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Security
Transfers by Fiduciaries

The Uniform Act for Simplification of Fiduciary Security Transfers, promulgated at the 1958 meeting of the National Conference of Commissioners on Uniform State Laws, eliminates many of the present "documentary" requisites of transfers required by transfer agents to assure their safety. Professor Braucher analyzes the practical effect of these changes on the liability of transfer agents for participation in a breach of fiduciary duty.

Robert Braucher*

At its 1958 annual meeting the National Conference of Commissioners on Uniform State Laws completed work on a Uniform Act for Simplification of Fiduciary Security Transfers. The House of Delegates of the American Bar Association promptly approved the act, and it has been promulgated for enactment by state legislatures convening in 1959. The act gives promise of a solution to a problem which has long plagued attorneys for trusts and estates, and which has produced a good deal of recent literature.¹

I. The Problem

The trouble began with a decision rendered by Mr. Chief Justice Taney on circuit in 1848.² Under earlier English and American de-

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²Lowry v. Commercial & Farmers' Bank, 15 Fed. Cas. 1040 (No. 8581) (C.C.D. Md. 1848). Additional cases are collected in Christy, Transfer of Stock passim
cisions, a corporation was under no duty to inquire into the right-
fulness of stock transfers made by fiduciaries. But the Chief Justice
thought that the corporation was a trustee for everyone interested
in the shares, and that it should take notice of wills as publicly re-
corded documents; when registering a transfer by a fiduciary it
became liable for participation in a breach of trust if it had reason-
able ground for knowledge of the breach. The Taney doctrine pre-
vailed and became a rule imposing a stringent duty of investigation.
Transfer agents began to insist on proof of rightfulness.

The result is a documentary transfer system. In the typical case
of a deceased shareholder, the executor signs the power of attorney
printed on the back of the share certificate, gets a bank or broker
to guarantee the signature, obtains a waiver signed by the appropri-
ate inheritance tax official, and gets the clerk of the probate court
to issue a certificate that the executor has qualified and has not been
removed. With these documents, under the Taney doctrine, the
executor is ordinarily required by the transfer agent to supply a
certified copy of the will; many transfer agents will demand a court
order in addition to or instead of the will. When the documents are
received by the transfer agent, they are carefully examined, and
often additional documents such as affidavits from the heirs are then
demanded.

This system costs the estate money. Professor Conard has esti-
imated the average cost for each block of shares at $10 for documents
and $20 for lawyers' time. Where the amount involved is small, the
entire value may be used up in satisfying the transfer agent that
the transfer is rightful. The only possible justification for this burden
is the protection of the estate (1) by the prevention of fraud when
the transfer agent is diligent and (2) by the possibility of recovery

(3d ed. 1958); SCOTT, TRUSTS § 325 (2d ed. 1956); Dewey, The Transfer Agent's
Dilemma: Conflicting Claims to Shares of Stock, 52 HARV. L. REV. 553 (1939);
Annots., 56 A.L.R. 1190 (1928) (presentation for transfer by fiduciary); 139 A.L.R.
273 (1942) (knowledge or suspicion of conflicting rights); 3 A.L.R.2d 881 (1949)
(stock of infant or incompetent); 7 A.L.R.2d 1240 (1949) (stock of decedent); 22
A.L.R.2d 12 (1952) (remedies).

Bank of Virginia v. Craig, 50 Va. (6 Leigh) 399 (1835); Hutchins v. State Bank, 47
Mass. (12 Metc.) 421 (1847). For the persistence of the old rule in England, see
Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, § 20; Companies Act,
1862, 25 & 26 Vict. c. 89, § 50; Companies (Consolidation) Act, 1898, 8 Edw. 7,
c. 69, § 27; Companies Act, 1929, 19 & 20 Geo. 5, c. 23, § 101; Companies Act,
1948, 11 & 12 Geo. 6, c. 38, § 117; In re Perkins, [1890] Q.B. 613, 616; Simpson v.
GORE-BROWN, HANDBOOK ON JOINT STOCK COMPANIES 76 (41st ed. 1952); COWER,
MODERN COMPANY LAW 399, 393-94, 399-400 (1934); BANKING & SPICER, COMPANY
LAW 126 (10th ed. 1955); Cower, Some Contrasts Between British and American Cor-

of damages from the corporation when fraud does occur. As for prevention, the protection is illusory: there are many ways to perpetrate fraud, and the documentary transfer system merely closes one of the many doors open to the dishonest fiduciary. As for salvage, informed opinion has long been very nearly unanimous that the cost is excessive, and that the system should be changed.

Efforts to ameliorate the situation have had some success with respect to corporate fiduciaries. Transfer agents sometimes forego documentation in reliance on an indemnity agreement executed by a responsible trust company. And such fiduciaries are often permitted by statute to hold securities in the name of a nominee, without disclosing the existence of a trust. Interested groups have also explored the possibilities of developing simplified forms under existing law and of insuring against transfer risks. But such measures have not been much help to the individual fiduciary. The core of the problem is the Taney doctrine, and most efforts have centered on legislation to abrogate that doctrine.

Abrogation has its problems. When a responsible corporate fiduciary transfers stock in a large publicly-held corporation, the justification for the documentary transfer system is at its weakest. There is little more sense in making the transfer agent a policeman in such cases than there would be in asking railroad station agents to check all ticket-buyers in order to catch absconding trustees. The percentage of transfers which involves fraud is very small; the remedy against the fiduciary is adequate; and the burden on the innocent transfer is excessive. The same may be said when an individual fiduciary is covered by an adequate surety bond. If a testator has directed that his executor serve without bond, the remedy against him may be quite inadequate, but it can then be said that the testator deliberately chose to place that risk on his estate.

