

INSURANCE LITIGATION™

Reporter

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Marsh & McLennan: Some More Brief History before the Spitzer Scandal—Part B: Putnam, Trident, and Mercer

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In this section, Essay III, of our five-part series, we address Marsh & McLennan's ("MarshMac") financial units, namely Putnam Investments, certain Mercer consulting units, and MMC Capital operating investment partnerships. This series of papers revolves around the scandal of the suit *The People of the State of New York by Eliot Spitzer, Attorney General of the State of New York v. Marsh & McLennan Companies, Inc. and Marsh, Inc.* (the "Suit" or the "Spitzer Suit").¹ The purpose of the series is to provide the historical, social, and legal contexts of the Suit in order to convey the significance of this litigation for MarshMac and the insurance industry in general. The five parts of the series include the following:

Before the Marsh & McLennan Scandal and its Times;²

*Marsh & McLennan: Some Brief History Before the Spitzer Scandal—Part A: The Insurance Side of the Business;*³

Marsh & McLennan: Some Brief History Before the Spitzer Scandal—Part B: The

*Financial Side of the Business;*⁴

The Spitzer Suit, its Settlement, and a Relative or Two;

Marsh & McLennan: Consequences of the Scandal Spitzer and his Suit Broke Open—Legal & Otherwise.

In this essay, we discuss some history of the major financial institutional relatives of MarshMac. Each of them has an interesting history and is familiar with scandals in its own right. We begin with Putnam, the investment unit. We do not discuss the Kroll subsidiary, one of MarshMac's most recent acquisitions. It is not so much a financial unit, and, whatever it is now, it started as mostly a detective agency—albeit a sophisticated and very expensive one.

Before we turn to the MarshMac subsidiaries which are not obviously insurance companies or insurance brokerage houses, it might be well to point out that there are significant conceptual similarities between part of MarshMac's business and the themes in the businesses of Putnam and Mercer, as well as the management of the Trident entities. Insurance is probably the central institutional and business

1. 2004 WL 2413318 (N.Y. Sup. Ct., filed October 14, 2004).

2. 27 Litigation Reporter 5 (2005).

3. 27 Insurance Litigation Reporter 125 (2005).

4. This article.

personification, as it were, of the central ideas of risk management. Risk management, of course, involves two central concepts: risk reduction and risk reallocation. The business of insurance is primarily concerned with reallocation, but it should surprise no one to learn that insurance companies are also heavy into risk reduction. That is what property carriers, for example, inspect the buildings they insure and insist that they have various safety precautions.

Similarly, a fair amount of fund management is also about risk management. Rightly, it is about asset entity diversification, which is to be understood along the lines of the consequences of the “Law of Large Numbers.”⁵ Partly, it is based on the idea that one should hire the best people to manage ones risk. This might be called *differential risk assessment*. Part of it should be understood as *portfolio balancing*.⁶

Risk management, obviously, with respect to assets and income is extremely important, especially as people age. The semi-affluent are far more concerned about loosing what they have than they are getting even more. The same is true with preserving assets for survivors. The same is true with respect to paying for help. At the same time, it needs to be kept in mind that insurance on a number of businesses are, at least in a deep level, somewhat similar:

[T]he essential reason for treating risk in the marketplace was to move it to an optimal risk manager—that is, to someone for whom the risk represented the smallest possible burden. A simple analogy may help to clarify this point. Although it may sound strange, a market for risk turns out to be a lot like a market for garbage. When there is competitive bidding for sanitation services, you will generally agree to “transfer” your garbage to the lowest bidder. Unlike the market for almost any other good, where the buyer pays the seller, here the seller pays the buyer to take the product (the garbage) away. The lowest bidder should, in most cases, be

the most efficient waste management firm. A working market for garbage thus allows you to transfer your refuse to the optimal waste manager. Essentially the same holds true in the case of risk. A working market for risk facilitates its transfer to the most efficient *risk* manager. [¶] But what makes one person (or entity) a better risk manager than another? . . . [T]he collective merchant association managed transport risks better than any individual merchant because it enjoyed the ability to diversify. Today, most of us shift numerous risks onto insurance companies for about the same reason. The power of diversification is not limited to insurance carriers.⁷

If one contemplates the fundamental truth contained in the foregoing lengthy quote, it becomes obvious why farsighted, thinking outfit like MarshMac would have bought its way into entities like Putnam and Mercer; why it would have created the Trident entities; and why it would have bought Knoll. The property insurers need safety engineers. Brokerage houses need detectives who are able to apply forensic technique to financial situations indeed, to white collar situations in general.

Putnam: Story and Scandal

The main business of Putnam is investment management. Its business is to handle trust funds, mutual funds, various forms of investment, and so forth. The mission is to manage other people’s money. In some ways, that is also the responsibility of insurance intermediaries. That turns out to be especially true if one thinks about the problems that MarshMac has created for itself regarding the allegations in the Suit regarding how it earns money on the insurance side. It will also be nearly self-evident when we portray the plaintiffs’ pleadings in the Spitzer Suit in the next paper.

There is an extremely interesting irony in the way

5. Ian Hacking, AN INTRODUCTION TO PROBABILITY AND INDUCTIVE LOGIC 190 (2001). The law of large numbers is that “random effects on individuals even out as one takes a large sample.” James Franklin, THE SCIENCE OF CONJECTURE: EVIDENCE AND PROBABILITY BEFORE PASCAL 205 (2001).

6. David A. Moss, WHEN ALL ELSE FAILS: GOVERNMENT AS THE ULTIMATE RISK MANAGER 34 (2002).

7. Id. at 33.

in which Putnam publicizes itself and advertises itself. The company was founded and, to some extent, run, by a blue-blooded, northeastern family. One of the early members of that family was Justice Samuel Putnam of the Massachusetts Supreme Judicial Court. In 1830, in the case of *Harvard College v. Amory*,⁸ Justice Putnam formulated what has ever since been called the “Prudent Man Rule,” at least when its not referred to as the “Prudent Investor Rule.” The rule is simple, at least on its surface:

All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.⁹

This principle rejected the rule of English law then in force that required trustees to invest in government securities, thus eschewing any investment in private stocks as too risky. In terms of trust liability, Justice Putnam wrote:

Trustees are justly and uniformly considered favorably, and it is of great importance to bereaved families and orphans, that they should not be held to make good, losses in the depreciation of stocks were the failure of the capital itself, which they held in trust, provided they conduct themselves honestly

and discreetly and carefully, according to the existing circumstances, in the discharge of their trusts. If this were held otherwise, no prudent man would run the hazard of losses which might happen without any neglect or breach of good faith.¹⁰

Implicit within this concept is the idea that trustees should be judged on their conduct, not on their results, taken alone, or even primary. Great returns on an investment do not mean that a trustee’s conduct is prudent under this rule. Investment failure or decline do not entail liability since they do not entail imprudent error.

The Prudent Man Rule continues to be the main standard by which trustees and financial fiduciaries are held by the law.¹¹ The RESTATEMENT OF TRUSTS is the leading treatise on trusts.¹² Both it and another leading text, THE LAW OF TRUSTS,¹³ have attempted to flesh out the Prudent Man Rule as a standard by formulating more specific rules, by commenting extensively, and by giving examples. May the Lord save those with limited spans of attentiveness.

There are, of course, things to complain about regarding the Prudent Man Rule. Another way it is known is called the Rule for *Men*. Not only is this title sexist, but it is historical only given the number of women who are working these days in financial fields.¹⁴ Also, as we understand it, if someone for whom a financial fiduciary is working has sufficient sophistication, a trustee can engage in speculative activities, so long as the person for whom he is working has consented with sufficient knowledge.¹⁵

The history of the Putnam company begins almost seventy years ago. George Putnam, the great-great-

8. 26 Mass. (9 Pick.) 446 (1830).

9. *Id.* at 469.

10. *Id.* at 473.

11. Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U.L. REV. 52, 58 (1987). The Prudent Man Rule has, though, evolved over time. The *Harvard College* opinion now is considered to have branched into two rules: the duty to use ordinary skill and prudence and the prudent investor rule. J. Alan Nelson, *The Prudent Person Rule: A Shield for the Professional Trustee*, 45 BAYLOR L. REV. 933, 935 (1993).

12. *Id.*

13. *Id.*

14. Granted, they are not treated equally or even very well, and the sexual abuse they have suffered has given rise to substantial litigation over recent years. See generally Susan Antilla, *TALES FROM THE BOOM-BOOM ROOM: THE LANDMARK LEGAL BATTLES THAT EXPOSED WALL STREET’S SHOCKING CULTURE OF SEXUAL HARASSMENT* (2003).

15. *Id.*

grandson of Justice Putnam, was a trustee of the Putnam family fortunes and the fortunes of Lowell family.¹⁶ In 1937, George Putnam founded the George Putnam Fund of Boston.¹⁷ The stated purpose of the new fund was “maximizing the advantages of the ‘Boston Type’ investment trust and the benefits obtained through individual trust funds under the supervision of private trustees in Massachusetts.”¹⁸ This was one of the first funds to offer a balanced portfolio of stocks and bonds.¹⁹

Shortly after the founding of the company, it made a historic stand. In the late 1930s, the Securities and Exchange Commission (“SEC”) expressed concern about regulating investment trusts.²⁰ The Putnam company reported that its trustees would welcome regulation, assuming that the regulators recognized the benefits to group investing and remain open to progress.²¹ Obviously, there was a time when many Wall Street businesses were skeptical of the SEC, to say the least.²²

In June 1942, when the United States was heavily involved in World War II, the George Putnam Fund of Boston announced its conclusions from the study it conducted on the war and on post-war investment trends. The Fund concluded four significant propositions: first, there was no chance for uncontrolled inflation; second, there was no real possibility of a post-war slump, third, private enterprise would survive and grow after the war; and

fourth, there was no basis to distrust so-called “blue chip” stocks.²³ We know some of these predictions to have turned out to be incorrect. For instance, the U.S. experienced rampant inflation after the war.²⁴ Further, prices on Wall Street could not match the exploding economy.²⁵ Merrill Lynch described the post-war stagnant stock market as lumbering along at a “horse-and-buggy rate,” while BARRON’S declared Wall Street as a “depressed industry.”²⁶ The private economy did, however, as predicted, boom in the two decades after the war.²⁷

The original Fund grew substantially after the war. Funds under management in 1952 were \$9 million and increased to \$12 million in 1953.²⁸ This trend in increasing fund assets continued throughout the 1950’s. George Putnam, the Fund’s founder, died at the age of 70 on January 23, 1960.²⁹ His son, also named George, took over the company at the point of his father’s death.

After World War II, Putnam funds multiplied. Until 1963, the Putnam Management Company, which is closely related to its predecessor, operated only open-end funds: the George Putnam Fund of Boston, which continued to be a balanced fund and to anymore recently created relative, the Putnam Growth Fund, which had long-term rewards as its approach to investment management, and as its name implies.³⁰ Putnam management organized the Putnam Income Fund in mid-1963.³¹ By then, the Putnam funds had

16. Adrienne Carter, et al., *The Greed Machine*, MONEY 130 (December 2000).

17. *George Putnam Fund Files on Stock Issue*, N.Y. TIMES, Nov. 9, 1937, at 39. See Samuel Clarke Busnell’s famous toast: “I come from good old Boston, the home of the bean and the cud, where Cabots speak only to Lowells, and the Lowells speak only to God.”

