by consideration, unless the writing itself otherwise indicates or it is otherwise proved.

289 N.E.2d at 389-90.

⁷² 202 N.W. at 616.

⁷³ The problem with finding consideration in the fulfillment of charitable purposes is, basically, that such consideration is not given in exchange for the subscriber's promise, particularly where the pledge does not designate any particular use. See Taylor, *supra* note 7, at 33-34.

4) Promissory Estoppel

The *Allegheny College* case is credited with prompting other courts to use promissory estoppel as a basis for enforcing charitable subscriptions.⁷⁴ Commentators suspect, however, that Judge Cardozo sensed a problem justifying the college's action as in reliance on the pledge.⁷⁵ Citing *Allegheny College*, the court in *I. & I. Holding Corp.* noted that promissory estoppel was only necessary as a substitute for consideration when an invitation to carry on with the charitable work could not be implied. In other words, given the New York Court of Appeals' expanded view of consideration, it would be a rare situation that could not give rise to an implied request by the donor.

The doctrine of promissory estoppel is described as a twentieth-century phenomenon.⁷⁶ The basic doctrine was set forth in Restatement of Contracts section 90 (1932) as follows:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

The basic elements of an action for promissory estoppel are: 1) a promise; 2) foreseeable action; 3) in reliance on the promise and; 4) injustice resulting from a failure to enforce the promise.⁷⁷ The reliant

⁷⁴ JOHN E. MURRAY JR., MURRAY ON CONTRACTS 240, at n. 94 (3d ed. 1990).

⁷⁵ *Id.*

⁷⁶ CALAMARI, *supra* note 11, at 275.

⁷⁷ Billig, *supra* note 5, at 480, commenting in 1927 on the then-tentative Restatement of Contracts, stated as follows:

Should our prevailing doctrine of estoppel be so extended as to bring [charitable subscription] cases within it? This seems to be the solution offered by the tentative Restatement. . . . But, seemingly, when section [90] is reached, the Restators have in mind the incorporation therein of the "promissory estoppel" theory advanced by Professor Williston in section 119 of his treatise on contracts. The Commentaries to said Restatement suggests that section [90] is offered as a solution for the problem of the charitable subscription cases. If so, it appears to the writer that as far as the charitable subscription cases are concerned, the tentative Restatement has jumped out of the frying pan of consideration into the fire of estoppel.

To the end of harmonizing these cases with sound legal principle, the following rule of law is submitted:

A written subscription to a charity, signed by the subscriber or his agent, and delivered to the charity, shall not be invalid or unenforceable for want of consideration. (footnotes omitted).

action must be "definite and substantial." The "substantial" requirement is quantitative, while the requirement that it be "definite" looks to the foreseeability of the specific action.⁷⁸ As originally set forth, the remedy for breach is the same as in ordinary contract cases, which is full expectancy rather than reliance damages.⁷⁹ The first three characteristics are questions of fact, while the nature of the injustice is a question of law. Finally, promissory estoppel binds only the promisor; the promisee, although making a substantial change in position, is not obligated to complete the performance.⁸⁰

The application of the doctrine of promissory estoppel to the enforcement of charitable subscriptions is illustrated in *Danby v. Osteopathic Hospital Ass'n of Delaware*.⁸¹ The Supreme Court of Delaware considered a claim by Danby, a former president of the defendant hospital association, who had signed and delivered \$40,000 in promissory notes to the association on the eve of the commencement of construction to renovate a residence for use as a hospital. Later, when the association needed to borrow additional funds to complete the project, Danby signed and delivered to the association an additional \$15,000 in promissory notes. The relationship between Danby and the association subsequently deteriorated and Danby resigned his position and demanded the return of the unused notes. The association refused, and Danby brought this action to recover the unused notes.

Danby's main argument was that he had the right to revoke the notes prior to their being used. He contended that, until they were used, they were no more than a bare continuing offer, unsupported by consideration.

In placing the situation in a legal framework, the court recognized the strong public policy supporting the enforcement of charitable subscriptions,⁸² stating:

This promise was made to a charitable corporation, and for that reason, we are not confined to the same orthodox concepts which once were applicable to every situation arising within a

⁷⁸ CALAMARI, *supra* note 11, at 272.

⁷⁹ See E. Allan Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1, 22, and authorities cited therein.

⁸⁰ See Gibson, *supra* note 67, at 685-86.

⁸¹ 104 A.2d 903 (Del. 1954).

⁸² 104 A.2d at 907.

common law jurisdiction. There can be no denying that the strong desire on the part of the American courts to favor charitable institutions has established a doctrine which once would have been looked upon as legal heresy. Doubtless this judicial attitude is largely responsible for the massive machinery of benevolence to be observed on every side. The reasons announced in justification for these holdings, however, have not always been technically satisfying.

But regardless of its genesis, there can be no doubting the general American rule that while a bare promise to a charity is at first revocable, it does not remain so after the charity, in reliance upon that promise, has put itself into a legal position from which it cannot be expected to extricate itself without substantial injury. This principle is often spoken of as an application of the doctrine of promissory estoppel.

As soon as the contracts were executed, the legal obligation to the contractors presumably bound defendant to complete the job. The 'acceptance' was not the borrowing of the money, but the assumption of the obligation to build the hospital. And even if the building had been without a contract, a half-built hospital is of little use, so the application of sound business principles would have led to the same result.

This plaintiff, therefore, is within the prohibition of the promissory estoppel rule which applies to charities.⁸³

Delaware thus comes into the camp of those states which have adopted the doctrine of promissory estoppel to charitable subscriptions.⁸⁴ Maryland law clearly adopts the original Restatement of Contracts section 90⁸⁵ and has adamantly refused to consider changing.⁸⁶ Nevertheless, one

⁸³ *Id.*

⁸⁴ A secondary issue raised by the plaintiff for the first time on appeal was that, at the time he signed the final \$15,000 in notes, the project was underway and the association was already obligated to complete the project. The court acknowledged this argument but deferred answering it pending a trial in the case.

⁸⁵ See *Maryland Natl. Bank v. United Jewish Appeal Fed. of Greater Washington, Inc.*, 407 A.2d 1130 (Md. 1979); *Arrowsmith v. Mercantile-Safe Deposit and Trust Company*, 545 A.2d 674 (Md. 1988).

⁸⁶ In its 1988 decision in *Arrowsmith v. Mercantile-Safe Deposit and Trust Company*, the Maryland court reaffirmed its firm adherence to RESTATEMENT OF CONTRACTS § 90 (1932), requiring reliance of a substantial and definite character before the subscription would be enforced.

commentator has suggested that adoption of promissory estoppel is likely to result in fewer charitable subscriptions being enforced because of the difficulty of showing reliant action.⁸⁷

5) Enforceability Without Consideration or Reliance

The Restatement of Contracts was revised in 1979, and it made substantial and important revisions to section 90. The current version, Restatement (Second) of Contracts section 90, seeks to reflect the strong public policy of enforcing charitable pledges by completely doing away with the requirement of consideration and reliance in the case of charitable subscriptions.⁸⁸ While the second version of the Restatement presents the "latest" thinking of the American Law Institute, the enforcement of charitable subscriptions solely on public policy grounds was recognized in case law much earlier.⁸⁹ The versions of section 90 that

⁸⁷ See CALAMARI, *supra* note 11, at 280, which states:

Surprisingly, however, if promissory estoppel in its traditional form is the doctrine under which subscriptions are to be tested, fewer subscriptions are likely to be enforced than previously. This is because in the majority of the cases the charity would not be able to show substantial injurious reliance -- that is that it did anything differently than it would have done in reliance on a particular promise. This would appear to be true even in a case where the first subscriber has promised to pledge a large sum if others would pledge an equal amount. (citations omitted).

Concluding that the use of the doctrine of promissory estoppel should be limited to intra-family promises and donative gifts, one commentator has pointed out six practical problems with the doctrine in the business context: (1) reliance does not reliably indicate which transactions should be enforced because it is present in nearly all cases, regardless whether the parties have reached an agreement to be bound; (2) claims of reliance are difficult to prove or disprove; (3) promissory estoppel is one-sided, binding only the promisor; (4) promissory estoppel erodes the need for agreement; (5) the application of promissory estoppel has led to serious doctrinal errors such as being used to circumvent the parol evidence rule or to enforce contract modifications; and (6) courts have failed to develop a consistent theory regarding the proper relationship between bargained-for consideration theory and promissory estoppel. Gibson, *supra* note 67, at 708-710, 716.

⁸⁸ While public policy may favor enforcing charitable subscriptions, there are reasons why the public policy may be considered inappropriate. In 1928, it was argued that modern fundraising tactics have evolved into high pressure "drives" by sophisticated charities in which decisions are not in reality "voluntary" decisions but in many cases are coerced. See Elbert H. Carver, Note, *Contract: Consideration in Charitable Subscriptions*, 13 CORNELL L.Q. 270, 275-76 (1928). The note further cautions against taking large amounts of property out of the tax base. *Id.*

⁸⁹ See the suggestion that the soundest solution to the question of enforceability of charitable subscriptions would be to "allow the charity to recover on the basis of public policy alone, without consideration" in Taylor, *supra* note 7, at 35.

appear in the first and second versions of the Restatement read as follows (emphases added):

Restatement of Contracts
Section 90

A promise which the promisor should reasonably expect to induce action or forbearance of *a definite and substantial character* on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

Restatement (Second) of
Contracts Section 90

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee *or a third person* and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. *The remedy granted for breach may be limited as justice requires.*

(2) *A charitable subscription or a marriage settlement is binding under subsection (1) without proof that the promise induced action or forbearance.*

By the elimination of the words "of a definite and substantial character", the Restatement (Second) adds flexibility to analysis of the level of reliant action required to enforce a promise. This elimination, however, is thought to be offset by the addition of the last sentence of subsection (1) limiting the remedy "as justice requires", which recognizes the possibility of a less-than-full recovery.⁹⁰ Thus, the more substantial the reliance or forbearance, the more likely a full recovery of the promised or expected performance.

Subsection (2) in the Restatement (Second) specifically provides that a charitable subscription is binding without proof that the promise induced action or forbearance. This change is equivalent to saying that the promise is enforceable without consideration or reliance.⁹¹

⁹⁰ See CALAMARI, *supra* note 11, at 280. See also Reporter's Note to RESTATEMENT (SECOND) OF CONTRACTS § 90.

⁹¹ For a comprehensive discussion of the changes to RESTATEMENT § 90, see MURRAY, *supra* note 73, at 278-88. See also CALAMARI, *supra* note 11, at 272-74. See also Reporter's Note to RESTATEMENT (SECOND) § 90 Cmt. f, which provides:

Subsection (2) of this Section, in Tentative Draft, was cited with approval in *Salsbury v. Northwestern Bell Tel. Co.*, 221 N.W.2d 609 (Iowa 1974); see also JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 6-5 (2d ed. 1977). Both of these authorities interpret Subsection (2) to treat charitable subscriptions as a *sui generis*

Paraphrasing subsection (1) to eliminate the proof requirement made inapplicable to charitable subscriptions by subsection (2), subsection (1), as applied to charitable subscriptions, would read:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

As a result, all that would be required of the promise is to show 1) that a promise was made, 2) that it was reasonable to expect that it would be relied upon, and 3) that injustice would result if it were not enforced. Presumably, the resulting injustice is not based on the reliance but on the injustice to the society from the loss of the charitable contribution.⁹²

Nevertheless, the addition of the stronger language favoring enforcement in subsection (2) is perhaps a logical extension of the courts' attitude of favoring charitable subscriptions and finding consideration where it otherwise would not be found.⁹³ Even as far back as *Barnes v. Perine*,⁹⁴ a court recognized that conceptions of public policy have shaped the rulings which loosen the rigorous consideration requirement in order to support philanthropy.⁹⁵ Since that time, courts have generally strained to find grounds for enforcement of charitable pledges, illustrating the depth of public policy considerations favoring philanthropy.

Since the Restatement (Second) no longer requires reliance or consideration to enforce a charitable pledge, comment f to section 90(2)⁹⁶

category requiring neither consideration nor reliance, and both approve of this approach.

In contrast, see *Jordan v. Mount Sinai Hospital*, 276 So. 2d 102 (Fla. Dist. Ct. App. 1973), *aff'd*, 290 So. 2d 484 (Fla. 1974); Kenneth P. Cohen, Note, *Charitable Subscriptions -- Is Consideration Necessary?* 26 BAYLOR L. REV. 256 (1974). These authorities summarize and analyze many different approaches to the problem.

⁹² See Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 60 (1981).

⁹³ CALAMARI, *supra* note 11, at 281; Carolyn C. Clark and Jay W. Swanson, *Promised Gifts to Museums: Monet in the Bank?*, PROBATE & PROPERTY, JAN.-FEB. 1992, at 12.

⁹⁴ See *supra* note 17.

⁹⁵ See text *supra* accompanying note 21.

⁹⁶ Comment f reads:

Charitable subscriptions, marriage settlements, and other gifts — One of the functions of the doctrine of consideration is to deny enforcement to a promise to make a gift. Such a promise is ordinarily enforced by virtue of the promisee's reliance only if his conduct is foreseeable and reasonable and involves a definite and

suggests that "a probability of reliance" by the charity is essentially all the courts should require to justify full enforcement.⁹⁷ Presumably, if such probability is found within the reasonable expectation of the promisor, no adjustment to the remedy need be made for the breach and the charity will recover the full expectation.

One commentator suggests that the reliance-based policy of the Restatement (Second) with respect to charities can best be stated as follows:

[O]ur society depends on private charity to carry on many necessary activities that would otherwise have to be performed by the government or not at all; charitable organizations rely from year to year on the likely performance *in the aggregate* of the promises of support they receive, and incur substantial contractual and other obligations in reliance on those promises; therefore, the law should enforce *all* such promises, despite the difficulty of showing that any particular promise produced substantial reliance, or of arguing that injustice would result if that promise alone were to go unperformed.⁹⁸

Reliance on the "aggregate of promises" means, in effect, that each pledge is relied upon enough to show that a mere probability of reliance existed.

By completely eliminating the need to show reliance by the charity on the promise, the Restatement (Second) adopts a position which deviates dramatically from the goal of the Restatement Committee, which is merely to state what the current law is and not what the committee might

substantial change of position which would not have occurred if the promise had not been made. In some cases, however, other policies reinforce the promisee's claim. Thus the promisor might be unjustly enriched if he could reclaim the subject of the promised gift after the promisee has improved it.

Subsection (2) identifies two other classes of cases in which the promisee's claim is similarly reinforced. American courts have traditionally favored charitable subscriptions and marriage settlements and have found consideration in many cases where the element of exchange was doubtful or nonexistent. Where recovery is rested on reliance in such cases, a probability of reliance is enough, and no effort is made to sort out mixed motives or to consider whether partial enforcement would be appropriate.

RESTATEMENT (SECOND) OF CONTRACTS § 90 Cmt. f (1979).

⁹⁷ Knapp, *supra* note 91, at 60-61.

⁹⁸ *Id.*

want the law to be.⁹⁹ Section 90 of the Restatement (Second) has not been adopted by many states. Indeed, it has been rejected in Maryland on the basis that it is unpersuasive and that any such change is for the legislature to make.

Several states have embraced the proposition that charitable subscriptions are enforceable solely on policy grounds. For example, in 1940, the New Jersey Supreme Court's decision in *More Game Birds in America, Inc. v. Boettger*¹⁰⁰ took the logical and perhaps anticipated step and held charitable subscriptions enforceable on public policy grounds, stating:

[In one case] our Court . . . treated a subscription to a charitable enterprise as standing on the same footing as any other contract in requiring acceptance and legal consideration to support it. But . . . the court was careful to observe . . . " . . . in this class of cases where public and charitable interests are involved, the courts lean towards sustaining such contracts, sometimes on consideration which in a purely business contract might be regarded as questionable." [T]he same court . . . was careful to observe that " . . . the weight of authority is to the effect that contracts of this character, based upon the mutual promises of several persons to contribute to the same fund, are not without consideration." A careful study of the cited decisions and many others to like effect, together with opinions of text writers on the subject, impels the conclusion that public policy forms the basis upon which consideration is spelled out in order to impose liability on charitable subscriptions.¹⁰¹

⁹⁹ Professor E. Allan Farnsworth, Reporter on the RESTATEMENT (SECOND) OF CONTRACTS, states:

A continuing controversy centers on the desirability of departing in the Restatement from rules derived from existing precedents, in the interest of a more just regime of law. A notable example of such a departure from precedent in the original Restatement of Contracts was the creative formulation in § 90 of the doctrine that is sometimes known as 'promissory estoppel.' To some extent the expanded role of comments, to permit criticism as well as explanation, has helped to provide a vehicle for the expression of idealism.

E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 30-31 (1990). Professor Farnsworth considers § 90 as the RESTATEMENT's most significant departure from its stated policy of following precedent. *Id.* at 139.

¹⁰⁰ 14 A.2d 778 (N.J. 1940).

¹⁰¹ *Id.* at 780 (citations omitted and emphasis added).

In 1989, the New Jersey Superior Court in *Jewish Federation of Central New Jersey v. Barondess*,¹⁰² decided the case merely by citing *More Game Birds in America, Inc.* for the proposition that: "The real basis for enforcing a charitable subscription is one of public policy--that enforcement of a charitable subscription is a desirable social goal."¹⁰³

Iowa also parallels the Restatement (Second) in dispensing with consideration as well as reliance; its courts will enforce charitable subscriptions on public policy grounds alone. An important trilogy of Iowa cases demonstrates the application of contract and public policy rules to similar subscriptions: *Pappas v. Hauser*,¹⁰⁴ *Pappas v. Bever*,¹⁰⁵ and *Salsbury v. Northwestern Bell Telephone Company*.¹⁰⁶ These cases arose out of a fund-raising campaign to establish the Charles City College in Charles City, Iowa. John Salsbury, the first and only chairman of the college, hired Peter Bruno, a professional fundraiser, to solicit funds. The college used a pledge card that read:

It is my intention to contribute the sum of \$___ to the College Founders' Fund. . . . This is a statement of intention and expectation and shall not be legally binding in any way.¹⁰⁷

When bank credit could not be obtained on the basis of the original card, the language of the card was changed to:

I/we intend to subscribe to the College Founder's Fund the sum of ___ Dollars. I intend to pay: () Monthly . . . or as follows: _____¹⁰⁸

Bisonette (the donor in *Bever*), Hauser, and Northwestern Bell Telephone Company ("Northwestern Bell") subscribed to the Founder's Fund. Bisonette and Hauser signed the latter version of the card, but Northwestern Bell sent a separate letter subscribing to the fund. Within a year, the college closed its doors and a receiver was appointed. Bever and Hauser refused to pay the pledges and the receiver brought suit.

¹⁰² 560 A.2d 1353 (N.J. Super. Ct. App. Div. 1989).

¹⁰³ *Id.* at 1354.

¹⁰⁴ 197 N.W.2d 607 (Iowa 1972).

¹⁰⁵ 219 N.W.2d 720 (Iowa 1974).

¹⁰⁶ 221 N.W.2d 609 (Iowa 1974).

¹⁰⁷ 197 N.W.2d at 609.

¹⁰⁸ *Id.*

Hauser defended on the ground that Bruno, the professional fundraiser, had orally represented that the pledge was merely a statement of intention and was not enforceable. In *Bever*, on the other hand, Bisonette received no such representation and had made two payments on the pledge. Bever, Bisonette's executor, relied solely on the wording of the pledge card, arguing that an intention to subscribe is not a promise to pay a certain amount. In *Hauser*, the court allowed the oral evidence of Bruno's statement into the record and held that the pledge card was not enforceable based on that oral representation. In *Bever*, the court applied the contract law doctrine that the language of the contract be construed more strongly against the drafter. It held that the word "intend" did not amount to a promise. Thus, the receiver of the college's assets was denied recovery.

Bruno's solicitation of Northwestern Bell resulted in a letter pledge which read as follows:

This is to advise you that the contribution from Northwestern Bell Telephone Co. to the Charles City College has been approved by Mr. E. A. McDaniel, District Manager, Mason City.

The \$15,000 contribution will be made over a three year period, in three equal payments. Our first \$5000 payment will be made in 1968.

We are very pleased to add our name to the list of contributors to this fine community undertaking.¹⁰⁹

To assist the college in obtaining needed additional funds, John Salsbury guaranteed the payment of a supplier. Northwestern Bell's subscription, along with the other subscriptions, was transferred to the supplier as security for the extension of credit. Ultimately, Salsbury made good on his guarantee and personally received an assignment of the unpaid subscriptions. He conceded that he had no knowledge of Northwestern Bell's letter and that all of his and the college's actions were taken with the belief that Northwestern Bell's obligation under the letter was no different than the obligation of those who executed the regular subscription card. In fact, Salsbury had not even seen Northwestern Bell's letter before the trial. Salsbury further conceded that Northwestern Bell's letter was taken "in lieu of" and on the "same basis as" a pledge card. Northwestern Bell sought to introduce evidence showing the pledge cards

¹⁰⁹ 221 N.W.2d at 613.

were not considered binding. The court held, however, that defenses to the pledge cards did not apply to Northwestern Bell's letter and that defenses to the letter must be based on the letter's own wording.

Northwestern Bell then argued that the subscriptions should not be enforced because the closing of the college represented a failure of consideration. The court acknowledged that in prior cases it had found consideration in the promises of other subscribers. It recognized that such a theory is subject to criticism because it does not generally conform to the facts, since in most cases the pledge is made directly to the charity.¹¹⁰

While acknowledging the validity of criticism of those cases that enforce charitable subscriptions only on a fictional finding of consideration, the Iowa Supreme Court noted that other courts, as well as the then-draft Restatement (Second) of Contracts section 90, had eliminated the consideration and reliance requirements and simply enforced charitable pledges based on policy. The Iowa court found this latter view was well supported on public policy grounds, as well as logic. It stated:

Charitable subscriptions often serve the public interest by making possible projects which otherwise could never come about. It is true some fundraising campaigns are not conducted on a plan which calls for subscriptions to be binding. In such a case we do not hesitate to hold them not binding. . . . However where a subscription is unequivocal the pledgor should be made to keep his word.¹¹¹

Thus Iowa entered the ranks of those states which, along with New Jersey and possibly Michigan¹¹² and Ohio¹¹³, would enforce charitable subscriptions without regard to reliance or consideration.

¹¹⁰ *Brokaw v. McElroy*, 143 N.W. 1087 (Iowa 1913); *Board of Trustees of Upper Iowa Conf. of Methodist Episcopal Church v. Noyes*, 146 N.W. 848 (Iowa 1914); *Young Men's Christian Ass'n v. Caward*, 239 N.W. 41 (Iowa 1931).

¹¹¹ 221 N.W.2d at 613 (citations omitted).

¹¹² *Estate of Timko v. Oral Roberts Evangelistic Ass'n*, 215 N.W.2d 750 (Mich. Ct. App. 1974).

¹¹³ *Hirsch v. Hirsch*, 289 N.E.2d 386 (Ohio Ct. App. 1972) and discussion at *infra* note 145.

B) Selected Issues of Enforceability

The theories of enforceability are not applied in a vacuum, but in real life situations where secondary issues often arise. For example, must a pledge be in writing to be enforceable? Can creditors enforce the pledge after the charity has become insolvent? The purpose of this Part B is to explore several such issues and to develop a better understanding of the context in which such questions arise.

1) Need for a Writing

In general it does not make a difference from the standpoint of enforceability¹¹⁴ if the promise is oral rather than in writing.¹¹⁵ The Statute of Frauds does not expressly cover charitable pledges,¹¹⁶ but it does cover promises that may involve charities. First, the Statute of Frauds denies enforcement to contracts which cannot be performed within one year from the making thereof.¹¹⁷ Courts have construed this provision narrowly so as to prohibit enforcement only of those contracts which cannot possibly be performed within one year.¹¹⁸ In addition, when the charitable agreement is enforceable under a promissory estoppel theory,¹¹⁹ the evidence of reliance and the inequity which would result

¹¹⁴ The question of oral promises raises two issues. First, whether the promises are enforceable at all and, second, in defining the scope of and conditions to the promise. The first issue is dealt with briefly in this section and the second is covered in connection with a discussion of the parol evidence rule in Part I.B.10.b., *infra*.

¹¹⁵ Writing in 1927, Billig, *supra* note 5 at 481, suggested that enforcement be limited to written subscriptions, noting that of the cases he reviewed, only a half dozen involved solely an oral promise.

¹¹⁶ *Thompson v. McAllen Federated Woman's Bldg. Corp.*, 273 S.W.2d 105 (Tex. Civ. App. 1954).

¹¹⁷ RESTATEMENT (SECOND) OF CONTRACTS §§ 110, 130 (1979).

¹¹⁸ RESTATEMENT (SECOND) CONTRACTS § 139 (1979). See also *Loranger Constr. Corp. v. E.F. Hauseman Co.*, 374 N.E.2d 306 (Mass. App. 1978), *aff'd*, 384 N.E.2d 176 (Mass. 1978), questioning whether the Statute of Frauds is applicable when recovery is based on promissory estoppel.

¹¹⁹ In *Byington v. Little Rock Chamber of Commerce*, 201 S.W. 122 (Ark. 1918), the Little Rock Chamber of Commerce, acting in a quasi-public capacity, sued a subscriber who had agreed to purchase unspecified real estate to be donated to the Chamber of Commerce by others. The failure to identify specifically the real estate rendered the contract too indefinite to be specifically enforced within the statute of frauds. Nevertheless, the court held that it could enforce the contract as a joint undertaking by the subscribers (including the defendant) to contribute to a common fund, with the Chamber of Commerce acting as the agent of the subscribers to acquire the real estate.

from not enforcing the promise may avoid the effect of the Statute of Frauds.¹²⁰

Second, some states require an agreement to make a bequest to be in writing.¹²¹ In *Congregation Kadimah Toras-Moshe v. DeLeo*,¹²² the decedent had orally promised, in the presence of witnesses, to contribute \$25,000 to the Congregation Kadimah Toras-Moshe. The congregation planned to use the funds to renovate a room for use as a library and to name the library after the decedent. It had so allocated the funds in its budget. In deciding the case, the court reiterated the Massachusetts rule that, for a charitable promise to be enforceable, either consideration or reliance must be present. The court held there was no evidence that the congregation had induced the decedent's promise by its own promise to name the library after the decedent, as was the situation in *Allegheny College*; hence, there was no consideration. The court further held that the allocation of funds in the budget was insufficient to show reliance. In refusing to enforce the provision,¹²³ the court stated that it would be contrary to public policy to enforce an oral promise against an estate.¹²⁴

In contrast with Massachusetts, the New Jersey courts enforce charitable subscriptions on public policy grounds. A New Jersey court refused to allow the Statute of Frauds to undermine the policy favoring enforcement, saying it would be absurd to permit the Statute of Frauds to be used as a defense to a charitable pledge which the court characterized as a contract solely to insure that it would be enforced.¹²⁵ Thus, whether

¹²⁰ See Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HAR. L. REV. 678, 696 (1984) (discussing when, if ever, the reliance principle in promissory estoppel should override the formality requirement, and noting decisions that have gone both ways). See also Gibson, *supra* note 67, at 689-97 (discussing the relationship between promissory estoppel and the statute of frauds in situations covered by the Uniform Commercial Code).

¹²¹ See, e.g., MASS. GEN. L. CH. 259, § 5A (1986).

¹²² 540 N.E.2d 691 (Mass. 1989).

¹²³ The court, in *Congregation Kadimah Toras-Moshe* considered RESTATEMENT (SECOND) OF CONTRACTS § 90 and noted, without deciding whether it would apply, that Comment f would use evidence of consideration and reliance in enforcing charitable subscriptions. It further found no injustice in not enforcing the decedent's promise. Having found no consideration or reliance, the court noted that it was not deciding whether oral promises would be enforced if there were a showing of consideration or reliance.

¹²⁴ The defendant argued that, if the decedent was aware of impending death, yet made no gift during life, then the promise is in the nature of a promise to make a will, which is unenforceable, by virtue of the Statute of Frauds. The court did not find a need to consider the argument. 540 N.E.2d at 694, n. 5. See Part I.B.2., *infra* for a discussion of oral promises in the context of the dead man's statute.

¹²⁵ *Jewish Fed'n v. Barondess*, 560 A.2d 1353, 1354 (N.J. Super. Ct. Law Div. 1989).

the requirement of a writing applies may be determined by the theory of enforcement of pledges utilized by a particular state's judiciary.

2) Dead Man's Statute

Closely related to the question of whether a writing is required is the question of whether oral evidence can be used to establish facts necessary to support the enforceability of the charitable subscription after the death of the pledgor. This question involves application of the dead man's statute.

The dead man's statute is invoked when a contract is entered into by two people and one of them subsequently dies. It prevents the surviving party or other interested persons from being a competent witness in any suit involving the contract. The prohibition, however, applies only to matters occurring prior to the death of the decedent if the testimony is on behalf of the surviving contracting party against the legal representative or heirs of the decedent. It is intended to protect estate assets from spurious claims and false testimony. Since testamentary bequests are a common form of large-scale philanthropic giving, this rule has broad potential application to charitable pledges.

An extensive analysis of the application of the dead man's statute in Indiana is set forth in *United Theological Seminary v. Estate of Burkhardt*.¹²⁶ In that case, the decedent sent a letter offering to pledge \$25,000 if Horace Smith, a co-trustee with the decedent of United Theological Seminary, would agree to match the decedent's contribution. The seminary sought to enforce the subscription as a third-party beneficiary contract, and Smith's testimony was needed to establish that the decedent's offer had been accepted. The Indiana dead man's statute declared that any person "who is a necessary party to the issue or record, whose interest is adverse to such estate" and persons who "acted as an agent in the making or continuing of a contract" would be incompetent witnesses.¹²⁷

The seminary argued that the dead man's statute only applied to "parties to the judgment" who would personally benefit from the judgment. Since Smith would not benefit from the judgment, the seminary argued that his testimony should be held competent. The court

¹²⁶ 494 N.E.2d 361 (Ind. Ct. App. 1986).

¹²⁷ IND. CODE ANN. §§ 34-1-14-6 to -8 (West 1992).

essentially identified Smith's interest with that of the seminary and found that, for purposes of the dead man's statute, he was a "party" to the issue. Without his testimony the seminary could not establish Smith's acceptance of the decedent's offer and a resulting contract between Smith and the decedent for the benefit of the seminary. The court entered judgment for the estate.

Was the purpose of the dead man's statute¹²⁸ furthered in this case? The answer may be yes, since there appears to have been a strong suspicion that the decedent was subject to undue influence. However, the court did not reach the question of undue influence when the testimony of the co-trustee was excluded: it simply identified Smith as an interested party, not an easily understood conclusion.

The dead man's statute, however, is in disrepute among commentators as often failing to achieve its purpose and perhaps even yielding inequitable results. In Texas, for example, *United Theological Seminary* would have had a different result, since the Texas statute has no application to officers and directors of a corporation.¹²⁹

3) Need for Specificity

A Florida case, *Mount Sinai Hospital of Greater Miami, Inc. v. Jordan*,¹³⁰ illustrates the importance of specificity in establishing a relationship between a pledgor's request and the charity's acts of reliance. In that case, the decedent had signed two subscriptions for \$50,000, both of which provided, in pertinent part, as follows:

In consideration of and to induce the subscriptions of others, I (We) promise to pay to Mount Sinai Hospital of Greater Miami, Inc. on order the sum of Fifty Thousand and no/100 dollars \$50,000.00 payable herewith: Balance in Nine equal annual installments¹³¹

¹²⁸ The purpose is the protection of estate assets from spurious claims by guarding against potentially false testimony by the surviving party of a transaction with the decedent.