A harder case can be put, and has been put; it is responsible for most of the problems in drafting proper legislation. Suppose, in addition to the fact that the fraudulent fiduciary is an executor serving without bond, that the corporation is small and closely held, that its secretary handles its transfers, and that he knows a great deal about the private affairs of the shareholders. Go one step further: the president of the corporation is the faithless executor, and the secre-


tary is counsel to the estate. Should the corporation and the transfer agent—the secretary—be relieved of all duty of care in such a case?

To most of us who have worked seriously on the legislative problem, the answer to the question is Yes. But we have come to that answer only with difficulty, and after some struggle. Suggestions have been made that we distinguish between large corporations and small, or between transfers of large blocks of stocks and transfers of small blocks. But attempts to write such distinctions in legislative form have been utterly unsuccessful and have commanded no significant support. Qualifications in terms of "actual knowledge," "honesty in fact," "good faith," and the like have a more complex history, of which more later.

II. THE UNIFORM FIDUCIARIES ACT

Statutory assaults on the Taney doctrine began long ago with a Pennsylvania statute of 1874; by 1922 Delaware, Kentucky, Massachusetts and Illinois had somewhat similar statutes. In 1920 the National Conference authorized the preparation of a Uniform Fiduciaries Act, and the services of Professor Scott of the Harvard Law School were engaged. He made an extensive study of the subject of participation in breach of trust and prepared an act which was promulgated in 1922. Section 3 of the act, dealing with security transfers, is based upon the Massachusetts statute; by 1957 it had been substantially adopted in 28 jurisdictions. During the same period other statutes similar in purpose were also enacted in at least 9 states.

10. 9B UNIF. LAWS ANN. 10 (1957); Scott, Participation in a Breach of Trust, 34 Harv. L. Rev. 454, 465-67 (1921); see 1921 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 209-10 [hereinafter cited as HANDBOOK]; 1922 HANDBOOK 339-40.
12. CAL. CORP. CODE § 2411 (Deering 1953); Evinger v. MacDougall, 28 Cal.
The Uniform Fiduciaries Act applies to any securities issued by a corporation, association or trust, but only if the securities are registered in the name of a fiduciary. "Fiduciary" is defined broadly to include receivers and agents as well as trustees, executors, guardians and the like. When applicable, the act eliminates the duty of inquiry established under the Taney doctrine; if the fiduciary transfers the securities, the issuer or transfer agent is liable for registering the transfer "only where registration of the transfer is made with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making the transfer, or with knowledge of such facts that the action in registering the transfer amounts to bad faith."

"Bad faith" is not defined, but "good faith" is defined in terms of honesty, without regard to negligence.

The "actual knowledge" qualification was contained in the Massachusetts model, and is stated in one Canadian case. The additional "bad faith" language was not in Professor Scott's original draft, but was suggested in the Conference. Decisions under other sections of the Uniform Fiduciaries Act have interpreted similar language to exonerate banks from any duty of inquiry and from any liability for negligence, and the New York Court of Appeals has said that under section 3 "the measure of responsibility . . . is restricted as in England." Unlike the English law, however, the Uniform Fiduciaries Act does not forbid the corporation to receive notice of a trust; in several cases the corporation, after making some inquiry, has been held responsible for what it has learned.


opinions use language which suggests that imprudence may be the equivalent of bad faith. 18 And there always lurks the possibility that a corporation's "actual knowledge" may include everything known by hundreds of employees. 19

Whatever its effect in litigation, the Uniform Fiduciaries Act has not had the desired effect on the practices of professional transfer agents, although the Ohio and Massachusetts acts seem to have had partial success in practice. 20 Various reasons have been given, but the most significant one seems to be that the risk of liability for registering a wrongful transfer is far greater than the risk of liability for refusing to register a rightful transfer. 21

III. Recent Legislation

The Uniform Commercial Code. The draftsmen of article 8 of the Uniform Commercial Code therefore made a new attempt to simplify fiduciary security transfers. 22 As promulgated in 1952 and enacted in Pennsylvania in 1953, effective in 1954, 23 the Code dealt with liability both for wrongful registration and for wrongful refusal to transfer. Section 8-401(1) stated the issuer's duty to register transfer if three conditions were met: (a) full indorsement for transfer, (b) no knowledge of unrightfulness and no duty to inquire into rightfulness, and (c) proof of payment or waiver of taxes or consent to transfer. Section 8-401(2) then negated liability when the duty was performed. Section 8-402 forbade the issuer to require more than certain specified evidence, "unless the issuer has notice that the person signing the indorsement has no power to make the indorsement." The specified evidence for a fiduciary was "an indorsement signed by the fiduciary, a guarantee of that signature, and proof that the person signing was such fiduciary at the date of signing." Section 8-403 limited the issuer's duty of inquiry into rightfulness to cases where "he has notice of another claim to an interest in the se-

18. Cf. Watterson v. Tremaine, 24 N.Y.S.2d 830, 835 (Sup. Ct. 1941) ("Good faith requires an honest effort to ascertain the facts. . . ").
19. But see Scott, Participation in a Breach of Trust, 34 HARV. L. REV. 454, 481 (1921), denying liability "merely because it appears that at some stage by piecing together all the facts known to different employees a breach of trust would become more or less apparent."
21. Id. at 851-61.
curity.” But “notice that the transfer is to the fiduciary in his individual capacity” or that the proceeds “are made payable in cash or to the fiduciary individually” was enough to create a duty of inquiry. Section 8-404 imposed liability on the issuer if the transfer was wrongful, unless there was a duty to transfer under section 8-401; section 8-406 put the transfer agent under the same obligations as the issuer.

The Wisconsin Statute. Also in 1953, Wisconsin adopted a statute patterned on the simplification provisions of the Code. The Wisconsin statute does not cover registered bonds, and does not provide for the issuer’s duty to register transfer. Moreover, it attempts to deal with the problem of vicarious knowledge by limiting it to knowledge of the individual conducting the transaction and knowledge he would have acquired if other agents had exercised due diligence.

