

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:96cv01285(JR)
)	
DIRK KEMPTHORNE,)	
Secretary of the Interior, <u>et al.</u> ,)	
)	
)	
Defendants.)	
_____)	

**DEFENDANTS' FILING OF RESPONDING EXPERT REPORT
OF JOHN H. LANGBEIN, PURSUANT TO RULE 26(a)(2)
OF THE FEDERAL RULES OF CIVIL PROCEDURE**

Defendants hereby file and attach hereto the Responding Expert Report of

John H. Langbein.

Dated: September, 17, 2007.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that, on September 17, 2007 the foregoing *Defendants' Filing of Responding Expert Report of John H. Langbein, Pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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Re: Cobell v. Kempthorne

Dear Mr. Stemplewicz:

You have asked me, in my capacity as an expert on trust and equity matters, for my opinion regarding the expert report of Robert C. Vaughn, Jr., dated August 9, 2007 (hereafter Vaughn Report).

I have also reviewed the expert report of Paul M. Homan, dated August 17, 2007, which incorporates by reference his 2003 report and trial testimony in this case; and the expert report of Richard V. Fitzgerald, dated August 24, 2007, which incorporates by reference his 2003 trial testimony in the case. The substance of their opinions is addressed in large part by my expert report dated February 28, 2003, and by my prior testimony in the 2003 trial in this case, which I hereby incorporate by reference.

Expertise

1. *Employment.* I am Sterling Professor of Law and Legal History at Yale Law School. Previously, I have held chairs or other academic appointments at the University of Chicago, Cambridge University, Stanford University, Oxford University, the University of Michigan, and the Max Planck Institutes in Freiberg and Frankfurt, Germany. I have specialized in the connected fields of trusts, fiduciary administration, probate administration, and pension and employee benefits (ERISA) for more than three decades.

2. *Publications.* I co-author the principal coursebook, John H. Langbein, Susan J. Stabile & Bruce A. Wolk, Pension and Employee Benefit Law (Foundation Press, 4th ed. 2006 & 2007

Supp.), that is used in most American law schools that teach the pensions curriculum. I have written extensively in the scholarly literature about trust matters. I co-edit a student book that is widely used in trusts courses, John H. Langbein & Lawrence W. Waggoner, *Uniform Statutes on Trusts and Estates: 2007-08 Edition* (Foundation Press, 2007; prior eds. since 1987). My c.v., attached as an exhibit, lists my publications in these and other areas.

3. *Law revision activity.* Since 1984 I have served continuously under gubernatorial appointments from Illinois and Connecticut as a Uniform Law Commissioner. From 1991 to 1997 I chaired the Commission's probate and trust division (Division D). I was the reporter and principal drafter for the Uniform Prudent Investor Act (1994), which now governs fiduciary investing in 45 states and the District of Columbia and has been emulated by nonuniform acts in the rest. I was a member of the drafting committees responsible for the Uniform Trust Code (2000), the first comprehensive national codification of the law of trusts. I served on the drafting committee for the Uniform Prudent Management of Institutional Funds Act (UPMIFA) (2006), which governs endowment investing. I presently serve on the drafting committee that is preparing the Uniform Statutory Trust Entity Act (for commercial trusts). For the American Law Institute, I am the associate reporter for the Restatement (Third) of Property: Wills and Other Donative Transfers (Vol. I, 1999; Vol. II, 2003, Vol. III, forthcoming 2008, Vol. IV in preparation). I served on the advisory panel for the Restatement (Third) of Trusts: Prudent Investor Rule (1992), and I presently serve on the advisory panel that is overseeing a complete revision of the Restatement (Third) of Trusts.

4. *Litigation and advisory work.* I have served as an expert in trust and pension litigation, and as an advisor and consultant on fiduciary practice and fiduciary investment matters. Exhibit B lists deposition and trial testimony since 1987. Since 1994, I have appeared in a series of training videos for bank trust officers on aspects of fiduciary investing produced by Federated Investors.

5. *Exhibits.* I attach my c.v. (Exhibit A); a schedule of prior deposition and trial testimony (Exhibit B), together with a statement respecting my compensation in this matter (Exhibit C).

The Vaughn Report

6. *Global failings.* The Vaughn Report, at pages 3-4, contains four numbered opinions, each of which is framed as a response to a question propounded by plaintiffs' counsel. Below in this report I examine each of his opinions separately. At the outset, however, I direct attention to certain shortcomings that pervade all four of Mr. Vaughn's opinions.

7. *Want of authority.* Trust accounting, the field about which Vaughn opines, is heavily governed by statute, rules of court, and case law in each jurisdiction. There are notable differences among the states in accounting procedures. For example, the differences in state law concerning the extent to which a trust instrument can authorize departure from otherwise prescribed procedures is the subject of a classic law review article: see David Westfall, *Nonjudicial Settlement of Trustees' Accounts*, 71 *Harvard L. Rev.* 40 (1957). The Vaughn Report cites no authority for any of its assertions--no statute, no rules of court, no Restatements, no treatises. In my opinion, a responsible expert opinion purporting to address the appropriate standards for trust accounting should be grounded in relevant authority.

8. *Undemonstrated expertise.* Lacking citation to relevant authority, the Vaughn Report rests entirely on Vaughn's experience in probating estates and trusts. Since his c.v. identifies

him as a member only of the bar of North Carolina, I infer that his experience is confined to that state (together with any ancillary administration arising from out-of-state assets in North Carolina estates). Vaughn claims to have been involved in more than 1,000 trust or estate accountings, Vaughn Report, at page 1, but he supplies no detail about these accountings. If these accountings were mostly routine probate filings and estate closings, Vaughn's experience is remote from the complex administrative challenges inherent in the IIM accounts.