¹²⁹ *Thompson v. McAllen Federated Woman's Bldg. Corp.*, 273 S.W.2d 105, 107 (Tex. Civ. App. 1954).

¹³⁰ 290 So. 2d 484 (Fla. 1974), *aff'd* 276 So. 2d 102 (Fla. Dist. Ct. App. 1973) (in which the lower court reviewed numerous cases involving the theories of liability set forth in this article).

¹³¹ 290 So. 2d at 485.

Prior to his death, the decedent had paid \$20,000 on the subscriptions, leaving a balance of \$80,000. There was no claim that the charity had suffered any material detriment or that any substantial liability had been incurred in reliance upon the subscriptions. The Florida Supreme Court stated the issue as "whether in the absence of a showing of reliant action on the part of the promisee, is a pledge binding where the only evidence of consideration is to induce the subscription of others?"¹³²

A mere gratuitous promise of a future gift is unenforceable in Florida. When the promise is coupled with an inducement for others to subscribe, the promise is no longer void on its face and the doctrine of promissory estoppel can be used to enforce the promise if the donor reasonably expected to induce action or forbearance of a substantial character on the part of the promisee.¹³³ The *Mount Sinai Hospital* court noted that two elements must be present for the doctrine of promissory estoppel to apply to a pledge after the death of the donor. First, the subscription document must recite with particularity the specific purpose for which the funds are to be used. The two reasons given for this requirement are: (1) it permits the executor to monitor whether the purposes of the subscription are being fulfilled¹³⁴ and (2) it forces the decedent, when making the pledge, to give serious thought as to how the pledge will be paid and to arrange his or her affairs accordingly. Second, the donee must show actual reliance of a substantial character in furtherance of the specified purpose.

Reviewing the facts with these parameters in mind, the court in *Mount Sinai Hospital* found that the "pledge in question was not made for any specified purpose, clearly was not used to induce others to subscribe, and the Hospital undertook no work in reliance upon Burt's

¹³² *Id.* at 486.

¹³³ It is not entirely clear why the court required a recitation of consideration as a prerequisite to applying the doctrine of promissory estoppel. It may be that, without such recitation, it would be improper or unreasonable for the charity to rely on the promise.

¹³⁴ Even without a specific statement of the purpose of the pledge, the court can still find implied conditions to the enforcement of the pledge. See, e.g., *Scottish Rite Temple Ass'n v. Lucksinger*, 101 S.W.2d 511 (Mo. Ct. App. 1937), in which agreements on the part of a charity to apply funds for a given purpose, and restricting the use of funds to that purpose, could be implied from the subscription agreement. Furthermore, the condition that the pledge was enforceable only if \$30,000 were pledged carried with it an implied condition that the total amount be pledged within a reasonable time. Here, the total was only pledged hurriedly after the subscriber's death.

[the decedent's] subscription."¹³⁵ To the *Mount Sinai Hospital* court, not even promissory estoppel will support enforcement of the pledge without a showing of reliance (although a showing of specific reliance would not be necessary under the Restatement (Second) of Contracts). In Florida, the wording of the pledge card must form a basis for a showing that the action of the donee was taken in reliance on the pledge and that the reliance was substantial.

The *Mount Sinai Hospital* decision demonstrates that when consideration is stated, it must be shown to be the actual consideration requested. Reciting the subscriptions of others without showing reliance by others on the subscriptions is insufficient. The Florida Supreme Court quoted with approval the lower court opinion as follows:

Courts should act with restraint in respect to the public policy arguments endeavoring to sustain a mere charitable subscription. To ascribe consideration where there is none, or to adopt any other theory which affords charities a different legal rationale than other entities, is to approve fiction.¹³⁶

While the courts will often supply (or imply) needed conditions, it is advisable that charities obtain commitments of maximum specificity, because specificity may become a significant issue.¹³⁷

¹³⁵ 290 So. 2d at 487.

¹³⁶ 290 So. 2d at 487, quoting from 276 So. 2d 102 at 108 (Fla. Dist. App. 1973). The lower court opinion analyzed various approaches utilized in other jurisdictions to address the enforceability of charitable subscriptions.

¹³⁷ The Iowa Supreme Court addressed the issue of whether failure to specify a time of payment rendered the subscription unenforceable. In *P.H.C.C.C., Inc. v. Johnston*, 340 N.W.2d 774 (Iowa 1983) an 80-year-old gentleman attended a meeting at which he orally pledged \$50,000 toward a project to encourage doctors to locate in the community. The defendant spoke favorably toward the project, signed a pledge card, and liquidated sufficient assets to pay \$12,500 toward the payment of the pledge. Although he was incompetent at the time of trial, the jury found the defendant competent at the time of execution of the pledge and that undue influence had not been exerted on him. The court easily found the subscription enforceable, reaffirming its earlier decision in *Salsbury v. Northwestern Bell Telephone Company*, 221 N.W.2d 609 (Iowa 1974) and its adoption of the rule stated in Restatement (Second) of Contracts section 90(2), and noting that the instant case also contained strong evidence of reliance on the part of the charity.

The Iowa court in *P.H.C.C.C.* raised the question of whether Article 3 of the Uniform Commercial Code covering negotiable instruments (and deeming an instrument without a payment date as payable on demand) is directly applicable to the transaction, but it did not decide whether a charitable pledge was a negotiable instrument. Rather, under Iowa law, it was clear that, where no time of payment is mentioned in a promissory note, the note operates like a check on a bank, payable on demand. Therefore the court rejected the argument that the pledge was unenforceable for failure to state a specific payment date.

4) Effect of Part Payment

In general, the payment of part of the subscription does not appear to affect the court's analysis of enforceability. That Polinger had paid \$66,500 of his \$200,000 pledge in the *Maryland National Bank* case did not prevent the court from finding the pledge unenforceable, nor did the court find it necessary to discuss the issue.¹³⁸ The same result was reached in *Mount Sinai Hospital of Greater Miami, Inc.*, where the decedent paid \$20,000 of a \$100,000 subscription.

In the early case of *Trustees of Farmington Academy v. Allen*,¹³⁹ however, the court held that a person could not withdraw a pledge after standing by silently and watching the charity incur liability without objecting. The defendant was an inhabitant of the town, must have known of the erection of the building covered by his promise, and had actually advanced some part of the materials, excusing himself from paying the whole subscription only on the ground of his inability at the time. The partial payment seemed to support the defendant's knowledge of the charity's reliance.

It is also interesting to recall that part payment by Mary Yates Johnston and acceptance by Allegheny College was a sufficient basis to imply a promise on the part of the college to carry out the request to name the fund and result in a bilateral, enforceable contract.

5) The Charity as a Creditor

If a court is willing to enforce a charitable subscription even when consideration in the traditional sense is absent, will such a subscription be enforceable against an insolvent company in bankruptcy when it is unlikely that other creditors will recover the full amount of their claims? In *In re Morton Shoe Co.*,¹⁴⁰ the Combined Jewish Philanthropies of Greater Boston filed a claim against the bankruptcy estate of Morton Shoe Company, Inc. The court held that the allowability of claims is to be determined under state law.¹⁴¹ The court in *In re Morton Shoe* held that

¹³⁸ See *supra* note 41 and accompanying text.

¹³⁹ 14 Mass. 172 (1817).

¹⁴⁰ 40 B.R. 948 (Bankr. D. Mass. 1984).

¹⁴¹ In *re Morton Shoe Co.* involved a claim of a charity against a bankruptcy estate. The claim was allowed because charitable subscriptions are enforceable under Massachusetts law either (1) on the basis of a finding of consideration in the traditional sense in the charity's agreement to appropriate funds in accordance with the terms of the subscription

Massachusetts law enforced subscriptions based on the mutual and independent promises between the charity and the subscriber¹⁴² and on the basis of the reliance on the promises by the charity, such as the expenditure of money, labor, and time in furtherance of obtaining the subscription.

Although the court recognized that it may be appropriate to do away with the formal requirements of consideration and reliance as Restatement (Second) section 90 has suggested, Massachusetts has not adopted that position. Therefore, the *Morton Shoe* court found sufficient reliance because the Combined Jewish Philanthropies of Greater Boston had the practice of borrowing funds and making distributions to charities based on the pledges.¹⁴³ Thus, the subscription was enforceable and the charity was granted the status of an unsecured creditor in the bankruptcy court equal with other unsecured creditors.

6) Status of Creditors of the Charity

In general, charitable subscriptions are enforced to facilitate the continued future operation of the charity free of past debts. When the charity ceases operation, thereby frustrating the purpose of the subscription, the subscription becomes unenforceable.¹⁴⁴ However, when third parties such as creditors of the charity are unpaid, the third parties have been permitted to enforce the subscriptions. For example, in *Salsbury v. Northwestern Bell Telephone Company*, a creditor¹⁴⁵ was

or (2) on the basis of the charity's reliance on the promise, such as its expenditure of money, labor, and time in furtherance of obtaining the subscription.

¹⁴² See, e.g., *Ladies' Collegiate Inst. v. French*, 82 Mass. (16 Gray) 196 (1860); see also *Robinson v. Nutt*, 70 N.E. 198 (Mass. 1904).

¹⁴³ This reliance is substantial compared to the mere allocation of pledged funds in the charity's annual budget, which was held to be insufficient reliance in *Congregation Kadimah Toras-Moshe v. DeLeo*, 540 N.E.2d 691. See *supra* notes 121-123 and accompanying text.

¹⁴⁴ See text at Part I.B.8., *infra*.

¹⁴⁵ For an early case allowing creditors to enforce charitable subscriptions see *Hopkins v. Upshur*, 20 Tex. 89 (1857). Relying primarily on Massachusetts cases, the Texas court held enforceable a subscription reading: "We, the undersigned, agree to donate the cash or property set opposite our names, for the purpose of erecting a Protestant Episcopal church in the city of Austin" and upon which the church incurred liabilities and expense. Further, the court permitted the contractor who undertook to build the church, and to whom the subscription was assigned in payment, to maintain an action thereon in his own name.

permitted to enforce subscriptions made to a defunct college.¹⁴⁶ *Northwestern Bell* reflected Iowa law which enforced the subscription without consideration or reliance. If consideration or reliance is required, a court may reach a different result.¹⁴⁷

7) Availability of Specific Performance

In cases involving a pledge to donate unique property, money damages may not be an adequate remedy. In such circumstances the question is whether the remedy of specific performance is available to enforce a pledge. Specific performance is used when the remedy at law falls short of full compensation. Courts have consistently held that specific performance will not be awarded where it will be inequitable, unfair, or unjust.¹⁴⁸ Four factors have emerged that favor specific performance:

- a) the inability of money to "buy" a duplicate or substantial equivalent of the promised performance;
- b) the difficulty or impossibility of estimating damages with a "reasonable" certainty;
- c) the existing or prospective insolvency of the defendant;
- d) the probability that full compensation cannot be attained, even with multiple litigation.¹⁴⁹

The courts have not provided clear answers to the application of specific performance to suits to enforce charitable pledges. Under the first three enforcement theories discussed (i.e., mutual promises between

¹⁴⁶ An Ohio case recognizing a charitable subscription as a debt of an estate is *Hirsch v. Hirsch*, 289 N.E.2d 386 (Ohio Ct. App. 1972). In that case, the Ohio court followed *Irwin v. Lombard University*, 46 N.E. 63 (Ohio 1897), holding that the consideration for a charitable subscription is the accomplishment of the purposes for which the institution was organized and created and in whose aid the pledge is made, and that such consideration is sufficient. *Hirsch*, in effect, stands for the proposition that charitable subscriptions will be enforced in Ohio without consideration or reliance.

¹⁴⁷ See *Louisiana World Exposition v. Federal Ins. Co.*, 858 F.2d 233 (5th Cir. 1988) *reh'g denied*, 864 F.2d 1147 (5th Cir. 1989), for a case in which the creditor's committee of a bankrupt non-profit corporation was permitted to assert on behalf of the corporation a claim of the corporation against the corporation's own directors for breach of the directors' fiduciary duty. The debtor in possession had failed to assert the claim. If a claim against the directors is considered an asset of the estate, certainly claims against third parties would also be so considered.

¹⁴⁸ See, e.g., *Hennessey v. Woolworth*, 128 U.S. 438, 443 (1888); *Huntington v. Rogers*, 9 Ohio St. 511, 516 (1911).

¹⁴⁹ RESTATEMENT (SECOND) OF CONTRACTS § 360 (1979).

charity and subscriber; mutual promises between subscribers; and a unilateral promise enforceable when accepted), courts find a binding simple contract. Although, for simple contracts, damages are ordinarily based on the injured party's expectation¹⁵⁰ and are intended to give the injured party the benefit of its bargain, there seems to be no good reason why a court, which finds the remedy at law inadequate, should be prevented from ordering specific performance.¹⁵¹ If the pledge is enforced based on promissory estoppel under section 90 of the original Restatement, the charity will have established its right to recover by showing reliance of a definite and substantial nature. Therefore, an even stronger case for specific performance is presented.¹⁵²

Under the fifth theory of recovery, charitable pledges are enforceable on public policy grounds without consideration or reliance. While policy reasons alone could justify courts increasing the use of specific performance,¹⁵³ the lack of substantial reliance by the charity may make it inequitable to grant such relief. For example, Restatement (Second) section 90, which reflects the policy of enforcing charitable pledges, will find a binding promise on a mere "probability of reliance" on the part of the charity.¹⁵⁴ The price paid for this heightened enforceability of promises is to grant courts the power to limit the remedy

¹⁵⁰ *Id.* at § 347 cmt. a.

¹⁵¹ *Id.*

¹⁵² *Montoya v. New Mexico Services Department*, 771 P.2d 196 (N.M. App. 1989), although not involving a charitable subscription, offers insight into the use of specific performance to enforce promises under promissory estoppel. Montoya filed suit seeking to obtain government welfare benefits, which had been denied based upon the State of New Mexico's belief that he owned a parcel of land. The land had been given to the claimant's wife by her parents, and she in turn had made an oral gift of the land to her children. The court had to determine whether the oral gift of the land effectively removed the asset from claimant's estate. The court held that if proof exists as to all of the elements of promissory estoppel, an oral gift of real property is enforceable. The court went on to state that suits for specific performance based on an oral promise to give land are governed by the same rules as those for the sale of land. Relying on the first paragraph of RESTATEMENT (SECOND) § 90, the court held that specific performance was available to enforce an oral gift. Reliance was shown by the promisee's improvement of the land.

¹⁵³ See Knapp, *supra* note 91, at 52 (1981). The public policy considerations which support the courts in adopting promissory estoppel when dealing with a charitable pledge should enable a court to enforce a charitable subscription through the use of specific performance based on the same policy considerations. One of the principle purposes of equity is to aid where the law fails. There is nothing in the Restatement or the comments that eliminates specific performance as an available remedy for charitable organizations. This leads to the conclusion that the Restatement approves of the use of specific performance and leaves application to the discretion of the court. Of course, § 90(1) gives the court discretion in fashioning a remedy.

¹⁵⁴ RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. f (1979).

as justice requires. The Restatement, however, gives no insight into how this authority is to be applied, and it appears there has never been a case where the court has ordered a promisor to deliver the promised property to the chosen charity.¹⁵⁵

8) Dissolution of the Charitable Organization

Since the dissolution of a charity would arguably frustrate the purpose of the pledge, subscribers have sometimes sought to avoid their obligations after the dissolution of the charity. In *Inasmuch Gospel Mission, Inc. v. Mercantile Trust Co. of Baltimore*,¹⁵⁶ the decedent, who died in July, 1940, left one-fourth of her estate to Inasmuch Gospel Mission, Inc., a charitable organization founded in 1924 to assist destitute men to become self-supporting. About the time of testator's death, the mission was going through a bankruptcy proceeding and foreclosure which resulted in all of its property being sold to raise money to pay its debts. It was clearly the intent of those operating the mission prior to its bankruptcy to discontinue operation of the mission. Following the bankruptcy, one of the mission's founders, Frederick Grimes, purchased the property of the mission, reorganized its operation, and was successful in continuing the activities of the mission.

The question before the court was whether the new organization was the object of the testator's bequest. The Maryland court acknowledged that charitable bequests, because of their lofty motivation and the general benefits they confer, should be strongly favored by the courts. The court adopted the view, stated by Chief Judge Cardozo of the New York Court of Appeals, that "neither bankruptcy, nor cessation of business, nor dispersion of stockholders, nor absence of directors, nor all combined, will avail without more to stifle the breath of juristic personality."¹⁵⁷ It found that the corporation had not been dissolved and

¹⁵⁵ There has been considerable debate on whether the appropriate measure of damages under promissory estoppel should be reliance damages or expectation damages. Nevertheless, courts have overwhelmingly awarded expectation damages in commercial contracts as well as charitable pledges. *Hoffman v. Red Owl Stores, Inc.*, 133 N.W. 2d 267 (Wis. 1965); *RCM Supply Co. v. Hunter Douglas, Inc.*, 686 F.2d 1074 (4th Cir. 1982); *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948). See also W. David Slawson, *The Rule of Reliance in Contract Damages*, 76 CORNELL L. REV. 197, 200 (1990).

¹⁵⁶ 40 A.2d 506 (Md. 1945).

¹⁵⁷ *Id.* at 509, citing *Petrogradsky Mejdunarodny Kommerchesky Bank v. Nat'l. City Bank*, 170 N.E. 479, 482 (N.Y. 1930).

that Grimes could exercise the right to appoint directors and continue the operation. Further, the court accepted the power of an organization to transfer charitable assets to any person willing to exercise the public trust. Finally, the court found that the present operation of the mission was consistent with the objectives the testator intended to support. Consequently, the court directed the executor to make the distribution.¹⁵⁸

The opposite result was reached in *Cotner College v. Hester's Estate*.¹⁵⁹ In that case, Cotner College sought to enforce a 1924 pledge for \$25,000 plus interest which stated: "In consideration of our interest in Christian Education and for the purpose of producing an Endowment for Cotner College and for value received, we hereby subscribe and promise to pay to Cotner College, Bethany, Nebraska, the sum of . . . Twenty five thousand Dollars . . ." In 1933, the college discontinued operations but, in 1945, an attempt was made to reinstitute the college at a new location near the University of Nebraska. In 1949, the maker of the note died and the college filed a claim against his estate asserting that it was the successor of the original college and entitled to enforce the 1924 pledge.

The lower court found that the program of the new college was not a renewal of the former educational program and not the type of education formerly provided on the Bethany campus. As a result, the consideration for the subscription wholly failed. Citing normal contract principles, the court held that the abandonment of the enterprise for which the subscription was obtained released the subscriber from his obligation to make the payment. The court quoted from a New York case that "the law is not so absurd as to hold one to his subscription or promise to give to a charitable or public enterprise after the enterprise has been abandoned. If no condition be attached, the law will imply that the enterprise must be existing when payment is demanded."¹⁶⁰ Such a result, however, may not obtain when creditors of the charity seek to enforce subscriptions to defunct organizations.¹⁶¹

¹⁵⁸ In *Rutherford College, Inc. v. Payne*, 184 S.E. 827 (N.C. 1936), the assets of an insolvent college had been transferred to another college owned and operated by the same conference of the Methodist Episcopal Church. The court held that even though the pledge was based upon a sufficient consideration when made, it may become unenforceable where the promisee charity, before the subscription has been paid, becomes insolvent and is liquidated, so that it is unable to hold and use such a fund. *Id.* at 830.

¹⁵⁹ 51 N.W.2d 612 (Neb. 1952).

¹⁶⁰ *Commercial Travelers' Home Ass'n v. McNamara*, 88 N.Y.S. 443 (App. Div. 1904).

¹⁶¹ See Part I.B.6., *supra*, "Status of Creditors of the Charity". See also *Petition of Upper Peninsula Development Bureau*, 110 N.W.2d 709 (Mich. 1961), in which the court gave creditors of an insolvent charity leave to seek garnishment against subscribers to enforce

Thus, in cases where successor organizations seek to enforce subscriptions, the court will probably look at whether and how closely the successor seeks to carry on the purpose of the original organization.

9) Effect of the Internal Government of the Organization

A unique defense which has been raised in cases involving religious organizations is that the rules governing the organization prohibit the use of the courts to enforce claims among co-religionists. In *Congregation B'nai Sholom v. Martin*,¹⁶² the defendant attempted to amend his answer to raise a defense that Jewish law prohibited the use of civil courts to resolve matters between the synagogue and its members and that Congregation B'nai Sholom should have resorted to internal procedures before taking the defendant to court on his pledge.¹⁶³ The defendant introduced the affidavit of Rabbi Bernard D. Perlow, a rabbi for 25 years and a scholar of Judaic law. Perlow's affidavit stated, in part, as follows:

5: That the religious customs, practices and laws binding on all Jews are codified in the work known as the Shulchan Aruch; That this code is generally regarded as binding as a matter of religious faith by both Orthodox and Conservative Jews; . . .

pledges as assets of the charity. The trial judge in that case expressed what may be the popular conception of the enforceability of subscription agreements as follows:

Yes, there has been no proof of any contract even though there have been pledge cards. Pledge cards are for different things and we are all familiar with them and as a general rule nobody ever pursues them too far. If the alleged donor gets into financial difficulties, they usually forget it. There is nobody pressing them for payment or attempting to enforce the thing. Even this type here I don't think constitutes any contract at all.

Id. at 710-11.

¹⁶² See *supra* text accompanying note 39.

¹⁶³ Christian theology, relying on the writings of St. Paul the Apostle, would hold a similar position. Writing about the year A.D. 67, St. Paul states:

Dare any of you, having a matter against another, go to law before the unjust, and not before the saints? Do ye not know that the saints shall judge the world? and if the world shall be judged by you, are ye unworthy to judge the smallest matters? . . . But brother goeth to law with brother, and that before the unbelievers. Now therefore there is utterly a fault among you, because ye go to law one with another. Why do ye not rather take wrong? why do ye not rather suffer yourselves to be defrauded? Nay, ye do wrong, and defraud, and that your brethren.

¹ *Corinthians* 6:1-8 (King James Version).

6. That in the opinion of this deponent, the Shulchan Aruch, as well as the custom and tradition for more than a thousand years, prohibits the bringing of a suit in the civil courts of any state by a synagogue against any of its members or vice versa and is contrary to Jewish law and is prohibited; that any such civil controversy must be first brought before the Jewish religious court known as the Beth Din (a Jewish rabbinical court); that under Jewish law, matters of charity to the synagogue go to the heart of the Jewish religion; that a charitable contribution to a synagogue is considered a religious matter by and between the synagogue and the member; . . . that historically, pledges to synagogues were always considered and are still considered as moral obligations and not the subject of a lawsuit; . . .

* * *

8. Therefore in the opinion of this deponent, the synagogue had no right under Jewish law, which is controlling and binding upon the parties, to institute this suit.¹⁶⁴

The court held that it was error to refuse to allow the defendant to amend his answer for the reason that the affidavit of Dr. Perlow raised a question of fact as to Jewish custom which may be controlling upon the parties. The result is that the bylaws or other governing instruments of the organization should be considered in determining whether the parties intended the pledges to be enforceable. This is particularly true when the subscribers are members of the charity.¹⁶⁵

¹⁶⁴ 173 N.W.2d 504, 506-508.

¹⁶⁵ The courts' hesitation to enforce what is essentially a religious commitment has its roots in the 1871 Supreme Court decision, *Watson v. Jones*, 80 U.S. (13 Wall.) 679, and has been expressed in a variety of church autonomy cases. See, e.g., *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). More recently, some courts have been unwilling to enforce Jewish dietary laws, *Ran-Dav's County Kosher, Inc. v. New Jersey*, 608 A.2d 1353 (N.J. 1992), or divorce settlements that require Orthodox Jews to provide their spouses with a "get", *Margulies v. Margulies*, 42 A.D. 2d 517 (N.Y. App. Div. 1973). Cf. *Minkin v. Minkin*, 434 A.2d 665 (N.J. 1981).

10) Conditional Promises

a) In General

In *Fredericktown Chamber of Commerce v. Chaney*,¹⁶⁶ the defendants' subscriptions were conditioned on the Fredericktown Chamber of Commerce's raising \$30,000 to build an addition to a shoe factory and contained the following language:

In consideration of the subscription made by others to do likewise I . . . agree to pay unto the . . . Fredericktown Chamber of Commerce . . . the sum of money appearing in figures opposite my signature hereto. The said sum to be paid within 90 days from date and the same to apply to a building fund amounting to \$30,000.00 known as the Spalsbury-Steis Shoe Company Building Addition Fund; Provided that in event the said \$30,000.00 fund is not fully subscribed to, this pledge becomes and is void and of no effect; and provided further that if payment is made of the sum shown opposite my name below and the said \$30,000.00 fund is not fully raised or if for any reason the said Spalsbury-Steis Shoe Company building addition is not constructed, then I am to be refunded the full amount of the payment made¹⁶⁷

The subscription of Paul Chaney was for \$50.00 and that of Paul Wengler was for \$75.00. When the factory addition was completed, Chaney and Wengler refused to pay their pledges and the Chamber of Commerce brought suit. The defendants claimed that only \$26,000 had been raised and that their subscriptions were therefore void. The Chamber of Commerce argued that the addition was completed, albeit for \$23,000; in any event, the \$30,000 had been raised since the shoe company had agreed to provide the additional \$4,000, if necessary, to complete the project. Nevertheless, the court held that the conditions in the subscription had not been met and that the subscriptions of Chaney and Wengler were void. The court held that the subscriptions were subject to conditions precedent and that substantial compliance with conditions was required before the subscriptions would be binding. There was no compliance with the conditions, so the pledgors' obligations were discharged.

¹⁶⁶ 250 S.W.2d 820 (Mo. Ct. App. 1952).

¹⁶⁷ *Id.* at 821.

b) Saul Steinberg's Defense

Returning to Saul Steinberg's letter of December 7, 1973, quoted at the beginning of this article, Woodmere Academy decided, after having completed the library and naming it for Mrs. Steinberg, to take Mr. Steinberg to court. Mr. Steinberg had moved from the community and his children no longer attended the school. Although somewhat dilatory in deciding on a defense and presenting it to the court, Mr. Steinberg finally argued that his pledge was unenforceable because it had been made subject to certain conditions.¹⁶⁸ In particular, he asserted that it was subject to the following conditions:

- 1) the collection of pledges from other contributors in a total amount equivalent to the sums the academy received from him;
- 2) the Academy's earmarking of such matching funds solely for the construction of the library at a cost which was not to exceed \$750,000;
- 3) its pursuit of a plan for merger with the neighboring Lawrence School; and
- 4) the Academy's agreement to manage its financial affairs "wisely and soundly" and disburse its funds "carefully."¹⁶⁹

The New York Court of Appeals found little difficulty in observing that "as a matter of public policy, pledge agreements calculated to foster eleemosynary enterprises are enforceable."¹⁷⁰ Indeed the court further observed that "courts, in the enforcement of such agreements, seek to resolve doubtful questions so as to avoid their repudiation."¹⁷¹ Acknowledging that it is appropriate to qualify pledges on the fulfillment of conditions, the court found that such conditions cannot be established by parol evidence but must be expressed in the agreement or at least be present by implication. Under the parol evidence rule, parol evidence can only be used to show conditions precedent to the effectiveness of the

agreement or fraud in the inception.¹⁷² Applying the rule, the court found that, of the two letters between the parties evidencing the subscription, the second letter, dated December 12, 1972, was conclusively presumed to have merged all conditions into the one condition articulated in that letter. As stated by the court:

Except as to the original agreement's reference to the consideration consisting of "gifts of others," from which it might have been possible to imply a promise to obtain matching funds, neither writing expressly or impliedly is conditioned in the other ways suggested by the defendant. If anything, on the principle of *inclusio unius est exclusio alterius*, the insertion of the one condition regarding the building and naming of the library for Mrs. Steinberg in the December 12 letter implies just the contrary, especially since at least one of its draftsmen was defendant's counsel. . . . The record having tendered no other admissible proof of a condition precedent and the single condition stipulated in the revision of the pledge agreement as incorporated in the letter of December 12 having already been performed, defendant's obligation became absolute. . . .¹⁷³

The court rejected Mr. Steinberg's allegations of fraud in the inception since the alleged fraudulent statements were either not false or were not promises, being expressions of opinion or of present or future expectations. Thus, there were no unmet conditions to Mr. Steinberg's pledge and the court granted summary judgment for Woodmere Academy to enforce the commitment.

What lessons should be gleaned from Saul Steinberg's experience? That a subscriber should consult counsel prior to signing a charitable subscription? Certainly that is often a wise course. However, as stated in the decision, Mr. Steinberg, "an experienced business executive who makes a point of the fact that prior unhappy experiences with charity-giving had alerted him to a need for great caution in such matters, signed that letter only after he had arranged for his own attorney to participate in the drafting and approval of its language."¹⁷⁴ Rather, the lesson for both charities and donors is the importance of a clear written statement of the obligations of the parties. A clear writing is particularly

¹⁶⁸ For a comprehensive summary of cases dealing with conditional subscriptions, see Annotation, *Enforceability of Subscriptions Under Conditional Charitable Pledge*, 97 A.L.R.3d 1054 (1980).

¹⁶⁹ *Woodmere Academy v. Steinberg*, 385 N.Y.S.2d 549 (N.Y. App. Div. 1976) *aff'd*, 363 N.E.2d 1169, 1172 (N.Y. 1977).

¹⁷⁰ 363 N.E.2d at 1172.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 1172-73 (citations omitted).

¹⁷⁴ *Id.* at 1170.

important where a subscriber desires to condition the pledge on the performance of specified acts. In general, however, the burden of providing a clear statement of the parties' obligations is best borne by the charity, which can make clear on the subscription card whether it views the subscription as enforceable.¹⁷⁵ Such a clear statement should obviate or minimize many of these special problem areas of enforceability.

If the charity provides the clear writing and proceeds to carry out its duties in reliance on the subscriptions, the charity should be confident of enforcing pledges in the courts. Many states have expressly or implicitly recognized a strong public policy favoring enforcement of charitable pledges. Contract doctrine has often been molded, and occasionally twisted, to uphold enforceability. Doctrines like promissory estoppel and enforceability without consideration have expanded the ability of charities to sue successfully.¹⁷⁶ Indeed, as we shall see in the next section, the increasing likelihood that courts will order payment of charitable pledges is an important factor in the determination that a charity's directors may have a duty to pursue such claims.

¹⁷⁵ The charity often faces a dilemma since it wants to induce a signature on a subscription card but does not want to state clearly that the subscription is not intended to be enforceable. See Konefsky, *supra* note 24, quoting from the language of the brief for the National Chautauqua County Bank of Jamestown, presumably written by Robert H. Jackson, later Associate Justice of the United States Supreme Court, as follows:

The printed form was supplied by the plaintiff and must be interpreted against it. The document seems carefully devised to induce execution rather than to force collection.

It does not style itself "contract" or "promissory note". Many a cautious widow would shy at that! "Estate Pledge", seductive creature of the lay mind -- suggestive of futurity and moral duty -- not a suggestion of establishing creditor and debtor relationship or an unalterable obligation. The only suggestion of contract about it is the effort to recite for her a consideration - in that they used recitals more persuasive to signing than collection, "interest in Christian Education" - so by this recital could be urged all the good things in both the real and the hypothetical worlds. "Subscription of others" - Here the social pressure of not being outdone in virtue by others would impress any prospective drivee. Certainly it is not too much to expect that those who conduct "intensive drives" to convert the charitable tendencies and religious impulses of elderly women into bills receivable should do so by language plainly conveying to the driven one the effect of her act.