18. *George Putnam Fund: Organized to Combine Benefits of Two Kinds of Trusts*, N.Y. TIMES, Feb. 1, 1938, at 34.

19. *Id.*

20. This time period witnessed several significant pieces of legislation to regulate the investment community. See e.g., Securities Act of 1933, Securities Exchange Act of 1934, Investment Company Act of 1940.

21. *George Putnam Fund Rises*, N.Y. TIMES, Feb. 14, 1940, at 35.

22. See, e.g., *Trust Regulation by SEC Held Futile*, N.Y. TIMES, Oct. 30, 1936, at 35.

23. *Topics of Interest in Wall Street Yesterday*, N.Y. TIMES, June 11, 1942, at 33.

24. John Steele Gordon, *AN EMPIRE OF WEALTH: THE EPIC HISTORY OF AMERICAN ECONOMIC POWER* 371 (2004).

25. *Id.* at 368.

26. Steve Fraser, *A HISTORY OF WALL STREET IN AMERICAN LIFE: EVERY MAN A SPECULATOR* 480 (2005). For an interesting discussion of the economic turn and related Wall Street problems at the beginning of the Twenty-First Century, see Maggie Mahar, *BULL! A HISTORY OF THE BOOM*, 1981999 (333-369) 2003. (Discussion of Spitzer’s legal exploits against Wall Street).

27. *Id.*

28. *Putnam Fund Sets Record in Civil Court* 53, N.Y. TIMES, Jan. 9, 1954, at 20.

29. *George Putnam on Mutual Fund*, N.Y. TIMES, Jan. 24, 1960, at 27.

30. Open-end funds permit virtually unlimited new investment dollars. Closed-end funds, on the other hand, stop taking new investments after a stated dollar value.

over \$500 million under management.³² Shortly after 1963, the Putnam group began to grow in ways not seen before. In 1964, it merged with the Parker Corporation, thereby creating one of the largest groups of mutual funds in the country.³³ The very next year, Putnam acquired an insurance company, the Western Travelers Life Insurance Company of Los Angeles.³⁴ Putnam used the subsidiary for selling life insurance.³⁵ Obviously, the synthesizing of investments and insurance had begun. Oddly very little public financial reporting or financial literature exists, regarding the Putnam-Western combination.

In 1969, Putnam began the Voyager Fund, which was a closed-end fund, but quite risky. A Putnam Group vice-president posed the new fund as having evolved from a legacy of 12-years of aggressive fund management.³⁶ The purpose of the new fund was to be a “go-go” fund targeting more speculative investments.³⁷ The Putnam vice-president who praised the deal indicated that speculative securities were entirely appropriate as investment vehicles, as long as the investor understood the risks.³⁸ The risky nature of the Voyager Fund was evident to its own manager, who in a press interview asserted that it “was not for the retired man,” but for businessmen who can assume greater than normal risks.³⁹ (So it is not for the old, the shy or the feminine, including women. It

is hence for the younger, the masculine, the adventuresome, and those who might love rough seas.)

In 1970, MarshMac acquired Putnam for about \$30 million.⁴⁰ George Putnam, the son of the founder, had varied interests outside Putnam. He served on the Harvard Board of Overseers⁴¹ and was treasurer of Harvard University for 11 years.⁴²

In 1983, Putnam opened offices in both London and Tokyo for the purpose of serving the “global investment needs of clients.”⁴³ Putnam also continued to create new funds for all different risk levels. In 1985, a Putnam executive proudly proclaimed that with the variety of funds then available, “it is possible to find a fund to meet every reasonable financial goal—high risk, medium risk, loss risk or specialization.”⁴⁴ He goes on to say that “it is not necessary to hold individual stocks or bonds.”⁴⁵ But some investment experts discouraged investors in considering some of the new types of funds.⁴⁶ Putnam even got into the “junk bond” market, offering one of the biggest “junk bond” mutual funds in the industry.⁴⁷

By 1986, Putnam managed almost \$30 billion in institutional and mutual fund assets.⁴⁸ This expansion is, of course, parallel to the expansion in MarshMac itself. So is its international growth (although London and Bermuda were not as

31. *Putnam Management Organizes New Fund*, N.Y. TIMES, July 10, 1963, at 65.

32. *Id.*

33. *Parker Completes Fund Merger Plan*, N.Y. TIMES, April 17, 1964, at 46.

34. *Putnam Company Acquires Insurer*, N.Y. TIMES, March 6, 1964, at 45.

35. Robert J. Cole, *Oppenheimer will Enter Insurance Field*, N.Y. TIMES, Feb. 3, 1973, at 47.

36. Robert Metz, *Putnam Starts Voyager Fund*, N.Y. TIMES, April 2, 1969, at 64.

37. *Id.*

38. *Id.*

39. Robert Metz, *How Not to Buy a Mutual Fund*, N.Y. TIMES, April 21, 1972, at 52.

40. Steve Bailey & Steven Syre, *Putnam Becomes Its Parents' Powerhouse*, BOSTON GLOBE, Oct. 24, 1996, at D2.

41. John H. Fenton, *Kennedy Loses Vote for Harvard Board*, N.Y. TIMES, June 16, 1967, at 1.

42. Kenneth N. Gilpin, *Business People: A Portfolio Challenge for Harvard Treasurer*, N.Y. TIMES, June 11, 1984, at D2.

43. See Marsh & McLennan, *MILESTONES OF MARSH & MCLENNAN COMPANIES*, available at www.mmc.com (last visited Jan. 4, 2005) (hereinafter “MILESTONES”).

44. Nathaniel C. Nash, *Mutual Funds Offerings for All*, N.Y. TIMES, Nov. 17, 1985, at FP41.

45. *Id.* Well, if one wanted to save by not paying mutual fund fees, there may be a good reason to own individual stocks or bonds.

46. Anise C. Wallace, *New Fund Offerings Stage a Rebound*, N.Y. TIMES, March 20, 1988, at 119.

47. Anise C. Wallace, *“Junk Bond” Inquiry by S.E.C. Seen*, N.Y. TIMES, Oct. 9, 1989, at D1 and D5. A “junk bond” is generally considered a bond of high yield, yet low quality. Vartanig, G. Vartan, *Hidden Treasure in Junk Bonds*, N.Y. TIMES, Sept. 26, 1976, at F14. In other words, it is an extremely risky investment.

48. *Putnam's President Quits to Start Firm*, N.Y. TIMES, Sept. 4, 1986, at D2.

important). Its acquisitions and mergers history is also reminiscent of MarshMac.

The financial landscape in the 1990s started as a bear market.⁴⁹ As most know, this did not last and the market soon recovered by 1991.⁵⁰ During the 1990s bull market, Putnam became an aggressive, market-driven company that charged high fees regardless of fund performance. At the same time, Putnam's fund performance was often near the bottom when compared to that of its peers.⁵¹ Thus, we have a company with a hugely globalistic, geography, a lengthy aristocratic advertising history stretching back to the early part of the Nineteenth Century (largely mythic), and arrogance, or—at least—self-exalting pride as its method of selfpresentation. All of these things turn out to be false. Does any reader sense lawsuits around the corner?

The stock market's booming years of the 1990s saw Putnam create new stock funds, which it aggressively sold to brokers. Despite claiming publicly that it was "built for balance,"⁵² Putnam had more than twice as much in growth funds as it had in value funds when the bull market reversed. Larry Lasser, the head of the companies, stated that "[w]e were riding the crest of the boom."⁵³ More will be said of Lasser presently. He also commented that brokers tried to steer clients toward more moderate funds. The peak of Putnam's assets under management was \$420 billion in early 2000. A lot of money!

Putnam funds lost big in the early 2000s, however. Despite the retreat of the Nasdaq in early 2000, Putnam started two new, risky funds and also reopened three other growth funds which he had previously deployed. These efforts were supported

by senior management at MarshMac. In the spring of 2000, Jeffrey Greenberg, then the head of the parent company, wrote MarshMac shareholders that Putnam has built a broad, balanced range of products so that it will have attractive investments to offer its clients and shareholders in any market economy.⁵⁴ "This has the added benefit of providing some insulation from a market downturn for [MarshMac] shareholders."⁵⁵ One is tempted to ask how well Greenberg understood the situation.

As is well-known, around 1999-2000, the stock market "blew up."⁵⁶ This disaster led Lasser to wish to restore equilibrium through "intense introspection." He even conceded that "[i]t would be right to say in retrospect [that] we [i.e., Putnam] probably weren't as good as we seemed[, at least to ourselves.]"⁵⁷ Lasser also conceded that Putnam had "disappointed a lot of people." Faced with the history of disappointment, he conceded that the company did not "envison in the near or median term [future] a 'nineties'-type recovery in the market We see very respectable returns going forward, but we need to adjust to pre-1992" mode of behavior. In March of 1992, Putnam closed or merged 11 of its 66 retail funds, including the two very risky funds that it started in early 2000.⁵⁸

The same stock disaster also lead to Spitzer first news-oriented attack on prestige businesses. The targets included many brokerage houses.⁵⁹ Putnam Companies were not among the targets.

It is fairly obvious that a combination between a cautious and even conservative insurance intermediary and an investment company like Putnam, was not a marriage made in heaven. Indeed, looking at it in

49. Carole Gould, *Strategies for a Bear Market*, N.Y. TIMES, Oct. 7, 1990, at F16.

50. Floyd Norris, *Investors Flock to Bond Funds*, N.Y. TIMES, Sept. 27, 1991, at D6.

51. Christine Dugas, *Putnam to Pay \$110M in Penalties*, USA TODAY, April 9, 2004, at B.01.

52. Michael Santoli, *Prudent Again: Putnam Works to Mend Fortunes After Nineties Excesses*, DOW JONES CAPITAL MARKETS REPORT (April 5, 2002), at 23.

53. *Id.*

54. *Id.*

55. *Id.*

56. The blow up is well known. Partly it happened because of a collapse amongst high techs docs and amongst telecommunication companies. There were, of course, scandals galore. See Charles Gasparino, *BLOOD ON THE STREETS: THE SENSATIONAL INSIDE STORY OF HOW WALL STREET ANALYSTS DUKED A GENERATION OF INVESTORS* (2005). (The author is a senior writer at NEWSWEEK and formerly a writer for the WALL STREET JOURNAL. He was nominated for the Pulitzer Prize in 2002.)

57. *Id.*

58. *Id.*

59. *Id.* at 214ff. More of this will be discussed in Essay IV.

black and white, the marriage was inappropriate. The question therefore becomes, is it still? We ourselves would not be surprised to see the marriage break up now that the Spitzer suit has come and gone.

The Lasser Way

In discussing Putnam's growth and aggressiveness in the 1980s and 1990s, it is important to highlight the talent and nature of its leader, Larry Lasser. He was named president of the companies in 1981 and he became CEO in 1985.⁶⁰ Lasser was the son of a New York garment manufacturer. He had worked his way up from a financial analyst to a research director to a chief investment officer. When he was appointed chief of Putnam, he had never actually managed a mutual fund himself.⁶¹ However, despite its being a wholly-owned subsidiary of MarshMac, Lasser operated Putnam as a relatively independent entity. There was some tension between the sub and the parent. It was mostly concealed from the public.