Criticism of the Code. Criticism at hearings held by the New York Law Revision Commission during 1954 focussed on other aspects of article 8; and Supplement No. 1 to the Code, published by the sponsoring organizations early in 1955, proposed only minor changes in the simplification provisions. A provision was added to section 8-402 that the status of an indorser “at the date of signing” might be established by a certificate dated within a reasonable period before presentation; and a provision was added to section 8-403 that a duty of inquiry could be discharged “by any reasonable means, including” a definite adverse claims procedure.

Later in 1955 Mr. Christy, the author of the standard treatise on transfer of stock, published a vigorous attack on the Code provisions. On the recommendation of a committee of which he was a member, the House of Delegates of the American Bar Association adopted a resolution urging state legislatures to adopt simplifying acts and referring to the statutes of Ohio, Pennsylvania and Wisconsin as possible precedents. Early in 1956, in response to that...
resolution, the Conference appointed a committee to draft a new uniform act which would simplify security transfers. At about the same time, the New York Law Revision Commission made its report on the Code: it approved the policy of section 8-402, limiting the documentation an issuer may require, but disapproved the imposition by section 8-403 of a duty to inquire into transfers by a fiduciary for his individual benefit.  

The Model Act. Working with the responsible committees of the American Bar Association and the Illinois State Bar Association, Mr. Christy prepared a draft of an act finally published in 1957 as the Model Fiduciaries Securities Transfer Act. The Model Act, like section 3 of the Uniform Fiduciaries Act, is simply an exoneration statute for issuers and transfer agents. It says nothing of any duty to register transfers; it negates any duty of inquiry when a security is transferred to or by a fiduciary. No exception is made for "actual knowledge" or "bad faith"; the only exceptions to the rule of nonliability depend on written notice. An adverse claims procedure is provided for cases in which written notice is delivered to the corporation.

The Model Act is not limited, as the Fiduciaries Act is, to securities registered in the name of the fiduciary. Like statutes enacted in California and New York, the Model Act applies also to transfers by a fiduciary of securities registered in the name of a deceased person, minor or incompetent. In such cases the Model Act provides that "the corporation shall obtain a copy of a document showing his appointment and, if court appointed, certified by the clerk of the appointing court within sixty days before the date of transfer, but the corporation is charged with notice of only that part of the document which provides for the appointment."

The Model Act was enacted at 1957 legislative sessions in Connecticut, Delaware and Illinois. It is reported that in cases covered by the Model Act transfer agents in Illinois have dispensed with the production of wills, trust agreements, court orders and other documents traditionally required. The situation in Connecticut and Delaware is less clear, but there is hope that transfer agents there will follow the lead of Illinois.

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30. CALIF. CORP. CODE § 2412 (Deering 1953); N.Y. GEN. BUS. LAW § 359-k; see REPORT OF THE NEW YORK LAW REVISION COMMISSION 129, 166-69 (1937).
The 1956 Revision of the Code. The writer was chairman of the Conference committee appointed in response to the ABA resolution of 1955,33 and he and other members of the committee were also participants in the revision of the Uniform Commercial Code during 1956. The committee based its work on early drafts of the Model Act, but revised the language to conform to the terminology and style of the Uniform Commercial Code.34 At the annual meeting of the Conference in 1956 the committee submitted a tentative draft which limited the issuer's duty of inquiry to two cases: (1) where a notification of adverse claim is received, and (2) where the issuer elects to investigate a transfer and both requires and obtains a document which gives it reason to know of an adverse claim. The committee asked policy guidance on the question whether the exoneration of the issuer and transfer agent from liability should be limited to cases where "the individual conducting the transaction on behalf of the issuer acts honestly in fact." After full discussion, the Conference voted by an overwhelming majority to omit any such limitation, and tentative approval was given to the basic policies expressed in the draft.

It was made clear to the Conference that the proposal would be submitted to the Editorial Board for the Uniform Commercial Code if thus approved. The committee informed the Editorial Board and its subcommittee on article 8 of the action of the Conference and submitted a draft of amendments to incorporate into the Code the policies approved by the Conference. Revision of the Code to meet criticism by the New York Law Revision Commission and others was then under way, and the Editorial Board approved a thorough overhaul of the Code provisions on indorsement, signature guarantee and registration of transfer.35

The revised Code was completed late in 1956, and was enacted in Massachusetts in 1957, effective October 1, 1958, and in Kentucky in 1958, effective July 1, 1960.36 A manual prepared by a committee of Massachusetts bank lawyers advises bankers who act as transfer agents that they may safely transfer fiduciary securities in sole reliance on a signature guarantee made in a Code state or on an out-of-state guarantee accompanied by a certificate of incumbency; bankers are warned not to require wills and other controlling instru-

33. See note 27 supra.
34. See Report of Special Committee on Uniform Act on Simplification of Security Transfers, 1956 HANDBOOK 285.
36. MASS. ANN. LAWS c. 106 (Supp. 1958); Ky. Laws 1958, c. 77.
ments. Professor Conard has predicted complete simplification of wholly intrastate transfers, but indicates that there is some doubt whether Illinois transfer agents will give effect to the Massachusetts Code.

Completion of the Uniform Act. The Conference committee reported in 1957 that the revised Code fully incorporated the policies approved by the 1956 Conference, and redrew its proposed Uniform Act to follow closely the relevant Code provisions. At the 1957 annual meeting of the Conference the proposal was taken up as a final draft, approved section by section, and recommended for final adoption. But upon representations by members of the responsible committee of the American Bar Association that they had not had time to consider changes from prior drafts and that enactment of the Model Act in three states had changed the situation, the recommendation was rescinded and the matter put over for a year to permit further discussion.