Id. at 698-99.

¹⁷⁶ MURRAY, *supra* note 73, at 278 credits the charitable subscription cases as leading the way in the development of contract law:

Whatever problems are inspired by the use of the detrimental reliance theory to enforce charitable subscriptions, however, it is clear that the expanded use of detrimental reliance which pervades modern case law is due in no small measure to the success of the doctrine in charitable subscription cases. While a few courts recognize other antecedents of the modern doctrine, the typical judicial inquiry into the history of detrimental reliance will focus upon the use of the device in charitable subscription cases. (citations omitted).

III) Duty to Enforce Charitable Pledges

It is generally accepted that directors and trustees of nonprofit organizations owe a duty of care to the organization.¹⁷⁷ However, the scope of this duty is unsettled. If a charitable pledge is treated as enforceable by the courts, must a director of the charitable organization uphold his duty of care by seeking enforcement of the pledge? Do the organization's directors break their duty of care if they fail to do so? Directors of nonprofit organizations face these questions when pledges go unfulfilled or abandoned. High-profile events, such as convicted Wall Street arbitrageur Ivan Boesky's pledge to Princeton University and convicted investment advisor David Bloom's donation and pledge to Duke University,¹⁷⁸ should heighten the nonprofit director's awareness both of the potential for donors to abandon or leave pledges unfulfilled and the conflicting reasons for deciding on whether to enforce a pledge. An inquiring director, however, will not find straightforward answers to questions concerning his or her duties.

The case law concerning the nonprofit director's duty of care generally involves mismanagement, nonmanagement,¹⁷⁹ or failure to comply with duties clearly stated by legal authorities or in an organization's bylaws, articles or trust instruments. In addition, certain sources of authority discuss a nonprofit director's general duty of care, such as the Restatement (Second) of Trusts, the Model Nonprofit Code

¹⁷⁷ DANIEL L. KURTZ, BOARD LIABILITY - GUIDE FOR NONPROFIT DIRECTORS 21 (1988); HOWARD L. OLECK, NONPROFIT CORPORATIONS, ORGANIZATIONS AND ASSOCIATIONS (4th ed. 1980); Gordon H. Marsh, *Governance of Non-Profit Organizations: An Appropriate Standard of Conduct for Trustees and Directors of Museums and Other Cultural Institutions*, 85 DICK. L. REV. 607 (1981); Thomas H. Boyd, Note, *A Call to Reform the Duties of Directors Under State Not-For-Profit Corporation Statutes*, 72 IOWA L. REV. 725 (1987); Alan C. Geolot, Note, *The Fiduciary Duties of Loyalty and Care Associated With the Directors and Trustees of Charitable Organizations*, 64 VA. L. REV. 449 (1978); Note, *Duties of Charitable Trust Trustees and Charitable Corporation Directors*, 2 REAL PROP. PROB. & TRUST J. 545, 560 (1967).

¹⁷⁸ See text *infra* at Part II.D.

¹⁷⁹ See, e.g., *Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses & Missionaries*, 381 F. Supp. 1003 (D.D.C. 1974) [hereinafter "Lucy Webb Hayes"] (directors failing to manage organization's funds); *Louisiana World Exposition v. Federal Ins. Co.*, 858 F.2d 233 (5th Cir. 1988), *reh'g denied*, 864 F.2d 1147 (5th Cir. 1989) [hereinafter "Louisiana World Exposition"] (directors' alleged failure to manage and supervise organization's assets and personnel); *Johnson v. Johnson*, 515 A.2d 255 (N.J. Super. Ct. Ch. Div. 1986) (alleged mismanagement of foundation's investments); *Lynch v. John M. Redfield Found.*, 88 Cal. Rptr. 86 (Ct. App. 1970) (mismanagement by directors in allowing organization's funds to accumulate in non-interest bearing accounts for approximately five years).

and the Revised Model Nonprofit Corporation Act.¹⁸⁰ Diligent directors must synthesize these various strands of authority in order to estimate whether they have a duty to enforce an abandoned or unfulfilled pledge. As a threshold question, the directors must determine whether they are to be held to the standard of care applicable to trustees or to the standard applicable to corporate directors. The case law illustrates a trend as to which standard is considered appropriate, but it does not provide a definite answer. Next, directors must determine their obligations under the applicable standard.

This section will discuss the duties of the nonprofit director under both the trustee and corporate standards and will illustrate the trend towards imposing a corporate standard. The difficulties with the enforcement of such duties and supervision of directors will be discussed, and current relevant developments in the accounting standards area will be reviewed. The section will end with an examination of several hypothetical situations applying the duty to enforce under both the trustee and corporate standards and illustrating the various tensions that can influence nonprofit directors' decisions.¹⁸¹

The article concludes that charity directors and trustees generally do have a duty to enforce binding pledges. This duty can be avoided only when, after careful analysis, the directors or trustees conclude that enforcement would be futile, too costly, or more damaging to the charity (under the particular circumstances of the pledge in question) than abandoning the claim. Concededly, a general duty to enforce has not yet been articulated in decisional law. The logic of the relevant authorities points directly towards that duty, however, and it is probable that courts will begin to impose that duty when they must face the issue.

A) Trustee Standard

In the absence of any specific provisions in the trust instrument, the trustee of a private trust must act according to certain fiduciary duties.¹⁸² The high fiduciary obligation imposed on trustees is strictly enforced. Judge Cardozo described the standard of conduct for trustees as follows:

¹⁸⁰ See notes 181 and 214, *infra*.

¹⁸¹ See, e.g., *McDaniel v. Frisco Employees' Hosp. Ass'n.*, 510 S.W.2d 752 (Mo. Ct. App. 1974) (trustees of hospital attempting to dissolve corporation improperly).

¹⁸² RESTATEMENT (SECOND) OF TRUSTS § 164(b) (1959).

A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.¹⁸³

1) Duties of a Trustee of a Private Trust

The Restatement (Second) of Trusts subdivides the trustee's fiduciary obligation into several categories. The trustee must exercise reasonable care and skill,¹⁸⁴ take and keep control of trust property,¹⁸⁵ preserve the trust property,¹⁸⁶ enforce claims,¹⁸⁷ and prudently invest trust property.¹⁸⁸ The trustee's failure to perform adequately any of these duties could result in his liability.

In the administration of a private trust, including the making of investment decisions, the trustee must exercise such care and skill as a man of ordinary prudence would use in dealing with his own property.¹⁸⁹ As stated in the Restatement (Second) of Trusts section 174:

The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill.¹⁹⁰

Even a negligent failure to meet this high standard could result in the trustee's personal liability. Furthermore, if the trustee has greater skill

¹⁸³ *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

¹⁸⁴ RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).

¹⁸⁵ *Id.* at § 175.

¹⁸⁶ *Id.* at § 176.

¹⁸⁷ *Id.* at § 177.

¹⁸⁸ *Id.* at § 227.

¹⁸⁹ *Id.* at § 174.

¹⁹⁰ Comment a to RESTATEMENT (SECOND) OF TRUSTS § 174 provides:

a. *Standard of care and skill.* The standard of care and skill required of a trustee is the external standard of a man of ordinary prudence in dealing with his own property. A trustee is liable for a loss resulting from his failure to use the care and skill of a man of ordinary prudence, although he may have exercised all the care and skill of which he was capable. On the other hand, if the trustee has a greater degree of skill than that of a man of ordinary prudence, he is liable for a loss resulting from the failure to use such skill as he has. . . .

than that of an ordinary prudent man, the trustee is under a duty to employ such skill and care as can be attributable to him.¹⁹¹ Such a rigorous standard of skill and care arises from the concept that the trust beneficiaries expect that the trust funds be managed with due diligence and skill.¹⁹²

The trustee also must meet the same high standard to preserve the trust property and to take reasonable steps to take and keep control of it. The following situation illustrates the extent of this duty:

A is the trustee of certain chattels. B converts chattels. Although B is solvent and a prudent investor would have brought an action against him to recover the chattels or their value, A neglects to do so. B later becomes insolvent. A is liable.¹⁹³

According to this illustration, the trustee must take the necessary steps to preserve the trust property by claiming and protecting the trust's assets.¹⁹⁴ Failure to preserve the property results in personal liability.

2) Duties of a Trustee of a Charitable Trust

The duties of a trustee of a charitable trust are as rigorous as those of a private trustee. The significant difference between a charitable trustee and a private trustee is that the charitable trustee ordinarily owes duties not to specific beneficiaries,¹⁹⁵ but to an amorphous mass of beneficiaries. The state attorney general usually takes on the role of the specific beneficiary and enforces the trustee's duties in the public interest.¹⁹⁶ Trustees of both kinds of trusts, however, share the same standards and duties of ordinary skill and prudence, a duty of loyalty,¹⁹⁷ a duty not to

delegate,¹⁹⁸ and a duty not to commingle assets,¹⁹⁹ among others. In practice, however, the application of these standards and duties to charitable trustees may not be as strict, due to the sporadically-working enforcement mechanism of the state attorneys general.²⁰⁰

3) Specific Duties of Trustees

a) Duty to Pursue Claims

The trustee must take reasonable steps to realize claims and enforce debts which are held by the trust²⁰¹ or else face personal liability for the loss. If a person has promised to transfer property to the trust, the trustee must take reasonable steps to enforce the promise.²⁰²

This duty may be modified if it would be unreasonable to enforce the claim. If the trustee reasonably determines that the enforceability or collectability of a claim is doubtful, or if the related expenses seem unrealistically high, the trustee can submit to arbitration or compromise and may even be excused from bringing an action.²⁰³ Such decisions will be based upon the given facts and circumstances of each claim. Section 192 of the Restatement (Second) of Trusts provides:

The trustee can properly compromise, submit to arbitration or abandon claims affecting the trust property, provided that in so doing he exercises reasonable prudence.²⁰⁴

¹⁹⁸ RESTATEMENT (SECOND) OF TRUSTS § 171 (1959); SCOTT ON TRUSTS, *supra* note 190, at § 379.

¹⁹⁹ RESTATEMENT (SECOND) OF TRUSTS § 179 (1959); SCOTT ON TRUSTS, *supra* note 190, at § 379.

²⁰⁰ See text *infra* at Part II.E.

²⁰¹ RESTATEMENT (SECOND) OF TRUSTS § 177.

²⁰² *Id.* at § 177 cmt. a.

²⁰³ *Id.* at § 177 cmt. c.

²⁰⁴ Comment c to § 192 provides:

c. *Abandonment of Claim.* The trustee cannot properly abandon claims affecting the trust property unless it reasonably appears that a suit would be futile or the expense of litigation or the character of the claim would make it reasonable not to bring suit and he is unable to effect any reasonable settlement by compromise or submission to arbitration.

¹⁹¹ *Id.*; AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 174 (4th ed. 1987) [hereinafter SCOTT ON TRUSTS].

¹⁹² SCOTT ON TRUSTS, *supra* note 190, at § 164.

¹⁹³ RESTATEMENT (SECOND) OF TRUSTS § 176 illustration 4 (1959).

¹⁹⁴ SCOTT ON TRUSTS, *supra* note 190, at § 176.

¹⁹⁵ SCOTT ON TRUSTS, *supra* note 190, at § 174; See Geolot, Note, *supra* note 176, at 452.

¹⁹⁶ SCOTT ON TRUSTS, *supra* note 190, at § 391; GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 411 (rev. 2d. ed. & Supp. 1991) [hereinafter BOGERT ON TRUSTS].

¹⁹⁷ RESTATEMENT (SECOND) OF TRUSTS § 170 (1959). Note that under the duty of loyalty the trustee must administer the trust solely in the interest of the beneficiary. Although this is an important trustee duty, it deals mainly with self-dealing which is inconsequential to the duty to protect an asset which is the focus of this paper.

b) Duty to Invest Prudently

The strict duties of care and skill in administering a private or charitable trust affect the trustee's duties to invest. The trustee has a duty to make only those investments which a prudent person would make of his or her own property.²⁰⁵ This investment standard has become known as "the prudent man rule" as articulated in *Harvard College v. Amory*.²⁰⁶ Under the prudent man rule, the trustee must keep the preservation of the estate in view and distribute the risk of loss through a reasonable diversification of investments.²⁰⁷ The duty to diversify can be excused if the trustee acts prudently in not doing so. In addition, the trustee must act with a degree of caution when administering the invested funds.²⁰⁸

c) The New Prudent Investor Rule

Although the standards for trustee administration have varied little through the years, the recent change in the prudent investor rule may raise concerns in the future for trustees in their management approach. In 1990, the American Law Institute drafted proposed changes to the Prudent Investor Rule of section 227 of the Restatement (Second) of Trusts. These proposed changes were recently adopted as the Restatement (Third) of Trusts section 227²⁰⁹ ("new section 227"). New section 227 provides as follows:

The trustee is under a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements and other circumstances of the trust.

(a) This standard requires the exercise of reasonable care, skill and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall

²⁰⁵ RESTATEMENT (SECOND) OF TRUSTS § 227.

²⁰⁶ 26 Mass. (9 Pick.) 446, 461 (1830). The rule states: "He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds considering the probable income as well as the probable safety of the capital to be invested."

²⁰⁷ RESTATEMENT (SECOND) OF TRUSTS § 228.

²⁰⁸ *Id.* at cmt. c.

²⁰⁹ RESTATEMENT (THIRD) OF TRUSTS (Prudent Investor Rule) § 227 (1992).

investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust.

(b) In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so.

(c) In addition, the trustee must:

(1) conform to fundamental fiduciary duties of loyalty (§ 170) and impartiality (§ 183);

(2) act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents (§ 171); and

(3) incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship (§ 188).

(d) The trustee's duties under this Section are subject to the rule of § 228, dealing primarily with contrary investment provisions of a trust or statute.

The revisions were drafted as a response to the conflict between the prudent man rule and modern asset management practices.²¹⁰

As the prudent man rule of *Harvard College* was interpreted by courts, categories of imprudent investments gradually evolved. As a result, a trustee investing in one of these "imprudent" categories might be liable even if he used prudence, skill and caution. With the fast-paced conditions of modern finance, this inflexibility has become unjustified and often is itself imprudent.²¹¹ Thus, the American Law Institute proposed the revisions in which the objectives

range from that of liberating expert trustees to pursue challenging, rewarding, non-traditional strategies when appropriate to the particular trust, to that of providing other trustees with reasonably clear guidance to safe harbors that are practical, adaptable, readily identifiable and expectedly rewarding.²¹²

²¹⁰ *Id.* See generally Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52 (1987).

²¹¹ RESTATEMENT (THIRD) OF TRUSTS § 227 introduction (1992).

²¹² *Id.* at 3.

The Restatement (Third) of Trusts seeks to modernize and make trust investment law more specific, and at the same time restore the generality and flexibility of the original prudent man rule.

New section 227 thus has a dual impact on trustees. The standards of investment are more flexible because there are no *per se* imprudent categories of investment. In practice, the trustee's duty to be prudent and cautious in making investments will become more demanding. Trustees can no longer invest in an approved investment category and then stand back and watch. Under the new standard, the trustee must monitor and review investments with prudence and skill.²¹³ This change may compel trustees, exercising their discretion, to be more alert and active in deciding whether to enforce a claim.

B) Corporate Standard

Like trustees, directors of nonprofit corporations owe a duty of care to the corporation, except that the standard applied to nonprofit directors is generally less strict than the standard applied to trustees.²¹⁴ The "corporate" standard, sometimes referred to as the "business" standard, is set forth in section 8.30(a) of the Revised Model Nonprofit Corporation Act ("RMNCA") as follows:

- (a) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:
 - (1) in good faith;
 - (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
 - (3) in a manner the director reasonably believes to be in the best interests of the corporation.²¹⁵

²¹³ RESTATEMENT (THIRD) OF TRUSTS § 227 cmt. b (Proposed Final Draft 1990).

²¹⁴ KURTZ, *supra* note 176, at 21; *Duties of Charitable Trust Trustees and Charitable Corporation Directors*, *supra* note 176, at 560; Boyd, Note, *supra* note 176, at 728; Geolot, Note, *supra* note 176, at 453.

²¹⁵ REVISED MODEL NONPROFIT CORP. ACT § 8.30, official cmt. (1988) ["RMNCA"]. See also KURTZ, *supra* note 176, at 23; Boyd, Note, *supra* note 176, at 736; Geolot, Note, *supra* note 176, at 453.

This standard is a derivation of the standard of care used to judge the conduct of directors of for-profit corporations.²¹⁶

Several state nonprofit statutes and various judicial decisions set forth the standard of care applied to for-profit corporations as the appropriate standard by which to evaluate the conduct of nonprofit directors.²¹⁷ Furthermore, the drafters of the Revised Model Nonprofit Corporation Act have established the corporate standard of care as the proper standard by which to judge directors of nonprofit corporations.²¹⁸ The RMNCA provision includes most of the major elements of the corporate standard found in related state statutes and case law.²¹⁹ Accordingly, this article will examine the crucial terms used in defining the statutory duty of care proposed by the RMNCA in order to illustrate the corporate standard of care. Only by understanding the duty of care imposed on directors can we determine if that standard mandates the enforcement of charitable pledges.

SECTION 8.30. of the RMNCA, entitled "GENERAL STANDARDS FOR DIRECTORS" provides:

- (a) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:
 - (1) in good faith;
 - (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
 - (3) in a manner the director reasonably believes to be in the best interests of the corporation.
- (b) In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
 - (1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

²¹⁶ See RMNCA § 8.30(a). See also RMNCA § 8.30 official cmt.; KURTZ, *supra* note 176, at 22-23.

²¹⁷ See *infra* notes 275 - 290 and accompanying text.

²¹⁸ RMNCA § 8.30 official cmt.

²¹⁹ RMNCA § 8.30. See also KURTZ, *supra* note 176, at 24.

- (2) legal counsel, public accountants or other persons as to matters the director reasonably believes are within the person's professional or expert competence;
- (3) a committee of the board of which the director is not a member, as to matters within its jurisdiction, if the director reasonably believes the committee merits confidence; or
- (4) in the case of religious corporations, religious authorities and ministers, priests, rabbis or other persons whose position or duties in the religious organization the director believes justify reliance and confidence and whom the director believes to be reliable and competent in the matters presented.
- (c) A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.
- (d) A director is not liable to the corporation, any member, or any other person for any action taken or not taken as a director, if the director acted in compliance with this section.
- (e) A director shall not be deemed to be a trustee with respect to the corporation or with respect to any property held or administered by the corporation, including without limit, property that may be subject to restrictions imposed by the donor or transferor of such property.²²⁰

As can be seen, RMNCA section 8.30 does not specify what particular acts or omissions will constitute failure by the directors to fulfill their prescribed duty of care.²²¹ Thus, an examination of the crucial terms in this provision is vital to define the RMNCA's duty of care.²²²

²²⁰ RMNCA § 8.30. The RMNCA was adopted in 1987 by the Subcommittee on the Model Nonprofit Corporation Law of the Business Law Section of the American Bar Association. The RMNCA is a complete revision of the Model Nonprofit Corporation Act promulgated in 1964. The revision was necessary because the original Act did not address certain issues, such as the standard of care required of directors of nonprofit corporations. Thus, one of the purposes of the RMNCA was to clarify and set forth the standard of care that governs the conduct of nonprofit directors. RMNCA, at xix and xxxv and at § 8.30 official cmt.

²²¹ RMNCA § 8.30. See also KURTZ, *supra* note 176, at 132, n. 16. The same is true for equivalent state statutes.

²²² KURTZ, *supra* note 176, at 23.

1) Basic Requirements of the Standard

a) The "Good Faith" Requirement

First, the RMNCA requires that directors act in "good faith" in discharging their duties.²²³ This requirement normally involves determining the director's state of mind.²²⁴ In deciding whether the good faith element is present, courts will look to objective facts and circumstances which tend to indicate the director's subjective motivation in acting.²²⁵

b) The "Best Interest" Requirement

Second, the RMNCA requires that directors act in a manner that they reasonably believe is in the "best interest" of the corporation,²²⁶ rather than in furtherance of their own interests or the interests of others.²²⁷ This requirement also involves a subjective element,²²⁸ and it requires examination of objective facts and circumstances to evaluate the reasonableness of directors' beliefs.

c) The "Care" Requirement

Third, the RMNCA mandates that directors discharge their duties with the "care of an ordinarily prudent person in a like position under similar circumstances."²²⁹ The term "care" consists primarily of two basic elements: "diligence and attention."²³⁰ "Diligence" requires that directors take an active interest in the organization's activities.²³¹ "Attention" calls for directors to devote sufficient time to the

²²³ RMNCA § 8.30(a)(1).

²²⁴ RMNCA § 8.30 official cmt.

²²⁵ *Id.*; *Virginia Mason Hosp. Ass'n. v. Larson*, 114 P.2d 976 (Wash. 1941). See also KURTZ, *supra* note 176, at 25.

²²⁶ RMNCA § 8.30(a)(3).

²²⁷ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 25.

²²⁸ RMNCA § 8.30 official cmt.

²²⁹ RMNCA § 8.30(a)(2).

²³⁰ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 26.

²³¹ KURTZ, *supra* note 176, at 26.

organization's affairs so that they are reasonably informed about matters demanding their attention.²³²

Diligence and attention require directors to attend meetings regularly,²³³ as well as to review and understand any materials submitted to the board of directors.²³⁴ Directors must request and receive information necessary for them to fulfill their responsibilities as directors.²³⁵ Moreover, when a problem arises or a report on its face does not make sense, directors are compelled to address the matter by making reasonable inquiries into the surrounding facts and circumstances.²³⁶ The inquiry required is one that "an ordinarily prudent person in a like position would make under similar circumstances."²³⁷

d) The "Ordinarily Prudent Person" Requirement

"An ordinarily prudent person" is one who is expected to possess and exercise sound, common-sense judgment and to reach informed conclusions.²³⁸ Ordinary prudence does not require that the directors' conclusions be right or be guarantees of the success of the organization's investments or activities.²³⁹ Instead, the ordinary prudence element grants directors the right to use discretion in exercising judgment.²⁴⁰ More significantly, nonprofit directors are permitted to exercise their judgment with due regard to the nature, operations, finances and objectives of the organization.²⁴¹

e) The "In a Like Position" Requirement

The concept of "in a like position" highlights the fact that for-profit and nonprofit corporations have different goals, objectives and

²³² RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 26.

²³³ RMNCA § 8.30 official cmt. See also *Lucy Webb Hayes*, 381 F. Supp. at 1013; *Blankenship v. Boyle*, 329 F. Supp. 1089, 1102 (D.D.C. 1971); KURTZ, *supra* note 176, at 26.

²³⁴ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 26.

²³⁵ RMNCA § 8.30 official cmt.

²³⁶ *Id.*

²³⁷ *Id.* and text *infra* at Parts II.B.1.d-f.

²³⁸ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 26.

²³⁹ RMNCA § 8.30 official cmt.

²⁴⁰ *Id.*

²⁴¹ *Id.*

resources.²⁴² For-profit corporations operate to maximize profits and to benefit shareholders economically.²⁴³ On the other hand, nonprofit corporations operate to achieve the organization's specific public, charitable, or religious purposes.²⁴⁴ Thus, the directors of these different corporations are not in like positions relative to one another or relative to for-profit directors.²⁴⁵ For instance, nonprofit corporations, in contrast to their for-profit counterparts, frequently have limited financial support. Thus, directors of nonprofit corporations might reasonably conclude that the organization's lean financial situation necessitates undertaking, or alternatively, avoiding risky ventures.²⁴⁶

Nonprofit directors are distinguished from their for-profit counterparts in other ways. Specifically, they often serve without compensation and serve in their capacity as directors to promote the public good.²⁴⁷ The Official Comment of the RMNCA recognizes that courts may consider these two factors when determining if nonprofit directors are liable for a breach of their duty of care.²⁴⁸ No jurisprudential authority, however, expressly indicates that courts have given much weight to such factors in reaching their decisions. The Official Comment, in fact, cautions nonprofit directors who serve on a volunteer basis or who own no economic interest in the corporation that such status does not give them license to disregard or ignore their responsibilities as directors of the organization.²⁴⁹

f) The "Under Similar Circumstances" Requirement

The phrase "under similar circumstances" involves examining the particular conditions under which the directors make their decisions.²⁵⁰ Nonprofit directors are not operating under similar circumstances as for-profit directors due to the differences in the nature

²⁴² *Id.* See also KURTZ, *supra* note 176, at 26-27.

²⁴³ RMNCA § 8.30 official cmt.

²⁴⁴ *Id.*

²⁴⁵ *Id.* See also KURTZ, *supra* note 176, at 27.

²⁴⁶ RMNCA § 8.30 official cmt.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* See also KURTZ, *supra* note 176, at 27.

and objectives of the two types of organizations.²⁵¹ Some factors considered in applying the "under similar circumstances" test include the size and complexity of the organization, the necessity for an urgent decision, the potential risks and benefits of the decision, and the information available to the directors at the time of a decision.²⁵² For instance, the directors' use of incomplete information to evaluate a proposed investment may be reasonable if the offer is available only for a limited time and the investment, if successful, could result in substantial benefits to the organization.²⁵³

The term "under similar circumstances" also involves examining the special background and qualifications of the individual directors. Individuals are often elected to serve as directors of nonprofit organizations because either they have expertise in raising funds or because they have made significant financial contributions to the organization.²⁵⁴ Ordinarily, such directors possess no other particular skill or background that would benefit the organization.²⁵⁵ In applying the standard of care to such directors' conduct, the law does not require any special skill or expertise from such directors, unless the background or knowledge of a particular director indicates that he or she possesses some special ability, such as knowledge of accounting.²⁵⁶

Although a particular director's role should be considered in determining whether he or she has met the requisite standard of care, the law nevertheless mandates that all board members must be functioning directors and not mere figureheads.²⁵⁷ Accordingly, the RMNCA does not

²⁵¹ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 27.

²⁵² KURTZ, *supra* note 176, at 27.

²⁵³ *Id.*

²⁵⁴ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 30.

²⁵⁵ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 30.

²⁵⁶ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 27, 30. See, e.g., *Creighton Home for Poor Working Girls' Trust v. Waltman*, 299 N.W. 261, 268 (Neb. 1941); *Graham Bros. Co. v. Galloway Woman's College*, 81 S.W.2d 837, 840 (Ark. 1935); *Midlantic Nat'l Bank v. Frank G. Thompson Found.*, 405 A.2d 866, 871-72 (N.J. Super. Ct. Ch. Div. 1979).

²⁵⁷ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 27, 30. Many charitable organizations avoid this problem by recognizing passive donors/directors through establishment of honorary or emeritus directors, advisory boards and other alternatives to encourage enhanced giving. KURTZ, *supra* note 176, at 30, 136 n. 30.

provide exceptions to the standard of care for those directors whose only role is to make significant annual contributions to the organization.²⁵⁸

2) The Case of Employee-Directors

The special role of employee-directors must be considered when determining possible liability for breach of the duty of care.²⁵⁹ Employee-directors should be expected to have a greater awareness of the corporation's activities and should be expected to take an active role in monitoring operations, problem-solving, and decision-making.²⁶⁰ Since active employee-directors are crucial to the operation of the organization,²⁶¹ volunteer directors may rely on employee-directors for both information and action.²⁶² Consequently, such employee-directors may bear a heavier legal obligation.²⁶³

3) Reliance and Delegation

In certain situations, nonprofit directors are permitted to rely on others for information to make decisions and to delegate authority to others to perform certain functions.²⁶⁴ The reliance and delegation provisions are an effort to respond to the practical needs of nonprofit corporations²⁶⁵ that tend to have comparatively large boards of directors.²⁶⁶ While for-profit corporations have boards that on an average consist of 13 directors,²⁶⁷ nonprofit corporations have boards that

²⁵⁸ KURTZ, *supra* note 176, at 27. See, e.g., *Ray v. Homewood Hosp., Inc.*, 27 N.W.2d 409, 411 (Minn. 1947).

²⁵⁹ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 27.

²⁶⁰ RMNCA § 8.30 official cmt.

²⁶¹ *Id.* See also KURTZ, *supra* note 176, at 134 n. 20.

²⁶² RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 134 n. 22; *infra* notes 263-274 and accompanying text for discussion of reliance and delegation provisions for corporate standard of care.

²⁶³ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 27.

²⁶⁴ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 28-29.

²⁶⁵ RMNCA § 8.30(b) and official cmt. See also KURTZ, *supra* note 176, at 28.

²⁶⁶ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 28.

²⁶⁷ KURTZ, *supra* note 176, at 5-6 (citing KORN, FERRY INT'L., BOARD OF DIRECTORS 12TH ANNUAL STUDY, Feb. 1985 at 4).

ordinarily consist of anywhere from 30 to 34 directors.²⁶⁸ The size and complexity of most nonprofit organizations make the reliance and delegation provisions particularly vital.²⁶⁹

Specifically, directors may rely on information, opinions, reports, and statements prepared and furnished by certain individuals and committees if they have a reasonable basis on which to rely and do in fact rely. The directors must read the relevant report, hear it presented, or otherwise evaluate it.²⁷⁰ If directors have a reasonable basis to be suspicious, or are in fact suspicious of the information, then the duty of care requires that the directors make further inquiry.²⁷¹

Directors of nonprofit corporations are also permitted to delegate authority to certain committees, officers, employees, or agents of the corporation so that these persons can perform various functions on behalf of the directors.²⁷² However, delegation is allowed only if the organization's affairs are continuously managed under the direction of the corporation's board of directors.²⁷³ Directors are entitled to assume that the delegated tasks are being performed responsibly (unless they know otherwise),²⁷⁴ if the directors have acted reasonably in delegating responsibility through the proper selection and continuing appraisal of the delegates.²⁷⁵

4) The Applicable Degree of Negligence

The corporate standard set forth in RMNCA section 8.30(a) is distinguished from the trustee standard in the degree of negligence that

²⁶⁸ KURTZ, *supra* note 176, at 6 (citing Israel Unterman and Richard Hart Davis, *The Strategy Gap in Not-For-Profits*, HARV. BUS. REV. May-June 1982, at 30; NOVA INSTITUTE, FUND-RAISING PRACTICES OF UNITED WAY AGENCIES IN NEW YORK CITY 57 (1980)).

²⁶⁹ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 28; MODEL BUSINESS CORP. ACT § 8.30, official cmt. (1988).

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² RMNCA §§ 8.01, 8.30, official cmts. See also KURTZ, *supra* note 176, at 28. Certain functions are nondelegable by the directors. For example, adopting by-law amendments or authorizing fundamental corporate changes are nondelegable functions. KURTZ, *supra* note 176, at 134 n. 23. See, e.g., N.Y. NOT-FOR-PROFIT CORP. LAW § 712(a) (McKinney 1991).

²⁷³ RMNCA §§ 8.01(b) and 8.30, official cmts.

²⁷⁴ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 28.