9. *Unique features of the IIM accounts.* The IIM accounts involve matters stretching back into the nineteenth century, touching the interests of hundreds of thousands of persons. By contrast, typical estate and trust proceedings involve a handful of parties and a much more compressed period of fiduciary administration. The immense size and unique character of the assets in the IIM accounts differ notably from the assets characteristic of personal trusts. Moreover, unlike in conventional trust administration, the trust terms for the IIM accounts must be elicited from a succession of federal statutes. Because the sovereign has been the trustee, the competing responsibilities of the sovereign have shaped the trusteeship in a fashion that is without counterpart in routine trust practice. Thus, as Judge Williams observed in *Cobell XVII*, "the IIM trust differs from ordinary private trusts along a number of dimensions" *Cobell v. Norton*, 428 F.3d 1070, 1074 (2005).

10. The Vaughn Report, however, takes no account of the differences between Vaughn's background in routine estate matters and the daunting challenges of federal fiduciary administration involved in the IIM accounts. It is the plaintiffs' responsibility to demonstrate why the views of an estates practitioner who cites no support in the governing authorities should be entitled to any deference in a federal matter so complex and so remote from his experience, a matter governed by the interplay of federal law and common law fiduciary principles that he does not cite.

11. *Ignoring the duty of cost sensitivity.* There is a notable omission in all of Vaughn's opinions. He argues for relentless historical precision ("back to the beginning of the trust relationship," Vaughn Report, at 3). But he ignores without mention the limiting principle, the fiduciary duty of cost sensitivity, that suffuses all issues of trust administration, including trust accounting. See *Cobell XVII*, in which Judge Williams observed: "Even plaintiffs' counsel, responding during oral argument to a hypothetical involving \$1 million in accounting expenses for a \$1,000 trust, conceded some role for practicality." 428 F.3d at 1075.

12. The duty of cost sensitivity that the Vaughn Report ignores has recently been recodified in the Restatement (Third) of Trusts. The black letter reads: "A trustee can properly incur and pay expenses that are reasonable in amount and appropriate to the purposes and circumstances of the trust and to the experience, skills, responsibilities, and other circumstances of the trustee." Restatement (Third) of Trusts § 88 (2007) (formerly Restatement (Second) of Trusts § 188 (1959)). "Implicit in a trustee's fiduciary duties is a duty to be cost-conscious." Restatement (Third) of Trusts § 88, cmt a. (2007). The duty of cost-sensitivity is also codified in the Uniform Prudent Investor Act § 7 (1994), whose official comment says: "Wasting beneficiaries' money is imprudent." 7B Unif. Laws Ann. 37 (2006). When a federal agency engages in trust administration at public expense, a similar responsibility runs to the fisc. The duty of cost sensitivity is an application of the fundamental care norm that governs all aspects of trust administration, the duty of prudent administration. "The trustee has a duty to administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust." Restatement (Third) of Trusts § 88 (2007) (formerly Restatement (Second) of Trusts § 174 (1959)). Properly applied in the present case, the duty of cost sensitivity limits, and in places contradicts, Vaughn's opinion that lavishly expensive historical accounting procedures should be employed in the IIM accounts, without regard to the minute size of the accounts and the disrepair

and complexity of many of the records that would be needed for such an accounting. A prudent trustee does not engage in unreasonably expensive accounting procedures.

I turn now to each of Vaughn's four numbered opinions.

Vaughn's Opinion No. 1

13. Vaughn's Opinion No 1, at page 3, purports to answer the question, "What is a trust accounting?" His answer calls for various steps that entail maximum expenditure. What is peculiar about Vaughn's answer is that he neglects to question the question. He should have asked: "Accounting for what purpose with respect to what assets?"

14. *Accounting for what.* In truth, trust accountings serve many purposes, and the steps appropriate to an accounting vary according to the purpose and the circumstances. I have had occasion in the scholarly literature to point to the range of tasks that are embraced by the concept of accounting in trust matters:

In trust practice and parlance, the term "accounting" has been used to refer to five distinct doctrines or remedies: (1) the trustee's duty to keep appropriate internal financial records respecting the trust property, Restatement (Second) of Trusts §172 (1959); (2) financial reporting to the beneficiary about the trust assets, id. § 173; (3) financial reporting to the court for purposes of obtaining a judicial decree with preclusive effect approving the accounts, id. § 260; (4) so-called "accounting for profits," a restitutionary remedy to recoup from a trustee a profit that the trustee has made from the trust in circumstances that do not constitute breach of trust, id. § 203; and (5) the equitable remedy of account, which arises from equity's power of discovery, and which commonly entails the use of a master or referee to examine and offset financial records and prepare consolidated accounts, see 1 Dan Dobbs, Law of Remedies § 4.3(5), at 609, 610 (1993).

John H. Langbein, Mandatory Rules in the Law of Trusts, 98 Northwestern U. L. Rev. 1105, 1125 n. 107 (2004).

15. *Confusing ledgers and accountings.* The procedures that Vaughn treats as required in a trust accounting are absurdly elaborate, for example, "an item by item proof of all revenue, income, or receipts," Vaughn Report, at page 3. In truth, it is quite common in trust accountings not to present such ledger-level data to the beneficiary or to the court, but rather to consolidate receipts by category for quarterly or other intervals. The same is true of the "item-by-item proof of all funds paid out" that Vaughn treats as obligatory. A sound trust accounting does not have to itemize every postage stamp.

16. *Trustee's discretion.* If one turns to the Restatement provisions that I have cited in the extract reproduced supra in § 14 of this report, one finds that the Restatement requires none of the steps that Vaughn treats as obligatory in his Opinion No. 1. In truth, the choice of accounting procedures, unless otherwise governed by statute or court rule, is remitted to the fiduciary discretion of the trustee. A major shortcoming in Vaughn's Opinion No. 1 is his failure to take account of the discretion that the trustee must exercise in selecting accounting procedures that balance the disclosure objectives of accounting with the duty of cost sensitivity. The Restatement says: "A trustee generally has discretion (i.e., is to use fiduciary judgment) with respect to the exercise of the powers of the trusteeship." Restatement (Third) of Trusts § 87, cmt a (2007). "When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion." Id. § 87.