Lasser introduced a system at Putnam that focused on quantitative criteria to judge stocks. That was, of course, eminently fashionable at the time. Mathematics was said to be everything. Thus, Lasser's fund managers were generally restricted to following only the stocks that met the mathematically specified criteria.

Lasser himself also focused on selling stocks through brokers and financial planners instead of big advertising campaigns. The result was high sales commissions for those who succeeded at the program.⁶²

Under Lasser, Putnam also embraced the multi-class share structure which many brokers failed to explain fully to investors.⁶³ For decades, the mutual fund industry charged a fee, called a load, up-front, or

when the investment was made. The multiple class structure changed this, whereby, depending on the share class an investor purchased, the fee could be at the back-end, or when the investor sold the shares, it could be a declining "exit fee," meaning that the percentage of the fee may decline over time as the investor continues to hold the shares.⁶⁴ There are many variations of how a mutual fund may charge a fee. The point here is that investors do not always understand the differences, may not be able to determine which share class best suits their needs (such as whether they expect to be short-term or long-term investors), and the critics argue that brokers don't actually explain it all to them.⁶⁵

Running Putnam, Lasser made substantial sums of money. In 1994, he was paid \$10.5 million.⁶⁶ In 2000, Lasser got a back bonus of \$33 million,⁶⁷ and in 2001 he got a bonus of \$17 million.⁶⁸

As readily and plainly discernible, there was very little perfectly known relationship between MarshMac and Putnam. In addition, there were a few lawsuits brought against Putnam that were of any serious consequence. Trouble was brewing on both fronts. Lasser, for example, was chafing at Putnam's being classified as a subsidiary of MarshMac. He made this clear in a 1999 interview:

Its right to say Putnam is a division of Marsh & McLennan. Another way to say it is that some of Marsh & McLennan's other businesses are mathematically divisions of Putnam. If we're half the company's earnings, we're probably more than half the company's valuation, maybe significantly more.⁶⁹

Thus Lasser remarks publicly that from a revenue standpoint, Putnam is the parent and MarshMac is the

60. Robert McGough *Putnam Investments Looses 2 Heavy Hitters*, WALL ST. J. C1 (May 10, 1995).

61. Richard Tetelbaum & Andrea L. Prochnaik, *Look Who's Beating Fidelity: Putnam*, FORTUNE (June 10, 1996).

62. *Id.* at 75.

63. Carter et al., *supra* note 16.

64. Carole Gould, *Clearing up Confusion over "Class,"* N.Y. TIMES, Nov. 14, 1993, at 107.

65. *Id.* Timothy Middleton, *Abecedarians, Take Note: Classes Multiply*, N.Y. TIMES, Nov. 24, 1996, at F8.

66. Kimberly Blanton, *Tough Team Leader at Putnam Fund Firm, CEO Rules with an Iron Fist, Eschews Stars and Gets Results*, BOSTON GLOBE, Nov. 19, 1995, at 89.

67. Santoli, *supra* note 52.

68. Charles Jaffe, *Putnam Finds a New Way to Disappoint Investors*, SAN DIEGO-TRIBUNE H4 (April 14, 2002).

69. Steven Syre, *Putnam—A Success for Parent, Lasser Says*, BOSTON GLOBE, Feb. 5, 1999, at C1.

sub. Imagining Jeff Greenberg's reaction is not difficult.

Given the financial-reward tendencies vis a vis senior executives at the term of the Twenty-First Century, it is not surprising that Lasser made good money. He led Putnam through the aggressive fund boom of the 1990s.⁷⁰ Lasser himself had a highly publicized aggressive approach to business.⁷¹ In 1996, for example, he was unapologetic about charging quite high fees for risky funds. He remarked, "there is a market [for low expenses] no doubt about it. But when you get to the area of proprietary funds, the fact is that the market doesn't seem to be concerned about prices for performance."⁷² In addition to publicity for charging high fees, Lasser also enjoyed the accoutrements that often go with high-flying days. In 1995, for example, he hired the designer of Disney's stores to renovate Putnam's headquarters. His instruction to the company was, "Shock the culture!" What resulted was an odd decor, plus an art collection with quite remarkable works—those of Frank Stella, Roy Lichtenstein, and Claus Oldenburg, all well-known—indeed, famous—Twentieth Century artists.⁷³ As one might expect, this aesthetic adventure was highly controversial in straight and stiff Boston society. Others didn't like it because of the amount of money that was spent.

Lasser's announced management style, and consequently Putnam's focus, was a "team management approach," rather than an approach adoring "star" fund managers.⁷⁴ Of course, this management style created a certain amount of resentment in those who wanted to be stars—those who wanted high

publicity or cheap fame, as well as a lot of money. Lasser himself got them. He was nicknamed *Master Lasser*, for reasons which are not exactly clear, but when informed of this nickname, he responded: "This is not an organization where complacency has a place."⁷⁵

Lasser was also famous for his *Lassergrams*, which were short rapier-like memos. Naturally, many who received them didn't like them. Lasser himself is said to have criticized place settings in the executive dining room, in various e-mails, and is said to have commanded managers, in others, not to slump when meeting Putnam directors.⁷⁶ It is not clear from the story who is being criticized for setting the table badly. One of the authors confesses that his mother told him to stand up straight many times in his youth, and a few others have told him to stand up straight in his adulthood. If somebody he worked for said it, he might resent it.

Interestingly, e-mails have become a principal source of Spitzer evidence. This was true in his attack on brokerage houses,⁷⁷ and it has been true in his assault on MarshMac, as we shall see.

Back to Putnam. Its executive dining room was famous for excellent cuisine. As another representation of Lasser's hierarchical style, there were several different dining rooms, geared toward different levels of management. One dining room was for senior managers only, offering a free buffet of succulent dishes.⁷⁸ So much for "team management."

Another columnist describes what he calls *Lasser's Way*. The idea was that Lasser had a fairly rigid way to run the business, and if people didn't follow his rules, he fired them. Lasser was quoted as follows: "I'm certainly sure you are correct that some people

70. Santoli, *supra* note 52. Notice that even a newspaper article of 2002 refers to the relationship between companies of the Putnam Group and the Prudent Man Rule.

71. Dugas, *supra* note 51, at B.01.

72. Bailey & Syre, *supra* note 40, at D2.

73. Blanton, *supra* note 56, at 89.

74. Blanton, *supra* note 56, at 89. See Teitelbaum & Prochniak, *supra* n. 61, at 75.

75. McGough, *supra* note 60.

76. McGough, *supra* note 60, at C1.

77. Gasparino, *supra* n. 56 *passim*. Some of the worst characters discussed in this book are Henry Blodgett and Jack Grubman. Some of Blodgett's e-mails revealed that he had negative views of stocks he was publicly recommending. Some of Grubman's e-mails suggested that he might be receiving bribes for some public recommendations. In one case, there was an indication that Grubman was able to put his twin children in a private school in a fashionable part of New York because Sandy Weill of City Group gave the school seven figures. *Id.* at 288 and elsewhere.

78. Bryan Miller, *The Executive Dining Room Slims Down*, N.Y. TIMES, June 18, 1995, at F11.

find me difficult to deal with, am hard to understand, and maybe, not likeable. . . I'm sorry about that, but I'll recover[, even if others don't.]"⁷⁹ Lasser has been described by various journalists as a brash, mercurial, and arrogant taskmaster.⁸⁰ Some, who were at the company but who are no longer employed there, observe that if they did something to displease Lasser, they were shunned, and asked by others of his subordinates not to communicate with Lasser directly. He, of course, would not communicate with despised or hated subordinates directly but would send messages through inferiors who were likely to be junior to the person receiving the message. Such is a classic rule of insulting in the hierarchy context of businesses.⁸¹ Some law firms—even small ones—operate in somewhat the same way. Does Putnam sound like a company that is waiting to be sued at least by its employees?

Putnam seemed to have a passion during the administration of Lasser to stir up news about itself. In early 2002, it stopped identifying its fund managers in its SEC documents, causing angst about its secrecy.⁸² Around the same time, Putnam took steps in the conservative direction by indicating that it would no longer pursue volatile technology stocks with a passion but would instead return to a more conservative, more orthodox, and safer wide range of securities. The claim was made that the company was now looking for "constant growers, good balance sheets, and catalysts for change."⁸³ In terms of controls, the company indicated that it would now focus on "building efficient portfolios, with good risk-adjusted returns, where [managers] look at combina-

tions of stocks and the right risk/reward characteristics."⁸⁴ One cannot help but suppose that this kind of public relations rhetoric is approaching something like bad faith when a company has for years been pursuing what it would describe as the same thing by opposite means. Sure enough, a significant lawsuit emerged.

Prior Ethics Issues

Some analysts were concerned about the lack of trading controls at Putnam as early as the 1980s. For instance, Putnam announced in 1984 that it would take an extraordinary after tax charge of about \$60 million because of large losses from a rogue trader.⁸⁵ Putnam indicated a single trader violated company policy in accumulating Government bond positions, resulting in significant losses. One analyst is quoted as questioning the company's controls, "[y]ou don't run up losses like this in one fell swoop."⁸⁶ Later, it was disclosed that the Putnam trader had acquired more than \$2 billion in government bonds, and sustained a loss of \$155 million.⁸⁷

Two Putnam executives conspired to transfer about \$80,000 from a Putnam fund to a personal investment account in October 1999.⁸⁸ One of them also altered an e-mail from a Putnam manager to make it appear as if the transfer were authorized.⁸⁹ Putnam discovered the transfer, immediately fired the two, and notified the FBI.⁹⁰ One later pled guilty to conspiracy and wire fraud, and the other was convicted of conspiracy.⁹¹ With respect to this event, Lasser issued a statement that Putnam did not "tolerate or condone this type of behavior."⁹²

79. Blanton, *supra* note 56, at 89. Lasser was reported in the same article to her then as demanding and autocratic. That seems fairly obvious given the statements that are attributed to him.

80. Dugas, *supra* note 51.

81. Teitelbaum & Prochnaik, *supra* n. 61, at 75. Lasser stepped down in November 2002.

82. Charles Jaffe, *Putnam Finds New Way to Disappoint Investors*, SAN DIEGO UNION-TRIBUNE H4 (April 14, 2002).

83. Santoli, *supra* note 52.

84. *Id.*

85. Karen W. Arenson, *Marsh & McLennan Loss on Bonds*, N.Y. TIMES, April 10, 1984, at D1.

86. *Id.* at D4.

87. Karen W. Arenson, *Marsh Image Strong, Despite Loss*, N.Y. TIMES, May 5, 1984, at 31.

88. *Former Putnam Exec Pleads Guilty*, INVESTMENT NEWS, July 10, 2002, at 2.

89. *Former Putnam Vice President Sentenced, Reports U.S. Attorney*, PR NEWswire, June 20, 2001.