²⁷⁵ KURTZ, *supra* note 176, at 28.

causes a director to be liable for a breach of a duty of care.²⁷⁶ The general rule is that directors subject to the trustee standard are liable for simple negligence, while directors subject to the corporate standard must commit gross negligence before liability will attach.²⁷⁷ Notwithstanding the general rule, it is not apparent from the language of RMNCA section 8.30(a) that liability is predicated on a finding of gross negligence.²⁷⁸ In fact the language of RMNCA section 8.30(a) suggests that ordinary negligence is the standard for the for-profit directors.²⁷⁹

The case law likewise creates confusion by using the language of ordinary negligence (i.e. "ordinary" and "reasonable" care) while calling for a gross negligence standard. Consider the language of the court in *Stern v. Lucy Webb Hayes National Training School for Deaconesses & Missionaries*,²⁸⁰ which is the leading case²⁸¹ establishing the corporate standard as applicable to non-profit corporations:

Both trustees and corporate directors are liable for losses occasioned by their negligent mismanagement of investments. However, the degree of care required appears to differ in many jurisdictions. A trustee is uniformly held to a high standard of care and will be held liable for simple negligence, while a director

²⁷⁶ *Lucy Webb Hayes*, 381 F. Supp. at 1013 (D.D.C. 1974); *Louisiana World Exposition, Inc.*, 864 F.2d 1147, 1151-52 (5th Cir. 1989). See also KURTZ, *supra* note 176, at 22; Boyd, Note, *supra* note 176, at 728.

²⁷⁷ *Lucy Webb Hayes*, 381 F. Supp. at 1013; *Louisiana World Exposition, Inc.*, 864 F.2d at 1151-52. See also KURTZ, *supra* note 176, at 22; Boyd, Note, *supra* note 176, at 728.

²⁷⁸ See generally Alan R. Palmiter, *Reshaping the Corporate Fiduciary Model: A Director's Duty of Independence*, 67 TEX. L. REV. 1351, 1359-1360 (1989).

²⁷⁹ Michael P. Dooley, *Two Models of Corporate Governance*, 47 BUS. LAW. 461, 481 n. 61 (1992). Dooley suggests that the standard of care in RMNCA § 8.30(a) is one of ordinary care (negligence). See also WILLIAM E. KNEPPER & DAN A. BAILEY, *LIABILITY OF CORPORATE OFFICERS AND DIRECTORS* 39, 43, 188-89 (4th ed. 1988) [hereinafter "KNEPPER AND BAILEY"], in which the authors suggest that under the RMNCA Sec. 8.30 and at common law, in the absence or inapplicability of the business judgment rule, the standard is one of simple negligence (quoting from *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963)) that "directors of a corporation in managing corporate affairs are bound to use that amount of care which ordinarily careful and prudent men would use in similar circumstances." KNEPPER AND BAILEY state, "Although that is similar to the 'ordinary negligence' rule stated in the Model Business Corporation Act, later Delaware decisions have held that 'under the business judgment rule director liability is predicated upon gross negligence.'" *Id.* at 43-44 (citing *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985)).

²⁸⁰ 381 F. Supp. 1003 (D.D.C. 1974)

²⁸¹ *Louisiana World Exposition*, 864 F.2d at 1151.

must often have committed "gross negligence" or otherwise be guilty of more than mere mistakes of judgment. . . .

. . . More specifically, directors of charitable corporations are required to exercise ordinary and reasonable care in the performance of their duties, exhibiting honesty and good faith.²⁸²

By adopting the for-profit corporate standard as the standard for nonprofit corporations, the courts are, in effect, adopting the business judgment rule's standard of gross negligence.²⁸³ The gross negligence standard applicable to for-profit corporations has resulted in few for-profit corporate directors ever being held personally liable for their business decisions.²⁸⁴ A similar result may be expected in nonprofit corporation cases.

The general rule for the corporate standard of care may vary depending on the jurisdiction or on the provisions included in the particular organization's articles of incorporation or by-laws.²⁸⁵ For instance, in response to the litigation involving the officers and directors of the Louisiana World Exposition, the Louisiana legislature in 1987 enacted a statute shielding the officers and directors of nonprofit corporations from liability in the absence of allegations of "willful or wanton misconduct."²⁸⁶

²⁸² *Lucy Webb Hayes*, 381 F. Supp. at 1013 (citations omitted). The court justified its lowering of the standard of care relative to trustees on the basis that corporate directors have more extensive duties than trustees who can concentrate on the single function of investing the trust's assets:

This distinction may amount to little more than a recognition of the fact that corporate directors have many areas of responsibility, while the traditional trustee is often charged only with the management of the trust funds and can therefore be expected to devote more time and expertise to that task. Since the board members of most large charitable corporations fall within the corporate rather than the trust model, being charged with the operation of ongoing businesses, it has been said that they should only be held to the less stringent corporate standard of care.

²⁸³ One commentator on non-profit corporations recognizes this interaction of the business judgment rule and the corporate standard, stating "Among the important differences between the two are: trustees' liability for simple negligence in performing their duties in contrast to directors' enjoyment of the protection of the business judgment rule, making them effectively liable only for gross negligence" KURTZ, *supra* note 176, at 22 (emphasis added).

²⁸⁴ See Palmiter, *supra* note 277, at 1360.

²⁸⁵ *Lucy Webb Hayes*, 381 F. Supp. at 1013; *Louisiana World Exposition*, 864 F.2d at 1151-52. See also Boyd, Note, *supra* note 176, at 728.

²⁸⁶ LA. REV. STAT. ANN. § 9:2792.1 (West 1990). The Fifth Circuit in the *Louisiana World Exposition* case refused to accept the defendants' argument that the statute shielded some of them from liability, because the statute was adopted after the lawsuit began and

When applying the standard of care requirements to corporate directors, courts should be careful about second-guessing directors who made decisions in good faith, even though such decisions prove incorrect.²⁸⁷ Thus, directors who meet the requisite standard of care cannot be held liable for injury or damage resulting from unwise decisions or actions.²⁸⁸

Moreover, the RMNCA makes it clear that directors are not trustees with respect to the nonprofit corporation or any property held or administered by the corporation.²⁸⁹ Nonprofit directors who meet the general standard of care set forth in the statute may not be held liable for a breach of trust by improperly using, disposing of, or otherwise dealing with assets held by the corporation in trust.²⁹⁰ Depending on state law, the corporation itself may nevertheless be liable for breach of trust, but it may not seek indemnification or contribution from the directors.²⁹¹

5) The Business Judgment Rule

The business judgment rule is an offspring of the fundamental principle that the business and affairs of a corporation are managed under its board of directors.²⁹² The "business judgment rule" originated in the context of evaluating the conduct of directors of for-profit corporations.²⁹³ A familiar formulation of the rule, found in *Aronson v. Lewis*,²⁹⁴ is that the business judgment rule is:

[A] presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. . . . Absent an abuse of discretion, that judgment

was not intended to apply retroactively. *Louisiana World Exposition*, 858 F.2d at 244-45.

²⁸⁷ RMNCA § 8.30 official cmt.

²⁸⁸ RMNCA § 8.30(d), official cmt. No. 9. But see Dooley, *supra* note 278, at 481 n. 61, in which the author contends that the language of § 8.30(d) is tautological because it says that a director isn't liable for negligence if he wasn't negligent.

²⁸⁹ RMNCA § 8.30(e) official cmt.

²⁹⁰ RMNCA § 8.30 official cmt.

²⁹¹ *Id.*

²⁹² *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

²⁹³ KURTZ, *supra* note 176, at 49.

²⁹⁴ 473 A.2d 805 (Del. 1984).

will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption.²⁹⁵

The *Aronson* court then stated that in the absence of bad faith and self-dealing, the standard to be applied to director decisions under the business judgment rule is one of gross negligence.²⁹⁶

The business judgment rule is one of judicial abstention and should be applied before any applicable statutory or common law standard of care. In the absence of fraud, self-dealing, or bad faith, the plaintiff must overcome the business judgment rule by showing that the directors were grossly negligent in failing to properly inform themselves before making the decision. If this threshold is crossed and the directors lose the protection of the rule, then the appropriate standard of care is applied to the decision itself. Since directors must be grossly negligent to lose the protection of the business judgment rule, it is unlikely that directors will lose the protection of that rule and then escape liability under either the trustee or corporate standard of care.²⁹⁷

The rule protects directors from liability for business judgments that are plausibly rational and do not involve a conflict of interest by

²⁹⁵ *Id.* at 812 (citations omitted). Another formulation of the business judgment rule is found in *Gries Sports Enterprises, Inc. v. Cleveland Browns Football Co., Inc.*, 496 N.E.2d 959, 963-64 (Ohio 1986) as follows:

The business judgment rule is a principle of corporate governance that has been part of the common law for at least one hundred fifty years. It has traditionally operated as a shield to protect directors from liability for their decisions. If the directors are entitled to the protection of the rule, then the courts should not interfere with or second-guess their decisions. If the directors are not entitled to the protection of the rule, then the courts scrutinize the decision as to its intrinsic fairness to the corporation and the corporation's minority shareholders. The rule is a rebuttable presumption that directors are better equipped than courts to make business judgments and that the directors acted without self-dealing or personal interest and exercised reasonable diligence and acted with good faith. A party challenging a board of directors' decision bears the burden of rebutting the presumption that the decision was a proper exercise of the business judgment of the board.

²⁹⁶ The court stated, "While the Delaware cases use a variety of terms to describe the applicable standard of care, our analysis satisfies us that under the business judgment rule director liability is predicated upon concepts of gross negligence." 473 A.2d at 812. This view was confirmed in *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) in which the court stated "We think the concept of gross negligence is also the proper standard for determining whether a business judgment reached by a board of directors was an informed one," 488 A.2d at 873. KNEPPER AND BAILEY, *supra* note 278, at 44, point out that there is no clear definition of the term "gross negligence" and define it for their purposes as "... more than ordinary negligence but different in kind from wanton or willful misconduct."

²⁹⁷ See Dooley, *supra* note 278, at 481 n. 61.

guarding the reasonable board's decision-making process from intense judicial scrutiny.²⁹⁸ Protection of the directors' honest, informed business judgments encourages the undertaking of risky and innovative entrepreneurial activities.²⁹⁹

Considering this background, it is not clear to what extent the business judgment rule should apply to decisions of nonprofit directors.³⁰⁰ Some urge that it only be applied in a limited context because nonprofit corporations do not have the same built-in safeguards that for-profit corporations do to restrain or penalize poor business decisions by their boards. Specifically, for-profit corporations possess two major safeguards – shareholder derivative suits and the ability to measure definitively the directors' performance by objective economic factors.³⁰¹ In contrast, nonprofit corporations do not have shareholders to commence derivative suits, and they do not have the same economic measures as their for-profit counterparts do.³⁰² Instead, nonprofit corporations have only a "somewhat nebulous general public interest;"³⁰³ thus, the nonprofit board is less subject to close non-judicial scrutiny by other interested parties and the business judgment rule should not be so readily applied.

The extent to which the business judgment rule may apply to directors of nonprofit corporations, if at all, is not certain.³⁰⁴ A few courts have, nonetheless, applied the business judgment rule when evaluating the conduct of nonprofit directors.³⁰⁵ However, the drafters of the RMNCA explicitly elected not to include the rule in the Act,³⁰⁶ leaving application of the rule up to the courts.³⁰⁷ The drafters did, however, comment on the circumstances that should activate the business judgment rule. If the

²⁹⁸ KURTZ, *supra* note 176, at 49.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ KURTZ, *supra* note 176, at 49-50.

³⁰² KURTZ, *supra* note 176, at 49-50, 138 n. 43.

³⁰³ *Id.*

³⁰⁴ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 49.

³⁰⁵ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 50. See, e.g., *Morris v. Scribner*, 508 N.E.2d 136 (N.Y. 1987) (applying business judgment rule to directors of a religious corporation); *Graham Bros. v. Galloway Women's College*, 81 S.W.2d 837 (Ark. 1935); *Beard v. Achenbach Memorial Hosp. Ass'n.*, 170 F.2d 859 (10th Cir. 1948); *Midlantic Nat'l Bank v. Frank G. Thompson Found.*, 405 A.2d 866 (N.J. Super. Ct. Ch. Div. 1979).

³⁰⁶ RMNCA § 8.30 official cmt. no. 3. See also KURTZ, *supra* note 176, at 51, 138 n. 40.

³⁰⁷ RMNCA § 8.30 official cmt. no. 3. See also KURTZ, *supra* note 176, at 51, 138 n. 40.

directors meet the requisite standard of care set forth in the RMNCA, there is no need for any court to invoke the business judgment rule.³⁰⁸ The courts should use the rule only if the nonprofit directors have failed a threshold test by failure to comply with the standard of care established by section 8.30 of the RMNCA.³⁰⁹ Thus, the RMNCA effectively reverses the order of consideration from that which normally is used under the business judgment rule.³¹⁰

Encouraging risk-taking in the nonprofit area may conflict with the traditional cautious view held by many nonprofit directors -- that preservation of capital is of the utmost importance.³¹¹ Further, some analysts reject or limit the application of the rule to the conduct of nonprofit directors because they fear that applying this rule in the nonprofit area may result in insulating important matters of public policy from judicial scrutiny.³¹² Thus, the extent to which the business judgment rule should be invoked in the nonprofit context is a question whose answer depends upon the balance to be struck between providing directors with business discretion and limiting discretion because of reduced levels of practical scrutiny.

C) Are Nonprofit Directors Subject to the Trustee Standard or the Corporate Standard?

No clear consensus exists as to whether the trustee standard or the corporate standard should be used to evaluate the conduct of nonprofit

³⁰⁸ One commentator, reviewing the RMNCA comments and the paucity of relevant jurisprudence in the nonprofit context, suggests that the business judgment rule will have minimal impact. Little practical difference exists between the business judgment rule and the standard of gross negligence that usually imposes liability on corporate directors. Accordingly, the commentator concurs with the drafters of the RMNCA that the corporate standard of care should be applied to the conduct of nonprofit directors and, when that standard is properly applied, the use of the business judgment rule is of limited value.

Nevertheless, some justifications exist for applying the business judgment rule in the nonprofit context, based on the nature and financial structure of nonprofit corporations. For instance, use of the rule may be justified because of the reluctance by courts to hold nonprofit directors to too-exacting a standard of care, given the noncompensatory nature of the services rendered by such directors. Moreover, use of the rule tends to encourage charitable risk-taking that may stimulate innovative uses of nonprofit resources and thereby improve the financial stability of nonprofit corporations. KURTZ, *supra* note 176, at 50-51.

³⁰⁹ RMNCA § 8.30 official cmt. See also KURTZ, *supra* note 176, at 51, 138 n. 40.

³¹⁰ See Dooley, *supra* note 278, at 481 n. 61.

³¹¹ *Id.*

³¹² KURTZ, *supra* note 176, at 50-51.

directors, but the trend of modern state statutes and recent case law favors applying the corporate standard.³¹³ The RMNCA has also adopted the corporate standard of care, but that statute is not yet widely in force. Regardless of the current trend, the uncertainty in the law causes major problems for both nonprofit directors seeking guidance for their conduct and for courts seeking a legal standard of review.

Approximately twenty states, primarily drawing upon the corporate standard of care that applies to for-profit directors, have enacted statutes setting forth the standard of care required of directors of nonprofit corporations.³¹⁴ The remaining states have not yet provided such explicit statutory guidance.³¹⁵ A comparison of the state statutes indicates that, although the wording varies considerably, the substantive nature of such provisions are similar.³¹⁶ More specifically, all statutory provisions generally require that nonprofit directors "discharge their duties in good faith, and with the diligence and care that an ordinarily prudent person would exercise in a like position and under similar circumstances."³¹⁷ In other words, those states enacting statutes have adopted the corporate standard of care by which to judge the conduct of directors of nonprofit corporations.³¹⁸

Most of the state statutes, like RMNCA section 8.30(a), expressly pattern the standard of care required of directors of nonprofit corporations after the standard for directors of for-profit corporations.³¹⁹

³¹³ See KURTZ, *supra* note 176, at 22-24 (in which the author suggests it is fairly well established not only in the various statutes but also in judicial opinions); Marsh, *supra* note 176, at 615. See also Boyd, Note, *supra* note 176, at 732 in which the author suggests that the trustee standard should be used for directors of public benefit corporations and the corporate standard should be used for directors of mutual benefit corporations.

³¹⁴ Boyd, Note, *supra* note 176, at 736; KURTZ, *supra* note 176, at 23. See, e.g., CAL. CORP. CODE §§ 5231, 7231 (Deering 1991); CONN. GEN. STAT. ANN. § 33-447(d) (West 1989); GA. CODE ANN. § 14-3-113 (1990); ILL. REV. STAT. ch. 32, § 108.65 (1989); LA. REV. STAT. ANN. § 12:226(A) (West 1990); MICH. COMP. LAWS ANN. § 450.2541 (West 1990); N.J. STAT. ANN. § 15A:6-14 (West 1990); N.Y. NOT-FOR-PROFIT CORP. LAW § 717(a) (McKinney 1991).

³¹⁵ KURTZ, *supra* note 176, at 23.

³¹⁶ See, e.g., *supra* note 313. See also, Boyd, Note, *supra* note 176, at 736.

³¹⁷ See, e.g., *supra* note 313.

³¹⁸ KURTZ, *supra* note 176, at 23.

³¹⁹ Compare, MODEL BUSINESS CORP. ACT § 35 with RMNCA, § 8.30; CAL. CORP. CODE §§ 5231, 7231 (Deering 1991); CONN. GEN. STAT. ANN. § 33-447(d) (West 1989); MICH. COMP. LAWS ANN. § 450.2541 (West 1990); N.J. STAT. ANN. § 15A:6-14 (West 1990); N.Y. NOT-FOR-PROFIT CORP. LAW § 717(a) (McKinney 1991). See also KURTZ, *supra* note 176, at 22-23; Boyd, Note, *supra* note 176, at 740.

Unfortunately, some state statutes are unclear as to what standard the courts should apply to nonprofit directors.³²⁰ For instance, section 226A of the Louisiana Nonprofit Corporation Law³²¹ ("section 226A") provides:

Officers and directors shall be deemed to stand in a *fiduciary* relation to the corporation and its members, and shall discharge the duties of their respective positions in good faith, and with that *diligence, care, judgment and skill which ordinarily prudent men would exercise under similar circumstances in like positions.*³²²

The language of the statute seems ambiguous as to whether the trustee standard or the corporate standard should be applied.³²³ On the one hand, the term "fiduciary relation" suggests that directors of nonprofit corporations should be subject to the trustee standard of care.³²⁴ On the other hand, the "ordinarily prudent men" language suggests that the corporate standard is appropriate to evaluate the conduct of directors of nonprofit corporations.³²⁵

A comparison of the two standards demonstrates their significant differences:

RMNCA section 8.30(a)

Restatement (Second)
Trusts section 174

A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:

- (1) in good faith;
- (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
- (3) in a manner the director reasonably believes to be in the best interests of the corporation.

The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property;

While it is at least arguable that both authorities impose a simple negligence standard on the conduct of directors, Louisiana case law has adopted a gross negligence standard favored by the RMNCA. In *Louisiana World Exposition, Inc. v. Federal Insurance Company*³²⁶ the United States Court of Appeals for the Fifth Circuit confronted the question of whether, under section 226A, a director of a nonprofit corporation could be held liable for gross negligence. The defendants argued that a director could only be liable for fraud. The Fifth Circuit initially compared the language of section 226A with the language of section 91 of the Louisiana Business Corporation Law³²⁷ ("section 91") and noted that not only was the language of both statutes nearly identical, but that a comment to the Louisiana Nonprofit Corporation Law stated that the provisions of that law were conformed to those of the Business Corporation Law. Consequently, the court concluded that it must look to case law to determine whether a director of a nonprofit corporation was liable for gross negligence. The court quoted from *Pool v. Pool*,³²⁸ a 1943 decision, as follows:

³²⁶ 858 F.2d 233 (5th Cir. 1988).

³²⁷ LA. REV. STAT. ANN. § 12:91 (West 1990).

³²⁸ 16 So. 2d 132 (La. Ct. App. 1943).

³²⁰ See LA. REV. STAT. ANN. § 12:226(A) (West 1990). See also Boyd, Note, *supra* note 176, at 738; Marsh, *supra* note 176, at 614.

³²¹ LA. REV. STAT. ANN. § 12:226(A).

³²² *Id.* (emphasis added).

³²³ Boyd, Note, *supra* note 176, at 738; Marsh, *supra* note 176, at 614.

³²⁴ Boyd, Note, *supra* note 176, at 738. RMNCA § 8.30, official cmt. 1 notes that the term "fiduciary" is not used in the section because of the possible confusion between the corporate and trust uses of the term.

³²⁵ Boyd, Note, *supra* note 176, at 739.

Directors are not liable for mere errors of judgment on their part where they act in good faith. They are only required to exercise reasonable care and diligence and act in good faith. But they are liable for wilful neglect of duty, gross negligence or their fraudulent breach of trust.³²⁹

The court held that Louisiana law was clear, and concluded that directors could be liable for gross negligence in the discharge of their duties.³³⁰

On rehearing in *Louisiana World Exposition*, the court addressed the related question of whether, under section 226A, a director could be held liable for simple negligence. The court noted that not only was section 226A nearly identical to section 91, but that section 91 was nearly identical to the analogous provisions contained in the original version of the Model Business Corporation Act, so that commentary on that act could be used to interpret section 91 and section 226A.³³¹

In addressing the issue of director liability for simple negligence, the court acknowledged that its task was simply to interpret the standard as it is written in the statute and noted that:

Although the language in the statutory standard makes no reference to concepts of ordinary or gross negligence, the courts have turned to these concepts to guide them in determinations of what the standard means. Our task here, then, is to clarify the meaning of the Louisiana statutory standard of care in terms of gross and ordinary negligence to give greater guidance to the district court on remand.³³²

The court reviewed Louisiana decisions³³³ interpreting the for-profit corporation law and concluded that Louisiana cases require at least gross

³²⁹ *Id.* at 135.

³³⁰ 858 F.2d at 238.

³³¹ 864 F.2d at 1149.

³³² *Id.*

³³³ In reviewing the apparent inconsistency in describing the standard of care applicable to directors in *Pool v. Pool*, *supra* note 327, the court in *Louisiana World Exposition* quoted from a commentator to the effect that:

[T]he discrepancy in standards suggested by the dicta of a Louisiana court in *Pool v. Pool* is more apparent than real. In stating that directors must exercise such "diligence, care, judgment and skill which ordinarily prudent men would exercise under similar circumstances in like positions," and then stating that directors are liable for their "gross negligence," the court did not use the term "gross negligence" to lower the articulated standard of care — but rather to refer to conduct that failed to satisfy the articulated standard. This use is confirmed by reference to the first authority cited by the court which states:

negligence as a basis for liability of directors of for-profit corporations, and that simple negligence is not enough under section 91.³³⁴

Then, looking to other jurisdictions for guidance regarding the appropriate standard for nonprofit corporations, the court concluded that the jurisprudence indicated a shift away from the trustee standard to the corporate standard for nonprofit corporations, citing *Lucy Webb Hayes* as the leading case indicating this shift. The court concluded that section 226A did not permit directors of nonprofit corporations to be held liable for simple negligence.

Although most decisions apply the corporate standard to nonprofit directors,³³⁵ courts have occasionally treated funds collected for charitable purposes as held in constructive trust, thereby holding directors of nonprofit corporations to the stricter trustee standard of care.³³⁶ The underlying reasoning has been the necessity of protecting the public interest, since significant funding comes from public donations given for use in furtherance of charitable purposes.³³⁷ For instance, in the 1970 case *Lynch v. John M. Redfield Foundation*,³³⁸ a California appellate court held that a foundation's directors were liable for mismanagement of the organization's assets by accumulating the foundation's funds in a non-interest bearing checking account for approximately five years.³³⁹ The court first ruled that the assets of a charitable corporation are

In some jurisdictions the only negligence for which directors are liable is gross negligence, or gross negligence which would warrant an imputation of fraud, but both in these and other jurisdictions, the measure of care required is ordinary and reasonable care, such as a reasonably prudent, careful, and skillful man exercises in the conduct of his own affairs, and they are liable for losses when they fail to exercise such care, and only when they fail to exercise such care. A failure to conform to this standard is held to constitute gross negligence.

S. Samuel Arsht and Joseph Hinsey IV, *Codified Standard--Safe Harbor but Chartered Channel: A Response*, 35 BUS. LAW. 947, 949 (1980).

864 F.2d at 1151 (citations omitted).

³³⁴ *Id.*

³³⁵ See KURTZ, *supra* note 176, at 23.

³³⁶ See, e.g., *Brown v. Concerned Citizens for Sickle Cell Anemia*, 382 N.E.2d 155 (Ohio 1978); *Lynch v. John M. Redfield Found.*, 88 Cal. Rptr. 86, 89-90 (Ct. App. 1970). See also OLECK, NONPROFIT CORPORATIONS, ORGANIZATIONS OR ASSOCIATIONS, *supra* note 176, at 290; MARION FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT 130-32 (1965) (treatment of assets of nonprofit corporations as trust funds); BOGERT ON TRUSTS, *supra* note 195 at §77; Boyd, Note, *supra* note 176, at 733-34; Geolot, Note, *supra* note 176, at 462-63.

³³⁷ *Brown v. Concerned Citizens for Sickle Cell Anemia*, 382 N.E.2d at 1155. See also Boyd, Note, *supra* note 176, at 734.

³³⁸ 88 Cal. Rptr. 86 (Ct. App. 1970).

³³⁹ *Id.* at 92.

"impressed with a trust."³⁴⁰ Accordingly, the court held that directors of nonprofit corporations are essentially trustees, and the foundation's directors were subject to the stricter trustee standard in determining whether they breached the duty of care owed to the foundation.³⁴¹ The court expressly rejected the directors' contentions that they should be subject to a lesser fiduciary standard because they served without compensation.³⁴² In addition, although the court acknowledged that substantial evidence showed that the foundation's directors acted in good faith, the court held that good faith is not a defense to an action for negligence.³⁴³

Courts have generally favored applying the corporate standard of care when evaluating the conduct of nonprofit directors, because the functions of directors of nonprofit corporations are more similar to those of the directors of for-profit corporations than they are to the traditional work of trustees of private trusts.³⁴⁴ Several commentators contend, however, that underlying the current jurisprudential trend favoring the corporate standard is the courts' concern that subjecting nonprofit directors to a too-strict standard of care may discourage competent individuals from serving on the boards of charitable organizations and, thereby, may diminish the success of such organizations in the accomplishment of their charitable goals.³⁴⁵ Commentators also suggest that court decisions that select the corporate standard are implicitly recognizing that nonprofit directors are entitled to special treatment since they frequently serve without compensation.³⁴⁶

An examination of recent case law shows the reasoning behind the trend of favoring the application of the corporate standard to the conduct of directors of nonprofit corporations. In the seminal *Lucy Webb Hayes*³⁴⁷

³⁴⁰ *Id.* at 89.

³⁴¹ *Id.*

³⁴² *Id.* at 91.

³⁴³ *Id.*

³⁴⁴ *Louisiana World Exposition*, 858 F.2d at 233; *Lucy Webb Hayes*, *supra* note 178, 381 F. Supp. at 1003; *Johnson v. Johnson*, 515 A.2d 255 (N.J. Super. Ct. Ch. Div. 1986); *Midlantic Nat'l Bank v. Frank G. Thompson Found.*, 405 A.2d 866 (N.J. Super. Ct. Ch. Div. 1979). See also KURTZ, *supra* note 176, at 22-24; Boyd, Note, *supra* note 176, at 734; Geolot, Note, *supra* note 176, at 463; Marsh, *supra* note 176, at 615.

³⁴⁵ KURTZ, *supra* note 176, at 22-24; Boyd, Note, *supra* note 176, at 734; Geolot, Note, *supra* note 176, at 463-65; Marsh, *supra* note 176, at 615.

³⁴⁶ See *supra* text at Part II.B.1.f.

³⁴⁷ 381 F. Supp. 1003 (D.D.C. 1974).

case, patients of a nonprofit hospital in the District of Columbia filed a class action, alleging various breaches of the duty of care on the part of the hospital's directors, one of which was negligent mismanagement of the hospital's investments.³⁴⁸ Although the court found that the directors' conduct constituted a breach of their fiduciary duties, the court declined to hold the directors liable for any loss or to remove them from their positions.³⁴⁹

In addressing the issue as to which standard of care the hospital's directors were subject, the court recognized that the issue is unsettled primarily because charitable corporations are, in effect, new legal entities which do not fit securely into the common law classification of corporations or trusts.³⁵⁰ The court elected to apply the less strict corporate standard rather than the trustee standard for the alleged breach of the duty of care.³⁵¹ The court reasoned that the corporate standard is the appropriate one because the functions of directors of nonprofit corporations are virtually indistinguishable from the functions of directors of for-profit corporations.³⁵²

The *Lucy Webb Hayes* court noted, however, that a difference existed in the degree of care required of trustees and corporate directors. Trustees are normally subject to a higher standard of care and are held liable for simple negligence,³⁵³ while corporate directors often are liable for gross negligence and not for mere mistakes of judgment.³⁵⁴ The court further explained that the distinction in the degree of care required by trustees and corporate directors results from the differences in their responsibilities and functions.³⁵⁵ Specifically, corporate directors have many areas of responsibility, such as operating an ongoing business and managing the corporation's assets, while traditional trustees' responsibilities are frequently limited to managing the trust funds.³⁵⁶

³⁴⁸ *Id.* at 1007.

³⁴⁹ *Id.* at 1017-20. Among the reasons for not granting compensatory relief against the directors was the fact that the case was one of first impression and that most of the objectionable practices had been rectified.

³⁵⁰ *Id.* at 1013.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

Consequently, trustees are expected to devote more time and expertise to conducting that fairly narrow task.³⁵⁷ In contrast, supervising all of the ongoing operations of the nonprofit corporation should place nonprofit directors under the less stringent corporate standard of care.³⁵⁸

In *Midlantic National Bank v. Frank G. Thompson Foundation*,³⁵⁹ a 1979 New Jersey decision, the court was called upon to clarify whether, under the Uniform Management of Institutional Funds Act,³⁶⁰ trust or corporate standards should be used when judging the payment of compensation of nonprofit directors in the area of investment management. Following the reasoning of *Lucy Webb Hayes*, the court held that the corporate standard is the proper standard to apply under the statute.³⁶¹ The court also relied on two additional distinctions between trustees and corporate directors.³⁶² First, unlike corporate directors, trustees traditionally are compensated based on the value of the trust assets managed and the income produced therefrom.³⁶³ In contrast, for-profit and nonprofit corporate directors are normally compensated on an annual salary or fee basis. Second, trustees generally are not allowed to delegate responsibility, but instead are expected to perform their own duties.³⁶⁴ In contrast, corporate directors are permitted, as well as expected, to delegate their duties to others.³⁶⁵

Thus, the corporate standard seems to be emerging from state statutory systems and judicial interpretation as the appropriate legal standard of care by which to determine if nonprofit directors have met their requisite duties of care owed to the organization.³⁶⁶ Directors' duties

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ 405 A.2d 866 (N.J. Super. Ct. Ch. Div. 1979).

³⁶⁰ N.J. STAT. ANN. 15:18-15 to -24 (West 1990).

³⁶¹ 405 A.2d at 870-71.

³⁶² 405 A.2d at 870.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ In 1986, in *Johnson v. Johnson*, 515 A.2d 255 (N.J. Super. Ct. Ch. Div. 1986), another New Jersey court reaffirmed *Midlantic Nat'l Bank's* holding that nonprofit directors are subject to the less stringent corporate standard of care. After the court applied the corporate standard to the conduct of a director of two charitable foundations, it held that the director was not liable for alleged mismanagement of the foundations' investments. The court in the *Johnson* case effectively equated the N.J.S.A. 15(A):6-14 (the New Jersey equivalent of RMNCA § 8.30(a)) standard of an ordinarily prudent person in similar circumstances to the standard under the business judgment rule. *Id.* at 264.

to enforce a pledge consequently must be examined with these probabilities in mind.