17. The message of these authorities as applied to the present litigation is that *the level of detail appropriate to a trust accounting is a matter of fiduciary discretion*, because the trustee has to balance cost against benefit. Vaughn's suggestion that all trust accountings require minute itemization is a prescription for wastefulness, and is irreconcilable both with the duty of cost sensitivity and with the principle of trustee discretion in fiduciary administration.

18. *Trustee fees*. One characteristic entry that commonly appears in trust accountings for private and commercial trusts is an expense item for trustee fees. Vaughn makes no mention of trustee fees, nor does he mention the rule that "the trustee is entitled to reasonable compensation out of the trust estate for his services as trustee" Restatement (Second) of Trusts § 242 (1959).

If the Department of the Interior as trustee were to charge fees commensurate with the costs of maintaining hundreds of thousands of tiny IIM accounts (especially accounts that are worth less than the cost of servicing them), those accounts would be extinguished through insolvency and thus would cease to have the claims that the plaintiffs assert in the *Cobell* litigation.

Vaughn's Opinion No. 2

19. Vaughn's Opinion No. 2 addresses the question of "what is required of a trustee in the performance of a historical accounting under the above facts." Vaughn Report, at page 3. Presumably, "the above facts" refer to Vaughn's brief recital, *id.*, at pages 1-2, of some aspects of the IIM accounts and their history. However, in his Opinion No. 2, he does not mention any of the facts; he says nothing, for example, about how the small size and minute value of so many of the accounts should bear on the trustee's discretion in selecting appropriate accounting procedures. Instead, he announces that "the trustee must go back to the beginning of the trust relationship and open an account ... for each beneficiary" *Id.*, at page 3. In truth, such a procedure is one alternative, but in circumstances such as the present, in which there have been large numbers of smallish accounts, extending back over very long periods of times, in circumstances in which some records are unavailable or difficult to ascertain, the trustee may in the exercise of its fiduciary discretion conclude that other techniques of estimation or approximation may in some circumstances strike a better balance between the fiduciary duties of disclosure and cost-sensitivity.

Vaughn's Opinion No. 3

20. Vaughn's Opinion No. 3 shows a similar insensitivity to the facts of the IIM accounts and a similar proclivity for treating expense-maximizing procedures as obligatory without any citation to relevant authority. The question that Vaughn purports to answer is: "Do the requirements of an accounting change, if the accounting is only required from a point in time subsequent to the creation of the trust relationship?" Vaughn Report, at page 3. Vaughn's opinion is, in effect, that even if an accounting is prepared for one interval, every interest has to be traced back to the inception of the trust relationship. In his words: "both the identification of account holders and the balance in each account must be correct. For the identification of each account holder to be correct and the amount in each account to be correct, one must trace the allotment ownership from its commencement through heirs and devisees to insure that each individual entitled to a beneficial ownership in fact has a beneficial ownership which is correct and to insure that the [balances in the accounts are correct]."

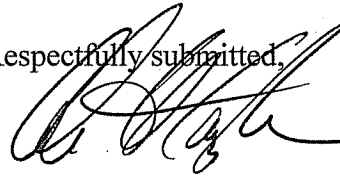
21. Such meticulous historicism may be suitable in ordinary private trust settings in which relatively few interests are at stake, durations have been relatively short, and records are conveniently at hand. When the circumstances are quite different, as with the IIM accounts,

procedures of estimation and approximation for more remote periods may be more suited to the trustee's duty of cost sensitivity.

Vaughn's Opinion No. 4

22. *The rule against commingling.* The gist of Vaughn's one-sentence Opinion No. 4 is that the rule against commingling trust assets does not prevent common fund administration, but that in such cases account-level records of the respective interests need to be maintained. There is no reason, in my opinion, to rest such an elementary rule of trust law on purported expert opinion, as opposed to relevant authority. The rule against commingling can be found authoritatively stated as Restatement (Third) of Trusts § 84 (2007); for the earmarking standards appropriate to pooled administration, see *id.* § 84, cmt. d. American trust law has long encouraged the use of pooled investments to facilitate diversification and economies of scale in investment management. See, e.g., the Uniform Common Trust Fund Act (1938), 7 Unif. Laws Ann. 175 (2002); Uniform Prudent Investor Act § 3, cmt. (1994), 7B Unif. Laws Ann. 30 (2006) ("pooled investment vehicles have become the main mechanism for the investment needs of smaller trusts").

Respectfully submitted,



John H. Langbein

JHL/st
encs. (3)

August 2007

John H. Langbein

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I. Professional

Sterling Professor of Law and Legal History, Yale University, since 2001; previously Chancellor
Kent Professor of Law and Legal History, 1990-2001

Honorary Fellow, Trinity Hall, Cambridge (elected 2000)

Previous positions: University of Chicago, Max Pam Professor of American and Foreign Law,
1980-90; professor, assistant professor 1971-80

Visiting professor: Arthur Goodhart Professor in Legal Science, Cambridge University (1997-
98); Yale Law School (1989-90); Stanford Law School (1985-86); University of
Michigan Law School (summer 1976)

Visiting fellow:

Trinity Hall, Cambridge (1997-98)
All Souls College, Oxford (1977)
Max Planck Institute for European Legal History, Frankfurt (1977; 1969-70)
Max Planck Institute for Criminal Law, Freiburg (1973) (Alexander von Humboldt-
Stiftung Fellow)

Teaching subjects:

Pension and employee benefit law (ERISA)
Wills and succession
Trusts, estates, and fiduciary administration
English, European, and American legal history
Comparative law (emphasizing German law and legal institutions)

Admitted to the bar:

District of Columbia (1969)
England: Of the Inner Temple, Barrister-at-Law (1970)
Florida (1971)

Member:

Academy of European Private Law (elected 2001)
American Academy of Arts and Sciences (elected 1987)
American Bar Association (sections: Legal Education; Real
Property, Probate & Trust)
American College of Trust and Estate Counsel (elected 1985)
American Historical Association
American Law Institute (elected 1983)
American Society for Legal History
Association internationale de droit judiciaire (elected 1984)
Connecticut Bar Association (section: Estates & Probate)
Gesellschaft für Rechtsvergleichung (Germany)
International Academy of Comparative Law (elected 1984)
International Academy of Estate and Trust Law (elected 1985)
International Commission for the History of Representative and Parliamentary
Institutions
National Academy of Social Insurance (elected 2004)
Selden Society
Society of Legal Scholars (UK)

II. Degrees

M.A. 1990 (hon.), Yale University

Ph.D. 1971, Cambridge University, England (Trinity Hall).
Thesis: "The Criminal Process in the Renaissance" (awarded Yorke Prize)

LL.B. 1969, Cambridge University; first class honours;
Trinity Hall Prize in English law; Scholar of Trinity Hall

LL.B. 1968, Harvard Law School; magna cum laude; editor, Harvard
Law Review, vol. 80, articles editor, vol. 81; Frank Knox Fellow, 1968-69; Harvard Law
School Fellow in Foreign and Comparative Law, 1968-71

A.B. 1964, Columbia University (economics)

III. Personal

Born 17 November 1941; American citizen; married 24 June 1973, Kirsti M. Langbein; children, Christopher H., b. 11 July 1979; Julia L., b. 6 June 1981; Anne K., b. 25 March 1983

Languages: fluent German, good French, working Italian

Listed in: Who's Who in America
Who's Who in American Law
Who's Who in American Education
Who's Who in the World

IV. Public Service

Uniform Law Commission, Reporter, Uniform Prudent Investor Act (1991-94)

American Law Institute, Associate Reporter, Restatement of Property (Third): Wills and Other Donative Transfers (since 1990); vols. 1-2 published (1999, 2003), vol. 3 (forthcoming 2007)

American Law Institute, Adviser, Restatement of the Law of Trusts (Third) (since 1993); and Restatement of the Law of Trusts (Third): Prudent Investor Rule (1987-92)

National Academy of Social Insurance, Panel Member, Uncharted Waters: Paying Benefits from Individual Accounts in Federal Retirement Policy (2003-05)

Uniform Law Commission (National Conference of Commissioners on Uniform State Laws), Commissioner, (since 1984); gubernatorial appointments from Illinois, 1984-91; from Connecticut, since 1991.

Current Project: Drafting Committee on Uniform Statutory Trust Entity Act (since 2003).

Completed projects: Co-reporter, Uniform Transfer on Death Security Registration Act; Drafting Committee on Uniform Custodial Trust Act; Drafting Committees to Revise Articles II & VI, Uniform Probate Code; Drafting Committee on Uniform Health-Care Decisions Act (right to die); Drafting Committee on Uniform Principal and Income Act; Drafting Committee on Uniform Management of Public Employee Retirement Systems Act; Drafting Committees on the Uniform Trust Code
Drafting Committee on Uniform Prudent Management of Institutional Funds Act.

Joint Editorial Board for the Uniform Trust and Estate Acts (formerly Joint Editorial Board for the Uniform Probate Code), Uniform Law Commission representative (since 1985)

Connecticut Law Revision Commission, Probate Advisory Committee, member, since 1990

U.S. Secretary of State's Advisory Committee on Private International Law, Member, Study Groups on Trusts and Decedents' Estates (1984-1998)

V. Principal Publications: Books

- Pension and Employee Benefit Law (with Susan Stabile & Bruce Wolk) (4th ed., Foundation Press 2006) (prior eds., with Bruce Wolk, 2000, 1995; 1990); annual supplements (1991-2007); teacher's manual (2006 and previous eds.)
- History of the Yale Law School: The Tercentenary Lectures (with A. Kronman et al.) (Yale Univ. Press 2004)
- The Origins of Adversary Criminal Trial (Oxford Univ. Press 2003, paperback 2005) (2006, awarded Biennial Coif Book Award for outstanding book in law)
- Uniform Statutes on Trusts and Estates: 2007-08 Edition (with Lawrence Waggoner) (Foundation Press 2005) (previous editions, 2005-06, 2004, 2003, 2002, 2001; sub nom. Selected Statutes on Trusts and Estates, 1995, 1994, 1992, 1991, 1989, 1987)
- Pension and Employee Benefit Statutes and Regulations: Selected Sections: 2005 Edition (with Bruce Wolk) (Foundation Press 2005) (previous eds. 2004, 2003, 2002)
- The Privilege Against Self-Incrimination: Its Origins and Development (with R.H. Helmholz et al.) (Univ. Chicago Press) (1997)
- Comparative Criminal Procedure: Germany (West Pub. Co., American Casebook Series 1977)
- Torture and the Law of Proof: Europe and England in the Ancien Régime (Univ. Chicago Press 1977, paperback edition with new introduction, 2006)
- Prosecuting Crime in the Renaissance: England, Germany, France (Harvard Univ. Press 1974; reprint edition issued 2005); excerpted in part and published in translation as "Die Carolina" in F.C. Schroeder, ed., Die Carolina: Die Peinliche Gerichtsordnung Kaiser Karls V. von 1532 (Wissenschaftliche Buchgesellschaft, Darmstadt 1986)

VI. Principal Publications: Articles

Pension and Investment Law

- Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA, 101 Northwestern Univ. L. Rev. 1315 (2007)
- Social Security and the Private Pension System, in In Search of Retirement Security: The Changing Mix of Social Insurance, Employee Benefits, and Individual Responsibility (T. Ghilarducci et al. eds.) (National Academy of Social Insurance 2005)
- What's Wrong with Employee Stock Pension Plans, in Enron: Corporate Fiascos and Their Implications 487 (Nancy B. Rapoport & Bala G. Dharan eds. 2004) (reproducing testimony presented to U.S. Senate Committee on Governmental Affairs, Jan. 24, 2002)

What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West, 103 Columbia L. Rev. 1317 (2003), substantially republished in New York University Review of Employee Benefits and Executive Compensation 2-1 (2004)