During 1957–1958 the Conference committee met with an advisory committee which included representatives of the American Bar Association and Illinois State Bar Association committees, of the subcommittee on article 8 of the Code, and of organizations of transfer agents and corporate secretaries. Representatives of the New York Stock Exchange also participated actively; they had had experience with the conversion of a model act into the Uniform Gifts to Minors Act, and had taken the lead in securing enactment of that act, which included a section exonerating third parties.

In view of reports that the Model Act was being relied on by the Chicago transfer agents, the terminology and style of the Model Act were substituted in the Uniform Act for those of the Code. Numerous minor problems, arising primarily from the insistence of the Conference committee that the substance of the act must be compatible with the structure of the Code, were resolved by discussion and compromise. A few problems of substance gave difficulty, as described below in connection with the veto of the New York bill to enact the Model Act, but finally a revised draft was ready for the 1958 annual meeting of the Conference and, with some changes, was finally approved.

Veto of the Model Act in New York. The Model Act was introduced in the 1958 session of the New York legislature. The bill had

41. N.Y. Assembly Bill Int. No. 972, Fr. No. 4569, Senate No. 4453, Rec. 407 (1958); Memorandum of the Governor, April 22, 1958.
the support of lawyers, bankers and several large corporations but was opposed by the Surrogates' Association and the organized surety companies. Initial opposition by the New York Stock Exchange and organized brokers and dealers was withdrawn when a new section was added to exonerate banks, brokers and others as well as corporations and transfer agents. The amended bill passed both houses but was vetoed by the governor.

The veto message objected to the new section as “badly drafted and too broad in scope.” It also referred to the probability that a Uniform Act would be promulgated later the same year, and said “it would be advisable to have an opportunity to examine the Uniform Act” before enacting “the proposed fundamental change in the responsibility of transfer agents and others dealing with securities of fiduciaries.” The governor also quoted the objections of the Surrogates’ Association to the absence of any exception for transfers to the fiduciary himself or for “knowledge” or “notice” or “lack of good faith,” and to the shortness of the period specified for court action by an adverse claimant.

The points raised in the governor’s message were given further consideration in the preparation of the Uniform Act. Representatives of the objecting organizations were invited to meet with the Conference committee and its advisory committee, and did so. A new section was prepared to deal with the liability of banks, brokers and other persons participating in a transfer of securities. The period for court action by an adverse claimant was changed from the 15 days of the Model Act to the 30 days provided in the Code and in the Connecticut version of the Model Act.

The final version of the Uniform Act made no change, however, with respect to transfers to the fiduciary himself or as to knowledge or bad faith. As to self-dealing, the Conference committee stood firm on the ground that an exception which prevented simplification in the very common case of the executrix-widow-sole legatee would greatly impair the usefulness of the act. Mr. Christy, apparently in the hope of salvaging something from the wreckage, suggested an amendment placing the burden of proof of bad faith on the person who sued the corporation or transfer agent, and the committee submitted such a provision to the 1958 annual meeting of the Conference. But the Conference was nearly unanimous that such a provision would defeat the objective of simplification, and the provision was deleted.

IV. PROVISIONS OF THE UNIFORM ACT

The Uniform Act for Simplification of Fiduciary Security Transfers, as promulgated, follows the general scheme of the Model Act.
But section 3 of the Model Act is expanded and broken into sections 3 and 4 of the Uniform Act, and section 7 of the Uniform Act is new. The section titles of the Uniform Act follow:

1. Definitions.
2. Registration in the Name of a Fiduciary.
3. Assignment by a Fiduciary.
4. Evidence of Appointment or Incumbency.
5. Adverse Claims.
8. Territorial Application.
10. Uniformity of Interpretation.
11. Short Title.
12. Repeal.

Scope. Primarily the act restricts the liability of a "corporation" or its "transfer agent" for registering transfer of a "security" by a "fiduciary." "Corporation" means a public or private corporation, association, or trust issuing a security. "Transfer agent" includes employees of the issuer as well as corporate agents. "Security" includes bonds and other securities, if registered as to ownership, as well as stock. "Fiduciary" includes executors, administrators and guardians as well as trustees and nominees, but does not include agents, corporate officers, receivers or trustees in bankruptcy.

Thus the act is comprehensive as to types of issuers, securities, and trusts and estates: it applies to transfers out of the name of a decedent, minor or incompetent as well as to transfers by a fiduciary who is the registered owner. But the act does not deal comprehensively with the duty of the issuer to register transfers or with its liability for wrongful registration; the provisions are merely that in certain defined circumstances there is no liability. Section 7 limits the liability of signature guarantors and other third persons, but again only in specified circumstances. Affirmative provision for liability in cases where the act does not apply is left to other bodies of law.

Lack of Power: Forgery. In general the Uniform Act, like the Model Act, observes the distinction laid down by Mr. Christy,\textsuperscript{42} that the transfer agent should be relieved of responsibility for transfers in breach of trust but should continue to be responsible for registering "void" transfers. Thus neither act deals with transfers on a forged signature, as to which the issuer acts at its peril both at common

law and under the Uniform Commercial Code.\textsuperscript{43} The Uniform Act in section 2 assumes an effective assignment by or on behalf of the old registered owner; sections 3 and 4 are explicitly limited to transfers "pursuant to an assignment by a fiduciary." If the assignment is made by a forger instead of by the registered owner or the fiduciary, the transfer is not within the quoted language and there is no transfer or other action "authorized by this act" within the meaning of section 6, the section limiting the liability of the corporation or transfer agent. A signature on behalf of the fiduciary by an agent acting without authority stands on the same footing.