D) Effect of the Proposed FASB Statement on Duty to Enforce Charitable Pledges

The recent proposal³⁶⁷ of the Financial Accounting Standards Board ("FASB")³⁶⁸ suggests significant changes in the reporting of charitable contributions by nonprofit organizations for financial statement purposes. This is another factor that must be considered when analyzing the scope of the duty to enforce charitable pledges, because such pledges will be considered assets. An "asset" is more tangible than a "pledge", and directors will have a stronger and more immediate duty to protect a pledge/asset. Proposed Statement of Financial Accounting Standards No. 121-A provides uniform rules for reporting charitable pledges.³⁶⁹ As will be explained presently, FASB proposes that all unconditional pledges be recognized as assets, even though there is no assurance of the pledges being collected. At present, nonprofit organizations generally have the choice, for financial reporting purposes, to record charitable pledges as revenues and assets either at the time the pledges are made or at the time the pledges are actually received.³⁷⁰ If the organization selects the latter option, it is generally required to make a disclosure in its financial statement as to the existence of pledges made, but not yet received.³⁷¹

³⁶⁷ FIN. ACCOUNTING STANDARDS BD. PROPOSED STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 096-B, ACCOUNTING FOR CONTRIBUTIONS RECEIVED AND CONTRIBUTIONS MADE AND CAPITALIZATION OF WORKS OF ART, HISTORICAL TREASURES, AND SIMILAR ASSETS (EXPOSURE DRAFT OCT. 1990). A revised Exposure Draft was issued on NOVEMBER 17, 1992 as Proposed Statement No. 121-A, and this proposal will hereinafter be referred to as "PFAS No. 121-A". The new version is, for the purposes of this article, substantially unchanged.

³⁶⁸ The pronouncements of the Financial Accounting Standards Board are recognized as authoritative by the Securities and Exchange Commission (*see* the Commission's FINANCIAL REPORTING RELEASE No. 1, §101) and the American Institute of Certified Public Accountants (*see* Rule 203 of the Institute's RULES OF CONDUCT, as amended May 1973 and May 1979).

³⁶⁹ PFAS No. 121-A, *supra* note 366, at 1-2.

³⁷⁰ *Id.* at 11-12. *See generally* AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, AUDITS OF COLLEGES AND UNIVERSITIES (1973); AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, AUDITS OF PROVIDERS OF HEALTH CARE SERVICES (1990); and AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, STATEMENT OF POSITION 78-10, ACCOUNTING PRINCIPLES AND REPORTING PRACTICES FOR CERTAIN NONPROFIT ORGANIZATIONS (1978).

³⁷¹ PFAS No. 121-A, *supra* note 109, at 11-12.

PFAS No. 121-A defines "promise to give" as a written or oral promise to contribute cash or other assets to another entity.³⁷² The proposed statement distinguishes between unconditional pledges and conditional pledges for financial reporting purposes.³⁷³ An "unconditional pledge" is defined as a pledge that depends only on the passage of time or the demand by the pledgee organization for performance.³⁷⁴ PFAS No. 121-A would require all nonprofit organizations to recognize their unconditional pledges as revenues and assets (i.e., receivables) upon the donor making the pledge, instead of upon actual collection of the pledge.³⁷⁵ Realizing that some uncertainty usually exists about the collectibility of these receivables, FASB provides guidance for measuring the value of promises to give.³⁷⁶

A "conditional promise to give" is defined as a pledge that depends on the occurrence of a specified future and uncertain event to bind the pledgor.³⁷⁷ For instance, a person has made a conditional pledge if he or she conditions payment of the pledge on the nonprofit organization beginning construction of a building. FASB's proposed statement would require all nonprofit organizations to record conditional pledges as revenues and assets (i.e., receivables) when the conditions of the pledge have been substantially met.³⁷⁸ Accordingly, recognition of a conditional pledge is mandated when the conditional pledge effectively becomes an unconditional pledge.³⁷⁹ Thus, in the example above, the pledgee organization would record the pledge as a receivable in its financial statement for the fiscal year in which the organization commenced construction of the building. Until the conditions of a conditional pledge are substantially met, the nonprofit organization must report it as a refundable advance.³⁸⁰

³⁷² *Id.* at 2, 66.

³⁷³ *Id.* at 2.

³⁷⁴ *Id.* at 2, 67.

³⁷⁵ *Id.* at 4, 7. Unconditional pledges would be recorded at their fair value. *Id.*

³⁷⁶ *Id.* at 6, 36-7. See also FINANCIAL ACCOUNTING STANDARDS BOARD STATEMENT NO. 5, ACCOUNTING FOR CONTINGENCIES (1975) for standards by which to assess whether losses from uncollectible receivables should be recognized.

³⁷⁷ PFAS No. 121-A, *supra* note 366, at 7, 65.

³⁷⁸ *Id.* at 7.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

As far back as 1986, FASB began to review the accounting practices of nonprofit organizations.³⁸¹ Based on this review, FASB discovered that the accounting practices, as well as the authoritative guidance for such practices, were inconsistent.³⁸² Accordingly, FASB concluded that the proposed statement was necessary to make the financial statements of nonprofit organizations more consistent and uniform.³⁸³ Through establishment of uniform rules, FASB seeks to increase the usefulness of financial statement information to external users of nonprofit organizations, particularly donors, by having similar transactions accounted for in the same way.³⁸⁴ FASB believes that uniformity in the accounting standards will lead to a greater ability to compare the financial information of nonprofit organizations, which, in turn, will enhance the usefulness, understandability, and credibility of financial statements of nonprofit organizations.³⁸⁵

For many years, charity regulators³⁸⁶ and experts in the nonprofit area have called for the establishment of a single set of comprehensive accounting standards for nonprofit organizations.³⁸⁷ Like FASB, these commentators believe that uniformity of accounting standards for nonprofit organizations provides a way to produce useful and credible financial statements for donors and other external users.³⁸⁸ They point to the recent significant growth of the nonprofit sector in the American economy³⁸⁹ as an additional reason for the need for uniform rules.³⁹⁰

³⁸¹ *Id.* at 7. See also Johnston, *Charity Snafus Spur Call for Tighter Standards*, L.A. TIMES, Mar. 7, 1986, pt. 5, at 1, col. 1.

³⁸² PFAS No. 121-A, *supra* note 366, at 11-12.

³⁸³ *Id.* See also Peter Pae, *Nonprofit Groups Face Major Changes In How They Record Charitable Gifts*, WALL ST. J., Nov. 1, 1990, at C9; Alison L. Cowan, *New Accounting Proposal Creates Nonprofit Anxiety*, N.Y. TIMES, July 29, 1990, § 3, at 10.

³⁸⁴ PFAS No. 121-A, *supra* note 366, at 17. See also Pae, *supra* note 382, at C9, col. 2; Cowan, *supra* note 382, § 3, at 10, col. 1.

³⁸⁵ PFAS No. 121-A, *supra* note 366, at 17.

³⁸⁶ Some examples of charity regulators are National Charities Information Bureau, Inc., Philanthropic Advisory Service of the Council of Better Business Bureaus, National Committee for Responsive Philanthropy, and National Association of State Charity Officials.

³⁸⁷ Johnston, *supra* note 380, pt. 5, at 1, col. 1; Cowan, *supra* note 382, § 3, at 10, col. 1.

³⁸⁸ Johnston, *supra* note 380, pt. 5, at 1, col. 1; Cowan, *supra* note 382, § 3, at 10, col. 1.

³⁸⁹ INDEPENDENT SECTOR, NONPROFIT ALMANAC 1992-1993; DIMENSIONS OF THE INDEPENDENT SECTOR 16-17 estimates for 1990 that there were 983,000 organizations that came under 26 U.S.C. § 501 (c)(3) and (4) as "charitable" or social welfare organizations,

During the 1980's, the nonprofit sector grew into a \$200 billion-per-year enterprise.

Moreover, the commentators suggest that uniformity in accounting standards may eliminate or greatly reduce financial scandals involving charities.³⁹¹ In support of this proposition, they point to the lack of private and government regulatory supervision in the nonprofit sector compared to the quantity and quality of regulatory supervision found in the for-profit sector.³⁹² Specifically, the Securities and Exchange Commission and shareholders exert the requisite pressure on for-profit entities to present consistent and credible financial information that accurately reflects the operations of such corporations.³⁹³ Commentators reason that establishment of uniform accounting standards for financial statements of nonprofit organizations will lessen the regulatory gap and will exert pressure on nonprofit organizations to provide consistent and reliable financial information to donors.³⁹⁴

While PFAS No. 121-A seems to respond to the concerns of charity regulators and other experts, the proposed statement has caused an uproar in the nonprofit community for several reasons.³⁹⁵ First, nonprofit organizations are concerned that this proposed mandatory rule for recording charitable pledges will increase their reported revenues and make them look both richer and financially more stable than they would desire.³⁹⁶ These organizations fear that such inflated financial pictures will make potential donors complacent, thereby hindering possible future fundraising.³⁹⁷

with a collective income of \$289 billion, 6.2% of the national income, a percentage up from 4.9% in 1977.

³⁹⁰ Johnston, *supra* note 380, pt. 5, at 1, col. 1.

³⁹¹ *Id.* See, e.g., *Heritage Village Church and Missionary Fellowship, Inc. aka PTL, et al. v. Bakker, et al.*, 92 B.R. 1000 (Bankr. D.S.C. 1988) (Jim Bakker and PTL Scandal); Johnston, *supra* note 380, pt. 5, at 1, col. 1 (fraudulent conduct of chief fund-raiser and eight prominent businessmen in connection with American Cancer Society's fund-raising activities in New York City).

³⁹² Johnston, *supra* note 380, pt. 5, at 1, col. 1; Cowan, *supra* note 382, § 3, at 10, col. 1.

³⁹³ Johnston, *supra* note 380, pt. 5, at 1, col. 1; Cowan, *supra* note 382, § 3, at 10, col. 1.

³⁹⁴ Johnston, *supra* note 380, pt. 5, at 1, col. 1; Cowan, *supra* note 382, § 3, at 10, col. 1.

³⁹⁵ Pae, *supra* note 382, at C9, col. 1; Cowan, *supra* note 382, § 3, at 10, col. 1.

³⁹⁶ Pae, *supra* note 382, at C9, col. 1; Cowan, *supra* note 382, § 3, at 10, col. 1.

³⁹⁷ Pae, *supra* note 382, at C9, col. 1; Cowan, *supra* note 382, § 3, at 10, col. 1.

Second, nonprofit organizations point to the fact that the percentage of pledges to charities actually fulfilled varies, depending on the type of charitable organization.³⁹⁸ Although there appears to be no formal survey of charities' collection rates, the Wall Street Journal estimates that some charities experience a 95% success rate, while other charities are believed to experience only a 50% success rate.³⁹⁹ Recognizing the dramatic differences in the estimated rates of receipt, nonprofit organizations express concern that this variance will affect some organizations' abilities to record pledges accurately for financial reporting purposes. This would hinder FASB's goal of comparable and credible financial statements.⁴⁰⁰

The nonprofit sector believes that some nonprofit organizations, such as hospitals, will be able to account for pledges without too much trouble and, therefore, will not be adversely affected by the proposed rule.⁴⁰¹ Relying on past fundraising activities, these organizations will know what their collection record will most likely be, and they can set up adequate reserves for any losses they may suffer from an occasional bad debt.⁴⁰² However, other nonprofit organizations, in particular universities and churches, are expected to have a more difficult time reporting pledges accurately on financial statements because these charities generally attract large, infrequent donations from prominent individuals.⁴⁰³ Accordingly, these organizations are reluctant to record mere pledges that often go uncollected.⁴⁰⁴ Richard R. Spies, Vice-President for Finance of Princeton University, has stated:

"There are many cases where people for a variety of reasons can't make good on their pledges It can be business reversals, family circumstances, even a change of heart. We try to get people to honor those commitments, but we don't take legal efforts to force them to make good on those pledges" ⁴⁰⁵

³⁹⁸ Pae, *supra* note 382, at C9, col. 1; Cowan, *supra* note 382, § 3, at 10, col. 1.

³⁹⁹ Pae, *supra* note 382, at C9, col. 1.

⁴⁰⁰ Pae, *supra* note 382, at C9, col. 1; Cowan, *supra* note 382, § 3, at 10, col. 1.

⁴⁰¹ Cowan, *supra* note 382, § 3, at 10, col. 1.

⁴⁰² *Id.*

⁴⁰³ *Id.*; Pae, *supra* note 382, at C9, col. 1.

⁴⁰⁴ Cowan, *supra* note 382, § 3, at 10, col. 1.

⁴⁰⁵ *Id.*

Nonprofit organizations are currently faced with the problem of determining their responsibilities with respect to "tainted" pledges, i.e., pledges of ill-gotten assets or from persons who fall into disrepute after making the pledge.⁴⁰⁶ For instance, the University of North Dakota confronted whether it should decline Ralph Engelstad's offer of \$5 million to the university's hockey program when it learned of allegations of Mr. Engelstad's anti-Semitic activities.⁴⁰⁷ In the 1970's, Georgetown University returned a "six-figure" gift from the Libyan government on the ground that the university had no interest in establishing a working relationship with that government.⁴⁰⁸ Similarly, Dartmouth College turned down a \$5,000 scholarship award from Playboy Magazine, stating that "it would be inappropriate to accept money from a periodical that so many on campus feel is degrading to women."⁴⁰⁹ In 1986, Ivan Boesky said he would donate \$1.5 million to Princeton University.⁴¹⁰ When Boesky metamorphosed from a leading Wall Street arbitrager to a convicted felon bereft of disposable funds,⁴¹¹ Princeton was thankful that it elected not to report the pledge as revenue on its financial statement.⁴¹² Duke University had a similar problem with David Bloom, an art history graduate of Duke.⁴¹³ Bloom, an unregistered investment adviser, was convicted of defrauding investors of almost \$15 million.⁴¹⁴ Bloom took the investors' funds, pretended to purchase stocks for them, and instead purchased a costly art collection, two extravagant homes, two expensive cars and other luxury items for himself.⁴¹⁵ Shortly before his fraudulent

⁴⁰⁶ *Education: When a College Gets a Gift That Is Tainted*, N.Y. TIMES, Nov. 9, 1988, §B, at 11.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ Cowan, *supra* note 382, § 3 at 10, col. 1.

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.* See also David A. Vise and Steve Coll, *SEC Claims Artful Swindle; Investors' Funds Allegedly Spent on Paintings*, WASH. POST, Jan. 13, 1988, § 1, at A1; Albert Scardino, *Lush Life: Investor, 23, Named in Huge Fraud*, N.Y. TIMES, Jan. 13, 1988, § A, at 1; *School to Give Up Art Tied to Stock Scheme*, N.Y. TIMES, Jan. 14, 1988, § B, at 3; *Stock Fund Spent on Luxuries, SEC Says*, CHI. TRIBUNE, Jan. 14, 1988, § C, at 3; *Consultant, 23, Faces Charge of Mail Fraud; Unregistered Adviser Could Get 5-Year Term*, L.A. TIMES, Jan. 15, 1988, pt. 4, at 5; and Arnold H. Lubasch, *Wall St. "Whiz Kid" Gets 8-Year Term for Fraud*, N.Y. TIMES, Dec. 10, 1988, § 1, at 31.

⁴¹⁴ Lubasch, *supra* note 412, § 1, at 31.

⁴¹⁵ *Id.*

scheme was uncovered, Bloom pledged \$1 million to Duke University to create an endowment fund for Duke's Art Museum to acquire artwork by American artists.⁴¹⁶ He paid only \$20,000 on the \$1 million pledge.⁴¹⁷ Bloom also donated two paintings to the university.⁴¹⁸ In January, 1988, the officials of Duke University returned the paintings and money donated by Bloom to the court-appointed receiver.⁴¹⁹ The university also cancelled the remaining balance of Mr. Bloom's \$1 million pledge.⁴²⁰ In clarifying the university's actions, Leonard Pardue, a spokesman for Duke University, stated "officials thought that it would be no big deal to return art and money from an alumnus charged with embezzlement."⁴²¹

Finally, nonprofit organizations are worried that PFAS No. 121-A will hold them to a greater degree of accountability for the enforcement of charitable pledges.⁴²² Specifically, nonprofit organizations are concerned that this proposed rule will put them in the awkward position of either suffering significant write-offs or forcing them to press or shake down donors, possibly jeopardizing the organization's receipt of future donations.⁴²³ Richard T. Lawrence, the pastor of St. Vincent de Paul Church in Baltimore, best sums up the charities' concerns by stating, "If you press the guy, you may not get that pledge, and you'll certainly never get another one."⁴²⁴ For the above reasons, many nonprofit organizations, particularly universities and churches, would prefer to keep uncollected pledges off their books.⁴²⁵

All of the factors mentioned above would also enter into directors' duties of whether to enforce an unfulfilled or abandoned pledge. The problems of ill will and loss of prospective donors are legitimate business concerns. Such concerns must be weighed against the other factors surrounding the pledge. For instance, if the pledge is small, or if the donor is insolvent, when considered with the other factors, a

⁴¹⁶ Scardino, *supra* note 412, § A, at 1; *School to Give Up Art Tied to Stock Scheme*, *supra* note 450, § B, at 3.

⁴¹⁷ *School to Give Up Art Tied to Stock Scheme*, *supra* note 412, § B, at 3.

⁴¹⁸ Scardino, *supra* note 412, § A, at 1.

⁴¹⁹ *School to Give Up Art Tied to Stock Scheme*, *supra* note 412, § B, at 3.

⁴²⁰ *Id.*

⁴²¹ *Education: When a College Gets a Gift That Is Tainted*, *supra* note 405, at 11.

⁴²² *Id.*; see also Pae, *supra* note 382, at C9.

⁴²³ Cowan, *supra* note 382, § 3, at 10; Pae, *supra* note 382, at C9.

⁴²⁴ Cowan, *supra* note 382, § 3, at 10.

⁴²⁵ *Id.*; Pae, *supra* note 382, at C9.

director may prudently decide to forego enforcement. Circumstances, however, may cloud the picture, and the director's decision and subsequent action must be scrutinized under the appropriate standard. Fears of ill will among prospective donors may weigh heavily as a factor in foregoing enforcement under a conventional corporate standard; however, a stricter corporate or trustee standard may not allow a prudent director to forego enforcement based on such concerns.

E) Enforcement and Supervisory Duties of State Attorneys General

Although the corporate standard is usually applied to nonprofit directors, the states' attorneys general are vested with the power and discretion to enforce this duty upon the director. This discretion often results in the attorney general's inaction and so provides directors with greater opportunity to breach their fiduciary duties without penalty. The supervision mechanism of the attorneys general, therefore, must be understood in order fully to comprehend the difficulties in determining directors' duties to enforce charitable pledges.

The charitable trust or corporation serves a recognized charitable purpose -- it benefits the public. In general, the public, as a mass beneficiary, cannot enforce the duties of a charitable trustee or director, like a private beneficiary could.⁴²⁶ As a practical matter, then, to vest enforcement power in the beneficiaries was administratively impossible; thus, such regulatory power was historically given to the king who acted through his attorney general.⁴²⁷

In the United States, all states follow this structure and vest supervisory powers over charitable entities in a government official, usually the attorney general, either by statute or judicial decision.⁴²⁸ The attorney general's power of enforcement has been described as:

[T]he duty to oversee the activities of the fiduciary who is charged with management of the funds, as well as the right to bring to the

⁴²⁶ See FREMONT-SMITH, *supra* note 335, at 198.

⁴²⁷ Elias Clark, *Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979, 1005 (1957). Even before the Statute of Elizabeth, 1601, 43 Eliz. 1, ch.4, the Court of Chancery recognized and enforced charitable trusts at the request of the Attorney General.

⁴²⁸ *Id.* at 1005. See also James J. Fishman, *The Development of NonProfit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 669 (1985).

attention of the court any abuses which may need correction. Thus, a duty to enforce implies a duty to supervise (or oversee) in its broader sense. It does not, however, include a right to regulate, or a right to direct either the day-to-day affairs of the charity, or the actions of the court.⁴²⁹

The duty to enforce extends to all funds held for charity, whether in formal trust or not.⁴³⁰ The same holds true for a charitable corporation. Regarding the charitable corporate form, the attorney general has standing as a representative of the public which is to be benefitted by the corporation.⁴³¹

The rationale for designating a public officer as the beneficiary, rather than the public at large, is that the official can more efficiently enforce the charity's duties. Endowment of the attorney general with enforcement powers avoids the administrative nightmare of unreasonable and vexatious litigation by any member of the benefitted public,⁴³² as well as avoiding multiple suits against the charitable organization. In addition to avoiding vexatious litigation, bestowing enforcement on one entity avoids the publicity generated from multiple suits which may adversely affect the reputation of the organization and, in turn, harm fund-raising efforts.⁴³³

In several states, statutes expressly provide that the attorney general enforce charitable trusts and corporations.⁴³⁴ Several other states provide the same enforcement powers through case law.⁴³⁵ A county law

⁴²⁹ FREMONT-SMITH, *supra* note 335, at 198.

⁴³⁰ *Id.*

⁴³¹ Paul G. Haskell, *The University as Trustee*, 17 GA. L. REV. 1, 4 (1982).

⁴³² Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 449 (1960). See also BOGERT ON TRUSTS, *supra* note 195, at § 411.

⁴³³ Fishman, *supra* note 427, at 671.

⁴³⁴ WEST'S ANN. CA. GOV'T. CODE §§ 12580-12599.5 (1992); IDAHO CODE § 67-1401 (Michie 1989); ILL. REV. STATS. ch. 14, §§ 51-69 (1992 Supp.); ME. REV. STAT., ANN. tit. 5, § 194 (West 1989); ANN. CODE OF MD., EST. & TRUSTS LAW § 14-301 (1991); MASS. GEN. LAWS ANN. ch. 12, § 8 (West 1968 and 1992 Supp.); MICH. STAT. ANN. §§ 26.1192, 26.1200 (36)(1982); MINN. STAT. ANN. § 501B.31 (1990); N.Y. EST. POWERS & TRUST LAW § 8-1.1(f) (McKinney 1992); OHIO REV. CODE ANN. § 109.24 (Anderson 1992); ORE. R.S. § 128.710 (1991); S.C. CODE ANN. § 1-7-130 (Law. Co-op. 1991); VERNON'S ANN. TEX. CIV. STATS. PROPERTY LAW § 123.002 (1992 Supp.).

⁴³⁵ See, e.g., *State v. Griffith*, 2 Del.Ch. 392 (1868); *Attorney General v. Wallace's Devises*, 47 Ky. (7 B.Mon.) 611 (1847); *Attorney General v. Bedard* 105 N.E. 993 (Mass. 1914); *Stearns v. Newport Hospital*, 62 A. 132 (R.I. 1906); *State v. Taylor*, 362 P.2d 247 (Wash. 1961).

officer, rather than the attorney general, has the statutory power of enforcement in a few states.⁴³⁶ In sum, the attorney general or similar officer enjoys widespread authority of enforcement, granted either by case law or statute, in all but three states.⁴³⁷

The grant of supervisory power to the attorney general operates to exclude the general public from acting against charitable entities. Despite the attorney general's monopoly on enforcement, that officer cannot be compelled to bring an action for enforcement.⁴³⁸ The determination of whether litigation to enforce the charitable trust serves the public interest has been interpreted as a discretionary power belonging to the attorney general.⁴³⁹

If the attorney general fails to bring an action, a few states have allowed use of a relator.⁴⁴⁰ In such a case, the attorney general brings suit on the information provided by the relator. The use of relators derives from the quo warranto proceeding⁴⁴¹ but has been expanded in use in some jurisdictions in order to file abuses by charitable organizations with the attorney general.⁴⁴² Although the use of a relator seems theoretically to expand the standing to other persons, the attorney general still maintains control over the lawsuit.

The Restatement (Second) of Trusts section 391, however, appears to expand the field by recognizing that the attorney general is one of a few persons who can enforce a charitable trust. Section 391 states in pertinent part:

A suit can be maintained for the enforcement of a charitable trust by the attorney general or other public officer, or by a co-trustee,

⁴³⁶ See, e.g., NEB. REV. STAT. § 30-240 (1991) (district court has jurisdiction and control over charitable trusts and county attorney enforces); OHIO REV. CODE ANN. § 1719.05 (Anderson 1992) (county prosecuting attorney); N.D. CENT. CODE § 59-04-02 (Michie 1991) (attorney general and state's attorneys); FLA. STAT. ANN. § 737.501 (West 1992) (local state's attorney represents unascertainable beneficiaries).

⁴³⁷ The three states are Arizona, Vermont, and West Virginia. THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, POWERS, DUTIES AND OPERATIONS OF STATE ATTORNEYS GENERAL 313 (1977) hereafter "ATTORNEYS GENERAL COMMITTEE". On the powers of state officers generally, see BOGERT ON TRUSTS, *supra* note 195, at § 411; ATTORNEYS GENERAL COMMITTEE 314.

⁴³⁸ *Ames v. Attorney General*, 124 N.E. 2d 511, 513 (Mass. 1955).

⁴³⁹ Karst, *supra* note 431, at 451.

⁴⁴⁰ Fishman, *supra* note 427, at 669.

⁴⁴¹ *Id.* at 672.

⁴⁴² *Id.* at 673.

or by a person who has a special interest in the enforcement of the charitable trust. . . .⁴⁴³

Persons having a special interest are, for the most part, narrowly defined and include only those entitled to receive a benefit under the trust.⁴⁴⁴ Again, these persons often must join the attorney general as a party,⁴⁴⁵ so that the public interest in the administration of the trust will be adequately represented. These fairly severe limits on standing correspondingly enlarge the importance of the role of state attorneys general.

A wide range of possible court actions accompany the near-exclusive supervisory power of the attorney general. These actions include:

accountings, removal of trustees, dissolution of corporations, forced transfer of corporation property, or a combination of these. He may ask the court to force charitable fiduciaries to restore losses caused by breach of duty and to return profits made in the course of administration of the trust. He may seek to enjoin trustees from further wrongdoing or from continuing certain specific actions. . . . The attorney general, as well as trustees, may bring actions requesting modification or deviation from the terms of the trust, or cy pres application of funds.⁴⁴⁶

In practice, however, the power of the attorney general is seldom used. Although in theory the attorney general has power to enforce the duties of charitable trusts and corporations, there is no duty upon the attorney general to do so.⁴⁴⁷ In fact, in the absence of complaining beneficiaries of a charitable trust or corporation who would press for the taking of action, the attorney general will avoid taking affirmative action unless the case involves dishonesty or extreme imprudence.⁴⁴⁸ The attorney general's discretionary enforcement powers are, in essence, a business judgment rule of judging prudently when a breach is extreme

⁴⁴³ RESTATEMENT (SECOND) OF TRUSTS § 391 (1959).

⁴⁴⁴ For example, a charitable trust may be created for the benefit of the minister for the time being of a particular church. In such a case, a minister of the church can maintain a suit against the trustee for the enforcement of the trust. RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c (1959).

⁴⁴⁵ RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c (1959); SCOTT ON TRUSTS, *supra* note 190, § 391; BOGERT ON TRUSTS, *supra* note 195, at §§ 411, 414.

⁴⁴⁶ FREMONT-SMITH, *supra* note 335, at 233.

⁴⁴⁷ ATTORNEYS GENERAL COMMITTEE, *supra* note 436, at 314.

⁴⁴⁸ Karst, *supra* note 431, at 460.

enough to warrant enforcement. Theoretically, upon determining whether a breach has occurred, the attorney general should apply the appropriate fiduciary standard, whether it be the trust or corporate standard.

Actual enforcement against charitable trusts and corporations has been sporadic.⁴⁴⁹ Several reasons underlie this lack of action. First, the attorney general has many responsibilities that take higher priority than the supervision of charities. For instance, as late as 1977, only eight states assigned attorneys full-time to the enforcement of charitable trusts and the regulation of charitable corporations.⁴⁵⁰ In the same survey, eleven states had no attorneys assigned, while most had one or two part-time attorneys assigned to supervise charitable trusts and corporations.⁴⁵¹ Bogert notes that in most states there is also no provision as to how the enforcing officer should perform his duty, and rarely is another public official obliged to aid the attorney general in charity enforcement.⁴⁵²

The lack of resources in the attorneys general offices parallels the lack of information about charitable organizations. This lack of information regarding the existence and administration of charitable trusts and organizations results in further inaction.⁴⁵³ Although the information is available and could be produced by scouring through records, it would require a sizable staff and a significant budget in order to monitor the great number of charitable organizations.⁴⁵⁴

In recognition of the lack of information on charitable trusts, New Hampshire led the remedial effort by promulgating a statute which required charitable trusts to register their activities with the attorney general.⁴⁵⁵ Several states have passed similar statutes that impose reporting requirements.⁴⁵⁶ In 1954, the National Conference of Commissioners on

⁴⁴⁹ SCOTT ON TRUSTS, *supra* note 190, at § 391.

⁴⁵⁰ NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE REGULATION OF CHARITABLE TRUSTS AND SOLICITATIONS 8 (1977).

⁴⁵¹ *Id.*

⁴⁵² George G. Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 MICH. L. REV. 633, 639 (1954).

⁴⁵³ BOGERT ON TRUSTS, *supra* note 195, at §411; SCOTT ON TRUSTS, *supra* note 190, at §391.

⁴⁵⁴ Karst, *supra* note 431, at 452.

⁴⁵⁵ BOGERT ON TRUSTS, *supra* note 195, at §411; ATTORNEYS GENERAL COMMITTEE, *supra* note 436, at 314.

⁴⁵⁶ California, Georgia, Idaho, Illinois, Iowa, Massachusetts, Michigan, Minnesota, New Hampshire, New York, Ohio, Oregon, Rhode Island, South Carolina, and Washington. SCOTT ON TRUSTS, *supra* note 190, at § 391.

Uniform State Laws promulgated a model statute entitled the Uniform Supervision of Trustees for Charitable Purposes Act which features registration and reporting requirements and an enumeration of the attorney general's enforcement powers.⁴⁵⁷ This Act has been adopted in several states⁴⁵⁸ and requires registration with the attorney general's office and periodic reports to that office.⁴⁵⁹ The Act also grants investigatory, supervisory, and various enforcement powers to the attorney general.⁴⁶⁰ Such reporting requirements facilitate the attorney general's obligation to investigate and ascertain whether the funds of the charitable organization are being prudently managed and to determine if there are any improprieties in the management of the organization.

Although these reporting statutes help provide attorneys general with the information needed to discover improprieties, they have not corrected the fact that attorney general supervision in the area of charitable organizations is sporadic. The recent adoption of the Revised Model Nonprofit Corporation Act did little to rectify the problem. Under the RMNCA, the attorney general has the right to bring suit with respect to conflict-of-interest transactions and similar offenses if there is an abuse of assets held in charitable trust.⁴⁶¹ The attorney general also has the right to supervise assets upon dissolution.⁴⁶² These rights are the same that exist under common law and the state statutes. The RMNCA, however, does not address the problem of ineffective control and supervision by the attorney general.⁴⁶³ Although the RMNCA does provide the attorney general with

⁴⁵⁷ 7B U.L.A. (1988).