Trust-Investment Law in the United States: Main Themes of the Uniform Prudent Investor Act, Shintaku No. 189 (Feb. 1997) (in Japanese)

The Uniform Prudent Investor Act and the Future of Trust Investing, 81 Iowa Law Review 641 (1996); republished in Modern International Developments in Trust Law (D. Hayton, ed.) (1999)

The New American Trust-Investment Law, 8 Trust Law International 123 (1994)

Reversing the Nondelegation Rule of Trust-Investment Law, 59 Missouri Law Review 104 (1994) (William Fratcher memorial issue)

The Supreme Court Flunks Trusts, [1990] Supreme Court Review 207 (1991)

The Conundrum of Fiduciary Investing under ERISA, in Proxy Voting of Pension Plan Equity Securities 128 (D. McGill, ed.) (Wharton School: Pension Research Council 1989)

ERISA's Fundamental Contradiction: The Exclusive Benefit Rule (with Daniel R. Fischel), 55 Univ. Chicago Law Review 1105 (1988)

Social Investing of Pension Funds and University Endowments: Unprincipled, Futile, and Illegal, in Disinvestment: Is it Legal, Is it Moral? Is it Productive? (National Legal Center for the Public Interest, Washington 1985)

Social Investing and the Law of Trusts (with Richard Posner), 79 Michigan Law Review 72 (1980)

Market Funds and Trust-Investment Law II (with Richard Posner), 1977 American Bar Foundation Research Journal I

The Revolution in Trust Investment Law (with Richard Posner), 62 American Bar Association Journal 887 (1976)

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Trust and Estate Law

Why Did Trust Law Become Statute Law in the United States?, 58 Alabama Law Review 1069 (2007) (Meador Lecture 2006)

Questioning the Trust-Law Duty of Loyalty: Sole Interest or Best Interest? 114 Yale Law Journal 929 (2005) (2006 Green Bag award, best written article)

The Rise of the Management Trust, 143 *Trusts & Estates Magazine* 52 (Oct. 2004), substantially republished in 4 *Trusts Trimestrale di Approfondimento Scientifico e Professionale* 338 (2005)

Mandatory Rules in the Law of Trusts, 98 *Northwestern Law Review* 1105 (2004) (Hess Memorial Lecture of the Ass'n of the Bar of the City of New York, April 2002)

Curing Execution Errors and Mistaken Terms in Wills: The Restatement of Wills Delivers New Tools (and New Duties) for Probate Lawyers, 18 *Probate & Property* 28 (Jan./Feb. 2004); substantially republished in 51 *Yale Law Report* 36 (Sum. 2004)

The Uniform Trust Code: Codification of the Law of Trusts in the United States, 15 *Trust Law International* 69 (2001).

The Secret Life of the Trust: The Trust as an Instrument of Commerce, 107 *Yale Law Journal* 165 (1997); republished in *Modern International Developments in Trust Law* (D. Hayton, ed.) (1999)

The Contractarian Basis of the Law of Trusts, 105 *Yale Law Journal* 625 (1995)

Will Contests, 103 *Yale Law Journal* 2039 (1994) (review)

Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code (with Lawrence Waggoner), 55 *Albany Law Review* 871 (1992) (Uniform Probate Code Symposium Issue)

The Inheritance Revolution, *The Public Interest* 15-31 (Winter 1991)

Education and Family Wealth, 20 *Planning for Higher Education* 1 (1991)

Taking a Look at the Pluses and Minuses of the Practice, *Trusts & Estates* 10-18 (Dec. 1989)

The Twentieth-Century Revolution in Family Wealth Transmission, 86 *Michigan Law Review* 722 (1988)

The Twentieth-Century Revolution in Family Wealth Transmission and the Future of the Probate Bar, 1988 *Probate Lawyer* 1 (American College of Probate Counsel)

Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law, 87 *Columbia Law Review* 1 (1987)

Redesigning the Spouse's Forced Share (with Lawrence Waggoner), 22 *Real Property, Probate and Trust Journal* 303 (ABA, 1987); abridged and republished, 32 *Law Quadrangle Notes* 30 (Univ. Michigan Law School 1988)

The Nonprobate Revolution and the Future of the Law of Succession, 97 *Harvard Law Review* 1108 (1984)

Reformation of Wills on the Ground of Mistake: Change of Direction in American Law? (with Lawrence Waggoner), 130 *Univ. Pennsylvania Law Review* 521 (1982)

Defects of Form in the Execution of Wills: Australian and Other Experience with the Substantial Compliance Doctrine, in *American/Australian/New Zealand Law: Parallels and Contrasts* 59 (ABA Press 1980) *Crumbling of the Wills Act: Australians Point the Way*, 65 *American Bar Association Journal* 1192 (1979); substantially republished as *The Crumbling of the Wills Act: The Australians Point the Way*, 25 *Univ. Chicago Law School Record* 3 (1979)

Living Probate: The Conservatorship Model, 77 *Michigan Law Review* 63 (1978)

Substantial Compliance with the Wills Act, 88 *Harvard Law Review* 489 (1975)

Comparative Law

Cultural Chauvinism in Comparative Law, 5 *Cardozo Journal of International & Comparative Law* 41 (1997)

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January 2007

John H. Langbein

Prior Deposition and Trial Testimony

In re Galloway Family Trusts (Galloway v. U.S. Bank N.A.), Ramsey County Minnesota District Court, Second District, Court File C1-04-200006/0045; fiduciary duty of professional trustee of irrevocable trust to commission and institute suitable tax planning measures; retained for plaintiff by John A. Cotter, Esq., Larkin, Hoffman, Daly & Lindgren, 1500 Wells Fargo Plaza, 7900 Xerxes Ave. South, Minneapolis, MN 55431-1194, tel. 952-835-3800; deposition taken in New Haven, CT., May 8, 2006; trial testimony in St. Paul, MN, Sept. 27, Nov. 16, 2006.