90. *Id.*

91. Tom Walsh, *Jury Convicts Second Ex-Putnam Exec*, BOSTON HERALD, March 27, 2001, at 22.

92. *Id.*

In 1994, Putnam suspended a securities analysis for buying private stock for his own account.⁹³ A stock promoter had introduced the analysis to the private company and the analysis received approval from Putnam before making the purchase. Later, though, Putnam instructed the analyst to “sell [the stock] at no profit to avoid the appearance of conflict.”⁹⁴ Putnam’s spokesperson stated that the purchase did not violate Putnam’s rules. So, why the suspension? Evidently, it was a reaction based on the “skittishness of the mutual fund industry over professional staff members who trade for themselves even as they are advising or trading for public mutual funds.”⁹⁵

Putnam’s Market Timing Past

Knowledge about market timing within and outside of Putnam existed before the 2003 charges.⁹⁶ In 1996, Putnam created an internal Market Timing Department (MTD) in order to “review available data to determine if specific trading patterns fall within the parameters of the definition of ‘abusive or excessive’ and to communicate with the offenders with regard to market timing issues.”⁹⁷ However, while the MTD did attempt to stop market timing trades, it was restricted from following activity in defined contribution and 401K plans.⁹⁸ When the MTD finally did get access in early 2003, its role was explicitly as one of advice to the plan managers.⁹⁹

Indeed, Putnam was aware since early 2000 that two of its portfolio managers (the same two named in the 2003 law suit) were engaging in market timing and short-term trades in their personal accounts. In January 2000, a Putnam human resource employee

talked with one of these managers, and followed up in February 2000 with a memo to memorialize the conversation, with a copy to the other manager.¹⁰⁰ Despite this, neither portfolio manager stopped engaging in market timing. Further, Putnam did not require them to disgorge their profits.¹⁰¹

In a March 2000 internal document, Putnam forbade market timing since excessive trading had a “detrimental effect on the long-term shareholders of those funds.” Putnam management indicated their concern with the cash-flow volatility caused by excessive trading.¹⁰² In May 2002, Putnam itself amended its Code of Ethics to prohibit market-timing strategies.¹⁰³ Evidently, this did not do the trick, and market timing continued by investors and Putnam’s own managers.

The Whistle-Blower

Regulatory officials did not act on their own initiative in pursuing Putnam. Instead, the investigation was initiated after a whistleblower’s complaint.¹⁰⁴ Peter Scannell was hired in 2000 to work in a Putnam call center in Massachusetts, where he executed trades at the request of mutual fund owners.¹⁰⁵ He stated that he noticed frequent trading by members of an electrical industry union during early morning hours, when they appeared to be trading based on Nasdaq results and trading entire retirement portfolios, rather than diversified investing and trading. Scannell testified before a Congressional panel that he and others in the call center were a bit disturbed by the market timing, but any discussion of it was rebuffed by supervisors.¹⁰⁶

93. Susan Antilla, *In the Mutual Fund Industry, New Worries about Trading*, N.Y. TIMES, Jan. 20, 1994, at D6.

94. *Id.*

95. *Id.*

96. See Anne Kates Smith & Alison Stevenson, *KIPLINGER’S PERSONAL FINANCE*, Jan. 2004 (the strategy has “been widespread and well-known for years”).

97. Commonwealth of Massachusetts, Office of the Secretary of the Commonwealth Securities Division, *Administrative Complaint*, Docket No. E-2003-061, Oct. 28, 2003, at 11-12 (available online at <http://www.sec.state.ma.us/sct/sctpdf/putnamcomplaint.pdf>).

98. *Id.*

99. *Id.*

100. Commonwealth of Massachusetts Original Complaint, *supra* note 97, at 19.

101. *Id.*

102. Jayne O’Donnell, *The Guy who Blew the Whistle on Putnam*, USA TODAY, Nov. 20, 2003, at 1.

103. Commonwealth of Massachusetts Original Complaint, *supra* note 97, at 19.

104. O’Donnell, *supra* note 102, at 1.

105. O’Donnell, *supra* note 102, at 1.

The common explanation was that Putnam had no system to track market timing activity. In the fall of 2000, he noticed similar market trading tendencies among members of a boilermakers' union.¹⁰⁷ Scannell also said he noticed that trading was particularly heavy among a very small number of union members.¹⁰⁸

Scannell testified that he started to track the activity of the boilermaker's union and shared the information with other specialists in his group. As a challenge to the refrain that it was not possible to track the activity, Scannell intentionally engaged in market timing, simulating the market timing activities of the boilermaker's union members over a few month period, eventually making 18 trades. In May 2002, a Putnam executive sent Scannell a missive to cease market timing in his own accounts. This communiqué confirmed Scannell's suspicion that it was possible to track market timing transactions. Yet, Putnam management still permitted union members to engage in market timing and earn large sums. As Scannell puts it: "Bottom line, if you want to market time you needed to get in a Putnam 401K or IRA."

Eventually, in January 2003, he informed his supervisors that he would no longer accept trades from known market timers. Days later, he was physically attacked when he was sitting in his car listening to the radio.¹⁰⁹ He alleges that a man wearing clothing bearing the local boilermakers union logo began hitting him with a brick, [and] telling him to shut up about Putnam.¹¹⁰

Scannell then searched for an attorney. With his attorney at his side, he met with SEC officials to discuss what he had witnessed and gave them copies

of the documents he had collected. After the meeting, the SEC was silent. A few months later, after reading about Massachusetts regulatory officials going after misbehavior in the financial services industry, Scannell approached them. In September 2003, Scannell met with Massachusetts regulatory officials.¹¹¹ Things quickly changed. Even if the SEC was not interested, the Massachusetts officials definitely were. Spitzer has had the same experience with the SEC.¹¹²

The Putnam Suits

On October 28, 2003, SEC and the Commonwealth Massachusetts securities regulatory officials filed suit against Putnam for allowing six fund managers and individual investors to engage in market timing in Putnam funds.¹¹³ The charges targeted market timing by Putnam employees that began years earlier, in 1998, and alleged that Putnam's management was aware of it as early as 2000.¹¹⁴ The SEC's complaint alleges that the six Putnam employees enjoyed more than \$1 million for their personal trades.¹¹⁵ The Massachusetts complaint was for violating the anti-fraud provisions of the Massachusetts Uniform Securities Act, while the SEC sued under Investment Advisors Act of 1940 and the Investment Company Act of 1940.

The regulators separately sued two of Putnam's fund managers for personally trading in funds they managed. The allegations suggested these two fund managers took advantage when U.S. market conditions could impact overseas stock prices. Putnam had just recently terminated them for the same issue.¹¹⁶

106. Hidden Costs and Fees of Mutual Fund: Hearing Before the Senate Governmental Affairs Subcommittee on Financial Management, the Budget, and International Security, Jan. 27, 2004 (statement of Peter Scannell).

107. Id. The evidence purported in the eventual suit outlined 2,600 trades by 10 boilermaker union members in and out of a single Putnam fund, netting them a profit of \$4.1 million. Andrew Caffrey, *State, SEC Hit Putnam, 2 Managers*, BOSTON GLOBE, Oct. 29, 2003.

108. O'Donnell, *supra* note 102, at 1.

109. Marcy Gordon, *Assault Alleged in Testimony Mutual-Fund Whistleblower Tells Congress He was Beaten After Reporting Trading Abuses*, THE SEATTLE TIMES, Jan. 28, 2004, at E2.

110. O'Donnell, *supra* note 102, at 1.

111. O'Donnell, *supra* note 102, at 1.

112. Gasparino, *supra* note 56.

113. Faith Arner, *How Putnam Landed in this Pickle: SEC Charges of Fraud at the Mutual-Fund Giant are the Culmination of Management Missteps that Began Building Years Ago*, BUSINESS WEEK, Oct. 29, 2003.

114. Dugas, *supra* note 51.

115. Morgenson, *Mutual Fund Accused of Fraud in Rapid Trading by Managers*, N.Y. TIMES, Oct. 29, 2003, at A1.

The Massachusetts complaint alleged that Putnam had issued mutual fund prospectuses indicating that Putnam would not permit excessive short-term trading. The statements were said to be misleading since Putnam did permit market timing, particularly by the boilermaker's union. Not only did Putnam permit the union members to market time, the complaint states that its behavior became even "more egregious" by permitting its own fund managers to market time in Putnam funds.

Here is a description of how at least some of the market timing occurred: Mutual funds calculate their share prices, known as net asset values, at 4 p.m. based on the value of the securities held in the portfolio. But prices of foreign securities can be hours old because those markets have already closed. Subsequent world events or corporate news can presage moves in those markets when they open, creating a buying opportunity to those who recognize that the securities are mispriced and can freely engage in fund trading. Fund managers, with their intimate knowledge of portfolio holdings, are in a better position than anybody to capitalize on these moves.¹¹⁷

An interesting aspect of the allegations is that the market timing trades were not alleged to be illegal. Instead, the SEC and Massachusetts regulator asserted that the actions were fraudulent since they violated Putnam's own internal policies. William F. Galvin, the Massachusetts' secretary of the commonwealth, explained the rationale: "Mutual should mean equal opportunity for gain and loss. There should not be two classes of investors."¹¹⁸

The regulators even alleged the reason that Putnam did not want to stop the market timing in the two union plans: "Putnam was aggressively seeking to expand 'the unions' DC/401K plan business and retain their current plans in a competitive market."¹¹⁹

With these allegations circling during this time,

some large state pension funds withdrew their money from Putnam funds.¹²⁰ The fraud allegations quickly resulted in the ouster of Lasser as CEO.¹²¹ Days after the suit was filed Greenberg said in a public statement:

MMC and Putnam *are* committed to seeing that the interests of Putnam's clients and investors are well served. ... We are taking actions today to address the issues that are confronting Putnam. The kind of conduct that occurred *has no place at Putnam*. We are taking measures to see that this does not happen again.... Putnam will make complete *restitution to the Putnam funds* for any losses suffered by *Putnam shareholders* as a result of any improper market-timing activities. We deeply regret that such conduct occurred and *apologize to Putnam shareholders*.¹²²

So, in 2003, Greenberg promised restitution of losses resulting from market timing. Notice that the restitution goes only to the Funds and not others a Fund's market trading might have caused, if any.

In addition, Putnam hired Barry P. Barbash, a former high official with the SEC to review Putnam's policies.¹²³ In naming Barbash, Putnam finally started to follow some of the basic guidelines on organizational ethics.

Some companies name an outsider to the position [of ethics officer.] Going outside the company works particularly well if the person named immediately brings credibility to the office through an unflawed reputation and a clean character slate. This approach has the advantage of lending a degree of objectivity to the office; a new face may be just what is needed in a time of cynicism and low

116. Gretchen Morgenson, *Mutual Fund Accused of Fraud in Rapid Trading by Managers*, N.Y.TIMES, Oct. 29, 2003, at A1.

117. Morgenson, *supra* note 115, at A1.

118. Morgenson, *Mutual Fund Accused of Fraud in Rapid Trading by Managers*, N.Y.TIMES, Oct. 29, 2003, at A1.

119. Commonwealth of Massachusetts Original Complaint, *supra* note 97, at 18.

120. *Putnam Investments' Chief Steps Down after Fraud Allegations*, THE ATLANTA JOURNAL-CONSTITUTION, Nov. 3, 2003.

121. *Putnam Investments' Chief Steps Down after Fraud Allegations*, THE ATLANTA JOURNAL-CONSTITUTION, Nov. 3, 2003.