⁴⁵⁸ GA. CODE ANN. §§ 53-12-90 TO 53-12-102 (1991); ANN. CODE OF MD., EST. & TRUSTS LAW § 14-301(a) (1990); MASS. GEN. LAWS ANN. ch. 12, §§ 8-8M (West 1992); MICH. COMP. LAWS ANN. §§ 14.251-14.266 (West 1992); MINN. ST. ANN. §§ 501B.34-501B.45 (West 1993); NEV. REV. STAT. ANN. § 86.190 (Michie 1991); N.H. REV. STAT. ANN. §§ 7:19-7:29 (1991); N.Y. EST. POWERS & TRUSTS LAW § 8-1.4 (McKinney 1992); OHIO REV. CODE ANN. §§ 109.24-109.33 (Anderson 1992); R.I. GEN. LAWS §§ 18-9-1 to 18-9-17 (1991); S.C. CODE ANN. §§ 62-7-50 to 62-7-53 (Law Co-op. 1991); WASH. REV. CODE ANN. § 43.10-110 (West 1992).

⁴⁵⁹ 7B U.L.A., Uniform Supervision of Trustees for Charitable Purposes Act § 4, Register of Charities and § 6, Filing of Periodic Reports.

⁴⁶⁰ 7B U.L.A., Uniform Supervision of Trustees for Charitable Purposes Act § 8, Investigation and § 11, Power of Attorney General and Courts.

⁴⁶¹ RMNCA § 170 discusses the authority of the attorneys general.

⁴⁶² Michael C. Hone, Aristotle and Lyndon Baines Johnson: Thirteen Ways of Looking at Blackbirds and Nonprofit Corporations - The American Bar Association's Revised Model Nonprofit Corporation Act, 39 CASE W. RES. L. REV. 751, 767 (1988-89); Professor Hone's remarks in discussion.

⁴⁶³ *Id.* at 773. Professor Hone has responded in discussion that the subcommittee has not given the attorney general a right to meddle in the internal policy disputes of nonprofits.

the right to supervise, it does not establish affirmative duties, such as requiring yearly investigations of organizations in the absence of reported abuse.

In light of the existing authority, the attorney general or similar public official retains the right to supervise and enforce charitable organizations. For several reasons, however, this function has been inadequately utilized and abuses of charitable assets are rarely corrected unless they are both brought to the attention of the attorney general and are egregious. In determining whether to take action, the attorney general presumably measures the abuse according to the appropriate standard of conduct. The fact that charitable organizations are ongoing enterprises will probably lead the attorney general to apply a corporate standard. Only extreme showings of imprudence will likely prompt the attorney general to act.⁴⁶⁴ As a result, charitable organizations suffer from leadership judged by magnified leniency. First, courts are judging directors' duties under the corporate standard of care. Second, the attorney general uses the same discretionary standard to determine if and when to force directors of a nonprofit organization to act, and that official acts sporadically. This tiered discretionary approach results in the infrequent enforcement of duties upon directors of nonprofit organizations. In turn, directors can act more freely without the fear of attorney general interference.

F) Does the Director Have a Duty to Enforce Charitable Pledges?

Part I of this article illustrates that many charitable pledges will be enforceable under some legal theory, although often with only a tenuous connection to traditional contract law. If the pledge is enforceable, it takes on the character of a claim, contract or debt which the organization can legally act upon in order to recover. Furthermore, the pledge may very likely be regarded as an asset of the organization and must be treated as such by directors. Directors, as fiduciaries, must act with a certain requisite care either to protect the assets of the organization under the trustee standard, or to ensure the ongoing operability of the organization under the corporate standard. The general duties of care thus apply to directors' actions regarding an unfulfilled pledge. Although directors can be found

⁴⁶⁴ Karst, *supra* note 431, at 461.

to have a duty to enforce a pledge under either standard, each standard has its own focus.

There is an explicit duty to protect trust assets under the trustee standard of care. Beyond the general duty to exercise such care as a person of ordinary prudence would use in dealing with his or her own property,⁴⁶⁵ there are several specific duties which require a director under the trustee standard to protect the organization's assets. These include the duty to take and keep control of trust property,⁴⁶⁶ the duty to preserve the trust property (which can include bringing an action to recover assets),⁴⁶⁷ and the duty to enforce claims.⁴⁶⁸ Under that last duty, directors must enforce any debt owed the trust, including taking reasonable steps to enforce a person's covenant to transfer property to the trust.⁴⁶⁹ The duty to enforce, however, can be modified when it would appear unreasonable to enforce the claim because of expense or uncertainty.⁴⁷⁰

Two recent developments should alert directors under the trustee standard to reassess their attitudes towards enforcing pledges. First, the New Prudent Investor Rule,⁴⁷¹ although making investment standards more flexible, also imposes a stricter duty for trustees to be more active and careful in investing the organization's assets. This tightening of the supervisory duty could also impose on directors the duty to be more alert and careful in protecting and claiming assets by enforcing unfulfilled pledges.

Second, since PFAS No. 121-A treats pledges as financial assets, the contention that a trustee must enforce such a pledge is bolstered by the new financial status of pledges. The FASB proposal adds further support to the state courts' strong tendency to enforce charitable pledges. Consequently, a state attorney general may no longer be able to ignore directors' willful practices of not enforcing pledges. The financial statements alone will indicate that assets are being lost annually through nonenforcement, and this should alert the attorney general that fiduciary duties are being breached or ignored and therefore an official inquiry is necessary.

⁴⁶⁵ RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).

⁴⁶⁶ *Id.* at § 175.

⁴⁶⁷ *Id.* at § 176.

⁴⁶⁸ *Id.* at § 177.

⁴⁶⁹ *Id.* at cmt. a.

⁴⁷⁰ *Id.*

⁴⁷¹ RESTATEMENT (THIRD) OF TRUSTS § 227 (1992).

As discussed earlier, the recent trend has been to treat nonprofit directors not as trustees, but rather as answerable under the standard of care applied to a corporate director. In addition, the Revised Model Nonprofit Corporation Act adopted the corporate standard as the relevant standard of care for directors of nonprofit corporations.⁴⁷² Therefore, nonprofit directors who are to be held to a corporate standard should act as corporate directors must act.

The standard of care imposed on for-profit corporate directors is lower than the standard imposed on a trustee.⁴⁷³ For-profit corporate directors must exercise the degree of care which ordinary prudent persons would exercise under similar circumstances.⁴⁷⁴ Corporate directors are liable only for gross negligence as opposed to the trustee's liability for mere negligence. This more lenient standard gives corporate directors greater leeway to direct operations as they see fit. Although corporate directors may have more discretion, they must still maintain the financial status of the organization, including diligent protection of the organization's assets. An enforceable pledge is the equivalent of an account receivable. Corporate directors would certainly be in breach of that duty if they were to ignore and not collect upon accounts receivable. By analogy, therefore, even under the corporate standard, directors would be remiss in their duties to protect the organization's assets by not collecting on enforceable claims, whether based on contracts or pledges.

The adoption of the FASB proposal would provide a practical incentive for directors under the corporate standard to enforce pledges. Pledges will be reported as assets on the financial statements. In a for-profit corporation, a shareholder would have standing to raise the issue with directors and even to institute an action upon the directors' breach of duty. Under the potentially heightened scrutiny by the attorney general and other interested parties that the FASB proposal would create, a nonprofit director would be best advised to protect the assets in the same way as the for-profit director. Despite heightened scrutiny, nonprofit directors may be able to claim, under their greater decision-making discretion, that nonenforcement is necessary to maintain the organization's goodwill with donors, depending on the size of the donation, future relations with the donor, and general public relations.

⁴⁷² RMNCA § 8.30 official cmt. (1988).

⁴⁷³ Report of Committee of Charitable Trusts, *Duties of Charitable Trust Trustees and Charitable Corporation Directors*, 2 REAL PROP. PROB. & TRUST J. 545, 560 (1967).

⁴⁷⁴ GEORGE D. HORNSTEIN, CORPORATE LAW AND PRACTICE § 446 (1959).

Treatment of a pledge as an asset will hold directors under the corporate standard to a duty to protect and collect upon assets and debts of the organization. Nonenforcement will be evident through the filed financial statements.

Directors have a duty to protect the charitable organization's assets under both the trustee and corporate standards. This duty has been ignored, partly due to the lack of authority confirming that a charitable pledge is an asset. The duty to enforce is buried further due to the leniency of the corporate standard, which provides a myriad of situations in which nonenforcement may be found excusable.

Several sources have criticized the treatment of nonprofits under the corporate standard and advocate instead a third set of standards specifically designed for nonprofit organizations. Karst advocates that:

The law should recognize that the charitable trust and the charitable corporation have more in common with each other than each with its counterpart. The important differences among charities relate not to their form but to their function. In the area of fiduciary duties, a law of charities is needed.⁴⁷⁵

The Committee on Charitable Trusts also noted that society has the same interest in a charitable organization whether it is a trust or corporation; therefore, charitable organizations should be evaluated within a single body of law.⁴⁷⁶ Commentators have stated that it is essential that a higher standard of care be required of charitable trustees and directors alike. A development of standards and duties exclusively for nonprofit directors would balance the need to protect the public interest in the charitable funds and the need not to unduly burden and restrain the directors. Under such a scheme, directors would likely be held to a high standard of care, in which case they would have a strict duty to protect the organization's assets and thus enforce pledges. As one commentator succinctly put it, "nonprofit corporation law should be more than the 'hand me down' of business corporation law."⁴⁷⁷ The development of standards of fiduciary responsibility will also require the improved functioning of the offices of the state attorneys general.

Until the standards and duties of trustees and corporate directors are established, directors must be doubly careful about their duties to

⁴⁷⁵ Karst, *supra* note 431, at 430.

⁴⁷⁶ *Duties of Charitable Trust Trustees*, *supra* note 176, at 563.

⁴⁷⁷ Fishman, *supra* note 427, at 683.

enforce pledges. Although the RMNCA purports to adopt the corporate standard, only one state has yet adopted the statute in full.⁴⁷⁸ Furthermore, even though recent case law seems to lean toward treating directors of nonprofits as accountable to the corporate standard, a trend is not a certainty. Directors of nonprofits should be on guard and act within the duties of both the trustee and corporate standards so as to avoid being held liable.

Under the present state of the law, directors of charities should undertake a careful analysis when deciding whether or not to enforce a pledge. Although relevant statutes and decisional law have not yet addressed the issue, the general duties of directors, combined with the likelihood that a charity can successfully pursue a pledge in court, indicates that there often will be a duty on directors to enforce payment of the pledge. Any decision to allow a pledge to go unfulfilled should be based on sound reasons pertaining to the overall good of the charitable organization. The next section will examine possible factual variations that can affect these decisions.

IV) Hypothetical Cases Involving the Duty to Enforce Charitable Pledges

As illustrated above, nonprofit directors very likely have a duty to protect assets, by enforcing pledges under both the trustee standard and the corporate standard. In practice, however, such enforcement is sporadic for a variety of reasons. Directors must consider a plethora of elements in determining whether to enforce a pledge: the organization's need for money, goodwill, public relations, and the donor's history. Due to the rather ineffectual enforcement by the states' attorneys general, a director is rarely forced to act.

Analyzing a set of facts with close attention to the general fiduciary obligations of non-profit directors demonstrates that the duty to enforce is frequently apt to be present. The following hypotheticals analyze directors' duties under certain circumstances, using both the trustee standard and the corporate standard. The hypotheticals illustrate that specific facts and circumstances should always be considered by directors in determining their duties under either standard.

⁴⁷⁸ Oregon appears to be the only state to have adopted the RMNCA in its entirety. See generally OR. REV. STAT. ch. 65

A common pledge situation involves a pledge of cash to a charitable organization earmarked for a specific purpose. This method frequently involves a cash donation in order to acquire, create or improve facilities. The following hypothetical, however, involves a cash pledge for the purpose of saving a child's life.

Jimmy is a nine-year-old boy who needs a bone marrow transplant. The procedure is very costly. Jimmy's insurance carrier refuses to cover bone marrow transplants as experimental and his family cannot afford the operation. Jimmy will only live six months without the operation.

The Children-In-Need Cancer Society, which is organized and operated for cancer-related research and for the provision of services to child cancer patients in need, learns of Jimmy's plight. The Society's operations depend upon continual donations which are derived from mail solicitation and an annual telethon. In order to help Jimmy, the Society contacted the local media to cover his story as a human interest feature.

A wealthy investor and past contributor, Mr. Donor, saw the story on the local news and called the Society to pledge the \$100,000 necessary to cover the operation. Mr. Donor announced his pledge on the local news and had a photo session with Jimmy. The Society, in response to Mr. Donor's action, received pledges from a few other persons in amounts from \$100 to \$1,000, earmarked for Jimmy's operation. These subsequent donations in aggregate amounted to less than a tenth of the cost of the operation. The bone marrow donor was found soon thereafter and the plans for the operation were finalized.

Assume that the day before the operation the stock market crashes, leaving Mr. Donor in severe financial difficulties. As a result, Mr. Donor reneges on his pledge. Under the circumstances, Mr. Donor's action would shock most people, due to the life-and-death situation at hand and the high-profile media coverage. The Society must now determine what should be done regarding the pledge.

Suppose the stock market crash left Mr. Donor bankrupt. Under the trustee standard, the director of the Society has a duty to preserve the trust property and enforce claims over trust property unless it proves too costly or too uncertain. The pledge would be enforceable and the directors would have to file a claim as an unsecured creditor to Mr. Donor's bankrupt estate. Recall that if Mr. Donor lived in a state that required donee reliance for a subscription to be enforceable, he may claim that there was no reliance and, hence, the pledge is unenforceable. Although this defense may not prevail, it would entail litigation (and the attendant time and expense) to determine that the oral pledge was

enforceable.⁴⁷⁹ Under the trustee duty to enforce, if pursuing the claim would be too expensive in relation to the reasonable gain, a trustee could legitimately choose not to enforce without facing liability. In this situation, however, that a child's life was dependent on an operation and the extraordinary publicity surrounding the matter would likely outweigh the expense; thus, the directors would have a duty to enforce the pledge.

The same factors are relevant under the corporate standard of care if Mr. Donor files for bankruptcy. Under the corporate standard directors must discharge their duties in good faith and with the diligence and care that an ordinary prudent person would exercise in a like position and under similar circumstances. As seen earlier, the pledge is enforceable and, thus, is an asset of the organization. Furthermore, the purpose of the organization is to provide services to children in need. As businesspersons, the directors would have a duty to collect from a debtor, and as nonprofit directors, they must also operate to achieve the organization's specific purpose. A combination of considerations would result in finding a duty to enforce the pledge.

Under the corporate standard, directors are not as strictly held to preservation of the assets as trustees. Corporate directors have an extra layer of protection in which to take risks that would be good for business. Because Mr. Donor is bankrupt, directors would not be as concerned with goodwill and future donations from Mr. Donor. Filing as a creditor to enforce the pledge, therefore, would not be an extreme risk in this situation. In fact, the Society may find itself portrayed in a worse light by not trying to get the money for the operation, due to the intense media attention drawn to both Mr. Donor and the Society.

Alternatively, assume that when the stock market crashed, Mr. Donor suffered serious financial loss but still had the money to cover the operation. Mr. Donor, in fear of his future financial situation, decided that making good on the pledge would jeopardize his livelihood. This situation changes the considerations for directors.

First, under a trustee standard, directors would likely have an even stronger obligation to enforce the pledge. Mr. Donor has sufficient funds to pay off the pledge, so the uncertainty of fulfilling the obligation would

⁴⁷⁹ See, e.g., *In re Payson (Metropolitan Museum of Art)*, 180 N.Y.L.J. 14, col.4 (July 26, 1978) (Surr. Ct. Nassau Co.) (an oral pledge to a museum, confirmed by public acknowledgement of the pledge and an informal written memorandum, is enforceable). See also Carolyn C. Clark and Jay W. Swanson, *Promised Gifts to Museums: Monet in the Bank?* PROBATE & PROPERTY Jan.-Feb. 1992, at 12. The authors discuss the importance of reducing a pledge to writing so as to avoid enforcement difficulties.

not be a legitimate concern to excuse the board from enforcing the claim. The pledge is enforceable and the money is available; therefore, the claim would be substantial.

Under the corporate standard, Mr. Donor's liquidity raises additional concerns. Directors must be concerned with the future of the organization. Directors under a corporate standard must not only maintain financial integrity, but also look to the long-term, ongoing operations of the organization. Mr. Donor was a contributor in the past and, upon rebuilding his financial empire, may be a contributor in the future. Furthermore, directors must be concerned with goodwill: pursuing Mr. Donor's pledge while he seems to be in a precarious financial situation may scare off potential future donors.

In light of these considerations, the directors would initially have a duty to try to settle with Mr. Donor. The money is necessary for Jimmy's operation and foregoing litigation would avoid unwanted embarrassment for both parties. Thus, a settlement would serve the interests of both parties. The organization would get some remuneration and maintain the good will of Mr. Donor. Furthermore, a duty to settle may exist in order to avoid the extraordinary expenses associated with litigation. If settlement talks are unsuccessful, then the directors would have a duty under the corporate standard of care to enforce the pledge by litigation. This duty would also be stronger in the case where Mr. Donor has sufficient funds to cover the pledge, as this fact minimizes the risks of seeking enforcement. In essence, the directors have a duty to preserve the organization's financial stability and operations by collecting enforceable and collectible receivables. The extremity of the moral considerations of saving the child's life and the organization's maintenance of good public relations would probably outweigh concerns of maintaining donor good will.

To make the factual scenario even more extreme, assume Mr. Donor reneged on his pledge after medical procedures had started. Under such a scenario, there is reliance. The fact that the service has been performed and, therefore, must be paid for would clarify directors' duties under either standard. The actual reliance creates a debtor-creditor relationship which gives directors a right and obligation to collect on the pledge/debt.

Assume further that the Society does not have an adequate cash reserve and would be unable to cover the cost of the operation without risking insolvency. Under such circumstances, when the operation is completed, the Society would be liable for the expense which Mr. Donor pledged to cover. Because the Society would risk insolvency by paying

for the operation without the requisite funds, the duties to preserve the assets and maintain ongoing operations would require enforcing the pledge to prevent insolvency. Directors owe a primary fiduciary duty under both standards to preserve or maintain the financial viability of the organization.⁴⁸⁰ When its livelihood is at risk, but is rectifiable by enforcing a pledge, there would be a strong duty to act.

As illustrated above, directors have a basic duty to enforce Mr. Donor's pledge under the various scenarios. The degree and strength of the duty is the only variable. These scenarios are analogous to cash donations for the purpose of building a new library or refurbishing a hospital. In those more common situations, under the analysis presented above, the pledge would still be considered an asset due to its enforceability, and the directors' considerations and duty to protect an organization's assets would be the same as analyzed in the Donor hypothetical. The hypothetical is intentionally extreme to illustrate a situation where directors could not easily ignore their duty without severe direct consequences. Directors would probably be more willing not to complete a building than to let Jimmy die. Directors' duties, however, should not depend on such human and emotional elements. A pledge for either purpose should be measured as an asset of the organization and should be enforced based on the organization's financial picture.

In contrast, what happens to a director's duties when the cash is not donated for a specific purpose, and the absence of the pledge would not have any serious impact on the organization? As the following hypothetical illustrates, the directors' duties remain the same.

State University is one of a rare breed of thriving public educational organizations. Liquidity is the least of its problems. State University has an annual mail campaign which consistently solicits contributions of close to \$2 million. Mr. Alumnus pledged \$500,000 and sent in his pledge card on the first of the year. The pledge had no specific earmarked designation. Six months later, after the pledge due-date and after State University had a disappointing NCAA basketball tournament, Mr. Alumnus still had not fulfilled his pledge. Mr. Alumnus ignored the second and third notices, so the University telephoned regarding his generous pledge.

Mr. Alumnus' response indicated that since the basketball team had embarrassed him, he did not feel the need to contribute to State

University. State University had not relied on the pledge and certainly did not need the funds; if paid, it would likely invest the money. Assuming the written pledge is an enforceable claim, the benefit to the charity would likely outweigh any expense and uncertainty. Thus, a director held to the trustee standard would have a duty to enforce the claim.

A director would also have a duty to enforce the pledge under the corporate standard of care. The pledge amount would be considered a material amount in the pledge drive and thus worth enforcing to insure the maintenance of ongoing operations. Furthermore, because State University depends on volume in its pledge drives, the directors may not want to let one donor off the hook and risk the chance that others might follow. Nevertheless, the directors would not want to risk the bad publicity of a lawsuit which might scare donors off. As a result of such conflicting goals, the directors would have a duty to try to settle before acting directly to enforce the pledge.

The FASB proposal enhances the directors' duty to enforce the pledge under a corporate standard, because under the proposal, Mr. Alumnus' pledge would have been reported as an asset in State University's financial report. The directors should treat the pledge as an account receivable and collect the debt owed, just as corporate directors would be obliged to do for any material receivable or debt. Furthermore, the primary purpose of the FASB proposal is to provide a uniform reporting mechanism so that donors can obtain the requisite information on the organization. Volume is crucial to State University, so the financial statement must accurately reflect the assets in order not to misrepresent its financial position to donors.⁴⁸¹ Thus, the FASB proposal imposes on the directors a stronger duty to enforce, so that the financial report accurately represents the assets that the University holds.

Assume, in the alternative, that Mr. Alumnus responded to the phone call by saying that his business is insolvent and that he has no funds to give State University. Under a trustee standard, the directors must enforce a claim only if it is not too uncertain. If the directors reasonably determine that Mr. Alumnus does not have sufficient capital to collect upon, the directors may properly forego enforcement. Under the corporate standard, the directors may determine to forego enforcement as

⁴⁸⁰ See discussion in text Parts II.A.3., II.B., and II.B.4., *supra*.

⁴⁸¹ Although the financial statement can be footnoted to explain the uncollectability adjustment, directors would prefer not to publicize reasons behind the loss of pledges such as the kind offered by Mr. Alumnus. On the other hand, it may look just as bad to donors if the uncollectability adjustments are not explained.

well. In response to the FASB proposed regulations, the directors would be under a duty to scrutinize closely Mr. Alumnus' circumstances for availability of the funds. The directors, however, may have an additional concern that if Mr. Alumnus had significantly contributed in the past, he will likely do so upon his financial recovery. In such a case, the directors may not want to squeeze the donor now, when the funds are not readily available. The directors may instead choose to maintain goodwill. The problem of reporting an uncollected pledge on the financial statement can be minimized by listing it as an uncollectible adjustment with an explanatory footnote.

Probably the most difficult area in which to ascertain directors' duties involves donors pledging unique assets, such as a work of art or a parcel of real estate. Such situations are difficult for various reasons. First, there is a question whether under such special circumstances a court would uphold the pledge by granting specific performance. The case law provides no guidance. As a result, one cannot predict whether a pledge of a unique asset would be enforceable.⁴⁸² Unlike cash or fungible pledges, which have generally been upheld as a matter of public policy, it is not prudent to assume enforceability regarding the pledges of unique assets. Once a pledge is enforceable, it becomes in essence a contract or debt owed to the organization. As such, the pledge then can be called an asset, and the directors have a duty to protect the organization's assets. The same reasoning cannot follow from the uncertain state of the law surrounding pledges of unique assets. Therefore, to determine whether directors have a duty to enforce such a pledge, court enforceability is a major issue.

The following hypothetical illustrates some of the issues involved with pledges of unique assets. Assume that Ms. Art donates a Renoir painting to the City Museum of Art. This particular Renoir is one of the relatively few in existence that captures his early style. The City Museum is also in the midst of planning a retrospective for which the museum has been acquiring pieces of his work over the last two years. It plans to continue the search for another year. Ms. Art decides, a year after her pledge, to renege because she would rather hang the Renoir in her home.

⁴⁸² Clark and Swanson, *supra* note 478. Clark and Swanson argue that as a matter of policy and logic the same reasoning should apply to the enforceability of a pledge of a sum of money and a pledge of a work of art, although proof of reliance is more difficult pertaining to a pledge of a work of art.

Assuming that the pledge would likely be enforceable, the duty upon the directors to enforce the pledge would be strong under both the trustee and corporate standards. The reasoning for finding a duty would follow the reasoning discussed in the previous hypotheticals. There is, however, a second layer here that makes the duty stronger. In order for directors to fulfill the purpose of the museum, they must seek to maintain and enhance (through acquisitions) the integrity and educational quality of its collection.⁴⁸³ Foregoing a unique and rare work of art would be a failure to fulfill the purpose of the museum. Therefore, the directors would have a magnified duty to do what is necessary in order to enforce the pledge and acquire the Renoir.

The duty to enforce, however, is only strong if the pledge can be considered enforceable and, thus, an asset. The real question, therefore, is whether the pledge is enforceable. A court may consider such situations to be dependent on the degree of reliance. If reliance is substantial, a court would be more likely to enforce the pledge under a legitimate contract theory, without having to rely on the more ephemeral theory of eleemosynary public policy. The most difficult situation is where the museum has not relied on the pledge in any way. In such a case, a court would likely decide that the only detriment the museum suffered would be very general -- not having another Renoir as part of its collection. Upholding the pledge under such circumstances is possible, but a court might find it difficult to order specific performance.

Assume, however, that the museum had publicized the gift, foregone other Renoir acquisitions in reliance on the pledge, and that other donors had pledged Renoirs to the collection because the museum's acquisition of such a rare early work added credibility to the collection. Such clear reliance by the museum would make it easier to find enforceability under contract theory. Still, it is uncertain whether a court would consider even such extreme reliance substantial enough to order specific performance of the pledge.

In sum, whether a pledge of a unique asset is enforceable or not would determine directors' duties whether to try to enforce it. As long as there is a possibility that the pledge can be enforced, the unique quality of the pledge combined with the focused purpose of the organization could

⁴⁸³ At a roundtable discussion on December 7, 1990, entitled *The Museum: Preserving Our Cultural Heritage*, one commentator noted that museums are now seen as educational institutions and not as repositories. In fact, the Metropolitan Museum of Art in New York City was founded with an educational mission in mind.

create a duty for the directors to attempt to enforce the pledge. Under the trustee standard, the risk of cost and uncertainty may reasonably excuse a director from enforcing the pledge. Under the corporate standard, the business judgment rule would come into play, to forestall the problem of second-guessing by the judiciary. As discussed earlier, the business judgment rule has limited applicability to nonprofit directors⁴⁸⁴ and may be of little value once the corporate standard of care is applied to nonprofit directors.⁴⁸⁵ Under the corporate standard of care, the risk of enforcement may excuse the director from taking action. However, under these specific hypothetical circumstances, the business judgment rule may be the appropriate standard to use. The business judgment rule would allow the director to take the risk of a serious attempt at enforcement in order to improve greatly the museum's collection. Under a cost-benefit analysis, the acquisition of the Renoir may be of greater public interest, if action can be taken without seriously jeopardizing the museum. Thus, where there is a risk or chance of failure, directors under the corporate standard may have a duty to attempt to enforce the pledge in order to serve the organization's public purpose.

V) Conclusion

Once it is determined that a charitable pledge is legally enforceable, and that will often be the case, directors and trustees of nonprofit organizations generally have a duty to enforce the pledge. This duty normally exists regardless of whether the conduct of the directors or trustees is evaluated by using the strict trustee standard or the less stringent corporate standard. The degree of the duty may vary, however, if unique facts and circumstances are present. For instance, if the pledgor is bankrupt, the nonprofit organization may decide to forego pursuing the claim on the ground that the cost of litigation may outweigh any benefits that can be derived from enforcement of the pledge. Regardless of the particular facts and circumstances of a given situation, directors and trustees of nonprofit organizations have an affirmative duty to address the matter. They must make reasonable inquiries into the facts and

⁴⁸⁴ KURTZ, *supra* note 176, at 51.

⁴⁸⁵ *Id.*

circumstances and make an informed decision as to whether to pursue collection of the pledge.

Theoretically, a duty to enforce charitable pledges does exist. However, in practice, directors and trustees of nonprofit organizations, as well as governmental officials such as state attorneys general, have been reluctant in the past to confront and deal with the issue. In other words, the rule of law imposing a duty to enforce charitable pledges is in place, but the rule needs to be enforced. To remedy this situation, the nonprofit sector and the governmental sector must work both together and separately to enforce the law.

An initial step for achieving this objective is to provide clarity in the law. Regulation and enforcement of the duty to enforce charitable pledges can occur only if a well-defined legal standard exists. Further, directors and trustees of nonprofit organizations can satisfy their duty of care only if they know what it is. Accordingly, the law establishing the legal standard of care that must be met by directors and trustees of nonprofit organizations needs to be clarified and defined.

The Revised Model Nonprofit Corporation Act moves in the right direction because it establishes the corporate standard as the standard of care required of nonprofit directors. However, something more is necessary. Specifically, an overall consensus among the various jurisdictions must be achieved. Both the nonprofit sector and the state legislatures need to combine their efforts to enact uniform statutory provisions explicitly defining the prescribed legal standard of care owed by nonprofit directors and trustees. The establishment of a uniform standard of care will allow nonprofit directors and trustees to know what is expected of them. It will also assist the nonprofit sector, the governmental sector, and the judiciary to make certain that the governing bodies of nonprofit organizations are meeting the standard of care owed to such organizations with regard to enforcement of charitable pledges.

With a well-defined and uniform legal standard in place, the next step is to enhance regulation of the conduct of directors and trustees of nonprofit organizations. Such regulation involves a two-prong approach. One prong involves self-regulation on the part of the nonprofit organizations; the other prong involves governmental regulation. Since the nonprofit sector itself is most familiar with its own needs and capabilities, nonprofit organizations should establish a formal mechanism by which they can monitor and regulate their own activities. In addition, since the nonprofit sector is a significant and still-growing part of the national economy, it would behoove nonprofit organizations to participate voluntarily in regulating their own activities rather than have rules and

regulations thrust upon them from outside sources. Thus, nonprofit organizations should establish their own regulatory body, similar to self-regulatory bodies established for attorneys and certified public accountants. This regulatory body should work with nonprofits and outside groups to establish specific uniform rules for nonprofit organizations to follow. The regulatory body should also be responsible for supervising and regulating the activities of nonprofit organizations. Further, the regulatory body should sponsor training sessions for directors and trustees of nonprofit organizations so that those individuals are fully aware of the responsibilities and duties required of them.

In addition to self-regulation, governmental regulation is necessary to assure that the public interest is protected. Governmental regulation is generally in the hands of the state attorneys general. Although these offices are typically understaffed and overworked, the various jurisdictions nonetheless must recognize that nonprofit organizations are now a significant part of our society. Thus, tighter government regulation of these organizations is necessary to ensure the public is adequately protected. Accordingly, each state attorney general should give serious thought to assigning specific staff members to monitor the operations and activities of nonprofit entities. In addition, state legislatures should enact more stringent annual reporting requirements of nonprofit organizations so that government agencies charged with the task of regulating such bodies have the necessary information available to perform efficiently their regulatory task. A well-defined uniform legal standard of care coupled with regulation of that standard are the two components necessary to put some teeth in the law requiring directors and trustees of nonprofit organizations to enforce charitable pledges and, thereby, to hold such directors and trustees legally accountable to fulfill those duties to enforce.

In short, the current anomaly is that charities probably often will have a legal duty to enforce pledges, but this is an obligation to which charities themselves and supervising governmental agencies do not pay sufficient attention. Therefore, the law should be clarified and unified, and the relevant organizations and officers should begin addressing the issue of enforcement.