Janet M. Jeanes v. Bank of America et al., Shawnee County Kansas District Court, Civil Case No. 046 1636; investment responsibilities under agency account with express exclusion of investment authority over particular asset; retained for defendant by Charles A. Redd., Esq., Sonnenschein Nath & Rosenthal, 1 Metropolitan Square, Suite 3000, St. Louis, MO 63102; deposition taken in New York City, April 13, 2006.

Bayer v. Harris Trust Co., Jackson County Oregon Circuit Court, Case No 032370-L7; imprudent investing and failure to diversify prevailingly single-stock portfolio; retained for plaintiff by Jeffrey R. Sylvester, Esq., Sylvester & Polodnak, Ltd., 7371 Prairie Falcon, Suite 120, Las Vegas, NV 89128; deposition taken in New Haven, CT, Mar. 10, 2006.

Matter of Conservatorship of Estate of Ruth Lilly; Matter of the Ruth Lilly Charitable Remainder Annuity Trusts, Marion County Indiana Probate Division, Cause No. 48D08 0211 TR002770-71; breach of duty to diversify single-stock inception asset charitable remainder annuity trusts; retained for plaintiffs Americans for the Arts by Andrew J. Goodman, Esq., Kurzman Eisenberg Corbin Lever & Goodman LLP, 675 Third Ave, 18th Fl., New York, NY 10017, 212-661-2150; depositions taken in New York City Mar. 4 & Apr. 29, 2005.

Furstenau v. AT&T Corp. et al., U.S. District Court, District of New Jersey, Civil Action No. 02-CV-5409; ERISA class action alleging breaches of fiduciary duty arising from employer stock option in 401(k) plan; retained for defendants by Mark Blocker, Esq., Sidley Austin Brown & Wood LLP, Bank One Plaza 10 South Dearborn St., Chicago, IL 60603; 312-853-6097; deposition taken in Hartford, CT, Jan. 6, 2005.

In re William C. Roettger Trust, Vandenberg County Indiana Superior Court, Cause No. 82D07-0110-TR-00539; loyalty and impartiality issues in distributions from inter vivos trust;

retained for plaintiff by Martha T. Starkey, Esq., Starkey Law Group, 30 South Meridian St., Suite 850, Indianapolis, IN 46280; 317-705-8888; teleconference deposition taken in New Haven, CT, June 9, 2004; trial testimony in Evansville, IN, Aug. 11, 2004.

In Re Harry Winston; Bruce Winston v. Deutsche Bank, Westchester County N.Y. Surrogates Court File No. 3806/1978; cotrusteeship and fiduciary investing responsibilities of corporate fiduciary when trust owns an operating business; retained for plaintiff by Raymond A. Bragar, Esq., Bragar Wexler Eigel & Morgenstern, LLP, 885 Third Ave., Suite 3040, New York, N.Y. 10022; 212-308-5858; deposition taken in New York City Feb. 12, 2004; trial testimony, White Plains, N.Y., Dec. 7, 2004.

Cobell v. Norton, U.S. District Court, District of Columbia; Case No. 1:96 CV 01285 RCL (D.D.C.); fiduciary standards in federal Indian Trust accounting action; retained for defendant United States by John T. Stemplewicz, Esq., U.S. Department of Justice, Civil Division, P.O. Box 875, Ben Franklin Station Washington, D.C. 20044-0875; trial testimony in Phase 1.5 trial Jun. 2-3, 2003.

Richard L. Berry v. Key Trust Co., et. al., Court of Common Pleas, Cuyahoga County, Ohio, Case No. 431079; trust termination action; retained for petitioner in April 2002 by Martha T. Starkey, Esq., Starkey Law Group, 2 Meridian Corporate Plaza, 401 Pennsylvania Parkway, Suite 100, Suite 100, Indianapolis, IN 46280; 317-705-8888; deposition taken in Cleveland, OH, Sept. 27, 2002.

Keach & Sage v. U.S. Trust Co., N.A., et. al., U.S. District Court, Central District of Illinois, Peoria Division, Case No. 01-1168; ESOP fiduciary investment issues under ERISA; retained by Dean B. Rhoads, Esq., Sutkowski & Rhoads, Ltd., 124 S.W. Adams St., Suite 560, Peoria, IL 61602-1357; deposition taken in New York, NY, Aug. 12, 2002.

Bishop v. McNeil, Court of Chancery, New Castle County, DE; trust division proceeding, including issues of co-trustee fiduciary duties; retained for Henry McNeil in April 2002 by Lawrence T. Hoyle, Esq., Hoyle, Morris & Kerr LLP, 1 Liberty Place, Suite 4900, 1650 Market St., Philadelphia, PA 19103-7397; 215-981-5700; deposition taken in Philadelphia, PA, Jun. 13, 2002.

Godfrey v. Kamin, U.S. District Court, Northern District of Illinois, Eastern Division, Case No. 01 C 3433; breach of trust action: loyalty, prudence, and diversification issues arising from investment in close corporation; impartiality issues arising from excessive concentration of financial assets in fixed income investments; retained in Dec. 2000 by David H. Latham, Esq., Suite 1118, 300 West Washington St., Chicago IL 60606; 312-782-1910; retained for plaintiff trust beneficiaries; deposition taken in Chicago, January 8, 2002.

Whetman v. IKON, U.S. District Court, Eastern District of Pennsylvania, Civil No. 00-87, also D. Utah No. Civil 2-98-CV-89; ERISA action involving fiduciary duties of employer and other fiduciaries in the designation of employer stock as an investment option under a 401(k)

plan; retained in March 2000 by Ron Kilgard, Esq., Dalton, Gotto, Samson & Kilgard, Suite 900, National Bank Plaza, 3101 North Central Ave., Phoenix, AZ 85012; (602) 230-6324; retained for plaintiff plan participants; deposition taken in New York, August 2, 2001.

Stoddart v. Miller (Peccole Trusts), Las Vegas, NE, state court; equitable accounting issues; retained for trusts by William R. Phillips, Esq., General Counsel, Peccole Nevada Corp., 851 South Rampart Blvd., Suite 220, Las Vegas, NE 89145; trial testimony in Las Vegas, NE, May 4, 2001.