122. *Id.*

123. Carter et al., *supra* note 16.

morale.¹²⁴

In Essay II, we demonstrated fairly accurately, based on one of Greenberg's speeches, that he, or his public relations ghostwriter, had little respect for truth. The speech quoted two paragraphs above illustrates the same proposition, and to these it is even more clever. First Greenberg claims that Putnam is *committed* to seeing the interests of Putnam clients well served. That seems doubtful, given the massively bad behavior of people who work for Putnam. Second, he says that marketing timing "has no place at Putnam." One wonders what that means. It certainly did have a place. Of course, he uses the present tense, so maybe he is trying to imply that it had a place but it doesn't any more. Third, he either promises or predicts that Putnam will make restitution to Putnam funds and/or Putnam stockholders. There is no reference to anyone else. Fourth, there is an apology to Putnam shareholders, but there is none to anyone else. Imagine the following: "I hereby apologize to the stockholders of my company for the evil misconduct of some of my employees and for our idiotic failure to supervise them, even though we knew they were misbehaving themselves and in particularly outrageous ways. As for the rest of you, I offer no apology. I have next to nothing to do with you. Besides, I am better than you are!" How much of the foregoing is implied or suggested in the rhetoric of Greenberg's statement? These are the kinds of things, as we argued in Essay II, that the litigator needs to think about. Those representing plaintiffs need to work out and draw forth the implications and suggestions. Those defending need to anticipate and try to reduce them.

Putnam quickly settled, in principle at least, with the SEC. The exact details of the financial settlement were subject to further proceedings. But, Putnam agreed to hire an independent consultant to determine the amount that would fairly compensate

fund shareholders for losses. Putnam did not admit or deny any of the accusations at this point. The partial settlement agreement, announced on November 13, 2003, included the following commitments by Putnam:

- ¾ of the Board of Trustees must be independent, with an independent staff to assist them.
- Board action would require approval of a majority of the independent trustees.
- The Chief Compliance Officer must inform the independent trustees on a quarterly basis of any breach of fiduciary duty or security law violation.
- Putnam must maintain a Code of Ethics Oversight Committee to monitor compliance with the Code of Ethics.
- Putnam must establish an Independent Compliance Consultant to conduct a comprehensive review of Putnam's policies and procedures for detecting any fiduciary or ethical breach.¹²⁵

Massachusetts, though, was not too happy with the SEC's settlement. The Secretary of the Commonwealth, William F. Galvin, wanted an apology and an admission of wrongdoing.¹²⁶ Hence, Galvin and Putnam continued negotiating. Galvin was also interested in broader reforms.¹²⁷

Then in March 2004, an internal report released by Putnam indicated that certain top executives, including Lasser and the firm's general counsel, had known about the market timing incidents by fund managers since 2000.¹²⁸ Indeed, Putnam then blamed Lasser for hiding the improper trading to maintain his

124. Dawn-Marie Driscoll, W. Michael Hoffman, & Edward S. Petry, *THE ETHICAL EDGE: TALES OF ORGANIZATIONS THAT HAVE FACED MORAL CRISES* 106 (1995).

125. Steve Cutler, *Settlement Helps Investors*, USA TODAY, Nov. 24, 2003, at 12a.

126. *Mutual Funds: A Fair Settlement*, BUSINESS WEEK, Dec. 1, 2003, at 132.

127. Mike McNamee, *Good Settlement, Bad Teamwork*, BUSINESS WEEK, Dec. 1, 2003, at 34.

128. *Can this Man Save Putnam?*, BUSINESS WEEK, April 19, 2004. Christine Dugas, *Trustees: Putnam Knew of Market Timing*, USA TODAY, March 24, 2004, at 1b.

“absolute control” and protect his large pay package.¹²⁹

Putnam finally settled with Massachusetts in April 2004, agreeing to some of the same reforms as it had previously done with the SEC. Galvin gained a small win when Putnam’s settlement included some acknowledgement: “solely for the purposes of resolution of this administrative proceeding,” Putnam admitted facts alleged in the Massachusetts complaint.¹³⁰

The financial settlement included fines of \$10 million and a \$5 million fund for restitution to the funds. Putnam also agreed that an independent consultant could determine the amount of damages suffered by investors. The consultant is a Harvard Business School Professor.¹³¹

Putnam announced the precise amounts involved in its earlier settlements in early March 2005. The total price Putnam would pay was \$193 million: \$108.5 million in restitution to shareholders; \$45 million penalty to the S.E.C.; and \$40 million as a penalty to the Commonwealth of Massachusetts.¹³² So the total is \$386.5 million. Notice that this occurred *after* the settlement of the Spitzer Suit. One wonders about the current truth of Lasser’s claim for Putnam of financial parenthood over MarshMac. Then again, Putnam paid a good deal less than MarshMac itself.

The Prudent Man Rule no longer seems representative of the Putnam culture in the 1990s. A financial advisor that had sold Putnam funds is quoted as having smashed the Putnam mug he had received that was inscribed with the Prudent Man Rule credo, since he was so angry after hearing the allegations

against Putnam.¹³³ And perhaps knowing they were true.

With the beating that Putnam’s marketing strategy using the Prudent Man Rule has taken, Putnam obviously desires a replacement. In 2003, a Putnam managing director is quoted as indicating that Putnam hopes that its efforts to correct its practices “will someday become universally known as ‘The Putnam Solution.’”¹³⁴

Lasser’s departure was also not without huge cost to Putnam. Lasser and Putnam disputed the amount he was entitled to. In the end, Putnam paid Lasser \$78 million,¹³⁵ apparently to get rid of him. Costly! Well done! Needed? At that price?

Ed Haldeman took over for Lasser. Haldeman was a recent Putnam employee, having joined as head of investment in 2002.¹³⁶ This made the choice of Haldeman strategic since his short tenure meant that he was not tainted with any wrongdoing.¹³⁷ His first mission as Putnam’s new leader were to win over the S.E.C., which he accomplishing by quickly negotiating a partial settlement. Then, to win back investor confidence, he toured the U.S. to address the larger shareholders and ease their concerns. The third step was to prevent the loss of talented managers. To accomplish this, he paid early bonuses.¹³⁸ Haldeman also, and fourth, dramatically changed the Lasser business structure, by making the unit less hierarchical and formal.¹³⁹ Perhaps a “star” slowly resurrecting, though perhaps without holiness. History will determine.

Haldeman’s new mantra is that Putnam’s “Job is to take care of other people’s money.”¹⁴⁰ He admits

129. John Hechinger, *Putnam Claims Ex-CEO, to Keep Power, Hid Abuses*, ASIAN WALL ST. J., March 25, 2005, at M5.

130. John Hechinger, *Putnam Settles Agencies’ Claims for \$110 Million*, ASIAN WALL ST. J., April 12, 2004, at M6; Putnam Investment Management, LLC, Offer of Settlement, April 8, 2004, <http://www.sec.state.ma.us/sct/sctpdf/putnamsettlement.pdf>.

131. John Hechinger, *Putnam May Owe \$100 Million: Independent Consultant Finds Improper Trading Cost Investors More than Previously Believed*, WALL ST. J., Feb.2, 2005, at C17.

132. Andrew Caffrey, *Putnam to Pay \$193 Million in Scandal: Most Investors will Get Little in Restitution*, BOSTON GLOBE, March 4, 2005, at C1.

133. Frederick P. Gabriel Jr., *Lasser Exit Fails to Calm Advisers; Disgust over Putnam Scandal Lingers*, INVESTMENT NEWS, Nov. 10, 2003, 1.

134. *Id.*, at 1.

135. Riva D. Atlas, *Former Chief of Putnam to Receive \$78 Million*, N.Y. TIMES, June 11, 2004, at C1.

136. Simon Targett, *Face to Face: A Troubleshooter Meets his Match*, THE FINANCIAL TIMES, March 8, 2004, at 4.

137. *Id.*

138. *Id.*

139. *Id.*

140. Carter et al., *supra* note 16.

that Putnam may have forgotten its job during the 90s boon years.¹⁴¹ The phraseology “*other people’s money*,” which is to be “*taken care of*” by us has both cultural and legal interests. Cultural interest is that a book has just been published by a former official of Goldman Sachs, Bear Stearns, Lehman Brothers, and the Chase Manhattan Bank, which is entitled OTHER PEOPLE’S MONEY. The problem is that this book, published in 2004 is subtitled THE CORPORATE MUGGING OF AMERICA. In other words, three of the words used by Haldeman can easily be associated with current critiques of corporate America. From the legal point of view, emphasizing that the money involved is the money of the people and that it is to be *taken care of* by Putnam virtually entails that Putnam is a fiduciary of those who are its customers. Fiduciary duty is wondrous and growing area of the law.¹⁴² It’s a hard idea not to love. It’s an easy concept to see as profoundly moral and deeply attractive.

MarshMac also bowed to pressure from four Putnam investors to appoint an independent director to its board.¹⁴³ Thus, the Putnam scandal, litigation, fines, and disgrace have had an impact on the structure of MarshMac. It is highly publicized these days that independent directors are becoming more and more powerful; they are becoming more and more influential in running companies; and they are becoming more and more cognizant of details of legal regulation, including Sarbanes-Oxley. After all, it was the members of the independent board that sacked Maurice Greenberg, as the head of A.I.G. on or about

Monday, March 13, 2005.¹⁴⁴ And there are other examples.¹⁴⁵ Moreover, at least some directors are having to pay substantially for their inattention. This has been especially true in the WorldCom case on March 2005.¹⁴⁶

Putnam’s problems are not over. By November 2004, there were over 70 civil actions pending against Putnam regarding the market timing allegations. Putnam reported receiving enquiries from other regulators in Florida, New York, West Virginia, Vermont, the United States Attorney in Boston, and the U.S. Department of Labor.¹⁴⁷ These investigations appear to be related to the market timing issues, but bring up other claims as well. These involve questions about Putnam’s operation of pension funds, payments to third party vendors, payments to its own ERISA plans. It should come as no surprise to anyone that a number of these plaintiffs are trying to figure out ways to attack MarshMac as well as Putnam. One would not be surprised if at least some of them succeeded.

The Putnam Difference

Putnam advertises the “Putnam Difference.” It highlights seven bases for the claim. The *first* is that Putnam is “Built for Balance.” Putnam proudly claims that “[t]his balanced approach to the foundation of Putnam’s 65-year old heritage of prudent money management.”¹⁴⁸ In addition, some of Putnam’s ads use the catchphrase, “built for balance.”¹⁴⁹ Indeed, Putnam continues to use the phrase on its website

141. *Id.*

142. It has been growing for the last 20 years or so. Anne M. H. Foley, et al., *Brokers*, 12 AM. J. 2d § 148 (2003). ([G]enerally, the relationship between a stockbroker and a customer is a fiduciary one. § 148. This is “especially [true] in cases where the customer deposits money with the broker for the purchase of insurance or deliver securities to the broker for sale or exchange.” § 149.) See *Leib v. Merrell Lynch, Pierce, Fenner & Smith*, 461 F.Supp. 951 (E.D. Mich. 1978) (a widely cited case). See *Flinckinger v. Harold C. Brown & Co., Inc.*, 947 F.2d 595 (2d Cir. 1991). (Longstanding relationships which involve the provision of investment advise and services create and involve fiduciary duties from the analyst to the customer. See also *Conway v. Icab & Co., Inc.*, 16 F.3d 504 (2d Cir. 1994). (“The relationship between a stockbroker and a customer is that of a principal and agent and is fiduciary in nature, according to New York law.” *Id.* at 510. There is much such authority.)