Appendix I

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Appendix II

Case Summary - Enforceability of Charitable Subscriptions

ALABAMA

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- 1924 *Cartwright v. Dennis*, 163 Ark. 503, 260 S.W. 424 (1924).

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- 1898 *Rogers v. Galloway Female College*, 64 Ark. 627, 44 S.W. 554 (1898). *See* Annotation, 97 A.L.R.3d at 1066, 1073, 1089, and 1095. *See* Annotation, 38 A.L.R. at 875, 881, 884, 887, 899, 900, and 901.

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- 1895 *Howell v. Trustees of Methodist Episcopal Church*, 61 Ill. App. 121 (1895). *See* Annotation, 97 A.L.R.3d at 1071. *See* Annotation, 38 A.L.R. at 914.

- 1888 Vierling v. Horton, 27 Ill. App. 629 (1888). *See* Annotation, 38 A.L.R. at 881 and 905.
- 1887 Friedline v. Carthage College, 23 Ill. App. 494 (1887). *See* Annotation, 38 A.L.R. at 881 and 905.
- 1887 Lincoln University v. Hapley, 23 Ill. App. 629 (1887). *See* Annotation, 38 A.L.R. at 905 and 914.
- 1885 Hudson v. Greenhill Seminary Corp., 113 Ill. 618 (1885). *See* Annotation, 38 A.L.R. at 881, 883, and 884.
- 1884 Whitsitt v. Preemption Presbyterian Church, 110 Ill. 125 (1884). *See* Annotation, 38 A.L.R. at 881, 883, 891, 892, and 898.
- 1880 Beach v. First Methodist Episcopal Church, 96 Ill. 177 (1880). *See* Annotation, 38 A.L.R. at 875, 878, and 881.
- 1879 Pratt v. Baptist Society, 93 Ill. 475, 34 Am. Rep. 187 (1879). *See* Annotation, 38 A.L.R. at 875, 877, 881, and 884.
- 1874 Kentucky Baptist Education Society v. Carter, 72 Ill. 247, 34 Am. Rep. 187 (1874). *See* Annotation, 38 A.L.R. at 881, 894, 896, and 898.
- 1873 Blanchard v. Williamson, 70 Ill. 647 (1873).
- 1871 Snell v. Trustees of Society of Methodist Episcopal Church, 58 Ill. 290 (1871). *See* Annotation, 97 A.L.R.3d at 1091 and 1093. *See* Annotation, 38 A.L.R. at 883.
- 1870 Trustees of Methodist Episcopal Church of Indianapolis v. Garvey, 53 Ill. 401, 5 Am. Rep. 51 (1870). *See* Annotation, 38 A.L.R. at 881 and 902.
- 1867 McClure v. Wilson, 43 Ill. 356 (1867).
- 1864 Johnson v. Ewing Female University, 35 Ill. 518 (1864). *See* Annotation, 97 A.L.R.3d at 1091. *See* Annotation, 38 A.L.R. at 881, 883, and 892.

- 1861 Pryor v. Cain, 25 Ill. 292 (1861). *See* Annotation, 38 A.L.R. at 891.
- 1861 Griswold v. Peoria University, 26 Ill. 41, 79 Am. Dec. 361 (1861). *See* Annotation, 38 A.L.R. at 881, 883, 884, and 891.
- 1841 Robertson v. Marsh, 4 Ill. (3 Scam.) 198 (1841). *See* Annotation, 38 A.L.R. at 881, 890, and 891.

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- 1986 United Theological Seminary v. Estate of Burkhart, 494 N.E.2d 361 (Ind. Ct. App. 1986).
- 1933 Indianapolis Bible Institute v. Kiddey, 98 Ind. App. 567, 187 N.E. 846 (1933).
- 1921 Scott v. Triggs, 76 Ind. App. 69, 131 N.E. 415 (1921). *See* Annotation, 38 A.L.R. at 881 and 904.
- 1902 Woodworth v. Veitch, 29 Ind.App. 589, 64 N.E. 932 (1902). *See* Annotation, 38 A.L.R. at 890 and 901.
- 1899 Rothenberger v. Glick, 22 Ind. App. 288, 52 N.E. 811 (1899). *See* Annotation, 97 A.L.R.3d at 1065 and 1089.
- 1894 Barnett v. Franklin College, 10 Ind. App. 103, 37 N.E. 427 (1894). *See* Annotation, 97 A.L.R.3d at 1097. *See* Annotation, 38 A.L.R. at 890, 900, and 908.
- 1891 Bryan v. Watson, 127 Ind. 42, 11 L.R.A. 63, 26 N.E. 666 (1891). *See* Annotation, 38 A.L.R. at 907.
- 1891 Garrigus v. Home, Frontier & Foreign Missionary Society, 3 Ind. App. 91, 28 N.E. 1009, 50 Am. St. Rep. 262 (1891). *See* Annotation, 38 A.L.R. at 874 and 890.

- 1891 *Gammon Theological Seminary v. Robbins*, 128 Ind. 85, 12 L.R.A. 506, 27 N.E. 341 (1891). *See* Annotation, 38 A.L.R. at 877.
- 1886 *Landwerlen v. Wheeler*, 106 Ind. 523, 5 N.E. 888 (1886). *See* Annotation, 38 A.L.R. at 881, 891, and 912.
- 1884 *Petty v. Trustees of Church of Christ*, 95 Ind. 278 (1884). *See* Annotation, 97 A.L.R.3d at 1066. *See* Annotation, 38 A.L.R. at 907.
- 1883 *Kenny v. Phillipy*, 91 Ind. 511 (1883).
- 1877 *Roche v. Roanoke Classical Seminary*, 56 Ind. 198 (1877). *See* Annotation, 86 A.L.R.4th at 246. *See* Annotation, 38 A.L.R. at 874, 890, 891, and 907.
- 1876 *Higert v. Indiana Asbury University*, 53 Ind. 326 (1876). *See* Annotation, 38 A.L.R. at 907.
- 1874 *Musselman v. Cravens*, 47 Ind. 1 (1874). *See* Annotation, 38 A.L.R. at 913.
- 1871 *Northwestern Conference of Universalists v. Myers*, 36 Ind. 375 (1871).
- 1868 *Davis v. Calloway*, 95 Am. Dec. 671, 30 Ind. 112 (1868).
- 1867 *Franklin College v. Hurlburt*, 28 Ind. 344 (1867). *See* Annotation, 97 A.L.R.3d at 1070. *See* Annotation, 38 A.L.R. at 890.
- 1865 *Downey v. Hinchman*, 25 Ind. 453 (1865).
- 1861 *Jewett v. Salisbury*, 16 Ind. 370 (1861). *See* Annotation, 38 A.L.R. at 907.
- 1854 *Pierce v. Ruley*, 5 Ind. 69 (1854). *See* Annotation, 38 A.L.R. at 890 and 908.
- 1851 *Johnson v. Wabash College*, 2 Ind. 555 (1851). *See* Annotation, 38 A.L.R. at 881 and 890.

IOWA

- 1983 *P.H.C.C.C., Inc. v. B.J. Johnston* 340 N.W.2d 774 (Iowa 1983). *See* Annotation, 86 A.L.R.4th at 251.
- 1974 *Salsbury v. Northwestern Bell Telephone Company*, 221 N.W.2d 609 (Iowa 1974). *See* Annotation, 86 A.L.R.4th at 250-51.
- 1974 *Pappas v. Bever*, 219 N.W.2d 720 (Iowa 1974). *See* Annotation, 86 A.L.R.4th at 251.
- 1972 *Pappas v. Hauser*, 197 N.W.2d 607 (Iowa 1972). *See* Annotation, 97 A.L.R.3d at 1062. *See* Annotation, 86 A.L.R.4th at 251.
- 1931 *Young Men's Christian Ass'n. v. Caward*, 213 Iowa 408, 239 N.W. 41 (1931). *See* Annotation, 95 A.L.R. at 1307, 1311, and 1312.
- 1919 *In re Leigh's Estate*, 186 Iowa 931, 173 N.W. 143 (1919). *See* Annotation, 38 A.L.R. at 907 and 910.
- 1917 *First Presbyterian Church of Mt. Vernon v. Dennis*, 178 Iowa 1352, 161 N.W. 183 (1917).
- 1914 *Board of Trustees of Upper Iowa Conference of Methodist Episcopal Church v. Noyes*, 165 Iowa 601, 146 N.W. 848 (1914). *See* Annotation, 38 A.L.R. at 881.
- 1913 *Brokaw v. McElroy*, 162 Iowa 288, 50 L.R.A.(N.S.) 835, 143 N.W. 1087 (1913). *See* Annotation, 38 A.L.R. at 881, 894, 895, 896, 897, and 907.
- 1906 *King v. Carroll*, 129 Iowa 364, 105 N.W. 705 (1906). *See* Annotation, 38 A.L.R. at 881 and 909.
- 1903 *Leland Norwegian Lutheran Congregation v. Larson*, 121 Iowa 151, 96 N.W. 706 (1903). *See* Annotation, 97 A.L.R.3d at 1094.

- 1899 *University of Chicago v. Emmert*, 108 Iowa 500, 79 N.W. 285 (1899). *See* Annotation, 38 A.L.R. at 881.
- 1899 *First Methodist Episcopal Church v. Donnell*, 110 Iowa 5, 46 L.R.A. 858, 81 N.W. 171 (1899). *See* Annotation, 38 A.L.R. at 902 and 903.
- 1894 *Cottage Hospital v. Merrill*, 92 Iowa 649, 61 N.W. 490 (1894). *See* Annotation, 97 A.L.R.3d at 1100. *See* Annotation, 38 A.L.R. at 881 and 892.
- 1892 *First Methodist Episcopal Church v. Sweny*, 85 Iowa 627, 52 N.W. 546 (1892). *See* Annotation, 97 A.L.R.3d at 1090.
- 1887 *Simpson Centenary College v. Tuttle*, 71 Iowa 596, 33 N.W. 74 (1887). *See* Annotation, 97 A.L.R.3d at 1073 and 1089. *See* Annotation, 38 A.L.R. at 875, 881, 912, and 913.
- 1886 *McCabe v. O'Connor*, 69 Iowa 134, 28 N.W. 573 (1886). *See* Annotation, 38 A.L.R. at 881.
- 1884 *University of Des Moines v. Livingston*, 65 Iowa 202, 21 N.W. 564 (1884). *See* Annotation, 97 A.L.R.3d at 1073. *See* Annotation, 38 A.L.R. at 894.
- 1882 *United Presbyterian Church v. Baird*, 60 Iowa 237, 14 N.W. 303 (1882). *See* Annotation, 38 A.L.R. at 881. *See* Annotation, 38 A.L.R. at 902.
- 1881 *University of Des Moines v. Livingston*, 57 Iowa 307, 42 Am. Rep. 42, 10 N.W. 738 (1881). *See* Annotation, 38 A.L.R. at 875, 881, and 903.
- 1878 *Simpson Centenary College v. Bryan*, 50 Iowa 293 (1878). *See* Annotation, 38 A.L.R. at 881 and 900.
- 1867 *Burlington University v. Barrett*, 22 Iowa 60, 92 Am. Dec. 376 (1867). *See* Annotation, 38 A.L.R. at 881 and 907.

- 1861 *McDonald v. Gray*, 11 Iowa 508, 79 Am. Dec. 509 (1861). *See* Annotation, 38 A.L.R. at 881 and 891.

KANSAS

- 1945 *In re Brown's Estate*, 159 Kan. 408, 155 P.2d 445 (Kan. 1945).
- 1936 *Southwestern College of Winfield v. Hawley*, 144 Kan. 652, 62 P.2d 850 (1936). *See* Annotation, 86 A.L.R.4th at 246.
- 1931 *Cotner College v. Hyland*, 133 Kan. 322, 299 P. 607 (1931). *See* Annotation, 95 A.L.R. at 1312.
- 1926 *American Legion, Christie E. Wilson Post No. 324, Rexford Kan. v. Thompson*, 121 Kan. 124, 245 P. 744 (1926).
- 1918 *Young Men's Christian Ass'n v. Sentney*, 103 Kan. 388, 173 P. 917 (1918). *See* Annotation, 97 A.L.R.3d at 1068 and 1074.
- 1898 *Highland University Co. v. Long*, 7 Kan. App. 173, 53 P. 766 (1898). *See* Annotation, 97 A.L.R.3d at 1074 and 1103.
- 1898 *Beeler v. Highland University Co.*, 8 Kan. App. 89, 54 P. 295 (1898). *See* Annotation, 97 A.L.R.3d at 1084.
- 1895 *Sullivan v. Corbett*, 3 Kan. App. 390, 42 P. 1105 (1895).
- 1893 *Judson University v. Kinkaid*, 50 Kan. 369, 31 P. 1074 (1893). *See* Annotation, 97 A.L.R.3d at 1068, 1087, and 1098.
- 1892 *Schuler v. Myton*, 48 Kan. 282, 29 P. 163 (1892). *See* Annotation, 97 A.L.R.3d at 1090. *See* Annotation, 38 A.L.R. at 901.

- 1892 *Fulton v. Sterling Land & Investment Co.*, 47 Kan. 621, 28 P. 720 (1892). *See* Annotation, 38 A.L.R. at 883.

KENTUCKY

- 1947 *Lake Bluff Orphanage v. Magill's Executors*, 305 Ky. 391, 204 S.W.2d 224 (Ky. Ct. App. 1947). *See* Annotation, 97 A.L.R.3d at 1103. *See* Annotation, 86 A.L.R.4th at 246.
- 1943 *Floyd v. Christian Church Widows and Orphans Home of Kentucky*, 296 Ky. 196, 176 S.W.2d 125, 151 A.L.R. 1230 (1943). *See* Annotation, 97 A.L.R.3d at 1063. *See* Annotation, 151 A.L.R. at 1242.
- 1942 *Hyden v. Scott-Lees Collegiate Institute*, 291 Ky. 139, 163 S.W.2d 295 (1942). *See* Annotation, 151 A.L.R. at 1241.
- 1937 *McDonald's Executor v. Transylvania University*, Lexington, 274 Ky. 168, 118 S.W.2d 171 (1937).
- 1933 *Ex. parte Walker's Executor*, 253 Ky. 111, 68 S.W.2d 745 (1933). *See* Annotation, 97 A.L.R.3d at 1075 and 1100.
- 1924 *Vance v. Dobson*, 205 Ky. 640, 266 S.W. 368 (1924).
- 1924 *Lewis v. Durham*, 205 Ky. 403, 265 S.W. 934 (1924).
- 1910 *Baskett v. Ohio Valley Banking & Trust Co.*, 125 S.W. 1066 (Ky. 1910).
- 1910 *Central University of Kentucky v. Cox's Ex'r.*, 136 Ky. 260 (1910).
- 1906 *Central University of Kentucky v. Walters' Ex'rs.*, 122 Ky. 65 (1906).
- 1889 *Anderson v. West Kentucky College*, 10 Ky. L. Rptr. 725 (1889). *See* Annotation, 97 A.L.R.3d at 1074.

- 1874 *Trustees Kentucky Female Orphan School v. Fleming*, 10 Bush 234 (1874). *See* Annotation, 38 A.L.R. at 878 and 879.
- 1847 *Collier v. Baptist Education Society*, 8 B. Mon 68 (Shelby Cir. Ky. 1847). *See* Annotation, 38 A.L.R. at 878 and 879.
- 1841 *Chambers v. Baptist Educational Society*, 1 B. Mon. 215 (Ky. 1841). *See* Annotation, 38 A.L.R. at 882, 900, and 901.

LOUISIANA

- 1962 *Dillard University v. Local U. 1419, International Longshoreman's Association*, 144 So.2d 710 (La. App. 4th Cir., 1962), *appealed other grounds* 169 So.2d 710, *appeal denied* 247 La. 342, 170 So. 2d 864. *See* Annotation, 86 A.L.R.4th at 246 and 247-48.
- 1930 *Baptist Hospital v. Cappel*, 14 La. App. 626, 129 So. 425 (1930). *See* Annotation, 97 A.L.R.3d at 1088. *See* Annotation, 95 A.L.R. at 1308, 1311, and 1313.
- 1925 *Oglethorpe University v. Salmon*, 1 La. App. 645 (1925). *See* Annotation, 97 A.L.R.3d at 1095 and 1099. *See* Annotation, 95 A.L.R. at 1309.
- 1877 *Homer College v. Calhoun*, Man. Unrep. Cas. 140 (1877-80). *See* Annotation, 38 A.L.R. at 898.
- 1836 *Louisiana College v. Keller*, 10 La. 164 (1836). *See* Annotation, 95 A.L.R. at 1308. *See* Annotation, 38 A.L.R. at 874 and 875.

MAINE

- 1926 *Central Maine General Hospital v. Carter*, 125 Me. 191, 132 A. 417, 44 A.L.R. 1333 (1926). *See* Annotation, 86 A.L.R.4th at 246. *See* Annotation, 95 A.L.R. at 1308, 1309, and 1310.
- 1882 *Maine Central Institute v. Haskell*, 73 Me. 140 (1882). *See* Annotation, 38 A.L.R. at 875, 882, 891, and 892.
- 1830 *Freyburg v. Ripley*, 6 Me. 442 (1830). *See* Annotation, 97 A.L.R.3d at 1071 and 1093. *See* Annotation, 38 A.L.R. at 898 and 899.
- 1826 *Foxcroft Academy v. Favor*, 4 Me. (Greenl.) 382 (1826). *See* Annotation, 38 A.L.R. at 875 and 878.

MARYLAND

- 1988 *Arrowsmith v. Mercantile-Safe Deposit and Trust Company*, 313 Md. 334, 545 A.2d 674 (1988). *See* Annotation, 86 A.L.R.4th at 245, 246, and 247-48.
- 1979 *Maryland National Bank v. United Jewish Appeal Federation of Greater Washington, Inc.*, 286 Md. 274, 407 A.2d 1130 (1979). *See* Annotation, 86 A.L.R.4th at 246 and 247.
- 1948 *American University v. Collings*, 190 Md. 688, 59 A.2d 333 (1948).
- 1945 *Inasmuch Gospel Mission, Inc. v. Mercantile Trust Co. of Baltimore*, 184 Md. 231, 40 A.2d 506 (1945).
- 1936 *Sterling v. Victor Cushwa & Sons*, 170 Md. 226, 183 A. 593 (1936).
- 1917 *Erdman v. Trustees of Eutaw Methodist Protestant Church*, 129 Md. 595, 99 A. 793 (1917). *See* Annotation, 38 A.L.R. at 882 and 902.

- 1854 *Gittings v. Mayhew*, 6 Md. 113 (1854). *See* Annotation, 38 A.L.R. at 893.

MASSACHUSETTS

- 1989 *Congregation Kadimah Toras-Moshe v. DeLeo*, 405 Mass. 365, 540 N.E. 2d 691 (1989). *See* Annotation, 86 A.L.R.4th at 246.
- 1984 *In re Morton Shoe Co., Inc.*, 40 B.R. 948 (Bankr. D. Mass. 1984). *See* Annotation, 86 A.L.R.4th at 246 and 249.
- 1904 *Robinson v. Nutt*, 185 Mass. 345, 70 N.E. 198 (1904). *See* Annotation, 38 A.L.R. at 875, 882, and 898.
- 1901 *Martin v. Meles*, 179 Mass. 114, 60 N.E. 397 (1901).
- 1897 *Sherwin v. Fletcher*, 168 Mass. 413, 47 N.E. 197 (1897).
- 1883 *President & Trustees of Bates College v. Bates*, 135 Mass. 487 (1883). *See* Annotation, 97 A.L.R.3d at 1084.
- 1877 *Cottage Street Methodist Episcopal Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286 (1877). *See* Annotation, 38 A.L.R. at 875, 897, 898, 907, and 911.
- 1875 *Athol Music Hall Company v. Carey*, 116 Mass 571 (1875).
- 1860 *Ladies' Collegiate Institute v. French*, 82 Mass. (16 Gray) 196 (1860). *See* Annotation, 38 A.L.R. at 878 and 879.
- 1854 *Mirick v. French*, 68 Mass. 420 (1854). *See* Annotation, 97 A.L.R.3d at 1068 and 1101. *See* Annotation, 38 A.L.R. at 882, 889, and 891.
- 1853 *Worcester Medical Institution v. Harding*, 65 Mass. 285 (1853). *See* Annotation, 97 A.L.R.3d at 1091.

- 1852 *Watkins v. Eames*, 63 Mass. (9 Cush) 537 (1852). *See* Annotation, 38 A.L.R. at 904 and 907.
- 1843 *Ives v. Sterling*, 47 Mass. (6 Metc.) 310 (1843). *See* Annotation, 97 A.L.R.3d at 1066 and 1101. *See* Annotation, 38 A.L.R. at 882, 886, 891, and 894.
- 1841 *First Universalist Society v. Currier*, 44 Mass. (3 Metc.) 417 (Mass. 1841). *See* Annotation, 38 A.L.R. at 875 and 878.
- 1840 *Thompson v. Page*, 42 Mass. (1 Metc.) 565 (1840). *See* Annotation, 38 A.L.R. at 882, 898, and 906.
- 1832 *Williams College v. Danforth*, 29 Mass (12 Pick.) 541 (Mass. 1832). *See* Annotation, 38 A.L.R. at 878, 898, and 909.
- 1828 *Trustees of Amherst Academy v. Cows*, 23 Mass. (6 Pick.) 427 (Mass. 1828). *See* Annotation, 38 A.L.R. at 882, 884, 888, and 889.
- 1828 *Church & Congregation in Second Precinct v. Stetson*, 22 Mass. (5 Pick.) 506 (Mass. 1828). *See* Annotation, 38 A.L.R. at 890, 897, 902, and 907.
- 1825 *Fisher v. Ellis*, 20 Mass (3 Pick.) 322 (Mass. 1825). *See* Annotation, 38 A.L.R. at 906.
- 1824 *Trustees of Bridgewater Academy v. Nathaniel Gilbert*, 19 Mass (2 Pick.) 579, 13 Am. Dec. 457 (1824). *See* Annotation, 38 A.L.R. at 872, 886, 888, 889, 894, and 911.
- 1817 *Trustees of Farmington Academy v. Allen*, 14 Mass. 172, 7 Am. Dec. 201 (1817). *See* Annotation, 38 A.L.R. at 882, 886, 888, and 889.
- 1814 *Phillips Limerick Academy v. Davis*, 11 Mass. 113, 6 Am.Dec. 162 (1814). *See* Annotation, 38 A.L.R. at 872, 875, 883, 884, 886, 888, and 911.

- 1812 *Boutell v. Cowdin*, 9 Mass. 254 (1812). *See* Annotation, 38 A.L.R. at 883, 888, and 902.

MICHIGAN

- 1974 *Estate of Timko v. Oral Roberts Evangelistic Ass'n*, 51 Mich. App. 662, 215 N.W.2d 750 (1974). *See* Annotation, 86 A.L.R.4th at 246.
- 1968 *Congregation B'nai Sholom v. Martin*, 11 Mich. App. 261, 160 N.W.2d 784 (1968), *rev'd* 382 Mich. 659, 173 N.W.2d 504 (1969). *See* Annotation, 86 A.L.R.4th at 246.
- 1961 *In re Upper Peninsula Development Bureau*, 364 Mich. 179, 110 N.W.2d 709 (1961).
- 1923 *Clark Memorial Masonic Association v. Colman*, 222 Mich. 599, 193 N.W. 219 (1923). *See* Annotation, 38 A.L.R. at 907.
- 1902 *Waters v. Union Trust Co.*, 129 Mich. 640, 89 N.W. 687 (1902). *See* Annotation, 97 A.L.R.3d at 1062. *See* Annotation, 38 A.L.R. at 907 and 909.
- 1901 *First Universalist Church v. Pungs*, 126 Mich. 670, 86 N.W. 235 (1901). *See* Annotation, 97 A.L.R.3d at 1067. *See* Annotation, 38 A.L.R. at 882 and 907.
- 1880 *Allen v. Duffie*, 43 Mich. 1, 4 N.W. 427 (1880).
- 1867 *Comstock v. Howd*, 15 Mich. 237 (1867). *See* Annotation, 38 A.L.R. at 882, 897, and 905.
- 1863 *Underwood v. Waldron*, 12 Mich. 73 (1863). *See* Annotation, 38 A.L.R. at 882, 897, 907, and 908.
- 1857 *Wesleyan Seminary v. Fisher*, 4 Mich. 515 (1857). *See* Annotation, 38 A.L.R. at 882 and 892.

MINNESOTA

- 1925 *In re Stack's Estate*, 164 Minn. 57, 204 N.W. 546 (1925). *See* Annotation, 95 A.L.R. at 1307, 1310, 1311, and 1312.
- 1903 *Albert Lea College v. Brown's Estate*, 88 Minn. 524, 60 L.R.A. 870, 93 N.W. 672 (1903). *See* Annotation, 38 A.L.R. at 878, 879, 882, and 894.
- 1873 *Culver v. Banning*, 19 Minn. 303 (1873).

MISSOURI

- 1952 *Fredericktown Chamber of Commerce v. Chaney*, 250 S.W.2d 820 (Mo. Ct. App. 1952). *See* Annotation, 86 A.L.R.4th at 147.
- 1940 *Missouri Wesleyan College v. Shulte*, 346 Mo. 628, 142 S.W.2d 644 (1940). *See* Annotation, 151 A.L.R. at 1240.
- 1937 *Scottish Rite Temple Association v. Lucksinger*, 231 Mo. App. 486, 101 S.W.2d 511 (1937). *See* Annotation, 97 A.L.R.3d at 1062. *See* Annotation, 115 A.L.R. at 591 and 592.
- 1928 *Hardin College v. Johnson*, 221 Mo. App. 285, 3 S.W.2d 264 (Ct.App. 1928). *See* Annotation, 95 A.L.R. at 1307 and 1310.
- 1918 *La Grange Male & Female College v. Parker*, 198 Mo. App. 372, 200 S.W. 663 (1918). *See* Annotation, 38 A.L.R. at 875.
- 1912 *Young Men's Christian Ass'n of Carthage v. Morrow*, 165 Mo. App. 511, 148 S.W. 952 (1912). *See* Annotation, 38 A.L.R. at 882, 883, and 894.
- 1902 *Christian University v. Hoffman*, 95 Mo. App. 488, 69 S.W. 474 (1902). *See* Annotation, 38 A.L.R. at 882.

- 1897 *School District of City of Kansas City v. Stocking*, 138 Mo. 672, 37 L.R.A. 406, 60 Am. St. Rep. 576, 40 S.W. 656 (1897). *See* Annotation, 38 A.L.R. at 880, 882, 887, 905, and 912.
- 1878 *Methodist Orphans' Home Association v. Sharp*, 6 Mo.App. 150 (1878). *See* Annotation, 38 A.L.R. at 875, 898, 903, 910, and 911.
- 1868 *Trustees of Westminster College v. Estate of Gamble*, 42 Mo. 411 (1868). *See* Annotation, 97 A.L.R.3d at 1086. *See* Annotation, 38 A.L.R. at 899.
- 1866 *Koch v. Lay*, 38 Mo. 147 (1866). *See* Annotation, 38 A.L.R. at 882, 893, and 914.
- 1855 *Caples v. Branham*, 20 Mo. 244, 64 Am. Dec. 183 (1855). *See* Annotation, 38 A.L.R. at 875.

NEBRASKA

- 1964 *Barker v. Wardens and Vestrymen of St. Barnabas Church*, 176 Neb. 327, 126 N.W.2d 170 (1964).
- 1960 *In re Estate of Couch*, 170 Neb. 518, 103 N.W.2d 274 (1960). *See* Annotation, 86 A.L.R.4th at 247.
- 1952 *Cotner College v. Hester's Estate*, 155 Neb. 279, 51 N.W.2d 612 (1952).
- 1938 *Continental Company of Lincoln v. Eilers*, 134 Neb. 278, 278 N.W. 497 (1938). *See* Annotation, 97 A.L.R.3d at 1063, 1064, and 1087.
- 1925 *Nebraska Wesleyan Univ. v. Griswold's Estate*, 113 Neb. 256, 202 N.W. 609, 38 A.L.R. 858 (1925). *See* Annotation, 38 A.L.R. at 875, 876, 878, 884, 896, 898, and 911.

- 1912 *Lowe v. Keens*, 90 Neb. 565, 133 N.W. 1127 (1912). *See* Annotation, 97 A.L.R.3d at 1069.

NEW HAMPSHIRE

- 1860 *New London Literary & Scientific Institution v. Prescott*, 40 N.H. 330 (1860). *See* Annotation, 97 A.L.R.3d at 1078.
- 1850 *Curry v. Rogers*, 21 N.H. 247 (1850). *See* Annotation, 38 A.L.R. at 907 and 910.
- 1845 *Moore v. Chesley*, 17 N.H. 151 (1845). *See* Annotation, 38 A.L.R. at 907 and 908.
- 1835 *Congregational Society of Troy v. Goddard*, 7 N.H. 435 (1835).
- 1833 *Congregational Society v. Perry*, 6 N.H. 164, 25 Am. Dec. 455 (1833). *See* Annotation, 38 A.L.R. at 907 and 909.
- 1829 *George v. Harris*, 4 New Hamp. R. 533 (1829).

NEW JERSEY

- 1989 *Jewish Federation of Central New Jersey v. Barondess*, 234 N.J. Super. 526, 560 A.2d 1353 (1989). *See* Annotation, 86 A.L.R.4th at 251-52.
- 1940 *More Game Birds in America, Inc. v. Boettger*, 125 N.J.L. 97, 14 A.2d 778 (N.J. Super. L. 1940). *See* Annotation, 97 A.L.R.3d at 1071 and 1101. *See* Annotation, 151 A.L.R. at 1241.
- 1935 *American University v. Conover*, 180 A. 830 (N.J. Ct. Err. and App. 1935).

- 1921 *New Jersey Orthopaedic Hospital & Dispensary v. Wright*, 95 N.J.L. 462, 113 A. 144 (1921). *See* Annotation, 38 A.L.R. at 870, 882, and 898.

NEW MEXICO

- 1930 *In re Chavez's Estate*, 35 N.M. 130, 290 P. 1020 (1930). *See* Annotation, 95 A.L.R. at 1310.
- 1914 *Turknett v. The Western College of the New Mexico Conference of the Methodist Episcopal Church, South*, 19 N.M. 572, 145 P. 138 (1914).

NEW YORK

- 1989 *Laventhol & Horwath v. Moet-Hennessy*, 147 A.D.2d 366, 537 N.Y.S.2d 530 (1st Dept. 1989). *See* Annotation, 97 A.L.R.3d pocket part reference to section 19[b] [p.1102].
- 1977 *Woodmere Academy v. Steinberg*, 41 N.Y.2d 746, 395 N.Y.S.2d 434, 363 N.E.2d 1169, 97 A.L.R.3d 1047 (1977) *aff'd* 53 A.D.2d 156, 385 N.Y.S.2d 549 (1st Dept. 1976). *See* Annotation, 97 A.L.R.3d at 1064, 1072, 1076, 1098, and 1102. *See* Annotation, 86 A.L.R.4th at 253.
- 1966 *Cohoes Memorial Hospital v. Mossey*, 266 N.Y.S.2d, 25 A.D.2d 476 (3d Dept. 1966). *See* Annotation, 97 A.L.R.3d at 1096.
- 1965 *In re Lipsky's Estate*, 45 Misc. 2d 320, 256 N.Y.S.2d 429 (Surr. Ct. N.Y. County 1965). *See* Annotation, 86 A.L.R.4th at 252-53.
- 1963 *In re Kirby's Will*, 39 Misc. 2d 190, 240 N.Y.S.2d 214 (Surr. Ct. Westchester County 1963).