Ceridian Corporation Retirement Plan, et al., Claimants, v. Corporate Officers & Directors Assurance, Ltd., Respondents: International Arbitration under the Laws of Bermuda; ERISA attorney fees issues in construction of fiduciary liability insurance policy; retained in April 2000 by R. Scott Davies, Briggs & Morgan PA, 2400 IDS Center, 60 South Eighth St., Minneapolis, MN 55402; 612-334-8561; retained for claimant Ceridian Plan; deposition taken in New York, May 3, 2000; arbitration testimony in Toronto, Canada, May 31, 2000.

Tanaka v. First Hawaiian Bank et al., U.S. District Court for the District of Hawaii, Honolulu, HI, Civil No. 96-00734-SPK; fiduciary standards in probate and trust administration; retained in 1997 by Gerald A. Brooks, P.O. Box 121, Honolulu, HI 96810; 808-533-3312; retained for plaintiff, Yoshitaro K. Tanaka; deposition taken in New York, May 5, 2000.

First National Bank of Chicago v. Acco USA, Inc.-IBT Retirement Plan, U.S. District Court, N.D. IL, Chicago IL, No. 93 C 0896; issues of impartiality and prudent administration in the operation of a collective real estate investment trust; retained in 1999 by William Conlan & Mark Blocker, Sidley & Austin, 10 South Dearborn St., Chicago, IL 60603, 312-853-7000; retained for functional defendant, First National Bank of Chicago; deposition taken November 1999, trial testimony in Chicago December 16, 1999.

Board of Pensions of the Municipal Employees Pension and Relief Fund of Prichard, Alabama v. Regions Bank, No. CV-97-002524; Mobile County, AL, Circuit Court; fiduciary duties of trustee under "legal list" trust-investment statute; retained in 1998 by J. Marshall Gardner, Esq., Vickers, Riis, Murray & Curran, LLC, Regions Bank Bldg., 106 St. Francis St., Mobile, AL 36602-3408, 334-432-9772; retained on behalf of defendant trustee; deposition in New Haven, CT, April 22, 1999; trial testimony in Mobile AL, August 29, 1999.

In re Eric A. Knudsen Trust, No. T No. 95-120; First Circuit Court, Honolulu, Hawaii; trust investment issues, including duties of diversification, prudence, and productivity; retained in 1994 by John Hoshibata, Suite 2300 Pauahi Tower, 1001 Bishop St., Honolulu, HI 96813, 808-524-5644; retained on behalf of trust beneficiaries; deposition in New Haven, CT, June 9-10, 1999.

Eychaner & Weiss v. Theodore Gross & Roosevelt University, No. 94 CH 11328; Cook County, IL, Circuit Court, Chancery Division; trust creation issues affecting ownership of landmark structure; retained in 1998 by Susan A. Stone, Esq., Sidley & Austin, 10 South

Dearborn St., Chicago IL. 60603, 312-853-2177; retained on behalf of defendant university, an Illinois not for profit corporation, and its president; deposition in Chicago, May 29, 1998; trial testimony in Chicago, July 7, 1998.

Fisher v. Bank of America National Trust and Savings Ass'n, et. al, U.S. District Court, N.D. CA (San Francisco), No. C 96-0203 CAL; loyalty, prudence, diversification, and remedy issues arising from corporate fiduciary's investing trust accounts in real estate limited partnerships; retained in 1997 by Derek G. Howard, Esq., The Mills Firm, 200 Drake's Landing, Suite 155, Greenbrae, CA 94904, 415/464-4770; retained on behalf of plaintiff class; deposition in San Francisco, April 13-14, 1998.

Sheronas v. Glenmede Trust Co. et al., Court of Common Pleas, Montgomery County, Orphans' Court Division, PA, Nos. 90-1320, 84-422; fiduciary loyalty and impartiality issues; retained in 1995 by William T. Hangle, Esq., Hangle Aronchick Segal & Pudlin, 1 Logan Square, 12th Fl., Philadelphia, PA 19103-6933, 215/668-0300; retained for defendant trustee's counsel; expert report June 13, 1997; deposition in Philadelphia, August 1, 1997.

Arthur R. Moore et al. v. Raymond J. Sweeney, et al., Circuit Court, Alexandria, VA, No. CL941029; ERISA loyalty, prudence, and prohibited transactions issues in attorney malpractice action; retained in 1997 for defendant attorney by Nicholas Lobenthal, Esq., Mayer, Brown & Platt, 1675 Broadway, New York, NY 10019-5820, 212/506-2584; deposition in Alexandria, VA, June 12, 1997.

Carol F. Nickel v. Bank of America National Trust and Savings Ass'n, et al., U.S. District Court, N.D. CA (San Francisco), No. C 94 2716 CAL; remedy and measure of damages issues in trustee fee overcharge class action; retained in 1996 by Derek G. Howard, Esq., The Mills Firm, 200 Drake's Landing, Suite 155, Greenbrae, CA 94904, 415/464-4770; retained on behalf of plaintiff class; deposition in San Francisco, July 24-25, 1996; trial testimony in San Francisco, September 19, 1996. Testimony cited with approval in reported appellate case, 290 F. 3d. 1134, 1138 (9th Cir. 2002).

In re McCune Foundation, Court of Common Pleas, Orphans' Court Division, Allegheny County (Pittsburgh) PA, No. 2-79-R-4788; trustee loyalty and diversification issues; retained in 1993 by Donald G. Gerlach, Esq., Reed Smith Shaw & McClay, 435 Sixth Ave., Pittsburgh, PA 15219-1886, 412/288-3192; retained for plaintiffs, members of trust distribution committee; trial testimony April 24, 1996.

Fisher v. Wilmington Trust Co. Court of Chancery, New Castle (Wilmington) DE Civil Action 11376; trust investment issues touching diversification and principal and income allocations; retained in 1993 by Phebe S. Young, Esq., Bayard, Handelman & Murdoch, P.A., 922 Market St., 13th Floor, Wilmington DE 19899, 302/429-4236; retained for plaintiff; deposition taken April 18, 1996.

