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Introduction

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INTRODUCTION

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A common theme running through three of the five lead articles in this symposium is the need for regulatory reform. Professor Karmel's article, *Greenmail, the Control Premium and Shareholder Duty*,[1] addresses one of the more pernicious defensive tactics to a threatened takeover—greenmail, whereby the target company's management uses corporate funds to buy out a would-be control acquirer and thereby perpetuate its incumbency. Professor Karmel's article thus analyzes the shortcomings of the current regulatory scheme in monitoring an important aspect of corporate governance. Professor Markham's article, *The Commodity Exchange Monopoly—Reform Is Needed*[2] focuses on market regulation. In particular Professor Markham's article addresses many of the perceived deficiencies of the trading systems used by commodity exchanges in this country. Professor Warren's article, *The Regulation of Insider Trading in the European Community*,[3] deals with the regulation of European insider trading. The article suggests that the European community would be well advised to learn from the mistakes of the insider trading regulation in this country and should enact a more stringent system of regulation.

Mr. Treadway's article, *Looking for the Perfect Enforcement Remedy—Old Wine in New Bottles or: Have I seen this Movie Before?*,[4] rather than issue a call for reform of regulatory policy, gives a well-reasoned defense

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1. Karmel, *Greenmail, the Control Premium and Shareholder Duty*, 48 WASH. & LEE L. REV. 937 (1991).

2. Markham, *The Commodity Exchange Monopoly—Reform Is Needed*, 48 WASH. & LEE L. REV. 977 (1991).

3. Warren, *The Regulation of Insider Trading in the European Community*, 48 WASH. & LEE L. REV. 1037 (1991).

4. Treadway, *Looking for the Perfect Enforcement Remedy—Old Wine in New Bottles or: Have I seen this Movie Before?*, 48 WASH. & LEE L. REV. 859 (1991).

of recent expansions of the SEC's enforcement powers. Regulatory policy and enforcement power are important issues in securities and commodities regulation. An equally important question involves the proper role of the courts in interpreting the applicable law. When a federal statute does not expressly address issues relating to claims created by the statute, the courts must decide where to look to fill the gap. Professor Johnson's article, *Some Thoughts about Interstitial Lawmaking and the Federal Securities Laws*,[5] examines the process of interstitial lawmaking and the securities laws.

TREADWAY ON SEC ENFORCEMENT

In recent years, Congress significantly expanded the SEC's enforcement powers. Most notably the Commission was given the power to issue cease and desist orders and also to seek orders barring individuals from serving in an official capacity with companies subject to the SEC's reporting requirements. This is in addition to the ability to impose fines in administrative proceedings and increased civil penalties that can be obtained by going to court. At various times during the SEC's history, the Commission has been criticized for abusing its authority. Mr. Treadway's contribution to this issue[6] presents an excellent defense of similar attacks on the expansion of the Commission's enforcement powers. As Mr. Treadway points out, the SEC has a long history of seeking remedies that are effective in providing a deterrent without unduly punishing violators of the securities laws. The current legislative reforms, and SEC use of its enforcement powers, as Mr. Treadway explains, are merely a continuation of the Commission's judicious use of its enforcement authority.

JOHNSON ON INTERSTITIAL LAWMAKING

Professor Johnson's article[7] examines the difficult question of how courts should fill gaps in the securities laws. In two recent cases, the Supreme Court took different approaches to gap filling. In one case, the Court looked to the most analogous federal law.[8] In the other case, decided in the same term, the Court held that state law applied.[9] In reaching these results, the court reasoned that statutes of limitations in federally created rights of action are essentially federal in nature, whereas rules relating to derivative actions are a matter of corporate law that traditionally has been

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5. Johnson, *Some Thoughts about Interstitial Lawmaking and the Federal Securities Laws*, 48 WASH. & LEE L. REV. 879 (1991).

6. Treadway, *supra* note 4.

7. Johnson, *supra* note 5.

8. Lampf, Pleva, Lipkind, Prupis & Pettigrow v. Gilbertson, 111 S. Ct. 2773 (1991) (holding that most analogous federal, rather than state, statute of limitations is to be applied to implied private right of action under SEC Rule 10b-5).

9. Kamen v. Kemper Financial Services, Inc., 111 S.Ct. 1711 (1991) (deferring to state law on application of requirement in derivative suits that plaintiff shareholder make demand on directors to bring suit).

reserved to the states. Professor Johnson suggests that in deciding whether to apply federal or state law, the federal courts when engaging in interstitial lawmaking should be more concerned with which result would result in the better policy. Professor Johnson thus is suggesting a form of judicial activism that would be more outcome oriented than the more traditional doctrinal approach.