\textit{Lack of Power: Purported Fiduciaries.} Where the assignment is made by a purported fiduciary who is not in fact serving in the capacity he professes, the Uniform Act does not treat the transfer as "void" in all cases. If the security is once properly registered in the name of a fiduciary or a purported fiduciary, on the basis of a proper signature by the former registered owner, section 2 permits the corporation and transfer agent to "assume without inquiry that the newly registered owner continues to be the fiduciary" until it receives written notice to the contrary.\textsuperscript{45} The same rule also applies, for example, where registered ownership is properly changed from the name of a decedent to the name of his executor; subsequent removal of the executor affects the corporation and transfer agent only if the statutory written notice is received.

Transfer on the signature of a purported fiduciary who is not the registered owner, on the other hand, would seem to be the equivalent of forgery. In such cases section 2 does not help the transfer agent, since the wrongful transfer giving rise to liability is complete before the statutory permission, "thereafter" to assume that the fiduciary status "continues," becomes operative. And there is no "assignment by a fiduciary" to make sections 3 and 4 applicable. The absolute liability imposed in such cases under prior law is therefore not impaired.

Under section 4, on transfer "pursuant to an assignment by a fiduciary who is not the registered owner" the transfer agent "shall obtain" specified evidence of appointment or incumbency. If the specified evidence is not obtained, the transfer seems not to be made "in a manner authorized by this act" so as to make applicable the nonliability provisions of section 6, and there may be a risk of liability for participating in a breach of fiduciary duty as well as the risk of absolute liability if the purported fiduciary is an impostor. A

\textsuperscript{43} See Christy, \textit{Transfer of Stock \S\S 242-48} (3d ed. 1958); \textit{Uniform Commercial Code \S\S 8-311, 8-404}.

\textsuperscript{44} See Commissioners' Comment to Section 2.

signature guarantee may cover the risk of absolute liability but not the risk of breach of trust.46

On the other hand, even if the specified evidence is obtained, it may sometimes be the fact that no valid appointment was ever made or that the fiduciary has been removed between the date of the evidence and the date of the signature. The risk of absolute liability in such cases is not eliminated by the Uniform Act; but that risk is probably covered by the signature guarantee, and it has traditionally been treated by transfer agents as an acceptable business risk.47 Under both the Uniform Stock Transfer Act and the Uniform Commercial Code, the effectiveness of the signature seems to be determined as of the date of signing rather than as of the subsequent time of delivery or registration.48

Lack of Power: Court Orders. Statutes often require that particular types of fiduciaries obtain a court order before transferring such securities, and such statutes sometimes make a transfer without court order “void.” Section 3 of the Uniform Act, in language similar to that of the Model Act, permits the corporation or transfer agent to “assume without inquiry that the fiduciary has complied with any controlling instrument and with the law of the jurisdiction governing the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer.”49 This language seems adequate to protect the corporation and transfer agent from liability even though the transfer is for other purposes “void” because no court order was obtained. But it has been suggested that a court-order statute might impliedly repeal the quoted provision if re-enacted thereafter, and that an amendment to the court-order statute would be appropriate to avoid apparent conflict.50

Inquiry and Notice. Like the Model Act, the Uniform Act abolishes the traditional duty of the transfer agent to inquire into breaches of trust. Section 2 negates any such duty when a security is first registered in the name of a fiduciary, and section 3 permits the corporation and transfer agent to “assume without inquiry” that an assignment by a fiduciary is “within his authority and capacity and is not in breach of his fiduciary duties.” That permission is granted “except as otherwise provided in this act,” and three exceptions are provided in the act: (1) Section 2 excepts written notice

47. See Christy, Transfer of Stock § 85 (3d. 1958); cf. Uniform Commercial Code § 8-402(1)(c) and comment 3.
50. See Conard, Simplifying Securities Transfers, 30 Rocky Mt. L. Rev. 33, 43-45 (1957).
that a fiduciary registered as owner is no longer acting as fiduciary with respect to the particular security; (2) Section 4 requires the transfer agent to obtain evidence of appointment or incumbency when the assignment is made by a fiduciary who is not the registered owner; (3) Section 5 provides for written notice of a claim of beneficial interest adverse to the transfer. No exception is made for cases of "actual knowledge" or "bad faith," but there is no intention to impair the responsibility imposed by the general law of torts on a person who consciously aids and abets a fraudulent conspiracy.\footnote{51}

The Uniform Act does not spell out the consequences of inquiry. One who inquires cannot well be said to "assume without inquiry." Literally, therefore, the act seems to leave his liability to the prior law, which can be summed up in the maxim that he who sets his hand to the plow must plow to the end of the furrow.\footnote{52} Such a conclusion is consistent with the act's main purpose, which is to induce transfer agents to forego inquiry. And the conclusion is confirmed by section 4(b), dealing with the evidence of appointment or incumbency to be obtained when a successor to an inter vivos trustee seeks transfer of securities registered in the name of his predecessor. In such a case, a copy of the trust instrument may be appropriate evidence, and section 4(b) expressly provides that the transfer agent is charged with notice of the contents of the document only to the extent that they relate directly to the appointment or incumbency. That provision is meaningful only on the assumption that unnecessary inquiry might create a duty of further inquiry.

There is another risk if the transfer agent makes an inquiry which the act renders unnecessary. The principle seems to be well established that unreasonable refusal to transfer may result in liability for substantial damages.\footnote{53} A refusal which would formerly have been reasonable because of the stringent duty of inquiry imposed on the transfer agent may be unreasonable when that duty has been abolished by the act.

\textit{Written Notice; Adverse Claims.} Two types of written notice are provided for in the Uniform Act. The section 2 notice "that the fiduciary is no longer acting as such with respect to the particular security" may apparently be informal: a request to change the address and payee to whom dividend checks are to be sent, for example, might be enough. The section 5 notice of adverse claim is

\footnote{51. See Commissioners' Comment to § 6.}
\footnote{52. See note 17 supra; cf. \textit{Uniform Commercial Code} §§ 8-402(4), 8-403(1) (b).}
prescribed in more detail: it is not effective unless the written notice identifies the claimant, the registered owner and the issue of which the security is a part, provides an address for communications directed to the claimant and is received before the transfer.” But it would seem that the section 2 notice would commonly satisfy section 5 as well. Thus a notice to change the designation and signature for the checking account of a fiduciary would seem inadequate as notice to the transfer department of the same bank, since it would not refer to his status “with respect to the particular security.” Similarly, notice from the obituary columns of the daily newspapers would not seem to satisfy the language of either section.