143. Jay Fitzgerald, *Marsh & McLennan Relents, Nominates Outside Director*, THE BOSTON HERALD, March 19, 2004, at 33.

144. Gretchen Morgenson, *Chief is Leaving Insurance Giant; Inquiries Amount—Greenberg Out at A.I.G.: Directors Appear to Move Quickly to Avert Clash With the Regulators*, N.Y. TIMES (March 15, 2005), at A1.

145. *The Price of Prominence: Insuring America’s Corporate Bigwigs May Become More Expensive*, 374 THE ECONOMIST 69 (January 15, 2005).

146. Gretchen Morgenson, *Ex-Decorators Act WorldCom Settle Anew*, N.Y. TIMES B1 (March 19, 2005). (The directors agreed to pay \$20 million out of their own pockets, whereas the D&O insurer had agreed to pay \$35 million.)

147. MarshMac Form 10-Q for the quarter ended September 30, 2004.

148. www.putnam.com (viewed on January 15, 2005).

149. Santoli, *supra* note 52.

today and appears to have registered it as a trademark.¹⁵⁰

The *second* is that Putnam is “committed to financial advisors.” This one is interesting. One would have thought a money manager should be committed to investors. But, seeing as Putnam funds are not marketed directly to investors, it makes sense for Putnam to want to keep happy the ones that bring in the money. Interestingly, it was precisely the dedication of Wall Street brokerage houses to their investment analysts—a sort of meta-advisor, as well as a public advisor—that led to a lot of the problems of the early Twenty-First Century.¹⁵¹ *Third*, Putnam highlights its “team approach.” It indicates that it encourages an “active exchange of information. Next, *fourth*, Putnam is proud of its “acclaimed research” team of “analysis who scrutinize companies, industries, and economies. The *fifth* item is “active risk management.” This is terrific advertising, we suppose, but what does mean?

Might this not mean marvelous material for depositions? Third Question: What is a “team approach?” Please explain it in detail. Ask that question to a dozen people, and you will get at least nine and one-half different answers. Next, what makes research *acclaim*? That too is a good deposition question. Or, how about this one? Fourth Questions: What is it to scrutinize a company? An industry? An economy? Question: What is the essence of scrutinization? Question: Is it always done the same way? Question: What are the most important methodologies in scrutinizing Type-X industries? And so forth. This *fifth* topic should be especially attractive to and enjoyable by insurance lawyers. Fifth Questions: “What is “active risk management?” What about this one? Question: What is the difference between active risk management and ordinary risk management? Or this one: Please describe passive risk management? Finally, and to some extent this one is our favorite. Question: What is risk management anyway? (The truth of the matter, of course, is that the phrase *risk management* is a

fashionable phrase. One sees it in business journals all the time. There are even lots of books about it.¹⁵² Few of them actually have anything to do with insurance, which—we believe—is where the phrase arose.

The *sixth* is Putnam’s “commitment to style consistency.” Here, Putnam claims that it does not “stray” from a fund’s stated objective, style, and risk positioning “to chase short-term market opportunities.” We find this an interesting claim considering the frequency of the market timing incidents and the excessive short-term trading discussed above. Question: What is *style consistency* in financial marketing? In risk analysis? In risk management? And so forth.

The last tenet—its *seventh*—is Putnam’s “global reach.” After reviewing Putnam’s growth above, we have no qualms that Putnam has achieved this milestone. Obviously, the whole idea of *global reach* is also a very fashionable idea. Business globalism is current obsession in the business and economic world, as well as in governmental circles. This is another one of those phrases which should be put to as many different deponents as possible. The question is simple: What is global reach? Or, try this as the second question: What is stylistic consistency in the concept of global reachiness? Or how about this? Question: Where does one pursue active risk management in different parts of the globe? Or, how does one pursue stylistically consistent risk management for one industry in one part of the globe, which has sales all over the globe, for investors who are also all over the globe, at least in the southern hemisphere? Jeffery Greenberg in his speeches.

Trident Partnerships

Now we return to insurance more manifested. MarshMac is under heat with its MMC Capital unit for related-party transactions. Today, MMC Capital manages three investment funds under the name Trident.¹⁵³ The first Trident partnership was created

150. <https://www.putnam.com/individual/> (last visited March 19, 2005).

151. See, Gasparino, *supra* note 56.

152. See Moss, *supra*, note 6. This book is about risk management as public policy and governmental strategy. However, it has excellent early and life chapters on the general idea; it contains a large and helpful bibliography in its footnotes; and it is understandably written. The author teaches at the Harvard Business School.

153. Christopher Oster & Theo Francis, *Marsh and Aon Have Holdings in Two Insurers*, WALL ST. J., Nov. 1, 2004, at C4.

in 1994.¹⁵⁴ Like other investment capital funds, the Trident partnerships invest other people's money in other companies, with the hopes of profiting from a later sale or public offering of the company at prices higher than the purchase price. MMC Capital earns management fees from the venture funds. Based in the Cayman Islands, the three Trident partnerships have raised about \$3 billion for investment purposes.¹⁵⁵ The Trident partnerships generally invest in companies whose business involves insurance.¹⁵⁶ MMC Capital has also used Trident funds to create new insurance and reinsurance companies.¹⁵⁷

The Trident partnerships have purchased interests in at least two companies from MarshMac and has invested in other companies that do business with Marsh.¹⁵⁸ For instance, in June 2002 Trident II acquired MarshMac's stake in ARC Group, LLC, a special liability broker, yielding MarshMac an after tax profit of \$6 million.¹⁵⁹ In addition, in 1999 Trident II bought an interest from MarshMac in Sedgwick Claims Management.¹⁶⁰ Then, there is concern with the advantage that MMC Capital may have with the clout MarshMac has in the insurance arena.¹⁶¹ About 25% of the funds raised in each Trident partnership comes from MarshMac itself.¹⁶² MarshMac has also allowed certain of its directors and officers to invest their personal money. Jeffrey Greenberg and

MarshMac's vice chairman, for example, have personal financial stakes in Trident partnerships.¹⁶³ The first Trident fund included \$300 million from MarshMac.¹⁶⁴ MarshMac acknowledged potential conflicts early on. For example, Marsh executives committed in a 1999 partnership agreement to act in good faith to reduce all conflicts.¹⁶⁵

The conflicts here seem obvious. Where Marsh was selling a stake in a business it owned, MarshMac executives with interests in Trident may be personally benefited by providing a low estimate for the purchase price. Further, MarshMac's insurance brokerage business could financially benefit in the Trident partnerships by steering a client to buy insurance from a company in which Trident makes an investment.¹⁶⁶ Directly and through Trident II, MarshMac owns almost 10% of Axis Capital Holding, which, as of July 2003, received about 40% of its business through MarshMac.¹⁶⁷ Trident II is reported to enjoy lucrative returns, with one insider reporting the fund had earned 25% in 2003.¹⁶⁸

The Trident funds also invest in companies that do business with MarshMac. One such investment highlighted in the business community is the investment in Axis Capital, a reinsurer for catastrophic loss policies.¹⁶⁹ Indeed, Trident created Axis after September 11, 2001, to capitalize on the sudden growth in reinsurance. When Axis went public in 2003,

154. Kevin Stevenson, *Bermuda Sets the Pace, Lloyd's moves Point Island Insurers into New Business Lines*, BERMUDIAN BUSINESS, Spring 1996, at 16.

155. Theo Francis & Ian McDonald, *Marsh & McLennan Considers Selling its MMC Capital Unit*, WALL ST. J., Jan. 20, 2005, at B2; Joseph B. Treaster, *S.E.C. Looks at Marsh & McLennan Partnerships*, N.Y. TIMES, Dec. 23, 2004, at C1.

156. Oster & Francis, *supra* note 153, at C4.

157. Ari Nathanson, *MMC Capital Raises \$1.1B for Trident III*, BUYOUTS, Aug. 9, 2004.

158. Alex Berenson, *Broker's Directors Used Partnerships for Private Profits*, N.Y. TIMES, Oct. 21, 2004, at A1.

159. Diya Gullapalli, *Tracking the Numbers/Outside Audit: Related-Party Deals Boost Profit – Strategic Reasons are Cited by Marsh in 2 Transactions with Trident Equity Funds*, ASIAN WALL ST. J., Nov. 11, 2004, at M5.

160. *Marsh & McLennan Sells Minority Interest in Sedgwick Claims to Private Equity Partnership*, INSURANCE ADVOCATE, Nov. 6, 1999, at 38.

161. Joseph P. Treaster, *S.E.C. Looks at Marsh & McLennan Partnerships*, N.Y. TIMES, Dec. 23, 2004, at C1.

162. Theo Francis & Ian McDonald, *Marsh May Sell a Unit that Drew SEC's Interest*, WALL ST. J., Jan. 20, 2005, at C1.

163. Alex Berenson, *Broker's Directors Used Partnerships for Private Profits*, N.Y. TIMES, Oct. 21, 2004, at A1.

164. *Id.* at C6.

165. *Id.*

166. *Id.*

167. Christopher Oster & Theo Francis, *Ties Among Insurers are Complex – Marsh and Aon Channel Business to Firms they Helped Set Up, Partly Own*, ASIAN WALL ST. J., Nov. 2, 2004, at M7.

168. Alex Berenson, *Partnership Deals at Insurance Broker for Private Profits*, N.Y. TIMES, Oct. 21, 2004, at A1.

169. Berenson, *supra* note 158, at C6.

it reported that 40% of its business through MarshMac.¹⁷⁰ Another insurer, Quanta Capital Holdings initially resisted MarshMac's request for a contingency commission deal. It finally agreed to a contingency commission scheme in 2004.¹⁷¹ In a filing related to its going public in 2003, Quanta cited the risk that MarshMac might favor other companies it had created or sponsored.¹⁷²

In late December 2004, MarshMac announced that the Trident partnerships were the subject of enquiry by the SEC for these related-party transactions.¹⁷³ The related-party transactions are not necessarily illegal, but raise conflict questions. "[I]t is unusual for a company's directors, who represent the interests of shareholders, to invest in company-managed private funds alongside the executives they are supposed to supervise."¹⁷⁴ MarshMac has publicly stated that it is cooperating fully with the investigation.¹⁷⁵ Nothing much has turned up in the press as yet.

Trident III closed with \$1.1 billion in capital in August 2004.¹⁷⁶ Perhaps because of the bad publicity regarding the conflict issues, MMC Capital did not permit any MarshMac directors to invest in Trident III.¹⁷⁷

On February 28, 2005, MarshMac announced it had signed a letter of intent for MMC Capital's senior management to take over the MMC Capital business, including the management of the three Trident partnerships.¹⁷⁸

Mercer Consulting Units

Now we draft away from explicit insurance again. Another important part of MarshMac's business is its

consulting units generally operating under the Mercer name.¹⁷⁹ The three units we address here are Mercer Human Resources Consulting, Mercer Investment Consulting, and Mercer Management Consulting.

