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Insider Trading and the Stock Market. by Henry G. Manne.

Alan H. Vogt

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Moreover, all of these forms must be properly filled in and properly executed. If they are filled in by a lay grantor without the help of a lawyer—as Mr. Dacey invites his readers to do²⁰—there is obviously danger of defective execution, and while these forms may not be held to be testamentary documents by the courts, they share with wills one unfortunate characteristic: defects tend to show up when it is too late to correct them. Mr. Dacey pooh-poohs this objection and says lawyers make mistakes too, but it is to be feared that the combination of a sophisticated form and a lay draftsman will produce an unintended result—if not outright invalidity—more often than Mr. Dacey thinks.

This book will disappear from the best-seller lists, but we can expect its forms to begin turning up in our courts in the near future, and to continue there for some years to come. Whatever their theoretical validity, it is certainly predictable that they will be a source of extensive—and expensive—litigation, which may one day bring lawyers to lift their voices in a paraphrase of the old toast:

“To the probate avoider, let’s drink to his dust,
Who for four ninety-five makes his own Dacey Trust.”

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INSIDER TRADING AND THE STOCK MARKET. By Henry G. Manne. New York: The Free Press, 1966. Pp. xiii, 274. \$6.95.

The action commenced by the S.E.C. in 1965 against Texas Gulf Sulfur Company and certain of its directors, officers and employees¹ has caused a great concern and uncertainty with regard to the legality and liability of corporate insiders, *i.e.* directors, officers and employees and others, trading in a corporation’s shares when they are in possession of information not generally available to the investing public.

declaration of trust will not alter in the slightest degree your right to do with them as you wish during your lifetime.”

20. He does concede that a lawyer may be needed to amend an existing trust, but “if he’s worth his salt, it’s not more than a twenty-minute job.” P. 242.

1. S.E.C. v. Texas Gulf Sulfur Co., 258 F. Supp. 262 (S.D.N.Y. 1966). This case is concerned with trading in the corporation’s stock by insiders prior to public disclosure of a substantial ore find in the Trimmins Ontario area. The S.E.C. complaint was based on Rule 10b-5 and requested injunctive relief, rescission and restitution. The lower court decision, which has been appealed, accepted a limited part of the S.E.C.’s contention as to insider liability, held substantially against the S.E.C.’s position on the facts and dismissed the action against the company and ten or twelve individual defendants. This decision did not deal with questions concerning the remedies to be applied to the two defendants found in violation.

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Prior to *Texas Gulf Sulfur*, restrictions on insider trading were of three classes. First, the majority common law rule. This rule requires a special relationship between the insider and the outsider indicating a substantial danger of fraud before insider liability for trading will be imposed. Second, the "Short Swing Profits" rule under Section 16(b) of the Securities Exchange Act of 1934. This rule requires that all profits derived by purchases or sales by an insider within a six-month period be turned over to the corporation. Third, the law developed under Rule 10b-5. This rule, which deals with fraudulent practices in the sale of securities was judicially extended to apply to some insider trading situations even prior to *Texas Gulf Sulfur*. The relief requested by the S.E.C. in *Texas Gulf Sulfur* greatly exceeded any relief previously granted on the basis of 10b-5. Even the limited relief granted by the trial court extends the limits of liability for insider trading.

Most of the comment and discussion resulting from this case has been concerned with the extent of the prohibition against insider trading, the liability of insiders for trading and the remedies available to the S.E.C. and the investing public in the event of trading by insiders. The case has not resulted in any substantial reanalysis of the basic reasons why insider trading should or should not be discouraged. Professor Manne suggests that such a reanalysis should be undertaken. He concludes that insider trading causes no substantial harm to the investing public, the corporations involved or to any other party having an interest in the matter; that the potential rewards of such insider trading are an appropriate form of compensation for entrepreneurial activities on the part of corporate insiders; and that there exist no valid reasons why such insider trading and the associated profits should not be held to be socially and legally acceptable.

After discussing the current state of the law, the author analyzes hypothetically the market effect of insider trading on the basis of undisclosed information. He concludes that such trading has no effect upon the long term investor in a corporate security. He admits that there may be some effect of such trading on the profits of a short term trader but concludes that there is nothing socially undesirable from this effect. He next analyzes his concept of the functions and compensations of the capitalist, the manager and entrepreneur in a corporate business. The capitalist invests in a business and receives interest as compensation for his investment. The manager performs the function of operating the existing business of a corporation in an orderly and profitable manner, and receives a salary as compensation for his service. The function of both the capitalist and the manager are static. The entrepreneur's function, on the other hand, is dynamic. He innovates and creates new entities, combinations, approaches, products and methods which are essential to competition and growth of a business and the economy in general. The functions of the capitalist, the manager and the entrepreneur, or any two of them, may be performed by the same individual but the traditional forms of compensation do not adequately compensate for

entrepreneurial activity. To reach this conclusion the author analyzes salaries, bonuses, bonus plans and stock options and finds each of them lacking.