KARMEL ON GREENMAIL

In her article on greenmail,[10] Professor Karmel presents a number of ways to control the pernicious problem of paying a "bribe" (paid from corporate assets) to a minority shareholder for not seeking control of a company. Greenmail in essence compensates a person seeking control of a company for losing the control contest. Furthermore, it preserves the jobs of existing management of the target company but is financed not by the managers who benefit directly but by the corporation and therefore by the shareholders derivatively. The shareholders are thus asked not only to finance the entrenchment of current management but also to pay off a would-be control acquirer who, if successful, might well offer the shareholders a price for their shares at a premium well above the market value. Although for several years most observers have condemned the practice of greenmail, legislative inaction and judicial overreliance on the business judgment rule have combined to leave greenmail virtually unregulated. Professor Karmel aptly points out the anomaly of prohibiting controlling shareholders from reaping excessive control premiums while at the same time permitting minority shareholders to reap a comparable premium for not taking control.

MARKHAM ON THE COMMODITY EXCHANGE MONOPOLY

Professor Markham[11] analyzes the operation of the commodities markets which recently have been the subject of a great deal of bad press due to various floor trading scandals. A major (and no doubt controversial) portion of Professor Markham's proposed reform is the easing of the contract market monopoly that has been a part of the Commodity Exchange Act since its enactment in 1936. Professor Markham suggests that economic forces rather than regulatory barriers should determine which contracts are traded on which exchanges. A number of Professor Markham's proposals involve bringing the regulation of the commodities markets more in line with that of the securities markets. Thus, for example, he recommends expanding the board of directors of commodities exchanges to include public representation. This, he believes, will take these self-regulatory organizations out of the grip of the regulated industry—a situation which, not surprisingly, has led to an impediment to regulatory reform. He also recommends that

10. Karmel, *supra* note 1.
11. Markham, *supra* note 2.

the current system of commodities futures and options floor traders be replaced with a market maker system analogous to that which exists in the over-the-counter securities markets.

WARREN ON INSIDER TRADING IN EUROPE

Over the past decade there have been a number of highly publicized insider trading cases in the United States. Insider trading has also been the center of a number of recent scandals in the Japanese markets. It thus is not surprising that in connection with the economic unification of western Europe, the European Community was concerned with regulating insider trading. In his article,[12] Professor Warren analyzes the various approaches to insider trading regulation that could have been adopted by the EC and the mandatory model act that was eventually adopted. The model act is a minimum standards act that requires each of the twelve member states to enact national legislation. Professor Warren commends the EC effort insofar as it provides a good basis for providing a definition of insider trading—a process that has been most difficult in the United States. He also welcomes the rejection of the duty-based approach[13] to insider trading that he believes plagues the law in this country. Professor Warren is critical of the breadth of the EC's minimum insider trading prohibitions. He believes that by deciding to take a middle ground, modelled on the approaches currently taken in France and the United Kingdom, the EC has failed to provide adequate protection against insider trading. In particular, he is critical of the EC's failure to require its members to extend insider trading prohibitions only to primary insiders who have "direct access" to inside information by virtue of their "employment, profession or duties" with regard to the company in question but not to what he refers to as secondary insiders who are those who otherwise come into possession of inside information. In this regard, EC law is in accord with the current state of United States jurisprudence and has rejected a possession test that was at one time urged by the SEC.[14]

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12. Warren, *supra* note 3.

13. *See, e.g.*, Chiarella v. United States, 445 U.S. 222 (1980).

14. In 1987 Congress began to consider legislation that not only would have defined illegal insider trading to encompass the misappropriation theory but also would have contained a remedy for investors in the open market taking the other side of the illegal trades. In adopting the 1988 insider trading legislation, Congress considered adopting a definition of what constitutes improper trading on inside information. There was some move to expand the misappropriation theory by outlawing trading while in possession of material, nonpublic information. It was alternatively proposed that a possession test was too broad and the prohibition should be limited to the improper *use* of the information. Nevertheless, as was the case in 1984, the attempt to legislatively define insider trading was dropped and the statute was enacted without any such definition. *See* H.R. REP. No. 100-910, 100th Cong., 2d Sess. 11 (1988).