MarshMac started an employee benefits department in 1937. William Manson Mercer created a firm in Canada in 1945. In 1959, Marsh & McLennan acquired William M. Mercer Limited. In 1983, Mercer's employee benefit practice merged with Meidinger, another human resource consulting firm, to expand its geographical and services reach.¹⁸⁰ The Mercer Human Resources Consulting unit's mission statement is as follows:

We work with clients to address a broad array of their most important human resource issues, both domestically and globally. We have specialist expertise in all areas of human resource consulting, including compensation, employee benefits, communication, and human capital strategy.¹⁸¹

Thus, one of the key Mercer companies advertises itself as a consultant in the area as a consultant in the area of the relationship between management and the employment, including compensation, benefits, how management and other employees should communicate with each other, how employees should communicate with each other, and so forth. They also advise on *human capital strategy*. One can only love a phrase like this. At the same time, no one with an ounce of brains can do anything but wonder what it means. This is a phrase that needs definition. When it is not defined, it is fair to draw a conclusion that less

170. Christopher Oster & Theo Francis, *Ties Among Insurers are Complex – Marsh and Aon Channel Business to Firms they Helped Set up, Partly Own*, ASIAN WALL ST. J. Nov. 2, 2004, at M7.

171. *Id.*

172. *Id.*

173. *Hot or Not: Marsh & McLennan*, THE STAR-LEDGER, Dec. 24, 2004, at 44; Joseph E. Treaster, *S.E.C. Looks at Marsh & McLennan Partnership*, N.Y. TIMES, Dec. 23, 2004, at 1.

174. Alex Berenson, *Broker's Directors Used Partnerships for Private Profits*, N.Y. TIMES, Oct. 21, 2004, at A1.

175. Joseph E. Treaster, *S.E.C. Looks at Marsh & McLennan Partnerships*, N.Y. TIMES, Dec. 23, 2004, at C1.

176. Ari Nathanson, *MMC Capital Raises \$1.1 Billion for Trident III*, BUYOUTS, Aug. 8, 2004.

177. Joseph B. Treaster, *S.E.C. Looks at Marsh & McLennan Partnerships*, N.Y. TIMES, Dec. 23, 2004, at C2.

178. MarshMac Form 10-K for the Period Ended December 31, 2004.

179. MarshMac's website: <http://www.mmc.com/frameset.php?embed=consult/index.php> (last visited March 19, 2004).

180. PR NEWSWIRE, Dec. 1, 1983.

181. <http://www.mercerhr.com/mercerservices.jhtml/dynamic/rl/en;jsessionid=RFQ1YUTUJOCICYCTGOUFCHP.QKMZ0QUI2C>

than the whole story is being told. Princeton University Press has published a marvelous book on this subject by a very distinguished American co-author.¹⁸² (At the same time, it must be confessed that the phrase *human capital* is set forth on the Mercer Human Resource Consulting website. Here's what it said:

Human Capital: definition key elements

By aligning multiple workforce management activities, HR can help operational leaders shape and influence the organizations most visible and valuable human capital assets.

Obviously, at best, this definition is circular. Although there are other pages with more words and longer lists, the point remains the same.¹⁸³

Mercer's human resources practice has triggered complaints. For instance, in late 2004, a county in New Jersey accused the consultancy unit of "shoddy and useless work" in auditing the county's prescription drug plan.¹⁸⁴ In addition, the county complained that Mercer did not inform the county of business ties it had to prescription drug plan's operator.

Of course, perhaps the biggest Mercer consulting scandal is related to the New York Stock Exchange and the pay package with its former chairman, Dick Grasso. On August 7, 2003, the NYSE board approved a new employment contract with Grasso with an immediate payment of \$139.5 million, plus \$48 million to be paid over the four years of the contract, for a total compensation package of over \$187 million.¹⁸⁵ Mercer's human resources consulting unit had advised the NYSE's compensation committee on certain aspects of the proposed new package. Eliot

Spitzer, the New York Attorney General, investigated and eventually brought suit, alleging that the amount was unreasonable compensation in violation of New York's Not-for Profit Corporation Law, which limited compensation to that which is "reasonable" and "commensurate with the services performed." This lawsuit was triggered by a request from the new head of the New York Stock Exchange, John Reed.¹⁸⁶ One of the contentious issues connecting Mercer's advice was whether a portion of a deferred compensation plan had vested and, thus, could be paid out to Grasso in 2003. While the Mercer consultant providing advice questioned some of the conclusions to be given to the NYSE board, a voluminous report commissioned by the NYSE paints a picture whereby the head of the NYSE human resources department manipulated the consultant.¹⁸⁷

In April 2004, Mercer settled, admitting that it had provided the compensation committee with incomplete and inaccurate information, and agreed to return the \$440,275 fee it earned for working on the package.¹⁸⁸

There is also the Mercer pension consulting unit. The Mercer Investment Consulting business was originally created when corporate employers began to underwrite their own pension coverage instead of purchasing pension insurance.¹⁸⁹ MarshMac then saw itself as being less a broker of the pension insurance and more of an adviser to the companies.¹⁹⁰

There were early signs of potential conflicts. A 1999 article discusses a pension consultant who was introduced to Mercer's practices when his firm (Johnson & Higgins) was acquired by MarshMac.¹⁹¹ He writes of an alliance between MarshMac and Automated Data Processing that provided employee pension and 401(k) plans. He was instructed not to

182. Harry G. Frankfurt, ON BULLSHIT (2005).

183. Id.

184. Rick Brand, \$153G Prescription Plan Audit, NEWSDAY, Dec. 22, 2004, at A18.

185. People v. Grasso, Complaint filed in the Supreme Court of the State of New York, New York County.

186. Gasparino, *supra* note 56 at 312-17.

187. Dan K. Webb., *Report to the New York Stock Exchange on Investigation Relating to the Compensation of Richard A. Grasso*, Dec. 15, 2003, at 73-75. (available at <http://news.findlaw.com/wp/docs/grasso/webprtgrassonyse1203.pdf>) (last viewed March 16, 2005).

188. *Insurance Broker Marsh Mired in Scandal*, PITTSBURGH POST-GAZETTE, Oct. 24, 2004, at F2.

189. Karen W. Arenson, *Image Strong Despite Loss*, N.Y. TIMES, May 5, 1984, at 31.

190. Id. at 32.

191. Ed Leefeldt, *Pension Consulting "Tilt" Charged*, SEATTLE POST-INTELLIGENCER, Nov. 15, 1999, at C1.

conduct an independent search for plans until ADP indicated it did not want to bid on the business. He was also told to push clients toward their own products.

Mercer launched a joint venture with Attica Asset Management whereby Mercer provides the advice and research and Attica then picks fund managers and monitors them.¹⁹² A Mercer executive indicates: "Our preferred route is to go down the Mercer 360 [route] because we believe this allows the client to capture the benefit of Mercer's research. ... But, if the client feels uncomfortable with that, or if they want to see some competition, we will arrange a beauty contest...."¹⁹³

Mercer got heat in 2002 for offering actuarial services and fund management at the same time. Mercer's head of consulting explained that doing both was an economic necessity. "Consultants give advice to pension funds, they often take decisions and the client rubber-stamps them. ... But if people want to give us the responsibility for picking fund managers, then we need greater fees to do it."¹⁹⁴ He said that Mercer could live with the inherent conflict of interest if they can help their clients and their own bank balances.

Another common complaint is the inherent conflicts when a pension consulting firm also has a brokerage or trading unit.¹⁹⁵ Pension funds try to purchase stocks, bonds and other appropriate assets which will serve to provide incomes to people as they age and/or when they retire. Obviously, under most circumstances, such purchases need to be safe and growth-oriented over the long haul. Speculative voyaging is inappropriate in such funds, at least most of the time for most people. Safety not adventure is the core idea. Pension fund management is not a

"Kick ass! Take names!" kind of business. While the faint-hearted should probably find something else to do neither George Washington in his younger years nor General Braddock in his older years are welcome.¹⁹⁶ This is particularly true when the consultant recommends its sister company's funds to a client. There is even more complexity when one entity is a fund manager, a broker, and consultant. Obviously, brokers oriented to speculation and consultants who love the newest trends should probably not be pension fund managers. The same is true when it is not one company, but a group of three which form a larger unit, as it were.

There is also the "pay-to-play" scheme whereby pension consulting outfits receive fees from money managers to attend the consulting firm's annual conferences. These sound like mere lectures which tend to be small-ish, except for ex-presidents, Jack Welch, and the like, but not all of these fees are quite so small. They are also marketing set-ups. These conferences are marketed to speakers as opportunities for the pension consultant to meet the money managers. However, the thought is that the consultant will recommend to pension plans only those money managers that attend and pay for the conferences. Indeed, some of the money managers privately confess they attend for the primary purpose of increasing the likelihood of being recommended by the pension consultant sponsoring the conference.¹⁹⁷ From conference fees and other services it offers, Mercer has recently received millions of dollars from money managers every year.¹⁹⁸ For instance, one MarshMac subsidiary, Eager Manager Advisory Services, charges money managers over \$35,000 a year for "marketing advice."¹⁹⁹ Many question whether this taints Mercer's objectivity.²⁰⁰ Are the

192. We find the use of the title "Attica" interesting since it is also the name of a famous prison in New York State, where inmates rioted in 1971. See Tom Wicker, *A TIME TO DIE: THE ATTICA PRISON REVOLT* (1994).

193. Simon Targett, *Survey - FTFM - Mercer Aims to Expand its Sphere of Influence*, FINANCIAL TIMES, April 15, 2002, at 4.

194. Yuri Bender, *Survey - Pension Fund Investment - Suffering the Slings and Arrows*, FINANCIAL TIMES, June 5, 2002, at 3.

195. Gretchen Morgenson & Mary Williams Walsh, *How Consultants can Retire on your Pension*, N.Y. TIMES, Dec. 12, 2004, at C1.

196. Joseph J. Ellis, *HIS EXCELLENCY GEORGE WASHINGTON* (2004), at 19-23.

197. Douglas Appell & Danielle Randall, *Callan Keeps its Conferences; Other Consultants Pull the Plug*, PENSIONS & INVESTMENTS, Nov. 15, 2004, at 1.

198. Neil Weinberg, *A Bribe By any Other Name*, 173 FORBES, April 19, 2004, at 54.

199. Daniel Fisher & Christopher Helman, *Pay for Play: The supposedly Impartial Judges who Seek out the Best Money Managers have an Interesting Sideline - Selling Advice to the Money Managers*, 166 FORBES, SEPT. 4, 2000, at 76.

200. Id.; Arden Dale, *Marsh's Mercer Unit Axes Forum Criticized for Conflicts*, DOW JONES NEWS SERVICES, Oct. 29, 2004.

speakers genuinely rational and objective or are they trying to sell something? Is there litigation here? Is there professional malpractice somewhere in the background?

Another potential conflict arises when a Mercer consulting unit recommends Putnam as a client's pension manager.²⁰¹ Putnam's former compliance officer states that: "It's a rare day when a pension consultant recommends a money manager who hasn't paid to play."²⁰² Wouldn't it be natural—indeed rational—to be skeptical if Mercer recommends Putnam?

In December 2003, the SEC sent Mercer's pension consulting unit, along with several other investment consulting firms, a request for documents related to practices in advising on the selection of money managers.²⁰³ One of the questions the SEC asked MarshMac was whether payments by money managers influence the consultant's selection or placement of the money manager's fund in a client's retirement plan.²⁰⁴ Likely as a result of the foregoing such criticism, Mercer announced in late 2004 that it would stop holding its money manager conferences.²⁰⁵ Mercer stated that the cancellation of its annual conferences was due to "changes in the regulatory environment and client expectations."²⁰⁶ A critic charges:

On the verge of the SEC mandating disclosure of pay-to-play schemes involving brokerage kickbacks, conference fee kickbacks and improper fee arrangements, pension consultants are frantically making strategic moves to distance themselves from conflicting lines of revenue.²⁰⁷

Obviously, Mercer shared its problems with a number of other businesses

In the late Twentieth Century, Mercer expanded both its size and its diversity. Mercer started in Canada and it has been publishing material on Canadian business and economics for many years. Mercer began analyzing business, labor relations economics on a worldwide basis. It also expanded its practical (as opposed to purely consulting) work.