The requirement that the notice be “written” is not likely to be very significant. Common courtesy and the desire for good relations with the public are likely to result in receptive answers to telephone calls, and testimony that the transfer agent accepted telephonic notice is likely to seem credible. It may then be argued that the statute has been satisfied by the notes made by the transfer agent, or that the statute has been waived. Experience with statutes requiring that an order to stop payment of a check be in writing indicates that such arguments are likely to prevail.54

Once the section 2 notice is received, the act seems to leave the corporation and transfer agent to the prior law, under which a subsequent transfer would be made at the issuer’s peril. Upon receipt of a “notice of a claim of beneficial interest adverse to the transfer,” however, section 5(b) gives the corporation or transfer agent a path to follow to avoid liability. That path is made available even though the notice does not satisfy the formal requirements, as for example where the notice is oral. When the security is later presented for transfer, the corporation or transfer agent may send notice of the presentation to the claimant by registered or certified mail. If this path is taken, the transfer must be withheld for thirty days after the mailing and then must be made unless restrained by court order. As a practical matter, it seems likely that adverse claimants will sometimes seek to avoid court proceedings. In such cases, if the claim seems meritorious, the transfer agent may be willing to withhold the transfer beyond the thirty days upon the filing of an indemnity bond. The Uniform Act would not then deny liability, but the corporation and transfer agent would be protected by the bond. Nothing in the Uniform Act seems to prevent this procedure.55

Liability of Third Persons. Section 7 has no counterpart in the Model Act. It had its origin in reports of fears on the part of Chicago

brokers arising after Chicago transfer agents began to simplify fiduciary transfers in reliance on the Model Act. Brokers have commonly made little or no investigation of fiduciary transfers, even when they guarantee fiduciary signatures. Their normal familiarity with their customers provides some assurance against liability on the guarantee, but it seems likely that they have relied heavily on the diligent inquiry made by the transfer agent to uncover cases both of lack of power and of breach of trust. Moreover, if the wronged beneficiary or the successor fiduciary has a clear remedy against the issuer, he may not make a claim against the broker for participation in breach of trust.

Thus the elimination of inquiry by the transfer agent and the exoneration of the issuer from liability might result in increased exposure of the broker to claims, even though the law governing the broker’s liability were not changed. According to Professor Scott, a broker is liable for participation in breach of trust if he has “notice” of the breach, but is under no duty of inquiry when he acts as agent even though he knows a trustee is involved.56 When he acts as a dealer, however, Professor Scott says the broker has the same duty as any other purchaser; and other authorities indicate that even the agent-broker may have a duty of inquiry.57 It has been argued that such a duty is contemplated by Rule 405 of the Board of Governors of the New York Stock Exchange, requiring “due diligence to learn the essential facts relative to every customer [and] every order,” although that rule is probably designed merely to preserve the broker’s solvency for the benefit of others who deal with him.

Hence there was a real danger that under the Model Act brokers might begin to require documentation of fiduciary transfers. The objective of simplification would be largely defeated if the bottleneck were moved from the office of the transfer agent to the office of the broker. Banks which guarantee signatures or otherwise participate in transfers are in much the same legal position as the broker, and might also insist on documentation. At the urging of the New York Stock Exchange, therefore, those preparing the Uniform Act undertook to follow the lead of the Uniform Commercial Code in abolishing any duty on the part of third persons to inquire into breaches of trust. There seemed to be an incongruity in the Code provisions, however: as to ordinary commercial paper, an exception was made for “actual knowledge,” while as to investment se-
securities “reason to know” created a duty of inquiry. It was thought that stocks and bonds should be no less negotiable than promissory notes, and the “actual knowledge” test was therefore adopted.

Section 7(a) is the result. Applying to any person who participates in a transfer of registered securities by or to a fiduciary, it negates liability for participation in breach of trust “by reason of failure to inquire whether the transaction involves such a breach.” The provision expressly covers signature guarantors, as to whom it restates the case law. The exception for “actual knowledge” is in terms which place the burden of proof on the claimant: “unless it is shown that he acted with actual knowledge.” Actual knowledge of an organization, according to a Commissioners’ comment, is not to result merely from “piecing together all the facts known to different employees”; probably the standard in such cases is one of due diligence in the internal communications of the organization.

Signature Guarantors. The Uniform Act does not attempt to answer the much-disputed questions concerning the scope of the signature guarantee. In addition to the express provision of section 7(a) on the signature guarantor’s liability for participation in breach of trust, however, section 7(b) seeks to prevent increased risk to the guarantor by virtue of simplification by the transfer agent. Once the transfer has been registered, section 7(b) provides that liability on the guarantee does not run to any person as against whom the act exonerates the corporation or transfer agent.

The operation of section 7(b) may be illustrated by supposing a transfer by an executor which is “void” because no court order was obtained. Even a bona fide purchaser might be required to restore the security to the estate, and might then have recourse against the signature guarantor. Under the traditional practice, this risk is minimized by the fact that the transfer will not be registered by the transfer agent unless the court order is submitted. By reason of the Uniform Act, the corporation and transfer agent incur no liability to the purchaser by making the transfer without obtaining the court order. Under section 7(b), therefore, if the transfer agent makes the transfer, the signature guarantor is not liable to the purchaser on the guarantee.