- 1959 *In re Field's Will*, 181 N.Y.S.2d 922, 15 Misc. 2d 950 (Surr. Ct. Suffolk County 1959) *mod.* 11 App.Div. 2d 774, 204 N.Y.S.2d 947. *See* Annotation, 97 A.L.R.3d at 1076.
- 1958 *In re Field's Estate*, 172 N.Y.S.2d 740, 11 Misc. 2d 427 (Surr. Ct. Westchester County 1958).
- 1957 *Liberty Maimonides Hospital v. Felberg*, 4 Misc. 2d 291, 158 N.Y.S.2d 913 (Surr. Ct. Sullivan County 1957).
- 1953 *In re Eckel's Will (Re Galt)*, 124 N.Y.S.2d 448 (Surr. Ct. Erie County 1953). *See* Annotation, 97 A.L.R.3d at 1097.
- 1949 *In re De Brabant's Estate*, 197 Misc. 923, 95 N.Y.S.2d 324 (Surr. Ct. N.Y. County 1949).
- 1943 *Matter of Borden's Will*, 180 Misc. 988, 42 N.Y.S.2d 560 (Surr. Ct. Ulster County 1943) *aff'd* 47 N.Y.S.2d 120, 267 A.D. 823 (1944). *See* Annotation, 151 A.L.R. at 1238 and 1241.
- 1941 *Matter of Metz' Estate*, 262 App.Div. 508, 30 N.Y.S.2d 502 (1st Dept. 1941). *See* Annotation, 151 A.L.R. at 1242.
- 1941 *Matter of Lord's Will*, 175 Misc. 921, 25 N.Y.S.2d 747 (Surr. Ct. Kings County 1941). *See* Annotation, 151 A.L.R. at 1239, 1240, 1241, and 1242.
- 1938 *I. & I. Holding Corp. v. Gainsburg*, 276 N.Y. 427, 12 N.E.2d 532, 115 A.L.R. 582 (1938). *See* Annotation, 115 A.L.R. at 589, 590, 591, 592, and 593.
- 1937 *Tioga County General Hospital v. Tidd*, 164 Misc. 273, 298 N.Y.S. 460 (Sup. Ct. Tioga County 1937). *See* Annotation, 115 A.L.R. at 590, 591, 592, and 593.
- 1937 *Matter of Barker's Estate*, 249 App. Div. 336, 293 N.Y.S. 199 (1939) *aff'g* 158 Misc. 803, 287 N.Y. S. 841 (Surr. Ct. St. Lawrence County 1937). *See* Annotation, 151 A.L.R. at 1239. *See* Annotation, 115 A.L.R. at 590.

- 1936 *Matter of Tummond's Estate*, 160 Misc. 137, 290 N.Y.S. 40 (Surr. Ct. Wayne County 1936).
- 1932 *Matter of Taylor's Estate*, 236 App.Div. 571, 260 N.Y.S. 836 (3rd Dept. 1932). *See* Annotation, 95 A.L.R. at 1310.
- 1932 *Eaton v. Reich*, 258 N.Y. 202, 179 N.E. 385 (1932). *See* Annotation, 95 A.L.R. at 1307.
- 1931 *Hoffstot v. Fifth Avenue Hospital*, 140 Misc. 206, 249 N.Y.S. 399 (Sup. Ct. N.Y. County 1931). *See* Annotation, 95 A.L.R. at 1314.
- 1930 *Washington Heights Methodist Episcopal Church v. Comfort*, 138 Misc. 236, 246 N.Y.S. 450 (N.Y. Mun. Ct. Boro. of Manhattan 1930). *See* Annotation, 95 A.L.R. at 1311 and 1312.
- 1929 *In re Reed's Estate*, 133 Misc. 903, 233 N.Y.S. 450 (Surr. Ct. N.Y. County 1929). *See* Annotation, 95 A.L.R. at 1309 and 1311.
- 1929 *Matter of Taylor's Estate*, 251 N.Y. 257, 167 N.E. 434 (1929). *See* Annotation, 95 A.L.R. at 1310.
- 1929 *First Methodist Episcopal Church of Mt. Vernon v. Howard's Estate*, 133 Misc. 723, 233 N.Y.S. 451 (Surr. Ct. Westchester County 1929) *aff'd* 233 App. Div. 753, 250 N.Y.S. 906 (1931). *See* Annotation, 151 A.L.R. at 1238. *See* Annotation, 95 A.L.R. at 1306, 1309, 1310, and 1313.
- 1927 *Allegheny College v. National Chautauqua County Bank of Jamestown*, 246 N.Y. 369, 159 N.E. 173, 57 A.L.R. 980 (1927). *See* Annotation, 95 A.L.R. at 1308, 1309, 1311, and 1313.
- 1923 *Guinzburg v. Blustein*, 121 Misc. 784, 202 N.Y.S. 333 (1923). *See* Annotation, 97 A.L.R.3d at 1071.
- 1922 *Russian Symphony Society v. Holstein*, 199 App. Div. 353, 192 N.Y.S. 64 (1st Dept. 1922). *See* Annotation, 38 A.L.R. at 882 and 904.

- 1920 *Mechanicville War Chest v. Butterfield*, 110 Misc. 257, 181 N.Y.S. 428 (Sar. County Ct. 1920). *See* Annotation, 38 A.L.R. at 882 and 904.
- 1920 *In re Conger's Estate*, 113 Misc. 129, 184 N.Y.S. 74 (Surr. Ct. Albany County 1920). *See* Annotation, 38 A.L.R. at 882, 894, 895, and 898.
- 1920 *Mechanicville War Chest v. Ryan*, 110 Misc. 448, 181 N.Y.S. 576 (Sar. County Ct. 1920). *See* Annotation, 38 A.L.R. at 882 and 904.
- 1914 *Locke v. Taylor*, 161 App. Div. 44, 146 N.Y.S. 256 (4th Dept. 1914).
- 1911 *First Church of Christ Scientist in Buffalo v. Schreck*, 70 Misc. 645, 127 N.Y.S. 174 (1911).
- 1904 *Commercial Travelers' Home Association of America v. McNamara*, 95 App. Div. 1, 88 N.Y.S. 443 (1904). *See* Annotation, 38 A.L.R. at 875 and 882.
- 1901 *Keuka College v. Ray*, 167 N.Y. 96, 60 N.E. 325 (1901). *See* Annotation, 38 A.L.R. at 882, 887, 889, 894, and 898.
- 1899 *Hull v. Pearson*, 38 Am.Div. 588, 56 N.Y.S. 518 (1899). *See* Annotation, 38 A.L.R. at 875, 876 and 890.
- 1896 *Central Presbyterian Church v. Thompson*, 8 App. Div. 565, 40 N.Y.S. 912 (4th Dept. 1896). *See* Annotation, 38 A.L.R. at 882, 887, 888, and 891.
- 1894 *Stoddard v. Cleveland*, 4 How. Pr. 148 (N.Y. 1894). *See* Annotation, 38 A.L.R. at 873 and 885.
- 1890 *Twenty-Third Street Baptist Church v. Cornwell*, 117 N.Y. 601, 23 N.E. 177 (1890) *aff'd* 56 N.Y. Sup Ct. 260, 3 N.Y.S. 51 (1888). *See* Annotation, 97 A.L.R.3d at 1081. *See* Annotation, 38 A.L.R. at 875, 891, 897, 898, and 911.

- 1889 *Presbyterian Church of Albany v. Cooper*, 112 N.Y. 517, 20 N.E. 352 (1889) *aff'd* 45 Hun. 453 (N.Y. 1887). *See* Annotation, 97 A.L.R.3d at 1068, 1080, and 1081. *See* Annotation, 38 A.L.R. at 887, 889, 896, 898, and 911.
- 1886 *Roberts v. Cobb*, 103 N.Y. 600, 9 N.E. 500 (1886). *See* Annotation, 38 A.L.R. at 882, 894, 895, and 896.
- 1880 *Marie v. Garrison*, 83 N.Y. 14, 38 Sickels 14 (1880).
- 1878 *Presbyterian Society of Knoxboro v. Beach*, 74 N.Y. 72, 29 Sickels 72 (1878). *See* Annotation, 38 A.L.R. at 882, 888, 891, 894, and 905.
- 1874 *Reformed Protestant Dutch Church v. Hardenbergh*, 48 How. Pr. 414 (N.Y. 1874). *See* Annotation, 38 A.L.R. at 874, 882, 891, and 894.
- 1871 *Rector of Church of Redeemer v. Crawford*, 43 N.Y. 476 (1871).
- 1871 *Hammond v. Shepard*, 40 How. Pr. 452 (N.Y. 1871). *See* Annotation, 97 A.L.R.3d at 1093. *See* Annotation, 38 A.L.R. at 880, 882, 887, 898, and 899.
- 1866 *Richmondville Union Seminary and Female Collegiate Institute v. McDonald*, 34 N.Y. 379, 7 Tiffany 378 (1866). *See* Annotation, 38 A.L.R. at 882, 887, 891, and 905.
- 1865 *Hutchins v. Smith*, 46 Barb. Ch. 235 (N.Y. 1865). *See* Annotation, 97 A.L.R.3d at 1067 and 1075. *See* Annotation, 38 A.L.R. at 882, 887, and 892.
- 1863 *Genesee College v. Dodge*, 26 N.Y. 213 (1863). *See* Annotation, 38 A.L.R. at 898 and 900.
- 1862 *Richmondville Union Seminary v. Brownell*, 37 Barb. 535 (N.Y. 1862). *See* Annotation, 38 A.L.R. at 882, 887, and 892.
- 1861 *Dodge v. Pond*, 23 N.Y. 69 (1861). *See* Annotation, 38 A.L.R. at 875 and 902.

- 1861 Wayne & O. Collegiate Inst. v. Smith, 36 Barb. 235 (1861). *See* Annotation, 38 A.L.R. at 882, 887, 888, 891, 892, and 910.
- 1860 First Baptist Society v. Robinson, 21 N.Y. 234 (1860). *See* Annotation, 38 A.L.R. at 874.
- 1859 Reformed Dutch Church v. Brown, 17 How. Pr. 287 *aff'd*, 29 Barb Ch. 335 (N.Y. 1859). *See* Annotation, 97 A.L.R.3d at 1069. *See* Annotation, 38 A.L.R. at 882, 883, and 898.
- 1854 Barnes v. Perine, 12 N.Y. (2 Kernan) 18 (1854). *See* Annotation, 38 A.L.R. at 870, 872, 882, 887, 888, 891, 894, and 910.
- 1851 Wilson v. Baptist Educational Society, 10 Barb. 308 (N.Y. 1851). *See* Annotation, 38 A.L.R. at 871, 877, 882, and 890.
- 1849 Stoddord v. Cleveland, 4 How. Pr. 148 (N.Y. 1849).
- 1848 Trustees of Hamilton College v. Stewart, 1 N.Y. (1 Comst.) 581 *aff'g* 2 Denio 403 (N.Y. 1845). *See* Annotation, 97 A.L.R.3d at 1079. *See* Annotation, 38 A.L.R. at 871, 872, 876, 885, 887, 890, 896, 898, 907, 910 and 911.
- 1822 Dieffendorf v. Trustees of Reformed Calvinist Church of Canhajoharie, 20 Johns 12 (N.Y. 1822). *See* Annotation, 97 A.L.R.3d at 1094. *See* Annotation, 38 A.L.R. at 882, 898, 899, and 902.
- 1822 McAuley v. Billenger, 20 Johns 89 (1822). *See* Annotation, 97 A.L.R.3d at 1075. *See* Annotation, 38 A.L.R. at 882, 887, and 890.
- 1810 First Religious Society of Whitestown v. Stone, 7 Johns 113 (N.Y. 1810). *See* Annotation, 38 A.L.R. at 882 and 902.

NORTH CAROLINA

- 1936 Rutherford College v. Payne, 209 N.C. 792, 184 S.E. 827 (1936). *See* Annotation, 86 A.L.R.4th at 247. *See* Annotation, 115 A.L.R. at 593.
- 1932 Greenville Supply Co. v. Whitehurst, 202 N.C. 413, 163 S.E. 446 (1932). *See* Annotation, 95 A.L.R. at 1312.
- 1930 Atlantic Christian College v. Hines, 198 N.C. 622, 152 S.E. 797 (1930). *See* Annotation, 97 A.L.R.3d at 1087.
- 1915 Rousseau v. Call, 169 N.C. 173, 85 S.E. 414 (1915). *See* Annotation, 38 A.L.R. at 907.
- 1903 Baptist Female University v. Borden, 132 N.C. 476, 44 S.E. 47 (1903). *See* Annotation, 38 A.L.R. at 894, 897, and 907.
- 1855 Pipkin v. Robinson, 48 N.C. (3 Jones) 152 (1855). *See* Annotation, 38 A.L.R. at 882, 892, and 898.

NORTH DAKOTA

- 1911 Thompkins v. Dinnie, 21 N.D. 305, 130 N.W. 935 (1911). *See* Annotation, 97 A.L.R.3d at 1072 and 1076. *See* Annotation, 38 A.L.R. at 898.

OHIO

- 1972 Hirsch v. Hirsch, 32 Ohio App. 2d 200, 61 Ohio Ops. 2d 212, 289 N.E.2d 386 (1972). *See* Annotation, 86 A.L.R.4th at 247, 249-50, and 252.
- 1938 Cincinnati Summer Opera Association v. Williams, 58 Ohio App. 513, 11 Ohio Ops. 529, 26 Ohio L. Abs. 694, 16 N.E.2d 1000 (1938). *See* Annotation, 97 A.L.R.3d at 1098.

- 1897 *Irwin v. Lombard University*, 56 Ohio St. 9, 36 L.R.A. 239, 46 N.E. 63 (1897). *See* Annotation, 38 A.L.R. at 878, 879, 882, 890, 891, 897, 898, 907, and 908.
- 1894 *Durrell v. Belding*, 4 Ohio C. D. 263, 1 Ohio Dec. 184 (1894). *See* Annotation, 38 A.L.R. at 882 and 893.
- 1893 *Sutton v. Trustees of Otterbein University*, 7 Ohio C.C. 343, 4 Ohio C.D. 627 (1893). *See* Annotation, 38 A.L.R. at 875 and 877.
- 1885 *Johnson v. Otterbein University*, 41 Ohio St. 527 (1885). *See* Annotation, 38 A.L.R. at 875, 880, and 903.
- 1873 *Hooker v. Wittenberg College*, 2 Cin. Sup. Ct. Rep. 353 (Ohio 1873). *See* Annotation, 38 A.L.R. at 873 and 891.
- 1864 *Ohio Wesleyan Female College v. Higgins*, 16 Ohio St. 20 (1864). *See* Annotation, 38 A.L.R. at 874, 878, 880, 882, and 893.
- 1859 *Farmers' College v. McMicken*, 2 Disney 495 (Ohio 1859). *See* Annotation, 38 A.L.R. at 882 and 887.

OREGON

- 1876 *Philomath College v. Hartless*, 6 Or. 158 (1876). *See* Annotation, 86 A.L.R.4th at 247. *See* Annotation, 38 A.L.R. at 871, 882, 887, 892, and 893.

PENNSYLVANIA

- 1944 *Carson's Estate*, 349 Pa. 529, 37 A.2d 488 (1944). *See* Annotation, 97 A.L.R.3d at 1064 and 1092.
- 1935 *Young Men's Christian Association v. Buckland*, 25 Pa. D. & C. 355 (1935). *See* Annotation, 97 A.L.R.3d at 1072.

- 1932 *Wanamaker's Estate*, 17 Pa. D & C 496 (1932). *See* Annotation, 86 A.L.R.4th at 247. *See* Annotation, 95 A.L.R. at 1310 and 1312.
- 1923 *Trustees of University of Pennsylvania v. Cadwalader*, 277 Pa. 512, 121 A. 314 (1923). *See* Annotation, 38 A.L.R. at 882.
- 1913 *Converse's Estate*, 240 Pa. 458, 87 A. 849 (1913). *See* Annotation, 97 A.L.R.3d at 1077. *See* Annotation, 38 A.L.R. at 882, 894, and 895.
- 1912 *Patchen's Estate*, 22 Pa.Dist.R. 56 (1912). *See* Annotation, 38 A.L.R. at 873. *See* Annotation, 38 A.L.R. at 876.
- 1905 *First Evangelical Lutheran Church v. Gardner*, 28 Pa. Sup. 82 (1905). *See* Annotation, 97 A.L.R.3d at 1064 and 1099. *See* Annotation, 38 A.L.R. at 882, 887, and 891.
- 1904 *Presbyterian Board of Foreign Missions v. Smith*, 209 Pa. 361, 58 A. 689 (1904). *See* Annotation, 38 A.L.R. at 870, 882, and 899.
- 1904 *Cohen v. Congregation Casseur Israel*, 30 Pa. Co. Ct. 623 (1904). *See* Annotation, 38 A.L.R. at 885 and 912.
- 1902 *Lippincott's Estate*, 21 Pa. Super. Ct. 214 (1902). *See* Annotation, 38 A.L.R. at 875.
- 1896 *Pierson's Estate*, 6 Pa. D. 23 (1896). *See* Annotation, 38 A.L.R. at 882 and 897.
- 1896 *Thum's Estate*, 5 Pa. D. 739, 18 Pa. D. R. 739, 18 Pa. Co. Ct. 615 (1896). *See* Annotation, 38 A.L.R. at 876 and 906.
- 1896 *First Cong. Church v. Gillis*, 17 Pa. Co. Ct. 614 (1896). *See* Annotation, 38 A.L.R. at 903, 912, and 913.
- 1886 *Garard v. Monongahela College*, 114 Pa. 337, 6 A. 701 (1886). *See* Annotation, 97 A.L.R.3d at 1063 and 1085.

- 1885 *Gans v. Reimensnyder*, 110 Pa. 17, 2 A. 425 (1885). *See* Annotation, 38 A.L.R. at 873. *See* Annotation, 38 A.L.R. at 875 and 878.
- 1881 *Stoke's Estate*, 14 Phila. 251 (1881). *See* Annotation, 38 A.L.R. at 875, 876, and 911.
- 1879 *Baird's Estate*, 13 Phila. 241 (1879). *See* Annotation, 38 A.L.R. at 875.
- 1879 *Hart's Estate*, 13 Phila. 226 (Pa. 1879). *See* Annotation, 38 A.L.R. at 903 and 907.
- 1875 *Helfenstein's Estate*, 77 Pa. 328, 18 Am. Rep. 449 (1875). *See* Annotation, 38 A.L.R. at 875 and 877.
- 1865 *McLain v. School Directors*, 51 Pa. 196 (1865). *See* Annotation, 38 A.L.R. at 894.
- 1860 *Edinboro Academy v. Robinson*, 37 Pa. 210, 78 Am. Dec. 421 (1860). *See* Annotation, 38 A.L.R. at 907 and 909.
- 1859 *Ryerss v. Presbyterian Congregation*, 33 Pa. 114 (1859). *See* Annotation, 38 A.L.R. at 882 and 891.
- 1857 *Price v. Maxwell*, 28 Pa. (4 Casey) 23 (1857).
- 1853 *Phipps v. Jones*, 20 Pa. 260, 59 Am. Dec. 708 (1853). *See* Annotation, 38 A.L.R. at 875 and 877.
- 1851 *Chambers v. Calhoun*, 18 Pa. 13 (1851).
- 1847 *Tyrone Twp. v. Dundleberger*, 6 Pa. 29 (1847). *See* Annotation, 38 A.L.R. at 894.
- 1846 *Caul v. Gibson*, 3 Pa. 416 (1846). *See* Annotation, 38 A.L.R. at 873, 878, 882, and 891.
- 1836 *Martin v. M'Cord*, 5 Watts 493, 30 Am. Dec. 343 (1836). *See* Annotation, 38 A.L.R. at 894.

SOUTH DAKOTA

- 1928 *Huron Lodge No. 444, B.P.O.E. v. Hinckley*, 54 S.D. 99, 222 N.W. 661 (1928). *See* Annotation, 95 A.L.R. at 1310.
- 1928 *Huron Lodge No. 444, B.P.O.E. v. McNamara*, 53 S.D. 153, 220 N.W. 468 (1928). *See* Annotation, 95 A.L.R. at 1313.

SOUTH CAROLINA

- 1922 *Furman University v. Waller*, 124 S.C. 68, 117 S.E. 356, 33 A.L.R. 615 (1922). *See* Annotation, 86 A.L.R.4th at 247. *See* Annotation, 38 A.L.R. at 872 and 883.

TENNESSEE

- 1913 *Board of Trustees of Third Presbyterian Church v. Caldwell*, 4 Tenn. C.C.A. 30 (1913). *See* Annotation, 38 A.L.R. at 884 and 912.
- 1881 *Foust v. Board of Publication of Cumberland Presbyterian Church*, 8 Lea. 552, 76 Tenn. 552 (1881). *See* Annotation, 86 A.L.R.4th at 247. *See* Annotation, 38 A.L.R. at 876, 878, and 883.
- 1841 *Macon v. Sheppard*, 2 Humph. 334 (1841). *See* Annotation, 38 A.L.R. at 891 and 902.

TEXAS

- 1954 Thompson v. McAllen Federated Woman's Building Corporation, 273 S.W.2d 105 (Tex. Civ. App. 1954). *See* Annotation, 86 A.L.R.4th at 247.
- 1932 Rouff v. Washington & Lee University, 48 S.W.2d 483 (Tex. Civ. App. 1932). *See* Annotation, 97 A.L.R.3d at 1096. *See* Annotation, 95 A.L.R. at 1310.
- 1927 Brown v. Weir, 293 S.W. 916 (Tex. Civ. App. 1927). *See* Annotation, 95 A.L.R. at 1310.
- 1910 Wasson v. Clarendon College & University Training School, 131 S.W. 852 (Tex. Civ. App. 1910). *See* Annotation, 97 A.L.R.3d at 1081.
- 1883 Williams v. Rogan, 59 Tex. 438 (1883). *See* Annotation, 38 A.L.R. at 883, 884, 892, 893, and 914.
- 1859 Doyle v. Glasscock, 24 Tex. 200 (1859). *See* Annotation, 38 A.L.R. at 883 and 900.
- 1857 Hopkins v. Upshur, 20 Tex. 89, 70 Am. Dec. 375 (1857). *See* Annotation, 38 A.L.R. at 876, 883, 884, and 891.

VERMONT

- 1933 University of Vermont v. Wilbur's Estate, 105 Vt. 147, 163 A. 572 (1933). *See* Annotation, 97 A.L.R.3d at 1083.
- 1923 Eastern States Agricultural and Industrial League v. Estate of Vail, 97 Vt. 495, 124 A. 568, 38 A.L.R. 845 (1923). *See* Annotation, 97 A.L.R.3d at 1077. *See* Annotation, 38 A.L.R. at 876, 883, and 894.
- 1897 In re Smith's Estate, 69 Vt. 382, 38 A. 66 (1897). *See* Annotation, 86 A.L.R.4th at 247. *See* Annotation, 38 A.L.R. at 870, 876, and 880.

- 1852 Troy Conference Academy v. Nelson, 24 Vt. 189 (1852). *See* Annotation, 38 A.L.R. at 883, 887, 894, 902, 904, 907, 908, and 912.
- 1837 State Treasurer v. Cross, 9 Vt. 289, 31 Am. Dec. 626 (1837). *See* Annotation, 38 A.L.R. at 907.
- 1829 University of Vermont v. Buell, 2 Vt. 48 (1829). *See* Annotation, 38 A.L.R. at 883 and 893.
- 1828 President & Fellows of Middlebury College v. Williamson, 1 Vt. 212 (1828). *See* Annotation, 97 A.L.R.3d at 1080.

VIRGINIA

- 1853 Galt's Executor v. Swain, 50 Va. (9 Gratt) 633, 60 Am. Dec. 311 (1853). *See* Annotation, 86 A.L.R.4th at 247. *See* Annotation, 38 A.L.R. at 870, 876, and 883.

WASHINGTON

- 1924 First Methodist Episcopal Church v. Soden, 131 Wash. 228, 229 P. 534 (1924). *See* Annotation, 97 A.L.R.3d at 1097.
- 1921 Ellison v. Keith, 117 Wash. 648, 202 P. 241 (1917). *See* Annotation, 86 A.L.R.4th at 247. *See* Annotation, 38 A.L.R. at 883.
- 1917 De Pauw University v. Ankeny, 97 Wash. 451, 166 P. 1148 (Wash. 1917). *See* Annotation, 38 A.L.R. at 883, 895, and 897.
- 1915 Young Men's Christian Association of Wenatchee v. Olds Company, 84 Wash. 630, 147 P. 406 (1915). *See* Annotation, 38 A.L.R. at 883 and 904.

WEST VIRGINIA

- 1960 State ex rel. Remke v. Falland, 145 W.Va. 364, 115 S.E.2d 326 (1960).
- 1942 Wesleyan University v. Hubbard, 124 W. Va. 434, 20 S.E.2d 677 (1942). *See* Annotation, 86 A.L.R.4th at 247. *See* Annotation, 151 A.L.R. at 1238, 1239, 1240, and 1242.

WISCONSIN

- 1939 In re McCanna's Estate, 230 Wis. 561, 284 N.W. 502 (1939). *See* Annotation, 86 A.L.R.4th at 247. *See* Annotation, 151 A.L.R. at 1240.
- 1909 Evangelish Lutherish St. Martin's Gemeinde v. Pruess, 140 Wis. 349, 122 N.W. 719, 17 Ann. Cas. 1074 (1909). *See* Annotation, 38 A.L.R. at 876.
- 1902 Hodges v. O'Brien, 113 Wis. 97, 88 N.W. 901 (1902). *See* Annotation, 97 A.L.R.3d at 1087. *See* Annotation, 38 A.L.R. at 883, 887, and 891.
- 1899 Hodges v. Nalty, 104 Wis. 464, 80 N.W. 726 (1899). *See* Annotation, 38 A.L.R. at 883 and 891.
- 1893 Trustees of Seventh Day Baptist Memorial Fund v. Saunders, 84 Wis. 570, 54 N.W. 1094 (1893). *See* Annotation, 38 A.L.R. at 883 and 905.
- 1889 La Fayette County Monument Corp. v. Magoon, 73 Wis. 627, 3 L.R.A. 761, 42 N.W. 17 (1889). *See* Annotation, 38 A.L.R. at 883 and 898.
- 1877 Leonard v. Lent, 43 Wis. 83 (1877). *See* Annotation, 38 A.L.R. at 876 and 877.
- 1874 Sun Prairie Methodist Episcopal Church v. Sherman, 36 Wis. 404 (1874). *See* Annotation, 38 A.L.R. at 876.

UNITED STATES FEDERAL AND FOREIGN CASES

- U.S. 1966 Rochester Civic Theatre, Inc. v. Ramsay, 368 F.2d 748, 10 Fed. R. Serv. 2d (Callaghan) 1211 (8th Cir. 1962). *See* Annotation, 86 A.L.R.4th at 247 (applying Minnesota law).
- U.S. 1963 Petty v. Commissioner, 40 T.C. 521 (1963). *See* Annotation, 86 A.L.R.4th at 247 (applying New Mexico law).
- U.S. 1962 Estate of Wardwell v. Commissioner, 301 F.2d 623 (8th Cir. 1962).
- U.S. 1941 Brown v. United States, 93 Ct. Cl. 217, 37 F. Supp. 444 (1941). *See* Annotation, 151 A.L.R. at 1241.
- U.S. 1938 Helvering v. Safe Deposit & Trust Company, 95 F.2d 806 (4th Cir. 1938). *See* Annotation, 151 A.L.R. at 1241 and 1242.
- U.S. 1936 Commissioner v. Bryn Mawr Trust Co. 87 F.2d 607 (3d Cir. 1936). *See* Annotation, 115 A.L.R. at 591 and 592.
- U.S. 1936 Trustees of Baker University v. Clelland, 86 F.2d 14 (8th Cir. 1936). *See* Annotation, 86 A.L.R.4th at 247. *See* Annotation, 115 A.L.R. at 590, 591, and 592 (applying Missouri law).
- U.S. 1882 American Printing House for Blind v. Louisiana Board of Trustees of American Printing House for Blind, 104 U.S. 711, 26 L. Ed. 902 (1882). *See* Annotation, 97 A.L.R.3d at 1063 and 1102.
- U.S. 1878 Sturges v. Colby, 2 Flipp. 163, Fed. Cas. No. 13,566 (1878). *See* Annotation, 38 A.L.R. at 881.
- U.S. 1875 Capelle v. Trinity Methodist Episcopal Church, 11 Nat. Bankr. Reg. 536, Fed. Cas. No. 2,392. *See* Annotation, 38 A.L.R. at 881, 905, 906, and 909.

- U.S. 1844 *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127 (1884).
- Can. 1936 *Royal Institute v. P. Lyall & Sons Co.*, Rap. Jud. Quebec 62 K.B. 125 (1936). *See* Annotation, 115 A.L.R. at 590.
- Can. 1934 *Governors of Dalhousie College at Halifax v. Estate of Boutilier*, S. C. R. 642, 95 A.L.R. 1298 (1934).
- UK 1885 *In re Hudson*, 54 L.J.Ch.N.S. 811 (Eng. 1885). *See* Annotation, 95 A.L.R. at 1306. *See* Annotation, 38 A.L.R. at 869, 872, 886, 902, and 903.

CASES ON RELATED CONTRACT ISSUES

- 1978 *Loranger Construction Corp. v. E.F. Hauserman Co.*, 376 Mass. 757, 384 N. E.2d 176 (1978) - distinguishing consideration and bargain from reliance in the absence of consideration - decided by Justice Braucher, former Reporter of the Restatement (Second) of Contracts and stating "the concept of reliance antedates the concept of protected expectations" relying, in part, on Restatement 2d Sec. 90 comment a.
- 1971 *In re Estate of Bucci*, 488 P.2d 216 (Colo. App. 1971).
- 1965 *Southeastern Sales and Service Co. v. T. T. Watson, Inc.*, 172 So. 2d 239 (1965).
- 1934 *Mitchell v. Reolds Farms Co.*, 268 Mich. 301, 256 N.W. 445 (1934) - Interest on defaulted pledges.
- 1930 *Petrogradsky Bank v. National City Bank of New York*, 253 N.Y. 23, 170 N.E. 479, 482 (1930).

- 1898 *Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898). Case involved the gift of a promissory note from a grandfather to his granddaughter. It is an early example of the extension of the doctrine of estoppel to promissory expressions. *See* CALAMARI *supra* note 11 at 275 and, to the same effect, *see* *In re Estate of Bucci*, 488 P.2d 216 (Colo. App. 1971).
- 1891 *Hamer v. Sidway*, 124 N.Y. 538, 27 N.E. 256, 12 L.R.A. 463, 21 Am. St. Rep. 693 (1891) - holding enforceable an uncle's promise to give his 15 year old nephew \$5,000 if the nephew refrained from smoking, drinking and gambling until he reached the age of 21. Upon performance the promise became enforceable.
- 1883 *Coit v. Comstock* 51 Conn. 352 (1883) - in which the court upheld charitable bequest recognizing the importance of using whatever equity powers necessary to uphold a charitable bequest.
- 1845 *Kirksey v. Kirksey*, 8 Ala. 131 (1845) - holding unenforceable a promise to take care of a widowed sister-in-law and her children if she would move to the brother-in-law's home.