The last form of compensation considered is that of profits derived from trading on the basis of information obtained as an insider. These profits are not dependent upon or related to the amount of investment of the insider in the corporation but are generally related to the activity of the corporation resulting from the entrepreneurial activities of its executives. Permitting insiders to make these profits makes it possible for corporations to induce able men with entrepreneurial inclination to serve as directors and executives. For these reasons the author feels that insider trading is an appropriate and desirable means of providing additional compensation to insiders who are the entrepreneurs of the corporations.

The two drawbacks to the author's approach which immediately come to mind are: first, that permitting insiders to trade on the basis of undisclosed information may cause an increase in manipulation in the disclosure of information and in trading; and second, a rule which permits unrestricted insider trading would not insure that the entrepreneurs who have contributed to the corporate growth and activity would be the parties who derive benefit from the insider trading. The author attempts to answer these two criticisms. His answers, however, are not completely convincing.

After discussing the criticism of his proposal, the author considers the means and effects of enforcement of rules prohibiting or restricting insider trading by the government and individual corporations. His conclusion is that such enforcement is generally ineffective and has many undesirable side effects. Thus based upon his premises that inside trading does not substantially hurt the investing public, that trading profits derived from insider trading based on inside information is an appropriate form of entrepreneurial compensation and that an effective means of enforcing prohibitions on insider trading is difficult if not impossible to devise and operate, Mr. Manne concludes that such trading should be permitted and accepted.

The book contains an additional discussion relating to the problems created by trading by government officials and employees on the basis of inside information which they have obtained in their official capacities. It analyzes the various situations in which such information is obtained, and the existing and proposed recommendations for controlling trading by government officials and employees on the basis of such information. It is Professor Manne's opinion that such trading cannot be justified upon the same grounds upon which insider trading by corporate officials can be justified. The same conclusions as to lack of harm to other investors and the difficulty of enforcement apply, but there is no justification for such profits going to governmental officials and employees. For this reason the author recommends that regulations or legislation be adopted to prohibit or restrict such trading by governmental officials or employees.

Whether one agrees with and accepts all or any part of the author's con-

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clusions, the book causes one to agree with his initial assertion, *i.e.* that a thorough re-examination of the justification, problems and effects of insider trading on the basis of undisclosed information should be undertaken. If such a re-examination is undertaken, it is hoped that adoption of better legislation or regulations relating to the problem will result.

As a technical matter this book is well-written. It contains footnotes to supplement and amplify its points and conclusions, as well as the text of the principal cases referred to in the section dealing with the existing law in the area. The book should be of interest to any student of American corporations and to any practitioner who has frequent or occasional contact with the problems confronting publicly held corporations.

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A SIGN FOR CAIN. By Frederick Wertham, M.D. An Exploration Of Human Violence. New York: The Macmillan Company, 1966. Pp. 391. \$6.95.

In 1941 Dr. Wertham wrote *Dark Legend: A Study In Murder*, a non-fiction novel concerning a case of matricide wherein he had extensively interviewed and studied the murderer.

In 1949 he wrote *The Show of Violence—A Psychiatrist Tells Why People Kill And How Murder Can Be Prevented*. He here discussed in some depth several murderers he had examined. He preached concerning some of the sins of society and outlined some of the problems of psychiatric testimony. He also began to enlarge his scope to discuss murderers in literature and in recent and remote history. He endeavored to find some pattern of behavior and some clue as to prevention.

Numerous other writings of Dr. Wertham firmly establish him as an expert on violence. On the dust jacket *A Sign For Cain* purports to be "the first complete study of human violence." Not only does he undertake that ambitious task, but he arrives at the double thesis that "on the one hand, violence is becoming much more entrenched in our social life . . . on the other hand, it is within our power eventually to conquer and abolish it."¹

To conquer violence, Dr. Wertham asserts, we must solve two major problems: First, we must continue the crusade against comic books and other mass media as has been advocated by Dr. Wertham; and second, we must deal with neo-Malthusian thinking.

Among the problems this reviewer has in accepting these points as major issues in this "complete study of violence" is the use of what often seems tenuous or irrelevant connections. Also troublesome is the use of a quotation from one of Dr. Wertham's own legal reports as evidence of "truth."

1. P. 13.