Conflict of Laws. Section 8(a) provides that the rights and duties

60. See Scott, Participation in a Breach of Trust, 34 Harv. L. Rev. 454 (1921), quoted in Commissioners’ Comment to § 7; cf. Uniform Commercial Code § 1–201 (27).
61. See note 46 supra.
of the corporation and its transfer agents in making fiduciary transfers are governed by the law of the jurisdiction under whose laws the corporation is organized. This accords with all known American authority with respect to stock transfers,\textsuperscript{62} and probably will not cause difficulty as applied to bond transfers or in courts of foreign nations.\textsuperscript{63} Under the Model Act, which contains a similar provision, many transfer agents are reported to have insisted on a "three-contact approach": fiduciary transfers are simplified only if protection is afforded by the laws of the state of incorporation, the state of registration of transfer, and the state of fiduciary administration. In view of this attitude, the practical success of the movement for simplification depends on the enactment of simplification statutes in a large number of states. Section 8(a) will then specify the governing law.

The "three-contact approach" seems to have very little warrant in law. The argument that the law of the place of registration applies, even in the absence of statute, seems to rest on highly theoretical speculation and remote analogy, and insistence on protection in the fiduciary's state is said to rest on fear that judges will be incompetent.\textsuperscript{64} It seems very unlikely that a corporation could successfully resist liability for wrongful refusal to transfer on the ground that it was afraid judges would be incompetent.\textsuperscript{65} Fear of such liability has not been an effective spur to action in the past; the New York practice has long been flatly contrary to a clear statement by the New York Court of Appeals that the applicable law is the same as in England.\textsuperscript{66} As a practical matter, it is normally cheaper for the aggrieved stockholder to comply with an unreasonable demand for documentation than to bring suit. Nevertheless, there may be some hope that the "three-contact approach" will give way to a "two-contact approach."

As to the liabilities of third persons such as banks and brokers, including signature guarantors, there is no such clear authority for applying the law of the state of incorporation. The Uniform Act therefore adopts the traditional territorial approach: section 8(b) makes section 7 applicable to acts and omissions "in this state" and to a person who guarantees "in this state."\textsuperscript{67}


\textsuperscript{64} Id. at 874.

\textsuperscript{65} See note 53 supra.

\textsuperscript{66} See note 16 supra.

V. Conforming the Uniform Commercial Code

The National Conference of Commissioners on Uniform State Laws obviously should not be in the position of simultaneously recommending for enactment two inconsistent pieces of legislation. The committee which drafted the Uniform Act was therefore "careful to avoid recommending provisions which would not be compatible with the structure of the Code." The Conference, after approving the Uniform Act, directed the committee to prepare conforming amendments to the Code, and to submit the amendments to the sponsors' Editorial Board for the Code.

In fact, drafts of such amendments had already been circulated by the committee, and promptly after the approval of the Uniform Act the writer submitted to the Editorial Board a proposed final draft. The Editorial Board has approved those amendments with minor changes, and it seems likely that they will be included in Code bills submitted to the 1959 legislatures in Pennsylvania and other states.

**Terminology.** The conforming amendments so approved make no effort to reconcile the terminology of the Code with that of the Uniform Act. The Code uses the lawyers' terminology which has been embodied in the Uniform Stock Transfer Act for fifty years, while the Uniform Act, following the Model Act, uses the jargon of transfer agents. Thus the power of attorney to register transfer is an "indorsement" in the Code, an "assignment" in the Uniform Act. The "corporation" of the Uniform Act is the "issuer" of the Code. Under the Code a delivery of a security to a purchaser is a "transfer" which is later "registered" by a transfer agent; under the Uniform Act "transfer" is the change in "registered ownership."

The traditional lawyers' terminology has been described as an "Alice-in-Wonderland vocabulary," but nothing of substance seems to turn on the words used. The meanings are made quite clear in both statutes by definition and by context. And any revision of the terminology of article 8 of the Code would be dangerous unless the entire Code was reviewed for consistency between articles.

**Scope.** The Uniform Act is a narrow statute, limited in scope to some aspects of registration of transfers made by fiduciaries. Article 8 of the Code covers transfers of bearer securities as well; it deals with the rights and duties of buyers and sellers as well as the

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rights of issuers, banks and brokers; it defines the scope of the signature guarantee and the duty to register transfers as well as liability for wrongful registration. Thus the Code governs many situations which the Uniform Act leaves to the prior law; a number of relevant Code provisions of this type have been cited above in the analysis of the Uniform Act. Conformity of the Code to the substance of the Uniform Act does not require revision of such provisions, but some review of them was desirable to avoid incongruities within the Code.

The Proposed Amendments. The amendments to the Code approved by the Editorial Board relate primarily to section 8-402, “Assurance That Indorsements are Effective,” and to section 8-403 on the issuer’s “Limited Duty of Inquiry.” In addition substantive amendments are proposed in section 8-304, “Notice to Purchaser of Adverse Claims,” and in section 8-318, “No Conversion by Good Faith Delivery.”

Evidence of Appointment or Incumbency. The theory of the Code provisions on evidence of appointment or incumbency of a fiduciary is somewhat different from the theory of the Uniform Act. Under section 4 of the Uniform Act, the obtaining of the evidence seems to be a condition of obtaining immunity from liability for participation in breach of trust. Under section 8-402(1)(c) of the Code, such evidence is treated as “assurance” that an indorsement is genuine and effective; such assurance, under section 8-401(1)(b), is a condition of the issuer’s duty to transfer. Under the Code failure to obtain such evidence does not affect liability for wrongful registration: if in fact the indorsement is effective, liability for participation in breach of trust under section 8-404 depends on whether there was a duty to inquire under section 8-403, and section 8-403 makes no reference to evidence of appointment or incumbency.