Mercer expanded into management consulting in acquiring Temple, Barker & Sloan in 1987.²⁰⁸ In 1990, MarshMac acquired Strategic Planning Associates and merged with the Temple, Barker & Sloan practice to bolster the management consulting business. The merged unit changes its name to Mercer Management Consulting, Inc. in 1992.²⁰⁹ Its website is illustrative. It lists hundreds of reports it has prepared worldwide, as well as a variety of other material.

And this is not all to be found on the website. There is evidence of cross-selling between the Mercer consulting units. For example, the Mercer Human Resources Consulting website touts Mercers investment consulting services.²¹⁰ The webpage also has links for personal investment advice and retirement planning.

As another sign of that the MarshMac divisions lack objectivity, Putnam hired Mercer Human Resources Consulting in 2003 to give Putnam advice on funds to offer in the Putnam employees profit-sharing plan.²¹¹ At the time, the employee profit-sharing plan offered only MarshMac stock and Putnam mutual funds. According to Putnam officials, the object was for Mercer to determine if the plan should offer non-Putnam funds; however, Mercer was not permitted to challenge any Putnam fund being offered.²¹² Critics say that MarshMac "appears to run

201. Neil Weinberg, *A Bribe By any Other Name*, 173 FORBES, April 19, 2004, at 54.

202. Id.

203. Id.

204. Gretchen Morgenson, *S.E.C. Inquiry to Encompass 401(k) Plans*, N.Y. TIMES, July 7, 2004, at C1.

205. Id.

206. Id.

207. Arden Dale, *Marsh's Mercer Unit Axes Forum Criticized for Conflicts*, DOW JONES NEWS SERVICES, Oct. 29, 2004.

208. Milestones, *supra* note 43.

209. Milestones, *supra* note 43.

210. http://www.mercerhr.com/mercercservices.jhtml?dynamic=/en.jsessionid=RFQ1YUTUIJOCJYCTGOUFCHPQK_MZ0QUI2C (last visited March 19, 2005).

211. *Conflicting Interests*, PENSIONS & INVESTMENTS, Nov. 1, 2004, at 10.

its pension programs more in the interest of the corporation than participants.”²¹³

The Aftermath

In direct contrast to the trustful tone of the Prudent Man Rule, and its title the Putnam name is now used as an example of corporate scandal.²¹⁴ Indeed, the Putnam scandal is being used as a warning to the potential risks of President Bush’s “plan” to privatize parts of social security.²¹⁵ Investors continue even today to withdraw their monies from Putnam. In 2004, assets under management declined by \$27 billion.²¹⁶ Unquestionably, this is one hell of a side consequence to litigation and its near relatives.

The “tainted” image of Mercer Consulting and MarshMac has some potential consulting clients wary. An official with an Asian firm looking at appointing Mercer as the investment consultant to a trade union warned of “the fact that the scam that Mercer and Marsh[Mac] were involved in are in fact established as murky deals,” referring to the NYSE/Grasso pay issue and the MarshMac contingency commission problems.²¹⁷

Recent Legal Problems

The MarshMac subsidiary which are only remotely connected to insurance, but which are substantially involved in risk management have faced legal problems for the last several years. Trident is frequently discussed in the papers as having engaged in inappropriate conduct. Both Putnam and Mercer have actually been dragged into court both by governmental agency and by private individuals.

Putnam recently announced more investigations. For one, The U.S. Department of Labor issued a

subpoena regarding Putnam’s blackout periods on employee trading in MarshMac’s stock during the fall of 2004 because of the MarshMac litigation.²¹⁸ The employees thereby were prohibited from trading at a time the MarshMac stock price was falling. While it is common, indeed at times required, that a company in the midst of material litigation to prevent employees from trading in the company’s stock because of the potential of trading on nonpublic information, in this case employees witnessed large dips in the price of MarshMac stock during the restricted period and could not reduce their losses by selling.²¹⁹

Next, in early 2005, the Pension Benefit Guaranty Corporation has requested information about the funded status of MarshMac’s own pension funds.²²⁰ In addition, the regulator requested other (unspecified publicly) “financial and business developments at [MarshMac]” since the Spitzer suit.

Despite the Putnam scandal and the recently disclosed new investigations, Putnam at least says that it remains confident. A spokeswoman indicated that the improved Putnam, with its new ethics and system of controls have “led to renewed confidence” by clients.²²¹ A new ad campaign uses a portrait of the first George Putnam as the “face of responsible investing” near the end of the Great Depression, then highlighting CEO Haldeman as the new “face of responsible investing.”²²² The ads also underscore Putnam’s team management style of fund operations. The message may be confusing, some argue, since Putnam also recently announced it was changing top managers at two of its higher profile funds.²²³ Then again, notice the historically significant business figure who is neglected. Also, perhaps it is worth

212. Id.

213. Id.

214. Tomas Watterson, *A Primer on Office Politics, Good and Bad*, THE BOSTON GLOBE, Jan. 2, 2005, at D2.

215. Steve Bailey, *Putnam Fund Scandal Shows Risks of Social Security Privatization*, Knight-Ridder Tribune Business News, Feb. 2, 2005.

216. *2,500 Marsh Job Cuts Spare Boston-Based Putnam Investments*, March 2, 2005, at 16.

217. *Financial Express: Why Mercer? Asks Citu*, FINANCIAL EXPRESS, March 5, 2005.

218. MarshMac Form 10-K for year ended December 31, 2004.

219. Andrew Caffrey, *Putnam Discloses More Investigations; News of Disputes Emerges a Week after Firm Settles Trading Scandal*, THE BOSTON GLOBE, March 10, 2005, at E3.

220. MarshMac Form 10-K for the Period Ended December 31, 2004, at 92.

221. Andrew Caffrey, *Putnam Discloses More Investigations; News of Disputes Emerges a Week after Firm Settles Trading Scandal*, THE BOSTON GLOBE, March 10, 2005, at E3.

mentioning that the depression as a period of funding business is a confusing era.²²⁴

Despite its claims to have mended its self and its ways, Putnam officials continue to minimize the events. For instance, a March 3, 2005 letter by John Hill, the Chairman of Trustees of the Putnam Funds, chastises press accounts of the market timing scandal for containing “significant inaccuracies.” Hill goes on to indicate that Putnam had no agreements with any individual to permit market timing. Further, he states, Putnam did not receive any financial benefit from the improper trades of a “small number of employees or plan participants” in pension plans administered by Putnam. Of course, this glosses over the financial benefit Putnam received for keeping plan participants happy, particularly in the boilermakers’ union. Finally, Hill pats Putnam on the back for its detailed scrutiny of trading in its funds, which, he says, is “without precedent in the mutual fund industry.”

The Mercer consulting units also have been hit with official enquiries. For instance, MarshMac recently announced the U.S. Department of Labor and other regulators have asked for information relating to the services Mercer provides to retirement plans and compensation agreements.²²⁵ In addition, the West Virginia securities regulators have enquired about the services Mercer provides to the state and its pension fund.²²⁶

Conclusion

Essays II and III in this series have concerned

recent legal problems of MarshMac and its subsidiaries. Some of these problems arose before the Spitzer Suit; some of them arose after; some of those which arose before have become worse as a result of the Spitzer Suit.

The amount of money that MarshMac and its subsidiaries have spent in resolving their legal problems are quite substantial. When fines, legal fees, court costs, advertising costs, departure payments to senior employees, and so forth are all grouped together, there is little doubt that these problems will cost upward of \$1 billion. There are those critics who say, of course, that a billion dollars these days for large companies is not that much money. Perhaps we confess to naivety, when we admit that it sounds like a lot to us. As we shall see in later parts of this rather ecstatic article, it has given away both employees and customers of MarshMac.

The impact of the Spitzer Suit on at least the surfaces of the American financial world are quite large. Aon has been sued and has settled. State governments are investigating whether agencies—for example, Minnesota is investigating Willis for roughly the same kind of misconduct as MarshMac and Aon.

In somewhat unrelated areas, directors of very large companies are paying historically presidential sums for the misconduct of the companies they are suppose to direct. This has happened in connection with Enron. This has happened in connection with WorldCom. And the list goes on. Probably, some of this is attributable to the enormous successes of

222. Chuck Jaffe, *Your Funds: What's Putnam Saying in its Ads?*, BOSTON HERALD, March 13, 2005, at 27. This is not the first time in recent years that Putnam has used Samuel Putnam's face in public advertising. In a 1992 ad campaign, an ad showed a boardroom bearing a large painting of Samuel Putnam, with the message of Putnam's "time-honored tradition in money management." Stuart Elliott, *Putnam (Who?) Abandons Tradition of Noble Obscurity*, N.Y. TIMES, Feb. 18, 1992, at D9. While Putnam's intent was not to sell directly to investors per se, but it wanted to push its public image because brokerage firms had started to sell their own mutual funds and Lasser felt this new competition heat up. *Id.* Not everyone liked the ads. Some critics argued that the ads unnecessarily exploited investors' fears by conveying a message that investors cannot make good investment choices by themselves. Carole Gould, *When Ads Exploit Investors' Fears*, N.Y. TIMES, Feb. 27, 1994, at F30.

223. Chuck Jaffe, *Your Funds: What's Putnam Saying in its Ads?*, BOSTON HERALD, March 13, 2005, at 2

224. For an interesting discussion of running and founding at least some businesses during the Depression Era, see Michael Augsberger, *AN ECONOMY OF ABUNDANT BEAUTY: Fortune Magazine and Depression America* (2004).

225. Ian McDonald, *Marsh's Retirement Work is an Issue: Regulatory Inquiries Focus on the Practices of Units that Advice Plan Sponsors*, WALL ST. J., March 10, 2005, at C15.

226. *Marsh Units are Focus of Dozens of State and Federal Probes*, BEST'S INSURANCE NEWS, March 10, 2005.

Spitzer over the last decade, or so.²²⁷ Now that we have a picture of the MarshMac family of companies,

its time to look at the Spitzer suit itself.

227. Gasparino, *supra* n.56 at 215. (The Mahar Book, BULLI, tells something of the same story in many of your pages. Mahar also pays attention to the conflicts between Spitzer and Rudolph Giuliani. "If Eliot Spitzer was interested in serious reform on Wall Street, he might have brought a criminal indictment against Merrill Lynch. That would be war. That was precisely what former New York Mayor Rudolph Giuliani had done in the late 80s, when, the young federal prosecutor, he was laying the foundation for his political career. Giuliani indicted Drexel Burnham Lambert on racketeering charges. The firm went bankrupt. [¶] But Spitzer was far less feisty than Giuliani . . . [¶] Moreover, for Rudy Giuliani, the man known for cleaning up Wall Street in the 80s demonstrated his talents as a switch-side debater. By 2002, Giuliani had thread up a consulting firm and was now representing Merrill Lynch, informally pleading its case with Spitzer." *Id.* at 351.