In re William F. Dart Trust, Ingham County (Lansing) MI Probate Court, Probate Case No. G-6372; trustee removal and breach of trust proceedings; retained in 1995 by Allan T. Claypool, Esq., Foster, Swift, Collins & Smith, 313 So. Washington Square, Lansing, MI 48933-2193, 517/371-6264; retained for defendant trustee; depositions taken December 1995 and November 1996.

Chubet v. Huntington Trust Co., Court of Common Pleas, Franklin County, Columbus, OH, Case No. 94CVA-06-4133; trustee loyalty and diversification issues; retained in 1995 by Bernard Mazer, Esq., Mazer & Co., 420 B Metro Place South, Dublin, OH 43017, 614/766-8108; retained for Mary Ann Prescott Chubet, plaintiff; expert report provided; deposition taken October 1995.

Estate of Elizabeth Peebles Jones, Circuit Court for Indian River County, FL, Probate Div., Case No. P-93-374.01; prudence of executor's retention of nondiversified block of shares; retained in 1994 by James G. Pressly, Jr., Esq., 222 Lakeview Dr., West Palm Beach FL 33401-6112, 407/659-4040; retained for Owen Jones, plaintiff; deposition taken June 1995.

Maud Hill Schroll Trust, Ramsey County (St. Paul) District Court, MN; principal and income issues affecting timber lands; retained in 1994 by James M. Dombrowski, Esq., P.O. Box 751027, Petaluma, CA 94975-1027, 707/762-7807; retained for Christopher Schroll, plaintiff; trial testimony May 1995.

In re Trust under Will of Isabel Stillman Rockefeller, Court of Probate, District No. 57, Greenwich CT; trustee loyalty and investment issues; retained 1994 by Charles A DeLuca, Esq., P.O. Box 3057, 80 Fourth St., Stamford, CT, 203/357-9200; retained in 1994 for John W. Roberts, Esq., Guardian ad Litem; deposition taken February 1995.

Vivian R. Broderick et al. v. Colorado National Bank et al., City and County of Denver CO Probate Court, Case No. 92 PR 1520; trustee's liability for exposing unrelated trust assets to environmental liability of trust-held enterprise; retained in 1994 by Gregory A. Ruegsegger, Esq., Dufford & Brown, 1700 Broadway, Suite 1700, Denver. CO 80290-1701, 303/861-8013; retained for plaintiffs; deposition taken June 1994.

First National Bank of Chicago v. Stephen R. Steinbrink, U.S. District Court, N.D. IL, Chicago IL, No. 92 C 4053, and related federal administrative court hearings, Chicago 1993; prudence and regulatory compliance of bank trustee's administration of collective real estate investment trust; retained by Harold C. Hirshman, Esq., Sonnenschein, Nath & Rosenthal, 8400 Sears Tower, Chicago, IL 60606-6404, 312/876-7934; retained for functional defendant, First National Bank of Chicago; affidavit provided, 1993; deposition taken June 1993; trial testimony in administrative court September 1993.

Virginia D'Addario, et al. v. Stanley Bergman et al., Superior Court for District of Fairfield (Bridgeport), CT, Case No. CV 90-0266582S; trustee's liability for resignation to

facilitate third-party's intentional breach of trust; retained by Allan M. Cane, Esq., 1172 Post Rd., Fairfield, CT 06430, 203/255-2626; retained for plaintiffs; pretrial deposition July 1993

CAHP, et al. v. Prudential Securities, Inc., et al., San Mateo CA Superior Court, Case No. 372537; prudence of conduct of stock broker alleged to have been fiduciary regarding investments of non-ERISA pension investor; retained by Michael Lawson, Esq., Steefel, Levitt & Weiss, One Embarcadero Center, 29th Floor, San Francisco, CA 94111-3784, 415/788-0900; retained for defendant, Prudential Securities, Inc.; pretrial deposition June 1993.

Virginia D. Blake et al. v. Federal Deposit Insurance Corp., et al., U.S. District Court, District of Maine, Portland ME, Civil Action No. 91-422 P-C; bank co-trustee's liability for retention of trust holding of the bank's shares; retained in 1992 by Thomas A. Cox, Friedman & Babcock, 6 City Center, P.O. Box 4726, Portland, ME 04112, 207/761-0900; retained for defendant Federal Deposit Insurance Corp. as successor to defendant Bank of New England; pretrial deposition September 1992, in Boston, MA.

Weyerhaeuser Co. v. Geewax Terker & Co., federal district court proceeding in Seattle, WA; pension investment manager's liability under ERISA for investing beyond account authority; retained in 1991 by Harry H. Schneider, Jr., Perkins Coie, 1201 Third Ave., 40th Fl., Seattle, WA 98101-3099, 206/583-8888; retained for plaintiff Weyerhaeuser Co.; pretrial deposition November 1991.

In re Estate of Raymond Marks, Circuit Court of Lake County (Waukeegan) IL, No. 82-P-0547; conflict-tainted executors' breach of fiduciary duties of loyalty and prudence in funding estate's marital devise; retained in 1989 by Lee A. Freeman, Sr., Freeman, Freeman & Salzman, 401 No. Michigan Ave., Chicago, IL 60611, 312/222-5110; retained for plaintiff Carol Marks Jacobsohn; pretrial deposition and trial testimony 1990.

In re Estate of Jaffe, state court action in Seattle Washington; bank trustee's fiduciary duties in funding spousal trust; retained in 1987 by Henry M. Aronson, Esq., Seattle, WA; retained for plaintiff Ruby Jaffe; pretrial deposition and trial deposition taken in March 1987.

September 13, 2007

Statement of John H. Langbein

Re: Cobell v. Kempthorne

I submit the following statement regarding my compensation in connection with service as an expert in this matter: I am being compensated at my normal hourly rate of \$550.



John H. Langbein