Thus the obtaining of the evidence is a condition of immunity from liability for wrongful registration under the Uniform Act; under the Code it is a practical precaution which the issuer may take to protect itself if it so desires. There seems to be no need to conform the Code to the Uniform Act in this aspect. If the proposed amendments to the Code are adopted, the specifications of the type of evidence to be obtained will be substantially identical in both statutes, but the Code will continue to give the issuer an option to run the risk that indorsements are ineffective, free of any risk from breach of trust.

Inquiry. Under the proposed amendments section 8-403 of the Code will permit the issuer to “assume without inquiry” in substantially the language of the Uniform Act. Section 8-402(4), like section 4(b) of the Uniform Act, will free the issuer from any notice from documents properly obtained as evidence of appointment or
incumbency. The duty to honor a written notice of an adverse claim will be the same as in the Uniform Act, but will be stated in terms of a “duty to inquire” rather than as an exception to the statutory immunity from liability. And the Code, in section 8-402(4), will spell out the conclusions, found only by implication in the Uniform Act,71 (1) that the issuer who makes unnecessary inquiry is charged with notice of what he should find, and (2) that inquiry beyond that specified in the statute is a justification for delay in registration only if reasonable or if the transfer turns out to be wrongful.

**Adverse Claims.** The Code states the procedure to be followed when a notice of adverse claim is received, in terms of discharging the duty of inquiry. The narrow liability-free path prescribed by the Uniform Act is open under the Code, but the notice sent to the adverse claimant must contain terms prescribed by section 8-403(2) explaining what the issuer proposes to do. The Code also permits the duty of inquiry to be discharged “by any reasonable means,” and expressly refers to the filing of an indemnity bond.72 The proposed amendments do not affect these provisions of the Code, which seem to be consistent with those of the Uniform Act but to add flexibility.

**Rights of Third Persons.** The proposed amendments would extend section 8-318 of the Code, limiting the liability of agents and bailees for conversion, to limit liability for participation in breach of trust as well. This conforms to Section 7(a) of the Uniform Act, except that the less onerous standard of “good faith” is substituted for “actual knowledge.”73 As to purchasers, the Code deals with ownership rights as well as with liability for participation in breach of trust, and the proposed amendment to section 8-304 would conform the test of bona fide purchase to the “actual knowledge” standard of section 7(a) of the Uniform Act and of Code section 3-304, dealing with commercial paper.

**Resulting Consistency.** It is believed that the proposed amendments are sufficient to produce consistency in practical effect between a state which enacts the Code and a state which enacts the Uniform Act. Of course uniformity is limited to the narrow scope of the Uniform Act, and there is some possibility that differences in terminology may produce some unforeseen difference in meaning. Moreover, there are three minor differences of substance: (1) under the Code the issuer who relies solely on the signature guarantee to show the incumbency of the fiduciary incurs no added responsibility for breaches of trust;74 (2) the Code prescribes in more

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71. See text at notes 52, 53 supra.
72. See note 55 supra.
73. Defined in section 1-201(19) as “honesty in fact”; cf. § 1-203; see note 60 supra.
74. See note 37 supra.
detail the contents of the notice to be sent to an adverse claimant; (3) the Code standard for participation in breach of trust by an agent or bailee is "good faith" rather than "actual knowledge." But none of these variations seems to have any great practical significance.

The question may well arise, however, whether both statutes should be enacted in the same state. It may even happen that both are pending before the same legislature at the same time. What then? The writer's belief is that no practical harm would come of enactment of both. A similar problem was faced when the Code was enacted in Massachusetts, and it was decided not to repeal the earlier Massachusetts act.75 But as an aesthetic matter it would seem desirable to provide for any conflict which might result. This could be done, for example, by adding a new subsection (3) to section 8-404, "Liability and Non-Liability for Registration":

"(3) Nothing in this section imposes any liability on an issuer or transfer agent for acting in a manner authorized by the Uniform Act for Simplification of Fiduciary Security Transfers."

VI. Conclusion

The objective of all this effort is a uniform nationwide system for registering fiduciary transfers of securities. Where the fiduciary is the registered owner, transfer would be made on his signature, supported only by a signature guarantee and any necessary tax waiver. Where an executor, administrator or guardian seeks transfer of securities registered in the name of his decedent or ward, a simple court certificate dated within sixty days would be the only additional document. A successor trustee not appointed by a court would have to supply some other appropriate evidence of incumbency. Wills, trust instruments, court orders and affidavits would not ordinarily be supplied to the transfer agent.

There is some hope that such a system may be established under present law for transfers whose only relevant contacts are with Connecticut, Delaware, Illinois and Massachusetts. Widespread enactment of the Uniform Act for Simplification of Fiduciary Security Transfers, or of a conforming version of the Uniform Commercial Code, or of both, should make possible the extension of that system. But perhaps more important than any change in the law is the convincing of the transfer agents that simplified transfers are desirable and safe. One clear-cut decision by the New York Court of Appeals, to the effect that under the Uniform Fiduciaries Act a corporation incurred liability for substantial damages because its transfer agent refused to register a transfer until a copy of a will was supplied, might have done more to simplify transfers than all the legislative

efforts to date. In the absence of such a decision, it is necessary that legislative efforts be supplemented by unremitting efforts of all interested parties to persuade transfer agents to abandon their demands for excessive documentation.

This effort provides a nice illustration of the problems encountered in obtaining uniform legislation, and particularly of the utility of consultation with representatives of all possible interested groups. It also shows that comprehensive codification need not freeze obsolete rules of law or prevent review and reform in the light of changed conditions. There was some initial resistance to the proposal to draft the Uniform Act, on the ground that it might impede efforts to enact the Uniform Commercial Code. But it seems clear as a matter of hindsight that the Conference decision to go forward was sound: the result has been to improve the Code, and to allay fears that the sponsors of the Code had lost sight of the goal of flexibility in their pursuit of the goal of uniformity.